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Author(s)

Matthew Bender[(R)] Practice Guide: California Contract Litigation Volume 1

CHAPTERS 1-17

Causes of Action

Remedies

Existence & Validity

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Honorable Jon S. Tigar Judge of the Alameda County Superior Court

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Charles Crompton

Charles Crompton is a Litigation Partner in Latham & Watkins' San Francisco Office and a member of the firm's Intellectual Property and Technology Practice Group, as well as the firm's Antitrust and Competition Group.

Mr. Crompton has handled intellectual property cases involving patent, trademark, copyright claims. He has also handled a number of antitrust cases. In fact, many of Mr. Crompton's most challenging and noteworthy cases involve the balance--or the conflict, some would say--between intellectual property rights on the one hand and the limits that the antitrust laws place on the assertion of those rights on the other. In 2004, Mr. Crompton was on the trial team that represented Oracle Corporation in its victory over the U.S. Department of Justice's antitrust challenge to Oracle's acquisition of PeopleSoft.

Outside the courtroom, Mr. Crompton speaks and writes about his areas of experience. From 1999-2000, he was the Chair of the Antitrust and Unfair Competition Law Section of the California State Bar. He has lectured on trademark law for the Practising Law Institute, computer law for Law Seminars International, antitrust law for the State Bar of California, and patent law for the University of California at Berkeley's Boalt Hall. In addition, Mr. Crompton has received state and local awards for his pro bono work on behalf of indigent individuals and non-profit institutions.

Mr. Crompton received his B.A. from Columbia College in 1985 and his J.D. from Columbia Law School in 1988. From 1988-1989, he served as Judicial Clerk to the Honorable Jane R. Roth, United States District Court for the District of Delaware. (Judge Roth now sits on the United States Court of Appeals for the Third Circuit.)

Dana J. Dunwoody

Dana J. Dunwoody is a partner in the San Diego office of Sheppard Mullin Richter & Hampton's Business Trial Practice Group. Mr. Dunwoody's general business litigation practice emphasizes disputes concerning hotels, motels and resorts,

real property, and complex contract, corporate, and partnership disputes. He has also tried and arbitrated several employment cases for employers and lender liability matters for banks. Mr. Dunwoody is a member of the International Society of Hospitality Consultants (ISHC).

Mr. Dunwoody is the former Chair of the Executive Committee (1998-1999) of the then 12,000 member Litigation Section of the California State Bar. From 1990 to 1994 he served as the Editor-In-Chief of Cal. Lit. News, the Litigation Section's newsletter. Mr. Dunwoody also served as a Board member of the Association of Business Trial Lawyers of San Diego. Mr. Dunwoody is a frequent lecturer and panelist in continuing education programs sponsored by the California Continuing Education of the Bar (CEB), the Association of Business Trial Lawyers (ABTL), the National Institute of Trial Advocacy (NITA) and other organizations, where he has taught classes on trial and deposition techniques and strategies.

Mr. Dunwoody has served as a Consulting Editor for CEB's "Action Guide" series. He co-authored a chapter on Alternative Dispute Resolution, Mediation and Arbitration of hospitality disputes in "Hotel Investments: Issues & Perspectives"--4th Edition. He has edited portions of CEB's "Effective Use of ADR in California," and has written numerous other articles on legal and hotel-related topics.

Prior to joining Sheppard Mullin, Mr. Dunwoody practiced for 15 years as a member of Mazzarella, Dunwoody & Caldarelli LLP, in San Diego, a boutique trial firm he founded. Prior to that, Mr. Dunwoody was associated with the San Diego office of Allen, Matkins, Leck, Gamble & Mallory, San Diego's Luce, Forward, Hamilton & Scripps, and Los Angeles's Cox, Castle & Nicholson. Mr. Dunwoody is a former Judicial Extern for the Honorable Laughlin E. Waters of the United States District Court for the Central District of California. He received his Juris Doctor degree in 1985 from Boalt Hall School of Law at the University of California, Berkeley, where he served as an Associate Editor for the Industrial Relations Law Journal. Mr. Dunwoody received his Bachelor of Arts degree from the University of California, San Diego, with High Honors in Economics.

Judge Jon S. Tigar

Judge Jon S. Tigar was appointed to the Alameda County Superior Court by Governor Davis in December 2001. Prior to assuming the bench, Judge Tigar was a partner in the law firm of Keker & Van Nest, where he specialized in complex commercial litigation. He was also Co-Chair of that firm's Pro Bono Committee, and in 2001 he received the Wiley M. Manuel Award for Pro Bono Legal Services from the State Bar of California. He has also served as a trial lawyer in the San Francisco Public Defender's Office, and as a litigator in the San Francisco office of Morrison & Foerster. He clerked for the late Honorable Robert S. Vance of the Eleventh Circuit Court of Appeals in Birmingham, Alabama.

Judge Tigar graduated from the Boalt Hall School of Law, where he was a member of Order of the Coif and an Articles Editor of the California Law Review. He also has a Bachelor's Degree in English and Economics from Williams College.

Judge Tigar is active in several community and professional organizations, including the American Bar Association and the Center for Judicial Education and Research. In 2003, he was elected to the American Law Institute. He has lectured frequently both as a lawyer and as a judge, on topics including the basics of trial practice, pre-trial discovery, evidence, ethics, internal investigations, family law, and the California False Claims Act.

Judge Tigar currently sits as a Civil Trial Judge.



6 of 175 DOCUMENTS

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1 MB Practice Guide: CA Contract Litigation Abbreviations

Abbreviations

United States Constitution and Statutory Sources

US Const United States Constitution

USC United States Code

USC app United States Code Appendices

IRC United States Code, Title 26 **California Constitution and Statutory Sources**

Cal Const California Constitution

B&P Code Business and Professions Code

CC Civil Code

CCP Code of Civil Procedure

Com Code Commercial Code

Corp Code Corporations Code

Ed Code Education Code

Elec Code Elections Code

Evid Code Evidence Code

Fam Code Family Code

Fin Code Financial Code

F&G Code Fish and Game Code

F&A Code Food and Agriculture Code

Gov Code Government Code

H&N Code Harbors and Navigation Code

H&S Code Health and Safety Code

Ins Code Insurance Code

Lab Code Labor Code

M&V Code Military and Veterans Code

Pen Code Penal Code

Prob Code Probate Code

PC Code Public Contract Code

PR Code Public Resources Code

PU Code Public Utilities Code

R&T Code Revenue and Taxation Code

S&H Code Streets and Highways Code

UI Code Unemployment Insurance Code

Veh Code Vehicle Code

Water Code Water Code

W&I Code Welfare and Institutions Code

Cal Stat California Statutes **California and Federal Regulations**

CCR California Regulations

CFR Code of Federal Regulations

Fed Reg Federal Register **California Attorney General Opinions**

Ops Cal Atty Gen Opinions of California Attorney General **Case Law**

US United States Supreme Court Reports

S Ct Supreme Court Reporter

L Ed Lawyer's Edition

L Ed2d Lawyer's Edition, Second Series

F Federal Reporter

F2d Federal Reporter, Second Series

F3d Federal Reporter, Third Series

F Supp Federal Supplement

F Supp2d Federal Supplement, Second Series

FRD Federal Rules Decisions

C California Reports

C2d California Reports, Second Series

C3d California Reports, Third Series

C4th California Reports, Fourth Series

CA California Appellate Reports

CA2d California Appellate Reports, Second Series

CA3d California Appellate Reports, Third Series

CA4th California Appellate Reports, Fourth Series

CA Supp California Appellate Reports, Supplement

CA2d Supp California Appellate Reports, Second Series, Supplement

CA3d Supp California Appellate Reports, Third Series, Supplement

CA4th Supp California Appellate Reports, Fourth Series, Supplement

CR California Reporter

CR2d California Reporter, Second Series

P Pacific Reporter

P2d Pacific Reporter, Second Series

P3d Pacific Reporter, Third Series **Federal Rules**

Fed R Civ P Rules of Civil Procedure

Fed R Civ P Appendix of Forms Rules of Civil Procedure, Forms Appendix

Fed R App P Federal Rules of Appellate Procedure

9th Cir R Circuit Rules

9th Cir R Appendix of Forms Circuit Rules, Forms Appendix

Sup Ct R Supreme Court Rules

Multidistrict R Multidistrict Rules

Fed R Evid Rules of Evidence

Fed R Bankr P Rules of Bankruptcy Procedure

Fed R Crim P Rules of Criminal Procedure **Central District abbreviations**

CD Cal Civ LR Local Rules

CD Cal Local Civil Appendix Civil Appendices

CD Cal Mag LR Magistrate Judge Rules

CD Cal Gen Order General Orders **Eastern District abbreviations**

ED Cal Gen LR General Rules

ED Cal Civ LR Civil Rules

ED Cal Mag LR Magistrate Judge Rules

ED Cal Automated Case Assignment Plan Automated Case Assignment Plan

ED Cal Gen Order General Orders **Northern District abbreviations**

ND Cal Civ LR Local Rules

ND Cal ADR LR Local Rules for Alternative Dispute Resolution

ND Cal Appendix Appendixes of Sample Forms

NC Cal Gen Order General Orders **Southern District abbreviations**

SD Cal Civ LR Local Rules

SD Cal Gen Order General Orders **California State Court Rules**

Cal Rules Ct California Rules of Court

Cal Rules Prof Conduct California Rules of Professional Conduct **Miscellaneous**

US Code Cong & Admin News Congressional and Administrative News

UST United States Treaties



9 of 175 DOCUMENTS

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What's New

1 MB Practice Guide: CA Contract Litigation Scope

Scope

HIGHLIGHTS

Release 12 October 2010

2010 Midyear Update for Recent Judicial Decisions

The entire publication has been updated for recent California and federal judicial decisions. For a more detailed summary of the important changes incorporated into the publication in this release, see below.

This release contains the 2010 midyear update for recent California and federal decisions that have been compiled or become final since the cutoff date for Release 11. These include new decisions dealing with arbitration, unconscionability, and other aspects of contract law, and include the following:

Choice of Law--Class Action Waiver Unconscionable; Forum Selection Clause Unenforceable. In *Omstead v. Dell, Inc.* (9th Cir 2010) 594 F3d 1081 , the Ninth Circuit held that a choice-of-law provision in a manufacturer's consumer contract was unenforceable because the contract contained a class action waiver that was unconscionable under California law, and California had a materially greater interest than Texas in applying its own law. See Ch. 3, *Determining Jurisdiction and Venue in Contract Actions*, 3.06[3][c]; Ch. 18, *Asserting or Defending Claim That Contract Is Illegal, Contrary to Public Policy, or Unconscionable*, 18.18.

Statute of Limitations--Breach Occurred When Idea Was Disclosed. In *Benay v. Warner Bros. Entm't, Inc.* (9th Cir 2010) 607 F3d 620 , the Ninth Circuit held that a breach of an implied contract not to use a screenplay without paying for it did not occur until the defendant disclosed the idea to a substantial segment of the public, because such disclosure tends to destroy any further marketability of the idea. See Ch. 4, *Determining Applicable Statute of Limitations and Effect on Potential Action*, 4.19[2].

Arbitration--Corporation's Arbitration Agreement Did Not Bind Shareholders; Unconscionable Arbitration Clause Not Severable. In *Suh v. Superior Court* (2010) 181 CA4th 1504 , the court held that shareholders of a corporation could not be compelled to arbitrate based on an arbitration agreement entered into by the corporation. The

court further held that an arbitration clause's absolute prohibition of consequential, punitive, incidental, or special damages in employment-related cases was so egregious and so draconian that the arbitration clause was not severable. See *Ch. 5, Determining Whether to Arbitrate or Litigate*, 5.19[2], 5.29[4]; *Ch. 18, Asserting or Defending Claim That Contract Is Illegal, Contrary to Public Policy, or Unconscionable*, 18.16[4][g].

Arbitration--Arbitration Clause Permeated With Unconscionability Is Not Severable. In *Lhotka v. Geographic Expeditions, Inc.* (2010) 181 CA4th 816, the court held that an arbitration agreement contained in a hiking expedition company's release form was procedurally unconscionable because the company presented its terms as both nonnegotiable and no different than what plaintiffs would find with any other provider. The court further held that the arbitration agreement, which limited plaintiffs' recovery to the amount they paid the company for their trip, required them to arbitrate in a distant forum, and required them to indemnify the company for its costs and attorney fees for defending any claims was permeated with unconscionability and was not severable. See *Ch. 5, Determining Whether to Arbitrate or Litigate*, 5.29[4]; *Ch. 18, Asserting or Defending Claim That Contract Is Illegal, Contrary to Public Policy, or Unconscionable*, 18.15[4][b], 18.15[5][a], 18.19.

Arbitration--Arbitration Award Not Reviewable. In *Gravillis v. Coldwell Banker Residential Brokerage Co.* (2010) 182 CA4th 503, the court held that an arbitration provision requiring the arbitrator to apply California law or to render an award in accordance with California law does not, by itself, mandate judicial review of the award on the merits. See *Ch. 5, Determining Whether to Arbitrate or Litigate*, 5.31C.

Arbitration--Arbitration Award Vacated. In *Pearson Dental Supplies, Inc. v. Superior Court* (2010) 48 C4th 665, the California Supreme Court held that in a case alleging violations of statutory rights, judicial review of an arbitrator's decision may be justified when granting finality to an arbitrator's decision would be inconsistent with the protection of those rights. The court held that the arbitration award in the case before it should be vacated because the arbitrator's clear legal error caused plaintiff's FEHA claim to be incorrectly deemed time-barred. The court further held that the arbitrator's written decision did not satisfy the third *Armendariz* requirement because it did not explain, even briefly, the reason for the arbitrator's conclusion that the plaintiff's claim did not benefit from a statutory tolling period. See *Ch. 5, Determining Whether to Arbitrate or Litigate*, 5.31C; *Ch. 18, Asserting or Defending Claim That Contract Is Illegal, Contrary to Public Policy, or Unconscionable*, 18.16[3].

Arbitration--Arbitrator Did Not Exceed Powers. In *San Francisco Housing Authority v. Service Employees Internat. Union, Local 790* (2010) 182 CA4th 933, the court held that an arbitrator did not exceed her powers by ordering an employer who violated a Memorandum of Understanding (MOU) to place an employee in a position that was filled by temporary or term employees; although the MOU did not expressly provide for the arbitrator's remedy, it did not expressly prohibit it. See *Ch. 5, Determining Whether to Arbitrate or Litigate*, 5.31D.

Damages--Damages Can Be Proved Using Best Available Evidence; Contract Interpretation--Disputed Issue of Interpretation Is Jury Question. In *Dillingham-Ray Wilson v. City of Los Angeles* (2010) 182 CA4th 1396, the court held that a public works contractor could use engineering estimates to prove its damages for breach of contract if those estimates were the best evidence of damages available. The court further held that given the patent ambiguity of the contract provision at issue and the extrinsic evidence offered by the contractor, the contractor was entitled to have disputed issues of contract interpretation submitted to the jury. See *Ch. 7, Seeking or Opposing Damages in Contract Actions*, 7.04[3]; *Ch. 21, Asserting a Particular Construction of Contract*, 21.04[2][h].

Equitable Remedies--Benefit of Bargain Damages Not Available for Rescission. In *Sharabianlou v. Karp* (2010) 181 CA4th 1133, the court held that a plaintiff may not recover "benefit of the bargain" damages in a rescission action; such damages are available only in an action for breach of contract. See *Ch. 8, Seeking or Opposing Equitable Remedies in Contract Actions*, 8.14[2], 8.14[7].

Essential Elements--Elements of Claim for Breach of Implied Contract. In *Benay v. Warner Bros. Entm't, Inc.* (9th Cir 2010) 607 F3d 620, the Ninth Circuit held that an implied contract not to use a screenplay without paying for it

exists when (1) a plaintiff submits a screenplay for sale to defendant, (2) the plaintiff conditions the use of the screenplay on payment, (3) the defendant knows or should know of the condition, (4) the defendant voluntarily accepts the screenplay, (5) the defendant actually uses the screenplay, and (6) the screenplay has value. See *Ch. 13, Attacking or Defending Existence of Contract--Absence of Essential Element*, 13.04A.

Essential Elements--Buyer's Effort to Obtain Parcel Split Is Consideration for Option Agreement. In *Steiner v. Thexton* (2010) 48 CA4th 411, the California Supreme Court held that a buyer's effort to obtain a parcel split conferred a benefit on the seller and constituted prejudice suffered by the buyer, was bargained for and induced the seller to grant an option agreement, and therefore was adequate consideration for the agreement. See *Ch. 13, Attacking or Defending Existence of Contract--Absence of Essential Element*, 13.40, 13.41.

Essential Elements--Promise to Perform Existing Obligation Is Not Adequate Consideration; Lender's Promise to Postpone Foreclosure Sale Supports Promissory Estoppel. In *Garcia v. World Savings, FSB* (2010) 183 CA4th 1031, the court held that the borrowers' promise to make monthly loan payments, plus interest and late fees, was not adequate consideration for a lender's promise to postpone a foreclosure sale, because the borrowers promised to do nothing more than they were already legally obligated to do. The court further held that the lender's promise to extend the date of any foreclosure sale so long as the borrowers' new loan closed in the first week of September was sufficiently definite to support promissory estoppel. See *Ch. 13, Attacking or Defending Existence of Contract--Absence of Essential Element*, 13.42[6], 13.45[2].

Illegality--No Offset for Unlicensed Work; Party Who Knows Contractor Is Unlicensed Nonetheless Is Entitled to Reimbursement. In *Alatraste v. Cesar's Exterior Designs, Inc.* (2010) 183 CA4th 656, the court held that a party is entitled to reimbursement for amounts paid to an unlicensed contractor even if the party knew the contractor was unlicensed. See *Ch. 18, Asserting or Defending Claim That Contract Is Illegal, Contrary to Public Policy, or Unconscionable*, 18.06[2][a].

Unconscionability--Class Arbitration Waiver Not Unconscionable. In *Arguelles-Romero v. Superior Court* (2010) 184 CA4th 825, a class action against a lender challenging its vehicle repossession practices, the court held that plaintiffs failed to establish that the individual amounts at issue were so small that a class action was the only viable remedy when the amount at issue exceeded \$16,000. See *Ch. 18, Asserting or Defending Claim That Contract Is Illegal, Contrary to Public Policy, or Unconscionable*, 18.18.

Illegality--Lawful Parts of Agreement Can Be Severed; Quantum Meruit Recovery Available for Lawful Services. In *MKB Management, Inc. v. Melikian* (2010) 184 CA4th 796, an action brought to recover compensation under a property management agreement, the trial court erred in concluding that as a matter of law the lawful parts of the agreement could not be severed from the unlawful portions. Although a real estate broker's license (which the property management company did not have) was required for some of the activities covered by the agreement, it was not required for other management duties such as causing repairs to be made, decorating, and general maintenance. The court further held that the property management company broker could bring a claim in quantum meruit for services that did not require a real estate broker license. See *Ch. 18, Asserting or Defending Claim That Contract Is Illegal, Contrary to Public Policy, or Unconscionable*, 18.22[2], 18.23[3].



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[2] California Case Databases.

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CA Supreme Court Cases from 1850 (CAL;CAL)

CA Courts of Appeal Cases from 1905 (CAL;APP)

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FOOTNOTES:

(n1)Footnote 1. Unpublished CA Court of Appeal Cases from 1966 covers selected unpublished, depublished and partially published opinions from August 1966 through current, and full coverage of Rule 977 unpublished opinions from October 2001. Although local rules generally preclude citation to unpublished opinions except in limited circumstances, this database may be useful to research similar fact patterns, case information, rulings, factual discovery, strategy and disposition.



13 of 175 DOCUMENTS

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14 of 175 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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15 of 175 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 1 Determining the Applicable Law

1-1 MB Practice Guide: CA Contract Litigation 1.syn

§ 1.syn Synopsis to Chapter 1: Determining the Applicable Law

1.01 Scope.

1.02 Objective and Strategy.

1.02[1] Objective.

1.02[2] Strategy.

1.03 CHECKLIST: Determining Which Jurisdiction's Law Applies.

1.04 Options and Strategies.

1.04[1] Contract May Provide for Application of Different Law.

1.04[1][a] California Follows Restatement (Second) of Conflict of Laws Approach.

1.04[1][b] Choice-of-Law Contract Provision Can Determine Entire Outcome.

1.04[2] Choice-of-Law Issue May Arise If Contract Does Not Contain Provision.

1.04[2][a] "True Conflict" Will Trigger Governmental Interest Analysis in California Courts.

1.04[2][b] Viability of Class Action Cases May Depend on Choice-of-Law Rulings on Class Certification.

1.04[2][c] Interpretation of Insurance Policies Is Function of Forum's Substantive Law.

1.04[2][d] Availability of Defenses May Depend on Choice of Law.

1.05 Trial Court Determines Choice of Law Only If True Conflict Exists.

1.05[1] Trial Court Must First Decide Whether True Conflict Exists.

1.05[2] California Law May Apply If Issue Remains Undecided in Other Jurisdiction.

1.06 Analysis Depends on Whether Contract Contains Choice-of-Law Provision.

1.07 If Contract Has No Enforceable Choice-of-Law Provision, Court Determines Applicable Forum Law.

1.07[1] Party Proposing Foreign Law Has Burden of Identifying Rule and Showing It Applies.

1.07[2] Choice of Which Foreign Law to Apply Depends on Facts of Case.

1.07[2][a] General Rule Interprets Contract Using Law of Place of Performance or Place Contract Was Made.

1.07[2][b] Using Law of Place of Performance.

1.07[2][c] Using Law of Place Where Contract Is "Made."

1.08 In California, Parties' Chosen Law Will Apply If There Is Reasonable Basis and If Applying It Would Not Contravene California Public Policy.

1.08[1] California Follows Restatement Choice-of-Law Test.

1.08[1][a] Direct or Indirect Designation of Choice of Law.

1.08[1][b] California Court Will First Determine Whether Chosen Jurisdiction Has Substantial Relationship to Parties or Transaction.

1.08[1][c] Court Will Consider Whether Reasonable Basis Exists for Parties' Choice of Law.

1.08[1][d] Court Will Determine Whether Chosen State's Law Is Contrary to Fundamental California Policy and Whether California Has Materially Greater Interest.

1.08[2] California Courts Use Three-Step Analysis to Determine Choice of Law Based on Relative Governmental Interests of Affected States.

1.08[2][a] Relative Governmental Interests Are Weighed.

1.08[2][b] First Step--Proponent of Foreign Law Must Identify Applicable Law and Show It Is Materially Different From California Law.

1.08[2][c] Second Step--If Laws Are Materially Different, Court Must Determine Interest of Each State in Application of Its Law.

1.08[2][d] Third Step--If Laws Differ and If Each State Has an Interest, Court Must Select Law That Would Cause Lesser Impairment.

1.08[3] If Choice-of-Law Provision Is Enforceable, It May Govern All Claims Arising From Contract.

1.09 For Certain High-Dollar Contracts, Parties May Choose to Apply California Law Even If There Is No Reasonable Basis for Choice.

1.09[1] Parties May Provide That Contracts Involving \$250,000 or More Be Governed by California Law.

1.09[2] Contracts Involving \$1 Million or More.

1.10 Under UCC, Parties to Multi-State Transaction May Choose Law With Reasonable Relationship to Contract.

1.10[1] General Rule Allows Parties to Agree on Law of Any State With Reasonable Relationship to Contract.

1.10[2] Whether Commercial Code "Reasonable Relation" Test Differs From Restatement's "Substantial Relationship" Test Is Unresolved.

1.11 Invalid Contracts for Transfer of Interests in Land May Be Subject to Unique Choice-of-Law Rule.

1.12 Choice-of-Law Provision May Bind Closely Related Third Parties.

1.13 Choice-of-Law Provision Is Significant If Jurisdiction Is Disputed Issue.

1.14 CHECKLIST: Challenging Contractual Choice-of-Law Provision.

1.15 Application of Contractual Choice-of-Law Provision to Cause of Action Must Be Determined.

1.16 Grounds for Challenging Contractual Choice-of-Law Provision Must Be Shown.

1.17 Enforceability of Choice-of-Law Provision Involves Issues of Fact That Require Evidentiary Hearing.

1.18 Procedural Context of Challenge Depends on Circumstances of Case.

1.18[1] Issue May Arise on Motion for Summary Adjudication or Summary Judgment.

1.18[2] Issue May Arise on Demurrer.

1.18[3] Issue May Be Raised by Affirmative Defense in Answer.

1.18[4] Issue May Arise in Action for Declaratory Relief.

1.19 CHECKLIST: Determining Whether Federal or State Law Applies.

1.20 Federal Law Applies to Federal Claims.

1.21 Federal Law May Preempt State Law If Conflict Exists.

1.22 California Substantive Law Applies in Diversity Case Brought in Federal District Court in California.

1.23 Substantive Law of Federal Enclave Applies in Case Brought in California State Court.

1.24 CHECKLIST: Determining Whether UCC or Common Law Applies.

1.25 Commercial Code Applies to Broad Spectrum of Commercial Agreements.

1.26 Contracts for Sale of Goods Are Covered by Commercial Code Article 2.

1.26[1] Article 2 Governs Most Sales Contracts.

1.26[2] Article 2 Contracts Only Involve "Goods" As Defined in Commercial Code.

1.26[3] Security Transactions and Real Property Leases Are Excluded From Article 2.

1.27 Contracts Concerning Investment Securities Are Covered by Commercial Code Article 8.

1.27[1] Article 8 Defines "Investment Securities."

1.27[2] Article 8 Has Its Own Choice-of-Law Rule.

1.27[2][a] Law of Issuer's Jurisdiction, Securities Intermediary's Jurisdiction, or Security's Location Applies.

1.27[2][b] Disputes Governed by Law of Issuer's Jurisdiction.

1.27[2][c] Disputes Governed by Law of Securities Intermediary's Jurisdiction.

1.28 Contracts Involving Secured Transactions Are Governed by Commercial Code Article 9.

1.28[1] Overview of Article 9 Coverage.

1.28[2] In Event of Conflict, Other Law Prevails Over Article 9.

1.29 Contracts Involving Personal Property Leases Are Governed by Commercial Code Article 10.

1.29[1] Overview of Article 10 Coverage.

1.29[2] In Event of Conflict, Other Law Prevails Over Article 10.

1.30 CHECKLIST: Determining Whether Other Statutes Govern Contract.

1.31 Contracts Are Often Governed by Specific Statutes.

1.32 Counsel Must Determine Whether Specific California Statutes Govern Contract.

1.33 If Contract Was Entered Into by Consumer, California Consumer Protection Statutes Apply.

1.33[1] Statutes Apply to Persons Meeting Applicable Definition of "Consumer."

1.33[2] Consumers Legal Remedies Act Applies to Sale or Lease of Consumer Goods or Services.

1.33[3] Consumer Contract Awareness Act of 1990 Applies to Consumer Contracts and Contract Guaranties.

1.34 Other Consumer and Commercial Statutes Apply to Specific Classes of Contracts.

1.35 If Contract Was Entered Into by Public Entity, California Statutes Governing Such Contracts May Control.



16 of 175 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 1 Determining the Applicable Law

I. STRATEGY

1-1 MB Practice Guide: CA Contract Litigation 1.01

1.01 Scope.

This chapter covers:

- Objective and strategy for determining which jurisdiction's law applies to a contract [see 1.02].
- Determining choice of law [see 1.03 -1.13], including whether a court must decide the issue [see 1.05]; considerations if the contract does not contain a choice-of-law provision [see 1.07] and, if it does [see 1.08], special rules governing high-dollar contracts [see 1.09] and contracts governed by the UCC [see 1.10]; and the effect of a choice-of-law provision on a third party [see 1.12].
- Challenging a contractual choice-of-law provision [see 1.14 -1.18], including deciding whether the provision applies to the dispute [see 1.15]; grounds for a challenge [see 1.16]; and the manner of challenge [see 1.18].
- Determining whether federal or state law applies to a contract [see 1.19 -1.23].
- Determining whether the UCC applies to a contract [see 1.24 -1.29].
- Determining whether other California statutes apply to a contract [see 1.30 -1.35], including statutes governing specific commercial contracts [see 1.32], consumer contracts [see 1.33], and contracts entered into by public entities [see 1.35].

Core Statutes:

CC §§ 1549 et seq., 1646.5, 1738 et seq.; CCP § 410.40; Com Code §§ 2101 et seq., 8101 et seq., 9101 et seq., 10101 et seq.

Legal Topics:

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

Civil Procedure
Federal & State Interrelationships
Choice of Law
General Overview
Commercial Law (UCC)
General Provisions (Article 1)
Application & Construction
Choice of Law
General Overview



17 of 175 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 1 Determining the Applicable Law

I. STRATEGY

1-1 MB Practice Guide: CA Contract Litigation 1.02

1.02 Objective and Strategy.

1.02[1] Objective. A lawsuit based on a contract may have a significant relationship to more than one state. Each state has its own choice-of-law rules to determine which of the affected states' substantive law should apply in the suit [see Restatement (Second) of Conflict of Laws § 2 (1969)].

It is not uncommon for a written contract to provide that a given state's substantive law will govern the rights and duties created by the contract. The same contract may choose that state as a forum for litigating disputes (although the two provisions are not the same).

Distinguish:

Choice-of-law rules exist to guide the decision as to which state's law should determine the parties' rights and duties; choice-of-law rules do not themselves make such determinations [see Restatement (Second) of Conflict of Laws § 2 cmt a (1969)].

Examples:

- In a California suit by former internet service providers subscribers for wrongful charges after they had terminated their services, the provider contended litigation should proceed in Virginia because of its customer contract, which designated Virginia as a proper forum *and* provided that Virginia law applied to all disputes. The court did not enforce the choice of law clause because its deprivation of consumer rights contravened an important California public policy [see *America Online, Inc. v. Superior Court* (2001) 90 CA4th 1, 12-13, 108 CR2d 699] .

- In an action arising from a bank's payment of a customer's check with a forged endorsement, the parties' choice of New York law was enforceable, and, under New York's borrowing statute, California's shorter, one-year statute of limitations applied [*Hughes Elecs. Corp. v. Citibank Delaware* (2004) 120 CA4th 251, 258 (California policy favored enforcing parties' choice-of-law provisions)].

1.02[2] Strategy. Each party should promptly identify the substantive law that applies to the contract. This

determination may affect the validity of the contract itself, as well as any claims or defenses.

The first step is to determine whether the contract contains a choice-of-law provision. If the contract contains a choice-of-law provision, that provision usually will be enforceable if there is a reasonable basis for the choice and enforcing the choice will not violate a fundamental public policy of California. If the contract has no choice-of-law provision, the law of the forum (in this case, California) will apply unless the party seeking to have foreign law apply identifies the law, shows its applicability, and persuades the court that applying it will not contravene a fundamental public policy of California.

Judge's Perspective:

Remember that a choice of law provision must be affirmatively asserted in the litigation, or the court is entitled to use California law in the proceeding--even if the contract specifies otherwise [see *Commerce & Indus. Ins. Co. v. Chubb Custom Ins. Co.* (1999) 75 CA4th 739, 748 n6, 89 CR2d 415] . Just because the court *can* do so, however, does not mean that it *will*. Even in the face of a waiver, the court retains the authority to determine which jurisdiction's law is controlling [*Riley v. Fitzgerald* (1986) 178 CA3d 871, 875, 223 CR 889] .

A different issue is presented in class certification proceedings. There, the trial court *must* consider variations in state law, and whether such variations might make it difficult to conduct the litigation fairly and efficiently. Failure to do so is a ground for remand to the trial court to reconsider certification [*Washington Mut. Bank, FA v. Superior Court* (2001) 24 C4th 906, 926, 103 CR2d 320, 15 P3d 1071] .

Counsel must also look at the parties and subject matter of the contract to determine whether a particular body of law, such as federal admiralty law, or statutory scheme, such as the UCC, applies, and the consequences of that applicability.

Strategic Point:



The applicable law can make all the difference in some cases. For example, California's consumer laws are considered more favorable to plaintiffs than many other states' laws. Therefore, to responsibly evaluate the case, it is important to determine which law applies as soon as possible--before filing suit, if you represent plaintiff.

Detailed Discussion/Forms:

California Forms of Pleading and Practice, Ch. 140, Contracts (Matthew Bender).

California Legal Forms, Ch. 75, Formation of Contracts and Standard Contractual Provisions (Matthew Bender).

California Points and Authorities, Ch. 50, Contracts (Matthew Bender).



Cross Reference:

For tips on updating case law and expanding your research with additional resources, see **How to Use Lexis.com With This Publication** at the front of this volume.

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Application & Construction
Choice of Law
General Overview
Contracts Law
Contract Conditions & Provisions
General

Overview



18 of 175 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 1 Determining the Applicable Law

II. DETERMINING WHICH JURISDICTION'S LAW APPLIES

1-1 MB Practice Guide: CA Contract Litigation 1.03

1.03 CHECKLIST: Determining Which Jurisdiction's Law Applies.

- ☐ Determine whether contract contains choice-of-law provision.

Authority:

Washington Mut. Bank, FA v. Superior Court (2001) 24 C4th 906, 915-916, 103 CR2d 320, 15 P3d 1071

Discussion:

See 1.06

- ☐ If contract does not contain choice-of-law provision, determine whether California's or other jurisdiction's law applies:

- ☐ Party asserting foreign law must identify it and show its application.

Authority:

Washington Mut. Bank, FA v. Superior Court (2001) 24 C4th 906, 919, 103 CR2d 320, 15 P3d 1071

Discussion:

See 1.07[1]

- ☐ Consider where contract was made and where performance is designated to occur.

Authority:

CC § 1646; Gamer v. DuPont Glove Forgan, Inc. (1976) 65 CA3d 280, 289, 135 CR 230

Discussion:

See 1.07[2]

☐ If foreign law potentially applies, determine if true conflict exists, so that court is required to decide:

☐ Is there a material difference between the two laws?

☐ Does other jurisdiction arguably have a legitimate interest in seeing its law applied?

☐ If true conflict exists, determine whether parties will agree to apply California law.

Discussion:

See 1.05

☐ Evaluate interests of California and of other jurisdiction in having their respective laws applied to contract, considering:

☐ Place of contracting.

☐ Place of negotiation of contract.

☐ Place of performance.

☐ Location of subject matter of contract.

☐ Domicile, residence, nationality, place(s) of incorporation and place(s) of business of parties.

Authority:

Stonewall Surplus Lines Ins. Co. v. Johnson Controls, Inc. (1993) 14 CA4th 637, 646, 17 CR2d 713

Discussion:

See 1.08[2][c]

☐ If it appears that other jurisdiction(s) would have an interest in applying their local law, determine which jurisdiction's interests would suffer greatest "impairment" if its law is not applied.

Authority:

Travelers Ins. Co. v. Workmen's Comp. Appeals Bd. (1967) 68 C2d 7, 11-12, 64 CR 440, 434 P2d 992 ; *Hurtado v. Superior Court* (1974) 11 C3d 574, 579-580, 114 CR 106, 522 P2d 666

Discussion:

See 1.08[2][d]

☐ If contract contains choice-of-law provision, determine whether provision is enforceable, considering:

- ☐ Whether chosen jurisdiction has substantial relationship to parties or transaction, or other reasonable basis for choice exists.

Authority:

Nedlloyd Lines B.V. v. Superior Court (1992) 3 C4th 459, 464-466, 11 CR2d 330, 834 P2d 1148 ; *Discover Bank v. Superior Court* (2005) 36 C4th 148, 173-174 ; Restatement (Second) of Conflict of Laws § 187 (1969)

Discussion:

See 1.08[1][b], [c]

- ☐ Whether law of chosen jurisdiction contravenes fundamental policy of California.

Authority:

Nedlloyd Lines B.V. v. Superior Court (1992) 3 C4th 459, 464-465, 11 CR2d 330, 834 P2d 1148 ; *Discover Bank v. Superior Court* (2005) 36 C4th 148, 173-174 ; *Aral v. Earthlink, Inc.* (2005) 134 CA4th 544, 563, 36 CR3d 229

Discussion:

See 1.08[1][d]

- ☐ Whether California has "materially greater interest" than designated jurisdiction in case.

Authority:

Application Group, Inc. v. Hunter Group, Inc. (1998) 61 CA4th 881, 897, 72 CR2d 73, 1998-1 Trade Cas. (CCH) P72076 ; *Guardian Sav. & Loan Ass'n v. MD Assocs.* (1998) 64 CA4th 309, 323, 75 CR2d 151 ; *Discover Bank v. Superior Court* (2005) 36 C4th 148, 173-174 ; *Discover Bank v. Superior Court* (2005) 134 CA4th 886, 894-895, 36 CR3d 456 ; *Aral v. Earthlink, Inc.* (2005) 134 CA4th 544, 563, 36 CR3d 229

Discussion:

See 1.08[1]

- ☐ Whether contract involves \$250,000 or more.

Authority:

CC § 1646.5; CCP § 410.40

Discussion:

See 1.09

- ☐ Whether UCC governs contract involving multi-state transaction.

Authority:

Com Code § 1301

Discussion:

See *1.10*

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General Overview
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General Overview



19 of 175 DOCUMENTS

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Chapter 1 Determining the Applicable Law

II. DETERMINING WHICH JURISDICTION'S LAW APPLIES

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1.04 Options and Strategies.

1.04[1] Contract May Provide for Application of Different Law.

1.04[1][a] California Follows Restatement (Second) of Conflict of Laws Approach. The contracting parties may provide for the contract to be governed by specified law. Applying the principles set forth in Restatement (Second) of Conflict of Laws § 187 (1969), California courts will uphold the parties' choice of law if the contract has a substantial relationship to the place whose law is chosen, or there is another reasonable basis for the parties' choice of law, and application of that law will not contravene any strong California public policy [*Discover Bank v. Superior Court* (2005) 36 C4th 148, 173-174 ; *Nedlloyd Lines B.V. v. Superior Court* (1992) 3 C4th 459, 464-465, 11 CR2d 330, 834 P2d 1148] . If a contract contains an enforceable choice-of-law provision for resolution of disputes by the "laws" of a foreign jurisdiction, the trial court must enforce all of the applicable laws of that jurisdiction [*Hughes Elecs. Corp. v. Citibank Delaware* (2004) 120 CA4th 251, 256] .

Cross Reference:

Discussion of enforceability of choice-of-law provisions, see *California Forms of Pleading and Practice*, § 140.30[3][a] (Matthew Bender).

1.04[1][b] Choice-of-Law Contract Provision Can Determine Entire Outcome. If the contract contains a choice-of-law provision, the trial court must determine the enforceability of that agreement. The choice-of-law determination can have a profound impact on the outcome of the case:

- It can affect the validity of the contract as a whole by determining, for example, the parties' capacity to contract or the legality of the entire contract.
- It can affect the availability of a defense such as the statute of limitations.
- In class actions, it can crucially impact class certification.
- In insurance coverage cases, it can set the rules for interpreting the policy.

Judge's Perspective:

Because choice of law is purely a legal issue, it can be resolved by the trial court early in the litigation. Sometimes one party can obtain a substantial benefit from the application of law from a particular jurisdiction. Examples include punitive damages that might not otherwise be available or a longer statute of limitations. If one party can obtain a significant benefit from the law of a particular jurisdiction, it makes sense to obtain a ruling on that issue as early as possible. At a minimum, an early ruling will eliminate one uncertainty that would otherwise prevent meaningful settlement discussions.



Strategic Point--Choice-of-Law Provision Is Not Unenforceable Merely Because Contract Is One of

Adhesion:

California has no public policy against the enforcement of choice-of-law provisions merely because they are contained in contracts of adhesion when they are otherwise appropriate [*Washington Mut. Bank, FA v. Superior Court* (2001) 24 C4th 906, 917, 103 CR2d 320, 15 P3d 1071 ; see *Cal-State Business Products & Services, Inc. v. Ricoh* (1993) 12 CA4th 1666, 1679, 16 CR2d 417] . However, enforcement of a choice-of-law clause cannot result in a violation or waiver of a fundamental California policy protecting consumers [see *America Online, Inc. v. Superior Court* (2001) 90 CA4th 1, 4-5, 108 CR2d 699] .



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Sample Search: For general treatise discussion of conflict of law or choice of law

try the following search: *heading (conflict! OR choice /5 law)*

1.04[2] Choice-of-Law Issue May Arise If Contract Does Not Contain Provision.

1.04[2][a] "True Conflict" Will Trigger Governmental Interest Analysis in California Courts. Absent an effective choice-of-law provision, a California court will find a "true conflict" of laws, and conduct a three-step "governmental interest analysis" of the claims [*Washington Mut. Bank, FA v. Superior Court* (2001) 24 C4th 906, 919, 103 CR2d 320, 15 P3d 1071 ; *J.P. Morgan & Co., Inc. v. Superior Court* (2003) 113 CA4th 195, 210] .



Cross References:

Discussion of impact on availability of defenses, see 1.04[2][d].

Impact on class actions, see 1.04[2][b].

Impact on interpretation of insurance policies, see 1.04[2][c].

Analysis of governmental interests, see 1.08[2][a].

Enforceability of contract's choice-of-law provision, see 1.17.

1.04[2][b] Viability of Class Action Cases May Depend on Choice-of-Law Rulings on Class Certification.

Resolution of choice-of-law issues is a vital part of the class certification process. If pertinent documents in the case require adjudication of nonresident class members' claims under their home state laws, class proponents have the burden

of demonstrating that certification of a nationwide class would be both manageable and warranted by predominantly common legal questions [*Washington Mut. Bank, FA v. Superior Court* (2001) 24 C4th 906, 915, 103 CR2d 320, 15 P3d 1071] .

If the class certification proponent meets its burden of demonstrating the constitutionally requisite number of significant contacts with California, the burden shifts to the opponent of nationwide certification to demonstrate that foreign law should apply to class claims [*Wershba v. Apple Computer, Inc.* (2001) 91 CA4th 224, 244, 110 CR2d 145] .



Strategic Point--Subclasses May Be Viable:

If the laws of different states apply, counsel should propose subclasses to make the litigation manageable [see *Washington Mut. Bank, FA v. Superior Court* (2001) 24 C4th 906, 926, 103 CR2d 320, 15 P3d 1071] .

If the trial court finds the documents' choice-of-law provisions are neither unenforceable nor irrelevant to class claims, the court cannot disregard them merely because their enforcement precludes prosecution of a multi-state class action or results in the exclusion of nonresidents from a California-based class action [*Washington Mut. Bank, FA v. Superior Court* (2001) 24 C4th 906, 918, 103 CR2d 320, 15 P3d 1071] .

Example:

A home loan company required its borrowers to maintain hazard insurance. Homebuyers sought certification of a nationwide class for an action against the lender for allegedly overcharging for replacement hazard insurance. Each homeowner's deed of trust contained a choice-of-law clause designating federal law and the law of the state where the property was located. The California Supreme Court held that it was error to certify a nationwide class without deciding what law applied to the claims of class members. Homebuyers had the burden of identifying any variations of applicable state law and demonstrating how a trial on the class claims could be conducted fairly and efficiently in light of those variations [*Washington Mut. Bank, FA v. Superior Court* (2001) 24 C4th 906, 915-921, 103 CR2d 320, 15 P3d 1071] .



Cross Reference:

Discussion of three-step analysis, see 1.08[2].

1.04[2][c] Interpretation of Insurance Policies Is Function of Forum's Substantive Law. The choice-of-law decision can profoundly affect interpretation of insurance policies and allowable coverage.

Examples:

- Although a trucking company and its insurer were both Washington corporations and the trucker's comprehensive liability policy had been issued in Washington, California law applied to interpret the extent of the policy's coverage for losses occurring in California [*Shippers Dev. Co. v. General Ins. Co.* (1969) 274 CA2d 661, 674, 79 CR 388] .

- A California court applied California, not Wisconsin, law to hold that insurers were not liable to insured for indemnification of exemplary damages [*Stonewall Surplus Lines Ins. Co. v. Johnson Controls, Inc.* (1993) 14 CA4th 637, 646-649, 17 CR2d 713 (California law prohibits indemnity for punitive damages, but Wisconsin law does not)].

1.04[2][d] Availability of Defenses May Depend on Choice of Law. The choice-of-law determination can affect the availability of a given defense, such as the bar of the statute of limitations, which may be available under the law of one affected state but not others [see, e.g., *Hambrecht & Quist Venture Partners v. American Med. Int'l, Inc.* (1995) 38 CA4th 1532, 1539-1544, 46 CR2d 33 (Delaware limitations period barred California suit for breach of contract); *ABF Capital Corp. v. Osley* (9th Cir 2005) 414 F3d 1061, 1066 (Application of New York law rendered contractual waiver of limitations period unenforceable and action time-barred)].



Trap:

No fundamental state policy prohibits applying a foreign jurisdiction's statute of limitations to claims brought in California courts; therefore, the shortest limitations period will probably apply [*Hambrecht & Quist Venture Partners v. American Med. Int'l, Inc.* (1995) 38 CA4th 1532, 1548-1549, 46 CR2d 33] . Because California has a substantial interest in preventing the prosecution of stale claims in its courts, its interest in applying its own statute of limitations is strongest when its limitations period is shorter than that of the foreign state; hence, California courts will almost always dismiss untimely claims [see *Deutsch v. Turner Corp.* (9th Cir 2003) 324 F3d 692, 717] .

Examples:

- Because California permits contractual waivers of the statute of limitations, while New York prohibits such waivers before accrual of the cause of action, application of New York law rendered such a waiver unenforceable and caused the action to be time-barred [*ABF Capital Corp. v. Osley* (9th Cir 2005) 414 F3d 1061, 1066] .

- A California resident purchased a mobile home for installation in California from a Nevada dealer. The dealer sued to recover possession and obtain a deficiency judgment. The buyer set up violation of the California Rees-Levering Act [CC § 2981 et seq.] as a defense and sought rescission, damages, and attorney's fees. The dealer argued unsuccessfully that Nevada law applied. The trial court properly applied California law because California had a strong interest (and Nevada had no interest) in having its law applied [*Dixon Mobile Homes, Inc. v. Walters* (1975) 48 CA3d 964, 972-973, 122 CR 202 , disapproved on other grounds by *Bullis v. Security Pac. Nat'l Bank* (1978) 21 C3d 801, 815 n18, 148 CR 22, 582 P2d 109 (California had strong interest as forum state, buyer's residence, place buyer originated payments, site of mobile home installation, site of real property security for transaction, and site of acts relating to breach)].



Cross References:

Discussion of determining applicable statutes of limitations in contract actions, see California Forms of Pleading and Practice, Ch. 345, Limitation of Actions (Matthew Bender); and

Restatement (Second) of Conflict of Laws § 142 (1969).

Legal Topics:

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

Civil ProcedureFederal & State InterrelationshipsChoice of LawGeneral OverviewCivil ProcedureFederal & State InterrelationshipsChoice of LawSignificant RelationshipsCommercial Law (UCC)General Provisions (Article 1)Application & ConstructionChoice of LawGeneral OverviewCommercial Law (UCC)General Provisions (Article 1)Application & ConstructionChoice of LawContractual Choice of LawContracts LawContract Conditions &

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20 of 175 DOCUMENTS

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Chapter 1 Determining the Applicable Law
II. DETERMINING WHICH JURISDICTION'S LAW APPLIES

1-1 MB Practice Guide: CA Contract Litigation 1.05

1.05 Trial Court Determines Choice of Law Only If True Conflict Exists.

1.05[1] Trial Court Must First Decide Whether True Conflict Exists. The court must determine which law applies only if a true conflict exists. There is no true conflict if any of the following apply:

- The law is the same in both jurisdictions [see *Hamilton v. Abadjian* (1947) 30 C2d 49, 51, 179 P2d 804 ; *International Serv. Ins. Co. v. Gonzales* (1987) 194 CA3d 110, 116, 239 CR 341 ; *Gitano Group v. Kemper Group* (1994) 26 CA4th 49, 57, 31 CR2d 271] .
- Both parties accept that California law applies [see *Glickman v. Collins* (1975) 13 C3d 852, 857, 120 CR 76, 533 P2d 204 ; *Wells v. Wells* (1946) 74 CA2d 449, 453, 169 P2d 23 ; *BII Fin. Co. v. U-States Forwarding Servs. Corp.* (2002) 95 CA4th 111, 126, 115 CR2d 312] .
- Only one state has a legitimate interest in the contract [see *In re Title U.S.A. Ins. Corp.* (1995) 36 CA4th 363, 372, 42 CR2d 498 ; *Abogados v. AT&T, Inc.* (9th Cir 2000) 223 F3d 932, 936] .



Search California State and Federal UCC Cases:

Use *lexis.com* to search for documents discussing challenges to a forum selection clause:

■ Legal > States Legal--U.S. > California > Find Cases > By Area of Law > CA Uniform Commercial Code Cases



Sample Search: To find California state and federal cases analyzing whether a true conflict exists, run the following search: *true w/1 conflict or choice and not convict!*.

1.05[2] California Law May Apply If Issue Remains Undecided in Other Jurisdiction. If foreign-state law would otherwise apply, but that law cannot be determined, the court may apply California law if it can do so consistently with the federal and state constitutions [*Evid Code* § 311(a) (court may apply foreign law "as ends of justice require"); see, e.g., *Ferrell v. Southern Nevada Off-Road Enthusiasts, Ltd.* (1981) 147 CA3d 309, 314, 195 CR 90 (no law of Nevada on agreements purporting to exculpate party from its liability for future negligence or other

tortious conduct)]. Alternatively, the court may dismiss the action without prejudice or, in the case of a reviewing court, remand the case to the trial court with directions to dismiss the action without prejudice [*Evid Code* § 311(b)].

Legal Topics:

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

Civil Procedure
Federal & State Interrelationships
Choice of Law
General Overview
Commercial Law (UCC)
General Provisions (Article 1)
Application & Construction
Choice of Law
General Overview
Contracts Law
Contract Conditions & Provisions
General Overview



21 of 175 DOCUMENTS

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Chapter 1 Determining the Applicable Law

II. DETERMINING WHICH JURISDICTION'S LAW APPLIES

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1.06 Analysis Depends on Whether Contract Contains Choice-of-Law Provision.

In actions involving parties from different states, California has two different analyses to decide the choice of law [*Washington Mut. Bank, FA v. Superior Court* (2001) 24 C4th 906, 919-920, 103 CR2d 320, 15 P3d 1071] :

- If the parties agree that another jurisdiction's law will govern any disputes, the trial court will evaluate whether their choice-of-law agreement is enforceable.
- If the parties have not agreed on another jurisdiction's law, the trial court will analyze the governmental interests of the various jurisdictions implicated in the transaction and select the most appropriate law.

Legal Topics:

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

Civil Procedure Federal & State Interrelationships Choice of Law General Overview Commercial Law (UCC) General Provisions (Article 1) Application & Construction Choice of Law Contractual Choice of Law Contracts Law Contract Conditions & Provisions General Overview Contracts Law Contract Interpretation General Overview



22 of 175 DOCUMENTS

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Chapter 1 Determining the Applicable Law

II. DETERMINING WHICH JURISDICTION'S LAW APPLIES

1-1 MB Practice Guide: CA Contract Litigation 1.07

1.07 If Contract Has No Enforceable Choice-of-Law Provision, Court Determines Applicable Forum Law.

1.07[1] Party Proposing Foreign Law Has Burden of Identifying Rule and Showing It Applies. The party proposing use of a foreign law must identify the pertinent rule and show its application is appropriate [*Washington Mut. Bank, FA v. Superior Court* (2001) 24 C4th 906, 919, 103 CR2d 320, 15 P3d 1071 ; *American Home Assurance Co. v. Societe Commerciale Toutelectric* (2002) 104 CA4th 406, 427, 128 CR2d 430] .



Search Statutes From 50 States Puerto Rico and Virgin Islands for Conflicts of Law:

Use *lexis.com* to search for state statutes that may affect conflict or choice of law issues:

■ Legal > States Legal--U.S. > Combined States > Find Statutes & Legislative Materials > Codes, Constitutions, Court Rules & ALS > Codes > Codes from 50 States PR and VI



Sample Search: for state statutes that may affect conflict of law or choice of law issues involving remedies or damages, try the following search: *heading (contract!) OR section (contract!) AND conflict! OR choice /5 law AND damage OR remed!*

1.07[2] Choice of Which Foreign Law to Apply Depends on Facts of Case.

1.07[2][a] General Rule Interprets Contract Using Law of Place of Performance or Place Contract Was Made. A contract is interpreted in accordance with the law and usage of the place at which it is to be performed, or, if the contract does not indicate a place of performance, according to the law and usage of the place at which it was made [CC § 1646; see, e.g., *Shannon-Vail Five Inc. v. Bunch* (9th Cir 2001) 270 F3d 1207, 1210] .

Distinguish--Rule Inapplicable to Determine Validity of Formation:

While the rule of CC § 1646 applies to the *interpretation* of a contract, it does not apply to the *formation* of that contract [*Townsend v. Flotill Prods., Inc.* (1947) 82 CA2d 863, 865, 187 P2d 466] .

1.07[2][b] Using Law of Place of Performance. A contract indicates a place of performance within the meaning of CCP § 1646 if the intended place of performance can be gleaned from the nature of the contract and its surrounding

circumstances [*Frontier Oil Corp. v. RLI Ins. Co.* (2007) 153 CA4th 1436, 1450, 63 CR3d 816 (intended place of performance of liability insurance policy is place of the insured risk)].

1.07[2][c] Using Law of Place Where Contract Is "Made." A contract is "made" where the last act necessary to the formation of the contract is performed. For example, if an offer is mailed, the contract is made where the offeree receives and accepts the offer [*Michelin Tire Co. v. Coleman & Bentel Co.* (1919) 179 C 598, 604, 178 P 507 ; *Ury v. Jewelers Acceptance Corp.* (1964) 227 CA2d 11, 16, 38 CR 376] .

If an oral contract is made by telephone, the place of making is the place where the acceptor speaks [see *Travelers Ins. Co. v. Workmen's Comp. Appeals Bd.* (1967) 68 C2d 7, 14, 64 CR 440, 434 P2d 992 ; *Janzen v. Workers' Comp. Appeals Bd.* (1997) 61 CA4th 109, 114, 71 CR2d 260 ; see also Effross, *The Legal Architecture of Virtual Stores: World Wide Web Sites and the Uniform Commercial Code*, 34 San Diego L. Rev. 1263, 1280-1283 (1997)].

Exception:

California courts will not enforce a foreign law that is so offensive to California public policy as to be prejudicial to recognized standards of morality and to the general interest of the citizens [*Bassidji v. Goe* (9th Cir 2005) 413 F3d 928, 933 (refusing to apply Hong Kong law, which would have allowed enforcement of an American citizen's guarantees of payments in furtherance of a trade agreement between an Iranian company and a Hong Kong company; United States presidential Executive Orders prohibited American citizens from trading with Iran)].



Cross Reference:

Discussion of general rule of contract interpretation absent choice-of-law provision, see *California Forms of Pleading and Practice*, § 140.30[1] (Matthew Bender).

Legal Topics:

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

Civil Procedure Federal & State Interrelationships Choice of Law General Overview Commercial Law (UCC) General Provisions (Article 1) Application & Construction Choice of Law General Overview Commercial Law (UCC) General Provisions (Article 1) Application & Construction Choice of Law Appropriate Relation Test Contracts Law Contract Interpretation General Overview International Law Dispute Resolution Conflicts of Laws Choice of Law



23 of 175 DOCUMENTS

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Chapter 1 Determining the Applicable Law

II. DETERMINING WHICH JURISDICTION'S LAW APPLIES

1-1 MB Practice Guide: CA Contract Litigation 1.08

1.08 In California, Parties' Chosen Law Will Apply If There Is Reasonable Basis and If Applying It Would Not Contravene California Public Policy.

1.08[1] California Follows Restatement Choice-of-Law Test.

1.08[1][a] Direct or Indirect Designation of Choice of Law. If the parties have directly or indirectly stated their choice of governing law, California courts apply the principles set forth in Restatement (Second) of Conflict of Laws § 187 (1969) [see *Discover Bank v. Superior Court* (2005) 36 C4th 148, 173-174 ; *Nedlloyd Lines B.V. v. Superior Court* (1992) 3 C4th 459, 464-465, 11 CR2d 330, 834 P2d 1148] :

- The state law chosen by the parties will be applied if the issue is one the parties could have resolved by an explicit contract provision.
- Even if the parties could not have resolved the issue by explicit provision, their chosen law will be applied unless either:
 - ☐ The chosen state has no substantial relationship to the parties or the transaction, and there is no other reasonable basis for their choice; or
 - ☐ The chosen state law would contravene a fundamental policy of a state with a materially greater interest.

If neither test is met, that inquiry ends and the court need not enforce the parties' choice of law [*Nedlloyd Lines B.V. v. Superior Court* (1992) 3 C4th 459, 466, 11 CR2d 330, 834 P2d 1148 ; *Application Group, Inc. v. Hunter Group, Inc.* (1998) 61 CA4th 881, 897, 72 CR2d 73, 1998-1 Trade Cas. (CCH) P72076] .

Exception:

Absent indications of contrary intention, the parties' chosen state law means that state's "local law," i.e., not that state's choice-of-law rules. However, if the state's local law would require that the parties' dispute be settled by the law of a different state, that requirement will control.

1.08[1][b] California Court Will First Determine Whether Chosen Jurisdiction Has Substantial Relationship to Parties or Transaction. In determining whether the chosen jurisdiction has either a substantial relationship to the parties or another reasonable basis for the choice of law, the court may consider any appropriate factor, including:

- The parties' reasonable expectations as to which law would apply to their contract [*see Roesgen v. American Home Prods. Corp.* (9th Cir 1983) 719 F2d 319, 321 ; *Rosenthal v. Fonda* (9th Cir 1988) 862 F2d 1398, 1403] .
- Character of the contract and purposes of the contract law under consideration.
- Where the parties entered into the contract.
- Where the negotiations for the contract took place.
- Where the contract was performed or was to be performed.
- Where the subject matter of the contract was located.
- Domiciles, residences, places of business, and places of incorporation of the parties.
- Nationality of the parties.
- If any payments were made, where they were initiated.
- If a loan was involved, where the security for the loan was located.
- Where any acts relating to the breach occurred.

The substantial relationship and reasonable basis tests are met when one of the parties is domiciled in the chosen state [*Expansion Pointe Properties Limited Partnership v. Procopio, Cory, Hargreaves & Savitch, LLP* (2007) 152 CA4th 42, 59, 61 CR3d 166] .

The substantial relationship of the state whose law is chosen to the parties or contract is a question of fact requiring evidentiary hearings [*Mencor Enters., Inc. v. Hets Equities Corp.* (1987) 190 CA3d 432, 439, 235 CR 464] .

1.08[1][c] Court Will Consider Whether Reasonable Basis Exists for Parties' Choice of Law. If the court finds that the chosen jurisdiction does not have a substantial relationship to the parties or their transaction, it will consider whether any other reasonable basis exists for their choice of law [*Discover Bank v. Superior Court* (2005) 36 C4th 148, 173, 30 CR3d 76, 113 P3d 1100 ; *Nedlloyd Lines B.V. v. Superior Court* (1992) 3 C4th 459, 466, 11 CR2d 330, 834 P2d 1148] .

If there is a reasonable basis for the parties' choice of law and there is no conflict with California law, the court must enforce the parties' choice [*Application Group, Inc. v. Hunter Group, Inc.* (1998) 61 CA4th 881, 897, 72 CR2d 73, 1998-1 Trade Cas. (CCH) P72076] .

Examples--Reasonable Basis for Choice of Law:

- There was a reasonable basis for choosing New York law when one of the parties to the contract was a New York resident, as was the intended beneficiary, and the contract was to be performed in New York

[*ABF Capital Corp. v. Berglass* (2005) 130 CA4th 825, 834-835] .

- There was a reasonable basis for the selection of Swiss law because, although the successors in interest to the contract were American entities, the original signatories were based in Switzerland and France [*Applera Corp. v. MP Biomedicals, LLC* (2009) 173 CA4th 769, 790, 93 CR3d 178] .

1.08[1][d] Court Will Determine Whether Chosen State's Law Is Contrary to Fundamental California Policy and Whether California Has Materially Greater Interest. If the chosen state has a substantial relationship to the parties or their transaction or some other reasonable basis exists for the parties' choice of law, and the chosen state's law conflicts with California law, the court must next determine whether the chosen state's law contravenes a fundamental California policy [*Discover Bank v. Superior Court* (2005) 36 C4th 148, 173-174, 30 CR3d 76, 113 P3d 1100 ; *Nedlloyd Lines B.V. v. Superior Court* (1992) 3 C4th 459, 464-465, 11 CR2d 330, 834 P2d 1148] . If no such conflict exists, the court will enforce the parties' choice of law. If, however, a fundamental conflict exists with California law, the court must then determine whether California has a materially greater interest than the chosen state in the determination of the particular issue [*Aral v. Earthlink, Inc.* (2005) 134 CA4th 544, 563, fn. 3, 36 CR3d 229] .

Examples--Chosen State Law Contravenes Fundamental Policy of State With Materially Greater Interest:

- Plaintiff brought an unsuccessful action for breach of a contract containing a New York forum selection clause and a unilateral attorney's fees provision which, if governed by California law, would be interpreted as a reciprocal fees provision under CC § 1717. The court refused to apply New York law, finding that (1) California had a fundamental policy of preventing the uncertainty and overreaching that one-sided attorney's fees provisions can create and (2) California had a materially greater interest in the litigation than New York, as the action was brought in a California court against California defendants [*ABF Capital Corp. v. Grove Props. Co.* (2005) 126 CA4th 204, 218-220] .

- In a consumer class action against an internet service provider, enforcement of forum-selection and choice-of-law clauses providing for Virginia law would have been the functional equivalent of a contractual waiver of consumer protections under the California Consumer Legal Remedies Act [CC § 1750 *et seq.*]. Because such an evisceration of important legal rights afforded to California consumers would contravene a fundamental public policy of California, the clauses were unenforceable [*America Online, Inc. v. Superior Court* (2001) 90 CA4th 1, 12-13, 108 CR2d 699] .

- In a consumer class action brought by a California resident against an internet service provider with its principal place of business in Georgia, application of Georgia's law would contravene the fundamental right of California in ensuring that its citizens have a viable forum in which to recover minor amounts of money allegedly obtained in violation of the California Unfair Competition Law. Because forcing consumers to travel to a distant location and depriving them of any hope of class litigation would pose an insurmountable barrier to recovery of small sums unjustly obtained, undermining the protections of the Unfair Competition Law, California had a materially greater interest than Georgia in the determination of the issue [*Aral v. Earthlink, Inc.* (2005) 134 CA4th 544, 564, 36 CR3d 229] .

- In a consumer class action brought by a California resident against a Delaware-based credit card issuer, application of Delaware's law permitting class action waivers in "take it or leave it" arbitration clauses would contravene fundamental California public policy. Distinguishing *Discover Bank* (discussed *above*), the court concluded that California's policy interest in protecting its residents was materially greater than Delaware's interest in uniformity among its corporate citizens because the plaintiff sought to represent only California residents with California statutory claims, and the class

action waiver was not contained in the cardholder agreement but rather in a National Arbitration Forum website referenced in the agreement [*Klussman v. Cross Country Bank* (2005) 134 CA4th 1283, 1293-1300, 36 CR3d 728] .

Example--Chosen Law Does Not Contravene Fundamental California Policy.

A contract specified that it was to be governed by Swiss law. Although the contract did not contain an attorney's fees provision, Swiss law provided for the award of attorney's fees to the prevailing party as a matter of course. The California appellate court held that Swiss law on attorney's fees did not violate California's public policy, because it was qualitatively no different than the insertion of a reciprocal, prevailing party attorney's fees clause in a contract, which is clearly enforceable under California law [*Applera Corp. v. MP Biomedicals, LLC* (2009) 173 CA4th 769, 790, 93 CR3d 178] .

Example--California Lacks Materially Greater Interest Than Foreign State:

In a putative nationwide class action brought by a California resident against a bank domiciled in Delaware, Delaware's interest was greater than California's because Delaware was home to the sole defendant, Delaware had a statute providing that Delaware law should apply to claims between Delaware banks and their cardholders, and the plaintiff asserted claims under Delaware law alone [*Discover Bank v. Superior Court* (2005) 134 CA4th 886, 894-895, 36 CR3d 456] .

1.08[2] California Courts Use Three-Step Analysis to Determine Choice of Law Based on Relative Governmental Interests of Affected States.

1.08[2][a] Relative Governmental Interests Are Weighed. In cases involving issues that the parties could not have resolved by explicit provisions in their agreement, and if there is a conflict that implicates one or more of the states' public policies, a California court will use a three-step analysis to determine choice of law based on the relative governmental interests of the affected states [*Washington Mut. Bank, FA v. Superior Court* (2001) 24 C4th 906, 919-920, 103 CR2d 320, 15 P3d 1071 ; *ABF Capital Corp. v. Grove Props. Co.* (2005) 126 CA4th 204, 215] :

- First, the proponent of the foreign law must identify the applicable rule of law of the potentially concerned foreign state and show that it materially differs from the law of California [see 1.08[2][b]].
- Second, if the trial court finds that the laws are materially different, it must determine what interest, if any, each state has in having its own law applied to the case [see 1.08[2][c]].
- Third, upon determining that the laws are materially different and that each state has an interest in having its own law applied, the trial court must select the law of the state whose interests would be more impaired if its law were not applied [see 1.08[2][d]].

1.08[2][b] First Step--Proponent of Foreign Law Must Identify Applicable Law and Show It Is Materially Different From California Law. A California court will apply California law unless a party timely invokes the law of a foreign state [*Clothesrigger, Inc. v. GTE Corp.* (1987) 191 CA3d 605, 614, 236 CR 605] . In that case, the party invoking foreign law must identify the applicable rule of law and must show that a true conflict exists because that law materially differs from the law of California [*Hurtado v. Superior Court* (1974) 11 C3d 574, 581, 114 CR 106, 522 P2d 666 ; *Washington Mut. Bank, FA v. Superior Court* (2001) 24 C4th 906, 919-920, 103 CR2d 320, 15 P3d 1071] .

1.08[2][c] Second Step--If Laws Are Materially Different, Court Must Determine Interest of Each State in Application of Its Law. If the laws are materially different, the court must determine the genuine interest of each state in the application of its law [*Sierra-Bay Fed. Land Bank Assn. v. Superior Court* (1991) 227 CA3d 318, 331, 277 CR 753] . The court must examine the laws of the states involved, including their underlying policies, to assess their relative interests in application of their laws to the case. Only if each of the states has a legitimate but conflicting interest in applying its own law is there a "true conflict" [*Washington Mut. Bank, FA v. Superior Court* (2001) 24

C4th 906, 919-920, 103 CR2d 320, 15 P3d 1071 ; *In re Title U.S.A. Ins. Corp.* (1995) 36 CA4th 363, 372, 42 CR2d 498] .



Warning:

If the connection to California is too tenuous, California law will not apply [see *Edwards v. United States Fid. & Guar. Co.* (ND Cal 1994) 848 F Supp 1460, 1465] .

The relevant touchstones to be considered in determining the interest of a state in applying its law are [*Stonewall Surplus Lines Ins. Co. v. Johnson Controls, Inc.* (1993) 14 CA4th 637, 646, 17 CR2d 713] :

- The place of contracting.
- The place of negotiation of the contract.
- The place of performance.
- The location of the subject matter of the contract.
- The domicile, residence, nationality, place of incorporation and place of business of the parties.



Decision Point--Importance of Contacts Depends on Nature of Dispute:

The court must analyze the relevant contacts in connection with the states' interests in the issues, the character of the contract, and the purposes of the law under consideration. For example, if the case involves a casualty insurance contract, the location of the insured risk is particularly important [*Stonewall Surplus Lines Ins. Co. v. Johnson Controls, Inc.* (1993) 14 CA4th 637, 646, 17 CR2d 713] .

1.08[2][d] Third Step--If Laws Differ and If Each State Has an Interest, Court Must Select Law That Would Cause Lesser Impairment. If the foreign law is materially different from California law, and if the foreign state has a genuine interest in the application of its law, the court must weigh the interests and choose the law of the state whose interests would be more impaired if its law were not applied [*Travelers Ins. Co. v. Workmen's Comp. Appeals Bd.* (1967) 68 C2d 7, 11-12, 64 CR 440, 434 P2d 992 ; *Hurtado v. Superior Court* (1974) 11 C3d 574, 579-580, 114 CR 106, 522 P2d 666] . The balancing of impairment is slightly weighted by California's general preference for applying its own law [*Fleury v. Harper & Row Publishers Inc.* (9th Cir 1983) 698 F2d 1022, 1025 ; *Engel v. CBS Inc.* (9th Cir 1992) 981 F2d 1076, 1081] .



Strategic Point--Laws of Different States May Apply to Different Claims of Same Person:

If a case involves both tort and breach of contract claims, the laws of different states may apply to the different types of claims [see, e.g., *Arno v. Club Med Inc.* (9th Cir 1994) 22 F3d 1464, 1468-1469 (California law applied to employee's contract claims against employer and French law applied to employee's tort claims)].

Distinguish:

If a written contract has an enforceable choice-of-law provision, it may govern all claims arising from the contract [see *Nedlloyd Lines B.V. v. Superior Court* (1992) 3 C4th 459, 470, 11 CR2d 330, 834 P2d 1148 ; see also 1.08[3]].

1.08[3] If Choice-of-Law Provision Is Enforceable, It May Govern All Claims Arising From Contract. An enforceable choice-of-law provision will be broadly construed, particularly if the contracting parties are sophisticated

commercial entities. Thus, a validly specified body of law that "governs" the "agreement" between the parties will encompass all causes of action arising from or related to that agreement, regardless of how they are characterized, including tortious breaches [*Nedlloyd Lines B.V. v. Superior Court* (1992) 3 C4th 459, 470, 11 CR2d 330, 834 P2d 1148 (choice of law comprehends all actions, irrespective of characterization, including tortious breaches of duties emanating from agreement or legal relationships it creates)].

Example:

Depending on the language of the provision, it may apply to a breach of fiduciary duty claim arising out of the contract [*Nedlloyd Lines B.V. v. Superior Court* (1992) 3 C4th 459, 469-470, 11 CR2d 330, 834 P2d 1148] , a fraud claim [*General Signal Corp. v. MCI Telecommunications Corp.* (9th Cir 1995) 66 F3d 1500, 1506] , or an age discrimination claim [*Olinick v. BMG Entertainment* (2006) 138 CA4th 1286, 1299-1300, 42 CR3d 268] .

Legal Topics:

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

Civil Procedure
Federal & State Interrelationships
Choice of Law
General Overview
Commercial Law (UCC)
General Provisions (Article 1)
Application & Construction
Choice of Law
Contractual Choice of Law
Commercial Law (UCC)
General Provisions (Article 1)
Application & Construction
Choice of Law
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Law
Contract Interpretation
General Overview
International Law
Dispute Resolution
Conflicts of Laws
General Overview



24 of 175 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 1 Determining the Applicable Law

II. DETERMINING WHICH JURISDICTION'S LAW APPLIES

1-1 MB Practice Guide: CA Contract Litigation 1.09

1.09 For Certain High-Dollar Contracts, Parties May Choose to Apply California Law Even If There Is No Reasonable Basis for Choice.

1.09[1] Parties May Provide That Contracts Involving \$250,000 or More Be Governed by California Law.

The parties to any contract, agreement, or undertaking, contingent or otherwise, relating to a transaction involving in the aggregate not less than \$250,000, may agree that California law will govern their rights and duties in whole or in part, whether or not the contract, agreement, or undertaking, or the transaction, bears a reasonable relation to California [CC § 1646.5].

Exception:

This rule does not apply to any of the following kinds of contracts [CC § 1646.5]:

- A contract for labor or personal services;
- A contract relating to any transaction primarily for personal, family, or household purposes; or
- Any other contract to the extent provided in *Com Code § 1105(2)*, which lists situations involving creditors' rights against goods sold, leases, bank deposits and collections, letters of credit, bulk sales, investment securities, and perfection of security interests, in which the parties' choice of law will be overridden.

1.09[2] Contracts Involving \$1 Million or More. Any person may maintain an action in a California court against a nonresident when the action arises out of or relates to any contract when [CCP § 410.40]:

- The contract contains a provision for the choice of California law.
- The contract relates to a transaction involving in the aggregate not less than \$1,000,000.

Legal Topics:

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

Civil ProcedureFederal & State InterrelationshipsChoice of LawGeneral OverviewCommercial Law (UCC)General Provisions (Article 1)Application & ConstructionChoice of LawContractual Choice of LawCommercial Law (UCC)General Provisions (Article 1)Application & ConstructionChoice of LawReasonable Relation TestContracts LawContract InterpretationGeneral OverviewInternational LawDispute ResolutionConflicts of LawsChoice of Law



25 of 175 DOCUMENTS

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Chapter 1 Determining the Applicable Law

II. DETERMINING WHICH JURISDICTION'S LAW APPLIES

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1.10 Under UCC, Parties to Multi-State Transaction May Choose Law With Reasonable Relationship to Contract.

1.10[1] General Rule Allows Parties to Agree on Law of Any State With Reasonable Relationship to Contract. In transactions governed by the Uniform Commercial Code, the contracting parties may agree on a choice of law of any state having a reasonable relationship to the contract. If there is no contractual choice-of-law provision, California law will apply to contracts bearing an appropriate relation to the state [*Com Code § 1301(a), (b)*].

Exception:

If one of the following Commercial Code provisions specifies the applicable law, that provision governs, and any contrary agreement of the parties is effective only to the extent permitted by the law specified in the applicable Commercial Code provision [*Com Code § 1301(c)*]:

- *Com Code § 2402*--rights of creditors against sold goods.
- *Com Code §§ 10105, 10106*--property leases.
- *Com Code § 4102*--bank deposits and collections.
- *Com Code § 5116*--letters of credit.
- *Com Code § 6103*--bulk sales.
- *Com Code § 8110*--investment securities.
- *Com Code §§ 9301-9307*--perfection, the effect of perfection or nonperfection, and the priority of security interests.

➡ Cross References:

Remedies under Division 2 of the California Commercial Code, see Ch. 26, Contract for Sale of

Goods--Seeking Remedies Under California Commercial Code.

Formation of contracts under Division 2 of the California Commercial Code, see Ch. 27, Contract for Sale of Goods--Attacking or Defending Existence of Contract Under California Commercial Code.

Breach of contract under Division 2 of the California Commercial Code, see Ch. 28, Contract for Sale of Goods--Suing or Defending Action for Breach of Contract Under California Commercial Code.

Warranties under Division 2 of the California Commercial Code, see Ch. 24, Suing or Defending Action for Breach of Warranty.

Discussion of contracts concerning the sale of goods under the UCC generally, see California Legal Forms, Ch. 52, Sales of Goods Under the Uniform Commercial Code (Matthew Bender).



Search California State and Federal UCC Cases:

Use *lexis.com* to search for documents discussing challenges to choice-of-law issues under the Uniform Commercial Code:

■ Legal > States Legal--U.S. > California > Find Cases > By Area of Law > CA Uniform Commercial Code Cases

☐ Sample Search: To find California state and federal cases discussing choice of law based on the where the contract was made, run the following search: *conflict or choice w/3 law* and place w/10 made and not convict!*.

☐ Sample Search: To find California state and federal cases discussing choice of law based on the contract's place of performance, run the following search: *conflict or choice w/3 law* and place w/1 perform! and not convict!*.

☐ Sample Search: To find California state and federal cases applying the governmental-interest analysis, run the following search: California> Cases> By Area of Law> CA Uniform Commercial Code Cases *conflict or choice w/3 law* and government! w/4 interest* and not convict!*.

1.10[2] Whether Commercial Code "Reasonable Relation" Test Differs From Restatement's "Substantial Relationship" Test Is Unresolved. The California Supreme Court has noted the apparent similarity between the former *Com Code* § 1105(1) provision (*now see Com Code* § 1301(a)) that the parties may choose the law of a state having a "reasonable relation" to the transaction and the "substantial relationship" test of the Restatement (Second) of Conflict of Laws § 187 (1969), which otherwise applies to choice-of-law provision enforceability in California. However, the Court has specifically declined to determine whether and to what extent, if any, the Commercial Code and Restatement approaches differ [*see Nedlloyd Lines B.V. v. Superior Court* (1992) 3 C4th 459, 465 n2, 11 CR2d 330, 834 P2d 1148] .

Legal Topics:

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

Commercial Law (UCC)General Provisions (Article 1)Application & ConstructionChoice of LawReasonable Relation Test



26 of 175 DOCUMENTS

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Chapter 1 Determining the Applicable Law

II. DETERMINING WHICH JURISDICTION'S LAW APPLIES

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1.11 Invalid Contracts for Transfer of Interests in Land May Be Subject to Unique Choice-of-Law Rule.

Generally, if the parties to an invalid contract for the transfer of an interest in land have failed to designate an effective choice of law, the transfer of interest will be governed by the state in which the land is situated. However, if another state has a more significant relationship to the transaction and the parties, the law of that state will be applied [Restatement (Second) of Conflict of Laws § 189, cmt d (1969); see *In re Penn Cent. Transp. Co.* (ED Penn 1979) 471 F Supp 1354, 1359-1360] .

Legal Topics:

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

Civil ProcedureFederal & State InterrelationshipsChoice of LawGeneral OverviewContracts LawContract InterpretationGeneral OverviewInternational LawDispute ResolutionConflicts of LawsChoice of LawReal Property LawPurchase & SaleRemediesGeneral Overview



27 of 175 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 1 Determining the Applicable Law

II. DETERMINING WHICH JURISDICTION'S LAW APPLIES

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1.12 Choice-of-Law Provision May Bind Closely Related Third Parties.

Contractual forum selection clauses may bind nonparties who are closely related to the contract if the chosen state is a suitable forum for the suit.

Example:

A private plaintiff who itself suffered no injury filed a representative action under the unfair competition law [see *B&P Code § 17200 et seq.*] based on contract provisions; the contract's forum selection provision specified New Jersey. The plaintiff was bound by that provision, just as the defendant's customers would have been bound if they had filed the action [*Net2Phone, Inc. v. Superior Court* (2003) 109 CA4th 583, 585].

One court held that a defendant must show the following to demonstrate that it is so closely related to the contractual relationship that it is entitled to enforce the forum selection clause [*Bancomer, S.A. v. Superior Court* (1996) 44 CA4th 1450, 1461, 52 CR2d 435] :

- That it agreed to be bound by the terms of the contract;
- That the contracting parties intended the defendant to benefit from the contract; or
- That a defined and intertwining business relationship existed with a contracting party.

The same considerations should apply with respect to third parties and choice-of-law provisions [see *Nedlloyd Lines B.V. v. Superior Court* (1992) 3 C4th 459, 464, 11 CR2d 330, 834 P2d 1148 (issues of enforceability of choice-of-law and choice-of-forum provisions are closely related)].

Legal Topics:

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

Civil Procedure Federal & State Interrelationships Choice of Law General Overview Commercial Law (UCC) General Provisions (Article 1) Application & Construction Choice of Law Contractual Choice of Law Contracts Law Contract Interpretation General Overview International Law Dispute Resolution Conflicts of Laws Choice of Law



28 of 175 DOCUMENTS

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Chapter 1 Determining the Applicable Law

II. DETERMINING WHICH JURISDICTION'S LAW APPLIES

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1.13 Choice-of-Law Provision Is Significant If Jurisdiction Is Disputed Issue.

A court attempting to determine whether the requisite minimum contacts exist to exert personal jurisdiction over a nonresident may consider a contractual choice-of-law provision as relevant to the jurisdiction dispute.

Examples:

- In deciding to exercise personal jurisdiction over nonresident restaurants, the California Supreme Court found it significant that the franchise agreements for the nonresident restaurants provided that any contract disputes would be litigated in California *under California law* [*Vons Cos., Inc. v. Seabest Foods, Inc.* (1996) 14 C4th 434, 443, 58 CR2d 899, 926 P2d 1085 ; compare *Goehring v. Superior Court* (1998) 62 CA4th 894, 73 CR2d 105 (insufficient contacts for California court to exercise jurisdiction over nonresident; contracts were governed by Texas law)].
- Likewise, the United States Supreme Court found a franchise agreement provision designating application of Florida law significant to its determination that an out-of-state franchisee had sufficient contacts with Florida for the exercise of personal jurisdiction over it by that state [*Burger King Corp. v. Rudzewicz* (1985) 471 US 462, 481-483, 105 S Ct 2174, 85 L Ed2d 528] .



Cross References:

Jurisdiction issues in contract actions generally, see Ch. 3, Determining Jurisdiction and Venue in Contract Actions.

Forms and discussion of moving to quash service of summons based on lack of personal jurisdiction, see Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, Ch. 9, Motions to Quash and Other Objections to Personal Jurisdiction.

Discussion of minimum contacts necessary for exercise of personal jurisdiction, see *California Forms of Pleading and Practice*, § 323.12 (Matthew Bender).

Legal Topics:

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

Civil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Personam ActionsGeneral OverviewCivil
ProcedureFederal & State InterrelationshipsChoice of LawGeneral OverviewCommercial Law (UCC)General
Provisions (Article 1)Application & ConstructionChoice of LawContractual Choice of LawContracts LawContract
InterpretationGeneral Overview



29 of 175 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 1 Determining the Applicable Law

III. CHALLENGING CONTRACTUAL CHOICE-OF-LAW PROVISION

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1.14 CHECKLIST: Challenging Contractual Choice-of-Law Provision.

- ☐ Determine whether contractual choice-of-law provision applies to dispute.

Authority:

Nedlloyd Lines B.V. v. Superior Court (1992) 3 C4th 459, 469-472, 11 CR2d 330, 834 P2d 1148

Discussion:

See 1.15

- ☐ If so, determine whether grounds exist for challenging provision because:

- ☐ Application of law of chosen state violates California policy.
- ☐ The California policy that would be violated is fundamental.
- ☐ California has a materially greater interest than chosen state in the determination of particular issue.
- ☐ California would be state of applicable law but for choice-of-law provision.

Authority:

International Bus. Machs. Corp. v. Bajorek (9th Cir 1999) 191 F3d 1033, 1038, 1999-2 Trade Cas. (CCH) P72733

Discussion:

See 1.16

☐ Determine procedure to be employed in making challenge:

- ☐ Motion for summary judgment.
- ☐ Motion for summary adjudication.
- ☐ Demurrer.
- ☐ Affirmative defense in answer.
- ☐ Suit for declaratory relief.

Authority:

CCP §§ 430.10(e), 431.30(b), 437c, 1060

Discussion:

See 1.18

Legal Topics:

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

Civil Procedure Federal & State Interrelationships Choice of Law General Overview Commercial Law (UCC) General Provisions (Article 1) Application & Construction Choice of Law General Overview Commercial Law (UCC) General Provisions (Article 1) Application & Construction Choice of Law Contractual Choice of Law Contracts Law Contract Interpretation General Overview International Law Dispute Resolution Conflicts of Laws Choice of Law



30 of 175 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 1 Determining the Applicable Law

III. CHALLENGING CONTRACTUAL CHOICE-OF-LAW PROVISION

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1.15 Application of Contractual Choice-of-Law Provision to Cause of Action Must Be Determined.

The specific language of the contractual choice-of-law provision should be analyzed to determine its scope. It may one of the following common variants [see, e.g., *Nedlloyd Lines B.V. v. Superior Court* (1992) 3 C4th 459, 469-472, 11 CR2d 330, 834 P2d 1148] :

- An agreement to be governed by the law of a particular state.
- An agreement that the contract will be construed according to the law of a particular state.
- An agreement to submit to the jurisdiction of the courts of a particular state.
- An agreement that the contract is to be deemed to have been entered into in a particular state.
- Some combination of the above or some other agreement.

The court will assume that the parties intended their choice-of-law clause to apply to their entire dispute, absent proof to the contrary [*Nedlloyd Lines B.V. v. Superior Court* (1992) 3 C4th 459, 468-470, 11 CR2d 330, 834 P2d 1148] .

Example:

A contractual choice-of-law provision stated that the contract "shall be governed by and construed in accordance with the laws of the State of Delaware." The defendant in the breach of contract suit successfully demurred on the ground that the suit was barred by Delaware's three-year statute of limitations for breach of contract because the "laws" of Delaware included its statute of limitations [*Hambrecht & Quist Venture Partners v. American Med. Int'l, Inc.* (1995) 38 CA4th 1532, 1538, 46 CR2d 33] .

► Cross Reference:

Drafting a choice-of-law provision, see *California Legal Forms*, § 75.273 (Matthew Bender).

Legal Topics:

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

Civil ProcedureFederal & State InterrelationshipsChoice of LawGeneral OverviewCommercial Law (UCC)General Provisions (Article 1)Application & ConstructionChoice of LawContractual Choice of LawContracts LawContract Conditions & ProvisionsGeneral OverviewContracts LawContract InterpretationGeneral OverviewInternational LawDispute ResolutionConflicts of LawsChoice of Law



31 of 175 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 1 Determining the Applicable Law

III. CHALLENGING CONTRACTUAL CHOICE-OF-LAW PROVISION

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1.16 Grounds for Challenging Contractual Choice-of-Law Provision Must Be Shown.

To avoid a contractual choice-of-law provision, a party must show all of the following [*International Bus. Machs. Corp. v. Bajorek* (9th Cir 1999) 191 F3d 1033, 1038, 1999-2 Trade Cas. (CCH) P72733] :

- Application of the law of the chosen state would violate California policy.
- The California policy that would be violated is fundamental.
- California has a materially greater interest than the chosen state in the determination of the particular issue.
- California law would apply were it not for the choice-of-law provision.

► Cross Reference:

See 1.08; Restatement (Second) of Conflict of Laws § 187 (1969).

Legal Topics:

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

Civil Procedure Federal & State Interrelationships Choice of Law General Overview Commercial Law (UCC) General Provisions (Article 1) Application & Construction Choice of Law General Overview Contracts Law Contract Interpretation General Overview International Law Dispute Resolution Conflicts of Laws Choice of Law



32 of 175 DOCUMENTS

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Chapter 1 Determining the Applicable Law

III. CHALLENGING CONTRACTUAL CHOICE-OF-LAW PROVISION

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1.17 Enforceability of Choice-of-Law Provision Involves Issues of Fact That Require Evidentiary Hearing.

The parties' choice of foreign law will be permitted in a California forum only on the examination of the reasonable relationship of the contract to the foreign state, the substantial contacts of the parties with the foreign state, and consideration of California's fundamental policy with respect to the issue as to which a true conflict exists. These are issues of fact requiring evidentiary hearings [*Mencor Enters., Inc. v. Hets Equities Corp.* (1987) 190 CA3d 432, 439-441, 235 CR 464] .

Legal Topics:

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

Civil ProcedureFederal & State InterrelationshipsChoice of LawGeneral OverviewCommercial Law (UCC)General Provisions (Article 1)Application & ConstructionChoice of LawContractual Choice of LawContracts LawContract Conditions & ProvisionsGeneral OverviewInternational LawDispute ResolutionConflicts of LawsChoice of Law



33 of 175 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 1 Determining the Applicable Law
III. CHALLENGING CONTRACTUAL CHOICE-OF-LAW PROVISION

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1.18 Procedural Context of Challenge Depends on Circumstances of Case.

1.18[1] Issue May Arise on Motion for Summary Adjudication or Summary Judgment. The enforceability of a choice-of-law provision may arise in the context of a motion for summary adjudication or summary judgment if, for example, the validity of a cause of action or of an affirmative defense depends on the law applied [*see CCP § 437c*].

Example:

The trial court entered summary judgment in favor of the plaintiff, a creditor foreclosing its security interests. On appeal, the defendants argued that the contractual choice of Texas law should not be enforced. Although Texas law allowed deficiency judgments following foreclosure of a purchase-money security interest (but California law did not), under the facts, the choice-of-law provision was enforceable and the plaintiff was entitled to summary judgment [*Guardian Sav. & Loan Ass'n v. MD Assocs.* (1998) 64 CA4th 309, 75 CR2d 151] .

► Cross References:

Discussion of motions for summary judgment and adjudication, see Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, Ch. 38, Summary Judgment;

California Forms of Pleading and Practice, Ch. 537, Summary Judgment (Matthew Bender); or

California Points and Authorities, Ch. 221, Summary Judgments (Matthew Bender).

1.18[2] Issue May Arise on Demurrer. The enforceability of a choice-of-law provision may arise in the context of a demurrer. This may happen if the law of the chosen state does not recognize the plaintiff's cause of action or if the cause of action is barred by a statute of limitations [*see CCP § 430.10(e)*].

Examples:

- An agreement between a corporation and its shareholders provided that the agreement would be governed by and construed in accord with Hong Kong law. The corporation sued the shareholders and

the shareholders demurred. In connection with the demurrer, the shareholders claimed that Hong Kong law applied. The trial court applied California law and overruled the demurrers. The California Supreme Court held that the choice-of-law clause requiring that the contract be governed by the law of Hong Kong was fully enforceable and applied to the plaintiffs' claims [*Nedlloyd Lines B.V. v. Superior Court* (1992) 3 C4th 459, 469, 11 CR2d 330, 834 P2d 1148] .

■ Venture partners sued a corporation for breach of a stock purchase agreement. The corporation demurred on the ground that the cause of action was barred by Delaware's three year statute of limitations, which was made applicable by the agreement's choice-of-law provision. The trial court agreed and sustained the demurrer. The court of appeal affirmed [*Hambrecht & Quist Venture Partners v. American Med. Int'l, Inc.* (1995) 38 CA4th 1532, 1539, 46 CR2d 33] .

Exception:

If the choice-of-law determination turns on factual questions, an evidentiary hearing is required and the issue may not be resolved on demurrer [see *Mencor Enters., Inc. v. Hets Equities Corp.* (1987) 190 CA3d 432, 441, 235 CR 464] .

Cross References:

Discussion of demurrers and motions for judgment on the pleadings, see Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, Ch. 11, Demurrers and Motions for Judgment on the Pleading;

California Forms of Pleading and Practice, Ch. 206, Demurrers and Motions for Judgment on the Pleadings (Matthew Bender); or

California Points and Authorities, Ch. 71, Demurrers and Motions for Judgment on the Pleadings (Matthew Bender).

1.18[3] Issue May Be Raised by Affirmative Defense in Answer. The issue of the enforceability and application of a choice-of-law provision may arise in the context of an affirmative defense, such as the claim being barred by the statute of limitations of the chosen state [see CCP § 431.30(b)(2)].

Example:

A bank refused to credit the customer's account for its payment of a check bearing a forged endorsement. The customer's suit was timely under the New York statute of limitations, but time-barred under California law. The agreement between the customer and the bank contained a choice-of-law provision designating New York law. The bank asserted as an affirmative defense that the claim was time-barred, because under New York law, the New York borrowing statute would apply and that statute required the use of California's one year statute of limitations, not New York's three year limit. The appellate court reversed the trial court's application of the New York limitations period and remanded with directions to conduct a trial on the affirmative defense of the statute of limitations [*Hughes Elecs. Corp. v. Citibank Delaware* (2004) 120 CA4th 251, 264-265] .

Cross References:

Discussion of pleading affirmative defenses in answers, see Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, Ch. 14, Answers; or

California Forms of Pleading and Practice, Ch. 26, Answers (Matthew Bender).

Sample Judicial Council form for answer and discussion of use of form, see *California Forms of*

Pleading and Practice, § 140.132 (Matthew Bender).

1.18[4] Issue May Arise in Action for Declaratory Relief. A party to a contract may bring an action for declaratory relief to determine the parties' rights and liabilities under the contract [*Frame v. Merrill Lynch, Pierce, Fenner & Smith* (1971) 20 CA3d 668, 670-673, 97 CR 811, 1971 Trade Cas. (CCH) P73748] . The issue of the enforceability of a contractual choice-of-law provision is one that may be raised in an action for declaratory relief if the plaintiff seeks a declaration that the provision is or is not enforceable [see CCP § 1060].

Examples:

- A California-based company sought to hire a Maryland resident for employment in California. The Maryland resident had an employment contract with her Maryland employer that contained a noncompetition clause and that provided it was to be "governed by and construed in accordance with the laws of the State of Maryland." The California-based company sued in California for a declaratory judgment that California law applied to the noncompetition clause. The trial court ruled that California law applied and that the clause could not be enforced. The court of appeal affirmed [*Application Group, Inc. v. Hunter Group, Inc.* (1998) 61 CA4th 881, 900-905, 72 CR2d 73, 1998-1 Trade Cas. (CCH) P72076] .

- Borrowers filed an action for declaratory relief concerning a loan contract they alleged was usurious. The loan contract provided it was to be "governed by and construed" by New York law and specified interest aggregating 20.3% per month--an illegal rate in California, but legal in New York. The court enforced the choice-of-law provision in the contract and held the contract valid [*Ury v. Jewelers Acceptance Corp.* (1964) 227 CA2d 11, 16-22, 38 CR 376] .

► Cross References:

General discussion of declaratory relief in contract actions, see Ch. 11, Seeking or Opposing Declaratory Relief in Contract Matters.

Discussion of actions for declaratory relief, see California Forms of Pleading and Practice, Ch. 182, Declaratory Relief (Matthew Bender); or

California Points and Authorities, Ch. 67, Declaratory Relief (Matthew Bender).

Legal Topics:

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

Civil ProcedureFederal & State InterrelationshipsChoice of LawGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsGeneral OverviewCivil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCommercial Law (UCC)General Provisions (Article 1)Application & ConstructionChoice of LawGeneral OverviewContracts LawContract InterpretationGeneral Overview



34 of 175 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 1 Determining the Applicable Law

IV. DETERMINING WHETHER FEDERAL OR STATE LAW APPLIES

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1.19 CHECKLIST: Determining Whether Federal or State Law Applies.

☐ Determine whether federal or state law applies:

☐ Does claim arise under federal law?

Authority:

US Const, art VI, *cl* 2

Discussion:

See 1.20

☐ Is state law preempted by federal law?

Authority:

Peatros v. Bank of Am. NT & SA (2000) 22 *C4th* 147, 157-158, 91 *CR2d* 659, 990 *P2d* 539

Discussion:

See 1.21

☐ Is case filed in federal district court based on diversity?

Authority:

Erie R.R. Co. v. Tompkins (1938) 304 *US* 64, 78-79, 58 *S Ct* 817, 82 *L Ed* 1188

Discussion:

See 1.22

☐ Is case brought in state court based on claim arising in federal enclave?

Authority:

Hansford v. District of Columbia (1993) 329 Md 112, 617 A2d 1057, 1065-1066

Discussion:

See 1.23

Legal Topics:

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

Civil ProcedureFederal & State InterrelationshipsChoice of LawGeneral OverviewCivil ProcedureFederal & State InterrelationshipsErie DoctrineCivil ProcedureFederal & State InterrelationshipsFederal Common LawGeneral OverviewCivil ProcedureFederal & State InterrelationshipsFederal Common LawPreemption



35 of 175 DOCUMENTS

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Chapter 1 Determining the Applicable Law

IV. DETERMINING WHETHER FEDERAL OR STATE LAW APPLIES

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1.20 Federal Law Applies to Federal Claims.

If a claim arises under federal law, federal law applies whether an action is filed in state court or federal court [see US Const, art VI, *cl* 2].

Examples:

The validity of a provision in a contract for cruise ship passage [*Carnival Cruise Lines, Inc. v. Shute* (1991) 499 US 585, 590, 111 S Ct 1522, 113 L Ed2d 622 ; *Schlessinger v. Holland Am., NV* (2004) 120 CA4th 552, 557] or marine insurance [*Suma Fruit Int'l v. Albany Ins. Co.* (9th Cir 1997) 122 F3d 34, 35] is interpreted by the general maritime law of the United States, not state law. Likewise, interpretation of a flood insurance policy issued under the National Flood Insurance Program is governed by federal common law [*Flick v. Liberty Mut. Fire Ins. Co.* (9th Cir 2000) 205 F3d 386, 390] .

► Cross References:

Discussion of federal question jurisdiction, see *Matthew Bender[(R)] Practice Guide: Federal Pretrial Civil Procedure in California*, 2.03 -2.09.

Discussion of federal common law, see *Moore's Federal Practice*, § 124.40 (Matthew Bender 3d ed.).

Legal Topics:

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

Civil ProcedureFederal & State InterrelationshipsChoice of LawGeneral OverviewCivil ProcedureFederal & State InterrelationshipsChoice of LawGovernmental InterestsCivil ProcedureFederal & State InterrelationshipsErie DoctrineCivil ProcedureFederal & State InterrelationshipsFederal Common LawGeneral OverviewCivil ProcedureFederal & State InterrelationshipsFederal Common LawPreemption



36 of 175 DOCUMENTS

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Chapter 1 Determining the Applicable Law

IV. DETERMINING WHETHER FEDERAL OR STATE LAW APPLIES

1-1 MB Practice Guide: CA Contract Litigation 1.21

1.21 Federal Law May Preempt State Law If Conflict Exists.

If state law conflicts with a federal statute, the state law is invalid [*Maryland v. Louisiana* (1981) 451 US 725, 747, 101 S Ct 2114, 68 L Ed2d 576] . Whether federal law preempts state law depends on whether Congress has intended such a result. It is generally presumed that Congress did not intend to preempt state law, and preemption of state law by federal law is only found in the following situations [*Peatros v. Bank of Am. NT & SA* (2000) 22 C4th 147, 157-158, 91 CR2d 659, 990 P2d 539] :

- "Express preemption" exists if Congress has explicitly stated that a federal law preempts state law.
- "Field preemption" exists if Congress has intended that federal law exclusively occupy a field.
- "Conflict preemption" exists if state law actually conflicts with federal law.

Example--Express Preemption:

The preemption provision of the Airline Deregulation Act of 1978 prohibits states from imposing their own substantive standards regarding rates, routes, or services. Thus, in awarding damages for breach of contract, courts may not award punitive damages or any other relief greater than what was expressly and contractually negotiated between a carrier and a shipper [*Power Standards Lab, Inc. v. Federal Express Corp.* (2005) 127 CA4th 1039] .



Cross Reference:

Discussion of when federal law preempts state law generally, see Moore's Federal Practice, § 107.14 (Matthew Bender 3d ed.).

Legal Topics:

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

Civil ProcedureFederal & State InterrelationshipsChoice of LawGeneral OverviewCivil ProcedureFederal & State InterrelationshipsErie DoctrineCivil ProcedureFederal & State InterrelationshipsFederal Common LawGeneral OverviewCivil ProcedureFederal & State InterrelationshipsFederal Common LawPreemption



37 of 175 DOCUMENTS

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Chapter 1 Determining the Applicable Law

IV. DETERMINING WHETHER FEDERAL OR STATE LAW APPLIES

1-1 MB Practice Guide: CA Contract Litigation 1.22

1.22 California Substantive Law Applies in Diversity Case Brought in Federal District Court in California.

If a case is in federal district court in California based on diversity of citizenship, the district court must apply the substantive law of California. The district court will apply federal rules of procedure, however [*Erie R.R. Co. v. Tompkins* (1938) 304 US 64, 78-79, 58 S Ct 817, 82 L Ed 1188] , including the Federal Rules of Evidence [see Fed R Evid 101].

Cross Reference:

Discussion of diversity jurisdiction, see *Matthew Bender[(R)] Practice Guide: Federal Pretrial Civil Procedure in California*, 2.09 -2.25; or

Moore's Federal Practice, Ch. 102, Diversity Jurisdiction (Matthew Bender 3d ed.).



Strategic Point--Choice-of-Law Rules and Rules of Contract Interpretation Are Substantive:

In this context, choice-of-law rules are "substantive," and a California federal district court in a diversity case will apply the choice-of-law rules that would be applied by a California state court [see *Klaxon Co. v. Stentor Elec. Mfg. Co., Inc.* (1941) 313 US 487, 496-497, 61 S Ct 1020, 85 L Ed 1477 ; *Day & Zimmermann, Inc. v. Challoner* (1975) 423 US 3, 4, 96 S Ct 167, 46 L Ed2d 3 ; *Arno v. Club Med Inc.* (9th Cir 1994) 22 F3d 1464, 1467 ; *Dole Food Co. v. Watts* (9th Cir 2002) 303 F3d 1104, 1119] . Likewise, rules governing the interpretation of contracts are deemed "substantive" [*Manetti-Farrow, Inc. v. Gucci Am., Inc.* (9th Cir 1988) 858 F2d 509, 513 ; *In re Aslan* (9th Cir 1990) 909 F2d 367, 369 ; *Jones v. GNC Franchising, Inc.* (9th Cir 2000) 211 F3d 495, 497] .

Cross References:

Discussion of California choice-of-law rules, see 1.06 -1.13.

Discussion of the *Erie* doctrine, see Moore's Federal Practice, § 120.31 (Matthew Bender 3d ed.).

Legal Topics:

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

Civil ProcedureFederal & State InterrelationshipsChoice of LawGeneral OverviewCivil ProcedureFederal & State
InterrelationshipsErie DoctrineCivil ProcedureFederal & State InterrelationshipsFederal Common LawGeneral
Overview



38 of 175 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 1 Determining the Applicable Law

IV. DETERMINING WHETHER FEDERAL OR STATE LAW APPLIES

1-1 MB Practice Guide: CA Contract Litigation 1.23

1.23 Substantive Law of Federal Enclave Applies in Case Brought in California State Court.

A federal enclave is land over which the federal government exercises legislative jurisdiction, such as a military base [*Kelly v. Lockheed Martin Servs. Group* (DPR 1998) 25 F Supp2d 1, 3] . California courts generally have subject matter jurisdiction over claims arising in federal enclaves within California's borders. The state court is required to apply the enclave's law to those actions [*Hansford v. District of Columbia* (1993) 329 Md 112, 617 A2d 1057, 1065-1066] . The enclave's law includes federal law, any California law not in conflict with federal law that existed at the creation of the enclave, and any subsequently enacted state law to the extent authorized by Congress [*Taylor v. Lockheed Martin Corp.* (2000) 78 CA4th 472, 482-486, 92 CR2d 873] .

Legal Topics:

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

Civil ProcedureFederal & State InterrelationshipsChoice of LawGeneral OverviewCivil ProcedureFederal & State InterrelationshipsFederal Common LawApplicabilityCivil ProcedureFederal & State InterrelationshipsFederal Common LawPreemption



39 of 175 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 1 Determining the Applicable Law
V. DETERMINING WHETHER UCC OR COMMON LAW APPLIES

1-1 MB Practice Guide: CA Contract Litigation 1.24

1.24 CHECKLIST: Determining Whether UCC or Common Law Applies.

- ☐ Determine whether UCC applies to contract.

Discussion:

See 1.25

- ☐ Is contract one for sale of goods?

Authority:

Com Code § 2101 et seq.

Discussion:

See 1.26

- ☐ Does contract concern investment securities?

Authority:

Com Code § 8101 et seq.

Discussion:

See 1.27[1]

- ☐ Does contract concern secured transaction?

Authority:

Com Code § 9101 et seq.

Discussion:

See 1.28

- ☐ Does contract concern a lease of personal property?

Authority:

Com Code § 10101 et seq.

Discussion:

See 1.29

- ☐ If contract concerns investment securities, determine which law applies:

- ☐ Law of issuer's jurisdiction.
- ☐ Law of securities intermediary's jurisdiction.
- ☐ Law of jurisdiction where security is located.

Authority:

Com Code § 8110

Discussion:

See 1.27[2]

Legal Topics:

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

Commercial Law (UCC)General Provisions (Article 1)Application & ConstructionGeneral OverviewCommercial Law (UCC)General Provisions (Article 1)Application & ConstructionChoice of LawGeneral OverviewContracts LawContract InterpretationGeneral Overview



40 of 175 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 1 Determining the Applicable Law
V. DETERMINING WHETHER UCC OR COMMON LAW APPLIES

1-1 MB Practice Guide: CA Contract Litigation 1.25

1.25 Commercial Code Applies to Broad Spectrum of Commercial Agreements.

If the contract is covered by the Uniform Commercial Code, specific statutory rules (as opposed to common law) will apply to such things as formation and interpretation of the contract, as well as available remedies.

Article 2 of the Commercial Code concerns contracts for the sale of goods. Under Article 2, such contracts may be made in any manner sufficient to show agreement, including conduct by both parties that recognizes the existence of the contract [*Com Code* § 2204(1)]. Furthermore, if there is a reasonably certain basis for providing a remedy and the parties intend to contract, a court may find there is a contract even if the time of its making is undetermined [*Com Code* § 2204(2)] and one or more terms are left open [*Com Code* § 2204(3)].

Article 8 of the Commercial Code concerns securities and contains a choice-of-law rule [*see Com Code* § 8110].

► Cross References:

Discussion of contracts concerning sales of securities, see California Forms of Pleading and Practice, Ch. 163, Corporations: Transfers of Shares (Matthew Bender).

Forms concerning secured transactions, see California Legal Forms, Ch. 42, Secured Transactions (Matthew Bender).

Legal Topics:

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

Commercial Law (UCC)General OverviewCommercial Law (UCC)General Provisions (Article 1)Application & ConstructionGeneral Overview



41 of 175 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 1 Determining the Applicable Law
V. DETERMINING WHETHER UCC OR COMMON LAW APPLIES

1-1 MB Practice Guide: CA Contract Litigation 1.26

1.26 Contracts for Sale of Goods Are Covered by Commercial Code Article 2.

1.26[1] Article 2 Governs Most Sales Contracts. Unless the context otherwise requires, Article 2 of the Commercial Code [*Com Code § 2101 et seq.*] applies to contracts for the sale of goods [*Com Code § 2102*]. A "contract for sale" includes both a present sale of goods and a contract to sell goods at a future time. A "sale" means the passing of title from the seller to the buyer for a price [*Com Code § 2106(1)*].

Distinguish--Commercial Code Does Not Impair Consumer Statutes:

Article 2 of the Commercial Code governing contracts for the sale of goods does not impair or repeal any statute regulating sales to consumers, farmers or other specified classes of buyers [*Com Code § 2102*].

➤ Cross References:

Discussion of statutes affecting sales to consumers, see 1.33.

Contract remedies under Commercial Code Article 2, see Ch. 26, Contract for Sale of Goods--Seeking Remedies Under California Commercial Code.

Contract formation under Commercial Code Article 2, see Ch. 27, Contract for Sale of Goods--Attacking or Defending Existence of Contract Under California Commercial Code.

Actions for breach of contract under Commercial Code Article 2, see Ch. 28, Contract for Sale of Goods--Suing or Defending Action for Breach of Contract Under California Commercial Code.

Breach of warranty actions under California Commercial Code, see Ch. 24, Suing or Defending Action for Breach of Warranty.

Discussion of contracts concerning sales of goods, see California Forms of Pleading and Practice, Ch. 500, Sales: Sales Under the Commercial Code (Matthew Bender); or California Points and Authorities, Ch. 206, Sales (Matthew Bender).

Jury Instructions:

California Forms of Jury Instruction, Ch. 3H, Commercial Code Sales Contracts Instructions (Matthew Bender).

1.26[2] Article 2 Contracts Only Involve "Goods" As Defined in Commercial Code. "Goods" means all things (including specially manufactured goods) that are movable at the time of identification to the contract for sale other than [*Com Code* § 2105(1)]:

- The money in which the price is to be paid;
- Investment securities; and
- Things in action.

"Goods" includes the unborn young of animals, growing crops, and other identified things attached to realty [*Com Code* § 2105(1)].

1.26[3] Security Transactions and Real Property Leases Are Excluded From Article 2. Article 2 of the Commercial Code does not apply to any transaction that is intended to operate only as a security transaction, and does not apply to leases of real property [*see Com Code* § 2102].

Legal Topics:

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

Commercial Law (UCC)Sales (Article 2)General OverviewContracts LawSales of GoodsGeneral Overview



42 of 175 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 1 Determining the Applicable Law
V. DETERMINING WHETHER UCC OR COMMON LAW APPLIES

1-1 MB Practice Guide: CA Contract Litigation 1.27

1.27 Contracts Concerning Investment Securities Are Covered by Commercial Code Article 8.

1.27[1] Article 8 Defines "Investment Securities." Under Article 8 of the Commercial Code [*Com Code § 8101 et seq.*], a "security" is an obligation of an issuer [*see Com Code § 8201* ("issuer" defined)] or a share, participation, or other interest in an issuer or in property or an enterprise of an issuer that is [*Com Code § 8102*]:

- Represented by a security certificate in bearer or registered form, or the transfer of which may be registered upon books maintained for that purpose by or on behalf of the issuer;
- One of a class or series or by its terms is divisible into a class or series of shares, participations, interests, or obligations; and
- Either dealt in or traded on securities exchanges or securities markets or a medium for investment and by its terms expressly provides that it is a security governed by Article 8.

Cross References:

Discussion of choice-of-law issues arising in connection with the transfer of securities, see California Forms of Pleading and Practice, Ch. 163, Corporations: Transfer of Shares (Matthew Bender); or

Ballantine & Sterling, California Corporation Laws, Ch. 10, Transfer and Registration of Securities (After 1996) (Matthew Bender).

Forms concerning the transfer of securities, see Forms & Procedure Under the UCC, Article 8, Investment Securities (Matthew Bender).

Search California State and Federal UCC Cases:

Use *lexis.com* to search for documents discussing choice of law in securities cases:

- Legal > States Legal--U.S. > California > Find Cases > By Area of Law > CA Uniform Commercial Code Cases

○ Sample Search: To find California state and federal cases discussing whether a contract involves investment securities, run the following search: *conflict or choice w/3 law* and investment w/4 securit* and not convict!*.

1.27[2] Article 8 Has Its Own Choice-of-Law Rule.

1.27[2][a] Law of Issuer's Jurisdiction, Securities Intermediary's Jurisdiction, or Security's Location

Applies. Article 8 of the Commercial Code contains a choice-of-law rule which provides for the application of the law of the issuer's jurisdiction, the securities intermediary's jurisdiction, or the jurisdiction in which a security is located, depending on the nature of the dispute [*Com Code § 8110*]. The local law of the jurisdiction in which a security certificate is located at the time of delivery governs whether an adverse claim can be asserted against a person to whom the security certificate is delivered [*Com Code § 8110(c)*]. Otherwise, the local law of the jurisdiction of the issuer or of the securities intermediary applies.

1.27[2][b] Disputes Governed by Law of Issuer's Jurisdiction. Article 8 of the Commercial Code provides that the local law of the issuer's jurisdiction governs all of the following [*Com Code § 8110*]:

- The validity of a security.
- The rights and duties of the issuer with respect to registration of transfer.
- The effectiveness of registration of transfer by the issuer.
- Whether the issuer owes any duties to an adverse claimant to a security.
- Whether an adverse claim can be asserted against a person to whom transfer of a certificated or uncertificated security is registered or a person who obtains control of an uncertificated security.

The "issuer's jurisdiction" is the jurisdiction under which the issuer of the security is organized or, if permitted by the law of that jurisdiction, the law of another jurisdiction specified by the issuer. A California issuer may specify the law of another jurisdiction as the law governing these matters, except that California law will always govern the validity of a security issued by a California issuer [*Com Code § 8110(d)*].

1.27[2][c] Disputes Governed by Law of Securities Intermediary's Jurisdiction. The local law of the securities intermediary's jurisdiction governs the following [*Com Code § 8110(b)*; see *Com Code § 8102(5), (14)* ("securities intermediary" defined)]:

- Acquisition of a security entitlement from the securities intermediary.
- The rights and duties of the securities intermediary and entitlement holder arising out of a security entitlement.
- Whether the securities intermediary owes any duties to an adverse claimant to a security entitlement.
- Whether an adverse claim can be asserted against a person who acquires a security entitlement from the securities intermediary or a person who purchases a security entitlement or interest therein from an entitlement holder.

**Strategic Point:**

To determine the jurisdiction of a securities intermediary [*Com Code § 8110(e)*]:

- First look at the agreement between the securities intermediary and its entitlement holder governing the securities account.
- If that agreement expressly provides that a particular jurisdiction is the security intermediary's jurisdiction, that jurisdiction is the securities intermediary's jurisdiction.
- If there is no such provision, and the agreement expressly provides that the securities account is maintained at an office in a particular jurisdiction, that jurisdiction is the securities intermediary's jurisdiction.
- If the agreement contains neither provision, the securities intermediary's jurisdiction is the jurisdiction in which the office identified in an account statement as the office serving the entitlement holder's account is located.
- Finally, if no such office is identified, the securities intermediary's jurisdiction is the jurisdiction in which the chief executive office of the securities intermediary is located.

A securities intermediary's jurisdiction is not determined by the physical location of certificates representing financial assets, or by the jurisdiction in which is organized the issuer of the financial asset with respect to which an entitlement holder has a security entitlement, or by the location of facilities for data processing or other record keeping concerning the account [*Com Code § 8110(f)*].

Legal Topics:

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

Commercial Law (UCC)Investment Securities (Article 8)General OverviewCommercial Law (UCC)Investment Securities (Article 8)Choice of LawContracts LawTypes of ContractsInvestment Contracts



43 of 175 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 1 Determining the Applicable Law
V. DETERMINING WHETHER UCC OR COMMON LAW APPLIES

1-1 MB Practice Guide: CA Contract Litigation 1.28

1.28 Contracts Involving Secured Transactions Are Governed by Commercial Code Article 9.

1.28[1] Overview of Article 9 Coverage. Article 9 of the Commercial Code generally applies (with some exceptions) to a transaction (regardless of its form) that, by contract, creates a security interest in personal property or fixtures. Article 9 also applies to agricultural liens; sales of accounts, chattel paper, payment intangibles, or promissory notes; consignments; and specified security interests arising under other articles of the Commercial Code [*Com Code § 9109(a)*].

If Article 9 applies, it controls aspects such as perfection and priority of security interests [*see Com Code § 9301 et seq.*] and the rights of third parties [*see Com Code § 9401 et seq.*].

1.28[2] In Event of Conflict, Other Law Prevails Over Article 9. Some transactions subject to Article 9 of the Commercial Code also are subject to other applicable laws, such as those relating to consumers [*see 1.33*]. Article 9 provides that in the case of a conflict between it and the other specified laws [*see Com Code § 9102(b)*](other controlling laws), the other law controls [*Com Code § 9201(c)*]. Furthermore, nothing in Article 9 validates any rate, charge, agreement, or practice that violates any of those laws [*Com Code § 9201(d)*].

Cross Reference:

Discussion of secured transactions, see California Forms of Pleading and Practice, Ch. 503, Sales: Secured Transactions (Matthew Bender);

California Legal Forms, Ch. 42, Secured Transactions; or

Forms & Procedures Under the UCC, Article 9, Secured Transactions (Matthew Bender).

Legal Topics:

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

Commercial Law (UCC)Secured Transactions (Article 9)General OverviewCommercial Law (UCC)Secured Transactions (Article 9)Application & ConstructionGeneral OverviewContracts LawSecured TransactionsGeneral Overview



44 of 175 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 1 Determining the Applicable Law
V. DETERMINING WHETHER UCC OR COMMON LAW APPLIES

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1.29 Contracts Involving Personal Property Leases Are Governed by Commercial Code Article 10.

1.29[1] Overview of Article 10 Coverage. Article 10 of the Commercial Code applies to any transaction, regardless of form, that creates a lease in personal property [*Com Code § 10102*]. If Article 10 applies, it controls such things as formation and construction of the lease contract [*see Com Code § 10201 et seq.*], repudiation, substitution, and excuse of performance under the contract [*see Com Code § 10401 et seq.*].

1.29[2] In Event of Conflict, Other Law Prevails Over Article 10. A lease governed by Article 10 may also be governed by other applicable laws, such as those governing consumer leases. California consumer laws, both decisional and statutory, generally will control in the case of any conflict between Article 10 and the applicable consumer law [*see Com Code § 10104; see also 1.33*]. A choice-of-law provision in a consumer lease is only enforceable if the law chosen is that of a jurisdiction [*Com Code § 10106*]:

- In which the lessee resides at the time the lease agreement becomes enforceable, or within 30 days thereafter;
- In which the goods are to be used; or
- In which the lease is executed by the lessee.

► Cross Reference:

Discussion of personal property leases, see California Forms of Pleading and Practice, Ch. 413, Personal Property Leases (Matthew Bender); or

California Legal Forms, Ch. 53, Personal Property Leasing (Matthew Bender).

Legal Topics:

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

Commercial Law (UCC)Leases (Article 2A)General OverviewContracts LawTypes of ContractsLease AgreementsPersonalty LeasesGeneral Overview



45 of 175 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 1 Determining the Applicable Law

VI. DETERMINING WHETHER OTHER CALIFORNIA STATUTES GOVERN CONTRACT

1-1 MB Practice Guide: CA Contract Litigation 1.30

1.30 CHECKLIST: Determining Whether Other Statutes Govern Contract.

- ☐ Determine whether any specific California statutes govern the specific type of commercial contract.

Discussion:

See 1.32

- ☐ Determine whether contract involves consumer transaction.

☐ Is contract for acquisition by individual of goods or services for his or her personal or household use?

Authority:

CC §§ 1761, 1799.201

Discussion:

See 1.33[1], [2]

- ☐ If contract involves consumer transaction, determine applicability of:

- ☐ Consumers Legal Remedies Act.
- ☐ Consumer Contract Awareness Act of 1990.
- ☐ Other consumer protection statutes governing the specific transaction.

Authority:

CC §§ 1760 et seq., 1799.200 et seq.

Discussion:

See 1.33

☐ If party to contract is public entity, determine whether any specific state statute governs contract.

Authority:

PC Code § 10100 et seq.

Discussion:

See 1.35

Legal Topics:

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

Civil Procedure Federal & State Interrelationships Choice of Law General Overview Commercial Law (UCC) General Provisions (Article 1) Application & Construction Choice of Law General Overview Contracts Law Contract Interpretation General Overview Governments Legislation Statutory Remedies & Rights



46 of 175 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 1 Determining the Applicable Law

VI. DETERMINING WHETHER OTHER CALIFORNIA STATUTES GOVERN CONTRACT

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1.31 Contracts Are Often Governed by Specific Statutes.

A wide variety of state statutes govern specific types of contracts, based on the identity or status of the contracting parties (for example, consumers) or because of the nature of the transaction. These statutes typically affect the contract in one or more of the following ways:

- By directing that particular steps be taken (such as specified disclosures) or not taken as part of the contract negotiations.
- By requiring that the contract be written and that it contain particular provisions.
- By prohibited specified terms from being included in the contract.
- By providing specific remedies in addition to, or in lieu of, the standard common law remedies available in contract actions.

Failure to comply with the above types of statutory requirements will render the contract void or voidable in many cases.

Cross References:

Discussion of statutory formalities imposed on contract by specific statutes, see Ch. 15, *Attacking or Defending Existence of Contract--Failure to Comply With Applicable Formalities*.

Discussion of availability of statutory remedies in contract actions, see Ch. 10, *Seeking or Opposing Statutory Remedies in Contract Actions*.

Rules relating to contracts by minors, see Ch. 14, *Attacking or Defending Existence of Contract--Lack of Capacity*, 14.05.

Legal Topics:

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

Contracts Law Contract Interpretation General Overview Governments Legislation Statutory Remedies & Rights



47 of 175 DOCUMENTS

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Chapter 1 Determining the Applicable Law

VI. DETERMINING WHETHER OTHER CALIFORNIA STATUTES GOVERN CONTRACT

1-1 MB Practice Guide: CA Contract Litigation 1.32

1.32 Counsel Must Determine Whether Specific California Statutes Govern Contract.

It is essential for counsel to determine at the outset whether the contract is subject to any specific statute. A wide variety of California statutes govern all sorts of commercial contracts and transactions.

Examples:

- Contract between a landscape architect and client [*B&P Code § 5616*].
- Franchise agreements for petroleum distribution franchises [*B&P Code §§ 20999-20999.4, 21140, 21140.1; Corp Code §§ 31005, 31005.5, 31104*], and retail gasoline sales [*B&P Code § 21150.1*].
- Invention development service contracts [*B&P Code § 22370 et seq.*].
- Suretyship contracts [*CC § 2792 et seq.*].
- Real property sales contracts [*CC § 2985 et seq.*].
- Contracts of independent wholesale sales representatives [*CC § 1738.10 et seq.*; see California Forms of Pleading and Practice, Ch. 505, Independent Wholesale Sales Representatives Contractual Relations Act (Matthew Bender)].

Legal Topics:

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

Contracts LawContract InterpretationGeneral OverviewGovernmentsLegislationStatutory Remedies & Rights



48 of 175 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 1 Determining the Applicable Law

VI. DETERMINING WHETHER OTHER CALIFORNIA STATUTES GOVERN CONTRACT

1-1 MB Practice Guide: CA Contract Litigation 1.33

1.33 If Contract Was Entered Into by Consumer, California Consumer Protection Statutes Apply.

1.33[1] Statutes Apply to Persons Meeting Applicable Definition of "Consumer." Most consumer protection statutes contain a specific definition of consumer, but the statutory definitions generally refer to an individual who is contracting for goods or services for personal, family, or household purposes [*see, e.g., CC §§ 1761(d), 1799.201*].

1.33[2] Consumers Legal Remedies Act Applies to Sale or Lease of Consumer Goods or Services. The Consumers Legal Remedies Act [*CC§ 1750 et seq.*] proscribes unlawful methods of competition and unfair or deceptive practices in the sale or lease of consumer goods or services [*see CC § 1760*]. A "consumer" is an individual who seeks or acquires, by purchase or lease, any goods or services for personal, family, or household purposes [*CC § 1761(d)*]. A wide variety of unfair methods of competition and unfair or deceptive acts or practices are made unlawful by the Act, including [*see CC § 1770*]:

- Passing off goods or services as those of another.
- Misrepresenting the source, sponsorship, approval, or certification of goods or services.
- Misrepresenting the affiliation, connection, or association with, or certification by, another.
- Using deceptive representations or designations of geographic origin in connection with goods or services.
- Representing that goods are original or new if they have deteriorated unreasonably or are altered, reconditioned, reclaimed, used, or secondhand.
- Representing that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another.
- Disparaging the goods, services, or business of another by false or misleading representation of fact.

Punitive damages, as well as attorney's fees, are an available remedy for a consumer who suffers any damage as a result of the use or employment by any person of an unlawful act, method, or practice [*CC § 1780(a), (e)*]. If the consumer is a

senior citizen or disabled person, an additional penalty of \$5,000 is available under certain circumstances [see CC § 1780(b)].

Prerequisite--Precomplaint Notice and Demand Required Under Consumers Legal Remedies Act:

Before filing a complaint for damages, the consumer must give the potential defendant a minimum of 30 days notice of the alleged violations, and demand rectification. The notice and demand must be written and sent to the potential defendant by certified or registered mail, return receipt requested [CC § 1782(a)].



Warning--Claim Fails If 3-Day Notice Not Given:

If the plaintiff or the plaintiff's agent does not to give the requisite 30-day notice, then the plaintiff's claim for damages absolutely fails [see *Cattie v. Wal-Mart Stores, Inc.* (2007) 504 F Supp2d 939, 949-950 ; *Von Grabe v. Sprint Corp.*(2003) 312 F Supp2d 1285, 1302-1305 ; *Outboard Marine Corp. v. Superior Court* (1975) 52 CA3d 30, 40-41, 124 CR 852] .



Cross Reference:

California Forms of Pleading and Practice, Ch. 504, Sales: Consumers Legal Remedies Act (Matthew Bender).

1.33[3] Consumer Contract Awareness Act of 1990 Applies to Consumer Contracts and Contract Guaranties. Consumer contracts and consumer contract guaranties are governed by the Consumer Contract Awareness Act of 1990 [see CC § 1799.200 et seq.]. Under the Act, a "consumer contract" is a writing which [CC § 1799.201]:

- Is prepared by a seller;
- Is signed by a consumer or a consumer's guarantor; and
- Provides for either the sale or lease of goods or services that are purchased or leased primarily for personal, family, or household purposes, or for extension of credit, the proceeds of which are used primarily for personal, family, or household purposes.

A seller who fails to comply with the Act's requirements for delivery of the contract to the consumer [see CC § 1799.202] or consumer's guarantor [see CC § 1799.206] is liable to the consumer or guarantor for actual damages suffered as a result of that failure [CC §§ 1799.205(a), 1799.206(c)]. The seller's failure is also admissible to establish a basis for rescission of the contract [CC §§ 1799.205(b), 1799.206(d)]. The provisions of the Act cannot be waived [see CC § 1799.207].

Legal Topics:

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

Antitrust & Trade LawConsumer ProtectionGeneral OverviewBanking LawConsumer ProtectionGeneral OverviewContracts LawContract Conditions & ProvisionsGeneral OverviewContracts LawContract InterpretationGeneral OverviewContracts LawDebtor & Creditor Relations



49 of 175 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 1 Determining the Applicable Law

VI. DETERMINING WHETHER OTHER CALIFORNIA STATUTES GOVERN CONTRACT

1-1 MB Practice Guide: CA Contract Litigation 1.34

1.34 Other Consumer and Commercial Statutes Apply to Specific Classes of Contracts.

Counsel must determine whether the contract is subject to any specific statute. A wide variety of commercial and consumer contracts and transactions are subject to specific statutes, including but not limited to the following:

- Adjustable rate residential mortgage loans [*CC* § 1921(b)].
- Arbitration provisions in medical service contracts [*CCP* § 1295].
- Arbitration of public works contracts claims [*PC Code* §§ 22200, 22201].
- Automobile sales finance contracts [*CC* § 2981 *et seq.*].
- Bailment contracts with automobile parking lots [*CC* §§ 1630, 1630.5].
- California State University Contract Law [*PC Code* § 10700 *et seq.*].
- Consignment agreements between dealer and vehicle owner [*Veh Code* §§ 266, 11729, 11730].
- Consumer credit contracts [*CC* § 1799.90 *et seq.*].
- Consumer's or subscriber's presence required for delivery, service, connection or repair, for retail merchandise, cable television or utility [*CC* § 1722].
- Continuing care (life care) contracts [*H&S Code* § 1770 *et seq.*].
- Contracts for prison supplies [*Pen Code* § 2051].
- Contracts for public purchases [*Gov Code* § 4475 *et seq.*].
- Contracts for purchase of information technology goods and services by the state [*PC Code* §§ 12103.5, 12104, 12104.5].

1-1 MB Practice Guide: CA Contract Litigation 1.34

- Contracts for purchase of technological supplies and equipment by school districts [PC Code § 20118.2].
- Contracts for purchase or sale of capital stock of corporation or association without intention to receive or deliver are void [*Corp Code § 29104*].
- Contracts for rapid transit equipment or structures [*Gov Code § 4500*].
- Contracts for sale of farm or home to veteran [M&V Code §§ 270.19, 986.9, 987.1, 987.2, 987.69].
- Credit cards [*CC § 1747 et seq.*].
- Dance studio contracts [*CC § 1812.50 et seq.*].
- Dating service contracts [*CC § 1694 et seq.*].
- Discount buying service contracts [*CC § 1812.100 et seq.*].
- Employment agencies, employment counseling services, job listing services, and nurses' registries [*CC § 1812.500 et seq.*].
- Financial institution prohibited from entering into contract that provides for reassignment [*B&P Code §§ 17350, 17351*].
- Foreign language translation of contract, or related disclosure required by law, required to be given to consumer before execution of contract, lease, loan, or agreements [*CC § 1632*].
- Franchise agreements between retail gasoline dealer and franchiser [*B&P Code § 21150.1*].
- Franchises between petroleum refiner and distributor or retailer, or distributor and another distributor or retailer [*B&P Code §§ 20999-20999.4, 21140, 21140.1, 21150; Corp Code §§ 31005, 31005.5, 31104*].
- Funeral service contracts [*B&P Code § 7685 et seq.*].
- Health studio contracts [*CC § 1812.80 et seq.*].
- Home improvement contracts, including contracts for swimming pool construction [*B&P Code § 7150 et seq.*].
- Home solicitation contracts [*CC §§ 1689.5-1689.14*].
- Indemnity clauses in construction contracts [*CC §§ 2782-2784*].
- Indemnity clauses in hauling contracts [*CC § 2784.5*].
- Invention development service contracts [*B&P Code § 22370 et seq.*].
- Landscape architects required to provide customer with detailed written contract [*B&P Code § 5616*].

- Motor club service contracts [*Ins Code §§ 12158, 12250 et seq.*].
- Real property sales contracts [*CC § 2985 et seq.*].
- Required contents of sales contract relating to purchase of real property in subdivision [*B&P Code § 11200*].
- Retail installment sales contracts [*CC § 1801 et seq.*].
- Sale of goods [*Com Code § 2101 et seq.*].
- Sale of mining machinery [*CC § 1631*].
- State Contract Act [*PC Code § 10100 et seq.*].
- Suretyship contracts [*CC § 2792 et seq.*].
- Termination of mobile telephony services contracts and motor vehicle leases by reservists and members of the National Guard ordered into active military duty [*M&V Code §§ 823, 826*].
- Warranties in consumer contracts [*CC § 1790 et seq.*].
- Weight loss program or center contracts [*CC § 1694.5 et seq.*].



Cross References:

Discussion of statutes regulating specific consumer contracts, see California Forms of Pleading and Practice, Ch. 89, Automobiles: Sales and Financing Under the Rees-Levering Act; Ch. 127, Consumer Contracts and Loans; Ch. 128, Consumer Contracts: Statutes Regulating Specific Types of Contracts; Ch. 501, Sales: Retail Installment Sales; and Ch. 502, Sales: Warranties (Matthew Bender).

Legal Topics:

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

Antitrust & Trade Law Consumer Protection General Overview Banking Law Consumer Protection General Overview



50 of 175 DOCUMENTS

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Chapter 1 Determining the Applicable Law

VI. DETERMINING WHETHER OTHER CALIFORNIA STATUTES GOVERN CONTRACT

1-1 MB Practice Guide: CA Contract Litigation 1.35

1.35 If Contract Was Entered Into by Public Entity, California Statutes Governing Such Contracts May Control.

Counsel must determine whether the contract is subject to any specific statute because one of the parties is a public entity. The applicable statutes will define which public entities and transactions they govern.

Examples:

- For the purpose of emergency termination of public contracts, a "public agency" includes the state, its various commissions, boards and departments and any county, city, district or state agency authorized to enter into contracts for public work [*Gov Code § 4401*].
- Contracts for emergency work or remedial measures necessary to immediately avert, alleviate, repair, or mitigate destruction of property caused by the accidental or unplanned release of toxic substances, and necessary to protect the health, safety, and welfare of the general public, are not subject to application of the State Contract Act [*PC Code § 10101*].

A wide variety of California statutes govern specific types of public entity contracts.

Examples:

- Arbitration of public works contracts claims [*PC Code §§ 22200, 22201*].
- California State University Contract Law [*PC Code § 10700 et seq.*].
- Contracts for prison supplies [*Pen Code § 2051*].
- Contracts for public purchases in the amount of \$25,000 or more [*Gov Code § 4475 et seq.; see Gov Code § 4478; PC Code § 10301*].
- Contracts for rapid transit equipment or structures [*Gov Code § 4500*].

- Contracts of local agencies [PC Code § 20100 et seq.].
- State Contract Act [PC Code § 10100 et seq.].

Exception--Contracts Below Specified Dollar Amount May Be Exempt:

Contracts under a specified dollar amount may be exempted from public entity contracting requirements. For example, state contracts for the acquisition or lease of goods with a value of under \$25,000 are not required to be submitted to competitive bidding [see PC Code § 10301].



Trap--A Claim Is Required Under Tort Claims Act Before Suit Against a Public Entity for Breach of

Contract:

The claims requirements of the Tort Claims Act, more properly described as the Government Claims Act [Gov Code § 900 et seq.], apply to breach of contract claims against a public entity [Gov Code §§ 905, 905.2(b)(3); *City of Stockton v. Superior Court* (2007) 42 C4th 730, 734, 68 CR3d 295, 171 P3d 20; *Westcon Construction Corp. v. County of Sacramento* (2007) 152 CA4th 183, 190, 61 CR3d 89].



Cross References:

Discussion and forms relating to the claims procedure under Tort Claims Act [Gov Code § 810 et seq.], see *Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure*, 4.09;

California Forms of Pleading and Practice, Ch. 464, Public Entities and Officers (Matthew Bender); or

California Points and Authorities, Ch. 196, Public Entities (Matthew Bender).

California contracting procedures, see California Legal Forms, Ch. 90A, State Government Contracts.

Legal Topics:

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

Public Contracts LawGeneral OverviewPublic Contracts LawContract InterpretationGeneral Overview



51 of 175 DOCUMENTS

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Chapter 2 Determining What Causes of Action Exist

1-2 MB Practice Guide: CA Contract Litigation 2.syn

§ 2.syn Synopsis to Chapter 2: Determining What Causes of Action Exist

2.01 Scope.

2.02 Objective and Strategy.

2.03 CHECKLIST: Determining What Causes of Action Exist.

2.04 Obtain Information and Documents to Evaluate Potential Causes of Action and Defenses.

2.04[1] Determine Client's Objective.

2.04[2] Ascertain Relevant Facts.

2.04[3] Review Written Contract and/or Other Documents.

2.04[3][a] Specific Contract Terms May Control Aspects of Litigation.

2.04[3][b] Oral Agreement May Raise Statute of Frauds or Statute of Limitations Issues.

2.04[3][c] Written Communications May Alert Counsel to Potential Defenses.

2.04[4] Gather Information Concerning Circumstances Giving Rise to Dispute.

2.05 Potential Cause(s) of Action Depend on Nature of Conduct Complained of, Relief Sought, and Governing Law.

2.05[1] Causes of Action Must Be Viable Under Governing Law.

2.05[1][a] Counsel Must Determine Applicable Law.

2.05[1][b] Action Must Comply With Applicable Statute of Limitations.

2.05[2] Litigation May Be Governed by Commercial Code.

2.05[3] Statutory Remedies May Be Available for Other Particular Types of Contracts.

2.05[4] Facts May Support Multiple Causes of Action or Remedies.

2.05[5] Potential Damages May Be Greater If Defendant's Conduct Gives Rise to Action in Tort.

2.05[6] Contract or Statute May Provide for Recovery of Attorney's Fees.

2.06 Proper Jurisdiction and Venue Must Be Determined.

2.07 Arbitration or Other Alternative Dispute Resolution May Be Desirable or Required.

2.08 Validity and Enforceability of Contract Must Be Evaluated.

2.08[1] Issue of Validity or Enforceability May Preclude Cause of Action on Contract.

2.08[2] Existence or Validity of Contract May Be Attacked on Numerous Grounds.

2.08[2][a] Absence of an Essential Element.

2.08[2][b] Lack of Capacity of a Party to Contract.

2.08[2][c] Authority to Contract on Behalf of Another.

2.08[2][d] Failure to Comply With Applicable Formalities.

2.08[2][e] Mistake.

2.08[2][f] Fraud, Duress, Menace, and Undue Influence.

2.08[2][g] Illegality, Unconscionability, Public Policy, and Similar Claims.

2.08[3] Agency Law May Determine Who Has Rights and Liabilities Under the Contract.

2.08[4] Status As Third Party Beneficiary May Affect Party's Ability to Enforce Contract.

2.09 Plaintiff Seeking to Enforce Contract May Consider Action for Declaratory Relief, Specific Performance, or Similar Remedies.

2.09[1] Declaratory Relief May Be Appropriate When Dispute Exists That May Affect, or Has Affected, Performance.

2.09[2] Plaintiff May Seek Specific Performance of Contract When Damages for Breach Would Be Inadequate.

2.09[3] Injunctive Relief May Be Available to Prevent Breach of Contract.

2.10 Plaintiff May Seek Provisional Remedies to Protect Property.

2.11 Plaintiff May Obtain Compensation for Goods or Services Through Action for Quantum Valebant or Quantum Meruit.

2.11[1] Quantum Counts Are Used When Defendant Is Not Liable for Fixed Sum.

2.11[2] Quantum Valebant Seeks Payment of Money Due for Reasonable Value of Goods Delivered.

2.11[3] Quantum Meruit Recovery Provides Payment for Services Rendered.

2.12 Plaintiff May Seek Damages Arising Out of Defendant's Breach of Contract, Breach of the Duty of Good Faith and Fair Dealing, or Breach of Warranty.

2.12[1] Action for Breach of Contract Arises If Defendant Fails to Perform or Prevents Plaintiff From Performing Obligations Under Contract.

2.12[1][a] Action Provides Compensation for Party Who Did Not Receive Benefit of Bargain.

2.12[1][b] Evaluating Claim Requires Analysis of Numerous Potential Issues.

2.12[1][c] Plaintiff Should Consider Potential Defenses.

2.12[2] Action for Breach of Duty of Good Faith and Fair Dealing Arises If Defendant's Conduct Unfairly Deprives Plaintiff of Benefits of Contract.

2.12[3] Action for Breach of Warranty May Arise From Express or Implied Warranty.

2.13 Plaintiff Seeking to Prevent Enforcement of Contract May Seek Declaratory Relief, Rescission, or Reformation of Contract.

2.13[1] Plaintiff May Seek Declaratory Relief to Preclude Action on Contract by Opposing Party.

2.13[2] Contract May Be Rescinded If All Parties Consent.

2.13[3] Plaintiff May Unilaterally Rescind Contract Under Certain Circumstances.

2.13[4] Plaintiff May Seek Reformation If Contract Does Not Express True Intention of Parties.



52 of 175 DOCUMENTS

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Chapter 2 Determining What Causes of Action Exist

I. STRATEGY

1-2 MB Practice Guide: CA Contract Litigation 2.01

2.01 Scope.

This chapter covers:

- Objective and strategy for determining what potential causes of action exist [see 2.02].
- Determining the client's objective in seeking relief, and ascertaining the relevant facts [see 2.04].
- Evaluating potential causes of action based on the nature of the conduct complained of, the relief sought, and the applicable law [see 2.05].
- Determining proper jurisdiction and venue [see 2.06].
- Determining whether arbitration of other alternative dispute resolution is desirable or required [see 2.07].
- Evaluating the validity and enforceability of the contract at issue [see 2.08], including:
 - ☐ Determining the grounds on which a contract might be subject to attack [see 2.08[2]].
 - ☐ Considering whether agency law applies in determining the parties who have rights and liabilities under the contract [see 2.08[3]].
 - ☐ Determining whether a party's status as a third party beneficiary affects his or her ability to enforce the contract [see 2.08[4]].
- If plaintiff is seeking to enforce the contract, determining whether to allege a cause of action for:
 - ☐ Declaratory relief [see 2.09[1]];

- ☐ Specific performance [*see 2.09[2]*]; or
- ☐ Injunctive relief [*see 2.09[3]*].
- Determining whether plaintiff should seek provisional remedies [*see 2.10*].
- Determining whether plaintiff should allege a claim for quantum valebant or quantum meruit recovery [*see 2.11*].
- If plaintiff is seeking damages, determining whether plaintiff can allege a cause of action for:
 - ☐ Breach of contract [*see 2.12[1]*];
 - ☐ Breach of the duty or good faith and fair dealing [*see 2.12[2]*]; or
 - ☐ Breach of warranty [*see 2.12[3]*].
- If plaintiff is seeking to prevent enforcement of a contract, determining whether to seek:
 - ☐ Declaratory relief [*see 2.13[1]*];
 - ☐ Rescission [*see 2.13[2], [3]*]; or
 - ☐ Reformation of the contract [*see 2.13[4]*].

Legal Topics:

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

Contracts LawBreachCauses of ActionGeneral OverviewContracts LawRemediesGeneral Overview



53 of 175 DOCUMENTS

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Chapter 2 Determining What Causes of Action Exist

I. STRATEGY

1-2 MB Practice Guide: CA Contract Litigation 2.02

2.02 Objective and Strategy.

An initial analysis of a client's contract dispute is an essential prerequisite to all subsequent steps that the attorney may take for the client. The initial analysis should be thorough and careful, and should be used to create a road map of the attorney's strategy for obtaining the result that the client wants. The initial assessment of the case will, of course, need to be refined as the attorney becomes more familiar with the facts, the contentions of the defendant, the applicable law, the role of other parties, and other factors. Nevertheless, determining at the outset what causes of action exist in a contract dispute is essential to obtaining the desired relief.

The potential causes of action in a particular case will depend on numerous factors, including:

- The client's objective in litigating the dispute, which may be one or more of the following:
 - ☐ Enforcing the contract according to its terms (specific performance).
 - ☐ Obtaining compensation from the defendant for goods or services provided.
 - ☐ Recovering damages for the defendant's breach of the contract.
 - ☐ Preventing the opposing party from enforcing the contract.
- The validity and enforceability of the contract itself.
- The provisions of the contract, which may specify or limit remedies.
- The applicable law.
- The nature of the defendant's conduct giving rise to the dispute.



Strategic Point--Plaintiff:

Counsel should consider not only the potential causes of action that may be alleged, but also the defenses likely to be raised by the defendant to each potential cause of action. Determining whether all of the elements of each potential cause action can be properly alleged, and what potential defenses may be raised, can avoid asserting causes of action that may be subject to demurrer or to summary adjudication in the defendant's favor.



Decision Point:

Determining which causes of action *can* be brought is not the same as deciding which causes of action *should* be brought. The former is a purely academic exercise; the latter requires a practical analysis. In considering which causes of action may be alleged, the likely consequences that should be considered are not limited to defenses likely to be raised and counterclaims that might be asserted, but also include the effects of each potential claim on the complexity, scope, and cost of the litigation, including:

- The difficulty of proving one's case.
- The discovery likely to be needed, and permitted, to develop each potential claim.
- The evidence likely to be admitted at trial.
- The realistic likelihood that the client will actually prevail on the claim.
- The types of relief (preliminary relief, injunctive relief, damages, and so on) that each potential cause of action could yield.

Sometimes it is more advisable to bring a simpler, relatively easily proven, rifle-shot case. In other cases it may be preferable to launch an all-out assault and assert all possible claims.



Cross Reference:

For Tips on updating case law and expanding your research with additional resources, see **How to Use Lexis.com With This Publication** at the front of this volume.



Search Current California Case Law:

Use *lexis.com* to search for cases discussing elements of a cause of action:

- Legal > States Legal--U.S. > California > Find Cases > By Area of Law > CA Contract Cases



Sample Search: To explore cases discussing elements of a cause of action, substitute your cause of action in this suggested search: *strict liability /10 elements OR prima facie OR factors OR test*.

Legal Topics:

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

Civil Procedure Pleading & Practice General Overview Contracts Law General Overview Contracts Law Breach Causes of Action General Overview Contracts Law Remedies General Overview



54 of 175 DOCUMENTS

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Chapter 2 Determining What Causes of Action Exist
II. DETERMINING WHAT CAUSES OF ACTION EXIST

1-2 MB Practice Guide: CA Contract Litigation 2.03

2.03 CHECKLIST: Determining What Causes of Action Exist.

- ☐ Determine client's objective in seeking relief through litigation.

See 2.04[1], 2.05

- ☐ Obtain information and documents from client, including:

- ☐ Relevant facts concerning the parties involved.

Discussion:

See 2.04[2]

- ☐ Written contract, if any, and/or other documents.

Discussion:

See 2.04[3]

- ☐ Circumstances giving rise to dispute.

Discussion:

See 2.04[4]

- ☐ Evaluate potential causes of action, based on conduct complained of, relief sought, and governing law, taking into account:

- ☐ Whether cause(s) of action are viable under to the governing law, including applicable statute of

limitations.

Discussion:

See 2.05[1]

- ☐ Whether the litigation is governed by Civil Code's contract provisions, or provisions of Commercial Code.

Discussion:

See 2.05[2]

- ☐ Whether other statutory remedies are available, based on particular type of contract at issue.

Discussion:

See 2.05[3]

- ☐ Whether facts support multiple causes of action.

Discussion:

See 2.05[4]

- ☐ Whether defendant's conduct may give rise to action in tort, so that the greater range of tort damages may be available.

Discussion:

See 2.05[5]

- ☐ Whether contract or a statute provides for recovery of attorney's fees.

Discussion:

See 2.05[6]

- ☐ Determine proper jurisdiction and venue.

Discussion:

See 2.06

- ☐ Determine whether arbitration is necessary or desirable.

Discussion:

See 2.07

- ☐ Evaluate validity and enforceability of contract at issue:

- ☐ Determine if grounds exist to attack existence or validity of the contract based on:

- ☐ Absence of essential contract elements, such as:

- ☐ Lack of valid offer, or revocation of offer before acceptance;
- ☐ Lack of a valid acceptance;
- ☐ No intent to contract;
- ☐ Lack of adequate consideration; or
- ☐ Absence of essential term of contract.

Discussion:

See 2.08[2][a]

- ☐ Lack of capacity of a party to contract.

Discussion:

See 2.08[2][b]

- ☐ Lack of authority of signer of contract to contract on behalf of another person or entity.

Discussion:

See 2.08[2][c]

- ☐ Failure to comply with statute of frauds or other applicable formalities.

Discussion:

See 2.08[2][d]

- ☐ Mistake of law or fact.

Discussion:

See 2.08[2][e]

- ☐ Fraud, duress, menace, or undue influence.

Discussion:

See 2.08[2][f]

- ☐ Illegality, unconscionability, or public policy.

Discussion:

See 2.08[2][g]

- ☐ Determine if agency law applies to determine parties who have rights and liabilities under contract.

Discussion:*See 2.08[3]*

- ☐ Determine if a party's status as a third party beneficiary affects his or her ability to enforce contract.

Discussion:*See 2.08[4]*

- ☐ If client is seeking to enforce contract, consider cause(s) of action for:

- ☐ Declaratory relief, if dispute exists between parties that may affect, or has affected, performance of contract.

Discussion:*See 2.09[1]*

- ☐ Specific performance, if damages for breach of contract would be an inadequate remedy.

Discussion:*See 2.09[2]*

- ☐ Injunctive relief, if necessary to prevent a breach of contract.

Discussion:*See 2.09[3]*

- ☐ If client is seeking compensation for value of goods or services provided, and possibility exists that client may not be able to recover under contract, determine whether claim for quantum valebant or quantum meruit recovery is appropriate.

Discussion:*See 2.11*

- ☐ If client is seeking monetary damages, determine whether client can state a cause of action for:

- ☐ Breach of contract;

Discussion:*See 2.12[1]*

- ☐ Breach of duty of good faith and fair dealing; or

Discussion:*See 2.12[2]*

- ☐ Breach of warranty.

Discussion:

See 2.12[3]

☐ If client is seeking to prevent opposing party from enforcing contract according to its terms, consider cause(s) of action for:

☐ Declaratory relief.

Discussion:

See 2.13[1]

☐ Relief based on rescission.

Discussion:

See 2.13[2], [3]

☐ Reformation of the contract.

Discussion:

See 2.13[4]

☐ Determine whether client should seek provisional remedies to protect property involved in dispute, pending litigation or other final resolution of dispute.

Discussion:

See 2.10

Legal Topics:

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

Contracts LawBreachCauses of ActionGeneral OverviewContracts LawBreachCauses of ActionAssumpsitContracts LawBreachCauses of ActionBreach of WarrantyContracts LawBreachCauses of ActionElements of ClaimsContracts LawBreachCauses of ActionMoney Had & Received



55 of 175 DOCUMENTS

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Chapter 2 Determining What Causes of Action Exist

II. DETERMINING WHAT CAUSES OF ACTION EXIST

1-2 MB Practice Guide: CA Contract Litigation 2.04

2.04 Obtain Information and Documents to Evaluate Potential Causes of Action and Defenses.

2.04[1] Determine Client's Objective.

When a client first consults an attorney regarding a dispute that has arisen concerning a contract or purported contract, counsel should determine at the outset whether the party seeking relief has a particular objective in litigating the matter. For example, the client may be seeking to:

- Compel an opposing party to perform his or her obligations under the contract, in accordance with the contract terms;
- Terminate the contract and recover damages for the opposing party's nonperformance of that party's obligations under the contract; or
- Prevent an opposing party from enforcing the purported contract against the client.

Although the client initially may have a particular remedy in mind, counsel should evaluate the matter and explore possible alternative causes of action and remedies with the client, taking into account all of the circumstances of the case.

Example:

If the client anticipates and desires an ongoing business relationship with the opposing party, resolving a dispute through an action for declaratory relief or reformation of the contract, before the dispute escalates into an actual breach of the agreement and action for damages, may be desirable. Informal mediation or arbitration also may help solve the problem without destroying the parties' business relationship.

2.04[2] Ascertain Relevant Facts. As in any litigation, an evaluation of client's case should begin by collecting and analyzing the basic facts concerning the individuals and entities involved, including names, addresses, capacities, and relationship to the contract or to the parties to the contract.

This information is important not only for counsel to determine whether there are any conflicts or other obstacles to accepting the case, but also to consider whether issues arising out of the capacities, residence, or place of business of the

potential parties may be involved in the potential litigation.

Examples:

- Diversity of citizenship of the parties may result in removal of an action from state to federal court.
- The liability of a potential defendant may be in question if agency issues are involved.
- A plaintiff who is a third party beneficiary of a contract may be limited in the causes of action that can be asserted.
- The capacity of a party or a fiduciary or other relationship between the parties, other than the contractual relationship, may give rise to potential defenses to an action on contract.

 Cross References:

Detailed discussion of preliminary information gathering prior to litigation, see Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, Ch. 2, Client Interview.

Agency issues in contract actions, see Ch. 20, Asserting Agency Issues in Contract Actions.

Third party beneficiary issues, see Ch. 19, Seeking or Opposing Recovery As Third Party Beneficiary of Contract.

Capacity issues, see Ch. 14, Attacking or Defending Existence of Contract--Lack of Capacity.

Removal of action to federal court, see Matthew Bender[(R)] Practice Guide: Federal Pretrial Civil Procedure in California, Ch. 3, Removing a State Court Case to Federal Court.

2.04[3] Review Written Contract and/or Other Documents.

2.04[3][a] Specific Contract Terms May Control Aspects of Litigation. Counsel should obtain and review the contract at issue, if it is in writing, and any purported written modifications to the contract. The terms of the contract may contain a choice of law provision that would affect the potential causes of action, or may specify or limit the remedies available to the client.

Examples:

- A choice of law provision specifying the law of another jurisdiction may preclude remedies that would otherwise be available under California law.
- The contract may contain a liquidated damages provision specifying the amount of damages recoverable for breach of the agreement.
- The contract may contain a provision for prevailing party attorney's fees that would expose the client to liability for defendant's attorney's fees if the litigation brought by client were unsuccessful.

- The contract may require client's claims to be arbitrated instead of litigated.
- The contract may expressly authorize conduct by the defendant that might otherwise constitute a breach of the duty of good faith and fair dealing.

Judge's Perspective:

Counsel will also want to review any documents concerning the formation of the contract, since these documents may affect the parties' interpretations of the contract. The court will admit evidence concerning any interpretation to which the contract is "reasonably susceptible" [*Pacific Gas & Elec. Co. v. G. W. Thomas Drayage & Rigging Co.* (1968) 69 C2d 33, 37, 69 CR 561, 442 P2d 641] .

Cross References:

Discussion of effect of choice of law provision on determination of causes of action, see 2.05[1].

Liquidated damages provisions in contracts, see Ch. 7, *Seeking or Opposing Damages in Contract Actions*, 7.05[3] -[5].

Attorney's fees in contract actions, see Ch. 12, *Recovering Attorney's Fees and Costs in Contract Litigation*.

Arbitration issues, see Ch. 5, *Determining Whether to Arbitrate or Litigate*.

Contractual duty of good faith and fair dealing, see Ch. 23, *Suing or Defending Action for Breach of Duty of Good Faith and Fair Dealing*.

2.04[3][b] Oral Agreement May Raise Statute of Frauds or Statute of Limitations Issues. If the purported contract between the parties is not in writing, counsel should consider whether the contract may be unenforceable because of a failure to comply with applicable formalities. Furthermore, even if an oral agreement is enforceable, an action on the agreement is subject to a shorter statute of limitations [*compare CCP §§ 337, 339*] that may preclude the client's action on the contract.

Cross References:

Discussion of statute of frauds issues, see Ch. 15, *Attacking or Defending Existence of Contract--Failure to Comply With Applicable Formalities*.

Discussion of statutes of limitations for actions on written and oral contracts, see Ch. 4, *Determining Applicable Statute of Limitations and Effect on Potential Action*.

2.04[3][c] Written Communications May Alert Counsel to Potential Defenses. Counsel should obtain and review any written communications between the parties concerning the performance, or nonperformance of the contract. Communications may allude to potential defenses the opposing party may raise in litigation or indicate causes of action the client should pursue.

Examples:

- Communications between the parties may indicate that, if sued for breach of contract, the opposing party would attack the validity of the contract on the basis of fraud.

- Communications between the parties may reveal that there is a disagreement concerning the meaning of an ambiguous term of the contract, which may be resolved by an action seeking declaratory relief prior to a breach by the opposing party.

Cross References:

Fraud in contract actions, see Ch. 17, *Attacking or Defending Existence of Contract--Fraud, Duress, Menace, and Undue Influence*.

Declaratory relief actions, see Ch. 11, *Seeking or Opposing Declaratory Relief in Contract Matters*.

2.04[4] Gather Information Concerning Circumstances Giving Rise to Dispute. In addition to reviewing the written contract, if any, counsel should thoroughly explore the circumstances giving rise to the dispute, to determine whether all of the elements of a potential cause of action are present and to anticipate possible defenses.

Examples:

- Client's performance of his or her obligations under the contract, or excuse for nonperformance, is an essential element of a cause of action for damages for breach of contract.
- The existence of a fiduciary or other confidential relationship between the parties may give rise to a defense against enforcement of the contract on the basis of constructive fraud.

Judge's Perspective:

Another reason to review the parties' correspondence carefully is that it may show conduct consistent with one or the other party's interpretation of the contract. Extrinsic evidence of the parties' conduct can be relevant to prove the terms of the contract [*City of Manhattan Beach v. Superior Court* (1996) 13 C4th 232, 246, 52 CR2d 82, 914 P2d 160 ; *Armstrong Petroleum Corp. v. Tri-Valley Oil & Gas Co.* (2004) 116 CA4th 1375, 1389] .

Cross References:

Nonperformance and excuse, see Ch. 22, *Suing or Defending Action for Breach of Contract*, 22.13 -22.23.

Constructive fraud, see Ch. 17, *Attacking or Defending Existence of Contract--Fraud, Duress, Menace, and Undue Influence*, 17.14 -17.19.

Legal Topics:

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

Contracts LawBreachGeneral OverviewContracts LawBreachCauses of ActionGeneral OverviewContracts LawRemediesGeneral Overview



56 of 175 DOCUMENTS

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Chapter 2 Determining What Causes of Action Exist

II. DETERMINING WHAT CAUSES OF ACTION EXIST

1-2 MB Practice Guide: CA Contract Litigation 2.05

2.05 Potential Cause(s) of Action Depend on Nature of Conduct Complained of, Relief Sought, and Governing Law.

2.05[1] Causes of Action Must Be Viable Under Governing Law.

2.05[1][a] Counsel Must Determine Applicable Law. Because a lawsuit based on a contract may have a significant relationship to more than one state, issues as to which jurisdiction's law applies may arise. Identifying the substantive law that applies to the litigation is fundamental to determining what causes of action exist and what defenses may be available to the opposing party.

If the contract contains a choice of law provision, counsel must determine the scope and affect of the provision on the proposed litigation and potential causes of action. A choice of law provision might include:

- An agreement to be governed by the law of a particular state.
- An agreement that the contract will be construed according to the law of a particular state.
- An agreement to submit to the jurisdiction of the courts of a particular state.
- An agreement that the contract is to be deemed to have been entered into in a particular state.
- Some combination of these terms or some other agreement.

If the application of the choice of law provision appears unfavorable to the client, counsel should consider whether the provision can be challenged.

If the litigation involves a claim arising under federal law, counsel must also determine whether federal law will preempt any state law claims.



Cross Reference:

Discussion of determining the applicable law and grounds for challenging a choice of law provision, see

Ch. 1, Determining the Applicable Law.

2.05[1][b] Action Must Comply With Applicable Statute of Limitations. Any civil action, including a contract action, can be commenced only within the applicable period of limitations, after the cause of action accrues [*CCP* § 312]. After determining which jurisdiction's law applies, counsel should determine when each potential cause of action accrued to bring the action within the applicable limitations period.

Generally, the nature of the contract will determine the applicable statute of limitations for an action on the contract [*see CCP* §§ 337 (four-year statute of limitations if contract founded on instrument in writing), 339 (two-year statute of limitations if contract oral or implied)]. Other statutes of limitations will apply to other causes of action that may be alleged [*see, e.g., CCP* §§ 339(1) (two-year statute for action in quantum meruit), 338 (three-year statute for action for fraud)].

Counsel should also determine whether the contract itself contains a limitations period and whether that provision applies in the instant case.



Cross Reference:

Discussion of statutes of limitation, see Ch. 4, Determining Applicable Statute of Limitations and Effect on Potential Action.

2.05[2] Litigation May Be Governed by Commercial Code. The Commercial Code pertains to a broad spectrum of commercial agreements. These include:

- Contracts for the sale of goods (Article 2).
- Investment securities (Article 8).
- Secured transactions (Article 9).
- Personal property leases (Article 10).

If a contract is subject to the Commercial Code, specific statutory rules apply to issues of contract formation, interpretation, and remedies.



Cross References:

Discussion of determining whether UCC or common law applies, see *Ch. 1, Determining the Applicable Law*, 1.24 -1.29.

Discussion of contract litigation under Commercial Code Article 2, see Ch. 26, Contract for Sale of Goods--Seeking Remedies Under California Commercial Code;

Ch. 27, Contract for Sale of Goods--Attacking or Defending Existence of Contract Under California Commercial Code; and

Ch. 28, Contract for Sale of Goods--Suing or Defending Action for Breach of Contract Under California Commercial Code.



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2.05[3] Statutory Remedies May Be Available for Other Particular Types of Contracts. In addition to contracts governed by the Commercial Code, many other types of contracts are regulated by statute. Counsel must determine if the contract at issue is subject to any specific statutory scheme. If a statutory scheme exists, statutory damages or penalties may be available if the opposing party has failed to comply with statutory requirements in connection with the transaction in question. In some cases, statutory damages or penalties are authorized in addition to actual damages. In other cases, a statutory remedy may be the sole remedy for a specific violation of a statutory scheme.



Cross References:

Discussion of determining whether California statutes govern the contract, see Ch. 1, *Determining the Applicable Law*.

Discussion of determining whether statutory damages or civil penalties are available, see Ch. 10, *Seeking or Opposing Statutory Remedies in Contract Actions*.

2.05[4] Facts May Support Multiple Causes of Action or Remedies. The conduct complained of by the client may give rise to more than one cause of action, and more than one remedy may be available. If supported by the facts, counsel should consider alleging multiple causes of action to obtain all of the relief sought by client and resolve the parties' dispute.

Example:

A client complaining of a defendant's unauthorized disclosure of confidential information in violation of a contract provision may seek both damages for breach of contract and injunctive relief to prohibit further disclosure.



Cross References:

Discussion of potential causes of action based on unauthorized disclosure of confidential or proprietary information, see Ch. 25, *Seeking Recovery for Unauthorized Disclosure of Confidential or Proprietary Information*.

Temporary restraining orders and temporary injunctions, see Ch. 6, *Using or Opposing Provisional Remedies in Contract Actions*, 6.13.

Injunctive relief in contract actions, see Ch. 8, *Seeking or Opposing Equitable Remedies in Contract Actions*.

The determination of what causes of action to allege and what remedies to pursue will depend on the particular circumstances, including:

- Whether there has been an actual breach of the contract.
- The nature and extent of damages incurred by client, if any.

- The client's need or desire to have the contract performed according to its terms.
- The client's need or desire to terminate the contract.
- The client's need or desire to continue a business relationship with defendant.
- The availability of attorney's fees for certain types of contract claims.
- Whether defendant's conduct also constitutes a violation of a statute that provides for statutory damages or a civil penalty.



Decision Point--Thorough Cost-Benefit Analysis Essential:

A comprehensive cost-benefit analysis is essential. Determining which causes of action to assert can only be done on a case by case basis, and requires careful consideration of all of the following:

- A thorough analysis of all available facts and evidence--examined objectively, standing in the fact-finder's shoes.
- An understanding of the client's goal's, including whether the client wants a quick result or a comprehensive result.
- An analysis of the relief obtainable under each potential cause of action.
- Predicting the defenses that may be asserted, counterclaims that may be raised, and their corresponding effect on the scope and cost of the case, including:
 - ☐ The potential for summary judgment.
 - ☐ The amount and extent of discovery likely to be permitted.
 - ☐ The evidence likely to be admitted at trial.

Judge's Perspective:

If the dispute might successfully be resolved by an action for declaratory relief, counsel should consider bringing an action for only that remedy. There is an exception to the bar of res judicata when the plaintiff seeks solely declaratory relief in the initial action [*Mycogen Corp. v. Monsanto Co.* (2002) 28 C4th 888, 898-901, 123 CR2d 432, 51 P3d 297] . On the other hand, if the plaintiff seeks both declaratory relief and damages in the same action, a later action seeking additional coercive relief will be barred by the doctrine of res judicata [*Mycogen Corp. v. Monsanto Co.* (2002) 28 C4th 888 898-901] .



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► Cross References:

Determining whether a breach of contract has occurred, see *Ch. 22, Suing or Defending Action for Breach of Contract*, 22.03 et seq.

Determining amount of damages, see *Ch. 7, Seeking or Opposing Damages in Contract Actions*, 7.03-7.06.

Availability of attorney's fees, see *Ch. 12, Recovering Attorney's Fees and Costs in Contract Litigation*.

Statutory penalties in contract actions, see *Ch. 10, Seeking or Opposing Statutory Remedies in Contract Actions*.

Declaratory relief, see *Ch. 11, Seeking or Opposing Declaratory Relief in Contract Matters*.

2.05[5] Potential Damages May Be Greater If Defendant's Conduct Gives Rise to Action in Tort. Counsel should consider whether the defendant's conduct also gives rise to an action in tort. Alleging both contract and tort causes of action may increase the possible remedies and recovery.

Examples:

- An action by a helicopter manufacturer against a part supplier who provided false certificates of conformance for parts sold to the manufacturer contained causes of action for fraud and intentional misrepresentation as well as breach of contract, supporting an award of punitive as well as compensatory damages [*Robinson Helicopter Co., Inc. v. Dana Corp.* (2004) 34 Cal4th 979, 984] .

- An action for the unauthorized disclosure of confidential information may be founded in a number of causes of action, including breach of contract, misappropriation of trade secret [see *CC § 3426 et seq.*], unfair competition [see *B&P Code § 17200 et seq.*], or breach of confidence [see *Tele-Count Eng'rs, Inc. v. Pacific Tel. & Tel. Co.* (1985) 168 Cal3d 455, 463, 214 CalR2d 276] .

Judge's Perspective:

Note that the tortious conduct in *Robinson Helicopter*, discussed above, was part of the defendant's breach but still gave rise to an independent claim in tort.

► Cross References:

Discussion of alleging both tort and contract claims, see 7.06.

Discussion of potential causes of action based on unauthorized disclosure of confidential or proprietary information, see *Ch. 25, Seeking Recovery for Unauthorized Disclosure of Confidential or Proprietary Information*.

Contract damages are limited to the amount that will compensate the client for all of the detriment proximately caused

by a breach of contract, or which, in the ordinary course of things, would be likely to result from the breach [CC § 3300].

Tort damages are broader in scope. Tort damages may include compensation for all detriment proximately caused by the tort, whether it could have been anticipated or not [CC § 3333]. If the statutory prerequisites are met, punitive damages also may be available [CC § 3294(a)].

Cross Reference:

Detailed discussion of other tort and statutory claims that may arise in the business context, including unfair competition, false or misleading advertising, fraud, antitrust, interference with economic relationships, misappropriation or conversion, misappropriation of trade secrets, commercial defamation, trademark infringement and cybersquatting, see Matthew Bender[(R)] Practice Guide: California Unfair Competition and Business Torts.

2.05[6] Contract or Statute May Provide for Recovery of Attorney's Fees. Although costs of litigation generally are recoverable by the prevailing party [see CCP § 1021], attorney's fees are only recoverable if recovery is specifically allowed by the contract or a statute [see CC § 1717; CCP § 1021].

Decision Point--Plaintiff:

In considering whether to pursue potential causes of action, counsel should determine whether a specific contract term or a particular statutory claim will allow the recovery of attorney's fees. In some cases, the availability or unavailability of attorney's fees may be a significant factor in determining whether or not a particular cause of action should be asserted.

Warning--Recoverability of Attorney's Fees Can Harm As Well As Help Client:

Before alleging a cause of action for which attorney's fees may be recoverable by the prevailing party, counsel should also consider, and disclose to the client, the client's own potential liability for the opposing party's attorney's fees if the client does not prevail.

Cross Reference:

Discussion of recovery of attorney's fees, see Ch. 12, Recovering Attorney's Fees and Costs in Contract Litigation.

Legal Topics:

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

Civil Procedure Federal & State Interrelationships Choice of Law General Overview Commercial Law (UCC) General Provisions (Article 1) Application & Construction Choice of Law General Overview Contracts Law Breach Causes of Action General Overview Contracts Law Remedies General Overview



57 of 175 DOCUMENTS

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Chapter 2 Determining What Causes of Action Exist

II. DETERMINING WHAT CAUSES OF ACTION EXIST

1-2 MB Practice Guide: CA Contract Litigation 2.06

2.06 Proper Jurisdiction and Venue Must Be Determined.

Determining the proper court in which to file suit is essential to maintaining any cause of action. In a contract action, counsel should first determine whether the contract contains a valid and enforceable forum selection clause. If the contract does not contain a forum selection clause, counsel must determine where personal jurisdiction over the defendant(s) exists.

The court in which the action is filed also must have subject matter jurisdiction over the dispute. Superior courts in California have original jurisdiction over contract disputes [*Cal Const*, art VI, §§ 10, 11].

Federal court jurisdiction may exist either because of either a federal question or the complete diversity of the parties' state citizenship. Counsel attempting to seek or avoid a federal court forum therefore should consider not only whether a federal claim exists, but also whether the defendant(s) to be named in the action will subject an action filed in state court to removal to federal court, based on complete diversity of citizenship [*see 28 USC § 1332(a)*].

Proper venue is determined by statute [*see CCP §§ 392-403*]. Although the parties may specify a forum selection in the contract, venue selection clauses are not permitted [*see Alexander v. Superior Court (2003) 114 CA4th 723*].



Cross Reference:

Discussion of jurisdiction and venue, see Ch. 3, Determining Jurisdiction and Venue in Contract Actions.

Legal Topics:

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

Civil ProcedureJurisdictionSubject Matter JurisdictionGeneral OverviewCivil ProcedureJurisdictionSubject Matter
JurisdictionJurisdiction Over ActionsGeneral OverviewCivil ProcedureJurisdictionSubject Matter
JurisdictionSupplemental JurisdictionGeneral OverviewCivil ProcedureVenueGeneral OverviewCivil ProcedureFederal
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58 of 175 DOCUMENTS

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Chapter 2 Determining What Causes of Action Exist

II. DETERMINING WHAT CAUSES OF ACTION EXIST

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2.07 Arbitration or Other Alternative Dispute Resolution May Be Desirable or Required.

The contract, or a separate arbitration agreement, may provide that disputes be resolved by arbitration or some other form of alternative dispute resolution (ADR). If the contract contains an arbitration agreement, counsel must demand arbitration, rather than file an action in court, unless grounds exist for opposing the enforcement of the arbitration provision.

Even if the contract does not contain an arbitration agreement, and the action is filed in court, judicial arbitration or mediation may be mandatory, if the amount in controversy does not exceed more than \$50,000 for each plaintiff [*see CCP §§ 1141.11(a)-(c), 1775.3*].

The parties may, of course, agree to arbitration, mediation, or any other type of dispute resolution, once a dispute arises. Alternative dispute resolution may allow the controversy to be resolved in less time, with less expense, and with less damage to an ongoing business relationship between the parties, than litigation. If ADR is not otherwise required, counsel must determine whether would be advantageous to negotiate the use of ADR under the circumstances.

Consider:

The advisability of ADR in a particular case is a subject in itself, as Ch. 5, *Determining Whether to Arbitrate or Litigate*, indicates. Practical advantages to ADR that may be particularly relevant to preserving the business relationship include greater schedule flexibility (for example, to accommodate busy witnesses' schedules on both sides) and generally less publicity, which prevents "trying the case to the press" and thus alienating the other side.

Judge's Perspective:

If the contract contains a mandatory arbitration clause (as an increasing number of contracts do), counsel must become familiar with the arbitrator's rules so as to preserve the client's rights in arbitration. For example, the American Arbitration Association Commercial Arbitration Rules specify time limits for the taking of certain actions. In any agreement that provides for arbitration by the AAA, the parties are deemed to have made the Commercial Arbitration Rules a part of that agreement [*see AAA Comm. Arb. Rules R-1*].



Cross Reference:

Discussion of whether arbitration or other alternative dispute resolution is desirable or required, see Ch.

5, Determining Whether to Arbitrate or Litigate.

Legal Topics:

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

Civil ProcedureAlternative Dispute ResolutionGeneral OverviewCivil ProcedureAlternative Dispute
ResolutionArbitrationsGeneral OverviewContracts LawContract Conditions & ProvisionsArbitration Clauses



59 of 175 DOCUMENTS

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Chapter 2 Determining What Causes of Action Exist

II. DETERMINING WHAT CAUSES OF ACTION EXIST

1-2 MB Practice Guide: CA Contract Litigation 2.08

2.08 Validity and Enforceability of Contract Must Be Evaluated.

2.08[1] Issue of Validity or Enforceability May Preclude Cause of Action on Contract. Before bringing an action on contract, counsel should consider whether the contract at issue is valid and enforceable. If the client is seeking to prevent the opposing party from enforcing the contract, counsel should consider whether there are grounds to challenge the contract in an action for declaratory relief or rescission. If the client is seeking to enforce the contract, considering issues of validity and enforceability will alert counsel to potential defenses that may be raised by the opposing party. If such issues are likely to arise, counsel may also consider whether to assert claims, such as for quantum meruit, for which an express contract is not required for recovery.



Warning--Always Analyze Validity of Contract, Even If Client Is Seeking Only Damages:

Even if the client's objective is to recover damages for the other party's breach of the contract--and therefore to rely on the contract rather than to contest its validity--counsel should not overlook an analysis of the contract's validity at the outset. Failure to consider these issues prior to filing suit may result in unpleasant surprises when the defendant responds to the allegations.



Cross Reference:

Discussion of asserting claims for quantum valebant or quantum meruit recovery, see 2.11.

2.08[2] Existence or Validity of Contract May Be Attacked on Numerous Grounds.

2.08[2][a] Absence of an Essential Element. The existence of a valid contract is fundamental to maintaining an action to enforce a contract or recover damages for its breach. The existence of a valid contract requires all of the following [CC § 1550]:

- Parties capable of contracting.
- The parties' consent to contract. Consent may be shown by a signed written agreement or by a valid offer to contract made by one party and a valid acceptance of the offer by the other party.
- A lawful object.

- Sufficient cause or consideration.

The existence or validity of a purported contract can be challenged, either as a defense in an action on contract or in an action for declaratory relief, based on the absence of an essential element, such as:

- Lack of a valid offer, or revocation of an offer before acceptance.
- Lack of a valid acceptance.
- No intent to contract.
- Lack of adequate consideration.
- Absence of an essential term of the contract.

Cross References:

Discussion of issues concerning the essential elements of a valid contract, see Ch. 13, *Attacking or Defending Existence of Contract--Absence of Essential Element*.

Declaratory relief actions, see Ch. 11, *Seeking or Opposing Declaratory Relief in Contract Matters*.

Defenses to action for breach of contract, see Ch. 22, *Suing or Defending Action for Breach of Contract*, 22.61 -22.72.

2.08[2][b] Lack of Capacity of a Party to Contract. To have a valid contract, the parties must have been capable of contracting [CC § 1550]. Under California law, all persons are presumed capable of contracting except minors, persons of unsound mind, and persons deprived of civil rights [CC § 1556].

The issue of whether a contract is unenforceable because a party was incapable of contracting depends on circumstances of the particular case. Even a person not presumed capable of contracting may have a capacity to contract for a particular purpose.

Examples:

- A minor cannot disaffirm a contract for items necessary for the support of the minor or minor's family, if the items have been actually furnished to the minor or minor's family, and the contract was entered into at a time when the minor is not under the care of a parent or guardian able to provide for the minor or minor's family [Fam Code § 6712].
- A conservatee retains the right to enter into transactions to the extent reasonable to provide the necessities of life to the conservatee or his or her spouse, minor children, or domestic partner [Prob Code § 1871(d)].
- A person with a mental disorder, but not adjudged incompetent, may still be capable of contracting [Prob Code § 810(b)].
- A prisoner in state prison may sell or convey real or personal property while confined [Pen Code §

2601(a)].

➤ **Cross Reference:**

Discussion of lack of capacity to contract, see Ch. 14, Attacking or Defending Existence of Contract--Lack of Capacity.

2.08[2][c] Authority to Contract on Behalf of Another. Capacity to contract involves the question of whether a party to a purported contract had the ability to consent to a contract. A similar, but somewhat different, issue is whether a person who signed a contract on behalf of another person or an entity had the power to contract on behalf of that other person or entity.

Guardians, conservators and trustees have the power to contract on behalf of their wards, conservatees, and trusts [see *Prob Code* § 2451.5(a)]. In addition to the powers specifically granted to them by the Probate Code to carry out their responsibilities, guardians and conservators may be granted a general right to contract on behalf of their wards and conservatees without obtaining prior court authorization [see *Prob Code* §§ 2590, 2591]. Trustees have the express authority to execute and deliver all instruments needed to accomplish or facilitate the exercise of their powers [*Prob Code* § 16248]. The question of whether a guardian, conservator, or trustee had the power to contract depends on powers granted by statute, court order, or trust documents.

The question of whether an officer, director, partner, or employee had the power to enter into a contract on behalf of a corporation, partnership, or other business entity is determined by the statutes governing the particular type of entity [see, e.g., *Corp Code* §§ 207(g) (power of corporation to contract), 313 (enforceability of contract signed by corporate officer)] and principles of agency law.

➤ **Cross References:**

Discussion of lack of capacity to contract, see Ch. 14, Attacking or Defending Existence of Contract--Lack of Capacity.

Discussion of agency issues, see Ch. 20, Asserting Agency Issues in Contract Actions.

2.08[2][d] Failure to Comply With Applicable Formalities. The statute of frauds requires that following types of contracts be in writing to be enforceable [*CC* § 1624]:

- Contracts that cannot be performed within one year.
- Contracts that promise to answer for the debt, default, or miscarriage of another.
- Contracts for the sale or lease of an interest in real property for longer than one year.
- Contracts that authorize or employ an agent or other person to purchase or sell real estate or to lease real estate for longer than one year.
- Contracts that cannot be performed within the lifetime of the promisor.
- Contracts by a purchaser of real property to pay indebtedness secured by a mortgage or deed of trust.
- Contracts for a commercial loan or extension of credit of more than \$100,000.

The statute of frauds is usually raised as a defense in an action on the contract. However, certain exceptions to the statute exist, and the party seeking to enforce the contract nevertheless may be entitled to some recovery if the equitable

principles of estoppel or partial performance are appropriate under the circumstances.

In addition to the statute of frauds, other statutes regulate particular types of contracts or transactions. Governing statutes require a written contract, particular contract provisions, or other formalities. Counsel should review the governing statutory scheme for the type of contract at issue to determine if the contract has complied with such requirements.

Examples:

- Premarital agreements must be in writing and signed by both parties [*Fam Code § 1611*].
- Sales of personal property for more than \$5,000 require written contracts, with certain exceptions [*Civ Code § 1624.5*].
- Contracts between inventors and invention developers must be in writing and must contain specified disclosures [*B&P Code §§ 22372, 22379*].
- Agreements to submit potential future disputes to arbitration must be in writing [*CCP § 1281*].



Cross Reference:

Discussion of statute of frauds and formality issues, see Ch. 15, Attacking or Defending Existence of Contract--Failure to Comply With Applicable Formalities.

2.08[2][e] Mistake. The parties' consent to a contract must be mutual and freely given [*CC § 1565*]. Consent is not considered freely given if obtained through mistake [*CC § 1567*].

Mistake may be either of fact or law [*CC § 1576*]. Mistake of fact is a mistake, not caused by the neglect of a legal duty on the part of the person making the mistake, and consisting of [*CC § 1577*]:

- An unconscious ignorance or forgetfulness of a fact past or present, material to the contract; or
- Belief in the present existence of a thing material to the contract, which does not exist, or in the past existence of such a thing, which has not existed.

Mistake of law arises from [*CC § 1578*]:

- A misapprehension of the law by all parties, all supposing that they knew and understood it, and all making substantially the same mistake as to the law; or
- A misapprehension of the law by one party, of which the others are aware at the time of contracting, but which they do not rectify.

The issue of mistake may be raised as an affirmative defense to an action on the contract and may provide grounds for rescission or reformation of the contract [*see CC §§ 1689(b)(1), 3399*].



Cross References:

Discussion of mistake, see Ch. 16, Attacking or Defending Existence of Contract--Mistake.

Discussion of rescission and reformation, see Ch. 8, Seeking or Opposing Equitable Remedies in Contract Actions.

2.08[2][f] Fraud, Duress, Menace, and Undue Influence. The parties' consent to a contract must be mutual and freely given [CC § 1565]. Consent is not considered freely given if obtained by fraud, duress, menace, or undue influence [CC § 1567].

Fraud may be either actual or constructive fraud [CC §§ 1572, 1573]. A claim of actual fraud may be based on any of the following [CC § 1572]:

- Intentional misrepresentation of a fact.
- Negligent misrepresentation of a fact.
- Concealment of a fact.
- A promise made without intention of performing it.

A claim of constructive fraud may be based on either of the following [CC § 1573]:

- A breach of a duty arising out of a fiduciary or confidential relationship between the parties, resulting in an advantage to the breaching party to the prejudice of the other.
- An act or omission that the law specifically declares to be fraudulent.

A claim of duress or menace may be based on any of the following [CC §§ 1569, 1570]:

- Unlawful acts or threats against a person or person's property constituting duress, as specified by statute.
- Intentional threats or pressure that compelled a party to consent to contract against his or her will.
- Threats to a person's economic interests.

A claim of undue influence may exist when one of the following circumstances exists [CC §§ 1575]:

- One party, in whom a confidence was reposed, or who held a position of real or apparent authority over the other party, used that position or authority to obtain an unfair advantage.
- One party took advantage of the other party's weakness of mind.
- One party took a grossly oppressive and unfair advantage of the other party's necessities or distress.

These claims can be asserted either as affirmative defenses in an action on contract, or by a plaintiff in an action for rescission [see CC § 1689(b)(1)]. A party may be able to allege more than one these defenses to a contract under the circumstances of the case.

A party asserting a claim of fraud, duress, menace, or undue influence should also consider whether the opposing party's conduct gives rise to a cause of action in tort.

► Cross References:

Discussion of evaluating whether a cause of action in tort exists, see 2.05[5].

Discussion of fraud, duress, menace, and undue influence, see Ch. 17, Attacking or Defending Existence of Contract--Fraud, Duress, Menace, and Undue Influence.

Detailed discussion of tort and statutory claims that may arise in the business context, see Matthew Bender[(R)] Practice Guide: California Unfair Competition and Business Torts.

2.08[2][g] Illegality, Unconscionability, Public Policy, and Similar Claims. A contract must have a legal object to be enforceable [CC § 1596]. A contract is illegal if it is either [CC § 1667]:

- Contrary to an express provision of law;
- Contrary to the policy of express law, though not expressly prohibited; or
- Otherwise contrary to good morals.

A court also may refuse to enforce a contract on the ground that it is contrary to a broader public policy. Although not strictly illegal, a contract contrary to public policy violates wider societal norms. To determine whether a contract violates public policy, the court will consider the nature of the conduct, the extent of public harm that may be involved, and the moral quality of the conduct of the parties in light of the prevailing standards in the community [*Dunkin v. Boskey* (2000) 82 CA4th 171, 183, 98 CR2d 44] .

While a contract contrary to public policy has broader social concerns, an unconscionable contract is unenforceable because of the disproportionate burden it places on a particular party. An unconscionable contract ordinarily involves both a procedural and a substantive element [*Donovan v. RRL Corp.* (2001) 26 C4th 261, 291, 109 CR2d 807, 27 P3d 702] :

- Oppression or surprise due to unequal bargaining power; and
- Overly harsh or one-sided results.

The party challenging the contract may raise issues of illegality, public policy, or unconscionability as a defense to an action on the contract or in a complaint for declaratory relief.

► Cross Reference:

Discussion of illegality, violation of public policy, and unconscionability, see Ch. 18, Asserting or Defending Claim That Contract Is Illegal, Contrary to Public Policy, or Unconscionable.

2.08[3] Agency Law May Determine Who Has Rights and Liabilities Under the Contract. If the client has entered into a contract with an agent acting on behalf of another person or entity, agency law determines whether the client can bring an action against either the agent or the principal, or both. Agency law will also determine if the principal can bring an action to enforce the contract.

If an agency relationship exists, the agent's acts within the scope of his or her authority are considered the acts of the principal [CC § 2330]. If the agent is named as a defendant, the agent may be able to raise agency issues as a defense to liability for actions performed as an agent. Similarly, the principal may raise agency issues as a defense to liability if the agent's authority to act on the principal's behalf is disputed.

Cross Reference:

Discussion of agency issues, see Ch. 20, Asserting Agency Issues in Contract Actions.

2.08[4] Status As Third Party Beneficiary May Affect Party's Ability to Enforce Contract. Many contracts confer direct or indirect benefits on persons who are not parties to the contract. A person seeking to enforce his or her rights as a third party beneficiary of a contract must prove that the contracting parties had an express intention to benefit the third party [see CC § 1559]. Express intention may be directly manifested in the contract or may appear from the circumstances in which the contract was created.

A third party beneficiary's rights under a contract are subject to any conditions and limitations imposed by the contract [*Mercury Cas. Co. v. Maloney* (2003) 113 CA4th 799, 803] .

The remedies available to either the promisee or the third party beneficiary for the promisor's breach of the contract will depend on whether the third party is a creditor beneficiary, who is owed a legal obligation by the promisee, or a donee beneficiary, who is receiving a gift.

A creditor beneficiary may recover damages from either the promisor or promisee for breach [*Kraus v. Willow Park Pub. Golf Course* (1977) 73 CA3d 354, 371, 140 CR 744] . A donee beneficiary may recover to the extent permitted by the standard contract rules applying to gifts [see, e.g., *In re Marriage of Smith & Maescher* (1993) 21 CA4th 100, 108, 26 CR2d 133] . If the promisee is seeking to enforce the contract, he or she can recover damages for the promisor's breach of a creditor beneficiary contract, but is limited to specific performance for breach of a donee beneficiary contract [*In re Marriage of Smith & Maescher* (1993) 21 CA4th 100, 106-108, 26 CR2d 133] .

A third party beneficiary also may recover in tort for breach of a duty arising out of a contract, despite the lack of privity, when some negligent act has occurred [*Christensen v. Superior Court* (1991) 54 C3d 868, 891, 2 CR2d 79, 820 P2d 181] .

A third party beneficiary has the right to enforce a contract, but not to rescind it [*Schauer v. Mandarin Gems of California, Inc.* (2005) 125 CA4th 949, 959-960, 23 CR3d 233] .

Cross Reference:

Discussion of enforcing or opposing the rights of a third party beneficiary, see Ch. 19, Seeking or Opposing Recovery As Third Party Beneficiary of Contract.

Legal Topics:

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

Contracts LawContract Conditions & ProvisionsGeneral OverviewContracts LawDefensesGeneral OverviewContracts LawRemediesRescission & RedhibitionGeneral Overview



60 of 175 DOCUMENTS

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Chapter 2 Determining What Causes of Action Exist

II. DETERMINING WHAT CAUSES OF ACTION EXIST

1-2 MB Practice Guide: CA Contract Litigation 2.09

2.09 Plaintiff Seeking to Enforce Contract May Consider Action for Declaratory Relief, Specific Performance, or Similar Remedies.

2.09[1] Declaratory Relief May Be Appropriate When Dispute Exists That May Affect, or Has Affected, Performance. If a dispute has arisen between the parties, a party seeking to enforce the contract should consider filing an action for declaratory relief, whether or not an actual breach has occurred.

If an actual controversy exists between the parties, a party may seek declaratory relief to obtain a declaration of the rights and duties of the respective parties to the contract or a determination of any question of construction or validity arising under the contract [CCP § 1060].

Declaratory relief may be particularly appropriate if the parties have an ongoing contractual relationship and the same issues concerning the contract are likely to arise again in the future.

➤ **Cross References:**

Discussion of declaratory relief action, see Ch. 11, Seeking or Opposing Declaratory Relief in Contract Matters.

Discussion of questions of contract interpretation, see Ch. 21, Asserting a Particular Construction of Contract.

2.09[2] Plaintiff May Seek Specific Performance of Contract When Damages for Breach Would Be Inadequate. If the contract at issue involves real property or personal property of a unique nature, counsel should determine whether the plaintiff would prefer that the other party be required to perform the contract according to its terms, as opposed to seeking monetary damages for the other party's nonperformance.

The specific performance of a contract may be compelled except when precluded by statute [CC § 3384]. Specific performance is precluded by statute for the following obligations [CC § 3390]:

- An obligation to render personal service.

- An obligation to employ another in personal service.
- An agreement to perform an act that the party cannot lawfully perform.
- An agreement to procure the act or consent of a third party.
- An agreement, the terms of which are not sufficiently certain to make the precise act which is to be done clearly ascertainable.

The remedy of specific performance is available if damages for breach of the contract would not be an adequate remedy [*Morrison v. Land* (1915) 169 C 580, 586, 147 P 259] . It is presumed that breach of an agreement to transfer real property is not adequately compensated by monetary damages [CC § 3387]. Damages for the breach of a contract relating to personal property generally are considered adequate, unless the personal property is unique [*Wehen v. Lundgaard* (1940) 41 CA2d 610, 613, 107 P2d 491] .

If, under the circumstances of the case, it appears that specific performance possibly could be denied, or if plaintiff would also be satisfied with monetary compensation, the plaintiff may seek specific performance of an agreement and, in the alternative, damages for the breach of the contract.



Cross Reference:

Discussion of seeking or opposing specific performance of a contract, see *Ch. 8, Seeking or Opposing Equitable Remedies in Contract Actions*, 8.03 et seq.



Search CEB Materials:

Use *lexis.com* to find CEB materials on breach of real property agreements:

■ Legal > States Legal--U.S. > California > Search Analysis & CLE Materials > Continuing Education of the Bar (CEB), CA > CEB combined Publications > California Real Property Remedies and Damages



Sample Search: For discussion about causes of action in breach of real property purchase and sale agreements, try this: *breach! /5 contract! OR agreement AND cause of action OR elements.*

2.09[3] Injunctive Relief May Be Available to Prevent Breach of Contract. An injunction is a writ or order requiring a person to refrain from doing a particular act [CCP § 525]. A final (permanent) injunction may be granted to prevent the breach of an obligation in the following situations [CC § 3422]:

- When pecuniary compensation would not afford adequate relief.
- When it would be extremely difficult to ascertain the amount of compensation that would afford adequate relief.
- When the restraint is necessary to prevent a multiplicity of judicial proceedings.
- When the obligation arises from a trust.

If a contract is specifically enforceable, an aggrieved party may seek injunctive relief to prevent a breach of contract [CC § 3423(e); CCP § 526(a)(1)].

An injunction cannot be granted to prevent the breach of a contract the performance of which would not be specifically enforced, other than a contract in writing for personal services, when the services have peculiar value and the compensation for the services is within certain amounts specified by statute [*CCP* § 526(b)(5)].

Cross References:

Discussion of seeking or opposing injunctions in contract actions, see *Ch. 8, Seeking or Opposing Equitable Remedies in Contract Actions*, 8.59 -8.71.

Discussion of seeking injunctive relief to prevent unauthorized disclosure of confidential information, see *Ch. 25, Seeking Recovery for Unauthorized Disclosure of Confidential or Proprietary Information*.

Temporary restraining orders and preliminary injunctions, see *Ch. 6, Using or Opposing Provisional Remedies in Contract Actions*, 6.13.

Legal Topics:

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

Civil ProcedureDeclaratory Judgment ActionsGeneral OverviewContracts LawRemediesGeneral OverviewContracts LawRemediesEquitable ReliefGeneral OverviewContracts LawRemediesSpecific Performance



61 of 175 DOCUMENTS

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Chapter 2 Determining What Causes of Action Exist

II. DETERMINING WHAT CAUSES OF ACTION EXIST

1-2 MB Practice Guide: CA Contract Litigation 2.10

2.10 Plaintiff May Seek Provisional Remedies to Protect Property.

The following provisional remedies may be used in contract litigation to protect property until the time of final judgment:

- A temporary restraining order and/or preliminary injunction [CCP §§ 526, 527] maintains the status quo by commanding the party holding property to either maintain the property or refrain from depleting or disposing of the property.
- Claim and delivery [CCP § 511.010 *et seq.*] requires that a defendant transfer specific property to the plaintiff to hold while the litigation is pending.
- An attachment [CCP § 481.010 *et seq.*] requires property of the defendant to be held by a levying officer for execution after judgment, if necessary.
- A receivership [CCP § 564 *et seq.*] requires a neutral receiver to hold property that is the subject matter of litigation.
- A deposit in court [CCP § 572 *et seq.*] provides that disputed property must be held by the court during the litigation.

Each of these provisional remedies has statutory requirements that must be met before the court will order the remedy. Counsel contemplating the use of a provisional remedy should consider the need for the remedy under the particular circumstances of the case, including whether the statutory requirements can be met, and whether the need for the remedy will justify its expense.



Warning:

Provisional relief in contract cases can be an extremely powerful remedy--and can sometimes result in immediate termination of the case (for example, by settlement)--but it is rarely granted, and is highly discretionary under both state and federal law. Even a good case on the merits may not warrant such relief when the claimed harm to plaintiff can be compensated with money damages. Losing a motion for such relief can be disastrous for a plaintiff, in terms of cost, loss of credibility with the court, exposure of one's witnesses and evidence to attack, and other considerations. Accordingly, provisional relief should

be sought only when one's case on the merits appears very strong and a good argument can be made that irreparable harm will result absent such relief.

**Cross Reference:**

Discussion of provisional remedies, see Ch. 6, Using or Opposing Provisional Remedies in Contract Actions.

Legal Topics:

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

Civil Procedure Remedies Prejudgment Remedies General Overview Civil Procedure Remedies Provisional Remedies General Overview Contracts Law Remedies General Overview Contracts Law Remedies Equitable Relief General Overview



62 of 175 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 2 Determining What Causes of Action Exist
II. DETERMINING WHAT CAUSES OF ACTION EXIST

1-2 MB Practice Guide: CA Contract Litigation 2.11

2.11 Plaintiff May Obtain Compensation for Goods or Services Through Action for Quantum Valebant or Quantum Meruit.

2.11[1] Quantum Counts Are Used When Defendant Is Not Liable for Fixed Sum. The "quantum" common counts are used to recover the reasonable value of goods or services provided to the defendant when the defendant is not liable for a fixed sum. To recover under the quantum counts, the plaintiff need not prove the existence of a contract [see *Maglica v. Maglica* (1998) 66 CA4th 442, 449-452, 78 CR2d 101] . Although the existence of a contract is not required, the quantum counts may be used when the plaintiff has performed an obligation pursuant to an express contract, and what remains is defendant's obligation to pay for the reasonable value of services or goods furnished [see *Meredith v. Marks* (1963) 212 CA2d 265, 272-273, 27 CR 737] .



Strategic Point--Plaintiff:

Because the existence of a contract is not required, these counts may provide an alternate basis for recovery when a contract is defective or otherwise unenforceable but one of the parties has supplied goods or services.

2.11[2] Quantum Valebant Seeks Payment of Money Due for Reasonable Value of Goods Delivered. The common count of quantum valebant is used to recover the reasonable value of goods sold and delivered [*Weitzenkorn v. Lesser* (1953) 40 C2d 778, 792-794, 256 P2d 947] . The plaintiff may be able to assert a claim for quantum valebant when all of the following circumstances exist [*Weitzenkorn v. Lesser* (1953) 40 C2d 778, 256 P2d 947 ; *Hallidie v. Sutter St. R.R.* (1883) 63 C 575, 577] :

- The plaintiff sold or delivered goods to the defendant.
- The plaintiff's performance was made pursuant to the defendant's express or implied request.
- The defendant used the property for his or her benefit in a manner and under circumstances for which the law imposes a duty of compensation for that use.
- The defendant did not refuse to accept the goods.

Cross Reference:

Discussion of seeking or opposing a claim for quantum valebant, see Ch. 9, Seeking or Opposing Quantum Meruit or Quantum Valebant Recovery in Contract Actions.

Jury Instructions:

Contracts--Common Count: Goods and Services Rendered, see *Judicial Council of California Civil Jury Instructions*, CACI No. 371 (LexisNexis Matthew Bender).

2.11[3] Quantum Meruit Recovery Provides Payment for Services Rendered. The common count of quantum meruit is used to recover the reasonable value of services rendered [*McFarland v. Holcomb* (1898) 123 C 84, 86-87, 55 P 761] . To recover in quantum meruit, the plaintiff must show all of the following [*Huskinson & Brown LLP v. Wolf* (2004) 32 C4th 453, 458 ; *Day v. Alta Bates Med. Ctr.* (2002) 98 CA4th 243, 248-249, 119 CR2d 606] :

- The plaintiff rendered services pursuant to either an express or implied request for those services from the defendant.
- The services were rendered under some understanding or expectation of both parties that the services would be compensated.
- The services rendered were intended to and did benefit the defendant, and defendant did not pay plaintiff, or cause plaintiff to be paid by another, for those services.

Judge's Perspective:

It is usually good practice to include a count for quantum meruit or quantum valebant if there is any doubt about the validity of the contract or plaintiff's ability to recover under it.

Cross Reference:

Discussion of quantum meruit, see Ch. 9, Seeking or Opposing Quantum Meruit or Quantum Valebant Recovery in Contract Actions.

Jury Instructions:

Contracts--Common Count: Goods and Services Rendered, see *Judicial Council of California Civil Jury Instructions*, CACI No. 371 (LexisNexis Matthew Bender).

Legal Topics:

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

Contracts Law Remedies Equitable Relief General Overview Contracts Law Remedies Equitable Relief Quantum Meruit



63 of 175 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 2 Determining What Causes of Action Exist

II. DETERMINING WHAT CAUSES OF ACTION EXIST

1-2 MB Practice Guide: CA Contract Litigation 2.12

2.12 Plaintiff May Seek Damages Arising Out of Defendant's Breach of Contract, Breach of the Duty of Good Faith and Fair Dealing, or Breach of Warranty.

2.12[1] Action for Breach of Contract Arises If Defendant Fails to Perform or Prevents Plaintiff From Performing Obligations Under Contract.

2.12[1][a] Action Provides Compensation for Party Who Did Not Receive Benefit of Bargain. An action for damages for breach of contract allows a party who has not received the benefit of a bargain to recover compensation for the other party's failure to fully perform. To maintain an action for breach of contract, the plaintiff must plead and prove all of the following [*Acoustics, Inc. v. Trepte Constr. Co. (1971) 14 CA3d 887, 913, 92 CR 723*] :

- The existence of a contract.
- Plaintiff's performance or excuse for nonperformance.
- Defendant's breach.
- Plaintiff's damages proximately caused by defendant's breach.



Cross Reference:

Discussion of evaluating the existence of a valid contract, see 2.08.

2.12[1][b] Evaluating Claim Requires Analysis of Numerous Potential Issues. Evaluating whether a cause of action for breach of contract exists may involve numerous issues, including:

■ Determining whether nonperformance can be established based on any of the following circumstances:

- ☐ Defendant failed to fully or substantially perform under the contract.
- ☐ Performance was tendered by an unauthorized person.

- ☐ Defendant's partial performance was not accepted by plaintiff.
 - ☐ Defendant failed to make payment in a specified manner.
 - ☐ Defendant failed to fulfill a condition precedent.
 - ☐ Defendant prevented the happening of a condition precedent.
 - ☐ Defendant failed to perform a condition concurrent.
 - ☐ Defendant failed to perform prior to occurrence of a condition subsequent.
 - ☐ Plaintiff's failure to perform is excused, but defendant's failure to perform is not.
 - ☐ Defendant's failure to perform was only temporarily rather than permanently excused.
 - ☐ Defendant's repudiation of the contract constituted anticipatory breach.
- Determining whether the breach was material, considering factors such as:
 - ☐ The extent to which the plaintiff will obtain the substantial benefit that reasonably could be anticipated from the bargain.
 - ☐ The extent to which the plaintiff may be adequately compensated in damages for lack of complete performance.
 - ☐ The extent to which the defendant has failed to perform or make preparations for performing.
 - ☐ The extent of the hardship on the defendant, if the court terminates the contract.
 - ☐ The willful, negligent or innocent behavior of the defendant.
 - ☐ The extent of certainty that the defendant will perform the remainder of the contract.
 - ☐ The timing of the breach, in that a slight breach at the outset is more likely to justify termination, whereas a similar breach later in performance may be immaterial.
 - Determining whether the breach was partial, and the consequences of a partial breach, including:

- ☐ The amount of time the plaintiff must wait for performance.
 - ☐ The plaintiff's right to treat a total breach as partial.
 - ☐ The plaintiff's right to recover damages for a partial breach.
- Determining whether a breach resulted from performance not in accord with the terms of the contract, such as:
- ☐ Substantial performance that was not in strict compliance with the contract.
 - ☐ A failure to terminate the contract in accord with the contract terms.
 - ☐ Performance in an improper location.
 - ☐ A defective performance based on an implicit duty.
 - ☐ A failure to perform an available alternative provided by the contract.
- Determining whether a breach resulted from an untimely performance.
- Determining whether a breach resulted from an improper assignment to another person.
- Determining the proper measure of damages.

➡ **Cross References:**

Discussion of action for breach of contract, see Ch. 22, Suing or Defending Action for Breach of Contract.

Discussion of action for breach of contract based on unauthorized disclosure of confidential information, see Ch. 25, Seeking Recovery for Unauthorized Disclosure of Confidential or Proprietary Information.

Discussion of the measure of damages for breach of contract, see Ch. 7, Seeking or Opposing Damages in Contract Actions.

2.12[1][c] Plaintiff Should Consider Potential Defenses. In addition to determining whether the elements of a cause of action for breach of contract can be established, plaintiff should identify and consider potential defenses, prior to filing suit, that might be asserted by the opposing party. Defenses to an action for breach of contract may include:

- The absence of an element of the cause of action.
- A justification for defendant's nonperformance.
- An excuse for defendant's nonperformance.
- The nonperformance or nonexistence of a condition precedent.

- The occurrence of a condition subsequent.
- A waiver of the alleged breach.
- A release from the contract.
- Substantial performance.
- The statute of limitations.
- Plaintiff's failure to mitigate damages.



Cross References:

Discussion of defenses to an action for breach of contract, see Ch. 22, Suing or Defending Action for Breach of Contract.

Discussion of the failure to mitigate damages, see Ch. 7, Seeking or Opposing Damages in Contract Actions.

2.12[2] Action for Breach of Duty of Good Faith and Fair Dealing Arises If Defendant's Conduct Unfairly Deprives Plaintiff of Benefits of Contract. The parties to a contract are bound not only by the express covenants of the agreement, but also by the implied covenant of good faith and fair dealing. In the insurance context, breach of the implied covenant may give rise to tort liability and the recovery of tort damages. In a noninsurance context, breach of the implied covenant may be the basis for the recovery of contract damages [*Cates Constr., Inc. v. Talbot Partners* (1999) 21 C4th 28, 60-61, 86 CR2d 855, 980 P2d 407] .

To state a cause of action for breach of the duty of good faith and fair dealing:

- There must be a contractual relationship between the parties [*Smith v. City & County of San Francisco* (1990) 225 CA3d 38, 49, 275 CR 17] ;
- Plaintiff must have performed, or have been excused from performing, his or her obligations under the contract [see CC § 1439];
- Defendant must have unfairly prevented plaintiff from receiving the benefits he or she was entitled to receive under the contract [see *Comunale v. Traders & Gen. Ins. Co.* (1958) 50 C2d 654, 658, 328 P2d 198] ; and
- Defendant's conduct must have resulted in harm to plaintiff [see *Cates Constr., Inc. v. Talbot Partners* (1999) 21 C4th 28, 60-61, 86 CR2d 855, 980 P2d 407] .

Although an express contractual relationship between the parties is required to state a cause of action for breach of the implied covenant, breach of a specific provision is not a prerequisite [*Carma Developers (Cal.), Inc. v. Marathon Dev. Cal., Inc.* (1992) 2 C4th 342, 373, 6 CR2d 467, 826 P2d 710] .



Strategic Point--Plaintiff:

A party to a contract should consider alleging a cause of action for breach of the duty of good faith and

fair dealing if the other party's conduct frustrates his or her rights to the benefits contemplated by the agreement, but does not technically transgress the express provisions of the contract.



Cross References:

Discussion of breach of the duty of good faith and fair dealing, see Ch. 23, Suing or Defending Action for Breach of Duty of Good Faith and Fair Dealing.

Discussion of the measure of contract damages, see Ch. 7, Seeking or Opposing Damages in Contract Actions.

2.12[3] Action for Breach of Warranty May Arise From Express or Implied Warranty. In contract actions, a claim for breach of warranty may arise from a contract for the sale of goods when the seller has delivered the goods, but the buyer is dissatisfied with them. A warranty may involve the title, character, quality, identity, or condition of the goods [*A.A. Baxter Corp. v. Colt Indus., Inc. (1970) 10 CA3d 144, 153, 88 CR 842*] .



Strategic Point--Plaintiff:

Counsel for a potential plaintiff should consider the possibility of a breach of warranty claim whenever the defendant has provided the goods specified by the contract, but the client is dissatisfied with the quality of those goods or otherwise thinks that they do not measure up to expectations. In evaluating whether any warranties exist, counsel should consider all of the following:

- Whether the contract itself contains any language requiring that the goods measure up to specified standards;
- Whether other conduct or representations of the defendant apart from the contract itself have created an expectation on the part of the plaintiff that the goods will meet particular standards; or
- Whether the law itself requires that the goods meet particular standards.

There are three different statutory bases for actions for breach of warranty in the sale of goods:

- Division 2 of the Commercial Code [*Com Code §§ 2312-2317*], which codifies basic warranty law.
- The Song-Beverly Consumer Warranty Act [*CC § 1790 et seq.*], which provides additional requirements and remedies concerning warranties made to consumers.
- The federal Magnuson-Moss Warranty-Federal Trade Commission Improvement Act [*15 USC § 2301 et seq.*], which imposes disclosure requirements on warrantors and provides a broad cause of action.



Strategic Point--Plaintiff:

Counsel considering a cause of action for breach of warranty must consult the appropriate governing statutes to determine both the requirements for asserting the claim and the potential remedies.

A warranty may be express or implied. A seller's statement of fact or promise to the buyer that relates to the goods, or a

description, sample, or model of the goods, that becomes part of the basis of the parties' bargain creates an express warranty [see *Com Code* § 2313].

Implied warranties are implied by law pursuant to the statutes governing the transaction, such as:

- A warranty that goods are merchantable is implied by law in a contract for their sale if the seller is a merchant dealing in goods of that kind [*Com Code* § 2314(1)].
- A warranty that goods are fit for a particular purpose is implied by law in a contract for their sale if the seller, at the time the contract is made, has reason to know that the buyer requires the goods for a particular purpose and is relying on the seller's skill and judgment to select or furnish goods suitable for that purpose [*Com Code* § 2315].
- A warranty that the seller has good title, and will convey it free of encumbrances, is deemed to be a part of all contracts for the sale of goods [*Com Code* 2312].

Cross References:

Discussion of suing for breach of warranty, see Ch. 24, Suing or Defending Action for Breach of Warranty.

Discussion of warranties provided by the Commercial Code, see Ch. 28, Contract for Sale of Goods--Suing or Defending Action for Breach of Contract Under California Commercial Code.

Legal Topics:

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

Contracts LawBreachCauses of ActionGeneral OverviewContracts LawBreachCauses of ActionBreach of WarrantyContracts LawContract Conditions & ProvisionsExpress WarrantiesContracts LawContract Conditions & ProvisionsImplied WarrantiesGeneral OverviewContracts LawContract InterpretationGood Faith & Fair Dealing



64 of 175 DOCUMENTS

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Chapter 2 Determining What Causes of Action Exist

II. DETERMINING WHAT CAUSES OF ACTION EXIST

1-2 MB Practice Guide: CA Contract Litigation 2.13

2.13 Plaintiff Seeking to Prevent Enforcement of Contract May Seek Declaratory Relief, Rescission, or Reformation of Contract.

2.13[1] Plaintiff May Seek Declaratory Relief to Preclude Action on Contract by Opposing Party. If an actual controversy exists between the parties, a party may seek declaratory relief to obtain a declaration of the rights and duties of the respective parties to the contract or a determination of any question of construction or validity arising under the contract [CCP § 1060].



Strategic Point--Plaintiff:

A plaintiff who wants to prevent the opposing party from enforcing a contract or suing for damages for breach should consider bringing an action for declaratory relief to resolve disputes concerning the construction or validity of the contract before the opposing party can claim an alleged breach. Potential advantages to parties seeking declaratory relief may include choosing the most preferable potential forum, catching the opponent off guard, and seizing the upper hand in the court of public opinion.

A plaintiff may challenge the existence or enforceability of the contract in a declaratory relief action on the same grounds that could be asserted to defend an action for breach of contract, such as:

- Absence of an essential element for a valid contract.
- Lack of capacity.
- Failure to comply with applicable formalities.
- Occurrence or nonoccurrence of a condition.
- Mistake.
- Fraud, duress, menace, an undue influence.

- Illegality, unconscionability, or public policy.

Cross References:

Discussion of grounds to attack the existence or validity of a contract, see 2.08[2].

Discussion of determination of questions of construction, see Ch. 21, Asserting a Particular Construction of Contract.

Discussion of declaratory relief action, see Ch. 11, Seeking or Opposing Declaratory Relief in Contract Matters.

2.13[2] Contract May Be Rescinded If All Parties Consent. A contract may be rescinded if all the parties to the contract consent to the rescission [CC § 1689(a)]. The purpose of rescission is to extinguish the contract [see CC § 1688] and restore both parties to their pre-contract position as far as possible [see CC §§ 1691, 1692].



Strategic Point--Plaintiff:

A party seeking to avoid a contract should consider whether negotiating a mutual rescission is possible, under the circumstances, to restore the parties to their pre-contract positions without the time and expense involved in litigating a future breach.

Cross Reference:

Discussion of seeking or opposing rescission in contract actions, see Ch. 8, Seeking or Opposing Equitable Remedies in Contract Actions.

2.13[3] Plaintiff May Unilaterally Rescind Contract Under Certain Circumstances. A party seeking to avoid a contract may unilaterally rescind the contract in any of the following circumstances [CC § 1689(b)]:

- The rescinding party's consent to the contract was given by mistake or obtained through duress, menace, fraud, or undue influence.
- The consideration for the rescinding party's obligation failed, in whole or in part, through the fault of the other party.
- The consideration for the rescinding party's obligation is entirely void.
- The consideration for the rescinding party's obligation failed in a material respect before it was rendered.
- The contract is unlawful for reasons that do not appear in the contract and the parties are not equally at fault.
- The public interest will be prejudiced by permitting the contract to stand.
- Rescission is allowed by statute.

The rescinding party can provide notice of the rescission by informing the other party of the intention to rescind or by serving a pleading in an action seeking relief based on rescission [CC § 1691].

Cross References:

Discussion of seeking or opposing rescission of a contract, see Ch. 8, Seeking or Opposing Equitable Remedies in Contract Actions.

Discussion of raising issues of mistake, see Ch. 16, Attacking or Defending Existence of Contract--Mistake.

Discussion of raising issues of fraud, duress, menace, or undue influence, see Ch. 17, Attacking or Defending Existence of Contract--Fraud, Duress, Menace, and Undue Influence.

2.13[4] Plaintiff May Seek Reformation If Contract Does Not Express True Intention of Parties. A party may seek reformation of a written contract if the contract does not truly express the intention of the parties because of fraud, mutual mistake, or unilateral mistake [CC § 3399]. The purpose of reformation is to make a written agreement fully express the intention of the parties.

A unilateral mistake is a ground for reformation only if the other party knew or suspected the mistake at the time [CC § 3399].

Strategic Point--Plaintiff:



If the plaintiff is seeking to avoid having the contract enforced according to its terms, because of fraud or mistake, but does not want to rescind the contract, counsel should consider an action for reformation. A contract may be first revised through reformation and then specifically enforced [CC § 3402].

Cross Reference:

Discussion of seeking or opposing reformation of a contract, see Ch. 8, Seeking or Opposing Equitable Remedies in Contract Actions.

Legal Topics:

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

Civil ProcedureDeclaratory Judgment ActionsGeneral OverviewContracts LawRemediesGeneral OverviewContracts LawRemediesReformationContracts LawRemediesRescission & Redhibition



65 of 175 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 3 Determining Jurisdiction and Venue in Contract Actions

1-3 MB Practice Guide: CA Contract Litigation 3.syn

§ 3.syn Synopsis to Chapter 3: Determining Jurisdiction and Venue in Contract Actions

3.01 Scope.

3.02 Objective and Strategy.

3.03 CHECKLIST: Determining If Contract Action Can Be Brought in California.

3.04 Options and Strategy.

3.05 Action May Be Brought in California If Court Has Both Subject Matter Jurisdiction and Personal Jurisdiction.

3.05[1] Subject Matter Jurisdiction Addresses Court's Authority to Hear Action.

3.05[2] Personal Jurisdiction Addresses Court's Authority to Enter Judgment Against a Particular Party.

3.05[3] Both Subject Matter Jurisdiction and Personal Jurisdiction Are Required for Valid Judgment.

3.06 Forum Selection Clause in Contract May Determine Personal Jurisdiction.

3.06[1] Courts Routinely Uphold Forum Selection Clauses.

3.06[2] Some Types of Contractual Forum Selection Clauses Are Prohibited by Statute.

3.06[2][a] Construction Subcontracts May Not Select Forum Outside California.

3.06[2][b] Franchise Agreements May Not Require Venue Outside California.

3.06[2][c] Forum Selection Clauses Designating Forum Outside California Are Unenforceable in Small Claims Court Actions.

3.06[3] Court May Decline to Enforce Forum Selection Clause.

3.06[3][a] Forum Selection Clause Must Be Fair and Reasonable.

3.06[3][b] Valid Basis Must Exist for Chosen Forum.

3.06[3][c] Clause Is Unenforceable If Law of Chosen Forum Is Contradictory to Fundamental Policy of California.

3.06[3][d] Clause Will Not Be Enforced Unless It Provides Adequate Notice.

3.06[3][e] Forum Selection Language Must Be Clear and Unambiguous.

3.07 Determining If Superior Courts Have Personal Jurisdiction Over Party to Contract Action.

3.07[1] California Long-Arm Statute Governs Personal Jurisdiction.

3.07[2] Personal Jurisdiction Over Individuals Exists for Specific Acts.

3.07[2][a] Examples of Personal Jurisdiction Contained in Judicial Council Comments.

3.07[2][b] Voluntary Presence in California Establishes Personal Jurisdiction.

3.07[2][c] Person Domiciled in California Establishes Personal Jurisdiction.

3.07[2][d] California Citizenship Establishes Personal Jurisdiction.

3.07[2][e] Consent Establishes Personal Jurisdiction.

3.07[2][f] Making a General Appearance Establishes Personal Jurisdiction.

3.07[2][g] Doing Business in California As an Individual Establishes Personal Jurisdiction.

3.07[2][h] Doing an Act in California As an Individual Establishes Personal Jurisdiction.

3.07[2][i] Causing Effect in California by Act Done Elsewhere Establishes Personal Jurisdiction.

3.07[2][j] Individual Ownership, Use, or Possession of Thing in California Establishes Personal Jurisdiction.

3.07[2][k] Other Individual Relationships May Establish Personal Jurisdiction.

3.07[2][l] Plaintiff's Filing of Action in California Establishes Personal Jurisdiction.

3.07[3] Personal Jurisdiction Over Corporations Depends on Domestic or Foreign Status.

3.07[3][a] Domestic Corporations Are Subject to California Jurisdiction Even If Corporation Does No Business in State.

3.07[3][b] Foreign Corporations May Consent to Jurisdiction.

3.07[3][c] Foreign Corporations May Appoint Agent for Service of Process.

3.07[3][d] Foreign Corporations May Enter Appearance.

3.07[3][e] Foreign Corporation Doing Business in California Is Subject to Jurisdiction.

3.07[3][f] Foreign Corporation Doing Act in California Is Subject to Jurisdiction.

3.07[3][g] Foreign Corporation Causing Effect in California by Act Done Elsewhere Is Subject to Jurisdiction.

3.07[3][h] Foreign Corporate Ownership, Use, or Possession of Tangible Thing in California Is Subject to Jurisdiction.

3.07[3][i] Other Foreign Corporate Relationships May Subject Corporation to Jurisdiction.

3.07[3][j] Partnerships and Limited Liability Companies Doing Business in California Are Subject to Personal Jurisdiction.

3.07[4] Nonresident Defendants Must Have Minimum Contacts With California to Satisfy Constitutional Requirements for Personal Jurisdiction.

3.07[4][a] Fourteenth Amendment Requires Defendant to Have Minimum Contacts With California.

3.07[4][b] Individuals and Corporations Are Treated Similarly, but Scope of Jurisdiction May Be Limited With Corporate Defendant.

3.07[4][c] Scope of Jurisdiction Over General Partnership and Partner May Be Limited.

3.07[4][d] Commercial Acts Without Physical Entry Into California May Satisfy Minimum Contacts Test.

3.07[4][e] Electronic Communications Without Physical Entry May Establish Minimum Contacts.

3.07[4][f] Internet Activity, by Itself, Generally Does Not Establish Minimum Contacts.

3.07[4][g] Personal Jurisdiction May Be Denied Despite Minimum Contacts If California Action Would Offend Traditional Notions of Fair Play and Substantial Justice.

3.07[4][h] Foreign National Defendants Given Extra Consideration.

3.07[5] Immunity May Prevent Jurisdiction Over Defendant.

3.07[5][a] Diplomats, Legislators, and Members of Congress Are Immune to Civil Action.

3.07[5][b] National Banks Without a Branch Office in California Are Not Subject to Suit.

3.07[5][c] Witnesses in Criminal Proceedings Are Not Subject to Service of Process and Extradited Criminal Defendants Are Protected for Specified Period.

3.08 Determining If Superior Courts Have Subject Matter Jurisdiction Over Contract Action.

3.08[1] Subject Matter Jurisdiction Established by State Constitution.

3.08[2] Subject Matter Jurisdiction Cannot Be Conferred or Defect Waived.

3.08[3] Concurrent Subject Matter Jurisdiction May Exist.

3.08[4] Classification of California Cases for Jurisdictional Purposes.

3.08[4][a] Cases Are Classified As "Limited" or "Unlimited."

3.08[4][b] Small Claims Court Jurisdiction Is Limited to Amounts Not Exceeding \$5,000.

3.09 Forum May Be "Inconvenient" Even If Jurisdiction Exists.

3.09[1] Court May Stay or Dismiss Action If Forum Is Inconvenient.

3.09[2] Defendant Must Raise Issue by Motion or Objection Is Waived.

3.09[3] Suitable Alternative Forum Must Exist.

3.09[4] Private Factors May Affect Suitability of Alternative Forum.

3.09[5] Public Factors May Affect Suitability of Alternative Forum.

3.09[6] Some Actions Are Not Subject to Forum Non Conveniens Motion.

3.09[7] Moving Party Has Burden of Proof.

3.10 CHECKLIST: Determining If Contract Action Can Be Brought in Federal Court.

3.11 Determining If Federal Courts Have Personal Jurisdiction Over Party to Contract Action.

3.12 Determining If Federal Courts Have Subject Matter Jurisdiction Over Contract Action.

3.12[1] Federal Question Jurisdiction May Exist.

3.12[2] Diversity Jurisdiction May Exist.

3.12[2][a] Federal Diversity Jurisdiction Is Controlled by Statute.

3.12[2][b] Amount in Controversy Must Exceed \$75,000.

3.12[3] Subject Matter Jurisdiction Cannot Be Conferred or Defect Waived.

3.12[4] "Case or Controversy" Must Exist.

3.12[4][a] Dispute Must Provide Actual, Immediate, and Concrete Controversy.

3.12[4][b] Case Must Not Be Moot.

3.12[4][c] Plaintiff Must Have Standing to Sue Based on Personal Stake in the Matter.

3.12[4][d] Case Presenting "Political Question" Cannot Be Judicially Decided.

3.12[5] Supplemental Jurisdiction Extends Federal Court Subject Matter Jurisdiction.

3.13 CHECKLIST: Choosing California or Federal Forum If Both Options Are Available.

3.14 Personal Jurisdiction Is the Same.

3.15 Pleading Requirements Are Generally the Same.

3.16 Substantive Law Is the Same for Federal Cases With Diversity Jurisdiction.

3.17 Discovery Procedures Differ.

3.18 Juries May Differ.

3.19 Judicial Assignments May Differ.

3.20 State Court May Be More Amenable to Class Actions.

3.21 Evidence Rules May Differ.

3.22 Federal Magistrate Can Facilitate Case Management.

3.23 CHECKLIST: Challenging California Court Jurisdiction.

3.24 Challenging Superior Court Personal Jurisdiction.

3.24[1] Defendant Must Move to End Action Immediately Without Submitting to California Jurisdiction.

3.24[2] Defendant Must Avoid Making a General Appearance, Which Waives Objection to California Jurisdiction.

3.24[3] Motion Must Be Served and Filed on or Before Last Day to Plead.

3.25 Challenging Superior Court Subject Matter Jurisdiction.

3.25[1] Challenge to Subject Matter Jurisdiction May Be Raised by Demurrer, Affirmative Defense, or Motion to Dismiss.

3.25[2] Challenge May Be Made at Any Time.

3.26 CHECKLIST: Challenging Federal Court Jurisdiction.

3.27 Challenging Federal Court Personal Jurisdiction.

3.27[1] Procedures for Challenging Personal Jurisdiction.

3.27[2] Avoiding Waiver of Objection to Personal Jurisdiction.

3.28 Challenging Federal Court Subject Matter Jurisdiction.

3.28[1] Federal Subject Matter Jurisdiction May Be Challenged by Asserting Lack of Federal Question.

3.28[2] Federal Subject Matter Jurisdiction May Be Challenged by Asserting Lack of Diversity.

3.28[3] Federal Subject Matter Jurisdiction May Be Challenged by Asserting Lack of Case or Controversy.

3.29 CHECKLIST: Removing a California Contract Action to Federal Court.

3.30 Removing a State Contract Action to Federal Court.

3.30[1] Availability of Removal Option in Contract Cases.

3.30[2] Options and Strategies for Party Seeking to Remove Contract Action.

3.30[3] Grounds for Removal.

3.30[3][a] Federal Question Is Basis for Removal.

3.30[3][b] Diversity of Citizenship Is Basis for Removal.

3.30[3][c] Special Removal Statute Is Basis for Removal.

3.30[4] Procedure for Seeking Removal.

3.30[4][a] Notice Must Be Filed in Proper Court.

3.30[4][b] Notice Must Specify Grounds for Removal.

3.30[4][c] Notice Generally Must Be Filed Within 30-Day Period.

3.30[4][d] Notice Must Be Given to Adverse Parties and Clerk of State Court.

3.31 CHECKLIST: Determining Proper Venue.

3.32 Venue Rules Limit Appropriate Places for Litigation.

3.32[1] Statute Dictates Venue Selection.

3.32[2] Special Venue Rule Applies to Consumer Obligations and Consumer Contracts.

3.32[3] Special Venue Rule Applies to Actions Involving City or County.

3.32[4] Special Venue Rule Applies to Actions Involving the State.

3.32[5] Actions Against Corporations Have Broader Venue Than Those Against Individual Defendants.

3.32[6] Actions Are Classified As "Transitory" or "Local" for Venue Purposes.

3.32[6][a] "Transitory" Actions Are Those in Which Claim Could Have Arisen Anywhere.

3.32[6][b] "Local" Actions Are Those Dealing With Land or Other Local Relationships.

3.32[6][c] Transitory Action Dictates Venue in Mixed Actions.

3.32[7] Venue Selection Clauses Are Not Permitted.

3.33 Challenging and Changing Venue.

3.33[1] County Where Complaint Was Filed Is Presumptively Proper County for Trial.

3.33[2] Change of Venue May Be Requested for Valid Reason.



66 of 175 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 3 Determining Jurisdiction and Venue in Contract Actions

I. STRATEGY

1-3 MB Practice Guide: CA Contract Litigation 3.01

3.01 Scope.

This chapter covers:

- Understanding the objective and strategy for choosing jurisdiction and venue in contract actions [see 3.02].
- Evaluating whether there is a valid forum selection clause [see 3.06], and whether the facts might cause a court to decline to enforce it [see 3.06[3]].
- Determining whether a California superior court may exercise personal jurisdiction over a party in the action [see 3.05, 3.07].
- Determining whether a California superior court has subject matter jurisdiction over the type of contract action involved [see 3.05, 3.08].
- Determining whether a federal court may exercise personal jurisdiction over a party in the action [see 3.11].
- Determining whether a federal court has subject matter jurisdiction over the type of contract action involved [see 3.12].
- Determining whether a party may be immune from suit [see 3.07[5]].
- Analyzing the doctrine of forum non conveniens, including the suitability of an alternate forum [see 3.09[3]], the private factors involved [see 3.09[4]], and the public factors involved [see 3.09[5]].
- Analyzing advantages and disadvantages of state and federal court options if both are available [see 3.14 -3.22].
- Determining how and when to challenge superior court jurisdiction [see 3.24, 3.25], including challenging personal jurisdiction [see 3.24] and challenging subject matter jurisdiction [see 3.25].

- Determining how and when to challenge federal court jurisdiction [see 3.27, 3.28], including challenging personal jurisdiction [see 3.27] and challenging subject matter jurisdiction [see 3.28].
- Determining how and when to seek removal of contract action to federal court [see 3.30].
- Determining the proper venue for contract actions [see 3.32].
- Analyzing how to challenge venue [see 3.33].

Core Statutes:

CCP §§ 395, 395.5, 410.10; 28 USC §§ 1331, 1332, 1338

Legal Topics:

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

Civil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsGeneral OverviewCivil ProcedureVenueGeneral OverviewContracts LawContract Conditions & ProvisionsForum Selection Clauses



67 of 175 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 3 Determining Jurisdiction and Venue in Contract Actions

I. STRATEGY

1-3 MB Practice Guide: CA Contract Litigation 3.02

3.02 Objective and Strategy.

Enforceable jurisdiction and venue are key components to any lawsuit. Although a jurisdictional defect may be waived if not timely challenged through appropriate procedures, it is best to obviate the cost and expense of litigating an issue that can be properly determined from the outset.

To effectively defend a lawsuit, counsel can save time and expense by correctly analyzing whether jurisdiction and venue are proper. If not, counsel can protect a client from imposition of inappropriate personal jurisdiction. Counsel should analyze the following issues:

- Is there a valid and enforceable forum selection clause [*see 3.06*]?
- Are both subject matter jurisdiction and personal jurisdiction present [*see 3.05[3]*]?
- Will the court have personal jurisdiction over the parties in the action [*see 3.07, 3.11*]?
- Will the court selected for the action have subject matter jurisdiction [*see 3.08, 3.12*]?
- Do any of the parties have immunity from suit [*see 3.07[5]*]?
- Even if personal jurisdiction exists, is the chosen forum unfairly inconvenient [*see 3.09*]?
- Is venue proper [*see 3.32*]?
- Is removal from state to federal court an available option [*see 3.30*]?

Although an attorney may have a preference for state or federal court, whether due to familiarity with the rules, the basic scope of practice, or the location of the courthouse, the inquiry should focus on which court would be more beneficial to the client, considering whether:

- Federal subject matter jurisdiction exists, either because of a federal question or diversity of the parties' home jurisdictions [*see 3.12*].

- A party may be joined or dismissed, resulting in the possibility of removal or remand.
- The differences in either procedure or jury and judicial profiles may be more or less favorable to the client in federal or state court [see 3.17 -3.19].
- The magistrate judge and the tighter discovery coordination, common in federal (as opposed to state) court, are favorable to the client [see 3.22].

**Cross Reference:**

For Tips on updating case law and expanding your research with additional resources, see **How to Use Lexis.com With This Publication** at the front of this volume.

Legal Topics:

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

Civil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsGeneral OverviewCivil
ProcedureJurisdictionSubject Matter JurisdictionGeneral OverviewCivil ProcedureVenueGeneral OverviewContracts
LawContract Conditions & ProvisionsForum Selection Clauses



68 of 175 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 3 Determining Jurisdiction and Venue in Contract Actions

II. DETERMINING IF CONTRACT ACTION CAN BE BROUGHT IN CALIFORNIA

1-3 MB Practice Guide: CA Contract Litigation 3.03

3.03 CHECKLIST: Determining If Contract Action Can Be Brought in California.

- ☐ Determine whether contract contains a forum selection clause.

Discussion:

See 3.06

- ☐ Determine if subject matter jurisdiction exists.

- ☐ Is case classified as unlimited, limited, or small claims?

Authority:

Cal Const, art VI, §§ 10, 11; CCP §§ 85, 86, 86.1

Discussion:

See 3.08

- ☐ Determine if personal jurisdiction exists for a California court to issue a binding judgment over defendant based on defendant's status or conduct:

- ☐ Does defendant's conduct or status match one of the grounds for personal jurisdiction under California long-arm statute?

Authority:

CCP § 410.10

Discussion:

See 3.07

☐ Is defendant a domestic or foreign corporation?

☐ If defendant is foreign corporation, has defendant consented to California personal jurisdiction or acted in a manner that will bring it under California long-arm statute?

Authority:

CCP § 410.10

Discussion:

See 3.07[3]

☐ If defendant is not a California resident, does defendant have sufficient minimum contacts with California to satisfy constitutional requirements?

Authority:

Shaffer v. Heitner (1977) 433 US 186, 198-200, 97 S Ct 2569, 53 L Ed2d 683 ; International Shoe Co. v. Wash. (1945) 326 US 310, 316 ; Burger King Corp. v. Rudzewicz (1985) 471 US 462, 474, 105 S Ct 2174, 85 L Ed2d 528

Discussion:

See 3.07[4]

☐ Does defendant have a type of immunity that would prevent obtaining jurisdiction?

Authority:

22 USC § 254d; 12 USC § 94; Pen Code §§ 1334.4, 1555

Discussion:

See 3.07[5]

☐ Determine whether forum is convenient.

Discussion:

See 3.09

☐ Does a suitable alternative forum exist?

Discussion:

See 3.09[3]

☐ Do private factors support the alternative forum?

Discussion:

See 3.09[4]

☐ Do public factors support the alternative forum?

Discussion:

See 3.09[5]

Legal Topics:

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

Civil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsGeneral OverviewCivil

ProcedureJurisdictionSubject Matter JurisdictionGeneral OverviewCivil ProcedureVenueGeneral OverviewContracts

LawContract Conditions & ProvisionsForum Selection Clauses



69 of 175 DOCUMENTS

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Chapter 3 Determining Jurisdiction and Venue in Contract Actions
II. DETERMINING IF CONTRACT ACTION CAN BE BROUGHT IN CALIFORNIA

1-3 MB Practice Guide: CA Contract Litigation 3.04

3.04 Options and Strategy.

The traditional bases for obtaining jurisdiction over a defendant include [*see, e.g., Burnham v. Superior Court (1990) 495 US 604, 110 S Ct 2105, 109 L Ed2d 631*] :

- Filing suit in the defendant's home state.
- Filing suit anywhere the defendant has consented to jurisdiction.
- Filing suit anywhere the defendant has waived the right to object to jurisdiction.
- Filing suit anywhere the defendant can be found.

Usually, the plaintiff determines where to file suit, choosing any forum where jurisdiction over the defendant can be obtained and venue is proper. Defendant's express consent to jurisdiction is unnecessary if one of the traditional bases of personal jurisdiction, such as domicile or presence, is available [*see, e.g., De Young v. De Young (1946) 27 C2d 521, 524, 165 P2d 457*] . Other relevant factors affecting plaintiff's choice include:

- Whether the action is a class action.
- Whether the cost and expense of litigating in California is relatively favorable.
- Whether there are potential statute of limitations issues.

Legal Topics:

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

Civil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsGeneral OverviewCivil
ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Personam ActionsGeneral OverviewCivil
ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Personam ActionsLong-Arm JurisdictionCivil
ProcedureVenueGeneral Overview



70 of 175 DOCUMENTS

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Chapter 3 Determining Jurisdiction and Venue in Contract Actions
II. DETERMINING IF CONTRACT ACTION CAN BE BROUGHT IN CALIFORNIA

1-3 MB Practice Guide: CA Contract Litigation 3.05

3.05 Action May Be Brought in California If Court Has Both Subject Matter Jurisdiction and Personal Jurisdiction.

3.05[1] Subject Matter Jurisdiction Addresses Court's Authority to Hear Action. Jurisdiction, in its broadest sense, is the power to hear and determine causes [*Abelleira v. District Court of Appeal* (1941) 17 C2d 280, 288 ; *People v. National Auto. & Cas. Co.* (2000) 82 CA4th 120, 125-126, 97 CR2d 858] . Subject matter jurisdiction is the court's power to hear and resolve a particular dispute or cause of action in a particular way and is the authority of a court to try actions of the type or class to which the suit belongs [*Donaldson v. National Marine, Inc.* (2005) 35 C4th 503, 512 ; *Greener v. Workers' Comp. Appeals Bd.* (1993) 6 C4th 1028, 1035, 25 CR2d 539, 863 P2d 784] .

Example:

While California courts can hear a myriad of types of actions involving torts, contracts, unfair competition, and so on under the grant of general jurisdiction by the California Constitution [*Cal Const, art VI, § 10*], California state courts generally cannot hear actions on patents because 28 USC § 1338 provides for exclusive subject matter jurisdiction for these actions in federal court [*Holiday Matinee, Inc. v. Rambus, Inc.* (2004) 118 CA4th 1413, 1422] .

Distinguish:

Actions for breach of a patent licensing agreement arise under state law, notwithstanding the potential for state adjudication of federal patent law issues [*Applera Corp. v. MP Biomedicals, LLC* (2009) 173 CA4th 769, 782, 93 CR3d 178 (plaintiff could prove breach of agreement to pay royalties on products sold under a patent licensing agreement without invoking federal patent law)].

➡ Cross References:

Detailed discussion of superior court subject matter jurisdiction, see 3.08.

Detailed discussion of federal court subject matter jurisdiction, see 3.12.

Discussion of opposing superior court subject matter jurisdiction, see 3.25.

Discussion of opposing federal court subject matter jurisdiction, see 3.28.

3.05[2] Personal Jurisdiction Addresses Court's Authority to Enter Judgment Against a Particular Party.

Personal jurisdiction relates to the court's power to bind a particular *party*, and depends on the party's presence, contacts, or other conduct within the forum state [*Donaldson v. National Marine, Inc.* (2005) 35 C4th 503, 512] . Personal jurisdiction in California is governed by the California long-arm statute [CCP § 410.10], which intends to confer on California courts the broadest possible personal jurisdiction, limited only by constitutional considerations [*Sibley v. Superior Court* (1976) 16 C3d 442, 445, 128 CR 34, 546 P2d 322] .

If the defendant is a current resident of California, personal jurisdiction is a fairly simple matter because California courts may exercise judicial jurisdiction over California residents [see CCP § 410.10 Judicial Council cmt; *Muckle v. Superior Court* (2002) 102 CA4th 218, 229-230, 125 CR2d 303] . However, nonresident defendants do not come under the personal jurisdiction of a state court unless there exist certain "minimum contacts" with the forum state so that maintenance of the suit does not offend traditional notions of fair play and substantial justice [*International Shoe Co. v. Wash.* (1945) 326 US 310, 316] .

Example:

An Oregon borrower who sued a creditor for breach of a loan agreement could not also obtain jurisdiction against the creditor's parent corporation, because the parent corporation did not have substantial, continuous, and systematic contacts with California. "[A] parent company's ownership or control of a subsidiary corporation does not, without more, subject the parent corporation to the jurisdiction of the state where the subsidiary does business" [*DVI, Inc. v. Superior Court* (2002) 104 CA4th 1080, 1087, 128 CR2d 683] . In this case, the parent corporation had no contact with California and conducted no business there except for its ownership of the creditor subsidiary [*DVI, Inc. v. Superior Court* (2002) 104 CA4th 1080, 128 CR2d 683] .

Judge's Perspective:

A dominant consideration in determining jurisdiction in a breach of contract action is whether the defendant had any connection to the state in the negotiation or performance of the contract. If so, the court likely has at least specific jurisdiction over the defendant. See *Virtualmagic Asia, Inc. v. Fil-Cartoons, Inc.* (2002) 99 CA4th 228, 121 CR2d 1 (although defendant corporation was not domiciled in California, negotiation meetings for animation contract took place in California, and some work was performed there); *Pedus Building Services, Inc. v. Allen* (2002) 96 CA4th 152, 116 CR2d 542 (although defendant did not conduct plaintiff's business in California, he made regular administrative visits to the state while employed by plaintiff, and traveled to California to negotiate his termination agreements; thus, he purposefully availed himself of the forum and jurisdiction was proper). There was no similar evidence in DVI.

**Cross References:**

Detailed discussion of superior court personal jurisdiction, see 3.07.

Detailed discussion of federal court personal jurisdiction, see 3.11.

Discussion of opposing superior court personal jurisdiction, see 3.24.

Discussion of opposing federal court personal jurisdiction, see 3.27.

3.05[3] Both Subject Matter Jurisdiction and Personal Jurisdiction Are Required for Valid Judgment.

Lack of subject matter jurisdiction is such a basic defect that it renders a judgment void, and the defect can be raised at any stage of the proceedings, including being raised for the first time on appeal [*Residents for Adequate Water v. Redwood Valley County Water Dist.* (1995) 34 CA4th 1801, 1805, 41 CR2d 123 ; *Miranda v. 21st Century Ins. Co.* (2004) 117 CA4th 913, 920] .

**Strategic Point--Both Parties:**

Both parties should be mindful from the very outset of whether or not subject matter jurisdiction exists and, when in doubt, raise the issue at the earliest possible opportunity. There is no potential benefit in avoiding the issue, because it can be raised at any time by any party or the court. The later it is raised, the more money and time are wasted if a dismissal results [*see also* 3.25[2]].

A judgment by a court that lacks personal jurisdiction violates the *Due Process Clause of the Fourteenth Amendment* [*Kulko v. Superior Court* (1978) 436 US 84, 101, 98 S Ct 1690, 56 L Ed2d 132] .

The objection to personal jurisdiction in California must be made on or before the last day of the time to plead, which generally is 30 days after being served with summons, or the objection is waived [*see CCP §§ 418.10, 412.20*].

**Cross References:**

Discussion of opposing superior court subject matter jurisdiction, see 3.25.

Discussion of opposing federal court subject matter jurisdiction, see 3.28.

Discussion of opposing superior court personal jurisdiction, see 3.24.

Discussion of opposing federal court personal jurisdiction, see 3.27.

Legal Topics:

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

Civil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsGeneral OverviewCivil
ProcedureJurisdictionSubject Matter JurisdictionGeneral Overview



71 of 175 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 3 Determining Jurisdiction and Venue in Contract Actions

II. DETERMINING IF CONTRACT ACTION CAN BE BROUGHT IN CALIFORNIA

1-3 MB Practice Guide: CA Contract Litigation 3.06

3.06 Forum Selection Clause in Contract May Determine Personal Jurisdiction.

3.06[1] Courts Routinely Uphold Forum Selection Clauses. Contracting parties may consent to jurisdiction by a court other than one that would have jurisdiction by statute or under case law, and such contractual forum selection clauses routinely are upheld [see, e.g., *Carnival Cruise Lines, Inc. v. Shute* (1991) 499 US 585, 590-595, 111 S Ct 1522, 113 L Ed2d 622 ; *National Equip. Rental Ltd. v. Szukhent* (1964) 375 US 311, 315-316, 84 S Ct 411, 11 L Ed2d 354] . This is true even if the chosen forum is far from the plaintiff's base of operations [see *Intershop Communications AG v. Superior Court* (2002) 104 CA4th 191, 196-198, 127 CR2d 847] .

A defendant seeking to enforce a forum selection clause may move to stay or dismiss the action on the ground of inconvenient forum [CCP §§ 410.30(a), 418.10(a)(1); see *Miller-Leigh LLC v. Henson* (2007) 152 CA4th 1143, 1149-1150, 62 CR3d 83 (party seeking to enforce forum selection clause cannot do so by means of demurrer asserting lack of subject matter jurisdiction)].

**Warning:**

The defendant must make the motion at the time of filing a demurrer, or waive the issue [CCP § 418.10(e)(3)].

**Strategic Point:**

If a lawsuit alleges contract and tort claims arising from a common nucleus of facts, a contract's forum selection clause applies to both [see *Cal-State Bus. Prods. & Servs., Inc. v. Ricoh* (1993) 12 CA4th 1666, 1677, 16 CR2d 417 ; *Olinick v. BMG Entertainment* (2006) 138 CA4th 1286, 1300-1301, 42 CR3d 268 (forum selection clause in employment agreement applies to age discrimination claim)].

**Search California Points and Authorities:**

Use *lexis.com* to search for documents discussing jurisdiction issues:

- Legal > States Legal--U.S. > California > Search Analysis & CLE Materials > CA Treatises &

Analytical Materials > California Points & Authorities



Sample Search: To find forms pertaining to questions of jurisdiction in actions involving both contract and tort claims, run the following search: *contract! w/8 tort! and juris!.*

Drawback:

If "parties to a valid and enforceable contractual choice of law provision make an unqualified choice to govern the resolution of their disputes by the 'laws' of a foreign jurisdiction, a trial court may not choose to enforce some but not all of the applicable laws of that jurisdiction" [*Hughes Elecs. Corp. v. Citibank Delaware* (2004) 120 CA4th 251, 256] . Note that although *Hughes* involved a choice of law provision rather than a forum selection clause, forum selection clauses (especially those also containing choice of law provisions) may affect substantive law issues.

**Cross References:**

Discussion of forum non conveniens, see 3.09.

Discussion of forum selection clauses, see California Forms of Pleading and Practice, Ch. 323, Jurisdiction: Personal Jurisdiction, Inconvenient Forum, and Appearances (Matthew Bender).

3.06[2] Some Types of Contractual Forum Selection Clauses Are Prohibited by Statute.

3.06[2][a] Construction Subcontracts May Not Select Forum Outside California. A forum selection clause that attempts to require disputes between a contractor and a subcontractor with principal offices in California to be determined outside California is void and unenforceable [CCP § 410.42].

3.06[2][b] Franchise Agreements May Not Require Venue Outside California. Forum selection clauses in franchise agreements restricting venue to a forum outside California are void with respect to any claim arising under or relating to a franchise agreement involving a franchise business operating within California [B&P Code § 20040.5]. This statutory means of avoiding foreign-state forum selection in franchise agreements embodies a strong public policy interest in precluding enforcement of such clauses [see *Jones v. GNC Franchising, Inc.* (9th Cir 2000) 211 F3d 495, 497] .

**Cross Reference:**

Discussion of forum selection clauses in contradiction of fundamental policy of California, see 3.06[3][c].

3.06[2][c] Forum Selection Clauses Designating Forum Outside California Are Unenforceable in Small Claims Court Actions. In actions subject to small claims court jurisdiction that concern the sale of goods, services, or property and arise out of agreements entered into or renewed on or after January 1, 2003, forum selection clauses in the agreements that provide for a forum outside California are void and unenforceable [CCP § 116.225].

Cross Reference:

Discussion of small claims jurisdiction, see 3.08[4][b].

3.06[3] Court May Decline to Enforce Forum Selection Clause.

3.06[3][a] Forum Selection Clause Must Be Fair and Reasonable. A forum selection clause does not, by itself, automatically defeat jurisdiction; it is one factor considered by a court when deciding whether to stay or dismiss an action under the doctrine of forum non conveniens [see *Cal-State Bus. Prods. & Servs., Inc. v. Ricoh* (1993) 12 CA4th

1666, 1682-1683, 16 CR2d 417 ; *Smith, Valentino & Smith, Inc. v. Superior Court* (1976) 17 C3d 491, 494-496, 131 CR 374, 551 P2d 1206] .



Strategic Point:

The enforceability of a forum selection clause pertaining to the parties' agreed choice of governing law must be separately analyzed.



Cross Reference:

Discussion of choice of law clauses, see Ch. 1, Determining the Applicable Law.

If the forum selection clause is mandatory and valid, it is enforceable notwithstanding convenience factors to the contrary [see *Intershop Communications AG v. Superior Court* (2002) 104 CA4th 191, 196, 127 CR2d 847] . In order for a forum selection clause to be unreasonable, the inconvenience must be so grave that it effectively deprives the litigants of their day in court [*The Bremen v. Zapata Off-Shore Co.* (1972) 407 US 1, 17-18, 92 S Ct 1907, 32 L Ed2d 513] . Courts will enforce a contract's forum selection clause voluntarily negotiated at arm's length unless enforcement would be unfair or unreasonable [*Smith, Valentino & Smith, Inc. v. Superior Court* (1976) 17 C3d 491, 495-496, 131 CR 374, 551 P2d 1206] .

If the clause is valid and permissive--that is, it merely provides for submission to a particular forum but does not require that litigation be exclusively handled in that forum--the traditional forum non conveniens analysis applies [see *Intershop Communications AG v. Superior Court* (2002) 104 CA4th 191, 127 CR2d 847] .

Example--Reasonable Forum Selection:

Neither added inconvenience nor additional litigation expense is generally considered "unreasonable" [see, e.g., *Cal-State Bus. Prods. & Servs., Inc. v. Ricoh* (1993) 12 CA4th 1666, 1679, 16 CR2d 417 ; *Hall v. Superior Court* (1983) 150 CA3d 411, 416, 197 CR 757 ; *Smith, Valentino & Smith, Inc. v. Superior Court* (1976) 17 C3d 491, 496, 131 CR 374, 551 P2d 1206] .

Example--Unreasonable Forum Selection:

A forum selection clause that requires California customers to travel to Georgia to recover \$40 or \$50 from their Internet service provider effectively deprives them of their day in court and is unreasonable [*Aral v. Earthlink, Inc.* (2005) 134 CA4th 544, 561, 36 CR3d 229] .



Cross Reference:

Discussion of forum non conveniens, see 3.09[1] -[7].

3.06[3][b] Valid Basis Must Exist for Chosen Forum. Absent some logical nexus between either the forum and one of the parties or the forum and the dispute, a forum selection clause will be unenforceable [*America Online v. Superior Court* (2001) 90 CA4th 1, 12, 108 CR2d 699 ; see *Nedlloyd Lines, B.V. v. Superior Court* (1992) 3 C4th 459, 464-465, 11 CR2d 330, 834 P2d 1148] .

Examples--Adequate Bases for Forum Selection:

- A party's incorporation in a state is sufficient contact to allow the parties to choose that state's law to govern their contract [*Nedlloyd Lines, B.V. v. Superior Court* (1992) 3 C4th 459, 467, 11 CR2d 330, 834 P2d 1148] .

- A party's residence in a forum provides a sufficient basis for a forum selection clause [*Hughes Elecs. Corp. v. Citibank Delaware* (2004) 120 CA4th 251, 258] .

- A particular forum's expertise in a subject may be sufficient as a basis for choosing that forum. For instance, in a case between a New Jersey corporation and a California resident, a forum selection clause choosing New York as the forum was upheld because New York courts have a great deal of familiarity with commercial litigation, since New York is a major commercial center [*Cal-State Bus. Prods. & Servs., Inc. v. Ricoh* (1993) 12 CA4th 1666, 1682, 16 CR2d 417] .

Distinguish:

California courts will uphold a California choice of law provision if the transaction in question involves at least \$250,000, whether or not it bears a reasonable relationship to California as a forum provided the contract is not one for personal services, does not relate to any transaction primarily for personal, family, or household purposes, and is not subject to UCC limitations [see *Com Code § 1105(2)*] relating to choice of law [CC § 1646.5; see Ch. 1, Determining the Applicable Law].

3.06[3][c] Clause Is Unenforceable If Law of Chosen Forum Is Contradictory to Fundamental Policy of California. California courts will not enforce a forum selection clause if doing so would substantially "diminish the rights of California residents in a way that violates [the state's] public policy" [*America Online v. Superior Court* (2001) 90 CA4th 1, 12-13, 108 CR2d 699] . If enforcing a forum selection clause would specifically contravene a California law, or otherwise curtail the rights of its citizens, a court will not enforce the forum selection [see, e.g., *Jones v. GNC Franchising, Inc.* (9th Cir 2000) 211 F3d 495, 497 ; *ABF Capital Corp. v. Grove Properties Co.* (2005) 126 CA4th 204] .

Examples:

- In *America Online v. Superior Court* [*America Online v. Superior Court* (2001) 90 CA4th 1, 108 CR2d 699] , a corporation relied on a contractual forum selection clause and choice of law provision designating Virginia as the forum state. A California court refused to dismiss a consumer class action, despite the forum selection clause, because doing so would have violated a fundamental policy embodied in the California Consumers Legal Remedies Act (CLRA), which contains a provision that voided any purported waiver of rights under the CLRA as contrary to California public policy. Enforcement of the forum selection clause would have been the functional equivalent of a contractual waiver of the consumer protections under the CLRA and therefore was prohibited under California law. In addition, because Virginia laws did not provide for consumer class-action lawsuits, the available remedies were more limited, and the rights of the California consumer class members would have been substantially diminished had they been required to litigate the dispute in Virginia, thereby violating the important California public policy of consumer protection [*America Online v. Superior Court* (2001) 90 CA4th 1, 108 CR2d 699 ; see *Doe 1 v. AOL LLC* (9th Cir 2009) 552 F3d 1077 (holding same forum selection clause unenforceable under federal law as to California resident plaintiffs because enforcement would contravene a strong California public policy, as declared by the California Court of Appeal in *America Online v. Superior Court*)].

- A contract for the sale of securities contained both Nevada forum selection and choice of law provisions. All parties were California residents and the corporate defendant had its principal place of business in California. Despite the fact that the contract had been executed at the Las Vegas airport, the transaction at issue took place in California. The court found there had been an offer to sell or buy

securities in California, subjecting the transaction to California's securities laws. It held that buyers of securities in California had the right to have California law apply to any future dispute arising out of the transaction because this right could not be waived by stipulation of the parties to a securities transaction. The Nevada choice of law provision violated California public policy. Therefore, the forum selection clause was unreasonable [*Hall v. Superior Court* (1983) 150 CA3d 411, 418, 197 CR 757] .

- In an age discrimination claim, a New York forum selection clause in the terminated employee's employment agreement was enforceable because New York provided an adequate remedy for age discrimination, there was no reason to believe that New York courts were less likely than California courts to enforce anti-discrimination laws, and unlike other statutory schemes, FEHA does not contain an antiwaiver provision [*Olinick v. BMG Entertainment* (2006) 138 CA4th 1286, 1301-1305, 42 CR3d 268] .

- A choice-of-law provision in a manufacturer's consumer contract was unenforceable because the contract contained a class action waiver that was unconscionable under California law, and California had a materially greater interest than Texas in applying its own law [*Omstead v. Dell, Inc.* (9th Cir 2010) 594 F3d 1081, 1086-1087] .

Drawback:

Forum selection clauses generally are considered prima facie valid and enforceable unless the contesting party meets a heavy burden of proving that enforcement would be unreasonable under the circumstances [*Bancomer, S.A. v. Superior Court* (1996) 44 CA4th 1450, 1457, 52 CR2d 435 ; *CQL Original Prods., Inc. v. National Hockey League Players Ass'n* (1995) 39 CA4th 1347, 1354, 46 CR2d 412] . However, if the clause in question contravenes a California policy embodied by a particular statute's anti-waiver provision, the burden of proof will shift to the party seeking enforcement [see, e.g., *America Online v. Superior Court* (2001) 90 CA4th 1, 11, 108 CR2d 699 ; *Wimsatt v. Beverly Hills Weight Loss Clinics Int'l, Inc.* (1995) 32 CA4th 1511, 1522, 38 CR2d 612] .

Cross Reference:

Discussion of disputing terms in a contract, see Ch. 13, Attacking or Defending Existence of Contract--Absence of Essential Element.

3.06[3][d] Clause Will Not Be Enforced Unless It Provides Adequate Notice. Even if one party does not actually read the forum selection provision, the provision will be upheld as long as the clause provides adequate notice of agreement to the jurisdiction [see, e.g., *Schlessinger v. Holland Am., N.V.* (2004) 120 CA4th 552, 559 ; *Hunt v. Superior Court* (2000) 81 CA4th 901, 908, 97 CR2d 215 (citing *Carnival Cruise Lines, Inc. v. Shute* (1991) 499 US 585, 590-595, 111 S Ct 1522, 113 L Ed2d 622)]. However, if the clause does not give the parties adequate notice, there is no mutual consent to that contractual term and no valid agreement with respect to the forum selection clause [see, e.g., *Hunt v. Superior Court* (2000) 81 CA4th 901, 908, 97 CR2d 215 (citing *Carnival Cruise Lines, Inc. v. Superior Court* (1991) 234 CA3d 1019)].

Example:

A forum selection clause that merely recited that the plaintiffs' agreement to submit to the "applicable" jurisdiction and to waive jury trial did not sufficiently identify California as the chosen jurisdiction. Plaintiffs' signatures on the contract documents did not confer validity because the clause did not provide adequate notice that plaintiffs were consenting to California jurisdiction [*Hunt v. Superior Court* (2000) 81 CA4th 901, 908, 97 CR2d 215] .

Cross Reference:

Discussion of disputing terms in a contract, see Ch. 13, Attacking or Defending Existence of

Contract--Absence of Essential Element.

3.06[3][e] Forum Selection Language Must Be Clear and Unambiguous. The language of the forum selection clause must be clear and unambiguous [*CQL Original Prods., Inc., v. National Hockey League Players Ass'n* (1995) 39 CA4th 1347, 1358, 46 CR2d 412] .

Legal Topics:

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

Civil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsGeneral OverviewCivil
ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Personam ActionsGeneral OverviewContracts
LawContract Conditions & ProvisionsForum Selection Clauses



72 of 175 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 3 Determining Jurisdiction and Venue in Contract Actions
II. DETERMINING IF CONTRACT ACTION CAN BE BROUGHT IN CALIFORNIA

1-3 MB Practice Guide: CA Contract Litigation 3.07

3.07 Determining If Superior Courts Have Personal Jurisdiction Over Party to Contract Action.

3.07[1] California Long-Arm Statute Governs Personal Jurisdiction. California's long-arm statute states: "A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States" [CCP § 410.10]. The intent of this statute is to confer on California courts the broadest possible personal jurisdiction, limited only by constitutional considerations [*Sibley v. Superior Court* (1976) 16 C3d 442, 445, 128 CR 34, 546 P2d 322] .

3.07[2] Personal Jurisdiction Over Individuals Exists for Specific Acts.

3.07[2][a] Examples of Personal Jurisdiction Contained in Judicial Council Comments. Extensive Judicial Council Comments explaining the scope of the long-arm statute were issued at the time the statute was enacted [see Bases of Judicial Jurisdiction--1969 Report of the Judicial Council of California to the Governor and the Legislature]. The complete text of the Comment follows CCP § 410.10 in Deering's California Code Annotated. These comments provide multiple examples of activities and conduct that confer to courts personal jurisdiction over individuals and corporations, and are discussed in detail in the following subsections.

3.07[2][b] Voluntary Presence in California Establishes Personal Jurisdiction. California may exercise jurisdiction over an individual who is voluntarily, physically present within California, whether permanently or temporarily, if the individual is properly served with process at that time he or she is present in California [see CCP § 410.10 Judicial Council cmt; see also *Silverman v. Superior Court* (1988) 203 CA3d 145, 150, 249 CR 724] .

3.07[2][c] Person Domiciled in California Establishes Personal Jurisdiction. California may exercise jurisdiction over an individual who is domiciled in California but may be absent from the state. A person's domicile usually is the place where the person has his or her home. No person has more than one domicile at a time [see CCP § 410.10 Judicial Council cmt; see also *Allen v. Superior Court* (1953) 41 C2d 306, 310-311, 259 P2d 905] .

3.07[2][d] California Citizenship Establishes Personal Jurisdiction. California may exercise jurisdiction over an individual who is a citizen of California unless the individual's relationship to the state is so attenuated as to make the exercise of jurisdiction unreasonable [see CCP § 410.10 Judicial Council cmt].

Examples:

- Unincorporated associations are citizens of every state in which their members are citizens [*Chapman v. Barney* (1889) 129 US 677, 682, 9 S Ct 426, 32 L Ed 800 ; *Carden v. Arkoma Assoc.* (1990) 494 US 185, 192-196, 110 S Ct 1015, 108 L Ed2d 157] .

- The "principal place of business" of a corporation is either the place of operations [see *Kelly v. United States Steel Corp.* (3d Cir 1960) 284 F2d 850, 854] or its "nerve center" where the corporation's executive office is located [see *Scot Typewriter Co. v. Underwood Corp.* (SDNY 1959) 170 F Supp 862, 865] . A subsidiary corporation does not necessarily have the same citizenship as its parent corporation.

3.07[2][e] Consent Establishes Personal Jurisdiction. California may exercise jurisdiction over a competent individual who has consented either by words or conduct to personal jurisdiction in California [see CCP § 410.10 Judicial Council cmt; *National Equip. Rental v. Szukhent* (1964) 375 US 311, 315-316, 84 S Ct 411, 11 L Ed2d 354] .

3.07[2][f] Making a General Appearance Establishes Personal Jurisdiction. California may exercise jurisdiction over an individual who has entered a general appearance as a defendant in the action [see CCP § 410.10 Judicial Council cmt]. A general appearance waives any objection to personal jurisdiction [*Donaldson v. National Marine, Inc.* (2005) 35 C4th 503, 512] . A general appearance is made when a defendant either enters an appearance in an action without limiting the purpose of the appearance or, except as otherwise provided by statute, when the defendant asks for relief that only a court with personal jurisdiction over the defendant can give or recognizes the authority of the court to proceed [see *Hamilton v. Asbestos Corp.* (2000) 22 C4th 1127, 1147, 95 CR2d 701, 998 P2d 403] .

3.07[2][g] Doing Business in California As an Individual Establishes Personal Jurisdiction. California may exercise jurisdiction over an individual who [see CCP § 410.10 Judicial Council cmt]:

- Does business in California with respect to causes of action arising out of that business;
- Did business in California, before the action was brought, with respect to causes of action arising out of that business; or
- Does business in California with respect to causes of action that do not arise from that business, if the business is so continuous and substantial as to make the exercise of jurisdiction reasonable.

3.07[2][h] Doing an Act in California As an Individual Establishes Personal Jurisdiction. California may exercise jurisdiction over an individual who has done, or has caused to be done, an act in California (1) with respect to any cause of action in tort arising from the act; and (2) with respect to any cause of action not in tort arising from the act unless the nature of the act and of the individual's relationship to the state and to other states make the exercise of jurisdiction unreasonable [see CCP § 410.10 Judicial Council cmt; see also *Floyd J. Harkness Co. v. Amezcu* (1976) 60 CA3d 687, 691, 131 CR 667] .

3.07[2][i] Causing Effect in California by Act Done Elsewhere Establishes Personal Jurisdiction. California may exercise jurisdiction over an individual who causes effects in California by an act done elsewhere with respect to any cause of action arising from these effects, unless the nature of the effects and of the individual's relationship to the state makes the exercise of jurisdiction unreasonable [see CCP § 410.10 Judicial Council cmt; *Jewish Def. Org., Inc. v. Superior Court* (1999) 72 CA4th 1045, 1057, 85 CR2d 611] . When the act was not done with the intention of causing effects in California and could not reasonably have been expected to do so, California may not exercise jurisdiction over the defendant unless the defendant is found to have an extensive relationship with the state [see *Kaiser Aetna v. I.C. Deal* (1978) 86 CA3d 896, 904, 150 CR 615] . When the act, although not done with the intention of causing effects in California, reasonably could have been expected to do so, the mere causing of an effect in the forum is not sufficient, without more, to afford a constitutional basis for jurisdiction [see *Mansour v. Superior Court* (1995) 38 CA4th 1750,

1761, 46 CR2d 191] .

3.07[2][j] Individual Ownership, Use, or Possession of Thing in California Establishes Personal Jurisdiction.

California may exercise jurisdiction over an individual who has owned, used, or possessed (1) an immovable thing in California with respect to any cause of action arising from the thing while it was owned, used, or possessed by the individual or (2) a chattel in California with respect to any cause of action arising from the chattel while it was in the state and was so, owned, used, or possessed, unless the nature of the chattel and of the individual's relationship to California makes the exercise of jurisdiction unreasonable [see CCP § 410.10 Judicial Council cmt; see *Indiana Ins. Co. v. Pettigrew* (1981) 115 CA3d 862, 864-868, 171 CR 770] .

3.07[2][k] Other Individual Relationships May Establish Personal Jurisdiction. California may exercise jurisdiction over an individual in other situations, not specifically enumerated, when the individual has such a relationship to the state that it is reasonable for the state to exercise jurisdiction [see CCP § 410.10 Judicial Council cmt; Restatement (Second) of Conflict of Laws, § 39].

3.07[2][l] Plaintiff's Filing of Action in California Establishes Personal Jurisdiction. California may exercise jurisdiction over an individual or a foreign corporation who brings an action in California, in that action and in any other action that the defendant may bring against the individual or corporation by way of cross-complaint to the extent that the law of California provides at the beginning of the action [see CCP §§ 410.10, 428.80 Judicial Council cmt; Restatement (Second) of Conflict of Laws, §§ 34, 46].



Warning:

By commencing a lawsuit in California, a nonresident plaintiff becomes subject to related claims and specific personal jurisdiction [see, e.g., *Nobel Farms, Inc. v. Pasero* (2003) 106 CA4th 654, 659, 130 CR2d 881] .

3.07[3] Personal Jurisdiction Over Corporations Depends on Domestic or Foreign Status.

3.07[3][a] Domestic Corporations Are Subject to California Jurisdiction Even If Corporation Does No Business in State. Incorporation in California gives California a basis for exercising judicial jurisdiction over the corporation in any action that may be brought against the corporation in California, even if the corporation does no business in the state [see CCP § 410.10 Judicial Council cmt].

3.07[3][b] Foreign Corporations May Consent to Jurisdiction. California may exercise jurisdiction over a foreign corporation that has consented to the exercise of jurisdiction [see CCP § 410.10 Judicial Council cmt; see, e.g., CCP § 410.40 (providing for jurisdiction over a foreign corporation or nonresident person based on consent to jurisdiction as expressed in specified contracts)].

3.07[3][c] Foreign Corporations May Appoint Agent for Service of Process. California may exercise jurisdiction over a foreign corporation that has authorized an agent or public official to accept service of process in actions brought against the corporation in California, as well as to all causes of action to which the authority of the agent or official to accept service extends [see CCP § 410.10 Judicial Council cmt]. Foreign corporations that transact intrastate business in California are required, among other things, to appoint an agent for service of process in California [Corp Code § 2105(a)(4)], and to consent to service of process on the California Secretary of State if the agent for service of process is no longer authorized to act or cannot be found [Corp Code § 2105(a)(5)(A)].

3.07[3][d] Foreign Corporations May Enter Appearance. California may exercise jurisdiction over a foreign corporation that enters an appearance as defendant in the action [see CCP § 410.10 Judicial Council cmt; Restatement (Second) of Conflict of Laws, § 45].

3.07[3][e] Foreign Corporation Doing Business in California Is Subject to Jurisdiction. California may

exercise jurisdiction over a foreign corporation that does business in the state with respect to causes of action arising from the business done in the state, and with respect to causes of action that do not arise from the business done in the state if the business is so continuous and substantial as to make it reasonable for the state to exercise jurisdiction [see *CCP § 410.10* Judicial Council cmt; Restatement (Second) of Conflict of Laws, § 47]. A state may also exercise judicial jurisdiction over a foreign corporation that did business in the state before the action is brought, with respect to causes of action arising from the business done in the state [see *CCP § 410.10* Judicial Council cmt; Restatement (Second) of Conflict of Laws, § 48].

3.07[3][f] Foreign Corporation Doing Act in California Is Subject to Jurisdiction. California may exercise jurisdiction over a foreign corporation that has done, or has caused to be done, an act in California with respect to any cause of action in tort arising from the act, and any cause of action not in tort arising from the act, unless the nature of the act and of the corporation's relationship to California makes the exercise of jurisdiction unreasonable [see *CCP § 410.10* Judicial Council cmt; Restatement (Second) of Conflict of Laws, § 49].

3.07[3][g] Foreign Corporation Causing Effect in California by Act Done Elsewhere Is Subject to Jurisdiction. California may exercise jurisdiction over a foreign corporation that causes effects in California by an act done elsewhere with respect to any cause of action arising from the effects, unless the nature of the effects and of the corporation's relationship to California makes the exercise of jurisdiction unreasonable [see *CCP § 410.10* Judicial Council cmt; Restatement (Second) of Conflict of Laws, § 50; *Secrest Mach. Corp. v. Superior Court* (1983) 33 C3d 664, 669, 190 CR 175, 660 P2d 399].

3.07[3][h] Foreign Corporate Ownership, Use, or Possession of Tangible Thing in California Is Subject to Jurisdiction. California may exercise jurisdiction over a foreign corporation that has owned, used, or possessed an immovable thing or a chattel in the state, with respect to any cause of action arising from the immovable thing while it was owned, used, or possessed by the corporation or arising from the chattel while it was in California and was so owned, used, or possessed, unless the nature of the chattel and of the corporation's relationship to California make the exercise of jurisdiction unreasonable [*CCP § 410.10* Judicial Council cmt; Restatement (Second) of Conflict of Laws, § 51].

3.07[3][i] Other Foreign Corporate Relationships May Subject Corporation to Jurisdiction. California may exercise jurisdiction over a foreign corporation in other situations, not specifically enumerated, if the foreign corporation has such a relationship to California that it is reasonable for the state to exercise jurisdiction [see *CCP § 410.10* Judicial Council cmt; Restatement (Second) of Conflict of Laws, § 52].

3.07[3][j] Partnerships and Limited Liability Companies Doing Business in California Are Subject to Personal Jurisdiction. Foreign partnerships and limited liability companies doing business within California under a common name are subject to the jurisdiction of California courts [see *CCP § 369.5*]. Doing business in this state is a descriptive term that the courts have equated with such minimum contacts with the state that the maintenance of the suit does not offend traditional notions of fair play and substantial justice [see *International Aerial Tramway Corp. v. Doppelmayr & Sohn* (1969) 70 C2d 400, 74 CR 908, 450 P2d 284].

To acquire jurisdiction over a partnership, the partnership entity must be designated as a defendant; naming only the individual partners in the complaint is not sufficient [see *Epstein v. Frank* (1981) 125 CA3d 111, 119-120, 177 CR 831; *Hildebrand v. Stonecrest Corp.* (1959) 174 CA2d 158, 169, 344 P2d 378].

A California court has jurisdiction over only those individual partners who personally established minimum contacts with California [*Goehring v. Superior Court* (1998) 62 CA4th 894, 904-905, 73 CR2d 105].

Cross Reference:

Discussion of minimum contacts and reasonableness tests, see 3.07[4].

3.07[4] Nonresident Defendants Must Have Minimum Contacts With California to Satisfy Constitutional Requirements for Personal Jurisdiction.

3.07[4][a] Fourteenth Amendment Requires Defendant to Have Minimum Contacts With California. The *due process clause of the Fourteenth Amendment* [US Const, amend 14] operates as a limitation on the jurisdiction of state courts to enter judgments affecting rights or interests of *nonresident* defendants [*Shaffer v. Heitner* (1977) 433 US 186, 198-200, 97 S Ct 2569, 53 L Ed2d 683] . Therefore, for a state to exercise personal jurisdiction over a nonresident defendant, the defendant must have certain minimum contacts with the forum state so that maintenance of the suit does not offend traditional notions of fair play and substantial justice [*International Shoe Co. v. Wash.* (1945) 326 US 310, 316] . The key issue for nonresident defendants is whether the defendant *purposefully* established minimum contacts in the forum state [*Burger King Corp. v. Rudzewicz* (1985) 471 US 462, 474, 105 S Ct 2174, 85 L Ed2d 528] .

The minimum contacts test is not susceptible of mechanical application; rather the facts of each case must be weighed to determine whether the requisite affiliating circumstances are present [*Kulko v. Superior Court* (1978) 436 US 84, 92, 98 S Ct 1690, 56 L Ed2d 132 ; *see also* *Floyd J. Harkness Co. v. Amezcua* (1976) 60 CA3d 687, 691, 131 CR 667] .

Contacts are meaningful if they are "substantial, continuous, and systematic" [see *Helicopteros Nacionales de Colombia, S. A. v. Hall* (1984) 466 US 408, 414-416, 104 S Ct 1868, 80 L Ed2d 404] .

Contacts are "substantial" or "continuous and systematic," if reflected in factors such as deliberate presence in the forum state (which might include physical facilities, bank accounts, or conducting substantial company business) and active solicitation of forum market activity, such as operating a sales force or using television to advertise in the forum state [see, e.g., *West Corp. v. Superior Court* (2004) 116 CA4th 1167 ; *Bancroft & Masters, Inc. v. Augusta Nat'l, Inc.* (9th Cir 2000) 223 F3d 1082, 1086 ; *Perkins v. Benguet Consol. Mining Co.* (1952) 342 US 437, 445, 47 Ohio Op. 216] .

Each defendant's contacts must be assessed individually [*Calder v. Jones* (1984) 465 US 783, 790, 104 S Ct 1482, 79 L Ed2d 804 ; *Burger King Corp. v. Rudzewicz* (1985) 471 US 462, 105 S Ct 2174, 85 L Ed2d 528] .

Examples--Sufficient Contacts:

- A food franchisee's contacts with California were sufficiently systematic and continuous to provide a basis for general jurisdiction when the president of one of the parties attended yearly franchise meetings in California, received monthly account statements from an office in California, and the company purchased equipment from California [*Vons Cos., Inc. v. Seabest Foods, Inc.* (1996) 14 C4th 434, 58 CR2d 899, 926 P2d 1085] .
- General jurisdiction was found in California over defendant foreign airline in lawsuit over plane crash in England, even though defendant had no flights in or out of California. The airline's California reservations office and parts-purchasing office represented sufficiently substantial, systematic, and continuous contacts [*Koninklijke Luchtvaart Maatschappij v. Superior Court* (1951) 107 CA2d 495, 500-501, 237 P2d 297] .
- A website that sells a product or hotel accommodations into a particular forum would support a finding of meaningful contacts [see, e.g., *Snowney v. Harrah's Entertainment, Inc.* (2005) 35 C4th 1054, 1064-1065, 29 CR3d 33, 112 P3d 28 ; *West Corp. v. Superior Court* (2004) 116 CA4th 1167] .
- In an action against nonresident defendants for conspiring to deceive and defraud California

investors, a California court had specific jurisdiction over several foreign banks, a trust company and individuals because the individuals, acting on behalf of the business entities, visited California for the purpose of obtaining investments from California residents, engaging in significant activities in the state and purposefully availing themselves of forum benefits [*Anglo Irish Bank Corp., plc v. Superior Court* (2008) 165 CA4th 969, 984, 81 CR3d 535] .

- A California court had specific jurisdiction over an Italian seller of olive oil because the negotiations between the Italian seller and the California buyer were conducted and completed in Italy and California, and the Italian seller was to deliver the olive oil to California and maintained responsibility for the goods until they arrived in California. In addition, the size of the contemplated transaction--more than \$400,000 for the first shipment and another similarly sized shipment contemplated--was substantial [*Luberski, Inc. v. Oleificio F.LLI Amato S.R.L.* (2009) 171 CA4th 409, 419, 89 CR3d 774] .

Examples--Insufficient Contacts:

- Because an out-of-state resident's only California contact was a single purchase of goods from a California vendor for delivery out of state, there were insufficient minimum contacts to establish general personal jurisdiction, even though the California vendor supplied financing to the buyer [*Futuresat Indus., Inc. v. Superior Court* (1992) 3 CA4th 155, 159-161, 4 CR2d 74] .

- Although regular purchasing activities in a state may be a basis for jurisdiction over an out-of-state buyer, the general rule in both federal courts and in California is that a nonresident making a one-time purchase of goods from a seller in the forum state cannot be subject to the exercise of general personal jurisdiction by the courts of the seller's state [see *Pavlovich v. Superior Court* (2002) 29 C4th 262, 272-273, 127 CR2d 329, 58 P3d 2 ; *Hunt v. Superior Court* (2000) 81 CA4th 901, 906, 97 CR2d 215 ; *Cornell Univ. Med. Coll. v. Superior Court* (1974) 38 CA3d 311, 315-316, 113 CR 291] .

- The mere fact that a nonresident defendant enters California to execute a contract would not establish sufficient basis to exercise jurisdiction over that defendant [*Burger King Corp. v. Rudzewicz* (1985) 471 US 462, 105 S Ct 2174, 85 L Ed2d 528] . It is important to identify where the consequences of performing the contract really will be felt [*Stone v. State of Texas* (1999) 76 CA4th 1043, 1048, 90 CR2d 657] .

- The following contacts were insufficient to establish personal jurisdiction in California over a publicly regulated utility operating in the Midwest: (1) the utility's weather derivative contract with Sacramento Municipal Utilities District; (2) its property insurance policy for itself and subsidiaries covering 38 properties, one of which was in California; (3) previous participation by the utility's subsidiary in California Public Utility Commission proceedings; and (4) SEC filings reporting a subsidiary's interest in a cogeneration facility in California [*Aquila, Inc. v. Superior Court* (2007) 148 CA4th 556, 571, 55 CR3d 803] .

Cross Reference:

Discussion of due process requirements protecting nonresident defendants and specific bases of personal jurisdiction, see Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, Ch. 9, Motions to Quash and Other Objections to Personal Jurisdiction; or

California Forms of Pleading and Practice, Ch. 323, Jurisdiction: Personal Jurisdiction, Inconvenient Forum, and Appearances (Matthew Bender).

3.07[4][b] Individuals and Corporations Are Treated Similarly, but Scope of Jurisdiction May Be Limited With Corporate Defendant. The minimum contacts rule applies to individual defendants as well as to corporate defendants [*Arnesen v. Raymond Lee Org., Inc.* (1973) 31 CA3d 991, 996, 107 CR 744] . Jurisdiction over an out-of-state corporation does not necessarily mean that the court also may assert jurisdiction over its employees, nor does jurisdiction over a parent corporation automatically establish jurisdiction over a wholly owned subsidiary. Each individual's contacts with the forum state must be assessed individually [*Keeton v. Hustler Magazine, Inc.* (1984) 465 US 770, 781, 104 S Ct 1473, 79 L Ed2d 790 ; see also *Serafini v. Superior Court* (1998) 68 CA4th 70, 78-80, 80 CR2d 159] .

Activities undertaken by an individual on behalf of a defendant that is a corporation or other business entity may be attributed to that defendant for purposes of personal jurisdiction if the defendant purposefully directed those activities toward the forum state. The proper jurisdictional question is not whether the defendant can be liable for the acts of another person or entity under state substantive law, but whether the defendant has purposefully directed its activities at the forum state by causing a separate person or entity to engage in forum contacts. That constitutional question does not turn on the specific state law requirements of alter ego or agency, although the inquiry may be similar in some circumstances [*Anglo Irish Bank Corp., plc v. Superior Court* (2008) 165 CA4th 969, 981-983, 81 CR3d 535] .

3.07[4][c] Scope of Jurisdiction Over General Partnership and Partner May Be Limited. Jurisdiction over a partnership does not necessarily permit a court to assume jurisdiction over the individual partners; even though individual partners are jointly and severally liable for torts of the partnership, jurisdiction over each defendant must be established individually. A California court has jurisdiction over only those individual partners who personally established minimum contacts with California [*Goehring v. Superior Court* (1998) 62 CA4th 894, 904-905, 73 CR2d 105] .

3.07[4][d] Commercial Acts Without Physical Entry Into California May Satisfy Minimum Contacts Test. A nonresident defendant may not avoid personal jurisdiction merely because the defendant did not physically enter the forum state. As long as a commercial actor's efforts are purposefully directed toward residents of another state, the absence of physical contacts cannot defeat personal jurisdiction there [*Burger King Corp. v. Rudzewicz* (1985) 471 US 462, 476, 105 S Ct 2174, 85 L Ed2d 528] .

Examples:

- If the sale of a product of a manufacturer or distributor is not simply an isolated occurrence, but arises from the efforts of the manufacturer or distributor to serve, directly or indirectly, the market for its product in other states, it is not unreasonable to subject the manufacturer or distributor to suit in one of those states if its allegedly defective merchandise has been the source of injury to its owners or to others there [*World-Wide Volkswagen Corp. v. Woodson* (1980) 444 US 286, 297, 100 S Ct 559, 62 L Ed2d 490] .

- A manufacturer's placement of goods in the stream of commerce with the expectation that the goods will be purchased or used by consumers in California constitutes purposeful availment if the income earned by the manufacturer from the sale or use of its product in California is substantial [*Bridgestone Corp. v. Superior Court* (2002) 99 CA4th 767, 774-775, 121 CR2d 673] . However, "foreseeability" that a manufacturer's product would enter or cause injury in California, alone, has never been a sufficient benchmark for personal jurisdiction; rather, it is the defendant's conduct and connection with California that is the main element, not the mere likelihood that a product will find its way into the state [*Carretti v. Italpast* (2002) 101 CA4th 1236, 1253-1254, 125 CR2d 126] .

- The assertion of specific jurisdiction was fair when a hotel advertised heavily in California, obtained a significant percentage of its business from California residents, and maintained an Internet website and toll-free phone number where visitors or callers could obtain room quotes and make reservations. The hotel purposefully availed itself of the privilege of doing business in California. The guest's causes of action were premised on alleged omissions during the hotel's consummation of transactions with California residents and in its California advertisements. Because the harm alleged by the guest related directly to the content of the hotel's promotional activities in California, an inherent relationship between the guest's claims and the hotel's contacts with California existed. By purposefully and successfully soliciting the business of California residents, the hotels could reasonably anticipate being subject to litigation in California in the event their solicitations caused an injury to a California resident [*Snowney v. Harrah's Entm't* (2005) 35 C4th 1054, 29 CR3d 33, 112 P3d 28] .

- When breach of contract claim arises directly from services rendered by a law firm for services rendered in California to a former nonresident client in an unrelated action, limited jurisdiction existed for resolution of the breach of contract claim, even when the nonresident client was dismissed from the previous unrelated action based on insufficient contacts with California [*Daar & Newman v. VRL Int'l* (2005) 129 CA4th 482] .

3.07[4][e] Electronic Communications Without Physical Entry May Establish Minimum Contacts. Use of the telephone and email to routinely conduct business with a salesperson in the forum state are sufficient minimum contacts to support the exercise of specific personal jurisdiction in a contract case pertaining to those contacts [see *Hall v. LaRonde* (1997) 56 CA4th 1342, 1344, 66 CR2d 399] . An attorney's mere physical presence or absence in California is not determinative of jurisdiction over the attorney and the attorney's firm when the practice of law in the state occurs by the attorney advising a California client on California law in connection with a California legal dispute by telephone, fax, computer, or other modern technological means [*Birbrower, Montalbano, Condon & Frank v. Superior Court* (1998) 17 C4th 119, 128-129, 70 CR2d 304, 949 P2d 1 ; cf. *Simons v. Steverson* (2001) 88 CA4th 693, 713, 106 CR2d 193 (sufficient minimum contacts existed for jurisdiction over out-of-state attorney and firm, because attorney, licensed in California, performed legal services for California residents and therefore practiced law in state)].

3.07[4][f] Internet Activity, by Itself, Generally Does Not Establish Minimum Contacts. Insufficient minimum contacts exist when a defendant's sole contact with California is the posting of source code on an Internet website accessible to any person with Internet access, and the defendant owns no property, has no telephone listing, and conducts no business in California, even though it may be foreseeable that the defendant's tortious conduct would cause injury in California [*Pavlovich v. Superior Court* (2002) 29 C4th 262, 275-276, 127 CR2d 329, 58 P3d 2 ; see also *Nam Tai Elecs., Inc. v. Titzer* (2001) 93 CA4th 1301, 1311-1313, 113 CR2d 769 (registering a nickname or alias with Yahoo!)] .

Insufficient minimum contacts also exist when a defendant merely maintains a website advertisement in one state and has no contacts with the forum state other than maintaining an essentially passive home page that is accessible to citizens of the forum state, and everyone else, over the Internet [*Cybersell, Inc. v. Cybersell, Inc.* (9th Cir 1997) 130 F3d 414, 415-420 (distinguishing cases involving interactive websites and greater levels of actual contact); see also *Shisler v. Sanfer Sports Cars, Inc.* (2006) 146 CA4th 1254, 1261, 53 CR3d 335 (no personal jurisdiction over operator of website that merely advertised vehicles and included credit application, but did not conduct business via the site or specifically target California residents)].

Insufficient minimum contacts exist over nonresident defendants based on their contract with one or more Internet service providers who happen to maintain offices in California, so as to permit defendants to operate a passive website from their New York residence when the Internet providers were engaged by a corporate defendant from its computer in New York [see *Jewish Def. Org., Inc. v. Superior Court* (1999) 72 CA4th 1045, 1057-1062, 85 CR2d 611] .

Distinguish:

Sufficient minimum contacts exist over Nevada hotels that operate a website touting their proximity to California, providing driving directions from California, and permitting California patrons to make reservations using the website [*Snowney v. Harrah's Entertainment, Inc.* (2005) 35 C4th 1054, 1064-1065] .

To determine whether a website is sufficient to establish purposeful availment, a court first looks to a sliding scale analysis. At one end of the spectrum are situations in which a defendant clearly does business over the Internet. If the defendant enters into contracts with residents of a foreign jurisdiction that involve the knowing and repeated transmission of computer files over the Internet, personal jurisdiction is proper. At the opposite end are situations in which a defendant has simply posted information on an Internet website which is accessible to users in foreign jurisdictions. A passive website that does little more than make information available to those who are interested in it is not grounds for the exercise of personal jurisdiction. The middle ground is occupied by interactive websites where a user can exchange information with the host computer. In these cases, the exercise of jurisdiction is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the website [see *Snowney v. Harrah's Entm't* (2005) 35 C4th 1054, 1063] .

3.07[4][g] Personal Jurisdiction May Be Denied Despite Minimum Contacts If California Action Would Offend Traditional Notions of Fair Play and Substantial Justice. The minimum requirements of "fair play and substantial justice" may defeat the reasonableness of jurisdiction even if the defendant has purposefully engaged in forum activities and minimum contacts exist [*Burger King Corp. v. Rudzewicz* (1985) 471 US 462, 477, 105 S Ct 2174, 85 L Ed2d 528 ; *Haisten v. Grass Valley Med. Reimbursement* (9th Cir 1986) 784 F2d 1392, 1397] . When deciding whether to deny personal jurisdiction in these situations, the court considers [*Burger King Corp. v. Rudzewicz* (1985) 471 US 462, 476-477, 105 S Ct 2174, 85 L Ed2d 528] :

- The burden on the defendant.
- The forum state's interest in adjudicating the dispute.
- The plaintiff's interest in obtaining convenient and effective relief.
- The interstate judicial system's interest in obtaining the most efficient resolution of controversies.
- The shared interest of the several states in furthering fundamental substantive social policies.

3.07[4][h] Foreign National Defendants Given Extra Consideration. The difficulties for a foreign national to defend itself in a foreign legal system has significant weight in assessing the reasonableness of applying the long-arm statute of personal jurisdiction over national borders, but if minimum contacts are sufficient, personal jurisdiction over the foreign national may be upheld [see *Asahi Metal Indus. Co. v. Superior Court* (1987) 480 US 102, 114, 107 S Ct 1026, 94 L Ed2d 92] .

3.07[5] Immunity May Prevent Jurisdiction Over Defendant.

3.07[5][a] Diplomats, Legislators, and Members of Congress Are Immune to Civil Action. Heads of foreign diplomatic missions and members of their staffs having diplomatic rank are immune to civil actions and proceedings; this immunity does not extend to consular officers who are mainly concerned with the commercial interests of their nationals [see 22 USC § 254d; Restatement (Second) of Foreign Relations Law of the United States, §§ 73, 74, 81]. Members of the California legislature are immune to civil process during, and for five days before and after, a legislative session [Cal Const, art IV, § 14]. Members of the United States Congress are subject to civil process [see *Long v. Ansell* (1934) 293 US 76, 81-83, 55 S Ct 21, 79 L Ed 208] .

3.07[5][b] National Banks Without a Branch Office in California Are Not Subject to Suit. A national bank coming within the provisions of 12 USC § 94 and having no branch in California is not subject to suit in California [see *Citizens & S. Nat'l Bank v. Bougas* (1977) 434 US 35, 38, 98 S Ct 88, 54 L Ed2d 218 ; *Kaiser Aetna v. I.C. Deal* (1978) 86 CA3d 896, 899, 150 CR 615] . A national bank may be subject to suit in California when it intentionally does an act elsewhere knowing that the effect of that act will be experienced in California [*United Cal. Bank v. First Bank of Oak Park* (1979) 98 CA3d 439, 442-444, 159 CR 607] .

3.07[5][c] Witnesses in Criminal Proceedings Are Not Subject to Service of Process and Extradited Criminal Defendants Are Protected for Specified Period. A person who comes into California in obedience to a subpoena directing the person to attend and testify in this state is not, while in California pursuant to the subpoena or order, subject to arrest or the service of process, civil or criminal, in connection with matters that arose before the person's entrance into this state under the subpoena [*Pen Code* § 1334.4]. A person brought into California on or after waiver of extradition based on a criminal charge is not subject to service of process in civil actions arising out of the same facts as the criminal proceedings for which the person is returned until the person has been convicted in the criminal proceeding or, if acquitted, until the person has had reasonable opportunity to return to the state from which the person was extradited [*Pen Code* § 1555].

Legal Topics:

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

Civil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsConstitutional LimitsCivil
 ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Personam ActionsDoing BusinessCivil
 ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Personam ActionsDomicileCivil
 ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Personam ActionsLong-Arm JurisdictionCivil
 ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Personam ActionsSubstantial Contacts



73 of 175 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 3 Determining Jurisdiction and Venue in Contract Actions
II. DETERMINING IF CONTRACT ACTION CAN BE BROUGHT IN CALIFORNIA

1-3 MB Practice Guide: CA Contract Litigation 3.08

3.08 Determining If Superior Courts Have Subject Matter Jurisdiction Over Contract Action.

3.08[1] Subject Matter Jurisdiction Established by State Constitution. Superior courts in California have original jurisdiction over contract disputes [*Cal Const, art VI, §§ 10, 11*].

3.08[2] Subject Matter Jurisdiction Cannot Be Conferred or Defect Waived. If the court in which the action is filed does not have the authority to adjudicate the dispute, the proceedings are void [*Marlow v. Campbell* (1992) 7 CA4th 921, 928, 9 CR2d 516] . A subject matter jurisdictional defect cannot be waived [see *People v. National Auto. & Cas. Ins. Co.* (2000) 82 CA4th 120, 125, 97 CR2d 858] . However, a court that has subject matter jurisdiction may adjudicate the case, even in the wrong venue, unless the defendant makes a timely motion for transfer [see *Lipari v. Department of Motor Vehicles* (1993) 16 CA4th 667, 672, 20 CR2d 246] .

3.08[3] Concurrent Subject Matter Jurisdiction May Exist. California courts lack jurisdiction over the subject matter of a cause of action when jurisdiction is vested by federal law exclusively in a federal court or agency [see, e.g., *Holiday Matinee, Inc. v. Rambus, Inc.* (2004) 118 CA4th 1413, 1422] . However, some federal statutes creating a right of action expressly give the state and federal courts concurrent jurisdiction to enforce the right [see, e.g., 28 USC § 1352 (action on a bond executed under any law of the United States except matters within the jurisdiction of the Court of International Trade); 45 USC § 56 (claims under the Federal Employers' Liability Act)]. The general rule is that state courts may assume subject matter jurisdiction over a federal cause of action, absent a provision by Congress to the contrary or a disabling incompatibility between the federal and state court adjudication [*Tafflin v. Levitt* (1990) 493 US 455, 459, 110 S Ct 792, 107 L Ed2d 887] .

➡ Cross References:

Challenging superior court subject matter jurisdiction, see 3.25.

Determining if there is federal court jurisdiction, see 3.11, 3.12.

Discussion of an action commenced in wrong court, see California Forms of Pleading and Practice, Ch. 571, Venue (Matthew Bender).

Discussion of courts having jurisdiction to determine jurisdiction and form for making a motion to

transfer or dismiss the action because the court lacks subject matter jurisdiction, see Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, Ch. 10, Dismissal for Lack of Subject Matter Jurisdiction; or
California Forms of Pleading and Practice, Ch. 324, Jurisdiction: Subject Matter Jurisdiction (Matthew Bender).

3.08[4] Classification of California Cases for Jurisdictional Purposes.

3.08[4][a] Cases Are Classified As "Limited" or "Unlimited." The classification of a case as limited or unlimited in the California courts is determined by the amount in controversy and whether the relief sought may be granted in a limited civil case [CCP §§ 85, 86, 86.1]. Superior courts can hear both limited and unlimited civil cases [CCP § 32.5]. "Limited" civil cases have special jurisdictional rules and limitations, as well as procedural differences.

Examples:

- The amount in controversy for a limited civil case is \$25,000 or less [CCP § 85].
- An answer to a verified complaint in a limited civil case need not be verified [CCP § 92(b)].
- Limited civil cases include suits for reformation of a contract if sought in connection with an action on the contract for \$25,000 or less [CCP § 86(a)(3)].

Cross Reference:

Discussion of limited civil cases, see California Forms of Pleading and Practice, Ch. 345A, Limited Civil Cases; Ch. 324, Jurisdiction: Subject Matter Jurisdiction (Matthew Bender).

3.08[4][b] Small Claims Court Jurisdiction Is Limited to Amounts Not Exceeding \$5,000. Small claims courts provide simplified adjudication in actions for money damages not in excess of \$5,000 or enforcement of payment of delinquent unsecured personal property taxes in an amount not exceeding \$5,000 [CCP § 116.220]. If the lack of jurisdiction is due solely to an excess in the amount of money demanded, the excess amount may be waived, but any waiver will not become operative until judgment [CCP § 116.220(d)].

Cross Reference:

Discussion of transferring cases within the unified California court system, see California Forms of Pleading and Practice, Ch. 571, Venue (Matthew Bender).

Legal Topics:

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

Civil ProcedureJurisdictionSubject Matter JurisdictionJurisdiction Over ActionsGeneral OverviewCivil ProcedureJurisdictionSubject Matter JurisdictionJurisdiction Over ActionsConcurrent JurisdictionCivil ProcedureJurisdictionSubject Matter JurisdictionJurisdiction Over ActionsGeneral JurisdictionCivil ProcedureJurisdictionSubject Matter JurisdictionJurisdiction Over ActionsLimited Jurisdiction



74 of 175 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 3 Determining Jurisdiction and Venue in Contract Actions
II. DETERMINING IF CONTRACT ACTION CAN BE BROUGHT IN CALIFORNIA

1-3 MB Practice Guide: CA Contract Litigation 3.09

3.09 Forum May Be "Inconvenient" Even If Jurisdiction Exists.

3.09[1] Court May Stay or Dismiss Action If Forum Is Inconvenient. Even if a court has both subject matter jurisdiction and personal jurisdiction over the parties, it may stay or dismiss the action on the ground that the particular court is an inconvenient forum [*CCP* § 418.10(a)]. The doctrine, traditionally known as forum non conveniens, is generally codified in *CCP* §§ 410.30, 418.10(a)(2).

The issue is not whether some other location (state or country) provides a better forum for the litigation, but whether California is a seriously inconvenient forum [*Ford Motor Co. v. Insurance Co. of N. Am.* (1995) 35 CA4th 604, 611, 41 CR2d 342] .

Cross References:

Discussion of dismissing a case in federal court under the doctrine of forum non conveniens and form for motion to transfer venue for convenience in federal court, see Matthew Bender[(R)] Practice Guide: Federal Pretrial Civil Procedure in California, Ch. 2, Determining Forum (Jurisdiction and Venue).

Discussion of forum non conveniens, see California Forms of Pleading and Practice, Ch. 323, Jurisdiction: Personal Jurisdiction, Inconvenient Forum, and Appearances (Matthew Bender).

Discussion of presumptions relating to California residents and inconvenient forum, see California Points and Authorities, Ch. 132, Jurisdiction: Personal Jurisdiction and Inconvenient Forum (Matthew Bender).

3.09[2] Defendant Must Raise Issue by Motion or Objection Is Waived. The defendant must raise the issue of inconvenient forum by filing a motion on or before the last day of defendant's time to plead, or within any further time that the court may allow for good cause [*CC* § 418.10(a)(2)]. Failure to make a forum non conveniens motion at the time of filing a demurrer or a motion to strike waives the objection [*CCP* § 418.10(e)(3)].

3.09[3] Suitable Alternative Forum Must Exist. Before a court can rule that California is an inconvenient forum, there must be another forum in which a valid judgment may be obtained against the defendant [*Stangvik v. Shiley, Inc.* (1991) 54 C3d 744, 751, 1 CR2d 556, 819 P2d 14] .

If the court determines that the alternate forum is a suitable place for trial, its next step is to consider the private interests of the litigants and the interests of the public in retaining the action for trial in California [*Stangvik v. Shiley, Inc.* (1991) 54 C3d 744, 751, 1 CR2d 556, 819 P2d 14] .

Cross Reference:

Discussion of establishing inconvenient forum, see California Forms of Pleading and Practice, Ch. 323, Jurisdiction: Personal Jurisdiction, Inconvenient Forum, and Appearances (Matthew Bender).

3.09[4] Private Factors May Affect Suitability of Alternative Forum. The private factors identified as relevant to a court's inquiry in determining whether to grant a motion based on inconvenient forum are [*Stangvik v. Shiley, Inc.* (1991) 54 C3d 744, 751, 1 CR2d 556, 819 P2d 14] :

- Access to sources of evidence and proof (location of physical evidence and witnesses, etc.).
- The cost of obtaining the attendance of witnesses.
- The availability of compulsory process for attendance of unwilling witnesses.

3.09[5] Public Factors May Affect Suitability of Alternative Forum. The public factors relevant to a determination whether to grant a motion based on inconvenient forum include the following [*Stangvik v. Shiley, Inc.* (1991) 54 C3d 744, 751, 1 CR2d 556, 819 P2d 14] :

- The burden on already overworked courts.
- The interests of potential jurors so they are not called upon to decide cases in which the local community has little concern.
- Weighing the competing interests of the state and the alternative forum in the litigation.

3.09[6] Some Actions Are Not Subject to Forum Non Conveniens Motion. An action cannot be dismissed on the ground of forum non conveniens if the action involves a contract that does all of the following [CCP § 410.40]:

- Designates California law as governing, either in whole or in part.
- Relates to a transaction involving at least \$1,000,000 (or more).
- Contains an agreement by any nonresident parties to submit to the jurisdiction of the California courts.

3.09[7] Moving Party Has Burden of Proof. On a motion for forum non conveniens, the defendant, as the moving party, bears the burden of proof. The granting or denial of such a motion is within the trial court's discretion, and substantial deference is accorded its determination in this regard [*Stangvik v. Shiley, Inc.* (1991) 54 C3d 744, 751, 1 CR2d 556, 819 P2d 14 ; *Piper Aircraft Co. v. Reyno* (1981) 454 US 235, 257, 102 S Ct 252, 70 L Ed2d 419] .

Legal Topics:

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

Civil ProcedureJurisdictionSubject Matter JurisdictionGeneral OverviewCivil ProcedureJurisdictionSubject Matter JurisdictionJurisdiction Over ActionsGeneral OverviewCivil ProcedureVenueForum Non ConveniensCivil ProcedureVenueMotions to TransferGeneral Overview



75 of 175 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 3 Determining Jurisdiction and Venue in Contract Actions

III. DETERMINING IF CONTRACT ACTION CAN BE BROUGHT IN FEDERAL COURT

1-3 MB Practice Guide: CA Contract Litigation 3.10

3.10 CHECKLIST: Determining If Contract Action Can Be Brought in Federal Court.

- ☐ Determine if federal court has personal jurisdiction over parties.

Authority:

Fed R Civ P 4(k)(1); *Omni Capital Int'l v. Rudolf Wolff & Co., Ltd.* (1987) 484 US 97, 101, 108 S Ct 404, 98 L Ed2d 415 ; *Brainerd v. Governors of the Univ. of Alberta* (9th Cir 1989) 873 F2d 1257, 1258 ; *Fed R Civ P 4(k)(2)*

Discussion:

See 3.11

- ☐ Determine if federal court has subject matter jurisdiction over action.

- ☐ Does case present a federal question?

Authority:

28 USC § 1331; *Clinton v. Babbitt* (9th Cir 1999) 180 F3d 1081, 1086-1087 ; *Presbyterian Church (U.S.A.) v. United States* (9th Cir 1989) 870 F2d 518, 524 ; *Church of Scientology Int'l v. Kolts* (CD Cal 1994) 846 F Supp 873, 878 ; 5 USC § 702; *Abbott Labs. v. Gardner* (1967) 387 US 136, 140, 87 S Ct 1507, 18 L Ed2d 681 , overruled on other grounds by *Califano v. Sanders* (1977) 430 US 99, 97 S Ct 980, 51 L Ed2d 192

Discussion:

See 3.12[1]

- ☐ Does case involve diversity jurisdiction?

Authority:

28 USC § 1332(a)(1); 28 USC § 1332(a)(2); 28 USC § 1332(a)(3); 28 USC § 1332(a)(4)

Discussion:

See 3.12[2][a]

- ☐ Does amount in controversy exceed \$75,000?

Authority:

28 USC § 1332(a); *Bank of Cal. v. Twin Harbors Lumber Co.* (9th Cir 1972) 465 F2d 489, 491

Discussion:

See 3.12[2][b]

- ☐ Is there a "case or controversy"?
- ☐ Does dispute involve an actual, immediate, and concrete controversy?

Discussion:

3.12[4][a]

- ☐ Is case moot?

Authority:

Abbott Labs. v. Gardner (1967) 387 US 136, 149, 87 S Ct 1507, 18 L Ed2d 681 ,
overruled on other grounds by *Califano v. Sanders* (1977) 430 US 99, 97 S Ct 980, 51 L
Ed2d 192

- ☐ Is threatened harm capable of repetition while evading review?

Authority:

Southern Pac. Terminal Co. v. Interstate Commerce Comm'n (1911) 219 US 498, 515,
31 S Ct 279, 55 L Ed 310 ; *Roe v. Wade* (1973) 410 US 113, 125, 93 S Ct 705, 35 L
Ed2d 147

Discussion:

3.12[4][b]

- ☐ Determine if plaintiff has standing to sue based on personal stake in matter.

- ☐ Did plaintiff suffer some redressable injury attributable to defendant's conduct?
- ☐ Does action fall within zone of interests protected by some legal rule?
- ☐ Did plaintiff sustain an injury that could be remedied by relief sought?

Discussion:

See 3.12[4][c]

- ☐ Evaluate whether case presents a "political question" that cannot be judicially decided.

Authority:

Baker v. Carr (1962) 369 US 186, 208-211, 82 S Ct 691, 7 L Ed2d 663

Discussion:

See 3.12[4][d]

- ☐ Determine if supplemental jurisdiction extends federal court subject matter jurisdiction.

- ☐ Did claims arise from a common nucleus of operative fact?
- ☐ Are claims of a type that would ordinarily be tried together in one proceeding?

Discussion:

See 3.12[5]

Legal Topics:

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

Civil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsGeneral OverviewCivil
ProcedureJurisdictionSubject Matter JurisdictionGeneral OverviewCivil ProcedureJurisdictionSubject Matter
JurisdictionFederal QuestionsGeneral OverviewCivil ProcedureFederal & State InterrelationshipsAbstention



76 of 175 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 3 Determining Jurisdiction and Venue in Contract Actions

III. DETERMINING IF CONTRACT ACTION CAN BE BROUGHT IN FEDERAL COURT

1-3 MB Practice Guide: CA Contract Litigation 3.11

3.11 Determining If Federal Courts Have Personal Jurisdiction Over Party to Contract Action.

California and federal personal jurisdiction are co-extensive. Thus, if one can obtain jurisdiction over a defendant in state court through one of the bases discussed above, personal jurisdiction would also exist in a California federal court [see *Fed R Civ P 4(k)(1)*; *Omni Capital Int'l v. Rudolf Wolff & Co., Ltd.* (1987) 484 US 97, 101, 108 S Ct 404, 98 L Ed2d 415]. A federal court need only determine whether the assertion of personal jurisdiction violates the Due Process Clause [*Brainerd v. Governors of the Univ. of Alberta* (9th Cir 1989) 873 F2d 1257, 1258] .



Cross References:

Discussion of personal jurisdiction requirements in state court, see 3.07.

Discussion of immunity that may prevent jurisdiction over defendant, see 3.07[5].

Defendants who are not subject to personal jurisdiction in any state court, but who have contacts with the United States as a whole, may be subject to personal jurisdiction in federal question cases [see *Fed R Civ P 4(k)(2)*].

Legal Topics:

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

Civil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsGeneral OverviewCivil
 ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsConstitutional LimitsCivil ProcedureJurisdictionPersonal
 Jurisdiction & In Rem ActionsIn Personam ActionsLong-Arm JurisdictionCivil ProcedureJurisdictionPersonal
 Jurisdiction & In Rem ActionsIn Personam ActionsMinimum Contacts



77 of 175 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 3 Determining Jurisdiction and Venue in Contract Actions

III. DETERMINING IF CONTRACT ACTION CAN BE BROUGHT IN FEDERAL COURT

1-3 MB Practice Guide: CA Contract Litigation 3.12

3.12 Determining If Federal Courts Have Subject Matter Jurisdiction Over Contract Action.

3.12[1] Federal Question Jurisdiction May Exist. A party may invoke federal question jurisdiction in a contract action by:

- Claiming that a statute is facially inconsistent with the US Constitution [see *Clinton v. Babbitt* (9th Cir 1999) 180 F3d 1081, 1086-1087 (Navajo Nation members living on Hopi lands sufficiently invoked federal question jurisdiction by alleging that proposed leases violated equal protection regardless of whether members stated claim on which relief could be granted)].
- Claiming that defendant's conduct violated plaintiff's constitutional rights [see *Presbyterian Church (U.S.A.) v. United States* (9th Cir 1989) 870 F2d 518, 524 (federal jurisdiction over declaratory relief suit alleging violation of the *First* and *Fourth Amendments*); *Church of Scientology Int'l v. Kolts* (CD Cal 1994) 846 F Supp 873, 878] .

➤ Cross Reference:

See Matthew Bender[(R)] Practice Guide: Federal Pretrial Civil Procedure in California, 2.06[1].

■ Basing his/her claim on a federal statute that gives rise to federal question jurisdiction by expressly or impliedly creating a right to a claim for relief. Examples include:

- ☐ 28 USC § 1331 ("district courts have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States").
- ☐ 28 USC § 1338(a) (patent and copyright law).
- ☐ 28 USC § 1339 (postal service).
- ☐ 28 USC § 1340 (internal revenue service).

➤ **Cross Reference:**

See *Matthew Bender*[(R)] *Practice Guide: Federal Pretrial Civil Procedure in California*, 2.06[2].

■ Claiming that he/she is adversely affected by federal agency action in violation of the law [see 5 USC § 702; see also *Abbott Labs. v. Gardner* (1967) 387 US 136, 140, 87 S Ct 1507, 18 L Ed2d 681 , overruled on other grounds by *Califano v. Sanders* (1977) 430 US 99, 97 S Ct 980, 51 L Ed2d 192] .

➤ **Cross Reference:**

See *Matthew Bender*[(R)] *Practice Guide: Federal Pretrial Civil Procedure in California*, 2.06[3].

■ Claiming that a federal rule of decision is necessary to protect uniquely federal interests or claiming that Congress has given the courts the power to develop substantive law on the issue to be litigated.

➤ **Cross Reference:**

See *Matthew Bender*[(R)] *Practice Guide: Federal Pretrial Civil Procedure in California*, 2.06[4].

3.12[2] Diversity Jurisdiction May Exist.

3.12[2][a] Federal Diversity Jurisdiction Is Controlled by Statute. Diversity jurisdiction exists when the controversy exists between any of the following:

- Citizens of different states [28 USC § 1332(a)(1)].
- Citizens of a state and citizens of a foreign state [28 USC § 1332(a)(2)].
- Citizens of different states with citizens of a foreign state as additional parties [28 USC § 1332(a)(3)].
- A foreign state serving as a plaintiff and state citizens [28 USC § 1332(a)(4)].

3.12[2][b] Amount in Controversy Must Exceed \$75,000. For federal diversity jurisdiction purposes, the amount in controversy must exceed \$75,000, exclusive of interest and costs [28 USC § 1332(a)]. A plaintiff may aggregate its claims against a defendant to meet the amount in controversy requirement, even if the claims are unrelated to one another [see *Bank of Cal. v. Twin Harbors Lumber Co.* (9th Cir 1972) 465 F2d 489, 491] .

3.12[3] Subject Matter Jurisdiction Cannot Be Conferred or Defect Waived. Parties to an action cannot confer jurisdiction on federal courts by stipulation or waiver. If a federal court lacks subject matter jurisdiction, that defect cannot be cured by an agreement between or among the parties that the case may be heard in that court [*Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee* (1982) 456 US 694, 702, 102 S Ct 2099, 72 L Ed2d 492] . Indeed, the absence of subject matter jurisdiction may be raised at any time, even after judgment [see *Fed R Civ P* 12(h)(3)].

3.12[4] "Case or Controversy" Must Exist.

3.12[4][a] Dispute Must Provide Actual, Immediate, and Concrete Controversy. Federal courts evaluate cases for "ripeness" based on both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration [see *Abbott Labs. v. Gardner* (1967) 387 US 136, 149, 87 S Ct 1507, 18 L Ed2d 681 , overruled on other grounds by *Califano v. Sanders* (1977) 430 US 99, 97 S Ct 980, 51 L Ed2d 192] . In other words, the dispute

must have progressed to the point that the parties are in clear disagreement about legal rights or duties.



Strategic Point:

Because federal pleading requirements include a jurisdictional statement, counsel should immediately analyze the case to defend the jurisdictional statement if there is an attempt to dismiss the case. The analysis should review the following issues:

- Whether a case or controversy exists.
- Whether subject matter jurisdiction exists, either through federal question, or diversity, or supplemental jurisdiction.



Cross Reference:

Discussion of ripeness, see *Matthew Bender[(R)] Practice Guide: Federal Pretrial Civil Procedure in California*, 2.44.

3.12[4][b] Case Must Not Be Moot. Federal courts will dismiss a moot case if the facts and circumstances have changed to such an extent that judicial relief will no longer be effective.

Examples:

- In *Kremens v. Bartley*, the United States Supreme Court dismissed the case because passage of new legislation proscribed the challenged, previously permissible practices [*Kremens v. Bartley* (1977) 431 US 119, 129, 97 S Ct 1709, 52 L Ed2d 184] .

- In *De Funis v. Odegaard*, a law school appealed the federal trial court's order to admit a rejected law school applicant who challenged the school's affirmative action program. The Supreme Court dismissed the case as moot because at the time of its review, the plaintiff was completing his final semester and the school said that it would not expel the student even if it won [*DeFunis v. Odegaard* (1974) 416 US 312, 319-320, 94 S Ct 1704, 40 L Ed2d 164] .

Exception--Capable of Repetition Yet Evading Review:

The mootness rule does not apply if the threatened harm can be repeated but systematically evade review. In such cases, an Article III court may still hear the case [see, e.g., *Southern Pac. Terminal Co. v. Interstate Commerce Comm'n* (1911) 219 US 498, 515, 31 S Ct 279, 55 L Ed 310] .

Example:

In *Roe v. Wade*, a previously pregnant woman challenged a Texas statute criminally prohibiting abortion. Noting that the human gestation period would effectively prohibit litigation related to pregnancy, the Supreme Court rejected respondent's mootness claim because the harm was "capable of repetition yet evading review" [*Roe v. Wade* (1973) 410 US 113, 125, 93 S Ct 705, 35 L Ed2d 147] .



Cross Reference:

Discussion of mootness, see *Matthew Bender[(R)] Practice Guide: Federal Pretrial Civil Procedure in California*, 2.45.

3.12[4][c] Plaintiff Must Have Standing to Sue Based on Personal Stake in the Matter. To have standing, the plaintiff must make a showing of:

- Having suffered some redressable injury attributable to the defendant's conduct ("injury in fact") [*Association of Data Processing Serv. Orgs. Inc. v. Camp* (1970) 397 US 150, 152, 90 S Ct 827, 25 L Ed2d 184 ; see *Warth v. Seldin* (1975) 422 US 490, 525, 95 S Ct 2197, 45 L Ed2d 343 (dissenting opinion)].
- Arguably falling within the zone of interests protected by some legal rule.
- Having sustained an injury that could be remedied by the relief sought [*Linda R.S. v. Richard D.* (1973) 410 US 614, 618, 93 S Ct 1146, 35 L Ed2d 536 ; see *Warth v. Seldin* (1975) 422 US 490, 525-526, 95 S Ct 2197, 45 L Ed2d 343 (dissenting opinion)].

3.12[4][d] Case Presenting "Political Question" Cannot Be Judicially Decided. A political question is present in any of the following situations [*Baker v. Carr* (1962) 369 US 186, 208-211, 82 S Ct 691, 7 L Ed2d 663] :

- There is a "textually demonstrable constitutional commitment of the issue to a coordinate political department."
- There is a "lack of judicially discoverable and manageable standards for resolving" the dispute.
- The case is impossible to decide without "an initial policy determination of a kind clearly for nonjudicial discretion."
- The case is impossible to decide without "expressing lack of the respect due coordinate branches of government."
- There is an "unusual need for unquestioning adherence to a political decision already made."
- There is potential for "embarrassment from multifarious pronouncements by various departments on one question."



Cross Reference:

Discussion of political question doctrine, see *Matthew Bender[(R)] Practice Guide: Federal Pretrial Civil Procedure in California*, 2.46.

3.12[5] Supplemental Jurisdiction Extends Federal Court Subject Matter Jurisdiction. Supplemental jurisdiction allows federal courts to hear additional claims against existing parties, or claims against additional parties, that otherwise would not qualify for federal jurisdiction [28 USC § 1367]. If there are claims within both federal and state jurisdiction, a federal court may retain jurisdiction over the case even if eventually the federal claim is dismissed on the merits. Supplemental jurisdiction over multiple claims requires that [*Trustees of the Constr. Indus. & Laborers Health & Welfare Trust v. Desert Valley Landscape & Maint., Inc.* (9th Cir 2003) 333 F3d 923, 925] :

- The claims arise from a common nucleus of operative fact; and
- The claims are of the type that ordinarily would be tried together in one proceeding.



Cross References:

Form for remanding removed action to state court, see *Matthew Bender[(R)] Practice Guide: Federal*

Pretrial Civil Procedure in California, Ch. 3, Removing a State Court Case to Federal Court.

Discussion of diversity jurisdiction, see Matthew Bender[(R)] Practice Guide: Federal Pretrial Civil Procedure in California, Ch. 2, Determining Forum (Jurisdiction and Venue).

Legal Topics:

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

Civil ProcedureJurisdictionSubject Matter JurisdictionFederal QuestionsGeneral OverviewCivil
ProcedureJurisdictionSubject Matter JurisdictionFederal QuestionsSubstantial QuestionsCivil
ProcedureJurisdictionSubject Matter JurisdictionFederal QuestionsWell-Pleaded Complaint RuleCivil
ProcedureJurisdictionSubject Matter JurisdictionJurisdiction Over ActionsGeneral Overview



78 of 175 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 3 Determining Jurisdiction and Venue in Contract Actions

IV. CHOOSING CALIFORNIA OR FEDERAL FORUM IF BOTH OPTIONS ARE AVAILABLE

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3.13 CHECKLIST: Choosing California or Federal Forum If Both Options Are Available.

- ☐ Determine whether there is a choice between federal and state forum.

Discussion:

See 3.14

- ☐ Evaluate all possible variances between applicable state law and federal statutory and common law, if any.

Discussion:

See 3.16

- ☐ Analyze whether differences between California Superior Court and Federal District Court jury pools may be significant.

☐ For plaintiff(s).

☐ For defendant(s).

☐ For possible intervenors or other third-party litigant(s).

Discussion:

See 3.18

- ☐ Analyze whether 9 out of 12 jurors needed to prevail in state court, compared to unanimous 6 jurors needed in federal court, will be significant in case.

Discussion:

See 3.18

- ☐ Determine whether federal system of assigning judges could be advantageous to client's position.

Discussion:

See 3.19

- ☐ If action is class action, determine if California court would be more amenable.

Discussion:

See 3.20

- ☐ Are there any significant differences in evidence rules that would be more favorable to client's case?

Discussion:

See 3.21

- ☐ Will federal magistrate system be advantageous to case management of client's case?

Discussion:

See 3.22

Legal Topics:

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

Civil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsGeneral OverviewCivil
ProcedureJurisdictionSubject Matter JurisdictionGeneral OverviewCivil ProcedureVenueGeneral Overview



79 of 175 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 3 Determining Jurisdiction and Venue in Contract Actions

IV. CHOOSING CALIFORNIA OR FEDERAL FORUM IF BOTH OPTIONS ARE AVAILABLE

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3.14 Personal Jurisdiction Is the Same.

Because California and federal personal jurisdiction are co-extensive, if one cannot obtain jurisdiction over a defendant in state court, there should be no expectation of a better jurisdictional result in a California federal court [*see Fed R Civ P 4(k)(1)*; *Omni Capital Int'l v. Rudolf Wolff & Co., Ltd. (1987) 484 US 97, 101, 108 S Ct 404, 98 L Ed2d 415*].

Legal Topics:

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

Civil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsGeneral OverviewCivil

ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsConstitutional LimitsCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Personam ActionsGeneral Overview



80 of 175 DOCUMENTS

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Chapter 3 Determining Jurisdiction and Venue in Contract Actions

IV. CHOOSING CALIFORNIA OR FEDERAL FORUM IF BOTH OPTIONS ARE AVAILABLE

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3.15 Pleading Requirements Are Generally the Same.

California and federal courts have substantially similar pleading requirements:

Examples--Pleading a Complaint:

- California requires statement of the facts in ordinary and concise language [*CCP* § 425.10(a)(1)].
- Federal notice pleading requirements call for a short and plain statement of the claims [*Fed R Civ P* 8(a)].

Legal Topics:

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

Civil ProcedurePleading & PracticePleadingsGeneral OverviewCivil ProcedurePleading & PracticePleadingsComplaintsGeneral Overview



81 of 175 DOCUMENTS

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Chapter 3 Determining Jurisdiction and Venue in Contract Actions
IV. CHOOSING CALIFORNIA OR FEDERAL FORUM IF BOTH OPTIONS ARE AVAILABLE

1-3 MB Practice Guide: CA Contract Litigation 3.16

3.16 Substantive Law Is the Same for Federal Cases With Diversity Jurisdiction.

In cases brought under diversity jurisdiction in federal court, there are no differences in the substantive law applied [see *Erie R.R. Co. v. Tompkins* (1938) 304 US 64, 78, 11 Ohio Op. 246] .



Strategic Point:

Although the same substantive law applies, variances in procedures nevertheless may significantly affect the outcome [see, e.g., "California's Anti-SLAPP Remedy After Eleven Years," 34 *McGeorge LR* 731 (2003)]. Under the *Erie* doctrine, certain federal rules are applied, rather than their state counterparts, when hearing a state claim based on diversity jurisdiction. A defendant should investigate whether any such procedural differences would be significant to the case.

Legal Topics:

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

Civil ProcedureJurisdictionDiversity JurisdictionGeneral OverviewCivil ProcedureFederal & State
InterrelationshipsErie Doctrine



82 of 175 DOCUMENTS

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Chapter 3 Determining Jurisdiction and Venue in Contract Actions

IV. CHOOSING CALIFORNIA OR FEDERAL FORUM IF BOTH OPTIONS ARE AVAILABLE

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3.17 Discovery Procedures Differ.

The differences between federal and state discovery procedures, including cut-off times and mandatory disclosures, may prove to be of strategic importance to a particular dispute. For example, in federal courts, parties must disclose, without waiting for a discovery request, the names of all witnesses and copies of any documentary evidence supporting their positions [*Fed R Civ P 26(a)(1)*].

Cross Reference:

Discovery process in federal court, see Matthew Bender[(R)] Practice Guide: Federal Pretrial Civil Procedure in California, Ch. 23, Methods of Discovery.

Legal Topics:

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

Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryDisclosuresMandatory DisclosuresCivil ProcedureDiscoveryMethodsGeneral Overview



83 of 175 DOCUMENTS

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Chapter 3 Determining Jurisdiction and Venue in Contract Actions

IV. CHOOSING CALIFORNIA OR FEDERAL FORUM IF BOTH OPTIONS ARE AVAILABLE

*1-3 MB Practice Guide: CA Contract Litigation 3.18***3.18 Juries May Differ.**

The general perception that jury pools drawn from urban and rural areas are different may be worth considering in the context of the subject matter of the contract in dispute.

Examples:

- Urban and rural jury pools might have different approaches to a farm contract dispute.
- There potentially may be relevant ideological differences between the two sets of jurors.
- The choice between the two courts may ultimately have an impact on the amount of damages awarded.
- Federal courts have smaller juries and require unanimous verdicts; California courts have 12-person juries and require only a 3/4 verdict in civil cases [*CCP § 618*; *Fed R Civ P 48*].

**Strategic Point:**

In a civil trial in state court, the plaintiff needs to convince only 9 out of 12 jurors [*CCP § 618*]. In federal court, there are usually six-person juries, and their verdict must be unanimous [*Fed R Civ P 48*].

**Cross Reference:**

Number of jurors required for verdict in federal cases, see Moore's Federal Practice, Ch. 48, Number of Jurors--Participation in Verdict (Matthew Bender 3d ed.).

Legal Topics:

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

Civil ProcedureTrialsJury TrialsGeneral OverviewCivil ProcedureTrialsJury TrialsJurorsGeneral OverviewCivil ProcedureTrialsJury TrialsJurorsSelectionGeneral Overview



84 of 175 DOCUMENTS

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Chapter 3 Determining Jurisdiction and Venue in Contract Actions

IV. CHOOSING CALIFORNIA OR FEDERAL FORUM IF BOTH OPTIONS ARE AVAILABLE

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3.19 Judicial Assignments May Differ.

Federal court cases are assigned to a single judge for all purposes. Unless that judge is recused or delegates matters to a magistrate, he or she will hear all matters in the case, from the initial status conference through law and motion and trial. California courts, on the other hand, often assign the same matter to different judges for law and motion, conferences, and trial (though some use the same "permanent assignment" system as the federal courts). Thus, federal judges may acquire a greater depth of familiarity with the facts of the case, which may be significant in matters that are unusually complex, and with the parties and their attorneys. In addition, federal judges are likely to be more familiar with federal claims and defenses, since they encounter them with greater frequency than state court judges. Depending on the type of contract claim in question, this difference may become important.

Legal Topics:

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

Civil ProcedureJudicial OfficersJudgesGeneral OverviewCivil ProcedurePretrial MattersConferencesGeneral
OverviewCivil ProcedurePretrial MattersConferencesCase Management



85 of 175 DOCUMENTS

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Chapter 3 Determining Jurisdiction and Venue in Contract Actions

IV. CHOOSING CALIFORNIA OR FEDERAL FORUM IF BOTH OPTIONS ARE AVAILABLE

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3.20 State Court May Be More Amenable to Class Actions.

A perception exists among some California attorneys that California courts are more class action-friendly than federal courts, especially on issues of class certification.

Cross References:

Federal class action procedures, see Matthew Bender[(R)] Practice Guide: Federal Pretrial Civil Procedure in California, Ch. 20, Class Actions.

California class action procedures, see Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, Ch. 33, Class Actions; or

California Forms of Pleading and Practice, Ch. 120, Class Actions.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsGeneral Overview



86 of 175 DOCUMENTS

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Chapter 3 Determining Jurisdiction and Venue in Contract Actions

IV. CHOOSING CALIFORNIA OR FEDERAL FORUM IF BOTH OPTIONS ARE AVAILABLE

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3.21 Evidence Rules May Differ.

Although California and federal evidence rules generally are similar, differences do exist. For example, a federal judge has greater discretion to exclude expert testimony [see Fed R Evid 702], and the federal exceptions to the hearsay rules are more lenient [see Fed R Evid 807].

Cross Reference:

Discussion of the federal evidence rules, and the complete text of the Federal Rules of Evidence, see Moore's Federal Practice.

Legal Topics:

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

EvidenceHearsayExceptionsGeneral OverviewEvidenceTestimonyExpertsGeneral Overview



87 of 175 DOCUMENTS

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Chapter 3 Determining Jurisdiction and Venue in Contract Actions

IV. CHOOSING CALIFORNIA OR FEDERAL FORUM IF BOTH OPTIONS ARE AVAILABLE

1-3 MB Practice Guide: CA Contract Litigation 3.22

3.22 Federal Magistrate Can Facilitate Case Management.

In federal courts, a magistrate exerts a tight rein on case management [*see Fed R Civ P 72* (referral of pretrial matters to magistrate)]. If there are likely to be discovery battles, with attendant need for discovery orders, the federal court magistrate can be a positive force in moving the case along.

Cross References:

Referring cases to magistrate judges, see *Matthew Bender[(R)] Practice Guide: Federal Pretrial Civil Procedure in California*, Ch. 16, *Case Management Conferences*, 16.24.

Discussion of federal magistrate system, see *Moore's Federal Practice*, Ch. 72, *Magistrate Judges; Pretrial Orders*, §§ 72.20-72.24 (Matthew Bender 3d ed.).

Legal Topics:

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

Civil ProcedureJudicial OfficersMagistratesGeneral OverviewCivil ProcedurePretrial MattersConferencesCase Management



88 of 175 DOCUMENTS

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Chapter 3 Determining Jurisdiction and Venue in Contract Actions
V. CHALLENGING CALIFORNIA COURT JURISDICTION

1-3 MB Practice Guide: CA Contract Litigation 3.23

3.23 CHECKLIST: Challenging California Court Jurisdiction.

☐ If personal jurisdiction may not exist against defendant in California, move immediately to end action without submitting to California jurisdiction.

☐ Select grounds for objection:

☐ Motion to quash service of summons for lack of personal jurisdiction.

☐ Motion to dismiss or stay action for inconvenient forum.

☐ Motion to dismiss or stay action for delay in serving summons.

Authority:

CCP § 418.10

Discussion:

See 3.24[1]

☐ Do not waive objection to jurisdiction by making a general appearance.

Authority:

CCP § 418.10; Greener v. Workers' Comp. Appeals Bd. (1993) 6 C4th 1028, 1036-1037, 25 CR2d 539, 863 P2d 784 ; Hamilton v. Asbestos Corp. (2000) 22 C4th 1127, 1147, 95 CR2d 701, 998 P2d 403

Discussion:

See 3.24[2]

☐ Serve and file motion before last day to plead to avoid waiver.

Authority:*CCP § 418.10***Discussion:**

See 3.24[3]

☐ Determine if California courts lacks subject matter jurisdiction to enter judgment on the type of action.

☐ Select procedure for challenge:

☐ Demurrer to complaint.

☐ Affirmative defense.

☐ Motion to dismiss.

Authority:*CCP §§ 430.10, 430.30, 430.70, 396, 597***Discussion:**

See 3.25[1]

☐ Make challenge at earliest possible time (however, challenge is never waived).

Authority:*Residents for Adequate Water v. Redwood Valley County Water Dist. (1995) 34 CA4th 1801, 1805***Discussion:**

See 3.25[2]

Legal Topics:

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

Civil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Personam ActionsChallengesCivil
 ProcedureJurisdictionSubject Matter JurisdictionGeneral OverviewCivil ProcedurePleading & PracticeDefenses,
 Demurrers & ObjectionsMotions to DismissCivil ProcedurePleading & PracticeDefenses, Demurrers &
 ObjectionsWaiver & Preservation



89 of 175 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 3 Determining Jurisdiction and Venue in Contract Actions
V. CHALLENGING CALIFORNIA COURT JURISDICTION

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3.24 Challenging Superior Court Personal Jurisdiction.

3.24[1] Defendant Must Move to End Action Immediately Without Submitting to California Jurisdiction.

Motions to quash and motions to stay or dismiss the action brought under *CCP* § 418.10 provide the defendant with an opportunity to end an action immediately without making a general appearance, which would have the effect of submitting to the court's jurisdiction to proceed with the case [*see CCP* §§ 418.10, 1014]. The objections that can be raised are:

- Lack of personal jurisdiction [*see* 3.07] (via motion to quash service of summons).
- Inconvenient forum [*see* 3.09] (via motion to stay or dismiss action).
- Dismissal for delay in serving summons (via motion to stay or dismiss action).

These issues must be the first ones to be raised. Making another response before doing so will constitute a general appearance submitting to the court's jurisdiction and waiving any claim of lack of personal jurisdiction [*see CCP* § 1014].



Trap:

Failure to make a *CCP* § 418.10 motion at the time of filing a demurrer or motion to strike constitutes a waiver of the issues of lack of personal jurisdiction, inadequacy of process, inadequacy of service of process, inconvenient forum, and delay in serving summons [*see CCP* § 418.10(e)(3)].

The effect of *CCP* § 418.10(e)(3) is limited to cautioning that a defendant who chooses to demur or move to strike must also move to quash; such a defendant cannot reserve the jurisdictional objection and later file it with the answer if his or her challenge to the pleadings fails [*Roy v. Superior Court* (2005) 127 CA4th 337]. Under *CCP* § 418.10(e), a defendant may move to quash coupled with any other action without being deemed to have submitted to the court's jurisdiction; however, the motion to quash remains essential. Thus, a defendant in a breach of contract action may move to quash and simultaneously file an answer containing affirmative defenses, but the latter is not a substitute for the former [*Roy v. Superior Court* (2005) 127 CA4th 337].

Cross References:

Procedures and forms for challenging personal jurisdiction in California, see Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, Ch. 9, Motions to Quash and Other Objections to Personal Jurisdiction.

Challenging subject matter jurisdiction checklist form for drafting notice of motion to quash summons due to lack of personal jurisdiction or for setting aside and vacating default judgment, and discussion of facts establishing lack of personal jurisdiction, see California Forms of Pleading and Practice, Ch. 323, Jurisdiction: Personal Jurisdiction, Inconvenient Forum, and Appearances (Matthew Bender).

Discussion of obtaining relief from judgments for lack of jurisdiction, see California Forms of Pleading and Practice, Ch. 489, Relief From Judgments and Orders (Matthew Bender).

3.24[2] Defendant Must Avoid Making a General Appearance, Which Waives Objection to California Jurisdiction. A general appearance in an action waives any objection to personal jurisdiction, and the defendant submits to the personal jurisdiction of the court [see, e.g., *Greener v. Workers' Comp. Appeals Bd.* (1993) 6 C4th 1028, 1036-1037, 25 CR2d 539, 863 P2d 784] . A general appearance is made when a defendant either [see *Hamilton v. Asbestos Corp.* (2000) 22 C4th 1127, 1147, 95 CR2d 701, 998 P2d 403] :

- Enters an appearance in an action without limiting the purpose of the appearance; or
- Except as otherwise provided by statute, asks for relief that only a court with personal jurisdiction over the defendant can give or recognizes the authority of the court to proceed.



Warning:

Even if moving party designates motion to quash as a "special appearance," if the moving party seeks relief on any basis other than lack of personal jurisdiction, the party makes a general appearance [*Greener v. Workers' Comp. Appeals Bd.* (1993) 6 C4th 1028, 1036-1037, 25 CR2d 539, 863 P2d 784 ; see also *Factor Health Mgmt. v. Superior Court* (2005) 132 CA4th 246 (because parties who challenged personal jurisdiction in a trade secrets lawsuit filed an application for discovery in response to an order to show cause for a preliminary injunction before they had filed a motion to quash service of summons, they were not protected from making a general appearance by CCP § 418.10(e)(1))].



Strategic Pointss--Defendant:

- Effective January 1, 2003, California amended CCP § 418.10 to allow a party making a 418.10 motion to simultaneously answer, demur, or move to strike the complaint or cross-complaint without making a general appearance until entry of the order denying the motion. The legislature specifically stated the amendment was to conform California practice with respect to challenging personal jurisdiction to federal practice under *Fed R Civ P 12*. Attorneys are advised to review applicable case law in California for interpretation of this change in practice before including these additional pleadings, since it has significantly changed the procedures for what constitutes a special as opposed to a general appearance.
- Objecting to personal jurisdiction can have a substantial effect on the manner in which these disputes

are litigated, since lawyers, of course, must be extremely sensitive about waiving, through appearances, discovery, or briefing, what may be the most significant defense the out-of-state party has. Real problems can arise if the substantive defense and the jurisdictional defense overlap, such as in a breach of contract case in which the out-of-state defendant argues that no contract was formed and there was no minimum contact sufficient for jurisdiction (for example, when the negotiations/sale involved an agent). In those situations, the plaintiff can argue that the defendant was arguing the merits and not limiting its arguments to the jurisdictional issues. Be sure to fashion the motion objecting to personal jurisdiction in a manner that does not seek any type of relief that a court having personal jurisdiction over the defendant could enter.



Cross Reference:

Discussion of special and general appearance, see *Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure*, 9.07.

3.24[3] Motion Must Be Served and Filed on or Before Last Day to Plead. A notice of motion to quash service of summons on the ground of lack of jurisdiction of the court over the defendant must be served and filed on or before the last day of the time to plead, or within any further time that the court may for good cause allow [CCP § 418.10(a)].



Timing:

A responsive pleading to a civil action complaint must be filed within 30 days after service of summons [CCP § 412.20(a)(3)].

Legal Topics:

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

Civil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsGeneral OverviewCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Personam ActionsChallengesCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to DismissCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsWaiver & Preservation



90 of 175 DOCUMENTS

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Chapter 3 Determining Jurisdiction and Venue in Contract Actions
V. CHALLENGING CALIFORNIA COURT JURISDICTION

1-3 MB Practice Guide: CA Contract Litigation 3.25

3.25 Challenging Superior Court Subject Matter Jurisdiction.

3.25[1] Challenge to Subject Matter Jurisdiction May Be Raised by Demurrer, Affirmative Defense, or Motion to Dismiss. A challenge to subject matter jurisdiction asserts that the court in which the action is filed is without the constitutional or statutory authority to hear the type of action that is before it. The challenge is brought by:

- Demurrer to the complaint if lack of jurisdiction appears on the face of the complaint [*CCP* §§ 430.10(a), 430.30(a), 430.70; *Greener v. Workers' Comp. Appeals Bd.* (1993) 6 C4th 1028, 1036, 25 CR2d 539, 863 P2d 784] .
- Affirmative defense [*CCP* §§ 430.30(b), 597].
- Motion to dismiss [*see CCP* § 396].

► Cross References:

Discussion of challenging subject matter jurisdiction, see Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, Ch. 10, Dismissal for Lack of Subject Matter Jurisdiction.

Discussion of challenging diversity jurisdiction, see Matthew Bender[(R)] Practice Guide: Federal Pretrial Civil Procedure in California, Ch. 2, Determining Forum (Jurisdiction and Venue).

Challenging subject matter jurisdiction checklist and form for making a motion to dismiss or transfer because the court lacks subject matter jurisdiction, see California Forms of Pleading and Practice, Ch. 324, Jurisdiction: Subject Matter Jurisdiction (Matthew Bender).

Discussion of obtaining relief from judgments for lack of jurisdiction, see California Forms of Pleading and Practice, Ch. 489, Relief From Judgments and Orders (Matthew Bender).

3.25[2] Challenge May Be Made at Any Time. A defect in subject matter jurisdiction can be raised at any stage of the proceedings, including being raised for the first time on appeal [*Residents for Adequate Water v. Redwood Valley County Water Dist.* (1995) 34 CA4th 1801, 1805, 41 CR2d 123 ; *Miranda v. 21st Century Ins. Co.* (2004) 117

CA4th 913, 920] .



Strategic Point--Defendant:

Even though fundamental subject matter jurisdiction cannot be waived, the issue should be raised at the earliest opportunity. If the issue is not raised and a party prevails on an issue, the opposing party can render the success meaningless. Taking the gamble that the lack of subject matter jurisdiction will not be raised is rarely worth the risk. If the opposing party does not recognize the defect, it is highly likely that the court--particularly an appellate court--will identify the issue [*see, e.g., Indiana Gas Co. v. Home Ins. Co. (7th Cir 1998) 141 F3d 314, 321*] .

Legal Topics:

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

Civil ProcedureJurisdictionSubject Matter JurisdictionGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to Dismiss



91 of 175 DOCUMENTS

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Chapter 3 Determining Jurisdiction and Venue in Contract Actions

VI. CHALLENGING FEDERAL COURT JURISDICTION

1-3 MB Practice Guide: CA Contract Litigation 3.26

3.26 CHECKLIST: Challenging Federal Court Jurisdiction.

☐ If personal jurisdiction does not exist against defendant in federal court, move immediately to end action without submitting to federal court jurisdiction.

☐ Determine which of following methods to use to bring challenge:

☐ Rule 12(b) motion for dismissal.

☐ Raise a jurisdictional defense in answer.

☐ Allow plaintiff to obtain a default judgment by not appearing in action, then collaterally attack that judgment for lack of jurisdiction.

Authority:

Fed R Civ P 12(b); Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee
(1982) 456 US 694, 706, 102 S Ct 2099, 72 L Ed2d 492

Discussion:

See 3.27[1]

☐ Do not waive objection to jurisdiction by making a *Fed R Civ P 12* motion but not including an objection to personal jurisdiction, or by not making a *Fed R Civ P 12* motion and failing to include the objection in answer.

Authority:

Fed R Civ P 12(b), (g), (h)(1); Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee
(1982) 456 US 694, 704, 102 S Ct 2099, 72 L Ed2d 492

Discussion:

See 3.28[2]

☐ Determine grounds for challenge:

☐ Lack of subject matter jurisdiction over action.

☐ Does case involve federal question?

Discussion:

See 3.28[1]

☐ Lack of diversity jurisdiction.

Discussion:

See 3.27[2]

☐ Absence of "case or controversy":

☐ Dispute is not yet "ripe."

Authority:

See *Abbott Labs v. Gardner* (1967) 387 US 136, 149, 87 S Ct 1507, 18 L Ed2d 681 ,
overruled on other grounds by *Califano v. Sanders* (1977) 430 US 99, 97 S Ct 980, 51 L
Ed2d 192

Discussion:

See 3.28[3]

☐ Mootness.

Authority:

DeFunis v. Odegaard (1974) 416 US 312, 319-320, 94 S Ct 1704, 40 L Ed2d 164

Discussion:

See 3.28[3]

☐ Plaintiff's lack of redressable injury.

Authority:

Warth v. Seldin (1975) 422 US 490, 525, 95 S Ct 2197, 45 L Ed2d 343

Discussion:

See 3.28[3]

☐ Case presents "political question" that cannot be judicially decided.

Authority:

Baker v. Carr (1962) 369 US 186, 208-211, 82 S Ct 691, 7 L Ed2d 663

Discussion:

See 3.28[3]

Legal Topics:

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

Civil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsGeneral OverviewCivil
ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Personam ActionsGeneral OverviewCivil
ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Personam ActionsChallengesCivil
ProcedureJurisdictionSubject Matter JurisdictionGeneral OverviewCivil ProcedureJurisdictionSubject Matter
JurisdictionJurisdiction Over ActionsGeneral Overview



92 of 175 DOCUMENTS

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Chapter 3 Determining Jurisdiction and Venue in Contract Actions
VI. CHALLENGING FEDERAL COURT JURISDICTION

1-3 MB Practice Guide: CA Contract Litigation 3.27

3.27 Challenging Federal Court Personal Jurisdiction.

3.27[1] Procedures for Challenging Personal Jurisdiction. Personal jurisdiction may be challenged as follows:

- Defendant may attack jurisdiction by filing a motion to dismiss for lack of jurisdiction over the person at the beginning of the action [*Fed R Civ P 12(b)*].
- Defendant may raise a jurisdictional defense in the answer [*Fed R Civ P 12(b)*].
- Defendant may allow plaintiff to obtain a default judgment by not appearing in the action, and then collaterally attack the default judgment for lack of jurisdiction [*see Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee* (1982) 456 US 694, 706, 102 S Ct 2099, 72 L Ed2d 492] .

► Cross References:

See *Matthew Bender[(R)] Practice Guide: Federal Pretrial Civil Procedure in California*, 2.41.

3.27[2] Avoiding Waiver of Objection to Personal Jurisdiction. A defendant must raise an objection to personal jurisdiction, either by proper pre-pleading motion or in the initial responsive pleading, to avoid waiving the right to object. The jurisdiction objection is waived if either [*see Fed R Civ P 12(b), (g), (h)(1); Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee* (1982) 456 US 694, 704, 102 S Ct 2099, 72 L Ed2d 492] :

- Defendant makes a *Fed R Civ P 12* motion but does not include an objection to personal jurisdiction.
- Defendant does not make a *Fed R Civ P 12* motion, and fails to include the objection in the answer.

► Cross Reference:

Matthew Bender[(R)] Practice Guide: Federal Pretrial Civil Procedure in California, 2.41.

Legal Topics:

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

Civil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Personam ActionsGeneral OverviewCivil
ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Personam ActionsChallengesCivil ProcedurePleading
& PracticeDefenses, Demurrers & ObjectionsMotions to DismissCivil ProcedurePleading & PracticeDefenses,
Demurrers & ObjectionsWaiver & Preservation



93 of 175 DOCUMENTS

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Chapter 3 Determining Jurisdiction and Venue in Contract Actions
VI. CHALLENGING FEDERAL COURT JURISDICTION

1-3 MB Practice Guide: CA Contract Litigation 3.28

3.28 Challenging Federal Court Subject Matter Jurisdiction.

3.28[1] Federal Subject Matter Jurisdiction May Be Challenged by Asserting Lack of Federal Question.

Federal question jurisdiction may be challenged by any of the following methods:

- Bringing a Rule 12(b) motion for dismissal [*Fed R Civ P 12(b)(1)*].
- Raising a jurisdictional defect in the answer [*Fed R Civ P 12(h)(3)*].
- Bringing a motion for relief from judgment [*see Fed R Civ P 60(b)(6)*; *Bank of Montreal v. Olafsson* (6th Cir 1981) 648 F2d 1078, 1079] .
- Litigating the issue in a collateral proceeding by a party that did not appear in the underlying action and against whom a default judgment was entered [*see Chicot County Drainage Dist. v. Baxter State Bank* (1940) 308 US 371, 378, 60 S Ct 317, 84 L Ed 329] .



Cross References:

Form for remanding removed action back to state court, see Matthew Bender[(R)] Practice Guide: Federal Pretrial Civil Procedure in California, Ch. 3, Removing a State Court Case to Federal Court.

Discussion of federal question jurisdiction, see Matthew Bender[(R)] Practice Guide: Federal Pretrial Civil Procedure in California, Ch. 2, Determining Forum (Jurisdiction and Venue).

3.28[2] Federal Subject Matter Jurisdiction May Be Challenged by Asserting Lack of Diversity. Diversity jurisdiction may be challenged by any of the following methods:

- Bringing a Rule 12(b) motion for dismissal [*Fed R Civ P 12(b)(1)*].
- Raising the defect in the answer [*Fed R Civ P 12(h)(3)*].
- Bringing a motion for relief from judgment [*see Fed R Civ P 60(b)(6)*; *Bank of Montreal v. Olafsson*

(6th Cir 1981) 648 F2d 1078, 1079] .

- Litigating the issue in a collateral proceeding by a party that did not appear in the underlying action and against whom a default judgment was entered against them [see *Chicot County Drainage Dist. v. Baxter State Bank* (1940) 308 US 371, 378, 60 S Ct 317, 84 L Ed 329] .

3.28[3] Federal Subject Matter Jurisdiction May Be Challenged by Asserting Lack of Case or Controversy.

Federal courts only have jurisdiction over actual cases and controversies; no federal subject matter jurisdiction exists absent a proper case or controversy [see *Cardinal Chem. Co. v. Morton Int'l, Inc.* (1993) 508 US 83, 99, 113 S Ct 1967, 124 L Ed2d 1] . This rule requires a tangible dispute between the parties before the court [see *Church of Scientology v. United States* (1992) 506 US 9, 12, 113 S Ct 447, 121 L Ed2d 313] .

Article III requires that a plaintiff's claim be live not just when the action is commenced, but throughout the litigation, including while the case is on appeal [see *Lewis v. Continental Bank Corp.* (1990) 494 US 472, 477-478, 110 S Ct 1249, 108 L Ed2d 400] .

The following are components of the case or controversy determination:

- Standing [see 3.12[4][c]].
- Ripeness [see 3.12[4][a]].
- Mootness [see 3.12[4][b]].
- Political questions [see 3.12[4][d]].

Strategic Point:



Because federal pleading requirements include a jurisdictional statement, counsel should immediately analyze the case for grounds to attack the jurisdictional statement. The analysis should review the following issues:

- Whether a case or controversy exists.
- Whether subject matter jurisdiction exists, either through federal question, or diversity, or supplemental jurisdiction.

Legal Topics:

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

Civil ProcedureJurisdictionSubject Matter JurisdictionGeneral OverviewCivil ProcedureJurisdictionSubject Matter JurisdictionFederal QuestionsGeneral OverviewCivil ProcedureJurisdictionSubject Matter JurisdictionJurisdiction Over ActionsGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to Dismiss



94 of 175 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 3 Determining Jurisdiction and Venue in Contract Actions

VII. REMOVING A CALIFORNIA CONTRACT ACTION TO FEDERAL COURT

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3.29 CHECKLIST: Removing a California Contract Action to Federal Court.

☐ Determine if action meets general criteria for removal.

☐ Was civil action originally brought in state court?

☐ Does district court have original jurisdiction over the action?

☐ Does the defendant or all defendants seek removal?

☐ Is removal sought to federal district court for the district and division in which the state action is pending?

Authority:

28 USC § 1441

Discussion:

See 3.30[1]

☐ Consider options and strategies regarding removal.

☐ Would removal increase costs of litigation?

☐ Are federal court rules and procedures more favorable to defendant?

☐ If the federal court declines to exercise its jurisdiction over part of the action:

- ☐ Is it rational to litigate in both state and federal forums simultaneously?
- ☐ Can one of the actions be stayed?
- ☐ Should there be a stipulation to remand the entire action to the state court?

Discussion:

See 3.30[2]

- ☐ Determine if grounds exist for removal.
 - ☐ Does case involve federal question?
 - ☐ Does the case involve diversity of citizenship?
 - ☐ Does a special removal statute serve as basis for removal?

Authority:*28 USC § 1331; 28 USC § 1332***Discussion:**

See 3.30[3]

- ☐ Follow procedure for seeking removal.

Authority:

28 USC § 1446(a); Fed R Civ P Rule 11; 28 USC § 1446(a); 28 USC § 1446(b); Blankenberg v. Commercial Ins. Co. of Newark, N.J. (ND Cal 1987) 655 F Supp 223, 225 ; 12 USC § 1441a(l)(3)(A); 12 USC § 1819(b)(2)(B); 28 USC § 1446(d)

Discussion:

See 3.30[4]

Legal Topics:

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

Civil ProcedureRemovalBasisGeneral OverviewCivil ProcedureRemovalElementsGeneral OverviewCivil ProcedureRemovalElementsFederal VenueCivil ProcedureRemovalElementsProper TransferorsCivil ProcedureRemovalElementsRemovability



95 of 175 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 3 Determining Jurisdiction and Venue in Contract Actions

VII. REMOVING A CALIFORNIA CONTRACT ACTION TO FEDERAL COURT

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3.30 Removing a State Contract Action to Federal Court.

3.30[1] Availability of Removal Option in Contract Cases. Removal statutes permit defendants to transfer an action originally filed in state court to the federal district court for the district and division in which the state action is pending. Defendants may invoke removal jurisdiction only when the case could have originally been brought in federal court. Removal usually is accomplished under the general removal statute, which provides for removal based on federal question or diversity jurisdiction [*see 28 USC § 1441*].

The general removal statute includes the following restrictions [*see 28 USC § 1441*]:

- Removal is possible only in civil actions brought originally in state court.
- The district courts must have original jurisdiction over the action.
- Only the defendant or all defendants may remove.
- The action must be removed to the federal district court for the district and division in which the state action is pending.

3.30[2] Options and Strategies for Party Seeking to Remove Contract Action. It is generally more expensive to litigate in the federal courts and an action of de minimis value probably is better off in state court. If the matter has been removed on the basis of diversity jurisdiction and the plaintiff genuinely believes that the amount in controversy is less than \$75,000, the plaintiff should consider stipulating that recovery in excess of that amount will not be sought.

Some attorneys view the federal court rules and procedures as more favorable to defendants. However, this view is not universally held, and may not be accurate for certain kinds of cases.

The parties should carefully consider any circumstances in which there is a potential that the action may proceed in part in state court and in part in the federal court due to lack of diversity and only partial subject matter jurisdiction in the federal court. If the federal court declines to exercise its jurisdiction over the remainder of the claims, the parties must evaluate the following:

- Whether it is rational to litigate in both forums simultaneously;
- Whether one of the actions should be stayed; or
- Whether there should be a stipulation to remand the entire action to the state court in order to allow all of the proceedings to remain in the same forum.

Cross Reference:

Discussion of strategies and procedures for moving to remand action, see *Matthew Bender[(R)] Practice Guide: Federal Pretrial Civil Procedure in California*, 3.23 *et seq.*

3.30[3] Grounds for Removal.

3.30[3][a] Federal Question Is Basis for Removal. Removal to federal court is available in cases involving a claim or right arising under the Constitution, treaties, or laws of the United States (federal question) [see 28 USC § 1331].

Cross Reference:

Additional analysis of federal question, see *Matthew Bender[(R)] Practice Guide: Federal Pretrial Civil Procedure in California*, 3.09.

3.30[3][b] Diversity of Citizenship Is Basis for Removal. Removal to federal court is available in actions brought between citizens of different states when the matter in controversy exceeds \$75,000, exclusive of interest and costs [see 28 USC § 1332].

Cross Reference:

Additional analysis of diversity, see *Matthew Bender[(R)] Practice Guide: Federal Pretrial Civil Procedure in California*, 3.10.

3.30[3][c] Special Removal Statute Is Basis for Removal. Certain federal statutes allow for removal to federal court, in some cases even when the federal court does not have original jurisdiction.

Cross Reference:

Matthew Bender[(R)] Practice Guide: Federal Pretrial Civil Procedure in California, 3.13.

3.30[4] Procedure for Seeking Removal.

3.30[4][a] Notice Must Be Filed in Proper Court. The notice of removal must be filed in the United States district court for the district and division within which the action is pending [28 USC § 1446(a); *Fed R Civ P* 11].

Cross References:

Discussion of notice to district court, see *Matthew Bender[(R)] Practice Guide: Federal Pretrial Civil Procedure in California*, 3.17, 3.19[1]; or

Moore's Federal Practice, § 107.30[2][a] (Matthew Bender 3d ed.).

3.30[4][b] Notice Must Specify Grounds for Removal. The notice of removal must contain a short and plain statement of the grounds for removal, together with a copy of all process, pleadings, and orders served on the party in the action [28 USC § 1446(a)]. The party is not required to serve copies of discovery documents such as interrogatories and notices of deposition [*Visicorp v. Software Arts, Inc.* (ND Cal 1983) 575 F Supp 1528, 1531] .

► Cross References:

Discussion of contents and preparation of notice, see *Matthew Bender[(R)] Practice Guide: Federal Pretrial Civil Procedure in California*, 3.18.

Additional forms, see *Matthew Bender[(R)] Practice Guide: Federal Pretrial Civil Procedure in California*, 3.34 -3.37.

3.30[4][c] Notice Generally Must Be Filed Within 30-Day Period. In general, the notice of removal must be filed within 30 days after the receipt by the defendant of a copy of the initial pleading setting forth plaintiff's claim for relief, or within 30 days after the service of summons on the defendant if that initial pleading has been filed in court and is not required to be served on defendant, whichever period is shorter [28 USC § 1446(b); see *Blankenberg v. Commercial Ins. Co. of Newark, N.J. (ND Cal 1987) 655 F Supp 223, 225*].

Exception:

In some instances, the statute authorizing removal to federal court may specify its own time period for filing a notice of removal [see, e.g., 12 USC § 1441a(l)(3)(A); 12 USC § 1819(b)(2)(B)].

► Cross Reference:

Discussion of timely notice, see *Matthew Bender[(R)] Practice Guide: Federal Pretrial Civil Procedure in California*, 3.20; or

Moore's Federal Practice, § 107.30[3][a] (Matthew Bender 3d ed.).

3.30[4][d] Notice Must Be Given to Adverse Parties and Clerk of State Court. The defendant seeking removal must give written notice of the removal to all adverse parties and must file a copy of the notice of removal with the clerk of the state court. The state court clerk must then effect the removal and the state court must proceed no further in the case [28 USC § 1446(d)].

► Cross Reference:

Discussion of notice to adverse parties and state court, see *Matthew Bender[(R)] Practice Guide: Federal Pretrial Civil Procedure in California*, 3.19[3]; or

Moore's Federal Practice, § 107.30[2][b] (Matthew Bender 3d ed.).

Legal Topics:

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

Civil ProcedureRemovalBasisGeneral OverviewCivil ProcedureRemovalElementsGeneral Overview



96 of 175 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 3 Determining Jurisdiction and Venue in Contract Actions

VIII. DETERMINING PROPER VENUE

1-3 MB Practice Guide: CA Contract Litigation 3.31

3.31 CHECKLIST: Determining Proper Venue.

- ☐ Decide whether action is "transitory" or "local."

Discussion:

See 3.32[6]

- ☐ Determine appropriate venue for each defendant:

Authority:

CCP § 395

Discussion:

See 3.32[1]

- ☐ County where obligation was to be performed.

Discussion:

See 3.32[1]

- ☐ County where contract was entered into.

Discussion:

See 3.32[1]

- ☐ County where any defendant resides at commencement of action.

Discussion:

See 3.32[1]

- ☐ Determine appropriate venue for a corporate defendant:

Authority:

CCP § 395.5

Discussion:

See 3.32[5]

- ☐ Where corporation has principal place of business.

Discussion:

See 3.32[5]

- ☐ Where contract was made.

Discussion:

See 3.32[5]

- ☐ Where contract was to be performed.

Discussion:

See 3.32[5]

- ☐ Where obligation arose.

Discussion:

See 3.32[5]

Legal Topics:

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

Civil ProcedureVenueGeneral Overview



97 of 175 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 3 Determining Jurisdiction and Venue in Contract Actions
VIII. DETERMINING PROPER VENUE

1-3 MB Practice Guide: CA Contract Litigation 3.32

3.32 Venue Rules Limit Appropriate Places for Litigation.

3.32[1] Statute Dictates Venue Selection. If a defendant has contracted to perform an obligation in a particular county, venue is appropriate in any of the following places [*see CCP § 395(a)*]:

- The venue where the obligation is to be performed (the place of making the contract unless specified otherwise in writing, if the defendant is an individual); a corporate defendant is not required to have a special writing [*CCP § 395.5*].
- The venue where the contract was entered into (the place of acceptance) [*see Wilson v. Scannavino (1958) 159 CA2d 369, 370-371, 324 P2d 350*].
- The venue where any defendant resides at the commencement of the action.

If other types of actions are litigated with the contract action (e.g., breach of promissory note, personal injury, fraud), special venue provisions may apply [*see CCP § 395(a)*].



Warning--Venue Selection Clauses Void:

The venue statute represents legislatively declared public policy fixing the place for trial and a venue selection clause that disrupts that policy will be held void [*see Alexander v. Superior Court (2003) 114 CA4th 723, 731, see 3.32[7]*].



Strategic Point--All Parties:

In alternate dispute resolution, by contrast, the place where the dispute will be heard *can* be determined by contract. Just as parties to an arbitration or mediation agreement can select the governing rules, the timetable, the number of arbitrators or mediators, the arbitrators or mediators themselves, and other logistics, the parties also can specify where an arbitration proceeding will take place. In other words,

although courts cannot be pre-selected, arbitration locales can. For discussion of contractual arbitration clauses, see Ch. 5, Determining Whether to Arbitrate or Litigate.

 Cross Reference:

Discussion of statutes governing venue, see California Forms of Pleading and Practice, Ch. 571, Venue (Matthew Bender).

3.32[2] Special Venue Rule Applies to Consumer Obligations and Consumer Contracts. Actions concerning goods intended for personal, family, or household are governed by a separate venue rule, under which venue is proper in either [CCP § 395(b)]:

- The county where the buyer or lessee consumer signed the contract; or
- The county where the buyer or lessee consumer resided at the time the contract was entered into or at outset of the litigation.

3.32[3] Special Venue Rule Applies to Actions Involving City or County. Venue in actions involving cities or counties is governed by CCP § 394. This very complex statute basically provides that an action or proceeding against a city, county, or local agency may be tried in the county, or the county in which the governmental entity is situated, unless another local governmental entity is the party bringing the action, in which case the action may be tried in any county not a party to the action and in which the governmental entity is not situated. In most cases the parties have the right to have the action transferred to a neutral forum if desired [see CCP § 394(a)]. For more detailed discussion of the application of CCP § 394, see Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, 6.43[3].

 Cross Reference:

Discussion of actions involving a city or county or other local government entity, see California Forms of Pleading and Practice, Ch. 571, Venue (Matthew Bender).

3.32[4] Special Venue Rule Applies to Actions Involving the State. Actions against the State of California for injury to persons or personal property are to be tried in the county in which the injury arose [Gov Code § 955.2].

3.32[5] Actions Against Corporations Have Broader Venue Than Those Against Individual Defendants. For actions against corporations, venue is proper in the county or counties where any of the following occurred [CCP § 395.5]:

- The corporation has its principal place of business.
- The contract was made.
- The contract was to be performed.
- The obligation or liability arose.

If the proper documentation is on file with the Secretary of State, unincorporated associations are treated like corporations for venue purposes [CCP § 395.2]. Although the Beverly-Killea Limited Liability Company Act [Corp Code § 17000 et seq.] does not specifically so state, it is assumed that venue for limited liability companies is the same as for corporations and associations.

 Cross Reference:

Discussion of venue rules for corporate litigants and joining corporate and individual defendants,

including foreign corporations and unincorporated associations, see California Forms of Pleading and Practice, Ch. 571, Venue (Matthew Bender).

3.32[6] Actions Are Classified As "Transitory" or "Local" for Venue Purposes.

3.32[6][a] "Transitory" Actions Are Those in Which Claim Could Have Arisen Anywhere. Actions are classified for venue purposes mainly as transitory or local [*Brown v. Superior Court* (1984) 37 C3d 477, 482 n5, 208 CR 724, 691 P2d 272 ; see CCP §§ 392, 395]. An action is transitory if the inquiry deals primarily with financial obligations or personal relationships [*Carlton v. Superior Court* (1966) 240 CA2d 586, 589, 49 CR 759] . Transitory actions are governed by the general venue rule that the action be tried in the defendant's county of residence. If there is more than one defendant, the county in which any of them resides is appropriate [CCP § 395]. If all of the defendants reside outside California, or the actual county within California is unknown, any county chosen by the plaintiff is appropriate [CCP § 395(a)].



Search California Points and Authorities:

Use *lexis.com* to search for documents discussing choice issues of venue:

■ Legal > States Legal--U.S. > California > Search Analysis & CLE Materials > CA Treatises & Analytical Materials > California Points & Authorities



Sample Search: To find forms addressing the issue of whether an action is transitory or local, run the following search: *transitory w/s local and not syn!*.



Cross Reference:

Discussion of "transitory" venue rules, see California Forms of Pleading and Practice, Ch. 571, Venue (Matthew Bender).

3.32[6][b] "Local" Actions Are Those Dealing With Land or Other Local Relationships. A local action is one in which title to or possession of real property is the focus of the trial [see *Carlton v. Superior Court* (1966) 240 CA2d 586, 49 CR 759] .

3.32[6][c] Transitory Action Dictates Venue in Mixed Actions. Mixed venue actions occur if plaintiff alleges two or more causes of action, each of which is governed by a different venue statute, or when two or more named defendants are subject to different venue standards [Brown v. Superior Court (1984) 37 C3 477, 488,]. In cases having both a local action and a transitory action, the transitory action dictates venue for the whole proceeding [see *Gallin v. Superior Court* (1991) 230 CA3d 541, 544-545, 281 CR 304 ; see also *Brown v. Superior Court* (1984) 37 C3d 477, 487-488, 208 CR 724, 691 P2d 272] .

Distinguish:

A defendant must be granted a requested venue change if two or more inconsistent venue provisions apply in the same case and the defendant is entitled to a different venue on any one cause of action [see *Capp Care, Inc. v. Superior Court* (1987) 195 CA3d 504, 508, 241 CR 741] .



Cross Reference:

Discussion of "local" venue rules, see California Forms of Pleading and Practice, Ch. 571, Venue (Matthew Bender).

3.32[7] Venue Selection Clauses Are Not Permitted. Unlike forum selection clauses, which select jurisdiction, venue selection clauses attempt to dictate the county or other territory from which the jury will be selected and the case

will be heard [see *Milliken v. Gray* (1969) 276 CA2d 595, 600, 81 CR 525] . A forum selection clause chooses a court from among different states or nations [see, e.g., *The Bremen v. Zapata Off-Shore Co.* (1972) 407 US 1, 92 S Ct 1907, 32 L Ed2d 513] .

Venue selection clauses generally have been held invalid in California to the extent they disrupt statutory venue provisions, on the ground that they violate a legislatively declared public policy fixing the place for trial [see *General Acceptance Corp. v. Robinson* (1929) 207 Cal. 285, 288-289, 277 P. 1039 ; *Arntz Builders v. Superior Court* (2004), 122 Cal. App. 4th 1195, 1204, 19 Cal. Rptr. 3d 346 ; *Alexander v. Superior Court* (2003) 114 Cal. App. 4th 723, 725-727, 8 Cal. Rptr. 3d 111 (both relying on *General Acceptance*)].

Distinguish:

In one case, the California Supreme Court upheld a forum selection clause specifying Los Angeles County (rather than the entire state of California) as the forum [*Smith, Valentino & Smith, Inc. v. Superior Court* (1976) 17 Cal. 3d 491, 495-496, 131 Cal. Rptr. 374, 551 P.2d 1206] . However, that case distinguished rather than overruled earlier authority, on the ground that it involved a forum selection clause rather than a venue selection clause [*Smith, Valentino Smith, Inc. v. Superior Court* (1976) 17 Cal. 3d 491, 495, 131 Cal. Rptr. 374, 551 P.2d 1206] . Subsequent opinions have adopted the position that this decision left unchanged the earlier rule invalidating venue selection clauses [*Alexander v. Superior Court* (2003) 114 Cal. App. 4th 723, 730, 8 Cal. Rptr. 3d 111 ; see *Arntz Builders v. Superior Court* (2004), 122 Cal. App. 4th 1195, 1201, 19 Cal. Rptr. 3d 346 (following *Alexander*)]. Whether a contract may validly specify venue in only one of multiple venues that would be proper, however, has not yet been conclusively resolved [*Arntz Builders v. Superior Court* (2004) 122 CA4th 1195, 1202 n5, 19 CR3d 346] .



Strategic Point--All Parties:

In alternate dispute resolution, by contrast, the place where the dispute will be heard *can* be determined by contract. Just as parties to an arbitration or mediation agreement can select the governing rules, the timetable, the number of arbitrators or mediators, the arbitrators or mediators themselves, and other logistics, the parties also can specify where an arbitration proceeding will take place. In other words, although courts cannot be pre-selected, arbitration locales can. For discussion of contractual arbitration clauses, see Ch. 5, Determining Whether to Arbitrate or Litigate.

Legal Topics:

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

Civil ProcedureVenueGeneral OverviewCivil ProcedureVenueMotions to TransferChoice of ForumCivil ProcedureVenueSpecial VenueContracts LawContract Conditions & ProvisionsForum Selection Clauses



98 of 175 DOCUMENTS

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Chapter 3 Determining Jurisdiction and Venue in Contract Actions
VIII. DETERMINING PROPER VENUE

1-3 MB Practice Guide: CA Contract Litigation 3.33

3.33 Challenging and Changing Venue.

3.33[1] County Where Complaint Was Filed Is Presumptively Proper County for Trial. The plaintiff's choice of venue is presumptively correct, and the burden of proving otherwise rests with the party moving to change venue. A motion to change venue may be granted on a showing that the county in which the action was filed was improper under any applicable theory [*Black Diamond Asphalt, Inc. v. Superior Court* (2003) 109 CA4th 166, 170, 134 CR2d 510] . Upon evidence that the court was not the proper one, a timely motion to transfer venue must be granted [CCP §§ 396b, 397(a)].

**Strategic Point--Timing:**

An unsuccessful motion for change of venue may not be the last word on the subject. If circumstances change, renewal of the motion may be proper, but counsel should bring the renewed motion within a reasonable time after knowledge of the changed circumstances is or should have been acquired [*Thompson v. Superior Court* (1972) 26 CA3d 300, 306, 103 CR 94] .

**Cross Reference:**

Discussion of burden of proof to change venue, see *California Forms of Pleading and Practice*, § 571.40 (Matthew Bender).

3.33[2] Change of Venue May Be Requested for Valid Reason. Valid reasons for requesting a change of venue include the following:

- The action was filed in the wrong court [see CCP §§ 396b, 397(a)].
- There is reason to believe that an impartial trial cannot be had in the county in which the action was originally filed [CCP § 397(b)].
- There is no judge qualified to act [CCP § 397(d)].
- The convenience of witnesses and the ends of justice dictate a transfer [CCP § 397(c)].

Accounting for the "convenience of witnesses and the ends of justice" allows for a discretionary transfer of venue. If several venues are proper, a court may transfer the case to any venue that might be proper, as selected by the moving defendant [see *Cubic Corp. v. Superior Court* (1986) 186 CA3d 622, 625, 231 CR 18] .

Distinguish:

In California, the parties' convenience is not considered except under extraordinary circumstances [see *Union Trust Life Ins. Co. v. Superior Court* (1968) 259 CA2d 23, 28, 66 CR 270 ; *Wrin v. Ohlandt* (1931) 213 C 158, 160, 1 P2d 991] .



Warning:

The rule is different in federal court, where the court may transfer a case outside of California for the convenience of parties and witnesses [see 28 USC § 1404(a)].



Cross References:

Moving for change of venue, see *Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure*, Ch. 6, *Determining Forum*, 6.45 -6.56.

Discussion of challenging improper venue under federal rules and form for notice of motion and motion to transfer venue for convenience in federal court, see *Matthew Bender[(R)] Practice Guide: Federal Pretrial Civil Procedure in California*, Ch. 2, *Determining Forum (Jurisdiction and Venue)*.

Discussion of "convenience of witnesses and the ends of justice" and grounds for a motion for change of venue, see *California Forms of Pleading and Practice*, Ch. 571, *Venue (Matthew Bender)*.

Legal Topics:

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

Civil ProcedureVenueFederal Venue TransfersGeneral OverviewCivil ProcedureVenueFederal Venue TransfersConvenience TransfersCivil ProcedureVenueFederal Venue TransfersImproper Venue TransfersCivil ProcedureVenueMotions to TransferGeneral OverviewCivil ProcedureVenueMotions to TransferChoice of Forum



99 of 175 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 4 Determining Applicable Statute of Limitations and Effect on Potential Action

1-4 MB Practice Guide: CA Contract Litigation 4.syn

§ 4.syn Synopsis to Chapter 4: Determining Applicable Statute of Limitations and Effect on Potential Action

4.01 Scope.

4.02 Objective and Strategy.

4.03 CHECKLIST: Determining Applicable Statute of Limitations.

4.04 Options and Strategy.

4.05 Four-Year Statute of Limitations Applies to Breach of Written Contract.

4.05[1] Writing Must Express Contractual Obligation.

4.05[2] Tangible Written Indication of Acceptance by Defendant Must Exist.

4.06 Two-Year Statute of Limitations Applies to Breach of Oral or Implied Contract.

4.07 Four-Year Statute of Limitations Applies to Breach of UCC Sales Contract.

4.07[1] Parties May Not Extend Statute of Limitations.

4.07[2] Parties May Reduce Statute of Limitations.

4.08 Three-Year Statute Applies to Action for Fraud.

4.09 Two-Year or Four-Year Statute Applies to Action for Rescission of Contract.

4.10 Two-Year Statute for Action in Quantum Meruit.

4.11 Statute of Limitations Clause in Contract Can Override Applicable Statute.

4.11[1] Bargained for, Reasonable Limitation Period Can Be Valid.

4.11[2] Parties to Contract May Designate Limitation Period Shorter Than Fixed by Statute.

4.11[3] Parties to Contract May Designate Limitation Period Longer Than Fixed by Statute.

4.11[4] Waiver Designed to Bar Statute of Limitations Defense Must Be in Writing and Signed.

4.11[5] Contractual Provision Altering Statute of Limitations Applies Only to Parties With Whom Privity Exists.

4.11[6] Insurance Policy Provisions Can Affect Limitations Period.

4.12 Special Statutes of Limitations Apply for Breach of Construction Contracts Involving Latent Defects, Actions for Breach of Warranty, and Legal Malpractice Actions.

4.12[1] Breaches of Construction Contracts Involving Latent Defects Have 10-Year Statute of Repose.

4.12[2] Four-Year Statute Applies to Legal Malpractice Actions Based on Contract, Obligation, or Written Instrument.

4.13 Federal Law May Dictate Statute of Limitations.

4.14 Law of Forum State Governs Determination of Applicable Statute of Limitations.

4.15 Contractual Choice-of-Law Clause Incorporates Statute of Limitations From Chosen State.

4.16 If Case Can Be Covered by Two Statutes of Limitation, Only One Applies.

4.17 CHECKLIST: Determining When Limitations Period Expires.

4.18 Options and Strategy.

4.19 Statute of Limitations Begins to Run When Cause of Action Accrues.

4.19[1] Cause of Action Accrues When Claim Becomes Actionable.

4.19[2] For Oral and Written Contracts, Statute Begins to Run at Time of Breach.

4.19[3] For UCC Sales Contracts, Cause of Action Accrues When Breach Occurs, Regardless of Aggrieved Party's Knowledge of Breach.

4.19[4] Statute Does Not Begin to Run Until Conditions Precedent Are Satisfied.

4.19[5] When Contract Designates Fixed Time for Performance, Statute Does Not Begin Until Expiration of That Time Period.

4.19[6] When Contract Calls for Demand, Demand Must Be Made Before Cause of Action Accrues.

4.19[7] Timeliness of Complaint Is Determined Based on Date on Which Action Is Filed.

4.19[8] Single Event May Trigger Running of Statute for Multiple Causes of Action.

4.20 Amended Complaint Relates Back and Thus Avoids Statute of Limitations If Recovery Is Based on Same General Set of Facts.

4.21 Statute of Limitations May Be Tolled.

4.21[1] Discovery Rule May Toll Statute of Limitations.

4.21[2] Fraud Tolls Running of Statute.

4.21[2][a] Contract Breach Involving Fraud Is Treated As Fraud.

4.21[2][b] If Breach Involves Fraud, Statute Begins to Run From Date Plaintiff Discovers Facts Constituting Fraud.

4.21[2][c] Statute Is Tolled by Fraudulent Concealment of Facts.

4.21[3] Resident's Absence From State Tolls Statute.

4.21[4] Commencement of Action Suspends Running of Limitations Period.

4.21[5] Tolling Agreement Can Suspend Limitations Period.

4.21[6] Defendant May Be Equitably Estopped to Assert Statute of Limitations.

4.22 CHECKLIST: Raising Statute of Limitations Defense.

4.23 Options and Strategy.

4.23[1] Statute of Limitations Is Affirmative Defense.

4.23[2] Defendant Has Burden of Proof to Establish Statute of Limitations.

4.23[3] Failure to Properly and Timely Raise Defense May Result in Waiver of Defense.

4.24 Defense Generally Is Raised in Answer or Demurrer.

4.24[1] Defect on Face of Complaint Can Be Addressed by Demurrer.

4.24[2] Sufficient Facts Must Exist in Pleadings to Demur on Statute of Limitations Issue.

4.24[3] Statute of Limitations Defense Generally Is Raised in Answer Either by Alleging All Facts or by Citing Specific Code Section.

4.24[4] Statute of Limitations Defense May Be Raised in Amended Answer.

4.24[5] Statute of Limitations Defense May Be Raised by Motion for Summary Judgment.

4.24[6] Statute of Limitations Defense May Be Raised by Motion to Strike If Motion Is Accompanied by Demurrer.

4.25 Raising Defense of Laches.

4.25[1] Defendant May Assert Laches Defense If Prejudiced by Plaintiff's Unreasonable Delay.

4.25[2] Laches Can Apply Even If Action Was Timely Under Statute of Limitations.

4.25[3] Unclear Whether Defense of Laches Applies in California to Actions for Money Had and Received.

4.25[4] Laches Is Question of Fact.

4.25[5] Defendant Cannot Raise Laches Defense Unless Pledged Facts Show Laches.

4.25[6] Laches May Be Raised on Demurrer.

4.26 Demurrer to Complaint on Ground That Claim Is Barred by Statute of Limitations.

Demurrer to Complaint on Ground That Claim Is Barred by Statute of Limitations.

4.27 Answer Raising Affirmative Defense of Statute of Limitations.

Answer Raising Affirmative Defense of Statute of Limitations.

4.28 Memorandum for Party Asserting That Statute of Limitations Applicable to Fraud Should Apply.

Memorandum for Party Asserting That Statute of Limitations Applicable to Fraud Should Apply.

4.29 Memorandum for Party Asserting That Action Is Barred by Statute of Limitations.

Memorandum for Party Asserting That Action Is Barred by Statute of Limitations.

4.30 Memorandum for Party Asserting That Four-Year Limitation Period to Action on Contract Evidenced by Writing.

Memorandum for Party Asserting That Four-Year Limitation Period to Action on Contract Evidenced by Writing.

4.31 Demurrer to Complaint on Ground That Claim Is Barred by Laches.

Demurrer to Complaint on Ground That Claim Is Barred by Laches.

4.32 Allegation for Party Asserting Contractual Extension of Limitation Period.

Allegation for Party Asserting Contractual Extension of Limitation Period.



100 of 175 DOCUMENTS

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Chapter 4 Determining Applicable Statute of Limitations and Effect on Potential Action

I. STRATEGY

1-4 MB Practice Guide: CA Contract Litigation 4.01

4.01 Scope.

This chapter covers:

- Options and strategy for determining the applicable statute of limitations in breach of contract actions [see 4.04].
- The statute of limitations for breach of written contracts [see 4.05; see 4.30].
- The statute of limitations for breach of oral contracts [see 4.06].
- The statute of limitations for contracts governed by the UCC [see 4.07].
- The statute of limitations in fraud actions [see 4.08].
- The statute of limitations for breach of construction contracts involving latent defects; actions for breach of warranty; and legal malpractice actions [see 4.12].
- Determining when the statute of limitations begins to run [see 4.19] and the relation-back doctrine [see 4.20].
- Determining whether the statute of limitations may be tolled [see 4.21].
- Raising the statute of limitations as a defense [see 4.22 -4.25; Forms: see 4.26 -4.31].
- Asserting that the statute of limitations was extended by agreement of the parties [see 4.11[3]; Form: see 4.32].

Core Statutes:

CCP §§ 337, 339, 360, 360.5; Com Code § 2725

Legal Topics:

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

Contracts LawDefensesStatutes of LimitationsGovernmentsLegislationStatutes of LimitationsGeneral Overview



101 of 175 DOCUMENTS

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Chapter 4 Determining Applicable Statute of Limitations and Effect on Potential Action
I. STRATEGY

*1-4 MB Practice Guide: CA Contract Litigation 4.02***4.02 Objective and Strategy.**

This chapter covers the applicable statutes of limitations for breach of contract actions. It addresses the issues of which statute applies, when the action accrues, when the statute of limitations begins to run, and how and when the statute of limitations defense is raised. Related issues such as the discovery rule and fraud in contract actions are also discussed. The chapter also covers the related equitable doctrine of laches.

Civil actions, including contract actions, can be commenced only within periods of limitations, after the cause of action accrues [CCP § 312; *Angeles Chem. Co., Inc. v. Spencer, Inc. & Jones* (1996) 44 CA4th 112, 120, 51 CR2d 594]. Statutes of limitations "are designed to protect the enacting state's residents and courts from the burdens associated with the prosecution of stale cases in which memories have faded and evidence has been lost" [*Ashland Chem. Co. v. Provence* (1982) 129 CA3d 790, 794, 181 CR 340].

Strategic Point:

California law requires that the defense of the statute of limitations must be raised promptly and properly on discovery. An advantage to doing so is that the action may be dismissed on demurrer without leave to amend. A disadvantage of not following this approach is that the defense can be deemed waived [see *Hambrecht & Quist Venture Partners v. American Med. Int'l, Inc.* (1995) 38 CA4th 1532, 1548, 46 CR2d 33].

**Cross References:**

Discussion of law applicable to action, see Ch. 1, Determining the Applicable Law.

Discussion of which causes of action may apply in a particular case, see Ch. 2, Determining What Causes of Action Exist.

Discussion of jurisdiction and venue, see Ch. 3, Determining Jurisdiction and Venue in Contract Actions.

Discussion of contract damages, see Ch. 7, Seeking or Opposing Damages in Contract Actions.

Discussion of procedures to attack and defend a contract action, see Chs. 13 -17.

Discussion of suing for breach of contract, see Ch. 22, Suing or Defending Action for Breach of Contract.

For Tips on updating case law and expanding your research with additional resources, see **How to Use Lexis.com With This Publication** at the front of this volume.

Legal Topics:

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

Civil Procedure Pleading & Practice Defenses, Demurrers & Objections General Overview Contracts

Law Defenses Statutes of Limitations Governments Legislation Statutes of Limitations General Overview



102 of 175 DOCUMENTS

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Chapter 4 Determining Applicable Statute of Limitations and Effect on Potential Action

II. DETERMINING APPLICABLE STATUTE OF LIMITATIONS

1-4 MB Practice Guide: CA Contract Litigation 4.03

4.03 CHECKLIST: Determining Applicable Statute of Limitations.

☐ Analyze contract to determine applicable statute of limitations.

☐ Four years for a contract founded upon an instrument in writing.

Authority:

CCP § 337

Discussion:

See 4.05

☐ Parties may agree by contract to shorten statute of limitations for breach of a written contract.

Authority:

Hambrecht & Quist Venture Partners v. American Med. Int'l, Inc. (1995) 38 CA4th 1532, 1547-1548, 1549 n17, 46 CR2d 33

Discussion:

See 4.11[2]

Form:

See 4.27

☐ Parties may agree by contract to extend statute of limitations for breach of a written contract.

Authority:

Hambrecht & Quist Venture Partners v. American Med. Int'l, Inc. (1995) 38 CA4th 1532, 1547-1548, 1549 n17, 46 CR2d 33

Discussion:

See 4.11[3]

Form:

See 4.32

- ☐ Parties may agree in writing to waive statute of limitations.

Authority:

CCP § 360.5

Discussion:

See 4.11[4]

- ☐ Two years for a contract not founded upon an instrument in writing; that is, an *oral* or *implied* contract.

Authority:

CCP § 339

Discussion:

See 4.06

- ☐ Four years for a contract for the sale of goods (UCC sales contract), whether written or oral.

Authority:

Com Code § 2725

Discussion:

See 4.07

- ☐ Parties may not extend statute of limitations for a UCC sales contract.

Authority:

Com Code § 2725(1)

Discussion:

See 4.07[1]

- ☐ Parties may reduce statute of limitations for a UCC sales contract.

Authority:

Com Code § 2725(1)

Discussion:

See 4.07[2]

- ☐ Three-year statute of limitations for action for fraud.

Authority:*CCP § 338***Discussion:**

See 4.08

- ☐ Four-year statute of limitations for rescission of written contract.

Authority:*CCP § 337(3)***Discussion:**

See 4.09

- ☐ Two-year statute of limitations for rescission of nonwritten contract.

Authority:*CCP § 339(3)***Discussion:**

See 4.09

- ☐ Two-year statute of limitations for quantum meruit recovery in contract action.

Authority:*CCP § 339***Discussion:**

See 4.10

- ☐ Special statute of limitations apply for breach of construction contracts involving latent defects and legal malpractice actions.

Authority:*CCP §§ 337, 337.15***Discussion:**

See 4.12

- ☐ If more than one statute of limitations applies, determine which statute controls.

Authority:*Collection Bureau of San Jose v. Rumsey (2000) 24 C4th 301, 310-311, 99 CR2d 792, 6 P3d 713 ;
Anson v. County of Merced (1988) 202 CA3d 1195, 1199***Discussion:**

See 4.16

Legal Topics:

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

Contracts LawContract Conditions & ProvisionsGeneral OverviewContracts LawDefensesStatutes of LimitationsGovernmentsLegislationStatutes of LimitationsTime LimitationsGovernmentsLegislationStatutes of LimitationsWaivers



103 of 175 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 4 Determining Applicable Statute of Limitations and Effect on Potential Action

II. DETERMINING APPLICABLE STATUTE OF LIMITATIONS

*1-4 MB Practice Guide: CA Contract Litigation 4.04***4.04 Options and Strategy.**

The applicable limitations period in California varies depending on the nature of the underlying action and, in some cases, by the provisions of the underlying contract. Therefore, it is essential that the first step in initiating or defending against a lawsuit is to determine which statute of limitations applies. After the applicable statute has been determined, the attorney then can determine when the limitations period commenced running, and when it expires [see 4.18]. The latter determinations, in turn, dictate whether an action can be filed or maintained, and how much time the plaintiff's attorney has in which to file it.

**Strategic Point--Plaintiff:**

In some cases the applicable limitations periods may dictate the available causes of action. When multiple potential causes of action exist, and some are barred by the applicable limitations period while other are not, the plaintiff's options may be significantly limited.

**Strategic Point--Defendant:**

Because the applicable limitations period is determined by the gravamen of plaintiff's complaint rather than the named cause of action, defense counsel should consider whether plaintiff's complaint attempts to disguise a cause of action in order to take advantage of a longer statute of limitations [see *Akin v. Certain Underwriters at Lloyd's London* (2006) 140 CA4th 291, 299, 44 CR3d 284 (when properly construed, plaintiff's cause of action against an insurer for improper rescission amounted to no more than a cause of action for breach of contract, which was barred by a contractual one-year limitations period)].

Legal Topics:

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

Contracts LawDefensesStatutes of LimitationsGovernmentsLegislationStatutes of LimitationsGeneral Overview



104 of 175 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 4 Determining Applicable Statute of Limitations and Effect on Potential Action
II. DETERMINING APPLICABLE STATUTE OF LIMITATIONS

1-4 MB Practice Guide: CA Contract Litigation 4.05

4.05 Four-Year Statute of Limitations Applies to Breach of Written Contract.

4.05[1] Writing Must Express Contractual Obligation. The statute of limitations for breach of a contract "founded upon an instrument in writing" is four years after the breach has occurred [CCP § 337]. The four-year statute of limitation of CCP § 337 applies when a breach of contract action is based on an instrument in writing [*Century Indem. Co. v. Superior Court* (1996) 50 CA4th 1115, 1123, 58 CR2d 69 ("although Century's obligation to Scottsdale could be said to ultimately or remotely stem from Century's written contract of insurance with Vikron, it is not one immediately resting in or growing out of that written instrument")].

An action is "based on an instrument in writing" within the meaning of CCP § 337 when the writing expresses the obligation sued on [*Murphy v. Hartford Accident & Indem. Co.* (1960) 177 CA2d 539, 543, 2 CR 325].

Jury Instructions:

General Time Limitation for Suit on Written Contract, see *California Forms of Jury Instruction, Ch. 3F, Instr. MB 300F.50* (Matthew Bender).

A contract may be "in writing" for purposes of the statute of limitations even though it was accepted orally or by an act other than signing [*Amen v. Merced County Title Co.* (1962) 58 C2d 528, 532, 25 CR 65, 375 P2d 33 ; *Pietrobon v. Libarle* (2006) 137 CA4th 992, 997, 40 CR3d 718] .

It is not sufficient that the cause of action is in some way remotely or indirectly connected with such an instrument, or that the instrument is a link in the chain establishing the cause of action. The instrument itself must contain a contract to do the thing for the nonperformance of which the action is brought [*E.O.C. Ord. Inc. v. Kovakovich* (1988) 200 CA3d 1194, 1199, 246 CR 456].

Judge's Perspective:

Whether the action is connected to a writing is important because it affects the statute of limitations: the plaintiff has only two years to bring a claim on an oral contract, but four years to bring a claim on a written contract [see CCP §§ 337, 339]. Thus, the question of whether the parties have a contract based upon an instrument in writing can mean the difference between a case that is timely filed and one that is not. Note that a contract "founded upon an instrument in writing" is not the same thing as a written contract. In *E.O.C. Ord. Inc. v. Kovakovich* (1988) 200 CA3d 1194, 246 CR 456 , the plaintiff sent the

defendant a letter proposing the terms of a contract, and the defendant accepted orally in a telephone call shortly thereafter. The court found that the four-year statute of limitations applied, because the plaintiff had satisfied the requirements of CCP § 337: "that there be a writing containing all terms and that there be acceptance by the party to be charged" [*E.O.C. Ord. Inc. v. Kovakovich* (1988) 200 CA3d 1194, 1201, 246 CR 456].

Examples:

Following are examples of writings held sufficient to constitute a contract:

- **Letter Accepted by Party Is Instrument in Writing.** A letter that constitutes an offer, which was accepted by the plaintiff, is evidence of a writing signed by the party to be charged. Therefore, the four-year statute of limitations is applicable to an action for damages for the offeror's breach of the contract [*Ravel v. Hubbard* (1952) 112 CA2d 255, 258-259, 246 P2d 88].

- **Unsigned Settlement Agreement Is Instrument in Writing.** The four-year statute of limitations applies to an action to enforce a settlement agreement drafted by the defendant's attorney and signed by the plaintiff but not by the defendant. The defendant admitted that he had agreed to the settlement and reaffirmed that the terms to which he had agreed were those set forth in the written settlement agreement prepared by his attorney [*Pietrobon v. Libarle* (2006) 137 CA4th 992, 997-998, 40 CR3d 718].

- **Receipt for Money Containing Promise Is Instrument in Writing.** A written receipt for money that contains words from which a promise may be inferred, arising directly from the receipt itself and including its terms, is an instrument in writing to which the four-year statute of limitations provided by CCP § 337 applies. All of the obligations and promises that the words in the writing necessarily imply are included in the terms of the writing [*O'Brien v. King* (1917) 174 C 769, 774, 164 P 631 ; *Ashley v. Vischer* (1864) 24 C 322, 327-329].

- **Action by Third-Party Beneficiary Is on Written Contract.** An action by a third-party beneficiary is on an obligation founded on a written instrument within the meaning of CCP § 337, although parol evidence may be necessary to show that the party maintaining the action is an intended beneficiary within the class intended to be benefitted by the contract, and to show the extent of the party's interest [*Division of Labor Law Enforcement v. Dennis* (1947) 81 CA2d 306, 311, 183 P2d 932].

Jury Instructions:

Statute of Limitations Against Third Party Beneficiary, see *California Forms of Jury Instruction, Ch. 3F, Instr. MB 300F.53* (Matthew Bender).

- **Action by Employees Involving Collective Bargaining Agreement.** The four-year limitation period prescribed by CCP § 337 applies to an action by orally hired employees to recover the difference between the wages actually received and the amounts claimed to have been payable to them under the provisions of collective bargaining agreements between the employer and unions [*Division of Labor Law Enforcement v. Dennis* (1947) 81 CA2d 306, 310-311, 183 P2d 932].

- **Escrow Instructions in Writing Constitute Written Contract.** An action for failure to comply with escrow instructions is an action on a written contract to which the four-year limitation period prescribed in CCP § 337 applies, if the instructions are in writing and the escrow holder accepts them, or if the escrow holder prepares the instructions and offers to perform them, and the buyer and seller accept the offer [*Amen v. Merced County Title Co.* (1962) 58 C2d 528, 532, 25 CR 65, 375 P2d 33].

Consider:

The omission of information to be inserted in blanks in a written instrument does not invalidate the agreement as a written contract [*Benard v. Walkup* (1969) 272 CA2d 595, 602, 77 CR 544].

 Cross References:

Discussion of statute of limitations regarding oral contracts, see 4.06.

Form for memorandum asserting application of four-year statute to written contract, see 4.30.

General discussion of statute of limitations as it relates to contract actions, see *Matthew Bender*[(R)] *Practice Guide: California Pretrial Civil Procedure*, 4.05[1].

4.05[2] Tangible Written Indication of Acceptance by Defendant Must Exist. For an action to be founded on an instrument in writing, there must be some tangible written indication of acceptance of the terms of the writing by the defendant [*James De Nicholas Assocs., Inc. v. Heritage Constr. Corp.* (1970) 5 CA3d 421, 424-425, 85 CR 233]. When all the writings tending to show the terms of an agreement are the plaintiff's writings, they cannot be used to show the defendant's acceptance [*James De Nicholas Assocs., Inc. v. Heritage Constr. Corp.* (1970) 5 CA3d 421, 425, 85 CR 233].

Distinguish--UCC Sales Contract:

The statute of limitations for an action by a seller against a buyer under a retail installment sales "security agreement" by which the buyer becomes obligated to pay a certain sum in monthly installments is *Com Code* § 2725, not *CCP* § 337. In an action by a seller for breach of such a contract, the buyer could not rely on the four-year limitation period of *Com Code* § 2725, when the buyer did not plead underlying facts establishing a bar, but instead pleaded that the action was barred by the four-year statute of *CCP* § 337 [*Mysel v. Gross* (1977) 70 CA3d Supp 10, 14-15, 138 CR 873].

 Cross References:

Detailed discussion on establishing the existence of a contract, see Chs. 13-18.

Remedies under the Commercial Code, see Ch. 26, Contract for Sale of Goods--Seeking Remedies Under California Commercial Code.

Statute of limitations issues in breach of warranty action under Commercial Code, see *Ch. 24, Suing or Defending Action for Breach of Warranty*, 24.38.

Legal Topics:

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

Contracts LawBreachCauses of ActionGeneral OverviewContracts LawDefensesStatutes of LimitationsContracts LawTypes of ContractsExecuted ContractsGovernmentsLegislationStatutes of LimitationsTime Limitations



105 of 175 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 4 Determining Applicable Statute of Limitations and Effect on Potential Action

II. DETERMINING APPLICABLE STATUTE OF LIMITATIONS

1-4 MB Practice Guide: CA Contract Litigation 4.06

4.06 Two-Year Statute of Limitations Applies to Breach of Oral or Implied Contract.

The statute of limitations for breach of a contract "not founded upon an instrument in writing"--that is, an *oral* or *implied* contract--is two years after the breach has occurred [CCP § 339].

Jury Instructions:

General Time Limitation for Suit on Oral or Implied Contract, see *California Forms of Jury Instruction*, Ch. 3F, Instr. MB 300F.51 (Matthew Bender).



Warning:

The term "any contract for sale," as used in the four-year Commercial Code statute of limitations applicable to contracts for sale of goods, includes an oral agreement [*Com Code* § 2725; see *Filmservice Labs., Inc. v. Harvey Bernhard Enters., Inc.* (1989) 208 CA3d 1297, 1304, 256 CR 735].



Cross Reference:

Discussion of statute of limitations regarding written contracts, see 4.05.

Legal Topics:

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

Contracts LawDefensesStatutes of LimitationsContracts LawTypes of ContractsImplied-in-Fact ContractsContracts LawTypes of ContractsOral AgreementsGovernmentsLegislationStatutes of LimitationsTime Limitations



106 of 175 DOCUMENTS

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Chapter 4 Determining Applicable Statute of Limitations and Effect on Potential Action

II. DETERMINING APPLICABLE STATUTE OF LIMITATIONS

*1-4 MB Practice Guide: CA Contract Litigation 4.07***4.07 Four-Year Statute of Limitations Applies to Breach of UCC Sales Contract.**

4.07[1] Parties May Not Extend Statute of Limitations. The statute of limitations for a UCC sales contract is four years after the cause of action has accrued [*Com Code* § 2725; *see also* *Mysel v. Gross* (1977) 70 CA3d Supp 10, 14, 138 CR 873]. The parties may not by agreement extend the statute of limitations of a UCC sales contract beyond four years [*Com Code* § 2725].

4.07[2] Parties May Reduce Statute of Limitations. The parties may reduce by agreement the period of limitation of a UCC sales contract, but the period may not be less than one year [*Com Code* § 2725].

**Warning:**

The term "any contract for sale," as used in the four-year statute of limitations applicable to contracts for sale of goods, includes an oral agreement [*Com Code* § 2725; *see* *Filmservice Labs., Inc. v. Harvey Bernhard Enters., Inc.* (1989) 208 CA3d 1297, 1304-1305, 256 CR 735].

**Cross References:**

Remedies under the California Commercial Code (UCC sales contract), *see* Ch. 26, Contract for Sale of Goods--Seeking Remedies Under California Commercial Code.

Breach of contract actions under the California Commercial Code (UCC sales contracts), *see* Ch. 28, Contract for Sale of Goods--Suing or Defending Action for Breach of Contract Under California Commercial Code.

Legal Topics:

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

Commercial Law (UCC)Sales (Article 2)RemediesStatutes of LimitationsTime LimitationsContracts
LawDefensesStatutes of LimitationsContracts LawSales of GoodsStatutes of LimitationsTime
LimitationsGovernmentsLegislationStatutes of LimitationsTime Limitations



107 of 175 DOCUMENTS

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Chapter 4 Determining Applicable Statute of Limitations and Effect on Potential Action

II. DETERMINING APPLICABLE STATUTE OF LIMITATIONS

*1-4 MB Practice Guide: CA Contract Litigation 4.08***4.08 Three-Year Statute Applies to Action for Fraud.**

Although an action for fraud may be based on a contract, the three-year statute of limitations that governs a claim of fraud is different from the two-year or four-year statute for a claim of breach of contract [CCP § 338; *see, e.g., Mills v. Mills* (1956) 147 CA2d 107, 121, 305 P2d 61].

**Strategic Point--Defendant:**

It is not uncommon for a resourceful plaintiff whose breach of oral contract cause of action (two-year statute of limitations) has gone stale to instead plead fraud alone, in an attempt to take advantage of its three-year fraud statute of limitations. When faced with such a complaint, the defendant should carefully examine whether the plaintiff has successfully pleaded the additional elements required for a fraud cause of action and, if not, move to dismiss.

**Cross References:**

Discussion of statutes of limitation for written and oral contracts, *see* 4.05, 4.06.

Discussion of contract breach involving fraud, *see* 4.21[2][b].

Discussion of fraud actions, *see* California Forms of Pleading and Practice, Ch. 269, Fraud and Deceit (Matthew Bender).

Legal Topics:

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

Commercial Law (UCC)Sales (Article 2)RemediesFraudContracts LawDefensesStatutes of LimitationsContracts LawSales of GoodsStatutes of LimitationsTime LimitationsGovernmentsLegislationStatutes of LimitationsTime LimitationsTortsBusiness TortsFraud & MisrepresentationGeneral Overview



108 of 175 DOCUMENTS

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Chapter 4 Determining Applicable Statute of Limitations and Effect on Potential Action

II. DETERMINING APPLICABLE STATUTE OF LIMITATIONS

1-4 MB Practice Guide: CA Contract Litigation 4.09

4.09 Two-Year or Four-Year Statute Applies to Action for Rescission of Contract.

An action for rescission of a contract founded upon an instrument in writing must be brought within four years from the date the facts entitling the aggrieved party to rescind occurred [CCP § 337(3)]. An action for rescission of a contract not founded upon an instrument in writing must be brought within two years of the date on which the facts that entitle the aggrieved party to rescind occurred [CCP § 339(3)]. When the ground for rescission is fraud or mistake, the time does not begin to run until the discovery by the aggrieved party of the facts constituting the fraud or mistake [CCP §§ 337(3), 339(3)]. When the ground for rescission is a misrepresentation under *Ins Code* § 359, the time does not begin to run until the representation becomes false [CCP § 337(3)].

Jury Instructions:

Statute of Limitations for Rescission of Contract, see *California Forms of Jury Instruction*, Ch. 3F, Instr. MB 300F.56 (Matthew Bender).

➡ Cross References:

Discussion of rescission in contract actions, see Ch. 8, Seeking or Opposing Equitable Remedies in Contract Actions.

Discussion of fraud in contract actions, see Ch. 17, Attacking or Defending Existence of Contract--Fraud, Duress, Menace, and Undue Influence.

Legal Topics:

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

Contracts LawDefensesStatutes of LimitationsContracts LawRemediesRescission & RedhibitionGeneral OverviewContracts LawSales of GoodsStatutes of LimitationsTime LimitationsGovernmentsLegislationStatutes of LimitationsTime Limitations



109 of 175 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 4 Determining Applicable Statute of Limitations and Effect on Potential Action

II. DETERMINING APPLICABLE STATUTE OF LIMITATIONS

1-4 MB Practice Guide: CA Contract Litigation 4.10

4.10 Two-Year Statute for Action in Quantum Meruit.

An action in quantum meruit must be brought within two years of the date of accrual of the cause of action [*CCP* § 339(1); *Iverson, Yoakum, Papiano & Hatch v. Berwald* (1999) 76 CA4th 990, 996, 90 CR2d 665].

Cross Reference:

Discussion of quantum meruit in contract actions, see Ch. 9, Seeking or Opposing Quantum Meruit or Quantum Valebant Recovery in Contract Actions.

Legal Topics:

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

Contracts LawDefensesStatutes of LimitationsContracts LawRemediesEquitable ReliefQuantum MeruitContracts LawSales of GoodsStatutes of LimitationsTime LimitationsContracts LawTypes of ContractsImplied-in-Law ContractsGovernmentsLegislationStatutes of LimitationsTime Limitations



110 of 175 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 4 Determining Applicable Statute of Limitations and Effect on Potential Action
 II. DETERMINING APPLICABLE STATUTE OF LIMITATIONS

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4.11 Statute of Limitations Clause in Contract Can Override Applicable Statute.

4.11[1] Bargained for, Reasonable Limitation Period Can Be Valid. A contract may set the time within which a suit may be brought that is a shorter or a longer period than the time in the statute [*Schram v. Robertson* (9th Cir 1940) 111 F2d 722, 724 ; see also *Sousa v. Unilab Corp. Class II (Non-Exempt) Members Group Benefit Plan* (ED Cal 2002) 252 F Supp2d 1046, 1055 (insurer entitled to summary judgment when surviving spouse's claim that insurer wrongfully denied her accidental death benefits on her deceased husband's policy was filed outside three-year contractual limitations period stated in her ERISA-covered policy; although statute of limitations for ERISA actions in California was four years, pursuant to CCP § 337, contractual three-year limitations period was reasonable and allowed by law)].

Whether an agreed-on period of limitation is in itself unreasonable is a question of law [*Capehart v. Heady* (1962) 206 CA2d 386, 388, 23 CR 851]. Generally, that question must be decided as of the date the contract was made [*Capehart v. Heady* (1962) 206 CA2d 386, 391, 23 CR 851]. Financial considerations usually are irrelevant, and the fact that the agreed-on period of limitation operates as to the claims of one party but not the other does not of itself make the period unreasonable. However, unreasonableness may be shown by the fact that the time when the agreed-on period begins is fluctuating, vague, and indefinite [*Capehart v. Heady* (1962) 206 CA2d 386, 388-391, 23 CR 851].

 Cross Reference:

Discussion of altering limitation period by agreement, see *California Forms of Pleading and Practice*, § 345.28[1] (Matthew Bender).

4.11[2] Parties to Contract May Designate Limitation Period Shorter Than Fixed by Statute. Parties to a contract may agree to a shorter limitation period than the period fixed by statute. However, the period must not violate public policy in that it is not so unreasonable as to show imposition or undue advantage [*Hambrech & Quist Venture Partners v. American Med. Int'l, Inc.* (1995) 38 CA4th 1532, 1547-1548, 1549 n17, 46 CR2d 33 ; *Hamaker v. Williams* (1937) 22 CA2d 256, 259, 70 P2d 973].

Example:

Requiring a client to assert a claim for breach of contract against her attorney within 10 days of receipt of a billing statement was inherently unreasonable [*Charnay v. Cobert* (2006) 145 CA4th 170, 183, 51 CR3d 471] .

If the party in whose favor the agreed-on period operates is engaged in a business or an activity of a quasi-public nature, the agreement as to the shortened period is viewed more critically than an agreement between private parties in general [*Capehart v. Heady* (1962) 206 CA2d 386, 388-391, 23 CR 851].

 Cross Reference:

Form for affirmative defense that parties contractually shortened limitation period, see 4.27.



Warning:

Contractual stipulations limiting the right to sue to a period *shorter* than granted by a statute are looked on with disfavor and should be strictly construed, although this rule cannot be used to destroy the effect of the words of the contract itself. However, this is a general rule of law that should not be used to destroy the effect of a more specific applicable rule [see *Sanders v. American Cas. Co.* (1969) 269 CA2d 306, 309, 74 CR 634 ; *Western Filter Corp. v. Argan, Inc.* (9th Cir 2008) 540 F3d 947, 949 (stock purchase agreement provision permitting representations and warranties to survive closing for one year did not unambiguously state the parties' intent to contractually reduce the statute of limitations to one year)].

4.11[3] Parties to Contract May Designate Limitation Period Longer Than Fixed by Statute. Parties to a contract may agree to extend the statute of limitations [*Hambrech & Quist Venture Partners v. American Med. Int'l, Inc.* (1995) 38 CA4th 1532, 1547, 46 CR2d 33].

 Cross Reference:

Form for allegation that parties contractually extended limitation period, see 4.32.

Careful research into applicable law is advised, however, because the parties' ability to extend the statute of limitations may be limited.

Examples:

- The four-year limitation period for breach of a UCC sales contract cannot be extended by agreement, but can be shortened to not less than one year [*Com Code § 2725(1)*].

- No waiver executed before the expiration of the time limited for the commencement of the action by *CCP § 312 et seq.* may be effective for a period exceeding four years from the date of expiration of the statutory period, and no waiver executed after the expiration of that time may be effective for a period exceeding four years from the date thereof [*CCP § 360.5*]. However, any such waiver may be renewed for a further period of not exceeding four years from the expiration of the immediately preceding waiver, and such waivers may be made successively [*CCP § 360.5*; see also *Carlton Browne & Co., Inc. v. Superior Court* (1989) 210 CA3d 35, 40-46, 258 CR 118].

Judge's Perspective:

Although it is conceivable that parties to an oral contract might agree to extend (or reduce) the period of the statute of limitations, it seems unlikely that such parties would do so. Of course, an oral contract's limitations period could be extended by the parties' conduct in other ways, such as by estoppel [see *Langdon v. Langdon* (1942) 47 CA2d 28, 31-32, 117 P2d 371]. Further, the parties to an oral contract can agree at a subsequent date to extend the limitations period, which would be valid only if in writing

and signed by the party who would otherwise assert the statute of limitations [see CCP § 260.5].

4.11[4] Waiver Designed to Bar Statute of Limitations Defense Must Be in Writing and Signed. Generally, a waiver designed to bar a defense to an action that is based on the fact that the action was not commenced within the applicable statute of limitations must be in writing and signed by the person obligated [CCP § 360.5].

A waiver of statute of limitations also may be valid if signed by the authorized agent of the person obligated [*Carlton Browne & Co., Inc. v. Superior Court* (1989) 210 CA3d 35, 46, 258 CR 118 (written waiver signed by corporate defendant's attorney-agent)].

Distinguish:

It is not necessary in all cases that a waiver of the defense of bar of a statute of limitation be in writing; the conduct, or even the silence, of a party may create, under some circumstances, an equitable estoppel that would deprive that party of the right to plead the bar of the applicable statute [see, e.g., *Isaacson v. Oakland* (1968) 263 CA2d 414, 419, 69 CR 379 ; *Atlas Fin. Corp. v. Kenny* (1945) 68 CA2d 504, 517, 157 P2d 401].

 Cross Reference:

Discussion of waiving limitations by agreement, see *California Forms of Pleading and Practice*, § 345.28[1] (Matthew Bender).

4.11[5] Contractual Provision Altering Statute of Limitations Applies Only to Parties With Whom Privity Exists. Although parties may contract to extend the limitations period, such an agreement has no effect on other potential parties with whom there is no privity [*FNB Mortgage Corp. v. Pacific Gen. Group* (1999) 76 CA4th 1116, 1121, 1135, 90 CR2d 841 (defendant's tolling agreement with plaintiff did not extend defendant's time to file cross-complaint against developer for indemnity)].

Third-party beneficiaries may have to take the contract as they find it and be bound by the contractual statute of limitations [see *Kaichen's Metal Mart, Inc. v. Ferro Cast Co.* (1995) 33 CA4th 8, 14-16, 39 CR2d 233 (agreement to extend statute of limitations made between senior secured lienholder creditor and debtor was binding on junior lienholder)].

 Cross Reference:

Discussion of effect of waiving limitations by agreement, see *California Forms of Pleading and Practice*, § 345.28[1] (Matthew Bender).

Jury Instructions:

Statute of Limitations Against Third Party Beneficiary, see *California Forms of Jury Instruction*, Ch. 3F, Instr. MB 300F.53 (Matthew Bender).

4.11[6] Insurance Policy Provisions Can Affect Limitations Period. Insurance policies frequently require notice of a claim, which can be a contractual condition precedent to the running of the statute of limitations [see *California Shoppers, Inc. v. Royal Globe Ins. Co.* (1985) 175 CA3d 1, 56, 221 CR 171]. In addition, many insurance policies contain a time limit, different from the notice requirement, for filing an action against the insurer. This effectively operates as a contractual statute of limitations [see *Ins Code* § 2071 (fire insurance policy must require loss actions to be brought within 12 months of loss); *Akin v. Certain Underwriters at Lloyd's London* (2006) 140 CA4th 291, 299, 44 CR3d 284 (plaintiff's claim was barred by the one-year limitations period provided in homeowner's insurance policy)].

 Cross Reference:

Further discussion of statutes of limitation and insurance policies, see *California Forms of Pleading and*

Practice, Ch. 308, Insurance (Matthew Bender).

Legal Topics:

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

Commercial Law (UCC)Sales (Article 2)RemediesStatutes of LimitationsTime LimitationsContracts LawContract
Conditions & ProvisionsGeneral OverviewContracts LawDefensesStatutes of LimitationsContracts LawSales of
GoodsStatutes of LimitationsGeneral OverviewGovernmentsLegislationStatutes of LimitationsGeneral Overview



111 of 175 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 4 Determining Applicable Statute of Limitations and Effect on Potential Action

II. DETERMINING APPLICABLE STATUTE OF LIMITATIONS

1-4 MB Practice Guide: CA Contract Litigation 4.12

4.12 Special Statutes of Limitations Apply for Breach of Construction Contracts Involving Latent Defects, Actions for Breach of Warranty, and Legal Malpractice Actions.

4.12[1] Breaches of Construction Contracts Involving Latent Defects Have 10-Year Statute of Repose. When a defect is latent (not apparent from a reasonable inspection), the four-year statute of limitations in *CCP* § 337 begins to run only after the damage is sufficiently obvious to give a reasonable person notice [*Siegel v. Anderson Homes (2004) 118 CA4th 994, 1014*]. However, for latent defect in construction, there is a 10-year repose period after substantial completion of improvement, which imposes an absolute 10-year bar based on the date of substantial completion, regardless of discovery of the defect [*CCP* § 337.15; see *San Diego Unified School Dist. v. County of San Diego (2009) 170 CA4th 288, 301-302, 87 CR3d 796*]. This 10-year limitation is a statute of repose rather than a statute of limitations.

Jury Instructions:

Statute of Repose, see *California Forms of Jury Instruction, Ch. 3I, Instr. MB 300I.76* (Matthew Bender).

These statutes set up two related rules [*Angeles Chem. Co., Inc. v. Spencer, Inc. & Jones (1996) 44 CA4th 112, 51 CR2d 594*]:

- Actions for a latent construction defect must be filed within four years of discovery (if *CCP* § 337 applies); but
- In any event, such actions must be filed within 10 years of substantial completion.

➡ Cross Reference:

Discussion of statute of limitations in building contracts, see *California Forms of Pleading and Practice, § 104.10 et seq. (Matthew Bender)*.

4.12[2] Four-Year Statute Applies to Legal Malpractice Actions Based on Contract, Obligation, or Written Instrument. Although most legal malpractice actions are based on negligence and subject to a one-year statute of limitations [see *CCP* § 340.6], a legal malpractice action based on a contract, obligation, or liability founded on an

instrument in writing must be brought within the four-year limitations period of *CCP* § 337 [see *Benard v. Walkup* (1969) 272 CA2d 595, 601, 77 CR 544 (legal malpractice action based on defendant's failure to prosecute plaintiff's personal injury claim pursuant to a written contingent fee agreement was timely filed within the four-year period)].

The contract need not require the attorney to take any specific action or promise a specific result [see, e.g., *Benard v. Walkup* (1969) 272 CA2d 595, 601, 77 CR 544 (contingent fee contract did not require any specific action by attorney or that he obtain specific result or exercise particular skill in prosecuting plaintiff's action, requirement that writing express obligation sued on was satisfied because agreement employed defendant to "commence and prosecute such claims" and stated over defendant's signature: "I accept said employment and agree to do all things necessary to prosecute said claim")].



Cross Reference:

Discussion of action for legal malpractice, see California Forms of Pleading and Practice, Ch. 76, Attorney Professional Liability (Matthew Bender).

Legal Topics:

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

Contracts LawBreachCauses of ActionBreach of WarrantyContracts LawDefensesStatutes of LimitationsContracts LawSales of GoodsStatutes of LimitationsTime LimitationsGovernmentsLegislationStatutes of LimitationsTime LimitationsTortsMalpractice & Professional LiabilityAttorneys



112 of 175 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 4 Determining Applicable Statute of Limitations and Effect on Potential Action
II. DETERMINING APPLICABLE STATUTE OF LIMITATIONS

1-4 MB Practice Guide: CA Contract Litigation 4.13

4.13 Federal Law May Dictate Statute of Limitations.

Federal law may preempt the applicable California statute of limitations when Congress has provided a specific statute of limitations in a controlling statute [see, e.g., *Angeles Chem. Co., Inc. v. Spencer, Inc. & Jones* (1996) 44 CA4th 112, 127, 51 CR2d 594 (CERCLA eliminated 10-year bar of CCP § 337.15 in certain environmental cases)].

Example:

A chemical company sued a contractor based on faulty construction work that led to the contamination of subsoil. The chemical company filed its action within three years of discovering the defective work, but more than 10 years after its completion. Under the California statute governing latent construction defects, the action would not have been timely. However, the court held that the statute of limitations under federal law (CERCLA) explicitly preempted the state statute, such that the court was required to apply a discovery rule in all instances [*Angeles Chem. Co., Inc. v. Spencer, Inc. & Jones* (1996) 44 CA4th 112, 127, 51 CR2d 594].

**Strategic Point--All Parties:**

Statutes of limitations arguably are no longer considered procedural under conflict of laws analysis or in interpreting choice-of-law provisions [see *Ashland Chem. Co. v. Provence* (1982) 129 CA3d 790, 793-794, 181 CR 340]. As the Supreme Court has stated, "except at the extremes, the terms 'substance' and 'procedure' precisely define very little except a dichotomy" [*Sun Oil Co. v. Wortman* (1988) 486 US 717, 726, 736, 108 S Ct 2117, 100 L Ed2d 743 ; *Hambrecht & Quist Venture Partners v. American Med. Int'l, Inc.* (1995) 38 CA4th 1532, 1542, 46 CR2d 33]. Further, what these two terms mean in any particular context is determined by the purpose for which the dichotomy is made [*Sun Oil Co. v. Wortman* (1988) 486 US 717, 726-727, 108 S Ct 2117, 100 L Ed2d 743]. Accordingly, the parties should be prepared to argue the underlying purpose for which the distinction is made, and not the distinction itself [see *Lackner v. LaCroix* (1979) 25 C3d 747, 750-752, 159 CR 693, 602 P2d 393], and recall that in applying choice of law principles, courts generally will defer to another state's substantive laws, but not its procedural laws [see *Klingebiel v. Lockheed Aircraft Corp.* (ND Cal 1971) 372 F Supp 1086, 1089].

Consider:

Federal procedure requires that in a pleading to a preceding pleading, affirmative defenses including the

statute of limitations should be set forth affirmatively [*Fed R Civ P 8(c)*]. In federal cases, problems relating to the statute of limitations should appear on the face of the complaint, because averments of time and place are material and must be considered when evaluating the sufficiency of pleadings [*Fed R Civ P 9(f)*].

**Cross Reference:**

Discussion of impact of federal rules on state statutes of limitation, see Moore's Federal Practice, § 6.03 (Matthew Bender 3d ed.).

Legal Topics:

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

Civil ProcedureFederal & State InterrelationshipsChoice of LawGeneral OverviewCivil ProcedureFederal & State InterrelationshipsFederal Common LawPreemptionContracts LawDefensesStatutes of LimitationsGovernmentsLegislationStatutes of LimitationsGeneral Overview



113 of 175 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 4 Determining Applicable Statute of Limitations and Effect on Potential Action

II. DETERMINING APPLICABLE STATUTE OF LIMITATIONS

1-4 MB Practice Guide: CA Contract Litigation 4.14

4.14 Law of Forum State Governs Determination of Applicable Statute of Limitations.

The law of the forum state, rather than the law of the state where the obligation arose, governs the determination of the applicable statute of limitations [*Western Coal & Mining Co. v. Jones* (1946) 27 C2d 819, 828, 167 P2d 719].

Judge's Perspective:

Whether the holding of *Western Coal & Mining* is still good law after cases like *Hambrecht & Quist* [*Hambrecht & Quist Venture Partners v. American Med. Int'l, Inc.* (1995) 38 CA4th 1532, 1542, 46 CR2d 33] remains to be seen. Under *Western Coal*, the law of the forum state applies in a breach of contract case, even if the California court would otherwise apply another state's law to interpret or enforce the contract (for example, under traditional choice of law principles) [*Western Coal & Mining Co. v. Jones* (1946) 27 C2d 819, 828, 167 P2d 719]. This holding is based on the longstanding legal distinction between laws that are "procedural" and laws that are "substantive"; in applying choice of law principles, courts generally will defer to another state's substantive laws, but not its procedural laws [*Klingebiel v. Lockheed Aircraft Corp.* (ND Cal 1971) 372 F Supp 1086, 1089 (discussing the distinction in California law)]. The line of cases including *Hambrecht & Quist*, however, has swept aside that distinction. These cases reject that distinction as it applies to statutes of limitation, holding that another state's statute of limitations is part of the "law" the parties choose when they agree on a choice-of-law provision [see *Hambrecht & Quist Venture Partners v. American Med. Int'l, Inc.* (1995) 38 CA4th 1532, 1542, 46 CR2d 33]. That same analysis should apply whenever a California court applies another state's law to a contract, regardless of whether the reason is a choice of law provision in the contract or the application of California's choice of law doctrine to the facts of the case. Thus, a California trial court applying Ohio law to the interpretation and enforcement of a contract should be free to apply Ohio's statute of limitations, even if prior cases held to the contrary [see, e.g., *Boyle v. Lampe* (1963) 223 CA2d 715, 719, 35 CR 910]. In this context, it is likely that California's borrowing statute [CCP § 361] does apply to contract cases, though there is as yet no case authority for this proposition.

► Cross Reference:

Discussion of application of forum state statute of limitations, see Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, Ch. 4, Limitation of Actions.

Legal Topics:

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

Civil ProcedureFederal & State InterrelationshipsChoice of LawGeneral OverviewContracts LawDefensesStatutes of LimitationsGovernmentsLegislationStatutes of LimitationsGeneral Overview



114 of 175 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 4 Determining Applicable Statute of Limitations and Effect on Potential Action
 II. DETERMINING APPLICABLE STATUTE OF LIMITATIONS

1-4 MB Practice Guide: CA Contract Litigation 4.15

4.15 Contractual Choice-of-Law Clause Incorporates Statute of Limitations From Chosen State.

A choice-of-law clause providing that a contract will be governed by the law of a particular state incorporates that state's statute of limitations [*Taylor v. Lockheed Martin Corp.* (2000) 78 CA4th 472, 487, 92 CR2d 873 (citing *Hambrecht & Quist Venture Partners v. American Med. Int'l, Inc.* (1995) 38 CA4th 1532, 1536, 1538-1544, 46 CR2d 33)].

Example:

A stock purchase agreement that stated that it was to be governed and construed in accordance with Delaware law incorporated Delaware's three-year statute of limitations on written contracts rather than California's four-year statute, even though the Delaware corporation's principal place of business was in California [*Hambrecht & Quist Venture Partners v. American Med. Int'l, Inc.* (1995) 38 CA4th 1532, 1536, 1538-1544, 46 CR2d 33].

➡ Cross Reference:

Discussion of contractual choice-of-law clauses, see *Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure*, 4.10[3].

Distinguish:

If the cause of action arising in another state is in favor of a plaintiff who has resided in California continuously from the time the cause of action accrued, the plaintiff may invoke a more favorable California statute of limitations to defeat a bar by the foreign state's more restrictive limitation period [CCP § 361; see, e.g., *Grant v. McAuliffe* (1953) 41 C2d 859, 864-865, 264 P2d 944 (California-resident victims of Arizona auto accident could sue deceased Arizona driver's estate under California statutes permitting survival of negligence actions against deceased)].

For a contractual choice-of-law provision to be enforceable [see *Hambrecht & Quist Venture Partners v. American Med. Int'l, Inc.* (1995) 38 CA4th 1532, 1539-1544, 46 CR2d 33]:

- The chosen state must have a substantial relationship to the parties; or
- There must be any other reasonable basis for the parties' choice; and

- The chosen state's law may not fundamentally conflict with a policy of California.

If there is a fundamental conflict, the choice-of-law provision will not be enforced if California has a materially greater interest than the chosen state in the determination of the issue [*Hambrecht & Quist Venture Partners v. American Med. Int'l, Inc.* (1995) 38 CA4th 1532, 1536, 1534-1545, 46 CR2d 33].

Cross Reference:

Further discussion of contractual choice of law provisions, see *California Forms of Pleading and Practice*, § 140.30[3][a] (Matthew Bender).

The law of the forum state, rather than the law of the place where the obligation arose, governs the determination of the applicable statute of limitations [*Western Coal & Mining Co. v. Jones* (1946) 27 C2d 819, 828, 167 P2d 719].

Judge's Perspective:

Whether the holding of *Western Coal & Mining* is still good law after cases like *Hambrecht & Quist* is uncertain [see *Hambrecht & Quist Venture Partners v. American Med. Int'l, Inc.* (1995) 38 CA4th 1532, 1536, 1534-1545, 46 CR2d 33]. For further discussion, see the Judge's Perspective to 4.14.

Legal Topics:

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

Civil ProcedureFederal & State InterrelationshipsChoice of LawGeneral OverviewContracts LawContract Conditions & ProvisionsForum Selection ClausesContracts LawDefensesStatutes of LimitationsGovernmentsLegislationStatutes of LimitationsGeneral Overview



115 of 175 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 4 Determining Applicable Statute of Limitations and Effect on Potential Action

II. DETERMINING APPLICABLE STATUTE OF LIMITATIONS

1-4 MB Practice Guide: CA Contract Litigation 4.16

4.16 If Case Can Be Covered by Two Statutes of Limitation, Only One Applies.

It is possible that more than one statute of limitations can apply to a particular situation. In that case, when one statute is more general and another is more specific, the more specific statute applies [*Collection Bureau of San Jose v. Rumsey* (2000) 24 C4th 301, 310-311, 99 CR2d 792, 6 P3d 713]. If two statutes apply and neither is more specific, the statute with the shorter limitation period controls [*Anson v. County of Merced* (1988) 202 CA3d 1195, 1199].

Cross Reference:

Discussion of limitation period when more than one statute of limitations applies, see *Matthew Bender*[(R)] *Practice Guide: California Pretrial Civil Procedure*, 4.11.

Legal Topics:

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

Civil ProcedureFederal & State InterrelationshipsChoice of LawGeneral OverviewContracts LawDefensesStatutes of LimitationsGovernmentsLegislationStatutes of LimitationsGeneral Overview



116 of 175 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 4 Determining Applicable Statute of Limitations and Effect on Potential Action

III. DETERMINING WHEN LIMITATIONS PERIOD EXPIRES

1-4 MB Practice Guide: CA Contract Litigation 4.17

4.17 CHECKLIST: Determining When Limitations Period Expires.

☐ Determine when cause of action accrued.

☐ Cause of action under written or oral contract accrues at time of breach.

Authority:

CCP § 337; Angeles Chem. Co., Inc. v. Spencer, Inc. & Jones (1996) 44 CA4th 112, 119, 51 CR2d 594

Discussion:

See 4.19[1]

☐ Cause of action for breach of UCC sales contract accrues when breach occurs, regardless of aggrieved party's knowledge of breach.

Authority:

Com Code § 2725(2)

Discussion:

See 4.19[3]

☐ Statute does not begin to run until conditions precedent are satisfied.

Authority:

Ghirardelli v. Peninsula Props. Co. (1940) 16 C2d 494, 498, 107 P2d 41

Discussion:

See 4.19[4]

- ☐ If contract designates fixed time for performance, statute does not begin until expiration of that time period.

Authority:

Bank of Am. v. McLaughlin (1957) 152 CA2d Supp 911, 915, 313 P2d 220

Discussion:

See 4.19[5]

- ☐ If demand is integral to contract, period of limitations does not run until demand is made.

Authority:

Phillis v. Santa Barbara (1964) 229 CA2d 45, 55, 40 CR 27

Discussion:

See 4.19[6]

- ☐ Timeliness of complaint is determined based on date on which action is filed.

Authority:

Cuadra v. Millan (1998) 17 C4th 855, 864, 72 CR2d 687, 952 P2d 704

Discussion:

See 4.19[7]

- ☐ Single event may trigger running of statute for multiple causes of action.

Authority:

Forcier v. Microsoft Corp (ND Cal 2000) 123 F Supp2d 520, 527

Discussion:

See 4.19[8]

- ☐ Ascertain whether applicable statute of limitations has been tolled or suspended for any reason, such as:

- ☐ Discovery rule.

Authority:

Mills v. Forestex Co. (2003) 108 CA4th 625, 642-643, 134 CR2d 273

Discussion:

See 4.21[1]

- ☐ Fraud.

Authority:

CCP § 338; *Regents of Univ. Cal. v. Superior Court* (1999) 20 C4th 509, 533, 85 CR2d 257, 976 P2d 808

Discussion:

See 4.21[2]

- ☐ Resident's absence from state.

Authority:

CCP § 351

Discussion:

See 4.21[3]

- ☐ Commencement of action.

Authority:

Record Mach. & Tool Co. v. Pageman Holding Corp. (1959) 172 CA2d 164, 175-176, 342 P2d 402

Discussion:

See 4.21[4]

- ☐ Agreement of Parties.

Authority:

American Cemwood Corp. v. American Home Assurance Co. (2001) 87 CA4th 431, 434, 104 CR2d 670

Discussion:

See 4.21[5]

- ☐ Equitable Estoppel.

Authority:

Ashou v. Liberty Mut. Fire Ins. Co. (2006) 138 CA4th 748, 766-767, 41 CR3d 819

Discussion:

See 4.21[6]

Legal Topics:

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

Contracts LawDefensesStatutes of LimitationsGovernmentsLegislationStatutes of LimitationsTime Limitations



117 of 175 DOCUMENTS

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Chapter 4 Determining Applicable Statute of Limitations and Effect on Potential Action
III. DETERMINING WHEN LIMITATIONS PERIOD EXPIRES

1-4 MB Practice Guide: CA Contract Litigation 4.18

4.18 Options and Strategy.

After determining what statute of limitation applies [see 4.03-4.16], the attorney must determine when the applicable limitations period is going to expire. This determination obviously is critical to every party to the litigation.

For the plaintiff's attorney, it is essential to determine at the outset when the statute will expire, first so that it can be determined whether the action can be filed at all, and second (and equally important) so that the limitations period will not inadvertently be allowed to expire before the case is filed. Every attorney has experienced or heard horror stories involving clients who wait until the eleventh hour to consult an attorney, leaving the attorney with little or no time to become familiar with the facts before the action must be filed.

Conversely, for a defense attorney whose client has just been served in the litigation, it is important to determine at the outset whether or the not action was filed before the statute of limitations expired. If the statute has run, expiration of the limitations period provides an immediate defense.

Determining when the statute of limitations will expire involves the following steps:

- Determining which statute of limitations applies [see 4.04].
- Determining when the cause of action accrued [see 4.19].
- Determining whether the statute arguably was tolled for any reason once the running of the limitations period commenced [see 4.21].
- Computing the date on which the limitations period will expire, beginning on the date when it began to run, calculating the date at which the end of the basic applicable limitations period will expire, and adding any periods of time during which the statute was tolled.



Warning:

The plaintiff's attorney should not wait until the very end of the period computed above to file the action if it can be filed earlier. The date of accrual and issues of tolling are not always clear-cut, especially in discovery rule situations, and a plaintiff's attorney who waits until the last minute to file suit risks waiting too long. Allowing the statute of limitations to run before filing suit is one of the classic mistakes leading

to legal malpractice claims. The plaintiff's attorney should be alert to possible issues regarding discovery and tolling and, if at all possible, file the action early enough that any statute of limitations issues, even if resolved against his/her client, would not affect the timeliness of the action.

Legal Topics:

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

Contracts Law
Defenses
Statutes of Limitations
Governments
Legislation
Statutes of Limitations
General
Overview
Governments
Legislation
Statutes of Limitations
Time Limitations



118 of 175 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 4 Determining Applicable Statute of Limitations and Effect on Potential Action
 III. DETERMINING WHEN LIMITATIONS PERIOD EXPIRES

1-4 MB Practice Guide: CA Contract Litigation 4.19

4.19 Statute of Limitations Begins to Run When Cause of Action Accrues.

4.19[1] Cause of Action Accrues When Claim Becomes Actionable. Civil actions can be commenced only within periods of limitations, after the cause of action accrues [CCP § 312; *Angeles Chem. Co., Inc. v. Spencer, Inc. & Jones* (1996) 44 CA4th 112, 120, 51 CR2d 594]. A cause of action accrues when a claim becomes legally actionable [*Glue-Fold, Inc. v. Slatutterback Corp.* (2000) 82 CA4th 1018, 1029, 98 CR2d 661], such as when there is a remedy available [*People v. Barger* (1979) 97 CA3d 661, 663, 158 CR 825 ; *Heyer v. Flaig* (1969) 70 C2d 223, 230, 74 CR 225, 449 P2d 161]. Thus, the statute of limitations begins to run on the occurrence of the last element essential to the cause of action [*Norgart v. Upjohn Co.* (1999) 21 C4th 383, 389, 397, 87 CR2d 453, 981 P2d 79 ; *Neel v. Magana, Olney, Levy, Cathcart & Gelfand* (1971) 6 C3d 176, 187, 98 CR 837, 491 P2d 421].

► **Cross References:**

Discussion of when cause of action accrues in particular contract cases, see 4.19[2] -[8].

Further discussion of accrual of causes of action, see Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, Ch. 4, Limitation of Actions.

4.19[2] For Oral and Written Contracts, Statute Begins to Run at Time of Breach. The statute of limitations does not begin to run from the time of the making of a contract, but from the date of the breach of the obligation [*Spear v. California State Automobile Ass'n* (1992) 2 C4th 1035, 1043, 9 CR2d 381, 831 P2d 821 ; *Fox v. Dehn* (1974) 42 CA3d 165, 173, 116 CR 786 ; see also *Waxman v. Citizens Nat'l Trust & Sav. Bank* (1954) 123 CA2d 145, 149, 266 P2d 48 ("[A] cause of action for breach of contract accrues on the failure of the promisor to do the thing contracted for at the time and in the manner contracted")].

Examples:

■ In the case of a personal performance contract, breach of the contract (that is, breach of the obligation to pay) occurs at the time the other party completes the required performance and payment is not made [*E.O.C. Ord, Inc. v. Kovakovich* (1988) 200 CA3d 1194, 1203, 246 CR 456].

- In a general liability insurance coverage "duty to defend" case, breach of the insurance policy occurs when the insurer refuses to defend the insured in the underlying litigation [*Eaton Hydraulics Inc. v. Continental Cas. Co.* (2005) 132 CA4th 966, 968].

- In an action against an insurer for breaching the implied covenant by unreasonably failing to accept a settlement offer within policy limits, the breach occurs upon the entry of the judgment for an amount in excess of the insurance policy limits (but the statute of limitations is equitably tolled until the judgment is final) [*Archdale v. American Int'l Specialty Lines Ins. Co.* (2007) 154 CA4th 449, 474, 478, 64 CR3d 632].

- Statute of limitations on landlord's claim against tenant for breach of its agreement to remodel premises began to run on date remodeling was to be completed; landlord's letter two and a half years after performance was due, reminding tenant that it continued to be in breach, did not constitute retroactive written approval of a new performance date [*Tin Tin Corp. v. Pacific Rim Park, LLC* (2009) 170 CA4th 1220, 1234, 88 CR3d 816].

- In an action for breach of an implied contract not to use a screenplay without paying for it, the breach did not occur until the defendant disclosed the idea to a substantial segment of the public, because such disclosure tends to destroy any further marketability of the idea [*Benay v. Warner Bros. Entm't, Inc.* (9th Cir 2010) 607 F3d 620, 633].

► Cross Reference:

Discussion of condition precedent to running of statute, see 4.19[4].

Consider:

The running of the statute of limitations is subject to the tolling provisions such as the discovery rule, whereby the claim accrues when the plaintiff discovers, or could have discovered through reasonable diligence, the injury and its cause [*Angeles Chem. Co., Inc. v. Spencer, Inc. & Jones* (1996) 44 CA4th 112, 119, 51 CR2d 594].

Jury Instructions:

Statute of Limitations--Discovery of Claim, see *California Forms of Jury Instruction, Ch. 3F, Instr. MB 300F.54* (Matthew Bender).

► Cross Reference:

Discussion of discovery rule and other tolling provisions, see 4.21.

4.19[3] For UCC Sales Contracts, Cause of Action Accrues When Breach Occurs, Regardless of Aggrieved Party's Knowledge of Breach. For a UCC sales contract, the cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach [*Com Code § 2725(2)*].

Distinguish:

A breach of warranty occurs when tender of delivery is made. However, when a warranty explicitly extends to future performance of the goods, and discovery of the breach must await the time of that performance, the cause of action accrues when the breach is or should have been discovered [*Com Code § 2725*; see Ch. 24, Suing or Defending Action for Breach of Warranty]. This "future performance" exception to the four-year limitations period in *Com Code § 2725* applies only when the seller explicitly agreed to warrant its product for a defined period of time [*Cardinal Health 301, Inc. v. Tyco Electronics Corp.* (2008) 169 CA4th 116, 131-132, 87 CR3d 5 (promise by manufacturer that a part would work for 50,000 cycles did not bring the warranty within the "future performance" exception

because it did not specify a date or time in the future); *Carrau v. Marvin Lumber & Cedar Co. (2001)* 93 CA4th 281, 291, 112 CR2d 869 (general assertions as to performance or durability of product, such as assertions made by defendant window manufacturer in its advertisements, were not warranties extending to future performance of product)].

Jury Instructions:

Statute of Limitations for Breach of Prospective Warranty, see *California Forms of Jury Instruction, Ch. 3I, Instr. MB 300I.79* (Matthew Bender).

Statute of Limitations for Breach of Prospective Warranty in Case of Progressively Developing Damage, see *California Forms of Jury Instruction, Ch. 3I, Instr. MB 300I.7* (Matthew Bender).

Cross Reference:

Further discussion of issues pertaining to actions for breach of warranty, see Ch. 24, Suing or Defending Action for Breach of Warranty.

4.19[4] Statute Does Not Begin to Run Until Conditions Precedent Are Satisfied. The statute of limitations does not begin to run until the performance of an act that is a condition precedent to the commencement of an action, such as a contract condition or breach. In this situation, to preserve the action, the plaintiff must amend the complaint within the limitation period after the condition has occurred [*Ghirardelli v. Peninsula Props. Co. (1940)* 16 C2d 494, 498, 107 P2d 41].

Example:

In an action arising out of a conditional sales contract for furniture, full accounting and return of uncollected notes were conditions precedent to commencement of the action [*Ghirardelli v. Peninsula Props. Co. (1940)* 16 C2d 494, 498, 107 P2d 41].

4.19[5] When Contract Designates Fixed Time for Performance, Statute Does Not Begin Until Expiration of That Time Period. When a contract fixes a time for performance, the statute of limitations does not begin to run until expiration of that time [*Armstrong Petroleum Corp. v. Tri-Valley Oil & Gas Co. (2004)* 116 CA4th 1375, 1388]. When a contract is still executory, such as a settlement agreement that has no expiration date, the promisee is not bound to treat the contract as abandoned on the first breach or any particular breach, and the statute of limitations does not begin to run as long as the promisee elects to rely on the contract [*Baugh v. Garl (2006)* 137 CA4th 737, 747, 40 CR3d 539].

4.19[6] When Contract Calls for Demand, Demand Must Be Made Before Cause of Action Accrues. When a demand is an integral part of the cause of action, the right of action does not accrue until the demand is made, although plaintiff cannot suspend the running of the period indefinitely by delaying to make the demand [*Phillis v. Santa Barbara (1964)* 229 CA2d 45, 55, 40 CR 27].

In an action based on an oral contract, plaintiff may establish the right of action at any time by making a demand on the defendant. The demand must be made within a reasonable time after it can be lawfully made, and it must be made within the two-year period of limitations [*Stafford v. Oil Tool Corp. (1955)* 133 CA2d 763, 766, 284 P2d 937].

When demand is necessary to perfect the right of action and no time for demand is specified in the contract, the period of limitations begins to run within a reasonable time after a demand can lawfully be made [*Phillis v. Santa Barbara (1964)* 229 CA2d 45, 55, 40 CR 27].



Warning:

It is not enough to notify one's opponent, even in writing, that a claim has arisen and to threaten suit. To

be timely, the action must be on file with the court before the statute of limitations expires. If a party is negotiating or planning to negotiate with an opponent and fears that a lawsuit will jeopardize the negotiations, the party can file a complaint and withhold service. However, be sure to check the applicable rules of civil procedure and local court rules to determine how long an action may remain unserved before being dismissed for failure to prosecute [*see CCP § 583.410 et seq.*].

4.19[7] Timeliness of Complaint Is Determined Based on Date on Which Action Is Filed. The plaintiff's act of filing the complaint fixes the date on which the action is commenced. It is from this date that the defendant and the court determine whether the action is commenced within the period prescribed by the applicable statute of limitations, and thus whether it is timely [CC § 350; *Cuadra v. Millan* (1998) 17 C4th 855, 864, 72 CR2d 687, 952 P2d 704 , *overruled on other grounds*, 22 C4th 1 (1999)].

4.19[8] Single Event May Trigger Running of Statute for Multiple Causes of Action. A plaintiff's claims for multiple causes of action may accrue at the same time [*see, e.g., Forcier v. Microsoft Corp. (ND Cal 2000) 123 F Supp2d 520, 527* (plaintiff's claims for fraud, constructive fraud, breach of contract, and unfair competition arose out of alleged misappropriation of plaintiff's trade secrets, thus, statute of limitations on all claims began running at once)].

Legal Topics:

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

Contracts Law Defenses Statutes of Limitations Governments Legislation Statutes of Limitations Time Limitations



119 of 175 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 4 Determining Applicable Statute of Limitations and Effect on Potential Action

III. DETERMINING WHEN LIMITATIONS PERIOD EXPIRES

1-4 MB Practice Guide: CA Contract Litigation 4.20

4.20 Amended Complaint Relates Back and Thus Avoids Statute of Limitations If Recovery Is Based on Same General Set of Facts.

Generally, an amended complaint relates back to the filing of the original complaint and thus avoids the bar of the statute of limitations if both pleadings [*Norgart v. Upjohn Co. (1999) 21 C4th 383, 408-409, 87 CR2d 453, 981 P2d 79*]:

- Rest on the same general set of facts;
- Involve the same injury; and
- Refer to the same instrumentality.

A plaintiff may not state a new cause of action by amending the complaint when the statute of limitations has run on the new cause of action [*Stark v. Coker (1942) 20 C2d 839, 845, 129 P2d 390*].

Example:

In a later proceeding in a case involving rescission of a contract to sell shares of stock, the court did not allow relation back after the statute of limitations had run, due to the party's failure to make an appearance in the initial action [*Luna Records Corp. v. Alvarado (1991) 232 CA3d 1023, 1028-1031, 283 CR 865*].

Distinguish--Equitable Estoppel:

The equitable estoppel doctrine applies and an amendment for the purpose of avoiding a bar by the statute of limitations is allowed if the plaintiff establishes [see *Kleinecke v. Montecito Water Dist. (1983) 147 CA3d 240, 245-247, 195 CR 58*]:

- That the defendant was aware of the limitation period;
- That he or she intended that the plaintiff should rely on his or her conduct or statements;
- That the plaintiff was ignorant of the true facts; and

- That the plaintiff relied on the defendant's conduct or statements to his or her detriment.

Cross References:

Discussion of equitable estoppel, see 4.21[6]. Further discussion of the effect of amended complaints on the statute of limitations, including relation back, see *Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure*, 34.09.

Legal Topics:

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

Civil Procedure Pleading & Practice Pleadings Amended Pleadings Relation Back Contracts Law Defenses Statutes of Limitations Governments Legislation Statutes of Limitations Time Limitations



120 of 175 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 4 Determining Applicable Statute of Limitations and Effect on Potential Action
III. DETERMINING WHEN LIMITATIONS PERIOD EXPIRES

1-4 MB Practice Guide: CA Contract Litigation 4.21

4.21 Statute of Limitations May Be Tolled.

4.21[1] Discovery Rule May Toll Statute of Limitations. Although the statute of limitations begins to run on breach of the contract, California courts have held that it is manifestly unjust to deprive plaintiffs of a cause of action before they are aware that they have been injured. Accordingly, a cause of action under the discovery rule accrues when the plaintiff discovers or should have discovered all facts essential to the cause of action [*Mills v. Forestex Co. (2003) 108 CA4th 625, 640, 134 CR2d 273* ; *April Enterprises, Inc. v. KTTV (1983) 147 CA3d 805, 832, 195 CR 421*]. The discovery rule is satisfied when plaintiff either (1) actually discovered his injury and its cause, or (2) could have discovered the injury and cause through the exercise of reasonable diligence. The discovery rule avoids dismissing a suit on grounds of limitation when a plaintiff is blamelessly ignorant of the cause of action [*April Enterprises, Inc. v. KTTV (1983) 147 CA3d 805, 832, 195 CR 421*].

Jury Instructions:

Statute of Limitations--Discovery of Claim, see *California Forms of Jury Instruction, Ch. 3F, Instr. MB 300F.54* (Matthew Bender).

The discovery rule can be applied to breaches of contract that can be, and are, committed in secret, when the harm flowing from those breaches will not reasonably be discoverable by plaintiffs until a future time [*April Enterprises, Inc. v. KTTV (1983) 147 CA3d 805, 832, 195 CR 421*].

Generally, courts have applied the discovery rule when [*Gryczman v. 4550 Pico Partners, Ltd. (2003) 107 CA4th 1, 5, 131 CR2d 680*]:

- The injury or the act causing the injury, or both, have been difficult for the plaintiff to detect;
- The defendant has been in a far superior position to comprehend the act and the injury; and
- The defendant has reason to believe the plaintiff remained ignorant of the fact that he or she has been wronged.

Example:

The discovery rule was applied to toll the statute of limitations when a TV station secretly erased

programs from videotapes, in violation of contract, which the plaintiff TV producer was not able to discover until several years after limitations period [*April Enterprises, Inc. v. KTTV* (1983) 147 CA3d 805, 832-833, 195 CR 421].

Under the discovery rule, the limitations period begins once the plaintiff has notice or information of circumstances to put a reasonable person on inquiry about the injury [*Mills v. Forestex Co.* (2003) 108 CA4th 625, 642, 134 CR2d 273].

A plaintiff need not be aware of the specific facts necessary to establish the claim [*Mills v. Forestex Co.* (2003) 108 CA4th 625, 643, 134 CR2d 273].



Warning:

Once a plaintiff suspects wrongdoing and has an incentive to sue, the plaintiff must decide whether to file suit or sit on his or her rights. As long as a suspicion exists, the plaintiff must go find the facts [*Mills v. Forestex Co.* (2003) 108 CA4th 625, 643, 134 CR2d 273]. But it is unreasonable to expect a contracting party to continually monitor whether the other party is performing some act inconsistent with one of the many possible terms in a contract, especially when the breaching party can commit the offending act secretly [*Gryczman v. 4550 Pico Partners, Ltd.* (2003) 107 CA4th 1, 5, 131 CR2d 680].



Cross Reference:

Discussion of breach of contract committed in secret, and form for memorandum, see California Points and Authorities, Form 25.6 (Matthew Bender).

4.21[2] Fraud Tolls Running of Statute.

4.21[2][a] Contract Breach Involving Fraud Is Treated As Fraud. When fraud is mixed with a breach of contract, the action, as regards the bar of the statute of limitations, must be treated as one for relief on the ground of fraud, and the limitation period does not run until the discovery of the facts constituting the fraud [CCP § 338; *Gregory v. Spieker* (1895) 110 C 150, 153, 42 P 576].

Jury Instructions:

Statute of Limitations--Discovery of Claim, see *California Forms of Jury Instruction*, Ch. 3F, Instr. MB 300F.54 (Matthew Bender).



Cross Reference:

Discussion of fraud in contract actions, see Ch. 17, Attacking or Defending Existence of Contract--Fraud, Duress, Menace, and Undue Influence.

When a breach of contract is accomplished by the defendant's secret confederacy with another person in which the other person's name is used to hide the defendant's actions, fraud is so ingrained with the breach of a contract that the action, as to the bar of the statute of limitations, must be treated as for relief on the ground of fraud [*Gregory v. Spieker* (1895) 110 C 150, 153, 42 P 576].



Cross Reference:

Discussion of effect of discovery rule, see *Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure*, 4.15[1].

4.21[2][b] If Breach Involves Fraud, Statute Begins to Run From Date Plaintiff Discovers Facts Constituting Fraud. When a breach of contract involves fraud, the statute of limitations begins to run from the date the plaintiff

discovers or reasonably should have discovered the facts constituting the fraud. In these cases, the rights arising out of fraud and contract are blended [*San Filippo v. Griffiths* (1975) 51 CA3d 640, 645, 124 CR 399].

Jury Instructions:

Statute of Limitations--Discovery of Claim, see *California Forms of Jury Instruction, Ch. 3F, Instr. MB 300F.54* (Matthew Bender).

 Cross References:

Form for memorandum asserting fraud statute applies, see 4.28.

Further discussion of contract breach involving fraud, see Ch. 17, Attacking or Defending Existence of Contract--Fraud, Duress, Menace, and Undue Influence.

4.21[2][c] Statute Is Told by Fraudulent Concealment of Facts. Fraudulent concealment of the facts on which the plaintiff's action and right of recovery are based, under proper circumstances, tolls the statute of limitations until plaintiff discovers or should have discovered facts about the fraudulent concealment through a reasonable exercise of diligence [*Hernandez v. Garcetti* (1998) 68 CA4th 675, 681, 80 CR2d 443].

Examples:

- In a dispute over restaurant franchise agreements, the district court did not err in applying the discovery rule to toll the statute of limitations when the franchisee's alleged misrepresentations and forgery hindered the franchisor's discovery that the franchisee had breached the agreement by operating competing restaurants [*El Pollo Loco, Inc. v. Hashim* (9th Cir 2003) 316 F3d 1032, 1039-1040 (applying California law)].

- In an action against a bank for breach of contract, fraud, and truth in lending violations, a letter from the bank to plaintiff was misleading and dissuaded plaintiff from suing, the statute of limitations on the breach of contract claims was tolled [*Hubbard v. Fidelity Fed. Bank* (9th Cir 1996) 91 F3d 75, 78-79].

4.21[3] Resident's Absence From State Tolls Statute. The statute of limitations in a cause of action for breach of contract is tolled by a resident's absence from the state if the out-of-state travel is unrelated to interstate commerce [CCP § 351; *Filet Menu, Inc. v. Cheng* (1999) 71 CA4th 1276, 1280-1284, 84 CR2d 384].

 Cross Reference:

Discussion of effect of resident's absence from forum, see *Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure*, 4.18.

4.21[4] Commencement of Action Suspends Running of Limitations Period. The commencement of an action suspends the running of a period of limitation as to matters arising out of the transaction set forth in the complaint [*Record Mach. & Tool Co. v. Pageman Holding Corp.* (1959) 172 CA2d 164, 175, 342 P2d 402].

 Cross Reference:

Further discussion of factors that may toll the statute of limitations, see *Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure*, Ch. 4, Limitation of Actions.

4.21[5] Tolling Agreement Can Suspend Limitations Period. It is not uncommon for a party contemplating suit to request from the opposing party a tolling agreement as to the statute of limitations to allow the parties time to

negotiate [*American Cemwood Corp. v. American Home Assurance Co.* (2001) 87 CA4th 431, 434, 104 CR2d 670 ; see *FNB Mortgage Corp. v. Pacific Gen. Group* (1999) 76 CA4th 1116, 1121, 1135, 90 CR2d 841].



Warning:

Although tolling agreements are sometimes advisable, such as when negotiations cannot be concluded before the expiration of the statute of limitations, many defense attorneys advise against their use because they create perverse incentives (delaying the case and pushing for better deals), and can unfairly increase the potential plaintiff's leverage in the case.

4.21[6] Defendant May Be Equitably Estopped to Assert Statute of Limitations. A defendant will be estopped to assert the statute of limitations if the defendant's conduct, relied on by the plaintiff, has induced the plaintiff to postpone filing the action until after the statute has run [*Mills v. Forestex Co.* (2003) 108 CA4th 625, 652, 134 CR2d 273] .

To establish equitable estoppel, a plaintiff must prove the following four elements [*Ashou v. Liberty Mut. Fire Ins. Co.* (2006) 138 CA4th 748, 766-767, 41 CR3d 819] :

- The party to be estopped must know the facts;
- The party must intend that his or her conduct shall be acted upon, or must so act that the party asserting the estoppel had the right to believe that it was so intended;
- The party asserting the estoppel must be ignorant of the true state of facts; and
- The party must rely upon the conduct, causing him or her injury.

It is not necessary that the defendant act in bad faith or intend to mislead the plaintiff; it is sufficient that the defendant's conduct induces the plaintiff to refrain from instituting legal proceedings [*Mills v. Forestex Co.* (2003) 108 CA4th 625, 652, 134 CR2d 273] .

Examples:

- In an insurance coverage case involving damage from the 1994 Northridge earthquake, the insured plead sufficient facts for the application of equitable estoppel by alleging that the insurer told the insured that damage to its property was less than the amount of the deductible, that damage actually exceeded the deductible, and that the insured reasonably relied on the insurer's representations in delaying filing suit until after the statute of limitations had run [*Doheny Park Terrace Homeowners Ass'n, Inc. v. Truck Ins. Exch.* (2005) 132 CA4th 1076, 1096-1099, 34 CR3d 157] .

- In another insurance coverage case involving damage from the 1994 Northridge earthquake, the insured could not establish the second element of equitable estoppel because the insurer sent her a letter expressly stating that although it would reconsider her claim, it would not waive any defenses [*Ashou v. Liberty Mut. Fire Ins. Co.* (2006) 138 CA4th 748, 767, 41 CR3d 819] .

- In an action for specific performance brought by the seller of oilfields against the buyer, the buyer was estopped from asserting the statute of limitations as a defense because the seller suspended legal actions in reliance on the buyer's promise to amend the contracts between them [*Union Oil Co. of California v. Greka Energy Corp.* (2008) 165 CA4th 129, 138, 80 CR3d 738] .

Legal Topics:

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

Commercial Law (UCC)Sales (Article 2)RemediesStatutes of LimitationsTerminations & TollingContracts
LawDefensesStatutes of LimitationsContracts LawSales of GoodsStatutes of LimitationsTerminations &
TollingGovernmentsLegislationStatutes of LimitationsTolling



121 of 175 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 4 Determining Applicable Statute of Limitations and Effect on Potential Action
IV. RAISING STATUTE OF LIMITATIONS DEFENSE

1-4 MB Practice Guide: CA Contract Litigation 4.22

4.22 CHECKLIST: Raising Statute of Limitations Defense.

- ☐ Recognize that statute of limitations is an affirmative defense.

Authority:

Union Sugar Co. v. Hollister Estate Co. (1935) 3 C2d 740, 744, 47 P2d 273 ; *County of San Mateo v. Booth* (1982) 135 CA3d 388, 399, 185 CR 349

Discussion:

See 4.23[1]

- ☐ Be aware that defendant has burden to plead and prove defense of statute of limitations.

Authority:

Burgen v. Kaiser Found. Hosps. (1979) 93 CA3d 813, 824, 155 CR 763 , *overruled in part on other grounds*, (1999),

Discussion:

See 4.23[2]

- ☐ Determine when "earliest opportunity" to raise defense properly and in a timely manner will arise, in order to avoid any possibility of inadvertently waiving defense.

Authority:

Hambrecht & Quist Venture Partners v. American Med. Int'l, Inc. (1995) 38 CA4th 1532, 1548, 46 CR2d 33

Discussion:

See 4.23[3]

☐ To raise defense at "earliest opportunity," assert it either in demurrer or in answer to complaint.

Authority:

Isaac v. A & B Loan Co. (1988) 201 CA3d 307, 311-312, 247 CR 104

☐ Verify that statute of limitations has lapsed.

Authority:

CCP §§ 337, 339; Com Code § 2725

Discussion:

See 4.18

☐ Determine whether complaint states sufficient facts to warrant demurrer.

Authority:

Marshall v. Gibson, Dunn & Crutcher (1995) 37 CA4th 1397, 1403, 44 CR2d 339

Discussion:

See 4.24[2]

Form:

See 4.26

☐ Determine whether defense of limitations should be raised in answer.

Authority:

Union Sugar Co. v. Hollister Estate Co. (1935) 3 C2d 740, 744, 47 P2d 273

Discussion:

See 4.24

Form:

See 4.27

☐ If raising defense of limitations in answer, verify that either all necessary facts are stated, or relevant provision of Code of Civil Procedure is cited.

Authority:

CCP § 458

Discussion:

See 4.24[3]

☐ If raising defense of limitations by motion to strike, verify that demurrer accompanies motion.

Authority:

Sullivan v. Wright (1954) 124 CA2d 836, 837-838, 269 P2d 671

Discussion:

See 4.24[6]

- ☐ Determine whether plaintiff's claim is barred by the doctrine of laches.

Authority:

Miller v. Glenn Miller Prods. (CD Cal 2004) 318 F Supp2d 923, 944-945

Discussion:

See 4.25

Form:

See 4.31

Legal Topics:

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

Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsGeneral OverviewCivil ProcedurePleading & PracticePleadingsAnswersContracts LawDefensesStatutes of LimitationsGovernmentsLegislationStatutes of LimitationsPleading & Proof



122 of 175 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 4 Determining Applicable Statute of Limitations and Effect on Potential Action
IV. RAISING STATUTE OF LIMITATIONS DEFENSE

1-4 MB Practice Guide: CA Contract Litigation 4.23

4.23 Options and Strategy.

4.23[1] Statute of Limitations Is Affirmative Defense. A party who wishes to rely on the defense that an action is barred by a statute of limitation must affirmatively raise that defense in an appropriate pleading [see *Union Sugar Co. v. Hollister Estate Co.* (1935) 3 C2d 740, 744, 47 P2d 273 ; see also *County of San Mateo v. Booth* (1982) 135 CA3d 388, 399, 185 CR 349].



Search California Points and Authorities:

Use *lexis.com* to search for documents discussing statute of limitations defense issues:

■ Legal > States Legal--U.S. > California > Search Analysis & CLE Materials > CA Treatises & Analytical Materials > California Forms of Pleading and Practice



Sample Search: To find forms for the affirmative defense of statute of limitations

try: *heading (forms and affirmative defense and statute limitations).*



Cross Reference:

Full discussion of asserting affirmative defenses, see Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, Ch. 14, Answers.

4.23[2] Defendant Has Burden of Proof to Establish Statute of Limitations. The defendant has the burden to establish a prima facie case that the statute of limitations applies [*Burton v. Kaiser Found. Hosps.* (1979) 93 CA3d 813, 824, 155 CR 763 , *overruled in part on other grounds*, (1999),].

4.23[3] Failure to Properly and Timely Raise Defense May Result in Waiver of Defense. A defendant who fails to raise the defense of the statute of limitations by an appropriate pleading may be held to have waived the right to rely on the defense [*In re Andrew V.* (1991) 232 CA3d 1286, 1291, 284 CR 38]. The defense typically is waived by failure to plead or to adequately plead the defense [see *Hall v. Chamberlain* (1948) 31 C2d 673, 679-680, 192 P2d 759 ; *Hambrech & Quist Venture Partners v. American Med. Int'l, Inc.* (1995) 38 CA4th 1532, 1548, 46 CR2d 33 (defendant who does not timely raise limitations defense waives defense no matter how long plaintiff delayed in suing);

Stalberg v. Western Title Ins. Co. (1991) 230 CA3d 1223, 1232, 282 CR 43 (statute of limitations defense not raised in trial court waived and could not be raised on appeal)].

To avoid possible waiver, an affirmative defense such as the statute of limitations should be raised at the earliest possible time [see *California Concrete Co. v. Beverly Hills Savings & Loan Assn.* (1989) 215 CA3d 260, 272-273]. Ordinarily, the earliest opportunity is when the defendant demurs or files an answer to a complaint [*Isaac v. A & B Loan Co.* (1988) 201 CA3d 307, 311-312, 247 CR 104].

Judge's Perspective:

The defendant's failure to raise a statute of limitations defense as soon as possible does not necessarily mean that the defense is waived. The defendant can always move the court for permission to amend the answer, and the court is likely to grant the motion unless the plaintiff can demonstrate incurable prejudice. This is because courts have a strong policy in favor of resolving litigation on the merits, and allowing a claim that is otherwise time-barred to go forward would violate this policy by requiring a defendant to litigate a stale claim. Certainly, however, failure to assert a statute of limitations defense early will prevent the defendant from *disposing* of the litigation on that ground, at least until the answer has been amended [see *California Concrete Co. v. Beverly Hills Savings & Loan Assn.* (1989) 215 CA3d 260, 273 (reversing grant of summary judgment on statute of limitations grounds when that defense had not been raised in answer)].

Cross References:

Raising statute of limitations defense in amended answer, see 4.24[4].

Detailed discussion of asserting defense of statute of limitations, see Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, Ch. 4, Limitation of Actions.

Legal Topics:

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

Civil Procedure Pleading & Practice Defenses, Demurrers & Objections Affirmative Defenses General Overview Contracts Law Defenses Statutes of Limitations Governments Legislation Statutes of Limitations Pleading & Proof



123 of 175 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 4 Determining Applicable Statute of Limitations and Effect on Potential Action

IV. RAISING STATUTE OF LIMITATIONS DEFENSE

1-4 MB Practice Guide: CA Contract Litigation 4.24

4.24 Defense Generally Is Raised in Answer or Demurrer.

4.24[1] Defect on Face of Complaint Can Be Addressed by Demurrer. If the defect appears on the face of a complaint, a defendant may invoke the statute of limitation defense either by demurrer or by answer. The failure to urge the defense by way of demurrer does not deprive the defendant of the right to rely on the defense in the answer [*Stafford v. Russell* (1953) 117 CA2d 319, 321, 255 P2d 872].

**Warning:**

A party relying on the defense of limitations must affirmatively raise the defense in an appropriate pleading at the earliest opportunity [see *Union Sugar Co. v. Hollister Estate Co.* (1935) 3 C2d 740, 744, 47 P2d 273 ; *Isaac v. A & B Loan Co.* (1988) 201 CA3d 307, 311-312, 247 CR 104 ; see also *County of San Mateo v. Booth* (1982) 135 CA3d 388, 399, 185 CR 349]. Failure to raise the defense by an appropriate pleading can result in waiver of the right to rely on it [*In re Andrew V.* (1991) 232 CA3d 1286, 1291, 284 CR 38 (court's jurisdiction not affected by running of statute; party must plead defense of limitation or it is waived)].

**Cross References:**

Discussion of waiver of defense of limitations, see 4.23[3].

Form for answer, see 4.27.

Form for demurrer, see 4.26.

Further discussion of answers and demurrers, see Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, Ch. 11, Demurrers and Motions for Judgment on the Pleadings; see also Ch. 14, Answers.

4.24[2] Sufficient Facts Must Exist in Pleadings to Demur on Statute of Limitations Issue. A demurrer on the ground of bar of a statute of limitation does not lie if the complaint shows merely that the action *might* be barred. The defense must state affirmatively that, on the facts stated in the complaint, the right to maintain an action is *necessarily* barred [see *Marshall v. Gibson, Dunn & Crutcher* (1995) 37 CA4th 1397, 1403, 44 CR2d 339 ; *Farris v. Merritt*

(1883) 63 C 118, 119].

A demurrer based on statute of limitations is valid if the dates in question are shown on the face of the pleading. If those dates are missing or ambiguous, it may not be proper to respond with a general demurrer [*United W. Med. Ctrs. v. Superior Court* (1996) 42 CA4th 500, 505, 49 CR2d 682], although it may be possible to file a demurrer for uncertainty [see *Moya v. Northrup* (1970) 10 CA3d 276, 282, 88 CR 783].

Example:

A complaint that alleged that a notice of rejection of a claim presented to a public entity was mailed "on or about" a date six months and one day before the complaint was filed was held sufficient to withstand a general demurrer based on the six-month statute of limitations in *Gov Code § 945.6(a)(1)* [*Childs v. State of California* (1983) 144 CA3d 155, 159-162, 192 CR 526].

 Cross References:

Form for demurrer based on ground of limitations, see 4.26.

Further discussion of demurrers, see Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, Ch. 11, Demurrers.

4.24[3] Statute of Limitations Defense Generally Is Raised in Answer Either by Alleging All Facts or by Citing Specific Code Section. There are two ways to make a plea of bar of a statute of limitation. The first is by alleging all of the facts showing that the action is barred and indicating that the lateness of the commencement of the action is being urged as a defense [*Brown v. World Church* (1969) 272 CA2d 684, 691, 77 CR 669].

The second does not require that the facts showing the defense be stated, but rather states the cause of action is barred by the provisions of a specified code section, giving the number of the section relied on [CCP § 458; *Brown v. World Church* (1969) 272 CA2d 684, 691, 77 CR 669].

 Warning:

CCP § 458's section-pleading requirement is highly technical and includes number subsections. If a defendant following CCP § 458 fails to specify the applicable section (and subsections, if applicable) the plea is insufficient [*Brown v. World Church* (1969) 272 CA2d 684, 691, 77 CR 669] and the defense may be deemed waived for failure to comply with this requirement [see *Mysel v. Gross* (1977) 70 CA3d Supp 10, 15, 138 CR 873, disapproved on other grounds, *Carrier Corp. v. Detrex Corp.* (1992) 4 CA4th 1522, 6 CR2d 565]. The court may allow an amendment of the answer for the purpose of inserting the omitted reference [*St. Paul Title & Trust Co. v. Stensgaard* (1912) 162 C 178, 180, 121 P 731]. However, a safer approach is to plead all potentially applicable sections or subsections; inapplicable sections will be disregarded by the court.

 Cross References:

Form for memorandum asserting action is barred by statute of limitations, see 4.29.

Further discussion of answers, see Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, Ch. 14, Answers.

4.24[4] Statute of Limitations Defense May Be Raised in Amended Answer. An amendment of the answer may be allowed for the purpose of raising the defense of bar of a statute of limitation, even though no attempt was made originally to plead that defense [*Wrightson v. Dougherty* (1936) 5 C2d 257, 265-266, 54 P2d 13]. An amendment may be allowed any time before there is a decision, verdict, or judgment [see *Trower v. City & County of San*

Francisco (1910) 157 C 762, 766-767, 109 P 617 (amendment allowed after cause submitted)]. Absent a showing of prejudice to the other side, leave to amend typically is liberally granted.



Warning:

A request to amend an answer to plead the defense of limitations may be denied if it is made too late or if the circumstances of the case show that the defendant has no tenable ground on which to base it [see, e.g., *L.B. Labs., Inc. v. Mitchell* (1952) 39 C2d 56, 61, 244 P2d 385 (denial of request to amend answer to plead bar of CCP § 337 was proper when complaint showed action was based on contract, plaintiff's opening argument so stated without objection from defendant, and request was made only after defendant's motion for nonsuit on ground of lack of evidence of negligence was opposed by plaintiff's argument that action was based on contract)].



Cross Reference:

Further discussion of amended pleadings, see Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, Ch. 34, Amended and Supplemental Pleadings.

4.24[5] Statute of Limitations Defense May Be Raised by Motion for Summary Judgment. If a defendant asserting a statute of limitation fails to raise it by demurrer or in the answer, the defendant may nevertheless be permitted to assert it by moving for summary judgment on the basis of a declaration stating the facts that show the action to be barred. The granting of a motion for summary judgment in such a case has been upheld, in derogation of the plaintiff's argument that the defendant's right to assert the bar of the applicable statute was waived, or the defendant was estopped to assert it, because of failure to demur or plead the bar in the answer. The reasoning was that because the defendant could have amended the answer and then moved for judgment on the pleadings, the granting of the motion for summary judgment achieved a proper result by a more direct method [see *Hunter v. Los Angeles County* (1968) 262 CA2d 820, 823, 69 CR 288 ; but see *California Concrete Co. v. Beverly Hills Savings & Loan Assn.* (1989) 215 CA3d 260, 273 (reversing grant of summary judgment on statute of limitations grounds when that defense had not been raised in answer, and noting that defendant should have filed motion to amend answer, which would have required defendant to explain why it had delayed in raising defense)].

Although resolution of a statute of limitations issue normally is a question of fact, summary judgment is proper when the uncontradicted facts established through discovery are susceptible of only one legitimate inference [*Mills v. Forestex Co.* (2003) 108 CA4th 625, 640, 134 CR2d 273].



Strategic Point--Defendant:

Although the use of demurrer or motion to dismiss is preferable in cases involving the statute of limitations, summary judgment can be appropriate if the defense does not appear on the face of the complaint. In this case, the defense must be specially pleaded in the answer, and presumably cannot be decided until summary judgment, at the earliest. A motion for summary judgment should be brought as early as the defendant believes a dispositive victory on this issues is possible, thus resulting in the dismissal of, or favorable judgment on, a cause of action.

Judge's Perspective:

Generally, summary judgment is an excellent way to assert a statute of limitations defense. Unlike some defenses, statutes of limitation usually describe a "bright line," which can be easy for the trial court to apply. When a plaintiff simply has failed to bring a claim within the required time, or admits knowing the facts necessary to have brought a claim but has failed to do so, the court will be receptive to a motion for summary judgment. This will not be true when there is a question as to the reasonableness of one party's conduct, such as whether the plaintiff exercised reasonable diligence in determining whether the

contract had been breached, since such an inquiry is fact-intensive [see, e.g., *Gryczman v. 4550 Pico Partners, Ltd.* (2003) 107 CA4th 1, 6-7, 131 CR2d 680].

Cross Reference:

Further discussion of moving for summary judgment, see Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, Ch. 38, Summary Judgment.

4.24[6] Statute of Limitations Defense May Be Raised by Motion to Strike If Motion Is Accompanied by Demurrer. Raising the defense of a statute of limitation as a motion to strike the complaint has been upheld when the motion was accompanied by a demurrer pleading the same objection, as well as an answer pleading the bar [see *Sullivan v. Wright* (1954) 124 CA2d 836, 837-838, 269 P2d 671]. The rationale was that if the appellate court were to reverse the order striking the complaint on the basis that the bar of a statute of limitation cannot be a ground for granting a motion to strike, the demurrer raising the bar nevertheless would remain intact even though the action was in fact barred. Thus, reversing the order to strike would have achieved no useful purpose [*Sullivan v. Wright* (1954) 124 CA2d 836, 837-838, 269 P2d 671].



Strategic Point:

It is not advisable to bring a demurrer or motion to strike unless there is a strong likelihood that it would be granted without leave to amend; to bring such a demurrer against a curable complaint is a waste of time and money. In the case of the statute of limitations, however, it may be difficult for the plaintiff to "fix" this problem even if leave to amend the complaint is granted, assuming the limitations period has truly expired.

Cross References:

Further discussion of motions to strike, see Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, Ch. 12, Motions to Strike.

Discussion of pleading bar of statute, see *California Forms of Pleading and Practice*, § 345.100 (Matthew Bender).

Legal Topics:

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

Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsAffirmative DefensesGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsDemurrersCivil ProcedurePleading & PracticePleadingsAnswersContracts LawDefensesStatutes of LimitationsGovernmentsLegislationStatutes of LimitationsPleading & Proof



124 of 175 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 4 Determining Applicable Statute of Limitations and Effect on Potential Action

IV. RAISING STATUTE OF LIMITATIONS DEFENSE

1-4 MB Practice Guide: CA Contract Litigation 4.25

4.25 Raising Defense of Laches.

4.25[1] Defendant May Assert Laches Defense If Prejudiced by Plaintiff's Unreasonable Delay. A plaintiff's breach of contract claim may be barred by the doctrine of laches if [*Johnson v. City of Loma Linda* (2000) 24 C4th 61, 68, 99 CR2d 316, 5 P3d 874]:

- The plaintiff unreasonably delays bringing the suit; and
- The defendant is prejudiced by the delay.

Example:

The plaintiffs sought to bring claims for breach of contract and other claims against a corporation; the plaintiffs' claims were barred by the doctrine of laches because the plaintiffs unreasonably delayed well beyond the four-year limitations period in filing their suit against the corporation, which was prejudiced by the delay [*Miller v. Glenn Miller Prods.* (CD Cal 2004) 318 F Supp2d 923, 944-945].

**Search California Contracts Cases:**

Use *lexis.com* to search for cases discussing the laches defense:

- Legal > States Legal--U.S. > California > Cases > By Area of Law > CA Contract Cases



Sample Search: To find cases regarding laches as a defense, try: *laches w/10 element OR test OR standard OR prong OR requir! OR factor.*

**Cross Reference:**

Discussion of defense of laches, see *California Forms of Pleading and Practice*, § 345.40 *et seq.* (Matthew Bender).

4.25[2] Laches Can Apply Even If Action Was Timely Under Statute of Limitations. The defense of laches applies without regard to the applicable statute of limitations [*Johnson v. City of Loma Linda* (2000) 24 C4th 61, 68,

99 CR2d 316, 5 P3d 874]. Under the doctrine of laches the plaintiff will be refused equitable relief because of his or her delay in bringing suit, even if the suit is commenced within the statutory period of limitation [see *In re Marriage of Dancy* (2000) 82 CA4th 1142, 1150, 98 CR2d 775].

Cross Reference:

Form for demurrer asserting defense of laches, see 4.31.

4.25[3] Unclear Whether Defense of Laches Applies in California to Actions for Money Had and Received. It is unsettled in California whether the equitable defense of laches applies to an action for money had and received. Although such an action is an action at law, it is governed by equitable principles [*Creditors Collection Serv. v. Castaldi* (1995) 38 CA4th 1039, 1044 n4, 45 CR2d 511].

4.25[4] Laches Is Question of Fact. Laches is a question of fact, which must be determined on the evidence by all of the circumstances of each particular case [see *In re Marriage of Plescia* (1997) 59 CA4th 252, 256, 69 CR2d 120].

There is no hard and fast rule, either as to the lapse of time or as to the circumstances, that will justify the application of the doctrine of laches [see *Wolpert v. Gripton* (1931) 213 C 474, 483, 2 P2d 767].

Warning:

The defense of laches is a principle of equity, not a defense at law. In an action at law, or when the plaintiff asserts no equitable rights, the statute of limitation rather than the doctrine of laches governs. Therefore, whether laches or the statute of limitations applies will depend on the nature of the underlying action [see *United States Capital Corp. v. Nickelberry* (1981) 120 CA3d 864, 867-868, 174 CR 814 (defense of laches not available in action on judgment, which is action at law); but see *In re Marriage of Dancy* (2000) 82 CA4th 1142, 1148-1149, 98 CR2d 775 (although child support is legal right, actions to determine arrearages are equitable proceedings to which laches may be a defense)].

4.25[5] Defendant Cannot Raise Laches Defense Unless Pleaded Facts Show Laches. The general rule is that defendant cannot raise laches when neither the defendant nor the complaint pleaded facts showing laches [see *Hamud v. Hawthorne* (1959) 52 C2d 78, 84, 338 P2d 387 ; *Reed v. Norman* (1953) 41 C2d 17, 21-22, 256 P2d 930].

Distinguish:

In extraordinary cases, a court may deny equitable relief on its own initiative if the evidence shows that the plaintiff is guilty of laches [*Akley v. Bassett* (1922) 189 C 625, 648, 209 P 576].

4.25[6] Laches May Be Raised on Demurrer. Laches may be raised by demurrer if the facts constituting laches are apparent on the face of the complaint [see *Neet v. Holmes* (1944) 25 C2d 447, 460, 154 P2d 854]. If the facts constituting laches are not apparent, laches should be raised in the answer [*Sangiolo v. Sangiolo* (1978) 87 CA3d 511, 514, 151 CR 27].

Cross Reference:

Discussion of raising defense of laches, see Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, Ch. 4, Limitation of Actions.

Legal Topics:

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

Civil Procedure Pleading & Practice Defenses, Demurrers & Objections Affirmative Defenses General Overview



125 of 175 DOCUMENTS

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Chapter 4 Determining Applicable Statute of Limitations and Effect on Potential Action
V. FORMS

1-4 MB Practice Guide: CA Contract Litigation 4.26

4.26 Demurrer to Complaint on Ground That Claim Is Barred by Statute of Limitations.**Demurrer to Complaint on Ground That Claim Is Barred by Statute of Limitations.**

_____ [Name of attorney]
 _____ [Street address]
 _____ [City, state, and ZIP]
 _____ [Area code and phone number]
 _____ [State Bar no. of attorney]
 Attorney for _____ [name of party]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

[name] _____,	)	
Plaintiff,	)	NO.
vs.	)	_____
[name] _____,	)	_____
Defendant.	)	DEMURRER OF
	)	_____
	)	_____ [identify defendant, e.g.,
	)	DEFENDANT MARY JONES] TO COMPLAINT
	)	OF
	)	_____ [identify plaintiff or
	)	cross-complainant, e.g., PLAINTIFF JOHN SMITH]
	)	[LIMITED CIVIL CASE]
	)	Judge:
	)	_____ Department:
	)	_____
	)	_____

 _____ Identify defendant, e.g., Defendant
 Mary Jones] demurs to the [First or other designation
 _____] Cause of Action specified in the
 [complaint or _____ cross-complaint] of
 [identify plaintiff or cross-complainant, e.g.,
 _____ Plaintiff John Smith], on the ground
 that the complaint does not state facts sufficient to constitute a cause of action because it appears from the face of the
 complaint that the action is barred by the statute of limitation [e.g., of four years pursuant to *Code of Civil Procedure*
Section 337].

WHEREFORE, Defendant prays as follows:

1. That Plaintiff take nothing by his/her complaint herein;
2. For costs of suit; and
3. For such other and further relief as the court deems proper.

Dated: _____

[firm name, if any] _____

By: [signature] _____

[typed name] _____

Attorney for Defendant

[Add memorandum supporting demurrer]

[Attach required notice of hearing]

NOTES.

Authority:

CCP §§ 337, 339, 430.10, 458

Using Demurrer to Assert That Claim Is Barred by Statute of Limitations:

See 4.24[3]

Legal Topics:

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

Civil Procedure Pleading & Practice Defenses, Demurrers & Objections Demurrers Contracts Law Defenses Statutes of

LimitationsGovernmentsLegislationStatutes of LimitationsGeneral Overview



126 of 175 DOCUMENTS

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Chapter 4 Determining Applicable Statute of Limitations and Effect on Potential Action
V. FORMS

1-4 MB Practice Guide: CA Contract Litigation 4.27

4.27 Answer Raising Affirmative Defense of Statute of Limitations.**Answer Raising Affirmative Defense of Statute of Limitations.**

_____ [Name of attorney]
 _____ [Street address]
 _____ [City, state, and ZIP]
 _____ [Area code and phone number]
 _____ [State Bar no. of attorney]
 Attorney for _____ [name of party]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

[name] _____,	)	
Plaintiff,	)	NO.
vs.	)	_____
[name] _____,	)	_____
Defendant.	)	ANSWER OF
	)	_____
	)	_____ [identify defendant, e.g.,
		DEFENDANT MARY JONES] TO COMPLAINT
		OF
		_____ [identify plaintiff, e.g.,
		PLAINTIFF JOHN SMITH]
		[LIMITED CIVIL CASE]
		Judge:

		Department:

Defendant answers the complaint as follows:

[Include general denial below, or set forth, in numbered paragraphs, specific denials, admissions, and allegations in response to those in complaint, in the order in which they are alleged in complaint:]

1. Pursuant to *Code of Civil Procedure Section 431.30(b)(1)*, Defendant generally denies each and every allegation of Plaintiff's Complaint, including all the purported causes of action contained therein, and further denies that Plaintiff is entitled to any equitable or legal relief, or any damages whatsoever.

[Defendant asserts the following affirmative defenses. By doing so, defendant shall not be deemed to have assumed the burden of proving any matters that otherwise would be plaintiff's burden.]

[Allege any affirmative defenses, e.g.,]

[If alleging that plaintiff's action is barred by statute of limitations]

FIRST AFFIRMATIVE DEFENSE

(Cause of Action Is Barred by Statute of Limitations)

2. Plaintiff's cause of action is barred by the statute of limitation of four *[or other applicable limitations period]* years _____ *[cite specific section of Code of Civil Procedure, such as: pursuant to Code of Civil Procedure Section 337(1).]*

[AND/OR, if alleging that plaintiff's action is barred under contract provision setting contractual limit on time for bringing action]

SECOND AFFIRMATIVE DEFENSE

(Cause of Action Is Barred By Contractual Limitation Period)

3. The contract referred to in Plaintiff's complaint [, as set forth in the copy of the agreement attached as Exhibit _____ and incorporated by reference,] contains a clause _____ [requiring that any action arising out of the contract be brought within *(time period)* _____ after the cause of action accrues or *quote contractual limitation provision verbatim, e.g.,* as follows: _____]. Plaintiff's claim was not brought within the time required by that provision, and the action therefore is barred.

[ADD additional affirmative defenses, if any]

[CONTINUE]

WHEREFORE, Defendant prays as follows:

1. That Plaintiff take nothing by his/her complaint herein;
2. For costs of suit; and
3. For such other and further relief as the court deems proper.

Dated: _____

[firm name, if any] _____

By: [signature] _____

[typed name] _____

Attorney for Defendant

[ADD following verification, if applicable]

VERIFICATION

I am the defendant in the above entitled action; I have read the foregoing answer and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein stated on information and belief, and, as to those matters, I believe it to be true.

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

[date] _____

[signature] _____

[typed name] _____

NOTES.

Authority:

CCP §§ 337, 339, 360.5, 458

Responding to Complaint With Answer Raising Affirmative Defense of Statute of Limitations:

See 4.24[4]

Asserting Defense of Contractually Shortened Limitations Period:

See 4.11

Legal Topics:

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

Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsAffirmative DefensesGeneral OverviewCivil
ProcedurePleading & PracticePleadingsAnswersContracts LawDefensesStatutes of
LimitationsGovernmentsLegislationStatutes of LimitationsGeneral Overview



127 of 175 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 4 Determining Applicable Statute of Limitations and Effect on Potential Action
V. FORMS

1-4 MB Practice Guide: CA Contract Litigation 4.28

4.28 Memorandum for Party Asserting That Statute of Limitations Applicable to Fraud Should Apply.

Memorandum for Party Asserting That Statute of Limitations Applicable to Fraud Should Apply.

[Include the following, if appropriate under the circumstances of the case, in a memorandum by the party asserting that the statute of limitations applicable to fraud should apply, along with factual discussion demonstrating how the principles of law stated below are applicable to the particular case]

WHEN A BREACH OF CONTRACT INTEGRALLY INVOLVES FRAUD, THE ELEMENTS OF WHICH HAVE BEEN PLEADED, THE ACTION MUST BE TREATED AS ONE FOR RELIEF ON THE GROUND OF FRAUD, AND THE ACTION IS GOVERNED BY THE STATUTE OF LIMITATIONS FOR FRAUD, WHICH DOES NOT BEGIN UNTIL DISCOVERY OF THE FACT CONSTITUTING THE FRAUD, AS PRESCRIBED BY CODE OF CIVIL PROCEDURE SECTION 338.

A. Fraud Tolls Running of Statute. When fraud is ingrained with a breach of contract, the action, regarding the bar of the statute of limitations, must be treated as one for relief on the ground of fraud, and the limitation period does not begin to run until the plaintiff's discovery of the facts constituting the fraud as prescribed by *Code of Civil Procedure Section 338* [*Gregory v. Spieker* (1895) 110 Cal. 150, 153, 42 P. 576].

[AND/OR]

[Optional] **B. Breach Accomplished Secretly.** When a contract is breached by the defendant's secret confederacy with another person in which the other person's name is used to hide the defendant's actions, fraud is so ingrained with the breach of a contract that the action, regarding the bar of the statute of limitations, must be treated as one for relief on the ground of fraud [*Gregory v. Spieker* (1895) 110 Cal. 150, 153, 42 P. 576].

NOTES.

Authority:
CCP § 338

Asserting Defense of Statute of Limitations Applicable to Fraud:

See 4.08, 4.21[2]

Legal Topics:

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

Commercial Law (UCC)Sales (Article 2)RemediesFraudCommercial Law (UCC)Sales (Article 2)RemediesStatutes of LimitationsGeneral OverviewContracts LawDefensesStatutes of LimitationsContracts LawSales of GoodsStatutes of LimitationsGeneral OverviewGovernmentsLegislationStatutes of LimitationsGeneral Overview



128 of 175 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 4 Determining Applicable Statute of Limitations and Effect on Potential Action
V. FORMS

1-4 MB Practice Guide: CA Contract Litigation 4.29

4.29 Memorandum for Party Asserting That Action Is Barred by Statute of Limitations.

Memorandum for Party Asserting That Action Is Barred by Statute of Limitations.

[Include the following, if appropriate under the circumstances of the case, in a memorandum by the party asserting that the action is barred by the statute of limitations, along with factual discussion demonstrating how the principles of law stated below are applicable to the particular case]

THIS ACTION IS BARRED BY THE STATUTE OF LIMITATIONS.

A. Accrual of Cause of Action. A cause of action for breach of contract accrues at the time of the breach [*E.O.C. Ord, Inc. v. Kovakovich* (1988) 200 Cal. App. 3d 1194, 1203, 246 Cal. Rptr. 456]. This generally is on the failure of the promisor to do the thing contracted for at the time and in the manner contracted [*Waxman v. Citizens Nat'l Trust & Sav. Bank* (1954) 123 Cal. App. 2d 145, 149, 266 P.2d 48].

[AND/OR]

B. Running of Limitation Period. The limitation period begins to run at the time of the breach of the contract [*Baker v. Joseph* (1860) 16 Cal. 173, 177 ; *Barlow v. Collins* (1958) 166 Cal. App. 2d 274, 278-279, 333 P.2d 64].

[EITHER]

B. Limitation Period. An action on a written contract must be commenced within four years after the cause of action has accrued [Code Civ. Proc. § 337].

[OR]

B. Limitation Period. An action on a contract not founded on an instrument in writing must be commenced within two years after the cause of action has accrued [Code Civ. Proc. § 339].

[CONTINUE]

[Optional] **C. Requirement That Writing Contain Contract.** An instrument in writing is not a contract unless it contains the contract to do the thing for the nonperformance of which an action may be brought. The writing must create a duty before a duty may be inferred from the writing. It is not sufficient that a cause of action is in some way remotely or indirectly connected with an instrument in writing or that the instrument is a link in the chain establishing the cause of action [*Citizens Cas. Co. v. Otis Clark & Co.* (1971) 19 Cal. App. 3d 294, 299-300, 96 Cal. Rptr. 838].

[AND/OR]

[Optional] **D. Requirement of Indication of Acceptance.** In order for an action to be founded on an instrument in writing, there must be some tangible written indication of acceptance of the terms of the writing by the defendant [*James De Nicholas Assocs., Inc. v. Heritage Constr. Corp.* (1970) 5 Cal. App. 3d 421, 424, 85 Cal. Rptr. 233].

[AND/OR]

[Optional] **E. Tolling of Limitation Period.** The statute of limitations in a cause of action for breach of contract is tolled by a resident's absence from the state pursuant to *Code of Civil Procedure Section 351* if the out-of-state travel is unrelated to interstate commerce [*Filet Menu, Inc. v. Cheng* (1999) 71 Cal. App. 4th 1276, 1282-1284, 84 Cal. Rptr. 2d 384].

NOTES.

Authority:

CCP §§ 337, 339, 351

Raising Affirmative Defense of Statute of Limitations:

See 4.24[4]

Legal Topics:

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

Civil Procedure Pleading & Practice Defenses, Demurrers & Objections Affirmative Defenses General
Overview Commercial Law (UCC) Sales (Article 2) Remedies Statutes of Limitations General Overview Contracts
Law Defenses Statutes of Limitations Contracts Law Sales of Goods Statutes of Limitations General
Overview Governments Legislation Statutes of Limitations Pleading & Proof



129 of 175 DOCUMENTS

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Chapter 4 Determining Applicable Statute of Limitations and Effect on Potential Action
V. FORMS

1-4 MB Practice Guide: CA Contract Litigation 4.30

4.30 Memorandum for Party Asserting That Four-Year Limitation Period to Action on Contract Evidenced by Writing.

Memorandum for Party Asserting That Four-Year Limitation Period to Action on Contract Evidenced by Writing.

[Include the following, if appropriate under the circumstances of the case, in a memorandum by the party asserting that the action is barred by the four-year statute of limitation for contracts founded on an instrument in writing, along with factual discussion demonstrating how the principles of law stated below are applicable to the particular case]

THE FOUR-YEAR LIMITATION PERIOD APPLIES TO A CONTRACT FOUNDED ON AN INSTRUMENT IN WRITING.

A. Limitation Period for Written Contract. The four-year limitation period applies to a contract founded on an instrument in writing [*Code Civ. Proc. § 337(1)*].

[CONTINUE]

[Optional] **B. Letter Accepted by Party Is Instrument in Writing.** A letter that constitutes an offer and was accepted by the plaintiff is evidence of a writing signed by the party to be charged. Therefore, the four-year statute of limitations is applicable to an action for damages for breach of the contract by the offeror [*Ravel v. Hubbard (1952) 112 Cal. App. 2d 255, 258-259, 246 P.2d 88*].

[AND/OR]

[Optional] **C. Receipt for Money Containing Promise Is Instrument in Writing.** A written receipt for money that contains words from which a promise may be inferred, arising directly from the receipt itself and including its terms, is an instrument in writing to which the four-year statute of limitations provided by *Code of Civil Procedure Section 337(1)* applies. All obligations and promises that the writing's words necessarily import must be regarded as being included in the terms of the writing [*O'Brien v. King (1917) 174 Cal. 769, 773, 164 P. 631* ; *Ashley v. Vischer (1864)*].

24 Cal. 322, 327-329].

[AND/OR]

[Optional] **D. Action by Third-Party Beneficiary Is on Written Contract.** An action by a third-party beneficiary is one on an obligation founded on a written instrument within the meaning of *Code of Civil Procedure Section 337*, although parol evidence may be necessary to show that the party maintaining the action is within the class intended to be benefitted by the contract and to show the extent of the party's interest [*Division of Labor Law Enforcement v. Dennis* (1947) 81 Cal. App. 2d 306, 311, 183 P.2d 932].

[AND/OR]

[Optional] **E. Action by Employees Involving Collective Bargaining Agreement.** The four-year limitation period prescribed by *Code of Civil Procedure Section 337(1)* applies to an action by orally hired employees to recover the difference between the wages actually received and the amounts claimed to have been payable to them under the provisions of collective bargaining agreements between the employer and unions [*Division of Labor Law Enforcement v. Dennis* (1947) 81 Cal. App. 2d 306, 310-311, 183 P.2d 932].

[AND/OR]

[Optional] **F. Escrow Instructions in Writing Constitute Written Contract.** An action for failure to comply with escrow instructions is on a written contract to which the four-year limitation period prescribed in *Code of Civil Procedure section 337* applies, if the instructions are in writing and the escrow holder accepts them, or if the escrow holder prepares the instructions and offers to perform them, and the buyer and seller accept the offer [*Amen v. Merced County Title Co.* (1962) 58 Cal. 2d 528, 532, 25 Cal. Rptr. 65, 375 P.2d 33].

[AND/OR]

[Optional] **G. Blanks in Contract.** The omission of information to be inserted in blanks in a written instrument does not invalidate the agreement as a written contract [*Benard v. Walkup* (1969) 272 Cal. App. 2d 595, 602, 77 Cal. Rptr. 544].

NOTES.

Authority:

CCP § 337

Asserting Applicability of Four-Year Statute of Limitations:

See 4.05

Legal Topics:

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

Civil Procedure Pleading & Practice Defenses, Demurrers & Objections Affirmative Defenses General Overview Commercial Law (UCC) Sales (Article 2) Remedies Statutes of Limitations General Overview Contracts Law Defenses Statutes of Limitations Contracts Law Sales of Goods Statutes of Limitations General Overview Governments Legislation Statutes of Limitations Pleading & Proof



130 of 175 DOCUMENTS

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Chapter 4 Determining Applicable Statute of Limitations and Effect on Potential Action
V. FORMS*1-4 MB Practice Guide: CA Contract Litigation 4.31***4.31 Demurrer to Complaint on Ground That Claim Is Barred by Laches.****Demurrer to Complaint on Ground That Claim Is Barred by Laches.**

_____[Name of attorney]
 _____[Street address]
 _____[City, state, and ZIP]
 _____[Area code and phone number]
 _____[State Bar no. of attorney]
 Attorney for _____[name of party]

SUPERIOR COURT OF CALIFORNIA,
 COUNTY OF _____

[name] _____,	)	
Plaintiff,	)	NO.
vs.	)	_____
[name] _____,	)	_____
Defendant.	)	DEMURRER OF
	)	_____
	)	_____ [identify defendant, e.g.,
		DEFENDANT MARY JONES] TO COMPLAINT
		OF
		_____ [identify plaintiff or
		cross-complainant, e.g., PLAINTIFF JOHN SMITH]
		[LIMITED CIVIL CASE]
		Judge:

		Department:

_____ Identify defendant, e.g., Defendant Mary Jones] demurs to the [First or other designation _____] Cause of Action specified in the [complaint or _____ cross-complaint] of [identify plaintiff or cross-complainant, e.g., Plaintiff John Smith], on the ground that the complaint does not state facts sufficient to constitute a cause of action because it appears from the face of the complaint that the action is barred by laches, in that Plaintiff has inexcusably and unreasonably delayed commencement of the action to the prejudice of Defendant.

WHEREFORE, Defendant prays as follows:

1. That Plaintiff take nothing by his/her complaint herein;
2. For costs of suit; and
3. For such other and further relief as the court deems proper.

Dated: _____

[firm name, if any] _____

By: [signature] _____

[typed name] _____

Attorney for Defendant

[Add memorandum supporting demurrer]

[Attach required notice of hearing]

NOTES.

Authority:

Johnson v. City of Loma Linda (2000) 24 C4th 61, 68, 99 CR2d 316, 5 P3d 874

Using Demurrer to Assert That Claim Is Barred by Laches:

See 4.25[6]

Legal Topics:

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

Civil Procedure Pleading & Practice Defenses, Demurrers & Objections Affirmative Defenses General Overview Civil Procedure Pleading & Practice Defenses, Demurrers & Objections Demurrers



131 of 175 DOCUMENTS

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Chapter 4 Determining Applicable Statute of Limitations and Effect on Potential Action
V. FORMS

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4.32 Allegation for Party Asserting Contractual Extension of Limitation Period.

Allegation for Party Asserting Contractual Extension of Limitation Period.

[Include the following allegation in appropriate circumstances in a complaint to assert that the parties agreed to a longer limitation period than provided by statute]

1. The agreement referred to above contains a clause

_____ [authorizing suit to be brought on the contract with *(specify contractual period in excess of applicable statute of limitations)*

_____ years after the cause of action accrues, without regard to the statute of limitations that otherwise would be applicable or that makes *(other state)*

_____ 's _____-year statute of limitations applicable to the contract, rather than California's four-year statute of limitations or *quote contractual limitation provision verbatim, e.g., that provides as follows: _____*]. Plaintiff has commenced

this action within the time period permitted by the agreement.

NOTES.

Authority:

CCP § 360.5

Asserting Applicability of Contractually Extended Limitations Period:

See 4.11

Legal Topics:

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

Commercial Law (UCC)Sales (Article 2)RemediesStatutes of LimitationsTime LimitationsContracts
LawDefensesStatutes of LimitationsContracts LawSales of GoodsStatutes of LimitationsTime
LimitationsGovernmentsLegislationExtension & Revival



132 of 175 DOCUMENTS

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Chapter 5 Determining Whether to Arbitrate or Litigate

1-5 MB Practice Guide: CA Contract Litigation 5.syn

§ 5.syn Synopsis to Chapter 5: Determining Whether to Arbitrate or Litigate

5.01 Scope.

5.02 Objective and Strategy.

5.03 CHECKLIST: Determining Whether Arbitration or Other Alternative Dispute Resolution Is Required.

5.04 Options and Strategy.

5.05 Determining If Judicial Arbitration Is Required.

5.06 Determining If Mediation Is Required.

5.06[1] Statute May Require Mediation.

5.06[2] Mediation May Be Required by Contract or by Choice of Parties.

5.07 Determining If Contract Requires Arbitration.

5.07[1] General Contract Principles Determine Validity of Agreement.

5.07[1][a] Contract Principles Determine Validity and Defenses to Enforcement.

5.07[1][b] Arbitration of Statutory Claims Generally Is Enforceable.

5.07[1][c] Arbitration Clause May Be Incorporated by Reference.

5.07[1][d] "Service of Suit" Clause Does Not Preclude Arbitration of Claims.

5.07[1][e] Claims for Injunctive Relief under Consumer Legal Remedies Act and Business and Professions Code Sections 17200 and 17500 Are Not Arbitrable.

5.07[1][f] Mandatory Fee Arbitration Act Does Not Limit Ability of Attorneys and Clients to Enter Into Binding

Contractual Arbitration.

5.07[2] Federal Arbitration Act May Preempt Statutory Requirements.

5.07[2][a] FAA Preempts Statutes That Apply Only to Arbitration Agreements.

5.07[2][b] FAA's Reach Is Broadly Defined.

5.07[2][c] Only Substantive FAA Provisions Preempt State Law.

5.08 Determining If Contract Requires Reference.

5.09 Determining If Combined ADR Methods Will Be Required.

5.10 CHECKLIST: Determining Whether Arbitration or Other ADR Is Preferable to Litigation.

5.11 Options and Strategy.

5.12 Advantages and Disadvantages of Mediation.

5.12[1] Mediation Is Often Faster, Less Expensive, and Allows More Participation.

5.12[2] Mediation Is Inappropriate If Parties Are of Uneven Strength or Are Unwilling to Negotiate.

5.13 Judicial Arbitration and Contractual Arbitration Have Different Characteristics.

5.13[1] Absent Stipulation, Judicial Arbitration Is Limited to Claims Under \$50,000 Per Party.

5.13[2] Discovery and Hearing Formalities Differ.

5.13[3] Contractual Arbitration Award Generally Is Binding.

5.13[4] Judicial Arbitration Award Generally Is Nonbinding.

5.13[5] Judicial Arbitration Expenses Generally Are Paid by Court; Contractual Arbitration Expenses by Parties.

5.13[6] Provisional Remedies Are Available During Contractual Arbitration.

5.14 Contractual Hearing Before Referee May Be Faster and Allow for Selecting a Referee With Expertise, but Costs Are Paid by Parties.

5.15 CHECKLIST: Submitting to or Compelling Arbitration.

5.16 Options and Strategy.

5.17 Demanding Arbitration.

5.17[1] Aggrieved Party Must Demand Arbitration.

5.17[2] Demand Usually Is Made by Letter.

5.17[3] Underlying Contract Determines Timing of Demand.

5.17[4] Arbitration Agreements Generally Are Not Self-Executing.

5.18 Agreeing to Arbitrate.

5.18[1] Parties May Enter Into Pre- or Post-Dispute Arbitration Agreement.

5.18[2] Post-Dispute Arbitration Agreement.

5.18[2][a] Post-Dispute Arbitration Agreements Must Be in Writing.

5.18[2][b] If Parties Are in Litigation, Post-Dispute Arbitration Agreement Must Be by Stipulation.

5.18[2][c] Post-Dispute Arbitration Agreement May Include Detailed Provisions Governing Arbitration.

5.19 Arbitration Agreement May Be Enforced by a Nonsignatory.

5.19[1] Arbitration Agreement May Be Enforced by an Intended Third-Party Beneficiary.

5.19[2] Arbitration Agreement May Be Enforced by a Nonsignatory Based on Equitable Estoppel.

5.20 Petitioning to Compel Arbitration.

5.20[1] Contents and Allegations of Petition.

5.20[1][a] Plaintiff or Defendant May Petition to Compel Arbitration.

5.20[1][b] Specific Allegations Are Required to Obtain Order Compelling Arbitration.

5.20[2] Superior Court Has Jurisdiction; Venue Is Determined by Statute.

5.20[3] Petition to Compel Arbitration Must Be Filed Within Four Years After Refusal to Arbitrate.

5.20[4] Notice of Hearing Must Be Served Not Less Than 10 Days Prior to Hearing.

5.20[5] Service of Petition to Enforce Arbitration Agreement.

5.20[5][a] Parties Must Be Served More Than 10 Days Prior to Hearing.

5.20[5][b] Persons Who Have Not Previously Appeared Must Be Served Pursuant to Statute.

5.20[5][c] Service on Persons Outside of California Must Meet Statutory Requirements.

5.20[5][d] Service to Others Is Governed by Statute.

5.20[6] Court's Options After Hearing of Petition to Compel Arbitration.

5.20[6][a] Court May Order Parties to Arbitrate Entire Controversy.

5.20[6][b] Court May Sever Issue or Stay Action or Arbitration on Severed Issue.

5.20[6][c] Court May Act to Avoid Inconsistent Rulings in Different Forums.

5.20[6][d] Court May Consolidate Separate Arbitration Proceedings.

5.20[7] Order Compelling Arbitration.

5.20[7][a] Order Compelling Arbitration Must Be in Writing.

5.20[7][b] Order Compelling Arbitration Is Not Immediately Appealable.

5.20[8] Order Denying Arbitration Is Appealable and Statement of Decision Is Required.

5.20[9] Order Determining Who Decides Arbitrability Is Not Appealable.

5.21 Court May Stay Action or Proceeding Pending Arbitration.

5.22 Appeals of Denials to Compel Arbitration and Stays of Arbitration.

5.22[1] Denial of Petition to Compel Arbitration Requires Immediate Appeal.

5.22[2] Order to Stay Arbitration Is Immediately Appealable.

5.23 CHECKLIST: Opposing Arbitration.

5.24 Options and Strategy.

5.25 Disputing Existence of Arbitration Agreement.

5.25[1] Party Resisting Arbitration Must File Response.

5.25[2] Burden of Proof Is on Party Resisting Arbitration.

5.25[3] Existence of Agreement to Arbitrate Is Question of Fact.

5.25[4] Agreement Not Formed If Court Finds Lack of Mutual Assent.

5.25[5] Lack of Contractual Capacity Voids Arbitration Agreement.

5.25[6] Attempt to Add Arbitration Clause Unilaterally May Be Defeated.

5.26 Party May Oppose Arbitration If Issue Is Beyond Scope of Agreement.

5.27 Party May Oppose Arbitration If Nonsignatory Is Indispensable Party.

5.28 Opposing Arbitration on Grounds of Fraud.

5.28[1] Claim of Fraud Affecting Primary Contract May Be Subject to Arbitration.

5.28[2] Fraud May Invalidate Arbitration Clause Under Specific Conditions.

5.28[3] Motion to Compel Arbitration May Be Defeated by Allegations in Verified Complaint or by Affidavit or Declaration.

5.29 Opposing Arbitration on Ground That Agreement Is Unconscionable.

5.29[1] Court Should Refuse to Enforce Unconscionable Agreement or Clause.

5.29[2] Unconscionability Determined by Procedural and Substantive Aspects.

5.29[3] Contracts of Adhesion May Not Be Enforced Unless Terms Meet Specific Conditions.

5.29[4] Court May Sever Unconscionable Term and Enforce Remainder of Contract.

5.29[5] Arbitration Agreement Must Meet Specific Requirements If Claim Arises From Unwaivable Public Right.

5.30 Party May Oppose Arbitration on Grounds of Waiver.

5.30[1] Waiver May Be Explicit or Implied.

5.30[2] Party Urging Arbitration Must Have Prejudiced Other Party's Rights.

5.30[3] Time and Expense Alone Usually Do Not Constitute Sufficient Prejudice.

5.31 Party May Oppose Arbitration Provision in Health Care Service Plan That Fails to Comply With H&S Code § 1363.1.

5.31[1] H&S Code § 1363.1 Imposes Format Requirements.

5.31[2] H&S Code § 1363.1 Is Not Preempted by FAA.

5.31[3] H&S Code § 1363.1 May Be Preempted by Medicare Law.

5.31A CHECKLIST: Moving to Vacate or Correct Arbitration Award.

5.31B Options and Strategy.

5.31C Scope of Judicial Review Generally Is Limited.

5.31D Court Must Vacate Arbitration Award Under Specified Circumstances.

5.31E Court Must Correct Arbitration Award Under Specified Circumstances.

5.32 Demand for Arbitration.

Demand for Arbitration.

5.33 Petition to Compel Arbitration.

Petition to Compel Arbitration.

5.34 Notice of Hearing on Petition to Compel Arbitration.

Notice of Hearing on Petition to Compel Arbitration.

5.35 Order Compelling Arbitration.

Order Compelling Arbitration.

5.36 Order Denying Arbitration and Dismissing Proceeding.

Order Denying Arbitration and Dismissing Proceeding.

5.37 Notice of Motion to Stay Pending Action Until Arbitration Is Completed.

Notice of Motion to Stay Pending Action Until Arbitration Is Completed.

5.38 Order Staying Proceedings in Pending Action.

Order Staying Proceedings in Pending Action.



133 of 175 DOCUMENTS

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Chapter 5 Determining Whether to Arbitrate or Litigate

I. STRATEGY

1-5 MB Practice Guide: CA Contract Litigation 5.01

5.01 Scope.

This chapter covers:

- Objectives and strategy for determining whether judicial arbitration, contractual arbitration, mediation, or consensual reference is a required or desirable alternative to litigation [see 5.02].
- Characteristics, advantages, and disadvantages of judicial arbitration, contractual arbitration, mediation, and consensual reference [see 5.05 -5.14].
- Demanding arbitration [see 5.17; Form: see 5.32].
- Use of post-dispute arbitration agreements [see 5.18].
- Petitioning to compel arbitration [see 5.19, 5.20; Forms: see 5.33 -5.36].
- Staying action or proceeding on arbitrable issue(s) [see 5.21; Forms: see 5.37, 5.38].
- Resisting contractual arbitration [see 5.23 -5.31].
- Moving to correct or vacate an arbitration award [see 5.31A -5.31E].

Core Statutes:

CCP §§ 638, 1141.10 et seq., 1280 et seq.

Legal Topics:

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

Civil ProcedureAlternative Dispute ResolutionGeneral OverviewCivil ProcedureAlternative Dispute ResolutionArbitrationsGeneral OverviewCivil ProcedureAlternative Dispute ResolutionMediations



134 of 175 DOCUMENTS

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Chapter 5 Determining Whether to Arbitrate or Litigate

I. STRATEGY

1-5 MB Practice Guide: CA Contract Litigation 5.02

5.02 Objective and Strategy.

In any contract dispute, the parties must consider whether or not they desire to pursue alternative dispute resolution (ADR), or whether they are required to do so by law or the contract itself. The four most popular types of alternative dispute resolution (ADR) are:

- Mediation.
- Judicial arbitration.
- Consensual reference.
- Contractual arbitration.

If the parties have an agreement for contractual arbitration [*CCP § 1280 et seq.*; *9 USC § 1 et seq.*], each party needs to consider whether contractual arbitration is desirable under the circumstances, whether grounds to resist arbitration exist, and whether another ADR method or litigation is preferable.

If a party to an arbitration agreement files an action in court, the opposing party should consider which of the following alternative courses to pursue:

- To acquiesce in the litigation by filing an answer;
- To compel arbitration under the terms of the contract; or
- To negotiate for use of another ADR method, such as mediation or consensual reference, with respect to some or all issues.

Legal Topics:

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

Civil ProcedureAlternative Dispute ResolutionGeneral OverviewCivil ProcedureAlternative Dispute ResolutionArbitrationsGeneral OverviewCivil ProcedureAlternative Dispute ResolutionMandatory ADRCivil

ProcedureAlternative Dispute ResolutionMediationsContracts LawContract Conditions & ProvisionsArbitration
Clauses



135 of 175 DOCUMENTS

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Chapter 5 Determining Whether to Arbitrate or Litigate

II. DETERMINING IF ARBITRATION OR OTHER ALTERNATIVE DISPUTE RESOLUTION IS REQUIRED

1-5 MB Practice Guide: CA Contract Litigation 5.03

5.03 CHECKLIST: Determining Whether Arbitration or Other Alternative Dispute Resolution Is Required.

☐ Determine whether matter is subject to mandatory judicial arbitration:

- ☐ Is amount in controversy likely to be \$50,000 or less for each plaintiff?
- ☐ Does plea for equitable relief exempt matter from judicial arbitration?
- ☐ Is it unlikely that arbitration will reduce probable time and expense necessary to resolve the litigation?
- ☐ Has plaintiff filed election for judicial arbitration?

Authority:

CCP §§ 1141.11, 1141.12(b), 1141.13; Cal Rules Ct, Rule 3.811(a)(1)-(3), (5)

Discussion

See 5.05

☐ Determine whether mediation will be required by statute.

Authority:

CCP § 1775.3(a)

Discussion:

See 5.06[1]

☐ Review complaint and parties' contract to determine if mediation will be required either by itself or as first step

before arbitration or other ADR.

Discussion:

See 5.06[2], 5.09

☐ Review complaint and/or parties' contract to determine if arbitration will be required, giving consideration to the following:

- ☐ Whether dispute is within scope of matters required by contract to be arbitrated.
- ☐ Whether contract provides time within which arbitration must be demanded.
- ☐ Whether any prerequisites to arbitration exist, and if so, if they have been met.
- ☐ Whether any defenses exist to enforcement of the arbitration agreement, and if so, whether client wishes to waive or assert them.
- ☐ Whether any state statute imposing requirements for the enforceability of the arbitration agreement are preempted by the Federal Arbitration Act.

Authority:

CCP § 1280 et seq.

Discussion:

See 5.07, 5.13

☐ Review complaint and contract to determine if consensual reference will be required, giving consideration to the following:

- ☐ Whether dispute is within scope of matters required to be determined by consensual reference.
- ☐ Whether any prerequisites to consensual reference exist, and if so, if they have been met.
- ☐ Whether any defenses exist to enforcement of the reference agreement, and if so, whether client wishes to waive or assert them.

Authority:

CCP § 639

Discussion:

See 5.08, 5.14

Legal Topics:

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

Civil Procedure Alternative Dispute Resolution Mandatory ADR Contracts Law Contract Conditions &

ProvisionsArbitration Clauses



136 of 175 DOCUMENTS

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Chapter 5 Determining Whether to Arbitrate or Litigate

II. DETERMINING IF ARBITRATION OR OTHER ALTERNATIVE DISPUTE RESOLUTION IS REQUIRED

1-5 MB Practice Guide: CA Contract Litigation 5.04

5.04 Options and Strategy.

The first thing to determine is whether the parties' contract contains a valid and enforceable provision that will require the dispute to be determined by some type of ADR. Counsel should carefully consider review the advantages and disadvantages of each type of ADR. Part of this determination involves evaluating any defenses that may be available to any type of ADR required by the contract.

Consider:

If there is a contractual provision, consider any ways the provision may be set aside. If the matter involves less than \$50,000, the court may require judicial arbitration or mediation [CCP §§ 1141.10-1141.31].



Cross Reference:

Discussion of opposing arbitration, see 5.23 -5.31.

Legal Topics:

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

Civil ProcedureAlternative Dispute ResolutionGeneral OverviewContracts LawContract Conditions & ProvisionsArbitration Clauses



137 of 175 DOCUMENTS

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Chapter 5 Determining Whether to Arbitrate or Litigate

II. DETERMINING IF ARBITRATION OR OTHER ALTERNATIVE DISPUTE RESOLUTION IS REQUIRED

1-5 MB Practice Guide: CA Contract Litigation 5.05

5.05 Determining If Judicial Arbitration Is Required.

In counties with more than 18 superior court judges, and in other counties that have so provided by local rule, parties will be forced to judicial arbitration [CCP §§ 1141.10-1141.31] if the court determines that the amount in controversy does not exceed more than \$50,000 for each plaintiff [CCP § 1141.11(a)-(c); *Cal Rules Ct, Rule 3.811(a)(1)-(3)*]. The court makes that determination at the first case management conference held after all named parties have appeared or defaulted [CCP § 1141.16(a); *Cal Rules Ct, Rules 3.727(b), 3.812(d)*], and has discretion not to order judicial arbitration if it finds that arbitration would not reduce the probable time and expense necessary to resolve the litigation [Cal Rules Ct, Rule 3.811(b)(6), (7)]. Actions with a prayer for equitable relief that is not frivolous or insubstantial are excluded from mandatory judicial arbitration [CCP § 1141.13; *Cal Rules Ct, Rule 3.811(b)(1)*], as are cases involving multiple causes of action or a cross-complaint if the court determines that the amount in controversy any given cause of action or cross-complaint exceeds \$50,000 [Cal Rules Ct, Rule 3.811(b)(8)].

Judge's Perspective:

Cal Rules Ct, Rule 3.810 et seq. and *CCP § 1141.10 et seq.* provide a comprehensive set of rules and procedures governing judicial arbitration. The California Rules of Court list other types of cases that are not subject to judicial arbitration. These include all class actions, unlawful detainer proceedings, and "any case otherwise subject to arbitration that is found by the court not to be amenable to arbitration on the ground that arbitration would not reduce the probable time and expense necessary to resolve the litigation" [Cal Rules Ct, Rule 3.811(b)(6)]. In addition, the superior courts of each county have the authority to exempt whole categories of cases as "not amenable to arbitration" [Cal Rules Ct, Rule 3.811(b)(7)]. Counsel should check the local rules to determine whether any such categories exist in his or her county, and should also find out whether the local court has a practice (rather than a rule) of excluding particular categories of cases. For example, the court may exclude certain types of actions, such as personal injury cases, because one of the parties always requests a trial de novo, eliminating any savings to the parties or the court.

➡ Cross Reference:

Discussion and forms, see Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, Ch. 24, Pretrial ADR; or

California Forms of Pleading and Practice, Ch. 36, Judicial Arbitration (Matthew Bender).

Legal Topics:

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

Civil ProcedureAlternative Dispute ResolutionMandatory ADR



138 of 175 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 5 Determining Whether to Arbitrate or Litigate

II. DETERMINING IF ARBITRATION OR OTHER ALTERNATIVE DISPUTE RESOLUTION IS REQUIRED

1-5 MB Practice Guide: CA Contract Litigation 5.06

5.06 Determining If Mediation Is Required.

5.06[1] Statute May Require Mediation. Mediation is a process in which a neutral person or persons facilitate communication between disputants to assist them in reaching a mutually acceptable resolution to a dispute [*CCP* § 1775.1(a); *Evid Code* § 1115(a)]. Courts in Los Angeles County, and any other counties that have opted into the program, may order any at-issue civil action in which judicial arbitration is otherwise required [*see CCP* § 1141.11] to mediation as an alternative to judicial arbitration. This power applies even if there is a prayer for equitable relief, which would otherwise exempt the matter from judicial arbitration [*CCP* § 1775.3(a)].

**Strategic Point:**

Even though parties may be required by a court to go to mediation, once they are there each participant has the right to decide the extent of his or her participation in the mediation, including the right to withdraw from the mediation at any time [*Cal Rules Ct, Rule 3.853(2)*].

**Cross Reference:**

Discussion of requirements for judicial arbitration, see 5.05.

5.06[2] Mediation May Be Required by Contract or by Choice of Parties. Mediation is voluntary. Thus, most mediations arise from contracts or because the parties chose to mediate after their dispute arose. Mediation begins, continues, and concludes by agreement of the parties. Any party is free to withdraw from the process at any time after it has commenced [*Cal Rules Ct, Rule 3.853(2)*; *Kirschenman v. Superior Court (1994) 30 CA4th 832, 835, 36 CR2d 166*].

**Cross Reference:**

Discussion of the advantages of mediation, see 5.12[1].

Legal Topics:

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

Civil ProcedureAlternative Dispute ResolutionMandatory ADRCivil ProcedureAlternative Dispute

ResolutionMediationsContracts LawContract Conditions & ProvisionsArbitration Clauses



139 of 175 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 5 Determining Whether to Arbitrate or Litigate

II. DETERMINING IF ARBITRATION OR OTHER ALTERNATIVE DISPUTE RESOLUTION IS REQUIRED

1-5 MB Practice Guide: CA Contract Litigation 5.07

5.07 Determining If Contract Requires Arbitration.

5.07[1] General Contract Principles Determine Validity of Agreement.

5.07[1][a] Contract Principles Determine Validity and Defenses to Enforcement. A written agreement to submit an existing controversy to arbitration or a subsequent agreement to arbitrate is valid, irrevocable, and enforceable under the California Arbitration Act (CAA) [CCP §§ 1280-1294.2], except on the grounds that exist for the revocation of any contract [CCP § 1281]. The CAA establishes rules for enforcement of agreements to arbitrate and for conduct of the arbitration proceedings except as otherwise agreed by the parties. It also describes the circumstances under which arbitration awards may be judicially vacated, corrected, confirmed, and enforced [CCP § 1280-1294.2]. The most common defenses to enforcement of arbitration agreements are waiver and unconscionability of all or a part of the arbitration clause.

Example--Arbitration Clauses Covering All Claims:

An arbitration clause that covers any claim "arising out of or relating to the contract or the breach thereof" has been held to cover all claims [*Larkin v. Williams, Woolley, Cogswell, Nakazawa & Russell* (1999) 76 CA4th 227, 230, 90 CR2d 195]. An arbitration clause that covers "all disputes arising in connection with the agreement" also was interpreted broadly and held to cover all claims [*Simula, Inc. v. Autoliv, Inc.* (9th Cir 1999) 175 F3d 716, 720-725].

Example--Arbitration Clause Covering Some Claims:

A contract that failed to add the phrase "or relating to" may exclude arbitration of certain claims [*Tracer Research v. National Envtl. Servs. Co.* (9th Cir 1994) 42 F3d 1292, 1295].

Judge's Perspective:

The arbitrator, and not the court, will decide whether a particular dispute is arbitrable if the parties have "clearly and unmistakably" so provided in their contract [see *Hartnell Community College Dist. v. Superior Court* (2005) 124 CA4th 1443, 1449 ; *Dream Theater, Inc. v. Dream Theater* (2004) 124 CA4th 547, 552]. In case of any ambiguity, the matter of arbitrability will be decided by the court [*Baker v. Osborne Development Corp.* (2008) 159 CA4th 884, 893-894, 71 CR3d 854 ; *Hartnell Community College Dist. v. Superior Court* (2005) 124 CA4th 1443, 1449].

Example:

An agreement containing a severability provision stating that "[i]n the event that any provision of this Agreement shall be determined by a trier of fact of competent jurisdiction to be unenforceable in any jurisdiction, such provision shall be unenforceable in that jurisdiction" did not clearly and unmistakably reserve to the arbitration panel the issue whether those arbitration provisions were unenforceable, because "trier of fact of competent jurisdiction" referred to a trial court. [*Parada v. Superior Court* (2009) 176 CA4th 1554, 1566, 98 CR3d 743] .

Exception:

Even if the contract clearly and unmistakably provides that the arbitrator should determine arbitrability, if the court finds that provision to be unconscionable, then the court rather than the arbitrator will decide whether the arbitration agreement is unconscionable [Murphy v. Check ' N Go of California, Inc. (2007) 156 CA4th 138, 145, 67 CR3d 120 ; see *Ontiveros v. DHL Express (USA), Inc.* (2008) 164 CA4th 494, 505, 79 CR3d 471 (expressing concern about potential for inequitable use of such provisions in areas, such as employment, in which one party tends to be a "repeat player," thereby giving the arbitrator a self-interest in deciding that a dispute is arbitrable)].

**Strategic Points--All Parties:**

- Whether a party wishes to enforce arbitration agreement or oppose its enforcement, that party should determine at the outset whether any defenses are likely to invalidate the arbitration agreement in whole or in part.
- In case of ambiguity on the issue of arbitrability, extrinsic evidence is admissible to aid in interpreting the parties' intent [*Hartnell Community College Dist. v. Superior Court* (2005) 124 CA4th 1443, 1451, 22 CR3d 410].

**Warning:**

If the procedure identified in the contract has failed and the other party does not consent to the proposed method, arbitration cannot be ordered. For example, if a party is no longer a member of the organization that was to conduct the arbitration and therefore is not entitled to use that organization's arbitration services absent consent, and consent is not forthcoming, a court will not order arbitration [*Provencio v. WMA Sec., Inc.* (2005) 125 CA4th 1028, 1032-1033, 23 CR3d 524 (defendant no longer member of NASD; plaintiff would not consent to arbitration before NASD)].

**Cross References:**

Discussion of court's options regarding petition to arbitrate, see 5.20[6].

Discussion of defenses to enforcement of arbitration agreements, see 5.25-5.31.

Discussion of enforcement by or against third party, see 5.19.

5.07[1][b] Arbitration of Statutory Claims Generally Is Enforceable. Unless Congress has evinced an intention to preclude a waiver of judicial remedies for the particular statutory rights at issue, statutory claims are arbitrable under most broadly worded arbitration clauses. The burden of proving otherwise is on the party seeking to avoid arbitration [*Gilmer v. Interstate/Johnson Lane Corp.* (1991) 500 US 20, 26, 111 S Ct 1647, 114 L Ed2d 26]. California public

policy strongly encourages enforcement of arbitration clauses [*Ericksen, Arbuthnot, McCarthy, Kearney & Walsh, Inc. v. 100 Oak St.* (1983) 35 C3d 312, 323, 197 CR 581, 673 P2d 251].



Cross Reference:

Comprehensive list of statutes under which claims are arbitrable, see Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, Ch. 6, Determining Forum; or

California Forms of Pleading and Practice, Ch. 32, Contractual Arbitration: Agreements and Compelling Arbitration (Matthew Bender).

5.07[1][c] Arbitration Clause May Be Incorporated by Reference. An entire arbitration clause can be incorporated by reference into the primary contract as long as the arbitration provision is clearly referred to and identified and is available for inspection [*Wolschlag v. Fidelity Nat'l Title Ins. Co.* (2003) 111 CA4th 784, 790-791 (incorporation of C.L.T.A. Coverage Policy form by preliminary title report's clear and unequivocal reference); *Kleveland v. Chicago Title Ins. Co.* (2006) 141 CA4th 761, 763, 46 Cal. Rptr. 3d 314 (distinguishing *Wolschlag*; arbitration clause was not incorporated by reference into preliminary title report when arbitration was not mentioned in preliminary title report and report referred to a policy that was different than that actually issued by the insurer)]. More often an arbitration agreement incorporates only the arbitration rules of a specific entity or organization that are to be used in any arbitration in accordance with the agreement [*Ware v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (1972) 24 CA3d 35, 40-42, 100 CR 791].

5.07[1][d] "Service of Suit" Clause Does Not Preclude Arbitration of Claims. An arbitration clause is enforceable even if it appears in a contract also containing a "service of suit" clause, under which a party agrees to submit to the jurisdiction of a particular court, if the contract contains language establishing priority of the arbitration clause over the service of suit clause [*Boghos v. Certain Underwriters at Lloyd's of London* (2005) 36 C4th 495, 501-503, (no conflict existed between service of suit clause and arbitration clause when insurance policy also provided that "[n]otwithstanding any other item set forth herein, the parties hereby agree that any dispute which arises shall be settled in Binding Arbitration")].

5.07[1][e] Claims for Injunctive Relief under Consumer Legal Remedies Act and Business and Professions Code Sections 17200 and 17500 Are Not Arbitrable. Claims for injunctive relief on behalf of the general public under the Consumer Legal Remedies Act [CC§ 1770] and B&P Code §§ 17200 and 17500 are not subject to arbitration [*Cruz v. PacifiCare Health Sys., Inc.* (2003) 30 C4th 303, 315, 133 CR2d 58, 66 P3d 1157; *Broughton v. Cigna Healthplans* (1999) 21 C4th 1066, 1079-1080, 90 CR2d 334, 988 P2d 67] .

Distinguish:

Statutory claims for damages, restitution, and disgorgement are arbitrable [*Cruz v. PacifiCare Health Sys., Inc.* (2003) 30 C4th 303, 317-320, 133 CR2d 58, 66 P3d 1157] .

When a party brings a claim under B&P Code § 17200 seeking both injunctive and restitutionary relief and the dispute is subject to arbitration, the proper procedure is to sever the claim for injunctive relief and compel arbitration of the claim for restitutionary relief only [*Aral v. Earthlink, Inc.* (2005) 134 CA4th 544, 553, 36 CR3d 229] . The trial court has the discretion to stay proceedings on the inarbitrable claims pending resolution of the arbitration [CCP § 1281.4; *Cruz v. PacifiCare Health Sys., Inc.* (2003) 30 C4th 303, 320, 133 CR2d 58, 66 P3d 1157] .



Warning:

California's Proposition 64 amended B&P Code § 17204 to require that a plaintiff asserting a cause of action under B&P Code § 17200 must have suffered injury in fact and lost money or property as a result of the alleged violation.

► Cross Reference:

Actions under *B&P Code § 17200* and discussion of effect of Proposition 64, see Matthew Bender[(R)] Practice Guide: California Unfair Competition and Business Torts, Ch. 2, Unfair Competition.

5.07[1][f] Mandatory Fee Arbitration Act Does Not Limit Ability of Attorneys and Clients to Enter Into Binding Contractual Arbitration. The Mandatory Fee Arbitration Act (MFAA) [*B&P § 6200 et seq.*] allows a client to choose to submit a fee dispute with an attorney to arbitration by a local bar association. Unless the attorney and client agree in writing after the dispute has arisen that the arbitration will be binding, however, either party may request a trial de novo within 30 days after the arbitration has concluded [*B&P § 6204(a)*]. However, if an attorney and client have entered into a valid predispute agreement to binding arbitration pursuant to the California Arbitration Act [*CCP § 1280 et seq.*], the MFAA does not override the contractual obligation to submit to binding arbitration [*Schatz v. Allen Matkins Leck Gamble & Mallory LLP* (2009) 45 C4th 557, 575, 87 CR 3d 700, 198 P3d 1109] .

5.07[2] Federal Arbitration Act May Preempt Statutory Requirements.

5.07[2][a] FAA Preempts Statutes That Apply Only to Arbitration Agreements. If the matter involves interstate commerce, the Federal Arbitration Act (FAA) will apply [*9 USC § 1 et seq.*]. Under the FAA, an arbitration contract must be enforced according to its terms subject to state law defenses applicable to all disputes under general contract principles, such as fraud, duress, or unconscionability [*Discover Bank v. Superior Court* (2005) 36 C4th 148, 165-166, 30 CR3d 76, 113 P3d 1100]. A court may not invalidate an arbitration agreement under a state law that is applicable only to arbitration agreements [*Allied-Bruce Terminix Cos., Inc. v. Dobson* (1995) 513 US 265, 281, 115 S Ct 834, 130 L Ed2d 753 ; *Hedges v. Carrigan* (2004) 117 CA4th 578, 583-584, 11 CR3d 787]. Thus, particular California statutes, such as *CCP § 1298*, which imposes format and initialing requirements on arbitration agreements that are not imposed on other agreements, are preempted if the matter involves interstate commerce. Failure of the arbitration agreement to conform to the preempted statute does not bar its enforcement on all other grounds [*Hedges v. Carrigan* (2004) 117 CA4th 578, 587, 11 CR3d 787]. In addition, the FAA preempts California statutes that refer certain disputes initially to a judicial forum or an administrative agency [*Preston v. Ferrer* (2008) 552 US 346, 128 S Ct 978, 169 L Ed2d 917, 2008 U.S. LEXIS 2011] .

Other California statutes that have been held preempted by the FAA include the following:

- *Corp Code § 31512* is preempted to the extent that it can be interpreted to require a judicial forum for resolution of claims under the Franchise Investment Law. Those claims can be arbitrated [*Southland Corp. v. Keating* (1984) 465 US 1, 10-16, 104 S Ct 852, 79 L Ed2d 1] .
- A provision of the California Talent Agencies Act [*Lab Code § 1700.44(a)*] that grants the Labor Commissioner exclusive jurisdiction to decide an issue that the parties agreed to arbitrate is preempted by the FAA [*Preston v. Ferrer* (2008) 552 U.S. 346, 128 S. Ct. 978, 169 L. Ed. 2d 917, 2008 U.S. LEXIS 2011] .
- *CC §§ 1781(a), 1783*, parts of the California Legal Remedies Act that prohibit waiver of a consumer's right to bring class action lawsuits within three years, are preempted by the FAA. However, an arbitration agreement prohibiting class actions and imposing a shorter limitation period would be enforceable were it not also unconscionable [see *Ting v. AT&T* (9th Cir 2003) 319 F3d 1126, 1148-1152] .
- *CCP § 1298.7*, which would otherwise allow a purchaser to pursue a court action against a developer for construction and design defects despite having signed an arbitration agreement, is preempted by the FAA. The purchaser would be compelled to arbitrate the construction or design defect claim [*Shepard v. Edward Mackay Enterprises, Inc.* (2007) 148 CA4th 1092, 1101, 56 CR3d 326 ; *Basura v. U.S. Home*

Corp. (2002) 98 CA4th 1205, 1213-1214, 120 CR2d 328].

- *Lab Code* § 229, which invalidates an arbitration agreement in favor of a judicial forum for statutory wage claims, was preempted in the case of a corporate officer's unpaid wages claim against his former employer, because his work involved significant interstate business activities [*Giuliano v. Inland Empire Personnel, Inc.* (2007) 149 CA4th 1276, 1287-1288, 58 CR3d 5] .

Distinguish:

In cases that do not involve interstate commerce, state requirements for arbitration provisions will not be preempted [see, e.g., *Woolls v. Superior Court* (2005) 127 CA4th 197, 25 CR3d 426 (agreement between a California homeowner and a California contractor to renovate a single family residence in California does not implicate interstate commerce; failure to comply with formalities required by *B&P Code* § 7191 renders arbitration clause unenforceable against homeowner)].

Arbitration and conciliation of international commercial disputes are governed by *CCP* § 1297.11 *et seq.*

5.07[2][b] FAA's Reach Is Broadly Defined. "Involving commerce" is given the broadest interpretation possible consistent with Congress' exercise of its Commerce Clause power. A matter need not be shown to have any specific effect on interstate commerce if the economic activity in question, such as commercial banking or mortgage lending, generally is subject to federal control [*Citizens Bank v. Alafabco, Inc.* (2003) 539 US 52, 56-58, 123 S Ct 2037, 156 L Ed2d 46 ; *Hedges v. Carrigan* (2004) 117 CA4th 578, 585-587, 11 CR3d 787].

5.07[2][c] Only Substantive FAA Provisions Preempt State Law. The substantive provisions of the FAA [9 USC §§ 1, 2] apply in state court proceedings, but the procedural terms of the FAA [9 USC §§ 3, 4] apply only in federal court [*Rosenthal v. Great W. Fin. Sec. Corp.* (1996) 14 C4th 394, 405-407, 58 CR2d 875, 926 P2d 1061 ; see *Ovitz v. Schulman* (2005) 133 CA4th 830, 851, 35 CR3d 117 (9 USC §§ 10, 12 apply only in federal court)]. One major procedural difference is that federal law provides for a jury trial on the issue of whether an arbitration agreement exists, while California law does not [compare 9 USC § 4 with *CCP* § 1290.2]. Other procedural differences between the FAA and California law include the following:

- Stay of arbitration. The FAA does not provide for a stay of arbitration if third parties who have not signed the arbitration agreement are necessary to resolution of the dispute. However, by an appropriate choice of law provision in their arbitration agreement, the parties can make *CCP* § 1281.2(c) applicable, which provides for a stay in those circumstances [see *Volt Information Sciences v. Board of Trustees* (1989) 489 US 468, 477-478, 109 S Ct 1248, 103 L Ed2d 488 (abrogating *Energy Group, Inc. v. Liddington* (1987) 192 CA3d 1520, 1522-1528, 238 CR 202 ; *Cronus Investments, Inc. v. Concierge Services* (2005) 35 C4th 376, 394, CR3d 540, 107 P3d 217 (arbitration clause containing California choice-of-law provision and providing for application of the FAA "if it would be applicable" does not preclude application of *CCP* § 1281.2(c); disapproving *Warren-Guthrie v. Health Net* (2000) 84 CA4th 804, 101 CR2d 260 and *Energy Group, Inc. v. Liddington* (1987) 192 CA3d 1520, 238 CR 202); *Best Interiors, Inc. v. Millie & Severson, Inc.* (2008) 161 CA4th 1320, 1329, 75 CR3d 1 (FAA does not preempt *CCP* § 1281.2(c))].

- California law requires the vacating of any award rendered by an arbitrator who failed timely to disclose a ground for disqualification of which he or she was aware, while the FAA permits the vacating of an arbitration award only on a showing of "evident partiality" by the arbitrator, when the undisclosed facts create a "reasonable impression of partiality" [compare *CCP* § 1286.2(a)(6)(A) with 9 USC § 10(a)(2)]. *CCP* § 1286.2(a)(6)(A) is not preempted by the FAA because 9 USC § 10(a)(2) is a procedural rather than substantive provision, and because *CCP* § 1286.2(a)(6)(A) neither limits the rights of contracting parties to submit disputes to arbitration nor discourages persons from using arbitration [

Ovitz v. Schulman (2005) 133 CA4th 830, 853, 35 CR3d 117] .



Strategic Point:

Parties wishing to avoid application of California's procedural rules for arbitration can expressly designate in their arbitration agreement that any arbitration proceeding will be governed by the FAA's procedural provisions rather than the California Arbitration Act [*Cronus Investments, Inc. v. Concierge Services* (2005) 35 C4th 376, 394, CR3d 540, 107 P3d 217 ; see, e.g., *Rodriguez v. American Techs., Inc.* (2006) 136 CA4th 1110, 1121-1122, 39 CR3d 437 (FAA's procedural provisions governed contract that provided that any claims were to be arbitrated "pursuant to the Federal Arbitration Act" and contained no express choice-of-law provision designating California law generally)].

Legal Topics:

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

Civil ProcedureAlternative Dispute ResolutionArbitrationsArbitrabilityContracts LawContract Conditions & ProvisionsArbitration Clauses



140 of 175 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 5 Determining Whether to Arbitrate or Litigate

II. DETERMINING IF ARBITRATION OR OTHER ALTERNATIVE DISPUTE RESOLUTION IS REQUIRED

1-5 MB Practice Guide: CA Contract Litigation 5.08

5.08 Determining If Contract Requires Reference.

A general reference is one in which the referee is empowered to hear and determine any or all issues in an action or proceeding, whether of fact or of law, and to make a binding decision that must stand as the decision of the court [CCP §§ 638, 644(a)]. A general reference must be based on the agreement of the parties filed with the clerk or judge or entered in the minutes, or on the motion of a party to enforce a written contract or lease that requires the controversy to be heard by a referee [CCP §§ 638, 644(a); *Greenbriar Homes Cmtys., Inc. v. Superior Court* (2004) 117 CA4th 337, 342-343, 11 CR3d 371].

Contractual provisions for general reference of all or some issues are becoming common in residential building and development contracts. A predispute agreement for appointment of a referee is determined under standard rules of contract interpretation [*Greenbriar Homes Cmtys., Inc. v. Superior Court* (2004) 117 CA4th 337, 343, 11 CR3d 371] and is subject to standard contract defenses, including:

- Unconscionability [*Greenbriar Homes Cmtys., Inc. v. Superior Court* (2004) 117 CA4th 337, 343-346, 11 CR3d 371 ; *Woodside Homes of Cal., Inc. v. Superior Court* (2003) 107 CA4th 723, 735-736, 132 CR2d 35]; and

- Lack of mutual assent. Thus, an agreement for judicial reference in a development contract is not enforceable against a subsequent purchaser who has never assented to judicial reference [*Greenbriar Homes Cmtys., Inc. v. Superior Court* (2004) 117 CA4th 337, 343, 11 CR3d 371 ; see *Treo @ Kettner Homeowners Assn. v. Superior Court* (2008) 166 CA4th 1055, 1067, 83 CR3d 318 (a developer-written requirement in a homeowners association's covenants, conditions and restrictions (CC&Rs) that all disputes between owners and the developer and disputes between the association and the developer be decided by a general judicial reference is not enforceable, because almost all of the association members are purchasers who effectively have no choice but to accept the CC&Rs prepared by the developer)].

The fact that a judicial reference provision is silent regarding the reference costs does not render that provision unconscionable or unenforceable [*Trend Homes, Inc. v. Superior Court* (2005) 131 CA4th 950, 959-960, 32 CR3d 411].

A court does not have authority to invalidate a judicial reference agreement on the ground that a multiplicity of suits might result, as it would under CCP § 1281.2(c) if the contract called for arbitration [*Greenbriar Homes Cmtys., Inc. v.*

Superior Court (2004) 117 CA4th 337, 347-348].



Cross Reference:

Discussion and forms, see Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, Ch. 25, Reference; or

California Forms of Pleading and Practice, Ch. 38, Reference (Matthew Bender).

Legal Topics:

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

Civil ProcedureJudicial OfficersRefereesGeneral OverviewCivil ProcedureAlternative Dispute ResolutionGeneral OverviewContracts LawContract Conditions & ProvisionsArbitration Clauses



141 of 175 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 5 Determining Whether to Arbitrate or Litigate

II. DETERMINING IF ARBITRATION OR OTHER ALTERNATIVE DISPUTE RESOLUTION IS REQUIRED

1-5 MB Practice Guide: CA Contract Litigation 5.09

5.09 Determining If Combined ADR Methods Will Be Required.

It is not uncommon for an agreement to provide for a multi-step protocol involving several types of ADR, beginning with one using fewer resources and graduating to contractual arbitration.

Examples:

An employment contract specified that an employee's first step in contesting his or her termination was a termination review board with members chosen by the employer and the employee [*see Saeta v. Superior Court (2004) 117 CA4th 261, 264-265, 11 CR3d 610*].

■ A subcontract agreement between a contractor and a subcontractor required that any dispute between the parties must be submitted to mediation before resorting to arbitration or litigation [*see Templeton Development Corp. v. Superior Court (2006) 144 CA4th 1073, 1077-1078, 51 CR3d 19*].

Besides the obvious ability to prevent arbitration or litigation by asserting the opposing party's failure to exhaust prerequisite remedies, many contracts contain penalties for failure to attempt ADR in the sequence required by the contract [*see Leamon v. Krajewicz (2003) 107 CA4th 424, 431-433, 132 CR2d 362*].

Example:

An agreement that requires a party to attempt mediation before arbitration in order to recover attorney's fees is enforceable, even against a party who successfully asserts that the contract is void [*Leamon v. Krajewicz (2003) 107 CA4th 424, 431-433, 132 CR2d 362*].

Legal Topics:

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

Civil Procedure
Alternative Dispute Resolution
General Overview
Civil Procedure
Alternative Dispute Resolution
Mandatory ADR
Contracts Law
Contract Conditions & Provisions
Arbitration Clauses



142 of 175 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 5 Determining Whether to Arbitrate or Litigate

III. DETERMINING WHETHER ARBITRATION OR OTHER ADR IS PREFERABLE TO LITIGATION

1-5 MB Practice Guide: CA Contract Litigation 5.10

5.10 CHECKLIST: Determining Whether Arbitration or Other ADR Is Preferable to Litigation.

☐ Review characteristics of ADR methods and client's preferences to determine which ADR method is preferable, giving consideration to the following:

- ☐ What degree of formality is appropriate or required?
- ☐ Will client require a judgment, or will a written settlement agreement suffice?
- ☐ Is confidentiality an issue?

Authority:

Evid Code § 1119

Discussion:

See 5.12

- ☐ Is issue more emotional than legal?
- ☐ Are parties of equal bargaining strength?
- ☐ Do parties have a relationship they wish to maintain, and if so, is informality of ADR, and specifically mediation, preferable?
- ☐ Is special expertise required of trier of fact?

Discussion:

See 5.14

- ☐ Is expense of ADR method an issue?

Authority:

CCP § 1141.28

Discussion:

See 5.13[5], 5.14

- ☐ Consider whether judicial arbitration is most inexpensive and expeditious method of resolving dispute:

- ☐ If each plaintiff agrees to limit any recovery to \$50,000; or

- ☐ If parties stipulate to submit case to arbitration.

Authority:

CCP § 1141.12; Cal Rules Ct, Rules 3.811(a)(4), (5), 3.812(a), (b)

Discussion:

See 5.05, 5.13

- ☐ If no ADR method is required by statute or contract, determine whether parties can agree to one.

Legal Topics:

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

Civil ProcedureAlternative Dispute ResolutionGeneral OverviewCivil ProcedureAlternative Dispute ResolutionMediationsCivil ProcedureAlternative Dispute ResolutionSummary Jury TrialsCivil ProcedureAlternative Dispute ResolutionValidity of ADR MethodsContracts LawContract Conditions & ProvisionsArbitration Clauses



143 of 175 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 5 Determining Whether to Arbitrate or Litigate

III. DETERMINING WHETHER ARBITRATION OR OTHER ADR IS PREFERABLE TO LITIGATION

1-5 MB Practice Guide: CA Contract Litigation 5.11

5.11 Options and Strategy.

Once counsel knows whether any type of ADR is ostensibly required and what options, if any, are available to resist it, counsel can review the characteristics of other ADR methods and discuss the client's needs and preferences to determine whether it is preferable to negotiate the use of some other type of ADR. Mediation may be the best option if the parties have a relationship that they feel should be continued, but is not recommended for parties with unequal bargaining positions [see 5.12]. Arbitration can be useful, but can be quite expensive [see 5.13].



Strategic Point:

Careful consideration of the various attributes of each method of ADR should be undertaken early in the case to assess how the dispute may be settled most advantageously for all parties, but particularly the client.



Cross Reference:

Discussion of opposing arbitration, see 5.23 -5.31.

Legal Topics:

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

Civil Procedure Alternative Dispute Resolution General Overview Contracts Law Contract Conditions & Provisions Arbitration Clauses



144 of 175 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 5 Determining Whether to Arbitrate or Litigate

III. DETERMINING WHETHER ARBITRATION OR OTHER ADR IS PREFERABLE TO LITIGATION

1-5 MB Practice Guide: CA Contract Litigation 5.12

5.12 Advantages and Disadvantages of Mediation.

5.12[1] Mediation Is Often Faster, Less Expensive, and Allows More Participation. Mediation is likely to be faster and less expensive than more formal ADR processes, and should be considered early on in a dispute. Unlike binding arbitration, submitting to mediation does not restrict a party's recourse to the courts. Typically, mediation involves factual presentations by lawyers, followed by negotiations between the parties involved in the dispute with the assistance of a mediator, with or without an evaluative component.

Mediation allows the participants to be involved in the process fully and may provide emotional resolution not available through other ADR methods. Mediation therefore is appropriate when the "real issue" is not a legal one. Active participation, a feeling of ability to control the process, and focus on the issues most important to the disputants are likely to result in compliance with any settlement reached and to preserve any ongoing relationship between the disputants if that is what they desire.

Another advantage of mediation is its confidentiality. No public record of the dispute or its resolution need exist. There is no binding legal precedent to govern future cases or future proceedings in a particular case if they are necessary. No evidence of anything said or any admission made for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation is admissible or subject to discovery, and disclosure of that evidence cannot be compelled in any arbitration, administrative adjudication, civil action, or other noncriminal proceeding [*Evid Code* § 1119(a)]. Writings prepared in the course of mediation are similarly protected [*Evid Code* § 1119(b)].

5.12[2] Mediation Is Inappropriate If Parties Are of Uneven Strength or Are Unwilling to Negotiate.

Mediation is not appropriate if the parties are of unequal strength in terms of bargaining power or ability to negotiate. Nor is it appropriate if one party does not actually want resolution, but prefers delay and obfuscation. Mediation also is not appropriate in the following situations:

- If the matter involves public interest, such as statutory or constitutional interpretation, or deterrence of illegal, fraudulent, or deceptive practices. The public interest in such cases may be better served by a judgment, injunction, fine, and/or punitive damages, which may serve as a future deterrent to similar conduct.
- Cases in which extensive discovery will be required, such as those involving pattern and practice.

These types of cases are also likely to involve some public concern.



Strategic Point--Both Parties:

A danger of mediation is that if, during the mediation, one shows one's hand, strategy, and feelings, those present will learn and may make use of that information if the mediation is unsuccessful and litigation ensues, despite the protections from discovery provided in *Evid Code § 1119*. However, this is a two-edged sword, since all parties may have to disclose enough about their respective positions to put the other parties on notice of the strengths and weaknesses of their respective positions.

Legal Topics:

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

Civil Procedure Alternative Dispute Resolution Mediations



145 of 175 DOCUMENTS

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Chapter 5 Determining Whether to Arbitrate or Litigate

III. DETERMINING WHETHER ARBITRATION OR OTHER ADR IS PREFERABLE TO LITIGATION

1-5 MB Practice Guide: CA Contract Litigation 5.13

5.13 Judicial Arbitration and Contractual Arbitration Have Different Characteristics.

5.13[1] Absent Stipulation, Judicial Arbitration Is Limited to Claims Under \$50,000 Per Party. Mandatory judicial arbitration is limited to matters in which there is less than \$50,000 in controversy for each plaintiff [*CCP* §§ 1141.11(a)-(c), 1141.12(b); *Cal Rules Ct, Rule 3.811(a)(1)-(3), (5)*].

When it is not mandatory, all plaintiffs may force a matter to judicial arbitration by agreeing that the award will not exceed \$50,000 for each plaintiff [*CCP* § 1141.12(b); *Cal Rules Ct, Rules 3.811(a)(5), 3.812(b)*]. However, nothing prohibits a judicial arbitrator from issuing an award in excess of \$50,000 [*CCP* § 1141.26]. The parties also may stipulate to submit the matter to judicial arbitration prior to any trial, regardless of the amount in controversy [*CCP* § 1141.12(a); *Cal Rules Ct, Rules 3.811(a)(4), 3.812(a)*], but in that case, they must pay the arbitrator [*CCP* § 1141.28(b)].

Cross References:

Discussion of court ordered judicial arbitration costs, see 5.05.

Discussion of comparisons of arbitration expenses, see 5.13[5].

5.13[2] Discovery and Hearing Formalities Differ. In judicial arbitration, the parties have all the rights and remedies with respect to discovery afforded by *CCP* § 1985 *et seq.* [*Cal Rules Ct, Rule 3.822(a)*], except that a court order is required to obtain discovery with respect to punitive damages [*CCP* § 1141.19.5]. The rules of evidence governing civil actions apply in judicial arbitration hearings, except that certain reports and documents must be provided to the opposing parties 20 days before the hearing [*Cal Rules Ct, Rule 3.823(b)*]. Although the arbitrator may make a record of a judicial arbitration proceeding, no other record can be made of a judicial arbitration hearing, and no stenographer, court reporter, or recording device may be present [*Cal Rules Ct, Rule 3.824(b)*].

In contractual arbitration, unless the matter involves wrongful death or personal injury or the arbitration agreement provides otherwise, once the arbitrator has been appointed, the parties have the same rights and remedies with respect to discovery as those set forth in *CCP* §§ 1985-1997 (subpoenas) and 2016.010 *et seq.* (depositions and discovery) [*CCP* §§ 1283.05, 1283.1].



Strategic Point--Both Parties:

Although *CCP* § 1283.05(e) requires leave of the arbitrator to take depositions, the expense of obtaining an order can be avoided if the parties agree to the depositions. Always consider requesting a stipulation from opposing counsel prior to seeking leave of court.

Unless the arbitration agreement or the parties provide otherwise, all parties to the arbitration are entitled to be heard, to present evidence and to cross-examine witnesses appearing at the hearing, but rules of evidence and rules of judicial procedure need not be observed. On request of a party, testimony of witnesses must be given under oath [*CCP* § 1282.2(d)].



Cross Reference:

Discussion of stipulations, see Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, Ch. 28, Stipulations.

5.13[3] Contractual Arbitration Award Generally Is Binding. Contractual arbitration [*CCP* §§ 1280-1294.2] is sometimes referred to as binding arbitration because there are very limited grounds for judicial review of the arbitrator's award [*CCP* § 1286.2], which is generally confirmed and entered as a judgment [*CCP* §§ 1285-1287.6].

Unless the agreement provides otherwise, arbitrators are not bound to decide cases in accordance with the law, but may base an award on principles of justice and equity [*Moncharsh v. Heily & Blase* (1992) 3 C4th 1, 10-11, 10 CR2d 183, 832 P2d 899 ; *Sy First Family Ltd. P'ship v. Cheung* (1999) 70 CA4th 1334, 1342, 83 CR2d 340].

Parties to an arbitration agreement may expand the scope of judicial review of an arbitration award, however, by expressly providing that legal errors are an excess of arbitral authority subject to judicial review [*Cable Connection, Inc. v. DIRECTV, Inc.* (2008) 44 C4th 1334, 1361, 82 CR3d 229, 190 P3d 586 (disapproving Court of Appeal opinions refusing to enforce specific provisions for judicial review of the merits)].

Distinguish:

Under the Federal Arbitration Act, parties cannot expand the scope of review by contract, and any provision for review of an award for legal error is void and unenforceable [*Hall St. Assocs., L.L.C. v. Mattel, Inc.* (2008) 552 U.S. 576, 128 S. Ct. 1396, 1400, 170 L. Ed. 2d 254 ; *Kyocera Corp. v. Prudential-Bache Trade Servs., Inc.* (9th Cir 2003) 341 F3d 987, 1000 (Ninth Circuit rule under FAA)].

A provision for review by a second arbitrator is enforceable as long as it is truly bilateral [*Finley v. Saturn of Roseville* (2004) 117 CA4th 1253, 1257-1260, 12 CR3d 561] .

5.13[4] Judicial Arbitration Award Generally Is Nonbinding. Although a party may stipulate away his or her right to a trial de novo [*cf.* *Blanton v. Womancare, Inc.* (1985) 38 C3d 396, 407-408, 212 CR 151, 696 P2d 645 (attorney had no authority to so stipulate)], judicial arbitration is not binding to the extent that any party dissatisfied with an award may elect trial de novo [*CCP* § 1141.20].

Trial de novo must be requested within 30 days after the judicial arbitration award is filed with the court clerk [*CCP* § 1141.20(b); *Cal Rules Ct, Rule 3.826(a)*]. However, except in the case of an award in excess of \$50,000, if the party who requested trial de novo fails to obtain a judgment more favorable than the arbitration award, he or she will be liable for significant costs and fees [see *CCP* § 1141.21].

If no party requests a trial, the arbitration award is entered as a judgment and is not subject to appeal [*Cal Rules Ct, Rule 3.827*]. A party may move to vacate the judgment within six months after entry only on certain specified grounds [see

Cal Rules Ct, Rule 3.828].

5.13[5] Judicial Arbitration Expenses Generally Are Paid by Court; Contractual Arbitration Expenses by Parties. All administrative costs of judicial arbitration, including compensation of arbitrators, must be paid for by the court in which the arbitration costs are incurred [CCP § 1141.28(a)]. However, if the matter is in judicial arbitration solely because of the stipulation of the parties, the parties must pay the arbitrator's fees in equal shares, absent evidence that equal division would create substantial economic hardship for any party [CCP § 1141.28(b)].

In contractual arbitration, unless the arbitration agreement or parties otherwise provide, each party pays his or her pro rata share of the expenses and fees of the neutral arbitrator and any other expenses of the arbitration incurred or approved by the neutral arbitrator. Each party also is responsible for counsel fees, witness fees, and other expenses incurred for his or her own benefit [CCP § 1284.2].

Exceptions:

- In a dispute brought under a consumer protection statute that provides for a prevailing plaintiff to recover costs and attorneys fees, those costs and fees will be awarded under the governing statute [*Broughton v. Cigna Healthplans of Cal.* (1999) 21 C4th 1066, 1086-1087, 90 CR2d 334, 988 P2d 67 ; see CC § 1780(e)].
- In arbitration under an employer-employee agreement in which the employee seeks to vindicate statutory or other unwaivable rights, the employee cannot be required to pay any costs or expenses that are unique to the arbitral forum [*Little v. Auto Stiegler, Inc.* (2003) 29 C4th 1064, 1080-1081, 1094-1095, 130 CR2d 892, 63 P3d 979 ; *Armendariz v. Foundation Health Psychcare Servs., Inc.* (2000) 24 C4th 83, 110-113, 99 CR2d 745, 6 P3d 669 ; *Abramson v. Juniper Networks, Inc.* (2004) 115 CA4th 638, 661, 9 CR3d 422 ; see 5.29[5]].

Judge's Perspective:

This means that courts generally will not enforce an arbitration clause that imposes *any* expense on an employee litigant beyond what that employee would have had to pay to litigate in court [see *Armendariz v. Foundation Health Psychcare Servs., Inc* (2000) 24 C4th 83, 110-111, 99 CR2d 745, 6 P3d 669 ("when an employer imposes mandatory arbitration as a condition of employment, the arbitration agreement or arbitration process cannot generally require the employee to bear any *type* of expense that the employee would not be required to bear if he or she were free to bring the action in court")]. This is true even if the employer pays the lion's share of any extra arbitration expenses, leaving a smaller fraction for the employee. However, note that if the arbitration agreement is silent about the payment of costs, the court will interpret the agreement as requiring the employer to pay any costs that are unique to arbitration [*Armendariz v. Foundation Health Psychcare Servs., Inc* (2000) 24 C4th 83, 113, 99 CR2d 745, 6 P3d 669] .

- In a consumer arbitration involving unwaivable statutory rights, the court may impose an implied agreement that unaffordable fees not be allocated to the consumer at any in point in the arbitration process, and that the determination of what is affordable be made on a case by case basis, with the consumer bearing the burden of proof as to what he or she cannot afford [*Gutierrez v. Autowest, Inc.* (2003) 114 CA4th 77, 83, 92-99, 7 CR3d 267] .

- In an arbitration mandated by a school enrollment contract of a student's claims under California hate crimes laws [CC §§ 51.7, 52.1], a student and the parents may not be required to pay any type of arbitral expense that would not be

imposed were the dispute adjudicated in court [*D.C. v. Harvard-Westlake School* (2009) 176 CA4th 836, 862, 98 CR3d 300] .

In a proceeding to confirm, correct or vacate a contractual arbitration award pursuant to CCP § 1285, a court must award costs to the prevailing party [CCP § 1293.2; *Marcus & Millichap Real Estate Investment Brokerage Co. v. Woodman Investment Group* (2005) 129 CA4th 508, 513, 28 CR3d 584]. Attorney's fees are recoverable as costs if authorized by the arbitration agreement [CCP § 1033.5(a)(10)(A)].

5.13[6] Provisional Remedies Are Available During Contractual Arbitration. Parties to a contractual arbitration agreement have the option, if they need it, of applying to a court for a provisional remedy if one is necessary to insure that the arbitration award not be rendered ineffectual [CCP § 1281.8(b); see *Jay Bharat Developers, Inc. v. Minidis* (2008) 167 CA4th 437, 446-447, 84 CR3d 267 (injunction prohibiting terminated franchisees from continuing to use franchisor's trademark)]. Provisional remedies include [CCP § 1281.8(a)]:

- Attachments and temporary protective orders issued pursuant to CCP § 481.010 et seq.
- Writs of possession issued pursuant to CCP § 512.010 et seq.
- Preliminary injunctions and temporary restraining orders issued pursuant to CCP § 527.
- Receivers appointed pursuant to CCP § 564.

The party requesting a provisional remedy must meet the requirements for the particular remedy sought.



Cross Reference:

Provisional remedies, see Ch. 6, Using or Opposing Provisional Remedies in Contract Actions.

Legal Topics:

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

Civil Procedure Alternative Dispute Resolution Arbitrations General Overview Contracts Law Contract Conditions & Provisions Arbitration Clauses



146 of 175 DOCUMENTS

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Chapter 5 Determining Whether to Arbitrate or Litigate

III. DETERMINING WHETHER ARBITRATION OR OTHER ADR IS PREFERABLE TO LITIGATION

1-5 MB Practice Guide: CA Contract Litigation 5.14

5.14 Contractual Hearing Before Referee May Be Faster and Allow for Selecting a Referee With Expertise, but Costs Are Paid by Parties.

A hearing before a referee is conducted in the same manner as a court trial [*In re McNamee* (1933) 131 CA 30, 31, 20 P2d 722]. The Evidence Code applies [Evid Code § 300]. The parties to a consensual reference pursuant to CCP § 638 must pay the referee's fees. If the parties cannot agree on the division of responsibility for the referee's fees, the court may apportion the responsibility for fees in accordance with CCP § 645.1(b) [CCP § 645.1(a)]. Parties to a contractual reference also will have to pay for the place where the reference is held, because court facilities and court personnel cannot be used for a private reference pursuant to CCP § 638, except on a finding by the presiding judge or his or her designee that the use would further the interests of justice [Cal Rules Ct, Rule 3.907].

Although some have claimed that a consensual reference can be heard sooner than a court trial, this may or may not be so in a particular county [see *Pardee Constr. Co. v. Superior Court* (2002) 100 CA4th 1081, 1090-1091, 123 CR2d 288] .

Perhaps the greatest advantage of contractual reference is that the parties can choose a person with a particular expertise as their referee. Up to three persons may be appointed as referees [CCP § 640(a)]. The court must appoint the referee(s) agreed on by the parties [CCP § 640(a)]. If the parties do not agree on a referee, each party submits up to three nominees to the court and the court appoints the referee(s), from those nominated [CCP § 640(b)]. If the proposed referee is a former California judicial officer, he or she must be an active or inactive member of the State Bar [Cal Rules Ct, Rule 3.903].

Legal Topics:

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

Civil ProcedureJudicial OfficersRefereesGeneral OverviewCivil ProcedureAlternative Dispute ResolutionGeneral OverviewContracts LawContract Conditions & ProvisionsArbitration Clauses



147 of 175 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 5 Determining Whether to Arbitrate or Litigate
IV. SUBMITTING TO OR COMPELLING ARBITRATION

1-5 MB Practice Guide: CA Contract Litigation 5.15

5.15 CHECKLIST: Submitting to or Compelling Arbitration.

☐ Review arbitration agreement to determine the following:

- ☐ Whether all or part of dispute is within scope of agreement.
- ☐ Whether all parties necessary to resolution of dispute are parties to arbitration agreement.
- ☐ Whether there are any defenses to formation or enforcement of the agreement.
- ☐ Whether there are any prerequisites to arbitration.

Authority:

Leamon v. Krajewicz (2003) 107 CA4th 424, 431-433, 132 CR2d 362

Discussion:

See 5.18

- ☐ What particular choice of law or arbitration rules/procedures are specified as applicable.
- ☐ Whether any arbitration service provider is designated.
- ☐ Time within which arbitration must be demanded, commenced, or completed.
- ☐ How arbitral costs and expenses are apportioned and when they must be paid.

Authority:*CCP § 1284.2***Discussion:***See 5.13[5]*

- ☐ Prepare and serve a demand for arbitration within time required.
- ☐ If an arbitration service is designated and has its own demand form, use that form.
- ☐ Serve demand in accordance with rules of arbitration service, usually by certified mail to provide signature of recipient, on:
- ☐ All parties to dispute.
- ☐ The arbitration service provider, including payment of any fee required to initiate arbitration.
- ☐ If arbitration service is not used, prepare demand in letter form and include the following:
- ☐ Description of the issues to be arbitrated.
- ☐ Identification of agreement that requires arbitration.
- ☐ Number of arbitrators, method by which, and time within which they are to be chosen.
- ☐ Name of desired arbitrator or several arbitrators from whom respondent may choose.
- ☐ Serve demand, by certified mail to provide signature of recipient, on:
- ☐ All parties to dispute.
- ☐ Any arbitrators who are nominated.

Authority:*CCP § 1281.2***Discussion:***See 5.17***Form:***See 5.32*

- ☐ Consider postdispute arbitration agreement, if parties agree on particulars.

☐ If parties agree to use arbitration service that has its own form of submission agreement or stipulation, use that form; or

☐ Draft and execute arbitration submission agreement or stipulation, setting forth as much detail as desired, e.g.:

☐ Issues to be arbitrated.

☐ Name(s) of arbitrators, or method by and time within which they are to be chosen.

☐ Applicable law and rules, including rules of evidence to be followed.

☐ Extent of discovery.

☐ Time, place, or length of arbitration hearings.

☐ Who will pay arbitration fees.

Authority:

CCP § 1284.2

Discussion:

See 5.13[5]

☐ Whether hearing will be reported, and if so, who will pay reporter.

☐ Any minimum or maximum award.

☐ Limit, if any, on amount of time (measured from close of hearing or post-hearing briefing) the panel has to render its decision.

☐ The form of decision.

☐ If a court action or proceeding has been commenced, file stipulation, which should also provide for stay of action or proceeding.

Authority:

CCP § 1281; Cal Rules Ct, Rules 3.221(a)(4), 3.726

Discussion:

See 5.18

☐ If parties desire to clarify or narrow scope of pre-dispute arbitration agreement, draft and execute agreement, setting forth as much detail as desired, e.g.:

- ☐ Issues to be arbitrated.
- ☐ Name(s) of arbitrators, or method by and time within which they are to be chosen.
- ☐ Applicable law and rules, including rules of evidence to be followed.
- ☐ Extent of discovery.
- ☐ Time, place, or length of arbitration hearings.
- ☐ Who will pay arbitration fees.

Authority:

CCP § 1281

Discussion:

See 5.18

☐ If party refuses to arbitrate after demand and arbitration agreement is not self-executing, petition to compel arbitration.

- ☐ Include the following in petition:
 - ☐ Existence and description of arbitration agreement, by quoting relevant portions of agreement or attaching copy as exhibit and incorporate in petition by reference.
 - ☐ Existence of dispute within scope of arbitration agreement.
 - ☐ Service of demand to arbitrate.
 - ☐ Respondent's refusal to arbitrate.
- ☐ Obtain hearing date and prepare notice of hearing of petition to compel arbitration.
- ☐ Prepare memorandum in support of petition.
- ☐ Prepare any necessary declarations in support of petition.
- ☐ Serve and file petition, notice and supporting documents.

**Timing:**

Notice of hearing must be served no less than 10 days before hearing date or, if served on party outside California, no less than 30 days before hearing date.

☐ Service on parties who have not yet appeared is made in same manner as service of summons.

☐ Service on parties who have appeared or been served in accordance with *CCP* § 1290.4(b), is made in manner provided for other papers in *CCP* §§ 1010-1020.

Authority:

CCP §§ 1281.2, 1281.7, 1290

Discussion:

See 5.20

Form:

See 5.33

- ☐ If action or proceeding is pending to resolve arbitrable issue:
- ☐ File motion to stay action or proceeding during pendency of arbitration.
 - ☐ Prepare supporting declarations and memorandum.
 - ☐ Serve and file notice of motion and accompanying papers.
 - ☐ If a case is stayed, immediately file and serve notice of the stay on Judicial Council Form CM-180 and attach a copy of the order or other document staying the proceedings.

Authority:

CCP § 1281.4; *Cal Rules Ct*, Rule 3.650

Discussion:

See 5.21

Form:

See 5.37

Legal Topics:

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

Civil ProcedureAlternative Dispute ResolutionGeneral OverviewCivil ProcedureAlternative Dispute ResolutionArbitrationsArbitrabilityCivil ProcedureAlternative Dispute ResolutionArbitrationsFederal Arbitration ActOrders to Compel ArbitrationCivil ProcedureAlternative Dispute ResolutionValidity of ADR MethodsContracts LawContract Conditions & ProvisionsArbitration Clauses



148 of 175 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 5 Determining Whether to Arbitrate or Litigate
IV. SUBMITTING TO OR COMPELLING ARBITRATION

1-5 MB Practice Guide: CA Contract Litigation 5.16

5.16 Options and Strategy.

If there is a pre-dispute arbitration agreement, the process is usually commenced first by sending a demand for arbitration and later by petitioning to compel arbitration if the other party does not comply with the demand. If there is no arbitration agreement between the parties but arbitration seems a preferred method for resolving the dispute, counsel should consider negotiating a post-dispute arbitration agreement. Even if the parties are bound by a pre-dispute arbitration agreement, they may wish to change it or refine it.



Strategic Point--All Parties:

If the parties are going to create a post dispute arbitration agreement, remember that it is a negotiation. Discuss with your client what is most important. Then you can fight for those characteristics in the agreement, allowing the other party some of the attributes they feel are important.

Legal Topics:

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

Civil ProcedureAlternative Dispute ResolutionGeneral OverviewCivil ProcedureAlternative Dispute ResolutionArbitrationsFederal Arbitration ActOrders to Compel ArbitrationCivil ProcedureAlternative Dispute ResolutionValidity of ADR MethodsContracts LawContract Conditions & ProvisionsArbitration Clauses



149 of 175 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 5 Determining Whether to Arbitrate or Litigate
IV. SUBMITTING TO OR COMPELLING ARBITRATION

1-5 MB Practice Guide: CA Contract Litigation 5.17

5.17 Demanding Arbitration.

5.17[1] Aggrieved Party Must Demand Arbitration. The first step in enforcing an agreement to arbitrate is to demand arbitration under the agreement [see CCP § 1281.2; *Charles J. Rounds Co. v. Joint Council of Teamsters* (1971) 4 C3d 888, 892-894 (failure of other party to arbitrate must be alleged in petition to compel arbitration)].

**Cross Reference:**

Form for demand for arbitration, see 5.32.

5.17[2] Demand Usually Is Made by Letter. A demand for arbitration usually is submitted in the form of a letter. The demand should identify the underlying contract and describe the dispute. The demand may include nomination of persons to serve as neutral arbitrator, may name a party arbitrator, or if the contract is silent on the procedure for selecting the arbitrator(s), may suggest a procedure for selecting the arbitrator(s) [see CCP § 1281.6].

If the arbitration agreement calls for arbitration by a specific arbitration service provider, such as the American Arbitration Association, the demand for arbitration should comply with that service provider's form and requirements and any arbitration rules that may have been adopted by the parties.

Example:

The American Arbitration Association's (AAA) demand forms require the demand to contain a statement of the matter in dispute, the names and addresses of all parties, the amount of money involved, if any, the remedy sought, and the hearing locale requested. AAA has a variety of submission agreements to choose from, depending on subject matter and size of case, and desired tribunal, among other factors. In addition, the form agreement can be varied by the parties if mutually desired. Two copies of the demand must be submitted to the regional office.

**Warning:**

If the procedure identified in the contract has failed and the other party does not consent to the proposed method, arbitration cannot be ordered. For example, if a party is no longer a member of the organization that was to conduct the arbitration and therefore is not entitled to use that organization's arbitration services absent consent, and consent is not forthcoming, a court will not order arbitration [*Provencio v.*

WMA Sec., Inc. (2005) 125 CA4th 1028, 1032-1033 (defendant no longer member of NASD; plaintiff would not consent to arbitration before NASD)].

The demand should be sent by certified mail to provide a record of signature and delivery. Copies of the demand should be mailed to any arbitration association or arbitrators selected under the contract.

5.17[3] Underlying Contract Determines Timing of Demand. A contract may require a party to demand arbitration within a certain time. Failure to make a demand for arbitration within the time required by the contract may constitute a waiver of the right to arbitrate [see *Spear v. California State Automobile Ass'n* (1992) 2 C4th 1035, 1043, 9 CR2d 381, 831 P2d 821]. If the arbitration agreement does not specify a time within which arbitration must be demanded, a reasonable time is allowed [*Sawday v. Vista Irrigation Dist.* (1966) 64 C2d 833, 836, 52 CR 1, 415 P2d 816]. What constitutes a reasonable time is a question of fact depending on the situation of the parties, the nature of the transaction, and the facts of the particular case [see, e.g., *Spear v. California State Automobile Ass'n* (1992) 2 C4th 1035, 1043-1044, 9 CR2d 381, 831 P2d 821].



Strategic Point--Commencing Civil Action Tolls Time for Making Arbitration Demand.

Commencing a civil action within the time required to demand arbitration tolls that deadline from the date the civil action is commenced until 30 days after a final determination by the court that the controversy must be arbitrated, or 30 days after the final termination of the civil action, whichever occurs first [CCP § 1281.12].

5.17[4] Arbitration Agreements Generally Are Not Self-Executing. Agreements to arbitrate are not usually self-executing. An agreement is self-executing if it specifically provides that in the event there is a dispute and either party refuses to arbitrate, after demand, the other party may unilaterally select an arbitrator and proceed with the arbitration. It is not necessary for the party seeking arbitration to obtain a court order to arbitrate [*Brink v. Allegro Builders, Inc.* (1962) 58 C2d 577, 579-580, 25 CR 556, 375 P2d 436]. A party to a self-executing agreement who fails to select an arbitrator is still entitled to notice of the arbitration hearing and an opportunity to be heard [see CCP § 1282.2(a), (d), (e); *Smith v. Campbell & Facciolla, Inc.* (1962) 202 CA2d 134, 135-136, 20 CR 606 (notice of arbitration is required by the due process clause of the US Const, art XIV)].

If arbitration proceeds under a self-executing agreement without a court order to arbitrate, the party who did not make the demand is required to participate in the arbitration and raise its objections in a petition to vacate the award under CCP § 1286.2 or to oppose the petition to confirm the award [*National Marble Co. of Cal., Inc. v. Bricklayers & Allied Craftsmen* (1986) 184 CA3d 1057, 1064].

Legal Topics:

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

Civil ProcedureAlternative Dispute ResolutionArbitrationsFederal Arbitration ActOrders to Compel ArbitrationCivil ProcedureAlternative Dispute ResolutionValidity of ADR Methods



150 of 175 DOCUMENTS

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Chapter 5 Determining Whether to Arbitrate or Litigate
IV. SUBMITTING TO OR COMPELLING ARBITRATION

1-5 MB Practice Guide: CA Contract Litigation 5.18

5.18 Agreeing to Arbitrate.

5.18[1] Parties May Enter Into Pre- or Post-Dispute Arbitration Agreement. Parties may agree to submit an existing or future controversy to arbitration [CCP § 1281; *Platt Pac., Inc. v. Andelson* (1993) 6 C4th 307, 313-314, 24 CR2d 597, 862 P2d 158]. A pre-dispute arbitration agreement usually is contained in the underlying or "primary" contract between the parties. It may or may not be extremely detailed with respect to procedures and rules governing the arbitration. A post-dispute arbitration agreement may be the only agreement addressing the procedures for arbitration of the dispute, or it may add specificity to a pre-dispute agreement.

Distinguish--Contractual Waiver of Right to Jury Trial Is Invalid:

A pre-dispute agreement to adjudicate disputes in a court trial and not by jury trial is unenforceable because it violates CC § 631, which specifies the six means by which parties to a civil lawsuit may waive their right to have their disputes adjudicated in a jury trial rather than in a court trial [*Grafton Partners L.P. v. Superior Court* (2005) 36 C4th 944].

5.18[2] Post-Dispute Arbitration Agreement.

5.18[2][a] Post-Dispute Arbitration Agreements Must Be in Writing. An agreement to arbitrate must be in writing [CCP § 1281]. A written agreement includes a written agreement that has been extended or renewed by an oral or implied agreement [CCP § 1280(f)].

5.18[2][b] If Parties Are in Litigation, Post-Dispute Arbitration Agreement Must Be by Stipulation. If a matter is in litigation when the parties decide to submit it to arbitration, their agreement must be in the form of a stipulation [Cal Rules Ct, Rule 3.726]. The clerk provides the plaintiff with a form stipulation to ADR process as part of an ADR information package when the complaint is filed, which the plaintiff must serve with the complaint [Cal Rules Ct, Rule 3.221(a)].

Cross-complainants also must serve copies of the ADR information package on any new parties to the action along with the cross-complaint [Cal Rules Ct, Rule 3.221(c)]. If the parties agree to use an ADR process, they must complete the form stipulation jointly and file it with the court [Cal Rules Ct, Rule 3.726].



Strategic Point--Both Parties:

If the parties agree to use a specific arbitration service provider, such as the American Arbitration Association, that organization will likely have its own form of submission agreement.

5.18[2][c] Post-Dispute Arbitration Agreement May Include Detailed Provisions Governing Arbitration.

Among the matter the parties may wish their arbitration agreement to include are:

- The existence and particulars of the dispute.
- Identification of issues that are and are not to be arbitrated, as well as list of any facts on which the parties agree.
- Waiver of the right to a jury trial.
- Agreement on specific terms and conditions of the arbitration, such as discovery, and dates by which discovery must be compelled.
- Specification of whether the Evidence Code will apply.
- Specification of whether arbitration rules and procedures of a specific organization or arbitration service will control.
- Identification of the single neutral arbitrator, and the method by which arbitrator(s) will be selected.
- Provision of a time within which the arbitration must commence and terminate.
- Time(s) and place(s) for the hearings, or location(s), or authority for the arbitrator(s) to set the times and places for all hearings, and specification of any notice requirements desired.
- Any limitation on the amount of time (measured from close of hearing or post-hearing briefing) the panel has to render its decision.
- The form of decision.
- Addresses for notices to be given.
- Specification of any limit on the arbitrator's power.
- Requirement that the award to be made by a certain date.
- Provision of a minimum and maximum amount of the award, and state whether those are to be disclosed to the arbitrator.
- If the parties have an ongoing contractual relationship, provision that the parties' further dealings under the contract will be conducted in accordance with the interpretation of the agreement made by the arbitrator.
- Provision for the parties to bear the arbitrator's compensation and expenses of arbitration equally.

- Provision for the prevailing party to recover costs or attorney's fees.
- Provision for joinder of necessary parties.



Warning--Be Specific in Allocating Costs and Expenses:

The agreement should be explicit as to what arbitration expenses are to be borne equally by the parties and which must be borne by the party incurring them. Unless the agreement expressly provides, each party pays its pro rata share of the expenses and fees of the neutral arbitrator together with the expenses of the arbitration incurred or approved by the arbitrator. Examples of common expenses are subpoenas, witness fees, transcripts and cost of a hearing room. Costs are not recoverable in contractual arbitrations unless the parties so agree [CCP § 1284.2].



Strategic Points--All Parties:

- Remember that the arbitration agreement is a negotiation. Plan ahead for the provisions you feel are most important and fight for those, leaving room to "give" on those provisions which are less important to your client.
- Arbitrators are costly. It is more economical for the parties to dispose of by agreement as many of the administrative details as possible. Consider also the expenses of the hearing room.
- Consider having the arbitration agreement signed by the parties rather than, or as well as, by their attorneys, to avoid the argument that a party did not consent to arbitration [see, e.g., *Toal v. Tardif* (2009) 178 CA4th 1208, 1221, 101 CR3d 97 (a client is bound by an arbitration agreement signed by his or her counsel only if the client consented to or ratified the agreement); *CPI Builders, Inc. v. Impco Techs., Inc.* (2001) 94 CA4th 1167, 1172-1174, 114 CR2d 851 (party claimed that it withdrew its consent to its attorney to enter into binding arbitration)].



Cross References:

Discussion of joinder of necessary parties, see 5.27.

Form for arbitration agreement, see California Forms of Pleading and Practice, Ch. 32, Contractual Arbitration: Agreements and Compelling Arbitration (Matthew Bender).

Legal Topics:

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

Civil Procedure Alternative Dispute Resolution General Overview Contracts Law Contract Conditions & Provisions Arbitration Clauses



151 of 175 DOCUMENTS

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Chapter 5 Determining Whether to Arbitrate or Litigate
IV. SUBMITTING TO OR COMPELLING ARBITRATION

1-5 MB Practice Guide: CA Contract Litigation 5.19

5.19 Arbitration Agreement May Be Enforced by a Nonsignatory.

5.19[1] Arbitration Agreement May Be Enforced by an Intended Third-Party Beneficiary. An arbitration agreement may be enforced by an intended non-party beneficiary. The third party has the burden of proving that the contracting parties intended to benefit that third party. It is not enough that a literal interpretation of the contract would result in a benefit to the third party [*City of Hope v. Bryan Cave, L.L.P.* (2002) 102 CA4th 1356, 1369-1370, 126 CR2d 283 (general release held insufficient to allow third party to demand arbitration)]. The determination of the third party's status usually is made by the court, not the arbitrator [*Smith v. Microskills San Diego L.P.* (2007) 153 CA4th 892, 900, 63 CR3d 608 ; *Valley Casework, Inc. v. Comfort Constr., Inc.* (1999) 76 CA4th 1013, 1023-1024, 90 CR2d 779].

5.19[2] Arbitration Agreement May Be Enforced by a Nonsignatory Based on Equitable Estoppel. Principles of equitable estoppel may permit a nonsignatory defendant to compel a signatory plaintiff to arbitrate its claims when the plaintiff's claims against the nonsignatory are intimately founded in and intertwined with the obligations of the contract containing the arbitration clause [*Nguyen v. Tran* (2007) 157 CA4th 1032, 1034, 68 CR3d 906 (nonsignatory buyers' agents could compel signatory buyers to arbitrate, but could not compel arbitration against listing brokers, who did not sign arbitration agreement and had no preexisting confidential or contractual relationship with buyers' agents)].

Examples--Arbitration Agreement Enforced:

- Plaintiff employee was equitably required to arbitrate his causes of action against a nonsignatory to his employment agreement, which contained an arbitration clause, because plaintiff's claims relied on the employment agreement between plaintiff and a codefendant [*Boucher v. Alliance Title Co., Inc.* (2005) 127 CA4th 262, 272, 25 CR3d 440] .
- Claims against nonsignatory defendant, who agreed to submit to arbitration, arose out of the settlement agreement and were essentially the same as those against signatory defendants [*Evans v. Centerstone Dev. Co.* (2005) 134 CA4th 151, 165, 35 CR3d 745] .
- A nonsignatory who is sued as a corporate signatory's alter ego may compel arbitration [*Rowe v. Exline* (2007) 153 CA4th 1276, 1285, 63 CR3d 787] .

Examples--Arbitration Agreement Not Enforced:

■ A vocational school had no right to compel a student to arbitrate claims against the school based on an arbitration agreement in a student loan agreement, to which the school was a nonsignatory [*Smith v. Microskills San Diego L.P.* (2007) 153 CA4th 892, 899-900, 63 CR3d 608] .

■ A talent agency could not bind a deceased actor's heir to the actor's agreement to arbitrate disputes with the agency [*Matthau v. Superior Court* (2007) 151 CA4th 593, 598-600, 60 CR3d 93] .

■ First group of insurers could not compel arbitration against a second group of insurers based on an arbitration agreement between the insured and the first group of insurers, to which the insurers in the second group were nonsignatories [*Crowley Maritime Corp. v. Boston Old Colony Ins. Co.* (2008) 158 CA4th 1061, 1072, 70 CR3d 605] .

■ Nonsignatory accountants and lawyers could not compel plaintiff investors to arbitrate their claims against them because the contractual obligations in the operating agreements containing an arbitration clause were unrelated to plaintiffs' claims against the accountants and lawyers [*Goldman v. KPMG, LLP* (2009) 173 CA4th 209, 213-214, 92 CR3d 534] .

■ An insurance company that issued credit insurance to cover the amount of a loan taken out by its policyholder could not compel the policyholder's widow to arbitrate her claims against it, because her claim that the insurance company breached the insurance policy was not intertwined with the loan agreement containing the arbitration provision [*Mundi v. Union Sec. Life Ins. Co.* (9th Cir 2009) 555 F3d 1042, 1047] .

The same rules of equitable estoppel apply to arbitration agreements governed by the Federal Arbitration Act [see *Turtle Ridge Media Group, Inc. v. Pacific Bell Directory* (2006) 140 CA4th 828, 835, 44 CR3d 817 (defendant, whose contract with a third party was incorporated into the third party's contract with the plaintiff, could enforce the arbitration provision with the third party against the plaintiff, even though the plaintiff had no direct contractual relationship with the defendant)].

In addition, equity may require joinder of nonsignatories to the arbitration agreement [see *Metalclad Corp. v. Ventana Envtl. Organizational P'ship* (2003) 109 CA4th 1705, 1713-1719, 1 CR3d 328 (parent corporation that was to fund acquisition); *Norcal Mut. Ins. Co. v. Newton* (2000) 84 CA4th 64, 73-78, 100 CR2d 683 (based on acceptance of defense under malpractice policy); see also *RN Solution, Inc. v. Catholic Healthcare West* (2008) 165 CA4th 1511, 1521, 81 CR3d 892 (plaintiff signed arbitration agreement only in her capacity as defendant's president and CEO); but see *Suh v. Superior Court* (2010) 181 CA4th 1504, 1514, 105 CR3d 585 (shareholders of a corporation could not be compelled to arbitrate based on arbitration agreement entered into by corporation)].

**Cross References:**

Detailed discussion of enforcement of arbitration clause by and against nonsignatories, see Ch. 19, Seeking or Opposing Recovery As Third Party Beneficiary of Contract.

Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, Ch. 6, Determining Forum.

California Forms of Pleading and Practice, Ch. 32, Contractual Arbitration: Agreements and Compelling Arbitration (Matthew Bender).

Legal Topics:

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

Civil ProcedureAlternative Dispute ResolutionArbitrationsFederal Arbitration ActOrders to Compel ArbitrationCivil
ProcedureAlternative Dispute ResolutionValidity of ADR MethodsContracts LawContract Conditions &
ProvisionsArbitration Clauses



152 of 175 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 5 Determining Whether to Arbitrate or Litigate
IV. SUBMITTING TO OR COMPELLING ARBITRATION

*1-5 MB Practice Guide: CA Contract Litigation 5.20***5.20 Petitioning to Compel Arbitration.****5.20[1] Contents and Allegations of Petition.**

5.20[1][a] Plaintiff or Defendant May Petition to Compel Arbitration. The claimant or plaintiff may use a petition to obtain a court order compelling arbitration [*see CCP §§ 1281.2, 1290*].

A defendant served with a complaint involving matters required to be arbitrated in accordance with an arbitration agreement may file a petition to compel arbitration in lieu of an answer to the complaint [*see CCP § 1281.1, 1281.2*].

**Timing:**

If the petition is denied, the defendant has 15 days from denial to plead to the complaint [*CCP § 1281.7*].

Consider:

Proceedings to compel arbitration are given preference over all other civil actions or proceedings, except older matters of the same character and matters to which special precedence may be given by law [*CCP § 1291.2*]. Because a petition to compel arbitration is heard as a motion, the facts ordinarily are proven by affidavit or declaration and documentary evidence, with oral testimony taken only in the court's discretion [*Rosenthal v. Great W. Fin. Sec. Corp.* (1996) 14 C4th 394, 413-414, 58 CR2d 875, 926 P2d 1061].

**Strategic Point--Defendant:**

When the petition to compel arbitration is used by a defendant in lieu of an answer, the prayer of the petition should include a request that the action or proceeding be stayed during the pendency of the arbitration in accordance with *CCP § 1281.4*, and the caption should show the status of the parties in both roles, for example, "Defendant and Petitioner."

**Cross Reference:**

Form for petition to compel arbitration, see 5.33.

5.20[1][b] Specific Allegations Are Required to Obtain Order Compelling Arbitration. A petition to compel arbitration must allege the following [CCP § 1281.2]:

- An agreement to arbitrate;
- A controversy within the scope of that agreement; and
- Respondent's refusal to arbitrate after demand.

The petition can allege the provisions of the written agreement and the paragraph that provides for arbitration verbatim or attach a copy of the agreement to the petition and incorporate it by reference [see *Cal Rules Ct, Rule 3.1330*]. The burden then shifts to the party resisting arbitration to prove the invalidity of the alleged agreement [*Condee v. Longwood Mgmt. Corp. (2001) 88 CA4th 215, 219, 105 CR2d 597*].

A trial court must deny a petition to compel arbitration if the moving party fails to allege the existence of a written agreement containing an arbitration clause [*Brodke v. Alphatec Spine Inc. (2008) 160 CA4th 1569, 1571, 73 CR3d 554* ; see also *Adajar v. RWR Homes, Inc. (2008) 160 CA4th 563, 566, 73 CR3d 17* (motion to compel arbitration denied because moving party failed to submit the arbitration agreement that was allegedly incorporated by reference in home buyers' applications for warranty protection); *Mitri v. Arnel Management Co. (2007) 157 CA4th 1164, 1171, 69 CR3d 223* (motion to compel arbitration denied when defendant employer submitted employee handbook stating a policy in favor of arbitration, but failed to produce evidence of an arbitration agreement signed by plaintiffs)].

If the petition to compel arbitration is used to commence a proceeding, it also must contain an allegation regarding venue [see CCP § 1292; see also 5.20[2]].

Strategic Point--Plaintiff:



If the agreement or the incorporated arbitration rules provide for joinder of necessary third parties, that fact should also be alleged in order to anticipate opposition on the ground that a third party who is not a party to the arbitration agreement is necessary to the resolution of the matter [*Zakarian v. Bekov (2002) 98 CA4th 316, 325-327, 119 CR2d 623*].

Strategic Point--All Parties:



Review the arbitration agreement to determine whether it includes the signatories' consent to joinder of any necessary third parties in the arbitration.



Cross Reference:

Discussion of jurisdiction and venue, see 5.20[2].

5.20[2] Superior Court Has Jurisdiction; Venue Is Determined by Statute. Superior courts have jurisdiction over petitions to compel arbitration, whether the matter is a limited or unlimited civil case [see *Cal Const, art VI, § 10*].

Venue for filing a petition to compel arbitration, other than in a pending action, is the court having jurisdiction in any of the following [CCP § 1292]:

- The county where the agreement is to be performed or was made.

- If the agreement does not specify the county where it is to be performed and was not made in any county in California, the county where any party resides or has a place of business.
- In cases not covered by the two previous options, any county in California.

If an action or proceeding is already pending regarding the controversy to be arbitrated, a petition to compel arbitration must be filed in that action or proceeding [CCP § 1292.4].

Judge's Perspective:

The arbitrator, and not the court, will decide whether a particular dispute is arbitrable if the parties have "clearly and unmistakably" so provided in their contract [see *Dream Theater, Inc. v. Dream Theater* (2004) 124 CA4th 547, 552, 21 CR3d 322]. In case of any ambiguity, the matter of arbitrability will be decided by the court [*Dream Theater, Inc. v. Dream Theater* (2004) 124 CA4th 547, 552-553, 21 CR3d 322].

Exception:

Even if the contract clearly and unmistakably provides that the arbitrator should determine arbitrability, if the court finds that provision to be itself unconscionable, then the court rather than the arbitrator will decide whether the arbitration agreement is unconscionable [Murphy v. Check ' N Go of California, Inc. (2007) 156 CA4th 138, 145, 67 CR3d 120 ; see *Ontiveros v. DHL Express (USA), Inc.* (2008) 164 CA4th 494, 505, 79 CR3d 471 (expressing concern about potential for inequitable use of such provisions in areas, such as employment, in which one party tends to be a "repeat player," thereby giving the arbitrator a self-interest in deciding that a dispute is arbitrable)].



Strategic Points--All Parties:

In case of ambiguity on the issue of arbitrability, extrinsic evidence is admissible to aid in interpreting the parties' intent [*Hartnell Community College Dist. v. Superior Court* (2005) 124 CA4th 1443, 1451, 22 CR3d 410].



Cross Reference:

Discussion of whether court or arbitrator determines arbitrability, see 5.26.

5.20[3] Petition to Compel Arbitration Must Be Filed Within Four Years After Refusal to Arbitrate. A

petition to compel arbitration must be filed within four years after the respondent's refusal to arbitrate [*Spear v. California State Automobile Ass'n* (1992) 2 C4th 1035, 1040-1043, 9 CR2d 381, 831 P2d 821 ; see CCP § 337 (four-year limitation applicable to breach of written contract)].



Warning--Shortened Limitation Period:

The arbitration agreement or the rules of arbitration specified in the arbitration agreement may provide for a modified limitation period, which will govern in place of four-year limitation of CCP § 337 [see *Boys Club of San Fernando Valley, Inc. v. Fidelity & Deposit Co.* (1992) 6 CA4th 1266, 1276 n4, 8 CR2d 587 ; *Hamaker v. Williams* (1937) 22 CA2d 256, 259, 70 P2d 973]. If the agreement does not provide a time for the parties to seek arbitration, a court may consider whether the petitioning party has sought arbitration within a reasonable time under the circumstances, which may or may not be as long as the four-year limitation period [see *Meyer v. Carnow* (1986) 185 CA3d 169, 175, 229 CR 617]. A shortened limitation period may be so short that it would be unconscionable to enforce it [see *Circuit City Stores, Inc. v. Mantor* (9th Cir 2003) 335 F3d 1101, 1107 ; *Ingle v. Circuit City Stores, Inc.* (9th Cir 2003) 328 F3d 1165, 1175 (one-year limitation period); *Davis v. O'Melveny & Myers* (9th Cir 2007)

485 F3d 1066, 1076-1078 (one year); *Martinez v. Master Prot. Corp.* (2004) 118 CA4th 107, 117, 12 CR3d 663 (6 months)].

Distinguish:

A court may not deny a petition to compel arbitration on the ground the statute of limitations has run on the claims the parties agreed to arbitrate. That is an affirmative defense to be decided by the arbitrator [*Wagner Construction Co. v. Pacific Mechanical Corp.* (2007) 41 C4th 19, 25-26, 58 CR3d 434, 157 P3d 1029] .

5.20[4] Notice of Hearing Must Be Served Not Less Than 10 Days Prior to Hearing. Written notice of the time and place of the hearing on a petition to compel arbitration must be served along with a copy of the petition and any other papers on which the petition is based [see CCP § 1290.4(a)]. Not less than 10 days notice of the date set for the hearing on the petition must be given [CCP § 1290.2; see CCP §§ 1003-1020 (motions and notices)], unless the petition is served outside California, in which case the petition may not be heard until at least 30 days after the date of service [CCP § 1290.4(b)(2)].



Cross References:

Form for notice of hearing on petition to compel arbitration, see 5.34.

Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, Ch. 26, Law and Motion Procedure.

California Forms of Pleading and Practice, Ch. 372, Motions and Orders (Matthew Bender).

5.20[5] Service of Petition to Enforce Arbitration Agreement.

5.20[5][a] Parties Must Be Served More Than 10 Days Prior to Hearing. The petitioner must serve all other parties with sufficient time to give the other parties not less than 10 days notice of the date set for the hearing on the petition [CCP §§ 1290.2, 1209.4]. If the arbitration agreement specifies the manner of service, use that method [CCP § 1290.4(a)].

5.20[5][b] Persons Who Have Not Previously Appeared Must Be Served Pursuant to Statute. Service on persons who have not previously appeared in the proceeding, or who have not previously been served in accordance with CCP § 1290.4(b), must be made in the manner provided by law for the service of summons in an action [CCP § 1290.4(b)(1); see CCP §§ 413.10-417.40].



Cross Reference:

Rules governing service of summons, see Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, Ch. 8, Service of Summons.

5.20[5][c] Service on Persons Outside of California Must Meet Statutory Requirements. Service outside California must be made by mailing a copy of the petition, notice, and other papers on which the petition is based by registered or certified mail, although personal service is the equivalent of this service by mail. An affidavit of proof of service by mail must show the mailing together with the return receipt of the United States Post Office bearing the signature of the person on whom service was made [CCP § 1290.4(b)(2)].



Timing:

When service is made, the petition may not be heard until at least 30 days after the date of service [CCP § 1290.4(b)(2)].

5.20[5][d] Service to Others Is Governed by Statute. If the arbitration agreement does not provide the manner in which service is to be made and the person to be served has previously appeared in the proceeding or has previously been served in accordance with *CCP* § 1290.4(b), service must be made in the manner provided by *CCP* §§ 1010-1020 governing service of papers other than summons [*CCP* § 1290.4(c)].



Cross Reference:

Rules governing service of papers, see Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, Ch. 27, Service of Papers.

5.20[6] Court's Options After Hearing of Petition to Compel Arbitration.

5.20[6][a] Court May Order Parties to Arbitrate Entire Controversy. If the court determines that an agreement to arbitrate the controversy exists and that the dispute falls within the scope of that agreement, the court must order the parties to arbitrate the controversy, unless it determines that one of the following is the case:

- The petitioner waived the right [*CCP* § 1281.2(a)];
- Grounds exist for revocation of the agreement [*CCP* § 1281.2(b)]; or
- A party to the arbitration agreement is also a party to a pending court action or special proceeding with a third party, arising out of the same transaction or series of related transactions, and there is a possibility of conflicting rulings on a common issue of law or fact [*CCP* § 1281.2(c)].

If the court determines that a written agreement to arbitrate a controversy exists, it may not deny a petition to compel arbitration on the ground that the petitioner's contentions lack substantive merit [*CCP* § 1281.2(c); *Wagner Construction Co. v. Pacific Mechanical Corp.* (2007) 41 C4th 19, 26, 58 CR3d 434, 157 P3d 1029 (court erred when it denied petition to compel arbitration on ground that statute of limitations had run on claims that parties agreed to arbitrate)].

In a matter governed by the Federal Arbitration Act, it is error for the court to deny arbitration without first determining two "gateway" issues [*Howsam v. Dean Witter Reynolds, Inc.* (2002) 537 US 79, 83-85, 123 S Ct 588, 154 L Ed2d 491]:

- Whether the parties are bound by a valid and enforceable arbitration agreement; and
- Whether that binding agreement applies to the particular controversy.

Distinguish:

Under the Federal Arbitration Act, a challenge to the arbitration clause itself must be decided by the court [*Winter v. Window Fashions Professionals, Inc.* (2008) 166 CA4th 943, 948, 83 CR3d 89] . However, a challenge to the validity of the contract as a whole, and not specifically to the arbitration clause, must be decided by the arbitrator rather than the court [*Buckeye Check Cashing, Inc. v. Cardegna* (2006) 546 US 440, 449, 126 S Ct 1204, 163 L Ed2d 1038 ; *Higgins v. Superior Court* (2006) 140 CA4th 1238, 1249, 45 CR3d 293 ; but compare *Hotels Nevada LLC v. Bridge Banc, LLC* (2005) 130 CA4th 1431, 1437, 30 CR3d 903 (under contract governed by FAA and California law, it was proper for court to decide illegality of the contract after the issue had first been presented to arbitrator, who acknowledged his authority to determine that issue, but ceded it to court)].

Exception:

CCP § 1281.2(c) expressly exempts agreements to arbitrate disputes regarding a health care provider's

professional negligence in accordance with *CCP § 1295*.

Cross References:

Discussion of waiver of right to arbitration, see 5.30.

Discussion of revocation of arbitration agreement, see 5.25.

Discussion of court's options with possible conflicting rulings, see 5.20[6][c].

5.20[6][b] Court May Sever Issue or Stay Action or Arbitration on Severed Issue. If the court determines that there are other issues between the petitioner and respondent, not subject to arbitration, which are being litigated in another pending action or special proceeding between those parties, and the resolution in that action or proceeding may make the arbitration unnecessary, the court may delay its order to arbitrate until a determination of those other issues or until any earlier time the court specifies [*CCP § 1281.2*]. If arbitration could make trial of the severable issues unnecessary, the court may order arbitration and stay action on the severable issues or remedies pending the completion of the arbitration [see *Coast Plaza Doctors Hosp. v. Blue Cross of Cal. (2000) 83 CA4th 677, 691-693, 99 CR2d 809*].

Cross References:

Discussion of staying case pending arbitration results, see 5.21.

Form for notice of motion to stay pending action until arbitration completed, see 5.37.

Form for order staying proceeding pending action, see 5.38.

5.20[6][c] Court May Act to Avoid Inconsistent Rulings in Different Forums. If a party to an arbitration agreement is also a party to a pending court action or special proceeding with a third party, arising out of the same transaction or series of related transactions, and there is a possibility of conflicting rulings on a common issue of law or fact, the court may do any of the following [*CCP § 1281.2(c)*]:

- Refuse to enforce the arbitration agreement and order intervention or joinder of all parties in a single action or special proceeding.
- Order intervention or joinder as to all or only certain issues.
- Order arbitration among the parties who have agreed to arbitration and stay the court action or special proceeding pending the outcome of the arbitration proceeding.
- Stay arbitration pending the outcome of the court action or special proceeding.

Example--Arbitration Stayed:

A homeowner sued home improvement contractors and the lender that financed the improvements. The only arbitration clause was in the loan application, to which the contractors and their agents were not parties. The trial court stayed arbitration under *CCP § 1281.2(c)* [*Henry v. Alcove Inv., Inc. (1991) 233 CA3d 94, 101-102, 284 CR 255*].

Examples--Arbitration Denied:

- In an action brought by a subcontractor against a general contractor, property owner, and building inspectors, the trial court properly exercised its discretion in refusing to enforce an arbitration agreement

in the construction contract to which the inspectors were not parties [*Best Interiors, Inc. v. Millie & Severson, Inc.* (2008) 161 CA4th 1320, 1330, 75 CR3d 1] .

■ In a case brought by the wife and adult daughters of a deceased nursing home patient alleging wrongful death, elder abuse, and related causes of action against a nursing home, a hospital, and several doctors, the trial court properly exercised its discretion in refusing to enforce the patient's arbitration agreement with the nursing home, because the hospital and the doctors were not parties to the arbitration agreement, and because plaintiffs alleged several causes of action in their individual capacities as third parties not bound by the arbitration agreement [*Birl v. Heritage Care, LLC* (2009) 172 CA4th 1313, 1318-1321, 91 CR3d 777] .

Distinguish:

If the defendants who are not signatories to the arbitration agreement have an equitable right to compel a signatory plaintiff to arbitrate its claims, then the defendants are not "third parties" and CCP § 1281.2(c) does not apply [see *Rowe v. Exline* (2007) 153 CA4th 1276, 1290, 63 CR3d 787 ; see also *RN Solution, Inc. v. Catholic Healthcare West* (2008) 165 CA4th 1511, 1521, 81 CR3d 892 (although plaintiff signed arbitration agreement only in her capacity as defendant's president and CEO, she benefited financially and professionally from the contract and was bound by the arbitration agreement both as an agent-employee of defendant and as a third party beneficiary of the contract; therefore, she was not a third party to arbitration agreement); *Segal v. Silberstein* (2007) 156 CA4th 627, 636, 67 CR3d 426 (trial court erred in denying petition to compel arbitration on grounds that parties were involved in pending court action, because court action involved separate issues beyond terms of arbitration provision)].



Cross Reference:

Discussion of staying case pending arbitration results, see 5.21.

5.20[6][d] Court May Consolidate Separate Arbitration Proceedings. A party to an arbitration agreement may petition the court to consolidate separate arbitration proceedings under the following circumstances [CCP § 1281.3]:

- Separate arbitration agreements or proceedings exist between the same parties, or one party is a party to a separate arbitration agreement or proceeding with a third party.
- The disputes arise from the same transactions or series of related transactions.
- There is a common issue or issues of law or fact creating the possibility of conflicting rulings by more than one arbitrator or panel of arbitrators.

If the arbitration agreements name separate arbitrators, panels, or tribunals, in the absence of an agreed method of selection by all parties to the consolidated arbitration, the court must appoint an arbitrator according to the procedures set forth in CCP § 1281.6 [CCP § 1281.3]. If the arbitration agreements contain inconsistent provisions, the court must resolve all conflicts and determine the rights and duties of the various parties to achieve substantial justice under all the circumstances [CCP § 1281.3].

Examples:

- The trial court acted within its discretion under CCP § 1281.3 when it ordered combined arbitration of uninsured motorist claims under *Ins Code* § 11580.2(f) and third-party claims arising from the same

incident subject to judicial arbitration under *CCP § 1141.10 et seq.* [*Gordon v. G.R.O.U.P., Inc.* (1996) 49 CA4th 998, 1001, 56 CR2d 914].

- When one agreement provided for arbitration before a single arbitrator and another provided for arbitration before a three-arbitrator panel, the trial court erred by resolving the conflicting arbitration provisions in favor of a single arbitrator; the right to a three-arbitrator panel was a substantial contractual right [*Parker v. McCaw* (2005) 125 CA4th 1494, 1506].

- When one arbitration agreement permitted group arbitration proceedings and another arbitration agreement did not, and the petitioner made an adequate showing under *CCP § 1281.3* that there were common issues of law and fact, the trial court erred by refusing to strike the ban on group arbitration [*Independent Ass'n of Mailbox Ctr. Owners, Inc. v. Superior Court* (2005) 133 CA4th 396, 410-411].

Exception:

CCP § 1281.3 expressly exempts agreements to arbitrate disputes regarding a health care provider's professional negligence in accordance with *CCP § 1295*.

5.20[7] Order Compelling Arbitration.

5.20[7][a] Order Compelling Arbitration Must Be in Writing. An order compelling arbitration must specify the act directed by the court and be made or entered in writing [*CCP §§ 1003, 1064*]. Because an order compelling arbitration is not appealable, no statement of decision is required [*CCP §§ 1291, 1294*].

The order compelling arbitration generally is prepared by the attorney for the petitioner and presented to the court for signature. Once signed, it is filed and served on the same persons on whom the petition was served unless notice is waived by all parties in open court and entered into the minutes [*CCP § 1019.5*].

5.20[7][b] Order Compelling Arbitration Is Not Immediately Appealable. An order compelling arbitration is not immediately reviewable. Usually one must arbitrate and raise the matter as part of an appeal from a judgment confirming the arbitration award [*CCP §§ 1294, 1294.2*; *Graham v. Scissor-Tail, Inc.* (1981) 28 C3d 807, 811 n1, 171 CR 604, 623 P2d 165 ; *Muao v. Grosvenor Props., Ltd.* (2002) 99 CA4th 1085, 1090-1092, 122 CR2d 131]. On appeal of the judgment confirming an arbitration award, the order compelling arbitration may be reviewed as an order that involves the merits or necessarily affects that judgment [*CCP § 1294.2*]. If the order compelling arbitration dismisses rather than stays any underlying action, that order of dismissal may be appealed and the order compelling arbitration reviewed as part of that appeal [*Muao v. Grosvenor Props., Ltd.* (2002) 99 CA4th 1085, 1093, 122 CR2d 131].

Exception--Immediate Writ:

In rare instances, an order compelling arbitration may be reviewed by writ of mandate or prohibition when the matters ordered arbitrated are clearly beyond the scope of the arbitration agreement and the arbitration process would appear to be unduly time-consuming or expensive [*International Film Investors v. Arbitration Tribunal of Dirs. Guild of Am., Inc.* (1984) 152 CA3d 699, 704, 199 CR 690 (dicta; prohibition found not proper); *Dinong v. Superior Court* (1980) 102 CA3d 845, 848, 162 CR 606 (mandate)].



Cross Reference:

Form for order compelling arbitration, see 5.35.

5.20[8] Order Denying Arbitration Is Appealable and Statement of Decision Is Required. Because an order denying arbitration is appealable, the court must issue a statement of decision pursuant to *CCP § 632* if requested by a party [*CCP § 1291*].

 Cross Reference:

Form for order denying arbitration and dismissing proceeding, see 5.36.

5.20[9] Order Determining Who Decides Arbitrability Is Not Appealable. A ruling on who decides a matter's arbitrability--the arbitrator or the court--is not an appealable final order [*Vivid Video, Inc. v. Playboy Entertainment Group, Inc.* (2007) 147 CA4th 434, 436-437, 54 CR3d 232] .

Legal Topics:

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

Civil ProcedureAlternative Dispute ResolutionArbitrationsFederal Arbitration ActOrders to Compel ArbitrationCivil ProcedureAlternative Dispute ResolutionValidity of ADR Methods



153 of 175 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 5 Determining Whether to Arbitrate or Litigate
IV. SUBMITTING TO OR COMPELLING ARBITRATION

1-5 MB Practice Guide: CA Contract Litigation 5.21

5.21 Court May Stay Action or Proceeding Pending Arbitration.

On a party's motion, a California court must stay an action or proceeding pending before it if a court of competent jurisdiction has ordered arbitration of a controversy that is an issue involved in the case or an application has been made to a court of competent jurisdiction for an order to arbitrate a controversy that is an issue in the case, and the application is undetermined [CCP § 1281.4]. When arbitration has been ordered or an application has been made, the court must stay the action or proceeding until there is arbitration, or until such earlier time as the court specifies. If the issue subject to arbitration is severable, the stay may be with respect to that issue only [CCP § 1281.4]. The party moving to stay an action under CCP § 1281.4 need not be a party to the arbitration agreement [*Rodriguez v. American Techs., Inc.* (2006) 136 CA4th 1110, 1123, 39 CR3d 437] .

**Strategic Point:**

If an action has been filed on the arbitrable issue, it is good practice to apply for a stay of the action at the same time the petition to compel arbitration is filed.

The motion for stay must be made in the court where the action is pending [CCP §§ 1281.4, 1292.8].

Once the stay is granted, the party requesting the stay must immediately serve and file a notice of the stay on Judicial Council Form CM-180 and attach a copy of the order or other document staying the proceedings [CCP § 1281.4; *Cal Rules Ct, Rule 3.650(a)*]. The notice must state whether the stay applies to the entire action and to all parties or only to certain causes of action and parties. The notice must be served on all parties who have appeared in the case [*Cal Rules Ct, Rule 3.650*]. When the stay is vacated, is no longer in effect, or is modified, the party who filed the notice of the stay must immediately serve and file a notice of termination or modification of stay. If that party fails to do so, any other party in the action who has knowledge of the termination or modification of the stay must serve and file a notice of termination or modification of stay [*Cal Rules Ct, Rule 3.650(d)*].

**Warning--Sanctions for Failure to File Notice of Stay:**

Sanctions may be imposed for failure to file and serve the notice of stay [*Cal Rules Ct, Rule 2.30*].

**Cross References:**

Form for notice of motion to stay pending action until arbitration completed, see 5.37.

Form for order staying proceeding pending action, see 5.38.

Legal Topics:

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

Civil ProcedureAlternative Dispute ResolutionArbitrationsGeneral OverviewCivil ProcedureAlternative Dispute
ResolutionArbitrationsFederal Arbitration ActStays Pending Arbitration



154 of 175 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 5 Determining Whether to Arbitrate or Litigate
IV. SUBMITTING TO OR COMPELLING ARBITRATION

1-5 MB Practice Guide: CA Contract Litigation 5.22

5.22 Appeals of Denials to Compel Arbitration and Stays of Arbitration.

5.22[1] Denial of Petition to Compel Arbitration Requires Immediate Appeal. An order denying a petition to compel arbitration is immediately appealable [*CCP* § 1294(a); *Mayhew v. Benninghoff* (1997) 53 CA4th 1365, 1369, 62 CR2d 27]. An immediate appeal must be taken, because subsequent review of an order denying a petition to compel arbitration, on appeal from the final judgment, is precluded by *CCP* § 906 [see *Hobbs v. Bateman Eichler* (1985) 164 CA3d 174, 190-191, 210 CR 387].

On appeal from an order denying a petition to compel arbitration, the court may review the decision on the petition and any intermediate ruling, proceeding, order, or decision that involves the merits or necessarily affects the order or judgment [*CCP* § 1294.2].

When the language of an arbitration provision is not in dispute, the trial court's decision as to arbitrability is subject to de novo review [*Gravillis v. Coldwell Banker Residential Brokerage Co.* (2006) 143 CA4th 761, 771, 49 CR3d 531] .

5.22[2] Order to Stay Arbitration Is Immediately Appealable. An order staying arbitration is immediately appealable [*Sanders v. Kinko's, Inc.* (2002) 99 CA4th 1106, 1109-1110, 121 CR2d 766 ; *Henry v. Alcove Inv., Inc.* (1991) 233 CA3d 94, 99-100, 284 CR 255].

Legal Topics:

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

Civil ProcedureAlternative Dispute ResolutionArbitrationsGeneral OverviewCivil ProcedureAlternative Dispute ResolutionArbitrationsFederal Arbitration ActOrders to Compel ArbitrationCivil ProcedureAlternative Dispute ResolutionArbitrationsFederal Arbitration ActStays Pending ArbitrationCivil ProcedureAppealsAppellate JurisdictionGeneral OverviewCivil ProcedureAppealsReviewabilityGeneral Overview



155 of 175 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 5 Determining Whether to Arbitrate or Litigate
V. OPPOSING ARBITRATION

1-5 MB Practice Guide: CA Contract Litigation 5.23

5.23 CHECKLIST: Opposing Arbitration.

☐ Review arbitration agreement and facts surrounding its formation to determine if any potential defenses are applicable, including the following:

☐ Failure of mutual assent.

Authority:

*CC §§ 1550, 1565, 1567, 1580; CCP § 1281; Lopez v. Charles Schwab & Co. (2004)
118 CA4th 1224, 1230*

Discussion:

See 5.25[4]

☐ Lack of contractual capacity.

Authority:

CC § 1550

Discussion:

See 5.25[5]

☐ Invalid attempt to unilaterally add arbitration clause.

☐ Did agreement authorize unilateral modification?

☐ Was addition of arbitration clause within scope of unilateral modification allowed?

☐ Were all formalities for unilateral modification complied with?

Authority:

Perdue v. Crocker Nat'l Bank (1985) 38 C3d 913, 921-924, 216 CR 345, 702 P2d 503

Discussion:

See 5.25[6]

- ☐ Issue is beyond scope of arbitration agreement.

Authority:

CCP § 1281.2(c); *Engineers & Architects Assn. v. Community Development Dept.* (1994) 30 CA4th 644, 652, 35 CR2d 800

Discussion:

See 5.26

- ☐ Nonsignatory is indispensable party.

Authority:

CCP § 1281.2(c)

Discussion:

See 5.27

- ☐ Fraud.

☐ Determine whether any misrepresentations were made inducing client to enter into contract.

☐ Determine whether any misrepresentations were made as to existence or nature of arbitration provisions.

☐ Determine whether any misrepresentation caused client to execute contract.

☐ Determine whether client relied on misrepresentation and whether misrepresentation was material.

Authority:

Engalla v. Permanente Med. Group, Inc. (1997) 15 C4th 951, 973-975, 64 CR2d 843, 938 P2d 903 ; *Rosenthal v. Great W. Fin. Sec. Corp.* (1996) 14 C4th 394, 419, 58 CR2d 875, 926 P2d 1061 ; *Ericksen, Arbuthnot, McCarthy, Kearney & Walsh, Inc. v. 100 Oak St.* (1983) 35 C3d 312, 323, 197 CR 581, 673 P2d 251 ; *Lynch v. Cruttenden & Co.* (1993) 18 CA4th 802, 807-809, 22 CR2d 636

Discussion:

See 5.28

- ☐ Unconscionability.

- ☐ Determine whether contract was negotiated or offered on a take-it-or-leave-it basis by stronger/drafting party.
- ☐ Determine whether arbitration provision was reasonably to be expected.
- ☐ Determine whether arbitration provision is unduly oppressive to one party.
- ☐ Determine whether provisions for arbitration procedures lack minimum levels of integrity.
- ☐ Determine whether arbitration provisions result in surprise, oppression, or unreasonable allocation of risk to one party.
- ☐ If any of the above apply, determine whether offending term(s) are severable so that remainder of arbitration provision can be enforced.
- ☐ If unwaivable rights are at issue, determine whether arbitration costs are payable by party drafting agreement, or whether consumer may have to bear unaffordable costs.

Authority:

CC § 1670.5; CCP § 1281

Discussion:

See 5.29

☐ Waiver.

- ☐ Determine whether party seeking arbitration has prejudiced client's ability to derive benefits expected from arbitration.
- ☐ Determine whether party seeking arbitration has unreasonably delayed before demanding arbitration.

Authority:

Saint Agnes Med. Ctr. v. PacifiCare of Cal. (2003) 31 C4th 1187, 1200-1205 ; Engalla v. Permanente Med. Group, Inc. (1997) 15 C4th 951, 983-984, 64 CR2d 843, 938 P2d 903

Discussion:

See 5.30

☐ Failure of arbitration agreement in health care service plan to comply with statutory formalities.

Authority:

H&S Code § 1363.1; Robertson v. Health Net of Cal., Inc. (2005) 132 CA4th 1419, 1429 ; Pagarigan v. Superior Court (2002) 102 CA4th 1121, 1134

Discussion:

See 5.31

☐ Prepare response to petition to compel, asserting all contractual or other defenses of client.

☐ Prepare declarations or affidavits establishing defenses.

Authority:

CCP §§ 1281, 1290, 1290.6, 1290.8

Discussion:

See 5.25[1]

☐ Serve and file response on all parties.

Legal Topics:

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

Civil ProcedureAlternative Dispute ResolutionArbitrationsFederal Arbitration ActOrders to Compel ArbitrationCivil ProcedureAlternative Dispute ResolutionValidity of ADR MethodsContracts LawContract Conditions & ProvisionsArbitration Clauses



156 of 175 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 5 Determining Whether to Arbitrate or Litigate
V. OPPOSING ARBITRATION

1-5 MB Practice Guide: CA Contract Litigation 5.24

5.24 Options and Strategy.

Whether counsel intends enforcing an existing arbitration agreement or resisting arbitration under an agreement, it is appropriate to investigate, consider, and evaluate the most common available defenses to enforcement of arbitration agreements. Counsel should bear in mind that public policy strongly favors enforcement of arbitration agreements [*Eriksen, Arbuthnot, McCarthy, Kearney & Walsh, Inc. v. 100 Oak St.* (1983) 35 C3d 312, 323, 197 CR 581, 673 P2d 251]. The burden is squarely on the shoulders of the party who is seeking to vacate the arbitration [*Balandran v. Labor Ready Inc.* (2004) 124 CA4th 1522, 1527].

Judge's Perspective:

A court can invalidate contractual arbitration provisions, just as it can any other provision of the contract, based on contract law [see CCP § 1281 ("a written agreement to submit to arbitration an existing controversy or a controversy thereafter arising is valid, enforceable and irrevocable, save upon such grounds as exist for the revocation of any contract"); see also 9 USC § 2 (Federal Arbitration Act provision holding that contractual arbitration provision is valid "save upon such grounds as exist at law or in equity for the revocation of any contract")]. This means that almost any defense to the validity of a contract generally can also be raised to the application of a contractual arbitration provision. Thus, these strategies are not exhaustive.

**Search California Forms of Pleading and Practice:**

Use *lexis.com* to find a form opposing arbitration:

■ Legal > States Legal--U.S. > California > Search Analysis & CLE Materials > CA Treatises & Analytical Materials > California Forms of Pleading and Practice



Sample Search: To find a complaint to opposing arbitration, try: *heading (forms) AND section (restraining order OR preliminary injunction AND arbitration).*

Legal Topics:

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

Civil Procedure Alternative Dispute Resolution Arbitrations Federal Arbitration Act Orders to Compel Arbitration Civil

ProcedureAlternative Dispute ResolutionValidity of ADR MethodsContracts LawContract Conditions & ProvisionsArbitration Clauses



157 of 175 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 5 Determining Whether to Arbitrate or Litigate
V. OPPOSING ARBITRATION

1-5 MB Practice Guide: CA Contract Litigation 5.25

5.25 Disputing Existence of Arbitration Agreement.

5.25[1] Party Resisting Arbitration Must File Response. A respondent resists arbitration by filing a response. If the respondent fails to file a response, he or she will be deemed to have admitted the allegations of the petition [CCP § 1290]. A response must be served as provided in CCP §§ 1010-1020 [CCP § 1290.8].

**Timing:**

A response must be filed and served within 10 days after service of the petition, unless the petition is served out of state, in which case the response must be served and filed within 30 days after service of the petition. The parties may extend the time for response by a written agreement, or the court, for good cause, may order an extension [CCP §§ 1290.4(b), 1290.6].

**Cross References:**

Discussion and form for demanding or petitioning to compel arbitration, see 5.20[1], 5.32, 5.33.

Form for response to petition to compel arbitration, see Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, Ch. 6, Determining Forum.

Service of Papers, see Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, Ch. 27, Service of Papers.

California Forms of Pleading and Practice, Ch. 32, Contractual Arbitration: Agreements and Compelling Arbitration (Matthew Bender).

5.25[2] Burden of Proof Is on Party Resisting Arbitration. Once the existence of a written arbitration agreement is alleged [see CCP § 1281.2; Cal Rules Ct, Rule 3.1330], the burden shifts to the party resisting arbitration to prove the invalidity of the alleged agreement [Condee v. Longwood Mgmt. Corp. (2001) 88 CA4th 215, 219, 105 CR2d 597].

**Strategic Point--Party Resisting Arbitration:**

Note that California public policy strongly encourages enforcement of arbitration clauses [*Ericksen, Arbuthnot, McCarthy, Kearney & Walsh, Inc. v. 100 Oak St.* (1983) 35 C3d 312, 323, 197 CR 581, 673 P2d 251], so it may be difficult to strike an arbitration clause.

Consider:

An arbitration clause in a contract that has been terminated can still require arbitration of a dispute that arose under the contract while it was in force [see, e.g., *Ajida Techs., Inc. v. Roos Instruments, Inc.* (2001) 87 CA4th 534, 545, 104 CR2d 686].

5.25[3] Existence of Agreement to Arbitrate Is Question of Fact. Whether a contract to arbitrate exists is a question of fact [*Cochran v. Rubens* (1996) 42 CA4th 481, 485, 49 CR2d 672]. Facts relevant to enforcement of the arbitration agreement must be determined in the manner provided by law for the hearing of motions [*Rosenthal v. Great W. Fin. Sec. Corp.* (1996) 14 C4th 394, 413, 58 CR2d 875, 926 P2d 1061]. The court may examine affidavits or declarations, and even oral testimony at its discretion, to interpret the agreement [see *Brookwood v. Bank of Am.* (1996) 45 CA4th 1667, 1670, 53 CR2d 515]. It is error for the trial court to deny a motion to compel arbitration in reliance on allegations in an unverified complaint without holding an evidentiary hearing [*Hotels Nevada v. L.A. Pacific Center, Inc.* (2006) 144 CA4th 754, 762, 50 CR3d 700].

5.25[4] Agreement Not Formed If Court Finds Lack of Mutual Assent. No enforceable contract will be formed if the parties do not freely consent [CC § 1565; see CC § 1567 (fraud, duress, menace, including threat of criminal prosecution); *Bayscene Resident Negotiators v. Bayscene Mobilehome Park* (1993) 15 CA4th 119, 127-129, 18 CR2d 626]. Mutual assent usually rests on an offer and acceptance [CC §§ 1550, 1565, 1580] evidenced by objective manifestations, not the subjective intent of any individual involved [*Lopez v. Charles Schwab & Co.* (2004) 118 CA4th 1224, 1230].



Cross References:

Discussion of capacity of parties, see Ch. 13, Attacking or Defending Existence of Contract--Absence of Essential Element.

Discussion of fraud, menace, duress, see Ch. 17, Attacking or Defending Existence of Contract--Fraud, Duress, Menace, and Undue Influence.

5.25[5] Lack of Contractual Capacity Voids Arbitration Agreement. Like all contracts, an arbitration agreement can be defeated by a party without contractual capacity [CC § 1550], or in the case of an organization or entity, when the requisite formalities are not observed [see, e.g., *Hydrothermal Energy Corp. v. Fort Bidwell Indian Cmty. Council* (1985) 170 CA3d 489, 495-496, 216 CR 59 (*Native American tribal council had not agreed to arbitrate*)].

Example--Lack of Capacity to Contract:

A patient admitted to nursing home while comatose could neither execute the agreement containing the arbitration provision herself nor authorize execution by a relative [*Pagarigan v. Libby Care Center, Inc.* (2002) 99 CA4th 298, 301-303, 120 CR2d 892 ; see *Flores v. Evergreen at San Diego, LLC* (2007) 148 CA4th 581, 587-589, 55 CR3d 823 (husband did not have authority to bind wife to nursing home's arbitration agreement because he had no power of attorney and wife did not indicate that her husband was to act as her agent); *Warfield v. Summerville Senior Living, Inc.* (2007) 158 CA4th 443, 445, 69 CR3d 783 (same)].

Example--Capacity to Contract:

A daughter who was authorized under a durable power of attorney to make all health care decisions for her mother had authority to enter into an arbitration agreement on behalf of her mother requiring arbitration of medical malpractice claims [*Garrison v. Superior Court* (2005) 132 CA4th 253, 265-267 ;

Hogan v. Country Villa Health Services (2007) 148 CA4th 259, 264-268, 55 CR3d 450] .

Cross Reference:

Discussion of capacity of parties, see Ch. 14, Attacking or Defending Existence of Contract--Lack of Capacity.

Jury Instructions:

Contract Formation--Essential Factual Elements, see *Judicial Council of California Civil Jury Instructions, CACI No. 302* (LexisNexis Matthew Bender).

5.25[6] Attempt to Add Arbitration Clause Unilaterally May Be Defeated. If the arbitration clause was added by one party after the contract of which it is a part was executed, the arbitration provision will be valid only if the following occur [*Perdue v. Crocker Nat'l Bank (1985) 38 C3d 913, 922-924, 216 CR 345, 702 P2d 503* ; *Badie v. Bank of Am. (1998) 67 CA4th 779, 797-806, 79 CR2d 273*].

- The primary contract allows one party to change the terms of the agreement unilaterally.
- The arbitration provision is within the scope of the modifications contemplated by the provision allowing unilateral modification.
- All other requirements for unilateral modification, such as written notification, are met. Based on federal Truth in Lending regulations, cases may require that after a unilateral modification of a credit card agreement, the cardholder be given a chance to "opt out" of the arbitration provision [see *Shea v. Household Bank (SB) (2003) 105 CA4th 85, 90, 129 CR2d 387* ; *Szetela v. Discover Bank (2002) 97 CA4th 1094, 1100, 118 CR2d 862*].

Legal Topics:

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

Civil ProcedureAlternative Dispute ResolutionArbitrationsFederal Arbitration ActOrders to Compel ArbitrationCivil ProcedureAlternative Dispute ResolutionValidity of ADR MethodsContracts LawContract Conditions & ProvisionsArbitration Clauses



158 of 175 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 5 Determining Whether to Arbitrate or Litigate
V. OPPOSING ARBITRATION

1-5 MB Practice Guide: CA Contract Litigation 5.26

5.26 Party May Oppose Arbitration If Issue Is Beyond Scope of Agreement.

One can resist arbitration by proving that a particular dispute is not within the scope of the arbitration agreement that is the basis for the petition to compel arbitration. Doubts as to whether an arbitration clause applies to a particular dispute are to be resolved in favor of arbitration [*Engineers & Architects Assn. v. Community Development Dept.* (1994) 30 CA4th 644, 652, 35 CR2d 800], but one may not be required to arbitrate a dispute that he or she has not agreed to arbitrate [*Titolo v. Cano* (2007) 157 CA4th 310, 317, 68 CR3d 616] .

Examples--Issue Beyond Scope of Agreement:

- Plaintiffs successfully opposed a petition to compel arbitration when the arbitration clause covered any disputes arising out of plaintiffs' employment, and plaintiffs' claim involved a pre-employment dispute [*Balandran v. Labor Ready, Inc.* (2004) 124 CA 4th 1522, 1528-1530].
- Medical group's claim that its insurance provider had defamed it by stating that its physicians performed unnecessary procedures was outside the scope of an agreement limiting arbitration to disputes over the payment of claims [*Medical Staff of Doctors Med. Ctr. in Modesto v. Kamil* (2005) 132 CA4th 679, 684-685, 33 CR3d 853].
- Arbitration clause in land development agreement covering controversies involving "the construction and application of any provision of this Agreement" was not broad enough to require arbitration of defamation action brought by one party to agreement against another [*Bono v. David* (2007) 147 CA4th 1055, 1067, 54 CR3d 837] .
- Arbitration clause in contract between plaintiff and a computer software developer stating that "any dispute ... arising from or out of this ... agreement shall be submitted to arbitration" was broad enough to cover tort claims brought by plaintiff against former officers, directors, and employees of the software developer, even though those individuals were not signatories to the agreement and claims were extracontractual [*EFund Capital Partners v. Pless* (2007) 150 CA4th 1311, 1330, 59 CR3d 340] .
- Arbitration clause in recruitment contract between two companies did not cover tort claims arising

from alleged violent physical assault by employee of one company against employee of the other in the context of an intimate domestic relationship between them [*RN Solution, Inc. v. Catholic Healthcare West* (2008) 165 CA4th 1511, 1523, 81 CR3d 892] .

■ Because an arbitration provision was incomplete, the court could not determine whether the dispute was one the parties agreed to arbitrate; therefore, the trial court should have denied the petition for arbitration and refused to confirm the arbitration award [*Villacreses v. Molinari* (2005) 132 CA4th 1223, 1232-1233, 34 CR3d 281].

Generally, the court determines the question of the arbitrability of a particular dispute. However, the parties' agreement may be shown by "clear and unmistakable evidence" to provide for the arbitrator to determine the issue of arbitrability [*First Options of Chicago, Inc. v. Kaplan* (1995) 514 US 938, 944, 115 S Ct 1920, 131 L Ed2d 985 ; *Rodriguez v. American Techs., Inc.* (2006) 136 CA4th 1110, 1123, 39 CR3d 437].



Strategic Point:

Note that California public policy strongly encourages enforcement of arbitration clauses [*Ericksen, Arbuthnot, McCarthy, Kearney & Walsh, Inc. v. 100 Oak St.* (1983) 35 C3d 312, 323, 197 CR 581, 673 P2d 251].



Cross Reference:

Discussion of contract interpretation, see Ch. 21, Asserting a Particular Construction of Contract.

Legal Topics:

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

Civil ProcedureAlternative Dispute ResolutionArbitrationsArbitrabilityCivil ProcedureAlternative Dispute ResolutionArbitrationsFederal Arbitration ActOrders to Compel ArbitrationCivil ProcedureAlternative Dispute ResolutionValidity of ADR MethodsContracts LawContract Conditions & ProvisionsArbitration Clauses



159 of 175 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 5 Determining Whether to Arbitrate or Litigate
V. OPPOSING ARBITRATION

1-5 MB Practice Guide: CA Contract Litigation 5.27

5.27 Party May Oppose Arbitration If Nonsignatory Is Indispensable Party.

If a party to an arbitration agreement is also a party to a pending court action or special proceeding with a third party, arising out of the same transaction or series of related transactions, and there is a possibility of conflicting rulings on a common issue of law or fact, the court may, among other things, refuse to enforce the arbitration agreement and order intervention or joinder of all parties in a single action or special proceeding or stay arbitration pending the outcome of the court action or special proceeding [CCP § 1281.2(c); see *Gravillis v. Coldwell Banker Residential Brokerage Co.* (2006) 143 CA4th 761, 782-784, 49 CR3d 531].

Exceptions:

CCP § 1281.2(c) does not apply to agreements governed by CCP § 1295 relating to health care provider's professional negligence.



Strategic Point--All Parties:

Avoiding arbitration altogether is only one of the court's options in this situation, and it may be the most expensive option. Joinder of all parties in the arbitration may save time and money. When negotiating the arbitration agreement consider providing for, and contain the consent of all parties to, the joinder of necessary third parties [see *Zakarian v. Bekov* (2002) 98 CA4th 316, 325-326, 119 CR2d 623].

Legal Topics:

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

Civil ProcedureAlternative Dispute ResolutionArbitrationsFederal Arbitration ActOrders to Compel ArbitrationCivil ProcedureAlternative Dispute ResolutionValidity of ADR MethodsContracts LawContract Conditions & ProvisionsArbitration Clauses



160 of 175 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 5 Determining Whether to Arbitrate or Litigate
V. OPPOSING ARBITRATION

1-5 MB Practice Guide: CA Contract Litigation 5.28

5.28 Opposing Arbitration on Grounds of Fraud.

5.28[1] Claim of Fraud Affecting Primary Contract May Be Subject to Arbitration. If a contract containing an arbitration agreement is induced, or claimed to have been induced, by fraud, that claim itself is arbitrable unless the parties have specifically provided otherwise [*Rosenthal v. Great W. Fin. Sec. Corp.* (1996) 14 C4th 394, 419, 58 CR2d 875, 926 P2d 1061 ; *Ericksen, Arbuthnot, McCarthy, Kearney & Walsh, Inc. v. 100 Oak St.* (1983) 35 C3d 312, 323, 197 CR 581, 673 P2d 251 ; accord *Prima Paint Corp. v. Flood & Conklin Mfg. Co.* (1967) 388 US 395, 403-404, 87 S Ct 1801, 18 L Ed2d 1270 ; *Mago v. Shearson Lehman Hutton, Inc.* (9th Cir 1992) 956 F2d 932, 934].

Exception:

If fraud in the inception or execution of a contract caused the promisor to be deceived as to the nature of his or her act, he or she did not know what he or she was signing, and did not intend to enter into a contract at all. In that situation mutual assent is lacking, and arbitration cannot be compelled [*Rosenthal v. Great W. Fin. Sec. Corp.* (1996) 14 C4th 394, 415-416, 58 CR2d 875, 926 P2d 1061 ; *Brown v. Wells Fargo Bank, N.A.* (2008) 168 CA4th 938, 958, 85 CR3d 817] .

Consider:

If the arbitration clause is contained in an agreement that lacked essential language *required by a statutory scheme*, and the agreement was entered into under misleading circumstances, which also violates the statute, then the entire contract is void and unenforceable, and its arbitration provisions likewise are not enforceable [*Duffens v. Valenti* (2008) 161 CA4th 434, 441, 74 CR3d 311 (invalidating contracts that violated dating service statutes, CC § 1694 et seq.)].

**Warning:**

Cases analyzing this issue in terms of fraud "permeating" the contract may use that terminology to refer to fraud in the inception or execution of the contract, and conclude that there is no valid and enforceable agreement. However, cases dealing with the "permeation doctrine" should not be relied on if they fail to recognize that the arbitration clause is severable from the rest of the contract when the issue is fraud in the inducement [see *Rosenthal v. Great W. Fin. Sec. Corp.* (1996) 14 C4th 394, 418, 58 CR2d 875, 926 P2d 1061 (criticizing *Ford v. Shearson Lehman Am. Express, Inc.* (1986) 180 CA3d 1011, 1019-1028, 225 CR 895)].

 Cross Reference:

Discussion of fraud, and forms, see Ch. 17, Attacking or Defending Existence of Contract--Fraud, Duress, Menace, and Undue Influence.

5.28[2] Fraud May Invalidate Arbitration Clause Under Specific Conditions. For fraud to invalidate an arbitration clause, the fraud must specifically affect the agreement to arbitrate so that it nullifies the apparent consent to that agreement; for example, by actively concealing the nature of the arbitration clause, its existence, or misrepresenting its meaning or value [*Rosenthal v. Great W. Fin. Sec. Corp.* (1996) 14 C4th 394, 419, 58 CR2d 875, 926 P2d 1061 ; *Ericksen, Arbuthnot, McCarthy, Kearney & Walsh, Inc. v. 100 Oak St.* (1983) 35 C3d 312, 323, 197 CR 581, 673 P2d 251 ; *Hayes Children Leasing Co. v. NCR Corp.* (1995) 37 CA4th 775, 784-785, 43 CR2d 650]. The following elements must be proven to establish fraud as to the arbitration agreement [*Engalla v. Permanente Med. Group, Inc.* (1997) 15 C4th 951, 973-975, 64 CR2d 843, 938 P2d 903]:

- Misrepresentation (false representation, concealment, or nondisclosure).
- Knowledge of falsity ("scienter").
- Intent to defraud (intent to induce reliance).
- Justifiable reliance.
- Resulting damage.

 Cross Reference:

Discussion of fraud, and forms, see Ch. 17, Attacking or Defending Existence of Contract--Fraud, Duress, Menace, and Undue Influence.

5.28[3] Motion to Compel Arbitration May Be Defeated by Allegations in Verified Complaint or by Affidavit or Declaration. Allegations in a verified complaint may be sufficient to defeat a motion to compel arbitration [see *Rice v. Dean Witter Reynolds, Inc.* (1991) 235 CA3d 1016, 1027-1028, 1 CR2d 265 *disapproved on other grounds* in *Rosenthal v. Great Western Fin. Securities Corp.* (1996) 14 C4th 394, 926 P.2d 1061 (to be so used verified complaint must allege ultimate facts rather than evidentiary facts). However, the better practice is to submit affidavits or declarations under penalty of perjury in opposition to the petition to compel arbitration [*Strauch v. Eyring* (1994) 30 CA4th 181, 185-186, 35 CR2d 747 ; see also *Rosenthal v. Great W. Fin. Sec. Corp.* (1996) 14 C4th 394, 413-414, 58 CR2d 875, 926 P2d 1061].

Distinguish:

It is error for the trial court to deny a motion to compel arbitration in reliance on allegations in an *unverified* complaint [*Hotels Nevada v. L.A. Pacific Center, Inc.* (2006) 144 CA4th 754, 762, 50 CR3d 700] .

 Cross References:

Discussion of fraud, and forms, see Ch. 17, Attacking or Defending Existence of Contract--Fraud, Duress, Menace, and Undue Influence.

Discussion and forms, see Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, Ch. 6, Determining Forum.

California Forms of Pleading and Practice, Ch. 269, Fraud and Deceit (Matthew Bender).

Legal Topics:

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

Civil ProcedureAlternative Dispute ResolutionArbitrationsFederal Arbitration ActOrders to Compel ArbitrationCivil
ProcedureAlternative Dispute ResolutionValidity of ADR MethodsContracts LawContract Conditions &
ProvisionsArbitration ClausesContracts LawDefensesFraud & MisrepresentationGeneral Overview



161 of 175 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 5 Determining Whether to Arbitrate or Litigate
V. OPPOSING ARBITRATION

1-5 MB Practice Guide: CA Contract Litigation 5.29

5.29 Opposing Arbitration on Ground That Agreement Is Unconscionable.

5.29[1] Court Should Refuse to Enforce Unconscionable Agreement or Clause. A court should refuse to enforce an agreement, or any clause, that it finds unconscionable at the time it was made [CC § 1670.5(a)]. The court should first rule on the "gateway" issue of whether an arbitration agreement is enforceable, including claims of unconscionability, before considering whether a particular dispute is within the scope of the arbitration clause [*Independent Ass'n of Mailbox Ctr. Owners, Inc. v. Superior Court* (2005) 133 CA4th 396, 407-408 ; *Omar v. Ralphs Grocery Co.* (2004) 118 CA4th 955, 961].

Distinguish:

Under the Federal Arbitration Act, while the court properly determines whether an arbitration provision is unenforceable, a challenge to the validity of the contract as a whole, and not specifically to the arbitration clause, must go to the arbitrator [*Buckeye Check Cashing, Inc. v. Cardegna* (2006) 546 US 440, 449, 126 S Ct 1204, 163 L Ed2d 1038 ; *Higgins v. Superior Court* (2006) 140 CA4th 1238, 1249, 45 CR3d 293 ; *but compare Hotels Nevada LLC v. Bridge Banc, LLC* (2005) 130 CA4th 1431, 1437, 30 CR3d 903 (under contract governed by FAA and California law, it was proper for court to decide illegality of the contract after the issue had first been presented to arbitrator, who acknowledged his authority to determine that issue, but ceded it to court)].

There are two approaches to determining unconscionability, both of which should reach the same result [*Patterson v. ITT Consumer Fin. Corp.* (1993) 14 CA4th 1659, 1663-1664, 18 CR2d 563]. These two approaches are discussed in 5.29[2] and [3], respectively.

Unconscionability is a defense applicable to enforcement of contracts generally and therefore is applicable in disputes governed by the Federal Arbitration Act [*Ingle v. Circuit City Stores, Inc.* (9th Cir 2003) 328 F3d 1165, 1170 ; *Armendariz v. Foundation Health Psychcare Servs., Inc.* (2000) 24 C4th 83, 98-99, 119, 99 CR2d 745, 6 P3d 669 ; *see County of Solano v. Lionsgate Corp.* (2005) 126 CA4th 741, 750].

**Cross Reference:**

General discussion of unconscionability in contract context, see *Ch. 18, Attacking or Defending Claim That Contract Is Illegal, Contrary to Public Policy, or Unconscionable*, 18.13 -18.19, 18.24 -18.28.

5.29[2] Unconscionability Determined by Procedural and Substantive Aspects. One approach analyzes the contract in terms of its procedural and substantive aspects [*Abramson v. Juniper Networks, Inc.* (2004) 115 CA4th 638, 655-658 ; *Stirlen v. Supercuts, Inc.* (1997) 51 CA4th 1519, 1532-1534, 60 CR2d 138 .] Both procedural and substantive unconscionability must be present before a court can refuse to enforce an arbitration provision based on unconscionability [*Brown v. Wells Fargo Bank, N.A.* (2008) 168 CA4th 938, 955, 85 CR3d 817] . However, the two elements need not be present in the same degree [*Armendariz v. Foundation Health Psychcare Servs., Inc.* (2000) 24 C4th 83, 114, 99 CR2d 745, 6 P3d 669 ; *Abramson v. Juniper Networks, Inc.* (2004) 115 CA4th 638, 655].

Procedural unconscionability concerns the manner in which the contract was negotiated and the circumstances of the parties at that time, focusing on surprise and oppression. Oppression arises from an inequality of bargaining power and the absence of real negotiation or meaningful choice on the part of the weaker party [*Abramson v. Juniper Networks, Inc.* (2004) 115 CA4th 638, 656 ; *Kinney v. United Healthcare Servs., Inc.* (1999) 70 CA4th 1322, 1329, 83 CR2d 348]. Surprise arises when the challenged terms are hidden in a preprinted form drafted by the party seeking to enforce them [*Abramson v. Juniper Networks, Inc.* (2004) 115 CA4th 638, 656 ; *Metters v. Ralphs Grocery Co.* (2008) 161 CA4th 696, 703, 74 CR3d 210 (arbitration agreement was contained not in an employment contract, where it might have been expected, but in a form on which employee was directed to submit grievance)].

Substantive unconscionability focuses on terms so harsh or one-sided as to "shock the conscience" [*Armendariz v. Foundation Health Psychcare Servs., Inc.* (2000) 24 C4th 83, 115-121, 99 CR2d 745, 6 P3d 669 ; *Abramson v. Juniper Networks, Inc.* (2004) 115 CA4th 638, 656]. A wide variety of attributes may affect the determination of substantive unconscionability, but the key factor is lack of mutuality [*Armendariz v. Foundation Health Psychcare Servs., Inc.* (2000) 24 C4th 83, 114-120, 99 CR2d 745, 6 P3d 669 ; *Higgins v. Superior Court* (2006) 140 CA4th 1238, 1253-1254, 45 CR3d 293 ; see *Sanchez v. Western Pizza Enterprises, Inc.* (2009) 172 CA4th 154, 177-178, 90 CR3d 818 (designation of a "panel" of arbitrators consisting of a single arbitrator selected by the employer created a false appearance of mutuality in the selection of an arbitrator and gave rise to a significant risk of financial interdependence between the employer and the arbitrator)].

Cross Reference:

Discussion and forms, see *Ch. 18, Asserting or Defending Claim That Contract Is Illegal, Contrary to Public Policy, or Unconscionable*, 18.13 -18.19, 18.29 -18.32.

5.29[3] Contracts of Adhesion May Not Be Enforced Unless Terms Meet Specific Conditions. The other approach begins by determining whether the contract is one of adhesion [*Armendariz v. Foundation Health Psychcare Servs., Inc.* (2000) 24 C4th 83, 113, 99 CR2d 745, 6 P3d 669 ; *Abramson v. Juniper Networks, Inc.* (2004) 115 CA4th 638, 655]. An adhesion contract is a standardized contract, imposed and drafted by the party of superior bargaining strength, which relegates to the subscribing party only the opportunity to adhere to the contract or reject it [*Armendariz v. Foundation Health Psychcare Servs., Inc.* (2000) 24 C4th 83, 113, 99 CR2d 745, 6 P3d 669]. Absent unusual circumstances, use of a contract of adhesion establishes a minimal degree of procedural unconscionability notwithstanding the availability of market alternatives [*Gatton v. T-Mobile USA, Inc.* (2007) 152 CA4th 571, 585, 61 CR3d 344] . A court will not enforce an arbitration provision in an adhesion contract unless its terms fall within the reasonable expectations of the weaker party and are not unduly oppressive or unconscionable [*Armendariz v. Foundation Health Psychcare Servs., Inc.* (2000) 24 C4th 83, 113, 99 CR2d 745, 6 P3d 669 ; see *County of Solano v. Lionsgate Corp.* (2005) 126 CA4th 741, 750].

Cross Reference:

Detailed discussion and forms, see *Ch. 18, Asserting or Defending Claim That Contract Is Illegal, Contrary to Public Policy, or Unconscionable*, 18.13 -18.19, 18.29 -18.32.

5.29[4] Court May Sever Unconscionable Term and Enforce Remainder of Contract. A court has the power to sever an unconscionable provision and enforce the remainder of the contract in order to preserve the contractual

relationship and to prevent the parties from gaining undeserved benefit or suffering undeserved detriment [CC § 1670.5(a); *Armendariz v. Foundation Health Psychcare Servs., Inc.* (2000) 24 C4th 83, 123-124, 99 CR2d 745, 6 P3d 669; *Abramson v. Juniper Networks, Inc.* (2004) 115 CA4th 638, 658-659]. However, an unconscionable provision cannot be severed when the unconscionability or illegality is pervasive, and in that case the entire contract is unenforceable [*Armendariz v. Foundation Health Psychcare Servs., Inc.* (2000) 24 C4th 83, 123-124, 99 CR2d 745, 6 P3d 669; *Abramson v. Juniper Networks, Inc.* (2004) 115 CA4th 638, 659-660; *Davis v. O'Melveny & Myers* (9th Cir 2007) 485 F3d 1066, 1084 (arbitration agreement containing four substantively unconscionable or void terms was unenforceable because those terms could not be stricken or excised without gutting the agreement); *Sanchez v. Western Pizza Enterprises, Inc.* (2009) 172 CA4th 154, 181, 90 CR3d 818 (arbitration agreement containing a class arbitration waiver that was contrary to public policy and an unconscionable arbitrator selection clause was permeated by an unlawful purpose and thus unenforceable); *Suh v. Superior Court* (2010) 181 CA4th 1504, 1517, 105 CR3d 585 (absolute prohibition of consequential, punitive, incidental, or special damages in employment-related cases was so egregious and so draconian that the arbitration clause was not severable); *Lhotka v. Geographic Expeditions, Inc.* (2010) 181 CA4th 816, 826, 104 CR3d 844 (arbitration agreement in hiking expedition company's release form that limited plaintiffs' recovery to the amount they paid the company for their trip, required them to arbitrate in a distant forum, and required them to indemnify the company for its costs and attorney fees for defending any claims was permeated with unconscionability)].

Cross Reference:

Discussion and forms, see Ch. 18, Asserting or Defending Claim That Contract Is Illegal, Contrary to Public Policy, or Unconscionable.

5.29[5] Arbitration Agreement Must Meet Specific Requirements If Claim Arises From Unwaivable Public Right. When plaintiff's claims arise from unwaivable public rights, whether statutory or non-statutory, the arbitration agreement must satisfy the following additional criteria [*Abramson v. Juniper Networks, Inc.* (2004) 115 CA4th 638, 653-654; see *Little v. Auto Stiegler, Inc.* (2003) 29 C4th 1064, 1076-1077, 130 CR2d 892, 63 P3d 979; *Armendariz v. Foundation Health Psychcare Servs., Inc.* (2000) 24 C4th 83, 102, 99 CR2d 745, 6 P3d 669]:

- The agreement must provide for adequate discovery.
- It must require a written decision allowing limited judicial review.
- The agreement must permit the types of relief available in court.
- It must provide for the employer to pay all types of costs that are unique to arbitration.
- The agreement must provide for a neutral arbitrator.

Examples:

■ Claims under the California Fair Employment and Housing Act (FEHA) are an example of a statutory "unwaivable public right" referred to above [see *Armendariz v. Foundation Health Psychcare Servs., Inc.* (2000) 24 C4th 83, 101, 99 CR2d 745, 6 P3d 669].

■ Actions alleging wrongful termination of employment in violation of public policy (known as *Tameny* actions, after *Tameny v. Atlantic Richfield Co.* (1980) 27 C3d 167, 164 CR 839, 610 P2d 1330) are an example of a nonstatutory right [see *Little v. Auto Stiegler, Inc.* (2003) 29 C4th 1064, 1077, 130 CR2d 892, 63 P3d 979].

● Under some circumstances, a class arbitration waiver in an employment agreement impermissibly interferes with employees' ability to vindicate unwaivable rights under overtime laws [*Gentry v. Superior Court* (2007) 42 C4th 443, 457, 64 CR3d 773, 165 P3d 556 ; see *Sanchez v. Western Pizza Enterprises, Inc.* (2009) 172 CA4th 154, 171, 90 CR3d 818 ; *Franco v. Athens Disposal Co., Inc.* (2009) 171 CA4th 1277, 1290, 90 CR3d 539 (*Gentry* applies to claims for meal and rest periods)].

Distinguish:

In a case brought by a corporate officer against his former employer, the court held that the employee's claim did not arise from unwaivable public rights, even though the employee asserted a wage claim under *Lab Code* § 229, because the employee sought a multimillion-dollar bonus and severance payment, not minimum wage or overtime payments [*Giuliano v. Inland Empire Personnel, Inc.* (2007) 149 CA4th 1276, 1290, 58 CR3d 5] .

If the agreement is silent as to arbitral forum costs, the court can infer the employer's obligation to pay arbitral forum costs [*Little v. Auto Stiegler, Inc.* (2003) 29 C4th 1064, 1082, 130 CR2d 892, 63 P3d 979 ; *Armendariz v. Foundation Health Psychcare Servs., Inc.* (2000) 24 C4th 83, 112-113, 99 CR2d 745, 6 P3d 669] but an explicit cost-sharing provision does not permit such an inference and cannot be enforced [*Abramson v. Juniper Networks, Inc.* (2004) 115 CA4th 638, 661 ; see *D.C. v. Harvard-Westlake School* (2009) 176 CA4th 836, 862, 98 CR3d 300 (plaintiff bringing claims under California hate crimes laws, *CC* §§ 51.7, 52.1, may not be required to pay any type of arbitral expense that would not be imposed were the dispute adjudicated in court)]. In a consumer arbitration involving unwaivable statutory rights under the Consumer Legal Remedies Act [*CC* § 1750 *et seq.*] and the Vehicle Leasing Act [*CC* § 2985.7 *et seq.*], the court did not require the non-consumer party to pay all arbitral costs but imposed an implied agreement that unaffordable fees not be allocated to the consumer at any in point in the arbitration process, and that the determination of what is affordable be made on a case by case basis, with the consumer bearing the burden of proof as to what he or she cannot afford [*Gutierrez v. Autowest, Inc.* (2003) 114 CA4th 77, 89-92].

Legal Topics:

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

Civil Procedure
Alternative Dispute Resolution
Arbitrations
Federal Arbitration Act
Orders to Compel Arbitration
Civil Procedure
Alternative Dispute Resolution
Validity of ADR Methods
Contracts Law
Contract Conditions & Provisions
Arbitration Clauses
Contracts Law
Defenses
Unconscionability
Arbitration Agreements



162 of 175 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 5 Determining Whether to Arbitrate or Litigate
V. OPPOSING ARBITRATION

1-5 MB Practice Guide: CA Contract Litigation 5.30

5.30 Party May Oppose Arbitration on Grounds of Waiver.

5.30[1] Waiver May Be Explicit or Implied. One can resist arbitration on the ground that the party seeking to compel it has waived the right to do so [CCP § 1281.2(c); *Wagner Construction Co. v. Pacific Mechanical Corp.* (2007) 41 C4th 19, 27-31, 58 CR3d 434, 157 P3d 1029]. Waiver may be explicit [see *Gustafson v. State Farm Mut. Auto. Ins. Co.* (1973) 31 CA3d 361, 365, 107 CR 243 (settlement and release of arbitrable claim)], but more often it is implied.

5.30[2] Party Urging Arbitration Must Have Prejudiced Other Party's Rights. The primary evidence needed to establish waiver is that the party urging arbitration has done something to prejudice the other party's ability to receive the benefits of arbitration [see *Doers v. Golden Gate Bridge, Highway & Transp. Dist.* (1979) 23 C3d 180, 188, 151 CR 837, 588 P2d 1261; *McMillin Dev., Inc. v. Home Buyers Warranty* (1998) 68 CA4th 896, 909, 80 CR2d 611]. In determining whether there has been an implied waiver of the right to compel arbitration, the court may consider whether the party urging arbitration has done any of the following [*Saint Agnes Med. Ctr. v. PacifiCare of Cal.* (2003) 31 C4th 1187, 1200-1205; *Engalla v. Permanente Med. Group, Inc.* (1997) 15 C4th 951, 983-984, 64 CR2d 843, 938 P2d 903; *Christensen v. Dewor Devs.* (1983) 33 C3d 778, 781-783, 191 CR 8, 661 P2d 1088; *Law Offices of Dixon R. Howell v. Valley* (2005) 129 CA4th 1076, 1096-1098]:

- Previously took steps inconsistent with an intent to invoke arbitration.
- Unreasonably delayed seeking arbitration or delayed in a way that affected, misled, or prejudiced the opposing party.
- Acted in bad faith or with willful misconduct.
- Invoked the litigation machinery so substantially that the parties were well into preparation of a lawsuit before the party notified the opposing party of intent to arbitrate.
- Either requested arbitration enforcement close to the trial date or delayed for a long period before seeking a stay.
- Filed a counterclaim without asking for a stay of the proceedings.

- Took advantage of judicial discovery procedures not available in arbitration.

Examples--No Waiver:

- Two lawsuits were filed--one in Los Angeles County and the other in Fresno County--relating to two health services contracts, only one of which contained an arbitration clause. Plaintiff in the Los Angeles County action claimed the contract containing the arbitration clause was void *ab initio* based on the occurrence of a condition subsequent. Defendant in the Los Angeles action then filed the second action in Fresno County. Each party sought to have venue transferred to the county in which the lawsuit it initiated was pending. The actions ended up in Los Angeles. Four months after initiating the first action, plaintiff in that action petitioned to compel arbitration of portions of the Fresno action and to stay other proceedings pending completion of the arbitration. Although the party resisting arbitration had incurred expenses, neither attacking the validity of the contract containing the arbitration clause, nor seeking or opposing a change of venue amounted to waiver [*Saint Agnes Med. Ctr. v. PacificCare of Cal.* (2003) 31 C4th 1187].

- Without mentioning arbitration, the defendant filed a demurrer, served objections to discovery requests, and, a few weeks after filing its motion to compel arbitration, filed a motion in superior court to compel the plaintiff's deposition, asserting in that motion that it intended to file a motion for summary judgment. The court held that these facts did not demonstrate waiver of arbitration, because when the defendant filed its notice of petition to compel arbitration a little more than two months after the plaintiff filed the complaint, no substantive discovery responses had yet been served by either side, and no formal hearings had taken place on the discovery issues. Moreover, the discovery requests served by the defendant (a set of form interrogatories and a request for production of documents) were authorized under arbitration rules [*Roman v. Superior Court* (2009) 172 CA4th 1462, 1478-1479, 92 CR3d 153] .

Examples--Waiver:

- In an action for sexual harassment, defendant employer did not seek to compel arbitration until seven months after raising that right as an affirmative defense in its answer. During that time, defendant obtained 1,600 pages of documents from plaintiff and took plaintiff's two-day, 410-page videotaped deposition. Defendant was held to have unreasonably delayed the motion to compel arbitration to use discovery to learn plaintiff's strategies, evidence, and witnesses and to pin plaintiff down to a particular version of the facts, all to plaintiff's prejudice [*Davis v. Continental Airlines, Inc.* (1997) 59 CA4th 205, 211-217, 69 CR2d 79].

- Defendant waived its right to arbitrate when it attempted to obtain a broad release of class claims by misleading the class members and the court about the benefits of a proposed settlement [*Aviation Data, Inc. v. American Express Travel Related Services Co., Inc.* (2007) 152 CA4th 1522, 1539, 62 CR3d 396 (applying FAA)].

5.30[3] Time and Expense Alone Usually Do Not Constitute Sufficient Prejudice. Prejudice may consist of attorney's fees incurred, and delays causing lost records and faded memories [*Christensen v. Dewor Devs.* (1983) 33 C3d 778, 784, 191 CR 8, 661 P2d 1088]. However, time and expense alone do not constitute the prejudice necessary to waive the right to compel arbitration [*Groom v. Health Net* (2000) 82 CA4th 1189, 1195-1197, 98 CR2d 836]. Prejudice usually requires the party resisting arbitration to have disclosed facts, witnesses, and legal strategies in

discovery, which necessarily deprives the party resisting arbitration of the efficiencies that would have been available by arbitration [*McMillin Dev., Inc. v. Home Buyers Warranty* (1998) 68 CA4th 896, 909-910, 80 CR2d 611]. Being forced to articulate a legal theory clearly enough to withstand a demurrer is not prejudice [*Groom v. Health Net* (2000) 82 CA4th 1189, 1195-1197, 98 CR2d 836].



Warning--Failure to Pay Fee Required to Initiate Arbitration:

In one case, though the court did not refer to it as waiver, after the party responsible for paying the arbitrator's fees was ordered to pay the fees necessary to initiate arbitration and failed to do so, the court lifted the stay and sent the matter to be tried [*Sink v. Aden Enters., Inc.* (9th Cir 2003) 352 F3d 1197, 1201-1202].

Judge's Perspective:

The rule applied in the foregoing cases is an equitable one, and counsel seeking to persuade the court that a party has or has not demonstrated fairness should make arguments that emphasize fairness. In *Groom v. Health Net* (2000) 82 CA4th 1189, 1195-1197, 98 CR2d 836 , for example, the court concluded that the plaintiff had intentionally drafted her complaint so as to avoid arbitration. Thus, the court found that the expense and trouble of the demurrer proceedings was largely of her own making, since she could have avoided the process by drafting her complaint more clearly to begin with, so as to acknowledge the arbitration provision in the parties' contract.

Legal Topics:

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

Civil ProcedureAlternative Dispute ResolutionArbitrationsFederal Arbitration ActOrders to Compel ArbitrationCivil ProcedureAlternative Dispute ResolutionValidity of ADR MethodsContracts LawContract Conditions & ProvisionsArbitration ClausesContracts LawContract Conditions & ProvisionsWaiversGeneral OverviewContracts LawDefensesGeneral Overview



163 of 175 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 5 Determining Whether to Arbitrate or Litigate
V. OPPOSING ARBITRATION

1-5 MB Practice Guide: CA Contract Litigation 5.31

5.31 Party May Oppose Arbitration Provision in Health Care Service Plan That Fails to Comply With H&S Code § 1363.1.

5.31[1] H&S Code § 1363.1 Imposes Format Requirements. *H&S Code § 1363.1* requires arbitration clauses in health care plans to be prominently displayed and to be placed immediately before the signature line provided for the subscriber's signature on the enrollment form [*H&S Code § 1363.1(b), (d)*; *Robertson v. Health Net of Cal., Inc. (2005) 132 CA4th 1419, 1422*]. Arbitration clauses that do not meet these requirements are unenforceable [*Robertson v. Health Net of Cal., Inc. (2005) 132 CA4th 1419, 1429*; *Medeiros v. Superior Court (2007) 146 CA4th 1008, 1017-1018, 53 CR3d 307 (H&S Code § 1363.1 requirements apply to employer's benefits election form)*].

Examples:

- The court denied an HMO's petition to compel arbitration for failure to comply with *H&S Code § 1363.1* because the enrollment form's arbitration agreement did not appear directly above the enrollee signature line and was in the same typeface as the rest of the document with only its two-word title in bolded print [*Robertson v. Health Net of Cal., Inc. (2005) 132 CA4th 1419, 1428-1429*].
- Although an arbitration disclosure appeared immediately before the signature line of the enrollment form, it was not prominently displayed because it had no heading, was in a plain, small typeface, and most of the rest of the form contained larger typeface, some of which was bold and some of which was highlighted by a different background color [*Burks v. Kaiser Foundation Health Plan, Inc. (2008) 160 CA4th 1021, 1029, 73 CR3d 257*].

5.31[2] H&S Code § 1363.1 Is Not Preempted by FAA. Notwithstanding that *H&S Code § 1363.1* imposes format requirements on arbitration agreements that are not imposed on other agreements, most courts have held that *H&S Code § 1363.1* is not preempted by the FAA. FAA preemption of *H&S Code § 1363.1* is blocked by the McCarran-Ferguson Act, 15 USC § 1012, which prevents a federal law that does not specifically relate to the business of insurance from invalidating a state law enacted for the purpose of regulating the business of insurance [15 USC § 1012(b); see *Pagarigan v. Superior Court (2002) 102 CA4th 1121, 1134*; *Smith v. PacifiCare Behavioral Health Plan of Cal., Inc. (2001) 93 CA4th 139, 143*].

**Warning:**

The cases are not unanimous. For a contrary view, see *Erickson v. Aetna Health Plans of Cal.* (1999) 71 CA4th 646, 652 (*H&S Code* § 1363.1 preempted by FAA).

**Cross Reference:**

Discussion of FAA preemption, see 5.07[2].

5.31[3] H&S Code § 1363.1 May Be Preempted by Medicare Law. Depending on the date of the plan, plan enrollment documents for Medicare+Choice plans may or may not be subject to the requirements of *H&S Code* § 1363.1.

Arbitration provisions in plan enrollment documents for Medicare+Choice plans submitted to the Health Care Financing Agency (HCFA) for approval before December 21, 2000 must comply with *H&S Code* § 1363.1 to be enforceable.

Medicare law [42 USC § 1395w-26(b)(3)] was amended, effective December 21, 2000 [see Pub L No 106-554, Dec 21, 2000, 114 Stats 2763, 2763A], to add Medicare plan marketing materials to the matters expressly preempting state laws, and to authorize regulations providing model language for marketing materials. That amendment was prospective only, and it provided that no state law is preempted unless it is inconsistent with Medicare law [42 CFR § 422.402]. Whether *H&S Code* § 1363.1 is preempted by Medicare law with respect to health care plan marketing materials submitted for HCFA approval after the 2000 amendment is undetermined.

Medicare law [42 USC § 1395w-26(b)(3)] again was amended, effective December 8, 2003 [see Pub L No 108-173, Dec 8, 2003, 117 Stat 2066]. That amendment broadened the scope of federal preemption regarding Medicare Advantage plans to include any state law or regulation other than state licensing laws or state laws relating to plan solvency [42 CFR § 422.402], making a stronger case for preemption of *H&S Code* § 1363.1 after December 8, 2003.

**Cross Reference:**

Discussion of *H&S Code* § 1363.1 and federal preemption, see California Points and Authorities, § 20.194.

Legal Topics:

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

Civil Procedure
Alternative Dispute Resolution
Arbitration
Federal Arbitration Act
Orders to Compel Arbitration
Civil Procedure
Alternative Dispute Resolution
Validity of ADR Methods
Contracts Law
Contract Conditions & Provisions
Arbitration Clauses
Insurance Law
Claims & Contracts
Arbitration



164 of 175 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 5 Determining Whether to Arbitrate or Litigate
VI. MOVING TO VACATE OR CORRECT ARBITRATION AWARD

1-5 MB Practice Guide: CA Contract Litigation 5.31A

5.31A CHECKLIST: Moving to Vacate or Correct Arbitration Award.

☐ Determine whether grounds exist for motion to vacate arbitration award.

☐ Did arbitrator commit legal error, and does arbitration provision expressly provide that legal errors are an excess of arbitral authority reviewable by the courts?

Authority:

Cable Connection, Inc. v. DIRECTV, Inc. (2008) 44 C4th 1334, 1361, 82 CR3d 229, 190 P3d 586

Discussion:

See 5.31C

☐ Was award procured by corruption, fraud or other undue means?

☐ Was there corruption on part of arbitrator?

☐ Were rights of potential moving party substantially prejudiced by misconduct of a neutral arbitrator?

☐ Did arbitrator exceed his or her powers and, if so, can award not be corrected without affecting merits of decision?

☐ Were rights of potential moving party party substantially prejudiced by refusal of arbitrator to postpone hearing despite showing of sufficient cause for postponement?

☐ Were rights of potential moving party substantially prejudiced by the refusal of the arbitrator to hear evidence material to the controversy or by other conduct of the arbitrator contrary to the provisions of *CCP § 1280 et seq.*?

☐ Did an arbitrator making award fail to disclose a ground for disqualification?

☐ Was an arbitrator making award subject to disqualification under *CCP § 1281.91* but failed to disqualify himself or herself?

Authority:

CCP § 1286.2

☐ Does contract contain an illegal provision that would cause granting of finality to the arbitrator's decision to be inconsistent with protection of a party's statutory rights?

Authority:

Jones v. Humanscale Corp. (2005) 130 CA4th 401, 409-410, 29 CR3d 881

Discussion:

See 5.31D



Timing:

Petition to vacate award must be served and filed not later than 100 days after date of service of signed copy of award on petitioner.

Authority:

CCP § 1288

☐ Determine whether grounds exist for motion to correct arbitration award.

☐ Was there an evident miscalculation of figures or an evident mistake in description of any person, thing, or property referred to in award?

☐ Did arbitrator exceed his or her powers, and if so, can award be corrected without affecting merits of decision upon controversy submitted?

☐ Is award imperfect in a matter of form, not affecting merits of controversy?

Authority:

CCP § 1286.6

Discussion:

See 5.31E



Timing:

Petition to correct award must be served and filed not later than 100 days after date of service of signed copy of award on petitioner.

Authority:

CCP § 1288

Legal Topics:

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

Civil ProcedureAlternative Dispute ResolutionJudicial ReviewCivil ProcedureAlternative Dispute ResolutionValidity
of ADR Methods



165 of 175 DOCUMENTS

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Chapter 5 Determining Whether to Arbitrate or Litigate
VI. MOVING TO VACATE OR CORRECT ARBITRATION AWARD

1-5 MB Practice Guide: CA Contract Litigation 5.31B

5.31B Options and Strategy.

In most cases, an arbitration award is final and not subject to judicial review. This is true even when the arbitrator's legal analysis is incorrect. Counsel may, however, move to vacate or correct an arbitration award under limited statutory grounds.

Legal Topics:

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

Civil ProcedureAlternative Dispute ResolutionGeneral OverviewCivil ProcedureAlternative Dispute ResolutionJudicial ReviewCivil ProcedureAlternative Dispute ResolutionValidity of ADR Methods



166 of 175 DOCUMENTS

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Chapter 5 Determining Whether to Arbitrate or Litigate
VI. MOVING TO VACATE OR CORRECT ARBITRATION AWARD

1-5 MB Practice Guide: CA Contract Litigation 5.31C

5.31C Scope of Judicial Review Generally Is Limited.

An arbitration award generally is not subject to judicial review [*Moncharsh v. Heily & Blase* (1992) 3 C4th 1, 11, 10 CR2d 183, 832 P2d 899]. A court is not permitted to review the validity of the arbitrator's reasoning or the sufficiency of the evidence supporting an arbitrator's award [*Moncharsh v. Heily & Blase* (1992) 3 C4th 1, 11, 10 CR2d 183, 832 P2d 899]. Nor may a party challenge the arbitrator's rulings on discovery, admission of evidence, or conduct of the proceedings [*Evans v. Centerstone Dev. Co.* (2005) 134 CA4th 151, 167, 35 CR3d 745 (awarding sanctions for frivolous appeal)]. Furthermore, a court may not vacate or correct an arbitration award merely because it disagrees with the arbitrator's choice of remedy [*Taylor v. Van-Catlin Constr.* (2005) 130 CA4th 1061, 1066, 30 CR3d 690]. However, a court may vacate or correct an award under limited circumstances prescribed by statute [*Jones v. Humanscale Corp.* (2005) 130 CA4th 401, 408, 29 CR3d 881 ; see 5.31D, 5.31E].

Exceptions:

- Parties to an arbitration agreement may expand the scope of review of an arbitration award by expressly providing that legal errors are an excess of arbitral authority reviewable by the courts [*Cable Connection, Inc. v. DIRECTV, Inc.* (2008) 44 C4th 1334, 1361, 82 CR3d 229, 190 P3d 586] . An arbitration provision requiring the arbitrator to apply California law or to render an award in accordance with California law does not, by itself, mandate review of the award on the merits [*Gravillis v. Coldwell Banker Residential Brokerage Co.* (2010) 182 CA4th 503, 519, 106 CR3d 70 ; *Baize v. Eastridge Companies, LLC* (2006) 142 CA4th 293, 301-302, 47 CR3d 763] .

- In a case alleging violations of statutory rights, judicial review of an arbitrator's decision may be justified when granting finality to an arbitrator's decision would be inconsistent with the protection of those rights [*Pearson Dental Supplies, Inc. v. Superior Court* (2010) 48 C4th 665, 676-679, 108 CR3d 171, 229 P3d 83 (arbitrator's award should be vacated because arbitrator's clear legal error caused plaintiff's FEHA claim to be incorrectly deemed time-barred)].

Distinguish:

Although a discovery dispute involving a nonparty to an arbitration proceeding must be submitted first to the arbitrator, the nonparty is entitled to full judicial review of the arbitrator's discovery order [*Berglund v. Arthroscopic & Laser Surgery Center of San Diego, L.P.* (2008) 44 C4th 528, 532, 79 CR3d 370, 187 P3d 86] .

Legal Topics:

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

Civil ProcedureAlternative Dispute ResolutionJudicial ReviewCivil ProcedureAlternative Dispute ResolutionValidity
of ADR Methods



167 of 175 DOCUMENTS

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Chapter 5 Determining Whether to Arbitrate or Litigate
VI. MOVING TO VACATE OR CORRECT ARBITRATION AWARD

1-5 MB Practice Guide: CA Contract Litigation 5.31D

5.31D Court Must Vacate Arbitration Award Under Specified Circumstances.

The court must vacate the award if it determines any of the following [CCP § 1286.2]:

- The award was procured by corruption, fraud or other undue means.
- There was corruption in any of the arbitrators.
- The rights of a party were substantially prejudiced by misconduct of a neutral arbitrator.
- The arbitrators exceeded their powers and the award cannot be corrected without affecting the merits of the decision.
- The rights of a party were substantially prejudiced by the refusal of the arbitrators to postpone the hearing upon sufficient cause being shown for postponement, or by the refusal of the arbitrators to hear evidence material to the controversy, or by other conduct of the arbitrators contrary to the provisions of CCP § 1280 *et seq.*
- An arbitrator making the award failed to disclose a ground for disqualification or was subject to disqualification under CCP § 1281.91 but failed to disqualify himself or herself.

Exception:

This last ground does not apply to arbitration proceedings conducted under a collective bargaining agreement between employers and employees or between their respective representatives [CCP § 1286.2(a)(6)].



Timing:

A petition to vacate an award must be served and filed not later than 100 days after the date of the service of a signed copy of the award on the petitioner [CCP § 1288; see *Eternity Investments, Inc. v. Brown* (2007) 151 CA4th 739, 745-746, 60 CR3d 134] .



Strategic Point:

A party may not submit an issue to the arbitrator for decision and later argue that an adverse decision on the issue exceeded the arbitrator's powers [see *J.C. Gury Co. v. Nippon Carbide Indus. (USA) Inc.* (2007) 152 CA4th 1300, 1304-1306, 62 CR3d 118] .

Examples:

- The court acted properly in vacating an arbitration award when the arbitrator exceeded his authority by reexamining whether the parties were bound by the arbitration provision in the plaintiffs' enrollment form; that decision was in the province of the trial court, which had previously determined arbitrability [*Malek v. Blue Cross of Cal.* (2004) 121 CA4th 44, 56, 16 CR3d 687] .

- The court acted properly in vacating arbitration award under CCP § 1286.2(a)(6)(A) because the arbitrator had not disclosed an intent to entertain additional offers from the parties or their lawyers, but nonetheless accepted such an offer while the arbitration was pending without disclosing that fact [*Ovitz v. Schulman* (2005) 133 CA4th 830, 844-845, 35 CR3d 117] .

- An arbitrator was not required to disclose employment arrangements with a bank whose corporate parent acquired a party to the arbitration before the arbitration award was final, and arbitration award was not subject to being vacated [*Hayden v. Robertson Stephens, Inc.* (2007) 150 CA4th 360, 366-368, 58 CR3d 333] .

- An arbitrator who issued an award in an initial dispute between the parties did not exceed his powers when, after one party demanded a second arbitration, the arbitrator construed the arbitration agreement as authorizing him to act as the arbitrator for subsequent disputes between the parties [*Patchett v. Bergamot Station, Ltd.* (2006) 143 CA4th 1390, 1392, 49 CR3d 941] .

- The trial court erred in vacating an arbitration award based on the arbitrators' denial of a continuance request; the arbitrators could reasonably have concluded there was no good cause to further delay the arbitration, and the trial court also had no discretion to vacate the arbitration award based on the arbitrators' refusal to allow plaintiff to amend its statement of claims [*SWAB Financial, LLC v. E*Trade Securities, LLC* (2007) 150 CA4th 1181, 1198, 58 CR3d 904] .

- An arbitrator did not exceed his powers by declining, on equitable grounds, to enforce a notice-and-cure condition against the plaintiff, even though the arbitration agreement provided that the arbitrator could not modify or change any material provisions in the agreement [*Gueyffier v. Ann Summers, Ltd.* (2008) 43 C4th 1179, 1188, 77 CR3d 613, 184 P3d 739] .

- The court properly vacated an arbitration award when the arbitrator failed to disclose that he and his law firm represented marine insurers that were affiliated with the plaintiff's insurer, a representative of whom attended the arbitration [*Advantage Medical Services, LLC v. Hoffman* (2008) 160 CA4th 806, 809, 72 CR3d 935] .

- In an arbitration of a commercial rent dispute before a panel of three real estate brokers, the neutral arbitrator was not required to disclose that he had contributed \$500 to the mayoral campaign of the arbitrator selected by the tenant or that the neutral arbitrator's employer, an international real estate firm, had prior business dealings with the tenant and its arbitrator, when the neutral arbitrator himself was not involved in those business dealings; the trial court erred in vacating the arbitration award [*Casden Park La Brea Retail LLC v. Ross Dress for Less, Inc.* (2008) 162 CA4th 468, 478, 75 CR3d 763] .

- The court properly vacated an arbitration award in a dispute between the buyer and seller of real property after the arbitrator excluded material evidence of a lot line adjustment, substantially prejudicing the seller [*Burlage v. Superior Court* (2009) 178 CA4th 524, 527, 100 CR3d 531] .

- An arbitrator whose legal error barred an employee subject to a mandatory arbitration agreement from obtaining a hearing on the merits of a FEHA claim exceeded his powers under CCP § 1286.2 [*Pearson Dental Supplies, Inc. v. Superior Court* (2010) 48 C4th 665, 680, 108 CR3d 171, 229 P3d 83] .

- An arbitrator did not exceed her powers by ordering an employer who violated a Memorandum of Understanding (MOU) to place an employee in a position that was filled by temporary or term employees. Although the MOU did not expressly provide for the arbitrator's remedy, it did not expressly prohibit it [*San Francisco Housing Authority v. Service Employees Internat. Union, Local 790* (2010) 182 CA4th 933, 951, 107 CR3d 62] .

In addition to the statutory grounds for vacating an arbitration award listed above, courts have recognized a limited exception to the rule of arbitral finality when a contract contains an illegal provision and granting finality to an arbitrator's decision would be inconsistent with the protection of a party's statutory rights [*Jones v. Humanscale Corp.* (2005) 130 CA4th 401, 409-410, 29 CR3d 881].

Example:

In a dispute between an attorney and a former client, judicial review was appropriate because enforcement of a private arbitration clause that violates the client's rights under mandatory fee arbitration law would exceed an arbitrator's powers [*Aguilar v. Lerner* (2004) 32 C4th 974, 982-983, 12 CR3d 287 (by filing a malpractice action, the client waived his right to arbitrate the fee dispute under the mandatory fee arbitration law; therefore the attorney was entitled to binding contractual arbitration); see *Schatz v. Allen Matkins Leck Gamble & Mallory LLP* (2009) 45 C4th 557, 575, 87 CR3d 700, 198 P3d 1109 (mandatory fee arbitration law does not limit the ability of attorneys and clients to enter into binding contractual arbitration)].

 Cross Reference:

Discussion of Mandatory Fee Arbitration Act, see 5.07[1][f].

Legal Topics:

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

Civil ProcedureAlternative Dispute ResolutionJudicial ReviewCivil ProcedureAlternative Dispute ResolutionValidity of ADR Methods



168 of 175 DOCUMENTS

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Chapter 5 Determining Whether to Arbitrate or Litigate
VI. MOVING TO VACATE OR CORRECT ARBITRATION AWARD

1-5 MB Practice Guide: CA Contract Litigation 5.31E

5.31E Court Must Correct Arbitration Award Under Specified Circumstances.

The court must correct the award and confirm it as corrected if the court determines any of the following [*CCP* § 1286.6]:

- There was an evident miscalculation of figures or an evident mistake in the description of any person, thing or property referred to in the award.
- The arbitrators exceeded their powers but the award may be corrected without affecting the merits of the decision upon the controversy submitted.
- The award is imperfect in a matter of form, not affecting the merits of the controversy.



Timing:

A petition to correct an award must be served and filed not later than 100 days after the date of the service of a signed copy of the award on the petitioner [*CCP* § 1288; see *Eternity Investments, Inc. v. Brown* (2007) 151 CA4th 739, 745-746, 60 CR3d 134].

Examples:

- In a wage claim case, the arbitrator exceeded his power by directing employee to pay half of the costs of arbitration. The trial court erred by vacating the entire award rather than merely correcting it because the correction would not affect the merits of the arbitrator's decision [*Jones v. Humanscale Corp.* (2005) 130 CA4th 401, 411-412, 29 CR3d 881].
- The trial court erred in correcting an arbitration award by striking an award of attorney's fees because it believed that the arbitrator failed to apply case law interpreting a statute. The arbitrator's alleged mistake was an error of law, not an act exceeding his powers, and the award was therefore not subject to judicial review [*Taylor v. Van-Catlin Constr.* (2005) 130 CA4th 1061, 1068].

Legal Topics:

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

Civil ProcedureAlternative Dispute ResolutionJudicial ReviewCivil ProcedureAlternative Dispute ResolutionValidity
of ADR Methods



169 of 175 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 5 Determining Whether to Arbitrate or Litigate
VII. FORMS

1-5 MB Practice Guide: CA Contract Litigation 5.32

5.32 Demand for Arbitration.**Demand for Arbitration.**

Director, Litigation
Corporation, Inc.
1000 Main Street, Suite 4200
Farallon, CA 94000

_____ Re: Agreement dated

DEMAND FOR ARBITRATION

A dispute exists between you and the undersigned, _____ [name], relating to the agreement dated _____, for _____ [state nature of agreement or otherwise identify it, e.g. delivery of packaging equipment.] ("Agreement").

Under Paragraph _____ of the Agreement, disputes arising under the Agreement are to be settled by arbitration. That provision states the following: _____ [set out paragraph of agreement providing for arbitration].

THEREFORE, THE UNDERSIGNED HEREBY DEMANDS that the following dispute(s) be submitted to arbitration: _____ [set forth nature of dispute, e.g., the undersigned's entitlement to damages in the amount of \$65,000, which resulted from defects in the packaging equipment delivered to the undersigned on September 16, 2008].

[EITHER, if single neutral arbitrator is to be used and contract specifies method of selection, demand compliance with the contractual procedure in as many paragraphs as necessary, for example]

TAKE NOTICE that the undersigned proposes any the following three persons as the neutral arbitrator:
 _____ [list names, addresses, and telephone numbers of proposed arbitrators].

TAKE FURTHER NOTICE that under Paragraph _____ of the Agreement, you have _____ days to agree to one of these persons as neutral arbitrator or to propose a counter list, and if you fail to do so, the undersigned has the right to petition the court for appointment of a neutral arbitrator pursuant to *Code of Civil Procedure Section 1281.6*.

[OR, if single neutral arbitrator is to be used and contract does not specify method of selection, request agreement on a procedure in as many paragraphs as necessary, for example]

TAKE NOTICE that the undersigned intends to exercise his or her right to petition the court for appointment of a neutral arbitrator under *Code of Civil Procedure Section 1281.6* if we have not selected a neutral arbitrator by _____ [date]. The undersigned suggests _____ [name persons who would be acceptable as neutral arbitrator or outline a procedure for selecting an arbitrator].

[OR, if panel of arbitrators it to be used, initiate contractual procedure for selecting panel, for example]

TAKE NOTICE that the undersigned has selected _____ [name] as a party arbitrator to act on their behalf in the dispute and hereby demands that you select a party arbitrator to act on your behalf in the dispute. Your selection must be made within _____ days after this demand is served on you.

TAKE FURTHER NOTICE that the party arbitrator acting on behalf of the undersigned will be ready to cooperate with the party arbitrator acting on your behalf, in the selection of a third, neutral arbitrator; in the settlement of the claims, controversies, and disputes existing between yourselves and the undersigned; and in the determination of all demands and differences arising out of the Agreement.

TAKE FURTHER NOTICE that should you refuse to select a party arbitrator to act on your behalf, as stated above, or should you otherwise refuse to arbitrate the disputes mentioned above, the undersigned will take further steps to proceed with arbitration according to law.

[CONTINUE]

Dated: _____

_____ [signature]

_____ [typed name]

NOTES.

Authority:

CCP § 1281.2

Timing:

See 5.17[3]

Related Petition to Compel Arbitration:

See 5.33

Legal Topics:

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

Civil ProcedureAlternative Dispute ResolutionArbitrationsFederal Arbitration ActOrders to Compel ArbitrationCivil
ProcedureAlternative Dispute ResolutionValidity of ADR Methods



170 of 175 DOCUMENTS

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Chapter 5 Determining Whether to Arbitrate or Litigate
VII. FORMS

1-5 MB Practice Guide: CA Contract Litigation 5.33

5.33 Petition to Compel Arbitration.**Petition to Compel Arbitration.**

_____ [Name of attorney]
 _____ [Street address]
 _____ [City, state, and ZIP]
 _____ [Area code and phone number]
 _____ [State Bar no. of attorney]
 Attorney for _____ [name of party]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

[name] _____,
 Petitioner,
 vs.
 [name] _____,
 Respondent.

)
) NO.
) _____
)
) PETITION TO COMPEL ARBITRATION
) [LIMITED CIVIL CASE]
) [Amount demanded]
) _____
) _____ (exceeds or does not ex-
) ceed) \$10,000]
) Date:
) _____
)
) _____
) Time:
) _____
) _____
) Dept:
) _____
) _____

Judge:

Date Action Filed:

Trial Date:

Petitioner alleges:

[*EITHER*]

1. The agreement alleged below _____ [is to be performed *or* was made] in Farallon County, California.

[*OR*]

1. The agreement alleged below does not specify a county where it is to be performed and was not made in California. _____ [Petitioner *or* Respondent] _____ [resides *or* has a place of business] in Farallon County, California at 1000 Main Street, Suite 4200, Farallon, CA 94000].

[*CONTINUE*]

2. On or about _____ [date], Petitioner and Respondent entered into a written agreement in which, in Paragraph _____, the parties agreed to arbitrate _____ [specify controversy subject to arbitration, e.g., all disputes arising out of the agreement]. A copy of the agreement is attached as Exhibit "A" and incorporated by reference.

3. On or about _____ [date], a controversy arose between Petitioner and Respondent in that _____ [describe controversy, e.g., Respondent refused to accept delivery of goods, which it claimed did not conform to the specifications agreed in the contract]. The arbitration agreement herein alleged requires that Petitioner and Respondent arbitrate their controversy _____ [as to the following issues: _____ (specify, e.g., contract specifications) *or* in its entirety].

4. On or about _____, Petitioner demanded that Respondent submit the _____ [issues *or* controversy] to arbitration as agreed. Respondent has at all times refused, and still refuses, to arbitrate.

[If agreement provides for joinder in arbitration of any third party who is not a party to the agreement but who is necessary for complete resolution of any matter required to be arbitrated and requires the arbitrator to determine whether anyone must be so joined, ADD]

5. The arbitration agreement which is Exhibit "A" to this petition includes in Paragraph _____ Respondent's consent to the intervention or joinder in the arbitration proceeding of all parties relevant for a full and complete settlement of any dispute arbitrated under the agreement which provides that the arbitrator determine, prior to the date set for the arbitration hearing, any person whose participation is material or relevant to a complete resolution of this dispute. Thus, the fact that _____ [name] has been named in the complaint but is not a party to the arbitration agreement does not prevent arbitration of this matter because Petitioner contends, and will seek to have the neutral arbitrator determine before the arbitration hearing, that _____ [name] is required to be joined in the arbitration.

[CONTINUE]

WHEREFORE, Petitioner prays:

1. That the court order Respondent to arbitrate the controversy as herein alleged.
2. That Petitioner be awarded costs of suit herein incurred.
3. For such other and further relief as the court may deem proper.

_____ [firm name, if any]

By: _____ [signature]

_____ [typed name]

Attorney for Petitioner _____

NOTES.

Authority:

CCP §§ 1281.2, 1281.7, 1290

Drafting Petition:

See 5.20[1], [4]

Timing:

See 5.20[3]

Service:

See 5.20[4], [5]

Related Orders Granting or Denying Petition to Compel Arbitration:

See 5.20[7], [8], 5.21

Appealing Denial:

See 5.22

Legal Topics:

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

Civil ProcedureAlternative Dispute ResolutionArbitrationsFederal Arbitration ActOrders to Compel ArbitrationCivil
ProcedureAlternative Dispute ResolutionValidity of ADR Methods



171 of 175 DOCUMENTS

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Chapter 5 Determining Whether to Arbitrate or Litigate

VII. FORMS

1-5 MB Practice Guide: CA Contract Litigation 5.34

5.34 Notice of Hearing on Petition to Compel Arbitration.**Notice of Hearing on Petition to Compel Arbitration.**

_____ [Name of attorney]
 _____ [Street address]
 _____ [City, state, and ZIP]
 _____ [Area code and phone number]
 _____ [State Bar no. of attorney]
 Attorney for _____ [name of party]

SUPERIOR COURT OF CALIFORNIA,
 COUNTY OF _____

[name] _____,
 Petitioner,
 vs.
 [name] _____,
 Respondent.

)
) NO.
) _____
) _____
) NOTICE OF HEARING ON PETITION TO COM-
) PEL ARBITRATION
) [LIMITED CIVIL CASE]
) [Amount demanded]
) _____
) _____ (exceeds or does not ex-
) ceed) \$10,000]
) Date:
) _____
) _____
) Time:
) _____
) _____
) Dept:
) _____

Judge:

Date Action Filed:

Trial Date:

To Respondent _____[*name*] and to _____[*name*], his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____[*date*], at _____[*time*], or as soon thereafter as the matter can be heard, in [Department

_____ of] this court, located at _____[*street address*], _____[*city*], California, the petition of _____[*name*] for an order to arbitrate certain controversies specified in the petition, a copy of which is served herewith, will be heard by the court.

This petition is based on the following described papers which are served with this petition:

_____ [*describe, e.g., motion, memorandum, and declaration of Petitioner, John Smith*].

Dated: _____

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Petitioner _____

NOTES.

Authority:

CCP §§ 1290.2, 1290.4

Timing:

See 5.20[3]

Service:

See 5.20[4], [5]

Related Petition to Compel Arbitration:

See 5.33

Legal Topics:

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

Civil ProcedureAlternative Dispute ResolutionArbitrationsFederal Arbitration ActOrders to Compel ArbitrationCivil
ProcedureAlternative Dispute ResolutionValidity of ADR Methods



172 of 175 DOCUMENTS

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Chapter 5 Determining Whether to Arbitrate or Litigate

VII. FORMS

1-5 MB Practice Guide: CA Contract Litigation 5.35

5.35 Order Compelling Arbitration.**Order Compelling Arbitration.**

_____ [Name of attorney]
 _____ [Street address]
 _____ [City, state, and ZIP]
 _____ [Area code and phone number]
 _____ [State Bar no. of attorney]
 Attorney for _____ [name of party]

SUPERIOR COURT OF CALIFORNIA,

COUNTY OF _____

[name] _____,	)	
Petitioner,	)	NO.
vs.	)	_____
[name] _____,	)	
Respondent.	)	ORDER COMPELLING ARBITRATION
	)	[LIMITED CIVIL CASE]
	)	

_____ The petition of [name, e.g., John Smith] for an order compelling arbitration came on regularly for hearing on _____ [date]
 _____. Petitioner appeared through his/her counsel [name, e.g., _____] Tom Doe] and Respondent appeared through his/her counsel [name, e.g., Jane Lee].

Due and proper notice of the hearing of the petition having been given and proof having been made to the satisfaction of

the court that the petition should be granted,

_____ IT IS ORDERED that Petitioner
[*name, e.g.,* _____ John Smith] and
Respondent [*name, e.g.,* Mary Jones] arbitrate the controversies existing between them in accordance with the
provisions of their agreement dated _____ [*date*], and that Petitioner recover his/her costs of this
proceeding.

Dated: _____

_____ [*signature*]

Judge of the Superior Court

NOTES.

Authority:

CCP § 1281.2

Discussion:

See 5.20[7]

Related Petition to Compel Arbitration:

See 5.33, 5.34

Legal Topics:

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

Civil ProcedureAlternative Dispute ResolutionArbitrationsFederal Arbitration ActOrders to Compel ArbitrationCivil
ProcedureAlternative Dispute ResolutionValidity of ADR Methods



173 of 175 DOCUMENTS

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Chapter 5 Determining Whether to Arbitrate or Litigate

VII. FORMS

1-5 MB Practice Guide: CA Contract Litigation 5.36

5.36 Order Denying Arbitration and Dismissing Proceeding.**Order Denying Arbitration and Dismissing Proceeding.**

_____ [Name of attorney]
 _____ [Street address]
 _____ [City, state, and ZIP]
 _____ [Area code and phone number]
 _____ [State Bar no. of attorney]
 Attorney for _____ [name of party]

SUPERIOR COURT OF CALIFORNIA,

COUNTY OF _____

[name] _____,	)	
Petitioner,	)	NO.
vs.	)	_____
[name] _____,	)	_____
Respondent.	)	ORDER DENYING ARBITRATION AND DIS-
	)	MISSING PROCEEDING
	)	[LIMITED CIVIL CASE]

_____ The petition of [name, e.g.,
 _____ John Smith] for an order compelling
 arbitration came on regularly for hearing on this date. Petitioner appeared through his/her counsel, [name, e.g.,
 _____ Tom Doe] and Respondent appeared
 through his/her counsel, [name, e.g., Jane Lee].

_____ The court, having considered the

[affidavit(s) or declaration(s)] and other documents and evidence in support of and in opposition to the petition, having heard the arguments of counsel, and being fully advised in the premises,

IT IS ORDERED that the petition to order arbitration is denied and the proceeding is dismissed, Respondent to recover his/her costs herein incurred.

Dated: _____

_____ [signature]

Judge of the Superior Court

NOTES.

Authority:

CCP § 1281.2

Related Forms:

See 5.33, 5.34

Appeal:

See 5.22

Legal Topics:

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

Civil ProcedureAlternative Dispute ResolutionArbitrationsFederal Arbitration ActOrders to Compel ArbitrationCivil ProcedureAlternative Dispute ResolutionValidity of ADR Methods



174 of 175 DOCUMENTS

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Chapter 5 Determining Whether to Arbitrate or Litigate
VII. FORMS

1-5 MB Practice Guide: CA Contract Litigation 5.37

5.37 Notice of Motion to Stay Pending Action Until Arbitration Is Completed.**Notice of Motion to Stay Pending Action Until Arbitration Is Completed.**

_____ [Name of attorney]
 _____ [Street address]
 _____ [City, state, and ZIP]
 _____ [Area code and phone number]
 _____ [State Bar no. of attorney]
 Attorney for _____ [name of party]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

[name] _____,
 Plaintiff,
 vs.
 [name] _____,
 Defendant.

)
) NO.
) _____
)
) NOTICE OF MOTION TO STAY PROCEEDINGS
) [LIMITED CIVIL CASE]
) [Amount demanded]
) _____
) _____ (exceeds or does not ex-
) ceed) \$10,000]
) Date:
) _____
)
)
) Time:
) _____
)
) Dept:
) _____
) _____

Judge:

Date Action Filed:

Trial Date:

_____ To *[identify party, e.g., Plaintiff John Smith]*, and to his/her attorney of record:

[EITHER, if application for arbitration is pending]

NOTICE IS HEREBY GIVEN that on _____ *[date]*, at _____ *[time]* , or as soon thereafter as the matter may be heard, in [_____ (Department or Division) of] this court, located at _____ *[street address]*, _____ *[city]* _____, *[specify moving party, e.g., Defendant Mary Jones]* will, and hereby does, move for an order staying the proceedings herein until *[identify party, e.g., defendant's]* application to arbitrate, now pending before _____ *[specify court]*, is determined and there is an arbitration, if it is ordered. The motion will be made on the ground that the controversy to be arbitrated pursuant to the application is an issue involved in the above entitled cause now pending before this court.

[OR, If arbitration has been ordered]

NOTICE IS HEREBY GIVEN that on _____ *[date]*, at _____ *[time]* , or as soon thereafter as the matter may be heard, in [_____ (Department or Division) of] this court, located at _____ *[street address]*, _____ *[city]* _____, *[specify moving party, e.g., Defendant]* will move for an order staying the proceedings herein until there is an arbitration in accordance with the order by _____ *[specify court]*, a copy of which is attached to, and served with, this notice of motion, or until such earlier time as the court may order. The motion will be made on the ground that the controversy to be arbitrated pursuant to the order is an issue involved in the above entitled cause now pending before this court.

[CONTINUE]

_____ The motion will be based on this notice of motion, the declaration of *[name, e.g., Defendant Mary Jones]*, and the memorandum served and filed with

this notice, on the records and file of this case, and on any evidence that may be presented at the hearing of the motion.

Dated: _____

_____ [firm name, if any]

By: _____ [signature]

_____ [typed name]

Attorney for _____

[party's status, e.g., defendant]

SUPPORTING DECLARATION OF [name]

_____, I, [name, e.g., Mary Jones], say:

1. I am _____ [specify, e.g., the defendant in this action].

2. On _____ [date], I obtained an order compelling arbitration from] the Superior Court of California, County of Farallon.

3. The controversy subject to arbitration as

_____ [stated in the petition mentioned above or ordered] is _____ [describe, e.g., regarding damages for failure to accept delivery of goods Plaintiff John Smith alleges were substandard]. This controversy is an issue involved in the above entitled cause now pending before this court in that _____ [specify, e.g., Plaintiff John Smith has filed the subject lawsuit claiming damages for delivery of substandard goods based upon the same shipment. This could result in potentially conflicting rulings].

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

_____ [date]

_____ [signature]

_____ [typed name]

MEMORANDUM

[Add memorandum supporting motion]

NOTES.

Authority:

CCP § 1281.4

Related Order Staying Proceeding:

See 5.38

Legal Topics:

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

Civil ProcedureAlternative Dispute ResolutionArbitrationsGeneral OverviewCivil ProcedureAlternative Dispute ResolutionArbitrationsFederal Arbitration ActStays Pending Arbitration



175 of 175 DOCUMENTS

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Chapter 5 Determining Whether to Arbitrate or Litigate
VII. FORMS

1-5 MB Practice Guide: CA Contract Litigation 5.38

5.38 Order Staying Proceedings in Pending Action.**Order Staying Proceedings in Pending Action.**

_____ [Name of attorney]
 _____ [Street address]
 _____ [City, state, and ZIP]
 _____ [Area code and phone number]
 _____ [State Bar no. of attorney]
 Attorney for _____ [name of party]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

[name] _____,	)	
Plaintiff,	)	
vs.	)	NO.
[name] _____,	)	_____
Defendant.	)	_____
	)	ORDER
	)	

The motion of _____ [name]
 _____ for an order to stay proceedings in
 the above entitled cause came on regularly for hearing this date. [identify party, e.g., plaintiff] appeared by his/her
 counsel _____ [name]
 _____ and [identify party, e.g., defendant]
 appeared by his/her counsel _____ [name].

Proof having been made to the satisfaction of the court that the motion should be granted and good cause appearing therefor,

_____. IT IS ORDERED that the above entitled [action or _____ proceeding] be stayed [*specify, e.g.,* _____ as to all proceedings therein] until [arbitration has been concluded and award made in accordance with the Order Compelling Arbitration made by the Superior Court of California, County of Farallon, dated _____,

_____, or the Petition to Compel Arbitration now pending before the Superior Court of California, County of Farallon, is determined and arbitration is concluded if ordered therein *or (date)* _____,

_____, as specified by the court].
Dated: _____

_____ [signature]

Judge of the Superior Court

NOTES.

Authority:

CCP § 1281.4

Related Form:

See 5.37

Legal Topics:

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

Civil ProcedureAlternative Dispute ResolutionArbitrationsGeneral OverviewCivil ProcedureAlternative Dispute ResolutionArbitrationsFederal Arbitration ActStays Pending Arbitration



1 of 189 DOCUMENTS

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Chapter 6 Using or Opposing Provisional Remedies in Contract Actions

1-6 MB Practice Guide: CA Contract Litigation 6.syn

§ 6.syn Synopsis to Chapter 6: Using or Opposing Provisional Remedies in Contract Actions

6.01 Scope.

6.02 Objective and Strategy.

6.03 CHECKLIST: Seeking or Opposing Preliminary Injunction.

6.04 Options and Strategies.

6.05 Breach of Contract Can Be Enjoined in Some Cases.

6.05[1] Injunctive Relief Is Limited.

6.05[2] Injunction Can Obviate Specific Performance.

6.05[3] Injunction Can Enforce Personal Services Contract in Limited Situations.

6.05[4] Injunction Can Enforce Cooperative Marketing Contract.

6.05[5] Injunction Can Enforce Trust Agreement.

6.05[6] Injunction Can Enforce Noncompetition Agreement.

6.06 Preliminary Injunction May Protect Party During Litigation.

6.06[1] Injunction Can Preserve Status Quo.

6.06[2] Injunction Can Preclude Ineffectual Judgment.

6.06[3] Injunction Can Prevent Multiple Proceedings.

6.07 Circumstances Must Warrant Preliminary Injunction.

6.08 CHECKLIST: Seeking or Opposing Attachment.

6.09 Options and Strategies.

6.10 Attachment Is Available in Some Contract Actions.

6.10[1] Plaintiff Must Claim at Least \$500 in Damages.

6.10[2] Claim May Be Secured by Personal Property.

6.10[3] Attachment Is Specifically Precluded by Statute in Some Cases.

6.10[3][a] Claim Secured by Real Property May Be Disqualified.

6.10[3][b] Claim Against Individual for Consumer Debt Is Disqualified.

6.10[3][c] Claim Against Individual Not Arising From Business Is Disqualified.

6.10[4] Plaintiff Must Show Probable Validity of Claim.

6.10[5] Unlawful Detainer Presents Special Case.

6.11 All Property of Corporation, Partnership, or Association Can Be Attached.

6.12 Only Nonexempt Property of Individual Can Be Attached.

6.12[1] Defendant Must Claim Exemption.

6.12[2] Fraudulent Transfer Could Generate Exception.

6.12[3] Subject Property Is Specified in Statutes.

6.12[3][a] Community Property Can Be Attached.

6.12[3][b] Declared Homestead Can Be Attached.

6.12[3][c] Attachment Lien on Homestead Is Limited.

6.12[3][d] Real Property Can Be Attached.

6.12[3][e] Mineral Interests Can Be Attached.

6.12[3][f] Equipment, Farm Products, and Inventory Can Be Attached.

6.12[3][g] Business-Related Intangible Property Can Be Attached.

6.12[3][h] Money Can Be Attached.

6.12[3][i] Negotiable Instruments Can Be Attached.

6.13 Plaintiff Can Obtain Provisional Injunctive Relief (Temporary Protective Order).

6.13[1] Plaintiff May Request Relief.

6.13[1][a] Plaintiff Must Show Great or Irreparable Injury.

6.13[1][b] Plaintiff Must Show Probable Validity of Claim.

6.13[2] Court May Issue Injunction in Lieu of Attachment.

6.13[3] Injunction Is Subject to Statutory Requirements.

6.13[3][a] Equitable Considerations Are Paramount.

6.13[3][b] Transfer of Property Generally May Be Prohibited.

6.13[3][c] Farm Products or Inventory Will Remain Transferrable.

6.13[3][d] Defendant May Continue to Issue Checks.

6.13[4] Service of Injunction Creates Lien on Attachable Property.

6.13[5] Injunction Is Short-Lived.

6.14 Plaintiff Can Obtain Turnover Order.

6.15 CHECKLIST: Seeking or Opposing Claim and Delivery.

6.16 Options and Strategies.

6.17 Application for Writ of Possession Is by Notice of Motion or Ex Parte.

6.18 Plaintiff Must Show Probable Validity of Claim.

6.19 Plaintiff Can Obtain Provisional Injunctive Relief.

6.20 Plaintiff Can Obtain Turnover Order.

6.21 Court Can Make Supplemental Orders.

6.22 CHECKLIST: Seeking or Opposing Appointment of Receiver.

6.23 Options and Strategies.

6.24 Existence of Alternative Remedy Does Not Bar Receivership.

6.25 Seller's Action to Recover Property Can Involve Receivership.

6.26 Creditor's Equitable Action Can Involve Receivership.

6.27 Equitable Action Between Partners, Joint Venturers, or Like Parties Can Involve Receivership.

6.28 Lender's Action to Enforce Assignment of Real Property Rents Can Involve Receivership.

6.29 Receiver Can Be Appointed Whenever Necessary to Preserve Property or Party's Rights.

6.30 Receiver Can Be Appointed for Property Subjected to Attachment.

6.31 Court May Appoint Receiver on Its Own Initiative.

6.32 CHECKLIST: Seeking or Opposing Turnover or Deposit in Court.

6.33 Options and Strategies.

6.34 Party Can Request Turnover of Money or Thing.

6.34[1] Court Has Power to Issue Turnover Order.

6.34[2] Claimant Must Move for Order.

6.34[3] Court May Impose Conditions or Order Deposit in Court.

6.35 Party Can Request Order for Deposit of Money or Thing in Court.

6.36 Defendant Can Preemptively Deposit Money in Court.

6.36[1] Defendant Must Tender, Allege, and Deposit Full Amount to Which Plaintiff Is Entitled.

6.36[2] Defendant Can Recover Costs.

6.36[3] Defendant Can Recover Attorney's Fees.



2 of 189 DOCUMENTS

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Chapter 6 Using or Opposing Provisional Remedies in Contract Actions

I. STRATEGY

1-6 MB Practice Guide: CA Contract Litigation 6.01

6.01 Scope.

This chapter covers selecting an appropriate provisional remedy, and determining how to oppose an application for such a remedy, in an action based on a contract. Possible remedies include:

- Preliminary injunction [see 6.03 -6.07].
- Attachment [see 6.08 -6.12].
- Provisional relief specific to attachment [see 6.13, 6.14, 6.30].
- Claim and delivery [see 6.15 -6.18].
- Provisional relief in aid of a writ of possession (for claim and delivery), including:
 - ☐ Injunctive relief [see 6.19];
 - ☐ A turnover order [see 6.20]; and
 - ☐ Supplemental orders [see 6.21].
- Appointment of a receiver [see 6.22 -6.29].
- Turnover orders and deposits in court [see 6.33 -6.36].

Core Statutes:

CCP §§ 481.010 et seq., 511.010 et seq., 525 et seq., 564 et seq., 572 et seq.

Legal Topics:

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

Civil Procedure Remedies Injunctions General Overview Civil Procedure Remedies Prejudgment Remedies General

OverviewCivil ProcedureRemediesProvisional RemediesGeneral Overview



3 of 189 DOCUMENTS

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Chapter 6 Using or Opposing Provisional Remedies in Contract Actions

I. STRATEGY

1-6 MB Practice Guide: CA Contract Litigation 6.02

6.02 Objective and Strategy.

Provisional remedies in actions on contracts have the general purpose of holding one party (usually the defendant) in a stand-still position with respect to either property that is the subject of the litigation, or the party's conduct during the litigation, or the party's potential ability to pay damages if adjudged liable.

To protect any potential rights in property that is the subject of the litigation, the plaintiff can either:

- Use claim and delivery to obtain immediate possession, in a suit to recover the property (or, in lieu of obtaining possession, force the defendant to provide an undertaking to cover the plaintiff's potential damages if the property is not eventually delivered after a judgment) [see 6.16];
- Ask for appointment of a receiver, if there is a risk that the property will be harmed or removed by the defendant before a judgment can be enforced [see 6.23]; or
- Ask for an order that the property be deposited in court until a judgment can be rendered [see 6.33].

If the defendant has threatened to breach the parties' contract, in some cases the plaintiff can sue for a final injunction to prevent the breach, and in those cases the plaintiff can also obtain a preliminary injunction to prevent the breach from occurring during the litigation [see 6.04, 6.05].

With respect to either party's conduct during the litigation, the other party could obtain a preliminary injunction to preserve the status quo, prevent an ineffectual judgment, or prevent multiple proceedings [see 6.04, 6.06].

When the plaintiff sues for more than \$500 in damages for breach of a commercial contract, and has reason to fear that the defendant's property, which could be levied on to enforce a judgment for damages, might be otherwise consumed or removed before a judgment could be enforced, the plaintiff can obtain issuance of a writ of attachment, for the purpose of keeping the defendant's property available for satisfaction of a judgment [see 6.09].

Detailed Discussion/Forms:

Permanent injunctions, see *Ch. 8, Seeking or Opposing Equitable Remedies in Contract Actions*, 8.59-8.71.

Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, Ch. 18, TROs and Preliminary Injunctions; Ch. 19, Attachment; Ch. 20, Claim and Delivery.

California Forms of Pleading and Practice, Ch. 62, Attachment; Ch. 119, Claim and Delivery; Ch. 211, Deposit in Court; Ch. 303, Injunctions; Ch. 486, Receivers (Matthew Bender).

California Points and Authorities, Ch. 23, Attachment; Ch. 40, Claim and Delivery; Ch. 116, Injunctions; Ch. 200, Receivers (Matthew Bender).



Cross Reference:

For Tips on updating case law and expanding your research with additional resources, see **How to Use Lexis.com With This Publication** at the front of this volume.

Legal Topics:

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

Civil Procedure Remedies Injunctions Preliminary & Temporary Injunctions Civil Procedure Remedies Provisional Remedies General Overview Civil Procedure Remedies Receiverships General Overview



4 of 189 DOCUMENTS

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Chapter 6 Using or Opposing Provisional Remedies in Contract Actions

II. SEEKING OR OPPOSING PRELIMINARY INJUNCTION

1-6 MB Practice Guide: CA Contract Litigation 6.03

6.03 CHECKLIST: Seeking or Opposing Preliminary Injunction.

☐ If plaintiff is suing for breach of contract, determine if contract is one of following types for which injunctive relief is available:

☐ Contract, performance of which could be specifically enforced.

Authority:

CC § 3423(e); CCP § 526(b)(5)

Discussion:

See 6.05[2]

☐ Contract for personal services of actor or performing musician (or any other personal services contract meeting statutory compensation requirements).

Authority:

CC § 3423(e); CCP § 526(b)(5)

Discussion:

See 6.05[3]

☐ Exclusive output contract by member or shareholder of nonprofit cooperative marketing corporation or association.

Authority:

CC § 3423(e); CCP § 526(b)(5)

Discussion:

See 6.05[4]

- ☐ Trust agreement, if plaintiff is suing to prevent breach by trustee.

Authority:

CC § 3422; CCP § 526(a)(7)

Discussion:

See 6.05[5]

- ☐ Enforceable noncompetition agreement.

Authority:

B&P Code §§ 16601-16602.5; CCP §§ 526(a)(1), 527(a); Monogram Indus., Inc. v. Sar Indus., Inc. (1976) 64 CA3d 692, 703, 134 CR 714

Discussion:

See 6.05[6]

- ☐ Determine whether preliminary injunction can be obtained by either party (although usually by plaintiff) because of necessity.

- ☐ Is injunction needed to preserve status quo by preventing commission or continuance of some act during litigation that would produce waste, or great or irreparable injury, to moving party?

Authority:

CCP § 526(a)(2)

Discussion:

See 6.06[1]

- ☐ Is injunction needed to protect moving party by preventing some act in violation of party's rights respecting subject of action and tending to render judgment ineffectual?

Authority:

CCP § 526(a)(3)

Discussion:

See 6.06[2]

- ☐ Is injunction needed to prevent multiple proceedings?

Authority:

CCP § 526(a)(6)

Discussion:

See 6.06[3]

- ☐ Determine whether preliminary injunction can be obtained because circumstances warrant it, in exercise of

judicial discretion.

Authority:

CCP § 527(a); Common Cause of Cal. v. Board of Supervisors (1989) 49 C3d 432, 441-442, 261 CR 574, 777 P2d 610

Discussion:

See 6.07

Legal Topics:

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

Civil Procedure Remedies Injunctions Preliminary & Temporary Injunctions Civil Procedure Remedies Provisional Remedies General Overview



5 of 189 DOCUMENTS

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Chapter 6 Using or Opposing Provisional Remedies in Contract Actions

II. SEEKING OR OPPOSING PRELIMINARY INJUNCTION

1-6 MB Practice Guide: CA Contract Litigation 6.04

6.04 Options and Strategies.

Injunctive relief as a provisional remedy in an action based on a contract can be obtained in three basic contexts:

- When the complaint demands an injunction as ultimate relief, the plaintiff can sometimes obtain the same relief on a preliminary basis for the duration of the litigation (and usually from the outset), provided there is compelling evidence of the need for that relief and of the propriety of giving it [*see CCP §§ 525, 526(a)(1), 527(a)*]. That remedy is called a preliminary injunction. There are situations in which the impending breach of a contract can be enjoined [*see 6.05*], and in such a case, the plaintiff may be entitled to a preliminary injunction.
- When a party demands other equitable relief--such as rescission and restitution, reformation of the contract, or cancellation of the contract--the party can sometimes obtain temporary injunctive relief, if necessary, on the ground that damages would not afford adequate relief or that computing the amount of damages would be extremely difficult [*see CCP §§ 525, 526(a)(4), (5), 527(a)*]. That remedy, too, is called a preliminary injunction. As one or both of those grounds would be proved, or be taken as given, in an action for equitable relief, and since in any case those grounds would be considered by the court whenever a party applies for a preliminary injunction [*see 6.07*], they are not discussed further in this chapter.
- In any kind of case, regardless of the ultimate relief demanded, a party can sometimes obtain temporary injunctive relief when it is necessary and appropriate to restrain another party from doing some act while the litigation is pending. That remedy, too, is called a preliminary injunction. The situations in which it could be available in an action based on a contract are prescribed by statute [*see CCP §§ 525, 526(a)(2), (3), 527(a); 6.06*].

A temporary restraining order (TRO) is a procedural device in aid of a preliminary injunction, which a judge will issue to maintain the status quo between the parties until the application for the preliminary injunction can be heard. In practice, a TRO is almost always obtained *ex parte*, for which the applicant for the preliminary injunction must show that:

- Unless the TRO is issued, great or irreparable injury will result to the applicant before the matter can be heard on notice [*CCP § 527(c)(1)*]; and

- The applicant gave the other party reasonable notice of the time and place for requesting the TRO, or a good faith attempt to do that was unavailing, or for a specified reason no such notice should be given to the other party [CCP § 527(c)(2)].



Strategic Point:

A preliminary injunction cannot be issued without prior notice to the other party [CCP § 527(a)]. Normally a hearing on the application for a preliminary injunction is set by a regular notice of motion; but if the applicant obtains a TRO, then the preliminary injunction hearing is set by an order to show cause.

Distinguish--Prohibitory and Mandatory Injunctions:

By statute, a preliminary injunction requires a person to refrain from a particular act [see CCP § 525; see also CC §§ 3420, 3421 (injunctions give "preventive relief"; provisional injunctions are governed by Code of Civil Procedure)]. There is no statutory authority for a court to issue a mandatory preliminary injunction, that is, one directing a person to do a particular act. Nevertheless, courts have been willing to issue mandatory preliminary injunctions. An order granting an application for a preliminary injunction can be immediately appealed [CCP § 904.1(a)(6)]; and to the extent that the injunction is mandatory, enforcement of it is automatically stayed by the filing of a notice of appeal [*Kettenhofen v. Superior Court* (1961) 55 C2d 189, 191, 10 CR 356, 358 P2d 684].

Consider--Union Contracts; Arbitration Agreements:

Preliminary injunctions affecting the enforcement of collective bargaining agreements or the enforcement of arbitration agreements can be obtained in appropriate cases, but they are beyond the scope of this chapter.



Cross References:

Seeking permanent injunctions in contract actions, see *Ch. 8, Seeking or Opposing Equitable Remedies in Contract Actions*, 8.59 -8.71.

Checklist for seeking injunctive relief, see *Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure*, 18.03.

Checklist for opposing injunctive relief, see *Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure*, 18.12.

Forms for obtaining TRO and preliminary injunction, see *Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure*, 18.26 -18.30.

Discussion of practice respecting notice of motion or order to show cause, see *California Forms of Pleading and Practice*, Ch. 372, *Motions and Orders* (Matthew Bender).

Legal Topics:

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

Civil Procedure Remedies Injunctions Preliminary & Temporary Injunctions Civil Procedure Remedies Prejudgment Remedies General Overview Civil Procedure Remedies Provisional Remedies General Overview



6 of 189 DOCUMENTS

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Chapter 6 Using or Opposing Provisional Remedies in Contract Actions

II. SEEKING OR OPPOSING PRELIMINARY INJUNCTION

1-6 MB Practice Guide: CA Contract Litigation 6.05

6.05 Breach of Contract Can Be Enjoined in Some Cases.

6.05[1] Injunctive Relief Is Limited. Injunctive relief, including a preliminary injunction, can be obtained to prevent the breach of a contract in the following situations:

- To prevent the breach of a contract the performance of which could be specifically enforced [*see CC § 3423(e); CCP § 526(b)(5); see also 6.05[2]*].
- To prevent the breach of a written contract by an actor or a performing musician (or the breach of any other personal-services contract), provided certain conditions exist [*see CC § 3423(e); CCP § 526(b)(5); see also 6.05[3]*].
- To prevent the breach of an exclusive output contract by a member or shareholder of a nonprofit cooperative marketing corporation or association [*see CC § 3423(e); CCP § 526(b)(5); see also 6.05[4]*].
- To prevent the breach of a trust agreement by the trustee [*see CC § 3422; CCP § 526(a)(7); see also 6.05[5]*].
- To prevent the breach of an enforceable noncompetition agreement [*see 6.05[6]*].



Strategic Point:

Apart from the above situations, an injunction usually will not be issued to prevent the breach of a contract because, in any other situation, obtaining injunctive relief would require proof of one of the following conditions [*see CC § 3422; CCP § 526(a)(4), (5); see also 6.07*], which usually cannot be proved with respect to the breach of a contract:

- Damages (on being recovered after a breach) would not afford adequate relief; or
- It would be extremely difficult to ascertain the amount of compensation that would afford adequate

relief.

Cross Reference:

Detailed discussion of circumstances under which a permanent injunction may be granted in a contract action, see *Ch. 8, Seeking or Opposing Equitable Remedies in Contract Actions*, 8.63 -8.67.

6.05[2] Injunction Can Obviate Specific Performance. Since an injunction cannot be granted to prevent the breach of a contract the performance of which could not be specifically enforced [*see CC § 3423(e)*], implicitly an injunction can be granted to prevent the breach of a contract the performance of which would be specifically enforced. In other words, if the breach of a contract would entitle the aggrieved party to have a decree of specific performance, then the aggrieved party may obtain an injunction to prevent the breach (on proof of required conditions). The aggrieved party can obtain a preliminary injunction in such a case [*CCP § 526(b)(5)*], on a showing of sufficient grounds [*CCP § 527(a)*].

Strategic Point--Applicant:



Whether specific performance actually would be decreed is beside the point. The preliminary injunction can be issued if specific performance would be a possible remedy for breach of the contract [*see, e.g., Southern Christian Leadership Conference v. Al Malaikah Auditorium Co. (1991) 230 CA3d 207, 224, 281 CR 216* (action to enforce contract to make lease); *Steinmeyer v. Warner Consol. Corp. (1974) 42 CA3d 515, 519-520, 116 CR 57* (action to enforce contract to transfer corporation stock that was not obtainable on market)].

Strategic Point--Opponent:



The obvious line of attack is to argue that the contract could not be specifically enforced. When that argument is convincing, the application for a preliminary injunction should be denied [*see CCP § 526(b)(5)*; *see, e.g., Thayer Plymouth Ctr., Inc. v. Chrysler Motors Corp. (1967) 255 CA2d 300, 303-305, 63 CR 148* (car dealership contract could not be specifically enforced against manufacturer; trial court improperly issued preliminary injunction)]. If the complaint requests specific performance in such a case, then parallel arguments could be that (1) the applicant cannot be expected to prevail on the merits and (2) damages would be an adequate remedy, since each of those is a basis for denying an application for a preliminary injunction [*see 6.07*].

Consider:

Whether the contract could be specifically enforced might be determined in reliance on a provision of the contract authorizing a party to enforce the other party's obligations by any proceeding in law or equity [*see Zakaria v. Lincoln Prop. Co. (1986) 185 CA3d 500, 510, 229 CR 669*].

Cross References:

Requirement to show sufficient grounds for preliminary injunction, *see 6.07*.

Seeking permanent injunctions in contract actions, *see Ch. 8, Seeking or Opposing Equitable Remedies in Contract Actions*, 8.59 -8.71.

Discussion of specific performance as remedy for breach of contract, *see California Forms of Pleading and Practice*, Ch. 528, Specific Performance (Matthew Bender).

Memorandum supporting or opposing issuance of preliminary injunction to prevent breach of contract that would be specifically enforceable, see California Points and Authorities, Ch. 116, Injunctions (Matthew Bender).

6.05[3] Injunction Can Enforce Personal Services Contract in Limited Situations. An injunction can be granted to prevent the breach of a contract in writing for the rendition of personal services from one person to another if both of the following conditions are satisfied [CC § 3423(e)]:

- The promised service is of a special, unique, unusual, extraordinary, or intellectual character, which gives it peculiar value, the loss of which cannot be reasonably or adequately compensated in damages in an action at law; and
- The individual who promised to render the service has received compensation for the covered personal services commensurate with a detailed and complex statutory formula [see CC § 3423(e)(2)].

The aggrieved party can obtain a preliminary injunction in such a case [CCP § 526(b)(5)(B)], on a showing of sufficient grounds [CCP § 527(a)].

Consider:

Attorneys may find the statute confusing because it speaks in general terms and prescribes an arcane compensation formula as a test for when the statute can be applied. In practice, the statute usually will be applied to an exclusive performance contract between an athlete, actor, or musician (or some other performance artist) and a producer or impresario [see, e.g., *MCA Records, Inc. v. Newton-John* (1979) 90 CA3d 18, 22, 153 CR 153 (applying former version of statute)]. The peculiar compensation formula is the result of negotiations between the legislative sponsor of the 1993 amendment putting it in place and various interested persons including talent attorneys, representatives from the recording, television, and motion picture industry, and unions for performing artists [see generally Assembly Committee on Judiciary, Report on SB 487 (Aug. 18, 1993); see also *Motown Record Corp. v. Brockert* (1984) 160 CA3d 123, 128-129, 207 CR 574 (description and explanation of practical problems caused by previous version of statute, which 1993 negotiated amendment was expected to cure)].

The compensation formula refers to an employment period of up to seven years because, under the Labor Code, a contract to render personal service, other than a contract of apprenticeship, generally may not be enforced against the employee beyond seven years from the commencement of service under the contract [see *Lab Code* § 2855(a)]. When a court issues a preliminary injunction under CCP § 526(b)(5), it cannot endure beyond the expiration of the contract being enforced, or beyond the statutory period of seven years, whichever period of duration would be shorter. Because it is a preliminary injunction, it also cannot endure beyond the conclusion of the action in which it is issued; and a plaintiff's general duty to exercise due diligence in the prosecution of an action and to bring it to conclusion within a reasonable time [see CCP §§ 581, 583.310 *et seq.*, 583.410 *et seq.*] is particularly strong when a preliminary injunction is in effect [see *MCA Records, Inc. v. Newton-John* (1979) 90 CA3d 18, 24, 153 CR 153].

Strategic Point:



Generally a contract to render personal services or to employ a person in personal service cannot be specifically enforced [CC § 3390; see generally, e.g., *Woolley v. Embassy Suites, Inc.* (1991) 227 CA3d 1520, 1533-1534, 278 CR 719 (reasons why such contracts are not specifically enforceable)]. Therefore, except when the foregoing special statute applies, the breach of such a contract cannot be prevented by an injunction [CC § 3423(e); CCP § 526(b)(5)].



Cross References:

Requirement to show sufficient grounds for preliminary injunction, see 6.07.

Discussion of injunctive relief to enforce personal services contract, see California Forms of Pleading and Practice, Ch. 249, Employment Law: Termination and Discipline; see also Ch. 528, Specific Performance (Matthew Bender).

Memorandum supporting issuance of preliminary injunction to prevent breach of personal-services contract, see California Points and Authorities, Ch. 116, Injunctions (Matthew Bender).

6.05[4] Injunction Can Enforce Cooperative Marketing Contract. Two statutory provisions authorize a cooperative marketing association to obtain an injunction to prevent the breach of a cooperative marketing agreement by a producer or provider of a commodity covered by the agreement:

- An injunction may be granted to prevent the breach of a contract entered into between any nonprofit cooperative corporation or association and a member of the association or shareholder of the corporation, in respect to any provision regarding the sale or delivery to the association or corporation of the products produced or acquired by the member or shareholder [CC § 3423(e); see generally *Poultry Producers of S. Cal., Inc. v. Barlow* (1922) 189 C 278, 285-286, 208 P 93 (opinion that was partially abrogated by 1925 amendment adding this statutory provision)]. The association can obtain a preliminary injunction in such a case [CCP § 526(b)(5)], on a showing of sufficient grounds [CCP § 527(a)].

- If there is a threatened breach of a marketing contract by a member of an association that is governed by the nonprofit cooperative associations law [see *F&A Code § 54001 et seq.*], the association is entitled to an injunction to prevent the threatened breach and is entitled to a decree of specific performance of the contract. Pending the adjudication of the action, the association is entitled to a temporary restraining order and a preliminary injunction against the member [*F&A Code § 54265*].

Distinguish:

When the association can invoke *F&A Code § 54265*, no showing of other "sufficient grounds" [see *CCP § 527(a)*; see also 6.07] is required to support the issuance of a preliminary injunction or a temporary restraining order [cf. *In re Marriage of Van Hook* (1983) 147 CA3d 970, 984-985, 195 CR 541 (usual equitable grounds need not be shown to obtain injunctive relief authorized by statute--in this case, former CC § 4359--when statutory conditions for issuance are satisfied)].



Decision Point:

Cooperative marketing contracts are specifically enforceable by the marketing association in many cases [see, e.g., *Corp Code § 13356* (nonprofit fish-marketing association's contract); *F&A Code §§ 54263, 54265* (nonprofit cooperative association's contract); see also *Colma Vegetable Ass'n v. Bonetti* (1928) 91 CA 103, 114, 267 P 172 (application of former cooperative marketing act)], and thus they would also be enforceable by injunction on that ground [see 6.05[2]].



Cross Reference:

Requirement to show sufficient grounds for preliminary injunction, see 6.07.

6.05[5] Injunction Can Enforce Trust Agreement. An injunction may be granted to prevent the breach of an obligation arising from a trust [CC § 3422]. The aggrieved party can obtain a preliminary injunction in such a case [CCP § 526(a)(7)], on a showing of sufficient grounds [CCP § 527(a)].

► Cross Reference:

Requirement to show sufficient grounds for preliminary injunction, see 6.07.

6.05[6] Injunction Can Enforce Noncompetition Agreement. Although noncompetition agreements generally are prohibited [see *B&P Code* § 16600], it is possible to make an enforceable noncompetition agreement in limited circumstances:

- The seller of a business can agree not to compete with the buyer [*B&P Code* § 16601].
- A withdrawing partner can agree not to compete with the partnership [*B&P Code* § 16602].
- A withdrawing member of a limited liability company can agree not to compete with the company [*B&P Code* § 16602.5].

Such an agreement can be enforced by a final injunction [see, e.g., *Martinez v. Martinez* (1953) 41 C2d 704, 706, 263 P2d 617; *City Carpet Beating etc. Works v. Jones* (1894) 102 C 506, 509-515, 36 P 841]. Therefore, the aggrieved party can obtain a preliminary injunction in a suit for a final injunction [*CCP* § 526(a)(1)], on a showing of sufficient grounds [*CCP* § 527(a); e.g., *Monogram Indus., Inc. v. Sar Indus., Inc.* (1976) 64 CA3d 692, 703, 134 CR 714].

Distinguish:

An employee's contractual obligation not to compete with the employer after termination of the employment generally is not enforceable except as necessary to protect the employer's trade secrets and properly confidential information [*B&P Code* § 16600; see, e.g., *Fortna v. Martin* (1958) 158 CA2d 634, 638-640, 323 P2d 146 (judgment granting final injunction against employee was reversed)].

► Cross References:

Requirement to show sufficient grounds for preliminary injunction, see 6.07.

Permanent injunction enforcing noncompetition agreement, see *Ch. 8, Seeking or Opposing Equitable Remedies in Contract Actions*, 8.65.

Legal Topics:

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

Civil Procedure Remedies Injunctions Preliminary & Temporary Injunctions Civil Procedure Remedies Provisional Remedies General Overview Contracts Law Remedies Equitable Relief Injunctive Relief Contracts Law Remedies Specific Performance Contracts Law Types of Contracts Personal Service Agreements



7 of 189 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 6 Using or Opposing Provisional Remedies in Contract Actions

II. SEEKING OR OPPOSING PRELIMINARY INJUNCTION

1-6 MB Practice Guide: CA Contract Litigation 6.06

6.06 Preliminary Injunction May Protect Party During Litigation.

6.06[1] Injunction Can Preserve Status Quo. A preliminary injunction may be granted when it appears from the complaint or affidavits that the commission or continuance of some act during the litigation would produce waste, or great or irreparable injury, to a party to the action [CCP § 526(a)(2)].

Example:

Defendant, the owner of a parcel of land, agreed to build a house on it and then to convey the house and land to plaintiff, who opened an escrow account with a deposit for the transaction. When the house was finished, defendant directed the escrow agent to cancel the escrow, since plaintiff had failed (unwittingly, because of the escrow agent's misinformation) to place additional money in the escrow account. Defendant conveyed the house and land to a third person. Plaintiff was determined to have the house and promptly sued both defendant and the third person, asking for specific performance of the contract between plaintiff and defendant, and other appropriate relief. Plaintiff also obtained a temporary restraining order preventing the third person from moving in, which the court continued in the form of a preliminary injunction. On appeal, the injunction was upheld. The appellate court observed that while the question was a close one, plaintiff had made a convincing argument that the difference between a new house and a used one, as perceived by a buyer of ordinary sensitivity, is a difference of character and not merely of value. Viewed in this light, there was substantial evidence from which the trial court could find a risk of irreparable injury to plaintiff if the third person were allowed to move in. Further, the trial court could find that this risk outweighed the risk of harm likely to result from issuance of the preliminary injunction [*Grey v. Webb* (1979) 97 CA3d 232, 237-238, 158 CR 595].

Distinguish:

In a federal court action governed by the *Erie* doctrine, this ground will be treated as one of the equitable considerations in determining whether to issue a preliminary injunction [see 6.07]--that is, it will always be considered--and will be expressed as the principle that maintenance of the status quo (or "status quo ante litem") is the purpose of a preliminary injunction [see, e.g., *Kaiser Trading Co. v. Associated Metals & Minerals Corp.* (ND Cal 1970) 321 F Supp 923, 935].

6.06[2] Injunction Can Preclude Ineffectual Judgment. A preliminary injunction may be granted when it appears, during the litigation, that a party to the action is doing, or threatens, or is about to do, or is procuring or

suffering to be done, some act in violation of the rights of another party to the action respecting the subject of the action, and tending to render the judgment ineffectual [CCP § 526(a)(3)].

Example:

Defendant agreed to sell all of the stock of a corporation to plaintiff, who in return gave defendant a promissory note backed by a letter of credit, which was payable by the issuing bank on its presentment along with the note and defendant's statement that plaintiff had defaulted in payment on the note. The note entitled plaintiff to an offset for the amount of any loss, liability, or damages suffered in connection with the parties' agreement. On discovering substantial undisclosed liabilities on the corporation's books, plaintiff gave notice of intention to exercise the offset right--which would reduce the unpaid principal on the note by 80 percent. Intending to have the stock at the reduced price, plaintiff sued defendant and the bank, and the trial court issued a preliminary injunction to prohibit defendant's presentment to the bank of the documents needed to authorize payment of the letter of credit. The injunction was proper for two reasons, one being that the stock transfer agreement was specifically enforceable because the corporation stock could not be obtained on the market and therefore had peculiar value [see CCP § 526(b)(5); see also 6.05[2]]. In addition, plaintiff had argued, defendant and affiliated parties were not California residents and had few assets in California; therefore, any judgment against them for wrongfully negotiating the letter of credit probably could not be satisfied except through litigation elsewhere. The appellate court observed that this consideration was sufficient to invoke the trial court's power to grant a preliminary injunction when a party is threatening to do an act that would render the court's judgment ineffectual [*Steinmeyer v. Warner Consol. Corp.* (1974) 42 CA3d 515, 520, 116 CR 57].



Strategic Point--Protection of Procedural Rights:

The rights protectable by the injunction include a party's procedural rights, such as the right to have discovery. A preliminary injunction can require the other party to refrain from destroying potentially relevant evidence--for instance, refrain from modifying or deleting computer files--in the party's possession or control [*Dodge, Warren & Peters Ins. Servs., Inc. v. Riley* (2003) 105 CA4th 1414, 1418-1419, 130 CR2d 385].



Strategic Point--Defendant's Potential Insolvency:

If the defendant can be expected to be insolvent (or otherwise unable to pay damages) by the time a judgment for damages would be collectable, the court may take that expectation into account in determining whether the plaintiff may have a preliminary injunction aimed at keeping the defendant solvent [*West Coast Constr. Co. v. Oceano Sanitary Dist.* (1971) 17 CA3d 693, 700, 95 CR 169 (sanitation district could be prevented from spending money dedicated sewer construction fund during pendency of construction company's action to be paid for sewer construction)].

6.06[3] Injunction Can Prevent Multiple Proceedings. A preliminary injunction may be granted when the restraint is necessary to prevent a multiplicity of judicial proceedings [CCP § 526(a)(6); see generally *Advanced Bionics Corp. v. Medtronic, Inc.* (2002) 29 C4th 697, 704-708, 128 CR2d 172, 59 P3d 231 (discussion of power to enjoin other judicial proceedings)].

Distinguish:

On this ground, but not for any other reason, the injunction may stay a judicial proceeding pending at the commencement of the action in which the injunction is demanded [CCP § 526(b)(1)]. Ordinarily, the injunction would be aimed at staying proceedings not then pending, which a party subsequently attempts to get underway in another court [see *Glade v. Glade* (1995) 38 CA4th 1441, 1455, 45 CR2d 695].

Exceptions:

The injunction cannot do either of the following:

- Stay proceedings in a court of the United States [*CCP* § 526(b)(2)]; or
- Stay proceedings in another state on a judgment of a court of that state [*CCP* § 526(b)(3)].

**Strategic Point--Power to Restrain Subsequent Proceeding:**

The first court to assert subject matter jurisdiction possesses the power and authority to grant equitable relief restraining proceedings in another court that threaten to impair the judgment in the first court [Franklin & Franklin v. 7- Eleven Owners for Fair Franchising (2000) 85 CA4th 1168, 1176, 102 CR2d 770 ; see, e.g., In re Marriage of Van Hook (1983) 147 CA3d 970, 987, 195 CR 541].

**Strategic Point--Risk That Court Will Stay Proceedings:**

A party planning to apply for a preliminary injunction on the ground of avoiding a multiplicity of actions should bear in mind that the court could decide that the other proceedings should continue, and therefore the court might, either spontaneously or on the other party's motion, stay proceedings in the present action [see, e.g., Seidman & Seidman v. Wolfson (1975) 50 CA3d 826, 833-834, 123 CR 873].

Legal Topics:

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

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8 of 189 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 6 Using or Opposing Provisional Remedies in Contract Actions

II. SEEKING OR OPPOSING PRELIMINARY INJUNCTION

1-6 MB Practice Guide: CA Contract Litigation 6.07

6.07 Circumstances Must Warrant Preliminary Injunction.

The governing statute requires a showing of "sufficient grounds" for the issuance of a preliminary injunction [CCP § 527(a)]. This is not a reference to one of the statutory grounds listed in CCP § 526 (which of course must be shown) but is an invocation of the judicial discretion that must be applied in the exercise of equity jurisdiction [*cf. Kaiser Trading Co. v. Associated Metals & Minerals Corp. (ND Cal 1970) 321 F Supp 923, 933* (even though preliminary injunction is allowed, or is not prohibited, by CCP § 526, issuance is still in court's discretion and requires showing of equitable grounds)]. Trial courts traditionally consider and weigh two factors in determining whether to issue a preliminary injunction [*e.g., Common Cause of Cal. v. Board of Supervisors (1989) 49 C3d 432, 441-442, 261 CR 574, 777 P2d 610*; *Jay Bharat Developers, Inc. v. Minidis (2008) 167 CA4th 437, 443-444, 84 CR3d 267* (injunction prohibiting terminated franchisees from continuing to use franchisor's trademark was appropriate)]:

- Is the applicant likely to prevail on the merits in the action?
- Would the applicant be more harmed by withholding the injunction than the other party would be harmed by issuing it?

The greater the showing on one factor, the less must be shown on the other to support an injunction [*Butt v. State (1992) 4 C4th 668, 678, 15 CR2d 480, 842 P2d 1240*].



Strategic Point--Risk of Great or Irreparable Harm:

There is no requirement to show the probability of great or irreparable harm to the applicant in the event the injunction is not issued, except in a situation in which that requirement is imposed by the governing statute [see, *e.g., CCP § 526(a)(2)*; see also 6.06[1]; but see, *e.g., Kaiser Trading Co. v. Associated Metals & Minerals Corp. (ND Cal 1970) 321 F Supp 923, 930-931* (showing of irreparable harm is required to obtain preliminary injunction in federal court)]. Nevertheless, courts usually consider that probability when determining to what extent the applicant would be harmed by withholding the injunction [see, *e.g., Dodge, Warren & Peters Ins. Servs., Inc. v. Riley (2003) 105 CA4th 1414, 1420-1421, 130 CR2d 385*].



Strategic Point--Absence of Adequate Alternative Remedy:

There also is no requirement to show the absence of an adequate alternative remedy. Again, however, the court, in determining to what extent the applicant would be harmed by withholding the injunction, usually will consider whether an adequate alternative remedy is available [see, e.g., *Abrams v. St. John's Hosp. & Health Ctr.* (1994) 25 CA4th 628, 636, 30 CR2d 603] .

Consider:

A contract provision for liquidated damages anticipates the possibility that it could be extremely difficult to ascertain the amount of compensation affording adequate relief in the event of a breach [see, e.g., *CC* § 1671]; thus a liquidated damages provision tends to negate an argument that damages would not afford adequate relief.



Strategic Point--Opponent:

An application for a preliminary injunction usually can be defeated by showing simply that one of the two factors cannot be established--that is, either (1) the applicant cannot be expected to prevail in the action or (2) the balance of potential harms does not tip in the applicant's favor [e.g., *Jessen v. Keystone Savings & Loan Assn.* (1983) 142 CA3d 454, 459, 191 CR 104] . However, the California Supreme Court has indicated a willingness to allow the issuance of a preliminary injunction if the party seeking the injunction can make a sufficiently strong showing of likelihood of success on the merits, notwithstanding an inability to show that the balance of harms tips in that party's favor [see *Common Cause of Cal. v. Board of Supervisors* (1989) 49 C3d 432, 446-447, 261 CR 574, 777 P2d 610 ; but see *White v. Davis* (2003) 30 C4th 528, 561, 133 CR2d 648, 68 P3d 74 (explaining that statement in *Common Cause* did not suggest that when applicant makes sufficient showing of likely success on merits, court need not consider relative balance of hardships at all, or that when balance of hardships dramatically favors denial of preliminary injunction, court nonetheless may grant preliminary injunction on basis of likelihood-of-success factor alone)].



Decision Point:

If the court fails to make explicit findings of fact with respect to the equitable grounds for a preliminary injunction, but there is evidence in the record that could support any unexpressed findings of fact, an appellate court may presume that the trial court made the necessary findings [*MCA Records, Inc. v. Newton-John* (1979) 90 CA3d 18, 23, 153 CR 153] . The parties should bear this in mind when deciding whether to request explicit findings.



Cross Reference:

Discussion of how court determines whether to issue preliminary injunction, see *California Forms of Pleading and Practice*, § 303.43 (Matthew Bender).

Legal Topics:

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

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9 of 189 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 6 Using or Opposing Provisional Remedies in Contract Actions

III. SEEKING OR OPPOSING ATTACHMENT

1-6 MB Practice Guide: CA Contract Litigation 6.08

6.08 CHECKLIST: Seeking or Opposing Attachment.

☐ Determine whether attachment is available in present action.

☐ Confirm that plaintiff is seeking at least \$500 in damages for breach of contract.

Authority:

CCP § 483.010(a)

Discussion:

See 6.10[1]

☐ Ascertain that claim is not adequately secured by real property.

Authority:

CCP § 483.010(b)

Discussion:

See 6.10[3][a]

☐ Confirm that claim is not against individual for consumer debt.

Authority:

CCP § 483.010(c)

Discussion:

See 6.10[3][b]

☐ If claim is against individual, confirm that it arose from defendant's conduct of trade, business, or profession.

Authority:*CCP § 483.010(c)***Discussion:**

See 6.10[3][c]

- ☐ Determine if plaintiff can show probable validity of claim.

Authority:*CCP §§ 484.090(a)(2), 485.220(a)(2)***Discussion:**

See 6.10[4]

- ☐ Determine if defendant has property that could be levied on under writ of attachment.

- ☐ Confirm that defendant is corporation, partnership, or other unincorporated association, all of whose property is subject to attachment.

Authority:*CCP § 487.010(a), (b)***Discussion:**

See 6.11

- ☐ Determine whether individual defendant has nonexempt property that is subject to attachment.

Authority:*CCP § 487.010(c)***Discussion:**

See 6.12

- ☐ Determine whether plaintiff should apply for provisional relief in aid of attachment.

- ☐ Determine whether injunctive relief (temporary protective order) is appropriate.

Authority:*CCP § 486.010***Discussion:**

See 6.13

- ☐ Determine whether turnover order is appropriate, provided writ of attachment has been issued.

Authority:*CCP § 482.080***Discussion:**

See 6.14

- ☐ Determine whether appointment of receiver for property subjected to attachment is appropriate.

Authority:

CCP § 488.700

Discussion:

See 6.30

Legal Topics:

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

Civil Procedure Remedies Prejudgment Remedies General Overview Civil Procedure Remedies Provisional Remedies Attachments



10 of 189 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 6 Using or Opposing Provisional Remedies in Contract Actions
III. SEEKING OR OPPOSING ATTACHMENT

*1-6 MB Practice Guide: CA Contract Litigation 6.09***6.09 Options and Strategies.**

The provisional remedy called attachment generally is available only in an action asserting a claim for money that is based--or multiple claims for money, each of which is based--on a contract, express or implied, if the total amount claimed is a fixed or readily ascertainable amount not less than \$500 exclusive of costs, interest, and attorney's fees [CCP § 483.010(a)]. In some cases, however, attachment is specifically precluded by statute [see 6.10[3]]. Attachment is intended to be limited to cases arising out of commercial transactions [Law Revision Commission cmt to CCP § 483.010, 11 Cal L Rev Comm'n Reports 562 (1973)] and usually is ineffectual or unavailable in actions on secured claims [see 6.10[2], [3][a]].

**Strategic Points:**

- An attachment may be issued whether or not other forms of relief are demanded [CCP § 483.010(d)].
- If a specific statute authorizes attachment in a particular situation, that statute is not abrogated by the Attachment Law [see Law Revision Commission cmt to CCP § 483.010, 11 Cal L Rev Comm'n Reports 562 (1973)].

Distinguish--Individual As Defendant Compared to Entity As Defendant:

When the defendant is an individual, the availability of attachment is limited to situations in which the plaintiff's claim arose from the defendant's conduct of a trade, business, or profession [see CCP § 483.010(c); see also 6.10[3][c]]. When the defendant is a corporation or a partnership or some unincorporated association, it does not matter whether the defendant is organized for profit or not for profit, nor does it matter whether the plaintiff's claim arose from an activity in which the entity was engaged for profit [Law Revision Commission cmt to CCP § 483.010, 26 Cal L Rev Comm'n Reports 321 (1996)].

**Decision Point--Attachment Compared to Claim and Delivery:**

Attachment is a remedy by which a plaintiff with a contractual claim to money may have various items

of the defendant's property seized before judgment and held by the levying officer for execution after judgment. The attachment statutes contain no provision for releasing attached property to the plaintiff before judgment; instead, the attached property is held for possible execution after judgment, in the event the plaintiff succeeds in obtaining a judgment. Claim and delivery, in contrast, is a remedy by which a plaintiff with a superior right to a specific item of personal property (created, most commonly, by a contractual lien) may recover possession of that specific property before judgment [*Waffer Int'l Corp. v. Khorsandi* (1999) 69 CA4th 1261, 1271, 82 CR2d 241 ; see 6.15 et seq. (claim and delivery)].

Strategic Point--Attachment Compared to Preliminary Injunction:



Nothing in the Attachment Law precludes granting provisional injunctive relief [CCP § 482.020]. Thus, the availability of attachment as a remedy should not be a reason for the court to refuse to issue a preliminary injunction. The remedies provided by the Attachment Law are not intended to be exclusive. In some circumstances, attachment, while theoretically available, may be impractical or ineffectual; or attachment may be withheld because of a close factual issue respecting liability. In these situations, an injunction may provide a more satisfactory remedy, and so the ruling on an application for injunctive relief should not be prejudiced by the theoretical availability of attachment as an alternative remedy [Law Revision Commission cmt to CCP § 482.020, 11 Cal L Rev Comm'n Reports 559 (1973); see 6.03 et seq. (discussion of preliminary injunctions in contract actions)].

Because a "hearing" is required [CCP § 484.040; see generally *Hobbs v. Weiss* (1999) 73 CA4th 76, 78-82, 86 CR2d 146 (what is necessary for compliance with requirement for hearing)], the plaintiff usually applies for a right-to-attach order (which mandates issuance of a writ of attachment) by a verified notice of motion supported by affidavits [see CCP §§ 484.010-484.030]. However, on a likewise verified showing of one of the following additional facts, the plaintiff may obtain issuance of a right-to-attach order ex parte [see CCP § 485.210]:

- There is a danger that the property sought to be attached would be concealed, substantially impaired in value, or otherwise made unavailable to levy if issuance of the order were delayed until the matter could be heard on notice [CCP § 485.010(b)(1)].
- The defendant has failed to pay the debt underlying the requested attachment, and the defendant is insolvent in the sense that the defendant generally is not paying debts as those debts become due, unless the debts are subject to a bona fide dispute [CCP § 485.010(b)(2)].
- With respect to a bulk transfer by the defendant, a bulk sale notice has been recorded and published pursuant to Division 6 of the Commercial Code [CCP § 485.010(b)(3)].
- With respect to the sale by the defendant of a liquor license, an escrow has been opened pursuant to the provisions of *B&P Code* § 24074 with respect to the sale by the defendant of a liquor license [CCP § 485.010(b)(4)].
- Any other circumstances exist showing that great or irreparable injury would result to the plaintiff if issuance of the order were delayed until the matter could be heard on notice [CCP § 485.010(b)(5)].

Strategic Point:



The defendant can move to set aside a right-to-attach order issued ex parte (and to quash the writ, if issued), but not on the ground that the plaintiff would not have suffered great or irreparable injury if issuance of the order had been delayed until the matter could have been heard on notice [CCP §

485.240(b); see generally *Western Steel & Ship Repair, Inc. v. RMI, Inc.* (1986) 176 CA3d 1108, 1113-1114, 222 CR 556 (explaining defendant's options)].

The facts supporting ex parte issuance of a right-to-attach order also are grounds for obtaining provisional injunctive relief, called a temporary protective order, in aid of the application for a writ of attachment [see *CCP* § 486.010 et seq.; see also 6.13].

A receiver can be appointed for attached property [see *CCP* § 488.700; see also 6.30].



Cross References:

Checklist for obtaining writ of attachment or temporary protective order, see *Matthew Bender*[(R)] *Practice Guide: California Pretrial Civil Procedure*, 19.03.

Checklist for opposing attachment or temporary protective order, see *Matthew Bender*[(R)] *Practice Guide: California Pretrial Civil Procedure*, 19.14.

Memorandum supporting defendant's notice of opposition to plaintiff's application for right-to-attach order, see *California Points and Authorities*, Ch. 23, Attachment (Matthew Bender).

Memorandum in reply to notice of opposition to plaintiff's application for right-to-attach order, see *California Points and Authorities*, Ch. 23, Attachment (Matthew Bender).

Memorandum supporting contention that receiver should be appointed in attachment proceeding, see *California Points and Authorities*, § 200.270 (Matthew Bender).

Legal Topics:

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

Civil Procedure Remedies Prejudgment Remedies General Overview Civil Procedure Remedies Provisional Remedies Attachments



11 of 189 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 6 Using or Opposing Provisional Remedies in Contract Actions
III. SEEKING OR OPPOSING ATTACHMENT

1-6 MB Practice Guide: CA Contract Litigation 6.10

6.10 Attachment Is Available in Some Contract Actions.

6.10[1] Plaintiff Must Claim at Least \$500 in Damages. In general, attachment is available only in an action asserting a claim for money that is based--or multiple claims for money, each of which is based--on a contract, express or implied, if the total amount claimed is a fixed or readily ascertainable amount not less than \$500 exclusive of costs, interest, and attorney's fees [CCP § 483.010(a)]. The term "contract" as used in the statute includes leases of real property and leases of personal property [see *CIT Group/Equip. Fin., Inc. v. Super DVD, Inc.* (2004) 115 CA4th 537, 540].

The damages must be readily ascertainable by reference to the contract, and the basis of the computation of damages must be reasonable and definite. The fact that the damages are unliquidated is not determinative, but the contract must furnish a standard by which the amount due can be clearly ascertained, and there must be a basis on which the damages can be determined by proof. It is not necessary that the amount owed appear on the face of the contract; it often happens that the amount due under a contract does not appear in the contract [*CIT Group/Equip. Fin., Inc. v. Super DVD, Inc.* (2004) 115 CA4th 537, 541 (master lease and corresponding lease schedules provided clear and definite formula for computation of damages: monthly rent multiplied by unexpired term)].

Exception--Nonresident Defendant:

When the defendant is a nonresident individual, a foreign corporation not qualified to do business in California, or a foreign partnership that has not filed a designation of an agent for service of process, the essential prerequisite for attachment is simply that the action be for the recovery of money [CCP § 492.010]. The plaintiff must show the same facts, apart from the nature of the action, as are required in an application for a right-to-attach order when the defendant is not a nonresident, but the order can always be sought and issued ex parte [see CCP §§ 492.020, 492.030]. Any property of the defendant in California can be levied on under the writ, but the defendant, after making a general appearance, can claim any applicable exemption, and so exempt property can be released from the levy [CCP § 492.040]. The defendant also can move to have the order set aside and the writ quashed [CCP § 492.050].

6.10[2] Claim May Be Secured by Personal Property. Although attachment usually is sought by a plaintiff whose claim is not secured [see *North Hollywood Marble Co. v. Superior Court* (1984) 157 CA3d 683, 690, 204 CR 55 (primary purpose of attachment is to give unsecured creditor assurance that debtor's assets will not be dissipated before creditor can obtain and enforce judgment)], the remedy is available even if the plaintiff's claim is secured by personal

property. The effect of the plaintiff's security interest is to reduce the amount that can be covered by the attachment lien [see CCP § 483.015(b)(4)].



Warning:

If that reduction produces zero (or less than zero) as the amount to be covered by the attachment lien, the plaintiff will not obtain a right-to-attach order [see CCP § 484.090(a)(4)].



Cross Reference:

Attachment precluded for claim secured by real property, see 6.10[3][a].

6.10[3] Attachment Is Specifically Precluded by Statute in Some Cases.

6.10[3][a] Claim Secured by Real Property May Be Disqualified. An attachment generally may not be issued on a claim secured by any interest in real property arising from an agreement, a statute, or any other rule of law, including any mortgage or deed of trust of real property and any statutory, common law, or equitable lien on real property, but excluding any security interest in fixtures subject to Division 9 of the Commercial Code [CCP § 483.010(b)]. The effect of this statute is that the plaintiff may not simply waive the security interest and so become eligible to pursue attachment [Law Revision Commission cmt to CCP § 483.010, 13 Cal L Rev Comm'n Reports 28 (1976)].

Exception--When Security Becomes Inadequate:

An attachment may be issued if the claim originally was secured as described above but, without any act by the plaintiff or the person to whom the security was given, the security has become valueless or has decreased in value to less than the amount then owing on the claim. In that event the amount to be secured by the attachment cannot exceed the lesser of the amount of the decrease or the difference between the value of the security and the amount then owing on the claim [CCP § 483.010(b)].



Strategic Point--Plaintiff's Burden of Proof:

It is the plaintiff's burden, in seeking attachment for a claim based on a contract that was originally secured by real property, to prove that (1) the security has diminished in value and (2) the plaintiff was not responsible for the diminution. The plaintiff's required affidavit [see CCP § 484.030; see also 6.10[4]] is not required to contain averments of those facts, but including such averments would be prudent, since the court need not consider additional evidence at the application hearing without good cause [*Bank of Am. v. Salinas Nissan, Inc.* (1989) 207 CA3d 260, 273, 254 CR 748 ; see CCP § 484.090(d); see also 6.10[4]].

6.10[3][b] Claim Against Individual for Consumer Debt Is Disqualified. If the action is against an individual, an attachment may not be issued on a claim against the defendant that is based on the sale or lease of property, a license to use property, the furnishing of services, or the loan of money, if the defendant used the property, services, or money primarily for personal, family, or household purposes [CCP § 483.010(c)].

6.10[3][c] Claim Against Individual Not Arising From Business Is Disqualified. If the action is against an individual, an attachment may be issued only on a claim that arises out of the defendant's conduct of a trade, business, or profession [CCP § 483.010(c); e.g., *Advance Transformer Co. v. Superior Court* (1974) 44 CA3d 127, 144, 118 CR 350 (attachment may issue against individual who guaranteed corporate obligations or business debts only if guaranty sued on was part and parcel of activity that occupied time, attention, and effort of individual guarantor for purpose of livelihood or profit on continuing basis)].

6.10[4] Plaintiff Must Show Probable Validity of Claim. At the hearing on the application, the court may not

issue a right-to-attach order--nor may the court issue the order ex parte--unless the court finds that the plaintiff has established the probable validity of the claim on which the attachment is based [CCP §§ 484.090(a)(2), 485.220(a)(2)]. The application must be supported by an affidavit showing that the plaintiff, on the facts presented, would be entitled to a judgment on the claim on which the attachment is based [CCP § 484.030; see *Bank of Am. v. Salinas Nissan, Inc.* (1989) 207 CA3d 260, 272, 254 CR 748 (affidavit should be geared to establishing probable validity of plaintiff's claim)].

Consider:

The plaintiff's claim has probable validity if it is more likely than not that the plaintiff will obtain a judgment against the defendant on that claim [CCP § 481.190]. In determining the probable validity of a claim, when the defendant makes an appearance, the court must consider the relative merits of the positions of the parties and make a determination of the probable outcome of the litigation [*Loeb & Loeb v. Beverly Glen Music, Inc.* (1985) 166 CA3d 1110, 1120, 212 CR 830] . This may involve some complicated issues that might entail, for example, construing the contract in question [e.g., *Homes & Land Publ'g, Ltd. v. ApartmentNet Corp.* (SD Cal 2000) 100 F Supp2d 1248, 1252-1253] and dissecting the plaintiff's theory of recovery [e.g., *Hobbs v. Weiss* (1999) 73 CA4th 76, 82-83, 86 CR2d 146] .



Decision Point:

The court's determination on this issue usually will be made on the basis of the pleadings and papers in the record. On good cause shown, however, the court may receive and consider at the hearing additional evidence, oral or documentary, and additional points and authorities, or may continue the hearing for the production of the additional evidence or points and authorities [CCP § 484.090(d); see generally *Pos-A-Traction, Inc. v. Kelly-Springfield Tire Co.* (CD Cal 1999) 112 F Supp2d 1178, 1182 (summarizing what court may and should consider)].

6.10[5] Unlawful Detainer Presents Special Case. Special rules apply when attachment is sought in an unlawful detainer case [see CCP § 483.020].



Cross Reference:

Discussion of unlawful detainer proceedings, see Matthew Bender[(R)] Practice Guide: California Landlord-Tenant Litigation, Ch. 5, Unlawful Detainer.

Legal Topics:

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

Civil Procedure Remedies Prejudgment Remedies General Overview Civil Procedure Remedies Provisional Remedies Attachments



12 of 189 DOCUMENTS

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Chapter 6 Using or Opposing Provisional Remedies in Contract Actions
III. SEEKING OR OPPOSING ATTACHMENT

1-6 MB Practice Guide: CA Contract Litigation 6.11

6.11 All Property of Corporation, Partnership, or Association Can Be Attached.

If the defendant is a corporation or a partnership or other unincorporated association, all property of the defendant is subject to attachment, to the extent that a method of levy is prescribed by the Attachment Law [*CCP* § 487.010(a), (b); *see generally CCP* § 488.300 *et seq.* (methods of levy); *cf. CCP* § 484.020(e) (application for attachment may describe property to be attached as simply "all ... property which is subject to attachment")].

Distinguish--No Exemption:

The Attachment Law provides for exemptions from attachment, but they apply only to the property of individuals [*see* 6.12[1]]. No property of a corporation, partnership, or association is exempt from attachment [*see CCP* § 487.020; Law Revision Commission cmt to *CCP* § 484.020, 11 Cal L Rev Comm'n Reports 766-767 (1973)], just as no such property is exempt from enforcement of a money judgment [*see CCP* § 703.020(a)].



Strategic Point--Partners:

While there is no exemption for partnership property, an individual defendant who is a partner and whose property is reached pursuant to *CCP* § 487.010 could claim an exemption [*see Corp Code* § 16504(d) (Uniform Partnership Act of 1994 does not deprive partner of rights under exemption laws with respect to partner's interest in partnership)].

Legal Topics:

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

Civil Procedure Remedies Prejudgment Remedies General Overview Civil Procedure Remedies Provisional Remedies Attachments



13 of 189 DOCUMENTS

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Chapter 6 Using or Opposing Provisional Remedies in Contract Actions
III. SEEKING OR OPPOSING ATTACHMENT

1-6 MB Practice Guide: CA Contract Litigation 6.12

6.12 Only Nonexempt Property of Individual Can Be Attached.

6.12[1] Defendant Must Claim Exemption. If an exemption is duly claimed [see CCP §§ 482.100, 485.610, 487.030] and not preempted by a fraudulent transfer [see 6.12[2]], the following property of an individual defendant is exempt from attachment [CCP § 487.020]:

- All property exempt from enforcement of a money judgment. This includes not only the exemptions allowed in the Enforcement of Judgments Law [see CCP § 703.010 *et seq.*], but also any other special exemptions allowed by law [Leg Comm cmt to 1974 amendment of CCP § 487.020], such as the exemption for spendthrift trusts [see *Estate of Lawrence* (1968) 267 CA2d 77, 82, 72 CR 851] and the exemption for property *in custodia legis* [see *Robbins v. Bueno* (1968) 262 CA2d 79, 83, 68 CR 347].
- Property that is necessary for the defendant's support or for the support of the defendant's family whom the defendant supports in whole or in part [see generally *Randone v. Appellate Dep't* (1971) 5 C3d 536, 562, 96 CR 709, 488 P2d 13 (rationale for this exemption)].
- Earnings [see CCP § 706.011 (definition, which is in Wage Garnishment Law)].
- All property not subject to attachment, namely:
 - ☐ Any leasehold estate in real property with an unexpired term of less than one year [see CCP § 487.010(c)(1); see also 6.12[3][d]].
 - ☐ An account receivable (or the like) with an unpaid principal of less than \$150 [see CCP § 487.010(c)(2); see also 6.12[3][g]].
 - ☐ The first \$1,000 of money located elsewhere than on premises where the defendant conducts a trade, business, or profession [see CCP § 487.010(c)(7); see also 6.12[3][h]].



Decision Point:

The Attachment Law specifies that when the defendant is an individual, the application for a right-to-attach order must contain a "description of the property ... reasonably adequate to permit the defendant to identify the specific property sought to be attached" [CCP § 484.020(e); *but see Bank of Am. v. Salinas Nissan, Inc. (1989) 207 CA3d 260, 268, 254 CR 748* (description in general terms was "all-inclusive" but was reasonably adequate to inform individual guarantors what property was targeted for attachment)]. One purpose of that requirement is to assist the defendant in determining whether to make a claim for exemption [Law Revision Commission cmt to CCP § 484.020, 11 Cal L Rev Comm'n Reports 766-767 (1973)]. As to the specified property, the defendant might decide that making a claim for exemption would not be worthwhile. However, the defendant should bear in mind that as to the specified property, once a claim for exemption is forgone, it usually cannot be made later [CCP § 484.070(a)]. As to any exempt property not described in the application, the defendant should consider whether to make a claim for exemption now, which if allowed would shield the property from levy under any later-issued supplemental writ of attachment [see generally CCP § 484.510 *et seq.* (supplemental writs)]. If the defendant makes such a forward-looking claim, and it is not allowed, then the defendant generally may not claim the exemption again later (when the plaintiff obtains a supplemental writ, for instance); however, failure to make such a claim in opposition to the plaintiff's original application would not preclude making it later [CCP § 484.070(b)].

Strategic Point:



If the defendant makes a claim of exemption, and the plaintiff fails to oppose it [see CCP § 484.070(f) (plaintiff's opposition)], the court must allow the exemption, even if it probably could not be sustained if opposed [*Bank of Am. v. Salinas Nissan, Inc. (1989) 207 CA3d 260, 270, 254 CR 748*].



Cross Reference:

Memorandum supporting claim of exemption, see California Points and Authorities, Ch. 23, Attachment (Matthew Bender).

6.12[2] Fraudulent Transfer Could Generate Exception. In an action against an individual for relief under the Uniform Fraudulent Transfer Act [see CC § 3439 *et seq.*], a creditor may obtain an attachment or another provisional remedy against the asset transferred or its proceeds, in accordance with the Attachment Law [CC § 3439.07(a)(2)], and no exemption that would otherwise be applicable can be invoked by the defendant to prevent that attachment or other provisional remedy [see CCP § 487.020].

6.12[3] Subject Property Is Specified in Statutes.

6.12[3][a] Community Property Can Be Attached. Community property is subject to attachment if it is property of a type described in CCP § 487.010(c) [see 6.12[3][d] -[i]] and would be subject to enforcement of the judgment obtained in the action in which the attachment is sought [CCP § 487.010(d)].

Strategic Point:



If community property is subject to attachment, then [CCP § 487.010(d)]:

- Any provision of the Attachment Law that applies to the defendant's property or to obligations owed to the defendant also applies to the community property interest of the defendant's spouse and to obligations owed to either spouse that are community property; and

- Any provision of the Attachment Law that applies to property in the defendant's possession or under the defendant's control also applies to community property in the possession or under the control of the defendant's spouse.

6.12[3][b] Declared Homestead Can Be Attached. The recording of a homestead declaration [see *CCP* § 704.910(d) (definition)] does not limit or affect the right of a plaintiff to attach the declared homestead, whether the homestead declaration is recorded before or after the declared homestead is attached [*CCP* § 487.025(a)].

Distinguish:

This does not limit the defendant's right to an exemption under *CCP* § 487.020(b) for property necessary for the support of the defendant or the defendant's family [*CCP* § 487.025(c)].



Cross Reference:

Defendant's claim of exemption, see 6.12[1].

6.12[3][c] Attachment Lien on Homestead Is Limited. An attachment lien attaches to a homestead [see *CCP* § 704.710(c) (definition)] in the amount of any surplus over the sum of (1) all liens and encumbrances on the homestead at the time the attachment lien is created, plus (2) the homestead exemption amount set forth in *CCP* § 704.730, which is at least \$50,000 [*CCP* § 487.025(b)].

Distinguish:

This does not limit the defendant's right to an exemption under *CCP* § 487.020(b) for property necessary for the support of the defendant or the defendant's family [*CCP* § 487.025(c)].



Strategic Point:

The homestead is exempt from sale to the extent provided in *CCP* § 704.800 when it is sought to be sold to enforce the judgment obtained in the action in which the attachment was obtained [*CCP* § 487.025(d)]. Therefore, it cannot be sold if no bid at the execution sale exceeds the aggregate of (1) the sum of liens, encumbrances, and the exemption amount described above and (2) the judgment lien.



Cross Reference:

Defendant's claim of exemption, see 6.12[1].

6.12[3][d] Real Property Can Be Attached. Interests in real property, except a leasehold estate with an unexpired term of less than one year, are subject to attachment [*CCP* § 487.010(c)].

Distinguish--Real Property:

Real property includes any right in real property, including, but not limited to, a leasehold interest in real property [*CCP* § 481.203].

6.12[3][e] Mineral Interests Can Be Attached. Minerals or the like (including oil and gas) to be extracted are subject to attachment [*CCP* § 487.010(c)(11)].

6.12[3][f] Equipment, Farm Products, and Inventory Can Be Attached. Equipment, farm products, and inventory are subject to attachment [*CCP* § 487.010(c)(3)-(5)]:

- "Equipment" means tangible personal property in the possession of the defendant and used or bought for use primarily in the defendant's trade, business, or profession, if it is not included in the definitions of inventory or farm products [*CCP* § 481.100].

- "Farm products" means crops or livestock or supplies used or produced in farming operations or products of crops or livestock in an unmanufactured state (such as ginned cotton, wool clip, maple syrup, milk, and eggs), while in the possession of the defendant, if the defendant is engaged in raising, fattening, grazing, or other farming operations. If tangible personal property is a farm product, it is neither equipment nor inventory [CCP § 481.110].

- "Inventory" means tangible personal property in the possession of the defendant that is either [CCP § 481.120]:

- ☐ Held by the defendant for sale or lease or to be furnished under contracts of service;
- or
- ☐ Raw materials, work in process, or materials used or consumed in the defendant's trade, business, or profession. Inventory is not to be classified as equipment.

Tangible personal property can include, in this context, chattel paper, documents of title, instruments, securities, and money [CCP § 481.225].

Cross References:

Attachment of chattel paper, see 6.12[3][g].

Attachment of documents of title, instruments, and securities, see 6.12[3][i].

Attachment of money, see 6.12[3][h].

6.12[3][g] Business-Related Intangible Property Can Be Attached. The following business-related intangible property is subject to attachment:

- Accounts receivable, chattel paper, and general intangibles arising out of the defendant's conduct of a trade, business, or profession, except any such individual claim with a principal balance of less than \$150 [CCP § 487.010(c)(2)]. "Account receivable" means an account as defined in *Com Code* § 9102(a)(2) [CCP § 481.030]. "Chattel paper" means chattel paper as defined in *Com Code* § 9102(a)(11) [CCP § 481.040]. "General intangibles" means general intangibles as defined in *Com Code* § 9102(a)(42), consisting of rights to payment [CCP § 481.115].

- Final money judgments arising out of the defendant's conduct of a trade, business, or profession [CCP § 487.010(c)(6)].

6.12[3][h] Money Can Be Attached. Money that is located on the premises where the defendant conducts a trade, business, or profession is subject to attachment. Money located elsewhere, except for the first \$1,000, is subject to attachment. Deposit accounts are subject to attachment [CCP § 487.010(c)(7); see CCP § 481.080; *Com Code* § 9102(a)(29) (definition of "deposit account")].



Strategic Point--Plaintiff:

If the defendant has more than one deposit account or has at least one deposit account and money located elsewhere than on the premises where the defendant conducts a trade, business, or profession, then the court, on the plaintiff's application, may order that the writ of attachment be levied so that an aggregate amount of \$1,000 of that money and in those accounts will remain free of levy [CCP § 487.010(c)(7)].

6.12[3][i] Negotiable Instruments Can Be Attached. The following types of instruments are subject to attachment [CCP § 487.010(c)(8)-(10)]:

- Negotiable documents of title [see *Com Code* § 9102(a)(30) (definition)]. A document of title is negotiable if it is negotiable within the meaning of *Com Code* § 7104 [CCP § 481.090].
- Instruments [see *Com Code* § 9102(a)(47) (definition); CCP § 481.117].
- Securities [see *Com Code* § 8102 (definition); CCP § 481.210].

Legal Topics:

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

Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionExemptionsCivil
ProcedureRemediesPrejudgment RemediesGeneral OverviewCivil ProcedureRemediesProvisional
RemediesAttachments



14 of 189 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 6 Using or Opposing Provisional Remedies in Contract Actions
III. SEEKING OR OPPOSING ATTACHMENT

1-6 MB Practice Guide: CA Contract Litigation 6.13

6.13 Plaintiff Can Obtain Provisional Injunctive Relief (Temporary Protective Order).

6.13[1] Plaintiff May Request Relief.

6.13[1][a] Plaintiff Must Show Great or Irreparable Injury. If the plaintiff would suffer great or irreparable injury unless a temporary protective order were issued, then, at the time of applying for a right-to-attach order, the plaintiff may apply for a temporary protective order by filing an application for the order with the court in which the action is brought [CCP § 486.010]. The standard for determining whether the plaintiff would suffer great or irreparable injury is the same as for determining whether a right-to-attach order can be issued ex parte [CCP § 486.010(b); see CCP § 485.010; see also 6.09].

➤ **Cross Reference:**

Form for application for temporary protective order, see *Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, 19.41*.

6.13[1][b] Plaintiff Must Show Probable Validity of Claim. The court may issue the temporary protective order if it finds all of the following facts [CCP § 486.020]:

- The claim on which the application for attachment is based is one on which an attachment may be issued [see 6.10].
- The plaintiff has established the probable validity of the claim on which the application for the attachment is based. The plaintiff's claim has probable validity if it is more likely than not that the plaintiff will obtain a judgment against the defendant on that claim [CCP § 481.190].
- The temporary protective order is not sought for a purpose other than the recovery on the claim on which the application for the attachment is based.
- The plaintiff will suffer great or irreparable injury if the temporary protective order is not issued [see CCP § 485.010; see also 6.09].

➤ **Cross Reference:**

Requirement to show probable validity of claim in order to obtain right-to-attach order, see 6.10[4].

6.13[2] Court May Issue Injunction in Lieu of Attachment. If the plaintiff has made an ex parte application for a right-to-attach order and a writ of attachment [see *CCP* § 485.010 *et seq.*; 6.09], the court may in its discretion deny the application and issue instead a temporary protective order, on determining that the requirements for ex parte issuance of a right-to-attach order and a writ are met [see *CCP* § 485.220; see also 6.09] and that issuance of the temporary protective order instead of a right-to-attach order and a writ would be in the interest of justice and equity to the parties, taking into account the effect on the defendant of issuing a writ of attachment ex parte, the effect on the plaintiff of issuing the temporary protective order instead of the writ, and other factors that bear on equity and justice in the circumstances of the case [*CCP* § 486.030(a)].



Strategic Point:

If the court issues the temporary protective order, the plaintiff's ex parte application for a right-to-attach order and writ must be treated as a regular application for a right-to-attach order and writ, and the plaintiff must comply with the requirements of service provided in *CCP* § 484.040 [*CCP* § 486.030(b)].



Cross Reference:

Complying with service requirements, see *Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure*, 19.06.

6.13[3] Injunction Is Subject to Statutory Requirements.

6.13[3][a] Equitable Considerations Are Paramount. The temporary protective order must contain whatever provisions the court determines would be in the interest of justice and equity to the parties, taking into account the effects on both the defendant and the plaintiff in the circumstances of the case [*CCP* § 486.040].



Strategic Point--Defendant:

On the defendant's ex parte application or, if the court so orders, after a noticed hearing, the court may modify or vacate the temporary protective order if it determines that modifying or vacating it would be in the interest of justice and equity to the parties, taking into account the effect on the defendant of the continuance of the original order, the effect on the plaintiff of modifying or vacating it, and any other factors [*CCP* § 486.100].

6.13[3][b] Transfer of Property Generally May Be Prohibited. In general, the temporary protective order may prohibit a transfer by the defendant of any of the defendant's property in California subject to the levy of the writ of attachment. The order must describe the property in a manner adequate to permit the defendant to identify the property subject to the order [*CCP* § 486.050(a)].



Strategic Point--Only Defendant Is Bound:

The temporary protective order will bind only the defendant, whether or not any other person knows of or is served with a copy of the order [*CCP* § 486.070]. However, a lien created by service of the order on the defendant will continue on the affected property, in most cases, after transfer or encumbrance of the property [*CCP* §§ 486.070, 486.110; see 6.13[4]].



Cross Reference:

Form for temporary protective order, see *Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure*, 19.45.

6.13[3][c] Farm Products or Inventory Will Remain Transferrable. If the temporary protective order covers farm products held for sale or covers inventory, the order may not prohibit the defendant from transferring that property in the ordinary course of business, but may impose appropriate restrictions on the disposition of the proceeds from that type of transfer [CCP § 486.050(b)].



Cross Reference:

Definitions of "farm products" and "inventory," see 6.12[3][f].

6.13[3][d] Defendant May Continue to Issue Checks. Notwithstanding any terms of the temporary protective order, the defendant may issue any number of checks against any of the defendant's accounts in a financial institution in California for the following purposes [CCP § 486.060].

- Payment of any payroll expense (including fringe benefits and taxes and premiums for worker's compensation and unemployment insurance) falling due in the ordinary course of business before the levy of a writ of attachment.
- Payment for goods thereafter delivered to the defendant C.O.D. for use in the defendant's trade, business, or profession.
- Payment of taxes if payment is necessary to avoid penalties that will accrue if there is any further delay in payment.
- Payment of reasonable legal fees and reasonable costs and expenses (including, but not limited to, statutory fees, charges, commissions, and expenses) required for the defendant's representation in the action.
- Any other purpose, provided the aggregate amount of the checks for other purposes does not exceed the greater of the following:



\$1,000; or



The amount by which the total amount on deposit exceeds the sum of (1) the amount sought to be secured by the attachment and (2) the amounts permitted to be paid for the specific purposes listed above.

"Financial institution" means a state or national bank, state or federal savings and loan association or credit union, or like organization [CCP § 481.113].

6.13[4] Service of Injunction Creates Lien on Attachable Property. Service of a temporary protective order on the defendant [see CCP § 486.080 (personal service is required)] creates a lien on any property, or the proceeds of any property, that the order describes and that the defendant owns at the time of service, if the property is subject to attachment pursuant to the Attachment Law [CCP § 486.110(a)].



Strategic Pointss--Continuance of Lien:

- The lien continues on property subject to the lien, notwithstanding the transfer or encumbrance of the property, unless the person receiving the property, whether it is real property or personal property, is a person listed in *CCP* § 697.740, which describes situations in which property subject to an execution lien is no longer subject to that lien after being transferred or encumbered [*CCP* § 486.110(a)].

- After expiration of the temporary protective order, the lien continues on property that was levied on, while the temporary protective order was in effect, under a writ of attachment issued on the plaintiff's application; but with respect to any other property, the lien terminates [*CCP* § 486.110(b)].

6.13[5] Injunction Is Short-Lived. The temporary protective order expires at the earliest of the following times [*CCP* § 486.090]:

- Forty days after issuance of the order;
- At any earlier date prescribed in the order; or
- As to specific property described in the order: when the plaintiff makes a levy of attachment on that property.

Legal Topics:

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

Civil Procedure Remedies Injunctions Temporary Restraining Orders Civil Procedure Remedies Prejudgment Remedies General Overview Civil Procedure Remedies Provisional Remedies General Overview



15 of 189 DOCUMENTS

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Chapter 6 Using or Opposing Provisional Remedies in Contract Actions
III. SEEKING OR OPPOSING ATTACHMENT

1-6 MB Practice Guide: CA Contract Litigation 6.14

6.14 Plaintiff Can Obtain Turnover Order.

If a writ of attachment is issued, the court also may issue an order directing the defendant to transfer to the levying officer possession of either or both of the following [CCP § 482.080(a)]:

- The property to be attached, if the property is sought to be attached by taking it into custody; and
- Documentary evidence of title to property of or a debt owed to the defendant that is sought to be attached.

The order may be served when the property or debt is levied on or thereafter [CCP § 482.080(a)].

Strategic Point:



The purpose of a turnover order is to compel the defendant to cooperate with the levying officer when the levy must be made by taking possession of the property or documentary evidence of title to property or of a debt. Issuance of a turnover order is plainly conditioned on the issuance of a writ of attachment. A naked turnover order is not authorized. Because a turnover order is issued in aid of a writ, and not as an independent order, it must order the defendant to transfer possession of the attached property or documentary evidence of the attached property to the levying officer to whom the writ of attachment is directed. That is the officer who will need the defendant's cooperation when the levy requires a transfer of possession [*Pacific Decision Scis. Corp. v. Superior Court* (2004) 121 CA4th 1100, 1106 (turnover order could not cover Florida bank account because California court could not issue writ of attachment to any levying officer in Florida)].



Cross References:

Seeking turnover order, see *Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure*, § 20.16.

Discussion and forms for obtaining turnover orders, see *California Forms of Pleading and Practice*, Ch. 62, Attachment; see also Ch. 254, Execution and Enforcement of Judgments.

Legal Topics:

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

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16 of 189 DOCUMENTS

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Chapter 6 Using or Opposing Provisional Remedies in Contract Actions

IV. SEEKING OR OPPOSING CLAIM AND DELIVERY

1-6 MB Practice Guide: CA Contract Litigation 6.15

6.15 CHECKLIST: Seeking or Opposing Claim and Delivery.

- ☐ Determine whether plaintiff can obtain issuance of writ of possession because plaintiff can show probable validity of plaintiff's claim to recover specific personal property.

Authority:

CCP § 512.060(a)(1)

Discussion:

See 6.18

- ☐ Determine whether plaintiff should seek additional provisional relief in aid of a writ of possession.

- ☐ Determine whether injunctive relief is needed because there is immediate danger that property will become unavailable to levy by reason of being transferred, concealed, or removed, or that it will become substantially impaired in value.

Authority:

CCP §§ 513.010, 513.020

Discussion:

See 6.19

- ☐ Determine whether turnover order, aimed at getting defendant to cooperate in transferring possession of property to plaintiff, is appropriate.

Authority:

CCP § 512.070

Discussion:

See 6.20

☐ Determine whether supplemental orders are needed because seizing property will involve substantial risk of death or serious bodily harm to any person.

Authority:

CCP § 514.010(c)

Discussion:

See 6.21

Legal Topics:

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

Civil Procedure Remedies Prejudgment Remedies Applications Civil Procedure Remedies Provisional Remedies General Overview Civil Procedure Remedies Provisional Remedies Replevins



17 of 189 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 6 Using or Opposing Provisional Remedies in Contract Actions
IV. SEEKING OR OPPOSING CLAIM AND DELIVERY

1-6 MB Practice Guide: CA Contract Litigation 6.16

6.16 Options and Strategies.

The provisional remedy called claim and delivery can be used by a plaintiff suing, on a contract, to recover personal property, when the plaintiff's claim is "probably valid" [see 6.18]. The remedy focuses on the plaintiff's right to possession [see CCP § 512.010(b)(1)]; the plaintiff is not necessarily the owner of the property (but, for instance, might be a lessee), and the owner (such as a lessor) is not necessarily entitled to possession.

If the plaintiff is entitled to the provisional relief, and files an undertaking, the court issues a writ of possession directing a sheriff, constable, or marshal to take possession of the property [CCP § 512.080]. Once that officer has custody of the property, it will be held or disposed of as follows:

- The plaintiff can obtain possession of the property if certain conditions are satisfied [see CCP §§ 514.030(a)(1), 515.030(b), (d)]. If the plaintiff subsequently fails to obtain a judgment for the property, the plaintiff must return it to the defendant, and the plaintiff and the plaintiff's surety will be liable to the defendant for damages [CCP § 512.120].
- The defendant can prevent the plaintiff from getting possession, and can get the property back, if certain conditions are satisfied [see CCP §§ 514.030(a)(2), 515.020, 515.030(a), (c)]. The defendant and the defendant's surety will be liable to the plaintiff for damages, based on the plaintiff's lack of possession, in the event the plaintiff obtains a judgment for the property [CCP § 515.020(a)].
- When the defendant has not taken the prescribed steps to regain possession of the property, the court may order the officer to sell it, and deposit the proceeds in court for eventual disposition according to the judgment, if the property is perishable or for some other reason the parties' interests will be served best by selling the property [CCP § 514.030(b)]. Either party may move for such an order.

Distinguish--Claim and Delivery Compared to Attachment:

Claim and delivery is a remedy by which a plaintiff with a superior right to a specific item of personal property (created, most commonly, by a contractual lien) may recover possession of that property before judgment. Attachment, by contrast, is a remedy by which a plaintiff with a contractual claim to money--as opposed to a specific item of property--may have various items of the defendant's property seized before judgment and held by the levying officer for execution after judgment [see 6.09]. The attachment statutes contain no provision for releasing attached property to the plaintiff before judgment;

instead, the attached property is held for possible execution after judgment, in the event the plaintiff succeeds in obtaining a judgment [*Waffer Int'l Corp. v. Khorsandi* (1999) 69 CA4th 1261, 1271, 82 CR2d 241] .

Distinguish--Claim and Delivery Compared to Preliminary Injunction:

The claim and delivery law provides a complete prejudgment remedy to recover possession of personal property. It appears that since there is an adequate remedy under the claim and delivery law, a preliminary injunction is not a proper remedy to recover possession of personal property [*Simms v. NPCK Enters., Inc.* (2003) 109 CA4th 233, 242-243, 134 CR2d 557] . However, nothing in the claim and delivery statutes precludes granting provisional injunctive relief [CCP § 516.050]. Thus, the availability of claim and delivery as a remedy should not be a reason for the court to refuse to issue a preliminary injunction whenever that would be a satisfactory remedy [cf. Law Revision Commission cmt to CCP § 482.020, 11 Cal L Rev Comm'n Reports 559 (1973) (intended effect of identical provision in Attachment Law); see 6.09].



Cross References:

Detailed discussion of claim and delivery, see Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, Ch. 20, Claim and Delivery.

Discussion of attachment, see 6.08 et seq.

Discussion of preliminary injunctions, see 6.03 et seq.

Legal Topics:

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

Civil Procedure Remedies Prejudgment Remedies General Overview Civil Procedure Remedies Provisional Remedies General Overview Civil Procedure Remedies Provisional Remedies Replevin



18 of 189 DOCUMENTS

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Chapter 6 Using or Opposing Provisional Remedies in Contract Actions
IV. SEEKING OR OPPOSING CLAIM AND DELIVERY

1-6 MB Practice Guide: CA Contract Litigation 6.17

6.17 Application for Writ of Possession Is by Notice of Motion or Ex Parte.

The plaintiff usually applies for the writ of possession by a notice of motion [CCP § 512.020(a)], which must be verified [CCP § 512.010(b)] and state specified facts [see CCP § 512.010(b)(1)-(5)] or must be accompanied by affidavits stating those facts [CCP § 512.010(c)]. However, on a verified showing of one of the following additional facts, the plaintiff may obtain issuance of the writ ex parte [CCP § 512.020(b)]:

- The defendant feloniously took the property from the plaintiff, other than by (1) fraudulent appropriation after the property was entrusted to the defendant; (2) false or fraudulent representation or pretense; or (3) embezzlement [CCP § 512.020(b)(1)].
- The property is a credit card [CCP § 512.020(b)(2)].
- The defendant acquired the property in the ordinary course of a trade or business and for commercial purposes, provided all of the following conditions exist [CCP § 512.020(b)(3)]:
 - ☐ The property is not necessary for the support of the defendant or the defendant's family;
 - ☐ There is an immediate danger that the property will become unavailable to levy by reason of being transferred, concealed, or removed from California or will become substantially impaired in value by acts of destruction or by failure to take care of the property in a reasonable manner; and
 - ☐ Ex parte issuance of the writ of possession is necessary to protect the property.

If a writ is issued ex parte, the defendant may move for an order quashing it (and directing the release of the seized property); and pending the disposition of that motion, the court may order the levying officer not to deliver the property to the plaintiff [CCP § 512.020(b)]. An alternative to seeking ex parte issuance of the writ is to apply for provisional injunctive relief [see CCP §§ 513.010, 513.020; see also 6.19].

Consider:

A seizure of property under the claim and delivery procedure would violate due process if it occurred before a hearing on the merits, unless the seizure were justified by weighty state interests or creditor interests [*Blair v. Pitchess* (1971) 5 C3d 258, 278, 96 CR 42, 486 P2d 1242] . The current statutory scheme was put in place specifically to meet constitutional standards [*Simms v. NPCK Enters., Inc.* (2003) 109 CA4th 233, 242, 134 CR2d 557]

**Cross References:**

Checklist for applying for writ of possession, see *Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure*, 20.03.

Checklist for opposing application for writ of possession, see *Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure*, 20.20.

Legal Topics:

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

Civil Procedure Remedies Prejudgment Remedies General Overview Civil Procedure Remedies Prejudgment Remedies Applications Civil Procedure Remedies Prejudgment Remedies Notices Civil Procedure Remedies Provisional Remedies Replevin



19 of 189 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 6 Using or Opposing Provisional Remedies in Contract Actions
IV. SEEKING OR OPPOSING CLAIM AND DELIVERY

1-6 MB Practice Guide: CA Contract Litigation 6.18

6.18 Plaintiff Must Show Probable Validity of Claim.

At the hearing on the plaintiff's application, the court will not issue a writ--nor will the court issue a writ ex parte--unless the plaintiff has established the probable validity of the plaintiff's claim to possession of the property [CCP § 512.060(a)(1)]. The plaintiff's claim has probable validity when it is more likely than not that the plaintiff will obtain a judgment against the defendant on that claim [CCP § 511.090].

Example:

A lessee leased television and telephone equipment from the lessor, and failed to make full payment under the lease agreements, on the ground that the telephone equipment was defective. The lessor sued to repossess all of the equipment and applied for a writ of possession. The facts established the probable validity of the lessor's claim for possession. Whatever the lessee's right may have been to recover damages for the alleged defects in the equipment, it could not defeat the lessor's right to reclaim the equipment. The claim for possession and the claim for damages were unrelated. The lessor was entitled to the writ [*RCA Serv. Co. v. Superior Court* (1982) 137 CA3d 1, 2-3, 187 CR 602] .

Strategic Points:



- The court's determination to issue the writ has no legal effect on the ultimate determination of the plaintiff's claim [CCP § 512.110]. However, if the plaintiff's claim is probably valid so as to warrant issuance of the writ, then the plaintiff might effectively conclude the lawsuit by getting possession of the property through the use of the writ. The defendant's tactical loss at that stage of the proceedings could be a strong incentive to settle the case.

- The plaintiff will fail to satisfy this requirement if the defendant shows that there is a reasonable probability that the defendant can assert a successful defense to the action.

Strategic Point:



The plaintiff must file an undertaking for the defendant's protection [*CCP* § 512.060(a)(2)], which will entail some expense. Moreover, if the property to be seized is used as a dwelling (such as a mobilehome or a houseboat), then the levying officer must install a keeper for two days (presumably long enough to allow the occupants to leave and take whatever contents they are entitled to take), at the plaintiff's expense [*CCP* § 514.010(b)]. The plaintiff should determine whether getting provisional possession of the property will be worth the aggregate expense for the undertaking, for a keeper if necessary, for the levying officer's fees, and for the officer's costs incurred to seize and hold the property. The plaintiff should bear in mind, however, that these costs will be recoverable if the plaintiff prevails.



Cross Reference:

Recovery of costs, see Ch. 12, Recovering Attorney's Fees and Costs in Contract Litigation.

Legal Topics:

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

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20 of 189 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 6 Using or Opposing Provisional Remedies in Contract Actions
IV. SEEKING OR OPPOSING CLAIM AND DELIVERY

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6.19 Plaintiff Can Obtain Provisional Injunctive Relief.

Whenever there is an immediate danger that the property will become unavailable to levy by reason of being transferred, concealed, or removed, or that it will become substantially impaired in value, the plaintiff can obtain, ex parte, a temporary restraining order in aid of the application for a writ of possession [see CCP §§ 513.010(a), (b), 513.020]. After a hearing, the TRO can be supplanted by a preliminary injunction [CCP § 513.010(c)].



Strategic Point:

This is an alternative to seeking ex parte issuance of the writ, and these grounds for injunctive relief are somewhat more accommodating than the comparatively narrower grounds for ex parte issuance of the writ [see CCP § 512.020 (ex parte issuance of writ); see also 6.16].



Cross References:

Use of TRO and obtaining of preliminary injunction, see 6.04.

Form for declaration for ex parte writ of possession, see *Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure*, 20.35.

Legal Topics:

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

Civil Procedure Remedies Injunctions Temporary Restraining Orders Civil Procedure Remedies Provisional Remedies General Overview



21 of 189 DOCUMENTS

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Chapter 6 Using or Opposing Provisional Remedies in Contract Actions

IV. SEEKING OR OPPOSING CLAIM AND DELIVERY

1-6 MB Practice Guide: CA Contract Litigation 6.20

6.20 Plaintiff Can Obtain Turnover Order.

If necessary, once a writ of possession is issued, the court also may order the defendant to transfer possession of the property to the plaintiff [CCP § 512.070].



Strategic Point:

This turnover order is not an alternative to the writ of possession but is an order that the court may "also" issue if a writ is issued. The order should be aimed at getting the defendant to cooperate in transferring possession of the property to the plaintiff [*Edwards v. Superior Court* (1991) 230 CA3d 173, 178, 281 CR 30] . Thus the inconvenience and expense of a levy under the writ might be avoided.

Distinguish:

The turnover order has been characterized as a form of mandatory injunctive relief [*Pillsbury, Madison & Sutro v. Schectman* (1997) 55 CA4th 1279, 1283, 64 CR2d 698] , but there is a difference of opinion in that regard [*Edwards v. Superior Court* (1991) 230 CA3d 173, 178, 281 CR 30 (refusing to treat turnover order as mandatory injunction)].



Cross Reference:

Distinction between prohibitory preliminary injunction and mandatory preliminary injunction, see 6.04.

Seeking turnover order, see *Matthew Bender*[(R)] *Practice Guide: California Pretrial Civil Procedure*, 20.16.

Legal Topics:

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

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22 of 189 DOCUMENTS

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Chapter 6 Using or Opposing Provisional Remedies in Contract Actions

IV. SEEKING OR OPPOSING CLAIM AND DELIVERY

1-6 MB Practice Guide: CA Contract Litigation 6.21

6.21 Court Can Make Supplemental Orders.

If the levying officer reasonably believes that seizing the property will involve a substantial risk of death or serious bodily harm to any person, the officer must refrain from seizing the property and must promptly make a return to the court from which the writ issued, setting forth the reasons for believing that the risk exists. The court then must make whatever orders may be appropriate [CCP § 514.010(c)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil Procedure Remedies Provisional Remedies General Overview



23 of 189 DOCUMENTS

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Chapter 6 Using or Opposing Provisional Remedies in Contract Actions
V. SEEKING OR OPPOSING APPOINTMENT OF RECEIVER

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6.22 CHECKLIST: Seeking or Opposing Appointment of Receiver.

☐ Determine whether plaintiff can obtain appointment of receiver.

☐ Determine whether claim satisfies following set of criteria for appointment of receiver:

☐ Seller is suing for rescission on ground of fraud;

☐ Buyer has possession of property; and

☐ There is substantial risk that property will be lost, removed, or materially harmed.

Authority:

CCP § 564(b)(1)

Discussion:

See 6.25

☐ Determine whether claim satisfies following set of criteria for appointment of receiver:

☐ Creditor is suing to subject particular property to creditor's claim;

☐ Debtor has possession or control of property; and

☐ There is substantial risk that property will be lost, removed, or materially harmed.

Authority:

CCP § 564(b)(1)

Discussion:

See 6.26

☐ Determine whether claim satisfies following set of criteria for appointment of receiver:

☐ Plaintiff and defendant are jointly interested, as partners or joint venturers or otherwise under contract, in property or fund that is subject of litigation;

☐ One of them has possession or control of it; and

☐ There is substantial risk that property or fund will be lost, removed, or materially harmed.

Authority:

CCP § 564(b)(1)

Discussion:

See 6.27

☐ Determine whether receiver may be appointed because claim involves secured lender suing for specific performance of assignment-of-rents provision in deed of trust, mortgage, or separate assignment document.

Authority:

CCP § 564(b)(11)

Discussion:

See 6.28

☐ In other cases, determine whether plaintiff or defendant can obtain appointment of receiver because appointment is necessary.

☐ Is receiver needed to preserve property or rights of party?

Authority:

CCP § 564(b)(9)

Discussion:

See 6.29

☐ Is receiver needed to preserve value of property subjected to attachment.

Authority:

CCP § 488.700

Discussion:

See 6.30

Legal Topics:

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

Civil ProcedureRemediesProvisional RemediesGeneral OverviewCivil ProcedureRemediesReceivershipsGeneral Overview



24 of 189 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 6 Using or Opposing Provisional Remedies in Contract Actions
V. SEEKING OR OPPOSING APPOINTMENT OF RECEIVER

1-6 MB Practice Guide: CA Contract Litigation 6.23

6.23 Options and Strategies.

Generally a receiver is appointed during litigation, usually at the outset, when the subject of the litigation is particular property or a particular fund and it is necessary to take the property or fund out of the hands of the party possessing or controlling it, because otherwise the property or fund might not survive intact until the expected judgment can be enforced [see *La Societe Francaise d'Epargnes et de Prevoyance Mutuelle v. District Court* (1879) 53 C 495, 553]. In an action based on a contract, there could be grounds for appointment of a receiver in any of the following situations:

- A seller sues for rescission on the ground of fraud, the buyer has possession of the property, and there is a substantial risk that the property will be lost, removed, or materially harmed [see CCP § 564(b)(1); see also 6.25].
- A creditor sues to subject particular property to the creditor's claim, the debtor has possession or control of the property, and there is a substantial risk that the property will be lost, removed, or materially harmed [see CCP § 564(b)(1); see also 6.26].
- The plaintiff and the defendant are jointly interested, as partners or joint venturers or otherwise under a contract, in the property or fund that is the subject of the litigation, one of them has possession or control of it, and there is a substantial risk that the property or fund will be lost, removed, or materially harmed [see CCP § 564(b)(1); see also 6.27].
- A secured lender sues for specific performance of an assignment-of-rents provision in a deed of trust, mortgage, or separate assignment document [see CCP § 564(b)(11); see also 6.28].

It is also possible to seek appointment of a receiver to protect property rights or for property subject to attachment [see CCP §§ 564(b)(9), 488.700; see also 6.29].

The governing statutes do not prescribe any particular procedure for how a party is to apply for appointment of a receiver [see CCP § 564 *et seq.*; *Neider v. Dardi* (1955) 130 CA2d 646, 650, 279 P2d 598]. In an appropriate case the appointment of a receiver can be obtained *ex parte* (usually on the basis of a verified pleading) [see *Cal Rules Ct, Rules* 3.1175, 3.1176]. When *ex parte* appointment cannot be justified, the common practice is to use a noticed motion.



Decision Point--Receivership and Attachment:

Receivership is not a substitute for attachment [*Rogers v. Smith* (1946) 76 CA2d 16, 21, 172 P2d 365 (order appointing receiver was reversed)]. If a plaintiff needs the protection that attachment can provide [see 6.09], then attachment is the remedy to pursue. (Generally speaking, the purpose of attachment is to ensure that the plaintiff's expected judgment in a commercial contract action for damages will not be worthless when eventually it is entered.) However, once property has been subjected to attachment, grounds may exist for appointing a receiver to take possession of the property [see CCP § 488.700; see also 6.30].



Strategic Point--Expenses and Risks of Receivership:

A receiver is entitled to fees and reimbursement of expenses, which could make the remedy somewhat costly if the assets in receivership happen to need substantial management. If management of the assets will require any kind of expertise because of the nature of the assets or other peculiar circumstances, both parties should make a strenuous effort to find and nominate a receiver who has that expertise.



Cross References:

Discussion of procedure for appointment of receiver, see *California Forms of Pleading and Practice*, § 486.15 (Matthew Bender).

Procedural checklists for obtaining appointment and opposing application for appointment of receiver, see *California Forms of Pleading and Practice*, §§ 486.90, 486.91 (Matthew Bender).

Memorandum supporting court's own motion to appoint receiver, see *California Points and Authorities*, § 200.70 (Matthew Bender).

Legal Topics:

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

Civil ProcedureRemediesProvisional RemediesGeneral OverviewCivil ProcedureRemediesReceivershipsGeneral Overview



25 of 189 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 6 Using or Opposing Provisional Remedies in Contract Actions
V. SEEKING OR OPPOSING APPOINTMENT OF RECEIVER

1-6 MB Practice Guide: CA Contract Litigation 6.24

6.24 Existence of Alternative Remedy Does Not Bar Receivership.

The existence of an alternative remedy does not preclude appointment of a receiver in a proper case [*Sibert v. Shaver* (1952) 113 CA2d 19, 21, 247 P2d 609 ; see *Sunset Farms, Inc. v. Superior Court* (1935) 9 CA2d 389, 405, 50 P2d 106] . It follows that the applicant should not be required to show the absence of an effective alternative remedy in order to obtain appointment of a receiver.



Strategic Point--Opponent:

Although the absence of an alternative remedy is not required as a condition of appointing a receiver, the opposing party nevertheless should always argue in support of an alternative remedy (such as an injunction). A court normally should prefer a viable alternative remedy [see *Alhambra-Shumway Mines, Inc. v. Alhambra Gold Mine Corp.* (1953) 116 CA2d 869, 873, 254 P2d 599] .

Exception--Ex Parte Appointment:

When the applicant seeks appointment of a receiver ex parte, if any other remedy would be less severe in its results than appointment of a receiver and would adequately protect the rights of the parties, the court should not take property out of the hands of its owners [*Golden State Glass Corp. v. Superior Court* (1939) 13 C2d 384, 393, 90 P2d 75] . The general rule is that the appointment of a receiver to take property out of a party's possession without a hearing is unjustifiable without prior notice to that party, unless it clearly appears that irreparable injury would be done during the few days necessary for a hearing on notice. Even in such an extreme case, a temporary injunction [see 6.04] usually will be sufficient [*Fischer v. Superior Court* (1895) 110 C 129, 138, 42 P 561] .

Exception:

Some courts espouse the view that appointment of a receiver is an "extraordinary and harsh" remedy in any case and is therefore "to be allowed cautiously and only where less onerous remedies would be inadequate or unavailable" [*Cohen v. Herbert* (1960) 186 CA2d 488, 495, 8 CR 922] . Usually this attitude prevails in the cases falling under CCP § 564(b)(9) [see 6.29].

Legal Topics:

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

Civil ProcedureRemediesProvisional RemediesGeneral OverviewCivil ProcedureRemediesReceivershipsGeneral
OverviewCivil ProcedureRemediesReceivershipsReceiversAppointments



26 of 189 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 6 Using or Opposing Provisional Remedies in Contract Actions
V. SEEKING OR OPPOSING APPOINTMENT OF RECEIVER

1-6 MB Practice Guide: CA Contract Litigation 6.25

6.25 Seller's Action to Recover Property Can Involve Receivership.

In an action by a vendor to vacate a fraudulent purchase of property, a receiver may be appointed by the court in which the action is pending, or by a judge of that court, on the application of the plaintiff or of any other party to the pending action, when [CCP § 564(b)(1)]:

- The applicant's right to or interest in the property, or the proceeds of the property, is probable; and
- It is shown that the property is in danger of being either:
 - ☐ Lost;
 - ☐ Removed; or
 - ☐ Materially injured.

Example:

A buyer made a successful bid and paid a deposit to buy a farm that was part of the estate of which the seller was the administrator. The probate judge confirmed the sale and ordered prompt payment of the balance of the price. The buyer then failed to pay the balance of the price and admitted to seller that he was unable to pay it. Nevertheless, the buyer immediately, and without legal right, put a tenant in possession of the farm under a purported sharecropping lease. The tenant planted crops. The seller declared the deposit forfeited and demanded possession of the farm. When the demand was ignored, the seller sued for a decree forfeiting the deposit, terminating the claims of the buyer and the tenant to the farm and the growing crops, and enjoining the buyer and the tenant from interfering with the seller's right of possession and title. In addition, the seller asked that a receiver be appointed to harvest and market the crops (which were then ready to be harvested) and to hold the proceeds during the litigation. The trial court appointed a receiver but then revoked the appointment. The appellate court ordered reinstatement of the receivership, on the ground that if crops are planted by a trespasser who wrongfully assumes to hold possession of the land and threatens to harvest and market the crops, CCP § 564(b)(1) authorizes the appointment of a receiver in an appropriate proceeding. In effect, the court noted, the result of the probate court proceedings had been a contract between the buyer and seller, and the action was based on

a breach of that contract by an insolvent buyer. (Implicitly, an offer to buy is fraudulent if the buyer is insolvent.) The complaint sought appropriate equitable relief, and the appointment of the receiver was proper [*Barnes v. Morrison* (1929) 102 CA 152, 156-159, 282 P 986] .

Distinguish--Buyer in Default Without Fraud:

When a buyer falls into default under an executory contract for land, but there was no fraud on the buyer's part in making the contract, the seller has no standing under CCP § 564(b)(1) to obtain appointment of a receiver to harvest and sell crops growing on the land. Once the seller regains possession of the land in an ejectment action, the seller's only additional remedy is to sue the defaulted buyer for the value of the use of the land during the period of the buyer's wrongful possession. As the value of the crop would not be the measure of damages (because the crop embodies the value of the farmer's labor in addition to the value of the use of the land), the seller has no claim on the crop [*California Delta Farms, Inc. v. Chinese Am. Farms, Inc.* (1928) 204 C 524, 526-528, 269 P 443] . (If the seller happened to have a security interest in the crop, however, that would make a difference [see 6.26].)



Cross References:

Forms for use in obtaining appointment of receiver, see California Forms of Pleading and Practice, Ch. 486, Receivers (Matthew Bender).

Memorandum supporting appointment of receiver in action by vendor to vacate fraudulent purchase of property, see *California Points and Authorities*, § 200.80 (Matthew Bender).

Legal Topics:

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

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27 of 189 DOCUMENTS

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Chapter 6 Using or Opposing Provisional Remedies in Contract Actions
V. SEEKING OR OPPOSING APPOINTMENT OF RECEIVER

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6.26 Creditor's Equitable Action Can Involve Receivership.

In an action by a creditor to subject any property or fund to the creditor's claim, a receiver may be appointed by the court in which the action is pending, or by a judge of that court, on the application of the plaintiff or of any other party to the pending action, when [CCP § 564(b)(1)]:

- The applicant's right to or interest in the property or fund, or the proceeds of the property, is probable; and
- It is shown that the property or fund is in danger of being either:
 - ☐ Lost;
 - ☐ Removed; or
 - ☐ Materially injured.

Example:

A buyer made an installment-sale contract to buy an orchard from a seller, with payments to extend over a nine-year period, during which the seller retained the title as security. The buyer was to cultivate the orchard during the payment period, and the seller was to remain entitled to the proceeds of sale of the fruit. The buyer fell behind in payments after four years. The value of the property had depreciated since the contract was entered into, so that it was probably insufficient to cover the balance due. The property was in danger of being materially injured because of the buyer's failure to care properly for the grove, failure to irrigate at proper times, failure to disc, and failure to fertilize, all of which were contrary to accepted agricultural practice. Unless those matters could be attended to immediately, in the period when the trees were blooming and setting fruit, irreparable damage would be caused to the soil, trees, and crop. The seller sued to foreclose the buyer's interest in the property under the contract, and obtained the ex parte appointment of a receiver to effect the necessary cultivation. At a subsequent hearing the court confirmed and extended the receivership for the duration of the litigation. This was a

proper exercise of the court's power to appoint a receiver [*Snidow v. Hill* (1948) 84 CA2d 702, 704-708, 191 P2d 513] .

Distinguish:

The statute authorizes appointment of a receiver "in aid of a creditor's bill" [*La Societe Francaise d'Epargnes et de Prevoyance Mutuelle v. District Court* (1879) 53 C 495, 552] ; that is, it aids a creditor with a lien (or some equivalent claim) on the property or fund in question. A general (unsecured) creditor has no standing under CCP § 564(b)(1) to obtain appointment of a receiver for property in the debtor's possession [*California Delta Farms, Inc. v. Chinese Am. Farms, Inc.* (1928) 204 C 524, 526, 269 P 443] .

 Cross References:

Allegations and prayer for appointment of receiver in action by secured creditor to enforce personal property security agreement, see *California Forms of Pleading and Practice*, § 486.136 (Matthew Bender).

Memorandum supporting appointment of receiver in action by creditor to subject property or fund to creditor's claim, see *California Points and Authorities*, § 200.220 (Matthew Bender).

Memorandum opposing appointment of receiver in action by creditor to subject property or fund to creditor's claim, see *California Points and Authorities*, §§ 200.230, 200.231 (Matthew Bender).

Legal Topics:

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

Civil Procedure Remedies Equitable Accountings General Overview Civil Procedure Remedies Provisional Remedies General Overview Civil Procedure Remedies Receiverships Receivers General Overview Contracts Law Remedies Equitable Relief General Overview



28 of 189 DOCUMENTS

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Chapter 6 Using or Opposing Provisional Remedies in Contract Actions
V. SEEKING OR OPPOSING APPOINTMENT OF RECEIVER

1-6 MB Practice Guide: CA Contract Litigation 6.27

6.27 Equitable Action Between Partners, Joint Venturers, or Like Parties Can Involve Receivership.

In an action between partners or others jointly owning or interested in any property or fund, a receiver may be appointed by the court in which the action is pending, or by a judge of that court, on the application of the plaintiff or of any other party to the pending action, when [CCP § 564(b)(1)]:

- The applicant's right to or interest in the property or fund, or the proceeds of the property, is probable; and
- It is shown that the property or fund is in danger of being either:
 - ☐ Lost;
 - ☐ Removed; or
 - ☐ Materially injured.

Example:

Plaintiff and defendant formed a joint venture to own a parcel of real property and manage it under a long-term lease. Plaintiff, in order to enjoy his rights under their agreement, eventually had to sue defendant; and plaintiff obtained appointment of a receiver to manage their property during the litigation. The case for appointing a receiver was made by evidence that defendant had excluded plaintiff from participation in the management of their enterprise, from receipt of any share of the profits, and from all knowledge of defendant's transactions respecting the property. In addition, there was evidence of defendant's dissipation of a considerable portion of the receipts of the enterprise and defendant's hazarding the loss of the venture's sole asset. The need for the appointment of a receiver to protect and conserve the assets and plaintiff's share of future revenue during the litigation was "well nigh compelling" [*Neider v. Dardi* (1955) 130 CA2d 646, 649, 279 P2d 598] .

**Strategic Point:**

The parties in cases of this type usually have a common interest in preserving property that is the subject of litigation between them. In that event, they can stipulate to the appointment of a receiver [see, e.g., *Cal-American Income Prop. Fund VII v. Brown Dev. Corp.* (1982) 138 CA3d 268, 271-272, 187 CR 703]

**Trap:**

A careless stipulation could subvert the parties' purpose of preserving the property. For instance, they might unwittingly empower the receiver to sell the property if they stipulate to an order of appointment that does not withhold that power; and then the court might approve a sale, even though neither party wanted that outcome [see, e.g., *Cal-American Income Prop. Fund VII v. Brown Dev. Corp.* (1982) 138 CA3d 268, 274, 187 CR 703 (stipulated order of appointment broadly authorized receiver "generally to do such acts respecting the property as the court may authorize"; when receiver sought confirmation of sale, court correctly concluded that receiver had power to sell subject to court's confirmation; court confirmed sale but abused discretion because evidence was not sufficient to warrant confirmation)].

**Cross References:**

Allegations and prayer for appointment of receiver to take possession of property or fund in which parties have joint interest, see *California Forms of Pleading and Practice*, § 486.130 (Matthew Bender).

Memorandum supporting appointment of receiver in action between parties jointly owning or interested in property or fund, action between partners, action between vendor and vendee, or action between joint venturers, see *California Points and Authorities*, §§ 200.90, 200.91, 200.100, 200.101, 200.110, 200.120, 200.121 (Matthew Bender).

Memorandum opposing appointment of receiver in action between parties jointly owning or interested in property or fund, action between partners, action between vendor and vendee, or action between joint venturers, see *California Points and Authorities*, §§ 200.130, 200.140, 200.141, 200.150, 200.160 (Matthew Bender).

Legal Topics:

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

Civil Procedure Remedies Equitable Accountings Partnerships Civil Procedure Remedies Provisional Remedies General Overview Civil Procedure Remedies Receiverships General Overview Contracts Law Remedies Equitable Relief General Overview



29 of 189 DOCUMENTS

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Chapter 6 Using or Opposing Provisional Remedies in Contract Actions
V. SEEKING OR OPPOSING APPOINTMENT OF RECEIVER

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6.28 Lender's Action to Enforce Assignment of Real Property Rents Can Involve Receivership.

In an action by a secured lender for specific performance of an assignment-of-rents provision in a deed of trust, mortgage, or separate assignment document, a receiver may be appointed by the court in which the action is pending, or by a judge of that court [CCP § 564(b)(11)].

Strategic Point:



The appointment may be continued after entry of a judgment for specific performance if appropriate to protect, operate, or maintain the real property encumbered by the deed of trust or mortgages or to collect rents from the property while a pending nonjudicial foreclosure under power of sale in the deed of trust or mortgage is being completed [CCP § 564(b)(11)].



Cross References:

Appointment of receiver in lender's action for specific performance of some other provision in deed of trust or mortgage, see 6.25.

Allegations and prayer for appointment of receiver in action to enforce assignment of rents, see *California Forms of Pleading and Practice*, § 486.132 (Matthew Bender).

Memorandum supporting appointment of receiver in action for specific performance of assignment-of-rents provision, see *California Points and Authorities*, § 200.190 (Matthew Bender).

Legal Topics:

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

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30 of 189 DOCUMENTS

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Chapter 6 Using or Opposing Provisional Remedies in Contract Actions
V. SEEKING OR OPPOSING APPOINTMENT OF RECEIVER

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6.29 Receiver Can Be Appointed Whenever Necessary to Preserve Property or Party's Rights.

A receiver may be appointed by the court in which an action or proceeding is pending, or by a judge of that court, in any case if necessary to preserve the property or rights of any party [CCP § 564(b)(9)].

Exception:

If the facts bring the case within the purview of one of the more specific grants of authority to appoint a receiver [see CCP § 564(b)-(d)], then the specific statutory provision is controlling [*Marsch v. Williams* (1994) 23 CA4th 238, 246 n8, 28 CR2d 402 ; *Dabney Oil Co. v. Providence Oil Co.* (1913) 22 CA 233, 237, 133 P 1155] . Usually only two of those specific provisions would be applicable in contract actions [see CCP § 564(b)(1), (11); see also 6.25 -6.28].



Strategic Point--Limitation to Equity Cases:

The statute allows appointment of a receiver "in any case" as necessary; however, in practice, since the remedy is equitable, it is available only insofar as a party has invoked the court's equity jurisdiction [see, e.g., *Snidow v. Hill* (1948) 84 CA2d 702, 704-705, 191 P2d 513 ; see also *O'Flaherty v. Belgum* (2004) 115 CA4th 1044, 1092 (Grignon, J. dissenting; observation that remedy is equitable and implicitly available only in case in equity)].

Example--Specific Performance of Mortgage Provision:

A creditor held a mortgage on a railroad company's property to secure the payment of principal and interest on the company's bonds that creditor had taken up. The mortgage expressly entitled the creditor to enter the company's property covered by the mortgage and take possession of it, in the event of a default in the payment of principal or interest (and the existence of various additional conditions). The default occurred as provided for, and the creditor sued for specific performance of the mortgage provision after the railroad company declined to hand over possession of its property. At the creditor's request, the trial court appointed a receiver ex parte to take possession of the company's property during the litigation. The appointment was a proper exercise of the trial court's power under CCP § 564(b)(9) [*Sacramento & Placerville R.R. Co. v. Superior Court* (1880) 55 C 453, 456-457].

Distinguish--Buyer's Action for Specific Performance:

In a normal case when the buyer sues for specific performance of a contract to convey real property,

there should be no basis for appointing a receiver to take possession of the property. If the seller in possession of the property is engaged in harvesting and selling crops, or otherwise using the property, the buyer cannot make a case for receivership, even if the seller's use of the property violates the buyer's contract rights. The buyer's remedy is to await judgment on the specific performance complaint, and then (on a favorable judgment) sue for damages for the seller's use of the property during whatever period the buyer was entitled to possession [see *Khatchadourian v. Davidian* (1947) 79 CA2d 539, 541, 179 P2d 853]. Only when the seller in possession is doing something harmful to the property or violating the buyer's rights in some way not redressable by damages might the buyer make a case for receivership.



Cross References:

Forms for use in obtaining appointment of receiver, see California Forms of Pleading and Practice, Ch. 486, Receivers (Matthew Bender).

Memorandum supporting appointment of receiver in case to preserve property or rights of party, see *California Points and Authorities*, §§ 200.250, 200.251 (Matthew Bender).

Memorandum opposing appointment of receiver in case to preserve property or rights of party, see *California Points and Authorities*, § 200.260 (Matthew Bender).

Legal Topics:

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

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31 of 189 DOCUMENTS

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Chapter 6 Using or Opposing Provisional Remedies in Contract Actions
V. SEEKING OR OPPOSING APPOINTMENT OF RECEIVER

1-6 MB Practice Guide: CA Contract Litigation 6.30

6.30 Receiver Can Be Appointed for Property Subjected to Attachment.

If property has been or is sought to be attached, the court may appoint a receiver to preserve the value of the property, including but not limited to selling the property, if the court determines that either [CCP § 488.700]:

- The property is perishable or will greatly deteriorate or greatly depreciate in value; or
- For some other reason the interests of the parties will be best served by the order.

Distinguish:

Receivership is not a substitute for attachment [*Rogers v. Smith* (1946) 76 CA2d 16, 21, 172 P2d 365] but, under this statute, can be used in aid of attachment.



Cross References:

Attachment as provisional remedy, see 6.09.

Forms for use in obtaining appointment of receiver, see California Forms of Pleading and Practice, Ch. 486, Receivers (Matthew Bender).

Memorandum supporting appointment of receiver in attachment proceeding, see *California Points and Authorities*, § 200.270 (Matthew Bender).

Legal Topics:

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

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32 of 189 DOCUMENTS

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Chapter 6 Using or Opposing Provisional Remedies in Contract Actions
V. SEEKING OR OPPOSING APPOINTMENT OF RECEIVER

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6.31 Court May Appoint Receiver on Its Own Initiative.

A court may appoint a receiver whenever a proper case is made, even if no party has requested it [*Neider v. Dardi* (1955) 130 CA2d 646, 650, 279 P2d 598] . A "proper case" would entail, at least:

- A party's request for *some* type of equitable remedy (other than appointment of a receiver) in circumstances in which appointment of a receiver would be appropriate [see *Venza v. Venza* (1949) 94 CA2d 878, 880-883, 211 P2d 913] .

Example:

In an ex-wife's action against her ex-husband for an accounting and equitable division of former community assets, including business they had operated together, the court properly appointed a receiver to operate the business during litigation, even though neither party asked for that remedy, in light of allegations of the ex-husband's fraudulent concealment of business's revenue and other assets, and his fraudulent inducement of his ex-wife to enter into the marital settlement agreement, on which division of their community property had been predicated in their divorce judgment [see *Venza v. Venza* (1949) 94 CA2d 878, 880-883, 211 P2d 913] .

- The absence of any party's well-taken and timely objection to the court's spontaneous appointment of a receiver [see *Whitney v. Buckman* (1864) 26 C 447, 453] .

Legal Topics:

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

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Procedure Remedies Receiverships Receivers Appointments



33 of 189 DOCUMENTS

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Chapter 6 Using or Opposing Provisional Remedies in Contract Actions
VI. SEEKING OR OPPOSING TURNOVER OR DEPOSIT IN COURT

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6.32 CHECKLIST: Seeking or Opposing Turnover or Deposit in Court.

☐ Determine whether client can obtain turnover order because other party:

- ☐ Admits having sum of money or anything capable of being delivered; and
- ☐ Admits that it belongs to client.

Authority:

CCP § 572

Discussion:

See 6.34

☐ Determine whether client can obtain order for deposit in court because:

- ☐ Other party admits having sum of money or anything capable of being delivered; and
- ☐ Under circumstances of case, it should be held by court pending final disposition of action.

Authority:

CCP § 572

Discussion:

See 6.35

☐ If representing defendant, determine whether client can and should make preemptive deposit of money in court to become eligible to recover costs and attorney's fees.

☐ Ascertain whether, before commencement of action, client tendered to plaintiff full amount to which plaintiff is entitled.

Authority:

CCP § 1025

Discussion:

See 6.36

☐ Ascertain whether, before filing answer, client is able and willing to tender to plaintiff full amount to which plaintiff is entitled.

Authority:

CC § 1717(b)(2)

Discussion:

See 6.36

Legal Topics:

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

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34 of 189 DOCUMENTS

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Chapter 6 Using or Opposing Provisional Remedies in Contract Actions
VI. SEEKING OR OPPOSING TURNOVER OR DEPOSIT IN COURT

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6.33 Options and Strategies.

In any action, if either party admits having a sum of money or anything capable of being delivered, and admits that it belongs to the other party, the other party can request a turnover order [*see CCP § 572; see also 6.34*].

Either party can request an order for deposit in court when a sum of money or anything capable of being delivered should be taken out of the hands of the other party, who admittedly has it, and placed in the court's custody during litigation [*see CCP § 572; see also 6.35*]. Usually the money or thing is the subject of the litigation.

A defendant who tendered payment of the plaintiff's claim before the lawsuit was commenced or before filing an answer can deposit the amount in court, and by doing so might become entitled to recover costs [*see CCP § 1025*] and attorney's fees [*see CC § 1717(b)(2)*], if the plaintiff fails to obtain a judgment for more than the tendered amount [*see 6.36*].

Legal Topics:

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

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35 of 189 DOCUMENTS

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Chapter 6 Using or Opposing Provisional Remedies in Contract Actions
VI. SEEKING OR OPPOSING TURNOVER OR DEPOSIT IN COURT

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6.34 Party Can Request Turnover of Money or Thing.

6.34[1] Court Has Power to Issue Turnover Order. The court may order the turnover of money or anything capable of being delivered, subject to the further direction of the court, when a party to the action has admitted by the party's pleadings, or the examination of the party has shown, that the money or thing [CCP § 572]:

- Is in that party's possession or control; and
- Belongs or is due to the other party.

It is not necessary that the money or thing be the subject of the litigation, unless the party possessing or controlling the money or thing holds it as trustee for the party claiming it [see CCP § 572].



Warning:

Demurrers and cross complaints are both "pleadings" for these purposes [CCP § 422.10]. Counsel should consider whether any such pleadings may contain admissions that might justify a request for a turnover order. Counsel should also bear in mind that a material allegation in a complaint or cross-complaint that is not controverted by the answer will be taken as true for purposes of the action [CCP § 431.20(a); see CCP § 431.10(a)].



Decision Point--Defendant Holding Money:

When the defendant holds money (rather than a thing) that could be the subject of a turnover order, the defendant should consider preemptively depositing it in court, which could not only preclude a turnover order but also position the defendant to claim costs and attorney's fees [see CC § 1717(b)(2); CCP § 1025; see also 6.36].



Strategic Points:

- Under the statutory language, the essential facts do not have to be established in the same way; one fact could be admitted in the pleadings of the party having or controlling the money or thing, while the other fact could be shown on the examination of the party [*see CCP § 572*].

- A fact shown on the examination of a witness other than a party cannot support a turnover order (even if the witness' statement would be deemed an admission by the party under a rule of evidence), since the statute specifically refers to "the examination of a party to the action" [*see CCP § 572*].

- The statutory reference to "the examination" of the other party [*see CCP § 572*] is broad enough to encompass a deposition. However, there is no reported case showing that a court has considered this interpretation.

- A fact can be "shown on the examination" of a party even if the party does not admit it.

6.34[2] Claimant Must Move for Order. The party laying claim to the money or thing must move for the turnover order [*CCP § 572*]. There is no time limit for making the motion. The motion can be made orally during the trial or in a pretrial hearing. The statute requires a motion but does not specify a noticed motion [*see generally CCP § 1005(a)* (motions that must be made on written notice)].



Strategic Point:

The judge is not authorized to order a turnover unless a party requests it [*see CCP § 572* (order may be made "upon motion")].



Cross References:

Notice of motion for turnover order, see *California Forms of Pleading and Practice*, § 211.50 (Matthew Bender).

Additional discussion of procedure for turnover orders, see *Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure*, 20.16.

6.34[3] Court May Impose Conditions or Order Deposit in Court. The turnover order may impose "those conditions that may be just" [*CCP § 572*]. In lieu of ordering a turnover to the claimant, the court may mandate that the money or thing be deposited in court, subject to the further direction of the court [*CCP § 572; see 6.35*].

Legal Topics:

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

Civil Procedure Remedies Deposits in Court Civil Procedure Remedies Prejudgment Remedies General Overview Civil Procedure Remedies Provisional Remedies General Overview



36 of 189 DOCUMENTS

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Chapter 6 Using or Opposing Provisional Remedies in Contract Actions
VI. SEEKING OR OPPOSING TURNOVER OR DEPOSIT IN COURT

1-6 MB Practice Guide: CA Contract Litigation 6.35

6.35 Party Can Request Order for Deposit of Money or Thing in Court.

The court may order that money, or anything capable of being delivered, be deposited in court, subject to the further direction of the court, when [CCP § 572]:

- A party to the action has admitted in the party's pleadings, or the examination of the party has shown, that the money or thing is in that party's possession or control; and
- In the circumstances of the case, the money or thing should be held by the court pending final disposition of the action.

The party believing that the money or thing should be deposited in court must move for the order [see CCP § 572].

The statutory requirements, as well as considerations and procedures, governing orders for deposit in court are the same as for turnover orders, since both are governed by the same provisions of CC § 572 [see 6.34].



Strategic Point--Defendant Holding Money:

When the defendant holds money (rather than a thing) that could be the subject of an order for deposit in court, the defendant can preemptively deposit it in court, which could not only obviate an order but also position the defendant to claim costs and attorney's fees [see CC § 1717(b)(2); CCP § 1025; see also 6.36].



Cross Reference:

Notice of motion for order to deposit money or thing in court, see *California Forms of Pleading and Practice*, § 211.50 (Matthew Bender).

Legal Topics:

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

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37 of 189 DOCUMENTS

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Chapter 6 Using or Opposing Provisional Remedies in Contract Actions
VI. SEEKING OR OPPOSING TURNOVER OR DEPOSIT IN COURT

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6.36 Defendant Can Preemptively Deposit Money in Court.

6.36[1] Defendant Must Tender, Allege, and Deposit Full Amount to Which Plaintiff Is Entitled. In a contract action for damages, the defendant can make a preemptive deposit of money in court, so as to become entitled to recover costs [see 6.36[2]] or attorney's fees [see 6.36[3]], or both, even if judgment is rendered for the plaintiff. The following conditions must be satisfied [see *CC § 1717(b)(2)*; *CCP § 1025*]:

- The defendant must have tendered to the plaintiff the full amount to which the plaintiff is entitled.
- The defendant's answer must allege that fact.
- The defendant must deposit that same amount in court, for the plaintiff.
- The allegation must be found to be true.



Warning:

The statute applies in an action for the recovery of "money only" [*CCP § 1025*]. In no reported case has a court examined how this condition should be applied in practice.



Strategic Point:

While the defendant's deposit in court could position the defendant to claim costs and attorney's fees, it also should preclude a turnover order--which the plaintiff could possibly obtain, in the absence of a deposit in court, if the answer admitted that a specified amount was due to the plaintiff [see *CCP § 572*; see also 6.34].



Cross References:

Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, Ch. 14, Answers.

Discussion of contents of answer, see California Forms of Pleading and Practice, Ch. 26, Answers

(Matthew Bender).

6.36[2] Defendant Can Recover Costs. If the statutory conditions are satisfied [see 6.36[1]], and the defendant made the tender to the plaintiff before commencement of the action, then the plaintiff cannot recover costs, but instead must pay costs to the defendant [CCP § 1025].

 Cross References:

Detailed discussion of recovery of costs and attorney's fees, see Ch. 12, Recovering Attorney's Fees and Costs in Contract Litigation.

Discussion of party's right to recover costs, see *California Forms of Pleading and Practice*, § 174.10 *et seq.* (Matthew Bender).

6.36[3] Defendant Can Recover Attorney's Fees. If the statutory conditions are satisfied [see 6.36[1]], and CC § 1717 applies (entitling the prevailing party to recover attorney's fees in an action on a contract that provides for attorney's fees), then the defendant is deemed to be a party prevailing on the contract within the meaning of CC § 1717 [CC § 1717(b)(2)].

Consider:

Unlike the recovery of costs under CCP § 1025 [see 6.36[2]], the defendant need not have tendered the amount in question to the plaintiff before the commencement of the action. CC § 1717 does not impose that condition. It should be sufficient to make the tender before the answer is filed, since the statute requires only that the answer must allege the fact of making the tender [see CC § 1717(b)(2)].

The court, on application of any party to the action, must order the deposited money to be invested in an insured, interest-bearing account. Interest on the amount must be allocated to the parties in the same proportion as the original funds are allocated [CC § 1717(b)(2)].

 Cross References:

Detailed discussion of recovery of costs and attorney's fees, see Ch. 12, Recovering Attorney's Fees and Costs in Contract Litigation.

Discussion of party's right to recover attorney's fees, see *California Forms of Pleading and Practice*, § 174.50 *et seq.* (Matthew Bender).

Legal Topics:

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

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38 of 189 DOCUMENTS

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Chapter 7 Seeking or Opposing Damages in Contract Actions

1-7 MB Practice Guide: CA Contract Litigation 7.syn

§ 7.syn Synopsis to Chapter 7: Seeking or Opposing Damages in Contract Actions

7.01 Scope.

7.02 Objective and Strategy.

7.03 CHECKLIST: Determining Measure of Damages.

7.04 Damages Compensate Plaintiff for Detriment Caused by Breach.

7.04[1] Unless Otherwise Provided by Statute, General Measure of Contract Damages Applies.

7.04[2] Damages Must Have Been Contemplated by Parties.

7.04[2][a] General Damages Must Naturally Arise From Breach or Have Been Reasonably Foreseeable by Parties.

7.04[2][b] Generally No Recovery for Unanticipated Damage or Injury.

7.04[3] Damages Must Be Clearly Ascertainable.

7.04[4] Plaintiff Is Entitled to Benefit of Bargain.

7.04[5] Damages Are Not Measured by Savings or Benefit to Defendant Resulting From Breach.

7.04[6] Secondary or Derivative Losses May Be Recoverable as Special Damages.

7.04[6][a] Special Damages Are Secondary and Derivative Losses Arising From Circumstances Peculiar to Specific Contract.

7.04[6][b] Special Damages Generally Are Nonrecoverable.

7.04[6][c] Special Damages Are Recoverable If Breaching Party Voluntarily Assumed Risk of Liability for Unusual Losses.

7.04[6][d] Special Damages Are Recoverable If Circumstances Compel Inference that Breaching Party Should Have Contemplated Possibility of Loss.

7.04[7] Measure of Damages for Breach of Particular Contracts Are Specified by Statute.

7.04[7][a] Obligation to Pay Money Only.

7.04[7][b] Covenant of Seisin, Right to Convey, Warranty, or Quiet Enjoyment.

7.04[7][c] Covenant Against Encumbrances.

7.04[7][d] Contract to Convey Land.

7.04[7][e] Agreement to Deliver Quitclaim Deed.

7.04[7][f] Agreement to Purchase Real Property.

7.04[7][g] Leases of Real or Personal Property.

7.04[7][h] Obligations of Carriers of Passengers, Freight, and Messages.

7.04[7][i] Warranty of Agent's Authority.

7.04[8] Measure of Damages May Be Included in Statutory Scheme Governing Transaction.

7.04[9] Measure of Damages for Particular Circumstances May Be Established by Case Law.

7.04[10] More Than One Method of Determining Damages May Apply.

7.04[11] Nominal Damages Are Presumed.

7.05 Amount of Damages May Be Limited by Contract or Circumstances.

7.05[1] Prospective Damages Are Not Available for Partial Breach.

7.05[2] Damages Are Limited When Contract Contains Termination Provision.

7.05[3] Liquidated Damages Provisions May Specify Recovery.

7.05[3][a] Reasonable Liquidated Damages Provisions Generally Are Valid Under CC § 1671.

7.05[3][b] Liquidated Damages Provisions in Consumer Contracts and Residential Leases Are Enforceable Only in Limited Circumstances.

7.05[3][c] Deposit May Constitute Liquidated Damages.

7.05[4] Provisions in Real Estate Purchase Contracts for Liquidated Damages to Seller Upon Default by Buyer.

7.05[4][a] Liquidated Damages Provisions Must Meet Requirements of CC §§ 1677 and 1671(b).

7.05[4][b] CC § 1677 Specifies Format and Signature Requirements for Liquidated Damages Provision.

7.05[4][c] CC § 1671(b) Requires Provision to Have Been Reasonable Under Circumstances When Made.

7.05[4][d] Provisions in Contracts for Purchase of Residential Property Are Subject to Additional Requirements.

7.05[5] Other Liquidated Damages Provisions in Real Estate Purchase Contracts Are Governed by CC § 1671.

7.06 Facts May Support Claim for Either Tort or Contract Damages.

7.06[1] Tort Claim Exists If Conduct Violates Duty Independent of Contract Arising from Principles of Tort Law.

7.06[2] Economic Loss Rule Bars Tort Recovery by Purchaser Absent Personal Injury or Damage to Other Property.

7.06[3] Affirmative Misrepresentations Made in Performance of Contract May Support Action for Fraud.

7.07 CHECKLIST: Pleading and Proving Damages.

7.08 Damages Must Be Alleged.

7.08[1] Allegation of Damages Is Essential to State Cause of Action.

7.08[2] General Damages Need Not Be Alleged in Detail.

7.08[3] Plaintiff Must Allege Particular Facts to Recover Special Damages.

7.09 Plaintiff Must Prove Damages With Reasonable Certainty.

7.09[1] Plaintiff Must Prove Damages Were Suffered and Were Caused by Defendant's Breach.

7.09[2] Certainty As to Amount Is Not Required.

7.09[3] Future Damages Are Recoverable If Proven With Reasonable Certainty.

7.09[4] Requirement of "Reasonable Certainty" Does Not Affect Burden of Proof.

7.09[5] Issue of "Reasonable Certainty" Is Generally for Trier of Fact.

7.10 Plaintiff Must Show Causation.

7.10[1] Damages Must Be Proximately Caused by Breach.

7.10[2] Breach Must Be Cause-in-Fact for Loss or Harm.

7.10[3] Breach Need Not Be Sole Cause of Damages.

7.11 Damages Must Have Been Foreseeable.

7.12 Proving Entitlement to Particular Elements of Damages.

7.12[1] Loss of Profits May Be Recoverable As General Damages.

7.12[1][a] Extent and Occurrence Must Be Ascertained With Reasonable Certainty.

7.12[1][b] Anticipated Profits of Unestablished Business May Be Recoverable.

7.12[1][c] Anticipated Profits for Unestablished Business May Be Shown in Various Ways.

7.12[1][d] Measure of Damages Is Net Profits.

7.12[1][e] Special Allegations Usually Are Not Required.

7.12[2] Damages for Physical or Mental Suffering Arising From Breach.

7.12[2][a] Generally Not Recoverable in Claim for Breach of Contract.

7.12[2][b] May Be Recoverable When Foreseeable and Contemplated Result of Breach of Particular Contract.

7.12[3] Loss of Goodwill May Be Element of Damages.

7.12[3][a] Goodwill Must Have Been Within Contemplation of Parties.

7.12[3][b] Difficulty of Proof Does Not Preclude Recovery.

7.12[3][c] Facts Concerning Loss of Goodwill Should Be Alleged With Particularity.

7.12[4] Damage to Reputation Generally Is Not Recoverable.

7.12[5] Plaintiff May Recover Expenditures Incurred in Performance If Not Awarded Full Benefit of Bargain.

7.12[5][a] Reasonably Necessary Expenditures or Value of Services Rendered May Be Recoverable.

7.12[5][b] Plaintiff Also May Recover Net Profit, If Established.

7.12[5][c] Defendant Has Burden of Showing Expenses Were Extravagant and Unnecessary.

7.12[6] Expenses Incurred Because of Breach May Be Recovered.

7.12[6][a] Plaintiff Is Entitled to Reasonable and Necessary Expenses.

7.12[6][b] Damages Include Expenses Incurred in Mitigation.

7.12[7] Prejudgment Interest.

7.12[7][a] Party Entitled to Recover Damages Certain Is Entitled to Interest From Day Right of Recovery Vests.

7.12[7][b] Court May Allow Prejudgment Interest When Claim Was Unliquidated.

7.12[7][c] Contract May Stipulate Rate of Interest.

7.12[7][d] Accepting Payment of Whole Principal Waives Claim to Interest.

7.12[8] Punitive or Exemplary Damages Are Unavailable for Breach of Contract.

7.13 CHECKLIST: Contesting Damages.

7.14 Claim for Damages May Be Subject to Attack on Various Grounds.

7.14[1] Defendant May Demur to Complaint If Damages Are Not Properly Alleged.

7.14[2] Defendant's Liability for Damages Alleged May Be Contested.

7.14[3] Plaintiff's Entitlement to Particular Damages May Be Contested.

7.15 Defendant May Assert Affirmative Defense of Failure to Mitigate Damages.

7.15[1] Plaintiff Must Make Reasonable Effort to Mitigate.

7.15[2] Reasonableness of Effort Depends on Circumstances.

7.15[3] Plaintiff Cannot Recover Avoidable Damages.

7.15[4] Mitigation May Not Be Required Under Circumstances.

7.15[4][a] Obligation to Mitigate Is Excused by Reliance on Defendant's Promises.

7.15[4][b] Nature of Contract or Extent of Plaintiff's Performance May Excuse Obligation to Mitigate.

7.15[4][c] Obligation to Mitigate May Not Be Imposed to Deprive Plaintiff of Benefit of Subsequent Contracts.

7.15[4][d] Obligation to Mitigate Does Not Apply When Plaintiff Has Fully Performed.

7.15[4][e] Obligation to Mitigate Does Not Require Obligations Beyond Plaintiff's Means.

7.15[5] Failure to Mitigate Is Affirmative Defense.

7.16 Complaint for Breach of Contract With Allegation(s) of Damages.

Complaint for Breach of Contract With Allegation(s) of Damages.

7.17 Answer to Complaint for Breach of Contract With Affirmative Defense Based on Plaintiff's Failure to Mitigate Damages.

Answer to Complaint for Breach of Contract With Affirmative Defense Based on Plaintiff's Failure to Mitigate Damages.

7.18 Memorandum for Party Seeking Damages--General Damages Sufficiently Alleged.

Memorandum for Party Seeking Damages--General Damages Sufficiently Alleged.

7.19 Memorandum for Party Seeking Damages--Loss of Profits Recoverable.

Memorandum for Party Seeking Damages--Loss of Profits Recoverable.

7.20 Memorandum for Party Seeking Damages--Mental or Emotional Distress Damages Recoverable.

Memorandum for Party Seeking Damages--Mental or Emotional Distress Damages Recoverable.

7.21 Memorandum for Party Seeking Damages--Plaintiff's Effort to Mitigate Was Reasonable.

Memorandum for Party Seeking Damages--Plaintiff's Effort to Mitigate Was Reasonable.

7.22 Memorandum for Party Seeking Damages--Mitigation Not Required Under Circumstances.

Memorandum for Party Seeking Damages--Mitigation Not Required Under Circumstances.

7.23 Memorandum for Party Contesting Damages--Allegations Insufficient to Recover Special Damages.

Memorandum for Party Contesting Damages--Allegations Insufficient to Recover Special Damages.

7.24 Memorandum for Party Contesting Damages--Damages Not Recoverable Because Plaintiff Failed to Mitigate.

Memorandum for Party Contesting Damages--Damages Not Recoverable Because Plaintiff Failed to Mitigate.



39 of 189 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 7 Seeking or Opposing Damages in Contract Actions

I. STRATEGY

1-7 MB Practice Guide: CA Contract Litigation 7.01

7.01 Scope.

This chapter covers:

- Objective and strategy for seeking or contesting the award of damages in contract actions [see 7.02].
- Determining the appropriate measure of damages [see 7.03 -7.06], including the general measure of contract damages [see 7.04[1] -[5]], the availability of special damages [see 7.04[6]], measures of damages specified by statute and case law [see 7.04[7] -[9]], and the award of nominal damages when plaintiff has suffered no appreciable detriment [see 7.04[11]].
- Determining the correct measure of damages when more than one method of determining damages may apply [see 7.04[10]].
- Determining whether the amount of damages is limited because breach was partial [see 7.05[1]], the contract was terminated according to its terms [see 7.05[2]], or the contract contains a liquidated damages provision [see 7.05[3] -[5]].
- Determining whether facts support an alternative claim for tort damages [see 7.06].
- Pleading and proving the damages sought [see 7.07 -7.12; Forms: see 7.16, 7.18 -7.22], including alleging damages [see 7.08], proving damages with reasonable certainty [see 7.09], and showing causation [see 7.10] and foreseeability [see 7.11].
- Proving entitlement to particular elements of damages [see 7.12; Forms: see 7.18 -7.22], including loss of profits [see 7.12[1]], damages for physical or mental suffering [see 7.12[2]], loss of goodwill [see 7.12[3]], expenses incurred in performance [see 7.12[5]], expenses incurred because of breach [see 7.12[6]], and prejudgment interest [see 7.12[7]].
- Contesting damages, including the affirmative defense of plaintiff's failure to mitigate [see 7.13 -7.15; Forms: see 7.17, 7.23, 7.24].

Core Statutes:

CC §§ 1671-1681 (liquidated damages), *3287-3289* (interest on damages), *3300-3318* (measure of damages)

Legal Topics:

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

Contracts Law Remedies General Overview Contracts Law Remedies Compensatory Damages General Overview Contracts Law Remedies Foreseeable Damages General Overview Contracts Law Remedies Liquidated Damages Contracts Law Remedies Punitive Damages



40 of 189 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 7 Seeking or Opposing Damages in Contract Actions

I. STRATEGY

1-7 MB Practice Guide: CA Contract Litigation 7.02

7.02 Objective and Strategy.

Damages are an essential element of a cause of action for breach of contract [see 7.08[1]]. Because contract damages are more limited in scope than tort damages [see CC §§ 3300, 3333], the plaintiff must determine the appropriate measure of damages to optimize recovery [see 7.04] and prepare the case accordingly. The plaintiff also must determine his or her entitlement to particular types of damages, such as loss of goodwill, to comply with any particular requirements of pleading and proof [see 7.12]. The plaintiff must properly allege and prove all of the damages sought [see 7.08 -7.10].

The defendant in a breach of contract action must consider how best to minimize his or her exposure for the damages sought by the complaint. The defendant is liable for foreseeable damages that were proximately caused by his or her breach [see 7.10, 7.11]. The defendant therefore must consider whether his or her liability for the damages sought can be disputed because of lack of foreseeability or causation [see 7.14[1], [2]].

The defendant also must consider whether to dispute plaintiff's entitlement to particular items of damages [see 7.14[3]]. For example, a plaintiff may be requesting punitive damages under a breach-of-contract cause of action that permits only compensatory damages. A motion to strike or for summary judgment would be likely to succeed and thereby significantly limit defendant's risk at trial.

Even if liability for damages cannot be contested completely, the defendant must consider whether an affirmative defense, such as the existence of a liquidated damages provision or plaintiff's failure to mitigate, can be asserted to limit the plaintiff's potential recovery [see 7.15].



Strategic Point--All Parties:

Damages often involve issues of fact that cannot be resolved prior to trial. However, the defendant should consider whether, under the circumstances of the case, any damages issues can be resolved prior to or during trial, by demurrer or motion. In some circumstances, raising a damages issue by demurrer or motion may result in dismissal of the case or, at least, a limit on the type or amount of damages that ultimately can be awarded [see 7.14].

Detailed Discussion/Forms:

California Forms of Pleading and Practice, Ch. 140, Contracts; Ch. 177, Damages (Matthew Bender).

California Legal Forms, Ch. 75, Formation of Contracts and Standard Contractual Provisions (Matthew Bender).

California Points and Authorities, Ch. 50, Contracts; Ch. 65, Damages (Matthew Bender).

 Cross Reference:

For Tips on updating case law and expanding your research with additional resources, see **How to Use Lexis.com With This Publication** at the front of this volume.

Legal Topics:

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

Contracts LawRemediesGeneral OverviewContracts LawRemediesCompensatory DamagesGeneral OverviewContracts LawRemediesForeseeable DamagesGeneral OverviewContracts LawRemediesLiquidated DamagesContracts LawRemediesPunitive Damages



41 of 189 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 7 Seeking or Opposing Damages in Contract Actions

II. DETERMINING MEASURE OF DAMAGES

1-7 MB Practice Guide: CA Contract Litigation 7.03

7.03 CHECKLIST: Determining Measure of Damages.

☐ Determine whether measure of damages for breach of contract at issue has been established:

☐ By statute:

☐ Obligation to pay money only.

Authority:

CC § 3302

Discussion:

See 7.04[7][a]

☐ Covenant of seisin, right to convey, warranty, or quiet enjoyment.

Authority:

CC § 3304

Discussion:

See 7.04[7][b]

☐ Covenant against encumbrances.

Authority:

CC § 3305

Discussion:

See 7.04[7][c]

- ☐ Contract to convey land.

Authority:

CC § 3306

Discussion:

See 7.04[7][d]

- ☐ Agreement to deliver quitclaim deed.

Authority:

CC § 3306a

Discussion:

See 7.04[7][e]

- ☐ Agreement to purchase real property.

Authority:

CC § 3307

Discussion:

See 7.04[7][f]

- ☐ Leases of real or personal property.

Authority:

CC § 1951.2; Com Code §§ 10602, 10519, 10520, 10527-10532, 10600

Discussion:

See 7.04[7][g]

- ☐ Obligations of carrier of passengers, freight, and messages.

Authority:

CC §§ 3315, 3316

Discussion:

See 7.04[7][h]

- ☐ Warranty of agent's authority.

Authority:

CC § 3318

Discussion:

See 7.04[7][i]

- ☐ Other statutory scheme governing transaction.

Discussion:

See 7.04[8]

☐ If measure of damages is not established by statute, determine damages using general measure of contract damages provided by CC § 3300 considering that

- ☐ Damages must compensate plaintiff for harm proximately caused by breach.

Authority:

CC § 3300

Discussion:

See 7.04[1]

- ☐ Damages must have been contemplated by parties.

Authority:*California Press Mfg. Co. v. Stafford Packing Co. (1923) 192 C 479, 483, 221 P 345***Discussion:**

See 7.04[2]

- ☐ Damages must be clearly ascertainable.

Authority:CC § 3301; *Benach v. County of Los Angeles (2007) 149 CA4th 836, 848, 57 CR3d 363***Discussion:**

See 7.04[3]

- ☐ Plaintiff is entitled to benefit of bargain.

Authority:*Martin v. U-Haul Co. of Fresno (1988) 204 CA3d 396, 409, 251 CR 17***Discussion:**

See 7.04[4]

- ☐ Damages cannot be measured by savings or benefit to defendant resulting from breach.

Authority:*Gregory v. Spieker (1895) 110 C 150, 155, 42 P 576***Discussion:**

See 7.04[5]

- ☐ Measure of general damages for particular circumstances may have been established by case law.

Discussion:

See 7.04[9]

- ☐ Even if breach has caused no appreciable detriment to plaintiff, nominal damages are presumed.

Authority:

CC § 3360

Discussion:

See 7.04[11]

- ☐ If plaintiff has incurred some harm as a result of the breach because of special circumstances concerning the contract, determine whether plaintiff is entitled to special, as well as general, damages.

Authority:

Brandon & Tibbs v. George Kevorkian Accountancy Corp. (1990) 226 CA3d 442, 455, 277 CR 40

Discussion:

See 7.04[6]

- ☐ If more than one method of determining damages applies, select appropriate method:

- ☐ If one of the methods is a specific measure of damages, determine damages according to that measure.

Authority:

CC § 3300

Discussion:

See 7.04[10]

- ☐ If both methods are adequate and permissible, determine damages according to method yielding the more accurate and certain result.

Authority:

California Press Mfg. Co. v. Stafford Packing Co. (1923) 192 C 479, 485, 221 P 345

Discussion:

See 7.04[10]

- ☐ If two measures are accurate and will fully compensate plaintiff, determine damages according to method less expensive to defendant.

Authority:

A.A. Baxter Corp. v. Colt Indus., Inc. (1970) 10 CA3d 144, 160, 88 CR 842

Discussion:

See 7.04[10]

☐ Determine whether amount of damages is limited because of circumstances such as:

☐ Breach was partial, so prospective damages are not available.

Authority:

Coughlin v. Blair (1953) 41 C2d 587, 598, 262 P2d 305

Discussion:

See 7.05[1]

☐ Contract was terminated according to its terms, so damages are limited to those that accrued prior to termination.

Authority:

Martin v. U-Haul Co. of Fresno (1988) 204 CA3d 396, 409-411, 251 CR 17

Discussion:

See 7.05[2]

☐ A liquidated damages provision specifies amount of recovery.

Authority:

CC §§ 1671-1681

Discussion:

See 7.05[3] -[5]

☐ Determine whether facts will support alternative claim for tort damages.

Authority:

Applied Equip. Corp. v. Litton Saudi Arabia Ltd. (1994) 7 C4th 503, 515, 28 CR2d 475, 869 P2d 454 ;
Robinson Helicopter Co., Inc. v. Dana Corp. (2004) 34 C4th 979, 990-991

Discussion:

See 7.06

Legal Topics:

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

Contracts LawRemediesGeneral OverviewContracts LawRemediesCompensatory DamagesGeneral OverviewContracts LawRemediesForeseeable DamagesGeneral OverviewContracts LawRemediesLiquidated DamagesContracts LawRemediesPunitive Damages



42 of 189 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 7 Seeking or Opposing Damages in Contract Actions
II. DETERMINING MEASURE OF DAMAGES

1-7 MB Practice Guide: CA Contract Litigation 7.04

7.04 Damages Compensate Plaintiff for Detriment Caused by Breach.

7.04[1] Unless Otherwise Provided by Statute, General Measure of Contract Damages Applies. Every person who suffers loss or harm as a result of the unlawful act or omission of another is entitled to recover monetary compensation, known as damages [CC §§ 3281, 3282].

Unless otherwise expressly provided by statute, the measure of damages for breach of an obligation arising from contract is the amount that will compensate the aggrieved party for all the detriment proximately caused by the breach, or which, in the ordinary course of things, would be likely to result from the breach [CC § 3300].



Strategic Point--All Parties:

If the contract at issue is subject to specific statutory requirements, such as a residential lease [see CC § 1940 *et seq.*], the measure of damages for certain breaches of the contract may be included in those requirements [see, e.g., CC § 1951.2 (damages recoverable by lessor upon breach and abandonment by lessee)]. Counsel should review any such governing statutes to determine whether a particular measure of damages has been provided.



Strategic Point--Plaintiff:

Plaintiff's counsel should evaluate potential damages in the total context of the case. Sometimes the highest possible dollar amount of damages may not be the best one to assert, strategically speaking, if it is speculative, difficult to prove, or subject to an affirmative defense that would not be relevant if the claim for damages was limited to a lesser amount.

Jury Instructions:

Introduction to Contract Damages, see *Judicial Council of California Civil Jury Instructions*, CACI No. 350 (LexisNexis Matthew Bender).

Introductory Instruction: Right to Recover Damages and Determination of Damages, see *California*

Forms of Jury Instruction, Ch. 3E, Instr. MB 300E.01 (Matthew Bender).

General Measure of Damages, see *California Forms of Jury Instruction, Ch. 3E, Instr. MB 300E.02* (Matthew Bender).

Recovery Limited to Damages Proximately Caused by Breach, see *California Forms of Jury Instruction, Ch. 3E, Instr. MB 300E.03* (Matthew Bender).

Damages Not Recoverable Unless Loss or Harm Would Not Have Occurred "But For" Breach, see *California Forms of Jury Instruction, Ch. 3E, Instr. MB 300E.04* (Matthew Bender).

Concurrent Causes, see *California Forms of Jury Instruction, Ch. 3E, Instr. MB 300E.05* (Matthew Bender).

Cross References:

Discussion of statutes providing measure of damages, see 7.04[7], [8].

Discussion of proximate cause, see 7.10[1].

7.04[2] Damages Must Have Been Contemplated by Parties.

7.04[2][a] General Damages Must Naturally Arise From Breach or Have Been Reasonably Foreseeable by Parties. The damages recoverable for breach of contract are limited to damages that actually were contemplated by or within the reasonable contemplation of the parties at the time they entered into the contract [*California Press Mfg. Co. v. Stafford Packing Co.* (1923) 192 C 479, 483, 221 P 345 ; *Brandon & Tibbs v. George Kevorkian Accountancy Corp.* (1990) 226 CA3d 442, 457]. "General" damages are those that naturally arise from the breach, or might have been reasonably contemplated or foreseen by the parties as the probable result of the breach [*Glendale Fed. Sav. & Loan Ass'n v. Marina View Heights Dev. Co.* (1977) 66 CA3d 101, 125].

Cross Reference:

Distinction between general and special damages, see 7.04[6][a].

7.04[2][b] Generally No Recovery for Unanticipated Damage or Injury. Contract damages, unlike tort damages, ordinarily do not include recovery for unanticipated damage or injury. This rule is often referred to as the rule of *Hadley v. Baxendale* [*Hadley v. Baxendale* (1854) 156 Eng Rep 145]. California courts view this rule as having been incorporated into CC § 3300 [*Lewis Jorge Constr. Mgmt., Inc. v. Pomona Unified Sch. Dist.* (2004) 34 C4th 960, 969]. Under this rule, damages for breach of contract are limited to losses that were either actually foreseen or were reasonably foreseeable when the contract was formed [*Lewis Jorge Constr. Mgmt., Inc. v. Pomona Unified Sch. Dist.* (2004) 34 C4th 960, 970].

Cross Reference:

Circumstances under which special damages are recoverable, see 7.04[6][b] -[d].

7.04[3] Damages Must Be Clearly Ascertainable. No damages can be recovered for a breach of contract that are not clearly ascertainable in both their nature and origin [CC § 3301; *Benach v. County of Los Angeles* (2007) 149 CA4th 836, 848, 57 CR3d 363 (mere delay, without proof of actual harm suffered as a result of the delay, is not an actionable breach)]. However, when it is clear that a party suffered damages, the fact that the amount of damage may not be susceptible of exact proof or may be uncertain, contingent, or difficult to ascertain does not bar recovery [*Dillingham-Ray Wilson v. City of Los Angeles* (2010) 182 CA4th 1396, 1406, 106 CR3d 691 (public works contractor could use engineering estimates to prove its damages for breach of contract if those estimates were the best evidence of

damages available)].

Example--Damages Ascertainable:

An insured injured in a single car accident sued his insurer, alleging that the insurer disposed of a defective tire after being informed of the importance of the tire to a case against the manufacturer. The court held that the damages sought by the insured were ascertainable in both their nature and origin; the origin of the damages was the insurer's destruction of the tire, and the nature of the damages was what the insured would have probably recovered in the underlying action had the tire not been destroyed, less the amount received in settlement from the tire manufacturer [*Cooper v. State Farm Mutual Automobile Ins. Co.* (2009) 177 CA4th 876, 900, 99 CR3d 870] .

Judge's Perspective:

Future lost profits are the key component of many breach of contract claims but, unless the contract provided for a fixed number of goods or amount of services, the amount of such profits is open to debate (putting aside precedent questions such as whether the contract was breached). Plaintiff's counsel would do well to retain an expert early in the litigation to assist with the collection and presentation of evidence on this topic. A good expert can help counsel defeat a claim that such damages are too speculative, and can repeat and emphasize the evidence that is most likely to lead to a high damages award. Similarly, counsel for defendant should retain an expert familiar with the relevant industry to explore whether plaintiff's damage claims are inflated, since plaintiff's lost profits will often depend on many factors outside of plaintiff's control and specific to the industry, such as the availability of substitutes, labor costs, and other similar factors. To the extent that plaintiff has an obligation to mitigate damages, a good expert will also be able to identify lost opportunities for plaintiff to have done so.

Jury Instructions:

Damage Must Be Reasonably Certain; Certainty as to Amount Not Required, see *California Forms of Jury Instruction*, Ch. 3E, Instr. MB 300E.06 (Matthew Bender).



Cross Reference:

Discussion of pleading and proving damages, see 7.08 -7.12.

7.04[4] Plaintiff Is Entitled to Benefit of Bargain. Damages for breach of contract are intended to give the injured party the benefit of his or her bargain [*Martin v. U-Haul Co. of Fresno* (1988) 204 CA3d 396, 409, 251 CR 17]. The aim is to put the injured party in as good a position as he or she would have been in had performance been rendered as promised [*Brandon & Tibbs v. George Kevorkian Accountancy Corp.* (1990) 226 CA3d 442, 468, 277 CR 40].

Except as expressly provided by statute, a person cannot recover a greater amount in damages for the breach of an obligation that he or she could have gained by the full performance of the obligation on both sides [CC § 3358].

Jury Instructions:

Damages May Not Exceed What Plaintiff Would Have Received From Full Performance, see *California Forms of Jury Instruction*, Ch. 3E, Instr. MB 300E.09 (Matthew Bender).

7.04[5] Damages Are Not Measured by Savings or Benefit to Defendant Resulting From Breach. Evidence of what it would have cost the defendant to perform or of the benefit the defendant obtained as a result of the breach is admissible if it tends to prove the amount of the plaintiff's loss or harm [*Macken v. Martinez* (1963) 214 CA2d 784, 789, 29 CR 867 ; *General Paint Corp. v. Seymour* (1932) 124 CA 611, 615-616, 12 P2d 990]. However, damages for breach of contract cannot be based on or measured by the amount it would have cost the defendant to perform, or on the amount of savings or benefit the defendant obtained as a result of the breach [*Gregory v. Spieker* (1895) 110 C 150, 155, 42 P 576 ; *County of Ventura v. Channel Islands Marina, Inc.* (2008) 159 CA4th 615, 627, 71 CR3d 762] .

Example:

Defendants were given the right to remove sand from plaintiff's land. They removed the sand, but failed to level the land and replace the top soil, as they had agreed to do. The value of the land was not diminished by the excavation, and the leveling would not have increased the value. Plaintiff was fully compensated by the award of the value of the land, even though the value of the land was less than the cost of leveling and replacing the top soil. Neither the value of the sand taken by the defendants, nor the cost defendants would have incurred in restoring the land, was the measure of plaintiff's damage [*Avery v. Fredericksen & Westbrook* (1944) 67 CA2d 334, 336-341, 154 P2d 41].

Jury Instructions:

Damages Not to Be Measured by Defendant's Savings or Costs, see *California Forms of Jury Instruction, Ch. 3E, Instr. MB 300E.11* (Matthew Bender).

7.04[6] Secondary or Derivative Losses May Be Recoverable as Special Damages.

7.04[6][a] Special Damages Are Secondary and Derivative Losses Arising From Circumstances Peculiar to Specific Contract. Special damages are those losses that do *not* arise directly and inevitably from any similar breach of any similar agreement. Instead, they are secondary or derivative losses arising from circumstances that are particular to the contract or to the parties [*Lewis Jorge Constr. Mgmt., Inc. v. Pomona Unified Sch. Dist.* (2004) 34 C4th 960, 968].

Jury Instructions:

Special Damages, see *Judicial Council of California Civil Jury Instructions, CACI No. 351* (LexisNexis Matthew Bender).

**Cross References:**

General damages, see 7.04[2][a].

Discussion of pleading entitlement to special damages, see 7.08[3].

7.04[6][b] Special Damages Generally Are Nonrecoverable. If special circumstances caused some unusual injury, special damages are not recoverable unless the circumstances were known or should have been known to the breaching party at the time that party entered into the contract. The requirement of knowledge or notice as a prerequisite to the recovery of special damages is based on the theory that a party does not and cannot assume limitless responsibility for all consequences of a breach, and that at the time of contracting must be advised of the facts concerning special harm that might result from a breach, so that the party may determine whether or not to accept the risk of contracting [*Brandon & Tibbs v. George Kevorkian Accountancy Corp.* (1990) 226 CA3d 442, 456].

Example:

Plaintiff contractor was hired by defendant school district to complete a construction project. After the project was begun, the district terminated the contract. The contractor's bonding company then reduced the amount of bond it would issue to the plaintiff, which in turn reduced the number of projects the plaintiff could bid on. The construction company eventually ceased bidding and closed down. The trial court awarded damages based on the work the plaintiff could no longer bid on because the amount of its bond had been reduced. The Supreme Court reversed, holding that although termination of the contract was "the first event in series of misfortunes," the consequences plaintiff suffered were not the natural and necessary result of the breach of every construction contract involving bonding. Therefore, lost profits on other contracts were not actually foreseen or foreseeable as reasonably probable to result from the district's breach, and were not recoverable as special damages [*Lewis Jorge Constr. Mgmt., Inc. v. Pomona Unified Sch. Dist.* (2004) 34 C4th 960, 977].

Special damages therefore are recoverable only in either of the following situations [*Lewis Jorge Constr. Mgmt., Inc.*

v. *Pomona Unified Sch. Dist.* (2004) 34 C4th 960, 968-969]:

- The special or particular circumstances from which the damages arise were actually communicated to or known by the breaching party (a subjective test) [see 7.04[6][c]]; or
- The special or particular circumstances from which the damages arise were matters of which the breaching party should have been aware at the time of contracting (an objective test) [see 7.04[6][d]].



Cross Reference:

General rule precluding recovery of damages that were not contemplated by parties; application of rule in *Hadley v. Baxendale*, see 7.04[2][b].

7.04[6][c] Special Damages Are Recoverable If Breaching Party Voluntarily Assumed Risk of Liability for Unusual Losses. Parties may voluntarily assume the risk of liability for unusual losses, but to do so they must be told, at the time the contract is made, of any special harm likely to result from a breach [*Lewis Jorge Constr. Mgmt., Inc. v. Pomona Unified Sch. Dist.* (2004) 34 C4th 960, 970, 102 P3d 257 ; *Brandon & Tibbs v. George Kevorkian Accountancy Corp.* (1990) 226 CA3d 442, 456]. A party is not deemed to have assumed such additional risk simply by entering into the contract [*Lewis Jorge Constr. Mgmt., Inc. v. Pomona Unified Sch. Dist.* (2004) 34 C4th 960, 970, 102 P3d 257].

7.04[6][d] Special Damages Are Recoverable If Circumstances Compel Inference that Breaching Party Should Have Contemplated Possibility of Loss. The nature of the contract or the circumstances in which it is made may compel an inference that the defendant should have contemplated the fact that such a loss would be the probable result of the defendant's breach [*Burnett & Doty Dev. Co. v. Phillips* (1978) 84 CA3d 384, 389-390 (loss of anticipated profits recoverable when foreseeable and reasonably certain)].

Example:

Lost profits were recoverable as damages when evidence showed that plaintiff's sole business was the construction of single family residences, that plaintiff was unable to complete homes during the forced shutdown period caused by defendant's breach of contract, and that the parties contemplated completion of the contract by specified date; evidence supported determination that the parties contemplated or should have contemplated at the time of contracting that the interruption of plaintiff's business, and attendant loss of profits, was likely to result from defendant's failure of timely performance. Thus, plaintiff's losses were a foreseeable result of any extensive delay in performance of the agreement [*Burnett & Doty Dev. Co. v. Phillips* (1978) 84 CA3d 384, 389-390].

7.04[7] Measure of Damages for Breach of Particular Contracts Are Specified by Statute.

7.04[7][a] Obligation to Pay Money Only. The detriment caused by the breach of an obligation to pay money only is the amount due by the terms of the obligation, plus interest on that amount [CC § 3302].

Jury Instructions:

Obligation to Pay Money Only, see *Judicial Council of California Civil Jury Instructions*, CACI No. 355 (*LexisNexis Matthew Bender*).

7.04[7][b] Covenant of Seisin, Right to Convey, Warranty, or Quiet Enjoyment. The detriment caused by the breach of a covenant of "seisin," of "right to convey," of "warranty," or of "quiet enjoyment," in a grant of an estate in real property, is [CC § 3304]:

- The price paid to the grantor; or, if a breach is partial, the proportion of the price as the value of the property affected by the breach bore at the time of the grant to the value of the whole property;

- Interest on the amount for the time during which the grantee derived no benefit from the property, not exceeding five years; and
- Any expenses properly incurred by the covenantee in defending his or her possession.

7.04[7][c] Covenant Against Encumbrances. The detriment caused by the breach of a covenant against encumbrances in a grant of an estate in real property is deemed to be the amount which has been actually expended by the covenantee in extinguishing either the principal or interest. In the case of principal, this amount may not exceed a proportion of the price paid to the grantor equivalent to the relative value at the time of the grant of the property affected by the breach, as compared with the whole. In the case of interest, this amount may not exceed interest on a like amount [CC § 3305].

7.04[7][d] Contract to Convey Land. The detriment caused by the breach of an agreement to convey an estate in real property is [CC § 3306]:

- The price paid;
- The expenses properly incurred in examining the title and preparing the necessary papers;
- The difference between the price agreed to be paid and the value of the estate agreed to be conveyed at the time of the breach;
- The expenses properly incurred in preparing to enter upon the land, consequential damages according to proof; and
- Interest.

Jury Instructions:

Buyer's Damages for Breach of Contract for Sale of Real Property, see *Judicial Council of California Civil Jury Instructions, CACI No. 356 (LexisNexis Matthew Bender)*.

7.04[7][e] Agreement to Deliver Quitclaim Deed. The minimum detriment caused by the breach of an agreement to execute and deliver a quitclaim deed to real property is [CC § 3306a]:

- The expenses incurred by the promisee in quieting title to the property; and
- The expenses incidental to the entry upon the property.

The expenses, which include reasonable attorneys' fees, must be fixed by the court in the quiet title action [CC § 3306a].

7.04[7][f] Agreement to Purchase Real Property. The detriment caused by the breach of an agreement to purchase an estate in real property is deemed to be the excess, if any, of the amount which would have been due to the seller under the contract over the value of the property to him or her, consequential damages according to proof, and interest [CC § 3307].

Example:

Plaintiff buyer entered into a contract to buy sellers' home and then unilaterally cancelled escrow. The sellers sold the property for \$1 million more than the plaintiff had agreed to pay. Other than \$9,000 in damages sustained to the roof during plaintiff's staking of the property, the sellers did not contend they

sustained any consequential damages as a result of plaintiff's breach. The court held that the sellers were entitled to retain plaintiff's \$600,000 deposit only to the extent of the \$9,000 in actual damages that were incurred; the excess over actual damages must be refunded to the buyer, regardless of whether the breach was innocent or willful [*Kuish v. Smith* (2010) 181 CA4th 1419, 1429, 105 CR3d 475] .

Jury Instructions:

Seller's Damages for Breach of Contract to Purchase Real Property, see *Judicial Council of California Civil Jury Instructions*, CACI No. 357 (*LexisNexis Matthew Bender*).

7.04[7][g] Leases of Real or Personal Property. The specialized provisions of the California landlord-tenant statutes govern damages on termination of leases of real property executed on or after July 1, 1971 [see CC § 1951.2; see also CC § 3308 (applicable to leases of real property executed before July 1, 1971)].

Damages on termination of leases for personal property entered on or after January 1, 1990 are governed by Division 10 of the California Commercial Code [*Com Code § 10101 et seq.*; see *Com Code §§ 10602* (application to leases), 10600 (effective dates)]. Division 10 specifies in detail the damages for default by the lessor [see *Com Code §§ 10519, 10520*] or the lessee [see *Com Code §§ 10527-10532*] under a personal property lease. Division 10 is inapplicable, however, to personal property leases entered into prior to January 1, 1990, and extension, renewals, modifications, and supplements to those leases, unless the parties specifically agree otherwise [*Com Code § 10600*; see CC § 3308 (agreement regarding measure of damages when lease is not subject to Division 10)].



Cross References:

Discussion of parties' rights upon termination of lease and measure of damages under CC § 1951.2, see Matthew Bender[(R)] Practice Guide: California Landlord-Tenant Litigation, Ch. 7, Suing a Tenant for Unpaid Rent and Damages.

Discussion and forms for recovery damages under personal property lease governed by Division 10 of Commercial Code, see California Forms of Pleading and Practice, Ch. 413, Personal Property Leases (Matthew Bender).

7.04[7][h] Obligations of Carriers of Passengers, Freight, and Messages. Damages caused by the breach of a carrier's obligation to accept freight, messages, or passengers, are the difference between the amount that the carrier had the right to charge for the carriage and the amount that would be necessary to pay for the same service when it ought to be performed [CC § 3315].

Damages caused by the breach of a carrier's obligation to deliver freight, when the carrier has not converted it to its own use, are the value at the place and on the day at which it should have been delivered, deducting the freightage to which the carrier would have been entitled if it had completed the delivery [CC § 3316].

The detriment caused by a carrier's delay in the delivery of freight is the depreciation in the intrinsic value of the freight during the delay, and also the depreciation, if any, in the market value of the freight, other than by reason of a depreciation in its intrinsic value, at the place where it ought to have been delivered, and between the day at which it ought to have been delivered, and the day of its actual delivery [CC § 3317].

7.04[7][i] Warranty of Agent's Authority. Damages for the breach of a warranty of an agent's authority are [CC § 3318]:

- The amount that could have been recovered and collected from the principal if the warranty had been complied with; and

- The reasonable expenses of legal proceedings taken, in good faith, to enforce the act of the agent against the principal.

Cross Reference:

Complaint for breach of warranty of authority, see *Ch. 20, Asserting Agency Issues in Contract Actions*, 20.22.

7.04[8] Measure of Damages May Be Included in Statutory Scheme Governing Transaction. If the transaction at issue is regulated by statute, the measure of damages for a particular breach may be included in that statutory scheme. Counsel should scrutinize any statutes governing the transaction to determine if a specific measure of damages is provided. If a statute provides a specific measure of damages, that statute controls [*CC* § 3300; *CCP* § 1859].

Examples:

- Damages recoverable by lessor of real property on breach by lessee and termination of lease [*CC* § 1951.2].
- Damages recoverable by buyer of consumer goods for breach of warranty or service contract [*CC* § 1794].

7.04[9] Measure of Damages for Particular Circumstances May Be Established by Case Law. The measure of damages under *CC* § 3300 may be established by case law for specific types of contracts and particular fact situations.

Examples:

- Breach of employment contract [*Parker v. Twentieth Century-Fox Film Corp.* (1970) 3 C3d 176, 181-182, 89 CR 737, 474 P2d 689].
- Breach of contract to construct improvements [*Coughlin v. Blair* (1953) 41 C2d 587, 600, 262 P2d 305].
- Wrongful cancellation of insurance policy [*Caminetti v. Pacific Mut. Life Ins. Co.* (1943) 23 C2d 94, 104-110, 142 P2d 741].

Counsel therefore should review the substantive law for the specific transaction at issue to determine the appropriate measure of damages under *CC* § 3300.

Jury Instructions:

Owner's/Lessee's Damages for Breach of Contract to Construct Improvements on Real Property, see *Judicial Council of California Civil Jury Instructions*, CACI No. 354 (*LexisNexis Matthew Bender*).

Cross Reference:

Detailed discussion of the substantive law governing the contract at issue, see *California Forms of Pleading and Practice*, Ch. 104, Building Contracts;

Ch. 127, Consumer Contracts and Loans;

Ch. 128, Consumer Contracts: Statutes Regulating Specific Types of Contracts; and

Ch. 249, Employment Law: Termination and Discipline (Matthew Bender).

7.04[10] More Than One Method of Determining Damages May Apply. If there is a more specific measure of damages than the general measure provided by CC § 3300, the more specific measure applies [see CC § 3300 (general measure applies except as otherwise provided by statute); *Boshes v. Miller* (1953) 119 CA2d 332, 336, 259 P2d 447].

However, if there are two measures or methods of determining damages that are otherwise adequate and permissible, the one yielding the more accurate and certain result should be used [*California Press Mfg. Co. v. Stafford Packing Co.* (1923) 192 C 479, 485, 221 P 345]. If two measures of damages are accurate and each will fully compensate the plaintiff for his or her loss, the measure that is less expensive to the defendant should be used [*A.A. Baxter Corp. v. Colt Indus., Inc.* (1970) 10 CA3d 144, 160, 88 CR 842].

Jury Instructions:

Choice of Alternative Methods of Determining Plaintiff's Damages, see *California Forms of Jury Instruction, Ch. 3E, Instr. MB 300E.10* (Matthew Bender).

7.04[11] Nominal Damages Are Presumed. Nominal damages are available when a breach of duty has caused no appreciable detriment to the plaintiff [CC § 3360]. Nominal damages are properly awarded in two circumstances [*Avina v. Spurlock* (1972) 28 CA3d 1086, 1088, 105 CR 198 (wrongful eviction case)]:

- When there is no loss or injury to be compensated, but the law still recognizes a technical invasion of a plaintiff's rights or a breach of a defendant's duty.
- Although the plaintiff suffered a real, actual injury, and damages, the extent of the plaintiff's injury and damages cannot be determined from the evidence presented.

The plaintiff is entitled to recover nominal damages for the breach of contract, despite an inability to show actual damage, because the defendant's failure to perform a contractual duty is, in itself, a legal wrong that is fully distinct from the actual damages [*Sweet v. Johnson* (1959) 169 CA2d 630, 632-633, 337 P2d 499]. The court can award no more than nominal damages when the proof of actual or punitive damages fails [*Avina v. Spurlock* (1972) 28 CA3d 1086, 1088, 105 CR 198].

Nominal damages ordinarily are limited to an amount of a few cents or a dollar [*Avina v. Spurlock* (1972) 28 CA3d 1086, 1089, 105 CR 198].

Example:

Plaintiff, an actor, agreed to have his photograph appear, without compensation, in a magazine published by defendant. Plaintiff later sued defendant for breach of contract, alleging that defendant breached an agreement to place his photo on the cover of the magazine. Plaintiff sought damages for the loss of publicity. Because of the wholly speculative nature of the detriment suffered, plaintiff was not entitled to compensatory damages. However, plaintiff was entitled to nominal damages for breach of contract [*Ericson v. Playgirl, Inc.* (1977) 73 CA3d 850, 859, 140 CR 921].

Jury Instructions:

Nominal Damages, see *Judicial Council of California Civil Jury Instructions, CACI No. 360* (LexisNexis Matthew Bender).

Judge's Perspective:

Nominal damages are different from no damages at all, and a case involving the latter should not be filed. Damages are an element of a cause of action for breach of contract [*see, e.g., Amelco Elec. v. City of Thousand Oaks* (2002) 27 C4th 228, 243, 115 CR2d 900, 38 P3d 1120 ("under a breach of contract theory, the plaintiff must demonstrate a contract, the plaintiff's performance or excuse for nonperformance, the defendant's breach, and damage to the plaintiff"). A complete failure to prove damages to the plaintiff is grounds for nonsuit. A plaintiff who deserves nominal damages clearly has suffered damage, although it might be difficult to say in what amount. In *Ericson v. Playgirl, Inc.* (1977) 73 CA3d 850, 859, 140 CR 921, the jury originally awarded plaintiff \$12,500. The Court of Appeal found that damages were too speculative to support that amount, and reduced the award to \$300. It was clear from the evidence that plaintiff had suffered some harm, but it was difficult to quantify.

Legal Topics:

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

Commercial Law (UCC)Sales (Article 2)RemediesBuyer's RemediesDamagesGeneral OverviewCommercial Law (UCC)Sales (Article 2)RemediesSeller's RemediesDamagesGeneral OverviewContracts LawRemediesCompensatory DamagesConsequential Damages



43 of 189 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 7 Seeking or Opposing Damages in Contract Actions
II. DETERMINING MEASURE OF DAMAGES

1-7 MB Practice Guide: CA Contract Litigation 7.05

7.05 Amount of Damages May Be Limited by Contract or Circumstances.

7.05[1] Prospective Damages Are Not Available for Partial Breach. When a breach of contract is partial, the aggrieved party may recover damages for nonperformance only to the time of trial and may not recover damages for anticipated future nonperformance [*Coughlin v. Blair* (1953) 41 C2d 587, 598, 262 P2d 305] .



Cross Reference:

Discussion of partial and total breach, see Ch. 22, Suing or Defending Action for Breach of Contract.

7.05[2] Damages Are Limited When Contract Contains Termination Provision. If the contract contains a provision allowing either party to terminate the contract without cause by giving notice to the other party, damages for breach of the contract are limited to those that could potentially accrue during the period of the required notice [*Martin v. U-Haul Co. of Fresno* (1988) 204 CA3d 396, 409-411, 251 CR 17].

Example:

Plaintiff was a distributor of defendant's products. Under the termination provision of their agreement, plaintiff was entitled to sell defendant's products for 30 days after termination. Defendant notified plaintiff that the agreement would terminate on February 28, 1954. Defendant breached the agreement by failing to deliver products that plaintiff had ordered to be delivered during February. However, defendant did not breach the contract by refusing to deliver products plaintiff had ordered to be delivered in March, after the agreement terminated [*California Beverage & Supply Co. v. Distillers Distrib. Corp.* (1958) 158 CA2d 758, 764-767, 323 P2d 517].

7.05[3] Liquidated Damages Provisions May Specify Recovery.

7.05[3][a] Reasonable Liquidated Damages Provisions Generally Are Valid Under CC § 1671. A provision in a contract, other than a retail consumer contract or residential lease, liquidating the damages for the breach of the contract is valid unless the party seeking to invalidate the provision establishes that the provision was unreasonable under the circumstances existing at the time the contract was made [CC § 1671(b); see *Roodenburg v. Pavestone Co., L.P.* (2009) 171 CA4th 185, 194-195, 89 CR3d 558 (defendant failed to satisfy its burden of establishing an 18 percent interest charge was an unreasonable estimate of damages)]. Such a provision will be considered unreasonable, however, if the amount specified bears no reasonable relationship to the range of actual damages the parties could have

contemplated at the time of contracting [*Poseidon Development, Inc. v. Woodland Lane Estates, LLC* (2007) 152 CA4th 1106, 1115, 62 CR3d 59 (in promissory note, late charge of 10 percent of the overdue amount, which could range from \$642 to over \$77,000, was unlawful penalty).

Example--Liquidated Damages Upheld:

After a commercial tenant ceased operations at a shopping center before the end of its lease term, the landlord charged it 10 cents per leased square foot per day, according to a liquidated damages provision in the lease. The trial court concluded that the tenant failed to carry its burden of demonstrating that the liquidated damages provision was an unlawful penalty, and the court of appeal affirmed. Although the tenant presented evidence that the liquidated damages provision was arbitrarily applied to the tenants at the shopping center and therefore could not be a reasonable estimate of potential damages at the time the lease was signed, the landlord countered with evidence that the liquidated damages clause was intended to reimburse it for the synergy, goodwill, and patronage the shopping center would lose if the tenant ceased operation [*El Centro Mall, LLC v. Payless ShoeSource, Inc.* (2009) 174 CA4th 58, 64-65, 94 CR3d 43] .

Exception:

If another statute expressly applicable to the contract prescribes the rules or standard for determining the validity of a liquid damages provision, the rules or standard of that statute apply [CC § 1671(a)].



Cross Reference:

Discussion of standard for determining validity of liquidated damages provision in real property purchase contract, see 7.05[4].

7.05[3][b] Liquidated Damages Provisions in Consumer Contracts and Residential Leases Are Enforceable Only in Limited Circumstances. A provision in a consumer contract or residential lease specifying liquidated damages for breach is void, except that the parties to such a contract may agree in the contract on an amount that will be presumed to be the amount of damage sustained by a breach when, from the nature of the case, it would be impracticable or extremely difficult to fix the actual damage [CC § 1671(c), (d)]. The amount selected must represent a reasonable endeavor by the parties to estimate fair compensation for the loss sustained [*Utility Consumers' Action Network, Inc. v. AT&T Broadband of S. Cal., Inc.* (2006) 135 CA4th 1023, 1029, 37 CR3d 827] . If the amount selected is designed to substantially exceed the damages suffered, and its primary purpose is to serve as a threat to compel compliance through the imposition of charges bearing little or no relationship to the amount of actual loss, then the purported liquidated damages provision is an invalid attempt to impose a penalty [*Utility Consumers' Action Network, Inc. v. AT&T Broadband of S. Cal., Inc.* (2006) 135 CA4th 1023, 1029, 37 CR3d 827] . The requirement that the selected amount of liquidated damages must result from a reasonable endeavor by the parties does not mean that mutual negotiation is required; a liquidated damages provision is not invalid simply because it is contained in one party's preprinted form contract [*Utility Consumers' Action Network, Inc. v. AT&T Broadband of S. Cal., Inc.* (2006) 135 CA4th 1023, 1029, 37 CR3d 827] .

Distinguish:

A fee imposed by a bank when a merchant terminates a credit card merchant account is a deferred charge, and not liquidated damages, because it is not dependent on a breach of the merchant agreement [*Morris v. Redwood Empire Bancorp* (2005) 128 CA4th 1305, 1315].

The non-breaching party who seeks to enforce the liquidated damages provision has the burden of showing that it was impracticable or extremely difficult to fix the actual damages [*Orozco v. Casimiro* (2004) 121 CA4th Supp 7, 11].

7.05[3][c] Deposit May Constitute Liquidated Damages. Instead of promising to pay a fixed sum as liquidated damages in case of a breach, a party to a contract may provide a deposit as security for the performance of his or her contractual obligations [Recommendation Relating to Liquid Damages, 13 Cal L Rev Comm'n Rpts 1736, 1752 (1976)].

If the parties provide that the deposit will be liquidated damages for a breach of the contract, the question of whether the deposit may be retained in case of a breach is determined in accordance with the standard provided in *CC* § 1671(b) or (d), whichever applies [Recommendation Relating to Liquid Damages, 13 Cal L Rev Comm'n Rpts 1736, 1752 (1976)].

If the parties do not intend that the deposit will constitute liquidated damages in the event of a breach, the deposit is merely a fund to secure the payment of actual damages, if any are determined [Recommendation Relating to Liquid Damages, 13 Cal L Rev Comm'n Rpts 1736, 1752 (1976)].

7.05[4] Provisions in Real Estate Purchase Contracts for Liquidated Damages to Seller Upon Default by Buyer.

7.05[4][a] Liquidated Damages Provisions Must Meet Requirements of CC §§ 1677 and 1671(b). Except as provided in *CC* § 1675 for contracts for the purchase of residential property, a provision in a contract to purchase and sell real property liquidating the damages to the seller if the buyer fails to complete the purchase of the property is valid if it satisfies the requirements of *CC* §§ 1677 and 1671(b), noted below [*CC* § 1676].

7.05[4][b] CC § 1677 Specifies Format and Signature Requirements for Liquidated Damages Provision. A provision in a contract to purchase and sell real property liquidating damages to the seller if the buyer fails to complete the purchase of the property is invalid unless [*CC* § 1677]:

- The provision is separately signed or initialed by each party to the contract; and
- If the provision is included in a printed contract, it is set out either in at least 10-point bold type or in contrasting read print in at least eight-point bold type.

7.05[4][c] CC § 1671(b) Requires Provision to Have Been Reasonable Under Circumstances When Made. Under *CC* § 1671(b), a provision liquidating damages for the breach of the contract is valid unless the party seeking to invalidate the provision establishes that the provision was unreasonable under the circumstances existing at the time the contract was made [*CC* § 1671(b)].

7.05[4][d] Provisions in Contracts for Purchase of Residential Property Are Subject to Additional Requirements. A contract to purchase and sell residential property that provides that any or any part of a payment made by the buyer will constitute liquidated damages to the seller upon the buyer's failure to complete the purchase is enforceable if it complies with both the format and signature requirements of *CC* § 1677 and the limitations as to amount and additional requirements imposed by *CC* § 1675 [*CC* § 1675(b); see *Kuish v. Smith* (2010) 181 CA4th 1419, 1429, 105 CR3d 475].



Cross Reference:

Detailed discussion of requirements imposed by *CC* §§ 1675-1681, see California Forms of Pleading and Practice, Ch. 569, Vendor and Purchaser (Matthew Bender).

7.05[5] Other Liquidated Damages Provisions in Real Estate Purchase Contracts Are Governed by CC § 1671. The limitations and requirements imposed by *CC* §§ 1675-1681 on purchase contracts for real property apply only to provisions for liquidated damages to the seller if the buyer fails to complete the purchase [*CC* § 1679].

The validity of any other provisions for liquidated damages in a contract to purchase and sell real property must be determined under *CC* § 1671 [*CC* § 1679].

The limitations and requirements imposed by *CC* §§ 1675-1681 are inapplicable to real property sales contracts under which one party agrees to convey title to real property to another party upon the satisfaction of specified conditions set

forth in the contract and which does not require conveyance of title within one year from the date the contract is formed [CC §§ 1681, 2985].



Cross Reference:

Discussion of validity of liquidated damages provisions under CC § 1671, see 7.05[3].

Legal Topics:

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

Commercial Law (UCC)Sales (Article 2)RemediesBuyer's RemediesDamagesGeneral OverviewCommercial Law (UCC)Sales (Article 2)RemediesSeller's RemediesDamagesGeneral OverviewContracts LawRemediesCompensatory DamagesGeneral OverviewContracts LawRemediesLiquidated DamagesReal Property LawPurchase & SaleRemediesDamagesGeneral Overview



44 of 189 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 7 Seeking or Opposing Damages in Contract Actions
II. DETERMINING MEASURE OF DAMAGES

1-7 MB Practice Guide: CA Contract Litigation 7.06

7.06 Facts May Support Claim for Either Tort or Contract Damages.

7.06[1] Tort Claim Exists If Conduct Violates Duty Independent of Contract Arising from Principles of Tort Law. If the conduct amounting to a breach of contract also violates an independent duty arising from principles of tort law, the plaintiff may be able to allege both contract and tort causes of action [*Applied Equip. Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 C4th 503, 515]. However, the mere negligent breach of a contract is not a sufficient basis for tort liability [*Stop Loss Ins. Brokers, Inc. v. Brown & Toland Medical Group* (2006) 143 CA4th 1036, 1043, 49 CR3d 609] .

Examples--Tort Damages Permitted:

- Negligence in the performance of a contract, directly causing physical injury [*Fuentes v. Perez* (1977) 66 CA3d 163, 168].
- Breach of the covenant of good faith and fair dealing in an insurance contract [*Crisci v. Security Ins. Co.* (1967) 66 C2d 425, 433-434].
- Wrongful discharge in violation of fundamental public policy [*Tameny v. Atlantic Richfield Co.* (1980) 27 C3d 167, 175-176].
- Fraudulent inducement to enter into a contract [*Las Palmas Assocs. v. Las Palmas Ctr. Assocs.* (1991) 235 CA3d 1220, 1238-1239].

Distinguish:

California courts do not recognize a tort of bad faith denial of the existence of, or liability under, a breached contract [*Freeman & Mills, Inc. v. Belcher Oil Co.* (1995) 11 C4th 85, 102]. Nor do they recognize a tort of breach of commercial contract in violation of public policy [*Harris v. Atlantic Richfield Co.* (1993) 14 CA4th 70, 82].



Strategic Point--Duplicate Award of Damages Not Permitted:

Although a plaintiff may allege both tort and contract causes of action in the complaint, the plaintiff is not entitled to a duplicate award of damages [see *Acadia, Cal., Ltd. v. Herbert* (1960) 54 C2d 328, 337].



Strategic Point--Punitive or Exemplary Damages May Be Available in Tort:

If the facts support a tort cause of action and claim for tort damages, the plaintiff may also be able to recover punitive or exemplary damages in appropriate cases [see CC § 3294].

Jury Instructions:

Plaintiff May Not Recover Duplicate Contract and Tort Damages, see *Judicial Council of California Civil Jury Instructions, CACI No. 361 (LexisNexis Matthew Bender)*.



Cross References:

Discussion of unavailability of punitive or exemplary damages for breach of contract, see 7.12[8].

Discussion of determining whether to sue in contract, tort, or both, see Ch. 2, Determining What Causes of Action Exist.

Discussion of breach of the duty of good faith and fair dealing, see Ch. 23, Suing or Defending Action for Breach of Duty of Good Faith and Fair Dealing.

7.06[2] Economic Loss Rule Bars Tort Recovery by Purchaser Absent Personal Injury or Damage to Other Property. The "economic loss rule" provides that if a purchaser's expectations in a sale are frustrated because a product is not working properly, the purchaser is limited to contract remedies, for the purchaser has suffered only "economic losses" [*Robinson Helicopter Co., Inc. v. Dana Corp.* (2004) 34 C4th 979, 988-989, 102 P3d 268]. A purchaser can recover in tort only if he or she can demonstrate harm above and beyond a broken contractual promise, such as personal injury or damage to property other than the product itself [*Robinson Helicopter Co., Inc. v. Dana Corp.* (2004) 34 C4th 979, 988-989, 102 P3d 268 ; see also *Butler-Rupp v. Lourdeaux* (2005) 134 CA4th 1220, 1229, 36 CR3d 685 (commercial tenant who suffered no physical injury could recover only in contract for economic losses deriving from landlords' failure to perform their contract obligations)].

Exception:

In cases involving contracts for the performance of *services* rather than the sale of goods, the economic loss rule does not bar tort recovery for solely economic losses, provided that the negligent performance of the contract results in foreseeable economic losses, and a "special relationship" between the parties exists [*North Am. Chem. Co. v. Superior Court* (1997) 59 CA4th 764, 785]. The existence of a special relationship is determined according to the following six criteria [*North Am. Chem. Co. v. Superior Court* (1997) 59 CA4th 764, 782 (citing)]:

- The extent to which the transaction was intended to affect the plaintiff.
- The foreseeability of harm to the plaintiff.
- The degree of certainty that the plaintiff suffered injury.
- The closeness of the connection between the defendant's conduct and the injury suffered.

- The moral blame attached to the defendant's conduct.
- The policy of preventing future harm.

Exception:

California's Right to Repair Act, *CC § 895 et seq.*, applicable to contracts signed in 2003 or later, establishes a set of standards for residential construction and allows a homeowner to recover economic losses from a builder without having to show that the violation caused property damage or personal injury [see *Greystone Homes, Inc. v. Midtec, Inc. (2008) 168 CA4th 1194, 1210-1211, 86 CR3d 196*].

Example--Negligence Claim Permitted:

A chemical manufacturer stated a claim against a transportation company for negligent performance of its contract to ship the manufacturer's product, resulting in contamination of its product during shipment. The manufacturer alleged, or asserted that it could allege, facts sufficient to establish the existence of the special relationship required to justify the recovery of economic losses [*North Am. Chem. Co. v. Superior Court (1997) 59 CA4th 764, 787*].

Example--Negligence Claim Not Permitted:

Homeowners alleging construction defects could not recover damages for a developer's negligence because the construction defects had not caused any property damage; homeowners could not show the required special relationship [*Aas v. Superior Court (2000) 24 C4th 627, 632*, superseded by *CC § 895 et seq.* for post-2002 contracts as to construction defect claims regarding new residential units].

7.06[3] Affirmative Misrepresentations Made in Performance of Contract May Support Action for Fraud.

The economic loss rule does not bar an action for fraud when a defendant makes affirmative misrepresentations on which a plaintiff relies and which expose a plaintiff to liability for personal damages independent of the plaintiff's economic loss [*Robinson Helicopter Co., Inc. v. Dana Corp. (2004) 34 C4th 979, 993, 102 P3d 268*].

Example:

In *Robinson Helicopter Co., Inc. v. Dana Corp. (2004) 34 C4th 979, 102 P3d 268*, the plaintiff helicopter manufacturer entered into a contract with the defendant parts manufacturer for the purchase of helicopter parts. The contract required that the parts conform to certain specifications and that the defendant supply certificates of conformance. After the defendant changed its manufacturing process, resulting in parts that no longer met the contract's specifications, it continued to provide certificates of conformance falsely stating that the parts met the specifications. Even though the plaintiff suffered no personal injury or damage to property other than the helicopter parts, the Supreme Court held that the economic loss rule did not bar the helicopter manufacturer's fraud and intentional misrepresentation claims, because the affirmative intentional misrepresentation of fact in the certificates of conformance was an independent tort separate from the breach of contract (the supplying of nonconforming parts).

**Strategic Point:**

The *Robinson* case is a departure from the Supreme Court's previous cases relying on the economic loss rule to bar tort recovery in contract cases. It remains to be seen whether courts will extend its holding beyond the particular facts of the case. At the very least, a purchaser of a defective product should be able to state a claim for fraud if the supplier has stated, orally or in writing, that it is supplying the product ordered. It is not clear whether courts will read *Robinson* to allow fraud claims based on alleged affirmative misrepresentations in the terms of a contract itself, as opposed to statements made in the performance of the contract.

**Cross Reference:**

Detailed discussion of tort damages in contract actions, see California Forms of Pleading and Practice, Ch. 177, Damages (Matthew Bender).

Legal Topics:

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

Contracts Law Remedies General Overview Contracts Law Remedies Punitive Damages Torts Damages General Overview Torts Damages Punitive Damages General Overview



45 of 189 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 7 Seeking or Opposing Damages in Contract Actions

III. PLEADING AND PROVING DAMAGES

1-7 MB Practice Guide: CA Contract Litigation 7.07

7.07 CHECKLIST: Pleading and Proving Damages.

- ☐ Determine if complaint for breach of contract contains allegations of damages, which are essential to state cause of action for breach.

Authority:

Reichert v. General Ins. Co. (1968) 68 C2d 822, 830, 69 CR 321, 442 P2d 377

Discussion:

See 7.08[1]

Form:

See 7.16 (complaint for breach of contract)

- ☐ Determine if allegations are sufficient for type of damages sought:

- ☐ General damages need not be alleged in detail.

Authority:

Colvig v. RKO Gen., Inc. (1965) 232 CA2d 56, 68-69, 42 CR 473

Discussion:

See 7.08[2]

Forms:

See 7.16 (complaint for breach of contract), 7.18 (memorandum for party seeking damages)

- ☐ Allegations of special damages must be alleged with particularity.

Authority:

Shook v. Pearson (1950) 99 CA2d 348, 351-352, 221 P2d 757

Discussion:

See 7.08[3]

☐ Determine if evidence is sufficient to prove damages sought with reasonable certainty:

- ☐ Plaintiff must prove that damages were suffered and were caused by defendant's breach.

Authority:

Stott v. Johnston (1951) 36 C2d 864, 875, 229 P2d 348

Discussion:

See 7.09[1]

- ☐ Certainty as to amount is not required.

Authority:

Acree v. General Motors Acceptance Corp. (2001) 92 CA4th 385, 398, 112 CR2d 99

Discussion:

See 7.09[2]

- ☐ Future damages are recoverable if requirement of reasonable certainty is satisfied.

Authority:

Caminetti v. Pacific Mut. Life Ins. Co (1943) 23 C2d 94, 103, 142 P2d 741

Discussion:

See 7.09[3]

- ☐ "Reasonable certainty" must be established by a preponderance of the evidence.

Authority:

Khan v. Southern Pac. Co. (1955) 132 CA2d 410, 416, 282 P2d 78

Discussion:

See 7.09[4], [5]

☐ Determine if evidence is sufficient to show causation:

- ☐ Damages must have been proximately caused by breach.

Authority:

CC § 3300

Discussion:

See 7.10[1]

- ☐ Breach must have been cause-in-fact for loss or harm.

Authority:

Never v. King (1969) 276 CA2d 461, 471, 81 CR 161

Discussion:

See 7.10[2]

- ☐ Breach need not have been sole cause of damages.

Authority:

Bruckman v. Parliament Escrow Corp. (1987) 190 CA3d 1051, 1061-1063, 235 CR 813

Discussion:

See 7.10[3]

- ☐ Determine if evidence is sufficient to show that damages were foreseeable, that is:

- ☐ In contemplation of parties as probable result of breach at the time they made contract; or
- ☐ Likely to follow, in the ordinary course of things, from a breach.

Authority:

Overstreet v. Merritt (1921) 186 C 494, 503, 200 P 11 ; *A.A. Baxter Corp. v. Colt Indus., Inc.* (1970) 10 CA3d 144, 155, 88 CR 842

Discussion:

See 7.11

- ☐ Determine if, under the circumstances, evidence supports claim(s) for particular elements of damages, such as:

- ☐ Loss of profits.

Authority:

Resort Video, Ltd. v. Laser Video, Inc. (1995) 35 CA4th 1679, 1697-1698, 42 CR2d 136

Discussion:

See 7.12[1]

Form:

See 7.19 (memorandum for party seeking damages)

- ☐ Damages for physical or mental suffering arising from breach.

Authority:

Chelini v. Nieri (1948) 32 C2d 480, 482, 196 P2d 915

Discussion:

See 7.12[2]

Form:

See 7.20 (memorandum for party seeking damages)

- ☐ Loss of goodwill.

Authority:

Stott v. Johnston (1951) 36 C2d 864, 872, 229 P2d 348

Discussion:

See 7.12[3], [4]

- ☐ Expenditures incurred in performance.

Authority:

Patty v. Berryman (1949) 95 CA2d 159, 172, 212 P2d 937

Discussion:

See 7.12[5]

- ☐ Expenses incurred because of breach.

Authority:

Walpole v. Prefab Mfg. Co. (1951) 103 CA2d 472, 489, 230 P2d 36

Discussion:

See 7.12[6]

- ☐ Prejudgment interest.

Authority:

CC §§ 3287, 3289

Discussion:

See 7.12[7]

- ☐ Punitive or exemplary damages, if tort as well as contract cause of action is alleged.

Authority:

CC § 3294

Discussion:

See 7.12[8]

Legal Topics:

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

Civil Procedure Pleading & Practice Pleadings Complaints Requirements Civil Procedure Remedies Damages General

OverviewCivil ProcedureRemediesDamagesCompensatory DamagesCivil ProcedureRemediesDamagesGeneral
DamagesContracts LawRemediesGeneral Overview



46 of 189 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 7 Seeking or Opposing Damages in Contract Actions
III. PLEADING AND PROVING DAMAGES

1-7 MB Practice Guide: CA Contract Litigation 7.08

7.08 Damages Must Be Alleged.

7.08[1] Allegation of Damages Is Essential to State Cause of Action. To state a cause of action for damages for breach of contract, the plaintiff must allege [*Reichert v. General Ins. Co.* (1968) 68 C2d 822, 830, 69 CR 321, 442 P2d 377]:

- The existence of a contract;
- Plaintiff's performance or excuse for nonperformance;
- Defendant's breach; and
- The resulting damages to the plaintiff.

When damages do not necessarily result from the breach of contract, a general allegation of damages is insufficient, and the defendant may demur to the complaint on the ground that the pleading is uncertain [*Comstock v. Coronet Heating Supply Co.* (1952) 111 CA2d 600, 603-604, 245 P2d 35, 245 P2d 357 ; see CCP § 430.10(f) (uncertain pleading as grounds for demurrer)].

Example:

Plaintiff sued defendant, her partner, for breach of an agreement to defend plaintiff in an action brought against them by a third party. Plaintiff had provided her own defense and lost, resulting in a judgment that was executed against her interest in the partnership. Because the agreement to defend was not an agreement to defend the suit successfully, the damages to plaintiff could not be measured by the judgment in the suit. Rather, the damages were to be measured by the cost of defending the suit. Because the complaint did not contain any allegations that it cost plaintiff anything to defend the suit, the complaint was defective because it did not allege damages [*Brumfield v. Crocker-Anglo Nat'l Bank* (1960) 185 CA2d 759, 763-765, 8 CR 591].



Cross Reference:

Form for complaint for breach of contract with allegation(s) of damages, see 7.16.

7.08[2] General Damages Need Not Be Alleged in Detail. Although the complaint must allege that damages were suffered, a claim for general damages does not need to allege in detail the nature and extent of the damages [*Colvig v. RKO Gen., Inc.* (1965) 232 CA2d 56, 68-69, 42 CR 473].

 Cross Reference:

Form for memorandum for party seeking damages, see 7.18 (general damages sufficiently alleged).

7.08[3] Plaintiff Must Allege Particular Facts to Recover Special Damages. To recover special damages, the complaint must include the following [*Shook v. Pearson* (1950) 99 CA2d 348, 351-352, 221 P2d 757]:

- The facts as to special damages must be stated with particularity.
- The amount of the special damages must be stated with particularity.
- The amount of the special damages must be given, and the means of occasioning them must be set forth.
- When the damages depend on proof of different circumstances from the general damages, the grounds of each claim must be alleged.

The plaintiff must show that the injury was one reasonably within the contemplation of the parties and that the conditions likely to result in the special injury complained of were brought to the attention of the defendant at the time the contract was made [*Shook v. Pearson* (1950) 99 CA2d 348, 351-352, 221 P2d 757].

Jury Instructions:

Special Damages, see *Judicial Council of California Civil Jury Instructions, CACI No. 351 (LexisNexis Matthew Bender)*.

 Cross Reference:

Form for memorandum for party contesting damages, see 7.23 (allegations insufficient to recover special damages).

Legal Topics:

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

Civil ProcedurePleading & PracticePleadingsComplaintsRequirementsCivil ProcedureRemediesDamagesGeneral OverviewContracts LawBreachCauses of ActionGeneral OverviewContracts LawRemediesCompensatory DamagesGeneral Overview



47 of 189 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 7 Seeking or Opposing Damages in Contract Actions

III. PLEADING AND PROVING DAMAGES

1-7 MB Practice Guide: CA Contract Litigation 7.09

7.09 Plaintiff Must Prove Damages With Reasonable Certainty.

7.09[1] Plaintiff Must Prove Damages Were Suffered and Were Caused by Defendant's Breach. The plaintiff must prove with reasonable certainty that the elements of damage for which recovery is sought were in fact suffered and were in fact caused by the defendant's breach of contract [*Stott v. Johnston* (1951) 36 C2d 864, 875, 229 P2d 348].

7.09[2] Certainty As to Amount Is Not Required. Certainty as to the amount of damages is not required [*GHK Assocs. v. Mayer Group, Inc.* (1990) 224 CA3d 856, 873, 274 CR 168]. The plaintiff may recover damages if he or she presents some reasonable basis for estimating or approximating the amount [*Acree v. General Motors Acceptance Corp.* (2001) 92 CA4th 385, 398, 112 CR2d 99 ; see *Dillingham-Ray Wilson v. City of Los Angeles* (2010) 182 CA4th 1396, 1406, 106 CR3d 691 (public works contractor could use engineering estimates to prove its damages for breach of contract if those estimates were the best evidence of damages available)].



Strategic Point--Plaintiff:

It is common practice to establish the amount of plaintiff's damages by presenting expert testimony regarding the amount of damages. This is especially important with respect to future damages, loss of profits, loss of goodwill, and other damages that may be difficult to ascertain with certainty. Plaintiff should engage experts in the field as soon as possible to evaluate the nature and dollar amount of such damages and prepare evaluations in support of plaintiff's claims with respect to the amount of damages plaintiff has suffered.

Jury Instructions:

Damage Must Be Reasonably Certain; Certainty as to Amount Not Required, see *California Forms of Jury Instruction*, Ch. 3E, Instr. MB 300E.06 (Matthew Bender).

7.09[3] Future Damages Are Recoverable If Proven With Reasonable Certainty. The plaintiff may recover damages for detriment that will be suffered in the future because of the defendant's breach, if the nature, existence, and cause of those future damages is proven with reasonable certainty [*Caminetti v. Pacific Mut. Life Ins. Co* (1943) 23 C2d 94, 103, 142 P2d 741 ; see CC § 3283 (recovery of future damages)].

Jury Instructions:

Present Cash Value of Future Damages, see *Judicial Council of California Civil Jury Instructions, CACI No. 359 (LexisNexis Matthew Bender)*.

Effect of Contingencies That May Increase Future Damages, see *California Forms of Jury Instruction, Ch. 3E, Instr. MB 300E.07 (Matthew Bender)*.

Effect of Contingencies That May Decrease Amount of Future Damages, see *California Forms of Jury Instruction, Ch. 3E, Instr. MB 300E.08 (Matthew Bender)*.

7.09[4] Requirement of "Reasonable Certainty" Does Not Affect Burden of Proof. Although the plaintiff must show with reasonable certainty that damages were suffered as a result of defendant's breach, the "reasonable certainty" requirement does not affect the burden of proof. The requirement of "reasonable certainty" must be established by a preponderance of the evidence [*see Khan v. Southern Pac. Co. (1955) 132 CA2d 410, 416, 282 P2d 78*].

7.09[5] Issue of "Reasonable Certainty" Is Generally for Trier of Fact. The determination of whether the plaintiff has shown claimed elements of damage with "reasonable certainty" is generally regarded as one to be made by the trier of fact [*Varjabedian v. City of Madera (1977) 20 C3d 285, 294-295, 142 CR 429, 572 P2d 43*].

Legal Topics:

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

Civil Procedure Remedies Damages General Overview Commercial Law (UCC) Sales (Article 2) Remedies Buyer's Remedies Damages General Overview Contracts Law Remedies Compensatory Damages General Overview Contracts Law Remedies Foreseeable Damages General Overview Evidence Procedural Considerations Burdens of Proof General Overview



48 of 189 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 7 Seeking or Opposing Damages in Contract Actions

III. PLEADING AND PROVING DAMAGES

1-7 MB Practice Guide: CA Contract Litigation 7.10

7.10 Plaintiff Must Show Causation.

7.10[1] Damages Must Be Proximately Caused by Breach. The plaintiff's recovery in an action for breach of contract is limited to those damages "proximately caused" by the breach [*see CC § 3300*]. The damages must immediately follow and be produced by the act or omission complained of or, in the ordinary course of things, must be likely to result from the breach [*Friend & Terry Lumber Co. v. Miller (1885) 67 C 464, 467, 8 P 40*].

Example:

Plaintiff was a contestant in a spelling bee sponsored by defendant. Plaintiff came in second in the bee, after misspelling a word. Plaintiff filed suit against defendant, alleging that defendant had breached its agreement with the contestants by improperly allowing the winner to advance in the contest. Even if defendant had allowed the winner to advance in violation of the contest rules, as alleged, the plaintiff could not show that his damage was caused by that breach. Plaintiff could not show that he otherwise would not have misspelled the word that disqualified him, or that he would not have been defeated by another contestant [*McDonald v. John P. Scripps Newspaper (1989) 210 CA3d 100, 104, 257 CR 473*].

Jury Instructions:

Recovery Limited to Damages Proximately Caused by Breach, *see California Forms of Jury Instruction, Ch. 3E, Instr. MB 300E.03* (Matthew Bender).

7.10[2] Breach Must Be Cause-in-Fact for Loss or Harm. To be entitled to damages, the plaintiff generally must show that the loss or harm would not have occurred "but for" the defendant's breach [*Never v. King (1969) 276 CA2d 461, 471, 81 CR 161*]. If the loss or harm would have occurred even if the defendant had fully performed his or her obligations under the contract, the defendant's breach of the contract cannot be considered a cause of the plaintiff's loss or harm [*Metzenbaum v. R.O.S. Associates (1986) 188 CA3d 202, 213-214, 232 CR 741*].

Examples:

- Defendant, a property owner, entered into an exclusive agency agreement with plaintiff, a mortgage loan broker, to obtain a loan commitment. Plaintiff was unable to obtain a loan for defendant with the required terms. A few days before plaintiff's exclusive agency agreement expired, defendant obtained a

loan through another mortgage broker. Plaintiff sued defendant to recover a commission, alleging breach of the exclusive agency agreement. Defendant's motion for a directed verdict was properly granted because plaintiff, who had been unable to obtain a loan commitment for defendant, could not show that he could have performed, and been entitled to the commission, but for the defendant's breach [*Metzenbaum v. R.O.S. Associates* (1986) 188 CA3d 202, 211-214, 232 CR 741].

■ Lessee sued lessor for breach of contract when the lessor opposed the lessee's attempts to obtain the necessary permits for removal, at the end of the lease period, of improvements constructed by the lessee. Because the Coastal Commission would not have allowed removal of the improvements even if the lessor had cooperated with the lessee, the cause of the lessee's loss was not the lessor's breach of the lease, but the Coastal Commission's regulations [*County of Ventura v. Channel Islands Marina, Inc.* (2008) 159 CA4th 615, 627-628, 71 CR3d 762].

Jury Instructions:

Damages Not Recoverable Unless Loss or Harm Would Not Have Occurred "But For" Breach, see *California Forms of Jury Instruction, Ch. 3E, Instr. MB 300E.04* (Matthew Bender).

7.10[3] Breach Need Not Be Sole Cause of Damages. The defendant's breach need not be the sole cause of plaintiff's damages. The defendant may be liable for plaintiff's damages, even though other factors contributed, as long as the breach was a substantial factor in bringing about the loss or harm to plaintiff [*Bruckman v. Parliament Escrow Corp.* (1987) 190 CA3d 1051, 1061-1063, 235 CR 813].

Example:

A seller sued an escrow company for negligence and breach of contract after escrow collapsed and the would-be buyer sued the seller for specific performance. The escrow company was found liable for attorneys' fees and litigation expenses incurred by the seller in the action brought by the buyer because the escrow company's failure to perform its duties with reasonable care was a substantial factor in the collapse of escrow [*Bruckman v. Parliament Escrow Corp.* (1987) 190 CA3d 1051, 1061-1063, 235 CR 813].

Jury Instructions:

Recovery Limited to Damages Proximately Caused by Breach, see *California Forms of Jury Instruction, Ch. 3E, Instr. MB 300E.03* (Matthew Bender).

Concurrent Causes, see *California Forms of Jury Instruction, Ch. 3E, Instr. MB 300E.05* (Matthew Bender).

Legal Topics:

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

Civil Procedure Remedies Damages General Overview Contracts Law Remedies Compensatory Damages General Overview Contracts Law Remedies Compensatory Damages Consequential Damages



49 of 189 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 7 Seeking or Opposing Damages in Contract Actions

III. PLEADING AND PROVING DAMAGES

1-7 MB Practice Guide: CA Contract Litigation 7.11

7.11 Damages Must Have Been Foreseeable.

The plaintiff may recover for only those damages that may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach [*Overstreet v. Merritt* (1921) 186 C 494, 503, 200 P 11].

The parties are not required to have actually contemplated the very consequence that occurred, if the consequence was one that the parties, in the light of all the facts known, or which should have been known to them, may be reasonably supposed to have considered as likely to follow, in the ordinary course of things, from a breach [*A.A. Baxter Corp. v. Colt Indus., Inc.* (1970) 10 CA3d 144, 155, 88 CR 842].

Foreseeability is determined as of the time the contract was entered into and not as of the time of the breach or some other subsequent event [*Gerwin v. Southeastern Cal. Assn. of Seventh Day Adventists* (1971) 14 CA3d 209, 220, 92 CR 111].

Legal Topics:

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

Contracts LawRemediesForeseeable DamagesGeneral OverviewContracts LawRemediesForeseeable DamagesBenefit of the BargainContracts LawRemediesForeseeable DamagesLost Profits



50 of 189 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 7 Seeking or Opposing Damages in Contract Actions
III. PLEADING AND PROVING DAMAGES

1-7 MB Practice Guide: CA Contract Litigation 7.12

7.12 Proving Entitlement to Particular Elements of Damages.

7.12[1] Loss of Profits May Be Recoverable As General Damages.

7.12[1][a] Extent and Occurrence Must Be Ascertained With Reasonable Certainty. Loss of profits to an established business may be recovered if their extent and occurrence can be ascertained with reasonable certainty [*Resort Video, Ltd. v. Laser Video, Inc.* (1995) 35 CA4th 1679, 1697-1698, 42 CR2d 136].

The extent of loss of profits may be measured by the past volume of business and other provable data relevant to the probable future sales [*Shade Foods, Inc. v. Innovative Prods. Sales & Mktg., Inc.* (2000) 78 CA4th 847, 890, 93 CR2d 364].

Jury Instructions:

Loss of Profits--No Profits Earned, see *Judicial Council of California Civil Jury Instructions, CACI No. 352* (LexisNexis Matthew Bender).

Loss of Profits--Some Profits Earned, see *Judicial Council of California Civil Jury Instructions, CACI No. 353* (LexisNexis Matthew Bender).



Cross Reference:

Form for memorandum for party seeking damages, see 7.19 (loss of profits recoverable).

7.12[1][b] Anticipated Profits of Unestablished Business May Be Recoverable. If a business is new, anticipated profits may be too speculative to support a damage award [*Resort Video, Ltd. v. Laser Video, Inc.* (1995) 35 CA4th 1679, 1698, 42 CR2d 136]. However, the loss of prospective profits for a new business may be allowed if the evidence meets the legal standard of reasonable certainty as to both the occurrence and extent of such profits, such as when the owners have experience in the business they are seeking to establish, and when the business is in an established market [*Resort Video, Ltd. v. Laser Video, Inc.* (1995) 35 CA4th 1679, 1698, 42 CR2d 136].



Cross Reference:

Form for memorandum for party seeking damages, see 7.19 (loss of profits recoverable).

7.12[1][c] Anticipated Profits for Unestablished Business May Be Shown in Various Ways. Loss of profits for an unestablished business may be shown with reasonable certainty in various ways, such as the following [Kids' Universe v. In2Labs (2002) 95 CA4th 870, 884, 116 CR2d 158]:

- Expert testimony.
- Economic and financial data.
- Market surveys and analyses.
- Business records of similar enterprises.

Example:

- A parking garage operator was awarded loss of profits in an action against the developer who failed to construct a parking garage, as agreed. Although the garage was a new venture, loss of profits could be established with reasonable certainty because (1) the parking business was an established business; (2) the parking garage operator was highly experienced in the business; (3) running a parking garage was a relatively simple operation; (4) an experienced land economist concluded, based on feasibility studies and the evidence developed at the trial, that the garage would have been very profitable; and (5) a longtime employee of the garage operator testified to the profitability of a similar garage already operated by the plaintiff [S. Jon Kreedman & Co. v. Meyers Bros. Parking-Western Corp. (1976) 58 CA3d 173, 184-185, 130 CR 41].

- A franchisee sought to recover damages for lost profits after the franchisors unilaterally terminated a subfranchise agreement. The court found the evidence insufficient to establish the amount of lost anticipated profits. There was no evidence that the franchisee's expert's projections were based on facts that were substantially similar to the lost business opportunity, and the franchisee failed to establish that other restaurants' profit and loss experience were sufficiently similar to the franchisee's to be relevant. However, although the franchisee could not recover lost franchise fees based on unreliable projections of future revenues for proposed restaurants, it was entitled to recover lost franchise fees for a restaurant that had opened, because those projected fees were based on the actual revenues and growth rate of that restaurant [Parlour Enterprises, Inc. v. The Kirin Group, Inc. (2007) 152 CA4th 281, 288-294, 61 CR3d 243] .

7.12[1][d] Measure of Damages Is Net Profits. The measure of damages for loss of anticipated profits is the amount of net profits, not gross profits [Gerwin v. Southeastern Cal. Assn. of Seventh Day Adventists (1971) 14 CA3d 209, 222, 92 CR 111]. In calculating the net profit, all the costs of producing the gross income should be deducted, including the value of labor, materials, rents, and all expenses, together with the interest of the capital employed [Gerwin v. Southeastern Cal. Assn. of Seventh Day Adventists (1971) 14 CA3d 209, 223, 92 CR 111].

7.12[1][e] Special Allegations Usually Are Not Required. Loss of profits generally is recoverable without pleading special allegations [Myers v. Stephens (1965) 233 CA2d 104, 121, 43 CR 420]. Loss of profits usually is the direct and natural result of a breach of contract and may fairly be supposed to have entered into the contemplation of the parties when they made the contract [Myers v. Stephens (1965) 233 CA2d 104, 121, 43 CR 420].



Cross Reference:

Form for memorandum for party seeking damages, see 7.19 (loss of profits recoverable).

7.12[2] Damages for Physical or Mental Suffering Arising From Breach.

7.12[2][a] Generally Not Recoverable in Claim for Breach of Contract. Damages for physical or mental suffering generally are not recoverable in a claim for breach of contract [*Westwater v. Grace Church* (1903) 140 C 339, 341, 73 P 1055 ; *Erlich v. Menezes* (1999) 21 C4th 543, 558, 87 CR2d 886, 981 P2d 978].

Examples:

- Plaintiffs could not recover emotional distress damages in a breach of contract claim against their contractor for construction defects in the building of their home [*Erlich v. Menezes* (1999) 21 C4th 543, 558-561, 87 CR2d 886, 981 P2d 978].
- Commercial tenant could not recover emotional distress damages against her landlord when the tenant suffered no physical injury and proved no intentional tort. Because the tenant's damages derived solely from the landlords' failure to perform their contract obligations, she could recover only in contract for the economic losses due to her disappointed contractual expectations [*Butler-Rupp v. Lourdeaux* (2005) 134 CA4th 1220, 1229, 36 CR3d 685].

Distinguish--Availability of Tort Damages:

Although damages for physical or mental suffering are not available for a breach of contract claim, the plaintiff may have a tort, as well as contract, cause of action arising out of the same circumstances that would allow recovery of the broader range of tort damages [see *Applied Equip. Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 C4th 503, 515, 28 CR2d 475, 869 P2d 454].

**Cross Reference:**

Discussion of availability of tort damages, see 7.06.

7.12[2][b] May Be Recoverable When Foreseeable and Contemplated Result of Breach of Particular Contract. When the terms of a contract relate to matters that directly concern the comfort, happiness, or personal welfare of one of the parties, or the subject matter of the contract directly affects or moves the affection, self-esteem, or tender feelings of that party, the plaintiff may be entitled to recover damages for physical or emotional suffering or illness proximately caused by the breach [*Chelini v. Nieri* (1948) 32 C2d 480, 482, 196 P2d 915]. Such damages are allowed when it is apparent from the particular subject matter of the contract that mental suffering or emotional distress is a foreseeable and contemplated result of the breach [*Rogoff v. Grabowski* (1988) 200 CA3d 624, 633, 246 CR 185].

Examples--Mental or Emotional Distress Damages Allowed:

- Breach of contract by a mortician to preserve a body [*Chelini v. Nieri* (1948) 32 C2d 480, 482, 196 P2d 915].
- Breach of a promise not to advance funds to allow a spouse to gamble in defendant's club [*Wynn v. Monterey Club* (1980) 111 CA3d 789, 799-801, 168 CR 878].
- Breach of a bailment contract involving cherished family jewelry [*Windeler v. Scheers Jewelers* (1970) 8 CA3d 844, 851-852, 88 CR 39].

Example--Mental or Emotional Distress Damages Not Allowed:

Breach of contract to provide veterinary care, resulting in death of companion pet [*McMahon v. Craig*

(2009) 176 CA4th 1502, 1513-1515] .



Cross References:

Form for memorandum for party seeking damages, see 7.20 (mental or emotional distress damages recoverable).

Detailed discussion of damages for mental suffering resulting from breach of contract, see California Forms of Pleading and Practice, Ch. 362, Mental Suffering and Emotional Distress (Matthew Bender).

7.12[3] Loss of Goodwill May Be Element of Damages.

7.12[3][a] Goodwill Must Have Been Within Contemplation of Parties. The goodwill of a business is the expectation of continued patronage by the public [*B&P Code § 14100*]. The plaintiff in a breach of contract action may recover damages for loss of goodwill resulting from the breach, if those damages were a direct and natural result of the breach within the contemplation of the parties at the time they entered into the contract [*Stott v. Johnston (1951) 36 C2d 864, 872, 229 P2d 348*].

Example:

A painting contractor was entitled to recover damages for loss of goodwill in a suit against the defendant paint company for breach of warranty. The plaintiff contractor had agreed to purchase the defendant's paint for the many jobs he had at the time of the contract, based on the defendant's assurances concerning the quality of the paint and the company's willingness to remedy any problems with it. The defendant knew the particular purpose for which the plaintiff bought the paint and the plaintiff's reliance on the defendant's judgment. Under the circumstances, damages for the loss of goodwill were within the contemplation of the parties as a detriment directly and naturally resulting from the breach of warranty [*Stott v. Johnston (1951) 36 C2d 864, 872, 229 P2d 348*].

7.12[3][b] Difficulty of Proof Does Not Preclude Recovery. There is no rule as to what evidence must be introduced to prove damages for loss of goodwill [*Stott v. Johnston (1951) 36 C2d 864, 873-874, 229 P2d 348*].

The trier of fact is entitled to award damages for loss of goodwill based on the evidence of the particular case, even though such damages cannot be measured with precision [*Ross v. Frank W. Dunne Co. (1953) 119 CA2d 690, 701-703, 260 P2d 104*].

Example:

Defendant, a paint company, sold defective paint to plaintiff, a painting contractor. Plaintiff painted over 50 houses and buildings with the paint, which began to peel, crack, discolor, and come off within six months or less. The damages awarded for loss of goodwill were supported by evidence showing that although plaintiff had increased business capacity, efficiency and promotion activities to take advantage of the postwar building boom, he was unable to expand his business after receiving complaints from customers on whose buildings he had used defendant's paint [*Stott v. Johnston (1951) 36 C2d 864, 876, 229 P2d 348*].



Strategic Point--All Parties:

Courts have wide discretion in determining goodwill value [*In re Marriage of Iredale & Cates (2004) 121 CA4th 321, 329* (value of professional practice in context of marital dissolution)]. As a result, it is common for expert testimony to be used to support (and to attack) plaintiff's allegations of lost goodwill. Often courts are faced with a choice between more than one perfectly valid, well-established method of valuing goodwill [see, e.g., *In re Marriage of Iredale & Cates (2004) 121 CA4th 321, 330-331*]. In *In*

re Marriage of Iredale & Cates (2004) 121 CA4th 321, 330, for example, the court rejected the "average salaried person" standard in favor of the "similarly situated professional" standard.

7.12[3][c] Facts Concerning Loss of Goodwill Should Be Alleged With Particularity. Facts concerning damages claimed for the loss of goodwill should be alleged with particularity to show that such damages were within the contemplation of the parties and resulted directly and naturally in the ordinary course of events from the breach of the contract [see *Stott v. Johnston (1951) 36 C2d 864, 871-872, 229 P2d 348*; *Walpole v. Prefab Mfg. Co. (1951) 103 CA2d 472, 490, 230 P2d 36*].

Example:

Plaintiff's allegations that, because of defendant's breach of a contract to deliver goods, she was forced to employ additional clerks to handle customer complaints and to make refunds of deposits to placate customers, were sufficient to state a claim for damages for loss of goodwill [*Walpole v. Prefab Mfg. Co. (1951) 103 CA2d 472, 490, 230 P2d 36*].

7.12[4] Damage to Reputation Generally Is Not Recoverable. Damages for injury to an individual's name, character, or personal reputation arising from a breach of contract generally are not recoverable because they are considered too uncertain, speculative, and remote [*Walpole v. Prefab Mfg. Co. (1951) 103 CA2d 472, 489, 230 P2d 36*].

Exception:

Damages for loss of publicity caused by a breach of contract may be recoverable if they are related to the loss of publicity for some particular event, such as a musical concert or a prize fight, or loss of publicity for some continuing activity, such as the conduct of a specific business at a specific location or the practice of a particular skill or art [*Ericson v. Playgirl, Inc. (1977) 73 CA3d 850, 856, 140 CR 921*].

7.12[5] Plaintiff May Recover Expenditures Incurred in Performance If Not Awarded Full Benefit of Bargain.

7.12[5][a] Reasonably Necessary Expenditures or Value of Services Rendered May Be Recoverable.

Reasonably necessary expenditures incurred, and the value of services rendered, by the contracting party not in default, may be recovered as damages for breach of contract if the plaintiff has not also recovered the full price of the value of the benefits expected under the contract [*Patty v. Berryman (1949) 95 CA2d 159, 172, 212 P2d 937*].

Examples:

- Plaintiff company entered into a concession agreement with defendant county. Plaintiff brought an action against the defendant for breach of contract. Under the circumstances, loss of profits was too conjectural to be a basis for damages. Therefore, plaintiff was entitled to recover compensation for the 1,250 hours of time expended by the president and secretary of the company in attempting to carry out the contract [*Mendoyoma v. County of Mendocino (1970) 8 CA3d 873, 881-882, 87 CR 740*].

- After franchisors unilaterally terminated a subfranchise agreement, franchisee was entitled to recover its expenditures in developing different restaurant locations [*Parlour Enterprises, Inc. v. The Kirin Group, Inc. (2007) 152 CA4th 294, 61 CR3d 281*].

7.12[5][b] Plaintiff Also May Recover Net Profit, If Established. In addition to expenses, the plaintiff is entitled to the net profit he or she would have made on the entire contract, if it can be established [*Patty v. Berryman (1949) 95 CA2d 159, 172-173, 212 P2d 937*]. The net profit is the contract price less the total amount of expenditures,

including those already incurred, which the plaintiff would have made from the beginning to the end of the contract [*Patty v. Berryman* (1949) 95 CA2d 159, 173, 212 P2d 937].

7.12[5][c] Defendant Has Burden of Showing Expenses Were Extravagant and Unnecessary. If the plaintiff establishes the amount he or she was induced to expend, the defendant has the burden of establishing that those expenses were extravagant and unnecessary for the purpose of carrying out the contract [*Mendoyoma v. County of Mendocino* (1970) 8 CA3d 873, 879, 87 CR 740].



Strategic Point--All Parties:

Even if expenditures incurred in performance of the contract were not extravagant or unnecessary, they may not be recoverable as general damages. Expenditures, like other elements of damages, are not recoverable as general damages unless they were foreseeable as a natural result of the breach. If such expenditures cannot be considered to arise naturally from the breach, the plaintiff must plead and prove them as elements of special damages, the special circumstances of which were known to the defendant when the parties entered into the contract [see *Mendoyoma v. County of Mendocino* (1970) 8 CA3d 873, 879, 87 CR 740].

Example:

Plaintiff company sued defendant county for breach of a concession agreement. Plaintiff could not recover amounts incurred for interest on loans that it had obtained to finance its operations because there was no evidence that defendant was aware that performance of the contract was to be financed through loans at the time the parties entered into the agreement [*Mendoyoma v. County of Mendocino* (1970) 8 CA3d 873, 880, 87 CR 740].



Cross Reference:

Discussion of pleading special damages, see 7.08[3].

7.12[6] Expenses Incurred Because of Breach May Be Recovered.

7.12[6][a] Plaintiff Is Entitled to Reasonable and Necessary Expenses. The plaintiff is entitled to recover all reasonable and necessary expenses he or she was required to incur because of a breach of contract [*Walpole v. Prefab Mfg. Co.* (1951) 103 CA2d 472, 489, 230 P2d 36].

Example:

Defendant leased an entire office building from plaintiff for a term of five years. After only three years, defendant abandoned the property. Plaintiff listed the property for lease or sale. Plaintiff received no offers to lease the property, so the property was eventually sold. Under the circumstances of the case, the sale of the building was a reasonably foreseeable consequence of defendant's breach. Plaintiff therefore was entitled to recover the expenses of the sale as an item of damages, unless defendant could prove that the expenses incurred were unreasonable or unnecessary [*Millikan v. American Spectrum Real Estate Servs. Cal., Inc.* (2004) 117 CA4th 1094, 1105-1106].

7.12[6][b] Damages Include Expenses Incurred in Mitigation. If, in a good faith attempt to mitigate damages, the plaintiff incurs expenses that he or she would not otherwise have incurred, and thereby succeeds in preventing a still greater loss, those expenses become an item of damages the plaintiff is entitled to recover [*W.C. Cook & Co. v. White Truck & Transfer Co.* (1932) 124 CA 721, 727, 13 P2d 549].

7.12[7] Prejudgment Interest.

7.12[7][a] Party Entitled to Recover Damages Certain Is Entitled to Interest From Day Right of Recovery

Vests. If a person is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover those damages is vested in that person on a particular day, the person also is entitled to recover interest on the amount of damages from that day [CC § 3287(a)].

Exception:

The party entitled to damages is not entitled to interest during such time as the debtor is prevented by law, or by the act of the creditor, from paying the debt [CC § 3287(a)].

Distinguish:

The requirement of CC § 3287(a) that the amount of damages be certain or capable of being made certain by calculation does not apply when prejudgment interest is part of the contractual amount owed [*Roodenburg v. Pavestone Co., L.P.* (2009) 171 CA4th 185, 191-192, 89 CR3d 558 (operating agreement required defendant to pay interest to plaintiff on any amount not paid within 30 days of a triggering event)].

This entitlement is applicable to recovery of damages and interest from any debtor, including the state or any county, city, city and county, municipal corporation, public district, public agency, or any political subdivision of the state [CC § 3287(a)].

7.12[7][b] Court May Allow Prejudgment Interest When Claim Was Unliquidated. A person who is entitled under any judgment to receive damages based on a cause of action in contract when the claim was unliquidated also may recover interest on the amount of damages from a date prior to the entry of judgment that the court, in its discretion, may fix, but that date may not be earlier than the date the action was filed [CC § 3287(b)]. An award of unliquidated damages to a cross-complainant is a setoff against prejudgment interest awarded a plaintiff for liquidated damages [*Great Western Drywall, Inc. v. Roel Construction Co., Inc.* (2008) 166 CA4th 761, 768, 83 CR3d 235 (subcontractor was entitled to no prejudgment interest because the entire amount of general contractor's recovery was an offset as it arose from subcontractor's deficient performance of the subcontract)].

7.12[7][c] Contract May Stipulate Rate of Interest. Any legal rate of interest stipulated by a contract remains chargeable after a breach of the contract, as before, until the contract is superseded by a verdict or other new obligation [CC § 3289(a)]. For this purpose, the rate of the contracted finance charge is the legal rate of interest stipulated by a retail installment contract subject to the Unruh Act [CC §§ 1801 et seq., 3289.5].



Cross Reference:

Detailed discussion of retail installment contracts, see California Forms of Pleading and Practice, Ch. 501, Sales: Retail Installment Sales (Matthew Bender).

If a contract entered into after January 1, 1986, does not stipulate a legal rate of interest, the obligation bears interest at a rate of 10 percent per annum after a breach [CC § 3289(b)].

Exception:

The term "contract" in this context does not include a note secured by a deed of trust on real property [CC § 3289(b)].

If a contract was entered into prior to January 1, 1986, the rate of interest is seven percent per annum [Cal Const, art XV, § 1; see *Green v. Future Two* (1986) 179 CA3d 738, 744, 225 CR 3].

7.12[7][d] Accepting Payment of Whole Principal Waives Claim to Interest. Accepting payment of the whole principal, as such, waives all claim to interest [CC § 3290].

Distinguish--Interest Owed Pursuant to Contract Provision to Pay Interest:

CC § 3290 applies only to interest claimed as damages for nonpayment or default in payment of a debt. If interest is claimed as part of a debt on the basis of a contract provision to pay interest, the interest is an accretion to principal. Payment of less than the aggregate of principal and interest constitutes nothing more than a payment on account and does not extinguish the right to interest on the principal [*Kawasho Int'l U.S.A., Inc. v. Lakewood Pipe Serv., Inc.* (1983) 152 CA3d 785, 794-795, 201 CR 640].

7.12[8] Punitive or Exemplary Damages Are Unavailable for Breach of Contract. Punitive or exemplary damages are not recoverable in an action based solely on breach of contract [CC § 3294]. Such damages are unavailable in an action on contract even if the defendant's conduct amounts to oppression, fraud, or malice [see *Myers Bldg. Industries, Ltd. v. Interface Technology, Inc.* (1993) 13 CA4th 949, 960, 17 CR2d 242].

Distinguish--Case Involving Both Contract and Tort Causes of Action:

If the defendant's conduct constituted both a breach of contract and a tort, and the plaintiff alleges and establishes both the defendant's liability for tort damages and the fraud, oppression, or malice sufficient to sustain a punitive damages award, punitive damages are recoverable [*Haigler v. Donnelly* (1941) 18 C2d 674, 680, 117 P2d 331].

Example:

A jury completed a special verdict form, awarding compensatory damages on plaintiff's breach of contract claim. Although the form stated that the jury awarded "no further damages" on plaintiff's tort claim, the form indicated that there was a finding of liability on that claim. No further compensatory damages were awarded because such damages would have been duplicative of those awarded on the breach of contract cause of action. Because the plaintiff otherwise would have been entitled to compensatory damages on the tort claim, had the verdict form addressed that cause of action first, the jury was not precluded from awarding punitive damages on the tort claim [*All-West Design, Inc. v. Boozer* (1986) 183 CA3d 1212, 1222-1225, 228 CR 736].

Jury Instructions:

Punitive Damages Not Recoverable (Jury Instructed Only on Breach of Contract), see *California Forms of Jury Instruction, Ch. 3E, Instr. MB 300E.12* (Matthew Bender).

Punitive Damages Not Recoverable (Jury Also Instructed on Non-Contract Punitive Damage Claims), see *California Forms of Jury Instruction, Ch. 3E, Instr. MB 300E.13* (Matthew Bender).

 Cross References:

Discussion of recovery of damages when both tort and contract causes of action exist, see 7.06.

Discussion of determining whether to sue in contract, tort, or both, see Ch. 2, Determining What Causes of Action Exist.

Legal Topics:

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

Contracts Law Remedies Compensatory Damages General Overview Contracts Law Remedies Compensatory Damages Consequential Damages Contracts Law Remedies Compensatory Damages Interest Contracts Law Remedies Foreseeable Damages General Overview Contracts Law Remedies Foreseeable Damages Lost Profits



51 of 189 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 7 Seeking or Opposing Damages in Contract Actions
IV. CONTESTING DAMAGES

1-7 MB Practice Guide: CA Contract Litigation 7.13

7.13 CHECKLIST: Contesting Damages.

☐ Determine whether plaintiff has properly alleged damages in complaint for breach of contract, and file demurrer or answer to complaint, as appropriate:

- ☐ Complaint must contain allegation of damages to state claim for breach of contract.
- ☐ Complaint must allege particular facts if special damages are sought.

Authority:

Reichert v. General Ins. Co. (1968) 68 C2d 822, 830, 69 CR 321, 442 P2d 377 ; Shook v. Pearson (1950) 99 CA2d 348, 351-352, 221 P2d 757

Discussion:

See 7.14[1]

Form:

See 7.23 (memorandum for party contesting damages)

☐ Determine whether damages can be contested, in answer to complaint and appropriately during course of the action, on ground(s) that plaintiff cannot prove with reasonable certainty that damages were:

- ☐ Suffered by plaintiff;
- ☐ Proximately caused by defendant's breach; and/or
- ☐ Foreseeable, at time parties made contract, as probable result of breach.

Authority:

CC § 3300; Stott v. Johnston (1951) 36 C2d 864, 875, 229 P2d 348 ; A.A. Baxter Corp. v. Colt Indus., Inc. (1970) 10 CA3d 144, 160, 88 CR 842

Discussion:

See 7.14[2]

☐ Determine whether damages sought can be contested, in answer to complaint and appropriately during course of action, on ground(s) that:

- ☐ Plaintiff is not seeking correct measure of damages, such as when measure of damages is established by statute and plaintiff is seeking different measure of damages;
- ☐ There is a limitation on recoverable damages, such as an enforceable liquidated damages provision in parties' agreement; and/or
- ☐ Particular items of damages sought by plaintiff, such as loss of profits, are not recoverable under circumstances of case.

Discussion:

See 7.14[3]

☐ Determine whether to contest damages sought by asserting affirmative defense of plaintiff's failure to mitigate damages because:

- ☐ Plaintiff had obligation to make reasonable effort to mitigate damages; and
- ☐ Obligation to mitigate was not excused under circumstances of case.

Authority:

Valle de Oro Bank v. Gamboa (1994) 26 CA4th 1686, 1691, 32 CR2d 329 ; Shaffer v. Debbas (1993) 17 CA4th 33, 41, 21 CR2d 110

Discussion:

See 7.15

Forms:

See 7.17 (answer to complaint for breach of contract with affirmative defense(s)), 7.24 (memorandum for party contesting damages)

Legal Topics:

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

Civil Procedure Remedies Damages General Overview Commercial Law (UCC) Sales (Article 2) Remedies Buyer's Remedies Damages General Overview Commercial Law (UCC) Sales (Article 2) Remedies Seller's Remedies Damages General Overview Contracts Law Remedies Compensatory Damages General Overview



52 of 189 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 7 Seeking or Opposing Damages in Contract Actions
IV. CONTESTING DAMAGES

1-7 MB Practice Guide: CA Contract Litigation 7.14

7.14 Claim for Damages May Be Subject to Attack on Various Grounds.

7.14[1] Defendant May Demur to Complaint If Damages Are Not Properly Alleged. An allegation of damages is essential to state a cause of action for breach of contract [*Reichert v. General Ins. Co. (1968) 68 C2d 822, 830, 69 CR 321, 442 P2d 377*]. If the complaint contains no allegation of damages, the defendant may demur to the complaint for failure to state a cause of action [see CCP § 430.10(e)].

If the plaintiff is seeking special damages, the complaint must allege particular facts concerning the plaintiff's entitlement to those damages [*Shook v. Pearson (1950) 99 CA2d 348, 351-352, 221 P2d 757*]. If the plaintiff fails to do so, the defendant may demur to the complaint on the ground the pleading is uncertain [see CCP § 430.10(f)].

► **Cross References:**

Discussion of requirements for allegation of damages, see 7.08.

Form for memorandum for party contesting damages, see 7.23 (allegations insufficient to recover special damages).

Detailed discussion of demurrers, see Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, Ch. 11, Demurrers and Motions for Judgment on the Pleadings; or

California Forms of Pleading and Practice, Ch. 206, Demurrers and Motions for Judgment on the Pleadings (Matthew Bender).

7.14[2] Defendant's Liability for Damages Alleged May Be Contested. The plaintiff must prove with reasonable certainty that the damages for which recovery is sought were:

- Suffered by plaintiff [*Stott v. Johnston (1951) 36 C2d 864, 875, 229 P2d 348*];
- Proximately caused by the defendant's breach of contract [CC § 3300]; and
- Foreseeable, at the time the parties made the contract, as the probable result of a breach [*A.A.*

Baxter Corp. v. Colt Indus., Inc. (1970) 10 CA3d 144, 160, 88 CR 842].



Decision Point:

Defendant should determine whether to dispute the existence, proximate cause, or foreseeability of the damages sought by plaintiff. If any of those matters are in dispute, defendant should demur to or deny the allegations of the complaint related to those issues and contest liability appropriately during the course of the action.



Strategic Point--Defendant:

The appropriate manner of contesting defendant's liability for the damages sought will depend on plaintiff's pleadings and proof. Issues such as proximate cause and foreseeability generally involve questions of fact that cannot be resolved prior to trial. However, under the circumstances of the particular action, the defendant may be able to raise those issues and have them resolved favorably prior to or during the trial.

Example--Demurrer Sustained When Causation Could Not Be Shown:

Plaintiff was a contestant in a spelling bee sponsored by defendant. Plaintiff came in second in the bee, after misspelling a word. Plaintiff filed suit against defendant, alleging that defendant had breached its agreement with the contestants by improperly allowing the winner to advance in the contest. Even if defendant had allowed the winner to advance in violation of the contest rules, as alleged, the plaintiff could not show that his damage was caused by that breach. Defendant's demurrer was properly sustained without leave to amend because plaintiff would not be able to prove causation under any theory [*McDonald v. John P. Scripps Newspaper (1989) 210 CA3d 100, 103-104, 257 CR 473].*

Example--Motion for Directed Verdict Granted Because Plaintiff Could Not Show Causation:

Defendant, a property owner, entered into an exclusive agency agreement with plaintiff, a mortgage loan broker, to obtain a loan commitment. Plaintiff was unable to obtain a loan for defendant with the required terms. During a few days before plaintiff's exclusive agency agreement expired, defendant obtained a loan through another mortgage broker. Plaintiff sued defendant to recover a commission, alleging breach of the exclusive agency agreement. Defendant's motion for a directed verdict was properly granted because plaintiff, who had been unable to obtain a loan commitment for defendant, could not show that he could have performed, and been entitled to the commission, but for defendant's breach [*Metzenbaum v. R.O.S. Associates (1986) 188 CA3d 202, 211-214, 232 CR 741].*



Cross References:

Discussion of certainty, causation, and foreseeability of damages, see 7.09 -7.11.

Form for answer to complaint for breach of contract, see 7.17.

Detailed discussion of denials in answers, see Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, Ch. 14, Answers; or

California Forms of Pleading and Practice, Ch. 26, Answers (Matthew Bender).

7.14[3] Plaintiff's Entitlement to Particular Damages May Be Contested. The defendant should scrutinize the amount and particular items of damages sought and plaintiff's entitlement to those damages. Defendant should answer with denials of the allegations related to those damages, assert affirmative defenses, or move to strike, as appropriate under the circumstances. Defendant should consider:

- The correct measure of damages, under the circumstances of the case, including whether the measure of damages is established by statute or case law [see 7.03 -7.06];
- Limitations on the damages sought, if any, under the circumstances of the case, such as a liquidated damages provision in the parties' agreement [see 7.05[3]]; and
- Whether particular items of damages sought by plaintiff, such as loss of profits, are recoverable under the circumstances of the case [see 7.12].



Strategic Points--Defendant:

- Issues as to amounts of damages generally are issues of fact that cannot be resolved prior to trial, and defendant should deny the allegations of the complaint accordingly. However, defendant also should consider whether entitlement to particular items of damages can be challenged prior to trial to minimize his or her exposure. For example, if the complaint seeks items of damages for breach of contract which are not recoverable, such as punitive damages [see CC § 3294(a)], defendant should consider filing a motion to strike in response [see CCP § 435(b)].
- If there is a limitation on the damages sought by plaintiff, such as the existence of a liquidated damages provision, which is not put into issue by the allegations of the complaint, defendant should assert the existence of that limitation by way of an affirmative defense [see CCP § 431.30(b)(2)]. Plaintiff's failure to mitigate damages also should be asserted with an affirmative defense [see 7.15].
- It is common practice to present expert testimony regarding the amount of damages. The defense should assume that plaintiff will present expert testimony on this issue and should begin as soon as possible to locate appropriate experts who will refute the plaintiff's claims with respect to the dollar amount of damages.



Cross References:

Discussion of limitations on damages, see 7.05.

Discussion of entitlement to particular elements of damages, see 7.12.

Form for answer to complaint for breach of contract, see 7.17.

Detailed discussion of answers, see Matthew Bender(R) Practice Guide: California Pretrial Civil Procedure, Ch. 14, Answers; or

California Forms of Pleading and Practice, Ch. 26, Answers (Matthew Bender).

Legal Topics:

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

Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsDemurrersCivil

ProcedureRemediesDamagesGeneral OverviewContracts LawRemediesCompensatory DamagesGeneral Overview



53 of 189 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 7 Seeking or Opposing Damages in Contract Actions
IV. CONTESTING DAMAGES

1-7 MB Practice Guide: CA Contract Litigation 7.15

7.15 Defendant May Assert Affirmative Defense of Failure to Mitigate Damages.

7.15[1] Plaintiff Must Make Reasonable Effort to Mitigate. A plaintiff who is injured by a breach of contract must take reasonable steps to mitigate his or her damages [*Valle de Oro Bank v. Gamboa* (1994) 26 CA4th 1686, 1691, 32 CR2d 329; *Shaffer v. Debbas* (1993) 17 CA4th 33, 41, 21 CR2d 110]. If a plaintiff suffers losses that could have been prevented by his or her own reasonable efforts, those losses are considered to have been proximately caused by the plaintiff's, rather than the defendant's, conduct [*Valencia v. Shell Oil Co.* (1944) 23 C2d 840, 846-847, 147 P2d 558].

Example:

Plaintiffs sued defendant for breach of contract after defendant refused to complete his purchase of plaintiffs' home for \$385,000. After filing suit, plaintiffs relisted the property for sale at \$390,000, then dropped the price to \$365,000. Within five months of filing suit, plaintiffs removed the property from the market. Plaintiffs then continued to live in the home, did not sell it, did not reoffer it for sale, and did not intend to sell it. The property had increased in value by the time of trial to an amount exceeding the contract price plus plaintiffs' expenses. Because the plaintiffs had taken the property off the market for their own benefit and for reasons unrelated to marketability, plaintiffs did not fulfill their duty to mitigate damages as a matter of law and could no longer maintain their action against the defendant [*Spurgeon v. Drumheller* (1985) 174 CA3d 659, 665, 220 CR 195].

Jury Instructions:

Mitigation of Damages, see *Judicial Council of California Civil Jury Instructions*, CACI No. 358 (LexisNexis Matthew Bender).

Extent of Plaintiff's Obligation to Avoid or Minimize Damages, see *California Forms of Jury Instruction*, Ch. 3E, Instr. MB 300E.14 (Matthew Bender).

➤ Cross Reference:

Form for memorandum for party contesting damages, see 7.24 (damages not recoverable because of failure to mitigate).

7.15[2] Reasonableness of Effort Depends on Circumstances. Whether a plaintiff has acted reasonably to

mitigate damages is determined in light of the situation with which the plaintiff was confronted at the time the loss was threatened and not by the judgment of hindsight [*Green v. Smith* (1968) 261 CA2d 392, 396, 67 CR 796].

Example:

Although a landlord generally will attempt to mitigate damages after a tenant abandons a lease by making reasonable efforts to relet the property, the landlord's sale of the property is not a breach of a duty to mitigate if the trier of fact finds the sale to have been a reasonable means to avoid further loss of rental revenue under the circumstances [*Millikan v. American Spectrum Real Estate Servs. Cal., Inc.* (2004) 117 CA4th 1094, 1100].

The fact that reasonable measures other than the one taken would have avoided damage is not, in and of itself, proof of the fact that the one taken, though unsuccessful, was unreasonable [*Green v. Smith* (1968) 261 CA2d 392, 397, 67 CR 796].



Cross Reference:

Form for memorandum for party seeking damages, see 7.21 (plaintiff's effort to mitigate was reasonable).

7.15[3] Plaintiff Cannot Recover Avoidable Damages. Damages that the injured party could have avoided by making reasonable efforts or expenditures may not be recovered [*Valencia v. Shell Oil Co.* (1944) 23 C2d 840, 844, 147 P2d 558].

However, the plaintiff is not precluded from recovery to the extent that he or she has made reasonable efforts to avoid the loss, even though those efforts were unsuccessful [*Brandon & Tibbs v. George Kevorkian Accountancy Corp.* (1990) 226 CA3d 442, 460, 277 CR 40].



Cross Reference:

Form for memorandum for party contesting damages, see 7.24 (damages not recoverable because of failure to mitigate).

7.15[4] Mitigation May Not Be Required Under Circumstances.

7.15[4][a] Obligation to Mitigate Is Excused by Reliance on Defendant's Promises. A plaintiff's failure to mitigate damages does not bar recovery if the failure to take action is the result of a reasonable belief, induced by the promises or actions of the defendant, that the defendant will perform its obligations at issue or take steps to minimize the plaintiff's damages [*Valencia v. Shell Oil Co.* (1944) 23 C2d 840, 844-846, 147 P2d 558 ; *Questo v. Dorado* (1955) 136 CA2d 332, 335-336, 288 P2d 529].

Example:

The lessor of farm land sued a lessee for rent due. The lessee cross-complained, alleging that the lessor breached their agreement by failing to provide water for the irrigation of lessee's tomato crop. The damage to the lessee was caused solely by the lessor's failure to furnish water in accordance with the parties' agreement. The lessee had a right to rely on the continuing representations of the lessor that the lessor would furnish water. Under the circumstances, the lessee was not required to mitigate damages by assuming the burden of the lessor [*Questo v. Dorado* (1955) 136 CA2d 332, 335-336, 288 P2d 529].

The issue of whether the plaintiff was excused from the obligation to mitigate damages because of reliance on the defendant's express or implied promises generally is a question of fact [see *Questo v. Dorado* (1955) 136 CA2d 332, 335-336, 288 P2d 529].

Jury Instructions:

Obligation to Mitigate Is Excused by Reliance on Defendant's Promises, see *California Forms of Jury Instruction, Ch. 3E, Instr. MB 300E.16* (Matthew Bender).

**Cross Reference:**

Form for memorandum for party seeking damages, see 7.22 (mitigation not required under circumstances).

7.15[4][b] Nature of Contract or Extent of Plaintiff's Performance May Excuse Obligation to Mitigate.

Generally, either party to an executory contract has the power to stop performance of the contract by giving notice or direction to that effect, subjecting himself or herself to liability for damages [*Bomberger v. McKelvey* (1950) 35 C2d 607, 613-614, 220 P2d 729]. Because of the obligation to mitigate damages, the injured party, upon receiving such a notice, cannot continue to perform and recover damages based on full performance [*Bomberger v. McKelvey* (1950) 35 C2d 607, 614, 220 P2d 729].

However, the injured party may go forward, complete his or her performance, and insist on specific performance of the agreement if [*Bomberger v. McKelvey* (1950) 35 C2d 607, 614, 220 P2d 729]:

- The injured party must proceed with his or her performance under the contract to fulfill contract obligations to others;
- The injured party has progressed so far in his or her performance that it would be impracticable to attempt to make a reasonable estimate of damages; or
- To complete the work would diminish damages, or, at least, not enhance them.

Example:

Defendants agreed to pay plaintiffs to demolish a building and remove the salvage. Defendants breached the agreement by notifying plaintiffs that they were not to enter the land or demolish the building. Plaintiffs demolished the building, as originally agreed, and sued to recover the contract amount. During the negotiations for the agreement, plaintiffs had informed defendants that they planned to use the salvage in the construction of another building because the materials were then scarce. Under the circumstances, plaintiffs were not obligated to mitigate damages upon defendants' breach, but were entitled to specific performance of the agreement [*Bomberger v. McKelvey* (1950) 35 C2d 607, 615-616, 220 P2d 729].

7.15[4][c] Obligation to Mitigate May Not Be Imposed to Deprive Plaintiff of Benefit of Subsequent

Contracts. The obligation to mitigate damages does not apply to contracts that do not require all or a great portion of the plaintiff's time, or that do not preclude plaintiff from undertaking and being engaged contemporaneously in the performance of other contracts [*Seaboard Music Co. v. Germano* (1972) 24 CA3d 618, 622-623, 101 CR 255]. A plaintiff is not required to mitigate damages if the effect would be to require the plaintiff to sacrifice and surrender valuable rights in subsequent contracts that would have been available to plaintiff irrespective of the breach of the contract at issue [*Seaboard Music Co. v. Germano* (1972) 24 CA3d 618, 623, 101 CR 255].

Example:

Plaintiff was in the business of leasing coin-operated juke boxes and other amusement equipment to businesses. Plaintiff leased a juke box and pool table to defendant, a tavern owner. Under the agreement, plaintiff and defendant were to split the gross income from the equipment. When defendant breached the agreement during the term of the lease, plaintiff repossessed the equipment and sued to recover loss of profits. Plaintiff had a warehouse full of similar equipment from which it serviced its customers and from

which it could service any additional leases negotiated. Plaintiff was not obligated to re-lease the equipment repossessed from defendant, in preference to using its other equipment to carry on its normal business. Plaintiff was not required to mitigate its damages, and reduce defendants' liability, by foregoing profit which it would otherwise make in the normal course of its business [*Seaboard Music Co. v. Germano* (1972) 24 CA3d 618, 623, 101 CR 255].

 Cross Reference:

Form for memorandum for party seeking damages, see 7.22 (mitigation not required under circumstances).

7.15[4][d] Obligation to Mitigate Does Not Apply When Plaintiff Has Fully Performed. The obligation to mitigate does not apply when the plaintiff has fully performed his or her obligations under the contract at the time of the other party's breach [see *Capaldi v. Levy* (1969) 1 CA3d 274, 282, 81 CR 629].

 Cross Reference:

Form for memorandum for party seeking damages, see 7.22 (mitigation not required under circumstances).

7.15[4][e] Obligation to Mitigate Does Not Require Obligations Beyond Plaintiff's Means. The duty to minimize damages does not require the plaintiff to do what is unreasonable or impracticable. Consequently, when expenditures are necessary for mitigation of damages, the duty does not run to a person who is financially unable to make those expenditures [*Jordan v. Talbot* (1961) 55 C2d 597, 611, 12 CR 488, 361 P2d 20]. Whether a particular expenditure that allegedly would have reduced the plaintiff's damages was beyond the plaintiff's financial means generally is a question of fact [see *Berge v. International Harvester Co.* (1983) 142 CA3d 152, 163, 190 CR 815 ; *Gerwin v. Southeastern Cal. Assn. of Seventh Day Adventists* (1971) 14 CA3d 209, 219-220, 92 CR 111].

Jury Instructions:

Obligation to Mitigate Does Not Require Obligations Beyond Plaintiff's Means, see California Forms of Jury Instruction, Ch. 3E, Instr. MB 300E.15 (Matthew Bender).

 Cross Reference:

Form for memorandum for party seeking damages, see 7.22 (mitigation not required under circumstances).

7.15[5] Failure to Mitigate Is Affirmative Defense. The failure to mitigate damages is an affirmative defense that must be pleaded and proved by the defendant [*Baruh v. Kuhl* (1963) 213 CA2d 266, 273, 28 CR 573].

The defendant bears the burden of proving that all or part of the plaintiff's losses were reasonably avoidable [*Brandon & Tibbs v. George Kevorkian Accountancy Corp.* (1990) 226 CA3d 442, 460, 277 CR 40].

 Cross Reference:

Form for answer with affirmative defense alleging failure to mitigate, see 7.17.

Legal Topics:

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

Civil Procedure Pleading & Practice Defenses, Demurrers & Objections Affirmative Defenses General Overview Civil Procedure Remedies Damages General Overview Contracts Law Remedies Avoidable Consequences Labor & Employment Law Discrimination Title VII of the Civil Rights Act of 1964 Remedies Mitigation of Damages Real Property Law Purchase & Sale Remedies Damages Duty to Mitigate



54 of 189 DOCUMENTS

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Chapter 7 Seeking or Opposing Damages in Contract Actions
V. FORMS

1-7 MB Practice Guide: CA Contract Litigation 7.16

7.16 Complaint for Breach of Contract With Allegation(s) of Damages.**Complaint for Breach of Contract With Allegation(s) of Damages.**

_____[Name of attorney]
 _____[Street address]
 _____[City, state, and ZIP]
 _____[Area code and phone number]
 _____[State Bar no. of attorney]
 Attorney for _____[name of party]

SUPERIOR COURT OF CALIFORNIA,
 COUNTY OF _____

[name(s)] _____,	)	
Plaintiff(s),	)	No.
vs.	)	_____
[name(s)] _____	)	_____
[and DOES 1 THROUGH _____]	)	COMPLAINT FOR DAMAGES FOR BREACH OF
_____]	)	CONTRACT [LIMITED CIVIL CASE]
Defendant(s).	)	[Amount Demanded _____]
		(Exceeds or Does Not Exceed) \$10,000]

Plaintiff _____[name] alleges:

[For an individual plaintiff]

1-7 MB Practice Guide: CA Contract Litigation 7.16

1. Plaintiff is an individual residing in _____ [city, if any, and county], California, [in the (name of judicial district, if any) _____], [and therein doing business under the fictitious business name of _____].

_____. Plaintiff has duly complied in all respects with the requirements of *Business and Professions Code Sections 17910 through 17917* with respect to this fictitious business name].

[OR, for a domestic corporation or domestic limited liability company]

1. Plaintiff _____ [name] is, and at all times herein mentioned was, a _____ [corporation or limited liability company] organized and existing under the laws of California, with its principal place of business in _____ [city, if any, and county], California [in the (name of judicial district, if any) _____], [and therein doing business under the fictitious business name of _____]. Plaintiff has duly complied in all respects with the requirements of *Business and Professions Code Sections 17910 through 17917* with respect to this fictitious business name].

[OR, for a foreign corporation or foreign limited liability company]

1. Plaintiff _____ [name] is, and at all times herein mentioned was, a _____ [corporation or limited liability company] organized and existing under the laws of _____ [state or foreign country], and _____ [for foreign corporation authorized to do business and doing business in California or, for foreign limited liability company maintaining action or intrastate business, and registered to transact intrastate business in California], with its principal place of business in California in _____ [city, if any, and county], California [in the (name of judicial district, if any) _____].

[OR, for a general or limited partnership or an unincorporated association]

1. Plaintiff _____ [name] is, and at all times herein mentioned was, a _____ [partnership or unincorporated association] with its principal place of business in _____ [city, if any, and county], California [in the (name of judicial district, if any) _____], [and therein doing business under the fictitious business name of _____]. Plaintiff has duly complied in all respects with the requirements of *Business and Professions Code Sections 17910 through 17917* with respect to this fictitious business name].

[CONTINUE]

[For an individual defendant]

2. Defendant _____ [name] is an individual residing in _____ [city, if any, and county], California [in the (name of judicial district, if any) _____].

_____] [and doing business therein under the fictitious business name of _____].

[OR, for a domestic corporation or domestic limited liability company]

2. Defendant _____ [name] is, and at all times herein mentioned was, a _____ [corporation or limited liability company] organized and existing under the laws of California, [with its principal place of business in (city, if any, and county) _____, California, (in the _____ [name of judicial district, if any])].

[OR, for a foreign corporation or foreign limited liability company]

2. Defendant _____ [name] is, and at all times herein mentioned was, a _____ [corporation or limited liability company] organized and existing under the laws of _____ [state or foreign country], [with its principal place of business in (city, if any, and county) _____, California, (in the _____ [name of judicial district, if any])].

[OR, for a general or limited partnership or an unincorporated association]

2. Defendant _____ [name] is, and at all times herein mentioned was, _____ [a partnership or an unincorporated association] sued herein under the name _____ [it has assumed or by which it is known], [with its principal place of business in (city, if any, and county) _____, California, (in the _____ [name of judicial district, if any])]. [Defendants (names of individual partners or members) _____ are, and at all times herein mentioned were, members of that _____ (partnership or unincorporated association) (and are, and at all times herein mentioned were, residents of _____ County, California)].

[CONTINUE]

3. Plaintiff is ignorant of the true names and capacities of Defendants sued herein as DOES 1 through _____ [numeral, e.g., 50], inclusive, and therefore sues these Defendants by these fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when ascertained. [Plaintiff is informed and believes and thereon alleges that each of the fictitiously named defendants is responsible in some manner for the occurrences herein alleged, and that plaintiff's damages as herein alleged were proximately caused by those defendants.]

4. Plaintiff is informed and believes and thereon alleges that at all times material to this complaint, _____ [identify defendants to whom agency allegation applies, e.g., each of the defendants or each of the individual defendants or Defendant Harry Jones], [and each of the defendants fictitiously named in this complaint,] in addition to acting for himself, herself, or itself and on

his, her, or its own behalf individually, is and was acting as the agent, servant, employee and representative of, and with the knowledge, consent and permission of, and in conspiracy with, each and all of the Defendants and within the course, scope and authority of that agency, service, employment, representation, and conspiracy. Plaintiff further alleges on information and belief that the acts of each of the Defendants were fully ratified by each and all of the Defendants. Specifically, and without limitation, Plaintiff alleges on information and belief that the actions, failures to act, breaches, conspiracy, and misrepresentations alleged herein and attributed to one or more of the specific Defendants were approved, ratified, and done with the cooperation and knowledge of each and all of the Defendants.

5. _____ [Set forth in this and subsequently numbered paragraphs allegations stating facts concerning existence and terms of contract and/or referring to attached contract.]

6. _____ [Set forth in this and subsequently numbered paragraphs allegations stating facts concerning plaintiff's performance or excuse for nonperformance.]

7. _____ [Set forth in this and subsequently numbered paragraphs allegations stating facts concerning defendant's breach.]

[EITHER, to allege general damages]

8. As a proximate result of Defendant's breach of the contract, as alleged, Plaintiff has suffered damages in the sum of \$_____.

[OR, to allege damages pursuant to a liquidated damages provision in a contract entered into after July 1, 1978, other than consumer contract or residential lease]

8. The parties agreed in Paragraph _____ [specify paragraph of contract containing liquidated damages provision] of the contract that _____ [in the event of a breach by either party or specify conditions under which liquidated damages provision would apply], Plaintiff would be entitled to recover _____ [specify amount and/or formula to calculate amount].

[OR, to allege that the parties agreed in the contract that a deposit would constitute liquidated damages]

8. When the parties entered into the contract, Defendant provided a deposit of \$_____ as security for the performance of his/her/its contractual obligations. The contract provided that this deposit would be liquidated damages in the event of a breach of the contract. Defendant has breached the contract, as alleged, entitling Plaintiff to the sum of \$_____ as damages.

[ADD, to allege special damages, if appropriate]

9. At the time the parties entered into the contract, _____ [plaintiff told defendant or defendant knew, or had reason to know,] that _____ [specify facts indicating that the special damages suffered were reasonably within the contemplation of the parties at the time of contracting]. As a result of Defendant's breach, as alleged, _____ [specify facts concerning how, and in what amount, special damages were suffered by plaintiff]. Plaintiff therefore is entitled to special damages in the amount of _____

\$_____.

[CONTINUE]

WHEREFORE, Plaintiff prays judgment against Defendant as follows:

1. For compensatory damages, in the sum of

\$_____;

2. For interest at the _____ [legal rate or
specify other rate provided by contract] on the sum of

\$_____ from and after
_____ [date];

[ADD, if provided by contract or statute]

3. For reasonable attorney's fees _____ [in
the amount of \$_____ or according to
proof];

[CONTINUE]

4. For costs of suit; and

5. For such other and further relief as the court may deem proper.

[firm name, if any] _____

By: [signature] _____

[typed name] _____

Attorney for Plaintiff

[ADD verification, if desired]

VERIFICATION

I am the plaintiff in the above entitled action; I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein stated on information and belief, and, as to those matters, I believe it to be true.

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

[*date*] _____

[*signature*] _____

[*typed name*] _____

NOTES.

Authority:

CC § 3300; CCP § 425.10

Allegations of Damages:

See 7.08

More Detailed Form for Complaint for Breach of Contract:

See Ch. 22, Suing or Defending Action for Breach of Contract

Legal Topics:

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

Contracts LawBreachCauses of ActionGeneral OverviewContracts LawRemediesGeneral Overview



55 of 189 DOCUMENTS

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Chapter 7 Seeking or Opposing Damages in Contract Actions
V. FORMS

1-7 MB Practice Guide: CA Contract Litigation 7.17

7.17 Answer to Complaint for Breach of Contract With Affirmative Defense Based on Plaintiff's Failure to Mitigate Damages.**Answer to Complaint for Breach of Contract With Affirmative Defense Based on Plaintiff's Failure to Mitigate Damages.**

_____ [Name of attorney]
 _____ [Street address]
 _____ [City, state, and ZIP]
 _____ [Area code and phone number]
 _____ [State Bar no. of attorney]
 Attorney for _____ [name of party]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

[name(s)] _____,	)	
Plaintiff(s),	)	
vs.	)	No.
[name(s)] _____	)	_____
[and DOES 1 THROUGH	)	_____
_____]	)	ANSWER OF
Defendant(s).	)	_____ [identify defendant, e.g.,
		DEFENDANT MARY JONES] TO COMPLAINT
		OF
		_____ [identify plaintiff, e.g.,
		PLAINTIFF JOHN SMITH]
		[LIMITED CIVIL CASE]

Judge:

Department: _____
_____]

[FIRST] AFFIRMATIVE DEFENSE

(Failure to mitigate damages)

2. Plaintiff is not entitled to recover damages from Defendant because Plaintiff has failed and refused, and continues to fail and refuse, to make a reasonable effort to mitigate damages.

3. By the exercise of reasonable effort, Plaintiff could have mitigated the amount of damages allegedly suffered by _____ [specify facts, e.g., placing plaintiff's property, which has substantially increased in value since the time of the purported contract for sale to defendant, and selling it to another purchaser for the increased price].

[ADD additional affirmative defenses, if any]

[CONTINUE]

WHEREFORE, Defendant prays as follows:

1. That Plaintiff take nothing by his/her complaint herein;
2. For costs of suit; and
3. For such other and further relief as the court deems proper.

Dated: _____

[firm name, if any] _____

By: [signature] _____

[typed name] _____

Attorney for _____ Attorney for Defendant

[ADD following verification, if applicable]

VERIFICATION

I am the defendant in the above entitled action; I have read the foregoing answer and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein stated on information and belief, and, as to those matters, I believe it to be true.

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

[date] _____

[signature] _____

[typed name] _____

NOTES.

Authority:

CCP § 431.30(b)(2); Baruh v. Kuhl (1963) 213 CA2d 266, 273, 28 CR 573

Plaintiff's Obligation to Mitigate Damages:

See 7.15

More Detailed Form for Answer in Response to Complaint for Breach of Contract:

See Ch. 22, Suing or Defending Action for Breach of Contract

Legal Topics:

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

Civil Procedure Pleading & Practice Defenses, Demurrers & Objections Affirmative Defenses General Overview Civil Procedure Pleading & Practice Pleadings Answers Contracts Law Breach Causes of Action General Overview Contracts Law Remedies Avoidable Consequences



56 of 189 DOCUMENTS

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Chapter 7 Seeking or Opposing Damages in Contract Actions
V. FORMS

1-7 MB Practice Guide: CA Contract Litigation 7.18

7.18 Memorandum for Party Seeking Damages--General Damages Sufficiently Alleged.

Memorandum for Party Seeking Damages--General Damages Sufficiently Alleged.

[Include the following, if appropriate under the circumstances of the case, in a memorandum by the party seeking damages]

THE COMPLAINT SUFFICIENTLY ALLEGES DAMAGES BECAUSE GENERAL DAMAGES NEED NOT BE ALLEGED IN DETAIL

A. Cause of Action for Breach of Contract Is Stated When Plaintiff Alleges Damages Proximately Caused by Defendant's Breach. To state a cause of action for breach of contract, the plaintiff must allege the existence of a contract, plaintiff's performance or excuse for nonperformance, defendant's breach, and the resulting damages to Plaintiff (*Reichert v. General Ins. Co.* (1968) 442 P2d 377).

B. Nature and Extent of General Damages Need Not Be Alleged. A claim for general damages does not need to allege in detail the nature and extent of the damages (*Colvig v. RKO Gen., Inc.* (1965) 232 Cal. App. 2d 56, 68-69, 42 Cal. Rptr. 473).

C. Damages Naturally Resulting From Breach May Be Alleged Generally. The natural and ordinary damages resulting from a breach of contract may be recovered under a general allegation of damages without alleging how the damages have arisen (*Colvig v. RKO Gen., Inc.* (1965) 232 Cal. App. 2d 56, 69, 42 Cal. Rptr. 473).

NOTES.

Allegation of Damages:

See 7.08

Detailed Discussion of Format/Skeletal Forms for Memoranda:

California Forms of Pleading and Practice, Ch. 417, Points and Authorities (Matthew Bender);
California Points and Authorities, Ch. 1, Writing Legal Memoranda and Briefs (Matthew Bender)

Additional Memoranda Relating to Contract Damages:

California Points and Authorities, Ch. 50, Contracts; Ch. 65, Damages (Matthew Bender)

Legal Topics:

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

Civil Procedure Remedies Damages General Damages Contracts Law Breach Causes of Action General Overview Contracts
Law Remedies General Overview



57 of 189 DOCUMENTS

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Chapter 7 Seeking or Opposing Damages in Contract Actions
V. FORMS

1-7 MB Practice Guide: CA Contract Litigation 7.19

7.19 Memorandum for Party Seeking Damages--Loss of Profits Recoverable.

Memorandum for Party Seeking Damages--Loss of Profits Recoverable.

[Include the following, if appropriate under the circumstances of the case, in a memorandum by the party seeking damages]

PLAINTIFF IS ENTITLED TO RECOVER THE LOSS OF PROFITS CAUSED BY DEFENDANT'S BREACH

A. Loss of Profits Is Recoverable As General Damages. Loss of profits generally is recoverable without pleading special allegations (*Myers v. Stephens* (1965) 233 Cal. App. 2d 104, 121, 43 Cal. Rptr. 420). Loss of profits usually is the direct and natural result of a breach of contract and may fairly be supposed to have entered into the contemplation of the parties when they made the contract (*Myers v. Stephens* (1965) 233 Cal. App. 2d 104, 121, 43 Cal. Rptr. 420).

[ADD, if appropriate]

B. Loss of Profits of New Business Is Recoverable. The loss of prospective profits for a new business is recoverable when both the occurrence and extent of the lost profits can be shown with reasonable certainty, such as when the owners have experience in the business they are seeking to establish and the business is in an established market (*Resort Video, Ltd. v. Laser Video, Inc.* (1995) 35 Cal. App. 4th 1679, 1698, 42 Cal. Rptr. 2d 136).

NOTES.

Loss of Profits Recoverable As Element of Damages:

See 7.12[1]

Detailed Discussion of Format/Skeletal Forms for Memoranda:

California Forms of Pleading and Practice, Ch. 417, Points and Authorities (Matthew Bender);
California Points and Authorities, Ch. 1, Writing Legal Memoranda and Briefs (Matthew Bender)

Additional Memoranda Relating to Contract Damages:

California Points and Authorities, Ch. 50, Contracts; Ch. 65, Damages (Matthew Bender)

Legal Topics:

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

Contracts LawBreachCauses of ActionGeneral OverviewContracts LawRemediesForeseeable DamagesLost Profits



58 of 189 DOCUMENTS

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Chapter 7 Seeking or Opposing Damages in Contract Actions
V. FORMS

1-7 MB Practice Guide: CA Contract Litigation 7.20

7.20 Memorandum for Party Seeking Damages--Mental or Emotional Distress Damages Recoverable.

Memorandum for Party Seeking Damages--Mental or Emotional Distress Damages Recoverable.

[Include the following, if appropriate under the circumstances of the case, in a memorandum by the party seeking damages]

PLAINTIFF IS ENTITLED TO RECOVER DAMAGES FOR MENTAL SUFFERING ARISING FROM
DEFENDANT'S BREACH OF THE CONTRACT IN THIS CASE

A. Damages for Mental Suffering Are Recoverable When Contract Relates to Comfort, Happiness, or Personal Welfare. When the terms of a contract relate to matters that directly concern the comfort, happiness, or personal welfare of one of the parties, or the subject matter of the contract directly affects or moves the affection, self-esteem, or tender feelings of that party, the Plaintiff may be entitled to recover damages for physical or emotional suffering or illness proximately caused by the breach (*Chelini v. Nieri* (1948) 32 Cal. 2d 480, 482, 196 P.2d 915).

B. Damages for Mental Suffering Are Recoverable When Foreseeable and Contemplated as Result of Breach. Damages for mental suffering are allowed when it is apparent from the particular subject matter of the contract that mental suffering or emotional distress is a foreseeable and contemplated result of the breach (*Rogoff v. Grabowski* (1988) 200 Cal. App. 3d 624, 633, 246 Cal. Rptr. 185).

NOTES.

Damages for Mental Suffering Arising From Breach:

See 7.12[2]

Detailed Discussion of Format/Skeletal Forms for Memoranda:

California Forms of Pleading and Practice, Ch. 417, Points and Authorities (Matthew Bender); and
California Points and Authorities, Ch. 1, Writing Legal Memoranda and Briefs (Matthew Bender)

Additional Memoranda Relating to Contract Damages:

California Points and Authorities, Ch. 50, Contracts; Ch. 65, Damages (Matthew Bender)

Legal Topics:

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

Contracts LawBreachCauses of ActionGeneral OverviewContracts LawBreachCauses of ActionElements of
ClaimsContracts LawRemediesGeneral Overview



59 of 189 DOCUMENTS

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Chapter 7 Seeking or Opposing Damages in Contract Actions
V. FORMS

1-7 MB Practice Guide: CA Contract Litigation 7.21

7.21 Memorandum for Party Seeking Damages--Plaintiff's Effort to Mitigate Was Reasonable.

Memorandum for Party Seeking Damages--Plaintiff's Effort to Mitigate Was Reasonable.

[Include the following, if appropriate under the circumstances of the case, in a memorandum by the party seeking damages]

PLAINTIFF IS ENTITLED TO RECOVER THE DAMAGES SOUGHT BECAUSE PLAINTIFF MADE A REASONABLE EFFORT TO MITIGATE

A. Recovery Is Not Precluded if Effort to Mitigate Was Reasonable. A plaintiff is not precluded from recovering damages to the extent that he or she has made reasonable efforts to avoid the loss, even though those efforts were unsuccessful (*Brandon & Tibbs v. George Kevorkian Accountancy Corp.* (1990) 226 Cal. App. 3d 442, 460, 277 Cal. Rptr. 40).

B. Reasonableness Is Not Judged in Hindsight. Whether a plaintiff has acted reasonably to mitigate damages is determined in light of the situation with which the plaintiff was confronted at the time the loss was threatened, and not by the judgment of hindsight (*Green v. Smith* (1968) 261 Cal. App. 2d 392, 396, 67 Cal. Rptr. 796).

C. Defendant Has Burden of Proving Failure to Mitigate. The defendant bears the burden of proving that all or part of the plaintiff's losses were reasonably avoidable (*Brandon & Tibbs v. George Kevorkian Accountancy Corp.* (1990) 226 Cal. App. 3d 442, 460, 277 Cal. Rptr. 40).

D. Existence of Other Reasonable Measures Does Not Prove Unreasonableness of Measure Taken. The fact that reasonable measures other than the one taken would have avoided damage is not, in and of itself, proof of the fact that the one taken, though unsuccessful, was unreasonable (*Green v. Smith* (1968) 261 Cal. App. 2d 392, 397, 67 Cal. Rptr. 796).

NOTES.

Reasonableness of Effort to Mitigate:

See 7.15[2]

Burden of Proving Failure to Mitigate:

See 7.15[5]

Detailed Discussion of Format/Skeletal Forms for Memoranda:

California Forms of Pleading and Practice, Ch. 417, Points and Authorities (Matthew Bender); and
California Points and Authorities, Ch. 1, Writing Legal Memoranda and Briefs (Matthew Bender)

Additional Memoranda Relating to Contract Damages:

California Points and Authorities, Ch. 50, Contracts; Ch. 65, Damages (Matthew Bender)

Legal Topics:

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

Contracts LawBreachCauses of ActionGeneral OverviewContracts LawRemediesAvoidable Consequences



60 of 189 DOCUMENTS

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Chapter 7 Seeking or Opposing Damages in Contract Actions
V. FORMS

1-7 MB Practice Guide: CA Contract Litigation 7.22

7.22 Memorandum for Party Seeking Damages--Mitigation Not Required Under Circumstances.

Memorandum for Party Seeking Damages--Mitigation Not Required Under Circumstances.

[Include the following, if appropriate under the circumstances of the case, in a memorandum by the party seeking damages]

[EITHER]

PLAINTIFF WAS NOT REQUIRED TO MITIGATE DAMAGES BECAUSE OF HIS/HER RELIANCE ON
DEFENDANT'S PROMISES

An Obligation to Mitigate Is Excused by Reliance on Defendant's Promises. A plaintiff's failure to mitigate damages does not bar recovery if the failure to take action is the result of a reasonable belief, induced by the promises or actions of the defendant, that the defendant will perform its obligations at issue or take steps to minimize the plaintiff's damages (*Valencia v. Shell Oil Co. (1944) 23 Cal. 2d 840, 844-846, 147 P.2d 558* ; *Questo v. Dorado (1955) 136 Cal. App. 2d 332, 335-336, 288 P.2d 529*).

[OR]

PLAINTIFF WAS NOT REQUIRED TO MITIGATE DAMAGES AND DEPRIVE HIMSELF/HERSELF OF THE
BENEFIT OF SUBSEQUENT CONTRACTS

A. Obligation to Mitigate Does Not Apply to Contracts That Can Performed Contemporaneously. The obligation to mitigate damages does not apply to contracts that do not require all or a great portion of the time of the plaintiff, or that do not preclude plaintiff from undertaking and being engaged contemporaneously in the performance of other contracts (*Seaboard Music Co. v. Germano (1972) 24 Cal. App. 3d 618, 622-623, 101 Cal. Rptr. 255*).

B. Obligation to Mitigate Cannot Be Imposed to Deprive Plaintiff of Benefit of Other Contracts. A plaintiff is not required to mitigate damages if the effect would be to require the plaintiff to sacrifice and surrender valuable rights in

subsequent contracts that would have been available to the plaintiff irrespective of the breach of the contract at issue (*Seaboard Music Co. v. Germano* (1972) 24 Cal. App. 3d 618, 623, 101 Cal. Rptr. 255).

[OR]

PLAINTIFF HAD NO DUTY TO MITIGATE DAMAGES BECAUSE PLAINTIFF'S PERFORMANCE WAS COMPLETE AT THE TIME OF BREACH

Obligation to Mitigate Does Not Apply When Plaintiff Has Fully Performed. The obligation to mitigate does not apply when the plaintiff has fully performed his or her obligations under the contract at the time of the defendant's breach (*Capaldi v. Levy* (1969) 1 Cal. App. 3d 274, 282, 81 Cal. Rptr. 629).

[OR]

PLAINTIFF HAD NO DUTY TO MITIGATE BECAUSE MITIGATION WOULD HAVE REQUIRED EXPENDITURES BEYOND PLAINTIFF'S MEANS

Obligation to Mitigate Does Not Require Expenditures Beyond Plaintiff's Means. The duty to minimize damages does not require the plaintiff to do what is unreasonable or impracticable, and consequently, when expenditures are necessary for mitigation of damages, the duty does not run to a person who is financially unable to make those expenditures (*Jordan v. Talbot* (1961) 55 Cal. 2d 597, 611, 12 Cal. Rptr. 488, 361 P.2d 20).

NOTES.

Circumstances When Mitigation Is Not Required:

See 7.15[4]

Detailed Discussion of Format/Skeletal Forms for Memoranda:

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

California Points and Authorities, Ch. 1, Writing Legal Memoranda and Briefs (Matthew Bender)

Additional Memoranda Relating to Contract Damages:

California Points and Authorities, Ch. 50, Contracts; Ch. 65, Damages (Matthew Bender)

Legal Topics:

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

Contracts LawBreachCauses of ActionGeneral OverviewContracts LawRemediesAvoidable Consequences



61 of 189 DOCUMENTS

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Chapter 7 Seeking or Opposing Damages in Contract Actions
V. FORMS

1-7 MB Practice Guide: CA Contract Litigation 7.23

7.23 Memorandum for Party Contesting Damages--Allegations Insufficient to Recover Special Damages.

Memorandum for Party Contesting Damages--Allegations Insufficient to Recover Special Damages.

[Include the following, if appropriate under the circumstances of the case, in a memorandum by the party contesting damages]

THE COMPLAINT FAILS TO SUFFICIENTLY ALLEGE SPECIAL DAMAGES

A. General Allegation of Damages Is Insufficient. When damages do not necessarily result from the breach of contract, a general allegation of damages is insufficient (*Comstock v. Coronet Heating Supply Co. (1952) 111 Cal. App. 2d 600, 603-604, 245 P.2d 35, 245 P.2d 357*).

B. Complaint Must Allege Particular Facts to Recover Special Damages. To recover special damages, the complaint must state the facts concerning those damages with particularity (*Shook v. Pearson (1950) 99 Cal. App. 2d 348, 351-352, 221 P.2d 757*).

C. Special Damages Are Recoverable Only If Contemplated by Parties. Plaintiff can recover special damages only if the circumstances regarding those damages were known, or should have been known, to defendant at the time the parties entered into the contract (*Brandon & Tibbs v. George Kevorkian Accountancy Corp. (1990) 226 Cal. App. 3d 442, 455, 277 Cal. Rptr. 40*).

D. Failure to Properly Allege Special Damages Constitutes Grounds for Demurrer Under CCP § 430.10(f). When a complaint fails to properly allege the particular facts concerning special damages, the defendant may demur to the complaint on the ground that the pleading is uncertain (*Comstock v. Coronet Heating Supply Co. (1952) 111 Cal. App. 2d 600, 603-604, 245 P.2d 35, 245 P.2d 357*).

NOTES.

Recovery of Special Damages:

See 7.04[6]

Alleging Special Damages:

See 7.08[3]

Detailed Discussion of Format/Skeletal Forms for Memoranda:

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

California Points and Authorities, Ch. 1, Writing Legal Memoranda and Briefs (Matthew Bender)

Additional Memoranda Relating to Contract Damages:

California Points and Authorities, Ch. 50, Contracts; Ch. 65, Damages (Matthew Bender)

Legal Topics:

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

Civil Procedure Remedies Damages Special Damages Contracts Law Breach Causes of Action General Overview Contracts
Law Remedies General Overview Contracts Law Remedies Foreseeable Damages General Overview



62 of 189 DOCUMENTS

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Chapter 7 Seeking or Opposing Damages in Contract Actions
V. FORMS

1-7 MB Practice Guide: CA Contract Litigation 7.24

7.24 Memorandum for Party Contesting Damages--Damages Not Recoverable Because Plaintiff Failed to Mitigate.

Memorandum for Party Contesting Damages--Damages Not Recoverable Because Plaintiff Failed to Mitigate.

[Include the following, if appropriate under the circumstances of the case, in a memorandum by the party contesting damages]

PLAINTIFF IS NOT ENTITLED TO THE RECOVERY SOUGHT BECAUSE HE/SHE FAILED TO MITIGATE DAMAGES

A. Plaintiff Had a Duty to Mitigate Damages. A plaintiff who is injured by a breach of contract must take reasonable steps to mitigate his or her damages (*Valle de Oro Bank v. Gamboa* (1994) 26 Cal. App. 4th 1686, 1691, 32 Cal. Rptr. 2d 329 ; *Shaffer v. Debbas* (1993) 17 Cal. App. 4th 33, 41, 21 Cal. Rptr. 2d 110).

B. Plaintiff Cannot Recover Damages That Were Avoidable. Damages that an injured party could have avoided by making reasonable efforts or expenditures may not be recovered (*Valencia v. Shell Oil Co.* (1944) 23 Cal. 2d 840, 844, 147 P.2d 558).

NOTES.

Plaintiff's Duty to Mitigate:

See 7.15[1] -[3]

Detailed Discussion of Format/Skeletal Forms for Memoranda:

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

California Points and Authorities, Ch. 1, Writing Legal Memoranda and Briefs (Matthew Bender)

Additional Memoranda Relating to Contract Damages:

California Points and Authorities, Ch. 50, Contracts; Ch. 65, Damages (Matthew Bender)

Legal Topics:

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

Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsAffirmative DefensesGeneral OverviewCivil
ProcedureRemediesDamagesGeneral OverviewContracts LawRemediesAvoidable ConsequencesReal Property
LawLandlord & TenantLease AgreementsDamagesMitigationReal Property LawPurchase &
SaleRemediesDamagesDuty to Mitigate



63 of 189 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 8 Seeking or Opposing Equitable Remedies in Contract Actions

1-8 MB Practice Guide: CA Contract Litigation 8.syn

§ 8.syn Synopsis to Chapter 8: Seeking or Opposing Equitable Remedies in Contract Actions

8.01 Scope.

8.02 Objective and Strategy.

8.03 CHECKLIST: Seeking or Opposing Rescission of Contract.

8.03[1] Determining Whether Contract May Be Rescinded.

8.03[2] Giving Notice and Consent to Rescission.

8.03[3] Seeking Relief Based on Rescission.

8.03[4] Opposing Claim for Rescission.

8.04 Options and Strategies.

8.04[1] Rescission "Unmakes" Contract.

8.04[2] Any Party May Seek Relief Based on Rescission of Contract.

8.04[3] Void Contract May Be Disregarded Without Rescission, but Rescission Action Still May Be Safest Practice.

8.04[4] Plaintiff Can Seek Both Rescission and Damages, but Must Elect One or the Other.

8.04[5] Entire Contract Must Be Rescinded Unless It Is Divisible.

8.04[6] Opposing Party Should Consider Various Defenses to Rescission Action.

8.05 General List of Grounds for Rescinding Contract.

8.06 Both Parties May Rescind Contract by Mutual Consent.

8.06[1] Elements of Claim for Mutual Rescission.

8.06[2] Consent of Parties Is Basis for Mutual Rescission.

8.06[3] Unequivocal Conduct Is Required for Mutual Rescission.

8.06[4] Third Party Beneficiary Contract May Be Mutually Rescinded.

8.06[5] Basic Four-Year or Two-Year Statute of Limitations Apply.

8.07 One Party May Unilaterally Rescind Contract.

8.07[1] Elements of Claim for Unilateral Rescission.

8.07[2] Basic Four-Year or Two-Year Statute of Limitations Apply.

8.07[3] Party May Unilaterally Rescind If Rescinding Party's Consent to Contract Was Given by Mistake or Obtained Through Duress, Menace, Fraud, or Undue Influence.

8.07[4] Party May Unilaterally Rescind for Other Party's Breach.

8.07[5] Party May Unilaterally Rescind If Consideration for Rescinding Party's Obligation Failed or Is Void.

8.07[6] Party May Unilaterally Rescind If Contract Is Unlawful.

8.07[7] Party May Unilaterally Rescind If Public Interest Will Be Damaged by Permitting Contract to Stand.

8.07[8] Party May Unilaterally Rescind If Statute Specifically Allows Rescission.

8.08 Either or Both Parties May Seek Partial Rescission of Contract.

8.09 Effecting Rescission.

8.09[1] Rescinding Party Can Give Notice of Rescission by Informing Other Party of Intent to Rescind or Serving Pleading in Action for Rescission.

8.09[2] Offer of Restoration Is Not Required If Rescinding Party Received Nothing of Value.

8.09[3] Plaintiff's Delay in Providing Prompt Notice May Be Excused.

8.09[4] Plaintiff's Delay in Providing Notice Will Not Bar Relief Unless Delay Is Substantially Prejudicial.

8.10 Pleading Requirements for Complaint Seeking Rescission.

8.10[1] General List of Pleading Requirements.

8.10[2] Complaint Must Set Forth Formation and Relevant Terms of Contract.

8.10[3] Complaint Must Allege Facts Showing Ground for Rescission.

8.10[4] Complaint Must Allege Plaintiff's Performance or Excuse for Nonperformance.

8.10[5] Complaint Must Allege Injury or Harm Suffered by Plaintiff.

8.10[6] Complaint Must Allege That Plaintiff Gave Notice of Rescission or State That Summons and Complaint Are to Serve As Notice.

8.11 Every Party to Contract Must Be Joined in Rescission Action.

8.12 Complaint Must Be Brought Within Applicable Limitations Period.

8.13 Right to Jury Trial for Rescission.

8.14 Relief Available After Rescission.

8.14[1] Parties Have Right to Seek Relief After Rescission.

8.14[2] Plaintiff May Recover Consequential Damages.

8.14[3] Plaintiff May Recover Interest.

8.14[4] Plaintiff May Recover Punitive Damages.

8.14[5] Plaintiff May Recover Attorney's Fees.

8.14[6] Attachment May Be Available to Plaintiff.

8.14[7] Court May Require Plaintiff to Compensate Defendant.

8.15 Opposing Claim for Rescission.

8.16 Defendant Can Assert Affirmative Defenses.

8.16[1] Plaintiff Seeking Rescission Is in Material Default of Performance.

8.16[2] Plaintiff's Knowing Acceptance of Contract Benefits Waives Right to Rescind Contract.

8.16[3] Action Is Barred If Plaintiff Failed to Bring Claim Within Applicable Statute of Limitations.

8.16[4] Plaintiff's Delay in Giving Notice of Rescission or Tendering Restoration Was Prejudicial.

8.16[5] Impossibility Excuses Defendant's Performance.

8.16[6] Rescission Is Unavailable If Third Party's Rights Would Be Harmed.

8.17 Defendant May Be Able to Obtain Setoff Against Plaintiff's Damages.

8.18 CHECKLIST: Seeking or Opposing Reformation of Contract.

8.18[1] Determining Whether Contract Can Be Reformed.

8.18[2] Pleading to Reform Contract.

8.18[3] Opposing Claim for Reformation.

8.19 Options and Strategies.

8.20 Elements of Cause of Action for Reformation.

8.21 Statute of Limitations Is Three Years.

8.22 Only Written Contracts Can Be Reformed.

8.23 Void Contracts Generally Cannot Be Reformed.

8.24 Contract Must Fail to Express Parties' True Intent.

8.24[1] Failure to Express Parties' True Intent Must Be Due to Fraud, Mutual Mistake, or Unilateral Mistake.

8.24[2] Fraud Is Basis for Reformation.

8.24[3] Mutual Mistake Is Basis for Reformation.

8.24[4] Unilateral Mistake Is Basis for Reformation.

8.24[5] Complaint Must Allege Fraud, Mutual Mistake, or Unilateral Mistake.

8.25 All Parties Must Have Complete, Mutual Understanding of All Essential Terms of Contract.

8.26 Complaint Must Allege Plaintiff's Status As Aggrieved Party.

8.27 Complaint Must Allege Parties' True Intent.

8.28 Complaint Must Allege Contract As It Was Written.

8.29 Burden of Proof, Presumptions, and Scope of Inquiry in Reformation of Contract.

8.29[1] Plaintiff Has Burden of Proving Parties' True Intent and That Failure Was Due to Fraud or Mistake.

8.29[2] Court Presumes That Parties Intended to Make Equitable Contract.

8.29[3] Court May Inquire Into Intended Meaning of Contract.

8.30 Party May Seek Specific Performance After Reformation.

8.31 Party May Not Seek Jury Trial for Reformation.

8.32 Opposing Claim for Reformation.

8.32[1] Defendant Can Rebut Essential Elements of Plaintiff's Claim.

8.32[2] Defendant Can Demur or Answer Defects in Complaint.

8.32[3] Defendant Can Assert Affirmative Defenses in Answer.

8.32[3][a] Three-Year Statute of Limitations Is Affirmative Defense.

8.32[3][b] Res Judicata Is Affirmative Defense.

8.32[3][c] Unclean Hands Is Affirmative Defense.

8.32[3][d] Waiver of Right to Reform and Ratification of Contract Are Affirmative Defenses.

8.32[3][e] Laches Is Affirmative Defense.

8.32[3][f] Plaintiff's Negligent Failure to Discover Mistake Is Affirmative Defense.

8.33 CHECKLIST: Seeking or Opposing Specific Performance of Contract.

8.33[1] Determining Whether Specific Performance Is Available.

8.33[2] Pleading Claim for Specific Performance.

8.33[3] Opposing Claim for Specific Performance.

8.34 Options and Strategies.

8.35 Elements of Cause of Action for Specific Performance.

8.36 Either Four-Year or Two-Year Statute of Limitations Applies.

8.37 Plaintiff Must Have No Adequate Remedy at Law.

8.37[1] Specific Performance Is Unavailable When Damages Will Adequately Compensate Plaintiff.

8.37[2] Personal Property Must Be Rare or Unique.

8.37[3] Damages Presumed Inadequate Compensation for Real Property.

8.37[4] Specific Performance of Entire Contract May Be Available If Contract Relates to Both Real and Personal Property.

8.37[5] Complaint Must Allege Facts Showing That Damages Are Inadequate.

8.37[6] Contract Provision for Equitable Remedy Will Be Enforced Unless Adequate Legal Remedy Exists or Contract Is Contrary to Law or Public Policy.

8.38 Contract Must Not Be for Personal Services.

8.39 Specific Performance Cannot Be Used to Compel Performance of Obligation Party Cannot Lawfully Perform.

8.40 Contract Must Not Be Impossible to Perform.

8.41 Contract Must Not Be to Procure Act or Consent of Third Party.

8.42 Obligation Must Be Sufficiently Certain to Be Enforced.

- 8.43 Party Against Whom Specific Performance Is Sought Must Have Received Adequate Consideration.
- 8.44 Contract Must Be Just and Reasonable As to Party Against Whom Specific Performance Is Sought.
- 8.45 Contract Must Not Be Unconscionable.
- 8.46 Defendant's Assent Must Not Have Been Obtained by Misrepresentation, Concealment, Circumvention, or Unfair Practices.
- 8.47 Defendant's Assent Must Not Have Been Given Under Influence of Mistake, Misapprehension, or Surprise.
- 8.48 Plaintiff Must Have Fully Performed Conditions Precedent to Defendant's Performance.
- 8.48[1] Performance of Conditions Precedent Is Required.
- 8.48[2] Complaint Must Allege Plaintiff's Performance or Excuse.
- 8.48[3] Failure to Sign Contract Does Not Bar Specific Performance When Other Party Has Performed.
- 8.49 Contract Must Not Require Succession of Continuous Acts.
- 8.50 Complaint Must Allege Defendant's Failure to Perform.
- 8.51 For Oral Contract Within Statute of Frauds, Complaint Must Allege That Defendant Is Estopped From Relying on Statute of Frauds.
- 8.52 Complaint May Allege Alternative Theories of Recovery.
- 8.53 Plaintiff May Recover Damages Incidental to Specific Performance.
- 8.53[1] Incidental Damages Are Available in Specific Performance Actions.
- 8.53[2] Specific Performance Claim Must First Be Established.
- 8.53[3] Specific Allegation and Prayer for Incidental Damages Is Not Required.
- 8.54 Party Can Seek Specific Performance After Reformation.
- 8.55 Party May Not Seek Jury Trial for Specific Performance.
- 8.56 Plaintiff May Bring Action for Quasi-Specific Performance Against Deceased Person.
- 8.57 Opposing Claim for Specific Performance.
- 8.58 Defendant Can Assert Affirmative Defenses.
- 8.58[1] Specific Performance Is Unavailable If Contract Is for Personal Services.
- 8.58[2] Specific Performance Is Unavailable If Defendant's Assent to Contract Was Obtained by Misrepresentation, Concealment, Circumvention, or Unfair Practices.
- 8.58[3] Specific Performance Is Unavailable If Defendant's Assent to Contract Was Given Under Mistake, Misapprehension, or Surprise.

8.58[4] Specific Performance Is Unavailable If Contract Is for Performance of Unlawful Act.

8.58[5] Specific Performance Is Unavailable If Contract Is Too Uncertain to Enforce.

8.58[6] Specific Performance Is Unavailable If Plaintiff Waived Right to Specific Performance by Accepting Consideration.

8.58[7] Specific Performance Is Unavailable If Contract Is Impossible to Perform.

8.58[8] Specific Performance Is Unavailable If Contract Procures Act of Third Person.

8.58[9] Specific Performance Is Unavailable If Seller's Title in Contract for Real Property Is in Doubt.

8.58[10] Specific Performance Is Unavailable If Contract Requires Succession of Continuous Acts.

8.58[11] Specific Performance Is Unavailable If Claim Was Not Brought Within Applicable Limitations Period.

8.58[12] Specific Performance Is Unavailable If Claim Is Barred by Laches.

8.58[13] Specific Performance Is Unavailable If Plaintiff Has Adequate Remedy at Law.

8.59 CHECKLIST: Seeking or Opposing Injunctions in Contract Actions.

8.59[1] Determining Whether Injunctive Relief Is Available.

8.59[2] Seeking Injunctive Relief.

8.59[3] Opposing Claim for Injunctive Relief.

8.60 Options and Strategies.

8.61 Grounds for Obtaining Permanent Injunction to Prevent Breach of Contract.

8.62 Plaintiff Must Have No Adequate Remedy at Law.

8.63 Injunction to Enforce Personal Services Contract Is Available Only Under Very Limited Circumstances.

8.63[1] Injunctive Relief Generally Is Unavailable to Enforce Personal Service Contracts.

8.63[2] Injunction Is Available When Personal Services Are Extraordinary or Unique.

8.64 Injunction Can Enforce Trust Agreement.

8.65 Injunction Can Enforce Noncompetition Agreement.

8.66 Injunction Can Enforce Nonprofit Cooperative Marketing Contract.

8.67 Requirements to Obtain Permanent Injunction.

8.68 Permanent Injunction Can Be Obtained by Seeking Judgment Granting Desired Relief.

8.69 Jury Trial Is Unavailable.

8.70 Opposing Party Can Contest Existence of Essential Element.

8.71 Defendant Can Raise Affirmative Defenses.

8.71[1] Changed Circumstances Render Injunctive Relief Unnecessary.

8.71[2] Plaintiff's Claim Can Be Barred by Laches.

8.71[3] Injunction Is Unavailable If Plaintiff Has Adequate Remedy at Law.

8.71[4] Injunction Is Unavailable If Not in Public Interest.

8.71[5] Injunction Is Unavailable If Relief Granted Would Be Contrary to Law.

8.71[6] Injunction Is Unavailable If Plaintiff Has Unclean Hands.

8.71[7] Injunctive Relief Is Unavailable If Relief Sought Is Overbroad.

8.71[8] Injunctive Relief Is Unavailable If Contract Cannot Be Specifically Enforced.

8.72 Notice of Rescission of Contract.

Notice of Rescission of Contract.

8.73 Complaint for Relief Based on Rescission of Contract.

Complaint for Relief Based on Rescission of Contract.

8.74 Complaint for Reformation of Contract.

Complaint for Reformation of Contract.

8.75 Complaint for Specific Performance of Contract.

Complaint for Specific Performance of Contract.

8.76 Complaint for Permanent Injunction Enjoining Breach of Personal Services Contract.

Complaint for Permanent Injunction Enjoining Breach of Personal Services Contract.

8.77 Answer to Complaint for Rescission.

Answer to Complaint for Rescission.

8.78 Answer to Complaint for Reformation.

Answer to Complaint for Reformation.

8.79 Answer to Complaint for Specific Performance.

Answer to Complaint for Specific Performance.

8.80 Answer to Complaint for Injunction.

Answer to Complaint for Injunction.



64 of 189 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 8 Seeking or Opposing Equitable Remedies in Contract Actions
I. STRATEGY

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8.01 Scope.

This chapter covers:

- Objectives and strategies for seeking or opposing various equitable remedies in contract actions, including rescission, reformation, specific performance, injunctions [see 8.02].
- Procedures and considerations in seeking or opposing rescission of a contract [see 8.03 -8.17].
- Procedures and considerations in seeking or opposing reformation of a contract [see 8.18 -8.32].
- Procedures and considerations in seeking or opposing specific performance of a contract [see 8.33 -8.58].
- Procedures and considerations in seeking or opposing injunctive relief in a contract action [see 8.59 -8.71].
- Forms for use in all of these actions [see 8.72 -8.80].

Core Statutes:

CC §§ 1688-1693, 3399-3402, 3384-3395, 3420-3423; CCP § 525 et seq.

Legal Topics:

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

Contracts Law Remedies Equitable Relief General Overview Contracts Law Remedies Equitable Relief Injunctive Relief Contracts Law Remedies Reformation Contracts Law Remedies Rescission & Redhibition General Overview Contracts Law Remedies Specific Performance



65 of 189 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 8 Seeking or Opposing Equitable Remedies in Contract Actions

I. STRATEGY

1-8 MB Practice Guide: CA Contract Litigation 8.02

8.02 Objective and Strategy.

To ensure that a party obtains all relief available in a contract, the aggrieved party must consider equitable remedies in addition to legal remedies. In contract actions, courts have broad equitable power to fashion appropriate remedies [*Zarrah v. Zarrah* (1988) 205 CA3d 1, 4-5, 252 CR 20]. Equitable remedies may be sought alone, in conjunction with other equitable remedies, or in conjunction with legal remedies.

The remedy of rescission extinguishes a contract as if it never existed [*Asmus v. Pacific Bell* (2000) 23 C4th 1, 6 n1, 96 CR2d 179, 999 P2d 71 ; see CC § 1688 ("a contract is extinguished by its rescission")]. The purpose of rescission is to restore both parties to their pre-contract positions as far as possible [*Gardiner Solder Co. v. Supalloy Corp.* (1991) 232 CA3d 1537, 1544, 284 CR 206 ; see 8.03 et seq.].

The remedy of reformation is used to reframe a written instrument to accurately express the parties' true agreement when, through fraud, mutual mistake, or certain types of unilateral mistake, the writing does not embody their agreement [CC § 3399; *Bailard v. Marden* (1951) 36 C2d 703, 708, 227 P2d 10]. The purpose of reformation is to make a written agreement fully express the intention of the parties [*American Home Ins. Co. v. Travelers Indem. Co.* (1981) 122 CA3d 951, 963, 175 CR 826 ; see 8.18 et seq.].

The remedy of specific performance is used to procure the promised performance of a contract by a party who has failed or refused to perform, when there is no adequate remedy at law [CC §§ 3384-3395; *Schaefer v. United Bank & Trust Co.* (1930) 104 CA 635, 641, 286 P 723 ; *Patterson v. Reddish* (1922) 56 CA 197, 202, 204 P 565 ; see 8.33 et seq.].

An injunction is a writ or order requiring a person to refrain from doing a particular act [CCP § 525; *Long Beach Drug Co. v. United Drug Co.* (1939) 13 C2d 158, 170-171, 88 P2d 698] . Injunctions can be preliminary or permanent. Injunctions normally are not granted in advance to prevent breaches of contract. However, they are granted in limited circumstances to prevent the breach of a contract that would be specifically enforceable [CC § 3423(e); *Steinmeyer v. Warner Consol. Corp.* (1974) 42 CA3d 515, 519, 116 CR 57 ; see 8.59 et seq.].

A jury trial generally is not available in an action seeking equitable remedies [*Porter v. Superior Court* (1977) 73 CA3d 793, 798-801, 141 CR 59] . This includes actions under the Unfair Competition Law (UCL) [B&P Code § 17200 et seq.], because that law provides an equitable cause of action. Thus, there is no right to a jury trial in a UCL action, even if contract issues are implicated [*Hodge v. Superior Court* (2006) 145 CA4th 278, 284-285, 51 CR3d 519] .

However, when legal and equitable issues are joined in the same action, the parties may demand a jury trial on the legal issues [*Abbott v. City of Los Angeles* (1958) 50 C2d 438, 462, 326 P2d 484 ; see also *Runyan v. Pacific Air Indus., Inc.* (1970) 2 C3d 304, 312-313, 85 CR 138, 466 P2d 682 (right to jury trial is determined by nature of substantive relief requested)].



Strategic Point:

Judges will sometimes allow advisory juries when the equitable claims require broad factual determinations [see, e.g., *Saret-Cook v. Gilbert, Kelly, Crowley & Jennett* (1999) 74 CA4th 1211, 1227, 88 CR2d 732].



Cross References:

See Ch. 2, Determining What Causes of Action Exist;

Ch. 6, Using or Opposing Provisional Remedies in Contract Actions;

Ch. 7, Seeking or Opposing Damages in Contract Actions;

Ch. 9, Seeking or Opposing Quantum Meruit or Quantum Valebant Recovery in Contract Actions;

Ch. 10, Seeking or Opposing Statutory Remedies in Contract Actions;

Ch. 11, Seeking or Opposing Declaratory Relief in Contract Matters;

Ch. 12, Recovering Attorney's Fees and Costs in Contract Litigation;

Ch. 13, Attacking or Defending Existence of Contract--Absence of Essential Element;

Ch. 14, Attacking or Defending Existence of Contract--Lack of Capacity;

Ch. 15, Attacking or Defending Existence of Contract--Failure to Comply With Applicable Formalities;

Ch. 16, Attacking or Defending Existence of Contract--Mistake;

Ch. 17, Attacking or Defending Existence of Contract--Fraud, Duress, Menace, and Undue Influence;

Ch. 18, Asserting or Defending Claim That Contract Is Illegal, Contrary to Public Policy, or Unconscionable; and

Ch. 22, Suing or Defending Action for Breach of Contract.

For Tips on updating case law and expanding your research with additional resources, see **How to Use Lexis.com With This Publication** at the front of this volume.

Legal Topics:

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

Contracts Law Remedies Equitable Relief General Overview Contracts Law Remedies Reformation Contracts Law Remedies Rescission & Redhibition General Overview Contracts Law Remedies Specific Performance



66 of 189 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 8 Seeking or Opposing Equitable Remedies in Contract Actions

II. SEEKING OR OPPOSING RESCISSION OF CONTRACT

1-8 MB Practice Guide: CA Contract Litigation 8.03

8.03 CHECKLIST: Seeking or Opposing Rescission of Contract.

8.03[1] Determining Whether Contract May Be Rescinded.

- ☐ Determine whether all parties to contract will mutually consent to rescission.

Authority:

CC § 1689(a)

Discussion:

See 8.06

- ☐ If only one party wants to unilaterally rescind contract, determine if any of following grounds for unilateral rescission exist:

Authority:

CC § 1689(b)

Discussion:

See 8.07

- ☐ Was either or both parties' consent to contract the result of mistake?

Authority:

CC § 1689(b)(1)

Discussion:

See 8.07[3]

- ☐ Was consent to contract by party seeking rescission obtained through duress, menace, fraud, or

undue influence?

Authority:

CC § 1689(b)(1)

Discussion:

See 8.07[3]

- ☐ Did party not seeking rescission breach any of its obligations under contract?

Authority:

CC § 1689(b)(2)

Discussion:

See 8.07[4]

- ☐ Was there a there was a failure of consideration for obligation of party seeking rescission?

Authority:

CC § 1689(b)(2)-(4)

Discussion:

See 8.07[5]

- ☐ Was consideration for rescinding party's obligation entirely void?

Authority:

CC § 1689(b)(3)

Discussion:

See 8.07[5]

- ☐ Did consideration for rescinding party's obligation fail in a material respect?

Authority:

CC § 1689(b)(4)

Discussion:

See 8.07[5]

- ☐ Is contract unlawful for causes that do not appear in contract itself?

Authority:

CC § 1689(b)(5)

Discussion:

See 8.07[6]

- ☐ Would public interest will be prejudiced by permitting contract to stand?

Authority:*CC § 1689(b)(6)***Discussion:**

See 8.07[7]

- ☐ Is rescission is permitted by statute?

Authority:*CC § 1689(b)(7)***Discussion:**

See 8.07[8]

- ☐ Determine whether partial rescission is appropriate or possible.

Authority:*Simmons v. California Inst. of Tech. (1949) 34 C2d 264, 275, 209 P2d 581***Discussion:**

See 8.08

8.03[2] Giving Notice and Consent to Rescission.

- ☐ If issue exists as to whether mutual rescission occurred, verify that all parties to contract clearly and unequivocally agreed to rescind it.

Authority:*CC § 1689(a)***Discussion:**

See 8.06

- ☐ Determine whether party seeking unilateral rescission promptly notified other parties of intent to rescind.

- ☐ If not, attorney representing party seeking rescission should advise party to give such notice immediately by either:

- ☐ Informing other parties of intent to rescind; or

- ☐ Serving other parties with a pleading in an action for rescission.

Authority:*CC § 1691(a)***Discussion:**

See 8.09

Form:

See 8.72

- ☐ Determine whether party seeking unilateral rescission has restored all consideration received under contract.

☐ If not, attorney representing party seeking rescission should advise party to restore all consideration immediately.

Authority: *CC § 1691(b)*

Discussion:

See 8.09

8.03[3] Seeking Relief Based on Rescission.

- ☐ Allege all of following in complaint:

☐ Relevant terms of contract.

Authority:*CC §§ 1688-1692***Discussion:**

See 8.10[2]

Form:

See 8.73

- ☐ Facts showing existence of a ground for rescission.

Authority:*CC §§ 1688-1692***Discussion:**

See 8.10[3]

Form:

See 8.73

- ☐ Plaintiff's performance or excuse for nonperformance.

Authority:*Consolidated Concessions Co. v. McConnell (1919) 40 CA 443, 444-445, 180 P 842***Discussion:**

See 8.10[4]

Form:

See 8.73

- ☐ Injury or harm suffered by plaintiff.

Authority:*Guthrie v. Times-Mirror Co. (1975) 51 CA3d 879, 886, 124 CR 577***Discussion:**

See 8.10[5]

Form:

See 8.73

- ☐ One or more of following allegations, as appropriate:

☐ Allegation that plaintiff gave notice of rescission and offered to restore consideration received;

☐ Facts showing that restoration is not necessary; or

☐ Statement that service of summons and complaint is to serve as notice of rescission and offer of restoration.

Authority:*CC § 1691***Discussion:**

See 8.10[6]

Form:

See 8.73

- ☐ Relief based on rescission that plaintiff seeks to obtain.

Authority:*CC § 1692***Discussion:**

See 8.14

Form:

See 8.73

- ☐ Ensure that all required contracting parties are joined in action.

Authority:*Hartman Ranch Co. v. Associated Oil Co. (1937) 10 C2d 232, 262-265, 73 P2d 1163*

Discussion:

See 8.11

- ☐ Bring claim within time permitted by applicable statute of limitations.

Authority:

CCP § 337

Discussion:

See 8.12

8.03[4] Opposing Claim for Rescission.

- ☐ Analyze complaint to determine appropriate response.

Authority:

CCP § 430.10

Discussion:

See 8.15

- ☐ Rebut any essential elements of plaintiff's claim if possible.

Authority:

CCP § 430.30

Discussion:

See 8.15

Form:

See 8.77

- ☐ Plead any appropriate affirmative defenses, such as:

Authority:

CCP § 430.30

Discussion:

See 8.16

Form:

See 8.77

- ☐ Plaintiff is in material default of performance.

Authority:

Nelson v. Spence (1960) 182 CA2d 493, 499, 6 CR 312

Discussion:

See 8.16[1]

- ☐ Plaintiff has waived right to rescind.

Authority:

Whitney Inv. Co. v. Westview Dev. Co. (1969) 273 CA2d 594, 603, 78 CR 302

Discussion:

See 8.16[2]

- ☐ Claim was not brought within applicable limitations period.

Authority:

CCP § 337(3); Miller v. Bechtel Corp. (1983) 33 C3d 868, 873, 191 CR 619, 663 P2d 177

Discussion:

See 8.16[3]

- ☐ Plaintiff delayed giving notice of rescission and delay was substantially prejudicial.

Authority:

CC § 1693

Discussion:

See 8.16[4]

- ☐ It is impossible for defendant to perform under contract.

Authority:

Calabrese v. Rexall Drug & Chem. Co. (1963) 218 CA2d 774, 784, 32 CR 665

Discussion:

See 8.16[5]

- ☐ Rescission would harm an innocent third party's rights.

Authority:

Gill v. Rich (2005) 128 CA4th 1254, 1265

Discussion:

See 8.16[6]

- ☐ Determine whether defendant might be able to obtain a setoff in event that plaintiff prevails on rescission claim.

Authority: *CC § 1692*

Discussion:

See 8.17; see 8.14[7]

Legal Topics:

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

Commercial Law (UCC) Sales (Article 2) Form, Formation & Readjustment Modification, Rescission & Waiver Contracts
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Restitution



67 of 189 DOCUMENTS

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Chapter 8 Seeking or Opposing Equitable Remedies in Contract Actions

II. SEEKING OR OPPOSING RESCISSION OF CONTRACT

1-8 MB Practice Guide: CA Contract Litigation 8.04

8.04 Options and Strategies.

8.04[1] Rescission "Unmakes" Contract. Rescission of a contract is a statutory process that extinguishes a contract as if it never existed [*Asmus v. Pacific Bell* (2000) 23 C4th 1, 6 n1, 96 CR2d 179, 999 P2d 71 ; see CC § 1688]. It is tantamount to "unmaking" the contract [*People ex rel. Kennedy v. Beaumont Inv., Ltd.* (2003) 111 CA4th 102, 133], as if it were void from the outset [see *PWS, Inc. v. Ban* (1991) 234 CA3d 223, 228, 285 CR 598]. Rescission is intended to restore both parties to their pre-contract position as much as possible [*Gardiner Solder Co. v. Supalloy Corp.* (1991) 232 CA3d 1537, 1544, 284 CR 206 ; *Fireman's Fund Am. Ins. Co. v. Escobedo* (1978) 80 CA3d 610, 619, 145 CR 785].

Rescission is effected by the parties' mutual consent, or by one party unilaterally as prescribed by CC § 1689 [*Asmus v. Pacific Bell* (2000) 23 C4th 1, 12, 96 CR2d 179, 999 P2d 71].

8.04[2] Any Party May Seek Relief Based on Rescission of Contract. Once a contract has been rescinded (either by the mutual consent of the parties or unilaterally by one party), any party to the contract may seek relief based on the rescission [CC § 1692; see 8.14].

8.04[3] Void Contract May Be Disregarded Without Rescission, but Rescission Action Still May Be Safest Practice. If a contract is void, it may be disregarded without the necessity of rescission, and a party can seek relief on other theories of recovery [*Ford v. Shearson Lehman Am. Express, Inc.* (1986) 180 CA3d 1011, 1015, 1028, 225 CR 895].

**Strategic Point--Plaintiff:**

Even if a party believes a contract to be void, it may be the better practice to include a cause of action for rescission, along with other theories of recovery, to be safe.

**Cross Reference:**

Discussion of void and voidable contracts, see California Forms of Pleading and Practice, Ch. 140, Contracts (Matthew Bender).

8.04[4] Plaintiff Can Seek Both Rescission and Damages, but Must Elect One or the Other. Bringing a claim for contract damages is not inconsistent with a claim for relief based on rescission. An aggrieved party is entitled to complete relief, including restitution of any benefits conferred as a result of the transaction, and appropriate consequential damages [CC § 1692].

Duplicate recovery or inconsistent items of recovery are not permitted, however [CC § 1692]. Because an action for damages is based on affirmance of a contract (whereas rescission is based on the disaffirmance of a contract), the plaintiff cannot have it both ways, and damages cannot be recovered if a contract is rescinded [*Sharabianlou v. Karp* (2010) 181 CA4th 1133, 1146, 105 CR3d 300 (trial court erred in awarding "benefit of the bargain" damages in rescission action); *Akin v. Certain Underwriters at Lloyd's London* (2006) 140 CA4th 291, 296, 44 CR3d 284]. Therefore, a party may plead both a claim for damages and a claim for rescission, and if the court determines that the contract cannot be rescinded, the court can award other relief, including damages [CC § 1692; *Walters v. Marler* (1978) 83 CA3d 1, 16, 147 CR 655]. The plaintiff is not required to elect remedies in advance unless prejudice to the other party will otherwise result [*Warfield v. Richey* (1959) 167 CA2d 93, 99, 334 P2d 101]. Thus, the plaintiff is not required to make an election of remedies before the case is submitted to the jury, but if the plaintiff thereafter makes an election in favor of rescission, items of damages that are "duplicate" of recovery will be stricken [see *Jahn v. Brickey* (1985) 168 CA3d 399, 406, 214 CR 119].



Cross Reference:

See Ch. 7, Seeking or Opposing Damages in Contract Actions.

8.04[5] Entire Contract Must Be Rescinded Unless It Is Divisible. A party generally must rescind the entire contract [*IMO Dev. Corp. v. Dow Corning Corp.* (1982) 135 CA3d 451, 458, 185 CR 341], but partial rescission is possible if the contract is divisible [*Merced County Mut. Fire Ins. Co. v. State of California* (1991) 233 CA3d 765, 775-776, 284 CR 680].

8.04[6] Opposing Party Should Consider Various Defenses to Rescission Action. A party opposing rescission should consider the potential applicability of a variety of defenses, including the defenses that the other party:

- Is in material default under the contract;
- Waived the right to rescind;
- Did not bring the action within the applicable limitations period;
- Delayed in giving notice;
- Did not properly elect remedies; or
- Is subject to any of the other defenses that are potentially available in equitable actions, such as unclean hands, laches, and the like.

In addition, the party opposing rescission may assert that rescission is precluded, that impossibility of performance is a bar, or that the party seeking rescission has not complied with proper procedure [see 8.16, 8.17].

Legal Topics:

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

Commercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentModification, Rescission & WaiverContracts LawRemediesRescission & RedhibitionGeneral OverviewReal Property LawPurchase & SaleRemediesRescission &

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68 of 189 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 8 Seeking or Opposing Equitable Remedies in Contract Actions

II. SEEKING OR OPPOSING RESCISSION OF CONTRACT

1-8 MB Practice Guide: CA Contract Litigation 8.05

8.05 General List of Grounds for Rescinding Contract.

Grounds for rescission include the following:

- The parties can mutually rescind if all parties consent to rescission [CC § 1689(a); see 8.06].
- One party may unilaterally rescind if any of the following applies [CC § 1689(b)]:
 - ☐ The rescinding party's consent to the contract was given by mistake or obtained through duress, menace, fraud, or undue influence [see 8.07[3]].
 - ☐ Consideration for the rescinding party's obligation failed, in whole or in part, through the fault of the other party [see 8.07[5]].
 - ☐ Consideration for the rescinding party's obligation is void [see 8.07[5]].
 - ☐ Consideration for the rescinding party's obligation failed in a material respect before it was rendered [see 8.07[5]].
 - ☐ The contract is unlawful for reasons that do not appear in the contract, and the parties are not equally at fault [see 8.07[6]].
 - ☐ It is contrary to the public interest to permit the contract to stand [see 8.07[7]].
 - ☐ Statutory conditions are met [see 8.07[8]].

Jury Instructions:

Rescission, see *California Forms of Jury Instruction, Ch. 3G, Instr. MB 300G.01* (Matthew Bender).

Distinguish--Abandonment Versus Rescission:

Abandonment of duties under a contract by one party is likely to be a breach of the contract, while a mutual abandonment by both parties effectively amounts to mutual rescission of the contract [C. *Norman Peterson Co. v. Container Corp. of Am. (1985) 172 CA3d 628, 640-644, 218 CR 592 ; see 8.06*].

Legal Topics:

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

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69 of 189 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 8 Seeking or Opposing Equitable Remedies in Contract Actions

II. SEEKING OR OPPOSING RESCISSION OF CONTRACT

1-8 MB Practice Guide: CA Contract Litigation 8.06

8.06 Both Parties May Rescind Contract by Mutual Consent.

8.06[1] Elements of Claim for Mutual Rescission. The formalities required for mutual rescission of a contract are the same as those required for formation of a contract [*Harriman v. Tetik* (1961) 56 C2d 805, 810, 17 CR 134, 366 P2d 486] :

- A meeting of the minds;
- An offer;
- Acceptance of the offer; and
- Consideration.

The mutual promises to waive rights under the contract to be rescinded are consideration for the rescission [*Schertzinger v. Williams* (1961) 198 CA2d 242, 246, 17 CR 719] .

Consider:

Since mutual rescission, by definition, involves the consent of both parties, normally it is accomplished without resort to litigation. If all parties want to abrogate the contract, there is no need for anyone to ask a court to intervene. The problems in this area more often arise when a question is raised after the fact as to whether mutual rescission actually occurred--in other words, whether or not the parties had actually intended to and did abrogate the contract. For example, one party may sue another for breach of contract, and the other, believing that the contract had been mutually rescinded and that performance was no longer required, may be compelled to raise prior mutual rescission as a defense. The best defense to this kind of problem is clarity. At the time of the rescission, the parties should clearly and unequivocally indicate in writing their intent to rescind the contract, just as they should have been clear and unequivocal in the original contract itself. It is hard to dispute the status of the contract if a written agreement expressly rescinding it exists (unless of course the rescinding agreement itself is subject to attack). Conversely, if a party refuses to execute a written rescission agreement, the other party will at least be put on notice of that party's resistance to rescission, and is less likely to be misled into suspending performance under the contract in the mistaken belief that rescission had occurred.

 Cross References:

See Ch. 13, Attacking or Defending Existence of Contract--Absence of Essential Element.

Form for written agreement to rescind contract by mutual consent, see *California Legal Forms*, § 77.330 (*Matthew Bender*).

Unless the contract being rescinded is for the sale of goods governed by UCC Division 2 and provides that it can only be rescinded in writing, an oral agreement to rescind is sufficient [*Sass v. Hank (1951) 108 CA2d 207, 215, 238 P2d 652*].

 Cross References:

See Ch. 26, Contract for Sale of Goods--Seeking Remedies Under California Commercial Code.

See also Ch. 27, Contract for Sale of Goods--Attacking or Defending Existence of Contract Under California Commercial Code.

An oral agreement to rescind a written contract is sufficient even if the underlying contract is within the statute of frauds [*Hastings v. Matlock (1985) 171 CA3d 826, 837, 217 CR 856*].



Warning:

Although an oral agreement may be legally sufficient, it is more likely to be a source of misunderstanding among the parties, and can be much harder to prove if problems arise after the fact. Written agreements are far better.



Strategic Point--Both Parties:

An oral agreement for mutual rescission may be specifically enforced [see *Hastings v. Matlock (1985) 171 CA3d 826, 840-842, 217 CR 856*].



Cross Reference:

Discussion of seeking or opposing specific performance of a contract, see 8.33 et seq.

A mutual rescission need not be express, but the intent to mutually rescind may be implied from the conduct of the parties [*Unger v. Isaacs (1954) 123 CA2d 533, 535, 266 P2d 869*]. The intent of the parties is determined by the facts and circumstances of the particular case.

Example:

If the parties negotiate a new and different contract concerning the same subject matter as the original agreement, an intent to mutually rescind the original contract can be implied by that conduct [*Busch v. Globe Indus. (1962) 200 CA2d 315, 320, 19 CR 441* ; *Honda v. Reed (1958) 156 CA2d 536, 539, 319 P2d 728*].

8.06[2] Consent of Parties Is Basis for Mutual Rescission. A contract may be rescinded if all the parties consent to the rescission [CC § 1689(a)]. After a mutual rescission, either party may seek relief based on the rescission [see, e.g., *Luna Records Corp. v. Alvarado (1991) 232 CA3d 1023, 1026, 283 CR 865*], such as by an action to recover money or property owed to by the other party as a consequence of the rescission [CC § 1692; see *Alder v. Drudis (1947) 30 C2d 372, 384-385, 182 P2d 195* (recovery of specific property)].

 Cross Reference:

Relief available after rescission, see 8.14.

Jury Instructions:

Rescission by Consent, see *California Forms of Jury Instruction, Ch. 3G, Instr. MB 300G.02* (Matthew Bender).

**Strategic Point--Both Parties:**

If the parties mutually rescind the contract, the statute of limitations for an action seeking relief based on the rescission begins to run on the date of the rescission [see *Luna Records Corp. v. Alvarado* (1991) 232 CA3d 1023, 1026, 283 CR 865] .

 Cross Reference:

Statute of limitations in rescission actions, see 8.12.

8.06[3] Unequivocal Conduct Is Required for Mutual Rescission. The conduct of the parties relied on to establish mutual rescission must be positive, unequivocal, and inconsistent with the continued assertion of rights under the contract [*Pennel v. Pond Union Sch. Dist.* (1973) 29 CA3d 832, 838, 105 CR 817] .

Example:

Conduct equally consistent with illness, as claimed by one party, will not establish an intent to rescind or abandon the contract [*Pennel v. Pond Union Sch. Dist.* (1973) 29 CA3d 832, 838, 105 CR 817 ; *Ross v. Tabor* (1921) 53 CA 605, 615, 200 P 971].

 Cross Reference:

See *California Points and Authorities, § 50.470* (Matthew Bender).

8.06[4] Third Party Beneficiary Contract May Be Mutually Rescinded. Absent estoppel, the parties to a third-party beneficiary contract may rescind the agreement at any time before commencement of an action by the third party [CC § 1559; *R.J. Cardinal Co. v. Ritchie* (1963) 218 CA2d 124, 136, 32 CR 545] .

Distinguish:

A third party beneficiary has the right to enforce a contract, but not to rescind it [*Schauer v. Mandarin Gems of Cal., Inc.* (2005) 125 CA4th 949, 959-960].

Jury Instructions:

Rescission of Third Party Beneficiary Contract, see *California Forms of Jury Instruction, Ch. 3G, Instr. MB 300G.04* (Matthew Bender).

Rescission Based on Improper Conduct of Third Party, see *California Forms of Jury Instruction, Ch. 3G, Instr. MB 300G.06* (Matthew Bender).

Estoppel to Rescind Third Party Beneficiary Contract, see *California Forms of Jury Instruction, Ch. 3F, Instr. MB 300F.28* (Matthew Bender).

 Cross Reference:

See Ch. 19, Seeking or Opposing Recovery As Third Party Beneficiary of Contract.

8.06[5] Basic Four-Year or Two-Year Statute of Limitations Apply. An action based on the rescission of a contract in writing is subject to the four-year statute of limitations [*CCP* § 337(3)]. An action based on the rescission of an oral contract is subject to the two-year statute of limitations [*CCP* § 339(3)].



Cross Reference:

Detailed discussion of applicable statutes of limitation in contract actions, see 8.12.

Legal Topics:

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

Commercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentModification, Rescission & WaiverContracts
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70 of 189 DOCUMENTS

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Chapter 8 Seeking or Opposing Equitable Remedies in Contract Actions

II. SEEKING OR OPPOSING RESCISSION OF CONTRACT

1-8 MB Practice Guide: CA Contract Litigation 8.07

8.07 One Party May Unilaterally Rescind Contract.

8.07[1] Elements of Claim for Unilateral Rescission. To establish a claim for unilateral rescission, the plaintiff must show all of the following [*see Guthrie v. Times-Mirror Co. (1975) 51 CA3d 879, 883-886, 124 CR 577*] :

- Formation of the contract.
- The ground for rescission [*see 8.07[3] -[8]*].
- The plaintiff's performance or excuse for nonperformance.
- The defendant's nonperformance.
- The plaintiff's discovery of the basis for rescission.
- The injury or harm suffered by the plaintiff.
- Proper notice of rescission and an offer of restoration.

8.07[2] Basic Four-Year or Two-Year Statute of Limitations Apply. An action based on the rescission of a contract in writing is subject to the four-year statute of limitations [*CCP* § 337(3)]. An action based on the rescission of an oral contract is subject to the two-year statute of limitations [*CCP* § 339(3)].



Cross Reference:

Detailed discussion of applicable statutes of limitation in contract actions, *see 8.12*.

8.07[3] Party May Unilaterally Rescind If Rescinding Party's Consent to Contract Was Given by Mistake or Obtained Through Duress, Menace, Fraud, or Undue Influence. A party may unilaterally rescind a contract if the consent of rescinding party was [*CC* § 1689(b)(1)]:

- Given by mistake; or

- Obtained through duress, menace, fraud, or undue influence.

Jury Instructions:

Improperly Obtained Consent, see *California Forms of Jury Instruction, Ch. 3G, Instr. MB 300G.05* (Matthew Bender).

Jury instructions relating to mistake, see *California Forms of Jury Instruction, Ch. 3G, Instrs. MB 300G.20 -MB 300G.28* (Matthew Bender).



Cross References:

See Ch. 16, Attacking or Defending Existence of Contract--Mistake.

See also Ch. 17, Attacking or Defending Existence of Contract--Fraud, Duress, Menace, and Undue Influence.

8.07[4] Party May Unilaterally Rescind for Other Party's Breach. A contract may be rescinded if the other party fails to perform its obligations under the contract, such as by failing to provide the agreed consideration, whether the performance of some task, or payment of money [CC § 1689(b)(2); *Wylar v. Feuer* (1978) 85 CA3d 392, 403-404, 149 CR 626].

Example:

Wife was not entitled to rescind postmarital agreement based on purported anticipatory breach by husband because wife previously had repudiated the agreement, excusing any further performance by the husband [*In re Marriage of Burkle* (2006) 139 CA4th 712, 749-751, 43 CR3d 181] .

Jury Instructions:

Rescission for Breach, see *California Forms of Jury Instruction, Ch. 3G, Instr. MB 300G.08* (Matthew Bender).

8.07[5] Party May Unilaterally Rescind If Consideration for Rescinding Party's Obligation Failed or Is Void. A party may unilaterally rescind a contract in any of the following circumstances [CC § 1689(b)(2)-(4)]:

- Consideration for the rescinding party's obligation failed, in whole or in part, through the fault of the other party.
- Consideration for the rescinding party's obligation is entirely void.
- Consideration for the rescinding party's obligation failed in a material respect before it was rendered.

Jury Instructions:

Material Failure of Consideration, see *California Forms of Jury Instruction, Ch. 3G, Instr. MB 300G.07* (Matthew Bender).

8.07[6] Party May Unilaterally Rescind If Contract Is Unlawful. A party may unilaterally rescind a contract if the contract is unlawful for causes that do not appear in the contract and the parties are not equally at fault [CC § 1689(b)(5)]. A contract is unlawful if its consideration or object is any of the following [CC § 1667]:

- Contrary to an express provision of law.
- Contrary to the policy of express law.

- Otherwise contrary to good morals.

Example:

A corporation that was involved in an illegal stock purchase could not rescind the purchase agreement [*Tiedje v. Aluminum Taper Milling Co. (1956) 46 C2d 450, 453-454, 296 P2d 554*] .

Judge's Perspective:

Just because one party to an illegal contract may not rescind it does not mean that the courts will require performance. Rather, the purpose of the rule is to ensure that neither party can seek the assistance of the court in connection with the illegal contract: the promisee cannot enforce it, and the promisor cannot seek rescission. "Ordinarily, a party to an illegal contract can neither recover damages for breach nor, by rescinding, recover the performance that he has rendered or its value" [*Tiedje v. Aluminum Taper Milling Co. (1956) 46 C2d 450, 453, 296 P2d 554*] . However, this rule is subject to exceptions, the primary of which is that if one party is ignorant of the facts giving rise to the illegality and the other party is not, the first party may seek rescission against the second [*Tiedje v. Aluminum Taper Milling Co. (1956) 46 C2d 450, 454, 296 P2d 554* (citing Restatement (Second) of Contracts § 599(a))].

 Cross Reference:

See Ch. 18, Asserting or Defending Claim That Contract Is Illegal, Contrary to Public Policy, or Unconscionable.

8.07[7] Party May Unilaterally Rescind If Public Interest Will Be Damaged by Permitting Contract to Stand. A party may unilaterally rescind a contract if the public interest will be prejudiced by letting the contract stand [CC § 1689(b)(6)].

 Cross Reference:

See Ch. 18, Asserting or Defending Claim That Contract Is Illegal, Contrary to Public Policy, or Unconscionable.

8.07[8] Party May Unilaterally Rescind If Statute Specifically Allows Rescission. A party may unilaterally rescind a contract if a statute specifically provides for rescission [CC § 1689(b)(7); see CC §§ 39, 1533, 1566, 1785, 1789, 1930, 2314; Corp Code § 2470; Ins Code §§ 331, 338, 359, 447, 1904, 2030].

Many specific types of contracts, most relating to consumer transactions, provide for cancellation by the consumer within a specified period [see CC §§ 1689.2-1689.24, 2945.2; see, e.g., CC § 1689.6 (right to cancel home solicitation contract or offer within three days of signing)].

 Cross Reference:

Discussion of types of consumer contracts subject to rescission, see California Forms of Pleading and Practice, Ch. 127, Consumer Contracts and Loans (Matthew Bender); or *California Legal Forms*, § 77.22.

An insurance company may rescind a contract of insurance for a variety of improper acts by the insured, including concealment and fraudulent omissions [Ins Code § 650; see Ins Code § 330 et seq.; *O'Riordan v. Federal Kemper Life Assurance (2005) 36 C4th 281, 286-287* (disputed material fact as to whether in her application for life insurance policy, insured concealed her past smoking in order to obtain nonsmoker rate, entitling insurer to rescind policy)]. Even a negligent or unintentional misrepresentation by an insured permits an insurer to rescind an insurance policy [Ins Code § 331; *Mitchell v. United National Ins. Co. (2005) 127 CA4th 457, 473*].

Exception:

An insurance company waives disclosure of material facts in an application when the facts are distinctly implied by other information communicated to it and the company fails to make inquiries as to such facts [Ins Code § 336; *West Coast Life Ins. Co. v. Ward* (2005) 132 CA4th 181, 192, 33 CR3d 319] .

Jury Instructions:

Rescission for Misrepresentation or Concealment in Insurance Application--Essential Factual Elements, see *Judicial Council of California Civil Jury Instructions, CACI No. 2308* (LexisNexis Matthew Bender).

**Cross Reference:**

Grounds for rescission of insurance contract, see California Insurance Law and Practice, Ch. 8, The Insurance Contract.

Legal Topics:

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

Commercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentModification, Rescission & WaiverCommercial Law (UCC)Sales (Article 2)RemediesStatutes of LimitationsTime LimitationsContracts LawRemediesRescission & RedhibitionGeneral OverviewReal Property LawPurchase & SaleRemediesRescission & Restitution



71 of 189 DOCUMENTS

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Chapter 8 Seeking or Opposing Equitable Remedies in Contract Actions

II. SEEKING OR OPPOSING RESCISSION OF CONTRACT

1-8 MB Practice Guide: CA Contract Litigation 8.08

8.08 Either or Both Parties May Seek Partial Rescission of Contract.

One or both of the parties may seek partial rescission on proper grounds if a contract is severable or divisible. This is commonly shown by consideration that is apportioned [*Simmons v. California Inst. of Tech. (1949) 34 C2d 264, 275, 209 P2d 581*] . If the contract is entire and not severable, partial rescission is not available [*IMO Dev. Corp. v. Dow Corning Corp. (1982) 135 CA3d 451, 458-459, 185 CR 341* ; see *Habitat Trust for Wildlife, Inc. v. City of Rancho Cucamonga (2009) 175 CA4th 1306, 1344, 96 CR3d 813* (savings clause was of no effect after rescission because entire contract was extinguished)].

Example:

A construction contract that covered two buildings with separate payments for each building was divisible because the consideration was apportioned. A severable part of the contract could be rescinded while the rest of the contract remained operable [*Simmons v. California Inst. of Tech. (1949) 34 C2d 264, 275, 209 P2d 581*] .

Distinguish:

A court has the equitable power to set aside a release in a contract induced by fraud. This is different from partial rescission, and a party fraudulently induced to execute a contract containing a release is not required to rescind the contract and return consideration received in order to pursue a fraud claim [*Persson v. Smart Inventions, Inc. (2005) 125 CA4th 1141, 1152-1156, 23 CR3d 335*].

Legal Topics:

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

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72 of 189 DOCUMENTS

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Chapter 8 Seeking or Opposing Equitable Remedies in Contract Actions

II. SEEKING OR OPPOSING RESCISSION OF CONTRACT

1-8 MB Practice Guide: CA Contract Litigation 8.09

8.09 Effecting Rescission.

8.09[1] Rescinding Party Can Give Notice of Rescission by Informing Other Party of Intent to Rescind or Serving Pleading in Action for Rescission. On discovering facts that provide the ground or grounds for rescission, a party seeking to unilaterally rescind a contract must [CC § 1691(a), (b)].

- Promptly give notice to the other contracting party or parties of the intent to rescind; and
- Restore or offer to restore, to its original owner, all consideration received under the contract to the date of rescission, or offer to restore the same on condition that the other party do likewise, unless the latter is unable or refuses to do so.

When notice of rescission has not otherwise been given, or an offer to restore the benefits received under the contract has not otherwise been made, the service of a pleading in an action that seeks relief based on rescission is deemed to be notice or offer or both [CC § 1691]. A pleading seeking relief based upon rescission must allege facts demonstrating a rescission has been effected—not merely facts that, if proved correct, would establish a legal basis to elect a rescission at some point in the future [*Myerchin v. Family Benefits, Inc.* (2008) 162 CA4th 1526, 1533, 76 CR3d 816].

Notice of rescission need not be formal and explicit. A notice is sufficient if it clearly shows the intention of the person rescinding to consider the contract at an end [*Wilson v. Lewis* (1980) 106 CA3d 802, 809, 165 CR 396].

Judge's Perspective:

Although the courts will apply the rule stated in the text that a notice of rescission need not be formal and explicit, the better practice is to make the notice as clear and unambiguous as possible. Oral notice is discouraged. There is no advantage to sending a notice whose purpose is unclear. Moreover, a party seeking rescission has a duty to act promptly; failure to act promptly waives the right to rescind [*Cutter Labs., Inc. v. Twining* (1963) 221 CA2d 302, 317, 34 CR 317]. Therefore, a party seeking rescission who sends a notice that is unclear risks the other party's continuing performance under the contract. If the other party is substantially prejudiced by the delay, the court will not order rescission.

➡ Cross References:

Pleading requirements for rescission claim, see 8.10.

Form for notice of rescission, see 8.72.

Form for complaint for relief based on rescission, see 8.73.

8.09[2] Offer of Restoration Is Not Required If Rescinding Party Received Nothing of Value. No offer to restore is required if:

- The rescinding party did not receive anything of value [*Realty Co. of Am. v. Burton* (1958) 160 CA2d 178, 195-196, 325 P2d 171] ; or
- Through no fault of the rescinding party, restoration cannot be made [*Carruth v. Fritch* (1950) 36 C2d 426, 430-431, 224 P2d 702] .

Examples:

■ The plaintiff owners of an oil and gas lease hired the defendants to drill an oil well. The defendants abandoned the work after drilling a crooked well short of the agreed depth, leaving their equipment in the well, thereby making other drilling impossible. The court found that under these circumstances, the plaintiffs had received nothing of value and were not required to make restoration [*Modoc Mineral & Oil Co. v. Cal-Vada Drilling & Exploration Co.* (1965) 236 CA2d 868, 873-874, 46 CR 508] .

■ The plaintiff, injured in a car accident, was improperly coerced into signing an agreement by the defendant's insurance adjuster to release the insurer from all liability for the accident. The plaintiff later sued for more than the settlement amount, and when the insurance company demanded restoration of the consideration (the release of liability) on appeal, the court held that the plaintiff was not required to do so, because of the settlement agreement was void due to the coercive negotiations [*Wetzstein v. Thomasson* (1939) 34 CA2d 554, 558-559, 93 P2d 1028] .

8.09[3] Plaintiff's Delay in Providing Prompt Notice May Be Excused. The requirement for prompt notice and tender of consideration is excused if the rescinding party was subject to duress, menace, undue influence, or disability [CC § 1691].

In addition, a party must be aware of the right to rescind before failure to give prompt notice or offer to restore can bar rescission [CC § 1691].

 Cross Reference:

Discussion of fraud, duress, menace, or undue influence in the context of contracts generally, see *Ch. 17, Attacking or Defending Existence of Contract--Fraud, Duress, Menace, and Undue Influence*, 17.03-17.06.

8.09[4] Plaintiff's Delay in Providing Notice Will Not Bar Relief Unless Delay Is Substantially Prejudicial. A plaintiff seeking rescission will not be denied relief because of a delay in giving notice of intent to rescind unless the delay substantially prejudiced the other parties to the contract [CC § 1693; *Saret-Cook v. Gilbert, Kelly, Crowley & Jennett* (1999) 74 CA4th 1211, 1227, 88 CR2d 732] . Prejudice is a question of fact to be determined from the circumstances of the case [see *Saret-Cook v. Gilbert, Kelly, Crowley & Jennett* (1999) 74 CA4th 1211, 1225-1227, 88 CR2d 732] .

Example--Substantially Prejudicial Delay:

A plaintiff employee's failure to provide notice of rescission of a settlement agreement involving an employment dispute was found to be substantially prejudicial to the defendant law firm. The lack of notice precluded the firm from discharging the employee and excluding her from the office, rather than enduring an ensuing period of suffering, turmoil, and damage caused by the plaintiff's behavior [*Saret-Cook v. Gilbert, Kelly, Crowley & Jennett* (1999) 74 CA4th 1211, 1227, 88 CR2d 732] .

Legal Topics:

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

Commercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentModification, Rescission & WaiverContracts
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73 of 189 DOCUMENTS

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Chapter 8 Seeking or Opposing Equitable Remedies in Contract Actions

II. SEEKING OR OPPOSING RESCISSION OF CONTRACT

1-8 MB Practice Guide: CA Contract Litigation 8.10

8.10 Pleading Requirements for Complaint Seeking Rescission.

8.10[1] General List of Pleading Requirements. A complaint for rescission must allege all of the following:

- The formation and relevant terms of the contract [see 8.10[2]].
- Facts showing the existence of a ground for rescission [see 8.10[3]].
- The plaintiff's performance or excuse for nonperformance [see 8.10[4]].
- The injury or harm suffered by the plaintiff [see 8.10[5]].
- That plaintiff gave notice of rescission [see 8.10[6]].

8.10[2] Complaint Must Set Forth Formation and Relevant Terms of Contract. To plead for the rescission of a contract, the plaintiff must set forth in the complaint the facts of the contract formation and the terms of the contract [CC §§ 1688-1692].

8.10[3] Complaint Must Allege Facts Showing Ground for Rescission. A complaint for rescission must set forth the ground for rescission [CC §§ 1688-1692]. The grounds for rescission will vary with each case, and, depending on the ground, specific information must be provided.



Cross Reference:

Coverage of the grounds of rescission, see 8.06, 8.07.

Example--Alleging Fraudulent Representations:

In an action for rescission on the ground of fraudulent representations, the complaint should allege that representations were made with the intent to induce the plaintiff to enter into the contract [*Hall v. Mitchell* (1922) 59 CA 743, 748, 211 P 853].

Example--No Allegation of Failure of Consideration:

A plaintiff was not entitled to rescission on the ground of failure of consideration when he had alleged

only fraud and undue influence, and did not allege failure of consideration [*Clancy v. Becker-Arbuckle-Wright Corp.* (1934) 137 CA 43, 47, 29 P2d 868] .

Example--Complaint Insufficient to Show Fraud:

A complaint failed to state a cause of action for rescission on the ground of fraud when it did not indicate that the contract was unfair or that the plaintiff had suffered any damage [*Molfino v. Levinson Produce Co.* (1947) 79 CA2d 587, 589, 180 P2d 365] .

8.10[4] Complaint Must Allege Plaintiff's Performance or Excuse for Nonperformance. A complaint for rescission must allege either the extent of the plaintiff's performance, or an excuse for nonperformance [see *Consolidated Concessions Co. v. McConnell* (1919) 40 CA 443, 444-445, 180 P 842] .

8.10[5] Complaint Must Allege Injury or Harm Suffered by Plaintiff. A complaint for rescission must allege some injury or harm to the plaintiff, or it is fatally defective [*Guthrie v. Times-Mirror Co.* (1975) 51 CA3d 879, 886, 124 CR 577] . The plaintiff need not show pecuniary damage, but only that an essential character of the transaction has changed [see *Engalla v. Permanente Med. Group, Inc.* (1997) 15 C4th 951, 979-980, 64 CR2d 843, 938 P2d 903] .

8.10[6] Complaint Must Allege That Plaintiff Gave Notice of Rescission or State That Summons and Complaint Are to Serve As Notice. The complaint must state one of the following with respect to plaintiff's obligation to give notice of rescission [CC § 1691]:

- That plaintiff gave notice of rescission and made an offer of restoration to the other party.
- Facts demonstrating that restoration is not necessary.
- That service of the summons and complaint will serve as notice of rescission and/or offer of restoration, if no other notice or offer of restoration was given.

Legal Topics:

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

Civil Procedure Pleading & Practice Pleadings Complaints Requirements Commercial Law (UCC) Sales (Article 2) Form, Formation & Readjustment Modification, Rescission & Waiver Contracts Law Remedies Rescission & Redhibition General Overview Real Property Law Purchase & Sale Remedies Rescission & Restitution



74 of 189 DOCUMENTS

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Chapter 8 Seeking or Opposing Equitable Remedies in Contract Actions

II. SEEKING OR OPPOSING RESCISSION OF CONTRACT

1-8 MB Practice Guide: CA Contract Litigation 8.11

8.11 Every Party to Contract Must Be Joined in Rescission Action.

Every party to the rescinded contract or lease is an indispensable party to an action for relief based on rescission, and therefore must be joined as either a plaintiff or a defendant [*Hartman Ranch Co. v. Associated Oil Co (1937) 10 C2d 232, 262-265, 73 P2d 1163*] .

Legal Topics:

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

Civil ProcedurePleading & PracticePleadingsComplaintsRequirementsCivil ProcedurePartiesJoinderNecessary PartiesCommercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentModification, Rescission & WaiverContracts LawRemediesRescission & RedhibitionGeneral OverviewReal Property LawPurchase & SaleRemediesRescission & Restitution



75 of 189 DOCUMENTS

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Chapter 8 Seeking or Opposing Equitable Remedies in Contract Actions
II. SEEKING OR OPPOSING RESCISSION OF CONTRACT

*1-8 MB Practice Guide: CA Contract Litigation 8.12***8.12 Complaint Must Be Brought Within Applicable Limitations Period.**

An action based on the rescission of a written contract is subject to a four-year limitations period beginning on the date the facts entitling the aggrieved party to rescind occurred [*CCP* § 337(3); *Miller v. Bechtel Corp.* (1983) 33 C3d 868, 873, 191 CR 619, 663 P2d 177]. An action based on the rescission of an oral contract is subject to a two-year limitations period beginning on the date the facts entitling the aggrieved party to rescind occurred [*CCP* § 339(3)].

For rescission of both written and oral contracts, the discovery rule provides that when the ground is fraud or mistake, the statute does not begin to run until discovery of the facts constituting the fraud or mistake [*CCP* §§ 337(3), 339(3); see *CCP* § 337(3) (discovery rule for misrepresentation in insurance contracts)].

Examples:

- In an action filed in 1978 for rescission of a marital settlement agreement based on misrepresentation of the value of stock, the statute commenced when the spouse first had constructive notice of the misrepresentation, in 1972. The duty to inquire arose in 1972, not in 1977, when the spouse's stock was sold [*Miller v. Bechtel Corp.* (1983) 33 C3d 868, 873, 191 CR 619, 663 P2d 177].
- An action for rescission on the ground of fraud filed one year after the discovery of the basis for the rescission was barred by the doctrine of laches [*Keidatz v. Albany* (1952) 39 C2d 826, 829, 249 P2d 264].

**Strategic Point--Plaintiff:**

A complaint filed after the statute limitations has run is vulnerable to demurrer based on statutory limitations if it fails to allege the circumstances of the rescinding party's discovery of the grounds for rescission and the facts justifying the delay in filing the complaint [*Tarrant v. Butler* (1960) 180 CA2d 235, 239, 4 CR 230]. Therefore, if there was a delay in filing the complaint, the plaintiff should ensure that the circumstances surrounding the plaintiff's discovery of the grounds for rescission and the facts justifying the plaintiff's delay in filing the complaint are set forth in the complaint.

**Cross Reference:**

See Ch. 4, Determining Applicable Statute of Limitations and Effect on Potential Action.

Legal Topics:

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

Commercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentModification, Rescission & WaiverCommercial Law (UCC)Sales (Article 2)RemediesStatutes of LimitationsTime LimitationsContracts LawDefensesStatutes of LimitationsContracts LawRemediesRescission & RedhibitionGeneral OverviewGovernmentsLegislationStatutes of LimitationsTime Limitations



76 of 189 DOCUMENTS

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Chapter 8 Seeking or Opposing Equitable Remedies in Contract Actions

II. SEEKING OR OPPOSING RESCISSION OF CONTRACT

1-8 MB Practice Guide: CA Contract Litigation 8.13

8.13 Right to Jury Trial for Rescission.

The right to a jury trial is determined by the nature of the relief requested [*Runyan v. Pacific Air Industries, Inc.* (1970) 2 C3d 304, 313, 85 CR 138, 466 P2d 682] . When restitution or damages are sought and there is a question of fact to be resolved regarding the amount of damages or restitution, a party is entitled to a jury trial [*Paularena v. Superior Court* (1965) 231 CA2d 906, 911-913, 42 CR 366] . This is true even if the parties seek ancillary relief of an equitable nature that is incidental to the recovery of a money judgment [*Nmsbpcslldhb v. County of Fresno* (2007) 152 CA4th 954, 964, 61 CR3d 425] .

When a party is not seeking restitution or damages, but only relief of an equitable nature, there is no right to a jury trial [*Porter v. Superior Court* (1977) 73 CA3d 793, 798-801, 141 CR 59] .

If a party in a rescission action seeks to recover something other than the consideration it gave under the contract, even if what it seeks to recover is money, the action is equitable in nature and there is no right to a jury trial [*Nmsbpcslldhb v. County of Fresno* (2007) 152 CA4th 954, 962, 61 CR3d 425] .

Example:

Whether there is material failure in consideration to be rendered to the rescinding party is a question of fact for the jury [*Calabrese v. Rexall Drug & Chem. Co.* (1963) 218 CA2d 774, 782, 32 CR 665] .

Jury Instructions:

Rescission, see *California Forms of Jury Instruction, Ch. 3G, Instr. MB 300G.01* (Matthew Bender).

Legal Topics:

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

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77 of 189 DOCUMENTS

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Chapter 8 Seeking or Opposing Equitable Remedies in Contract Actions

II. SEEKING OR OPPOSING RESCISSION OF CONTRACT

1-8 MB Practice Guide: CA Contract Litigation 8.14

8.14 Relief Available After Rescission.

8.14[1] Parties Have Right to Seek Relief After Rescission. When a contract has been rescinded in whole or in part, any party to the contract may seek relief based on the rescission by bringing an action to recover any money or thing owed by any other party to the contract as a consequence of the rescission, or for any other relief to which the party is entitled [CC § 1692(a)].

A claim for damages is not inconsistent with a claim for relief based on rescission [CC § 1692]. The plaintiff is not required to elect remedies unless prejudice to the other party will otherwise result [*Warfield v. Richey* (1959) 167 CA2d 93, 99, 334 P2d 101]. The court will decide, after seeing the evidence, whether rescission or an action for breach of the contract is appropriate [*Walters v. Marler* (1978) 83 CA3d 1, 16, 147 CR 655]. If an action seeks relief based on rescission and the court determines that the contract has not been rescinded, the court may grant any party to the action any other relief to which the party is entitled [CC § 1692].

**Strategic Point--Plaintiff:**

Because the court is able to grant rescission or damages, depending on the proof, a plaintiff should always seek damages in any rescission action. The plaintiff should allege all applicable remedies and make an election only when the court requires it.

**Cross References:**

See Ch. 7, Seeking or Opposing Damages in Contract Actions.

See also Ch. 22, Suing or Defending Action for Breach of Contract.

8.14[2] Plaintiff May Recover Consequential Damages. Some courts have allowed claims for damages for fraud, as well as consequential damages, based on CC § 1692, to make the rescinding party whole [see, e.g., *Jahn v. Brickey* (1985) 168 CA3d 399, 406-407, 214 CR 119]. Other courts have required the rescinding party to elect between damages for fraud and rescissionary relief [see, e.g., *Whistler v. Ondulando Highlands Corp.* (1970) 13 CA3d 108, 118, 91 CR 879].

Some courts have observed that consequential damages are available when rescission is based on the fault of the nonrescinding party (such as cases of fraud or misrepresentation) but not when rescission is sought based on mistake [see *Runyan v. Pacific Air Industries, Inc.* (1970) 2 C3d 304, 317, 85 CR 138, 466 P2d 682 ; *Sharabianlou v. Karp* (2010) 181 CA4th 1133, 1145, 105 CR3d 300] .

Examples--Consequential Damages Allowed:

- The court awarded consequential damages after rescission, and emotional distress damages for fraud and breach of fiduciary duty [*Jahn v. Brickey* (1985) 168 CA3d 399, 406-407, 214 CR 119] .

- A franchisee who quit his job to operate the franchise and later rescinded the franchise contract was entitled, in addition to the return of the franchise fee, to consequential damages including loss of income from the date the franchise contract was signed to the date of the notice of rescission at the rate of his former salary, plus his training and operating expenses, less the gross income from the franchise operation [*Runyan v. Pacific Air Indus., Inc.* (1970) 2 C3d 304, 308 n3, 318-319, 85 CR 138, 466 P2d 682] .

Example--Consequential Damages for Emotional Distress Denied:

When rescission was granted on the ground of undue influence or fraud, damages for emotional distress were denied under both CC §§ 1692 and 3343 [*O'Neil v. Spillane* (1975) 45 CA3d 147, 158-159, 119 CR 245] .

Example--Consequential Damages for Emotional Distress Permitted:

Damages for emotional distress were sustained on the theory that the plaintiff had also prevailed on tort theories. The court said that just because rescission was available did not require the plaintiff to elect between rescission and tort remedies [*Jahn v. Brickey* (1985) 168 CA3d 399, 406-407, 214 CR 119] .



Warning:

Damages for emotional distress are not recoverable as consequential damages for breach of contract (subject to a narrow exception when emotional tranquility is the essence of the contract) [see *Erlich v. Menezes* (1999) 21 C4th 543, 558-560, 87 CR2d 886, 981 P2d 978] .

Distinguish:

The court may not award "benefit of the bargain" damages in a rescission action. Such damages are available only in an action for breach of contract [*Sharabianlou v. Karp* (2010) 181 CA4th 1133, 1146, 105 CR3d 300 (in action for rescission of contract to purchase real property, trial court erred in awarding sellers the difference between the rescinded contract's sale price and the amount received from a later sale to a different buyer)].



Cross References:

General discussion of damages, see Ch. 7, Seeking or Opposing Damages in Contract Actions.

Discussion of the availability of damages for emotional distress, see California Forms of Pleading and Practice, Ch. 362, Mental Suffering and Emotional Distress (Matthew Bender).

8.14[3] Plaintiff May Recover Interest. In an action for relief based on rescission of a contract, the right to the repayment of money paid under the contract is fixed by the rescission, and interest on that money is recoverable from the date of rescission. When the elements of consequential damages are met, interest on those damages is also

recoverable from the date of rescission [*Leaf v. Phil Rauch, Inc. (1975) 47 CA3d 371, 376-377, 120 CR 749*] .

 Cross Reference:

See Ch. 7, Seeking or Opposing Damages in Contract Actions.

8.14[4] Plaintiff May Recover Punitive Damages. If the plaintiff can establish by clear and convincing evidence that the defendant acted with malice, fraud, or oppression, punitive damages are available in a rescission action [CC § 3294(a)].

 Warning:

Punitive damages can be awarded under CC § 3294(a) only in addition to actual damages [see *Douglas v. Ostermeier (1991) 1 CA4th 729, 750, 2 CR2d 594*].

Judge's Perspective:

Punitive damages are not available for breach of contract, "even where the defendant's conduct in breaching the contract was wilful, fraudulent, or malicious" [*Cates Constr., Inc. v. Talbot Partners (1999) 21 C4th 28, 61, 86 CR2d 855, 980 P2d 407*] . However, rescission is not technically an action on the contract, but an action to be relieved of the contract, and so rescission actions are not subject to this rule. When alleging rescission based on fraud, it is recommended to always seek punitive damages whenever justified.

 Cross Reference:

See Ch. 7, Seeking or Opposing Damages in Contract Actions.

8.14[5] Plaintiff May Recover Attorney's Fees. If the contract that has been rescinded contained a provision for attorney's fees that did not limit its operation to particular types of actions on the contract, attorney's fees are recoverable in an action for relief based on rescission [*Hastings v. Matlock (1985) 171 CA3d 826, 840-842, 217 CR 856* ; see CC § 1717].

 Cross Reference:

See Ch. 12, Recovering Attorney's Fees and Costs in Contract Litigation.

8.14[6] Attachment May Be Available to Plaintiff. The remedy of attachment is available to a party seeking restitution based on rescission because the basis of recovery is the implied contract for repayment [see, e.g., CCP § 483.010(a) (attachment available in action on implied contract when more than \$500 is involved); *Landry v. Marshall (1966) 243 CA2d 170, 177-178, 52 CR 119*].

 Cross Reference:

Discussion of attachment procedures, see California Forms of Pleading and Practice, Ch. 62, Attachment (Matthew Bender).

8.14[7] Court May Require Plaintiff to Compensate Defendant. If a party seeks relief based on rescission, the court may require the party to whom the relief is granted to compensate the other party, as justice requires, and also may adjust the equities between the parties in other ways [CC § 1692].

Examples:

■ When a purchaser rescinds a sale of real or personal property, the seller ordinarily is entitled to payment or credit for the value of the property during the time the purchaser had possession [*Kent v. Clark* (1942) 20 C2d 779, 785-786, 128 P2d 868].

■ In a transaction involving the sale of a business, recovery by the seller against whom the sale is rescinded is limited to the lesser of the reasonable rental value of the property involved or the profits, if any, generated by the purchaser from the subject matter [*McCoy v. West* (1977) 70 CA3d 295, 303, 138 CR 660].

Distinguish:

The court may not award "benefit of the bargain" damages in a rescission action. Such damages are available only in an action for breach of contract [*Sharabianlou v. Karp* (2010) 181 CA4th 1133, 1146, 105 CR3d 300 (in action for rescission of contract to purchase real property, trial court erred in awarding sellers the difference between the rescinded contract's sale price and the amount received from a later sale to a different buyer)].



Cross Reference:

See Ch. 7, Seeking or Opposing Damages in Contract Actions.

Legal Topics:

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

Commercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentModification, Rescission & WaiverContracts
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78 of 189 DOCUMENTS

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Chapter 8 Seeking or Opposing Equitable Remedies in Contract Actions

II. SEEKING OR OPPOSING RESCISSION OF CONTRACT

1-8 MB Practice Guide: CA Contract Litigation 8.15

8.15 Opposing Claim for Rescission.

The party against whom rescission is sought, in addition to raising affirmative defenses, may simply rebut one or more of the essential elements that must be proven.

If a defect appears on the face of the complaint, defendant may raise that issue by demurrer [CCP § 430.10(e)]. If the defect does not appear on the face of the complaint, the defendant should consider raising the defenses by answer or in a motion for summary judgment or summary adjudication [CCP §§ 430.30(b), 437c].

Cross References:

Affirmative defenses to rescission, see 8.16.

Grounds for rescission, see 8.05.

Pleading requirements for claim of rescission, see 8.10.

Legal Topics:

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

Commercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentModification, Rescission & WaiverContracts
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79 of 189 DOCUMENTS

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Chapter 8 Seeking or Opposing Equitable Remedies in Contract Actions

II. SEEKING OR OPPOSING RESCISSION OF CONTRACT

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8.16 Defendant Can Assert Affirmative Defenses.

8.16[1] Plaintiff Seeking Rescission Is in Material Default of Performance. A plaintiff cannot unilaterally rescind a contract if he or she is in material default of performance of an obligation that affects the other party's performance or duty to perform [*Nelson v. Spence* (1960) 182 CA2d 493, 499, 6 CR 312 ; *Joshua Tree Townsite Co. v. Joshua Tree Land Co.* (1950) 100 CA2d 590, 596, 224 P2d 85] . The defendant can assert this default as an affirmative defense.

Exceptions:

If the plaintiff's default is unrelated to the other party's obligation on which the asserted right of rescission is based, the plaintiff may rescind the contract [*Integrated, Inc. v. Alec Fergusson Elec. Contractor* (1967) 250 CA2d 287, 298, 58 CR 503] . A purchaser who has been defrauded also may rescind, even if in default, because the purchaser has a right to withhold payments on learning the grounds for rescission [*Warfield v. Richey* (1959) 167 CA2d 93, 97-98, 334 P2d 101] .



Cross Reference:

Form, see 8.77.

8.16[2] Plaintiff's Knowing Acceptance of Contract Benefits Waives Right to Rescind Contract. When a party has full knowledge of the facts that warrant rescission, but accepts and receives benefits under a contract, waiver of the right to rescind is presumed [*Whitney Inv. Co. v. Westview Dev. Co.* (1969) 273 CA2d 594, 603, 78 CR 302] . The plaintiff's conduct must be so inconsistent with an intent to enforce the contract as to induce a reasonable belief that the right to rescind has been relinquished [*Soon v. Beckman* (1965) 234 CA2d 33, 36, 44 CR 190] .

Examples:

- Acceptance of rent accruing after a known default is a waiver [*Soon v. Beckman* (1965) 234 CA2d 33, 36, 44 CR 190] .
- Acceptance of performance later than agreed waives the right to rescind for failure of compliance

with a time provision [*Leiter v. Eltinge* (1966) 246 CA2d 306, 317, 54 CR 703].

- Acceptance by physicians of coverage for medical malpractice through interindemnity arrangement waives the right to rescind interindemnity agreement [*Gill v. Rich* (2005) 128 CA4th 1254, 1264].

- Acceptance of annual payments from former husband under postmarital agreement **for five years** waives the right to rescind the agreement [*In re Marriage of Burkle* (2006) 139 CA4th 712, 751-752, 43 CR3d 181].

Cross Reference:

Waiver by delay, see 8.16[4].

Plaintiff's waiver of the right to rescind is an affirmative defense that must be pleaded and cannot be raised for first time on appeal [*Calabrese v. Rexall Drug & Chem. Co.* (1963) 218 CA2d 774, 785, 32 CR 665].

Acts by which the rescinding party preserves the subject matter to be able to restore it to the party against whom he or she rescinds do not amount to waiver.

Example:

To avoid default, the plaintiff made payments on a mortgage after giving notice of rescission. This conduct did not constitute a waiver of the right to rescind [*Hefferan v. Freebairn* (1950) 34 C2d 715, 723, 214 P2d 386].

Cross Reference:

Form, see 8.77.

8.16[3] Action Is Barred If Plaintiff Failed to Bring Claim Within Applicable Statute of Limitations. The plaintiff's claim for rescission must be brought within the period of the applicable statute of limitations: four years for written contracts and two years for oral contracts [see CCP §§ 337(3), 339(3)].

Cross References:

Determining the statute of limitations for claim of rescission and determining when cause of action accrues, see 8.12.

Detailed discussion of applicable statutes of limitation, see Ch. 4, Determining Applicable Statute of Limitations and Effect on Potential Action.



Strategic Point--Defendant:

A complaint filed after statutory period of limitations has run is vulnerable to demurrer based on the statute of limitations if it fails to allege the circumstances of the rescinding party's discovery of the grounds for rescission and the facts justifying the delay in filing the complaint [*Tarrant v. Butler* (1960) 180 CA2d 235, 239, 4 CR 230].

8.16[4] Plaintiff's Delay in Giving Notice of Rescission or Tendering Restoration Was Prejudicial. Under the doctrine of laches, a delay in giving notice of rescission or tendering restoration of benefits received does not bar relief based on rescission unless the delay has substantially prejudiced the other party [CC § 1693]. The defendant bears the burden of proving that he or she has been prejudiced by any delay [see *Saret-Cook v. Gilbert, Kelly, Crowley & Jennett* (1999) 74 CA4th 1211, 1225-1227, 88 CR2d 732].

Laches and waiver are sometimes pleaded or established together [see, e.g., *Neet v. Holmes* (1944) 25 C2d 447, 458-461, 154 P2d 854].

Cross References:

Form, see 8.77.

Discussion of what constitutes prejudicial delay, see 8.09[4].

Discussion of laches, see Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, Ch. 4, Limitation of Actions.

8.16[5] Impossibility Excuses Defendant's Performance. In an action to rescind a contract for the defendant's failure to perform, the defendant can plead impossibility of performance as an affirmative defense [*Calabrese v. Rexall Drug & Chem. Co.* (1963) 218 CA2d 774, 784-785, 32 CR 665] .

Example:

An allegation that promissory notes relevant to a transaction were stolen, if proved, would establish the impossibility of performance by the party required to endorse and deliver the notes [*Calabrese v. Rexall Drug & Chem. Co.* (1963) 218 CA2d 774, 785, 32 CR 665] .

Cross References:

Form, see 8.77.

See also Ch. 13, Attacking or Defending Existence of Contract--Absence of Essential Element; and

Ch. 22, Suing or Defending Action for Breach of Contract.

8.16[6] Rescission Is Unavailable If Third Party's Rights Would Be Harmed. Rescission will not be granted if it will cause harm to the interests of innocent third parties [*Gill v. Rich* (2005) 128 CA4th 1254, 1265].

Examples--Rescission Denied:

- A surety company was not entitled to rescission of a bond guaranteeing the performance of an attorney who embezzled from estate property because, among other reasons, permitting rescission would adversely and unfairly injure the beneficiaries of the estate [*Conservatorship of O'Connor* (1996) 48 CA4th 1076, 1098-1099, 56 CR2d 386] .

- Physicians could not rescind an interindemnity agreement, which provided them with coverage for medical malpractice, because rescission would harm the rights of innocent third parties, including nonrescinding physicians who relied on all members' final contributions and patients with medical malpractice claims [*Gill v. Rich* (2005) 128 CA4th 1254, 1267-1268].

Legal Topics:

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

Commercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentModification, Rescission & WaiverContracts LawDefensesGeneral OverviewContracts LawRemediesRescission & RedhibitionGeneral OverviewReal Property LawPurchase & SaleRemediesRescission & Restitution



80 of 189 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 8 Seeking or Opposing Equitable Remedies in Contract Actions

II. SEEKING OR OPPOSING RESCISSION OF CONTRACT

1-8 MB Practice Guide: CA Contract Litigation 8.17

8.17 Defendant May Be Able to Obtain Setoff Against Plaintiff's Damages.

If a party seeks relief based on rescission, the court may require the party to whom relief is granted to make any compensation to the other party that justice may require, and may otherwise adjust the equities between the parties [CC § 1692; see 8.14[7]].

Legal Topics:

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

Commercial Law (UCC)Sales (Article 2)RemediesGeneral OverviewContracts LawRemediesGeneral OverviewContracts LawRemediesRescission & RedhibitionGeneral OverviewReal Property LawPurchase & SaleRemediesRescission & Restitution



81 of 189 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 8 Seeking or Opposing Equitable Remedies in Contract Actions

III. SEEKING OR OPPOSING REFORMATION OF CONTRACT

1-8 MB Practice Guide: CA Contract Litigation 8.18

8.18 CHECKLIST: Seeking or Opposing Reformation of Contract.

8.18[1] Determining Whether Contract Can Be Reformed.

☐ Verify that contract is written.

Authority:

CC § 3399

Discussion:

See 8.22

☐ Determine that contract is not void.

Authority:

Ainsworth v. Morrill (1916) 31 CA 509, 510, 160 P 1089

Discussion:

See 8.23

☐ Confirm that because of fraud, mutual mistake, or unilateral mistake, contract does not express parties' true intention.

Authority:

CC § 3399

Discussion:

See 8.24

☐ Confirm that all parties have a complete, mutual understanding of all essential terms of contract.

Authority:

Bailard v. Marden (1951) 36 C2d 703, 708, 227 P2d 10

Discussion:

See 8.25

8.18[2] Pleading to Reform Contract.

☐ Allege the following in complaint:

☐ Plaintiff's status as an aggrieved party.

Authority:

CC § 3399

Discussion:

See 8.26

Form:

See 8.74

☐ Parties' true intention.

Authority:

CC § 3399

Discussion:

See 8.27

Form:

See 8.74

☐ Contract language as it was written.

Authority:

CC § 3399

Discussion:

See 8.28

Form:

See 8.74

☐ That failure of contract to reflect parties' true agreement resulted from fraud, mutual mistake of fact, or unilateral mistake of fact.

Authority:

CC § 3399

Discussion:

See 8.24[5]

Form:

See 8.74

8.18[3] Opposing Claim for Reformation.

- ☐ Analyze complaint to determine the appropriate response.

Authority:

CCP § 430.10

Discussion:

See 8.32

Form:

See 8.78

- ☐ Determine if plaintiff's complaint states all essential elements of a reformation claim.

Authority:

CCP § 430.30

Discussion:

See 8.32[1]

Form:

See 8.78

- ☐ Assert affirmative defenses as appropriate:

Authority:

CCP § 430.30

Discussion:

See 8.32[3]

Form:

See 8.78

- ☐ Claim was not brought within applicable statute of limitations period.

Authority:

CCP § 338(d)

Discussion:

See 8.32[3][a]

- ☐ Action is barred by res judicata.

Authority:

Getty v. Getty (1986) 187 CA3d 1159, 1173, 232 CR 603

Discussion:

See 8.32[3][b]

- ☐ Plaintiff has unclean hands.

Authority:

Seymour v. Cariker (1963) 220 CA2d 300, 305, 33 CR 727

Discussion:

See 8.32[3][c]

- ☐ Plaintiff waived right to reform contract or has ratified contract.

Authority:

San Fernando Valley Chamber of Commerce v. Thomas (1954) 123 CA2d 348, 350-351, 266 P2d 891

Discussion:

See 8.32[3][d]

- ☐ Plaintiff's claim is barred by laches.

Authority:

Getty v. Getty (1986) 187 CA3d 1159, 1170, 232 CR 603

Discussion:

See 8.32[3][e]

- ☐ Plaintiff was inexcusably negligent in failing to discover mistake for which reformation is sought.

Authority:

Voge, Inc. v. Rose (1962) 205 CA2d 534, 539, 23 CR 87

Discussion:

See 8.32[3][f]

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts Law Remedies Reformation



82 of 189 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 8 Seeking or Opposing Equitable Remedies in Contract Actions
III. SEEKING OR OPPOSING REFORMATION OF CONTRACT

1-8 MB Practice Guide: CA Contract Litigation 8.19

8.19 Options and Strategies.

Reformation is an equitable remedy used to reframe a written instrument to accurately express the parties' true agreement when, through fraud, mutual mistake, or unilateral mistake the writing does not embody their agreement [CC § 3399; *Bailard v. Marden* (1951) 36 C2d 703, 708, 227 P2d 10]. The purpose of reformation is to make a written agreement fully express the intention of the parties [*American Home Ins. Co. v. Travelers Indem. Co.* (1981) 122 CA3d 951, 963, 175 CR 826] .

The party seeking to reform the contract should focus on establishing that the contract requires reformation because it does not reflect the parties' true intention due to fraud, mutual mistake, or unilateral mistake [see 8.24]. Showing that there was no mutual understanding of all essential terms of the contract is key in this regard [see 8.25]. After a party has succeeded in reforming a contract, the party then may seek to specifically enforce the contract [CC § 3402; see 8.30].

The party opposing reformation should seek to establish that there is no dispute as to the intention of the parties, and that no fraud or mistake was involved [see 8.24]. This party will want to establish that there was a mutual understanding of the terms of the contract [see 8.25]. The party opposing reformation also may assert that an essential element of the cause of action is not established, as well as a variety of affirmative defenses related to the plaintiff's conduct rendering reformation unavailable [see 8.32]. To keep the plaintiff from obtaining a jury trial, the defendant will want to preempt any legal issues, such as breach of contract, and keep the case focused on equitable issues, tried to the court [see 8.31].



Cross References:

Discussion of seeking or opposing specific performance of a contract, see 8.33 et seq.

Discussion of mistake, see Ch. 16, Attacking or Defending Existence of Contract--Mistake.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts Law Remedies Reformation



83 of 189 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 8 Seeking or Opposing Equitable Remedies in Contract Actions

III. SEEKING OR OPPOSING REFORMATION OF CONTRACT

1-8 MB Practice Guide: CA Contract Litigation 8.20

8.20 Elements of Cause of Action for Reformation.

A contract may be reformed if it meets all of the following requirements [*see, e.g., American Home Ins. Co. v. Travelers Indem. Co. (1981) 122 CA3d 951, 961, 175 CR 826*] :

- The contract is a written contract [*see 8.22*].
- The contract is not void [*see 8.23*].
- Because of fraud, mutual mistake, or unilateral mistake, the contract does not express the true intention of the parties [*see 8.24*].
- All parties have a complete, mutual understanding of the essential terms of the contract [*see 8.25*].
- The party seeking reformation has standing as an aggrieved party [*see 8.26*].
- The party seeking reformation must show the true intention of the parties [*see 8.27*].

Legal Topics:

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

Contracts LawDefensesAmbiguity & MistakeMutual MistakeContracts LawDefensesAmbiguity & MistakeUnilateral MistakeContracts LawDefensesFraud & MisrepresentationGeneral OverviewContracts LawRemediesReformation



84 of 189 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 8 Seeking or Opposing Equitable Remedies in Contract Actions
III. SEEKING OR OPPOSING REFORMATION OF CONTRACT

1-8 MB Practice Guide: CA Contract Litigation 8.21

8.21 Statute of Limitations Is Three Years.

An action for reformation on the ground of fraud or mistake is required to be brought within three years [CCP § 338(d)]. A cause of action for reformation based on fraud or mistake does not accrue until the aggrieved party discovers the facts constituting the fraud or mistake [CCP § 338(d); see *Welsher v. Glickman* (1969) 272 CA2d 134, 140, 77 CR 141].



Cross Reference:

Applicable statutes of limitations in contract actions, see Ch. 4, Determining Applicable Statute of Limitations and Effect on Potential Action.

Legal Topics:

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

Commercial Law (UCC)Sales (Article 2)RemediesStatutes of LimitationsTime LimitationsContracts
LawDefensesStatutes of LimitationsContracts LawRemediesReformationGovernmentsLegislationStatutes of
LimitationsTime Limitations



85 of 189 DOCUMENTS

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Chapter 8 Seeking or Opposing Equitable Remedies in Contract Actions

III. SEEKING OR OPPOSING REFORMATION OF CONTRACT

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8.22 Only Written Contracts Can Be Reformed.

Only written contracts can be reformed [CC § 3399].

Legal Topics:

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

Contracts Law Remedies Reformation



86 of 189 DOCUMENTS

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Chapter 8 Seeking or Opposing Equitable Remedies in Contract Actions
III. SEEKING OR OPPOSING REFORMATION OF CONTRACT

1-8 MB Practice Guide: CA Contract Litigation 8.23

8.23 Void Contracts Generally Cannot Be Reformed.

Because a void agreement has no standing in the law, it cannot be reformed [*see, e.g., Ainsworth v. Morrill (1916) 31 CA 509, 511, 160 P 1089*]. A court will not make a new contract from a void one when it appears that the parties never intended to make a legal, valid agreement [*see First Am. Title Ins. & Trust Co. v. Cook (1970) 12 CA3d 592, 597-598, 90 CR 645*].

Exception:

Reformation will reform an otherwise valid instrument by removing an illegal term that was never intended by the parties, but was erroneously included [*see First Am. Title Ins. & Trust Co. v. Cook (1970) 12 CA3d 592, 597-598, 90 CR 645*].

Whether a contract that is void under the statute of frauds may be reformed depends on how it fails to satisfy the statute [*see Oatman v. Niemeyer (1929) 207 C 424, 426-427, 278 P 1043*].

➡ Cross Reference:

Discussion of effect of statute of frauds on reformation claim, see California Forms of Pleading and Practice, Ch. 488, Reformation of Instruments (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts Law Remedies Reformation



87 of 189 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 8 Seeking or Opposing Equitable Remedies in Contract Actions

III. SEEKING OR OPPOSING REFORMATION OF CONTRACT

1-8 MB Practice Guide: CA Contract Litigation 8.24

8.24 Contract Must Fail to Express Parties' True Intent.

8.24[1] Failure to Express Parties' True Intent Must Be Due to Fraud, Mutual Mistake, or Unilateral Mistake. A written contract that does not embody the parties' true intention may be reformed because of fraud, mutual mistake, or unilateral mistake [CC § 3399; *Bailard v. Marden* (1951) 36 C2d 703, 708, 227 P2d 10 ; see 8.24[2] -[4]].



Cross References:

Discussion of fraud see Ch. 17, Attacking or Defending Existence of Contract--Fraud, Duress, Menace, and Undue Influence.

Discussion of mistake, see Ch. 16, Attacking or Defending Existence of Contract--Mistake.

8.24[2] Fraud Is Basis for Reformation. Fraud, as a basis for reformation, consists of the following elements [*Security-First Nat'l Bank v. Earp* (1942) 19 C2d 774, 777-778, 122 P2d 900] :

- A false representation by one party.
- Knowledge of the falsity by that party.
- Intent that the other party rely on the false representation.
- Justifiable reliance on the false representation by the other party.

Specifically, when one party justifiably relies on the other party's false representation that the written instrument either already conforms, or will conform, to the parties' true intent, reformation is appropriate [*Security-First Nat'l Bank v. Earp* (1942) 19 C2d 774, 777-778, 122 P2d 900 see *R & B Auto Center, Inc. v. Farmers Group, Inc.* (2006) 140 CA4th 327, 351, 44 CR3d 426 (insured could seek reformation of contract if its insurance agents misrepresented coverage and the coverage that was delivered did not conform to the agreement of the parties)].



Warning:

Fraudulent inducement to enter into a written agreement is not a basis for reformation because, although

fraudulently induced, the contract reflects the intent of the parties [*Lane v. Davis* (1959) 172 CA2d 302, 307-308, 342 P2d 267].

Reformation also may be available to correct a defect in a deed resulting from the unconscionable conduct of one party that is neither fraudulent nor illegal [*MacFarlane v. Peters* (1980) 103 CA3d 627, 631, 163 CR 655]. This type of conduct should be the basis of a reformation action, as it is for a rescission action.

Cross References:

Discussion of fraud, duress, menace, or undue influence in the context of contracts generally, see Ch. 17, *Attacking or Defending Existence of Contract--Fraud, Duress, Menace, and Undue Influence*, 17.03-17.06.

Unconscionability in the context of contracts generally, see Ch. 18, *Asserting or Defending Claim That Contract Is Illegal, Contrary to Public Policy, or Unconscionable*.

8.24[3] Mutual Mistake Is Basis for Reformation. A mutual mistake by both parties is a ground for reformation [CC § 3399; *Shupe v. Nelson* (1967) 254 CA2d 693, 700, 62 CR 352]. It is irrelevant who drafted the writing to be reformed, as long as both parties shared the common mistake about the writing's contents [*Renshaw v. Happy Valley Water Co.* (1952) 114 CA2d 521, 524-525, 250 P2d 612].

Example:

A party may seek to reform a contract when the mistake of a third person acting for the parties, such as an attorney, is responsible for the contract's failure to express the parties' true intent. A mistake attributable to a third person in reducing the common intent of the parties to writing is a ground for reformation based on mutual mistake [*Breen v. Donnelly* (1887) 74 C 301, 304, 15 P 845 (surveyor's mistake in surveying boundary line); see *Mills v. Schulba* (1950) 95 CA2d 559, 561-562, 213 P2d 408 (attorney's mistake in transferring title)].

8.24[4] Unilateral Mistake Is Basis for Reformation. A unilateral mistake by one party is a ground for reformation when the other party knew of, or suspected, the mistake [CC § 3399]. Constructive notice of a unilateral mistake is insufficient for reformation [see, e.g., *La Mancha Dev. Corp. v. Sheegog* (1978) 78 CA3d 9, 16-17, 144 CR 59 (reformation of deed to insert land use restriction on ground of unilateral mistake was improper because grantees did not know of or suspect mistake)].

Examples:

- A contract arising out of a contractor's bid was not subject to reformation even though the bid contained a clerical error. The other party never agreed to pay more than the sum designated in the bid. Even if the understanding of the parties was based on a mistaken assumption of fact, a court cannot improve the parties' understanding through reformation of the written instrument. To do so would be to create a new contract based on terms to which the parties never agreed [*Lemoge Elec. v. County of San Mateo* (1956) 46 C2d 659, 663-664, 297 P2d 638].

- A hospital was not entitled to reformation of a contract for treatment of Medi-Cal beneficiaries. Although the hospital alleged that both it and the state were mistaken about the payment rate for the treatment of certain patients provided in the contract, no evidence existed showing that the state knew or suspected that the hospital intended the contract to exclude certain categories of patients at the time the parties entered into the contract, because these topics were never discussed during the negotiations and the hospital never expressed its intention [*Cedars-Sinai Med. Ctr. v. Shewry* (2006) 137 CA4th 964,

985, 41 CR3d 48] .

8.24[5] Complaint Must Allege Fraud, Mutual Mistake, or Unilateral Mistake. The complaint must allege that the contract's failure to express the parties' true agreement was due to fraud, mutual mistake, or unilateral mistake [*Bailard v. Marden* (1951) 36 C2d 703, 708, 227 P2d 10 ; see CC § 3399].



Cross Reference:

Form, see 8.74.



Strategic Point--Plaintiff:

If there was a delay between the fraud or mistake and the filing of the action, the defendant may raise the defenses of laches and/or statute of limitations. Therefore, the plaintiff should consider including in the complaint allegations pertaining to the discovery of the fraud or mistake, the plaintiff's diligence in bringing the action on discovering the fraud or mistake, and other circumstances that show the delay was excusable [see *Miller v. Lantz* (1937) 9 C2d 544, 548, 71 P2d 585 ; see also CCP § 338(d)].



Cross References:

Defense of laches to an action seeking reformation, see 8.32[3][e].

Defense of statute of limitations to an action seeking reformation, see 8.32[3][a].

Legal Topics:

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

Contracts LawDefensesAmbiguity & MistakeMutual MistakeContracts LawDefensesAmbiguity & MistakeUnilateral MistakeContracts LawDefensesFraud & MisrepresentationGeneral OverviewContracts LawRemediesReformation



88 of 189 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 8 Seeking or Opposing Equitable Remedies in Contract Actions
III. SEEKING OR OPPOSING REFORMATION OF CONTRACT

1-8 MB Practice Guide: CA Contract Litigation 8.25

8.25 All Parties Must Have Complete, Mutual Understanding of All Essential Terms of Contract.

To obtain reformation of a contract, the parties must have a complete mutual understanding of all of the contract's essential terms. Otherwise, there is no standard by which the writing can be reformed [*Bailard v. Marden* (1951) 36 C2d 703, 708, 227 P2d 10].



Strategic Point--Plaintiff:

Although a contract that accurately reflects a common intent based on a mistake of fact cannot be reformed, the mistake may be ground for rescission [see, e.g., *White v. Berrenda Mesa Water Dist. of Kern County* (1970) 7 CA3d 894, 900-908, 87 CR 338].



Cross Reference:

Discussion of seeking or opposing rescission of a contract, see 8.03 et seq.

Legal Topics:

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

Contracts LawFormationGeneral OverviewContracts LawFormationMeeting of MindsContracts LawRemediesReformation



89 of 189 DOCUMENTS

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Chapter 8 Seeking or Opposing Equitable Remedies in Contract Actions

III. SEEKING OR OPPOSING REFORMATION OF CONTRACT

1-8 MB Practice Guide: CA Contract Litigation 8.26

8.26 Complaint Must Allege Plaintiff's Status As Aggrieved Party.

The party seeking reformation must show his or her standing as an aggrieved party [CC § 3399; *American Home Ins. Co. v. Travelers Indem. Co.* (1981) 122 CA3d 951, 961, 175 CR 826] .



Strategic Point:

The availability of reformation is not limited to the parties to the contract, but includes all aggrieved parties [CC § 3399]. A person who suffers prejudice or pecuniary loss as a result of the contract is an aggrieved party who may seek to reform it [*Orcutt v. Ferranini* (1965) 237 CA2d 216, 224, 46 CR 715].



Cross Reference:

Form, see 8.74.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts Law Remedies Reformation



90 of 189 DOCUMENTS

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Chapter 8 Seeking or Opposing Equitable Remedies in Contract Actions

III. SEEKING OR OPPOSING REFORMATION OF CONTRACT

1-8 MB Practice Guide: CA Contract Litigation 8.27

8.27 Complaint Must Allege Parties' True Intent.

The party seeking reformation of a contract must allege the parties' true intention [CC § 3399; *American Home Ins. Co. v. Travelers Indem. Co.* (1981) 122 CA3d 951, 961, 175 CR 826] .



Cross Reference:

Form, see 8.74.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts Law Remedies Reformation



91 of 189 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 8 Seeking or Opposing Equitable Remedies in Contract Actions

III. SEEKING OR OPPOSING REFORMATION OF CONTRACT

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8.28 Complaint Must Allege Contract As It Was Written.

The complaint must allege the contract as it was written [*Johnson v. Sun Realty Co. (1934) 138 CA 296, 300-301, 32 P2d 393 ; see CC § 3399*].



Strategic Point--Plaintiff:

The best way to establish the contents of the contract is to attach a copy of the contract to the complaint and incorporate it by reference.



Cross Reference:

Form, see 8.74.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts Law Remedies Reformation



92 of 189 DOCUMENTS

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Chapter 8 Seeking or Opposing Equitable Remedies in Contract Actions
III. SEEKING OR OPPOSING REFORMATION OF CONTRACT

1-8 MB Practice Guide: CA Contract Litigation 8.29

8.29 Burden of Proof, Presumptions, and Scope of Inquiry in Reformation of Contract.

8.29[1] Plaintiff Has Burden of Proving Parties' True Intent and That Failure Was Due to Fraud or Mistake. To reform a written instrument, the party seeking relief must establish by clear and convincing evidence the true intent of the parties and that the defect in the contract resulted from fraud or mistake [*Shupe v. Nelson* (1967) 254 CA2d 693, 700, 62 CR 352].

8.29[2] Court Presumes That Parties Intended to Make Equitable Contract. For the purpose of reforming a contract, the court will presume that all the parties to the contract intended to make an equitable and conscientious agreement [CC § 3400]. This presumption is not conclusive and may be overcome by evidence showing that the written instrument is not in conformity with true agreement of parties. The burden of overcoming the presumption is on the party who seeks to avoid the plain terms of the written contract [*California Trust Co. v. Cohn* (1935) 9 CA2d 33, 40, 48 P2d 744].

8.29[3] Court May Inquire Into Intended Meaning of Contract. In reforming a written instrument, the court may inquire what the instrument was intended to mean and what its legal consequences were meant to be. The court is not confined to the inquiry of what the language of the instrument was intended to be [CC § 3401].

Example:

An insurance policy may be reformed to show the premises intended to be covered, the persons included in the coverage, the name and capacity of the insured, the nature of the coverage and its extent, and the amount payable under the policy [*Modica v. Hartford Accident & Indem. Co.* (1965) 236 CA2d 588, 595-596, 46 CR 158].

Judge's Perspective:

The court will make the inquiry suggested by CC § 3401 only if it has already determined to reform the contract.

Legal Topics:

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

Contracts Law Remedies Reformation Evidence Inferences & Presumptions Presumptions Evidence Procedural

ConsiderationsBurdens of ProofClear & Convincing Proof



93 of 189 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 8 Seeking or Opposing Equitable Remedies in Contract Actions

III. SEEKING OR OPPOSING REFORMATION OF CONTRACT

1-8 MB Practice Guide: CA Contract Litigation 8.30

8.30 Party May Seek Specific Performance After Reformation.

A party who has succeeded in reforming a contract then may seek to specifically enforce that contract [CC § 3402]. The contract may be reformed and specifically enforced in the same action. The court also may reform the contract and then give money damages, if it finds that specific performance cannot be given in the circumstances [*Tomas v. Vaughn* (1944) 63 CA2d 188, 193-194, 146 P2d 499] .



Cross Reference:

Seeking specific performance, see 8.33 et seq.

Legal Topics:

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

Contracts LawRemediesReformationContracts LawRemediesSpecific Performance



94 of 189 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 8 Seeking or Opposing Equitable Remedies in Contract Actions

III. SEEKING OR OPPOSING REFORMATION OF CONTRACT

1-8 MB Practice Guide: CA Contract Litigation 8.31

8.31 Party May Not Seek Jury Trial for Reformation.

In a reformation action there is generally no right to a jury trial [*Martinez v. Martinez* (1950) 99 CA2d 425, 428, 221 P2d 986] . However, if a plaintiff joins legal and equitable issues in the same action, such as by seeking reformation of the contract and damages for breach of the contract as reformed, the plaintiff may demand a jury trial on the legal issues [*Abbott v. City of Los Angeles* (1958) 50 C2d 438, 462, 326 P2d 484] .

Legal Topics:

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

Civil ProcedureTrialsJury TrialsActions in EquityCivil ProcedureTrialsJury TrialsRight to Jury TrialContracts
LawRemediesReformation



95 of 189 DOCUMENTS

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Chapter 8 Seeking or Opposing Equitable Remedies in Contract Actions

III. SEEKING OR OPPOSING REFORMATION OF CONTRACT

1-8 MB Practice Guide: CA Contract Litigation 8.32

8.32 Opposing Claim for Reformation.

8.32[1] Defendant Can Rebut Essential Elements of Plaintiff's Claim. The party against whom reformation is sought may rebut one or more of the essential elements of the claim for reformation that must be proven. For example, the defending party may show that the writing does in fact reflect the true intent of the parties [*see Getty v. Getty* (1986) 187 CA3d 1159, 1178, 232 CR 603].

► Cross References:

Grounds for reformation, see 8.20.

Pleading requirements for plaintiff seeking reformation, see 8.26 -8.29.

8.32[2] Defendant Can Demur or Answer Defects in Complaint. If a defect appears on the face of the complaint, the defendant may raise a defense to it by demurrer [*CCP* § 430.10(e)]. If the defect does not appear on the face of the complaint, the defendant should consider raising the defenses by answer or in a motion for summary judgment [*CCP* §§ 430.30(b), 437c].

► Cross Reference:

Discussion of demurrers and answers, see Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, Ch. 11, Demurrers and Motions for Judgment on the Pleadings; and Ch. 14, Answers.

8.32[3] Defendant Can Assert Affirmative Defenses in Answer.

8.32[3][a] Three-Year Statute of Limitations Is Affirmative Defense. An action for relief on the ground of fraud or mistake, including a reformation action, must be brought within three years of the time the cause of action arises [*CCP* § 338(d)]. A cause of action for reformation based on fraud or mistake does not accrue until the aggrieved party discovers the facts constituting the fraud or mistake [*CCP* § 338(d); *Welsher v. Glickman* (1969) 272 CA2d 134, 140, 77 CR 141].

When there is considerable delay between the occurrence of fraud or mistake and its discovery by the aggrieved party, the court uses a reasonable diligence standard to determine the point at which the aggrieved party should be charged

with constructive notice of the facts [*Laing v. Occidental Life Ins. Co. (1966) 244 CA2d 811, 820, 53 CR 681*] .

Exception:

Constructive notice of a unilateral mistake is an insufficient ground for reformation [see, e.g., *La Mancha Dev. Corp. v. Sheegog (1978) 78 CA3d 9, 16-17, 144 CR 59* (reformation of deed to insert land use restriction on ground of unilateral mistake was improper because defendant grantees did not know or suspect mistake)].

➡ **Cross References:**

Form, see 8.78.

Defense of laches in action for reformation, see 8.32[3][e].

Ch. 4, Determining Applicable Statute of Limitations and Effect on Potential Action.

8.32[3][b] Res Judicata Is Affirmative Defense. An action for reformation may be barred by the doctrine of res judicata if an earlier judgment binds the parties on a litigated issue sought to be relitigated in a later action [*Getty v. Getty (1986) 187 CA3d 1159, 1172-1174, 232 CR 603* (trust instrument's irrevocability and distribution provisions were reformed in earlier action, binding parties in later action)].

➡ **Cross References:**

Form, see 8.78.

See also Ch. 22, Suing or Defending Action for Breach of Contract.

8.32[3][c] Unclean Hands Is Affirmative Defense. Reformation is subject to the equitable defense of unclean hands, by which the plaintiff is precluded from recovery due to plaintiff's own dishonest, unfair, or unconscionable conduct [*Seymour v. Cariker (1963) 220 CA2d 300, 305-306, 33 CR 727*] .

➡ **Cross Reference:**

Form, see 8.78.

8.32[3][d] Waiver of Right to Reform and Ratification of Contract Are Affirmative Defenses. Reformation is subject to the equitable defenses of waiver and ratification [*San Fernando Valley Chamber of Commerce v. Thomas (1954) 123 CA2d 348, 350-351, 266 P2d 891*]. An executed contract cannot be reformed if the aggrieved party, with knowledge of the facts, waived the right to reform by ratifying it through accepting performance in accordance with the terms of the contract as written [*Vantress Farms, Inc. v. Sydenstricker (1970) 11 CA3d 943, 951, 90 CR 251*] .

➡ **Cross References:**

Form, see 8.78.

Defense of waiver in breach of contract actions, see Ch. 22, *Suing or Defending Action for Breach of Contract*, 22.68.

8.32[3][e] Laches Is Affirmative Defense. Reformation is subject to the equitable defense of laches, by which a delay in complaining of the need for reformation bars relief because the delay has substantially prejudiced the other party [*Getty v. Getty (1986) 187 CA3d 1159, 1170-1171, 232 CR 603* (plaintiff's delay of 25 years after reaching age of majority in bringing action to reform trust was barred by laches)].

➡ **Cross References:**

Form, see 8.78.

See also Ch. 22, Suing or Defending Action for Breach of Contract.

8.32[3][f] Plaintiff's Negligent Failure to Discover Mistake Is Affirmative Defense. As a general equitable rule, inexcusable negligence in failing to discover the mistake for which a remedy is sought bars the granting of equitable relief [*Voge, Inc. v. Rose* (1962) 205 CA2d 534, 539, 23 CR 87]. However, negligence is not a blanket bar to reformation. Instead, the court analyzes the circumstances of the case and determines the extent to which the aggrieved party was negligent [*Voge, Inc. v. Rose* (1962) 205 CA2d 534, 539, 23 CR 87].

Courts will excuse negligence if a person of ordinary prudence would have been negligent in the same circumstances [*Voge, Inc. v. Rose* (1962) 205 CA2d 534, 539, 23 CR 87]. Negligence in failing to read a written instrument sought to be reformed is not necessarily a bar to relief [see *Baines v. Zuieback* (1948) 84 CA2d 483, 491, 191 P2d 67]. However, negligence that is so gross as to constitute a neglect of legal duty will bar the granting of relief [*Los Angeles & Redondo R.R. Co. v. New Liverpool Salt Co.* (1906) 150 C 21, 28, 87 P 1029 ; see also CC § 1577].

Example--Reformation Barred:

Reformation was denied when the party seeking reformation failed to read the contents of the contract through the party's own carelessness [*Miller v. Lantz* (1937) 9 C2d 544, 548, 71 P2d 585 (no showing that defendant was prevented from reading the contract or from fully comprehending the meaning of the language used)].

Example--Reformation Not Barred:

Reformation was allowed when the party's failure to read the instrument was attributable to fraud and false representations by the other party about the contents of the writing [*California Trust Co. v. Cohn* (1932) 214 C 619, 627, 7 P2d 297] .



Cross References:

Form, see 8.78.

Discussion of circumstances in which plaintiff's negligence bars reformation, see California Forms of Pleading and Practice, Ch. 488, Reformation of Instruments (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts Law Remedies Reformation



96 of 189 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 8 Seeking or Opposing Equitable Remedies in Contract Actions
IV. SEEKING OR OPPOSING SPECIFIC PERFORMANCE OF CONTRACT

1-8 MB Practice Guide: CA Contract Litigation 8.33

8.33 CHECKLIST: Seeking or Opposing Specific Performance of Contract.

8.33[1] Determining Whether Specific Performance Is Available.

☐ Verify that there is no adequate remedy at law.

Authority:

Morrison v. Land (1915) 169 C 580, 586, 147 P 259

Discussion:

See 8.37

☐ Confirm that obligation sought to be enforced is not any of the following:

☐ Obligation to render personal services.

Authority:

CC § 3390(1)

Discussion:

See 8.38

☐ Obligation to employ another person in personal service.

Authority:

CC § 3390(2)

Discussion:

See 8.38

- ☐ Obligation to perform an act that party cannot lawfully perform.

Authority:

CC § 3390(3)

Discussion:

See 8.39

- ☐ Obligation that is impossible to perform.

Authority:

Anderson v. Neal Insts. Co. (1918) 37 CA 174, 176, 173 P 779 ; see CC § 3423(e)

Discussion:

See 8.40

- ☐ Obligation to procure act or consent of a third party.

Authority:

CC § 3390(4)

Discussion:

See 8.41

- ☐ Confirm that obligation sought to be enforced is an agreement with terms that are sufficiently certain to make the act to be ordered clearly ascertainable.

Authority:

CC § 3390(5)

Discussion:

See 8.42

- ☐ Confirm that party against whom specific performance is sought has received adequate consideration.

Authority:

CC § 3391(1)

Discussion:

See 8.43

- ☐ Confirm that contract is just and reasonable as to party against whom specific performance is sought.

Authority:

CC § 3391(2)

Discussion:

See 8.44

- ☐ Confirm that contract is not unconscionable.

Authority:

CC § 1670.5

Discussion:

See 8.45

- ☐ Verify that consent of party against whom specific performance is sought was not obtained by misrepresentation, concealment, circumvention, or unfair practices.

Authority:

CC § 3391(3)

Discussion:

See 8.46

- ☐ Verify that assent of party against whom specific performance is sought was not given under influence of mistake, misapprehension, or surprise.

Authority:

CC § 3391(4)

Discussion:

See 8.47

- ☐ Confirm that party seeking specific performance has fully and fairly performed all conditions precedent to other party's performance under contract.

Authority:

CC § 3392

Discussion:

See 8.48

- ☐ Confirm that contract does not require a succession of continuous acts.

Authority:

Ellison v. Ventura Port Dist. (1978) 80 CA3d 574, 580, 145 CR 665

Discussion:

See 8.49

- ☐ If specific performance is being sought from deceased person, file action for quasi-specific performance.

Authority:

Estate of Brenzikofer v. Schwarz (1996) 49 CA4th 1461, 1467, 57 CR2d 401

Discussion:

See 8.56

8.33[2] Pleading Claim for Specific Performance.

- ☐ Allege that contract is sufficiently definite and certain in its terms to be enforced.

Authority:

Hennefer v. Butcher (1986) 182 CA3d 492, 227 CR 318

Discussion:

See 8.42

Form:

See 8.75

- ☐ Allege that consideration was adequate and contract just and reasonable.

Authority:

Young v. Matthew Turner Co. (1914) 168 C 671, 675, 143 P 1029

Discussion:

See 8.43, 8.44

Form:

See 8.75

- ☐ Allege that plaintiff has performed his or her obligations under contract.

Authority:

Cockrill v. Boas (1931) 213 C 490, 492, 2 P2d 774

Discussion:

See 8.48

Form:

See 8.75

- ☐ Allege that plaintiff has satisfied all conditions precedent under contract.

Authority:

Byrne v. Harvey (1962) 211 CA2d 92, 112-113, 27 CR 110

Discussion:

See 8.48

Form:

See 8.75

- ☐ Allege that defendant failed to perform obligations under contract.

Authority:

CC § 3384

Discussion:

See 8.50

Form:

See 8.75

- ☐ Allege that plaintiff has no adequate remedy at law.

Authority:

Wait v. Kern River Mining, Milling, & Developing Co. (1909) 157 C 16, 24, 106 P 98

Discussion:

See 8.37

Form:

See 8.75

- ☐ If contract is oral, allege that defendant is estopped from relying on statute of frauds.

Authority:

Porporato v. Devincenzi (1968) 261 CA2d 670, 675, 68 CR 210

Discussion:

See 8.51

Form:

See 8.75

- ☐ If appropriate, plead alternative remedies of specific performance and damages.

Authority:

Foreman & Clark Corp. v. Fallon (1971) 3 C3d 875, 883, 92 CR 162, 479 P2d 362

Discussion:

See 8.52

- ☐ File action within applicable limitations period.

Authority:

CCP §§ 337, 339

Discussion:

See 8.36

8.33[3] Opposing Claim for Specific Performance.

- ☐ Analyze complaint to determine appropriate response.

Authority:*CCP § 430.10***Discussion:**

See 8.57

Form:

See 8.79

☐ Assert any applicable affirmative defenses, such as:**Authority:***CCP § 430.30***Discussion:**

See 8.58

Form:

See 8.79

☐ Contract is for personal services.**Authority:***CC § 3390(1)***Discussion:**

See 8.58[1]

☐ Defendant's assent to contract was obtained by misrepresentation, concealment, circumvention, or unfair practices.**Authority:***CC § 3391(3)***Discussion:**

See 8.58[2]

☐ Defendant's assent to contract was given under mistake, misapprehension, or surprise.**Authority:***CC § 3391(4)***Discussion:**

See 8.58[3]

☐ Contract is for performance of an unlawful act.**Authority:***CC § 3390(3)*

Discussion:

See 8.58[4]

- ☐ Contract is too uncertain to specifically enforce.

Authority:

Henderson v. Fisher (1965) 236 CA2d 468, 477, 46 CR 173

Discussion:

See 8.58[5]

- ☐ Contract is impossible to perform.

Authority:

Anderson v. Neal Insts. Co. (1918) 37 CA 174, 176, 173 P 779

Discussion:

See 8.58[7]

- ☐ Contract is to procure act of a third person.

Authority:

CC § 3390(4)

Discussion:

See 8.58[8]

- ☐ If contract pertains to real property, seller's title is in doubt.

Authority:

CC § 3394

Discussion:

See 8.58[9]

- ☐ Contract requires a succession of continuous acts.

Authority:

Ellison v. Ventura Port Dist. (1978) 80 CA3d 574, 580, 145 CR 665

Discussion:

See 8.58[10]

- ☐ Claim was not brought within applicable limitations period.

Authority:

CCP §§ 337, 339

Discussion:

See 8.58[11]

- ☐ Claim is barred by laches.

Authority:

McGibbon v. Schmidt (1916) 172 C 70, 74, 155 P 460

Discussion:

See 8.58[12]

- ☐ Plaintiff has an adequate remedy at law.

Authority:

Wilkison v. Wiederkehr (2002) 101 CA4th 822, 832-833, 124 CR2d 631

Discussion:

See 8.58[13]

Legal Topics:

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

Commercial Law (UCC)Sales (Article 2)RemediesBuyer's RemediesReplevin & Specific PerformanceContracts
LawRemediesSpecific PerformanceReal Property LawPurchase & SaleRemediesSpecific Performance



97 of 189 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 8 Seeking or Opposing Equitable Remedies in Contract Actions
IV. SEEKING OR OPPOSING SPECIFIC PERFORMANCE OF CONTRACT

1-8 MB Practice Guide: CA Contract Litigation 8.34

8.34 Options and Strategies.

Specific performance is an equitable action to obtain the performance of a contract when a party refuses, or has failed, to perform [*Schaefer v. United Bank & Trust Co. (1930) 104 CA 635, 641, 286 P 723*]. Specific performance is granted to compel the performance of an affirmative obligation in a contract [see *Long Beach Drug Co. v. United Drug Co. (1939) 13 C2d 158, 170-171, 88 P2d 698*]. The specific performance of a contract may be compelled except when precluded by statute [CC § 3384; see CC §§ 3386-3395].

A plaintiff alternatively may seek specific performance of an agreement and damages for the breach of that agreement, and the court may award damages if the plaintiff is not entitled to specific performance [*Foreman & Clark Corp. v. Fallon (1971) 3 C3d 875, 883, 92 CR 162, 479 P2d 362*]. The remedies of damages for breach of contract and specific performance are inconsistent, so a plaintiff cannot receive both [*Mycogen Corp. v. Monsanto Co. (2002) 28 C4th 888, 906, 123 CR2d 432, 51 P3d 297* ; see 8.52]. Chiefly, the plaintiff will want to assert that there is no adequate remedy at law, making specific performance the only equitable remedy [see 8.37].

The party opposing specific performance will want to assert that the contract is not suitable for specific performance [see 8.38 -8.42], that the plaintiff has an adequate remedy at law, usually in the form of money damages [see 8.37], or that another affirmative defense such as the statute or limitations, laches, or unclean hands is applicable [see 8.32].

A party who has signed a written contract may be compelled specifically to perform it even if the other party has not signed the contract, if the other party has performed or offers to perform it and the case is otherwise proper for enforcing specific performance [CC § 3388].

If a party wants to compel an agreement not to do something, or to prevent the breach of an affirmative obligation, the appropriate course of action is to seek injunctive relief [see *Smith v. Mendonsa (1952) 108 CA2d 540, 542-544, 238 P2d 1039*].



Cross References:

Seeking or opposing injunctions and similar relief in contract actions, see 8.59 -8.71.

Seeking temporary injunctions, see Ch. 6, Using or Opposing Provisional Remedies in Contract Actions.

Legal Topics:

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

Commercial Law (UCC)Sales (Article 2)RemediesBuyer's RemediesReplevin & Specific PerformanceContracts
LawRemediesSpecific PerformanceReal Property LawPurchase & SaleRemediesSpecific Performance



98 of 189 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 8 Seeking or Opposing Equitable Remedies in Contract Actions
IV. SEEKING OR OPPOSING SPECIFIC PERFORMANCE OF CONTRACT

1-8 MB Practice Guide: CA Contract Litigation 8.35

8.35 Elements of Cause of Action for Specific Performance.

To establish a cause of action for specific performance, the plaintiff must establish all of the following [*see generally Henderson v. Fisher* (1965) 236 CA2d 468, 472-474, 46 CR 173] :

- There is no adequate remedy at law [*see* 8.37].
- The obligation sought to be enforced is not one to render personal services or to employ another person in personal service [*see* 8.38].
- The obligation sought to be enforced is not one to perform an act that the party cannot lawfully perform [*see* 8.39].
- The obligation sought to be enforced is not one to procure the act or consent of a third party [*see* 8.41].
- The terms of the agreement sought to be enforced are sufficiently certain to make the precise act to be done clearly ascertainable [*see* 8.42].
- The party against whom specific performance is sought has received adequate consideration [*see* 8.43].
- The contract is just and reasonable as to the party against whom specific performance is sought [*see* 8.44].
- The party seeking specific performance has fully and fairly performed all the conditions precedent to performance under the contract [*see* 8.48].

Legal Topics:

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

Commercial Law (UCC)Sales (Article 2)RemediesBuyer's RemediesReplevin & Specific PerformanceContracts
LawBreachCauses of ActionGeneral OverviewContracts LawBreachCauses of ActionElements of ClaimsContracts

LawRemediesSpecific PerformanceReal Property LawPurchase & SaleRemediesSpecific Performance



99 of 189 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 8 Seeking or Opposing Equitable Remedies in Contract Actions
IV. SEEKING OR OPPOSING SPECIFIC PERFORMANCE OF CONTRACT

1-8 MB Practice Guide: CA Contract Litigation 8.36

8.36 Either Four-Year or Two-Year Statute of Limitations Applies.

A claim for specific performance of a written contract is subject to the four-year statute of limitations [CCP § 337(1); *Estate of Brenzikofer v. Schwarz* (1996) 49 CA4th 1461, 1468-1469, 57 CR2d 401]. A claim for specific performance of an oral contract is subject to the two-year statute of limitations [CCP § 339(1); see 8.58[11]].

The statute of limitations begins to run when the cause of action accrues [CCP § 312]. When the cause of action accrues depends on the circumstances of the case [*Spear v. California State Automobile Ass'n* (1992) 2 C4th 1035, 1040, 9 CR2d 381, 831 P2d 821].

Examples:

- A cause of action for specific performance of an installment contract accrues when the last installment is due [*Tahoe Pines Co. v. Newman* (1922) 59 CA 186, 190, 210 P 445] .
- An action to compel arbitration, which is essentially an action in equity to compel specific performance of a contract, accrues when one party has refused to arbitrate the controversy [*Spear v. California State Automobile Ass'n* (1992) 2 C4th 1035, 1042, 9 CR2d 381, 831 P2d 821].
- A contract to make a will is breached only if it has not been complied with on the promisor's death. The cause of action accrues when the promisor dies [*Estate of Brenzikofer v. Schwarz* (1996) 49 CA4th 1461, 1468-1469, 57 CR2d 401] .



Cross Reference:

See Ch. 4, Determining Applicable Statute of Limitations and Effect on Potential Action.

Legal Topics:

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

Commercial Law (UCC)Sales (Article 2)RemediesBuyer's RemediesReplevin & Specific PerformanceCommercial Law (UCC)Sales (Article 2)RemediesStatutes of LimitationsTime LimitationsContracts LawRemediesSpecific

Performance Governments Legislation Statutes of Limitations Time Limitations Real Property Law Purchase & Sale Remedies Specific Performance



100 of 189 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 8 Seeking or Opposing Equitable Remedies in Contract Actions
IV. SEEKING OR OPPOSING SPECIFIC PERFORMANCE OF CONTRACT

1-8 MB Practice Guide: CA Contract Litigation 8.37

8.37 Plaintiff Must Have No Adequate Remedy at Law.

8.37[1] Specific Performance Is Unavailable When Damages Will Adequately Compensate Plaintiff. Specific performance is available only when no adequate remedy at law is available to the plaintiff. Most commonly, this means that specific performance is not available if the plaintiff can be adequately compensated by money damages [*Palo Alto-Menlo Park Yellow Cab Co. v. Santa Clara County Transit Dist.* (1976) 65 CA3d 121, 133, 135 CR 192 ; see *DVD Copy Control Assn., Inc. v. Kaleidescape, Inc.* (2009) 176 CA4th 697, 725-726, 97 CR3d 856 (contract provision calling for equitable remedy in event of breach will be enforced unless the evidence shows that an aggrieved party has adequate remedy at law or provision is otherwise contrary to law or public policy)].

In determining the adequacy of the plaintiff's remedy at law, the court will look at whether the remedy at law on the contract itself is sufficient, rather than whether the plaintiff has some remedy at law outside the contract [*Henderson v. Fisher* (1965) 236 CA2d 468, 474, 46 CR 173].

➤ **Cross Reference:**

Form, see 8.75.

8.37[2] Personal Property Must Be Rare or Unique. Specific performance is not available on contracts relating to personal property when the property does not have a special value to the contracting party and the recovery of damages will enable the plaintiff to purchase other property of like kind and quality [*Emirzian v. Asato* (1913) 23 CA 251, 256, 137 P 1072]. When the property has rare or sentimental value that cannot be duplicated or replaced, specific performance may be granted [*Wehen v. Lundgaard* (1940) 41 CA2d 610, 613, 107 P2d 491].

➤ **Cross Reference:**

Form, see 8.75.

8.37[3] Damages Presumed Inadequate Compensation for Real Property. It is presumed that the breach of an agreement to transfer real property cannot be adequately compensated by monetary damages, and so specific performance is appropriate. For a single-family dwelling that the party seeking performance intends to occupy, the presumption is conclusive. In other cases, this presumption affects the burden of proof [CC § 3387]. The presumption extends to agreements containing covenants to maintain property in a specified condition [*Union Oil Co. of California*

v. Greka Energy Corp. (2008) 165 CA4th 129, 134, 80 CR3d 738 .

Examples:

- The fact that the buyer in a commercial real property transaction was motivated solely to make a profit from the purchase of the property was insufficient to overcome the strong statutory presumption that damages were inadequate [*Real Estate Analytics, LLC v. Vallas (2008) 160 CA4th 463, 476, 72 CR3d 835*] .

- The trial court properly ordered specific performance of an oilfield purchaser's contractual obligation to the seller to plug and abandon idle oil wells on the property; the seller obtained the promises to plug and abandon the wells in an effort to avoid future liability to regulatory agencies and landowners [*Union Oil Co. of California v. Greka Energy Corp. (2008) 165 CA4th 129, 135, 80 CR3d 738*] .

 Cross Reference:

Form, see 8.75.

8.37[4] Specific Performance of Entire Contract May Be Available If Contract Relates to Both Real and Personal Property. If the subject matter of the contract consists partly of land and partly of personal property, specific performance of the entire contract may be available, even though compensation in money would be an adequate remedy for the failure to perform the part of the contract relating to personal property [*Henderson v. Fisher (1965) 236 CA2d 468, 473, 46 CR 173*] .

 Cross Reference:

Form, see 8.75.

8.37[5] Complaint Must Allege Facts Showing That Damages Are Inadequate. The complaint must allege facts showing the inadequacy of the legal remedy of damages [*Korabek v. Weaver Aircraft Corp. (1944) 65 CA2d 32, 40, 149 P2d 876*] . It is insufficient to merely allege that the legal remedy is inadequate or that the breach cannot be adequately compensated by damages, which is a conclusion of law [*Wait v. Kern River Mining, Milling, & Developing Co. (1909) 157 C 16, 24, 106 P 98*] . The plaintiff must allege specific facts showing the inadequacy of the remedy at law [*Korabek v. Weaver Aircraft Corp. (1944) 65 CA2d 32, 40, 149 P2d 876*] .

Exception:

Because it is presumed that the breach of an agreement to transfer real property cannot be adequately remedied by damages, an allegation of the inadequacy of the legal remedy is not required in this case [see CC § 3387].

 Warning:

Because damages ordinarily are deemed adequate to compensate a party for the loss of personal property, special care should be taken in alleging the reasons why the property in question is unique or why damages otherwise would not be an adequate remedy. The unique characteristics of the property should be noted and the reasons why it is unique should be described. If sentimental value is the reason why damages would be inadequate, that fact should be noted.

 Cross Reference:

Form, see 8.75.

8.37[6] Contract Provision for Equitable Remedy Will Be Enforced Unless Adequate Legal Remedy Exists or Contract Is Contrary to Law or Public Policy. When a contract contains a provision calling for an equitable remedy in the event of breach, a court will honor the parties' agreement and enforce the stipulation, unless the evidence shows that an aggrieved party actually has an adequate remedy at law, or that the provision is otherwise contrary to law or public policy [*DVD Copy Control Assn., Inc. v. Kaleidescape, Inc. (2009) 176 CA4th 697, 725-726, 97 CR3d 856*] .

Legal Topics:

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

Commercial Law (UCC)Sales (Article 2)RemediesBuyer's RemediesReplevin & Specific PerformanceContracts

LawRemediesEquitable ReliefGeneral OverviewContracts LawRemediesSpecific PerformanceReal Property

LawPurchase & SaleRemediesSpecific Performance



101 of 189 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 8 Seeking or Opposing Equitable Remedies in Contract Actions
IV. SEEKING OR OPPOSING SPECIFIC PERFORMANCE OF CONTRACT

1-8 MB Practice Guide: CA Contract Litigation 8.38

8.38 Contract Must Not Be for Personal Services.

Generally, contracts to render a personal service or to employ another person in personal service may not be specifically enforced [CC § 3390(1), (2); *Barndt v. County of Los Angeles* (1989) 211 CA3d 397, 404-405, 259 CR 372 (contract for appointment as cardiologist); *Lyon v. Goss* (1942) 19 C2d 659, 674-675, 123 P2d 11 (contract to employ personal sales representative)]. This is especially true when the relationship between the contracting parties is one of mutual confidence, and the contract stipulates for acts that require special knowledge, skill, or ability, or the exercise of judgment, discretion, integrity, and like personal qualities [*Poultry Producers of S. Cal., Inc. v. Barlow* (1922) 189 C 278, 288, 208 P 93] .

**Strategic Point--Plaintiff:**

Although a contract to render personal services generally cannot be enforced, an injunction may be granted to prevent breach of a personal service contract [CC § 3423(e); CCP § 526(b)(5)].

**Cross Reference:**

Injunctive relief for contracts for personal services, see 8.59, 8.76.

Exceptions:

A court may order specific performance of an obligation to perform personal services when the corresponding services by the plaintiff have been fully or substantially performed, making the contract no longer executory [*Stone v. Burke* (1952) 110 CA2d 748, 756, 244 P2d 51 (employee had already performed his obligation under employment contract by giving up previous employment and had begun taking care of real property for employers)].

An agreement for personal services is subject to specific performance if the services are of such a peculiar, extraordinary, or exceptional character that it is impossible to estimate their value by any pecuniary standard or to adequately compensate for them in money [*Porporato v. Devincenzi* (1968) 261 CA2d 670, 676-677, 68 CR 210] . When a contract for personal services is specifically enforced, it may not be enforced beyond seven years from the commencement of service under the contract [Lab Code § 2855; *De Haviland v. Warner Bros. Pictures, Inc.* (1944) 67 CA2d 225, 153 P2d 983] .

**Cross References:**

Availability of injunctive relief under personal service contracts, see 8.63.

Discussion of contracts for personal services, see California Forms of Pleading and Practice, Ch. 249, Employment Law: Termination and Discipline (Matthew Bender).

Detailed coverage of employment law and contracts, see California Employment Law (Matthew Bender).

Legal Topics:

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

Contracts Law Remedies Specific Performance Contracts Law Types of Contracts Personal Service Agreements



102 of 189 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 8 Seeking or Opposing Equitable Remedies in Contract Actions
IV. SEEKING OR OPPOSING SPECIFIC PERFORMANCE OF CONTRACT

1-8 MB Practice Guide: CA Contract Litigation 8.39

8.39 Specific Performance Cannot Be Used to Compel Performance of Obligation Party Cannot Lawfully Perform.

An agreement to perform an act that the party does not have the power lawfully to perform when required to do so cannot be specifically enforced [*CC* § 3390(3); *Kreamer v. Earl* (1891) 91 C 112, 117, 27 P 735 (prospective property owner, who was not U.S. citizen, was not legally entitled to homestead California property)].



Cross Reference:

See Ch. 18, Asserting or Defending Claim That Contract Is Illegal, Contrary to Public Policy, or Unconscionable.

Legal Topics:

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

Contracts Law Remedies Equitable Relief General Overview Contracts Law Remedies Specific Performance



103 of 189 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 8 Seeking or Opposing Equitable Remedies in Contract Actions
IV. SEEKING OR OPPOSING SPECIFIC PERFORMANCE OF CONTRACT

1-8 MB Practice Guide: CA Contract Litigation 8.40

8.40 Contract Must Not Be Impossible to Perform.

To be subject to specific performance, a contract must call for something that is possible to perform. If there are no means available for the accomplishment of the objects of the contract, whether difficult or practically impossible, the agreement cannot be specifically enforced [*Dulin v. Pacific Wood & Coal Co. (1894) 103 C 357, 364, 37 P 207*] .

Example:

It was not possible for the court to order, and monitor, one company to make medicinal remedies as specified by another competing company [*Anderson v. Neal Insts. Co. (1918) 37 CA 174, 176, 173 P 779*] .

Legal Topics:

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

Commercial Law (UCC)Sales (Article 2)RemediesBuyer's RemediesReplevin & Specific PerformanceContracts
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LawPurchase & SaleRemediesSpecific Performance



104 of 189 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 8 Seeking or Opposing Equitable Remedies in Contract Actions
IV. SEEKING OR OPPOSING SPECIFIC PERFORMANCE OF CONTRACT

1-8 MB Practice Guide: CA Contract Litigation 8.41

8.41 Contract Must Not Be to Procure Act or Consent of Third Party.

An agreement to procure the act or consent of a third person, including the spouse of the contracting party, is not specifically enforceable [CC § 3390(4); *Casady v. Modern Metal Spinning & Mfg. Co. (1961) 188 CA2d 728, 731, 10 CR 790*].

Example:

If a co-owner of real property contracts to convey the property and signs the name of the other co-owner to the contract without his or her consent, and that co-owner refuses to perform, the court will not order specific performance of the contract [see *Olson v. Lovell (1891) 91 C 506, 508, 27 P 765*].

Legal Topics:

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

Commercial Law (UCC)Sales (Article 2)RemediesBuyer's RemediesReplevin & Specific PerformanceContracts
LawRemediesSpecific PerformanceReal Property LawPurchase & SaleRemediesSpecific Performance



105 of 189 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 8 Seeking or Opposing Equitable Remedies in Contract Actions
IV. SEEKING OR OPPOSING SPECIFIC PERFORMANCE OF CONTRACT

1-8 MB Practice Guide: CA Contract Litigation 8.42

8.42 Obligation Must Be Sufficiently Certain to Be Enforced.

For a contract to be specifically enforced, the terms of the contract must be sufficiently certain to make the precise act to be done clearly ascertainable [*CC* § 3390(5); *Crail v. Blakely* (1973) 8 C3d 744, 753-754, 106 CR 187, 505 P2d 1027] .

Whether the contractual terms are sufficiently certain for specific enforcement depends on the circumstances of the case. Every term and condition of an agreement need not be set forth in contract, and custom, usage and other extrinsic evidence may assist in making an agreement sufficiently certain for specific performance [*Larwin-Southern Cal., Inc. v. JGB Inv. Co.* (1979) 101 CA3d 626, 641, 162 CR 52 ; see *Patel v. Liebermensch* (2008) 45 C4th 344, 351, 86 CR3d 366, 197 P3d 177 (escrow specifications are not necessary terms in contract for sale of real estate)]. Although custom is admissible for the purpose of interpreting the agreement of the parties and for furnishing details not expressly covered, it is not admissible to establish the existence of a contract [*White Point Co. v. Herrington* (1968) 268 CA2d 458, 468, 73 CR 885] .

Examples:

- A real estate option contract was sufficiently certain to be specifically enforced despite the fact that the length of the escrow period was not specified in the contract; that term could be determined by implication [*Patel v. Liebermensch* (2008) 45 C4th 344, 350, 86 CR3d 366, 197 P3d 177] .

- An agreement to convey real property that did not include a definite description of the land to be conveyed was not sufficiently certain to warrant specific performance [*Carlson v. Richardson* (1968) 267 CA2d 204, 206-207, 72 CR 769] .

- A provision in a license agreement stating that the technology that was the subject of the agreement was "intended to prevent casual users from the unauthorized copying of copyrighted materials recorded on DVDs" set forth a standard by which the licensee's performance could be measured. Although the parties disagreed on what that standard required, that dispute could be resolved by the trial court and did not preclude specific performance [*DVD Copy Control Assn., Inc. v. Kaleidescape, Inc.* (2009) 176 CA4th 697, 719, 97 CR3d 856] .

Consider:

- The terms of a contract to be specifically enforced must be significantly more certain than a contract for which the plaintiff seeks damages [*Larwin-Southern Cal., Inc. v. JGB Inv. Co.* (1979) 101 CA3d 626, 636, 162 CR 52] .
- If only part of a contract is certain enough for specific performance, the court can order specific performance of just that part of the contract [*Lawrence v. Shutt* (1969) 269 CA2d 749, 763-764, 75 CR 533] .

**Strategic Point--Plaintiff:**

If the contract is ambiguous, the plaintiff should set forth in the complaint the meaning of the contract; if the plaintiff's construction is reasonable, the plaintiff's construction will be given deference if challenged by demurrer [*Connell v. Zaid* (1969) 268 CA2d 788, 794-795, 74 CR 371] .

**Cross Reference:**

Form, see 8.75.

Legal Topics:

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

Commercial Law (UCC)Sales (Article 2)RemediesBuyer's RemediesReplevin & Specific PerformanceContracts
LawRemediesSpecific PerformanceReal Property LawPurchase & SaleRemediesSpecific Performance



106 of 189 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 8 Seeking or Opposing Equitable Remedies in Contract Actions
IV. SEEKING OR OPPOSING SPECIFIC PERFORMANCE OF CONTRACT

*1-8 MB Practice Guide: CA Contract Litigation 8.43***8.43 Party Against Whom Specific Performance Is Sought Must Have Received Adequate Consideration.**

Specific performance cannot be ordered against a party to a contract unless that party has received adequate consideration for the contract [CC § 3391(1)]. The adequacy of the consideration is a question of fact that depends on the circumstances of the case [*Henderson v. Fisher* (1965) 236 CA2d 468, 475, 46 CR 173].

"Adequate consideration" does not mean the highest price obtainable, equality of price, or a consideration measuring the value of the property to the fullest extent. It means only a price that is fair and reasonable under the circumstances [*Chalmers v. Raras* (1962) 200 CA2d 682, 689, 19 CR 531].

Judge's Perspective:

Although "adequate consideration" does not mean the highest price obtainable, it clearly imposes some requirement of fairness on the party seeking specific performance. In one case, for example, a land purchase agreement set a price of \$65,000, and expert testimony at trial set fair market value at \$99,000. The court found the consideration inadequate [*Loeb v. Wilson* (1967) 253 CA2d 383, 388, 61 CR 377]. For the purpose of determining whether consideration is adequate, the value of the promised performance is measured as of the time the contract is executed [*Paratore v. Perry* (1966) 239 CA2d 384, 386, 48 CR 682].

**Warning:**

The acceptance of the agreed consideration waives any claim of inadequacy, and thus is a waiver of any cause of action for specific performance [*Peters v. Binnard* (1933) 219 C 141, 150, 25 P2d 834 ; see 8.58[6]].

**Cross Reference:**

See Ch. 13, Attacking or Defending Existence of Contract--Absence of Essential Element.

Legal Topics:

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

Commercial Law (UCC)Sales (Article 2)RemediesBuyer's RemediesReplevin & Specific PerformanceContracts LawConsiderationAdequate ConsiderationContracts LawRemediesSpecific PerformanceReal Property LawPurchase & SaleRemediesSpecific Performance



107 of 189 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 8 Seeking or Opposing Equitable Remedies in Contract Actions
IV. SEEKING OR OPPOSING SPECIFIC PERFORMANCE OF CONTRACT

1-8 MB Practice Guide: CA Contract Litigation 8.44

8.44 Contract Must Be Just and Reasonable As to Party Against Whom Specific Performance Is Sought.

Specific performance cannot be enforced against a party to a contract if the contract is not just and reasonable as to that party [CC § 3391(2); *Berkeley Lawn Bowling Club v. City of Berkeley* (1974) 42 CA3d 280, 290, 116 CR 762] .

Whether a contract is fair and reasonable is determined from the circumstances that existed at the time the contract was made [*Ellison v. Ventura Port Dist.* (1978) 80 CA3d 574, 582, 145 CR 665] . A change of circumstances that makes performance more difficult or more expensive than expected is not necessarily a bar to specific performance [*Ellison v. Ventura Port Dist.* (1978) 80 CA3d 574, 582, 145 CR 665] .

To state a cause of action for specific performance, the complaint must allege that the defendant has received adequate consideration and that the contract was just and reasonable as to the defendant [*Young v. Matthew Turner Co.* (1914) 168 C 671, 675, 143 P 1029 ; *Rose v. Lawton* (1963) 215 CA2d 18, 19, 29 CR 844 (plaintiff was not entitled to judgment for specific performance when complaint did not allege adequate consideration and that contract was just and reasonable as to defendant)]. The complaint must allege facts supporting the conclusion that the contract is fair and the consideration adequate [*Lifton v. Harshman* (1947) 80 CA2d 422, 434-435, 182 P2d 222 , *disapproved on other grounds*, *Pao Ch'en Lee v. Gregoriou* (1958) 50 C2d 502, 326 P2d 135].

Exception:

The plaintiff need not allege fairness and adequacy of consideration if the defendant has accepted an agreed consideration, because the acceptance of the consideration waives a claim of its inadequacy [*Beab, Inc. v. First W. Bank & Trust Co.* (1962) 204 CA2d 680, 685, 22 CR 583 ; *Conway v. Moore* (1945) 70 CA2d 166, 174, 160 P2d 865].



Cross References:

Form, see 8.79.

See also Ch. 18, Asserting or Defending Claim That Contract Is Illegal, Contrary to Public Policy, or Unconscionable.

Legal Topics:

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

Commercial Law (UCC)Sales (Article 2)RemediesBuyer's RemediesReplevin & Specific PerformanceContracts
LawRemediesSpecific PerformanceReal Property LawPurchase & SaleRemediesSpecific Performance



108 of 189 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 8 Seeking or Opposing Equitable Remedies in Contract Actions
IV. SEEKING OR OPPOSING SPECIFIC PERFORMANCE OF CONTRACT

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8.45 Contract Must Not Be Unconscionable.

If a court finds, as a matter of law, that a contract or any clause of the contract was unconscionable at the time it was made, it may refuse to enforce the contract, may enforce the remainder of the contract without the unconscionable clause, or may so limit the application of any unconscionable clause as to avoid any unconscionable result [CC § 1670.5(a)]. An "unconscionable" contract is one that is outside the weaker party's expectation, and typically is one-sided and harsh [see *Armendariz v. Foundation Health Psychcare Servs., Inc. (2000) 24 C4th 83, 113, 99 CR2d 745, 6 P3d 669*].

➤ Cross References:

See Ch. 18, Asserting or Defending Claim That Contract Is Illegal, Contrary to Public Policy, or Unconscionable.

See also Ch. 21, Asserting a Particular Construction of Contract.

Legal Topics:

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

Commercial Law (UCC)Sales (Article 2)RemediesBuyer's RemediesReplevin & Specific PerformanceContracts
LawDefensesUnconscionabilityGeneral OverviewContracts LawRemediesSpecific PerformanceReal Property
LawPurchase & SaleRemediesSpecific Performance



109 of 189 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 8 Seeking or Opposing Equitable Remedies in Contract Actions
IV. SEEKING OR OPPOSING SPECIFIC PERFORMANCE OF CONTRACT

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8.46 Defendant's Assent Must Not Have Been Obtained by Misrepresentation, Concealment, Circumvention, or Unfair Practices.

A contract cannot be specifically enforced against a party if that party's assent was obtained by the misrepresentation, concealment, circumvention, or unfair practices of a party to whom performance would become due under the contract, or by a promise of that party that has not been substantially fulfilled [CC § 3391(3)].

➡ **Cross Reference:**

See Ch. 17, Attacking or Defending Existence of Contract--Fraud, Duress, Menace, and Undue Influence.

Legal Topics:

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

Commercial Law (UCC) Sales (Article 2) Remedies Buyer's Remedies Replevin & Specific Performance Contracts Law Defenses Fraud & Misrepresentation General Overview Contracts Law Defenses Fraud & Misrepresentation Material Misrepresentation Contracts Law Remedies Specific Performance Real Property Law Purchase & Sale Remedies Specific Performance



110 of 189 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 8 Seeking or Opposing Equitable Remedies in Contract Actions
IV. SEEKING OR OPPOSING SPECIFIC PERFORMANCE OF CONTRACT

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8.47 Defendant's Assent Must Not Have Been Given Under Influence of Mistake, Misapprehension, or Surprise.

A contract will not be specifically enforced if the defendant's assent was given under the influence of mistake, misapprehension, or surprise. However, when the contract provides for compensation in case of mistake, a mistake within the scope of the provision may be compensated, and the contract specifically enforced in other respects, if enforcement is otherwise proper [CC § 3391(4)].



Cross References:

See Ch. 16, Attacking or Defending Existence of Contract--Mistake.

See also Ch. 17, Attacking or Defending Existence of Contract--Fraud, Duress, Menace, and Undue Influence.

Legal Topics:

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

Commercial Law (UCC)Sales (Article 2)RemediesBuyer's RemediesReplevin & Specific PerformanceContracts
LawDefensesGeneral OverviewContracts LawDefensesAmbiguity & MistakeGeneral OverviewContracts
LawRemediesSpecific PerformanceReal Property LawPurchase & SaleRemediesSpecific Performance



111 of 189 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 8 Seeking or Opposing Equitable Remedies in Contract Actions
IV. SEEKING OR OPPOSING SPECIFIC PERFORMANCE OF CONTRACT

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8.48 Plaintiff Must Have Fully Performed Conditions Precedent to Defendant's Performance.

8.48[1] Performance of Conditions Precedent Is Required. The party seeking specific performance must first have fully and fairly performed all the conditions precedent on that party's part to the obligation of the other party [CC § 3392].

When that party's failure to perform is only partial and either is entirely immaterial or is capable of being fully compensated, specific performance may be compelled on full compensation being made for the default [CC § 3392; *Crail v. Blakely* (1973) 8 C3d 744, 754, 106 CR 187, 505 P2d 1027]. Incomplete performance is not a defense to an action for specific performance when there has been substantial performance and full performance was prevented by the defendant [*Ambrose v. Alioto* (1944) 65 CA2d 362, 369, 150 P2d 502].

➡ **Cross Reference:**

Discussion of conditions precedent, see Ch. 22, Suing or Defending Action for Breach of Contract.

Exceptions:

Notwithstanding that the agreed counterperformance for the contract is not or would not have been specifically enforceable, specific performance may be compelled if [CC § 3386]:

- Specific performance would otherwise be an appropriate remedy; and
- The agreed counterperformance has been substantially performed or its concurrent or future performance is assured or, if the court deems necessary, can be secured to the satisfaction of the court.

8.48[2] Complaint Must Allege Plaintiff's Performance or Excuse. The plaintiff must allege performance, offer of performance, or excuse for nonperformance of the contract terms and conditions in the complaint [*Cockrill v. Boas* (1931) 213 C 490, 492, 2 P2d 774 ; *Reyburn v. Young* (1936) 11 CA2d 478, 479, 54 P2d 86].

A general allegation that plaintiff has duly performed all conditions is sufficient [CCP § 457; *Lynn v. Knob Hill Improvement Co.* (1917) 177 C 56, 60, 169 P 1009]. However, the plaintiff's excuse for nonperformance must be

pleaded specifically [*Nelson v. Specialty Records, Inc.* (1970) 11 CA3d 126, 141, 89 CR 540] . If a condition precedent must occur before the defendant's duty of performance accrues, a specific allegation of this event must be pleaded [*Byrne v. Harvey* (1962) 211 CA2d 92, 112-113, 27 CR 110] .

Example:

If the defendant's promise to pay money is conditioned on his or her ability to pay or on the existence of a fund from which payment is to be made, to state a claim for specific performance, the complaint must allege that the condition has been satisfied [*Byrne v. Harvey* (1962) 211 CA2d 92, 112-113, 27 CR 110] .

8.48[3] Failure to Sign Contract Does Not Bar Specific Performance When Other Party Has Performed. A party who has signed a written contract may be compelled specifically to perform it even though the other party has not signed the contract, if the other party has performed it, or offers to perform it, and the case is otherwise proper for enforcing specific performance [CC § 3388].

Example:

When the purchaser under a written contract for the sale of real property, which was signed only by vendor, took possession of the property after making a down payment, paid the purchase price of \$2,400 less \$15, placed improvements on the property of \$3,500, and nothing remained to be done except deliver the deed, the contract was held enforceable [*Boehle v. Benson* (1957) 150 CA2d 696, 700-701, 310 P2d 650] .

Legal Topics:

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

Commercial Law (UCC)Sales (Article 2)RemediesBuyer's RemediesReplevin & Specific PerformanceContracts LawContract Conditions & ProvisionsConditions PrecedentContracts LawRemediesSpecific PerformanceReal Property LawPurchase & SaleRemediesSpecific Performance



112 of 189 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 8 Seeking or Opposing Equitable Remedies in Contract Actions
IV. SEEKING OR OPPOSING SPECIFIC PERFORMANCE OF CONTRACT

1-8 MB Practice Guide: CA Contract Litigation 8.49

8.49 Contract Must Not Require Succession of Continuous Acts.

Courts generally will deny specific performance of a contract providing for a succession of continuous acts calling for the exercise of special knowledge, skill, and judgment by the parties, requiring protracted supervision and direction by the court [*Ellison v. Ventura Port Dist.* (1978) 80 CA3d 574, 580, 145 CR 665] . However, specific performance has been granted in cases in which a party claimed that continuous supervision would be required by the court [see, e.g., *Gale v. Seymour* (1949) 91 CA2d 727, 728, 205 P2d 752 ; *Bakersfield Country Club v. Pacific Water Co.* (1961) 192 CA2d 528, 539, 13 CR 573] .

Legal Topics:

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

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LawRemediesSpecific PerformanceReal Property LawPurchase & SaleRemediesSpecific Performance



113 of 189 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 8 Seeking or Opposing Equitable Remedies in Contract Actions
IV. SEEKING OR OPPOSING SPECIFIC PERFORMANCE OF CONTRACT

1-8 MB Practice Guide: CA Contract Litigation 8.50

8.50 Complaint Must Allege Defendant's Failure to Perform.

A complaint must allege facts setting forth the defendant's failure or refusal to perform [*see CC § 3384*].



Cross Reference:

Form, *see* 8.75.

Legal Topics:

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

Commercial Law (UCC)Sales (Article 2)RemediesBuyer's RemediesReplevin & Specific PerformanceContracts
LawRemediesSpecific PerformanceReal Property LawPurchase & SaleRemediesSpecific Performance



114 of 189 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 8 Seeking or Opposing Equitable Remedies in Contract Actions
IV. SEEKING OR OPPOSING SPECIFIC PERFORMANCE OF CONTRACT

1-8 MB Practice Guide: CA Contract Litigation 8.51

8.51 For Oral Contract Within Statute of Frauds, Complaint Must Allege That Defendant Is Estopped From Relying on Statute of Frauds.

If a contract is oral and within the statute of frauds, the complaint must allege that the defendant is estopped from relying on the statute of frauds [*Porporato v. Devincenzi* (1968) 261 CA2d 670, 675, 68 CR 210].

➡ **Cross References:**

Statute of frauds issues in contract actions, see Ch. 15, Attacking or Defending Existence of Contract--Failure to Comply With Applicable Formalities.

Discussion of the statute of frauds, see California Forms of Pleading and Practice, Ch. 530, Statute of Frauds (Matthew Bender).

Legal Topics:

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

Commercial Law (UCC)Sales (Article 2)RemediesBuyer's RemediesReplevin & Specific PerformanceContracts LawRemediesSpecific PerformanceContracts LawStatutes of FraudsGeneral OverviewContracts LawStatutes of FraudsExceptionsGeneral OverviewReal Property LawPurchase & SaleRemediesSpecific Performance



115 of 189 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 8 Seeking or Opposing Equitable Remedies in Contract Actions
IV. SEEKING OR OPPOSING SPECIFIC PERFORMANCE OF CONTRACT

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8.52 Complaint May Allege Alternative Theories of Recovery.

A plaintiff may seek specific performance of an agreement or, in the alternative, damages for the breach of that agreement, and the court may award damages if the plaintiff is not entitled to specific performance [*Foreman & Clark Corp. v. Fallon* (1971) 3 C3d 875, 883, 92 CR 162, 479 P2d 362] . However, the remedies of damages for breach of contract and specific performance are inconsistent, so a plaintiff cannot receive both [*Tri-Continent Int'l Corp. v. Paris Sav. & Loan Ass'n* (1993) 12 CA4th 1354, 1358-1359, 16 CR2d 508].

The plaintiff may seek specific performance in conjunction with other compatible remedies. For example, after a party has succeeded in reforming a contract, the party then may seek to specifically enforce the contract [CC § 3402].

A contract that provides for liquidated damages or a penalty for breach still may be specifically enforced, regardless of whether the breaching party is willing to pay the damages or penalty [CC § 3389; see *Dyer Bros. Golden W. Iron Works v. Central Iron Works* (1920) 182 C 588, 596, 189 P 445] .

 Cross References:

Discussion of seeking or opposing reformation, see 8.18 et seq.

General discussion of liquidated damages provisions, see *Ch. 7, Seeking or Opposing Damages in Contract Actions*, 7.05[3] -[5].

Legal Topics:

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

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LawRemediesSpecific PerformanceReal Property LawPurchase & SaleRemediesSpecific Performance



116 of 189 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 8 Seeking or Opposing Equitable Remedies in Contract Actions
IV. SEEKING OR OPPOSING SPECIFIC PERFORMANCE OF CONTRACT

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8.53 Plaintiff May Recover Damages Incidental to Specific Performance.

8.53[1] Incidental Damages Are Available in Specific Performance Actions. In an action for specific performance, damages incidental to the specific performance decree, such as damages for delay in performance, may be awarded [see *Ellis v. Mihelis* (1963) 60 C2d 206, 219, 32 CR 415, 384 P2d 7] .

Example:

A party to a contract for the purchase of real property who is entitled to a decree of specific performance also is ordinarily entitled to a judgment for the property's rents and profits from the time the party was entitled to a conveyance [*Ellis v. Mihelis* (1963) 60 C2d 206, 219, 32 CR 415, 384 P2d 7] .

8.53[2] Specific Performance Claim Must First Be Established. A court cannot award incidental damages unless a cause of action for specific performance has been successfully established [*Paratore v. Perry* (1966) 239 CA2d 384, 388, 48 CR 682] .

8.53[3] Specific Allegation and Prayer for Incidental Damages Is Not Required. It is not necessary to specifically request incidental damages, though it is advisable to do so if they are justifiable. The prayer for specific performance and the general prayer "for such other and further relief as the court may deem just" are sufficient [*Greenstone v. Claretian Theological Seminary* (1959) 173 CA2d 21, 32, 343 P2d 161 , *disapproved on other grounds*, *Ellis v. Mihelis* (1963) 60 C2d 206, 221, 32 CR 415, 384 P2d 7] .



Cross Reference:

Discussion of calculating incidental damages in specific performance actions, see California Forms of Pleading and Practice, Ch. 528, Specific Performance (Matthew Bender).

Legal Topics:

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

Commercial Law (UCC) Sales (Article 2) Remedies Buyer's Remedies Replevin & Specific Performance Contracts Law Remedies General Overview Contracts Law Remedies Specific Performance Real Property Law Purchase & Sale Remedies Specific Performance



117 of 189 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 8 Seeking or Opposing Equitable Remedies in Contract Actions
IV. SEEKING OR OPPOSING SPECIFIC PERFORMANCE OF CONTRACT

1-8 MB Practice Guide: CA Contract Litigation 8.54

8.54 Party Can Seek Specific Performance After Reformation.

A party who has succeeded in reforming a contract may seek to specifically enforce that contract [CC § 3402]. The contract may be reformed and specifically enforced in the same action. The court may also reform the contract and then give money damages, if it finds that specific performance cannot be given in the circumstances [*Tomas v. Vaughn* (1944) 63 CA2d 188, 193-194, 146 P2d 499] .



Cross Reference:

Seeking reformation, see 8.18 et seq.

Legal Topics:

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

Commercial Law (UCC)Sales (Article 2)RemediesBuyer's RemediesReplevin & Specific PerformanceContracts
LawRemediesReformationContracts LawRemediesSpecific PerformanceReal Property LawPurchase &
SaleRemediesSpecific Performance



118 of 189 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 8 Seeking or Opposing Equitable Remedies in Contract Actions
IV. SEEKING OR OPPOSING SPECIFIC PERFORMANCE OF CONTRACT

1-8 MB Practice Guide: CA Contract Litigation 8.55

8.55 Party May Not Seek Jury Trial for Specific Performance.

In an action for specific performance there is generally no right to a jury trial [*Gregory v. Hamilton* (1978) 77 CA3d 213, 219-220, 142 CR 563] . In classifying a given action as legal or equitable, the court looks to the nature of the rights at issue and the remedy sought; the label attached to a complaint or cause of action does not control [*Benach v. County of Los Angeles* (2007) 149 CA4th 836, 845-846, 57 CR3d 363 (prayer for "incidental monetary damages" was insufficient to convert equitable action for specific performance into one at law for which jury trial is required). However, if a plaintiff joins legal and equitable issues in the same action, the plaintiff may demand a jury trial on the legal issues [*Farnsworth v. Hunter* (1938) 11 C2d 27, 31-32, 77 P2d 840] .

Legal Topics:

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

Civil ProcedureTrialsJury TrialsActions in EquityCivil ProcedureTrialsJury TrialsRight to Jury TrialCommercial Law (UCC)Sales (Article 2)RemediesBuyer's RemediesReplevin & Specific PerformanceContracts LawRemediesSpecific PerformanceReal Property LawPurchase & SaleRemediesSpecific Performance



119 of 189 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 8 Seeking or Opposing Equitable Remedies in Contract Actions
IV. SEEKING OR OPPOSING SPECIFIC PERFORMANCE OF CONTRACT

1-8 MB Practice Guide: CA Contract Litigation 8.56

8.56 Plaintiff May Bring Action for Quasi-Specific Performance Against Deceased Person.

An action for quasi-specific performance is an action for specific performance between the plaintiff and a deceased person. This action technically is not an action for specific performance, because the decedent obviously cannot be compelled to execute a contract. However, if the plaintiff is entitled to receive the performance promised in the contract, the court can declare a constructive trust in the successors to the decedent's estate, who then can be compelled to complete performance [*Estate of Brenzikofer v. Schwarz* (1996) 49 CA4th 1461, 1467, 57 CR2d 401] .

A cause of action for quasi-specific performance has the same requirements as a cause of action for specific performance [see *Henderson v. Fisher* (1965) 236 CA2d 468, 473, 46 CR 173 ; see 8.35].

Legal Topics:

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

Contracts Law Remedies Equitable Relief General Overview Contracts Law Remedies Specific Performance Estate, Gift & Trust Law Trusts Constructive Trusts Real Property Law Purchase & Sale Remedies Specific Performance Real Property Law Trusts Constructive Trusts



120 of 189 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 8 Seeking or Opposing Equitable Remedies in Contract Actions
IV. SEEKING OR OPPOSING SPECIFIC PERFORMANCE OF CONTRACT

1-8 MB Practice Guide: CA Contract Litigation 8.57

8.57 Opposing Claim for Specific Performance.

The party against whom specific performance is sought may rebut one or more of the essential elements that must be proven [see 8.35], as well as raise appropriate affirmative defenses [see 8.58].

If a defect appears on the face of the complaint, the defendant should raise the defenses by demurrer [CCP § 430.10(e)]. If a defect does not appear on the face of the complaint, the defendant should consider raising the defenses by answer or in a motion for summary judgment [CCP §§ 430.30(b), 437c].

➡ Cross Reference:

Discussion of demurrers and answers, see Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, Ch. 11, Demurrers and Motions for Judgment on the Pleadings; and Ch. 14, Answers.

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Sales (Article 2)RemediesBuyer's RemediesReplevin & Specific PerformanceContracts
LawDefensesGeneral OverviewContracts LawRemediesSpecific PerformanceReal Property LawPurchase &
SaleRemediesSpecific Performance



121 of 189 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 8 Seeking or Opposing Equitable Remedies in Contract Actions
IV. SEEKING OR OPPOSING SPECIFIC PERFORMANCE OF CONTRACT

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8.58 Defendant Can Assert Affirmative Defenses.

8.58[1] Specific Performance Is Unavailable If Contract Is for Personal Services. If a contract requires performance of personal services, the defendant can raise that fact as an affirmative defense. In most cases, neither an obligation to render personal service nor an obligation to employ another person in personal service can be specifically enforced [CC § 3390(1), (2); *but see* CC § 3423(e); CCP § 526(b)(5) (specific performance is available for personal services of special, unique, extraordinary, or intellectual character)].

Cross References:

Discussion, see 8.38.

Form, see 8.79.

8.58[2] Specific Performance Is Unavailable If Defendant's Assent to Contract Was Obtained by Misrepresentation, Concealment, Circumvention, or Unfair Practices. Specific performance cannot be enforced against a party to a contract whose assent was obtained by the misrepresentation, concealment, circumvention, or unfair practices of a party to whom performance would become due under the contract, or by the promise of that party, which is not substantially fulfilled [CC § 3391(3)].

Cross References:

Discussion, see 8.46.

Form, see 8.79.

8.58[3] Specific Performance Is Unavailable If Defendant's Assent to Contract Was Given Under Mistake, Misapprehension, or Surprise. Specific performance cannot be enforced against a party to a contract whose assent was given under the influence of mistake, misapprehension, or surprise [CC § 3391(4)].

Cross References:

Discussion, see 8.47

Form, see 8.79.

8.58[4] Specific Performance Is Unavailable If Contract Is for Performance of Unlawful Act. An agreement to perform an act which the party does not have the power lawfully to perform when required to do so cannot be specifically enforced [CC § 3390(3)].

➤ **Cross References:**

Discussion, see 8.39.

Form, see 8.79.

8.58[5] Specific Performance Is Unavailable If Contract Is Too Uncertain to Enforce. When a contract is uncertain or incomplete, a court will not be able to order specific enforcement, because the terms are too vague to allow the court to be able to craft an order [*Henderson v. Fisher* (1965) 236 CA2d 468, 477, 46 CR 173].

➤ **Cross References:**

Discussion, see 8.42.

Form, see 8.79.

8.58[6] Specific Performance Is Unavailable If Plaintiff Waived Right to Specific Performance by Accepting Consideration. The plaintiff's acceptance of the agreed consideration under the contract waives any claim of inadequacy, and thus is a waiver of any cause of action for specific performance [*Peters v. Binnard* (1933) 219 C 141, 150, 25 P2d 834].

➤ **Cross References:**

Discussion, see 8.43.

Form, see 8.79.

8.58[7] Specific Performance Is Unavailable If Contract Is Impossible to Perform. Impossibility is a ground for denying specific performance [*Anderson v. Neal Insts. Co.* (1918) 37 CA 174, 176, 173 P 779 ; see CC § 3423(e)]. If there are no means available for the accomplishment of the objects of the contract, the agreement cannot be specifically enforced [*Dulin v. Pacific Wood & Coal Co.* (1894) 103 C 357, 364, 37 P 207] .

➤ **Cross References:**

Discussion, see 8.40.

Form, see 8.79.

8.58[8] Specific Performance Is Unavailable If Contract Procures Act of Third Person. An agreement to procure the act or consent of a third person cannot be enforced [CC § 3390(4)].

➤ **Cross References:**

Discussion, see 8.41.

Form, see 8.79.

8.58[9] Specific Performance Is Unavailable If Seller's Title in Contract for Real Property Is in Doubt. An agreement for the sale of property cannot be specifically enforced in favor of a seller who cannot give the buyer a title

free from reasonable doubt [CC § 3394]. This defense generally is used in situations involving the sale of real property. If the seller has any claim to the property, he or she cannot avoid specific performance just because the title is not exactly as agreed [*Groobman v. Kirk* (1958) 159 CA2d 117, 126, 323 P2d 867].

Exception:

Although a seller who has no title or interest in land to be conveyed cannot be required to specifically perform, the seller may be required to do so if he or she is equitable owner of the property and has the right to call for legal title [*Weisberg v. Ashcraft* (1961) 194 CA2d 225, 232, 14 CR 817].

When an obligation as to real property can be specifically enforced against a particular person, it may be enforced against any other person claiming under that person by a title created subsequently to the obligation. However, this does not include a purchaser or encumbrancer in good faith and for value. In addition, any such person can be exonerated by conveying all the estate to the person entitled to enforce the obligations [CC § 3395].

➤ **Cross Reference:**

Discussion of contracts for the purchase and sale of real property, see California Forms of Pleading and Practice, Ch. 569, Vendor and Purchaser (Matthew Bender).

8.58[10] Specific Performance Is Unavailable If Contract Requires Succession of Continuous Acts. A contract that provides for a succession of continuous acts requiring protracted supervision and direction by the court with the exercise of special knowledge, skill, and judgment by the parties performing the acts will not be specifically enforced [*Ellison v. Ventura Port Dist.* (1978) 80 CA3d 574, 580, 145 CR 665 ; see 8.49].

➤ **Cross References:**

Discussion, see 8.49.

Form, see 8.79.

8.58[11] Specific Performance Is Unavailable If Claim Was Not Brought Within Applicable Limitations Period. Specific performance of a written contract is subject to a four-year statute of limitations; specific performance of an oral contract is subject to a two-year statute of limitations [CCP §§ 337(1), 339(1); see 8.36]. Actions not brought within those periods are subject to this affirmative defense.

➤ **Cross References:**

Discussion, see 8.36.

Form, see 8.79.

General discussion of statutes of limitations, see Ch. 4, Determining Applicable Statute of Limitations and Effect on Potential Action.

8.58[12] Specific Performance Is Unavailable If Claim Is Barred by Laches. The defense of laches may be raised when the plaintiff has delayed prosecuting the action, regardless of whether the statute of limitations has not run [*Jones v. H.F. Ahmanson & Co.* (1969) 1 C3d 93, 120, 81 CR 592, 460 P2d 464].

➤ **Cross Reference:**

See Ch. 4, Determining Applicable Statute of Limitations and Effect on Potential Action, 4.25.

8.58[13] Specific Performance Is Unavailable If Plaintiff Has Adequate Remedy at Law. Specific performance is not available if the plaintiff has an adequate remedy at law, such as monetary damages [*Wilkison v.*

Wiederkehr (2002) 101 CA4th 822, 832-833, 124 CR2d 631 ; see 8.37].

**Cross References:**

Discussion, see 8.37.

Form, see 8.79.

Legal Topics:

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

Civil Procedure Pleading & Practice Defenses, Demurrers & Objections Affirmative Defenses General Overview Contracts Law Defenses General Overview Contracts Law Remedies Specific Performance Contracts Law Types of Contracts Personal Service Agreements Real Property Law Purchase & Sale Remedies Specific Performance



122 of 189 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 8 Seeking or Opposing Equitable Remedies in Contract Actions
V. SEEKING OR OPPOSING INJUNCTIONS IN CONTRACT ACTIONS

1-8 MB Practice Guide: CA Contract Litigation 8.59

8.59 CHECKLIST: Seeking or Opposing Injunctions in Contract Actions.

8.59[1] Determining Whether Injunctive Relief Is Available.

☐ Do any of following grounds for injunctive relief exist?

☐ Pecuniary compensation (damages) will not afford adequate relief.

Authority:

CC § 3422(1)

Discussion:

See 8.62

☐ It is extremely difficult to ascertain amount of compensation that would afford adequate relief.

Authority:

CC § 3422(2)

Discussion:

See 8.62

☐ Restraint is necessary to prevent a multiplicity of judicial proceedings.

Authority:

CC § 3422(3)

Discussion:

See 8.61

☐ Is a party to action doing, threatening, about to do, or procuring to be done, some act in violation of rights of another party to action respecting subject of action, and tending to render judgment ineffectual?

Authority:

CCP § 526(a)(3)

Discussion:

See 8.61

☐ Is injunctive relief barred because obligation in question cannot be specifically enforced (with limited exception for personal services contracts)?

Authority:

CC § 3423(e); CCP § 526(a), (b)

Discussion:

See 8.61

☐ If obligation is one for personal services, are services of special, unique, unusual, extraordinary, or intellectual character that give services particular value the loss of which cannot reasonably be compensated by damages?

Authority:

CC § 3423(e); CCP § 526(a)

Discussion:

See 8.63

☐ Does obligation arise out of any of the following?

☐ Trust agreement.

Authority:

CC § 3422; CCP § 526(a)(7)

Discussion:

See 8.64

☐ Valid noncompetition agreement.

Authority:

Martinez v. Martinez (1953) 41 C2d 704, 706, 263 P2d 617 ; City Carpet Beating etc. Works v. Jones (1894) 102 C 506, 509-515, 36 P 841

Discussion:

See 8.65

☐ Cooperative marketing agreement between nonprofit cooperative association or association and member or stockholder.

Authority:

CC § 3423(e)(3); CCP § 526(b)(5)(C); F&A Code § 54265

Discussion:

See 8.66

8.59[2] Seeking Injunctive Relief.

☐ Allege all of following in complaint for injunctive relief:

☐ Elements of a cause of action for wrongful act sought to be enjoined.

Authority:

Art Movers, Inc. v. Ni W., Inc. (1992) 3 CA4th 640, 646-647, 4 CR2d 689

Discussion:

See 8.67

Form:

See 8.76

☐ Grounds for equitable relief.

Authority:

Art Movers, Inc. v. Ni W., Inc. (1992) 3 CA4th 640, 646-647, 4 CR2d 689

Discussion:

See 8.67

Form:

See 8.76

☐ That plaintiff has suffered or will suffer irreparable harm and that plaintiff has no adequate remedy at law.

Authority:

CCP § 526(a)

Discussion:

See 8.67

Form:

See 8.76

☐ Seek injunction in conjunction with final judgment granting desired relief.

Authority:

Art Movers, Inc. v. Ni W., Inc. (1992) 3 CA4th 640, 646-647, 4 CR2d 689

Discussion:

See 8.68

8.59[3] Opposing Claim for Injunctive Relief.

- ☐ Analyze complaint to determine appropriate response and potential affirmative defenses:

Authority:

CCP § 430.10

Discussion:

See 8.70, 8.71

Form:

See 8.80

- ☐ Are acts unlikely to be repeated in future?

Authority:

Early v. Santa Clara Broad. Co. (1962) 211 CA2d 367, 373, 27 CR 212

Discussion:

See 8.71[1]

- ☐ Is plaintiff's claim arguably barred by laches?

Authority:

Gravelly Ford Canal Co. v. Pope & Talbot Land Co. (1918) 36 CA 717, 737, 178 P 155

Discussion:

See 8.71[2]

- ☐ Does plaintiff have an adequate remedy at law?

Authority:

CC § 3422

Discussion:

See 8.71[3]

- ☐ Does public interest require that injunction not be granted?

Authority:

Lamb v. Cal. Water & Tel. Co. (1942) 21 C2d 33, 39, 129 P2d 371

Discussion:

See 8.71[4]

- ☐ Is relief sought contrary to law?

Authority:

Armstrong v. Picquelle (1984) 157 CA3d 122, 129, 203 CR 552

Discussion:

See 8.71[5]

- ☐ Does plaintiff have unclean hands?

Authority:

Art Movers, Inc. v. Ni W., Inc. (1992) 3 CA4th 640, 646-647, 4 CR2d 689

Discussion:

See 8.71[6]

- ☐ Is requested relief overbroad?

Authority:

Aguilar v. Avis Rent A Car Sys. (1999) 21 C4th 121, 178-179, 87 CR2d 132, 980 P2d 846 (employment discrimination case)

Discussion:

See 8.71[7]

- ☐ Is contract one that could not be specifically enforced?

Authority:

CC § 3423(e)

Discussion:

See 8.71[8]

Legal Topics:

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

Civil Procedure Remedies Injunctions General Overview Contracts Law Remedies Equitable Relief Injunctive Relief



123 of 189 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 8 Seeking or Opposing Equitable Remedies in Contract Actions
V. SEEKING OR OPPOSING INJUNCTIONS IN CONTRACT ACTIONS

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8.60 Options and Strategies.

An injunction is a writ or order requiring a person to refrain from doing a particular act [CCP § 525; *Long Beach Drug Co. v. United Drug Co.* (1939) 13 C2d 158, 170-171, 88 P2d 698] .

An injunction to prevent the breach of a contract normally is not granted except in limited situations [CC § 3423; *Steinmeyer v. Warner Consol. Corp.* (1974) 42 CA3d 515, 519, 116 CR 57 ; *see* 8.61]. The plaintiff therefore will want to establish the extraordinary circumstances of the case, while the defendant will seek to minimize those circumstances. If the contract is to render personal services, the defendant can establish this as a defense to injunctive relief unless the personal services are of a special, unique, extraordinary, or intellectual nature [*see* 8.63].

A defendant seeking to avoid imposition of an injunction can assert a variety of defenses, including changed circumstances, laches, the existence of an adequate remedy at law, a public interest overriding the need for the injunction, the plaintiff's unclean hands, and an overbroad injunction [*see* 8.71].

Distinguish--Injunctions and Specific Performance:

Injunctions differ from the remedy of specific performance in that specific performance normally compels the performance of an affirmative obligation in a contract, while an injunction prohibits an act [*see* 8.33 et seq.].

Distinguish--Preliminary Injunctions and Permanent Injunctions:

Unlike a preliminary injunction, a permanent injunction is not issued to maintain the status quo [*Art Movers, Inc. v. Ni W., Inc.* (1992) 3 CA4th 640, 646, 4 CR2d 689 ; CC § 3420]. A permanent injunction is a determination on the merits that a plaintiff has prevailed on a cause of action against a defendant and that equitable relief is appropriate [*Art Movers, Inc. v. Ni W., Inc.* (1992) 3 CA4th 640, 646, 4 CR2d 689] . A permanent injunction may be the same in scope and effect as a previously granted preliminary injunction, or it may be different, because it is a restraint imposed by a new and distinct order [*San Diego Water Co. v. Pacific Coast Steamship Co.* (1894) 101 C 216, 221, 35 P 651] .

Strategic Point--Plaintiff:



A plaintiff who is seeking injunctive relief should consider whether to first obtain a temporary restraining order or a preliminary injunction to preserve the status quo and prevent irreparable damage

while the litigation seeking a permanent injunction is in progress.



Cross Reference:

Discussion of preliminary injunctions, temporary restraining orders, and other interim remedies, see Ch. 6, Using or Opposing Provisional Remedies in Contract Actions.

Legal Topics:

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

Civil Procedure Remedies Injunctions General Overview Contracts Law Remedies Equitable Relief Injunctive Relief



124 of 189 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 8 Seeking or Opposing Equitable Remedies in Contract Actions
V. SEEKING OR OPPOSING INJUNCTIONS IN CONTRACT ACTIONS

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8.61 Grounds for Obtaining Permanent Injunction to Prevent Breach of Contract.

To obtain a permanent injunction, the plaintiff must establish one of the following grounds to prevent the breach of an obligation [CCP § 526(a); CC § 3422]:

- Pecuniary compensation would not afford adequate relief.
- It would be extremely difficult to ascertain the amount of compensation that would afford adequate relief.
- The restraint is necessary to prevent a multiplicity of judicial proceedings.
- The obligation arises from a trust.
- The plaintiff is entitled to the relief demanded, and the relief consists in restraining the commission or continuance of an act, for a limited period or perpetually.
- The complaint or affidavits show that the commission or continuance of an act during the litigation would produce waste, or great or irreparable injury, to a party to the action.
- During the litigation, a party to the action is doing, threatens, is about to do, or is planning to some act that violates the rights of another party to the action as to the subject of the action, which tends to render the judgment ineffectual.

Example--Injunction Used to Prevent Party From Acting in Violation of Other Party's Rights:

A permanent injunction has been used in a contract action when a party is threatening to, or about to, destroy potentially discoverable evidence related to the contract [*Zakaria v. Lincoln Prop. Co. (1986) 185 CA3d 500, 504-505, 229 CR 669* (seeking preliminary and permanent injunction to enjoin allegedly discriminatory housing policy)].

Prerequisite--Specific Performance Must Be Available:

Ordinarily in order for injunctive relief to be granted, specific performance must be available to enforce the contract in question. If the contract cannot be specifically enforced, injunctive relief cannot be granted [CC § 3423(e); *Steinmeyer v. Warner Consol. Corp. (1974) 42 CA3d 515, 519, 116 CR 57* ;

Golden W. Baseball Co. v. City of Anaheim (1994) 25 CA4th 11, 49-50, 31 CR2d 378 ; see 8.33 et seq.].

Examples--Injunction Granted:

- A contracting party enjoined a stranger to the contract from unlawfully interfering with business or rights under the contract when the stranger's acts would result in irreparable injury [*California Grape Control Bd., Ltd. v. California Produce Corp.* (1935) 4 CA2d 242, 244, 40 P2d 846].
- A party who bought a business and its goodwill, and agreed that the seller would refrain from carrying on a similar business within a specified area for a specified time, could enforce the agreement by injunction against the seller [*General Paint Corp. v. Seymour* (1932) 124 CA 611, 615, 12 P2d 990].
- A searcher of title records who contracted with the purchaser of the abstracting company not to engage in abstracting work in a particular locality during a particular time could seek an injunction to restrain the breach of that contract [*Ragsdale v. Nagle* (1895) 106 C 332, 334-335, 39 P 628].
- In a transaction in which a party who leased premises to sell candy and fountain drinks, in which the parties contracted that the lessor would not rent, for a similar purpose, any other part of the building abutting on that street, the parties' covenant could be protected by injunction [*Pappadatos v. Market St. Bldg. Corp.* (1900) 130 CA 62, 64, 19 P2d 517].

Examples--Injunction Denied:

- In a written contract that contained a negative covenant of exclusive agency and affirmative covenants for the defendant to sell products to the plaintiff and for the plaintiff to purchase them, the affirmative covenant could not be specifically enforced, so an injunction was not available to prevent a breach of the negative covenant [*Long Beach Drug Co. v. United Drug Co.* (1939) 13 C2d 158, 172, 88 P2d 698].
- A permanent injunction prohibiting an automobile manufacturer from breaching its contract with a distributor was not granted when the effect of the injunction would have been to specifically enforce the dealership agreement requiring the manufacturer to sell its products to the dealer over an indefinite term, and the decree would impose on the court the impossible task of supervising continuous performance by the parties [*Thayer Plymouth Ctr., Inc. v. Chrysler Motors Corp.* (1967) 255 CA2d 300, 304, 63 CR 148].
- Because an oral contract to make a will cannot be specifically enforced, an injunction is not available to prevent the breach of the parties' oral contract [*O'Brien v. O'Brien* (1925) 197 C 577, 588, 241 P 861].



Search California State and Federal Cases:

Use [lexis.com](http://www.lexis.com) to search for contract cases involving injunctive relief:

- Legal > States Legal--U.S. > California > Cases > CA Federal and State Cases, Combined

○ Sample Search: To find California federal and state contract cases involving a request for injunction, try: *core-terms(contract) and disposition(injunct!)*.

Legal Topics:

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

Civil Procedure Remedies Injunctions Elements General Overview Civil Procedure Remedies Injunctions Permanent Injunctions Contracts Law Remedies Equitable Relief Injunctive Relief



125 of 189 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 8 Seeking or Opposing Equitable Remedies in Contract Actions
V. SEEKING OR OPPOSING INJUNCTIONS IN CONTRACT ACTIONS

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8.62 Plaintiff Must Have No Adequate Remedy at Law.

If monetary damages give the plaintiff adequate relief and the amount of monetary damages is not extremely difficult to ascertain, an injunction may not be granted [*Thayer Plymouth Ctr., Inc. v. Chrysler Motors Corp.* (1967) 255 CA2d 300, 306, 63 CR 148] .

Legal Topics:

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

Civil Procedure Remedies Injunctions General Overview Civil Procedure Remedies Injunctions Elements Irreparable Harm Contracts Law Remedies Equitable Relief Injunctive Relief



126 of 189 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 8 Seeking or Opposing Equitable Remedies in Contract Actions
V. SEEKING OR OPPOSING INJUNCTIONS IN CONTRACT ACTIONS

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8.63 Injunction to Enforce Personal Services Contract Is Available Only Under Very Limited Circumstances.

8.63[1] Injunctive Relief Generally Is Unavailable to Enforce Personal Service Contracts. Generally, contracts to render personal service and to employ another person in personal service are not specifically enforceable [CC § 3390; *see* 8.38], and hence an injunction to enforce performance of such a contract generally is unavailable [*see* CC § 3423(e); CCP § 526(b)(5); *see generally, e.g., Woolley v. Embassy Suites, Inc. (1991) 227 CA3d 1520, 1533-1534, 278 CR 719* (reasons why such contracts are not specifically enforceable)]. However, there are a number of very specific exceptions to this rule that may permit use of injunctions to enforce personal service contracts under limited circumstances [*see* 8.63[2]].

Cross References:

Form, *see* 8.76.

Discussion of contracts for personal services, *see* California Forms of Pleading and Practice, Ch. 249, Employment Law: Termination and Discipline (Matthew Bender).

8.63[2] Injunction Is Available When Personal Services Are Extraordinary or Unique. An injunction can be granted to prevent the breach of a contract in writing for the rendition of personal services from one person to another if both of the following conditions are satisfied [CC § 3423(e); CCP § 526(b)]:

- The promised service is of a special, unique, unusual, extraordinary, or intellectual character, which gives it peculiar value, the loss of which cannot be reasonably or adequately compensated in damages in an action at law; and
- The individual who promised to render the service has received compensation for the covered personal services commensurate with a complex statutory formula [*see* CC § 3423(e)(2); CC § 526(b)(5)].

Consider:

Attorneys may find the statute confusing because it speaks in general terms and prescribes an arcane compensation formula as a test for when the statute can be applied. In practice, the statute usually will be

applied to exclusive performance contracts between athletes, actors, musicians, or other performance artists on one hand, and teams, producers, or impresarios on the other [see, e.g., *Lemat Corp. v. Barry* (1969) 275 CA2d 671, 675-676, 80 CR 240 (basketball player); *Foxx v. Williams* (1966) 244 CA2d 223, 235, 52 CR 896 (comedian/actor); *MCA Records, Inc. v. Newton-John* (1979) 90 CA3d 18, 22, 153 CR 153 (singer)]. When the performance of an artist or athlete is at issue, the employer normally has contracted for the exclusive right to the performer's services for a specified period. That no other person may employ the performer during that period is considered part of the right for which the employer has bargained and compensated the performer [*Lemat Corp. v. Barry* (1969) 275 CA2d 671, 677-678, 80 CR 240] . The peculiar compensation formula is the result of negotiations between the legislative sponsor of the 1993 amendment putting it in place and various interested persons including talent attorneys, representatives from the recording, television, and motion picture industry, and unions for performing artists [see generally Assembly Committee on Judiciary, Report on SB 487 (Aug. 18, 1993); see also *Motown Record Corp. v. Brockert* (1984) 160 CA3d 123, 128-129, 207 CR 574 (description and explanation of practical problems caused by previous version of statute, which 1993 negotiated amendment was expected to cure)].

The ability to enjoin a contract for personal services is subject to the compensation requirements set forth in CC § 3423 and duration limits Lab Code § 2855 [see, e.g., *Motown Record Corp. v. Brockert* (1984) 160 CA3d 123, 134, 207 CR 574] .

Consider:

The statutory compensation formula [see CC § 3423(e)(2); CC § 526(b)(5)] refers to an employment period of up to seven years because under the Labor Code, a contract to render personal service (other than a contract of apprenticeship) generally may not be enforced against the employee beyond seven years from the commencement of service under the contract [see Lab Code § 2855(a)]. When a court issues an injunction under CCP § 526(b)(5), it cannot endure beyond the expiration of the contract being enforced, or beyond the statutory period of seven years, whichever period of duration would be shorter.

Legal Topics:

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

Civil Procedure Remedies Injunctions General Overview Contracts Law Remedies Equitable Relief Injunctive Relief Contracts Law Types of Contracts Personal Service Agreements



127 of 189 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 8 Seeking or Opposing Equitable Remedies in Contract Actions
V. SEEKING OR OPPOSING INJUNCTIONS IN CONTRACT ACTIONS

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8.64 Injunction Can Enforce Trust Agreement.

An injunction may be granted to prevent the breach of an obligation arising from a trust [CC § 3422; CCP § 526(a)(7)].

Legal Topics:

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

Civil Procedure Remedies Injunctions General Overview Contracts Law Remedies Equitable Relief Injunctive Relief Estate,
Gift & Trust Law Trusts General Overview Real Property Law Trusts General Overview



128 of 189 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 8 Seeking or Opposing Equitable Remedies in Contract Actions
V. SEEKING OR OPPOSING INJUNCTIONS IN CONTRACT ACTIONS

1-8 MB Practice Guide: CA Contract Litigation 8.65

8.65 Injunction Can Enforce Noncompetition Agreement.

Although noncompetition agreements generally are prohibited [see *B&P Code § 16600*], it is possible to make an enforceable noncompetition agreement in limited circumstances:

- The seller of a business can agree not to compete with the buyer [*B&P Code § 16601*].
- A withdrawing partner can agree not to compete with the partnership [*B&P Code § 16602*].
- A withdrawing member of a limited liability company can agree not to compete with the company [*B&P Code § 16602.5*].

Such an agreement can be enforced by injunction [see, e.g., *Martinez v. Martinez* (1953) 41 C2d 704, 706, 263 P2d 617; *City Carpet Beating etc. Works v. Jones* (1894) 102 C 506, 509-515, 36 P 841] .

Distinguish:

An employee's contractual obligation not to compete with the employer after termination of the employment generally is not enforceable except as necessary to protect the employer's trade secrets and properly confidential information [*B&P Code § 16600*; see, e.g., *Fortna v. Martin* (1958) 158 CA2d 634, 638-640, 323 P2d 146 (judgment granting injunction against employee was reversed)].

Legal Topics:

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

Civil Procedure Remedies Injunctions General Overview Computer & Internet Law Trade Secret Protection Noncompetition & Nondisclosure Agreements Contracts Law Remedies Equitable Relief Injunctive Relief Labor & Employment Law Employment Relationships Employment Contracts Conditions & Terms Trade Secrets & Unfair Competition Noncompetition & Nondisclosure Agreements Trade Secrets Law Ownership Rights Covenants Not to Compete



129 of 189 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 8 Seeking or Opposing Equitable Remedies in Contract Actions
V. SEEKING OR OPPOSING INJUNCTIONS IN CONTRACT ACTIONS

1-8 MB Practice Guide: CA Contract Litigation 8.66

8.66 Injunction Can Enforce Nonprofit Cooperative Marketing Contract.

Two statutory provisions authorize a cooperative marketing association to obtain an injunction to prevent the breach of a cooperative marketing agreement by a producer or provider of a commodity covered by the agreement:

- An injunction may be granted to prevent the breach of a contract entered into between any nonprofit cooperative corporation or association and a member of the association or shareholder of the corporation, in respect to any provision regarding the sale or delivery to the association or corporation of the products produced or acquired by the member or shareholder [*CC* § 3423(e)(3); *CCP* § 526(b)(5)(C); *see generally Poultry Producers of S. Cal., Inc. v. Barlow* (1922) 189 C 278, 285-286, 208 P 93 (opinion that was partially abrogated by 1925 amendment adding this statutory provision)].
- If there is a threatened breach of a marketing contract by a member of an association that is governed by the nonprofit cooperative associations law [*see F&A Code* § 54001 *et seq.*], the association is entitled to an injunction to prevent the threatened breach and is entitled to a decree of specific performance of the contract [*F&A Code* § 54265].

Consider:

Cooperative marketing contracts are specifically enforceable by the marketing association in many cases [*see, e.g., Corp Code* § 13356 (nonprofit fish-marketing association's contract); *F&A Code* §§ 54263, 54265 (nonprofit cooperative association's contract); *see also Colma Vegetable Ass'n v. Bonetti* (1928) 91 CA 103, 114, 267 P 172 (application of former cooperative marketing act)], and thus they would also be enforceable by injunction on that ground [*see Ch. 6, Using or Opposing Provisional Remedies in Contract Actions*, 6.05[4]].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts Law Remedies Equitable Relief Injunctive Relief



130 of 189 DOCUMENTS

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Chapter 8 Seeking or Opposing Equitable Remedies in Contract Actions
V. SEEKING OR OPPOSING INJUNCTIONS IN CONTRACT ACTIONS

1-8 MB Practice Guide: CA Contract Litigation 8.67

8.67 Requirements to Obtain Permanent Injunction.

To obtain a permanent injunction, the plaintiff must allege in the complaint and prove the following [*Art Movers, Inc. v. Ni W., Inc.* (1992) 3 CA4th 640, 646-647, 4 CR2d 689] :

- The elements of a cause of action involving the wrongful act sought to be enjoined.
- The grounds for equitable relief, such as inadequacy of the remedy at law.

Strategic Point--Plaintiff:

Although they appear to be separate grounds for relief, allegations of irreparable injury and an inadequate remedy at law are traditionally included in a complaint for injunctive relief [see *Art Movers, Inc. v. Ni W., Inc.* (1992) 3 CA4th 640, 646-647, 4 CR2d 689] . This is true even though CC § 3422, which governs the issuance of final injunctions, does not list irreparable injury as a ground for obtaining a final injunction. This is because an injury is not considered irreparable when it can be adequately compensated in damages, i.e., when the remedy at law is adequate [*Helms Bakeries v. State Bd. of Equalization* (1942) 53 CA2d 417, 425, 128 P2d 167 (revocation of resale permit)]. The questions of whether an actual or threatened injury is irreparable and whether the legal remedy is adequate are so inextricable that the two should be considered together [*People v. Monterey Fish Prods. Co.* (1925) 195 C 548, 564, 234 P 398 (injunction to prevent improper handling of fish products)]. Therefore, the complaint should allege facts showing actual or threatened injury and facts showing that the legal remedy of an action for damages is inadequate [see *Brownfield v. Daniel Freeman Marina Hosp.* (1989) 208 CA3d 405, 410, 256 CR 240 (injunction seeking to require hospital to counsel rape victims)].

**Cross Reference:**

Form, see 8.76.

Legal Topics:

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

Civil Procedure Remedies Injunctions Elements General Overview Civil Procedure Remedies Injunctions Permanent

Injunctions Contracts Law Remedies Equitable Relief Injunctive Relief



131 of 189 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 8 Seeking or Opposing Equitable Remedies in Contract Actions
V. SEEKING OR OPPOSING INJUNCTIONS IN CONTRACT ACTIONS

1-8 MB Practice Guide: CA Contract Litigation 8.68

8.68 Permanent Injunction Can Be Obtained by Seeking Judgment Granting Desired Relief.

As in other civil actions, a permanent injunction can be obtained by seeking a judgment that grants the desired relief [see *Art Movers, Inc. v. Ni W., Inc.* (1992) 3 CA4th 640, 646-647, 4 CR2d 689] .



Strategic Point:

When an injunction is a part of the final judgment that adjudicates all of the rights of the parties, a notice or an order to show cause (as is required before the issuance of a preliminary injunction) is not necessary [*Knox v. Wolfe* (1946) 73 CA2d 494, 506, 167 P2d 3].



Cross Reference:

Discussion and forms relating to obtaining and entering judgments in general, see California Forms of Pleading and Practice, Ch. 318, Judgments (Matthew Bender).

Legal Topics:

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

Civil Procedure Remedies Injunctions Permanent Injunctions Contracts Law Remedies Equitable Relief Injunctive Relief



132 of 189 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 8 Seeking or Opposing Equitable Remedies in Contract Actions
V. SEEKING OR OPPOSING INJUNCTIONS IN CONTRACT ACTIONS

1-8 MB Practice Guide: CA Contract Litigation 8.69

8.69 Jury Trial Is Unavailable.

Because an injunction is an equitable remedy [*Tide Water Associated Oil Co. v. Superior Court* (1955) 43 C2d 815, 822, 279 P2d 35 (waste of petroleum resources)], there is generally no right to a jury trial [*People v. Englebrecht* (2001) 88 CA4th 1236, 1245, 106 CR2d 738 (action to abate public nuisance and for injunctive relief)]. However, a plaintiff's suit may combine legal and equitable relief and seek both a money judgment and injunctive relief, for which a jury trial is appropriate on the legal issues [*St. James Church of Christ Holiness v. Superior Court* (1955) 135 CA2d 352, 361, 287 P2d 387 (action to restrain trustee from improperly collecting church's rental income)].

Legal Topics:

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

Civil ProcedureTrialsJury TrialsActions in EquityCivil ProcedureTrialsJury TrialsRight to Jury TrialCivil
ProcedureRemediesInjunctionsGeneral OverviewContracts LawRemediesEquitable ReliefInjunctive Relief



133 of 189 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 8 Seeking or Opposing Equitable Remedies in Contract Actions
V. SEEKING OR OPPOSING INJUNCTIONS IN CONTRACT ACTIONS

1-8 MB Practice Guide: CA Contract Litigation 8.70

8.70 Opposing Party Can Contest Existence of Essential Element.

The party against whom a permanent injunction is sought may rebut one or more of the essential elements that must be proven [see 8.61, 8.67], as well as raise applicable affirmative defenses [see 8.71].

If a defect appears on the face of the complaint, the defendant should raise the defenses by demurrer [CCP § 430.10(e)]. If a defect does not appear on the face of the complaint, the defendant should consider raising the defenses by answer or a motion for summary judgment [CCP § 430.30(b)].

► Cross References:

Requirements for pleading injunctive relief, see 8.67.

Form, see 8.80.

Discussion of demurrers and answers, see Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, Ch. 11, Demurrers and Motions for Judgment on the Pleading; and Ch. 14, Answers.

Legal Topics:

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

Civil Procedure Remedies Injunctions Elements General Overview Contracts Law Remedies Equitable Relief Injunctive Relief



134 of 189 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 8 Seeking or Opposing Equitable Remedies in Contract Actions
V. SEEKING OR OPPOSING INJUNCTIONS IN CONTRACT ACTIONS

1-8 MB Practice Guide: CA Contract Litigation 8.71

8.71 Defendant Can Raise Affirmative Defenses.

8.71[1] Changed Circumstances Render Injunctive Relief Unnecessary. To justify injunctive relief, it must appear with reasonable certainty that the wrongful acts will be continued or repeated [*Early v. Santa Clara Broad. Co.*, (1962) 211 CA2d 367, 373, 27 CR 212 ; see *Sahlolbei v. Providence Healthcare, Inc.* (2003) 112 CA4th 1137, 1156-1157 (termination of doctor's hospital staff privileges)]. Absent extraordinary circumstances, injunctive relief may not be granted when events have rendered the relief unnecessary or ineffectual [*Paul v. Milk Depots, Inc.* (1964) 62 C2d 129, 133 (regulation of milk prices)].

Injunctive relief is not applicable to wrongs that have been completed or that have voluntarily ceased; relief will be denied absent a showing that past violations will probably recur [*Cisneros v. U.D. Registry, Inc.* (1995) 39 CA4th 548, 574, 46 CR2d 233 (improper credit reporting practices)].

➤ **Cross Reference:**

Form, see 8.80.

8.71[2] Plaintiff's Claim Can Be Barred by Laches. The equitable defense of laches may be asserted in a suit for an injunction by showing unreasonable delay in bringing the action and prejudice to the responding party from the delay [*Finnie v. Town of Tiburon* (1988) 199 CA3d 1, 14, 244 CR 581 (action to enjoin election regarding ballot measure)]. There is no bright-line rule as to the length of time that operates to bring about laches, and the defense may be invoked even if the delay is less than an applicable limitation period [*Holt v. County of Monterey* (1982) 128 CA3d 797, 801, 180 CR 514 (challenging approval of condominium development plan)].

➤ **Cross Reference:**

Form, see 8.80.

8.71[3] Injunction Is Unavailable If Plaintiff Has Adequate Remedy at Law. A responding party may challenge an injunction on the ground that a legal remedy (i.e., monetary damages) would be adequate, and hence injunctive relief is not called for [see CC § 3422; *Thayer Plymouth Ctr., Inc. v. Chrysler Motors Corp.* (1967) 255 CA2d 300, 306, 63 CR 148] .

 Cross References:

Form, see 8.80.

Discussion, see 8.62.

8.71[4] Injunction Is Unavailable If Not in Public Interest. Although a party may have made a prima facie case for injunctive relief, the court must consider the interests of third persons, if any, and the general public before issuing an injunction, and may decline to issue an injunction if it is in the public interest to do so [see *Lamb v. Cal. Water & Tel. Co.* (1942) 21 C2d 33, 39, 129 P2d 371] .

Example:

When a landowner was not being deprived of water to be delivered under a contract, but merely disputed the price to be paid for the water and wanted the water delivered by a mandatory order for an unspecified "necessary" amount without state regulation, the public interest in appropriate public use of water made damages, not injunctive relief, the appropriate remedy [*Lamb v. Cal. Water & Tel. Co.* (1942) 21 C2d 33, 40-43, 129 P2d 371] .

8.71[5] Injunction Is Unavailable If Relief Granted Would Be Contrary to Law. An injunction may not be granted when the relief requested would be contrary to the requirements of the law [*Armstrong v. Picquelle* (1984) 157 CA3d 122, 129, 203 CR 552].

Example:

A court could not validly order interest to be paid on partnership loan transactions, as specified in a contract at 14 percent, which was above the constitutional legal maximum limit of 7 percent [*Armstrong v. Picquelle* (1984) 157 CA3d 122, 129, 203 CR 552].

8.71[6] Injunction Is Unavailable If Plaintiff Has Unclean Hands. The defendant may challenge an action for an injunction by claiming that the plaintiff has unclean hands, by which the plaintiff is precluded from recovery due to dishonest, unfair, or unconscionable conduct [see *Art Movers, Inc. v. Ni W., Inc.* (1992) 3 CA4th 640, 646-647, 4 CR2d 689] . The misconduct must relate directly to the cause of action and prejudicially affect the rights of the person against whom the relief is sought so that it would be inequitable to grant such relief [*Jay Bharat Developers, Inc. v. Minidis* (2008) 167 CA4th 437, 446, 84 CR3d 267 (franchisees' allegations that franchisor failed to disclose pending litigation when the parties entered into a franchise agreement did not preclude franchisor from obtaining preliminary injunction prohibiting franchisees from using franchisor's trademarks after franchisor terminated franchise agreement)].

 Cross Reference:

Form, see 8.80.

8.71[7] Injunctive Relief Is Unavailable If Relief Sought Is Overbroad. The defendant may assert that an injunction is overbroad. For example, an injunction cannot issue in a vacuum based on the proponent's fear about something that may happen in the future--it must be specific and be supported by actual evidence that there is a realistic prospect that the party enjoined intends to engage in the prohibited activity [*Aguilar v. Avis Rent A Car Sys.* (1999) 21 C4th 121, 178-179, 87 CR2d 132, 980 P2d 846 (injunction prohibiting racial epithets not overbroad); see *Korean Philadelphia Presbyterian Church v. California Presbyterian* (2000) 77 CA4th 1069, 1083, 92 CR2d 275].



Strategic Point--Defendant:

The defendant should evaluate the possible overbreadth of the proposed injunction and determine whether a more limited order is justified.

8.71[8] Injunctive Relief Is Unavailable If Contract Cannot Be Specifically Enforced. If specific performance

would be unavailable to enforce an obligation, injunctive relief ordinarily also is unavailable, except in the case of personal service contracts meeting detailed criteria [CC § 3423(e); *Golden W. Baseball Co. v. City of Anaheim* (1994) 25 CA4th 11, 49-50, 31 CR2d 378 ; see 8.61]. Therefore, if the contract is of a type that cannot be specifically enforced, the defendant should assert that fact in response to a complaint seeking injunctive relief.



Cross Reference:

Form, see 8.80.

Legal Topics:

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

Civil Procedure Pleading & Practice Defenses, Demurrers & Objections Affirmative Defenses General Overview Civil Procedure Remedies Injunctions General Overview Contracts Law Defenses General Overview Contracts Law Remedies Equitable Relief Injunctive Relief



135 of 189 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 8 Seeking or Opposing Equitable Remedies in Contract Actions

VI. FORMS

1-8 MB Practice Guide: CA Contract Litigation 8.72

8.72 Notice of Rescission of Contract.**Notice of Rescission of Contract.**

 _____ TO: [name, e.g., Mary Jones]
 _____ [address]

 _____ You are hereby notified that the
 undersigned hereby rescinds that certain contract between [identify parties, e.g.,
 _____ John Smith and Mary Jones] dated
 _____, for [specify subject matter of
 contract, e.g., the sale of Mary Jones' original, signed copy of Charles Dickens' novel *Bleak House* to John Smith for the
 sum of \$5,000].

 _____ This rescission is made on the
 ground that [e.g., Mary Jones' copy of *Bleak House* is not an original copy, and the signature of Charles Dickens' name
 therein is a forgery].

 _____ The undersigned hereby offers to
 restore and tenders to you all consideration and benefits received pursuant to the contract, specifically [e.g., Mary Jones'
 copy of the novel *Bleak House* _____]. This
 offer is conditioned on you restoring the consideration you received under this contract, specifically [specify, e.g., the
 sum of \$5,000 that the undersigned previously tendered you for the item described above]. The undersigned hereby
 demands that you restore that consideration to him/her immediately.

_____ [date]

_____ [signature]

NOTES.

Authority:

CC § 1691

Use of Form:

See 8.10

Timing:

See 8.10

Complaint for Relief Based on Rescission:

See 8.73

Legal Topics:

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

Commercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentModification, Rescission & WaiverContracts
LawRemediesRescission & RedhibitionGeneral Overview



136 of 189 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 8 Seeking or Opposing Equitable Remedies in Contract Actions
VI. FORMS

1-8 MB Practice Guide: CA Contract Litigation 8.73

8.73 Complaint for Relief Based on Rescission of Contract.**Complaint for Relief Based on Rescission of Contract.**

[Name of attorney]

_____[Street address]

_____[City, state, and ZIP]

_____[Area code and phone number]

_____[State Bar no. of attorney]

Attorney for _____[name of party]

SUPERIOR COURT OF CALIFORNIA,

COUNTY OF _____

[name(s)] _____,

Plaintiff(s), _____)

vs. _____)

[name(s)] _____,

[and DOES 1 THROUGH _____,

_____,]

Defendant(s). _____)

NO.

COMPLAINT FOR RESCISSION

[LIMITED CIVIL CASE]

[Amount Demanded _____

_____) (Exceeds or Does Not
Exceed) \$10,000]

Plaintiff _____[name] alleges:

[For an individual plaintiff]

1-8 MB Practice Guide: CA Contract Litigation 8.73

1. Plaintiff is an individual residing in _____ [city, if any, and county], California, [in the (name of judicial district, if any) _____] [, and therein doing business under the fictitious business name of _____.

Plaintiff has duly complied in all respects with the requirements of *Business and Professions Code Sections 17910 through 17917* with respect to this fictitious business name].

[OR, for a domestic corporation or domestic limited liability company]

1. Plaintiff _____ [name] is, and at all times herein mentioned was, a _____ [corporation or limited liability company] organized and existing under the laws of California, with its principal place of business in _____ [city, if any, and county], California [in the (name of judicial district, if any) _____] [, and therein doing business under the fictitious business name of _____.

Plaintiff has duly complied in all respects with the requirements of *Business and Professions Code Sections 17910 through 17917* with respect to this fictitious business name].

[OR, for a foreign corporation or foreign limited liability company]

1. Plaintiff _____ [name] is, and at all times herein mentioned was, a _____ [corporation or limited liability company] organized and existing under the laws of _____ [state or foreign country], and _____ [for foreign corporation authorized to do business and doing business in California or, for foreign limited liability company maintaining action or intrastate business, and registered to transact intrastate business in California], with its principal place of business in California in _____ [city, if any, and county], California [in the (name of judicial district, if any) _____].

[OR, for a general or limited partnership or an unincorporated association]

1. Plaintiff _____ [name] is, and at all times herein mentioned was, a _____ [partnership or unincorporated association] with its principal place of business in _____ [city, if any, and county], California [in the (name of judicial district, if any) _____] [, and therein doing business under the fictitious business name of _____.

Plaintiff has duly complied in all respects with the requirements of *Business and Professions Code Sections 17910 through 17917* with respect to this fictitious business name].

[CONTINUE]

[For an individual defendant]

2. Defendant _____ [name] is an individual residing in _____ [city, if any, and county], California [in the (name of judicial district, if any) _____].

_____] [and doing business therein under the fictitious business name of _____].

[OR, for a domestic corporation or domestic limited liability company]

2. Defendant _____ [name] is, and at all times herein mentioned was, a _____ [corporation or limited liability company] organized and existing under the laws of California [, with its principal place of business in _____ (city, if any, and county), California (, in the _____ [name of judicial district, if any])].

[OR, for a foreign corporation or foreign limited liability company]

2. Defendant _____ [name] is, and at all times herein mentioned was, a _____ [corporation or limited liability company] organized and existing under the laws of _____ [state or foreign country], with its principal place of business in _____ (city, if any, and county), California (, in the _____ [name of judicial district, if any])].

[OR, for a general or limited partnership or an unincorporated association]

2. Defendant _____ [name] is, and at all times herein mentioned was, _____ [a partnership or an unincorporated association] sued herein under the name _____ [it has assumed or by which it is known], with its principal place of business in _____ (city, if any, and county), California (, in the _____ [name of judicial district, if any]). [Defendants (names of individual partners or members) _____ are, and at all times herein mentioned were, members of that _____ (partnership or unincorporated association) (and are, and at all times herein mentioned were, residents of _____ County, California)].

[CONTINUE]

3. Plaintiff is ignorant of the true names and capacities of Defendants sued herein as DOES 1 through _____ [numeral, e.g., 50], inclusive, and therefore sues these Defendants by these fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when ascertained. [Plaintiff is informed and believes and thereon alleges that each of the fictitiously named Defendants is responsible in some manner for the occurrences herein alleged, and that Plaintiff's damages as herein alleged were proximately caused by those Defendants.]

4. Plaintiff is informed and believes and thereon alleges that at all times material to this complaint, _____ [identify defendants to whom agency allegation applies, e.g., each of the Defendants or each of the individual Defendants or Defendant Harry Jones], [and each of the Defendants fictitiously named in this complaint,] in addition to acting for himself, herself, or itself and on his, her, or its own behalf individually, is and was acting as the agent, servant, employee and representative of, and with

the knowledge, consent and permission of, and in conspiracy with, each and all of the Defendants and within the course, scope and authority of that agency, service, employment, representation, and conspiracy. Plaintiff further alleges on information and belief that the acts of each of the Defendants were fully ratified by each and all of the Defendants. Specifically, and without limitation, Plaintiff alleges on information and belief that the actions, failures to act, breaches, conspiracy, and misrepresentations alleged herein and attributed to one or more of the specific Defendants were approved, ratified, and done with the cooperation and knowledge of each and all of the Defendants.

5. On or about _____ [date], at _____ [place], Plaintiff and Defendant entered into _____ [a written or an oral] contract whereby Plaintiff agreed to _____ [specify plaintiff's obligation, e.g., purchase from Defendant] and Defendant agreed to _____ [specify defendant's obligation; e.g., sell to Plaintiff Defendant's 1997 Mercedes 500 SEL automobile, California license number 1STU123, for the sum of \$10,000]. [A copy of the contract is attached as Exhibit A and incorporated by reference].

6. _____ [Set forth in this and subsequently numbered paragraphs allegations specifying details of factual basis for rescission, as illustrated in the example in Paragraphs 6 through 10, below; e.g., On or about June 15, 2005, in San Francisco, California, Defendant, knowing the representations to be false and with the intent to deceive Plaintiff and to induce him/her to enter into the contract, falsely and fraudulently represented to Plaintiff that the odometer correctly indicated that the automobile had only been driven approximately 25,000 miles and that no repairs to the automobile other than normal maintenance had ever been necessary or made.

7. The representations made by Defendant were in fact false. The true facts were that _____ (specify, e.g., the odometer had been turned back and the automobile had in fact been driven approximately 125,000 miles by the date the parties made their contract. Further, the automobile had been involved in a collision and although major repairs were made to it on account of the collision, it was never thereafter possible to align it properly)].

8. At the time the representations were made, and at the time Plaintiff entered into the contract, and at the time Plaintiff rendered his/her performance under the contract, Plaintiff did not know the representations were false, but believed them to be true and reasonably relied on them. Had Plaintiff known the true facts, he/she would not have entered into the contract and would not have rendered or accepted performance thereunder.

9. Under the terms of the contract, _____ [specify plaintiff's performance of contractual obligations, e.g., on or about June 20, 2003, Plaintiff personally delivered to Defendant a cashier's check number 123-4567 payable to Defendant in the amount of \$10,000, the full purchase price].

10. On or about June 21, 2005, Defendant delivered possession of the automobile to Plaintiff, along with the registration and certificate of ownership that he/she had properly endorsed. Thereafter, _____ (specify facts showing plaintiff's discovery of basis for rescission, e.g., on or about June 25, 2005, Plaintiff discovered the true facts to be those alleged in Paragraph 7. The automobile overheated often in traffic and after Plaintiff had owned it for a few days, pulled to the right when the brakes were applied, and the tires were wearing unevenly. In the course of having these problems repaired, Plaintiff discovered the true facts)].

[CONTINUE]

[EITHER, if notice of rescission has not been given and plaintiff has not received anything of value]

12. Plaintiff intends service of the summons and complaint in this action to serve as notice of rescission of the contract, and hereby demands that Defendant restore to him/her the consideration furnished by Plaintiff, specifically _____ *[specify, e.g., \$15,000, representing the contract price of \$10,000, plus \$5,000 representing consequential damages, for repairs, gas, and the cost of rental cars]*.

[OR, if notice of rescission has not been given and plaintiff has received something of value]

13. Plaintiff intends service of the summons and complaint in this action to serve as notice of rescission of the contract, and hereby offers to restore all consideration furnished by Defendant under the contract, on condition that Defendant restore to him/her the consideration furnished by Plaintiff, specifically _____ *[specify, e.g., the sum of \$10,000 plus \$5,000 consequential damages, less the reasonable value to Plaintiff of the use of the automobile for the few days before the misrepresentations were discovered]*.

[OR, if a notice of rescission and, when necessary, an offer to restore, which sufficiently set forth all claims and demands, have already been given]

13. On or about _____ *[date]*, Plaintiff notified Defendant in writing that Plaintiff had rescinded the contract on the ground of _____ *[specify, e.g., fraudulent misrepresentation]*. A copy of that notice is attached as Exhibit B and incorporated by reference. Defendant refused, and continues to refuse, to restore to Plaintiff, in whole or in part, the consideration paid by Plaintiff or to recognize that the contract has been rescinded.

[CONTINUE]

WHEREFORE, Plaintiff prays as follows:

1. That this court declare that the contract has been rescinded;

2. That Defendant be ordered to pay Plaintiff the following sums:

_____ *[specify damages, e.g., the consideration paid by Plaintiff in the sum of \$10,000, with interest at 5 percent per annum from July 1, 2003; and the sums paid, by Plaintiff for gas, repairs, and rental cars in the sum of \$5,000 with interest thereon at 5 percent per annum from July 1, 2003]*.

3. For costs of suit; and

4. For such other and further relief as the court deems proper.

Dated: _____

_____ *[firm name, if any]*

By: _____ *[signature]*

_____ [typed name]

Attorney for Defendant _____

[ADD following verification, if applicable]

VERIFICATION

I am the plaintiff in the above-entitled action; I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein stated on information and belief, and, as to those matters, I believe it to be true.

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

_____ [date]

_____ [signature]

_____ [typed name]

NOTES.

Authority:

CC §§ 1688-1693

Grounds for Rescission:

See 8.05

Pleading Requirements:

See 8.10

Notice of Rescission:

See 8.72

Damages Available to Plaintiff:

See 8.14

Additional Forms:

California Forms of Pleading and Practice, Ch. 490, Rescission and Restitution (Matthew Bender)

Legal Topics:

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

Civil Procedure Pleading & Practice Pleadings Complaints General Overview Commercial Law (UCC) Sales (Article 2) Form, Formation & Readjustment Modification, Rescission & Waiver Contracts Law Remedies Rescission & Redhibition General Overview



137 of 189 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 8 Seeking or Opposing Equitable Remedies in Contract Actions
VI. FORMS

*1-8 MB Practice Guide: CA Contract Litigation 8.74***8.74 Complaint for Reformation of Contract.****Complaint for Reformation of Contract.**

[Name of attorney]

_____[Street address]

_____[City, state, and ZIP]

_____[Area code and phone number]

_____[State Bar no. of attorney]

Attorney for _____[name of party]

SUPERIOR COURT OF CALIFORNIA,

COUNTY OF _____

[name(s)] _____,

Plaintiff(s), _____)

vs. _____)

[name(s)] _____,

[and DOES 1 THROUGH _____)

_____,]

Defendant(s). _____)

_____)

NO.

COMPLAINT FOR REFORMATION

[LIMITED CIVIL CASE]

[Amount Demanded

_____(Exceeds or Does Not
Exceed) \$10,000]

Plaintiff _____[name] alleges:

[For an individual plaintiff]

1-8 MB Practice Guide: CA Contract Litigation 8.74

1. Plaintiff is an individual residing in _____ [city, if any, and county], California, [in the (name of judicial district, if any) _____] [, and therein doing business under the fictitious business name of _____.

Plaintiff has duly complied in all respects with the requirements of *Business and Professions Code Sections 17910 through 17917* with respect to this fictitious business name].

[OR, for a domestic corporation or domestic limited liability company]

1. Plaintiff _____ [name] is, and at all times herein mentioned was, a _____ [corporation or limited liability company] organized and existing under the laws of California, with its principal place of business in _____ [city, if any, and county], California [in the (name of judicial district, if any) _____] [, and therein doing business under the fictitious business name of _____.

Plaintiff has duly complied in all respects with the requirements of *Business and Professions Code Sections 17910 through 17917* with respect to this fictitious business name].

[OR, for a foreign corporation or foreign limited liability company]

1. Plaintiff _____ [name] is, and at all times herein mentioned was, a _____ [corporation or limited liability company] organized and existing under the laws of _____ [state or foreign country], and _____ [for foreign corporation authorized to do business and doing business in California or, for foreign limited liability company maintaining action or intrastate business, and registered to transact intrastate business in California], with its principal place of business in California in _____ [city, if any, and county], California [in the (name of judicial district, if any) _____].

[OR, for a general or limited partnership or an unincorporated association]

1. Plaintiff _____ [name] is, and at all times herein mentioned was, a _____ [partnership or unincorporated association] with its principal place of business in _____ [city, if any, and county], California [in the (name of judicial district, if any) _____] [, and therein doing business under the fictitious business name of _____.

Plaintiff has duly complied in all respects with the requirements of *Business and Professions Code Sections 17910 through 17917* with respect to this fictitious business name].

[CONTINUE]

[For an individual defendant]

2. Defendant _____ [name] is an individual residing in _____ [city, if any, and county], California [in the (name of judicial district, if any) _____].

_____] [and doing business therein under the fictitious business name of _____].

[OR, for a domestic corporation or domestic limited liability company]

2. Defendant _____ [name] is, and at all times herein mentioned was, a _____ [corporation or limited liability company] organized and existing under the laws of California [, with its principal place of business in _____ (city, if any, and county), California (, in the _____ [name of judicial district, if any])].

[OR, for a foreign corporation or foreign limited liability company]

2. Defendant _____ [name] is, and at all times herein mentioned was, a _____ [corporation or limited liability company] organized and existing under the laws of _____ [state or foreign country], with its principal place of business in _____ (city, if any, and county), California (, in the _____ [name of judicial district, if any])].

[OR, for a general or limited partnership or an unincorporated association]

2. Defendant _____ [name] is, and at all times herein mentioned was, _____ [a partnership or an unincorporated association] sued herein under the name _____ [it has assumed or by which it is known], with its principal place of business in _____ (city, if any, and county), California (, in the _____ [name of judicial district, if any]). [Defendants (names of individual partners or members) _____ are, and at all times herein mentioned were, members of that _____ (partnership or unincorporated association) (and are, and at all times herein mentioned were, residents of _____ County, California)].

[CONTINUE]

3. Plaintiff is ignorant of the true names and capacities of Defendants sued herein as DOES 1 through _____ [numeral, e.g., 50], inclusive, and therefore sues these Defendants by these fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when ascertained. [Plaintiff is informed and believes and thereon alleges that each of the fictitiously named Defendants is responsible in some manner for the occurrences herein alleged, and that Plaintiff's damages as herein alleged were proximately caused by those Defendants.]

4. Plaintiff is informed and believes and thereon alleges that at all times material to this complaint, _____ [identify defendants to whom agency allegation applies, e.g., each of the Defendants or each of the individual Defendants or Defendant Harry Jones], [and each of the Defendants fictitiously named in this complaint,] in addition to acting for himself, herself, or itself and on his, her, or its own behalf individually, is and was acting as the agent, servant, employee and representative of, and with

the knowledge, consent and permission of, and in conspiracy with, each and all of the Defendants and within the course, scope and authority of that agency, service, employment, representation, and conspiracy. Plaintiff further alleges on information and belief that the acts of each of the Defendants were fully ratified by each and all of the Defendants. Specifically, and without limitation, Plaintiff alleges on information and belief that the actions, failures to act, breaches, conspiracy, and misrepresentations alleged herein and attributed to one or more of the specific Defendants were approved, ratified, and done with the cooperation and knowledge of each and all of the Defendants.

5. On or about _____ [date], at _____ [place], Plaintiff and Defendant entered into _____ [a written or an oral] contract whereby Plaintiff agreed to _____ [specify plaintiff's obligation, e.g., lease from Defendant] and Defendant agreed to _____ [specify defendant's obligation; e.g., lease to Plaintiff commercial property located at 123 Main Street, Los Angeles, California. The purpose of this agreement was to enable Plaintiff to open and operate a second business location]. [A copy of the contract is attached as Exhibit A and incorporated by reference].

6. The _____ [written or oral] agreement of Plaintiff and Defendant consisted, in pertinent part, of the following terms: _____ [specify relevant terms of contract, e.g., Defendant agreed to lease the premises to Plaintiff for a fixed term of five years, commencing on August 1, 2005. Plaintiff agreed to pay Defendant, as the monthly rent for the premises, a sum equal to 10 percent of the gross income for that month from Plaintiff's second place of business located on the leased premises].

7. _____ [Specify how contract departs from oral agreement, e.g., On July 1, 2005, at Los Angeles, California, Plaintiff and Defendant executed a written lease agreement to carry out their intended agreement, a copy of which is attached as Exhibit B and incorporated by reference. The written lease fails to reflect the true intent of the parties in that it provides that the monthly rent equal 10 percent of the gross income for that month from both Plaintiff's principal place of business and Plaintiff's second place of business].

8. To reflect the true intent of the parties, the written agreement should instead provide that _____ [specify how contract should be reformed, e.g., the monthly rent will be a sum equal to 10 percent of the gross income for that month from Plaintiff's second place of business only; that is, the place of business located on the premises that Defendant leased to Plaintiff].

9. The above-described failure of the written agreement to reflect the true intent of the parties resulted from a unilateral mistake on the part of Plaintiff, in that _____ [specify how need for reformation arose, e.g., Plaintiff made a clerical error in drafting the rental clause of the lease agreement, but mistakenly believed, in presenting the lease agreement to Defendant for execution, that the clause correctly expressed the terms for rental intended by the parties].

10. On or about _____ [date], Plaintiff discovered the error in the written agreement and notified Defendant, but Defendant has declined to modify the written agreement and indicated an intent to hold Plaintiff to the terms of the written agreement, rather than the correct terms of the original contract between the parties.

WHEREFORE, Plaintiff prays as follows:

1. For the reformation of the written agreement to reflect the true intent of the parties, such that it provides _____ [specify, e.g., that the monthly rent

will be a sum equal to 10 percent of the gross income for that month from Plaintiff's second place of business only, that is, the place of business located on the premises].

2. For costs of suit; and

3. For such other and further relief as the court deems proper.

Dated: _____

_____ [firm name, if any]

By: _____ [signature]

_____ [typed name]

Attorney for Defendant _____

[ADD following verification, if applicable]

VERIFICATION

I am the plaintiff in the above-entitled action; I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein stated on information and belief, and, as to those matters, I believe it to be true.

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

_____ [date]

_____ [signature]

_____ [typed name]

NOTES.

Authority:

CC §§ 1688-1693

Grounds for Reformation:

See 8.20

Pleading Requirements:

See 8.26 -8.29

Additional Forms:

California Forms of Pleading and Practice, Ch. 488, Reformation of Instruments (Matthew Bender)

Legal Topics:

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

Civil Procedure Pleading & Practice Pleadings Complaints General Overview Contracts Law Remedies Reformation



138 of 189 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 8 Seeking or Opposing Equitable Remedies in Contract Actions
VI. FORMS

*1-8 MB Practice Guide: CA Contract Litigation 8.75***8.75 Complaint for Specific Performance of Contract.****Complaint for Specific Performance of Contract.**

[Name of attorney]

_____[Street address]

_____[City, state, and ZIP]

_____[Area code and phone number]

_____[State Bar no. of attorney]

Attorney for _____[name of party]

SUPERIOR COURT OF CALIFORNIA,

COUNTY OF _____

[name(s)] _____,

Plaintiff(s), _____)

vs. _____)

[name(s)] _____,

[and DOES 1 THROUGH _____,

_____,]

Defendant(s). _____)

_____)

NO.

COMPLAINT FOR SPECIFIC PERFORMANCE

[LIMITED CIVIL CASE]

[Amount Demanded _____]

_____ (Exceeds or Does Not
Exceed) \$10,000]

Plaintiff _____[name] alleges:

[For an individual plaintiff]

1-8 MB Practice Guide: CA Contract Litigation 8.75

1. Plaintiff is an individual residing in _____ [city, if any, and county], California, [in the (name of judicial district, if any) _____] [, and therein doing business under the fictitious business name of _____.

Plaintiff has duly complied in all respects with the requirements of *Business and Professions Code Sections 17910 through 17917* with respect to this fictitious business name].

[OR, for a domestic corporation or domestic limited liability company]

1. Plaintiff _____ [name] is, and at all times herein mentioned was, a _____ [corporation or limited liability company] organized and existing under the laws of California, with its principal place of business in _____ [city, if any, and county], California [in the (name of judicial district, if any) _____] [, and therein doing business under the fictitious business name of _____.

Plaintiff has duly complied in all respects with the requirements of *Business and Professions Code Sections 17910 through 17917* with respect to this fictitious business name].

[OR, for a foreign corporation or foreign limited liability company]

1. Plaintiff _____ [name] is, and at all times herein mentioned was, a _____ [corporation or limited liability company] organized and existing under the laws of _____ [state or foreign country], and _____ [for foreign corporation authorized to do business and doing business in California or, for foreign limited liability company maintaining action or intrastate business, and registered to transact intrastate business in California], with its principal place of business in California in _____ [city, if any, and county], California [in the (name of judicial district, if any) _____].

[OR, for a general or limited partnership or an unincorporated association]

1. Plaintiff _____ [name] is, and at all times herein mentioned was, a _____ [partnership or unincorporated association] with its principal place of business in _____ [city, if any, and county], California [in the (name of judicial district, if any) _____] [, and therein doing business under the fictitious business name of _____.

Plaintiff has duly complied in all respects with the requirements of *Business and Professions Code Sections 17910 through 17917* with respect to this fictitious business name].

[CONTINUE]

[For an individual defendant]

2. Defendant _____ [name] is an individual residing in _____ [city, if any, and county], California [in the (name of judicial district, if any) _____].

_____] [and doing business therein under the fictitious business name of _____].

[OR, for a domestic corporation or domestic limited liability company]

2. Defendant _____ [name] is, and at all times herein mentioned was, a _____ [corporation or limited liability company] organized and existing under the laws of California [, with its principal place of business in _____ (city, if any, and county), California (, in the _____ [name of judicial district, if any])].

[OR, for a foreign corporation or foreign limited liability company]

2. Defendant _____ [name] is, and at all times herein mentioned was, a _____ [corporation or limited liability company] organized and existing under the laws of _____ [state or foreign country], with its principal place of business in _____ (city, if any, and county), California (, in the _____ [name of judicial district, if any])].

[OR, for a general or limited partnership or an unincorporated association]

2. Defendant _____ [name] is, and at all times herein mentioned was, _____ [a partnership or an unincorporated association] sued herein under the name _____ [it has assumed or by which it is known], with its principal place of business in _____ (city, if any, and county), California (, in the _____ [name of judicial district, if any]). [Defendants (names of individual partners or members) _____ are, and at all times herein mentioned were, members of that _____ (partnership or unincorporated association) (and are, and at all times herein mentioned were, residents of _____ County, California)].

[CONTINUE]

3. Plaintiff is ignorant of the true names and capacities of Defendants sued herein as DOES 1 through _____ [numeral, e.g., 50], inclusive, and therefore sues these Defendants by these fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when ascertained. [Plaintiff is informed and believes and thereon alleges that each of the fictitiously named Defendants is responsible in some manner for the occurrences herein alleged, and that Plaintiff's damages as herein alleged were proximately caused by those Defendants.]

4. Plaintiff is informed and believes and thereon alleges that at all times material to this complaint, _____ [identify defendants to whom agency allegation applies, e.g., each of the Defendants or each of the individual Defendants or Defendant Harry Jones], [and each of the Defendants fictitiously named in this complaint,] in addition to acting for himself, herself, or itself and on his, her, or its own behalf individually, is and was acting as the agent, servant, employee and representative of, and with

the knowledge, consent and permission of, and in conspiracy with, each and all of the Defendants and within the course, scope and authority of that agency, service, employment, representation, and conspiracy. Plaintiff further alleges on information and belief that the acts of each of the Defendants were fully ratified by each and all of the Defendants. Specifically, and without limitation, Plaintiff alleges on information and belief that the actions, failures to act, breaches, conspiracy, and misrepresentations alleged herein and attributed to one or more of the specific Defendants were approved, ratified, and done with the cooperation and knowledge of each and all of the Defendants.

5. On or about _____ [date], in _____ [place], Plaintiff and Defendant entered into _____ [a written or an oral] agreement whereby Plaintiff agreed to _____ [specify what plaintiff agreed to do, e.g., buy Defendant's original Picasso pencil drawing dated 1931 and known as "Two Donkeys"] and Defendant agreed to _____ [specify what defendant agreed to do, e.g., sell that drawing to Plaintiff for the price of \$250,000]. [A copy of that agreement is attached as Exhibit A and incorporated by reference.]

6. The consideration set forth in the agreement, as specified in Paragraph 5, above, is adequate as to the Defendant and is fair and reasonable. [Add facts supporting fairness of consideration, if desired, e.g., One week before the parties entered into this contract, the drawing was valued at \$230,000 by an independent professional art appraiser selected by the Defendant].

[EITHER, if plaintiff has performed all contractual requirements]

7. Plaintiff has performed all conditions, covenants, and promises that he/she is required to perform, in accordance with the terms of the contract.

[OR, if plaintiff has not performed all contractual requirements]

7. Plaintiff has performed all conditions, covenants, and promises that he/she is required to perform, in accordance with the terms of the contract, except that _____ [specify facts alleging remaining performance, e.g., Plaintiff has not arranged for a professional art shipper to package and deliver the drawing to Plaintiff because Defendant subsequently notified Plaintiff of Defendant's refusal to complete the transaction, as specified below]. Plaintiff remains ready, willing, and able to perform all remaining terms and conditions of the contract that he/she is required to perform, and has offered, and continues to offer, to do so.

[OR, if plaintiff has offered to perform all contractual requirements]

7. Plaintiff has offered, and continues to offer, to _____ [specify facts alleging plaintiff's readiness, e.g., pay the Defendant the sum of \$250,000 as provided for in the agreement]. Plaintiff remains ready, willing, and able to perform all terms and conditions of the contract that he/she is required to perform and has offered, and continues to offer, to do so.

[CONTINUE]

8. Defendant has failed and refused, and continues to fail and refuse, to perform the conditions of the contract on her part, in that _____ [specify facts alleging defendant's breach, e.g., Defendant notified Plaintiff that Defendant has changed his/her mind about the transaction and

wishes to keep the drawing, and refuses to deliver it to Plaintiff].

10. Plaintiff has no adequate legal remedy in that

_____ [specify facts alleging that plaintiff has not adequate remedy at law, e.g., the drawing bargained for by the parties is a one-of-a kind original drawing by the renowned artist Pablo Picasso. No other drawing like it exists, and Defendant contracted to purchase it because of certain features of its subject matter and composition that are unique to this particular drawing and therefore make it impossible for Plaintiff to obtain a suitable substitute or replacement at any price. For these reasons, an award of damages would not adequately compensate the Plaintiff for the detriment Defendant's breach has caused Plaintiff].

WHEREFORE, Plaintiff prays as follows:

1. That Defendant be ordered _____ [specify desired action, e.g., to execute and deliver to Plaintiff a sufficient conveyance of the drawing described herein];
2. For costs of suit; and
3. For such other and further relief as the court deems proper.

Dated: _____

_____ [firm name, if any]

By: _____ [signature]

_____ [typed name]

Attorney for Defendant _____

[ADD following verification, if applicable]

VERIFICATION

I am the plaintiff in the above-entitled action; I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein stated on information and belief, and, as to those matters, I believe it to be true.

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

_____ [date]

_____ [signature]

_____ [typed name]

NOTES.

Authority:

CC § 3384

Grounds for Specific Performance:

See 8.35

Pleading Requirements:

See 8.35 et seq.

Additional Forms:

California Forms of Pleading and Practice, Ch. 528, Specific Performance (Matthew Bender)

Legal Topics:

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

Civil Procedure Pleading & Practice Pleadings Complaints General Overview Commercial Law (UCC) Sales (Article 2) Remedies Buyer's Remedies Replevin & Specific Performance Contracts Law Remedies Specific Performance Real Property Law Purchase & Sale Remedies Specific Performance



139 of 189 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 8 Seeking or Opposing Equitable Remedies in Contract Actions
VI. FORMS

1-8 MB Practice Guide: CA Contract Litigation 8.76

8.76 Complaint for Permanent Injunction Enjoining Breach of Personal Services Contract.**Complaint for Permanent Injunction Enjoining Breach of Personal Services Contract.**

[Name of attorney]

_____[Street address]

_____[City, state, and ZIP]

_____[Area code and phone number]

_____[State Bar no. of attorney]

Attorney for _____[name of party]

SUPERIOR COURT OF CALIFORNIA,

COUNTY OF _____

[name(s)] _____,

Plaintiff(s), _____)

vs. _____)

[name(s)] _____,

[and DOES 1 THROUGH _____,

_____,]

Defendant(s). _____)

NO.

COMPLAINT FOR INJUNCTIVE RELIEF

[LIMITED CIVIL CASE]

[Amount Demanded _____]

_____(Exceeds or Does Not
Exceed) \$10,000]

Plaintiff _____[name] alleges:

[For an individual plaintiff]

1-8 MB Practice Guide: CA Contract Litigation 8.76

1. Plaintiff is an individual residing in _____ [city, if any, and county], California, [in the (name of judicial district, if any) _____] [, and therein doing business under the fictitious business name of _____.

Plaintiff has duly complied in all respects with the requirements of *Business and Professions Code Sections 17910 through 17917* with respect to this fictitious business name].

[OR, for a domestic corporation or domestic limited liability company]

1. Plaintiff _____ [name] is, and at all times herein mentioned was, a _____ [corporation or limited liability company] organized and existing under the laws of California, with its principal place of business in _____ [city, if any, and county], California [in the (name of judicial district, if any) _____] [, and therein doing business under the fictitious business name of _____.

Plaintiff has duly complied in all respects with the requirements of *Business and Professions Code Sections 17910 through 17917* with respect to this fictitious business name].

[OR, for a foreign corporation or foreign limited liability company]

1. Plaintiff _____ [name] is, and at all times herein mentioned was, a _____ [corporation or limited liability company] organized and existing under the laws of _____ [state or foreign country], and _____ [for foreign corporation authorized to do business and doing business in California or, for foreign limited liability company maintaining action or intrastate business, and registered to transact intrastate business in California], with its principal place of business in California in _____ [city, if any, and county], California [in the (name of judicial district, if any) _____].

[OR, for a general or limited partnership or an unincorporated association]

1. Plaintiff _____ [name] is, and at all times herein mentioned was, a _____ [partnership or unincorporated association] with its principal place of business in _____ [city, if any, and county], California [in the (name of judicial district, if any) _____] [, and therein doing business under the fictitious business name of _____.

Plaintiff has duly complied in all respects with the requirements of *Business and Professions Code Sections 17910 through 17917* with respect to this fictitious business name].

[CONTINUE]

[For an individual defendant]

2. Defendant _____ [name] is an individual residing in _____ [city, if any, and county], California [in the (name of judicial district, if any) _____].

_____] [and doing business therein under the fictitious business name of _____].

[OR, for a domestic corporation or domestic limited liability company]

2. Defendant _____ [name] is, and at all times herein mentioned was, a _____ [corporation or limited liability company] organized and existing under the laws of California [, with its principal place of business in _____ (city, if any, and county), California (, in the _____ [name of judicial district, if any])].

[OR, for a foreign corporation or foreign limited liability company]

2. Defendant _____ [name] is, and at all times herein mentioned was, a _____ [corporation or limited liability company] organized and existing under the laws of _____ [state or foreign country], with its principal place of business in _____ (city, if any, and county), California (, in the _____ [name of judicial district, if any])].

[OR, for a general or limited partnership or an unincorporated association]

2. Defendant _____ [name] is, and at all times herein mentioned was, _____ [a partnership or an unincorporated association] sued herein under the name _____ [it has assumed or by which it is known], with its principal place of business in _____ (city, if any, and county), California (, in the _____ [name of judicial district, if any]). [Defendants (names of individual partners or members) _____ are, and at all times herein mentioned were, members of that _____ (partnership or unincorporated association) (and are, and at all times herein mentioned were, residents of _____ County, California)].

[CONTINUE]

3. Plaintiff is ignorant of the true names and capacities of Defendants sued herein as DOES 1 through _____ [numeral, e.g., 50], inclusive, and therefore sues these Defendants by these fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when ascertained. [Plaintiff is informed and believes and thereon alleges that each of the fictitiously named Defendants is responsible in some manner for the occurrences herein alleged, and that Plaintiff's damages as herein alleged were proximately caused by those Defendants.]

4. Plaintiff is informed and believes and thereon alleges that at all times material to this complaint, _____ [identify defendants to whom agency allegation applies, e.g., each of the Defendants or each of the individual Defendants or Defendant Harry Jones], [and each of the Defendants fictitiously named in this complaint,] in addition to acting for himself, herself, or itself and on his, her, or its own behalf individually, is and was acting as the agent, servant, employee and representative of, and with

the knowledge, consent and permission of, and in conspiracy with, each and all of the Defendants and within the course, scope and authority of that agency, service, employment, representation, and conspiracy. Plaintiff further alleges on information and belief that the acts of each of the Defendants were fully ratified by each and all of the Defendants. Specifically, and without limitation, Plaintiff alleges on information and belief that the actions, failures to act, breaches, conspiracy, and misrepresentations alleged herein and attributed to one or more of the specific Defendants were approved, ratified, and done with the cooperation and knowledge of each and all of the Defendants.

5. On or about _____ [date], Plaintiff and Defendant entered into a written contract whereby Defendant agreed to render personal services to Plaintiff, consisting of

_____. [specify nature of services, e.g., the writing of an original romance novel about Queen Elizabeth I of England, to be written by Defendant for publication in September, 2006]. A copy of this contract is attached as Exhibit A and incorporated by reference.

6. The services promised by Defendant are special, unique, unusual, and extraordinary in character, which gives them peculiar value, the loss of which cannot be reasonably or adequately compensated in damages in an action at law, because _____. [specify facts establishing why remedy at law is inadequate, e.g., Defendant is internationally known and recognized as a highly successful writer of historical romances, and Plaintiff entered into this contract with Defendant relying on Defendant's name and reputation as an essential element in the successful marketing and sale of the novel to the public].

7. The consideration Plaintiff agreed to pay Defendant for the services described in Paragraph 6 was

_____. [e.g., \$500,000 over the one-year term of the contract, plus royalties of

_____ percent of net sales and other residual compensation as specified in the attached Exhibit A]. This compensation exceeds the minimum rate of compensation required by *Code of Civil Procedure Section 526* and *Civil Code Section 3423(e)*. Further, at the time of the filing of this complaint, payments actually made by Plaintiff to Defendant during the term of the contract aggregated in excess of \$ _____. [e.g., \$200,000], which exceeds the minimum rate of compensation required by *Code of Civil Procedure Section 526* and *Civil Code Section 3423(e)*.

8. Plaintiff has performed all conditions, covenants, and promises required to be performed on Plaintiff's part in accordance with the terms and conditions of the contract up to this time and is ready, willing, and able to perform all conditions required to be performed on Plaintiff's part in the future.

9. On or about _____ [date], Defendant

_____. [specify facts about defendant's breach, e.g., stopped performing the personal services she was obligated to render under the contract with Plaintiff. Plaintiff has asked Defendant to continue performing the services but Defendant refused, and continues to refuse, to do so. Plaintiff is informed and believes and thereon alleges that Defendant has contracted with a third party to perform services for that party that are substantially similar to the services Defendant contracted to perform for Plaintiff].

10. Plaintiff will suffer great and irreparable injury unless Defendant is enjoined and restrained by order of this court from performing services for anyone else, in that

_____. [specify facts alleging harm suffered by plaintiff, e.g., Plaintiff has devoted considerable time and resources in developing the project that Defendant was to complete, has turned down other projects to be able to adequately perform under the agreement, and has entered into numerous agreements, including marketing, distribution, and promotional agreements, based on the Defendant's agreement with the Plaintiff, and will therefore suffer irreparable harm if the Defendant's conduct is not restrained].

11. Plaintiff has no adequate remedy at law for the because it will be impossible for Plaintiff to determine the precise

amount of damage that Plaintiff will suffer if Defendant's conduct is not restrained.

WHEREFORE, Plaintiff prays as follows:

1. For a permanent injunction enjoining Defendant from

_____ [specify, e.g., performing the services set forth in the contract attached as Exhibit A and incorporated by reference for any other person, corporation, or association during the period of the contract with Plaintiff].

2. For costs of suit herein incurred; and

3. For such other and further relief as the court may deem proper.

Dated: _____

_____ [firm name, if any]

By: _____ [signature]

_____ [typed name]

Attorney for Defendant _____

[ADD following verification, if applicable]

VERIFICATION

I am the plaintiff in the above-entitled action; I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein stated on information and belief, and, as to those matters, I believe it to be true.

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

_____ [date]

_____ [signature]

_____ [typed name]

NOTES.

Authority:

CCP §§ 526(b), 527(a); CC §§ 3422, 3423(e)

Grounds for Injunctive Relief:

See 8.61

Pleading Requirements:

See 8.67

Preliminary Injunctions:

See Ch. 6, Using or Opposing Provisional Remedies in Contract Actions

Legal Topics:

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

Civil ProcedurePleading & PracticePleadingsComplaintsGeneral OverviewCivil
ProcedureRemediesInjunctionsPermanent InjunctionsContracts LawRemediesEquitable ReliefInjunctive
ReliefContracts LawTypes of ContractsPersonal Service Agreements



140 of 189 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 8 Seeking or Opposing Equitable Remedies in Contract Actions
VI. FORMS

1-8 MB Practice Guide: CA Contract Litigation 8.77

8.77 Answer to Complaint for Rescission.**Answer to Complaint for Rescission.**

[Name of attorney]

_____[Street address]

_____[City, state, and ZIP]

_____[Area code and phone number]

_____[State Bar no. of attorney]

Attorney for _____[name of party]

SUPERIOR COURT OF CALIFORNIA,

COUNTY OF _____

[name] _____,

Plaintiff,

vs.

[name] _____,

Defendant.

)

)

)

)

)

)

)

NO.

ANSWER OF

_____[identify defendant, e.g.,
DEFENDANT MARY JONES] TO COMPLAINT
OF

_____[identify plaintiff, e.g.,
PLAINTIFF JOHN SMITH]

Judge:

Department:

Defendant answers the complaint as follows:

[Include general denial below, or set forth, in numbered paragraphs, specific denials, admissions, and allegations in response to those in complaint, in the order in which they are alleged in complaint:]

1. Pursuant to *Code of Civil Procedure Section 431.30(b)(1)*, Defendant generally denies each and every allegation of Plaintiff's complaint, including all the purported causes of action contained therein, and further denies that Plaintiff is entitled to any equitable or legal relief, or any damages whatsoever.

[Defendant asserts the following affirmative defenses. By doing so, Defendant shall not be deemed to have assumed the burden of proving any matters that otherwise would be Plaintiff's burden.]

[Allege any affirmative defenses, e.g.,]

FIRST AFFIRMATIVE DEFENSE

(Plaintiff Is in Material Default of Performance)

2. Plaintiff's claim is barred because Plaintiff is in material default of performance of an obligation that affects the Defendant's duty to perform under the contract, in that

_____ *[specify in general terms the nature of plaintiff's default, e.g., Plaintiff has failed to pay the last three monthly advances due under the contract].*

[AND/OR]

SECOND AFFIRMATIVE DEFENSE

(Plaintiff Waived the Right to Rescind the Contract)

3. Plaintiff has received and accepted benefits under the contract and therefore has waived the right to rescind the contract.

[AND/OR]

THIRD AFFIRMATIVE DEFENSE

(Claim Barred by Statute of Limitations)

4. Plaintiff's claim is barred by the statute of limitations set forth in Code of Civil Procedure section _____ *[337(3) or 339(3)].*

[AND/OR]

FOURTH AFFIRMATIVE DEFENSE

(Plaintiff's Delay in Providing Notice of Rescission Was Prejudicial to Defendant)

5. Plaintiff's delay in providing Defendant with notice of the rescission was substantially prejudicial to the Defendant.

[AND/OR]

FIFTH AFFIRMATIVE DEFENSE

(Agreement Is Impossible to Perform)

6. Plaintiff is not entitled to rescission of the contract based on Defendant's nonperformance of the conditions of the agreement as specified in Plaintiff's complaint, because the conditions in question were impossible for Defendant to perform, in that _____ [*specify, e.g., at least twelve of the trees that Defendant was required to trim were destroyed in a fire on Plaintiff's property*].

[ADD additional affirmative defenses, if any]

[CONTINUE]

WHEREFORE, Defendant prays as follows:

1. That Plaintiff take nothing by his/her complain;
2. For costs of suit; and
3. For such other and further relief as the court deems proper.

Dated: _____

_____ [*firm name, if any*]By: _____ [*signature*]_____ [*typed name*]

Attorney for Defendant _____

[ADD following verification, if applicable]

VERIFICATION

I am the defendant in the above entitled action; I have read the foregoing answer and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein stated on information and belief, and,

as to those matters, I believe it to be true.

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

_____ [date]

_____ [signature]

_____ [typed name]

NOTES.

Authority:

McDonald v. Pacific Debenture Co. (1905) 146 C 667, 669, 80 P 1090

Opposing Claim for Rescission:

See 8.15

Defense That Plaintiff Is In Material Default of Performance:

See 8.16[1]

Defense That Plaintiff Waived Right to Rescind Contract:

See 8.16[2]

Statute of Limitations Defense:

See 8.16[3]

Defense That Plaintiff's Delay in Giving Notice of Rescission Was Prejudicial:

See 8.16[4]

Defense That Contract Is Impossible to Perform:

See 8.16[5]

Legal Topics:

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

Civil Procedure Pleading & Practice Pleadings Answers Commercial Law (UCC) Sales (Article 2) Form, Formation & Readjustment Modification, Rescission & Waiver Contracts Law Remedies Rescission & Redhibition General Overview



141 of 189 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 8 Seeking or Opposing Equitable Remedies in Contract Actions
VI. FORMS

*1-8 MB Practice Guide: CA Contract Litigation 8.78***8.78 Answer to Complaint for Reformation.****Answer to Complaint for Reformation.**

[Name of attorney]

_____[Street address]

_____[City, state, and ZIP]

_____[Area code and phone number]

_____[State Bar no. of attorney]

Attorney for _____[name of party]

SUPERIOR COURT OF CALIFORNIA,

COUNTY OF _____

[name] _____,

Plaintiff,

vs.

[name] _____,

Defendant.

)

)

)

)

)

)

)

NO.

ANSWER OF

_____ [identify defendant, e.g.,
DEFENDANT MARY JONES] TO COMPLAINT
OF

_____ [identify plaintiff, e.g.,
PLAINTIFF JOHN SMITH]

Judge:

Department:

Defendant answers the complaint as follows:

[Include general denial below, or set forth, in numbered paragraphs, specific denials, admissions, and allegations in response to those in complaint, in the order in which they are alleged in complaint:]

1. Pursuant to *Code of Civil Procedure Section 431.30(b)(1)*, Defendant generally denies each and every allegation of Plaintiff's complaint, including all the purported causes of action contained therein, and further denies that Plaintiff is entitled to any equitable or legal relief, or any damages whatsoever.

[Defendant asserts the following affirmative defenses. By doing so, Defendant shall not be deemed to have assumed the burden of proving any matters that otherwise would be Plaintiff's burden.]

[Allege any affirmative defenses, e.g.,]

FIRST AFFIRMATIVE DEFENSE

(Claim Is Barred by Statute of Limitations)

2. Plaintiff's claim is barred by the statute of limitations set forth in *Code of Civil Procedure Section 337(d)*.

[AND/OR]

SECOND AFFIRMATIVE DEFENSE

(Plaintiff's Claim Is Barred by Res Judicata)

3. Plaintiff's claim is barred by the doctrine of res judicata in that

_____. *[specify, e.g., the issues raised in Plaintiff's complaint were previously adjudicated in another action, (specify case name, number, court, and date judgment or other adjudication was rendered)*

_____].

[AND/OR]

THIRD AFFIRMATIVE DEFENSE

(Plaintiff Has Unclean Hands)

4. Plaintiff's is precluded from recovery because Plaintiff has unclean hands, in that Plaintiff has _____ *[specify facts supporting affirmative defense of unclean hands]*.

[AND/OR]

FOURTH AFFIRMATIVE DEFENSE

(Plaintiff Has Waived the Right to Reform the Contract)

5. Plaintiff has already ratified the contract and therefore has waived the right to rescind the contract.

[AND/OR]

FIFTH AFFIRMATIVE DEFENSE

(Plaintiff Was Inexcusably Negligent in Failing to Discover Mistake)

6. Plaintiff was inexcusably negligent in failing to discover the mistake that is the basis for Plaintiff's claim for relief.

[ADD additional affirmative defenses, if any]

[CONTINUE]

WHEREFORE, Defendant prays as follows:

1. That Plaintiff take nothing by his/her complaint herein;
2. For costs of suit; and
3. For such other and further relief as the court deems proper.

Dated: _____

_____ [firm name, if any]

By: _____ [signature]

_____ [typed name]

Attorney for Defendant _____

[ADD following verification, if applicable]

VERIFICATION

I am the defendant in the above entitled action; I have read the foregoing answer and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein stated on information and belief, and, as to those matters, I believe it to be true.

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

_____ [date]

_____ [signature]

_____ [typed name]

NOTES.

Authority:

CC § 3399

Opposing Claim for Reformation:

See 8.32

Defense That Claim Is Barred by Statute of Limitations:

See 8.32[3][a]

Defense That Claim Is Barred by Res Judicata:

See 8.32[3][b]

Defense That Plaintiff Has Unclean Hands:

See 8.32[3][c]

Defense That Plaintiff Has Waived Right to Reform Contract:

See 8.32[3][d]

Defense That Plaintiff Was Inexcusably Negligent in Failing to Discover Mistake That Is Basis of Plaintiff's Claim:

See 8.32[3][e]

Legal Topics:

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

Civil Procedure Pleading & Practice Pleadings Answers Contracts Law Remedies Reformation



142 of 189 DOCUMENTS

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Chapter 8 Seeking or Opposing Equitable Remedies in Contract Actions
VI. FORMS

1-8 MB Practice Guide: CA Contract Litigation 8.79

8.79 Answer to Complaint for Specific Performance.**Answer to Complaint for Specific Performance.**

[Name of attorney]

_____[Street address]

_____[City, state, and ZIP]

_____[Area code and phone number]

_____[State Bar no. of attorney]

Attorney for _____[name of party]

SUPERIOR COURT OF CALIFORNIA,

COUNTY OF _____

[name] _____,

Plaintiff,

vs.

[name] _____,

Defendant.

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)

)

NO.

ANSWER OF

_____ [identify defendant, e.g.,
DEFENDANT MARY JONES] TO COMPLAINT
OF

_____ [identify plaintiff, e.g.,
PLAINTIFF JOHN SMITH]

Judge:

Department:

Defendant answers the complaint as follows:

[Include general denial below, or set forth, in numbered paragraphs, specific denials, admissions, and allegations in response to those in complaint, in the order in which they are alleged in complaint:]

1. Pursuant to *Code of Civil Procedure Section 431.30(b)(1)*, Defendant generally denies each and every allegation of Plaintiff's complaint, including all the purported causes of action contained therein, and further denies that Plaintiff is entitled to any equitable or legal relief, or any damages whatsoever.

[Defendant asserts the following affirmative defenses. By doing so, Defendant shall not be deemed to have assumed the burden of proving any matters that otherwise would be Plaintiff's burden.]

[Allege any affirmative defenses, e.g.,]

FIRST AFFIRMATIVE DEFENSE

(Defendant's Assent to Contract Obtained by Misrepresentation)

2. Plaintiff's claim is barred because Defendant's assent to the underlying contract was obtained by misrepresentation by Plaintiff, in that _____*[specify nature of plaintiff's misrepresentations]*.

[AND/OR]

SECOND AFFIRMATIVE DEFENSE

(Defendant's Assent to Contract Given by Mistake)

3. Plaintiff's claim is barred because Defendant's assent to the underlying contract was mistakenly given, in that _____*[specify nature of plaintiff's mistake]*.

[AND/OR]

THIRD AFFIRMATIVE DEFENSE

(Contract is for Personal Services)

4. The contract cannot be specifically enforced because it involves the rendering of personal services.

[AND/OR]

FOURTH AFFIRMATIVE DEFENSE

(Contract Requires Performance of an Unlawful Act)

5. The contract cannot be enforced because it requires the performance of an unlawful act, in that _____ [specify nature of act, e.g., sale of the materials Defendant was required to deliver to Defendant under the terms of the contract was subsequently banned by the United States Environmental Protection Agency, and Defendant would now be violating federal regulations by complying with the terms of the contract].

[AND/OR]

FIFTH AFFIRMATIVE DEFENSE
(Agreement Is Impossible to Perform)

6. The parties' agreement cannot be enforced because it is impossible to perform, in that _____ [specify, e.g., the vehicle that Defendant was supposed to convey to Plaintiff under the terms of the contract was stolen before Defendant could convey it to Plaintiff, and was never recovered].

[AND/OR]

SIXTH AFFIRMATIVE DEFENSE
(Contract Procures Act of Third Party)

7. The agreement cannot be enforced because it requires Defendant to procure the act of a third party.

[AND/OR]

SEVENTH AFFIRMATIVE DEFENSE
(Seller's Title Is in Doubt)

8. The agreement cannot be enforced because the Defendant's title to the goods that are the subject matter of the contract is in doubt.

[AND/OR]

EIGHTH AFFIRMATIVE DEFENSE
(Contract Requires a Succession of Continuous Acts)

9. The agreement cannot be specifically enforced because it requires the succession of continuous acts.

[AND/OR]

NINTH AFFIRMATIVE DEFENSE
(Claim Is Barred by Statute of Limitations)

10. Plaintiff's claim is barred by the statute of limitations set forth in Code of Civil Procedure Section _____ [337(1) or 339(1)].

[AND/OR]

TENTH AFFIRMATIVE DEFENSE
(Claim is Barred by Doctrine of Laches)

11. Plaintiff's claim is barred by the doctrine of laches.

[AND/OR]

ELEVENTH AFFIRMATIVE DEFENSE
(Plaintiff Has an Adequate Remedy at Law)

12. Plaintiff is not entitled to specific performance because Plaintiff has an adequate remedy at law, in that money damages are sufficient to compensate Plaintiff for any nonperformance by Defendant.

[ADD additional affirmative defenses, if any]

[CONTINUE]

WHEREFORE, Defendant prays as follows:

1. That Plaintiff take nothing by his/her complaint herein;
2. For costs of suit; and
3. For such other and further relief as the court deems proper.

Dated: _____

_____ [firm name, if any]

By: _____ [signature]

_____ [typed name]

Attorney for Defendant _____

[ADD following verification, if applicable]

VERIFICATION

I am the defendant in the above entitled action; I have read the foregoing answer and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein stated on information and belief, and, as to those matters, I believe it to be true.

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

_____ [date]

_____ [signature]

_____ [typed name]

NOTES.

Authority:

CC §§ 3384-3395

Opposing Claim for Specific Performance:

See 8.57

Defense That Contract Is for Personal Services:

See 8.58[1]

Defense That Defendant's Assent to Contract Was Obtained by Misrepresentation:

See 8.58[2]

Defense That Defendant's Assent to Contract Was Given by Mistake:

See 8.58[3]

Defense That Contract Is for the Performance of an Unlawful Act:

See 8.58[4]

Defense That Contract Is Impossible to Perform:

See 8.58[7]

Defense That Contract Procures Act of Third Party:

See 8.58[8]

Defense That Seller's Title Is in Doubt:

See 8.58[9]

Defense That Contract Requires the Succession of Continuous Acts:

See 8.58[10]

Statute of Limitations Defense:

See 8.58[11]

Laches Defense:

See 8.58[12]

Defense That Plaintiff Does Not Have Adequate Remedy at Law:

See 8.58[13]

Legal Topics:

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

Civil Procedure Pleading & Practice Pleadings Answers Commercial Law (UCC) Sales (Article 2) Remedies Buyer's Remedies Replevin & Specific Performance Contracts Law Remedies Specific Performance Real Property Law Purchase & Sale Remedies Specific Performance



143 of 189 DOCUMENTS

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Chapter 8 Seeking or Opposing Equitable Remedies in Contract Actions
VI. FORMS*1-8 MB Practice Guide: CA Contract Litigation 8.80***8.80 Answer to Complaint for Injunction.****Answer to Complaint for Injunction.**

[Name of attorney]

_____[Street address]

_____[City, state, and ZIP]

_____[Area code and phone number]

_____[State Bar no. of attorney]

Attorney for _____[name of party]

SUPERIOR COURT OF CALIFORNIA,

COUNTY OF _____

[name] _____,

Plaintiff,

vs.

[name] _____,

Defendant.

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NO.

ANSWER OF

_____[identify defendant, e.g.,
DEFENDANT MARY JONES] TO COMPLAINT
OF_____[identify plaintiff, e.g.,
PLAINTIFF JOHN SMITH]

Judge:

Department:

Defendant answers the complaint as follows:

[Include general denial below, or set forth, in numbered paragraphs, specific denials, admissions, and allegations in response to those in complaint, in the order in which they are alleged in complaint:]

1. Pursuant to *Code of Civil Procedure Section 431.30(b)(1)*, Defendant generally denies each and every allegation of Plaintiff's complaint, including all the purported causes of action contained therein, and further denies that Plaintiff is entitled to any equitable or legal relief, or any damages whatsoever.

[Defendant asserts the following affirmative defenses. By doing so, Defendant shall not be deemed to have assumed the burden of proving any matters that otherwise would be Plaintiff's burden.]

[Allege any affirmative defenses, e.g.,]

FIRST AFFIRMATIVE DEFENSE

(Changed Circumstances Render Injunction Unnecessary)

2. Changed circumstances between the parties have eliminated the need for an injunction, in that _____ *[specify circumstances that have eliminated need for injunctive relief]*.

[AND/OR]

SECOND AFFIRMATIVE DEFENSE

(Claim Barred by Doctrine of Laches)

3. Plaintiff's claim is barred by the doctrine of laches.

[AND/OR]

THIRD AFFIRMATIVE DEFENSE

(Plaintiff Has an Adequate Remedy at Law)

4. Plaintiff is not entitled to injunctive relief because the Plaintiff has an adequate remedy at law, in that money damages are sufficient to compensate Plaintiff for any acts performed or not performed by Defendant.

[AND/OR]

FOURTH AFFIRMATIVE DEFENSE

(Public Interest Requires Injunction Not be Granted)

5. The contract cannot be enforced because, if granted, the relief sought would be contrary to the public interest, in that _____[*specify public interest affected*].

[AND/OR]

FIFTH AFFIRMATIVE DEFENSE

(Relief Granted Would Be Contrary to Existing Law)

6. The contract cannot be enforced because, if granted, the relief sought would be contrary to existing law, in that _____[*specify how relief would be contrary to law*].

[AND/OR]

SIXTH AFFIRMATIVE DEFENSE

(Plaintiff Has Unclean Hands)

7. Plaintiff is precluded from recovery because Plaintiff has unclean hands, in that Plaintiff has _____[*specify facts supporting affirmative defense of unclean hands*].

[AND/OR]

SEVENTH AFFIRMATIVE DEFENSE

(Contract Could Not Be Specifically Enforced)

8. Injunctive relief is unavailable with respect to the contract referred to in Plaintiff's complaint because the performance of that contract could not be specifically enforced and it does not meet the criteria specified in *Civil Code Section 3423(e)* for availability of injunctive relief with respect to a contract for personal services.

[ADD additional affirmative defenses, if any]

[CONTINUE]

WHEREFORE, Defendant prays as follows:

1. That Plaintiff take nothing by his/her complaint herein;
2. For costs of suit; and
3. For such other and further relief as the court deems proper.

Dated: _____

_____ [firm name, if any]

By: _____ [signature]

_____ [typed name]

Attorney for Defendant _____

[ADD following verification, if applicable]

VERIFICATION

I am the defendant in the above entitled action; I have read the foregoing answer and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein stated on information and belief, and, as to those matters, I believe it to be true.

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

_____ [date]

_____ [signature]

_____ [typed name]

NOTES.

Authority:

CC §§ 3384-3395

Opposing a Claim for Injunction:

See 8.70

Defense That Changed Circumstances Have Rendered Injunctive Relief Unnecessary:

See 8.71[1]

Defense of Laches:

See 8.71[2]

Defense That Plaintiff Has an Adequate Remedy at Law:

See 8.71[3]

Defense That Relief Granted Is Contrary to Law:

See 8.71[5]

Defense That Plaintiff Has Unclean Hands:

See 8.71[6]

Legal Topics:

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

Civil ProcedurePleading & PracticePleadingsAnswersCivil ProcedureRemediesInjunctionsGeneral OverviewContracts
LawRemediesEquitable ReliefInjunctive Relief



144 of 189 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 9 Seeking or Opposing Quantum Meruit or Quantum Valebant Recovery in Contract Actions

1-9 MB Practice Guide: CA Contract Litigation 9.syn

§ 9.syn Synopsis to Chapter 9: Seeking or Opposing Quantum Meruit or Quantum Valebant Recovery in Contract Actions

9.01 Scope.

9.02 Objective and Strategy.

9.02[1] Quantum Meruit Is a Common Count.

9.02[2] Quantum Meruit Is Often Used in Contract-Related Actions.

9.02[3] Quantum Meruit Recovery Is Quasi-Contractual.

9.02[4] Quantum Meruit Is Unavailable When Express Contract Governs Compensation.

9.02[5] Quantum Valebant Is Used to Recover Value of Goods Sold and Delivered.

9.03 CHECKLIST: Seeking Quantum Meruit Recovery in Contract Actions.

9.04 Options and Strategies.

9.04[1] Quantum Meruit Claims and Other Contract Claims May Be Asserted in Same Action.

9.04[2] Jury Trial Is Available for Quantum Meruit Claims.

9.05 Elements of Quantum Meruit Claim.

9.06 Plaintiff Has Burden of Proving Each Element of Quantum Meruit Claim.

9.07 Defendant Must Have Expressly or Impliedly Requested Plaintiff's Performance.

9.08 Both Parties Must Have Understood Plaintiff Would Be Compensated for Services Rendered.

9.09 Services Must Have Benefitted Defendant.

9.10 Claim Must Be Made Within Applicable Statute of Limitations.

9.11 Quantum Meruit Recovery May Be Available When Plaintiff Renders Incomplete or Imperfect Performance.

9.11[1] Quantum Meruit Recovery Available When Plaintiff Renders Part Performance on Express Contract.

9.11[2] Quantum Meruit Recovery Available If Defendant Accepted Plaintiff's Imperfect Performance Rendered in Good Faith.

9.12 Existence of Contract Is Not Necessary.

9.12[1] Quantum Meruit Recovery Is Quasi-Contractual.

9.12[2] Quantum Meruit Recovery Is Available for Void Contracts.

9.13 Quantum Meruit Recovery Is Not Available for Liquidated Debts.

9.14 Measure of Recovery Is Reasonable Value of Beneficial Services.

9.15 Pleading Quantum Meruit Claims.

9.15[1] Judicial Council Form for Common Counts May Be Used to Plead Quantum Meruit Claim.

9.15[2] Complaint Must Meet Specific Pleading Requirements.

9.15[3] Complaint Must Allege That Plaintiff Performed Services for Defendant's Benefit.

9.15[4] Complaint Must Allege Reasonable Value of Services Rendered.

9.15[5] Complaint Must Allege That Services Were Rendered at Defendant's Request.

9.15[6] Complaint Must Allege That Services Are Unpaid.

9.15[7] Not Necessary to Specify When Indebtedness Accrued.

9.15[8] Not Necessary to Specify When Services Were Rendered.

9.15[9] Demand for Payment Is Not Required.

9.16 CHECKLIST: Opposing Quantum Meruit Claims in Contract Actions.

9.17 Options and Strategies.

9.18 Defending Against Quantum Meruit Claims

9.18[1] Claim Must Be Premised on Services Actually Rendered to Defendant.

9.18[2] Defendant Can Claim No Evidence Exists of Value of Services Rendered.

9.18[3] Defendant Must Have Accepted Services and Derived Benefit From Them.

9.18[4] Defendant Can Claim Contract Contains Terms Specifying Payment.

9.18[5] Services Must Not Have Been Intended to Be Gratuitous.

9.18[6] Claim Must Have Been Brought Within Applicable Statute of Limitations.

9.19 General Denial Is Sufficient to Raise Almost Any Defense, Except Some Affirmative Defenses.

9.20 Statute of Frauds Is Not an Appropriate Defense.

9.21 Quantum Meruit Usually Is Not Subject to Demurrer.

9.22 Summary Judgment May Be Available on Quantum Meruit Claims.

9.23 Defendant May Demand Bill of Particulars.

9.23[1] Defendant Has Right to Learn Specifics of Plaintiff's Claim.

9.23[2] Bill of Particulars Is Not a Pleading and Cannot Be Answered.

9.23[3] Items in Bill Must Be Set Forth Precisely and Definitely in Good Faith.

9.24 CHECKLIST: Seeking or Opposing Quantum Valebant Recovery in Contract Actions.

9.24[1] Determining Whether Quantum Valebant Is Available.

9.24[2] Pleading Claims for Quantum Valebant.

9.24[3] Opposing Claims for Quantum Valebant.

9.25 Options and Strategies.

9.26 Elements of Quantum Valebant Claim.

9.27 Basic Two-Year or Four-Year Statute of Limitations Applies.

9.28 Defendant Must Not Have Refused to Accept Goods.

9.29 Defendant Must Have Used Property in Way That Created Duty of Compensation for Use.

9.30 Measure of Recovery Is Reasonable Value of Goods Sold and Delivered.

9.31 Plaintiff Need Not Specify When Indebtedness Accrued.

9.32 Judicial Council Form for Common Counts May Be Used to Plead Quantum Valebant Claim.

9.33 Demand for Payment Is Not Required.

9.34 Defending Against Quantum Valebant Claim.

9.35 General Denial Sufficient to Raise Most Defenses.

9.36 Quantum Valebant Generally Not Subject to Demurrer.

9.37 Defenses Should Be Raised in Answer or Summary Judgment Motion.

9.38 Defendant May Demand Bill of Particulars.

9.39 Judicial Council Form PLD-C-001(2) Cause of Action--Common Counts.

Judicial Council Form PLD-C-001(2) Cause of Action--Common Counts.

9.40 Complaint for Quantum Meruit Seeking Reasonable Value of Work, Labor, and Services.

Complaint for Quantum Meruit Seeking Reasonable Value of Work, Labor, and Services.

9.41 Answer to Complaint Seeking Quantum Meruit Recovery With Affirmative Defenses.

Answer to Complaint Seeking Quantum Meruit Recovery With Affirmative Defenses.

9.42 Demand for Bill of Particulars.

Demand for Bill of Particulars.

9.43 Bill of Particulars

Bill of Particulars

9.44 Complaint for Reasonable Value of Goods Sold and Delivered (Quantum Valebant).

Complaint for Reasonable Value of Goods Sold and Delivered (Quantum Valebant).

9.45 Answer to Complaint for Reasonable Value of Goods Sold (Quantum Valebant).

Answer to Complaint for Reasonable Value of Goods Sold (Quantum Valebant).



145 of 189 DOCUMENTS

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Chapter 9 Seeking or Opposing Quantum Meruit or Quantum Valebant Recovery in Contract Actions

I. STRATEGY

1-9 MB Practice Guide: CA Contract Litigation 9.01

9.01 Scope.

This chapter covers:

- Objective and strategies for seeking or opposing quantum meruit recovery in contract actions [see 9.02].
- Determining whether quantum meruit is available [see 9.02 -9.15].
- Raising a quantum meruit claim (pleading issues) [see 9.03 -9.15; Form: see 9.40].
- Opposing a quantum meruit claim [see 9.16 -9.23; Form: see 9.41].
- Raising a quantum valebant claim recovery in a contract action [see 9.24 -9.38; Forms: see 9.39, 9.44].
- Opposing a quantum valebant claim in a contract action [Form: see 9.45].

Legal Topics:

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

Contracts Law Remedies Equitable Relief Quantum Meruit Contracts Law Types of Contracts Implied-in-Law Contracts



146 of 189 DOCUMENTS

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Chapter 9 Seeking or Opposing Quantum Meruit or Quantum Valebant Recovery in Contract Actions
I. STRATEGY

1-9 MB Practice Guide: CA Contract Litigation 9.02

9.02 Objective and Strategy.

9.02[1] Quantum Meruit Is a Common Count. Quantum meruit is a "common count," which is an abbreviated statement alleging that the defendant is indebted to the plaintiff for a particular sum and for a particular reason [see *Philpott v. Superior Court* (1934) 1 C2d 512, 518, 36 P2d 635] .

➡ Cross Reference:

Discussion of other common counts and common counts in general, see California Forms of Pleading and Practice, Ch. 121, Common Counts (Matthew Bender).

9.02[2] Quantum Meruit Is Often Used in Contract-Related Actions. Practitioners often plead a quantum meruit claim as an alternative to, or in addition to, a breach of contract claim. When doing so, however, a plaintiff should rely on a quantum meruit claim only when the terms of the contract discussing the defendant's obligations are unclear, uncertain, or logistically difficult to enforce.

Quantum meruit is one of the most frequently used forms of the common counts. It is proper in a variety of situations:

- When services are rendered under a contract that does not specify the compensation to be paid [*Meredith v. Marks* (1963) 212 CA2d 265, 272-273, 27 CR 737] .
- When an express contract includes a method for calculating compensation that cannot be followed under the circumstances [*Miller v. San Francisco Church Extension Soc'y* (1932) 125 CA 85, 94, 95, 13 P2d 824] .
- When the terms of a contract have been modified by mutual agreement [*Castagnino v. Balletta* (1889) 82 C 250, 258, 23 P 127 ; *Dodge v. Harbor Boat Bldg. Co.* (1950) 99 CA2d 782, 791, 222 P2d 697] .
- When a plaintiff, working under an express contract, performs additional work at the defendant's request that is not specified in the contract [*Combs v. California Cotton Mills Co.* (1952) 112 CA2d 781, 786-787, 247 P2d 382] .

- When the services rendered by one party to a void contract are not illegal [*Sims v. Petaluma Gas Light Co.* (1901) 131 C 656, 660, 63 P 1011 ; *Lawn v. Camino Heights, Inc.* (1971) 15 CA3d 973, 980-983, 93 CR 621].

- When the defendant breaches an express contract before the plaintiff has completed performance [*Oliver v. Campbell* (1954) 43 C2d 298, 301-302, 273 P2d 15].

- When the plaintiff has fully performed, and any part of the consideration due from the defendant is something other than a liquidated debt [*Chodos v. West Publ'g Co., Inc.* (9th Cir 2002) 292 F3d 992, 1001-1002] .

- When plaintiff's performance was imperfect, but the services were rendered in good faith and the defendant accepted them [*Roseleaf Corp. v. Radis* (1953) 122 CA2d 196, 207, 264 P2d 964] .



Cross Reference:

Detailed discussion of the circumstances in which quantum meruit recovery is appropriate, see *California Forms of Pleading and Practice*, § 121.25 (Matthew Bender).

9.02[3] Quantum Meruit Recovery Is Quasi-Contractual. Quantum meruit recovery is quasi-contractual, a theory implying the existence of a contract for the payment of services to satisfy the ends of justice [see *Maglica v. Maglica* (1998) 66 CA4th 442, 449-450, 78 CR2d 101 (to recover in quantum meruit, a party need not prove the existence of a contract)].



Warning:

The line between an implied-in-fact contract and recovery in quantum meruit is "fuzzy" [*Maglica v. Maglica* (1998) 66 CA4th 442, 456 n14, 78 CR2d 101]. One court distinguished the two as follows: Quantum meruit is a theory that implies a promise to pay for services as a matter of law for reasons of justice, while implied-in-fact contracts are predicated on actual agreements, albeit not ones expressed in words [*Maglica v. Maglica* (1998) 66 CA4th 442, 456 n14, 78 CR2d 101].

9.02[4] Quantum Meruit Is Unavailable When Express Contract Governs Compensation. Quantum meruit is an equitable theory that supplies missing contractual terms, and contractual terms are not "missing" when the parties have agreed on express terms [*Hedging Concepts, Inc. v. First Alliance Mortgage Co.* (1996) 41 CA4th 1410, 1419, 49 CR2d 191]. When an express contract between the parties exists governing compensation, the remedy of quantum meruit is not available. The law will not imply a promise to pay the reasonable value of services when the parties have an express agreement governing compensation [*Hedging Concepts, Inc. v. First Alliance Mortgage Co.* (1996) 41 CA4th 1410, 1419-1420, 49 CR2d 191].

A plaintiff, therefore, has a choice to recover damages based on the express terms of the contract or on a theory of quantum meruit seeking the reasonable value of services rendered [*Haggerty v. Warner* (1953) 115 CA2d 468, 475, 252 P2d 373]. In either case, however, a plaintiff may plead both the breach of contract claim and the quantum meruit claim in the same action, which is often the better practice in many situations [see 9.03 -9.28].

9.02[5] Quantum Valebant Is Used to Recover Value of Goods Sold and Delivered. Quantum valebant, like quantum meruit is a common count. It is used to recover the reasonable value of goods sold and delivered [*Weitzenkorn v. Lesser* (1953) 40 C2d 778, 792-794, 256 P2d 947 ; see 9.03]. Quantum valebant differs from quantum meruit in that quantum meruit is used to recover the reasonable value of services rendered, while quantum valebant is used to recover the reasonable value of goods sold and delivered [*Weitzenkorn v. Lesser* (1953) 40 C2d 778, 792-794, 256 P2d 947]. Most attorneys are less familiar with quantum valebant than quantum meruit, but it is nevertheless a

viable remedy that should be considered in situations in which quantum meruit would be considered but for the fact that goods rather than services are involved.



Cross References:

See Ch. 2, Determining What Causes of Action Exist;

Ch. 4, Determining Applicable Statute of Limitations and Effect on Potential Action;

Ch. 7, Seeking or Opposing Damages in Contract Actions;

Ch. 8, Seeking or Opposing Equitable Remedies in Contract Actions;

Ch. 10, Seeking or Opposing Statutory Remedies in Contract Actions;

Ch. 12, Recovering Attorney's Fees and Costs in Contract Litigation; and

Ch. 22, Suing or Defending Action for Breach of Contract.

For tips on updating case law and expanding your research with additional resources, see **How to Use Lexis.com With This Publication** at the front of this volume.

Legal Topics:

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

Contracts Law Remedies Equitable Relief Quantum Meruit Contracts Law Types of Contracts Implied-in-Law Contracts



147 of 189 DOCUMENTS

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Chapter 9 Seeking or Opposing Quantum Meruit or Quantum Valebant Recovery in Contract Actions

II. SEEKING QUANTUM MERUIT RECOVERY IN CONTRACT ACTIONS

1-9 MB Practice Guide: CA Contract Litigation 9.03

9.03 CHECKLIST: Seeking Quantum Meruit Recovery in Contract Actions.

- ☐ Determine whether plaintiff performed services for defendant.

Authority:

Day v. Alta Bates Med. Ctr. (2002) 98 CA4th 243, 248, 119 CR2d 606

Discussion:

See 9.05

- ☐ Determine whether plaintiff's performance was made pursuant to defendant's express or implied request.

Authority:

Day v. Alta Bates Med. Ctr. (2002) 98 CA4th 243, 249, 119 CR2d 606

Discussion:

See 9.07

- ☐ Determine whether both parties understood that plaintiff would be compensated for services rendered.

Authority:

Day v. Alta Bates Med. Ctr. (2002) 98 CA4th 243, 249, 119 CR2d 606

Discussion:

See 9.08

- ☐ Determine whether services rendered benefitted defendant.

Authority:

Day v. Alta Bates Med. Ctr. (2002) 98 CA4th 243, 119 CR2d 606

Discussion:

See 9.09

- ☐ Determine whether claim is being brought within applicable statute of limitations.

Authority:

CCP § 339

Discussion:

See 9.10

- ☐ To plead a quantum meruit cause of action:

- ☐ Allege that plaintiff performed services for defendant.

Authority:

Haggerty v. Warner (1953) 115 CA2d 468, 475, 252 P2d 373

Discussion:

See 9.15[3]

- ☐ Allege reasonable value of services that plaintiff performed.

Authority:

Haggerty v. Warner (1953) 115 CA2d 468, 475, 252 P2d 373

Discussion:

See 9.15[4]

- ☐ Allege that services plaintiff performed were rendered at defendant's request.

Authority:

Haggerty v. Warner (1953) 115 CA2d 468, 475, 252 P2d 373

Discussion:

See 9.15[5]

- ☐ Allege that plaintiff has not received payment for services rendered.

Authority:

Haggerty v. Warner (1953) 115 CA2d 468, 475, 252 P2d 373

Discussion:

See 9.15[6]

Legal Topics:

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

Contracts Law Remedies Equitable Relief Quantum Meruit Contracts Law Types of Contracts Implied-in-Law Contracts



148 of 189 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 9 Seeking or Opposing Quantum Meruit or Quantum Valebant Recovery in Contract Actions

II. SEEKING QUANTUM MERUIT RECOVERY IN CONTRACT ACTIONS

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9.04 Options and Strategies.

9.04[1] Quantum Meruit Claims and Other Contract Claims May Be Asserted in Same Action. A plaintiff may plead both contract damages and quantum meruit in the same action. California courts recognize the general principle that if a fair and reasonable doubt exists as to whether a plaintiff is entitled to recover upon an express or an implied contract for services rendered, the plaintiff may plead a claim based upon each and recover according to the proof [*see, e.g., Leoni v. Delany* (1948) 83 CA2d 303, 307-308, 188 P2d 765 ; *Wilkerson v. Seib* (1942) 20 C2d 556, 563, 127 P2d 904 ; *see also Bay Cities Paving & Grading, Inc. v. Lawyers' Mut. Ins. Co.* (1993) 5 C4th 854, 860, 21 CR2d 691, 855 P2d 1263 (seeking different kinds of relief does not establish different causes of action; cause of action should be distinguished from remedy and relief sought because a plaintiff may be entitled to several different remedies within a single cause of action)].

Example:

In an action seeking quantum meruit recovery, the court held that when a plaintiff renders personal services to the defendant at the defendant's request, and the defendant refuses to compensate the plaintiff for those services, the plaintiff may elect to plead either on the express terms of the contract or in quantum meruit for the reasonable value of the services rendered [*see Haggerty v. Warner* (1953) 115 CA2d 468, 475, 252 P2d 373].

Judge's Perspective:

A plaintiff suing for breach of contract should also consider bringing a quantum meruit claim. Defendants frequently contest the validity of contracts, and a plaintiff's chances of recovery increase if the plaintiff has also brought a quantum meruit claim in the event that the court invalidates the contract. In addition, even if a defendant does not question the validity of the contract, a plaintiff may also seek payment for work performed outside the scope of the contract, which the plaintiff might only recover under a quantum meruit claim.

**Warning:**

If a plaintiff pleads both a quantum meruit claim and a breach of contract claim based on the same contract, and the claim for breach is defective, the court may dismiss both claims upon demurrer [*Jones v. Daly* (1981) 122 CA3d 500, 509-510, 176 CR 130].

9.04[2] Jury Trial Is Available for Quantum Meruit Claims. The plaintiff should also consider whether to try the quantum meruit claim before a jury. Although quantum meruit is described as an "equitable theory" of recovery, jury trials are available for plaintiffs seeking quantum meruit recovery [see *Philpott v. Superior Court* (1934) 1 C2d 512, 522, 36 P2d 635 ("that an action is of an equitable nature does not make it an action in equity"); *Jogani v. Superior Court* (2008) 165 CA4th 901, 909, 81 CR3d 503 (the fact that equitable principles are applied in an action does not necessarily identify the resultant relief as equitable)]. California juries have decided many quantum meruit claims.

Examples:

- A jury found in the plaintiffs' favor on their quantum meruit claim and awarded them \$320,066 [see *Valentine v. Read* (1996) 50 CA4th 787, 791, 57 CR2d 836].
- A jury heard plaintiff's quantum meruit claim and determined that the reasonable value of employee's services rendered was \$96,000 [*George v. Double D Foods, Inc.* (1984) 155 CA3d 36, 39].



Strategic Point--Both Parties:

A party seeking or opposing a quantum meruit claim should weigh these factors when considering the possibility of a jury trial:

- Whether the defendant's reason for not paying the plaintiff for services rendered will make the jury frown on one party or the other.
- Whether either party will have a difficult time explaining to the jury the arguments and evidence supporting or opposing a quantum meruit claim.
- Whether the value of the case warrants a jury trial, which is often up to twice as expensive as a bench trial.

Jury Instructions:

Reasonable Value of Services, see California Forms of Jury Instruction, Ch. 71A, Instr. MB 7100A.05 (Matthew Bender).



Search California Forms of Jury Instruction:

Use *lexis.com* to search for jury instructions discussing quantum meruit actions:

■ Legal > States Legal--U.S. > California > Jury Instruction & Verdicts > California Forms of Jury Instruction



Sample Search: To find jury instructions regarding quantum meruit actions, try:
quantum meruit.

Legal Topics:

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

Civil Procedure Pleading & Practice Pleadings Complaints General Overview Contracts Law Remedies Equitable
Relief Quantum Meruit Contracts Law Types of Contracts Implied-in-Law Contracts



149 of 189 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 9 Seeking or Opposing Quantum Meruit or Quantum Valebant Recovery in Contract Actions

II. SEEKING QUANTUM MERUIT RECOVERY IN CONTRACT ACTIONS

1-9 MB Practice Guide: CA Contract Litigation 9.05

9.05 Elements of Quantum Meruit Claim.

A plaintiff pleading a claim of quantum meruit has the burden of proving each element of the claim [*Foye v. Board of Trade* (1936) 11 CA2d 734, 738, 54 P2d 761]. The essential elements of a quantum meruit claim are:

- The plaintiff must have performed services pursuant to the defendant's express or implied request [*Day v. Alta Bates Med. Ctr.* (2002) 98 CA4th 243, 248, 119 CR2d 606 ; see 9.07];
- Both parties must have understood that the plaintiff would be compensated for the services [*Huskinson & Brown, LLP v. Wolf* (2004) 32 C4th 453, 458 ; see 9.08];
- The services must have benefitted the defendant [*Day v. Alta Bates Med. Ctr.* (2002) 98 CA4th 243, 249, 119 CR2d 606 ; see 9.09]; and
- The claim must have been made within the applicable statute of limitations [see 9.10].

Jury Instructions:

Contracts--Common Count: Goods and Services Rendered, see *Judicial Council of California Civil Jury Instructions*, CACI No. 371 (LexisNexis Matthew Bender).



Search California Combined Federal and State Cases:

Use *lexis.com* to search for forms for complaints alleging claims for quantum meruit:

■ Legal > States Legal--U.S. > California > Search Analysis & CLE Materials > CA Treatises & Analytical Materials > California Forms of Pleading and Practice



Sample Search: To find complaint for quantum meruit actions, try: *heading(forms)* and *section(quantum meruit)*.

Legal Topics:

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

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150 of 189 DOCUMENTS

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Chapter 9 Seeking or Opposing Quantum Meruit or Quantum Valebant Recovery in Contract Actions

II. SEEKING QUANTUM MERUIT RECOVERY IN CONTRACT ACTIONS

1-9 MB Practice Guide: CA Contract Litigation 9.06

9.06 Plaintiff Has Burden of Proving Each Element of Quantum Meruit Claim.

A plaintiff pleading a claim of quantum meruit has the burden of proving each element of the claim [*Foye v. Board of Trade* (1936) 11 CA2d 734, 738, 54 P2d 761].

Legal Topics:

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

Contracts Law Remedies Equitable Relief Quantum Meruit Contracts Law Types of Contracts Implied-in-Law Contracts



151 of 189 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 9 Seeking or Opposing Quantum Meruit or Quantum Valebant Recovery in Contract Actions

II. SEEKING QUANTUM MERUIT RECOVERY IN CONTRACT ACTIONS

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9.07 Defendant Must Have Expressly or Impliedly Requested Plaintiff's Performance.

In order to recover under a quantum meruit theory, a plaintiff must establish that he or she performed services pursuant to the defendant's express or implied request [*Day v. Alta Bates Med. Ctr.* (2002) 98 CA4th 243, 248, 119 CR2d 606 ; *Producers Cotton Oil Co. v. Amstar Corp.* (1988) 197 CA3d 638, 659, 242 CR 914] .

Example:

A plaintiff attorney performed services for clients regarding an estate property in which the defendants were jointly interested. The defendants actively participated in conferences and court proceedings, consulted with the plaintiff about the matter at various stages, and expressly agreed to negotiate for a compromise. The court found that the defendants, as evidenced by their conduct, had impliedly agreed to pay the plaintiff for services rendered and should have reasonably known that they would be expected to pay for the services despite not having expressly requested them [*Young v. Bruere* (1926) 78 CA 127, 132, 248 P 301].

Legal Topics:

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

Contracts Law Remedies Equitable Relief Quantum Meruit Contracts Law Types of Contracts Implied-in-Law Contracts



152 of 189 DOCUMENTS

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Chapter 9 Seeking or Opposing Quantum Meruit or Quantum Valebant Recovery in Contract Actions

II. SEEKING QUANTUM MERUIT RECOVERY IN CONTRACT ACTIONS

1-9 MB Practice Guide: CA Contract Litigation 9.08

9.08 Both Parties Must Have Understood Plaintiff Would Be Compensated for Services Rendered.

To recover in quantum meruit, a plaintiff must show that both parties understood or expected that the defendant would compensate the plaintiff for the services rendered [*Huskinson & Brown, LLP v. Wolf (2004) 32 C4th 453, 458*].

Example:

A law firm sued a second law firm to which it had referred a medical malpractice claim against a health care provider for recovery in quantum meruit. In exchange for the referral, the second law firm orally agreed to pay the referring firm 25 percent of any attorney fees recovered. Although the second firm prosecuted the action, the referring firm had paid \$800 to a medical expert and performed 20 hours of legal services on the case. Following a successful judgment, the second firm received attorney fees but failed to pay the referring firm. The court found that the referring firm did not gratuitously offer the services rendered and that all parties expected the second firm to compensate the referring firm for its services if the second firm recovered attorney's fees [*Huskinson & Brown, LLP v. Wolf (2004) 32 C4th 453, 458*].

Legal Topics:

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

Contracts Law Formation Meeting of Minds Contracts Law Remedies Equitable Relief Quantum Meruit Contracts Law Types of Contracts Implied-in-Law Contracts



153 of 189 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 9 Seeking or Opposing Quantum Meruit or Quantum Valebant Recovery in Contract Actions

II. SEEKING QUANTUM MERUIT RECOVERY IN CONTRACT ACTIONS

1-9 MB Practice Guide: CA Contract Litigation 9.09

9.09 Services Must Have Benefitted Defendant.

The services that the plaintiff performed must have benefitted the defendant [*Day v. Alta Bates Med. Ctr.* (2002) 98 CA4th 243, 249, 119 CR2d 606 ; *Maglica v. Maglica* (1998) 66 CA4th 442, 445-446, 78 CR2d 101 ; *Earhart v. William Low Co.* (1979) 25 C3d 503, 510, 158 CR 887, 600 P2d 1344] .

Exception:

A party who expends funds and performs services for a third party at the request of another, under the reasonable belief that the requesting party will compensate the performing party for the services, may recover in quantum meruit *even if the services do not directly benefit the requesting party* [*Earhart v. William Low Co.* (1979) 25 C3d 503, 515, 158 CR 887, 600 P2d 1344] .

Example:

At the defendant's request, the plaintiff commenced construction of a mobile home park on land owned by the defendant and on an adjacent parcel owned by a third party. The defendant refused to compensate the plaintiff for any of the plaintiff's services, and the plaintiff sued in quantum meruit. The court ruled that the plaintiff could recover the reasonable value of the services rendered on both parcels, including the plaintiff's services performed on the third party's parcel of land even though those services did not directly benefit the defendant's property [*Earhart v. William Low Co.* (1979) 25 C3d 503, 515, 158 CR 887, 600 P2d 1344] .

Example--Services Found Not to Benefit Defendant:

An attorney who had previously represented a plaintiff in an unsuccessful medical malpractice action brought a quantum meruit claim against a hospital, which was the lien claimant in the malpractice action, seeking payment from the attorney's client for unpaid medical services. The attorney asserted that the hospital owed him payment for services rendered in the underlying medical malpractice action that, arguably, could have incidentally benefitted the hospital in relation to its lien. The appellate court affirmed a grant of summary judgment to the hospital, explaining that the attorney could not properly sue the hospital in quantum meruit, in part because the hospital actually received no direct benefit from the attorney's services as a result of the bifurcated underlying medical malpractice suit having failed to proceed beyond the liability phase to the damages phase [*Day v. Alta Bates Med. Ctr.* (2002) 98 CA4th 243, 249, 119 CR2d 606] .

Legal Topics:

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

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154 of 189 DOCUMENTS

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Chapter 9 Seeking or Opposing Quantum Meruit or Quantum Valebant Recovery in Contract Actions

II. SEEKING QUANTUM MERUIT RECOVERY IN CONTRACT ACTIONS

1-9 MB Practice Guide: CA Contract Litigation 9.10

9.10 Claim Must Be Made Within Applicable Statute of Limitations.

The statute of limitations for quantum meruit claims is two years [*Maglica v. Maglica* (1998) 66 CA4th 442, 452, 78 CR2d 101 ; CCP § 339 (action upon an "obligation" ... not founded upon an instrument of writing)].

The date when the statute begins to run depends on the circumstances of the case. Generally, a statute of limitations begins to run when a cause of action accrues, which is the occurrence of the last essential element of the claim [*Spear v. California State Automobile Ass'n* (1992) 2 C4th 1035, 1040, 9 CR2d 381, 831 P2d 821]. The date upon which a cause of action accrues depends on the facts.

Examples:

- If an attorney is discharged by a client, quantum meruit recovery for work performed on a contingency fee matter is not available until "after the matter is concluded successfully" [*Trimble v. Steinfeldt* (1986) 178 CA3d 646, 651-652, 224 CR 195] .
- If the contract is for an indefinite period of time and no time for payment is specified, the statute does not begin to run until the services end [*Long v. Rumsey* (1938) 12 C2d 334, 342, 84 P2d 146].
- The facts of the case may demonstrate that the parties understood that payment would be made upon termination of the services, and therefore the statute would begin to run upon the termination of the services [see *Maglica v. Maglica* (1998) 66 CA4th 442, 453, 78 CR2d 101].
- The terms of a construction contract may provide that a contractor's compensation would be a percentage of the net profits derived from the sale of the building with the consent of both parties. If the building is sold without the contractor's consent, then the statute of limitations would begin to run when the building was sold. Therefore, a contractor's suit brought within two years after the sale seeking the reasonable value of services rendered is timely [see *Hayes v. 2831 Ellendale Place, Inc.* (1963) 223 CA2d 362, 367, 36 CR 94] .

➡ Cross Reference:

See Ch. 4, Determining Applicable Statute of Limitations and Effect on Potential Action.

Legal Topics:

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

Contracts Law
Defenses
Statutes of Limitations
Contracts Law
Remedies
Equitable Relief
Quantum Meruit
Contracts Law
Types of Contracts
Implied-in-Law Contracts
Governments
Legislation
Statutes of Limitations
Pleading & Proof
Governments
Legislation
Statutes of Limitations
Time Limitations



155 of 189 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 9 Seeking or Opposing Quantum Meruit or Quantum Valebant Recovery in Contract Actions

II. SEEKING QUANTUM MERUIT RECOVERY IN CONTRACT ACTIONS

1-9 MB Practice Guide: CA Contract Litigation 9.11

9.11 Quantum Meruit Recovery May Be Available When Plaintiff Renders Incomplete or Imperfect Performance.

9.11[1] Quantum Meruit Recovery Available When Plaintiff Renders Part Performance on Express Contract. When the parties executed an express contract and the defendant breaches the contract before the plaintiff completes performance, the plaintiff may [*Oliver v. Campbell* (1954) 43 C2d 298, 301-302, 273 P2d 15] :

- Affirm the contract and bring an action to recover damages for the breach; or
- Disaffirm the contract and seek to recover the reasonable value of the services rendered, even if the value exceeds the contract price.

9.11[2] Quantum Meruit Recovery Available If Defendant Accepted Plaintiff's Imperfect Performance Rendered in Good Faith. A plaintiff may recover in quantum meruit, even if the plaintiff rendered imperfect performance, as long as the plaintiff rendered the services in good faith and the defendant accepted them [*Roseleaf Corp. v. Radis* (1953) 122 CA2d 196, 207, 264 P2d 964] .



Warning:

It is unclear whether quantum meruit is available when the defendant's obligation under the contract is conditional. Some early cases prevented recovery [see *Davisson v. East Whittier Land & Water Co.* (1908) 153 C 81, 84-85, 96 P 88] , but others upheld the use of the remedy in actions when the defendant's obligation to perform was conditioned on third-party approval [*Castagnino v. Balletta* (1889) 82 C 250, 260-261, 23 P 127] . Later decisions also are divided on this issue [see *Oliver v. Campbell* (1954) 43 C2d 298, 305, 273 P2d 15 ; *Draper v. Patterson* (1958) 156 CA2d 606, 608-609, 319 P2d 694] .



Cross Reference:

Detailed discussion of the circumstances in which quantum meruit recovery is appropriate, see California Forms of Pleading and Practice, § 1212.25 (Matthew Bender).

Legal Topics:

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

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156 of 189 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 9 Seeking or Opposing Quantum Meruit or Quantum Valebant Recovery in Contract Actions

II. SEEKING QUANTUM MERUIT RECOVERY IN CONTRACT ACTIONS

1-9 MB Practice Guide: CA Contract Litigation 9.12

9.12 Existence of Contract Is Not Necessary.

9.12[1] Quantum Meruit Recovery Is Quasi-Contractual. To recover in quantum meruit, a party need not prove the existence of a contract [*Maglica v. Maglica* (1998) 66 CA4th 442, 449, 78 CR2d 101]. Recovery under quantum meruit is quasi-contractual, based on an implied contract for the payment of services to satisfy the ends of justice [see *Maglica v. Maglica* (1998) 66 CA4th 442, 446 n2, 78 CR2d 101].

**Warning:**

The line separating recovery based on implied-in-fact contracts from recovery based in quantum meruit is "fuzzy" [*Maglica v. Maglica* (1998) 66 CA4th 442, 456 n14, 78 CR2d 101]. One court distinguished the two this way: Quantum meruit is a theory that implies a promise to pay for services as a matter of law for reasons of justice, while implied-in-fact contracts are predicated on actual agreements, albeit not ones expressed in words [*Maglica v. Maglica* (1998) 66 CA4th 442, 456 n14, 78 CR2d 101]. Thus, quantum meruit is a different theory altogether from contracts implied-in-fact [*Maglica v. Maglica* (1998) 66 CA4th 442, 456 n14, 78 CR2d 101].

9.12[2] Quantum Meruit Recovery Is Available for Void Contracts. Quantum meruit recovery also is available when the contract governing the parties' obligations is void, as long as the consideration underlying the parties' agreement is not illegal [*Sims v. Petaluma Gas Light Co.* (1901) 131 C 656, 660, 63 P 1011 ; *Lawn v. Camino Heights, Inc.* (1971) 15 CA3d 973, 980-983, 93 CR 621] .

Example:

Plaintiff referred a client to defendants, who represented the client in her claim against a health care provider. Defendants agreed to pay plaintiff 25 percent of any attorney fee recovered in the case in exchange for the referral. Plaintiff also performed 20 hours of legal services and paid an expert fee in the case. When the client prevailed and attorney fees were awarded, defendants refused to pay plaintiff. Plaintiff sued on various theories, including quantum meruit. The court ruled that the fee-splitting agreement was unenforceable under Cal Rules *Prof Conduct*, Rule 2-200, but that plaintiff was allowed to recover the reasonable value of his services under a quantum meruit theory [see *Huskinson & Brown, LLP v. Wolf* (2004) 32 C4th 453, 457-458 ; see also *Cohen v. Brown* (2009) 173 CA4th 302, 320, 93 CR3d 24 (attorney may recover in quantum meruit when fee-splitting agreement is unenforceable under

Rule 2-200); *but see Strong v. Beydoun* (2008) 166 CA4th 1398, 1404, 83 CR3d 632 (attorney cannot recover from the *client* the reasonable value of attorney's services that were performed pursuant to an unenforceable fee-sharing agreement with another attorney to which the client did not consent)].

Distinguish:

When regulatory statutes require written agreements or licensure, a party generally may not recover in quantum meruit for that which cannot be recovered on the unenforceable contract [see *Castillo v. Barrera* (2007) 146 CA4th 1317, 2007 Cal App LEXIS 73 (denying quantum meruit recovery to boxing manager who lacked license and written contract required by Boxing Act, B&P Code § 18600 *et seq.*)].

 Cross Reference:

Discussion of denial of recovery by unlicensed persons, see *Ch. 18, Asserting or Defending Claim That Contract Is Illegal, Contrary to Public Policy, or Unconscionable*, 18.06[2][a].

Legal Topics:

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

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157 of 189 DOCUMENTS

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Chapter 9 Seeking or Opposing Quantum Meruit or Quantum Valebant Recovery in Contract Actions

II. SEEKING QUANTUM MERUIT RECOVERY IN CONTRACT ACTIONS

1-9 MB Practice Guide: CA Contract Litigation 9.13

9.13 Quantum Meruit Recovery Is Not Available for Liquidated Debts.

If the contract contains terms that specify payment or reduce the parties' obligations to liquidated debts, quantum meruit recovery is not available [*Hedging Concepts, Inc. v. First Alliance Mortgage Co. (1996) 41 CA4th 1410, 1419, 49 CR2d 191*] .

Example:

A legal publisher contracted with an author to write a publication. After the author submitted the manuscript, the company decided not to publish the book and declined to compensate the author. The author sought recovery under a theory of quantum meruit. The court proceeded on the assumption that the plaintiff had completed performance on the contract, which provided that the plaintiff was entitled to 15 percent of the gross revenues from the publication. The plaintiff's ability to recover in quantum meruit turned on whether the 15 percent of the gross revenues constituted a "liquidated debt." The court found that the plaintiff's entitlement to 15 percent of the revenues from the book was not a liquidated debt under California law because it was not a certain or readily ascertainable figure. The court explained that the mere existence of a fixed percentage royalty in a contract does not render that royalty a "liquidated debt" if the revenues to which that percentage figure is to be applied cannot be calculated with reasonable certainty. Under the facts, it was impossible to determine what the revenues would have been because the publisher did not publish the book [*Chodos v. West Publ'g Co., Inc. (9th Cir 2002) 292 F3d 992, 1001-1002 ; see also Hedging Concepts, Inc. v. First Alliance Mortgage Co. (1996) 41 CA4th 1410, 1419, 49 CR2d 191*] .

This rule exists because it would be inequitable for courts to impose onto parties obligations different from those that the parties freely, fairly, and voluntarily bargained for in the contract [*Hedging Concepts, Inc. v. First Alliance Mortgage Co. (1996) 41 CA4th 1410, 1419, 49 CR2d 191 ; Wal-Noon Corp. v. Hill (1975) 45 CA3d 605, 613, 119 CR 646*] .

**Cross References:**

Discussion of availability of quantum meruit recovery when contract specifies terms of payment, see 9.02.

Form, see 9.40.

Legal Topics:

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

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158 of 189 DOCUMENTS

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Chapter 9 Seeking or Opposing Quantum Meruit or Quantum Valebant Recovery in Contract Actions

II. SEEKING QUANTUM MERUIT RECOVERY IN CONTRACT ACTIONS

1-9 MB Practice Guide: CA Contract Litigation 9.14

9.14 Measure of Recovery Is Reasonable Value of Beneficial Services.

Quantum meruit allows recovery only for the value of services rendered, not the value of the benefit accruing from the rendering of those services [*Maglica v. Maglica* (1998) 66 CA4th 442, 449-452, 78 CR2d 101 ; *Palmer v. Gregg* (1967) 65 C2d 657, 660, 56 CR 97, 422 P2d 985] .

Example:

In a case involving a plaintiff's quantum meruit claim seeking the value of her services provided to the defendant's business during the parties' 21-year period of cohabitation without marriage, an appellate court reversed an \$84 million jury verdict for the plaintiff because the trial court mistakenly instructed the jury concerning the manner in which the jury could calculate the reasonable value of the plaintiff's services. The trial court's instructions permitted the jury to calculate the value of the plaintiff's services based, erroneously, on the value of the defendant's benefit that accrued over time as a result of the plaintiff having rendered those services, allowing the jury to value plaintiff's services as having bought her an ownership interest in the defendant's business, even though the defendant never agreed to transfer any interest in his business to the plaintiff [*Maglica v. Maglica* (1998) 66 CA4th 442, 450, 78 CR2d 101].

California courts generally hold that the reasonable value of a plaintiff's services is [*Maglica v. Maglica* (1998) 66 CA4th 442, 450-452, 78 CR2d 101] :

- The amount that it would have cost the defendant to obtain the services from another person;
 - The amount the defendant would have had to pay on the "open market" to obtain the same services;
- or
- The "comparable charge" for the services.

In determining the amount of damages to be awarded in a quantum meruit claim, the court may consider the "extent, character and value of the plaintiff's services" [*George v. Double D. Foods, Inc.* (1984) 155 CA3d 36, 46, 201 CR 870] .

Judge's Perspective:

Often, a plaintiff may establish the value of services rendered with evidence that the plaintiff has charged

the same price to others for having performed similar services. Obviously, the more frequently a plaintiff has charged and received payment of that price, the more credible the plaintiff's valuation is. The plaintiff may also introduce evidence of the prices that the defendant has paid to others for the same type of work that plaintiff has performed. When the plaintiff's evidence is lacking, however, the plaintiff instead may establish the value of services rendered through expert testimony concerning the value of similar services performed within the relevant market.



Strategic Point--Both Parties:

It is important to keep in mind that the contract price and the reasonable value of services rendered are two separate issues [*Maglica v. Maglica* (1998) 66 CA4th 442, 450, 78 CR2d 101]. Sometimes the reasonable value of services exceeds the contract price, while at other times the opposite is true [*Maglica v. Maglica* (1998) 66 CA4th 442, 450, 78 CR2d 101]. The contract price, however, is competent evidence bearing on the reasonable value of the rendered services [*Oliver v. Campbell* (1954) 43 C2d 298, 305, 273 P2d 15]. The plaintiff should be mindful of these considerations when formulating a recovery strategy in order to ensure the greatest recovery. Similarly, when determining a defense strategy, the defendant should also be mindful of these considerations in an effort to minimize liability.

Legal Topics:

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

Contracts Law Remedies Equitable Relief Quantum Meruit Contracts Law Types of Contracts Implied-in-Law Contracts



159 of 189 DOCUMENTS

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Chapter 9 Seeking or Opposing Quantum Meruit or Quantum Valebant Recovery in Contract Actions

II. SEEKING QUANTUM MERUIT RECOVERY IN CONTRACT ACTIONS

1-9 MB Practice Guide: CA Contract Litigation 9.15

9.15 Pleading Quantum Meruit Claims.

9.15[1] Judicial Council Form for Common Counts May Be Used to Plead Quantum Meruit Claim. The California Judicial Council has approved a pleading form, Judicial Council Form PLD-C-001(2), for alleging a common count cause of action [*Cal Rules Ct, Rule 1.45(a), (b)*]. Use of this form is optional rather than mandatory. This form may be used for any of a number of common count causes of action, including quantum meruit.



Cross Reference:

Judicial Council Form PLD-C-001(2) Cause of Action--Common Counts, see 9.39.

9.15[2] Complaint Must Meet Specific Pleading Requirements. A plaintiff bringing a quantum meruit claim should ensure that the complaint satisfies the applicable pleading requirements, that the complaint sufficiently sets forth the elements of the claim, and that the claim is timely [*see 9.05 -9.18*]. The plaintiff should allege all of the following in the complaint [*Haggerty v. Warner (1953) 115 CA2d 468, 475, 252 P2d 373* (citing *Brown v. Crown Gold Milling Co. (1907) 150 C 376, 382, 89 P 86*)]:

- That the plaintiff performed certain services for the benefit of the defendant.
- The reasonable value of the services rendered.
- That those services were rendered at the request of the defendant.
- That those services are unpaid.

9.15[3] Complaint Must Allege That Plaintiff Performed Services for Defendant's Benefit. A quantum meruit claim must allege that the plaintiff performed services for the benefit of the defendant [*Haggerty v. Warner (1953) 115 CA2d 468, 475, 252 P2d 373* (citing *Brown v. Crown Gold Milling Co. (1907) 150 C 376, 382, 89 P 86*)].

Exception:

A party who expends funds and performs services for a third party at the request of another, under the reasonable belief that the requesting party will compensate the performing party for the services, may recover in quantum meruit *even if the services do not directly benefit the requesting party* [*Earhart v.*

William Low Co. (1979) 25 C3d 503, 515, 158 CR 887, 600 P2d 1344 . If the plaintiff intends to rely on this exception to the benefit rule, the facts should be pled with sufficient clarity to establish applicability of this exception [see 9.18[1]].

Cross Reference:

Forms, see 9.39, 9.40.

9.15[4] Complaint Must Allege Reasonable Value of Services Rendered. A quantum meruit claim must also allege the reasonable value of the plaintiff's services performed for the defendant's benefit [*Haggerty v. Warner (1953) 115 CA2d 468, 475, 252 P2d 373* (citing *Brown v. Crown Gold Milling Co. (1907) 150 C 376, 382, 89 P 86*)].



Warning:

A plaintiff should thoroughly investigate the reasonable value of services rendered before filing the complaint. This process may even include retaining the services of an expert witness to help the plaintiff determine the value of the rendered services before filing.



Strategic Point--Plaintiff:

When pleading a quantum meruit claim, a plaintiff need not specify the items that form the basis of the indebtedness alleged in the complaint [*McFarland v. Holcomb (1898) 123 C 84, 87, 55 P 761*]. Rather, depending on the circumstances of the case, the plaintiff may wish instead to omit from the complaint specific information about the services rendered and wait until the defendant demands a bill of particulars to provide that information. The plaintiff must provide the bill of particulars within 10 days of receiving the demand [CCP § 454; see 9.23].

Cross References:

Discussion of bill of particulars, see 9.23.

Forms, see 9.42, 9.43.

9.15[5] Complaint Must Allege That Services Were Rendered at Defendant's Request. A complaint seeking quantum meruit recovery must allege that the plaintiff performed services at the request of the defendant [*Haggerty v. Warner (1953) 115 CA2d 468, 475, 252 P2d 373* (citing *Brown v. Crown Gold Milling Co. (1907) 150 C 376, 382, 89 P 86*)].

Cross Reference:

Forms, see 9.39, 9.40.

9.15[6] Complaint Must Allege That Services Are Unpaid. The complaint must also allege that the plaintiff's services performed for the defendant's benefit remain unpaid [*Haggerty v. Warner (1953) 115 CA2d 468, 475, 252 P2d 373* (citing *Brown v. Crown Gold Milling Co. (1907) 150 C 376, 382, 89 P 86*)].

Cross Reference:

Forms, see 9.39, 9.40.

9.15[7] Not Necessary to Specify When Indebtedness Accrued. A quantum meruit claim is not deficient if it fails to state when the defendant became indebted to the plaintiff [*Evans v. Zeigler (1949) 91 CA2d 226, 230, 204 P2d 902*].

9.15[8] Not Necessary to Specify When Services Were Rendered. It is not necessary to specify the date upon

which the plaintiff's services were rendered in an action seeking to recover their reasonable value [*Evans v. Zeigler* (1949) 91 CA2d 226, 230, 204 P2d 902].



Strategic Point--Plaintiff:

Nevertheless, it is customary to specify the date or periods of indebtedness in order to establish the timeliness of the action under the statute of limitations [*Evans v. Zeigler* (1949) 91 CA2d 226, 230, 204 P2d 902].



Warning:

The defendant may attack any uncertainty or ambiguity in the complaint regarding the date upon which the services were rendered by demurrer [*Miller v. Brown* (1951) 107 CA2d 304, 307, 237 P2d 320].



Cross Reference:

Demurring to claim on quantum meruit where date services rendered is ambiguous, see 9.21.

9.15[9] Demand for Payment Is Not Required. The plaintiff is not required to make a demand for payment before instituting a claim for quantum meruit [*McDonald v. Filice* (1967) 252 CA2d 613, 623, 60 CR 832].

Legal Topics:

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

Civil Procedure Pleading & Practice Pleadings Complaints General Overview Civil Procedure Pleading & Practice Pleadings Complaints Requirements Contracts Law Remedies Equitable Relief Quantum Meruit Contracts Law Types of Contracts Implied-in-Law Contracts



160 of 189 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 9 Seeking or Opposing Quantum Meruit or Quantum Valebant Recovery in Contract Actions

III. OPPOSING QUANTUM MERUIT CLAIMS IN CONTRACT ACTIONS

1-9 MB Practice Guide: CA Contract Litigation 9.16

9.16 CHECKLIST: Opposing Quantum Meruit Claims in Contract Actions.

☐ Analyze complaint to determine appropriate response.

Authority:

McDonald v. Pacific Debenture Co. (1905) 146 C 667, 669, 80 P 1090 ; Interstate Group Adm'rs, Inc. v. Cravens, Dargan & Co. (1985) 174 CA3d 700, 706, 220 CR 250

Discussion:

See 9.17 -9.23

☐ Answer.

Authority:

McDonald v. Pacific Debenture Co. (1905) 146 C 667, 669, 80 P 1090

Discussion:

See 9.17 -9.23

Form:

See 9.41

☐ Demurrer.

Authority:

McFarland v. Holcomb (1898) 123 C 84, 87, 55 P 761 ; Iverson, Yoakum, Papiano & Hatch v. Berwald (1999) 76 CA4th 990, 995, 90 CR2d 665, 669

Discussion:

See 9.17 -9.23

- ☐ Summary judgment motion.

Authority:

Day v. Alta Bates Med. Ctr. (2002) 98 CA4th 243, 247-249, 119 CR2d 606

Discussion:

See 9.22

- ☐ Determine whether claim is sufficiently pled, considering:

- ☐ Whether claim is premised on services actually rendered to defendant or at defendant's request.

Authority:

Parker v. Solomon (1959) 171 CA2d 125, 135-136, 340 P2d 353 ; Earhart v. William Low Co. (1979) 25 C3d 503, 515, 158 CR 887, 600 P2d 1344

Discussion:

See 9.18[1]

- ☐ Whether plaintiff alleged reasonable value of services rendered.

Authority:

Hocker v. Glover (1931) 113 CA 152, 156

Discussion:

See 9.18[2]

- ☐ Whether defendant accepted the services or derived benefit from them.

Authority:

Spurgeon v. Buchter (1961) 192 CA2d 198, 206, 207, 13 CR 354

Discussion:

See 9.18[3]

- ☐ Whether parties entered into special agreement to pay particular amount or in particular manner.

Authority:

Hedging Concepts, Inc. v. First Alliance Mortgage Co. (1996) 41 CA4th 1410, 1419-1420, 49 CR2d 191

Discussion:

See 9.18[4]

- ☐ Whether services were intended to be gratuitous.

Authority:

Huskinson & Brown, LLP v. Wolf (2004) 32 C4th 453, 458

Discussion:

See 9.18[5]

- ☐ Whether claim was brought within applicable statute of limitations.

Authority:*Maglica v. Maglica* (1998) 66 CA4th 442, 452, 78 CR2d 101 ; CCP § 339**Discussion:**

See 9.18[6]

- ☐ Whether plaintiff fully performed and consideration due from defendant is a liquidated debt, thereby rendering plaintiff's quantum meruit claim improper.

Authority:*Chodos v. West Publ'g Co., Inc.* (9th Cir 2002) 292 F3d 992, 1001-1002**Discussion:**

See 9.13

- ☐ Determine whether to demand a bill of particulars.

Authority:

CCP § 454

Discussion:

See 9.23

Form:

See 9.42, 9.43

- ☐ Verify that bill of particulars is available under the circumstances.

Authority:

CCP § 454

Discussion:

See 9.23

Legal Topics:

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

Civil Procedure Pleading & Practice Defenses, Demurrers & Objections General Overview Contracts

Law Defenses General Overview Contracts Law Remedies Equitable Relief Quantum Meruit Contracts Law Types of Contracts Implied-in-Law Contracts



161 of 189 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 9 Seeking or Opposing Quantum Meruit or Quantum Valebant Recovery in Contract Actions
 III. OPPOSING QUANTUM MERUIT CLAIMS IN CONTRACT ACTIONS

1-9 MB Practice Guide: CA Contract Litigation 9.17

9.17 Options and Strategies.

In defending against a quantum meruit claim, the defendant should analyze the complaint to determine the sufficiency of the plaintiff's allegations, whether the defendant can rebut any of the elements of the claim that the plaintiff must prove, and whether the claim was brought within the applicable statute of limitations.

**Cross Reference:**

Detailed discussion of defenses to equitable remedies, see Ch. 8, Seeking or Opposing Equitable Remedies in Contract Actions.

The plaintiff's complaint may not allege a sufficient amount of information to allow the defendant to form an adequate response. This is because, when pleading quantum meruit, a plaintiff need not specify the items alleged in the pleadings or the date the services were rendered [*McFarland v. Holcomb* (1898) 123 C 84, 87, 55 P 761 ; *Evans v. Zeigler* (1949) 91 CA2d 226, 230, 204 P2d 902 ; see 9.11]. In response, however, a defendant has the right to demand a bill of particulars in order to learn the specifics of the alleged claim [*Auzerais v. Naglee* (1887) 74 C 60, 64, 15 P 371 ; CCP § 454; see 9.23]. This procedure forces the plaintiff to itemize the total amount on which the complaint is based so that the defendant is not taken by surprise and is in a position to answer or otherwise respond to the complaint [*Halagan v. Ohanesian* (1967) 257 CA2d 14, 17, 64 CR 792 ; see 9.23].

A bill of particulars may be requested in a variety of situations, such as when the defendant seeks an itemization of services rendered [see *Baroni v. Musick* (1934) 3 CA2d 419, 421, 39 P2d 435].

A bill of particulars is not a pleading and cannot be answered [*Chamberlain v. Loewenthal* (1902) 138 C 47, 49, 70 P 932 ; *Weiner v. Davies* (1967) 248 CA2d 387, 391, 56 CR 546]. The bill, however, amplifies the complaint and is considered incorporated into the complaint as originally filed [*Kurokawa v. Saroyan* (1928) 95 CA 772, 775, 273 P 613]. The items specified in the bill, therefore, act to limit the nature and amount of the plaintiff's recovery, as well to determine the admissibility of evidence offered in support of the plaintiff's claim at trial [*Abbott v. Limited Mut. Comp. Ins. Co.* (1938) 30 CA2d 157, 161, 85 P2d 961 ; see *Gough v. Security Trust & Sav. Bank* (1958) 162 CA2d 90, 94, 327 P2d 555] .

Strategic Point--Defendant:

Although the defendant can obtain through the course of the normal discovery process the same information that a plaintiff would set forth in a bill of particulars, a demand for a bill of particulars is usually less costly than discovery proceedings, which involve the expenses of significant attorney hours and other costs related to document requests and depositions.

A defendant generally may not demur to a quantum meruit claim. However, demurrer is appropriate in limited circumstances, such as when the complaint affirmatively demonstrates that the plaintiff's action is barred by the statute of limitations [see 9.21].

Summary judgment may also be appropriate under some circumstances [see 9.22].

Legal Topics:

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

Contracts Law Remedies Equitable Relief Quantum Meruit Contracts Law Remedies Equitable Relief Unclean Hands Contracts Law Types of Contracts Implied-in-Law Contracts



162 of 189 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 9 Seeking or Opposing Quantum Meruit or Quantum Valebant Recovery in Contract Actions

III. OPPOSING QUANTUM MERUIT CLAIMS IN CONTRACT ACTIONS

1-9 MB Practice Guide: CA Contract Litigation 9.18

9.18 Defending Against Quantum Meruit Claims

9.18[1] Claim Must Be Premised on Services Actually Rendered to Defendant. A count is defective if the quantum meruit claim is not premised on any services actually rendered to the defendant that might serve as a basis of the plaintiff's recovery [*Parker v. Solomon* (1959) 171 CA2d 125, 134-135, 340 P2d 353] .

➡ **Cross Reference:**

Discussion of requirement that services be rendered to the defendant, see 9.07 -9.09.

**Warning:**

The plaintiff need not have been rendered services directly to the defendant in order for the defendant to have benefitted from the services [*Earhart v. William Low Co.* (1979) 25 C3d 503, 515, 158 CR 887, 600 P2d 1344] .

**Cross References:**

Discussion of circumstances in which court found that defendant benefitted from services rendered to a third party, see 9.09.

Form, see 9.41.

9.18[2] Defendant Can Claim No Evidence Exists of Value of Services Rendered. Although a plaintiff's quantum meruit claim is proper if it alleges only the reasonable value of the services performed for the defendant's benefit [*Haggerty v. Warner* (1953) 115 CA2d 468, 475, 252 P2d 373 (citing *Brown v. Crown Gold Milling Co.* (1907) 150 C 376, 382, 89 P 86)], the plaintiff may not recover the reasonable value of those services without sufficient evidence of their value [*Hocker v. Glover* (1931) 113 CA 152, 156] .

**Cross References:**

Discussion of requirement that plaintiff allege the reasonable value of services rendered, see 9.15[4].

Form, see 9.39, 9.40.

9.18[3] Defendant Must Have Accepted Services and Derived Benefit From Them. A plaintiff may not imply

the existence of a contract if the defendant neither accepted the plaintiff's services nor derived a benefit from them [*Spurgeon v. Buchter* (1961) 192 CA2d 198, 206, 207, 13 CR 354] .

The plaintiff must prove that the services rendered benefitted the defendant [*Day v. Alta Bates Med. Ctr.* (2002) 98 CA4th 243, 248-249, 119 CR2d 606] . If it is unclear whether or not the services actually benefitted the defendant, the defendant should raise that issue.



Warning:

The plaintiff need not have rendered the services directly to the defendant in order for the defendant to have benefitted from the services [see 9.15[3]].



Cross References:

Discussion of circumstances in which court found that defendant benefitted from services rendered to a third party, see 9.09.

Forms, see 9.39, 9.40.

9.18[4] Defendant Can Claim Contract Contains Terms Specifying Payment. If the contract contains terms that specify payment, quantum meruit recovery is not available [*Hedging Concepts, Inc. v. First Alliance Mortgage Co.* (1996) 41 CA4th 1410, 1419, 49 CR2d 191 ; see also *Chodos v. West Publ'g Co., Inc.* (9th Cir 2002) 292 F3d 992, 1001-1002 (quantum meruit recovery available because fixed percentage royalty clause in publishing contract does not amount to "liquidated debt" when revenues to which percentage figure is to be applied cannot be calculated with reasonable certainty and when it was impossible to determine what revenues would have been because publisher did not publish book)].



Cross References:

Discussion of availability of quantum meruit recovery when contract specifies terms of payment, see 9.02.

Forms, see 9.39, 9.40.

9.18[5] Services Must Not Have Been Intended to Be Gratuitous. It must be apparent that the plaintiff did not perform the services gratuitously [*Huskinson & Brown, LLP v. Wolf* (2004) 32 C4th 453, 458]. If not, the defendant should raise this issue as a defense to the plaintiff's claim. Unless the parties are near relatives, the recipient of the services has the burden to prove the defense that the services were rendered gratuitously or without obligation to pay on the recipient's part [*Miller v. Campbell, Warburton, Fitzsimmons, Smith, Mendel & Pastore* (2008) 162 CA4th 1331, 1344, 76 CR3d 649] .



Cross Reference:

Form, see 9.39, 9.40.

9.18[6] Claim Must Have Been Brought Within Applicable Statute of Limitations. The statute of limitations for quantum meruit claims is two years [*Maglica v. Maglica* (1998) 66 CA4th 442, 452, 78 CR2d 101 ; CCP § 339 (action upon an "obligation" ... not founded upon an instrument of writing)]. The date upon which the statute begins to run depends on the circumstances of the case [see 9.10].



Cross Reference:

General discussion of statutes of limitations, see *Ch. 4, Determining Applicable Statute of Limitations and Effect on Potential Action*, 4.03 -4.16.

Legal Topics:

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

Contracts Law Remedies Equitable Relief Quantum Meruit Contracts Law Remedies Equitable Relief Unclean Hands Contracts Law Types of Contracts Implied-in-Law Contracts



163 of 189 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 9 Seeking or Opposing Quantum Meruit or Quantum Valebant Recovery in Contract Actions
III. OPPOSING QUANTUM MERUIT CLAIMS IN CONTRACT ACTIONS

1-9 MB Practice Guide: CA Contract Litigation 9.19

9.19 General Denial Is Sufficient to Raise Almost Any Defense, Except Some Affirmative Defenses.

If the complaint is in the form of a common count, the defendant need not deny the allegations in the answer in any more specific language than that used by the plaintiff [*McDonald v. Pacific Debenture Co. (1905) 146 C 667, 669, 80 P 1090*]. For example, an answer may, but is not required to, specifically take issue with the indebtedness alleged by the plaintiff [*McDonald v. Pacific Debenture Co. (1905) 146 C 667, 669, 80 P 1090*].

A general denial is sufficient to raise almost any defense, including some defenses that customarily require special pleading [*Interstate Group Adm'rs, Inc. v. Cravens, Dargan & Co. (1985) 174 CA3d 700, 706, 220 CR 250*].

Exception:

Some affirmative defenses must be specifically pleaded, such as:

- The defense of the statute of limitations [*McFarland v. Holcomb (1898) 123 C 84, 87, 55 P 761*].
- Estoppel [*Grove v. Charles W. Barrett Co. (1927) 87 CA 165, 168, 261 P 739*].
- Lack of capacity to sue [*Grove v. Charles W. Barrett Co. (1927) 87 CA 165, 168, 261 P 739*].
- Any new matter relied on by the defendant that was not put in issue by the plaintiff [see *Interstate Group Adm'rs, Inc. v. Cravens, Dargan & Co. (1985) 174 CA3d 700, 706-707, 220 CR 250*].



Cross Reference:

Form, see 9.41.

Legal Topics:

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

Civil Procedure Pleading & Practice Defenses, Demurrers & Objections Affirmative Defenses General Overview Civil Procedure Pleading & Practice Defenses, Demurrers & Objections Denials Contracts Law Remedies Equitable Relief Quantum Meruit Contracts Law Types of Contracts Implied-in-Law Contracts



164 of 189 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 9 Seeking or Opposing Quantum Meruit or Quantum Valebant Recovery in Contract Actions

III. OPPOSING QUANTUM MERUIT CLAIMS IN CONTRACT ACTIONS

1-9 MB Practice Guide: CA Contract Litigation 9.20

9.20 Statute of Frauds Is Not an Appropriate Defense.

The statute of frauds does not render defective a common count seeking the reasonable value of services, even if the contract itself may be unenforceable under the statute of frauds [*Leoni v. Delany* (1948) 83 CA2d 303, 307, 188 P2d 765 ; *McFarland v. Holcomb* (1898) 123 C 84, 87, 55 P 761].

Legal Topics:

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

Civil Procedure Pleading & Practice Defenses, Demurrers & Objections Affirmative Defenses General Overview Contracts Law Defenses General Overview Contracts Law Remedies Equitable Relief Quantum Meruit Contracts Law Statutes of Frauds General Overview Contracts Law Types of Contracts Implied-in-Law Contracts



165 of 189 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 9 Seeking or Opposing Quantum Meruit or Quantum Valebant Recovery in Contract Actions
III. OPPOSING QUANTUM MERUIT CLAIMS IN CONTRACT ACTIONS

1-9 MB Practice Guide: CA Contract Litigation 9.21

9.21 Quantum Meruit Usually Is Not Subject to Demurrer.

A defendant generally may not demur to the complaint of a common count [*McFarland v. Holcomb* (1898) 123 C 84, 87, 55 P 761].

Exception:

A defendant should raise the statute of limitations defense by demurrer when the face of the complaint affirmatively demonstrates that the action is untimely or when the complaint is vague regarding this issue [*Iverson, Yoakum, Papiano & Hatch v. Berwald* (1999) 76 CA4th 990, 995, 90 CR2d 665 ; *Miller v. Brown* (1951) 107 CA2d 304, 306-307, 237 P2d 320 ; *Evans v. Zeigler* (1949) 91 CA2d 226, 230, 204 P2d 902]. In addition, as a general rule, a defendant may demur to a complaint alleging a common count when it is based on the same facts as a specific count alleging an express contract, but only when the specific count fails to state a cause of action [*White Lighting Co. v. Wolfson* (1968) 68 C2d 336, 346, 66 CR 697, 438 P2d 345 ; see also *Farmers Ins. Exch. v. Zerlin* (1997) 53 CA4th 445, 460, 61 CR2d 707 ; *Reichert v. General Ins. Co.* (1968) 68 C2d 822, 837, 69 CR 321, 442 P2d 377] .



Strategic Point--Defendant:

Even if the face of the complaint does not affirmatively demonstrate the untimeliness of the plaintiff's claim, the defendant still may wish to specially demur based on the ambiguity or uncertainty of the actual dates concerning the limitations defense [*Miller v. Brown* (1951) 107 CA2d 304, 307, 237 P2d 320].

Legal Topics:

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

Civil Procedure Pleading & Practice Defenses, Demurrers & Objections Demurrers Contracts Law Defenses General Overview Contracts Law Remedies Equitable Relief Quantum Meruit Contracts Law Types of Contracts Implied-in-Law Contracts



166 of 189 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 9 Seeking or Opposing Quantum Meruit or Quantum Valebant Recovery in Contract Actions

III. OPPOSING QUANTUM MERUIT CLAIMS IN CONTRACT ACTIONS

1-9 MB Practice Guide: CA Contract Litigation 9.22

9.22 Summary Judgment May Be Available on Quantum Meruit Claims.

A defendant should move for summary judgment if the plaintiff cannot establish that he or she did both of the following [*Day v. Alta Bates Med. Ctr.* (2002) 98 CA4th 243, 248-249, 119 CR2d 606] :

- Performed services pursuant to the defendant's express or implied request; and
- Intended to and did benefit the defendant by performing those services.



Cross Reference:

California Points and Authorities, Ch. 43, Common Counts and Bills of Particulars, Form 14 (Matthew Bender).

Legal Topics:

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

Civil Procedure Summary Judgment General Overview Contracts Law Remedies Equitable Relief Quantum Meruit Contracts Law Types of Contracts Implied-in-Law Contracts



167 of 189 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 9 Seeking or Opposing Quantum Meruit or Quantum Valebant Recovery in Contract Actions

III. OPPOSING QUANTUM MERUIT CLAIMS IN CONTRACT ACTIONS

*1-9 MB Practice Guide: CA Contract Litigation 9.23***9.23 Defendant May Demand Bill of Particulars.**

9.23[1] Defendant Has Right to Learn Specifics of Plaintiff's Claim. The defendant should, in most cases, demand a bill of particulars in order to learn about the specifics of the plaintiff's claim [CCP § 454; *Caruso v. Snap-Tite, Inc.* (1969) 275 CA2d 211, 212-213, 79 CR 642] .

The demand need not take any particular form, but the defendant must give it to the plaintiff in writing [CCP § 454]. The party making the demand should also be the party to sign it [see *Elmore v. Tingley* (1926) 78 CA 460, 467-468, 468, 248 P 706] .

The demand need not be made at any particular time [CCP § 454].

➡ **Cross Reference:**

Form, see 9.42.

**Strategic Point--Defendant:**

Making a demand does not extend the defendant's time to answer the complaint. If the defendant needs the additional information requested from the plaintiff in the bill of particulars to answer the complaint, the defendant should request additional time either by stipulation or court order, unless doing so would violate local court rules [see, e.g., *Dobbins v. Hardister* (1966) 242 CA2d 787, 794, 51 CR 866] .

9.23[2] Bill of Particulars Is Not a Pleading and Cannot Be Answered. The bill of particulars is not a pleading, and cannot be answered [*Chamberlain v. Loewenthal* (1902) 138 C 47, 49, 70 P 932 ; *Weiner v. Davies* (1967) 248 CA2d 387, 391, 56 CR 546]. The bill, however, amplifies the plaintiff's complaint and is considered incorporated into the complaint as originally filed. The items specified in the bill therefore act to limit the nature and amount of the plaintiff's recovery, as well to determine the admissibility of evidence offered in support of the plaintiff's claim at trial [*Kurokawa v. Saroyan* (1928) 95 CA 772, 775, 273 P 613].

➡ **Cross Reference:**

Form, see 9.43.

9.23[3] Items in Bill Must Be Set Forth Precisely and Definitely in Good Faith. The plaintiff must set forth the items in a bill of particulars in good faith, as precisely and as definitely as possible [*Meredith v. Marks* (1963) 212 CA2d 265, 270, 27 CR 737]. The court determines whether the plaintiff's response to a demand for a bill of particulars is sufficient [*Butler Bros. v. Connolly* (1962) 204 CA2d 22, 26, 22 CR 175] .

If the plaintiff delivers a bill of particulars that is too general, or defective in other ways, the defendant may demand a further bill of particulars [CCP § 454; *Burton v. Santa Barbara Nat'l Bank* (1966) 247 CA2d 427, 433, 55 CR 529] .



Cross References:

Form, see 9.43.

Discussion of bill of particulars, additional forms, see California Forms of Pleading and Practice, Ch. 121, Common Counts (Matthew Bender).

Legal Topics:

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

Civil Procedure Pleading & Practice Pleadings Bills of Particulars Contracts Law Remedies Equitable Relief Quantum Meruit Contracts Law Types of Contracts Implied-in-Law Contracts



168 of 189 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 9 Seeking or Opposing Quantum Meruit or Quantum Valebant Recovery in Contract Actions
IV. SEEKING OR OPPOSING QUANTUM VALEBANT RECOVERY IN CONTRACT ACTIONS

1-9 MB Practice Guide: CA Contract Litigation 9.24

9.24 CHECKLIST: Seeking or Opposing Quantum Valebant Recovery in Contract Actions.

9.24[1] Determining Whether Quantum Valebant Is Available.

☐ Did plaintiff sell or deliver goods to defendant?

Authority:

Weitzenkorn v. Lesser (1953) 40 C2d 778, 792-794, 256 P2d 947

Discussion:

See 9.26

☐ Did defendant expressly or impliedly request plaintiff's performance?

Authority:

Day v. Alta Bates Med. Ctr. (2002) 98 CA4th 243, 248, 119 CR2d 606

Discussion:

See 9.26

☐ Did both parties understand that plaintiff would be compensated for the goods?

Authority:

Hallidie v. Enginger (1917) 175 C 505, 508, 166 P 1

Discussion:

See 9.26

☐ Does defendant's use of goods for his or her benefit warrant imposition of a duty of compensation for that use?

Authority:

Weitzenkorn v. Lesser (1953) 40 C2d 778, 792-794, 256 P2d 947

Discussion:

See 9.26

- ☐ Was there no refusal by defendant to accept goods?

Authority:

Hallidie v. Sutter S.R. Co. (1883) 63 C 575, 577

Discussion:

See 9.26

- ☐ Was claim brought within applicable statute of limitations period?

Authority:

CCP §§ 337, 339

Discussion:

See 9.26

9.24[2] Pleading Claims for Quantum Valebant.

- ☐ Allege in complaint that plaintiff delivered goods to defendant.

Authority:

Weitzenkorn v. Lesser (1953) 40 C2d 778, 792-794, 256 P2d 947

Discussion:

See 9.25, 9.26

Forms:

See 9.39, 9.44

- ☐ Allege reasonable value of goods.

Authority:

Weitzenkorn v. Lesser (1953) 40 C2d 778, 792-794, 256 P2d 947

Discussion:

See 9.25, 9.26

Forms:

See 9.39, 9.44

- ☐ Allege that goods were delivered at defendant's request.

Authority:

Day v. Alta Bates Med. Ctr. (2002) 98 CA4th 243, 249, 119 CR2d 606

Discussion:

See 9.25, 9.26

Forms:

See 9.39, 9.44

- ☐ Allege that defendant did not pay for goods.

Authority:

First Interstate Bank of Cal. v. State of California (1987) 197 CA3d 627, 635, 243 CR 8

Discussion:

See 9.25, 9.26

Forms:

See 9.39,

9.24[3] Opposing Claims for Quantum Valebant.

- ☐ Analyze complaint to determine potential defenses, including:

Authority:

CCP § 430.10

Discussion:

See 9.34

Form:

See 9.45

- ☐ Plaintiff's claim is not premised on goods delivered to defendant.

Authority:

Weitzenkorn v. Lesser (1953) 40 C2d 778, 792-794, 256 P2d 947

Discussion:

See 9.34

Form:

See 9.45

- ☐ Plaintiff failed to allege value of delivered goods.

Authority:

Weitzenkorn v. Lesser (1953) 40 C2d 778, 792-794, 256 P2d 947

Discussion:

See 9.34

Form:

See 9.45

- ☐ No proof exists of special agreement to pay particular amount for goods.

Authority:

Weitzenkorn v. Lesser (1953) 40 C2d 778, 792-794, 256 P2d 947

Discussion:

See 9.34

Form:

See 9.45

- ☐ Plaintiff intended to deliver goods to defendant gratuitously.

Authority:

Huskinson & Brown, LLP v. Wolf (2004) 32 C4th 453, 458

Discussion:

See 9.34

Form:

See 9.45

- ☐ Plaintiff failed to bring claim within applicable limitations period.

Authority:

CCP §§ 337, 339

Discussion:

See 9.34

Form:

See 9.45

- ☐ Defendant did not accept goods or use them in a way warranting imposition of a duty of compensation for that use.

Authority:

Weitzenkorn v. Lesser (1953) 40 C2d 778, 792-794, 256 P2d 947

Discussion:

See 9.34

Form:

See 9.45

Legal Topics:

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



169 of 189 DOCUMENTS

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Chapter 9 Seeking or Opposing Quantum Meruit or Quantum Valebant Recovery in Contract Actions
IV. SEEKING OR OPPOSING QUANTUM VALEBANT RECOVERY IN CONTRACT ACTIONS

1-9 MB Practice Guide: CA Contract Litigation 9.25

9.25 Options and Strategies.

Quantum valebant is used to recover the reasonable value of goods sold and delivered and differs from a quantum meruit claim, which seeks to recover the value of services rendered [*Weitzenkorn v. Lesser* (1953) 40 C2d 778, 792-794, 256 P2d 947 ; see 9.03]. Quantum valebant, like quantum meruit, is a common count, which is a common law action in which the law, in order to prevent the defendant's unjust enrichment by the plaintiff's property, implies the defendant's promise to repay the sum demanded [see *Philpott v. Superior Court* (1934) 1 C2d 512, 518, 36 P2d 635] .

► Cross Reference:

Discussion of common counts, see California Forms of Pleading and Practice, Ch. 121, Common Counts (Matthew Bender).

Quantum valebant is based on the legal fiction that when one person delivers goods to another person at the latter's request, the latter makes an implied promise to pay for them, even if he or she never intended to pay for them in the first place [*Hallidie v. Enginger* (1917) 175 C 505, 508, 166 P 1 ; see 9.29]. Accordingly, the elements of a quantum valebant claim, and the defenses to the claim, are similar to those for quantum meruit [see 9.05, 9.18].

The plaintiff needs to establish that the goods were delivered at the defendant's request and that the defendant did not refuse to accept them. The plaintiff should also establish that the defendant used the goods for his or her own benefit [see 9.26]. In response, the defendant should attempt to refute both of these claims [see 9.34].

If the plaintiff seeks to recover a specific sum, rather than the reasonable value of the goods sold and delivered, the common count action of goods sold and delivered (indebitatus assumpsit) is more appropriate. Alternatively, if the plaintiff can establish that the defendant breached an oral or written contract made with the plaintiff, then the plaintiff can bring a contract action seeking damages for breach.

► Cross References:

Discussion of other common counts and common counts in general, see California Forms of Pleading and Practice, Ch. 121, Common Counts (Matthew Bender).

Discussion of breach of contract, see Ch. 7, Seeking or Opposing Damages in Contract Actions.

Legal Topics:

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

[Contracts Law](#)[Remedies](#)[Equitable Relief](#)[General Overview](#)[Contracts Law](#)[Sales of Goods](#)[General Overview](#)



170 of 189 DOCUMENTS

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Chapter 9 Seeking or Opposing Quantum Meruit or Quantum Valebant Recovery in Contract Actions
IV. SEEKING OR OPPOSING QUANTUM VALEBANT RECOVERY IN CONTRACT ACTIONS

1-9 MB Practice Guide: CA Contract Litigation 9.26

9.26 Elements of Quantum Valebant Claim.

A plaintiff who brings a quantum valebant claim does not need to prove the existence of a contract with the defendant. Rather, in order to properly plead a quantum valebant claim, the plaintiff must establish all of the following [*Weitzenkorn v. Lesser* (1953) 40 C2d 778, 792-794, 256 P2d 947] :

- The plaintiff sold or delivered goods to the defendant.
- The sale and delivery was pursuant to the defendant's express or implied request.
- Both parties understood that the plaintiff would be compensated for the goods.
- The defendant's use of the goods for his or her benefit warrants the imposition of a duty of compensation for that use [see 9.29].
- The defendant did not refuse to accept the goods [see 9.28].
- The claim was made within the applicable statute of limitations period [see 9.27].
- The defendant did not pay for the goods.



Cross Reference:

Forms, see 9.39, 9.44.

Jury Instructions:

Contracts--Common Count: Goods and Services Rendered, see *Judicial Council of California Civil Jury Instructions*, CACI No. 371 (LexisNexis Matthew Bender).

Legal Topics:

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

Contracts Law Remedies Equitable Relief General Overview Contracts Law Sales of Goods General Overview



171 of 189 DOCUMENTS

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Chapter 9 Seeking or Opposing Quantum Meruit or Quantum Valebant Recovery in Contract Actions
IV. SEEKING OR OPPOSING QUANTUM VALEBANT RECOVERY IN CONTRACT ACTIONS

1-9 MB Practice Guide: CA Contract Litigation 9.27

9.27 Basic Two-Year or Four-Year Statute of Limitations Applies.

A four-year statute of limitations period applies to quantum valebant claims if based on the existence of a writing [*CCP* § 337(1)], but a two-year statute of limitations period applies to quantum valebant claims based on representations that are oral or implied in fact [*CCP* § 339(1); *Maglica v. Maglica* (1998) 66 CA4th 442, 452-454, 78 CR2d 101] .

Legal Topics:

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

Contracts Law Remedies Equitable Relief General Overview Contracts Law Sales of Goods General Overview Contracts Law Sales of Goods Statutes of Limitations Time Limitations



172 of 189 DOCUMENTS

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Chapter 9 Seeking or Opposing Quantum Meruit or Quantum Valebant Recovery in Contract Actions
IV. SEEKING OR OPPOSING QUANTUM VALEBANT RECOVERY IN CONTRACT ACTIONS

1-9 MB Practice Guide: CA Contract Litigation 9.28

9.28 Defendant Must Not Have Refused to Accept Goods.

A plaintiff's quantum valebant claim will not succeed if the defendant refused to accept the plaintiff's delivery of the goods [*Hallidie v. Sutter S. R. Co. (1883) 63 C 575, 577*].

Legal Topics:

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

Contracts Law Remedies Equitable Relief General Overview Contracts Law Sales of Goods General Overview Contracts Law Sales of Goods Breach, Repudiation & Excuse General Overview



173 of 189 DOCUMENTS

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Chapter 9 Seeking or Opposing Quantum Meruit or Quantum Valebant Recovery in Contract Actions
IV. SEEKING OR OPPOSING QUANTUM VALEBANT RECOVERY IN CONTRACT ACTIONS

1-9 MB Practice Guide: CA Contract Litigation 9.29

9.29 Defendant Must Have Used Property in Way That Created Duty of Compensation for Use.

The defendant must have used the goods for his or her benefit, warranting the imposition of a duty of compensation for that use [*Weitzenkorn v. Lesser* (1953) 40 C2d 778, 794, 256 P2d 947] .

Legal Topics:

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

Contracts LawRemediesEquitable ReliefGeneral OverviewContracts LawSales of GoodsGeneral Overview



174 of 189 DOCUMENTS

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Chapter 9 Seeking or Opposing Quantum Meruit or Quantum Valebant Recovery in Contract Actions
IV. SEEKING OR OPPOSING QUANTUM VALEBANT RECOVERY IN CONTRACT ACTIONS

1-9 MB Practice Guide: CA Contract Litigation 9.30

9.30 Measure of Recovery Is Reasonable Value of Goods Sold and Delivered.

The recovery in a quantum valebant claim is limited to the reasonable value of an item, or the portion of the item that the defendant used [*Weitzenkorn v. Lesser* (1953) 40 C2d 778, 792-793, 256 P2d 947] .

Legal Topics:

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

Contracts LawRemediesEquitable ReliefGeneral OverviewContracts LawSales of GoodsGeneral Overview



175 of 189 DOCUMENTS

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Chapter 9 Seeking or Opposing Quantum Meruit or Quantum Valebant Recovery in Contract Actions
IV. SEEKING OR OPPOSING QUANTUM VALEBANT RECOVERY IN CONTRACT ACTIONS

1-9 MB Practice Guide: CA Contract Litigation 9.31

9.31 Plaintiff Need Not Specify When Indebtedness Accrued.

The plaintiff need not specify the date upon which the goods were delivered in a quantum valebant action [*Evans v. Zeigler* (1949) 91 CA2d 226, 230, 204 P2d 902].



Strategic Point--Plaintiff:

Nonetheless, the plaintiff should specify the date of delivery or periods of indebtedness in order to establish the timeliness of the action under the statute of limitations [*Evans v. Zeigler* (1949) 91 CA2d 226, 230, 204 P2d 902].

Legal Topics:

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

Contracts Law Remedies Equitable Relief General Overview Contracts Law Sales of Goods General Overview



176 of 189 DOCUMENTS

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Chapter 9 Seeking or Opposing Quantum Meruit or Quantum Valebant Recovery in Contract Actions
IV. SEEKING OR OPPOSING QUANTUM VALEBANT RECOVERY IN CONTRACT ACTIONS

1-9 MB Practice Guide: CA Contract Litigation 9.32

9.32 Judicial Council Form for Common Counts May Be Used to Plead Quantum Valebant Claim.

The California Judicial Council has approved a pleading form, Judicial Council Form PLD-C-001(2), for alleging a common count cause of action [*Cal Rules Ct, Rule 1.45(a), (b)*]. Use of this form is optional rather than mandatory.



Cross Reference:

Judicial Council Form PLD-C-001(2) Cause of Action--Common Counts, see 9.39.

Legal Topics:

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

Civil Procedure Pleading & Practice Pleadings Complaints General Overview Contracts Law Remedies Equitable Relief General Overview



177 of 189 DOCUMENTS

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Chapter 9 Seeking or Opposing Quantum Meruit or Quantum Volebant Recovery in Contract Actions
IV. SEEKING OR OPPOSING QUANTUM VALEBANT RECOVERY IN CONTRACT ACTIONS

1-9 MB Practice Guide: CA Contract Litigation 9.33

9.33 Demand for Payment Is Not Required.

Although customarily alleged, the plaintiff need not demand payment from the defendant in a quantum valebant case; the complaint itself serves as the plaintiff's demand [*Samuels v. Larrimore* (1909) 11 CA 337, 339, 104 P 1001].

Legal Topics:

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

Contracts LawRemediesEquitable ReliefGeneral OverviewContracts LawSales of GoodsGeneral Overview



178 of 189 DOCUMENTS

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Chapter 9 Seeking or Opposing Quantum Meruit or Quantum Valebant Recovery in Contract Actions
IV. SEEKING OR OPPOSING QUANTUM VALEBANT RECOVERY IN CONTRACT ACTIONS

1-9 MB Practice Guide: CA Contract Litigation 9.34

9.34 Defending Against Quantum Valebant Claim.

The defendant in a quantum valebant action can deny the allegations in an answer [see 9.35], disprove one or more elements of the cause of action [see 9.34], or assert any applicable affirmative defense, such as the statute of limitations [see 9.27, 9.37].

To defeat a claim for quantum valebant, the defendant should assert any of the following, as appropriate [*Weitzenkorn v. Lesser* (1953) 40 C2d 778, 792-794, 256 P2d 947] :

- The plaintiff's claim is not premised on goods delivered to the defendant.
- No evidence exists of the value of goods delivered.
- A special agreement exists specifying the payment terms of a particular amount for the goods.
- The plaintiff intended to deliver the goods to the defendant gratuitously.
- The plaintiff's claim was not brought within the applicable statute of limitations period [see 9.27].
- The defendant did not accept the goods or use them for his or her benefit [see 9.28].



Cross References:

Form, see 9.45.

Defenses to a quantum meruit claim, which is similar to a quantum valebant claim, see 9.18.

Legal Topics:

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

Contracts Law Remedies Equitable Relief General Overview Contracts Law Sales of Goods General Overview



179 of 189 DOCUMENTS

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Chapter 9 Seeking or Opposing Quantum Meruit or Quantum Valebant Recovery in Contract Actions
IV. SEEKING OR OPPOSING QUANTUM VALEBANT RECOVERY IN CONTRACT ACTIONS

1-9 MB Practice Guide: CA Contract Litigation 9.35

9.35 General Denial Sufficient to Raise Most Defenses.

If the plaintiff's complaint seeking recovery in quantum valebant is in the form of a common count, the defendant need not deny the allegations in the answer in any more specific language than that used by the plaintiff [*McDonald v. Pacific Debenture Co. (1905) 146 C 667, 669, 80 P 1090*]. For example, an answer may, but is not required to, specifically deny the plaintiff's allegations of indebtedness [*McDonald v. Pacific Debenture Co. (1905) 146 C 667, 669, 80 P 1090*].

A general denial is sufficient to raise almost any defense, including some defenses that customarily require special pleading [*Interstate Group Adm'rs, Inc. v. Cravens, Dargan & Co. (1985) 174 CA3d 700, 706, 220 CR 250*].

Some affirmative defenses must be specifically pleaded, such as:

- The statute of limitations [*McFarland v. Holcomb (1898) 123 C 84, 87, 55 P 761*].
- Estoppel [*Grove v. Charles W. Barrett Co. (1927) 87 CA 165, 168, 261 P 739*].
- Lack of capacity to sue [*Grove v. Charles W. Barrett Co. (1927) 87 CA 165, 168, 261 P 739*].
- Any new matter relied on by the defendant that was not put in issue by the plaintiff [see *Interstate Group Adm'rs, Inc. v. Cravens, Dargan & Co. (1985) 174 CA3d 700, 706-707, 220 CR 250*].

**Cross References:**

Form, see 9.45.

Discussion of defenses to common counts, see California Forms of Pleading and Practice, Ch. 121, Common Counts (Matthew Bender).

Legal Topics:

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

Civil Procedure Pleading & Practice Defenses, Demurrers & Objections Affirmative Defenses General Overview Civil Procedure Pleading & Practice Defenses, Demurrers & Objections Denials Contracts Law Remedies Equitable

ReliefGeneral Overview



180 of 189 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 9 Seeking or Opposing Quantum Meruit or Quantum Valebant Recovery in Contract Actions
IV. SEEKING OR OPPOSING QUANTUM VALEBANT RECOVERY IN CONTRACT ACTIONS

1-9 MB Practice Guide: CA Contract Litigation 9.36

9.36 Quantum Valebant Generally Not Subject to Demurrer.

A defendant generally may not demur to the complaint of a common count [*McFarland v. Holcomb* (1898) 123 C 84, 87, 55 P 761]. Further, a defendant may not specially demur to a complaint on the ground of uncertainty if the plaintiff failed to specify whether the action is based on a theory of quantum valebant or on the breach of an express contract [*Preston v. Central Cal. Water & Irrigation Co.* (1909) 11 CA 190, 196-197, 104 P 462].

Exception:

A defendant may properly raise the statute of limitations defense by demurrer when the face of the plaintiff's complaint affirmatively demonstrates that the plaintiff's quantum valebant claim is untimely [*Iverson, Yoakum, Papiano & Hatch v. Berwald* (1999) 76 CA4th 990, 995, 90 CR2d 665 ; *Evans v. Zeigler* (1949) 91 CA2d 226, 230, 204 P2d 902]. In addition, as a general rule, a defendant may demur to a complaint alleging a common count when it is based on the same facts as a specific count alleging an express contract, but only when the specific count fails to state a cause of action [*White Lighting Co. v. Wolfson* (1968) 68 C2d 336, 346, 66 CR 697, 438 P2d 345 ; *see also Farmers Ins. Exch. v. Zerin* (1997) 53 CA4th 445, 460, 61 CR2d 707 ; *Reichert v. General Ins. Co.* (1968) 68 C2d 822, 837, 69 CR 321, 442 P2d 377] .

Strategic Point--Defendant:

Even if the face of the complaint does not affirmatively demonstrate the untimeliness of the plaintiff's claim, the defendant still may wish to specially demur based on the ambiguity or uncertainty of the actual dates concerning the limitations defense [*Miller v. Brown* (1951) 107 CA2d 304, 307, 237 P2d 320].

Legal Topics:

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

Civil Procedure Pleading & Practice Defenses, Demurrers & Objections Demurrers Contracts Law Remedies Equitable Relief General Overview



181 of 189 DOCUMENTS

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Chapter 9 Seeking or Opposing Quantum Meruit or Quantum Valebant Recovery in Contract Actions
IV. SEEKING OR OPPOSING QUANTUM VALEBANT RECOVERY IN CONTRACT ACTIONS

1-9 MB Practice Guide: CA Contract Litigation 9.37

9.37 Defenses Should Be Raised in Answer or Summary Judgment Motion.

Because a defendant generally may not demur to the complaint of a common count such as quantum valebant, the defendant should raise in the answer or a motion for summary judgment any response to a pleading defect not appearing on the face of the complaint [*CCP* § 430.30(b); see *CCP* § 430.10(e)].

➡ **Cross Reference:**

Form for answer to complaint alleging quantum valebant, see 9.45.

Legal Topics:

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

Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsGeneral OverviewCivil ProcedurePleading & PracticePleadingsAnswersCivil ProcedureSummary JudgmentGeneral OverviewContracts LawRemediesEquitable ReliefGeneral OverviewContracts LawSales of GoodsGeneral Overview



182 of 189 DOCUMENTS

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Chapter 9 Seeking or Opposing Quantum Meruit or Quantum Valebant Recovery in Contract Actions
IV. SEEKING OR OPPOSING QUANTUM VALEBANT RECOVERY IN CONTRACT ACTIONS

1-9 MB Practice Guide: CA Contract Litigation 9.38

9.38 Defendant May Demand Bill of Particulars.

The defendant has the right to demand a bill of particulars in order to learn about the specifics of the plaintiff's claim [CCP § 454; *Caruso v. Snap-Tite, Inc.* (1969) 275 CA2d 211, 212-213, 79 CR 642]. The demand need not take any particular form, but the defendant must give it to the plaintiff in writing [CCP § 454]. The party making the demand also should be the party to sign it [see *Elmore v. Tingley* (1926) 78 CA 460, 467, 248 P 706]. Further, the demand need not be made at any particular time [CCP § 454].



Cross References:

Procedure for demanding bill of particulars, see 9.23.

Form for demand for bill of particulars, see 9.42.

Form for bill of particulars, see 9.43.

Further discussion of bill of particulars, see California Forms of Pleading and Practice, Ch. 121, Common Counts (Matthew Bender).

Legal Topics:

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

Civil Procedure Pleading & Practice Pleadings Bills of Particulars Contracts Law Remedies Equitable Relief General Overview



183 of 189 DOCUMENTS

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Chapter 9 Seeking or Opposing Quantum Meruit or Quantum Valebant Recovery in Contract Actions
V. FORMS

1-9 MB Practice Guide: CA Contract Litigation 9.39

9.39 Judicial Council Form PLD-C-001(2) Cause of Action--Common Counts.

Judicial Council Form PLD-C-001(2) Cause of Action--Common Counts.

[Click here to view image.](#)

NOTES.

Authority:

Cal Rules Ct, Rule 1.45(a), (b)

Use of Form:

See 9.15

Elements of Quantum Meruit Claim:

See 9.05

Elements of Quantum Valebant Claim:

See 9.26

Legal Topics:

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

Civil ProcedurePleading & PracticePleadingsComplaintsGeneral OverviewContracts LawRemediesEquitable
ReliefGeneral Overview



184 of 189 DOCUMENTS

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Chapter 9 Seeking or Opposing Quantum Meruit or Quantum Valebant Recovery in Contract Actions
V. FORMS

1-9 MB Practice Guide: CA Contract Litigation 9.40

9.40 Complaint for Quantum Meruit Seeking Reasonable Value of Work, Labor, and Services.**Complaint for Quantum Meruit Seeking Reasonable Value of Work, Labor, and Services.**

[Name of attorney]

_____[Street address]

_____[City, state, and ZIP]

_____[Area code and phone number]

_____[State Bar no. of attorney]

Attorney for _____[name of party]

SUPERIOR COURT OF CALIFORNIA,

COUNTY OF _____

[name(s)] _____,

Plaintiff(s)

vs.

[name(s)] _____

[and DOES 1 THROUGH

_____] _____

Defendant(s).

)

)

)

)

)

)

)

)

NO.

COMPLAINT FOR REASONABLE VALUE OF
WORK, LABOR AND SERVICES (COMMON
COUNT IN QUANTUM MERUIT)

[LIMITED CIVIL CASE]

[Amount Demanded

_____(Exceeds or Does Not
Exceed) \$10,000]

Plaintiff _____[name] alleges:

[For an individual plaintiff]

1. Plaintiff is an individual residing in _____ [city, if any, and county], California, [in the (name of judicial district, if any) _____] [, and therein doing business under the fictitious business name of _____].
Plaintiff has duly complied in all respects with the requirements of *Business and Professions Code Sections 17910 through 17917* with respect to this fictitious business name].

[OR, for a domestic corporation or domestic limited liability company]

1. Plaintiff _____ [name] is, and at all times herein mentioned was, a _____ [corporation or limited liability company] organized and existing under the laws of California, with its principal place of business in _____ [city, if any, and county], California [in the (name of judicial district, if any) _____] [, and therein doing business under the fictitious business name of _____].
Plaintiff has duly complied in all respects with the requirements of *Business and Professions Code Sections 17910 through 17917* with respect to this fictitious business name].

[OR, for a foreign corporation or foreign limited liability company]

1. Plaintiff _____ [name] is, and at all times herein mentioned was, a _____ [corporation or limited liability company] organized and existing under the laws of _____ [state or foreign country], and _____ [for foreign corporation authorized to do business and doing business in California or, for foreign limited liability company maintaining action or intrastate business, and registered to transact intrastate business in California], with its principal place of business in California in _____ [city, if any, and county], California [in the (name of judicial district, if any) _____].

[OR, for a general or limited partnership or an unincorporated association]

1. Plaintiff _____ [name] is, and at all times herein mentioned was, a _____ [partnership or unincorporated association] with its principal place of business in _____ [city, if any, and county], California [in the (name of judicial district, if any) _____] [, and therein doing business under the fictitious business name of _____].
Plaintiff has duly complied in all respects with the requirements of *Business and Professions Code Sections 17910 through 17917* with respect to this fictitious business name].

[CONTINUE]

[For an individual defendant]

2. Defendant _____ [name] is an individual residing in _____ [city, if any, and county], California [in the (name of judicial district, if any) _____] [and doing business therein under the fictitious business name of _____].

[OR, for a domestic corporation or domestic limited liability company]

2. Defendant _____ [name] is, and at all times herein mentioned was, a _____ [corporation or limited liability company] organized and existing under the laws of California [, with its principal place of business in _____ (city, if any, and county), California (, in the _____ [name of judicial district, if any])].

[OR, for a foreign corporation or foreign limited liability company]

2. Defendant _____ [name] is, and at all times herein mentioned was, a _____ [corporation or limited liability company] organized and existing under the laws of _____ [state or foreign country][, with its principal place of business in _____ (city, if any, and county), California (, in the _____ [name of judicial district, if any])].

[OR, for a general or limited partnership or an unincorporated association]

2. Defendant _____ [name] is, and at all times herein mentioned was, _____ [a partnership or an unincorporated association] sued herein under the name _____ [it has assumed or by which it is known][, with its principal place of business in _____ (city, if any, and county), California (, in the _____ [name of judicial district, if any])]. [Defendants (names of individual partners or members) _____ are, and at all times herein mentioned were, members of that _____ (partnership or unincorporated association) (and are, and at all times herein mentioned were, residents of _____ County, California)].

[CONTINUE]

3. Plaintiff is ignorant of the true names and capacities of Defendants sued herein as DOES 1 through _____ [numeral, e.g., 50], inclusive, and therefore sues these Defendants by these fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when ascertained. [Plaintiff is informed and believes and thereon alleges that each of the fictitiously named Defendants is responsible in some manner for the occurrences herein alleged, and that Plaintiff's damages as herein alleged were proximately caused by those Defendants.]

4. Within the last year, at Defendant's request, Plaintiff performed

_____ [specify type of services, e.g., construction services] for the Defendant in [_____ insert name of the city and county where the plaintiff performed services rendered]. Plaintiff and Defendant both understood that Plaintiff would be compensated for performing these services. Defendant knew that these services were being provided and never told Plaintiff to stop performing the services. Defendant accepted, used, and enjoyed the services provided by Plaintiff.

5. The fair and reasonable value of the services Plaintiff provided to Defendant is at least \$_____.

[If plaintiff has demanded payment, add]

6. Plaintiff has demanded payment from Defendant for Plaintiff's services as specified in Paragraph 4, above. Plaintiff's last demand for payment was made on _____[date]. [A copy of Plaintiff's letter demanding payment on that occasion is attached as Exhibit A and incorporated by reference.]

[Continue]

[If defendant has not paid anything]

7. Defendant has failed and refused, and still refuses, to pay Plaintiff all or any part of the reasonable value of the services specified in Paragraph 4. As a result of Defendant's failure to pay, Defendant is now indebted to Plaintiff in the sum of at least \$_____, representing the fair and reasonable value of Plaintiff's services as specified in Paragraph 4, above.

[OR, if partial payment has been made]

7. Defendant has paid only the sum of \$_____ to Plaintiff for the services specified in Paragraph 4, and has refused, and still refuses, to pay Plaintiff any additional sum for those services. As a result of Defendant's failure to pay, Defendant is now indebted to Plaintiff in the sum of at least \$_____, representing the balance due to Plaintiff for the fair and reasonable value of Plaintiff's services as specified in Paragraph 4, above.

[CONTINUE]

WHEREFORE, Plaintiff prays as follows:

1. That judgment be rendered against the Defendant for the reasonable value of the services rendered to the Defendant;
2. For costs of suit; and
3. For such other and further relief as the court deems proper.

Dated: _____

[firm name, if any] _____

By: [signature] _____

[typed name] _____

Attorney for Defendant

[ADD following verification, if applicable]

VERIFICATION

_____, I, , am the Plaintiff in the above-entitled action; I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein stated on information and belief, and, as to those matters, I believe it to be true.

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

[date] _____

[signature] _____

[typed name] _____

NOTES.

Authority:

Haggerty v. Warner (1953) 115 CA2d 468, 475, 252 P2d 373 (citing *Brown v. Crown Gold Milling Co.* (1907) 150 C 376, 382, 89 P 86)

Elements of Quantum Meruit Claim:

See 9.05

Pleading Requirements:

See 9.15

Jurisdiction and Venue:

See Ch. 3, Determining Jurisdiction and Venue in Contract Actions

Demand for Payment Not Necessary:

See 9.15[9]

Judicial Council Form for Cause of Action on Common Counts:

See 9.39

Legal Topics:

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

Civil ProcedurePleading & PracticePleadingsComplaintsGeneral OverviewContracts LawRemediesEquitable
ReliefQuantum MeruitContracts LawTypes of ContractsImplied-in-Law Contracts



185 of 189 DOCUMENTS

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Chapter 9 Seeking or Opposing Quantum Meruit or Quantum Valebant Recovery in Contract Actions
V. FORMS

1-9 MB Practice Guide: CA Contract Litigation 9.41

9.41 Answer to Complaint Seeking Quantum Meruit Recovery With Affirmative Defenses.**Answer to Complaint Seeking Quantum Meruit Recovery With Affirmative Defenses.**

[Name of attorney]

_____[Street address]

_____[City, state, and ZIP]

_____[Area code and phone number]

_____[State Bar no. of attorney]

Attorney for _____[name of party]

SUPERIOR COURT OF CALIFORNIA,

COUNTY OF _____

[name] _____,

Plaintiff,

vs.

[name] _____,

Defendant.

)

)

)

)

)

)

)

NO.

ANSWER OF

_____[identify defendant, e.g.,
DEFENDANT MARY JONES] TO COMPLAINT
OF

_____[identify plaintiff, e.g.,
PLAINTIFF JOHN SMITH]

Judge:

Department:

Defendant answers the complaint as follows:

[Include general denial below, or set forth, in numbered paragraphs, specific denials, admissions, and allegations in response to those in complaint, in the order in which they are alleged in complaint:]

1. Pursuant to *Code of Civil Procedure Section 431.30(b)(1)*, Defendant generally denies each and every allegation of Plaintiff's complaint, including all the purported causes of action contained therein, and further denies that Plaintiff is entitled to any equitable or legal relief, or any damages whatsoever.

[Defendant asserts the following affirmative defenses. By doing so, Defendant shall not be deemed to have assumed the burden of proving any matters that otherwise would be Plaintiff's burden.]

[Allege any affirmative defenses, e.g.,]

[EITHER, if alleging that plaintiff's claim is barred by the statute of limitations]

FIRST AFFIRMATIVE DEFENSE

(Claim is Barred by Statute of Limitations)

2. Plaintiff's claim is barred by the two-year statute of limitations set forth in *Code of Civil Procedure Section 339*.

[AND/OR, if alleging that the claim is premised on services actually rendered to the defendant]

SECOND AFFIRMATIVE DEFENSE

(Plaintiff Did Not Render Services to Defendant)

3. Plaintiff's claim is not premised on services actually rendered to Defendant, and Plaintiff therefore may not seek quantum meruit recovery for the value of those services.

[AND/OR, if alleging that the defendant neither accepted the services nor derived a benefit from them]

THIRD AFFIRMATIVE DEFENSE

(Defendant Did Not Accept or Derive a Benefit From Plaintiff's Services)

4. Defendant neither accepted nor derived a benefit from services alleged to have been performed by Plaintiff, and Plaintiff therefore may not seek quantum meruit recovery for the value of those services.

[AND/OR, if alleging that the parties entered into a special agreement to pay a particular amount or in a particular manner]

FOURTH AFFIRMATIVE DEFENSE

(Defendant Has Agreed to Particular Amount for Services Rendered)

5. Plaintiff and Defendant have entered into a special agreement whereby Defendant has agreed to pay a particular amount for the services rendered, and Plaintiff therefore may not seek quantum meruit recovery for the value of those services.

[AND/OR, if the parties' agreement provides express terms regarding compensation]

FIFTH AFFIRMATIVE DEFENSE

(Agreement Specifies Compensation Terms)

6. The agreement between Plaintiff and Defendant contains express terms regarding compensation for Plaintiff's services, and Plaintiff therefore may not seek quantum meruit recovery for the value of those services.

[AND/OR, if the services were intended to be gratuitous]

SIXTH AFFIRMATIVE DEFENSE

(Services Were Gratuitous)

7. Plaintiff and Defendant did not agree that payment would be rendered for the services, but rather understood that the rendering of the services was to be gratuitous, and Plaintiff therefore may not seek quantum meruit recovery for the value of those services.

[ADD additional affirmative defenses, if any]

[CONTINUE]

WHEREFORE, Defendant prays as follows:

1. That Plaintiff take nothing by his/her complaint herein;

2. For costs of suit; and

3. For such other and further relief as the court deems proper.

Dated: _____

[firm name, if any] _____

By: [signature] _____

[typed name] _____

Attorney for Defendant

[ADD following verification, if applicable]

VERIFICATION

_____, I, , am the defendant in the above-entitled action; I have read the foregoing answer and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein stated on information and belief, and, as to those matters, I believe it to be true.

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

[date] _____

[signature] _____

[typed name] _____

NOTES.

Authority:

McDonald v. Pacific Debenture Co. (1905) 146 C 667, 669, 80 P 1090

Opposing a Quantum Meruit Claim:

See 9.16 -9.23

Statute of Limitations Defense:

See 9.18[6]

Defense That Plaintiff Did Not Render Services to Defendant:

See 9.18[1]

Defense That Defendant Did Not Accept or Derive a Benefit From the Services:

See 9.18[3]

Defense of Parties' Agreement to Pay a Particular Amount for the Services Rendered:

See 9.18[4]

Defense That Parties' Agreement Contains Compensation Terms:

See 9.18[4]

Defense That Services Were Intended to Be Gratuitous:

See 9.18[5]

Legal Topics:

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

Civil Procedure Pleading & Practice Pleadings Answers Contracts Law Remedies Equitable Relief Quantum
Meruit Contracts Law Types of Contracts Implied-in-Law Contracts



186 of 189 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 9 Seeking or Opposing Quantum Meruit or Quantum Valebant Recovery in Contract Actions
V. FORMS

1-9 MB Practice Guide: CA Contract Litigation 9.42

9.42 Demand for Bill of Particulars.**Demand for Bill of Particulars.**

[Name of attorney]

_____[Street address]

_____[City, state, and ZIP]

_____[Area code and phone number]

_____[State Bar no. of attorney]

Attorney for _____[name of party]

SUPERIOR COURT OF CALIFORNIA,

COUNTY OF _____

[name] _____,

Plaintiff,)

vs.)

[name] _____,

Defendant.)

NO.

)))

DEMAND FOR BILL OF PARTICULARS

_____ To Plaintiff and to , Plaintiff's
attorney of record:

[Set forth the demand for the bill of particulars]

[EITHER state that the defendant seeks a bill of particulars that sets forth the type of services rendered to the plaintiff]

PLEASE BE ADVISED that, pursuant to *Civil Procedure Code Section 454*, Defendant demands that you provide a bill of particulars, setting forth the type of services rendered by Plaintiff to the Defendant on which this action is based. The bill of particulars must be delivered to Defendant within 10 days after service of this demand.

[OR state that the defendant seeks a bill of particulars that sets forth the type of services rendered to the plaintiff set forth in specific paragraphs of the complaint]

PLEASE BE ADVISED that, pursuant to *Civil Procedure Code Section 454*, Defendant demands that you provide a bill of particulars, setting forth the type of services rendered by Plaintiff to the Defendant on which Paragraphs 8, 9, 10, and 11 of Plaintiff's complaint are based. The bill of particulars must be delivered to Defendant within 10 days after service of this demand.

[CONTINUE]

[Optional: _____ In particular, demand is made on you to provide (if more specific information about when the services were rendered and what specific charges are being sought: the dates when the services were rendered, and the specific charges for the services or, if more specific information about when and where the services were rendered is sought: the date and place of the performance of the services alleged in the complaint).]

Dated: _____

[firm name, if any] _____

By: [signature] _____

[typed name] _____

Attorney for Defendant

[name] _____

[INCLUDE verification, if desired]

VERIFICATION

_____, I, , am the defendant in the above entitled action. I have read the foregoing demand for bill of particulars and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein stated on information and belief, and as to those matters, I believe it to be true.

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

[date] _____

[signature] _____

NOTES.

Authority:

CCP § 454; Auzerais v. Naglee (1887) 74 C 60, 64, 15 P 371

Timing:

See 9.23

Additional Forms:

See California Forms of Pleading and Practice, Ch. 121, Common Counts (Matthew Bender)

Form for Bill of Particulars:

See 9.43

Legal Topics:

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

Civil Procedure Pleading & Practice Pleadings Bills of Particulars Contracts Law Remedies Equitable Relief Quantum Meruit Contracts Law Types of Contracts Implied-in-Law Contracts



187 of 189 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 9 Seeking or Opposing Quantum Meruit or Quantum Valebant Recovery in Contract Actions
V. FORMS

*1-9 MB Practice Guide: CA Contract Litigation 9.43***9.43 Bill of Particulars****Bill of Particulars**

[Name of attorney]

_____[Street address]

_____[City, state, and ZIP]

_____[Area code and phone number]

_____[State Bar no. of attorney]

Attorney for _____[name of party]

SUPERIOR COURT OF CALIFORNIA,

COUNTY OF _____

[name] _____,

)

Plaintiff,

)

vs.

)

NO.

[name] _____,

)

Defendant.

)

)

)

BILL OF PARTICULARS

_____ To Defendant and to , Defendant's
attorney of record:

[Set forth information responsive to defendant's demand]

_____ In compliance with Defendant's demand for a bill of particulars, Plaintiff sets forth the following items on which this action is based:

[Set out individual items in separately numbered statements that respond to defendant's demand, e.g.

1. Construction services rendered on 12/01/04 (\$2,500).
2. Construction services rendered on 12/02/04 (\$5,000).
3. Construction services rendered on 12/3/04 (\$10,000).
4. Engineering consulting services rendered on 12/4/04 (\$15,000).]

[CONTINUE]

Dated: _____

[firm name, if any] _____

By: [signature] _____

[typed name] _____

Attorney for Plaintiff [name] _____

[INCLUDE, if demand was verified]

VERIFICATION

_____ I, , am the plaintiff in the above-entitled action. I have read the foregoing bill of particulars and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein stated on information and belief, and as to those matters, I believe it to be true.

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

[date] _____

[signature] _____

NOTES.

Authority:

CCP § 454; *Auzerais v. Naglee* (1887) 74 C 60, 64, 15 P 371

Use of Bill of Particulars:

See 9.23

Pleading Requirements:

See 9.23[2]

Additional Forms:

See California Forms of Pleading and Practice, Ch. 121, Common Counts (Matthew Bender)

Form for Demand for Bill of Particulars:

See 9.42

Legal Topics:

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

Civil Procedure Pleading & Practice Pleadings Bills of Particulars Contracts Law Remedies Equitable Relief Quantum Meruit Contracts Law Types of Contracts Implied-in-Law Contracts



188 of 189 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 9 Seeking or Opposing Quantum Meruit or Quantum Valebant Recovery in Contract Actions
V. FORMS

1-9 MB Practice Guide: CA Contract Litigation 9.44

9.44 Complaint for Reasonable Value of Goods Sold and Delivered (Quantum Valebant).**Complaint for Reasonable Value of Goods Sold and Delivered (Quantum Valebant).**

[Name of attorney]

[Street address]

[City, state, and ZIP]

[Area code and phone number]

[State Bar no. of attorney]

Attorney for [name of party]

SUPERIOR COURT OF CALIFORNIA,

COUNTY OF _____

[name(s)] _____,

Plaintiff(s)

vs.

[name(s)] _____

[and DOES 1 THROUGH _____]

Defendant(s).

)

)

)

)

)

)

)

)

NO.

COMPLAINT FOR REASONABLE VALUE OF
GOODS SOLD AND DELIVERED (COMMON
COUNT IN QUANTUM VALEBANT)

[LIMITED CIVIL CASE]

[Amount Demanded _____]

_____ (Exceeds or Does Not
Exceed) \$10,000]

Plaintiff _____ [name] alleges:

[For an individual plaintiff]

1. Plaintiff is an individual residing in _____ [city, if any, and county], California, [in the (name of judicial district, if any) _____] [, and therein doing business under the fictitious business name of _____].
Plaintiff has duly complied in all respects with the requirements of *Business and Professions Code Sections 17910 through 17917* with respect to this fictitious business name].

[OR, for a domestic corporation or domestic limited liability company]

1. Plaintiff _____ [name] is, and at all times herein mentioned was, a _____ [corporation or limited liability company] organized and existing under the laws of California, with its principal place of business in _____ [city, if any, and county], California [in the (name of judicial district, if any) _____] [, and therein doing business under the fictitious business name of _____].
Plaintiff has duly complied in all respects with the requirements of *Business and Professions Code Sections 17910 through 17917* with respect to this fictitious business name].

[OR, for a foreign corporation or foreign limited liability company]

1. Plaintiff _____ [name] is, and at all times herein mentioned was, a _____ [corporation or limited liability company] organized and existing under the laws of _____ [state or foreign country], and _____ [for foreign corporation authorized to do business and doing business in California or, for foreign limited liability company maintaining action or intrastate business, and registered to transact intrastate business in California], with its principal place of business in California in _____ [city, if any, and county], California [in the (name of judicial district, if any) _____].

[OR, for a general or limited partnership or an unincorporated association]

1. Plaintiff _____ [name] is, and at all times herein mentioned was, a _____ [partnership or unincorporated association] with its principal place of business in _____ [city, if any, and county], California [in the (name of judicial district, if any) _____] [, and therein doing business under the fictitious business name of _____].
Plaintiff has duly complied in all respects with the requirements of *Business and Professions Code Sections 17910 through 17917* with respect to this fictitious business name].

[CONTINUE]

[For an individual defendant]

2. Defendant _____ [name] is an individual residing in _____ [city, if any, and county], California [in the (name of judicial district, if any) _____] [and doing business therein under the fictitious business name of _____].

[OR, for a domestic corporation or domestic limited liability company]

2. Defendant _____ [name] is, and at all times herein mentioned was, a _____ [corporation or limited liability company] organized and existing under the laws of California [, with its principal place of business in _____ (city, if any, and county), California (, in the _____ [name of judicial district, if any])].

[OR, for a foreign corporation or foreign limited liability company]

2. Defendant _____ [name] is, and at all times herein mentioned was, a _____ [corporation or limited liability company] organized and existing under the laws of _____ [state or foreign country][, with its principal place of business in _____ (city, if any, and county), California (, in the _____ [name of judicial district, if any])].

[OR, for a general or limited partnership or an unincorporated association]

2. Defendant _____ [name] is, and at all times herein mentioned was, _____ [a partnership or an unincorporated association] sued herein under the name _____ [it has assumed or by which it is known][, with its principal place of business in _____ (city, if any, and county), California (, in the _____ [name of judicial district, if any])]. [Defendants (names of individual partners or members) _____ are, and at all times herein mentioned were, members of that _____ (partnership or unincorporated association) (and are, and at all times herein mentioned were, residents of _____ County, California)].

[CONTINUE]

3. Plaintiff is ignorant of the true names and capacities of Defendants sued herein as DOES 1 through _____ [numeral, e.g., 50], inclusive, and therefore sues these Defendants by these fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when ascertained. [Plaintiff is informed and believes and thereon alleges that each of the fictitiously named Defendants is responsible in some manner for the occurrences herein alleged, and that Plaintiff's damages as herein alleged were proximately caused by those Defendants.]

4. Plaintiff is informed and believes and thereon alleges that at all times material to this complaint, _____ [identify defendants to whom agency

allegation applies, e.g., each of the defendants or each of the individual defendants or Defendant Harry Jones], [and each of the defendants fictitiously named in this complaint,] in addition to acting for himself, herself, or itself and on his, her, or its own behalf individually, is and was acting as the agent, servant, employee and representative of, and with the knowledge, consent and permission of, and in conspiracy with, each and all of the Defendants and within the course, scope and authority of that agency, service, employment, representation, and conspiracy. Plaintiff further alleges on information and belief that the acts of each of the Defendants were fully ratified by each and all of the Defendants. Specifically, and without limitation, Plaintiff alleges on information and belief that the actions, failures to act, breaches, conspiracy, and misrepresentations alleged herein and attributed to one or more of the specific Defendants were approved, ratified, and done with the cooperation and knowledge of each and all of the Defendants.

5. On or about _____ [date], in _____ [location], at the special request of Defendant, Plaintiff sold and delivered to Defendant goods consisting of _____ [describe goods, e.g., 100 pairs of handmade women's leather shoes, 50 handmade women's cashmere sweaters, and 50 handmade women's suede jackets]. Defendant agreed to pay Plaintiff the reasonable value of those goods.

[If plaintiff has demanded payment, add]

6. Plaintiff has demanded payment from Defendant for the goods specified in Paragraph 5, above. Plaintiff's last demand for payment was made on _____ [date]. [A copy of Plaintiff's letter demanding payment on that occasion is attached as Exhibit A and incorporated by reference.]

[Continue]

[If defendant has not paid anything]

7. Defendant has failed and refused, and still refuses, to pay Plaintiff all or any part of the reasonable value of the goods specified in Paragraph 5, above. As a result of Defendant's failure to pay, Defendant is now indebted to Plaintiff in the sum of at least \$ _____, representing the fair and reasonable value of the goods as specified in Paragraph 5, above.

[OR, if partial payment has been made]

7. Defendant has paid only the sum of \$ _____ to Plaintiff for the goods specified in Paragraph 5, above, and has refused, and still refuses, to pay Plaintiff any additional sum for the goods. As a result of Defendant's failure to pay, Defendant is now indebted to Plaintiff in the sum of at least \$ _____, representing the balance due to Plaintiff for the fair and reasonable value of the goods as specified in Paragraph 4, above.

[CONTINUE]

WHEREFORE, Plaintiff prays as follows:

1. That judgment be rendered against the Defendant for the reasonable value of the goods delivered to the Defendant;

2. For costs of suit; and

3. For such other and further relief as the court deems proper.

Dated: _____

[firm name, if any] _____

By: [signature] _____

[typed name] _____

Attorney for Defendant

[ADD following verification, if applicable]

VERIFICATION

_____, I, , am the Plaintiff in the above-entitled action; I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein stated on information and belief, and, as to those matters, I believe it to be true.

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

[date] _____

[signature] _____

NOTES.

Authority:

CC § 3384

Elements of Quantum Valebant Claim:

See 9.26

Pleading Requirements:

See 9.24

Judicial Council Form--Common Counts:

See 9.39

Legal Topics:

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

Civil Procedure Pleading & Practice Pleadings Complaints General Overview Contracts Law Remedies Equitable Relief General Overview Contracts Law Sales of Goods General Overview



189 of 189 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 9 Seeking or Opposing Quantum Meruit or Quantum Valebant Recovery in Contract Actions
V. FORMS

1-9 MB Practice Guide: CA Contract Litigation 9.45

9.45 Answer to Complaint for Reasonable Value of Goods Sold (Quantum Valebant).**Answer to Complaint for Reasonable Value of Goods Sold (Quantum Valebant).**

[Name of attorney]

_____[Street address]

_____[City, state, and ZIP]

_____[Area code and phone number]

_____[State Bar no. of attorney]

Attorney for _____[name of party]

SUPERIOR COURT OF CALIFORNIA,

COUNTY OF _____

[name] _____,

Plaintiff,

vs.

[name] _____,

Defendant.

)

)

)

)

)

)

)

NO.

ANSWER OF

_____[identify defendant, e.g.,
DEFENDANT MARY JONES] TO COMPLAINT
OF

_____[identify plaintiff, e.g.,
PLAINTIFF JOHN SMITH]

Judge:

Department:

Defendant answers the complaint as follows:

[Include general denial below, or set forth, in numbered paragraphs, specific denials, admissions, and allegations in response to those in complaint, in the order in which they are alleged in complaint:]

1. Pursuant to *Code of Civil Procedure Section 431.30(b)(1)*, Defendant generally denies each and every allegation of Plaintiff's complaint, including all the purported causes of action contained therein, and further denies that Plaintiff is entitled to any equitable or legal relief, or any damages whatsoever.

[Defendant asserts the following affirmative defenses. By doing so, Defendant shall not be deemed to have assumed the burden of proving any matters that otherwise would be Plaintiff's burden.]

[Allege any affirmative defenses, e.g.,]

FIRST AFFIRMATIVE DEFENSE

(Plaintiff's Claim Not Premised on Goods Delivered to Defendant)

1. Plaintiff's claim is not premised on any goods that were actually delivered to Defendant, and Plaintiff therefore may not seek quantum valebant recovery for the value of those goods.

[AND/OR]

SECOND AFFIRMATIVE DEFENSE

(No Value Alleged of Goods Delivered)

2. Plaintiff has not alleged the value of the goods allegedly sold and delivered, and Plaintiff therefore may not seek quantum valebant recovery for the value of those goods.

[AND/OR]

THIRD AFFIRMATIVE DEFENSE

(Parties Have an Agreement Regarding the Value of the Goods)

3. Plaintiff is not entitled to the reasonable value of the goods delivered because Plaintiff and Defendant have a valid agreement as to the value of those goods, and Plaintiff therefore may not seek quantum valebant recovery for the value

of those goods.

[AND/OR]

FOURTH AFFIRMATIVE DEFENSE

(Delivery of Goods Intended to Be Gratuitous)

4. Plaintiff's delivery of the goods to Defendant was intended to be gratuitous, and Plaintiff therefore may not seek quantum valebant recovery for the value of those goods.

[AND/OR]

FIFTH AFFIRMATIVE DEFENSE

(Claim Barred by Statute of Limitations)

5. Plaintiff's claim is barred by the statute of limitations set forth in Code of Civil Procedure Section _____ [337(1) or 339(1)].

[AND/OR]

SIXTH AFFIRMATIVE DEFENSE

(Defendant Refused to Accept the Goods)

6. Plaintiff's claim is barred because Defendant justifiably refused to accept the goods.

[ADD additional affirmative defenses, if any]

[CONTINUE]

WHEREFORE, Defendant prays as follows:

1. That Plaintiff take nothing by his/her complaint herein;
2. For costs of suit; and
3. For such other and further relief as the court deems proper.

Dated: _____

[firm name, if any] _____

By: [signature] _____

[typed name] _____

_____. Attorney for Defendant

[ADD following verification, if applicable]

VERIFICATION

_____, I, , am the defendant in the above entitled action; I have read the foregoing answer and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein stated on information and belief, and, as to those matters, I believe it to be true.

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

[date] _____

[signature] _____

[typed name] _____

NOTES.

Authority:

CC §§ 3384-3395

Opposing Claim for Quantum Valebant:

See 9.24, 9.34

Defense That Plaintiff's Claim Must Be Premised on Goods Delivered to the Defendant:

See 9.28

Defense That There Is No Value of Goods Delivered:

See 9.28, 9.29

Defense That Delivery of Goods Was Intended to Be Gratuitous:

See 9.34

Statute of Limitations Defense:

See 9.27

Defense That Defendant Refused to Accept Goods:

See 9.28

Legal Topics:

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

Civil ProcedurePleading & PracticePleadingsAnswersContracts LawRemediesEquitable ReliefGeneral
OverviewContracts LawSales of GoodsGeneral Overview



1 of 175 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 10 Seeking or Opposing Statutory Remedies in Contract Actions

1-10 MB Practice Guide: CA Contract Litigation 10.syn

§ 10.syn Synopsis to Chapter 10: Seeking or Opposing Statutory Remedies in Contract Actions

10.01 Scope.

10.02 Objective and Strategy.

10.03 CHECKLIST: Determining Whether Statutory Damages or Civil Penalties Are Available in Contract Action.

10.04 Options and Strategies.

10.04[1] Availability of Statutory Damages and Penalties Should Be Considered in Contract Actions.

10.04[2] Provisions Regulating Contracts Exist Throughout California Codes.

10.04[3] Provisions Regulating Contracts Sometimes Include Statutory Damage Provisions.

10.05 Determining Whether Subject Matter of Contract Is Regulated by Statute.

10.05[1] Actions Arising Out of Motor Vehicle Leases, Sales, and Repairs.

10.05[1][a] Vehicle Leasing Act Provides for Statutory Damages.

10.05[1][b] Rees-Levering Automobile Sales Finance Act Provides Penalty for Violation of Prepayment Provision.

10.05[1][c] Song-Beverly Consumer Warranty Act Provides for Civil Penalties for Violations Relating to Vehicle Warranties and Repair Contracts.

10.05[2] Actions Arising out of Home Improvements and/or Repairs.

10.05[2][a] B&P Code § 7160 Provides Penalty for Fraudulent Inducement Into Home Improvement Contract.

10.05[2][b] CCP § 1029.8(c) Provides for Treble Damages When Unlicensed Contractor Causes Damages.

10.05[2][c] Unruh Act Provides Statutory Penalty to Extent Home Improvement Contract Is an Installment Contract.

10.05[3] Actions Arising Out of Sales of Consumer Goods.

10.05[3][a] Unruh Act Provides for Penalty for Willful Violation of Finance Charge Rules.

10.05[3][b] Song-Beverly Consumer Warranty Act Provides for Civil Penalties for Breach of Warranty.

10.05[4] Statutory Damages for Senior Citizens and Disabled Persons.

10.05[4][a] Consumer Legal Remedies Act Provides Specific Penalty for Actions Damaging Senior Citizens or Disabled Persons.

10.05[4][b] Civil Code Provides for Trebling Any Existing Statutory Damages for Unfair Competition Against Senior Citizens or Disabled Persons.

10.05[5] Usury Laws Provide Statutory Damages and Civil Penalties.

10.05[6] Other Statutory Schemes Provide Statutory Damages and Penalties Relating to Specific Types of Contracts.

10.06 Assessing Whether Defendant Complied With All Statutory Requirements.

10.06[1] Defendant Must Have Included Any Required Provisions in Contract.

10.06[2] Defendant Must Have Complied With Applicable Time Periods.

10.06[3] Defendant Must Have Made All Required Disclosures.

10.06[4] Defendant Must Have Complied With All Other Statutory Requirements.

10.07 Defendant's Specific Violation Must Be One for Which Statute Authorizes Statutory Damages or Civil Penalties.

10.08 Plaintiff Must Be One of Those Eligible for Statutory Damages or Civil Penalties.

10.09 CHECKLIST: Determining Whether to Seek Statutory Damages or Civil Penalties If Available.

10.10 Options and Strategies.

10.11 Determining Types of Statutory Damages Available.

10.11[1] Some Statutes Authorize Statutory Damages or Penalties in Addition to Actual Damages.

10.11[2] In Some Cases Statutory Penalty May Be Sole Remedy for Defendant's Violation of Statutory Scheme.

10.12 Analyzing Whether Seeking Statutory Damages Precludes Seeking Common Law Remedies.

10.12[1] Statutory Damage Provisions Often Only Pertain to Specific Violations.

10.12[2] Statutes May Provide Choice Between Statutory Damages and Common Law Remedy.

10.12[3] Many Schemes Provide for Doubling or Trebling of Actual Damages.

10.13 CHECKLIST: Pleading Entitlement to Statutory Damages or Civil Penalties in Contract Action.

10.14 Options and Strategies.

10.15 Complaint or Cross-Complaint Must Assert Violation of Statute in Addition to Contract Causes of Action.

10.16 Complaint or Cross-Complaint Must Plead Any Prerequisites to Award of Statutory Damages.

10.17 Complaint or Cross-Complaint Prayer Must Demand Statutory Damages.

10.18 CHECKLIST: Opposing Request for Statutory Damages in Contract Action.

10.19 Options and Strategies.

10.20 Determining Whether Complaint Alleges Violation Sufficient to Support Award of Statutory Damages.

10.20[1] Underlying Transaction Must Fall Within Statutory Scheme.

10.20[2] Plaintiff Must Be Entitled to Statutory Damages for Alleged Violation.

10.21 Drafting Appropriate Responsive Pleading.

10.21[1] Demurrer May Be Filed If Transaction Is Not Covered by Statutory Scheme or Statutory Damages Are Not Available for Alleged Violation.

10.21[2] Motion to Strike May Be Used If It Is Inappropriate to Demur to Entire Cause of Action.

10.21[3] Party Should File Answer If There Are No Grounds for Demurrer or Motion to Strike.

10.22 Complaint for Damages and Statutory Penalty for False Representations Under Home Improvement Contract [B&P Code § 7160]--Optional Allegations for Treble Damages Against Unlicensed Contractor [CCP Code § 1029.8].

Complaint for Statutory Damages Under Home Improvement Contract [B&P Code § 7160]--Optional Allegations for Treble Damages Against Unlicensed Contractor [CCP Code § 1029.8].

10.23 Complaint for Statutory Penalty--Retail Installment Contract [CC § 1812.9].

Complaint for Statutory Penalty--Retail Installment Contract [CC § 1812.9].



2 of 175 DOCUMENTS

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Chapter 10 Seeking or Opposing Statutory Remedies in Contract Actions

I. STRATEGY

1-10 MB Practice Guide: CA Contract Litigation 10.01

10.01 Scope.

This chapter covers:

- Objectives and strategy for evaluating the availability of, seeking, and opposing statutory remedies in a contract action [*see 10.02*].
- Statutory damages and penalties arising out of motor vehicle transactions [*see 10.05[1]*].
- Statutory damages and penalties arising out of home improvements and/or repairs [*see 10.05[2]*; Form: *see 10.22*].
- Statutory damages and penalties relating to retail installment sales and retail sales warranties [*see 10.05[3]*; Form: *see 10.23*].
- Various statutory damage provisions protecting senior citizens and disabled persons [*see 10.05[4]*].
- Statutory damages and penalties in usury laws and other miscellaneous statutory schemes relating to contracts [*see 10.05[5]*, [*6*]].
- Making a determination regarding whether to seek statutory damages or penalties if available [*see 10.06 -10.13*].
- Pleading entitlement to statutory damages or penalties [*see 10.13 -10.20*; Forms: *see 10.22*, *10.23*].
- Opposing plaintiff's request for statutory damages or penalties [*see 10.18-10.21*].

Core Statutes:

B&P Code § 7160 et seq.; *CC §§ 1750-1784* (Consumer Legal Remedies Act), *1790 et seq.* (Song-Beverly Consumer Warranty Act), *1801 et seq.* (Unruh Act [Retail Installment Sales]), *2981 et seq.* (Rees-Levering Motor Vehicle Sales and Financing Act), *2985.7 et seq.* (Vehicle Leasing Act); *CCP § 1029.8*

Legal Topics:

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

Commercial Law (UCC)Sales (Article 2)RemediesGeneral OverviewContracts LawRemediesGeneral
OverviewGovernmentsLegislationStatutory Remedies & Rights



3 of 175 DOCUMENTS

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Chapter 10 Seeking or Opposing Statutory Remedies in Contract Actions

I. STRATEGY

1-10 MB Practice Guide: CA Contract Litigation 10.02

10.02 Objective and Strategy.

This chapter covers the diverse area of statutory damages and penalties in actions arising out of contracts. While money damages and equitable remedies generally are available in contract actions, the legislature has provided for specific statutory remedies in actions involving specific types of transactions. While the statutory penalties may have a punitive or deterrent aspect, their primary purpose is to secure obedience to statutes and regulations imposed to assure important public policy objectives [*Hale v. Morgan* (1978) 22 C3d 388, 398, 149 CR 375, 584 P2d 512] *see also* *Beeman v. Burling* (1990) 216 CA3d 1586, 1598, 265 CR 719].

Strategic Point:



Attorneys involved in actions involving contracts tend to be concerned primarily with issues such as damages and may tend to overlook statutory provisions imposing specific penalties on the types of actions in question [see 10.04]. Consideration of potential statutory damages and penalties should be part of the evaluation of every contract action.

This chapter uses the general term "statutory damages and penalties" to describe these types of remedies. Statutory damages and penalties can be distinguished as follows: a statutory damages provision doubles or trebles the amount of plaintiff's actual damages, while a statutory penalty provision provides for a penalty in an arbitrary amount set by the legislature. In both cases the legislature has determined that a plaintiff should be entitled to money damages beyond customary compensatory damages.

Statutory damage and penalty provisions are widespread through California law. This chapter does not cover statutory damage provisions relating to landlord/tenant law, employment law, unfair competition law, and real property law, as those are covered in other publications, but rather cross-references to texts discussing statutory damages and penalties in these substantive areas. This chapter is not intended as an exhaustive guide to every penalty provision contained in the California statutes, but rather as a guide to the types of issues that typically arise in contract litigation with respect to statutory damages and penalties.

Detailed Discussion/Forms:

California Forms of Pleading and Practice, Ch. 89, Automobiles: Sales and Financing Under the Rees-Levering Act; Ch. 90, Automobiles: Vehicle Leasing Act; Ch. 104, Building Contracts; Ch. 501, Sales: Retail Installment Sales; Ch. 502, Sales: Warranties; Ch. 568, Usury (Matthew Bender)

Cross References:

Guide to provisional remedies, see Ch. 6, Using or Opposing Provisional Remedies in Contract Actions.

Guide to seeking compensatory money damages, see Ch. 7, Seeking or Opposing Damages in Contract Actions.

Guide to equitable remedies, see Ch. 8, Seeking or Opposing Equitable Remedies in Contract Actions.

Guide to recovering costs and attorney's fees, see Ch. 12, Recovering Attorney's Fees and Costs in Contract Litigation.

Discussion and forms relating to contracts and statutory damages and penalties in the context of a landlord/tenant relationship, see Matthew Bender[(R)] Practice Guide: California Landlord/Tenant Litigation, Ch. 6, Suing a Landlord for Damages; Ch. 7, Suing a Tenant for Unpaid Rent and Damages.

Discussion and forms relating to contracts and statutory damages and penalties in the context of civil rights laws, see California Forms of Pleading and Practice, Ch. 116, Civil Rights: Discrimination in Business Establishments (Matthew Bender).

Discussion and forms relating to contracts and statutory damages and penalties in the context of employment law, see California Forms of Pleading and Practice, Ch. 249, Employment Law: Termination and Discipline; see also Ch. 250, Employment Law: Wage and Hour Disputes (Matthew Bender).

Discussion and forms relating to contracts and statutory damages and penalties in the context of real property transactions, see California Forms of Pleading and Practice, Ch. 569, Vendor and Purchaser (Matthew Bender).

Discussion and forms relating to contracts and statutory damages and penalties in the context of unfair competition laws, see Matthew Bender[(R)] Practice Guide: California Unfair Competition and Business Torts, Ch. 2, Unfair Competition; California Forms of Pleading and Practice, Ch. 565, Unfair Competition (Matthew Bender).

For Tips on updating case law and expanding your research with additional resources, see **How to Use Lexis.com With This Publication** at the front of this volume.

Legal Topics:

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

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4 of 175 DOCUMENTS

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Chapter 10 Seeking or Opposing Statutory Remedies in Contract Actions

II. DETERMINING WHETHER ANY STATUTORY DAMAGES OR CIVIL PENALTIES ARE AVAILABLE IN
CONTRACT ACTION

1-10 MB Practice Guide: CA Contract Litigation 10.03

10.03 CHECKLIST: Determining Whether Statutory Damages or Civil Penalties Are Available in Contract Action.

☐ Research whether subject matter of contract is regulated by a statutory scheme, such as:

☐ Motor vehicle leasing.

Authority:

CC § 2985.7 et seq.

Discussion:

See 10.05[1][a]

☐ Motor vehicle sales.

Authority:

CC § 2981 et seq.

Discussion:

See 10.05[1][b]

☐ Motor vehicle repairs.

Authority:

CC § 1790 et seq.

Discussion:

See 10.05[1][c]

☐ Home improvement and/or repair contracts:☐ Fraudulent inducement.**Authority:***B&P Code § 7160 et seq.***Discussion:***See 10.05[2][a]***Form:***See 10.22*☐ Unlicensed contractors.**Authority:***CCP § 1029.8***Discussion:***See 10.05[2][b]***Form:***See 10.22*☐ Installment contracts.**Authority:***CC § 1801 et seq.***Discussion:***See 10.05[2][c]***Form:***See 10.23*☐ Contracts arising out of sale of goods:☐ Retail installment sales.**Authority:***CC § 1801 et seq.***Discussion:***See 10.05[3][a]***Form:***See 10.23*☐ Consumer warranties.

Authority:

CC § 1790 et seq.

Discussion:

See 10.05[3][b]

- ☐ Contracts involving senior citizens or disabled persons.

Authority:

CC §§ 1750-1784

Discussion:

See 10.05[4]

- ☐ Contracts covered by anti-usury laws.

Authority:

CC § 1916-3(a)

Discussion:

See 10.05[5]

- ☐ Other types of consumer contracts.

Authority:

CC § 1812.50 et seq.

Discussion:

See 10.05[6]

- ☐ Determine whether defendant violated statutory scheme applicable to type of contract at issue:

- ☐ Did defendant include all required provisions in contract?

Authority:

CC § 2985.8

Discussion:

See 10.06[1]

- ☐ Did defendant comply with applicable time periods?

Authority:

CC § 1812.53

Discussion:

See 10.06[2]

- ☐ Did defendant make all required disclosures?

Authority:

CC § 2985.8(c)(5)

Discussion:

See 10.06[3]

- ☐ Did defendant comply with all other statutory requirements?

Authority:

CC § 1812.54

Discussion:

See 10.06[4]

- ☐ Assess whether statutory damages or penalties are available as a result of defendant's violation.

Authority:

CC § 2988.5(a)

Discussion:

See 10.07

- ☐ Assess whether plaintiff is eligible for statutory damages or penalties.

Authority:

CC §§ 1791, 1794

Discussion:

See 10.08

Legal Topics:

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

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5 of 175 DOCUMENTS

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Chapter 10 Seeking or Opposing Statutory Remedies in Contract Actions

II. DETERMINING WHETHER ANY STATUTORY DAMAGES OR CIVIL PENALTIES ARE AVAILABLE IN CONTRACT ACTION

1-10 MB Practice Guide: CA Contract Litigation 10.04

10.04 Options and Strategies.

10.04[1] Availability of Statutory Damages and Penalties Should Be Considered in Contract Actions.

Attorneys handling contract disputes sometimes overlook the possibility that in addition to ordinary damages, statutory damages and penalties may be available. When handling any contract action, the attorney should undertake some basic research to see if any special statutes regulating the type of contract or transaction at issue in the litigation provide for penalties or damages in addition to those otherwise available at law. Although in many cases the amount of these statutory damages and penalties will not be substantial, nevertheless they should not be overlooked.



Strategic Point:

Many California statutes regulate specific types of contracts, or contracts involving specific classes of parties. An attorney handling a contract case should first research the law to determine if the subject matter of the agreement, for example, installment sales contracts, is regulated by any special statutes [*see 10.04[2]*]. The attorney then should determine whether the applicable statute provides for any statutory damages or penalties for noncompliance with statutory requirements [*see 10.04[3]*].

Many but not all of the special statutes imposing penalties or statutory damages deal with consumer transactions. Some require that the contracts in question contain specified provisions and provide remedies in the event that a contract does not meet the statutory requirements. The applicable statutes also may make the contract void or voidable if the contract fails to include specified provisions or meet other specific requirements.

Judge's Perspective:

Although statutory damages or penalties may be too small to litigate on behalf of an individual plaintiff, they can sometimes be effectively aggregated when asserted in a class action [*see generally King v. Central Bank (1977) 18 C3d 840, 843-848, 135 CR 771, 558 P2d 857* (upholding class action complaint for violation of the *Unruh Act*); *Corbett v. Superior Court (2002) 101 CA4th 649, 655, 125 CR2d 46* (class action under Consumer Legal Remedies Act)]. Counsel should avoid invoking a statute just to obtain civil penalties, however, because the courts are unfriendly to attempts to broaden these statutes beyond their original purpose [*see, e.g., Mackey v. Bristol West Ins. Servs. of Cal., Inc. (2003) 105*

CA4th 1247, 1270-1271, 130 CR2d 536 (affirming sustaining of demurrer on grounds that contract in question was not "retail installment contract" within meaning of the Unruh Act)]. This general statement, however, is qualified; the Legislature has made it clear that some of the statutes discussed in this chapter are to be construed broadly so as to effectuate their remedial purpose [*see, e.g., CC § 1760* (Consumer Legal Remedies Act "shall be liberally construed and applied to promote its underlying purposes, which are to protect consumers against unfair and deceptive business practices and to provide efficient and economical procedures to secure such protection")].

Cross Reference:

Discussion of voiding contracts, see Ch. 15, *Attacking or Defending Existence of Contract--Failure to Comply With Applicable Formalities*.

10.04[2] Provisions Regulating Contracts Exist Throughout California Codes. There is no single California code containing all provisions relating to contracts and damages that might conceivably be available based on a contractual relationship. Rather, relevant provisions may be found in any of the 29 different codes that make up California statutory law.

The Civil Code contains the majority of provisions regulating contractual relationships. This code also contains provisions relating generally to damages under California law. The Code of Civil Procedure contains some general provisions, such as *CCP § 1029.8*, addressing unlicensed persons. Most of the other codes are topical. For example, the Business and Professions Code may address a contractual relationship with someone who is required under California law to have a professional license, such as an attorney or contractor. The Health and Safety Code may contain provisions relating to contracts for medical care. Attorneys should search both the general codes, such as the Civil Code and Code of Civil Procedure, as well as the pertinent topical code to determine whether there are relevant statutory provisions.

Cross Reference:

Discussion of additional sources to assist in locating statutory damage provisions, see *10.02*.

10.04[3] Provisions Regulating Contracts Sometimes Include Statutory Damage Provisions. After locating any code sections that address the subject matter of the contract in question, the attorney should carefully review the statutory scheme applicable to that type of contract. Not all schemes authorize statutory damages or penalties. Alleging violations of the scheme may, instead, simply be a means of obtaining common law damages for breach of contract. Additionally, often not all violations of the statutory scheme entitle the aggrieved party to statutory damages or penalties. Some schemes provide for statutory damages for "any violation," while others enumerate violations that may serve as a basis for the statutory damages.

If the scheme regulating the relevant contract does contain a statutory damage or penalty provision, a determination then must be made as to whether the provision is intended to supplement otherwise available legal and equitable remedies or replace them. For further discussion, see *10.09 -10.12*.

Judge's Perspective:

Before seeking statutory penalties, there is no substitute for a thorough knowledge of the relevant law, which otherwise can be a trap for the unwary. For example, counsel asserting a violation of the Consumer Legal Remedies Act should know that "the Plaintiff shall file an affidavit stating facts showing that the action has been commenced in a county described in this section as a proper place for the trial of the action" [*CC § 1780(d)*]; and, at least 30 days prior to filing the action, Plaintiff must send the Defendant a notice identifying the objectionable goods or services and "demand[ing] that [the Defendant] correct, repair, replace, or otherwise rectify the goods or services alleged to be in violation of [the CLRA]" [*CC § 1782(a)*]. Failure to comply with these provisions is grounds for demurrer. Thus,

counsel should be completely familiar with the entire statutory scheme that provides for a statutory penalty before filing a complaint.

Legal Topics:

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

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6 of 175 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 10 Seeking or Opposing Statutory Remedies in Contract Actions

II. DETERMINING WHETHER ANY STATUTORY DAMAGES OR CIVIL PENALTIES ARE AVAILABLE IN CONTRACT ACTION

1-10 MB Practice Guide: CA Contract Litigation 10.05

10.05 Determining Whether Subject Matter of Contract Is Regulated by Statute.

10.05[1] Actions Arising Out of Motor Vehicle Leases, Sales, and Repairs.

10.05[1][a] Vehicle Leasing Act Provides for Statutory Damages. The Vehicle Leasing Act [CC § 2985.7 *et seq.*] authorizes statutory damages for violations of its provisions in the amount of 25 percent of the total amount of monthly payments under the lease, except the total may not be less than \$100 nor greater than \$1,000 [CC § 2988.5(a)(2)]. A separate statutory damage provision applies to class actions [CC § 2988.5(a)(2)]. The statutory damages are available for violations of provisions requiring a specific format and specific disclosures in the written lease contract, and provisions regarding depreciation and residual value of vehicles [CC §§ 2988.5(a), 2985.8, 2988].



Timing:

Actions under the Vehicle Leasing Act must be brought within one year of the termination of the lease contract [CC § 2988.5(1)].

Exceptions:

The statutory damages provisions of the Vehicle Leasing Act contain two exceptions: first, when the lessor notifies the lessee of its error and corrects the error within 15 days; and second, when the lessor shows by a preponderance of the evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adopted to avoid any such error [CC § 2988.5(c), (d)].



Cross Reference:

Discussion/Forms, see California Forms of Pleading and Practice, Ch. 90, Automobiles: Vehicle Leasing Act (Matthew Bender).

10.05[1][b] Rees-Levering Automobile Sales Finance Act Provides Penalty for Violation of Prepayment Provision. The Rees-Levering Automobile Sales Finance Act (Rees-Levering Act) provides that the buyer of an automobile may prepay the entire indebtedness without penalty [CC § 2982(1)]. If the seller or holder of the sales contract violates the prepayment provisions, the buyer may recover as damages three times the amount of any finance

charges paid [CC § 2983.1].

Exception:

The statutory damage provision of the Rees-Levering Automobile Act contains an exception for accidental or bona fide error of computation [CC § 2983.1].



Cross Reference:

Discussion/Forms, see California Forms of Pleading and Practice, Ch. 89, Automobiles: Sales and Financing Under the Rees-Levering Act (Matthew Bender).

10.05[1][c] Song-Beverly Consumer Warranty Act Provides for Civil Penalties for Violations Relating to Vehicle Warranties and Repair Contracts. The Song-Beverly Consumer Warranty Act authorizes statutory damages for willful violations of the Act's provisions. The amount of damages is unspecified, but may not exceed two times the amount of actual damages, in addition to any actual damages recovered [CC § 1794(c)]. The Act also authorizes a statutory civil penalty of up to two times the amount of actual damages for violation of CC § 1793.2(d)(2), which mandates that a vehicle manufacturer either replace the vehicle or make restitution if the manufacturer cannot repair a vehicle to conform to the express warranty after a reasonable number of attempts [CC § 1794(e)]. A consumer may not recover under both of these provisions for the same violation [CC § 1794(e)(5)].

Distinguish:

The basic statutory damage provision of CC § 1794(c) necessitates a finding that the seller's failure to comply was willful. The provision of CC § 1794(e), relating to motor vehicle repair, does not require such a finding.

Exceptions:

- The Song-Beverly Act applies only to vehicles purchased in California [*Cummins, Inc. v. Superior Court* (2005) 36 C4th 478, 483].
- An exception in the Song-Beverly Act eliminates statutory damages when a motor vehicle manufacturer maintains a qualified third-party dispute resolution process in accordance with CC § 1793.22 [CC § 1794(e)(2)].



Warning:

A motor vehicle buyer must serve a written notice requesting that the manufacturer comply with CC § 1793.2(d)(2) before the buyer can recover statutory damages under CC § 1794(e) [CC § 1794(e)(3)].

Judge's Perspective:

Counsel should be aware that seeking treble damages under the Song-Beverly Consumer Warranty Act might prevent recovery of punitive damages that might otherwise be available for the same conduct [see *Troensegaard v. Silvercrest Indus., Inc.* (1985) 175 CA3d 218, 228, 220 CR 712 ; (striking a punitive damage award when the trial court also awarded civil penalties under CC § 1794)].



Cross References:

Discussion/Forms, see California Forms of Pleading and Practice, Ch. 502, Sales: Warranties (Matthew Bender).

Breach of warranty actions under the Song-Beverly Act, see Ch. 24, Suing or Defending Action for Breach of Warranty.

10.05[2] Actions Arising out of Home Improvements and/or Repairs.**10.05[2][a] B&P Code § 7160 Provides Penalty for Fraudulent Inducement Into Home Improvement**

Contract. Any person who is induced to contract for a work of improvement based on false or fraudulent representations or false statements knowingly made may recover a statutory penalty of \$500, in addition to attorney's fees and actual damages [*B&P Code § 7160*].

 Cross References:

Form, see 10.22.

Discussion, see California Forms of Pleading and Practice, Ch. 104, Building Contracts (Matthew Bender).

10.05[2][b] CCP § 1029.8(c) Provides for Treble Damages When Unlicensed Contractor Causes Damages.

Any unlicensed person who causes injury or damage as a result of providing goods or performing services for which a license is required (including, but not limited to, a contractor's license) is liable to the injured person for treble the amount of actual damages assessed in a civil action [*CCP § 1029.8(a)*]. The additional damages may not exceed \$10,000 [*CCP § 1029.8(c)*].

Exception:

This statute does not apply to persons acting under the good-faith belief that they are licensed or to persons whose license has expired due to the nonpayment of renewal fees but who are otherwise eligible for renewal without applying for an original license [*CCP § 1029.8(d)*].

 Cross References:

Form for complaint with treble damages against unlicensed contractor, see 10.22.

Discussion, see California Forms of Pleading and Practice, Ch. 104, Building Contracts (Matthew Bender).

10.05[2][c] Unruh Act Provides Statutory Penalty to Extent Home Improvement Contract Is an Installment

Contract. California's Unruh Act [*CC § 1801 et seq.*] applies to retail installment contracts, defined as contracts providing for repayment in installments [*CC § 1802.6*]. The Unruh Act, by definition, does not apply to contracts providing for the construction of an entire residence or all or part of a structure designed for commercial or industrial occupancy [*CC § 1801.4*]. The Unruh Act does apply to services furnished in connection with the improvement of real property [*CC § 1802.2*].

The Unruh Act provides for statutory damages of three times the total of the finance charges and any delinquency, collection, extension, deferral or refinance charges imposed, contracted for or received on all contracts in the case of a willful violation of the Act's provisions pertaining to finance charges on installment contracts [*CC § 1812.9*].

 Cross References:

Form, see 10.23.

Finance charge provisions of Unruh Act, see 10.05[3][a]

Discussion/forms, see California Forms of Pleading and Practice, Ch. 501, Sales: Retail Installment Sales (Matthew Bender).

10.05[3] Actions Arising Out of Sales of Consumer Goods.

10.05[3][a] Unruh Act Provides for Penalty for Willful Violation of Finance Charge Rules. The Unruh Act applies to the sale of goods bought for use primarily for personal, family, or household purposes and bought by way of an installment contract [CC §§ 1802.1, 1802.6]. The Act provides for statutory damages of three times the total of the finance charges and any delinquency, collection, extension, deferral or refinance charges imposed, contracted for or received on all contracts in the case of a willful violation of the Act's provisions pertaining to finance charges on installment contracts [CC § 1812.9].

 Cross References:

Discussion, see 10.05[2][c].

Form, see 10.23.

Discussion/forms, see California Forms of Pleading and Practice, Ch. 501, Sales: Retail Installment Sales (Matthew Bender).

10.05[3][b] Song-Beverly Consumer Warranty Act Provides for Civil Penalties for Breach of Warranty. A seller of consumer goods who willfully fails to comply with any provision of the Song-Beverly Act may be liable for statutory damages not exceeding twice the amount of actual damages, in addition to the actual damages themselves [CC § 1794(c)]. "Consumer goods" are any new product or part thereof that is used, bought, or leased for use primarily for personal, family, or household purposes, except for clothing and consumables [CC § 1791(a)].

Distinguish:

While the Song-Beverly Act itself applies to both express and implied warranties, the statutory damage provision does not apply to claims based solely on a breach of an implied warranty [CC § 1794(c)].

 Cross References:

Discussion, see 10.05[1][c].

Discussion of implied warranties under the Song-Beverly Act, see Ch. 24, Suing or Defending Action for Breach of Warranty.

Discussion/forms, see California Forms of Pleading and Practice, Ch. 502, Sales: Warranties (Matthew Bender).

10.05[4] Statutory Damages for Senior Citizens and Disabled Persons.

10.05[4][a] Consumer Legal Remedies Act Provides Specific Penalty for Actions Damaging Senior Citizens or Disabled Persons. The Consumer Legal Remedies Act, which prohibits various methods of unfair competition and unfair or deceptive acts or practices, permits a court to award a senior citizen or disabled person (as defined in CC § 1761) up to \$5,000 if the trier of fact finds all of the following [CC §§ 1770, 1780(b)(1)]:

- The consumer has suffered substantial physical, emotional, or economic damage;
- There is a finding of any one of the following [see CC § 3345(b)]:
 - ☐ That the defendant knew or should have known that his or her conduct was directed to one or more senior citizens or disabled persons; or
 - ☐ That the defendant's conduct caused the person to suffer a loss such as loss of a primary residence, principal employment, source of income, property set aside for

retirement or personal care, or a pension or retirement plan; or

☐ That senior citizens or disabled persons are substantially more vulnerable than other members of the public to the defendant's conduct due to their circumstances; and

- An additional award is appropriate.

Strategic Point:



The remedies of the Consumer Legal Remedies Act are not exclusive and therefore are in addition to other available statutory remedies [CC § 1752].

Distinguish:

The Consumer Legal Remedies Act also prohibits various unfair practices against persons who are not senior citizens or disabled persons, but the statutory damages of \$5,000 are not available to those persons [CC § 1780(b)].

10.05[4][b] Civil Code Provides for Trebling Any Existing Statutory Damages for Unfair Competition Against Senior Citizens or Disabled Persons. In any action for the benefit of senior citizens or disabled persons to redress unfair or deceptive acts or practice, or unfair methods of competition, whenever a trier of fact is authorized by statute to impose a fine, penalty, or other remedy to punish and deter, it may impose a fine or penalty of up to three times greater than authorized by the statute if an affirmative finding is made regarding at least one of three factors [CC § 3345(a), (b)]:

- A finding that the defendant knew or should have known that his or her conduct was directed to one or more senior citizens or disabled persons;
- The defendant's conduct caused the person to suffer a loss such as loss of a primary residence or other losses enumerated in CC § 3345(b) [see 10.05[4][a]]; or
- A finding that senior citizens or disabled persons are substantially more vulnerable than other members of the public to the defendant's conduct due to their circumstances.



Cross Reference:

Discussion/Forms relating to unfair competition, see Matthew Bender[(R)] Practice Guide: California Unfair Competition and Business Torts, Ch. 2, Unfair Competition.

10.05[5] Usury Laws Provide Statutory Damages and Civil Penalties. Any person, company, association, or corporation who has paid a greater sum than that allowed under laws regulating the legal rate of interest may recover treble the amount of money paid or value delivered [CC § 1916.12-3(a) (Appx § 3(a))]. The legal rates of interest are established by CC §§ 1916.12-1-1916.12-2 (Appx §§ 1-2).



Timing:

An action under CC § 1916.12-3 (Appx § 3) must be brought within one year after payment [CC § 1916.12-3(a) (Appx § 3)(a)].



Cross Reference:

Discussion/Forms, see California Forms of Pleading and Practice, Ch. 568: Usury.

10.05[6] Other Statutory Schemes Provide Statutory Damages and Penalties Relating to Specific Types of Contracts. Numerous other statutory schemes provide statutory damages and penalties in the context of contract actions. Listed below are some commonly used provisions authorizing statutory damages and penalties. The list below is not intended to be comprehensive, but merely illustrative:

- Use of term "prize" or "gift" in misleading fashion [*B&P Code § 17537 et seq.*].
- Cause of action for failure to return funds deposited in escrow [*CC § 1057.3(b)*].
- Dating service contracts [*CC § 1694.4*].
- Prohibition against requiring a credit card in connection with accepting a negotiable instrument [*CC § 1725(e)*].
- Breach of contract action by independent wholesale sales representative [*CC § 1738.15*].
- Sales of fine art multiples [*CC § 1745.5(c), (d)*].
- Prohibition against recording personal information in credit card transactions [*CC § 1747.8(e)*].
- Penalties for wrongfully obtaining or using consumer credit data [*CC § 1785.19*].
- Check cashing businesses [*CC § 1789.35*].
- Dance Studio and Health Studio Act [*CC § 1812.50 et seq.*].
- Discount buying services [*CC § 1812.100 et seq.*].
- Failure of auctioneer to perform statutory duties [*CC § 1812.600(l)*].
- Item pricing in grocery stores and grocery departments using automatic checkout system [*CC § 7101(a), (d)*].
- Willful violation of provisions governing consumer loans secured by real property [*Fin Code § 4970 et seq.*].
- Health facility's retaliation for patient complaints [*H&S Code §§ 1278.5(b)(3), 1432*].
- Negligent or willful disclosure of HIV test results [*H&S Code § 120980*].

Legal Topics:

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

Commercial Law (UCC)Sales (Article 2)RemediesGeneral OverviewContracts LawRemediesGeneral OverviewContracts LawSales of GoodsDamages & RemediesGeneral OverviewGovernmentsLegislationStatutory Remedies & Rights



7 of 175 DOCUMENTS

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Chapter 10 Seeking or Opposing Statutory Remedies in Contract Actions

II. DETERMINING WHETHER ANY STATUTORY DAMAGES OR CIVIL PENALTIES ARE AVAILABLE IN CONTRACT ACTION

1-10 MB Practice Guide: CA Contract Litigation 10.06

10.06 Assessing Whether Defendant Complied With All Statutory Requirements.

10.06[1] Defendant Must Have Included Any Required Provisions in Contract. Many schemes for which statutory damages are available require the seller (or other vendor) to include specified provisions in any contract. In many instances, such details as the required size of the contract's typeface, as well as the location of specified provisions in the contract, are included in the statutory scheme as well.

Example:

The Vehicle Leasing Act mandates the inclusion of a paragraph specifying that there is no cooling off period in California for vehicle leases, among other provisions, and failure to include these provisions may result in statutory damages under *CC* § 2988.5 [*CC* § 2985.8].

10.06[2] Defendant Must Have Complied With Applicable Time Periods. Some statutory schemes provide time frames for contractual relationships. Failure to observe these time periods may give rise to a cause of action under the statute.

Example:

No contract for dance studio lessons and other services may require payments or financing by the buyer in excess of one year from the date the contract is entered into [*CC* § 1812.53]. Violation of this provision may entitle the injured buyer to treble damages [*CC* § 1812.62].

10.06[3] Defendant Must Have Made All Required Disclosures. Failure to make required contractual disclosures is a common basis for statutory damages. For example, the Vehicle Leasing Act requires the disclosure, among other things, of any fee to be retained by the lessor for document preparation [*CC* § 2985.8(c)(5)].

10.06[4] Defendant Must Have Complied With All Other Statutory Requirements. Statutory schemes regulating contracts have a multitude of different requirements.

Example:

The Dance Studio and Health Studio Act, for example, provides that a contract for dance studio lessons may be canceled at any time with written notice [*CC* § 1812.54(b)].

The applicable provision authorizing the statutory damages must be scrutinized to determine which violations may be the basis for such damages. In some statutory schemes, any violation may form the basis [*see, e.g.*, Dance and Health Studio Act, CC § 1812.50 *et seq.*], while in others, only violations of particular sections may lead to statutory damages [*see, e.g.*, Vehicle Leasing Act, CC § 2985.7 *et seq.*].

Legal Topics:

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

Commercial Law (UCC)Sales (Article 2)RemediesGeneral OverviewContracts LawRemediesGeneral
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8 of 175 DOCUMENTS

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Chapter 10 Seeking or Opposing Statutory Remedies in Contract Actions

II. DETERMINING WHETHER ANY STATUTORY DAMAGES OR CIVIL PENALTIES ARE AVAILABLE IN CONTRACT ACTION

1-10 MB Practice Guide: CA Contract Litigation 10.07

10.07 Defendant's Specific Violation Must Be One for Which Statute Authorizes Statutory Damages or Civil Penalties.

Statutory damage provisions often are specific with regard to which violations of the relevant statutory scheme may serve as the basis for statutory damages or penalties.

Example:

In the Vehicle Leasing Act, the statutory damages provision, *CC* § 2988.5(a), authorizes an award of statutory damages for only violation of *CC* §§ 2985.8 and 2988. There are many other provisions in the Vehicle Leasing Act that do not provide the basis for statutory damages under *CC* § 2988.5(a). *CC* § 2986.12, for example, prohibits the lessor from offering a discount, rebate, or other consideration to a lessee on the condition that the lessee assist the lessor in leasing or selling a motor vehicle to another person. However, a violation of this section may not provide the basis for a statutory damage award under *CC* § 2988.5(a).

Legal Topics:

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

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9 of 175 DOCUMENTS

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Chapter 10 Seeking or Opposing Statutory Remedies in Contract Actions

II. DETERMINING WHETHER ANY STATUTORY DAMAGES OR CIVIL PENALTIES ARE AVAILABLE IN CONTRACT ACTION

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10.08 Plaintiff Must Be One of Those Eligible for Statutory Damages or Civil Penalties.

In addition to setting out the factual situations necessary for obtaining statutory penalties, many statutes also use defined terms. Counsel should make sure that the facts fit both.

Example:

The Song-Beverly Act provides that "any buyer of consumer goods who is damaged by a failure to comply with any obligation under this chapter or under an implied or express warranty or service contract may bring an action for the recovery of damages" [CC § 1794(a)]. "Buyer" and "consumer goods" are both defined in CC § 1791.



Warnings:

- Each statutory scheme is unique. Be sure to review the statutory requirements specific to the situation.
- The court may award payment of attorney fees to a prevailing defendant if it finds plaintiff's prosecution was not in good faith [see, e.g., CC § 1080(d)].



Cross Reference:

Applicability of warranties under Song-Beverly Act, see Ch. 24, Suing or Defending Action for Breach of Warranty.

Legal Topics:

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

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10 of 175 DOCUMENTS

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Chapter 10 Seeking or Opposing Statutory Remedies in Contract Actions

III. DETERMINING WHETHER TO SEEK STATUTORY DAMAGES OR CIVIL PENALTIES IF AVAILABLE

1-10 MB Practice Guide: CA Contract Litigation 10.09

10.09 CHECKLIST: Determining Whether to Seek Statutory Damages or Civil Penalties If Available.

☐ Determine effect of relevant statutory scheme on availability of general contract remedies; e.g.:

☐ Statutory damages or penalties may be available in addition to actual damages.

Authority:

CC § 1780(b)

Discussion:

See 10.11[1]

☐ Statutory damages or penalties may be available for specific violations of a broader statutory scheme.

Authority:

CC § 2988.5

Discussion:

See 10.12[1]

☐ Statutory damages or penalties may be sole remedy for violation of scheme.

Authority:

CC § 1812.9

Discussion:

See 10.11[2]

☐ Determine what common law remedies are available in addition to statutory remedies.

- ☐ Actual or compensatory damages.

Authority:

B&P Code § 7160

Discussion:

See 10.11[1], 10.12[1], [3]

- ☐ Equitable remedies such as rescission.

Authority:

CC § 2988.7

Discussion:

See 10.12[2]

Legal Topics:

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

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Remedies & Rights



11 of 175 DOCUMENTS

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Chapter 10 Seeking or Opposing Statutory Remedies in Contract Actions

III. DETERMINING WHETHER TO SEEK STATUTORY DAMAGES OR CIVIL PENALTIES IF AVAILABLE

1-10 MB Practice Guide: CA Contract Litigation 10.10

10.10 Options and Strategies.

Some statutes provide statutory damages and penalties that limit or curtail the availability of more general remedies (such as damages) that otherwise would exist. In these situations, statutory damages and penalties may provide the plaintiff with the only possible basis of recovery, and the plaintiff must decide whether the potential recovery makes the action worthwhile. In other cases, the attorney should consider the following points in deciding whether to pursue statutory remedies and penalties in addition to other more general contract remedies:

- In some cases, a statutory damage or penalty provision is intended to supplement actual damages available to plaintiff. In such cases, there is no drawback to seeking statutory damages.
- A statutory damage provision may authorize statutory damages "in addition to" actual damages, or may double or treble the actual damages. In these circumstances, there is no reason not to seek statutory damages if the facts warrant such a strategy.
- Some statutory damage provisions require a finding of willfulness before the damages are available. In such a case, an assessment must be made as to whether plaintiff can make the requisite showing.
- In some instances, however, statutory penalties are an alternative to other remedies, and so the plaintiff must make an election.

Distinguish--Statutory Damages Differ From Punitive Damages:

Punitive damages should not be equated with statutory damages awarded in situations in which the legislature has determined that damages in excess of compensatory or actual damages are appropriate. Although both punitive damages and statutory damages serve to motivate compliance with the law and punish wrongdoers, they are distinct legal concepts, one of which is entrusted to the fact finder and the other to the legislature. The standards applicable to punitive damages do not apply to these other statutory damage awards [*Kizer v. County of San Mateo* (1991) 53 C3d 139, 146-148, 279 CR 318, 806 P2d 1353 (statutory penalties need not be based on showing of harm to plaintiff, and may be recovered from public entity notwithstanding Gov Code § 818); *Beeman v. Burling* (1990) 216 CA3d 1586, 1597-1598, 1601, 265 CR 719 (defendant's wealth irrelevant to award of statutory damages for violation of rent control ordinance)].

Legal Topics:

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

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12 of 175 DOCUMENTS

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Chapter 10 Seeking or Opposing Statutory Remedies in Contract Actions

III. DETERMINING WHETHER TO SEEK STATUTORY DAMAGES OR CIVIL PENALTIES IF AVAILABLE

1-10 MB Practice Guide: CA Contract Litigation 10.11

10.11 Determining Types of Statutory Damages Available.

10.11[1] Some Statutes Authorize Statutory Damages or Penalties in Addition to Actual Damages. The code section authorizing the statutory damages or penalties generally specifies whether or not the statutory remedy is the sole remedy available to a plaintiff. For example, the Vehicle Leasing Act statutory damage provision states that a lessor who fails to comply with the requirements imposed under *CC* § 2985.5 or 2988 is liable in an amount equal to the sum of the following [*CC* § 2988.5(a)]:

- Any actual damages sustained by the plaintiff.
- 25 percent of the total monthly payments, not less than \$100 or more than \$1,000.
- Costs and a reasonable attorney's fee.

Similarly, the Consumer Legal Remedies Act specifies that a senior citizen or disabled person may recover, in addition to actual damages and other remedies specified, up to \$5,000 as a statutory penalty [*CC* § 1780(b)].



Cross Reference:

Discussion/forms relating to recovering actual damages in contract actions, see Ch. 7, Seeking or Opposing Damages in Contract Actions.

10.11[2] In Some Cases Statutory Penalty May Be Sole Remedy for Defendant's Violation of Statutory Scheme. Some statutory schemes provide the exclusive remedy for violation of the statutory requirements.

Example:

A statutory penalty provision in the Unruh Act allows a buyer to recover three times the amount of the total finance charges and related fees from a seller who willfully violates the Act in connection with the imposition, computation, or disclosures relating to finance charges on a retail installment contract [*CC* § 1812.9]. Nothing in this provision, however, authorizes any other recovery or remedy such as, for example, indirect or consequential damages.

**Strategic Point:**

Costs and attorneys' fees are often available in addition to the statutory damages or penalties. Statutory schemes should be scrutinized carefully for authorization of costs and fees [*see, e.g., CC § 1811.1*].

**Cross Reference:**

Discussion/forms relating to costs and attorneys' fees in contract actions, see Ch. 12, Recovering Attorney's Fees and Costs in Contract Litigation.

Legal Topics:

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

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13 of 175 DOCUMENTS

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Chapter 10 Seeking or Opposing Statutory Remedies in Contract Actions

III. DETERMINING WHETHER TO SEEK STATUTORY DAMAGES OR CIVIL PENALTIES IF AVAILABLE

1-10 MB Practice Guide: CA Contract Litigation 10.12

10.12 Analyzing Whether Seeking Statutory Damages Precludes Seeking Common Law Remedies.

10.12[1] Statutory Damage Provisions Often Only Pertain to Specific Violations. Frequently, a code section authorizing statutory damages or penalties will apply only to one or two provisions of a voluminous statutory scheme. For example, the Vehicle Leasing Act's penalty provision only applies to violations of *CC* §§ 2985.8 and 2988 [*CC* § 2988.5(a)]. However, the plaintiff still may seek common law remedies such as money damages if he or she is otherwise damaged by a breach of a leasing contract [*CC* § 3300].

10.12[2] Statutes May Provide Choice Between Statutory Damages and Common Law Remedy. Some statutes may require a plaintiff to elect between statutory and non-statutory remedies. The Vehicle Leasing Act, for example, permits the lessee to choose between the statutory damage provision of *CC* § 2988.5 and rescission if the failure to comply with specified provisions of the Act was willful [*CC* § 2988.7].

Cross Reference:

Discussion/forms relating to rescission, see Ch. 8, Seeking or Opposing Equitable Remedies in Contract Actions.

10.12[3] Many Schemes Provide for Doubling or Trebling of Actual Damages. A number of statutory damage or penalty schemes authorize a doubling or trebling of actual damages, so that the damage amount is based on plaintiff's actual damages [see, e.g., *CC* § 1794(c) (doubling of actual damages for willful violation of Song-Beverly Act); *CCP* § 1029.8 (trebling of actual damages when contractor causing damage is unlicensed)].

Cross Reference:

Discussion/forms relating to recovering actual damages in contract actions, see Ch. 7, Seeking or Opposing Damages in Contract Actions.

Legal Topics:

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

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Remedies & Rights



14 of 175 DOCUMENTS

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Chapter 10 Seeking or Opposing Statutory Remedies in Contract Actions

IV. PLEADING ENTITLEMENT TO STATUTORY DAMAGES OR CIVIL PENALTIES IN CONTRACT ACTION

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10.13 CHECKLIST: Pleading Entitlement to Statutory Damages or Civil Penalties in Contract Action.

- ☐ If complaint alleges common law causes of action in addition to statutory causes of action, plead statutory violation as a separate cause of action.

Authority:

CCP § 425.10(a)(1); Cal Rules Ct, Rule 2.112

Discussion:

See 10.15

- ☐ Plead all prerequisites to award of statutory damages in complaint.

Authority:

Bach v. McNelis (1989) 207 CA3d 852, 865, 255 CR 232

Discussion:

See 10.16

- ☐ Request statutory damages in complaint's prayer.

Authority:

CCP § 425.10(a)(2)

Discussion:

See 10.17

Legal Topics:

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

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15 of 175 DOCUMENTS

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Chapter 10 Seeking or Opposing Statutory Remedies in Contract Actions

IV. PLEADING ENTITLEMENT TO STATUTORY DAMAGES OR CIVIL PENALTIES IN CONTRACT ACTION

1-10 MB Practice Guide: CA Contract Litigation 10.14

10.14 Options and Strategies.

Often a request for statutory damages will be included in a complaint with other causes of action (e.g., for breach of contract). The attorney must allege statutory violation in such a manner as to cover all essential elements of a cause of action as established by the statute. Additionally, the prayer must include a specific demand for the damages authorized by the statute.

Legal Topics:

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

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16 of 175 DOCUMENTS

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Chapter 10 Seeking or Opposing Statutory Remedies in Contract Actions

IV. PLEADING ENTITLEMENT TO STATUTORY DAMAGES OR CIVIL PENALTIES IN CONTRACT ACTION

*1-10 MB Practice Guide: CA Contract Litigation 10.15***10.15 Complaint or Cross-Complaint Must Assert Violation of Statute in Addition to Contract Causes of Action.**

The general pleading statutes do not specify any special rules or requirements for pleading statutory remedies. Although there is little law directly on point, it appears that if a statutory remedy arises out of the same facts as a breach of contract remedy, it should be permissible to seek the statutory remedy as part of the breach of contract cause of action. In any event, this appears to be a common practice. The important consideration is that the defendant must be put on notice that statutory remedies are being sought [see *Ostling v. Loring* (1994) 27 CA4th 1731, 1736, 1750].

**Strategic Point:**

As a matter of good drafting practice, if the statutory remedy is pled in the same count as a breach of contract, the violation of the statute should be stated in a separate paragraph for clarity, in ordinary and concise language [see CCP § 425.10(a)(1)], and the prayer must specifically request the statutory damages [see CCP § 425.10(a)(2)].

If it is necessary to plead different facts to establish a statutory remedy, it is advisable to plead the statutory violation as a separate cause of action. Combining different claims involving separate and distinct acts in the same cause of action risks a demurrer [see, e.g., *Zumbrun v. University of Southern California* (1972) 25 CA3d 1, 9 (special demurrer sustained when plaintiff combined breach of contract and third party beneficiary claims--each involving separate and distinct acts--in single cause of action; court observed that plaintiff should set forth separate theories in separate counts to facilitate adjudication of their validity)]. When a complaint contains separate causes of action, each must be separately numbered [Cal Rules Ct, Rule 2.112].

It is not essential that the complaint cite the exact statute under which the damages are sought, or, in appropriate cases, state that double or treble damages are a possible outcome. The complaint need only notify the defendant of the prospect of statutory damages. This is sufficient to put the defendant on notice to inquire which statutes might apply [*Ostling v. Loring* (1994) 27 CA4th 1731, 1750]. Nevertheless, the better practice is to plead both the statutory violation and the remedy as clearly as possible.

**Cross References:**

Discussion/forms relating to preparing complaints, see Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, Ch. 7, Complaints.

Discussion/forms relating to pleading of statutes and ordinances, see California Forms of Pleading and Practice, Ch. 531, Statutes and Ordinances (Matthew Bender).

Legal Topics:

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

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17 of 175 DOCUMENTS

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Chapter 10 Seeking or Opposing Statutory Remedies in Contract Actions

IV. PLEADING ENTITLEMENT TO STATUTORY DAMAGES OR CIVIL PENALTIES IN CONTRACT ACTION

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10.16 Complaint or Cross-Complaint Must Plead Any Prerequisites to Award of Statutory Damages.

The complaint or cross-complaint must plead every fact that is essential to the cause of action under the statute [*Bach v. McNelis* (1989) 207 CA3d 852, 865, 255 CR 232]. The complaint may be framed in the language of the statute [*Goss v. Fano* (1952) 114 CA2d 819, 823, 251 P2d 337]. Thus, if a statute imposes statutory damages or a penalty for violation of a specific requirement, facts supporting that violation must be pled.



Cross Reference:

Discussion/forms relating to preparing complaints, see Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, Ch. 7, Complaints.

Legal Topics:

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

Civil Procedure Pleading & Practice Pleadings Complaints General Overview Commercial Law (UCC) Sales (Article 2) Remedies General Overview Contracts Law Remedies General Overview Contracts Law Sales of Goods Damages & Remedies General Overview Governments Legislation Statutory Remedies & Rights



18 of 175 DOCUMENTS

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Chapter 10 Seeking or Opposing Statutory Remedies in Contract Actions

IV. PLEADING ENTITLEMENT TO STATUTORY DAMAGES OR CIVIL PENALTIES IN CONTRACT ACTION

1-10 MB Practice Guide: CA Contract Litigation 10.17

10.17 Complaint or Cross-Complaint Prayer Must Demand Statutory Damages.

The complaint or cross-complaint must contain a demand for the damages to which the plaintiff or cross-complainant claims he or she is entitled, along with the amount [CCP § 425.10(a)(2)].



Cross Reference:

Discussion/forms relating to preparing complaints, see Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, Ch. 7, Complaints.

Legal Topics:

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

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19 of 175 DOCUMENTS

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Chapter 10 Seeking or Opposing Statutory Remedies in Contract Actions
V. OPPOSING REQUEST FOR STATUTORY DAMAGES IN CONTRACT ACTION

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10.18 CHECKLIST: Opposing Request for Statutory Damages in Contract Action.

☐ Determine whether complaint, on its face, alleges facts sufficient to support an award of statutory damages.

☐ Determine whether plaintiff is proper party to seek statutory damages.

Authority:

CC § 2985.7

Discussion:

See 10.20

☐ Determine whether complaint alleges facts sufficient to support statutory damage award.

Authority:

CC § 1812.62

Discussion:

See 10.20

☐ Determine which type of responsive pleading is most appropriate.

☐ If complaint does not allege facts sufficient to support statutory damage award, consider demurrer.

Authority:

CCP § 430.10

Discussion:

See 10.21

☐ If plaintiff is not appropriate person to seek statutory damages pursuant to the statutory scheme, consider demurrer.

Authority:

CCP § 431.30

Discussion:

See 10.21[1]

☐ If complaint properly alleges breach of contract cause of action, but not statutory damages cause of action, consider motion to strike.

Authority:

CCP §§ 435-437

Discussion:

See 10.21[2]

☐ If complaint alleges sufficient facts to support statutory damages claim, file answer.

Authority:

CCP § 431.30

Discussion:

See 10.21[3]

Legal Topics:

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

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20 of 175 DOCUMENTS

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Chapter 10 Seeking or Opposing Statutory Remedies in Contract Actions
V. OPPOSING REQUEST FOR STATUTORY DAMAGES IN CONTRACT ACTION

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10.19 Options and Strategies.

Responding to a complaint requesting statutory damages or penalties requires a thorough examination of the statutory scheme. Counsel must make certain that the transaction which led to the complaint's filing is covered by the statutory scheme. Counsel should read the definitions section of the scheme carefully to ensure that the parties and the contract fit the definitions. After this has been determined, counsel should read the operative provision authorizing statutory damages to ascertain whether the violation alleged, if proven, entitles plaintiff to statutory damages or penalties. At this point, a decision can be made as to which type of responsive pleading to file: a demurrer, a motion to strike, or an answer.

➡ Cross References:

Discussion/forms relating to demurrers, see Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, Ch. 11, Demurrers and Motions for Judgment on the Pleadings.

Discussion/forms relating to motions to strike, see Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, Ch. 12, Motions to Strike.

Legal Topics:

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

Civil Procedure Pleading & Practice Defenses, Demurrers & Objections General Overview Commercial Law (UCC) Sales (Article 2) Remedies General Overview Contracts Law Remedies General Overview Contracts Law Sales of Goods Damages & Remedies General Overview Governments Legislation Statutory Remedies & Rights



21 of 175 DOCUMENTS

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Chapter 10 Seeking or Opposing Statutory Remedies in Contract Actions
V. OPPOSING REQUEST FOR STATUTORY DAMAGES IN CONTRACT ACTION

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10.20 Determining Whether Complaint Alleges Violation Sufficient to Support Award of Statutory Damages.

10.20[1] Underlying Transaction Must Fall Within Statutory Scheme. In determining how to respond to a complaint seeking statutory damages, the first step is to determine whether or not the underlying transaction in question is covered by the statutory scheme. The definitions section of the relevant statutory scheme usually will specify which transactions are covered.

Example:

In the Vehicle Leasing Act, the terms "motor vehicle," "lessor," "lessee," and "lease contract" define the scope of the statutory scheme [CC § 2985.7].

10.20[2] Plaintiff Must Be Entitled to Statutory Damages for Alleged Violation. If the underlying transaction falls within the statute under which plaintiff is seeking recovery, defendant must determine if the alleged violation will support the recovery requested. The operative provision imposing the statutory damages or penalties usually will specify the violations for which the damages or penalties are available. In some statutory schemes, statutory damages or penalties are available only for specified violations [see, e.g., Vehicle Leasing Act, CC § 2985.7 *et seq.*]. In others, statutory damages or penalties are available for any "violation of this title" [see, e.g., Dance Studio and Health Studio Act, CC § 1812.50 *et seq.*].

Legal Topics:

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

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22 of 175 DOCUMENTS

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Chapter 10 Seeking or Opposing Statutory Remedies in Contract Actions
V. OPPOSING REQUEST FOR STATUTORY DAMAGES IN CONTRACT ACTION

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10.21 Drafting Appropriate Responsive Pleading.

10.21[1] Demurrer May Be Filed If Transaction Is Not Covered by Statutory Scheme or Statutory Damages Are Not Available for Alleged Violation. If the transaction is not covered by the statutory scheme or if the complaint alleges a violation which does not entitle plaintiff to statutory damages, defendant may file a demurrer on the ground that the complaint does not state facts sufficient to constitute a cause of action [*CCP* § 430.10(e)].

Cross Reference:

Discussion/forms relating to demurrers, see Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, Ch. 11, Demurrers and Motions for Judgment on the Pleadings.



Warning: A demurrer may be taken only to an entire cause of action [*CCP* § 430.50(a)]. If the same general facts constituting the cause of action for statutory damages also constitute a cause of action for breach of contract, defendant should consider a motion to strike instead.



Strategic Point:

Motions to strike and motions for demurrer are rarely granted without leave to amend. Counsel may wish to consider waiting to bring a summary judgment motion instead.

10.21[2] Motion to Strike May Be Used If It Is Inappropriate to Demur to Entire Cause of Action. A motion to strike enables defendant to strike a portion of a cause of action, particular language in a pleading, or a claim for damages [*CCP* § 436].

Cross Reference:

Discussion/forms relating to motions to strike, see Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, Ch. 12, Motions to Strike.

**Strategic Point--Defendant:**

Motions to strike also may be brought in conjunction with a motion for judgment on the pleadings [*CCP* §§ 435(e), 438].

10.21[3] Party Should File Answer If There Are No Grounds for Demurrer or Motion to Strike. Defendant's answer must controvert, either by general or specific denials, the material allegations of the complaint, or raise new matter constituting an affirmative defense [*CCP* § 431.30(b)].

**Cross Reference:**

Discussion/forms relating to answers, see Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, Ch. 14, Answers.

Legal Topics:

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

Civil Procedure Pleading & Practice Defenses, Demurrers & Objections Demurrers Commercial Law (UCC) Sales (Article 2) Remedies General Overview Contracts Law Remedies General Overview Contracts Law Sales of Goods Damages & Remedies General Overview Governments Legislation Statutory Remedies & Rights



23 of 175 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 10 Seeking or Opposing Statutory Remedies in Contract Actions
VI. FORMS*1-10 MB Practice Guide: CA Contract Litigation 10.22***10.22 Complaint for Damages and Statutory Penalty for False Representations Under Home Improvement Contract [B&P Code § 7160]--Optional Allegations for Treble Damages Against Unlicensed Contractor [CCP Code § 1029.8].****Complaint for Statutory Damages Under Home Improvement Contract [B&P Code § 7160]--Optional Allegations for Treble Damages Against Unlicensed Contractor [CCP Code § 1029.8].**

[Name of attorney]

_____[Street address]

_____[City, state, and ZIP]

_____[Area code and phone number]

_____[State Bar no. of attorney]

Attorney for _____[name of party]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

[name(s)] _____,

Plaintiff(s)

vs.

[name(s)] _____

[and DOES 1 THROUGH _____]

Defendant(s).

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NO.

COMPLAINT FOR DAMAGES, PENALTY, AND
ATTORNEY'S FEES

[LIMITED CIVIL CASE]

[Amount Demanded _____]

_____(Exceeds or Does Not
Exceed) \$10,000]

1-10 MB Practice Guide: CA Contract Litigation 10.22

Plaintiff _____ [name] alleges:

1. Plaintiff is an individual residing in _____ [city, if any, and county], California.

[For an individual defendant]

2. Defendant _____ [name] is an individual residing in _____ [city, if any, and county], California [in the (name of judicial district, if any) _____] [and doing business therein under the fictitious business name of _____].

[OR, for a domestic corporation or domestic limited liability company]

2. Defendant _____ [name] is, and at all times herein mentioned was, a _____ [corporation or limited liability company] organized and existing under the laws of California [, with its principal place of business in _____ (city, if any, and county), California (, in the _____ [name of judicial district, if any])].

[OR, for a foreign corporation or foreign limited liability company]

2. Defendant _____ [name] is, and at all times herein mentioned was, a _____ [corporation or limited liability company] organized and existing under the laws of _____ [state or foreign country][, with its principal place of business in _____ (city, if any, and county), California (, in the _____ [name of judicial district, if any])].

[OR, for a general or limited partnership or an unincorporated association]

2. Defendant _____ [name] is, and at all times herein mentioned was, _____ [a partnership or an unincorporated association] sued herein under the name _____ [it has assumed or by which it is known][, with its principal place of business in _____ (city, if any, and county), California (, in the _____ [name of judicial district, if any])]. [Defendants (names of individual partners or members) _____ are, and at all times herein mentioned were, members of that _____ (partnership or unincorporated association) (and are, and at all times herein mentioned were, residents of _____ County, California)].

[CONTINUE]

3. Plaintiff is ignorant of the true names and capacities of Defendants sued herein as DOES 1 through _____ [numeral, e.g., 50], inclusive, and therefore sues these Defendants by these fictitious names. Plaintiff will amend this complaint to allege their true names

and capacities when ascertained. [Plaintiff is informed and believes and thereon alleges that each of the fictitiously named Defendants is responsible in some manner for the occurrences herein alleged, and that Plaintiff's damages as herein alleged were proximately caused by those Defendants.]

4. Plaintiff is informed and believes and thereon alleges that at all times material to this complaint, _____ [identify defendants to whom agency allegation applies, e.g., each of the Defendants or each of the individual Defendants or Defendant Harry Jones], [and each of the Defendants fictitiously named in this complaint,] in addition to acting for himself, herself, or itself and on his, her, or its own behalf individually, is and was acting as the agent, servant, employee and representative of, and with the knowledge, consent and permission of, and in conspiracy with, each and all of the Defendants and within the course, scope and authority of that agency, service, employment, representation, and conspiracy. Plaintiff further alleges on information and belief that the acts of each of the Defendants were fully ratified by each and all of the Defendants. Specifically, and without limitation, Plaintiff alleges on information and belief that the actions, failures to act, breaches, conspiracy, and misrepresentations alleged herein and attributed to one or more of the specific Defendants were approved, ratified, and done with the cooperation and knowledge of each and all of the Defendants.

5. On or about _____ [date], in _____ [city], _____ County, California, Defendant _____ [name of contractor] represented to Plaintiff that _____ [specify false representation, e.g., the installation of certain materials in the outer walls of Plaintiff's home would reduce Plaintiff's heating costs by 90 percent].

6. The representation made by Defendant was in fact false. The true facts were _____ [specify, e.g., that the installation of the materials would reduce Plaintiff's heating costs by only five percent].

7. When Defendant made the representation, he/she knew it to be false and made it with the intent to defraud and deceive Plaintiff and to induce Plaintiff to contract for the work of improvement.

8. Plaintiff, at the time the representation was made, was ignorant of its falsity and believed it to be true. Plaintiff was induced to enter into a contract for _____ [specify work of improvement, e.g., the installation of certain materials in the outer walls of Plaintiff's home to reduce Plaintiff's heating bill] in reliance on the false representation, and would not have entered into the contract had he/she known the true facts. [A copy of the contract is attached as Exhibit A and incorporated by reference.]

9. As a proximate result of Defendant's false representation, Plaintiff has been damaged in the sum of \$ _____ in that _____ [specify measure of damages, e.g., Plaintiff paid Defendant \$5,000 for the installation while the actual value of the installation was only \$2,500].

[ADD if plaintiff is seeking statutory treble damages on ground that defendant is an unlicensed contractor]

10. Defendant entered into the above-referenced contract with Plaintiff, and acted as a contractor within the meaning of *Business and Professions Code Section 7026* [or *7026.1*] at all times relevant to this action, without holding a valid contractor's license as required by *Business and Professions Code Section 7028*. Therefore, Plaintiff is entitled to treble damages and, if the court in its discretion so determines, attorney's fees and costs incurred in connection with this action, as provided by *Code of Civil Procedure Section 1029.8*.

[CONTINUE]

WHEREFORE, Plaintiff prays judgment against Defendant[s, and each of them,] as follows:

[EITHER]

1. For damages in the sum of \$ _____;

[OR, if seeking treble damages based on fact that contractor is unlicensed:]

1. For treble damages in the sum of \$ _____, as provided by *Code of Civil Procedure Section 1029.8*;

[CONTINUE]

2. For a penalty of \$500, as provided by *Business and Professions Code Section 7160*;

3. For reasonable attorney's fees in the sum of \$ _____ [amount], as provided by *Business and Professions Code Section[s 1029.8] and 7160*;

4. For costs of suit herein incurred; and

5. For such other and further relief as the court may deem proper.

Dated: _____

[firm name, if any] _____

By: [signature] _____

[typed name] _____

Attorney for [party's status and name] _____

[ADD following verification, if applicable]

VERIFICATION

I am the Plaintiff in the above-entitled action. I have read the foregoing complaint and know the contents of the complaint. The same is true of my own knowledge, except as to those matters which are alleged in the complaint on information and belief, and, as to those matters, I believe it to be true.

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

[date] _____

[signature] _____

[typed name] _____

NOTES.

Authority:

B&P Code § 7160; CCP § 1029.8

Grounds for Complaint:

See 10.05[2][a], [b]

Drafting Complaint:

See 10.13-10.20

Legal Topics:

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

Civil ProcedurePleading & PracticePleadingsComplaintsGeneral OverviewCommercial Law (UCC)Sales (Article 2)RemediesGeneral OverviewContracts LawRemediesGeneral OverviewContracts LawSales of GoodsDamages & RemediesGeneral OverviewGovernmentsLegislationStatutory Remedies & Rights



24 of 175 DOCUMENTS

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Chapter 10 Seeking or Opposing Statutory Remedies in Contract Actions
VI. FORMS*1-10 MB Practice Guide: CA Contract Litigation 10.23***10.23 Complaint for Statutory Penalty--Retail Installment Contract [CC § 1812.9].****Complaint for Statutory Penalty--Retail Installment Contract [CC § 1812.9].**

[Name of attorney]

_____[Street address]

_____[City, state, and ZIP]

_____[Area code and phone number]

_____[State Bar no. of attorney]

Attorney for _____[name of party]

SUPERIOR COURT OF CALIFORNIA,

COUNTY OF _____

[name(s)] _____,

Plaintiff(s)

vs.

[name(s)] _____

[and DOES 1 THROUGH

_____] _____

Defendant(s).

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NO.

COMPLAINT FOR STATUTORY PENALTY,
DAMAGES, AND ATTORNEY'S FEES
[LIMITED CIVIL CASE]
[Amount Demanded]_____(Exceeds or Does Not
Exceed) \$10,000]

Plaintiff _____[name] alleges:

1. Plaintiff is an individual residing in _____[city, if any, and county], California, [in the (name of

judicial district, if any) _____].

[CONTINUE]

[For an individual defendant]

2. Defendant _____ [name] is an individual residing in _____ [city, if any, and county], California [in the (name of judicial district, if any) _____] [and doing business therein under the fictitious business name of _____], and is _____ [authorized or licensed] to engage in, and engaging in, business as a retail seller, within the meaning of *Civil Code Section 1802.3*, of _____ [describe defendant's business, e.g., household goods and appliances].

[OR, for a domestic corporation or domestic limited liability company]

2. Defendant _____ [name] is, and at all times herein mentioned was, a _____ [corporation or limited liability company] organized and existing under the laws of California [, with its principal place of business in _____ (city, if any, and county), California (, in the _____ [name of judicial district, if any])], and is _____ [authorized or licensed] to engage in, and engaging in, business as a retail seller, within the meaning of *Civil Code Section 1802.3*, of _____ [describe defendant's business, e.g., household goods and appliances].

[OR, for a foreign corporation or foreign limited liability company]

2. Defendant _____ [name] is, and at all times herein mentioned was, a _____ [corporation or limited liability company] organized and existing under the laws of _____ [state or foreign country], with its principal place of business in _____ (city, if any, and county), California (, in the _____ [name of judicial district, if any])], and is _____ [authorized or licensed] to engage in, and engaging in, business as a retail seller, within the meaning of *Civil Code Section 1802.3*, of _____ [describe defendant's business, e.g., household goods and appliances].

[OR, for a general or limited partnership or an unincorporated association]

2. Defendant _____ [name] is, and at all times herein mentioned was, _____ [a partnership or an unincorporated association] sued herein under the name _____ [it has assumed or by which it is known], with its principal place of business in _____

_____ (city, if any, and county), California
 (, in the _____ [name of judicial district, if any]). [Defendants (names of individual partners or
 members) _____ are, and at all times herein
 mentioned were, members of that _____
 (partnership or unincorporated association) (and are, and at all times herein mentioned were, residents of
 _____ County, California)], and is
 _____ [authorized or licensed] to engage in,
 and engaging in, business as a retail seller, within the meaning of *Civil Code Section 1802.3*, of
 _____ [describe defendant's business, e.g.,
 household goods and appliances].

[CONTINUE]

3. Plaintiff is ignorant of the true names and capacities of Defendants sued herein as DOES 1 through
 _____ [numeral, e.g., 50], inclusive, and
 therefore sues these Defendants by these fictitious names. Plaintiff will amend this complaint to allege their true names
 and capacities when ascertained. [Plaintiff is informed and believes and thereon alleges that each of the fictitiously
 named Defendants is responsible in some manner for the occurrences herein alleged, and that Plaintiff's damages as
 herein alleged were proximately caused by those Defendants.]

4. Plaintiff is informed and believes and thereon alleges that at all times material to this complaint,
 _____ [identify defendants to whom agency
 allegation applies, e.g., each of the Defendants or each of the individual Defendants or Defendant Harry Jones], [and
 each of the Defendants fictitiously named in this complaint,] in addition to acting for himself, herself, or itself and on
 his, her, or its own behalf individually, is and was acting as the agent, servant, employee and representative of, and with
 the knowledge, consent and permission of, and in conspiracy with, each and all of the Defendants and within the course,
 scope and authority of that agency, service, employment, representation, and conspiracy. Plaintiff further alleges on
 information and belief that the acts of each of the Defendants were fully ratified by each and all of the Defendants.
 Specifically, and without limitation, Plaintiff alleges on information and belief that the actions, failures to act, breaches,
 conspiracy, and misrepresentations alleged herein and attributed to one or more of the specific Defendants were
 approved, ratified, and done with the cooperation and knowledge of each and all of the Defendants.

[EITHER]

5. On or about _____ [date], in
 _____ County, California, Plaintiff and
 Defendant _____ [name] entered into a written retail installment contract by the terms of which
 Defendant _____ [name] agreed to sell and Plaintiff agreed to buy the following
 _____ [goods or services]:
 _____ [describe goods or services, e.g.,
 Lucky Stove Model 3372] for a price payable in installments. A copy of the contract is attached to this complaint as
 Exhibit A and incorporated by reference.

[OR]

5. On or about _____ [date], Plaintiff and Defendant _____ [name of lender] entered
 into a written agreement by the terms of which Defendant _____ [name of lender] agreed to lend to

Plaintiff the sum of \$ _____, and Plaintiff agreed to repay this sum with interest. Plaintiff entered into the loan agreement for the purpose of financing the purchase of the following _____ [goods or services] from Defendant _____ [name of seller]:
 _____ [describe goods or services purchased, e.g., Lucky Stove Model 3372]. A copy of the loan agreement is attached as Exhibit A and incorporated by reference. Plaintiff is informed and believes and thereon alleges that Defendant _____ [name of lender] and Defendant _____ [name of seller]
 _____ [specify facts of relationship, e.g., are related by common ownership and control and the relationship was a material factor in the loan transaction or share in the profits and losses of either or both the sale of the above-described goods or services and the loan agreement or both].

[CONTINUE]

6. The _____ [goods or other as appropriate services] purchased pursuant to the above-described retail installment contract and all _____ [goods or other as appropriate services] subsequently purchased by Plaintiff from Defendant were bought primarily for Plaintiff's _____ [personal or family or household] purposes, thereby subjecting the contract to the requirements of the Retail Installment Sales Act, *Civil Code Section 1801 et seq.*

7. The above-described retail installment contract provided in part that _____ [show that contract is within the provisions of CC § 1801.1, e.g., the Defendant, may, at its option, add subsequent purchases made by the buyer, Plaintiff, to the contract, and that the total price of the goods covered by the contract is to be increased by the price of such additional goods, and that all finance charges and installment payments, at the seller's option, may be increased proportionately, and that all terms and conditions of the contract apply equally to any subsequent purchases].

8. On or about _____ [date], in _____ [city], _____ County, California, Plaintiff made a subsequent purchase from Defendant _____ of the following _____ [goods or services], all of which were purchased by Plaintiff primarily for _____ [personal or family or household] purposes: _____ [list goods and/or services purchased].

9. _____ [Set forth violation(s) of Unruh Act in connection with imposing, computing, or disclosing finance charge on consolidated total of two or more contracts under CC § 1808.1 et seq., e.g., Defendant has violated the provisions of Civil Code Section 1808.2 with respect to the subsequent purchase described above in that Defendant has failed to provide Plaintiff with a memorandum disclosing the amount of the finance charge and other information pertinent to the transaction prior to the due date of the first installment, or at any time thereafter, as required by that section].

10. Plaintiff is informed and believes and thereon alleges that the violation(s) of _____ [specify Civil Code section(s) violated by defendant as alleged in this complaint, e.g., Civil Code Section 1801 et seq.] was/were willful.

11. By reason of the above-described willful violation[s] of Civil Code Section[s] _____ [specify], Plaintiff is entitled to recover from Defendant three times the sum of \$ _____,

_____ , which is the total amount of finance charges and delinquency, collection, extension, deferral, and refinance charges imposed, contracted for, or received on the consolidated total of the above-described retail installment contracts.

12. By reason of the above-described willful violation(s) of Civil Code Section[s] _____

_____ [specify, e.g., 1801 et seq.],

Defendant _____ [name] is barred from recovering any finance, delinquency, collection, extension, deferral, or refinance charges in connection with the above-described retail installment contract(s)[, and any subsequent purchases made by Plaintiff under that contract].

13. Under *Civil Code Section 1811.1*, Plaintiff is entitled to recover reasonable attorney's fees and costs incurred, and to be incurred, in this action, in an amount to be determined by the court.

WHEREFORE, Plaintiff prays judgment against Defendant as follows:

1. For the sum of \$ _____, which is three times the total of all _____ [finance charges and/or finance and/or delinquency and/or collection and/or extension and/or deferral and/or refinance charges] imposed, contracted for, or received by Defendant in connection with the above-described retail installment contract(s)[, and all subsequent purchases thereunder];

2. For a declaration that Defendant is barred from any recovery of those charges;

3. For reasonable attorney's fees in an amount to be determined by the court;

4. For costs of suit incurred; and

5. For such other and further relief as the court may deem proper.

Dated: _____

[firm name, if any] _____

By: [signature] _____

[typed name] _____

Attorney for [party's status and name] _____

[ADD following verification, if applicable]

VERIFICATION

I am the Plaintiff in the above-entitled action. I have read the foregoing complaint and know the contents of the complaint. The same is true of my own knowledge, except as to those matters which are alleged in the complaint on information and belief, and, as to those matters, I believe it to be true.

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

[date] _____

[signature] _____

[typed name] _____

NOTES.

Authority:

CC § 1812.9

Grounds for Complaint:

See 10.05[2][c], [3][a]

Drafting Complaint:

See 10.13 -10.20

Legal Topics:

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

Civil Procedure Pleading & Practice Pleadings Complaints General Overview Commercial Law (UCC) Sales (Article 2) Remedies General Overview Contracts Law Remedies General Overview Contracts Law Sales of Goods Damages & Remedies General Overview Governments Legislation Statutory Remedies & Rights



25 of 175 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 11 Seeking or Opposing Declaratory Relief in Contract Matters

1-11 MB Practice Guide: CA Contract Litigation 11.syn

§ 11.syn Synopsis to Chapter 11: Seeking or Opposing Declaratory Relief in Contract Matters

11.01 Scope.

11.02 Objective and Strategy.

11.02[1] Declaratory Relief Can Eliminate Uncertainties and Controversies.

11.02[2] Use of Action by Party Seeking Enforcement of Contract.

11.02[3] Use of Action by Party Opposing Enforcement of Contract.

11.03 CHECKLIST: Seeking Declaratory Relief in Contract Matters.

11.04 Actual Controversy Is Required for Declaratory Relief; Breach of Obligation Is Not Required.

11.05 Controversy Involving Past Wrongs May Be Basis for Declaratory Relief When Wrongs May Be Repeated.

11.05[1] Declaratory Relief Not Available for Past Wrongs Alone.

11.05[2] Declaratory Relief Available When Parties Have Continuing Relationship.

11.05[3] Declaratory Relief Available When There Is Reasonable Expectation Wrong Will Be Repeated.

11.06 Specific Situations in Which Declaratory Relief Is Appropriate.

11.07 Plaintiff Must Exhaust Administrative Remedies.

11.08 Plaintiff Generally Must Seek Declaratory Relief Within Limitations Period on Underlying Cause of Action.

11.09 Declaratory Relief Does Not Preclude Other Remedies.

11.10 Pleading Requirements.

11.10[1] Complaint or Cross-Complaint Must Show Existence of Controversy.

11.10[2] Facts Need Not Establish Plaintiff Is Entitled to Favorable Judgment.

11.10[3] Noticed Motion Required for Declaratory Relief Action to Take Trial Precedence.

11.11 Declaratory Relief Action Has Precedence on Trial Calendar.

11.12 Right to Jury Trial Depends on Nature of Issues.

11.13 Court's Declaration Has Force of Final Judgment.

11.13[1] Declaration May Be Affirmative or Negative.

11.13[2] Judgment Has Res Judicata Effect As to Issues Declared.

11.13[3] Declaration May Be Rendered on Motion for Summary Judgment.

11.14 Court Has Discretion to Refuse Declaratory Relief.

11.15 Prevailing Party May Recover Attorney's Fees If Contract So Provides.

11.16 CHECKLIST: Opposing Declaratory Relief in Contract Matters.

11.17 Declaratory Relief Is Barred If Statute of Limitations Has Run on Cause of Action Arising From Breach.

11.18 Complaint for Declaratory Relief May Be Subject to Defense of Res Judicata.

11.19 Declaratory Relief May Be Denied If Not Necessary or Proper.

11.20 Party May Object to Granting of Declaratory Relief by Demurrer to Complaint or Affirmative Defenses in Answer.

11.21 Party May Obtain Declaration Adverse to Party Seeking Declaratory Relief by Pretrial Motion.

11.21[1] Court May Render Judgment on Merits on Motion for Judgment on Pleadings.

11.21[2] Summary Judgment Is Appropriate When Issues Can Be Resolved As Matter of Law.

11.22 Complaint for Declaratory Relief.

Complaint for Declaratory Relief.

11.23 Answer to Complaint for Declaratory Relief With Affirmative Defenses.

Answer to Complaint for Declaratory Relief With Affirmative Defenses.

11.24 Points and Authorities for Party Seeking Declaratory Relief--Sufficiency of Complaint As to Declaratory Relief.

Points and Authorities for Party Seeking Declaratory Relief--Sufficiency of Complaint As to Declaratory Relief.

11.25 Points and Authorities for Party Seeking Declaratory Relief--Action Not Barred by Statute of Limitations.

Points and Authorities for Party Seeking Declaratory Relief--Action Not Barred by Statute of Limitations.

11.26 Points and Authorities for Party Seeking Declaratory Relief--Declaratory Relief Appropriate When Parties Have Continuing Relationship and/or Wrong May Be Repeated.

Points and Authorities for Party Seeking Declaratory Relief--Declaratory Relief Appropriate When Parties Have Continuing Relationship and/or Wrong May Be Repeated.

11.27 Points and Authorities for Party Opposing Declaratory Relief--Action Barred by Statute of Limitations.

Points and Authorities for Party Opposing Declaratory Relief--Action Barred by Statute of Limitations.

11.28 Points and Authorities for Party Opposing Declaratory Relief--Declaratory Relief Not Necessary or Proper.

Points and Authorities for Party Opposing Declaratory Relief--Declaratory Relief Not Necessary or Proper.

11.29 Points and Authorities for Party Opposing Declaratory Relief--Opposing Party Entitled to Declaration Adverse to Party Seeking Relief--On Motion for Judgment on Pleadings.

Points and Authorities for Party Opposing Declaratory Relief--Opposing Party Entitled to Declaration Adverse to Party Seeking Relief--On Motion for Judgment on Pleadings.

11.30 Points and Authorities for Party Opposing Declaratory Relief--Opposing Party Entitled to Declaration Adverse to Party Seeking Relief--On Motion for Summary Judgment.

Points and Authorities for Party Opposing Declaratory Relief--Opposing Party Entitled to Declaration Adverse to Party Seeking Relief--On Motion for Summary Judgment.



26 of 175 DOCUMENTS

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Chapter 11 Seeking or Opposing Declaratory Relief in Contract Matters

I. STRATEGY

1-11 MB Practice Guide: CA Contract Litigation 11.01

11.01 Scope.

This chapter covers:

- Objectives and strategy for seeking or opposing declaratory relief in contract matters [*see 11.02*].
- Determining whether to seek declaratory relief [*see 11.03 -11.14*], including:
 - ☐ Whether an actual controversy exists for which declaratory relief would be appropriate [*see 11.04, 11.05*].
 - ☐ Whether to seek additional remedies in the same action [*see 11.09*].
 - ☐ Whether the pleading requirements for declaratory relief can be satisfied [*see 11.10*; Form: *see 11.22*].
 - ☐ Whether the precedence given to declaratory relief actions on the trial calendar is desirable under the circumstances [*see 11.11, 11.12*].
 - ☐ The effect of a grant or denial of declaratory relief [*see 11.13, 11.14*].
- Determining whether a declaratory relief action is barred by the statute of limitations [*see 11.17*; Forms: *see 11.23, 11.25, 11.27*].
- Determining whether the complaint for declaratory relief is subject to the defense of res judicata [*see 11.18*; Form: *see 11.23*].
- Determining whether declaratory relief will be denied because it is not necessary or proper under the circumstances [*see 11.19*; Forms: *see 11.23, 11.28*].
- Determining whether and how to oppose declaratory relief [*see 11.16 -11.21*], including:

- ☐ Objecting to the granting of declaratory relief by demurrer or affirmative defenses in the answer [*see* 11.20; Form: *see* 11.23].
- ☐ Moving for judgment on the pleadings to obtain a declaration adverse to the party seeking declaratory relief [*see* 11.21[1]; Form: *see* 11.29].
- ☐ Moving for summary judgment to obtain a declaration adverse to the party seeking declaratory relief when justiciable issues can be resolved as a matter of law [*see* 11.21[2]; Form: *see* 11.30].

Core Statutes:

CCP §§ 1060-1062.5

Legal Topics:

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

Civil Procedure Declaratory Judgment Actions State Judgments General Overview Contracts Law Remedies General Overview



27 of 175 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 11 Seeking or Opposing Declaratory Relief in Contract Matters

I. STRATEGY

1-11 MB Practice Guide: CA Contract Litigation 11.02

11.02 Objective and Strategy.

11.02[1] Declaratory Relief Can Eliminate Uncertainties and Controversies. The purpose of declaratory relief is to eliminate uncertainties and controversies that may result in future litigation [*Fagerstedt v. Continental Ins. Co.* (1968) 266 CA2d 370, 372, 72 CR 126]. Declaratory relief is available in numerous circumstances, including contract matters [see CCP §§ 1060-1062.5].

A person interested under a contract may seek declaratory relief to obtain a declaration of the rights and duties of the respective parties to the contract, or a determination of any question of construction or validity arising under the contract [CCP § 1060]. Declaratory relief may be sought by filing an original action or by filing a cross-complaint in an existing action [CCP § 1060].

Example:

Plaintiff claimed that an agreement for the purchase of a vehicle was not a valid contract and returned the vehicle to defendant. Defendant claimed that the contract was enforceable and informed plaintiff that it had placed the vehicle in storage for plaintiff's protection. Plaintiff was entitled to bring an action for declaratory relief to determine the existence and validity of the purported contract [*Foster v. Masters Pontiac Co., Inc.* (1958) 158 CA2d 481, 486, 322 P2d 592] .

Declaratory relief is available for controversies arising under oral as well as written contracts [*Zimmer v. Gorelnik* (1941) 42 CA2d 440, 445, 109 P2d 34].

Judge's Perspective:

Declaratory relief is a broad and powerful tool for resolving disputes over the content and meaning of contracts, provided that there is an actual controversy between the parties regarding their legal rights and duties. Thus, for example, although there are few cases on the subject, it is clear that the declaratory relief statute applies to oral contracts as well as written ones [see *Bouchard v. Cole* (1956) 143 CA2d 93, 97, 299 P2d 697 ; *Herrmann v. Fireman's Fund Ins. Co.* (1954) 127 CA2d 560, 566, 274 P2d 501] . Moreover, actions for declaratory relief can lie even when the plaintiff would be unable to bring an action for breach or to obtain damages [see, e.g., *Universal Sales Corp. v. California Press Mfg. Co.* (1942) 20 C2d 751, 773-774, 128 P2d 665 (declaratory judgment proper even though its terms might amount to judgment for specific performance to which plaintiff would not otherwise be entitled);

Bertero v. National Gen. Corp. (1967) 254 CA2d 126, 136, 62 CR 714 ("the fact that the oral contract may be one of employment, involving personal services and hence not specifically enforceable, does not necessarily render declaratory relief improper or unnecessary. This is merely a factor to be considered by the trial court in determining what declaration would be appropriate"). An action for declaratory relief may not be brought when the statute of limitations on an action for coercive relief has expired, however [see 11.13].

One of the many useful applications of the declaratory relief remedy is in situations involving insurance coverage, particularly when the coverage relates to other litigation involving the insured. In such instances, the insurer needs to know if it will be obligated to pay the insured's litigation expenses or any judgment against the insured. If so, the insurer has an interest in the underlying litigation. Conversely, the insured needs to know whether it will be required to pay these expenses from its own pocket. The answers to this question might dramatically affect the insured's position in the same underlying litigation.

Declaratory relief is also useful to determine the parties' rights and obligations under partnership or joint venture agreements, in which clarity in the parties' obligations is needed for the ongoing operation of the business.

Detailed Discussion/Forms:

California Forms of Pleading and Practice, Ch. 182, Declaratory Relief (Matthew Bender).

California Points and Authorities, Ch. 67, Declaratory Relief (Matthew Bender).

11.02[2] Use of Action by Party Seeking Enforcement of Contract. The party seeking to enforce a contract should consider filing an action for declaratory relief after a controversy has arisen between the parties concerning the validity of the contract or the interpretation of contract terms, whether or not an actual breach has occurred [see CCP § 1060]. Obtaining a declaration of the rights and duties of the parties may be particularly helpful when the parties have an ongoing contractual relationship and the same issues concerning the contract may arise again in the future. Because declaratory relief actions are entitled to precedence on the trial calendar [see CCP § 1062.3(a)], such an action may be used to resolve a dispute between the parties expeditiously, before damages have been incurred.

11.02[3] Use of Action by Party Opposing Enforcement of Contract. The party opposing enforcement of a contract should consider seeking declaratory relief to resolve issues concerning the construction or validity of the contract. If the party opposing enforcement of the contract seeks declaratory relief before the other party can claim an alleged breach [see CCP § 1060], the party opposing enforcement may be able to have the matter resolved in his or her favor without exposure to liability for damages. Because of the priority given to declaratory relief actions [see CCP § 1062.3(a)], seeking such relief may be particularly helpful when the party opposing enforcement needs to resolve the controversy with the party seeking enforcement before entering into a contract with a third party.



Strategic Point--All Parties:

Filing a declaratory relief action (as opposed to waiting to be sued) enables a party who would normally be the defendant to become the plaintiff, with all the attendant advantages including determining the date of filing, venue, initial scope of the case, and the like.



Cross Reference:

Constructions and interpretation of contract provisions, see Ch. 21, Asserting a Particular Construction of Contract.

In evaluating whether to seek a declaratory judgment, the attorney should consider whether attorney's fees will be

awarded to the prevailing party. Many contractual attorney's fees provisions allow attorney's fees to the prevailing party in "any dispute concerning enforcement or interpretation" of the contract (or similar language). The potential award of fees to the prevailing party might very well tip the scales in favor of--or away from--a desire to seek a declaratory judgment.

 Cross References:

Discussion of attorney's fees, see *11.15*.

Recovery of costs and attorney's fees in contract actions, see Ch. 12, *Recovering Attorney's Fees and Costs in Contract Litigation*.

Declaratory relief claims are equitable in nature, and thus, absent other factors, generally are tried to the judge rather than to a jury.

Strategic Point--All Parties:



Filing an equitable claim will entitle the opposing party to assert equitable defenses that might not be available in an action at law, such as unclean hands. This has an effect on both the scope of the case and the possible outcome on the merits.

 Cross References:

Discussion of jury trial demands, see Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, Ch. 23, *Case Management*.

For Tips on updating case law and expanding your research with additional resources, see **How to Use Lexis.com With This Publication** at the front of this volume.

Legal Topics:

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

Civil Procedure Declaratory Judgment Actions State Judgments Scope Contracts Law Remedies General Overview



28 of 175 DOCUMENTS

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Chapter 11 Seeking or Opposing Declaratory Relief in Contract Matters

II. SEEKING DECLARATORY RELIEF IN CONTRACT MATTERS

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11.03 CHECKLIST: Seeking Declaratory Relief in Contract Matters.

☐ Determine whether actual controversy exists relating to legal rights and duties of respective parties for which declaratory relief would be appropriate.

Authority:

CCP § 1060

See 11.04

☐ If controversy involves past wrong, determine if declaratory relief is nonetheless appropriate because of:

☐ Continuing relationship of parties.

☐ Reasonable expectation that wrong will be repeated.

Authority:

*Warren v. Kaiser Found. Health Plan, Inc. (1975) 47 CA3d 678, 683-684, 121 CR 19 ;
Southern Counties Gas Co. v. Ventura Pipeline Constr. Co. (1971) 19 CA3d 372, 381, 96
CR 825*

Discussion:

See 11.05

☐ If applicable, exhaust any administrative remedies before filing for declaratory relief.

Authority:

Pan Pac. Props., Inc. v. County of Santa Cruz (1978) 81 CA3d 244, 249, 146 CR 428 ; Holden v.

Arnebergh (1968) 265 CA2d 87, 91-92, 71 CR 401

Discussion:

See 11.07

- ☐ Determine time period within which to bring declaratory relief action.

Authority:

Maquire v. Hibernia Sav. & Loan Soc'y (1944) 23 C2d 719, 734, 146 P2d 673

Discussion:

See 11.08

- ☐ Decide whether to seek other remedies as well as declaratory relief, in same action.

Authority:

CCP § 1060

Discussion:

See 11.09

- ☐ Determine whether complaint or cross-complaint for declaratory relief can set forth facts showing existence of actual controversy.

Authority:

Maquire v. Hibernia Sav. & Loan Soc'y (1944) 23 C2d 719, 728, 146 P2d 673

Discussion:

See 11.10

Form:

See 11.22 (complaint for declaratory relief)

- ☐ Determine whether declaratory relief action will be given precedence on trial calendar.

Authority:

CCP § 1062.3(a)

Discussion:

See 11.11

- ☐ Determine whether right to jury trial exists for declaratory relief action.

Authority:

Interinsurance Exch. v. Savior (1975) 51 CA3d 691, 694, 124 CR 239

Discussion:

See 11.12

- ☐ Determine probable effect of court's declaration on controversy between parties, and whether overall effect will be positive or negative.

Authority:

CCP § 1060

Discussion:

See 11.13

- ☐ Determine if court may refuse to grant declaratory relief.

Authority:

CCP § 1061

Discussion:

See 11.14

- ☐ Determine if attorney's fees can be recovered.

Authority:

CC § 1717

Discussion:

See 11.15

Legal Topics:

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

Civil ProcedureDeclaratory Judgment ActionsState JudgmentsFactorsCivil ProcedureDeclaratory Judgment ActionsState JudgmentsScopeContracts LawRemediesGeneral Overview



29 of 175 DOCUMENTS

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Chapter 11 Seeking or Opposing Declaratory Relief in Contract Matters
II. SEEKING DECLARATORY RELIEF IN CONTRACT MATTERS

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11.04 Actual Controversy Is Required for Declaratory Relief; Breach of Obligation Is Not Required.

A party may seek declaratory relief when an actual controversy relating to the legal rights and duties of the respective parties exists [CCP § 1060]. The declaration may be had before there has been any breach of the obligation in respect to which the declaration is sought [CCP § 1060].

An "actual controversy" is a controversy that admits of definitive and conclusive relief by judgment within the field of judicial administration, as distinguished from an advisory opinion on a particular or hypothetical state of facts. The judgment must decree, not suggest, what the parties may or may not do [*Green v. Travelers Indem. Co. (1986) 185 CA3d 544, 557, 230 CR 13* ; *Selby Realty Co. v. San Buenaventura (1973) 10 C3d 110, 117-118, 109 CR 799, 514 P2d 111* (mere fact of county's drafting tentative general plan that ultimately could affect plaintiff's property was not "actual controversy")].

Judge's Perspective:

The court's judgment cannot be based on events that have not yet taken place. Thus, when an injured plaintiff sought relief against the alleged tortfeasor's insurance company before the tortfeasor's liability to the plaintiff had been established, the suit was properly dismissed on demurrer [*Green v. Travelers Indem. Co. (1986) 185 CA3d 544, 553, 230 CR 13*] .



Search California Forms of Pleading and Practice:

Use *lexis.com* to search for discussion of obtaining declaratory relief in contract cases:

■ Legal > States Legal-U.S. > California > Search Analysis & CLE Materials > CA Treatises & Analytical Materials > California Forms of Pleading and Practice



Sample Search: California Forms of Pleading and Practice has helpful discussion regarding declaratory relief in contract matters. Use this search to view them: *heading (contract!) AND declaratory relief*.

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ActionsState JudgmentsScopeContracts LawRemediesGeneral Overview



30 of 175 DOCUMENTS

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Chapter 11 Seeking or Opposing Declaratory Relief in Contract Matters

II. SEEKING DECLARATORY RELIEF IN CONTRACT MATTERS

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11.05 Controversy Involving Past Wrongs May Be Basis for Declaratory Relief When Wrongs May Be Repeated.

11.05[1] Declaratory Relief Not Available for Past Wrongs Alone. Declaratory relief operates prospectively, serving to set controversies at rest that otherwise would continue. When only past wrongs are involved, there is no basis for declaratory relief [*Baldwin v. Marina City Props., Inc. (1978) 79 CA3d 393, 407, 145 CR 406*].

Example:

Plaintiffs sold their interest in a limited partnership, retaining a purchase money security interest. When the party to whom the limited partnership interest was sold defaulted on the payments, plaintiffs sued the general partner for breach of the partnership agreement, breach of fiduciary duty, and declaratory relief. The defendant's demurrer to the count for declaratory relief was properly sustained. The action involved only past wrongs, and plaintiffs were no longer limited partners. Plaintiffs had a present accrued right as a secured party to foreclose on the collateral or to sue for an alleged impairment of the value of the collateral. Because there was no continuing relationship between the plaintiffs and the general partner, declaratory relief was not required to guide the future conduct of the relationship between the parties [*Baldwin v. Marina City Props., Inc. (1978) 79 CA3d 393, 407-408, 145 CR 406*].

11.05[2] Declaratory Relief Available When Parties Have Continuing Relationship. The court ordinarily will refuse declaratory relief when the rights of the complaining party have crystallized into a cause of action for past wrongs and all relationship between the parties has ceased to exist. In that case, an action for damages is appropriate [see *Travers v. Loudon (1967) 254 CA2d 926, 929-930, 62 CR 654*].

Consider:

There is no present actual controversy concerning contractual interpretation when the parties have already acted based on their own respective contract interpretations. In this case, one party is right (or more right) than the other party, or they are both wrong, because the contract is to be interpreted in a different way from both of their interpretations. Either way, the remedy is damages for breach of contract, and not a declaration governing interpretation of the contract.

When the parties maintain a contractual relationship that will continue after resolution of the immediate dispute, and that may give rise to additional claims, declaratory relief can help guide their future conduct and avoid multiple lawsuits [*Warren v. Kaiser Found. Health Plan, Inc. (1975) 47 CA3d 678, 683-684, 121 CR 19*].

Consider:

The reference to the parties' conduct is important, because declaratory relief may be sought to assist the parties in governing themselves appropriately prospectively. An action for declaratory relief can be more than merely resolving the proper interpretation of the written words, and serve to guide parties' future dealings [see *Warren v. Kaiser Found. Health Plan, Inc.* (1975) 47 CA3d 678, 683-684, 121 CR 19] .

Example:

Plaintiff was a member of defendant health plan. Plaintiff's wife was injured in automobile accident and taken to a non-plan hospital by emergency service personnel. Plaintiff sued for declaratory relief and breach of contract after defendant refused to pay for services rendered by the non-plan hospital. Plaintiff was entitled to declaratory relief because plaintiff continued to be a member of the plan after the claimed breach, and a declaration of the right of a member for reimbursement under the circumstances would guide the future conduct of the parties. Declaratory relief also would avoid multiplicity of litigation because a declaration that defendant was required to reimburse plaintiff would prevent threatened lawsuits by the people who provided medical and hospital care to plaintiff's wife [*Warren v. Kaiser Found. Health Plan, Inc.* (1975) 47 CA3d 678, 684, 121 CR 19] .

Jury Instructions:

Nature of Declaratory Relief Action--General Liability, see *California Forms of Jury Instruction, Ch. 23A, Instr. MB 2300A.04* (Matthew Bender).

**Cross References:**

Points and authorities for party seeking declaratory relief, see 11.26.

Discussion of action for damages, see Ch. 7, Seeking or Opposing Damages in Contract Actions.

11.05[3] Declaratory Relief Available When There Is Reasonable Expectation Wrong Will Be Repeated. In actions for declaratory relief, future and contingent legal rights may be encompassed by the relief granted [*Southern Counties Gas Co. v. Ventura Pipeline Constr. Co.* (1971) 19 CA3d 372, 381, 96 CR 825]. Although declaratory relief deals with present rights, the "present right" contemplated is the right to have immediate judicial assurance that advantages will be enjoyed or liabilities escaped in the future [*Southern Counties Gas Co. v. Ventura Pipeline Constr. Co.* (1971) 19 CA3d 372, 381, 96 CR 825]. If there is a reasonable expectation that the wrong, if any, will be repeated, declaratory relief is available [*Southern Counties Gas Co. v. Ventura Pipeline Constr. Co.* (1971) 19 CA3d 372, 381, 96 CR 825].

Example:

Defendant installed underground pipelines for plaintiff utility company pursuant to a series of contracts. When the lines began to leak, the investigation revealed that they had corroded due to a lack of protective coating. Plaintiff sued defendant for the cost of repairs and for a declaratory judgment determining the respective rights and duties of each party under the series of contracts. Because the plaintiff had not only present claims for indemnification as to corrosion damage previously discovered, but also the prospect that additional incidents would recur, the matter was a continuing controversy, ripe for decision, for which declaratory relief was appropriate [*Southern Counties Gas Co. v. Ventura Pipeline Constr. Co.* (1971) 19 CA3d 372, 381, 96 CR 825].

**Cross Reference:**

Points and authorities for party seeking declaratory relief, see 11.26.

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Civil ProcedureDeclaratory Judgment ActionsState JudgmentsGeneral OverviewCivil ProcedureDeclaratory Judgment
ActionsState JudgmentsFactorsContracts LawRemediesGeneral Overview



31 of 175 DOCUMENTS

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Chapter 11 Seeking or Opposing Declaratory Relief in Contract Matters
II. SEEKING DECLARATORY RELIEF IN CONTRACT MATTERS

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11.06 Specific Situations in Which Declaratory Relief Is Appropriate.

A party may seek declaratory relief in the following situations, among others:

- A party may seek declaratory relief when an actual controversy relating to the legal rights and duties of the respective parties exists [*CCP § 1060*; *see 11.04*].
- A person may obtain a judicial declaration as to the validity of an administrative rule, regulation, order, or standard [*Gov Code §§ 11350, 11350.3*].
- An interested person may bring a declaratory action as to the validity of decisions of the Unemployment Insurance Appeals Board [*UI Code § 409.2*].
- A person claiming to be a nonresident of California for income tax purposes may commence a declaratory relief action to determine the fact of his or her residence [*CCP § 1060.5*].
- Professional liability insurers for health care providers, health care providers, and other aggrieved persons may file a declaratory relief action for a declaration of rights, duties, and obligations relating to professional negligence [*CCP § 1062.5*].
- When a federal court has abstained from resolving an important issue of state law in deference to a state court, a party may seek declaratory relief to resolve that issue [*National Audubon Society v. Superior Court* (1983) 33 C3d 419, 432-433 n14, 189 CR 346, 658 P2d 709].

Distinguish:

One way to contrast the basic roles of declaratory judgment and damages in contract litigation is that declaratory judgment is requested to address future misconduct, while damages are sought to address harm from past misconduct.



Cross Reference:

Further discussion of appropriate situations for declaratory relief, see California Forms of Pleading and Practice, Ch. 182, Declaratory Relief (Matthew Bender).

Legal Topics:

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

Civil ProcedureDeclaratory Judgment ActionsState JudgmentsGeneral OverviewCivil ProcedureDeclaratory Judgment
ActionsState JudgmentsScopeContracts LawRemediesGeneral Overview



32 of 175 DOCUMENTS

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Chapter 11 Seeking or Opposing Declaratory Relief in Contract Matters

II. SEEKING DECLARATORY RELIEF IN CONTRACT MATTERS

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11.07 Plaintiff Must Exhaust Administrative Remedies.

A person who objects to the application of a statute or ordinance normally must invoke any available administrative remedies before seeking relief in court, including bringing an action for declaratory relief [*Pan Pac. Props., Inc. v. County of Santa Cruz* (1978) 81 CA3d 244, 249, 146 CR 428 ; see *Holden v. Arnebergh* (1968) 265 CA2d 87, 91-92, 71 CR 401] .



Cross Reference:

Further discussion of steps in seeking declaratory relief, see California Forms of Pleading and Practice, Ch. 182, Declaratory Relief (Matthew Bender).

Legal Topics:

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

Civil ProcedureJusticiabilityExhaustion of RemediesAdministrative RemediesCivil ProcedureDeclaratory Judgment
ActionsState JudgmentsGeneral OverviewCivil ProcedureDeclaratory Judgment ActionsState
JudgmentsFactorsContracts LawRemediesGeneral Overview



33 of 175 DOCUMENTS

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Chapter 11 Seeking or Opposing Declaratory Relief in Contract Matters

II. SEEKING DECLARATORY RELIEF IN CONTRACT MATTERS

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11.08 Plaintiff Generally Must Seek Declaratory Relief Within Limitations Period on Underlying Cause of Action.

If declaratory relief is sought as to an obligation that has been breached, and the right to commence a coercive action (i.e., action for damages, specific performance, or injunction) on the cause of action arising from the breach is barred by the statute of limitations, the right to declaratory relief is likewise barred [*Maguire v. Hibernia Sav. & Loan Soc'y* (1944) 23 C2d 719, 734, 146 P2d 673] . If declaratory relief is sought before breach of the obligation as to which the declaration is sought or within the statutory period after the breach, the right to relief is not barred [*Maguire v. Hibernia Sav. & Loan Soc'y* (1944) 23 C2d 719, 734, 146 P2d 673] .

➡ Cross Reference:

Discussion of statute of limitations as defense, see 11.17.

Legal Topics:

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

Civil ProcedureDeclaratory Judgment ActionsState JudgmentsGeneral OverviewCivil ProcedureDeclaratory Judgment ActionsState JudgmentsFactorsCivil ProcedureDeclaratory Judgment ActionsState JudgmentsScopeContracts LawDefensesStatutes of LimitationsContracts LawRemediesGeneral Overview



34 of 175 DOCUMENTS

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Chapter 11 Seeking or Opposing Declaratory Relief in Contract Matters
II. SEEKING DECLARATORY RELIEF IN CONTRACT MATTERS

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11.09 Declaratory Relief Does Not Preclude Other Remedies.

A party seeking declaratory relief may ask for a declaration of rights and duties, either alone or with other relief [CCP § 1060]. The court may make a binding declaration of the parties' respective rights and duties, whether or not further relief is or could be claimed at the time [CCP § 1060].

The declaratory relief remedies provided by CCP §§ 1060-1062.5 are cumulative and do not restrict any remedy, provisional or otherwise, provided by law for the benefit of any party to such an action [CCP § 1062]. No judgment under CCP §§ 1060-1062.5 precludes any party from obtaining additional relief based on the same facts [CCP § 1062].

In appropriate cases, a declaratory relief action can be combined with an action for damages for past wrongs, specific performance, or injunctive relief [see *Southern Counties Gas Co. v. Ventura Pipeline Constr. Co.* (1971) 19 CA3d 372, 380, 96 CR 825 ; *Eye Dog Found. v. State Bd. of Guide Dogs for the Blind* (1967) 67 C2d 536, 544, 63 CR 21, 432 P2d 717]. In addition, attorney's fees and costs can also be recovered.

 Cross Reference:

Discussion of other relief, see Ch. 7, Seeking or Opposing Damages in Contract Actions;
Ch. 8, Seeking or Opposing Equitable Remedies in Contract Actions;
Ch. 9, Seeking or Opposing Quantum Meruit or Quantum Valebant Recovery in Contract Actions; and
Ch. 10, Seeking or Opposing Statutory Remedies in Contract Actions.



Strategic Point:

CCP § 1062 provides an exemption from the bar of res judicata, allowing another action seeking additional relief based on the same facts, when the plaintiff seeks solely declaratory relief in the initial action [*Mycogen Corp. v. Monsanto Co.* (2002) 28 C4th 888, 898-901, 123 CR2d 432, 51 P3d 297]. If the plaintiff seeks both declaratory and relief for breach of contract in the same action (i.e., damages, specific performance, or injunction), a later action seeking further relief based on the same breach of contract is barred by the doctrine of res judicata [*Mycogen Corp. v. Monsanto Co.* (2002) 28 C4th 888, 898-901, 123 CR2d 432, 51 P3d 297].

Example:

Plaintiff brought an action against defendant for declaratory relief and specific performance of a license agreement. Summary judgment was granted in favor of plaintiff. Plaintiff subsequently brought another action for damages based on the same breach of the contract. Because the relief requested in both suits sought to vindicate the same right, the second action was barred by the doctrine of res judicata. All remedies, other than declaratory relief, arising out of the single breach of contract, were required to be brought in the same action or be forfeited [*Mycogen Corp. v. Monsanto Co.* (2002) 28 C4th 888, 904-908, 123 CR2d 432, 51 P3d 297].



Cross Reference:

Discussion of defense of res judicata in declaratory relief actions, see 11.18.

Legal Topics:

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

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35 of 175 DOCUMENTS

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Chapter 11 Seeking or Opposing Declaratory Relief in Contract Matters

II. SEEKING DECLARATORY RELIEF IN CONTRACT MATTERS

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11.10 Pleading Requirements.

11.10[1] Complaint or Cross-Complaint Must Show Existence of Controversy. A complaint for declaratory relief is legally sufficient if it does both of the following [*Maguire v. Hibernia Sav. & Loan Soc'y* (1944) 23 C2d 719, 728, 146 P2d 673 ; see *Nahrstedt v. Lakeside Village Condominium Assn.* (1994) 8 C4th 361, 379, 33 CR2d 63, 878 P2d 1275]:

- Sets forth facts showing the existence of an actual controversy relating to the legal rights and duties of the respective parties under a contract or statute [see 11.04 -11.06]; and
- Requests that those rights and duties be adjudged by the court.

A complaint is sufficient if a decree would serve in a practical way to stabilize a dispute that otherwise may lead to disastrous results or, if it involves a contract, defer the realization of the purposes of the contract [*Southern Counties Gas Co. v. Ventura Pipeline Constr. Co.* (1971) 19 CA3d 372, 377, 96 CR 825].

Example:

Plaintiff alleged that (1) defendants agreed to pay him a specified sum in cash on delivery of a deed to his real property following a foreclosure sale; and (2) defendants obtained possession of the deed by means of false representation and recorded it without paying plaintiff the agreed compensation. Plaintiff's allegations sufficiently alleged the existence of an actual controversy relating to the legal rights and duties of the parties under both a deed and a contract to state a cause of action for declaratory relief [*Strozier v. Williams* (1960) 187 CA2d 528, 531-532, 9 CR 683] .



Strategic Point--Plaintiff:

Some practitioners prefer to plead declaratory relief complaints in as spare a form as possible, unless there is some compelling reason to do otherwise. This involves setting out whatever minimum facts are needed to satisfy the actual controversy requirement. Very often, this may entail simply attaching a complaining letter from the other side, and essentially stating that the client disagrees with it.

► Cross References:

Form for complaint for declaratory relief, see 11.22.

Discussion of plaintiff's pleading requirements, see Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, Ch. 7, Complaints.

11.10[2] Facts Need Not Establish Plaintiff Is Entitled to Favorable Judgment. The plaintiff is not required to allege facts entitling him or her to a favorable decision [*Maquire v. Hibernia Sav. & Loan Soc'y* (1944) 23 C2d 719, 730, 146 P2d 673] . The point of a declaratory relief action is to get a ruling; if the plaintiff is not entitled to a favorable decision, the court must render a judgment embodying that determination, and not merely dismiss the action [*Maquire v. Hibernia Sav. & Loan Soc'y* (1944) 23 C2d 719, 731, 146 P2d 673] .

► Cross Reference:

Discussion of obtaining declaration adverse to party seeking declaratory relief by motion for judgment on the pleadings or summary judgment, see 11.21.

11.10[3] Noticed Motion Required for Declaratory Relief Action to Take Trial Precedence. In a declaratory relief action that includes other relief, in which the plaintiff seeks precedence on the trial calendar [*see* 11.11], the plaintiff is entitled to precedence only on noticed motion and a showing that the action requires a speedy trial [CCP § 1062.3(b)].

Legal Topics:

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

Civil ProcedurePleading & PracticePleadingsComplaintsRequirementsCivil ProcedureDeclaratory Judgment
ActionsState JudgmentsGeneral OverviewCivil ProcedureDeclaratory Judgment ActionsState
JudgmentsFactorsContracts LawRemediesGeneral Overview



36 of 175 DOCUMENTS

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Chapter 11 Seeking or Opposing Declaratory Relief in Contract Matters

II. SEEKING DECLARATORY RELIEF IN CONTRACT MATTERS

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11.11 Declaratory Relief Action Has Precedence on Trial Calendar.

An action for declaratory relief must be set for trial at the earliest possible date and takes precedence over all other cases, except older matter of the same character and matters to which special precedence is given by law [*CCP* § 1062.3(a)]. However, this advantage is inapplicable if the plaintiff seeks other relief in the action. When the plaintiff seeks additional relief in addition to a declaration of rights and duties, the action takes precedence only on noticed motion and a showing that the action requires a speedy trial [*CCP* § 1062.3(b)].



Cross Reference:

Discussion of motions for precedences, see Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, Ch. 23, Case Management.

Legal Topics:

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37 of 175 DOCUMENTS

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Chapter 11 Seeking or Opposing Declaratory Relief in Contract Matters
 II. SEEKING DECLARATORY RELIEF IN CONTRACT MATTERS

1-11 MB Practice Guide: CA Contract Litigation 11.12

11.12 Right to Jury Trial Depends on Nature of Issues.

Whether a right to jury trial exists in a declaratory relief action depends on whether the issues to be tried in the declaratory relief action are equitable or legal in nature [*Interinsurance Exch. v. Savior* (1975) 51 CA3d 691, 694, 124 CR 239] . A jury trial generally is a matter of right in a civil action at law, but not in equity [*C & K Eng'g Contractors v. Amber Steel Co.* (1978) 23 C3d 1, 8, 151 CR 323, 587 P2d 1136]. Therefore, if the declaratory relief action is a substitute for an action at law for breach of contract, the parties are entitled to a jury trial [*Interinsurance Exch. v. Savior* (1975) 51 CA3d 691, 694, 124 CR 239] . If the declaratory relief action is a substitute for an equitable claim, such as a claim for specific performance, there is no right to a jury trial [*Nwosu v. Uba* (2004) 122 CA4th 1229, 1241].

Example:

In his claim for declaratory relief, plaintiff requested a judicial determination that he was entitled to conveyance of title to certain property from defendant. Because the declaratory relief claim appeared to be a hybrid of his equitable claims for specific performance, to quiet title, and to foreclose an equitable lien, plaintiff's claim for declaratory relief was similarly an equitable claim for which there was no right to a trial by jury [*Nwosu v. Uba* (2004) 122 CA4th 1229, 1241].

**Strategic Points:**

- Most judges see declaratory relief claims as being equitable, and thus not triable to a jury, even if they are a purported substitute for an action at law. Judges often will look at the labels of the causes of action to determine whether a claim predominantly seeks equitable relief, rather than looking at the totality of the circumstances alleged in the complaint.
- One sometimes overlooked significance of pleading a case that will be tried to the court rather than to the jury is that bench trials typically are faster and cheaper and are easier for judges to fit into their schedules, so they usually go to trial sooner.

Jury Instructions:

Role of Jury--Declaratory Judgment or Contract Action, see California Forms of Jury Instruction, Ch. 23A, Instr. MB 2300A.07 (Matthew Bender).



Cross Reference:

Discussion of jury trial demands, see Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, Ch. 23, Case Management.

Legal Topics:

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

Civil ProcedureDeclaratory Judgment ActionsState JudgmentsGeneral OverviewCivil ProcedureTrialsJury TrialsActions in EquityCivil ProcedureTrialsJury TrialsRight to Jury TrialContracts LawRemediesGeneral Overview



38 of 175 DOCUMENTS

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Chapter 11 Seeking or Opposing Declaratory Relief in Contract Matters

II. SEEKING DECLARATORY RELIEF IN CONTRACT MATTERS

1-11 MB Practice Guide: CA Contract Litigation 11.13

11.13 Court's Declaration Has Force of Final Judgment.

11.13[1] Declaration May Be Affirmative or Negative. The declaration made by the court may be either affirmative or negative in form and effect [CCP § 1060]. The declaration has the force of a final judgment [CCP § 1060].

11.13[2] Judgment Has Res Judicata Effect As to Issues Declared. Although a judgment seeking solely declaratory relief does not preclude a subsequent suit for damages, specific performance, or injunction based on the same facts [see CCP § 1062], the judgment in the declaratory relief action has a res judicata effect as to those issues and claims expressly and unambiguously declared in the judgment [*Aerojet-General Corp. v. American Excess Ins. Co.* (2002) 97 CA4th 387, 413-414, 117 CR2d 427].

Judge's Perspective:

Counsel must be mindful of the specific language of the judgment. The party who has prevailed in a declaratory relief action should be careful to request a judgment from the court that confines itself only to declaratory relief if that party later wants to bring another action for coercive relief. "[P]urely declaratory judgments are exempt from the bar of res judicata" [*Mycogen Corp. v. Monsanto Co.* (2002) 28 C4th 888, 899, 123 CR2d 432, 51 P3d 297], and will not affect the prevailing party's ability to seek coercive relief in a later action. If the court issues its own judgment or statement of decision, and that document provides for coercive relief, counsel should seek modification within the appropriate time limits to protect the ability to seek additional relief in a later action.

11.13[3] Declaration May Be Rendered on Motion for Summary Judgment. Summary judgment is appropriate in a declaratory relief action when only legal issues are presented for the court's determination [*Siemon v. Russell* (1961) 194 CA2d 592, 595, 15 CR 218]. Summary judgment disposes of the issues considered as matter of law [*City of Tiburon v. Northwestern P. R. Co.* (1970) 4 CA3d 160, 172 n5, 84 CR 469].

Example:

A professor and the university that hired him entered into a patent agreement at the time of hire. Three years later, the university revised its patent policy and announced that it would pay the professor a lesser amount of royalties for the inventions and patents he was required to assign to the university. The professor brought an action for declaratory relief, seeking a declaration that he was entitled to the amount

of royalties to which the parties originally agreed. The trial court properly granted the professor's motion for summary judgment and declared that he was entitled to the original amount of royalties because the written agreement was enforceable and explicit, and there were no issues of material fact in dispute [*Shaw v. Regents of Univ. of Cal.* (1997) 58 CA4th 44, 52-54, 67 CR2d 850] .



Warning:

Declaratory relief actions often seek interpretation of ambiguous contract provisions. In these cases, the court must examine parol evidence, thus precluding summary judgment as a practical matter.



Cross References:

Discussion of motion for summary judgment by party opposing declaratory relief action, see 11.21[2].

Discussion of parol evidence, see Ch. 21, Asserting a Particular Construction of Contract.

Discussion of summary judgment, see Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, Ch. 38, Summary Judgment.

Construction and interpretation of contract provisions, see Ch. 21, Asserting a Particular Construction of Contract.

Legal Topics:

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

Civil Procedure Declaratory Judgment Actions State Judgments Appellate Review Contracts Law Remedies General Overview



39 of 175 DOCUMENTS

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Chapter 11 Seeking or Opposing Declaratory Relief in Contract Matters

II. SEEKING DECLARATORY RELIEF IN CONTRACT MATTERS

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11.14 Court Has Discretion to Refuse Declaratory Relief.

The court may refuse to grant declaratory relief if its declaration or determination is not necessary or proper at the time under all the circumstances [*CCP* § 1061].

► **Cross Reference:**

Discussion of opposing declaratory relief on ground that it is not necessary or proper, see *11.19*.

Legal Topics:

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

Civil Procedure Declaratory Judgment Actions State Judgments Discretion Contracts Law Remedies General Overview



40 of 175 DOCUMENTS

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Chapter 11 Seeking or Opposing Declaratory Relief in Contract Matters

II. SEEKING DECLARATORY RELIEF IN CONTRACT MATTERS

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11.15 Prevailing Party May Recover Attorney's Fees If Contract So Provides.

Under the mutuality of remedy statute [see CC § 1717], a prevailing party in a declaratory relief action relating to a contract may recover attorney's fees if the contract includes an attorney's fees provision [*Carroll v. Hanover Ins. Co.* (1968) 266 CA2d 47, 49-51, 71 CR 868 ; see *Reynolds Metals Co. v. Alperson* (1979) 25 C3d 124, 128, 158 CR 1, 599 P2d 83] .



Cross Reference:

Discussion of attorney's fees, see Ch. 12, Recovering Attorney's Fees and Costs in Contract Litigation.

Legal Topics:

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

Civil ProcedureDeclaratory Judgment ActionsState JudgmentsGeneral OverviewCivil ProcedureDeclaratory Judgment ActionsState JudgmentsScopeCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesGeneral OverviewContracts LawContract Conditions & ProvisionsGeneral OverviewContracts LawRemediesGeneral Overview



41 of 175 DOCUMENTS

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Chapter 11 Seeking or Opposing Declaratory Relief in Contract Matters
III. OPPOSING DECLARATORY RELIEF IN CONTRACT MATTERS

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11.16 CHECKLIST: Opposing Declaratory Relief in Contract Matters.

☐ Determine whether declaratory relief may be unavailable because:

☐ Action is barred by statute of limitations.

Authority:

Maguire v. Hibernia Sav. & Loan Soc'y (1944) 23 C2d 719, 734, 146 P2d 673

Discussion:

See 11.17

Forms:

See 11.23 (answer to complaint for declaratory relief with affirmative defenses), 11.25 (points and authorities for party seeking declaratory relief), 11.27 (points and authorities for party opposing declaratory relief)

☐ Action is subject to defense of res judicata.

Authority:

Bennett v. Hibernia Bank (1956) 47 C2d 540, 550, 554, 305 P2d 20

Discussion:

See 11.18

Form:

See 11.23 (answer to complaint for declaratory relief with affirmative defenses)

☐ Declaratory relief is not necessary or proper under circumstances of particular case.

Authority:

CCP § 1061

Discussion:

See 11.19

Forms:

See 11.23 (answer to complaint for declaratory relief with affirmative defenses), 11.28 (points and authorities for party opposing declaratory relief)

☐ Oppose granting of declaratory relief with appropriate responsive pleading:

☐ Demurrer for failure to state a cause of action.

Authority:

CCP §§ 430.10(e), 430.30

Discussion:

See 11.20

☐ Answer, with any applicable affirmative defenses.

Authority:

CCP §§ 430.10(e), 430.30

Discussion:

See 11.20

Form:

See 11.23 (answer to complaint for declaratory relief with affirmative defenses)

☐ Determine whether declaration of rights and duties of parties adverse to party seeking declaratory relief may be obtained before trial by:

☐ Motion for judgment on pleadings.

Authority:

Fisher v. City of Berkeley (1984) 37 C3d 644, 679 n31, 209 CR 682, 693 P2d 261

Discussion:

See 11.21[1]

Form:

See 11.29 (points and authorities for party opposing declaratory relief)

☐ Motion for summary judgment.

Authority:

Siemon v. Russell (1961) 194 CA2d 592, 595, 15 CR 218

Discussion:

See 11.21[2]

Form:

See 11.30 (points and authorities for party opposing declaratory relief)

Legal Topics:

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

Civil ProcedureDeclaratory Judgment ActionsState JudgmentsGeneral OverviewCivil ProcedureDeclaratory Judgment
ActionsState JudgmentsFactorsContracts LawRemediesGeneral Overview



42 of 175 DOCUMENTS

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Chapter 11 Seeking or Opposing Declaratory Relief in Contract Matters
III. OPPOSING DECLARATORY RELIEF IN CONTRACT MATTERS

1-11 MB Practice Guide: CA Contract Litigation 11.17

11.17 Declaratory Relief Is Barred If Statute of Limitations Has Run on Cause of Action Arising From Breach.

If declaratory relief is sought with reference to an obligation that has been breached, and the right to commence an action for other relief (damages, specific performance, or injunction) on the cause of action arising from the breach is barred by the statute of limitations, the right to declaratory relief is likewise barred [*Maquire v. Hibernia Sav. & Loan Soc'y* (1944) 23 C2d 719, 734, 146 P2d 673] .

If declaratory relief is sought before there has been a breach of the obligation in respect to which the declaration is sought or within the statutory period after the breach, the right to relief is not barred by the lapse of time [*Maquire v. Hibernia Sav. & Loan Soc'y* (1944) 23 C2d 719, 734, 146 P2d 673] .

➤ **Cross References:**

Form for answer to complaint for declaratory relief with affirmative defenses, see 11.23.

Form for points and authorities for party seeking declaratory relief, see 11.25.

Form for points and authorities for party opposing declaratory relief, see 11.27.

Discussion of limitations in contract actions, see Ch. 4, Determining Applicable Statute of Limitations and Effect on Potential Action.

Legal Topics:

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

Civil ProcedureDeclaratory Judgment ActionsState JudgmentsGeneral OverviewCivil ProcedureDeclaratory Judgment ActionsState JudgmentsFactorsContracts LawDefensesStatutes of LimitationsContracts LawRemediesGeneral Overview



43 of 175 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 11 Seeking or Opposing Declaratory Relief in Contract Matters
 III. OPPOSING DECLARATORY RELIEF IN CONTRACT MATTERS

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11.18 Complaint for Declaratory Relief May Be Subject to Defense of Res Judicata.

If the entire controversy between the parties has been settled by a prior judgment, the action is subject to the defense of res judicata, unless additional facts are alleged that justify setting that judgment aside [*Bennett v. Hibernia Bank* (1956) 47 C2d 540, 550, 554, 305 P2d 20].

Example:

Plaintiffs, the distributees of the estate of a person who had been a member of a bank, brought a declaratory relief action to establish their membership rights in the bank. In an earlier in rem action, the bank obtained a judgment determining all claims to membership rights. Because that judgment had the effect of determining that plaintiffs had no membership rights, the complaint for declaratory relief was subject to demurrer on the ground of res judicata, unless plaintiffs could plead and prove their claim that the previous judgment was obtained without proper service of process and by extrinsic fraud [*Bennett v. Hibernia Bank* (1956) 47 C2d 540, 553-555, 305 P2d 20].



Cross Reference:

Form for answer to complaint for declaratory relief with affirmative defenses, see 11.23.

Legal Topics:

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

Civil Procedure Declaratory Judgment Actions State Judgments General Overview Contracts Law Defenses General Overview Contracts Law Remedies General Overview



44 of 175 DOCUMENTS

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Chapter 11 Seeking or Opposing Declaratory Relief in Contract Matters
 III. OPPOSING DECLARATORY RELIEF IN CONTRACT MATTERS

1-11 MB Practice Guide: CA Contract Litigation 11.19

11.19 Declaratory Relief May Be Denied If Not Necessary or Proper.

The court may refuse to grant declaratory relief if the court's declaration or determination is not necessary or proper at the time, under all the circumstances [CCP § 1061]. When facts appear from the face of the complaint that would justify the trial court in concluding that its determination is not necessary or proper, the court may refuse to grant relief by sustaining a general demurrer to the complaint [*Moss v. Moss* (1942) 20 C2d 640, 642, 128 P2d 526]. If the objection to the necessity or propriety of declaratory relief is raised in the answer of the opposing party, the court may refuse to grant relief in a judgment entered after a separate trial of that issue [see CCP § 597] or, if there is no trial issue of fact, on a motion for summary judgment [see CCP § 437c]. Declaratory relief has been refused in various circumstances, such as [*C.J.L. Constr., Inc. v. Universal Plumbing* (1993) 18 CA4th 376, 390-391, 22 CR2d 360]:

- When evidence in the trial of the legal claim in the action would be substantially the same as evidence presented in connection with the declaratory relief claim.
- When another adequate form for relief is available because a cause of action has accrued.
- When a matter can be raised as an affirmative defense.
- When the court believes declaratory relief is being used to circumvent a jury's adjudication of legal claims that predominate, or to unfairly get an expedited trial when the legal claims predominate.

With limited exceptions, the state or a public agency can be sued in declaratory relief only when governmental immunity does not exist or is waived; immunity is a defense to a declaratory relief action [see *California Physicians' Serv. v. Garrison* (1946) 28 C2d 790, 800, 172 P2d 4 ; *People v. Buellton Dev. Co.* (1943) 58 CA2d 178, 185, 136 P2d 793].

Example:

Plaintiff, a building contractor, filed an action for declaratory relief, seeking a determination that a worker who had been killed in an industrial accident was a special employee. Although it was not disclosed by the complaint, the trial court had judicial knowledge that the worker's heirs had sought and obtained a workers' compensation award against the worker's employer, which made any issue of plaintiff's potential liability under the Workers' Compensation Law moot. The heirs had also filed a negligence action for damages against plaintiff, which was pending when plaintiff filed the action for

declaratory relief. Because the judgment in the negligence action would resolve every issue raised in the declaratory relief action, the trial court acted within its discretion in refusing declaratory relief because it was not necessary under the circumstances [*Fagerstedt v. Continental Ins. Co.* (1968) 266 CA2d 370, 371-373, 72 CR 126].



Cross References:

Form for answer to complaint for declaratory relief with affirmative defenses, see 11.23.

Form for points and authorities for party opposing declaratory relief, see 11.28.

Legal Topics:

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

Civil ProcedureDeclaratory Judgment ActionsState JudgmentsDiscretionCivil ProcedureDeclaratory Judgment ActionsState JudgmentsFactorsContracts LawRemediesGeneral Overview



45 of 175 DOCUMENTS

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Chapter 11 Seeking or Opposing Declaratory Relief in Contract Matters
III. OPPOSING DECLARATORY RELIEF IN CONTRACT MATTERS

1-11 MB Practice Guide: CA Contract Litigation 11.20

11.20 Party May Object to Granting of Declaratory Relief by Demurrer to Complaint or Affirmative Defenses in Answer.

If an action for declaratory relief is barred by the statute of limitations or the doctrine of res judicata, and that fact appears from the face of the complaint or from matter of which the court must or may take judicial notice [*see Evid Code §§ 451, 452*], the party opposing declaratory relief may raise the objection by general demurrer to the complaint, or by motion for judgment on the pleadings, on the ground that the complaint fails to state facts sufficient to constitute a cause of action in that it appears that the action is barred [*see CCP §§ 430.10(e), 430.30(a), 438(c)(1)(B)*].

If the action for declaratory relief is barred by the defense of the statute of limitations or res judicata, but does not appear from the face of the complaint or from judicially noticed matter, the objection may be raised by affirmative defense in the answer to the complaint [*see CCP §§ 430.30(b), 431.30(b)(2)*].

Similarly, if it appears from the face of the complaint or from matter of which the court may take judicial notice [*see Evid Code §§ 451, 452*] that declaratory relief is not necessary or proper under the circumstances [*see CCP § 1061*], the party opposing relief may raise the objection by general demurrer to the complaint, or by motion for judgment on the pleadings [*see CCP §§ 430.10(e), 430.30(a)*]. If those facts do not appear from the face of the complaint or from matter of which the court may take judicial notice, they may be raised as an affirmative defense in the answer [*see CCP §§ 430.30(b), 431.30(b)(2)*].

➡ Cross References:

Form for answer to complaint for declaratory relief with affirmative defenses, see *11.23*.

Discussion of demurrers and motions for judgment on the pleadings, see Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, Ch. 11, Demurrers and Motions for Judgment on the Pleadings.

Discussion of pleading affirmative defenses in an answer, see Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, Ch. 14, Answers.

Legal Topics:

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

Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsAffirmative DefensesGeneral OverviewCivil
ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsDemurrersCivil ProcedureDeclaratory Judgment
ActionsState JudgmentsGeneral OverviewContracts LawDefensesGeneral OverviewContracts LawRemediesGeneral
Overview



46 of 175 DOCUMENTS

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Chapter 11 Seeking or Opposing Declaratory Relief in Contract Matters
III. OPPOSING DECLARATORY RELIEF IN CONTRACT MATTERS

1-11 MB Practice Guide: CA Contract Litigation 11.21

11.21 Party May Obtain Declaration Adverse to Party Seeking Declaratory Relief by Pretrial Motion.

11.21[1] Court May Render Judgment on Merits on Motion for Judgment on Pleadings. A motion for judgment on the pleadings may be used in an action for declaratory relief to obtain a declaratory judgment on the merits in the defendant's favor, rather than a dismissal of the plaintiff's suit [*Fisher v. City of Berkeley* (1984) 37 C3d 644, 679 n31, 209 CR 682, 693 P2d 261] .

When the opposing party moves for judgment on the pleadings in a declaratory relief action on the ground that the complaint fails to state a cause of action, the court is not limited to rendering a judgment of dismissal [*Wilson v. Board of Ret.* (1957) 156 CA2d 195, 203, 319 P2d 426] . Because of the constructive admission of the facts pled in the complaint, the court may render a judgment on the merits declaring the rights and duties of the parties with respect to the controversies alleged [*Wilson v. Board of Ret.* (1957) 156 CA2d 195, 203, 319 P2d 426] .

► **Cross References:**

Form for points and authorities for party opposing declaratory relief, see 11.29.

Discussion of demurrers and motions for judgment on the pleadings, see Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, Ch. 11, Demurrers and Motions for Judgment on the Pleadings.

11.21[2] Summary Judgment Is Appropriate When Issues Can Be Resolved As Matter of Law. Summary judgment is appropriate in a declaratory relief action when only legal issues are presented for the court's determination [*Siemon v. Russell* (1961) 194 CA2d 592, 595, 15 CR 218] .

Summary judgment disposes of the issues considered as matter of law [*City of Tiburon v. Northwestern P. R. Co.* (1970) 4 CA3d 160, 172 n5, 84 CR 469] . If a grant of summary judgment is not favorable to the party seeking declaratory relief, the court must declare that the plaintiff is not entitled to a declaration in his or her favor, rather than enter a judgment of dismissal [*Siemon v. Russell* (1961) 194 CA2d 592, 595, 15 CR 218] .

Example:

Plaintiffs purchased property that was subject to defendant's 20-year oil and gas lease. The lease stated

that the defendant had sole and exclusive possession of the land, except that the lessor could use the land for agricultural uses. Plaintiffs wanted to subdivide the property into residential lots, and brought an action for declaratory relief. The terms of the lease were explicit, so no triable issue of facts existed that, if decided in plaintiff's favor, would entitle them to use the property for subdivision purposes. The court properly granted summary judgment in favor of defendant, declaring that plaintiffs' ownership was subject to the lease, that plaintiffs were not entitled to subdivide the property, and that defendant did not have a duty to quitclaim any surface rights to any part of the property to plaintiffs [*Siemon v. Russell* (1961) 194 CA2d 592, 595-597, 15 CR 218].



Cross References:

Form for points and authorities for party opposing declaratory relief, see 11.30.

Discussion of motions for summary judgment, see Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, Ch. 38, Summary Judgment.

Legal Topics:

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

Civil Procedure
Declaratory Judgment Actions
State Judgments
General Overview
Civil Procedure
Pretrial Judgments
Judgment on the Pleadings
Contracts Law
Remedies
General Overview



47 of 175 DOCUMENTS

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Chapter 11 Seeking or Opposing Declaratory Relief in Contract Matters
IV. FORMS

1-11 MB Practice Guide: CA Contract Litigation 11.22

11.22 Complaint for Declaratory Relief.**Complaint for Declaratory Relief.**

[Name of attorney]

_____[Street address]

_____[City, state, and ZIP]

_____[Area code and phone number]

_____[State Bar no. of attorney]

Attorney for _____[name of party]

SUPERIOR COURT OF CALIFORNIA,

COUNTY OF _____

[name(s)] _____,

Plaintiff(s)

vs.

[name(s)] _____

[and DOES 1 THROUGH

_____]

_____]

Defendant(s)

)

)

)

)

)

)

)

)

NO.

COMPLAINT FOR DECLARATORY RELIEF

Plaintiff _____[name] alleges:

[For an individual plaintiff]

1. Plaintiff is an individual residing in _____[city, if any, and county], California, [in the (name of
judicial district, if any) _____] [, and

therein doing business under the fictitious business name of _____. Plaintiff has duly complied in all respects with the requirements of *Business and Professions Code Sections 17910 through 17917* with respect to this fictitious business name].

[OR, for a domestic corporation or domestic limited liability company]

1. Plaintiff _____ [name] is, and at all times herein mentioned was, a _____ [corporation or limited liability company] organized and existing under the laws of California, with its principal place of business in _____ [city, if any, and county], California [in the (name of judicial district, if any) _____], and therein doing business under the fictitious business name of _____. Plaintiff has duly complied in all respects with the requirements of *Business and Professions Code Sections 17910 through 17917* with respect to this fictitious business name].

[OR, for a foreign corporation or foreign limited liability company]

1. Plaintiff _____ [name] is, and at all times herein mentioned was, a _____ [corporation or limited liability company] organized and existing under the laws of _____ [state or foreign country], and _____ [for foreign corporation authorized to do business and doing business in California or, for foreign limited liability company maintaining action or intrastate business, and registered to transact intrastate business in California], with its principal place of business in California in _____ [city, if any, and county], California [in the (name of judicial district, if any) _____].

[OR, for a general or limited partnership or an unincorporated association]

1. Plaintiff _____ [name] is, and at all times herein mentioned was, a _____ [partnership or unincorporated association] with its principal place of business in _____ [city, if any, and county], California [in the (name of judicial district, if any) _____], and therein doing business under the fictitious business name of _____. Plaintiff has duly complied in all respects with the requirements of *Business and Professions Code Sections 17910 through 17917* with respect to this fictitious business name].

[CONTINUE]

[For an individual defendant]

2. Defendant _____ [name] is an individual residing in _____ [city, if any, and county], California [in the (name of judicial district, if any) _____] [and doing business therein under the fictitious business name of _____].

[OR, for a domestic corporation or domestic limited liability company]

2. Defendant _____ [name] is, and at all times herein mentioned was, a _____ [corporation or limited liability company] organized and existing under the laws of California [, with its principal place of business in _____ (city, if any, and county), California (, in the _____ [name of judicial district, if any])].

[OR, for a foreign corporation or foreign limited liability company]

2. Defendant _____ [name] is, and at all times herein mentioned was, a _____ [corporation or limited liability company] organized and existing under the laws of _____ [state or foreign country][, with its principal place of business in _____ (city, if any, and county), California (, in the _____ [name of judicial district, if any])].

[OR, for a general or limited partnership or an unincorporated association]

2. Defendant _____ [name] is, and at all times herein mentioned was, _____ [a partnership or an unincorporated association] sued herein under the name _____ [it has assumed or by which it is known][, with its principal place of business in _____ (city, if any, and county), California (, in the _____ [name of judicial district, if any])]. [Defendants (names of individual partners or members) _____ are, and at all times herein mentioned were, members of that _____ (partnership or unincorporated association) (and are, and at all times herein mentioned were, residents of _____ County, California)].

[CONTINUE]

3. Plaintiff is ignorant of the true names and capacities of Defendants sued herein as DOES 1 through _____ [numeral, e.g., 50], inclusive, and therefore sues these Defendants by these fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when ascertained. [Plaintiff is informed and believes and thereon alleges that each of the fictitiously named Defendants is responsible in some manner for the occurrences herein alleged, and that Plaintiff's damages as herein alleged were proximately caused by those Defendants.]

4. Plaintiff is informed and believes and thereon alleges that at all times material to this complaint, _____ [identify Defendants to whom agency allegation applies, e.g., each of the Defendants or each of the individual Defendants or Defendant Harry Jones], [and each of the Defendants fictitiously named in this complaint,] in addition to acting for himself, herself, or itself and on his, her, or its own behalf individually, is and was acting as the agent, servant, employee and representative of, and with the knowledge, consent and permission of, and in conspiracy with, each and all of the Defendants and within the course, scope and authority of that agency, service, employment, representation, and conspiracy. Plaintiff further alleges on

information and belief that the acts of each of the Defendants were fully ratified by each and all of the Defendants. Specifically, and without limitation, Plaintiff alleges on information and belief that the actions, failures to act, breaches, conspiracy, and misrepresentations alleged herein and attributed to one or more of the specific Defendants were approved, ratified, and done with the cooperation and knowledge of each and all of the Defendants.

5. _____ [Set forth facts showing the existence of an actual controversy relating to the legal rights and duties of the parties under a contract, e.g., On or about January 1, 2005, Plaintiff requested in writing a quotation from Defendant to print and supply 10,000 T-shirts, to shipped to Plaintiff by June 1, 2005, for sale in its clothing stores. A copy of the request is attached to this complaint as Exhibit A and incorporated by reference. On February 1, 2005, Plaintiff sent a letter to Defendant stating it had found another manufacturer for the shirts and would not need Defendant's service. A copy of the letter is attached to this complaint as Exhibit B and incorporated by reference. Meanwhile, without Plaintiff's knowledge or agreement, Defendant produced the shirts and on February 18, 2005, notified Plaintiff it was prepared to ship the T-shirts, and demanded payment of \$25,000 for them. A copy of Defendant's notice is attached to this complaint as Exhibit C and incorporated by reference. On February 19, 2005, Plaintiff notified Defendant that the offer to make the shirts had been revoked by its February 1, 2005, letter, and that it did not want, and would not accept or pay for, the shirts made by Defendant. A copy of this letter is attached to this complaint as Exhibit D and incorporated by reference].

6. An actual controversy has arisen and now exists between Plaintiff and Defendant concerning their respective rights and duties in that Plaintiff contends _____ [specify Plaintiff's contentions as to controversy, e.g., the offer made by Plaintiff was revoked before Defendant's alleged acceptance, so that no contract exists], whereas Defendant disputes these contentions and contends that _____ [specify, e.g., the offer was not revoked before acceptance and an enforceable contract exists between the parties].

7. Plaintiff has no adequate and speedy remedy to resolve the parties' dispute other than by a declaratory judgment from this court. Because of the urgency and importance of the issues presented by the parties' dispute, it is necessary and appropriate for the court to resolve this dispute by issuing a judicial declaration determining the respective rights and obligations of the parties _____ [specify, e.g., with respect to the alleged agreement].

[Allege additional causes of action, if appropriate]

WHEREFORE, Plaintiff prays for judgment as follows:

1. For a judicial determination of his/her rights and duties and a declaration that _____ [specify, e.g., the offer to enter into a contract was revoked by Plaintiff before acceptance by Defendant, and no enforceable contract exists between the parties].

2. _____ [Specify any other relief requested, pursuant to any additional causes of action alleged.];

3. For costs of suit herein incurred; and

4. For such other and further relief as the court may deem proper.

Dated: _____

[firm name, if any] _____

By: *[signature]* _____*[typed name]* __________
Attorney for Plaintiff*[ADD following verification, if applicable]***VERIFICATION**

I am the Plaintiff in the above entitled action; I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein stated on information and belief, and, as to those matters, I believe it to be true.

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

[date] _____*[signature]* _____*[typed name]* _____**NOTES.****Authority:***CCP § 1060***Breach Not Required to Seek Declaratory Relief:***See 11.04***Complaint Must Show Existence of Controversy:***See 11.10[1]***Legal Topics:**

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

Civil Procedure Pleading & Practice Pleadings Complaints Requirements Civil Procedure Declaratory Judgment
Actions State Judgments General Overview Contracts Law Remedies General Overview



48 of 175 DOCUMENTS

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Chapter 11 Seeking or Opposing Declaratory Relief in Contract Matters
IV. FORMS

1-11 MB Practice Guide: CA Contract Litigation 11.23

11.23 Answer to Complaint for Declaratory Relief With Affirmative Defenses.**Answer to Complaint for Declaratory Relief With Affirmative Defenses.**

[Name of attorney]

_____[Street address]

_____[City, state, and ZIP]

_____[Area code and phone number]

_____[State Bar no. of attorney]

Attorney for _____[name of party]

SUPERIOR COURT OF CALIFORNIA,

COUNTY OF _____

[name] _____,

Plaintiff,

vs.

[name] _____,

Defendant.

)

)

)

)

)

)

)

NO.

ANSWER OF

_____[identify Defendant, e.g.,
DEFENDANT MARY JONES] TO COMPLAINT
OF

_____[identify Plaintiff, e.g.,
PLAINTIFF JOHN SMITH]

Judge:

Department:

Defendant _____ [name] answers the complaint as follows:

[Include general denial below, or set forth, in numbered paragraphs, specific denials, admissions, and allegations in response to those in complaint, in order in which they are alleged in complaint:]

1. Pursuant to *Code of Civil Procedure Section 431.30(b)(1)*, Defendant denies each and every allegation of the complaint, including all the purported causes of action contained therein, and further denies that Plaintiff is entitled to any equitable or legal relief whatsoever.

[Defendant asserts the following affirmative defenses. By doing so, Defendant shall not be deemed to have assumed the burden of proving any matters that otherwise would be Plaintiff's burden.]

[Allege any affirmative defenses, e.g.,]

[EITHER, if alleging that action for declaratory relief is barred by statute of limitations]

FIRST AFFIRMATIVE DEFENSE

(Statute of Limitations)

2. Plaintiff's action for declaratory relief arises out of an alleged contract that Plaintiff alleges was entered into on or about _____ [date] and breached on or about _____ [date]. Pursuant to _____ [specify limitations provision, e.g., *Code of Civil Procedure Section 337(1)*], any action arising out of that breach must have been brought within _____ [specify, e.g., four years]. Plaintiff's action for declaratory relief was brought on _____ [date], after the statute of limitations had run.

[AND/OR, if alleging that action for declaratory relief is subject to defense of res judicata]

SECOND AFFIRMATIVE DEFENSE

(Res Judicata)

3. Plaintiff's claim is for declaratory relief is barred by the doctrine of res judicata in that _____ [specify, e.g., the issues raised in Plaintiff's complaint were previously adjudicated in another action, (specify case name, number, court, and date judgment or other adjudication was rendered) _____]. [A certified copy of the judgment is attached as Exhibit A and incorporated by reference.]

[AND/OR, if alleging that declaratory relief is not necessary or proper]

THIRD AFFIRMATIVE DEFENSE

(Declaratory Relief Is Not Necessary or Proper)

4. The declaratory relief requested by Plaintiff is neither necessary nor proper under the circumstances, because _____ [specify reason(s) why relief is not necessary or proper, such as: another action, (specify case name, number, and court) _____ is already pending between the parties, and that action will resolve all issues with respect to which Plaintiff's complaint in this action seeks declaratory relief or Plaintiff's complaint alleges a fully matured claim for breach of contract and there is no other continuing relationship between the parties for which declaratory relief would be appropriate or there is no actual controversy between the parties relating to their legal rights and duties, in that the parties have not yet entered into a valid and binding contract].

[ADD additional affirmative defenses, if any]

[CONTINUE]

WHEREFORE, Defendant prays as follows:

1. That the court refuse the declaratory relief requested by Plaintiff;
2. For costs of suit; and
3. For such other and further relief as the court deems proper.

Dated: _____

[firm name, if any] _____

By: [signature] _____

[typed name] _____

Attorney for Defendant

[ADD following verification, if applicable]

VERIFICATION

I am the Defendant in the above entitled action; I have read the foregoing answer and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein stated on information and belief, and, as to those matters, I believe it to be true.

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

[date] _____

[signature] _____

[typed name] _____

NOTES.

Authority:

CCP §§ 431.30(b)(2), 1061; Maguire v. Hibernia Sav. & Loan Soc'y (1944) 23 C2d 719, 734, 146 P2d 673 ; Bennett v. Hibernia Bank (1956) 47 C2d 540, 550, 554, 305 P2d 20

Declaratory Relief Barred by Statute of Limitations:

See 11.17

Declaratory Relief Action Subject to Defense of Res Judicata:

See 11.18

Court's Discretion to Refuse Declaratory Relief When Not Necessary or Proper:

See 11.19

Asserting Affirmative Defenses in Answer to Complaint for Declaratory Relief:

See 11.20

Legal Topics:

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

Civil ProcedurePleading & PracticePleadingsAnswersCivil ProcedureDeclaratory Judgment ActionsState JudgmentsGeneral OverviewContracts LawRemediesGeneral Overview



49 of 175 DOCUMENTS

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Chapter 11 Seeking or Opposing Declaratory Relief in Contract Matters
IV. FORMS

1-11 MB Practice Guide: CA Contract Litigation 11.24

11.24 Points and Authorities for Party Seeking Declaratory Relief--Sufficiency of Complaint As to Declaratory Relief.

Points and Authorities for Party Seeking Declaratory Relief--Sufficiency of Complaint As to Declaratory Relief.

[Include the following, if appropriate under circumstances of the case, in a memorandum of points and authorities by the party seeking declaratory relief]

THE COMPLAINT STATES FACTS SUFFICIENT TO CONSTITUTE A CAUSE OF ACTION FOR
DECLARATORY RELIEF

A. Complaint Is Sufficient If Facts Show Actual Controversy. A complaint for declaratory relief is legally sufficient if it sets forth facts showing the existence of an actual controversy relating to the legal rights and duties of the respective parties under a contract and requests that those rights and duties be adjudged by the court (*Maguire v. Hibernia Sav. & Loan Soc'y* (1944) 23 Cal. 2d 719, 728, 146 P.2d 673).

[ADD, if appropriate]

B. Breach Is Not a Prerequisite to Declaratory Relief. A party may seek declaratory relief when an actual controversy relating to the legal rights and duties of the respective parties exists (*Code Civ. Proc. § 1060*). The declaration may be had before there has been any breach of the obligation in respect to which the declaration is sought (*Code Civ. Proc. § 1060*).

NOTES.

Breach Not Required to Seek Declaratory Relief:

See 11.04

Pleading Requirements:

See 11.10

Detailed Discussion of Format/Skeletal Forms for Points and Authorities:

California Forms of Pleading and Practice, Ch. 417, Points and Authorities (Matthew Bender); and
California Points and Authorities, Ch. 1, Writing Legal Memoranda and Briefs (Matthew Bender)

Additional Points and Authorities Relating to Declaratory Relief:

California Points and Authorities, Ch. 67, Declaratory Relief (Matthew Bender)

Legal Topics:

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

Civil ProcedurePleading & PracticePleadingsComplaintsRequirementsCivil ProcedureDeclaratory Judgment
ActionsState JudgmentsGeneral OverviewContracts LawRemediesGeneral Overview



50 of 175 DOCUMENTS

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Chapter 11 Seeking or Opposing Declaratory Relief in Contract Matters
IV. FORMS

1-11 MB Practice Guide: CA Contract Litigation 11.25

11.25 Points and Authorities for Party Seeking Declaratory Relief--Action Not Barred by Statute of Limitations.

Points and Authorities for Party Seeking Declaratory Relief--Action Not Barred by Statute of Limitations.

[Include the following, if appropriate under circumstances of the case, in a memorandum of points and authorities by the party seeking declaratory relief]

THE STATUTE OF LIMITATIONS DOES NOT BAR AN ACTION FOR DECLARATORY RELIEF BROUGHT BEFORE ACTUAL BREACH

No Cause of Action Has Accrued. If declaratory relief is sought before there has been a breach of the obligation in respect to which the declaration is sought, the right to relief is not barred by the statute of limitations because no cause of action has accrued (*Maguire v. Hibernia Sav. & Loan Soc'y* (1944) 23 Cal. 2d 719, 734, 146 P.2d 673 ; *United Pacific/Reliance Ins. Co. v. DiDomenico* (1985) 173 CA3d 673, 676-677, 219 CR 119).

NOTES.

Statute of Limitations Governing Action for Declaratory Relief:

See 11.17

Detailed Discussion of Format/Skeletal Forms for Points & Authorities:

California Forms of Pleading and Practice, Ch. 417, Points and Authorities (Matthew Bender); and
California Points and Authorities, Ch. 1, Writing Legal Memoranda and Briefs (Matthew Bender)

Additional Points and Authorities Relating to Declaratory Relief:

California Points and Authorities, Ch. 67, Declaratory Relief (Matthew Bender)

Legal Topics:

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

Civil ProcedureDeclaratory Judgment ActionsState JudgmentsGeneral OverviewContracts LawDefensesStatutes of LimitationsContracts LawRemediesGeneral OverviewGovernmentsLegislationStatutes of LimitationsGeneral Overview



51 of 175 DOCUMENTS

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Chapter 11 Seeking or Opposing Declaratory Relief in Contract Matters
IV. FORMS

1-11 MB Practice Guide: CA Contract Litigation 11.26

11.26 Points and Authorities for Party Seeking Declaratory Relief--Declaratory Relief Appropriate When Parties Have Continuing Relationship and/or Wrong May Be Repeated.

Points and Authorities for Party Seeking Declaratory Relief--Declaratory Relief Appropriate When Parties Have Continuing Relationship and/or Wrong May Be Repeated.

[Include the following, if appropriate under circumstances of the case, in a memorandum of points and authorities by the party seeking declaratory relief]

DECLARATORY RELIEF IS APPROPRIATE WHEN THE PARTIES HAVE A CONTINUING RELATIONSHIP AND/OR THE WRONG MAY BE REPEATED

A. Declaratory Relief Is Appropriate to Guide Future Conduct in Continuing Relationship. When the parties maintain a contractual relationship that will continue after resolution of the immediate dispute, and may give rise to additional claims, declaratory relief can help guide their future conduct and avoid multiple lawsuits (*Warren v. Kaiser Found. Health Plan, Inc.* (1975) 47 Cal. App. 3d 678, 683-684, 121 Cal. Rptr. 19).

B. Declaratory Relief Is Appropriate When Wrong May Be Repeated. Although declaratory relief deals with present rights, the "present right" contemplated is the right to have immediate judicial assurance that advantages will be enjoyed or liabilities escaped in the future (*Southern Counties Gas Co. v. Ventura Pipeline Constr. Co.* (1971) 19 Cal. App. 3d 372, 381, 96 Cal. Rptr. 825). If there is a reasonable expectation that the wrong, if any, will be repeated, declaratory relief is available (*Southern Counties Gas Co. v. Ventura Pipeline Constr. Co.* (1971) 19 Cal. App. 3d 372, 381, 96 Cal. Rptr. 825).

NOTES.

Declaratory Relief When Parties Have Continuing Relationship or Wrong May Be Repeated:

See 11.05

Detailed Discussion of Format/Skeletal Forms for Points and Authorities:

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

California Points and Authorities, Ch. 1, Writing Legal Memoranda and Briefs (Matthew Bender)

Additional Points and Authorities Relating to Declaratory Relief:

California Points and Authorities, Ch. 67, Declaratory Relief (Matthew Bender)

Legal Topics:

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

Civil ProcedureDeclaratory Judgment ActionsState JudgmentsGeneral OverviewCivil ProcedureDeclaratory Judgment
ActionsState JudgmentsFactorsContracts LawRemediesGeneral Overview



52 of 175 DOCUMENTS

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Chapter 11 Seeking or Opposing Declaratory Relief in Contract Matters
IV. FORMS

1-11 MB Practice Guide: CA Contract Litigation 11.27

11.27 Points and Authorities for Party Opposing Declaratory Relief--Action Barred by Statute of Limitations.

Points and Authorities for Party Opposing Declaratory Relief--Action Barred by Statute of Limitations.

[Include the following, if appropriate under circumstances of the case, in a memorandum of points and authorities by the party seeking declaratory relief]

THE ACTION FOR DECLARATORY RELIEF IS BARRED BECAUSE THE STATUTE OF LIMITATIONS HAS RUN ON AN ACTION FOR RELIEF

Statute of Limitations on Action for Relief Also Applies to Action for Declaratory Relief. If declaratory relief is sought with reference to an obligation that has been breached, and the right to commence an action for relief such as damages, specific performance, or injunction on the cause of action arising from the breach is barred by the statute of limitations, the right to declaratory relief is likewise barred (*Maquire v. Hibernia Sav. & Loan Soc'y* (1944) 23 Cal. 2d 719, 734, 146 P.2d 673).

NOTES.

Statute of Limitations Applicable to Action for Declaratory Relief:

See 11.17

Detailed Discussion of Format/Skeletal Forms for Points and Authorities:

California Forms of Pleading and Practice, Ch. 417, Points and Authorities (Matthew Bender); and
California Points and Authorities, Ch. 1, Writing Legal Memoranda and Briefs (Matthew Bender)

Additional Points and Authorities Relating to Declaratory Relief:

California Points and Authorities, Ch. 67, Declaratory Relief (Matthew Bender)

Legal Topics:

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

Civil ProcedureDeclaratory Judgment ActionsState JudgmentsGeneral OverviewContracts LawDefensesStatutes of

LimitationsContracts LawRemediesGeneral OverviewGovernmentsLegislationStatutes of LimitationsGeneral Overview



53 of 175 DOCUMENTS

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Chapter 11 Seeking or Opposing Declaratory Relief in Contract Matters
IV. FORMS

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11.28 Points and Authorities for Party Opposing Declaratory Relief--Declaratory Relief Not Necessary or Proper.

Points and Authorities for Party Opposing Declaratory Relief--Declaratory Relief Not Necessary or Proper.

[Include the following, if appropriate under circumstances of the case, in a memorandum of points and authorities by the party seeking declaratory relief]

A JUDICIAL DECLARATION OR DETERMINATION IS NOT NECESSARY OR PROPER AT THIS TIME
UNDER ALL THE CIRCUMSTANCES

A. Court Has Discretion to Refuse Relief. The court may refuse to grant declaratory relief if its declaration or determination is not necessary or proper at the time under all the circumstances (*Code Civ. Proc. § 1061*).

[ADD, if appropriate]

B. Declaratory Relief Unnecessary When Matter Can Be Raised as Affirmative Defense. When a matter can be raised as an affirmative defense in a pending action, the court can prevent the filing of a separate declaratory relief action by the defendant (*C.J.L. Constr., Inc. v. Universal Plumbing (1993) 18 Cal. App. 4th 376, 391, 22 Cal. Rptr. 2d 360*).

[ADD, if appropriate]

C. Declaratory Relief Unnecessary If Party Has Adequate Remedy. The availability of another form of relief that is adequate justifies the refusal to grant declaratory relief (*California Ins. Guarantee Assn. v. Superior Court (1991) 231 CA3d 1617, 1624, 283 CR 104*).

[ADD, if appropriate]

D. Declaratory Relief Sought by Cross-Complaint Properly Denied When Issues and Evidence Will Be Presented in Main Action. Declaratory relief may be properly denied when the issues and evidence in the trial of the main action would be substantially the same as that presented in connection with the cross-complaint (*International Ass'n of Fire Fighters v. City of Palo Alto* (1963) 60 Cal. 2d 295, 301-302, 32 Cal. Rptr. 842, 384 P.2d 170).

Denial of Declaratory Relief If Not Necessary or Proper:

See 11.19

Detailed Discussion of Format/Skeletal Forms for Points and Authorities:

California Forms of Pleading and Practice, Ch. 417, Points and Authorities (Matthew Bender); and
California Points and Authorities, Ch. 1, Writing Legal Memoranda and Briefs (Matthew Bender)

Additional Points and Authorities Relating to Declaratory Relief:

California Points and Authorities, Ch. 67, Declaratory Relief (Matthew Bender)

Legal Topics:

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

Civil ProcedureDeclaratory Judgment ActionsState JudgmentsGeneral OverviewCivil ProcedureDeclaratory Judgment
ActionsState JudgmentsFactorsContracts LawRemediesGeneral Overview



54 of 175 DOCUMENTS

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Chapter 11 Seeking or Opposing Declaratory Relief in Contract Matters
IV. FORMS

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11.29 Points and Authorities for Party Opposing Declaratory Relief--Opposing Party Entitled to Declaration Adverse to Party Seeking Relief--On Motion for Judgment on Pleadings.

Points and Authorities for Party Opposing Declaratory Relief--Opposing Party Entitled to Declaration Adverse to Party Seeking Relief--On Motion for Judgment on Pleadings.

[Include the following, if appropriate under circumstances of the case, in a memorandum of points and authorities by the party seeking declaratory relief]

THE COURT SHOULD GRANT DEFENDANT'S MOTION FOR JUDGMENT ON THE PLEADINGS AND RENDER A DECLARATORY JUDGMENT ON THE MERITS IN DEFENDANT'S FAVOR

Court Should Render Judgment on Merits Rather Than Dismiss Case. A motion for judgment on the pleadings may be used in an action for declaratory relief to obtain a declaratory judgment on the merits in the defendant's favor, rather than a dismissal of the plaintiff's suit (*Fisher v. City of Berkeley* (1984) 37 Cal. 3d 644, 679 n.31, 209 Cal. Rptr. 682, 693 P.2d 261). Because of the constructive admission of the facts pled in the complaint, the court may render a judgment on the merits declaring the rights and duties of the parties with respect to the controversies alleged (*Wilson v. Board of Ret.* (1957) 156 Cal. App. 2d 195, 203, 319 P.2d 426).

Judgment on Pleadings in Declaratory Relief Action:

See 11.21[1]

Detailed Discussion of Format/Skeletal Forms for Points and Authorities:

California Forms of Pleading and Practice, Ch. 417, Points and Authorities (Matthew Bender); and
California Points and Authorities, Ch. 1, Writing Legal Memoranda and Briefs (Matthew Bender)

Additional Points and Authorities Relating to Declaratory Relief:

California Points and Authorities, Ch. 67, Declaratory Relief (Matthew Bender)

Legal Topics:

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

Civil Procedure
Declaratory Judgment Actions
State Judgments
General Overview
Civil Procedure
Pretrial Judgments
Judgment on the Pleadings
Contracts Law
Remedies
General Overview



55 of 175 DOCUMENTS

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Chapter 11 Seeking or Opposing Declaratory Relief in Contract Matters
IV. FORMS

1-11 MB Practice Guide: CA Contract Litigation 11.30

11.30 Points and Authorities for Party Opposing Declaratory Relief--Opposing Party Entitled to Declaration Adverse to Party Seeking Relief--On Motion for Summary Judgment.

Points and Authorities for Party Opposing Declaratory Relief--Opposing Party Entitled to Declaration Adverse to Party Seeking Relief--On Motion for Summary Judgment.

[Include following, if appropriate under circumstances of case, in memorandum of points and authorities by party opposing declaratory relief]

THE COURT SHOULD ENTER SUMMARY JUDGMENT FOR DEFENDANT AND DECLARE THAT PLAINTIFF IS NOT ENTITLED TO A DECLARATION IN HIS/HER FAVOR

A. Summary Judgment Is Proper. Summary judgment is appropriate in a declaratory relief action when only legal issues are presented for the court's determination (*Siemon v. Russell* (1961) 194 Cal. App. 2d 592, 595, 15 Cal. Rptr. 218).

B. Court Must Declare Plaintiff Is Not Entitled to Declaration Sought. If summary judgment is granted that is not favorable to the party seeking declaratory relief, the court must declare that the plaintiff is not entitled to a declaration in his or her favor, rather than enter a judgment of dismissal (*Siemon v. Russell* (1961) 194 Cal. App. 2d 592, 595, 15 Cal. Rptr. 218).

Summary Judgment in Declaratory Relief Action:

See 11.21[2]

Detailed Discussion of Format/Skeletal Forms for Points and Authorities:

California Forms of Pleading and Practice, Ch. 417, Points and Authorities (Matthew Bender); and
California Points and Authorities, Ch. 1, Writing Legal Memoranda and Briefs (Matthew Bender)

Additional Points and Authorities Relating to Declaratory Relief:

California Points and Authorities, Ch. 67, Declaratory Relief (Matthew Bender)

Legal Topics:

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

Civil ProcedureDeclaratory Judgment ActionsState JudgmentsGeneral OverviewCivil ProcedureSummary
JudgmentMotions for Summary JudgmentGeneral OverviewContracts LawRemediesGeneral Overview



56 of 175 DOCUMENTS

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Chapter 12 Recovering Attorney's Fees and Costs in Contract Litigation

1-12 MB Practice Guide: CA Contract Litigation 12.syn

AUTHOR: James E. Wright II

§ 12.syn Synopsis to Chapter 12: Recovering Attorney's Fees and Costs in Contract Litigation

12.01 Scope.

12.02 Objective and Strategy.

12.03 CHECKLIST: Recovering Attorney's Fees by Statute or Contract.

12.04 Attorney's Fees Generally Not Recoverable.

12.05 Attorney's Fees Recoverable When Specifically Allowed by Contract or Statute.

12.05[1] Contract May Provide for Recovery.

12.05[2] Attorney's Fees Are Recoverable on Some Categories of Contracts by Statute.

12.05[3] Contingency Representation Does Not Bar Recovery of Fees.

12.05[4] Recovery Under Statute or Contract May Include Fees Incurred In Related Noncontract Causes of Action.

12.05[4][a] Attorneys' Fees Under CC § 1717 Are Apportioned Between Contract and Noncontract Claims Unless Incurred for Representation on Issue Common to Both.

12.05[4][b] Cause of Action Based on Breach of a Promise Is Contractual for Purposes of CC § 1717.

12.05[4][c] Scope of Particular Contractual Fee Provision May Be Broad Enough to Apply to Related Cause of Action.

12.05[5] Attorney's Time Need Not Be Allocated Between Parties Entitled and Not Entitled to Fees If It Cannot Be Separated Into Compensable and Noncompensable Units.

12.06 CC § 1717 Controls Scope of Contractual Provisions Governing Attorney's Fees.

12.06[1] Contract May Not Award Fees Unilaterally.

12.06[2] Contract Provision May Not Allow Award of Fees When Action Is Voluntarily Dismissed or Settled.

12.06[3] Contractual Provision for Fees Generally Applies to Entire Agreement.

12.07 Contract May Specifically Address What Fees Are Allowable.

12.08 Provisions for Attorney's Fees Appearing in One Document May Apply to Other Documents If Part of Same Agreement.

12.09 Actions for Rescission or Reformation Are Actions on Contract Under CC § 1717.

12.10 Finding That No Contract Exists Does Not Prevent Fee Recovery.

12.11 Condition Precedent of Initiating Mediation Before Litigation Is Valid.

12.12 Procedural Requirements Governing Recovery of Attorney's Fees.

12.12[1] Attorney's Fees Allowed by Contract Under CCP § 1033.5 Need Not Be Specifically Pleaded or Proven at Trial.

12.12[2] Noticed Motion Required for Award of Fees by Contract As Costs Pursuant to CCP § 1033.5.

12.12[3] Noticed Motion Not Required for Award of Fees by Statute Pursuant to CCP § 1033.5.

12.12[4] California Rules of Court Dictate Timing and Procedural Requirements for Recovery of Attorney's Fees.

12.13 Court Has Broad Discretion in Determining Reasonableness of Fee Awards.

12.13[1] Moving Party Bears Burden of Proof for Fees Not Fixed by Formula.

12.13[2] Factors Considered in Determining Reasonable Compensation.

12.13[3] Lodestar Method Uses Number of Hours Reasonably Expended Multiplied by Reasonable Hourly Rate.

12.14 Settlement Offers May Shift Fee Burden If Offer Is As Good As or Better Than Resulting Judgment Under CCP § 998.

12.15 Fees Incurred on Appeal May Be Recovered.

12.16 Attorney's Fees Are Recoverable for Services of In-House Counsel, but Not for Pro Se Representation.

12.16[1] Fees May Be Recovered for Representation by In-House Counsel.

12.16[2] Fees May Be Recovered for Representation by Other Members of Same Firm.

12.16[3] Pro Se Litigants May Not Recover Fees Not Actually Incurred.

12.17 Attorney's Fees May Be Recoverable By Party Who Is Not Signatory to Agreement.

12.18 CHECKLIST: Recovering Costs Allowed by Statute.

12.19 General Rule Allows Recovery of Reasonable and Necessary Costs.

12.19[1] Costs Recoverable by Prevailing Party.

12.19[1][a] Prevailing Party May Recover Costs.

12.19[1][b] Costs Must Be Reasonable in Amount and Necessarily Incurred.

12.19[1][c] Trial Court Has Discretion to Determine Allowable Costs Not Expressly Allowed by Statute.

12.19[1][d] Certain Types of Contracts Have Particular Categories of Recoverable Costs.

12.19[2] Judgment Required to Collect Costs.

12.19[2][a] Dismissal and Settlement Generally Allow Recovery of Costs.

12.19[2][b] Costs of Arbitration Are Recoverable.

12.19[2][c] Judicial Referee's Fees Are Recoverable.

12.19[3] CCP § 1033.5 Expressly Allows and Disallows Certain Categories of Costs.

12.19[4] Expert Witness Fees May Be Recovered As Item of Damages.

12.20 Burden of Proving Costs Falls on Moving Party.

12.20[1] Prima Facie Case Made and Burden Shifts to Respondent When Cost Allowed by Statute.

12.20[2] Party Seeking Costs Not Specifically Allowed by Statute Has Burden of Proof.

12.21 Actions or Conditions May Reduce Recoverable Costs.

12.21[1] Offers to Pay or Settle May Halt Accrual of Recoverable Costs.

12.21[1][a] Tender of Money Owed Prior to Commencement of Action for Money May Shift Costs to Plaintiff.

12.21[1][b] Good Faith Offers to Settle May Halt Accrual of Costs As of Time of Offer.

12.21[2] Incorrect Jurisdictional Classification May Reduce Recoverable Costs.

12.21[3] Separate Actions Against Multiple Parties for Single Cause When Single Action Could Have Been Filed May Reduce Recoverable Costs in Single Action.

12.21[4] When Multiple Defendants Are Sued With Different Outcomes, Costs Generally May Not Be Shifted Between Defendants.

12.22 California Rules of Court Dictate Timing and Procedural Requirements.

12.23 CHECKLIST: Determining Prevailing Party for Recovery of Costs or Fees.

12.24 Prevailing Party Is Different for Purpose of Recovering Costs Than for Purpose of Recovering Attorney's Fees.

12.24[1] Definition of Prevailing Party for Cost Purposes Under CCP § 1032.

12.24[2] Definition of Prevailing Party for Purpose of Recovering Attorney's Fees Under CC § 1717.

12.25 Courts Adopt Practical Approach When Prevailing Party Is Not Defined by Statute.

12.26 Discretion of Court Under CC § 1717 Is Not Unlimited.

12.27 Court Determines Prevailing Party on Noticed Motion in Request for Fees Allocated by Contract.

12.28 In Actions on Multiple Agreements That Stand on Their Own, Multiple Prevailing Parties May Exist for Purpose of Allocating Costs and Fees.

12.29 Notice of Motion to Determine Party Prevailing on Contract and to Fix Amount of Attorney's Fees to Be Awarded As Costs, With Supporting Declaration.

Notice of Motion to Determine Party Prevailing on Contract and to Fix Amount of Attorney's Fees to Be Awarded As Costs and Supporting Declaration.

James E. Wright II n*

FOOTNOTES:

(n2)Footnote *. Mr. Wright is a graduate of Harvard Law School and an attorney with Sidley Austin Brown & Wood LLP specializing in technology transactions and intellectual property related litigation. Mr. Wright also is an experienced software engineer and manager and has spoken and written on a variety of topics in software development.



57 of 175 DOCUMENTS

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Chapter 12 Recovering Attorney's Fees and Costs in Contract Litigation

I. STRATEGY

1-12 MB Practice Guide: CA Contract Litigation 12.01

AUTHOR: James E. Wright II

12.01 Scope.

This chapter covers issues relating to the recovery of costs and attorney's fees in actions arising out of a contract, specifically:

- Rules regarding recovery of attorney's fees as authorized by contract or statute [*see 12.03 -12.11, 12.14 -12.17*].
- Procedural requirements governing the recovery of attorney's fees [*see 12.12*].
- Determining the reasonableness of fee awards [*see 12.13*].
- Rules regarding recovery of costs [*see 12.18 -12.21*].
- Timing and procedural requirements for the recovery of costs [*see 12.22*].
- Determining the prevailing party [*see 12.23 -12.28*].

Core Statutes:

CCP §§ 1021, 1032, 1033.5; CC § 1717

Legal Topics:

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

Civil Procedure Remedies Costs & Attorney Fees Attorney Expenses & Fees American Rule Civil Procedure Remedies Costs & Attorney Fees Attorney Expenses & Fees Reasonable Fees Civil Procedure Remedies Costs & Attorney Fees Attorney Expenses & Fees Statutory Awards Civil Procedure Remedies Costs & Attorney Fees Costs General Overview Contracts Law Remedies General Overview



58 of 175 DOCUMENTS

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Chapter 12 Recovering Attorney's Fees and Costs in Contract Litigation

I. STRATEGY

1-12 MB Practice Guide: CA Contract Litigation 12.02

AUTHOR: James E. Wright II

12.02 Objective and Strategy.

The prevailing party in a contract action may be able to compel the losing party to pay the prevailing party's attorney's fees and costs in the action if such an award is authorized in the action either by contract or by statute.

Costs of litigation may be recovered by the prevailing party in California litigation as a matter of right [CCP § 1032], and CCP § 1033.5 specifically delineates those costs that are allowable and those that are not. Attorney's fees also may be recovered as costs in litigation when allowed by contract or by law [CCP § 1033.5(a)(10)]. The award of attorney's fees is relatively rare, but such recoveries typically are larger than the recovery of costs.

CC § 1717 controls the scope of contractual attorney's fees provisions. This section provides that [CC § 1717]:

- Unilateral fee provisions must be interpreted to award fees to either party.
- Attorney's fees may not be recovered when an action is voluntarily dismissed or settled.
- A provision limiting fee recovery to breach under particular sections of a contract will be interpreted to apply to the entire contract, unless both parties were represented by counsel in the negotiation of the contract.

A party seeking to recover attorney's fees under a contract need not plead or prove its entitlement to fees, but after judgment must file a noticed motion to determine the prevailing party and for the award of fees.

Central to the recovery of costs and/or attorney's fees is the determination of the prevailing party, which may have different meanings for the purposes of costs, attorney's fees in contract actions, attorney's fees specifically allowed by statute, and attorney's fees in other causes of action.

While a contract providing for the recovery of attorney's fees may seem clear on its face, the recoverability of costs and fees is influenced by a variety of factors beginning before the initial filing of a case and continuing until after a judgment is entered. Careful evaluation and reconsideration of these factors is warranted during the pre-filing investigation, during litigation, before and during any settlement discussions, and on later requests for costs or fees or

opposition to these requests.



Warning:

Parties should be mindful of the factors distinguishing cost recoveries from fee recoveries. Courts allow parties to recover costs with relative ease, but more rarely permit the recovery of fees. This is due primarily to the need for parties to provide explicitly in the contract for the recovery of fees, as well as to the different standards applicable to the recovery of costs and to the recovery of fees when attempting to prove a party's status as the prevailing party, discussed in 12.25.

Detailed Discussion/Forms:

California Forms of Pleading and Practice, Ch. 174, Attorney's Fees (Matthew Bender).

California Points and Authorities, Ch. 60, Costs (Matthew Bender).



Cross Reference:

For Tips on updating case law and expanding your research with additional resources, see **How to Use Lexis.com With This Publication** at the front of this volume.

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59 of 175 DOCUMENTS

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Chapter 12 Recovering Attorney's Fees and Costs in Contract Litigation
II. RECOVERING ATTORNEY'S FEES BY STATUTE OR CONTRACT

1-12 MB Practice Guide: CA Contract Litigation 12.03

AUTHOR: James E. Wright II

12.03 CHECKLIST: Recovering Attorney's Fees by Statute or Contract.

☐ Are attorney's fees allowed by statute or contract?

☐ Does a contractual provision for attorney's fees cover cause(s) of action on which requesting party recovered?

Authority:

CCP §§ 1021, 1033.5; Santisas v. Goodin (1998) 17 C4th 599, 71 CR2d 830, 951 P2d 399

Discussion:

See 12.05[4]

Form:

See 12.29

☐ Does contract allow fees for particular party seeking recovery?

Authority:

Reynolds Metals Co. v. Alperson (1979) 25 C3d 124, 158 CR 1, 599 P2d 83

Discussion:

See 12.17

☐ Was a statute specifically allowing fees pleaded?

Authority:

CCP § 1033.5(a)(10)

Discussion:

See 12.05[2]

☐ Were notice and motion requirements for recovery of fees met?

☐ Was there a timely served and filed notice and motion for fees?

Authority:

CCP § 1033.5(c)(5)

Discussion:

See 12.12

☐ If fees are sought for a contract cause of action, did court, on notice and motion, determine identity of prevailing party?

Authority:

CC § 1717

Discussion:

See 12.27

☐ Are fees requested of a type whose recovery is permitted under statute?

Authority:

CCP § 1033.5(b); First Nationwide Bank v. Mountain Cascade, Inc. (2000) 77 CA4th 871, 878-879, 92 CR2d 145

Discussion:

See 12.05, 12.07, 12.11, 12.16, 12.17

☐ Did moving party submit evidence supporting its fee request under lodestar or other methods?

Authority:

Melnyk v. Robledo (1976) 64 CA3d 618, 623-624, 134 CR 602

Discussion:

See 12.13

☐ Did an offer of settlement greater than recovery shift fee burden?

Authority:

CCP § 998

Discussion:

See 12.14

- ☐ Is recovery sought on contract causes of action for which it is barred by settlement or voluntary dismissal?

Authority:

CC § 1717

Discussion:

See 12.06[2]

- ☐ Were any contractual conditions precedent to fee recovery under agreement fulfilled?

Authority:

Leamon v. Krajewicz (2003) 107 CA4th 424, 433, 132 CR2d 362

Discussion:

See 12.11

- ☐ Is recovery of fees barred because prevailing party litigated pro se?

Authority:

Trope v. Katz (1995) 11 C4th 274, 292, 45 CR2d 241, 902 P2d 259

Discussion:

See 12.16

Legal Topics:

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

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60 of 175 DOCUMENTS

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Chapter 12 Recovering Attorney's Fees and Costs in Contract Litigation
II. RECOVERING ATTORNEY'S FEES BY STATUTE OR CONTRACT

1-12 MB Practice Guide: CA Contract Litigation 12.04

AUTHOR: James E. Wright II

12.04 Attorney's Fees Generally Not Recoverable.

In the absence of either a provision in the parties' agreement for the allocation of attorney's fees to the prevailing party (or otherwise), or a statute dictating an award of fees, each party bears its own attorney's fees [*Salgado v. County of Los Angeles* (1998) 19 C4th 629, 651, 80 CR2d 46, 967 P2d 585].



Cross Reference:

Discussion of general rule regarding attorney's fees, see *California Forms of Pleading and Practice*, § 174.50 *et seq.* (Matthew Bender).

Legal Topics:

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61 of 175 DOCUMENTS

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II. RECOVERING ATTORNEY'S FEES BY STATUTE OR CONTRACT

1-12 MB Practice Guide: CA Contract Litigation 12.05

AUTHOR: James E. Wright II

12.05 Attorney's Fees Recoverable When Specifically Allowed by Contract or Statute.

12.05[1] Contract May Provide for Recovery. *CCP § 1021* allows the recovery of fees when the contract provides for their recovery, in conjunction with the cost recovery mechanisms of *CCP §§ 1032* and *1033.5*. *CCP § 1033.5(a)(10)* provides that attorney's fees may be recovered as costs when an award of fees is provided by contract, law, or statute. The party seeking fees bears the burden of proof when the fees sought are not based on the court's established fee schedule [*CCP § 1033.5(c)(5)*].

Distinguish:

Provisions in public construction contracts requiring the contractor to indemnify and hold harmless the city from losses and expenses, including attorney fees, were standard indemnity clauses intended to apply only to expenses incurred in defending against third party tort claims, and not to claims on the contract itself [*Carr Business Enterprises, Inc. v. City of Chowchilla* (2008) 166 CA4th 14, 23, 82 CR3d 128] .



Cross Reference:

Discussion of fee schedule, see *12.13[1]*.



Search California Combined Federal and State Cases:

Use *lexis.com* to search for cases discussing whether a statute or contract allows for attorney's fees:

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Sample Search: To find California federal and state cases that discuss whether a statute or contract allows for attorney's fees, try: *statut! OR law OR code OR contract! /10 prevail! /10 attorney fees OR costs.*

12.05[2] Attorney's Fees Are Recoverable on Some Categories of Contracts by Statute. "Literally hundreds"

of statutes provide for or govern the recovery of attorney's fees in contracts or actions of particular types and subject areas [*Damian v. Tamondong* (1998) 65 CA4th 1115, 1125, n11, 77 CR2d 262]. Just a few of these provisions include:

- Actions under the Rees-Levering Motor Vehicle Sales and Financing Act [CC § 2983.4].
- Actions under the Vehicle Leasing Act [CC § 2988.9].
- Actions for nonpayment of wages or benefits [Lab Code § 218.5].
- Actions on contract for book accounts [CC § 1717.5].
- Actions against unlicensed persons acting in licensed professions [CCP § 1029.8(a)].
- Actions on retail installment sales contracts [CC § 1801 *et seq.*, and in particular, CC § 1811.1].
- Actions brought by independent sales representatives under the Independent Wholesale Sales Representatives Contractual Relations Act of 1990 [CC § 1738.10 *et seq.*].
- Actions under the Consumer Legal Remedies Act [CC § 1750 *et seq.*].
- Actions under the Song-Beverly Consumer Warranty Act (also known as the California "Lemon Law") [CC § 1790 *et seq.*].

CCP § 1033.5(a)(10)(B) provides for the recovery of fees awarded by statute, and CCP § 1033.5(c)(5) provides for the award of statutory fees on application supported by affidavit made concurrently with a claim for other costs.

12.05[3] Contingency Representation Does Not Bar Recovery of Fees. Representation by counsel on a contingency basis does not bar recovery of attorney's fees [*Gonzales v. Personal Storage, Inc.* (1997) 56 CA4th 464, 478-480, 65 CR2d 473].

Judge's Perspective:

The "reasonable fees" to which a party is entitled under a contract [see CC § 1717] is not always the same as the amount owed under the contingency fee agreement between the successful party and the attorney; that agreement is merely one factor to be considered [*Vella v. Hudgins* (1984) 151 CA3d 515, 520, 198 CR 725 ; see 12.13[1]]. The prevailing party therefore should be prepared to demonstrate that the fee was reasonable given the difficulty of the case, the quality of the legal work performed, and the other factors that a court might consider for any other fee [see 12.12[5]]. Otherwise, the prevailing party might be left to pay the difference between the court's "reasonable fee" and the amount of the contingency fee actually due.



Cross Reference:

Discussion of determining reasonableness of fee award, see 12.13.

12.05[4] Recovery Under Statute or Contract May Include Fees Incurred In Related Noncontract Causes of Action.

12.05[4][a] Attorneys' Fees Under CC § 1717 Are Apportioned Between Contract and Noncontract Claims Unless Incurred for Representation on Issue Common to Both. When a party prevails on a cause of action for breach of contract as well as other causes of action not on the contract, ordinarily the prevailing party may recover

attorney's fees under CC § 1717 only as they relate to the contract cause of action [*Reynolds Metals Co. v. Alperson* (1979) 25 C3d 124, 129, 158 CR 1, 599 P2d 83]. A party who prevails on a contract cause of action is entitled to recover attorney's fees under CC § 1717, regardless of whether the party recovers damages or only specific performance [*Baugh v. Garl* (2006) 137 CA4th 737, 742, 40 CR3d 539 ; see *Kachlon v. Markowitz* (2008) 168 CA4th 316, 347, 85 CR3d 532 (claims arising out of promissory note and deed of trust were contract claims even though remedies sought were equitable)].

Exception:

However, attorney's fees need not be apportioned when incurred for representation on an issue common to both the contract cause of action and another cause of action for which fees are not recoverable [*Reynolds Metals Co. v. Alperson* (1979) 25 C3d 124, 129-130, 158 CR 1, 599 P2d 83].

Apportionment of a fee award between fees incurred on a contract cause of action and those incurred on other causes of action is within the trial court's discretion [*El Escorial Owners' Assn. v. DLC Plastering, Inc.* (2007) 154 CA4th 1337, 1365, 65 CR3d 524 (court apportioned fees because tort and toxic mold issues were severable from contractual indemnity issues)].

Judge's Perspective:

When a party prevails on both contract theories and non-contract theories, the attorney's fees must be apportioned between the theories of relief. Lawyers involved in cases containing both contractual and non-contractual claims should be accounting for their time accordingly. Note, however, that this requirement will be excused if "the claims for relief are so intertwined that it would be impracticable" to separate the attorney's time between the compensable and non-compensable claims [*Bell v. Vista Unified Sch. Dist.* (2000) 82 CA4th 672, 687, 98 CR2d 263]. When a case goes to the jury on both contract and noncontract theories of relief without election, and the measure of damages is the same, the prevailing plaintiff may elect the contract theory *after* a successful verdict in order to recover attorney's fees [*Fairchild v. Park* (2001) 90 CA4th 919, 926-927, 109 CR2d 442].

Examples:

- In construction defect litigation, court acted within its discretion by awarding attorney's fees incurred in litigating issues common to contractual and non-contractual claims; further, the tort issues were determinative of the contractual claims [*Erickson v. R.E.M. Concepts, Inc.* (2005) 126 CA4th 1073, 1086, 28 CR3d 39].

- In a case alleging misuse of trade secrets, fraud, and breach of several contracts, only one of which contained an attorney's fees clause, trial court was not required to apportion fees because claims involved issues so interrelated that it would have been impossible to separate them [*Yield Dynamics, Inc. v. TEA Systems Corp.* (2007) 154 CA4th 547, 580, 66 CR3d 1].

- Because plaintiffs' tort theories and defendant's contract based cross-complaint were interrelated and required presentation of virtually identical evidence, the trial court properly could conclude a 10 percent reduction in the total amount of attorney fees was adequate to reduce the fee award to that amount attributable to the defense of the contract claim [*PM Group, Inc. v. Stewart* (2007) 154 CA4th 55, 68-69, 64 CR3d 227].

- In an action arising out of a corporate merger brought by the former president of the acquired corporation, the court awarded the defendants fees under the plaintiff's employment contract, which

included an attorney's fees clause, for defense of the plaintiff's breach of contract cause of action. The court of appeal agreed with the trial court that the allegations in seven tort causes of action overlapped the contract allegations to such an extent that allocation was not required [*Amtower v. Photon Dynamics, Inc.* (2008) 158 CA4th 1582, 1604-1605, 71 CR3d 361] .

- Plaintiffs who purchased a parcel of land from defendants sued claiming defendants falsely misrepresented to plaintiffs that the land could be subdivided. Before proceeding to trial, plaintiffs voluntarily dismissed their contract causes of action, opting instead to try only their fraud claim. After the jury returned a verdict in defendants' favor, the trial court refused to grant defendants' request for attorney's fees because it believed attorney fees were not recoverable in a tort action for fraud, even if the fraud arose out of the contract. The appellate court reversed, holding that defendants were entitled to recover fees under CCP § 1021. The court explained that although the dismissal of the contract action prevented defendants' recovery of fees under CC § 1717, the language in the contract permitting the prevailing party to recover attorney fees "in any action or proceeding arising out of [the] agreement" allowed defendants to recover fees even if plaintiffs' claim was based on tort rather than contract because plaintiffs' fraud claim arose out of the parties' agreement [*Lerner v. Ward* (1993) 13 CA4th 155, 160, 16 CR2d 486].

Cross References:

Discussion of fee recoveries under CC § 1717, see 12.06.

Discussion of procedures for recovering fees under CCP § 1033.5(a)(10)(A), see 12.12.

12.05[4][b] Cause of Action Based on Breach of a Promise Is Contractual for Purposes of CC § 1717. In some cases, a party who prevails on a cause of action other than a strict breach of contract claim still may recover attorney's fees under a contract provision pursuant to CC § 1717 if that claim is based on contract. Whether a claim is based on contract or tort depends on the nature of the right sued upon, not the form of the pleading or relief demanded. A claim based on breach of a promise is contractual; a claim based on breach of a noncontractual duty is a tort [*Kangarlou v. Progressive Title Co., Inc.* (2005) 128 CA4th 1174, 1178, 27 CR3d 754].

Examples:

- A landlord's breach of the implied warranty of habitability can warrant an award of fees under CC § 1717 based on a fee provision in the rental agreement [*Fairchild v. Park* (2001) 90 CA4th 919, 924-925, 109 CR2d 442].

- Plaintiff who prevailed on a breach of fiduciary duty claim against an escrow agent could recover attorney's fees under CC § 1717 because the escrow agent assumed fiduciary duties to the plaintiff only by entering the contract to execute the escrow; thus the fiduciary duties arose out of the contract [*Kangarlou v. Progressive Title Co., Inc.* (2005) 128 CA4th 1174, 1179, 27 CR3d 754].

Cross References:

Discussion of fee recoveries under CC § 1717, see 12.06.

Discussion of fee recovery for non-contract causes of action, see *California Forms of Pleading and Practice*, § 174.50 et seq. (Matthew Bender).

Implied warranties in general, see Ch. 24, *Suing or Defending Action for Breach of Warranty*, 24.07.

12.05[4][c] Scope of Particular Contractual Fee Provision May Be Broad Enough to Apply to Related Cause of Action. A contract provision for attorney's fees may be phrased broadly enough to cover causes of action in tort and other non-contractual claims between the parties related to the contract [*Exxess Electronixx v. Heger Realty Corp.* (1998) 64 CA4th 698, 708, 75 CR2d 376 ; *Santisas v. Goodin* (1998) 17 C4th 599, 608, 71 CR2d 830, 951 P2d 399]. Because these claims are not contract causes of action, recovery of fees is not governed by CC § 1717, but fees may be awarded under CCP § 1033.5(a)(10)(A) (providing for an award of fees to the prevailing party when authorized by contract). The restrictions found in CC § 1717, therefore, do not apply [see *Lerner v. Ward* (1993) 13 CA4th 155, 160-161, 16 CR2d 486 (although prevailing plaintiffs could not recover attorney's fees on dismissed contract cause of action under CC § 1717, they nonetheless could recover fees on tort action arising out of contract pursuant to CCP § 1021 and CCP § 1033(a)(10)(A))].



Strategic Point--Prevailing Party:

All attorney's fees provisions are not the same! Although it is standard practice to include an attorney's fees provision in contracts, the wording of such provisions varies. A prevailing party should always examine the language of the underlying attorney's fees provision carefully to ascertain whether or not that language might be broad enough to encompass fees incurred in connection with related claims.

Examples--Fee Provision Covers Tort Claims:

- An attorney's fees clause in a real estate purchase agreement providing for recovery of fees by the prevailing party in "any action, proceeding, or arbitration between Buyer and Seller arising out of this Agreement" was broad enough to cover fraud and negligent misrepresentation claims brought by the buyer against the seller [*Johnson v. Siegel* (2000) 84 CA4th 1087, 1101, 101 CR2d 412 ; see *Wakefield v. Bohlin* (2006) 145 CA4th 963, 987-989, 52 CR3d 400] .
- An attorney's fees clause in a real estate purchase agreement providing for recovery of fees by the prevailing party in any "lawsuit or other legal proceeding" to which "this Agreement gives rise" was broad enough to cover claims for negligence, breach of fiduciary duty, concealment and misrepresentation brought by buyers against their real estate agent [*Xuereb v. Marcus & Millichap, Inc.* (1992) 3 CA4th 1338, 1344-1345 , *disapproved on other grounds, as stated in* *Damian v. Tamondong* (1998) 65 CA4th 1115, 1127].
- An attorney's fees clause in a lease providing for the award of fees to the prevailing party "[i]n any legal action brought by either party to enforce the terms hereof or relating to the demised premises" was broad enough to cover claims for negligence, failure to disclose a latent defect, and breach of an implied warranty of habitability brought by the lessee's property insurer against the lessor [*Allstate Ins. Co. v. Loo* (1996) 46 CA4th 1794, 1799, 54 CR2d 541].
- An attorney's fees clause in a lease providing for recovery of fees by the prevailing party in any civil action "instituted in connection with this Agreement" was broad enough to cover claims for forcible detainer, wrongful eviction, and negligent infliction of emotional distress, in addition to breach of the lease agreement [*Cruz v. Ayromloo* (2007) 155 CA4th 1270, 1277, 66 CR3d 725] .
- A fee provision in a lease providing for attorney's fees to the prevailing party in "any legal action or proceeding brought by either party to this agreement" was exceptionally broad and encompassed an award of fees to the prevailing party in a tort action brought by tenants against their landlord [*Chinn v.*

KMR Property Management (2008) 166 CA4th 175, 183, 82 CR3d 586 .

Examples--Fee Provision Does Not Cover Tort Claims:

- A fee provision in a lease providing for recovery of fees by the prevailing party in any "action or proceeding to enforce the terms" of the lease or to "declare rights" under the lease did not extend to claims for constructive fraud and breach of fiduciary duty [*Exxess Electronixx v. Heger Realty Corp.* (1998) 64 CA4th 698, 709-713, 75 CR2d 376].

- A provision providing for recovery of fees by the prevailing party in "any action or proceeding brought to construe or enforce the terms of this Subcontract" did not cover claims for negligence in a construction defect case [*El Escorial Owners' Assn. v. DLC Plastering, Inc.* (2007) 154 CA4th 1337, 1365, 65 CR3d 524] .

- A provision that provided for recovery of fees "incurred in enforcing or attempting to enforce any of the terms, covenants or conditions" of an employment agreement did not support recovery of fees incurred in the prosecution of an employee's tort claims against his former employer [*Casella v. SouthWest Dealer Services, Inc.* (2007) 157 CA4th 1127, 1162, 69 CR3d 445] .

Example--Fee Provision May Cover Fees Incurred In Related Bankruptcy Action:

In a landlord-tenant dispute, the landlord successfully moved to dismiss the tenant's bankruptcy case and then filed an action in state court for breach of lease and other claims, and attorney's fees incurred in obtaining the dismissal of the bankruptcy case. The Court of Appeal held that the trial court erred in striking the claim for attorney's fees because the court was required to consider extrinsic evidence allegedly showing that the attorney's fees clause in the lease was broad enough to encompass bankruptcy proceedings [*Circle Star Center Associates, L.P. v. Liberate Technologies* (2007) 147 CA4th 1203, 1211, 55 CR3d 232] .

Cross References:

Discussion of fee recoveries under CC § 1717, see 12.06.

Recovery of expert witness fees as damages, see 12.19[4].

12.05[5] Attorney's Time Need Not Be Allocated Between Parties Entitled and Not Entitled to Fees If It Cannot Be Separated Into Compensable and Noncompensable Units. Allocation of fees incurred in representing multiple parties, some of whom are entitled to contractual attorney's fees and others who are not, is not required when the liability of the parties is so factually interrelated that it would be impossible to separate the attorney's activities into compensable and noncompensable time units [*Cruz v. Ayromloo* (2007) 155 CA4th 1270, 1277, 66 CR3d 725 ; *Liton Gen. Eng'g Contractor v. United Pac. Ins.* (1993) 16 CA4th 577, 588, 20 CR2d 200] .

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62 of 175 DOCUMENTS

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Chapter 12 Recovering Attorney's Fees and Costs in Contract Litigation
 II. RECOVERING ATTORNEY'S FEES BY STATUTE OR CONTRACT

1-12 MB Practice Guide: CA Contract Litigation 12.06

AUTHOR: James E. Wright II**12.06 CC § 1717 Controls Scope of Contractual Provisions Governing Attorney's Fees.**

12.06[1] Contract May Not Award Fees Unilaterally. In the litigation of any contract that awards fees to one party, or to the prevailing party, *CC § 1717* entitles the prevailing party, as defined and determined by the court under that section, to reasonable attorney's fees in addition to other costs. One-sided attorney's fee provisions, therefore, are turned into bilateral fee provisions by force of law [*Kachlon v. Markowitz* (2008) 168 CA4th 316, 347, 85 CR3d 532 (unilateral attorney's fees provisions in favor of lender in promissory note and deed of trust made reciprocal by *CC § 1717*)]. *CC § 1717(a)* voids any provision in a contract that waives attorney's fees, and *CC § 1717(b)(1)* provides that the court will decide the prevailing party for the purpose of attorney's fees on notice and motion.

Example:

Under reciprocity principles of *CC § 1717*, an indemnity agreement requiring subcontractors to indemnify a builder against claims arising out of the performance of subcontracts provided the basis for prevailing subcontractors to recover attorney's fees incurred in defending the builder's action to enforce the indemnity agreement [*Baldwin Builders v. Coast Plastering Corp.* (2005) 125 CA4th 1339, 1343-1346, 24 CR3d 9].

Courts have applied *CC § 1717* broadly to include deeds of trust and other instruments [see, e.g., *Mackinder v. OSCA Dev. Co.* (1984) 151 CA3d 728, 739, 198 CR 864 ("regardless of the form of the instrument, whether by contract, deed, or binding equitable servitude, an instrument containing a provision for the recovery of attorney fees in the event of litigation is governed by the reciprocity provisions" of *CC § 1717*)].

 Cross Reference:

Discussion of the prevailing party under *CC § 1717*, see 12.24[2].

Consider:

The inclusion of attorney's fee clauses in contracts may not be desirable in some areas of consumer law due to the reciprocity provisions of *CC § 1717*. Some consumer laws, for example, containing non-waivable implied warranties (such as those in landlord-tenant law) may favor the non-drafting party to the contract, in which case the plaintiff may net a small award, only to have it greatly compounded by

fees that eventually exceed the total amount of the award.

12.06[2] Contract Provision May Not Allow Award of Fees When Action Is Voluntarily Dismissed or Settled. *CC § 1717(b)(2)* prohibits recovery of attorney's fees when an action has been voluntarily dismissed or settled (other than when fees are expressly included in the settlement). *CC § 1717(b)(2)* contains no temporal limitation [*Marina Glencoe, L.P. v. Neue Sentimental Film AG (2008)* 168 CA4th 874, 876, 85 CR3d 800 (defendant is not entitled to attorney fees as the prevailing party when plaintiff dismisses action with prejudice after the start of trial)]. This provision has the effect of "overriding or nullifying conflicting contractual provisions, such as provisions expressly allowing recovery of attorney fees in the event of voluntary dismissal or defining 'prevailing party' as including parties in whose favor a dismissal has been entered" [*Santisas v. Goodin (1998)* 17 C4th 599, 617, 71 CR2d 830, 951 P2d 399 ; see *Ford Motor Credit Co. v. Hunsberger (2008)* 163 CA4th 1526, 1532, 78 CR3d 661 (*CC § 1717(b)(2)* prevents recovery of fees by defendant when plaintiff voluntarily dismisses its only cause of action against that defendant)]. Thus, a contractual provision that provides for recovery of attorney's fees on settlement is void insofar as it awards fees for causes of action based on the contract.

A party, however, may still recover attorney's fees under the contractual provision on related causes of action not based on the contract. For example, when the agreement allows recovery of fees for both tort and contract claims, and settlement bars recovery for the contract fees under *CC § 1717(b)(2)*, a party may still recover attorney's fees incurred in litigating the tort or other non-contract claims [*Santisas v. Goodin (1998)* 17 C4th 599, 621, 71 CR2d 830, 951 P2d 399 ; *Gogri v. Jack in the Box Inc. (2008)* 166 CA4th 255, 274, 82 CR3d 629] .

Exception:

CC § 1717(b)(2) will not bar the recovery of attorney's fees in a contract case when recovery of fees is authorized by a fee-shifting statute [*Kim v. Euromotors West/The Auto Gallery (2007)* 149 CA4th 170, 178, 56 CR3d 780] . Furthermore, despite the ruling in *Santisas*, courts apparently still construe *CC § 1717* to allow parties broad latitude in making attorney's fee arrangements. For example, the court in *Jackson v. Homeowners Assn. Monte Vista Estates-East (2001)* 93 CA4th 773, 779, 113 CR2d 363 explained that *CC § 1717* "cannot be said to supersede or limit the broad right of parties pursuant to *Code of Civil Procedure Section 1021* to make attorney fees agreements."

➡ Cross Reference:

Forms and discussion addressing dismissal and prevailing party requirement under *CC § 1717*, see California Points and Authorities, §§ 60.461-60.464, 60.466 (Matthew Bender).

12.06[3] Contractual Provision for Fees Generally Applies to Entire Agreement. Awards of attorney's fees may be limited to specific sections of a contract only if each party was represented by counsel in the negotiation and execution of the contract, and the fact of this representation is clearly stated in the agreement [*CC § 1717(a)*]. Thus, common consumer agreements in which one party is not represented by counsel cannot limit awards of attorney's fees to breach under particular sections.

Example:

An attorney's fees provision in escrow instructions giving the escrow company the right to recover fees if the buyer failed to pay escrow costs provided the basis under *CC § 1717* for the buyer to recover fees from the escrow company for its breach of fiduciary duties to the buyer [*Kangarlou v. Progressive Title Co., Inc. (2005)* 128 CA4th 1174, 1178, 27 CR3d 754] .

Distinguish:

A similar attorney's fees provision in escrow instructions did not indicate the parties' intent for recovery of fees in a dispute between the buyer and seller that had nothing to do with the performance of escrow services [*Paul v. Schoellkopf (2005)* 128 CA4th 147, 153-154, 26 CR3d 766] .

 Cross References:

Discussion of scope expansion under *CC § 1717*, see *California Forms of Pleading and Practice*, § 174.50 *et seq.* (Matthew Bender).

Forms and discussion addressing scope of attorney's fee provisions under *CC § 1717*, see *California Points and Authorities*, §§ 60.441 -60.442 (Matthew Bender).

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63 of 175 DOCUMENTS

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Chapter 12 Recovering Attorney's Fees and Costs in Contract Litigation
II. RECOVERING ATTORNEY'S FEES BY STATUTE OR CONTRACT

1-12 MB Practice Guide: CA Contract Litigation 12.07

AUTHOR: James E. Wright II

12.07 Contract May Specifically Address What Fees Are Allowable.

When a contract provides that the prevailing party may recover expert witness fees, those fees may not be recovered as an element of attorney's fees or costs, but may be recovered as damages if specially pled and proven at trial [*Carwash of America-PO, LLC v. Windswept Ventures, No. 1, LLC* (2002) 97 CA4th 540, 544, 118 CR2d 536].



Warning:

Bussey v. Affleck (1990) 225 CA3d 1162, 275 CR 646 , decided by Division Four of the First District, took a contrary view, holding that litigation costs such as expert witness fees could be awarded as an element of attorney fees because they represented expenses ordinarily billed to a client and not included in the overhead component of counsel's hourly rate. *Bussey* was criticized in subsequent decisions [see *Carwash of America-PO v. Windswept Ventures No. 1* (2002) 97 CA4th 540, 544, 118 CR2d 536 ; *Ripley v. Pappadopoulos* (1994) 23 CA4th 1616, 1627, 28 CR2d 878] and disavowed by Division Four of the First District in *Hsu v. Semiconductor Systems, Inc.* (2005) 126 CA4th 1330, 1342, 25 CR3d 82 .



Cross Reference:

Recovery of expert witness fees as damages, see 12.19[4].

Legal Topics:

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

Civil Procedure Remedies Costs & Attorney Fees Attorney Expenses & Fees Reasonable Fees Contracts Law Contract Conditions & Provisions General Overview Contracts Law Remedies General Overview



64 of 175 DOCUMENTS

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Chapter 12 Recovering Attorney's Fees and Costs in Contract Litigation
II. RECOVERING ATTORNEY'S FEES BY STATUTE OR CONTRACT

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AUTHOR: James E. Wright II

12.08 Provisions for Attorney's Fees Appearing in One Document May Apply to Other Documents If Part of Same Agreement.

Multiple instruments that are a part of the same agreement are to be construed together [CC § 1642; *BMP Prop. Dev. v. Melvin* (1988) 198 CA3d 526, 531, 243 CR 715]. When a fee provision covering the entire contract is found in one instrument, courts construe it to cover all of the other documents of the agreement as well [*Ganey v. Doran* (1987) 191 CA3d 901, 912, 236 CR 787 (fees provision from one contract could apply to others that form part of the same agreement under CC § 1642, and these fees need not be pleaded and proved when allowed as costs under CC § 1717 and CCP § 1033.5)].

However, if the different contracts are not between the same parties and do not constitute one transaction, a fee provision in one contract will not extend to the other contract.

Examples:

- In a dispute between real estate investors, a plaintiff who asserted claims on a memorandum of understanding, which did not contain a fee provision, could not recover fees based on fee provisions in two other agreements because those agreements were peripheral to the memorandum of understanding and were not part of an integrated agreement [*Pellegrini v. Weiss* (2008) 165 CA4th 515, 535, 81 CR3d 387] .
- In a breach of contract action based on an affiliate agreement brought by the former president of an acquired corporation, the defendants were not entitled to recover fees based on a fee provision in a separate merger agreement, which the affiliate agreement mentioned but did not expressly incorporate by reference, and to which the plaintiff was not a party [*Amtower v. Photon Dynamics, Inc.* (2008) 158 CA4th 1582, 1605-1610, 71 CR3d 361] .
- In a construction defect action, the purchaser of a shopping center who asserted claims on a contractor's warranty assigned to the purchaser by the developer, which did not contain a fee provision,

could not recover fees based on a fee provision in the construction contract between the contractor and the developer, which was not assigned to the purchaser of the property. There was no action on the construction contract, and none of its terms was necessarily interpreted [*Vons Cos., Inc. v. Lyle Parks Jr., Inc.* (2009) 177 CA4th 823, 835, 99 CR3d 562] .

**Cross Reference:**

Discussion of broadening of fee provisions when one party is not represented by counsel, see 12.06[3].

Legal Topics:

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

Civil Procedure Remedies Costs & Attorney Fees Attorney Expenses & Fees General Overview Contracts Law Contract Conditions & Provisions General Overview Contracts Law Remedies General Overview



65 of 175 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 12 Recovering Attorney's Fees and Costs in Contract Litigation
II. RECOVERING ATTORNEY'S FEES BY STATUTE OR CONTRACT

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AUTHOR: James E. Wright II

12.09 Actions for Rescission or Reformation Are Actions on Contract Under CC § 1717.

Courts have upheld attorney's fee awards in claims for rescission [*Neptune Soc'y Corp. v. Longanecker* (1987) 194 CA3d 1233, 1249-1251, 240 CR 117] and reformation [*Wong v. Davidian* (1988) 206 CA3d 264, 270-271, 253 CR 675] under CC § 1717 when the contracts contained attorney's fee provisions.



Cross References:

Discussion of fees under rescinded and reformed agreements, see *California Forms of Pleading and Practice*, § 174.50 *et seq.* (Matthew Bender).

Forms and discussion addressing recovery under attorney's fee provisions when contract is rescinded, canceled, or unenforceable, see *California Points and Authorities*, §§ 60.447 -60.449 (Matthew Bender).

Legal Topics:

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

Civil Procedure Remedies Costs & Attorney Fees Attorney Expenses & Fees Statutory Awards Contracts
Law Remedies General Overview Contracts Law Remedies Reformation Contracts Law Remedies Rescission &
Redhibition General Overview



66 of 175 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 12 Recovering Attorney's Fees and Costs in Contract Litigation
II. RECOVERING ATTORNEY'S FEES BY STATUTE OR CONTRACT

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AUTHOR: James E. Wright II

12.10 Finding That No Contract Exists Does Not Prevent Fee Recovery.

A party is entitled to attorney fees under *CC* § 1717 even if the party prevails on grounds that the contract is inapplicable, invalid, unenforceable, or nonexistent, if the other party would have been entitled to attorney's fees had that party prevailed [*Hsu v. Abbata* (1995) 9 C4th 863, 870, 39 CR2d 824, 891 P2d 804 ; *PM Group, Inc. v. Stewart* (2007) 154 CA4th 55, 68, 64 CR3d 227 .

Example:

A prevailing defendant sued for breach of a contract containing an attorney's fees provision was entitled to recover its own attorney's fees and costs, even though the trial court found that no contract existed [*Cano v. Glover* (2006) 143 CA4th 326, 331, 48 CR3d 871] .

Distinguish:

Attorney's fees are not recoverable under *CC* § 1717 when the contract providing for such fees has been excluded as inadmissible under *Evid Code* § 1115 *et seq.* because it was prepared in the course of a mediation [*Rael v. Davis* (2008) 166 CA4th 1608, 1622, 83 CR3d 745] .

Distinguish:

A prevailing party cannot obtain attorney's fees under *CC* § 1717 if the contract it relied on did not contain an attorney's fee provision, notwithstanding that the losing party defended the matter by relying on a different contract that did contain an attorney's fee provision [*Brittalia Ventures v. Stuke Nursery Co., Inc.* (2007) 153 CA4th 17, 20, 62 CR3d 467] .

Legal Topics:

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

Civil Procedure Remedies Costs & Attorney Fees Attorney Expenses & Fees General Overview Civil Procedure Remedies Costs & Attorney Fees Attorney Expenses & Fees Statutory Awards Contracts Law Remedies General Overview



67 of 175 DOCUMENTS

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Chapter 12 Recovering Attorney's Fees and Costs in Contract Litigation
II. RECOVERING ATTORNEY'S FEES BY STATUTE OR CONTRACT

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AUTHOR: James E. Wright II

12.11 Condition Precedent of Initiating Mediation Before Litigation Is Valid.

Courts have upheld contracts providing that as a condition precedent to recovering attorney's fees, a party must first attempt to resolve the dispute through mediation before commencing litigation.

Examples:

- A plaintiff who prevailed in a quiet title action by establishing that a real estate contract was invalid was prevented from recovering attorney's fees under the contract because she failed to mediate the dispute as required by the contract [*Leamon v. Krajciwicz* (2003) 107 CA4th 424, 433].

- An arbitrator found that plaintiffs who filed suit before mediation nonetheless were entitled to recover attorney's fees because they filed suit only to preserve their legal rights against a looming statute of limitations and did not intend to pursue the suit [*Kahn v. Chetcuti* (2002) 101 CA4th 61, 67].

Distinguish:

Prevailing *defendants* did not lose their right to recover contractual attorney's fees as a result of a plaintiff's failure to pursue mediation before filing suit; the condition precedent applied only to the party who initiated the action [*Johnson v. Siegel* (2000) 84 CA4th 1087, 1100-1101 ; see *Van Slyke v. Gibson* (2007) 146 CA4th 1296, 1299, 53 CR3d 491 (defendant is not required to seek mediation as a condition precedent to recovery of attorney's fees for defense of plaintiff's claims)].

Legal Topics:

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

Civil ProcedureAlternative Dispute ResolutionGeneral OverviewCivil ProcedureAlternative Dispute ResolutionMediationsCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesGeneral OverviewContracts LawContract Conditions & ProvisionsConditions Precedent



68 of 175 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 12 Recovering Attorney's Fees and Costs in Contract Litigation
II. RECOVERING ATTORNEY'S FEES BY STATUTE OR CONTRACT

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AUTHOR: James E. Wright II

12.12 Procedural Requirements Governing Recovery of Attorney's Fees.

12.12[1] Attorney's Fees Allowed by Contract Under CCP § 1033.5 Need Not Be Specifically Pleaded or Proven at Trial. The recovery of attorney's fees as costs under *CCP* § 1033.5 does not require the party to plead specifically the attorney's fee provision in the agreement or the amount of fees incurred. Rather, it is sufficient that all of the contract documents in question are attached to the complaint [*Ganey v. Doran* (1987) 191 CA3d 901, 911-912, 236 CR 787]. Courts have even held that a prayer for fees, while customary, is unnecessary for recovery as long as the attorney's fee provision is in the contract submitted with the pleadings [*Martin v. Pacific Southwest Royalties, Inc.* (1940) 41 CA2d 161, 172, 106 P2d 443 ; *North Associates v. Bell* (1986) 184 CA3d 860, 866 n2, 229 CR 305].

Distinguish:

When the fees sought are not allowed as costs under *CCP* § 1033.5, a party's entitlement to them as an item of damages must be separately and specifically pleaded and proven at trial to the trier of fact [*First Nationwide Bank v. Mountain Cascade, Inc.* (2000) 77 CA4th 871, 877, 92 CR2d 145 ; *Carwash of America-PO v. Windswept Ventures No. 1* (2002) 97 CA4th 540, 544].

12.12[2] Noticed Motion Required for Award of Fees by Contract As Costs Pursuant to CCP § 1033.5. A party seeking the award of fees as costs pursuant to a provision in a contract under *CCP* § 1033.5 first must file a noticed motion with the court, except in the case of a default judgment (or unless authorized by a stipulation of the parties) [*CCP* § 1033.5(c)(5)]. Under *CCP* § 1033.5, a party also must file a noticed motion for the award of fees as costs to the prevailing party under *CC* § 1717 (which also independently requires a noticed motion to determine the prevailing party) [*CCP* § 1033.5(c)(5); *CC* § 1717].

Judge's Perspective:

Although *CCP* § 1033.5 clearly states that a motion is required, the courts have shown "substantial latitude in allowing fees to be awarded without strict compliance with statutory temporal and procedural limitations" when a party is entitled to such fees as a matter of contract or statute [*Gunlock Corp. v. Walk On Water, Inc.* (1993) 15 CA4th 1301, 1305, 19 CR2d 197]. The *Gunlock* case discusses the many appellate courts that have awarded fees to the prevailing party, even in the absence of a noticed motion or other statutory noncompliance. The better practice, of course, is to comply with all applicable statutes

and Rules of Court. A party, however, opposes a request for attorney's fees based solely on statutory noncompliance at its peril. With respect to the time limits for filing such a motion, see 12.12[4].



Cross Reference:

Form, see 12.29.

12.12[3] Noticed Motion Not Required for Award of Fees by Statute Pursuant to CCP § 1033.5. When the award of fees is made pursuant to a statutory fee allocation, however, *CCP § 1033.5* does not require a noticed motion. Thus, if the statute awarding fees does not require a noticed motion to determine the prevailing party, recovery is allowed either by an affidavit supporting the award submitted along with the memorandum of costs, or at the time a statement of decision is rendered by the court [*CCP § 1033.5(c)(5)*].



Strategic Point--Plaintiff:

It is important to determine if the contract being litigated is covered by a statutory provision specifically awarding attorney's fees. This may eliminate the requirement for a noticed motion in order to claim a fee award under *CCP § 1033.5(c)(5)* and also potentially avoid a loss of attorney's fees due to voluntary dismissal.

12.12[4] California Rules of Court Dictate Timing and Procedural Requirements for Recovery of Attorney's Fees. The notice and motion for recovery of attorney's fees generally must be filed and served within the time set for filing a notice of appeal for any case in which the amount of or entitlement to fees requires a court determination [*Cal Rules Ct, Rule 3.1702*]. This time limit applies whether or not the order or judgment actually is appealable [*Sanabria v. Embrey (2001) 92 CA4th 422, 425-426, 111 CR2d 837*].

Judge's Perspective:

The *Sanabria* case reversed a trial court that had awarded attorneys' fees and costs in violation of the time limits set forth in *Cal Rules Ct, Rule 3.1702* [*Sanabria v. Embrey (2001) 92 CA4th 422, 425-426, 111 CR2d 837*]. A few years earlier, however, the *Court of Appeal in Gunlock Corp. v. Walk On Water, Inc. (1993) 15 CA4th 1301, 1304, 19 CR2d 197* , ruled that the time limits of *Cal Rules Ct, Rule 3.1702* are not jurisdictional. The conflict between these authorities (and the authority cited by the *Gunlock* court) has not been resolved.



Strategic Points--Both Parties:

Courts generally will entertain omnibus motions seeking to determine both the identity of the prevailing party as well as the reasonableness of attorney's fees, and parties need not necessarily file separate motions for each inquiry. Note, however, that tactical advantages may exist warranting the filing of separate motions. Filing a separate motion first to establish oneself as the prevailing party may actually lead one's opponent to settle the case, thus avoiding the time and expense involved in proving the reasonableness of fees [see 12.23].



Cross References:

Form, see 12.29.

Discussion of recovery of fees as costs under *Cal Rules Ct, Rule 3.1702*, see *California Forms of Pleading and Practice, § 174.50 et seq. (Matthew Bender)*.

Form and discussion addressing failure to file timely noticed motion, see *California Points and*

Authorities, § 60.465 (Matthew Bender).



Cross References:

Discussion of fee calculation, see *California Forms of Pleading and Practice*, § 174.50 et seq. (Matthew Bender).

Form and discussion addressing requirement for evidence to support fees award, see *California Points and Authorities*, § 60.551 (Matthew Bender).

Legal Topics:

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

Civil Procedure Remedies Costs & Attorney Fees Attorney Expenses & Fees Reasonable Fees Civil

Procedure Remedies Costs & Attorney Fees Attorney Expenses & Fees Statutory Awards Contracts Law Remedies General Overview



69 of 175 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 12 Recovering Attorney's Fees and Costs in Contract Litigation
II. RECOVERING ATTORNEY'S FEES BY STATUTE OR CONTRACT

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AUTHOR: James E. Wright II

12.13 Court Has Broad Discretion in Determining Reasonableness of Fee Awards.

12.13[1] Moving Party Bears Burden of Proof for Fees Not Fixed by Formula. As a general rule, the determination of what constitutes reasonable attorney's fees is committed to the discretion of the trial court [*PLCM Group, Inc. v. Drexler* (2000) 22 C4th 1084, 1095-1096, 95 CR2d 198, 997 P2d 511 ; *Cruz v. Ayromloo* (2007) 155 CA4th 1270, 1275-1276, 66 CR3d 725 (no abuse of discretion when trial court permissibly departed from Los Angeles Superior Court guidelines and based its fee award on lodestar method)].

Local court rules may provide guidelines for determining the amount of an award of attorney's fees under CC § 1717. For example, Los Angeles Sup Ct Rule 3.2 provides that its fee guidelines apply when a contract provides for reasonable attorney's fees unless otherwise determined by the court. However, judges are free to depart from its provisions whenever the interests of justice require it [Los Angeles Sup Ct Rule 3.2(a)]. To the extent a local rule conflicts with the state statute (CC § 1717(a), which provides that a reasonable attorney's fee will be fixed by the court), the rule is invalid [see *Cruz v. Ayromloo* (2007) 155 CA4th 1270, 1275, 66 CR3d 725 ; see also *Contractors Labor Pool, Inc. v. Westway Contractors, Inc.* (1997) 53 CA4th 152, 169, 61 CR2d 715] .

A party seeking to recover attorney's fees bears the burden of proof for fees that are not fixed by the court's established schedule [CCP § 1033.5(c)(5); see *El Escorial Owners' Assn. v. DLC Plastering, Inc.* (2007) 154 CA4th 1337, 1366, 65 CR3d 524 (party failed to prove all the fees it sought were reasonable and necessary)]. If the party seeking fees wishes to collect more than the scheduled amount under CCP § 1033.5(a)(10)(A) and CC § 1717, it may do so by presenting evidence supporting a greater award by using, for example, the lodestar method of fee calculation [see, e.g., *Sternwest Corp. v. Ash* (1986) 183 CA3d 74, 76, 227 CR 804 (approving lodestar award under prior version of CC § 1717)].



Cross Reference:

Superior Court fee schedules, see *California Forms of Pleading and Practice*, § 174.50 et seq. (Matthew Bender).

12.13[2] Factors Considered in Determining Reasonable Compensation. Among the many factors courts

examine when determining the reasonableness of fee awards are [*Melnyk v. Robledo* (1976) 64 CA3d 618, 623-624, 134 CR 602 ; see *Contractors Labor Pool, Inc. v. Westway Contractors, Inc.* (1997) 53 CA4th 152, 168, 61 CR2d 715]:

- The nature and difficulty of the litigation.
- The amount involved in the litigation.
- The skill and abilities required in handling the litigation.
- The skill employed in handling the litigation.
- The attorney's attention given and labor expended in the litigation.
- The success or failure of the attorney's efforts in trying the cause.
- The attorney's learning, age, and experience in the particular type of work demanded by the litigation.
- The intricacies and importance of the litigation.
- The attorney's time consumed by the litigation.

The trial court has discretion to reduce the lodestar amount according to equitable considerations [*EnPalm, LLC v. Teitler* (2008) 162 CA4th 770, 774-775, 75 CR3d 902 (reducing fee award by 90 percent because prevailing party engaged in conduct that made much of the litigation unnecessary; as a result, most of the lodestar figure represented attorney fees that were unreasonable)].

The fact that a fee award is higher than the overall damages awarded to the plaintiffs does not indicate that the fee is unreasonable or an abuse of the court's discretion [*Cruz v. Ayromloo* (2007) 155 CA4th 1270, 1276, 66 CR3d 725 ; see *Peak-Las Positas Partners v. Bollag* (2009) 172 Cal. App. 4th 101, 113-114, 90 Cal. Rptr. 3d 775 (defendant may not litigate tenaciously and then complain about the time necessarily spent by the plaintiff in response)].

The pleadings and depositions in the case can be used as evidence of the work performed [*Dover Mobile Estates v. Fiber Form Prods., Inc.* (1990) 220 CA3d 1494, 1501, 270 CR 183].



Strategic Point--Moving Party:

Counsel filing a motion for attorney's fees needs to be prepared to have his or her fees examined in minute detail by the other side and by the court.



Strategic Point--Both Parties:

Courts have a significant amount of flexibility and discretion to determine the reasonableness of fee awards, and parties seeking fee recoveries should consider obtaining discovery from a number of different sources to support their contention that the fees sought are reasonable. These sources include testimony from experts, petitions filed in bankruptcy proceedings seeking approval of fee awards, and the amount of opposing counsel's own attorney's fees. Although discovery into the latter can be a sensitive matter, this request may have the added benefit of forcing opposing counsel to stipulate to the

reasonableness of fees rather than submit to discovery into the amount of its own attorney's fees.

12.13[3] Lodestar Method Uses Number of Hours Reasonably Expended Multiplied by Reasonable Hourly Rate. "The fee setting inquiry in California ordinarily begins with the 'lodestar,' which is the number of hours reasonably expended multiplied by the reasonable hourly rate," while also taking into account the numerous factors listed by courts when determining reasonable compensation, or "[t]he reasonable hourly rate is that prevailing in the community for similar work" [*PLCM Group, Inc. v. Drexler* (2000) 22 C4th 1084, 1095, 95 CR2d 198, 997 P2d 511]. Expert opinions on reasonable fees for the services rendered are also relevant [*Martino v. Denevi* (1986) 182 CA3d 553, 559-560, 227 CR 354].

Detailed billing records are not necessarily required in order to support a motion for fees, as counsel's testimony and declarations may be sufficient to support the motion [*Padilla v. McClellan* (2001) 93 CA4th 1100, 1106, 113 CR2d 680]. The fee agreement between attorney and client is relevant to the determination of fees but not dispositive. "[T]he contract is some evidence of the value of an attorney's services, but as with other items of evidence, it is not controlling" [*Vella v. Hudgins* (1984) 151 CA3d 515, 521, 198 CR 725].

When the fee agreement between attorney and client is a contingency fee agreement, the reasonable fee determined by the court may be greater or less than the amount to which the attorney is entitled under the contingency fee agreement [*Persson v. Smart Inventions, Inc.* (2005) 125 CA4th 1141, 1176].

Cross References:

Discussion of fee recovery and contingency representation, see 12.05[3].

Form and discussion addressing applicability of lodestar method, see *California Points and Authorities*, § 60.482 (*Matthew Bender*).

Legal Topics:

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

Civil ProcedureJudicial OfficersJudgesDiscretionCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesReasonable FeesCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesStatutory AwardsContracts LawRemediesGeneral Overview



70 of 175 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 12 Recovering Attorney's Fees and Costs in Contract Litigation
II. RECOVERING ATTORNEY'S FEES BY STATUTE OR CONTRACT

1-12 MB Practice Guide: CA Contract Litigation 12.14

AUTHOR: James E. Wright II

12.14 Settlement Offers May Shift Fee Burden If Offer Is As Good As or Better Than Resulting Judgment Under CCP § 998.

Under *CCP* § 998, an offer of settlement may shift the burden of fees under *CCP* §§ 1032 and 1033.5 if the amount ultimately recovered is less than the amount of the offer. The fees incurred shift, beginning from the time of the offer, so that a prevailing plaintiff who receives less than the amount offered by a defendant in settlement can recover its fees against that defendant up to the time of the settlement offer, while the defendant receives its fees from that time forward [*Scott Co. of Cal. v. Blount, Inc.* (1999) 20 C4th 1103, 1107, 86 CR2d 614, 979 P2d 974]. When determining whether a settlement offer was greater than an amount recovered in litigation under *CCP* § 998, the attorney's fees and costs of the party who recovered them will be included if that party would be entitled to them under *CCP* § 1021 [*Adam v. DeCharon* (1995) 31 CA4th 708, 713-714, 37 CR2d 195].

CCP §§ 998(c)(1) and 998(d) expressly allow cost awards to include expert witness fees, satisfying the express allowance requirement of *CCP* § 1033.5(b), although these fees may not exceed those allowed under *Gov Code* § 68092.5 [*CCP* § 998(h)].

Exception:

CCP § 998 may not apply in all proceedings; in family law cases, for example, courts have broader discretion under *Fam Code* § 270 *et seq.* than under *CCP* § 998.



Cross References:

Discussions of award of costs and fees under *CCP* § 998, see *California Forms of Pleading and Practice*, § 174.10 *et seq.* (Matthew Bender).

Discussion of settlement offers pursuant to *CCP* § 998, see *Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure*, Ch. 37, *Settlement and Release*, 37.03 -37.27 (Matthew Bender).

Form and discussion addressing fee shifting under *CCP* § 998, see *California Points and Authorities*, § 60.444 (Matthew Bender).

Legal Topics:

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

Civil ProcedureSettlementsOffers of JudgmentGeneral OverviewCivil ProcedureRemediesCosts & Attorney
FeesAttorney Expenses & FeesReasonable FeesCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses &
FeesStatutory AwardsContracts LawRemediesGeneral Overview



71 of 175 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 12 Recovering Attorney's Fees and Costs in Contract Litigation
II. RECOVERING ATTORNEY'S FEES BY STATUTE OR CONTRACT

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AUTHOR: James E. Wright II

12.15 Fees Incurred on Appeal May Be Recovered.

Courts have construed contracts and statutes providing for an award of attorney's fees to the prevailing party to include fees for appellate proceedings [*Morcos v. Board of Retirement* (1990) 51 C3d 924, 927, 275 CR 187, 800 P2d 543]. Courts also have held that CC § 1717 allows recovery of fees incurred on appeal [*Mackinder v. OSCA Dev. Co.* (1984) 151 CA3d 728, 739-740, 198 CR 864].

Distinguish:

A statute providing for an award of attorney's fees "upon the trial of the action" does not include the recovery of attorney's fees on appeal [*Lewis & Queen v. S. Edmondson & Sons* (1952) 113 CA2d 705, 709-710, 248 P2d 973]. Courts probably would interpret a similar limitation in a contract the same way.

Legal Topics:

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

Civil Procedure Remedies Costs & Attorney Fees Attorney Expenses & Fees American Rule Civil
Procedure Remedies Costs & Attorney Fees Attorney Expenses & Fees Statutory Awards Civil Procedure Appeals Costs &
Attorney Fees Contracts Law Remedies General Overview



72 of 175 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 12 Recovering Attorney's Fees and Costs in Contract Litigation
II. RECOVERING ATTORNEY'S FEES BY STATUTE OR CONTRACT

1-12 MB Practice Guide: CA Contract Litigation 12.16

AUTHOR: James E. Wright II

12.16 Attorney's Fees Are Recoverable for Services of In-House Counsel, but Not for Pro Se Representation.

12.16[1] Fees May Be Recovered for Representation by In-House Counsel. Adopting the reasoning of federal courts, California courts have by awarded fees to corporations represented by in-house counsel under CC § 1717 when allowed by contract [*PLCM Group, Inc. v. Drexler* (2000) 22 C4th 1084, 1091, 95 CR2d 198, 997 P2d 511] .

12.16[2] Fees May Be Recovered for Representation by Other Members of Same Firm. When a lawyer is represented by other members of his or her law firm, and the representation involves the lawyer's personal interests and not those of the firm, an attorney-client relationship is formed, and the lawyer is entitled to recover reasonable attorney's fees under CC § 1717 [*Gilbert v. Master Washer & Stamping Co.* (2001) 87 CA4th 212, 216-223, 104 CR2d 461 , applying the same logic used in *Trope v. Katz* (1995) 11 C4th 274, 292, 45 CR2d 241, 902 P2d 259 and *PLCM Group, Inc. v. Drexler* (2000) 22 C4th 1084, 1091, 95 CR2d 198, 997 P2d 511] .

Example:

Homeowner who was an attorney could not recover contractual attorney fees for representing himself and his wife in a construction defect case, but he could recover for work done by other attorneys and paralegals in his law firm [*Gorman v. Tassajara Development Corp.* (2009) 178 CA4th 44, 96, 100 CR3d 152] .

Neither attorneys nor others appearing in propria persona are entitled to recover fees for opportunity costs or otherwise [*Trope v. Katz* (1995) 11 C4th 274, 292, 45 CR2d 241, 902 P2d 259] .

12.16[3] Pro Se Litigants May Not Recover Fees Not Actually Incurred.



Cross Reference:

Form and discussion addressing inability to recover fees when proceeding pro se, see *California Points and Authorities*, § 60.467 (Matthew Bender).

Legal Topics:

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

Civil Procedure Remedies Costs & Attorney Fees Attorney Expenses & Fees General Overview Civil
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Overview



73 of 175 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 12 Recovering Attorney's Fees and Costs in Contract Litigation
II. RECOVERING ATTORNEY'S FEES BY STATUTE OR CONTRACT

1-12 MB Practice Guide: CA Contract Litigation 12.17

AUTHOR: James E. Wright II

12.17 Attorney's Fees May Be Recoverable By Party Who Is Not Signatory to Agreement.

Under *CC § 1717*, a party to litigation who did not sign the contract may recover fees under the agreement if the party against whom the non-signatory is attempting to enforce the contract could recover them if it prevailed [*Reynolds Metals Co. v. Alperson* (1979) 25 C3d 124, 128, 158 CR 1, 599 P2d 83].

Distinguish:

If the terms of the fee provision allow an award of fees only in litigation between the parties to the agreement, then no fees may be recovered by either a signatory or a nonsignatory to the agreement in litigation between them [*Blickman Turkus, LP v. MF Downtown Sunnyvale, LLC* (2008) 162 CA4th 858, 896, 76 CR3d 325].

A third party beneficiary who prevails in litigation under the contract may recover attorney's fees under *Civ. Code § 1717* if the contract contains an attorney's fees provision [see, e.g., *Loduca v. Polyzos* (2007) 153 CA4th 334, 341-345, 62 CR3d 780]. Courts, however, may refuse to award fees to parties of contracts containing fee provisions drafted to cover only actions by parties who (1) are not signatories to the agreement, and (2) are not intended third-party beneficiaries of the agreement [*Kahn v. Chetcuti* (2002) 101 CA4th 61, 67, 123 CR2d 606].

Distinguish:

Only a party against whom an agreement can be enforced generally may recover attorney's fees for non-contract claims. The mutuality of remedy provision of *CC § 1717*, which the *Reynolds Metals Co.* case (discussed above) also extended to non-signatory parties, does not apply to non-contract causes of action [*Topanga & Victory Partners, LLP v. Toghia* (2002) 103 CA4th 775, 787, 127 CR2d 104].

Examples--Mutuality of Remedies:

- A bank entered into a security agreement with a general contractor. The security agreement permitted the bank to direct one of the general contractor's customers to make payments directly to the bank. The bank sued the customer after the customer failed to make payments to the bank. The customer prevailed and sought attorney's fees under *CC § 1717*. The court held that the customer, a non-signatory

to the security agreement, was entitled to attorney's fees because the action was "on the contract" within the meaning of *CC* § 1717, and the bank would have been entitled to fees if it had prevailed against the customer [*Dell Merk, Inc. v. Franzia* (2005) 132 CA4th 443,454-455].

■ In an unsuccessful action brought against a bank by a grandson as successor-in-interest to his deceased grandmother, the bank was entitled to a fee award against the grandson because of a fee provision in the deposit agreement between the grandmother and the bank. As successor-in-interest to his grandmother, the grandson stepped into her position, and would have been entitled to an award of attorney fees had he prevailed in the action against the bank [*Exarhos v. Exarhos* (2008) 159 CA4th 898, 905-907, 72 CR3d 409] .

Example--Third-Party Beneficiary:

■ Because an attorney's fee clause in a construction contract between a subcontractor and a general contractor made no reference to a party to the contract bringing the suit, the owner, who was an intended third party beneficiary to the contract, could recover attorney fees against the subcontractor under *CC* § 1717 [*Loduca v. Polyzos* (2007) 153 CA4th 334, 340, 62 CR3d 780] .

Cross Reference:

Form and discussion supporting entitlement to fees for a non-signatory to agreement under *CC* § 1717, see *California Points and Authorities*, § 60.446 (*Matthew Bender*).

Determining whether or not a party qualifies as a third-party beneficiary of a contract, see §§ 19.03 et seq.

Legal Topics:

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

Civil Procedure Remedies Costs & Attorney Fees Attorney Expenses & Fees General Overview Civil Procedure Remedies Costs & Attorney Fees Attorney Expenses & Fees American Rule Contracts Law Remedies General Overview



74 of 175 DOCUMENTS

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Chapter 12 Recovering Attorney's Fees and Costs in Contract Litigation

III. RECOVERING COSTS ALLOWED BY STATUTE

1-12 MB Practice Guide: CA Contract Litigation 12.18

AUTHOR: James E. Wright II

12.18 CHECKLIST: Recovering Costs Allowed by Statute.

☐ Is cost in question expressly allowed or disallowed by statute?

Authority:

CCP § 1033.5

Discussion:

See 12.19[3]

☐ Allowed costs:

☐ Filing, motion, and jury fees.

☐ Juror food and lodging expenses.

☐ Expenses of taking, taping, and transcribing depositions, including travel expenses.

☐ Costs of service of process.

☐ Expenses of attachment.

☐ Surety bond premiums.

☐ Ordinary witness fees under *Gov Code § 68093*.

- ☐ Court appointed expert fees.
- ☐ Court transcript fees.
- ☐ Court reporter's fees by statute.
- ☐ Models, enlargements, and copies.

☐ Disallowed costs:

- ☐ Expert witness fees for other than court appointed experts.
- ☐ Expenses of pre-filing investigation.
- ☐ Postage, telephone, and copying charges other than for exhibits.
- ☐ Juror investigation or voir dire preparation expenses.
- ☐ Transcripts of proceedings when not court ordered.

☐ Does an exception to general statutory rule allowing costs apply?

☐ Is action governed by a statute specially allowing the cost?

Authority:

CCP § 1033.5(b)

Discussion:

See 12.19[1][d]

☐ Does contract specifically allow the cost?

Authority:

Carwash of America-PO v. Windswept Ventures No. 1 (2002) 97 CA4th 540, 543-544

Discussion:

See 12.19[4]

☐ Did other party offer to pay all money owed before filing suit, thereby shifting cost burden?

Authority:

CCP § 1025

Discussion:

See 12.21[1][a]

☐ Was an offer of compromise exceeding amount recovered made before cost accrued, thereby shifting cost burden?

Authority:

CCP § 998

Discussion:

See 12.21[1][b]

☐ Was action brought in a court of higher jurisdictional classification than necessary, potentially reducing recoverable costs?

Authority:

CCP § 1033

Discussion:

See 12.21[2]

☐ Were multiple actions filed when a single action would have sufficed?

Authority:

CCP § 1022

Discussion:

See 12.21[3]

☐ Is cost reasonable, and was it necessarily incurred?

Authority:

CCP § 1033.5(c)

Discussion:

See 12.19[1][b]

☐ If not expressly allowed by statute, has cost been recognized as recoverable within court's discretion?

Authority:

CCP § 1033.5(c)(4)

Discussion:

See 12.19[1][c]

☐ Does cost more properly belong to another defendant?

Authority:

Transamerica Title Ins. Co. v. Green (1970) 11 CA3d 693, 704, 89 CR 915

Discussion:

See 12.21[4]

Legal Topics:

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

Civil Procedure Remedies Costs & Attorney Fees Costs General Overview Civil Procedure Remedies Costs & Attorney Fees Costs Court & Marshal Fees Civil Procedure Remedies Costs & Attorney Fees Costs Depositions & Transcripts Civil Procedure Remedies Costs & Attorney Fees Costs Reproduction Costs Contracts Law Remedies General Overview



75 of 175 DOCUMENTS

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Chapter 12 Recovering Attorney's Fees and Costs in Contract Litigation

III. RECOVERING COSTS ALLOWED BY STATUTE

1-12 MB Practice Guide: CA Contract Litigation 12.19

AUTHOR: James E. Wright II**12.19 General Rule Allows Recovery of Reasonable and Necessary Costs.****12.19[1] Costs Recoverable by Prevailing Party.**

12.19[1][a] Prevailing Party May Recover Costs. The right to recover costs in litigation at the trial court level in California is statutory, and only other statutes, not the courts, may create exceptions to this rule [*Murillo v. Fleetwood Enters., Inc.* (1998) 17 C4th 985, 989, 73 CR2d 682, 953 P2d 858]. The statutory provisions governing the award of costs are found in CCP §§ 1021-1038, and costs are awarded to the "prevailing party" in many cases as a matter of right under CCP § 1032. For cases in which CCP § 1032 does not define the prevailing party or in which a party recovers something other than monetary relief, courts have the discretion to award costs and to apportion them between the parties. CCP § 1033.5 lists many items allowable as costs under CCP § 1032 as well as several items not allowable except when expressly authorized by law [CCP § 1033.5(a), (b)].

Exception:

The right to allowable costs and the procedure for claiming them on appeal are within the province of the California Judicial Council under CCP § 1034(b), and therefore are controlled by *Cal Rules Ct, Rules* 8.278 and 8.891.

 Cross References:

Discussion of prevailing party for cost purposes under CCP § 1032, see 12.24[1].

Summary of cost allocation statutes, see *California Forms of Pleading and Practice*, § 174.10 *et seq.* (Matthew Bender).

12.19[1][b] Costs Must Be Reasonable in Amount and Necessarily Incurred. Costs must be:

- Reasonable in amount under CCP § 1033.5(c)(3);
- Reasonably necessary to the conduct of the litigation rather than merely convenient [CCP § 1033.5(c)(2)]; and

- Actually incurred, whether or not paid [*CCP* § 1033.5(c)(1)].

For costs to be "incurred" the claimant must be legally liable for the costs. If a discount has been applied on a cost, only the discounted rate may be recovered [*Nightingale v. Hyundai Motor Am. (1994)* 31 CA4th 99, 104, 37 CR2d 149 (portion of attorney fee award resulting from higher hourly rates for which plaintiff was not billed nor under any obligation to pay could not be recovered)].

Reasonableness is a question of fact "peculiarly within the trial court's discretion." The level of discretion ascribed to the trial court with respect to this determination under *CCP* § 1033.5(c)(4) is "broad" [*Baker-Hoey v. Lockheed Martin Corp. (2003)* 111 CA4th 592, 605, 3 CR3d 593 , (fees of special master, although not recoverable as matter of right under *CCP* § 1032(b), could be awarded as costs under broad discretion given to trial court under *CCP* § 1033.5(c)(4))].



Cross Reference:

Forms and discussion addressing reasonableness of amounts and necessity of costs, see *California Points and Authorities*, §§ 60.41, 60.45 (Matthew Bender).

12.19[1][c] Trial Court Has Discretion to Determine Allowable Costs Not Expressly Allowed by Statute.

CCP § 1033.5(c)(4) allows the court, in its discretion, to award as costs items not specifically allowed under *CCP* § 1033.5(a) or denied under *CCP* § 1033.5(b). As with all cost awards, the parties must actually have incurred the costs, and they must be reasonably necessary to the conduct of the litigation and reasonable in amount [see *CCP* § 1033.5(c)(1)-(3)]. Necessity to the conduct of the litigation is a common issue addressed in discretionary awards.

Judge's Perspective:

Courts are more likely to award costs if the party has kept detailed records of the costs incurred, including not only receipts and invoices, but also detailed records of the reasons for incurring the costs. If a cost seems higher than it should be, the party should be able to explain the reason. Finally, the party should provide any information about similar expenditures by the opposing party, making it more difficult for the opposing party to claim that the expenditures were unnecessary to the conduct of the litigation.

Example--Reasonably Necessary Costs:

Courts have held that reasonably necessary costs include [*Gibson v. Bobroff (1996)* 49 CA4th 1202, 1207-1208, 57 CR2d 235 ; *Cobler v. Stanley, Barber, Southard, Brown & Assocs. (1990)* 217 CA3d 518, 533, 265 CR 868 ; *Science Applications Int'l Corp. v. Superior Court (1995)* 39 CA4th 1095, 1104-1105, 46 CR2d 332 ; *Benach v. County of Los Angeles (2007)* 149 CA4th 836, 857-858, 57 CR3d 363] :

- Fees for court-ordered mediation.
- Fees for contractual arbitration.
- Costs of graphic exhibit boards and video analogous to models and blowups.
- Messenger services fees.

Example--Not Reasonably Necessary Costs:

Courts have disallowed other costs as not having been reasonably necessary because they amounted to

"high tech," including [*Science Applications Int'l Corp. v. Superior Court* (1995) 39 CA4th 1095, 1104-1105, 46 CR2d 332]:

- Expenses for high tech discovery tools.
- Costs of document control amounting to "high tech" paralegal services.
- Production of laser disks containing exhibits and a graphics communication system amounting to "high tech" document retrieval.

12.19[1][d] Certain Types of Contracts Have Particular Categories of Recoverable Costs. Some types of contracts have particular costs allocated by statute, allowing recovery of costs that are not otherwise specifically allowed under *CCP* § 1033. Even costs that generally are not allowed under *CCP* § 1033.5(b) can be recovered "where expressly authorized by law." One cost sometimes specifically allocated by statute is expert witness fees (for expert witnesses not appointed by the court), the expenses for which are ordinarily not allowed under *CCP* § 1033.5(b)(1) [see, e.g., *CC* § 1745(d), which specifically provides for the award of expert witness fees in some actions on sale of fine prints by art dealers].

12.19[2] Judgment Required to Collect Costs.

12.19[2][a] Dismissal and Settlement Generally Allow Recovery of Costs. The right to recover costs arises exclusively from a statutory grant [*Crib Retaining Walls, Inc. v. NBS/Lowry, Inc.* (1996) 47 CA4th 886, 889, 54 CR2d 850 ; *La Mesa-Spring Valley Sch. Dist. v. Otsuka* (1962) 57 C2d 309, 312, 19 CR 479, 369 P2d 7]. The award of costs arises solely as an incident to the judgment on the action [*Folsom v. Butte County Ass'n of Gov'ts* (1982) 32 C3d 668, 677, 186 CR 589, 652 P2d 437]. Under *CCP* § 581d, dismissal of the action constitutes a judgment, and whether a dismissal is voluntary or involuntary is irrelevant to the recovery of costs under *CCP* § 1032 [*D & J, Inc. v. Ferro Corp.* (1986) 176 CA3d 1191, 1193-1194, 222 CR 656]. Absent an allocation of costs in the settlement agreement, a voluntary dismissal by the plaintiff may result in a determination of the prevailing party under *CCP* § 1032 and an award of costs by the court [*Crib Retaining Walls, Inc. v. NBS/Lowry, Inc.* (1996) 47 CA4th 886, 890, 54 CR2d 850 ; see *Chinn v. KMR Property Management* (2008) 166 CA4th 175, 190, 82 CR3d 586 (after plaintiff voluntarily dismissed action as part of settlement, defendants were prevailing parties for purposes of an award of costs)].



Warning:

If any doubts exist about whether the opposing party might be the prevailing party under *CCP* § 1032, make sure to allocate costs expressly in any settlement agreement. Failure to do so may result in an award of costs after the dismissal is entered.

Distinguish:

Attorney's fees, unlike costs, may not be awarded when an action is voluntarily dismissed or settled, unless an award of fees is expressly included in the settlement agreement [*CC* § 1717(b)(2)].



Cross References:

Discussion of prevailing party for cost purposes and attorney's fees purposes under *CCP* § 1032, *CC* § 1717, and using "practical" methodology under other circumstances, see 12.25.

Discussion of inability to recover attorney's fees under *CC* § 1717 when action is dismissed or settled, see 12.06[2].

12.19[2][b] Costs of Arbitration Are Recoverable. The arbitration award of contractual disputes constitutes a

judgment, and courts have held that arbitration by contractual requirement satisfies the requirements of CCP § 1033.5 for recovery of arbitration fees by the prevailing party [*Cobler v. Stanley, Barber, Southard, Brown & Assocs.* (1990) 217 CA3d 518, 533, 265 CR 868]. The prevailing party also is entitled to costs incurred in a proceeding to confirm, correct or vacate a contractual arbitration award pursuant to CCP § 1285 [CCP § 1293.2; *Marcus & Millichap Real Estate Investment Brokerage Co. v. Woodman Investment Group* (2005) 129 CA4th 508, 513, 28 CR3d 584]. Attorney's fees are recoverable as costs if authorized by the arbitration agreement [CCP § 1033.5(a)(10)(A)]. Parties also may recover the costs of judicial arbitration as a method of alternative dispute resolution under CCP § 1141.21 [*Muega v. Menocal* (1996) 50 CA4th 868, 875, 57 CR2d 697 ; *Boyd v. Oscar Fisher Co.* (1989) 210 CA3d 368, 382, 258 CR 473].



Strategic Point--Both Parties:

Unlike most other allowable costs, the costs of arbitration can be compared to attorney's fees because most arbitrators are attorneys and bill their time accordingly.

12.19[2][c] Judicial Referee's Fees Are Recoverable. A judicial referee's fees are recoverable by the prevailing party as costs [*Trend Homes, Inc. v. Superior Court* (2005) 131 CA4th 950, 962, 32 CR3d 411].

Distinguish:

If the parties stipulate that a case will be submitted to a referee pursuant to CCP § 638 and agree to split the referee's fees between them, that agreement controls, and the court has no authority to award the referee's fees as a cost item to the prevailing party [*Carr Business Enterprises, Inc. v. City of Chowchilla* (2008) 166 CA4th 25, 28-30, 82 CR3d 135] .

12.19[3] CCP § 1033.5 Expressly Allows and Disallows Certain Categories of Costs. Costs expressly allowed under CCP § 1033.5(a) include:

- Filing, motion, and jury fees.
- Juror food and lodging expenses.
- Expenses of taking, video recording, and transcribing depositions, including travel expenses.
- Costs of service of process.
- Expenses of attachment.
- Surety bond premiums.
- Ordinary witness fees under *Gov Code* § 68093.
- Court appointed expert fees.
- Court transcript fees.
- Court reporter fees by statute.
- Models, enlargements, and copies.
- Attorney's fees [see discussion in 12.03 et seq.].

Costs expressly disallowed by *CCP* § 1033.5(b) except when otherwise provided by statute include:

- Expert witness fees for other than court appointed experts.
- Expenses of pre-filing investigation.
- Postage, telephone, and copying charges other than for exhibits.
- Juror investigation or voir dire preparation expenses.
- Transcripts of proceedings when not court ordered.



Cross References:

Discussion of allowable cost items under *CCP* § 1033.5, see *California Forms of Pleading and Practice*, § 174.10 et seq. (Matthew Bender).

Forms and discussion addressing recoverability of and motions to tax costs for specific items, see *California Points and Authorities*, §§ 60.40 -60.56, 60.90 -60.105 (Matthew Bender).

12.19[4] Expert Witness Fees May Be Recovered As Item of Damages. Although expert witness fees for experts retained by parties are disallowed as costs under *CCP* § 1033.5(b)(1), they nonetheless may be awarded to a prevailing party as damages when the contract expressly provides for their award [*Carwash of America-PO, LLC v. Windswept Ventures, No. 1, LLC* (2002) 97 CA4th 540, 544, 118 CR2d 536].

Expert fees may not be recovered using the procedures provided in *CCP* § 1032 and *CCP* § 1033.5, but rather must be pleaded and proven at trial as an item of damages [*Carwash of America-PO, LLC v. Windswept Ventures, No. 1, LLC* (2002) 97 CA4th 540, 544, 118 CR2d 536 (prevailing defendant); *Ripley v. Pappadopoulos* (1994) 23 CA4th 1616, 1627, 28 CR2d 878 (prevailing plaintiff); see *First Nationwide Bank v. Mountain Cascade, Inc.* (2000) 77 CA4th 871, 878-879, 92 CR2d 145 (legislature did not intend to prevent sophisticated parties from making their own arrangements, but those items deliberately excluded by the legislature are not recoverable as costs under *CCP* § 1033.5)].

Prerequisite:

If the contract awards "reasonable fees and costs, including expert costs to the prevailing party," then these items typically are presented to the judge by way of motion [see *CCP* § 1033.5(c)(5)]. The judge determines both "reasonableness" and the identity of the prevailing party [see *Baker-Hoey v. Lockheed Martin Corp.* (2003) 111 CA4th 592, 605, 3 CR3d 593 ; *Hsu v. Abbara* (1995) 9 C4th 863, 876-877, 39 CR2d 824, 891 P2d 804].



Strategic Point--Prevailing Party:

Courts have held that some common, substantial expenses do not qualify for recovery as costs under *CCP* § 1033.5 [see, e.g., *Science Applications Int'l Corp. v. Superior Court* (1995) 39 CA4th 1095, 1104-1105 (barring cost recovery for use of high-tech discovery tools)]. Drafters of contracts may increase the likelihood of recovering these items by expressly providing for their award as damages to the prevailing party.



Cross References:

Discussion of items disallowed as costs and limiting effect of *CCP* § 1033.5(b), see *California Forms of*

Pleading and Practice, § 174.10 et seq. (Matthew Bender).

Legal Topics:

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

Civil Procedure Remedies Costs & Attorney Fees Costs General Overview Civil Procedure Remedies Costs & Attorney Fees Costs Court & Marshal Fees Civil Procedure Remedies Costs & Attorney Fees Costs Depositions & Transcripts Civil Procedure Remedies Costs & Attorney Fees Costs Reproduction Costs Civil Procedure Remedies Costs & Attorney Fees Costs Witnesses



76 of 175 DOCUMENTS

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Chapter 12 Recovering Attorney's Fees and Costs in Contract Litigation

III. RECOVERING COSTS ALLOWED BY STATUTE

1-12 MB Practice Guide: CA Contract Litigation 12.20

AUTHOR: James E. Wright II

12.20 Burden of Proving Costs Falls on Moving Party.

12.20[1] Prima Facie Case Made and Burden Shifts to Respondent When Cost Allowed by Statute. When a specific cost is listed under *CCP* § 1033.5, and therefore is expressly recoverable under *CCP* § 1032, the burden for challenging the cost falls on the opposing party [*Ladas v. California State Auto. Ass'n* (1993) 19 CA4th 761, 774, 23 CR2d 810]. The verified cost bill is prima facie evidence that the items were necessarily incurred [*Melnyk v. Robledo* (1976) 64 CA3d 618, 624, 134 CR 602]. Once the party seeking costs makes a prima facie case for those costs, "mere statements in the points and authorities accompanying its notice of motion to strike cost bill and the declaration of its counsel are insufficient to rebut the prima facie showing" [*Rappenecker v. Sea-Land Serv., Inc.* (1979) 93 CA3d 256, 266, 155 CR 516]. If the items appear to be proper charges, the prevailing party's verified memorandum is prima facie evidence that costs, expenses, and services listed were necessarily incurred by the prevailing party, and the burden of showing that an item is not properly chargeable or is unreasonable is on the objecting party [*Benach v. County of Los Angeles* (2007) 149 CA4th 836, 856, 57 CR3d 363] .

12.20[2] Party Seeking Costs Not Specifically Allowed by Statute Has Burden of Proof. If items in a cost bill are properly objected to, the party claiming the items has the burden of proving the necessity and reasonableness of the cost [*Ladas v. California State Auto. Ass'n* (1993) 19 CA4th 761, 774, 23 CR2d 810]. This burden sometimes may be met with relatively little evidence, and the opposing party's pleadings alone may not suffice to defeat a showing. For example, when "[n]o counter-declarations or other rebuttal documents" were offered by the opposing party, courts have held that expert witness fees recoverable under *CCP* § 998 were sufficiently substantiated by the expert disclosure and invoices [*Jones v. Dumrichob* (1998) 63 CA4th 1258, 1268, 74 CR2d 607].

Legal Topics:

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

Civil Procedure Remedies Costs & Attorney Fees General Overview Civil Procedure Remedies Costs & Attorney Fees Costs General Overview Contracts Law Remedies General Overview



77 of 175 DOCUMENTS

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Chapter 12 Recovering Attorney's Fees and Costs in Contract Litigation

III. RECOVERING COSTS ALLOWED BY STATUTE

1-12 MB Practice Guide: CA Contract Litigation 12.21

AUTHOR: James E. Wright II**12.21 Actions or Conditions May Reduce Recoverable Costs.****12.21[1] Offers to Pay or Settle May Halt Accrual of Recoverable Costs.**

12.21[1][a] Tender of Money Owed Prior to Commencement of Action for Money May Shift Costs to Plaintiff. In a dispute that is only for the recovery of money, a defendant who has tendered to a plaintiff all moneys owed prior to the filing of the action may shift all costs to the plaintiff, including its own [CCP § 1025]. The defendant need only allege its pre-filing offer in its answer and deposit that amount with the court for the plaintiff [CCP § 1025].

Distinguish:

Note, however, that a deficient offer or an offer made after filing would not satisfy these requirements [see CCP § 1025].

**Cross Reference:**

Form and discussion addressing fee shifting after tender and deposit, see *California Points and Authorities*, § 60.443 (Matthew Bender).

12.21[1][b] Good Faith Offers to Settle May Halt Accrual of Costs As of Time of Offer. A defendant's offer to settle under CCP § 998 may shift costs to the plaintiff as of the date of the offer. In addition, if a plaintiff rejects the defendant's offer and the plaintiff fails to obtain a judgment more favorable than the defendant's offer, a court or arbitrator, in its discretion, may require the plaintiff to pay the defendant's reasonable post-offers expert witness fees [CCP § 998(d)].

To qualify as an offer of compromise under CCP § 998, the settlement offer must expressly refer to the statute and be rejected by the plaintiff prior to trial or arbitration, or within 30 days of having been made, whichever occurs first [*Stell v. Jay Hales Dev. Co.* (1992) 11 CA4th 1214, 1232, 15 CR2d 220 , overruled on other grounds by *Citizens for Covenant Compliance v. Anderson* (1995) 12 C4th 345, 359, 47 CR2d 898, 906 P2d 1314].

**Cross References:**

Discussion of settlement offers pursuant to *CCP § 998*, see *Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, Ch. 37, Settlement and Release, 37.03 -37.27* (Matthew Bender).

California Forms of Pleading and Practice, § 174.10 et seq. (Matthew Bender).

Forms and discussion addressing fee shifting after *CCP § 998* offer, see *California Points and Authorities, §§ 60.16, 60.83 -60.86* (Matthew Bender).

12.21[2] Incorrect Jurisdictional Classification May Reduce Recoverable Costs. If the judgment recovered by a prevailing party in an unlimited civil case could have been rendered in a limited civil case, the court may determine costs or any portion of claimed costs in its discretion [see *CCP § 1033(a)*; see also *CCP § 85* (limited civil case defined)].

Similarly, if a prevailing plaintiff in a limited civil case could have brought the action in small claims court and recovers an amount that a small claims court could have awarded, the court has discretion to allow or deny costs in whole or in part [*CCP § 1033(b)(1)*, see *CCP § 116.220* (small claims jurisdiction)]. If the limited civil case plaintiff recovers an amount that a small claims court could have awarded, but the plaintiff could not have brought the action in small claims court, then recoverable costs are limited to the filing fee and actual cost of service of process (and attorney's fees if otherwise allowed by law). The plaintiff can recover those costs only once the court is satisfied that the plaintiff informed the defendant in writing of the intended legal action and that the judgment would result in an award of costs and necessary disbursements allowed by *CCP § 1033(b)(2)* [*CCP § 1033(b)(2)*].

Cross Reference:

Discussion of jurisdictional classification and filing strategy, see *Ch. 3, Determining Jurisdiction and Venue in Contract Actions, 3.08[4]*.

12.21[3] Separate Actions Against Multiple Parties for Single Cause When Single Action Could Have Been Filed May Reduce Recoverable Costs in Single Action. If multiple actions are brought on a single note, bill, or other instrument, "or in any other case for the same cause of action, against several parties who might have been joined as defendants in the same action," the plaintiff may only recover costs from one of the actions if the other actions were against in-state defendants [*CCP § 1022*]. The plaintiff may still recover his or her "disbursements," which are specifically distinguished under this section, in each action [*People v. One 1950 Ford Sedan (1956) 140 CA2d 647, 649*]. The meaning of the term disbursements is "funds paid out," and is otherwise similar to the meaning of costs. Disbursements do not include items that would be excluded as costs under *CCP § 1033.5* [*Ferrell v. County of San Diego (2001) 90 CA4th 537, 542-544, 108 CR2d 681*].

Consider:

Only *CCP § 1033.5(c)(1)* notes any difference between barred costs and allowed disbursements under *CCP § 1022*, which says that costs may be recovered whether or not paid, if they are incurred.

12.21[4] When Multiple Defendants Are Sued With Different Outcomes, Costs Generally May Not Be Shifted Between Defendants. When courts are asked to allocate costs among multiple defendants, a court may not shift liability for costs onto one defendant when the costs are properly attributable to another defendant. When one defendant settles with an agreement that each party will bear its own costs, the non-settling defendant will not be held responsible for costs incurred with respect to the other settling defendant [*Levy v. Toyota Motor Sales USA, Inc. (1992) 4 CA4th 807, 813, 5 CR2d 770*]. Likewise, a defendant who is unsuccessful against a plaintiff will not be held responsible for the plaintiff's costs against a successful defendant, if the unsuccessful defendant did not bring the successful one into the case and was not responsible for the plaintiff having done so [*Transamerica Title Ins. Co. v. Green (1970) 11 CA3d 693, 704, 89 CR 915*].

Legal Topics:

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

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78 of 175 DOCUMENTS

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Chapter 12 Recovering Attorney's Fees and Costs in Contract Litigation

III. RECOVERING COSTS ALLOWED BY STATUTE

1-12 MB Practice Guide: CA Contract Litigation 12.22

AUTHOR: James E. Wright II

12.22 California Rules of Court Dictate Timing and Procedural Requirements.

The timing and procedure for recovery of costs at the trial court level is dictated by the Judicial Council under *CCP* § 1034(a), and therefore is governed by *Cal Rules Ct, Rule 3.1700*. Rule 3.1700 requires service of a verified memorandum of costs "within 15 days after the date of mailing of the notice of entry of judgment or dismissal by the clerk under *Code of Civil Procedure Section 664.5* or the date of service of written notice of entry of judgment or dismissal, or within 180 days after entry of judgment, whichever is first." Under *Cal Rules Ct, Rule 3.1700(a)(2)*, a party seeking a default judgment should request costs at that time by including the cost request on the form requesting the court to enter default.

➤ Cross References:

Forms and discussion addressing failures of timing or verification, see *California Points and Authorities*, §§ 60.13, 60.14, 60.70, 60.122 -60.124, 60.140, 60.150 -60.152 (Matthew Bender).

Discussion of procedural requirements for memoranda of costs and motions to tax, see *California Forms of Pleading and Practice*, § 174.10 et seq. (Matthew Bender).

Legal Topics:

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

Civil Procedure Remedies Costs & Attorney Fees General Overview Civil Procedure Remedies Costs & Attorney Fees Costs General Overview Contracts Law Remedies General Overview



79 of 175 DOCUMENTS

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Chapter 12 Recovering Attorney's Fees and Costs in Contract Litigation
IV. DETERMINING PREVAILING PARTY FOR RECOVERY OF COSTS OR FEES

1-12 MB Practice Guide: CA Contract Litigation 12.23

AUTHOR: James E. Wright II

12.23 CHECKLIST: Determining Prevailing Party for Recovery of Costs or Fees.

☐ Who is prevailing party for purpose of recovering costs?

☐ If one party obtained a net monetary recovery against the other, that party is prevailing party against the other.

Authority:
CCP § 1032

Discussion:
See 12.24[1]

☐ If defendant obtained dismissal, defendant is prevailing party.

Authority:
CCP § 1032

Discussion:
See 12.24[1]

☐ If defendant avoided any relief to a particular plaintiff, defendant is prevailing party against that plaintiff.

Authority:
CCP § 1032

Discussion:
See 12.24[1]

- ☐ If neither party obtained relief, defendant is prevailing party.

Authority:

CCP § 1032

Discussion:

See 12.24[1]

- ☐ Who is prevailing party for purpose of recovering attorney's fees?

- ☐ If action was voluntarily dismissed, neither party is prevailing party for recovery of attorney's fees on contract causes of action.

Authority:

CC § 1717; Santisas v. Goodin (1998) 17 C4th 599, 602, 71 CR2d 830, 951 P2d 399

Discussion:

See 12.06[2], 12.19[2][a], 12.24[2]

- ☐ Was there a notice and motion on which court determined who was prevailing party?

Authority:

CC § 1717(b)(1)

Discussion:

See 12.27

- ☐ Does contract define prevailing party?

Authority:

CCP § 1021; CC § 1717; Santisas v. Goodin (1998) 17 C4th 599, 622, 71 CR2d 830, 951 P2d 399

Discussion:

See 12.25

- ☐ Did one party clearly win or achieve its litigation objectives?

Authority:

Hsu v. Abbata (1995) 9 C4th 863, 876, 39 CR2d 824, 891 P2d 804

Discussion:

See 12.25, 12.26

- ☐ If multiple agreements exist with possibly different prevailing parties, prevailing party must be determined for each agreement.

Authority:

CC § 1717; Myers Bldg. Industries, Ltd. v. Interface Technology, Inc. (1993) 13 CA4th 949, 975, n21, 17 CR2d 242

Form:

See 12.28

Legal Topics:

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

Civil Procedure Remedies Costs & Attorney Fees General Overview Civil Procedure Remedies Costs & Attorney Fees Attorney Expenses & Fees General Overview Civil Procedure Remedies Costs & Attorney Fees Costs General Overview



80 of 175 DOCUMENTS

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Chapter 12 Recovering Attorney's Fees and Costs in Contract Litigation
IV. DETERMINING PREVAILING PARTY FOR RECOVERY OF COSTS OR FEES

1-12 MB Practice Guide: CA Contract Litigation 12.24

AUTHOR: James E. Wright II

12.24 Prevailing Party Is Different for Purpose of Recovering Costs Than for Purpose of Recovering Attorney's Fees.

12.24[1] Definition of Prevailing Party for Cost Purposes Under CCP § 1032. *CCP § 1032(a)(4)* defines the prevailing party for the purpose of recovering costs. The prevailing party is specifically defined in certain cases as:

- The party with a net monetary recovery;
- A defendant against whom a dismissal is entered;
- A defendant when neither party obtains any relief; and
- A defendant against those plaintiffs who do not recover relief against that defendant.

In other situations and when any party recovers other than monetary relief, the court is required to determine the identity of the prevailing party for cost purposes, and the court has discretion to allocate costs among the various parties. In exercising that discretion, the court should consider the necessity for the claimed costs, fairness, and whether the parties achieved their principal litigation objectives [*Wakefield v. Bohlin* (2006) 145 CA4th 963, 986-987, 52 CR3d 400] .

When a jury verdict results in a damage award for one litigant, that litigant is a "party with a net monetary recovery" under *CCP § 1032*, even if the judgment is later reduced to zero as a result of offsets for good faith settlements under *CCP § 877* [*Wakefield v. Bohlin* (2006) 145 CA4th 963, 982-983, 52 CR3d 400] .

12.24[2] Definition of Prevailing Party for Purpose of Recovering Attorney's Fees Under CC § 1717. The definition of the prevailing party for the purpose of attorney's fees under *CC § 1717* is different than it is for costs under *CCP § 1032* [*Sears v. Baccaglio* (1998) 60 CA4th 1136, 1142, 70 CR2d 769]. Thus, a prevailing party for the award of costs under *CC § 1032* is not necessarily the prevailing party for purposes of the award of attorney's fees [*McLarand, Vasquez & Partners, Inc. v. Downey Savings & Loan Assn.* (1991) 231 CA3d 1450, 1456, 282 CR 828 ("[w]e emphatically reject the contention that the prevailing party for the award of costs under section 1032 is necessarily the prevailing party for the award of attorneys' fees")].

CC § 1717(b)(1) provides that the court may decide that no prevailing party exists for the purpose of a fee award. In such a case, no attorney's fee award under CC § 1717 is possible, excepting, of course, a contractual provision to the contrary that expressly awards fees in the absence of a prevailing party.

Examples:

- When the defendant successfully attacked the plaintiff's complaint by motions for summary adjudication and judgment on the pleadings, the plaintiff successfully demurred to the defendant's cross-complaint, and the court entered a judgment by which neither party took anything, each party prevailed on the other's action on a contract and neither prevailed on the matter as a whole [*Blickman Turkus, LP v. MF Downtown Sunnyvale, LLC* (2008) 162 CA4th 858, 866, 894, 76 CR3d 325] .
- In litigation brought by a former chief executive officer against a company under an employment agreement and several other benefits contracts, the trial court did not err in finding that neither party was the prevailing party. The court was not required to determine separately whether the plaintiff was the prevailing party under each benefits contract, because the plaintiff did not file separate contract actions on the different contracts, and by virtue of the judgment, his rights were limited to those arising out of the employment contract [*Roden v. AmerisourceBergen Corp.* (2007) 155 CA4th 1548, 1578-1579, 67 CR3d 26].

CC § 1717(b)(2) provides that no prevailing party exists when a case is voluntarily dismissed or settled. Courts have construed this provision to nullify any contract language that purports to award attorney's fees on contract causes of action under these circumstances [*Santisas v. Goodin* (1998) 17 C4th 599, 621-622, 71 CR2d 830, 951 P2d 399]. CC § 1717(b)(2) also does not control the determination of a prevailing party (or recovery of fees) specified by statute without reference to the terms of the agreement [*Parrott v. Mooring Townhomes Assn., Inc.* (2003) 112 CA4th 873, 879].



Strategic Points--Both Parties:

- A party that may not recover fees under CC § 1717(b)(2) still may be able to recover sanctions under CCP § 128.5, even against a plaintiff that has voluntarily dismissed its case.
- The prevailing party status generally is determined at each level of the proceedings, and a party need not exhaust all appeals before a court makes its prevailing party status determination. But a reversal on the merits may result in the reversal of a fee award as well, so a party should consider the tactical advantages of seeking costs and fees as soon as possible during the proceedings. Parties should always be prepared, however, for the possibility that any recovery may have to be returned later.



Cross References:

Discussion of awards for other causes of action based on contractual fee provisions, see 12.05[4].

Discussion of *Santisas* holding regarding application of CC § 1717(b)(2), see 12.06[2].

Form, see 12.29.

Legal Topics:

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

Civil Procedure Remedies Costs & Attorney Fees General Overview Civil Procedure Remedies Costs & Attorney Fees Attorney Expenses & Fees General Overview Civil Procedure Remedies Costs & Attorney Fees Costs General Overview Contracts Law Remedies General Overview



81 of 175 DOCUMENTS

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Chapter 12 Recovering Attorney's Fees and Costs in Contract Litigation
IV. DETERMINING PREVAILING PARTY FOR RECOVERY OF COSTS OR FEES

1-12 MB Practice Guide: CA Contract Litigation 12.25

AUTHOR: James E. Wright II

12.25 Courts Adopt Practical Approach When Prevailing Party Is Not Defined by Statute.

Although under *CC § 1717(b)(2)* there is no prevailing party for causes of action based on contract when the case is dismissed or settled, *CC § 1717* does not apply to non-contract causes of action [*Damian v. Tamondong* (1998) 65 *CA4th* 1115, 1124, 77 *CR2d* 262]. *CC § 1717* permits parties to define the prevailing party in their agreements on both contract and non-contract causes of action [*Santisas v. Goodin* (1998) 17 *C4th* 599, 622, 71 *CR2d* 830, 951 *P2d* 399].

In determining the identity of the prevailing party under statutes requiring such a determination, but also not defining the term, courts have adopted a practical approach [*Heather Farms Homeowners Assn. v. Robinson* (1994) 21 *CA4th* 1568, 1572, 26 *CR2d* 758]. The California Supreme Court has described the process under *CC § 1717* as one that evaluates which party has achieved its litigation objectives [*Hsu v. Abbata* (1995) 9 *C4th* 863, 876, 39 *CR2d* 824, 891 *P2d* 804]. The trial court must compare the relief awarded on the contract claim or claims with the parties' demands on those same claims and their litigation objectives as disclosed by the pleadings, trial briefs, opening statements, and similar sources. The prevailing party determination is to be made only upon final resolution of the contract claims and only by "a comparison of the extent to which each party ha[s] succeeded and failed to succeed in its contentions" [*Hsu v. Abbata* (1995) 9 *C4th* 863, 876, 39 *CR2d* 824, 891 *P2d* 804].

Under this analysis, "a party who is denied direct relief on a claim may nonetheless be found to be a prevailing party if it is clear that the party has otherwise achieved its main litigation objective" [*Hsu v. Abbata* (1995) 9 *C4th* 863, 877, 39 *CR2d* 824, 891 *P2d* 804]. Thus, not all examples of prevailing parties are obvious ones.

Examples:

- A plaintiff was the prevailing party despite having only recovered less than one fourth of the original amount prayed for [*Scott Co. of Cal. v. Blount, Inc.* (1999) 20 *C4th* 1103, 1109, 86 *CR2d* 614, 979 *P2d* 974].
- The defendants were the prevailing party in a declaratory relief action because they were able to

prove that their alleged signatures on the contract were forgeries [*Milman v. Shukhat* (1994) 22 CA4th 538, 545, 27 CR2d 526].

- When a party's petition was dismissed in probate court but still could be pursued in a related civil action, the opposing party was not a prevailing party because the contract claim had not yet been resolved [*Estate of Drummond* (2007) 149 CA4th 46, 51, 56 CR3d691] .

- The defendant was the prevailing party when the trial court granted his motion to quash service for lack of personal jurisdiction and dismissed plaintiff's complaint [*Profit Concepts Management, Inc. v. Griffith* (2008) 162 CA4th 950, 952, 76 CR3d 396] .

- A party who successfully defeated a petition to compel arbitration was the prevailing party in the action on the contract, even though the merits of the parties' underlying contractual disputes were not yet resolved [*Otay River Constructors v. San Diego Expressway* (2008) 158 CA4th 796, 807, 70 CR3d 434] .

- The trial court did not abuse its discretion in determining that borrowers were entitled to attorney's fees as prevailing parties from a substituted trustee that conducted a nonjudicial foreclosure. Although the court ruled in favor of the trustee on the borrowers' negligence and slander of title claims, the court found the trustee jointly and severally liable with the lenders for the borrowers' attorney fees on their equitable claims because the trustee had consistently allied itself with the lenders on the essential issues relevant to claims on the note and deed of trust, on which the borrowers had prevailed [*Kachlon v. Markowitz* (2008) 168 CA4th 316, 349, 85 CR3d 532] .

- In litigation brought by homeowners against the board of directors of their condominium association, the trial court did not abuse its discretion in determining that the homeowners, who prevailed on their legal and equitable causes of action, were prevailing parties. Although the homeowners' monetary damages were not substantial, they avoided the association's cross-complaint. In their claims for injunctive relief, although the homeowners did not achieve their litigation "dream," they did accomplish a main litigation objective [*Ritter & Ritter, Inc. Pension & Profit Plan v. The Churchill Condominium Assn.* (2008) 166 CA4th 103, 126-127, 82 CR3d 389] .

- In an action brought by a bank against a borrower who failed to repay a home loan, the trial court erred in denying the borrower's motion for an award of attorney fees incurred in successfully defending against the bank's breach of contract cause of action. Even though the bank recovered a judgment on its unjust enrichment cause of action, the court could not properly consider the bank's success on its noncontract causes of action in making its determination of which party prevailed on the contract cause of action [*Federal Deposit Ins. Corp. v. Dintino* (2008) 167 CA4th 333, 358, 84 CR3d 38] .

- When a plaintiff unsuccessfully sought declaratory and injunctive relief to prevent arbitration, the defendants were prevailing parties on that discrete action, irrespective of who became the prevailing party in the subsequent arbitration [*Turner v. Schultz* (2009) 175 CA4th 974, 983-984, 96 CR3d 659] .

Cross Reference:

Discussion of fee recoveries under CC § 1717, see 12.06.

Legal Topics:

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

Civil Procedure Remedies Costs & Attorney Fees General Overview Civil Procedure Remedies Costs & Attorney

FeesAttorney Expenses & FeesGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesCostsGeneral
OverviewContracts LawRemediesGeneral Overview



82 of 175 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 12 Recovering Attorney's Fees and Costs in Contract Litigation
IV. DETERMINING PREVAILING PARTY FOR RECOVERY OF COSTS OR FEES

1-12 MB Practice Guide: CA Contract Litigation 12.26

AUTHOR: James E. Wright II

12.26 Discretion of Court Under CC § 1717 Is Not Unlimited.

While the practical approach to determining litigation success affords great flexibility to the court, sensible boundaries must be imposed on the court's discretion. When the decision on the litigated contract claims is "purely good news for one party and bad news for the other," a trial court has no discretion to deny attorney's fees to the successful litigant. Thus, when a defendant defeats recovery by the plaintiff on the only contract claim in the action, the defendant is the party prevailing on the contract under CC § 1717 as a matter of law [*Hsu v. Abbata* (1995) 9 C4th 863, 876, 39 CR2d 824, 891 P2d 804].

Legal Topics:

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

Civil ProcedureJudicial OfficersJudgesDiscretionCivil ProcedureRemediesCosts & Attorney FeesGeneral
OverviewCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesReasonable FeesCivil
ProcedureRemediesCosts & Attorney FeesCostsGeneral OverviewContracts LawRemediesGeneral Overview



83 of 175 DOCUMENTS

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Chapter 12 Recovering Attorney's Fees and Costs in Contract Litigation
IV. DETERMINING PREVAILING PARTY FOR RECOVERY OF COSTS OR FEES

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AUTHOR: James E. Wright II

12.27 Court Determines Prevailing Party on Noticed Motion in Request for Fees Allocated by Contract.

CC § 1717(b)(1) requires a noticed motion for a determination of the prevailing party. When seeking to recover fees under the contract for a contract cause of action invoking *CC § 1717*, a party should move for a determination of the prevailing party under that section. Absent the application of *CC § 1717* (for example, a tort award when a contract's fee provision is broad enough to cover such an award), no such requirement exists. However, in order to recover attorney's fees as costs under *CCP § 1021*, a party still must file a noticed motion in order to fix the fee award under *CCP § 1033.5(c)(5)*.



Cross Reference:

Form, see 12.29.

Legal Topics:

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

Civil Procedure Remedies Costs & Attorney Fees General Overview Civil Procedure Remedies Costs & Attorney Fees Attorney Expenses & Fees General Overview Civil Procedure Remedies Costs & Attorney Fees Attorney Expenses & Fees Reasonable Fees Contracts Law Remedies General Overview



84 of 175 DOCUMENTS

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Chapter 12 Recovering Attorney's Fees and Costs in Contract Litigation
IV. DETERMINING PREVAILING PARTY FOR RECOVERY OF COSTS OR FEES

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AUTHOR: James E. Wright II

12.28 In Actions on Multiple Agreements That Stand on Their Own, Multiple Prevailing Parties May Exist for Purpose of Allocating Costs and Fees.

In a lawsuit involving several contracts, attorney's fees may be awarded under *CC § 1717* to the prevailing party on *each* contract, whether or not that party is a prevailing party in the lawsuit [*Hunt v. Fahnestock* (1990) 220 CA3d 628, 630, 269 CR 614]. In cases involving multiple parties and independent agreements, fees may be awarded to the different parties who prevailed on each agreement. Moreover, which party obtained a higher net recovery in the lawsuit is irrelevant to the determination of which party prevailed in any particular action on a contract. Courts may award attorney's fees allocated by contract under *CC § 1717* under each particular agreement. Courts also may award fees based on other independent sources if those fee awards are based on the outcome of the suit as a whole. This is in contrast to *CCP § 1032*, which requires that costs be awarded to the party "with a net monetary recovery" [*Myers Bldg. Industries, Ltd. v. Interface Technology, Inc.* (1993) 13 CA4th 949, 975, n21, 17 CR2d 242].

Legal Topics:

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

Civil Procedure Remedies Costs & Attorney Fees General Overview Civil Procedure Remedies Costs & Attorney Fees Attorney Expenses & Fees General Overview Civil Procedure Remedies Costs & Attorney Fees Costs General Overview Contracts Law Remedies General Overview



85 of 175 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 12 Recovering Attorney's Fees and Costs in Contract Litigation
V. FORMS

1-12 MB Practice Guide: CA Contract Litigation 12.29

AUTHOR: James E. Wright II**12.29 Notice of Motion to Determine Party Prevailing on Contract and to Fix Amount of Attorney's Fees to Be Awarded As Costs, With Supporting Declaration.****Notice of Motion to Determine Party Prevailing on Contract and to Fix Amount of Attorney's Fees to Be Awarded As Costs and Supporting Declaration.**

_____ [Name of attorney]
 _____ [Street address]
 _____ [City, state, and ZIP]
 _____ [Area code and phone number]
 _____ [State Bar no. of attorney]
 Attorney for _____ [name of party]

SUPERIOR COURT OF CALIFORNIA,
 COUNTY OF _____

[name] _____,	)	
Plaintiff,	)	NO.
vs.	)	_____
[name] _____,	)	
Defendant.	)	NOTICE OF MO-
	)	TION _____
	)	_____ [TO DETERM-
		INE PARTY PREVAILING ON CONTRACT and/or
		TO FIX AMOUNT OF ATTORNEY'S FEES
		AWARDABLE AS ITEM OF COSTS], SUPPORT-
		ING DECLARATION OF
		_____ [identify party, e.g., DE-
		FENDANT MARY JONES] [, AND MEMOR-
		ANDUM]

Judge:

Department:

To _____ [identify party, e.g., Defendant]
 _____ [name] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that, on _____ [date], at _____ [time], or as soon
 thereafter as the matter may be heard, in [

_____ (Department or
 _____ Division) of] this court, located at
 _____ [street address], _____ [city]

_____, [specify party, e.g.,
 _____ Plaintiff] will move for an order

[determining that he/she/it is the party prevailing on the contract for purposes of *Civil Code Section 1717* and is entitled
 under that section to an award of attorney's fees as an item of costs *and/or*

_____ fixing the amount of attorney's fees
 to which he/she/it is entitled as the party prevailing on the contract in this action]. This motion will be made on the
 ground that [specify moving party, e.g.,

_____ Plaintiff] [recovered the greater
 relief in this action on the contract and is therefore the party prevailing on the contract within the meaning of *Civil Code*
Section 1717 and/or _____ has paid or
 incurred liability for attorney's fees to (prosecute *or* defend) this action, which he/she/it is entitled, as the party
 prevailing on the contract, to recover as part of his/her/its costs of suit].

The motion will be based on this notice of motion, on the declaration(s) of _____ [name(s)] and the
 memorandum served and filed herewith, on the records and file herein, and on such evidence as may be presented at the
 hearing of the motion.

Dated: _____

_____ [firm name, if any]

By: _____ [signature]

_____ [typed name]

Attorney for _____ [party's status and name]

.....

SUPPORTING DECLARATION OF

_____ [name]

I, _____ [name], declare:

1. I am _____ [identify declarant, e. g., an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for _____ (specify moving party, e.g., Plaintiff) in the above-described action].

2. This declaration is submitted in support of the motion by _____ [specify moving party, e.g., Plaintiff] for an order _____ [determining that he/she/it is the party prevailing on the contract for purposes of *Civil Code Section 1717* and is entitled under that section to an award of attorney's fees as an item of costs *and/or* fixing the amount of attorney's fees to which he/she/it is entitled as the party prevailing on the contract in the above-entitled action].

3. The above-entitled action is _____ [specify nature of action, e.g., for damages for breach of the contract that is set out in Exhibit "A" to the complaint in this action and that was also Plaintiff's Exhibit "D" in evidence at the trial)]. Paragraph _____ [specify letter or number] of that contract provides that

_____ [set forth contract provision for recovery of attorney's fees, e.g., if any party to that contract is required to retain the services of an attorney to enforce his or her rights under the contract or to acquire possession of the subject matter of the contract, that party will be entitled to recover reasonable attorney's fees in addition to any other relief to which he or she is entitled].

4. The above-entitled action resulted in _____ [specify result of action showing that moving party is the party prevailing on the contract whether or not it proceeded to final judgment, e.g., a judgment of this court in favor of Plaintiff entered on (date)

_____, in which this court awarded damages to Plaintiff in the sum of \$ _____].

[ADD, if declaration is supporting motion to fix amount of attorney's fees to be awarded as costs]

5. _____ [State here and in succeeding paragraphs, as necessary, facts showing the amount of attorney's fees incurred by moving party, and facts supporting an award in that amount].

I declare under penalty of perjury under the laws of the state of California that the foregoing is true and correct.

_____ [date]

_____ [signature]

.....

MEMORANDUM

[If desired, add memorandum supporting motion]

NOTES.

Authority:

CC § 1717(a), (b); CCP § 1033.5(a)(10)(B), (c)(5)

Attorney's Fees Authorized by Contract As Element of Costs:

See 12.05 -12.07

Attorney's Fees Authorized by Statute As Element of Costs:

See 12.05 -12.07

Claim for Attorney's Fees Not Based on Court's Established Schedule of Fees:

See 12.13

Court Authorized to Fix Attorney's Fees Authorized by Statute on Noticed Motion on Application Supported by Affidavit:

See 12.13

Prevailing Party Defined:

See 12.24, 12.25

Prevailing Party Entitled to Recover Costs Generally:

See 12.19[1]

Court Determines Prevailing Party on Noticed Motion:

See 12.27

Service and Filing of Notice of Motion for Attorney's Fees and Memorandum of Costs:

See 12.12[2] -[4]

Detailed Discussion of Format/Skeletal Forms for Memoranda:

California Forms of Pleading and Practice, Ch. 417, Points and Authorities (Matthew Bender);
California Points and Authorities, Ch. 1, Writing Legal Memoranda and Briefs (Matthew Bender)

Additional Memoranda Related to Motions for Attorney's Fees Under CC § 1717:

See California Points and Authorities, Ch. 60, Costs (Matthew Bender)

Legal Topics:

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

Civil Procedure Pleading & Practice Motion Practice Content & Form Civil Procedure Remedies Costs & Attorney Fees General Overview Civil Procedure Remedies Costs & Attorney Fees Attorney Expenses & Fees Reasonable Fees Contracts Law Remedies General Overview



86 of 175 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 13 Attacking or Defending Existence of Contract--Absence of Essential Element

1-13 MB Practice Guide: CA Contract Litigation 13.syn

§ 13.syn Synopsis to Chapter 13: Attacking or Defending Existence of Contract--Absence of Essential Element

Scope.

13.02 Objective and Strategy.

13.03 CHECKLIST: Determining Whether Essential Elements of Valid Contract Are Present.

13.04 Elements of Contract.

13.04A Contract May Be Either Express or Implied.

13.05 Parties Must Be Identifiable.

13.06 Parties Must Be Capable of Contracting.

13.07 Parties Must Consent to Contract.

13.07[1] Consent Must Be Mutual.

13.07[2] Consent Must Be Freely Given.

13.07[3] Consent Must Be Communicated.

13.07[3][a] Each Party Must Communicate Consent to Other Party.

13.07[3][b] Signing Contract Ordinarily Communicates Consent, Even If Party Did Not Read Contract Before Signing.

13.07[3][c] Exchanging Formal Offer and Acceptance Communicates Consent.

13.07[3][d] Receiving and Accepting Contract Signed by Other Party Communicates Consent.

13.07[4] Real, but Unexpressed, Intention of Party Is Immaterial.

13.07[4][a] Mutuality of Consent Is Judged by Objective Standard.

13.07[4][b] Test Is Whether Reasonable Person Would Conclude Consent Was Mutual.

13.07[4][c] Manifestation of Consent May Be Shown by Words, Acts, or Failure to Act.

13.07[4][d] Undisclosed Intentions Are Not Determinative.

13.08 Contract Must Have Lawful Object.

13.09 Contract Must Have Sufficient Cause or Consideration.

13.10 Contract Must Be Reasonably Definite.

13.10[1] Terms of Contract Must Be Expressed With Reasonable Certainty.

13.10[2] Issue of Certainty Is Question of Law.

13.11 CHECKLIST: Challenging Existence of Contract Based on Absence of Essential Element.

13.12 Procedural Context in Which Issue of Existence of Contract May Be Raised Depends on Circumstances of Case.

13.12[1] Party Seeking to Avoid Potential Action on Contract May Raise Issue in Action for Declaratory Relief.

13.12[2] Party Bringing Action on Contract Must Plead and Prove Existence of Contract.

13.12[3] Defendant Must Raise Issue Regarding Existence of Contract in Responsive Pleadings.

13.12[4] Issue May Be Resolved on Motion for Summary Judgment If Existence of Contract Is Question of Law.

13.13 Action for Declaratory Relief May Seek to Challenge or Confirm Existence of Contract.

13.14 Issue May Be Raised by Demurrer If Complaint Based on Contract Fails to Plead Essential Element for Existence of Contract.

13.14[1] Complaint May Fail to State Facts Sufficient to Constitute Cause of Action.

13.14[2] Objection Is Not Waived by Failure to Raise by Demurrer.

13.15 Answer May Deny Existence of Contract Pled by Complaint.

13.16 Absence of Essential Element Not Raised by Complaint May Be Raised by Affirmative Defense in Answer.

13.16[1] Absence of Essential Element of Contract May Constitute New Matter That Must Be Alleged As Affirmative Defense.

13.16[1][a] "New Matter" Is Anything Not Put in Issue by Allegations of Complaint.

13.16[1][b] Lack of Consideration Is Affirmative Defense.

13.16[1][c] Unlawful Object May Be Affirmative Defense.

13.16[2] Failure to Plead Affirmative Defenses Generally Waives Them.

13.16[3] Defendant Generally Has Burden of Proof As to Affirmative Defenses.

13.17 Issue of Existence of Contract May Be Determined on Motion for Summary Judgment If Absence of Essential Element Is Question of Law.

13.17[1] Certain or Undisputed Facts May Make Absence of Essential Element a Question of Law.

13.17[2] Triable Issues of Fact As to Essential Element of Contract Preclude Summary Judgment.

13.18 CHECKLIST: Determining Whether Valid Offer Was Made.

13.19 Elements of Valid Offer.

13.20 Offeror Must Have Intent to Contract.

13.20[1] Offer Indicates Offeror's Willingness to Enter Into Bargain.

13.20[2] Circumstances May Indicate Lack of Intent.

13.20[3] Offeror's Intent Is Question of Fact.

13.21 Offer Must Be Reasonably Definite.

13.22 Offer Must Be Received by Offeree.

13.23 Offer Must Not Be Revoked by Offeror Before Acceptance.

13.23[1] Offer Generally May Be Revoked Before Acceptance by Offeree.

13.23[2] Offer May Be Revoked by Notice to Offeree.

13.23[3] Offer May Be Revoked by Lapse of Time.

13.23[4] Offer May Be Revoked by Failure to Fulfill Condition Precedent to Acceptance.

13.23[5] Offer May Be Revoked by Death or Insanity of Offeror.

13.24 Some Offers Are Irrevocable.

13.24[1] Offer That Is Subject of Option Supported by Consideration Is Irrevocable.

13.24[2] Offer May Be Made Irrevocable by Statute or Regulation.

13.25 CHECKLIST: Determining Whether There Has Been a Valid Acceptance.

13.26 Elements of Valid Acceptance.

13.27 Acceptance Must Indicate Assent to Terms of Offer.

13.27[1] Acceptance May Be Expressed by Written or Oral Words or by Conduct Unless Offer or Statute Specifies Otherwise.

13.27[2] Performance of Conditions of Offer or Acceptance of Consideration Constitutes Acceptance.

13.28 Acceptance Must Be Absolute and Unqualified.

13.28[1] Terms of Offer Must Be Met Unequivocally.

13.28[2] Qualified Acceptance Constitutes Counteroffer.

13.28[3] "Grumbling" Acceptance Is Not Necessarily Rejection of Offer.

13.28[4] Issue of Acceptance or Rejection of Offer Is Question of Fact.

13.29 Acceptance Generally Must Be Communicated to Offeror.

13.29[1] Offeree Must Perform Act or Omission Intended to Communicate Acceptance.

13.29[2] Acceptance Must Satisfy Any Conditions Prescribed by Offer.

13.29[3] Unilateral Contract Is Accepted by Performance.

13.30 Acceptance Is Effective When Offeree Puts Acceptance in Course of Transmission to Offeror.

13.30[1] Transmission of Acceptance Must Comply With Requirements Specified by Offer.

13.30[2] Acceptance by Mail Is Effective Upon Posting.

13.31 Silence Generally May Not Constitute Acceptance.

13.32 CHECKLIST: Determining Whether Parties Intended to Contract.

13.33 Parties Must Manifest Intention to Agree in Regard to Matter in Question.

13.34 Parties' Promise to Agree in Future Does Not Necessarily Render Contract Unenforceable.

13.34[1] Law Favors Enforcement of Contracts.

13.34[2] Contract Is Enforceable If Court Can Determine What to Enforce.

13.35 Parties' Intention Determines Whether Contract Arises From Agreement to Execute Written Agreement.

13.35[1] Parties May Intend Informal Agreement to Be Binding.

13.35[2] Parties May Intend Contract to Be Effective Only After Formal Agreement Is Signed.

13.35[3] Parties' Intention Regarding Oral Agreement Is Question of Fact.

13.36 CHECKLIST: Determining Existence of Adequate Consideration.

13.37 Consideration Generally Is Required for Valid Contract.

13.38 Party Seeking to Avoid Written Contract Must Overcome Presumption of Consideration.

13.38[1] Presumption May Be Rebutted by Evidence Showing Lack of Consideration.

13.38[2] Presumption May Affect Burden of Producing Evidence, Not Burden of Proof.

13.39 Specified Contracts Are Exempted by Statute From Consideration Requirement.

13.39[1] Written Release of Debtor Does Not Require Consideration.

13.39[2] Written Acceptance of Part Performance in Satisfaction of Obligation Does Not Require Consideration.

13.39[3] Written Modification of Oral Contract Does Not Require Consideration.

13.39[4] Authorization of Agent Does Not Require Consideration.

13.39[5] Some Surety Obligations Do Not Require Consideration.

13.40 Consideration May Be Benefit to Promisor or Detriment to Promisee.

13.41 Consideration Must Be Part of Bargain or Agreed Exchange.

13.42 Consideration Must Be Sufficient.

13.42[1] Existing Legal or Moral Obligation of Promisor May Constitute Consideration Only in Limited Circumstances.

13.42[1][a] Existing Obligation May Constitute Consideration Only to Extent of Obligation.

13.42[1][b] Moral Consideration Is Sufficient Only If Enforceable Obligation Once Existed.

13.42[2] Promises Mutual in Obligation Constitute Consideration.

13.42[3] Sufficiency of Consideration Does Not Depend on Intrinsic Value.

13.42[4] Consideration Must Not Violate Law or Public Policy.

13.42[5] Amount of Consideration Need Not Be Specified.

13.42[5][a] Amount May Be Determined by Third Party or According to Specified Standard.

13.42[5][b] Amount Otherwise Must Be What Object of Contract Is Reasonably Worth.

13.42[5][c] Contract Is Void If Method for Ascertaining Consideration Is Impossible.

13.42[6] Promise to Perform Existing Duty Is Not Adequate Consideration.

13.42[7] Relinquishment of Claimed Right May Constitute Adequate Consideration.

13.43 Requirements Contracts Do Not Lack Consideration.

13.44 Contracts Containing Satisfaction Clauses Do Not Lack Consideration.

13.45 Promissory Estoppel May Substitute for Consideration.

13.45[1] Promise Without Consideration May Be Binding to Avoid Injustice.

13.45[2] Promise Must Be Clear and Unambiguous.

13.45[3] If Reliance Was Part of Bargain, Doctrine Does Not Apply.

13.45[4] Plaintiff Must Prove That Defendant Caused Plaintiff's Damages.

13.46 CHECKLIST: Determining Effect of Absence of a Contract Term.

13.47 Contract Need Not Set Forth Every Term and Condition to Be Enforceable.

13.47[1] Contract Must Evidence Agreement on Essential Items.

13.47[2] Law Disfavors Holding Contracts Unenforceable.

13.47[3] Inferences From Contract and Extrinsic Evidence May Supply Missing Terms.

13.47[4] Uncertainty May Be Resolved by Rules of Contract Interpretation.

13.48 Failure to Specify Price Does Not Necessarily Void Contract.

13.49 Time for Performance or Duration of Contract May Be Implied.

13.49[1] Time for Performance May Be Deemed to Be Within Reasonable Time.

13.49[2] Payment Is Deemed to Be Due Immediately.

13.49[3] Duration of Contract May Be Implied.

13.50 Failure to Specify Quantity Does Not Render Requirements Contract Unenforceable.

13.51 Conduct of Parties May Render Contract Enforceable Despite Uncertainty.

13.52 Specific Contract Terms May Be Required by Statute.

13.52[1] Many Types of Contracts Are Governed by Statute.

13.52[2] Particular Contract Terms May Be Specified.

13.52[3] Particular Contract Terms May Be Prohibited.

13.52[4] Failure to Comply May Render Contract Void or Voidable.

13.52[5] Statute May Provide Remedies for Violation.

13.53 Answer to Complaint for Breach of Contract With Affirmative Defense(s) Based on Absence of Essential Element.

Answer to Complaint for Breach of Contract With Affirmative Defense(s) Based on Absence of Essential Element.

13.54 Notice of Motion for Summary Judgment/Absence of Essential Element of Contract Is Question of Law.

Notice of Motion for Summary Judgment/Absence of Essential Element of Contract Is Question of Law.

13.55 Declaration in Support of Motion for Summary Judgment/Absence of Essential Element of Contract Is Question of Law.

Declaration in Support of Motion for Summary Judgment/Absence of Essential Element of Contract Is Question of Law.

13.56 Separate Statement of Undisputed Facts and Supporting Evidence in Support of Defendant's Motion for Summary Judgment

Separate Statement of Undisputed Facts and Supporting Evidence in Support of Defendant's Motion for Summary Judgment

13.57 Memorandum for Party Attacking Existence of Contract--Lack of Mutual Consent.

Memorandum for Party Attacking Existence of Contract--Lack of Mutual Consent.

13.58 Memorandum for Party Attacking Existence of Contract--Offer Revoked Before Acceptance.

Memorandum for Party Attacking Existence of Contract--Offer Revoked Before Acceptance.

13.59 Memorandum for Party Attacking Existence of Contract--Offer Not Accepted.

Memorandum for Party Attacking Existence of Contract--Offer Not Accepted.

13.60 Memorandum for Party Attacking Existence of Contract--Formal Agreement Not Signed.

Memorandum for Party Attacking Existence of Contract--Formal Agreement Not Signed.

13.61 Memorandum for Party Attacking Existence of Contract--Lack of Consideration.

Memorandum for Party Attacking Existence of Contract--Lack of Consideration.

13.62 Memorandum for Party Defending Existence of Contract--Signing Agreement Communicates Consent.

Memorandum for Party Defending Existence of Contract--Signing Agreement Communicates Consent.

13.63 Memorandum for Party Defending Existence of Contract--Revocation Not Communicated Before Acceptance.

Memorandum for Party Defending Existence of Contract--Revocation Not Communicated Before Acceptance.

13.64 Memorandum for Party Defending Existence of Contract--Oral Contract Enforceable Without Signed Agreement.

Memorandum for Party Defending Existence of Contract--Oral Contract Enforceable Without Signed Agreement.

13.65 Memorandum for Party Defending Existence of Contract--Promise Enforceable Without Consideration Under Doctrine of Promissory Estoppel.

Memorandum for Party Defending Existence of Contract--Promise Enforceable Without Consideration Under Doctrine of Promissory Estoppel.

13.66 Memorandum for Party Defending Existence of Contract--Contract Enforceable Despite Absence of Missing Term.

Memorandum for Party Defending Existence of Contract--Contract Enforceable Despite Absence of Missing Term.

13.67 Memorandum for Party Defending Existence of Contract--Implied Contract Enforceable Without Express Statement of Terms.

Memorandum for Party Defending Existence of Contract--Implied Contract Enforceable Without Express Statement of Terms.



87 of 175 DOCUMENTS

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Chapter 13 Attacking or Defending Existence of Contract--Absence of Essential Element

I. STRATEGY

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Scope.

This chapter covers:

- Objective and strategy for attacking or defending the existence of a contract, based on the absence of an essential element [see 13.02].
- Determining whether the essential elements required for a valid contract are present [see 13.03 -13.09], including:
 - ☐ Parties who are identifiable and capable of contracting [see 13.05, 13.06].
 - ☐ Mutual consent of the parties to contract [see 13.07].
 - ☐ A lawful object [see 13.08].
 - ☐ Sufficient consideration [see 13.09].
 - ☐ Terms sufficiently definite to be enforceable [see 13.10].
- Determining how and when to challenge the existence of a contract based on the absence of an essential element [see 13.11 -13.17].
- Determining whether there was a valid offer to contract [see 13.18 -13.24].
- Determining whether there was a valid acceptance of an offer to contract [see 13.25 -13.31].
- Determining whether the parties intended to agree [see 13.32 -13.35].
- Determining the existence of adequate consideration [see 13.36 -13.45].

- Determining the effect of the absence of a contract term [see 13.46 -13.52], such as:

- ☐ Terms specifying price [see 13.48].

- ☐ Terms stating time for performance, payment, or duration of the contract [see 13.49].

- ☐ Terms of quantity [see 13.50].

- ☐ Terms required by statute [see 13.52].

- Determining whether the conduct of the parties renders a contract enforceable despite the absence of an essential term [see 13.51].

Core Statutes:

CC §§ 1549, 1550, 1565, 1566, 1580-1587, 1605-1615, 1667

Legal Topics:

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

Contracts LawFormationAcceptanceGeneral OverviewContracts LawFormationCapacity of PartiesGeneral OverviewContracts LawFormationDefinite TermsContracts LawFormationMeeting of MindsContracts LawFormationOffersGeneral Overview



88 of 175 DOCUMENTS

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Chapter 13 Attacking or Defending Existence of Contract--Absence of Essential Element
I. STRATEGY

1-13 MB Practice Guide: CA Contract Litigation 13.02

13.02 Objective and Strategy.

The existence of a valid contract is fundamental to maintaining an action to enforce a contract or recover damages for its breach. A party bringing an action based on contract must plead and prove that the parties had a valid contract [see *Evid Code § 500*]. Thus, in enforcing or attempting to enforce a contract, the first step is to determine whether a valid contract actually exists.

Conversely, in opposing an action for nonperformance or breach of a contract, the defendant's first step should be to determine whether or not a valid contract was formed. A party sued for breach of contract may escape all or some liability if no valid enforceable contract existed.

Strategic Point--All Parties:



In some cases, quantum meruit recovery is possible even when no valid contract was formed. For discussion, see Ch. 9, Seeking or Opposing Quantum Meruit or Quantum Valebant Recovery in Contract Actions.

A challenge to the existence of a contract generally will be raised by the defendant in an action based on the purported contract [see 13.12 -13.16]. However, a party may also challenge the existence of a contract in an action for declaratory relief to avoid a potential action on the contract by the opposing party [see 13.13].



Cross Reference:

Discussion of declaratory relief actions, see Ch. 8, Seeking or Opposing Equitable Remedies in Contract Actions.

The party disputing the existence of the contract must determine the appropriate time and manner of raising the issue, based on the circumstances of the particular case [see 13.12]. The determination of how and when to raise the issue depends on whether the opposing party has filed an action based on the contract [see 13.12], how the existence of the purported contract is pled by the opposing party [see 13.11 -13.16], and whether the absence of an essential element of the contract is a question of law or a question of fact [see 13.17].

**Strategic Point--Plaintiff:**

One disadvantage of attacking the contract's existence (as opposed to arguing that it was breached) is that the attacking party may deprive itself of the ability to enforce the contract.

Detailed Discussion/Forms:

California Forms of Pleading and Practice, Ch. 140, Contracts (Matthew Bender);

California Legal Forms, Ch. 75, Formation of Contracts and Standard Contractual Provisions (Matthew Bender); and

California Points and Authorities, Ch. 50, Contracts (Matthew Bender).

**Cross Reference:**

For Tips on updating case law and expanding your research with additional resources, see **How to Use Lexis.com With This Publication** at the front of this volume.

Legal Topics:

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

Contracts LawConsiderationGeneral OverviewContracts LawFormationGeneral OverviewContracts

LawFormationAcceptanceGeneral OverviewContracts LawFormationCapacity of PartiesGeneral OverviewContracts

LawFormationMeeting of Minds



89 of 175 DOCUMENTS

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Chapter 13 Attacking or Defending Existence of Contract--Absence of Essential Element
II. DETERMINING WHETHER ESSENTIAL ELEMENTS OF VALID CONTRACT ARE PRESENT

1-13 MB Practice Guide: CA Contract Litigation 13.03

13.03 CHECKLIST: Determining Whether Essential Elements of Valid Contract Are Present.

- ☐ Determine whether parties to purported contract are identifiable.

Authority:

CC § 1558

Discussion:

See 13.05

- ☐ Determine whether parties were capable of contracting.

Authority:

CC § 1550

Discussion:

See 13.06

- ☐ Determine whether parties' consent to the contract was:

☐ Mutual.

Authority:

CC §§ 1550, 1565

Discussion:

See 13.07[1]

Forms:

See 13.57 (memorandum for party attacking existence of contract), 13.63 (memorandum

for party defending existence of contract)

☐ Freely given.

Authority:

CC § 1565

Discussion:

See 13.07[2]

☐ Communicated by each party to the other.

Authority:

CC § 1565

Discussion:

See 13.07[3]

☐ Determine whether contract has lawful object.

Authority:

CC §§ 1550, 1596

Discussion:

See 13.08

☐ Determine whether contract has sufficient cause or consideration.

Authority:

CC § 1550

Discussion:

See 13.09

Forms:

See 13.53 (answer with affirmative defenses), 13.61 (memorandum for party attacking existence of contract), 13.65 (memorandum for party defending existence of contract)

☐ Determine whether terms of contract are sufficiently definite to be enforceable.

Authority:

Judicial Council of California Civil Jury Instructions, CACI No. 302 P 2 (LexisNexis Matthew Bender); Weddington Productions, Inc. v. Flick (1998) 60 CA4th 793, 811 ; Restatement (Second) of Contracts § 33(1), (2)

Discussion:

See 13.10

Legal Topics:

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

Contracts LawConsiderationGeneral OverviewContracts LawFormationAcceptanceGeneral OverviewContracts
LawFormationCapacity of PartiesGeneral OverviewContracts LawFormationDefinite TermsContracts
LawFormationMeeting of Minds



90 of 175 DOCUMENTS

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Chapter 13 Attacking or Defending Existence of Contract--Absence of Essential Element
II. DETERMINING WHETHER ESSENTIAL ELEMENTS OF VALID CONTRACT ARE PRESENT

1-13 MB Practice Guide: CA Contract Litigation 13.04

13.04 Elements of Contract.

A contract is an agreement to do or not to do a certain thing [CC § 1549]. The existence of a contract requires the presence of these essential elements [CC § 1550; *see* 13.05 -13.09]:

- Parties identifiable [*see* 13.05] and capable of contracting [*see* 13.06].
- The parties' consent to contract. The parties' consent to contract may be shown by a signed written agreement, by a valid offer to contract made by one party and a valid acceptance of that offer by the other, or by conduct indicating consent [*see* 13.07].
- A lawful object [*see* 13.08; *see also* Ch. 18, Asserting or Defending Claim That Contract Is Illegal, Contrary to Public Policy, or Unconscionable].
- Sufficient cause or consideration [*see* 13.09].

The absence of any of these elements will preclude an action for breach of the purported contract.

Under *Judicial Council of California Civil Jury Instructions, CACI No. 302* (LexisNexis Matthew Bender), a party seeking to prove that a contract was created must prove all of the following:

- That the parties were legally capable of entering into the contract [*see* 13.06].
- That the contract terms were clear enough that the parties could understand what each was required to do [*see* 13.21].
- That the contract had a legal purpose [*see* 13.08; *see also* Ch. 18, Asserting or Defending Claim That Contract Is Illegal, Contrary to Public Policy, or Unconscionable].
- That the parties agreed to give each other something of value. A promise to do something or not to do something may have value [*see* 13.09].
- That the parties agreed to the terms of the contract [*see* 13.07].

**Strategic Point--All Parties:**

In some cases, quantum meruit recovery is possible even when no valid contract was formed. See Ch. 9, Seeking or Opposing Quantum Meruit or Quantum Valebant Recovery in Contract Actions.

**Cross Reference:**

Discussion, see *California Forms of Pleading and Practice*, §§ 140.20 -140.24 (Matthew Bender).

**Search California Points and Authorities:**

Use *lexis.com* to search California Points and Authorities regarding the elements of a contract:

■ Legal > States Legal--U.S. > California > Search Analysis & CLE Materials > CA Treatises & Analytical Materials > California Points & Authorities



Sample Search: For California Points and Authorities on the elements of a contract, use this search: *element /10 contract! OR agreement.*

Legal Topics:

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

Contracts LawConsiderationGeneral OverviewContracts LawFormationGeneral OverviewContracts LawFormationCapacity of PartiesGeneral OverviewContracts LawFormationDefinite TermsContracts LawFormationMeeting of Minds



91 of 175 DOCUMENTS

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Chapter 13 Attacking or Defending Existence of Contract--Absence of Essential Element
II. DETERMINING WHETHER ESSENTIAL ELEMENTS OF VALID CONTRACT ARE PRESENT

1-13 MB Practice Guide: CA Contract Litigation 13.04A

13.04A Contract May Be Either Express or Implied.

A contract may be either express or implied. An express contract is one in which the terms are stated in words, either oral or written [CC § 1620]. The terms of an implied contract, by contrast, are manifested by conduct [CC § 1621; *Silva v. Providence Hospital of Oakland* (1939) 14 C2d 762, 773, 97 P2d 798 ; *Division of Labor Law Enforcement v. Transpacific Transportation Co.* (1977) 69 CA3d 268, 275, 137 CR 855].

The elements of both express and implied contracts are the same [see 13.04]. Both require the parties' consent to contract; they differ only in the manner in which the parties' consent is established.

An implied contract cannot override the terms of an express agreement between the parties [*Falkowski v. Imation Corp.* (2005) 132 CA4th 499, 518].

Examples--Implied Contracts:

- Plaintiff's allegation that during almost seven years of employment he received repeated oral assurances of job security and consistent promotions, salary increases, and bonuses stated a cause of action for an implied contract limiting his employer's right to terminate him arbitrarily [*Foley v. Interactive Data Corp.* (1988) 47 C3d 654, 681-682, 254 CR 211, 765 P2d 373].
- When plaintiff presented a toy manufacturer with an idea for a cartoon and related toy line, and the manufacturer later produced a toy based on a concept similar to plaintiff's, the toy manufacturer could be bound by an implied promise to pay the plaintiff for using his idea, even if the plaintiff did not expressly condition disclosure on the toy manufacturer's agreement to pay for his idea [*Gunther-Wahl Productions, Inc. v. Mattel, Inc.* (2002) 104 CA4th 27, 35-43, 128 CR2d 50].
- When a distributor purchased wine from a supplier for resale to retailers in its assigned territories for many years, but the parties never discussed the terms of their distributorship relationship, an implied contract existed, the terms of which the court would determine from the parties' course of conduct [*Varni Bros. Corp. v. Wine World, Inc.* (1995) 35 CA4th 880, 889, 41 CR2d740].

■ An implied contract between a university and its students was created by the students' conduct when they accepted the university's offer of enrollment, and statements on the university's web site and in its catalogues promising not to raise the professional degree fee for continuing students became a term of their implied contracts [*Kashmiri v. Regents of University of California* (2007) 156 CA4th 809, 829-833, 67 CR3d 635] .

■ An implied contract not to use a screenplay without paying for it existed when (1) plaintiff submitted a screenplay for sale to defendant, (2) plaintiff conditioned use of the screenplay on payment, (3) defendant knew or should have known of the condition, (4) defendant voluntarily accepted the screenplay, (5) defendant actually used the screenplay, and (6) the screenplay had value [*Mann v. Columbia Pictures, Inc.* (1982) 128 CA3d 628, 646-647, 180 CR 522 ; *Benay v. Warner Bros. Entm't, Inc.* (9th Cir 2010) 607 F3d 620, 629] .

Example--No Implied Contract:

Application for an Academy Award did not create an implied contract [*Yari v. Producers Guild of America, Inc.* (2008) 161 CA4th 172, 182, 73 CR3d 803] .

Jury Instructions:

Implied-in-Fact Contract, see *Judicial Council of California Civil Jury Instructions*, CACI No. 305 (LexisNexis Matthew Bender).

Contract--Express or Implied, see *California Forms of Jury Instruction*, Ch. 3A, Instr. MB 300A.05 (Matthew Bender).

Implied Contracts (Literary Property), see *California Forms of Jury Instruction*, Ch. 3A, Instr. MB 300A.06 (Matthew Bender).

Cross References:

Memorandum for party defending existence of contract, see 13.62A.

Discussion of implied contracts, see *California Forms of Pleading and Practice*, § 140.10[5][a] (Matthew Bender).

Distinguish--Contracts Implied By Law:

Implied contracts are sometimes referred to as "implied-in-fact contracts" to distinguish them from contracts "implied in law" or "quasi-contracts." Unlike implied-in-fact contracts, which are based on the intention of the parties, contracts implied in law are not contracts at all, but rather obligations imposed by law to prevent unjust enrichment [*Weitzenkorn v. Lesser* (1953) 40 C2d 778, 794, 256 P2d 947 ; *Davies v. Krasna* (1970) 12 CA3d 1049, 1054, 91 CR 250].

Cross Reference:

Discussion of implied-by-law contracts, see *California Forms of Pleading and Practice*, § 140.10[5][b] (Matthew Bender).

Legal Topics:

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

Contracts LawFormationGeneral OverviewContracts LawTypes of ContractsExecuted ContractsContracts LawTypes of ContractsExpress ContractsContracts LawTypes of ContractsImplied-in-Fact ContractsContracts LawTypes of ContractsOral Agreements



92 of 175 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 13 Attacking or Defending Existence of Contract--Absence of Essential Element
II. DETERMINING WHETHER ESSENTIAL ELEMENTS OF VALID CONTRACT ARE PRESENT

1-13 MB Practice Guide: CA Contract Litigation 13.05

13.05 Parties Must Be Identifiable.

It is essential to the existence of a contract that the parties be identifiable [CC § 1558].

Examples:

■ When series of documents executed between a borrower and a real estate loan broker specifically stated that the broker was not the lender and that the borrower was not guaranteed a loan by signing the loan documents, and when the deed of trust and promissory note signed by the borrower left the name of the lender blank and granted the broker authority to fill in those blanks when a lender was arranged, the court held that it was clear that no one, including the broker, had agreed to extend credit to the borrower as of date of the borrower-broker agreement; the lender was unidentifiable and therefore no valid loan contract existed [*Jackson v. Grant* (9th Cir 1989) 890 F2d 118, 121].

■ In a products liability action by an injured skier against the lessor and distributor of defective ski equipment, the distributor was not entitled to claim the benefits of a release in a ski rental agreement executed by the skier and lessor because the agreement did not identify the distributor as a party to be bound or benefitted by agreement; the distributor therefore had the burden of showing some basis for extending the agreement to it, and failure to do so barred the distributor from invoking the contract [*Westlye v. Look Sports, Inc.* (1993) 17 CA4th 1715, 1728, 22 CR2d 781].

Legal Topics:

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

Contracts LawFormationCapacity of PartiesGeneral OverviewContracts LawFormationDefinite Terms



93 of 175 DOCUMENTS

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Chapter 13 Attacking or Defending Existence of Contract--Absence of Essential Element
II. DETERMINING WHETHER ESSENTIAL ELEMENTS OF VALID CONTRACT ARE PRESENT

1-13 MB Practice Guide: CA Contract Litigation 13.06

13.06 Parties Must Be Capable of Contracting.

For a contract to be valid, the parties must be capable of contracting [CC § 1550].

Jury Instructions:

Contract Formation--Essential Factual Elements, see *Judicial Council of California Civil Jury Instructions, CACI No. 302* (LexisNexis Matthew Bender).



Cross Reference:

Discussion of capacity of parties, see Ch. 14, Attacking or Defending Existence of Contract--Lack of Capacity.

Legal Topics:

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

Contracts LawFormationCapacity of PartiesGeneral OverviewContracts LawFormationCapacity of PartiesAgeContracts LawFormationCapacity of PartiesMental Capacity



94 of 175 DOCUMENTS

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Chapter 13 Attacking or Defending Existence of Contract--Absence of Essential Element
II. DETERMINING WHETHER ESSENTIAL ELEMENTS OF VALID CONTRACT ARE PRESENT

1-13 MB Practice Guide: CA Contract Litigation 13.07

13.07 Parties Must Consent to Contract.

13.07[1] Consent Must Be Mutual. The consent of the parties is required for a valid contract [CC § 1550]. The consent must be mutual [CC § 1565]. Consent is not mutual unless the parties all agree on the same thing in the same sense [CC § 1580].

Example--Mutual Consent:

A lender's closing instructions to an escrow bank regarding the sale of a business exhibited mutual consent and created contract between them [*Money Store Inv. Corp. v. Southern Cal. Bank* (2002) 98 CA4th 722, 728, 120 CR2d 58].

Example--Lack of Mutual Consent:

A settlement agreement imposed on the parties by a mediator was lacking mutual consent and was unenforceable because the defendants never agreed to its terms [*Weddington Prods., Inc. v. Flick* (1998) 60 CA4th 793, 811, 71 CR2d 265].



Warning:

It can be very difficult to prove state-of-mind issues after the fact. Generally speaking, a contemporaneous writing (no matter how informal) works much better than interested testimony.



Strategic Points--Both Parties:

- *Evid Code* § 622 provides that facts recited in a written instrument (other than recitals of consideration) are conclusively presumed to be true as between the parties to that instrument. If the contract contains a statement of the parties' consent, this rule may be cited in opposition to the argument that no consent was given.

- If one party has led another to believe that he or she has given consent to a contract, only to recant

later, the party arguing that consent was given should refer to *Evid Code* § 623, which provides that a party who has intentionally and deliberately led another to believe that a particular thing is true, and to act on that belief, is not permitted to contradict it in any litigation arising out of the statement.

Jury Instructions:

Contract Formation--Essential Factual Elements, see *Judicial Council of California Civil Jury Instructions*, CACI No. 302 (LexisNexis Matthew Bender).

Objective Test of Agreement, see *California Forms of Jury Instruction*, Ch. 3A, Instr. MB 300A.03 (Matthew Bender).

 Cross References:

Memorandum for party attacking existence of contract, see 13.57.

Memorandum for party defending existence of contract, see 13.62.

13.07[2] Consent Must Be Freely Given. The consent of the parties to the contract must be freely given [CC § 1565]. A consent that is not freely given does not render the contract absolutely void [CC § 1566]. If consent is not freely given, the contract may be rescinded by the parties [CC § 1566; see CC §§ 1688-1693].

An apparent consent is not real or free when obtained through any of the following [CC § 1657]:

- Duress.
- Menace.
- Fraud.
- Undue influence.
- Mistake.

Consent is deemed to have been obtained through one of these causes only when it would not have been given had that cause not existed [CC § 1568].

Example:

When loan documents that were signed by an elderly, blind, mentally impaired woman were obtained through fraud in the execution, mutual assent was lacking [*Jones v. Adams Fin. Servs.* (1999) 71 CA4th 831, 840, 84 CR2d 151].

 Cross References:

Discussion of seeking rescission in contract actions, see Ch. 8, Seeking or Opposing Equitable Remedies in Contract Actions.

Discussion of asserting a mistake, see Ch. 16, Attacking or Defending Existence of Contract--Mistake.

Discussion of fraud, duress, menace, and undue influence, see Ch. 17, Attacking or Defending Existence of Contract--Fraud, Duress, Menace, and Undue Influence.

13.07[3] Consent Must Be Communicated.

13.07[3][a] Each Party Must Communicate Consent to Other Party. The consent of the parties to a contract must be communicated by each to the other [CC § 1565].

Consent can be communicated effectively only by an act or omission of the contracting party [CC § 1581]:

- By which that party intends to communicate consent; or
- That necessarily tends to communicate consent.

13.07[3][b] Signing Contract Ordinarily Communicates Consent, Even If Party Did Not Read Contract Before Signing. Consent may be communicated between the parties by signing a contract [*Banner Entm't, Inc. v. Superior Court* (1998) 62 CA4th 348, 357-358, 72 CR2d 598].

Ordinarily, one who signs an instrument that on its face is a contract is deemed to assent to all its terms. A party cannot avoid the terms of a contract on the ground that he or she failed to read it before signing [*Marin Storage & Trucking, Inc. v. Benco Contracting & Eng'g, Inc.* (2001) 89 CA4th 1042, 1049, 107 CR2d 645] .

Example:

In an action to enforce a settlement agreement, the plaintiff could not defeat summary judgment by claiming that he had not read or understood the agreement before signing it [*Stewart v. Preston Pipeline Inc.* (2005) 134 CA4th 1565, 1587, 36 CR3d 901] .

Exception:

When the writing does not appear to be a contract, and the terms are not called to the attention of the recipient, no contract is formed with respect to the undisclosed term [*Marin Storage & Trucking, Inc. v. Benco Contracting & Eng'g, Inc.* (2001) 89 CA4th 1042, 1049-1050, 107 CR2d 645] .

➡ **Cross Reference:**

Memorandum for party defending existence of contract, see 13.62.

13.07[3][c] Exchanging Formal Offer and Acceptance Communicates Consent. The parties may communicate their consent to a contract by exchanging a formal offer and acceptance [*Schreiber v. Hooker* (1952) 114 CA2d 634, 637-640, 251 P2d 55] .

➡ **Cross References:**

Discussion of requirements for a valid offer, see 13.18 -13.24.

Discussion of requirements for a valid acceptance, see 13.25 -13.31.

13.07[3][d] Receiving and Accepting Contract Signed by Other Party Communicates Consent. The parties may communicate their consent to a contract if one party receives and accepts a contract signed by the other [*Dallman Supply Co. v. Smith-Blair, Inc.* (1951) 103 CA2d 129, 132, 228 P2d 886] .

13.07[4] Real, but Unexpressed, Intention of Party Is Immaterial.

13.07[4][a] Mutuality of Consent Is Judged by Objective Standard. The mutuality of the parties' consent is judged by an objective standard, based on the outward manifestation of consent [*Stewart v. Preston Pipeline Inc.* (2005) 134 CA4th 1565, 1587, 36 CR3d 901 ; *Leo F. Piazza Paving Co. v. Bebek & Brkich* (1956) 141 CA2d 226, 230, 296 P2d 368] .

Jury Instructions:

Objective Test of Agreement, see *California Forms of Jury Instruction, Ch. 3A, Instr. MB 300A.03*

(Matthew Bender).

13.07[4][b] Test Is Whether Reasonable Person Would Conclude Consent Was Mutual. The test to determine mutual consent is whether a reasonable person would conclude, from the conduct of the parties, that there was mutual agreement [*Beard v. Goodrich* (2003) 110 CA4th 1031, 1040].

13.07[4][c] Manifestation of Consent May Be Shown by Words, Acts, or Failure to Act. The manifestation of consent to a contract may be wholly or partly by written or spoken words or by other acts or by failure to act [*Merced County Sheriff's Employees' Assn. v. County of Merced* (1987) 188 CA3d 662, 670, 233 CR 519] . If the parties' consent is manifested through acts rather than words, the contract is sometimes referred to as an implied contract [CC § 1621; *Division of Labor Law Enforcement v. Transpacific Transportation Co.* (1977) 69 CA 3d 268, 275, 137 CR 855] .

 Cross Reference:

Discussion of implied contracts, see 13.04A.

13.07[4][d] Undisclosed Intentions Are Not Determinative. The real, but unexpressed, state of a party's mind on the subject is immaterial [*Brant v. California Dairies, Inc.* (1935) 4 C2d 128, 133, 48 P2d 13] . Therefore, a party who signs a contract may be bound by the terms of the contract even if he or she had a different, undisclosed intention [*Palmquist v. Mercer* (1954) 43 C2d 92, 98, 272 P2d 26 ; *Myers v. Carter* (1963) 215 CA2d 238, 241, 30 CR 91] .

 Cross Reference:

Memorandum for party defending existence of contract, see 13.62.

Legal Topics:

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

Contracts LawFormationAcceptanceGeneral OverviewContracts LawFormationMeeting of MindsContracts LawFormationOffersGeneral Overview



95 of 175 DOCUMENTS

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Chapter 13 Attacking or Defending Existence of Contract--Absence of Essential Element
 II. DETERMINING WHETHER ESSENTIAL ELEMENTS OF VALID CONTRACT ARE PRESENT

1-13 MB Practice Guide: CA Contract Litigation 13.08

13.08 Contract Must Have Lawful Object.

The object of a contract--the thing which it is agreed, on the part of the party receiving the consideration, to do or not do [CC § 1595]--must be lawful when the contract is made, and possible and ascertainable by the time the contract is to be performed [CC §§ 1550, 1596]. Contracts may be void or voidable for illegality, unconscionability, or because they are contrary to public policy.

Distinguish:

A contract that contemplates the doing of a thing that is at first lawful but that afterward and during the running of the contract term becomes unlawful ceases to be operative when a prohibitory law takes effect [*Industrial Dev. & Land Co. v. Goldschmidt* (1922) 56 CA 507, 509, 206 P 134 (effect of Prohibition on lease restricting use of leased property to liquor business)]. This situation is governed by CC § 1511, which states that performance of a contract is excused when prevented by operation of law [see, e.g., *Baird v. Wendt Enterprises, Inc.* (1967) 248 CA2d 52, 55, 56 CR 118 (foreign jurisdiction's adoption of building code precluding issuance of permit to construct building "prevented" performance of contract within meaning CC § 1511)]. For discussion of the defense of excuse, and its limitations, see Ch. 22, *Suing or Defending Action for Breach of Contract*, 22.65.

**Cross Reference:**

Detailed discussion of voiding a contract or contract term for illegality, unconscionability, or violation of public policy, see Ch. 18, *Asserting or Defending Claim That Contract Is Illegal, Contrary to Public Policy, or Unconscionable*.

Jury Instructions:

Contract Formation--Essential Factual Elements, see *Judicial Council of California Civil Jury Instructions*, CACI No. 302 (LexisNexis Matthew Bender).

Object of Contract Must Be Legal, see *California Forms of Jury Instruction*, Ch. 3F, Instr. MB 300F.90 (Matthew Bender).

**Strategic Point--Plaintiff:**

Although a party may be prevented from recovering for breach of an illegal contract, quantum meruit

recovery may still be possible. For example, when services are rendered under a contractual compensation arrangement that is unenforceable as against public policy, but the subject services are not otherwise prohibited, quantum meruit may be allowed [see, e.g., *Huskinson & Brown, LLP v. Wolf* (2004) 32 C4th 453, 463, 84 P3d 379 , (law firm could recover in quantum meruit despite fact that fee contract was unenforceable due to fee-splitting arrangement)].

**Cross References:**

See Ch. 9, Seeking or Opposing Quantum Meruit or Quantum Valebant Recovery in Contract Actions.

See also Ch. 18, Asserting or Defending Claim That Contract Is Illegal, Contrary to Public Policy, or Unconscionable.

Legal Topics:

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

Contracts LawDefensesIllegal BargainsContracts LawFormationDefinite Terms



96 of 175 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 13 Attacking or Defending Existence of Contract--Absence of Essential Element
II. DETERMINING WHETHER ESSENTIAL ELEMENTS OF VALID CONTRACT ARE PRESENT

1-13 MB Practice Guide: CA Contract Litigation 13.09

13.09 Contract Must Have Sufficient Cause or Consideration.

A contract must have a sufficient cause or consideration [CC § 1550].

However, the requirement of consideration applies only to executory contracts. After the contract is fully performed on both sides, the question of consideration becomes immaterial [*Schiffman v. Atlas Mill Supply, Inc. (1961) 193 CA2d 847, 853, 14 CR 708*] .

Jury Instructions:

Contract Formation--Essential Factual Elements, see *Judicial Council of California Civil Jury Instructions, CACI No. 302* (LexisNexis Matthew Bender).

Consideration--Thing of Value, see *California Forms of Jury Instruction, Ch. 3A, Instr. MB 300A.40* (Matthew Bender).

► Cross References:

Discussion of determining whether consideration is adequate, see 13.36 -13.45.

Answer with affirmative defenses, see 13.53.

Memorandum for party attacking existence of contract, see 13.61.

Memorandum for party defending existence of contract, see 13.65.

Legal Topics:

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

Contracts LawConsiderationGeneral OverviewContracts LawConsiderationSufficient ConsiderationContracts LawTypes of ContractsExecutory Contracts



97 of 175 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 13 Attacking or Defending Existence of Contract--Absence of Essential Element
II. DETERMINING WHETHER ESSENTIAL ELEMENTS OF VALID CONTRACT ARE PRESENT

1-13 MB Practice Guide: CA Contract Litigation 13.10

13.10 Contract Must Be Reasonably Definite.

13.10[1] Terms of Contract Must Be Expressed With Reasonable Certainty. The contract terms must be clear enough that the parties could understand what each was required to do [*Judicial Council of California Civil Jury Instructions*, CACI No. 302 P 2 (LexisNexis Matthew Bender); *Estate of Thottam* (2008) 165 CA4th 1331, 1340, 81 CR3d 856] . Even though a manifestation of intention is intended to be understood as an offer, it cannot be accepted so as to form a contract unless the terms of the contract are reasonably certain [Restatement (Second) of Contracts § 33(1)]. The terms of a contract are reasonably certain if they provide a basis for determining the existence of a breach and for giving an appropriate remedy [Restatement (Second) of Contracts § 33(2); *Alexander v. Codemasters Group Ltd.* (2002) 104 CA4th 129, 141, 127 CR2d 145] .

Examples:

- An amorphous promise to "consider" the amount employees at other companies were earning was too uncertain to be an enforceable contractual duty [*Ladas v. California State Auto. Ass'n* (1993) 19 CA4th 761, 771, 23 CR2d 810] .
- A lender's "letter of commitment" that did not specify the borrower's identity, amount of loan, percentage of purchase price, interest rates, or repayment terms did not state essential terms with sufficient certainty; the terms were not capable of being made certain and no binding agreement could have been reached to supply permanent financing on mutually agreed-upon terms; hence, no enforceable contract was created [*Peterson Dev. Co. v. Torrey Pines Bank* (1991) 233 CA3d 103, 115, 284 CR 367] .
- A contract between an attorney and a city providing for additional compensation for the attorney if he achieved "savings to the City of such magnitude" as (in the city's judgment) would justify additional compensation was uncertain not only as to the amount of additional compensation to be paid, but also what it was to be paid for, and was too vague to permit a true meeting of the minds [*Goldberg v. City of Santa Clara* (1971) 21 CA3d 857, 861-863, 98 CR 862] .

- A purported settlement agreement was not an enforceable contract because although the parties agreed to the goals of the settlement, they did not agree to the means of achieving the goals, which were material terms [*Terry v. Conlan* (2005) 131 CA4th 1445, 1459].
- A settlement agreement was not enforceable because the court could not tell what the parties meant when they provided for "binding mediation" of a payment dispute [*Lindsay v. Lewandowski* (2006) 139 CA4th 1618, 1623, 43 CR3d 846] .
- An agreement to form a joint venture to market an American company's software to users in Mexico was not sufficiently definite to be enforceable because the following material terms were unsettled: the form and amount of the plaintiff's compensation; the extent, duration, and nature of his management role, if any; the amount of the company's royalty; the equity percentage held by the plaintiff, "the management team," the company, and outside investors; and the liquidity path for both the plaintiff and investors [*Bustamante v. Intuit, Inc.* (2006) 141 CA4th 199, 211, 45 CR3d 692] .
- An arbitration clause and a Texas choice of law provision in a franchise agreement were unenforceable because the Uniform Franchise Offering Circular stated that those provisions "may not be enforceable under California law." As a result, there was no meeting of the minds on these issues [*Winter v. Window Fashions Professionals, Inc.* (2008) 166 CA4th 943, 949-950, 83 CR3d 89] .
- A chart prepared at a mediation session was a settlement agreement because it provided sufficient information about allocation of assets to indicate the intended obligations of the parties (but court did not decide question of the settlement agreement's enforceability) [*Estate of Thottam* (2008) 165 CA4th 1331, 1340-1341, 81 CR3d 856] .
- A rhetorical comment ("Why would [defendant] terminate anybody who is doing such a good job?") was not sufficient evidence that the defendant intended to agree that a distribution arrangement with the plaintiff could not be terminated except for good cause [*Unterberger v. Red Bull North America, Inc.* (2008) 162 CA4th 414, 420, 75 CR3d 368] .

Exception:

When minor matters in a contract are left for future agreement, it does not necessarily mean that the entire contract is unenforceable. The question is one of degree, and the issue is whether the indefinite portions are so essential to the bargain that inability to enforce it would make it unfair to enforce the remainder of the agreement [*Weddington Prods., Inc. v. Flick* (1998) 60 CA4th 793, 813, 71 CR2d 265 (citing Williston on Contracts, § 4:28)]. For additional discussion, see 13.34.

Judge's Perspective:

One of the recurring problems in contract litigation is that the party suing for breach comes into court unable to show clearly and specifically what the other side was required to do.

Jury Instructions:

Clarity of contract terms, see *Judicial Council of California Civil Jury Instructions*, CACI No. 302 P 2 (LexisNexis Matthew Bender).

Contract Formation--Offer, see *Judicial Council of California Civil Jury Instructions*, CACI No. 307 (LexisNexis Matthew Bender).



Cross References:

Discussion of the absence of an essential term of a contract, see 13.46 -13.52.

Discussion of alleging ambiguities in a contract, see Ch. 21, Asserting a Particular Construction of Contract.

13.10[2] Issue of Certainty Is Question of Law. The issue of whether a contract is sufficiently definite is a question of law for the court [*Ladas v. California State Auto. Ass'n* (1993) 19 CA4th 761, 770 n2, 23 CR2d 810] .

Judge's Perspective:

Generally, an indefinite term will not stop a court from enforcing a contract, provided that the court can imply a definite term [see *California Sch. Employees Assn. v. Sunnyvale Elementary Sch. Dist.* (1973) 36 CA3d 46, 71, 111 CR 433 ("a court will enforce even an indefinite contract if it is capable of being identified and rendered definite"); see also 13.45[2] (promissory estoppel)]. However, an indefinite term may affect the plaintiff's ability to obtain certain types of relief, including specific performance.



Cross References:

Interpretation of contract terms, see Ch. 21, Asserting a Particular Construction of Contract.

Discussion of specific performance, see Ch. 8, Seeking or Opposing Equitable Remedies in Contract Actions.

Legal Topics:

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



98 of 175 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 13 Attacking or Defending Existence of Contract--Absence of Essential Element
III. CHALLENGING EXISTENCE OF CONTRACT BASED ON ABSENCE OF ESSENTIAL ELEMENT

1-13 MB Practice Guide: CA Contract Litigation 13.11

13.11 CHECKLIST: Challenging Existence of Contract Based on Absence of Essential Element.

☐ If opposing party has not yet filed action based on purported contract, but actual controversy exists as to rights and duties of parties under purported contract, consider raising issue of existence of valid contract by filing action for declaratory relief.

Authority:

CCP § 1060

Discussion:

See 13.13

☐ If opposing party has filed complaint based on purported contract, and existence of contract can be challenged because of absence of essential element for valid contract, determine appropriate response to complaint:

☐ Demurrer, on ground that complaint fails to state facts sufficient to constitute cause of action, if absence of essential element of contract appears on face of complaint.

Authority:

CCP § 430.10(e)

Discussion:

See 13.14

Forms:

See 13.57 -13.61 (memorandum for party attacking existence of contract), 13.62-13.66 (memorandum for party defending existence of contract)

☐ Answer, with general denial or specific denials of allegations of complaint that plead essential

elements for creation of contract.

Authority:

CCP § 431.30(b)(1)

Discussion:

See 13.15

- ☐ Affirmative defense(s) in answer, if absence of essential element for contract is not put into issue by allegations of complaint.

Authority:

CCP § 431.30(b)(2)

Discussion:

See 13.16

Form:

See 13.53 (answer with affirmative defense(s) based on absence of essential element)

- ☐ Determine whether issue of existence of valid contract can be resolved on motion for summary judgment:

- ☐ Issue can be resolved by motion for summary judgment if certain or undisputed state of facts make issue of absence of essential element a question of law.

Authority:

CCP § 437c

Discussion:

See 13.17[1]

Forms:

See 13.54 (notice of motion for summary judgment), 13.55 (declaration in support of motion), 13.56 (separate statement of undisputed facts and supporting evidence), 13.57-13.61 (memorandum for party attacking existence of contract), 13.62-13.66 (memorandum for party defending existence of contract)

- ☐ Issue cannot be resolved by motion for summary judgment if triable issues of fact exist as to presence or absence of essential element of contract.

Authority:

CCP § 437c

Discussion:

See 13.17[2]

Forms:

See 13.62 -13.66 (memorandum for party defending existence of contract)

Legal Topics:

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

Civil ProcedureDeclaratory Judgment ActionsState JudgmentsGeneral OverviewContracts LawDefensesGeneral
OverviewContracts LawFormationGeneral OverviewContracts LawRemediesGeneral Overview



99 of 175 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 13 Attacking or Defending Existence of Contract--Absence of Essential Element
III. CHALLENGING EXISTENCE OF CONTRACT BASED ON ABSENCE OF ESSENTIAL ELEMENT

1-13 MB Practice Guide: CA Contract Litigation 13.12

13.12 Procedural Context in Which Issue of Existence of Contract May Be Raised Depends on Circumstances of Case.

13.12[1] Party Seeking to Avoid Potential Action on Contract May Raise Issue in Action for Declaratory Relief. A challenge to the existence of a valid contract generally arises after an action is brought on the purported contract. However, the party seeking to avoid enforcement of the purported contract, or a party seeking to enforce the contract, may also raise the issue in an action for declaratory relief [*see CCP § 1060*].



Cross Reference:

Discussion, see *13.13*.

13.12[2] Party Bringing Action on Contract Must Plead and Prove Existence of Contract. Except as otherwise provided by law, a plaintiff has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief [*Evid Code § 500*].

In an action based on contract, the plaintiff must plead and prove the existence of the contract [*Walsh v. West Valley Mission Cmty. Coll. Dist.* (1998) 66 CA4th 1532, 1545, 78 CR2d 725] .

Example:

Plaintiffs failed to meet their burden of proving an alleged oral contract when there was a serious conflict of evidence concerning the making of a contract. Plaintiffs' evidence consisted of conversations allegedly had with defendants, in which plaintiffs expressed their desire to have a contract, and defendants denied having had such conversations [*Sully v. Kern Drilling Corp.* (1954) 126 CA2d 651, 653-654, 272 P2d 549] .

Jury Instructions:

Contract Formation--Essential Factual Elements, see *Judicial Council of California Civil Jury Instructions*, CACI No. 302 (LexisNexis Matthew Bender).

13.12[3] Defendant Must Raise Issue Regarding Existence of Contract in Responsive Pleadings. If the defendant maintains that no contract exists between the parties, the defendant must determine the appropriate time and method for raising the issue under the circumstances of the particular case.

Challenging the contract will depend initially on how the existence of the contract is pled in the complaint. If the pleading indicates on its face the absence of an essential element for a contract, the defendant may demur to the complaint on the ground that the complaint fails to state facts sufficient to constitute a cause of action based on contract [see *CCP* § 430.10].

 Cross Reference:

Discussion, see 13.14.

If the defendant disputes the elements of a contract which are pled in the complaint, the defendant should answer with a general denial or with specific denials of those allegations [see *CCP* § 431.30(b)(1)].

 Cross Reference:

Discussion, see 13.15.

If the existence or absence of an essential element of a contract is not put into issue by the allegations of the complaint, the defendant must raise the issue by pleading an affirmative defense [see *CCP* § 431.30(b)(2)].

 Cross References:

Discussion, see 13.16.

Form, see 13.53.

13.12[4] Issue May Be Resolved on Motion for Summary Judgment If Existence of Contract Is Question of Law. The defendant may be able to move for summary judgment if the existence of the contract is a question of law [see *CCP* § 437c].

 Cross References:

Discussion, see 13.17.

Forms, see 13.54 -13.66.

Legal Topics:

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

Civil Procedure
Declaratory Judgment Actions
State Judgments
General Overview
Contracts Law
Defenses
General Overview
Contracts Law
Formation
General Overview



100 of 175 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 13 Attacking or Defending Existence of Contract--Absence of Essential Element
 III. CHALLENGING EXISTENCE OF CONTRACT BASED ON ABSENCE OF ESSENTIAL ELEMENT

1-13 MB Practice Guide: CA Contract Litigation 13.13

13.13 Action for Declaratory Relief May Seek to Challenge or Confirm Existence of Contract.

The issue of the existence of a valid contract generally will be raised defensively after an action is brought to enforce the contract or recover damages for its breach. However, if there is an actual controversy relating to the rights and duties of the parties to a purported contract, a party may bring an action for declaratory relief to have the purported contract declared invalid [see *CCP § 1060*]. Issues relating to the formation of a contract and its validity are proper subjects for declaratory relief [*Foster v. Masters Pontiac Co., Inc. (1958) 158 CA2d 481, 486, 322 P2d 592* ; *Howard v. Howard (1955) 131 CA2d 308, 313, 280 P2d 802*] .

Example:

Plaintiff claimed that an agreement for the purchase of a vehicle was not a valid contract and returned the vehicle to defendant. Defendant claimed that the contract was enforceable and informed plaintiff that it had placed the vehicle in storage for plaintiff's protection. Plaintiff was entitled to bring an action for declaratory relief to determine the existence and validity of purported contract [*Foster v. Masters Pontiac Co., Inc. (1958) 158 CA2d 481, 486, 322 P2d 592*] .



Cross References:

Seeking declaratory relief in contract actions, see *Ch. 11, Seeking or Opposing Declaratory Relief in Contract Matters, 11.03 -11.15*.

Discussion of actions for declaratory relief, see *California Forms of Pleading and Practice, Ch. 182, Declaratory Relief (Matthew Bender)*.

Legal Topics:

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

Civil Procedure Declaratory Judgment Actions State Judgments General Overview Contracts Law Remedies General Overview



101 of 175 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 13 Attacking or Defending Existence of Contract--Absence of Essential Element
III. CHALLENGING EXISTENCE OF CONTRACT BASED ON ABSENCE OF ESSENTIAL ELEMENT

1-13 MB Practice Guide: CA Contract Litigation 13.14

13.14 Issue May Be Raised by Demurrer If Complaint Based on Contract Fails to Plead Essential Element for Existence of Contract.

13.14[1] Complaint May Fail to State Facts Sufficient to Constitute Cause of Action. If a complaint based on a purported contract fails to plead an essential element for the existence of a valid contract, the defendant may demur on the ground that the complaint does not state facts sufficient to constitute a cause of action [see CCP § 430.10(e)].

Examples--Complaint Failed to State Cause of Action:

- Demurrer was properly sustained when plaintiff attempted to state cause of action for breach of an oral agreement to loan money for a construction project, but there was no allegation that parties had settled on definite terms, essential for a binding contract, concerning the dwellings to be built [*Mason v. Woodland Sav. & Loan Ass'n* (1967) 254 CA2d 41, 44, 61 CR 740] .

- Demurrer was properly sustained when plaintiffs, real estate brokers, brought an action to recover commissions from defendant sellers pursuant to written "authorization to sell" after plaintiffs produced a buyer. The prospective buyer and seller did not consummate a sale. The complaint failed to state a cause of action because the terms of the "authorization to sell" were too indefinite to constitute a binding contract until a prospective buyer and sellers reached a formal agreement for the sale [*Devereaux v. Harper* (1962) 210 CA2d 519, 528, 26 CR 837] .

Examples--Complaint Stated Cause of Action:

- In cause of action for breach of contract, plaintiff adequately pled existence of a contract by alleging that (1) defendant made an offer to sell the registration rights to an Internet domain name to the highest bidder, pursuant to the terms of an auction posted on its web site, (2) plaintiff's bid accepted the offer, in the exact terms in which it was made, and (3) because there were no higher bids, a contract was formed selling the registration rights to plaintiff [*Lim v. The.TV Corp. Internat.*, (2002) 99 CA4th 684, 690, 121

CR2d 333] .

■ In cause of action for breach of implied contract to provide annual salary increases, plaintiff union adequately pled existence of implied contract by alleging that (1) defendant employer had a practice of granting annual wage increases, (2) this practice was adopted after negotiation with the union, (3) the employees were aware of the practice, and (4) the employer had complied with its practice in the prior year [*Youngman v. Nevada Irrigation Dist.* (1969) 70 C2d 240, 246-247, 74 CR 398, 449 P2d 462] .

Strategic Point--Defendant:



Before demurring, defendant should determine whether the complaint fails to state a cause of action based on contract because an essential element for the contract alleged in the complaint is absent under the circumstances of the case, or because the plaintiff simply has done an inadequate job of pleading the essential elements. If failure to plead a cause of action is merely the result of inadequately pleading the facts, defendant may consider stipulating to an amendment of the complaint, instead of demurring. If there is a reasonable possibility that the plaintiff can cure the defects in the complaint, if given the opportunity to amend, it is an abuse of discretion for the court to sustain the demurrer without leave to amend [*Larwin-Southern Cal., Inc. v. JGB Inv. Co.* (1979) 101 CA3d 626, 634, 162 CR 52] .



Cross References:

Memorandum for party attacking existence of contract, see 13.57 -13.61.

Memorandum for party defending existence of contract, see 13.62 -13.66.

Discussion of demurrers and motions for judgment on the pleadings, see Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, Ch. 11, Demurrers and Motions for Judgment on the Pleadings; or

California Forms of Pleading and Practice, Ch. 206, Demurrers and Motions for Judgment on the Pleadings (Matthew Bender).

13.14[2] Objection Is Not Waived by Failure to Raise by Demurrer. The objection that the complaint does not state facts sufficient to constitute a cause of action is not waived by the failure to raise it by demurrer or answer [CCP § 430.80(a)].

Distinguish--Objection When Pleading Is Ambiguous As to Type of Contract May Be Waived:

A special demurrer may be filed in an action based on a contract if it cannot be ascertained from the complaint whether the contract is written, oral, or implied by conduct [CCP § 430.10(g)]. If the defendant does not object to the ambiguous pleading of the type of contract by demurrer or answer, the objection is deemed waived [CCP § 430.80(a)].

Strategic Point--Motion for Judgment on the Pleadings As Alternative to Demurrer:



A defendant disputing the existence of a contract may move for judgment on the pleadings on the ground that the complaint fails to state a cause of action, because of the absence of an essential element for a valid contract, after the time for filing a demurrer has run [see CCP § 438(f)(2)]. A motion for judgment on the pleadings can be a back up procedure if the defect in the pleadings was not discovered and a demurrer was not filed on time.



Cross References:

Memorandum for party attacking existence of contract, see 13.57 -13.61.

Memorandum for party defending existence of contract, see 13.62 -13.66.

Discussion of deciding whether to raise the objection to the complaint by demurrer or by a motion for judgment on the pleadings, see Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, Ch. 11, Demurrers and Motions for Judgment on the Pleadings.

Legal Topics:

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

Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsDemurrersContracts LawDefensesGeneral OverviewContracts LawFormationGeneral Overview



102 of 175 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 13 Attacking or Defending Existence of Contract--Absence of Essential Element
 III. CHALLENGING EXISTENCE OF CONTRACT BASED ON ABSENCE OF ESSENTIAL ELEMENT

1-13 MB Practice Guide: CA Contract Litigation 13.15

13.15 Answer May Deny Existence of Contract Pled by Complaint.

The defendant's answer can raise the issue of the existence of a valid contract by [*see CCP § 431.30(b)(1)*]:

- A general denial; or
- Specific denials of the material allegations of the complaint that plead the essential elements for creation of a contract.

A general denial denies in one sentence all the allegations of the complaint [*FPI Dev., Inc. v. Nakashima* (1991) 231 CA3d 367, 383, 282 CR 508] , including the existence of a contract [*Walsh v. West Valley Mission Cmty. Coll. Dist.* (1998) 66 CA4th 1532, 1545, 78 CR2d 725] . Denying the allegations of the complaint that plead the existence of a contract allows the denying party the opportunity to present evidence to refute the allegations in the complaint [*see Walsh v. West Valley Mission Cmty. Coll. Dist.* (1998) 66 CA4th 1532, 1545, 78 CR2d 725] .

Example:

When a plaintiff alleged that defendants' oral offer to do work at quoted prices gave rise to an enforceable contract, and the defendants claimed that they did not intend to contract to do the work, but only to submit a quotation of prices, the issue of the parties' intent to contract was raised by the defendants' denial of the allegations of the complaint [*Leo F. Piazza Paving Co. v. Bebek & Brkich* (1956) 141 CA2d 226, 232, 296 P2d 368] .

**Strategic Point--Defendant:**

Most commonly, the defendant's answer contains a general denial. In practice, specific denials are the exception in contract actions in California superior courts, and usually are made only if the complaint is verified [*see CCP § 431.30(d)*]. Attorneys generally prefer to use general rather than specific denials because they are concerned that specific denials can lock them into positions, and, in effect, create burdens of proof, that the attorney may later regret. The sample answer form in 13.53 contains a general denial.

**Cross References:**

Form for answer to complaint, see 13.53.

Discussion of denials in answers, see Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, Ch. 14, Answers; or
California Forms of Pleading and Practice, Ch. 26, Answers (Matthew Bender).

Legal Topics:

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

Civil Procedure Pleading & Practice Pleadings Answers Contracts Law Breach Causes of Action General
Overview Contracts Law Formation General Overview



103 of 175 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 13 Attacking or Defending Existence of Contract--Absence of Essential Element
III. CHALLENGING EXISTENCE OF CONTRACT BASED ON ABSENCE OF ESSENTIAL ELEMENT

1-13 MB Practice Guide: CA Contract Litigation 13.16

13.16 Absence of Essential Element Not Raised by Complaint May Be Raised by Affirmative Defense in Answer.

13.16[1] Absence of Essential Element of Contract May Constitute New Matter That Must Be Alleged As Affirmative Defense.

13.16[1][a] "New Matter" Is Anything Not Put in Issue by Allegations of Complaint. A defendant may raise "new matter" in his or her answer as an affirmative defense to the plaintiff's claims [CCP § 431.30(b)(2)]. "New matter" is something relied on by a defendant which is not put in issue by the allegations of the complaint. Thus, matters not responsive to essential allegations of the complaint must be raised in the answer as "new matter." However, if the answer sets forth facts showing some essential allegation of the complaint is not true, those facts are not "new matter," but only a denial [*Walsh v. West Valley Mission Cmty. Coll. Dist.* (1998) 66 CA4th 1532, 1546, 78 CR2d 725] .



Strategic Point--Defendant--Pleading Affirmative Defenses:

Although it may be technically unnecessary in most cases, the better practice for the defense attorney is to plead the lack of an essential element of the contract as an affirmative defense.

The plaintiff has the burden of proving each element of each cause of action [*Judicial Council of California Civil Jury Instructions, CACI No. 302* (LexisNexis Matthew Bender)]. However, under some circumstances, despite the plaintiff's burden, the courts have held that the nonexistence of an essential element--such as the lack of consideration--must be pled as an affirmative defense [see, e.g., *National Farm Workers Serv. Ctr., Inc. v. M. Caratan, Inc.* (1983) 146 CA3d 796, 808, 194 CR 617, discussed in 13.16[1][b] (lack of consideration must be pled as affirmative defense); but see CC § 1550; *Judicial Council of California Civil Jury Instructions, CACI No. 302* (LexisNexis Matthew Bender) (consideration is essential element of contract)]. To avoid any likelihood--even if remote--of inadvertently waiving a defense through failure to plead it, defense attorneys routinely plead the lack of any such element as an affirmative defense. Pleading it as an affirmative defense is so easy that it is hard to justify not doing so.



Strategic Point--Defendant--Pleading Affirmative Defenses in General Terms:

Since California is a "notice pleading" state, affirmative defenses, like the allegations in the complaint itself, do not require much specificity. Most defense attorneys prefer to plead affirmative defenses, like denials, in general terms. At the outset of the case, the defense attorney often may not be confident enough of his or her knowledge of the facts to assert them with specificity, although he or she may well know enough to know that a particular defense may apply. Secondly, if an affirmative defense is spelled out too specifically in the answer, it opens the client up to examination at deposition as to the specific factual basis of the affirmative defense. When the affirmative defense is pled generally, few attorneys will examine a deponent about it, and if they do the deponent can simply say: "I don't know. That is a purely legal matter handled by the attorney."

If an affirmative defense is pled in very general terms, there is the possibility that the plaintiff may demur. However, the court is required to liberally construe the pleading with a view to substantial justice [CCP § 452]. At worst, defendant may be required to re-allege the defense with greater specificity. On the other hand, plaintiffs may forgo asserting such easily cured objections, and failure to object will result in the objection being deemed waived [see *Henderson v. Northam* (1917) 176 C 493, 496, 168 P 1044 (plaintiff who treated answer that was "somewhat complex and artificially drawn" as sufficient to require proof of allegation of complaint was deemed to have waived all objections to sufficiency of denial)].

The exception is that if a cause of action requires specificity when pled in a complaint or cross-complaint (such as fraud), then it also must be specifically pled if asserted as an affirmative defense in an answer.

The affirmative defenses illustrated in are stated in very general terms in accordance with the principles stated above.

Cross References:

Form for answer with affirmative defenses, see 13.53.

Discussion of pleading affirmative defenses in an answer, see Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, Ch. 14, Answers; or California Forms of Pleading and Practice, Ch. 26, Answers (Matthew Bender).

Sample Judicial Council form for answer and discussion of use of form, see California Forms of Pleading and Practice, Ch. 140, Contracts (Matthew Bender).

13.16[1][b] Lack of Consideration Is Affirmative Defense. Although lack of consideration is an essential element of a contract [CC § 1550; *Judicial Council of California Civil Jury Instructions*, CACI No. 302 (LexisNexis Matthew Bender)], it nevertheless has been held to be "new matter" [see CCP § 431.30(b)(2)] that must be raised as an affirmative defense or waived [*National Farm Workers Serv. Ctr., Inc. v. M. Caratan, Inc.* (1983) 146 CA3d 796, 808, 194 CR 617 ; *Bryan v. Banks* (1929) 98 CA 748, 755, 277 P 1075] .

Cross Reference:

Discussion of a written instrument as presumptive evidence of consideration, see 13.38.

13.16[1][c] Unlawful Object May Be Affirmative Defense. A lawful object is an essential element of a contract [CC § 1550]. Generally, illegality of a contract is an affirmative defense and should be specially pleaded if the illegality does not appear from the face of the complaint [see *Eaton v. Brock* (1954) 124 CA2d 10, 13, 268 P2d 58] .

Cross References:

Discussion of lawful object of contract, see 13.08.

Discussion of claims of illegality, see Ch. 18, Asserting or Defending Claim That Contract Is Illegal, Contrary to Public Policy, or Unconscionable.

13.16[2] Failure to Plead Affirmative Defenses Generally Waives Them. A party who fails to plead affirmative defenses generally waives them [*California Acad. of Scis. v. County of Fresno* (1987) 192 CA3d 1436, 1442, 238 CR 154] .

Exception--Issue of Illegality Not Waived:

The court may raise the issue of illegality on its own motion when the evidence shows illegality, even if the parties did not raise the issue at trial [see *Yoo v. Robi* (2005) 126 CA4th 1089, 1103 ; *Bovard v. American Horse Enters., Inc.* (1988) 201 CA3d 832, 838, 247 CR 340] . The defense of illegality also may be raised for the first time on appeal when the evidence at trial discloses the illegality [*Lewis & Queen v. N.M. Ball Sons* (1957) 48 C2d 141, 147-148, 308 P2d 713] .

13.16[3] Defendant Generally Has Burden of Proof As to Affirmative Defenses. Except as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the defense that he or she is asserting [*Evid Code* § 500].

Example:

When the illegality of a contract does not appear on the face of a complaint, it becomes a matter of affirmative defense that must be specially pled, and the burden of proving illegality is on the defendant [*Eaton v. Brock* (1954) 124 CA2d 10, 13, 268 P2d 58] .



Cross Reference:

Discussion of burden of proof, see California Forms of Pleading and Practice, Ch. 551, Trial (Matthew Bender).

Legal Topics:

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

Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsAffirmative DefensesGeneral OverviewCivil ProcedurePleading & PracticePleadingsAnswersContracts LawBreachCauses of ActionElements of ClaimsContracts LawDefensesGeneral Overview



104 of 175 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 13 Attacking or Defending Existence of Contract--Absence of Essential Element
 III. CHALLENGING EXISTENCE OF CONTRACT BASED ON ABSENCE OF ESSENTIAL ELEMENT

1-13 MB Practice Guide: CA Contract Litigation 13.17

13.17 Issue of Existence of Contract May Be Determined on Motion for Summary Judgment If Absence of Essential Element Is Question of Law.

13.17[1] Certain or Undisputed Facts May Make Absence of Essential Element a Question of Law. The existence of the essential elements of a contract may be determined on a motion for summary judgment if a certain or undisputed state of facts make the issue a question of law [*Alexander v. Codemasters Group Ltd. (2002) 104 CA4th 129, 141, 127 CR2d 145*] .

Examples:

- Summary judgment was properly granted for defendant hospital on breach of contract claim brought by plaintiff physician. The contract claim was based on hospital bylaws, which the hospital was required by law to adopt. Because no consideration was given for bylaws, an essential element for a contract was absent, and bylaws did not constitute a contract between the parties as a matter of law [*O'Byrne v. Santa Monica-UCLA Med. Ctr. (2001) 94 CA4th 797, 810, 114 CR2d 575*] .

- A buyer made a written offer to buy real property. The seller made a written counteroffer on a standard form. Instead of signing the "acceptance" line of the form, the buyer signed the portion of the form entitled "counter to counteroffer." The buyer also wrote in certain terms of the purchase in a portion of the form entitled "changes/amendments," although, ultimately, it turned out that the terms did not vary from the terms of the seller's counteroffer. Viewing the counter-counteroffer in its entirety and objectively, the counter-counteroffer called for a response from the seller before a contract could be formed. Defendant seller therefore was entitled to summary judgment in buyer's action for specific performance, because seller negated the existence of a contract, a necessary element of buyer's case [*Roth v. Malson (1998) 67 CA4th 552, 556-559, 79 CR2d 226*] .

► Cross References:

Forms, see 13.54 -13.66.

Discussion of motions for summary judgment, see Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, Ch. 38, Summary Judgment; or California Forms of Pleading and Practice, Ch. 537, Summary Judgment (Matthew Bender).

13.17[2] Triable Issues of Fact As to Essential Element of Contract Preclude Summary Judgment. If the existence of a contract is in issue, and the evidence is conflicting or admits of more than one inference, the jury or other trier of fact must determine whether the contract did in fact exist [*Alexander v. Codemasters Group Ltd. (2002) 104 CA4th 129, 141, 127 CR2d 145*] .

Examples:

- Summary judgment for defendant employer was improper when differing inferences could be drawn from the evidence concerning the parties' mutual assent to the vesting of stock options for terminated employee. Mutual assent was a question of fact [*Alexander v. Codemasters Group Ltd. (2002) 104 CA4th 129, 141-147, 127 CR2d 145*] .

- Summary judgment for defendant producer was held improper when plaintiff submitted a synopsis of his screenplay to defendant's secretary and defendant later produced a motion picture based on a similar story. A triable issue of fact existed as to whether an implied contract had been formed, requiring defendant to pay plaintiff for use of his screenplay [*Desny v. Wilder (1956) 46 C2d 715, 744-750, 299 P2d 257*] .

Legal Topics:

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

Civil ProcedureSummary JudgmentMotions for Summary JudgmentGeneral OverviewCivil ProcedureSummary JudgmentStandardsLegal EntitlementContracts LawBreachCauses of ActionElements of ClaimsContracts LawDefensesGeneral Overview



105 of 175 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 13 Attacking or Defending Existence of Contract--Absence of Essential Element

IV. DETERMINING WHETHER VALID OFFER WAS MADE

1-13 MB Practice Guide: CA Contract Litigation 13.18

13.18 CHECKLIST: Determining Whether Valid Offer Was Made.

☐ Determine whether offeror had intent to contract:

☐ Did offer manifest offeror's intent to enter into a bargain?

Authority:

City of Moorpark v. Moorpark Unified Sch. Dist. (1991) 54 C3d 921, 930, 1 CR2d 896, 819 P2d 854

Discussion:

See 13.20[1]

☐ Did circumstances fail to indicate lack of intent?

Authority:

Scott v. Lee (1962) 208 CA2d 12, 15, 24 CR 824

Discussion:

See 13.20[2]

☐ Would reasonable person assume offeror's willingness to contract?

Authority:

In re First Capital Life Ins. Co. (1995) 34 CA4th 1283, 1287, 40 CR2d 816

Discussion:

See 13.20[3]

☐ Determine whether offer expressed terms of contract with reasonable certainty.

Authority:

Alexander v. Codemasters Group Ltd. (2002) 104 CA4th 129, 141, 127 CR2d 145

Discussion:

See 13.21

- ☐ Determine whether offer was received by offeree.

Authority:

American Bldg. Maint. Co. v. Indemnity Ins. Co. of N. Am. (1932) 214 C 608, 616, 7 P2d 305

Discussion:

See 13.22

- ☐ Determine whether offer was revoked by:

- ☐ Notice to offeree before acceptance.

Authority:

CC § 1587(1)

Discussion:

See 13.23[2]

Forms:

See 13.58 (memorandum for party attacking existence of contract), 13.63 (memorandum for party defending existence of contract)

- ☐ Lapse of time.

Authority:

CC § 1587(2)

Discussion:

See 13.23[3]

- ☐ Failure of offeree to fulfill condition precedent.

Authority:

CC § 1587(3)

Discussion:

See 13.23[4]

- ☐ Death or insanity of offeror.

Authority:

CC § 1587(4)

Discussion:

See 13.23[5]

☐ If offeror attempted to revoke offer, determine whether offer was irrevocable, such as:

☐ Option supported by consideration.

Authority:*Steiner v. Thexton (2010) 48 C4th 411, 420, 106 CR3d 252, 226 P3d 359***Discussion:**

See 13.24[1]

☐ Offer made irrevocable by statute or regulation.

Discussion:

See 13.24[2]

Legal Topics:

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

Contracts LawFormationOffersGeneral OverviewContracts LawFormationOffersIrrevocable OffersContracts LawFormationOffersRejectionsContracts LawFormationOffersRevocable Offers



106 of 175 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 13 Attacking or Defending Existence of Contract--Absence of Essential Element

IV. DETERMINING WHETHER VALID OFFER WAS MADE

1-13 MB Practice Guide: CA Contract Litigation 13.19

13.19 Elements of Valid Offer.

The following elements must be satisfied for there to be a valid offer to form a contract:

- The person making the offer must have the intent to contract [*see 13.20*].
- The offer must be reasonably definite [*see 13.21*].
- The offer must be received by the offeree [*see 13.22*].
- The offer must not have been revoked by the offeree prior to acceptance [*see 13.23*].

Legal Topics:

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

Contracts LawFormationOffersGeneral Overview



107 of 175 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 13 Attacking or Defending Existence of Contract--Absence of Essential Element
IV. DETERMINING WHETHER VALID OFFER WAS MADE

1-13 MB Practice Guide: CA Contract Litigation 13.20

13.20 Offeror Must Have Intent to Contract.

13.20[1] Offer Indicates Offeror's Willingness to Enter Into Bargain. An offer is the manifestation of the offeror's willingness to enter into a bargain, so made as to justify another person in understanding that the person's assent to that bargain is invited and will conclude it [*City of Moorpark v. Moorpark Unified Sch. Dist.* (1991) 54 C3d 921, 930, 1 CR2d 896, 819 P2d 854] .

Example:

An automobile dealer's advertisement was an objective manifestation of its intention to make an offer for the sale of the vehicle advertised at the stated price. A contract was formed when the buyer accepted the offer by tendering the advertised price [*Donovan v. RRL Corp.* (2001) 26 C4th 261, 278, 109 CR2d 807, 27 P3d 702] .

Jury Instructions:

Contract Formation--Offer, see *Judicial Council of California Civil Jury Instructions, CACI No. 307* (LexisNexis Matthew Bender).

Offer Defined, see *California Forms of Jury Instruction, Ch. 3A, Instr. MB 300A.20* (Matthew Bender).

13.20[2] Circumstances May Indicate Lack of Intent. A purported offer cannot be the basis of a contract if the circumstances indicate that the alleged offeror did not intend to create a contract [*Scott v. Lee* (1962) 208 CA2d 12, 15, 24 CR 824] .

Example:

An insurer mistakenly sent a late notice to the insured, announcing a grace period for premium payment, six months after the policy had lapsed. The insured had received several notices prior to the lapse, had allowed the policy to lapse, and had purchased replacement coverage. Under the circumstances, the insured had reason to know that the notice announcing a grace period was in error and that the insurer did not intend to offer to continue coverage [*In re First Capital Life Ins. Co.* (1995) 34 CA4th 1283, 1288-1289, 40 CR2d 816] .

➡ Cross Reference:

Discussion of acceptance of an offer, see 13.25 -13.31.

13.20[3] Offeror's Intent Is Question of Fact. The trier of fact must determine whether a reasonable person would necessarily assume a willingness to enter into a contract [*In re First Capital Life Ins. Co.* (1995) 34 CA4th 1283, 1287, 40 CR2d 816] .

Jury Instructions:

Contract Formation--Offer, see *Judicial Council of California Civil Jury Instructions, CACI No. 307* (LexisNexis Matthew Bender).

Legal Topics:

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



108 of 175 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 13 Attacking or Defending Existence of Contract--Absence of Essential Element

IV. DETERMINING WHETHER VALID OFFER WAS MADE

1-13 MB Practice Guide: CA Contract Litigation 13.21

13.21 Offer Must Be Reasonably Definite.

An offer must express the terms of the contract with reasonable certainty to be the basis of a contract [*Alexander v. Codemasters Group Ltd. (2002) 104 CA4th 129, 141, 127 CR2d 145*] .

Jury Instructions:

Contract Formation--Offer, see *Judicial Council of California Civil Jury Instructions, CACI No. 307* (LexisNexis Matthew Bender).



Cross References:

Requirement that contract be definite in order to be enforceable, see *13.10*.

Discussion of the absence of an essential term of a contract, see *13.46 -13.52*.

Specific Performance, see Ch. 8, Seeking or Opposing Equitable Remedies in Contract Actions.

Discussion of alleging ambiguities in a contract and discussion of interpretation of contract terms, see Ch. 21, Asserting a Particular Construction of Contract.

Legal Topics:

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

Contracts LawFormationOffersGeneral Overview



109 of 175 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 13 Attacking or Defending Existence of Contract--Absence of Essential Element

IV. DETERMINING WHETHER VALID OFFER WAS MADE

1-13 MB Practice Guide: CA Contract Litigation 13.22

13.22 Offer Must Be Received by Offeree.

An offer must be received by the offeree. The burden of determining whether it did reach the offeree is on the offeror [*American Bldg. Maint. Co. v. Indemnity Ins. Co. of N. Am.* (1932) 214 C 608, 616, 7 P2d 305] .

Jury Instructions:

Contract Formation--Offer, see *Judicial Council of California Civil Jury Instructions, CACI No. 307* (LexisNexis Matthew Bender).

Legal Topics:

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

Contracts LawFormationOffersGeneral Overview



110 of 175 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 13 Attacking or Defending Existence of Contract--Absence of Essential Element
IV. DETERMINING WHETHER VALID OFFER WAS MADE

1-13 MB Practice Guide: CA Contract Litigation 13.23

13.23 Offer Must Not Be Revoked by Offeror Before Acceptance.

13.23[1] Offer Generally May Be Revoked Before Acceptance by Offeree. An offer may be revoked at any time before its acceptance is communicated to the offeror, but not afterwards [CC § 1586]. Even an offer that states that it will remain open for a given length of time may be withdrawn at any time prior to acceptance, unless the offer is based on a valuable consideration [*Davies v. Langin* (1962) 203 CA2d 579, 584, 21 CR 682] .

Jury Instructions:

Contract Formation--Revocation of Offer, see *Judicial Council of California Civil Jury Instructions*, CACI No. 308 (LexisNexis Matthew Bender).

Revocation, see *California Forms of Jury Instruction*, Ch. 3A, Instr. MB 300A.21 (Matthew Bender).

13.23[2] Offer May Be Revoked by Notice to Offeree. An offer may be revoked by the communication of a notice of revocation by the offeror to the offeree, in the manner prescribed by CC §§ 1581, 1583, for the communication of consent [CC § 1587(1)]. The notice of revocation must be communicated to the offeree before the offeree's acceptance has been communicated to the offeror [CC § 1587(1)].

Examples--Offer Not Revoked Before Acceptance:

- The offeror's communication of revocation to the offeror's own agent did not revoke the offer when the agent did not notify the offeree of revocation before the offeree accepted [*Ersa Grae Corp. v. Fluor Corp.* (1991) 1 CA4th 613, 622-623, 2 CR2d 288] .

- Communication of revocation to the offeror's attorney did not revoke offer when the offeror's attorney did not notify the offeree's attorney of revocation before the offeree accepted [*CPI Builders, Inc. v. Impco Techs., Inc.* (2001) 94 CA4th 1167, 1173-1174, 114 CR2d 851] .



Cross References:

Discussion of effective communication of consent, see 13.07[3].

Discussion of communication of the offeree's acceptance, see 13.29.

Memorandum for party attacking existence of contract, see 13.58.

Memorandum for party defending existence of contract, see 13.63.

13.23[3] Offer May Be Revoked by Lapse of Time. An offer is revoked by [CC § 1587(2)]:

- The lapse of the time prescribed in the offer for its acceptance; or
- The lapse of a reasonable time without communication of the acceptance, if no time is prescribed.

13.23[4] Offer May Be Revoked by Failure to Fulfill Condition Precedent to Acceptance. An offer is revoked by the failure of the offeree to fulfill a condition precedent to acceptance [CC § 1587(3)].

Example:

Plaintiff signed a document agreeing to dismiss its claim against defendants in exchange for the payment of money. Defendants neither signed the document nor made any promise in exchange for plaintiff's promise. Plaintiff's promise therefore constituted a unilateral offer that was revocable until accepted by defendants by the tender of payment [*Sully-Miller Contracting Co. v. Gledson/Cashman Constr., Inc.* (2002) 103 CA4th 30, 36, 126 CR2d 400] .

13.23[5] Offer May Be Revoked by Death or Insanity of Offeror. An offer is revoked by the death or insanity of the offeror before acceptance [CC § 1587(4)].

Legal Topics:

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

Contracts LawFormationOffersIrrevocable OffersContracts LawFormationOffersRevocable Offers



111 of 175 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 13 Attacking or Defending Existence of Contract--Absence of Essential Element
IV. DETERMINING WHETHER VALID OFFER WAS MADE

1-13 MB Practice Guide: CA Contract Litigation 13.24

13.24 Some Offers Are Irrevocable.

13.24[1] Offer That Is Subject of Option Supported by Consideration Is Irrevocable. An option supported by consideration is a right acquired by contract to accept or reject an offer within a limited time in the future [*County of San Diego v. Miller* (1975) 13 C3d 684, 688, 119 CR 491, 532 P2d 139] .

An option is considered to have a dual nature: on the one hand it is an irrevocable offer, which upon acceptance ripens into a bilateral contract; on the other hand, it is a unilateral contract that binds the optionor to perform an underlying agreement upon the optionee's performance of a condition precedent [*Palo Alto Town & Country Vill., Inc. v. BBTC Co.* (1974) 11 C3d 494, 502-503, 113 CR 705, 521 P2d 1097] .

An option supported by sufficient bargained-for consideration is irrevocable for the negotiated period of time [*Steiner v. Thexton* (2010) 48 C4th 411, 420, 106 CR3d 252, 226 P3d 359 ; *City of Orange v. San Diego County Employees Retirement Assn.* (2002) 103 CA4th 45, 51, 126 CR2d 405] .

Cross Reference:

Discussion of option contracts, see California Forms of Pleading and Practice, Ch. 140, Contracts (Matthew Bender).

13.24[2] Offer May Be Made Irrevocable by Statute or Regulation. Specific types of offers are made irrevocable by statute or regulation [see, e.g., *Com Code* § 2205(a)].

Example:

A firm offer by a merchant to buy or sell goods is irrevocable if the offer by its terms gives assurance that it will be held open [*Com Code* § 2205(a)].

Cross Reference:

Discussion of offers under the Uniform Commercial Code, see Ch. 27, Contract for Sale of Goods--Attacking or Defending Existence of Contract Under California Commercial Code.

Legal Topics:

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



112 of 175 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 13 Attacking or Defending Existence of Contract--Absence of Essential Element
V. DETERMINING WHETHER THERE HAS BEEN A VALID ACCEPTANCE

1-13 MB Practice Guide: CA Contract Litigation 13.25

13.25 CHECKLIST: Determining Whether There Has Been a Valid Acceptance.

☐ Determine whether offeree assented to the terms of the offer by any of the following:

☐ Written or oral acceptance.

Authority:

CC § 1581; Riverside Fence Co. v. Novak (1969) 273 CA2d 656, 661, 78 CR 536

Discussion:

See 13.27[1]

☐ Conduct, or combination of words and conduct, indicating acceptance.

Authority:

CC § 1581; Beatty v. Oakland Sheet Metal Supply Co. (1952) 111 CA2d 53, 62, 244 P2d 25

Discussion:

See 13.27[1]

☐ Performance of conditions of offer.

Authority:

CC § 1584

Discussion:

See 13.27[2]

☐ Acceptance of consideration offered.

Authority:*CC § 1584***Discussion:***See 13.27[2]*

- ☐ Determine whether acceptance was absolute and unqualified:

Authority:*CC § 1585***Discussion:***See 13.28***Form:***See 13.59 (memorandum for party attacking existence of contract)*

- ☐ Determine whether acceptance was communicated to offeror by:

- ☐ Performance of act or omission intended to communicate acceptance.

Authority:*CC § 1581***Discussion:***See 13.29[1]*

- ☐ Satisfaction of conditions for communication of acceptance prescribed by offer, if any.

Authority:*CC § 1582***Discussion:***See 13.29[2]*

- ☐ Performance of offer for unilateral contract.

Authority:*Asmus v. Pacific Bell (2000) 23 C4th 1, 14-15, 96 CR2d 179, 999 P2d 71***Discussion:***See 13.29[3]*

- ☐ Determine when acceptance became effective, if time of acceptance is at issue.

Authority:*CC §§ 1582, 1583***Discussion:**

See 13.30

☐ Determine whether, if applicable under circumstances of case, silence of offeree constituted acceptance because:

- ☐ Offeree had a duty to act to reject a benefit;
- ☐ Offeree retained a benefit conferred [*see CC § 1589*];
- ☐ Past relations of parties indicated that silence would constitute acceptance; or
- ☐ Offeror had given offeree reason to believe that acceptance would be manifested by silence.

Authority:

Golden Eagle Ins. Co. v. Foremost Ins. Co. (1993) 20 CA4th 1372, 1385-1387, 25 CR2d 242

Discussion:

See 13.31

Legal Topics:

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

Contracts LawFormationAcceptanceGeneral OverviewContracts LawFormationAcceptanceMailbox RuleContracts LawFormationAcceptanceMethods of AcceptanceGeneral Overview



113 of 175 DOCUMENTS

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Chapter 13 Attacking or Defending Existence of Contract--Absence of Essential Element
V. DETERMINING WHETHER THERE HAS BEEN A VALID ACCEPTANCE

1-13 MB Practice Guide: CA Contract Litigation 13.26

13.26 Elements of Valid Acceptance.

The following elements must be satisfied to show valid acceptance of an offer:

- The acceptance must indicate assent to the terms of the offer [*see 13.27*].
- The acceptance must be absolute and unqualified [*see 13.28*].
- The acceptance must be communicated to the offeror [*see 13.29 -13.31*], except in the case of a contract that may be accepted by performance [*see 13.29[3]*].

Legal Topics:

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

Contracts LawFormationAcceptanceGeneral OverviewContracts LawFormationAcceptanceMethods of
AcceptanceGeneral Overview



114 of 175 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 13 Attacking or Defending Existence of Contract--Absence of Essential Element
V. DETERMINING WHETHER THERE HAS BEEN A VALID ACCEPTANCE

1-13 MB Practice Guide: CA Contract Litigation 13.27

13.27 Acceptance Must Indicate Assent to Terms of Offer.

13.27[1] Acceptance May Be Expressed by Written or Oral Words or by Conduct Unless Offer or Statute Specifies Otherwise. An acceptance of an offer must indicate the offeree's assent to the terms of the offer [CC §§ 1581, 1585]. An offer expressed in words may be accepted by either words or conduct, or by a combination of words and conduct that indicates to the offeror that the offer has been accepted [*Beatty v. Oakland Sheet Metal Supply Co. (1952) 111 CA2d 53, 62, 244 P2d 25*] .

In the case of an implied contract, both the offer and the acceptance are expressed by conduct rather than words [CC § 1621; *Division of Labor Law Enforcement v. Transpacific Transportation Co. (1977) 69 CA3d 268, 275, 137 CR 855*] .

➡ Cross Reference:

Discussion of implied contracts, see 13.04A.

Unless otherwise required by statute or by the terms of the offer [see *Estate of Crossman (1964) 231 CA2d 370, 372, 41 CR 800*] , an acceptance may be written or oral [*Riverside Fence Co. v. Novak (1969) 273 CA2d 656, 661, 78 CR 536*] .

If the offer does not contain any conditions concerning the communication of acceptance [see 13.29[2]], acceptance may be communicated by any reasonable and usual mode [CC § 1582].

Jury Instructions:

Contract Formation--Acceptance, see *Judicial Council of California Civil Jury Instructions, CACI No. 309* (LexisNexis Matthew Bender).

Acceptance by Words or Conduct, see *California Forms of Jury Instruction, Ch. 3A, Instr. MB 300A.22* (Matthew Bender).

Method of Acceptance Specified by Offer, see *California Forms of Jury Instruction, Ch. 3A, Instr. MB 300A.24* (Matthew Bender).

Acceptance, see *California Forms of Jury Instruction, Ch. 3A, Instr. MB 300A.25* (Matthew Bender).

 Cross Reference:

Discussion of communication of acceptance to offeror, see 13.29.

13.27[2] Performance of Conditions of Offer or Acceptance of Consideration Constitutes Acceptance. An offer may be accepted by [CC § 1584]:

- Performance of the conditions of the offer; or
- Acceptance of the consideration offered.

Jury Instructions:

Acceptance by Words or Conduct, see *California Forms of Jury Instruction, Ch. 3A, Instr. MB 300A.22* (Matthew Bender).

Acceptance of Benefits Assumes Duties, see *California Forms of Jury Instruction, Ch. 3A, Instr. MB 300A.26* (Matthew Bender).

Legal Topics:

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

Contracts LawFormationAcceptanceGeneral OverviewContracts LawFormationAcceptanceMethods of AcceptanceGeneral Overview



115 of 175 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 13 Attacking or Defending Existence of Contract--Absence of Essential Element
V. DETERMINING WHETHER THERE HAS BEEN A VALID ACCEPTANCE

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13.28 Acceptance Must Be Absolute and Unqualified.

13.28[1] Terms of Offer Must Be Met Unequivocally. An acceptance must be absolute and unqualified [CC § 1585].

The terms proposed in an offer must be met exactly, precisely, and unequivocally for its acceptance to result in the formation of a binding contract [*Panagotacos v. Bank of Am. (1998) 60 CA4th 851, 855-856, 70 CR2d 595*] .

However, an acceptance does not need to repeat the identical language of the offer [*Schreiber v. Hooker (1952) 114 CA2d 634, 639, 251 P2d 55*] .

Distinguish--Sales of Goods:

Under the Commercial Code, a definite and seasonable expression of acceptance or a written confirmation that is sent within a reasonable time operates as an acceptance even if it contains additional or different terms [Com Code § 2207; see 27.09[5][a]].

Jury Instructions:

Acceptance of Same Thing Offered, see *California Forms of Jury Instruction, Ch. 3A, Instr. MB 300A.27* (Matthew Bender).

► Cross References:

Memorandum for party attacking existence of contract, see 13.59.

More liberal offer and acceptance rules under the Commercial Code, see *Ch. 27, Contract for Sale of Goods--Attacking or Defending Existence of Contract Under California Commercial Code, 27.09*.

13.28[2] Qualified Acceptance Constitutes Counteroffer. A qualified acceptance is a new proposal [CC § 1585]. The qualified acceptance constitutes a rejection of the original offer and the making of a counteroffer to the original offeror [*Panagotacos v. Bank of Am. (1998) 60 CA4th 851, 855-856, 70 CR2d 595* ; *Landberg v. Landberg (1972) 24 CA3d 742, 750, 101 CR 335*] .

Example--Response to Offer Constituted Counteroffer:

A buyer made a written offer to buy real property. The seller made a written counteroffer on a standard form. Instead of signing the "acceptance" line of the form, the buyer signed the portion of the form entitled "counter to counteroffer." The buyer also wrote in certain terms of the purchase in a portion of the form entitled "changes/amendments," although, ultimately, it turned out that the terms did not vary from the terms of the seller's counteroffer. No contract was formed because the buyer's "counter to counteroffer" was a qualified acceptance of the seller's counteroffer [*Roth v. Malson* (1998) 67 CA4th 552, 554, 557-559, 79 CR2d 226] .

Example--Response Characterized As Counteroffer Did Not Constitute Acceptance:

A boilerplate document that was entitled "Counter Counter Offer" and began by stating "this is a counter offer" would not be construed as an acceptance of the plaintiff's counteroffer which had previously lapsed, even though the "time is of the essence" provision and lapse provision in plaintiff's counteroffer were for plaintiff's own benefit and plaintiff could have waived them. It was irrelevant whether or not adding an acceleration clause requirement to plaintiff's original counteroffer materially varied its terms; "the courts should treat a document as what it says it is unless extrinsic evidence supplies notice of ambiguities" [*Krasley v. Superior Court* (1980) 101 CA3d 425, 429-430, 161 CR 629] .



Cross References:

Memorandum for party attacking existence of contract, see 13.59.

Counteroffer can be acceptance under the Commercial Code, see *Ch. 27, Contract for Sale of Goods--Attacking or Defending Existence of Contract Under California Commercial Code*, 27.09[5].

13.28[3] "Grumbling" Acceptance Is Not Necessarily Rejection of Offer. An acceptance is not invalidated by the fact that it is "grumbling," or that the offeree makes some simultaneous "request." Nevertheless, it must appear that the "grumble" does not go so far as to make it doubtful that the expression is really one of assent. Similarly, the "request" must not add additional or different terms from those offered. Otherwise, the acceptance becomes a counteroffer [*Guzman v. Visalia Cmty. Bank* (1999) 71 CA4th 1370, 1376, 84 CR2d 581 (plaintiff's attorney's characterization of CCP § 998 offer of compromise as "insulting" and "demeaning" did not constitute a rejection of the offer; as a result, plaintiff's later acceptance of the offer was binding)].

13.28[4] Issue of Acceptance or Rejection of Offer Is Question of Fact. The interpretation of the purported acceptance or rejection of an offer is a question of fact. Based on the general rule that manifested mutual assent, rather than actual mental assent, is the essential element in the formation of contracts, the test of the true meaning of an acceptance or rejection is not what the party making it thought it meant or intended it to mean. Rather, the test is what a reasonable person in the position of the parties would have thought it meant [*Guzman v. Visalia Cmty. Bank* (1999) 71 CA4th 1370, 1376-1377, 84 CR2d 581] .

Jury Instructions:

Contract Formation--Acceptance, see *Judicial Council of California Civil Jury Instructions*, CACI 309 (LexisNexis Matthew Bender).

Contract Formation--Rejection of Offer, see *Judicial Council of California Civil Jury Instructions*, CACI No. 311 (LexisNexis Matthew Bender).

Legal Topics:

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

Contracts LawFormationAcceptanceGeneral OverviewContracts LawFormationAcceptanceMethods of AcceptanceGeneral Overview



116 of 175 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 13 Attacking or Defending Existence of Contract--Absence of Essential Element
V. DETERMINING WHETHER THERE HAS BEEN A VALID ACCEPTANCE

1-13 MB Practice Guide: CA Contract Litigation 13.29

13.29 Acceptance Generally Must Be Communicated to Offeror.

13.29[1] Offeree Must Perform Act or Omission Intended to Communicate Acceptance. The acceptance of an offer must be communicated to the offeror [*Commercial Cas. Ins. Co. v. Industrial Accident Comm'n* (1953) 116 CA2d 901, 907, 254 P2d 954] .

Acceptance can be effectively communicated by some action or omission of the party accepting [CC § 1581]:

- By which he or she intends to communicate acceptance; or
- Which necessarily tends to communicate acceptance.

➤ Cross Reference:

Discussion of acceptance of unilateral contract by performance, see 13.29[3].

13.29[2] Acceptance Must Satisfy Any Conditions Prescribed by Offer. If an offer contains any conditions concerning the communication of its acceptance, a contract does not result unless the acceptance conforms to those conditions [CC § 1582].

If the offer does not contain any conditions concerning the communication of acceptance, acceptance may be communicated by any reasonable and usual mode [CC § 1582].

Jury Instructions:

Method of Acceptance Specified by Offer, see *California Forms of Jury Instruction, Ch. 3A, Instr. MB 300A.24* (Matthew Bender).

➤ Cross Reference:

More liberal offer and acceptance rules under the Commercial Code, see *Ch. 27, Contract for Sale of Goods--Attacking or Defending Existence of Contract Under California Commercial Code, 27.09*.

13.29[3] Unilateral Contract Is Accepted by Performance. A unilateral contract is one in which no promisor

receives a promise as consideration for his or her own promise [*Smith v. Hermann* (1962) 199 CA2d 748, 753, 18 CR 833] . In a unilateral contract, there is only one promisor. The promise is given in consideration of the promisee's act or forbearance [*Asmus v. Pacific Bell* (2000) 23 C4th 1, 10, 96 CR2d 179, 999 P2d 71] . Thus, an offer for a unilateral contract is accepted, and the contract is formed, when the offeree performs [see *Asmus v. Pacific Bell* (2000) 23 C4th 1, 14-15, 96 CR2d 179, 999 P2d 71] .

After accepting the contract by performance, the offeree must give notice of the performance to the offeror within a reasonable time, to prevent the offeror from treating the offer as lapsed [*Harris v. Time, Inc.* (1987) 191 CA3d 449, 456-457, 237 CR 584] .

Legal Topics:

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

Contracts LawFormationAcceptanceGeneral OverviewContracts LawFormationAcceptanceMailbox RuleContracts LawFormationAcceptanceMethods of AcceptanceGeneral OverviewContracts LawFormationAcceptanceMethods of AcceptanceOvert ActsContracts LawFormationAcceptanceMethods of AcceptanceSilence



117 of 175 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 13 Attacking or Defending Existence of Contract--Absence of Essential Element
V. DETERMINING WHETHER THERE HAS BEEN A VALID ACCEPTANCE

1-13 MB Practice Guide: CA Contract Litigation 13.30

13.30 Acceptance Is Effective When Offeree Puts Acceptance in Course of Transmission to Offeror.

13.30[1] Transmission of Acceptance Must Comply With Requirements Specified by Offer. An acceptance becomes effective when the offeree puts the acceptance in the course of transmission to the offeror, in accordance with any requirements for communicating acceptance specified in the offer [CC §§ 1582, 1583].

13.30[2] Acceptance by Mail Is Effective Upon Posting. An acceptance by mail, properly addressed and with correct postage, is considered communicated to the offeror when the letter of acceptance is posted [*Palo Alto Town & Country Vill., Inc. v. BBTC Co. (1974) 11 C3d 494, 500-501, 113 CR 705, 521 P2d 1097* ; see CC §§ 1582, 1583].

Similarly, the exercise of an option becomes effective at the time written notice of acceptance is deposited in the mail, unless the option contract provides otherwise [*Palo Alto Town & Country Vill., Inc. v. BBTC Co. (1974) 11 C3d 494, 501, 113 CR 705, 521 P2d 1097* ; see CC §§ 1582, 1583].

If a letter of acceptance is delivered to a third person for posting, the acceptance is effective only upon posting, not upon the delivery to the third person [*Gibbs v. American Savings & Loan Assn. (1990) 217 CA3d 1372, 1376, 266 CR 517*].

Jury Instructions:

Offer Accepted by Mailing of Acceptance, see *California Forms of Jury Instruction, Ch. 3A, Instr. MB 300A.23* (Matthew Bender).

Legal Topics:

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

Contracts LawFormationAcceptanceGeneral OverviewContracts LawFormationAcceptanceMailbox Rule



118 of 175 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 13 Attacking or Defending Existence of Contract--Absence of Essential Element
V. DETERMINING WHETHER THERE HAS BEEN A VALID ACCEPTANCE

1-13 MB Practice Guide: CA Contract Litigation 13.31

13.31 Silence Generally May Not Constitute Acceptance.

Silence generally may not constitute an acceptance [*Southern Cal. Acoustics Co. v. C.V. Holder, Inc. (1969) 71 C2d 719, 722, 79 CR 319, 456 P2d 975*] .

However, acceptance may be inferred from inaction in the following circumstances [*Golden Eagle Ins. Co. v. Foremost Ins. Co. (1993) 20 CA4th 1372, 1385-1387, 25 CR2d 242*] :

- The offeree had a duty to act to reject a benefit.
- The offeree retained a benefit conferred [see *CC § 1589*].
- The past relations of the parties indicated that silence would constitute acceptance.
- The offeror had given the offeree reason to believe that acceptance would be manifested by silence.

Examples:

■ Insureds' conduct in retaining insurance renewal policy for nearly two months before objecting to the amount of the premium, together with existence of an ongoing relationship between the insureds and the insurer, was sufficient evidence of acceptance of the renewal policy [*Golden Eagle Ins. Co. v. Foremost Ins. Co. (1993) 20 CA4th 1372, 1386-1387, 25 CR2d 242*] .

■ When a commercial lease provided that lessee could request an additional 10-year extension of lease and that the lessor was required to inform the lessee within 90 days of such a request whether that request was accepted or rejected, the lessor's failure to respond to the lessee's request for extension constituted acceptance of that request, when the parties had ongoing seven-year relationship and the lessor was aware that the lessee was expending substantial amounts for improvements to the property in anticipation of long term occupancy. Under the facts, the lessor was held to have had an affirmative duty to reply in order to reject the lessee's request for an extension [*McAulay v. Jones (1952) 110 CA2d 302, 306-308, 242 P2d 650*] .

Jury Instructions:

Contract Formation--Acceptance by Silence, see *Judicial Council of California Civil Jury Instructions*, CACI No. 310 (LexisNexis Matthew Bender).

Silence as Acceptance, see *California Forms of Jury Instruction*, Ch. 3A, Instr. MB 300A.28 (Matthew Bender).

Acceptance of Benefits Assumes Duties, see *California Forms of Jury Instruction*, Ch. 3A, Instr. MB 300A.26 (Matthew Bender).

Legal Topics:

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

Contracts LawFormationAcceptanceMethods of AcceptanceGeneral OverviewContracts
LawFormationAcceptanceMethods of AcceptanceSilence



119 of 175 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 13 Attacking or Defending Existence of Contract--Absence of Essential Element

VI. DETERMINING WHETHER PARTIES INTENDED TO CONTRACT

1-13 MB Practice Guide: CA Contract Litigation 13.32

13.32 CHECKLIST: Determining Whether Parties Intended to Contract.

☐ Determine whether parties' intention to contract is at issue because:

☐ Parties have merely "agreed to agree" in future;

Discussion:

See 13.33, 13.34

☐ Parties have informally agreed in writing to execute formal agreement; or

Discussion:

See 13.33, 13.35[1], [2]

☐ Parties have orally agreed to proposed written agreement.

Discussion:

See 13.33, 13.35[3]

☐ If parties have "agreed to agree," determine whether:

☐ Agreement is unenforceable because matter left to the future is too uncertain for court to determine what to enforce; or

☐ Agreement is enforceable because it appears parties intended to contract, and court could reach a fair result based on terms of contract and extrinsic evidence.

Authority:

Okun v. Morton (1988) 203 CA3d 805, 817, 250 CR 220

Discussion:

See 13.34[2]

☐ If parties have agreed to execute a formal writing, determine whether:

☐ Agreement is enforceable because parties have agreed on all essential terms in an informal writing.

Authority:

Harris v. Rudin, Richman & Appel (1999) 74 CA4th 299, 306-309, 87 CR2d 822

Discussion:

See 13.35[1]

☐ Agreement is unenforceable because informal written agreement manifests intention not to be bound until final, formal agreement is executed.

Authority:

Beck v. American Health Group Int'l, Inc. (1989) 211 CA3d 1555, 1562-1563, 260 CR 237

Discussion:

See 13.35[1]

Form:

See 13.60 (memorandum for party attacking existence of contract)

☐ Enforceability of oral agreement to execute written agreement is question of fact for trial court.

Authority:

Banner Entm't, Inc. v. Superior Court (1998) 62 CA4th 348, 358, 72 CR2d 598

Discussion:

See 13.35[3]

Form:

See 13.64 (memorandum for party defending existence of contract)

Legal Topics:

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

Contracts LawFormationGeneral OverviewContracts LawFormationDefinite TermsContracts LawFormationMeeting of Minds



120 of 175 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 13 Attacking or Defending Existence of Contract--Absence of Essential Element
VI. DETERMINING WHETHER PARTIES INTENDED TO CONTRACT

1-13 MB Practice Guide: CA Contract Litigation 13.33

13.33 Parties Must Manifest Intention to Agree in Regard to Matter in Question.

To have a valid contract, the parties must consent to contract [CC §§ 1550, 1565], and must agree upon the same thing in the same sense [CC § 1580]. The parties must manifest an intention, by their words and acts, to agree in regard to the matter in question [*Beard v. Goodrich* (2003) 110 CA4th 1031, 1040 ; *Merced County Sheriff's Employees' Assn. v. County of Merced* (1987) 188 CA3d 662, 670, 233 CR 519] .

When the parties have agreed to agree, or to formalize their agreement, in the future, the manifestation of the parties' intent to be bound immediately determines whether an enforceable contract has been formed upon the initial agreement [*Banner Entm't, Inc. v. Superior Court* (1998) 62 CA4th 348, 358-359, 72 CR2d 598] .

➡ Cross Reference:

Discussion of parties' consent to contract, see 13.07.

Legal Topics:

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

Contracts LawFormationAcceptanceGeneral OverviewContracts LawFormationAcceptanceMethods of
AcceptanceGeneral OverviewContracts LawFormationAcceptanceMethods of AcceptanceOvert ActsContracts
LawFormationMeeting of MindsContracts LawFormationOffersGeneral Overview



121 of 175 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 13 Attacking or Defending Existence of Contract--Absence of Essential Element
VI. DETERMINING WHETHER PARTIES INTENDED TO CONTRACT

*1-13 MB Practice Guide: CA Contract Litigation 13.34***13.34 Parties' Promise to Agree in Future Does Not Necessarily Render Contract Unenforceable.**

13.34[1] Law Favors Enforcement of Contracts. The general rule is that if an essential element of a promise is reserved for the future agreement of both parties, the promise gives rise to no legal obligation until the future agreement is made [*Coleman Eng'g Co. v. North Am. Aviation, Inc.* (1966) 65 C2d 396, 405, 55 CR 1, 420 P2d 713] . However, the law favors carrying out the parties' intentions through the enforcement of contracts and disfavors holding them unenforceable because of uncertainty [*Okun v. Morton* (1988) 203 CA3d 805, 817, 250 CR 220] .

➡ **Cross Reference:**

Discussion of construing ambiguities in a contract, see Ch. 21, Asserting a Particular Construction of Contract.

13.34[2] Contract Is Enforceable If Court Can Determine What to Enforce. The enforceability of a contract containing a promise to agree depends on the relative importance and the severability of the matter left to the future; it is a question of degree and may be settled by determining whether the indefinite promise is so essential to the bargain that the inability to enforce that promise strictly according to its terms would make the enforcement of the rest of the contract unfair [*Coleman Eng'g Co. v. North Am. Aviation, Inc.* (1966) 65 C2d 396, 405, 55 CR 1, 420 P2d 713] .

A promise to agree in the future is unenforceable when the uncertainty or incompleteness prevents the court from knowing, with the aid of extrinsic evidence if necessary, what to enforce [*Bustamante v. Intuit, Inc.* (2006) 141 CA4th 199, 213, 45 CR3d 692 ; *Okun v. Morton* (1988) 203 CA3d 805, 817, 250 CR 220] . If the parties have concluded a transaction in which it appears that they intended to make a contract, the court should not frustrate their intention if it is possible to reach a fair and just result, even though that requires a choice among conflicting meanings and the filling of some gaps that the parties have left [*Okun v. Morton* (1988) 203 CA3d 805, 817, 250 CR 220] .

Examples:

- A metropolitan transit authority abolished its police force and contracted with the county to provide law enforcement through the county sheriff. The agencies agreed that transit authority officers who

passed the sheriff's review process would be transferred to the sheriff's department. The agencies also agreed that they would "meet and reach mutual agreement" on the placement of former police officers who did not pass the sheriff's review process. The agreement to agree in the future did not void the contract for failure to reach agreement on an essential term because at the time the agreement was made, the agencies had no way of knowing which officers, if any, would not pass the review or what jobs would be available and appropriate for the placement of each of those officers [*Herman v. County of L.A.* (2002) 98 CA4th 484, 486-488, 119 CR2d 691] .

- A contract between partners in a restaurant enterprise for joint exploitation of future business ventures on a "mutually agreeable basis" was enforceable because the conduct of the parties after execution of the agreement and before any controversy had arisen was persuasive evidence in determining the meaning of the allegedly fatally uncertain contract provision [*Okun v. Morton* (1988) 203 CA3d 805, 819, 250 CR 220] .



Cross Reference:

Discussion of determining the effect of the absence of a term of a contract regarding price, quantity, or time, see 13.46 -13.52.

Legal Topics:

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

Contracts LawFormationGeneral OverviewContracts LawFormationDefinite Terms



122 of 175 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 13 Attacking or Defending Existence of Contract--Absence of Essential Element
VI. DETERMINING WHETHER PARTIES INTENDED TO CONTRACT

1-13 MB Practice Guide: CA Contract Litigation 13.35

13.35 Parties' Intention Determines Whether Contract Arises From Agreement to Execute Written Agreement.

13.35[1] Parties May Intend Informal Agreement to Be Binding. If the parties definitely agree on all of the essential terms of an agreement in an informal writing, that agreement may constitute an enforceable contract, even though the parties intend to execute a formal writing later [*Harris v. Rudin, Richman & Appel* (1999) 74 CA4th 299, 306-309, 87 CR2d 822] .

Example:

Plaintiff and defendants engaged in settlement negotiations, which plaintiff claimed resulted in a settlement agreement. The terms of the alleged agreement were set out in a letter from defendants' counsel to plaintiffs' counsel. When plaintiff brought action alleging breach of the agreement, defendants demurred, asserting that the letter was merely an agreement to agree in the future. The trial court erred in sustaining the demurrer because the allegations of the complaint were sufficient, at a minimum, to state a claim for breach of an oral contract. Whether the parties intended their communications to be a binding settlement agreement or an agreement to further negotiate after a formal draft was prepared was a factual question not properly the subject of a demurrer [*Harris v. Rudin, Richman & Appel* (1999) 74 CA4th 299, 306-309, 87 CR2d 822] .

Jury Instructions:

Unformalized Agreement, see *Judicial Council of California Civil Jury Instructions*, CACI No. 306 (LexisNexis Matthew Bender).

13.35[2] Parties May Intend Contract to Be Effective Only After Formal Agreement Is Signed. If an agreement to agree shows a manifest intention that the parties not be bound until a final, formal agreement is executed, there is no enforceable contract [*Beck v. American Health Group Int'l, Inc.* (1989) 211 CA3d 1555, 1562-1563, 260 CR 237] .

Examples:

- Defendants sent a letter to plaintiff, stating that the letter was an outline of their future agreement. Defendants asked plaintiff to sign the letter to confirm their general understanding, so that defendants

could forward the letter to counsel to draft a contract. The letter also stated that the parties would discuss the contract when they had a draft. Under the circumstances, the letter did not constitute a binding contract, but was merely "an agreement to agree," which could not be the basis of a cause of action for breach of contract [*Beck v. American Health Group Int'l, Inc.* (1989) 211 CA3d 1555, 1562-1563, 260 CR 237] .

■ An entrepreneur attempted to create a joint venture with an American company to market the company's software to users in Mexico. After attempts to secure outside funding for the enterprise failed, the company stopped working with the entrepreneur, who then sued the company for breach of an agreement to "form and launch" the Mexican company. Because the parties always understood that it would not be possible to "form and launch" the Mexican company without significant third party investment, the failure of the parties' money-raising efforts meant that they were unable to create a working relationship with each other, and consequently no obligation arose or could arise to "form and launch" the new company on any terms [*Bustamante v. Intuit, Inc.* (2006) 141 CA4th 199, 212-213, 45 CR3d 692] .

Distinguish--Contract to Negotiate Agreement:

A contract to negotiate an agreement is distinguishable from an "agreement to agree." A contract to negotiate the terms of an agreement differs from a mere agreement to agree because failure to agree is not itself a breach of a contract to negotiate. Nevertheless, a party may be liable for breach of the contract to negotiate an agreement if a failure to reach an ultimate agreement results from a breach of that party's obligation to negotiate or to negotiate in good faith [*Copeland v. Baskin Robbins U.S.A.* (2002) 96 CA4th 1251, 1257, 117 CR2d 875] .

Jury Instructions:

Unformalized Agreement, see *Judicial Council of California Civil Jury Instructions*, CACI No. 306 (LexisNexis Matthew Bender).



Cross Reference:

Memorandum for party attacking existence of contract, see 13.60.

13.35[3] Parties' Intention Regarding Oral Agreement Is Question of Fact. If the parties orally agree on all of the terms and conditions of a proposed written agreement with the mutual intention that the oral agreement should be binding, the mere fact that a formal written agreement to the same effect has not yet been signed does not alter the binding validity of the oral agreement [*Elyaoudayan v. Hoffman* (2003) 104 CA4th 1421, 1430, 129 CR2d 41 ; *Banner Entm't, Inc. v. Superior Court* (1998) 62 CA4th 348, 358, 72 CR2d 598] .

Whether it was the parties' mutual intention that their oral agreement to the terms contained in a proposed written agreement should be binding immediately is to be determined from the surrounding facts and circumstances of a particular case and is a question of fact for the trial court [*Banner Entm't, Inc. v. Superior Court* (1998) 62 CA4th 348, 358, 72 CR2d 598] .



Strategic Point--All Parties:

Whether a party to an oral agreement intended to be immediately bound can be shown by that party's conduct. For example, did the party stop negotiating with others? Did the party tell others (employees, customers, etc.) that it had entered into a contract? Did it treat the other party to the oral agreement as though there was already an agreement in place; for example, by placing orders?


Warning--Oral Agreement Is Limited to Its Terms:

Even if the parties intend their oral agreement to be binding immediately, the oral agreement is limited to its own terms. Provisions added to the subsequent written agreement, which were not agreed to orally, are not enforceable unless the written agreement is signed [*Khajavi v. Feather River Anesthesia Med. Group* (2000) 84 CA4th 32, 61-62, 100 CR2d 627] .

Example:

A physician had an oral employment agreement with a medical group. A subsequent written agreement was never executed. When the physician brought an action for breach of the oral employment agreement, he claimed entitlement to an award of attorney's fees, based on the fact that written employment agreements signed by his colleagues subsequent to their oral agreements contained attorney's fees provisions. The physician was not entitled to fees, because the attorney's fees provision had not been discussed or agreed to as part of the oral agreement, and a subsequent written agreement had never been signed [*Khajavi v. Feather River Anesthesia Med. Group* (2000) 84 CA4th 32, 59-62, 100 CR2d 627] .

Jury Instructions:

Unformalized Agreement, see *Judicial Council of California Civil Jury Instructions*, CACI No. 306 (LexisNexis Matthew Bender).


Cross Reference:

Memorandum for party defending existence of contract, see 13.64.

Legal Topics:

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

Contracts LawFormationExecutionContracts LawFormationMeeting of Minds



123 of 175 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 13 Attacking or Defending Existence of Contract--Absence of Essential Element
VII. DETERMINING EXISTENCE OF ADEQUATE CONSIDERATION

1-13 MB Practice Guide: CA Contract Litigation 13.36

13.36 CHECKLIST: Determining Existence of Adequate Consideration.

- ☐ Determine whether contract is executory (and therefore requires consideration).

Authority:

CC § 1550; Schiffman v. Atlas Mill Supply, Inc. (1961) 193 CA2d 847, 851-853, 14 CR 708

Discussion:

See 13.37

- ☐ Determine whether party seeking to avoid contract must overcome presumption of consideration for written contracts.

Authority:

CC §§ 1614, 1615

Discussion:

See 13.38

- ☐ Determine whether contract is exempt from consideration requirement because contract is one of the following:

- ☐ Written release of debtor.

Authority:

CC § 1541

Discussion:

See 13.39[1]

- ☐ Written acceptance of part performance in satisfaction of obligation.

Authority:

CC § 1524

Discussion:

See 13.39[2]

- ☐ Written modification of oral contract.

Authority:

CC § 1697

Discussion:

See 13.39[3]

- ☐ Authorization of agent.

Authority:

CC § 2308

Discussion:

See 13.39[4]

- ☐ Suretyship obligation entered into at same time with original obligation, or with acceptance of original obligation by creditor.

Authority:

CC § 2792

Discussion:

See 13.39[5]

- ☐ If consideration is required, determine whether adequate consideration exists:

- ☐ Consideration is:

☐ Benefit to promisor; or

☐ Detriment to promisee.

Authority:

CC § 1605

Discussion:

See 13.40

- ☐ Consideration must be part of bargain or agreed exchange.

Authority:

Steiner v. Thexton (2010) 48 C4th 411, 422, 106 CR3d 252, 226 P3d 359

Discussion:

See 13.41

Form:

See 13.61 (memorandum for party attacking existence of contract)

- ☐ Consideration must be sufficient:

- ☐ Existing legal or moral obligation constitutes consideration only in limited circumstances.

Authority:

CC § 1606

Discussion:

See 13.42[1]

- ☐ Promises mutual in obligation constitute consideration.

Authority:

CC § 1605

Discussion:

See 13.42[2]

Form:

See 13.61 (memorandum for party attacking existence of contract)

- ☐ Sufficiency does not depend on intrinsic value.

Authority:

Horton v. Kyburz (1959) 53 C2d 59, 65, 346 P2d 399

Discussion:

See 13.42[3]

- ☐ Consideration must be lawful.

Authority:

CC § 1607

Discussion:

See 13.42[4]

- ☐ Amount of consideration need not be specified.

Authority:

CC § 1610

Discussion:

See 13.42[5]

- ☐ Promise to perform existing duty is not adequate consideration.

Authority:

Grant v. The Aerodraulics Co. (1949) 91 CA2d 68, 75, 204 P2d 683

Discussion:

See 13.42[6]

- ☐ Relinquishment of claimed right may constitute adequate consideration.

Authority:

Walters v. Calderon (1972) 25 CA3d 863, 873-874, 102 CR 89

Discussion:

See 13.42[7]

- ☐ Requirements contracts do not lack consideration.

Authority:

Ross v. Frank W. Dunne Co. (1953) 119 CA2d 690, 698, 260 P2d 104

Discussion:

See 13.43

- ☐ Contracts containing satisfaction clauses do not lack consideration.

Authority:

Mattei v. Hopper (1958) 51 C2d 119, 122-123, 126, 330 P2d 625

Discussion:

See 13.44

- ☐ If promise lacks consideration, determine whether promise is enforceable under doctrine of promissory estoppel.

Authority:

C & K Eng'g Contractors v. Amber Steel Co. (1978) 23 C3d 1, 6, 151 CR 323, 587 P2d 1136

Discussion:

See 13.45

Form:

See 13.65 (memorandum for party defending existence of contract)

Legal Topics:

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

Contracts LawConsiderationGeneral OverviewContracts LawConsiderationAdequate Consideration



124 of 175 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 13 Attacking or Defending Existence of Contract--Absence of Essential Element
VII. DETERMINING EXISTENCE OF ADEQUATE CONSIDERATION

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13.37 Consideration Generally Is Required for Valid Contract.

With a few limited exceptions [see 13.39], a contract must have a sufficient cause or consideration [CC § 1550]. Unless the contract is in writing, the party bringing an action on contract must plead the existence of consideration in the complaint [*Henke v. Eureka Endowment Ass'n* (1893) 100 C 429, 433, 34 P 1089 ; see Evid Code § 500]. If the action is based on a written contract, there is a presumption of consideration [CC § 1614].

**Strategic Point--Plaintiff:**

Generally speaking, attaching a copy of the contract to the complaint promotes efficiency and clarity. Those who believe that prosaic complaints are more persuasive can still quote liberally from the contract.

Distinguish--Contracts Fully Executed:

The requirement of consideration applies only to executory contracts. After the contract is fully executed on both sides, the question of consideration becomes immaterial [*Schiffman v. Atlas Mill Supply, Inc.* (1961) 193 CA2d 847, 851-853, 14 CR 708] .

Jury Instructions:

Contract Formation--Essential Factual Elements, see *Judicial Council of California Civil Jury Instructions*, CACI No. 302 (LexisNexis Matthew Bender).

**Cross References:**

Discussion of lack of consideration as an affirmative defense, see 13.16[1][a].
Form, see 13.53.

Legal Topics:

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

Contracts LawConsiderationGeneral OverviewContracts LawFormationGeneral Overview



125 of 175 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 13 Attacking or Defending Existence of Contract--Absence of Essential Element
VII. DETERMINING EXISTENCE OF ADEQUATE CONSIDERATION

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13.38 Party Seeking to Avoid Written Contract Must Overcome Presumption of Consideration.

13.38[1] Presumption May Be Rebutted by Evidence Showing Lack of Consideration. A written instrument is presumptive evidence of consideration [CC § 1614]. The presumption does not apply to ordinary letters, but only to more formal legal documents [*Michaelian v. State Comp. Ins. Fund* (1996) 50 CA4th 1093, 1112, 58 CR2d 133] .

The presumption may be rebutted by evidence that shows a lack of consideration [*Glickman v. Collins* (1975) 13 C3d 852, 861, 120 CR 76, 533 P2d 204]. Extrinsic evidence is always admissible to show that there was no consideration for an agreement [*Simmons v. California Inst. of Tech.* (1949) 34 C2d 264, 272, 209 P2d 581 ; *Star Pac. Invs., Inc. v. Oro Hills Ranch, Inc.* (1981) 121 CA3d 447, 456, 176 CR 546] .

13.38[2] Presumption May Affect Burden of Producing Evidence, Not Burden of Proof. The party seeking to invalidate or avoid a written contract has the burden of showing the insufficiency or lack of consideration [CC § 1615]. However, it is not clear whether the presumption of consideration raised by CC § 1614 and the burden placed on the opposing party by CC § 1615 concern the burden of proof or the burden of producing evidence. At least one court has held that the presumption of consideration goes to the burden of producing evidence, not the burden of proof [*Rancho Santa Fe Pharmacy, Inc. v. Seyfert* (1990) 219 CA3d 875, 884, 268 CR 505] .

Under this analysis, the presumption is triggered when the party seeking to enforce the contract produces the written contract. When the party against whom the presumption operates produces some quantum of evidence casting doubt on the truth of the presumed fact, the other party is no longer aided by the presumption. The presumption disappears, leaving it to the party in whose favor it initially worked to prove the fact in question [*Rancho Santa Fe Pharmacy, Inc. v. Seyfert* (1990) 219 CA3d 875, 882, 268 CR 505] .

Jury Instructions:

Consideration for Written Agreements, see *California Forms of Jury Instructions*, Ch. 3A, Instr. MB 300A.44 (Matthew Bender).



Cross Reference:

Discussion of burden of proof and burden of producing evidence, see *California Forms of Pleading and Practice*, Ch. 551, Trial (Matthew Bender).

Legal Topics:

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

Contracts Law
Consideration
Adequate Consideration
Contracts Law
Formation
Execution
Contracts Law
Types of
Contracts
Executed Contracts
Evidence
Inferences & Presumptions
Presumptions
Evidence
Inferences &
Presumptions
Rebuttal of Presumptions



126 of 175 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 13 Attacking or Defending Existence of Contract--Absence of Essential Element
VII. DETERMINING EXISTENCE OF ADEQUATE CONSIDERATION

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13.39 Specified Contracts Are Exempted by Statute From Consideration Requirement.

13.39[1] Written Release of Debtor Does Not Require Consideration. A creditor's written release of the debtor from an obligation does not require new consideration to be effective [CC § 1541].

13.39[2] Written Acceptance of Part Performance in Satisfaction of Obligation Does Not Require Consideration. Part performance of an obligation, either before or after a breach of that obligation, is effective to extinguish the obligation, without new consideration when [CC § 1524]:

- The part performance is expressly accepted by the creditor, in writing, in satisfaction; or
- The part performance is rendered pursuant to an agreement in writing for that purpose.

13.39[3] Written Modification of Oral Contract Does Not Require Consideration. A contract not in writing may be modified in any respect by consent of the parties, in writing, without a new consideration [CC § 1697].

Distinguish--Oral Modification of Written Contract Requires Consideration:

Unless the contract otherwise expressly provides, a contract in writing may be modified by an oral agreement supported by new consideration. The statute of frauds must be satisfied if the contract as modified is within its provisions [CC § 1698(c)].

Jury Instructions:

Consideration for Modification of Contract Not in Writing, see *California Forms of Jury Instruction, Ch. 3A, Instr. MB 300A.45* (Matthew Bender).

Consideration Required for Modification of Written Contract by Oral Agreement, see *California Forms of Jury Instruction, Ch. 3A, Instr. MB 300A.46* (Matthew Bender).

Oral Modification of Written Contract Dependent on Waiver or Estoppel, see *California Forms of Jury Instruction, Ch. 3A, Instr. MB 300A.47* (Matthew Bender).

13.39[4] Authorization of Agent Does Not Require Consideration. The authorization of an agent to act on

behalf of the principal does not require consideration to be binding on the principal [CC § 2308].

13.39[5] Some Surety Obligations Do Not Require Consideration. When a suretyship obligation is entered into at the same time as the original obligation, or with the acceptance of the original obligation by the creditor, and forms with that obligation a part of the consideration to the creditor, no other consideration is required [CC § 2792]. In all other cases, there must be a consideration distinct from that of the original obligation [CC § 2792].



Cross Reference:

Discussion of creation of suretyship, see California Legal Forms, Ch. 79, Suretyship, Guaranty, and Indemnity (Matthew Bender).

Legal Topics:

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

Contracts LawConsiderationGeneral OverviewContracts LawTypes of ContractsOral AgreementsContracts LawTypes of ContractsReleases



127 of 175 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 13 Attacking or Defending Existence of Contract--Absence of Essential Element
VII. DETERMINING EXISTENCE OF ADEQUATE CONSIDERATION

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13.40 Consideration May Be Benefit to Promisor or Detriment to Promisee.

Consideration is an act or return promise, bargained for and given in exchange for a promise, which either gives a benefit to the promisor or imposes a burden on the promisee [*CC* § 1605; *Steiner v. Thexton* (2010) 48 *CA4th* 411, 420-421, 106 *CR3d* 252, 226 *P3d* 359 (buyer's effort to obtain parcel split conferred benefit on seller and constituted prejudice suffered by buyer)].

Example--Detriment to Promisee:

A closely held corporation brought a declaratory relief action to have certain of its commitments under a reorganization agreement declared unenforceable for a lack of consideration. The corporation's original owner transferred ownership and control of the corporation to a new owner, to whom the corporation owed a large debt. Although the corporation agreed to make royalty payments to the original owner, the corporation argued in the declaratory relief action that the promise to make those payments was not supported by consideration. The consideration for the promise to pay royalties to the original owner was the detriment to the promisee, that is, the transfer of stock by the original owner to the new owner [*Flojo Int'l, Inc. v. Lassleben* (1992) 4 *CA4th* 713, 719, 6 *CR2d* 99] .

Jury Instructions:

Consideration--Thing of Value, see *California Forms of Jury Instruction, Ch. 3A, Instr. MB 300A.40* (Matthew Bender).

Past Performance Insufficient, see *California Forms of Jury Instruction, Ch. 3A, Instr. MB 300A.43* (Matthew Bender).

Legal Topics:

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

Contracts LawConsiderationGeneral OverviewContracts LawConsiderationAdequate ConsiderationContracts LawConsiderationDetrimental RelianceContracts LawConsiderationSufficient Consideration



128 of 175 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 13 Attacking or Defending Existence of Contract--Absence of Essential Element
VII. DETERMINING EXISTENCE OF ADEQUATE CONSIDERATION

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13.41 Consideration Must Be Part of Bargain or Agreed Exchange.

The consideration for a promise must be bargained for and given in exchange for the promise for the purported contract to be valid [*Steiner v. Thexton* (2010) 48 C4th 411, 422, 106 CR3d 252, 226 P3d 359 (buyer's promise to obtain parcel split was bargained for and induced seller to grant the option)].

Example--Promise Not Bargained for Not Enforceable:

An attorney who arranged a loan could not enforce a subsequent promise by the grateful borrower to transfer stock to the attorney because the promise of transfer was not bargained for prior to the arranging of the loan. The promise was merely an unenforceable promise to make a gift [*Passante v. McWilliam* (1997) 53 CA4th 1240, 1247-1249, 62 CR2d 298] .

Jury Instructions:

Agreed-Upon Exchange, see *California Forms of Jury Instruction, Ch. 3A, Instr. MB 300A.41* (Matthew Bender).



Cross Reference:

Memorandum for party attacking existence of contract, see 13.61.

Legal Topics:

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



129 of 175 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 13 Attacking or Defending Existence of Contract--Absence of Essential Element
VII. DETERMINING EXISTENCE OF ADEQUATE CONSIDERATION

1-13 MB Practice Guide: CA Contract Litigation 13.42

13.42 Consideration Must Be Sufficient.

13.42[1] Existing Legal or Moral Obligation of Promisor May Constitute Consideration Only in Limited Circumstances.

13.42[1][a] Existing Obligation May Constitute Consideration Only to Extent of Obligation. An existing legal obligation of the promisor, or a moral obligation originating in a benefit conferred on the promisor or a detriment to the promisee, is a good consideration for a promise [CC § 1606]. However, each of these obligations constitutes good consideration only to the extent of the obligation [CC § 1606].

Past consideration will not support a promise that is in excess of the promisor's existing debt or duty [*Leonard v. Gallagher* (1965) 235 CA2d 362, 373, 45 CR 211] .

Example--Past Obligation As Consideration:

The promisor's own past debt, on which the statute of limitations had run, was sufficient consideration for the promisor's promise to assign commissions to the creditor to pay that debt, but the promisor's past debt was not consideration for the promisor's promise to pay his mother's debt to the same creditor [*Leonard v. Gallagher* (1965) 235 CA2d 362, 372-374, 45 CR 211] .

13.42[1][b] Moral Consideration Is Sufficient Only If Enforceable Obligation Once Existed. A moral consideration will support an express promise only if an enforceable obligation once existed [*Estate of McConnell* (1936) 6 C2d 493, 498, 58 P2d 639] .

Example--Moral Consideration Insufficient:

A decedent had given a promissory note to his former partner in lieu of making a devise in his will. No consideration had been given for the note. The promise to pay the amount of the note was not supported by an existing moral obligation, enforceable against the decedent's estate, because the note itself was never an enforceable obligation [*Estate of McConnell* (1936) 6 C2d 493, 498, 58 P2d 639] .

Example--Moral Consideration Sufficient:

An ex-husband's moral obligation to provide support for his ex-wife was sufficient consideration for his promise to continue making monthly payments, when that moral obligation arose out of his failure to pay

a lump sum, required by the parties' property settlement agreement, which was intended as a substitute for previous monthly support [*Wilson v. Wilson* (1960) 54 C2d 264, 272, 5 CR 317, 352 P2d 725] .

13.42[2] Promises Mutual in Obligation Constitute Consideration. A promise is good consideration for a return promise [CC § 1605; *Porporato v. Devincenzi* (1968) 261 CA2d 670, 675, 68 CR 210] . To create an enforceable contract, the promises must be mutual in obligation [*Mattei v. Hopper* (1958) 51 C2d 119, 122, 330 P2d 625] .

Example:

Plaintiff signed a document agreeing to dismiss its claim against defendants in exchange for the payment of money. Defendants neither signed the document nor made any promise in exchange for plaintiff's promise. No contract was formed because there was no mutuality of obligation. Plaintiff's promise constituted a unilateral offer that was revocable until accepted by defendants by the tender of payment [*Sully-Miller Contracting Co. v. Gledson/Cashman Constr., Inc.* (2002) 103 CA4th 30, 36, 126 CR2d 400] .

Exception:

An agreement that is otherwise illusory may be enforced when the promisor has rendered at least part performance [*Steiner v. Thexton* (2010) 48 C4th 411, 423, 106 CR3d 252, 226 P3d 359 (buyer's part performance of bargained-for promise to seek a parcel split cured the initially illusory nature of the promise)].



Cross Reference:

Memorandum for party attacking existence of contract, see 13.61.

13.42[3] Sufficiency of Consideration Does Not Depend on Intrinsic Value. "Good consideration" means a valuable consideration [*Horton v. Kyburz* (1959) 53 C2d 59, 65, 346 P2d 399] . However, the sufficiency of the consideration does not depend on its market value [see *Horton v. Kyburz* (1959) 53 C2d 59, 66, 346 P2d 399 ; *Huong Que, Inc. v. Luu* (2007) 150 CA4th 400, 415 (quantum of consideration is generally irrelevant as long as it has some value)].

The court determines the sufficiency of the consideration as of the time the parties entered in to the contract [*Crail v. Blakely* (1973) 8 C3d 744, 753, 106 CR 187, 505 P2d 1027] . If there was sufficient consideration at the time the parties made the agreement, the fact that it subsequently diminished in value or became of no value does not relieve the promisor from liability on the promise [*Riverside Water Co. v. Jurupa Ditch Co.* (1960) 187 CA2d 538, 542, 9 CR 742] .

Jury Instructions:

Consideration--Thing of Value, see *California Forms of Jury Instruction, Ch. 3A, Instr. MB 300A.40* (Matthew Bender).

13.42[4] Consideration Must Not Violate Law or Public Policy. The consideration for a contract must be lawful [CC § 1607], which means that it must comport with express provisions of law, policies of expressed law, and public policy [see CC §§ 1607, 1667].

Example--Contract Unenforceable When Consideration Was Legal Impossibility.

A contract between two United States citizens was held to be for the purchase and sale, rather than the lease, of land located in Mexico, and therefore was unenforceable for lack of consideration because Mexican law expressly prohibited anyone other than citizens of Mexico from owning the land in question. Plaintiff therefore was legally incapable of conveying the property to defendant [*Losson v. Blodgett* (1934) 1 CA2d 13, 18, 36 P2d 147] .

 Cross Reference:

Detailed discussion of contracts violating law, public policy, or prohibition on unconscionability, see Ch. 18, Asserting or Defending Claim That Contract Is Illegal, Contrary to Public Policy, or Unconscionable.

13.42[5] Amount of Consideration Need Not Be Specified.

13.42[5][a] Amount May Be Determined by Third Party or According to Specified Standard. A consideration may be executed or executory [CC § 1609]. When a consideration is executory, the contract need not specify its amount or the means of determining it [CC § 1610]. The amount may be left to the decision of a third person, or regulated by any specified standard [CC § 1610].

13.42[5][b] Amount Otherwise Must Be What Object of Contract Is Reasonably Worth. The consideration for a contract must be the amount of money that the object of the contract is reasonably worth if [CC § 1611]:

- The contract does not determine the amount of the consideration or the method by which it is to be determined; or
- The contract leaves the amount of the consideration to the discretion of an interested party.

13.42[5][c] Contract Is Void If Method for Ascertaining Consideration Is Impossible. When a contract provides an exclusive method for determining its consideration, and that method is on its face impossible of execution, the entire contract is void [CC § 1612].

If the exclusive method for determining consideration appears possible on its face, but in fact is, or becomes, impossible of execution, only the provision containing the method for determining consideration is void [CC § 1613].

13.42[6] Promise to Perform Existing Duty Is Not Adequate Consideration. A promise to perform what the promisor is already legally bound to do does not constitute adequate consideration for the counter promise, because there is no exchange of value [*Grant v. The Aerodraulics Co. (1949) 91 CA2d 68, 75, 204 P2d 683*] .

Examples:

- Borrowers' promise to make monthly loan payments, plus interest and late fees, was not adequate consideration for lender's promise to postpone a foreclosure sale, because borrowers promised to do nothing more than what they were already legally obligated to do [*Garcia v. World Savings, FSB (2010) 183 CA4th 1031, 1040, 107 CR3d 683*] .

- A corporation operating a low-level radioactive waste disposal facility for the State Department of Health Services brought an action for breach of contract based on a memorandum of understanding between the parties. The memorandum could not be the basis for a breach of contract claim because it lacked consideration. The corporation promised in the memorandum that it would maintain the promised schedule set forth in its licensee-designee application and, if it did not, it would be subject to forfeiture of its performance bond. However, the promise did not constitute consideration because the corporation was already bound to perform those obligations on the same schedule, or lose its bond, under governing regulations [*US Ecology, Inc. v. State of California (2001) 92 CA4th 113, 128-129, 111 CR2d 689*] .

- Defendant bought an automobile from plaintiff. The agreement provided that if defendant defaulted on the installment payments, plaintiff was entitled to repossess the automobile. When defendant defaulted on the payments, plaintiff repossessed the automobile and resold it for a sum less than defendant owed. Plaintiff then sued defendant to recover the deficiency. Defendant claimed that

plaintiff's agent waived defendant's obligation to pay the entire purchase price when he repossessed the car. There was no consideration for the waiver of the obligation because the defendant merely relinquished possession, which he was legally bound to do under the express terms of the contract [*General Motors Acceptance Corp. v. Brown* (1934) 2 CA2d 646, 650, 38 P2d 482] .

Jury Instructions:

Existing Obligation and Compromise of Existing Claim, see *California Forms of Jury Instruction, Ch. 3A, Instr. MB 300A.42* (Matthew Bender).

13.42[7] Relinquishment of Claimed Right May Constitute Adequate Consideration. Waiver or relinquishment of a purported right constitutes adequate consideration if the purported right was one the promisee could have urged in good faith and which presented some bona fide question of validity [*Walters v. Calderon* (1972) 25 CA3d 863, 873-874, 102 CR 89] .

Waiver or relinquishment of a claimed right that may constitute consideration include the following [*Booth v. Bond* (1942) 56 CA2d 153, 157, 132 P2d 520] :

- Cancellation of an existing debt.
- Release of security.
- Forbearance to sue.

If the right waived and relinquished was obviously worthless and ineffective, a promise to relinquish it would not constitute valid consideration [*Walters v. Calderon* (1972) 25 CA3d 863, 873-874, 102 CR 89] .

Jury Instructions:

Existing Obligation and Compromise of Existing Claim, see *California Forms of Jury Instruction, Ch. 3A, Instr. MB 300A.42* (Matthew Bender).

Legal Topics:

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



130 of 175 DOCUMENTS

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Chapter 13 Attacking or Defending Existence of Contract--Absence of Essential Element

VII. DETERMINING EXISTENCE OF ADEQUATE CONSIDERATION

1-13 MB Practice Guide: CA Contract Litigation 13.43

13.43 Requirements Contracts Do Not Lack Consideration.

If a buyer agrees to buy what he or she needs or requires of a certain product, and the seller absolutely promises to sell, the resulting contract is not void for lack of consideration [*Ross v. Frank W. Dunne Co. (1953) 119 CA2d 690, 698, 260 P2d 104*] . The resulting contract imposes on the buyer the duty of buying what the buyer requires from the seller and on the seller the obligation to sell to the buyer at the contract price [*Ross v. Frank W. Dunne Co. (1953) 119 CA2d 690, 698, 260 P2d 104*] .

Legal Topics:

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

Contracts LawConsiderationGeneral OverviewContracts LawTypes of ContractsOutput & Requirements Contracts



131 of 175 DOCUMENTS

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Chapter 13 Attacking or Defending Existence of Contract--Absence of Essential Element
VII. DETERMINING EXISTENCE OF ADEQUATE CONSIDERATION

1-13 MB Practice Guide: CA Contract Litigation 13.44

13.44 Contracts Containing Satisfaction Clauses Do Not Lack Consideration.

Two types of contracts that make the duty of performance of one of the parties conditional on that party's satisfaction are enforceable [*see Mattei v. Hopper (1958) 51 C2d 119, 122-123, 126, 330 P2d 625*] :

- Contracts in which the condition calls for satisfaction as to commercial value or quality, operative fitness, or mechanical utility, because dissatisfaction cannot be claimed arbitrarily, unreasonably, or capriciously.
- Contracts containing satisfaction clauses involving fancy, taste, or judgment, because, even though the satisfaction is dependent on a subjective standard, the party's determination of dissatisfaction must be made in good faith.

Example:

An agreement to sell real property for a fixed price payable in full on a specified date contained a provision making the purchaser's obligation to pay dependent on him obtaining satisfactory leases for the premises. The agreement did not lack mutuality of obligation because the purchaser had a duty to exercise his judgment in good faith [*Mattei v. Hopper (1958) 51 C2d 119, 122-124, 126, 330 P2d 625*] .

Legal Topics:

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

Contracts LawConsiderationGeneral OverviewContracts LawContract Conditions & ProvisionsGeneral Overview



132 of 175 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 13 Attacking or Defending Existence of Contract--Absence of Essential Element
VII. DETERMINING EXISTENCE OF ADEQUATE CONSIDERATION

1-13 MB Practice Guide: CA Contract Litigation 13.45

13.45 Promissory Estoppel May Substitute for Consideration.

13.45[1] Promise Without Consideration May Be Binding to Avoid Injustice. A promise may be binding and enforceable, without consideration, under the doctrine of promissory estoppel if [*C & K Eng'g Contractors v. Amber Steel Co. (1978) 23 C3d 1, 6, 151 CR 323, 587 P2d 1136*] :

- The promise was one that the promisor should have reasonably expected to induce action or forbearance of a definite and substantial character on the part of the promisee.
- The promise induced that action or forbearance.
- Injustice can be avoided only by enforcement of the promise.

Examples:

■ Plaintiff general contractor used a bid submitted by defendant subcontractor to submit its own bid for a project. Plaintiff was awarded the contract for the project. The next day, defendant told plaintiff that a mistake had been made in computing defendant's bid, and defendant refused to do the work for the bid amount. Defendant claimed that there was no enforceable contract between the parties because it revoked its offer before plaintiff communicated its acceptance to defendant. Because defendant had reason to expect that plaintiff would rely on defendant's bid to submit its own bid, and plaintiff had no reason to know that defendant had made a mistake in its bid, the defendant's promise to perform the work at the bid price was enforceable under the doctrine of promissory estoppel [*Drennan v. Star Paving Co. (1958) 51 C2d 409, 413-416, 333 P2d 757*] .

■ An insured injured in a single car accident sued his insurer, alleging that the insurer disposed of a defective tire after being informed of the importance of the tire to a case against the manufacturer. The trial court erred in granting nonsuit for the defendant insurer, because the insured's allegations that the insurer promised to preserve the tire, and the insured's reliance on that promise, set forth prima facie evidence of promissory estoppel [*Cooper v. State Farm Mutual Automobile Ins. Co. (2009) 177 CA4th 876, 896, 99 CR3d 870*] .

In order to recover on the basis of promissory estoppel, the promisee must prove that its reliance on the promise was reasonable [*Diede Construction, Inc. v. Monterey Mechanical Co. (2004)* 125 CA4th 380, 391-392 (remanding for determination whether general contractor's reliance on subcontractor's mistake bid was reasonable)].

Exception:

Promissory estoppel will not be applied against the government if to do so would effectively nullify a strong rule of policy, adopted for the benefit of the public. Courts will apply the rules of estoppel against a public agency only in those special cases in which the interests of justice clearly require it [*Poway Royal Mobilehome Owners Assn. v. City of Poway (2007)* 149 CA4th 1460, 1471, 58 CR3d 153].

Jury Instructions:

Promissory Estoppel, see *California Forms of Jury Instruction, Ch. 3A, Instr. MB 300A.60* (Matthew Bender).



Cross References:

Memorandum for party defending existence of contract, see 13.65.

Detailed discussion of promissory estoppel, see *California Forms of Pleading and Practice, Ch. 140, Contracts* (Matthew Bender).

13.45[2] Promise Must Be Clear and Unambiguous. To be enforceable, the promise must be clear and unambiguous [*Lange v. TIG Ins. Co. (1998)* 68 CA4th 1179, 1185, 81 CR2d 39] .

Examples:

- An insurer sent a letter to independent insurance brokers stating that the brokerage agreement would be terminated July 6, 1996. Before that date, the insurer exercised its right, under the agreement, to terminate the agreement immediately for cause. The letter did not constitute an enforceable promise not to terminate the brokerage agreement prior to July 6, 1996. The letter did not contain a promise of any sort, let alone a promise of sufficient definitiveness and clarity to justify applying promissory estoppel [*Lange v. TIG Ins. Co. (1998)* 68 CA4th 1179, 1185-1187, 81 CR2d 39] .

- A mortgage broker representing borrowers asked their lender for an extension of time to make delinquent loan payments until the first week in September, when a new pending loan was scheduled to close. The lender's representative responded by assuring the mortgage broker that he would extend the date of any foreclosure sale so long as the borrowers' new loan closed in the first week of September. The lender's representative's promise was sufficiently definite to support promissory estoppel [*Garcia v. World Savings, FSB (2010)* 183 CA4th 1031, 1045, 107 CR3d 683] .

13.45[3] If Reliance Was Part of Bargain, Doctrine Does Not Apply. If the promisee's reliance was bargained for, the law of consideration governs, and the doctrine of promissory estoppel does not apply [*Youngman v. Nevada Irrigation Dist. (1969)* 70 C2d 240, 249, 74 CR 398, 449 P2d 462] .

Example:

Plaintiff employee alleged that his employer made an express oral promise that he would be granted a merit step increase in wages every year. Plaintiff also alleged that he relied on that promise by accepting employment with the employer, continuing in its employ, and refraining from accepting another job. Based on these allegations, the promise of a merit increase was part of the bargain under which the plaintiff entered employment and remained in his position. The promise was bargained for, and the

plaintiff rendered the consideration called for by the employment contract by accepting employment, remaining in his position, and performing his job satisfactorily. The doctrine of promissory estoppel therefore did not apply [*Youngman v. Nevada Irrigation Dist.* (1969) 70 C2d 240, 249-250, 74 CR 398, 449 P2d 462] .

13.45[4] Plaintiff Must Prove That Defendant Caused Plaintiff's Damages. A plaintiff seeking recovery on a promissory estoppel theory must prove, as in an ordinary contract action, that the defendant's breach was a substantial factor in causing the plaintiff's damages [*US Ecology, Inc. v. State of California* (2005) 129 CA4th 887, 891]. In addition, because promissory estoppel is an equitable remedy, courts have the discretion to deny relief when the plaintiff cannot demonstrate that the defendant's actions caused the plaintiff's damages [*US Ecology, Inc. v. State of California* (2005) 129 CA4th 887, 891].



Cross Reference:

Discussion of causation, see 7.10.

Legal Topics:

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

Contracts LawConsiderationGeneral OverviewContracts LawConsiderationPromissory Estoppel



133 of 175 DOCUMENTS

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Chapter 13 Attacking or Defending Existence of Contract--Absence of Essential Element
VIII. DETERMINING EFFECT OF ABSENCE OF A CONTRACT TERM

1-13 MB Practice Guide: CA Contract Litigation 13.46

13.46 CHECKLIST: Determining Effect of Absence of a Contract Term.

☐ Determine whether absence of a contract term renders contract unenforceable because:

☐ Intention of the parties as to essential items cannot be ascertained.

Authority:

California Lettuce Growers, Inc. v. Union Sugar Co. (1955) 45 C2d 474, 481, 289 P2d 785

Discussion:

See 13.47

☐ Uncertainty or incompleteness would prevent court from knowing what to enforce.

Authority:

Hennefer v. Butcher (1986) 182 CA3d 492, 500, 227 CR 318

Discussion:

See 13.47[2]

☐ Inferences from contract and/or extrinsic evidence cannot supply missing terms.

Authority:

Hennefer v. Butcher (1986) 182 CA3d 492, 500, 227 CR 318

Discussion:

See 13.47[3]

Form:

See 13.66 (memorandum for party defending existence of contract)

- ☐ Uncertainty cannot be resolved by rules of contract interpretation.

Authority:

CC § 1635 et seq.

Discussion:

See 13.47[4]

- ☐ Determine effect, if any, of absence of:

- ☐ Price.

Authority:

California Lettuce Growers, Inc. v. Union Sugar Co. (1955) 45 C2d 474, 482, 289 P2d 785

Discussion:

See 13.48

Form:

See 13.66 (memorandum for party defending existence of contract)

- ☐ Time for performance.

Authority:

CC § 1657

Discussion:

See 13.49[1]

Form:

See 13.66 (memorandum for party defending existence of contract)

- ☐ Time for payment.

Authority:

CC § 1657

Discussion:

See 13.49[2]

- ☐ Duration of contract.

Authority:

Haggerty v. Warner (1953) 115 CA2d 468, 473, 252 P2d 373

Discussion:

See 13.49[3]

Form:

See 13.66 (memorandum for party defending existence of contract)

☐ Quantity.

Authority:

California Ref. Co. v. Producers Ref. Corp. (1938) 25 CA2d 104, 108, 76 P2d 553 ;
Ross v. Frank W. Dunne Co. (1953) 119 CA2d 690, 698, 260 P2d 104

Discussion:

See 13.50

Form:

See 13.66 (memorandum for party defending existence of contract)

☐ If essential term of contract is absent, determine whether conduct of parties renders contract enforceable despite uncertainty.

Authority:

Bohman v. Berg (1960) 54 C2d 787, 794-795, 8 CR 441, 356 P2d 185

Discussion:

See 13.51

Form:

See 13.66 (memorandum for party defending existence of contract)

☐ If contract is governed by statute, determine whether absence of term is violation of statute and, if so, effect of that violation.

Discussion:

See 13.52

Legal Topics:

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

Contracts LawConsiderationGeneral OverviewContracts LawFormationGeneral OverviewContracts LawFormationDefinite Terms



134 of 175 DOCUMENTS

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Chapter 13 Attacking or Defending Existence of Contract--Absence of Essential Element
VIII. DETERMINING EFFECT OF ABSENCE OF A CONTRACT TERM

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13.47 Contract Need Not Set Forth Every Term and Condition to Be Enforceable.

13.47[1] Contract Must Evidence Agreement on Essential Items. A contract is void and unenforceable if it is so uncertain and indefinite that the intention of the parties in material particulars cannot be ascertained [*California Lettuce Growers, Inc. v. Union Sugar Co. (1955) 45 C2d 474, 481, 289 P2d 785*]. However, neither law nor equity requires that every term and condition of an agreement be set forth in the contract [*Patel v. Liebermensch (2008) 45 C4th 344, 349, 86 CR3d 366, 197 P3d 177* ; *King v. Stanley (1948) 32 C2d 584, 588, 197 P2d 321*].

A court may not consider the parties' conduct subsequent to the formation of a contract, including the dispute that arises and the remedy sought, in determining whether there was a meeting of the minds on essential terms [*Patel v. Liebermensch (2008) 45 C4th 344, 351-352, 86 CR3d 366, 197 P3d 177* (few contracts would be enforceable if the existence of subsequent disputes were taken as evidence that an agreement was never reached).]

Although the terms of a contract need not be stated in the minutest detail, the scope of the duty and limits of acceptable performance must be at least sufficiently defined to provide a rational basis for the assessment of damages in the case of breach [*Robinson & Wilson, Inc. v. Stone (1973) 35 CA3d 396, 407, 110 CR 675*].

Distinguish--Sales of Goods:

The Commercial Code provides that a meeting of the minds on all the essential terms is not required; a contract can be formed even though the parties do not agree on such terms as price, terms of payment, time and place of performance, or quantity [*Com Code § 2204(3)*].



Cross References:

Memorandum for party defending existence of contract, see 13.66.

Asserting a particular construction of a contract term, see Ch. 21, Asserting a Particular Construction of Contract.

Liberal contract formation standards under Commercial Code applicable to contracts for sale of goods, see Ch. 27, *Contract for Sale of Goods--Attacking or Defending Existence of Contract Under California Commercial Code*, 27.09[1][c].

13.47[2] Law Disfavors Holding Contracts Unenforceable. The law favors carrying out the parties' intention through the enforcement of contracts and disfavors holding them unenforceable because of uncertainty [*Patel v. Liebermensch* (2008) 45 C4th 344, 349, 86 CR3d 366, 197 P3d 177 ; *Burrow v. Timmsen* (1963) 223 CA2d 283, 288, 35 CR 668]. The defense of uncertainty precludes enforcement only when the uncertainty or incompleteness of the contract prevents the court from knowing what to enforce [*Hennefer v. Butcher* (1986) 182 CA3d 492, 500, 227 CR 318] .

13.47[3] Inferences From Contract and Extrinsic Evidence May Supply Missing Terms. The usual and reasonable terms found in similar contracts can be looked to, unexpressed provisions of the contract may be inferred from the writing, external facts may be relied upon, and custom and usage may be resorted to in an effort to supply a deficiency if it does not alter or vary the terms of the agreement [*Hennefer v. Butcher* (1986) 182 CA3d 492, 500-501, 227 CR 318] .

Example:

Buyers signed contracts to purchase homes to be built by a developer. When the buyers sought specific performance of the agreements, the developer claimed that the contracts were unenforceable because no legal description for the properties existed at the time the agreements were executed, there was no "metes and bounds" description, and the square footage and precise location of the lot lines could not be determined. However, properly admitted extrinsic evidence, including standard features sheets, site plans, floor plans, elevation plans, and tract map, rendered the description of the lots conveyed by the purchase agreements sufficiently definite for enforcement [*Blackburn v. Charnley* (2004) 117 CA4th 758, 766-767].



Cross References:

Memorandum for party defending existence of contract, see 13.66.

Asserting a particular construction of a contract term, see Ch. 21, Asserting a Particular Construction of Contract.

13.47[4] Uncertainty May Be Resolved by Rules of Contract Interpretation. The rules of contract interpretation [CC § 1635 *et seq.*] also may be applied to resolve an alleged uncertainty in a contract [see *Roy v. Salisbury* (1942) 21 C2d 176, 184, 130 P2d 706] .



Cross Reference:

Discussion of the rules of contract interpretation, see Ch. 21, Asserting a Particular Construction of Contract.

Legal Topics:

For related research and practice materials, see the following legal topics:
 Contracts LawFormationDefinite TermsContracts LawFormationMeeting of Minds



135 of 175 DOCUMENTS

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Chapter 13 Attacking or Defending Existence of Contract--Absence of Essential Element
VIII. DETERMINING EFFECT OF ABSENCE OF A CONTRACT TERM

1-13 MB Practice Guide: CA Contract Litigation 13.48

13.48 Failure to Specify Price Does Not Necessarily Void Contract.

A contract need not specify price if it can be objectively determined [*California Lettuce Growers, Inc. v. Union Sugar Co. (1955) 45 C2d 474, 482, 289 P2d 785*]. However, in the absence of internal or external indicia of what the parties would have agreed upon, a court cannot supply the omitted provision [*Roberts v. Adams (1958) 164 CA2d 312, 315, 330 P2d 900*] .

Example:

Plaintiff buyer signed a contract to purchase land to be developed as a residential subdivision. Under the terms of the agreement, the purchase price was to be calculated after certain improvement costs were determined. The price calculation and method to be used to obtain improvement costs were specified in the agreement. Because the agreement contained an objective method to determine improvement costs, which would be used to calculate the price according to a formula specified in the agreement, the agreement was enforceable [*Larwin-Southern Cal., Inc. v. JGB Inv. Co. (1979) 101 CA3d 626, 641-644, 162 CR 52*] .



Cross Reference:

Memorandum for party defending existence of contract, see 13.66.

Legal Topics:

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

Contracts LawFormationDefinite TermsContracts LawFormationMeeting of Minds



136 of 175 DOCUMENTS

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Chapter 13 Attacking or Defending Existence of Contract--Absence of Essential Element
VIII. DETERMINING EFFECT OF ABSENCE OF A CONTRACT TERM

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13.49 Time for Performance or Duration of Contract May Be Implied.

13.49[1] Time for Performance May Be Deemed to Be Within Reasonable Time. If no time is specified for the performance of an act required to be performed under a contract, a reasonable time is allowed [CC § 1657; *Patel v. Liebermensch* (2008) 45 C4th 344, 351, 86 CR3d 366, 197 P3d 177]. The question of what constitutes a reasonable time is a question of fact [*Stark v. Shaw* (1957) 155 CA2d 171, 177, 317 P2d 182]. In determining what period of time would be reasonable, the situation of the parties, the nature of the transaction, and the facts of the particular case should be considered [*Stark v. Shaw* (1957) 155 CA2d 171, 177, 317 P2d 182].

Examples:

- The parties entered into an option contract for the purchase of a condominium. The contract did not specify the length of the escrow period. After the buyer exercised the option, the parties disagreed on the length of escrow. The buyer brought an action for specific performance of the option contract. The trial court ruled for the buyer and implied an escrow period of 60 days. The Court of Appeal reversed, holding that the contract was too uncertain to enforce because it did not specify the time or manner of payment. The California Supreme Court disagreed, concluding that there was no substantial dispute over the manner of payment; the only term missing from the contract was the length of escrow. The court held that the escrow period is not a necessary term in a contract of sale, and that a reasonable time may be supplied by implication [*Patel v. Liebermensch* (2008) 45 C4th 344, 351, 86 CR3d 366, 197 P3d 177].

- A member of a health maintenance organization brought a breach of contract claim against the HMO, alleging that the HMO had breached its subscriber agreement by unreasonably delaying authorization for the member's referral to a specialist. Given the history of the member's Lyme disease, his condition, and the palliative failure of the care already provided by the HMO, a six-week wait for an appointment with an infectious disease specialist could well be found unreasonable [*Kotler v. PacifiCare of California* (2005) 126 CA4th 950, 956].

- A construction company contracted with a roofer to provide roofing on 936 houses the company

planned to build. The company made numerous representations about the project at the time the contract was signed, including representations that construction would begin approximately three weeks after the contract was signed, at a rate of approximately 10 houses per day, and that each house would be ready for roofing about three weeks after it was started. Under the circumstances, the trier of fact could properly conclude that a reasonable time for starting construction expired on a date more than two months after the contract was signed [*Stark v. Shaw* (1957) 155 CA2d 171, 177, 317 P2d 182] .

Cross Reference:

Memorandum for party defending existence of contract, see 13.66.

13.49[2] Payment Is Deemed to Be Due Immediately. If an act to be performed is in its nature capable of being done instantly, as, for example, if it consists in the payment of money only, it must be performed immediately when the thing to be done is exactly ascertained [CC § 1657].

13.49[3] Duration of Contract May Be Implied. A contract is not fatally uncertain or indefinite merely because it omits a time for its duration. The effect of the omission of the time of the contract's duration is generally determined by a construction of the contract, and may be implied from the nature of the contract or from the circumstances surrounding it [*Haggerty v. Warner* (1953) 115 CA2d 468, 473, 252 P2d 373] .

Example:

Defendants manufactured a mechanism, called "units," for talking dolls and other toys. Defendants hired plaintiff to promote the units for them. Their agreement stated that defendants would pay plaintiff five percent of all their billings on sales of the units. The contract was not void because it made no provision for its termination. The contract was subject to the construction, among others, that it was to continue as long as billings for the units were made by defendants [*Haggerty v. Warner* (1953) 115 CA2d 468, 471-473, 252 P2d 373] .

Cross References:

Memorandum for party defending existence of contract, see 13.66.

Asserting a particular construction of a contract term, see Ch. 21, Asserting a Particular Construction of Contract.

Legal Topics:

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

Contracts Law Formation Definite Terms



137 of 175 DOCUMENTS

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Chapter 13 Attacking or Defending Existence of Contract--Absence of Essential Element
VIII. DETERMINING EFFECT OF ABSENCE OF A CONTRACT TERM

1-13 MB Practice Guide: CA Contract Litigation 13.50

13.50 Failure to Specify Quantity Does Not Render Requirements Contract Unenforceable.

A contract that reserves in either party an option to deliver or to accept personal property, or which contracts for future delivery of personal property, with the quantity of the delivery being dependent on the will, wish, want, or desire of the other party, is void for lack of consideration and mutuality [*California Ref. Co. v. Producers Ref. Corp. (1938) 25 CA2d 104, 108, 76 P2d 553*] .

However, if a buyer agrees to buy what he or she needs or requires of a particular product, and the seller absolutely promises to sell, the resulting contract is enforceable [*Ross v. Frank W. Dunne Co. (1953) 119 CA2d 690, 698, 260 P2d 104*] .

Cross References:

Discussion of consideration and requirements contracts, see *13.43*.

Memorandum for party defending existence of contract, see *13.66*.

Commercial Code contracts for sale of goods, see *Ch. 27, Contract for Sale of Goods--Attacking or Defending Existence of Contract Under California Commercial Code, 27.09*; and *Ch. 28, Contract for Sale of Goods--Suing or Defending Action for Breach of Contract Under California Commercial Code, 28.05, 28.28*.

Legal Topics:

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

Contracts Law Formation Definite Terms Contracts Law Types of Contracts Output & Requirements Contracts



138 of 175 DOCUMENTS

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Chapter 13 Attacking or Defending Existence of Contract--Absence of Essential Element
VIII. DETERMINING EFFECT OF ABSENCE OF A CONTRACT TERM

1-13 MB Practice Guide: CA Contract Litigation 13.51

13.51 Conduct of Parties May Render Contract Enforceable Despite Uncertainty.

Although an agreement may be indefinite or uncertain in its inception, subsequent performance by the parties under the agreement cures the defect and renders the contract enforceable [*Bohman v. Berg* (1960) 54 C2d 787, 794-795, 8 CR 441, 356 P2d 185] . When one party performs under the contract, and the other party accepts that performance without objection, it is assumed that the performance was that contemplated by the agreement [*Bohman v. Berg* (1960) 54 C2d 787, 795, 8 CR 441, 356 P2d 185] .

Example:

Plaintiff, a custom auto body builder and metal fabricator, entered into an agreement to convert defendant's bus into a luxurious "land yacht." The contract price was \$25,000. Plaintiff completed the work, but it was more complex and difficult than anticipated. Although defendant paid the contract price, plaintiff brought an action seeking the reasonable value of services, labor and materials furnished. The reasonable value was an amount in excess of the agreed-upon price. Defendant contended that he was obligated to pay no more than the contract price for the work specified in that agreement. Plaintiff claimed that the contract was too uncertain to be enforceable because it did not include all the details of the work to be done. However, the conduct of the plaintiff in performing the work specified in the agreement indicated that the contract was not too indefinite to be performed. Plaintiff accepted the risk that the nature of the project might result in unexpected cost to him. Plaintiff was not entitled to receive more than the contract price because the risk materialized. Plaintiff was bound by the terms of the contract, including the agreed-upon price [*Bohman v. Berg* (1960) 54 C2d 787, 795, 8 CR 441, 356 P2d 185] .



Cross Reference:

Memorandum for party defending existence of contract, see 13.66.

Legal Topics:

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

Contracts Law Formation Definite Terms Contracts Law Formation Meeting of Minds Contracts Law Performance Partial Performance General Overview Contracts Law Performance Partial Performance Oral Agreements



139 of 175 DOCUMENTS

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Chapter 13 Attacking or Defending Existence of Contract--Absence of Essential Element
VIII. DETERMINING EFFECT OF ABSENCE OF A CONTRACT TERM

1-13 MB Practice Guide: CA Contract Litigation 13.52

13.52 Specific Contract Terms May Be Required by Statute.

13.52[1] Many Types of Contracts Are Governed by Statute. Various types of contracts, particularly consumer contracts, are governed by statute.

Examples:

- Home improvement contracts [*B&P Code § 7150 et seq.*].
- Dance studio contracts [*CC § 1812.50 et seq.*].
- Home solicitation contracts [*CC § 1689.5 et seq.*].
- Dating service contracts [*CC § 1694 et seq.*].
- Employment agency and employment counseling services contracts [*CC § 1812.500 et seq.*].

➡ Cross Reference:

Detailed discussion of issues relating to statutory requirements for contracts, see Ch. 15, Attacking or Defending Existence of Contract--Failure to Comply With Applicable Formalities.

13.52[2] Particular Contract Terms May Be Specified. When a contract is governed by a statutory scheme, specific contract terms may be required by statute, such as:

- Specific language notifying the purchaser of a right to cancel.

Examples:

- Home solicitation contracts [*CC § 1689.7*].

- Dating service contracts [CC § 1694.2].
- Seminar sales solicitation contracts [CC § 1689.21].
- Weight loss program or center contracts [CC § 1694.7].
- Mandatory contents of the contract.

Examples:

- Retail installment sales contracts [CC § 1803.3].
- Home equity sales contracts [CC § 1695.3].
- Credit services contracts [CC § 1789.16].
- Discount buying services contracts [CC § 1812.107].
- Dance studio lessons contracts [CC § 1812.54].
- Contracts with auctioneers for sale of goods at auction [CC § 1812.608(d)].
- Contingency fee contracts [B&P Code § 6147].
- Required language for an arbitration provision, if one is to be included in the contract.

Examples:

- Medical services contracts [CCP § 1295].
- Contract with contractors for work on residential property [B&P Code § 7191].
- A clause providing for refund in the case of death, disability, or relocation of the residence of the purchaser.

Examples:

- Dating service contracts [CC § 1694.3].
- Dance studio lessons contracts [CC § 1812.57].
- Health studio service contracts [CC § 1812.89].

13.52[3] Particular Contract Terms May Be Prohibited. In addition to requiring particular contract provisions, a statute governing the contract may also specifically prohibit particular provisions.

Examples:

- Term of contract cannot be measured by life of purchaser [CC §§ 1694.2(d) (dating services), 1812.53 (dance studio lessons), 1694.7(d) (weight loss program or center)].
- Provisions affecting the rights of the buyer that cannot be included in retail installment sales contracts [CC § 1804.1].

13.52[4] Failure to Comply May Render Contract Void or Voidable. The effect of failing to comply with a statute requiring or prohibiting particular contract terms depends on the specific statutory scheme. Failing to comply may:

- Render the contract void;

Examples:

- Dating service contracts [CC § 1694.4].
- Health studio services contracts [CC § 1812.91].
- Invention development service contracts [B&P Code § 22383].

- Render the contract voidable by the buyer; or

Example:

Discount buying services contracts [CC § 1812.119(a)].

- Render the prohibited provisions void, while the rest of the contract remains valid.

Example:

Retail installment sales contracts [CC § 1804.4].

 Cross Reference:

Detailed discussion of failure to comply with statutory formalities, see Ch. 15, Attacking or Defending Existence of Contract--Failure to Comply With Applicable Formalities.

13.52[5] Statute May Provide Remedies for Violation. When a statute mandates specific terms, notice provisions, or other requirements for a contract, remedies for violation of the statute may also be specified, such as treble damages and attorney's fees.

Examples:

- Employment agency and employment counseling contracts [CC § 1812.523].
- Discount buying services contracts [CC § 1812.107].
- Health studio services contracts [CC § 1812.94].

- Invention development service contracts [*B&P Code* § 22386].

**Cross References:**

Discussion of availability of statutory remedies in contract actions, see Ch. 10, Seeking or Opposing Statutory Remedies in Contract Actions.

Statutory authorization for recovery of costs and attorney's fees, see Ch. 12, Recovering Attorney's Fees and Costs in Contract Litigation.

Legal Topics:

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



140 of 175 DOCUMENTS

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Chapter 13 Attacking or Defending Existence of Contract--Absence of Essential Element
IX. FORMS

1-13 MB Practice Guide: CA Contract Litigation 13.53

13.53 Answer to Complaint for Breach of Contract With Affirmative Defense(s) Based on Absence of Essential Element.**Answer to Complaint for Breach of Contract With Affirmative Defense(s) Based on Absence of Essential Element.**

_____ [Name of attorney]
 _____ [Street address]
 _____ [City, state, and ZIP]
 _____ [Area code and phone number]
 _____ [State Bar no. of attorney]
 Attorney for _____ [name of party]

SUPERIOR COURT OF CALIFORNIA,
 COUNTY OF _____

[name] _____,
 Plaintiff,
 vs.
 [name] _____,
 Defendant.

)
) NO.
)
) _____
) ANSWER OF
)
) _____ [identify defendant, e.g.,
 DEFENDANT MARY JONES] TO COMPLAINT
 OF
)
) _____ [identify plaintiff, e.g.,
 PLAINTIFF JOHN SMITH]
 [LIMITED CIVIL CASE]
 Judge:

 Department:

Defendant answers the complaint as follows:

[Include general denial below, or set forth, in numbered paragraphs, specific denials, admissions, and allegations in response to those in complaint, in the order in which they are alleged in complaint:]

1. Pursuant to *Code of Civil Procedure Section 431.30(b)(1)*, Defendant generally denies each and every allegation of Plaintiff's complaint, including all the purported causes of action contained therein, and further denies that Plaintiff is entitled to any equitable or legal relief, or any damages whatsoever.

[Defendant asserts the following affirmative defenses. By doing so, Defendant shall not be deemed to have assumed the burden of proving any matters that otherwise would be Plaintiff's burden.]

[Allege any affirmative defenses, e.g.,]

[EITHER, if alleging that no contract exists because defendant is not identified as a party]

FIRST AFFIRMATIVE DEFENSE

(Defendant Not Identified as Party to Alleged Contract)

2. No valid contract was formed between Plaintiff and Defendant because the purported contract alleged in Plaintiff's complaint does not identify Defendant as a party to the contract.

[AND/OR, if alleging that no contract exists because defendant did not agree to contract terms]

SECOND AFFIRMATIVE DEFENSE

(Defendant Did Not Agree to Contract Terms)

3. No valid contract was formed between Plaintiff and Defendant because Defendant did not agree to the terms of the purported contract alleged in Plaintiff's complaint.

[AND/OR, if alleging that no contract exists because plaintiff did not communicate assent to the contract terms]

THIRD AFFIRMATIVE DEFENSE

(Plaintiff Did not Communicate Consent)

4. No valid contract was formed between Plaintiff and Defendant because Plaintiff did not communicate to Defendant Plaintiff's consent to the terms of the purported contract alleged in Plaintiff's complaint.

[AND/OR, if alleging that no contract exists because no valid offer was made]

FOURTH AFFIRMATIVE DEFENSE

(No Valid Offer)

5. No valid contract was formed between Plaintiff and Defendant because Defendant did not make any offer to contract with Plaintiff that Plaintiff could have accepted to form the purported contract alleged in Plaintiff's complaint.

[AND/OR, if that no contract exists because defendant's offer was revoked prior to acceptance by defendant]

FIFTH AFFIRMATIVE DEFENSE

(Offer Revoked Prior to Acceptance)

6. No valid contract was formed between Plaintiff and Defendant because Defendant revoked his/her/its offer to contract with Plaintiff before Plaintiff had communicated his/her/its acceptance of that offer.

[AND/OR, if alleging that contract is unenforceable because its terms were not sufficiently certain]

SIXTH AFFIRMATIVE DEFENSE

(Terms of Contract Uncertain)

7. No valid contract was formed between Plaintiff and Defendant because the terms of the purported contract alleged in Plaintiff's complaint are not sufficiently definite and certain to provide a basis for determining the existence of a breach and for giving an appropriate remedy.

[AND/OR, if alleging that contract is unenforceable because of lack of consideration]

SEVENTH AFFIRMATIVE DEFENSE

(Lack of Consideration)

8. No valid contract was formed between Plaintiff and Defendant because the terms of the purported contract alleged in Plaintiff's complaint lack sufficient cause or consideration for the formation of a valid contract.

[ADD additional affirmative defenses, if any]

[CONTINUE]

WHEREFORE, Defendant prays as follows:

1. That Plaintiff take nothing by his/her complaint herein;
2. For costs of suit; and
3. For such other and further relief as the court deems proper.

Dated: _____

[firm name, if any] _____

By: [signature] _____

[typed name] _____

Attorney for Defendant _____

[ADD following verification, if applicable]

VERIFICATION

I am the Defendant in the above entitled action; I have read the foregoing answer and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein stated on information and belief, and, as to those matters, I believe it to be true.

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

[date] _____

[signature] _____

[typed name] _____

NOTES.

Authority:

CCP § 431.30(b)(2); CC §§ 1550, 1667

Raising Affirmative Defenses in Answer:

See 13.16

Requirement of Lawful Object for Valid Contract:

See 13.08

Requirement of Sufficient Consideration for Valid Contract:

See 13.09

Defense of Lack of Capacity:

See Ch. 14, Attacking or Defending Existence of Contract--Lack of Capacity

Defense of Failure to Comply With Formalities Required for Type of Contract Involved:

See Ch. 15, Attacking or Defending Existence of Contract--Failure to Comply With Applicable Formalities

Defense of Mistake:

See Ch. 16, Attacking or Defending Existence of Contract--Mistake

Defenses of Fraud, Duress, Menace, and Undue Influence:

See Ch. 17, Attacking or Defending Existence of Contract--Fraud, Duress, Menace, and Undue Influence

Defenses of Illegality, Unconscionability, and Public Policy:

See Ch. 18, Asserting or Defending Claim That Contract Is Illegal, Contrary to Public Policy, or Unconscionable

Legal Topics:

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

Civil Procedure Pleading & Practice Pleadings Answers Contracts Law Breach Causes of Action Elements of Claims Contracts Law Defenses General Overview



141 of 175 DOCUMENTS

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Chapter 13 Attacking or Defending Existence of Contract--Absence of Essential Element
IX. FORMS*1-13 MB Practice Guide: CA Contract Litigation 13.54***13.54 Notice of Motion for Summary Judgment/Absence of Essential Element of Contract Is Question of Law.****Notice of Motion for Summary Judgment/Absence of Essential Element of Contract Is Question of Law.**

_____[Name of attorney]
 _____[Street address]
 _____[City, state, and ZIP]
 _____[Area code and phone number]
 _____[State Bar no. of attorney]
 Attorney for _____[name of party]

SUPERIOR COURT OF CALIFORNIA,
 COUNTY OF _____

	)	
	)	NO.
[name] _____,	)	_____
Plaintiff,	)	_____
vs.	)	NOTICE OF MOTION AND MOTION BY
[name] _____,	)	_____
Defendant.	)	_____ [identify party, e.g., De-
	)	fendant Mary Jones] FOR SUMMARY JUDGMENT,
	)	SEPARATE STATEMENT OF UNDISPUTED
	)	FACTS, SUPPORTING MEMORANDUM, AND
	)	SUPPORTING EVIDENCE
		Date:

		Time:

		Location:

Judge:

Date Action Filed:

Trial Date:

To [identify opposing party, e.g., Plaintiff John Smith] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [date], at _____ [time] , or as soon thereafter as the matter may be heard, in [_____ (Department or Division) of] this court, located at _____ [street address] _____, [specify party, e.g., Defendant Mary Jones] will, and hereby does, move for an order that judgment be entered in favor of [specify party, e.g., Defendant Mary Jones] as prayed for in [specify pleading, e.g., Defendant's Answer]. The motion is made on the grounds that there is no enforceable contract between the parties, there is no triable issue of material fact, and [specify moving party, e.g., Defendant Mary Jones] is entitled to judgment as a matter of law.

The motion is based on this notice, the accompanying memorandum, the accompanying separate statement of undisputed facts, the request for judicial notice, and the declarations and evidence submitted herewith.

Dated: _____

[firm name, if any] _____

By: [signature] _____

[typed name] _____

Attorney for _____

[specify party, e.g., Defendant Mary Jones]

NOTES.

Authority:

CCP § 437c; CC § 1550

Motion for Summary Judgment Based on Absence of Essential Element of Contract:

See 13.17

Related Form for Declaration in Support of Motion for Summary Judgment:

See 13.55

Separate Statement of Undisputed Facts and Supporting Evidence in Support of Defendant's Motion for Summary Judgment:

See 13.56

Legal Topics:

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

Civil ProcedureSummary JudgmentMotions for Summary JudgmentGeneral OverviewCivil ProcedureSummary JudgmentStandardsLegal EntitlementContracts LawBreachCauses of ActionElements of ClaimsContracts LawDefensesGeneral Overview



142 of 175 DOCUMENTS

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Chapter 13 Attacking or Defending Existence of Contract--Absence of Essential Element

IX. FORMS

1-13 MB Practice Guide: CA Contract Litigation 13.55

13.55 Declaration in Support of Motion for Summary Judgment/Absence of Essential Element of Contract Is Question of Law.

Declaration in Support of Motion for Summary Judgment/Absence of Essential Element of Contract Is Question of Law.

_____[Name of attorney]
 _____[Street address]
 _____[City, state, and ZIP]
 _____[Area code and phone number]
 _____[State Bar no. of attorney]
 Attorney for _____[name of party]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

[*name*] _____,
Plaintiff,
vs.
[*name*] _____,
Defendant.

)
) NO.
) _____
) _____
) DECLARATION OF [*name*]
) _____
) _____ IN SUPPORT OF MO-
) TION FOR SUMMARY JUDGMENT
) Date:
) _____
) _____
) Time:
) _____
) _____
) Location:
) _____

Judge:

Date Action Filed:

Trial Date:

I, _____ [name], declare:

1. I am _____ [identify declarant, e.g., the Defendant in the above-entitled action or other statement as appropriate].

[EITHER, if contract is not enforceable because of lack of mutual consent to contract]

2. _____ [Here and in subsequent paragraphs state evidentiary facts with particularity, to establish that there was no enforceable contract between the parties because there was no mutual consent to the contract, e.g., The purported settlement agreement was imposed on the parties by the mediator, over Defendant's protests, and Defendant never agreed to its terms].

[AND/OR, if contract is not enforceable because there was no valid offer]

2. _____ [Here and in subsequent paragraphs state evidentiary facts with particularity, to establish that there was no enforceable contract between the parties because there was no valid offer, e.g., The Defendant revoked the offer on March 1, 2005, before receiving an acceptance from Plaintiff. The notice of revocation, which was sent by certified mail, was received by Plaintiff on March 3, 2005. When Plaintiff mailed his acceptance on March 5, 2005, there was no longer a valid offer to contract].

[AND/OR, if contract is not enforceable because there was no valid acceptance]

2. _____ [Here and in subsequent paragraphs state evidentiary facts with particularity, to establish that there was no enforceable contract between the parties because there was no valid acceptance, e.g., The offer sent by Defendant to Plaintiff contained a signature line to indicate acceptance. Instead of signing the acceptance, Plaintiff sent Defendant a letter stating that Plaintiff would accept the offer if Defendant would agree to several changes to the proposed agreement. Defendant never accepted Plaintiff's counteroffer].

[AND/OR, if contract is not enforceable because of a lack of consideration]

2. _____ [Here and in subsequent paragraphs state evidentiary facts with particularity, to establish that there was no enforceable contract between the parties because of a lack of consideration, e.g., Plaintiff sent a letter to Defendant offering to dismiss his claim against

Defendant in exchange for the payment of \$20,000. Defendant did not respond to Plaintiff's letter and did not make any promise to Plaintiff in exchange for Plaintiff's promise. Plaintiff's letter is not an enforceable contract because there is a lack of consideration for Plaintiff's promise].

[AND/OR, if contract is not enforceable because of the absence of an essential contract term]

2. _____ [Here and in subsequent paragraphs state evidentiary facts with particularity, to establish that there was no enforceable contract between the parties because of the absence of an essential contract term, e.g., The contract between the parties was an agreement for dance studio lessons. *Civil Code Section 1812.54(c)* requires that the contract contain a written statement of the hourly rate for each type of lesson for which the student has contracted. The contract between the parties does not contain a statement of the hourly rate. Under *Civil Code Section 1812.59*, the contract is void and unenforceable because of the absence of the hourly rate provision].

[CONTINUE]

3. I have personal knowledge of the foregoing facts, and if called as a witness can and will competently testify to them under oath.

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

[date] _____

[signature] _____

[typed name] _____

NOTES.

Authority:

CCP § 437c(b); CC § 1550

Motion for Summary Judgment Based on Absence of Essential Element of Contract:

See 13.17

Requirement of Mutual Consent to Contract:

See 13.07, 13.33-13.35

Requirement of Lawful Object of Contract:

See 13.08

Requirement of Valid Offer:

See 13.20 -13.24

Requirement of Valid Acceptance:

See 13.27 -13.31

Requirement of Adequate Consideration:

See 13.37 -13.45

Effect of Absence of Contract Term:

See 13.47 -13.52

Related Notice of Motion for Summary Judgment:

See 13.54

Separate Statement of Undisputed Facts and Supporting Evidence in Support of Defendant's Motion for Summary Judgment:

See 13.56

Legal Topics:

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

Civil ProcedureSummary JudgmentMotions for Summary JudgmentGeneral OverviewCivil ProcedureSummary JudgmentStandardsLegal EntitlementContracts LawBreachCauses of ActionElements of ClaimsContracts LawDefensesGeneral Overview



143 of 175 DOCUMENTS

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Chapter 13 Attacking or Defending Existence of Contract--Absence of Essential Element
IX. FORMS*1-13 MB Practice Guide: CA Contract Litigation 13.56***13.56 Separate Statement of Undisputed Facts and Supporting Evidence in Support of Defendant's Motion for Summary Judgment****Separate Statement of Undisputed Facts and Supporting Evidence in Support of Defendant's Motion for Summary Judgment**

_____[*Name of attorney*]
 _____[*Street address*]
 _____[*City, state, and ZIP*]
 _____[*Area code and phone number*]
 _____[*State Bar no. of attorney*]
 Attorney for _____ [*name of party*]

SUPERIOR COURT OF CALIFORNIA,
 COUNTY OF _____

[*name*] _____,
 Plaintiff,
 vs.
 [*name*] _____,
 Defendant.

)
) NO. _____
)
)
) SEPARATE STATEMENT OF UNDISPUTED
) FACTS AND SUPPORTING EVIDENCE IN SUP-
) PORT OF MOTION BY DEFENDANT [*name*]
)
) _____ FOR SUMMARY
) JUDGMENT
) Date: _____
)
) Time: _____
)
) Location: _____

 Judge:

 Date Action Filed:

 Trial Date:

 I, _____[name], declare:

Defendant _____[name] hereby submits this statement of undisputed material facts, together with references to supporting evidence, in support of its motion for summary judgment in favor of Defendant _____[name] and against Plaintiff[s] _____[name(s)].

UNDISPUTED MATERIAL FACTS AND SUPPORTING EVIDENCE

[The right column must be left blank; the opposing party's statement of undisputed facts must contain the moving party's facts and supporting evidence as it appears in the left hand column, and directly opposite each recitation of fact, the opposing party's response, which must unequivocally state whether the fact is "disputed" or "undisputed," along with the nature of the dispute and the evidence that supports the position that the fact is controverted. See Cal Rules of Ct, Rule 3.1350(f)]

[specify fact, e.g., 1. On January 15, 2005, Defendant Mary Jones hand delivered to Plaintiff John Smith a written offer to provide exclusive janitorial and building maintenance services for the office building located at 1003 Main Street, Anytown, California.]

SUPPORTING EVIDENCE: _____

[specify source or sources of undisputed fact, including exhibit, title, page, and line numbers, e.g., Plaintiff's Complaint, Paragraph 4, line 26 Exhibit A to Plaintiff's complaint-Defendant's Written Offer dated January 15, 2005, Page 2, Paragraphs 3, 7, 8, 9]

[specify fact, e.g., 2. The terms of Defendant's offer required that it be accepted in writing by

Plaintiff within 30 days from the date the offer was made.]

SUPPORTING EVIDENCE: _____

[specify source or sources of undisputed fact; e.g., Exhibit A to Plaintiff's complaint-Defendant's Written Offer dated January 15, 2005, Page 4, Paragraph 18]

[specify fact, e.g., 3. Defendant's purported written acceptance of Plaintiff's offer was dated March 8, 2005]

SUPPORTING EVIDENCE: _____

[specify source or sources of undisputed fact; e.g., Exhibit B to Plaintiff's complaint-Plaintiff's Letter Purporting to Accept Defendant's Offer, Page 2, Date Line]

[continue as necessary]

Dated: _____

[firm name, if any] _____

By: [signature] _____

[typed name] _____

Attorney for Defendant _____

[specify party, e.g., Mary Jones]

NOTES.

Authority:

Cal Rules of Ct, Rule 3.1350(c)(2),(d)

Motion for Summary Judgment Based on Absence of Essential Element of Contract:

See 13.17

Related Notice of Motion for Summary Judgment:

See 13.54

Related Form for Declaration in Support of Motion for Summary Judgment:

See 13.55

Legal Topics:

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

Civil ProcedureSummary JudgmentMotions for Summary JudgmentWritten MotionsCivil ProcedureSummary
JudgmentSupporting MaterialsGeneral Overview



144 of 175 DOCUMENTS

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Chapter 13 Attacking or Defending Existence of Contract--Absence of Essential Element
IX. FORMS

1-13 MB Practice Guide: CA Contract Litigation 13.57

13.57 Memorandum for Party Attacking Existence of Contract--Lack of Mutual Consent.

Memorandum for Party Attacking Existence of Contract--Lack of Mutual Consent.

[Include the following, if appropriate under the circumstances of the case, in a memorandum by the party attacking the existence of a contract, along with factual discussion demonstrating how the principles of law stated below are applicable to the particular case.]

NO CONTRACT WAS FORMED BETWEEN THE PARTIES BECAUSE OF THE LACK OF MUTUAL CONSENT
TO CONTRACT

A. Mutual Consent Is Essential Element of Contract. The mutual consent of the parties is required for a valid contract (*Civ. Code* §§ 1550, 1565). Consent is not mutual unless the parties agree on the same thing in the same sense (*Civ. Code* § 1580).

B. Mutuality Is Judged by Objective Standard. The test to determine mutual consent is whether a reasonable person would conclude, from the conduct of the parties, that there was mutual agreement (*Beard v. Goodrich* (2003) 110 Cal. App. 4th 1031, 1040, 2 Cal. Rptr. 3d 160).

NOTES.

Mutual Consent:

See 13.07[1]

Detailed Discussion of Format/Skeletal Forms for Memoranda:

California Forms of Pleading and Practice, Ch. 417, Points and Authorities (Matthew Bender);
California Points and Authorities, Ch. 1, Writing Legal Memoranda and Briefs (Matthew Bender)

Additional Memoranda Relating to Contracts:

California Points and Authorities, Ch. 50, Contracts (Matthew Bender)

Legal Topics:

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

Contracts LawDefensesGeneral OverviewContracts LawFormationAcceptanceGeneral OverviewContracts
LawFormationOffersGeneral Overview



145 of 175 DOCUMENTS

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Chapter 13 Attacking or Defending Existence of Contract--Absence of Essential Element
IX. FORMS

1-13 MB Practice Guide: CA Contract Litigation 13.58

13.58 Memorandum for Party Attacking Existence of Contract--Offer Revoked Before Acceptance.

Memorandum for Party Attacking Existence of Contract--Offer Revoked Before Acceptance.

[Include the following, if appropriate under the circumstances of the case, in a memorandum by the party attacking the existence of a contract, along with factual discussion demonstrating how the principles of law stated below are applicable to the particular case.]

NO CONTRACT WAS FORMED BETWEEN THE PARTIES BECAUSE THE OFFER WAS REVOKED BEFORE ACCEPTANCE

A. Offer May Be Revoked Before Acceptance. An offer may be revoked at any time before its acceptance is communicated to the offeror (*Civ. Code § 1586*). An offer is revoked if the offeror communicates a notice of revocation to the offeree before the offeree communicates acceptance to the offeror (*Civ. Code § 1587(1)*).

B. Communication Is Effective When Put in Course of Transmission to Other Party. The communication of either the revocation or acceptance of an offer becomes effective when the revocation or acceptance is put in the course of transmission to the other party (*Civ. Code §§ 1583, 1587(1)*).

C. Communication by Mail Is Effective Upon Posting. Communication of an acceptance or revocation by mail, properly addressed and with correct postage, is effective when the letter is posted (*Palo Alto Town & Country Vill., Inc. v. BBTC Co. (1974) 11 Cal. 3d 494, 500-501, 113 Cal. Rptr. 705, 521 P.2d 1097* ; *see Civ. Code §§ 1583, 1587(1)*).

NOTES.

Notice of Revocation:

See 13.23[2]

Detailed Discussion of Format/Skeletal Forms for Memoranda:

California Forms of Pleading and Practice, Ch. 417, Points and Authorities (Matthew Bender);
California Points and Authorities, Ch. 1, Writing Legal Memoranda and Briefs (Matthew Bender)

Additional Memoranda Relating to Contracts:

California Points and Authorities, Ch. 50, Contracts (Matthew Bender)

Legal Topics:

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

Contracts LawFormationAcceptanceGeneral OverviewContracts LawFormationOffersGeneral OverviewContracts
LawFormationOffersRevocable Offers



146 of 175 DOCUMENTS

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Chapter 13 Attacking or Defending Existence of Contract--Absence of Essential Element
IX. FORMS

1-13 MB Practice Guide: CA Contract Litigation 13.59

13.59 Memorandum for Party Attacking Existence of Contract--Offer Not Accepted.

Memorandum for Party Attacking Existence of Contract--Offer Not Accepted.

[Include the following, if appropriate under the circumstances of the case, in a memorandum by the party attacking the existence of a contract, along with factual discussion demonstrating how the principles of law stated below are applicable to the particular case.]

NO CONTRACT WAS FORMED BETWEEN THE PARTIES BECAUSE THE OFFER WAS NOT ACCEPTED

A. Acceptance Must Be Unqualified. An acceptance must be absolute and unqualified (*Civ. Code* § 1585).

B. A Qualified Acceptance Constitutes Rejection of the Offer and Proposal of Counteroffer. A qualified acceptance is a new proposal (*Civ. Code* § 1585). The qualified acceptance constitutes a rejection of the original offer and the making of a counteroffer to the original offeror (*Panagotacos v. Bank of Am.* (1998) 60 Cal. App. 4th 851, 855-856, 70 Cal. Rptr. 2d 595 ; *Landberg v. Landberg* (1972) 24 Cal. App. 3d 742, 750, 101 Cal. Rptr. 335).

NOTES.

Absolute and Unqualified Acceptance:

See 13.28[1], [2]

Detailed Discussion of Format/Skeletal Forms for Memoranda:

California Forms of Pleading and Practice, Ch. 417, Points and Authorities (Matthew Bender);
California Points and Authorities, Ch. 1, Writing Legal Memoranda and Briefs (Matthew Bender)

Additional Memoranda Relating to Contracts:

California Points and Authorities, Ch. 50, Contracts (Matthew Bender)

Legal Topics:

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

Contracts LawFormationAcceptanceGeneral OverviewContracts LawFormationAcceptanceMethods of
AcceptanceGeneral Overview



147 of 175 DOCUMENTS

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Chapter 13 Attacking or Defending Existence of Contract--Absence of Essential Element
IX. FORMS

1-13 MB Practice Guide: CA Contract Litigation 13.60

13.60 Memorandum for Party Attacking Existence of Contract--Formal Agreement Not Signed.

Memorandum for Party Attacking Existence of Contract--Formal Agreement Not Signed.

[Include the following, if appropriate under the circumstances of the case, in a memorandum by the party attacking the existence of a contract, along with factual discussion demonstrating how the principles of law stated below are applicable to the particular case.]

NO CONTRACT WAS FORMED BETWEEN THE PARTIES BECAUSE A FORMAL AGREEMENT WAS NEVER SIGNED

Agreement to Contract Is Not Enforceable if Parties Did Not Intend to Be Bound Before Agreement Was Formalized. If an agreement to agree shows a manifest intention that the parties not be bound until a final, formal agreement is executed, there is no enforceable contract (*Beck v. American Health Group Int'l, Inc. (1989) 211 Cal. App. 3d 1555, 1562-1563, 260 Cal. Rptr. 237*).

NOTES.

Formal Agreement Required:

See 13.35[2]

Detailed Discussion of Format/Skeletal Forms for Memoranda:

California Forms of Pleading and Practice, Ch. 417, Points and Authorities (Matthew Bender);
California Points and Authorities, Ch. 1, Writing Legal Memoranda and Briefs (Matthew Bender)

Additional Memoranda Relating to Contracts:

California Points and Authorities, Ch. 50, Contracts (Matthew Bender)

Legal Topics:

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

Contracts LawFormationExecution



148 of 175 DOCUMENTS

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Chapter 13 Attacking or Defending Existence of Contract--Absence of Essential Element
IX. FORMS

1-13 MB Practice Guide: CA Contract Litigation 13.61

13.61 Memorandum for Party Attacking Existence of Contract--Lack of Consideration.

Memorandum for Party Attacking Existence of Contract--Lack of Consideration.

[Include the following, if appropriate under the circumstances of the case, in a memorandum by the party attacking the existence of a contract, along with factual discussion demonstrating how the principles of law stated below are applicable to the particular case.]

NO CONTRACT WAS FORMED BETWEEN THE PARTIES BECAUSE THERE WAS A LACK OF CONSIDERATION

A. Consideration Is Required for Valid Contract. A contract must have a sufficient cause or consideration (Civ. Code § 1550).

B. Consideration Must Be Part of Bargain or Agreed Exchange. The consideration for a promise must be bargained for and given in exchange for the promise for the purported contract to be valid (*Passante v. McWilliam* (1997) 53 Cal. App. 4th 1240, 1247-1249, 62 Cal. Rptr. 2d 298).

C. Promises Must Be Mutual in Obligation to Constitute Consideration. When promises are exchanged as consideration, the promises must be mutual in obligation (*Mattei v. Hopper* (1958) 51 Cal. 2d 119, 122, 330 P.2d 625).

NOTES.

Consideration Requirements:

See 13.09, 13.41, 13.42

Detailed Discussion of Format/Skeletal Forms for Memoranda:

California Forms of Pleading and Practice, Ch. 417, Points and Authorities (Matthew Bender);
California Points and Authorities, Ch. 1, Writing Legal Memoranda and Briefs (Matthew Bender)

Additional Memoranda Relating to Contracts:

California Points and Authorities, Ch. 50, Contracts (Matthew Bender)

Legal Topics:

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

Contracts LawConsiderationGeneral OverviewContracts LawConsiderationAdequate ConsiderationContracts
LawConsiderationSufficient Consideration



149 of 175 DOCUMENTS

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Chapter 13 Attacking or Defending Existence of Contract--Absence of Essential Element
IX. FORMS

1-13 MB Practice Guide: CA Contract Litigation 13.62

13.62 Memorandum for Party Defending Existence of Contract--Signing Agreement Communicates Consent.

Memorandum for Party Defending Existence of Contract--Signing Agreement Communicates Consent.

[Include the following, if appropriate under the circumstances of the case, in a memorandum by the party defending the existence of a contract, along with factual discussion demonstrating how the principles of law stated below are applicable to the particular case.]

THE PARTIES CONSENTED TO THE CONTRACT BY SIGNING THE AGREEMENT

A. Signing Contract Communicates Consent. Consent may be communicated between the parties by signing a contract (*Banner Entm't, Inc. v. Superior Court* (1998) 62 Cal. App. 4th 348, 357-358, 72 Cal. Rptr. 2d 598).

B. Failing to Read Contract Before Signing Does Not Negate Consent. A party cannot avoid the terms of a contract on the ground that he or she failed to read it before signing (*Marin Storage & Trucking, Inc. v. Benco Contracting & Eng'g, Inc.* (2001) 89 Cal. App. 4th 1042, 1049, 107 Cal. Rptr. 2d 645).

C. Party's Undisclosed Intentions Do Not Negate Consent. A party who signs a contract may be bound by the terms of the contract even if he or she had a different, undisclosed intention (*Palmquist v. Mercer* (1954) 43 Cal. 2d 92, 98, 272 P.2d 26 ; *Myers v. Carter* (1963) 215 Cal. App. 2d 238, 241, 30 Cal. Rptr. 91).

NOTES.

Consent by Signing Agreement:

See 13.07[1], [3][b], [4][d]

Detailed Discussion of Format/Skeletal Forms for Memoranda:

California Forms of Pleading and Practice, Ch. 417, Points and Authorities (Matthew Bender);
California Points and Authorities, Ch. 1, Writing Legal Memoranda and Briefs (Matthew Bender)

Additional Memoranda Relating to Contracts:

California Points and Authorities, Ch. 50, Contracts (Matthew Bender)

Legal Topics:

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

Contracts Law Formation Execution



150 of 175 DOCUMENTS

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Chapter 13 Attacking or Defending Existence of Contract--Absence of Essential Element
IX. FORMS

1-13 MB Practice Guide: CA Contract Litigation 13.63

13.63 Memorandum for Party Defending Existence of Contract--Revocation Not Communicated Before Acceptance.

Memorandum for Party Defending Existence of Contract--Revocation Not Communicated Before Acceptance.

[Include the following, if appropriate under the circumstances of the case, in a memorandum by the party defending the existence of a contract, along with factual discussion demonstrating how the principles of law stated below are applicable to the particular case.]

THE OFFER WAS NOT EFFECTIVELY REVOKED BECAUSE REVOCATION WAS NOT COMMUNICATED TO THE OFFEREE BEFORE ACCEPTANCE

A. Notice of Revocation of Offer Must Be Communicated Before Acceptance by Offeree. To revoke an offer to contract, the offeror must communicate a notice of revocation to the offeree before the offeree accepts the offer (*Civ. Code* § 1587(1)).

B. Communication Is Effective When Put in Course of Transmission to Other Party. The communication of either the revocation or acceptance of an offer becomes effective when the revocation or acceptance is put in the course of transmission to the other party (*Civ. Code* §§ 1583, 1587(1)).

C. Communication to Offeror's Own Agent Does Not Put Revocation in Course of Transmission. Communication of the revocation of an offer to the offeror's own agent is not effective to revoke the offer before acceptance by the offeree (*CPI Builders, Inc. v. Impco Techs., Inc.* (2001) 94 Cal. App. 4th 1167, 1173-1174, 114 Cal. Rptr. 2d 851 ; *Ersa Grae Corp. v. Fluor Corp.* (1991) 1 Cal. App. 4th 613, 622-623, 2 Cal. Rptr. 2d 288).

NOTES.

Notice of Revocation:

See 13.23[2]

Detailed Discussion of Format/Skeletal Forms for Memoranda:

California Forms of Pleading and Practice, Ch. 417, Points and Authorities (Matthew Bender);
California Points and Authorities, Ch. 1, Writing Legal Memoranda and Briefs (Matthew Bender)

Additional Memoranda Relating to Contracts:

California Points and Authorities, Ch. 50, Contracts (Matthew Bender)

Legal Topics:

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

Contracts LawFormationAcceptanceGeneral OverviewContracts LawFormationAcceptanceMethods of
AcceptanceGeneral OverviewContracts LawFormationOffersRevocable Offers



151 of 175 DOCUMENTS

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Chapter 13 Attacking or Defending Existence of Contract--Absence of Essential Element
IX. FORMS

1-13 MB Practice Guide: CA Contract Litigation 13.64

13.64 Memorandum for Party Defending Existence of Contract--Oral Contract Enforceable Without Signed Agreement.

Memorandum for Party Defending Existence of Contract--Oral Contract Enforceable Without Signed Agreement.

[Include the following, if appropriate under the circumstances of the case, in a memorandum by the party defending the existence of a contract, along with factual discussion demonstrating how the principles of law stated below are applicable to the particular case.]

THE PARTIES HAVE AN ENFORCEABLE ORAL CONTRACT EVEN THOUGH A FORMAL AGREEMENT WAS NOT SIGNED

Failure to Reduce Agreement to Writing Does Not Render Contract Unenforceable. If the parties orally agree on all of the terms and conditions of a proposed written agreement with the mutual intention that the oral agreement should be binding, the mere fact that a formal written agreement to the same effect has not yet been signed does not alter the binding validity of the oral agreement (*Elyaoudayan v. Hoffman* (2003) 104 Cal. App. 4th 1421, 1430, 129 Cal. Rptr. 2d 41 ; *Banner Entm't, Inc. v. Superior Court* (1998) 62 Cal. App. 4th 348, 358, 72 Cal. Rptr. 2d 598).

NOTES.

Enforceable Oral Agreement Not Reduced to Writing:

See 13.35[3]

Detailed Discussion of Format/Skeletal Forms for Memoranda:

California Forms of Pleading and Practice, Ch. 417, Points and Authorities (Matthew Bender);
California Points and Authorities, Ch. 1, Writing Legal Memoranda and Briefs (Matthew Bender)

Additional Memoranda Relating to Contracts:

California Points and Authorities, Ch. 50, Contracts (Matthew Bender)

Legal Topics:

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

Contracts LawFormationExecutionContracts LawTypes of ContractsOral Agreements



152 of 175 DOCUMENTS

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Chapter 13 Attacking or Defending Existence of Contract--Absence of Essential Element
IX. FORMS

1-13 MB Practice Guide: CA Contract Litigation 13.65

13.65 Memorandum for Party Defending Existence of Contract--Promise Enforceable Without Consideration Under Doctrine of Promissory Estoppel.

Memorandum for Party Defending Existence of Contract--Promise Enforceable Without Consideration Under Doctrine of Promissory Estoppel.

[Include the following, if appropriate under the circumstances of the case, in a memorandum by the party defending the existence of a contract, along with factual discussion demonstrating how the principles of law stated below are applicable to the particular case.]

CONSIDERATION IS NOT REQUIRED BECAUSE THE PROMISE IS ENFORCEABLE UNDER THE DOCTRINE OF PROMISSORY ESTOPPEL

A. Promise May Be Binding Without Consideration Under Doctrine of Promissory Estoppel. The doctrine of promissory estoppel makes a promise binding even though there is no consideration in the sense of something that is bargained for and given in exchange (*Drennan v. Star Paving Co. (1958) 51 Cal. 2d 409, 414, 333 P.2d 757*).

B. Doctrine of Promissory Estoppel Requires Three Elements. The doctrine of promissory applies if (1) the promise was one that the promisor should have reasonably expected to induce action or forbearance of a definite and substantial character on the part of the promisee; (2) the promise induced that action or forbearance; and (3) injustice can be avoided only by enforcement of the promise (*C & K Eng'g Contractors v. Amber Steel Co. (1978) 23 Cal. 3d 1, 6, 151 Cal. Rptr. 323, 587 P.2d 1136*).

NOTES.

Promissory Estoppel:

See 13.45

Detailed Discussion of Format/Skeletal Forms for Memoranda:

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

California Points and Authorities, Ch. 1, Writing Legal Memoranda and Briefs (Matthew Bender)

Additional Memoranda Relating to Contracts:

California Points and Authorities, Ch. 50, Contracts (Matthew Bender)

Legal Topics:

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

Contracts Law
Consideration
Promissory Estoppel



153 of 175 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 13 Attacking or Defending Existence of Contract--Absence of Essential Element
IX. FORMS

1-13 MB Practice Guide: CA Contract Litigation 13.66

13.66 Memorandum for Party Defending Existence of Contract--Contract Enforceable Despite Absence of Missing Term.

Memorandum for Party Defending Existence of Contract--Contract Enforceable Despite Absence of Missing Term.

[Include the following, if appropriate under the circumstances of the case, in a memorandum by the party defending the existence of a contract, along with factual discussion demonstrating how the principles of law stated below are applicable to the particular case.]

THE ABSENCE OF *[specify missing contract term(s), e.g., A SPECIFIED PRICE]* DOES NOT RENDER THE CONTRACT UNENFORCEABLE

A. Statement of Every Term or Condition Is Not Required. Neither law nor equity requires that every term and condition of an agreement be set forth in the contract (*King v. Stanley* (1948) 32 Cal. 2d 584, 588, 197 P.2d 321).

B. Inferences and Extrinsic Evidence May Supply Missing Terms. The usual and reasonable terms found in similar contracts can be looked to, unexpressed provisions of the contract may be inferred from the writing, external facts may be relied upon, and custom and usage may be resorted to in an effort to supply a deficiency if it does not alter or vary the terms of the agreement (*Hennefer v. Butcher* (1986) 182 Cal. App. 3d 492, 500-501, 227 Cal. Rptr. 318).

[ADD, if appropriate]

C. Price May Be Objectively Determined. A contract need not specify price if it can be objectively determined (*California Lettuce Growers, Inc. v. Union Sugar Co.* (1955) 45 Cal. 2d 474, 482, 289 P.2d 785).

[ADD, if appropriate]

C. Reasonable Time for Performance Is Allowed, if Time Is Not Specified. If no time is specified for the performance of an act required to be performed under a contract, a reasonable time is allowed (Civ. Code § 1657).

[ADD, if appropriate]

C. Duration of Contract May Be Implied. If not stated, the duration of a contract may be implied from the nature of the contract or from the circumstances surrounding it (*Haggerty v. Warner* (1953) 115 Cal. App. 2d 468, 473, 252 P.2d 373).

[ADD, if appropriate]

C. Requirements Contracts Are Enforceable. If a buyer agrees to buy what he or she needs or requires of a particular product, and the seller absolutely promises to sell, the resulting contract is enforceable (*Ross v. Frank W. Dunne Co.* (1953) 119 Cal. App. 2d 690, 698, 260 P.2d 104).

[ADD, if appropriate]

C. Parties' Conduct May Render Contract Enforceable Despite Uncertainty. Although an agreement may be indefinite or uncertain in its inception, subsequent performance by the parties under the agreement cures the defect and renders the contract enforceable (*Bohman v. Berg* (1960) 54 Cal. 2d 787, 794-795, 8 Cal. Rptr. 441, 356 P.2d 185).

NOTES.

Requirement of Agreement on Essential Items:

See 13.47[1]

Missing Terms Supplied from Inferences and Extrinsic Evidence:

See 13.47[3]

Failure to Specify Price:

See 13.48

Reasonable Time for Performance:

See 13.49[1]

Implied Duration:

See 13.49[3]

Failure to Specify Quantity:

See 13.50

Uncertainty Cured by Conduct of Parties:

See 13.51

Detailed Discussion of Format/Skeletal Forms for Memoranda:

California Forms of Pleading and Practice, Ch. 417, Points and Authorities (Matthew Bender);
California Points and Authorities, Ch. 1, Writing Legal Memoranda and Briefs (Matthew Bender)

Additional Memoranda Relating to Contracts:

California Points and Authorities, Ch. 50, Contracts (Matthew Bender)

Legal Topics:

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

Contracts LawFormationDefinite TermsContracts LawFormationMeeting of Minds



154 of 175 DOCUMENTS

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Chapter 13 Attacking or Defending Existence of Contract--Absence of Essential Element
IX. FORMS

1-13 MB Practice Guide: CA Contract Litigation 13.67

13.67 Memorandum for Party Defending Existence of Contract--Implied Contract Enforceable Without Express Statement of Terms.

Memorandum for Party Defending Existence of Contract--Implied Contract Enforceable Without Express Statement of Terms.

[Include the following, if appropriate under the circumstances of the case, in a memorandum by the party defending the existence of a contract, along with factual discussion demonstrating how the principles of law stated below are applicable to the particular case]

THE PARTIES HAVE AN ENFORCEABLE IMPLIED CONTRACT EVEN THOUGH THE TERMS NEVER WERE EXPRESSLY STATED

A. Implied Contract Is Manifested by Conduct Rather Than Words. Unlike an express contract, in which the terms are stated in words, an implied contract is one whose terms are manifested by conduct (CC § 1621; *Silva v. Providence Hospital of Oakland* (1939) 14 C2d 762, 773, 97 P2d 798 ; *Division of Labor Law Enforcement v. Transpacific Transportation Co.* (1977) 69 CA 3d 268, 275, 137 CR 855).

B. Promise to Pay May Be Implied. The parties' conduct may create an implied contract requiring one party to pay the other, even though payment was never expressly demanded or promised either orally or in writing (*Gunther-Wahl Productions, Inc. v. Mattel, Inc.* (2002) 104 CA4th 27, 42-43, 128 CR2d 50).

C. Terms of Implied Contract Must Be Determined From Parties' Conduct. In interpreting an implied contract, the court must determine the contract's terms by examining the parties' course of conduct (*Varni Bros. Corp. v. Wine World, Inc.* (1995) 35 CA4th 880, 889, 41 CR2d 740).

NOTES.

Discussion of Implied Contracts:

See 13.04A

Detailed Discussion of Format/Skeletal Forms for Memoranda:

California Forms of Pleading and Practice, Ch. 417, Points and Authorities (Matthew Bender);
California Points and Authorities, Ch. 1, Writing Legal Memoranda and Briefs (Matthew Bender)

Additional Memoranda Relating to Contracts:

California Points and Authorities, Ch. 50, Contracts (Matthew Bender)

Legal Topics:

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

Contracts Law Formation Definite Terms Contracts Law Types of Contracts Implied-in-Fact Contracts



155 of 175 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 14 Attacking or Defending Existence of Contract--Lack of Capacity

1-14 MB Practice Guide: CA Contract Litigation 14.syn

§ 14.syn Synopsis to Chapter 14: Attacking or Defending Existence of Contract--Lack of Capacity

14.01 Scope.

14.02 Objective and Strategy.

14.03 CHECKLIST: Determining Whether Party Has Capacity to Contract.

14.04 Capacity Is Presumed to Exist Except As to Minors, Persons of Unsound Mind, and Persons Deprived of Civil Rights.

14.05 Minors Have Limited Capacity to Contract.

14.05[1] Minors May Contract, but May Disaffirm Most Types of Contracts.

14.05[2] Minors Cannot Disaffirm Specified Types of Contracts.

14.05[3] Minors Are Prohibited by Law From Entering Into Specified Types of Contracts.

14.05[4] Emancipated Minors May Contract in Same Manner As Adults.

14.06 Person Adjudged Incompetent Lacks Capacity to Contract.

14.06[1] Person Judicially Determined to Be of Unsound Mind Lacks Capacity to Contract.

14.06[2] Establishment of Conservatorship Constitutes Adjudication of Incapacity.

14.06[3] Conservatee Retains Right to Provide for Necessities.

14.06[4] Court May Modify Legal Capacity of Conservatee.

14.07 Person Not Adjudged Incompetent May Lack Capacity to Contract.

14.07[1] Contract Entered Into by Person Entirely Without Understanding Is Void but Person Is Liable for

Necessaries.

14.07[2] Contract Entered Into by Person Not Entirely Without Understanding Is Voidable and May Be Rescinded.

14.07[2][a] Party Seeking to Rescind Must Be of Unsound Mind, but Need Not Be Entirely Lacking in Understanding.

14.07[2][b] Capacity of Party Seeking Rescission Is Determined As of Time Contract Was Made.

14.07[2][c] Rescission Must Be Prompt and Must Include Restoration of All Consideration Received.

14.07[3] Evidentiary Requirements for Lack of Capacity Must Be Met.

14.07[3][a] Due Process in Competence Determinations Act Establishes Standards for Judicial Determination of Capacity.

14.07[3][b] Determination That Person Lacks Capacity Must Be Based on Evidence of Defect in Mental Function.

14.08 Contracts Entered Into by Intoxicated Persons May Be Rescinded If Intoxication Is Shown to Have Deprived Person of Reason and Understanding.

14.09 Persons Deprived of Civil Rights Have Limited Capacity to Contract.

14.10 Business Entities Have Capacity to Contract.

14.10[1] Corporations.

14.10[1][a] Corporations Have General Capacity to Contract.

14.10[1][b] Corporation's Powers May Be Suspended for Failure to File Annual Statement or to Pay Taxes.

14.10[1][c] Corporate Officials May Contract on Corporation's Behalf.

14.10[1][d] Corporate Officers May Have Actual Authority to Bind Corporation.

14.10[1][e] Corporate Officers May Have Ostensible or Apparent Authority to Contract for Corporation.

14.10[1][f] Presumption Exists That Documents Signed by Two Specified Officers Were Signed on Behalf of Corporation.

14.10[1][g] Corporation May Ratify Contract.

14.10[2] Limited Liability Companies.

14.10[3] General Partnerships.

14.10[4] Limited Partnerships.

14.10[5] Unincorporated Associations.

14.11 Guardians, Conservators, and Trustees Have Capacity to Contract on Behalf of Wards, Conservatees, and

Beneficiaries.

14.12 Persons Who Lack Capacity Remain Obligated to Pay for Necessities.

14.13 CHECKLIST: Raising Absence of Capacity to Contract in Pleadings.

14.14 Lack of Capacity to Contract May Be Raised As Affirmative Defense.

14.15 Person Lacking Capacity May Bring Action Alleging Invalidity of Contract.

14.16 Lack of Capacity May Be Raised by Demurrer or Motion for Judgment on the Pleadings If Incapacity Appears in Pleading.

14.17 Lack of Capacity May Be Raised by Summary Judgment If Incapacity Is Established by Indisputable Evidence.

14.18 Complaint to Rescind Contract of Incompetent--Capacity Not Judicially Determined.

Complaint to Rescind Contract of Incompetent--Capacity Not Judicially Determined.

14.19 Conservator's Complaint to Declare Contract of Conservatee Void.

Conservator's Complaint to Declare Contract of Conservatee Void.

14.20 Answer With Affirmative Defenses--Lack of Capacity.

Answer With Affirmative Defenses--Lack of Capacity.



156 of 175 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 14 Attacking or Defending Existence of Contract--Lack of Capacity
I. STRATEGY

1-14 MB Practice Guide: CA Contract Litigation 14.01

14.01 Scope.

This chapter covers the basics rules and issues relating to capacity to contract, including:

- The capacity of minors to contract [see 14.05].
- The capacity of incompetent persons to contract [see 14.06, 14.07].
- The capacity of business entities and fiduciaries such as trustees, guardians, and conservators to contract [see 14.10 -14.12].
- The effects of a lack of capacity to contract [discussed throughout the chapter].
- The ways to plead lack of capacity to contract [see 14.14 -14.17].

This chapter does not address attacks on a party's capacity to sue or be sued.

Legal Topics:

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

Contracts LawFormationCapacity of PartiesGeneral OverviewContracts LawFormationCapacity of PartiesAgeContracts
LawFormationCapacity of PartiesMental Capacity



157 of 175 DOCUMENTS

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Chapter 14 Attacking or Defending Existence of Contract--Lack of Capacity
I. STRATEGY

*1-14 MB Practice Guide: CA Contract Litigation 14.02***14.02 Objective and Strategy.**

Capacity to contract goes to the core of contract formation. A contract in which one of the parties lacks the capacity to contract may be automatically void, or subject to rescission by the party lacking capacity. Of primary importance is the ability to recognize the various reasons for incapacity and the consequences of incapacity.

Consider:

The capacity to contract is very seldom litigated in the modern commercial world. There are a number of possible reasons. Conservatorship now makes a bright line in the case of mental defect, and the lowering of the age of majority to 18 eliminates the vast majority of cases involving minors. Title insurance deters minors from entering into contracts for real property. Consumer protection laws have provided preferred remedies that have preempted the need to attack general contract capacity.

**Search California Forms of Pleading and Practice:**

Use *lexis.com* to search for materials in California Forms of Pleading and Practice on capacity:

■ Legal > States Legal-U.S. > California > Search Analysis & CLE Materials--CA > CA Treatises & Analytical Materials > California Forms of Pleading and Practice



Sample Search: In California Forms of Pleading and Practice, try the following search to find discussion about capacity to form a contract: *capacity /10 contract!*.

**Cross Reference:**

For Tips on updating case law and expanding your research with additional resources, see **How to Use Lexis.com With This Publication** at the front of this volume.

Legal Topics:

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

Contracts LawFormationCapacity of PartiesGeneral OverviewContracts LawFormationCapacity of PartiesAgeContracts LawFormationCapacity of PartiesMental Capacity



158 of 175 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 14 Attacking or Defending Existence of Contract--Lack of Capacity
II. DETERMINING WHETHER PARTY HAS CAPACITY TO CONTRACT

1-14 MB Practice Guide: CA Contract Litigation 14.03

14.03 CHECKLIST: Determining Whether Party Has Capacity to Contract.

☐ Determine whether party falls within categories of persons who lack capacity to contract:

- ☐ Minors, meaning persons under the age of 18.
- ☐ Persons of unsound mind.
- ☐ Persons deprived of civil rights.

Authority:

CC §§ 38-40, 1556; Fam Code § 6500; Pen Code §§ 2600-2601

Discussion:

See 14.04

Form:

See 14.20 (affirmative defense: lack of capacity to contract)

☐ If party is a minor, determine whether minor is emancipated or unemancipated.

- ☐ Emancipated minors may contract in same manner as adults.
- ☐ Unemancipated minors have limited capacity to contract.

Authority:

Fam Code §§ 6700, 7002

Discussion:

See 14.05[4]

☐ If party is an unemancipated minor, determine whether law permits minor to enter into type of contract in question.

Authority:

Fam Code §§ 6700, 6701

Discussion:

See 14.05[1], [3]

Form:

See 14.20 (affirmative defense: contract void)

☐ If law permits minor to enter into type of contract involved, determine whether contract may be disaffirmed by minor.

Authority:

Fam Code §§ 6700, 6710-6713

Discussion:

See 14.05[1], [2]

Form:

See 14.20 (affirmative defense: minor disaffirmed contract)

☐ Determine whether person has been adjudged to be of unsound mind and therefore lacks capacity to contract.

- ☐ Contracts entered into by persons adjudged to be of unsound mind are void.
- ☐ Conservatorship is process by which person is adjudged to be of unsound mind.

Authority:

CC § 40; Prob Code § 1800 et seq.; Gibson v. Westoby (1953) 115 CA2d 273, 276, 251 P2d 1003

Discussion:

See 14.06

Forms:

See 14.19 (complaint by conservator to void contract), 14.20 (affirmative defense: contract after conservatorship established)

☐ If person has not been judicially determined to be of unsound mind, determine whether person lacks capacity to contract because he or she is entirely without understanding.

Authority:

CC § 38; San Francisco Credit Clearing-House v. MacDonald (1912) 18 CA 212, 215, 122 P 964

Discussion:

See 14.07[1]

Form:

See 14.20 (affirmative defense: defendant entirely without understanding)

☐ If person has not been judicially determined to be of unsound mind, nor is completely without understanding, determine if contract can be rescinded.

☐ Party seeking to rescind must be of unsound mind, but need not be entirely lacking in understanding.

☐ Party seeking rescission must have been incompetent at the time the contract was made.

☐ Rescission must be prompt and must include restoration of all consideration received.

Authority:

CC § 39; Burgess v. Security-First Nat'l Bank (1941) 44 CA2d 808, 820, 113 P2d 298

Discussion:

See 14.07[2]

Forms:

See 14.18 (complaint to rescind contract), 14.20 (affirmative defense: contract rescinded)

☐ Determine standards for judicial determination of whether person is completely without understanding or of unsound mind under Due Process in Competence Determinations Act.

☐ Rebuttable presumption that all persons have capacity to make decisions.

☐ Specific evidentiary standards set forth to rebut presumption.

Authority:

Prob Code §§ 810, 811

Discussion:

See 14.07[3]

☐ Determine whether person was intoxicated at time of contracting.

☐ Contracts entered into by intoxicated persons may be rescinded if intoxication is shown to have deprived the person of reason and understanding.

Authority:

Walton v. Bank of Cal., Nat'l Ass'n (1963) 218 CA2d 527, 541, 32 CR 856 ; Guidici v. Guidici (1935) 2 C2d 497, 502, 41 P2d 932

Discussion:

See 14.08

Form:

See 14.20 (affirmative defense: defendant intoxicated)

- ☐ Determine whether person was deprived of civil rights at time of contracting.

Authority:*CC § 1556; Pen Code §§ 2600-2601***Discussion:**

See 14.09

- ☐ Determine whether contract made in name of a business entity was entered into by person or persons with statutory authority to bind entity or person to whom such authority has been delegated.

Authority:*Corp Code §§ 207, 15509(1), 16201, 16301, 17003, 18105, 18110, 18115; R&T Code §§ 19001 et seq., 23001 et seq.***Discussion:**

See 14.10

- ☐ Determine if contract was made by guardian, conservator, trustee on behalf of ward, conservatee, or beneficiary.

Authority:*Prob Code §§ 2401, 2405, 2406, 2462, 2507, 850 et seq., 2540 et seq., 2550 et seq., 2570 et seq., 2580 et seq.***Discussion:**

See 14.11

- ☐ Determine whether contract was for minor's or incompetent's "necessities."

Authority:*CC § 38; Fam Code § 6712***Discussion:**

See 14.12

Legal Topics:

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

Contracts Law Formation Capacity of Parties General Overview Contracts Law Formation Capacity of Parties Age Contracts Law Formation Capacity of Parties Mental Capacity



159 of 175 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 14 Attacking or Defending Existence of Contract--Lack of Capacity
II. DETERMINING WHETHER PARTY HAS CAPACITY TO CONTRACT

1-14 MB Practice Guide: CA Contract Litigation 14.04

14.04 Capacity Is Presumed to Exist Except As to Minors, Persons of Unsound Mind, and Persons Deprived of Civil Rights.

Under California law, all persons are capable of contracting except [CC § 1556]:

- Minors [see 14.05, 14.12].
- Persons of unsound mind [see 14.06 -14.08,].
- Persons deprived of civil rights [see 14.09].

A minor under California law is any person under the age of 18 [*Fam Code § 6500*; see *CC § 1557(a)* (capacity of minors governed by *Fam Code § 6500 et seq.*)].

A person of "unsound mind" may or may not be "entirely without understanding," and may or may not have been previously adjudged as such [see *CC §§ 38-40*; see also *CC § 1557(b)* (capacity of person of unsound mind to contract governed by *CC § 38 et seq.*)]. Persons deprived of civil rights include any person who is serving a sentence in state prison for commission of a crime during the period of confinement [*Pen Code §§ 2600-2601*].

Jury Instructions:

Contract Formation--Essential Factual Elements, see *Judicial Council of California Civil Jury Instructions, CACI No. 302* (LexisNexis Matthew Bender).



Cross References:

Capacity of minors, see 14.05.

Capacity of persons of unsound mind, see 14.06, 14.07.

Capacity of persons deprived of civil rights, see 14.09.

Form for affirmative defense: lack of capacity to contract, see 14.20.

Legal Topics:

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

Contracts LawFormationCapacity of PartiesGeneral OverviewContracts LawFormationCapacity of PartiesAgeContracts
LawFormationCapacity of PartiesMental CapacityEvidenceInferences & PresumptionsPresumptions



160 of 175 DOCUMENTS

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Chapter 14 Attacking or Defending Existence of Contract--Lack of Capacity
II. DETERMINING WHETHER PARTY HAS CAPACITY TO CONTRACT

1-14 MB Practice Guide: CA Contract Litigation 14.05

14.05 Minors Have Limited Capacity to Contract.

14.05[1] Minors May Contract, but May Disaffirm Most Types of Contracts. Minors have the ability to contract in the same manner as adults, subject to the minor's right to disaffirm most types of contracts [*Fam Code* § 6700]. In order to disaffirm a contract, the minor must act before turning 18 or within a reasonable time afterwards [*Fam Code* § 6710]. A minor cannot select portions of the contract to keep and disaffirm others; the entire contract must be disaffirmed [*Holland v. Universal Underwriters Ins. Co.* (1969) 270 CA2d 417, 421, 75 CR 669].

Warning:

A disaffirmance of an agreement by a minor does not operate to terminate the contractual obligations of a parent who signed the agreement [*Berg v. Traylor* (2007) 148 CA4th 809, 822, 56 CR3d 140] .

Jury Instructions:

Minor's Right to Disaffirm, see *California Forms of Jury Instruction, Ch. 3C, Instr. MB 300C.71* (Matthew Bender).

**Cross References:**

Form for affirmative defense: minor disaffirmed contract, see 14.20.

Contractual rights of minors, see *California Family Law Practice and Procedure* (2d ed.), § 30.40 (Matthew Bender); or
California Legal Forms, § 100B.20 (Matthew Bender).

Voidable contracts subject to disaffirmance, see *California Family Law Practice and Procedure* (2d ed.), § 30.44 (Matthew Bender); or *California Legal Forms*, § 100B.22 (Matthew Bender).

14.05[2] Minors Cannot Disaffirm Specified Types of Contracts. A minor may not disaffirm the following types of contracts [*Fam Code* §§ 6711, 6712]:

- An obligation entered into under the express authority or direction of a statute.
- Contracts for "necessaries."

A contract will be considered to be contract for necessities only if all three of the following requirements are met [*Fam Code § 6712*]:

- The contract is to pay for items necessary for the support of the minor or minor's family;
- The items are actually furnished to the minor or the minor's family; and
- The contract is entered into at a time when the minor is not under the care of a parent or guardian able to provide for the minor or the minor's family.

In interpreting *Fam Code § 6712* (and its predecessor sections), the California courts have identified some specific types of contracts that may not be disaffirmed by a minor:

- Fees owed to attorneys for legal representation are considered to be contracts for necessities and may not be disaffirmed [*Leonard v. Alexander (1942) 50 CA2d 385, 387-388, 122 P2d 984*].
- Contracts for employment in art, entertainment, or professional sports, which must be approved by the court, may not be disaffirmed [*Fam Code § 6751*; see *Fam Code § 6750*; *Morgan v. Morgan (1963) 220 CA2d 665, 672, 34 CR 82*].

Distinguish:

A contract to secure personal management services for the purpose of advancing a minor's acting career is not a contract for necessities under *Fam Code § 6712* [*Berg v. Traylor (2007) 148 CA4th 809, 820, 56 CR3d 140*] .

Jury Instructions:

Liability of Minors, see *California Forms of Jury Instruction, Ch. 3C, Instr. MB 300C.72* (Matthew Bender).

Cross Reference:

Contracts not subject to disaffirmance, see *California Family Law Practice and Procedure (2d ed.)*, § 30.45 (Matthew Bender); or *California Legal Forms*, § 100B.22 (Matthew Bender).

14.05[3] Minors Are Prohibited by Law From Entering Into Specified Types of Contracts. By statute, minors may not do any of the following [*Fam Code § 6701*]:

- Give a delegation of power.
- Make a contract relating to real property or any interest in real property.
- Make a contract relating to personal property not in the immediate possession or control of the minor.

If a minor does enter into contract that falls within one of these three categories, the contract is automatically void and the minor need not disaffirm the contract [*Burnand v. Irigoyen (1947) 30 C2d 861, 865, 186 P2d 417*].



Search Public Records:

Use *lexis.com* to search for birth dates of contracting parties:

■ Public Records > People, Businesses & Asset Locators > EZFIND Combined Person Locator Nationwide



Sample Search: To find birth dates of contracting parties, look in Combined Person Locator using this search formation: *name (first name /3 last name), i.e., name (john /3 smith).*



Cross References:

Form for affirmative defense: void contract of minor, see 14.20.

Void contracts, see *California Family Law Practice and Procedure* (2d ed.), § 30.42 (Matthew Bender); or *California Legal Forms*, § 100B.21 (Matthew Bender).

14.05[4] Emancipated Minors May Contract in Same Manner As Adults. An emancipated minor is a person under the age of 18 who meets any of the following conditions:

- The person has entered into a valid marriage, whether or not the marriage has been dissolved.
- The person is on active duty with the United States armed forces.
- The person has received a declaration of emancipation under *Fam Code* § 7122 [*Fam Code* § 7002].

An emancipated minor is treated as an adult for a variety of purposes, including entering into contracts that would be prohibited transactions for an unemancipated minor, such as contracts for real property or a delegation of authority [*Fam Code* § 7050(e)(2)]. Emancipated minors also are permitted to enter into insurance contracts in the same way as adults [*Fam Code* § 7051], and to handle the rights and responsibilities associated with ownership of shares of stock in a corporation [*Fam Code* § 7052].



Cross References:

Contracts of emancipated minor, see *California Family Law Practice and Procedure* (2d ed.), § 30.41 (Matthew Bender); or *California Legal Forms*, § 100.52 (Matthew Bender).

Emancipation of minors, see *California Family Law Practice and Procedure* (2d ed.), §§ 30.50-30.54 (Matthew Bender); or *California Legal Forms*, §§ 100.50-100.52 (Matthew Bender).

Legal Topics:

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

Contracts LawFormationCapacity of PartiesGeneral OverviewContracts LawFormationCapacity of PartiesAge



161 of 175 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 14 Attacking or Defending Existence of Contract--Lack of Capacity
 II. DETERMINING WHETHER PARTY HAS CAPACITY TO CONTRACT

1-14 MB Practice Guide: CA Contract Litigation 14.06

14.06 Person Adjudged Incompetent Lacks Capacity to Contract.

14.06[1] Person Judicially Determined to Be of Unsound Mind Lacks Capacity to Contract. After his or her incapacity has been judicially determined, a person of unsound mind can make no conveyance or other contract until his or her restoration to capacity, subject to *Prob Code* § 1871, relating to the rights of conservatees [see 14.06[3]], and the Lanterman-Petris-Short Act [CC § 40(a); see *W&I Code* § 5000 *et seq.*]. Any contract entered into by a person who has been adjudged incompetent is void, not merely voidable [*Gibson v. Westoby* (1953) 115 CA2d 273, 276, 251 P2d 1003].

A party who enters into a contract with a person adjudged incompetent need not have any direct knowledge of the adjudication. The adjudication of incompetency serves as constructive notice to all parties who may seek to contract with an incompetent person [*Gibson v. Westoby* (1953) 115 CA2d 273, 276, 251 P2d 1003].

14.06[2] Establishment of Conservatorship Constitutes Adjudication of Incapacity. The establishment of a conservatorship under *Prob Code* § 1400 *et seq.* is a judicial determination of the incapacity of the conservatee, except as provided in *Prob Code* §§ 1873-1876 relating to the legal capacity of conservatee [CC § 40(b); see 14.06[4]]. The appointment of a conservator of the estate is an adjudication that the conservatee lacks the legal capacity to enter into any transaction that binds to conservatorship estate [*Prob Code* § 1872]. The incapacity attaches on the establishment of a temporary conservatorship [*O'Brien v. Dudenhoeffer* (1993) 16 CA4th 327, 330, 19 CR2d 826]. It does not attach on the appointment of a limited conservator unless the order of appointment so provides [*Prob Code* § 1872(b)].

► **Cross References:**

Form for complaint by conservator to void contract of conservatee, see 14.19.

Form for affirmative defense that defendant was under conservatorship, see 14.20.

Consider:

No authority has been found under current California law that anything other than a conservatorship constitutes a judicial determination of incapacity for purposes of CC § 40. Older cases construing prior law were hesitant to equate other proceedings as a determination under CC § 40 [see *Carroll v. Carroll* (1940) 16 C2d 761, 766, 108 P2d 420 (commitment in insanity proceedings to custody of probation

officer is not a judicial determination of insanity or incapacity within the meaning of *CC* § 40); *California Bank v. Bell* (1940) 38 CA2d 533, 538, 101 P2d 724 (fact that decedent was once inmate of asylum and that she was not formally discharged, or that her guardian who was then appointed had not been discharged, furnished no substantial evidence of judicial determination of incompetence that would render her execution of note and mortgage six years before her commitment void); *In re Guardianship of Carniglia* (1934) 139 CA 629, 631, 34 P2d 752 (proceeding under former Political Code § 2168 et seq. was not a conclusive judicial determination of incapacity or insanity); *Hitch v. Superior Court* (1934) 2 CA2d 406, 410, 38 P2d 190 (order committing woman to asylum is not judicial determination that she is insane so as to make her incompetent to make contracts within meaning of *CC* § 40)].

Prob Code § 810 refers to a judicial determination that a person is totally without understanding or is of unsound mind [see *Prob Code* § 810(c) (discussed in 14.07[3][b])]. However, this provision appears to apply only to rebut the presumption of capacity should incapacity be raised as an affirmative defense or become an issue in some other kind of proceeding, such as an action for breach of contract [see *Prob Code* § 810(a) (discussed in 14.07[3][b])]. There is no suggestion that this statute establishes a separate proceeding for the determination of legal capacity under *CC* § 40.



Search California Dockets:

Use *lexis.com* to search California Dockets for civil court filings involving conservatorships:

● Legal > States Legal-U.S. > California > Filings > Docket Materials > CA Combined Civil Court Filings From Superior and Municipal Courts



Sample Search: To find civil court filing on a particular topic, try inserting your topic in this search: *name (first name /3 last name) AND probate AND conservator.*

14.06[3] Conservatee Retains Right to Provide for Necessities. A conservatee retains the right to enter into transactions to the extent reasonable to provide the necessities of life to the conservatee, and to the spouse and minor children of the conservatee, and to provide the basic living expenses to any domestic partner of the conservatee [*Prob Code* § 1871(d)].

14.06[4] Court May Modify Legal Capacity of Conservatee. In the order appointing the conservator or on a petition, the court may authorize the conservatee to enter into transactions as may be appropriate in the circumstances of the particular conservatee and conservatorship estate. The court may modify the legal capacity of the conservatee by broadening or restricting the power of the conservatee to enter into transactions as may be appropriate in the circumstances of the particular conservatee and conservatorship estate [*Prob Code* § 1873(a)]. A petition may be filed by the conservator, the conservatee, or a spouse, domestic partner, relative, or friend of the conservatee, but not by one in a commercial relationship with the conservatee who might want to establish the conservatee's capacity [*Prob Code* § 1874].

Legal Topics:

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

Contracts Law Formation Capacity of Parties General Overview Contracts Law Formation Capacity of Parties Mental Capacity



162 of 175 DOCUMENTS

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Chapter 14 Attacking or Defending Existence of Contract--Lack of Capacity
II. DETERMINING WHETHER PARTY HAS CAPACITY TO CONTRACT

1-14 MB Practice Guide: CA Contract Litigation 14.07

14.07 Person Not Adjudged Incompetent May Lack Capacity to Contract.

14.07[1] Contract Entered Into by Person Entirely Without Understanding Is Void but Person Is Liable for Necessaries. A person who is entirely without understanding cannot make any kind of contract, although the person remains liable for the reasonable value of things furnished to the person for the support of the person or the person's family [CC § 38]. A contract entered into by a person meeting the criteria of CC § 38 is absolutely void [*Maionchi v. Nicholini* (1905) 1 CA 690, 693, 82 P 1052].

Only the party claiming incapacity may rely on CC § 38; it cannot be used by a person who has contracted with the person lacking capacity to avoid the contract [*San Francisco Credit Clearing-House v. MacDonald* (1912) 18 CA 212, 215, 122 P 964].

➤ Cross Reference:

Form for affirmative defense: defendant entirely without understanding, see 14.20.

14.07[2] Contract Entered Into by Person Not Entirely Without Understanding Is Voidable and May Be Rescinded.

14.07[2][a] Party Seeking to Rescind Must Be of Unsound Mind, but Need Not Be Entirely Lacking in Understanding. A conveyance or other contract of a person of unsound mind, but not entirely without understanding, made before the incapacity of the person has been judicially determined, is voidable and subject to rescission [CC § 39(a); see *Mills v. Kopf* (1963) 216 CA2d 780, 783-784, 31 CR 80]. The rescission must conform to the requirements of CC § 1688 et seq. [CC § 1689(b)(7)].

There is a rebuttable presumption affecting the burden of proof that a person is of unsound mind if the person is substantially unable to manage his or her own financial resources or resist fraud or undue influence. Substantial inability may not be proved solely by isolated incidents of negligence or improvidence [CC § 39(b)]. Only the party claiming incapacity may rely on CC § 39; it cannot be used by a person who has contracted with the person lacking capacity to avoid the contract [*Burgess v. Security-First Nat'l Bank* (1941) 44 CA2d 808, 820, 113 P2d 298].

14.07[2][b] Capacity of Party Seeking Rescission Is Determined As of Time Contract Was Made. In order to rescind under CC § 39, the person seeking rescission must have met the standard of the statute at the time the contract in

question was made. However, there is no requirement to show fraud or knowledge of the incompetency on the part of the other party to the contract [*Weseman v. Latham* (1957) 153 CA2d 841, 846-847, 315 P2d 364].

Example:

Despite expert medical testimony that the debtor would not have had the mental capacity to conduct business affairs at the time of the negotiations due to his subsequent diagnosis of cerebral aneurysm and stroke, the court did not err in finding the debtor mentally competent to enter into a settlement agreement. Witnesses who personally observed the debtor during the negotiations reported that he participated actively and appeared to have a full understanding of what was transpiring and of the terms of the settlement [*Rains v. Flinn* (9th Cir. 2005) 428 F3d 893, 901-902] .

14.07[2][c] Rescission Must Be Prompt and Must Include Restoration of All Consideration Received.

Rescission under CC § 39 must be made promptly on discovery of facts supporting the right to rescind [CC § 1691; *Burgess v. Security-First Nat'l Bank* (1941) 44 CA2d 808, 820, 113 P2d 298]. The incapacitated party must restore, or offer to restore, any consideration received under the contract [CC § 1691(b); *Mills v. Kopf* (1963) 216 CA2d 780, 783, 31 CR 80]. There is no right to rescind if the party accepts and retains benefits accruing under the contract [*Saret-Cook v. Gilbert, Kelly, Crowley & Jennett* (1999) 74 CA4th 1211, 1226, 88 CR2d 732].

Jury Instructions:

Lack of Understanding as to Nature of Transaction, see *California Forms of Jury Instruction, Ch. 3G, Instr. MB 300G.69* (Matthew Bender).



Cross References:

Form for complaint to rescind contract, see 14.18.

Form for affirmative defense: contract rescinded, see 14.20.

14.07[3] Evidentiary Requirements for Lack of Capacity Must Be Met.

14.07[3][a] Due Process in Competence Determinations Act Establishes Standards for Judicial

Determination of Capacity. The Due Process in Competence Determinations Act addresses the standards that a court is to use in determining that a person lacks the capacity to contract [see Stats 1995 ch 842, § 12 enacting CC § 39(b) and Prob Code §§ 810-813]. The Act affirms that a person who has a mental disorder still may be capable of contracting [Prob Code § 810(b)]. It establishes a rebuttable presumption affecting the burden of proof that all persons have the capacity to make decisions and to be responsible for their acts or decisions [Prob Code § 810(a)].

14.07[3][b] Determination That Person Lacks Capacity Must Be Based on Evidence of Defect in Mental

Function. A judicial determination that a person is totally without understanding, or is of unsound mind, or suffers from one or more mental deficits so substantial that, under the circumstances, the person should be deemed to lack the legal capacity to perform a specific act, should be based on evidence of a deficit in one or more of the person's mental functions, rather than on a diagnosis of a person's mental or physical disorder [Prob Code § 810(c)].

A determination that a person lacks the capacity to contract must be supported by evidence of a deficit in at least one of the following mental functions [Prob Code § 811(a)]:

- Alertness and attention, including but not limited to:

- ☐ Level of arousal or consciousness.
- ☐ Orientation to time, place, person, and situation.

- ☐ Ability to attend and concentrate.
- Information processing, including but not limited to:
 - ☐ Short- and long-term memory, including immediate recall.
 - ☐ Ability to understand or communicate with others, either verbally or otherwise.
 - ☐ Recognition of familiar objects and familiar persons.
 - ☐ Ability to understand and appreciate quantities.
 - ☐ Ability to reason using abstract concepts.
 - ☐ Ability to plan, organize, and carry out actions in one's own rational self-interest.
 - ☐ Ability to reason logically.
- Thought processes as demonstrated by the presence of the following:
 - ☐ Severely disorganized thinking.
 - ☐ Hallucinations.
 - ☐ Delusions.
 - ☐ Uncontrollable, repetitive, or intrusive thoughts.
- Ability to modulate mood and effect, as demonstrated by the presence of a pervasive and persistent or recurrent state of euphoria, anger, anxiety, fear, panic, depression, hopelessness or despair, helplessness, apathy or indifference, that is inappropriate in degree to the individual's circumstances.

A deficit in one of these mental functions may be considered only if the deficit, by itself, or in combination with one or more other mental function deficits, significantly impairs the person's ability to understand and appreciate the consequences of his or her actions with regard to the type of act or decision in question [*Prob Code § 811(b)*]. In determining whether a person suffers from a deficit in mental function so substantial that the person lacks the capacity to do a certain act, the court may take into consideration the frequency, severity, and duration of periods of impairment [*Prob Code § 811(c)*]. The mere diagnosis of a mental or physical disorder is insufficient in and of itself to support a determination that a person is of unsound mind or lacks the capacity to contract [*Prob Code § 811(d)*].

Consider:

Many old cases set forth standards for determining whether one is totally without understanding or of unsound mind and therefore lacks the capacity to contract under *CC §§ 38 and 39*. These cases probably

should not be relied on. The very specific standards set forth by the Due Process in Competence Determinations Act in *Prob Code* § 811 would seem to render these old cases and standards of historical interest only.

Legal Topics:

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

Contracts LawFormationCapacity of PartiesGeneral OverviewContracts LawFormationCapacity of PartiesMental Capacity



163 of 175 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 14 Attacking or Defending Existence of Contract--Lack of Capacity
II. DETERMINING WHETHER PARTY HAS CAPACITY TO CONTRACT

1-14 MB Practice Guide: CA Contract Litigation 14.08

14.08 Contracts Entered Into by Intoxicated Persons May Be Rescinded If Intoxication Is Shown to Have Deprived Person of Reason and Understanding.

Intoxication that is severe enough to deprive a person of reason and understanding may be sufficient to deprive a person of contractual capacity on a temporary basis [*Walton v. Bank of Cal., Nat'l Ass'n* (1963) 218 CA2d 527, 541, 32 CR 856]. One deprived of reason and understanding by reason of drunkenness is, for the time, unable to consent to the terms of a contract. A person who at the time of making a contract is completely intoxicated may avoid the contract notwithstanding the fact that the intoxicated condition may have been caused by the person's voluntary act and not by the contrivance of the other party to the contract [*Guidici v. Guidici* (1935) 2 C2d 497, 502, 41 P2d 932].

➡ **Cross Reference:**

Form for affirmative defense: defendant was intoxicated, see 14.20.

Legal Topics:

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

Contracts Law Formation Capacity of Parties General Overview Contracts Law Formation Capacity of Parties Mental Capacity Contracts Law Remedies Rescission & Redhibition General Overview



164 of 175 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 14 Attacking or Defending Existence of Contract--Lack of Capacity
II. DETERMINING WHETHER PARTY HAS CAPACITY TO CONTRACT

1-14 MB Practice Guide: CA Contract Litigation 14.09

14.09 Persons Deprived of Civil Rights Have Limited Capacity to Contract.

Persons deprived of civil rights are not capable of contracting [CC § 1556]. Under *Pen Code § 2600*, a prisoner in a state prison, during confinement, may be deprived of rights reasonably related to legitimate penological interests. The right of a prisoner to sell or convey real or personal property while confined is specifically affirmed by statute. However, the Department of Corrections may restrict or prohibit sales or conveyances that are made for business purposes [*Pen Code § 2601(a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawFormationCapacity of PartiesGeneral Overview



165 of 175 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 14 Attacking or Defending Existence of Contract--Lack of Capacity
II. DETERMINING WHETHER PARTY HAS CAPACITY TO CONTRACT

1-14 MB Practice Guide: CA Contract Litigation 14.10

14.10 Business Entities Have Capacity to Contract.

14.10[1] Corporations.

14.10[1][a] Corporations Have General Capacity to Contract. A corporation has the powers of a natural person in the conduct of the corporation's business [*Corp Code* § 207]. Accordingly, a corporation has legal capacity to enter into contracts on its own behalf, separate and distinct from its individual owners [*Corp Code* § 207(g)].

14.10[1][b] Corporation's Powers May Be Suspended for Failure to File Annual Statement or to Pay Taxes. A corporation's right to conduct business, and therefore to enter into contracts, may be suspended for failure to pay taxes, including penalties and interest. A corporation's authority may be suspended if the corporation fails to pay taxes due and payable to the Franchise Tax Board, under the Corporation Tax Law [*R&T Code* § 23001] or under the administrative provisions of the California tax laws [*R&T Code* § 19001 *et seq.*].

A corporation also may be suspended for failure to file the corporation's annual statement of information. In order for a corporation's powers to be suspended on this ground, the corporation must have failed to file a statement for 24 months and must have been assessed a penalty during that time [*Corp Code* § 2205(a)].

On suspension, the corporation may take no action other than to file the statement or to amend its articles of incorporation to change its name [*Corp Code* §§ 2205(c), (d)]. Thus, the capacity to contract is lost while suspended. A suspended corporation may be revived by curing the cause of the suspension [*Corp Code* §§ 2205(d) (filing of statement), 23305 (payment of taxes)].

14.10[1][c] Corporate Officials May Contract on Corporation's Behalf. Any contract or conveyance made in the name of a corporation binds the corporation if [*Corp Code* § 208(b)]:

- It is authorized or ratified by the board of directors; or
- It is done within the scope of authority, actual or apparent, conferred by the board of directors (except as the board's authority is limited by law) or within the agency power of the officer executing it.

Officers are not personally liable on contracts signed by them in the course and scope of employment, for and on behalf

of the corporation, unless they purport to bind themselves individually [*United States Liab. Ins. Co. v. Haidinger-Hayes, Inc.* (1970) 1 C3d 586, 595, 83 CR 418, 463 P2d 770].

Jury Instructions:

Corporation Acts Through Officers and Employees, see *California Forms of Jury Instruction, Ch. 3C, Instr. MB 300C.06* (Matthew Bender).



Cross References:

Discussion of principles of agency in a noncorporate context, see *Ch. 20, Asserting Agency Issues in Contract Actions, 20.07*.

Authority of corporate officers, see Ballantine & Sterling, *California Corporation Laws*, Ch. 5, § 89 (Matthew Bender).

14.10[1][d] Corporate Officers May Have Actual Authority to Bind Corporation. Actual authority to bind a corporation is conferred on corporate officers by either an express or implied grant. An express grant of authority may assume any of three common forms:

- The articles and bylaws may provide for and limit the authority of the corporate officers [*Corp Code* §§ 204(d), 212(b)(6), 312(a), (b)];
- The directors of the corporation may expressly grant authority to the officers by resolution [*Corp Code* § 312(a), (b)]; or
- Authority may be derived from statute.

Authority also may arise from an implied grant. Implied authority refers to those actual powers an officer has that are incidental to and reasonably proper in the performance of express powers [*Garber v. Prudential Ins. Co.* (1962) 203 CA2d 693, 701, 22 CR 123]. Implied authority may be established by showing the transaction to have been appropriate in the ordinary course of business [*Meyer v. Glenmoor Homes, Inc.* (1966) 246 CA2d 242, 253, 54 CR 786], the usages of the company, or the knowledge of the officers' activities by the board [see *Jeppi v. Brockman Holding Co., Inc.* (1949) 34 C2d 11, 15, 206 P2d 847 (informal meeting of directors, of which no minutes were kept, authorized president to sell all assets of a corporation that had been organized do dispose of a decedent's assets)].

14.10[1][e] Corporate Officers May Have Ostensible or Apparent Authority to Contract for Corporation.

Ostensible authority is authority that a principal, intentionally or by want of ordinary care, causes or allows a third person to believe the agent to possess [CC § 2317]. A principal is bound by the acts of an agent acting with ostensible authority to persons who have relied on the agency in good faith and with no want of ordinary care [CC § 2334].

Ostensible authority requires the existence of facts sufficient to raise an estoppel. Its essential elements are [*Meyer v. Glenmoor Homes, Inc.* (1966) 246 CA2d 242, 262, 54 CR 786 ; see *Hartong v. Partake, Inc.* (1968) 266 CA2d 942, 960, 72 CR 722 ; *Meyer v. Ford Motor Co.* (1969) 275 CA2d 90, 102, 79 CR 816]:

- A representation by the principal (in other words, in the corporate context, a representation or other act by the corporation indicating that a particular officer or other employee has authority to act as the corporation's agent);
- Justifiable reliance by the third party; and
- Change of position or injury resulting from that reliance.

► Cross Reference:

Showing elements of estoppel to establish ostensible authority, see *Ch. 20, Asserting Agency Issues in Contract Actions*, 20.14[2][c].

The existence of ostensible authority is predicated on the facts and circumstances of the transaction. It cannot be established merely by the representations and conduct of the officer whose authority is at issue, but requires statements or acts *of the corporation* that cause third parties to believe that the officer has authority [*Lee v. Helmco, Inc.* (1962) 199 CA2d 820, 834, 19 CR 413].

Examples:

- An officer has ostensible authority to act on behalf of a corporation if the corporation, whether intentionally or by want of ordinary care, actively holds out the person as fully authorized to represent the corporation [see *Pasadena Medi-Center Assocs. v. Superior Court* (1973) 9 C3d 773, 777-780, 108 CR 828, 511 P2d 1180].
- Providing an officer with corporate stationery and contract forms with the corporation's name on its letterhead, as well as advertising that the officer is representing the corporation, are sufficient to constitute a "holding out" of the officer [see *Lee v. Helmco, Inc.* (1962) 199 CA2d 820, 834, 19 CR 413].
- An officer will be deemed to have the authority to act if a corporation knowingly permits the officer to make contracts or otherwise transact business on behalf of the corporation and acquiesces in his or her conduct [*Huber v. New York Life Ins. Co.* (1937) 18 CA2d 269, 274, 63 P2d 318].

14.10[1][f] Presumption Exists That Documents Signed by Two Specified Officers Were Signed on Behalf of Corporation. A statutory presumption exists that contracts and other specified documents, when signed by at least two specified corporate officers, were validly signed on the corporation's behalf. This presumption applies unless there is a showing that the other person had actual knowledge that the signing officers had no authority to execute the instrument [*Corp Code* § 313]. The presumption applies to contracts signed by the chair of the board, the president, or any vice president, and any of the following officers [*Corp Code* § 313]:

- Secretary.
- Any assistant secretary.
- Chief financial officer.
- Any assistant treasurer.

The statute provides a conclusive, rather than a merely rebuttable, evidentiary presumption of authority on the part of the specified corporate officers to enter into the agreement [*Snukal v. Flightways Mfg., Inc.* (2000) 23 C4th 754, 782, 98 CR2d 1, 3 P3d 286].

The signature of one person is sufficient to bind the corporation if that person holds corporate offices in each of the two groups listed above, even if the instrument lists only one of his or her offices [*Snukal v. Flightways Mfg., Inc.* (2000) 23 C4th 754, 784, 786-787, 98 CR2d 1, 3 P3d 286].

14.10[1][g] Corporation May Ratify Contract. A contract made in the name of a corporation is valid if ratified by the board of directors [*Corp Code* § 208(b)]. Ratification may be express, as in a formal board resolution approving a contract. Ratification also may be implied; ratifying conduct may consist of affirmative acts, or of mere failure to discharge the agent when the challenged act comes to the principal's attention [*Holland v. Nelson* (1970) 5 CA3d 308, 314, 85 CR 117].

Example:

A dance studio operator's failure to discharge an agent who entered into a contract that violated the Dance Act, and the operator's request for confirmation of the fact that sums from the illegal contract were on deposit, constituted a ratification of the agent's acts in entering into the illegal contract and rendered the operator liable for treble damages imposed for violation of the statute [*Holland v. Nelson* (1970) 5 CA3d 308, 85 CR 117].

 Cross Reference:

Discussion of express and implied ratification of acts of agent, see *Ch. 20, Asserting Agency Issues in Contract Actions*, 20.14[3].

Distinguish--Equal Dignities Rule Inapplicable to Ratification by Corporations:

Under California agency law, a ratification can be made only in the manner that would have been necessary to confer an original authority for the act [*CC* § 2310]. Thus, for example, because an agent is required to have written authority to sell or lease real property [see *CC* § 2309], ratification of the agent's unauthorized sale or lease must also be in writing [*CC* § 2310]. However, corporations can act only through the agency of natural persons, and the requirement that ratification be made in the same manner necessary to confer an original authority for the act is inapplicable to the executive officer of the corporation, who is more than an agent and acts and speaks directly for the corporation in conducting its activities and objects [*Monteleone v. Southern California Vending Corp.* (1968) 264 CA2d 798, 806, 70 CR 703].

 Cross Reference:

Discussion of equal dignities rule, see *Ch. 20, Asserting Agency Issues in Contract Actions*, 20.08[3].

14.10[2] Limited Liability Companies. A limited liability company, like a corporation, has the same powers as a natural person in carrying out the company's business, including the express power to enter into contracts [*Corp Code* § 17003(d)]. Unless the LLC articles of organization vest management of the LLC in a manager or managers, the LLC's business affairs are managed by the members, subject to any restrictions in the articles of organization or operating agreement [*Corp Code* § 17150]. In a member-managed LLC, the act of any member for the apparent purpose of carrying on the normal business or affairs of the LLC is sufficient to bind the LLC, unless the member lacks authority to act and the other party knows that fact [*Corp Code* § 17157(a)].

If the LLC has managers, the managers are responsible for the LLC's business and affairs [*Corp Code* § 17151(b)] and have the power to bind the LLC and execute instruments in its name for the apparent purpose of carrying on the normal business or affairs of the LLC [*Corp Code* § 17157(b)(2)], unless that authority is otherwise restricted. However, no act of a manager in contravention of a restriction on authority will bind the LLC to persons having actual knowledge of the restriction [*Corp Code* § 17157(b), (c)]. When management of an LLC is vested in managers, members are not agents of the LLC and cannot execute instruments on its behalf [*Corp Code* § 17157(b)(1)].

A provision virtually identical to *Corp Code* § 313, discussed in 14.10[1][f], creates a presumption of validity for instruments that are signed by two specified officers of the LLC. This presumption applies unless there is a showing that the other person had actual knowledge that the signing officers had no authority to execute the instrument [*Corp Code* § 17154(c)].

 Cross Reference:

Discussion of operations of limited liability companies, see California Legal Forms, Ch. 12C, Limited Liability Companies (Matthew Bender); or California Forms of Pleading and Practice, Ch. 346, Limited Liability Companies (Matthew Bender).

14.10[3] General Partnerships. A partnership is a separate entity from its partners [*Corp Code § 16201*]. However, each partner is an agent of the partnership for the purpose of its business [*Corp Code § 16301(1)*]. An act of a partner, including the execution of an instrument in the partnership name, for the apparent purpose of carrying on in the ordinary course the partnership business or business of the kind carried on by the partnership, binds the partnership, unless [*Corp Code § 16301(1)*]:

- The partner had no authority to act for the partnership in the particular matter; and
- The person with whom the partner was dealing knew or had received a notification that the partner lacked authority.

An act of a partner that is not apparently for carrying on in the ordinary course the partnership business or business of the kind carried on by the partnership binds the partnership only if the act was authorized by the other partners [*Corp Code § 16301(2)*]; see *Owens v. Palos Verdes Monaco* (1983) 142 CA3d 855, 864, 191 CR 381, overruled on other grounds by *Applied Equip. Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 C4th 503, 521, 28 CR2d 475, 869 P2d 454].

 Cross Reference:

General discussion of nature and characteristics of general partnerships, and rights and obligations of partners, see California Legal Forms, Ch. 15, General Partnerships Pt. A (Matthew Bender); or California Forms of Pleading and Practice, Ch. 400, Partnerships: Governing Statutes (Matthew Bender).

Jury Instructions:

Responsibility of Partnership (or Joint Venture) for Partners' Acts in Usual Course of Business (UPA), see *California Forms of Jury Instruction*, Ch. 3C, Instr. MB 300C.33 (Matthew Bender).

Responsibility of Partnership (or Joint Venture) for Partners' Acts in Usual Course of Business (UPA'94), see *California Forms of Jury Instruction*, Ch. 3C, Instr. MB 300C.34 (Matthew Bender).

14.10[4] Limited Partnerships. The general partner of a limited partnership has the same rights and powers as a partner in a general partnership [*Corp Code § 15643(a)*]. Accordingly, the general partner of a limited partnership may enter into contracts in the partnership's name [*Corp Code § 16301(1)*].

Limited partners, as passive investors in the partnership, do not have the authority to contract on the partnership's behalf. As a condition of maintaining limited liability for the partnership's obligations, they are not permitted to participate in the control of its business [*Corp Code § 15632(a)*]. Although limited partners are permitted to perform specified activities without being deemed to participate in the control of the business [*see Corp Code § 15632(b)*], contracting on behalf of the partnership is not one of those activities. However, a limited partner who participated in the control of the business without being named as a general partner may be held liable as a general partner to persons who transact business with the limited partnership with actual knowledge of that partner's participation in control and with the reasonable belief, based on the limited partner's conduct, that the partner is a general partner at the time of transaction [*Corp Code § 15632(a)*]. The statute does not specify whether the partnership itself could also be bound by the acts of such a limited partner, but it is logical to assume that the question would be decided on agency law principles; in other words, whether or not the limited partner had actual or ostensible authority to act on the partnership's behalf.

► **Cross References:**

Actual and ostensible authority, see *Ch. 20, Asserting Agency Issues in Contract Actions*, 20.09[1], [2].

Operation of limited partnerships, see California Legal Forms, Ch. 15A, Formation of Limited Partnerships (Matthew Bender).

14.10[5] Unincorporated Associations. An unincorporated association may acquire, manage, encumber, or transfer interests in real or personal property in the name of the association [*Corp Code § 18105*]. Property acquired by or for the association is the property of the association and not its members [*Corp Code § 18110*]. Any acquisition, transfer or encumbrance of real property must be executed by the association's president, secretary, other comparable officers, or some other party authorized by resolution to execute the agreement in question [*Corp Code § 18115*].

► **Cross Reference:**

General discussion of law governing unincorporated associations, see California Legal Forms, Ch. 13A, Nonprofit Unincorporated Associations (Matthew Bender); or California Forms of Pleading and Practice, Ch. 61, Associations and Clubs (Matthew Bender).

Jury Instructions:

Non-Person Party, see Judicial Council of California *Civil Jury Instructions*, CACI No. 104 (LexisNexis Matthew Bender).

Non-Person Party, see *Judicial Council of California Civil Jury Instructions*, CACI No. 5006 (LexisNexis Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawFormationCapacity of PartiesGeneral Overview



166 of 175 DOCUMENTS

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Chapter 14 Attacking or Defending Existence of Contract--Lack of Capacity
II. DETERMINING WHETHER PARTY HAS CAPACITY TO CONTRACT

1-14 MB Practice Guide: CA Contract Litigation 14.11

14.11 Guardians, Conservators, and Trustees Have Capacity to Contract on Behalf of Wards, Conservatees, and Beneficiaries.

A conservator or guardian has management and control of the estate of the ward or conservatee, subject to any limitations set forth in the order from the appointing court [*Prob Code § 2401(a)*]. In order to carry out their responsibilities, guardians and conservators are granted specific powers relating to the support of the ward or conservatee [*see Prob Code § 2420*], including:

- The maintenance and management of estate assets [*see Prob Code §§ 2405-2406, 2462, 2500-2507*].
- The power to sell, encumber, convey, exchange, invest, purchase, and otherwise dispose of estate property [*see Prob Code §§ 850 et seq., 2540 et seq., 2550 et seq., 2570 et seq., 2580 et seq.*].
- The power to request authorization to exercise powers independent of direct court supervision and approval [*see Prob Code § 2590 et seq.*], including a general right to contract, without obtaining prior authorization from the appointing court [*see Prob Code § 2451.5(a)*].

A trustee's authority over trust assets is governed by *Prob Code § 16220 et seq.* Trustees are given express authority to execute and deliver all instruments needed to accomplish or facilitate the exercise of the powers vested in the trustee [*Prob Code § 16248*].

Legal Topics:

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

Contracts Law Formation Capacity of Parties General Overview Estate, Gift & Trust Law Conservators & Guardians Conservators General Overview Estate, Gift & Trust Law Conservators & Guardians Conservators Duties & Rights Estate, Gift & Trust Law Conservators & Guardians Guardians for Minors Estate, Gift & Trust Law Conservators & Guardians Testamentary Guardians



167 of 175 DOCUMENTS

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Chapter 14 Attacking or Defending Existence of Contract--Lack of Capacity

II. DETERMINING WHETHER PARTY HAS CAPACITY TO CONTRACT

1-14 MB Practice Guide: CA Contract Litigation 14.12

14.12 Persons Who Lack Capacity Remain Obligated to Pay for Necessities.

Both minors and persons found to be entirely without understanding must pay for necessities, even if they are otherwise unable to contract. A person entirely without understanding is liable for the reasonable value of things furnished to the person necessary for the support of the person or the person's family [CC § 38]. Similarly, minors are prohibited from disaffirming a contract for necessities when all of the following requirements are met:

- The contract is to pay the reasonable value of things necessary for the support of the minor or the minor's family;
- These things have been actually furnished to the minor or to the minor's family; and
- The contract is entered into by the minor when not under the care of a parent or guardian able to provide for the minor or the minor's family [*Fam Code § 6712*].

Legal Topics:

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

Contracts LawFormationCapacity of PartiesGeneral OverviewContracts LawFormationCapacity of PartiesAgeContracts LawFormationCapacity of PartiesMental Capacity



168 of 175 DOCUMENTS

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Chapter 14 Attacking or Defending Existence of Contract--Lack of Capacity
III. RAISING ABSENCE OF CAPACITY TO CONTRACT IN PLEADINGS

1-14 MB Practice Guide: CA Contract Litigation 14.13

14.13 CHECKLIST: Raising Absence of Capacity to Contract in Pleadings.

☐ Raise lack of capacity by most appropriate of following methods:

☐ As an affirmative defense in answer to complaint.

Authority:

CCP § 430.30(b); Evid Code § 522; Prob Code § 810(a); San Francisco Credit Clearing-House v. MacDonald (1912) 18 CA 212, 217, 122 P 964

Discussion:

See 14.14

Form:

See 14.20 (affirmative defenses alleging lack of capacity to contract)

☐ By a complaint alleging invalidity of contract, such as complaint for declaratory relief or rescission.

Authority:

Fetterley v. Randall (1928) 92 CA 411, 416-417, 268 P 434 ; LeBaron v. Berryessa Cattle Co. (1926) 78 CA 536, 541-542, 248 P 779

Discussion:

See 14.15

Forms:

See 14.18, 14.19 (complaints to avoid consequences of contract based on incapacity)

☐ By demurrer to pleading or motion for judgment on the pleadings.

Authority:

CCP §§ 430.10(e), 430.20, 430.30, 438(c)(1)

Discussion:

See 14.16

- ☐ By motion for summary judgment.

Authority:

CCP § 437c

Discussion:

See 14.17

Legal Topics:

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

Civil Procedure Pleading & Practice Defenses, Demurrers & Objections Affirmative Defenses General Overview Contracts
 Law Defenses General Overview Contracts Law Formation Capacity of Parties General Overview Contracts
 Law Formation Capacity of Parties Age Contracts Law Formation Capacity of Parties Mental Capacity



169 of 175 DOCUMENTS

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Chapter 14 Attacking or Defending Existence of Contract--Lack of Capacity
 III. RAISING ABSENCE OF CAPACITY TO CONTRACT IN PLEADINGS

1-14 MB Practice Guide: CA Contract Litigation 14.14

14.14 Lack of Capacity to Contract May Be Raised As Affirmative Defense.

A defendant who lacks capacity to contract may raise incapacity as an affirmative defense to a complaint seeking to enforce the contract [CCP § 430.30(b); see, e.g., *San Francisco Credit Clearing-House v. MacDonald* (1912) 18 CA 212, 217, 122 P 964]. The presumption that all persons have the capacity to make decisions and to be responsible for their acts or decisions places the burden of proof on the person alleging incapacity [Prob Code § 810(a)]. The person claiming incapacity due to insanity has the burden of proof on that issue [Evid Code § 522].

Consider:

In the case of a contract involving a minor, raising minority alone as an affirmative defense should be sufficient only if the contract is one that a minor is totally disabled by law from entering into, such as a contract regarding an interest in real property [see *Fam Code* § 6701 (discussed in 14.05[3])]. In most cases, the minor must take the affirmative step of disaffirming the contract [see *Fam Code* § 6710 (discussed in 14.05[1])]. Thus, the fact of a sufficient disaffirmance would have to be pled as an affirmative defense [see, e.g., *Deason v. Jones* (1935) 7 CA2d 482, 483, 45 P2d 1025 ; form, see 14.20].

 Cross References:

Form for affirmative defenses raising lack of capacity to contract, see 14.20.

Pleading affirmative defenses, see *Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure*, 14.18, 14.19; or *California Forms of Pleading and Practice*, §§ 26.17[7], 26.223, 26.251 (*Matthew Bender*).

**Search California Points and Authorities:**

Use *lexis.com* to search for materials in California Points and Authorities on capacity:

• Legal > States Legal-U.S. > California > Search Analysis & CLE Materials > CA Treatises & Analytical Materials > California Points & Authorities



Sample Search: In California Points and Authorities, try the following search to find discussion about capacity to form a contract: *capacity /10 contract!*.

Legal Topics:

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

Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsAffirmative DefensesGeneral OverviewContracts
LawDefensesGeneral OverviewContracts LawFormationCapacity of PartiesGeneral OverviewContracts
LawFormationCapacity of PartiesAgeContracts LawFormationCapacity of PartiesMental Capacity



170 of 175 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 14 Attacking or Defending Existence of Contract--Lack of Capacity
III. RAISING ABSENCE OF CAPACITY TO CONTRACT IN PLEADINGS

1-14 MB Practice Guide: CA Contract Litigation 14.15

14.15 Person Lacking Capacity May Bring Action Alleging Invalidity of Contract.

A minor or other person lacking the capacity to contract may bring an action for rescission or to recover amounts paid on the contract [see, e.g., *LeBaron v. Berryessa Cattle Co. (1926) 78 CA 536, 544, 248 P 779*]. The complaint must allege facts that establish the grounds for the plaintiff's incapacity. The complaint also must allege that the plaintiff was incapacitated at the time the contract was made. If the plaintiff fails to include these allegations, a defendant's demurrer to the complaint will be sustained [*Fetterley v. Randall (1928) 92 CA 411, 416-417, 268 P 434*].

► **Cross Reference:**

Forms for complaints to avoid the consequences of a contract based on lack of capacity, see *14.18, 14.19*.

Legal Topics:

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

Contracts LawFormationCapacity of PartiesGeneral OverviewContracts LawFormationCapacity of PartiesAgeContracts LawFormationCapacity of PartiesMental Capacity



171 of 175 DOCUMENTS

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Chapter 14 Attacking or Defending Existence of Contract--Lack of Capacity
III. RAISING ABSENCE OF CAPACITY TO CONTRACT IN PLEADINGS

1-14 MB Practice Guide: CA Contract Litigation 14.16

14.16 Lack of Capacity May Be Raised by Demurrer or Motion for Judgment on the Pleadings If Incapacity Appears in Pleading.

If the incapacity of the defendant appears on the face of the complaint to enforce a contract, the defendant may file a demurrer to the complaint [CCP §§ 430.10(e), 430.30(a)] or a motion for judgment on the pleadings [CCP § 438(c)(1)(B)(ii)].

Example:

A complaint alleges that the defendant had a conservator of the estate at the time that the contract was entered into. The contract is attached and shows the conservatee's signature, but not the conservator's. The complaint may be attacked by demurrer or motion for judgment on the pleadings. [see CC § 40 (discussed in 14.06[1])].

Similarly, in an action by the incapacitated person alleging the invalidity of a contract, if the incapacity is established on the face of the answer, the answer may be attacked by demurrer [CCP §§ 430.20, 430.30(a)] or the plaintiff may move for judgment on the pleadings [CCP § 438(c)(1)(A)].

➡ Cross Reference:

Demurrers and motions for judgment on the pleadings, see Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, Ch. 11, Demurrers and Motions for Judgment on the Pleadings; or California Forms of Pleading and Practice, Ch. 206, Demurrers and Motions for Judgment on the Pleadings (Matthew Bender).

Legal Topics:

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

Civil Procedure Pleading & Practice Defenses, Demurrers & Objections Demurrers Civil Procedure Pretrial Judgments Judgment on the Pleadings Contracts Law Formation Capacity of Parties General Overview



172 of 175 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 14 Attacking or Defending Existence of Contract--Lack of Capacity
III. RAISING ABSENCE OF CAPACITY TO CONTRACT IN PLEADINGS

1-14 MB Practice Guide: CA Contract Litigation 14.17

14.17 Lack of Capacity May Be Raised by Summary Judgment If Incapacity Is Established by Indisputable Evidence.

If the incapacity of a party does not appear from the face of the pleading but can be established by indisputable evidence, the action may be resolved by a motion for summary judgment [*see CCP § 437c*]. The motion must be granted if the papers submitted show that there is no triable issue as to any material fact, and that the moving party is entitled to judgment as a matter of law [*CCP § 437c(c)*].

Example:

Plaintiff sues for damages resulting from defendant's breach of contract for the purchase of real property. The defendant's declarations and offers of proof show conclusively that the defendant was a minor at the time the contract was entered into. Summary judgment for the minor defendant should be granted [*see Fam Code § 1601* (discussed in 14.05[3])].

➡ Cross Reference:

Motions for summary judgment, see *Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure*, 38.03 -38.18; or California Forms of Pleading and Practice, Ch. 537, Summary Judgment (Matthew Bender).

Legal Topics:

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

Civil ProcedureSummary JudgmentGeneral OverviewCivil ProcedureSummary JudgmentEvidenceCivil ProcedureSummary JudgmentMotions for Summary JudgmentGeneral OverviewContracts LawFormationCapacity of PartiesGeneral Overview



173 of 175 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 14 Attacking or Defending Existence of Contract--Lack of Capacity
IV. FORMS

1-14 MB Practice Guide: CA Contract Litigation 14.18

14.18 Complaint to Rescind Contract of Incompetent--Capacity Not Judicially Determined.**Complaint to Rescind Contract of Incompetent--Capacity Not Judicially Determined.**

[Name of attorney]

_____[Street address]

_____[City, state, and ZIP]

_____[Area code and phone number]

_____[State Bar no. of attorney]

Attorney for _____[name of party]

SUPERIOR COURT OF CALIFORNIA,

COUNTY OF _____

[name(s)] _____,

Plaintiff(s)

vs.

[name(s)] _____

[and DOES 1 THROUGH _____]

Defendant(s)

)

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NO.

COMPLAINT TO RESCIND CONTRACT OF IN-
COMPETENT

[LIMITED CIVIL CASE]

[Amount Demanded]

_____(Exceeds or Does Not
Exceed) \$10,000]

Plaintiff _____[name], an incompetent person, through _____[name], his/her
guardian ad litem, alleges:

1. Plaintiff is an individual residing in _____ [city, if any, and county], California, [in the (name of judicial district, if any) _____].

2. On _____ [date], _____ [name] was appointed guardian ad litem for Plaintiff by the _____ [above-entitled or specify other] Court for purposes of this action.

[For an individual defendant]

3. Defendant _____ [name] is an individual residing in _____ [city, if any, and county], California [in the (name of judicial district, if any) _____] [and doing business therein under the fictitious business name of _____].

[OR, for a domestic corporation or domestic limited liability company]

3. Defendant _____ [name] is, and at all times herein mentioned was, a _____ [corporation or limited liability company] organized and existing under the laws of California [, with its principal place of business in _____ (city, if any, and county), California (, in the _____ [name of judicial district, if any])].

[OR, for a foreign corporation or foreign limited liability company]

3. Defendant _____ [name] is, and at all times herein mentioned was, a _____ [corporation or limited liability company] organized and existing under the laws of _____ [state or foreign country], with its principal place of business in _____ (city, if any, and county), California (, in the _____ [name of judicial district, if any])].

[OR, for a general or limited partnership or an unincorporated association]

3. Defendant _____ [name] is, and at all times herein mentioned was, _____ [a partnership or an unincorporated association] sued herein under the name _____ [it has assumed or by which it is known], with its principal place of business in _____ (city, if any, and county), California (, in the _____ [name of judicial district, if any]). [Defendants (names of individual partners or members) _____ are, and at all times herein mentioned were, members of that _____ (partnership or unincorporated association) (and are, and at all times herein mentioned were, residents of _____ County, California)].

[CONTINUE]

4. Plaintiff is ignorant of the true names and capacities of defendants sued herein as DOES 1 through _____ [numeral, e.g., 50], inclusive, and therefore sues these defendants by these fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when ascertained. [Plaintiff is informed and believes and thereon alleges that each of the fictitiously named Defendants is responsible in some manner for the occurrences herein alleged, and that Plaintiff's damages as herein alleged were proximately caused by those defendants.]

5. On or about _____ [date], at _____, California, Plaintiff and Defendant entered into _____ [a written or an oral] contract under which _____ [describe relevant terms of the contract, attaching a copy if available, e.g., Plaintiff was to purchase from Defendant a 1994 Mercedes 500 SEL automobile, California registration number 13240606, for the sum of \$20,000]. [A copy of the contract is attached as Exhibit "A" and incorporated by reference.]

6. Under the terms of the contract, on or about _____ [date], _____ [describe Plaintiff's performance, e.g., Plaintiff personally delivered to Defendant cashier's check number 1209 drawn on First California Bank and payable to Defendant in the amount of \$20,000.00, the full purchase price].

7. On or about _____ [date], Defendant _____ [describe Defendant's performance, e.g., delivered possession of the automobile to Plaintiff, along with the registration and certificate of ownership that he had properly endorsed].

8. At the time Plaintiff and Defendant entered into the contract, Plaintiff was a person of unsound mind, but not entirely without understanding, and was substantially unable to manage his/her own financial resources or resist fraud or undue influence.

9. Plaintiff has been damaged in that _____ [set forth any facts showing harm from bargain, e.g., he parted with \$20,000 that was needed for Plaintiff's care, maintenance, and support].

10. Service of this Complaint shall constitute notice to Defendant that Plaintiff has rescinded their contract. Plaintiff stands willing to _____ [set forth plaintiff's acts to restore any consideration received from the defendant, e.g., return the Mercedes to Defendant on Defendant's return of Plaintiff's \$20,000].

WHEREFORE, Plaintiff prays judgment as follows:

1. That this Court declare that the contract as set forth above has been rescinded;

2. That Defendant be ordered to pay Plaintiff the following sums:

a. The consideration paid by Plaintiff in the sum of \$ _____, with interest thereon at [specify legal or agreed rate] _____ percent per annum from [date of rescission] _____;

[b. The sums paid, or which will be paid, by Plaintiff for

_____ [enumerate other items for which
 Plaintiff will have to be reimbursed to be placed in the position he or she was in prior to the execution of the contract
 being rescinded, e.g., storage of the vehicle]
 _____ [in the sum of
 \$ _____ or according to proof], with interest
 thereon at [specify legal or agreed rate]
 _____ percent per annum from [date of
 rescission] _____;

[3. For reasonable attorney's fees as _____
 (provided for in the contract or authorized by statute) according to proof.]

4. For costs of suit herein incurred; and

5. For such other relief as the Court deems proper.

Dated: _____.

[firm name, if any] _____

By: [signature] _____

[typed name] _____

 Attorney for Plaintiff

[ADD following verification, if applicable]

VERIFICATION

I am the plaintiff in the above entitled action; I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein stated on information and belief, and, as to those matters, I believe it to be true.

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

[date] _____

[signature] _____

[typed name] _____

NOTES.

Authority:

CC § 39

Rescission of Contract of Person of Unsound Mind but Not Entirely Without Understanding:

See 14.07[2]

Action for Rescission of Contract:

See 14.15

Legal Topics:

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

Civil Procedure Pleading & Practice Pleadings Complaints Requirements Contracts Law Formation Capacity of Parties General Overview Contracts Law Formation Capacity of Parties Age Contracts Law Formation Capacity of Parties Mental Capacity Contracts Law Remedies Rescission & Redhibition General Overview



174 of 175 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 14 Attacking or Defending Existence of Contract--Lack of Capacity
IV. FORMS

1-14 MB Practice Guide: CA Contract Litigation 14.19

14.19 Conservator's Complaint to Declare Contract of Conservatee Void.**Conservator's Complaint to Declare Contract of Conservatee Void.**

[Name of attorney]

_____[Street address]

_____[City, state, and ZIP]

_____[Area code and phone number]

_____[State Bar no. of attorney]

Attorney for _____[name of party]

SUPERIOR COURT OF CALIFORNIA,

COUNTY OF _____

[name(s)] _____,

Plaintiff(s)

vs.

[name(s)] _____

[and DOES 1 THROUGH

_____]

_____]

Defendant(s)

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)

)

NO.

COMPLAINT TO DECLARE CONTRACT OF
CONSERVATEE VOID

[LIMITED CIVIL CASE]

[Amount Demanded

_____(Exceeds or Does Not
Exceed) \$10,000]

Plaintiff _____[name of conservator] alleges:

1. Plaintiff is an individual residing in _____[city, if any, and county], California, [in the (name of

judicial district, if any) _____. On _____ [date], Plaintiff was appointed conservator of the [person and] estate of _____ [name of conservatee] ("Conservatee") by the _____ Court of _____; and on _____ [date], letters of conservatorship were issued. [A certified copy of those letters is attached as Exhibit "A" and incorporated by reference.]

[For an individual defendant]

2. Defendant _____ [name] is an individual residing in _____ [city, if any, and county], California [in the (name of judicial district, if any) _____] [and doing business therein under the fictitious business name of _____].

[OR, for a domestic corporation or domestic limited liability company]

2. Defendant _____ [name] is, and at all times herein mentioned was, a _____ [corporation or limited liability company] organized and existing under the laws of California [, with its principal place of business in _____ (city, if any, and county), California (, in the _____ [name of judicial district, if any])].

[OR, for a foreign corporation or foreign limited liability company]

2. Defendant _____ [name] is, and at all times herein mentioned was, a _____ [corporation or limited liability company] organized and existing under the laws of _____ [state or foreign country], with its principal place of business in _____ (city, if any, and county), California (, in the _____ [name of judicial district, if any])].

[OR, for a general or limited partnership or an unincorporated association]

2. Defendant _____ [name] is, and at all times herein mentioned was, _____ [a partnership or an unincorporated association] sued herein under the name _____ [it has assumed or by which it is known], with its principal place of business in _____ (city, if any, and county), California (, in the _____ [name of judicial district, if any]). [Defendants (names of individual partners or members) _____ are, and at all times herein mentioned were, members of that _____ (partnership or unincorporated association) (and are, and at all times herein mentioned were, residents of _____ County, California)].

[CONTINUE]

3. Plaintiff is ignorant of the true names and capacities of defendants sued herein as DOES 1 through _____ [numeral, e.g., 50], inclusive, and therefore sues these defendants by these fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when ascertained. [Plaintiff is informed and believes and thereon alleges that each of the fictitiously named defendants is responsible in some manner for the occurrences herein alleged, and that Plaintiff's damages as herein alleged were proximately caused by those defendants.]

4. On or about _____ [date after conservatorship was established], at _____, California, Conservatee and Defendant entered into _____ [a written or an oral] contract under which _____ [describe relevant terms of the contract, attaching a copy if available, e.g., Conservatee paid to Defendant the sum of \$99.00 for a wireless phone and further agreed to pay to Defendant the sum of \$55.00 monthly for wireless phone service for a period of three years]. [A copy of the contract is attached as Exhibit "A" and incorporated by reference.]

5. Under the terms of the contract, on or about _____ [date], _____ [describe conservatee's performance, e.g., Conservatee personally delivered to Defendant check number 1209 drawn on First California Bank and payable to Defendant in the amount of \$99.00].

6. On or about _____ [date], Defendant _____ [describe defendant's performance or nonperformance, e.g., delivered the wireless phone to Conservatee].

7. At the time Conservatee and Defendant entered into the contract, Conservatee had previously been judicially determined in the conservatorship proceeding above referenced to be a person of unsound mind who could make no conveyance or other contract until his/her restoration to capacity.

8. Plaintiff has been damaged in that the conservatorship estate _____ [set forth facts showing loss to conservatorship, e.g., has been diminished in the sum of \$99.00, which Conservatee expended without authorization, and Defendant believes it has an ongoing right to receive a monthly payment from the conservatee for its services].

WHEREFORE, Plaintiff prays judgment as follows:

1. That this Court declare that the contract above referenced is and always has been void in its entirety;

2. That Defendant be ordered to pay Plaintiff the following sums:

a. The consideration paid by Plaintiff in the sum of \$ _____, with interest thereon at [specify legal or agreed rate] _____ percent per annum from [date of rescission] _____;

[b. The sums paid, or which will be paid, by Plaintiff for [enumerate other items for which Plaintiff will have to be reimbursed to be placed in the position he or she was in prior to the execution of the contract being rescinded]

_____ [in the sum of \$ _____ or according to proof], with interest

thereon at *[specify legal or agreed rate]*

_____ percent per annum from *[date of rescission]* _____;

[3. For reasonable attorney's fees as _____
(provided for in the contract or authorized by statute), according to proof.]

4. For costs of suit herein incurred; and

5. For such other relief as the Court deems proper.

Dated: _____.

[firm name, if any] _____

By: *[signature]* _____

[typed name] _____

Attorney for Plaintiff

[ADD following verification, if applicable]

VERIFICATION

I am the plaintiff in the above entitled action; I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein stated on information and belief, and, as to those matters, I believe it to be true.

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

[date] _____

[signature] _____

[typed name] _____

NOTES.

Authority:

CC § 40; Prob Code § 1872

Person Adjudicated Incompetent Lacks Capacity to Contract:

See 14.06[1]

Establishment of Conservatorship Constitutes Adjudication of Incompetency:

See 14.06[2]

Action for Invalidity of Contract:

See 14.15

Legal Topics:

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

Civil ProcedurePleading & PracticePleadingsComplaintsRequirementsCivil ProcedureDeclaratory Judgment
ActionsState JudgmentsGeneral OverviewContracts LawFormationCapacity of PartiesMental CapacityContracts
LawRemediesGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansConservatorsDuties & Rights



175 of 175 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 14 Attacking or Defending Existence of Contract--Lack of Capacity
IV. FORMS

*1-14 MB Practice Guide: CA Contract Litigation 14.20***14.20 Answer With Affirmative Defenses--Lack of Capacity.****Answer With Affirmative Defenses--Lack of Capacity.**

[Name of attorney]

_____[Street address]

_____[City, state, and ZIP]

_____[Area code and phone number]

_____[State Bar no. of attorney]

Attorney for _____[name of party]

SUPERIOR COURT OF CALIFORNIA,

COUNTY OF _____

[name] _____,

Plaintiff,

vs.

[name] _____,

Defendant.

)

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)

)

NO.

ANSWER OF

_____[identify defendant, e.g.,
DEFENDANT MARY JONES] TO COMPLAINT
OF

_____[identify plaintiff, e.g.,
PLAINTIFF JOHN SMITH]
[LIMITED CIVIL CASE]
Judge:

Department:

Defendant answers the complaint as follows:

[Include general denial below, or set forth, in numbered paragraphs, specific denials, admissions, and allegations in response to those in complaint, in the order in which they are alleged in complaint:]

1. Pursuant to *Code of Civil Procedure Section 431.30(b)(1)*, Defendant generally denies each and every allegation of Plaintiff's Complaint, including all the purported causes of action contained therein, and further denies that Plaintiff is entitled to any equitable or legal relief, or any damages whatsoever.

[Defendant asserts the following affirmative defenses. By doing so, Defendant shall not be deemed to have assumed the burden of proving any matters that otherwise would be Plaintiff's burden.]

[Allege any affirmative defenses, e.g.,]

[EITHER, if alleging that defendant generally lacked capacity to contract]

FIRST AFFIRMATIVE DEFENSE

(Lack of Capacity to Contract)

2. Defendant alleges that at the time when the contract alleged in the Complaint was entered into, he/she did not have the legal capacity to contract because, at that time, he/she was a _____ [minor or person of unsound mind or person deprived of civil rights].

[OR, if alleging that defendant was an incompetent]

FIRST AFFIRMATIVE DEFENSE

(Defendant Incompetent to Contract)

2. Defendant alleges that at the time when the contract alleged in the Complaint was entered into, he/she was a person entirely without understanding and was not competent to make a contract of any kind.

[OR, if alleging that defendant was of unsound mind but not entirely without understanding, and has rescinded the contract]

FIRST AFFIRMATIVE DEFENSE

(Defendant Is of Unsound Mind and Has Rescinded Contract)

2. Defendant alleges that at the time when the contract alleged in the Complaint was entered into, he/she was a person of unsound mind, but not entirely without understanding, substantially unable to manage his/her own financial resources

or resist fraud or undue influence, and that he/she has rescinded the contract.

[OR, if alleging that contract was void because it was made after a conservator had been appointed for defendant]

FIRST AFFIRMATIVE DEFENSE

(Defendant Was Conservatee At Time Contract Was Entered Into)

2. Defendant alleges that at the time when the contract alleged in the Complaint was entered into, he/she had been judicially determined to be a person of unsound mind and lacking the capacity to contract, and

_____ [name] had been appointed his/her conservator of the estate by order of the

_____ Court of

_____, Case No.

_____.

[OR, if alleging that contract was void because it was made while defendant was a minor]

FIRST AFFIRMATIVE DEFENSE

(Contract Void Because Defendant Was Minor)

2. Defendant alleges that at the time when the contract alleged in the Complaint was entered into, he/she was a minor under the age of 18 years, and the contract was one relating to

_____ [real property or personal property not in the immediate possession or control of the Defendant].

[OR, if alleging that no contract exists because defendant was a minor when contract was entered into and subsequently disaffirmed the contract]

FIRST AFFIRMATIVE DEFENSE

(Contract Disaffirmed After Defendant Reached Age of Majority)

2. Defendant alleges that at the time when the contract alleged in the Complaint was entered into, he/she was a minor under the age of 18 years, and on _____ [date], Defendant expressly disaffirmed the contract [in writing]. [A copy of Defendant's written disaffirmance is attached as Exhibit

_____ to this Answer.]

[OR, if alleging that no contract exists because defendant was intoxicated at the time of entering into the contract]

FIRST AFFIRMATIVE DEFENSE

(Defendant Intoxicated At Time of Entering Into Contract)

2. Defendant alleges that at the time when the contract alleged in the Complaint was entered into, he/she was intoxicated so severely that he/she was totally deprived of reason and understanding with regard to the transaction and was unable to consent to the terms of a contract.

[ADD additional affirmative defenses, if any]

[CONTINUE]

WHEREFORE, defendant prays as follows:

1. That Plaintiff take nothing by his/her complaint herein;
2. For costs of suit; and
3. For such other and further relief as the court deems proper.

Dated: _____.

[firm name, if any] _____

By: [signature] _____

[typed name] _____

Attorney for Defendant

[ADD following verification, if applicable]

VERIFICATION

I am the defendant in the above entitled action; I have read the foregoing answer and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein stated on information and belief, and, as to those matters, I believe it to be true.

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

[date] _____

[signature] _____

[typed name] _____

NOTES.

Authority:

CC §§ 38 (persons entirely without understanding), 39 (persons of unsound mind but not entirely without understanding), 40 (contracts entered into after appointment of conservator), 1556 (lack of capacity to contract); Fam Code §§ 6701 (contracts by minors; when void), 6710 (disaffirmance of contract by minor); Prob Code § 1872 (contracts entered into after appointment of conservator); see *Walton v. Bank of Cal.*, Nat'l Ass'n (1963) 218 CA2d 527, 541, 32 CR 856 ; *Guidici v. Guidici* (1935) 2

C2d 497, 502, 41 P2d 932 (contracts by intoxicated persons)

Persons Lacking Capacity to Contract:

See 14.04

Capacity of Person Entirely Without Understanding:

See 14.07[1]

Capacity of Person Not Entirely Without Understanding:

See 14.07[2]

Person Adjudicated Incompetent Lacks Capacity to Contract:

See 14.06[1]

Establishment of Conservatorship Constitutes Adjudication of Incompetency:

See 14.06[2]

Void Contracts of Minors:

See 14.05[3]

Minor's Right to Disaffirm Contract:

See 14.05[1]

Lack of Capacity Due to Intoxication:

See 14.08

Lack of Capacity to Contract May Be Raised As an Affirmative Defense:

See 14.14

Legal Topics:

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

Civil Procedure Pleading & Practice Defenses, Demurrers & Objections Affirmative Defenses General Overview Civil Procedure Pleading & Practice Pleadings Answers Contracts Law Formation Capacity of Parties General Overview Contracts Law Formation Capacity of Parties Age Contracts Law Formation Capacity of Parties Mental Capacity



1 of 193 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 15 Attacking or Defending Existence of Contract--Failure to Comply With Applicable Formalities

1-15 MB Practice Guide: CA Contract Litigation 15.syn

§ 15.syn Synopsis to Chapter 15: Attacking or Defending Existence of Contract--Failure to Comply With Applicable Formalities

15.01 Scope.

15.02 Objective and Strategy for Attacking Existence of Contract Based on Lack of Formalities.

15.03 Objective and Strategy for Countering Claim That Contract Lacks Necessary Formalities.

15.04 CHECKLIST: Determining Whether Contract Complies With Statute of Frauds.

15.04[1] Determining Whether Statute of Frauds Requires Writing.

15.04[2] Determining Whether Particular Evidence of Contract Is Sufficient to Satisfy Statute of Frauds.

15.05 Statute of Frauds Imposes Writing Requirement.

15.05[1] Writing Requirement Applies to Specified Types of Contracts.

15.05[2] Exceptions to Writing Requirement Exist.

15.05[3] Statute of Frauds Applies Only to Types of Contracts Specified in Statute.

15.05[4] Statute of Frauds Is Designed to Prevent False Contract Claims.

15.05[5] Statute of Frauds Is Defensive Evidentiary Rule.

15.05[6] Statute of Frauds Is Subject to Equitable Principles.

15.06 Specific Rules Apply to Each Category for Which Statute Requires Writing.

15.06[1] Contract That Cannot Be Performed Within One Year.

15.06[1][a] Any Possibility of Performance in One Year Exempts Contract From Statute.

15.06[1][b] Contract of Indefinite Duration Is Not Covered by Statute Unless Terms of Contract Foreclose Performance Within One Year.

15.06[1][c] One-Year Period Begins on Date After Parties Make Contract.

15.06[2] Contract That Promises to Answer for Debt, Default, or Miscarriage of Another.

15.06[2][a] Promise to Answer for Obligation of Another Ordinarily Must Be in Writing.

15.06[2][b] Exception When Promise to Answer for Obligation of Another Actually Constitutes Original Obligation of Promisor.

15.06[3] Contract for Sale or Lease of Interest in Real Property for Longer Than One Year.

15.06[3][a] Contract for Sale of Interest in Real Property Must Be in Writing.

15.06[3][b] Contract for Real Property Lease Longer Than One Year Must Be in Writing.

15.06[4] Contract That Authorizes or Employs Agent or Other Person to Purchase or Sell Real Estate or to Lease Real Estate for Longer Than One Year.

15.06[5] Contract That Cannot Be Performed Within Lifetime of Promisor.

15.06[6] Contract by Purchaser of Real Property to Pay Indebtedness Secured by Mortgage or Deed of Trust.

15.06[6][a] Agreement to Pay Secured Indebtedness Ordinarily Must Be in Writing.

15.06[6][b] Exception When Agreement to Pay Secured Indebtedness Is Contained in Conveyance.

15.06[7] Contract for Commercial Loan or Extension of Credit of More Than \$100,000.

15.07 Sufficiency of Writing Required by Statute of Frauds.

15.07[1] Writings Must Satisfy Basic Criteria of Statute.

15.07[2] Party to Be Charged Must Sign Writing.

15.07[2][a] Party to Be Charged Generally Must Authenticate Writing.

15.07[2][b] Party May Direct Another Person to Sign.

15.07[3] Writing Is Sufficient If Agent of Party to Be Charged Signed Writing.

15.07[3][a] Agent's Signature May Satisfy Statute of Frauds.

15.07[3][b] Agent Must Have Authority to Sign Contract.

15.07[3][c] Unauthorized Agent's Signature May Subsequently Be Ratified.

15.07[4] Handwritten Signature Is Not Required for Authentication.

15.07[5] Contract May Be Proved by One Writing or Series of Related Writings.

15.07[5][a] Separate Documents That Relate to Subject Matter May Be Combined.

15.07[5][b] Separate Documents Must Be Connected to Same Transaction.

15.07[6] Extrinsic Evidence Is Admissible to Explain Terms of Agreement.

15.07[7] Documents Should Be Gathered Early to Determine If Writing Requirement of Statute of Frauds Can Be Met.

15.08 Exceptions to Writing Requirement of Statute of Frauds.

15.08[1] Personal Property Leases Are Governed by Separate Statute.

15.08[2] Qualified Financial Contracts Are Excepted From Writing Requirement.

15.08[2][a] Qualified Financial Contracts Need Not Be in Writing.

15.08[2][b] Types of Qualified Financial Contract Subject to Exception.

15.08[2][c] Proof Necessary to Establish That Qualified Financial Contract Was Made.

15.08[3] Oral Modification of Written Contract May Satisfy Statute If Supported by New Consideration.

15.08[4] Equitable Estoppel Doctrine May Preclude Party From Asserting Statute of Frauds.

15.08[4][a] Application of Estoppel Principles Is Consistent With Purpose of Statute of Frauds.

15.08[4][b] Estoppel May Be Applied When Plaintiff Would Suffer Unconscionable Injury.

15.08[4][c] Estoppel May Be Applied When Defendant Would Be Unjustly Enriched by Plaintiff's Performance.

15.08[5] Statute of Frauds Inapplicable If Fraud Was Used to Prevent Writing.

15.08[6] Statute of Frauds Inapplicable to Oral Settlement Agreement Made on Record Before Court.

15.08[7] Statute of Frauds Inapplicable to Executed Contract.

15.09 Oral Agreement Failing to Comply With Statute of Frauds Is Voidable.

15.10 CHECKLIST: Raising Statute of Frauds Issues.

15.10[1] Checklist for Plaintiff.

15.10[2] Checklist for Defendant.

15.11 Complaint Should Allege Sufficient Facts to Bring Contract Within Statute of Frauds.

15.11[1] Complaint Must State Whether It Is Written, Oral, or Implied by Contract.

15.11[2] Written Contract Should Be Attached to Complaint.

15.11[3] When Contract Is Formed by Series of Writings, Complaint Should Allege and Incorporate Them.

15.11[4] If Signed by Someone Other than Plaintiff, Signer's Authority Should Be Alleged.

15.11[5] Complaint Should Allege Facts Bringing Oral Contract Within Statute of Frauds Exceptions.

15.11[6] Facts Taking Oral Contract Out of Statute Should Be Alleged If Applicable.

15.12 Defendant Must Raise Statute of Frauds at Earliest Opportunity.

15.12[1] Failure to Comply With Statute of Frauds Is Affirmative Defense.

15.12[2] Defense Is Waived If Not Asserted by Defendant.

15.12[3] Defendant Has Burden of Proving Application of Statute.

15.13 Defendant May Demur to Complaint That Fails to Specify Whether Asserted Contract Is Written, Oral, or Implied.

15.13[1] Complaint for Breach of Contract Must Specify Basis of Complaint.

15.13[2] Failure of Complaint to Specify Basis of Complaint Is Grounds for Demurrer.

15.14 Defendant May Demur to Complaint If Invalidity of Contract Under Statute of Frauds Appears on Face of Complaint.

15.15 Defendant May Raise Failure to Comply With Statute of Frauds by Answer to Complaint.

15.16 Defendant May Raise Failure to Comply With Statute of Frauds by Motion.

15.16[1] Defendant May Raise Issue by Motion Once Answer Has Been Filed.

15.16[2] Defendant May Raise Statute in Evidentiary Context by Motion to Exclude or Strike Evidence of Oral Agreement.

15.17 Defendant May Raise Issue by Request for Jury Instruction.

15.18 Plaintiff May Respond to Statute of Frauds Defense by Motion.

15.18[1] Plaintiff May Assert That Oral Agreement Is Not Within Statute of Frauds.

15.18[2] Plaintiff May Assert That There Is Sufficient Memorandum of Agreement to Satisfy Statute of Frauds.

15.18[3] Plaintiff May Assert That Defendant Is Equitably Estopped From Asserting Statute of Frauds.

15.19 Plaintiff May Raise Statute of Frauds Issue by Request for Jury Instruction.

15.20 CHECKLIST: Determining Whether Other Statutes Require Written Contract, Particular Contract Provisions,

or Other Formalities.

15.21 Premarital Agreements Must Be in Writing.

15.21[1] Premarital Agreement Must Be in Writing and Signed by Parties.

15.21[2] Effect of Failure to Comply With Writing Requirement.

15.21[3] Premarital Agreements Are Subject to Additional Scrutiny by Courts.

15.22 Sale of Personal Property for More Than \$5,000 Requires Written Contract.

15.22[1] Written Contract Is Necessary to Enforce Sale of Personal Property for Amount Greater Than \$5,000.

15.22[2] Writing Requirement for Sale of Personal Property Inapplicable to Specified Contracts.

15.23 Some Personal Property Leases Must Be in Writing.

15.23[1] Ordinary Personal Property Lease in Amount Greater Than \$1,000 Must Be in Writing.

15.23[2] All Consumer Leases of Personal Property Must Be in Writing.

15.23[3] Writing Must Specify Lease Terms.

15.24 Sale of Goods for More Than \$500 Requires Written Contract.

15.25 Agreement Between Contractor and Owner or Tenant for Improvement to Structure Must Be in Writing and Contain Specific Information.

15.25[1] Home Improvement Contract Over \$500 Must Be in Writing.

15.25[2] Home Improvement Contract Over \$500 Must Make Specific Disclosures.

15.26 Contract Between Inventor and Invention Developer Must Be in Writing and Contain Specified Disclosures.

15.26[1] Invention Development Services Contract Must Be in Writing.

15.26[2] Disclosures Required in Every Invention Development Services Contract.

15.27 Agreement to Submit to Arbitration Must Be in Writing.

15.28 Agreement to Toll or Waive Statute of Limitations Must Be in Writing.

15.28[1] Promise to Toll Statute of Limitations Must Be in Writing.

15.28[2] Waiver of Statute of Limitations Must Be in Writing.

15.29 Representation Regarding Third Person's Credit Must Be in Writing.

15.30 Contract to Make Will or Not to Revoke Will or Other Instrument Must Comply With Formalities.

15.31 Translation Requirements Apply to Contracts Negotiated in Languages Other Than English.

15.31[1] Translation of Contract Must Be Provided.

15.31[2] Contracts Subject to Translation Requirement.

15.31[3] Notice of Right to Translation Must Be Posted.

15.31[4] Consumer May Rescind Contract for Noncompliance.

15.32 Transactions Conducted by Electronic Means Are Subject to Special Rules.

15.33 Other Types of Agreements Require Compliance With Specific Formalities.

15.34 Plaintiff's Allegation That Writing Satisfies Statute of Frauds.

Plaintiff's Allegation That Writing Satisfies Statute of Frauds.

15.35 Plaintiff's Allegation of Part Performance Rendering Statute of Frauds Inapplicable to Oral Contract to Convey Real Property.

Plaintiff's Allegation of Part Performance Rendering Statute of Frauds Inapplicable to Oral Contract to Convey Real Property.

15.36 Demurrer Asserting That Complaint Does Not Indicate Whether Contract Is Written, Oral, or Implied, or Asserting That Contract Fails to Satisfy Statute of Frauds.

Demurrer Asserting That Complaint Does Not Indicate Whether Contract Is Written, Oral, or Implied, or Asserting That Contract Fails to Satisfy Statute of Frauds.

15.37 Answer to Complaint for Breach of Contract With Affirmative Defenses Based on Statute of Frauds and/or Noncompliance With Statutory Requirements.

Answer to Complaint for Breach of Contract With Affirmative Defenses Based on Statute of Frauds and/or Noncompliance With Statutory Requirements.

15.38 Memorandum for Party Attacking Existence of Contract Based on Failure to Comply With Statutory Requirements.

Memorandum for Party Attacking Existence of Contract Based on Failure to Comply With Statutory Requirements.

15.39 Plaintiff's Motion Requesting Equitable Enforcement of Oral Contract [CCP § 1010].

Plaintiff's Motion Requesting Equitable Enforcement of Oral Contract [CCP § 1010].



2 of 193 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 15 Attacking or Defending Existence of Contract--Failure to Comply With Applicable Formalities
I. STRATEGY

1-15 MB Practice Guide: CA Contract Litigation 15.01

15.01 Scope.

This chapter covers:

- Objectives and strategy for a party defending [see 15.02] or asserting [see 15.03] that a contract fails to meet the requirements of the statute of frauds.
- The nature and purpose of the statute of frauds writing requirement [see 15.04, 15.05].
- Types of agreements required by the statute of frauds to be in writing [see 15.06].
- Exceptions from the requirements of the statute of frauds for certain types of agreements [see 15.08].
- Determining whether a particular writing is sufficient to satisfy the requirements of the statute of frauds, and whether appropriate documents can be produced [see 15.07].
- Enforceability of a contract that fails to satisfy the statute of frauds [see 15.09].
- What the plaintiff should include in a complaint to avoid statute of frauds issues [see 15.13; Form: see 15.34].
- Raising the statute of limitations of frauds as an affirmative defense [see 15.12; Form: see 15.37].
- The procedural mechanisms for a party defending against a contract claim to raise the statute of frauds and other formality issues [see 15.13, 15.16, 15.17; Forms: see 15.36 -15.38].
- The procedural mechanisms for a party asserting a contract claim to counter an assertion of failure to comply with the statute of frauds and other formality requirements, including a motion [see 15.18; Form: see 15.39] and request for jury instructions [see 15.19].
- Formalities required by other statutes regarding writings, signatures, translations, and particular required contract disclosures [see 15.20 -15.33].

Core Statute:

CC § 1624



Cross Reference:

For Tips on updating case law and expanding your research with additional resources, see **How to Use Lexis.com With This Publication** at the front of this volume.

Legal Topics:

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

Contracts LawDefensesGeneral OverviewContracts LawFormationExecutionContracts LawStatutes of FraudsGeneral Overview



3 of 193 DOCUMENTS

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Chapter 15 Attacking or Defending Existence of Contract--Failure to Comply With Applicable Formalities
I. STRATEGY

1-15 MB Practice Guide: CA Contract Litigation 15.02

15.02 Objective and Strategy for Attacking Existence of Contract Based on Lack of Formalities.

The statute of frauds requires that certain types of contracts must be in writing and signed by the parties to be enforceable [see 15.05]. Other statutes also require some type of writing and authentication of the contract, such as a signature, and some statutes require translation or disclosures of information by one party to the other for the protection of the less knowledgeable party [see 15.20 -15.33].

The statute of frauds and other statutes requiring contract formalities are designed to protect the parties to a contract. They do so by providing that the contract will not be enforced, for example, when a party might have to resort to obtaining perjured testimony or fraud to prove the contract, because there has been no written contract executed as a record of the transaction. Consequently, the statutes require that certain types of contracts must be evidenced by a writing [see 15.05].

The party raising a statute of frauds issue usually is the defendant, who typically is filing an answer to a breach of contract claim, particularly when the contract is based on an asserted oral agreement. The defendant may be trying to avoid unfavorable consequences of the contract and may do so with the assertion of the statute of frauds, because failure to comply with the statute makes the contract unenforceable at the option of the party who has not signed the writing [see 15.09].

Consider:

Before pleading that a contract is unenforceable for failure to comply with the statute of frauds, the defendant must ask itself whether it can live without the contract. In other words, does the plaintiff have remaining obligations that the defendant needs the plaintiff to perform? Once the defendant has taken the position that the contract is unenforceable, the plaintiff may refuse to perform further obligations under the contract. Alternatively, it is perfectly acceptable for the defendant to plead that the contract has not been breached and that, even if it was breached, the contract is unenforceable for failure to comply with the statute of frauds. This duality can continue through trial, as long as the defendant takes care to avoid self-contradiction, and the appearance of trying to have it both ways.

Strategic Point--Defendant:



A party should raise the issue of the statute of frauds at the earliest possible time. Failure to raise the affirmative defense of the statute of frauds results in a waiver of the defense. Ordinarily, the earliest

opportunity is when a defendant demurs or files an answer to a complaint.

Legal Topics:

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

Contracts LawDefensesGeneral OverviewContracts LawFormationExecutionContracts LawStatutes of
FraudsRequirementsGeneral Overview



4 of 193 DOCUMENTS

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Chapter 15 Attacking or Defending Existence of Contract--Failure to Comply With Applicable Formalities
I. STRATEGY

1-15 MB Practice Guide: CA Contract Litigation 15.03

15.03 Objective and Strategy for Countering Claim That Contract Lacks Necessary Formalities.

The party resisting a statute of frauds defense usually is the plaintiff, who typically is filing a breach of contract claim and wants to enforce the contract.



Strategic Point--Plaintiff:

The best way to defend against a statute of frauds defense is to anticipate it and respond to it before the defense is even raised. The plaintiff's attorney usually will identify the issues during the pre-filing investigation, because the lack of a written contract will be as obvious to the plaintiff as it is to the defendant once the complaint is filed and served.

The plaintiff's possible responses to a statute of frauds defense may include:

- Showing that the contract in question is not one that the statute of frauds requires to be in writing [see 15.06]; or
- Showing that memoranda or other written evidence of the contract satisfies the writing requirement [see 15.07].

Another common way to meet a statute of frauds defense is to allege that the promisee detrimentally relied on the promisor's representation, or that the promisor has been unjustly enriched by the promisee's performance. These matters should be the subject of early discovery and should be pleaded in the complaint to avoid an unnecessary, expensive, and time-consuming demurrer [see 15.08].

The plaintiff may also be able to enforce a contract even without showing the existence of a writing or signature when equitable circumstances of estoppel or partial performance are appropriate [see 15.08[4]].

Consider:

An important point to keep in mind in for a plaintiff resisting the defense of the statute of frauds is what the plaintiff's position will be if the court finds there is no contract. A plaintiff who has based his or her entire strategy on the assumption of an enforceable contract may be caught without options if enforcement becomes impossible.

Detailed Discussion/Forms:

California Forms of Pleading and Practice, Ch. 140, Contracts; Ch. 530, Statute of Frauds (Matthew Bender).

California Points and Authorities, Ch. 50, Contracts; Ch. 216, Statute of Frauds (Matthew Bender).

Legal Topics:

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

Contracts LawDefensesGeneral OverviewContracts LawFormationExecutionContracts LawStatutes of FraudsGeneral OverviewContracts LawStatutes of FraudsExceptionsGeneral OverviewContracts LawStatutes of FraudsRequirementsGeneral Overview



5 of 193 DOCUMENTS

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Chapter 15 Attacking or Defending Existence of Contract--Failure to Comply With Applicable Formalities
II. DETERMINING WHETHER CONTRACT COMPLIES WITH STATUTE OF FRAUDS

1-15 MB Practice Guide: CA Contract Litigation 15.04

15.04 CHECKLIST: Determining Whether Contract Complies With Statute of Frauds.

15.04[1] Determining Whether Statute of Frauds Requires Writing.

- ☐ Determine if agreement cannot possibly be performed in one year.

Authority:

CC § 1624(a)(1)

Discussion:

See 15.06[1]

- ☐ Determine if:

☐ Agreement contains promise of promisor to answer for debt, default, or miscarriage of another; and

☐ Agreement does not constitute an original obligation of promisor.

Authority:

CC § 1624(a)(2)

Discussion:

See 15.06[2]

- ☐ Determine if agreement is for either:

☐ Sale of real property; or

- ☐ Lease of interest in real property for longer than one year.

Authority:

CC § 1624(a)(3)

Discussion:

See 15.06[3]

- ☐ Determine if agreement authorizes or employs agent or other person either to:

- ☐ Purchase or sell real estate; or

- ☐ Lease real estate for longer than one year.

Authority:

CC § 1624(a)(4)

Discussion:

See 15.06[4]

- ☐ Determine if agreement cannot be performed within lifetime of promisor.

Authority:

CC § 1624(a)(5)

Discussion:

See 15.06[5]

- ☐ Determine whether agreement is by purchaser of real property to pay indebtedness secured by a mortgage or deed of trust.

Authority:

CC § 1624(a)(6)

Discussion:

See 15.06[6][a]

- ☐ Determine whether agreement is by purchaser of real property to pay indebtedness secured by a mortgage or deed of trust, unless agreement to pay secured indebtedness is contained in conveyance itself.

Authority:

CC § 1624(a)(6)

Discussion:

See 15.06[6][b]

- ☐ Determine whether agreement is for commercial loan or extension of credit of more than \$100,000.

Authority:

CC § 1624(a)(7)

Discussion:

See 15.06[7]

15.04[2] Determining Whether Particular Evidence of Contract Is Sufficient to Satisfy Statute of Frauds.

- ☐ Conduct early formal and informal discovery to determine what documents exist to prove or disprove whether writing satisfies statute of frauds.

Discussion:

See 15.07[7]

- ☐ If agreement is memorialized by one writing, determine whether the writing:
- ☐ Reasonably identifies the subject matter of an agreement;
 - ☐ Establishes that an agreement concerning that subject matter has been made between particular parties; and
 - ☐ States with reasonable certainty the essential terms of the unperformed promises of the agreement.

Authority:

Gaggero v. Yura (2003) 108 CA4th 884, 894, 134 CR2d 313

Discussion:

See 15.07[1]

- ☐ Determine whether party to be charged has signed the writing, either by:
- ☐ Personally signing the writing; or
 - ☐ Expressly directing another person to sign the writing, and that person has signed.

Authority:

CC § 1624(a)

Discussion:

See 15.07[2]

- ☐ If party to be charged has not signed the writing, determine whether agent of party:
- ☐ Personally signed the writing; and

- ☐ Had actual authority to sign.

Authority:

CC § 1624(a)

Discussion:

15.07[3][a], [b]

- ☐ If agent who signed the writing lacked actual authority, determine whether party to be charged subsequently ratified the agent's actions.

Authority:

Behniwal v. Mix (2005) 133 CA4th 1027, 1039 ; CC §§ 2309-2310

Discussion:

15.07[3][c]

- ☐ If party to be charged has not signed writing, determine whether party has somehow indicated in the writing the intent to authenticate it.

Authority:

Donovan v. RRL Corp. (2001) 26 C4th 261, 277-278, 109 CR2d 807, 27 P3d 702

Discussion:

See 15.07[4]

- ☐ If one writing does not contain all elements required by statute of frauds, including signature by party or agent, determine if:

- ☐ Other writings relate to agreement;
- ☐ Those other writings constitute part of a single connected transaction; and
- ☐ All writings together contain all required elements of statute of frauds, including signature by party to be charged or party's agent.

Authority:

Goodman v. Community Sav. & Loan Ass'n (1966) 246 CA2d 13, 22, 54 CR 456

Discussion:

See 15.07[5]

- ☐ If no writings satisfy statute of fraud requirements, determine whether an exception to the statute applies, such as:

- ☐ Agreement is personal property lease covered by Commercial Code.

Authority:

CC § 1624(c)

Discussion:

See 15.08[1]

☐ Agreement is "qualified financial contract" which is exempt even though not to be performed in one year, in that:

- ☐ Neither party to the agreement is a natural person.
- ☐ Agreement is any of following types:
 - ☐ Purchase, sale, or exchange of certain currencies or exchanges.
 - ☐ Purchase, sale, or transfer of a commodity.
 - ☐ A commodity swap or commodity option.
 - ☐ A rate swap, basis swap, forward rate transaction, or interest rate option.
 - ☐ A security swap.
 - ☐ A price or index transaction of any of above transactions.
 - ☐ An option for any of above transactions.

☐ Agreement is evidenced by any of following types of proof:

- ☐ Electronic communication.
- ☐ Written confirmation.
- ☐ Admission by party who is subject of enforcement.
- ☐ Note or memorandum of existence of agreement.

Authority:

CC § 1624(b)

Discussion:

See 15.08[2]

☐ Agreement is an oral agreement modifying a written contract, and is:

☐ Supported by new consideration; or

☐ Agreement as modified does not fall within statute of frauds.

Authority:

CC § 1698

Discussion:

See 15.08[3]

☐ Court will refuse to apply statute of frauds based on estoppel principles because:

☐ Promisee has detrimentally relied on oral agreement and would suffer unconscionable injury if oral agreement was not enforced; or

☐ Promisor would receive unjust enrichment if allowed to retain benefit of any performance by promisee without court requiring performance of promisor's obligations under oral agreement.

Authority:

Estate of Housley (1997) 56 CA4th 342, 359, 65 CR2d 628

Discussion:

See 15.08[4]

☐ Court will refuse to apply statute of frauds because fraud was used to prevent writing.

Authority:

CC § 1623

Discussion:

See 15.08[5]

☐ Agreement is oral settlement agreement made on record before court.

Authority:

Kohn v. Jaymar-Ruby, Inc. (1994) 23 CA4th 1530, 1534-1535, 28 CR2d 780

Discussion:

See 15.08[6]

Legal Topics:

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

Contracts Law Statutes of Frauds General Overview Contracts Law Statutes of Frauds Requirements General Overview Contracts Law Statutes of Frauds Requirements Performance Contracts Law Statutes of

FraudsRequirementsSignaturesContracts LawStatutes of FraudsRequirementsWritings



6 of 193 DOCUMENTS

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Chapter 15 Attacking or Defending Existence of Contract--Failure to Comply With Applicable Formalities
II. DETERMINING WHETHER CONTRACT COMPLIES WITH STATUTE OF FRAUDS

1-15 MB Practice Guide: CA Contract Litigation 15.05

15.05 Statute of Frauds Imposes Writing Requirement.

15.05[1] Writing Requirement Applies to Specified Types of Contracts. The primary statute of frauds, contained in *CC § 1624*, provides that the following contracts are invalid, unless they, or some note or memorandum, are in writing and subscribed by the party to be charged or by the party's agent [*CC § 1624(a)*]:

- An agreement that by its terms is not to be performed within a year from its making [*see 15.06[1]*].
- A special promise to answer for the debt, default, or miscarriage of another person, except in the cases provided for in *CC § 2794* [*see 15.06[2]*].
- An agreement for the leasing for a longer period than one year, or for the sale, of real property, or of an interest in the property. Such an agreement, if made by an agent of the party sought to be charged, is invalid, unless the authority of the agent is in writing, subscribed by the party sought to be charged [*see 15.06[3]*].
- An agreement authorizing or employing an agent, broker, or any other person to purchase or sell real estate, or to lease real estate for a longer period than one year, or to procure, introduce, or find a purchaser or seller of real estate or a lessee or lessor of real estate if the lease is for a longer period than one year, for compensation or a commission [*see 15.06[4]*].
- An agreement that by its terms is not to be performed during the lifetime of the promisor [*see 15.06[5]*].
- An agreement by a purchaser of real property to pay an indebtedness secured by a mortgage or deed of trust on the property purchased, unless assumption of the indebtedness by the purchaser is specifically provided for in the conveyance of the property [*see 15.06[6]*].
- A contract, promise, undertaking, or commitment to loan money or to grant or extend credit, in an amount greater than \$100,000, not primarily for personal, family, or household purposes, made by a person engaged in the business of lending or arranging for the lending of money or extending credit. A

contract, promise, undertaking, or commitment to loan money secured solely by residential property consisting of one to four dwelling units will be deemed to be for personal, family, or household purposes [see 15.06[7]].

► **Cross References:**

Function of statute of frauds, see 15.05[3].

More detailed discussion of types of contracts subject to statute of frauds, see 15.06.

Sufficiency of writing, see 15.07.

► **Search California Contracts Cases:**

Use *lexis.com* to search for cases discussing the statute of frauds and other statutory contract formalities:

■ Legal > States Legal--U.S. > California > Cases > By Area of Law > CA Contract Cases

○ Sample Search: To find California published cases that discuss the statute of frauds and other statutory contract formalities, this search is helpful: *contract! OR agreement /10 statute frauds OR language /10 statut! OR code.*

15.05[2] Exceptions to Writing Requirement Exist. There are several major exceptions to the statute of frauds' requirement for a writing:

■ The statute is inapplicable if the agreement is a personal property lease covered by the Commercial Code [CC § 1624(c); see *Com Code § 10101 et seq.*; see 15.08[1]].

■ The statute is inapplicable if the agreement is a "qualified financial contract" even if it is not to be performed in one year, provided (1) there is sufficient evidence to indicate that a contract has been made, or (2) the parties, by means of a prior or subsequent written contract, have agreed to be bound by the terms of the qualified financial contract from the time they reached agreement on those terms [CC § 1624(b); see 15.08[2]].

■ An oral agreement is valid if it modifies a written contract but is supported by new consideration, or the agreement as modified does not fall within the statute of frauds [CC § 1698; see 15.08[3]].

■ Based on estoppel principles, the statute of frauds will not be applied based because of the promisor's detrimental reliance or the promisor's unjust enrichment [*Estate of Housley (1997) 56 CA4th 342, 359, 65 CR2d 628* ; see 15.08[4]].

■ The statute of frauds will not be applied when one party prevented the contract from being reduced to writing through the use of fraud [CC § 1623; see 15.08[5]].

► **Cross Reference:**

Detailed discussion of exceptions to statute of frauds, see 15.08.

15.05[3] Statute of Frauds Applies Only to Types of Contracts Specified in Statute. The written proof requirement of the statute of frauds applies only to the particular types of contracts specified in the statute [*Casa Herrera, Inc. v. Beydoun (2004) 32 C4th 336, 345, 83 P3d 497*].

Jury Instructions:

Statute of Frauds, see *California Forms of Jury Instruction, Ch. 3F, Instr. MB 300F.40* (Matthew Bender).

Statute of Frauds Generally, see *California Forms of Jury Instruction, Ch. 3H, Instr. MB 300H.30* (Matthew Bender).

**Cross Reference:**

Discussion of the types of contracts subject to writing requirement of statute of frauds, see 15.06.

15.05[4] Statute of Frauds Is Designed to Prevent False Contract Claims. The statute of frauds is intended to prevent perjured testimony and false claims when a party is presenting proof of a purported contract covered by the statute [*Casa Herrera, Inc. v. Beydoun* (2004) 32 C4th 336, 345, 83 P3d 497].

Example--Real Estate Sale Services:

One of the primary purposes of the statute of frauds requiring a written contract for the employment of an agent to purchase or sell real estate [see CC § 1624(a)(4)] is to protect real estate sellers and purchasers from the assertion of false claims by brokers for commissions [*Hoar v. Tuley* (1970) 12 CA3d 344, 348, 90 CR 559 ; *Toomy v. Dunphy* (1890) 86 C 639, 642, 25 P 130].

15.05[5] Statute of Frauds Is Defensive Evidentiary Rule. The statute of frauds does not determine the terms of a purported agreement. It is not a rule of substantive law [*In re Marriage of Shaban* (2001) 88 CA4th 398, 404-405, 105 CR2d 863]. Rather, the statute of frauds is an evidentiary rule or procedural defense that controls whether a party is permitted to use oral testimony to prove whether the agreement exists at all [*Casa Herrera, Inc. v. Beydoun* (2004) 32 C4th 336, 346, 83 P3d 497].

**Cross References:**

Discussion of the assertion of the statute of frauds as an affirmative defense, see 15.12.
Form for answer containing affirmative defense of statute of frauds, see 15.37.

Discussion of affirmative defenses in answer, see Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, Ch. 14, Answers.

Discussion of pleading statute of frauds as affirmative defense, see California Forms of Pleading and Practice, Ch. 140, Contracts; see also Ch. 333, Landlord and Tenant: Eviction Actions (Matthew Bender).

15.05[6] Statute of Frauds Is Subject to Equitable Principles. In some circumstances, a court may apply equitable principles to estop a promisor from relying on a statute of frauds to avoid an otherwise valid oral agreement. For example, equitable estoppel may apply if a promisor, by being allowed to involve the statute of frauds, would be unjustly enriched by receiving the benefit of the promisee's performance. Furthermore, because the statute of frauds was enacted for the purpose of preventing fraud, it may not be used to protect or aid a party relying on it to perpetuate a fraud [*Estate of Housley* (1997) 56 CA4th 342, 351-353, 65 CR2d 628] .

Consider:

The ability of courts to hold that parties are equitably estopped from asserting the statute of frauds is another reason to assert the statute as a defense as early in the case as possible. Doing so reduces the chance that the asserting party will appear to be acting secretly, and it may present an opportunity to assess the statute of fraud's viability in the particular case, with the particular opponent and the particular court.



Cross References:

Discussion of the application of equitable principles to the statute of frauds, see *15.18[3]*.

Discussion of equitable remedies generally, see Ch. 8, Seeking or Opposing Equitable Remedies in Contract Actions.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts Law Statutes of Frauds Requirements Writings



7 of 193 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 15 Attacking or Defending Existence of Contract--Failure to Comply With Applicable Formalities
II. DETERMINING WHETHER CONTRACT COMPLIES WITH STATUTE OF FRAUDS

1-15 MB Practice Guide: CA Contract Litigation 15.06

15.06 Specific Rules Apply to Each Category for Which Statute Requires Writing.**15.06[1] Contract That Cannot Be Performed Within One Year.**

15.06[1][a] Any Possibility of Performance in One Year Exempts Contract From Statute. An agreement that by its terms cannot be performed within a year from its making is invalid unless it is in writing and signed by the party to be charged or by the party's agent [CC § 1624(a)(1)]. This provision covers contracts of definite duration that cannot possibly be performed in less than one year [*White Lighting Co. v. Wolfson* (1968) 68 C2d 336, 343, 66 CR 697, 438 P2d 345 ; *Abeyta v. Superior Court* (1993) 17 CA4th 1037, 1042, 1044, 21 CR2d 680].

➤ **Cross Reference:**

Discussion of contracts subject to statute of frauds, see California Forms of Pleading and Practice, Ch. 530, Statute of Frauds (Matthew Bender).

15.06[1][b] Contract of Indefinite Duration Is Not Covered by Statute Unless Terms of Contract Foreclose Performance Within One Year. The statute of frauds does not apply to a contract of indefinite duration unless its terms absolutely foreclose completion of the performance of the contract within one year [*Foley v. Interactive Data Corp.* (1988) 47 C3d 654, 672, 254 CR 211, 765 P2d 373]. This means that an agreement is not subject to the statute of frauds and is valid, even if oral, if there is any possibility of performance within one year from its making [*Abeyta v. Superior Court* (1993) 17 CA4th 1037, 1043, 21 CR2d 680].

Foley v. Interactive Data Corp. makes clear that the key question is whether the contract can possibly be terminated under any contingency within one year, not the length of time it is contemplated performance may continue beyond the one year. If performance under a contract could be terminated within one year under some contingency, it makes no difference whether the contract has a definite outside term of several years, or whether it is for the employee's lifetime or some other indefinite period [*Abeyta v. Superior Court* (1993) 17 CA4th 1037, 1043, 21 CR2d 680 ; see *Foley v. Interactive Data Corp.* (1988) 47 C3d 654, 672-675, 254 CR 211, 765 P2d 373].

Examples--Contract Is Not Within Statute If It Allows Termination Within Year:

■ An employment contract of indefinite duration is not within the statute unless its terms absolutely require at least a year of performance by the employee. Thus, if a condition terminating an employment contract could occur within one year of its making, the contract does not fall within the scope of the statute of frauds even if performance of the contract would extend for longer than one year if the condition does not occur [*Foley v. Interactive Data Corp.* (1988) 47 C3d 654, 673, 254 CR 211, 765 P2d 373].

■ A lease agreement is not within the statute of frauds, unless its terms absolutely require at least a year of performance by both the lessor and the lessee. Thus, if a condition allows the lessor or lessee to terminate the lease within one year of its making, the lease does not fall within the scope of the statute of frauds [*Bed, Bath & Beyond of La Jolla, Inc. v. La Jolla Vill. Square Venture* (1997) 52 CA4th 867, 877, 60 CR2d 830].

Jury Instructions:

Statute of Frauds--Affirmative Defense, see *California Forms of Jury Instruction, Ch. 24A, Instr. MB 2400A.30* (Matthew Bender).

15.06[1][c] One-Year Period Begins on Date After Parties Make Contract. In computing the one-year period under CC § 1624, the date on which the agreement is made is excluded [see CC § 1624(a)(1)]. The period begins on the following day and ends at the close of the anniversary of the day on which the agreement was made [*Columbia Pictures Corp. v. De Toth* (1945) 26 C2d 753, 759, 161 P2d 217]. The duration of performance under the contract is irrelevant in determining whether the contract is within the statute. Thus, if a contract is limited to less than a one-year period, but that period is to begin in the future and full performance cannot occur until later than the anniversary of the making of the contract, it is within the statute and must be in writing [*American Trust Co. v. Kindsfater* (1960) 187 CA2d 735, 737-739, 9 CR 840].

Jury Instructions:

Statute of Frauds, see *California Forms of Jury Instruction, Ch. 3F, Instr. MB 300F.40* (Matthew Bender).

Statute of Frauds--Reasonable Time, see *California Forms of Jury Instruction, Ch. 3F, Instr. MB 300F.41* (Matthew Bender).

15.06[2] Contract That Promises to Answer for Debt, Default, or Miscarriage of Another.

15.06[2][a] Promise to Answer for Obligation of Another Ordinarily Must Be in Writing. A special promise to answer for the debt, default, or miscarriage of another, including a suretyship obligation, is invalid unless the promise is in writing and signed by the party to be charged or by his or her agent [CC §§ 1624(a)(2), 2793].

15.06[2][b] Exception When Promise to Answer for Obligation of Another Actually Constitutes Original Obligation of Promisor. A special promise to answer for the obligation of another person is enforceable, in particular circumstances, even if it is not in writing, if the special promise actually constitutes an original obligation of the promisor [CC §§ 1624(a)(2), 2794]. Whether an oral promise to answer for obligation of another person is excluded from statute of frauds because it is actually an original obligation of the promisor depends on the main purpose or leading object of the promisor [*Michael Distrib. Co. v. Tobin* (1964) 225 CA2d 655, 664-665, 37 CR 518 ; see *Schumm v. Berg* (1951) 37 C2d 174, 187, 231 P2d 39]. Whenever the leading and main object of the promisor is not to become surety or guarantor of another person, but to subserve some purpose or interest of his or her own, the promise is not within the statute of frauds, although the effect of the promise may be to pay the debt or discharge the obligation of another person [*Greenfield v. Sudden Lumber Co.* (1937) 18 CA2d 709, 717, 64 P2d 1007].

Example--Main Purpose of Promisor:

A builder's oral promise to pay for lumber and supplies to be used by a subcontractor had the main purpose of benefitting the builder, and was supported by the consideration of suppliers continuing to make deliveries; hence, the oral promise was not covered by the statute of frauds and was valid [*Michael Distrib. Co. v. Tobin* (1964) 225 CA2d 655, 666, 37 CR 518].

 Cross Reference:

Discussion of types of promises to answer for obligation of another that do not fall within statute of frauds, see California Forms of Pleading and Practice, Ch. 530, Statute of Frauds (Matthew Bender).

15.06[3] Contract for Sale or Lease of Interest in Real Property for Longer Than One Year.

15.06[3][a] Contract for Sale of Interest in Real Property Must Be in Writing. An agreement for the sale of any interest in real property is invalid unless it is in writing [CC § 1624(a)(3); see *Alameda Belt Line v. City of Alameda* (2003) 113 CA4th 15, 20-21]. If made by an agent of the party sought to be charged, an agreement for the sale of real property is invalid unless the authority of the agent is in writing and is signed by the party to be charged [CC § 1624(a)(3)].

 Cross Reference:

Statute of frauds in real estate litigation, see California Forms of Pleading and Practice, Ch. 528, Specific Performance (Matthew Bender).

15.06[3][b] Contract for Real Property Lease Longer Than One Year Must Be in Writing. An agreement for the lease of real property for longer than one year is invalid unless it is in writing. If made by an agent of the party sought to be charged, an agreement to lease real property for longer than one year is invalid unless the authority of the agent is in writing and is signed by the party to be charged [CC § 1624(a)(3)].

Distinguish--Term of Lease Controls:

It is the duration of the term of the lease agreement that controls whether the statute of frauds is applicable, not whether the lease could possibly be terminated within one year [*Bed, Bath & Beyond of La Jolla, Inc. v. La Jolla Vill. Square Venture* (1997) 52 CA4th 867, 877, 60 CR2d 830].

15.06[4] Contract That Authorizes or Employs Agent or Other Person to Purchase or Sell Real Estate or to Lease Real Estate for Longer Than One Year. An agreement authorizing or employing an agent, broker, or other person for compensation or a commission to purchase or sell real estate, lease real estate for a period longer than one year, or procure, introduce, or find a purchaser or seller or a lessee or lessor of real estate for a period longer than one year is invalid unless the agreement, or some note or memorandum of it, is in writing and signed by the party to be charged, or by his or her agent [CC § 1624(a)(4)].

Example:

A broker hired to modify an existing lease relating to oil drilling rights (which are personal property, not real property), not to procure an initial lease, could not rely on this provision of the statute of frauds because the contract did not relate to a sale or lease of real property [*Shell v. Darneille* (1984) 162 CA3d 957, 962, 209 CR 68].

 Cross Reference:

Discussion of agency, see Ch. 20, Asserting Agency Issues in Contract Actions.



Warning--Theory of Quantum Meruit Unavailable to Real Estate Broker:

A licensed real estate broker may not assert equitable estoppel against a statute of frauds defense in an action by the broker to recover a real estate commission except when the broker can show actual fraud.

The mere failure of a principal to pay for a broker's services pursuant to an unenforceable oral contract is not unjust enrichment sufficient to give rise to a valid claim of equitable estoppel. A licensed broker assumes the risk of relying on an oral agreement, and therefore there is no unconscionable injury. Licensed brokers are not permitted to circumvent the statute of frauds by claiming broker's fees on a theory of quantum meruit [*Margolin v. Shemaria* (2000) 85 CA4th 891, 899-900, 102 CR2d 502].

Cross References:

Discussion of licensed brokers and quantum meruit, see California Points and Authorities, Ch. 31, Brokers and Salespersons (Matthew Bender).

Quantum meruit recovery in contract actions generally, see Ch. 9, Seeking or Opposing Quantum Meruit or Quantum Valebant Recovery in Contract Actions.

15.06[5] Contract That Cannot Be Performed Within Lifetime of Promisor. An agreement that by its terms cannot be performed during the lifetime of the promisor is invalid unless the agreement, or some note or memorandum of it, is in writing and signed by the party to be charged or by the party's agent [CC § 1624(a)(5)]. As with contracts that cannot be performed within a year, this provision requires written evidence of a contract only if there is no possibility that the performance could occur during the promisor's lifetime [see *Kassianov v. Raissis* (1962) 200 CA2d 573, 576, 19 CR 614].

Example--Contract Condition Providing for Termination Prior to Death:

An oral contract allegedly provided that the plaintiff was to be employed by a decedent for at least 10 years following a decedent's death, but the contract was subject to an exception that would have allowed the contract to be terminated in the event plaintiff failed to comply with a specified condition. Since the possibility existed that the contract would be terminated by virtue of this condition prior to the decedent's death--and, hence, fully performed prior to that time--the oral contract was not subject to the statute of frauds [*Plumlee v. Poag* (1984) 150 CA3d 541, 552, 198 CR 66].

Jury Instructions:

Statute of Frauds--Reasonable Time, see *California Forms of Jury Instruction, Ch. 3F, Instr. MB 300F.41* (Matthew Bender).

15.06[6] Contract by Purchaser of Real Property to Pay Indebtedness Secured by Mortgage or Deed of Trust.

15.06[6][a] Agreement to Pay Secured Indebtedness Ordinarily Must Be in Writing. An agreement by a purchaser of real property to pay an indebtedness secured by a mortgage or deed of trust on the property purchased generally is invalid unless the agreement, or some note or memorandum of it, is in writing and signed by the party to be charged or by the party's agent [CC § 1624(a)(6)]. Only true contracts to pay an indebtedness are covered by the statute of frauds, and a purported "indebtedness" based on unjust enrichment does not come within the statute of frauds [*First Nationwide Sav. v. Perry* (1993) 11 CA4th 1657, 1670, 15 CR2d 173].

Example:

An action for unjust enrichment by the beneficiary of a deed of trust that had secured a purchase money loan, and that had been accidentally reconveyed, against the former owner of the property who sold the property without satisfying the loan, was not barred by CC § 1624(a)(6) [*First Nationwide Sav. v. Perry* (1993) 11 CA4th 1657, 1670, 15 CR2d 173].

15.06[6][b] Exception When Agreement to Pay Secured Indebtedness Is Contained in Conveyance. An agreement by a purchaser of real property to pay an indebtedness secured by a mortgage or deed of trust on the property purchased need not be set forth in an independent writing if the conveyance specifically provides for the assumption of

the indebtedness by the purchaser [CC § 1624(a)(6)].

15.06[7] Contract for Commercial Loan or Extension of Credit of More Than \$100,000. A contract, promise, undertaking, or commitment to loan money or to grant or extend credit, in an amount greater than \$100,000, must be in writing when made by a person engaged in the business of lending or arranging for the lending of money or extending credit unless it is primarily for personal, family, or household purposes. For purposes of this provision, a contract, promise, undertaking or commitment to loan money secured solely by residential property consisting of one to four dwelling units is deemed to be for personal, family, or household purposes [CC § 1624(a)(7)].



Cross References:

Discussion of many specific types of contracts required by statute to be in writing and contain specified provisions, see 15.33.

Discussion of contracts subject to statute of frauds, see California Forms of Pleading and Practice, Ch. 530, Statute of Frauds (Matthew Bender).

Legal Topics:

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

Commercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentStatutes of FraudsGeneral
OverviewCommercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentStatutes of FraudsFormal
RequirementsContracts LawStatutes of FraudsRequirementsWritingsReal Property LawPurchase & SaleContracts of
SaleEnforceabilityStatutes of Frauds



8 of 193 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 15 Attacking or Defending Existence of Contract--Failure to Comply With Applicable Formalities
II. DETERMINING WHETHER CONTRACT COMPLIES WITH STATUTE OF FRAUDS

1-15 MB Practice Guide: CA Contract Litigation 15.07

15.07 Sufficiency of Writing Required by Statute of Frauds.

15.07[1] Writings Must Satisfy Basic Criteria of Statute. A writing (or writings) satisfies the statute of frauds only if the writing does all of the following [see *Seaman's Direct Buying Serv., Inc. v. Standard Oil Co. (1984) 36 C3d 752, 762-763, 206 CR 354, 686 P2d 1158*, overruled in part on other grounds by *Freeman & Mills, Inc. v. Belcher Oil Co. (1995) 11 C4th 85, 87, 44 CR2d 420, 900 P2d 669*]:

- Reasonably identifies the subject matter of the agreement;
- Establishes that an agreement with respect to the subject matter has been made between particular parties; and
- States with reasonable certainty the essential terms of the unperformed promises of the contract.

Example--Contract for Sale of Real Estate:

In real estate sales contracts, a writing must identify the seller and the buyer, the price to be paid, the time of payment, the manner of payment, and the property to be transferred [*Gaggero v. Yura (2003) 108 CA4th 884, 894, 134 CR2d 313*].

Jury Instructions:

Statute of Frauds Generally, see *California Forms of Jury Instruction, Ch. 3H, Instr. MB 300H.30* (Matthew Bender).

Judge's Perspective:

Gaggero v. Yura involves an interesting twist on the statute of frauds. When the performance of a contract requires the parties to reach a collateral agreement, the fact that the *other* agreement is not yet in writing does not give rise to a statute of frauds defense. "[A] contract requiring an approval or agreement subject to the statute of frauds may be enforceable irrespective of the status of that agreement or approval." In *Gaggero*, the parties had a contract for the purchase and sale of land, but had not yet completed the CC & Rs for the property [*Gaggero v. Yura (2003) 108 CA4th 884, 895, 134 CR2d 313*].

 Cross Reference:

Discussion of the essential terms required for a contract, see Ch. 13, *Attacking or Defending Existence of Contract--Absence of Essential Element*.

15.07[2] Party to Be Charged Must Sign Writing.

15.07[2][a] Party to Be Charged Generally Must Authenticate Writing. An agreement that is covered by the statute of frauds is not enforceable unless the agreement or a note or memorandum of the agreement is signed by the party to be charged, or by the party's agent [CC § 1624(a); see 15.07[3]].

Distinguish:

Under CC § 1624, "party to be charged" means "the party to be charged in court with the performance of the obligation, i.e., the defendant in the action brought to enforce the contract." Thus, a *plaintiff's* failure to sign a contract is immaterial to the statute of frauds [*Ulloa v. McMillin Real Estate & Mortgage, Inc.* (2007) 149 CA4th 333, 339, 57 CR3d 1] .

15.07[2][b] Party May Direct Another Person to Sign. Under the "amanuensis rule," one person may expressly direct another person to sign the directing person's name, and in such a case, the signing person is not considered the directing person's agent. Rather, the person signing the name is instead regarded as a mere instrument or "amanuensis" of the directing person, and that signature is deemed to be the directing person's original signature, which is valid under the statute of frauds [*Estate of Stephens* (2002) 28 C4th 665, 670-671, 122 CR2d 358, 49 P3d 1093].

15.07[3] Writing Is Sufficient If Agent of Party to Be Charged Signed Writing.

15.07[3][a] Agent's Signature May Satisfy Statute of Frauds. Ordinarily, the party to be charged must sign a writing for the writing to satisfy the statute of frauds [see 15.07[2]]. However, the statute expressly allows an agent of the party to be charged to sign the writing [CC § 1624(a)].

15.07[3][b] Agent Must Have Authority to Sign Contract. An agent's signature is sufficient to satisfy the writing requirement of the statute of frauds if the agent has actual authority to sign the contract [CC § 1624(a); see *Colbough v. Hartline* (1994) 29 CA4th 1516, 1524, 35 CR2d 213]. It has also been held that under the equal dignities rule [see CC § 2309], authority to enter into a contract required by law to be in writing can itself only be given by an instrument in writing [*Kerner v. Hughes Tool Co.* (1976) 56 CA3d 924, 934, 128 CR 839].

 Cross Reference:

Discussion of agent's actual authority, see Ch. 20, *Asserting Agency Issues in Contract Actions*, 20.09.

15.07[3][c] Unauthorized Agent's Signature May Subsequently Be Ratified. Although an agent's signature does not satisfy the writing requirement of the statute of frauds if the agent lacks authority to sign the contract, the party to be charged may subsequently ratify the agent's actions in entering into the contract, thus treating the agent's signature as if originally authorized [*Behniwal v. Mix* (2005) 133 CA4th 1027, 1039]. To satisfy the statute of frauds, the ratification must itself be in writing [*Behniwal v. Mix* (2005) 133 CA4th 1027, 1039 ; CC §§ 2309-2310].

Example:

Condominium sellers' signatures on disclosure statements ratified the actions of their real estate agent, who previously (without authority) signed the sellers' names on an offer, counteroffer and addendum to the counteroffer. The sellers' ratification of their agent's actions created an enforceable contract binding on the sellers [*Behniwal v. Mix* (2005) 133 CA4th 1027, 1039-1042].

 Cross Reference:

Discussion of principal's ratification of agent's acts, see Ch. 20, *Asserting Agency Issues in Contract*

Actions, 20.09.

15.07[4] Handwritten Signature Is Not Required for Authentication. Although the statute requires that the contract has been "signed," a handwritten signature is not required; all that is necessary is that the party indicate in some manner in the writing that the party intends the authentication of the writing [*Poag v. Winston* (1987) 195 CA3d 1161, 1179, 241 CR 330].

 Cross Reference:

Discussion of signature requirements, see *California Forms of Pleading and Practice*, § 530.14[3] (Matthew Bender).

Example--Advertisement Operating As Authenticated Writing:

An automobile dealer's printed name in a printed newspaper advertisement to sell a vehicle evidences an intention to authenticate the advertisement as an offer, and therefore constitutes a "signature" satisfying the statute of frauds [*Donovan v. RRL Corp.* (2001) 26 C4th 261, 277-278, 109 CR2d 807, 27 P3d 702 (offeror's intent to authenticate offeror's name as signature can be established from face of advertisement)].

15.07[5] Contract May Be Proved by One Writing or Series of Related Writings.

15.07[5][a] Separate Documents That Relate to Subject Matter May Be Combined. If the parties have sent or exchanged a series of numerous writings that have a relation to the same subject matter, the series of writings together may satisfy the statute of frauds if the series otherwise satisfies the statute, and one of the writings is signed by the party to be charged [*Searles v. Gonzalez* (1923) 191 C 426, 431, 216 P 1003 ; see *Gaggero v. Yura* (2003) 108 CA4th 884, 895-896, 134 CR2d 313].

 Cross Reference:

Discussion of essential contract terms, see Ch. 13, Attacking or Defending Existence of Contract--Absence of Essential Element.

15.07[5][b] Separate Documents Must Be Connected to Same Transaction. Under the "multiple writings" exception to the statute of frauds, a signature on one document may be grafted onto another document only if the writings relate to the same matter and constitute several parts of one connected transaction [*Goodman v. Community Sav. & Loan Ass'n* (1966) 246 CA2d 13, 22, 54 CR 456].

Jury Instructions:

Several Documents Interpreted Together, see *California Forms of Jury Instruction*, Ch. 3B, Instr. MB 300B.06 (Matthew Bender).

 Cross Reference:

Discussion of separate documents, see *California Forms of Pleading and Practice*, § 530.14[2] (Matthew Bender).

15.07[6] Extrinsic Evidence Is Admissible to Explain Terms of Agreement. When ambiguous terms in a memorandum are disputed, extrinsic evidence is admissible to resolve the uncertainty [*Sterling v. Taylor* (2007) 40 C4th 757, 767, 55 CR3d 116, 152 P3d 420 (disapproving statements in California cases barring consideration of extrinsic evidence to determine sufficiency of memorandum under statute of frauds)].

Distinguish:

Because the memorandum itself must include the essential contractual terms, extrinsic evidence cannot supply those required terms. It can only be used to *explain* essential terms that were understood by the

parties but otherwise would be unintelligible to others [*Sterling v. Taylor* (2007) 40 C4th 757, 767, 55 CR3d 116, 152 P3d 420] . Extrinsic evidence cannot be employed to prove an agreement at odds with the terms of the memorandum [*Sterling v. Taylor* (2007) 40 C4th 757, 771, 55 CR3d 116, 152 P3d 420] .

Example:

Buyers sought to enforce a memorandum concerning the sale of several apartment buildings. The handwritten memorandum contained the estimated rental income, a multiplier, and a purchase price. After the sellers sent the buyers formal purchase agreements with escrow instructions, the buyers refused to sign the purchase agreements on the ground that after reviewing the rent rolls, they determined the actual rental income from the buildings was less than the estimate, and therefore the purchase price in the memorandum was unacceptable. Buyers argued the purchase price should be adjusted based on the actual rental income figure and the multiplier contained in the memorandum. The California Supreme Court held that although it was appropriate to consider extrinsic evidence to clarify the terms of the written memorandum, the extrinsic evidence offered by the buyers was at odds with the writing, which stated a specific price and did not indicate that the parties contemplated any change based on actual rental income. Therefore, the evidence was insufficient to show with reasonable certainty that the parties understood and agreed to the price alleged by plaintiffs, and the statute of frauds was not satisfied [*Sterling v. Taylor* (2007) 40 C4th 757, 772-776, 55 CR3d 116, 152 P3d 420] .

15.07[7] Documents Should Be Gathered Early to Determine If Writing Requirement of Statute of Frauds Can Be Met. As with any proceeding in which documents will be an important component of the evidence of trial, counsel should gather evidence as early as possible to establish--or disprove--that there is a memorandum sufficient to defeat the statute of frauds. Because the document in question by definition is not a complete, fully executed contract, it may take many forms: a memorandum, an invoice, an exchange of sales correspondence, and so forth. Thus, counsel should conduct not only formal discovery designed to uncover whatever documents the opposing party has in its files, but also a thorough, early internal investigation to determine what documents the attorney's own client has. Without this information in hand, counsel cannot give appropriate advice to the client about the likelihood of prevailing at trial, the other discovery that needs to be conducted, or the reasonable value of settlement.

Legal Topics:

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

Commercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentStatutes of FraudsFormal RequirementsContracts LawStatutes of FraudsRequirementsWritingsReal Property LawPurchase & SaleContracts of SaleEnforceabilityStatutes of FraudsReal Property LawPurchase & SaleContracts of SaleFormalities



9 of 193 DOCUMENTS

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Chapter 15 Attacking or Defending Existence of Contract--Failure to Comply With Applicable Formalities
II. DETERMINING WHETHER CONTRACT COMPLIES WITH STATUTE OF FRAUDS

1-15 MB Practice Guide: CA Contract Litigation 15.08

15.08 Exceptions to Writing Requirement of Statute of Frauds.

15.08[1] Personal Property Leases Are Governed by Separate Statute. The writing requirements for personal property leases generally are covered by Division 10 of the Commercial Code and not by the primary statute of frauds [CC § 1624(c); see *Com Code § 10101 et seq.*; see also 15.23].

15.08[2] Qualified Financial Contracts Are Excepted From Writing Requirement.

15.08[2][a] Qualified Financial Contracts Need Not Be in Writing. Despite the writing requirement that generally applies to an agreement that cannot be performed within one year [see CC § 1624(a)(1); see also 15.06[1]], a qualified financial contract that is otherwise valid and enforceable is not invalid merely for lack of a writing and is enforceable by way of action or defense, if either there is sufficient evidence to establish that a contract has been made [see 15.08[2][c]] or the parties have agreed by means of a prior or subsequent written contract to be bound by the terms of the qualified financial contract [CC § 1624(b)(1)].

15.08[2][b] Types of Qualified Financial Contract Subject to Exception. A "qualified financial contract" is any of the following types of agreements in which neither party is a natural person [CC § 1624(b)(2)]:

- The purchase and sale of certain currencies or exchanges.
- Certain purchases, sales, or transfer of any commodity or similar good.
- A commodity swap or commodity option.
- A rate swap, basis swap, forward rate transaction, or interest rate option.
- A security-index swap or option, or security or securities price swap or option.
- Any transaction relating to a price or index involving any combination of the agreements listed above.
- An option for any agreement listed above.

Cross Reference:

Discussion of types of agreements that constitute qualified financial contracts, see California Forms of Pleading and Practice, Ch. 530, Statute of Frauds (Matthew Bender).

15.08[2][c] Proof Necessary to Establish That Qualified Financial Contract Was Made. In the following situations, a qualified financial contract need not be in writing to prove that the agreement exists:

- Evidence of an electronic communication, such as the recording of a telephone call or tangible written text produced by computer retrieval, is sufficient that a contract has been made if it indicates in the communication that a contract was made between the parties [CC § 1624(b)(3)(A)].
- A written confirmation indicating that a contract has been made between the parties is sufficient, provided the confirmation is received by the party against whom enforcement is sought no later than the fifth business day after the date the contract is made, and the sender does not receive, on or before the third business day after receipt, a written objection to a material term of the confirmation [CC § 1624(b)(3)(B)].
- There is sufficient evidence that a contract has been made if the party against whom enforcement is sought admits in its pleading, testimony, or otherwise in court that a contract was made [CC § 1624(b)(3)(C)].
- A note, memorandum, or other writing that indicates that a contract has been made constitutes sufficient evidence of the contract when it has been signed by the party against whom enforcement is sought or by its authorized agent or broker or amanuensis [CC § 1624(b)(3)(D)].

For purposes of determining the existence of an agreement, the tangible written text produced by telex, fax, computer retrieval, or other process by which electronic signals are transmitted by telephone or otherwise constitutes a "writing," and any symbol executed or adopted by a party with the present intention to authenticate a writing constitutes a "signing" [CC § 1624(b)(4)].

15.08[3] Oral Modification of Written Contract May Satisfy Statute If Supported by New Consideration.

Generally, a contract in writing may be modified only by a written modification [see CC § 1698(a); *Secrest v. Security National Mortgage Loan Trust 2002-2 (2008) 167 CA4th 544, 553, 84 CR3d 275* (forbearance agreement attempted to modify note and deed of trust and was subject to the statute of frauds)]. However, a written contract may be modified by an oral agreement supported by new consideration unless the written original contract expressly provides otherwise, and unless the contract, as modified, is itself within the provisions of the statute of frauds [CC § 1698(c); see *Diamond Woodworks, Inc. v. Argonaut Ins. Co. (2003) 109 CA4th 1020, 1038 n11, 135 CR2d 736*].

Example:

An employee leasing agreement provided that the contract may be altered or amended only by written amendment signed by both parties [*Diamond Woodworks, Inc. v. Argonaut Ins. Co. (2003) 109 CA4th 1020, 1038, 135 CR2d 736*].

15.08[4] Equitable Estoppel Doctrine May Preclude Party From Asserting Statute of Frauds.

15.08[4][a] Application of Estoppel Principles Is Consistent With Purpose of Statute of Frauds. The purpose of the statute of frauds is to prevent false claims or perjured testimony when a party is attempting to establish the existence of a purported contract. Therefore, the statute of frauds may not be used to further the very type of wrong it was designed to prevent, and the courts will not refuse to enforce a contract when to do so would shield, protect, or aid a party who relies on the statute to perpetrate a fraud [*Estate of Brenzikofer v. Schwarz (1996) 49 CA4th 1461, 1469 n4,*

57 CR2d 401]. Thus, the court may apply equitable estoppel principles to prevent unfair assertions of a statute of frauds [*Estate of Housley* (1997) 56 CA4th 342, 357, 65 CR2d 628].

The doctrine of estoppel to assert the statute of frauds has been consistently applied by California courts to prevent the fraud that would result from refusal to enforce oral contracts when either or both of the following conditions exist [*Monarco v. Lo Greco* (1950) 35 C2d 621, 623-624, 220 P2d 737]:

- One party has so seriously changed position in reliance upon, or in performance of, the contract that he or she would suffer an unconscionable injury if it were not enforced [see 15.08[4][b)]; or
- The other party has reaped the benefits of the contract and would be unjustly enriched if allowed to escape its obligations [see 15.08[4][c)].

15.08[4][b] Estoppel May Be Applied When Plaintiff Would Suffer Unconscionable Injury. A court may apply equitable estoppel to avoid the statute of frauds, and to make an oral agreement enforceable, when the promisee has detrimentally relied on the agreement and would suffer an unconscionable injury if the oral agreement were not enforced [*Estate of Housley* (1997) 56 CA4th 342, 359, 65 CR2d 628]. This change in the position of the promisee may be based either on the fraudulent or erroneous assertion that the agreement would be reduced to writing, or on the representation that the promisor would perform under the oral agreement [*Byrne v. Laura* (1997) 52 CA4th 1054, 1069, 60 CR2d 908].

The payment of money is not sufficient part performance to take an oral agreement out of the statute of frauds, because the party paying money under an invalid contract has an adequate remedy at law [*Secrest v. Security National Mortgage Loan Trust 2002-2* (2008) 167 CA4th 544, 555, 84 CR3d 275].

Jury Instructions:

Estoppel to Assert the Statute of Frauds, see *California Forms of Jury Instruction, Ch. 3F, Instr. MB 300F.42* (Matthew Bender).

15.08[4][c] Estoppel May Be Applied When Defendant Would Be Unjustly Enriched by Plaintiff's Performance. A court may apply equitable estoppel to make an oral agreement enforceable notwithstanding the statute of frauds if the promisor would receive unjust enrichment by being allowed to retain the benefit of any performance by the promisee without any performance of the promisor's obligations under the oral agreement [*Estate of Housley* (1997) 56 CA4th 342, 359, 65 CR2d 628]. To constitute part performance, the relevant acts either must unequivocally refer to the contract or clearly relate to its terms. Such conduct satisfies the evidentiary function of the statute of frauds by confirming that a bargain was in fact reached [*In re Marriage of Benson* (2005) 36 C4th 1096, 1109].

Consider:

Note that the leading cases on equitable estoppel in the context of contract law usually involve variations on the basic theme of oral promises to perform services in return for testamentary dispositions of property [see, e.g., *Estate of Housley* (1997) 56 CA4th 342, 359, 65 CR2d 628]. A separate line of cases exists holding that merely rendering services is not usually such a part performance of an oral agreement as will relieve the contract from the operation of the statute of frauds, unless the services are of such a peculiar character that it is impossible to estimate their value and the plaintiff, after performing the services, could not be restored to the situation in which he or she was prior to rendering the services [see *Kobus v. San Diego Trust & Sav. Bank* (1959) 172 CA2d 574, 579, 342 P2d 468]. One case has distinguished these cases by drawing a distinction between complete and partial performance of an oral contract, arguing that partial performance of an oral contract by one or both parties ordinarily is insufficient to remove a contract from the operation of the statute of frauds, but full performance of the contract by one party will do so [*Nesson v. Moes* (1963) 215 CA2d 655, 657-658, 30 CR 428]. These issues, however, seem to be largely ignored in the leading cases applying equitable estoppel to enforce

contracts that otherwise would be invalid under the statute of frauds. Instead, the leading cases have focused on the components of unconscionable injury and unjust enrichment [see, e.g., *Estate of Housley* (1997) 56 CA4th 342, 359, 65 CR2d 628 ; *Monarco v. Lo Greco* (1950) 35 C2d 621, 623-624, 220 P2d 737].

Jury Instructions:

Estoppel to Assert the Statute of Frauds, see *California Forms of Jury Instruction, Ch. 3F, Instr. MB 300F.42* (Matthew Bender).

Effect of Part Performance on Statute of Frauds, see *California Forms of Jury Instruction, Ch. 3F, Instr. MB 300F.43* (Matthew Bender).



Cross Reference:

Form for allegation of partial performance, see 15.35.

15.08[5] Statute of Frauds Inapplicable If Fraud Was Used to Prevent Writing. When a party to a contract uses fraud to prevent the contract from being reduced to writing, the defrauded party may enforce the contract against the party perpetrating the fraud even if the contract is subject to the statute of frauds and therefore is required by law to be in writing [CC § 1623; see also *Wilk v. Vencill* (1947) 30 C2d 104, 108-109, 180 P2d 351 (representation that one intends to sign agreement in future is basis for estoppel)].

Example:

A lessor who proposed and drafted a new lease that the lessee signed, admitted the lease existed, and accepted rent under it for an extended period, could not later claim the lease actually was an invalid modification of an earlier lease, and therefore within the statute of frauds, to prevent the lessee's recovery [*Keller v. Richbart* (1933) 130 CA 296, 298-299, 20 P2d 55].

15.08[6] Statute of Frauds Inapplicable to Oral Settlement Agreement Made on Record Before Court. The statute of frauds does not apply to an oral settlement agreement to which the parties stipulated before the court following a judicially mandated and supervised settlement conference. The concern addressed by the statute of frauds is not present when a neutral court participates in the settlement process [*Kohn v. Jaymar-Ruby, Inc.* (1994) 23 CA4th 1530, 1534-1535, 28 CR2d 780] .

Example:

The parties entered into a settlement of their lawsuit in open court, agreeing to a stipulated judgment to be paid by the defendant over a two-year period. Counsel for the defendant reduced the stipulation to writing and delivered it to the plaintiff for signature. The plaintiff signed the agreement, but the defendant did not. When the defendant stopped making payments, the plaintiff sued to enforce the agreement. The defendant asserted the statute of frauds as an affirmative defense, claiming the contract was not to be performed within one year, was not in writing, and was not signed by the defendant. The Court of Appeal ruled that the statute of frauds was inapplicable to a judicially supervised settlement agreement made orally on the record before the court [*Pietrobon v. Libarle* (2006) 137 CA4th 992, 998-999, 40 CR3d 718] .

15.08[7] Statute of Frauds Inapplicable to Executed Contract. The statute of frauds does not apply to an executed, as opposed to executory, contract [*Kirkpatrick v. Tapo Oil Co.* (1956) 144 CA2d 404, 414, 301 P2d 274 ; *Lee v. Lee* (2009) 175 CA4th 1553, 1557, 97 CR3d 516] .

Example:

Statute of frauds did not apply to transfer of real estate when oral contract was followed four years later by executed and delivered quitclaim deed [*Lee v. Lee* (2009) 175 CA4th 1553, 1557, 97 CR3d 516] .

Legal Topics:

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

Commercial Law (UCC) Sales (Article 2) Form, Formation & Readjustment Statutes of Frauds Exceptions General
Overview Contracts Law Statutes of Frauds Exceptions General Overview Contracts Law Statutes of
Frauds Exceptions Leading Object Rule Contracts Law Statutes of Frauds Exceptions Partial Performance Contracts
Law Statutes of Frauds Exceptions Subsequent Oral Agreements



10 of 193 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 15 Attacking or Defending Existence of Contract--Failure to Comply With Applicable Formalities
II. DETERMINING WHETHER CONTRACT COMPLIES WITH STATUTE OF FRAUDS

1-15 MB Practice Guide: CA Contract Litigation 15.09

15.09 Oral Agreement Failing to Comply With Statute of Frauds Is Voidable.

If an agreement is not supported by a writing sufficient to satisfy the statute of frauds, the agreement is not enforceable. In other words, an oral agreement within the statute of frauds is voidable at the option of either party [see *House of Prayer v. Evangelical Assn. for India* (2003) 113 CA4th 48, 53].

An oral agreement that is within the statute of frauds is not automatically void, but merely voidable [*Masin v. Drain* (1984) 150 CA3d 714, 717, 198 CR 367].



Cross Reference:

Discussion of void and voidable contracts, see *California Forms of Pleading and Practice*, § 140.10[6] (Matthew Bender).

Legal Topics:

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

Commercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentStatutes of FraudsGeneral
OverviewContracts LawStatutes of FraudsGeneral OverviewContracts LawStatutes of FraudsExceptionsSubsequent
Oral Agreements



11 of 193 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 15 Attacking or Defending Existence of Contract--Failure to Comply With Applicable Formalities

III. RAISING STATUTE OF FRAUDS ISSUES

1-15 MB Practice Guide: CA Contract Litigation 15.10

15.10 CHECKLIST: Raising Statute of Frauds Issues.

15.10[1] Checklist for Plaintiff.

- ☐ Ensure that any complaint based on a contract:
 - ☐ States whether contract is written, oral, or implied by conduct.
 - ☐ Alleges facts that show writing is in compliance with statute of frauds, if necessary.

Authority:

CCP § 430.10(g)

Discussion:

See 15.11[1]

Form:

See 15.34

- ☐ Ensure that any complaint based on a breach of a written contract:
 - ☐ Sets out terms of contract in body of complaint; or
 - ☐ Attaches a copy of written contract document and incorporates the contract by reference.

Authority:

Otworth v. Southern Pac. Transp. Co. (1985) 166 CA3d 452, 459, 212 CR 743

Discussion:

See 15.11[2]

Form:

See 15.34

☐ If defendant may assert that agreement does not comply with writing requirement of statute of frauds, allege any of following issues in complaint, as appropriate:

☐ A writing exists that constitutes a memorandum of the agreement sufficient to satisfy statute of frauds.

Authority:

Alameda Belt Line v. City of Alameda (2003) 113 CA4th 15, 20-21

Discussion:

See 15.11[2] -[4], 15.18[2]

Form:

See 15.34

☐ Agreement is not a type covered by statute of frauds.

Authority:

Abeyta v. Superior Court (1993) 17 CA4th 1037, 1040, 21 CR2d 680

Discussion:

See 15.11[5]

☐ Court should apply principles of equitable estoppel to preclude defendant from relying on statute of frauds.

Authority:

Estate of Housley (1997) 56 CA4th 342, 349, 65 CR2d 628

Discussion:

See 15.08[4], 15.11[6], 15.18[3]

Forms:

See 15.35, 15.39

☐ If a party has presented evidence regarding statute of frauds, be aware that plaintiff is entitled to a jury instruction regarding the issue, for example, that defendant should be estopped from relying on statute of frauds.

Authority:

Tomlins v. American Ins. Co. (1968) 258 CA2d 525, 528, 66 CR 92

Discussion:

See 15.19

15.10[2] Checklist for Defendant.

- ☐ If plaintiff has based contract claim on oral agreement, consider whether to assert statute of frauds.

Authority:

CC § 1624(a)

Discussion:

See 15.06 -15.08

- ☐ If applicable, raise statute of frauds at earliest opportunity, or defense may be waived.

Authority:

California Concrete Co. v. Beverly Hills Sav. & Loan Ass'n (1989) 215 CA3d 260, 273

Discussion:

See 15.12

- ☐ Raise statute of frauds by one of following methods, whichever provides earliest opportunity:

☐ By demurrer, if:

☐ Complaint does not state whether contract is written, oral, or implied by conduct;

or

Authority:

CCP § 430.10(g)

Discussion:

See 15.13

Form:

See 15.36

- ☐ It appears from face of complaint that contract does not satisfy statute of frauds, and plaintiff may have difficulty amending complaint to cure the problem.

Authority:

CCP § 430.30(a)

Discussion:

See 15.14

Form:

See 15.36

- ☐ In answer to complaint, if failure to comply with writing requirement is not apparent from face of complaint.

Authority:

CCP § 430.30(b)

Discussion:

See 15.15

Form:

See 15.37

- ☐ By pretrial motion such as motion for summary judgment.

Authority:*Alameda Belt Line v. City of Alameda (2003) 113 CA4th 15, 22***Discussion:**

See 15.16[1]

- ☐ By trial motion such as motion to exclude or strike evidence.

Authority:*McGirr v. Gulf Oil Corp (1974) 41 CA3d 246, 252, 115 CR 902***Discussion:**

See 15.16[2]

- ☐ By request for a jury instruction, if court has already properly allowed evidence of an oral agreement.

Authority:*Kaljian v. Menezes (1995) 37 CA4th 87A***Discussion:**

See 15.17

- ☐ Be aware that defendant usually has burden of proof on statute of frauds and other affirmative defenses.

Authority:*Waller v. Truck Ins. Exch., Inc. (1995) 11 C4th 1, 33, 44 CR2d 370, 900 P2d 619***Discussion:**

See 15.12[3]

Legal Topics:

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

Civil Procedure Pleading & Practice Defenses, Demurrers & Objections Affirmative Defenses General Overview Commercial Law (UCC) Sales (Article 2) Form, Formation & Readjustment Statutes of Frauds General Overview Contracts Law Statutes of Frauds General Overview Real Property Law Purchase & Sale Contracts of Sale Enforceability Statutes of Frauds



12 of 193 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 15 Attacking or Defending Existence of Contract--Failure to Comply With Applicable Formalities
III. RAISING STATUTE OF FRAUDS ISSUES

1-15 MB Practice Guide: CA Contract Litigation 15.11

15.11 Complaint Should Allege Sufficient Facts to Bring Contract Within Statute of Frauds.

15.11[1] Complaint Must State Whether It Is Written, Oral, or Implied by Contract. A complaint based on breach of an asserted contract must indicate on its face whether the contract is written, oral, or implied by conduct [*CCP* § 430.10(g)].



Warning:

Failure to satisfy this pleading requirement renders the complaint subject to objection by way of demurrer or answer [*CCP* § 430.10(g)].



Cross Reference:

Filing demurrer if contract fails to state whether contract is written, oral, or implied by contract, see 15.15.

15.11[2] Written Contract Should Be Attached to Complaint. A complaint alleging a breach of a written contract must set out the terms of the contract verbatim in the body of the complaint, or must attach a copy of the written instrument and incorporate it by reference [*Otworth v. Southern Pac. Transp. Co.* (1985) 166 CA3d 452, 458-459, 212 CR 743].



Strategic Point--Plaintiff:

Unless there is some special reason not to do so, the plaintiff should always attach a copy of the contract to the complaint. This avoids ambiguity and generally promotes convenience later in the case.



Cross Reference:

Pleading breach of contract, see *Ch. 22, Suing or Defending Action for Breach of Contract*, 22.12.

15.11[3] When Contract Is Formed by Series of Writings, Complaint Should Allege and Incorporate Them. If contract is formed by series of writings that collectively satisfy the statute of frauds, the complaint should describe the writings and their relation to the subject matter, and allege that the defendant signed at least one of them [see *Searles v.*

Gonzalez (1923) 191 C 426, 431, 216 P 1003].



Strategic Point--Plaintiff:

All of the relevant memoranda should be attached to the complaint and incorporated by reference.



Cross Reference:

Proving contract by a series of writings, see 15.07[5].

15.11[4] If Signed by Someone Other than Plaintiff, Signer's Authority Should Be Alleged. If a contract was signed by someone other than the plaintiff, the complaint should allege that fact and one of the following, as appropriate:

- That party signing the contract was plaintiff's agent and had authority to sign the contract [see CC § 1624(a)]; or
- If another person signed the plaintiff's name, that the person who signed the name was acting as plaintiff's instrument or "amanuensis" [*Estate of Stephens (2002) 28 C4th 665, 670-671, 122 CR2d 358, 49 P3d 1093].*



Cross References:

Agent's signature will satisfy statute of frauds, see 15.07[3][a], [b].

Signature at person's express direction is deemed to be directing person's signature, see 15.07[2][b].

15.11[5] Complaint Should Allege Facts Bringing Oral Contract Within Statute of Frauds Exceptions. If the contract is oral, the complaint should allege sufficient facts to bring it within the applicable exception(s) to the statute of frauds, such as:

- The term of the contract or the time frame within which performance is due, in such a way that on the face of the complaint, the contract can or must be performed within a year from the date of making [see CC § 1624(a)(1)].
- The fact that the contract involves personal property, services, or other subject matter for which a writing is not required [see CC § 1624(a)(3)].



Warning:

Although there is no express statutory requirement that the complaint allege facts sufficient to bring an oral contract within the statute of frauds, failure to do so may subject the complaint to a demurrer if it appears from the face of the complaint that the underlying contract does not satisfy the statute [see, e.g., *Gressley v. Williams (1961) 193 CA2d 636, 640-641, 14 CR 496*, discussed in 15.14], thereby forcing the plaintiff to amend the complaint (assuming it can be amended). To avoid this possibility, the best practice is to make sure that the complaint on its face alleges sufficient facts that indicate that the oral contract is valid.

15.11[6] Facts Taking Oral Contract Out of Statute Should Be Alleged If Applicable. If an oral contract would be invalid under the statute of frauds, but the plaintiff is relying on facts that will take the contract out of the statute of frauds, such as new consideration [see 15.08[3]] or estoppel based on performance resulting in unconscionable injury or unjust enrichment [see 15.08[4]], the complaint should allege those facts sufficiently to

withstand a demurrer.

Example:

When the underlying oral contract was for a term in excess of one year, the plaintiff's attempt to anticipate a statute of frauds defense simply by alleging in the complaint, without more, that the defendant was estopped to raise the statute of frauds, was inadequate to withstand a demurrer based on the statute of frauds because the allegation was merely a conclusion of the pleader. The pleader was required to allege facts sufficient to plead all the essential elements of estoppel [*Gressley v. Williams* (1961) 193 CA2d 636, 640-641, 14 CR 496].

Legal Topics:

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

Civil Procedure Pleading & Practice Defenses, Demurrers & Objections Affirmative Defenses General Overview Commercial Law (UCC) Sales (Article 2) Form, Formation & Readjustment Statutes of Frauds General Overview Contracts Law Defenses General Overview Contracts Law Statutes of Frauds General Overview Real Property Law Purchase & Sale Contracts of Sale Enforceability Statutes of Frauds



13 of 193 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 15 Attacking or Defending Existence of Contract--Failure to Comply With Applicable Formalities
III. RAISING STATUTE OF FRAUDS ISSUES

1-15 MB Practice Guide: CA Contract Litigation 15.12

15.12 Defendant Must Raise Statute of Frauds at Earliest Opportunity.

15.12[1] Failure to Comply With Statute of Frauds Is Affirmative Defense. The claim that a contract is unenforceable for failure to comply with the statute of frauds must be raised as an affirmative defense [*Walton v. City of Red Bluff* (1991) 2 CA4th 117, 131, 3 CR2d 275].

15.12[2] Defense Is Waived If Not Asserted by Defendant. The failure to raise the affirmative defense of the statute of frauds at the earliest possible time results in a waiver of the defense [see *California Concrete Co. v. Beverly Hills Sav. & Loan Ass'n* (1989) 215 CA3d 260, 272-273]. Ordinarily, the earliest opportunity is when the defendant demurs or files an answer to a complaint. However, a defendant may raise the issue at trial or even in jury instructions if it is not apparent until that time that the claimant is relying on an oral contract [*Isaac v. A & B Loan Co.* (1988) 201 CA3d 307, 311-312, 247 CR 104 ; see *Secrest v. Security National Mortgage Loan Trust* 2002-2 (2008) 167 CA4th 544, 552, 84 CR3d 275 (plaintiffs first produced agreement with reply brief in support of motion for preliminary injunction; defendant adequately raised statute of limitations defense by stipulating that the only issue to be tried was whether the agreement was enforceable)].

Strategic Point--Defendant:



The statute of frauds is most often raised as an affirmative defense in the answer. It can also be raised in a demurrer, especially if the judge is receptive to demurrers and the issue is case-dispositive. Generally, unless a demurrer can be sustained without leave to amend, it is better to raise the statute in the answer and then attempt to dispose of the case in a motion for summary judgment or a motion for summary adjudication of issues.

Jury Instructions:

Statute of Frauds--Reasonable Time, see *California Forms of Jury Instruction, Ch. 3F, Instr. MB 300F.41* (Matthew Bender).



Cross References:

Raising statute of frauds in answer, see 15.15.

Raising statute of frauds by demurrer or motion, see 15.16.

15.12[3] Defendant Has Burden of Proving Application of Statute. In general, a defendant asserting new matter as an affirmative defense, including the statute of frauds, has the burden of pleading and proving the affirmative defense [*Waller v. Truck Ins. Exch., Inc.* (1995) 11 C4th 1, 33, 44 CR2d 370, 900 P2d 619]. "New matter" refers to a new issue the defendant has introduced into the case, rather than the negation of an element of the plaintiff's cause of action [*Erler v. Five Points Motors, Inc.* (1967) 249 CA2d 560, 565-566, 57 CR 516 (noting that law on burden of proof as to affirmative defenses is somewhat unclear)].

Legal Topics:

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

Civil Procedure Pleading & Practice Defenses, Demurrers & Objections Affirmative Defenses General
 Overview Commercial Law (UCC) Sales (Article 2) Form, Formation & Readjustment Statutes of Frauds General
 Overview Contracts Law Defenses General Overview Contracts Law Statutes of Frauds General Overview Real Property
 Law Purchase & Sale Contracts of Sale Enforceability Statutes of Frauds



14 of 193 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 15 Attacking or Defending Existence of Contract--Failure to Comply With Applicable Formalities
III. RAISING STATUTE OF FRAUDS ISSUES

1-15 MB Practice Guide: CA Contract Litigation 15.13

15.13 Defendant May Demur to Complaint That Fails to Specify Whether Asserted Contract Is Written, Oral, or Implied.

15.13[1] Complaint for Breach of Contract Must Specify Basis of Complaint. When a complaint is based on breach of an asserted contract, the complaint must indicate on its face whether the contract is written, oral, or implied by conduct [*CCP* § 430.10(g); *see* 15.11[1]]. A complaint alleging a breach of a written contract must set out the terms verbatim in the body of the complaint or must attach a copy of the written instrument and incorporate it by reference [*Otworth v. Southern Pac. Transp. Co.* (1985) 166 CA3d 452, 458-459, 212 CR 743].

➡ **Cross Reference:**

Pleading breach of contract, *see* Ch. 22, *Suing or Defending Action for Breach of Contract*, 22.12.

15.13[2] Failure of Complaint to Specify Basis of Complaint Is Grounds for Demurrer. The party against whom a complaint has been filed may demur on the grounds that it cannot be ascertained from the complaint whether the contract is written, oral, or implied by conduct [*CCP* §§ 430.10(g), 430.30(a)].

When such a failure does not appear from the face of the complaint or cross-complaint, an objection on that ground must be taken by filing an answer to the pleading [*CCP* § 430.30(b); *see* 15.15].

Judge's Perspective:

Defendants often file demurrers when the point can be resolved informally. For example, if the plaintiff fails to specify whether a contract is oral or written, a simple phone call or letter to the plaintiff's counsel inviting an amendment to the complaint usually is all that will be required.

➡ **Cross References:**

Form for demurrer to complaint that fails to specify whether contract was oral or written or implied by conduct, *see* 15.36.

Detailed discussion of use of demurrer, *see* Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, Ch. 11, Demurrers and Motions for Judgment on the Pleadings.

Further discussion of use of demurrer with forms, see California Forms of Pleading and Practice, Ch. 206, Demurrers and Motions for Judgment on the Pleadings (Matthew Bender).

Legal Topics:

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

Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsAffirmative DefensesGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsDemurrersCommercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentStatutes of FraudsGeneral OverviewContracts LawStatutes of FraudsGeneral OverviewReal Property LawPurchase & SaleContracts of SaleEnforceabilityStatutes of Frauds



15 of 193 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 15 Attacking or Defending Existence of Contract--Failure to Comply With Applicable Formalities
III. RAISING STATUTE OF FRAUDS ISSUES

1-15 MB Practice Guide: CA Contract Litigation 15.14

15.14 Defendant May Demur to Complaint If Invalidity of Contract Under Statute of Frauds Appears on Face of Complaint.

The statute of frauds may be raised by a demurrer if it clearly appears from the face of the complaint that the contract is invalid under the statute [*see, e.g., Gressley v. Williams* (1961) 193 CA2d 636, 640-641, 14 CR 496].

A complaint is subject to demurrer if it does not state facts sufficient to constitute a cause of action [CCP § 430.10(e)]. A complaint fails to state facts sufficient to constitute a cause of action if it shows on its face or it appears from judicially noticed matter that the action is barred by an affirmative defense [*see, e.g., Halvorsen v. Aramark Unif. Servs., Inc.* (1998) 65 CA4th 1383, 1391, 77 CR2d 383 (defense to intentional interference with contractual relations appeared on face of complaint)]. The affirmative defense must clearly appear on the face of the complaint to support a demurrer; it cannot be sustained if the complaint *might* be barred, but is not *necessarily* barred [*CrossTalk Prods., Inc. v. Jacobson* (1998) 65 CA4th 631, 635, 76 CR2d 615 (dismissal of unclean hands defense was inappropriate when factual ambiguity existed)].

Example:

A complaint alleging that the defendants entered into an oral agreement to employ plaintiff as an auto sales manager during the period between April 1, 1957, and December 1, 1958, pleaded a contract that on its face was invalid and unenforceable under the statute of frauds, and therefore was subject to demurrer [*Gressley v. Williams* (1961) 193 CA2d 636, 640-641, 14 CR 496].

**Strategic Point--Defendant:**

Raising the statute of frauds by way of a demurrer may be advantageous if the defense counsel knows or strongly suspects that the plaintiff cannot fix the problem simply by amending the complaint. In some cases, failure to comply with the statute of frauds is a pleading defect that is not easily fixed by amendment. In this situation, defense counsel may be able to dispose of the case at an earlier point in the proceedings that would be possible by answering the complaint and then moving for summary judgment at a later time. On the other hand, if it appears likely that the plaintiff could fix the problem by amending the complaint, the extra effort and expense of filing a demurrer may not be worthwhile, and answering the complaint and raising the statute of frauds as a defense may be preferable.

**Cross Reference:**

Form for demurrer, see 15.36.

Legal Topics:

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

Civil Procedure Pleading & Practice Defenses, Demurrers & Objections Demurrers Commercial Law (UCC) Sales (Article 2) Form, Formation & Readjustment Statutes of Frauds General Overview Contracts Law Statutes of Frauds General Overview Real Property Law Purchase & Sale Contracts of Sale Enforceability Statutes of Frauds



16 of 193 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 15 Attacking or Defending Existence of Contract--Failure to Comply With Applicable Formalities
III. RAISING STATUTE OF FRAUDS ISSUES

1-15 MB Practice Guide: CA Contract Litigation 15.15

15.15 Defendant May Raise Failure to Comply With Statute of Frauds by Answer to Complaint.

A defendant may raise the issue of the statute of frauds as an affirmative defense in its answer to a breach of contract complaint. It is appropriate to raise the defense by answer when the failure to comply with the writing requirement is not apparent from the face of the complaint [*CCP* § 430.30(b); see *Kaljjan v. Menezes* (1995) 36 CA4th 573, 582, 42 CR2d 510].

➤ Cross References:

Form for answer including affirmative defense of statute of frauds, see 15.37.

Detailed discussion of answers and affirmative defenses, see Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, Ch. 14, Answers.

Legal Topics:

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

Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsAffirmative DefensesGeneral OverviewCivil ProcedurePleading & PracticePleadingsAnswersCommercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentStatutes of FraudsGeneral OverviewContracts LawDefensesGeneral OverviewContracts LawStatutes of FraudsGeneral Overview



17 of 193 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 15 Attacking or Defending Existence of Contract--Failure to Comply With Applicable Formalities

III. RAISING STATUTE OF FRAUDS ISSUES

1-15 MB Practice Guide: CA Contract Litigation 15.16

15.16 Defendant May Raise Failure to Comply With Statute of Frauds by Motion.

15.16[1] Defendant May Raise Issue by Motion Once Answer Has Been Filed. The typical manner for a defendant to raise the issue of the statute of frauds after it has filed an answer is by pretrial motion such as a motion for summary judgment, motion for summary adjudication of issues, or motion for nonsuit [see, e.g., *Alameda Belt Line v. City of Alameda* (2003) 113 CA4th 15, 20]. This issue can also be raised in a motion for judgment on the pleadings [CCP § 438(c)(1)(A)].

➡ Cross References:

Discussion of bringing summary judgment motion, see Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, Ch. 38, Summary Judgment.

Discussion of bringing motion for judgment on the pleadings, see Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, Ch. 11, Demurrers and Motions for Judgment on the Pleadings.

15.16[2] Defendant May Raise Statute in Evidentiary Context by Motion to Exclude or Strike Evidence of Oral Agreement. If the plaintiff has attempted to introduce evidence at trial that an oral agreement is an enforceable contract, the defendant may make a motion to have the evidence stricken as a violation of the statute of frauds. Such a motion may be made at any time during the trial [*McGirr v. Gulf Oil Corp.* (1974) 41 CA3d 246, 252, 115 CR 902].

➡ Cross Reference:

Discussion of bringing motion to strike, see Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, Ch. 12, Motions to Strike.

Legal Topics:

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

Civil ProcedurePretrial JudgmentsJudgment on the PleadingsCivil ProcedurePretrial JudgmentsNonsuitsInvoluntary NonsuitsCivil ProcedureSummary JudgmentGeneral OverviewContracts LawDefensesGeneral OverviewContracts LawStatutes of FraudsGeneral Overview



18 of 193 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 15 Attacking or Defending Existence of Contract--Failure to Comply With Applicable Formalities
III. RAISING STATUTE OF FRAUDS ISSUES

1-15 MB Practice Guide: CA Contract Litigation 15.17

15.17 Defendant May Raise Issue by Request for Jury Instruction.

If the court has already allowed properly introduced evidence of an oral agreement (such as to prove that an oral contract is not subject to the statute of frauds), the defendant may request a jury instruction on the issue of the statute of frauds. Such a request is sufficient to preserve the statute as an affirmative defense. The erroneous failure to give a statute of frauds jury instruction is grounds for a new trial, unless the error is harmless [*Kaljia v. Menezes* (1995) 37 CA4th 87a].



Cross Reference:

Discussion of requesting jury instructions, see California Forms of Pleading and Practice, Ch. 326, Jury Instructions (Matthew Bender).

Legal Topics:

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

Civil Procedure Trials Jury Trials Jury Instructions Requests for Instructions Commercial Law (UCC) Sales (Article 2) Form, Formation & Readjustment Statutes of Frauds General Overview Contracts Law Defenses General Overview Contracts Law Statutes of Frauds General Overview Real Property Law Purchase & Sale Contracts of Sale Enforceability Statutes of Frauds



19 of 193 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 15 Attacking or Defending Existence of Contract--Failure to Comply With Applicable Formalities
III. RAISING STATUTE OF FRAUDS ISSUES

1-15 MB Practice Guide: CA Contract Litigation 15.18

15.18 Plaintiff May Respond to Statute of Frauds Defense by Motion.

15.18[1] Plaintiff May Assert That Oral Agreement Is Not Within Statute of Frauds. If a defending party has asserted a statute of frauds defense in an action based on contract, the plaintiff may raise by motion, such as a motion in opposition to a motion for nonsuit, that the agreement is not covered by the statute of frauds because it does not fall in any category specified in the statute [CC § 1624; see *Abeyta v. Superior Court* (1993) 17 CA4th 1037, 1040, 21 CR2d 680].

15.18[2] Plaintiff May Assert That There Is Sufficient Memorandum of Agreement to Satisfy Statute of Frauds. If a defending party has asserted a statute of frauds defense in an action based on contract, the plaintiff may raise by motion, such as a motion in opposition to summary judgment, that a writing exists that is a memorandum of the agreement sufficient to satisfy the statute of frauds [*Alameda Belt Line v. City of Alameda* (2003) 113 CA4th 15, 20-21].

➡ **Cross Reference:**

Form for allegation that writing is sufficient evidence of contract, see 15.34.

15.18[3] Plaintiff May Assert That Defendant Is Equitably Estopped From Asserting Statute of Frauds. If a defending party has asserted a statute of frauds defense in an action based on contract, the plaintiff may assert, by motion in opposition, that the principles of equitable estoppel should prevent the defendant from relying on the statute of frauds [*Estate of Housley* (1997) 56 CA4th 342, 349, 65 CR2d 628].

Jury Instructions:

Estoppel to Assert the Statute of Frauds, see *California Forms of Jury Instruction, Ch. 3F, Instr. MB 300F.42* (Matthew Bender).

➡ **Cross References:**

Form for motion requesting equitable enforcement of contract, see 15.39.

Detailed discussion of motion practice, see Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, Ch. 26, Law and Motion Procedure.

Legal Topics:

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

Commercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentStatutes of FraudsGeneral
OverviewCommercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentStatutes of
FraudsExceptionsGeneral OverviewContracts LawStatutes of FraudsGeneral OverviewContracts LawStatutes of
FraudsExceptionsGeneral OverviewReal Property LawPurchase & SaleContracts of SaleEnforceabilityStatutes of
Frauds



20 of 193 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 15 Attacking or Defending Existence of Contract--Failure to Comply With Applicable Formalities

III. RAISING STATUTE OF FRAUDS ISSUES

1-15 MB Practice Guide: CA Contract Litigation 15.19

15.19 Plaintiff May Raise Statute of Frauds Issue by Request for Jury Instruction.

Just as a defendant is entitled to a jury instruction [see 15.17], the plaintiff is entitled to a jury instruction when it has presented evidence that the statute should not be applicable, for example, if the plaintiff asserts that the defendant should be estopped from relying on the statute [*Tomlins v. American Ins. Co.* (1968) 258 CA2d 525, 528, 66 CR 92].

➤ Cross Reference:

Discussion of requesting jury instructions, see California Forms of Pleading and Practice, Ch. 326, Jury Instructions (Matthew Bender).

Legal Topics:

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

Civil Procedure Trials Jury Trials Jury Instructions Requests for Instructions Commercial Law (UCC) Sales (Article 2) Form, Formation & Readjustment Statutes of Frauds General Overview Contracts Law Defenses General Overview Contracts Law Statutes of Frauds General Overview Real Property Law Purchase & Sale Contracts of Sale Enforceability Statutes of Frauds



21 of 193 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 15 Attacking or Defending Existence of Contract--Failure to Comply With Applicable Formalities
IV. DETERMINING WHETHER OTHER STATUTES REQUIRE WRITTEN CONTRACT, PARTICULAR
CONTRACT PROVISIONS, OR OTHER FORMALITIES

1-15 MB Practice Guide: CA Contract Litigation 15.20

15.20 CHECKLIST: Determining Whether Other Statutes Require Written Contract, Particular Contract Provisions, or Other Formalities.

☐ Determine whether there are statutes specifically regulating type of contract in question.

☐ If a particular type of contract or transaction is regulated by statute, determine whether that statute specifies:

☐ Writing requirement, such as for:

☐ Premarital agreement.

Authority:

Fam Code § 1611

Discussion:

See 15.21

☐ Sale of personal property for amount greater than \$5,000.

Authority:

Civ Code § 1624.5

Discussion:

See 15.22

☐ Personal property lease of an amount exceeding \$1,000.

Authority:

Com Code § 10201(a)(1)

Discussion:

See 15.23[1]

- ☐ Consumer lease of any amount.

Authority:

Com Code § 10201(a)(2)

Discussion:

See 15.23[2]

- ☐ Sale of goods for more than \$500.

Authority:

Com Code § 2201(1)

Discussion:

See 15.24

- ☐ Contract between contractor and owner or tenant for improvement to structure.

Authority:

B&P Code § 7159

Discussion:

See 15.25

- ☐ Contract between inventor and invention developer.

Authority:

B&P Code § 22372

Discussion:

See 15.26

- ☐ Agreement to submit future disputes to arbitration.

Authority:

CCP § 1281

Discussion:

See 15.27

- ☐ Agreement to toll statute of limitations.

Authority:

CCP § 360

Discussion:

See 15.28[1]

- ☐ Agreement to waive statute of limitations.

Authority:

CCP § 360.5

Discussion:

See 15.28[2]

- ☐ Representation to another person regarding a third person's credit.

Authority:

CCP § 1974

Discussion:

See 15.29

- ☐ Contract to make will, not to revoke will, or to die intestate.

Authority:

Prob Code § 21700

Discussion:

See 15.30

- ☐ Any other statute requiring a writing, such as vehicle lease contract.

Authority:

CC § 2985.8

Discussion:

See 15.33

- ☐ Required content for agreement, for example, work to be performed and materials to be used in performance.

Authority:

B&P Code § 7159(c)

Discussion:

See 15.25[2]

- ☐ Determine effect of failure to comply with formality of statute, such as:

- ☐ Opposition party's inability to enforce contract.

Authority:

Hall v. Hall (1990) 222 CA3d 578, 583, 271 CR 773

Discussion:

See 15.21[2]

- ☐ Contracting party's right to rescind contract, such as for failure to provide translation of contract negotiated in language other than English.

Authority:

CC § 1632(k)

Discussion:

See 15.31[4]

- ☐ Proof relating to required writings and signatures in internet contracts subject to UETA.

Authority:

CC § 1633.7

Discussion:

See 15.32

Legal Topics:

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

Contracts LawFormationGeneral OverviewContracts LawSales of GoodsForm, Formation & ReadjustmentStatutes of FraudsFormal RequirementsContracts LawTypes of ContractsLease AgreementsPersonalty LeasesStatutes of FraudsFamily LawMarital Duties & RightsProperty RightsPremarital AgreementsRequirementsGeneral OverviewReal Property LawPurchase & SaleContracts of SaleFormalities



22 of 193 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 15 Attacking or Defending Existence of Contract--Failure to Comply With Applicable Formalities
 IV. DETERMINING WHETHER OTHER STATUTES REQUIRE WRITTEN CONTRACT, PARTICULAR
 CONTRACT PROVISIONS, OR OTHER FORMALITIES

1-15 MB Practice Guide: CA Contract Litigation 15.21

15.21 Premarital Agreements Must Be in Writing.

15.21[1] Premarital Agreement Must Be in Writing and Signed by Parties. The California Uniform Premarital Agreement Act [*see Fam Code § 1500 et seq.*] provides that a premarital agreement must be in writing and signed by both parties [*Fam Code § 1611*]. The Act also specifies such matters as the type of property subject to such agreements and the requirements for amendments to a premarital agreement [*see In re Marriage of Bonds (2000) 24 C4th 1, 14-15, 99 CR2d 252, 5 P3d 815*].

Distinguish--Premarital Agreements Are Viewed More Strictly Than Ordinary Agreements:

The policy considerations behind the statute of frauds apply with even more force to prenuptial agreements than to ordinary contracts, so that the requirements of certainty of terms of a writing are even more strict [*In re Marriage of Shaban (2001) 88 CA4th 398, 406, 105 CR2d 863*].

However, even though the Act does not specifically make reference to any of the traditional exceptions to the statute of frauds, such as equitable estoppel, it appears that courts may be receptive to such arguments [*see Hall v. Hall (1990) 222 CA3d 578, 587, 271 CR 773*].

Distinguish:

Courts will not apply equitable estoppel to avoid application of the statute of frauds in the case of a transmutation (an interspousal transaction changing the character of community or separate property) [*In re Marriage of Benson (2005) 36 C4th 1096, 1110-1111 ; see Fam Code § 852(a)*].

15.21[2] Effect of Failure to Comply With Writing Requirement. The legislature intended the premarital agreement writing requirement to be a statute of frauds, so that a failure to comply means that the agreement is not enforceable [*Hall v. Hall (1990) 222 CA3d 578, 586, 271 CR 773*].

Judge's Perspective:

As the court noted in *Hall*, a premarital agreement subject to the statute of frauds can be enforced based on the same exceptions that apply to other contracts. For example, in that case the court of appeal enforced an oral premarital agreement when it was shown that the wife had substantially detrimentally relied on the husband's promise to grant her a life estate in his separate property [*Hall v. Hall (1990)*].

222 CA3d 578, 586-587, 271 CR 773].

Cross Reference:

Detailed discussion of writing requirement for premarital agreements, see *California Forms of Pleading and Practice*, § 530.12[3] (Matthew Bender).

15.21[3] Premarital Agreements Are Subject to Additional Scrutiny by Courts. A premarital agreement is not enforceable if the party against whom enforcement is sought proves that that party did not execute the agreement voluntarily [*Fam Code § 1615(a)(1), (c)* (circumstances under which court may deem execution not to be voluntary); see *In re Marriage of Bonds (2000) 24 C4th 1, 13, 99 CR2d 252, 5 P3d 815*].

Judge's Perspective:

This rule is consistent with a long-established public policy, set forth in both statute and numerous reported decisions, that spouses have a fiduciary obligation to each other. Thus, premarital agreements are treated differently from ordinary contracts because the parties have duties to each other, and might potentially give up rights, which ordinary contracting parties do not have. The litigation of premarital agreements is a specialized area requiring a thorough understanding of the law.

Legal Topics:

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

Family Law Marital Duties & Rights Property Rights Premarital Agreements Requirements General Overview



23 of 193 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 15 Attacking or Defending Existence of Contract--Failure to Comply With Applicable Formalities
IV. DETERMINING WHETHER OTHER STATUTES REQUIRE WRITTEN CONTRACT, PARTICULAR
CONTRACT PROVISIONS, OR OTHER FORMALITIES

1-15 MB Practice Guide: CA Contract Litigation 15.22

15.22 Sale of Personal Property for More Than \$5,000 Requires Written Contract.

15.22[1] Written Contract Is Necessary to Enforce Sale of Personal Property for Amount Greater Than \$5,000. With listed exceptions [*see 15.22[2]*], a contract for the sale of personal property other than "goods" is not enforceable through court action or defense in an amount greater than \$5,000 unless evidenced by a writing that meets the following requirements [*Civ Code § 1624.5(a)*]:

- It establishes that a contract for sale has been made between the parties at a specific price;
- It reasonably identifies the personal property; and
- It is signed by the party who is the object of enforcement or by his or her authorized agent.

➡ **Cross Reference:**

Detailed discussion of writing requirements for sale of personal property, see *California Forms of Pleading and Practice*, § 530.12[11] (*Matthew Bender*).

15.22[2] Writing Requirement for Sale of Personal Property Inapplicable to Specified Contracts. The personal property writing requirement [*see 15.22[1]*] does not apply to the following types of agreements [*Civ Code § 1624.5(b), (c)*]:

- Agreements for the sale of goods [*see 15.24*].
- Agreements for the sale of securities.
- Agreements establishing personal property as collateral.
- Qualified financial contracts [*see 15.08[2]*].

➡ **Cross Reference:**

Detailed discussion of writing requirements for agreements for sale of personal property, see *California Forms of Pleading and Practice*, § 530.12[11] (Matthew Bender).

Legal Topics:

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

Contracts LawTypes of ContractsPersonal Property



24 of 193 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 15 Attacking or Defending Existence of Contract--Failure to Comply With Applicable Formalities
 IV. DETERMINING WHETHER OTHER STATUTES REQUIRE WRITTEN CONTRACT, PARTICULAR
 CONTRACT PROVISIONS, OR OTHER FORMALITIES

1-15 MB Practice Guide: CA Contract Litigation 15.23

15.23 Some Personal Property Leases Must Be in Writing.

15.23[1] Ordinary Personal Property Lease in Amount Greater Than \$1,000 Must Be in Writing. If a personal property lease agreement other than a consumer lease is for payments that total \$1,000 or more, excluding payments for options to renew or buy, the lease is not enforceable by action or defense unless it is in writing [*Com Code § 10201(a)(1)*; see *Mitchell v. American Fair Credit Assn.* (2002) 99 CA4th 1345, 1357, 122 CR2d 193].

15.23[2] All Consumer Leases of Personal Property Must Be in Writing. A personal property consumer lease is not enforceable by action or defense unless it is in writing [*Com Code § 10201(a)(2)*]. For these purposes, a "consumer lease" is a lease that a lessor regularly engaged in the business of leasing or selling makes to a lessee who is an individual, and who takes under the lease primarily for a personal, family, or household purpose [*Com Code § 10103(a)(5)*].

15.23[3] Writing Must Specify Lease Terms. To be sufficient, a writing required for a personal property lease must contain all of the following [*Com Code § 10201(a)(2)*]:

- The signature of the party against whom enforcement is sought or by that party's authorized agent.
- A showing that a personal property lease has been made between the parties.
- A description of the personal property leased.
- A statement of the lease term.



Cross Reference:

Detailed discussion of writing requirements for agreements for lease of personal property, see California Forms of Pleading and Practice, Ch. 413, Personal Property Leases (Matthew Bender).

Legal Topics:

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

Contracts LawTypes of ContractsLease AgreementsPersonalty LeasesStatutes of Frauds



25 of 193 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 15 Attacking or Defending Existence of Contract--Failure to Comply With Applicable Formalities
IV. DETERMINING WHETHER OTHER STATUTES REQUIRE WRITTEN CONTRACT, PARTICULAR
CONTRACT PROVISIONS, OR OTHER FORMALITIES

1-15 MB Practice Guide: CA Contract Litigation 15.24

15.24 Sale of Goods for More Than \$500 Requires Written Contract.

A contract for the sale of goods generally is not enforceable through court action or defense in an amount greater than \$500 unless evidenced by a writing. The writing must meet the following requirements [*Com Code § 2201(1)*]:

- Establish that a contract for sale of goods has been made between the parties;
- Be authenticated by the party who is the object of enforcement, or by the party's authorized agent;
and
- Specify the quantity of goods.

► **Cross References:**

Essential elements of contracts for sale of goods, see *Ch. 27, Contract for Sale of Goods--Attacking or Defending Existence of Contract Under California Commercial Code, 27.06, 27.09*.

Remedies under Commercial Code contract for sale of goods, see *Ch. 26, Contract for Sale of Goods--Seeking Remedies Under California Commercial Code*.

Detailed discussion of writing requirement for sale of goods, see *California Forms of Pleading and Practice, § 530.12[12] (Matthew Bender)*.

Legal Topics:

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

Commercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentStatutes of FraudsGeneral
OverviewCommercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentStatutes of
FraudsExceptionsGeneral OverviewContracts LawSales of GoodsForm, Formation & ReadjustmentStatutes of
FraudsGeneral OverviewContracts LawSales of GoodsForm, Formation & ReadjustmentStatutes of
FraudsExceptionsContracts LawSales of GoodsForm, Formation & ReadjustmentStatutes of FraudsFormal
Requirements



26 of 193 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 15 Attacking or Defending Existence of Contract--Failure to Comply With Applicable Formalities
IV. DETERMINING WHETHER OTHER STATUTES REQUIRE WRITTEN CONTRACT, PARTICULAR
CONTRACT PROVISIONS, OR OTHER FORMALITIES

1-15 MB Practice Guide: CA Contract Litigation 15.25

15.25 Agreement Between Contractor and Owner or Tenant for Improvement to Structure Must Be in Writing and Contain Specific Information.

15.25[1] Home Improvement Contract Over \$500 Must Be in Writing. Every home improvement contract that has an aggregate contract price over \$500, and any changes to the contract, must be in writing and must be signed by the parties to the contract prior to the commencement of work covered by the contract or an applicable change order [*B&P Code § 7159(d)*].

15.25[2] Home Improvement Contract Over \$500 Must Make Specific Disclosures. The writing evidencing a home improvement contract of more than \$500 in labor, services, and materials must contain all of the following items:

- The name, business address, and license number of the contractor [*B&P Code § 7159(d)(1)*].
- If applicable, the name and registration number of the home improvement salesperson who solicited or negotiated the contract [*B&P Code § 7159(d)(2)*].
- The heading "Home Improvement" in at least 10-point boldface type [*B&P Code § 7159(d)(3)*].
- The following statement in at least 12-point boldface type: "You are entitled to a completely filled in copy of this agreement, signed by both you and the contractor, before any work may be started." [*B&P Code § 7159(d)(4)*].
- The contract price [*B&P Code § 7159(d)(5)*].
- Any finance charge, set out separately from the contract amount [*B&P Code § 7159(d)(6)*].
- A description of the project and a description of the significant materials to be used and equipment to be installed [*B&P Code § 7159(d)(7)*].
- The details of any downpayment, which may not exceed the lesser of \$1,000 or 10 percent of the contract price [*B&P Code § 7159(d)(8)*].

- A schedule of progress payments, which must specifically describe each phase of work, including the type and amount of work or services scheduled to be supplied in each phase, along with the amount of each proposed progress payment [*B&P Code § 7159(d)(9)*].
- The approximate start date and a statement that describes what constitutes substantial commencement of work under the contract [*B&P Code § 7159(d)(10)*].
- The estimated completion date of the work [*B&P Code § 7159(d)(11)*].
- If applicable, a list of documents incorporated into the contract [*B&P Code § 7159(d)(12)*].
- The following statement entitled "Note about Extra Work and Change Orders": "Extra Work and Change Orders become part of the contract once the order is prepared in writing and signed by the parties prior to the commencement of any work covered by the new change order. The order must describe the scope of the extra work or change, the cost to be added or subtracted from the contract, and the effect the order will have on the schedule of progress payments." [*B&P Code § 7159(d)(13)*].

Exception:

A contractor who furnishes a performance and payment bond, lien and completion bond, or a bond equivalent is exempt from certain of these requirements [*see B&P Code § 7159.5(a)(8)*].

**Cross Reference:**

Detailed discussion of writing requirements for home improvement contracts, see California Forms of Pleading and Practice, Ch. 104, Building Contracts (Matthew Bender).

Legal Topics:

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

Antitrust & Trade Law Consumer Protection General Overview Contracts Law Types of Contracts Construction Contracts



27 of 193 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 15 Attacking or Defending Existence of Contract--Failure to Comply With Applicable Formalities
 IV. DETERMINING WHETHER OTHER STATUTES REQUIRE WRITTEN CONTRACT, PARTICULAR
 CONTRACT PROVISIONS, OR OTHER FORMALITIES

1-15 MB Practice Guide: CA Contract Litigation 15.26

15.26 Contract Between Inventor and Invention Developer Must Be in Writing and Contain Specified Disclosures.

15.26[1] Invention Development Services Contract Must Be in Writing. Every contract for invention development services must be in writing, and a copy of the written contract must be given to the inventor at the time he or she signs the contract [*B&P Code § 22372(a)*]. If the invention developer plans one or more subsequent contracts with the inventor, a written statement of that intent must be supplied to the customer, and also a copy of the subsequent contract or a written summary of the general terms of every such subsequent contract, including the amount of fees required from the customer [*B&P Code § 22372(b)*].

15.26[2] Disclosures Required in Every Invention Development Services Contract. Every contract for invention development services is required to contain specific disclosures, including:

- The terms and conditions of payment [*B&P Code § 22379(a)*].
- The particular services that the invention developer will perform for the inventor [*B&P Code § 22379(b)*].
- A statement of whether the invention developer will construct one or more prototypes, models, or devices embodying the invention, and whether the developer will sell such items [*B&P Code § 22379(c), (d)*].
- The name of the person or firm of the invention developer and the invention developer's principal business address and the name and address of its agent authorized to receive service of process [*B&P Code § 22379(e), (f)*].
- A statement of all fees related to the invention development [*B&P Code § 22379(h)*].
- If any oral or written representation of estimated invention earnings is made, a statement of that estimate and the data on which it is based [*B&P Code § 22379(j)*].

■ A statement regarding potential patent rights and consequences of distribution [*B&P Code* § 22379(p)].



Cross Reference:

Detailed discussion of writing requirements for agreement for invention development services, see California Forms of Pleading and Practice, Ch. 411, Patents and Inventions (Matthew Bender).

Legal Topics:

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

Antitrust & Trade LawConsumer ProtectionGeneral OverviewContracts LawTypes of ContractsGeneral Overview



28 of 193 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 15 Attacking or Defending Existence of Contract--Failure to Comply With Applicable Formalities
 IV. DETERMINING WHETHER OTHER STATUTES REQUIRE WRITTEN CONTRACT, PARTICULAR
 CONTRACT PROVISIONS, OR OTHER FORMALITIES

1-15 MB Practice Guide: CA Contract Litigation 15.27

15.27 Agreement to Submit to Arbitration Must Be in Writing.

The California Arbitration Act [*CCP § 1280 et seq.*] is a comprehensive statutory scheme regulating arbitration by private parties in California. Under this detailed statutory scheme, the legislature has expressed a strong public policy in favor of arbitration as an expeditious and inexpensive means of dispute resolution [*Aguilar v. Lerner (2004) 32 C4th 974, 983, 88 P3d 24*]. However, for enforcement under the California Arbitration Act, an agreement to submit a potential future dispute to arbitration must be in writing [*CCP § 1281; see St. Agnes Med. Ctr. v. PacifiCare of Cal. (2003) 31 C4th 1187, 1194*]. The term "written agreement" under the arbitration statutes includes any written agreement that has been extended or renewed, even by an oral or implied agreement [*CCP § 1280(f)*].

➡ **Cross References:**

Discussion of arbitration considerations in contract litigation, see Ch. 5, Determining Whether to Arbitrate or Litigate.

Detailed discussion of writing requirements for agreement to submit future dispute to arbitration, see California Forms of Pleading and Practice, Ch. 32, Contractual Arbitration: Agreements and Compelling Arbitration (Matthew Bender).

Legal Topics:

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

Civil Procedure Alternative Dispute Resolution Arbitrations General Overview Contracts Law Contract Conditions & Provisions Arbitration Clauses



29 of 193 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 15 Attacking or Defending Existence of Contract--Failure to Comply With Applicable Formalities
IV. DETERMINING WHETHER OTHER STATUTES REQUIRE WRITTEN CONTRACT, PARTICULAR
CONTRACT PROVISIONS, OR OTHER FORMALITIES

1-15 MB Practice Guide: CA Contract Litigation 15.28

15.28 Agreement to Toll or Waive Statute of Limitations Must Be in Writing.

15.28[1] Promise to Toll Statute of Limitations Must Be in Writing. Any acknowledgment or promise sufficient to take a case out of operation of the statute of limitations or to toll the statute of limitations must be in writing and signed by party to be charged [CCP § 360].

15.28[2] Waiver of Statute of Limitations Must Be in Writing. No waiver bars a defense to any action that the action was not commenced within a statute of limitations period unless the waiver is in writing and signed by the person obligated [CCP § 360.5].

➡ **Cross References:**

Statute of limitations issues in contract litigation, see Ch. 4, Determining Applicable Statute of Limitations and Effect on Potential Action.

Detailed discussion of an agreement to waive or toll statute of limitations, see California Forms of Pleading and Practice, Ch. 345, Limitation of Actions; and
Ch. 530, Statute of Frauds, § 530.12[13] (Matthew Bender).

Legal Topics:

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

Contracts LawDefensesStatutes of LimitationsGovernmentsLegislationStatutes of LimitationsPleading & ProofGovernmentsLegislationStatutes of LimitationsTollingGovernmentsLegislationStatutes of LimitationsWaivers



30 of 193 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 15 Attacking or Defending Existence of Contract--Failure to Comply With Applicable Formalities
IV. DETERMINING WHETHER OTHER STATUTES REQUIRE WRITTEN CONTRACT, PARTICULAR
CONTRACT PROVISIONS, OR OTHER FORMALITIES

1-15 MB Practice Guide: CA Contract Litigation 15.29

15.29 Representation Regarding Third Person's Credit Must Be in Writing.

When a person makes a representation to another person to obtain credit for a third person, the person making the representation cannot be charged for the representation unless the representation or some memorandum of the representation is in writing, and either handwritten by or signed by the person to be charged [CCP § 1974]. This writing requirement applies only to representations in which the primary purpose is to procure credit for the third person [*Seneca Communications, Inc. v. International Bank of Cal.* (1980) 103 CA3d 541, 551, 163 CR 176].



Cross Reference:

Detailed discussion of representation regarding another's credit, see *California Forms of Pleading and Practice*, § 530.12[2][e] (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawStatutes of FraudsGeneral Overview



31 of 193 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 15 Attacking or Defending Existence of Contract--Failure to Comply With Applicable Formalities
 IV. DETERMINING WHETHER OTHER STATUTES REQUIRE WRITTEN CONTRACT, PARTICULAR
 CONTRACT PROVISIONS, OR OTHER FORMALITIES

1-15 MB Practice Guide: CA Contract Litigation 15.30

15.30 Contract to Make Will or Not to Revoke Will or Other Instrument Must Comply With Formalities.

If made after December 31, 2000, a contract to make a will other instrument, or not to revoke a will or other instrument, or to die intestate, can be proved only by one of the following methods [*Prob Code* § 21700(a)]:

- Written terms of a will or other instrument stating the material provisions of the contract.
- A written reference in a will or other instrument to such a contract, and extrinsic evidence proving the terms of the contract.
- A writing signed by the decedent evidencing the contract.
- Clear and convincing evidence of an agreement between the decedent and the claimant, or a promise by the decedent to the claimant that is enforceable in equity.
- Clear and convincing evidence of an agreement between the decedent and another person for the benefit of the claimant, or a promise by the decedent to another person for the benefit of the claimant that is enforceable in equity.

If made before January 1, 2001, a contract to make a will or other instrument generally cannot be established by mere evidence of an agreement, but rather may be shown only by a writing signed by the decedent, an express reference to the contract in the will along with extrinsic evidence showing the terms of the contract, or will provisions stating the material provisions of the contract [*see former Prob Code* § 150(a)].



Cross Reference:

Detailed discussion of an agreement to make a will or other instrument, or not to revoke a will or other instrument, or to die intestate, see *California Forms of Pleading and Practice*, § 530.12[9] (Matthew Bender).

Legal Topics:

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

Contracts Law Statutes of Frauds General Overview Estate, Gift & Trust Law Wills Contracts to Make Wills



32 of 193 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 15 Attacking or Defending Existence of Contract--Failure to Comply With Applicable Formalities
 IV. DETERMINING WHETHER OTHER STATUTES REQUIRE WRITTEN CONTRACT, PARTICULAR
 CONTRACT PROVISIONS, OR OTHER FORMALITIES

1-15 MB Practice Guide: CA Contract Litigation 15.31

15.31 Translation Requirements Apply to Contracts Negotiated in Languages Other Than English.

15.31[1] Translation of Contract Must Be Provided. If a person engaged in a trade or business uses a language other than English as the primary language for certain contract negotiations with a consumer, the consumer must be provided a translation of the contract in that other language before the consumer executes the contract. The translation must include a translation of every term and condition in the contract. For contracts entered into before July 1, 2004, this requirement applied only to contracts negotiated primarily in Spanish. On and after July 1, 2004, it is applicable to contracts negotiated primarily in Spanish, Chinese, Tagalog, Vietnamese, or Korean [CC § 1632(b)].

15.31[2] Contracts Subject to Translation Requirement. The foreign language translation requirement applies to the following types of contracts [CC § 1632(b)]:

- A contract or agreement that is subject to the Unruh Retail Installment Sales Act, the Rees-Levering Motor Vehicles Sales and Finance Act, or the Vehicle Leasing Act.
- A loan or extension of credit for use primarily for personal, family, or household purposes, when the loan or extension of credit is subject to the Industrial Loan Law or the California Finance Lenders Law.
- Any other loan or extension of credit secured otherwise than by real property, or unsecured, for use primarily for personal, family, or household purposes.
- A lease, sublease, rental contract or agreement, or other tenancy contract or agreement, for a period longer than one month, covering a dwelling, an apartment, a mobilehome, or any other dwelling unit normally occupied as a residence.
- A reverse mortgage.
- A contract or agreement containing a statement of fees or charges, entered into for the purpose of obtaining legal services, when the person with whom the consumer negotiates the contract or agreement is a California-licensed attorney.

- A foreclosure consulting contract subject to *CC* §§ 2945-2945.11 (as of July 1, 2009).

Certain types of contracts, and certain types of negotiations, are exempted from the translation requirement [*see CC* § 1632(g), (h)]. Certain exempted parts of the contract are not required to be translated [*see CC* § 1632(i)].

15.31[3] Notice of Right to Translation Must Be Posted. On entering into a contract that is subject to the Unruh Retail Installment Sales Act, the Rees-Levering Motor Vehicles Sales and Finance Act, or the Vehicle Leasing Act, or that is for a loan or extension of credit secured otherwise than by real property, or unsecured, for use primarily for personal, family, or household purposes, a notice in the other language must be conspicuously displayed stating that the person with whom the consumer is negotiating must provide a contract, or a translation of the disclosures required by law, in the other language in which the contract or agreement was negotiated [*CC* § 1632(f)].

15.31[4] Consumer May Rescind Contract for Noncompliance. In the event of noncompliance with the requirements of *CC* § 1632, the consumer may rescind the contract. When a contract for a consumer credit sale or consumer lease that has been sold and assigned to a financial institution is rescinded, the consumer must make restitution to, and have restitution made by, the person with whom he or she made the contract, and must give notice of rescission to the assignee. Notwithstanding that the contract was assigned without recourse, the assignment must be deemed rescinded, and the assignor must promptly repurchase the contract from the assignee [*CC* § 1632(k)].



Cross Reference:

Detailed discussion of translations required for consumer contracts, see *California Forms of Pleading and Practice*, § 127.19 (Matthew Bender).

Legal Topics:

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

Antitrust & Trade LawConsumer ProtectionGeneral OverviewAntitrust & Trade LawConsumer ProtectionDeceptive Acts & PracticesState RegulationContracts LawContract Conditions & ProvisionsGeneral OverviewContracts LawDefensesGeneral Overview



33 of 193 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 15 Attacking or Defending Existence of Contract--Failure to Comply With Applicable Formalities
 IV. DETERMINING WHETHER OTHER STATUTES REQUIRE WRITTEN CONTRACT, PARTICULAR
 CONTRACT PROVISIONS, OR OTHER FORMALITIES

*1-15 MB Practice Guide: CA Contract Litigation 15.32***15.32 Transactions Conducted by Electronic Means Are Subject to Special Rules.**

The Uniform Electronic Transactions Act ("UETA") [see CC § 1633.1 et seq.] generally validates electronic contracts and electronic signatures in transactions when each party has agreed to conduct the transaction by electronic means. Whether the parties have agreed to conduct a transaction by electronic means is determined from the context and surrounding circumstances, including the parties' conduct [CC § 1633(a)].

Under the UETA, a contract may be formed by the interaction of the parties' computer programs, even if no individual was aware of or reviewed the electronic agents' actions or the resulting terms and agreements, or by the interaction of a computer program and an individual [CC § 1633.14(a)(1), (2)]. A contract may not be denied legal effect or enforceability just because an electronic record was used in its formation [CC § 1633.7(b); see CC § 1633.2(g) ("electronic record" defined)].

If a law such as the statute of frauds requires that a contract be in writing, an electronic record satisfies the law [CC § 1633.7(c)]. If a signature is legally required, an electronic signature satisfies that requirement [CC § 1633.7(d)]. An electronic signature is a binding signature as long as the signature can be traced to an individual who took some affirmative action to agree to the contract [CC §§ 1633.7(d), 1633.9(a)], such as entering a password or clicking on an "I Agree" button.

**Strategic Point:**

The terms of an electronic contract are determined by the substantive law applicable to it [CC § 1633.14(b)]. Thus, internet contracts are subject to general contract law, including that pertaining to illegality, unconscionability, and construction of contract terms. Accordingly, internet contracts are subject to the same claims and defenses regarding formalities as other contracts, subject to proof.

**Cross Reference:**

Discussion of contracts under UETA, see *California Legal Forms*, § 57.34[4] (Matthew Bender).

Legal Topics:

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

Computer & Internet LawInternet BusinessContractsGeneral OverviewComputer & Internet LawInternet
BusinessContractsDigital SignaturesComputer & Internet LawInternet BusinessContractsElectronic Contracts



34 of 193 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 15 Attacking or Defending Existence of Contract--Failure to Comply With Applicable Formalities
 IV. DETERMINING WHETHER OTHER STATUTES REQUIRE WRITTEN CONTRACT, PARTICULAR
 CONTRACT PROVISIONS, OR OTHER FORMALITIES

1-15 MB Practice Guide: CA Contract Litigation 15.33

15.33 Other Types of Agreements Require Compliance With Specific Formalities.

A variety of other California statutes require a writing or other formality in specific instances. The list below includes many of the more important statutes, but does not purport to be all-inclusive. Particular types of contract subject to specific formal requirements imposed by statute include:

- Corporate shareholder voting agreements [*Corp Code § 706(a)*].

➤ **Cross Reference:**

California Forms of Pleading and Practice, Ch. 160, Corporations (Matthew Bender).

- Agreements with a third person by a member of a nonprofit association for the member to assume debt or liability of the association for acquisition of land or payment of construction improvements [*Corp Code § 21101*].

➤ **Cross Reference:**

California Forms of Pleading and Practice, Ch. 61, Associations and Clubs (Matthew Bender).

- Vehicle conditional sale contract agreements between a buyer and a holder of a contract to charge fees for extension of the scheduled due date or to defer payment of all or any part of any scheduled installment under the contract [*CC § 2982.3(a)*].

➤ **Cross Reference:**

California Forms of Pleading and Practice, Ch. 89, Automobiles: Sales and Financing Under the Rees-Levering Act (Matthew Bender).

- Retail installment sale contract provisions to charge fees for extension of the scheduled due date or to defer payment of all or any part of any scheduled installment under the contract [*CC § 1807.1*].

➤ **Cross Reference:**

California Forms of Pleading and Practice, Ch. 127, Consumer Contracts and Loans, and Ch. 501, Sales: Retail Installment Sales (Matthew Bender).

- Vehicle lease contract provisions and disclosures [CC § 2985.8].

➤ **Cross Reference:**

California Forms of Pleading and Practice, Ch. 90, Automobiles: Vehicle Leasing Act (Matthew Bender).

- Structural pest control service agreements [B&P Code § 8516].

➤ **Cross Reference:**

California Forms of Pleading and Practice, Ch. 90, Automobiles: Vehicle Leasing Act (Matthew Bender).

- Joint interests in property [CC § 683].

➤ **Cross Reference:**

California Forms of Pleading and Practice, Ch. 316, Joint Tenancy and Tenancy in Common (Matthew Bender).

- Life care contracts [H & S Code § 1780.4(a)].

➤ **Cross Reference:**

California Forms of Pleading and Practice, Ch. 351, Long-Term Health and Residential Care (Matthew Bender).

- Home equity sales contracts [CC § 1695.2].

➤ **Cross Reference:**

California Forms of Pleading and Practice, Ch. 555, Trust Deeds and Real Property Mortgages (Matthew Bender).

- Home or seminar sales solicitation contracts [CC § 1689.7].

➤ **Cross Reference:**

California Forms of Pleading and Practice, Ch. 128, Consumer Contracts: Statutes Regulating Specific Types of Contracts (Matthew Bender).

- Retail installment sales contracts [CC § 1803.1].

➤ **Cross Reference:**

California Forms of Pleading and Practice, Ch. 501, Sales: Retail Installment Sales (Matthew Bender).

- Rental-purchase agreements for personal property [CC § 1812.623].

➤ **Cross Reference:**

California Legal Forms, Ch. 102D, Registration and Transfer of Vehicles, Vessels, and Aircraft (Matthew Bender).

- Employment agency contracts [CC § 1812.504].

➤ **Cross Reference:**

California Forms of Pleading and Practice, Ch. 127, Consumer Contracts and Loans (Matthew Bender).

- Employment counseling service contracts [CC § 1812.511].

➤ **Cross Reference:**

California Legal Forms, Ch. 92, Service Contracts (Matthew Bender).

- Job listing service contracts [CC § 1812.516].

➤ **Cross Reference:**

California Forms of Pleading and Practice, Ch. 127, Consumer Contracts and Loans (Matthew Bender).

- Nursing service contracts [CC § 1812.526].

➤ **Cross Reference:**

California Legal Forms, Ch. 92, Service Contracts (Matthew Bender).

- Funeral services contracts [B&P Code § 7685.2].

➤ **Cross Reference:**

California Forms of Pleading and Practice, Ch. 127, Consumer Contracts and Loans (Matthew Bender).

- Discount buying services contracts [CC § 1812.107].

➤ **Cross Reference:**

California Forms of Pleading and Practice, Ch. 128, Consumer Contracts: Statutes Regulating Specific Types of Contracts (Matthew Bender).

- Contracts for seller-assisted marketing plans [CC § 1812.205].

➤ **Cross Reference:**

California Forms of Pleading and Practice, § 515.50 et seq. (Matthew Bender).

- Membership camping contracts [CC § 1812.303].

➤ **Cross Reference:**

California Legal Forms, Ch. 34, Condominiums and Other Common-Interest Developments (Matthew Bender).

- Dating service contracts [CC § 1694.2].

➡ **Cross Reference:**

California Forms of Pleading and Practice, Ch. 128, Consumer Contracts: Statutes Regulating Specific Types of Contracts (Matthew Bender).

- Weight loss contracts [CC § 1694.7].

➡ **Cross Reference:**

California Forms of Pleading and Practice, Ch. 128, Consumer Contracts: Statutes Regulating Specific Types of Contracts (Matthew Bender).

- Dance studio lesson contracts [CC § 1812.52].

➡ **Cross Reference:**

California Forms of Pleading and Practice, Ch. 128, Consumer Contracts: Statutes Regulating Specific Types of Contracts (Matthew Bender).

- Health studio services contracts [CC § 1812.82].

➡ **Cross Reference:**

California Forms of Pleading and Practice, Ch. 128, Consumer Contracts: Statutes Regulating Specific Types of Contracts (Matthew Bender).

➡ **Search California Statutes:**

Use *lexis.com* to search Deering's California Codes for statutes establishing contract formalities for specific types of contracts:

- Legal > States Legal--U.S. > California > Find Statutes, Regulations, Administrative Materials & Court Rules > CA--Deering's California Codes Annotated

○ Sample Search: In the California Code try the following search to find statutes that discuss the necessary corealities in contracts, i.e., statute of frauds, language, and notice: *unanno (contract! OR agreement /20 statute frauds OR language OR (notice OR notif! /10 requir! OR shall))*

Legal Topics:

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

Antitrust & Trade Law Consumer Protection Home Solicitation Business & Corporate Law Corporations Shareholders Meetings & Voting Voting Shares General Overview Contracts Law Types of Contracts Installment Contracts Contracts Law Types of Contracts Lease Agreements Personalty Leases Statutes of Frauds



35 of 193 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 15 Attacking or Defending Existence of Contract--Failure to Comply With Applicable Formalities
V. FORMS

1-15 MB Practice Guide: CA Contract Litigation 15.34

15.34 Plaintiff's Allegation That Writing Satisfies Statute of Frauds.

Plaintiff's Allegation That Writing Satisfies Statute of Frauds.

_____. 1. Plaintiff alleges that the contract alleged in the [specify number, e.g., third] cause of action of this complaint is sufficient to satisfy *Civil Code Section 1624* _____ because it is evidenced by a memorandum dated _____, which has been signed by [Defendant or Defendant's agent], [name] _____, and which contains the following terms:

_____ [specify, e.g., in sales agreement, the seller and the buyer, the price to be paid, the time of payment, the manner of payment, and description of the property sold].

_____ The memorandum dated _____ is attached to this complaint as Exhibit , and incorporated in this complaint for all purposes.

NOTES.

Authority:

CC § 1624(a)

Sufficiency of Writing to Satisfy Statute of Frauds:

See 15.07

Asserting in Complaint That Contract Satisfies Statute of Frauds:

See 15.11

Legal Topics:

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

Civil Procedure Pleading & Practice Pleadings Complaints Requirements Contracts Law Statutes of Frauds Requirements General Overview



36 of 193 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 15 Attacking or Defending Existence of Contract--Failure to Comply With Applicable Formalities
V. FORMS

1-15 MB Practice Guide: CA Contract Litigation 15.35

15.35 Plaintiff's Allegation of Part Performance Rendering Statute of Frauds Inapplicable to Oral Contract to Convey Real Property.

Plaintiff's Allegation of Part Performance Rendering Statute of Frauds Inapplicable to Oral Contract to Convey Real Property.

1. On _____ [date], Plaintiff and Defendant entered into an oral contract by which it was agreed that Defendant would convey to Plaintiff certain real property described as _____ [describe real property] ("the real property"), and _____ Plaintiff would pay Defendant \$ _____, to be paid _____ [describe terms of payment, e.g., by check, \$ _____ at the time of the agreement, and \$ _____ on (date) _____].

[EITHER]

2. Pursuant to the contract Defendant delivered and Plaintiff took possession of the real property, and at all times thereafter, Plaintiff has maintained actual possession of the real property by _____ [allege facts constituting actual possession, e.g., residing thereon with his family and all their household possessions].

[AND/OR]

2. Plaintiff, in reliance on the oral contract, has made substantial and permanent improvements on and to the real property in that _____ [he or she] has _____ [indicate nature and cost of improvements, e.g., graded and paved a driveway and constructed a garage at a cost of \$ _____].

[CONTINUE]

[EITHER]

3. Plaintiff paid the purchase price of the property in full to

_____, Defendant
 _____ [specify amounts and dates of
 payments, e.g., by checks dated (date)
 _____, and (date)
 _____, for
 \$ _____ and
 \$ _____, respectively], and Defendant
 accepted and retained the payment(s). Defendant refused, and continues to refuse, to execute a deed conveying the real
 property to Plaintiff.

[OR]

3. Plaintiff has paid to Defendant and Defendant has accepted the following sums to be applied to the total price of the
 real property: _____ [list amounts paid and dates of payment]. Plaintiff tendered the balance due of
 \$ _____ to Defendant, but Defendant
 refused, and continues to refuse, to execute a deed conveying the real property to Plaintiff.

NOTES.

Authority:

CC § 1624(a)(3); Estate of Housley (1997) 56 CA4th 342, 359, 65 CR2d 628

Discussion of Partial Performance to Exclude Assertion of Statute of

Frauds:

See 15.08[4][c]

Asserting in Complaint That Contract Satisfies Statute of Frauds:

See 15.11

Legal Topics:

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

Contracts Law Statutes of Frauds Exceptions Partial Performance Real Property Law Purchase & Sale Contracts of
 Sale Enforceability Statutes of Frauds



37 of 193 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 15 Attacking or Defending Existence of Contract--Failure to Comply With Applicable Formalities
V. FORMS

1-15 MB Practice Guide: CA Contract Litigation 15.36

15.36 Demurrer Asserting That Complaint Does Not Indicate Whether Contract Is Written, Oral, or Implied, or Asserting That Contract Fails to Satisfy Statute of Frauds.

Demurrer Asserting That Complaint Does Not Indicate Whether Contract Is Written, Oral, or Implied, or Asserting That Contract Fails to Satisfy Statute of Frauds.

[Name of attorney]

[Street address]

[City, state, and ZIP]

[Area code and phone number]

[State Bar no. of attorney]
Attorney for _____ [name of party]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

[name] _____,
Plaintiff,
vs.
[name] _____,
Defendant.

)
) NO.
) _____
) DEMURRER OF
) _____
) _____ [identify defendant, e.g.,
DEFENDANT MARY JONES] TO COMPLAINT
OF

[identify plaintiff or
cross-complainant, e.g., PLAINTIFF JOHN SMITH]
[LIMITED CIVIL CASE]

Judge:

Department:

 [If contract fails to specify whether the contract in question was written or oral]

 _____ Defendant Mary Jones] demurs to
 the [First or other designation _____]
 Cause of Action specified in the [complaint or
 _____ cross-complaint] of [identify plaintiff
 or cross-complainant, e.g., _____ Plaintiff
 John Smith], on the ground that it cannot be ascertained from the [complaint or cross-complaint] whether the contract
 that is alleged in this action is written or oral or implied by conduct.

[OR, if it appears from face of complaint that underlying contract is unenforceable under the statute of frauds]

 _____ Defendant Mary Jones] demurs to
 the [First or other designation] Cause of Action specified in the
 _____ cross-complaint] of [identify plaintiff
 or cross-complainant, e.g., Plaintiff John Smith] on the ground that it does not state facts sufficient to constitute a cause
 of action, in that it appears from the face of Plaintiff's complaint that the alleged contract on which Plaintiff's complaint
 is based is void and unenforceable under the California statute of frauds, *Civil Code Section 1624*.

[CONTINUE]

WHEREFORE, Defendant prays as follows:

1. That Plaintiff take nothing by his/her complaint herein;
2. For costs of suit; and
3. For such other and further relief as the court deems proper.

Dated: _____

[firm name, if any] _____

By: [signature] _____

[typed name] _____

Attorney for Defendant _____

[Add memorandum supporting demurrer]

[Attach required notice of hearing]

NOTES.

Authority:

CCP §§ 430.10(g), 430.30(a), (e)

Use of Demurrer to Challenge Complaint:

See 15.13, 15.14

Detailed Discussion, With Forms, of Demurrer:

Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, Ch. 11, Demurrers and Motions for Judgment on the Pleadings

Legal Topics:

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

Civil Procedure Pleading & Practice Defenses, Demurrers & Objections Demurrers Commercial Law (UCC) Sales (Article 2) Form, Formation & Readjustment Statutes of Frauds General Overview Contracts Law Statutes of Frauds General Overview Real Property Law Purchase & Sale Contracts of Sale Enforceability Statutes of Frauds



38 of 193 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 15 Attacking or Defending Existence of Contract--Failure to Comply With Applicable Formalities
V. FORMS

1-15 MB Practice Guide: CA Contract Litigation 15.37

15.37 Answer to Complaint for Breach of Contract With Affirmative Defenses Based on Statute of Frauds and/or Noncompliance With Statutory Requirements.

Answer to Complaint for Breach of Contract With Affirmative Defenses Based on Statute of Frauds and/or Noncompliance With Statutory Requirements.

[Name of attorney]

[Street address]

[City, state, and ZIP]

[Area code and phone number]

[State Bar no. of attorney]
Attorney for _____ [name of party]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

[name] _____,
Plaintiff,
vs.
[name] _____,
Defendant.

)
) NO. _____
) _____
) ANSWER OF _____
) _____ [identify defendant, e.g.,
) DEFENDANT MARY JONES] TO COMPLAINT
) OF _____
) _____ [identify plaintiff, e.g.,
PLAINTIFF JOHN SMITH]
[LIMITED CIVIL CASE]

Judge:

Department:

Defendant answers the complaint as follows:

[Include general denial below, or set forth, in numbered paragraphs, specific denials, admissions, and allegations in response to those in complaint, in the order in which they are alleged in complaint:]

1. Pursuant to *Code of Civil Procedure Section 431.30(b)(1)*, Defendant generally denies each and every allegation of Plaintiff's Complaint, including all the purported causes of action contained therein, and further denies that Plaintiff is entitled to any equitable or legal relief, or any damages whatsoever.

[Defendant asserts the following affirmative defenses. By doing so, Defendant shall not be deemed to have assumed the burden of proving any matters that otherwise would be Plaintiff's burden.]

[Allege any affirmative defenses, e.g.,]

[EITHER, if alleging that contract not to be performed in one year is unenforceable under statute of frauds]

FIRST AFFIRMATIVE DEFENSE (Statute of Frauds)

1. The contract alleged in the complaint is invalid under *Civil Code Section 1624(a)(1)* because the contract by its terms it not to be performed within a year from its making and neither the contract nor any note or memorandum thereof is in writing and subscribed to by Defendant or Defendant's agent.

[AND/OR, if alleging that no contract for sale of real property exists because it does not comply with statute of frauds]

SECOND AFFIRMATIVE DEFENSE (Statute of Frauds)

2. The contract alleged in the complaint is invalid under *Civil Code Section 1624(a)(3)* because the contract is for the _____ [sale of real property or sale of an interest in real property or leasing of real property for longer than one year] and neither the contract nor any note or memorandum thereof is in writing and subscribed by Defendant or Defendant's agent.

[AND/OR, if alleging that no broker's commission contract exists because it does not comply with statute of frauds]

THIRD AFFIRMATIVE DEFENSE (Statute of Frauds)

3. The contract alleged in the complaint is invalid under *Civil Code Section 1624(a)(4)* because the contract is one authorizing or employing an agent, broker, or other person to

_____ [purchase or sell real estate or lease real estate for a longer period than one year or procure a purchaser or seller of real estate or procure a lessee or lessor of real estate for a lease that is for a longer period than one year] for a commission and neither the contract nor any note or memorandum thereof is in writing and subscribed by Defendant or Defendant's agent.

[AND/OR, if alleging that no contract for sale of goods over \$500 exists because it does not comply with the Commercial Code statute of frauds]

FOURTH AFFIRMATIVE DEFENSE (Commercial Code Statute of Frauds)

4. The contract alleged in the complaint is invalid under *Commercial Code Section 2201* because it is an oral contract for the sale of goods valued at \$500 or more, and no written note or memorandum of the alleged contract signed by Defendant or Defendant's agent exists [add if parties are merchants:; nor did Defendant receive any written confirmation of the alleged contract from Plaintiff].

_____ [Defendant or Plaintiff] has neither accepted nor received any part of these goods, nor given anything in part payment of the alleged contract. [Add if plaintiff is seller: These goods were not specially manufactured for Defendant].

[AND/OR, to allege that the contract failed to comply with other statutory requirements:]

FIFTH AFFIRMATIVE DEFENSE (Noncompliance with Statutory Requirements for [type of contract])

5. The contract alleged in the complaint is void and unenforceable under

_____ [cite code section invalidating contract for noncompliance with statutory requirement, e.g., *Civil Code Section 1812.59*] because it fails to comply with _____ [cite code section imposing requirement that was violated, e.g., *Civil Code Section 1812.54(c)*], which requires that contracts for _____ [specify type of contract, e.g., dance studio lessons and other services] must _____ [specify requirement, e.g., contain a written statement of the hourly rate for which the student has contracted], in that the contract in question _____ [specify how contract fails to comply, e.g., stated only that lessons would be charged at Plaintiff's current standard rates and did not specify the amount of those rates as required by the statute].

[Add additional affirmative defenses, if any]

[CONTINUE]

WHEREFORE, Defendant prays as follows:

1. That Plaintiff take nothing by his/her complaint herein;
2. For costs of suit; and
3. For such other and further relief as the court deems proper.

Dated: _____

[firm name, if any] _____

By: [signature] _____

[typed name] _____

Attorney for Defendant _____

[ADD verification to answer not containing general denial, if applicable]

VERIFICATION

I am the Defendant in the above entitled action; I have read the foregoing answer and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein stated on information and belief, and, as to those matters, I believe it to be true.

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

[date] _____

[signature] _____

[typed name] _____

NOTES.

Authority:

CCP § 431.30(b)(2); CC § 1624; Com Code § 2201

Raising Affirmative Defenses in Answer:

See Ch. 13, Attacking or Defending Existence of Contract--Absence of Essential Element, 13.16

Requirements to Comply With Statute of Frauds Generally:

See 15.06, 15.07

Defense of Lack of Writing to Evidence Contract Not to be Performed in One Year:

See 15.06[1]

Defense of Lack of Writing to Evidence Contract for Lease or Interest in Real Property:

See 15.06[3]

Defense of Lack of Writing to Evidence Broker's Commission Contract:

See 15.06[4]

Defense of Lack of Writing to Evidence Contract for Sale of Goods Over \$ 500:

See 15.24

Detailed Discussion, With Forms, For Answer and Affirmative Defenses:

Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure: Ch. 14, Answers

Legal Topics:

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

Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsAffirmative DefensesGeneral OverviewCivil ProcedurePleading & PracticePleadingsAnswersContracts LawDefensesGeneral OverviewContracts LawStatutes of FraudsGeneral Overview



39 of 193 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 15 Attacking or Defending Existence of Contract--Failure to Comply With Applicable Formalities
V. FORMS

1-15 MB Practice Guide: CA Contract Litigation 15.38

15.38 Memorandum for Party Attacking Existence of Contract Based on Failure to Comply With Statutory Requirements.

Memorandum for Party Attacking Existence of Contract Based on Failure to Comply With Statutory Requirements.

[Include the following, if appropriate under the circumstances of the case, in a memorandum by the party attacking the existence of a contract, along with factual discussion demonstrating how the principles of law stated below are applicable to the particular case.]

THE CONTRACT BETWEEN THE PARTIES IS VOID AND UNENFORCEABLE BECAUSE
ITS TERMS FAIL TO COMPLY WITH STATUTORY REQUIREMENTS

A. _____ *[Specify type of contract, e.g., Dance Studio Lessons]* **Contracts Are Governed by Statute.**

_____ *[Specify type of contract, e.g., Dance studio lessons]* contracts are governed by
_____ *[specify statutes, e.g., Civil Code Section 1812.50 et seq.].*

B. Under _____ *[specify statute, e.g., Civil Code Section 1812.54], Contract Must*
_____ *[specify mandatory contract content, e.g., Include a Statement of the Hourly Rates].*
_____ *[Specify statute, e.g., Civil Code Section 1812.54]* requires that the contract
_____ *[specify mandatory contract content, e.g., include a statement of the hourly rates].*

C. Failure to Comply With Statute Renders Contract Void. A contract that does not comply with
_____ *[specify statute containing mandatory terms, e.g., Civil Code Section 1812.54]* is void and unenforceable

void, e.g., (Civil Code Section 1812.59)]. *[cite statute that renders contract*

NOTES.

Failure to Comply With Statutory Requirements:

See Ch. 13, *Attacking or Defending Existence of Contract--Absence of Essential Element*, 13.52[1]

Detailed Discussion of Format/Skeletal Forms for Memoranda:

California Forms of Pleading and Practice, Ch. 417, Points and Authorities (Matthew Bender); and
California Points and Authorities, Ch. 1, Writing Legal Memoranda and Briefs (Matthew Bender)

Additional Memoranda Relating to Contracts:

California Points and Authorities, Ch. 50, Contracts (Matthew Bender)

Legal Topics:

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

Contracts LawDefensesGeneral OverviewContracts LawFormationGeneral OverviewContracts LawStatutes of
FraudsRequirementsGeneral OverviewReal Property LawPurchase & SaleContracts of SaleFormalities



40 of 193 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 15 Attacking or Defending Existence of Contract--Failure to Comply With Applicable Formalities
V. FORMS

1-15 MB Practice Guide: CA Contract Litigation 15.39

15.39 Plaintiff's Motion Requesting Equitable Enforcement of Oral Contract [CCP § 1010].**Plaintiff's Motion Requesting Equitable Enforcement of Oral Contract [CCP § 1010].**

_____[Name of attorney]
 _____[Street address]
 _____[City, state, and ZIP]
 _____[Area code and phone number]
 _____[State Bar no. of attorney]
 Attorney for _____[name of party]

SUPERIOR COURT OF CALIFORNIA,
 COUNTY OF _____

	)	
	)	No.
	)	_____
	)	_____
[name] _____	)	NOTICE OF MOTION AND MOTION FOR OR-
Plaintiff,	)	DER
vs.	)	_____
[name] _____,	)	_____ [specify order sought,
Defendant.	)	e.g., TO ENFORCE ORAL CONTRACT
	)	
	)	
	)	
	)	
	)	Date:
	)	_____
		Time:

Location:

Judge:

Date Action

Filed: _____

Trial Date:

To [party, e.g., Defendant Mary Jones] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that, on _____ [date], at _____ [time]
_____, or as soon after that time as the
matter may be heard, in [Department or

Division] of this Court, located at

[street address], _____ [city]
_____, [party, e.g.,

Plaintiff John Smith] will move for
an order [specify, e.g., _____ enforcing the
agreement dated _____ between Defendant
Mary Jones and Plaintiff John Smith]. The motion will be made on the grounds that [specify legal grounds, e.g., under
the principles of equitable estoppel, the court should refuse to apply the statute of frauds to the agreement, in that
Plaintiff John Smith has relied on the agreement to his detriment, and would suffer an unconscionable injury if the
agreement were not enforced].

The motion will be based on this
notice of motion, on the [affidavit(s) or declaration(s)] of _____ [name(s)], and the memorandum
served and filed with this motion, on the records and file in this action, and on the evidence that may be presented at the
hearing of the motion.

Dated: _____

[firm name, if any] _____

By: [signature] _____

[typed name] _____

Attorney for Plaintiff _____

NOTES.

Authority:

CCP § 1010; Estate of Housley (1997) 56 CA4th 342, 359, 65 CR2d 628

Asserting in Complaint That Plaintiff Is Entitled to Equitable Enforcement of Contract:

See 15.08[4], 15.18[3]

Legal Topics:

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

Contracts Law Remedies Equitable Relief General Overview Contracts Law Statutes of Frauds Exceptions General Overview Contracts Law Types of Contracts Oral Agreements Real Property Law Purchase & Sale Contracts of Sale Enforceability General Overview



41 of 193 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 16 Attacking or Defending Existence of Contract--Mistake

1-16 MB Practice Guide: CA Contract Litigation 16.syn

§ 16.syn Synopsis to Chapter 16: Attacking or Defending Existence of Contract--Mistake

16.01 Scope.

16.02 Objective and Strategy.

16.03 CHECKLIST: Determining Existence and Nature of Mistake.

16.04 Elements of Mistake.

16.04[1] Elements of Mistake of Fact.

16.04[2] Elements of Mistake of Law.

16.05 Options and Strategies.

16.05[1] Attacking the Contract.

16.05[2] Defending the Contract.

16.06 Mistake of Fact.

16.06[1] Mistake of Fact Must Be About Past or Present Material Facts to Justify Relief.

16.06[1][a] Must Be About Past or Present Facts.

16.06[1][b] Must Be Material.

16.06[2] Must Not Have Been Caused by Neglect of Legal Duty.

16.06[3] Allocation of Risk of Mistake.

16.06[3][a] Party Seeking Relief Must Not Have Borne Risk of Mistake.

16.06[3][b] Unknown Facts Are Not Mistakes.

16.06[3][c] One Party May Bear Risk by Agreement.

16.06[3][d] One Party May Bear Risk Because of Surrounding Circumstances.

16.07 Mistake of Law.

16.07[1] Relief Is Available Only When Both Parties Are Under Same Mistaken Belief or Other Parties Are Aware of Failure to Correct.

16.07[2] Misinterpretation of Contract Language Is Mistake of Law.

16.07[3] Mistake of Foreign Law Is Mistake of Fact.

16.08 Mistake May Be Either Mutual or Unilateral.

16.08[1] Mutual Mistake.

16.08[2] Unilateral Mistake.

16.09 CHECKLISTS: Attacking or Defending Existence of Contract--Mutual Mistake.

16.09[1] Rescission of Contract.

16.09[2] Reformation of Contract.

16.10 Options and Strategies.

16.10[1] Attacking the Contract.

16.10[2] Defending the Contract.

16.11 Rescinding the Contract.

16.11[1] Mutual Mistake Regarding Material Matters May Prevent Formation of Contract.

16.11[2] Mutual Mistake May Support Rescission of Contract.

16.11[3] Aggrieved Party Must Be Worse Off Because of Mistake.

16.11[4] Rescission Is Unavailable If Third Party's Rights Are Adversely Affected.

16.11[5] Stipulation Regarding Errors of Description May Be Ineffective to Prevent Rescission.

16.11[6] Statute of Limitations Is Four Years From Discovery of Facts.

16.12 Reforming the Contract.

16.12[1] Agreement May Be Reformed to Reflect Parties' Intentions.

16.12[2] Reformation May Supply Words As Well As Remove Them.

16.12[3] Court May Not Create New Agreement.

16.12[4] Party Who Drafted Agreement Nevertheless May Seek Reformation.

16.12[5] Right to Reformation Is Not Restricted to Original Parties.

16.12[6] Reformation Is Not Available If Third Parties' Rights Will Be Adversely Affected.

16.12[7] Scrivener's Errors in Written Contract May Be Disregarded.

16.12[8] Parties' Intentions Must Be Shown.

16.13 CHECKLISTS: Attacking or Defending Existence of Contract--Unilateral Mistake.

16.13[1] Rescission of Contract.

16.13[1][a] Unilateral Mistake of Law.

16.13[1][b] Unilateral Mistake of Fact.

16.13[2] Reformation of Contract.

16.13[2][a] Unilateral Mistake of Law.

16.13[2][b] Unilateral Mistake of Fact.

16.14 Options and Strategies for Obtaining Relief Based on Unilateral Mistake.

16.14[1] Attacking the Contract.

16.14[2] Defending the Contract.

16.14[2][a] Mistake of Law.

16.14[2][b] Mistake of Fact.

16.15 Rescinding the Contract.

16.15[1] Unilateral Mistake of Law.

16.15[2] Unilateral Mistake of Fact.

16.15[2][a] Rescission Is Available When Mistake of Fact Is Known to Other Party.

16.15[2][b] Rescission May Be Available When Enforcement of Agreement Would Be Unconscionable.

16.15[3] Aggrieved Party Must Be Worse Off Because of Mistake.

16.15[4] Rescission Unavailable If a Third Party's Rights Would Be Adversely Affected.

16.15[5] Stipulation Regarding Errors of Description May Be Ineffective to Prevent Rescission.

16.15[6] Statute of Limitations Is Four Years From Discovery of Facts.

16.15[7] Special Rules for Government Bidding.

16.16 Reforming the Contract.

16.16[1] Unilateral Mistake of Law.

16.16[2] Unilateral Mistake of Fact.

16.16[3] Contract May Be Reformed to Reflect Aggrieved Party's Intent.

16.16[4] Reformation Is Unavailable If a Third Party's Rights Will Be Adversely Affected.

16.16[5] Parties' Intentions Must Be Shown.

16.17 CHECKLIST: Pleading and Proving Mistake.

16.18 Plaintiff May Assert Mistake in Complaint for Rescission or Reformation.

16.18[1] Complaint Must Show How, When, and Why Mistake Occurred.

16.18[2] Essential Allegations for Complaint for Mutual Mistake.

16.18[3] Essential Allegations for Claim of Unilateral Mistake.

16.19 Defendant May Assert Mistake As Defense to Action on Contract.

16.19[1] Mistake Is Affirmative Defense.

16.19[2] Failure to Assert Mistake As Affirmative Defense May Result in Waiver.

16.20 Party Asserting Mistake Has Burden of Proof.

16.21 Answer to Complaint for Breach of Contract--Mistake.

Answer to Complaint for Breach of Contract--Mistake.

16.22 Complaint for Rescission of Contract--Mutual Mistake.

Complaint for Rescission of Contract--Mutual Mistake.

16.23 Complaint for Reformation of Contract--Mutual Mistake.

Complaint for Reformation of Contract--Mutual Mistake.

16.24 Complaint for Rescission of Contract--Unilateral Mistake Known to or Induced by Other Party.

Complaint for Rescission of Contract--Unilateral Mistake Known to or Induced by Other Party.

16.25 Complaint for Reformation of Contract--Unilateral Mistake Known to or Induced by Other Party.

Complaint for Reformation of Contract--Unilateral Mistake Known to or Induced by Other Party.



42 of 193 DOCUMENTS

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Chapter 16 Attacking or Defending Existence of Contract--Mistake

I. STRATEGY

1-16 MB Practice Guide: CA Contract Litigation 16.01

16.01 Scope.

This chapter covers:

- Objectives and strategy for attacking and defending a contract based on a claim of mistake of law or fact [*see 16.02*].
- Determining the existence and nature of a mistake in a contract [*see 16.03 -16.08*].
- Mutual mistake and remedies [*see 16.09 -16.12; Forms: 16.22 -16.23*].
- Unilateral mistake and remedies [*see 16.13 -16.16; Forms: 16.24 -16.25*].

Core Statutes:

CC §§ 1567, 1576-1579, 1640, 1689-1690, 3391, 3399

Legal Topics:

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

Contracts LawDefensesAmbiguity & MistakeGeneral OverviewContracts LawDefensesAmbiguity & MistakeFailure to Read ContractContracts LawDefensesAmbiguity & MistakeMutual MistakeContracts LawDefensesAmbiguity & MistakeUnilateral MistakeContracts LawFormationAmbiguity & MistakeGeneral Overview



43 of 193 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 16 Attacking or Defending Existence of Contract--Mistake

I. STRATEGY

1-16 MB Practice Guide: CA Contract Litigation 16.02

16.02 Objective and Strategy.

The issue of mistake in a contract most commonly arises as a defense to a breach of contract action. Even as a defense, it is often accompanied by an affirmative request for relief, in the form of reformation or rescission of the contract. Less often mistake is raised by the plaintiff in a declaratory relief action, again seeking reformation or rescission.

Not every mistake merits relief. The courts generally will not intervene to rectify a party's error in judgment when that error consists of agreeing to unfavorable terms or entering into an agreement knowing that some facts were unknown [see, e.g., *Mosher v. Mayacamas Corp.* (1989) 215 CA3d 1, 5, 263 CR 373 ; *Donovan v. RRL Corp.* (2001) 26 C4th 261, 283, 109 CR2d 807, 27 P3d 702].

Although rescission and reformation are potentially available remedies, both are considered drastic measures, and courts will be reluctant to impose them except in a clear case.



Cross References:

Discussion of rescission and reformation, see Ch. 8, Seeking or Opposing Equitable Remedies in Contract Actions.

Detailed discussion/forms, see California Forms of Pleading and Practice, Ch. 215, Duress, Menace, Fraud, Undue Influence, and Mistake (Matthew Bender).

Judge's Perspective:

Claims of mistake require that you not only understand (and be prepared to defend against) your opponent's interpretation of the contract, but also that you and your client must have a competing interpretation that will survive discovery and scrutiny by the court. You should be in a position to advance this competing interpretation early in the case, to shape discovery, obtain favorable pre-trial rulings, and position the case for trial. Thus, the same steps that are important in the preparation of any civil case are particularly important here:

- Perform thorough pre-trial investigation of your own client and likely witnesses. This will allow you to avoid taking positions regarding the parties' intentions and factual assumptions that are inconsistent with the evidence. If your client takes a position regarding the parties' intent, and later formal discovery

is inconsistent with that position, the damage to your client's credibility will be difficult to cure.

- The preparation of any case should begin with applicable jury instructions. Here the relevant instructions are Affirmative Defense--Bilateral Mistake of Fact, *Judicial Council of California Civil Jury Instructions, CACI No. 331* (LexisNexis Matthew Bender) and Affirmative Defense--Unilateral Mistake of Fact, *Judicial Council of California Civil Jury Instructions, CACI No. 330* (LexisNexis Matthew Bender). These instructions form an outline in your preparation of the case.

- Develop your theme early, and, if your mistake claim will be an important part of your case, make sure that every filing with the court reflects your theme.

- Finally, consider redrafting the contract to reflect your client's understanding of the facts more clearly. This will help focus your thinking on the elements of the law of mistake.



Cross Reference:

For Tips on updating case law and expanding your research with additional resources, see **How to Use Lexis.com With This Publication** at the front of this volume.



Search Public Records:

Use *lexis.com* to research information on parties and witnesses:

- For individuals: Public Records > People, Business & Asset Locators > Person Locator > EZFIND Combined Person Locator Nationwide



Sample Search: To find personal information about contracting parties, try: *name (first name /3 last name)*, i.e. *name (john /3 smith)*.

- For information on business entities: Public Records > Public Records > Business & Corporation Information > Corporation, Partnership & DBA Registrations by State > CA Business and Corporation Information



Sample Search: Using California Business and Corporation Information to find agents and principals you can use the regis-agent and owner segments: *regis-agent (first name /3 last name) OR owner (first name /3 last name)*.

Legal Topics:

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

Contracts LawDefensesAmbiguity & MistakeGeneral OverviewContracts LawDefensesAmbiguity & MistakeFailure to Read ContractContracts LawDefensesAmbiguity & MistakeMutual MistakeContracts LawDefensesAmbiguity & MistakeUnilateral MistakeContracts LawFormationAmbiguity & MistakeGeneral Overview



44 of 193 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 16 Attacking or Defending Existence of Contract--Mistake

II. DETERMINING EXISTENCE AND NATURE OF MISTAKE

1-16 MB Practice Guide: CA Contract Litigation 16.03

16.03 CHECKLIST: Determining Existence and Nature of Mistake.

☐ Determine whether mistake is of law or of fact.

☐ Is claimed mistake one of law?

☐ A mistake of law is only a "mistake" giving rise to relief when:

☐ All parties were under substantially the same mistaken belief about the law; or

☐ One party was under mistaken belief of which other parties are aware, and which they did not correct.

☐ Simple failure to understand terms of contract constitutes mistake of law.

☐ Mistake of foreign law, on the other hand, is mistake of fact.

Authority:

CC §§ 1577, 1578, 1579; Hedging Concepts, Inc. v. First Alliance Mortgage Co. (1996) 41 CA4th 1410, 1421, 49 CR2d 191

Discussion:

See 16.07

☐ Is claimed mistake a mistake of fact?

☐ Mistake of fact is either ignorance of past or existing fact, or incorrect belief as to past or existing fact.

- ☐ Incorrect belief as to facts that may occur in future is not mistake of fact.

Authority:

CC § 1577; Mosher v. Mayacamas Corp. (1989) 215 CA3d 1, 5, 263 CR 373

Discussion:

See 16.06[1][a]

- ☐ Was claimed mistake of fact material part of inducement for contract?

- ☐ Mistakes about matters incidental to contract do not merit relief.

Authority:

Walton v. Bank of Cal., Nat'l Ass'n (1963) 218 CA2d 527, 545-546, 32 CR 856

Discussion:

See 16.06[1][b]

- ☐ Was mistake of fact caused by neglect of legal duty on part of claimant?

- ☐ Failure to review contract is neglect of legal duty and bars relief.

- ☐ Ordinary negligence is not neglect of legal duty and does not bar relief.

- ☐ Even if claimant is under statutory obligation to perform a certain act, and claimant's failure to perform that act led to his or her mistake, failure to fulfill that obligation may not constitute "neglect of legal duty."

Authority:

CC § 1577; Lawrence v. Shutt (1969) 269 CA2d 749, 765, 75 CR 533 ; White v. Berrenda Mesa Water Dist. of Kern County (1970) 7 CA3d 894, 901, 87 CR 338 ; Donovan v. RRL Corp. (2001) 26 C4th 261, 284-285, 109 CR2d 807, 27 P3d 702

Discussion:

See 16.06[2]

- ☐ Is claim of mistake of fact being made about matters that were known to be uncertain at time parties entered into agreement?

- ☐ If parties enter into contract knowing that their knowledge is incomplete, they bear risk of mistake.

- ☐ If one party bears risk of mistake under terms of agreement, that party may not obtain relief from that mistake.

Authority:

In re Marriage of Hahn (1990) 224 CA3d 1236, 1241, 273 CR 516 ; Donovan v. RRL Corp. (2001)

26 C4th 261, 284-285, 109 CR2d 807, 27 P3d 702 ; Restatement (Second) of Contracts § 154(a)

Discussion:

See 16.06[3]

☐ Is claimed mistake mutual?

☐ If each party knows what it wants, but because of a misunderstanding they do not want or agree to the same thing, then there is "mutual mistake" that may prevent formation of contract for lack of consent.

☐ Have parties agreed on material terms, but erred in reducing those terms to writing?

Authority:

Balistreri v. Nevada Livestock Production Credit Assn. (1989) 214 CA3d 635, 641-642, 262 CR 862 ; *Hess v. Ford Motor Co.* (2002) 27 C4th 516, 524, 117 CR2d 220, 41 P3d 46

Discussion:

See 16.08[1]

☐ Is claimed mistake unilateral?

☐ Unilateral mistake is one made by only one party to contract.

☐ Unilateral mistake may be remedied if other parties are aware of mistake at time of contracting, but fail to rectify it.

Authority:

CC § 3399

Discussion:

See 16.08[2]

Legal Topics:

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

Contracts LawDefensesAmbiguity & MistakeFailure to Read ContractContracts LawDefensesAmbiguity & MistakeMutual MistakeContracts LawDefensesAmbiguity & MistakeUnilateral MistakeContracts LawFormationAmbiguity & MistakeMutual MistakeContracts LawFormationAmbiguity & MistakeUnilateral Mistake



45 of 193 DOCUMENTS

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Chapter 16 Attacking or Defending Existence of Contract--Mistake

II. DETERMINING EXISTENCE AND NATURE OF MISTAKE

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16.04 Elements of Mistake.

16.04[1] Elements of Mistake of Fact. To merit relief, a mistake of fact:

- Must consist of one of the following [CC § 1577]:

- ☐ An unconscious ignorance or forgetfulness of a fact past or present, material to the contract [see 16.06[1]]; or

- ☐ A belief in the present existence of a thing material to the contract, which does not exist, or the past existence of a thing, which has not existed [see 16.06[1]].

- May not be caused by the neglect of the duty on the part of the person making the mistake [see 16.06[2]].

16.04[2] Elements of Mistake of Law. A mistake of law gives rise to relief only when it arises from [CC § 1578]:

- A misapprehension of the law by all parties, all supposing that they knew and understood it, and all making substantially the same mistake as to the law; or
- A misapprehension of the law by one party, of which the others are aware at the time of contracting, but which they do not rectify [see 16.07[1]].

Basic Statute of Limitations:

Four years for reformation [CCP § 337(1)].

Four years for rescission; time runs from the date on which the facts which entitle the aggrieved party to rescind occurred [CCP § 337(3)].

Jury Instructions:

Affirmative Defense--Bilateral Mistake of Fact, see *Judicial Council of California Civil Jury*

Instructions, CACI No. 331 (LexisNexis Matthew Bender).

Affirmative Defense--Unilateral Mistake of Fact, see *Judicial Council of California Civil Jury Instructions, CACI No. 330* (LexisNexis Matthew Bender).

Legal Topics:

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

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46 of 193 DOCUMENTS

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Chapter 16 Attacking or Defending Existence of Contract--Mistake
II. DETERMINING EXISTENCE AND NATURE OF MISTAKE

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16.05 Options and Strategies.

16.05[1] Attacking the Contract. The practitioner seeking to avoid a contract entirely, or modify it to terms more suitable to the client, must first determine what kind of mistake the client has made. The courts will be more amenable to modify or avoid a contract when the parties have all labored under a common misperception, whether of law or fact. The party claiming unilateral mistake has more obstacles to overcome in order to obtain relief [*see Donovan v. RRL Corp. (2001) 26 C4th 261, 279-282, 109 CR2d 807, 27 P3d 702*].

If the parties actually reached agreement on all material matters, but the contract as written does not accurately reflect the terms, then reformation is appropriate.

If a party wants to eliminate the contract, then rescission may be available.



Warning:

The practitioner must take care not to prove too much--if the client is happy with most of the deal, and wants to change only a part of it that is mistaken, there is a risk that proving a "mutual mistake" about a material matter could result in a ruling that no contract was ever formed.

16.05[2] Defending the Contract. Defending the contract begins with a careful evaluation of the attack against it.



Strategic Point--Defendant:

Since a claim of mutual mistake is more likely to justify relief than one of unilateral mistake, a good first step for the practitioner facing such a claim is to establish that any such mistake was *not* mutual. If possible, the client should obtain evidence and testimony establishing that the contract correctly expresses his or her own intentions, and that he or she made no mistake in its execution.

Transforming a claim of mutual mistake into one of unilateral mistake places additional burdens on the party attacking the contract, and thus makes the defense of the contract easier.

Even if the mistake was mutual, the contract is not necessarily unsalvageable. Only if the mutual mistake was about a "material matter" is the contract subject to reformation or rescission. If the matter about which parties were mistaken was not a deciding factor in reaching the agreement, then the contract stands despite the mistake [*Walton v. Bank of Cal., Nat'l Ass'n* (1963) 218 CA2d 527, 546, 32 CR 856].

Judge's Perspective:

Remember that mistake is an affirmative defense to breach as well as a basis for plaintiff to seek rescission [see 16.19]. Any preliminary investigation into the defense of the breach of contract case should explore whether the parties were mistaken about an important factual assumption. It may be that there is an interpretation under which your client did not breach the contract, but the interpretation is not consistent with the parties' factual assumptions. The preliminary investigation concerning the defense of any contract claim should focus on these assumptions so that the affirmative defense can be timely asserted.



Cross References:

See Ch. 21, Asserting a Particular Construction of Contract.

Discussion of unilateral mistake, see 16.08[2], 16.13-16.16.

Discussion of mutual mistake, see 16.08[1], 16.09-16.12.

Legal Topics:

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

Contracts LawDefensesAmbiguity & MistakeMutual MistakeContracts LawDefensesAmbiguity & MistakeUnilateral MistakeContracts LawFormationAmbiguity & MistakeMutual MistakeContracts LawFormationAmbiguity & MistakeUnilateral MistakeContracts LawRemediesReformation



47 of 193 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 16 Attacking or Defending Existence of Contract--Mistake
II. DETERMINING EXISTENCE AND NATURE OF MISTAKE

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16.06 Mistake of Fact.

16.06[1] Mistake of Fact Must Be About Past or Present Material Facts to Justify Relief.

16.06[1][a] Must Be About Past or Present Facts. A mistake of fact is defined as [CC § 1577]:

- An unconscious ignorance or forgetfulness of a fact, past or present, material to the contract; or
- Belief in the present existence of a thing material to the contract, which does not exist, or in the past existence of such a thing, which has not existed.

A mistaken belief about events that may happen in the future is not a mistake giving rise to relief; rather it is an error in judgment that the court will not rectify [see *Mosher v. Mayacamas Corp.* (1989) 215 CA3d 1, 5, 263 CR 373 (mistake as to valuation; court found that claimed "mistake" involved events subsequent to the agreement and denied relief)].

Distinguish--Failure of Underlying Mutual Assumption:

If, from the nature of the contract, it is evident that the parties contracted on the basis of the continued existence of a person or thing, condition, or state of things, the subsequent perishing of the person or thing, or cessation of existence of the condition, will excuse the performance, a condition to that effect being implied, in spite of the fact that the promise may have been unqualified [*Habitat Trust for Wildlife, Inc. v. City of Rancho Cucamonga* (2009) 175 CA4th 1306, 1343, 96 CR3d 813] .

Example--Failure of Underlying Mutual Assumption:

A developer's agreement to transfer land to an organization to satisfy a mitigation condition required by an environmental impact report was made on the mistaken assumption that the organization would be approved as qualified entity, and the agreement could be rescinded due to mutual mistake [*Habitat Trust for Wildlife, Inc. v. City of Rancho Cucamonga* (2009) 175 CA4th 1306, 1343, 96 CR3d 813] .

16.06[1][b] Must Be Material. Mistakes that are merely incidental to the agreement and do not affect the nature of the bargain or the adequacy of consideration will not justify relief. To obtain relief, the party must show that the mistake was a deciding factor in reaching the agreement [*Walton v. Bank of Cal., Nat'l Ass'n* (1963) 218 CA2d 527, 546, 32 CR 856].

16.06[2] Must Not Have Been Caused by Neglect of Legal Duty. A party claiming mistake must not have caused that mistake by his or her own neglect of a legal duty [CC § 1577]. Failure to make reasonable inquiry as to the contract terms may be considered "neglect of a legal duty" and bar relief [*Lawrence v. Shutt* (1969) 269 CA2d 749, 765, 75 CR 533]. However, a party's ordinary negligence generally is not considered "neglect of a legal duty" [*White v. Berrenda Mesa Water Dist. of Kern County* (1970) 7 CA3d 894, 901, 87 CR 338]. Even a party's failure to comply with a statutory obligation may not constitute a neglect of a legal duty in this context [*Donovan v. RRL Corp.* (2001) 26 C4th 261, 284-285, 109 CR2d 807, 27 P3d 702].

16.06[3] Allocation of Risk of Mistake.

16.06[3][a] Party Seeking Relief Must Not Have Borne Risk of Mistake. When one party bears the risk of a mistake, that party may not seek to avoid or reform the contract based on a mistake [*Donovan v. RRL Corp.* (2001) 26 C4th 261, 284-285, 109 CR2d 807, 27 P3d 702 ; Restatement (Second) of Contracts § 154(a)].

16.06[3][b] Unknown Facts Are Not Mistakes. Occasionally the parties to an agreement are aware that there are facts unknown to them. Under those circumstances, a party who enters into an agreement, knowing that his or her knowledge is limited, bears the risk of any mistake [*Donovan v. RRL Corp.* (2001) 26 C4th 261, 284-285, 109 CR2d 807, 27 P3d 702 ; *In re Marriage of Hahn* (1990) 224 CA3d 1236, 1241, 273 CR 516].

Example:

A party who signs an agreement without reading it cannot, absent fraud or knowledge of the alleged mistake by the other contracting party, later rescind the agreement on the basis that he or she was mistaken about its terms [*Stewart v. Preston Pipeline Inc.* (2005) 134 CA4th 1565, 1588-1589, 36 CR3d 901] .

16.06[3][c] One Party May Bear Risk by Agreement. The parties may agree between themselves that one of the contracting parties will bear the risk of unknown facts. Such agreements are valid, and the party who bears the risk by agreement cannot seek rescission or reformation based on a claim of mistake [*Donovan v. RRL Corp.* (2001) 26 C4th 261, 284-285, 109 CR2d 807, 27 P3d 702 ; Restatement (Second) of Contracts § 154(a)].

16.06[3][d] One Party May Bear Risk Because of Surrounding Circumstances. Even if the parties did not enter into the contract knowing of the risk of doubtful facts, and did not allocate the risk of mistake by agreement, the courts still may place the risk of mistake on one party when "it is reasonable in the circumstances to do so" [*Donovan v. RRL Corp.* (2001) 26 C4th 261, 284-285, 109 CR2d 807, 27 P3d 702 ; *6 Angels, Inc. v. Stuart-Wright Mortgage, Inc.* (2001) 85 CA4th 1279, 1287, 102 CR2d 711].

Examples:

- A person who died four months after purchasing an annuity was not entitled to rescission on the ground that she was unaware she was terminally ill. The court held that as a matter of law, an annuity purchaser bears the risk of mistake regarding health and life expectancy because such risks are an inherent part of life annuity contracts, which reflect, at their essence, a longevity wager measured by average life expectancy [*Grenall v. United of Omaha Life Ins. Co.* (2008) 165 CA4th 188, 193-194, 80 CR3d 609] .
- A trust deed beneficiary sued to set aside the deed at a foreclosure sale, claiming that it had mistakenly set the opening bid too low. The court refused to set aside the deed, citing the public policy in favor of finality at foreclosure sales as part of the reason to allocate the risk of such errors to the beneficiary [*6 Angels, Inc. v. Stuart-Wright Mortgage, Inc.* (2001) 85 CA4th 1279, 1287, 102 CR2d 711] .

Judge's Perspective:

As the *6 Angels* case [*6 Angels, Inc. v. Stuart-Wright Mortgage, Inc. (2001) 85 CA4th 1279, 1287, 102 CR2d 711*] makes clear, it is important to understand the culture and law of the client's business before alleging mistake, in order to know whether one party bore the risk of mistake. In *6 Angels*, the court upheld the foreclosure sale of a property for \$10,001 that should have been listed for \$100,000. The mortgage lender who listed the property was held to be responsible for its own clerical mistake, even though the net effect was a 90 percent reduction in the sales price. In contrast, in *Donovan* [*Donovan v. RRL Corp. (2001) 26 C4th 261, 284-285, 109 CR2d 807, 27 P3d 702*], the court rescinded a contract for the sale of an automobile which was advertised for approximately \$25,000 instead of the \$37,000 it was worth. The court held that the dealer made a mistake in good faith and that enforcement would be unconscionable. The court did not allocate the risk of mistake to the dealer. One reason for the difference in the outcomes of these two cases is the presumption in favor of the regularity of a foreclosure sale, and settled precedent which prevents the setting aside of such a sale on grounds that the price was inadequate. The juxtaposition of these cases demonstrates the importance of knowing the business culture and the law that apply to your client's business, since these may have a substantial effect on the court's allocation of the risk of mistake. The mistake cannot be caused by "excessive carelessness."

Jury Instructions:

Affirmative Defense--Unilateral Mistake of Fact, see *Judicial Council of California Civil Jury Instructions, CACI No. 330* (LexisNexis Matthew Bender).

Legal Topics:

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

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48 of 193 DOCUMENTS

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Chapter 16 Attacking or Defending Existence of Contract--Mistake
II. DETERMINING EXISTENCE AND NATURE OF MISTAKE

1-16 MB Practice Guide: CA Contract Litigation 16.07

16.07 Mistake of Law.

16.07[1] Relief Is Available Only When Both Parties Are Under Same Mistaken Belief or Other Parties Are Aware of Failure to Correct. A mistake of law is a "mistake" giving rise to relief only when it arises from [CC § 1578]:

- A misapprehension of the law by all parties, all supposing that they knew and understood it, and all making substantially the same mistake as to the law; or
- A misapprehension of the law by one party, of which the others are aware at the time of contracting, but which they do not rectify.

When the parties to a contract each place a different interpretation on its language, that will not constitute a mutual mistake--even if each different interpretation is mistaken. Only when both parties are under the *same* mistaken belief does the mistake become mutual [CC § 1578; see *Hedging Concepts, Inc. v. First Alliance Mortgage Co. (1996) 41 CA4th 1410, 1421, 49 CR2d 191*].

16.07[2] Misinterpretation of Contract Language Is Mistake of Law. Misinterpretation of contract language is a mistake of law [*Hedging Concepts, Inc. v. First Alliance Mortgage Co. (1996) 41 CA4th 1410, 1421, 49 CR2d 191*].

16.07[3] Mistake of Foreign Law Is Mistake of Fact. A mistake of *foreign* law is a mistake of fact [CC § 1579].

Legal Topics:

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

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49 of 193 DOCUMENTS

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Chapter 16 Attacking or Defending Existence of Contract--Mistake

II. DETERMINING EXISTENCE AND NATURE OF MISTAKE

1-16 MB Practice Guide: CA Contract Litigation 16.08

16.08 Mistake May Be Either Mutual or Unilateral.

16.08[1] Mutual Mistake. A "mutual mistake" may occur when both parties are under a mistaken belief as to the operative facts. If each party knows what it wants, but because of a misunderstanding the parties do not want or agree to the same thing, there is a "mutual mistake" that may prevent formation of a contract for lack of consent [*Balistreri v. Nevada Livestock Production Credit Assn.* (1989) 214 CA3d 635, 641-642, 262 CR 862].

A "mutual mistake" also may occur when the parties have agreed on the material terms, but have erred in reducing those terms to writing [*Hess v. Ford Motor Co.* (2002) 27 C4th 516, 524, 117 CR2d 220, 41 P3d 46].



Search California Forms of Pleading and Practice:

Use *lexis.com* to research mistake in formation of the contract:

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Sample Search: To research issues related to mistake in the formation of a contract, search: *section (mistake and contract)*.



Cross References:

Discussion of mutual mistake, see 16.09 -16.12.

See also Ch. 18, Asserting or Defending Claim That Contract Is Illegal, Contrary to Public Policy, or Unconscionable.

Jury Instructions:

Affirmative Defense--Bilateral Mistake of Fact, see *Judicial Council of California Civil Jury Instructions*, CACI No. 331 (LexisNexis Matthew Bender).

16.08[2] Unilateral Mistake. A unilateral mistake is one made by only one party to the contract. A unilateral

mistake may be remedied if the other parties are aware of the mistake at the time of contracting, but fail to rectify it [CC § 3399].



Cross Reference:

Discussion of unilateral mistake, see 16.13 -16.16.

Jury Instructions:

Affirmative Defense--Unilateral Mistake of Fact, see *Judicial Council of California Civil Jury Instructions, CACI No. 330* (LexisNexis Matthew Bender).

Legal Topics:

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

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50 of 193 DOCUMENTS

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Chapter 16 Attacking or Defending Existence of Contract--Mistake

III. ATTACKING OR DEFENDING EXISTENCE OF CONTRACT--MUTUAL MISTAKE

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16.09 CHECKLISTS: Attacking or Defending Existence of Contract--Mutual Mistake.

16.09[1] Rescission of Contract.

☐ Do you wish to rescind contract?

☐ If so, did parties reach agreement on all material matters?

☐ If parties did not agree on same thing in same sense, no contract was formed.

Authority:

CC § 1580; Balistreri v. Nevada Livestock Production Credit Assn. (1989) 214 CA3d 635, 641-642, 262 CR 862

Discussion:

See 16.11

☐ Was claimed mistake a material part of inducement for contract?

☐ Mistakes about matters incidental to contract do not merit relief.

Authority:

Walton v. Bank of Cal., Nat'l Ass'n (1963) 218 CA2d 527, 546, 32 CR 856 ; Bellwood Disc. Corp. v. Empire Steel Bldgs. Co. (1959) 175 CA2d 432, 435, 346 P2d 467 ; Odorizzi v. Bloomfield Sch. Dist. (1966) 246 CA2d 123, 130, 54 CR 533

Discussion:

See 16.06[1][b], 16.11[1]

☐ Is party seeking to avoid contract worse off because of mistake?

Authority:

Guthrie v. Times-Mirror Co. (1975) 51 CA3d 879, 886, 124 CR 577

Discussion:

See 16.11[3]

- ☐ Will interests of an innocent third party be harmed?

Authority:

Conservatorship of O'Connor (1996) 48 CA4th 1076, 1098-1099, 56 CR2d 386

Discussion:

See 16.11[4]

- ☐ Statute of limitations is four years from discovery by aggrieved party of facts constituting mistake.

Authority:

CCP § 337[3]

Discussion:

See 16.11[6]

16.09[2] Reformation of Contract.

- ☐ Do you wish to reform contract?

☐ Did parties reach agreement on all material matters, but because of an error, writing does not accurately express parties' intentions?

☐ Can words be transposed, rejected, or supplied to make contract's meaning more clear?

Authority:

CC § 3399; Heidlebaugh v. Miller (1954) 126 CA2d 35, 38, 271 P2d 557

Discussion:

See 16.12[1], [2]

- ☐ Is your client an "aggrieved party"?

- ☐ Has client suffered prejudice or pecuniary loss because of the mistake?

Authority:

CC § 3399; Watson v. Collins (1962) 204 CA2d 27, 32, 21 CR 832

Discussion:

See 16.12[5]

- ☐ Is reformation unavailable because interests of a third party will be harmed?

Authority:

CC § 3399

Discussion:

See 16.12[6]

- ☐ Does the contract contain a scrivener's error?

Authority:

CC § 1640

Discussion:

See 16.12[7]

- ☐ Can you prove intentions of parties?

☐ Party claiming mistake has burden of proof.

☐ Intentions may be shown through the following:

- ☐ Contemporaneous writings.
- ☐ Discussions.
- ☐ Other surrounding circumstances.

☐ Parol evidence rule does not apply.

Authority:

Hess v. Ford Motor Co. (2002) 27 C4th 516, 525-526, 117 CR2d 220, 41 P3d 46

Discussion:

See 16.12[8]

Legal Topics:

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

Contracts LawDefensesAmbiguity & MistakeGeneral OverviewContracts LawDefensesAmbiguity & MistakeMutual MistakeContracts LawFormationAmbiguity & MistakeGeneral OverviewContracts LawFormationAmbiguity & MistakeMutual Mistake



51 of 193 DOCUMENTS

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Chapter 16 Attacking or Defending Existence of Contract--Mistake

III. ATTACKING OR DEFENDING EXISTENCE OF CONTRACT--MUTUAL MISTAKE

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16.10 Options and Strategies.

16.10[1] Attacking the Contract. The party claiming a mutual mistake first must determine whether a contract exists at all. If the claimed mistake prevented the parties from reaching a "meeting of the minds," then no contract was ever formed [see *Balistreri v. Nevada Livestock Production Credit Assn.* (1989) 214 CA3d 635, 641-642, 262 CR 862]



Strategic Point:

If the parties do have an agreement, consider whether reformation or rescission of the contract is appropriate. The court may discard the agreement, and the client may have liked many of the terms in the now defunct contract. Careful consideration should be given before attempting to reform or rescind a contract.

If your client wishes to eliminate the contract completely, then rescission should be attempted. Rescission means the court will rule the contract to be null and void [*Asmus v. Pacific Bell* (2000) 23 C4th 1, 6 n1, 96 CR2d 179, 999 P2d 71 ; see CC § 1688]. The parties can then start from the beginning with a new contract.

If there are terms in the agreement to which a party did not agree, then reformation may be possible. Reformation allows the court to "rewrite" an agreement to conform to the intent of the parties. This remedy also is available to affected third parties.



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 Sample Search: To find arguments, cases and points and authorities which may be useful when researching the issue of mistake, search: *heading (mistake)*.

 Cross References:

Discussion of rescission, see 16.11.

Discussion of reformation, see 16.12.

Discussion of the parol evidence rule, see Ch. 21, Asserting a Particular Construction of Contract.

16.10[2] Defending the Contract. The attorney defending against a claim of mutual mistake ideally should have a ready answer--that the client made no such mistake and that any alleged mistake was unilateral at most. A claim of unilateral mistake must clear additional hurdles to prevail; the attorney defending the contract therefore is better off defending against a claim of unilateral mistake, rather than mutual mistake.

 Cross Reference:

Discussion of unilateral mistake, see 16.13 -16.16.

Alternatively, if the mistake truly was mutual, the contract still may be saved if the mistake either is not material, or not harmful to the party attacking the contract. Only a party actually harmed by a material mistake may seek to avoid or reform the contract.

Legal Topics:

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

Contracts LawDefensesAmbiguity & MistakeGeneral OverviewContracts LawFormationAmbiguity & MistakeGeneral OverviewContracts LawFormationMeeting of MindsContracts LawRemediesReformationContracts LawRemediesRescission & RedhibitionGeneral Overview



52 of 193 DOCUMENTS

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Chapter 16 Attacking or Defending Existence of Contract--Mistake

III. ATTACKING OR DEFENDING EXISTENCE OF CONTRACT--MUTUAL MISTAKE

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16.11 Rescinding the Contract.

16.11[1] Mutual Mistake Regarding Material Matters May Prevent Formation of Contract. Consent is not mutual unless the parties all agree on the same thing in the same sense [CC § 1580]. When the parties are under a mistaken understanding as to the subject matter of their agreement, and they are equally at fault (or not at fault) with respect to that mistake, they have not agreed on the same thing in the same sense, and no contract has been formed [*Balistreri v. Nevada Livestock Production Credit Assn.* (1989) 214 CA3d 635, 641-642, 262 CR 862].

The mistake must materially affect an essential element of the contract, not merely a collateral matter [*Bellwood Disc. Corp. v. Empire Steel Bldgs. Co.* (1959) 175 CA2d 432, 435, 346 P2d 467]. Generally, material mistakes concern one or more of the following [*Odorizzi v. Bloomfield Sch. Dist.* (1966) 246 CA2d 123, 130, 54 CR 533]:

- The nature of the transaction.
- The identity of the parties.
- The identity of thing to which the contract relates.
- The occurrence of collateral events.

Example:

Borrower, who owned property in both Sebastopol and Petaluma, sought a loan from Bank. Bank's loan agent prepared a deed of trust on Borrower's Petaluma home, but mistakenly described the property in the cover letter sent to Borrower as the "Sebastopol residence." Borrower signed the deed of trust believing that it referred to the Sebastopol property. In an action to foreclose on the deed of trust, Borrower sought to cancel the deed based on mutual mistake. Bank claimed that there was no mutual mistake, since Bank had intended all along to encumber the Petaluma property. The court held that mutual mistake had prevented any contract from being formed [*Balistreri v. Nevada Livestock Production Credit Assn.* (1989) 214 CA3d 635, 641-642, 262 CR 862].

Jury Instructions:

Contract Formation--Essential Factual Elements, see *Judicial Council of California Civil Jury*

Instructions, CACI No. 302 (LexisNexis Matthew Bender).

Affirmative Defense--Bilateral Mistake, see *Judicial Council of California Civil Jury Instructions, CACI No. 331 (LexisNexis Matthew Bender).*

16.11[2] Mutual Mistake May Support Rescission of Contract. Even if the mutual mistake does not prevent formation of the contract, it may be of such a serious character that it justifies rescission of the agreement [CC § 1689].

If consent to the agreement would not have been obtained but for the mutual mistake, rescission is appropriate [*Harris v. Rudin, Richman & Appel (2002) 95 CA4th 1332, 1339, 116 CR2d 552*].

Example:

Plaintiff sued his former attorneys for malpractice, claiming that their probate work had exposed him to substantial personal tax liability. The parties settled the malpractice claim. Shortly thereafter, the attorney defendants learned that a change in probate law, enacted two days before the settlement agreement and retroactive to the period of their representation of the plaintiff, would exonerate the plaintiff's tax liability and eliminate his damage claim. The attorney defendants were entitled to rescind the settlement agreement based on this mutual mistake of law [*Harris v. Rudin, Richman & Appel (2002) 95 CA4th 1332, 1339, 116 CR2d 552*].

 Cross Reference:

Discussion of rescission for unilateral mistake, see 16.15.

16.11[3] Aggrieved Party Must Be Worse Off Because of Mistake. When a contract has actually been formed, it can be rescinded on the basis of mistake only if the mistake has harmed one of the parties. "A contract is voidable for mistake only if enforcement would be materially harmful or more onerous to the party seeking avoidance than it would have been had the law or the facts been as believed" [*Guthrie v. Times-Mirror Co. (1975) 51 CA3d 879, 886, 124 CR 577*].

16.11[4] Rescission Is Unavailable If Third Party's Rights Are Adversely Affected. For rescission to be granted, it must not cause harm to the interests of innocent third parties, such as bona fide purchasers for value [*Conservatorship of O'Connor (1996) 48 CA4th 1076, 1098-1099, 56 CR2d 386*].

 Cross Reference:

Ch. 8, Seeking or Opposing Equitable Remedies in Contract Actions.

16.11[5] Stipulation Regarding Errors of Description May Be Ineffective to Prevent Rescission. Many contracts include a stipulation such as "The parties agree that errors of description contained in this document do not affect the terms of the agreement, and shall not operate to avoid the contract," or language to that effect. Similarly, the parties may stipulate in advance that errors of description may affect one party's compensation, but will not otherwise affect the terms of the agreement. Such stipulations may not be effective to prevent rescission of the contract based on a claim of mutual mistake, at least when the claimed mistake goes to an essential matter "and is not capable of exact and entire compensation" [CC § 1690].

16.11[6] Statute of Limitations Is Four Years From Discovery of Facts. The statute of limitations based on a rescission of a written contract is four years. When the ground for rescission is mistake, the time does not begin to run until the aggrieved party discovers the facts constituting the mistake [CCP § 337(3)].

 Cross References:

Discussion of discovery rule, see Matthew Bender[(R)] Practice Guide: California Pretrial Civil

Procedure, Ch. 4, Limitation of Action.

Statutes of limitations, see Ch. 4, Determining Applicable Statute of Limitations and Effect on Potential Action.

Legal Topics:

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

Contracts LawDefensesAmbiguity & MistakeMutual MistakeContracts LawDefensesStatutes of LimitationsContracts LawFormationAmbiguity & MistakeMutual MistakeContracts LawRemediesRescission & RedhibitionGeneral OverviewContracts LawThird PartiesGeneral Overview



53 of 193 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 16 Attacking or Defending Existence of Contract--Mistake

III. ATTACKING OR DEFENDING EXISTENCE OF CONTRACT--MUTUAL MISTAKE

1-16 MB Practice Guide: CA Contract Litigation 16.12

16.12 Reforming the Contract.

16.12[1] Agreement May Be Reformed to Reflect Parties' Intentions. If the parties have reached agreement on all material matters, but because of an error, the writing does not accurately express the parties' intentions, the agreement may be reformed [CC § 3399].

Example:

A passenger in a Ford pickup truck was injured in a rollover collision. He settled his claim against the other driver in the accident, and signed a release. The form release, provided by counsel for the other driver, included "boilerplate" language releasing all potentially responsible parties from liability. Passenger then sued Ford for breach of warranty and products liability arising from the rollover. Ford attempted to interpose the earlier release in its own defense, arguing that the passenger had agreed to release any potentially responsible party in his settlement with the other driver. The passenger brought a separate action for reformation of the release agreement. In both the action for reformation, and the main action against Ford, undisputed evidence established the lack of any intent to include Ford in the general release. Ford was not entitled to rely on the release and reformation was granted [*Hess v. Ford Motor Co.* (2002) 27 C4th 516, 525-526, 117 CR2d 220, 41 P3d 46].



Cross Reference:

See Ch. 8, Seeking or Opposing Equitable Remedies in Contract Actions.

16.12[2] Reformation May Supply Words As Well As Remove Them. If necessary to carry out the intention of a contract, words may be transposed, rejected, or supplied, to make its meaning more clear [*Heidlebaugh v. Miller* (1954) 126 CA2d 35, 38, 271 P2d 557 (words "with or with notice" appeared in a written agreement; on party's application, the court inserted the word "out" after the second "with" in order to make the clause conform both to the parties' intentions and to the clear intent of the agreement)].

16.12[3] Court May Not Create New Agreement. The courts have broad equity powers to reform agreements to reflect the parties' intentions. However, they cannot make a new agreement. Reformation is available only when the parties actually reached agreement on all material terms, and the court is simply expressing the parties' actual agreement. The court is not empowered to create a new contract not agreed to by the parties themselves [*Lemoge Elec. v. County of San Mateo* (1956) 46 C2d 659, 663-664, 297 P2d 638].

16.12[4] Party Who Drafted Agreement Nevertheless May Seek Reformation. Reformation in cases of mutual mistake is available even if the party seeking reformation is also the party who drafted the agreement. "[I]t makes no difference who wrote the instruments to be reformed so long as all parties were in common mistake as to what was contained therein" [*Treadaway v. Camellia Convalescent Hosps., Inc.* (1974) 43 CA3d 189, 202, 118 CR 341 (quoting *Renshaw v. Happy Valley Water Co.* (1952) 114 CA2d 521, 524-525, 250 P2d 612)].

16.12[5] Right to Reformation Is Not Restricted to Original Parties. CC § 3399 permits contracts to be reformed "on the application of a party aggrieved" by the mistake. The courts have consistently held that a "party aggrieved" is not limited to the original parties, but also "includes one who has suffered prejudice or pecuniary loss" because of the mistake [*Watson v. Collins* (1962) 204 CA2d 27, 32, 21 CR 832].

16.12[6] Reformation Is Not Available If Third Parties' Rights Will Be Adversely Affected. If the interests of third parties would be harmed by reformation of the contract, then reformation is unavailable [CC § 3399]. Reformation is available "only so far as it can be done without prejudice to rights acquired by third persons, in good faith and for value" [CC § 3399].



Cross References:

Discussion of rescission, see 16.11.

Discussion of other remedies, see Ch. 8, Seeking or Opposing Equitable Remedies in Contract Actions.

16.12[7] Scrivener's Errors in Written Contract May Be Disregarded. If the parties reach agreement on all material matters and all parties correctly understand the contract, but the writing simply contains a mistake, the court may simply disregard or rewrite the erroneous portion of the writing and give effect to the parties' intention [CC § 1640; see *Stoneridge Parkway Partners, LLC v. MW Housing Partners III, L.P.* (2007) 153 CA4th 1373, 1383, 64 CR3d 61 (trial court correctly disregarded provisions in loan agreement that did not comport with either party's intention or understanding of the transaction)].

16.12[8] Parties' Intentions Must Be Shown. Because the purpose of reformation is to express the parties' true intentions, those intentions must be proved to the satisfaction of the court, with the party claiming mistake bearing the burden of proof. Those intentions may be shown through any of the following; the parole evidence rule does not prevent a party from using such evidence to establish mistake [*Hess v. Ford Motor Co.* (2002) 27 C4th 516, 525-526, 117 CR2d 220, 41 P3d 46] :

- Contemporaneous writings.
- Discussions.
- Other circumstances.



Cross Reference:

Discussion of the parole evidence rule, see Ch. 21, Asserting a Particular Construction of Contract.

Legal Topics:

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

Contracts LawDefensesAmbiguity & MistakeGeneral OverviewContracts LawFormationAmbiguity & MistakeGeneral OverviewContracts LawRemediesReformationContracts LawThird PartiesGeneral Overview



54 of 193 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 16 Attacking or Defending Existence of Contract--Mistake

IV. ATTACKING OR DEFENDING EXISTENCE OF CONTRACT--UNILATERAL MISTAKE

1-16 MB Practice Guide: CA Contract Litigation 16.13

16.13 CHECKLISTS: Attacking or Defending Existence of Contract--Unilateral Mistake.

16.13[1] Rescission of Contract.

16.13[1][a] Unilateral Mistake of Law.

- ☐ Did party have misapprehension of the law?
 - ☐ Did party fail to understand terms of contract?
 - ☐ Was mistake one of foreign law?
- ☐ Were other parties aware of mistake?
- ☐ Did other parties fail to correct mistake?

Authority:

CC §§ 1577, 1578, 1579; Hedging Concepts, Inc. v. First Alliance Mortgage Co. (1996) 41 CA4th 1410, 1421, 49 CR2d 191

Discussion:

See 16.07, 16.15[1]

16.13[1][b] Unilateral Mistake of Fact.

- ☐ Is claimed mistake a mistake of fact?
 - ☐ Ignorance of past or existing fact.

- ☐ Incorrect belief as to past or existing fact.

Authority:

CC § 1577; Mosher v. Mayacamas Corp. (1989) 215 CA3d 1, 5, 263 CR 373

Discussion:

See 16.06[1]

- ☐ Was claimed mistake of fact a material part of inducement for contract?

Authority:

Walton v. Bank of Cal., Nat'l Ass'n (1963) 218 CA2d 527, 545-546, 32 CR 856

Discussion:

See 16.06[1][b]

- ☐ Was mistake of fact caused by a neglect of legal duty on claimant's part?

Authority:

CC § 1577; Lawrence v. Shutt (1969) 269 CA2d 749, 765, 75 CR 533 ; White v. Berrenda Mesa Water Dist. of Kern County (1970) 7 CA3d 894, 901, 87 CR 338 ; Donovan v. RRL Corp. (2001) 26 C4th 261, 284-285, 109 CR2d 807, 27 P3d 702

Discussion:

See 16.06[2]

- ☐ Does claim of mistake of fact relate to matters that parties knew to be uncertain at time they entered into the agreement?

- ☐ Is relief barred because complaining party bears the risk of mistake under terms of agreement?

Authority:

In re Marriage of Hahn (1990) 224 CA3d 1236, 1241, 273 CR 516 ; Donovan v. RRL Corp. (2001) 26 C4th 261, 284-285, 109 CR2d 807, 27 P3d 702 ; Restatement (Second) of Contracts § 154(a)

Discussion:

See 16.06[3]

- ☐ Did one party either induce the mistake or know of it and keep silent?

Authority:

Donovan v. RRL Corp. (2001) 26 C4th 261, 280, 109 CR2d 807, 27 P3d 702

Discussion:

See 16.15[2][a]

- ☐ Alternatively, court may grant relief if all of following conditions are satisfied:

- ☐ Party seeking relief made a mistake regarding a basic assumption upon which defendant made contract;
- ☐ Mistake has a material effect upon agreed exchange of performances that is adverse to party aggrieved;
- ☐ Party seeking relief does not bear risk of mistake; and
- ☐ Effect of mistake is such that enforcement of contract would be unconscionable.

Authority:

Donovan v. RRL Corp. (2001) 26 C4th 261, 280, 109 CR2d 807, 27 P3d 702

Discussion:

See 16.15[2][b]

- ☐ Is party seeking to avoid contract worse off because of mistake?

Authority:

Guthrie v. Times-Mirror Co. (1975) 51 CA3d 879, 886, 124 CR 577

Discussion:

See 16.15[3]

- ☐ Will interests of an innocent third party be harmed?

Authority:

Conservatorship of O'Connor (1996) 48 CA4th 1076, 1098-1099, 56 CR2d 386

Discussion:

See 16.15[4]

**Timing:**

Statute of limitations based on a rescission of a written contract is four years from discovery by aggrieved party of facts constituting mistake.

Authority:

CCP § 337(3)

Discussion:

See 16.15[6]

- ☐ Is contract at issue a government contract?

**Timing:**

Bidder must give public entity written notice of mistake within five working days after the opening of

the bids and any action to set aside bid must be filed *and served* on appropriate party within 90 days after opening of bid.

Authority:

PC Code § 5103

- ☐ Notice must specify in detail how mistake occurred.
- ☐ Mistake must have been clerical, not an error in judgment or a mistake in evaluating work.
- ☐ Mistake must have made bid "materially different" from bidder's intended bid.

Authority:

PC Code §§ 5102, 5103

Discussion:

See 16.15[7]

16.13[2] Reformation of Contract.

16.13[2][a] Unilateral Mistake of Law.

- ☐ Did a party have a misapprehension of the law?
 - ☐ Did a party to understand terms of contract?
 - ☐ Was mistake one of foreign law?
- ☐ Were other parties aware of mistake?
- ☐ Did other parties fail to correct mistake?

Authority:

CC §§ 1577, 1578, 1579; Hedging Concepts, Inc. v. First Alliance Mortgage Co. (1996) 41 CA4th 1410, 1421, 49 CR2d 191

Discussion:

See 16.07, 16.16[1]

16.13[2][b] Unilateral Mistake of Fact.

- ☐ Does client wish to reform a contract?
 - ☐ Was client's mistaken belief either induced by or known to other party?

Authority:

CC § 3399

Discussion:

See 16.16[2]

☐ Did other party communicate assent to mistaken party's intentions by keeping silent about mistake?

Authority:

CC § 3399; *Stare v. Tate* (1971) 21 CA3d 432, 438-439, 98 CR 264

Discussion:

See 16.16[3]

☐ Will interests of a third party be harmed?

Authority:

CC § 3399

Discussion:

See 16.16[4]

☐ Can you prove parties' intentions?

☐ Party claiming mistake has burden of proof.

☐ Intentions may be shown through the following:

☐ Contemporaneous writings.

☐ Discussions.

☐ Other surrounding circumstances.

☐ Parol evidence rule does not apply.

Authority:

Hess v. Ford Motor Co. (2002) 27 C4th 516, 525-526, 117 CR2d 220, 41 P3d 46

Discussion:

See 16.16[5]

Legal Topics:

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

Contracts LawDefensesAmbiguity & MistakeFailure to Read ContractContracts LawDefensesAmbiguity &
MistakeUnilateral MistakeContracts LawFormationAmbiguity & MistakeUnilateral MistakeContracts
LawRemediesReformationContracts LawRemediesRescission & RedhibitionGeneral Overview



55 of 193 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 16 Attacking or Defending Existence of Contract--Mistake

IV. ATTACKING OR DEFENDING EXISTENCE OF CONTRACT--UNILATERAL MISTAKE

1-16 MB Practice Guide: CA Contract Litigation 16.14

16.14 Options and Strategies for Obtaining Relief Based on Unilateral Mistake.

16.14[1] Attacking the Contract. The party claiming a unilateral mistake faces an uphill battle. Most such mistakes will not justify relief. Only under limited circumstances will the courts intervene to protect a party from the consequences of his or her own mistake [see *Harris v. Rudin, Richman & Appel* (2002) 95 CA4th 1332, 1339, 116 CR2d 552].



Strategic Point:

If the parties have an agreement, you should consider whether reformation or rescission of the contract is appropriate. The court may discard the agreement, and your client may have liked many of the terms in the now-defunct contract. Careful consideration should be given before attempting to reform or rescind a contract.

If the client wishes to eliminate the contract completely, then rescission should be attempted. Rescission means the court will rule the contract to be null and void [*Asmus v. Pacific Bell* (2000) 23 C4th 1, 6 n1, 96 CR2d 179, 999 P2d 71 ; see CC § 1688]. The parties can then start from the beginning with a new contract.

If there are terms in the agreement to which a party did not agree, then reformation may be possible. Reformation allows the court to "rewrite" an agreement to conform to the intent of the parties [CC § 3399]. This remedy is also available to affected third parties [*Shupe v. Nelson* (1967) 254 CA2d 693, 698, 62 CR 352].

16.14[2] Defending the Contract.

16.14[2][a] Mistake of Law. If the party defending the contract did not induce the mistake, or know of it, and it is a mistake of law, the court will not provide a remedy [see CC § 3399].

16.14[2][b] Mistake of Fact. When there is a mistake of fact, there are several successive lines of defense that may preserve the contract. The contract will not be rescinded if [see *Donovan v. RRL Corp.* (2001) 26 C4th 261, 284-285, 109 CR2d 807, 27 P3d 702]:

- The alleged mistake is insufficiently "material;"
- It does not affect "a basic assumption" upon which the contract was made; or
- Enforcement would not be "unconscionable."



Strategic Point:

However, in many cases in which one party is willing to risk the expense and effort of litigation, the mistake will pass these thresholds. At that point, the party defending the contract should attempt to establish that the aggrieved party "bore the risk" of the mistake. That risk need not have been explicitly allocated, or even anticipated by the parties, in reaching the agreement (although of course such an allocation would be helpful). Under certain circumstances, the court will place the risk of mistake on one party simply because it is reasonable to do so. Public policy may support such placement of risk. Accordingly, the attorney should seek to establish that public policy, or a statutory scheme, or simple fairness requires that the aggrieved party bear the risk of his or her own mistake.



Cross References:

Discussion of materiality, see *16.11[1]*.

Discussion of allocation of the risk, see *16.06[3]*.

Discussion of unconscionability, see Ch. 18, Asserting or Defending Claim That Contract Is Illegal, Contrary to Public Policy, or Unconscionable.

Legal Topics:

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

Contracts LawDefensesAmbiguity & MistakeFailure to Read ContractContracts LawDefensesAmbiguity & MistakeUnilateral MistakeContracts LawFormationAmbiguity & MistakeUnilateral MistakeContracts LawRemediesReformationContracts LawRemediesRescission & RedhibitionGeneral Overview



56 of 193 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 16 Attacking or Defending Existence of Contract--Mistake

IV. ATTACKING OR DEFENDING EXISTENCE OF CONTRACT--UNILATERAL MISTAKE

1-16 MB Practice Guide: CA Contract Litigation 16.15

16.15 Rescinding the Contract.

16.15[1] Unilateral Mistake of Law. A unilateral mistake of law is a "mistake" which would allow the court to rescind the contract, only if one party knows of the other party's mistake and does nothing to correct it [*CC § 1578*].

16.15[2] Unilateral Mistake of Fact.

16.15[2][a] Rescission Is Available When Mistake of Fact Is Known to Other Party. When the other party to the contract either induces the mistake, or knows of it and keeps silent, the contract may be rescinded [*Donovan v. RRL Corp. (2001) 26 C4th 261, 280, 109 CR2d 807, 27 P3d 702*].

Jury Instructions:

Affirmative Defense--Unilateral Mistake of Fact, see *Judicial Council of California Civil Jury Instructions, CACI No. 330* (LexisNexis Matthew Bender).

16.15[2][b] Rescission May Be Available When Enforcement of Agreement Would Be Unconscionable.

Although *CC § 1689* appears to support rescission under either mutual or unilateral mistake, the courts have severely restricted its application when the claimed mistake is unilateral [*Harris v. Rudin, Richman & Appel (2002) 95 CA4th 1332, 1339, 116 CR2d 552*]. If the mistake is a unilateral mistake of fact, and the other party neither induced the mistake nor knew of it, the courts are reluctant to intervene except under extraordinary circumstances. To avoid a contract on the ground of unilateral mistake not induced by, known to or suspected by the other party, the aggrieved party must show all of the following [*Donovan v. RRL Corp. (2001) 26 C4th 261, 280, 109 CR2d 807, 27 P3d 702*]:

- He or she made a mistake regarding a basic assumption upon which the defendant made the contract.
- The mistake has a material effect upon the agreed exchange of performances that is adverse to the party aggrieved.
- He or she does not bear the risk of the mistake.
- The effect of the mistake is such that enforcement of the contract would be unconscionable.

Example:

An automobile dealer mistakenly advertised a vehicle for sale at a price significantly less than its own cost. A buyer accepted the advertised offer, and sued to enforce the resulting contract. The Supreme Court agreed with the automobile dealer that the contract should be rescinded as a result of the mistake [*Donovan v. RRL Corp. (2001)* 26 C4th 261, 280, 109 CR2d 807, 27 P3d 702].

Judge's Perspective:

Proving unconscionability requires that the terms of the contract "shock the conscience." Unconscionability is a question of law [*Jones v. Wells Fargo Bank (2003)* 112 CA4th 1527, 1539]. However, many facts are considered in making the ruling [*Flores v. Transamerica HomeFirst, Inc. (2001)* 93 CA4th 846, 851, 113 CR2d 376]. Trial and appellate courts have reached different conclusions regarding unconscionability depending, in part, on the subject matter of the contract and, in part, on the contract culture of the particular judicial officer. Anyone raising this claim should thoroughly research the area of law of unconscionability and obtain as much information as possible about the prior rulings of the evaluating judge on this issue.

 Cross Reference:

Discussion of unconscionability, see Ch. 18, Asserting or Defending Claim That Contract Is Illegal, Contrary to Public Policy, or Unconscionable.

16.15[3] Aggrieved Party Must Be Worse Off Because of Mistake. When a contract has actually been formed, it can be rescinded on the basis of mistake only if the mistake has harmed one of the parties. "A contract is voidable for mistake only if enforcement would be materially harmful or more onerous to the party seeking avoidance than it would have been had the law or the facts been as believed" [*Guthrie v. Times-Mirror Co. (1975)* 51 CA3d 879, 886, 124 CR 577].

16.15[4] Rescission Unavailable If a Third Party's Rights Would Be Adversely Affected. Rescission, in order to be granted, must not cause harm to the interests of innocent third parties, such as bona fide purchasers for value [*Conservatorship of O'Connor (1996)* 48 CA4th 1076, 1098-1099, 56 CR2d 386].

 Cross Reference:

Detailed discussion of rescission, see Ch. 8, Seeking or Opposing Equitable Remedies in Contract Actions.

16.15[5] Stipulation Regarding Errors of Description May Be Ineffective to Prevent Rescission. Many contracts include a stipulation such as "The parties agree that errors of description contained in this document do not affect the terms of the agreement, and shall not operate to avoid the contract," or language to that effect. Similarly, the parties may stipulate in advance that errors of description may affect one party's compensation, but will not otherwise affect the terms of the agreement. Such stipulations may not be effective to prevent rescission of the contract based on a claim of mutual mistake, at least when the claimed mistake goes to an essential matter "and is not capable of exact and entire compensation" [CC § 1690].

16.15[6] Statute of Limitations Is Four Years From Discovery of Facts. The statute of limitations based on a rescission of a written contract is four years. When the ground for rescission is mistake, the time does not begin to run until the discovery by the aggrieved party of the facts constituting the mistake [CCP § 337(3)].

 Cross Reference:

Statutes of limitation in general, see Ch. 4, Determining Applicable Statute of Limitations and Effect on Potential Action.

16.15[7] Special Rules for Government Bidding. A bidder for government contracts who makes a mistake in his bid must follow specific procedures to obtain relief. Such a bidder must give the public entity written notice within five working days, excluding Saturdays, Sundays, and state holidays, after the opening of the bids of the mistake, specifying in the notice in detail how the mistake occurred. In order to justify relief, the mistake must have been clerical, rather than an error in judgment or a mistake in evaluating the work. Finally, the mistake must have made the bid "materially different" from the bidder's intended bid [*PC Code § 5103*; see *Diede Construction, Inc. v. Monterey Mechanical Co.* (2004) 125 CA4th 380, 386-388].



Warning:

Any action to set aside the bid must be filed *and served* on the appropriate party within 90 days after opening of the bid [*PC Code § 5102*].

Legal Topics:

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

Contracts LawDefensesAmbiguity & MistakeGeneral OverviewContracts LawDefensesAmbiguity & MistakeUnilateral MistakeContracts LawFormationAmbiguity & MistakeGeneral OverviewContracts LawFormationAmbiguity & MistakeUnilateral MistakeContracts LawRemediesRescission & RedhibitionGeneral Overview



57 of 193 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 16 Attacking or Defending Existence of Contract--Mistake

IV. ATTACKING OR DEFENDING EXISTENCE OF CONTRACT--UNILATERAL MISTAKE

1-16 MB Practice Guide: CA Contract Litigation 16.16

16.16 Reforming the Contract.

16.16[1] Unilateral Mistake of Law. A unilateral mistake of law is a "mistake" giving rise to relief only when one party knows of the other party's mistake and does nothing to correct it [CC § 1578].

16.16[2] Unilateral Mistake of Fact. When a party's mistaken belief is either induced by, or known to, the other party, the mistaken party is not limited to rescission as a remedy, but may be entitled to seek reformation of the agreement [CC § 3399].

16.16[3] Contract May Be Reformed to Reflect Aggrieved Party's Intent. When the mistake was induced by or known to the other party, the mistaken party may have the contract reformed in order to eliminate the "mistake"--in other words, to reflect what he or she had intended that the contract should provide. The courts have held that the party who kept silent about the mistake was in effect communicating his or her acceptance of the mistaken party's intentions, and is estopped to rely on his or her unspoken intentions. The time to speak out about those intentions was when the mistake became known [CC § 3399; *Stare v. Tate* (1971) 21 CA3d 432, 438-439, 98 CR 264].

Example:

The wife in a dissolution proceeding agreed to a property settlement based on a mathematical error by her attorney. Under the settlement, the wife believed that certain property was valued at \$550,000, but the net payment to her reflected a value of about \$100,000 less. After the settlement was finalized, the husband sent her a letter confirming the distribution with a taunting note: "PLEASE NOTE \$100,000 MISTAKE IN YOUR FIGURES." The wife sought reformation of the agreement to reflect a value on that property of \$550,000, with a resulting increase in the distribution to her. The husband resisted reformation, pointing out that he would not have agreed to a valuation of \$550,000, and that he agreed to the settlement only on the basis of the final distribution amount. The court was unimpressed with the husband's argument. Having kept silent about the wife's error, the husband was estopped to claim any other value [*Stare v. Tate* (1971) 21 CA3d 432, 438-439, 98 CR 264].

16.16[4] Reformation Is Unavailable If a Third Party's Rights Will Be Adversely Affected. Like rescission, reformation on the grounds of mistake is subject to the same general rules applicable to reformation generally. If the interests of third parties would be harmed by reformation of the contract, then reformation is unavailable [CC § 3399]. Reformation is available "only so far as it can be done without prejudice to rights acquired by third persons, in good

faith and for value" [CC § 3399].

 Cross References:

Discussion of rescission, see 16.15.

Discussion of other remedies, see Ch. 8, Seeking or Opposing Equitable Remedies in Contract Actions.

16.16[5] Parties' Intentions Must Be Shown. Because the purpose of reformation is to express the parties' true intentions, those intentions must be proved to the satisfaction of the court, with the party claiming mistake bearing the burden of proof. Such intentions may be shown through contemporaneous writings, discussions, or other surrounding circumstances. The parol evidence rule does not prevent a party from using such evidence to establish mistake [*Hess v. Ford Motor Co.* (2002) 27 C4th 516, 525-526, 117 CR2d 220, 41 P3d 46].

 Cross Reference:

Discussion of the parol evidence rule, see Ch. 21, Asserting a Particular Construction of Contract.

Legal Topics:

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

Contracts LawDefensesAmbiguity & MistakeGeneral OverviewContracts LawDefensesAmbiguity & MistakeUnilateral MistakeContracts LawFormationAmbiguity & MistakeGeneral OverviewContracts LawFormationAmbiguity & MistakeUnilateral MistakeContracts LawRemediesReformation



58 of 193 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 16 Attacking or Defending Existence of Contract--Mistake
V. PLEADING AND PROVING MISTAKE

1-16 MB Practice Guide: CA Contract Litigation 16.17

16.17 CHECKLIST: Pleading and Proving Mistake.

☐ If alleging mistake in complaint seeking relief:

☐ Allege sufficient facts to show factual basis of claim, including how, when, and why mistake occurred.

Authority:

Totten v. Underwriters at Lloyd's London (1959) 176 CA2d 440, 448, 1 CR 520 ;
Girard v. Miller (1963) 214 CA2d 266, 273, 29 CR 359 .

☐ Allege all essential elements for type of mistake that forms basis for claim.

☐ For mutual mistake, allege:

☐ That both parties were mistaken about a matter relevant to contract.

☐ That mistake was material.

☐ That plaintiff would not have entered contract if he/she was aware of mistake.

Discussion:

See 16.18[2]

☐ For unilateral mistake, allege:

☐ That plaintiff was mistaken about a particular matter.

☐ That defendant knew plaintiff was mistaken and used mistake to take advantage of plaintiff, or that effect of mistake is to make enforcement of contract unconscionable.

☐ That plaintiff's mistake was not caused by his/her own excessive carelessness.

☐ That mistake was material.

☐ That plaintiff would not have entered contract if he/she was aware of mistake.

Discussion:

See 16.18[3]

☐ Request type of relief required.

☐ Rescission; or

☐ Reformation.

Discussion:

See 16.11, 16.12, 16.15, 16.16

☐ If pleading mistake as defense to claim for breach of contract:

☐ Raise defense in answer to complaint.

☐ Allege mistake as affirmative defense to avoid waiving defense; general denial is not sufficient.

Authority:

California Acad. of Scis. v. County of Fresno (1987) 192 CA3d 1436, 1442, 238 CR 154
; *G. W. Andersen Constr. Co. v. Mars Sales* (1985) 164 CA3d 326, 339, 210 CR 409

Discussion:

See 16.19

☐ Be prepared to meet burden of proving each element of mistake.

Discussion:

See 16.20

Legal Topics:

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

Civil Procedure Pleading & Practice Defenses, Demurrers & Objections Affirmative Defenses General Overview Contracts Law Defenses Ambiguity & Mistake General Overview Contracts Law Formation Ambiguity & Mistake General Overview



59 of 193 DOCUMENTS

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Chapter 16 Attacking or Defending Existence of Contract--Mistake
V. PLEADING AND PROVING MISTAKE

1-16 MB Practice Guide: CA Contract Litigation 16.18

16.18 Plaintiff May Assert Mistake in Complaint for Rescission or Reformation.

16.18[1] Complaint Must Show How, When, and Why Mistake Occurred. A complaint seeking relief on grounds of mistake must allege the existence and grounds for the claim of mistake, and the relief (rescission or reformation) requested [see *CC* §§ 1689, 3399]. For mutual mistake, the plaintiff must allege facts showing how the mistake was made, whose mistake it was, and what brought it about, so that the mutuality may appear. Similarly, if unilateral mistake is the basis of the claim, the facts showing a mistake of that character must likewise be alleged [*Totten v. Underwriters at Lloyd's London* (1959) 176 CA2d 440, 448, 1 CR 520]. In the absence of a clear recitation of facts showing how, when, and why the mistake occurred, a complaint is inadequate as against a general and special demurrer [*Girard v. Miller* (1963) 214 CA2d 266, 273, 29 CR 359 (deed reformation action based on mutual mistake)].

16.18[2] Essential Allegations for Complaint for Mutual Mistake. A complaint for mutual mistake must allege the following [see *Judicial Council of California Civil Jury Instructions*, CACI No. 331 (LexisNexis Matthew Bender) (elements of mutual mistake as an affirmative defense)]:

- That both parties were mistaken about a matter relevant to the contract.
- That the mistake was material to the contract.
- That the plaintiff would not have agreed to enter into the contract if the plaintiff had known about the mistake.

Jury Instructions:

Affirmative Defense--Bilateral Mistake, see *Judicial Council of California Civil Jury Instructions*, CACI No. 331 (LexisNexis Matthew Bender).

➤ Cross References:

Discussion of what constitutes a mistake of fact, see 16.04[1], 16.06.
Discussion of what constitutes a mistake of law, see 16.04[2], 16.07.
Form for complaint for rescission--mutual mistake, see 16.22.

Form for complaint for reformation--mutual mistake, see 16.23.

16.18[3] Essential Allegations for Claim of Unilateral Mistake. A complaint for unilateral mistake must allege all of the following [CC §§ 1577, 1578; *Donovan v. RRL Corp. (2001) 26 C4th 261, 281-282, 109 CR2d 807, 27 P3d 702*]:

- That the plaintiff was mistaken about a particular matter.

- That either:

- The defendant knew plaintiff was mistaken about the matter and used that mistake to take advantage of plaintiff [see *Cypress v. New Amsterdam Cas. Co. (1968) 259 CA2d 219, 225, 66 CR 357* (complaint for reformation based on unilateral mistake must allege that mistake of one party was known or suspected by other party at time document was executed; without such an allegation, no cause of action for reformation is stated)]; or

- If defendant has no reason to know of and does not cause plaintiff's unilateral mistake of fact, that effect of mistake is such that enforcement of the contract would be unconscionable [*Donovan v. RRL Corp. (2001) 26 C4th 261, 281-282, 109 CR2d 807, 27 P3d 702*].

- That plaintiff's mistake was not caused by his or her own excessive carelessness [see *Lawrence v. Shutt (1969) 269 CA2d 749, 756-766, 75 CR 533* (failure to make reasonable inquiry after having notice of sufficient facts to put party on inquiry was neglect of party's legal duty and party's mistake therefore was not mistake of fact within meaning of CC § 1577)].

- That the mistake was material to the contract.

- That plaintiff would not have agreed to enter into the contract if he or she had known about the mistake.

Jury Instructions:

Affirmative Defense--Unilateral Mistake of Fact, see *Judicial Council of California Civil Jury Instructions, CACI No. 330* (LexisNexis Matthew Bender).

➡ Cross References:

Rescinding the contract, see 16.15.

Reforming the contract, see 16.16.

Form for complaint for rescission of contract--unilateral mistake known to or induced by other party, see 16.24.

Form for complaint for reformation of contract--unilateral mistake known to or induced by other party, see 16.25.

Legal Topics:

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

Civil Procedure Pleading & Practice Pleadings Complaints Requirements Contracts Law Defenses Ambiguity & Mistake General Overview Contracts Law Formation Ambiguity & Mistake General Overview Contracts Law Remedies Reformation Contracts Law Remedies Rescission & Redhibition General Overview



60 of 193 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 16 Attacking or Defending Existence of Contract--Mistake
V. PLEADING AND PROVING MISTAKE

1-16 MB Practice Guide: CA Contract Litigation 16.19

16.19 Defendant May Assert Mistake As Defense to Action on Contract.

A defendant may assert mistake as a defense to any action on a contract that would be defeated by showing that no valid contract exists [see CC §§ 1550 (consent is essential element of contract), 1567 (apparent consent not real or free when obtained through mistake)].

16.19[1] Mistake Is Affirmative Defense. Mistake is an affirmative defense [*Commissioners to Manage Yosemite Valley v. Barnard* (1893) 98 C 199, 201, 32 P 982]. It must be affirmatively alleged in the answer to the complaint [*Eucalyptus Growers Ass'n v. Orange County Nursery & Land Co.* (1917) 174 C 330, 335, 163 P 45].

Jury Instructions:

Affirmative Defense--Unilateral Mistake, see *Judicial Council of California Civil Jury Instructions*, CACI No. 330 (LexisNexis Matthew Bender).

Affirmative Defense--Bilateral Mistake, see *Judicial Council of California Civil Jury Instructions*, CACI No. 331 (LexisNexis Matthew Bender).

Strategic Point--Defendant--Pleading Affirmative Defenses in General Terms:



Since California is a "notice pleading" state, affirmative defenses, like the allegations in the complaint itself, generally do not require much specificity. Most defense attorneys prefer to plead affirmative defenses, like denials, in general terms. At the outset of the case, the defense attorney often may not be confident enough of his or her knowledge of the facts to assert them with specificity, although he or she may well know enough to know that a particular defense may apply. Secondly, if an affirmative defense is spelled out too specifically in the answer, it opens the client up to examination at deposition as to the specific factual basis of the affirmative defense. When the affirmative defense is plead generally, few attorneys will examine a deponent about it, and if they do the deponent can simply say: "I don't know. That is a purely legal matter handled by the attorney."

If an affirmative defense is pled in very general terms, there is the possibility that the plaintiff may demur. However, the court is required to liberally construe the pleading with a view to substantial justice

[CCP § 452]. At worst, defendant may be required to re-allege the defense with greater specificity. On the other hand, plaintiffs may forgo asserting such easily-cured objections, and failure to object will result in the objection being deemed waived [see *Henderson v. Northam* (1917) 176 C 493, 496, 168 P 1044 (plaintiff who treated answer that was "somewhat complex and artificially drawn" as sufficient to require proof of allegation of complaint was deemed to have waived all objections to sufficiency of denial)].

The affirmative defenses illustrated in 16.21 are stated in very general terms in accordance with the principles stated above, with additional language allowing greater specificity for specific allegations if desired.



Cross References:

Form for answer to complaint for breach of contract with affirmative defenses of mistake, see 16.21.

Alleging affirmative defenses, see *Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure*, 14.12 -14.25; or

California Forms of Pleading and Practice, Ch. 26, Answers (Matthew Bender).

16.19[2] Failure to Assert Mistake As Affirmative Defense May Result in Waiver. Generally, a party who fails to plead affirmative defenses waives them [*California Acad. of Scis. v. County of Fresno* (1987) 192 CA3d 1436, 1442, 238 CR 154]. Mistake is an affirmative defense that defendants are required to plead and prove [*Marich v. MGM/UA Telecommunications, Inc.* (2003) 113 CA4th 415, 424 (mistake as defense to privacy action)]. Failure to affirmatively allege mistake in the answer can result in a waiver of the defense [see, e.g., *G. W. Andersen Constr. Co. v. Mars Sales* (1985) 164 CA3d 326, 339, 210 CR 409].

Legal Topics:

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

Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsAffirmative DefensesGeneral OverviewCivil ProcedurePleading & PracticePleadingsAnswersContracts LawDefensesAmbiguity & MistakeGeneral OverviewContracts LawDefensesAmbiguity & MistakeMutual MistakeContracts LawDefensesAmbiguity & MistakeUnilateral Mistake



61 of 193 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 16 Attacking or Defending Existence of Contract--Mistake
V. PLEADING AND PROVING MISTAKE

1-16 MB Practice Guide: CA Contract Litigation 16.20

16.20 Party Asserting Mistake Has Burden of Proof.

The party asserting the existence of a mistake in the formation of a contract has the burden of proof regarding all the elements necessary for relief [*Roller v. California Pac. Title Ins. Co. (1949) 92 CA2d 149, 152, 206 P2d 694*]. Proof of the mistake must be clear, convincing, and satisfactory to the court [*Taff v. Atlas Assurance Co. (1943) 58 CA2d 696, 700, 137 P2d 483*].

Legal Topics:

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

Contracts LawDefensesAmbiguity & MistakeGeneral OverviewContracts LawFormationAmbiguity & MistakeGeneral OverviewEvidenceProcedural ConsiderationsBurdens of ProofGeneral Overview



62 of 193 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 16 Attacking or Defending Existence of Contract--Mistake
VI. FORMS*1-16 MB Practice Guide: CA Contract Litigation 16.21***16.21 Answer to Complaint for Breach of Contract--Mistake.****Answer to Complaint for Breach of Contract--Mistake.**

[Name of attorney]

_____[Street address]

_____[City, state, and ZIP]

_____[Area code and phone number]

_____[State Bar no. of attorney]

Attorney for _____[name of party]

SUPERIOR COURT OF CALIFORNIA,

COUNTY OF _____

[name] _____,

Plaintiff,

vs.

[name] _____,

Defendant.

)

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)

NO.

ANSWER OF

_____[identify Defendant, e.g.,
DEFENDANT MARY JONES] TO COMPLAINT
OF_____[identify Plaintiff, e.g.,
PLAINTIFF JOHN SMITH]

[LIMITED CIVIL CASE]

Judge:

Department:

Defendant answers the complaint as follows:

[Include general denial below, or set forth, in numbered paragraphs, specific denials, admissions, and allegations in response to those in complaint, in the order in which they are alleged in complaint:]

1. Pursuant to *Code of Civil Procedure Section 431.30(b)(1)*, Defendant generally denies each and every allegation of Plaintiff's complaint, including all the purported causes of action contained therein, and further denies that Plaintiff is entitled to any equitable or legal relief, or any damages whatsoever.

[Defendant asserts the following affirmative defenses. By doing so, Defendant shall not be deemed to have assumed the burden of proving any matters that otherwise would be Plaintiff's burden.]

[EITHER, if alleging a mutual mistake of fact]

FIRST AFFIRMATIVE DEFENSE

(Mutual Mistake of Fact)

2. Defendant is informed and believes, and thereon alleges, that at all relevant times, the parties to the purported agreement were acting under a mutual mistake of fact as to one or more facts that were a material part of the inducement of the purported contract, and would not have entered into that contract had the true facts been known. *[If greater specificity is desired with respect to one or more specific allegations, add:* These mistakes of fact included, without limitation, a mistaken belief that

_____ *(include details of the alleged mutual mistake, e.g., the subject property was suitable for development or the item to be sold was a genuine 1969 Fender Stratocaster guitar), when the true facts were that*

_____ *(include details, e.g., the subject property was protected wetlands or the item was an imitation or later model).]*

[AND/OR, if alleging a mutual mistake of law]

SECOND AFFIRMATIVE DEFENSE

(Mutual Mistake of Law)

3. Defendant is informed and believes, and thereon alleges, that at all relevant times, the parties to the purported agreement were acting under a mutual mistake or mistakes with respect to the law applicable to the subject matter of the purported contract, that their mistaken belief was a material part of the inducement for the purported contract, and that they would not have entered into that contract had they correctly understood the applicable law and the legal effect of the contract. *[If greater specificity is desired with respect to one or more specific allegations, add:* These mistakes of

law included, without limitation, a mistaken belief that

_____ (include details of the alleged mutual mistake, e.g., the Plaintiff's 1990 marriage was valid in California), when the applicable law provides that

_____ (include details, e.g., California does not recognize the marriage of 17-year-olds without parental consent).]

[AND/OR, if alleging a unilateral mistake of fact, induced by or known to the other party]

THIRD AFFIRMATIVE DEFENSE

(Unilateral Mistake of Fact)

4. At the time of the alleged agreement set forth in the complaint, Defendant was acting under a mistaken belief as to one or more facts that were a material part of the inducement for the purported contract, and would not have entered into that contract had the true facts been known. Defendant

_____ [is informed and believes, and thereon alleges, that Plaintiff was aware at all relevant times of Defendant's mistaken belief, and did nothing to correct it or further alleges that his/her/its mistaken belief was directly induced by Plaintiff's acts]. [If greater specificity is desired with respect to one or more specific allegations, add: These mistakes of fact included, without limitation, a mistaken belief that _____

_____ (include details of the alleged mutual mistake, e.g., the subject property had been appraised at \$370,000), when the true facts were that _____ (include details, e.g., the property had not been appraised or had been appraised at a significantly lower value).]

[AND/OR, if alleging a unilateral mistake of law, known to or induced by the other party]

FOURTH AFFIRMATIVE DEFENSE

(Unilateral Mistake of Law)

5. At the time of the alleged agreement set forth in the complaint, Defendant was acting under a mistake or mistakes with respect to the law applicable to the subject matter of the purported contract, that mistaken belief was a material part of the inducement for the purported contract, and Defendant would not have entered into that contract had he/she/it correctly understood the applicable law and the legal effect of the contract. Defendant

_____ [is informed and believes, and thereon alleges, that Plaintiff was aware at all relevant times of Defendant's mistaken belief, and did nothing to correct it or further alleges that his/her/its mistaken belief was directly induced by Plaintiff's acts]. [If greater specificity is desired with respect to one or more specific allegations, add: These mistakes of law included, without limitation, a mistaken belief that _____

_____ (include details of the alleged mutual mistake, e.g., a personal services contract having an initial term of seven years, plus a series of five subsequent one-year options exercisable at the employer's discretion, was fully enforceable by an employer under California law), when the applicable law was that

_____ (include details, e.g., personal services contracts in California cannot be enforced against an employee beyond seven years after the commencement of

service).]

[AND/OR, if alleging a unilateral mistake of fact not known to or induced by other party]

FIFTH AFFIRMATIVE DEFENSE

(Unilateral Mistake of Fact)

6. At the time of the alleged agreement set forth in the complaint, Defendant was acting under a mistaken belief as to one or more facts that were a material part of the inducement for the purported contract, and would not have entered into that contract had the true facts been known. Defendant's mistaken belief went to an essential term of the contract, and enforcement of the contract as written would be unconscionable and would work a severe and unjustified hardship on Defendant. *[If greater specificity is desired with respect to one or more specific allegations, add: These mistakes of fact included, without limitation, a mistaken belief that*

_____ *(include details of the alleged mutual mistake, e.g., the subject property had been appraised at \$370,000), when the true facts were that*

_____ *(include details, e.g., the property had been appraised at 370,000 yen, or about \$3370 at the then-applicable rate of exchange).]*

[CONTINUE]

WHEREFORE, Defendant prays as follows:

1. That Plaintiff take nothing by his/her complaint herein;
2. For costs of suit; and
3. For such other and further relief as the court deems proper.

Dated: _____

[firm name, if any] _____

By: [signature] _____

[typed name] _____

Attorney for Defendant _____

[ADD following verification, if applicable]

VERIFICATION

I am the Defendant in the above entitled action; I have read the foregoing answer and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein stated on information and belief, and,

as to those matters, I believe it to be true.

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

[date] _____

[signature] _____

[typed name] _____

NOTES.

Authority:

CC §§ 1577, 1578, 1640, 1689; *Balistreri v. Nevada Livestock Production Credit Assn.* (1989) 214 CA3d 635, 641-642, 262 CR 862 ; *Donovan v. RRL Corp.* (2001) 26 C4th 261, 280, 109 CR2d 807, 27 P3d 702

Jury Instructions:

Breach of Contract--Affirmative Defense--Unilateral Mistake of Fact, see *Judicial Council of California Civil Jury Instructions*, CACI VF-301 (LexisNexis Matthew Bender)

When Mistake of Law May Support Relief:

See 16.07

Mutual Mistake Preventing Formation of Contract:

See 16.09[1], 16.11

Parties' Actual Intentions Must Be Shown:

See 16.12[8]

Unilateral Mistake Known to Other Party:

See 16.15[1], [2], 16.16[1], [2]

Unilateral Mistake Rendering Agreement Unconscionable:

See 16.15[2][b]

Legal Topics:

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

Civil Procedure Pleading & Practice Defenses, Demurrers & Objections Affirmative Defenses General Overview Civil Procedure Pleading & Practice Pleadings Answers Contracts Law Defenses Ambiguity & Mistake General Overview Contracts Law Defenses Ambiguity & Mistake Mutual Mistake Contracts Law Defenses Ambiguity & Mistake Unilateral Mistake



63 of 193 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 16 Attacking or Defending Existence of Contract--Mistake
VI. FORMS*1-16 MB Practice Guide: CA Contract Litigation 16.22***16.22 Complaint for Rescission of Contract--Mutual Mistake.****Complaint for Rescission of Contract--Mutual Mistake.**

[Name of attorney]

_____[Street address]

_____[City, state, and ZIP]

_____[Area code and phone number]

_____[State Bar no. of attorney]

Attorney for _____[name of party]

SUPERIOR COURT OF CALIFORNIA,

COUNTY OF _____

[name(s)] _____,

Plaintiff(s)

vs.

[name(s)] _____

[and DOES 1 THROUGH

_____] _____

Defendant(s)

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NO.

COMPLAINT FOR RESCISSION OF CONTRACT-

-MISTAKE

[LIMITED CIVIL CASE]

[Amount Demanded

_____) (Exceeds or Does Not

Exceed) \$10,000]

Plaintiff _____[name] alleges:

[For an individual plaintiff]

1. Plaintiff is an individual residing in _____ [city, if any, and county], California, [in the (name of judicial district, if any) _____], [and therein doing business under the fictitious business name of _____].

_____. Plaintiff has duly complied in all respects with the requirements of *Business and Professions Code Sections 17910 through 17917* with respect to this fictitious business name].

[OR, for a domestic corporation or domestic limited liability company]

1. Plaintiff _____ [name] is, and at all times herein mentioned was, a _____ [corporation or limited liability company] organized and existing under the laws of California, with its principal place of business in _____ [city, if any, and county], California [in the (name of judicial district, if any) _____], [and therein doing business under the fictitious business name of _____]. Plaintiff has duly complied in all respects with the requirements of *Business and Professions Code Sections 17910 through 17917* with respect to this fictitious business name].

[OR, for a foreign corporation or foreign limited liability company]

1. Plaintiff _____ [name] is, and at all times herein mentioned was, a _____ [corporation or limited liability company] organized and existing under the laws of _____ [state or foreign country], and _____ [for foreign corporation authorized to do business and doing business in California or, for foreign limited liability company maintaining action or intrastate business, and registered to transact intrastate business in California], with its principal place of business in California in _____ [city, if any, and county], California [in the (name of judicial district, if any) _____].

[OR, for a general or limited partnership or an unincorporated association]

1. Plaintiff _____ [name] is, and at all times herein mentioned was, a _____ [partnership or unincorporated association] with its principal place of business in _____ [city, if any, and county], California [in the (name of judicial district, if any) _____], [and therein doing business under the fictitious business name of _____]. Plaintiff has duly complied in all respects with the requirements of *Business and Professions Code Sections 17910 through 17917* with respect to this fictitious business name].

[CONTINUE]

[For an individual defendant]

2. Defendant _____ [name] is an individual residing in _____ [city, if any, and county]

], California [in the *(name of judicial district, if any)* _____] [and doing business therein under the fictitious business name of _____].

[OR, for a domestic corporation or domestic limited liability company]

2. Defendant _____ [name] is, and at all times herein mentioned was, a _____ [corporation or limited liability company] organized and existing under the laws of California, [with its principal place of business in _____ (city, if any, and county), California, (in the _____ [name of judicial district, if any])].

[OR, for a foreign corporation or foreign limited liability company]

2. Defendant _____ [name] is, and at all times herein mentioned was, a _____ [corporation or limited liability company] organized and existing under the laws of _____ [state or foreign country], [with its principal place of business in _____ (city, if any, and county), California, (in the _____ [name of judicial district, if any])].

[OR, for a general or limited partnership or an unincorporated association]

2. Defendant _____ [name] is, and at all times herein mentioned was, _____ [a partnership or an unincorporated association] sued herein under the name _____ [it has assumed or by which it is known], [with its principal place of business in _____ (city, if any, and county), California, (in the _____ [name of judicial district, if any])]. [Defendants (names of individual partners or members) _____ are, and at all times herein mentioned were, members of that _____ (partnership or unincorporated association) (and are, and at all times herein mentioned were, residents of _____ County, California)].

[CONTINUE]

3. Plaintiff is ignorant of the true names and capacities of Defendants sued herein as DOES 1 through _____ [numeral, e.g., 50], inclusive, and therefore sues these Defendants by these fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when ascertained. [Plaintiff is informed and believes and thereon alleges that each of the fictitiously named Defendants is responsible in some manner for the occurrences herein alleged, and that Plaintiff's damages as herein alleged were proximately caused by those Defendants.]

4. Plaintiff is informed and believes and thereon alleges that at all times material to this complaint, _____ [identify Defendants to whom agency allegation applies, e.g., each of the Defendants or each of the individual Defendants or Defendant Harry Jones], [and each of the Defendants fictitiously named in this complaint,] in addition to acting for himself, herself, or itself and on

his, her, or its own behalf individually, is and was acting as the agent, servant, employee and representative of, and with the knowledge, consent and permission of, and in conspiracy with, each and all of the Defendants and within the course, scope and authority of that agency, service, employment, representation, and conspiracy. Plaintiff further alleges on information and belief that the acts of each of the Defendants were fully ratified by each and all of the Defendants. Specifically, and without limitation, Plaintiff alleges on information and belief that the actions, failures to act, breaches, conspiracy, and misrepresentations alleged herein and attributed to one or more of the specific Defendants were approved, ratified, and done with the cooperation and knowledge of each and all of the Defendants.

5. On or about _____ [date], Plaintiff and Defendant entered into an agreement under which _____ [include details, e.g., Defendant agreed to sell, and Plaintiff agreed to purchase, certain real property more fully described in Exhibit "A"].

6. Plaintiff is informed and believes, and thereon alleges, that at all relevant times, the parties to the purported agreement believed _____ [include details of the alleged mutual mistake, e.g., that the subject property was suitable for development]. That belief was shared by all parties to the purported agreement, and was mistaken. The true facts were _____ [include details, e.g., that the subject property was protected wetlands]. The parties' mistaken belief was an essential part of the inducement for the purported contract. The parties would not have entered into the agreement had the true facts been known. As a result, the agreement is void.

Plaintiff therefore prays as follows:

1. For an order rescinding the agreement;
2. For costs of suit; and
3. For such other and further relief as the court may find just and proper.

Dated: _____

[firm name, if any] _____

By: [signature] _____

[typed name] _____

Attorney for Plaintiff _____

Authority:

CC §§ 1567, 1577, 1689; *Balistreri v. Nevada Livestock Production Credit Assn.* (1989) 214 CA3d 635, 641-642, 262 CR 862

Mutual Mistake As Grounds for Rescission:

See 16.11

Related Form:

See 16.23

Detailed Discussion of Rescission:

See Ch. 8, *Seeking or Opposing Equitable Remedies in Contract Actions*, 8.03-8.17

Legal Topics:

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

Civil Procedure Pleading & Practice Pleadings Complaints Requirements Contracts Law Defenses Ambiguity & Mistake Mutual Mistake Contracts Law Formation Ambiguity & Mistake Mutual Mistake Contracts Law Remedies Rescission & Redhibition General Overview



64 of 193 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 16 Attacking or Defending Existence of Contract--Mistake
VI. FORMS*1-16 MB Practice Guide: CA Contract Litigation 16.23***16.23 Complaint for Reformation of Contract--Mutual Mistake.****Complaint for Reformation of Contract--Mutual Mistake.**

[Name of attorney]

_____[Street address]

_____[City, state, and ZIP]

_____[Area code and phone number]

_____[State Bar no. of attorney]

Attorney for _____[name of party]

SUPERIOR COURT OF CALIFORNIA,

COUNTY OF _____

[name(s)] _____,

Plaintiff(s)

vs.

[name(s)] _____

[and DOES 1 THROUGH

_____] _____

Defendant(s)

)

)

)

)

)

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)

)

NO.

COMPLAINT FOR REFORMATION OF CON-

TRACT--MISTAKE

[LIMITED CIVIL CASE]

[Amount Demanded

_____(Exceeds or Does Not
Exceed) \$10,000]

Plaintiff _____[name] alleges:

[For an individual plaintiff]

1. Plaintiff is an individual residing in _____ [city, if any, and county], California, [in the (name of judicial district, if any) _____], [and therein doing business under the fictitious business name of _____].

_____. Plaintiff has duly complied in all respects with the requirements of *Business and Professions Code Sections 17910 through 17917* with respect to this fictitious business name].

[OR, for a domestic corporation or domestic limited liability company]

1. Plaintiff _____ [name] is, and at all times herein mentioned was, a _____ [corporation or limited liability company] organized and existing under the laws of California, with its principal place of business in _____ [city, if any, and county], California [in the (name of judicial district, if any) _____], [and therein doing business under the fictitious business name of _____]. Plaintiff has duly complied in all respects with the requirements of *Business and Professions Code Sections 17910 through 17917* with respect to this fictitious business name].

[OR, for a foreign corporation or foreign limited liability company]

1. Plaintiff _____ [name] is, and at all times herein mentioned was, a _____ [corporation or limited liability company] organized and existing under the laws of _____ [state or foreign country], and _____ [for foreign corporation authorized to do business and doing business in California or, for foreign limited liability company maintaining action or intrastate business, and registered to transact intrastate business in California], with its principal place of business in California in _____ [city, if any, and county], California [in the (name of judicial district, if any) _____].

[OR, for a general or limited partnership or an unincorporated association]

1. Plaintiff _____ [name] is, and at all times herein mentioned was, a _____ [partnership or unincorporated association] with its principal place of business in _____ [city, if any, and county], California [in the (name of judicial district, if any) _____], [and therein doing business under the fictitious business name of _____]. Plaintiff has duly complied in all respects with the requirements of *Business and Professions Code Sections 17910 through 17917* with respect to this fictitious business name].

[CONTINUE]

[For an individual defendant]

2. Defendant _____ [name] is an individual residing in _____ [city, if any, and county]

], California [in the *(name of judicial district, if any)* _____] [and doing business therein under the fictitious business name of _____].

[OR, for a domestic corporation or domestic limited liability company]

2. Defendant _____ [name] is, and at all times herein mentioned was, a _____ [corporation or limited liability company] organized and existing under the laws of California, [with its principal place of business in _____ (city, if any, and county), California, (in the _____ [name of judicial district, if any])].

[OR, for a foreign corporation or foreign limited liability company]

2. Defendant _____ [name] is, and at all times herein mentioned was, a _____ [corporation or limited liability company] organized and existing under the laws of _____ [state or foreign country], [with its principal place of business in _____ (city, if any, and county), California, (in the _____ [name of judicial district, if any])].

[OR, for a general or limited partnership or an unincorporated association]

2. Defendant _____ [name] is, and at all times herein mentioned was, _____ [a partnership or an unincorporated association] sued herein under the name _____ [it has assumed or by which it is known], [with its principal place of business in _____ (city, if any, and county), California, (in the _____ [name of judicial district, if any])]. [Defendants (names of individual partners or members) _____ are, and at all times herein mentioned were, members of that _____ (partnership or unincorporated association) (and are, and at all times herein mentioned were, residents of _____ County, California)].

[CONTINUE]

3. Plaintiff is ignorant of the true names and capacities of Defendants sued herein as DOES 1 through _____ [numeral, e.g., 50], inclusive, and therefore sues these Defendants by these fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when ascertained. [Plaintiff is informed and believes and thereon alleges that each of the fictitiously named Defendants is responsible in some manner for the occurrences herein alleged, and that Plaintiff's damages as herein alleged were proximately caused by those Defendants.]

4. Plaintiff is informed and believes and thereon alleges that at all times material to this complaint, _____ [identify Defendants to whom agency allegation applies, e.g., each of the Defendants or each of the individual Defendants or Defendant Harry Jones], [and each of the Defendants fictitiously named in this complaint,] in addition to acting for himself, herself, or itself and on

his, her, or its own behalf individually, is and was acting as the agent, servant, employee and representative of, and with the knowledge, consent and permission of, and in conspiracy with, each and all of the Defendants and within the course, scope and authority of that agency, service, employment, representation, and conspiracy. Plaintiff further alleges on information and belief that the acts of each of the Defendants were fully ratified by each and all of the Defendants. Specifically, and without limitation, Plaintiff alleges on information and belief that the actions, failures to act, breaches, conspiracy, and misrepresentations alleged herein and attributed to one or more of the specific Defendants were approved, ratified, and done with the cooperation and knowledge of each and all of the Defendants.

5. On or about _____ [date], Plaintiff and Defendant entered into an agreement under which _____ [include details, e.g., Defendant agreed to sell, and Plaintiff agreed to purchase, certain real property more fully described in Exhibit A].

6. As the result of a mistake in transcription, the written agreement between the parties erroneously describes the agreement: _____ [include details, e.g., it refers to a different parcel of real property not intended to be purchased].

7. As a result, the agreement as written does not accurately set forth the true intentions of the parties.

Plaintiff therefore prays as follows:

1. For an order reforming the agreement to accurately reflect the parties' intentions;
2. For costs of suit; and
3. For such other and further relief as the court may find just and proper.

Dated: _____

[firm name, if any] _____

[signature] _____

[typed name] _____

Attorney for Plaintiff _____

NOTES.

Authority:

CC §§ 1577, 1578, 1640, 3399; *Hess v. Ford Motor Co.* (2002) 27 C4th 516, 525-526, 117 CR2d 220, 41 P3d 46

Mutual Mistake As Grounds for Reformation:

See 16.12

Related Form:

See 16.22

Detailed Discussion of Reformation:

See Ch. 8, *Seeking or Opposing Equitable Remedies in Contract Actions*, 8.18 -8.32

Legal Topics:

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

Civil Procedure Pleading & Practice Pleadings Complaints Requirements Contracts Law Defenses Ambiguity & Mistake Mutual Mistake Contracts Law Formation Ambiguity & Mistake Mutual Mistake Contracts Law Remedies Reformation



65 of 193 DOCUMENTS

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Chapter 16 Attacking or Defending Existence of Contract--Mistake
VI. FORMS

1-16 MB Practice Guide: CA Contract Litigation 16.24

16.24 Complaint for Rescission of Contract--Unilateral Mistake Known to or Induced by Other Party.**Complaint for Rescission of Contract--Unilateral Mistake Known to or Induced by Other Party.**

[Name of attorney]

_____[Street address]

_____[City, state, and ZIP]

_____[Area code and phone number]

_____[State Bar no. of attorney]

Attorney for _____[name of party]

SUPERIOR COURT OF CALIFORNIA,

COUNTY OF _____

[name(s)] _____,

Plaintiff(s)

vs.

[name(s)] _____

[and DOES 1 THROUGH _____]

Defendant(s)

)

)

)

)

)

)

)

)

NO.

COMPLAINT FOR RESCISSION OF CONTRACT-

-MISTAKE

[LIMITED CIVIL CASE]

[Amount Demanded _____]

_____ (Exceeds or Does Not

Exceed) \$10,000]

Plaintiff _____[name] alleges:

[For an individual plaintiff]

1. Plaintiff is an individual residing in _____ [city, if any, and county], California, [in the (name of judicial district, if any) _____], [and therein doing business under the fictitious business name of _____].

_____. Plaintiff has duly complied in all respects with the requirements of *Business and Professions Code Sections 17910 through 17917* with respect to this fictitious business name].

[OR, for a domestic corporation or domestic limited liability company]

1. Plaintiff _____ [name] is, and at all times herein mentioned was, a _____ [corporation or limited liability company] organized and existing under the laws of California, with its principal place of business in _____ [city, if any, and county], California [in the (name of judicial district, if any) _____], [and therein doing business under the fictitious business name of _____]. Plaintiff has duly complied in all respects with the requirements of *Business and Professions Code Sections 17910 through 17917* with respect to this fictitious business name].

[OR, for a foreign corporation or foreign limited liability company]

1. Plaintiff _____ [name] is, and at all times herein mentioned was, a _____ [corporation or limited liability company] organized and existing under the laws of _____ [state or foreign country], and _____ [for foreign corporation authorized to do business and doing business in California or, for foreign limited liability company maintaining action or intrastate business, and registered to transact intrastate business in California], with its principal place of business in California in _____ [city, if any, and county], California [in the (name of judicial district, if any) _____].

[OR, for a general or limited partnership or an unincorporated association]

1. Plaintiff _____ [name] is, and at all times herein mentioned was, a _____ [partnership or unincorporated association] with its principal place of business in _____ [city, if any, and county], California [in the (name of judicial district, if any) _____], [and therein doing business under the fictitious business name of _____]. Plaintiff has duly complied in all respects with the requirements of *Business and Professions Code Sections 17910 through 17917* with respect to this fictitious business name].

[CONTINUE]

[For an individual defendant]

2. Defendant _____ [name] is an individual residing in _____ [city, if any, and county]

], California [in the *(name of judicial district, if any)* _____] [and doing business therein under the fictitious business name of _____].

[OR, for a domestic corporation or domestic limited liability company]

2. Defendant _____ [name] is, and at all times herein mentioned was, a _____ [corporation or limited liability company] organized and existing under the laws of California, [with its principal place of business in _____ (city, if any, and county), California, (in the _____ [name of judicial district, if any])].

[OR, for a foreign corporation or foreign limited liability company]

2. Defendant _____ [name] is, and at all times herein mentioned was, a _____ [corporation or limited liability company] organized and existing under the laws of _____ [state or foreign country], [with its principal place of business in _____ (city, if any, and county), California, (in the _____ [name of judicial district, if any])].

[OR, for a general or limited partnership or an unincorporated association]

2. Defendant _____ [name] is, and at all times herein mentioned was, _____ [a partnership or an unincorporated association] sued herein under the name _____ [it has assumed or by which it is known], [with its principal place of business in _____ (city, if any, and county), California, (in the _____ [name of judicial district, if any])]. [Defendants (*names of individual partners or members*) _____ are, and at all times herein mentioned were, members of that _____ (partnership or unincorporated association) (and are, and at all times herein mentioned were, residents of _____ County, California)].

[CONTINUE]

3. Plaintiff is ignorant of the true names and capacities of Defendants sued herein as DOES 1 through _____ [numeral, e.g., 50], inclusive, and therefore sues these Defendants by these fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when ascertained. [Plaintiff is informed and believes and thereon alleges that each of the fictitiously named Defendants is responsible in some manner for the occurrences herein alleged, and that Plaintiff's damages as herein alleged were proximately caused by those Defendants.]

4. Plaintiff is informed and believes and thereon alleges that at all times material to this complaint, _____ [identify Defendants to whom agency allegation applies, e.g., each of the Defendants or each of the individual Defendants or Defendant Harry Jones], [and each of the Defendants fictitiously named in this complaint,] in addition to acting for himself, herself, or itself and on

his, her, or its own behalf individually, is and was acting as the agent, servant, employee and representative of, and with the knowledge, consent and permission of, and in conspiracy with, each and all of the Defendants and within the course, scope and authority of that agency, service, employment, representation, and conspiracy. Plaintiff further alleges on information and belief that the acts of each of the Defendants were fully ratified by each and all of the Defendants. Specifically, and without limitation, Plaintiff alleges on information and belief that the actions, failures to act, breaches, conspiracy, and misrepresentations alleged herein and attributed to one or more of the specific Defendants were approved, ratified, and done with the cooperation and knowledge of each and all of the Defendants.

5. On or about _____ [date], Plaintiff and Defendant entered into an agreement under which _____ [include details, e.g., Defendant agreed to sell, and Plaintiff agreed to purchase, certain real property more fully described in Exhibit A].

6. At the time of the agreement, Plaintiff was under the mistaken belief that _____ [include details of the alleged unilateral mistake, e.g., the subject property was suitable for development]. [Plaintiff is informed and believes, and thereon alleges, that the Defendant was at all relevant times aware of this mistaken belief, and did nothing to correct it. or Defendant induced this mistaken belief by the following acts: _____].

7. Plaintiff is informed and believes, and thereon alleges, that the true facts were that _____ [include details, e.g., that the subject property was protected wetlands]. Plaintiff's mistaken belief, _____ [known to or induced by] the Defendant, was a material part of the inducement for the contract. Plaintiff would not have entered into the agreement had the true facts been known.

Plaintiff therefore prays as follows:

1. For an order rescinding the agreement;
2. For costs of suit; and
3. For such other and further relief as the court may find just and proper.

Dated: _____

[firm name, if any] _____

[signature] _____

[typed name] _____

Attorney for Plaintiff _____

NOTES.

Authority:

CC §§ 1577, 1578, 1689; *Donovan v. RRL Corp.* (2001) 26 C4th 261, 280, 109 CR2d 807, 27 P3d 702

Rescission on Grounds of Unilateral Mistake:

See 16.15

Related Form:

See 16.25

Detailed Discussion of Reformation:

See *Ch. 8, Seeking or Opposing Equitable Remedies in Contract Actions*, 8.18 -8.32

Legal Topics:

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

Civil ProcedurePleading & PracticePleadingsComplaintsRequirementsContracts LawDefensesAmbiguity & MistakeUnilateral MistakeContracts LawFormationAmbiguity & MistakeUnilateral MistakeContracts LawRemediesRescission & RedhibitionGeneral Overview



66 of 193 DOCUMENTS

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Chapter 16 Attacking or Defending Existence of Contract--Mistake
VI. FORMS

1-16 MB Practice Guide: CA Contract Litigation 16.25

16.25 Complaint for Reformation of Contract--Unilateral Mistake Known to or Induced by Other Party.**Complaint for Reformation of Contract--Unilateral Mistake Known to or Induced by Other Party.**

[Name of attorney]

_____[Street address]
 _____[City, state, and ZIP]
 _____[Area code and phone number]
 _____[State Bar no. of attorney]

Attorney for _____[name of party]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

[name(s)] _____,	)	
Plaintiff(s)	)	NO.
vs.	)	_____
[name(s)] _____	)	_____
[and DOES 1 THROUGH	)	COMPLAINT FOR REFORMATION OF CON-
_____]	)	TRACT--MISTAKE
Defendant(s)	)	[LIMITED CIVIL CASE]
	)	[Amount Demanded
		_____ (Exceeds or Does Not
		Exceed) \$10,000]

Plaintiff _____[name] alleges:

[For an individual plaintiff]

1. Plaintiff is an individual residing in _____ [city, if any, and county], California, [in the (name of judicial district, if any) _____], [and therein doing business under the fictitious business name of _____].

_____. Plaintiff has duly complied in all respects with the requirements of *Business and Professions Code Sections 17910 through 17917* with respect to this fictitious business name].

[OR, for a domestic corporation or domestic limited liability company]

1. Plaintiff _____ [name] is, and at all times herein mentioned was, a _____ [corporation or limited liability company] organized and existing under the laws of California, with its principal place of business in _____ [city, if any, and county], California [in the (name of judicial district, if any) _____], [and therein doing business under the fictitious business name of _____]. Plaintiff has duly complied in all respects with the requirements of *Business and Professions Code Sections 17910 through 17917* with respect to this fictitious business name].

[OR, for a foreign corporation or foreign limited liability company]

1. Plaintiff _____ [name] is, and at all times herein mentioned was, a _____ [corporation or limited liability company] organized and existing under the laws of _____ [state or foreign country], and _____ [for foreign corporation authorized to do business and doing business in California or, for foreign limited liability company maintaining action or intrastate business, and registered to transact intrastate business in California], with its principal place of business in California in _____ [city, if any, and county], California [in the (name of judicial district, if any) _____].

[OR, for a general or limited partnership or an unincorporated association]

1. Plaintiff _____ [name] is, and at all times herein mentioned was, a _____ [partnership or unincorporated association] with its principal place of business in _____ [city, if any, and county], California [in the (name of judicial district, if any) _____], [and therein doing business under the fictitious business name of _____]. Plaintiff has duly complied in all respects with the requirements of *Business and Professions Code Sections 17910 through 17917* with respect to this fictitious business name].

[CONTINUE]

[For an individual defendant]

2. Defendant _____ [name] is an individual residing in _____ [city, if any, and county]

], California [in the *(name of judicial district, if any)* _____] [and doing business therein under the fictitious business name of _____].

[OR, for a domestic corporation or domestic limited liability company]

2. Defendant _____ [name] is, and at all times herein mentioned was, a _____ [corporation or limited liability company] organized and existing under the laws of California, [with its principal place of business in _____ (city, if any, and county), California, (in the _____ [name of judicial district, if any])].

[OR, for a foreign corporation or foreign limited liability company]

2. Defendant _____ [name] is, and at all times herein mentioned was, a _____ [corporation or limited liability company] organized and existing under the laws of _____ [state or foreign country], [with its principal place of business in _____ (city, if any, and county), California, (in the _____ [name of judicial district, if any])].

[OR, for a general or limited partnership or an unincorporated association]

2. Defendant _____ [name] is, and at all times herein mentioned was, _____ [a partnership or an unincorporated association] sued herein under the name _____ [it has assumed or by which it is known], [with its principal place of business in _____ (city, if any, and county), California, (in the _____ [name of judicial district, if any])]. [Defendants (names of individual partners or members) _____ are, and at all times herein mentioned were, members of that _____ (partnership or unincorporated association) (and are, and at all times herein mentioned were, residents of _____ County, California)].

[CONTINUE]

3. Plaintiff is ignorant of the true names and capacities of Defendants sued herein as DOES 1 through _____ [numeral, e.g., 50], inclusive, and therefore sues these Defendants by these fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when ascertained. [Plaintiff is informed and believes and thereon alleges that each of the fictitiously named Defendants is responsible in some manner for the occurrences herein alleged, and that Plaintiff's damages as herein alleged were proximately caused by those Defendants.]

4. Plaintiff is informed and believes and thereon alleges that at all times material to this complaint, _____ [identify Defendants to whom agency allegation applies, e.g., each of the Defendants or each of the individual Defendants or Defendant Harry Jones], [and each of the Defendants fictitiously named in this complaint,] in addition to acting for himself, herself, or itself and on

his, her, or its own behalf individually, is and was acting as the agent, servant, employee and representative of, and with the knowledge, consent and permission of, and in conspiracy with, each and all of the Defendants and within the course, scope and authority of that agency, service, employment, representation, and conspiracy. Plaintiff further alleges on information and belief that the acts of each of the Defendants were fully ratified by each and all of the Defendants. Specifically, and without limitation, Plaintiff alleges on information and belief that the actions, failures to act, breaches, conspiracy, and misrepresentations alleged herein and attributed to one or more of the specific Defendants were approved, ratified, and done with the cooperation and knowledge of each and all of the Defendants.

5. On or about _____ [date], Plaintiff and Defendant entered into an agreement under which _____ [include details, e.g., Defendant agreed to sell, and Plaintiff agreed to purchase, certain real property more fully described in Exhibit A].

6. At the time of the agreement, Plaintiff was under the mistaken belief that _____ [include details of the alleged unilateral mistake, e.g., that the subject property had been appraised at \$370,000]. Defendant is informed and believes, and thereon alleges, that the true facts were that _____ [include details, e.g., that the property had been appraised at 370,000 yen, or about \$3370].

[EITHER]

7. Plaintiff is informed and believes, and thereon alleges, that the Defendant was at all relevant times aware of this mistaken belief, and did nothing to correct it

[OR]

7. Defendant induced this mistaken belief by the following acts:

_____.

[CONTINUE]

8. Plaintiff's mistaken belief, _____ [known to or induced by] the Defendant, was a material part of the inducement for the contract. Plaintiff would not have entered into the agreement had the true facts been known.

9. By _____ [inducing or permitting] Plaintiff to enter into the agreement based on this mistaken belief, Defendant indicated his acceptance of Plaintiff's understanding of the agreement. As a result, the agreement should be reformed to reflect Plaintiff's understanding of the terms.

Plaintiff therefore prays as follows:

1. For an order reforming the agreement;
2. For costs of suit; and
3. For such other and further relief as the court may find just and proper.

Dated: _____

[firm name, if any] _____

[signature] _____

[typed name] _____

Attorney for Plaintiff _____

NOTES.

Authority:

CC §§ 1577, 1578, 3399; *Stare v. Tate* (1971) 21 CA3d 432, 438-439, 98 CR 264

Reformation of Contract--Unilateral Mistake:

See 16.16

Related Form:

See 16.24

Detailed Discussion of Reformation:

See Ch. 8, *Seeking or Opposing Equitable Remedies in Contract Actions*, 8.18 -8.32

Legal Topics:

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

Civil Procedure Pleading & Practice Pleadings Complaints Requirements Contracts Law Defenses Ambiguity & Mistake Unilateral Mistake Contracts Law Formation Ambiguity & Mistake Unilateral Mistake Contracts Law Remedies Reformation



67 of 193 DOCUMENTS

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Chapter 17 Attacking or Defending Existence of Contract--Fraud, Duress, Menace, and Undue Influence

1-17 MB Practice Guide: CA Contract Litigation 17.syn

§ 17.syn Synopsis to Chapter 17: Attacking or Defending Existence of Contract--Fraud, Duress, Menace, and Undue Influence

17.01 Scope.

17.02 Objective and Strategy.

17.03 CHECKLIST: Challenging Existence of Contract Based on Fraud, Duress, Menace, or Undue Influence.

17.04 Parties' Consent Is Essential Element of Valid Contract.

17.05 Fraud, Duress, Menace, or Undue Influence May Negate Consent.

17.06 Raising Issues of Fraud, Duress, Menace, or Undue Influence.

17.06[1] Facts Surrounding Challenging Party's Consent to Contract Should Be Carefully Reviewed.

17.06[2] More Than One Defense May Be Alleged Under Circumstances of Case.

17.06[3] Issues May Be Raised by Affirmative Defenses in Answer or in Action for Rescission.

17.06[4] Tort Cause of Action May Also Exist.

17.06[5] Facts Must Be Pled With Specificity.

17.06[6] Failure to Plead Affirmative Defenses Generally Waives Them.

17.07 CHECKLIST: Establishing Actual Fraud.

17.08 Elements of Actual Fraud.

17.09 Party Must Have Misrepresented or Concealed Material Fact.

17.09[1] Intentional or Negligent Misrepresentation of Fact, Concealment, or Promissory Fraud May Constitute Actual

Fraud.

17.09[2] Claim of Fraud Generally Must Be Based on Misrepresentation of Fact, Not Opinion.

17.09[2][a] Opinions Generally Are Deemed Not Actionable.

17.09[2][b] Statement of Opinion by Party With Superior Knowledge May Be Basis for Fraud.

17.09[2][c] Whether Statement Constitutes Opinion or Misrepresentation of Fact Generally Is Question of Fact.

17.09[3] Misrepresented Fact Is Material If Likely to Affect Conduct of Reasonable Person.

17.09[4] Concealment of Material Fact Constitutes Fraud Only When Duty to Disclose Exists.

17.09[5] Misrepresentation of Fact Is Implied When Promise Is Made Without Intention to Perform.

17.10 Misrepresentation Must Have Been Made With Knowledge of Falsity or Without Sufficient Information to Warrant Representation.

17.11 Party Must Have Intended to Induce Action of Other Party.

17.12 Party Alleging Fraud Must Have Justifiably Relied on Misrepresentation.

17.12[1] Reliance Is Essential Element of Fraud or Misrepresentation.

17.12[2] Reliance Occurs When, Absent Misrepresentation, Party Alleging Fraud Would Not Have Consented to Contract.

17.12[3] Reliance Is Presumed If Misrepresentation Was Material.

17.12[4] Reliance Must Have Been Justified.

17.12[5] Party Alleging Fraud Was Not Necessarily Required to Investigate Other Party's Representations.

17.12[6] Investigation by Claimant May Affect Claim of Reliance.

17.13 Misrepresentation Must Have Resulted in Injury.

17.13[1] Damage or Injury Is Required for Action or Defense Based on Fraud.

17.13[2] Pecuniary Damages Are Not Required for Rescission.

17.14 CHECKLIST: Establishing Constructive Fraud.

17.15 Elements of Constructive Fraud.

17.16 Constructive Fraud Usually Involves Taking Advantage of Confidential Relationship.

17.17 Confidential or Fiduciary Relationship Is Required.

17.17[1] Existence of Confidential Relationship Distinguishes Constructive Fraud From Actual Fraud.

17.17[2] Fiduciary Relationship Is Confidential.

17.17[3] Other Relationships Are Confidential When Trust and Confidence Is Found.

17.17[4] Existence of Confidential Relationship Is Question of Fact.

17.18 Party Claiming Constructive Fraud Must Show Breach of Duty by Other Party.

17.18[1] Breach of Duty Must Be Alleged.

17.18[2] Nondisclosure May Constitute Breach of Duty.

17.18[3] Fraudulent Intent Is Not Required.

17.18[4] Element of Reliance Is "Relaxed."

17.19 Party in Whom Confidence Was Placed Must Have Gained Advantage.

17.19[1] Improved Position, Favorable Opportunity, or Other Benefit or Gain Constitute Advantage.

17.19[2] Causation and Injury Must Be Shown.

17.19[3] Party Alleged to Have Gained Advantage Must Prove Fairness of Transaction.

17.20 CHECKLIST: Establishing Duress or Menace.

17.21 Types of Duress or Menace.

17.22 Wrongful Acts, Threats, or Coercion Constitute Duress.

17.22[1] Unlawful Acts Specified in CC § 1569 Constitute Duress.

17.22[2] Duress Has Been Expanded by Case Law to Include Intentional Threats or Pressure.

17.22[3] "Menace" Is Defined by CC § 1570, but Often Used Interchangeably With "Duress."

17.22[4] Threat to Do What One Has Legal Right to Do Is Not Duress or Menace.

17.23 Threats to Economic Interests May Constitute Duress.

17.24 Standard for Determining Duress.

17.24[1] Traditional Duress Is Evaluated Under Subjective Standard.

17.24[2] Economic Duress Is Evaluated Under Objective Standard.

17.25 CHECKLIST: Establishing Undue Influence.

17.26 Conduct That Constitutes Undue Influence.

17.27 Undue Influence May Be Based on Misuse of Confidential Relationship or Authority.

17.27[1] Misrepresentations or Concealment Are Not Required.

17.27[2] Advantage to Party in Position of Confidence or Authority Raises Presumption of Undue Influence.

17.27[3] Party in Position of Confidence or Authority Has Burden of Proving Free Consent and Understanding.

17.28 Undue Influence May Exist When No Confidential Relationship Exists.

17.28[1] Undue Influence May Consist of Undue Susceptibility of Victim, Use of Excessive Pressure, or Both.

17.28[2] Undue Susceptibility Need Not Be Wholly Incapacitating.

17.28[3] Use of Excessive Pressure Results in "Overpersuasion."

17.28[3][a] Overpersuasion Approaches Coercion.

17.28[3][b] Indicators of Overpersuasion Must Be Present.

17.28[4] Existence of Undue Influence Is Question of Fact.

17.29 Answer to Complaint for Breach of Contract With Affirmative Defense(s) Based on Fraud, Duress, Menace, and Undue Influence.

Answer to Complaint for Breach of Contract With Affirmative Defense(s) Based on Fraud, Duress, Menace, or Undue Influence.

17.30 Memorandum for Party Attacking Contract--Duty to Disclose Material Fact.

Memorandum for Party Attacking Contract--Duty to Disclose Material Fact.

17.31 Memorandum for Party Attacking Contract--Improper Threat of Legal Action.

Memorandum for Party Attacking Contract--Improper Threat of Legal Action.

17.32 Memorandum for Party Attacking Contract--Characteristics of Excessive Pressure.

Memorandum for Party Attacking Contract--Characteristics of Excessive Pressure.

17.33 Memorandum for Party Seeking to Enforce Contract--Effect of Independent Investigation.

Memorandum for Party Seeking to Enforce Contract--Effect of Independent Investigation.

17.34 Memorandum for Party Seeking to Enforce Contract--Right to Take Threatened Action.

Memorandum for Party Seeking to Enforce Contract--Right to Take Threatened Action.

17.35 Memorandum for Party Seeking to Enforce Contract--Availability of Reasonable Alternative to Unfavorable Contract.

Memorandum for Party Seeking to Enforce Contract--Availability of Reasonable Alternative to Unfavorable Contract.



68 of 193 DOCUMENTS

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Chapter 17 Attacking or Defending Existence of Contract--Fraud, Duress, Menace, and Undue Influence

I. STRATEGY

1-17 MB Practice Guide: CA Contract Litigation 17.01

17.01 Scope.

This chapter covers:

- Objective and strategy for attacking or defending the existence of a contract, based on fraud, duress, menace, or undue influence [*see 17.02*].
- Determining which of these defenses to enforcement of the contract may be present [*see 17.03 -17.06*].
- Determining if actual fraud can be established [*see 17.07 -17.13*; Form: *see 17.29*].
- Determining whether constructive fraud can be established [*see 17.14 -17.19*; Form: *see 17.29*].
- Determining whether duress or menace can be established [*see 17.20 -17.24*; Form: *see 17.29*].
- Determining whether undue influence can be established [*see 17.25 -17.28*; Form: *see 17.29*].

Core Statutes:

CC §§ 1565-1575

Legal Topics:

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

Contracts LawDefensesDuress & Undue InfluenceEconomic DuressContracts LawDefensesDuress & Undue InfluenceThreats of Arrest & ImprisonmentContracts LawDefensesFraud & MisrepresentationGeneral OverviewContracts LawDefensesFraud & MisrepresentationConstructive FraudContracts LawDefensesFraud & MisrepresentationIntentional Fraud



69 of 193 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 17 Attacking or Defending Existence of Contract--Fraud, Duress, Menace, and Undue Influence
I. STRATEGY

1-17 MB Practice Guide: CA Contract Litigation 17.02

17.02 Objective and Strategy.

Mutual consent, freely given, is essential for a valid contract [CC § 1565; *see 17.04*]. A contract may be unenforceable, and subject to rescission, if the consent of one of the parties was obtained through fraud, duress, menace, or undue influence [CC § 1567; *see 17.05*]. By asserting one or more of these grounds, a party is claiming that no valid consent existed and the contract is therefore unenforceable.

One important objective of claims of fraud, duress, menace and undue influence is to avoid performance of the challenging party's obligations under the contract. These claims can be asserted either as affirmative defenses to an action for breach of contract, or by a plaintiff in an action for rescission of the contract [*see 17.06*].

The other important objective is for the challenging party to obtain damages for or reimbursement of consideration given to the party because of fraud, duress, menace or undue influence. Therefore, counsel should also determine whether the conduct giving rise to these defenses also gives rise to a cause of action in tort for damages [*see 17.06[4]*].



Strategic Point:

Asserting fraud, duress, menace or undue influence in defense (or anticipation) of a breach of contract claim has potential benefits and drawbacks that should be considered. Among the potential benefits are recovery of punitive damages and access to broader discovery. Among the potential drawbacks are taking on the burden of proof, being subjected to broader discovery and perhaps spoiling the relationship between the contracting parties [*see 17.06*].

Judge's Perspective--Attacking the Validity of Consent:

When the client's consent to a contract was not validly obtained because of fraud, duress, menace or undue influence, the temptation will be simply to wait to see if the other party to the contract files suit. This strategy makes sense when the financial benefit of the claim outweighs the litigation cost. For example, if the client has not yet performed the contract, the other party has not yet demanded performance and seems unlikely to bring a claim, the most cost-effective route may be to send a notice of rescission, if the circumstances warrant it, and then see if the other party files suit.

On the other hand, if there is a reasonable possibility the other party to the contract will file suit, it will usually make sense to bring the matter to court. If your client was taken advantage of in the transaction,

it is better to adopt the role of plaintiff. Otherwise, your client's defense might look like an afterthought or a claim asserted in furtherance of a "best defense is a good offense" strategy.

Detailed Discussion/Forms:

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

California Points and Authorities, Ch. 92, Duress, Menace, Fraud, Undue Influence, and Mistake (Matthew Bender).



Cross Reference:

For tips on updating case law and expanding your research with additional resources, see **How to Use Lexis.com With This Publication** at the front of this volume.

Legal Topics:

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

Contracts LawDefensesDuress & Undue InfluenceGeneral OverviewContracts LawDefensesDuress & Undue InfluenceEconomic DuressContracts LawDefensesDuress & Undue InfluenceThreats of Arrest & ImprisonmentContracts LawDefensesFraud & MisrepresentationConstructive FraudContracts LawDefensesFraud & MisrepresentationIntentional Fraud



70 of 193 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 17 Attacking or Defending Existence of Contract--Fraud, Duress, Menace, and Undue Influence
II. CHALLENGING EXISTENCE OF CONTRACT BASED ON FRAUD, DURESS, MENACE, OR UNDUE INFLUENCE

1-17 MB Practice Guide: CA Contract Litigation 17.03

17.03 CHECKLIST: Challenging Existence of Contract Based on Fraud, Duress, Menace, or Undue Influence.

- ☐ Carefully examine circumstances under which party seeking to challenge contract originally gave his or her consent to contract terms.

Authority:

CC §§ 1565-1568

Discussion:

See 17.06[1]

- ☐ Determine which of defenses of fraud, duress, menace, or undue influence may potentially be alleged, in light of facts of the case, such as:

- ☐ Whether a confidential relationship existed between parties.
- ☐ Whether other party was in a position of authority over aggrieved party.
- ☐ Whether other party intentionally or negligently misrepresented a material fact.
- ☐ Whether other party concealed a material fact.
- ☐ Whether other party made a promise without intention of performing.
- ☐ Whether other party used threats or pressure to obtain consent.

- ☐ Whether aggrieved party had any particular susceptibility.

Authority:

CC §§ 1569-1575

Discussion:

See 17.06[2]

- ☐ Determine appropriate method of raising issue(s) of fraud, duress, menace, or undue influence, under circumstances of case, such as:

- ☐ Asserting affirmative defenses in answer, if opposing party has filed action to enforce contract or recover damages for its breach.
- ☐ Filing complaint seeking rescission of contract, if no action is pending.
- ☐ Filing complaint or cross-complaint alleging tort causes of action arising out of conduct constituting fraud, duress, menace, or undue influence.

Authority:

CC §§ 1689(b)(1), 1692; CCP § 431.30(b)(2)

Discussion:

See 17.06[3] -[5]

Form:

See 17.29 (answer with affirmative defenses based on fraud, duress, menace, or undue influence)

Legal Topics:

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

Contracts LawDefensesDuress & Undue InfluenceEconomic DuressContracts LawDefensesDuress & Undue InfluenceThreats of Arrest & ImprisonmentContracts LawDefensesFraud & MisrepresentationConstructive FraudContracts LawDefensesFraud & MisrepresentationIntentional FraudContracts LawDefensesFraud & MisrepresentationMaterial Misrepresentation



71 of 193 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 17 Attacking or Defending Existence of Contract--Fraud, Duress, Menace, and Undue Influence
II. CHALLENGING EXISTENCE OF CONTRACT BASED ON FRAUD, DURESS, MENACE, OR UNDUE INFLUENCE

1-17 MB Practice Guide: CA Contract Litigation 17.04

17.04 Parties' Consent Is Essential Element of Valid Contract.

The consent of the parties is required for a valid contract [CC § 1550]. The consent must be mutual and freely given [CC § 1565].



Cross Reference:

Consent issues in contract litigation, see *Ch. 13, Attacking or Defending Existence of Contract--Absence of Essential Element, 13.07*.

Legal Topics:

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

Contracts LawDefensesDuress & Undue InfluenceEconomic DuressContracts LawDefensesDuress & Undue InfluenceThreats of Arrest & ImprisonmentContracts LawDefensesFraud & MisrepresentationConstructive FraudContracts LawDefensesFraud & MisrepresentationIntentional FraudContracts LawDefensesFraud & MisrepresentationMaterial Misrepresentation



72 of 193 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 17 Attacking or Defending Existence of Contract--Fraud, Duress, Menace, and Undue Influence
 II. CHALLENGING EXISTENCE OF CONTRACT BASED ON FRAUD, DURESS, MENACE, OR UNDUE INFLUENCE

*1-17 MB Practice Guide: CA Contract Litigation 17.05***17.05 Fraud, Duress, Menace, or Undue Influence May Negate Consent.**

An apparent consent is not real or free when obtained through duress, menace, fraud, undue influence, or mistake [CC § 1567]. Consent is deemed to have been obtained through one of these causes only when it would not have been given had that cause not existed [CC § 1568].

A consent that is not free nevertheless is not absolutely void, but is voidable and may be rescinded by the parties [CC § 1566].

► **Search Treatises:**

Use *lexis.com* to research case law, statutory law and points and authorities regarding mistake in formation of the contract due to fraud:

■ Legal > States Legal--U.S. > California > Search Analysis & CLE Materials > CA Treatises & Analytical Materials > California Forms of Pleading and Practice

☐ Sample Search: To research issues related to mistake in the formation of a contract, search: *section (fraud)*.

■ Legal > States Legal--U.S. > California > Search Analytical & CLE Materials > CA Treatises & Analytical Materials > California Points & Authorities

☐ Sample Search: To research issues related to mistake in the formation of a contract, search: *section (fraud)*.

► **Cross References:**

Discussion of mistake, see Ch. 16, Attacking or Defending Existence of Contract--Mistake.

Discussion of seeking rescission in contract actions, see Ch. 8, Seeking or Opposing Equitable Remedies in Contract Actions.

Jury Instructions:

Improperly Obtained Consent, see *California Forms of Jury Instruction, Ch. 3G, Instr. MB 300G.05* (Matthew Bender).

Legal Topics:

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

Contracts LawDefensesDuress & Undue InfluenceEconomic DuressContracts LawDefensesDuress & Undue InfluenceThreats of Arrest & ImprisonmentContracts LawDefensesFraud & MisrepresentationConstructive FraudContracts LawDefensesFraud & MisrepresentationIntentional FraudContracts LawDefensesFraud & MisrepresentationMaterial Misrepresentation



73 of 193 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 17 Attacking or Defending Existence of Contract--Fraud, Duress, Menace, and Undue Influence
 II. CHALLENGING EXISTENCE OF CONTRACT BASED ON FRAUD, DURESS, MENACE, OR UNDUE INFLUENCE

1-17 MB Practice Guide: CA Contract Litigation 17.06

17.06 Raising Issues of Fraud, Duress, Menace, or Undue Influence.

17.06[1] Facts Surrounding Challenging Party's Consent to Contract Should Be Carefully Reviewed.

Because claims of fraud, duress, menace, and undue influence attack the validity of the challenging party's consent to the contract [see 17.04, 17.05], an analysis of potential grounds for contesting the validity of a contract should include particular attention to the circumstances under which the challenging party originally gave his or her consent to the contract. The following circumstances, in particular, should be carefully examined:

- The nature of the relationship between the party seeking to challenge the contract and the other parties to the contract.
- The key factual assumptions on which the challenging party relied in entering into the contract, and the source of those assumptions.
- The representations made by the other party.
- Facts not disclosed by the other party prior to entering into the agreement.
- The advantage, if any, gained by the other party as a result of the contract.
- The familiarity and sophistication of the party challenging the contract with legal and business matters in general, and with the subject matter of the contract in particular.
- The mental faculties of the party seeking to challenge the contract.
- The circumstances under which the party challenging the contract gave his or her consent to the agreement.
- The mental state of the party seeking to challenge the contract at the time that party consented to the contract, and the external factors that may have contributed to the party's mental state at the time.

- Any weakness or vulnerability on the part of the party challenging the contract.
- Any pressure or coercion used by the other party to obtain consent to the agreement.

17.06[2] More Than One Defense May Be Alleged Under Circumstances of Case. A party challenging the contract may be able to allege more than one of the defenses of fraud, duress, menace, and undue influence under the circumstances of the case. After carefully reviewing the facts of the case, counsel should determine which of the following elements are present, and consider as many of the defenses as appropriate:

Facts of Case	Potential Defense(s) to Contract
Confidential relationship between the parties	Constructive fraud [see 17.14-17.19]; undue influence [see 17.25-17.28]
One party in position of authority over other party	Undue influence [see 17.25-17.28]
Intentional misrepresentation of fact	Actual fraud [see 17.07-17.13]
Negligent misrepresentation of fact	Actual fraud [see 17.07-17.13]
Failure to disclose material fact	Actual fraud [see 17.07-17.13]
Promise without intention of performing	Actual fraud [see 17.07-17.13]
Threats or pressure to obtain consent	Duress or menace [see 17.20-17.24]; undue influence [see 17.25-17.28]
Particular susceptibility of party	Undue influence [see 17.25-17.28]

Cross References:

Discussion of establishing actual fraud, see 17.07 -17.13.

Discussion of establishing constructive fraud, see 17.14 -17.19.

Discussion of establishing duress or menace, see 17.20 -17.24.

Discussion of establishing undue influence, see 17.25 -17.28.

17.06[3] Issues May Be Raised by Affirmative Defenses in Answer or in Action for Rescission. If the opposing party has filed an action seeking to enforce a contract or recover damages for its breach, the party challenging the validity of the contract may assert fraud, duress, menace, and/or undue influence as affirmative defenses in an answer to the complaint [see CCP § 431.30(b)(2)].

If the opposing party has not filed an action on the contract, the party challenging the validity of the contract may file an action for rescission [see CC §§ 1689(b)(1), 1692]. However, a party claiming that a contract was fraudulently induced is not required to seek rescission; the party may retain the benefits of the contract and sue for damages for the fraud [*Denevi v. LGCC, LLC (2004) 121 CA4th 1211, 1220*]. This is true even if the fraudulently induced contract contains a mutual release. A court has the equitable power to set aside a release in a contract induced by fraud, allowing the defrauded party to retain the benefits of the contract while simultaneously pursuing a fraud claim [*Persson v. Smart*

Inventions, Inc. (2005) 125 CA4th 1141, 1152-1156].

Cross References:

Discussion of bringing action for fraud, see 17.06[4].

Form for answer with affirmative defense(s), see 17.29.

Discussion of seeking rescission, see Ch. 8, Seeking or Opposing Equitable Remedies in Contract Actions.

Discussion of pleading affirmative defenses in an answer, see Matthew Bender [(R)] Practice Guide: California Pretrial Civil Procedure, Ch. 14, Answers; or California Forms of Pleading and Practice, Ch. 26, Answers (Matthew Bender).

Sample Judicial Council form for answer and discussion of use of form, see California Forms of Pleading and Practice, Ch. 140, Contracts (Matthew Bender).

17.06[4] Tort Cause of Action May Also Exist. Conduct constituting fraud, duress, menace, or undue influence may also give rise to a cause of action in tort, such as an action for deceit or breach of fiduciary duty [*see, e.g., CC § 1710* (elements of actionable fraud)]. Bringing an action in tort allows the aggrieved party to seek a greater range of damages, including punitive damages [*Agosta v. Astor (2004) 120 CA4th 596, 605*].

Counsel for the aggrieved party should consider alleging tort causes of action in a complaint or cross-complaint to recover tort damages, if appropriate under the circumstances of the case, in light of the injury suffered by the aggrieved party.



Strategic Point:

Adding tort claims to a contract case will broaden it on many levels: scope of discovery, issues relevant at trial, and relief available. It will also make dismissal on summary judgment more unlikely. When considering whether to pursue tort damages along with the contract claim, counsel must be sure the claim, if in a non-insurance context, contains a "violation of an independent duty arising from principles of tort law other than the bad faith denial of the existence of, or liability under, the breached contract" [*Freeman & Mills, Inc. v. Belcher Oil Co. (1995) 11 C4th 85, 102, 44 CR2d 420, 900 P2d 669*].

Judge's Perspective--Filing a Tort Claim:

Sometimes the other party to the contract will have committed a tort by, for example, defrauding your client in the course of negotiating the contract [*see* 17.06]. Make sure to consider this possibility in drafting the complaint. Factors to consider in bringing such a claim include not only the relief you might expect to gain for your client, which might include punitive damages, but whether a tort claim will change other important aspects of the trial. For example, if your client seeks only rescission, and the other party to the contract does not file a breach of contract claim, the claim would only be tried only to the court. A tort claim, however, entitles your client to a jury.



Strategic Point--Party Alleging Fraud:

If the fraudulently induced contract contains a mutual release purporting to bar a claim for fraud, and your client does not wish to rescind the contract and return the benefits received under it, request that the court exercise its equitable power to set aside a release contained in a contract induced by fraud [*see*

Persson v. Smart Inventions, Inc. (2005) 125 CA4th 1141, 1152-1156].

Cross References:

Discussion of determining causes of action, see Ch. 2, Determining What Causes of Action Exist.

Tort actions for fraud, see California Forms of Pleading and Practice, Ch. 269, Fraud and Deceit (Matthew Bender).

17.06[5] Facts Must Be Pled With Specificity. The rules for pleading fraud are different from the rules for other claims that allow generalized allegations. A complaint or defense alleging fraud, duress, menace, or undue influence should be pled with specificity [see *Small v. Fritz Cos., Inc. (2003) 30 C4th 167, 184, 132 CR2d 490, 65 P3d 1255* (fraud)].

The claim must also "provide the defendants with the fullest possible details of the charge so they are able to prepare a defense to this serious attack. To withstand demurrer, the *facts* constituting every element of the fraud must be alleged with particularity, and the claim cannot be salvaged by references as to the general policy favoring liberal construction of the pleadings" [*Goldrich v. Natural Y Surgical Specialties (1994) 25 CA4th 772, 782-783, 31 CR2d 162* (citation omitted) (*emphasis in original*)].

The same rules apply to the pleading of a fraud affirmative defense to a breach of contract claim, or a claim for rescission based on fraud. Thus, the charging party must set out "(1) a representation, (2) that is false, (3) made with knowledge of its falsity, and (4) with an intent to deceive, coupled with (5) actual detrimental reliance and (6) resulting damage [*Lim v. The TV Corp. Internat. (2002) 99 CA4th 684, 694, 121 CR2d 333*]." A complaint that alleges fraud in a conclusory fashion may provide grounds for the opposing party to demur to the complaint or defense [see *CCP §§ 430.10, 430.20*].

Example:

A demurrer to a cause of action for negligent misrepresentation was properly sustained because the plaintiff failed to allege that any positive assertions were made by the defendant. Such positive assertions are required for a claim of negligent misrepresentation [*Vega v. Jones, Day, Reavis & Pogue (2004) 121 CA4th 282, 291*].

Consider:

While counsel is required to plead fraud with a certain specificity, the general rules permitting liberal amendment of pleadings essentially encourages plaintiffs to start with a complaint that might be initially too broad, requiring an amended complaint, rather than so specific that plaintiff is later constricted in discovery requests, proof at trial, or damages.

17.06[6] Failure to Plead Affirmative Defenses Generally Waives Them. A party who fails to plead affirmative defenses generally waives them [*California Acad. of Scis. v. County of Fresno (1987) 192 CA3d 1436, 1442, 238 CR 154* (failure to plead affirmative defenses of waiver and estoppel)].

Consider:

It is clearly best practice to add all applicable affirmative defenses at the outset, but new affirmative defenses can be added just as new causes of action can be added on a motion to amend, as long as they are not considered dilatory.

Legal Topics:

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

Contracts LawDefensesDuress & Undue InfluenceEconomic DuressContracts LawDefensesDuress & Undue InfluenceThreats of Arrest & ImprisonmentContracts LawDefensesFraud & MisrepresentationConstructive

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74 of 193 DOCUMENTS

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Chapter 17 Attacking or Defending Existence of Contract--Fraud, Duress, Menace, and Undue Influence

III. ESTABLISHING ACTUAL FRAUD

1-17 MB Practice Guide: CA Contract Litigation 17.07

17.07 CHECKLIST: Establishing Actual Fraud.

☐ Determine whether other party to contract committed any of the following types of actual fraud:

- ☐ Intentional misrepresentation of a fact.
- ☐ Negligent misrepresentation of a fact.
- ☐ Concealment of a fact.
- ☐ A promise made without intention of performing it.

Authority:

CC § 1572; *Hale v. George A. Hormel & Co.* (1975) 48 CA3d 73, 84, 121 CR 144 (CC § 1572(2) gives statutory recognition to negligent misrepresentation of a fact as a form of deceit)

Discussion:

See 17.09[1]

☐ Determine whether representation made was:

- ☐ An assertion of fact, which may be basis of a claim or defense of actual fraud; or
- ☐ An opinion, which is not actionable unless:

☐ Other party possessed or held himself or herself out as possessing superior

knowledge or special information or expertise regarding subject matter; and

☐ Party alleging fraud was so situated that he or she could reasonably rely on that supposed knowledge, information, or expertise.

Authority:

Anderson v. Deloitte & Touche LLP (1997) 56 CA4th 1468, 1476-1477, 66 CR2d 512 ;
Nibbi Bros., Inc. v. Home Fed. Sav. & Loan Ass'n (1988) 205 CA3d 1415, 1423, 253 CR 289

Discussion:

See 17.09[2]

☐ Determine whether misrepresented fact was material--that is, likely to affect conduct of a reasonable person with reference to transaction.

Authority:

Wood v. Kalbaugh (1974) 39 CA3d 926, 930, 114 CR 673

Discussion:

See 17.09[3]

☐ If claim of fraud is based on concealment of a material fact:

☐ Determine whether confidential relationship or fiduciary relationship giving rise to a duty to disclose exists.

☐ If no such relationship giving rise to a duty to disclose exists, determine whether there was a duty to disclose because:

☐ Other party made representations that were likely to mislead for want of disclosures;

☐ Other party actively concealed undisclosed matters; or

☐ Other party had sole knowledge or access to material facts and knew that those facts were not known to or reasonably discoverable by party alleging fraud.

Authority:

Goodman v. Kennedy (1976) 18 C3d 335, 347, 134 CR 375, 556 P2d 737 ; *Warner Constr. Corp. v. City of Los Angeles* (1970) 2 C3d 285, 294, 85 CR 444, 466 P2d 996

Discussion:

See 17.09[4]

Form:

See 17.30 (memorandum for party attacking contract)

- ☐ If claim of fraud is based on promise without intention of performing, determine if evidence, besides fact of nonperformance, exists to prove other party's intention not to perform.

Authority:

Tenzer v. Superscope, Inc. (1985) 39 C3d 18, 30, 216 CR 130, 702 P2d 212

Discussion:

See 17.09[5]

- ☐ Determine whether misrepresentation on which claim of fraud is based was made:

- ☐ With knowledge of falsity of representation; or
- ☐ Without sufficient information to warrant representation.

Authority:

CC § 1572; Engalla v. Permanente Med. Group, Inc. (1997) 15 C4th 951, 974, 64 CR2d 843, 938 P2d 903 ; Anderson v. Deloitte & Touche LLP (1997) 56 CA4th 1468, 1476, 66 CR2d 512

Discussion:

See 17.10

- ☐ Determine whether other party intended to either:

- ☐ Deceive party alleging fraud; or
- ☐ Induce party alleging fraud to enter into contract in reliance on false representation.

Authority:

CC § 1572

Discussion:

See 17.11

- ☐ Determine whether:

- ☐ Party alleging fraud relied on misrepresentation; and

Authority:

Engalla v. Permanente Med. Group, Inc. (1997) 15 C4th 951, 976, 64 CR2d 843, 938 P2d 903

Discussion:

See 17.12[2], [3]

☐ Reliance was justified.

Authority:

Seeger v. Odell (1941) 18 C2d 409, 414, 115 P2d 977

Discussion:

See 17.12[4] -[6]

Form:

See 17.33 (memorandum for party seeking to enforce contract)

☐ Determine whether injury resulted from misrepresentation.

Authority:

South Tahoe Gas Co. v. Hofmann Land Improvement Co. (1972) 25 CA3d 750, 765, 102 CR 286

Discussion:

See 17.13

Legal Topics:

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

Contracts LawDefensesFraud & MisrepresentationGeneral OverviewContracts LawDefensesFraud & MisrepresentationConstructive FraudContracts LawDefensesFraud & MisrepresentationIntentional FraudContracts LawDefensesFraud & MisrepresentationMaterial Misrepresentation



75 of 193 DOCUMENTS

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Chapter 17 Attacking or Defending Existence of Contract--Fraud, Duress, Menace, and Undue Influence

III. ESTABLISHING ACTUAL FRAUD

1-17 MB Practice Guide: CA Contract Litigation 17.08

17.08 Elements of Actual Fraud.

The following elements must be present to constitute actual fraud:

- There must be a false representation or concealment of a material fact [*see 17.09*].
- The representation must be made with knowledge of its falsity or without sufficient knowledge on the subject to warrant a representation [*see 17.10*].
- The representation must be made with the intent to induce the person to whom it is made to act upon it [*see 17.11*].
- The person to whom it is made must act in justifiable reliance upon the representation [*see 17.12*].
- There must be an injury to the party acting upon the representation [*see 17.13*].

Cross Reference:

Form for answer with affirmative defense based on fraud, *see 17.29*.

Legal Topics:

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

Contracts LawDefensesFraud & MisrepresentationConstructive FraudContracts LawDefensesFraud & MisrepresentationIntentional FraudContracts LawDefensesFraud & MisrepresentationMaterial Misrepresentation



76 of 193 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 17 Attacking or Defending Existence of Contract--Fraud, Duress, Menace, and Undue Influence
III. ESTABLISHING ACTUAL FRAUD

1-17 MB Practice Guide: CA Contract Litigation 17.09

17.09 Party Must Have Misrepresented or Concealed Material Fact.

17.09[1] Intentional or Negligent Misrepresentation of Fact, Concealment, or Promissory Fraud May Constitute Actual Fraud. Fraud is either actual or constructive [CC § 1571]. When determining the parties' consent to contract, any of the following acts may constitute actual fraud [CC § 1572]:

- The suggestion, as a fact, of something that is not true, by one who does not believe it to be true.
- The positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though that person believes it to be true.
- The suppression of that which is true, by one having knowledge or belief of the fact.
- A promise made without any intention of performing it.
- Any other act intended to deceive.

Thus, intentional or negligent misrepresentation of facts, concealment of facts, and promissory fraud, are all specifically recognized by statute as "actual fraud" which may be raised to attack the existence of a contract.

Jury Instructions:

Affirmative Defense--Fraud, see *Judicial Council of California Civil Jury Instructions, CACI No. 335* (LexisNexis Matthew Bender).

Affirmative Misrepresentation, see *California Forms of Jury Instruction, Ch. 3G, Instr. MB 300G.40* (Matthew Bender).

17.09[2] Claim of Fraud Generally Must Be Based on Misrepresentation of Fact, Not Opinion.

17.09[2][a] Opinions Generally Are Deemed Not Actionable. A representation ordinarily will give rise to a cause of action for fraud only if it is a representation of fact rather than opinion [*Nibbi Bros., Inc. v. Home Fed. Sav. & Loan Ass'n* (1988) 205 CA3d 1415, 1423, 253 CR 289].

Statements regarding future events or future action by some third party generally are deemed opinions and therefore are not actionable [*Nibbi Bros., Inc. v. Home Fed. Sav. & Loan Ass'n* (1988) 205 CA3d 1415, 1423, 253 CR 289].

17.09[2][b] Statement of Opinion by Party With Superior Knowledge May Be Basis for Fraud. If a party possesses or holds himself or herself out as possessing superior knowledge or special information or expertise regarding the subject matter, and the other party is so situated that he or she may reasonably rely on that supposed knowledge, information, or expertise, a statement that would otherwise be considered an opinion may be considered a misrepresentation of material fact [*Anderson v. Deloitte & Touche LLP* (1997) 56 CA4th 1468, 1477, 66 CR2d 512 ; *Harazim v. Lynam* (1968) 267 CA2d 127, 131, 72 CR 670].

Example--Opinion Constituted Actionable Assertion of Fact:

Investors in a failed limited partnership could maintain a cause of action for negligent misrepresentation against accountants who prepared financial projections for the confidential offering memoranda for the partnerships. Those expressions of professional opinion, if made without examining or acquiring the necessary information to support the opinion, could constitute misrepresentations of material fact [*Anderson v. Deloitte & Touche LLP* (1997) 56 CA4th 1468, 1476-1477, 66 CR2d 512].

Example--Opinion Not Actionable:

Developers of an ice and roller hockey arena project brought an action against an accounting firm and one of its principals, alleging that the defendants negligently represented the value of the property. However, the principal had merely predicted what value an appraiser would place on the property, and had indicated that a professional appraisal would be necessary to secure a loan. The developers knew that the principal was not a professional appraiser, and one of the developers had a graduate business degree and experience as a financial analyst. The defendants did not possess any superior knowledge. Under the circumstances, the statement regarding property value was merely an expression of opinion [*Neu-Visions Sports, Inc. v. Soren* (2000) 86 CA4th 303, 310-311, 103 CR2d 159].

Jury Instructions:

Statement of Opinion or Statement About the Law, see *California Forms of Jury Instruction, Ch. 3G, Instr. MB 300G.41* (Matthew Bender).

17.09[2][c] Whether Statement Constitutes Opinion or Misrepresentation of Fact Generally Is Question of Fact. It is a question of fact whether a statement is an opinion or a representation of fact [*Sime v. Malouf* (1949) 95 CA2d 82, 101, 212 P2d 946].

17.09[3] Misrepresented Fact Is Material If Likely to Affect Conduct of Reasonable Person. A misrepresented fact is material if it would be likely to affect the conduct of a reasonable person with reference to the transaction [*Wood v. Kalbaugh* (1974) 39 CA3d 926, 930, 114 CR 673].

Materiality generally is a question of fact unless the fact misrepresented is so obviously unimportant that the jury could not reasonably find that a reasonable person would have been influenced by it [*Engalla v. Permanente Med. Group, Inc.* (1997) 15 C4th 951, 977, 64 CR2d 843, 938 P2d 903].

Jury Instructions:

Materiality of Misrepresentation, see *California Forms of Jury Instruction, Ch. 3G, Instr. MB 300G.49* (Matthew Bender).

17.09[4] Concealment of Material Fact Constitutes Fraud Only When Duty to Disclose Exists. Nondisclosure of a material fact is not actionable fraud unless there is a duty to disclose [*Goodman v. Kennedy* (1976) 18 C3d 335, 347, 134 CR 375, 556 P2d 737]. The intentional failure to disclose a material fact is actionable fraud if there is a

fiduciary relationship giving rise to a duty to disclose it [*Black v. Shearson, Hammill & Co. (1968)* 266 CA2d 362, 367, 72 CR 157 ; see CC § 1710(3)].



Warning:

Even when a fiduciary relationship exists, no concealment occurs when one party makes information available for review by the other party, but the other party fails to review the information [*In re Marriage of Burkle (2006)* 139 CA4th 712, 740-744, 43 CR3d 181] .

Absent a fiduciary relationship, a duty to disclose only exists in the following situations [*Goodman v. Kennedy (1976)* 18 C3d 335, 347, 134 CR 375, 556 P2d 737 ; *Warner Constr. Corp. v. City of Los Angeles (1970)* 2 C3d 285, 294, 85 CR 444, 466 P2d 996]:

- When a party has made representations that were likely to mislead for want of the disclosures;
- When a party has actively concealed undisclosed matters; or
- When a party has sole knowledge or access to material facts and knows that these facts are not known to or reasonably discoverable by the other party.

Example:

The law firm for the acquiring company in a merger provided a disclosure schedule to the shareholders of the acquired company in the consent form. The disclosure schedule did not include the material terms of a financing transaction between the acquiring company and a third party. Although the law firm did not have a professional duty of care to the adverse parties in the merger transaction, it did have a duty not to defraud others. Because the law firm specifically undertook to disclose the financing transaction, it was not at liberty to conceal a material term [*Vega v. Jones, Day, Reavis & Pogue (2004)* 121 CA4th 282, 292].



Cross Reference:

Memorandum concerning duty to disclose, see 17.30.

Jury Instructions:

Concealment, see *California Forms of Jury Instruction, Ch. 3G, Instr. MB 300G.42* (Matthew Bender).

Duty to Disclose--Sole Access, see *California Forms of Jury Instruction, Ch. 3G, Instr. MB 300G.43* (Matthew Bender).

Duty to Disclose to Correct Misleading Statements, see *California Forms of Jury Instruction, Ch. 3G, Instr. MB 300G.44* (Matthew Bender).

Active Prevention of Investigation, see *California Forms of Jury Instruction, Ch. 3G, Instr. MB 300G.45* (Matthew Bender).

17.09[5] Misrepresentation of Fact Is Implied When Promise Is Made Without Intention to Perform.

Promissory fraud is a form of actual fraud that occurs when a party makes a promise without any intention of performing [*Engalla v. Permanente Med. Group, Inc. (1997)* 15 C4th 951, 973, 64 CR2d 843, 938 P2d 903 ; see CC § 1572(4)]. Because a promise to do something necessarily implies the intention to perform, if a promise is made without the intention to perform, there is an implied misrepresentation of fact [*Engalla v. Permanente Med. Group, Inc. (1997)* 15 C4th 951, 973, 64 CR2d 843, 938 P2d 903].



Strategic Point--Party Alleging Fraud:

Proof that a promise was made and that it was not fulfilled is not sufficient to prove fraud. Something more than nonperformance is required to prove the nonperforming party's intent not to perform his or her promise [*Tenzer v. Superscope, Inc.* (1985) 39 C3d 18, 30, 216 CR 130, 702 P2d 212]. Fraudulent intent not to perform often must be established by circumstantial evidence [*Tenzer v. Superscope, Inc.* (1985) 39 C3d 18, 30, 216 CR 130, 702 P2d 212].

Judge's Perspective:

Promissory fraud can be difficult to establish, because it requires proof of the defendant's state of mind. Although a defendant will sometimes make statements concerning his or her intention not to perform, circumstantial evidence is more common.

Consider:

The party alleging fraud might establish an intent not to perform through:

- Admissions in documents, depositions, or other discovery.
- Statements by third parties.
- Proof that the defrauding party did not have, or never obtained, the financial ability to perform.
- A promise to employ the plaintiff in a particular job while simultaneously planning to eliminate the position [see *Lazar v. Superior Court* (1996) 49 CR2d 377, 909 P2d 981].

Jury Instructions:

Promise Without Intent to Perform, see *California Forms of Jury Instruction, Ch. 3G, Instr. MB 300G.48* (Matthew Bender).

Legal Topics:

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

Contracts LawDefensesFraud & MisrepresentationGeneral OverviewContracts LawDefensesFraud & MisrepresentationConstructive FraudContracts LawDefensesFraud & MisrepresentationIntentional FraudContracts LawDefensesFraud & MisrepresentationMaterial MisrepresentationTortsBusiness TortsFraud & MisrepresentationActual FraudElements



77 of 193 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 17 Attacking or Defending Existence of Contract--Fraud, Duress, Menace, and Undue Influence
III. ESTABLISHING ACTUAL FRAUD

1-17 MB Practice Guide: CA Contract Litigation 17.10

17.10 Misrepresentation Must Have Been Made With Knowledge of Falsity or Without Sufficient Information to Warrant Representation.

The statutory definition of actual fraud, for purposes of consent to contract, includes not only intentional misrepresentation of fact, but also negligent misrepresentation of fact, concealment, and promissory fraud [see CC § 1572]. Thus, broad statements that "scienter," or knowledge of falsity, is an element of every fraud claim are untrue [*Anderson v. Deloitte & Touche LLP* (1997) 56 CA4th 1468, 1476, 66 CR2d 512 ; see also *Gagne v. Bertran* (1954) 43 C2d 481, 487 (because CC § 1710 has made cause of action for negligent misrepresentation a form of deceit, statement that scienter is essential for deceit is erroneous)].

The assertion of a false statement, honestly made in the belief it is true, but without reasonable ground for that belief, constitutes a negligent misrepresentation of fact, a form of actual fraud [see *Anderson v. Deloitte & Touche LLP* (1997) 56 CA4th 1468, 1476, 66 CR2d 512].

Similarly, false representations made recklessly and without regard for their truth in order to induce action by another are the equivalent of misrepresentations knowingly and intentionally uttered [*Engalla v. Permanente Med. Group, Inc.* (1997) 15 C4th 951, 974, 64 CR2d 843, 938 P2d 903].

Legal Topics:

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

Contracts LawDefensesFraud & MisrepresentationGeneral OverviewContracts LawDefensesFraud & MisrepresentationConstructive FraudContracts LawDefensesFraud & MisrepresentationIntentional FraudContracts LawDefensesFraud & MisrepresentationMaterial MisrepresentationTortsBusiness TortsFraud & MisrepresentationActual FraudElements



78 of 193 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 17 Attacking or Defending Existence of Contract--Fraud, Duress, Menace, and Undue Influence

III. ESTABLISHING ACTUAL FRAUD

1-17 MB Practice Guide: CA Contract Litigation 17.11

17.11 Party Must Have Intended to Induce Action of Other Party.

Although "intent" is an essential element of actual fraud, the intent need not be an intent to deceive [*see Anderson v. Deloitte & Touche LLP* (1997) 56 CA4th 1468, 1476, 66 CR2d 512]. The intent required to establish actual fraud, for purposes of consent to contract, can be either an intent to deceive or an intent to induce the other party to enter into the contract in reliance on the false representation [CC § 1572; *see Yellow Creek Logging Corp. v. Dare* (1963) 216 CA2d 50, 58, 30 CR 629 (intent required is intent to induce action); *see also Gagne v. Bertran* (1954) 43 C2d 481, 488 n5, 275 P2d 15 (intent to induce action, rather than intent to deceive, is essential to cause of action for deceit under CC § 1710)].

Legal Topics:

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

Contracts LawDefensesFraud & MisrepresentationGeneral OverviewContracts LawDefensesFraud & MisrepresentationIntentional FraudContracts LawDefensesFraud & MisrepresentationMaterial MisrepresentationTortsBusiness TortsFraud & MisrepresentationActual FraudGeneral OverviewTortsBusiness TortsFraud & MisrepresentationActual FraudElements



79 of 193 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 17 Attacking or Defending Existence of Contract--Fraud, Duress, Menace, and Undue Influence
III. ESTABLISHING ACTUAL FRAUD

1-17 MB Practice Guide: CA Contract Litigation 17.12

17.12 Party Alleging Fraud Must Have Justifiably Relied on Misrepresentation.

17.12[1] Reliance Is Essential Element of Fraud or Misrepresentation. Consent is deemed to have been obtained through fraud only when the consent would not have been given had the fraud not existed [CC § 1568]. In other words, in order to prove a claim of actual fraud, the party asserting the fraud must show that he or she reasonably relied on the other party's misrepresentation [*Judicial Council of California Civil Jury Instructions, CACI No. 335, Paragraph 3* (LexisNexis Matthew Bender)].

17.12[2] Reliance Occurs When, Absent Misrepresentation, Party Alleging Fraud Would Not Have Consented to Contract. Reliance occurs when a misrepresentation is an immediate cause of the other party's conduct, which alters his or her legal relations, and when, absent that representation, he or she would not, in all reasonable probability, have entered into the contract [*Engalla v. Permanente Med. Group, Inc. (1997) 15 C4th 951, 976, 64 CR2d 843, 938 P2d 903*]. However, that reliance on the truth of the fraudulent representation need not be the sole or even the predominant or decisive factor in influencing his or her conduct. It is enough if the representation plays a substantial part, and so is a substantial factor, in influencing his or her decision [*Engalla v. Permanente Med. Group, Inc. (1997) 15 C4th 951, 976-977, 64 CR2d 843, 938 P2d 903*].

17.12[3] Reliance Is Presumed If Misrepresentation Was Material. A presumption, or at least an inference, of reliance arises whenever there is a showing that a misrepresentation was material [*Engalla v. Permanente Med. Group, Inc. (1997) 15 C4th 951, 977, 64 CR2d 843, 938 P2d 903*].

 Cross Reference:

Discussion of materiality, see 17.09[3].

17.12[4] Reliance Must Have Been Justified. The party alleging fraud must have been justified in relying on the misrepresentation [*Seeger v. Odell (1941) 18 C2d 409, 414, 115 P2d 977*]. In determining whether reliance was justified, the party alleging fraud is not held to the standard of precaution or minimum knowledge of a reasonable person [*Seeger v. Odell (1941) 18 C2d 409, 415, 115 P2d 977*]. The party alleging fraud is denied recovery only if his or her conduct was manifestly unreasonable in light of his or her own intelligence and information [*Seeger v. Odell (1941) 18 C2d 409, 415, 115 P2d 977*].

Contract provisions disclaiming any fraudulent misrepresentations neither bar fraud claims nor establish as a matter of

law that reliance on the defendant's misrepresentations was unjustifiable [*McClain v. Octagon Plaza, LLC* (2008) 159 CA4th 784, 795, 71 CR3d 885] .

Example:

Lease provision stating that any statement in the lease of the size of the leased property was an approximation, and that rental payments based on that approximation were not subject to revision, did not insulate the landlord from liability for fraud or establish that the tenant's reliance on the landlord's alleged misrepresentations regarding the size of the leased property was unjustifiable as a matter of law [*McClain v. Octagon Plaza, LLC* (2008) 159 CA4th 784, 795, 71 CR3d 885] .

17.12[5] Party Alleging Fraud Was Not Necessarily Required to Investigate Other Party's Representations.

Negligence on the part of the party seeking rescission based on fraud is no defense to the fraud when the misrepresentation was intentional rather than negligent [*Seeger v. Odell* (1941) 18 C2d 409, 414, 115 P2d 977]. The fact that an investigation would have revealed the falsity of a misrepresentation does not bar recovery for fraud, unless the failure to investigate was manifestly unreasonable in light of the rescinding party's own intelligence and information [*Van Meter v. Bent Constr. Co.* (1956) 46 C2d 588, 593-594, 297 P2d 644 ; *Seeger v. Odell* (1941) 18 C2d 409, 415, 115 P2d 977].

Example:

Buyers of real estate alleged that sellers' broker misrepresented that a plot of land could be subdivided. After closing, buyers discovered that it could not, and sued brokers for intentional misrepresentation. Brokers argued that buyers could not justifiably rely on brokers' alleged misrepresentations as a matter of law because buyers would have discovered through a more diligent investigation that splitting the property was not permitted. The court of appeal held that buyers' negligence was no defense to the brokers' alleged intentional misrepresentations, and the contract gave buyers a contractual right, but not a contractual obligation, to conduct such an investigation [*Manderville v. PCG&S Group, Inc.*, 146 CA4th 1486, 1502-1503, 55 CR3d 59] .

Jury Instructions:

Effect of Defrauded Party's Failure to Investigate, see *California Forms of Jury Instruction, Ch. 3G, Instr. MB 300G.47* (Matthew Bender).

17.12[6] Investigation by Claimant May Affect Claim of Reliance. If the party seeking rescission conducts an independent investigation, that party cannot claim reliance on the other party's representations unless the falsity of the statements is not apparent from an inspection, the person making the representations has superior knowledge, or the party relying on the representations is not competent to judge the facts without expert assistance [*Bagdasarian v. Gragnon* (1948) 31 C2d 744, 748, 192 P2d 935].

Consider:

Note that certain contracts are so complex that the failure to conduct due diligence is unreasonable. Conversely, the failure to learn what could have been learned in a reasonable due diligence will preclude a claim of reasonable reliance.

 Cross Reference:

Memorandum concerning effect of investigation, see 17.33.

Jury Instructions:

Effect of Independent Investigation, see *California Forms of Jury Instruction, Ch. 3G, Instr. MB 300G.46* (Matthew Bender).

Legal Topics:

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

Contracts LawDefensesFraud & MisrepresentationGeneral OverviewContracts LawDefensesFraud & MisrepresentationConstructive FraudContracts LawDefensesFraud & MisrepresentationIntentional FraudContracts LawDefensesFraud & MisrepresentationMaterial MisrepresentationTortsBusiness TortsFraud & MisrepresentationActual FraudElements



80 of 193 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 17 Attacking or Defending Existence of Contract--Fraud, Duress, Menace, and Undue Influence
III. ESTABLISHING ACTUAL FRAUD

1-17 MB Practice Guide: CA Contract Litigation 17.13

17.13 Misrepresentation Must Have Resulted in Injury.

17.13[1] Damage or Injury Is Required for Action or Defense Based on Fraud. Generally, fraud without damage furnishes no ground for an action, nor is fraud without damage a defense [*South Tahoe Gas Co. v. Hofmann Land Improvement Co.* (1972) 25 CA3d 750, 765, 102 CR 286].

Example:

Defendants real estate developers contracted with plaintiff utility for a gas main extension into a tract they were developing. Although the contract per-foot rate for the extension was acknowledged to be illegal, the trial court properly concluded that the utility was entitled to recover the legal per-foot rate for the work. Defendants were not relieved of payment because of the utility's alleged fraud in misrepresenting the legal per-foot rate. Under the trial court's judgment, the utility was not receiving more than the legal rate, while the defendants had received all of the benefits for which they contracted and had not sought rescission of the contract. Because there were no damages resulting from the alleged fraud, the alleged fraud was not a defense to the action on contract [*South Tahoe Gas Co. v. Hofmann Land Improvement Co.* (1972) 25 CA3d 750, 763-765, 102 CR 286].

17.13[2] Pecuniary Damages Are Not Required for Rescission. Although damage or injury is an element of fraud, it is not necessary to plead or prove pecuniary damages as a result of the fraud to obtain rescission of a contract [*Engalla v. Permanente Med. Group, Inc.* (1997) 15 C4th 951, 979, 64 CR2d 843, 938 P2d 903 ; *Earl v. Saks & Co.* (1951) 36 C2d 602, 611, 226 P2d 340]. Even without pecuniary damages, the aggrieved party is injured by the fraud, because a contracting party has a right to receive what he or she has contracted for, and so has the right to rescind if he or she obtains something substantially different from that which he or she was lead to expect [*Engalla v. Permanente Med. Group, Inc.* (1997) 15 C4th 951, 979, 64 CR2d 843, 938 P2d 903].

Legal Topics:

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

Contracts LawDefensesFraud & MisrepresentationGeneral OverviewContracts LawDefensesFraud & MisrepresentationIntentional FraudContracts LawDefensesFraud & MisrepresentationMaterial Misrepresentation



81 of 193 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 17 Attacking or Defending Existence of Contract--Fraud, Duress, Menace, and Undue Influence

IV. ESTABLISHING CONSTRUCTIVE FRAUD

1-17 MB Practice Guide: CA Contract Litigation 17.14

17.14 CHECKLIST: Establishing Constructive Fraud.

☐ Determine whether consent to contract can be challenged on basis of constructive fraud arising out of either:

☐ Breach of a duty arising out of fiduciary or confidential relationship between parties, resulting in an advantage to breaching party to prejudice of other party; or

☐ Act or omission that the law specifically declares to be fraudulent.

Authority:

CC § 1573

Discussion:

See 17.16

☐ Determine if confidential relationship existed between parties because of:

☐ Formal fiduciary relationship; or

☐ Facts indicating one party placed trust and confidence in the other.

Authority:

In re Estate of Cover (1922) 188 C 133, 143, 204 P 583 ; O'Neil v. Spillane (1975) 45 CA3d 147, 153, 119 CR 245

Discussion:

See 17.17

- ☐ Determine if party in whom confidence was placed breached a duty arising out of that confidential relationship, such as failing to disclose material facts about transaction at issue.

Authority:

CC § 1573(1)

Discussion:

See 17.18

Form:

See 17.30 (memorandum for party attacking contract)

- ☐ Determine if party in whom confidence was placed gained an advantage, such as:

- ☐ An improvement in position.
- ☐ A favorable opportunity.
- ☐ Other gain, benefit, or profit.

Authority:

CC § 1573(1); Rader v. Thrasher (1962) 57 C2d 244, 250, 18 CR 736, 368 P2d 360

Discussion:

See 17.19[1]

- ☐ Determine if breach of duty was cause of injury or prejudice to party claiming fraud.

Authority:

CC §§ 1568, 1573(1)

Discussion:

See 17.19[2]

- ☐ Determine if party alleged to have gained advantage can prove fairness of transaction.

Authority:

Solon v. Lichtenstein (1952) 39 C2d 75, 82, 244 P2d 907

Discussion:

See 17.19[3]

Legal Topics:

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

Contracts LawDefensesFraud & MisrepresentationGeneral OverviewContracts LawDefensesFraud & MisrepresentationConstructive FraudTortsBusiness TortsFraud & MisrepresentationActual FraudGeneral OverviewTortsBusiness TortsFraud & MisrepresentationActual FraudElements



82 of 193 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 17 Attacking or Defending Existence of Contract--Fraud, Duress, Menace, and Undue Influence

IV. ESTABLISHING CONSTRUCTIVE FRAUD

1-17 MB Practice Guide: CA Contract Litigation 17.15

17.15 Elements of Constructive Fraud.

Unless the law specifically declares an act or omission to be fraudulent, without respect to actual fraud [see 17.16], the following elements must be present to constitute constructive fraud:

- There must be a fiduciary or other confidential relationship [see 17.16, 17.17].
- There must be the breach of a duty arising out of the fiduciary or confidential relationship [see 17.18].
- The breach must result in an advantage to the party at fault, to the prejudice of the other party [see 17.19].

► Cross Reference:

Answer with affirmative defense based on constructive fraud, see 17.29

Legal Topics:

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

Contracts LawDefensesFraud & MisrepresentationGeneral OverviewContracts LawDefensesFraud & MisrepresentationConstructive FraudTortsBusiness TortsFraud & MisrepresentationConstructive FraudElements



83 of 193 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 17 Attacking or Defending Existence of Contract--Fraud, Duress, Menace, and Undue Influence
IV. ESTABLISHING CONSTRUCTIVE FRAUD

1-17 MB Practice Guide: CA Contract Litigation 17.16

17.16 Constructive Fraud Usually Involves Taking Advantage of Confidential Relationship.

Constructive fraud generally arises from a breach of duty by a party who is in a confidential or fiduciary relationship with the other party to the transaction [*Byrum v. Brand* (1990) 219 CA3d 926, 937-938, 268 CR 609]. Constructive fraud consists of either:

- A breach of duty, without an actual fraudulent intent, whereby the person at fault, or anyone claiming under him or her, gains an advantage by misleading another person to that person's prejudice or the prejudice of anyone claiming under that person [CC § 1573(1)]; or
- An act or omission that the law specifically declares to be fraudulent, without respect to actual fraud [CC § 1573(2)].

Jury Instructions:

Constructive Fraud, see *California Forms of Jury Instruction, Ch. 3G, Instr. MB 300G.60* (Matthew Bender).

Legal Topics:

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

Contracts LawContract InterpretationFiduciary ResponsibilitiesContracts LawDefensesFraud & MisrepresentationGeneral OverviewContracts LawDefensesFraud & MisrepresentationConstructive FraudTortsBusiness TortsFraud & MisrepresentationConstructive FraudGeneral OverviewTortsBusiness TortsFraud & MisrepresentationConstructive FraudElements



84 of 193 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 17 Attacking or Defending Existence of Contract--Fraud, Duress, Menace, and Undue Influence
IV. ESTABLISHING CONSTRUCTIVE FRAUD

1-17 MB Practice Guide: CA Contract Litigation 17.17

17.17 Confidential or Fiduciary Relationship Is Required.

17.17[1] Existence of Confidential Relationship Distinguishes Constructive Fraud From Actual Fraud. Fraud is either actual or constructive [CC § 1571]. The existence of a confidential relationship is one of the defining elements of constructive fraud [*Byrum v. Brand* (1990) 219 CA3d 926, 937, 268 CR 609]. The existence of a confidential relationship distinguishes constructive fraud from actual fraud, including negligent representation, which may occur in any type of relationship [*Byrum v. Brand* (1990) 219 CA3d 926, 938, 268 CR 609].

Jury Instructions:

Existence of Confidential Relationship, see *California Forms of Jury Instruction, Ch. 3G, Instr. MB 300G.61* (Matthew Bender).

17.17[2] Fiduciary Relationship Is Confidential. A confidential or fiduciary relationship exists when one person reposes trust and confidence in another [*In re Estate of Cover* (1922) 188 C 133, 143, 204 P 583]. The term "fiduciary" denotes a person occupying a specific position in which trust and confidence is placed, such as:

- An attorney [*Sodikoff v. State Bar of Cal.* (1975) 14 C3d 422, 429, 121 CR 467, 535 P2d 331];
 - A real estate broker [*Batson v. Strehlow* (1968) 68 C2d 662, 674-675, 68 CR 589, 441 P2d 101];
- or
- A trustee [Prob Code § 16004].

When an individual acting in a fiduciary capacity gains an advantage in a transaction, a rebuttable presumption of undue influence arises [*Bradner v. Vasquez* (1954) 43 C2d 147, 151, 272 P2d 11 ; *Boyd v. Bevilacqua* (1966) 247 CA2d 272, 290-291, 55 CR 610].

**Strategic Point:**

Although a formal fiduciary relationship is not a prerequisite to the finding of a confidential relationship, the party alleging constructive fraud should specifically plead the existence of a formal fiduciary

relationship, if one exists, because a fiduciary relationship is deemed confidential, and because the jury instructions for breach of fiduciary duty are so favorable.

Jury Instructions:

Fiduciary Relationship Is Confidential, see *California Forms of Jury Instruction, Ch. 3G, Instr. MB 300G.62* (Matthew Bender).

17.17[3] Other Relationships Are Confidential When Trust and Confidence Is Found. Relationships other than formal fiduciary relationships may be deemed confidential if actual trust and confidence is shown to exist [see *Steinberger v. Steinberger* (1943) 60 CA2d 116, 122-123, 140 P2d 31].

Confidential relationships often exist when there is a family relationship between the parties, but a family relationship is not required [see *Steinberger v. Steinberger* (1943) 60 CA2d 116, 122-123, 140 P2d 31].

The mere fact that a relationship is friendly and intimate does not necessarily amount to a confidential relationship, unless one party places his or her trust and confidence in the integrity and fidelity of the other [*O'Neil v. Spillane* (1975) 45 CA3d 147, 153, 119 CR 245].

17.17[4] Existence of Confidential Relationship Is Question of Fact. The existence of a confidential relationship is a question of fact. Each case turns on its own facts [*O'Neil v. Spillane* (1975) 45 CA3d 147, 153, 119 CR 245].

Examples:

- Two women had a friendship of long duration, dating back to a friendship between one of them and the other's mother. Their close relationship continued throughout childhood and after one woman's marriage. One party sought rescission of a conveyance of real property she had made to the other party and the other party's husband. The party seeking rescission had been considered a member of the other's family, had attended family events, and had given generous gifts to the other party's children. The relationship intensified after party seeking rescission lost her sister. She then relied more heavily on the other party and other party's husband, and enlisted their help in finding an attorney to draft her will. Under the circumstances, the evidence supported a finding of a confidential relationship [*O'Neil v. Spillane* (1975) 45 CA3d 147, 153, 119 CR 245].

- A fiduciary relationship existed between a bank and its elderly customers, even before the customers had executed a brokerage agreement, when (1) for six months prior to the execution of the brokerage agreement, a bank vice president/stockbroker had been the customers' relationship manager at the bank; (2) the stockbroker knew that one of the customers had limited vision and that his declining health rendered him a "little slow"; (3) the stockbroker worked biweekly at the customers' home office; (4) the stockbroker was provided with access to all of the customers' financial information, and managed their significant financial paperwork; (5) the stockbroker introduced the customers to an estate attorney and an accountant; (6) the stockbroker gave the customers investment advice; and (7) the stockbroker insisted and repeatedly urged the customers to retain another bank stockbroker to handle their stock portfolio [*Brown v. Wells Fargo Bank, N.A.* (2008) 168 CA4th 938, 960-961, 85 CR3d 817].

Legal Topics:

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

Contracts LawContract InterpretationFiduciary ResponsibilitiesContracts LawDefensesFraud & MisrepresentationGeneral OverviewContracts LawDefensesFraud & MisrepresentationConstructive FraudTortsBusiness TortsFraud & MisrepresentationConstructive FraudElements



85 of 193 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 17 Attacking or Defending Existence of Contract--Fraud, Duress, Menace, and Undue Influence
IV. ESTABLISHING CONSTRUCTIVE FRAUD

1-17 MB Practice Guide: CA Contract Litigation 17.18

17.18 Party Claiming Constructive Fraud Must Show Breach of Duty by Other Party.

17.18[1] Breach of Duty Must Be Alleged. The party claiming constructive fraud must allege not only the existence of a confidential relationship, but the breach of a duty arising from that relationship [*Crocker-Anglo Nat'l Bank v. Kuchman* (1964) 224 CA2d 490, 494, 36 CR 806].

17.18[2] Nondisclosure May Constitute Breach of Duty. If a confidential or fiduciary relationship exists, the fiduciary or person in whom confidence is placed must make a full and complete disclosure of all material facts within his or her knowledge relating to the transaction in question [*Montoya v. McLeod* (1985) 176 CA3d 57, 64-65, 221 CR 353 ; *Brown v. Wells Fargo Bank, N.A.* (2008) 168 CA4th 938, 961-962, 85 CR3d 817 (when an investment professional has previously voluntarily induced a vulnerable individual to repose trust and confidence in the professional, creating a fiduciary relationship, the professional may be required to fully disclose, in a manner the individual understands, the material terms of a contract between them)]. A failure to disclose material facts may be grounds for constructive fraud [see *Montoya v. McLeod* (1985) 176 CA3d 57, 64-65, 221 CR 353].

► **Cross Reference:**

Memorandum concerning duty to disclose, see 17.30.

Jury Instructions:

Full Disclosure Defined, see *California Forms of Jury Instruction, Ch. 3G, Instr. MB 300G.64* (Matthew Bender).

Constructive Fraud of Agent, see *California Forms of Jury Instruction, Ch. 3G, Instr. MB 300G.65* (Matthew Bender).

17.18[3] Fraudulent Intent Is Not Required. Fraudulent intent is not required to establish constructive fraud as a defense to enforcement of a contract [CC § 1573(1)].

Distinguish--Lack of Intent When No Confidential Relationship Exists:

If no confidential relationship exists, an innocent misrepresentation cannot constitute constructive fraud [see CC § 1573(1)]. However, an innocent misrepresentation, if material, may provide grounds for rescission of a contract on the basis of mistake [*Crocker-Anglo Nat'l Bank v. Kuchman* (1964) 224

CA2d 490, 495, 36 CR 806].



Cross Reference:

Discussion of mistake as a defense to enforcement of a contract, see Ch. 16, Attacking or Defending Existence of Contract--Mistake.

17.18[4] Element of Reliance Is "Relaxed." The reliance element in constructive fraud has been deemed to be "relaxed" to the extent that reliance on one in a position of trust and confidence is presumed absent direct evidence of a lack of reliance [see *Estate of Gump (1991)* 1 CA4th 582, 601, 2 CR2d 269].

Judge's Perspective--Warning As to "Relaxed" Standard:

Although there is authority to the effect that the reliance requirement is "relaxed" in a constructive fraud claim, the same authority often repeats the requirement that plaintiffs still must show evidence of reliance [see *Estate of Gump (1991)* 1 CA4th 582, 602, 2 CR2d 269 ("we have found no case nor has any been cited to us in which trustee misconduct has been found fraudulent in the absence of some reliance by and injury to the beneficiary, however attenuated")].



Strategic Point--Party Alleging Constructive Fraud:

Because the existence of a confidential relationship is required for a claim of constructive fraud, the party claiming constructive fraud must allege facts concerning his or her trust and confidence in the other party. Allegations concerning such trust and confidence with respect to the contract at issue should be included and will, in effect, be allegations of reliance [see *Jones v. Wagner (2001)* 90 CA4th 466, 474 (reliance and causation must be shown)].

Legal Topics:

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

Contracts LawContract InterpretationFiduciary ResponsibilitiesContracts LawDefensesFraud & MisrepresentationGeneral OverviewContracts LawDefensesFraud & MisrepresentationConstructive FraudTortsBusiness TortsFraud & MisrepresentationConstructive FraudElements



86 of 193 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 17 Attacking or Defending Existence of Contract--Fraud, Duress, Menace, and Undue Influence
IV. ESTABLISHING CONSTRUCTIVE FRAUD

1-17 MB Practice Guide: CA Contract Litigation 17.19

17.19 Party in Whom Confidence Was Placed Must Have Gained Advantage.

17.19[1] Improved Position, Favorable Opportunity, or Other Benefit or Gain Constitute Advantage. The party claiming constructive fraud must allege facts showing an advantage gained by the party in whom confidence was placed [*Rader v. Thrasher* (1962) 57 C2d 244, 250, 18 CR 736, 368 P2d 360]. An advantage is obtained if [*Rader v. Thrasher* (1962) 57 C2d 244, 250, 18 CR 736, 368 P2d 360]:

- The position of the fiduciary or person in whom confidence is placed is improved;
- The fiduciary or person in whom confidence is placed obtains a favorable opportunity; or
- The fiduciary or person in whom confidence is placed otherwise gains, benefits, or profits.

Jury Instructions:

Advantage Defined, see *California Forms of Jury Instruction, Ch. 3G, Instr. MB 300G.63* (Matthew Bender).

17.19[2] Causation and Injury Must Be Shown. The party challenging the existence of a contract should allege facts indicating that consent to the contract would not have been given had constructive fraud not existed [see CC § 1568; *Jones v. Wagner* (2001) 90 CA4th 466, 474 n3, 108 CR2d 669 (reliance and causation must be shown)].

Constructive fraud involves not only an advantage to the party at fault, but also prejudice to the other party [see CC § 1573(1)]. The party claiming constructive fraud therefore should also allege facts indicating the injury or prejudice suffered because of the fraud [*Guthrie v. Times-Mirror Co.* (1975) 51 CA3d 879, 890, 124 CR 577].

Strategic Points--Party Alleging Constructive Fraud:



Although a presumption of fraud arises once a confidential relationship and an advantage are shown [see 17.19[3]], a claim of constructive fraud must still comply with the rule that fraud must be alleged with particularity [*Feeney v. Howard* (1889) 79 C 525, 529, 21 P 984]. Facts indicating the causal connection between one party's breach of duty and the resulting injury to the other party therefore should

be alleged, even though the party at fault will then have the burden of proving the fairness of the transaction [see 17.19[3]]. As in cases of actual fraud, when rescission of a contract is sought, the injury may be interference with the defrauded party's interest in making a free choice, so that pecuniary damage is not required [see 17.13].

17.19[3] Party Alleged to Have Gained Advantage Must Prove Fairness of Transaction. If a fiduciary or confidential relationship exists between the parties, and there is a showing of an advantage to one of them in a joint transaction, the transaction is presumptively fraudulent, and the burden shifts to the party gaining the advantage to show good faith and fairness in all regards [*Solon v. Lichtenstein* (1952) 39 C2d 75, 82, 244 P2d 907 ; *Boyd v. Bevilacqua* (1966) 247 CA2d 272, 290, 55 CR 610].

Legal Topics:

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

Contracts LawContract InterpretationFiduciary ResponsibilitiesContracts LawDefensesFraud & MisrepresentationGeneral OverviewContracts LawDefensesFraud & MisrepresentationConstructive FraudTortsBusiness TortsFraud & MisrepresentationConstructive FraudGeneral OverviewTortsBusiness TortsFraud & MisrepresentationConstructive FraudElements



87 of 193 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 17 Attacking or Defending Existence of Contract--Fraud, Duress, Menace, and Undue Influence
V. ESTABLISHING DURESS OR MENACE

1-17 MB Practice Guide: CA Contract Litigation 17.20

17.20 CHECKLIST: Establishing Duress or Menace.

☐ Determine whether party's consent to contract can be challenged on basis of duress or menace due to existence of any of following:

☐ Unlawful acts constituting duress, as specified in *CC* § 1569:

☐ Unlawful confinement of party, or relative of party;

☐ Unlawful detention of property of party or of a relative of party; or

☐ Confinement of party or relative of party, lawful in form, but fraudulently obtained, or fraudulently made unjustly harassing or oppressive.

Authority:

CC § 1569

Discussion:

See 17.22[1]

☐ Threats or pressure that destroyed party's free agency and constrained party to consent to contract against his or her will.

Authority:

In re Marriage of Baltins (1989) 212 CA3d 66, 84, 260 CR 403

Discussion:

See 17.22[2], [4]

Forms:

See 17.31 (memorandum for party attacking contract), 17.34 (memorandum for party seeking to enforce contract)

☐ Threats, as specified in CC § 1570:

- ☐ Threat of duress, as specified in CC § 1569(1), (3);
- ☐ Threat of unlawful and violent injury to person or property of party or party's relative; or
- ☐ Threat of injury to the character of party or party's relative.

Authority:

CC § 1570

Discussion:

See 17.22[3]

☐ Threats to party's economic interests.

Authority:

Leeper v. Beltrami (1959) 53 C2d 195, 203, 1 CR 12, 347 P2d 12

Discussion:

See 17.23

☐ Determine whether circumstances of case will support an allegation of duress under appropriate standard below:

☐ In cases of duress against person or person's property, duress exists if alleged victim was bereft of free exercise of his or her will in making the contract, in light of means used to produce that state of mind and victim's age, sex, state of health, and mental characteristics.

Authority:

In re Marriage of Gonzalez (1976) 57 CA3d 736, 744, 129 CR 566

Discussion:

See 17.24[1]

☐ In cases of economic duress, duress exists if wrongful act or threat is sufficiently coercive to cause a reasonably prudent person, faced with no reasonable alternative, to agree to an unfavorable contract.

Authority:

Perez v. Uline, Inc. (2007) 157 CA4th 953, 959, 68 CR3d 872

Discussion:

See 17.24[2]

Form:

See 17.35 (memorandum for party seeking to enforce contract)

Legal Topics:

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

Contracts LawDefensesDuress & Undue InfluenceGeneral OverviewContracts LawDefensesDuress & Undue
InfluenceEconomic DuressContracts LawDefensesDuress & Undue InfluenceThreats of Arrest & Imprisonment



88 of 193 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 17 Attacking or Defending Existence of Contract--Fraud, Duress, Menace, and Undue Influence
V. ESTABLISHING DURESS OR MENACE

1-17 MB Practice Guide: CA Contract Litigation 17.21

17.21 Types of Duress or Menace.

Duress or menace consist of any of the following:

- Unlawful acts or threats against a person or person's property, as specified in CC §§ 1569, 1570 [see 17.22[1], [3]].
- Intentional threats or pressure that destroy a person's free agency and constrain that person to do something against his or her will [see 17.22[2]].
- Threats to a person's economic interests [see 17.23].

► **Cross Reference:**

Answer with affirmative defense based on duress or menace, see 17.29

Legal Topics:

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

Contracts LawDefensesDuress & Undue InfluenceGeneral OverviewContracts LawDefensesDuress & Undue InfluenceEconomic DuressContracts LawDefensesDuress & Undue InfluenceThreats of Arrest & Imprisonment



89 of 193 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 17 Attacking or Defending Existence of Contract--Fraud, Duress, Menace, and Undue Influence
V. ESTABLISHING DURESS OR MENACE

1-17 MB Practice Guide: CA Contract Litigation 17.22

17.22 Wrongful Acts, Threats, or Coercion Constitute Duress.

17.22[1] Unlawful Acts Specified in CC § 1569 Constitute Duress. The Civil Code defines duress as [CC § 1569]:

- The unlawful confinement of the person of a party, or of a party's husband, wife, ancestor, descendant, or adopted child, or of the ancestor, descendant, or adopted child of the party's husband or wife;
- The unlawful detention of the property of any such person; or
- The confinement of such a person, lawful in form, but fraudulently obtained, or fraudulently made unjustly harassing or oppressive.

17.22[2] Duress Has Been Expanded by Case Law to Include Intentional Threats or Pressure. The courts have expanded the concept of what constitutes duress beyond the limited definition in CC § 1569 [*In re Marriage of Gonzalez* (1976) 57 CA3d 736, 743, 129 CR 566]. Duress now includes whatever destroys a person's free agency and constrains that person to do something against his or her will [*In re Marriage of Baltins* (1989) 212 CA3d 66, 84, 260 CR 403]. Duress may be exercised by threats, importunity, or any species of mental coercion [*Gross v. Needham* (1960) 184 CA2d 446, 461, 7 CR 664].

Examples:

- A husband threatened bankruptcy, actively interfered with the wife obtaining legal counsel, made misrepresentations, and threatened not to see their child to get wife to sign a grossly unfair marital settlement agreement [*In re Marriage of Baltins* (1989) 212 CA3d 66, 85-86, 260 CR 403].
- A husband threatened and intimidated his wife that, unless she signed a marital settlement agreement, she would lose the children and end up in the street with nothing [*In re Marriage of Gonzalez* (1976) 57 CA3d 736, 741, 129 CR 566].

- A brother pressured his half sister to execute a deed conveying an interest in her deceased father's property to the brother by falsely representing that she would lose the property if she did not sign the deed [*Gross v. Needham* (1960) 184 CA2d 446, 461, 7 CR 664].

Jury Instructions:

Affirmative Defense--Duress, see *Judicial Council of California Civil Jury Instructions*, CACI No. 332 (LexisNexis Matthew Bender).

Traditional Duress or Menace, see *California Forms of Jury Instruction*, Ch. 3G, Instr. MB 300G.80 (Matthew Bender).

17.22[3] "Menace" Is Defined by CC § 1570, but Often Used Interchangeably With "Duress." The Civil Code defines menace as [CC § 1570]:

- The threat of duress as specified in CC § 1569(1), (3);
- The threat of unlawful and violent injury to the person or property of any person specified in CC § 1569(1); or
- The threat of injury to the character of any person specified in CC § 1569(1).

Although technically different than duress, the term "menace" is often used interchangeably with duress in California [see *Odorizzi v. Bloomfield Sch. Dist.* (1966) 246 CA2d 123, 128, 54 CR 533].

Cross Reference:

Discussion of acts constituting duress under CC § 1569, see 17.22[1].

17.22[4] Threat to Do What One Has Legal Right to Do Is Not Duress or Menace. Threatening to do what one has a legal right to do does not constitute duress or menace [*U.S. Hertz, Inc. v. Niobrara Farms* (1974) 41 CA3d 68, 81, 116 CR 44]. Therefore, it is not duress to [*London Homes, Inc. v. Korn* (1965) 234 CA2d 233, 240, 44 CR 262]:

- Take a different, but mistaken, view of one's contractual rights.
- Refuse, in good faith, to proceed with a contract, even though the refusal might later be found to be wrong.
- Take, or threaten to take, legal action. The threat of a civil legal action may constitute duress only if the claims asserted are known to be false [*Leeper v. Beltrami* (1959) 53 C2d 195, 203-204, 1 CR 12, 347 P2d 12].

Exception--Threat of Criminal Prosecution:

As a matter of public policy, an agreement is obtained under duress if it was obtained under threat of criminal prosecution [*Bayscene Resident Negotiators v. Bayscene Mobilehome Park* (1993) 15 CA4th 119, 127, 18 CR2d 626]. An attorney negotiating an settlement agreement with opposing counsel must be particularly cautious about mentioning criminal acts during the course of settlement discussions.

Strategic Point--Possible Undue Influence:



Even if party has a right to threaten a civil action, his or her conduct in making such threats nonetheless

may constitute undue influence under the circumstances of the case [see *Odorizzi v. Bloomfield Sch. Dist.* (1966) 246 CA2d 123, 135, 54 CR 533].

Example:

A school district threatened to initiate suspension and dismissal proceedings against a teacher because of an arrest if he did not resign. Because the school district was entitled to initiate such proceedings, the threat to do so did not constitute duress. However, because the school district obtained the resignation through overpersuasion and imposition, the teacher could state a claim that his consent to the resignation had been obtained through the use of undue influence [*Odorizzi v. Bloomfield Sch. Dist.* (1966) 246 CA2d 123, 135, 54 CR 533].



Cross References:

Discussion of undue influence, see 17.27.

Memorandum concerning nature of threat, see 17.31, 17.34.

Jury Instructions:

Nature of Threat, see *California Forms of Jury Instruction, Ch. 3G, Instr. MB 300G.82* (Matthew Bender).

Legal Topics:

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

Contracts LawDefensesDuress & Undue InfluenceGeneral OverviewContracts LawDefensesDuress & Undue InfluenceEconomic DuressContracts LawDefensesDuress & Undue InfluenceThreats of Arrest & Imprisonment



90 of 193 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 17 Attacking or Defending Existence of Contract--Fraud, Duress, Menace, and Undue Influence
V. ESTABLISHING DURESS OR MENACE

1-17 MB Practice Guide: CA Contract Litigation 17.23

17.23 Threats to Economic Interests May Constitute Duress.

Under modern case law, duress is not limited to threats against a person or acts of mental coercion. Threats to business or property interests also may constitute duress [*Leeper v. Beltrami* (1959) 53 C2d 195, 203, 1 CR 12, 347 P2d 12]. The question of duress is a factual question; the existence of duress always depends upon the circumstances [*Krantz v. BT Visual Images, L.L.C.* (2001) 89 CA4th 164, 176, 107 CR2d 209].

Examples:

- Defendant employer terminated plaintiff's employment and offered him a severance agreement that provided six weeks' salary in exchange for a release of all claims against defendant. Plaintiff signed the agreement but later claimed that his agreement was obtained through economic duress because defendant knew, but failed to tell him, that the reason for his termination was wrongful, and because he was in the position of receiving no money if he did not accept the agreement or only a small amount if he did accept, without knowing why he was being discharged. The court held that the plaintiff had not shown economic duress. There was no evidence the defendant knew it owed plaintiff money in addition to what was paid and used the agreement to avoid paying an acknowledged debt. Nor was there evidence plaintiff was on the verge of bankruptcy, the six weeks' salary was inequitably low, or plaintiff was forced to accept the settlement amount to stave off financial disaster [*Perez v. Uline, Inc.* (2007) 157 CA4th 953, 959-960, 68 CR3d 872].

- Defendants hired plaintiff to perform grading and excavating work at a building site. Although defendants paid several invoices submitted by plaintiff as the work progressed, they refused to pay the final invoice. Defendants knew that plaintiff was a new company, and that it would be unable to pay its subcontractors if it did not receive the final payment. Defendants presented plaintiff with an agreement and release to comprise the final payment for a lesser amount. Plaintiff signed the agreement, which it characterized as "blackmail," received the lesser payment, and filed an action for breach of contract. Because plaintiff had signed the agreement and release only to avoid bankruptcy, the agreement and release were products of economic duress and not enforceable against the plaintiff [*Rich & Whillock, Inc. v. Ashton Dev., Inc.* (1984) 157 CA3d 1154, 1160-1161, 204 CR 86].

● The defendant city refused to grant plaintiffs a building permit unless they purchased easements for light, air, and access over a plaza constructed by the city, or revised their plans. To obtain the permit and expedite the building process, plaintiffs purchased the easements. However, the plaza constituted a street over which plaintiffs' lot was entitled to easements by operation of law. The contract for purchase of the easements therefore was entered into under economic duress. Plaintiffs were entitled to rescission and a refund of the purchase price [*Short Line Assocs. v. City & County of San Francisco* (1978) 78 CA3d 50, 59, 143 CR 921].

Jury Instructions:

Affirmative Defense--Economic Duress, see *Judicial Council of California Civil Jury Instructions, CACI No. 333* (LexisNexis Matthew Bender).

Economic Duress, see *California Forms of Jury Instruction, Ch. 3G, Instr. MB 300G.81* (Matthew Bender).

 Cross Reference:

Discussion of standard for determining economic duress, see 17.24[2].

Legal Topics:

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

Contracts LawDefensesDuress & Undue InfluenceGeneral OverviewContracts LawDefensesDuress & Undue InfluenceEconomic Duress



91 of 193 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 17 Attacking or Defending Existence of Contract--Fraud, Duress, Menace, and Undue Influence
V. ESTABLISHING DURESS OR MENACE

1-17 MB Practice Guide: CA Contract Litigation 17.24

17.24 Standard for Determining Duress.

17.24[1] Traditional Duress Is Evaluated Under Subjective Standard. Although case law has been divided regarding the appropriate test for duress, traditional duress generally is tested not by the nature of the threats, but by the state of mind induced in the victim [*In re Marriage of Gonzalez* (1976) 57 CA3d 736, 744, 129 CR 566]. The means used to produce that state of mind and the age, sex, state of health, and mental characteristics of the alleged victim are all considered to determine whether the alleged victim was bereft of the free exercise of his or her will in making the contract [*In re Marriage of Gonzalez* (1976) 57 CA3d 736, 744, 129 CR 566].

17.24[2] Economic Duress Is Evaluated Under Objective Standard. Economic duress exists if a wrongful act or threat is sufficiently coercive to cause a reasonably prudent person, faced with no reasonable alternative, to agree to an unfavorable contract [*Perez v. Uline, Inc.* (2007) 157 CA4th 953, 959, 68 CR3d 872]. The nonexistence of a "reasonable alternative" is a question of fact [*CrossTalk Prods., Inc. v. Jacobson* (1998) 65 CA4th 631, 644, 76 CR2d 615]. If there is insufficient evidence to create a triable issue of fact as to economic duress, the court may decide the issue on summary judgment [see *Myerchin v. Family Benefits, Inc.* (2008) 162 CA4th 1526, 1539, 76 CR3d 816 (mere fact that plaintiff felt he needed to be paid on his disputed claim as soon as possible, and chose to take less in settlement than he might have ultimately recovered in litigation, does not create a triable issue of economic duress)].



Cross Reference:

Memorandum concerning availability of reasonable alternative, see 17.35.

Legal Topics:

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

Contracts LawDefensesDuress & Undue InfluenceGeneral OverviewContracts LawDefensesDuress & Undue InfluenceEconomic DuressContracts LawDefensesDuress & Undue InfluenceThreats of Arrest & Imprisonment



92 of 193 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 17 Attacking or Defending Existence of Contract--Fraud, Duress, Menace, and Undue Influence
VI. ESTABLISHING UNDUE INFLUENCE

1-17 MB Practice Guide: CA Contract Litigation 17.25

17.25 CHECKLIST: Establishing Undue Influence.

☐ Determine whether party's consent to contract can be challenged on basis of undue influence because:

- ☐ One party, in whom a confidence was reposed, or who held a position of real or apparent authority over other party, used that position or authority to obtain an unfair advantage;
- ☐ One party took advantage of other party's weakness of mind; or
- ☐ One party took a grossly oppressive and unfair advantage of other party's necessities or distress.

Authority:

CC § 1575

Discussion:

See 17.26

☐ If party challenges contract on basis of undue influence because of other party's misuse of a position of confidence or authority, determine whether:

- ☐ Existence of confidential relationship or position of authority can be shown.

Authority:

CC § 1575(1)

Discussion:

See 17.26, 17.27[1]

☐ Advantage to party in position of confidence or authority can be shown, such as:

- ☐ Improvement in position.
- ☐ Favorable opportunity.
- ☐ Other gains, benefits, or profits.

Authority:

CC § 1575(1); *Rader v. Thrasher* (1962) 57 C2d 244, 250, 18 CR 736, 368 P2d 360

Discussion:

See 17.27[2]

☐ Party in position of confidence or authority can show that consent to contract was freely given, with full knowledge of facts and effect.

Authority:

Wilbur v. Wilbur (1925) 197 C 1, 15, 239 P 332 ; *Webb v. Saunders* (1949) 89 CA2d 732, 735, 201 P2d 816

Discussion:

See 17.27[3]

☐ If party challenges contract on basis of undue influence, in absence of a confidential relationship, determine whether either or both of following can be shown:

☐ Undue susceptibility of party challenging contract due to circumstances such as age, physical condition, emotional anguish, or a combination of these factors.

Authority:

CC § 1575(2), (3); *Odorizzi v. Bloomfield Sch. Dist.* (1966) 246 CA2d 123, 131, 54 CR 533

Discussion:

See 17.28[1], [2]

☐ Use of excessive pressure by other party, approaching coercion, under circumstances such as:

- ☐ Discussion of transaction at an unusual or inappropriate time.
- ☐ Consummation of transaction in an unusual place.

- ☐ Insistent demand that business be finished at once.
- ☐ Extreme emphasis on untoward consequences of delay.
- ☐ The use of multiple persuaders by dominant side against a single servient party.
- ☐ Absence of third-party advisers to servient party.
- ☐ Statements that there is no time to consult financial advisers or attorneys.

Authority:

CC § 1575(2), (3)

Discussion:

See 17.28[1], [3]

Form:

See 17.32 (memorandum for party attacking contract)

Legal Topics:

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

Contracts LawContract InterpretationFiduciary ResponsibilitiesContracts LawDefensesDuress & Undue
InfluenceGeneral OverviewEstate, Gift & Trust LawWill ContestsUndue InfluenceGeneral OverviewEstate, Gift &
Trust LawWill ContestsUndue InfluenceBurdens of ProofEstate, Gift & Trust LawWill ContestsUndue
InfluenceElements



93 of 193 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 17 Attacking or Defending Existence of Contract--Fraud, Duress, Menace, and Undue Influence
VI. ESTABLISHING UNDUE INFLUENCE

1-17 MB Practice Guide: CA Contract Litigation 17.26

17.26 Conduct That Constitutes Undue Influence.

Undue influence consists of any of the following:

- Use, by one in whom a confidence is reposed by another, or who holds a real or apparent authority over another, of that confidence or authority for the purpose of obtaining an unfair advantage [CC § 1575(1)].
- Taking advantage of another's weakness of mind [CC § 1575(2)].
- Taking a grossly oppressive and unfair advantage of another's necessities or distress [CC § 1575(3)].



Strategic Point--Party Claiming Undue Influence:

The three types of undue influence specified in CC § 1575 are not mutually exclusive. The party claiming undue influence should allege all types of undue influence indicated by the facts of the particular case.

Example:

Two women had a friendship of long duration. Over time, one woman came to rely heavily on the other woman and her husband, enlisted their help in finding an attorney to draft her will, and executed a deed giving them an interest in her real property. The evidence supported a finding of a confidential relationship between the grantor and the grantees. The evidence also indicated that the grantor was susceptible to imposition because of her age and mental infirmity. Undue influence existed in the transaction both because of the misuse of the confidential relationship and the unfair advantage taken of the grantor's weakness of mind [*O'Neil v. Spillane* (1975) 45 CA3d 147, 153, 119 CR 245].



Cross References:

Discussion of what constitutes a confidential relationship, see 17.17[1].
Answer with affirmative defense(s) based on undue influence, see 17.29.

Legal Topics:

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

Contracts LawContract InterpretationFiduciary ResponsibilitiesContracts LawDefensesDuress & Undue
InfluenceGeneral OverviewEstate, Gift & Trust LawWill ContestsUndue InfluenceGeneral OverviewEstate, Gift &
Trust LawWill ContestsUndue InfluenceBurdens of ProofEstate, Gift & Trust LawWill ContestsUndue
InfluenceElements



94 of 193 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 17 Attacking or Defending Existence of Contract--Fraud, Duress, Menace, and Undue Influence
VI. ESTABLISHING UNDUE INFLUENCE

1-17 MB Practice Guide: CA Contract Litigation 17.27

17.27 Undue Influence May Be Based on Misuse of Confidential Relationship or Authority.

17.27[1] Misrepresentations or Concealment Are Not Required. Undue influence based on the misuse of a confidential relationship or authority to obtain an advantage over another has been characterized as a species of constructive fraud [*O'Neil v. Spillane* (1975) 45 CA3d 147, 158, 119 CR 245]. However, unlike constructive fraud, it does not require any misrepresentations or concealment [*Odorizzi v. Bloomfield Sch. Dist.* (1966) 246 CA2d 123, 130, 54 CR 533].

Jury Instructions:

Affirmative Defense--Undue Influence, see *Judicial Council of California Civil Jury Instructions, CACI No. 334* (LexisNexis Matthew Bender).

Undue Influence in Confidential Relationship, see *California Forms of Jury Instruction, Ch. 3G, Instr. MB 300G.66* (Matthew Bender).

► Cross References:

Discussion of constructive fraud, see 17.17 -17.19.

Discussion of the existence of a confidential relationship between the parties, see 17.17.

17.27[2] Advantage to Party in Position of Confidence or Authority Raises Presumption of Undue Influence.

If a substantial benefit has been obtained by a person in a position of confidence or authority over another, a presumption arises that there was undue influence in the transaction [*Bradner v. Vasquez* (1954) 43 C2d 147, 151, 272 P2d 11].

An advantage exists if, because of the transaction, the party in a position of confidence or authority [*Rader v. Thrasher* (1962) 57 C2d 244, 250, 18 CR 736, 368 P2d 360]:

- Has an improvement in position;
- Obtains a favorable opportunity; or

- Otherwise gains, benefits, or profits.

Distinguish:

In interspousal transactions, which are governed by *Fam C § 721(b)*, the presumption of undue influence arises only when one spouse obtains an *unfair* advantage over the other [*In re Marriage of Burkle* (2006) 139 CA4th 712, 733-734, 43 CR3d 181] .

17.27[3] Party in Position of Confidence or Authority Has Burden of Proving Free Consent and

Understanding. If one party is shown to be in a position of confidence and authority, and an advantage to that party is shown, the burden shifts to the benefitted party to show that the contract was made freely, voluntarily, with full knowledge of all facts, and with perfect understanding of the effect of the contract [*Wilbur v. Wilbur* (1925) 197 C 1, 15, 239 P 332 ; *Webb v. Saunders* (1949) 89 CA2d 732, 735, 201 P2d 816].

Generally, proof that the party claiming undue influence had independent advice before entering into the contract is not required, but the presence or lack of independent advice is a circumstance to be considered [*Bradner v. Vasquez* (1954) 43 C2d 147, 153, 272 P2d 11 ; *Nagle v. Valadez* (1962) 202 CA2d 51, 55, 20 CR 548].

Legal Topics:

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

Contracts LawContract InterpretationFiduciary ResponsibilitiesContracts LawDefensesDuress & Undue InfluenceGeneral OverviewEstate, Gift & Trust LawWill ContestsUndue InfluenceGeneral OverviewEstate, Gift & Trust LawWill ContestsUndue InfluenceElements



95 of 193 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 17 Attacking or Defending Existence of Contract--Fraud, Duress, Menace, and Undue Influence
VI. ESTABLISHING UNDUE INFLUENCE

1-17 MB Practice Guide: CA Contract Litigation 17.28

17.28 Undue Influence May Exist When No Confidential Relationship Exists.

17.28[1] Undue Influence May Consist of Undue Susceptibility of Victim, Use of Excessive Pressure, or Both. Undue influence may consist of either or both of the following [*Odorizzi v. Bloomfield Sch. Dist. (1966) 246 CA2d 123, 131-132, 54 CR 533*]:

- The undue susceptibility to influence of the party challenging the contract; or
- The use of excessive pressure by the other party.



Strategic Point--Party Claiming Undue Influence:

Undue influence based on the victim's susceptibility or the other party's use of excessive pressure may be alleged when a confidential relationship exists, even though such a relationship is not required. However, if a confidential relationship does in fact exist, undue influence based on misuse of that relationship should be alleged, if appropriate, to raise the presumption of undue influence and to shift the burden of showing the fairness of the transaction to the other party [see 17.27[3]]. The presumption does not arise in cases not involving a confidential relationship, and in those cases the victim bears the burden of proving undue influence.



Cross Reference:

Discussion of presumption of undue influence when confidential relationship exists, and burden of proving fairness, see 17.27[2], [3].

Jury Instructions:

Affirmative Defense--Undue Influence, see *Judicial Council of California Civil Jury Instructions, CACI No. 334* (LexisNexis Matthew Bender).

Undue Influence Absent Confidential Relationship, see *California Forms of Jury Instruction, Ch. 3G, Instr. MB 300G.67* (Matthew Bender).

17.28[2] Undue Susceptibility Need Not Be Wholly Incapacitating. Undue susceptibility may consist of any of the following [*Odorizzi v. Bloomfield Sch. Dist. (1966) 246 CA2d 123, 131, 54 CR 533*]:

- Total weakness of mind that leaves a person entirely without understanding [CC § 38].
- A lesser weakness that destroys the capacity of a person to make a contract, even though he or she is not totally incapacitated [CC § 39].
- A still lesser weakness that provides sufficient grounds to rescind the contract [CC § 1575(2), (3)], such as a lack of full vigor due to age, physical condition, emotional anguish, or a combination of those factors.

Such a lesser weakness need not be long-lasting nor wholly incapacitating [*Odorizzi v. Bloomfield Sch. Dist. (1966) 246 CA2d 123, 131, 54 CR 533*].

Example:

A teacher sought to rescind his resignation, which the school district had requested shortly after he was arrested on criminal charges of homosexual activity. He alleged that when he signed the resignation, he had just completed the process of arrest, questioning, booking, and release on bail, and had been without sleep for forty hours. His allegations were sufficient to state a claim of undue influence because exhaustion and emotional turmoil may have incapacitated him from exercising his judgment [*Odorizzi v. Bloomfield Sch. Dist. (1966) 246 CA2d 123, 131-132, 54 CR 533*].



Strategic Point--Party Challenging Contract:

Total incapacity to make a contract renders a contract void [CC § 38]. An unsound mind, but not entirely without understanding, renders a contract rescindable *without* proof of undue influence [CC § 39]. Neither of those circumstances require the party challenging the contract to show that the other party took an unfair advantage of his or her condition. In contrast, if a party seeks to rescind the contract on the basis of undue influence, an unfair advantage taken by the opposing party also must be shown [see CC § 1575(2), (3)]. Counsel should consider pleading lack of capacity and undue influence in the alternative.



Cross Reference:

Discussion of challenging a contract because of lack of capacity, see Ch. 14, Attacking or Defending Existence of Contract--Lack of Capacity.

Jury Instructions:

Weakness of Mind Defined, see *California Forms of Jury Instruction, Ch. 3G, Instr. MB 300G.68* (Matthew Bender).

Lack of Understanding as to Nature of Transaction, see *California Forms of Jury Instruction, Ch. 3G, Instr. MB 300G.69* (Matthew Bender).

17.28[3] Use of Excessive Pressure Results in "Overpersuasion."

17.28[3][a] Overpersuasion Approaches Coercion. The use of excessive pressure results in "overpersuasion," which tends to be coercive in nature [*Odorizzi v. Bloomfield Sch. Dist. (1966) 246 CA2d 123, 130, 54 CR 533*]. The use of excessive pressure by one party over the other overcomes the will without convincing the judgment [*Odorizzi v. Bloomfield Sch. Dist. (1966) 246 CA2d 123, 130, 54 CR 533*]. The weaker party may also have an undue susceptibility to such pressure because of physical or emotional exhaustion or anguish which results in an inability to act with

unencumbered volition [*Odorizzi v. Bloomfield Sch. Dist.* (1966) 246 CA2d 123, 131, 54 CR 533].

17.28[3][b] Indicators of Overpersuasion Must Be Present. Overpersuasion is generally accompanied by certain characteristic elements which, when simultaneously present in a significant number, characterize the persuasion as excessive. These elements are [*Keithley v. Civil Serv. Bd.* (1970) 11 CA3d 443, 452, 89 CR 809]:

- Discussion of the transaction at an unusual or inappropriate time.
- Consummation of the transaction in an unusual place.
- Insistent demand that the business be finished at once.
- Extreme emphasis on untoward consequences of delay.
- The use of multiple persuaders by the dominant side against a single servient party.
- Absence of third-party advisers to the servient party.
- Statements that there is no time to consult financial advisers or attorneys.

Example:

A police officer's resignation following rape charges against him was found to be coerced because of undue influence by a superior officer. The facts indicated, among other things, that the resignation was the result of overpersuasion. The officer was called to police headquarters for three consecutive days, was kept waiting for long periods of time, was interrogated by more than one person, and was repeatedly asked what he was going to do, without being given any time to consider what he was going to do [*Keithley v. Civil Serv. Bd.* (1970) 11 CA3d 443, 452, 89 CR 809].

 Cross Reference:

Memorandum concerning characteristic elements of excessive pressure, see 17.32.

17.28[4] Existence of Undue Influence Is Question of Fact. The existence of undue influence depends on the facts and circumstances of the particular case [*Sparks v. Sparks* (1950) 101 CA2d 129, 135, 225 P2d 238]. Direct evidence of undue influence is rarely obtainable; a court normally determines the issue from the totality of the circumstances [*Keithley v. Civil Serv. Bd.* (1970) 11 CA3d 443, 451, 89 CR 809].

Legal Topics:

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

Contracts LawContract InterpretationFiduciary ResponsibilitiesContracts LawDefensesDuress & Undue InfluenceGeneral OverviewEstate, Gift & Trust LawWill ContestsUndue InfluenceGeneral Overview



96 of 193 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 17 Attacking or Defending Existence of Contract--Fraud, Duress, Menace, and Undue Influence
VII. FORMS

1-17 MB Practice Guide: CA Contract Litigation 17.29

17.29 Answer to Complaint for Breach of Contract With Affirmative Defense(s) Based on Fraud, Duress, Menace, and Undue Influence.

Answer to Complaint for Breach of Contract With Affirmative Defense(s) Based on Fraud, Duress, Menace, or Undue Influence.

[Name of attorney]

_____[Street address]

_____[City, state, and ZIP]

_____[Area code and phone number]

_____[State Bar no. of attorney]

Attorney for _____[name of party]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

[name] _____,

Plaintiff,

vs.

[name] _____,

Defendant.

)

)

)

)

)

)

)

NO.

ANSWER OF

_____[identify Defendant, e.g.,
DEFENDANT MARY JONES] TO COMPLAINT
OF

_____[identify Plaintiff, e.g.,
PLAINTIFF JOHN SMITH]

[LIMITED CIVIL CASE]

Judge:

Department:

Defendant answers the complaint as follows:

[Include general denial below, or set forth, in numbered paragraphs, specific denials, admissions, and allegations in response to those in complaint, in the order in which they are alleged in complaint:]

1. Pursuant to *Code of Civil Procedure Section 431.30(b)(1)*, Defendant denies each and every allegation of the Complaint, and further denies that Plaintiff is entitled to any equitable or legal relief, or any damages whatsoever.

[Defendant asserts the following affirmative defenses. By doing so, Defendant shall not be deemed to have assumed the burden of proving any matters that otherwise would be Plaintiff's burden.]

[Allege affirmative defenses as appropriate, e.g.,]

[EITHER, if alleging actual fraud based on intentional or negligent misrepresentations of fact]

FIRST AFFIRMATIVE DEFENSE

(Actual Fraud-- _____ [Intentional or Negligent] Misrepresentation)

2. The apparent consent of Defendant _____ [name] to the contract referred to in the complaint was not real, mutual, or free in that it was obtained through fraud, as herein alleged.

3. On or about _____ [date], Plaintiff _____ [name] falsely and fraudulently represented to Defendant _____ [name] that _____ [specify with particularity statements made by Plaintiff].

4. The representations made by Plaintiff _____ [name] were false. The true facts were as follows: _____ [specify].

5. When Plaintiff _____ [name] made these representations, he/she _____ [knew them to be false or had no reasonable grounds for believing them to be true].

6. Plaintiff _____ [name] made these representations with the intent [to deceive and] to induce Defendant _____ [name] to enter into the contract.

7. Defendant _____ [name] relied on the truth of the representations in entering into the contract. Defendant _____ [name] would not have given his/her apparent consent to the contract had it not been for the fraud. The reliance of Defendant _____ [name] was justified because _____ [specify].

8. As a result of the fraud, Defendant _____ [name] was injured in that _____ [specify injury].

[AND/OR, if alleging actual fraud based on concealment of material fact:]

SECOND AFFIRMATIVE DEFENSE

(Actual Fraud--Concealment of Material Fact)

2. The apparent consent of Defendant _____ [name] to the contract referred to in the complaint was not real, mutual, or free in that it was obtained through fraud, as herein alleged.

3. On or about _____ [date], Plaintiff _____ [name] _____ [intentionally concealed a material fact from Defendant or failed to disclose a material fact to Defendant], thereby creating a false representation, in that _____ [specify with particularity the fact concealed by Plaintiff and the resulting false representation].

4. Plaintiff _____ [name] had a duty to disclose the concealed fact because _____ [the parties were in a fiduciary relationship or the failure to disclose that fact made other representations made by Plaintiff misleading or Plaintiff actively concealed the undisclosed fact or the undisclosed fact was known only to Plaintiff and was not discoverable by Defendant].

5. Plaintiff _____ [name] concealed this fact with the intent [to deceive and] to induce Defendant _____ [name] to enter into the contract.

6. Defendant _____ [name] was unaware of the undisclosed fact and reasonably relied on Plaintiff's deception in entering into the contract. Defendant _____ [name] would not have given his/her apparent consent to the contract had it not been for the fraud. The reliance of Defendant _____ [name] was justified because _____ [specify].

7. As a result of the fraud, Defendant _____ [name] was injured in that _____ [specify injury].

[AND/OR, if alleging actual fraud based on a promise made without intention of performing it]

THIRD AFFIRMATIVE DEFENSE

(Actual Fraud--Promise Without Intention to Perform)

2. The apparent consent of Defendant _____ [name] to the contract referred to in the complaint was not real, mutual, or free in that it was obtained through fraud, as herein alleged.

3. On or about _____ [date], Plaintiff _____ [name] falsely and fraudulently promised Defendant _____ [name] that _____ [specify with particularity the promise made by Plaintiff].

4. Defendant _____ [name] is informed and believes, and thereon alleges that the promise made by

Plaintiff _____ [name] was made without any intention of performing it, in that _____ [specify facts indicating intention not to perform, other than fact of nonperformance].

5. Defendant _____ [name] is informed and believes, and thereon alleges that Plaintiff _____ [name] made this promise with the intent [to deceive and] to induce Defendant _____ [name] to enter into the contract.

6. Defendant _____ [name] relied on the promise in entering into the contract. Defendant _____ [name] would not have given his/her apparent consent to the contract had it not been for the fraud. The reliance of Defendant _____ [name] was justified because _____ [specify].

7. As a result of the fraud, Defendant _____ [name] was injured in that _____ [specify injury].

[AND/OR, if alleging constructive fraud based on the existence of a fiduciary or confidential relationship between the parties]

FOURTH AFFIRMATIVE DEFENSE (Constructive Fraud)

2. The apparent consent of Defendant _____ [name] to the contract referred to in the complaint was not real, mutual, or free in that it was obtained through constructive fraud, as herein alleged.

3. A _____ [fiduciary or confidential] relationship existed between Plaintiff _____ [name] and Defendant _____ [name] in that _____ [specify nature of fiduciary relationship or facts indicating existence of confidential relationship].

4. On or about _____ [date], Plaintiff _____ [specify with particularity the facts of the transaction, including trust and confidence placed in Plaintiff by Defendant concerning transaction, and Plaintiff's breach of duty, such as failing to fully disclose facts of transaction].

5. Plaintiff _____ [name] gained an advantage from the contract between the parties by misleading Defendant _____ [name] to his/her prejudice in that _____ [specify advantage gained by Plaintiff and prejudice to Defendant].

6. Defendant _____ [name] would not have given his/her apparent consent to the contract had it not been for the fraud.

[AND/OR, if alleging duress or menace]

FIFTH AFFIRMATIVE DEFENSE (Duress)

2. The apparent consent of Defendant _____ [name] to the contract referred to in the complaint was not

real, mutual, or free in that it was obtained through duress, as herein alleged.

3. On or about _____ [date], Plaintiff _____ [name] _____ [specify facts indicating unlawful acts or threats made by Plaintiff that deprived Defendant of the exercise of his/her free will].

4. Such _____ [unlawful acts or threats] deprived Defendant _____ [name] of his/her free will, and he/she would not have given his/her consent to the contract had it not been for the duress.

[AND/OR, if alleging undue influence in a confidential relationship]

SIXTH AFFIRMATIVE DEFENSE

(Undue Influence Based on Confidential Relationship)

2. The apparent consent of Defendant _____ [name] to the contract referred to in the complaint was not real, mutual, or free in that it was obtained through undue influence, as herein alleged.

3. A _____ [fiduciary or confidential] relationship existed between Plaintiff _____ [name] and Defendant _____ [name] in that _____ [specify nature of fiduciary relationship or facts indicating existence of confidential relationship].

4. On or about _____ [date], Plaintiff _____ [specify with particularity facts of transaction, including trust and confidence placed in Plaintiff by Defendant concerning transaction, and Plaintiff's use of that confidence in effecting the transaction].

5. Plaintiff _____ [name] gained an unfair advantage over Defendant _____ [name] from the contract in that _____ [specify advantage gained by Plaintiff].

6. Defendant _____ [name] would not have given his/her apparent consent to the contract had it not been for the undue influence of Plaintiff.

[AND/OR, if alleging undue influence because of Defendant's weakness of mind or distress and Plaintiff's use of excess pressure]

SEVENTH AFFIRMATIVE DEFENSE

(Undue Influence--Excess Pressure)

2. The apparent consent of Defendant _____ [name] to the contract referred to in the complaint was not real, mutual, or free in that it was obtained through undue influence, as herein alleged.

3. On or about _____ [date], Plaintiff _____ [name] and Defendant _____ [name] _____ [describe transaction].

4. At the time of the transaction, Defendant _____ [name] _____ [specify facts indicating weakness of mind or distress, such as age, infirmity, emotional strain].

5. While Defendant _____[*name*] was in this condition and unable to think clearly, _____[*specify circumstances indicating excessive pressure resulting in "overpersuasion," such as insistent demand that business be finished at one or absence of third-party advisers*] .

6. Plaintiff _____[*name*] took an unfair advantage of Defendant's _____[*weakness of mind or distress*] in that _____[*specify facts concerning unfair advantage*].

7. Defendant _____[*name*] would not have given his/her apparent consent to the contract had it not been for the undue influence of Plaintiff.

[*ADD additional affirmative defenses, if any*]

[*CONTINUE*]

WHEREFORE, Defendant prays as follows:

1. That Plaintiff take nothing by his/her complaint herein;
2. For costs of suit; and
3. For such other and further relief as the court deems proper.

Dated: _____

[*firm name, if any*] _____

By: [*signature*] _____

[*typed name*] _____

Attorney for Defendant

[*ADD following verification, if applicable*]

VERIFICATION

I am the Defendant in the above entitled action; I have read the foregoing answer and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein stated on information and belief, and, as to those matters, I believe it to be true.

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

[*date*] _____

[signature] _____

[typed name] _____

NOTES.

Authority:

CCP § 431.30(b)(2); CC §§ 1565-1575

Raising Affirmative Defenses in Answer:

See 17.06[3]

Alleging Actual Fraud:

See 17.08 -17.13

Alleging Constructive Fraud:

See 17.15 -17.19

Alleging Duress or Menace:

See 17.21 -17.24

Alleging Undue Influence:

See 17.26 -17.28

Legal Topics:

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

Civil Procedure Pleading & Practice Defenses, Demurrers & Objections Affirmative Defenses General Overview Civil
Procedure Pleading & Practice Pleadings Answers Contracts Law Defenses Duress & Undue Influence General
Overview Contracts Law Defenses Fraud & Misrepresentation General Overview



97 of 193 DOCUMENTS

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Chapter 17 Attacking or Defending Existence of Contract--Fraud, Duress, Menace, and Undue Influence
VII. FORMS

1-17 MB Practice Guide: CA Contract Litigation 17.30

17.30 Memorandum for Party Attacking Contract--Duty to Disclose Material Fact.

Memorandum for Party Attacking Contract--Duty to Disclose Material Fact.

[Include the following, if appropriate under the circumstances of the case, in a memorandum by the party attacking the contract]

[EITHER]

_____[PLAINTIFF'S or DEFENDANT'S]
INTENTIONAL FAILURE TO DISCLOSE A MATERIAL FACT CONSTITUTED FRAUD BECAUSE OF THE
FIDUCIARY RELATIONSHIP BETWEEN THE PARTIES

Fiduciary Has Duty of Disclosure. The intentional failure to disclose a material fact is actionable fraud if there is a fiduciary relationship giving rise to a duty to disclose it (*Black v. Shearson, Hammill & Co. (1968) 266 Cal. App. 2d 362, 367, 72 Cal. Rptr. 157*).

[OR]

_____[PLAINTIFF'S or DEFENDANT'S]
INTENTIONAL FAILURE TO DISCLOSE A MATERIAL FACT CONSTITUTED FRAUD

Duty to Disclose Exists When Nondisclosure Is Misleading. A duty to disclose exists, absent a fiduciary relationship, when a party has made representations that were likely to mislead for want of the disclosures (*Goodman v. Kennedy (1976) 18 Cal. 3d 335, 346-347, 134 Cal. Rptr. 375, 556 P.2d 737*).

[OR]

_____[PLAINTIFF'S or DEFENDANT'S]

INTENTIONAL FAILURE TO DISCLOSE A MATERIAL FACT CONSTITUTED FRAUD

Active Concealment Gives Rise to Actionable Fraud. A duty to disclose exists, absent a fiduciary relationship, and failure to do so gives rise to actionable fraud, when a party has actively concealed undisclosed matters (*Goodman v. Kennedy* (1976) 18 Cal. 3d 335, 346-347, 134 Cal. Rptr. 375, 556 P.2d 737).

[OR]

_____[PLAINTIFF'S or DEFENDANT'S]

INTENTIONAL FAILURE TO DISCLOSE A MATERIAL FACT CONSTITUTED FRAUD

Duty to Disclose Exists When Party Has Sole Knowledge or Access. A duty to disclose exists, absent a fiduciary relationship, when a party has sole knowledge or access to material facts and knows that these facts are not known to or reasonably discoverable by the other party (*Goodman v. Kennedy* (1976) 18 Cal. 3d 335, 347, 134 Cal. Rptr. 375, 556 P.2d 737).

NOTES.

Duty to Disclose Material Fact:

See 17.09[4]

Nondisclosure of Material Facts as Breach of Fiduciary Duty:

See 17.18[2]

Detailed Discussion of Format/Skeletal Forms for Memoranda:

California Forms of Pleading and Practice, Ch. 417, Points and Authorities (Matthew Bender); and
California Points and Authorities, Ch. 1, Writing Legal Memoranda and Briefs (Matthew Bender)

Additional Memoranda Relating to Contracts:

California Points and Authorities, Ch. 92, Duress, Menace, Fraud, Undue Influence, and Mistake
(Matthew Bender)

Legal Topics:

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

Contracts LawContract InterpretationFiduciary ResponsibilitiesContracts LawDefensesFraud &
MisrepresentationGeneral OverviewContracts LawDefensesFraud & MisrepresentationMaterial Misrepresentation



98 of 193 DOCUMENTS

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Chapter 17 Attacking or Defending Existence of Contract--Fraud, Duress, Menace, and Undue Influence
VII. FORMS

1-17 MB Practice Guide: CA Contract Litigation 17.31

17.31 Memorandum for Party Attacking Contract--Improper Threat of Legal Action.

Memorandum for Party Attacking Contract--Improper Threat of Legal Action.

[Include the following, if appropriate under the circumstances of the case, in a memorandum by the party attacking the contract]

[EITHER]

_____[PLAINTIFF'S or DEFENDANT'S]
THREAT OF A CIVIL ACTION CONSTITUTED DURESS BECAUSE HE/SHE KNEW THE CLAIMS ASSERTED
WERE FALSE

Party Has No Right to Make False Claims. The threat of a civil legal action constitutes duress if the claims asserted are known to be false (*Leeper v. Beltrami* (1959) 53 Cal. 2d 195, 203-204, 1 Cal. Rptr. 12, 347 P.2d 12).

[OR]

_____[PLAINTIFF'S or DEFENDANT'S]
THREAT OF CRIMINAL PROSECUTION CONSTITUTED DURESS

Threat of Criminal Prosecution Violates Public Policy. As a matter of public policy, an agreement is obtained under duress if it was obtained under threat of criminal prosecution (*Bayscene Resident Negotiators v. Bayscene Mobilehome Park* (1993) 15 Cal. App. 4th 119, 127, 18 Cal. Rptr. 2d 626).

NOTES.

When Threat of Legal Action Constitutes Duress:

See 17.22[4]

Detailed Discussion of Format/Skeletal Forms for Memoranda:

California Forms of Pleading and Practice, Ch. 417, Points and Authorities (Matthew Bender); and
California Points and Authorities, Ch. 1, Writing Legal Memoranda and Briefs (Matthew Bender)

Additional Memoranda Relating to Contracts:

California Points and Authorities, Ch. 92, Duress, Menace, Fraud, Undue Influence, and Mistake
(Matthew Bender)

Legal Topics:

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

Civil Procedure Pleading & Practice Defenses, Demurrers & Objections Affirmative Defenses General Overview Contracts
Law Defenses Duress & Undue Influence General Overview Contracts Law Defenses Duress & Undue Influence Threats of
Arrest & Imprisonment



99 of 193 DOCUMENTS

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Chapter 17 Attacking or Defending Existence of Contract--Fraud, Duress, Menace, and Undue Influence
VII. FORMS

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17.32 Memorandum for Party Attacking Contract--Characteristics of Excessive Pressure.

Memorandum for Party Attacking Contract--Characteristics of Excessive Pressure.

[Include the following, if appropriate under the circumstances of the case, in a memorandum by the party attacking the contract]

THE CIRCUMSTANCES UNDER WHICH THE CONTRACT WAS SIGNED ARE CHARACTERISTIC OF THE
USE OF EXCESSIVE PRESSURE

Certain Circumstances Indicate Excessive Pressure. When simultaneously present in a significant number, the following characteristic circumstances indicate that the pressure used in obtaining consent to a transaction was excessive (*Keithley v. Civil Serv. Bd.* (1970) 11 Cal. App. 3d 443, 452, 89 Cal. Rptr. 809):

- Discussion of the transaction at an unusual or inappropriate time.
- Consummation of the transaction in an unusual place.
- Insistent demand that the business be finished at once.
- Extreme emphasis on untoward consequences of delay.
- The use of multiple persuaders by the dominant side against a single servient party.
- Absence of third-party advisers to the servient party.
- Statements that there is no time to consult financial advisers or attorneys.

NOTES.

Characteristics of Excessive Pressure:

See 17.28[3][b]

Detailed Discussion of Format/Skeletal Forms for Memoranda:

California Forms of Pleading and Practice, Ch. 417, Points and Authorities (Matthew Bender); and
 California Points and Authorities, Ch. 1, Writing Legal Memoranda and Briefs (Matthew Bender)

Additional Memoranda Relating to Contracts:

California Points and Authorities, Ch. 92, Duress, Menace, Fraud, Undue Influence, and Mistake
 (Matthew Bender)

Legal Topics:

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

Civil Procedure Pleading & Practice Defenses, Demurrers & Objections Affirmative Defenses General Overview Contracts
 Law Defenses Duress & Undue Influence General Overview Contracts Law Defenses Duress & Undue Influence Economic
 Duress Contracts Law Defenses Duress & Undue Influence Threats of Arrest & Imprisonment Estate, Gift & Trust
 Law Will Contests Undue Influence Elements



100 of 193 DOCUMENTS

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Chapter 17 Attacking or Defending Existence of Contract--Fraud, Duress, Menace, and Undue Influence
VII. FORMS

1-17 MB Practice Guide: CA Contract Litigation 17.33

17.33 Memorandum for Party Seeking to Enforce Contract--Effect of Independent Investigation.

Memorandum for Party Seeking to Enforce Contract--Effect of Independent Investigation.

[Include the following, if appropriate under the circumstances of the case, in a memorandum by the party seeking to enforce the contract]

____ DEFENDANT] CANNOT SHOW
JUSTIFIABLE RELIANCE ON [PLAINTIFF'S or DEFENDANT'S] REPRESENTATIONS BECAUSE HE OR SHE
MADE AN INDEPENDENT INVESTIGATION OF THE FACTS

Independent Investigation Affects Claim of Reliance. If a party conducts an independent investigation, that party cannot claim reliance on the other party's representations unless the falsity of the statements is not apparent from an inspection, the person making the representations has superior knowledge, or the party relying on the representations is not competent to judge the facts without expert assistance (*Bagdasarian v. Gragnon* (1948) 31 Cal. 2d 744, 748, 192 P.2d 935).

NOTES.

Investigation of Other Party's Representations:

See 17.12[5], [6]

Detailed Discussion of Format/Skeletal Forms for Memoranda:

California Forms of Pleading and Practice, Ch. 417, Points and Authorities (Matthew Bender); and
California Points and Authorities, Ch. 1, Writing Legal Memoranda and Briefs (Matthew Bender)

Additional Memoranda Relating to Contracts:

California Points and Authorities, Ch. 92, Duress, Menace, Fraud, Undue Influence, and Mistake
(Matthew Bender)

Legal Topics:

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

Contracts LawDefensesFraud & MisrepresentationGeneral OverviewContracts LawDefensesFraud & MisrepresentationConstructive FraudContracts LawDefensesFraud & MisrepresentationIntentional FraudContracts LawDefensesFraud & MisrepresentationMaterial Misrepresentation



101 of 193 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 17 Attacking or Defending Existence of Contract--Fraud, Duress, Menace, and Undue Influence
VII. FORMS

1-17 MB Practice Guide: CA Contract Litigation 17.34

17.34 Memorandum for Party Seeking to Enforce Contract--Right to Take Threatened Action.

Memorandum for Party Seeking to Enforce Contract--Right to Take Threatened Action.

[Include the following, if appropriate under the circumstances of the case, in a memorandum of points and authorities by the party seeking to enforce the contract]

_____ DEFENDANT'S] [THREAT TO
EXERCISE or EXERCISE OF] A LEGAL RIGHT CANNOT CONSTITUTE DURESS

A. Threat or Exercise of Legal Right Is Not Duress. Threatening to do what one has a legal right to do does not constitute duress or menace (*U.S. Hertz, Inc. v. Niobrara Farms* (1974) 41 Cal. App. 3d 68, 81, 116 Cal. Rptr. 44).

[ADD, if appropriate]

B. Right to Different View of Contractual Rights. It is not duress to take a different view of one's contractual rights, even if that view was mistaken (*London Homes, Inc. v. Korn* (1965) 234 Cal. App. 2d 233, 240, 44 Cal. Rptr. 262).

[ADD, if appropriate]

C. Right to Refuse to Proceed With Contract. It is not duress to refuse, in good faith, to proceed with a contract, even though the refusal might later be found to be wrong (*London Homes, Inc. v. Korn* (1965) 234 Cal. App. 2d 233, 240, 44 Cal. Rptr. 262).

[ADD, if appropriate]

D. Right to Take Legal Action. It is not duress to take, or threaten to take, legal action one is entitled to take (*London Homes, Inc. v. Korn* (1965) 234 Cal. App. 2d 233, 240, 44 Cal. Rptr. 262).

NOTES.

Threat of Exercising Legal Right:

See 17.22[4]

Detailed Discussion of Format/Skeletal Forms for Memoranda:

California Forms of Pleading and Practice, Ch. 417, Points and Authorities (Matthew Bender); and
California Points and Authorities, Ch. 1, Writing Legal Memoranda and Briefs (Matthew Bender)

Additional Memoranda Relating to Contracts:

California Points and Authorities, Ch. 92, Duress, Menace, Fraud, Undue Influence, and Mistake
(Matthew Bender)

Legal Topics:

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

Contracts LawDefensesDuress & Undue InfluenceEconomic DuressContracts LawDefensesDuress & Undue
InfluenceThreats of Arrest & Imprisonment



102 of 193 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 17 Attacking or Defending Existence of Contract--Fraud, Duress, Menace, and Undue Influence
VII. FORMS

1-17 MB Practice Guide: CA Contract Litigation 17.35

17.35 Memorandum for Party Seeking to Enforce Contract--Availability of Reasonable Alternative to Unfavorable Contract.

Memorandum for Party Seeking to Enforce Contract--Availability of Reasonable Alternative to Unfavorable Contract.

[Include the following, if appropriate under the circumstances of the case, in a memorandum by the party seeking to enforce the contract]

_____[PLAINTIFF or DEFENDANT]
CANNOT CLAIM ECONOMIC DURESS BECAUSE HE/SHE HAD A REASONABLE ALTERNATIVE TO THE ALLEGEDLY UNFAVORABLE CONTRACT

Economic Duress Does Not Exist if Reasonable Alternative Available. Economic duress does not exist if the party claiming duress, acting as a reasonably prudent person, had a reasonable alternative to agreeing to the allegedly unfavorable contract (*CrossTalk Prods., Inc. v. Jacobson* (1998) 65 Cal. App. 4th 631, 644, 76 Cal. Rptr. 2d 615).

NOTES.

Availability of Reasonable Alternative to Contract:

See 17.24[2]

Detailed Discussion of Format/Skeletal Forms for Memoranda:

California Forms of Pleading and Practice, Ch. 417, Points and Authorities (Matthew Bender); and
California Points and Authorities, Ch. 1, Writing Legal Memoranda and Briefs (Matthew Bender)

Additional Memoranda Relating to Contracts:

California Points and Authorities, Ch. 92, Duress, Menace, Fraud, Undue Influence, and Mistake
(Matthew Bender)

Legal Topics:

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

Contracts LawDefensesDuress & Undue InfluenceGeneral OverviewContracts LawDefensesDuress & Undue
InfluenceEconomic Duress



103 of 193 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 18 Asserting or Defending Claim That Contract Is Illegal, Contrary to Public Policy, or Unconscionable

2-18 MB Practice Guide: CA Contract Litigation 18.syn

AUTHOR: Hannah Bentley

§ 18.syn Synopsis to Chapter 18: Asserting or Defending Claim That Contract Is Illegal, Contrary to Public Policy, or Unconscionable

18.01 Scope.

18.02 Objective and Strategy.

18.03 CHECKLIST: Asserting or Defending Claim of Illegality of Contract or Contract Provision.

18.04 Options and Strategies.

18.05 Illegal Contract Is Unenforceable.

18.05[1] Contract Must Have Lawful Object and Lawful Consideration.

18.05[2] When Contract Is Unlawful.

18.05[3] Legality Usually Is Question of Law.

18.05[4] Subsequent Illegality Excuses Performance.

18.05[5] Illegality May Invalidate Whole Contract or Require Severance.

18.06 Illegality Issues Recur in Specific Types of Contracts.

18.06[1] Some Agreements Limiting Remedies Are Invalid.

18.06[1][a] Private Agreement May Not Contravene Public Law.

18.06[1][b] Exculpatory Provision Involving Public Interest Will Exhibit Particular Characteristics.

- 18.06[1][c] Some Exculpatory Provisions Do Not Involve Public Interest.
- 18.06[1][d] Release of Liability for Gross Negligence Is Invalid.
- 18.06[1][e] Contract May Not Exculpate Person for Fraud or Willful Injury.
- 18.06[1][f] Some Exculpatory Provisions Are Expressly Prohibited.
- 18.06[2] Agreements Contemplating or Supporting Illegal Behavior Are Invalid.
 - 18.06[2][a] Performance by Unlicensed Persons or Firms.
 - 18.06[2][b] Agreements Not to Disclose Illegal Behavior Are Unenforceable.
- 18.06[3] Agreements Improperly Restraining Trade Are Invalid.
 - 18.06[3][a] Federal Laws May Invalidate Agreements.
 - 18.06[3][b] Agreements Preventing or Limiting Practice of Lawful Profession May Be Invalid.
 - 18.06[3][c] Agreements Regarding Improper Combinations of Capital May Be Invalid Under Cartwright Act.
 - 18.06[3][d] Unfair Business Practices Are Invalid.
- 18.06[4] Agreements Clearly Preventing or Harming a Marriage Are Invalid.
 - 18.06[4][a] Agreement Directly Barring Marriage Is Likely Invalid.
 - 18.06[4][b] Agreement Promoting Dissolution or Divorce May Be Invalid.
- 18.06[5] Agreements Tending to Obstruct Justice Are Invalid.
 - 18.06[5][a] Agreements Tampering With Evidence or Witnesses Are Invalid.
 - 18.06[5][b] Agreement to Refrain From Prosecution Is a Crime.
 - 18.06[5][c] Agreement Unjustly Discriminating Among Joint Tortfeasors Is Invalid.
 - 18.06[5][d] Agreement With Attorney Not to Settle Case Is Invalid.
- 18.06[6] Agreements With Public Agencies or Officers Violating Their Duties Are Void.
 - 18.06[6][a] Agreements Generally Are Void, Not Voidable.
 - 18.06[6][b] Agreements May Be Invalid for Lack of Proper Authorization.
 - 18.06[6][c] Agreements Calling for Excessive Public Indebtedness Are Void.
 - 18.06[6][d] Agreements Leading to Conflict of Interest Are Void.

18.06[7] Agreements Calling for Usurious Rate of Interest Are Voidable.

18.06[8] Agreements Providing for Excessive Penalties or Limitations on Damages May Be Invalid.

18.06[9] Agreements Providing for Pre-Dispute Waiver of Jury Trial Are Invalid.

18.07 CHECKLIST: Asserting or Defending Invalidity of Contract or Contract Provision Violates Public Policy.

18.08 Options and Strategies.

18.09 Elements of Claim for Invalidity on Public Policy Grounds.

18.10 Contracts Contrary to Public Policy Harm Moral or Social Imperative in Society.

18.11 Contracts Violating Public Policy Generally Are Void, Not Voidable.

18.12 Contract Provision Contrary to Public Policy May Be Severable.

18.13 CHECKLIST: Asserting or Defending Claim That Contract or Provision Is Unconscionable.

18.14 Options and Strategies.

18.15 Elements of Claim of Unconscionability.

18.15[1] Unconscionability Is Determined As of Time Contract Is Made.

18.15[2] Unconscionability Is Question of Law.

18.15[3] Both Procedural and Substantive Unconscionability Must Exist.

18.15[4] Procedural Unconscionability Is Established by Showing Contract of Adhesion, Use of Surprise, or Unequal Bargaining Power.

18.15[4][a] Adhesion Contract Usually Has At Least a Minimum Degree of Procedural Unconscionability.

18.15[4][b] Surprise or Oppression Also May Cause Procedural Unconscionability.

18.15[4][c] Courts Can Infer Procedural Unconscionability From Substantive Unconscionability.

18.15[5] Substantive Unconscionability Generally Is Shown Through Presence of Wholly One-Sided Term.

18.15[5][a] Wholly One-Sided Term Generally Sufficient to Show Substantive Unconscionability.

18.15[5][b] Courts Sometimes Require That Substantive Unconscionability Must "Shock the Conscience."

18.15[5][c] Substantive Unconscionability Generally Is Not Inferred From Procedural Unconscionability.

18.16 Agreements Providing for Arbitration or Referee Are Scrutinized Under Special Criteria.

18.16[1] Agreements That Are Not One-Sided Will Likely Be Enforced With Possible Procedural Guarantees.

18.16[2] Arbitration Cases Are Governed by Federal Arbitration Act.

18.16[3] Arbitration Agreements Are Likely Subject to Procedural Requirements in Cases of Public or Statutory Rights.

18.16[4] Particular Terms of Agreement May Be Held Invalid.

18.16[4][a] Arbitration of Only One Party's Claims Are Invalid.

18.16[4][b] Requiring Sharing of Arbitration Costs May Be Invalid.

18.16[4][c] Arbitral Appeal or Review of Award Exceeding Specific Amount Probably Is Invalid.

18.16[4][d] Provisions for Non-Neutral Arbitrators Are Invalid.

18.16[4][e] Some Provisions Limiting Discovery May Be Voidable.

18.16[4][f] Courts Will Deny Arbitration As to Injunctive Relief Relating to Public Statutory Rights.

18.16[4][g] Limitations on Amount or Type of Damages Recoverable May Be Invalid.

18.16[4][h] Shortened Statute of Limitations May Be Invalid.

18.17 Forum Selection Provisions May Be Held Invalid.

18.18 Provisions Prohibiting Maintenance of Class Actions Are Likely Invalid.

18.19 Courts Will Seek to Sever Unconscionable Contract Terms.

18.20 CHECKLIST: Determining Enforceability Based Upon Severability and Public Policy Considerations.

18.21 Options and Strategies.

18.22 Severability May Determine Whether Other Provisions of Contract May Be Enforceable.

18.22[1] Contract Is Void If Sole Object of Contract Is Illegal.

18.22[2] If Contract Has Multiple Objects, Court May Sever Illegal Parts and Respective Consideration.

18.22[3] Policy Regarding Severability Is Followed in Unconscionable Contracts and Contracts Violating Public Policy.

18.23 Consequences of Impermissible Contract or Term Depend on Equities.

18.23[1] Contract May Be Void If Parties Are Equally at Fault.

18.23[2] Contract May Be Voidable at Option of Less Responsible Party.

18.23[2][a] Malum in Se Is Contrary to Morals and Is Always Void.

18.23[2][b] Malum Prohibitum Is Contrary to Statute Only.

18.23[3] If Illegality, Unconscionability, or Public Policy Preclude Enforcement of Contract, Quantum Meruit Recovery May Still Be Available.

18.24 CHECKLIST: Evaluating Strategy for Asserting or Defending Claims of Illegality, Violation of Public Policy, or Unconscionability.

18.25 Options and Strategies.

18.26 Party Seeking to Affirm or Deny Validity of Contract or Contract Provision May Seek Declaratory Judgment.

18.26[1] Affirming or Denying Validity of Contract or Contract Provision in General.

18.26[2] Moving to Set Aside or Define Terms of Arbitration or Challenging Arbitral Award on Grounds of Illegality, Violation of Public Policy, or Unconscionability.

18.27 Validity Should Be Challenged in Answer or on Demurrer.

18.28 Summary Judgment Appropriate If Issue Is One of Law.

18.29 Complaint for Declaratory Judgment That Contract or Contract Term Is Illegal, Contrary to Public Policy, or Unconscionable.

Complaint for Declaratory Judgment That Contract or Contract Term Is Illegal, Contrary to Public Policy, or Unconscionable.

18.30 Answer Stating Affirmative Defense That Contract or Contract Term Is Illegal, Contrary to Public Policy, or Unconscionable.

Answer Stating Affirmative Defense That Contract or Contract Term Is Illegal, Contrary to Public Policy, or Unconscionable.

18.31 Notice of Motion and Motion for Summary Judgment on Grounds That Contract or Contract Term Is Unenforceable As Illegal, Contrary to Public Policy, or Unconscionable.

Notice of Motion and Motion for Summary Judgment on Grounds That Contract or Contract Term Is Unenforceable As Illegal, Contrary to Public Policy, or Unconscionable.

18.32 Notice of Motion and Motion for Summary Judgment on Ground That Contract or Contract Term Is Enforceable.

Notice of Motion and Motion for Summary Judgment on Ground That Contract or Contract Term Is Enforceable.

Hannah Bentley n*

FOOTNOTES:

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104 of 193 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 18 Asserting or Defending Claim That Contract Is Illegal, Contrary to Public Policy, or Unconscionable
I. STRATEGY

2-18 MB Practice Guide: CA Contract Litigation 18.01

AUTHOR: Hannah Bentley

18.01 Scope.

This chapter covers:

- Objective and strategy for asserting or defending a claim that a contract or term is illegal, contrary to public policy, or unconscionable [see 18.02].
- Asserting or defending a claim that a contract or contract provision is illegal [see 18.03 -18.06].
- Categories of contracts in which legality issues frequently arise [see 18.06].
- Asserting or defending a claim that a contract or term is invalid because it is contrary to public policy [see 18.07 -18.12].
- Asserting or defending a claim that a contract or contract term is unconscionable [see 18.13 -18.19].
- Determining enforceability based on severability and public policy considerations [see 18.20 -18.23].
- Procedural aspects of asserting or defending claims of illegality, violation of public policy, or unconscionability [see 18.24 -18.28].

Core Statutes:

CC §§ 1596, 1598, 1599, 1607, 1667, 1668, 1670.5, 1671, 3513

Legal Topics:

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

Contracts LawDefensesIllegal BargainsContracts LawDefensesPublic Policy ViolationsContracts
LawDefensesUnconscionabilityGeneral Overview



105 of 193 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 18 Asserting or Defending Claim That Contract Is Illegal, Contrary to Public Policy, or Unconscionable
I. STRATEGY

*2-18 MB Practice Guide: CA Contract Litigation 18.02***AUTHOR:** Hannah Bentley**18.02 Objective and Strategy.**

When a court finds that a contract is contrary to law or public policy, or is unconscionable, it may choose not to enforce the contract. An illegal contract is void or voidable [see 18.05[1]].

Thus, a party seeking to avoid a contract will want to examine carefully whether a contract or provision of a contract is contrary to a law or policy [see 18.03 -18.06], or contrary to a broader set of "public policies" [see 18.07 -18.12]. Because case law regarding illegality of contract is often stronger than case law on public policy, reliance on the doctrine of illegality usually is preferable. A party will want to determine if cases prohibiting exculpatory clauses under CC §§ 1668 and 3513 may be applicable [see 18.06[1]].

A party opposing a contract also will want to examine whether a contract or provision is so unfairly one-sided as to be unconscionable [see generally 18.13 -18.19]. Although unconscionability often is asserted by the weaker contracting party in the context of a "contract of adhesion," this is not always the case [see 18.15[4]]. Agreements to arbitrate are often subject to particular scrutiny under this doctrine [see 18.16].

A party seeking to enforce a contract will want to challenge any assertion that all or any part of the contract is illegal. Such a party should point to cases in which courts have asserted that unconscionability is limited to contracts or provisions that "shock the conscience" [see 18.15[5][b]]. Such a party also may want to rely on case law in which contracts were enforced despite their illegality [see 18.23], and on the significant body of precedent severing portions of contracts as unenforceable but giving effect to the remaining terms [see 18.22].

**Cross Reference:**

For tips on updating case law and expanding your research with additional resources, see **How to Use Lexis.com With This Publication** at the front of this volume.

Legal Topics:

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106 of 193 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 18 Asserting or Defending Claim That Contract Is Illegal, Contrary to Public Policy, or Unconscionable
II. ASSERTING OR DEFENDING CLAIM OF ILLEGALITY OF CONTRACT OR CONTRACT PROVISION

2-18 MB Practice Guide: CA Contract Litigation 18.03

AUTHOR: Hannah Bentley

18.03 CHECKLIST: Asserting or Defending Claim of Illegality of Contract or Contract Provision.

☐ Determine whether claim of illegality may exist because:

☐ Either an object, or some or all of consideration for contract, was unlawful.

Authority:

CC §§ 1596, 1607

Discussion:

See 18.05[1]

☐ Contract or term was contrary to either:

☐ Statute.

☐ Policy of statute.

☐ Good morals.

Authority:

CC § 1667

Discussion:

See 18.05[2], 18.07

☐ If illegality is present, assess remedies based on whether illegality existed at time contract was made.

☐ Contract that was illegal at time of making is void or voidable.

Authority:

CC §§ 1596, 1550(3)

Discussion:

See 18.05[4]

☐ If opposing contract made illegal by subsequent events, argue that performance is excused and, if appropriate, that public policy precludes enforcement of contract.

Authority:

CC § 1511(1)

Discussion:

See 18.05[4]

☐ Assess whether illegal term may be severable.

Authority:

CC §§ 1598, 1599

Discussion:

See 18.05[5]

☐ Evaluate whether contract or term falls within recurring categories of cases in which illegality has been identified.

☐ Does contract attempt to exempt a party from responsibility for fraud, willful injury to person or property, or violation of law?

☐ Is right being waived a "public" right?

Authority:

CC § 3513; Armendariz v. Foundation Health Psychcare Servs., Inc. (2000) 24 C4th 83, 100

Discussion:

See 18.06[1][a]

☐ In arguing whether right is "public" or "private," determine whether contract meets some or all *Tunkl* factors regarding matters of public interest.

Authority:

Tunkl v. Regents of Univ. of Cal. (1963) 60 C2d 92, 98-99

Discussion:

See 18.06[1][b], [c]

- ☐ Does contract purport to release liability for future gross negligence?

Authority:

City of Santa Barbara v. Superior Court (2007) 41 C4th 747, 62 CR3d 527, 161 P3d 1095

Discussion:

See 18.06[1][d]

- ☐ Does contract purport to exculpate a person for fraud or willful injury?

Authority:

CC § 1668; *Manderville v. PCG&S Group, Inc.* (2007) 146 CA4th 1486, 1489, 1501, 55 CR3d 59

Discussion:

See 18.06[1][e]

- ☐ Assess whether any exculpatory clause is specifically prohibited by any statute.

Authority:

CC §§ 1751, 2782, 2784.5; *Ins Code* § 533

Discussion:

See 18.06[1][f]

- ☐ Determine if contract contemplates or condones illegal activity.

- ☐ Review whether agreement calls for performance of contract in California by party not properly licensed in California.

Authority:

B&P Code §§ 143, 7031; *Hydrotech Sys., Ltd. v. Oasis Waterpark* (1991) 52 C3d 988, 998-999; *MW Erectors, Inc. v. Niederhauser Ornamental & Metal Works Co., Inc.* (2005) 36 C4th 412, 419

Discussion:

See 18.06[2][a]

- ☐ Examine whether agreement improperly requires that party not disclose illegal behavior.

Authority:

Cariveau v. Halferty (2000) 83 CA4th 126, 135

Discussion:

See 18.06[2][b]

- ☐ Consider whether agreement improperly restrains trade.

Discussion:

See 18.06[3][a] -[d]

☐ In appropriate circumstances, review whether agreement clearly prevents a possible marriage or tends to cause dissolution of an existing marriage.

☐ If agreement contains cohabitation agreement, decide if it is expressly based on illicit consideration.

Authority:

Marvin v. Marvin (1976) 18 C3d 660, 672

Discussion:

See 18.06[4][a]

☐ If agreement may tend to dissolve a marriage or lead to divorce, determine if it facilitates or encourages that result.

Authority:

In re Marriage of Pendleton & Fireman (2000) 24 C4th 39, 46

Discussion:

See 18.06[4][b]

☐ Review whether agreement may lead to obstruction of justice by affecting testimony, barring prosecution, or improperly constraining settlement.

Authority:

Pen Code §§ 136-139, 153; *CCP* §§ 877.5, 877.6; *Smith v. Superior Court* (1996) 41 CA4th 1014, 1025-1026, 49 CR2d 20; *Hoines v. Barney's Club, Inc.* (1980) 28 C3d 603, 610, 170 CR 42, 620 P2d 628; *Calvert v. Stoner* (1948) 33 C2d 97, 103-104, 199 P2d 297; *Cal Rules Prof Conduct, Rules* 3-100, 3-300; State Bar Formal Opinion No 1994-136

☐ If agreement is with public body, evaluate if it was properly authorized and prepare appropriate argument regarding remedies if necessary.

☐ Review whether public body generally had authority to enter into agreement under statutes and state constitution.

Authority:

Cal Const, art XVI, §§ 1, 18(a); *Gov Code* §§ 1090, 1091, 1091.5; *G.L. Mezzetta, Inc. v. City of American Canyon* (2000) 78 CA4th 1087, 1093-1094, 93 CR2d 292

Discussion:

See 18.06[6]

☐ In cases involving debt limitation, determine whether nonpublic client wishes to

establish legal rights without seeking monetary recovery in excess of limitation.

Authority:

Barkley v. City of Blue Lake (1996) 47 CA4th 309, 314, 54 CR2d 679

Discussion:

See 18.06[6][c]

☐ Assess availability of argument that nonperforming party receiving benefit of other's performance has been unjustly enriched.

Authority:

Thomson v. Call (1985) 38 C3d 633, 647, 214 CR 139, 699 P2d 316

Discussion:

See 18.06[6][a]

☐ If agreement was for high rate of interest, assess whether it may be challenged as usurious or unconscionable.

☐ If agreement's interest rate was usurious, determine if it was exempted under state constitution or by statute.

Authority:

Cal Const, art XVI, 1

Discussion:

See 18.06[7]

☐ If interest rate is excepted by state constitution or statute, determine if it nevertheless may be unconscionable.

Authority:

Carboni v. Arrospide (1991) 2 CA4th 76, 83-84, 2 CR2d 845

Discussion:

See 18.15[5][a]

☐ If agreement provides for liquidated damages, assess whether liquidated damages provision may be invalidated.

☐ Determine whether special statute provides standard for evaluating validity of provision.

Authority:

CC § 1671(a)

Discussion:

See 18.06[8]

☐ If not, determine whether contract was "consumer contract" or residential lease.

Authority:

CC § 1671(c); *Hitz v. First Interstate Bank* (1995) 38 CA4th 274, 278

Discussion:

See 18.06[8]

☐

If contract is one of these, argue that proponent has burden of showing that clause was warranted because it would have been impracticable or unreasonable to ascertain actual damages.

Authority:

CC § 1671(d); *Orozco v. Casimiro* (2004) 121 CA4th Supp 7, 12

Discussion:

See 18.06[8]

☐

If contract is not residential lease, consumer contract, or governed by specific law to the contrary, argue that opponent bears burden of proving clause was unreasonable when made.

Authority:

CC § 1671(b)

Discussion:

See 18.06[8]

☐

Determine whether agreement improperly provides that any lawsuit between the parties will be adjudicated in a court trial, and not by jury trial, in violation of CC § 631.

Authority:

Grafton Partners L.P. v. Superior Court (2005) 36 C4th 944 .

Discussion:

See 18.06[9]

Legal Topics:

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

Contracts LawContract Conditions & ProvisionsSeverability ClausesContracts LawContract InterpretationSeverabilityContracts LawDefensesIllegal Bargains



107 of 193 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 18 Asserting or Defending Claim That Contract Is Illegal, Contrary to Public Policy, or Unconscionable
 II. ASSERTING OR DEFENDING CLAIM OF ILLEGALITY OF CONTRACT OR CONTRACT PROVISION

*2-18 MB Practice Guide: CA Contract Litigation 18.04***AUTHOR:** Hannah Bentley**18.04 Options and Strategies.**

To be enforceable, a contract in California must have a legal object [CC § 1596]. Without a lawful object, the contract lacks an essential element [CC § 1550(3)]. Thus, to make a claim under a contract, it is essential show that the contract is lawful. Conversely, it sometimes may be essential to a party seeking to avoid performance under a contract to be able to show that it is not.

**Strategic Point:**

Because a party bears the burden of proof as to each element of a claim [Evid Code § 500], a party refusing to perform on grounds of illegality may have some incentive to wait until the proponent of the contract seeks enforcement. However, this incentive must be balanced against the benefits of certainty.

Judge's Perspective:

Although it is true that the party asserting illegality bears the burden of proof, in most cases illegality will be a legal issue that can be resolved on the face of the contract. In addition, in exchange for the chance that the other side might not seek enforcement, the party asserting illegality accepts the risk of a lawsuit in which (1) it has to prove illegality anyway, as it would if it had filed for declaratory relief, and (2) it now finds itself in the position of defendant, where its illegality claim looks defensive and potentially less persuasive.

**Cross References:**

Discussion of distinction between contracts or terms that are void or voidable, and argument that voidable contracts are enforceable against parties that are equally at fault, see 18.23[2].

Discussion of evaluating strategy for claims that contract or provision of a contract is illegal, contrary to public policy, or unconscionable, see 18.24 -18.28.

Discussion of declaratory relief actions, see Ch. 11, Seeking or Opposing Declaratory Relief in Contract Matters.

A party defending against a claim of illegality will want to assert one or more of the following arguments:

- The contract is legal.



Cross Reference:

Discussion of illegality, see *18.05 -18.06*.

- Even if the contract is not legal, it is nevertheless enforceable because it did not condone a moral wrong and the parties are equally at fault.



Cross Reference:

Consequences of impermissible contract or term depend on equities, see *18.23*.

- The illegal terms of the contract are severable from the remainder of the contract and the balance of the contract is enforceable.



Cross Reference:

Severability, see *18.22*.

Legal Topics:

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



108 of 193 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 18 Asserting or Defending Claim That Contract Is Illegal, Contrary to Public Policy, or Unconscionable
 II. ASSERTING OR DEFENDING CLAIM OF ILLEGALITY OF CONTRACT OR CONTRACT PROVISION

*2-18 MB Practice Guide: CA Contract Litigation 18.05***AUTHOR:** Hannah Bentley**18.05 Illegal Contract Is Unenforceable.**

18.05[1] Contract Must Have Lawful Object and Lawful Consideration. To be enforceable under California law, a contract must have a legal object [CC § 1550(3)]. Both the object of a contract [CC § 1596] and its consideration [CC § 1607] must be lawful for a contract to be enforced [*Howell v. City of Hamburg Co. (1913) 165 C 172, 176, 131 P 130* (lease of land void when it was premised on construction of structure on land in question and city charter prohibited such construction)]. The object of the contract must be lawful at the time the contract was made [CC § 1596]. An illegal contract is void and cannot be ratified by any subsequent act [*Black Hills Investments, Inc. v. Albertson's, Inc. (2007) 146 CA4th 883, 896, 53 CR3d 263*].

Exceptions:

When a party who is equally at fault seeks to disaffirm a void contract contrary to good morals and there is no strong public interest in voiding the contract, it may be enforced despite its illegality [*McIntosh v. Mills (2004) 121 CA4th 333, 347*]. Moreover, when a contract has multiple objects, and not all of them are illegal, the court may sever the offending provision and corresponding consideration [CC § 1608].

 Cross References:

Discussion of illegal consideration and other types of illegal contracts held invalid, see 18.06.

Discussion of party in pari delicto not being permitted to disaffirm a contract contrary to good morals, see 18.23[2].

18.05[2] When Contract Is Unlawful. A contract is illegal if it is [CC § 1667]:

- Contrary to an express provision of law;
- Contrary to the policy of express law, even though not expressly prohibited; or
- Contrary to good morals.

Examples:

- An agreement providing for liquidated damages in the event of infidelity in a marriage has been held unenforceable as contrary to the policy of the state's law of no-fault divorce [*Diosdado v. Diosdado* (2002) 97 CA4th 470, 474, 118 CR2d 494].
- A contract between a sperm donor and a sperm bank to keep the donor's identity secret under all circumstances violates the policy of family law statutes that records regarding artificial insemination be reviewable pursuant to court order on good cause shown [*Johnson v. Superior Court* (2000) 80 CA4th 1050, 1065-1067, 95 CR2d 864].
- An agreement to build a plant in Iran for manufacturing computer products to be sold in Iran was held illegal because it violated United States presidential executive orders prohibiting United States citizens from doing business in Iran [*Kashani v. Tsann Kuen China Enter. Co.* (2004) 118 CA4th 531, 536-537].
- Contracts for sale of real estate were void because they violated Subdivision Map Act [Gov C § 66499.30(b)], which prohibits the sale of real property for which a parcel map is required until a parcel map is recorded [*Black Hills Investments, Inc. v. Albertson's, Inc.* (2007) 146 Cal. App. 4th 883, 886-887, 53 Cal. Rptr. 3d 263 ; *Sixelles, LLC v. Cannery Business Park* (2008) 170 CA4th 648, 653-654, 88 CR3d 235] .
- Consulting agreements for matchmaking services were void and unenforceable because they violated express requirements of the dating service statutes, CC § 1694 et seq. [*Duffens v. Valenti* (2008) 161 CA4th 434, 441, 74 CR3d 311] .
- A lease was an illegal contract when the premises lacked a certificate of occupancy in violation of the local building code, and as a result, the landlord was not entitled to recover past due rent [*Espinoza v. Calva* (2008) 169 CA4th 1393, 1400, 87 CR3d 492] .

Consider:

A contract is void if it is contrary to good morals, regardless of whether it is also prohibited by statute [see *Homami v. Iranzadi* (1989) 211 CA3d 1104, 1109, 260 CR 6]. A contract is voidable at the option of the less responsible party if it is contrary to a statute but not contrary to good morals [*McIntosh v. Mills* (2004) 121 CA4th 333, 344 n10, 347] .

 Cross Reference:

Discussion of contracts contrary to "good morals" as those violating public policy, see 18.07 -18.12.

18.05[3] Legality Usually Is Question of Law. The issue of whether a contract is legal or contrary to public policy is one of law, and therefore generally is not presented to a jury [*Jackson v. Rogers & Wells* (1989) 210 CA3d 336, 350, 258 CR 454]. However, when the illegality of the contract raises questions of fact, it may be submitted to the jury [*Redke v. Silvertrust* (1971) 6 C3d 94, 103, 98 CR 293, 490 P2d 805].

Jury Instructions:

Interpretation in Favor of Contract, see *California Forms of Jury Instruction, Ch. 3B, Instr. MB 300B.07* (Matthew Bender).

18.05[4] Subsequent Illegality Excuses Performance. While CC § 1596 provides that a contract must be lawful when made, this does not mean that when a subsequent law makes an object unlawful, the contract nevertheless must be performed. CC § 1511(1) provides that lack of performance of an obligation is excused when performance is prevented by operation of law.

Example:

A foreign jurisdiction's adoption of a building code precluding issuance of a permit to construct a building "prevented" performance of the contract within the meaning of CC § 1511 [*Baird v. Wendt Enterprises, Inc.* (1967) 248 CA2d 52, 55, 56 CR 118].

 Cross Reference:

Discussion of the defense of excuse and its limitations, see Ch. 22, *Suing or Defending Action for Breach of Contract*, 22.65.



Strategic Point:

If performance subsequently becomes illegal, a party seeking to avoid the contract also may be able to argue that the contract is invalid and unenforceable on public policy grounds [see *Bovard v. American Horse Enters., Inc.* (1988) 201 CA3d 832, 841, 247 CR 340].

 Cross Reference:

Discussion of asserting or defending claim that contract or contract term violates public policy, see 18.07-18.12.

18.05[5] Illegality May Invalidate Whole Contract or Require Severance. If the main object of a contract is unlawful in whole or in part, the entire contract is void [CC § 1598].

In contrast, if a contract has several distinct objects, of which one at least is lawful, the contract may be voided in relevant part [CC § 1599].

However, if both the lawful and unlawful objects are provided in exchange for a single consideration, the entire contract is void [CC § 1608].

Examples:

- Severance was impossible because the contract provided for single fee in exchange for illegal attorney referral services as well as other lawful services [*Selten v. Hyon* (2007) 152 CA4th 463, 471, 60 CR3d 896] .

- A city's support for a tribe's trust acquisition was the sole consideration for the tribe entering into municipal services agreement, and because that support was illegal for failure to comply with CEQA, the contract was void [*County of Amador v. City of Plymouth* (2007) 149 CA4th 1089, 1114, 57 CR3d 704] .

In general, whether a court should seek to sever offending terms of a contract or declare it entirely invalid should be informed by which of these actions will further the interests of justice, and whether the court has the capacity to cure the unlawful contract through severance [*Armendariz v. Foundation Health Psychcare Servs., Inc.* (2000) 24 C4th 83,

124, 99 CR2d 745, 6 P3d 669].

 Cross Reference:

Discussion of determining severability of terms in contracts found illegal, contrary to public policy, or unconscionable, see 18.22.

Courts particularly will seek to enforce agreements by severing improper terms in two situations [*Armendariz v. Foundation Health Psychcare Servs., Inc.* (2000) 24 C4th 83, 123-124, 99 CR2d 745, 6 P3d 669]:

- If enforcing at least a portion of the agreement will prevent the inequitable results of voiding a partially performed contract.
- To preserve an otherwise legal contractual relationship.

 Cross Reference:

Discussion of enforcement based on severability, see 18.20 -18.23.

Legal Topics:

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

Contracts LawConsiderationGeneral OverviewContracts LawDefensesIllegal Bargains



109 of 193 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 18 Asserting or Defending Claim That Contract Is Illegal, Contrary to Public Policy, or Unconscionable
 II. ASSERTING OR DEFENDING CLAIM OF ILLEGALITY OF CONTRACT OR CONTRACT PROVISION

2-18 MB Practice Guide: CA Contract Litigation 18.06

AUTHOR: Hannah Bentley**18.06 Illegality Issues Recur in Specific Types of Contracts.****18.06[1] Some Agreements Limiting Remedies Are Invalid.**

18.06[1][a] Private Agreement May Not Contravene Public Law. Although anyone may waive the advantage of a law intended solely for his or her own benefit, a law established for a public reason cannot be contravened by a private agreement [CC § 3513]. In essence, courts will not uphold an agreement in which a party seeks to waive a "public" right [see, e.g., *Armendariz v. Foundation Health Psychcare Servs., Inc.* (2000) 24 C4th 83, 100, 99 CR2d 745, 6 P3d 669].

**Warning:**

Although one court of appeal stated in dicta that clauses seeking exculpation from liability imposed by any statute or regulation are invalid regardless of whether the public interest is involved [*Health Net of Cal., Inc. v. Department of Health Servs.* (2003) 113 CA4th 224, 235], this conclusion is questionable in light of CC § 3513.

Judge's Perspective:

CC § 3513 provides in part that "a law established for a public reason cannot be contravened by a private agreement." Of course, as the courts have recognized, "it is difficult to conceive of a statutory right enacted *solely* for the benefit of private individuals that does not also have an incidental public benefit" [*Bickel v. City of Piedmont* (1997) 16 C4th 1040, 1049 n4, 68 CR2d 758, 946 P2d 427 (emphasis in original)]. Thus, the question is not merely whether the contract waives a statutory right, but whether the public benefit of the statute is one of the statute's primary purposes [*Azteca Constr., Inc. v. ADR Consulting, Inc.* (2004) 121 CA4th 1156, 1166 (quoting *DeBerard Props., Ltd. v. Lim* (1999) 20 C4th 659, 669, 85 CR2d 292, 976 P2d 843)]. Notwithstanding the qualified nature of this language, however, the courts frequently have determined that statutes do have a public purpose and invalidated contracts that waived their protection [see, e.g., *Azteca Constr., Inc. v. ADR Consulting, Inc.* (2004) 121 CA4th 1156, 1166 (listing courts that have annulled or restricted contractual arbitration provisions that impaired statutory rights benefitting the public)].

18.06[1][b] Exculpatory Provision Involving Public Interest Will Exhibit Particular Characteristics.

Although there is no exact formula for determining whether a contract involves the public interest to the extent that an exculpatory clause will be invalidated, such a contract will exhibit some or all of the following characteristics [*Tunkl v. Regents of Univ. of Cal.* (1963) 60 C2d 92, 98-99, 32 CR 33, 383 P2d 441]:

- It concerns a business of a type generally thought suitable for public regulation.
- The party seeking exculpation is engaged in performing a service of great importance to the public, which is often a matter of practical necessity for some members of the public.
- The party holds himself or herself out as willing to perform this service for any member of the public who seeks it, or at least for any member coming within certain established standards.
- As a result of the essential nature of the service, in the economic setting of the transaction, the party invoking exculpation possesses a decisive advantage of bargaining strength against any member of the public who seeks that party's services.
- In exercising a superior bargaining power the party confronts the public with a standardized adhesion contract of exculpation, and makes no provision whereby a purchaser may pay additional reasonable fees and obtain protection against negligence.
- As a result of the transaction, the person or property of the purchaser is placed under the control of the seller, subject to the risk of carelessness by the seller or the seller's agents.

Examples:

- A party's waiver of its fiduciary duties is invalid [*Neubauer v. Goldfarb* (2003) 108 CA4th 47, 55-56, 133 CR2d 218].
- A clause exempting a child care provider from its own negligence is not valid [*Gavin W. v. YMCA of Metro. L.A.* (2003) 106 CA4th 662, 666, 131 CR2d 168].
- An agreement barring suit against a hospital by a doctor for denial of staff privileges is not enforceable [*Westlake Cmty. Hosp. v. Superior Court* (1976) 17 C3d 465, 480, 131 CR 90, 551 P2d 410].
- An agreement releasing a landlord from liability for negligence related to a tenant's injury in the common areas of the premises will not be enforced [*Henriouille v. Marin Ventures, Inc.* (1978) 20 C3d 512, 518-520, 143 CR 247, 573 P2d 465].
- A waiver of the right to bring a class action is unenforceable in a consumer contract of adhesion when disputes between the parties predictably will involve small amounts of damages allegedly due large numbers of consumers [*Discover Bank v. Superior Court* (2005) 36 C4th 148, 162-163].

18.06[1][c] Some Exculpatory Provisions Do Not Involve Public Interest. Courts have upheld exculpatory clauses that do not sufficiently involve the public interest in a number of contexts.

Examples:

- A telephone book advertising contract was not voidable under *Tunkl* because plaintiff might have negotiated different terms [*McCarn v. Pacific Bell Directory* (1992) 3 CA4th 173, 182, 4 CR2d 109].

- Exculpatory provisions in an oil drilling contract did not implicate the public interest because the drilling contractor did not hold itself out as performing services for the public, but only for the small number of entities that happened to be oil field operators, and the drilling of a particular oil well is generally only important to the party who will profit from it. The contractor did not seek or obtain complete exemption from culpability on account of its potential negligence or violation of any applicable regulations; it merely sought to limit its liability for economic harm suffered by the oil field operator [*CAZA Drilling (California), Inc. v. TEG Oil & Gas U.S.A., Inc.* (2006) 142 CA4th 453, 469, 475, 48 CR3d 271] .

Consider:

Even if an exculpatory clause is not ruled invalid, a court is likely to construe it strictly against the released party [*Queen Villas Homeowners Assn. v. TCB Property Management* (2007) 149 CA4th 1, 6, 56 R3d 528].

Numerous cases have held that exculpatory clauses in contracts relating to recreational or sports activities do not involve the public interest.

Examples:

- A release signed by passengers before boarding an aerial sightseeing tour did not affect the public interest [*Booth v. Santa Barbara Biplane Tours, LLC* (2008) 158 CA4th 1173, 1179, 70 CR3d 660] .

- A release of a ski company was held to include liability for injury from a chair lift accident during ski lessons [*Platzer v. Mammoth Mountain Ski Area* (2002) 104 CA4th 1253, 1259, 128 CR2d 885].

- A release of a gym was held to eliminate the gym's liability for injury due to use of weightlifting equipment even though it might not have extended to personal trainers [*Lund v. Bally's Aerobic Plus, Inc.* (2000) 78 CA4th 733, 738-740, 93 CR2d 169].

Distinguish--Negligence Per Se:

One court has held that although a release in a health club's membership agreement bars an ordinary negligence claim against it by a member who slipped and fell on a swimming pool deck, it does not protect the health club from a claim of negligence per se based on violations of regulatory statutes governing public swimming pools [*Capri v. L.A. Fitness International, LLC* (2006) 136 CA4th 1078, 1085-1087, 39 CR3d 425] .

Distinguish--Gross Negligence:

A release of liability for gross negligence generally is invalid [see 18.06[1][d]].

18.06[1][d] Release of Liability for Gross Negligence Is Invalid. An agreement made in the context of sports or recreational programs or services, purporting to release liability for future gross negligence, generally is unenforceable as a matter of public policy [*City of Santa Barbara v. Superior Court* (2007) 41 C4th 747, 750, 62 CR3d 527, 161 P3d 1095] . Public policy generally precludes enforcement of an agreement that would remove an obligation to adhere to even a minimal standard of care [*City of Santa Barbara v. Superior Court* (2007) *City of Santa Barbara v. Superior*

Court (2007) 41 C4th 747, 776-777, 62 CR3d 527, 161 P3d 1095].

Consider:

An exculpatory clause in a contract relating to sports or recreational programs may be enforceable to the extent it releases liability for ordinary negligence, if it does not involve the public interest [see 18.06 [1][c]], but still unenforceable to the extent it purports to release liability for gross negligence.

18.06[1][e] Contract May Not Exculpate Person for Fraud or Willful Injury. All contracts that intend, either directly or indirectly, to exempt a person from responsibility for that person's own fraud, willful injury to person or property, or violation of law (willful or negligent) are "against the policy of the law" [CC § 1668].

Example:

Exculpatory clauses in a standardized form used in the purchase and sale of real estate did not bar a claim for intentional misrepresentation brought by buyers against the sellers' brokers. The fact that the brokers were not parties to the agreement between the buyers and sellers does not preclude application of CC § 1668, which applies to "all contracts" the object of which is to directly or indirectly exempt "anyone" from responsibility for his or her "own fraud" [*Manderville v. PCG&S Group, Inc. (2007) 146 CA4th 1486, 1489, 1501, 55 CR3d 59*].

18.06[1][f] Some Exculpatory Provisions Are Expressly Prohibited. Some statutes specifically prohibit exculpatory clauses in specific instances. Thus, the following waivers are void:

- Consumers' waivers of their rights under the Consumer Legal Remedies Act [CC § 1751].
- Most waivers by mortgagors [CC § 2953].
- Waivers by tenants as to landlords [CC § 1953].
- Waivers by employees regarding particular rights [see, e.g., *Lab Code § 2804; UI Code § 1342; Elec Code § 14350*].
- Certain waivers of liability for injury relating to construction [CC § 2782], hauling, or trucking contracts [CC § 2784.5].

Additionally, an insurer is not liable for a loss "caused by the willful act of the insured" [*Ins Code § 533*]. The California Supreme Court held this statute precluded coverage for child sexual molestation on the ground that it is always intentional, wrongful, and harmful [*J.C. Penney Cas. Ins. Co. v. M.K. (1991) 52 C3d 1009, 1025, 278 CR 64, 804 P2d 689*]. The Court has since clarified that other conduct in the same context by an insured may be covered if the act is not clearly wilful [*Horace Mann Ins. Co. v. Barbara B. (1993) 4 C4th 1076, 1082, 17 CR2d 210, 846 P2d 792*]. A "willful act" under *Ins Code § 533* is an act deliberately done for the express purpose of causing damage or intentionally performed with knowledge that damage is highly probable [*Shell Oil Co. v. Winterthur Swiss Ins. Co. (1993) 12 CA4th 715, 742, 15 CR2d 815*].

18.06[2] Agreements Contemplating or Supporting Illegal Behavior Are Invalid.

18.06[2][a] Performance by Unlicensed Persons or Firms. A party not licensed to do business in California under the Business and Professions Code may not sue to collect on a contract to perform work in California if that work requires a license [*B&P Code §§ 143* (persons licensed under Business and Professions Code), *7031* (contractors)].

Example:

A licensed contractor who was president of an unlicensed corporation could not sue to recover

compensation for work performed on a contract. Even though the contractor's individual license number appeared on documents relating to the contract, the unlicensed corporation was the contracting party [*Opp v. St. Paul Fire & Marine Ins. Co.* (2007) 154 CA4th 71, 76, 64 CR3d 260] .

Exceptions:

- Contractors may be entitled to the benefit of the doctrine of substantial compliance if they were formerly licensed in California and meet certain other tests [B&P Code § 7031(e)], but other licensed persons may not rely on substantial compliance [B&P Code § 143(b)]. However, the substantial compliance doctrine is unavailable to a contractor who has not been duly licensed at some point before beginning performance of the contract [*Great West Contractors, Inc. v. WSS Industrial Construction, Inc.* (2008) 162 CA4th 581, 596, 76 CR3d 8 ; *Goldstein v. Barak Construction* (2008) 164 CA4th 845, 855, 79 CR3d 603 (contractor who obtained license three months after beginning performance was not entitled to compensation for post-license work); *Alatrisme v. Cesar's Exterior Designs, Inc.* (2010) 183 CA4th 656, 660, 672, 108 CR3d 277 (homeowner was entitled to reimbursement from contractor of total amount homeowner had paid for job, even though homeowner had prior knowledge of contractor's unlicensed status and contractor was licensed during portion of work); see *Oceguera v. Cohen* (2009) 172 CA4th 783, 794, 91 CR3d 443 (partnership was not in substantial compliance with the licensing requirement when the only licensed partner had executed a disassociation before the partnership entered into the contract, and the remaining partners failed to prove that they did not know or should not have known the partnership was unlicensed).].

- A contractor's license is not required for those who only furnish materials or supplies without fabricating them into, or consuming them in the performance of, the work of the contractor [B&P Code § 7052; *Banis Restaurant Design, Inc. v. Serrano* (2005) 134 Cal. App. 4th 1035, 1046, 36 CR3d 532] .

- An entity that provides construction management services to a private owner developing commercial real property is not required to have a contractor's license [*The Fifth Day, LLC v. Bolotin* (2009) 172 CA4th 939, 947, 91 CR3d 633] .

The prohibition on recovery by unlicensed persons also precludes actions in tort for damages for the price or value of the work or materials furnished [*Hydrotech Sys., Ltd. v. Oasis Waterpark* (1991) 52 C3d 988, 998-999, 277 CR 517, 803 P2d 370], and actions for quantum meruit [*Castillo v. Barrera* (2007) 146 CA4th 1317, 53 CR3d 494 (denying quantum meruit recovery to boxing manager who lacked license and written contract required by Boxing Act, B&P Code § 18600 et seq.); but see *Selten v. Hyon* (2007) 152 CA4th 463, 471-472, 60 CR3d 896 (contract authorizing litigation service provider to retain counsel and provide other litigation support services was illegal in part, because provider was not licensed as an attorney referral service under B&P Code § 6155, but provider was permitted to pursue common count for reasonable value of any lawful services rendered)].

A person who uses the services of an unlicensed contractor may recover all compensation paid to the unlicensed contractor [B&P Code § 7039(b)]. An unlicensed contractor may not reduce this recovery by asserting claims of offset arising out of the unlicensed work [*White v. Cridlebaugh* (2009) 178 CA4th 506, 522, 100 CR3d 434 ; *Alatrisme v. Cesar's Exterior Designs, Inc.* (2010) 183 CA4th 656, 672, 108 CR3d 277 (unlicensed contractor is not entitled to offset for amounts paid for materials)].

A contractor who was unlicensed at any time during contractual performance is barred from recovering compensation, even for individual acts performed while the contractor was duly licensed. However, a contractor who was fully licensed at all times during contractual performance is not barred from recovering compensation for the work solely because he or she was unlicensed when the contract was executed [*MW Erectors, Inc. v. Niederhauser Ornamental &*

Metal Works Co., Inc. (2005) 36 C4th 412, 419, 115 P3d 41].

A party is entitled to reimbursement for amounts paid to an unlicensed contractor even if the party knew the contractor was unlicensed [*Alatrisme v. Cesar's Exterior Designs, Inc. (2010) 183 CA4th 656, 668, 108 CR3d 277*].

The rule prohibiting the enforcement of contracts by unlicensed persons has been applied outside the context of persons licensed under the Business and Professions Code [see, e.g., *Yoo v. Robi (2005) 126 CA4th 1089, 1093-1094* ; *Waisbren v. Peppercorn Prods., Inc. (1995) 41 CA4th 246, 261, 48 CR2d 437* (agreement with party not licensed under Talent Agencies Act as required under *Lab Code §§ 1700-1700.47* held void); *Birbrower, Montalbano, Condon & Frank v. Superior Court (1998) 17 C4th 119, 138-139, 70 CR2d 304, 949 P2d 1* (holding enforcement of agreement with attorneys not licensed in California void without reference to *B&P Code § 143*)].

Judge's Perspective:

What makes these statutes so powerful is that they not only invalidate any contract for work performed by someone without the required license, but also bar recovery of any kind [see, e.g., *B&P Code § 7031* (such a party may not "recover in law or equity in any action, in any court of this state for the collection of compensation for the performance of any act") (emphasis added)]. This would seem to include quantum meruit claims.



Strategic Point--Defendant:

If some of the services were performed outside California, the doctrine of severability may apply [see *Birbrower, Montalbano, Condon & Frank v. Superior Court (1998) 17 C4th 119, 138-139, 70 CR2d 304, 949 P2d 1*].

18.06[2][b] Agreements Not to Disclose Illegal Behavior Are Unenforceable. Several courts have held that agreements not to disclose illegal behavior are not enforceable.

Examples:

- A nondisclosure provision in a settlement agreement between a customer and a securities broker is unenforceable because it violates the policies of disclosure for misconduct in the rules of the National Association of Securities Dealers rules [*Cariveau v. Halferty (2000) 83 CA4th 126, 135, 99 CR2d 417*].

- A school district may report a student's withdrawn complaint of rape against a teacher to the Commission on Teacher Credentialing in violation of a confidentiality provision in a settlement agreement between the district and the teacher, because the school district has a legal duty to report the reason for its disciplinary actions and the teacher's resignation to the Commission [*Picton v. Anderson Union High Sch. Dist. (1996) 50 CA4th 726, 736, 57 CR2d 829*].

18.06[3] Agreements Improperly Restraining Trade Are Invalid.

18.06[3][a] Federal Laws May Invalidate Agreements. A number of federal statutes govern restraint of trade [see, e.g., *15 USC §§ 1 et seq.* (Sherman Antitrust Act), *13 et seq.* (Clayton Act), *45(a)(1)* (Federal Trade Commission Act); *18 USC § 1961 et seq.* (the Racketeer Influenced and Corrupt Organizations Act)]. Agreements in violation of these statutes are invalid.

► Cross Reference:

Discussion of federal antitrust laws, see von Kalinowski, *Antitrust Laws and Trade Regulation* (Matthew Bender).

18.06[3][b] Agreements Preventing or Limiting Practice of Lawful Profession May Be Invalid. A contract by which a person is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void [B&P Code § 16600; *Kelton v. Stravinski* (2006) 138 CA4th 941, 946-947, 41 CR3d 877]. The statute prohibits employee noncompetition agreements unless the agreement falls within a statutory exception [*Edwards v. Arthur Andersen LLP* (2008) 44 C4th 937, 942, 81 CR3d 282, 189 P3d 285]

Exceptions:

- A person selling the goodwill of a business can make such an agreement relating to a specified geographic area encompassing the location of the business which is sold [B&P Code § 16601].

- A partner of a business, on departure from the partnership or on its dissolution, can covenant not to compete in a specified geographic area as long as a former partner is doing business there. A member of a dissolving limited liability company may enter into an agreement in similar circumstances [B&P Code §§ 16602, 16602.5].

Although B&P Code § 16601 permits nonsolicitation covenants barring the seller from soliciting the employees and customers of the sold business in the area where the sold company carried on business, a covenant barring a seller from soliciting the buyer's employees and customers is unenforceable [*Strategix, Ltd. v. Infocrossing West, Inc.* (2006) 142 CA4th 1068, 1073-1074, 48 CR3d 614 (court declined to rewrite overbroad covenant to make it enforceable)].

B&P Code § 16600 has been held to void covenants by employees not to work for companies that compete with their former employer, and thus to permit competing companies to solicit such employees [*Metro Traffic Control, Inc. v. Shadow Traffic Network* (1994) 22 CA4th 853, 859, 27 CR2d 573]. There may be issues regarding the enforceability of such contracts in California even when made under another state's law [see *Advanced Bionics Corp. v. Medtronic, Inc.* (2002) 29 C4th 697, 706-707, 128 CR2d 172, 59 P3d 231].

Examples:

- A noncompetition agreement that prohibited a certified public accountant (1) for an 18-month period, from performing professional services of the type he had provided while working for his former employer, for any client on whose account he had worked during 18 months prior to his termination, and (2) for a year after termination, from providing professional services to any client of the former employer was invalid because it restrained his ability to practice his profession [*Edwards v. Arthur Andersen LLP* (2008) 44 C4th 937, 948, 81 CR3d 282, 189 P3d 285] .

- A computer consulting contract that prohibited customers from hiring any of the consultant's employees for 12 months after the contract's termination, regardless of whether the employees worked for the customer or were even employed by the consultant at the time, was unenforceable [*VL Systems, Inc. v. Unisen, Inc.* (2007) 152 CA4th 708, 718, 61 CR3d 818] .

- A termination agreement that prevented a former employee from "raiding the former employer's

employees" was enforceable because it did not prevent employees from seeking employment with the new employer; it only restrained the former employee from contacting the employees first [*Loral Corp. v. Moyes* (1985) 174 CA3d 268, 279, 219 CR 836] .

- An injunction barring defendant investment advisors from directly or indirectly soliciting any current customers of the plaintiff securities firm for whom defendants previously worked was unenforceable [*The Retirement Group v. Galante* (2009) 176 CA4th 1226, 1238-1239, 98 CR3d 585] .

Exceptions:

- B&P Code § 16600 does not prohibit agreements for the protection of trade secrets [*Metro Traffic Control, Inc. v. Shadow Traffic Network* (1994) 22 CA4th 853, 859, 27 CR2d 573], such as, for example, a customer list [*Kolani v. Gluska* (1998) 64 CA4th 402, 408, 75 CR2d 257] .

- Outside the strict situation of a covenant not to compete, such as exclusivity contracts, B&P Code § 16600 merely mandates a balancing test [see, e.g., *Centeno v. Roseville Cmty. Hosp.* (1979) 107 CA3d 62, 71-72, 167 CR 183] .

18.06[3][c] Agreements Regarding Improper Combinations of Capital May Be Invalid Under Cartwright Act. In general, the Cartwright Act provides that combinations of capital to "carry out restrictions in trade or commerce," or fix prices are unlawful [B&P Code §§ 16702, 16720, 16726]. The Act may not reach purely interstate activity, but has been held to reach "transactions that have interstate aspects but significantly affect state interests" [*Younger v. Jensen* (1980) 26 C3d 397, 405, 161 CR 905, 605 P2d 813]. There is a great deal of case law independently evaluating the Cartwright Act, although federal case law is useful in interpreting its reach [see, e.g., *Marin County Bd. of Realtors, Inc. v. Palsson* (1976) 16 C3d 920, 925, 130 CR 1, 549 P2d 833] .

➡ Cross Reference:

Discussion of federal antitrust laws, see 18.06[3][a].

Jury Instructions:

Horizontal and Vertical Restraints Essential Elements, see *Judicial Council of California Civil Jury Instructions*, CACI No. 3405 (LexisNexis Matthew Bender).

18.06[3][d] Unfair Business Practices Are Invalid. The Unfair Practices Act generally prohibits giving away or selling articles below cost, or granting rebates or special privileges, when those actions have as their purpose or intended effect the injury of competitors or destroying competition [see generally B&P Code § 17000 et seq.]. The Unfair Competition Law prohibits "unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising" [see B&P Code § 17200; see also B&P Code § 17200 et seq.]. False and misleading advertising also is specifically prohibited by [B&P Code § 17500 et seq.].

➡ Cross Reference:

Discussion of unfair business practices, see Matthew Bender[(R)] Practice Guide: California Unfair Competition and Business Torts, Ch. 2, Unfair Competition.

Jury Instructions:

Secret Rebates Defined, see *Judicial Council of California Civil Jury Instructions*, CACI No. 3321 (LexisNexis Matthew Bender).

Secret Rebates, Essential Factual Elements, see *Judicial Council of California Civil Jury Instructions*, CACI No. 3320 (LexisNexis Matthew Bender).

18.06[4] Agreements Clearly Preventing or Harming a Marriage Are Invalid.

18.06[4][a] Agreement Directly Barring Marriage Is Likely Invalid. Contracts restraining marriage, other than of a minor, are void [CC § 1669]. This statute is interpreted not to prohibit cohabitation agreements unless they are "expressly and inseparably based upon an illicit consideration of sexual services" [see *Marvin v. Marvin* (1976) 18 C3d 660, 672, 134 CR 815, 557 P2d 106].

18.06[4][b] Agreement Promoting Dissolution or Divorce May Be Invalid. Contracts that facilitate, encourage, or promote divorce or dissolution are contrary to California's policy favoring marriage [*In re Marriage of Dawley* (1976) 17 C3d 342, 350, 131 CR 3, 551 P2d 323].

Examples:

- An agreement providing for one of the parties to receive a substantial amount of property only upon dissolution or divorce is illegal [*In re Marriage of Noghrey* (1985) 169 CA3d 326, 331, 215 CR 153].

- A contract under the law of another jurisdiction to the same effect will not be enforced [*In re Marriage of Dajani* (1988) 204 CA3d 1387, 1389-1390, 251 CR 871].

18.06[5] Agreements Tending to Obstruct Justice Are Invalid.

18.06[5][a] Agreements Tampering With Evidence or Witnesses Are Invalid. Threats or bribes in an attempt to influence a witness's testimony are felonies [Pen Code §§ 136-139]. In addition, a witness who accepts a bribe to testify or to change testimony is guilty of a felony [Pen Code § 138(b)].



Strategic Point:

Even when an agreement does not reach the level of a bribe, a party should consider challenging its validity if its effect is to prevent a witness from testifying. Thus, a foreign state's judgment entering a settlement agreement including a permanent injunction barring a witness from providing relevant testimony has been held invalid [*Smith v. Superior Court* (1996) 41 CA4th 1014, 1025-1026, 49 CR2d 20].

18.06[5][b] Agreement to Refrain From Prosecution Is a Crime. Unless otherwise excepted by law, a person with knowledge of a crime who enters into an agreement for some kind of reward in return for concealing that crime or refraining from prosecution of it is guilty of a crime [Pen Code § 153].

Exception:

A prosecutor's agreement to dismiss a charge in return for the prospective defendant's agreement not to civilly prosecute is not void as against public policy [*Hoines v. Barney's Club, Inc.* (1980) 28 C3d 603, 610, 170 CR 42, 620 P2d 628].

18.06[5][c] Agreement Unjustly Discriminating Among Joint Tortfeasors Is Invalid. If one or more, but not all, defendants enter into a "sliding scale" settlement agreement with the plaintiff whereby the plaintiff may return some of its recovery from the remaining defendant or defendants, the parties must immediately inform the court of the agreement, or the agreement is invalid [CCP § 877.5]. The governing statute requires that the court must inform the jury

of the agreement and its relevant terms if the defendant is called to testify at trial [CCP § 877.5(a)(2)]. Such agreements are not presumptively invalid [*Abbott Ford, Inc. v. Superior Court* (1987) 43 C3d 858, 870, 239 CR 626, 741 P2d 124].



Strategic Point:

Any party may seek a determination from the court as to whether such a settlement was entered into in "good faith" and may be enforced [see *Abbott Ford, Inc. v. Superior Court* (1987) 43 C3d 858, 875, 239 CR 626, 741 P2d 124 (citing CCP § 877.6)].

18.06[5][d] Agreement With Attorney Not to Settle Case Is Invalid. At least outside the class action context, a provision in a contingency agreement between a client and an attorney whereby the client agrees not to settle a case has been held void as against public policy [see *Calvert v. Stoner* (1948) 33 C2d 97, 103-104, 199 P2d 297]. Moreover, in a contingency fee case involving a potential statutory fee award, the attorney must inform the client that the fees belong to the client and can be bargained away in exchange for other settlement terms even though this may result in the attorney not being compensated [State Bar Formal Opinion No 1989-114 (citing *Evans v. Jeff D.* (1986) 475 US 717, 727-728, 106 S Ct 1531, 89 L Ed2d 747)]. However, an attorney may contract for the right to the statutory attorney's fees in advance in the retainer agreement, as long as the attorney complies with *Cal Rules Prof Conduct, Rules 3-100* and 3-300 requiring, among other things, notice and informed consent in writing [State Bar Formal Opinion No 1994-136].

18.06[6] Agreements With Public Agencies or Officers Violating Their Duties Are Void.

18.06[6][a] Agreements Generally Are Void, Not Voidable. A contract in which a public officer is interested is void, not merely voidable [*Marin Healthcare Dist. v. Sutter Health* (2002) 103 CA4th 861, 871, 127 CR2d 113 (quoting *Thomson v. Call* (1985) 38 C3d 633, 646 n15, 214 CR 139, 699 P2d 316)]. Moreover, at least with regard to contracts violating the conflict of interest provisions set forth in *Gov Code § 1090 et seq.*, the government agency is entitled to recover any sums expended while retaining any benefits bestowed as a result of contract performance [*Thomson v. Call* (1985) 38 C3d 633, 647, 214 CR 139, 699 P2d 316 ; *Carson Redevelopment Agency v. Padilla* (2006) 140 CA4th 1323, 1329, 44 CR3d 881]. Although such a harsh remedy may not be available with regard to all contracts voided for lack of authority by the public agency, it is clear that such contracts are "unenforceable" [*Midway Orchards v. County of Butte* (1990) 220 CA3d 765, 783, 269 CR 796].

18.06[6][b] Agreements May Be Invalid for Lack of Proper Authorization. A city or county cannot enter into a contract beyond its delegated powers to do so, and any resulting contract is void [*G.L. Mezzetta, Inc. v. City of American Canyon* (2000) 78 CA4th 1087, 1093-1094, 93 CR2d 292].

Examples:

- An oral contract entered into by a city employee who lacked authority under the city's charter to execute oral contracts was void [*Katsura v. City of San Buenaventura* (2007) 155 CA4th 104, 109, 65 CR3d 762].
- An agreement with a "general law" city, not signed by the mayor as required by *Gov Code § 40602*, is invalid [see, e.g., *Authority for California Cities Excess Liability v. City of Los Altos* (2006) 136 CA4th 1207, 1212, 39 CR3d 571].
- An agreement entered into in violation of competitive bidding statutes is not valid [see, e.g., *Miller*

v. McKinnon (1942) 20 C2d 83, 87, 124 P2d 34].

- A development agreement in violation of a county's general plan is void [*Midway Orchards v. County of Butte* (1990) 220 CA3d 765, 773, 269 CR 796].

Similarly, a state agency may not contract in excess of its statutory powers [*California League of Senior Citizens, Inc. v. Brian* (1973) 35 CA3d 443, 456, 110 CR 809].

Examples:

- A state agency cannot contract to limit its powers [*Air Quality Prods., Inc. v. State of California* (1979) 96 CA3d 340, 349-350, 157 CR 791].

- All contracts entered into by state agencies must be authorized by statute [*California League of Senior Citizens, Inc. v. Brian* (1973) 35 CA3d 443, 456, 110 CR 809].

18.06[6][c] Agreements Calling for Excessive Public Indebtedness Are Void. The California Constitution bars agreements calling for excessive indebtedness by counties, municipalities, school districts, or the State Legislature when those agreements are not approved by the voters. [Cal Const, art XVI, §§ 1, 18(a)].



Strategic Point--Plaintiff:

A party that has contracted with a public entity in excess of its debt limitation nevertheless should consider suing on the agreement, because the constitutional provisions only limit its right to payment as relief [*Barkley v. City of Blue Lake* (1996) 47 CA4th 309, 314, 54 CR2d 679].

18.06[6][d] Agreements Leading to Conflict of Interest Are Void. Members of the legislature and state, county, district, judicial district, and city officers or employees are not permitted to be financially interested in any contract made by them in their official capacity, or by any body or board of which they are members [Gov Code § 1090]. "Financial interest" can be either a direct interest [*Thomson v. Call* (1985) 38 C3d 633, 645, 214 CR 139, 699 P2d 316] or an indirect interest [*People v. Honig* (1996) 48 CA4th 289, 314, 55 CR2d 555].

Exceptions:

If an official has a "remote" interest, as defined by [Gov Code § 1091], the agency may enter into the contract as long as the official abstains from participating in the decision in any way. Certain putative interests also are classified as "non-interests" and are excluded altogether [see Gov Code § 1091.5; *Lexin v. Superior Court* (2010) 47 C4th 1050, 103 CR3d 767, 222 P3d 214 (Gov Code § 1091.5(a)(3) excludes retirement board trustees' approval of contracts in which their only financial interest is an interest in benefits shared generally with their constituency at large)].



Warning:

Contracts subject to Gov Code § 1090 are void, not voidable, and the public agency may retain the benefit of an interested party's performance without providing anything in return [*Marin Healthcare Dist. v. Sutter Health* (2002) 103 CA4th 861, 871, 127 CR2d 113 (quoting *Thomson v. Call* (1985) 38 C3d 633, 646 n15, 647, 214 CR 139, 699 P2d 316); see also *County of San Bernardino v. Walsh* (2007) 158 CA4th 533, 549-552, 69 CR3d 848 (defendants in bribery scheme were required to disgorge to the county profits they realized from selling contract they received through bribing county official)].

► **Cross Reference:**

Discussion of agreements that are void, not voidable, see 18.06[6][a].

18.06[7] Agreements Calling for Usurious Rate of Interest Are Voidable. *Cal Const, art XV, § 1* limits rates at which loans are permitted in different situations. Exceptions apply to real estate brokers, building and loan associations, banks, other types of institutional creditors, and parties specifically exempted from the provision by the Legislature [*Cal Const, art XV, § 1*].

► **Cross References:**

Discussion of interest not usurious under *Cal Const, art XV* that may nevertheless be unconscionable, see 18.15[5][a].

Discussion of usury, see *California Forms of Pleading and Practice, Ch. 568, Usury* (Matthew Bender).

Jury Instructions:

Usury Defined, see *California Forms of Jury Instruction, Ch. 3F, Instr. MB 300F.92* (Matthew Bender).

18.06[8] Agreements Providing for Excessive Penalties or Limitations on Damages May Be Invalid. A provision in a contract for liquidated damages is valid unless the party opposing it establishes that the provision was unreasonable at the time it was made [*CC § 1671*]. This general rule does not apply in situations when special statutes govern [*CC § 1671(a)*], such as consumer contracts, or leases of residential property [*CC § 1671(c)*].

With regard to consumer contracts or leases of residential property, the party relying upon the provision must show that it would be impracticable or extremely difficult to show the actual damage [*CC § 1671(d)*; see *Orozco v. Casimiro* (2004) 121 CA4th Supp 7, 12]. *CC § 1671(d)* has been held applicable to credit card and bank contracts with customers [*Beasley v. Wells Fargo Bank* (1991) 235 CA3d 1383, 1390, 1 CR2d 446].

► **Cross Reference:**

Discussion of liquidated damages, see Ch. 7, Seeking or Opposing Damages in Contract Actions.

18.06[9] Agreements Providing for Pre-Dispute Waiver of Jury Trial Are Invalid. A pre-dispute agreement that any lawsuit between two parties will be adjudicated in a court trial, and not by jury trial, is unenforceable because it violates *CC § 631*, which specifies the only six means by which parties to a civil lawsuit may waive their right to have their disputes adjudicated in a jury trial rather than in a court trial [*Grafton Partners L.P. v. Superior Court* (2005) 36 C4th 944, 961, 967].

Legal Topics:

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

Contracts LawContract Conditions & ProvisionsExculpatory ClausesContracts LawContract InterpretationFiduciary ResponsibilitiesContracts LawDefensesIllegal BargainsGovernmentsLegislationStatutory Remedies & Rights



110 of 193 DOCUMENTS

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Chapter 18 Asserting or Defending Claim That Contract Is Illegal, Contrary to Public Policy, or Unconscionable
III. ASSERTING OR DEFENDING CLAIM THAT CONTRACT OR CONTRACT PROVISION VIOLATES
PUBLIC POLICY

2-18 MB Practice Guide: CA Contract Litigation 18.07

AUTHOR: Hannah Bentley

18.07 CHECKLIST: Asserting or Defending Invalidity of Contract or Contract Provision Violates Public Policy.

☐ Is challenge based on illegality of whole contract or of a provision in contract?

Discussion:

See 18.08

☐ If contract or provision in question is not illegal, assess whether challenging party can carry burden of showing it is "entirely plain" that contract is contrary to public policy, based on:

- ☐ Nature of conduct involved;
- ☐ Extent of public harm involved; or
- ☐ Moral quality of parties' conduct in light of prevailing community standards.

Authority:

Dunkin v. Boskey (2000) 82 CA4th 171, 183, 98 CR2d 44

Discussion:

See 18.10

☐ Should entire contract be treated as void?

Authority:

Kelly v. First Astri Corp. (1999) 72 CA4th 462, 488-489, 84 CR2d 810

Discussion:

See 18.11

☐ Is provision in question severable?

Authority:

Whorton v. Dillingham (1988) 202 CA3d 447, 454, 248 CR 405

Discussion:

See 18.12

Legal Topics:

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

Contracts LawContract Conditions & ProvisionsSeverability ClausesContracts LawContract InterpretationSeverabilityContracts LawDefensesPublic Policy Violations



111 of 193 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 18 Asserting or Defending Claim That Contract Is Illegal, Contrary to Public Policy, or Unconscionable
 III. ASSERTING OR DEFENDING CLAIM THAT CONTRACT OR CONTRACT PROVISION VIOLATES
 PUBLIC POLICY

*2-18 MB Practice Guide: CA Contract Litigation 18.08***AUTHOR:** Hannah Bentley**18.08 Options and Strategies.**

Courts are reluctant to invalidate contracts on public policy grounds because of the difficulty in the standard imposed and the lack of case law in this area [see 18.09]. If possible, therefore, a party trying to invalidate a contract should seek to show that a contract is illegal rather than contrary to public policy. Conversely, a party seeking to uphold a contract will want to argue that the more stringent public policy standard applies.

**Strategic Point:**

Proving that a contract or term is contrary to public policy may be less difficult than showing that it is unconscionable, because the party does not have to demonstrate that it is procedurally unconscionable. To state a public policy challenge, counsel must show that the conduct at issue violated wider social norms that the court should not condone.

**Cross References:**

Elements of claim of invalidity on public policy grounds, see 18.09.

Discussion of elements of claim of illegality, see 18.05.

Discussion of standards for showing public policy violation, see 18.09, 18.10.

Standards for unconscionability and public policy contrasted, see 18.10.

Legal Topics:

For related research and practice materials, see the following legal topics:
 Contracts Law Defenses Public Policy Violations



112 of 193 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 18 Asserting or Defending Claim That Contract Is Illegal, Contrary to Public Policy, or Unconscionable
 III. ASSERTING OR DEFENDING CLAIM THAT CONTRACT OR CONTRACT PROVISION VIOLATES
 PUBLIC POLICY

2-18 MB Practice Guide: CA Contract Litigation 18.09

AUTHOR: Hannah Bentley

18.09 Elements of Claim for Invalidity on Public Policy Grounds.

A court may decline to enforce a contract on policy grounds expressed or implied in a statute or the rules of a voluntary regulatory entity [*Cariveau v. Halferty* (2000) 83 CA4th 126, 132, 99 CR2d 417]. Because it is a social imperative to encourage contracts among competent parties, a court will not find a contract invalid unless it is "entirely plain" that the contract is contrary to sound public policy [*Bovard v. American Horse Enters., Inc.* (1988) 201 CA3d 832, 839, 247 CR 340 ; see *Sanchez v. County of San Bernardino* (2009) 176 CA4th 516, 527, 98 CR3d 96 (county's agreement not to disclose facts giving rise to employee's severance agreement did not violate public policy); *Myerchin v. Family Benefits, Inc.* (2008) 162 CA4th 1526, 1538-1539, 76 CR3d 816 (rejecting claim that enforcing settlement agreement violated public policy because opposing counsel continued negotiating it with plaintiff directly even after becoming aware plaintiff had retained counsel)]. The burden is on the party seeking to avoid the contract to show that it violates public policy in this manner [*Bovard v. American Horse Enters., Inc.* (1988) 201 CA3d 832, 839, 247 CR 340].

A court will consider these factors in deciding whether a contract violates public policy [*Dunkin v. Boskey* (2000) 82 CA4th 171, 183, 98 CR2d 44]:

- The nature of the conduct.
- The extent of public harm that may be involved.
- The moral quality of the conduct of the parties in light of the prevailing standards in the community.

Jury Instructions:

Violation of Public Policy, see *California Forms of Jury Instruction, Ch. 24A, Instr. MB 2400A.11* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawDefensesPublic Policy Violations



113 of 193 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 18 Asserting or Defending Claim That Contract Is Illegal, Contrary to Public Policy, or Unconscionable
 III. ASSERTING OR DEFENDING CLAIM THAT CONTRACT OR CONTRACT PROVISION VIOLATES
 PUBLIC POLICY

2-18 MB Practice Guide: CA Contract Litigation 18.10

AUTHOR: Hannah Bentley

18.10 Contracts Contrary to Public Policy Harm Moral or Social Imperative in Society.

Although not strictly illegal, contracts contrary to public policy are not enforced, because courts do not wish to condone such conduct [see, e.g., *Scolinos v. Kolts* (1995) 37 CA4th 635, 640, 44 CR2d 31]. Courts often describe contracts as contrary to public policy when they contain exculpatory provisions that violate some or all of the factors listed in *Tunkl v. Regents of Univ. of Cal.* (1963) 60 C2d 92, 99, 32 CR 33, 383 P2d 441 [see 18.06[1][b]].

Examples:

- Contracts contemplating or supporting illegal conduct are void, even if the contracts themselves are not illegal [*Bovard v. American Horse Enters., Inc.* (1988) 201 CA3d 832, 841, 247 CR 340 (agreement for sale of company that primarily manufactured drug paraphernalia was not itself illegal, but would not be enforced because company's purpose was to support illegal behavior)].
- An agreement providing spousal support to an abusive spouse violated the public policy embodied in *Fam C* § 4325, which provides a rebuttable presumption against awarding spousal support to a spouse convicted of domestic violence against the other spouse [*In re Marriage of Cauley* (2006) 138 CA4th 1100, 1106, 41 CR3d 902].
- An agreement to forego familial rights such as child support is void [*In re Marriage of Ayo* (1987) 190 CA3d 442, 451-452, 235 CR 458], as is an agreement by one spouse to pay the other spouse for nursing services that should be rendered in the usual course of a marriage [*Borelli v. Brusseau* (1993) 12 CA4th 647, 652-653, 16 CR2d 16].

Judge's Perspective:

Contracts involving family matters also usually implicate family law, which is a specialized area requiring particular expertise. Thus, for example, the provisions of an agreement between parents for child support are automatically severable from any provisions involving property or support [*Fam Code* § 3585]. Moreover, the state has a

guideline for determining child support based on the incomes of the parents, the amount of time the child spends with each parent, and other factors [*Fam Code § 4055*]. The parents may agree to set child support in a different amount, but only after declaring that certain facts are true [*Fam Code § 4065*]. Even then, an agreement for support less than guideline amount may be modified at any time with or without a change in circumstances [*Fam Code § 4065*]. The policy behind these statutes is that such contracts implicate the rights of children, whose right to support trumps the right of adults to freely contract.

- An agreement obtained based on a threat of criminal prosecution is contrary to public policy and will not be enforced [*Bayscene Resident Negotiators v. Bayscene Mobilehome Park* (1993) 15 CA4th 119, 127, 18 CR2d 626].
- Contracts to enforce debts incurred for the purpose of gambling are void [*Metropolitan Creditors Serv. v. Sadri* (1993) 15 CA4th 1821, 1828, 19 CR2d 646], although a court will enforce a foreign judgment on such a cause of action [*Crockford's Club, Ltd. v. Si-Ahmed* (1988) 203 CA3d 1402, 1406, 250 CR 728].
- Heir hunting contracts authorizing the heir hunter to select and pay for an attorney and control the litigation are void as against public policy [*Estate of Molino* (2008) 165 CA4th 913, 923, 81 CR3d 512].
- A contract that purports to allow a deduction from a person's wages for the cost of emigrating and transporting that person to the United States is void as against public policy [CC § 1670.7].

Strategic Point:



A party need not rely solely on a public policy rationale if the gambling contract is illegal where it is made [see *Kelly v. First Astri Corp.* (1999) 72 CA4th 462, 495-496, 84 CR2d 810].

Distinguish--Unconscionability Versus Public Policy:

A contract violative of public policy differs from one that is unconscionable in that unconscionable contracts are invalid due to the disproportionate burden they place on a particular party, rather than larger social concerns. Thus, a party seeking to prove that a contract is unconscionable must demonstrate that the contract or term was unfair to that party in particular. For example, the party could demonstrate surprise at a particular contract provision [see *McCarn v. Pacific Bell Directory* (1992) 3 CA4th 173, 183, 4 CR2d 109]. In contrast, contracts contrary to public policy violate wider social norms.



Cross Reference:

Discussion of unconscionability, see 18.13 -18.19.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawDefensesPublic Policy Violations



114 of 193 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 18 Asserting or Defending Claim That Contract Is Illegal, Contrary to Public Policy, or Unconscionable
 III. ASSERTING OR DEFENDING CLAIM THAT CONTRACT OR CONTRACT PROVISION VIOLATES
 PUBLIC POLICY

2-18 MB Practice Guide: CA Contract Litigation 18.11

AUTHOR: Hannah Bentley

18.11 Contracts Violating Public Policy Generally Are Void, Not Voidable.

A successful claim that a contract or contract term violates public policy usually will mean that the contract is void, and the court will not enforce it [*Armendariz v. Foundation Health Psychcare Servs., Inc.* (2000) 24 C4th 83, 99, 99 CR2d 745, 6 P3d 669]. Such contracts are almost always void, so that a court is unlikely to uphold them for the benefit of either party [see, e.g., *Kelly v. First Astri Corp.* (1999) 72 CA4th 462, 465, 84 CR2d 810].



Strategic Point:

If only certain remedies would violate public policy, a party seeking to enforce a contract should argue for the imposition of other remedies that do not present this problem.

Example:

A male former domestic partner who contracted with a female domestic partner to bear and raise a child could not sue for specific performance or for emotional distress related to her noncompliance with the contract, but could sue to recover the money spent on their agreement to raise the child [*Dunkin v. Boskey* (2000) 82 CA4th 171, 197, 98 CR2d 44].

Legal Topics:

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 Contracts LawDefensesPublic Policy Violations



115 of 193 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 18 Asserting or Defending Claim That Contract Is Illegal, Contrary to Public Policy, or Unconscionable
III. ASSERTING OR DEFENDING CLAIM THAT CONTRACT OR CONTRACT PROVISION VIOLATES
PUBLIC POLICY

2-18 MB Practice Guide: CA Contract Litigation 18.12

AUTHOR: Hannah Bentley

18.12 Contract Provision Contrary to Public Policy May Be Severable.

A contract that is contrary to public policy may be enforced if the offending term is severable [*Whorton v. Dillingham* (1988) 202 CA3d 447, 454, 248 CR 405].



Cross Reference:

Discussion of severability, see 18.22.

Legal Topics:

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

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116 of 193 DOCUMENTS

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Chapter 18 Asserting or Defending Claim That Contract Is Illegal, Contrary to Public Policy, or Unconscionable
IV. ASSERTING OR DEFENDING CLAIM THAT CONTRACT OR PROVISION IS UNCONSCIONABLE

2-18 MB Practice Guide: CA Contract Litigation 18.13

AUTHOR: Hannah Bentley

18.13 CHECKLIST: Asserting or Defending Claim That Contract or Provision Is Unconscionable.

☐ Assess whether contract was unconscionable when made, both:

- ☐ Procedurally unconscionable; and
- ☐ Substantively unconscionable.

Authority:

Coast Plaza Doctors Hosp. v. Blue Cross of Cal. (2000) 83 CA4th 677, 688-689, 99 CR2d 809 ; Armendariz v. Foundation Health Psychcare Servs., Inc. (2000) 24 C4th 83, 114, 99 CR2d 745, 6 P3d 669

Discussion:

See 18.15[1], [3]

☐ Determine procedural unconscionability by showing:

- ☐ Contract or term in question was one of adhesion;
- ☐ Contract or term involved surprise or oppression; or
- ☐ Procedural unconscionability should be inferred from one-sided substantive terms.

Authority:

Armendariz v. Foundation Health Psychcare Servs., Inc. (2000) 24 C4th 83, 113, 99

CR2d 745, 6 P3d 669 ; Donovan v. RRL Corp. (2001) 26 C4th 261, 291, 109 CR2d 807, 27 P3d 702

Discussion:

See 18.15[4]

☐ In case of arbitration agreement, determine if contract is unenforceable or subject to procedural safeguards.

☐ As party seeking to uphold agreement, determine if any state provision imposing requirements is preempted by Federal Arbitration Act.

Authority:

Mitchell v. American Fair Credit Assn. (2002) 99 CA4th 1345, 1355, 122 CR2d 193 ; Doctor's Assocs., Inc. v. Casarotto (1996) 517 US 681, 687, 116 S Ct 1652, 134 L Ed2d 902

Discussion:

See 18.16[2]

☐ As party seeking to challenge agreement, assess whether agreement is entirely invalid for imposing arbitration only on one party's claims.

Authority:

Armendariz v. Foundation Health Psychcare Servs., Inc. (2000) 24 C4th 83, 117-118, 99 CR2d 745, 6 P3d 669

Discussion:

See 18.16[4][a]

☐ If agreement is generally enforceable, assess whether claims for injunctive relief on behalf of general public are triable to a court and should be severed.

☐ As party opposing injunctive relief, argue that court action should be stayed pending outcome of arbitration on other claims.

Authority:

Cruz v. PacifiCare Health Sys., Inc. (2003) 30 C4th 303, 320, 133 CR2d 58, 66 P3d 1157

Discussion:

See 18.16[4][f]

☐ If agreement is generally enforceable, assess whether procedural protections should be required for enforcement of state public or statutory rights.

Authority:

Little v. Auto Stiegler, Inc. (2003) 29 C4th 1064, 1076, 130 CR2d 892, 63 P3d 979

Discussion:

See 18.16[3]

- ☐ Assuming procedural guarantees are available, assess whether they have been adequately provided in arbitral forum.

Authority:

Little v. Auto Stiegler, Inc. (2003) 29 C4th 1064, 1080-1081, 130 CR2d 892, 63 P3d 979

Discussion:

See 18.16[4][b], [c]

- ☐ Assess whether provision for arbitral appeal or trial de novo is invalid as one-sided.

Authority:

Little v. Auto Stiegler, Inc. (2003) 29 C4th 1064, 1071-1074, 130 CR2d 892, 63 P3d 979

Discussion:

See 18.16[4][c]

- ☐ Assess whether provision for non-neutral arbitrator is invalid.

Authority:

Graham v. Scissor-Tail, Inc. (1981) 28 C3d 807, 821, 825-827

Discussion:

18.16[4][d]

- ☐ Assess whether provision limiting discovery is invalid.

Authority:

Armendariz v. Foundation Health Psychcare Servs., Inc. (2000) 24 C4th 83, 105-106 ; Little v. Auto Stiegler, Inc. (2003) 29 C4th 1064, 1081]

Discussion:

18.16[4][e]

- ☐ Assess whether limitations on the amount or type of damages recoverable are invalid.

Authority:

Suh v. Superior Court (2010) 181 CA4th 1504, 1515, 105 CR3d 585

Discussion:

18.16[4][g]

- ☐ Assess whether any shortened statute of limitations is invalid.

Authority:

Martinez v. Master Prot. Corp. (2004) 118 CA4th 107, 117, 12 CR3d 663

Discussion:

See 18.16[4][h]

- ☐ Assess whether provision prohibiting the maintenance of a class action is invalid.

Authority:

Discover Bank v. Superior Court (2005) 36 C4th 148, 162-163

Discussion:

18.18

- ☐ Determine whether unconscionable provision is severable from remainder of agreement.

Authority:

CC § 1670.5(a); *Armendariz v. Foundation Health Psychcare Servs.* (2000) 24 C4th 83, 122, 124, 99 CR2d 745, 6 P3d 669 ; *Little v. Auto Stiegler, Inc.* (2003) 29 C4th 1064, 1074-1075, 130 CR2d 892, 63 P3d 979

Discussion:

See 18.19

Legal Topics:

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

Contracts LawDefensesUnconscionabilityGeneral OverviewContracts LawDefensesUnconscionabilityAdhesion
ContractsContracts LawDefensesUnconscionabilityArbitration Agreements



117 of 193 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 18 Asserting or Defending Claim That Contract Is Illegal, Contrary to Public Policy, or Unconscionable
IV. ASSERTING OR DEFENDING CLAIM THAT CONTRACT OR PROVISION IS UNCONSCIONABLE

2-18 MB Practice Guide: CA Contract Litigation 18.14

AUTHOR: Hannah Bentley

18.14 Options and Strategies.

To prevail on an argument that a contract is unconscionable, a party must demonstrate that the contract was unconscionable when made [see 18.15[1]], and must show that it is both procedurally and substantively unconscionable [see 18.15[3]]. A party challenging such an agreement will want to focus on substantive unconscionability rather than procedural unconscionability, since courts will sometimes infer procedural unfairness from a substantively unconscionable term, but the reverse is not true [*Donovan v. RRL Corp.* (2001) 26 C4th 261, 292, 109 CR2d 807, 27 P3d 702 ; see 18.15[4][c], 18.15[5][c]].

Courts have enunciated different standards for when an agreement is substantively unconscionable [see 18.15[5]]. A party seeking to uphold an agreement will wish to point to cases concluding that a contract must shock the conscience. A party challenging an agreement will want to point to California Supreme Court precedent suggesting that a lesser standard applies [see 18.15[5][b]].

Many cases on unconscionability deal with arbitration agreements [see 18.16]. The law in the area is not fully settled and is evolving rapidly. Discussion in this chapter is limited to the leading California Supreme Court cases, and counsel handling such a case should conduct additional research. Counsel should also seek to exploit differences between state and federal precedent in this area and should consider the most recent case law in choosing a forum to litigate issues relating to the enforcement of an arbitration agreement.

A party asserting that a contract is unconscionable also may be able to assert that it is contrary to public policy, because the elements of proof are related, and because it may be possible to obtain a more sweeping remedy under one doctrine than under the other [see 18.10].

Legal Topics:

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

Contracts LawDefensesUnconscionabilityGeneral OverviewContracts LawDefensesUnconscionabilityAdhesion
ContractsContracts LawDefensesUnconscionabilityArbitration Agreements



118 of 193 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 18 Asserting or Defending Claim That Contract Is Illegal, Contrary to Public Policy, or Unconscionable
IV. ASSERTING OR DEFENDING CLAIM THAT CONTRACT OR PROVISION IS UNCONSCIONABLE

2-18 MB Practice Guide: CA Contract Litigation 18.15

AUTHOR: Hannah Bentley

18.15 Elements of Claim of Unconscionability.

18.15[1] Unconscionability Is Determined As of Time Contract Is Made. A contract or term must have been unconscionable at the time it was made [CC § 1670.5(a)]. Thus, subsequent evidence of unconscionability is not considered [*Coast Plaza Doctors Hosp. v. Blue Cross of Cal. (2000) 83 CA4th 677, 688-689, 99 CR2d 809*].

18.15[2] Unconscionability Is Question of Law. Like illegality and public policy claims, the issue of unconscionability is a question of law [*Flores v. Transamerica HomeFirst, Inc. (2001) 93 CA4th 846, 851, 113 CR2d 376*].

18.15[3] Both Procedural and Substantive Unconscionability Must Exist. An unconscionable contract or term ordinarily will involve both a procedural and substantive element [*Armendariz v. Foundation Health Psychcare Servs., Inc. (2000) 24 C4th 83, 114, 99 CR2d 745, 6 P3d 669* ; see *Brown v. Wells Fargo Bank, N.A. (2008) 168 CA4th 938, 955, 85 CR3d 817* (both procedural and substantive unconscionability must be present for a contract to be found unconscionable)]. Procedural unconscionability is established by oppression or surprise due to unequal bargaining power; substantive unconscionability is demonstrated by overly harsh or one-sided results [*Donovan v. RRL Corp. (2001) 26 C4th 261, 291, 109 CR2d 807, 27 P3d 702*]. However, the two types exist on a sliding scale, so that if a contract's negotiation shows little surprise or inappropriate disparity of bargaining power, it may still be inappropriate if it creates overly harsh results [*Donovan v. RRL Corp. (2001) 26 C4th 261, 292, 109 CR2d 807, 27 P3d 702* ; *Nagrampa v. MailCoups, Inc. (9th Cir 2006) 469 F3d 1257, 1293* (although evidence of procedural unconscionability was slight, evidence of substantive unconscionability was strong enough to tip scale and render arbitration provision unconscionable)].

18.15[4] Procedural Unconscionability Is Established by Showing Contract of Adhesion, Use of Surprise, or Unequal Bargaining Power.

18.15[4][a] Adhesion Contract Usually Has At Least a Minimum Degree of Procedural Unconscionability. An adhesion contract is a form contract in which one party cannot negotiate terms. A party opposing a contract or term may demonstrate that it was procedurally unconscionable by showing that it was a contract of adhesion [*Little v. Auto Stiegler, Inc. (2003) 29 C4th 1064, 1071, 130 CR2d 892, 63 P3d 979*].

A contract of adhesion typically is drafted by the party having superior bargaining strength and relegates to the subscribing party only the opportunity to adhere to the contract or reject it [*Armendariz v. Foundation Health Psychcare Servs., Inc.* (2000) 24 C4th 83, 113, 99 CR2d 745, 6 P3d 669].

Absent unusual circumstances, use of a contract of adhesion establishes a minimal degree of procedural unconscionability notwithstanding the availability of market alternatives [*Gatton v. T-Mobile USA, Inc.* (2007) 152 CA4th 571, 585, 61 CR3d 344] .



Strategic Point:

While the adhesive nature of a contract can be sufficient to establish a minimal degree of procedural unconscionability, under the sliding scale approach plaintiffs must make a strong showing of substantive unconscionability to render the provision unenforceable. Thus, if the challenged provision does not have a high degree of substantive unconscionability, it still will be enforced [*Gatton v. T-Mobile USA, Inc.* (2007) 152 CA4th 571, 585-586, 61 CR3d 344 (arbitration provision in cellular phone service contract)].

Examples--Adhesion Contract:

- A work authorization contract presented by contractor like an invoice at the end of each day's work, which contained small printing on the reverse side including an exculpatory clause and other provisions, was a contract of adhesion [*Marin Storage & Trucking, Inc. v. Benco Contracting & Eng'g, Inc.* (2001) 89 CA4th 1042, 1053-1054, 107 CR2d 645].

- A booking agency's contract with a concert promoter that required union pay and work provisions generally used throughout the industry was adhesive despite the promoter's significant bargaining strength because he was forced to accept the primary terms offered or not agree to the contract at all [*Graham v. Scissor-Tail, Inc.* (1981) 28 C3d 807, 818-819, 171 CR 604, 623 P2d 165].

- An agreement for Digital Subscriber Line (DSL) service that was presented to the customer on a "take it or leave it" basis, either through installation of software or through materials included in a package mailed with the software, with no opportunity to opt out, demonstrated quintessential procedural unconscionability [*Aral v. Earthlink, Inc.* (2005) 134 CA4th 544, 557, 36 CR3d 229] .

- An arbitration agreement covering all current and future employees of a large law firm was procedurally unconscionable because it was "take it or leave it." Although the agreement's terms took effect three months after they were announced, an employee's only option was to leave and work somewhere else [*Davis v. O'Melveny & Myers* (9th Cir 2007) 485 F3d 1066, 1073-1075] .

- An arbitration agreement signed by an employee was procedurally unconscionable notwithstanding that employee had 30 days to opt out; employee would not likely have felt free to opt out, and the explanation of the benefits of arbitration was markedly one-sided, failing to mention any of the additional significant disadvantages of this particular arbitration agreement compared to litigation [*Gentry v. Superior Court* (2007) 42 C4th 443, 470-472, 64 CR3d 773, 165 P3d 556] .

- A home warranty agreement containing arbitration provisions was a contract of adhesion. The arbitration provisions took up one page in a 30-page booklet that was in single-spaced, 10-point type, and

the booklet was buried in a voluminous stack of purchase and sale documents. In addition, the home buyers were never asked to sign or initial the booklet, much less the arbitration provisions [*Bruni v. Didion* (2008) 160 CA4th 1272, 1293, 73 CR3d 395] .

- An arbitration agreement contained in a "Title 7 Master Declaration" given to homebuyers was part of a contract adhesion. It was contained in a preprinted form contract signed solely by the builders and brokers more than two years before any plaintiff closed escrow on a home, and plaintiffs had to accept the arbitration provisions if they wanted to buy a house [*Thompson v. Toll Dublin, LLC* (2008) 165 CA4th 1360, 1372, 81 CR3d 736] .

Example--No Adhesion Contract:

Home buyers did not meet their burden of showing that a purchase contract was an adhesion contract when they offered no evidence that they attempted to negotiate the provision and were rebuffed, no evidence the provision was included in every purchase agreement within the development or that the home builder denied any buyer's request to strike the provision, and no evidence that they lacked the education, experience, or sophistication necessary to understand the contracts. In addition, the home buyers did not state that they had insufficient time to read the provision, were pressured to sign it without reading it carefully, or were not afforded the opportunity to consult with anyone else, such as an attorney, before signing the agreement [*Trend Homes, Inc. v. Superior Court* (2005) 131 CA4th 950, 958-959, 32 CR3d 411] .

18.15[4][b] Surprise or Oppression Also May Cause Procedural Unconscionability. Although proof of procedural unconscionability generally takes the form of a contract of adhesion [*Little v. Auto Stiegler, Inc.* (2003) 29 C4th 1064, 1071, 130 CR2d 892, 63 P3d 979], a contract can be procedurally unconscionable without being a contract of adhesion [*Harper v. Ultimo* (2003) 113 CA4th 1402, 1409, 7 CR3d 418]. A contract is procedurally unconscionable if it contains elements of surprise (in which supposedly agreed terms are hidden in a contract's other terms) or oppression (in which an inequality of bargaining power results in an absence of meaningful choice) for the weaker party [*Stirlen v. Supercuts, Inc.* (1997) 51 CA4th 1519, 1532, 60 CR2d 138 ; *Morris v. Redwood Empire Bancorp* (2005) 128 CA4th 1305, 1319-1322, 27 CR3d 797].

Examples--Surprise:

- Arbitration provision that appeared in one of 12 numbered paragraphs in a section entitled "MISCELLANEOUS" near the end of a lengthy, single-spaced document was procedurally unconscionable. In contrast to several other paragraphs, no text in the arbitration provision was printed in bold letters or larger font or capitalized. Although plaintiffs were required to place their initials in boxes adjacent to six other paragraphs, no box appeared next to the arbitration provision [*Higgins v. Superior Court* (2006) 140 CA4th 1238, 1252-1253, 45 CR3d 293] .

- In action brought by homeowner against builder, an arbitration provision was procedurally unconscionable because it was not included in the terms of any contract between the homeowners and the builder, but was instead included in a document that purported to be an application by the builder to obtain a warranty from a third party, and the terms of the arbitration agreement were contained in additional documents that were not presented to the homeowners when they signed the builder application [*Baker v. Osborne Development Corp.* (2008) 159 CA4th 884, 894-895, 71 CR3d 854] .

- An arbitration agreement included in approximately 800 pages of documents given to homebuyers, which together comprised the purchase agreement, was procedurally unconscionable [*Thompson v. Toll Dublin, LLC* (2008) 165 CA4th 1360, 1372-1373, 81 CR3d 736] .

- An employee arbitration agreement was procedurally unconscionable because (1) the inequality in bargaining power between the low-wage employees and their employer made it likely that the employees felt at least some pressure to sign the arbitration agreement, and (2) the arbitration agreement falsely suggested that there were multiple arbitrators to choose from when in fact the designated arbitration provider included only one arbitrator, rendering the arbitrator selection process illusory and creating a significant risk that the employer as a "repeat player" before the same arbitrator would reap a significant advantage [*Sanchez v. Western Pizza Enterprises, Inc.* (2009) 172 CA4th 154, 174-175, 90 CR3d 818] .

- Although arbitration provision in precious metal dealer's account agreement was not beyond a customer's reasonable expectation, a customer would not reasonably expect any dispute arising under the account agreement to be arbitrated before a panel of *three* private arbitrators, the fees for whom were not expressly set forth in the agreement [*Parada v. Superior Court* (2009) 176 CA4th 1554, 1571, 98 CR3d 743] .

- Arbitration provision in employment agreement was procedurally unconscionable because a description of the new dispute resolution policy in explanatory materials given to employees in English and Spanish misleadingly described the policy as requiring mediation rather than arbitration, and the policy itself appeared in much smaller type than the explanatory materials, and in English only [*Olvera v. El Pollo Loco, Inc.* (2009) 173 CA4th 447, 455-456, 93 CR3d 65] .

- Arbitration clause was procedurally unconscionable because it was contained on page 13 of an agreement in the same typeface as the balance of the agreement, and employees were required to sign a printed form "Waiver and Agreement" binding them to the agreement without having the opportunity to see it [*Suh v. Superior Court* (2010) 181 CA4th 1504, 1516, 105 CR3d 585] .

Examples--No Surprise:

- Judicial reference provision in a home purchase contract contained no element of surprise when the provision was clearly written, entirely capitalized and initialed by the buyer and seller. Nor was the provision so complicated or subtle for the ordinary person to understand that it required the home builder to explain the provision [*Trend Homes, Inc. v. Superior Court* (2005) 131 CA4th 950, 959-960, 32 CR3d 411] .

- An arbitration provision in an employment agreement was not procedurally unconscionable when it was not buried in a long document, but was contained on the last page of a seven-page employment application underneath the heading "Please Read Carefully, Initial Each Paragraph and Sign Below," and set forth in a separate, four-sentence paragraph that the plaintiff initialed, affirming she had seen it [*Roman v. Superior Court* (2009) 172 CA4th 1462, 1470-1471, 92 CR3d 153] .

Examples--Oppression:

- An arbitration provision in an employment agreement was procedurally unconscionable because inequality in bargaining power between low-wage employees and their employer made it likely that employees felt pressure to agree to the new dispute resolution policy, whatever they understood that policy to be [*Olvera v. El Pollo Loco, Inc.* (2009) 173 CA4th 447, 455, 93 CR3d 65] .

- An arbitration agreement contained in a hiking expedition company's release form was procedurally

unconscionable because the company presented its terms both as nonnegotiable and no different than what plaintiffs would find with any other provider [*Lhotka v. Geographic Expeditions, Inc.* (2010) 181 CA4th 816, 824, 104 CR3d 844] .

Example--No Oppression:

Provisions for refueling charges in a truck rental contract were not oppressive because customers could choose to rent from another truck rental company [*Aron v. U-Haul Co. of California* (2006) 143 CA4th 796, 809, 49 CR3d 555] .

18.15[4][c] Courts Can Infer Procedural Unconscionability From Substantive Unconscionability. Because procedural and substantive unconscionability are evaluated on a sliding scale (on which a lack in one can be compensated by an excess in the other), a party may prevail by showing that a contract or term is substantively unconscionable [*Donovan v. RRL Corp.* (2001) 26 C4th 261, 292, 109 CR2d 807, 27 P3d 702] .

18.15[5] Substantive Unconscionability Generally Is Shown Through Presence of Wholly One-Sided Term.

18.15[5][a] Wholly One-Sided Term Generally Sufficient to Show Substantive Unconscionability. A substantively unconscionable agreement or term may take various forms, but generally is unfairly one-sided [*Discover Bank v. Superior Court* (2005) 36 C4th 148, 161, CR3d 76, P3d]. Although a significant number of cases on unconscionability deal with arbitration clauses, substantive agreements relating to a number of issues other than dispute resolution also may be found unconscionable.

Examples--Substantively Unconscionable:

- An agreement providing for 200 percent interest per annum is substantively unconscionable regardless of whether it is subject to the limits of the usury law [*Carboni v. Arrospide* (1991) 2 CA4th 76, 83-84, 2 CR2d 845] .
- A contract for the sale of a car based on an advertisement that misprinted the price as \$12,000 below the intended price was substantively unconscionable despite the generally greater bargaining strength of the seller [*Donovan v. RRL Corp.* (2001) 26 C4th 261, 292, 109 CR2d 807, 27 P3d 702] .
- An exculpatory clause in a contract for the sale for farm equipment was substantively unconscionable when the parties were of unequal experience and the stronger party attempted to limit its liability [*A&M Produce Co. v. FMC Corp.* (1982) 135 CA3d 473, 492, 186 CR 114] .
- Arbitration clause in franchise agreement giving franchisor access to a judicial forum to obtain provisional remedies to protect its intellectual property, while providing franchisee with only an arbitral forum to resolve her claims, lacked mutuality and was substantively unconscionable [*Nagrampa v. MailCoups, Inc.* (9th Cir 2006) 469 F3d 1257, 1285] .
- Terms in a law firm's employee arbitration agreement providing a one-year statute of limitations for claims, an overly broad confidentiality provision, and a provision exempting the law firm from arbitration for attorney-client privilege claims were substantively unconscionable [*Davis v. O'Melveny & Myers* (9th Cir 2007) 485 F3d 1066, 1076-1081] .
- Arbitration agreement contained in home warranty application was unfairly one-sided because it required homeowners to arbitrate virtually every claim they might raise against the builder and others involved in the construction of plaintiffs' homes, while the homebuilder would have no conceivable

reason to institute legal proceedings against a homeowner after escrow closed [*Baker v. Osborne Development Corp.* (2008) 159 CA4th 884, 896, 71 CR3d 854] .

- An arbitrator selection provision in an employee arbitration agreement was substantively unconscionable because its designation of a "panel" of arbitrators consisting of a single arbitrator selected by the employer created a false appearance of mutuality in the selection of an arbitrator and created a significant risk that the employer would reap a significant advantage as a "repeat player" before the same arbitrator [*Sanchez v. Western Pizza Enterprises, Inc.* (2009) 172 CA4th 154, 177-178, 90 CR3d 818] .

- A precious metal dealer's account agreement requiring a three-arbitrator panel and prohibiting consolidation or joinder was substantively unconscionable; the cost to each investor for a four-day arbitration would be at least \$20,800, which was prohibitive for losses ranging from \$44,000 to \$130,000 [*Parada v. Superior Court* (2009) 176 CA4th 1554, 1581, 98 CR3d 743] .

- An arbitration agreement contained in a hiking expedition company's release form was so one-sided as to be substantively unconscionable because it limited plaintiffs' recovery to the amount they paid the company for their trip, required them to arbitrate in a distant forum, and required them to indemnify the company for its costs and attorney fees for defending any claims covered by the release of liability form [*Lhotka v. Geographic Expeditions, Inc.* (2010) 181 CA4th 816, 825, 104 CR3d 844] .

Examples--Not Substantively Unconscionable:

- A merchant agreement imposing a one-time fee of \$150 when a merchant terminated a credit card merchant account was not substantively unconscionable [*Morris v. Redwood Empire Bancorp* (2005) 128 CA4th 1305, 1322-1324] .

- Authorized shipping outlet's insurance charge of \$0.70 per \$100 of declared value over \$100--a 100 percent markup--did not shock the conscience as a matter of law and was not substantively unconscionable [*Wayne v. Staples, Inc.* (2006) 135 CA4th 466, 483, 37 CR3d 544] .

- Truck rental company's \$20 fueling fee, additional charges for fuel used but not replaced, and allegedly illegal measuring system, did not shock the conscience as a matter of law [*Aron v. U-Haul Co. of California* (2006) 143 CA4th 796, 809, 49 CR3d 555] .

- The absence of express provisions requiring a written arbitration award and allowing discovery did not render an employee arbitration agreement substantively unconscionable; rather, those terms were implied as a matter of law as part of the agreement. Nor was a small claims provision applicable to claims under \$50,000 allowing the arbitrator to apply "relaxed rules of evidence, the use of broad principles of equity in place of strict application of law, telephonic hearings, and such other economic procedures as the Arbitrator deems appropriate" unconscionable [*Sanchez v. Western Pizza Enterprises, Inc.* (2009) 172 CA4th 154, 177, 90 CR3d 818] .

- National Association of Securities Dealers, Inc. (NASD) rules for arbitration of investors' claims, which did not require an arbitration award to include factual findings or legal reasoning, provided for limited appeals, allowed a minority of arbitrators to be affiliated with the securities industry, and discouraged depositions, were not substantively unconscionable [*Brown v. Wells Fargo Bank, N.A.* (2008) 168 CA4th 938, 956-957, 85 CR3d 817] .

18.15[5][b] Courts Sometimes Require That Substantive Unconscionability Must "Shock the Conscience." A number of courts require that, to be substantively unconscionable, a contract or term must "shock the conscience" [see, e.g., *California Grocers Ass'n v. Bank of Am.* (1994) 22 CA4th 205, 214, 27 CR2d 396 ; *Coast Plaza Doctors Hosp. v. Blue Cross of Cal.* (2000) 83 CA4th 677, 689, 99 CR2d 809 ; *Marin Storage & Trucking, Inc. v. Benco Contracting & Eng'g, Inc.* (2001) 89 CA4th 1042, 1055, 107 CR2d 645]. However, other precedent, including decisions from the California Supreme Court, suggests that the standard may be considerably less severe [see, e.g., *Donovan v. RRL Corp.* (2001) 26 C4th 261, 292, 109 CR2d 807, 27 P3d 702 ; *Little v. Auto Stiegler, Inc.* (2003) 29 C4th 1064, 1072-1074, 130 CR2d 892, 63 P3d 979 ; see also *Harper v. Ultimo* (2003) 113 CA4th 1402, 1407].

18.15[5][c] Substantive Unconscionability Generally Is Not Inferred From Procedural Unconscionability. Although procedural unconscionability may be inferred if a contract or term is sufficiently substantively unconscionable, the reverse is not the case. Thus, even if a party demonstrates that a contract was one of adhesion between parties of unequal bargaining strength, a court will not invalidate the agreement if its substantive requirements are not substantively unconscionable [*Marin Storage & Trucking, Inc. v. Benco Contracting & Eng'g, Inc.* (2001) 89 CA4th 1042, 1054-1055, 107 CR2d 645 ; *Jones v. Humanscale Corp.* (2005) 130 CA4th 401, 415-416].

Legal Topics:

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

Civil ProcedureTrialsJury TrialsProvince of Court & JuryContracts LawDefensesUnconscionabilityGeneral OverviewContracts LawDefensesUnconscionabilityAdhesion Contracts



119 of 193 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 18 Asserting or Defending Claim That Contract Is Illegal, Contrary to Public Policy, or Unconscionable
 IV. ASSERTING OR DEFENDING CLAIM THAT CONTRACT OR PROVISION IS UNCONSCIONABLE

*2-18 MB Practice Guide: CA Contract Litigation 18.16***AUTHOR:** Hannah Bentley**18.16 Agreements Providing for Arbitration or Referee Are Scrutinized Under Special Criteria.**

18.16[1] Agreements That Are Not One-Sided Will Likely Be Enforced With Possible Procedural Guarantees. As in all cases involving claims of unconscionability, in a challenge to an arbitration provision the court will look for evidence that the agreement was both procedurally and substantively unconscionable. A major factor in that analysis is the relative bargaining strength of the parties [see, e.g., *Little v. Auto Stiegler, Inc.* (2003) 29 C4th 1064, 1071, 130 CR2d 892, 63 P3d 979]. Contracts of adhesion likely will be found in preemployment arbitration agreements for all but the most sought-after employees [see *Armendariz v. Foundation Health Psychcare Servs., Inc.* (2000) 24 C4th 83, 115, 99 CR2d 745, 6 P3d 669].

Although there are cases in which arbitration agreements have been held entirely invalid [see, e.g., *Pardee Constr. Co. v. Superior Court* (2002) 100 CA4th 1081, 1092, 123 CR2d 288 ; *Harper v. Ultimo* (2003) 113 CA4th 1402, 1411], the California Supreme Court generally has upheld them (except as to actions for injunctive relief), subject to procedural guarantees in cases involving public or statutory state law rights, unless they provide for arbitration of only one party's claims [see *Armendariz v. Foundation Health Psychcare Servs.* (2000) 24 C4th 83, 122, 124, 99 CR2d 745, 6 P3d 669 ; see also 18.19].

**Strategic Point--All Parties:**

The perceived bargaining power of the parties to an arbitration agreement may influence its enforceability [see 18.15[4]]. Arbitration agreements between employers and employees, mass retailers and consumers, and other parties to potential adhesion relationships seem to receive more scrutiny and be held unenforceable more often than agreements between parties of perceived equal bargaining power, such as two similarly sized commercial enterprises.

**Cross References:**

Discussion of procedural guarantees, see 18.16[3], [4][b], [e].

Application of arbitration agreements to actions seeking injunctive relief, see 18.16[4][f]

Detailed discussion of actions for injunctive relief based on a contract, see Ch. 8, Seeking or Opposing Equitable Remedies in Contract Actions.

18.16[2] Arbitration Cases Are Governed by Federal Arbitration Act. Generally applicable contract defenses such as fraud, duress, and unconscionability, escape the preemptive force of Section 2 of the Federal Arbitration Act (general national policy in favor of arbitration) [*Mitchell v. American Fair Credit Assn.* (2002) 99 CA4th 1345, 1356-1357, 122 CR2d 193 ; see 9 USC § 2]. However, state law applicable only to arbitration provisions will be preempted by the FAA [see *Doctor's Assocs., Inc. v. Casarotto* (1996) 517 US 681, 687, 116 S Ct 1652, 134 L Ed2d 902 ; see also *Armendariz v. Foundation Health Psychcare Servs., Inc.* (2000) 24 C4th 83, 98, 99 CR2d 745, 6 P3d 669], as will provisions prohibiting waiver of rights under specific statutes [*Ting v. AT&T* (9th Cir 2003) 319 F3d 1126, 1148 (discussing anti-waiver provision of Consumer Legal Remedies Act)]. The FAA applies to essentially all agreements to arbitrate in connection with contracts evidencing a transaction involving commerce [*Citizens Bank v. Alafabco, Inc.* (2003) 539 US 52, 55, 123 S Ct 2037, 156 L Ed2d 46], including most employment contracts [*Circuit City Stores, Inc. v. Adams* (2001) 532 US 105, 115, 121 S Ct 1302, 149 L Ed2d 234].



Strategic Point--Defendant:

California Supreme Court case law importing procedural protections into arbitration agreements affecting statutory or public rights is potentially vulnerable based on Supreme Court precedent under the FAA to the effect that states may not decide that a contract is fair enough to enforce all its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause [*Allied-Bruce Terminix Cos. v. Dobson* (1995) 513 US 265, 281, 115 S Ct 834, 130 L Ed2d 753]. Counsel for a party seeking to enforce an arbitration agreement and any procedural provisions within such an agreement should consider making this argument [see *Ting v. AT&T* (9th Cir 2003) 319 F3d 1126, 1148].

18.16[3] Arbitration Agreements Are Likely Subject to Procedural Requirements in Cases of Public or Statutory Rights. Claims regarding virtually unwaivable rights that are based on a state statute [*Armendariz v. Foundation Health Psychcare Servs., Inc.* (2000) 24 C4th 83, 103, 106, 113, 99 CR2d 745, 6 P3d 669] or public policy [*Little v. Auto Stiegler, Inc.* (2003) 29 C4th 1064, 1076-1077, 130 CR2d 892, 63 P3d 979] may be arbitrable subject to certain procedural requirements, at least in the preemployment agreement context before a dispute has arisen. They are subject to the following requirements [*Armendariz v. Foundation Health Psychcare Servs., Inc.* (2000) 24 C4th 83, 103, 106, 113, 99 CR2d 745, 6 P3d 669 ; *Little v. Auto Stiegler, Inc.* (2003) 29 C4th 1064, 1076, 130 CR2d 892, 63 P3d 979]:

- The arbitration agreement may not limit the damages available.
- There must be discovery sufficient to adequately arbitrate the claim [see 18.16[4][e]].
- There must be a written decision and judicial review sufficient to ensure that the arbitrator(s) comply with the law.
- The employer must pay all types of costs unique to arbitration [see 18.16[4][b]].

Example:

In a FEHA case, the arbitrator's written decision did not satisfy the third *Armendariz* requirement because it did not explain, even briefly, the reason for the arbitrator's conclusion that the plaintiff's claim did not benefit from a statutory tolling period [*Pearson Dental Supplies, Inc. v. Superior Court* (2010) 48 C4th 665, 679, 108 CR3d 171, 229 P3d 83] .

Distinguish:

The California Supreme Court has declined to extend the *Armendariz/Little* protections to an arbitration of a bad faith insurance claim [*Boghos v. Certain Underwriters at Lloyd's of London* (2005) 36 C4th 495, 30 CR3d 787, 115 P3d 68]. The court cautioned that these protections have been applied only to statutory claims (such as the California Fair Employment and Housing Act, *Gov Code § 12900 et seq.*), as in *Armendariz*, and to claims of wrongful discharge in violation of public policy, as in *Little* [*Boghos v. Certain Underwriters at Lloyd's of London* (2005) 36 C4th 495, 507-508]. Claims of wrongful discharge in violation of public policy, although not statutory, "seek to enforce public policies that are carefully tethered to fundamental policies delineated in constitutional or statutory provisions" [*Boghos v. Certain Underwriters at Lloyd's of London* (2005) 36 C4th 495, 507, 30 CR3d 787, 115 P3d 68]. The court suggested that the *Armendariz/Little* protections could conceivably be extended beyond the employment context, but only to other types of unwaivable claims based on or tethered to statutes, and not generally to common law claims [*Boghos v. Certain Underwriters at Lloyd's of London* (2005) 36 C4th 495, 507-508, 30 CR3d 787, 115 P3d 68]. Following *Boghos*, one court has held that a franchisee-franchisor relationship is sufficiently factually similar to the employee-employer relationship to require the trial court to consider shifting costs of arbitration to the franchisor when a franchisee asserts unwaivable statutory claims against a franchisor [*Independent Ass'n of Mailbox Ctr. Owners, Inc. v. Superior Court* (2005) 133 CA4th 396, 416-417, 34 CR3d 659 ; see also *Giuliano v. Inland Empire Personnel, Inc.* (2007) 149 CA4th 1276, 1290, 58 CR3d 5 (employee's claim against former employer did not arise from unwaivable public rights, even though the employee asserted a wage claim under *Lab Code § 229*, because the employee sought a multimillion-dollar bonus and severance payment, not minimum wage or overtime payments)].

Strategic Point--All Parties:

A plaintiff filing an action in the face of an arbitration agreement will want to consider carefully whether to file the action in state or federal court. A defendant seeking to compel arbitration will need to decide whether it is worthwhile to remove to federal court before seeking to compel arbitration. Counsel for plaintiffs should note that the Ninth Circuit has suggested that a number of the procedural protections apply to the arbitration of statutory claims in general [*Ting v. AT&T* (9th Cir 2003) 319 F3d 1126, 1151]. Counsel for plaintiffs should consider the uncertainty regarding arbitral cost-sharing under federal law, and counsel for defendants should consider removal for this reason.

Strategic Point--Plaintiff:

To the extent possible, plaintiffs' counsel should seek to characterize their non-statutory claims as involving public policies tethered to statutes or constitutional provisions, in order to invoke the *Armendariz/Little* protections.

Strategic Point--Defendant:

Recent decisions of the U.S. Supreme Court have expanded the scope of claims subject to the FAA [see, e.g., *Citizens Bank v. Alafabco, Inc.* (2003) 539 US 52, 57-58, 123 S Ct 2037, 156 L Ed2d 46 ; *Circuit City Stores, Inc. v. Adams* (2001) 532 US 105, 119, 121 S Ct 1302, 149 L Ed2d 234]. Counsel seeking to enforce arbitration provisions should continue to argue that state laws limiting arbitration are not generally applicable, and are thus preempted by Section 2 of the FAA [9 USC § 2].

 Cross Reference:

Discussion of provisions requiring sharing of arbitration costs, see 18.16[4][b].

18.16[4] Particular Terms of Agreement May Be Held Invalid.

18.16[4][a] Arbitration of Only One Party's Claims Are Invalid. When there is unequal bargaining strength, an agreement to arbitrate only the weaker party's claims is likely to be invalid [*Armendariz v. Foundation Health Psychcare Servs., Inc.* (2000) 24 C4th 83, 117-118, 99 CR2d 745, 6 P3d 669 (employment arbitration context); *Higgins v. Superior Court* (2006) 140 CA4th 1238, 1253-1254, 45 CR3d 293 (arbitration clause in agreement for appearance on reality television show); *Nyulassy v. Lockheed Martin Corp.* (2004) 120 CA4th 1267, 1282-1283, 16 CR3d 296]. Parties may justify an "asymmetrical" arbitration agreement if there is a legitimate commercial need, but that need must be something other than the employer's desire to maximize its advantage in the arbitration [*Little v. Auto Stiegler, Inc.* (2003) 29 C4th 1064, 1073, 130 CR2d 892, 63 P3d 979 ; *Jones v. Humanscale Corp.* (2005) 130 CA4th 401, 411-412, 29 CR3d 881].

18.16[4][b] Requiring Sharing of Arbitration Costs May Be Invalid. Provisions requiring the sharing of costs of arbitration have been ruled invalid under state law in the context of preemployment arbitration agreements [*Little v. Auto Stiegler, Inc.* (2003) 29 C4th 1064, 1080-1081, 130 CR2d 892, 63 P3d 979 ; *Ontiveros v. DHL Express (USA), Inc.* (2008) 164 CA4th 494, 510-511, 79 CR3d 471] and elsewhere [*Gutierrez v. Autowest, Inc.* (2003) 114 CA4th 77, 91-92, 7 CF3d 267 (lending challenge); *Ting v. AT&T* (9th Cir 2003) 319 F3d 1126, 1151 (challenge under Consumer Legal Remedies Act); *Independent Ass'n of Mailbox Ctr. Owners, Inc. v. Superior Court* (2005) 133 CA4th 396, 416-417 (directing trial court to conduct proceedings regarding franchisees' request to shift costs to franchisor); *Higgins v. Superior Court* (2006) 140 CA4th 1238, 1254, 45 CR3d 293 (agreement for appearance on reality television show)].

Under California law, a court will interpret an arbitration agreement that is silent as to costs to impose those costs on the employer [*Armendariz v. Foundation Health Psychcare Servs., Inc.* (2000) 24 C4th 83, 113, 99 CR2d 745, 6 P3d 669]. Under federal law, a court may refuse to do so on the grounds that the inquiry would be premature at the stage of a motion to compel arbitration [*Green Tree Fin. Corp. v. Randolph* (2000) 531 US 79, 89-91, 121 S Ct 513, 148 L Ed2d 373]. Moreover, the federal standard as to cost-sharing may be more lenient [compare *Green Tree Fin. Corp. v. Randolph* (2000) 531 US 79, 91-92, 121 S Ct 513, 148 L Ed2d 373 , with *Cole v. Burns Int'l Sec. Servs.* (DC Cir 1997) 105 F3d 1465, 1485 , and *Ting v. AT&T* (9th Cir 2003) 319 F3d 1126, 1151 (citing *Cole*)].

Strategic Point--Defendant:



A party seeking to enforce cost-sharing in an arbitration agreement when the issues being arbitrated include federal statutory rights should consider arguing that the federal standard governs.

18.16[4][c] Arbitral Appeal or Review of Award Exceeding Specific Amount Probably Is Invalid. Provisions allowing an arbitral appeal or trial de novo if a party wins an award in excess of a specific amount repeatedly have been rejected as unconscionable [see *Little v. Auto Stiegler, Inc.* (2003) 29 C4th 1064, 1071-1074, 130 CR2d 892, 63 P3d 979]. These rulings are founded on the general prohibition against one-sided arbitration agreements [*Little v. Auto Stiegler, Inc.* (2003) 29 C4th 1064, 1073, 130 CR2d 892, 63 P3d 979].

Strategic Point:



A party seeking enforcement of an arbitration agreement providing for appeal or de novo review should argue that these rulings do not apply if the parties had equal bargaining power. In any event, if such a provision is invalid, the party should argue that it is severable [*Little v. Auto Stiegler, Inc.* (2003) 29 C4th 1064, 1074-1075, 130 CR2d 892, 63 P3d 979].

18.16[4][d] Provisions for Non-Neutral Arbitrators Are Invalid. Agreements to arbitrate are invalid if they provide for an arbitral body or referee that is likely to favor one of the parties [*Graham v. Scissor-Tail, Inc.* (1981) 28 C3d 807, 821, 825-827, 171 CR 604, 623 P2d 165 ; *Sehulster Tunnels v. Traylor Bros., Inc.* (2003) 111 CA4th 1328, 1340-1342, 4 CR3d 655]. However, the agreement to arbitrate may be enforced if the court severs the provision specifying a non-neutral arbitrator [*Graham v. Scissor-Tail, Inc.* (1981) 28 C3d 807, 831, 825-827, 171 CR 604, 623 P2d 165 ; *Armendariz v. Foundation Health Psychcare Servs., Inc.* (2000) 24 C4th 83, 126, 99 CR2d 745, 6 P3d 669 (citing cases)].

18.16[4][e] Some Provisions Limiting Discovery May Be Voidable. In general, there is no entitlement to discovery in arbitration proceedings [CCP § 1283.05(e)]. However, in specified situations in which discovery is allowed in arbitration, limitations on discovery have been held inappropriate in the arbitration of claims by employees under the Fair Employment and Housing Act [Gov Code § 12900 et seq.; *Armendariz v. Foundation Health Psychcare Servs., Inc.* (2000) 24 C4th 83, 105-106, 99 CR2d 745, 6 P3d 669 ; *Ontiveros v. DHL Express (USA), Inc.* (2008) 164 CA4th 494, 511-514, 79 CR3d 471] , and claims of wrongful termination in violation of public policy [*Little v. Auto Stiegler, Inc.* (2003) 29 C4th 1064, 1081, 130 CR2d 892, 63 P3d 979]. Curtailment of each party to two depositions has been held sufficient to invalidate an employment arbitration agreement in its entirety [*Fitz v. NCR Corp.* (2004) 118 CA4th 702, 717, 13 CR3d 88]. However, a limitation to 30 unspecified discovery requests including three depositions in a similar context was found not to be facially invalid [*Mercuro v. Superior Court* (2002) 96 CA4th 167, 183, 116 CR2d 671 ; see *Roman v. Superior Court* (2009) 172 CA4th 1462, 1475-1476, 92 CR3d 153 (AAA's employment dispute rules authorizing the arbitrator to order "such discovery, by way of deposition, interrogatory, document production, or otherwise, as the arbitrator considers necessary to a full and fair exploration of the issues in dispute, consistent with the expedited nature of arbitration" were not unconscionable)].



Warning:

Counsel should carefully assess the adequacy of discovery guarantees in the preemployment arbitration context given the fine distinctions between the cases.



Strategic Point:

Counsel for a party seeking to uphold or challenge arbitration agreements on discovery grounds outside the employment context should note statements by the California Supreme Court suggesting more extensive discovery is appropriate in the context of employment arbitration when the employer is in possession of most of the evidence [*Armendariz v. Foundation Health Psychcare Servs., Inc.* (2000) 24 C4th 83, 105-106, 99 CR2d 745, 6 P3d 669], and should consider whether the same argument is present in their case.

18.16[4][f] Courts Will Deny Arbitration As to Injunctive Relief Relating to Public Statutory Rights. The California Supreme Court has made clear that injunctions on behalf of the public--at least under the Consumer Legal Remedies Act [CC § 1770] or B&P Code §§ 17200 and 17500--are not subject to arbitration, because the relief is on behalf of the public generally and an arbitrator will not have the power to enforce that relief [*Cruz v. PacifiCare Health Sys., Inc.* (2003) 30 C4th 303, 314-316, 133 CR2d 58, 66 P3d 1157]. For the same reason, an arbitration provision prohibiting the filing of administrative claims is void [*Davis v. O'Melveny & Myers* (9th Cir 2007) 485 F3d 1066, 1082-1084] . However, a stay of litigation regarding injunctions until the arbitration regarding other relief is complete may be appropriate [*Cruz v. PacifiCare Health Sys., Inc.* (2003) 30 C4th 303, 320, 133 CR2d 58, 66 P3d 1157].



Warning:

California's Proposition 64 amended B&P Code § 17204 to require that a plaintiff asserting a cause of action under B&P Code § 17200 must have suffered injury in fact and lost money or property as a result

of the alleged violation.



Cross Reference:

Actions under *B&P Code* § 17200 and discussion of effect of Proposition 64, see Matthew Bender[(R)] Practice Guide: California Unfair Competition and Business Torts, Ch. 2, Unfair Competition.

18.16[4][g] Limitations on Amount or Type of Damages Recoverable May Be Invalid. Arbitration clauses that prohibit and arbitrator from awarding punitive, consequential, or limited damages, and limited the total amount of monetary damages that could be recovered by one party, have been rejected as unconscionable [*Suh v. Superior Court* (2010) 181 CA4th 1504, 1515, 105 CR3d 585 (absolute prohibition of consequential, punitive, incidental, or special damages in employment-related cases was substantively unconscionable); *Independent Ass'n of Mailbox Ctr. Owners, Inc. v. Superior Court* (2005) 133 CA4th 396, 411-413, 34 CR3d 659 (trial court should have stricken arbitration clauses that purported to deprive franchisees of remedies available by statute)].

18.16[4][h] Shortened Statute of Limitations May Be Invalid. A shortened limitation period may be so short that it would be unconscionable to enforce it [see *Ingle v. Circuit City Stores, Inc.* (9th Cir 2003) 328 F3d 1165, 1175 (one-year limitation period); *Davis v. O'Melveny & Myers* (9th Cir 2007) 485 F3d 1066, 1076-1078 (one year); *Martinez v. Master Prot. Corp.* (2004) 118 CA4th 107, 117, 12 CR3d 663 (six months)].

Legal Topics:

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

Contracts LawContract Conditions & ProvisionsArbitration ClausesContracts LawDefensesUnconscionabilityGeneral OverviewContracts LawDefensesUnconscionabilityArbitration AgreementsGovernmentsLegislationStatutory Remedies & Rights



120 of 193 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 18 Asserting or Defending Claim That Contract Is Illegal, Contrary to Public Policy, or Unconscionable
IV. ASSERTING OR DEFENDING CLAIM THAT CONTRACT OR PROVISION IS UNCONSCIONABLE

2-18 MB Practice Guide: CA Contract Litigation 18.17

AUTHOR: Hannah Bentley

18.17 Forum Selection Provisions May Be Held Invalid.

An agreement by a party of superior bargaining strength that requires the weaker party to bring an action in the stronger party's forum, when the stronger party has its choice, may be unconscionable [*Bolter v. Superior Court* (2001) 87 CA4th 900, 908-910, 104 CR2d 888]. However, if both parties agree to the forum of the stronger party's choice, it will likely be upheld [*Intershop Communications AG v. Superior Court* (2002) 104 CA4th 191, 201-202, 127 CR2d 847].



Cross Reference:

Discussion of forum selection agreements, see *Ch. 3, Determining Jurisdiction and Venue in Contract Actions*, 3.06.

Legal Topics:

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

Civil Procedure Venue General Overview Contracts Law Contract Conditions & Provisions Forum Selection
Clauses Contracts Law Defenses Unconscionability General Overview



121 of 193 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 18 Asserting or Defending Claim That Contract Is Illegal, Contrary to Public Policy, or Unconscionable
IV. ASSERTING OR DEFENDING CLAIM THAT CONTRACT OR PROVISION IS UNCONSCIONABLE

2-18 MB Practice Guide: CA Contract Litigation 18.18

AUTHOR: Hannah Bentley

18.18 Provisions Prohibiting Maintenance of Class Actions Are Likely Invalid.

A contractual provision waiving a party's right to bring a class action is unenforceable in a consumer contract of adhesion when disputes between the parties predictably will involve small amounts of damages allegedly due to large numbers of consumers [*Discover Bank v. Superior Court* (2005) 36 C4th 148, 162-163 ; see *Klussman v. Cross Country Bank* (2005) 134 CA4th 1283, 1298, 36 CR3d 728 (class action waiver contained in National Arbitration Forum website referenced in cardholder agreement is unconscionable)]. Such a provision creates virtual immunity for the stronger party, because few customers will bother to seek redress for relatively small amounts of money [*Szetela v. Discover Bank* (2002) 97 CA4th 1094, 1101]. However, although a prohibition on such claims may be unconscionable, they are most likely arbitrable [*Cruz v. Pacificare Health Sys., Inc.* (2003) 30 C4th 303, 318-319, 133 CR2d 58, 66 P3d 1157].

Examples:

- A group of franchisees brought action against a franchisor. All of the franchisees' franchise agreements contained arbitration clauses; some, but not all, prohibited class wide arbitration. Because the franchisees made an adequate showing under CCP § 1281.3 that there were common issues of law and fact, the trial court erred by refusing to strike the ban on group arbitration contained in some of the franchise agreements [*Independent Ass'n of Mailbox Ctr. Owners, Inc. v. Superior Court* (2005) 133 CA4th 396, 410, 411, 34 CR3d 659].
- A consumer brought a class action against an Internet service provider, alleging that the defendant charged fees to customers for Digital Subscriber Line (DSL) service for a period prior to providing customers with the equipment necessary to utilize the service. The defendant moved to compel arbitration, relying on its DSL service agreement, which contained an arbitration clause and a class action waiver. Because the gravamen of the complaint was that numerous consumers were cheated out of small sums of money through deliberate behavior, the class action waiver was unconscionable under California law [*Aral v. Earthlink, Inc.* (2005) 134 CA4th 544, 556-557, 36 CR3d 229] .
- A class action waiver in a satellite television company's customer agreement was unconscionable

because it appeared in a consumer contract of adhesion presented on a take it or leave it basis; the waiver was indisputably one-sided, as the company would have no occasion to use the class action device in disputes with its customers; and the sums involved were sufficiently small that a class action was likely the only effective way to redress the alleged wrongdoing by the company [*Cohen v. DIRECTV Inc.* (2006) 142 CA4th 1442, 1455, 48 CR3d 813] .

- In a class action against a cellular telephone provider challenging the early termination fee charged subscribers, a class action waiver contained in the service agreement's arbitration clause was substantively unconscionable under *Discover Bank* because many consumers would view the largest monetary damage claim of \$200 as insufficient to warrant individual litigation [*Gatton v. T-Mobile USA, Inc.* (2007) 152 CA4th 571, 587-588, 61 CR3d 344] .

- In a class action against a cellular telephone service provider, a class arbitration waiver in the defendant's standard contract for cellular phone service was unconscionable under *Discover Bank* because it was found in a consumer contract of adhesion, class members suffered individual damages in the hundreds of dollars, and the complaint alleged that the defendant induced thousands of customers to enter into agreements by misrepresenting to customers that their services would be improved only if they entered into contract extensions [*Shroyer v. New Cingular Wireless Servs.* (9th Cir 2007) 498 F3d 976, 983-984] .

- In a class action against a lender challenging its vehicle repossession practices, plaintiffs failed to establish that the individual amounts at issue were so small that a class action was the only viable remedy when the amount at issue exceeded \$16,000 [*Arguelles-Romero v. Superior Court* (2010) 184 CA4th 825, 844, 109 CR3d 289].

- A class action waiver in a contract for the purchase of a computer was unconscionable under *Discover Bank* because the agreement was an adhesion contract, the \$1200 to \$1500 purchase price was a small enough amount to prevent consumers from pursuing their individual claims, and plaintiffs alleged a deliberate practice to deprive consumers of money by selling products the manufacturer was aware were defective [*Omstead v. Dell, Inc.* (9th Cir 2010) 594 F3d 1081, 1086-1087] .

Similarly, a class arbitration waiver in an employment agreement may be unenforceable in a class action alleging overtime pay or other Labor Code violations. In determining whether to enforce the class arbitration waiver, the court must consider the size of potential individual recoveries, the potential for retaliation against members of the class, the fact that absent members of the class may be poorly informed about their rights, and other real-world obstacles to the vindication of class members' rights to overtime pay through individual arbitration [*Gentry v. Superior Court* (2007) 42 C4th 443, 463, 64 CR3d 773, 165 P3d 556 ; see also *Murphy v. Check 'N Go of California, Inc.* (2007) 156 CA4th 138, 148, 67 CR3d 120 (in wage and hour case, class action waiver was unconscionable; evidence showed that class members would have difficulty securing legal representation for individual cases because of the relatively small sums involved); *Sanchez v. Western Pizza Enterprises, Inc.* (2009) 172 CA4th 154, 170-171, 90 CR3d 818 (individual recovery in wage case was likely to be modest, the potential for retaliation against members of the class who litigated or arbitrated individually was significant, and most employees were immigrants with limited English language skills who were likely to be unaware of their legal rights); *Franco v. Athens Disposal Co., Inc.* (2009) 171 CA4th 1277, 1298, 90 CR3d 539 (in case alleging employer systematically denied employees meal and rest periods, the size of the potential individual recovery was small, the possibility of retaliation against an employee who filed an individual suit existed, and absent members of the class may have been ill-informed about their rights)].

In addition, a provision in an employee arbitration agreement prohibiting an employee from recovering

civil penalties on behalf of others as a "private attorney general" may be invalid if it impedes *Gentry's* goal of ensuring comprehensive enforcement of a statutory scheme [*Franco v. Athens Disposal Co., Inc.* (2009) 171 CA4th 1277, 1298, 90 CR3d 539] .

Distinguish:

Under the law of other states, such as Delaware, class action waivers are enforceable [*Discover Bank v. Superior Court* (2005) 134 CA4th 886, 891-893, 36 CR3d 456 (enforcing parties' choice-of-law provision and applying Delaware law)].



Cross Reference:

Discussion of class actions, see Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, Ch. 33, Class Actions.

Legal Topics:

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

Civil ProcedureClass ActionsGeneral OverviewContracts LawDefensesUnconscionabilityGeneral OverviewGovernmentsLegislationStatutory Remedies & Rights



122 of 193 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 18 Asserting or Defending Claim That Contract Is Illegal, Contrary to Public Policy, or Unconscionable
IV. ASSERTING OR DEFENDING CLAIM THAT CONTRACT OR PROVISION IS UNCONSCIONABLE

2-18 MB Practice Guide: CA Contract Litigation 18.19

AUTHOR: Hannah Bentley

18.19 Courts Will Seek to Sever Unconscionable Contract Terms.

CC § 1670.5(a) provides that if a court finds that a contract or term was unconscionable when made, the court may refuse to enforce the contract, may enforce the remainder of the contract without the unconscionable clause, or may limit the application of an unconscionable clause to avoid an unconscionable result. The statute allows a court to refuse enforcement of a contract as a whole only when the agreement is permeated with unconscionability. A court may analogize to the case law regarding severability relating to illegal contracts or terms in this regard [*Armendariz v. Foundation Health Psychcare Servs.* (2000) 24 C4th 83, 122, 124, 99 CR2d 745, 6 P3d 669].

Examples:

- A court generally will not sever a provision allowing for the arbitration of only one party's claims, even if the excepted party subsequently is willing to make the terms of the agreement mutual [*Armendariz v. Foundation Health Psychcare Servs.* (2000) 24 C4th 83, 124-125, 99 CR2d 745, 6 P3d 669].
- A court will sever an appellate arbitration provision working to only one party's benefit, as it must sever only one term to achieve this result [*Little v. Auto Stiegler, Inc.* (2003) 29 C4th 1064, 1074-1075, 130 CR2d 892, 63 P3d 979].
- A court will limit the applicability of an arbitration agreement to claims other than those for injunctive relief as to public rights [*Cruz v. PacifiCare Health Sys., Inc.* (2003) 30 C4th 303, 320, 133 CR2d 58, 66 P3d 1157].
- A court acts within its discretion in refusing to enforce entire agreement when it contains more than one unconscionable term [*Murphy v. Check 'N Go of California, Inc.* (2007) 156 CA4th 138, 139, 67 CR3d 120] .
- A court acts within its discretion in refusing to enforce an entire arbitration agreement when at least

three provisions are substantively unconscionable, including a provision for arbitrator determinations of enforceability issues, a provision requiring that the employee pay a portion of the arbitration-related costs, and a provision severely limiting discovery [*Ontiveros v. DHL Express (USA), Inc.* (2008) 164 CA4th 494, 515, 79 CR3d 471] .

- The court acted within its discretion in refusing to sever a class arbitration waiver that was contrary to public policy and an unconscionable arbitrator selection clause; those provisions considered together indicated an effort to impose on an employee a forum with distinct advantages for the employer, creating an arbitration agreement permeated by an unlawful purpose [*Sanchez v. Western Pizza Enterprises, Inc.* (2009) 172 CA4th 154, 181, 90 CR3d 818] .

- The court refused to sever provisions in a precious metal dealer's account agreement requiring investors to arbitrate disputes before a panel of three arbitrators from JAMS and prohibiting consolidation or joinder of claims; the precious metal dealer's failure to offer a justification or explanation for requiring three arbitrators instead of one demonstrated that it included these provisions deliberately to increase the cost of arbitration for the improper purpose of discouraging or preventing its customers from vindicating their rights [*Parada v. Superior Court* (2009) 176 CA4th 1554, 1586-1587, 98 CR3d 743] .

- The court acted within its discretion in refusing to sever an arbitration agreement contained in a hiking expedition company's release form that limited plaintiffs' recovery to the amount they paid the company for their trip, required them to arbitrate in a distant forum, and required them to indemnify the company for its costs and attorney fees for defending any claims covered by the release agreement [*Lhotka v. Geographic Expeditions, Inc.* (2010) 181 CA4th 816, 826, 104 CR3d 844] .

Legal Topics:

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

Contracts LawContract Conditions & ProvisionsSeverability ClausesContracts LawContract InterpretationSeverabilityContracts LawDefensesUnconscionabilityGeneral Overview



123 of 193 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 18 Asserting or Defending Claim That Contract Is Illegal, Contrary to Public Policy, or Unconscionable
V. DETERMINING ENFORCEABILITY BASED UPON SEVERABILITY AND PUBLIC POLICY
CONSIDERATIONS

2-18 MB Practice Guide: CA Contract Litigation 18.20

AUTHOR: Hannah Bentley

18.20 CHECKLIST: Determining Enforceability Based Upon Severability and Public Policy Considerations.

- ☐ Determine whether invalid term is severable.

Authority:

CC §§ 1598, 1599, 1670.5; Armendariz v. Foundation Health Psychcare Servs., Inc.
(2000) 24 C4th 83, 122, 99 CR2d 745, 6 P3d 669

Discussion:

See 18.22

- ☐ Assess whether party can argue for enforcement of contract despite illegality because both:

☐ Contract or term is merely contrary to statute, not morals; and

☐ Party seeking avoidance is less blameworthy.

Authority:

Asdourian v. Araj (1985) 38 C3d 276, 293, 211 CR 703, 696 P2d 95 ; McIntosh v.
Mills (2004) 121 CA4th 333, 347, 17 CR3d 66

Discussion:

See 18.23

Legal Topics:

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

Contracts LawContract Conditions & ProvisionsSeverability ClausesContracts LawContract
InterpretationSeverabilityContracts LawDefensesIllegal BargainsContracts LawDefensesPublic Policy Violations



124 of 193 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 18 Asserting or Defending Claim That Contract Is Illegal, Contrary to Public Policy, or Unconscionable
V. DETERMINING ENFORCEABILITY BASED UPON SEVERABILITY AND PUBLIC POLICY
CONSIDERATIONS

2-18 MB Practice Guide: CA Contract Litigation 18.21

AUTHOR: Hannah Bentley

18.21 Options and Strategies.

Whether a contract is found to be illegal, unconscionable, or contrary to public policy, the general standard for defining a remedy is the same: the question is whether the offending term is severable or whether it permeates the entire agreement [see 18.22]. Parties seeking to uphold agreements and parties seeking to invalidate them often will differ on this question, and should analogize to cases supporting their view.

A party seeking to uphold an agreement can appeal to the general policies in favor of enforcing agreements and prohibiting unjust results, particularly in the case of partially performed contracts, and should refer to the doctrine that when a contract is merely contrary to statute and both parties are equally to blame, a court should enforce the agreement despite its illegality [see 18.23].

Legal Topics:

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

Contracts LawContract Conditions & ProvisionsSeverability ClausesContracts LawContract
InterpretationSeverabilityContracts LawDefensesIllegal BargainsContracts LawDefensesPublic Policy
ViolationsContracts LawDefensesUnconscionabilityGeneral Overview



125 of 193 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 18 Asserting or Defending Claim That Contract Is Illegal, Contrary to Public Policy, or Unconscionable
V. DETERMINING ENFORCEABILITY BASED UPON SEVERABILITY AND PUBLIC POLICY
CONSIDERATIONS

2-18 MB Practice Guide: CA Contract Litigation 18.22

AUTHOR: Hannah Bentley

18.22 Severability May Determine Whether Other Provisions of Contract May Be Enforceable.

18.22[1] Contract Is Void If Sole Object of Contract Is Illegal. If the main object of a contract is unlawful in whole or in part, the entire contract is void [CC § 1598]. Whether a contract's object is entire or severable depends on its language and subject matter as intended by the parties [*Armendariz v. Foundation Health Psychcare Servs., Inc.* (2000) 24 C4th 83, 122, 99 CR2d 745, 6 P3d 669]. Although there are strong policy reasons for severing a term that is illegal, unconscionable, or contrary to public policy, a court will refuse to do so if the central purpose of the contract is tainted with illegality, is contrary to public policy, or is unconscionable [*Armendariz v. Foundation Health Psychcare Servs., Inc.* (2000) 24 C4th 83, 124, 99 CR2d 745, 6 P3d 669].

Examples:

- A contract providing for the procurement of performance engagements by a personal manager not licensed as a talent agent violated the Talent Agencies Act and was void and unenforceable; in order to further the public policy of deterrence underlying the Act, the court refused to sever the illegal portions of the contract from the legal, denying the unlicensed personal manager recovery even for activities that did not require a talent agency license [*Yoo v. Robi* (2005) 126 CA4th 1089, 1105, 24 CR3d 740].
- The trial court did not err in declining to sever a lawful cohabitation agreement from an unlawful agreement to perform recording management services without the required talent agency license, because the lawful and unlawful objects were inextricably intertwined considerations [*Chiba v. Greenwald* (2007) 156 CA4th 71, 81-82, 67 CR3d 86].
- An agreement that provides only for the employee's arbitration of claims against the employer, but not the reverse, cannot be reformed [*Armendariz v. Foundation Health Psychcare Servs., Inc.* (2000) 24 C4th 83, 124-125, 99 CR2d 745, 6 P3d 669].

- An agreement to sell 2 million board-feet of lumber at a certain price to a particular buyer and not to sell lumber to any other buyer cannot be reformed because the main object of the agreement is the restraint of trade [*Santa Clara Valley Mill & Lumber Co. v. Hayes* (1888) 76 C 387, 393, 18 P 391].

- A contract for the purchase of a liquor license, a lease, and the sale of alcoholic beverages was unenforceable because the sale of the license was illegal and was integral to the agreement [*Teachout v. Bogy* (1917) 175 C 481, 488, 166 P 319].

Jury Instructions:

Object of Contract Must Be Legal, see *California Forms of Jury Instruction, Instr. MB 300F.90* (Matthew Bender).

18.22[2] If Contract Has Multiple Objects, Court May Sever Illegal Parts and Respective Consideration. If a contract has several distinct objects, at least one of which is lawful, the contract may be voided in part [CC § 1599]. Although CC § 1599 authorizes a court to sever the illegal object of a contract from the legal, it does not *require* the court to do so. The decision whether to sever the illegal term of a contract is informed by equitable considerations [*Marathon Entertainment, Inc. v. Blasi* (2008) 42 C4th 974, 996, 70 CR3d 727, 174 P3d 741 (when Talent Agencies Act is violated, full voiding of parties' contract is available, but not mandatory; likewise, severance is available, but not mandatory); *Chiba v. Greenwald* (2007) 156 CA4th 71, 81, 67 CR3d 86] . Courts particularly will seek to enforce agreements by severing improper terms in two situations [*Armendariz v. Foundation Health Psychcare Servs., Inc.* (2000) 24 C4th 83, 123-124, 99 CR2d 745, 6 P3d 669 (citing cases)]:

- If enforcing at least a portion of the agreement will prevent the inequitable results of voiding a partially performed contract.

- In order to preserve an otherwise legal contractual relationship.

Examples:

- In an action brought to recover compensation under a property management agreement, the trial court erred in concluding that, as a matter of law, the lawful parts of the agreement could not be severed from the unlawful portions. Although a real estate broker's license (which the property management company did not have) was required for some of the activities covered by the agreement, it was not required for other management duties such as causing repairs to be made, decorating, and general maintenance [*MKB Management, Inc. v. Melikian* (2010) 184 CA4th 796, 804-805, 108 CR3d 899] .

- In an action against an actress brought by her personal manager seeking to recover commissions, the actress was not entitled to summary judgment on the ground that the manager had violated the Talent Agencies Act. Because the parties' agreement had the lawful purpose of providing personal management services that were unregulated by the Act, the possibility existed that the actress's obligation to pay the manager a commission could be severed from any unlawful parts of the parties' management agreement [*Marathon Entertainment, Inc. v. Blasi* (2008) 42 C4th 974, 982, 70 CR3d 727, 174 P3d 741] .

- An insurance contract issued by an unlicensed insurer is enforceable by an innocent consumer when the only taint of illegality is the unlicensed status of the insurer itself [*Medina v. Safe-Guard Products, Internat., Inc.* (2008) 164 CA4th 105, 112, 78 CR3d 672] .

- In an action brought by attorneys seeking to recover settlement proceeds, charging liens that violated *Cal Rules Prof Conduct, Rule 3-300*, could be severed from valid, enforceable contingent fee agreements

[*Shopoff & Cavallo LLP v. Hyon* (2008) 167 CA4th 1489, 1525, 85 CR3d 268] .

- A trial court properly severed a portion of a collective bargaining agreement between teachers and a school district that violated the Education Code from the valid portion [*Adair v. Stockton Unified School Dist.* (2008) 162 CA4th 1436, 1450, 77 CR3d 62] .

- In a subcontract agreement between a contractor and a subcontractor, a provision requiring that mediation take place in Nevada, which violated CCP § 410.42, was severed from the remainder of the provisions dealing with mediation [*Templeton Development Corp. v. Superior Court* (2006) 144 CA4th 1073, 1084-1085, 51 CR3d 19] .

- In a contract for the sale of machines, a number of which were illegal gambling machines, the provision for sale of those machines was severed from remainder of contract because separate consideration for those machines could be identified [*Keene v. Harling* (1964) 61 C2d 318, 322-323, 38 CR 513, 392 P2d 273] .

- An agreement for performance of legal services by attorneys not admitted to practice in California was upheld to the extent the agreement provided for legal services outside of state [*Birbrower, Montalbano, Condon & Frank v. Superior Court* (1998) 17 C4th 119, 137-139, 70 CR2d 304, 949 P2d 1] .

- An overbroad covenant not to compete may be limited to an appropriate geographic area [*General Paint Corp. v. Seymour* (1932) 124 CA 611, 614-615, 12 P2d 990] .

When an agreement contains more than one unlawful provision of importance, courts sometimes have refused to sever the unlawful provisions on the grounds that the agreement is permeated by an unlawful purpose [see *Sanchez v. Western Pizza Enterprises, Inc.* (2009) 172 CA4th 154, 181, 90 CR3d 818 (court refused to sever a class arbitration waiver that was contrary to public policy and an unconscionable arbitrator selection clause because those provisions considered together indicated an effort to impose on an employee a forum with distinct advantages for the employer, creating an arbitration agreement permeated by an unlawful purpose); *Franco v. Athens Disposal Co., Inc.* (2009) 171 CA4th 1277, 1298, 90 CR3d 539 (employee arbitration agreement containing a class arbitration waiver and also precluding an employee from seeking civil penalties on behalf of other employees as a private attorney general was tainted with illegality and unenforceable)].

18.22[3] Policy Regarding Severability Is Followed in Unconscionable Contracts and Contracts Violating Public Policy. While CC §§ 1598 and 1599 specifically address severability in the context of illegal contracts, their provisions generally will be followed so as to save contracts in which terms have been found unconscionable or contrary to public policy [*Armendariz v. Foundation Health Psychcare Servs., Inc.* (2000) 24 C4th 83, 122, 99 CR2d 745, 6 P3d 669] .

Legal Topics:

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

Contracts LawContract Conditions & ProvisionsSeverability ClausesContracts LawContract InterpretationSeverabilityContracts LawDefensesIllegal BargainsContracts LawDefensesPublic Policy ViolationsContracts LawDefensesUnconscionabilityGeneral Overview



126 of 193 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 18 Asserting or Defending Claim That Contract Is Illegal, Contrary to Public Policy, or Unconscionable
V. DETERMINING ENFORCEABILITY BASED UPON SEVERABILITY AND PUBLIC POLICY
CONSIDERATIONS

2-18 MB Practice Guide: CA Contract Litigation 18.23

AUTHOR: Hannah Bentley

18.23 Consequences of Impermissible Contract or Term Depend on Equities.

18.23[1] Contract May Be Void If Parties Are Equally at Fault. If the parties are equally at fault, a court will likely treat a contract as void and unenforceable by either of them, regardless of whether the contract is contrary to public policy [*Bovard v. American Horse Enters., Inc.* (1988) 201 CA3d 832, 841, 247 CR 340] or illegal [*McIntosh v. Mills* (2004) 121 CA4th 333, 347-351, 17 CR3d 66].

Example:

Trial court erred in awarding partial rescission to buyer of business because both parties were aware that business was substantially involved in the sale of counterfeit goods, rendering the object of the business purchase agreement illegal and the agreement unenforceable [*Yoo v. Jho* (2007) 147 CA4th 1249, 1254-1255, 55 CR3d 243].

18.23[2] Contract May Be Voidable at Option of Less Responsible Party.

18.23[2][a] Malum in Se Is Contrary to Morals and Is Always Void. A contract is "malum in se" when it is contrary to good morals. Such contracts are void regardless of the relative culpability of the parties [*McIntosh v. Mills* (2004) 121 CA4th 333, 344, 17 CR3d 66].

18.23[2][b] Malum Prohibitum Is Contrary to Statute Only. Despite language in some cases suggesting that contracts contrary to statute are always "malum prohibitum" rather than malum in se [see, e.g., *McIntosh v. Mills* (2004) 121 CA4th 333, 344], a contract is malum in se if it is contrary to good morals, regardless of whether it is also prohibited by statute [see *Homami v. Iranzadi* (1989) 211 CA3d 1104, 1109, 260 CR 6 ; *Asdourian v. Araj* (1985) 38 C3d 276, 293, 211 CR 703, 696 P2d 95]. If a contract is simply malum prohibitum, the contract is voidable at the option of the less responsible party [*McIntosh v. Mills* (2004) 121 CA4th 333, 347, 17 CR3d 66].

Examples:

● Voidable *malum prohibitum* contracts include contracts involving the violation of the contractor licensing law [*Asdourian v. Araj* (1985) 38 C3d 276, 293, 211 CR 703, 696 P2d 95 ; *Holland v. Morse Diesel Int'l, Inc.* (2001) 86 CA4th 1443, 1453, 104 CR2d 239] or the violation of the prohibition on attorney fee-splitting [*McIntosh v. Mills* (2004) 121 CA4th 333, 344, 17 CR3d 66], contingency fee contracts that lack the disclosures required by B&P Code § 6147 [*Fergus v. Songer* (2007) 150 CA4th 552, 558, 59 CR3d 273], insurance contracts issued by unlicensed insurers [*Medina v. Safe-Guard Products, Int'l, Inc.* (2008) 164 CA4th 105, 111-112, 78 CR3d 672], and contracts between health care service plans and health care providers illegally organized as nonprofit corporations instead of professional medical corporations or partnerships [*California Physicians' Service v. Aoki Diabetes Research Institute* (2008) 163 CA4th 1506, 1517, 78 CR3d 646] .

● Void *malum in se* contracts include contracts for the illegal manufacture of drug paraphernalia [*Bovard v. American Horse Enters., Inc.* (1988) 201 CA3d 832, 841, 247 CR 340] and to circumvent federal law [*Homami v. Iranzadi* (1989) 211 CA3d 1104, 1110-1111, 260 CR 6], including schemes to evade income taxes [*Homami v. Iranzadi* (1989) 211 CA3d 1104, 1112, 260 CR 6] .

When neither party is guilty of great moral fault, however, and the aggrieved party is seeking potential lost profits rather than restitution, equity does not require enforcement of a *malum prohibitum* contract [*Kelton v. Stravinski* (2006) 138 CA4th 941, 949, 41 CR3d 877 (refusing to enforce illegal covenant not to compete)].

Even a contract that has as its goal the unlawful evasion of taxes is enforceable by a party who is less at fault and who has fully performed his side of the transaction, if failure to enforce the agreement would result in a substantial forfeiture by the less guilty party [*Maudlin v. Pac. Decision Scis. Corp.* (2006) 137 CA4th 1001, 1015-1016, 40 CR3d 724] .

18.23[3] If Illegality, Unconscionability, or Public Policy Preclude Enforcement of Contract, Quantum Meruit Recovery May Still Be Available. As long as the circumstances disclose that the services were rendered with an understanding that payment would be made, recovery may be available even if a contract is found to be illegal, unconscionable, or contrary to public policy, if those requirements do not proscribe the conduct for which compensation is sought [see *Huskinson & Brown, LLP v. Wolf* (2004) 32 C4th 453, 458, 463, 9 CR3d 693, 84 P3d 379 (although fee-sharing agreement between law firms without client's consent was unenforceable under *Cal Rules Prof Conduct, Rule 2-200*, law firm nonetheless could recover reasonable value of legal services it rendered on client's behalf); *Cohen v. Brown* (2009) 173 CA4th 302, 320, 93 CR3d 24 (same); *Selten v. Hyon* (2007) 152 CA4th 463, 471-472, 60 CR3d 896 (although litigation service provider's contract was illegal in part, because provider was not licensed as an attorney referral service under B&P Code § 6155, provider was permitted to pursue common count for reasonable value of any lawful services rendered); *MKB Management, Inc. v. Melikian* (2010) 184 CA4th 796, 804-805, 108 CR3d 899 (unlicensed real estate broker could bring claim in quantum meruit for services provided under property management agreement that did not require a real estate broker license); *but see Strong v. Beydoun* (2008) 166 CA4th 1398, 1404, 83 CR3d 632 (attorney cannot recover from the *client* the reasonable value of the attorney's services when those services were performed pursuant to an unenforceable fee-sharing agreement with another attorney to which the client did not consent)].

Distinguish:

When regulatory statutes require written agreements or licensure, a party generally may not recover in quantum meruit for that which cannot be recovered on the unenforceable contract [see *Castillo v. Barrera* (2007) 146 CA4th 1317, 1328, 53 CR3d 494 (denying quantum meruit recovery to boxing manager who lacked license and written contract required by Boxing Act, B&P Code § 18600 *et seq.*)].

Jury Instructions:

Recovery in Quantum Meruit When Contract Is Illegal, see *California Forms of Jury Instruction, Ch. 3A*,

Instr. MB 300A.09 (Matthew Bender).



Cross Reference:

Discussion of seeking or opposing quantum meruit recovery in contract actions, see Ch. 9, Seeking or Opposing Quantum Meruit or Quantum Valebant Recovery in Contract Actions.

Discussion of denial of recovery by unlicensed persons, see *18.06[2][a]*.

Legal Topics:

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

Contracts LawDefensesGeneral OverviewContracts LawDefensesIllegal BargainsContracts LawDefensesPublic Policy ViolationsContracts LawDefensesUnconscionabilityGeneral Overview



127 of 193 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 18 Asserting or Defending Claim That Contract Is Illegal, Contrary to Public Policy, or Unconscionable
VI. EVALUATING STRATEGY FOR ASSERTING OR DEFENDING CLAIMS OF ILLEGALITY, VIOLATION
OF PUBLIC POLICY, OR UNCONSCIONABILITY

2-18 MB Practice Guide: CA Contract Litigation 18.24

AUTHOR: Hannah Bentley

18.24 CHECKLIST: Evaluating Strategy for Asserting or Defending Claims of Illegality, Violation of Public Policy, or Unconscionability.

- ☐ Consider value of declaratory judgment or enforcement action.

Authority:

Marin Healthcare Dist. v. Sutter Health (2002) 103 CA4th 861, 873, 127 CR2d 113

Discussion:

See 18.16 (arbitration agreements), 18.25, 18.26

- ☐ As defendant in an enforcement action, assert contract invalidity at earliest possible opportunity.

Discussion:

See 18.27, 18.28

Legal Topics:

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

Civil Procedure Declaratory Judgment Actions State Judgments General Overview Contracts Law Defenses Illegal
Bargains Contracts Law Defenses Public Policy Violations Contracts Law Defenses Unconscionability General Overview



128 of 193 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 18 Asserting or Defending Claim That Contract Is Illegal, Contrary to Public Policy, or Unconscionable
 VI. EVALUATING STRATEGY FOR ASSERTING OR DEFENDING CLAIMS OF ILLEGALITY, VIOLATION
 OF PUBLIC POLICY, OR UNCONSCIONABILITY

2-18 MB Practice Guide: CA Contract Litigation 18.25

AUTHOR: Hannah Bentley

18.25 Options and Strategies.

A party seeking to avoid performance of a contract believed to be contrary to law or public policy or unconscionable may be in a better position procedurally by declining to perform the contract and waiting for an enforcement action by the other party [see 18.04]. This tactic must be balanced against the possibility that a court will sever an offending term [see 18.22] or will choose to enforce an entire agreement on the ground that the contract is merely voidable, and both parties are equally at fault [see 18.23]. In the case of a partially performed contract, a party asserting illegality also should be aware that such a claim may be subject to a statute of limitation [see 18.26[1][a]], although a party may assert such a claim as a defense in an enforcement action at any time if it seeks no affirmative relief.

In the case of an arbitration agreement, the general incentives are reversed because the party seeking relief will want to invalidate the arbitration provision or assure that it includes certain procedural protections. Thus, the party opposed to arbitration will want to seek declaratory or other relief in court unless it is simply seeking procedural protections in the arbitration and can obtain a stipulation from opposing counsel guaranteeing those protections [see 18.26[2]].

Legal Topics:

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

Contracts LawContract InterpretationSeverabilityContracts LawDefensesIllegal BargainsContracts LawDefensesPublic Policy ViolationsContracts LawDefensesUnconscionabilityGeneral Overview



129 of 193 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 18 Asserting or Defending Claim That Contract Is Illegal, Contrary to Public Policy, or Unconscionable
 VI. EVALUATING STRATEGY FOR ASSERTING OR DEFENDING CLAIMS OF ILLEGALITY, VIOLATION
 OF PUBLIC POLICY, OR UNCONSCIONABILITY

*2-18 MB Practice Guide: CA Contract Litigation 18.26***AUTHOR:** Hannah Bentley

18.26 Party Seeking to Affirm or Deny Validity of Contract or Contract Provision May Seek Declaratory Judgment.

18.26[1] Affirming or Denying Validity of Contract or Contract Provision in General. An interested party may seek declaratory relief to determine the validity of a contract or contract provision [CCP § 1060].

**Timing:**

Actions to void contracts on grounds of illegality (and likely those for unconscionability or contrary to public policy) are subject to a statute of limitations [*Marin Healthcare Dist. v. Sutter Health* (2002) 103 CA4th 861, 873, 127 CR2d 113]. Although a determination of the appropriate limitations period is case-specific, potential limitations periods are those for an action based on statute [CCP § 338(a)], an action based on statute for penalty or forfeiture [CCP § 340(a)], or the four year catch-all statute found in CCP § 343 [see *Marin Healthcare Dist. v. Sutter Health* (2002) 103 CA4th 861, 877, 127 CR2d 113].

**Cross References:**

Declaratory relief actions, see Ch. 11, Seeking or Opposing Declaratory Relief in Contract Matters.

Discussion of asserting invalidity as a defense on summary judgment, see 18.28.

Discussion of statutes of limitation, see Ch. 4, Determining Applicable Statute of Limitations and Effect on Potential Action.

18.26[2] Moving to Set Aside or Define Terms of Arbitration or Challenging Arbitral Award on Grounds of Illegality, Violation of Public Policy, or Unconscionability. A party challenging an arbitration agreement as unconscionable may do so by means of a declaratory relief action. For arbitrations other than those involving collective bargaining governed by the California Arbitration Act, an arbitration award may be set aside, or an arbitration challenged, if the arbitrator fails to disclose certain grounds for disqualification [CCP § 1281.9]. If there is evidence that the contract itself was illegal, an arbitrator's award may not be upheld [*Loving & Evans v. Blick* (1949) 33 C2d 603,

610, 204 P2d 23]. A party also may challenge an arbitration agreement as unconscionable in its response to a petition to compel arbitration.



Strategic Point--Plaintiff:

A party seeking to challenge an arbitration may do so in an action before the fact on ground of unconscionability, or later if there is evidence that gives the party the opportunity to attack the award. Given the unsettled nature of the law in this area, it is preferable to challenge the arbitration at the first opportunity.



Cross References:

Discussion of arbitration agreements and unconscionability, see *18.16*.

Discussion of motion to vacate or correct an arbitration award, see *Ch. 5, Determining Whether to Arbitrate or Litigate*, 5.31A -5.31E.

Discussion of opposing arbitration on the ground that an arbitration agreement is unconscionable, see *Ch. 5, Determining Whether to Arbitrate or Litigate*, 5.29.

Discussion of declaratory relief, see *Ch. 11, Seeking or Opposing Declaratory Relief in Contract Matters*.

Legal Topics:

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

Civil Procedure
Declaratory Judgment Actions
State Judgments
General Overview
Civil Procedure
Alternative Dispute Resolution
Validity of ADR Methods
Contracts Law
Defenses
Illegal Bargains
Contracts Law
Defenses
Public Policy Violations
Contracts Law
Defenses
Unconscionability
General Overview



130 of 193 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 18 Asserting or Defending Claim That Contract Is Illegal, Contrary to Public Policy, or Unconscionable
 VI. EVALUATING STRATEGY FOR ASSERTING OR DEFENDING CLAIMS OF ILLEGALITY, VIOLATION
 OF PUBLIC POLICY, OR UNCONSCIONABILITY

*2-18 MB Practice Guide: CA Contract Litigation 18.27***AUTHOR:** Hannah Bentley**18.27 Validity Should Be Challenged in Answer or on Demurrer.**

It is preferable to raise the question of illegality either in an action for declaratory judgment or in an answer or demurrer. If a party neglects to do so, the court is not precluded from considering the question later on the motion of a party or on its own [*Yoo v. Robi* (2005) 126 CA4th 1089, 1103]. If the question of illegality develops during the course of a trial, a court must consider it whether pleaded or not. When a court learns that a contract may be illegal, it must start an inquiry [*Russell v. Solderinger* (1976) 59 CA3d 633, 642, 131 CR 145].

**Strategic Point:**

A party not seeking affirmative relief may defend against an enforcement action based on illegality without having to comply with the statute of limitations [*Styne v. Stevens* (2001) 26 C4th 42, 51-52, 109 CR2d 14, 26 P3d 343].

**Cross Reference:**

Use and procedural requirements for demurrers, see Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, Ch. 11, Demurrers and Motions for Judgment on the Pleadings.

Legal Topics:

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

Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsAffirmative DefensesGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsDemurrersCivil ProcedurePleading &

PracticePleadingsAnswersContracts LawDefensesIllegal Bargains



131 of 193 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 18 Asserting or Defending Claim That Contract Is Illegal, Contrary to Public Policy, or Unconscionable
 VI. EVALUATING STRATEGY FOR ASSERTING OR DEFENDING CLAIMS OF ILLEGALITY, VIOLATION
 OF PUBLIC POLICY, OR UNCONSCIONABILITY

2-18 MB Practice Guide: CA Contract Litigation 18.28

AUTHOR: Hannah Bentley

18.28 Summary Judgment Appropriate If Issue Is One of Law.

If facts relating to illegality, public policy, or unconscionability are not sufficiently developed in a complaint to permit a demurrer, a defendant may challenge a contract on these grounds on summary judgment [*see Arya Group, Inc. v. Cher* (2000) 77 CA4th 610, 615-616, 91 CR2d 815]. A plaintiff who files suit challenging the validity of an agreement generally bears the burden to show specifically that it is unconscionable, contrary to public policy, or illegal. The defendant can rely on the existence of the agreement in filing for summary judgment [*Williams v. California Physicians' Serv.* (1999) 72 CA4th 722, 742, 85 CR2d 497].



Cross Reference:

Use and procedural requirements for summary judgment, see Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, Ch. 38, Summary Judgment.

Legal Topics:

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

Civil Procedure Summary Judgment Motions for Summary Judgment General Overview Contracts Law Defenses Illegal Bargains Contracts Law Defenses Public Policy Violations Contracts Law Defenses Unconscionability General Overview



132 of 193 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 18 Asserting or Defending Claim That Contract Is Illegal, Contrary to Public Policy, or Unconscionable
VII. FORMS

*2-18 MB Practice Guide: CA Contract Litigation 18.29***AUTHOR:** Hannah Bentley

18.29 Complaint for Declaratory Judgment That Contract or Contract Term Is Illegal, Contrary to Public Policy, or Unconscionable.

Complaint for Declaratory Judgment That Contract or Contract Term Is Illegal, Contrary to Public Policy, or Unconscionable.

_____[Name of attorney]
 _____[Street address]
 _____[City, state, and ZIP]
 _____[Area code and phone number]
 _____[State Bar no. of attorney]
 Attorney for _____[name of party]

SUPERIOR COURT OF CALIFORNIA,
 COUNTY OF _____

_____ [name(s)] ,	)	
Plaintiff(s)	)	
vs.	)	NO.
_____ [name(s)] ,	)	_____
[and DOES 1 THROUGH	)	
_____]	)	COMPLAINT FOR DECLARATORY JUDGMENT
Defendant(s).	)	[LIMITED CIVIL CASE]
	)	[Amount Demanded
		_____ (Exceeds or Does Not
		Exceed) \$10,000]

Plaintiff _____[*name*] alleges:

[*For an individual plaintiff*]

1. Plaintiff is an individual residing in _____[*city, if any, and county*], California, [in the (*name of judicial district, if any*) _____] [and therein doing business under the fictitious business name of _____]. Plaintiff has duly complied in all respects with the requirements of *Business and Professions Code Sections 17910 through 17917* with respect to this fictitious business name].

[*OR, for a domestic corporation or domestic limited liability company*]

1. Plaintiff _____[*name*] is, and at all times herein mentioned was, a _____ [corporation or limited liability company] organized and existing under the laws of California, with its principal place of business in _____[*city, if any, and county*], California [in the (*name of judicial district, if any*) _____] [and therein doing business under the fictitious business name of _____]. Plaintiff has duly complied in all respects with the requirements of *Business and Professions Code Sections 17910 through 17917* with respect to this fictitious business name].

[*OR, for a foreign corporation or foreign limited liability company*]

1. Plaintiff _____[*name*] is, and at all times herein mentioned was, a _____ [corporation or limited liability company] organized and existing under the laws of _____[*state or foreign country*], and _____ [for foreign corporation authorized to do business and doing business in California or, for foreign limited liability company maintaining action or intrastate business, and registered to transact intrastate business in California], with its principal place of business in California in _____[*city, if any, and county*], California [in the (*name of judicial district, if any*) _____].

[*OR, for a general or limited partnership or an unincorporated association*]

1. Plaintiff _____[*name*] is, and at all times herein mentioned was, a _____ [partnership or unincorporated association] with its principal place of business in _____[*city, if any, and county*], California [in the (*name of judicial district, if any*) _____] [and therein doing business under the fictitious business name of _____]. Plaintiff has duly complied in all respects with the requirements of *Business and Professions Code Sections 17910 through 17917* with respect to this fictitious business name].

[*CONTINUE*]

[For an individual defendant]

2. Defendant _____ [name] is an individual residing in _____ [city, if any, and county], California [in the (name of judicial district, if any) _____] [and doing business therein under the fictitious business name of _____].

[OR, for a domestic corporation or domestic limited liability company]

2. Defendant _____ [name] is, and at all times herein mentioned was, a _____ [corporation or limited liability company] organized and existing under the laws of California [with its principal place of business in _____ (city, if any, and county), California (in the _____ [name of judicial district, if any])].

[OR, for a foreign corporation or foreign limited liability company]

2. Defendant _____ [name] is, and at all times herein mentioned was, a _____ [corporation or limited liability company] organized and existing under the laws of _____ [state or foreign country] [with its principal place of business in _____ (city, if any, and county), California (in the _____ [name of judicial district, if any])].

[OR, for a general or limited partnership or an unincorporated association]

2. Defendant _____ [name] is, and at all times herein mentioned was, _____ [a partnership or an unincorporated association] sued herein under the name _____ [it has assumed or by which it is known] [with its principal place of business in _____ (city, if any, and county), California (in the _____ [name of judicial district, if any])]. [Defendants (names of individual partners or members) _____ are, and at all times herein mentioned were, members of that _____ (partnership or unincorporated association) (and are, and at all times herein mentioned were, residents of _____ County, California)].

[CONTINUE]

3. Plaintiff is ignorant of the true names and capacities of defendants sued herein as DOES 1 through _____ [numeral, e.g., 50], inclusive, and therefore sues these defendants by these fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when ascertained. [Plaintiff is informed and believes and thereon alleges that each of the fictitiously named defendants is responsible in some manner for the occurrences herein alleged, and that plaintiff's damages as herein alleged were proximately caused by those defendants.]

4. Plaintiff is informed and believes and thereon alleges that at all times material to this complaint, _____ [identify defendants to whom agency allegation applies, e.g., each of the Defendants or each of the individual Defendants or Defendant Harry Jones], [and each of the defendants fictitiously named in this complaint,] in addition to acting for himself, herself, or itself and on his, her, or its own behalf individually, is and was acting as the agent, servant, employee and representative of, and with the knowledge, consent and permission of, and in conspiracy with, each and all of the Defendants and within the course, scope and authority of that agency, service, employment, representation, and conspiracy. Plaintiff further alleges on information and belief that the acts of each of the Defendants were fully ratified by each and all of the Defendants. Specifically, and without limitation, Plaintiff alleges on information and belief that the actions, failures to act, breaches, conspiracy, and misrepresentations alleged herein and attributed to one or more of the specific Defendants were approved, ratified, and done with the cooperation and knowledge of each and all of the Defendants.

5. This is a complaint for declaratory relief pursuant to *Code of Civil Procedure Section 1060*. Plaintiff is a party to a putative contract ("the Contract") with Defendant, the object of which is to _____.

[A copy of the contract is attached as Exhibit A and incorporated by reference.] Plaintiff hereby seeks a declaratory judgment that the Contract is void on the ground that _____ [the contract is contrary to express law *and/or* is contrary to the policy of express law *and/or* is contrary to public policy *and/or* is unconscionable] because the contract _____ [describe with specificity the contract's flaws, e.g., had a central purpose that was illegal, that is, the sale of gambling machines illegal in the state or was for the performance of a contract by a person not licensed in California in violation of *Business and Professions Code Section 7031* or provided for a rate of interest at 200 percent per annum].

6. _____ [Describe contract with further specificity, and explain why contract was contrary to morals if applicable, and why parties were not equally at fault].

7. The provisions of the contract that are _____ [illegal *and/or* contrary to public policy *and/or* unconscionable] are not severable, and the contract is permeated with _____ [illegality *and/or* contrariness to public policy *and/or* unconscionability] because _____ [specify]. Accordingly, the court should declare the contract void in its entirety.

8. An actual and present controversy exists between the parties because _____ [explain reasons with specificity, e.g., the contract was to be performed within this year and the Defendant is holding property of the Plaintiff as a deposit to guarantee performance of the contract].

[CONTINUE]

WHEREFORE, defendant prays as follows:

1. That the court declare the contract void as _____ [illegal *and/or* contrary to public policy *and/or* unconscionable];

2. _____ [Add, if appropriate: That the court order that the defendant describe appropriate relief, e.g., return all property of the plaintiff and take nothing];

3. For costs of suit; and

4. For such other and further relief as the court deems proper.

Dated: _____

_____ [firm name]

_____ [signature]

_____ [typed name]

Attorney for Plaintiff _____

[ADD following verification, if applicable]

VERIFICATION

I am the plaintiff in the above-entitled action; I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein stated on information and belief, and, as to those matters, I believe it to be true.

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

_____ [date]

_____ [signature]

_____ [typed name]

NOTES.

Authority:

CCP § 1060; CC §§ 1667, 1670.5

Illegality:

See 18.03 -18.06

Contrary to Public Policy:

See 18.07 -18.12

Unconscionability:

See 18.13 -18.19

Legal Topics:

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

Civil ProcedurePleading & PracticePleadingsComplaintsRequirementsCivil ProcedureDeclaratory Judgment
ActionsState JudgmentsGeneral OverviewContracts LawDefensesIllegal BargainsContracts LawDefensesPublic Policy
ViolationsContracts LawDefensesUnconscionabilityGeneral Overview



133 of 193 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 18 Asserting or Defending Claim That Contract Is Illegal, Contrary to Public Policy, or Unconscionable
VII. FORMS

2-18 MB Practice Guide: CA Contract Litigation 18.30

AUTHOR: Hannah Bentley

18.30 Answer Stating Affirmative Defense That Contract or Contract Term Is Illegal, Contrary to Public Policy, or Unconscionable.

Answer Stating Affirmative Defense That Contract or Contract Term Is Illegal, Contrary to Public Policy, or Unconscionable.

_____[Name of attorney]
 _____[Street address]
 _____[City, state, and ZIP]
 _____[Area code and phone number]
 _____[State Bar no. of attorney]
 Attorney for _____[name of party]

SUPERIOR COURT OF CALIFORNIA,
 COUNTY OF _____

_____ [name] ,	)	
Plaintiff	)	NO.
vs.	)	_____
_____ [name] ,	)	
Defendant.	)	ANSWER OF
	)	_____
	)	_____ [identify defendant, e.g.,
		DEFENDANT MARY JONES] TO COMPLAINT
		OF
		_____ [identify plaintiff, e.g.,
		PLAINTIFF JOHN SMITH]
		[LIMITED CIVIL CASE]
		Judge:

Department:

Defendant answers the complaint as follows:

[Include general denial below, or set forth, in numbered paragraphs, specific denials, admissions, and allegations in response to those in complaint, in the order in which they are alleged in complaint:]

1. Pursuant to *Code of Civil Procedure Section 431.30(b)(1)*, Defendant denies each and every allegation of the Complaint, and further denies that Plaintiff is entitled to any equitable or legal relief, or any damages whatsoever.

[Defendant asserts the following affirmative defenses. By doing so, Defendant shall not be deemed to have assumed the burden of proving any matters that otherwise would be Plaintiff's burden.]

[Allege any affirmative defenses, e.g.,]

FIRST AFFIRMATIVE DEFENSE
(Contract is Unenforceable)

2. The contract alleged in the complaint is unenforceable because it is contrary to _____ [an express provision of law and/or the policy of express law and/or good morals] under *Civil Code Section 1667* in that _____ [describe with specificity, e.g., Plaintiff entered into the claimed contract without the appropriate license required by the Talent Agencies Act, *Labor Code Sections 1700-1700.47*, and accordingly the contract is not enforceable and/or describe with specificity why the contract is unconscionable, e.g., the contract, while not usurious under the provisions of the California Constitution or statutes, nevertheless specifies a rate of interest that is so excessive as to shock the conscience, and the contract therefore is unconscionable].

WHEREFORE, defendant prays as follows:

1. That the plaintiff take nothing by his/her complaint;
2. For costs of suit; and
3. For such other and further relief as the court deems proper.

Dated: _____

_____ [firm name]

_____ [signature]

_____ [typed name]

Attorney for Defendant _____

[ADD verification, if possible]

VERIFICATION

I am the defendant in the above entitled action; I have read the foregoing answer and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein stated on information and belief, and, as to those matters, I believe it to be true.

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

_____ [date]

_____ [signature]

_____ [typed name]

NOTES.

Authority:

CCP § 431.30(b)(2); CC §§ 1667, 1670.5

Illegality:

See 18.03 -18.06

Contrary to Public Policy:

See 18.07 -18.12

Unconscionability:

See 18.13 -18.19

Legal Topics:

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

Civil Procedure Pleading & Practice Defenses, Demurrers & Objections Affirmative Defenses General Overview Civil Procedure Pleading & Practice Pleadings Answers Contracts Law Defenses Illegal Bargains Contracts Law Defenses Public Policy Violations Contracts Law Defenses Unconscionability General Overview



134 of 193 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 18 Asserting or Defending Claim That Contract Is Illegal, Contrary to Public Policy, or Unconscionable
VII. FORMS

*2-18 MB Practice Guide: CA Contract Litigation 18.31***AUTHOR:** Hannah Bentley

18.31 Notice of Motion and Motion for Summary Judgment on Grounds That Contract or Contract Term Is Unenforceable As Illegal, Contrary to Public Policy, or Unconscionable.

Notice of Motion and Motion for Summary Judgment on Grounds That Contract or Contract Term Is Unenforceable As Illegal, Contrary to Public Policy, or Unconscionable.

_____[Name of attorney]
 _____[Street address]
 _____[City, state, and ZIP]
 _____[Area code and phone number]
 _____[State Bar no. of attorney]
 Attorney for _____[name of party]

SUPERIOR COURT OF CALIFORNIA,
 COUNTY OF _____

	)	
	)	NO.
[name] _____,	)	_____
Plaintiff	)	
vs.	)	NOTICE OF MOTION AND MOTION BY
[name] _____,	)	_____
Defendant.	)	_____ [identify party, e.g., DE-
	)	FENDANT MARY JONES] FOR SUMMARY
	)	JUDGMENT, SEPARATE STATEMENT OF UN-
	)	DISPUTED FACTS, SUPPORTING MEMOR-
	)	ANDUM SUPPORTING EVIDENCE
		Date:

		Time:

 Location:

 Judge:

 Date Action Filed:

 Trial Date:

 _____ To [identify opposing party, e.g.,
 Plaintiff John Smith] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [date], at _____ [time] , or as soon
 thereafter as the matter may be heard, in [

 _____ (Department or Division) of] this
 court, located at _____ [street address]

_____, [specify party, e.g., Defendant Mary
 Jones] will, and hereby does, move for an order that judgment be entered in favor of

_____, [specify party, e.g., Defendant Mary
 Jones] as prayed for in _____ [specify
 pleading, e.g., Defendant's Answer]. The motion is made on the grounds that there is no enforceable contract between
 the parties because the contract is

_____, [choose one or more: illegal or
 contrary to public policy or unconscionable]. Further, the

_____, [choose as appropriate: object of the
 contract that is _____ (contrary to public
 policy or illegal) is not severable or unconscionable parts of the contract permeate the contract as a whole] and make[s]
 the contract unenforceable, there is no triable issue of material fact, and therefore

_____, [specify moving party, e.g.,
 Defendant Mary Jones] is entitled to judgment as a matter of law.

The motion is based on this notice, the accompanying memorandum, the accompanying separate statement of
 undisputed facts, the request for judicial notice, and the declarations and evidence submitted herewith.

Dated: _____

_____ [firm name, if any]

By: _____ [signature]

_____ [typed name]

Attorney for _____

[specify party, e.g., Defendant _____]

NOTES.

Authority:

CCP § 437c; CC §§ 1667, 1670.5

Illegality:

See 18.03 -18.06

Contrary to Public Policy:

See 18.07 -18.12

Unconscionability:

See 18.13 -18.19

Severability and Enforcement based on Equities:

See 18.20 -18.23

Legal Topics:

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

Civil ProcedureSummary JudgmentMotions for Summary JudgmentWritten MotionsCivil ProcedureSummary JudgmentNoticesContracts LawDefensesIllegal BargainsContracts LawDefensesPublic Policy ViolationsContracts LawDefensesUnconscionabilityGeneral Overview



135 of 193 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 18 Asserting or Defending Claim That Contract Is Illegal, Contrary to Public Policy, or Unconscionable
VII. FORMS

2-18 MB Practice Guide: CA Contract Litigation 18.32

AUTHOR: Hannah Bentley

18.32 Notice of Motion and Motion for Summary Judgment on Ground That Contract or Contract Term Is Enforceable.

Notice of Motion and Motion for Summary Judgment on Ground That Contract or Contract Term Is Enforceable.

_____[Name of attorney]
 _____[Street address]
 _____[City, state, and ZIP]
 _____[Area code and phone number]
 _____[State Bar no. of attorney]
 Attorney for _____[name of party]

SUPERIOR COURT OF CALIFORNIA,
 COUNTY OF _____

	)	
	)	NO.
[name]	)	_____
_____	)	
_____	)	NOTICE OF MOTION AND MOTION BY
Plaintiff	)	_____
vs.	)	_____ [identify party, e.g.,
[name]	)	PLAINTIFF JOHN SMITH] FOR SUMMARY
_____	)	JUDGMENT, SEPARATE STATEMENT OF UN-
_____	)	DISPUTED FACTS, SUPPORTING MEMOR-
Defendant.	)	ANDUM AND SUPPORTING EVIDENCE
		Date:

		Time:

2-18 MB Practice Guide: CA Contract Litigation 18.32

 Location:

 Judge:

 Date Action Filed:

 Trial Date:

 _____ To [identify opposing party, e.g.,
 Defendant Mary Jones] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [date], at _____ [time], or as soon
 thereafter as the matter may be heard, in
 _____ (Department or Division) of] this
 court, located at _____ [street address]
 _____, [specify party, e.g., Plaintiff John
 Smith] will, and hereby does, move for an order that judgment be entered in favor of
 _____ [specify party, e.g., Defendant Mary
 Jones] as prayed for in _____ [specify
 pleading, e.g., the Complaint on file in this action]. The motion is made on the grounds that there is an enforceable
 contract between the parties because [choose one or more: the contract is not illegal because
 _____ (specify) and/or the contract should
 nevertheless be enforced because its object is merely malum prohibitum (contrary to statute) and the parties were in pari
 delicto]. Further, any object of the contract that is
 _____ [contrary to public policy and/or
 illegal and/or unconscionable] is severable, so that the contract is enforceable and should be enforced, there is no triable
 issue of material fact, and therefore
 _____ [specify moving party, e.g., Plaintiff
 John Smith] is entitled to judgment as a matter of law.

The motion is based on this notice, the accompanying memorandum, the accompanying separate statement of
 undisputed facts, the request for judicial notice, and the declarations and evidence submitted herewith.

Dated: _____

_____ [firm name, if any]

By: _____ [signature]

_____ [typed name]

Attorney for _____

[specify party, e.g., Plaintiff _____]

NOTES.

Authority:

CCP § 437c; CC §§ 1667, 1670.5

Illegality:

See 18.03 -18.06

Contrary to Public Policy:

See 18.07 -18.12

Unconscionability:

See 18.13 -18.19

Severability and Enforcement based on Equities:

See 18.20 -18.23

Legal Topics:

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

Civil ProcedureSummary JudgmentMotions for Summary JudgmentWritten MotionsCivil ProcedureSummary JudgmentNoticesContracts LawDefensesIllegal BargainsContracts LawDefensesPublic Policy ViolationsContracts LawDefensesUnconscionabilityGeneral Overview



136 of 193 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 19 Seeking or Opposing Recovery As Third Party Beneficiary of Contract

2-19 MB Practice Guide: CA Contract Litigation 19.syn

§ 19.syn Synopsis to Chapter 19: Seeking or Opposing Recovery As Third Party Beneficiary of Contract

19.01 Scope.

19.02 Objective and Strategy.

19.03 CHECKLIST: Determining Whether Person Is Third Party Beneficiary of Contract.

19.04 Options and Strategies.

19.05 Contracting Parties Must Have Express Intent to Benefit Third Party.

19.06 Express Intent to Benefit Third Party Must Appear in Contract or From Surrounding Circumstances.

19.06[1] Express Intent to Benefit Can Be Directly Manifested in Contract.

19.06[2] Express Intent to Benefit Can Appear From Circumstances.

19.06[2][a] Parties' Express Intent Can Be Determined in Light of Circumstances.

19.06[2][b] Third Party Need Not Be Named or Be Exclusive Beneficiary.

19.06[2][c] Third Party Can Be Part of Intended Class of Beneficiaries.

19.06[3] Promisor Must Know of Promisee's Intent to Benefit.

19.06[4] Incidental Beneficiaries Cannot Recover on Contract.

19.07 CHECKLIST: Determining What Remedies Are Available.

19.08 Options and Strategies.

19.09 Elements of Claim for Breach of Third Party Beneficiary Contract.

19.10 Third Party's Rights and Remedies May Be Limited by Contract.

19.10A Third Party Beneficiary May Not Rescind Contract.

19.11 Creditor Beneficiary Can Sue Promisor and Promisee for Standard Contractual Remedies.

19.11[1] Third Party Is Creditor Beneficiary If Contract Discharges Promisee's Obligation to Third Party.

19.11[2] Creditor Beneficiary Can Seek Standard Remedies for Breach From Both Promisor and Promisee.

19.11[3] Double Recovery Is Not Allowed.

19.12 Donee Beneficiary Is Limited to Contractual Remedies for Gifts.

19.12[1] Third Party Is Donee Beneficiary If Contract Does Not Discharge Legal Obligation of Promisee to Third Party.

19.12[2] Donee Beneficiary May Recover for Economic Interest in Performance.

19.13 Promisee May Recover for Benefit of Third Party Beneficiary.

19.14 Third Party Beneficiary May Have Action Sounding in Tort.

19.14[1] No Privity Required for Third Party Beneficiary.

19.14[2] Transaction Must Be to Benefit Third Party and Involve Foreseeable Harm.

19.15 Attorney's Fees Are Available to Prevailing Party If Contract Contains Attorney's Fees Clause.

19.16 CHECKLIST: Seeking Recovery As Third Party Beneficiary.

19.17 Options and Strategies.

19.18 Four-Year Statute of Limitations Generally Applies.

19.18[1] Four-Year Limitation Period Applies to Third Party Beneficiary Claims on Written Contracts.

19.18[2] Two-Year Limitation Period Applies to Third Party Beneficiary Claims on Oral Contracts.

19.19 Beneficiary Status May Be Question for Jury.

19.19[1] Whether Plaintiff Was Intended Beneficiary Can Be Triable Issue of Fact.

19.19[2] Status Can Be Determined As Matter of Law in Absence of Conflicting Extrinsic Evidence.

19.20 Plaintiff Has Burden of Pleading and Proving Existence of Contract and Intended Beneficiary Status.

19.20[1] Plaintiff Has Burden of Pleading and Proving Existence of Third Party Beneficiary Contract.

19.20[2] Plaintiff Has Burden of Pleading and Proving Intended Beneficiary Status.

19.21 Plaintiff Has Burden of Pleading and Proving Performance by Promisee.

19.22 Plaintiff Has Burden of Pleading and Proving Breach of Promise and Resulting Damages.

19.23 CHECKLIST: Opposing Third Party Beneficiary Claim.

19.24 Options and Strategies.

19.25 Defendant Can Prove Plaintiff Is Not Intended Beneficiary.

19.26 In Action by Promisee, Defendant Can Show Third Party Is Merely Donee Beneficiary Not Entitled to Damages.

19.27 Defendant Can Prove Contract Was Rescinded Before Third Party Accepted, Adopted, or Acted on Contract.

19.28 Defendant Can Prove Waiver With Clear and Convincing Evidence.

19.29 Third Party Must Comply With Arbitration Clause in Original Contract.

19.30 Third Party Cannot Recover Through Party Guilty of Fraud on Contract.

19.31 Complaint for Damages by Third Party Beneficiary for Breach of Written Contract.

Complaint for Damages by Third Party Beneficiary for Breach of Written Contract.

19.32 Demurrer to Complaint on Ground That Promisee for Benefit of Donee Third Party May Not Recover Damages.

Demurrer to Complaint on Ground That Promisee for Benefit of Donee Third Party May Not Recover Damages.

19.33 Answer to Complaint for Breach of Contract With Affirmative Defense(s) Based on Absence of Essential Element.

Answer to Complaint for Breach of Contract With Affirmative Defense(s) Based on Absence of Essential Element.



137 of 193 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 19 Seeking or Opposing Recovery As Third Party Beneficiary of Contract

I. STRATEGY

2-19 MB Practice Guide: CA Contract Litigation 19.01

19.01 Scope.

This chapter covers:

- Determining whether a person is a third party beneficiary of a contract [*see 19.03 -19.06*].
- Determining what remedies are available to a third party beneficiary of a contract [*see 19.07 -19.15*].
- Seeking recovery as a third party beneficiary [*see 19.16 -19.22*].
- Opposing a third party beneficiary claim [*see 19.23 -19.30*].
- Forms for bringing and defending a third party beneficiary action [*see 19.31 -19.33*].

Core Statute:

CC § 1559

Legal Topics:

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

Contracts LawThird PartiesGeneral OverviewContracts LawThird PartiesBeneficiariesGeneral OverviewContracts LawThird PartiesBeneficiariesTypesGeneral Overview



138 of 193 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 19 Seeking or Opposing Recovery As Third Party Beneficiary of Contract

I. STRATEGY

*2-19 MB Practice Guide: CA Contract Litigation 19.02***19.02 Objective and Strategy.**

Many contracts confer direct or indirect benefits on persons who are not actually parties to the contract. When those persons do not receive the benefits they anticipated under the contract, they may seek to recover damages or otherwise enforce their expectations as beneficiaries of the contract, even though they are not parties to it. Under limited circumstances, the law allows such persons to recover as third party beneficiaries of the contract.

At the core of any third party beneficiary claim is the issue of whether or not the contracting parties expressly intended to benefit the third party. If a contract does not show an express intent to benefit a third party, that party cannot enforce the contract [see 19.06]. Whether or not the contracting parties had an express intention is a question of fact, unless there is no conflicting evidence [see 19.19]. Therefore, disputes over a third party's rights to enforce a contract often hinge on convincing a judge or a jury that the contracting parties did or did not "expressly" intend to benefit the third party when forming the contract. Express intent is determined on a case-by-case basis, but a good definition is "an intent that the obligation created by the contract inure to the third party's benefit." The definition of "express" is "the negation of incidental" [*Prouty v. Gores Tech. Group* (2004) 121 CA4th 1225, 1232-1233].

If the third party's status can be determined as a matter of law because of an absence of conflicting evidence, the dispute will hinge on the nature of the third party's rights in the contract. A third party owed a legal obligation by the promisee will have a better chance of recovering damages for breach than a third party trying to enforce a gift contract; a promisee trying to enforce a gift contract is limited to specific performance [see 19.12].

**Cross Reference:**

For tips on updating case law and expanding your research with additional resources, see **How to Use Lexis.com With This Publication** at the front of this volume.

Legal Topics:

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

Contracts LawThird PartiesGeneral OverviewContracts LawThird PartiesBeneficiariesGeneral OverviewContracts LawThird PartiesBeneficiariesClaims & EnforcementContracts LawThird PartiesBeneficiariesTypesGeneral Overview



139 of 193 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 19 Seeking or Opposing Recovery As Third Party Beneficiary of Contract
II. DETERMINING WHETHER PERSON IS THIRD PARTY BENEFICIARY OF CONTRACT

2-19 MB Practice Guide: CA Contract Litigation 19.03

19.03 CHECKLIST: Determining Whether Person Is Third Party Beneficiary of Contract.

☐ Determine if contracting parties' express intent to benefit third party is manifest in contract:

☐ Determine if express intent appears on face of contract.

Authority:

Brinton v. Bankers Pension Servs., Inc. (1999) 76 CA4th 550, 558, 90 CR2d 469

Discussion:

See 19.05, 19.06[1]

☐ Determine if express intent appears from circumstances of contract.

Authority:

Neverkovec v. Fredericks (1999) 74 CA4th 337, 349, 87 CR2d 856

Discussion:

See 19.06[2][a]

☐ Determine if third party is member of a class of expressly intended beneficiaries.

Authority:

Diamond Woodworks, Inc. v. Argonaut Ins. Co. (2003) 109 CA4th 1020, 1042, 135 CR2d 736

Discussion:

See 19.06[2][c]

☐ Determine if promisor knew of promisee's intent to benefit.

Authority:

Don Rose Oil Co., Inc. v. Lindsley (1984) 160 CA3d 752, 756-758, 206 CR 670

Discussion:

See 19.06[3]

- ☐ Determine if third party is merely an incidental beneficiary.

Authority:

Lundeen Coatings Corp. v. Department of Water & Power (1991) 232 CA3d 816, 834, 283 CR 551

Discussion:

See 19.06[4]

Legal Topics:

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

Contracts LawThird PartiesBeneficiariesTypesGeneral OverviewContracts LawThird

PartiesBeneficiariesTypesIncidental BeneficiariesContracts LawThird PartiesBeneficiariesTypesIntended Beneficiaries



140 of 193 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 19 Seeking or Opposing Recovery As Third Party Beneficiary of Contract
 II. DETERMINING WHETHER PERSON IS THIRD PARTY BENEFICIARY OF CONTRACT

2-19 MB Practice Guide: CA Contract Litigation 19.04

19.04 Options and Strategies.

The first step for a third party seeking to enforce a contract is proving that the contracting parties had an express intention to benefit the third party. Proof of express intention is not limited to the face of the contract, and the third party need not be named or even specifically contemplated when the contract is entered into [*Harper v. Wausau Ins. Co.* (1997) 56 CA4th 1079, 1086, 66 CR2d 64 ; see 19.06[2][b]].

**Strategic Point--All Parties:**

The concept of "express intention" is subject to a relatively broad test: the practitioner must convince the fact finder that, in light of the circumstances of the creation of the contract, the third party is not merely an incidental beneficiary [*Neverkovec v. Fredericks* (1999) 74 CA4th 337, 349, 87 CR2d 856 ; see 19.06[2][a]]. Although there is ample case law illustrating both express and incidental beneficiaries, there is no "bright line" rule or definition; the final analysis will be determined by the facts of the particular case.

Examples:

Common instances in which express intention is found even though the third party is not named on the face include situations in which:

- The third party is a member of a class of expressly intended beneficiaries, such as in an insurance policy's promise not to recover liability payments [*Diamond Woodworks, Inc. v. Argonaut Ins. Co.* (2003) 109 CA4th 1020, 1042, 135 CR2d 736 ; see 19.06[2][c]].
- The third party becomes an express beneficiary after the formation of the contract by entering a "role" or serving a function essential to the contract, such as the case of an outdoor advertising sign company benefitting from an agreement for advertising between an advertising agency and a product maker [*Outdoor Servs., Inc. v. Pabagold, Inc.* (1986) 185 CA3d 676, 681-684, 230 CR 73 ; see 19.06[2][c]].

**Search California Published Cases:**

Use *lexis.com* to search for case discussion of third party beneficiary status:

■ Legal > States Legal--U.S. > California > Find Cases > By Area of Law > CA Contract Cases



Sample Search: Search California published cases for cases discussing third party donee and creditor beneficiaries with this search: *third party OR creditor OR donee /5 beneficiary /10 contract!*.

Legal Topics:

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

Contracts LawThird PartiesBeneficiariesGeneral OverviewContracts LawThird PartiesBeneficiariesClaims & EnforcementContracts LawThird PartiesBeneficiariesTypesIncidental BeneficiariesContracts LawThird PartiesBeneficiariesTypesIntended Beneficiaries



141 of 193 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 19 Seeking or Opposing Recovery As Third Party Beneficiary of Contract
II. DETERMINING WHETHER PERSON IS THIRD PARTY BENEFICIARY OF CONTRACT

2-19 MB Practice Guide: CA Contract Litigation 19.05

19.05 Contracting Parties Must Have Express Intent to Benefit Third Party.

A contract, made expressly for the benefit of a third person, may be enforced by that person at any time before the parties rescind it [CC § 1559]. The word "expressly," by judicial interpretation, means the negative of "incidentally," i.e. an "express intent to benefit" means only "conferring a benefit not incidentally" [*Prouty v. Gores Tech. Group* (2004) 121 CA4th 1225, 1232-1233].

It must appear to have been the intention of the parties to secure to the third party personally the benefit of its provisions. Whether the third party is an intended beneficiary or merely an incidental beneficiary involves construction of the intention of the parties, gathered from reading the contract as a whole in light of the circumstances under which it was entered [*Prouty v. Gores Tech. Group* (2004) 121 CA4th 1225, 1233].

Because an "express intent to benefit" cannot have an exact universal definition, a finding of whether the contracting parties had an express intent to benefit a third party often is a factual determination made by the jury or the court [*Vahle v. Barwick* (2001) 93 CA4th 1323, 1332, 113 CR2d 793].

Jury Instructions:

Third Party Beneficiaries, see *California Forms of Jury Instruction, Ch. 3C, Instr. MB 300C.90* (Matthew Bender).

Example:

A common situation involving third party beneficiaries arises when a debtor and creditor agree that a debt is to be paid to the creditor's creditor, such as when a business seeks third party financing [*Business Title Corp. v. United States* (1978) 21 C3d 710, 713-716, 147 CR 622, 581 P2d 627].

➡ Cross References:

Discussion of determining beneficiary status by fact and by law, see 19.19.
Complaint for damages for breach of written contract--by third party beneficiary, see 19.31.

Consider:

"Express" intent does not mean an intent merely appearing on the face of the contract, but rather the intent gleaned from reading the contract as a whole in light of the circumstances of the case [see 19.06[2]].

Exception:

CC § 1559 does not apply to a trust beneficiary. A trust beneficiary may not sue the trustee, an agent of the trustee, or one with whom the trustee contracted for the benefit of the trust. The express trust beneficiary's rights are governed by the Probate Code provisions applicable to trusts [*Saks v. Damon Raiké & Co.* (1992) 7 CA4th 419, 430-431, 8 CR2d 869 ; see, e.g., Prob Code §§ 16401, 16420, 16421, 17000, 17200].

Legal Topics:

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

Contracts LawThird PartiesBeneficiariesClaims & EnforcementContracts LawThird PartiesBeneficiariesTypesGeneral OverviewContracts LawThird PartiesBeneficiariesTypesIncidental BeneficiariesContracts LawThird PartiesBeneficiariesTypesIntended Beneficiaries



142 of 193 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 19 Seeking or Opposing Recovery As Third Party Beneficiary of Contract
II. DETERMINING WHETHER PERSON IS THIRD PARTY BENEFICIARY OF CONTRACT

2-19 MB Practice Guide: CA Contract Litigation 19.06

19.06 Express Intent to Benefit Third Party Must Appear in Contract or From Surrounding Circumstances.

19.06[1] Express Intent to Benefit Can Be Directly Manifested in Contract. A third party is an intended beneficiary when the express intent of the contracting parties to benefit the third party appears from the terms of the agreement [*Brinton v. Bankers Pension Servs., Inc.* (1999) 76 CA4th 550, 558, 90 CR2d 469].

Cross Reference:

Discussion of determining beneficiary status as a matter of law, see 19.19[2].

19.06[2] Express Intent to Benefit Can Appear From Circumstances.

19.06[2][a] Parties' Express Intent Can Be Determined in Light of Circumstances. Whether or not a third party is an intended beneficiary to the contract involves construction of the parties' intent, gleaned from reading the contract as a whole in light of the circumstances under which it was entered [*Neverkovec v. Fredericks* (1999) 74 CA4th 337, 349, 87 CR2d 856].

Examples:

- In determining whether an employee was an intended beneficiary of a lease entered into by her employer for an apartment to house temporary staff, the court could consider the relevant circumstances surrounding the formation of the lease, including the execution of a letter of responsibility, an employment agreement, and a lease extension [*Spinks v. Equity Residential Briarwood Apartments* (2009) 171 CA4th 1004, 1029, 90 CR3d 453].
- An excess insurer was a third party beneficiary of a claims administration contract between the insured and its workers' compensation claims administrator because one purpose of the contract was to minimize the insured's liability for workers' compensation claims, which conferred on the excess insurer the benefit of reducing its exposure. In addition, the claims administration contract provided that the claims administrator was to administer all of the insured's workers' compensation claims, including those that exceeded the self-insurance limit and became the responsibility of the excess insurer [*National Union Fire Ins. Co. of Pittsburgh, PA v. Cambridge Integrated Services Group, Inc.* (2009) 171 CA4th

35, 51-52, 89 CR3d 473] .

19.06[2][b] Third Party Need Not Be Named or Be Exclusive Beneficiary. The third party beneficiary does not need to be named and identified in the contract or be the exclusive recipient of its benefits [*Harper v. Wausau Ins. Co.* (1997) 56 CA4th 1079, 1086, 66 CR2d 64 ; *COAC, Inc. v. Kennedy Eng'rs* (1977) 67 CA3d 916, 920, 136 CR 890].

Example:

A company engaged in the business of purchasing advertising space for clients was a third party beneficiary of a contract between the manufacturer and the manufacturer's advertising agent that specifically provided for an agent to contract with third persons for media time and space [*Outdoor Servs., Inc. v. Pabagold, Inc.* (1986) 185 CA3d 676, 681-684, 230 CR 73].

19.06[2][c] Third Party Can Be Part of Intended Class of Beneficiaries. A third party beneficiary can be one of the class of persons for whose benefit the contract was expressly made [*Diamond Woodworks, Inc. v. Argonaut Ins. Co.* (2003) 109 CA4th 1020, 1042, 135 CR2d 736].

Examples:

- Although an automobile manufacturer was not named in a release agreement in an automobile accident settlement, the release was applicable to all tortfeasors, and therefore the manufacturer was included in that group and immune from liability [*General Motors Corp. v. Superior Court* (1993) 12 CA4th 435, 444, 15 CR2d 622].
- Employees who worked on city contracts were intended third party beneficiaries of municipal contract provision requiring compliance with city's Living Wage Ordinance [*Amaral v. Cintas Corp. No. 2* (2008) 163 CA4th 1157, 1194, 78 CR3d 572] .
- Summary judgment was improper because issues of fact existed as to whether an employee was among a class of intended beneficiaries of a lease entered into by her employer for an apartment to house temporary staff [*Spinks v. Equity Residential Briarwood Apartments* (2009) 171 CA4th 1004, 1027, 90 CR3d 453] .

19.06[3] Promisor Must Know of Promisee's Intent to Benefit. The promisor must have understood that the promisee intended to benefit the third party, but the promisor's specific intent to benefit the third party is not required [*Lucas v. Hamm* (1961) 56 C2d 583, 591, 15 CR 821, 364 P2d 685].

Examples:

- A plaintiff who was only an incidental beneficiary of a title insurance policy issued to buyers was not an intended third party beneficiary and had no ground for recovery on a contract against the title insurer when the title abstracter had no knowledge of plaintiff's interest in the property at the time the contract was performed [*Stagen v. Stewart-West Coast Title Co.* (1983) 149 CA3d 114, 119, 196 CR 732].
- Even though a contract between a supplier and a seller was executed after the seller's agreement to assign the franchise to the plaintiff, the plaintiff was not a third party beneficiary entitled to enforce the agreement with the supplier because the supplier had no knowledge of the assignment and no intention to benefit the third party [*Don Rose Oil Co., Inc. v. Lindsley* (1984) 160 CA3d 752, 756-758, 206 CR 670].

- A plaintiff was an intended third party beneficiary of a contract to purchase an engagement ring because the jeweler knew that she and her fiancée had shopped for the ring together and that she had chosen the ring [*Schauer v. Mandarin Gems of California, Inc.* (2005) 125 CA4th 949, 957-958].

19.06[4] Incidental Beneficiaries Cannot Recover on Contract. A third person may not recover on a contract that incidentally benefits the person, but was not expressly made for his or her benefit [*Shurpin v. Elmhirst* (1983) 148 CA3d 94, 103, 195 CR 737].

Examples:

- A subcontractor was not an intended third party beneficiary of a contract between a city department and a primary contractor and therefore could not bring an action for the department's alleged breach of contract [*Lundeen Coatings Corp. v. Department of Water & Power* (1991) 232 CA3d 816, 834, 283 CR 551].

- An insured was not a third party beneficiary of a contract between an insurer and an independent adjuster hired by the insurer to investigate the cause and validity of the insured's claim [*Thompson v. Cannon* (1990) 224 CA3d 1413, 1416-1417, 274 CR 608].

- A vocational school was not an intended third party beneficiary of an arbitration provision in a student loan agreement between a student and a lender [*Smith v. Microskills San Diego L.P.* (2007) 153 CA4th 892, 899, 63 CR3d 608].

- A reinsurer was not an intended beneficiary of a contract for legal representation between the ceding insurer and the ceding insurer's attorney. Because of the potential conflict of interest between the ceding insurer and the reinsurer, it was impossible to conclude that either the ceding insurer or the attorney ever intended to confer on the reinsurer status as a beneficiary of the legal services the attorney performed for the ceding insurer [*Zenith Ins. Co. v. O'Connor* (2007) 148 CA4th 998, 1008, 55 CR3d 911].

- Occupants of a home in a planned development community were not intended third party beneficiaries of a lot line agreement between the owners and a homeowners association; nothing in the agreement clearly manifested an intent by the homeowners association or the owners to make the homeowners association's obligation inure to the benefit of the occupants [*Martin v. Bridgeport Community Assn., Inc.* (2009) 173 CA4th 1024, 1034, 93 CR3d 405].

- A developer was not an intended beneficiary of a contract between a county and a consultant hired to prepare an environmental impact report on the developer's development application; therefore, the consultant was not liable to the developer for damages due to the consultant's failure to prepare the report in a timely fashion [*Lake Almanor Associates L.P. v. Huffman-Broadway Group, Inc.* (2009) 178 CA4th 1194, 1199-1204, 101 CR3d 71].

Legal Topics:

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

Contracts LawThird PartiesBeneficiariesClaims & EnforcementContracts LawThird

PartiesBeneficiariesTypesDoneesContracts LawThird PartiesBeneficiariesTypesIncidental BeneficiariesContracts

LawThird PartiesBeneficiariesTypesIntended Beneficiaries



143 of 193 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 19 Seeking or Opposing Recovery As Third Party Beneficiary of Contract

III. DETERMINING WHAT REMEDIES ARE AVAILABLE

2-19 MB Practice Guide: CA Contract Litigation 19.07

19.07 CHECKLIST: Determining What Remedies Are Available.

☐ Determine whether promisee owes third party beneficiary a legal obligation (making third party a creditor beneficiary):

Authority:

COAC, Inc. v. Kennedy Eng'rs (1977) 67 CA3d 916, 919-920, 136 CR 890

Discussion:

See 19.11[1]

☐ Third party creditor beneficiary can recover damages for breach of contract against promisee and promisor.

Authority:

Kraus v. Willow Park Pub. Golf Course (1977) 73 CA3d 354, 372, 140 CR 744

Discussion:

See 19.11[2]

☐ Determine whether promisee intended to make a gift to third party beneficiary (making third party a donee beneficiary):

Authority:

In re Marriage of Smith & Maescher (1993) 21 CA4th 100, 108, 26 CR2d 133

Discussion:

See 19.12[1]

- ☐ Donee beneficiary may recover for economic interest in gift only against promisor.

Authority:

In re Marriage of Smith & Maescher (1993) 21 CA4th 100, 107, 26 CR2d 133

Discussion:

See 19.12[2]

- ☐ Determine if promisee is seeking to enforce contract on beneficiary's behalf:

- ☐ Promisee may recover damages for promisor's breach of creditor beneficiary contract.

Authority:

In re Marriage of Smith & Maescher (1993) 21 CA4th 100, 106-108, 26 CR2d 133

Discussion:

See 19.13

- ☐ Promisee is limited to specific performance for donee beneficiary contract.

Authority:

In re Marriage of Smith & Maescher (1993) 21 CA4th 100, 106-108, 26 CR2d 133

Discussion:

See 19.13

- ☐ Determine if third party has cause of action for damages sounding in tort:

- ☐ Third party was not in privity of contract, but parties intended contract to benefit third party to some extent.

- ☐ Express or implied duty of contract was breached.

- ☐ Third party was harmed by breach of duty.

- ☐ Harm resulting from breach was foreseeable.

Authority:

Christensen v. Superior Court (1991) 54 C3d 868, 891, 2 CR2d 79, 820 P2d 181 ; but see Freeman & Mills, Inc. v. Belcher Oil Co. (1995) 11 C4th 85, 88, 44 CR2d 420, 900 P2d 669

Discussion:

See 19.14[2]

- ☐ Determine if contract provides for recovery of attorney's fees and costs by prevailing party.

Authority:

CC § 1717; CCP § 1021

Discussion:

See 19.15

Legal Topics:

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

Contracts Law Remedies General Overview Contracts Law Third Parties Beneficiaries Claims & Enforcement Contracts
Law Third Parties Beneficiaries Types Creditors Contracts Law Third Parties Beneficiaries Types Donees Contracts
Law Third Parties Beneficiaries Types Intended Beneficiaries



144 of 193 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 19 Seeking or Opposing Recovery As Third Party Beneficiary of Contract

III. DETERMINING WHAT REMEDIES ARE AVAILABLE

2-19 MB Practice Guide: CA Contract Litigation 19.08

19.08 Options and Strategies.

After the plaintiff has demonstrated the contracting parties' express intention to benefit a third party, the next step is to establish the kind of enforceable rights the third party and/or the plaintiff have in the contract. The third party is bound by the conditions of the contract. The third party has the right to enforce the contract, but not to rescind it [*Schauer v. Mandarin Gems of California, Inc.* (2005) 125 CA4th 949, 959-960 ; see 19.10A].

A creditor beneficiary (a beneficiary owed a legal obligation by the promisee) may recover damages from either the promisor or the promisee for breach [*Kraus v. Willow Park Pub. Golf Course* (1977) 73 CA3d 354, 371, 140 CR 744 ; see 19.11[2]]. Double recovery is not allowed [*Kraus v. Willow Park Pub. Golf Course* (1977) 73 CA3d 354, 372, 140 CR 744 ; see 19.11[3]]. A donee beneficiary (a beneficiary who is receiving a gift) may recover only to the extent permitted by the standard contract rules applying to gifts [see *In re Marriage of Smith & Maescher* (1993) 21 CA4th 100, 108, 26 CR2d 133 ; see also 19.12].

If the promisee is seeking to enforce the contract, he or she can recover damages for a creditor beneficiary, but is limited to specific performance when enforcing on behalf of a donee beneficiary [*In re Marriage of Smith & Maescher* (1993) 21 CA4th 100, 106-108, 26 CR2d 133 ; see 19.13]. The third party beneficiary also may be able to bring a tort action, depending on the circumstances [*Christensen v. Superior Court* (1991) 54 C3d 868, 891, 2 CR2d 79, 820 P2d 181 ; see 19.14]. Attorney's fees and costs are recoverable by the prevailing party if the contract so provides [see *Sessions Payroll Mgmt., Inc. v. Noble Constr. Co.* (2001) 84 CA4th 671, 680-681, 101 CR2d 127 ; see also 19.15].

Legal Topics:

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

Contracts Law Remedies Rescission & Redhibition General Overview Contracts Law Third Parties Beneficiaries Claims & Enforcement Contracts Law Third Parties Beneficiaries Types Donees Contracts Law Third Parties Beneficiaries Types Intended Beneficiaries



145 of 193 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 19 Seeking or Opposing Recovery As Third Party Beneficiary of Contract

III. DETERMINING WHAT REMEDIES ARE AVAILABLE

2-19 MB Practice Guide: CA Contract Litigation 19.09

19.09 Elements of Claim for Breach of Third Party Beneficiary Contract.

A claim for breach of a third party beneficiary contract requires proof that [see *Brinton v. Bankers Pension Servs., Inc.* (1999) 76 CA4th 550, 558, 90 CR2d 469]:

- There is a valid contract, the performance of which will result in a benefit to the third party [see 19.20].
- The contracting parties had the express intent to benefit the third party [see 19.06].
- The third party accepted or acted on the contract before the contracting parties rescinded [see 19.27].
- The promisor breached the contract [see 19.22].

Basic Statute of Limitations:

Four years [CCP § 337(1)].

Jury Instructions:

Third Party Beneficiary, see *Judicial Council of California Civil Jury Instructions*, CACI No. 301 (LexisNexis Matthew Bender).

➤ Cross References:

Form for complaint for damages by third party beneficiary, see 19.31.

Discussion of third party beneficiary's rights under contract, see *California Forms of Pleading and Practice*, § 140.103 (Matthew Bender).

Legal Topics:

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

Contracts Law Breach Causes of Action Elements of Claims Contracts Law Defenses Statutes of Limitations Contracts

LawThird PartiesBeneficiariesClaims & Enforcement



146 of 193 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 19 Seeking or Opposing Recovery As Third Party Beneficiary of Contract
III. DETERMINING WHAT REMEDIES ARE AVAILABLE

2-19 MB Practice Guide: CA Contract Litigation 19.10

19.10 Third Party's Rights and Remedies May Be Limited by Contract.

A third party beneficiary's rights under a contract are subject to any conditions and limitations imposed by the contract [*Mercury Cas. Co. v. Maloney (2003) 113 CA4th 799, 802-803*].

Example:

An injured passenger who received medical payments from a driver's excess insurer was obligated to reimburse the insurer pursuant to an insurance policy provision requiring reimbursement on settlement with the responsible party [*Mercury Cas. Co. v. Maloney (2003) 113 CA4th 799, 802-803*].

A third party beneficiary cannot assert greater rights than those of the promisee under the contract [*Doe v. Wal-Mart Stores, Inc. (9th Cir. 2009) 572 F3d 677, 2009 US App. LEXIS 15279, *8*]. When a plaintiff seeks to secure benefits under a contract to which he or she is a third party beneficiary, the plaintiff must take the contract as is; the plaintiff may not select only the favorable parts while rejecting the unfavorable parts [*Souza v. Westlands Water Dist. (2006) 135 CA4th 879, 895, 38 CR3d 78*].

If the promisee breaches the contract, and the damages to the promisor equal or exceed the amount of the benefit that the promisor was to confer on the third party, the third party cannot recover [*Souza v. Westlands Water Dist. (2006) 135 CA4th 879, 895, 38 CR3d 78*].

Legal Topics:

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

Contracts LawContract Conditions & ProvisionsGeneral OverviewContracts LawRemediesGeneral OverviewContracts LawThird PartiesGeneral OverviewContracts LawThird PartiesBeneficiariesClaims & Enforcement



147 of 193 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 19 Seeking or Opposing Recovery As Third Party Beneficiary of Contract

III. DETERMINING WHAT REMEDIES ARE AVAILABLE

2-19 MB Practice Guide: CA Contract Litigation 19.10A

19.10A Third Party Beneficiary May Not Rescind Contract.

A third party beneficiary has the right to enforce a contract, but not to rescind it. Only the parties to the contract may rescind it [*Schauer v. Mandarin Gems of California, Inc. (2005) 125 CA4th 949, 959-960*].

Legal Topics:

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

Contracts LawRemediesRescission & RedhibitionGeneral OverviewContracts LawThird PartiesGeneral OverviewContracts LawThird PartiesBeneficiariesClaims & Enforcement



148 of 193 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 19 Seeking or Opposing Recovery As Third Party Beneficiary of Contract
III. DETERMINING WHAT REMEDIES ARE AVAILABLE

2-19 MB Practice Guide: CA Contract Litigation 19.11

19.11 Creditor Beneficiary Can Sue Promisor and Promisee for Standard Contractual Remedies.

19.11[1] Third Party Is Creditor Beneficiary If Contract Discharges Promisee's Obligation to Third Party.

A third party is a creditor beneficiary if the contract will discharge some form of legal duty owed to the beneficiary by the promisee [*COAC, Inc. v. Kennedy Eng'rs* (1977) 67 CA3d 916, 919-920, 136 CR 890].

Consider:

The promisee's obligation that the promisor agrees to perform is not limited to payment of a financial debt. For example, a sublessee's assumption of duties contained in a lease is such an obligation [*Hartman Ranch Co. v. Associated Oil Co.* (1937) 10 C2d 232, 244, 73 P2d 1163].

19.11[2] Creditor Beneficiary Can Seek Standard Remedies for Breach From Both Promisor and Promisee.

A third party creditor beneficiary, because he or she is owed a legal obligation, can enforce the contract against the promisor or the promisee, or may join them and obtain judgment against both [*Kraus v. Willow Park Pub. Golf Course* (1977) 73 CA3d 354, 371, 140 CR 744].

➤ Cross References:

Form for complaint for damages by third party beneficiary, see 19.31.

Discussion of remedies for breach of contract, see Ch. 22, Suing or Defending Action for Breach of Contract.

19.11[3] Double Recovery Is Not Allowed. Although the creditor beneficiary may enforce the original obligation against either the promisor or the promisee, the creditor beneficiary may not collect more than the total rightful damages. Satisfaction in whole or in part from one party will operate to that extent as satisfaction of the liability of the other [*Kraus v. Willow Park Pub. Golf Course* (1977) 73 CA3d 354, 372, 140 CR 744].

Legal Topics:

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

Contracts Law Remedies General Overview Contracts Law Third Parties Beneficiaries Claims & Enforcement Contracts
Law Third Parties Beneficiaries Types Creditors



149 of 193 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 19 Seeking or Opposing Recovery As Third Party Beneficiary of Contract
III. DETERMINING WHAT REMEDIES ARE AVAILABLE

2-19 MB Practice Guide: CA Contract Litigation 19.12

19.12 Donee Beneficiary Is Limited to Contractual Remedies for Gifts.

19.12[1] Third Party Is Donee Beneficiary If Contract Does Not Discharge Legal Obligation of Promisee to Third Party. A third party is a donee beneficiary if the promisee intends to make a gift or confer a right against the promisor [*Martinez v. Socoma Cos., Inc. (1974) 11 C3d 394, 400-401, 113 CR 585, 521 P2d 841*].

Example:

A son attending college was the donee beneficiary of his parents' marital separation agreement, which provided that the father would pay for his son's college expenses if the father was financially able [*In re Marriage of Smith & Maescher (1993) 21 CA4th 100, 108, 26 CR2d 133*].

Judge's Perspective:

The distinction between the terms "creditor beneficiaries" and "donee beneficiaries" is beginning to fade. "[T]he creditor-donee dichotomy as applied to third party beneficiaries is beginning to vanish. Although the two concepts are still viable, the specific descriptive words are being dropped by the courts and academicians to permit broader application of the doctrine" [*Prouty v. Gores Tech. Group (2004) 121 CA4th 1225, 1236 (quoting Gilbert Fin. Corp. v. Steelform Contracting Co. (1978) 82 CA3d 65, 71, 145 CR 448)*]. The Restatement Second of Contracts eliminated the creditor/donee classifications in favor of the broader term of "intended beneficiaries" because the older classifications carry overtones of obsolete doctrinal difficulties [*Prouty v. Gores Tech. Group (2004) 121 CA4th 1225, 1236 (quoting Restatement (Second) of Contracts § 302)*].



Warning:

Following general third party beneficiary rules, the donee beneficiary may recover only if the promisor must have understood the donative intent from the nature of the contract and the circumstances accompanying its execution [*Martinez v. Socoma Cos., Inc. (1974) 11 C3d 394, 400-401, 113 CR 585, 521 P2d 841*].

Distinguish:

A promisor contracting with a government entity to render a service to some or all of the members of the public is not liable to the public, either as creditors or donees, unless a contrary intention is manifested in

the contract [*Martinez v. Socoma Cos., Inc.* (1974) 11 C3d 394, 401-402, 113 CR 585, 521 P2d 841].

19.12[2] Donee Beneficiary May Recover for Economic Interest in Performance. A third party donee beneficiary ordinarily has an economic interest in the performance of the contract, as drafted with the third party beneficiary in mind, but the promisee does not [see generally *In re Marriage of Smith & Maescher* (1993) 21 CA4th 100, 107, 26 CR2d 133]. A donee beneficiary's remedies therefore are governed by the rules of contract applicable to gifts [see, e.g., *In re Marriage of Smith & Maescher* (1993) 21 CA4th 100, 108, 26 CR2d 133].



Cross References:

Promisee's enforcement of contract involving third party beneficiary, see 19.13.

Discussion of contractual remedies for breach of a gift promise, see Ch. 8, Seeking or Opposing Equitable Remedies in Contract Actions.

Legal Topics:

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

Contracts Law Remedies General Overview Contracts Law Third Parties Beneficiaries Claims & Enforcement Contracts Law Third Parties Beneficiaries Types Donees Estate, Gift & Trust Law Personal Gifts Procedures General Overview



150 of 193 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 19 Seeking or Opposing Recovery As Third Party Beneficiary of Contract
III. DETERMINING WHAT REMEDIES ARE AVAILABLE

2-19 MB Practice Guide: CA Contract Litigation 19.13

19.13 Promisee May Recover for Benefit of Third Party Beneficiary.

The promisee can enforce a third party contract for the benefit of the third party [*In re Marriage of Smith & Maescher* (1993) 21 CA4th 100, 106-108, 26 CR2d 133]. For a creditor beneficiary, the promisee may bring an action for damages or specific performance for the promisor's breach of a legal obligation. However, a promisee has no economic interest in the contractual gift to a donee beneficiary. Therefore, in gift cases, only specific performance is appropriate as a remedy [*In re Marriage of Smith & Maescher* (1993) 21 CA4th 100, 106-108, 26 CR2d 133].



Cross Reference:

Discussion of creditor and donee beneficiaries and available remedies, see 19.11, 19.12.

Legal Topics:

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

Contracts LawBreachCauses of ActionGeneral OverviewContracts LawRemediesGeneral OverviewContracts LawThird PartiesGeneral OverviewContracts LawThird PartiesBeneficiariesGeneral OverviewContracts LawThird PartiesBeneficiariesClaims & Enforcement



151 of 193 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 19 Seeking or Opposing Recovery As Third Party Beneficiary of Contract
 III. DETERMINING WHAT REMEDIES ARE AVAILABLE

2-19 MB Practice Guide: CA Contract Litigation 19.14

19.14 Third Party Beneficiary May Have Action Sounding in Tort.

19.14[1] No Privity Required for Third Party Beneficiary. A third party beneficiary may be able to recover in tort for breach of a duty arising out of a contract, despite lack of privity, when some negligent act has occurred [*Christensen v. Superior Court* (1991) 54 C3d 868, 891, 2 CR2d 79, 820 P2d 181]. Whether the defendant will be held liable to a third person not in privity is a matter of policy and involves balancing certain factors [*Christensen v. Superior Court* (1991) 54 C3d 868, 891, 2 CR2d 79, 820 P2d 181 ; *Biakanja v. Irving* (1958) 49 C2d 647, 650, 320 P2d 16 ; see 19.14[2]; but see *Freeman & Mills, Inc. v. Belcher Oil Co.* (1995) 11 C4th 85, 88, 44 CR2d 420, 900 P2d 669 (general rule precludes tort recovery for noninsurance contract breach in absence of independent duty arising from tort law)].

Example:

Family members present at a funeral service who later learned of the mishandling of the corpse were allowed to recover damages in tort for emotional distress. The mishandling breached the duty implied by the funeral contract between the promisor and promisee; therefore, the family members recovered as third party beneficiaries and not as mere bystanders [*Christensen v. Superior Court* (1991) 54 C3d 868, 890-891, 2 CR2d 79, 820 P2d 181].

**Warning:**

Under *Freeman & Mills, Inc. v. Belcher Oil* [*Freeman & Mills, Inc. v. Belcher Oil Co.* (1995) 11 C4th 85, 88, 44 CR2d 420, 900 P2d 669], the general rule precludes tort recovery for a noninsurance contract breach in the absence of an independent duty arising from tort law. Although this reasoning has not yet been applied in the context of third party beneficiary contract breaches, it is likely to be only a matter of time before the *Belcher Oil* reasoning is applied in these cases, precluding tort recovery absent some tort independent of the breach of contract [see *Freeman & Mills, Inc. v. Belcher Oil Co.* (1995) 11 C4th 85, 88, 44 CR2d 420, 900 P2d 669].

**Cross Reference:**

Discussion of combining contract and tort actions arising from single occurrence, see *California Forms of Pleading and Practice*, § 140.56[2][b] (Matthew Bender).

19.14[2] Transaction Must Be to Benefit Third Party and Involve Foreseeable Harm. The determination of whether a defendant will be held liable in tort to a third person not in privity is a matter of policy and involves the balancing of various factors, including [*Christensen v. Superior Court* (1991) 54 C3d 868, 891, 2 CR2d 79, 820 P2d 181 ; but see *Freeman & Mills, Inc. v. Belcher Oil Co.* (1995) 11 C4th 85, 88, 44 CR2d 420, 900 P2d 669 (general rule precludes tort recovery for noninsurance contract breach in absence of independent duty arising from tort law)]:

- The extent to which the transaction was intended to affect the plaintiff.
- The foreseeability of harm to the plaintiff.
- The degree of certainty that the plaintiff suffered injury.
- The closeness of the connection between the defendant's conduct and the injury suffered.
- The moral blame attached to the defendant's conduct.
- The policy of preventing future harm.

Distinguish:

There can be no tort liability when the only injury is purely financial loss [*Stop Loss Ins. Brokers, Inc. v. Brown & Toland Medical Group* (2006) 143 CA4th 1036, 1042-1043, 49 CR3d 609] .

Judge's Perspective:

Keep in mind that, as with any tort action, to be liable the defendant must have owed a duty of care to the plaintiff [*Boranian v. Clark* (2004) 123 CA4th 1012, 1017 (in action for professional negligence arising from attorney's preparation of will, attorney had no liability to beneficiaries who challenged decedent's testamentary capacity because attorney owed beneficiaries no duty of care)].

Legal Topics:

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

Contracts LawBreachCauses of ActionGeneral OverviewContracts LawRemediesGeneral OverviewContracts LawThird PartiesBeneficiariesClaims & EnforcementTortsNegligenceActionsGeneral Overview



152 of 193 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 19 Seeking or Opposing Recovery As Third Party Beneficiary of Contract
III. DETERMINING WHAT REMEDIES ARE AVAILABLE

2-19 MB Practice Guide: CA Contract Litigation 19.15

19.15 Attorney's Fees Are Available to Prevailing Party If Contract Contains Attorney's Fees Clause.

Recovery of attorney's fees and costs in third party beneficiary contract cases is treated the same as in other contract actions. An appropriate provision in the contract will support an award of attorney's fees and costs to the prevailing party under *CC § 1717(a)* [see *Sessions Payroll Mgmt., Inc. v. Noble Constr. Co. (2000) 84 CA4th 671, 680-681, 101 CR2d 127*]. Attorney's fees and costs can also be recovered under *CCP § 1021* for related tort causes of action arising under the contract [*Xuereb v. Marcus & Millichap, Inc. (1992) 3 CA4th 1338, 1342-1345, 5 CR2d 154*].



Cross Reference:

Discussion of recovery of attorney's fees and costs in contract actions, see Ch. 12, Recovering Attorney's Fees and Costs in Contract Litigation.

Legal Topics:

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

Civil Procedure Remedies Costs & Attorney Fees General Overview Contracts Law Remedies General Overview Contracts Law Third Parties Beneficiaries Claims & Enforcement



153 of 193 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 19 Seeking or Opposing Recovery As Third Party Beneficiary of Contract
IV. SEEKING RECOVERY AS THIRD PARTY BENEFICIARY

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19.16 CHECKLIST: Seeking Recovery As Third Party Beneficiary.

☐ Determine if statute of limitations has elapsed.

☐ Four-year limitation period for third party beneficiary action based on written contract.

Authority:
CCP § 337

Discussion:
See 19.18[1]

☐ Two-year limitation period for third party beneficiary action based on oral contract.

Authority:
CCP § 339

Discussion:
See 19.18[2]

☐ Determine if there are factual (jury) questions concerning beneficiary status:

☐ Determine if evidence of surrounding circumstances, including testimony, creates question of intended benefit.

Authority:
Neverkovec v. Fredericks (1999) 74 CA4th 337, 349, 87 CR2d 856

Discussion:

See 19.19[1]

- ☐ Determine if status can be decided as a matter of law because of absence of contrary extrinsic evidence.

Authority:

Kalmanovitz v. Bitting (1996) 43 CA4th 311, 315, 50 CR2d 332

Discussion:

See 19.19[2]

- ☐ Determine whether plaintiff can meet required burden of proof.

- ☐ Can plaintiff meet burden of pleading and proving existence of third party beneficiary contract?

Authority:

Sessions Payroll Mgmt., Inc. v. Noble Constr. Co. (2000) 84 CA4th 671, 680-681, 101 CR2d 127

Discussion:

See 19.20[1]

Form:

See 19.31

- ☐ Can plaintiff meet burden of pleading and proving required performance by promisee?

Authority:

Votaw Precision Tool Co. v. Air Canada (1976) 60 CA3d 52, 56-57, 131 CR 335

Discussion:

See 19.21

- ☐ Can plaintiff meet burden of pleading and proving intended beneficiary status?

Authority:

Alling v. Universal Mfg. Corp. (1992) 5 CA4th 1412, 1439, 7 CR2d 718

Discussion:

See 19.20[2]

- ☐ Can plaintiff meet burden of pleading and proving promisor's breach and resulting damages?

Authority:

Armstrong Petroleum Corp. v. Tri-Valley Oil & Gas Co. (2004) 116 CA4th 1375, 1391

Discussion:

See 19.22

Form:

See *19.31*

Legal Topics:

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

Contracts LawBreachCauses of ActionElements of ClaimsContracts LawDefensesStatutes of LimitationsContracts
LawRemediesGeneral OverviewContracts LawThird PartiesBeneficiariesClaims & Enforcement



154 of 193 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 19 Seeking or Opposing Recovery As Third Party Beneficiary of Contract
IV. SEEKING RECOVERY AS THIRD PARTY BENEFICIARY

2-19 MB Practice Guide: CA Contract Litigation 19.17

19.17 Options and Strategies.

To recover as a third party beneficiary, the plaintiff must:

- Establish his or her status as an intended beneficiary [*Alling v. Universal Mfg. Corp.* (1992) 5 CA4th 1412, 1439, 7 CR2d 718 ; see 19.20[2]];
- Prove the existence of the contract [*Sessions Payroll Mgmt., Inc. v. Noble Constr. Co.* (2000) 84 CA4th 671, 680-681, 101 CR2d 127 ; see 19.20[1]];
- Prove breach of that contract [*Armstrong Petroleum Corp. v. Tri-Valley Oil & Gas Co.* (2004) 116 CA4th 1375, 1391 ; see 19.22]; and
- Prove resulting damages [*Armstrong Petroleum Corp. v. Tri-Valley Oil & Gas Co.* (2004) 116 CA4th 1375, 1391 ; see 19.22].

Whether or not a third party was an expressly intended beneficiary ultimately is determined by the fact finder [*Vahle v. Barwick* (2001) 93 CA4th 1323, 1332, 113 CR2d 793 ; see 19.19[1]], although in some cases that status can be decided as a matter of law [*Kalmanovitz v. Bitting* (1996) 43 CA4th 311, 315, 50 CR2d 332 ; see 19.19[2]].

The plaintiff must bring the action within four years on a written contract [CCP § 337(1)] or two years on an oral contract [CCP § 339; see 19.18].



Search California Forms of Pleading and Practice:

Use *lexis.com* to search for cases discussing the approach to third party beneficiary cases:

■ Legal > States Legal--U.S. > California > Search Analysis & CLE Materials > CA Treatises & Analytical Materials > California Forms of Pleading and Practice



Sample Search: Search for discussions about third party donee and creditor beneficiaries with this search: *third party OR creditor OR donee /5 beneficiary /10*

contract!.

Legal Topics:

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

Contracts LawBreachCauses of ActionElements of ClaimsContracts LawThird PartiesBeneficiariesGeneral
OverviewContracts LawThird PartiesBeneficiariesClaims & EnforcementContracts LawThird
PartiesBeneficiariesTypesIntended Beneficiaries



155 of 193 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 19 Seeking or Opposing Recovery As Third Party Beneficiary of Contract
IV. SEEKING RECOVERY AS THIRD PARTY BENEFICIARY

2-19 MB Practice Guide: CA Contract Litigation 19.18

19.18 Four-Year Statute of Limitations Generally Applies.

19.18[1] Four-Year Limitation Period Applies to Third Party Beneficiary Claims on Written Contracts.

Contract claims by third party beneficiaries on written contracts are subject to the four year statute of limitation for written obligations [CCP § 337(1); *Skylawn & Skyview Mem'l Lawn v. Superior Court* (1979) 88 CA3d 316, 320, 151 CR 793]. Most third party beneficiary contracts will fall in this category.

Jury Instructions:

Statute of Limitations Against Third Party Beneficiary, see *California Forms of Jury Instruction, Ch. 3F, Instr. MB 300F.53* (Matthew Bender).

➤ Cross References:

Statutes of limitations in contract actions generally, see Ch. 4, Determining Applicable Statute of Limitations and Effect on Potential Action.

Discussion of application of limitation statutes in third party beneficiary cases, see *California Points and Authorities, § 50.132[3][c]* (Matthew Bender).

19.18[2] Two-Year Limitation Period Applies to Third Party Beneficiary Claims on Oral Contracts.

Contract claims by third party beneficiaries on oral contracts are subject to the two-year statute of limitation for other than written obligations [CCP § 339; *Skylawn & Skyview Mem'l Lawn v. Superior Court* (1979) 88 CA3d 316, 320, 151 CR 793].

Jury Instructions:

Statute of Limitations Against Third Party Beneficiary, see *California Forms of Jury Instruction, Ch. 3F, Instr. MB 300F.53* (Matthew Bender).

Consider:

The statute of frauds will apply to third party beneficiary oral contracts, just as it does with any other oral contract.

Judge's Perspective:

In most third party beneficiary cases, the promisee's interests are aligned with those of the third party beneficiary, the promisee will have (or feel) an obligation to the beneficiary, or they will have something else in common. Accordingly, proof in such cases will not be more difficult than in other oral contract cases, and the promisee is likely to testify at trial on the third party beneficiary's behalf as to what the promisor said or did.

**Cross References:**

Statutes of limitations in contract actions generally, see Ch. 4, Determining Applicable Statute of Limitations and Effect on Potential Action.

Discussion of statute of frauds, see Ch. 15, Attacking or Defending Existence of Contract--Failure to Comply With Applicable Formalities.

Legal Topics:

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

Contracts LawDefensesStatutes of LimitationsContracts LawThird PartiesBeneficiariesClaims & Enforcement



156 of 193 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 19 Seeking or Opposing Recovery As Third Party Beneficiary of Contract
IV. SEEKING RECOVERY AS THIRD PARTY BENEFICIARY

2-19 MB Practice Guide: CA Contract Litigation 19.19

19.19 Beneficiary Status May Be Question for Jury.

19.19[1] Whether Plaintiff Was Intended Beneficiary Can Be Triable Issue of Fact. Whether or not a contract is expressly for the benefit of a third party can be a triable issue of fact [*Vahle v. Barwick* (2001) 93 CA4th 1323, 1332, 113 CR2d 793]. In determining the meaning of an alleged third party beneficiary contract, evidence of the surrounding circumstances and negotiations of the parties in making the contract is admissible. In the absence of grounds for estoppel, the contracting parties should be allowed to testify as to their actual intention [*Neverkovec v. Fredericks* (1999) 74 CA4th 337, 349, 87 CR2d 856].

Example:

Whether a defendant attorney who was sued for malpractice in handling a personal injury case against a country club was the intended third party beneficiary of a release agreement between the plaintiffs and the country club was a triable issue of fact. Thus, the trial court erred in granting summary judgment to the attorney on the basis that the language in the release agreement was unambiguous and benefitted the attorney [*Vahle v. Barwick* (2001) 93 CA4th 1323, 1332, 113 CR2d 793].

19.19[2] Status Can Be Determined As Matter of Law in Absence of Conflicting Extrinsic Evidence. Third party beneficiary status may be determined as a matter of law if there is no conflicting extrinsic evidence [*Kalmanovitz v. Bitting* (1996) 43 CA4th 311, 315, 50 CR2d 332]. When there is no conflicting extrinsic evidence, the reviewing court is not bound by the rulings of the trial court, but rather must make an independent interpretation of the written contract [*Coopers & Lybrand v. Superior Court* (1989) 212 CA3d 524, 529, 260 CR 713].

Example:

When the evidence in a dispute over the rights under a partnership agreement was entirely based on the documents themselves, there was no extrinsic evidence and the court decided the third party beneficiary status [*Milazo v. Gulf Ins. Co.* (1990) 224 CA3d 1528, 1534, 274 CR 632].

Legal Topics:

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

Civil ProcedureTrialsJury TrialsProvince of Court & JuryContracts LawThird PartiesBeneficiariesTypesGeneral
OverviewContracts LawThird PartiesBeneficiariesTypesIncidental BeneficiariesContracts LawThird
PartiesBeneficiariesTypesIntended Beneficiaries



157 of 193 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 19 Seeking or Opposing Recovery As Third Party Beneficiary of Contract
IV. SEEKING RECOVERY AS THIRD PARTY BENEFICIARY

2-19 MB Practice Guide: CA Contract Litigation 19.20

19.20 Plaintiff Has Burden of Pleading and Proving Existence of Contract and Intended Beneficiary Status.

19.20[1] Plaintiff Has Burden of Pleading and Proving Existence of Third Party Beneficiary Contract. The party claiming to be, or bringing an action on behalf of, a third party beneficiary must allege in the original complaint that the contracting parties formed a valid contract [CC § 1812.10]. The plaintiff also bears the burden of proving that the contracting parties actually promised the performance that the third party beneficiary seeks [*Sessions Payroll Mgmt., Inc. v. Noble Constr. Co. (2000) 84 CA4th 671, 680-681, 101 CR2d 127*]. Although evidence of surrounding circumstances is admissible [see 19.06[2][a]], this remains largely a question of interpreting the written contract [*Sessions Payroll Mgmt., Inc. v. Noble Constr. Co. (2000) 84 CA4th 671, 681, 101 CR2d 127*].

➡ **Cross References:**

Form for complaint for damages by third party beneficiary, see 19.31.

Contract interpretation rules, see Ch. 21, Asserting a Particular Construction of Contract.

19.20[2] Plaintiff Has Burden of Pleading and Proving Intended Beneficiary Status. A party claiming third party beneficiary status must also include the relevant factual allegations of that status in the initial complaint [CC § 1812.10]. At trial, the plaintiff has the burden of proving that the contracting parties expressly intended to confer a benefit on the alleged third party beneficiary [*Alling v. Universal Mfg. Corp. (1992) 5 CA4th 1412, 1439, 7 CR2d 718*]. The third party's right to enforce covenants of a contract is predicated on the contracting parties' intent to benefit the third party. It is not enough that a literal interpretation of the contract would result in a benefit to the third party [*Vahle v. Barwick (2001) 93 CA4th 1323, 1328, 113 CR2d 793*].

Jury Instructions:

Recovery by Contractor as Third Party Beneficiary of Owner's Other Contracts, see *California Forms of Jury Instruction, Ch. 3I, Instr. MB 300I.13* (Matthew Bender).

➡ **Cross Reference:**

Discussion of express and incidental beneficiaries, see 19.05, 19.06.

Legal Topics:

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

Contracts LawBreachCauses of ActionGeneral OverviewContracts LawThird PartiesBeneficiariesClaims & EnforcementContracts LawThird PartiesBeneficiariesTypesIntended BeneficiariesEvidenceProcedural ConsiderationsBurdens of ProofGeneral Overview



158 of 193 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 19 Seeking or Opposing Recovery As Third Party Beneficiary of Contract

IV. SEEKING RECOVERY AS THIRD PARTY BENEFICIARY

2-19 MB Practice Guide: CA Contract Litigation 19.21

19.21 Plaintiff Has Burden of Pleading and Proving Performance by Promisee.

To be entitled to recovery, a third party beneficiary plaintiff must plead and prove that the promisee performed as required under the contract [*Votaw Precision Tool Co. v. Air Canada* (1976) 60 CA3d 52, 56-57, 131 CR 335].

Jury Instructions:

Third Party Beneficiary Must Prove Performance by Promisee, see *California Forms of Jury Instruction, Ch. 3C, Instr. MB 300C.91* (Matthew Bender).

Legal Topics:

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

Contracts LawBreachCauses of ActionElements of ClaimsContracts LawThird PartiesBeneficiariesClaims & Enforcement



159 of 193 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 19 Seeking or Opposing Recovery As Third Party Beneficiary of Contract

IV. SEEKING RECOVERY AS THIRD PARTY BENEFICIARY

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19.22 Plaintiff Has Burden of Pleading and Proving Breach of Promise and Resulting Damages.

In an action for damages arising from a breach of contract, the plaintiff must plead in the original complaint and prove at trial the defendant's breach and the resulting damages to plaintiff from that breach [*Armstrong Petroleum Corp. v. Tri-Valley Oil & Gas Co. (2004) 116 CA4th 1375, 1391*].

➡ **Cross References:**

Checklists, discussion, and forms relating to a breach of contract action, see Ch. 22, Suing or Defending Action for Breach of Contract.

Checklists, discussion, and forms relating to recovery of damages, see Ch. 7, Seeking or Opposing Damages in Contract Actions.

Legal Topics:

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

Contracts LawBreachCauses of ActionElements of ClaimsContracts LawThird PartiesBeneficiariesClaims & Enforcement



160 of 193 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 19 Seeking or Opposing Recovery As Third Party Beneficiary of Contract
V. OPPOSING THIRD PARTY BENEFICIARY CLAIM

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19.23 CHECKLIST: Opposing Third Party Beneficiary Claim.

☐ Determine if plaintiff's action is barred by statute of limitations.

☐ Four-year limitation period for third party beneficiary action based on written contract.

Authority:
CCP § 337

Discussion:
See 19.18[1]

Form:
See 19.33

☐ Two-year limitation period for third party beneficiary action based on oral contract.

Authority:
CCP § 339

Discussion:
See 19.18[2]

Form:
See 19.33

☐ Determine if plaintiff has met burden of demonstrating intended beneficiary status.

Authority:

Vahle v. Barwick (2001) 93 CA4th 1323, 1332, 113 CR2d 793

Discussion:

See 19.25

Form:

See 19.33

- ☐ Determine if promisee is bringing improper action for damages on behalf of donee-beneficiary.

Authority:

In re Marriage of Smith & Maescher (1993) 21 CA4th 100, 108, 26 CR2d 133

Discussion:

See 19.26

Form:

See 19.33

- ☐ Determine if contract was rescinded before third party accepted.

Authority:

CC § 1559

Discussion:

See 19.27

Form:

See 19.33

- ☐ Determine if there is any clear and convincing evidence of waiver by third party.

Authority:

Bass v. John Hancock Mut. Life Ins. Co. (1974) 10 C3d 792, 796, 112 CR 195, 518 P2d 1147

Discussion:

See 19.28

Form:

See 19.33

- ☐ Determine if original contract contains enforceable arbitration clause.

Authority:

Benasra v. Marciano (2001) 92 CA4th 987, 992, 112 CR2d 358

Discussion:

See 19.29

Form:

See 19.33

- ☐ Determine if third party is claiming benefits through party guilty of fraud on the contract.

Authority:

Reese v. Administrative Comm. of Profit Sharing Trust (1963) 218 CA2d 646, 650, 32 CR 818

Discussion:

See 19.30

- ☐ Determine best course of action to challenge plaintiff's complaint.

Discussion:

See 19.24

- ☐ Demurrer, such as to assert that donee third party beneficiary may not recover damages.

Form:

See 19.32

- ☐ Answer containing appropriate affirmative defenses.

Form:

See 19.33

Legal Topics:

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

Contracts LawDefensesGeneral OverviewContracts LawDefensesStatutes of LimitationsContracts LawThird PartiesBeneficiariesClaims & EnforcementContracts LawThird PartiesBeneficiariesDefensesContracts LawThird PartiesBeneficiariesTypesIncidental Beneficiaries



161 of 193 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 19 Seeking or Opposing Recovery As Third Party Beneficiary of Contract
V. OPPOSING THIRD PARTY BENEFICIARY CLAIM

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19.24 Options and Strategies.

The most important defense in a third party beneficiary case often is a refutation of the third party's claim to intended beneficiary status [see 19.25]. The burden is on the plaintiff to prove intended beneficiary status. Therefore, the defense is advised to devote substantial resources to casting as much doubt on the third party's status as possible. This can include showing that the third party is a donee beneficiary not entitled to recover damages [see *In re Marriage of Smith & Maescher* (1993) 21 CA4th 100, 108, 26 CR2d 133 ; see also 19.26].

Other affirmative defenses also may be available to a party defending against a third party's action. In appropriate cases, the defense can assert that:

- The contract was rescinded [CC § 1559; see 19.27].
- The third party waived its rights [*Bass v. John Hancock Mut. Life Ins. Co.* (1974) 10 C3d 792, 796, 112 CR 195, 518 P2d 1147 ; see 19.28].
- The third party is bound by an arbitration clause [*Benasra v. Marciano* (2001) 92 CA4th 987, 992, 112 CR2d 358 ; see 19.29].
- The third party is claiming rights through a party guilty of fraud on the contract [*Pearsall v. Townsend* (1935) 7 CA2d 162, 166, 45 P2d 824 ; see 19.30].
- The action is barred by the statute of limitations [see 19.18].

Strategic Point--Defendant:

If the defendant can establish facts demonstrating plaintiff is not an express beneficiary by one of the methods discussed in this part [see 19.25 -19.30], the defendant can raise an affirmative defense in the answer, an objection in a demurrer, or both at the same time, alleging that the plaintiff failed to state facts essential to the cause of action [CCP §§ 430.10(e), 430.30(c)]. Failure to raise the defense or objection in the initial answer or demurrer does not constitute waiver [CCP § 430.80(a)]; the objection can later be made by motion for judgment on the pleadings, by motion for summary judgment, by an objection at trial to the introduction of evidence, or on appeal [CCP § 438].

**Cross References:**

Form for demurrer, see 19.32.

Form for answer, see 19.33.

Discussion, checklists, and forms relating to demurrers, answers, and affirmative defenses, see Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, Ch. 11, Demurrers and Motions for Judgment on the Pleadings; and Ch. 14, Answers.

Legal Topics:

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

Contracts LawThird PartiesBeneficiariesClaims & EnforcementContracts LawThird

PartiesBeneficiariesDefensesContracts LawThird PartiesBeneficiariesTypesIncidental Beneficiaries



162 of 193 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 19 Seeking or Opposing Recovery As Third Party Beneficiary of Contract
V. OPPOSING THIRD PARTY BENEFICIARY CLAIM

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19.25 Defendant Can Prove Plaintiff Is Not Intended Beneficiary.

Because the plaintiff has the burden of proving third party beneficiary status [see 19.20], the defendant can defeat the plaintiff's claim by demurring if the plaintiff did not establish the intended beneficiary status, or alternatively by presenting evidence that disproves the plaintiff's beneficiary status [see *Vahle v. Barwick (2001) 93 CA4th 1323, 1332, 113 CR2d 793*].

Example:

An excess insurer who was not a party to a settlement agreement related to defective condominium construction was an incidental beneficiary, not an express third party beneficiary, of plaintiff primary insurer's policy to recover voluntary payments it had made [*Fireman's Fund Ins. Co. v. Maryland Cas. Co. (1994) 21 CA4th 1586, 1600, 26 CR2d 762*].

At a fundamental level, *CC* § 1559 precludes enforcement of a contract by persons only incidentally or remotely benefitted by it [*Clemens v. American Warranty Corp. (1987) 193 CA3d 444, 455, 238 CR 339*].



Cross Reference:

Form for answer containing affirmative defense that plaintiff is not intended beneficiary, see 19.33.

Legal Topics:

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

Contracts LawThird PartiesBeneficiariesDefensesContracts LawThird PartiesBeneficiariesTypesIncidental BeneficiariesContracts LawThird PartiesBeneficiariesTypesIntended Beneficiaries



163 of 193 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 19 Seeking or Opposing Recovery As Third Party Beneficiary of Contract
V. OPPOSING THIRD PARTY BENEFICIARY CLAIM

2-19 MB Practice Guide: CA Contract Litigation 19.26

19.26 In Action by Promisee, Defendant Can Show Third Party Is Merely Donee Beneficiary Not Entitled to Damages.

If the promisee is bringing an action for damages on the third party beneficiary's behalf, the defendant can successfully demur if the third party beneficiary is a donee beneficiary rather than an intended beneficiary, because donee beneficiaries are not entitled to damages. The promisee still can bring an action for specific performance, because although the donee beneficiary is entitled to the promised performance, he or she has no economic interest in the performance [*In re Marriage of Smith & Maescher* (1993) 21 CA4th 100, 108, 26 CR2d 133 ; see 19.12, 19.22].

Distinguish:

Note that for a *creditor* beneficiary, the promisee may bring an action for damages or specific performance, because the promisor has a legal obligation to pay the debt [*In re Marriage of Smith & Maescher* (1993) 21 CA4th 100, 108, 26 CR2d 133].

Consider:

The distinction between the terms "creditor beneficiaries" and "donee beneficiaries" is beginning to fade. The Restatement Second of Contracts eliminated the creditor/donee classifications in favor of the broader term of "intended beneficiaries" because the older classifications carry overtones of obsolete doctrinal difficulties [see *Prouty v. Gores Tech. Group* (2004) 121 CA4th 1225, 1236 (quoting Restatement (Second) of Contracts § 302)].

➡ **Cross References:**

Form for demurrer based on ground that promisee for benefit of donee third party may not recover damages, see 19.32.

Form for answer containing affirmative defense that plaintiff is donee beneficiary, see 19.33.

Further discussion of third party beneficiaries, see *California Forms of Pleading and Practice*, § 140.103 (Matthew Bender).

Legal Topics:

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

Contracts LawThird PartiesBeneficiariesClaims & EnforcementContracts LawThird
PartiesBeneficiariesDefensesContracts LawThird PartiesBeneficiariesTypesDonees



164 of 193 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 19 Seeking or Opposing Recovery As Third Party Beneficiary of Contract
V. OPPOSING THIRD PARTY BENEFICIARY CLAIM

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19.27 Defendant Can Prove Contract Was Rescinded Before Third Party Accepted, Adopted, or Acted on Contract.

The parties to a third party beneficiary contract may rescind it, even unilaterally, without the assent of a third party beneficiary at any time before the contract is accepted, adopted, or acted on by that third person [CC § 1559; see *Mitchell v. Marklund* (1965) 238 CA2d 398, 406, 47 CR 756].

Jury Instructions:

Rescission of Third Party Beneficiary Contract, see *California Forms of Jury Instruction, Ch. 3G, Instr. MB 300G.04* (Matthew Bender).

Rescission of Contract as Defense to Contractor's Action as Third Party Beneficiary of Owner's Contract, see *California Forms of Jury Instruction, Ch. 3I, Instr. MB 300I.58* (Matthew Bender).

➡ **Cross Reference:**

Discussion of rescission of third party beneficiary contract, see *California Forms of Pleading and Practice, Ch. 490, Rescission and Restitution* (Matthew Bender).

Exception:

Estoppel may work to prevent rescission of a third party creditor beneficiary contract [*R. J. Cardinal Co. v. Ritchie* (1963) 218 CA2d 124, 136, 32 CR 545].

Jury Instructions:

Estoppel to Rescind Third Party Beneficiary Contract, see *California Forms of Jury Instruction, Ch. 3F, Instr. MB 300F.28* (Matthew Bender).

➡ **Cross Reference:**

Form for answer containing affirmative defense that contract was rescinded, see 19.33.

Legal Topics:

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

Contracts Law Formation Acceptance General Overview Contracts Law Remedies Rescission & Redhibition General Overview Contracts Law Third Parties Beneficiaries Defenses



165 of 193 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 19 Seeking or Opposing Recovery As Third Party Beneficiary of Contract
V. OPPOSING THIRD PARTY BENEFICIARY CLAIM

2-19 MB Practice Guide: CA Contract Litigation 19.28

19.28 Defendant Can Prove Waiver With Clear and Convincing Evidence.

A third party beneficiary can voluntarily waive or disclaim his or her rights on the contract [*Bass v. John Hancock Mut. Life Ins. Co.* (1974) 10 C3d 792, 796, 112 CR 195, 518 P2d 1147]. The defendant must prove the affirmative defense of waiver by clear and convincing evidence in the answer, as an objection in a demurrer, or at trial [CCP §§ 430.10(e), 430.30(c)]. Failure to raise the defense or objection in the initial answer or general demurrer does not constitute waiver [CCP § 430.80(a)]. In doubtful cases, the court should preserve rights by finding no waiver [*Bass v. John Hancock Mut. Life Ins. Co.* (1974) 10 C3d 792, 796, 112 CR 195, 518 P2d 1147].

Jury Instructions:

Waiver of Rights as Third Party Beneficiary, see *California Forms of Jury Instruction, Ch. 3F, Instr. MB 300F.25* (Matthew Bender).



Cross Reference:

Form for answer containing affirmative defense that plaintiff waived rights under contract, see 19.33.

Legal Topics:

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

Contracts LawDefensesGeneral OverviewContracts LawThird PartiesBeneficiariesGeneral OverviewContracts LawThird PartiesBeneficiariesClaims & EnforcementContracts LawThird PartiesBeneficiariesDefensesEvidenceProcedural ConsiderationsBurdens of ProofClear & Convincing Proof



166 of 193 DOCUMENTS

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Chapter 19 Seeking or Opposing Recovery As Third Party Beneficiary of Contract
V. OPPOSING THIRD PARTY BENEFICIARY CLAIM

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19.29 Third Party Must Comply With Arbitration Clause in Original Contract.

An intended third party beneficiary can be compelled, as agreed by the contracting parties in the initial contract, to adhere to an arbitration provision in a contract executed for the third party's benefit [*Benasra v. Marciano (2001) 92 CA4th 987, 992, 112 CR2d 358*].

➡ **Cross References:**

Discussion of limiting third party rights under the contract, see *19.10*.

Form for answer containing affirmative defense that plaintiff is compelled to arbitrate dispute, see *19.33*.

Discussion of application of rules of arbitration to contract litigation, see Ch. 5, *Determining Whether to Arbitrate or Litigate*.

Legal Topics:

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

Contracts LawContract Conditions & ProvisionsArbitration ClausesContracts LawThird PartiesBeneficiariesClaims & Enforcement



167 of 193 DOCUMENTS

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Chapter 19 Seeking or Opposing Recovery As Third Party Beneficiary of Contract
V. OPPOSING THIRD PARTY BENEFICIARY CLAIM

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19.30 Third Party Cannot Recover Through Party Guilty of Fraud on Contract.

A third party cannot enforce a contract made in part for the third party's benefit if the promisee or promisor is guilty of fraud in the procurement of the contract [*Pearsall v. Townsend* (1935) 7 CA2d 162, 166, 45 P2d 824]. A third party also cannot recover on a contract if the party through which he or she seeks to recover is guilty of fraud in the execution of the contract [see, e.g., *Reese v. Administrative Comm. of Profit Sharing Trust* (1963) 218 CA2d 646, 650, 32 CR 818].

Examples:

- The wife and son of an employee who embezzled money from his employer did not have a claim to the deceased employee's pension fund because the employee's fraud vitiated any vested rights in the money and plaintiffs could claim no better right than that possessed by the deceased employee [*Reese v. Administrative Comm. of Profit Sharing Trust* (1963) 218 CA2d 646, 650, 32 CR 818].

- A third party beneficiary contractor was entitled to enforce the terms of a contract, procured fraudulently by a broker, to subdivide a company's land because the company and its shareholder had not rescinded the contract and had retained the benefits [*Pearsall v. Townsend* (1935) 7 CA2d 162, 166, 45 P2d 824].

Exception:

A third party beneficiary can enforce the contract involving fraud in the procurement if, after discovery of the fraud, the aggrieved party does not rescind the contract and retains the consideration and benefits [*Pearsall v. Townsend* (1935) 7 CA2d 162, 166, 45 P2d 824].

Legal Topics:

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

Contracts LawThird PartiesBeneficiariesClaims & EnforcementContracts LawThird PartiesBeneficiariesDefenses



168 of 193 DOCUMENTS

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Chapter 19 Seeking or Opposing Recovery As Third Party Beneficiary of Contract
VI. FORMS

2-19 MB Practice Guide: CA Contract Litigation 19.31

19.31 Complaint for Damages by Third Party Beneficiary for Breach of Written Contract.**Complaint for Damages by Third Party Beneficiary for Breach of Written Contract.**

_____[Name of attorney]
 _____[Street address]
 _____[City, state, and ZIP]
 _____[Area code and phone number]
 _____[State Bar no. of attorney]
 Attorney for _____[name of party]

SUPERIOR COURT OF CALIFORNIA,
 COUNTY OF _____

[name(s)] _____,	)	
Plaintiff(s)	)	NO.
vs.	)	_____
[name(s)] _____,	)	_____
[and DOES 1	)	COMPLAINT FOR DAMAGES
THROUGH _____]	)	[LIMITED CIVIL CASE]
_____]	)	[Amount Demanded (Exceeds or Does Not Exceed)
Defendant(s).	)	\$10,000]

Plaintiff _____[name] alleges:

[For an individual plaintiff]

1. Plaintiff is an individual residing in _____ [city, if any, and county], California, [in the (name of judicial district, if any) _____] [and therein doing business under the fictitious business name of _____].

_____. Plaintiff has duly complied in all respects with the requirements of *Business and Professions Code Sections 17910 through 17917* with respect to this fictitious business name].

[OR, for a domestic corporation or domestic limited liability company]

1. Plaintiff _____ [name] is, and at all times herein mentioned was, a _____ [corporation or limited liability company] organized and existing under the laws of California, with its principal place of business in _____ [city, if any, and county], California [in the (name of judicial district, if any) _____], [and therein doing business under the fictitious business name of _____]. Plaintiff has duly complied in all respects with the requirements of *Business and Professions Code Sections 17910 through 17917* with respect to this fictitious business name].

[OR, for a foreign corporation or foreign limited liability company]

1. Plaintiff _____ [name] is, and at all times herein mentioned was, a _____ [corporation or limited liability company] organized and existing under the laws of _____ [state or foreign country], and _____ [for foreign corporation authorized to do business and doing business in California or, for foreign limited liability company maintaining action or intrastate business, and registered to transact intrastate business in California], with its principal place of business in California in _____ [city, if any, and county], California [in the (name of judicial district, if any) _____].

[OR, for a general or limited partnership or an unincorporated association]

1. Plaintiff _____ [name] is, and at all times herein mentioned was, a _____ [partnership or unincorporated association] with its principal place of business in _____ [city, if any, and county], California [in the (name of judicial district, if any) _____], [and therein doing business under the fictitious business name of _____]. Plaintiff has duly complied in all respects with the requirements of *Business and Professions Code Sections 17910 through 17917* with respect to this fictitious business name].

[CONTINUE]

[For an individual defendant]

2. Defendant _____ [name] is an individual residing in _____ [city, if any, and county], California [in the (name of judicial district, if any) _____].

_____[and doing business therein under the fictitious business name of _____].

[OR, for a domestic corporation or domestic limited liability company]

2. Defendant _____[name] is, and at all times herein mentioned was, a _____[corporation or limited liability company] organized and existing under the laws of California, [with its principal place of business in _____(city, if any, and county), California, (in the _____[name of judicial district, if any])].

[OR, for a foreign corporation or foreign limited liability company]

2. Defendant _____[name] is, and at all times herein mentioned was, a _____[corporation or limited liability company] organized and existing under the laws of _____[state or foreign country], [with its principal place of business in _____(city, if any, and county), California, (in the _____[name of judicial district, if any])].

[OR, for a general or limited partnership or an unincorporated association]

2. Defendant _____[name] is, and at all times herein mentioned was, _____[a partnership or an unincorporated association] sued herein under the name _____[it has assumed or by which it is known], [with its principal place of business in _____(city, if any, and county), California, (in the _____[name of judicial district, if any])]. [Defendants (names of individual partners or members) _____are, and at all times herein mentioned were, members of that _____(partnership or unincorporated association) (and are, and at all times herein mentioned were, residents of _____County, California)].

[CONTINUE]

3. Plaintiff is ignorant of the true names and capacities of Defendants sued herein as DOES 1 through _____[numeral, e.g., 50], inclusive, and therefore sues these Defendants by these fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when ascertained. [Plaintiff is informed and believes and thereon alleges that each of the fictitiously named defendants is responsible in some manner for the occurrences herein alleged, and that plaintiff's damages as herein alleged were proximately caused by those defendants.]

4. Plaintiff is informed and believes and thereon alleges that at all times material to this complaint, _____[identify defendants to whom agency allegation applies, e.g., each of the Defendants or each of the individual Defendants or Defendant Harry Jones], [and each of the defendants fictitiously named in this complaint,] in addition to acting for himself, herself, or itself and on his, her, or its own behalf individually, is and was acting as the agent, servant, employee and representative of, and with

the knowledge, consent and permission of, and in conspiracy with, each and all of the Defendants and within the course, scope and authority of that agency, service, employment, representation, and conspiracy. Plaintiff further alleges on information and belief that the acts of each of the Defendants were fully ratified by each and all of the Defendants. Specifically, and without limitation, Plaintiff alleges on information and belief that the actions, failures to act, breaches, conspiracy, and misrepresentations alleged herein and attributed to one or more of the specific Defendants were approved, ratified, and done with the cooperation and knowledge of each and all of the Defendants.

5. On or about _____ [date], _____ [name] and Defendant entered into a written contract, a copy of which is attached as Exhibit A and incorporated by reference.

6. By the terms of the contract, _____ [name] agreed to _____ [specify performance], and Defendant agreed to _____ [specify performance]. The contract was made for the Plaintiff's benefit in that _____ [specify facts showing intent to benefit plaintiff].

7. On or about _____ [date], Defendant breached the contract by _____ [specify acts or omissions constituting breach].

8. As a result of Defendant's breach of the contract, Plaintiff has _____ [specify items of damage], to his/her/its damage in the sum of \$_____.

WHEREFORE, Plaintiff prays judgment against Defendant[s, and each of them,] as follows:

1. For compensatory damages in the sum of \$_____;

2. For interest on the sum of \$_____ from and after _____ [date];

[3. For reasonable attorney's fees _____ (of \$_____ or according to proof);]

4. For costs of suit; and

5. For such other and further relief as the court may deem proper.

[firm name, if any] _____

By: [signature] _____

[typed name] _____

Attorney for Plaintiff [name] _____

NOTES.

Authority:

CC § 1559

Timing:

See 19.18

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts Law Third Parties Beneficiaries Claims & Enforcement



169 of 193 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 19 Seeking or Opposing Recovery As Third Party Beneficiary of Contract
VI. FORMS

2-19 MB Practice Guide: CA Contract Litigation 19.32

19.32 Demurrer to Complaint on Ground That Promisee for Benefit of Donee Third Party May Not Recover Damages.

Demurrer to Complaint on Ground That Promisee for Benefit of Donee Third Party May Not Recover Damages.

[Name of attorney]

[Street address]

[City, state, and ZIP]

[Area code and phone number]

[State Bar no. of attorney]
Attorney for _____ [name of party]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

[name] _____,
Plaintiff,
vs.
[name] _____,
Defendant.

)
) NO.
) _____
) DEMURRER OF
) _____
) _____ [identify defendant, e.g.,
DEFENDANT MARY JONES] TO COMPLAINT
BY

[identify plaintiff, e.g.,
PLAINTIFF JOHN SMITH]
[NOTICE OF HEARING AND MEMORANDUM]
Judge:

Department: _____

Defendant demurs to the complaint on the following ground:

Plaintiff's complaint fails to state a cause of action in that the contract having been made for the benefit of a third party, and the Plaintiff having failed to allege that the Plaintiff was bound to provide the promised benefit to the third party, the Plaintiff may not recover damages for breach of the contract because the third party beneficiary is a donee beneficiary.

Dated: _____]

[firm name, if any] _____

By: [signature] _____

[typed name] _____

_____[name] Attorney for Defendant

NOTICE IS HEREBY GIVEN that this demurrer has been set for hearing on _____[date], at _____[time], or as soon thereafter as the matter may be heard, in [_____ (Department or _____ Division) of] the above-entitled court, located at _____[name of building or street address or both], in _____[city] _____, County, California.

The demurrer will be based on this notice of hearing and the memorandum served and filed with this demurrer and notice of hearing, on the records and files herein, and on such evidence as may be presented at the hearing of the demurrer.

NOTES.

Authority:

In re Marriage of Smith & Maescher (1993) 21 CA4th 100, 108, 26 CR2d 133

Filing Demurrer:

A party filing a demurrer must serve and file with it a notice of hearing and a memorandum in support of each ground [see *Cal Rules Ct*, Rules 3.1103(c), 3.1113(a), 3.1320(c)]

Cross Reference:

Discussion of drafting and filing demurrer, with additional forms, see Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, Ch. 11, Demurrers and Motions for Judgment on the Pleadings

Legal Topics:

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

Contracts LawThird PartiesBeneficiariesClaims & EnforcementContracts LawThird
PartiesBeneficiariesDefensesContracts LawThird PartiesBeneficiariesTypesDonees



170 of 193 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 19 Seeking or Opposing Recovery As Third Party Beneficiary of Contract
VI. FORMS

2-19 MB Practice Guide: CA Contract Litigation 19.33

19.33 Answer to Complaint for Breach of Contract With Affirmative Defense(s) Based on Absence of Essential Element.**Answer to Complaint for Breach of Contract With Affirmative Defense(s) Based on Absence of Essential Element.**

_____ [Name of attorney]
 _____ [Street address]
 _____ [City, state, and ZIP]
 _____ [Area code and phone number]
 _____ [State Bar no. of attorney]
 Attorney for _____ [name of party]

SUPERIOR COURT OF CALIFORNIA,
 COUNTY OF _____

[name] _____,
 Plaintiff,
 vs.
 [name] _____,
 Defendant.

)
) NO.
)
) _____
) ANSWER OF
)
) _____ [identify defendant, e.g.,
 DEFENDANT MARY JONES] TO COMPLAINT
 OF
)
) _____ [identify plaintiff, e.g.,
 PLAINTIFF JOHN SMITH]
 [LIMITED CIVIL CASE]
 Judge:

 Department:

Defendant answers the complaint as follows:

[Include general denial below, or set forth, in numbered paragraphs, specific denials, admissions, and allegations in response to those in complaint, in the order in which they are alleged in complaint:]

1. Pursuant to *Code of Civil Procedure Section 431.30(b)(1)*, Defendant generally denies each and every allegation of Plaintiff's Complaint, including all the purported causes of action contained therein, and further denies that Plaintiff is entitled to any equitable or legal relief, or any damages whatsoever.

[Defendant asserts the following affirmative defenses. By doing so, Defendant shall not be deemed to have assumed the burden of proving any matters that otherwise would be Plaintiff's burden.]

[Allege any affirmative defenses, e.g.,]

FIRST AFFIRMATIVE DEFENSE

(Action is Barred by Statute of Limitations)

2. Plaintiff's action is barred by limitations because it was not brought within the _____ [two or four]-year period required by Code of Civil Procedure Section _____.
[337 or 339].

[AND/OR, if alleging that plaintiff was incidental third party beneficiary]

SECOND AFFIRMATIVE DEFENSE

(Plaintiff is Incidental Third Party Beneficiary)

3. Plaintiff does not have standing to enforce the contract because Plaintiff is not a party to the contract and the complaint does not identify the contract as being for the express benefit of Plaintiff.

[AND/OR, if alleging that contract was rescinded before third party plaintiff accepted it]

THIRD AFFIRMATIVE DEFENSE

(Plaintiff is Donee Beneficiary Not Entitled to Damages)

4. Plaintiff is not entitled to recover damages under the contract because Plaintiff is a donee beneficiary.

[AND/OR, if alleging that contract was rescinded before third party plaintiff accepted it]

FOURTH AFFIRMATIVE DEFENSE

(Parties to Contract Rescinded Before Third Party Plaintiff Accepted)

5. Plaintiff cannot enforce the contract alleged in Plaintiff's complaint because that contract was rescinded before Plaintiff acted on it.

[AND/OR, if alleging that plaintiff waived rights to enforce contract]

FIFTH AFFIRMATIVE DEFENSE

(Plaintiff Waived Rights to Enforce Contract)

6. Plaintiff waived all rights to the contract and therefore is no longer entitled to enforce it.

[AND/OR, if alleging that plaintiff must arbitrate the dispute]

SIXTH AFFIRMATIVE DEFENSE

(Plaintiff Is Obligated to Arbitrate Dispute Under Contract)

7. Plaintiff is subject to the arbitration clause contained in the contract and therefore is not entitled to bring this action.

[ADD additional affirmative defenses, if any]

[CONTINUE]

WHEREFORE, Defendant prays as follows:

1. That Plaintiff take nothing by his/her complaint herein;
2. For costs of suit; and
3. For such other and further relief as the court deems proper.

Dated: _____

[firm name, if any] _____

By: *[signature]* _____

[typed name] _____

Attorney for Defendant _____

[ADD verification to answer not containing general denial, if applicable]

VERIFICATION

I am the defendant in the above entitled action; I have read the foregoing answer and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein stated on information and belief, and, as to those matters, I believe it to be true.

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

[date] _____

[signature] _____

[typed name] _____

NOTES.

Authority:

CC § 1559; *Vahle v. Barwick* (2001) 93 CA4th 1323, 1332, 113 CR2d 793 ; *Bass v. John Hancock Mut. Life Ins. Co.* (1974) 10 C3d 792, 796, 112 CR 195, 518 P2d 1147

Cross Reference:

Discussion of answers and affirmative defenses, including forms, see Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, Ch. 14, Answers

Legal Topics:

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

Contracts LawBreachCauses of ActionElements of ClaimsContracts LawThird PartiesBeneficiariesClaims & EnforcementContracts LawThird PartiesBeneficiariesDefenses



171 of 193 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 20 Asserting Agency Issues in Contract Actions

2-20 MB Practice Guide: CA Contract Litigation 20.syn

§ 20.syn Synopsis to Chapter 20: Asserting Agency Issues in Contract Actions

20.01 Scope.

20.02 Objective and Strategy.

20.03 CHECKLIST: Determining If Agency Relationship Exists.

20.04 Agent Represents Principal in Dealings With Third Parties.

20.05 Existence of Agency Is Question of Fact That Party Seeking to Establish Agency Must Prove.

20.05[1] Existence of Agency Relationship Is Question of Fact.

20.05[2] Party Seeking to Prove Existence of Agency Has Burden of Proof.

20.06 Integral Features of Agency Relationship.

20.06[1] Essential Elements of Agency Relationship.

20.06[2] Agent Has Power to Alter Legal Relationships Between Principal and Third Parties.

20.06[3] Agent Acts As Fiduciary of Principal.

20.06[3][a] Agent Owes Principal Duty of Loyalty.

20.06[3][b] Agent's Fiduciary Role Controls Agent's Behavior.

20.06[4] Principal Must Have Right to Control Agent's Actions.

20.07 Requirements for Creation of Agency Relationship Must Be Met.

20.07[1] Any Person Having Capacity to Contract May Appoint Agent.

20.07[2] Agency Relationship May Be Established by Words or Actions.

20.07[2][a] Agency Relationship May Be Created Informally.

20.07[2][b] Conduct of Parties May Be Sufficient to Create Agency.

20.07[2][c] Courts Will Look to Intentions of Parties.

20.07[3] Creation of Agency Must Comply With Equal Dignities Rule.

20.07[3][a] Equal Dignities Rule Applies When Underlying Contract Must Be in Writing.

20.07[3][b] Courts Have Established Exceptions to Equal Dignities Rule.

20.08 CHECKLIST: Determining If Principal Is Bound by Agent's Acts.

20.09 Agent Must Have Acted Within Scope of Authority.

20.09[1] Principal May Confer Actual Authority on Agent.

20.09[1][a] Actual Authority Is Authority That Principal Intends Agent to Have.

20.09[1][b] Actual Authority Need Not Be Express and May Be Proved by Circumstantial Evidence.

20.09[1][c] Grant of Actual Authority Includes Implied Authority to Act in Furtherance of Purpose of Agency.

20.09[1][d] Scope of Express Authority Is Defined by Principal's Instructions.

20.09[2] Conduct of Principal May Confer Ostensible Authority on Agent.

20.09[2][a] Ostensible Authority Must Be Based on Acts or Omissions of Principal, Not Agent.

20.09[2][b] Explicit Representations to Third Party Regarding Agent's Authority Are Not Required.

20.09[2][c] Elements of Estoppel Must Be Proven to Hold Principal Liable for Agent's Acts.

20.09[2][d] Wrongdoing or Receipt of Benefit Is Not Required to Hold Principal Liable.

20.09[2][e] Scope of Ostensible Authority Is Determined by Reasonable Person Standard.

20.09[3] Principal May Subsequently Ratify Agent's Acts.

20.09[3][a] Valid Ratification Is Equivalent of Original Grant of Authority.

20.09[3][b] Ratification Must Meet Any Requirements That Would Have Applied to Advance Authorization of Agent's Acts.

20.09[3][c] Principal Must Have Full Knowledge of Transaction.

20.09[3][d] Principal Must Have Power to Confer Authority on Agent at Time of Ratification.

20.09[3][e] Ratification Cannot Adversely Affect Third Parties Without Their Consent.

20.09[3][f] Principal Must Ratify Entire Transaction.

20.10 Acts Within Scope of Agent's Authority Are Considered Acts of Principal.

20.10[1] Third Party May Proceed Directly Against Principal.

20.10[2] Information Known to Agent May Be Imputed to Principal.

20.10[2][a] Presumption Is That Agent Will Communicate All Relevant Information.

20.10[2][b] Information Must Relate to Purpose of Agency.

20.10[2][c] Agent's Failure to Communicate Does Not Automatically Defeat Presumption of Communication.

20.10[2][d] Agent's Knowledge Will Not Be Imputed to Principal in Some Situations.

20.11 Principal May Not Be Bound If Agent Acted Without Authority.

20.11[1] Principal Not Liable If Agent Lacked Good Faith Belief in Authority to Act.

20.11[2] Principal Liable Only for Authorized Acts That Can Be "Plainly Separated" From Unauthorized Acts.

20.12 Third Party May Be Able to Recover From Agent If Principal Is Not Bound by Agent's Acts.

20.12[1] Agent May Be Liable for Breach of Warranty of Authority.

20.12[2] Agent May Be Liable in Other Situations.

20.13 Both Agent and Principal May Be Liable If Agency Is Undisclosed.

20.13[1] Agent Must Disclose Existence of Agency and Identity of Principal to Avoid Liability.

20.13[2] Undisclosed Principal May Claim Benefits of Agent's Transactions.

20.13[3] Third Party May Sue Undisclosed Principal or Agent, or Both.

20.13[3][a] Third Party May Sue Either Undisclosed Principal or Agent.

20.13[3][b] Plaintiff Must Elect Between Recovery Against Undisclosed Principal or Against Agent.

20.13[3][c] Recovery Against Agent Discharges Principal.

20.14 CHECKLIST: Procedure for Raising Agency Issues.

20.15 Plaintiff Third Party Should Allege Agency in Complaint Against Agent, Principal, or Both.

20.15[1] Only Principal Need Be Named If Agency Is Undisputed.

20.15[2] Agent Should Be Named Individually If Agency Is in Question.

20.16 Agent Named As Defendant May Raise Agency Status As Defense.

20.17 Principal May Enforce Contract Entered Into by Agent on Principal's Behalf.

20.18 Principal Named As Defendant May Raise Agent's Lack of Authority As Defense.

20.19 Agency Allegations--Complaint by Third Party Against Principal.

Agency Allegations--Complaint by Third Party Against Principal.

20.20 Answer to Complaint Against Principal, With Affirmative Defense Denying Agency.

Answer to Complaint Against Principal, With Affirmative Defense Denying Agency.

20.21 Answer to Complaint Against Agent, With Affirmative Defense Asserting Agency.

Answer to Complaint Against Agent, With Affirmative Defense Asserting Agency.

20.22 Complaint by Third Party Against Agent Alleging Breach of Warranty of Authority.

Complaint by Third Party Against Agent Alleging Breach of Warranty of Authority.



172 of 193 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 20 Asserting Agency Issues in Contract Actions

I. STRATEGY

2-20 MB Practice Guide: CA Contract Litigation 20.01

20.01 Scope.

This chapter covers the basic rules of agency law as it relates to contract litigation. The primary focus is on contract disputes between a stranger to the agency relationship, i.e., the third party, on the one hand, and an agent, a principal, or both on the other. This chapter covers:

- Determining whether an agency relationship exists [*see 20.03 -20.07*; Forms: *see 20.19, 20.22*].
- Determining whether a principal is bound by the agent's acts [*see 20.08 -20.13*; Form: *see 20.19*].
- How and when to raise agency issues [*see 20.14 -20.18*; Forms: *see 20.20, 20.22*].

Core Statutes:

CC §§ 2295-2357

Legal Topics:

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

Business & Corporate LawAgency RelationshipsGeneral OverviewBusiness & Corporate LawAgency RelationshipsAuthority to ActContracts & ConveyancesGeneral OverviewBusiness & Corporate LawAgency RelationshipsCauses of Action & RemediesBreach of ContractBusiness & Corporate LawAgency RelationshipsEstablishmentGeneral Overview



173 of 193 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 20 Asserting Agency Issues in Contract Actions

I. STRATEGY

*2-20 MB Practice Guide: CA Contract Litigation 20.02***20.02 Objective and Strategy.**

From a plaintiff's perspective, the law of agency allows a claimant who entered into a contract with an agent to extend liability to the principal on whose behalf the agent acted. When an agent is named as a defendant, the law will protect the agent from personal liability, provided the agent acted within the scope of its authority [see 20.10]. If an agent acts beyond the scope of its authority, or without any authority at all, the law allows the alleged principal to avoid liability for the agent's unauthorized acts [see 20.11].

Depending on the case, there may be strategic advantages to defendants as well as plaintiffs arising out of the existence of an agency relationship. For an agent-defendant, for example, liability can be passed on to the principal [see CC §§ 2330, 2334, 2337]. For a principal-defendant, on the other hand, an agency agreement may help by limiting the scope of the principal's liability to acts within the agent's authority [see CC §§ 2330, 2333, 2334].

Consider:

Contract cases in which agency issues arise sometimes will involve an ongoing business relationship between the attorney's client, the opposing party, and/or a third party. Often the client, the opposing party, or both, will have a business relationship with the entity that is being identified as the "principal" in the transaction. It is important to understand this business relationship before joining the third party to the litigation. It is equally important to bear the parties' business relationship and objectives in mind in determining litigation strategy and settlement prospects.

**Search Treatises:**

Use *lexis.com* to research the law of agency in further depth:

■ Legal > States Legal-U.S. > California > Search Analytical & CLE Materials > CA Treatises & Analytical Materials > California Forms of Pleading and Practice



Sample Search: To research issues related to agency by contract, search: *agent /10 liab!*.

■ Legal > Secondary Legal > Matthew Bender(R) > By Area of Law > Contracts > Corbin on Contracts

 Sample Search: To research issues related to agency by contract, search: *agent OR agency /10 liab!*.

Cross References:

Discussion of the power to contract on behalf of a business entity, see Ch. 14, Attacking or Defending Existence of Contract--Lack of Capacity.

Discussion of specific agency relationships, see California Forms of Pleading and Practice, Ch. 103, Brokers; Ch. 308, Insurance; and Ch. 427, Principal and Agent (Matthew Bender).

For Tips on updating case law and expanding your research with additional resources, see **How to Use Lexis.com With This Publication** at the front of this volume.

Legal Topics:

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

Business & Corporate LawAgency RelationshipsAuthority to ActContracts & ConveyancesGeneral OverviewBusiness & Corporate LawAgency RelationshipsAuthority to ActContracts & ConveyancesFormation & NegotiationBusiness & Corporate LawAgency RelationshipsAuthority to ActContracts & ConveyancesLiability of AgentBusiness & Corporate LawAgency RelationshipsAuthority to ActContracts & ConveyancesLiability of PrincipalBusiness & Corporate LawAgency RelationshipsEstablishmentGeneral Overview



174 of 193 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 20 Asserting Agency Issues in Contract Actions
II. DETERMINING IF AGENCY RELATIONSHIP EXISTS

2-20 MB Practice Guide: CA Contract Litigation 20.03

20.03 CHECKLIST: Determining If Agency Relationship Exists.

☐ Determine whether an agency exists.

☐ Existence of agency is a question of fact.

Authority:

CC § 2295

Discussion:

See 20.05[1]

☐ Can party seeking to establish agency meet burden of proof?

Authority:

Inglewood Teachers Assn. v. Public Employment Relations Bd. (1991) 227 CA3d 767, 780, 278 CR 228

Discussion:

See 20.05[2]

☐ Does agency relationship must exhibit these essential features?

☐ Does agent have power to alter legal relationships between principal and third parties?

☐ Does agent act as a fiduciary of principal?

☐ Does principal control agent's actions?

Authority:

Alvarez v. Felker Mfg. Co. (1964) 230 CA2d 987, 999, 41 CR 514 ; *Garlock Sealing Technologies, LLC v. NAK Sealing Technologies Corp.* (2007) 148 CA4th 937, 964, 56 CR3d 177

Discussion:

See 20.06

- ☐ Written or oral agreement is not required, nor must any consideration be given.

Authority:

Malloy v. Fong (1951) 37 C2d 356, 372, 232 P2d 241 ; *Frank Pisano & Assocs. v. Taggart* (1972) 29 CA3d 1, 15, 105 CR 414

Discussion:

See 20.07[2][a]

- ☐ Is there conduct of each party "manifesting acceptance of a relationship whereby one of them is to perform work for the other under the latter's direction"?

Authority:

Malloy v. Fong (1951) 37 C2d 356, 372, 232 P2d 241 ; *Edwards v. Freeman* (1949) 34 C2d 589, 592, 212 P2d 883 ; *Rezos v. Zahm & Nagel Co.* (1926) 78 CA 728, 731, 246 P 564

Discussion:

See 20.07[2][b]

- ☐ Determine if equal dignities rule applies to the agency authorization.

- ☐ Agency authorization required to be in writing because underlying contract is required to be in writing?

Authority:

CC § 2309

Discussion:

See 20.07[3][a]

- ☐ Do any exceptions to equal dignities rule apply?

☐ Has principal, by its own conduct, led third party to believe that agent has written authority, so that principal will be estopped from raising equal dignities rule against third party?

☐ Did agent perform a purely mechanical act without exercise of any discretion, such as signing a document on behalf of principal?

☐ Did an executive officer of a corporation sign contract on behalf of corporation?

Authority:

Kerner v. Hughes Tool Co. (1976) 56 CA3d 924, 934, 128 CR 839 ; *Ellis v. Mihelis* (1963) 60 C2d 206, 214, 32 CR 415, 384 P2d 7 ; *Jeppi v. Brockman Holding Co., Inc.* (1949) 34 C2d 11, 16-17, 206 P2d 847

Discussion:

See 20.07[3][b]

Legal Topics:

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

Business & Corporate LawAgency RelationshipsGeneral OverviewBusiness & Corporate LawAgency RelationshipsEstablishmentProof of AgencyGeneral OverviewBusiness & Corporate LawAgency RelationshipsEstablishmentProof of AgencyBurdens of ProofBusiness & Corporate LawAgency RelationshipsEstablishmentProof of AgencyQuestions of Fact & Law



175 of 193 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 20 Asserting Agency Issues in Contract Actions
II. DETERMINING IF AGENCY RELATIONSHIP EXISTS

2-20 MB Practice Guide: CA Contract Litigation 20.04

20.04 Agent Represents Principal in Dealings With Third Parties.

An agency relationship is defined as one in which one party--the agent--represents another party--the principal--in dealings with third persons [CC § 2295; see also *L. Byron Culver & Assocs. v. Jaoudi Indus. & Trading Corp.* (1991) 1 CA4th 300, 304, 1 CR2d 680 (agency is relation that results from act of one person, the principal, who authorizes another, the agent, to conduct one or more transactions with one or more third persons and to exercise a degree of discretion in achieving principal's purpose)].

Jury Instructions:

Existence of Agency Relationship Disputed, see *Judicial Council of California Civil Jury Instructions*, CACI No. 3705 (LexisNexis Matthew Bender).

Legal Topics:

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

Business & Corporate LawAgency RelationshipsAuthority to ActGeneral OverviewBusiness & Corporate LawAgency RelationshipsEstablishmentGeneral OverviewBusiness & Corporate LawAgency RelationshipsEstablishmentDefinitionBusiness & Corporate LawAgency RelationshipsEstablishmentElementsGeneral Overview



176 of 193 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 20 Asserting Agency Issues in Contract Actions
II. DETERMINING IF AGENCY RELATIONSHIP EXISTS

2-20 MB Practice Guide: CA Contract Litigation 20.05

20.05 Existence of Agency Is Question of Fact That Party Seeking to Establish Agency Must Prove.

20.05[1] Existence of Agency Relationship Is Question of Fact. The existence of an agency relationship is a question of fact [*Inglewood Teachers Assn. v. Public Employment Relations Bd.* (1991) 227 CA3d 767, 780, 278 CR 228 ; *Rubens v. Texam Oil Corp.* (1965) 239 CA2d 78, 82, 48 CR 411 , and is for the jury to decide unless the evidence is susceptible of only a single inference [*Dorsic v. Kurtin* (1971) 19 CA3d 226, 238, 96 CR 528]. The court may examine the circumstances of the case and the conduct of the parties in determining whether an agency relationship existed and whether an agent acted within the scope of his or her authority [*Inglewood Teachers Assn. v. Public Employment Relations Bd.* (1991) 227 CA3d 767, 780, 278 CR 228 ; *Rubens v. Texam Oil Corp.* (1965) 239 CA2d 78, 82, 48 CR 411].

20.05[2] Party Seeking to Prove Existence of Agency Has Burden of Proof. The party seeking to establish the existence of an agency relationship bears the burden of proof [*Inglewood Teachers Assn. v. Public Employment Relations Bd.* (1991) 227 CA3d 767, 780, 278 CR 228].



Search Treatises:

Use *lexis.com* to find a corporation's agents and principals:

● Legal > States Legal-U.S. > California > Public Records > Business & Corporation Information > Corporation, Partnership & DBA Registrations by State > CA Business and Corporation Information



Sample Search: To use California Business and Corporation Information to find agents and principals, use the regis-agent and owner segments, search: *regis-agent (first name /3 last name) OR owner (first name /3 last name)*.

Jury Instructions:

Legal Relationship Not Disputed, see *Judicial Council of California Civil Jury Instructions*, CACI No. 3703 (LexisNexis Matthew Bender).

Existence of Agency Relationship Disputed, see *Judicial Council of California Civil Jury Instructions*,

CACI No. 3705 (LexisNexis Matthew Bender).

Legal Topics:

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

Business & Corporate LawAgency RelationshipsEstablishmentElementsGeneral OverviewBusiness & Corporate LawAgency RelationshipsEstablishmentProof of AgencyGeneral OverviewBusiness & Corporate LawAgency RelationshipsEstablishmentProof of AgencyBurdens of ProofBusiness & Corporate LawAgency RelationshipsEstablishmentProof of AgencyQuestions of Fact & Law



177 of 193 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 20 Asserting Agency Issues in Contract Actions
II. DETERMINING IF AGENCY RELATIONSHIP EXISTS

2-20 MB Practice Guide: CA Contract Litigation 20.06

20.06 Integral Features of Agency Relationship.

20.06[1] Essential Elements of Agency Relationship. California courts have identified three major features that are integral to any agency relationship [*Alvarez v. Felker Mfg. Co.* (1964) 230 CA2d 987, 999, 41 CR 514 (no agency relationship found); *see also Garlock Sealing Technologies, LLC v. NAK Sealing Technologies Corp.* (2007) 148 CA4th 937, 964, 56 CR3d 177] :

- The agent has the power to alter legal relationships between the principal and third parties [see 20.06[2]].
- The agent generally acts as a fiduciary of the principal [see 20.06[3]].
- The principal has the right to control the agent's actions [see 20.06[4]].

**Strategic Point:**

An important thing to keep in mind when examining agency issues is that the nature of the parties' relationship (i.e. whether or not it is an agency) cannot always be determined based on the parties' agreement *or* their acts. As a result, reviewing the parties' agreement (if any) is not the end of the inquiry. Even if an agreement states that no agency has been created, an agency in fact may be created by the agent's ostensible authority [see 20.09[2]]; and even if an agreement spells out an agency, if the parties' relationship as a whole does not reflect an agency, none exists [see 20.07[2][c]].

Consider:

In deciding whether a person is another person's agent, as opposed to being merely an independent contractor, California courts often have applied to agency law the factors used to determine whether a person is an employee as opposed to an independent contractor; usually in the context of determining the alleged principal's liability for torts committed by the alleged agent [see, e.g., *Flores v. Brown* (1952) 39 C2d 622, 628-629, 248 P2d 922 ; *Malloy v. Fong* (1951) 37 C2d 356, 370-372, 232 P2d 241].

**Cross References:**

Discussion of court's review of parties' intentions, see 20.07[2][c].

Further discussion of agency relationship, see California Forms of Pleading and Practice, Ch. 427, Principal and Agent (Matthew Bender).

List of factors which are considered in determining whether an employment or independent contractor relationship exists, see Restatement (Second) of Agency § 220.

20.06[2] Agent Has Power to Alter Legal Relationships Between Principal and Third Parties. An agent may alter legal relationships between the principal and third parties in a variety of ways. The agent's ability to negotiate and enter into contracts on behalf of the principal is of key importance. When an agent executes a contract on behalf of a principal, the law regards the principal as the contracting party if both of the following requirements are met:

- It must be clear that the agent executed the contract as an agent and not as a principal [*Lippert v. Bailey* (1966) 241 CA2d 376, 382, 50 CR 478 ; see also *CPI Builders, Inc. v. Impco Techs., Inc.* (2001) 94 CA4th 1167, 1174, 114 CR2d 851].
- The agent must have acted within the agent's scope of authority [CC § 2330; *CPI Builders, Inc. v. Impco Techs., Inc.* (2001) 94 CA4th 1167, 1174, 114 CR2d 851].



Cross Reference:

Discussion, see California Forms of Pleading and Practice, Ch. 427, Principal and Agent (Matthew Bender).

20.06[3] Agent Acts As Fiduciary of Principal.

20.06[3][a] Agent Owes Principal Duty of Loyalty. CC § 2322 provides that an agent is held to the same duties of loyalty and good faith that bind a trustee under *Prob Code* § 16002, 16004, 16005, or 16009 [CC § 2322; see also *Fischer v. Machado* (1996) 50 CA4th 1069, 1072, 58 CR2d 213 ; *Pollack v. Lytle* (1981) 120 CA3d 931, 940, 175 CR 81]. While the agency relationship exists, the agent is prohibited from competing with the principal or acting on behalf of any party whose interests are adverse to the principal's interests [*L. Byron Culver & Assocs. v. Jaoudi Indus. & Trading Corp.* (1991) 1 CA4th 300, 304, 1 CR2d 680 ; *Pollack v. Lytle* (1981) 120 CA3d 931, 940, 175 CR 81 ; *Batson v. Strehlow* (1968) 68 C2d 662, 674-675, 68 CR 589, 441 P2d 101]. The duty of loyalty remains paramount regardless of whether or not the agent is compensated in any way for duties performed as an agent [*Zalk v. General Exploration Co.* (1980) 105 CA3d 786, 793, 164 CR 647].



Warning:

The prohibition against competing with the principal will be enforced regardless of whether the principal was actually injured by the agent's behavior, or whether the agent intended any wrongdoing [*Rezos v. Zahm & Nagel Co.* (1926) 78 CA 728, 731, 246 P 564].

20.06[3][b] Agent's Fiduciary Role Controls Agent's Behavior. The agent's role as a fiduciary both mandates certain actions on the agent's part and restricts the agent's permitted activities:

- The agent is obligated to disclose to the principal all material information regarding the subject matter of the agency [*Pollack v. Lytle* (1981) 120 CA3d 931, 940, 175 CR 81 ; *L. Byron Culver & Assocs. v. Jaoudi Indus. & Trading Corp.* (1991) 1 CA4th 300, 304, 1 CR2d 680].
- The agent must use reasonable care, skill and diligence in the performance of the object of the agency [*Pollack v. Lytle* (1981) 120 CA3d 931, 940, 175 CR 81].

■ The agent is also bound not to disclose any information the principal provided to the agent in confidence or otherwise acquired by the agent in the course of the agency [*Church of Scientology v. Armstrong* (1991) 232 CA3d 1060, 1072, 283 CR 917].

20.06[4] Principal Must Have Right to Control Agent's Actions. The primary factor in determining the existence of an agency relationship is the extent of the alleged principal's right to control the manner and means of accomplishing the result desired [*Dorsic v. Kurtin* (1971) 19 CA3d 226, 238-239, 96 CR 528]--in other words, whether or not the alleged principal controlled or had the legal right to control the activities of the alleged agent [*Flores v. Brown* (1952) 39 C2d 622, 628, 248 P2d 922]. This factor has been judicially characterized as "determinative" [*Flores v. Brown* (1952) 39 C2d 622, 628, 248 P2d 922] and "decisive" [*St. Paul Ins. Co. v. Industrial Underwriters Ins. Co.* (1989) 214 CA3d 117, 122, 262 CR 490] on the issue of whether or not an agency relationship exists. In the absence of the essential characteristic of the right of control, there is no true agency [van't Rood v. County of Santa Clara (2003) 113 CA4th 549, 572 ; *Edwards v. Freeman* (1949) 34 C2d 589, 592, 212 P2d 883].

It is not essential that the right of control be exercised or that there be actual supervision of the work of the agent. The existence of the right of control and supervision establishes the existence of an agency relationship [*Malloy v. Fong* (1951) 37 C2d 356, 370-372, 232 P2d 241].

Distinguish--Independent Contractor Relationship:

An independent contractor is one who renders service in the course of independent employment or occupation following the employer's desires only as to the results of the work, not as to the means whereby it is to be accomplished [*Dorsic v. Kurtin* (1971) 19 CA3d 226, 238, 96 CR 528].

Example--No Agency Created:

The fact that a financial institution provided credit, computer services, forms, and/or financing to another vendor (such as a car dealer) normally is not sufficient to establish that the vendor is the agent of the financial institution [*Bescos v. Bank of America* (2003) 105 CA4th 378, 395-397, 129 CR2d 423].

➡ Cross Reference:

Discussion of the distinctions between agents and independent contractors, see California Forms of Pleading and Practice, Ch. 427, Principal and Agent (Matthew Bender); or California Legal Forms, Ch. 84, Independent Contractors (Matthew Bender).

Legal Topics:

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

Business & Corporate LawAgency RelationshipsEstablishmentElementsGeneral OverviewBusiness & Corporate LawAgency RelationshipsEstablishmentElementsApplication of Agency Law PrinciplesBusiness & Corporate LawAgency RelationshipsEstablishmentElementsFactors Inconsistent With AgencyBusiness & Corporate LawAgency RelationshipsEstablishmentElementsManifestation by PrincipalBusiness & Corporate LawAgency RelationshipsEstablishmentElementsRight to Control by Principal



178 of 193 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 20 Asserting Agency Issues in Contract Actions
II. DETERMINING IF AGENCY RELATIONSHIP EXISTS

2-20 MB Practice Guide: CA Contract Litigation 20.07

20.07 Requirements for Creation of Agency Relationship Must Be Met.

20.07[1] Any Person Having Capacity to Contract May Appoint Agent. Any person having capacity to contract may appoint an agent, and any person may be an agent [CC § 2296].

► **Cross Reference:**

Discussion of capacity to contract, see Ch. 14, Attacking or Defending Existence of Contract--Lack of Capacity.

20.07[2] Agency Relationship May Be Established by Words or Actions.

20.07[2][a] Agency Relationship May Be Created Informally. Unlike many other legal relationships, an agency relationship may be created informally. In most cases, there is no requirement that either a written or oral agreement or that there be any consideration be given [*Malloy v. Fong* (1951) 37 C2d 356, 372, 232 P2d 241 ; *Frank Pisano & Assocs. v. Taggart* (1972) 29 CA3d 1, 15, 105 CR 414].

Jury Instructions:

Creation of Agency Relationship, see *California Forms of Jury Instruction, Ch. 3C, Instr. MB 300C.52* (Matthew Bender).

► **Cross Reference:**

Methods for conferring authority on agent, see 20.09.

20.07[2][b] Conduct of Parties May Be Sufficient to Create Agency. The conduct of each party "manifesting acceptance of a relationship whereby one of them is to perform work for the other under the latter's direction" can be sufficient to create an agency relationship [*Malloy v. Fong* (1951) 37 C2d 356, 372, 232 P2d 241 ; *see also* *Edwards v. Freeman* (1949) 34 C2d 589, 592, 212 P2d 883 ; *Rezos v. Zahm & Nagel Co.* (1926) 78 CA 728, 731, 246 P 564]. Even so, merely doing a favor for another will not create an agency relationship. There must be some legal duty owed by the agent to the principal [*Violette v. Shoup* (1993) 16 CA4th 611, 620, 20 CR2d 358], or the principal must have acted, either intentionally or through lack of ordinary care, in a way that led a third party to reasonably believe that the principal had employed an agent [*Pagarigan v. Libby Care Ctr., Inc.* (2002) 99 CA4th 298, 301-302, 120 CR2d 892].

An agency relationship cannot be created by the conduct of the agent alone. Conduct by *both principal and agent* are necessary to create the agency [*Flores v. Evergreen at San Diego, LLC* (2007) 148 CA4th 581, 587-588, 55 CR3d 823] . Nor can an agency relationship be implied from a marriage relationship alone [*Warfield v. Summerville Senior Living, Inc.* (2007) 158 CA4th 443, 449, 69 CR3d 783] .

Cross References:

Conduct of principal creating express authority, see 20.09[1][b].

Conduct of principal creating ostensible authority, see 20.09[2].

20.07[2][c] Courts Will Look to Intentions of Parties. Even if there is a written agreement between a purported principal and agent, the agreement is not controlling as to the nature of the relationship between the parties [*Nichols v. Arthur Murray, Inc.* (1967) 248 CA2d 610, 613, 56 CR 728]. The courts will examine the intention of the parties as well as their conduct in determining whether an agency relationship has been created. Merely using the terms "principal" and "agent" in a contract will not serve to create an agency relationship if the contract as a whole shows that the relationship does not meet the definition of an agency relationship or is for a different purpose altogether [*Anderson v. Badger* (1948) 84 CA2d 736, 742, 191 P2d 768].

This is not to say that contractual recitations are meaningless. A principal that has signed an agreement reciting an agency will be hard-pressed to disavow its existence [see *Woolley v. Embassy Suites, Inc.* (1991) 227 CA3d 1520, 1531, 278 CR 719 ("[t]he management contracts themselves eloquently confirm that the relationship is one of agency")].

Cross Reference:

Discussion and forms regarding creation of agency relationship, see California Forms of Pleading and Practice, Ch. 427, Principal and Agent (Matthew Bender).

20.07[3] Creation of Agency Must Comply With Equal Dignities Rule.

20.07[3][a] Equal Dignities Rule Applies When Underlying Contract Must Be in Writing. In California, the equal dignities rule provides that an oral authorization is sufficient for any purpose, except that an authority to enter into a contract required by law to be in writing can only be given by an instrument in writing [CC § 2309]. In other words, if a principal wishes its agent to enter into an agreement that is required by law to be in writing, the agent's authorization to enter into that agreement also must be in writing.

The equal dignities rule applies only when the requirement that an agreement be in writing is imposed by law or statute. The rule does not apply to a mere agreement between the parties that a right must be exercised in writing [*Ripani v. Liberty Loan Corp.* (1979) 95 CA3d 603, 610, 157 CR 272].

20.07[3][b] Courts Have Established Exceptions to Equal Dignities Rule. In interpreting the equal dignities rule, the courts have established a number of situations in which the rule will not be applied:

- A principal who, by its own conduct, leads a third party to believe that the agent has written authority will be estopped from raising the equal dignities rule against a third party [*Kerner v. Hughes Tool Co.* (1976) 56 CA3d 924, 934, 128 CR 839]. Similarly, the equal dignities rule will not be applied to prohibit enforcement of the agreement between the principal and the agent [*Sunset-Sternau Food Co. v. Bonzi* (1964) 60 C2d 834, 842-843, 36 CR 741, 389 P2d 133].
- When an agent performs a purely mechanical act without exercise of any discretion, such as signing a document on behalf of the principal, the agent's authorization to sign for the principal need not be in

writing [*Ellis v. Mihelis* (1963) 60 C2d 206, 214, 32 CR 415, 384 P2d 7].

- Authorization need not be in writing when an executive officer of a corporation signs on behalf of the corporation. This exception is based on the precept that an executive officer of a corporation is not merely an agent, but rather is the representative of the corporation itself [*Jeppi v. Brockman Holding Co., Inc.* (1949) 34 C2d 11, 16-17, 206 P2d 847].

Cross Reference:

Further discussion of the equal dignities rule, see California Forms of Pleading and Practice, Ch. 427, Principal and Agent (Matthew Bender).

Legal Topics:

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

Business & Corporate LawAgency RelationshipsEstablishmentGeneral OverviewBusiness & Corporate LawAgency RelationshipsEstablishmentAgency AgreementsBusiness & Corporate LawAgency RelationshipsEstablishmentConsentBusiness & Corporate LawAgency RelationshipsEstablishmentDefinitionBusiness & Corporate LawAgency RelationshipsEstablishmentElementsGeneral Overview



179 of 193 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 20 Asserting Agency Issues in Contract Actions
III. DETERMINING IF PRINCIPAL IS BOUND BY AGENT'S ACTS

2-20 MB Practice Guide: CA Contract Litigation 20.08

20.08 CHECKLIST: Determining If Principal Is Bound by Agent's Acts.

☐ Did agent have actual authority from principal to bind principal with respect to act in question?

☐ Did principal expressly confer authority on agent?

☐ Did principal, intentionally or by want of ordinary care, allow agent to believe that agent had authority?

☐ Did principal have implied authority because act was necessary or proper, and usual, in the ordinary course of business, for effecting purpose of agency?

Authority:

CC § 2316; Tomerlin v. Canadian Indem. Co. (1964) 61 C2d 638, 643, 39 CR 731, 394 P2d 571

Discussion:

See 20.09[1]

☐ If agent did not have actual authority, did agent have ostensible authority to bind principal, based of satisfaction of all of following requirements:

☐ Did third party dealing with agent reasonably believe that agent was authorized to act for principal?

☐ Would a reasonable person think that agent's act would be within scope of agent's ostensible authority?

☐ Did principal, intentionally or by want of ordinary care, cause or allow third party to believe that agent had authority?

☐ Did third party, acting with ordinary care, suffer some change of position or injury as a result of reliance on agent's authority?

☐ Was third party free from negligence in relying on agent's apparent authority?

Authority:

CC § 2317; *Reusche v. California Pac. Title Ins. Co.* (1965) 231 CA2d 731, 736, 42 CR 262 ; *Mejia v. Community Hosp. of San Bernardino* (2002) 99 CA4th 1448, 1456-1457, 122 CR2d 233 ; *Associated Creditors' Agency v. Davis* (1975) 13 C3d 374, 399-400, 118 CR 772, 530 P2d 1084

Discussion:

See 20.09[2]

☐ If agent did not have either actual or ostensible authority, did principal subsequently ratify agent's action?

☐ Did manner of ratification satisfy one of following requirements?:

☐ Was ratification made in same manner that would have been necessary to confer original authority for the act ratified?

☐ If an oral authorization would have sufficed, did principal ratify by accepting or retaining benefit of agent's act, with notice of that fact?

Authority:

CC § 2310; *Los Angeles Dredging Co. v. City of Long Beach* (1930) 210 C 348, 360, 291 P 839 ; *Rakestraw v. Rodrigues* (1972) 8 C3d 67, 73, 104 CR 57, 500 P2d 1401

Discussion:

See 20.09[3][b]

☐ Did principal have full knowledge of material facts of transaction at time of ratification?

Authority:

CC § 2314; *Estate of Fletcher* (1940) 36 CA2d 567, 573, 97 P2d 1039

Discussion:

See 20.09[3][c]

☐ Did principal have power to confer authority for act at time act was performed?

Authority:

CC § 2312; *Lindsay-Field v. Friendly* (1995) 36 CA4th 1728, 1736, 43 CR2d 71

Discussion:

See 20.09[3][d]

- ☐ Does ratification affect rights of any third party?

Authority:

CC § 2313

Discussion:

See 20.09[3][e]

- ☐ Can knowledge of information known to agent be imputed to principal?

- ☐ Should agent, in good faith and exercise of ordinary care and diligence, have communicated information to principal?

Authority:

CC § 2332; *Kelley v. British Commercial Ins. Co. Ltd.* (1963) 221 CA2d 554, 561, 34 CR 564

Discussion:

See 20.10[2][a]

- ☐ With respect to information in question:

- ☐ Was it obtained in course of agent's acts within scope of agent's authority; and

- ☐ Did it relate to subject matter of agency?

Authority:

Columbia Pictures Corp. v. DeToth (1948) 87 CA2d 620, 630, 197 P2d 580

Discussion:

See 20.10[2][b]

- ☐ Is presumption imputing agent's knowledge to principal rebuttable under facts of case, due to existence of any of following:

- ☐ Does any law specifically require actual notice to principal?

Authority:

Herman v. Los Angeles County Metro. Transp. Auth. (1999) 71 CA4th 819, 830, 84 CR2d 144

Discussion:

See 20.10[2]

☐ Does third party have knowledge of circumstances that clearly indicate that agent will not inform principal?

Authority:

Wagner v. Benson (1980) 101 CA3d 27, 35, 161 CR 516 ; Sands v. Eagle Oil & Ref. Co., Inc. (1948) 83 CA2d 312, 319, 188 P2d 782

Discussion:

See 20.10[2][d]

☐ Was agent acting adversely to interests of principal?

Authority:

Sands v. Eagle Oil & Ref. Co., Inc. (1948) 83 CA2d 312, 319, 188 P2d 782 ; People v. Park (1978) 87 CA3d 550, 566, 151 CR 146 ; Meyer v. Glenmoor Homes, Inc. (1966) 246 CA2d 242, 264, 54 CR 786

Discussion:

See 20.10[2][d]

☐ Was a criminal action involved?

Authority:

Freeman v. Superior Court (1955) 44 C2d 533, 538, 282 P2d 857

Discussion:

See 20.10[2]

☐ Based on determinations made above, are agent's acts in question legally deemed to be acts of principal, so that party seeking to enforce agent's acts can proceed against principal directly?

Authority:

Lippert v. Bailey (1966) 241 CA2d 376, 382, 50 CR 478

Discussion:

See 20.10[1]

☐ If agent's acts were outside grant of agent's authority, can principal avoid liability for agent's acts by demonstrating all of following:

- ☐ Agent did not have a good faith belief in his or her authority to act.
- ☐ Principal's conduct did not create an ostensible agency.
- ☐ Principal had no knowledge of agent's acts that exceeded agent's authority.

Authority:

Pagarigan v. Libby Care Ctr., Inc. (2002) 99 CA4th 298, 301-302, 120 CR2d 892 ;

*Jeppi v. Brockman Holding Co., Inc. (1949) 34 C2d 11, 18-19, 206 P2d 847 ;
Montgomery v. Bank of Am. Nat'l Trust & Sav. Ass'n (1948) 85 CA2d 559, 564, 193 P2d
475*

Discussion:

See 20.11[1]

☐ For purposes of imposing liability on principal, can agent's authorized acts be "plainly separated" from any unauthorized acts?

Authority:

CC § 2333

Discussion:

See 20.11[2]

☐ If third party cannot seek recovery from principal, can recovery be sought from agent?

☐ Can agent be liable for breach of warranty of authority?

☐ Did agent misrepresent scope of his or her authority?

☐ Was third party aware of the misrepresentation?

Authority:

CC § 2342

Discussion:

See 20.12[1]

☐ Was credit given, with agent's consent, to agent personally?

☐ Did agent enter into written contract in principal's name without believing, in good faith, that agent had authority to do so?

☐ Were agent's acts "wrongful in their nature?"

Authority:

CC § 2343

Discussion:

See 20.12[2]

☐ If principal was undisclosed, determine whether to sue agent or principal.

☐ Third party who discovers existence of an undisclosed principal may pursue claim against either

principal or agent.

Authority:

J & J Builders Supply v. Caffin (1967) 248 CA2d 292, 295, 56 CR 365 ; *Rigney v. De La Salle Inst.* (1935) 10 CA2d 492, 496, 52 P2d 579

Discussion:

See 20.13[3][a]

☐ Consider naming both agent and undisclosed principal in order to determine facts of agency relationship.

Authority:

Standard Oil Co. of Cal. v. Doneux (1961) 192 CA2d 608, 613, 13 CR 749 ; *Klinger v. Modesto Fruit Co., Inc.* (1930) 107 CA 97, 101, 290 P 127

Discussion:

See 20.13[3][b]

☐ If both agent and principal are named, elect which of the two to hold liable.

Authority:

Standard Oil Co. of Cal. v. Doneux (1961) 192 CA2d 608, 612, 13 CR 749 ; *Klinger v. Modesto Fruit Co., Inc.* (1930) 107 CA 97, 101, 290 P 127

Discussion:

See 20.13[3][b]

Legal Topics:

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

Business & Corporate LawAgency RelationshipsAuthority to ActContracts & ConveyancesGeneral OverviewBusiness & Corporate LawAgency RelationshipsAuthority to ActContracts & ConveyancesLiability of PrincipalBusiness & Corporate LawAgency RelationshipsDuties & LiabilitiesAuthorized Acts of AgentsGeneral OverviewBusiness & Corporate LawAgency RelationshipsDuties & LiabilitiesAuthorized Acts of AgentsLiability of PrincipalBusiness & Corporate LawAgency RelationshipsEstablishmentGeneral Overview



180 of 193 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 20 Asserting Agency Issues in Contract Actions
III. DETERMINING IF PRINCIPAL IS BOUND BY AGENT'S ACTS

2-20 MB Practice Guide: CA Contract Litigation 20.09

20.09 Agent Must Have Acted Within Scope of Authority.

20.09[1] Principal May Confer Actual Authority on Agent.

20.09[1][a] Actual Authority Is Authority That Principal Intends Agent to Have. Actual authority is the authority that a principal "intentionally confers upon the agent, or intentionally, or by want of ordinary care, allows the agent to believe himself to possess" [CC § 2316]. In other words, actual authority is based on conduct of the principal that leads *the agent* reasonably to believe that the principal consents to the agent's acts [*Tomerlin v. Canadian Indem. Co.* (1964) 61 C2d 638, 643, 39 CR 731, 394 P2d 571 ; *Mannion v. Campbell Soup Co.* (1966) 243 CA2d 317, 320, 52 CR 246].

Distinguish:

In contrast, ostensible authority arises as a result of conduct of the principal that leads *the third party* reasonably to believe that the agent possesses the authority to act on the principal's behalf [*Tomerlin v. Canadian Indem. Co.* (1964) 61 C2d 638, 643, 39 CR 731, 394 P2d 571 ; see 20.09[2]].



Warning:

A single agent may have actual authority for certain acts and ostensible authority for others [*Hartong v. Partake, Inc.* (1968) 266 CA2d 942, 960, 72 CR 722].

Jury Instructions:

Actual Authority of Agent, see *California Forms of Jury Instruction, Ch. 3C, Instr. MB 300C.53* (Matthew Bender).

20.09[1][b] Actual Authority Need Not Be Express and May Be Proved by Circumstantial Evidence. The principal's consent need not be express (i.e., actually granted to the agent by the principal orally or in writing) in order to establish actual authority. Agency may be implied from the facts, and if a principal by his or her acts has led others to believe that he or she has conferred authority upon an agent, the principal may not assert, as against third parties who have relied thereon in good faith, that the principal did not intend to confer such authority. An agent's authority may be proved by circumstantial evidence [*Tomerlin v. Canadian Indem. Co.* (1964) 61 C2d 638, 643, 39 CR 731, 394 P2d 571].

20.09[1][c] Grant of Actual Authority Includes Implied Authority to Act in Furtherance of Purpose of Agency. In addition to the agent's express authority, a grant of actual authority to an agent by a principal gives the agent implied authority to "do everything necessary or proper and usual, in the ordinary course of business, for effecting the purpose of his agency" [CC § 2319; *Garber v. Prudential Ins. Co.* (1962) 203 CA2d 693, 701-702, 22 CR 123 ; *Leavens v. Pinkham & McKevitt* (1912) 164 C 242, 248, 128 P 399]. An agent's exercise of implied authority still must be reasonably appropriate and serve to further the principal's purpose [*Garber v. Prudential Ins. Co.* (1962) 203 CA2d 693, 702-703, 22 CR 123].

20.09[1][d] Scope of Express Authority Is Defined by Principal's Instructions. If the agent has actual authority from the principal, the scope of the agent's authority will be limited to the express terms established by the principal, whether written or oral, together with implied authority to use all reasonable and necessary means to accomplish the purpose of the agency [CC § 2319; *Garber v. Prudential Ins. Co.* (1962) 203 CA2d 693, 701-702, 22 CR 123].

20.09[2] Conduct of Principal May Confer Ostensible Authority on Agent.

20.09[2][a] Ostensible Authority Must Be Based on Acts or Omissions of Principal, Not Agent. Ostensible authority is "such as a principal, intentionally or by want of ordinary care, causes or allows a third person to believe the agent to possess" [CC § 2317].

Any claim of ostensible authority must be based upon statements or conduct of *the principal*, rather than on the acts or representations by the agent [*Petersen v. Securities Settlement Corp.* (1991) 226 CA3d 1445, 1452, 277 CR 468 ; *Lindsay-Field v. Friendly* (1995) 36 CA4th 1728, 1734, 43 CR2d 71 ; *Mannion v. Campbell Soup Co.* (1966) 243 CA2d 317, 320, 52 CR 246].

Distinguish:

In contrast, actual authority arises as a result of conduct of the principal that leads *the agent* reasonably to believe that the principal consents to the agent's acts [*Tomerlin v. Canadian Indem. Co.* (1964) 61 C2d 638, 643, 39 CR 731, 394 P2d 571 ; see 20.09[1][a]].

Example:

An attorney, merely by virtue of his or her employment as such, has no apparent authority to bind a client to an agreement for arbitration [*Toal v. Tardif* (2009) 178 CA4th 1208, 1221, 101 CR3d 97 (client is bound by arbitration agreement signed by his or her counsel only if client consented to or ratified agreement)].



Warning:

A single agent may have actual authority for certain acts and ostensible authority for others [*Hartong v. Partake, Inc.* (1968) 266 CA2d 942, 960, 72 CR 722].

Jury Instructions:

Actual Authority of Agent, see *California Forms of Jury Instruction*, Ch. 3C, Instr. MB 300C.53 (Matthew Bender).

Ostensible Authority, see *California Forms of Jury Instruction*, Ch. 3C, Instr. MB 300C.55 (Matthew Bender).

Ostensible Agent, see *Judicial Council of California Civil Jury Instructions*, CACI No. 3709 (LexisNexis Matthew Bender).

20.09[2][b] Explicit Representations to Third Party Regarding Agent's Authority Are Not Required. The principal does not have to make explicit representations regarding the agent's authority to the third party before

ostensible authority can be found [*C.A.R. Transp. Brokerage Co., Inc. v. Darden Rests., Inc.* (9th Cir 2000) 213 F3d 474, 480 ; *Hartong v. Partake, Inc.* (1968) 266 CA2d 942, 960, 72 CR 722]. Ostensible authority may be proven by means such as the following [*C.A.R. Transp. Brokerage Co., Inc. v. Darden Rests., Inc.* (9th Cir 2000) 213 F3d 474, 480 ; *Meyer v. Ford Motor Co.* (1969) 275 CA2d 90, 102, 79 CR 816]:

- The principal remaining silent with respect to the agent's authority.
- The principal's representations to the general public.
- The principal appointing an agent to a particular position.
- The customs and usages of a particular trade.

20.09[2][c] Elements of Estoppel Must Be Proven to Hold Principal Liable for Agent's Acts. If an agent is acting under ostensible authority, a principal will be bound by the acts of the agent to any third persons who, in good faith and without want of ordinary care, incur a liability or part with value in reliance upon the agent's authority [CC § 2334]. Under CC §§ 2317 and 2334, the liability of the principal for the agent's acts is based on the doctrine of estoppel. In essence, a principal who allows an agent to act under ostensible authority has facilitated the commission of a fraud on a third party and, provided that the third party had no notice of the fraud, the principal will be held liable for the agent's fraud [*Hartong v. Partake, Inc.* (1968) 266 CA2d 942, 960, 72 CR 722 ; *Meyer v. Ford Motor Co.* (1969) 275 CA2d 90, 102, 79 CR 816].

Three elements must be proven in order to establish a principal's liability for the acts of an agent clothed with ostensible authority [*Reusche v. California Pac. Title Ins. Co.* (1965) 231 CA2d 731, 736, 42 CR 262 ; *Mejia v. Community Hosp. of San Bernardino* (2002) 99 CA4th 1448, 1456-1457, 122 CR2d 233 ; *Hartong v. Partake, Inc.* (1968) 266 CA2d 942, 960, 72 CR 722]:

- The person dealing with the agent must reasonably believe that the agent is authorized to act for the principal.
- The third party's belief must be the result of some act or neglect on the part of the principal.
- The third party, acting with ordinary care, must have suffered some change of position or injury as a result of relying on the agent's authority.

An alternative formulation of this three-part test states the third element to be that the third person, in relying on the agent's apparent authority, must not be guilty of negligence [see, e.g., *Associated Creditors' Agency v. Davis* (1975) 13 C3d 374, 399-400, 118 CR 772, 530 P2d 1084 (citing cases); *Seneca Ins. Co. v. County of Orange* (2004) 117 CA4th 611, 620].

Judge's Perspective:

The best evidence of whether it was reasonable for the plaintiff to believe that the agent had the authority to act for the principal is whether the agent had done so before [*Snukal v. Flightways Mfg., Inc.* (2000) 23 C4th 754, 779, 98 CR2d 1, 3 P3d 286 (a corporate officer may have ostensible authority to enter into an agreement on behalf of the corporation if he or she "assumed and exercised the power in the past" with the apparent consent and acquiescence of the corporation)]. However, the fact that the agent acted on the principal's behalf must have been known to third parties to make the reliance justifiable [*Snukal v. Flightways Mfg., Inc.* (2000) 23 C4th 754, 779, 98 CR2d 1, 3 P3d 286].



Strategic Point--Plaintiff:

Given the factual questions involved in an ostensible authority determination, it is unlikely that an agency relationship of this nature can be established on pretrial motion (although it is possible that one could be disproved, when, for example the purported agent was found to have understood and/or disclosed to third parties that no agency existed). Plaintiffs should keep this in mind when pleading the existence (and basis) of an agency relationship.

Jury Instructions:

Ostensible Agent, see *Judicial Council of California Civil Jury Instructions*, CACI No. 3709 (LexisNexis Matthew Bender).

Ostensible Authority, see *California Forms of Jury Instruction*, Ch. 3C, Instr. MB 300C.55 (Matthew Bender)

20.09[2][d] Wrongdoing or Receipt of Benefit Is Not Required to Hold Principal Liable. When an agent acts under ostensible authority, the principal will be subject to liability regardless of whether the principal is innocent of any wrongdoing or received any benefit from the transaction [*Hartong v. Partake, Inc.* (1968) 266 CA2d 942, 960, 72 CR 722].

20.09[2][e] Scope of Ostensible Authority Is Determined by Reasonable Person Standard. If the agent is acting under ostensible authority, the scope of the agent's authority will be established based on what a reasonable person would find to be the scope of the agent's authority [*Tomerlin v. Canadian Indem. Co.* (1964) 61 C2d 638, 643, 39 CR 731, 394 P2d 571 ; *Columbia Outfitting Co. v. Freeman* (1950) 36 C2d 216, 220, 223 P2d 21].

20.09[3] Principal May Subsequently Ratify Agent's Acts.

20.09[3][a] Valid Ratification Is Equivalent of Original Grant of Authority. If a principal properly ratifies an act performed by a purported agent, the ratification will relate back to the time of the agent's act and the act will be treated as if it had been approved originally [*Los Angeles Dredging Co. v. City of Long Beach* (1930) 210 C 348, 360, 291 P 839 ; *Rakestraw v. Rodrigues* (1972) 8 C3d 67, 73, 104 CR 57, 500 P2d 1401].

Example:

Condominium sellers' signatures on disclosure statements ratified the actions of their real estate agent, who previously (without authority) signed the sellers' names on an offer, counteroffer and addendum to the counteroffer. The sellers' ratification of their agent's actions created an enforceable contract binding on the sellers [*Behniwal v. Mix* (2005) 133 CA4th 1027, 1039-1042, 35 CR3d 320].

Exception:

There can be no ratification if [*Pacific Bone Coal & Fertilizer Co. v. Bleakmore* (1927) 81 CA 659, 666, 254 P 618 ; *Rakestraw v. Rodrigues* (1972) 8 C3d 67, 73, 104 CR 57, 500 P2d 1401]:

- The principal's purpose in adopting the agent's actions is minimizing the principal's losses; or
- The ratification is due to duress or misrepresentation on the part of the agent.

Jury Instructions:

Ratification, see *Judicial Council of California Civil Jury Instructions*, CACI No. 3710 (LexisNexis Matthew Bender).

Ratification by Acceptance of Benefits, see *California Forms of Jury Instruction, Ch. 3C, Instr. MB 300C.56* (Matthew Bender).

20.09[3][b] Ratification Must Meet Any Requirements That Would Have Applied to Advance Authorization of Agent's Acts. A ratification can be made only in the manner that would have been necessary to confer an original authority for the act ratified, or, if an oral authorization would suffice, by accepting or retaining the benefit of the act, with notice thereof [CC § 2310].

Ratification need not always be express. It may be implied based on conduct of the principal that [*Rakestraw v. Rodrigues* (1972) 8 C3d 67, 73, 104 CR 57, 500 P2d 1401 ; *Union Trust & Realty Co. v. Best* (1911) 160 C 263, 267, 116 P 737]:

- Shows an intention to ratify the acts of the purported agent; or
- Is inconsistent with any conclusion other than that the principal is adopting and approving the agent's acts, such as not objecting to a transaction entered into by a purported agent.

Conduct by the principal that will constitute ratification includes bringing legal action to secure the benefits of the alleged agency transaction [*Price v. McConnell* (1960) 184 CA2d 660, 666, 7 CR 695].

20.09[3][c] Principal Must Have Full Knowledge of Transaction. A ratification by a principal will not be effective if the principal does not have full and complete knowledge of the material facts of the transaction at the time of ratification [CC § 2314; *Estate of Fletcher* (1940) 36 CA2d 567, 573, 97 P2d 1039]. The principal's knowledge of the material facts encompasses both knowledge of the agent's acts and the legal effect of those acts [*Estate of Fletcher* (1940) 36 CA2d 567, 573, 97 P2d 1039]. In essence, the principal's decision to adopt the agent's actions must be truly voluntary [*Rakestraw v. Rodrigues* (1972) 8 C3d 67, 73, 104 CR 57, 500 P2d 1401]. Thus, the mere fact that the principal accepts the benefits of an agent's unauthorized acts generally will not constitute a ratification if the principal acted in ignorance of the relevant facts [*Pacific Bone Coal & Fertilizer Co. v. Bleakmore* (1927) 81 CA 659, 666, 254 P 618].

Exception:

If the principal's ignorance of the facts is due to the principal's own failure to investigate and if the circumstances are such as to put a reasonable person on inquiry, the principal may be held to have ratified the agent's acts despite lack of full knowledge [*Volandri v. Hlobil* (1959) 170 CA2d 656, 659, 339 P2d 218 ; *Reusche v. California Pac. Title Ins. Co.* (1965) 231 CA2d 731, 736, 42 CR 262].

Jury Instructions:

Ratification, see *Judicial Council of California Civil Jury Instructions, CACI No. 3710* (LexisNexis Matthew Bender).

Ratification by Acceptance of Benefits, see *California Forms of Jury Instruction, Ch. 3C, Instr. MB 300C.56* (Matthew Bender).

20.09[3][d] Principal Must Have Power to Confer Authority on Agent at Time of Ratification. A ratification will not be valid unless, at the time the principal ratifies the act, the principal has power to confer authority for such an act [CC § 2312; *Lindsay-Field v. Friendly* (1995) 36 CA4th 1728, 1736, 43 CR2d 71].

20.09[3][e] Ratification Cannot Adversely Affect Third Parties Without Their Consent. No unauthorized act by an agent can be made valid retroactively if ratification would prejudice any third parties without their consent [CC § 2313].

20.09[3][f] Principal Must Ratify Entire Transaction. Ratification of part of an indivisible transaction is a ratification of the whole [CC § 2311; *Volandri v. Hlobil* (1959) 170 CA2d 656, 659, 339 P2d 218]. The purpose of this rule is to prevent a principal from accepting the benefits of a transaction without the burdens [*Navrides v. Zurich Ins. Co.* (1971) 5 C3d 698, 704, 97 CR 309, 488 P2d 637 ; *Price v. McConnell* (1960) 184 CA2d 660, 666, 7 CR 695]. Since a ratification occurs after a transaction has taken place, this rule ensures that the principal may approve the transaction only as it is actually structured, and may not alter it to suit the principal's interests [*Navrides v. Zurich Ins. Co.* (1971) 5 C3d 698, 704, 97 CR 309, 488 P2d 637].

Legal Topics:

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

Business & Corporate LawAgency RelationshipsAgents DistinguishedGeneral AgentsBusiness & Corporate LawAgency RelationshipsAuthority to ActContracts & ConveyancesLiability of PrincipalBusiness & Corporate LawAgency RelationshipsDuties & LiabilitiesAuthorized Acts of AgentsGeneral OverviewBusiness & Corporate LawAgency RelationshipsDuties & LiabilitiesAuthorized Acts of AgentsLiability of PrincipalBusiness & Corporate LawAgency RelationshipsDuties & LiabilitiesAuthorized Acts of AgentsScope of Authority



181 of 193 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 20 Asserting Agency Issues in Contract Actions
III. DETERMINING IF PRINCIPAL IS BOUND BY AGENT'S ACTS

2-20 MB Practice Guide: CA Contract Litigation 20.10

20.10 Acts Within Scope of Agent's Authority Are Considered Acts of Principal.

20.10[1] Third Party May Proceed Directly Against Principal. Once a third party has proved the existence of an actual or ostensible agency, the agent's acts within the scope of the agent's authority are deemed to be those of the principal [CC §§ 2330, 2336, *Lippert v. Bailey* (1966) 241 CA2d 376, 382, 50 CR 478 ; *Spahn v. Guild Indus. Corp.* (1979) 94 CA3d 143, 156, 156 CR 375]. Accordingly, a third party may seek to enforce directly against the principal any transaction entered into with the agent [*Lippert v. Bailey* (1966) 241 CA2d 376, 382, 50 CR 478].

Jury Instructions:

Legal Relationship Not Disputed, see *Judicial Council of California Civil Jury Instructions*, CACI No. 3703 (LexisNexis Matthew Bender).

Liability of Principal for Acts of Agent--Agency Not Disputed, see *California Forms of Jury Instruction*, Ch. 3C, *Instr. MB 300C.51* (Matthew Bender).

► Cross References:

Form for complaint by third party against principal based on actions of agent, see 20.19.

Form for answer to complaint against agent, with affirmative defense asserting agency, see 20.21.

20.10[2] Information Known to Agent May Be Imputed to Principal.

20.10[2][a] Presumption Is That Agent Will Communicate All Relevant Information. Both principal and agent are deemed to have notice of whatever either has notice of, and ought, in good faith and the exercise of ordinary care and diligence, to communicate to the other [CC § 2332]. The rule of imputed knowledge is based upon the presumption that the agent will perform his or her duty to the principal and will communicate all knowledge that the agent has gained relative to the subject matter of the agency [*Kelley v. British Commercial Ins. Co. Ltd.* (1963) 221 CA2d 554, 561, 34 CR 564 ; *Maron v. Swig* (1952) 115 CA2d 87, 90, 251 P2d 770].

This presumption includes allowance for a reasonable lapse of time for communication by the agent to the principal [*Kelley v. British Commercial Ins. Co. Ltd.* (1963) 221 CA2d 554, 561, 34 CR 564].

Judge's Perspective:

The principal is chargeable with the agent's knowledge of facts acquired by the agent *prior to the commencement of the agency* "when that knowledge can reasonably be said to be in the mind of the agent when acting for the principal" [*Columbia Pictures Corp. v. DeToth* (1948) 87 CA2d 620, 631, 197 P2d 580 (knowledge regarding standard form contracts gained prior to meeting plaintiff)].

Jury Instructions:

Notice to Either Agent or Principal Is Notice to Other, see *California Forms of Jury Instruction, Ch. 3C, Instr. MB 300C.59* (Matthew Bender).

An agent who is acting for the principal but has an opposing personal interest in the transaction is nevertheless required to communicate to the principal all material facts regarding the transaction, and the law will presume that the agent has done so [*Maron v. Swig* (1952) 115 CA2d 87, 91, 251 P2d 770 ; *McKenney v. Ellsworth* (1913) 165 C 326, 329, 132 P 75].

20.10[2][b] Information Must Relate to Purpose of Agency. The information to be communicated must be information obtained in the course of the agent's acts within the scope of the agent's authority and must relate to the subject matter of the agency [*Columbia Pictures Corp. v. DeToth* (1948) 87 CA2d 620, 630, 197 P2d 580].

20.10[2][c] Agent's Failure to Communicate Does Not Automatically Defeat Presumption of Communication. The fact that the agent failed to communicate with the principal, or provided the principal with incomplete or incorrect information, will not defeat application of the rule [*Columbia Pictures Corp. v. DeToth* (1948) 87 CA2d 620, 630, 197 P2d 580 ; *Kelley v. British Commercial Ins. Co. Ltd.* (1963) 221 CA2d 554, 562, 34 CR 564]. The agent's failure to communicate information to the principal may constitute a breach of the agent's duty owed to the principal but will not operate to relieve the principal of liability towards innocent third parties [*Columbia Pictures Corp. v. DeToth* (1948) 87 CA2d 620, 630, 197 P2d 580 ; *Kelley v. British Commercial Ins. Co. Ltd.* (1963) 221 CA2d 554, 562, 34 CR 564].

20.10[2][d] Agent's Knowledge Will Not Be Imputed to Principal in Some Situations. California courts have established several exceptions and limitations to the rule that the agent's knowledge is imputed to the principal:

- When a law expressly requires actual notice to a principal, serving notice on the agent will be insufficient to impute knowledge of that service to the principal [*Herman v. Los Angeles County Metro. Transp. Auth.* (1999) 71 CA4th 819, 830, 84 CR2d 144].
- When the third party has knowledge of circumstances that clearly indicate that the agent will not inform the principal, the agent's knowledge is not imputed to the principal [*Wagner v. Benson* (1980) 101 CA3d 27, 35, 161 CR 516 ; *Sands v. Eagle Oil & Ref. Co., Inc.* (1948) 83 CA2d 312, 319, 188 P2d 782].
- When the agent is acting adversely to the interests of the principal, the principal's knowledge of the agent's acts will not be imputed [*Sands v. Eagle Oil & Ref. Co., Inc.* (1948) 83 CA2d 312, 319, 188 P2d 782 ; *People v. Park* (1978) 87 CA3d 550, 566, 151 CR 146 ; *Meyer v. Glenmoor Homes, Inc.* (1966) 246 CA2d 242, 264, 54 CR 786].
- The rule imputing the agent's knowledge to the principal cannot be used to protect bystanders who are not involved in any transaction with the agent or principal [*Lucas v. Pollock* (1992) 7 CA4th 668, 674-675, 8 CR2d 918 ; *Redman v. Walters* (1979) 88 CA3d 448, 454, 152 CR 42].

Legal Topics:

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

Business & Corporate LawAgency RelationshipsAuthority to ActGeneral OverviewBusiness & Corporate LawAgency RelationshipsAuthority to ActContracts & ConveyancesLiability of PrincipalBusiness & Corporate LawAgency RelationshipsDuties & LiabilitiesAuthorized Acts of AgentsLiability of PrincipalBusiness & Corporate LawAgency RelationshipsDuties & LiabilitiesAuthorized Acts of AgentsScope of Authority



182 of 193 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 20 Asserting Agency Issues in Contract Actions
 III. DETERMINING IF PRINCIPAL IS BOUND BY AGENT'S ACTS

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20.11 Principal May Not Be Bound If Agent Acted Without Authority.

20.11[1] Principal Not Liable If Agent Lacked Good Faith Belief in Authority to Act. If a purported agent acts without the grant of any authority by the purported principal, the principal may be able to avoid liability for the agent's acts if:

- The principal can defeat any claims that the principal, through the principal's acts or conduct, allowed the creation of an ostensible agency [*Pagarigan v. Libby Care Ctr., Inc.* (2002) 99 CA4th 298, 301-302, 120 CR2d 892 ; *Grasslands Water Ass'n, Inc. v. Lucky Leven Land & Cattle Co.* (1952) 112 CA2d 776, 779-780, 247 P2d 380]; and
- The agent did *not* have had a good faith belief in his or her authority to act [*Jeppi v. Brockman Holding Co., Inc.* (1949) 34 C2d 11, 18-19, 206 P2d 847].

Jury Instructions:

Liability of Agent for Breach of Contract Executed in Name of Principal, see *California Forms of Jury Instruction, Ch. 3C, Instr. MB 300C.57* (Matthew Bender).

In order to avoid liability altogether, the agent's acts must be obviously outside the scope of the agent's authority and there must be no basis for a claim of ostensible authority [*Torrance Nat'l Bank v. Enesco Fed. Credit Union* (1955) 134 CA2d 316, 328, 285 P2d 737]. In addition, the principal must not have had knowledge of the agent's acts that exceeded the agent's authority [*Montgomery v. Bank of Am. Nat'l Trust & Sav. Ass'n* (1948) 85 CA2d 559, 564, 193 P2d 475].

20.11[2] Principal Liable Only for Authorized Acts That Can Be "Plainly Separated" From Unauthorized Acts. A principal may not be liable for an agent's acts that exceed the agent's scope of authority. In this regard, CC § 2333 provides that "[w]hen an agent exceeds his authority, his principal is bound by his authorized acts so far only as they can be plainly separated from those which are unauthorized."

Legal Topics:

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

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183 of 193 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 20 Asserting Agency Issues in Contract Actions
III. DETERMINING IF PRINCIPAL IS BOUND BY AGENT'S ACTS

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20.12 Third Party May Be Able to Recover From Agent If Principal Is Not Bound by Agent's Acts.

20.12[1] Agent May Be Liable for Breach of Warranty of Authority. Any person who acts as an agent warrants "to all who deal with him in that capacity, that he has the authority which he assumes" [CC § 2342]. Thus, an agent who misrepresents the scope of his or her authority to innocent third parties will be liable for his or her breach of the warranty of authority [*Cheda v. Grandi* (1950) 97 CA2d 513, 518, 218 P2d 97].

The agent will not be liable if the complaining third party knew of the misrepresentation as to the agent's authority [*Yoakum v. Tarver* (1967) 256 CA2d 202, 206, 64 CR 7].

An agent may shift the burden of liability to the third party with whom the agent is dealing by alerting the third party to the source and scope of the agent's authority. By taking such an action, the third party is put on notice of the need to determine the exact extent of the agent's authority before concluding any transaction with the agent [*Yoakum v. Tarver* (1967) 256 CA2d 202, 207, 64 CR 7].

Jury Instructions:

Liability of Agent for Breach of Warranty of Authority, see *California Forms of Jury Instruction, Ch. 3C, Instr. MB 300C.58* (Matthew Bender).

➡ Cross Reference:

Complaint for breach of warranty of authority, see 20.22.

20.12[2] Agent May Be Liable in Other Situations. An agent may be liable to third parties as a principal in the following situations [CC § 2343]:

- When, with the agent's consent, credit is given to the agent personally in a transaction.
- When the agent enters into a written contract in the name of the principal, without believing, in good faith, that the agent has authority to do so.
- When the agent's acts are wrongful in their nature.

An agent who engages in any of the above acts will be unable to claim immunity for liability by relying on the general rule that an agent is not liable when both the existence of the agency and the identity of the principal are disclosed [*Bayuk v. Edson* (1965) 236 CA2d 309, 319-320, 46 CR 49]. The California courts have held that the rule protecting agents from liability merely creates an inference of nonliability that may be refuted by other facts relating to the transaction [*Midwest Television, Inc. v. Scott, Lancaster, Mills & Atha, Inc.* (1988) 205 CA3d 442, 451, 252 CR 573].

Legal Topics:

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

Business & Corporate LawAgency RelationshipsAuthority to ActContracts & ConveyancesLiability of AgentBusiness & Corporate LawAgency RelationshipsDuties & LiabilitiesAuthorized Acts of AgentsUnauthorized ActsBusiness & Corporate LawAgency RelationshipsDuties & LiabilitiesThird Parties



184 of 193 DOCUMENTS

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Chapter 20 Asserting Agency Issues in Contract Actions
III. DETERMINING IF PRINCIPAL IS BOUND BY AGENT'S ACTS

2-20 MB Practice Guide: CA Contract Litigation 20.13

20.13 Both Agent and Principal May Be Liable If Agency Is Undisclosed.

20.13[1] Agent Must Disclose Existence of Agency and Identity of Principal to Avoid Liability. An agent who wishes to avoid personal liability for a transaction must disclose, at the time of contracting, both [*W.W. Leasing Unlimited v. Commercial Standard Title Ins. Co. (1983) 149 CA3d 792, 795, 197 CR 118*]:

- The existence of the agency relationship; and
- The identity of the principal.

In order for the disclosure of an agency to be complete, the agent must provide the true name of the principal. In most cases, merely providing the trade name of the principal is not sufficient [*G.W. Andersen Constr. Co. v. Mars Sales (1985) 164 CA3d 326, 332, 210 CR 409* ; *W.W. Leasing Unlimited v. Commercial Standard Title Ins. Co. (1983) 149 CA3d 792, 796, 197 CR 118*].

There is no requirement that a third party dealing with an agent investigate the identity of the principal; the duty rests solely with the agent [*W.W. Leasing Unlimited v. Commercial Standard Title Ins. Co. (1983) 149 CA3d 792, 795, 197 CR 118*].

20.13[2] Undisclosed Principal May Claim Benefits of Agent's Transactions. An undisclosed principal generally may choose to accept the benefits of any transaction entered into by the agent and may sue or be sued in connection with such a transaction [*American Builder's Assn. v. Au-Yang (1990) 226 CA3d 170, 176, 276 CR 262* ; *Buckley v. Shell Chem. Co. (1939) 32 CA2d 209, 214, 89 P2d 453*]. However, the principal may not claim the benefits of a contract if doing so would cause injury to the other party to the contract [*Wood Bldg. Corp. v. Griffiths (1958) 164 CA2d 559, 565, 330 P2d 847* ; *Buckley v. Shell Chem. Co. (1939) 32 CA2d 209, 215, 89 P2d 453*]. Furthermore, an undisclosed principal may avoid liability for a transaction entered into by the agent if it is shown that the third party gives exclusive credit to the agent, without any intention to impose liability on another person [CC § 2335; *Rigney v. De La Salle Inst. (1935) 10 CA2d 492, 498-499, 52 P2d 579* ; *Walton v. Davis (1913) 22 CA 456, 459-460, 134 P 795*].

20.13[3] Third Party May Sue Undisclosed Principal or Agent, or Both.

20.13[3][a] Third Party May Sue Either Undisclosed Principal or Agent. When there is an undisclosed principal, once a third party discovers the existence of the principal, the third party has the option to pursue a claim against either the principal or the agent [*J & J Builders Supply v. Caffin* (1967) 248 CA2d 292, 295, 56 CR 365 ; *Rigney v. De La Salle Inst.* (1935) 10 CA2d 492, 496, 52 P2d 579].

 Cross Reference:

Filing agency suit, see 20.14 -20.15.

Form, see 20.19.

20.13[3][b] Plaintiff Must Elect Between Recovery Against Undisclosed Principal or Against Agent. The third party may name both the agent and the undisclosed principal in an action in order to determine the facts of the agency relationship [*Standard Oil Co. of Cal. v. Doneux* (1961) 192 CA2d 608, 613, 13 CR 749 ; *Klinger v. Modesto Fruit Co., Inc.* (1930) 107 CA 97, 101, 290 P 127]. However, the third party may be required to elect which of the two the third party will hold liable for the transaction [*Standard Oil Co. of Cal. v. Doneux* (1961) 192 CA2d 608, 612, 13 CR 749 ; *Klinger v. Modesto Fruit Co., Inc.* (1930) 107 CA 97, 101, 290 P 127].



Warning:

Note that if neither the agent nor the principal demands that the third party make such an election, the agent and principal will be deemed to have waived their right to require the election [*Klinger v. Modesto Fruit Co., Inc.* (1930) 107 CA 97, 105, 290 P 127].

 Cross Reference:

Filing third party agency suit, see 20.15.

Form, see 20.22.

20.13[3][c] Recovery Against Agent Discharges Principal. If the third party, with knowledge of the identity of the principal, recovers a judgment against the agent, the undisclosed principal is discharged from liability [*Standard Oil Co. of Cal. v. Doneux* (1961) 192 CA2d 608, 613, 13 CR 749].

Legal Topics:

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

Business & Corporate LawAgency RelationshipsAuthority to ActContracts & ConveyancesLiability of AgentBusiness & Corporate LawAgency RelationshipsAuthority to ActContracts & ConveyancesLiability of PrincipalBusiness & Corporate LawAgency RelationshipsDuties & LiabilitiesThird Parties



185 of 193 DOCUMENTS

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Chapter 20 Asserting Agency Issues in Contract Actions
IV. PROCEDURE FOR RAISING AGENCY ISSUES

2-20 MB Practice Guide: CA Contract Litigation 20.14

20.14 CHECKLIST: Procedure for Raising Agency Issues.

- ☐ Determine if an agency issue exists.
 - ☐ If there is, and you are representing plaintiff, raise issue in initial complaint.
- ☐ Determine if agency is disputed.
 - ☐ If undisputed, name only principal as defendant.

Authority:

CC § 2330; Lippert v. Bailey (1966) 241 CA2d 376, 382, 50 CR 478

Discussion:

See 20.15[1]

- ☐ If agency is disputed, name both agent and principal as defendants.
- ☐ Determine if separate claim exists against agent for personal liability.
 - ☐ If so, name agent as defendant.

Authority:

*Universal Bank v. Lawyers Title Ins. Corp. (1997) 62 CA4th 1062, 1066, 73 CR2d 196 ;
Zingheim v. Marshall (1967) 249 CA2d 736, 747-748, 57 CR 809 , cert. denied sub nom.
Rogers v. Zingheim (1967) 389 US 83,*

Discussion:

See 20.15[2]

☐ Determine whether agent may raise defense to liability.

☐ Determine if agent can establish both of following:

☐ That agent disclosed existence of agency relationship and identity of principal to plaintiff third party at time of contracting.

☐ That agent acted within scope of authority, whether actual or ostensible.

Authority:

Yoakum v. Tarver (1967) 256 CA2d 202, 207, 64 CR 7 ; *W. W. Leasing Unlimited v. Commercial Standard Title Ins. Co.* (1983) 149 CA3d 792, 795, 197 CR 118

Discussion:

See 20.16

☐ Determine whether principal may raise defense to liability.

☐ Will principal be able to show one of following sets of facts:

☐ That:

☐ Agent lacked both actual and ostensible authority to perform act in dispute; and

☐ With regard to ostensible authority, plaintiff third party was not justified in relying on agent's purported authority.

Authority:

Pagarigan v. Libby Care Ctr., Inc. (2002) 99 CA4th 298, 301-302, 120 CR2d 892 ;
Grasslands Water Ass'n, Inc. v. Lucky Leven Land & Cattle Co. (1952) 112 CA2d 776, 779-780, 247 P2d 380

Discussion:

See 20.18

☐ That agent was acting for agent's own account rather than on principal's behalf.

Authority:

CC § 2333; *Bayuk v. Edson* (1965) 236 CA2d 309, 319-320, 46 CR 49

Discussion:

See 20.18

☐ That third party relied on exclusive credit of purported agent, such that principal is relieved of liability.

Authority:

CC § 2335; Rigney v. De La Salle Inst. (1935) 10 CA2d 492, 498-499, 52 P2d 579 ; Walton v. Davis (1913) 22 CA 456, 459-460, 134 P 795

Discussion:

See 20.18

Legal Topics:

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

Business & Corporate LawAgency RelationshipsGeneral OverviewBusiness & Corporate LawAgency RelationshipsEstablishmentGeneral OverviewBusiness & Corporate LawAgency RelationshipsEstablishmentProof of Agency



186 of 193 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 20 Asserting Agency Issues in Contract Actions
IV. PROCEDURE FOR RAISING AGENCY ISSUES

2-20 MB Practice Guide: CA Contract Litigation 20.15

20.15 Plaintiff Third Party Should Allege Agency in Complaint Against Agent, Principal, or Both.

20.15[1] Only Principal Need Be Named If Agency Is Undisputed. A party seeking to recover from an agent or principal, or both, should allege the agency relationship in the initial complaint. If the existence of the agency relationship is undisputed, only the principal must be a named defendant, because the agent's acts within the scope of his authority are considered the acts of the principal [CC § 2330; *Lippert v. Bailey* (1966) 241 CA2d 376, 382, 50 CR 478].

Exception:

If there is any evidence that the agent acted beyond the scope of authority, or without any authority, plaintiff may have a separate claim against the agent and may name the agent as a defendant [*Clifton Cattle Co., Inc. v. Thompson* (1974) 43 CA3d 11, 16-17, 117 CR 500].

Drawback:

If the agent, alone, is a party to the contract, the agent will be deemed to be acting as surety for the principal, and any recovery obtained from the agent will act to bar later direct recovery from the principal [*Zingheim v. Marshall* (1967) 249 CA2d 736, 747-748, 57 CR 809 ; see Restatement (Second) of Agency § 184].



Strategic Point--Plaintiff:

To avoid excluding any source of potential liability, it is common practice to name all relevant parties as defendants and sort out their exact relationships during discovery and at trial [see 20.15[2]].



Cross Reference:

Recovery against agent personally, see 20.12.

20.15[2] Agent Should Be Named Individually If Agency Is in Question. In most cases, the agent should be named only if plaintiff has a separate claim that would establish the agent's personal liability or if the existence of an agency relationship is in question [*Zingheim v. Marshall* (1967) 249 CA2d 736, 747-748, 57 CR 809 , cert. denied sub nom. *Rogers v. Zingheim* (1967) 389 US 83], .



Strategic Pointss--Plaintiff:

- If the existence of the agency is at issue, plaintiff should name both principal and agent, because the issue ordinarily is a question of fact [*Universal Bank v. Lawyers Title Ins. Corp.* (1997) 62 CA4th 1062, 1066, 73 CR2d 196]. As a factual question, the issue may augment the scope of discovery and help defeat a motion for summary judgment.

- As a practical matter, potential agency questions virtually always exist, because there usually is no way for the plaintiff to know the precise relationship among a number of potential defendants at the time the complaint is filed. Because it may not be possible to sort these issues out before discovery is conducted and the facts of the case become clearer, the standard practice is to include a boilerplate agency allegation in virtually every complaint. All of the standard complaints in this publication contain agency allegations designed to accommodate any possible set of relationships among the defendants that might ultimately be proved at trial. More detailed alternatives are illustrated in 20.19.

Jury Instructions:

Liability of Principal for Acts of Agent--Agency Not Disputed, see *California Forms of Jury Instruction, Ch. 3C, Instr. MB 300C.51* (Matthew Bender).



Cross Reference:

Form containing standard agency allegations, see 20.19.

Legal Topics:

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

Business & Corporate LawAgency RelationshipsAuthority to ActContracts & ConveyancesGeneral OverviewBusiness & Corporate LawAgency RelationshipsEstablishmentGeneral OverviewBusiness & Corporate LawAgency RelationshipsEstablishmentProof of AgencyGeneral Overview



187 of 193 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 20 Asserting Agency Issues in Contract Actions
IV. PROCEDURE FOR RAISING AGENCY ISSUES

2-20 MB Practice Guide: CA Contract Litigation 20.16

20.16 Agent Named As Defendant May Raise Agency Status As Defense.

An agent who is named as a defendant in a complaint can assert his or her agency status as a defense in the answer. To put forth a valid defense, the agent must establish the following [*Yoakum v. Tarver* (1967) 256 CA2d 202, 207, 64 CR 7; *W. W. Leasing Unlimited v. Commercial Standard Title Ins. Co.* (1983) 149 CA3d 792, 795, 197 CR 118]:

- That the agent disclosed the existence of the agency relationship and the identity of the principal to the plaintiff third party at the time of contracting; and
- That the agent acted within the scope of its authority, whether actual or ostensible.

Strategic Point--Defendant:



Because fact issues usually exist as to the existence of the agency and/or the scope of the agent's authority, and because indemnity claims and cross-claims often will exist among co-defendants, a defendant's agency claim usually is not a subject for summary resolution. Exceptions may occur, however, if (1) the agency relationship is established by statute; or (2) the defendant agent and the co-defendant principal stipulate to the existence of the agency relationship, and the plaintiff is unable to raise a genuine dispute about the matter. In these situations, summary judgment might be obtainable.



Cross Reference:

Form for answer to complaint against agent, with affirmative defense asserting agency, see 20.21.

Legal Topics:

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

Business & Corporate Law Agency Relationships Authority to Act Contracts & Conveyances Liability of Agent Business & Corporate Law Agency Relationships Duties & Liabilities General Overview Civil Procedure Pleading &

PracticeDefenses, Demurrers & ObjectionsAffirmative DefensesGeneral Overview



188 of 193 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 20 Asserting Agency Issues in Contract Actions
IV. PROCEDURE FOR RAISING AGENCY ISSUES

2-20 MB Practice Guide: CA Contract Litigation 20.17

20.17 Principal May Enforce Contract Entered Into by Agent on Principal's Behalf.

Any agreement entered into by an agent who is acting within the scope of the agent's authority will be deemed to be an agreement of the principal [*Lippert v. Bailey* (1966) 241 CA2d 376, 382, 50 CR 478 ; *Spahn v. Guild Indus. Corp.* (1979) 94 CA3d 143, 156, 156 CR 375]. The principal has the right to enforce such an agreement and to receive all rights and benefits associated with it. Accordingly, if a third party enters into an agreement with the agent, the principal has the right to sue the third party with respect to any matters arising out of the agreement [*American Builder's Assn. v. Au-Yang* (1990) 226 CA3d 170, 176, 276 CR 262].

Since the principal's ability to enforce the contract is predicated on the existence of the agency relationship, the complaint should allege that the agent:

- Was the plaintiff's agent; and
- Was acting within the scope of the agent's authority in executing the contract.

Jury Instructions:

Liability of Principal for Acts of Agent--Agency Not Disputed, see *California Forms of Jury Instruction*, Ch. 3C, Instr. MB 300C.51 (Matthew Bender).

Legal Topics:

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

Business & Corporate LawAgency RelationshipsAuthority to ActContracts & ConveyancesGeneral OverviewBusiness & Corporate LawAgency RelationshipsAuthority to ActContracts & ConveyancesEnforcement & ExecutionBusiness & Corporate LawAgency RelationshipsAuthority to ActContracts & ConveyancesFormation & Negotiation



189 of 193 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 20 Asserting Agency Issues in Contract Actions
IV. PROCEDURE FOR RAISING AGENCY ISSUES

2-20 MB Practice Guide: CA Contract Litigation 20.18

20.18 Principal Named As Defendant May Raise Agent's Lack of Authority As Defense.

A defendant sued based on the acts of a purported agent may raise the lack of an agency relationship as a defense in the answer. In order for a principal to avoid liability for its agent's acts, the principal must be able to show one or more of the following set of facts:

- That the agent lacked both actual and ostensible authority to perform the act in dispute and, with regard to ostensible authority, that the plaintiff third party was not justified in relying on the agent's purported authority [*Pagarigan v. Libby Care Ctr., Inc.* (2002) 99 CA4th 298, 301-302, 120 CR2d 892 ; *Grasslands Water Ass'n, Inc. v. Lucky Leven Land & Cattle Co.* (1952) 112 CA2d 776, 779-780, 247 P2d 380].
- That the agent was acting for the agent's own account rather than on the principal's behalf [CC § 2333; *Bayuk v. Edson* (1965) 236 CA2d 309, 319-320, 46 CR 49].
- That the principal is relieved from liability because the third party relied on the exclusive credit of the purported agent [CC § 2335; *Rigney v. De La Salle Inst.* (1935) 10 CA2d 492, 498-499, 52 P2d 579 ; *Walton v. Davis* (1913) 22 CA 456, 459-460, 134 P 795].



Cross Reference:

Answer to complaint against alleged principal asserting nonexistence of agency, see 20.20.

Legal Topics:

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

Business & Corporate LawAgency RelationshipsDuties & LiabilitiesAuthorized Acts of AgentsUnauthorized ActsBusiness & Corporate LawAgency RelationshipsEstablishmentGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsAffirmative DefensesGeneral Overview



190 of 193 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 20 Asserting Agency Issues in Contract Actions
V. FORMS

2-20 MB Practice Guide: CA Contract Litigation 20.19

20.19 Agency Allegations--Complaint by Third Party Against Principal.**Agency Allegations--Complaint by Third Party Against Principal.**

[Name of attorney]

_____[Street address]

_____[City, state, and ZIP]

_____[Area code and phone number]

_____[State Bar no. of attorney]

Attorney for _____[name of party]

SUPERIOR COURT OF CALIFORNIA,

COUNTY OF _____

[name(s)] _____,

Plaintiff(s)

vs.

[name(s)] _____

[and DOES 1 THROUGH

_____] _____

Defendant(s).

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)

NO.

COMPLAINT FOR DAMAGES

[LIMITED CIVIL CASE]

[Amount Demanded

_____(Exceeds or Does Not
Exceed) \$10,000]

Plaintiff _____[name] alleges:

1. _____[state capacity and residence of plaintiff; see, e.g., 20.15, 20.13].

2. _____ [state capacity and residence of defendant; see, e.g., 20.15, 20.13].

3. _____ [include allegation of fictitious defendants; see, e.g., 20.13, 20.15].

[To allege that defendant was expressly authorized to act as co-defendant's agent:]

4. [Plaintiff is informed and believes, and thereon alleges, that] [D]efendant _____ [first defendant's name] intentionally conferred on Defendant _____ [second defendant's name] the authority to act as the agent of _____ [first defendant] with respect to _____ [specify subject matter of authority, e.g., the employment of persons to manage Defendant _____'s business affairs], including the authority to execute contracts in furtherance of that purpose on Defendant _____'s behalf. [A true copy of the written agreement between (first defendant) _____ and (second defendant) _____ conferring this authority on Defendant (second defendant) _____ is attached as Exhibit A and incorporated by reference]. Plaintiff is further informed and believes, and thereon alleges, that at all times and in all matters described in this complaint, Defendant _____ [second defendant's name] was acting as the agent of _____ [first defendant's name] and within the scope of the authority as such granted by _____ [first defendant's name].

[OR, to allege that agent had actual authority by virtue of principal's want of ordinary care:]

4. [Plaintiff is informed and believes, and thereon alleges, that] [D]efendant _____ [first defendant's name] _____ [intentionally or by want of ordinary care] allowed Defendant _____ [second defendant's name] to believe that he/she had the authority to act as the agent of _____ [first defendant] with respect to _____ [specify subject matter of authority, e.g., the employment of persons to manage Defendant _____'s business affairs] at all times and in all matters described in this complaint, including the authority to execute contracts in furtherance of that purpose on Defendant _____'s behalf. The belief of _____ [second defendant] in his/her authority was based on the conduct of _____ [first defendant] in _____ [specify, e.g., previously accepting employment contracts executed by Defendant (second defendant) _____ without comment as to authority].

[OR, to allege that agent had ostensible authority by virtue of principal's conduct:]

4. Plaintiff was led to believe, by the acts of Defendant _____ [first defendant's name], that Defendant _____ [second defendant's name] had the authority to act as the duly authorized agent of Defendant _____ [first defendant] with respect to _____ [specify subject matter of authority, e.g., the employment of persons to manage Defendant _____].

_____ 's business affairs] at all times and in all matters described in this complaint, including the authority to execute contracts in furtherance of that purpose on Defendant _____ 's behalf. Plaintiff's belief was reasonable under the circumstances because

_____ [specify principal's acts that induced plaintiff reasonably to believe that agent was acting under principal's authority, e.g., Defendant (first defendant) _____ had appointed (second defendant) _____ to the position of general manager and had previously accepted as binding contracts that were negotiated with Plaintiff by (second defendant) _____].

[OR, to include simple generic agency allegation]

4. [Plaintiff is informed and believes, and thereon alleges, that] [D]efendant _____ [first defendant's name] was acting as the agent of Defendant _____ [second defendant's name] at all times and in all matters described in this complaint.

[CONTINUE]

5. Plaintiff is ignorant of the true names and capacities of the Defendants sued herein as Does 1 through _____, inclusive, and therefore sues these Defendants by such fictitious names. Plaintiff will amend this Complaint to allege their true names and capacities when ascertained. Plaintiff is informed and believes, and thereon alleges, that each of the fictitiously named Defendants are jointly and severally liable for the acts complained of herein. Plaintiff is informed and believes, and thereon alleges, that Defendants Does 1 through 50 are the agents, servants and/or employees of each and every other Defendant, and at all times herein mentioned were acting within the course or scope of their agency and employment, and the acts of each Defendant were ratified by the others.

6. On _____ [date], Defendant _____ [agent's name], acting as the agent of Defendant _____ [principal's name] as described above, entered into _____ [a written or an oral] contract with _____ [name of third party], by which _____ [specify relevant terms of contract].

7. _____ [Specify defendant's acts constituting breach of contract].

8. _____ [Specify plaintiff's damages or other injury incurred as a result of defendant's breach of contract].

WHEREFORE, Plaintiff prays judgment against Defendant[s, and each of them,] as follows:

1. For compensatory damages in the sum of \$ _____;

2. For interest on the sum of \$ _____ from and after _____ [date];

[3. For reasonable attorney's fees _____ (of \$ _____ or according to proof);]

4. For costs of suit; and
5. For such other and further relief as the court may deem proper.

[firm name, if any] _____

By: [signature] _____

[typed name] _____

Attorney for Plaintiff [name] _____

[ADD following verification, if applicable]

VERIFICATION

I am the plaintiff in the above entitled action; I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein stated on information and belief, and, as to those matters, I believe it to be true.

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

[date] _____

[signature] _____

[typed name] _____

NOTES.

Authority:

CC §§ 2295-2357

Existence of Agency:

See 20.03 -20.07

Scope of Authority:

See 20.09 -20.11

Breach of Contract Allegations:

See Ch. 23, Suing or Defending Action for Breach of Duty of Good Faith and Fair Dealing

Allegations of Damages:

See Ch. 7, Seeking or Opposing Damages in Contract Actions

Defenses:

See 20.16, 20.18

Procedure:

See 20.15

Related Form:

See 20.22

Legal Topics:

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

Business & Corporate LawAgency RelationshipsDuties & LiabilitiesAuthorized Acts of AgentsLiability of
PrincipalBusiness & Corporate LawAgency RelationshipsDuties & LiabilitiesThird PartiesCivil ProcedurePleading &
PracticePleadingsComplaintsGeneral Overview



191 of 193 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 20 Asserting Agency Issues in Contract Actions
V. FORMS

2-20 MB Practice Guide: CA Contract Litigation 20.20

20.20 Answer to Complaint Against Principal, With Affirmative Defense Denying Agency.**Answer to Complaint Against Principal, With Affirmative Defense Denying Agency.**

[Name of attorney]

_____[Street address]

_____[City, state, and ZIP]

_____[Area code and phone number]

_____[State Bar no. of attorney]

Attorney for _____[name of party]

SUPERIOR COURT OF CALIFORNIA,

COUNTY OF _____

[name(s)] _____,

Plaintiff(s),

vs.

[name(s)] _____

and DOES I - [insert number of estimated DOES]

Defendant(s).

)

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)

)

)

)

)

)

NO.

ANSWER OF

_____ [identify defendant, e.g.,

DEFENDANT MARY JONES] TO COMPLAINT
OF

_____ [identify plaintiff, e.g.,

PLAINTIFF JOHN SMITH]

[LIMITED CIVIL CASE]

Judge:

Department:

Defendant answers the complaint as follows:

[Include general denial below, or set forth, in numbered paragraphs, specific denials, admissions, and allegations in response to those in complaint, in the order in which they are alleged in complaint:]

1. Pursuant to *Code of Civil Procedure Section 431.30(b)(1)*, Defendant generally denies each and every allegation of Plaintiff's complaint, including all the purported causes of action contained therein, and further denies that Plaintiff is entitled to any equitable or legal relief, or any damages whatsoever.

[Include specific denial if answering verified complaint:]

1. Defendant _____ *[name]* admits all statements in the complaint except as follows:
 _____ *[specify]*.

[CONTINUE]

[Defendant asserts the following affirmative defenses. By doing so, Defendant shall not be deemed to have assumed the burden of proving any matters that otherwise would be Plaintiff's burden.]

[Allege any affirmative defenses, e.g.,]

[EITHER, if alleged principal is denying that alleged agent had authority to act as such]

FIRST AFFIRMATIVE DEFENSE
 (No Agency Existed)

2. At no time did Defendant _____ *[name of alleged principal]* grant Defendant
 _____ *[name of alleged agent]* express or implied authority to act as agent for
 _____ *[name of alleged principal]* with respect to any of the matters alleged in Plaintiff's complaint.

[OR, if alleged principal is denying that his or her own acts caused alleged agent to reasonably believe that agency relationship existed]

FIRST AFFIRMATIVE DEFENSE
 (No Agency Existed)

2. At no time did Defendant _____ *[name of alleged principal]* grant Defendant
 _____ *[name of alleged agent]* express or implied authority to act as agent for
 _____ *[name of alleged principal]* with respect to any of the matters alleged in Plaintiff's complaint.
 Moreover, Defendant _____ *[name of alleged principal]* performed no act and made no representation

that could reasonably have led _____ [name of alleged agent] to believe that he/she had authority to act as an agent on _____ [name of alleged principal]'s behalf. [In the absence of such express or implied authority, Plaintiff's allegations that Defendant _____ (name of alleged agent) claimed to be acting as an agent of Defendant (name of alleged principal) _____ are not a sufficient basis on which to hold Defendant (name of alleged principal) _____ liable for any of the acts that Plaintiff alleges were performed by Defendant (name of alleged agent) _____.]

[OR, if alleged principal is denying that any of his/her own acts reasonably caused third party to believe that an agency existed]

FIRST AFFIRMATIVE DEFENSE
(No Actual or Ostensible Agency)

1. At no time did Defendant _____ [name of alleged principal] grant Defendant _____ [name of alleged agent] express or implied authority to act as agent for _____ [name of alleged principal] with respect to any of the matters alleged in Plaintiff's complaint. Moreover, Defendant _____ [name of alleged principal] performed no act and made no representation that could reasonably have led Plaintiff to believe that _____ [name of alleged agent] had authority to act as an agent on _____ [name of alleged principal]'s behalf.

[ADD additional affirmative defenses, if any]

[CONTINUE]

_____, WHEREFORE, Defendant prays that [specify, e.g., Plaintiff take nothing by his/her complaint and that Defendant be awarded her costs of suit].
Dated: _____

By: [signature] _____

[name] _____

_____, Attorney for Defendant
_____, [Verification if desired] Verification
if desired

NOTES.

Authority:
CC § 2342

Existence of Agency:
See 20.03 -20.07

Scope of Authority:

See 20.09 -20.11

Defenses:

See 20.16, 20.18

Procedure:

See 20.16, 20.18

Legal Topics:

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

Business & Corporate LawAgency RelationshipsAuthority to ActContracts & ConveyancesEnforcement & ExecutionBusiness & Corporate LawAgency RelationshipsDuties & LiabilitiesAuthorized Acts of AgentsUnauthorized ActsBusiness & Corporate LawAgency RelationshipsEstablishmentGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsAffirmative DefensesGeneral OverviewCivil ProcedurePleading & PracticePleadingsAnswers



192 of 193 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 20 Asserting Agency Issues in Contract Actions
V. FORMS

2-20 MB Practice Guide: CA Contract Litigation 20.21

20.21 Answer to Complaint Against Agent, With Affirmative Defense Asserting Agency.**Answer to Complaint Against Agent, With Affirmative Defense Asserting Agency.**

[Name of attorney]

_____[Street address]

_____[City, state, and ZIP]

_____[Area code and phone number]

_____[State Bar no. of attorney]

Attorney for _____[name of party]

SUPERIOR COURT OF CALIFORNIA,

COUNTY OF _____

[name(s)] _____,

Plaintiff(s),)

vs.)

[name(s)] _____)

and DOES I - [insert number of estimated DOES])

_____))

_____))

Defendant(s).)

NO.

ANSWER OF

_____ [identify defendant, e.g.,

DEFENDANT MARY JONES] TO COMPLAINT
OF

_____ [identify plaintiff, e.g.,

PLAINTIFF JOHN SMITH]

[LIMITED CIVIL CASE]

Judge:

Department:

Defendant answers the complaint as follows:

[Include general denial below, or set forth, in numbered paragraphs, specific denials, admissions, and allegations in response to those in complaint, in the order in which they are alleged in complaint:]

1. Pursuant to *Code of Civil Procedure Section 431.30(b)(1)*, Defendant generally denies each and every allegation of Plaintiff's complaint, including all the purported causes of action contained therein, and further denies that Plaintiff is entitled to any equitable or legal relief, or any damages whatsoever.

[Include specific denial if answering verified complaint:]

1. Defendant _____ *[name]* admits all statements in the complaint except as follows:
 _____ *[specify]*.

[CONTINUE]

[Defendant asserts the following affirmative defenses. By doing so, Defendant shall not be deemed to have assumed the burden of proving any matters that otherwise would be Plaintiff's burden.]

[Allege any affirmative defenses, e.g.,]

[EITHER, if defendant is claiming to have acted under express agency]

FIRST AFFIRMATIVE DEFENSE (Defendant Acted As Agent of Another)

2. At all times and in all matters referred to in Plaintiff's complaint, Defendant was acting as the agent of _____ *[name of principal]*, on _____ *[name of principal]*'s behalf and within the scope of the authority granted to Defendant by _____ *[name of principal]*. [A copy of the agreement naming Defendant as *(name of principal)* _____'s agent is attached to this answer and incorporated by reference]. Therefore, if any liability should be found to arise from the matters alleged in Plaintiff's complaint, _____ *[name of principal]*, as the principal in the transaction, is solely liable and Defendant, as a mere agent, is not liable.

[OR, if defendant is claiming to have acted in the good faith belief that he/she was empowered to act as an agent]

FIRST AFFIRMATIVE DEFENSE (Defendant Acted As Agent of Another)

2. At all times and in all matters referred to in Plaintiff's complaint, Defendant was acting under the reasonable belief

that _____[*name of principal*] had authorized and empowered Defendant to act as _____[*name of principal*]'s agent with respect to the matters alleged in Plaintiff's complaint, in that _____[*specify what principal did to create impression that defendant had authority to act as an agent, e.g., (name of principal)*], on numerous prior occasions, had expressly authorized Defendant to rent construction equipment on (*name of principal*) _____'s behalf and Defendant therefore reasonably believed that he/she had similar authority in this situation]. Defendant therefore possessed at least ostensible authority to act on behalf of _____[*name of principal*], and, if any liability should be found to arise from the matters alleged in Plaintiff's complaint, _____[*name of principal*], as the principal in the transaction, is solely liable and Defendant, as a mere agent, is not liable.

[ADD additional affirmative defenses, if any]

[CONTINUE]

_____. WHEREFORE, Defendant prays that [*specify, e.g., Plaintiff take nothing by his/her complaint and that Defendant be awarded her costs of suit*].
Dated: _____

By: [*signature*] _____

[*name*] _____

_____. Attorney for Defendant

[Verification if desired]

NOTES.

Authority:

CC §§ 2299 (actual agency), 2300 (ostensible agency), 2330 (principal liable for authorized acts of agent), 2334 (extent of principal's liability for acts of ostensible agent)

Actual Agency:

See 20.09[1]

Ostensible Agency:

See 20.09[2]

Acts Within Agent's Authority Are Considered Acts of Principal:

See 20.10

Effect of Undisclosed Agency:

See 20.13

Existence of Agency As Defense to Action Against Agent:

See 20.16

Legal Topics:

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

Business & Corporate LawAgency RelationshipsAuthority to ActContracts & ConveyancesEnforcement & ExecutionBusiness & Corporate LawAgency RelationshipsAuthority to ActContracts & ConveyancesLiability of AgentCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsAffirmative DefensesGeneral OverviewCivil ProcedurePleading & PracticePleadingsAnswers



193 of 193 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 20 Asserting Agency Issues in Contract Actions
V. FORMS

2-20 MB Practice Guide: CA Contract Litigation 20.22

20.22 Complaint by Third Party Against Agent Alleging Breach of Warranty of Authority.**Complaint by Third Party Against Agent Alleging Breach of Warranty of Authority.**

[Name of attorney]

_____[Street address]

_____[City, state, and ZIP]

_____[Area code and phone number]

_____[State Bar no. of attorney]

Attorney for _____[name of party]

SUPERIOR COURT OF CALIFORNIA,

COUNTY OF _____

[name(s)] _____,

Plaintiff(s)

vs.

[name(s)] _____

[and DOES 1 THROUGH

_____] _____

Defendant(s).

)

)

)

)

)

)

)

)

NO.

COMPLAINT FOR DAMAGES

[LIMITED CIVIL CASE]

[Amount Demanded

_____(Exceeds or Does Not
Exceed) \$10,000]

Plaintiff _____[name] alleges:

1. _____[state capacity and residence of plaintiff; see, e.g., 20.13, 20.15].

2-20 MB Practice Guide: CA Contract Litigation 20.22

2. _____ [state capacity and residence of defendant; see, e.g., 20.13, 20.15].

3. _____ [include allegation of fictitious defendants; see, e.g., 20.13, 20.15].

4. On or about _____ [date], Defendant _____ [name of purported agent] entered into _____ [a written or an oral] contract with Plaintiff. In inducing Plaintiff to enter into that contract, Defendant _____ [repeatedly] represented to Plaintiff that Defendant was the authorized agent of _____ [name of purported principal] and that Defendant was acting in his/her capacity as an agent, and within the scope of his/her authority as an agent, and was entering into the contract on _____ [name of purported principal]'s behalf. Plaintiff had no knowledge of any limitation on Defendant's authority relied on these representations by Defendant in entering into the contract.

5. The terms of the above contract provided that _____ [specify relevant terms of contract].

6. _____ [if breach occurred, specify how contract was breached].

7. When Plaintiff attempted to enforce the above-described contract, Plaintiff discovered that Defendant _____ [was not in fact an agent of (name of purported principal) _____ and did not have any authority to act on (name of purported principal) _____'s behalf or exceeded Defendant's authority by entering into the contract with Defendant]. Plaintiff is informed and believes, and thereon alleges, that Defendant had no reasonable basis for believing that he/or she [was an agent of (name of purported principal) _____ or] had authority to enter into the contract with on behalf of _____ [name of purported principal].

8. [By assuming to act as agent for (name of purported principal) _____ and] [B]y _____ [expressly and/or impliedly] representing to Plaintiff that Defendant had the authority to enter into the above-described contract with Plaintiff on behalf of _____ [name of purported principal], without any reasonable basis for doing so, Defendant breached his/her warranty of authority and is liable for all damages incurred by Plaintiff as a result of that breach.

[Include if plaintiff had previously expended money in unsuccessful attempt to enforce contract or recover from purported principal]

9. Plaintiff has expended the sum of \$ _____, including attorney's fees, in legal proceedings against _____ [name of purported principal] in an unsuccessful attempt to enforce the contract against _____ [name of purported principal] in the action entitled _____ [case name] Case No. _____, in the _____ Superior Court].

[CONTINUE]

10. [In addition,] Plaintiff was damaged in the amount of \$ _____, which represents the amount

Plaintiff would have received under the terms of the contract if Defendant had in fact been acting as an agent of _____ [name of purported principal] as Defendant warranted.

WHEREFORE, Plaintiff prays judgment against Defendant as follows:

1. For damages in the sum of \$ _____;
2. For interest on the damages according to proof [at the rate of _____ (e.g., 10) percent per year as provided in the contract,] from _____ [date];
- [3. For costs and attorney's fees incurred in the prior action herein referred to in the sum of \$ _____;]
4. For costs of suit herein incurred; and
5. For such other and further relief as the court may deem proper.

[signature] _____

[name] _____

Attorney for Plaintiff

[Verification, if desired]

NOTES.

Authority:

CC §§ 2295-2357

Scope of Authority:

See 20.09 -20.11

Defenses:

See 20.16, 20.18

Procedure:

See 20.15[2]

Related Form for Complaint:

See 20.19

Legal Topics:

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

Business & Corporate Law Agency Relationships Authority to Act General Overview Business & Corporate Law Agency

Relationships Authority to Act Contracts & Conveyances Liability of Agent Business & Corporate Law Agency
Relationships Duties & Liabilities Third Parties



1 of 188 DOCUMENTS

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Chapter 21 Asserting a Particular Construction of Contract

2-21 MB Practice Guide: CA Contract Litigation 21.syn

§ 21.syn Synopsis to Chapter 21: Asserting a Particular Construction of Contract

21.01 Scope.

21.02 Objective and Strategy.

21.03 CHECKLIST: Raising Contract Interpretation Issues in Litigation.

21.04 Procedural Context for Raising Interpretation Issue Depends on Circumstances.

21.04[1] Plaintiff Must Allege Meaning of Ambiguous Contract.

21.04[2] Defendant Must Raise Interpretation Issue in Manner Responsive to Plaintiff's Pleadings.

21.04[2][a] Defendant May Object to Complaint by Demurrer or Answer.

21.04[2][b] On Demurrer, Court Must Accept Plaintiff's Construction of Disputed Term.

21.04[2][c] Failure to Object to Complaint Generally Is Deemed Waiver.

21.04[2][d] Answer May Deny Complaint's Interpretation of Contract.

21.04[2][e] Affirmative Defense May Raise New Interpretation Issue.

21.04[2][f] Failure to Plead Affirmative Defenses Generally Waives Them.

21.04[2][g] Interpretation Issue May Be Resolved on Summary Judgment If Facts Are Undisputed.

21.04[2][h] Interpretation Dispute Based on Controverted Facts Presents Jury Question.

21.04[2][i] Interpretation Issue May Be Raised in Action for Declaratory Relief.

21.04[2][j] Failure to Object to Extrinsic Evidence Does Not Bar Challenge to Judgment.

21.04[2][k] Stranger to Contract May Invoke Parol Evidence Rule.

21.05 CHECKLIST: Determining Whether Contract Interpretation Issue Is Question of Law or Fact.

21.06 Courts Disagree on Whether Integration Is Question of Law or Fact.

21.07 Existence or Nonexistence of Ambiguity Is Question of Law.

21.08 Meaning of Unambiguous Contract Is Question of Law.

21.09 If Facts Are Disputed, Meaning of Ambiguous Contract Is Question of Fact.

21.10 Conflicting Inferences From Undisputed Evidence Do Not Create Fact Question.

21.11 Erroneous Trial Court Interpretation Does Not Bind Appeals Court.

21.12 CHECKLIST: Applying Rules of Interpretation to Determine Meaning of Contract Term.

21.13 Options and Strategy.

21.14 Parties' Intention at Time of Contracting Governs Interpretation.

21.14[1] Court Looks for Objective Manifestations of Intent.

21.14[2] Court Interprets Disputed Terms As Promisor Supposed That Promisee Understood Them.

21.15 Court Construes Uncertain Term Against Party Causing Uncertainty.

21.16 Between Two Interpretations, Court Applies Interpretation in Favor of Natural Right.

21.17 Court Ascertains Parties' Intent From Writing Alone If Possible.

21.18 Statutory Rules Apply If Parties' Intent Is Doubtful.

21.19 Court Considers Contract As Whole.

21.19[1] Court Gives Effect to Every Provision If Possible.

21.19[2] Court Considers Related Writings Together.

21.20 Words Are Given Their Ordinary Meanings.

21.21 Court Applies Local Meanings Used in Place Where Contract Is Performed or Made.

21.22 Technical Words Are Interpreted As Understood by Specialists in Field.

21.23 Court May Look at Circumstances of Contract Formation.

21.24 Terms May Be Explained by Course of Dealing, Trade Usage, and Course of Performance.

21.24[1] Evidence of Trade Usage Is Admissible, Whether or Not Pleaded.

21.24[2] Usage or Custom May Be Used to Explain or to Imply Term.

21.24[3] Contract Terms Implied by Custom Are No Longer Implied When Custom Ceases.

21.24[4] Custom and Trade Usage Cannot Change Law.

21.24[5] Court May Look to Parties' Conduct Before Controversy Arose.

21.25 Contract Is Construed to Avoid Internal Conflict.

21.25[1] Consistent Provisions Are Given Effect.

21.25[2] Specific Provision Controls Over Inconsistent General Provision.

21.25[3] Words Are Given Same Meaning in Different Parts of Contract.

21.25[4] Handwritten Provisions Control Preprinted Terms.

21.26 General Words Following List Apply to That List Only.

21.27 Courts Favor Interpretation That Renders Contract Enforceable.

21.28 Bilateral Promises Are Construed As Mutually Dependent and Concurrent.

21.29 Contract Is Construed to Avoid Forfeiture.

21.30 Contract Is Construed to Be Performed Within Reasonable Time.

21.31 Same Interpretation Rules Apply to Government and Private Contracts.

21.32 CHECKLIST: Alleging and Proving Ambiguities in Contract.

21.33 Options and Strategy.

21.34 "Ambiguous" Means Reasonably Susceptible to Two Interpretations.

21.35 California Does Not Apply "Plain Meaning Rule" for Determining Ambiguity.

21.36 Extrinsic Evidence Must Be Provisionally Received.

21.37 If Contract Is Ambiguous, Court Interprets in Light of Evidence, Applying Canons of Construction.

21.38 CHECKLIST: Opposing Admission of Extrinsic Evidence.

21.39 CHECKLIST: Moving for Admission of Extrinsic Evidence.

21.40 Options and Strategy.

21.41 Parol Evidence Rule Bars Some Extrinsic Evidence Affecting Written Contracts.

21.42 Parol Evidence Rule Is Substantive Law, Not Evidentiary Rule.

21.43 Parol Evidence Rule Requires Analysis of Integration and Ambiguity.

21.44 If Writing Fully Integrates Parties' Agreement, Extrinsic Evidence May Not Be Admitted to Contradict,

Explain, or Supplement It.

21.45 If Written Agreement Is Partially Integrated, Extrinsic Evidence May Be Admitted to Explain or Supplement but Not to Contradict It.

21.46 Court Looks Beyond Four Corners of Document to Ascertain Integration.

21.46[1] Court Examines Writing and Extrinsic Evidence.

21.46[2] California Does Not Employ Facial Completeness Test of Integration.

21.46[3] Court Applies Four-Factor Test in Deciding Whether Extrinsic Evidence Should Go to Jury.

21.46[4] Contradictory Evidence Is Evidence That Cannot Be Reconciled Semantically With Language of Writing.

21.46[5] Parties' Legal Sophistication and Use of Lawyers May Suggest Integrative Intent.

21.46[6] Signatures on Writing May Suggest Integrative Intent.

21.46[7] To Determine Integration, Court Must Interpret Writing.

21.46[8] Noncontractual and Incomplete Writings Are Not Integrations.

21.46[9] Inclusion or Exclusion of Merger Clause Is Significant but Not Conclusive.

21.46[10] Negotiations Suggest Integration; Preprinted Forms Do Not.

21.46[11] Language Regarding Subsequent Modification May Bear on Integration Question.

21.46[12] If Extrinsic Evidence Is Not in Conflict, Court Interprets Contract.

21.47 Extrinsic Evidence Is Admissible to Rebut Implied-in-Law Terms.

21.48 Extrinsic Evidence Is Admissible to Prove Consistent Oral Condition.

21.49 Extrinsic Evidence Is Admissible to Prove Custom or Trade Usage, Course of Dealing, or Course of Performance.

21.49[1] Course of Prior Dealings and Trade Usage Become Part of Contract.

21.49[2] Parties' Performance of Their Contract Reflects Their Understanding of Terms.

21.50 Extrinsic Evidence Is Admissible to Prove Circumstances of Formation.

21.51 Extrinsic Evidence Is Admissible to Prove Fraud, Duress, Illegality, Undue Influence, and Other Invalidating Causes.

21.52 Fraud Exception to Parol Evidence Rule Does Not Apply to False Promises That Contradict Contract Itself.

21.53 Parol Evidence Rule Does Not Apply to Consumer Fraud Claims Under CC § 1770(a)(14).

21.54 Extrinsic Evidence Is Admissible to Prove Accident or Mistake.

- 21.55 Extrinsic Evidence Is Admissible to Prove Imperfection or Invalidity of Writing.
- 21.56 Extrinsic Evidence Is Admissible to Prove Lack of Consideration.
- 21.57 Parol Evidence Rule Does Not Bar Evidence of Contemporaneous Written Agreement.
- 21.58 Parol Evidence Rule Does Not Bar Evidence of Subsequent Changes to Written Agreement.
- 21.58[1] Evidence May Show Modification by Executed Oral Agreement.
- 21.58[2] Evidence May Show Modification by Oral Agreement Supported by New Consideration.
- 21.58[3] Evidence May Show Novation.
- 21.58[4] Evidence May Show Discharge or Release.
- 21.59 CHECKLIST: Asserting or Opposing Construction of Contract Term Against Drafter.
- 21.60 Options and Strategy.
- 21.61 Agreement Is Construed Against Drafter When Other Canons Fail.
- 21.62 Principle Applies With Greater Force When Drafter Is Lawyer.
- 21.63 Principle Does Not Apply to Jointly Drafted Contract.
- 21.64 Adhesion Contract Outside Weaker Party's Reasonable Expectations Will Not Be Enforced.
- 21.65 Unconscionable Contract Will Not Be Enforced.
- 21.66 Special Construction Rules Apply to Insurance Contracts.
- 21.67 CHECKLIST: Supplying Missing Terms or Asserting Implied Terms.
- 21.68 Options and Strategy.
- 21.69 Court Will Not Insert Omitted Terms or Omit Inserted Terms.
- 21.70 Implied Covenants Are Disfavored.
- 21.71 Term May Be Implied by Statute or Policy.
- 21.72 Court May Choose Among Conflicting Meanings and Fill Gaps in Contract.
- 21.73 Contract Interpretation Rules May Resolve Uncertainty.
- 21.74 Parties' Course of Performance Under Contract Before Controversy Is Evidence of Their Intention.
- 21.75 Party With Discretion to Fill in Terms Must Do So in Good Faith.
- 21.76 Laws in Existence at Execution Are Implied Into Contract.
- 21.77 Laws Enacted After Execution Ordinarily Are Not Implied Into Contract.

21.78 Implied Terms Cannot Vary Express Terms.

21.79 Duty of Good Faith and Fair Dealing Is Implied in Every Contract.

21.80 Answer to Complaint for Breach of Contract With Affirmative Defense Based on Contract Interpretation.

Answer to Complaint for Breach of Contract With Affirmative Defense Based on Contract Interpretation.

21.81 Notice of Motion for Summary Judgment--Parol Evidence Rule Bars Evidence of Implied Contract Alleged by Plaintiff.

Notice of Motion for Summary Judgment--Parol Evidence Rule Bars Evidence of Implied Contract Alleged by Plaintiff.

21.82 Declaration in Support of Motion for Summary Judgment--Parol Evidence Rule Bars Evidence of Implied Contract Alleged by Plaintiff.

Declaration in Support of Motion for Summary Judgment--Parol Evidence Rule Bars Evidence of Implied Contract Alleged by Plaintiff.

21.83 Memorandum--Contract Is Ambiguous.

Memorandum--Contract Is Ambiguous.

21.84 Memorandum--Contract Is Not Ambiguous.

Memorandum--Contract Is Not Ambiguous.

21.85 Memorandum--Plaintiff Must Allege Construction of Ambiguous Contract Terms.

Memorandum--Plaintiff Must Allege Construction of Ambiguous Contract Terms.

21.86 Memorandum--On Demurrer, Plaintiff's Interpretation of Ambiguous Terms Must Be Accepted.

Memorandum--On Demurrer, Plaintiff's Interpretation of Ambiguous Terms Must Be Accepted.

21.87 Memorandum--Contract Stipulations Generally Are Interpreted As Covenants, Not Conditions.

Memorandum--Contract Stipulations Generally Are Interpreted As Covenants, Not Conditions.

21.88 Memorandum--Evidence Is Barred by Parol Evidence Rule.

Memorandum--Evidence Is Barred by Parol Evidence Rule.

21.89 Memorandum--Evidence Is Not Barred by Parol Evidence Rule.

Memorandum--Evidence Is Not Barred by Parol Evidence Rule.

21.90 Memorandum--Written Contract Was Modified by Oral Agreement Supported by New Consideration.

Memorandum--Written Contract Was Modified by Oral Agreement Supported by New Consideration.

21.91 Memorandum--Written Contract Was Modified by Executed Oral Agreement.

Memorandum--Written Contract Was Modified by Executed Oral Agreement.



2 of 188 DOCUMENTS

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Chapter 21 Asserting a Particular Construction of Contract

I. STRATEGY

2-21 MB Practice Guide: CA Contract Litigation 21.01

21.01 Scope.

This chapter covers:

- Objectives and strategy for raising contract interpretation issues in business litigation [see 21.02].
- Determining procedurally how to raise an interpretation issue [see 21.03, 21.04].
- Determining whether a contract interpretation issue is a question of law or fact [see 21.05 -21.11].
- Applying rules of interpretation to determine the meaning of a contract term [see 21.12 -21.31].
- Alleging and proving ambiguities in a contract [see 21.32 -21.37].
- Asserting or opposing the use of extrinsic evidence to interpret a contract [see 21.38 -21.58].
- Asserting or opposing construction of a contract term against the drafter [see 21.59 -21.66].
- Supplying missing terms or asserting implied terms [see 21.67 -21.79].

Core Statutes:

CC §§ 1635-1663; CCP §§ 1856-1866

Legal Topics:

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

Contracts LawContract InterpretationGeneral OverviewContracts LawContract InterpretationAmbiguities & Contra
ProferentemGeneral OverviewContracts LawContract InterpretationParol EvidenceGeneral Overview



3 of 188 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 21 Asserting a Particular Construction of Contract
I. STRATEGY

2-21 MB Practice Guide: CA Contract Litigation 21.02

21.02 Objective and Strategy.

Contract interpretation issues arise in various ways. Typically, a defendant will raise the issue in response to a complaint alleging breach of contract. If a contract is ambiguous, the plaintiff must go beyond attaching a copy of the contract and incorporating it in the complaint; the plaintiff must specifically aver in the complaint the meaning the plaintiff ascribes to the ambiguous provisions [*Evid Code* § 500; *see* 21.04[1]]. For purposes of ruling on a demurrer, the court will accept the plaintiff's interpretation if it is not clearly erroneous [*Hayter Trucking, Inc. v. Shell W. E&P, Inc.* (1993) 18 CA4th 1, 17, 22 CR2d 229 ; *see* 21.04[2][b]]. The defendant may raise the interpretation issue in its answer by denying the complaint's allegations generally or specifically, or may assert it as part of an affirmative defense [*CCP* § 431.30(b)(1); *see* 21.04[2][d]]. When no extrinsic evidence is introduced or the competent evidence is not disputed, the court may interpret the contract as a matter of law on a motion for summary judgment [*CCP* § 437c; *see* 21.04[2][g], 21.08]. However, if extrinsic evidence of the contract's meaning is disputed, the interpretation question will be a question of fact, and summary judgment will not be available [*Wolf v. Superior Court* (2004) 114 CA4th 1343, 1351 ; *see* 21.04[2][h], 21.09]. The interpretation of a contract also is a proper subject of declaratory relief.

In interpreting a contract, the court's goal is to ascertain the parties' original intentions *at the time of contract formation*, to the extent that they can be objectively determined [*CC* § 1636; *see* 21.14]. California law applies traditional rules of contract interpretation, considering the agreement together with the circumstances surrounding its execution [*CCP* § 1860; *see* 21.23]. The court seeks to dispel ambiguity or uncertainty in the terms by fair inference from the other terms of a written instrument. When two clauses conflict, the court seeks to reconcile the conflicting clauses so as to give effect to the whole of the instrument, if it can reach a reasonable interpretation consistent with the agreement's predominant purpose [*CC* §§ 1650, 1652, 1653; *see* 21.25]. When these rules do not resolve the question, the agreement may be construed against the party who caused the uncertainty, i.e., the drafter [*CC* § 1654; *see* 21.61].

With respect to written agreements, the parol evidence rule applies to bar use of extrinsic evidence to contradict the terms of a partially integrated agreement [*CCP* § 1856(a); *see* 21.45] or to contradict, add to, or modify the terms of a fully integrated agreement [*CCP* § 1856(b); *see* 21.44].

The state's courts have been accused of inconsistency in distinguishing between the use of extrinsic evidence to vary or add to an integrated agreement and its use to explain ambiguous terms. With respect to the latter, the California Supreme Court has largely abandoned the plain meaning rule, which asserts that if the language of an agreement appears on its face to be plain and unambiguous, the court must not look beyond the four corners of the writing to determine its meaning [*Pacific Gas & Elec. Co. v. G.W. Thomas Drayage & Rigging Co.* (1968) 69 C2d 33, 37-40,

69 CR 561, 442 P2d 641 ; see 21.35]. Extrinsic evidence must be received at least provisionally to determine in the first instance whether an agreement is ambiguous [*Pacific State Bank v. Greene* (2003) 110 CA4th 375, 386 ; see 21.36]. If the disputed language is reasonably susceptible to more than one interpretation, then extrinsic evidence is admissible to shed light on its meaning [see 21.37, 21.38 et seq.].



Strategic Point:

Because extrinsic evidence remains admissible for a wide variety of purposes regardless of whether or not an agreement is integrated [see 21.47 -21.55], counsel's decisions about how to frame the issues can be dispositive. Framing an issue not as one of adding an oral term to a written agreement but as merely using prior discussions to demonstrate and explain an extrinsic ambiguity can make the difference between getting key evidence admitted and having it excluded.

Judge's Perspective:

As the foregoing discussion illustrates, the issue of contract interpretation is raised immediately at the beginning of the litigation. Therefore, informal discovery and internal investigation of a lawyer's own client is at least as important as the formal discovery conducted of the other side. For example, a lawyer whose client alleges that a contract has only one meaning and is not ambiguous must determine quickly whether all of the material witnesses within the client's control have the same interpretation of the agreement. Similarly, the lawyer must develop a single, clear interpretation of the contract. Doing so will not only shape the lawyer's investigation and discovery efforts, but also will ensure that the lawyer takes consistent positions with the court throughout the litigation. Sometimes, failure of effort on the lawyer's part--or lack of complete disclosure on the client's part--will force the lawyer to modify or abandon a construction of the contract advanced early in the litigation. It can be difficult for the lawyer to regain his or her credibility once an opponent highlights these inconsistencies for the court.

Detailed Discussion/Forms:

California Forms of Pleading and Practice, Ch. 140, Contracts (Matthew Bender).

California Legal Forms, Ch. 75, Formation of Contracts and Standard Contractual Provisions (Matthew Bender).

California Points and Authorities, Ch. 50, Contracts (Matthew Bender).



Cross Reference:

For Tips on updating case law and expanding your research with additional resources, see **How to Use Lexis.com With This Publication** at the front of this volume.

Legal Topics:

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

Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsDemurrersCivil ProcedureDeclaratory Judgment
ActionsState JudgmentsGeneral OverviewContracts LawContract InterpretationGeneral OverviewContracts
LawContract InterpretationAmbiguities & Contra ProferentemGeneral OverviewContracts LawContract
InterpretationParol EvidenceGeneral Overview



4 of 188 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 21 Asserting a Particular Construction of Contract
II. RAISING CONTRACT INTERPRETATION ISSUES IN LITIGATION

2-21 MB Practice Guide: CA Contract Litigation 21.03

21.03 CHECKLIST: Raising Contract Interpretation Issues in Litigation.

☐ If opposing party's complaint reflects interpretation of contract that differs from client's, determine appropriate response to complaint.

☐ Demur, on ground that complaint fails to state facts sufficient to constitute cause of action, if interpretation issue appears on face of complaint.

Authority:

CCP § 430.10(e); Hayter Trucking, Inc. v. Shell W. E&P, Inc. (1993) 18 CA4th 1, 17, 22 CR2d 229; Aragon-Haas v. Family Sec. Ins. Servs., Inc. (1991) 231 CA3d 232, 239, 282 CR 233

Discussion:

See 21.04[2][b]

☐ Answer, with general or specific denials of allegations in complaint that plead interpretation of contract.

Authority:

CCP § 431.30(b)(1)

Discussion:

See 21.04[2][d]

Form:

See 21.80 (answer to complaint for breach of contract)

☐ Offer affirmative defense in answer, if interpretation is not put into issue by complaint.

Authority:

CCP § 431.30(b)(2); *Walsh v. West Valley Mission Cmty. Coll. Dist.* (1998) 66 CA4th 1532, 1546, 78 CR2d 725

Discussion:

See 21.04[2][e]

Form:

See 21.80 (answer to complaint for breach of contract)

☐ If interpretation has been put into issue by pleadings, determine whether issue can be resolved on motion for summary judgment or motion for summary adjudication of causes of action.

☐ Issue can be resolved by summary judgment if certain or undisputed facts make interpretation issue a question of law.

Authority:

CCP § 437c; *Wolf v. Superior Court* (2004) 114 CA4th 1343, 1351 , 8 CR3d 649

Discussion:

See 21.04[2][g]

Forms:

See 21.81 (notice of summary judgment motion), 21.82 (declaration in support of summary judgment motion)

☐ Issue cannot be resolved by summary judgment if triable issues of fact exist as to interpretation.

Authority:

CCP § 437c

Discussion:

See 21.04[2][h]

☐ If opposing party has not yet filed action based on contract, but actual controversy exists, consider raising interpretation issue by filing action for declaratory relief.

Authority:

CCP § 1060; *Southern Cal. Edison Co. v. Superior Court* (1995) 37 CA4th 839, 846, 44 CR2d 227

Discussion:

See 21.04[2][i]

Legal Topics:

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

Civil Procedure Pleading & Practice Defenses, Demurrers & Objections Affirmative Defenses General Overview Civil Procedure Pleading & Practice Defenses, Demurrers & Objections Demurrers Civil Procedure Pleading & Practice Pleadings Answers Civil Procedure Summary Judgment Motions for Summary Judgment General Overview Contracts Law Contract Interpretation General Overview



5 of 188 DOCUMENTS

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Chapter 21 Asserting a Particular Construction of Contract
II. RAISING CONTRACT INTERPRETATION ISSUES IN LITIGATION

2-21 MB Practice Guide: CA Contract Litigation 21.04

21.04 Procedural Context for Raising Interpretation Issue Depends on Circumstances.

21.04[1] Plaintiff Must Allege Meaning of Ambiguous Contract. The pleader has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense asserted [*Evid Code* § 500].

If a written instrument is ambiguous, the pleader must allege the meaning he or she ascribes to it. If the contract is merely attached and incorporated and the complaint does not allege any special meaning, the court construes the language on its face. Failure to plead exactly what extrinsic evidence will be offered does not constitute a waiver [*see Hayter Trucking, Inc. v. Shell W. E&P, Inc. (1993) 18 CA4th 1, 18, 22 CR2d 229*].

► **Cross References:**

Discussion of rule that plaintiff's construction is accepted on demurrer, see 21.04[2][b].

Discussion of applying rules of contract interpretation, see 21.12 -21.31.

Discussion of alleging and proving ambiguities in contract, see 21.32 -21.37.

Jury Instructions:

Contracts--Interpretation--Disputed Term, see *Judicial Council of California Civil Jury Instructions, CACI No. 314* (LexisNexis Matthew Bender).

21.04[2] Defendant Must Raise Interpretation Issue in Manner Responsive to Plaintiff's Pleadings.

21.04[2][a] Defendant May Object to Complaint by Demurrer or Answer. An interpretation issue may be raised in a demurrer or answer by an objection that the complaint or cross-complaint does not state facts sufficient to plead a cause of action or defense. In addition, the demurrer or answer may argue that [*see CCP* § 430.10(e), (g)]:

- The pleading is uncertain; or
- That it cannot be ascertained from the pleading whether the contract is written, oral, or implied by conduct.

21.04[2][b] On Demurrer, Court Must Accept Plaintiff's Construction of Disputed Term. For purposes of ruling on a demurrer, the court assumes the truth of the complaint's factual allegations. The demurrer tests the pleading alone, not the evidence to be offered to interpret the contract. Objections not appearing on the face of the pleading are raised by answer [*Hayter Trucking, Inc. v. Shell W. E&P, Inc.* (1993) 18 CA4th 1, 17, 22 CR2d 229].

If a complaint is based on a written contract that it sets out in full, a general demurrer admits not only the contents of the instrument but also any pleaded meaning to which the instrument is reasonably susceptible. While the plaintiff's interpretation ultimately may prove invalid, it is improper to resolve the issue solely on the pleading [*Aragon-Haas v. Family Sec. Ins. Servs., Inc.* (1991) 231 CA3d 232, 239, 282 CR 233 ; *L.B. Research & Ed. Found. v. UCLA Found.* (2005) 130 CA4th 171, 178-179].

Consider:

A court ruling on a demurrer cannot take judicial notice of the proper interpretation of a document submitted in support of the demurrer. Although the *existence* of a document may be judicially noticeable, the truth of statements contained in the document and its proper interpretation are not subject to judicial notice if those matters are reasonably disputable [*Fremont Indemnity Co. v. Fremont General Corp.* (2007) 148 CA4th 97, 114-115, 55 CR3d 621 (court erred in taking judicial notice of enforceability and proper interpretation of contract and deciding those questions in ruling on demurrer)].

Judge's Perspective:

The defendant should be careful to avoid saying more than necessary about its interpretation of the contract at the demurrer stage of the litigation. An interpretation that seems well-founded based on counsel's initial reading of the contract and early investigation may not seem as solid after further reading and formal discovery.

 Cross References:

Discussion of alleging and proving ambiguities in contract, see 21.32 -21.37.

Discussion of demurrers and motions for judgment on the pleadings, see Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, Ch. 11, Demurrers and Motions for Judgment on the Pleadings; or California Forms of Pleading and Practice, Ch. 206, Demurrers and Motions for Judgment on the Pleadings (Matthew Bender).

21.04[2][c] Failure to Object to Complaint Generally Is Deemed Waiver. A defendant's failure to object to the complaint, or a plaintiff's failure to object to a cross-complaint, by demurrer or answer generally is deemed to waive the objection. Exceptions include objections to subject matter jurisdiction and failure to state facts constituting a cause of action or defense [see CCP § 430.80(a)].

 Cross Reference:

Discussion of burden of proof, see California Forms of Pleading and Practice, Ch. 551, Trial (Matthew Bender).

21.04[2][d] Answer May Deny Complaint's Interpretation of Contract. The defendant's answer can raise the issue of contract interpretation in either a general denial or specific denials of the material allegations of the complaint that plead the essential elements for creation of a contract [see CCP § 431.30(b)(1)].

In a breach of contract case, a general denial denies that there is a contract, that the plaintiff performed or had an excuse for nonperformance, that the defendant did not perform, or that the plaintiff was damaged. A general denial allows the denying party to present evidence to refute the complaint's allegations [*Walsh v. West Valley Mission Cmty. Coll. Dist.* (1998) 66 CA4th 1532, 1545, 78 CR2d 725].

► **Cross References:**

Discussion of denials in answers, see Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, Ch. 14, Answers; or California Forms of Pleading and Practice, Ch. 26, Answers (Matthew Bender).

21.04[2][e] Affirmative Defense May Raise New Interpretation Issue. If the complaint does not put the contract interpretation dispute into issue, the issue may constitute "new matter" that the defendant must raise by pleading an affirmative defense [see CCP § 431.30(b)(2)]. "New matter" is something relied on by a defendant that is not put in issue by the complaint [*Walsh v. West Valley Mission Cmty. Coll. Dist.* (1998) 66 CA4th 1532, 1546, 78 CR2d 725].

► **Cross References:**

Sample Judicial Council form for answer and discussion of use of form, see *California Forms of Pleading and Practice*, § 140.132 (Matthew Bender).

Discussion of pleading affirmative defenses in an answer, see Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, Ch. 14, Answers; or California Forms of Pleading and Practice, Ch. 26, Answers (Matthew Bender).

21.04[2][f] Failure to Plead Affirmative Defenses Generally Waives Them. A party who fails to plead affirmative defenses generally waives them [*California Acad. of Scis. v. County of Fresno* (1987) 192 CA3d 1436, 1442, 238 CR 154].

► **Cross Reference:**

Discussion of failure to object to complaint, see 21.04[2][c].

21.04[2][g] Interpretation Issue May Be Resolved on Summary Judgment If Facts Are Undisputed. The defendant may be able to move for summary judgment (or summary adjudication of causes of action) if interpretation of the contract is a question of law [see CCP § 437c].

► **Cross References:**

Discussion of whether issues are questions of law or fact: see 21.05 -21.11.

Discussion of motions for summary judgment, see Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, Ch. 38, Summary Judgment; or California Forms of Pleading and Practice, Ch. 537, Summary Judgment (Matthew Bender).

21.04[2][h] Interpretation Dispute Based on Controverted Facts Presents Jury Question. When two interpretations of contract language are advanced, to which the language is reasonably susceptible, extrinsic evidence is admissible to aid in interpreting the agreement. If the extrinsic evidence is in dispute, the interpretation becomes a question of fact that precludes summary judgment [*Wolf v. Superior Court* (2004) 114 CA4th 1343, 1351].

Examples:

- In a dispute between an employee and employer over unpaid wages, the parties submitted conflicting parol evidence as to the period of the employee's employment, thereby creating a question of fact precluding summary judgment [*Leep v. American Ship Management* (2005) 126 CA4th 1028, 1041].

- Because ascertaining the intent of the parties at the time the contract was executed depended on the credibility of extrinsic evidence, that credibility determination and the interpretation of the contract were

questions of fact that were properly resolved by the jury [*City of Hope National Medical Center v. Genentech, Inc.* (2008) 43 C4th 375, 395, 75 CR3d 333, 181 P3d 142] .

■ In a dispute between a city and a contractor over interpretation of a public works contract, given the patent ambiguity of the contract provision at issue and the extrinsic evidence offered by the contractor, the contractor was entitled to have disputed issues of contract interpretation submitted to the jury [*Dillingham-Ray Wilson v. City of Los Angeles* (2010) 182 CA4th 1396, 1405, 106 CR3d 691] .

Jury Instructions:

Conflict in Evidence--Preliminary Instruction When Interpretation Is Jury Question, see *California Forms of Jury Instruction*, Ch. 3B, Instr. MB 300B.02 (Matthew Bender).



Warning--Remember to Ask for Special Verdict or Statement of Decision:

To preserve the jury's conclusions of fact on an ambiguity question, counsel should request a special verdict [see CCP § 624]. Similarly, in a bench trial, counsel should request a statement of decision addressing the issue [see CCP § 632].

Judge's Perspective:

The question for the court is whether the party offering the evidence is advancing an interpretation of the contract to which it is "reasonably susceptible." If so, the evidence must be admitted. If not, the evidence is extrinsic to the contract and must be excluded by the parol evidence rule. "While extrinsic evidence may be considered by a court as an aid in the interpretation of a written contract when it is relevant to prove a meaning to which the language of the instrument is reasonably susceptible, [if] the evidence offered would not persuade a reasonable man that the instrument meant anything other than the ordinary meaning of its words, it is useless" [*Producers Dairy Delivery Co. v. Sentry Ins. Co.* (1986) 41 C3d 903, 913, 226 CR 558, 718 P2d 920].



Cross References:

Discussion of motions for summary judgment, see Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, Ch. 38, Summary Judgment; or California Forms of Pleading and Practice, Ch. 537, Summary Judgment (Matthew Bender).

21.04[2][i] Interpretation Issue May Be Raised in Action for Declaratory Relief. Interpretation of a contract is a proper subject of declaratory relief [CCP § 1060; *Southern Cal. Edison Co. v. Superior Court* (1995) 37 CA4th 839, 846-847, 44 CR2d 227].

Even before any contract breach occurs, if an actual controversy exists relating to parties' legal rights and duties under a contract, a party may bring a declaratory relief action in superior court. This action may seek determination of any question of construction or validity of the contract. Such relief is in addition to any other available relief [see CCP § 1060].



Cross References:

Discussion of actions for declaratory relief, see Ch. 11, Seeking or Opposing Declaratory Relief in Contract Matters.

21.04[2][j] Failure to Object to Extrinsic Evidence Does Not Bar Challenge to Judgment. A party who has not objected to the introduction of extrinsic evidence cannot complain if the trier of fact considers that evidence. In determining whether substantial evidence supports a judgment, extrinsic evidence inconsistent with any plausible interpretation is irrelevant as a matter of substantive law [*Tahoe Nat'l Bank v. Phillips* (1971) 4 C3d 11, 23, 92 CR 704, 480 P2d 320].

A motion in limine should be made before or at trial to exclude irrelevant extrinsic evidence. A motion in limine is normally sufficient to preserve an issue for review, without a renewed objection when the evidence is offered, unless the evidence at trial differs substantially from that presented at the motion hearing or included in an offer of proof [*Summers v. A. L. Gilbert Co.* (1999) 69 CA4th 1155, 1184, 82 CR2d 162].

Cross References:

Discussion of motions in limine, see California Forms of Pleading and Practice, Ch. 373, Motions in Limine (Matthew Bender).

Matthew Bender[(R)] Practice Guide: Pretrial Civil Procedure, Ch. 14, Answers.

21.04[2][k] Stranger to Contract May Invoke Parol Evidence Rule. CCP § 1856 applies not only in actions between contract parties, but also in actions between a contract party and a stranger to the contract [*Neverkovec v. Fredericks* (1999) 74 CA4th 337, 350 n8].

Legal Topics:

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

Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsDemurrersCivil ProcedurePleading & PracticePleadingsAnswersContracts LawContract InterpretationGeneral OverviewContracts LawContract InterpretationAmbiguities & Contra ProferentemGeneral OverviewContracts LawContract InterpretationParol EvidenceGeneral Overview



6 of 188 DOCUMENTS

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Chapter 21 Asserting a Particular Construction of Contract

III. DETERMINING WHETHER CONTRACT INTERPRETATION ISSUE IS QUESTION OF LAW OR FACT

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21.05 CHECKLIST: Determining Whether Contract Interpretation Issue Is Question of Law or Fact.

- ☐ Determine if written contract is integrated; that is, meant to be a complete, final, exclusive expression of parties' agreement.

Authority:

Hayter Trucking, Inc. v. Shell W. E&P, Inc. (1993) 18 CA4th 1, 13, 22 CR2d 229

Discussion:

See 21.06, 21.43 -21.46

- ☐ Determine if contract is ambiguous; that is, whether it is reasonably susceptible to two meanings.

Authority:

Oceanside 84, Ltd. v. Fidelity Fed. Bank (1997) 56 CA4th 1441, 1448, 66 CR2d 487

Discussion:

See 21.07, 21.34 -21.36

- ☐ Determine whether extrinsic evidence relevant to resolving ambiguity is in dispute.

Authority:

ASP Props. Group, L.P. v. Fard, Inc. (2005) 133 CA4th 1257, 1275

Discussion:

See 21.08, 21.09, 21.34 -21.37

- ☐ Determine if issue involves conflicting inferences drawn from undisputed evidence that are not enough to create question of fact.

Authority:

McCrary Constr. Co. v. Metal Deck Specialists, Inc. (2005) 133 CA4th 1528, 1536

Discussion:

See 21.10

☐ On appeal, determine whether extrinsic evidence used by trial court to reach erroneous interpretation was inadmissible.

Authority:

Tahoe Nat'l Bank v. Phillips (1971) 4 C3d 11, 23, 92 CR 704, 480 P2d 320

Discussion:

See 21.11

Legal Topics:

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

Civil Procedure Trials Jury Trials Province of Court & Jury Contracts Law Contract Conditions & Provisions Integration
 Clauses Contracts Law Contract Interpretation General Overview Contracts Law Contract Interpretation Ambiguities &
 Contra Proferentem General Overview Contracts Law Contract Interpretation Parol Evidence General Overview



7 of 188 DOCUMENTS

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Chapter 21 Asserting a Particular Construction of Contract

III. DETERMINING WHETHER CONTRACT INTERPRETATION ISSUE IS QUESTION OF LAW OR FACT

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21.06 Courts Disagree on Whether Integration Is Question of Law or Fact.

For purposes of the parol evidence rule, the court must determine whether the parties intended the written agreement as a final, complete, and exclusive expression of their agreement [CCP § 1856(d)]. Courts have taken different positions on integration, variously holding that it is one of the following:

- A question of fact [see, e.g., *Heller v. Pillsbury Madison & Sutro* (1996) 50 CA4th 1367, 1382, 58 CR2d 336].
- A question of law [see, e.g., *Hayter Trucking, Inc. v. Shell W. E&P, Inc.* (1993) 18 CA4th 1, 14, 22 CR2d 229 ; cf. *Founding Members of the Newport Beach Country Club v. Newport Beach Country Club, Inc.* (2003) 109 CA4th 944, 954, 135 CR2d 505 (when evidence of integration is not in dispute)].
- A mixed question of law and fact [see, e.g., *FPI Dev., Inc. v. Nakashima* (1991) 231 CA3d 367, 391-392, 282 CR 508].



Cross Reference:

Discussion of parol evidence rule, see 21.38 et seq.

Legal Topics:

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

Civil Procedure Trials Jury Trials Province of Court & Jury Contracts Law Contract Conditions & Provisions Integration Clauses



8 of 188 DOCUMENTS

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Chapter 21 Asserting a Particular Construction of Contract

III. DETERMINING WHETHER CONTRACT INTERPRETATION ISSUE IS QUESTION OF LAW OR FACT

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21.07 Existence or Nonexistence of Ambiguity Is Question of Law.

The trial court's ruling on the threshold determination of "ambiguity" (i.e., whether the proffered evidence is relevant to prove a meaning to which the language is reasonably susceptible) is a question of law [*Winet v. Price* (1992) 4 CA4th 1159, 1165, 6 CR2d 554].

➡ Cross References:

Discussion of construction of ambiguity on demurrer and summary judgment, see 21.04[2][b], [h].

Discussion of alleging and proving ambiguities, see 21.34 -21.37.

Legal Topics:

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

Civil ProcedureTrialsJury TrialsProvince of Court & JuryContracts LawContract InterpretationAmbiguities & Contra ProferentemGeneral Overview



9 of 188 DOCUMENTS

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Chapter 21 Asserting a Particular Construction of Contract

III. DETERMINING WHETHER CONTRACT INTERPRETATION ISSUE IS QUESTION OF LAW OR FACT

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21.08 Meaning of Unambiguous Contract Is Question of Law.

The trial court's resolution of an ambiguity is a question of law if no parol evidence is admitted or if the parol evidence is not in conflict [*Beard v. Goodrich* (2003) 110 CA4th 1031, 1037].

► **Cross References:**

Discussion of construction of ambiguity on demurrer and summary judgment, see 21.04[2][b], [h].

Discussion of alleging and proving ambiguities, see 21.34 -21.37.

Legal Topics:

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

Civil ProcedureTrialsJury TrialsProvince of Court & JuryContracts LawContract InterpretationAmbiguities & Contra
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10 of 188 DOCUMENTS

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Chapter 21 Asserting a Particular Construction of Contract

III. DETERMINING WHETHER CONTRACT INTERPRETATION ISSUE IS QUESTION OF LAW OR FACT

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21.09 If Facts Are Disputed, Meaning of Ambiguous Contract Is Question of Fact.

When the competent parol evidence used to construe an ambiguity is in conflict, and thus requires resolution of credibility issues, any reasonable construction will be upheld as long as it is supported by substantial evidence [*ASP Props. Group, L.P. v. Fard, Inc. (2005) 133 CA4th 1257, 1275*].



Cross Reference:

Discussion of construction of ambiguity on summary judgment, see *21.04[2][h]*.

Legal Topics:

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

Contracts LawContract InterpretationAmbiguities & Contra ProferentemGeneral OverviewContracts LawContract InterpretationParol EvidenceGeneral Overview



11 of 188 DOCUMENTS

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Chapter 21 Asserting a Particular Construction of Contract

III. DETERMINING WHETHER CONTRACT INTERPRETATION ISSUE IS QUESTION OF LAW OR FACT

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21.10 Conflicting Inferences From Undisputed Evidence Do Not Create Fact Question.

If the evidentiary facts are undisputed and only the inferences to be drawn from those facts are disputed, an appellate court must independently construe the written language [*McCrary Constr. Co. v. Metal Deck Specialists, Inc. (2005) 133 CA4th 1528, 1536*].

Legal Topics:

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

Civil Procedure Summary Judgment Evidence Contracts Law Contract Interpretation Ambiguities & Contra Proferentem General Overview Evidence Inferences & Presumptions Inferences



12 of 188 DOCUMENTS

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Chapter 21 Asserting a Particular Construction of Contract

III. DETERMINING WHETHER CONTRACT INTERPRETATION ISSUE IS QUESTION OF LAW OR FACT

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21.11 Erroneous Trial Court Interpretation Does Not Bind Appeals Court.

In determining whether substantial evidence supports a judgment, extrinsic evidence inconsistent with any plausible interpretation is irrelevant. As a matter of substantive law such irrelevant evidence cannot support a judgment [see *Tahoe Nat'l Bank v. Phillips* (1971) 4 C3d 11, 23, 92 CR 704, 480 P2d 320].



Cross Reference:

Discussion of alleging and proving ambiguities, see 21.34 -21.37.

Legal Topics:

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

Civil ProcedureAppealsStandards of ReviewDe Novo ReviewCivil ProcedureAppealsStandards of ReviewFact & Law
Issues



13 of 188 DOCUMENTS

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Chapter 21 Asserting a Particular Construction of Contract

IV. APPLYING RULES OF INTERPRETATION TO DETERMINE MEANING OF CONTRACT TERM

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21.12 CHECKLIST: Applying Rules of Interpretation to Determine Meaning of Contract Term.

- ☐ Look for objective manifestations of parties' intent at time of contracting.

Authority:

CC §§ 1636, 1648, 1650; TRB Investments, Inc. v. Fireman's Fund Ins. Co. (2006) 40 C4th 19, 27, 50 CR3d 597, 145 P3d 472; Reigelsperger v. Siller (2007) 40 C4th 574, 579-580, 53 CR3d 887, 150 P3d 764

Discussion:

See 21.14[1]

- ☐ Determine how opposing party supposed that your client understood contract terms.

Authority:

CCP § 1864; see CC § 1649

Discussion:

See 21.14[2]

- ☐ If two constructions of disputed term are equally proper, determine in whose favor disputed contract provision was made.

Authority:

CC § 1654

Discussion:

See 21.15

- ☐ If contract is equally susceptible to two interpretations, determine which one is in favor of natural

right.

Authority:

CCP § 1866

Discussion:

See 21.16

- ☐ Determine whether parties' intent can be ascertained from the writing alone.

Authority:

CC § 1639; Powerine Oil Co., Inc. v. Superior Court (2005) 37 C4th 377, 396, 33 CR3d 562, 118 P3d 589

Discussion:

See 21.17

- ☐ Look at entire contract.

- ☐ Determine whether multiple writings exist that should be interpreted together.

Authority:

CC § 1642

Discussion:

See 21.19[2]

- ☐ Determine whether disputed term is used elsewhere in the agreement.

Authority:

CC § 1641

Discussion:

See 21.19[1]

- ☐ Determine whether all provisions can be given meaning without reaching absurd results.

Authority:

CC § 1641

Discussion:

See 21.19[1]

- ☐ Determine whether parties intended ordinary meaning of disputed contract term.

- ☐ Check dictionaries.

Authority:

People ex rel. Lockyer v. R.J. Reynolds Tobacco Co. (2004) 116 CA4th 1253, 1263

Discussion:

See 21.20

- ☐ Look for evidence of local usage of disputed term in place where contract was performed or made.

Authority:

CC § 1646

Discussion:

See 21.21

- ☐ Determine whether parties intended technical meaning or trade usage of disputed term.

Authority:

CCP § 1856(c)

Discussion:

See 21.22, 21.24, 21.49

- ☐ Construe contract to avoid internal conflict.

- ☐ Give effect to consistent provisions.

Authority:

CC § 1653

Discussion:

See 21.25[1]

- ☐ Give effect to particular provision over inconsistent general provision.

Authority:

CCP § 1859

Discussion:

See 21.25[2]

- ☐ Give words same meaning in different parts of contract.

Authority:

CC § 1641

Discussion:

See 21.25[3]

- ☐ Prefer handwritten provisions to preprinted terms.

Authority:

CC § 1651; see CCP § 1862

Discussion:

See 21.25[4]

- ☐ If enumeration of classes is followed by general words, apply general words to that class only.

Authority:

CC § 1648; Lawrence v. Walzer & Gabrielson (1989) 207 CA3d 1501, 1506, 256 CR 6

Discussion:

See 21.26

- ☐ Favor interpretation that renders contract valid and enforceable.

Authority:

CC §§ 1643, 1655, 1656, 3541

Discussion:

See 21.27

- ☐ Construe promises in bilateral contract as mutually dependent and concurrent if possible.

Authority:

Rubin v. Fuchs (1969) 1 C3d 50, 54, 81 CR 373, 459 P2d 925

Discussion:

See 21.28

- ☐ Construe contract to avoid forfeiture whenever reasonably possible.

Authority:

CC § 1442

Discussion:

See 21.29

- ☐ Construe contract that is silent as to time for performance within reasonable time; or immediately, for act that can be performed immediately.

Authority:

CC § 1657

Discussion:

See 21.30

- ☐ Ordinarily, interpret government contracts by same rules as private contracts.

Authority:

CC § 1635

Discussion:

See 21.31

Legal Topics:

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

Contracts LawContract InterpretationGeneral OverviewContracts LawContract InterpretationAmbiguities & Contra
ProferentemGeneral Overview



14 of 188 DOCUMENTS

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Chapter 21 Asserting a Particular Construction of Contract

IV. APPLYING RULES OF INTERPRETATION TO DETERMINE MEANING OF CONTRACT TERM

2-21 MB Practice Guide: CA Contract Litigation 21.13

21.13 Options and Strategy.

In all cases a party will of course strive to have the contract interpreted in its favor. When the party can reasonably argue that the contract language is clear and explicit [*see CC §§ 1638, 1639*] and in the party's favor, the party will want to have the contract interpreted as written without further analysis [*see 21.17*]. A party in this situation will want to oppose any suggestion that the contract is ambiguous, and that there is any need to interpret its terms further, look to the parties' original intent, or examine the parties prior conduct or the circumstances surrounding the transaction [*see 21.19, 21.20*].

Conversely, if a party stands to benefit by having the court interpret the meaning of the language of the contract and the original intention of the parties, that party will seek to establish that the contract language is ambiguous, thus requiring further analysis by the court of the parties' intentions, the language of the contract, and the surrounding circumstances [*see 21.20 -21.31*].

Legal Topics:

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

Contracts LawContract InterpretationGeneral OverviewContracts LawContract InterpretationAmbiguities & Contra ProferentemGeneral Overview



15 of 188 DOCUMENTS

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Chapter 21 Asserting a Particular Construction of Contract

IV. APPLYING RULES OF INTERPRETATION TO DETERMINE MEANING OF CONTRACT TERM

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21.14 Parties' Intention at Time of Contracting Governs Interpretation.

21.14[1] Court Looks for Objective Manifestations of Intent. A contract must be interpreted to give effect to the parties' mutual intention as it existed at the time of contracting, as far as it is ascertainable and lawful [CC § 1636; *TRB Investments, Inc. v. Fireman's Fund Ins. Co.* (2006) 40 C4th 19, 27, 50 CR3d 597, 145 P3d 472 ; see CCP § 1859]. This is to protect the objectively reasonable expectations of the promisee [*Building Industry Assn. of Central California v. City of Patterson* (2009) 171 CA4th 886, 896, 90 CR3d 63 (in development agreement between real estate developer and city, an objectively reasonable person would expect a "reasonably justified" increase in the affordable housing in-lieu fee to mean an increase that conformed to existing law)]. Cases decided or events occurring after the parties entered into the contract are irrelevant to the court's determination of the mutual intention of the parties at the time the contract was formed [*London Market Insurers v. Superior Court* (2007) 146 CA4th 648, 666, 53 CR3d 154] . It is the outward expression of the agreement, rather than a party's unexpressed intention, that a court will enforce [*Reigelsperger v. Siller* (2007) 40 C4th 574, 579-580, 53 CR3d 887, 150 P3d 764 ; *Cedars-Sinai Med. Ctr. v. Shewry* (2006) 137 CA4th 964, 982-983].

Distinguish:

Course of dealing, course of performance, and usage of trade may be used to explain or imply contract terms [see 21.24], as can the law and usage of the place where the contract was made [see 21.21].

However broad the terms of a contract may be, it extends only to those things concerning which it appears that the parties intended to contract [CC § 1648]. Particular clauses of a contract are subordinate to its general intent [CC § 1650].

Judge's Perspective:

The Civil Code and Code of Civil Procedure contain numerous maxims of contract interpretation that lawyers often overlook. Although some lawyers discount these rules as anachronistic, they remain a vital part of the canon of contract interpretation.

Jury Instructions:

Contracts--Interpretation--Disputed Term, see *Judicial Council of California Civil Jury Instructions*, CACI No. 314 (LexisNexis Matthew Bender).

Objection Intention of Parties, see *California Forms of Jury Instruction, Ch. 3B, Instr. MB 300B.03* (Matthew Bender).

➡ **Cross Reference:**

Discussion of interpretation of UCC contracts, see Ch. 27, Contract for Sale of Goods--Attacking or Defending Existence of Contract Under California Commercial Code.

21.14[2] Court Interprets Disputed Terms As Promisor Supposed That Promisee Understood Them. If the terms of a promise are ambiguous or uncertain, the promise must be interpreted in the sense in which the promisor believed, at the time of making it, that the promisee understood it [*CCP* § 1864; see also *CC* § 1649; *Safeco Ins. Co. v. Robert S. (2001)* 26 *C4th* 758, 763, 110 *CR2d* 844, 28 *P3d* 889 ; *Kashmiri v. Regents of University of California (2007)* 156 *CA4th* 809, 842-843, 67 *CR3d* 635] .

➡ **Cross Reference:**

Discussion of construction against drafter, see 21.61.

Legal Topics:

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

Contracts LawContract InterpretationGeneral OverviewContracts LawFormationGeneral OverviewContracts LawFormationMeeting of Minds



16 of 188 DOCUMENTS

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Chapter 21 Asserting a Particular Construction of Contract

IV. APPLYING RULES OF INTERPRETATION TO DETERMINE MEANING OF CONTRACT TERM

2-21 MB Practice Guide: CA Contract Litigation 21.15

21.15 Court Construes Uncertain Term Against Party Causing Uncertainty.

In cases of uncertainty not removed by other rules of contract construction, the language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist [CC § 1654].

In most cases, this will result in construing the agreement against the drafting party [see, e.g., *Pacific Gas & Elec. Co. v. Superior Court* (1993) 15 CA4th 576, 596, 19 CR2d 295, disapproved on other grounds, *Advanced Micro Devices, Inc. v. Intel Corp.* (1994) 9 C4th 362, 376-377, 36 CR2d 581, 885 P2d 994 (agreement as to the distribution of proceeds from a trust, which was drafted by the plaintiff's attorney)]. However, the rule also applies to contracts that were the result of negotiations [*City of Hope National Medical Center v. Genentech, Inc.* (2008) 43 C4th 375, 397-398, 75 CR3d 333, 181 P3d 142] . "It may well be that in a particular situation the discussions and exchanges between the parties in the negotiation process may make it difficult or even impossible for the jury to determine which party caused a particular contractual ambiguity to exist, but this added complexity does not make the underlying rule irrelevant or inappropriate for a jury instruction" [*City of Hope National Medical Center v. Genentech, Inc.* (2008) 43 C4th 375, 398, 75 CR3d 333, 181 P3d 142] .

Distinguish:

CC § 1654 refers to uncertainty caused by the drafter of the agreement, not by a party's actions after execution of the contract [*California National Bank v. Woodbridge Plaza LLC* (2008) 164 CA4th 137, 145, 78 CR3d 561] .

Jury Instructions:

Contracts--Interpretation--Construction Against Drafter, see *Judicial Council of California Civil Jury Instructions*, CACI No. 320 (LexisNexis Matthew Bender).



Cross Reference:

Construing contract against drafter, see 21.59 et seq.

Legal Topics:

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

Contracts LawContract InterpretationAmbiguities & Contra ProferentemGeneral Overview



17 of 188 DOCUMENTS

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Chapter 21 Asserting a Particular Construction of Contract

IV. APPLYING RULES OF INTERPRETATION TO DETERMINE MEANING OF CONTRACT TERM

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21.16 Between Two Interpretations, Court Applies Interpretation in Favor of Natural Right.

When a statute or instrument is equally susceptible to two interpretations, one in favor of a natural right, and the other against a natural right, the interpretation favoring a natural right is to be adopted [*CCP § 1866*].

Example:

The right to inherit from a family member under the laws of intestate succession is an example of a "natural right" [*Journeyman Butchers' Protective & Benevolent Assoc. v. Bristol* (1911) 17 CA 576, 578-579, 120 P 787].

Legal Topics:

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

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18 of 188 DOCUMENTS

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Chapter 21 Asserting a Particular Construction of Contract

IV. APPLYING RULES OF INTERPRETATION TO DETERMINE MEANING OF CONTRACT TERM

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21.17 Court Ascertains Parties' Intent From Writing Alone If Possible.

When a contract is in writing, the parties' intention is to be ascertained from the writing alone if possible [*Powerine Oil Co., Inc. v. Superior Court* (2005) 37 C4th 377, 396, 33 CR3d 562, 118 P3d 589]. This rule is subject to other provisions of Civil Code Title 3 on contract interpretation [CC § 1639; *but see* CCP § 1856; *Masterson v. Sine* (1968) 68 C2d 222, 226, 65 CR 545, 436 P2d 561 ; *Pacific Gas & Elec. Co. v. G. W. Thomas Drayage & Rigging Co.* (1968) 69 C2d 33, 37-40, 69 CR 561, 442 P2d 641]. The language of a contract is to govern its interpretation if the language is clear and explicit and does not involve an absurdity [CC § 1638; *see Falkowski v. Imation Corp.* (2005) 132 CA4th 499, 513, 33 CR3d 724]. Whatever interpretation is adopted must be reasonable [CC § 3542].

Legal Topics:

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



19 of 188 DOCUMENTS

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Chapter 21 Asserting a Particular Construction of Contract

IV. APPLYING RULES OF INTERPRETATION TO DETERMINE MEANING OF CONTRACT TERM

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21.18 Statutory Rules Apply If Parties' Intent Is Doubtful.

The rules of interpretation of written contracts are used to ascertain the meaning of the words used when their meaning cannot be otherwise determined [*see CC §§ 1635-1663; CCP §§ 1856-1866*].

Example:

A negotiated agreement between the Department of Industrial Relations and an employer about disputed reimbursement costs for uniforms, which did not fall neatly into statutory "wage" and "monetary benefit" categories, required application of contract interpretation rules [*Department of Indus. Relations v. UI Video Stores, Inc. (1997) 55 CA4th 1084, 1094, 64 CR2d 457*].

Legal Topics:

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

Contracts LawContract InterpretationGeneral OverviewContracts LawContract InterpretationAmbiguities & Contra ProferentemGeneral Overview



20 of 188 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 21 Asserting a Particular Construction of Contract

IV. APPLYING RULES OF INTERPRETATION TO DETERMINE MEANING OF CONTRACT TERM

2-21 MB Practice Guide: CA Contract Litigation 21.19

21.19 Court Considers Contract As Whole.

21.19[1] Court Gives Effect to Every Provision If Possible. The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other [CC § 1641; see *Boghos v. Certain Underwriters at Lloyd's of London* (2005) 36 C4th 495, 503 , 30 CR3d 787 , 115 P3d 68 ; *London Market Insurers v. Superior Court* (2007) 146 CA4th 648, 662, 53 CR3d 154 (contract must be construed in way that avoids rendering provision superfluous)].

Jury Instructions:

Contracts--Interpretation--Construction of Contract as a Whole, see *Judicial Council of California Civil Jury Instructions*, CACI No. 317 (LexisNexis Matthew Bender).

21.19[2] Court Considers Related Writings Together. Several contracts relating to the same matters, between the same parties, and made as parts of substantially one transaction, are to be taken together [CC § 1642; see *Reigelsperger v. Siller* (2007) 40 C4th 574, 580, 53 CR3d 887, 150 P3d 764 (construing informed consent agreement and arbitration agreement signed by patient at same time); *Peterson Dev. Co. v. Torrey Pines Bank* (1991) 233 CA3d 103, 284 CR 367 ("contract" can refer to any instrument)]. Whether the parties intended different documents to constitute a single contract is determined in the first instance by the contract language, but in this determination the court may also consider extrinsic evidence without violating the parol evidence rule [*Versaci v. Superior Court* (2005) 127 CA4th 805, 814-815, 26 CR3d 92].

Jury Instructions:

Several Documents Interpreted Together, see *California Forms of Jury Instruction*, Ch. 3B, Instr. MB 300B.06 (Matthew Bender).



Cross Reference:

Discussion of parol evidence rule, see 21.41 -21.45, 21.57.

Legal Topics:

For related research and practice materials, see the following legal topics:
[Contracts Law](#)[Contract Interpretation](#)[General Overview](#)



21 of 188 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 21 Asserting a Particular Construction of Contract

IV. APPLYING RULES OF INTERPRETATION TO DETERMINE MEANING OF CONTRACT TERM

2-21 MB Practice Guide: CA Contract Litigation 21.20

21.20 Words Are Given Their Ordinary Meanings.

The words of a contract are to be understood in their ordinary and popular sense, rather than according to their strict legal meaning. This is true unless words are used by the parties in a technical sense, or unless a special meaning is given to them by usage [CC § 1644]. Evidence is admissible that terms of a writing have a local, technical, or otherwise peculiar signification, and were so used and understood [CCP § 1861]. To determine a word's common meaning, the court typically will look to a dictionary [*People ex rel. Lockyer v. R.J. Reynolds Tobacco Co. (2004) 116 CA4th 1253, 1263, 11 CR3d 317* ; see *TRB Investments, Inc. v. Fireman's Fund Ins. Co. (2006) 40 C4th 19, 28, 50 CR3d 597, 145 P3d 472* (interpreting property insurance policy's "under construction" clause of the vacancy exclusion, court consulted several dictionaries to determine meaning of "under construction")]. However, expert witnesses also may be used.

Examples:

- An indemnity contract required a subcontractor both to indemnify a contractor against certain claims, and "at [its] own expense to defend" the contractor against "any suit or action ... founded upon" those claims. Interpreting this language, the court concluded that the duty to defend arose as soon as a "suit or action" was brought against the contractor that was "founded upon" a covered claim, and was not dependent on whether the very litigation to be defended later established the subcontractor's obligation to pay indemnity [*Crawford v. Weather Shield Mfg., Inc. (2008) 44 C4th 541, 553, 79 CR3d 721, 187 P3d 424*].

- In an insurance coverage dispute centered on an exclusion for damage caused by "[w]ater that backs up from a sewer or drain," the court concluded that the common sense interpretation of that language includes the sewage that inevitably accompanies the water in a sewer; thus the exclusion applied even though the insured's damage was caused by the pollutants contained in the water that backed up from the sewer, and not the water itself [*Penn-America Ins. Co. v. Mike's Tailoring (2005) 125 CA4th 884, 889-891, 22 CR3d 918*].

- In an insurance coverage dispute concerning a policy excluding coverage for vacant premises but specifying that buildings "under construction" are not considered vacant, the court concluded that the proper inquiry for determining whether a building falls within the "under construction" exception to the vacancy exclusion is whether the building project results in substantial continuing activities by persons

associated with the project at the premises, rather than a test turning upon technical distinctions between "construction" on one hand and "renovation" or "remodeling" on the other [*TRB Investments, Inc. v. Fireman's Fund Ins. Co.* (2006) 40 C4th 19, 30, 50 CR3d 597, 145 P3d 472] .

■ In a dispute over the interpretation of a real estate purchase agreement excluding from arbitration "actions for bodily injury," the court concluded that the parties would not reasonably expect that, as used in the agreement, "bodily injury" would include diabetes caused by emotional distress which, in turn, is caused by learning about termite damage [*Gravillis v. Coldwell Banker Residential Brokerage Co.* (2006) 143 CA4th 761, 782, 49 CR3d 531] .

■ Interpreting the scope of a release of claims based "in whole or in part upon any matters occurring at any time prior to the date of the release," the court concluded that the parties did not intend "matters" to be interpreted in the strictly legal sense of "actionable conduct," but rather in its broader, ordinary and popular sense. Thus, the plaintiff's copyright claims were barred by the release [*Marder v. Lopez* (9th Cir 2006) 450 F3d 445, 450-451] .

Jury Instructions:

Contracts--Interpretation--Meaning of Ordinary Words, see *Judicial Council of California Civil Jury Instructions, CACI No. 315* (LexisNexis Matthew Bender).

Interpretation of Words, see *California Forms of Jury Instruction, Ch. 3B, Instr. MB 300B.05* (Matthew Bender).

Legal Topics:

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

Contracts LawContract InterpretationGeneral OverviewContracts LawContract InterpretationAmbiguities & Contra ProferentemGeneral OverviewContracts LawContract InterpretationParol EvidenceGeneral OverviewContracts LawContract InterpretationParol EvidenceCustom & Usage



22 of 188 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 21 Asserting a Particular Construction of Contract

IV. APPLYING RULES OF INTERPRETATION TO DETERMINE MEANING OF CONTRACT TERM

2-21 MB Practice Guide: CA Contract Litigation 21.21

21.21 Court Applies Local Meanings Used in Place Where Contract Is Performed or Made.

A contract is to be interpreted according to the law and usage of the place where it is to be performed or, if not indicated, the place where it is made [CC § 1646].

Example:

In a case involving overtime pay for tugboat captains hired in California but working in Saudi Arabia, the court looked for evidence of overtime pay customs in Saudi Arabia in the absence of a specific provision in the contract providing for overtime pay [*Sharpe v. Arabian Am. Oil Co. (1952) 111 CA2d 99, 104-105, 244 P2d 83*].



Strategic Point:

The use of expert witnesses is appropriate to establish local meanings and technical meanings, as well as course of dealing, trade usage, and course of performance.

In certain transactions of \$250,000 or more, including transaction subject to choice of law provisions under the UCC [see *Com Code § 1301*], the parties may elect to be governed by California law irrespective of any relationship between the transaction and the state [see *CC § 1646.5*].

Legal Topics:

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

Contracts LawContract InterpretationGeneral OverviewContracts LawContract InterpretationParol EvidenceGeneral OverviewContracts LawContract InterpretationParol EvidenceCustom & Usage



23 of 188 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 21 Asserting a Particular Construction of Contract

IV. APPLYING RULES OF INTERPRETATION TO DETERMINE MEANING OF CONTRACT TERM

2-21 MB Practice Guide: CA Contract Litigation 21.22

21.22 Technical Words Are Interpreted As Understood by Specialists in Field.

Technical words are interpreted as usually understood by people in the profession or business to which the word relate, unless clearly used in a different sense [CC § 1645]. Technical meanings and special meanings from usage will be applied only if both contracting parties intended the same special or technical meaning; the key to interpretation is the mutual intention of the parties [*Weil v. Federal Kemper Life Assurance Co.* (1994) 7 C4th 125, 152, 27 CR2d 316, 866 P2d 774 ; see CC § 1638]. However, the circumstances surrounding and leading to the execution of a contract cannot be considered for the purpose of creating undertakings contrary to the specific terms of the writing [*Kashmiri v. Regents of University of California* (2007) 156 CA4th 809, 838, 67 CR3d 635] .

Jury Instructions:

Contracts--Interpretation--Meaning of Technical Words, see *Judicial Council of California Civil Jury Instructions*, CACI No. 316 (LexisNexis Matthew Bender).

Interpretation of Words, see *California Forms of Jury Instruction*, Ch. 3B, Instr. MB 300B.05 (Matthew Bender).

Legal Topics:

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

Contracts LawContract InterpretationGeneral Overview



24 of 188 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 21 Asserting a Particular Construction of Contract

IV. APPLYING RULES OF INTERPRETATION TO DETERMINE MEANING OF CONTRACT TERM

2-21 MB Practice Guide: CA Contract Litigation 21.23

21.23 Court May Look at Circumstances of Contract Formation.

In interpreting a contract, a court will consider the circumstances under which it was made and the matter to which it relates [*CCP* § 1860]. The parties' intention is determined by objective manifestations, including the words used in the agreement and extrinsic evidence of such objective matters as the circumstances surrounding negotiation and execution of the contract; the object, nature, and subject matter of the contract; and the parties' subsequent conduct [*CC* § 1647; *CCP* § 1856(g); *Wolf v. Superior Court* (2004) 114 CA4th 1343, 1356, 8 CR3d 649 ; see *California National Bank v. Woodbridge Plaza LLC* (2008) 164 CA4th 137, 144-145, 78 CR3d 561 (evidence of circumstances surrounding execution of lease indicated that the parties' intention was to tie bank tenant's rent to comparable rent for bank space)].

Jury Instructions:

Surrounding Circumstances, see *California Forms of Jury Instruction, Ch. 3B, Instr. MB 300B.04* (Matthew Bender).



Cross Reference:

Parol evidence rule, see 21.38 et seq.

Legal Topics:

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

Contracts LawContract InterpretationGeneral OverviewContracts LawContract InterpretationParol EvidenceCourse of DealingContracts LawFormationGeneral Overview



25 of 188 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 21 Asserting a Particular Construction of Contract

IV. APPLYING RULES OF INTERPRETATION TO DETERMINE MEANING OF CONTRACT TERM

2-21 MB Practice Guide: CA Contract Litigation 21.24

21.24 Terms May Be Explained by Course of Dealing, Trade Usage, and Course of Performance.

21.24[1] Evidence of Trade Usage Is Admissible, Whether or Not Pleaded. Evidence of usage of trade is admissible [see *CCP* § 1856(c)], whether or not pleaded, on the theory that it must be presumed that the parties, being specialists in the field, knew of the trade usage or custom [*Hayter Trucking, Inc. v. Shell W. E&P, Inc.* (1993) 18 CA4th 1, 16, 22 CR2d 229].

At least a preliminary consideration of parol evidence is necessary to avoid giving a meaning to a document not intended by the parties--irrespective of whether the contract is ambiguous to the court [*Hayter Trucking, Inc. v. Shell W. E&P, Inc.* (1993) 18 CA4th 1, 17, 22 CR2d 229].

Jury Instructions:

Interpretation of Words, see *California Forms of Jury Instruction, Ch. 3B, Instr. MB 300B.05* (Matthew Bender).



Cross References:

Form for allegation--custom and usage applicable to construction of contract, see *California Forms of Pleading and Practice, § 140.111* (Matthew Bender).

Parol evidence rule, see 21.38 et seq.

21.24[2] Usage or Custom May Be Used to Explain or to Imply Term. Generally, usage of trade or custom can be invoked only to interpret, not to create contractual terms, but a reasonable usage may supply an omitted term or otherwise supplement an agreement when the evidence establishes that the parties did not discuss the disputed term [see *Varni Bros. Corp. v. Wine World, Inc.* (1995) 35 CA4th 880, 889, 41 CR2d 740].

When a written contract states a term clearly and unambiguously, usage or custom that would vary or contradict it is inadmissible. If the parties contradict each other on whether a certain term was part of a contract based on their pre-contract discussions, usage or custom is not admissible to prove either party's version [see *Varni Bros. Corp. v. Wine World, Inc.* (1995) 35 CA4th 880, 889-890, 41 CR2d 740].



Cross Reference:

Parol evidence rule, see 21.38 et seq.

21.24[3] Contract Terms Implied by Custom Are No Longer Implied When Custom Ceases. When a contract is formed by implication from trade usage and custom at the time of formation, the contract is deemed modified when that trade usage ceases [see *Varni Bros. Corp. v. Wine World, Inc.* (1995) 35 CA4th 880, 891, 41 CR2d 740].

Jury Instructions:

Contracts--Interpretation--Construction by Conduct, see *Judicial Council of California Civil Jury Instructions*, CACI No. 318 (LexisNexis Matthew Bender).

21.24[4] Custom and Trade Usage Cannot Change Law. Custom and usage cannot overcome positive provisions of statutes [*Van de Kamp v. Bank of Am.* (1988) 204 CA3d 819, 835, 251 CR 530] .

Example:

The plaintiff's assertion that it was customary in the loan brokering business for limited partners to be liable for the partnership's obligation was in direct conflict with an express provision to the contrary in *Corp Code § 15501*, which was controlling [*Hayward Tamkin & Co. v. Carpenteria Inv. Co.* (1968) 265 CA2d 617, 624-625, 71 CR 462].

 Cross Reference:

Discussion of when laws are implied into contract, see 21.76, 21.77.

21.24[5] Court May Look to Parties' Conduct Before Controversy Arose. In construction of the terms of a contract, the construction given it by the acts and conduct of the parties with knowledge of its terms, and before any controversy has arisen as to its meaning, is admissible on the issue of the parties' intent. This rule is not limited to the joint conduct of the parties in the course of performance of the contract [*Southern Cal. Edison Co. v. Superior Court* (1995) 37 CA4th 839, 851, 44 CR2d 227].

Examples:

- An arbitration provision in a collective bargaining agreement between a community college district and its faculty association was ambiguous as to whether the district could unilaterally decide that a faculty grievance should be resolved by a process other than arbitration. Relying on undisputed extrinsic evidence that prior to the grievances at issue, the district had never refused to arbitrate a faculty grievance on the ground that the grievance could be redressed by another process such as collective bargaining, the court concluded that the parties intended to provide for arbitration of grievances upon the request of the faculty member [*Hartnell Community College Dist. v. Superior Court* (2004) 124 CA4th 1443, 1449-1451, 22 CR3d 410].

- In a dispute over how a contractor was to be paid for change orders to a public works contract, the trial court should not have excluded some of the contractor's claims on the theory that the contractor could not document its actual costs as required by contract. Evidence offered by the contractor of the parties' course of dealings indicated that the city had not directed the contractor to keep track of the cost of the work as it was being performed [*Dillingham-Ray Wilson v. City of Los Angeles* (2010) 182 CA4th 1396, 1404-1405, 106 CR3d 691] .

Jury Instructions:

Contracts--Interpretation--Construction by Conduct, see *Judicial Council of California Civil Jury Instructions*, CACI No. 318 (LexisNexis Matthew Bender).

 Cross Reference:

Discussion of admissibility of extrinsic evidence to prove trade usage, course of dealing, course of performance, see 21.49.

Legal Topics:

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

Contracts LawContract InterpretationGeneral OverviewContracts LawContract InterpretationParol EvidenceGeneral OverviewContracts LawContract InterpretationParol EvidenceCourse of DealingContracts LawContract InterpretationParol EvidenceCustom & Usage



26 of 188 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 21 Asserting a Particular Construction of Contract

IV. APPLYING RULES OF INTERPRETATION TO DETERMINE MEANING OF CONTRACT TERM

2-21 MB Practice Guide: CA Contract Litigation 21.25

21.25 Contract Is Construed to Avoid Internal Conflict.

21.25[1] Consistent Provisions Are Given Effect. Words wholly inconsistent with a contract's nature or the parties' main intention should be rejected [CC § 1653; *see also* CC § 1650].

Example:

In a case involving an accidental shooting, if the illegal act exclusion in a homeowner's insurance policy could not reasonably be given meaning under established rules of construction of a contract, it had to be rejected as invalid [*Safeco Ins. Co. v. Robert S. (2001)* 26 C4th 758, 765-766, 110 CR2d 844, 28 P3d 889].

21.25[2] Specific Provision Controls Over Inconsistent General Provision. When a general and particular provision are inconsistent, the more particular provision controls over the more general provision [CCP § 1859; *see Prouty v. Gores Tech. Group (2004)* 121 CA4th 1225, 1235, 18 CR3d 178 (specific provision as to retention of employees for specified period in stock purchase agreement controlled over more general provision not making terminated employees third-party beneficiaries)].

Repugnancy in a contract must be reconciled, if possible, by such an interpretation as will give some effect to the repugnant clauses [CC § 1652].

Examples:

- Specific statements in university's catalogues and website that professional degree fee would not be raised for continuing students controlled over general statement that fees could change at any time [*Kashmiri v. Regents of University of California (2007)* 156 CA4th 809, 835, 67 CR3d 635] .

- In a dispute between a homeowner's association and an individual homeowner over who was responsible for maintenance of a portion of a drainage channel crossing the homeowner's lot, the association's covenants, conditions, and restrictions provided that the association was responsible for maintaining landscaping areas, while homeowners were responsible for maintaining drainage devices on their lots. The court held that the specific provision governing the owners' obligations to maintain

drainage devices controlled over the association's more general duty to maintain landscaping areas. This conclusion was strengthened by undisputed evidence that for years the association had consistently assigned responsibility for maintenance of drainage ditches to individual property owners [*Starlight Ridge South Homeowners Assn. v. Hunter-Bloor* (2009) 177 CA4th 440, 452, 99 CR3d 20] .

Consider:

CC § 1650, which provides that particular clauses of a contract are subordinate to its general intent, appears to be in conflict with CCP § 1859 [but see *United States Liab. Ins. Co. v. Haidinger-Hayes, Inc.* (1968) 263 CA2d 531, 69 CR 373] . The court in *Haidinger-Hayes* said that CC § 1650, the "main purpose" rule (as well as CC § 1653), must be read together with CC § 1641, which provides that the whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other [*United States Liab. Ins. Co. v. Haidinger-Hayes, Inc.* (1968) 263 CA2d 531, 69 CR 373].

21.25[3] Words Are Given Same Meaning in Different Parts of Contract. The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret other clauses [see *Falkowski v. Imation Corp.* (2005) 132 CA4th 499, 509, 33 CR3d 724] .

Example:

In insurance coverage dispute, because the word "person" as used elsewhere in the policy clearly meant a natural person, and not an organization, the court was required to give "person" the same meaning in the disputed clause of the policy [*Mirpad v. California Ins. Guar. Ass'n* (2005) 132 CA4th 1058, 1063, 34 CR3d 136] .

21.25[4] Handwritten Provisions Control Preprinted Terms. When a contract is partly written and partly printed, or partly specially drafted and partly composed of preprinted "boilerplate," the written parts control the printed parts, and the original parts control parts copied from a form [CC § 1651; CCP § 1862]. The term "written" includes typewritten text [*Gutzi Assocs. v. Switzer* (1989) 215 CA3d 1636, 1642-1643, 264 CR 538] .



Cross Reference:

Discussion of implications of preprinted forms for integration analysis under parol evidence rule, see 21.46[10].

Legal Topics:

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 Contracts LawContract InterpretationGeneral Overview



27 of 188 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 21 Asserting a Particular Construction of Contract

IV. APPLYING RULES OF INTERPRETATION TO DETERMINE MEANING OF CONTRACT TERM

2-21 MB Practice Guide: CA Contract Litigation 21.26

21.26 General Words Following List Apply to That List Only.

The doctrine of ejusdem generis (also known as Lord Tenterden's rule) states that when general words follow the enumeration of particular classes of persons or things, the general words will be construed as applicable only to persons or things of the same general nature or class as those enumerated [*Lawrence v. Walzer & Gabrielson* (1989) 207 CA3d 1501, 1506, 256 CR 6] .

Examples:

- A plaintiff signed a retainer agreement with the defendant attorneys. The retainer agreement contained an arbitration clause that stated: "In the event of a dispute between us regarding fees, costs or any other aspect of our attorney-client relationship, the dispute shall be resolved by binding arbitration." When the plaintiff filed a malpractice claim against her attorneys, the attorneys invoked this arbitration claim. The court held that the rule of ejusdem generis precluded arbitration. Because the agreement specifically listed fees and costs in its arbitration clause, the court held that "any other aspect of our attorney-client relationship" applied only to financial matters similar to disputes regarding fees and costs, and not to the plaintiff's malpractice claim [*Lawrence v. Walzer & Gabrielson* (1989) 207 CA3d 1501, 1506, 256 CR 6] .

- Provision in former employee's employment agreement prohibiting from disclosing any of the company's information, knowledge, or data must be construed in light of the kinds of protected information enumerated in the sentence that followed, all of which were examples of proprietary information or trade secrets. Therefore, former employee did not breach employment agreement by disclosing information concerning his alleged working conditions and his employer's lifestyle and guests [*Nygard, Inc. v. Uusi-Kerttula* (2008) 159 CA4th 1027, 1046, 72 CR3d 210] .

However broad the terms of a contract are, they extend only to the things it appears that the parties intended to contract for [CC § 1648; see also *Badie v. Bank of Am.* (1998) 67 CA4th 779, 800, 79 CR2d 273] .

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28 of 188 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 21 Asserting a Particular Construction of Contract

IV. APPLYING RULES OF INTERPRETATION TO DETERMINE MEANING OF CONTRACT TERM

2-21 MB Practice Guide: CA Contract Litigation 21.27

21.27 Courts Favor Interpretation That Renders Contract Enforceable.

A contract must receive an interpretation that will make it lawful, operative, definite, reasonable, and capable of being carried into effect, if this can be done without violating the intention of the parties [CC §§ 1643, 3541; see *Edwards v. Arthur Andersen LLP* (2008) 44 C4th 937, 953-954, 81 CR3d 282, 189 P3d 285 (interpreting a contract provision releasing "any and all" claims not to encompass nonwaivable statutory protections, such as the employee indemnity protection of *Lab Code § 2802*); *Julian v. Hartford Underwriters Ins. Co.* (2005) 35 C4th 747, 756-757, 27 CR3d 648, 110 P3d 903].

Example:

- Plaintiff employee argued that language in a mandatory employment arbitration agreement, stating that the parties intended "to avoid the inconvenience, cost, and risk that accompany formal administrative or judicial proceedings," unlawfully restricted an employee from seeking administrative remedies for violations of FEHA. The California Supreme Court rejected that argument, construing that language as stating an intention to lawfully preclude or restrict the parties to the arbitration agreement from submitting their claims for adjudication to an administrative entity such as the Labor Commissioner, at least to the extent permitted by law [*Pearson Dental Supplies, Inc. v. Superior Court* (2010) 48 C4th 665, 682, 108 CR3d 171, 229 P3d 83] .

Jury Instructions:

Interpretation in Favor of Contract, see *California Forms of Jury Instruction, Ch. 3B, Instr. MB 300B.07* (Matthew Bender).

Stipulations necessary to make a contract reasonable, or conformable to usage, are implied if the contract does not manifest any contrary intention [CC § 1655]. All things in law or usage that are considered incidental to a contract, or necessary to carry it into effect, are implied from the contract, unless some are expressly mentioned, in which case all other things of the same class are deemed to be excluded [CC § 1656].



Cross Reference:

Discussion of supplying missing terms or asserting implied terms, see 21.69 -21.79.

Legal Topics:

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Contracts LawContract InterpretationGeneral Overview



29 of 188 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 21 Asserting a Particular Construction of Contract

IV. APPLYING RULES OF INTERPRETATION TO DETERMINE MEANING OF CONTRACT TERM

2-21 MB Practice Guide: CA Contract Litigation 21.28

21.28 Bilateral Promises Are Construed As Mutually Dependent and Concurrent.

Whenever possible, courts will construe promises in a bilateral contract as mutually dependent and concurrent. Conditions precedent generally are not favored in contract law [*Frankel v. Board of Dental Exam'rs* (1996) 46 CA4th 534, 550, 54 CR2d 128] , and provisions of a contract will not be construed as conditions precedent in the absence of language plainly requiring such a construction [*Fireman's Fund Ins. Co. v. Sizzler USA Real Property, Inc.* (2008) 169 CA4th 415, 421, 86 CR3d 715] . The phrase "subject to" is generally construed to impose a condition precedent [*Rubin v. Fuchs* (1969) 1 C3d 50, 53-54, 81 CR 373, 459 P2d 925] .

A condition that a third party must take some action should be construed against the party relying on it. When possible, the condition should be construed as a promise, rather than a condition [*Patrick J. Ruane, Inc. v. Parker* (1960) 185 CA2d 488, 504, 8 CR 379] .

Jury Instructions:

Contracts--Existence of Condition Precedent Disputed, see *Judicial Council of California Civil Jury Instructions*, CACI No. 321 (LexisNexis Matthew Bender).

Contracts--Occurrence of Agreed Condition Precedent, see *Judicial Council of California Civil Jury Instructions*, CACI No. 322 (LexisNexis Matthew Bender).

Contracts--Waiver of Condition Precedent, see *Judicial Council of California Civil Jury Instructions*, CACI No. 324 (LexisNexis Matthew Bender).



Cross References:

Discussion of admissibility of extrinsic evidence of consistent oral condition, see 21.48.

Discussion of conditions precedent, see Ch. 22, Suing or Defending Action for Breach of Contract.

Legal Topics:

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

Contracts LawConsiderationMutual ObligationContracts LawContract Conditions & ProvisionsConditions
PrecedentContracts LawContract InterpretationGeneral Overview



30 of 188 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 21 Asserting a Particular Construction of Contract

IV. APPLYING RULES OF INTERPRETATION TO DETERMINE MEANING OF CONTRACT TERM

2-21 MB Practice Guide: CA Contract Litigation 21.29

21.29 Contract Is Construed to Avoid Forfeiture.

A condition involving a forfeiture must be strictly interpreted against the party for whose benefit it is created [CC § 1442]. Forfeiture can never take place by implication, but must be effected by express, unambiguous language. Unless no other interpretation is reasonably possible, a contract should not be construed so as to effect or provide for forfeiture. The party claiming a forfeiture has the burden of showing that forfeiture was the unmistakable intention of the instrument [*ABI, Inc. v. City of Los Angeles* (1984) 153 CA3d 669, 681-682, 200 CR 563 ; *Alpha Beta Food Mkts., Inc. v. Retail Clerks Union* (1955) 45 C2d 764, 291 P2d 433] . When nonoccurrence of a condition precedent would work a forfeiture, the court has the power to equitably excuse the nonoccurrence [*Root v. American Equity Specialty Ins. Co.* (2005) 130 CA4th 926, 939, 30 CR3d 631].

Legal Topics:

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

Contracts LawContract Conditions & ProvisionsForfeiture ClausesContracts LawContract InterpretationGeneral Overview



31 of 188 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 21 Asserting a Particular Construction of Contract

IV. APPLYING RULES OF INTERPRETATION TO DETERMINE MEANING OF CONTRACT TERM

2-21 MB Practice Guide: CA Contract Litigation 21.30

21.30 Contract Is Construed to Be Performed Within Reasonable Time.

If a contract does not state a specific time for performance, a reasonable time is allowed. If an act by its nature can be done instantly, such as the payment of money, it must be done immediately [*CC* § 1657; see *Patel v. Liebermensch* (2008) 45 C4th 344, 351, 86 CR3d 366, 197 P3d 177 (court implied reasonable time for length of escrow)]. This rule applies when the contract is silent as to the time for performance. The reasonableness of time for performance is a question of fact that depends of the circumstances of the case, which include the situation of the parties, the nature of the transaction, and the specific facts of the case [*Sawday v. Vista Irrigation Dist.* (1966) 64 C2d 833, 836, 52 CR 1, 415 P2d 816] .

Legal Topics:

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

Contracts LawContract InterpretationGeneral OverviewContracts LawPerformanceGeneral Overview



32 of 188 DOCUMENTS

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Chapter 21 Asserting a Particular Construction of Contract

IV. APPLYING RULES OF INTERPRETATION TO DETERMINE MEANING OF CONTRACT TERM

2-21 MB Practice Guide: CA Contract Litigation 21.31

21.31 Same Interpretation Rules Apply to Government and Private Contracts.

All contracts, whether public or private, are to be interpreted by the same rules, except as otherwise provided [CC § 1635; *Hawley v. Orange County Flood Control Dist.* (1963) 211 CA2d 708, 713, 27 CR 478] .

Exception:

In tax sale contracts, the state and county governments are not subject to contractual liability; purchasers in these cases are limited to statutory remedies [*Craland, Inc. v. State of Cal.* (1989) 214 CA3d 1400, 1405, 1407-1408, 263 CR 255] .

Legal Topics:

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

Contracts LawContract InterpretationGeneral OverviewPublic Contracts LawContract InterpretationGeneral Overview



33 of 188 DOCUMENTS

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Chapter 21 Asserting a Particular Construction of Contract
V. ALLEGING AND PROVING AMBIGUITIES IN CONTRACT

2-21 MB Practice Guide: CA Contract Litigation 21.32

21.32 CHECKLIST: Alleging and Proving Ambiguities in Contract.

☐ Determine whether disputed term is ambiguous--that is, reasonably susceptible to two interpretations.

Authority:

Curry v. Moody (1995) 40 CA4th 1547, 1552, 48 CR2d 627

Discussion:

See 21.34

☐ If ambiguity does not appear on face of contract, request that court provisionally receive extrinsic evidence to demonstrate ambiguity.

Authority:

Pacific Gas & Elec. Co. v. G. W. Thomas Drayage & Rigging Co. (1968) 69 C2d 33, 37-40, 69 CR 561, 442 P2d 641

Discussion:

See 21.35, 21.36

☐ Move for admission of extrinsic evidence to explain ambiguity or otherwise interpret terms.

Authority:

Pacific State Bank v. Greene (2003) 110 CA4th 375, 386

Discussion:

See 21.37

Legal Topics:

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

Contracts LawContract InterpretationAmbiguities & Contra ProferentemGeneral OverviewContracts LawContract InterpretationAmbiguities & Contra ProferentemLatent AmbiguitiesContracts LawContract InterpretationAmbiguities & Contra ProferentemPatent AmbiguitiesContracts LawDefensesAmbiguity & MistakeGeneral Overview



34 of 188 DOCUMENTS

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Chapter 21 Asserting a Particular Construction of Contract
V. ALLEGING AND PROVING AMBIGUITIES IN CONTRACT

2-21 MB Practice Guide: CA Contract Litigation 21.33

21.33 Options and Strategy.

A party seeking to show ambiguities in contract language must show that the language itself is reasonably susceptible to more than one interpretation [see 21.34]. This requires the party to produce all credible evidence bearing on the disputed language, in an attempt to demonstrate the original intention of the parties, not properly expressed in the written contract [see 21.36].



Strategic Point:

This approach has its drawbacks, because language susceptible to more than one meaning may be interpreted in a way the party does not expect. Further, to suggest language is ambiguous can "open the floodgates" to all kinds of unexpected evidence and interpretation of the contract language. Accordingly, a party should carefully consider its options and strategy, and what evidence the opposing party might introduce, before urging that contract language is ambiguous.

The party opposing the contention that the contract is ambiguous will want to show that the contract as drafted is clear, explicit, and complete, and thus not subject to the introduction of evidence of the meaning of the contract and the circumstances surrounding its making.

Legal Topics:

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

Contracts LawContract InterpretationAmbiguities & Contra ProferentemGeneral OverviewContracts LawContract InterpretationAmbiguities & Contra ProferentemLatent AmbiguitiesContracts LawContract InterpretationAmbiguities & Contra ProferentemPatent AmbiguitiesContracts LawDefensesAmbiguity & MistakeGeneral Overview



35 of 188 DOCUMENTS

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Chapter 21 Asserting a Particular Construction of Contract
V. ALLEGING AND PROVING AMBIGUITIES IN CONTRACT

2-21 MB Practice Guide: CA Contract Litigation 21.34

21.34 "Ambiguous" Means Reasonably Susceptible to Two Interpretations.

When the parties dispute the meaning of a contract term, the trial court's first step is to determine whether the term is ambiguous. A contract that is "ambiguous" is reasonably susceptible to either of the meanings urged by the parties [*Curry v. Moody* (1995) 40 CA4th 1547, 1552, 48 CR2d 627].

➡ **Cross Reference:**

Discussion of construction of ambiguous terms at complaint, demurrer, and answer stages, see 21.04[1], [2][b].

Legal Topics:

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

Contracts LawContract InterpretationAmbiguities & Contra ProferentemGeneral OverviewContracts
LawDefensesAmbiguity & MistakeGeneral Overview



36 of 188 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 21 Asserting a Particular Construction of Contract
V. ALLEGING AND PROVING AMBIGUITIES IN CONTRACT

2-21 MB Practice Guide: CA Contract Litigation 21.35

21.35 California Does Not Apply "Plain Meaning Rule" for Determining Ambiguity.

The California Supreme Court rejected the traditional "plain meaning" rule, which required a judge to find that contract terms were ambiguous on their face before admitting extrinsic evidence to explain them [*Pacific Gas & Elec. Co. v. G. W. Thomas Drayage & Rigging Co.* (1968) 69 C2d 33, 37-40, 69 CR 561, 442 P2d 641]. The applicable test is not facial ambiguity, but rather whether the offered evidence is relevant to prove a meaning to which the language of the instrument is reasonably susceptible [*Pacific Gas & Elec. Co. v. G. W. Thomas Drayage & Rigging Co.* (1968) 69 C2d 33, 37-40, 69 CR 561, 442 P2d 641 ; *Wagner v. Columbia Pictures Industries, Inc.* (2007) 146 CA4th 586, 589-590, 52 CR3d 898 ; CCP § 1856(c), (g); see also CCP § 1859; CC § 1636].

Example:

A license agreement required the licensee to build its product according to specifications that the licensor would later provide. Extrinsic evidence showed that the parties intended that the licensee would receive technical specifications applicable to its device but would not be given specifications that would allow it to build another type of device. The license agreement was not reasonably susceptible to the licensee's interpretation that general specifications applicable to all devices were excluded [*DVD Copy Control Assn., Inc. v. Kaleidescape, Inc.* (2009) 176 CA4th 697, 714, 97 CR3d 856] .



Warning:

Despite the California Supreme Court's holding in *Pacific Gas & Electric Co.* [*Pacific Gas & Elec. Co. v. G. W. Thomas Drayage & Rigging Co.* (1968) 69 C2d 33, 37-40, 69 CR 561, 442 P2d 641], trial courts sometimes still apply the traditional plain meaning rule when interpreting contract terms [see, e.g., *Nedlloyd Lines B.V. v. Superior Court* (1992) 3 C4th 459, 468, 11 CR2d 330, 834 P2d 1148].

Consider:

In a concurring opinion, California Supreme Court Justice Baxter suggested that the court should reexamine the holding of *Pacific Gas & Electric Co.* and clarify the parol evidence rule in California [see *Dore v. Arnold Worldwide, Inc.* (2006) 39 C4th 384, 395-396, 46 CR3d 668, 139 P3d 56 (Baxter, J., concurring)].

Judge's Perspective:

As the text makes clear, different courts have applied *Pacific Gas & Electric Co.* and its progeny differently. Some courts will not accept extrinsic evidence, even provisionally, if the contract is not

"reasonably susceptible" to the proffered interpretation. Unless the court has already ruled that it will provisionally admit such evidence, a party seeking to exclude it should move to exclude it in limine.

If the contract language is not reasonably susceptible to the interpretation urged by party propounding the evidence, that party cannot prevail in the case. If the court decides the language is reasonably susceptible to the interpretation urged, the next query is what the parties intended the language to mean [*Southern Cal. Edison Co. v. Superior Court* (1995) 37 CA4th 839, 847-848, 44 CR2d 227 ; see 21.37].

**Cross References:**

Discussion of parol evidence rule, see 21.38 -21.58.

Discussion of statutory rules of contract interpretation, see 21.14 -21.31.

Legal Topics:

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

Contracts LawContract InterpretationGeneral Overview



37 of 188 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 21 Asserting a Particular Construction of Contract
V. ALLEGING AND PROVING AMBIGUITIES IN CONTRACT

2-21 MB Practice Guide: CA Contract Litigation 21.36

21.36 Extrinsic Evidence Must Be Provisionally Received.

To determine ambiguity, the court provisionally receives (without actually admitting) all credible evidence concerning the parties' intentions [*Pacific State Bank v. Greene* (2003) 110 CA4th 375, 386]. The court performs a limited weighing of the evidence to keep evidence that is not credible from the jury [*FPI Dev., Inc. v. Nakashima* (1991) 231 CA3d 367, 391, 282 CR 508] .

Jury Instructions:

Conflict in Evidence--Preliminary Instruction When Interpretation Is Jury Question, see *California Forms of Jury Instruction, Ch. 3B, Instr. MB 300B.02* (Matthew Bender).

Rational interpretation requires at least a preliminary consideration of all credible evidence offered to prove the intention of the parties [*Pacific Gas & Elec. Co. v. G. W. Thomas Drayage & Rigging Co.* (1968) 69 C2d 33, 39-40, 69 CR 561, 442 P2d 641] . Even if a contract appears unambiguous on its face, a latent ambiguity may be exposed by extrinsic evidence that reveals more than one possible meaning to which the language of the contract is reasonably susceptible [*Circle Star Center Associates, L.P. v. Liberate Technologies* (2007) 147 CA4th 1203, 1211, 55 CR3d 232] . Contract language must be construed in context and cannot be found to be ambiguous in the abstract [*La Jolla Beach & Tennis Club, Inc. v. Industrial Indem. Co.* (1994) 9 C4th 27, 37, 36 CR2d 100, 884 P2d 1048] .

Example:

An employment contract stating that the employment was "at will" and terminable "at any time" unambiguously created an at-will employment relationship, despite its failure to state that termination could be without cause. Extrinsic evidence that the employee was told his role would be critical, that the employer wanted the employee to build a relationship with an important new client, and that the company had a family atmosphere did not render the employment contract ambiguous concerning whether the employee could be terminated only for cause [*Dore v. Arnold Worldwide, Inc.* (2006) 39 C4th 384, 392-393, 46 CR3d 668, 139 P3d 56] .

➡ **Cross References:**

Discussion of parol evidence rule, see 21.38 -21.58.

Discussion of rules of contract interpretation, see 21.14 -21.31.

Legal Topics:

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

Contracts LawContract InterpretationParol EvidenceGeneral OverviewEvidenceProcedural ConsiderationsGeneral
OverviewEvidenceProcedural ConsiderationsPreliminary QuestionsGeneral Overview



38 of 188 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 21 Asserting a Particular Construction of Contract
V. ALLEGING AND PROVING AMBIGUITIES IN CONTRACT

2-21 MB Practice Guide: CA Contract Litigation 21.37

21.37 If Contract Is Ambiguous, Court Interprets in Light of Evidence, Applying Canons of Construction.

If the evidence is relevant to prove a meaning to which the contract language is reasonably susceptible, the court moves to the second question: what the parties intended the language to mean [*Southern Cal. Edison Co. v. Superior Court* (1995) 37 CA4th 839, 848, 44 CR2d 227] . The court must ascertain and give effect to the parties' intention by determining what they meant by the words they used [CC § 1636; *Pacific Gas & Elec. Co. v. G. W. Thomas Drayage & Rigging Co.* (1968) 69 C2d 33, 37-40, 69 CR 561, 442 P2d 641 ; see CCP § 1856(c)].

The evidence is admitted to aid in the second step of interpreting the contract: what the parties meant by the language [*Pacific State Bank v. Greene* (2003) 110 CA4th 375, 386 ; see also CCP §§ 1856(g), 1859].

The generally accepted canons of construction in CC §§ 1635-1654 guide the court in interpreting the contract [*Southern Cal. Edison Co. v. Superior Court* (1995) 37 CA4th 839, 852, 44 CR2d 227].

Example:

Because both parties' proposed interpretations of language in a company's stock option plans were facially reasonable, the plans were ambiguous. Relying on canons of construction, the court concluded that the defendants' interpretation embodied the intention of the parties because it was in better accord with the language of the option plans and was more consistent with the articulated purposes of those plans [*Falkowski v. Imation Corp.* (2005) 132 CA4th 499, 508-510].



Cross References:

Discussion of parol evidence rule, see 21.38 -21.58.

Discussion of rules of contract interpretation, see 21.14 -21.31.

Legal Topics:

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

Contracts LawContract InterpretationAmbiguities & Contra ProferentemGeneral Overview



39 of 188 DOCUMENTS

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Chapter 21 Asserting a Particular Construction of Contract

VI. ASSERTING OR OPPOSING USE OF EXTRINSIC EVIDENCE TO ESTABLISH TERMS OF OR TO
INTERPRET CONTRACT

2-21 MB Practice Guide: CA Contract Litigation 21.38

21.38 CHECKLIST: Opposing Admission of Extrinsic Evidence.

☐ Assert following arguments, as appropriate, in alleging that written agreement is integrated and hence no extrinsic evidence is needed:

☐ Written agreement appears on its face to be complete agreement.

Authority:

Casa Herrera, Inc. v. Beydoun (2004) 32 C4th 336, 349, 83 P3d 497

Discussion:

See 21.46[3]

☐ Other party signed agreement.

Authority:

Haggard v. Kimberly Quality Care, Inc. (1995) 39 CA4th 508, 518-519, 46 CR2d 16

Discussion:

See 21.46[6]

☐ Parties are legally sophisticated business people.

Authority:

Gerdlund v. Electronic Dispensers Int'l (1987) 190 CA3d 263, 272, 235 CR 279

Discussion:

See 21.46[5]

- ☐ Parties had advice of legal counsel.

Authority:

Esbensen v. Userware Int'l, Inc. (1992) 11 CA4th 631, 638, 14 CR2d 93

Discussion:

See 21.46[5]

- ☐ Written agreement contained provision requiring that any subsequent modifications be in writing.

Authority:

Haggard v. Kimberly Quality Care, Inc. (1995) 39 CA4th 508, 520, 46 CR2d 16

Discussion:

See 21.46[11]

- ☐ Written agreement was not a form agreement, but rather a negotiated, specifically drafted agreement.

Authority:

Gerdlund v. Electronic Dispensers Int'l (1987) 190 CA3d 263, 272, 235 CR 279

Discussion:

See 21.46[10]

- ☐ Party attacking integration helped draft agreement.

Authority:

Gerdlund v. Electronic Dispensers Int'l (1987) 190 CA3d 263, 272, 235 CR 279

Discussion:

See 21.46[5]

- ☐ Written agreement contains clear and comprehensive integration clause.

Authority:

Haggard v. Kimberly Quality Care, Inc. (1995) 39 CA4th 508, 518, 46 CR2d 16

Discussion:

See 21.46[9]

- ☐ Alleged oral agreement:

☐ Is not one that might naturally have been made as separate agreement by similarly situated parties; or

☐ If parties had reached such agreement, they certainly would have included it in writing.

Authority:

Casa Herrera, Inc. v. Beydoun (2004) 32 C4th 336, 349, 83 P3d 497 ; *Masterson v. Sine* (1968) 68 C2d 222, 228, 65 CR 545, 436 P2d 561

Discussion:

See 21.46[3]

- ☐ Proffered extrinsic evidence would be likely to mislead trier of fact.

Authority:

Casa Herrera, Inc. v. Beydoun (2004) 32 C4th 336, 349, 83 P3d 49

Discussion:

See 21.46[3]

- ☐ If written agreement is held to be fully or partially integrated, argue that:

- ☐ Proffered extrinsic evidence impermissibly contradicts, varies, or adds to fully integrated agreement.

Authority:

CCP § 1856(b)

Discussion:

See 21.44

- ☐ Proffered extrinsic evidence contradicts term of partially integrated written contract.

Authority:

CCP § 1856(a)

Discussion:

See 21.45

- ☐ To convince court that written term is not ambiguous, argue that:

- ☐ Other party has not alleged that written term has any special meaning or is ambiguous, so court should construe term on its face.

Authority:

CC § 1644

Discussion:

See 21.04[1], 21.08, 21.34 -21.37

- ☐ Proffered evidence is not credible, so court need not consider it.

Authority:

FPI Dev., Inc. v. Nakashima (1991) 231 CA3d 367, 391, 282 CR 508

Discussion:

See 21.36, 21.37

- ☐ In interpreting ambiguous term, allege that written term cannot reasonably be read to mean what other party says it means.

Authority:

Pacific Gas & Elec. Co. v. G. W. Thomas Drayage & Rigging Co. (1968) 69 C2d 33, 37, 69 CR 561, 442 P2d 641

Discussion:

See 21.37, 21.46

- ☐ If other party seeks to prove fraud, allege that:
- ☐ Other party is asserting fraudulent prior or contemporaneous statement at variance with terms of writing, which is inadmissible.

Authority:

Bank of Am. Nat'l Trust & Sav. Ass'n v. Pendergrass (1935) 4 C2d 258, 263, 48 P2d 659

Discussion:

See 21.52

- ☐ Alleged false promise is not independent of written instrument.

Authority:

Bank of Am. Nat'l Trust & Sav. Ass'n v. Pendergrass (1935) 4 C2d 258, 263, 48 P2d 659

Discussion:

See 21.52

- ☐ On appeal, even if counsel failed to object at trial to admission of extrinsic evidence, argue that judgment is not supported by substantial evidence because extrinsic evidence should have been excluded under parol evidence rule and is incompetent to support judgment.

Authority:

Tahoe Nat'l Bank v. Phillips (1971) 4 C3d 11, 23, 92 CR 704, 480 P2d 320

Discussion:

See 21.04[2][j]

Legal Topics:

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

Contracts LawContract InterpretationParol EvidenceGeneral OverviewEvidenceRelevanceParol Evidence



40 of 188 DOCUMENTS

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Chapter 21 Asserting a Particular Construction of Contract

VI. ASSERTING OR OPPOSING USE OF EXTRINSIC EVIDENCE TO ESTABLISH TERMS OF OR TO
INTERPRET CONTRACT

2-21 MB Practice Guide: CA Contract Litigation 21.39

21.39 CHECKLIST: Moving for Admission of Extrinsic Evidence.

☐ To attack validity and completeness of agreement as written, argue that:

☐ Mistake or imperfection of writing is put in issue by pleadings.

Authority:

CCP § 1856(e)

Discussion:

See 21.51 -21.56

☐ Extrinsic evidence relates to unmet condition precedent to performance of written contract, and writing has no expressly inconsistent terms.

Authority:

Banco do Brasil, S.A., v. Latian, Inc. (1991) 234 CA3d 973, 1004 n43, 285 CR 870

Discussion:

See 21.48

☐ Alleged false promise is consistent with written instrument.

Authority:

Wang v. Massey Chevrolet (2002) 97 CA4th 856, 873, 118 CR2d 770

Discussion:

See 21.52

- ☐ Extrinsic evidence establishes sham transaction.

Authority:

Saks v. Charity Mission Baptist Church (2001) 90 CA4th 1116, 1134, 110 CR2d 45

Discussion:

See 21.51

- ☐ Extrinsic evidence establishes forgery.

Authority:

Pacific State Bank v. Greene (2003) 110 CA4th 375, 387, modified and reh'g denied, 2003 Cal App LEXIS 1204 (2003), review denied, 2003 Cal LEXIS 7769 (2003)

Discussion:

See 21.55

- ☐ Extrinsic evidence establishes imperfection of writing, such as disparity between writing and parties' actual intent.

Authority:

CCP § 1856(e)

Discussion:

See 21.55

- ☐ Extrinsic evidence establishes lack of consideration.

Authority:

Pacific State Bank v. Greene (2003) 110 CA4th 375, 387

Discussion:

See 21.56

- ☐ Extrinsic evidence establishes mistake or accident.

Authority:

CCP § 1856(e); Hess v. Ford Motor Co. (2002) 27 C4th 516, 525, 117 CR2d 220, 41 P3d 46

Discussion:

See 21.54

- ☐ Extrinsic evidence establishes illegality.

Authority:

CCP § 1856(g)

Discussion:

See 21.51

- ☐ Extrinsic evidence establishes fraud, duress, or undue influence.

Authority:

CCP § 1856(g); Pacific State Bank v. Greene (2003) 110 CA4th 375, 387

Discussion:

See 21.51 -21.53

- ☐ To defend validity of written agreement, argue that extrinsic evidence establishes execution of agreement.

Authority:

Pacific State Bank v. Greene (2003) 110 CA4th 375, 387

Discussion:

See 21.51, 21.55

- ☐ To show that written agreement is not integrated, and thus subject to introduction of extrinsic evidence, argue that:

- ☐ Writing is incomplete on its face.

Authority:

McLain v. Great Am. Ins. Cos. (1989) 208 CA3d 1476, 1485, 256 CR 863

Discussion:

See 21.46[3]

- ☐ Writing is not signed.

Authority:

Haggard v. Kimberly Quality Care, Inc. (1995) 39 CA4th 508, 518-519, 46 CR2d 16

Discussion:

See 21.46[6]

- ☐ Parties are not legally sophisticated.

Authority:

Esbensen v. Userware Int'l, Inc. (1992) 11 CA4th 631, 638, 14 CR2d 93

Discussion:

See 21.46[5]

- ☐ Parties did not have advice of legal counsel.

Authority:

Esbensen v. Userware Int'l, Inc. (1992) 11 CA4th 631, 638, 14 CR2d 93

Discussion:

See 21.46[5]

- ☐ Written agreement was form (preprinted) agreement.

Authority:

McLain v. Great Am. Ins. Cos. (1989) 208 CA3d 1476, 1485, 256 CR 863

Discussion:

See 21.46[10]

- ☐ Written agreement provides for future modifications.

Authority:

McLain v. Great Am. Ins. Cos. (1989) 208 CA3d 1476, 1485, 256 CR 863

Discussion:

See 21.46[11]

- ☐ Written agreement lacks merger clause.

Authority:

McLain v. Great Am. Ins. Cos. (1989) 208 CA3d 1476, 1485, 256 CR 863

Discussion:

See 21.46[9]

- ☐ Issue on which extrinsic evidence bears is outside scope of merger clause.

Authority:

Cione v. Foresters Equity Servs., Inc. (1997) 58 CA4th 625, 637-639, 68 CR2d 167

Discussion:

See 21.46[9]

- ☐ Written agreement is silent on subject of proffered evidence, or is consistent with it.

Authority:

Masterson v. Sine (1968) 68 C2d 222, 225-226, 65 CR 545, 436 P2d 561

Discussion:

See 21.46[2]

- ☐ Extrinsic evidence is uncontroverted and should be interpreted by court.

Authority:

Parsons v. Bristol Dev. Co. (1965) 62 C2d 861, 865-866 & n2

Discussion:

See 21.46[12]

- ☐ Collateral agreement might naturally have been made as separate agreement by similarly situated parties, or it is not one that parties would certainly have included in writing.

Authority:

Casa Herrera, Inc. v. Beydoun (2004) 32 C4th 336, 349, 83 P3d 497 ; *Masterson v. Sine* (1968) 68 C2d 222, 228-229, 65 CR 545, 436 P2d 561

Discussion:

See 21.46[3]

- ☐ Proffered extrinsic evidence would not mislead fact finder.

Authority:

Casa Herrera, Inc. v. Beydoun (2004) 32 C4th 336, 349, 83 P3d 497

Discussion:

See 21.46[3]

- ☐ If written agreement is held to be fully or partially integrated, argue that:

- ☐ Extrinsic evidence supplements but does not contradict term of partially integrated written contract.

Authority:

CCP § 1856(a)

Discussion:

See 21.44

- ☐ Extrinsic evidence explains or supplements written terms by custom or trade usage, course of dealing, or course of performance.

Authority:

CCP § 1856(c)

Discussion:

See 21.24, 21.49

- ☐ Extrinsic evidence concerns contemporaneous written agreement.

Authority:

CCP § 1856(a); CC § 1642

Discussion:

See 21.57

- ☐ Extrinsic evidence rebuts term of writing that law would otherwise presume.

Authority:

Masterson v. Sine (1968) 68 C2d 222, 229-230, 65 CR 545, 436 P2d 561

Discussion:

See 21.47

☐ With regard to whether a written term is ambiguous, argue that:

☐ Extrinsic evidence shows that term of written agreement is reasonably susceptible to more than one meaning.

Authority:

Pacific Gas & Elec. Co. v. G. W. Thomas Drayage & Rigging Co. (1968) 69 C2d 33, 37, 69 CR 561, 442 P2d 641

Discussion:

See 21.34 -21.36, 21.43

☐ Term of written agreement that appears clear and unambiguous on its face in fact has a special meaning that both parties used and understood.

Authority:

CC § 1644; *Pacific Gas & Elec. Co. v. G. W. Thomas Drayage & Rigging Co.* (1968) 69 C2d 33, 37-40, 69 CR 561, 442 P2d 641

Discussion:

See 21.20 -21.22, 21.35

☐ In interpreting ambiguous term, argue that language is susceptible to both parties' interpretations, so extrinsic evidence must be admitted.

Authority:

Wolf v. Superior Court (2004) 114 CA4th 1343, 1351

Discussion:

See 21.04[2][h], 21.34, 21.37

☐ Seeking to prove other party's fraud, argue that:

☐ Integration does not bar use of extrinsic evidence to prove fraud.

Authority:

CCP § 1856(e), (g)

Discussion:

See 21.51

☐ Signature on agreement was procured by misrepresentation of content of physical document to be signed.

Authority:

Pacific State Bank v. Greene (2003) 110 CA4th 375, 392

Discussion:

See 21.52

☐ If writing has been modified or replaced, argue that:

☐ Extrinsic evidence establishes modification by executed oral agreement.

Authority:

CC § 1698(b)

Discussion:

See 21.58[1]

☐ Extrinsic evidence establishes modification by oral agreement supported by new consideration.

Authority:

CC § 1698(c)

Discussion:

See 21.58[2]

☐ Extrinsic evidence establishes novation.

Authority:

Santa Clara Sand & Gravel Co. v. State Bd. of Equalization (1964) 225 CA2d 676, 680, 37 CR 506

Discussion:

See 21.58[3]

☐ Extrinsic evidence establishes discharge or release.

Authority:

Jack v. Wood (1968) 258 CA2d 639, 648, 65 CR 856

Discussion:

See 21.58[4]

Legal Topics:

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

Contracts Law Contract Interpretation Parol Evidence General Overview Evidence Relevance Parol Evidence



41 of 188 DOCUMENTS

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Chapter 21 Asserting a Particular Construction of Contract

VI. ASSERTING OR OPPOSING USE OF EXTRINSIC EVIDENCE TO ESTABLISH TERMS OF OR TO INTERPRET CONTRACT

2-21 MB Practice Guide: CA Contract Litigation 21.40

21.40 Options and Strategy.

A party who wishes to have the contract enforced other than as indicated by its written language must seek to have parol evidence relating to the contract admitted. The parol evidence rule prohibits the introduction of evidence to vary, alter, or modify the terms of a fully integrated written agreement [see CC § 1625; CCP § 1856]. Accordingly, the party seeking to introduce parol evidence must show that the contract is not fully integrated, or that if it is fully integrated, it needs to be further explained or supplemented [see 21.43, 21.44]. The issue of integration is normally the first one tackled by the court.

The court will look beyond the four corners of the writing, and consider evidence on these points [see 21.43, 21.46]:

- Whether the written agreement appear to state a complete agreement.
- Whether an alleged oral agreement directly contradicts the writing.
- Whether a collateral agreement is one that might naturally have been made as a separate agreement.
- Whether the jury would be misled by the introduction of the parol testimony.

The party seeking to introduce parol evidence has a variety of bases on which to bring in the evidence, including [see 21.47 -21.56]:

- To rebut implied terms;
- To prove consistent oral terms;
- To prove custom or trade usage, course of dealing, and course of performance;
- To prove the circumstances of the contract's formation;
- To prove fraud, duress, illegality, accident, or mistake;

- To prove imperfection of a writing;
- To prove lack of consideration.

Evidence of contemporaneous written agreements and subsequent changes to a written agreement can also be admitted [see 21.57, 21.58].



Strategic Point:

A party has a better chance of getting parol evidence admitted by framing the relevant issue as one of interpretation, fraud, or unmet oral precondition, if possible, rather than as a straightforward contract claim involving an additional term [see CCP § 1856].

The party opposing the admission of extrinsic evidence will need to show that the contract, any other writings, and any related oral agreements all create a completely integrated whole that is not subject to further interpretation. This can best be done by showing that all of these agreements relate to, and fully cover, the topics involved in the litigation. Because the court normally will consider the issue of integration first, if the party opposing the admission of extrinsic evidence can prevail on this point, further proceedings will not be required, and the contract will be interpreted as written [see *Masterson v. Sine* (1968) 68 C2d 222, 228, 65 CR 545, 436 P2d 561] .

Legal Topics:

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

Contracts LawContract InterpretationParol EvidenceGeneral OverviewEvidenceRelevanceParol Evidence



42 of 188 DOCUMENTS

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Chapter 21 Asserting a Particular Construction of Contract

VI. ASSERTING OR OPPOSING USE OF EXTRINSIC EVIDENCE TO ESTABLISH TERMS OF OR TO INTERPRET CONTRACT

2-21 MB Practice Guide: CA Contract Litigation 21.41

21.41 Parol Evidence Rule Bars Some Extrinsic Evidence Affecting Written Contracts.

The parol evidence rule is codified in *CC* § 1625 and *CCP* § 1856. The rule generally prohibits the introduction of any extrinsic evidence, oral or written, to vary, alter, or add to the terms of an integrated written instrument [*CC* § 1625; *CCP* § 1856; *Casa Herrera, Inc. v. Beydoun* (2004) 32 *C4th* 336, 343, 83 *P3d* 497 ; see *Com Code* § 2202 (UCC version of parol evidence rule, applicable to contracts for sales of goods)].

Distinguish--Statute of Frauds:

The statute of frauds and the parol evidence rule have similar evidentiary consequences, but the parol evidence rule is substantive, whereas the statute of frauds is merely evidentiary. The statute of frauds prevents a contract from being unenforceable, but it does not necessarily establish the terms of the contract. The parol evidence rule determines the enforceable and incontrovertible terms of an integrated written agreement. Unlike the statute of frauds, the parol evidence rule cannot consistently be subjugated to the principles of objection and waiver in the Evidence Code or the doctrine of estoppel [*Casa Herrera, Inc. v. Beydoun* (2004) 32 *C4th* 336, 345-346, 83 *P3d* 497 ; see *CC* § 1624 (statute of frauds)].

➤ Cross References:

Discussion of statute of frauds, see Ch. 15, Attacking or Defending Existence of Contract--Failure to Comply With Applicable Formalities; and Ch. 27, Contract for Sale of Goods--Attacking or Defending Existence of Contract Under California Commercial Code.

Further discussion of parol evidence rule, see *California Forms of Pleading and Practice*, §§ 140.31, 500.31, 551.75 (Matthew Bender).

Legal Topics:

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

Contracts Law Contract Interpretation Parol Evidence General Overview Evidence Relevance Parol Evidence



43 of 188 DOCUMENTS

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Chapter 21 Asserting a Particular Construction of Contract

VI. ASSERTING OR OPPOSING USE OF EXTRINSIC EVIDENCE TO ESTABLISH TERMS OF OR TO
INTERPRET CONTRACT

2-21 MB Practice Guide: CA Contract Litigation 21.42

21.42 Parol Evidence Rule Is Substantive Law, Not Evidentiary Rule.

The parol evidence rule is not merely a rule of evidence excluding pre-contractual discussions due to lack of credibility or reliability [Banco do Brasil, S.A., v. Latian, Inc. (1991) 234 CA3d 973, 1000, 285 CR 870] . Under the parol evidence rule, as a matter of law, when parties embody the complete terms of their agreement in a writing (making the writing "integrated") [see 21.43 -21.46], the writing becomes the agreement. Extrinsic evidence then is inadmissible to prove the terms of the agreement, because the evidence is legally irrelevant [Casa Herrera, Inc. v. Beydoun (2004) 32 C4th 336, 344, 83 P3d 497].

Legal Topics:

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

Contracts LawContract InterpretationParol EvidenceGeneral OverviewEvidenceRelevanceParol Evidence



44 of 188 DOCUMENTS

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Chapter 21 Asserting a Particular Construction of Contract

VI. ASSERTING OR OPPOSING USE OF EXTRINSIC EVIDENCE TO ESTABLISH TERMS OF OR TO INTERPRET CONTRACT

2-21 MB Practice Guide: CA Contract Litigation 21.43

21.43 Parol Evidence Rule Requires Analysis of Integration and Ambiguity.

When parol evidence is offered to explain a written agreement, a court must answer two questions:

- Whether the writing was intended to be an integration [*Masterson v. Sine* (1968) 68 C2d 222, 225-226, 65 CR 545, 436 P2d 561] ; and
- Whether the agreement is reasonably susceptible to the meaning contended for by the party offering the evidence [*Pacific Gas & Elec. Co. v. G. W. Thomas Drayage & Rigging Co.* (1968) 69 C2d 33, 37, 69 CR 561, 442 P2d 641 ; *Wang v. Massey Chevrolet* (2002) 97 CA4th 856, 873, 118 CR2d 770] .

➤ Cross References:

Judicial inconsistency on whether integration is question of law or of fact, see 21.06.

Discussion of rules of contract interpretation, see 21.14 -21.31.

Alleging and proving ambiguities in contracts, see 21.32 -21.37.

Legal Topics:

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

Contracts LawContract Conditions & ProvisionsIntegration ClausesContracts LawContract InterpretationAmbiguities & Contra ProferentemGeneral OverviewContracts LawContract InterpretationParol EvidenceGeneral OverviewEvidenceRelevanceParol Evidence



45 of 188 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 21 Asserting a Particular Construction of Contract

VI. ASSERTING OR OPPOSING USE OF EXTRINSIC EVIDENCE TO ESTABLISH TERMS OF OR TO INTERPRET CONTRACT

2-21 MB Practice Guide: CA Contract Litigation 21.44

21.44 If Writing Fully Integrates Parties' Agreement, Extrinsic Evidence May Not Be Admitted to Contradict, Explain, or Supplement It.

When parties to a written contract intend the writing to be the final and complete expression of their understanding, it is deemed "integrated" and may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement [see CCP § 1856(b); Banco do Brasil, S.A. v. Latian, Inc. (1991) 234 CA3d 973, 1000, 285 CR 870] .

Execution of a written contract supersedes all negotiations or stipulations concerning its matter [CC § 1625]. If a written contract is integrated, the presumption that it supersedes prior or contemporaneous oral agreements cannot be overcome [Wagner v. Glendale Adventist Med. Ctr. (1989) 216 CA3d 1379, 1385, 265 CR 412] .

Cross References:

Discussion of rules of contract interpretation, see 21.14 -21.31.

Judicial inconsistency on whether integration is question of law or of fact, see 21.06.

Alleging and proving ambiguities in contracts, see 21.32 -21.37.

Legal Topics:

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

Contracts LawContract Conditions & ProvisionsIntegration ClausesContracts LawContract InterpretationParol EvidenceGeneral OverviewEvidenceRelevanceParol Evidence



46 of 188 DOCUMENTS

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Chapter 21 Asserting a Particular Construction of Contract

VI. ASSERTING OR OPPOSING USE OF EXTRINSIC EVIDENCE TO ESTABLISH TERMS OF OR TO
INTERPRET CONTRACT

2-21 MB Practice Guide: CA Contract Litigation 21.45

21.45 If Written Agreement Is Partially Integrated, Extrinsic Evidence May Be Admitted to Explain or Supplement but Not to Contradict It.

Parties may intend a writing to finally and completely express only certain terms of their agreement, resulting in partial integration. When only part of the agreement is integrated, the parol evidence rule applies to that part. Extrinsic evidence may be used to prove elements of the agreement not reduced to writing [*see CCP § 1856(a); Hayter Trucking, Inc. v. Shell W. E&P, Inc. (1993) 18 CA4th 1, 14, 22 CR2d 229*].

Legal Topics:

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

Contracts LawContract Conditions & ProvisionsIntegration ClausesContracts LawContract InterpretationParol EvidenceGeneral OverviewEvidenceRelevanceParol Evidence



47 of 188 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 21 Asserting a Particular Construction of Contract

VI. ASSERTING OR OPPOSING USE OF EXTRINSIC EVIDENCE TO ESTABLISH TERMS OF OR TO INTERPRET CONTRACT

2-21 MB Practice Guide: CA Contract Litigation 21.46

21.46 Court Looks Beyond Four Corners of Document to Ascertain Integration.

21.46[1] Court Examines Writing and Extrinsic Evidence. In addition to the writing itself, the court must consider the proffered collateral agreement. The circumstances surrounding contract formation may also help in determining the parties' intent. Evidence of oral collateral agreements should be excluded only when the fact finder is likely to be misled [*Masterson v. Sine* (1968) 68 C2d 222, 225-227, 65 CR 545, 436 P2d 561] .

Cross References:

Provisional receipt of extrinsic evidence, see 21.36.

Judicial inconsistency on whether integration is question of law or of fact, see 21.06.

21.46[2] California Does Not Employ Facial Completeness Test of Integration. The California Supreme Court has rejected the facial completeness test for determining whether a writing is an integrated agreement. Instead, the Court adopted a standard based on whether the parties intended their writing to serve as the exclusive embodiment of their agreement [see *Masterson v. Sine* (1968) 68 C2d 222, 65 CR 545, 436 P2d 561] . This standard is codified in CCP § 1856 [see 21.45].

The writing need not appear incomplete on its face. Parol evidence may be admitted to prove a separate oral agreement as to any matter on which the document is silent and which is not inconsistent with its terms [see *Masterson v. Sine* (1968) 68 C2d 222, 225-226, 65 CR 545, 436 P2d 561] .

Cross Reference:

Rejection of plain meaning rule, see 21.35.

21.46[3] Court Applies Four-Factor Test in Deciding Whether Extrinsic Evidence Should Go to Jury. In deciding whether extrinsic evidence should go to the jury, trial courts should ask questions such as the following [*Casa Herrera, Inc. v. Beydoun* (2004) 32 C4th 336, 349, 83 P3d 497 ; *Masterson v. Sine* (1968) 68 C2d 222, 228-229, 65 CR 545, 436 P2d 561] :

- Does the written agreement appear to state a complete agreement?
- Does the alleged oral agreement directly contradict the writing?
- Is the collateral agreement one that might naturally have been made as a separate agreement? Is it one that the parties would certainly have included in the writing?
- Would the jury be misled by the introduction of the parol testimony?

Courts disagree on whether a conflict between the oral and written agreements is a factor tending to show that the written agreement is not integrated [*compare Esbensen v. Userware Int'l, Inc.* (1992) 11 CA4th 631, 637 n3, 14 CR2d 93, with *Haggard v. Kimberly Quality Care, Inc.* (1995) 39 CA4th 508, 518, 46 CR2d 16].

21.46[4] Contradictory Evidence Is Evidence That Cannot Be Reconciled Semantically With Language of Writing. A contradiction is a juxtaposition of two statements that cannot be reconciled as a semantically permissible use of language; for example, a proffered oral agreement that does not satisfactorily account for the language used in the writing. The question of semantic conflict merges subtly with the question of credibility [*FPI Dev., Inc. v. Nakashima* (1991) 231 CA3d 367, 395, 282 CR 508].

Example:

Plaintiffs attempting to prove that television series contract entitled them to share in the net profits from all sources (including subsequent motion pictures) introduced extrinsic evidence regarding a previous agreement between the parties. The Court of Appeal concluded that plaintiffs' extrinsic evidence did not explain the contract language, but rather contradicted it. The contract at issue did not say that plaintiffs would share in the net profits "from all sources," as did the previous contract; instead, it said that plaintiffs would share in profits of movie rights only if those rights were exploited by the producer as ancillary or subsidiary rights of its primary "right to exhibit photoplays of the series"; but not if those rights were acquired by the producer independently from its right to exhibit photoplays [*Wagner v. Columbia Pictures Industries, Inc.* (2007) 146 CA4th 586, 592-593, 52 CR3d 898].



Strategic Point--Determining Scope of Written Agreement and Its Integration Clause:

Whether extrinsic evidence is deemed to supplement terms of a written agreement or explain an ambiguity depends on how a court defines the scope of the written agreement and its terms. The word "term," as used in CCP § 1856(a), (b), is borrowed in effect from Com Code § 1201(40) and means a portion of an agreement that relates to a particular matter [*FPI Dev., Inc. v. Nakashima* (1991) 231 CA3d 367, 387 n6, 282 CR 508 (interpreting former Com Code § 1201(42))].



Cross Reference:

Detailed critique of apparent contradictions in application of definitions and standards, see Martin-Davidson, *Yes, Judge Kozinski, There Is a Parol Evidence Rule in California--The Lessons of a Pyrrhic Victory*, 25 Sw. U. L. Rev. 1, 36-42 (1995) (criticizing logical inconsistencies of California's parol evidence rule with respect to identifying terms of agreement).

21.46[5] Parties' Legal Sophistication and Use of Lawyers May Suggest Integrative Intent. Courts have considered the parties' legal sophistication and whether they had the advice of counsel as indications of the likelihood that they intended a writing to be integrated [see, e.g., *Esbensen v. Userware Int'l, Inc.* (1992) 11 CA4th 631, 637-638, 14 CR2d 93].

Example:

In a wrongful discharge case involving an employee under a series of one-year employment contracts, the small business entrepreneur defendant and computer programmer plaintiff were both relatively unsophisticated in legal matters, and both unadvised by lawyers, leading to the conclusion that it was proper to admit parol evidence [*Esbensen v. Userware Int'l, Inc.* (1992) 11 CA4th 631, 638, 14 CR2d 93] .

21.46[6] Signatures on Writing May Suggest Integrative Intent. Courts have noted the fact that a party signed the writing as evidence of integrative intent [see, e.g., *Haggard v. Kimberly Quality Care, Inc.* (1995) 39 CA4th 508, 518-519, 46 CR2d 16] .

21.46[7] To Determine Integration, Court Must Interpret Writing. To ascertain whether a proposed additional term is consistent with a written agreement, the court must interpret the writing. The interpretation must be made in the light of all the circumstances, including evidence of the additional term. For this purpose, the meaning of the writing includes not only the terms explicitly stated, but also the terms fairly implied as part of the parties' bargain in fact [*FPI Dev., Inc. v. Nakashima* (1991) 231 CA3d 367, 396, 282 CR 508] .

**Cross Reference:**

Judicial inconsistency on whether integration is question of law or of fact, see 21.06.

21.46[8] Noncontractual and Incomplete Writings Are Not Integrations. Neither a noncontractual writing, such as a receipt or a mere memorandum, nor an incomplete writing, is an integration [*Wagner v. Glendale Adventist Med. Ctr.* (1989) 216 CA3d 1379, 1385, 265 CR 412 ; but see *Slivinsky v. Watkins-Johnson Co.* (1990) 221 CA3d 799, 805, 270 CR 585 (quoting Restatement (Second) of Contracts § 209, and stating that no particular form is required for an integrated agreement)]. California courts have sometimes disagreed, however, on what constitutes a contractual writing [compare *McLain v. Great Am. Ins. Cos.* (1989) 208 CA3d 1476, 1485, 256 CR 863 (employment application was agreement, but not integrated agreement), with *Harden v. Maybelline Sales Corp.* (1991) 230 CA3d 1550, 1555, 282 CR 96 (employment application was not agreement, but rather mere solicitation of offer)].

21.46[9] Inclusion or Exclusion of Merger Clause Is Significant but Not Conclusive. Inclusion of an express integration, or merger, clause is very persuasive evidence of integration [Banco do *Brasil, S.A., v. Latian, Inc.* (1991) 234 CA3d 973, 1001-1003, 285 CR 870] , but not conclusive as to whether the parties intended a writing to integrate their entire agreement. Integration may be partial as well as complete [*Cione v. Foresters Equity Servs., Inc.* (1997) 58 CA4th 625, 638 n10, 68 CR2d 167] .

In addition, the exclusion of a merger clause is not conclusive. The parties' integrative intent may be manifested without an explicit statement to that effect [*Heller v. Pillsbury Madison & Sutro* (1996) 50 CA4th 1367, 1382, 58 CR2d 336] .

The specific wording of an integration clause can be key to a court's analysis.

Example:

An integration clause stating that an employment agreement "contains the entire understanding of the parties hereto with respect to the subject matter contained herein" did not preclude evidence of a previously signed arbitration agreement, when the employment agreement did not address dispute resolution [see *Cione v. Foresters Equity Servs., Inc.* (1997) 58 CA4th 625, 637-639, 68 CR2d 167] .

21.46[10] Negotiations Suggest Integration; Preprinted Forms Do Not. The use of a preprinted (standard) form agreement often suggests that the written contract did not integrate all of the parties' agreement [see, e.g., *McLain v. Great Am. Ins. Cos.* (1989) 208 CA3d 1476, 1485, 256 CR 863] .

When parties execute a written agreement after a series of negotiations, the agreement is at least "partially" integrated,

as to the matters covered in the negotiations [*Esbensen v. Userware Int'l, Inc.* (1992) 11 CA4th 631, 637, 14 CR2d 93 ; see also *Gerdlund v. Electronic Dispensers Int'l* (1987) 190 CA3d 263, 272, 235 CR 279 (noting that plaintiff had helped draft the written agreement, evidence of integration)].

Jury Instructions:

Contracts--Oral or Written Contract Terms, see *Judicial Council of California Civil Jury Instructions*, CACI No. 304 (LexisNexis Matthew Bender).



Cross Reference:

Discussion of incomplete writings, see 21.46[8].

21.46[11] Language Regarding Subsequent Modification May Bear on Integration Question. Although the parol evidence rule does not limit subsequent modification of a written agreement, the language of an agreement's modification clause may help determine whether the agreement was intended as a complete, exclusive, and final expression of the parties' agreement [compare *McLain v. Great Am. Ins. Cos.* (1989) 208 CA3d 1476, 1485, 256 CR 863 (holding that language providing for subsequent changes suggested lack of integration), with *Haggard v. Kimberly Quality Care, Inc.* (1995) 39 CA4th 508, 520-521, 46 CR2d 16 (finding integration despite language providing for subsequent changes, when clause prohibited oral modification), and *Anderson v. Savin Corp.* (1988) 206 CA3d 356, 363, 254 CR 627 (provision that agreement could not be modified without higher approval supported finding of integration)].



Cross Reference:

Discussion of contract modifications, see 21.58.

21.46[12] If Extrinsic Evidence Is Not in Conflict, Court Interprets Contract. When no extrinsic evidence has been presented, or when the extrinsic evidence is presented but uncontroverted (if there is no opposing or conflicting extrinsic evidence), interpretations of the fully integrated contract are questions of law for the court [*Parsons v. Bristol Dev. Co.* (1965) 62 C2d 861, 865-866 &n2, 44 CR 767, 402 P2d 839 ; *Wolf v. Walt Disney Pictures & Television* (2008) 162 CA4th 1107, 1127-1128, 76 CR3d 585] .

Jury Instructions:

No Conflict in Extrinsic Evidence--Court Interprets Contract, see *California Forms of Jury Instruction*, Ch. 3B, Instr. MB 300B.01 (Matthew Bender).

Legal Topics:

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

Contracts LawContract Conditions & ProvisionsIntegration ClausesContracts LawContract InterpretationGeneral OverviewContracts LawContract InterpretationParol EvidenceGeneral OverviewEvidenceRelevanceParol Evidence



48 of 188 DOCUMENTS

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Chapter 21 Asserting a Particular Construction of Contract

VI. ASSERTING OR OPPOSING USE OF EXTRINSIC EVIDENCE TO ESTABLISH TERMS OF OR TO
INTERPRET CONTRACT

2-21 MB Practice Guide: CA Contract Litigation 21.47

21.47 Extrinsic Evidence Is Admissible to Rebut Implied-in-Law Terms.

Parol evidence may be admitted to rebut a term the law would otherwise presume [see *Masterson v. Sine* (1968) 68 C2d 222, 229-230, 65 CR 545, 436 P2d 561] .

Example:

It was proper to admit parol evidence of a contemporaneous collateral agreement as to the place of payment of a note, even though that evidence contradicted the presumption contained in former CCP § 537 that a note that is silent as to the place of payment is payable where the creditor resides [*American Indus. Sales Corp. v. Airscope, Inc.* (1955) 44 C2d 393, 397-398, 282 P2d 504] .



Cross Reference:

Discussion of missing and implied terms, see 21.68 -21.79.

Legal Topics:

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

Contracts LawContract Conditions & ProvisionsImplied WarrantiesGeneral OverviewContracts LawContract InterpretationGeneral OverviewContracts LawContract InterpretationParol EvidenceGeneral OverviewEvidenceRelevanceParol Evidence



49 of 188 DOCUMENTS

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Chapter 21 Asserting a Particular Construction of Contract

VI. ASSERTING OR OPPOSING USE OF EXTRINSIC EVIDENCE TO ESTABLISH TERMS OF OR TO INTERPRET CONTRACT

2-21 MB Practice Guide: CA Contract Litigation 21.48

21.48 Extrinsic Evidence Is Admissible to Prove Consistent Oral Condition.

The parol evidence rule does not bar evidence of a condition precedent to a written contract unless the writing contains inconsistent express provisions [*Banco do Brasil, S.A., v. Latian, Inc.* (1991) 234 CA3d 973, 1003 n43, 285 CR 870] .

An oral agreement establishing an unmet condition to a party's performance under a written agreement does not inherently contradict the written agreement that is silent about any conditions. A court must look at the writing, including its implied terms, and the alleged oral agreement and evaluate the credibility, or plausibility, that the condition was part of the parties' arrangement. If the oral agreement leaves the written obligation some area of potential applicability, there is no necessary contradiction [see *FPI Dev., Inc. v. Nakashima* (1991) 231 CA3d 367, 396, 282 CR 508] .

Exception:

The court in *Banco do Brasil, S.A., v. Latian, Inc.*, held that when a written agreement contains an express term in which the parties asserting the oral condition acknowledge that their obligations were unconditional, the alleged oral term cannot be reconciled with the written agreement [Banco do Brasil, S.A., v. Latian, Inc. (1991) 234 CA3d 973, 1003-1005, 285 CR 870] .

Jury Instructions:

Contracts--Existence of Condition Precedent Disputed, see *Judicial Council of California Civil Jury Instructions*, CACI No. 321 (LexisNexis Matthew Bender).

Contracts--Occurrence of Agreed Condition Precedent, see *Judicial Council of California Civil Jury Instructions*, CACI No. 322 (LexisNexis Matthew Bender).

Contracts--Waiver of Condition Precedent, see *Judicial Council of California Civil Jury Instructions*, CACI No. 323 (LexisNexis Matthew Bender).

► Cross References:

Discussion of construction of bilateral promises as mutually dependent and concurrent, see 21.28.

Discussion of conditions precedent, see Ch. 22, Suing or Defending Action for Breach of Contract.

Legal Topics:

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

Contracts LawContract InterpretationGeneral OverviewContracts LawContract InterpretationParol EvidenceGeneral
OverviewEvidenceRelevanceParol Evidence



50 of 188 DOCUMENTS

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Chapter 21 Asserting a Particular Construction of Contract

VI. ASSERTING OR OPPOSING USE OF EXTRINSIC EVIDENCE TO ESTABLISH TERMS OF OR TO INTERPRET CONTRACT

2-21 MB Practice Guide: CA Contract Litigation 21.49

21.49 Extrinsic Evidence Is Admissible to Prove Custom or Trade Usage, Course of Dealing, or Course of Performance.

21.49[1] Course of Prior Dealings and Trade Usage Become Part of Contract. "Usage of trade" is a uniform practice or course of conduct followed in certain lines of business or professions, or in some procedure or phase of a business or profession. When an established usage of trade is known to the parties to a transaction, it becomes a rule of law the courts will recognize in determining the rights of parties whose relations come within the usage, absent a controlling statute [*Hayter Trucking, Inc. v. Shell W. E&P, Inc.* (1993) 18 CA4th 1, 15-16, 21, 22 CR2d 229 ; see *Com Code § 1303* ("course of performance," "course of dealing," and "usage of trade" defined)]. Even an integrated writing may be explained or supplemented by extrinsic evidence of course of dealing, trade usage, or by course of performance [see *CCP § 1856(c)*].

Jury Instructions:

Contracts--Interpretation--Construction by Conduct, see *Judicial Council of California Civil Jury Instructions, CACI No. 318* (LexisNexis Matthew Bender).

➡ Cross Reference:

Discussion of using course of dealing and trade usage evidence in aid of interpretation, see 21.24.

21.49[2] Parties' Performance of Their Contract Reflects Their Understanding of Terms. A court seeks to give effect to the parties' mutual intention as objectively manifest in the words in the agreement, as well as in extrinsic evidence of [*Wolf v. Superior Court* (2004) 114 CA4th 1343, 1356, 3 CR3d 649]:

- The circumstances under which the parties negotiated or entered into the contract;
- The object, nature and subject matter of the contract; and
- The subsequent conduct of the parties.

Consistent prior interpretation of a contract can reflect the intent of the contracting parties, and therefore govern the

meaning to be attributed to the contract [*Turlock Irrigation Dist. v. Zanker* (2006) 140 CA4th 1047, 1056, 45 CR 3d 167 ; see also *Judicial Council of California Civil Jury Instructions, CACI No. 318* (Lexis Nexis Matthew Bender) ("[i]n deciding what the words in a contract meant to the parties, you may consider how the parties acted after the contract was created but before any disagreement between the parties arose").



Cross Reference:

Discussion of using course of performance usage evidence in aid of interpretation, see 21.24.

Legal Topics:

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

Contracts LawContract InterpretationParol EvidenceGeneral OverviewContracts LawContract InterpretationParol EvidenceCourse of DealingContracts LawContract InterpretationParol EvidenceCustom & UsageEvidenceRelevanceParol Evidence



51 of 188 DOCUMENTS

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Chapter 21 Asserting a Particular Construction of Contract

VI. ASSERTING OR OPPOSING USE OF EXTRINSIC EVIDENCE TO ESTABLISH TERMS OF OR TO
INTERPRET CONTRACT

2-21 MB Practice Guide: CA Contract Litigation 21.50

21.50 Extrinsic Evidence Is Admissible to Prove Circumstances of Formation.

A court may consider parol evidence of the circumstances of the making of an agreement, including the object, nature, and subject matter of the writing so the court can place itself, for evaluation purposes, in the same situation in which the parties found themselves at the time of contracting [*Winet v. Price (1992) 4 CA4th 1159, 1168, 6 CR2d 554*].



Cross Reference:

Discussion of using evidence of formation circumstances in aid of interpretation, see 21.23.

Legal Topics:

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

Contracts LawContract InterpretationGeneral OverviewContracts LawContract InterpretationParol EvidenceGeneral
OverviewContracts LawFormationEvidenceRelevanceParol Evidence



52 of 188 DOCUMENTS

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Chapter 21 Asserting a Particular Construction of Contract

VI. ASSERTING OR OPPOSING USE OF EXTRINSIC EVIDENCE TO ESTABLISH TERMS OF OR TO INTERPRET CONTRACT

2-21 MB Practice Guide: CA Contract Litigation 21.51

21.51 Extrinsic Evidence Is Admissible to Prove Fraud, Duress, Illegality, Undue Influence, and Other Invalidating Causes.

Even when a writing is integrated, parol evidence is admissible to prove that the instrument is void or voidable for mistake, fraud, duress, undue influence, illegality, alteration, lack of consideration, or other invalidating causes, such as that the writing is a forgery, joke, or sham. Most of these types of problems typically do not appear on the face of the writing, and so parol evidence is needed to evaluate them [*see CCP § 1856(e)-(g)*; *Pacific State Bank v. Greene (2003) 110 CA4th 375, 387* ; *see also CC § 1640*].

Judge's Perspective:

It is important to remember that the rules allowing extrinsic evidence to show false promise, fraud, mistake, or illegality are unqualified [*see CCP § 1856*]. Unlike the admission of extrinsic evidence to show a varying interpretation of the contract, which requires the court first to determine that the contract is "reasonably susceptible" of that interpretation, extrinsic evidence is always admissible to show these infirmities.

Jury Instructions:

Contracts--Affirmative Defense--Duress, *see Judicial Council of California Civil Jury Instructions, CACI No. 332* (LexisNexis Matthew Bender).

Contracts--Affirmative Defense--Economic Duress, *see Judicial Council of California Civil Jury Instructions, CACI No. 333* (LexisNexis Matthew Bender).

Contracts--Affirmative Defense--Undue Influence, *see Judicial Council of California Civil Jury Instructions, CACI No. 334* (LexisNexis Matthew Bender).

Contracts--Affirmative Defense--Fraud, *see Judicial Council of California Civil Jury Instructions, CACI No. 335* (LexisNexis Matthew Bender).



Cross References:

Discussion of imperfection or invalidity of writing, *see 21.55*.

Discussion of fraud, duress, and similar claims, see Ch. 17, Attacking or Defending Existence of Contract--Fraud, Duress, Menace, and Undue Influence; and Ch. 18, Asserting or Defending Claim That Contract Is Illegal, Contrary to Public Policy, or Unconscionable.

Legal Topics:

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

Contracts LawContract InterpretationGeneral OverviewContracts LawContract InterpretationParol EvidenceGeneral OverviewContracts LawDefensesDuress & Undue InfluenceGeneral OverviewContracts LawDefensesFraud & MisrepresentationGeneral OverviewContracts LawDefensesIllegal Bargains



53 of 188 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 21 Asserting a Particular Construction of Contract

VI. ASSERTING OR OPPOSING USE OF EXTRINSIC EVIDENCE TO ESTABLISH TERMS OF OR TO INTERPRET CONTRACT

2-21 MB Practice Guide: CA Contract Litigation 21.52

21.52 Fraud Exception to Parol Evidence Rule Does Not Apply to False Promises That Contradict Contract Itself.

The fraud exception to the parol evidence rule [*see CCP § 1856(g)*] allows extrinsic evidence to establish the invalidity of a written agreement by an independent fact or representation, fraud in the procurement of the instrument, or a breach of confidence concerning its use. However, the fraud exception does not allow evidence of promissory fraud involving a promise directly at variance with the promise of the writing [*see Bank of Am. Nat'l Trust & Sav. Ass'n v. Pendergrass (1935) 4 C2d 258, 263, 48 P2d 659*]. "Promissory fraud" is a false promise made without any intention of performing it [*Pacific State Bank v. Greene (2003) 110 CA4th 375, 390*].

The "Pendergrass exception" to the fraud exception [*see above*] effectively provides absolute protection from liability for prior or contemporaneous statements at variance with the terms of a written integrated agreement [*Casa Herrera, Inc. v. Beydoun (2004) 32 C4th 336, 343, 83 P3d 497*].

Examples:

- In a suit by an employee against his employer for misrepresentation and fraudulent inducement of contract, the court held that the parol evidence rule did not bar the plaintiff's tort claims based on the employer's alleged false promises concerning compensation. The employer allegedly made promises about both the length of employment and compensation, which induced the employee to leave a high-paying job to work for the employer. The employer had the plaintiff sign an at-will employment agreement on starting, then reneged on the pay plan and fired the plaintiff after he complained about it. The court held that the written at-will agreement precluded parol evidence of an implied contract allowing termination only for cause. However, the court allowed evidence that the employer had never intended to honor the promises he made about compensation. The plaintiff was entitled to recover for the loss of security and income from his previous job, which was unrelated to his discharge [*Agosta v. Astor (2004) 120 CA4th 596, 605-607*].
- The Pendergrass exception does not apply to misrepresentations of fact over the content of an agreement at the time of execution. Such evidence may be admitted under *CCP § 1856(f), (g)* to

invalidate an agreement [*Pacific State Bank v. Greene* (2003) 110 CA4th 375, 392].

Legal Topics:

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

Contracts LawContract InterpretationParol EvidenceGeneral OverviewContracts LawDefensesFraud & MisrepresentationGeneral OverviewEvidenceRelevanceParol Evidence



54 of 188 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 21 Asserting a Particular Construction of Contract

VI. ASSERTING OR OPPOSING USE OF EXTRINSIC EVIDENCE TO ESTABLISH TERMS OF OR TO
INTERPRET CONTRACT

2-21 MB Practice Guide: CA Contract Litigation 21.53

21.53 Parol Evidence Rule Does Not Apply to Consumer Fraud Claims Under CC § 1770(a)(14).

The parol evidence rule does not bar claims for violation of CC § 1770(a)(14) of the Consumers Legal Remedies Act or for a violation of the Unfair Competition Law [see B&P Code § 17200] predicated on a violation of CC § 1770(a)(14) [see *Wang v. Massey Chevrolet* (2002) 97 CA4th 856, 867-871, 873, 118 CR2d 770] .

► **Cross References:**

Discussion of consumer protection statutes, see Matthew Bender[(R)] Practice Guide: California Unfair Competition and Business Torts, Ch. 2, Unfair Competition.

For more detailed discussion of consumer protection statutes, see California Forms of Pleading and Practice, Ch. 14, Advertising; Ch. 127, Consumer Contracts and Loans; Ch. 129, Consumer Credit Reporting; Ch. 369, Mobilehomes and Mobilehome Parks; Ch. 503, Sales: Secured Transactions; Ch. 501, Sales: Retail Installment Sales; Ch. 504, Sales: Consumers Legal Remedies Act; Ch. 565, Unfair Competition (Matthew Bender).

Legal Topics:

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

Antitrust & Trade LawConsumer ProtectionGeneral OverviewContracts LawContract InterpretationParol EvidenceGeneral OverviewEvidenceRelevanceParol Evidence



55 of 188 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 21 Asserting a Particular Construction of Contract

VI. ASSERTING OR OPPOSING USE OF EXTRINSIC EVIDENCE TO ESTABLISH TERMS OF OR TO
INTERPRET CONTRACT

2-21 MB Practice Guide: CA Contract Litigation 21.54

21.54 Extrinsic Evidence Is Admissible to Prove Accident or Mistake.

When, through mistake, a writing does not express the parties' intention and therefore does not contain their real contract, extrinsic evidence is necessary for the court to determine the parties' true intentions, and to determine whether the written agreement accurately represents those intentions [*Hess v. Ford Motor Co. (2002) 27 C4th 516, 525, 117 CR2d 220, 41 P3d 46*] .

Jury Instructions:

Contracts--Affirmative Defense--Unilateral Mistake of Fact, see *Judicial Council of California Civil Jury Instructions, CACI No. 330* (LexisNexis Matthew Bender).

Contracts--Affirmative Defense--Bilateral Mistake, see *Judicial Council of California Civil Jury Instructions, CACI No. 331* (LexisNexis Matthew Bender).



Cross Reference:

Discussion of mistake issues, see Ch. 16, Attacking or Defending Existence of Contract--Mistake.

Legal Topics:

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

Contracts LawContract InterpretationParol EvidenceGeneral OverviewContracts LawDefensesAmbiguity &
MistakeGeneral OverviewEvidenceRelevanceParol Evidence



56 of 188 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 21 Asserting a Particular Construction of Contract

VI. ASSERTING OR OPPOSING USE OF EXTRINSIC EVIDENCE TO ESTABLISH TERMS OF OR TO INTERPRET CONTRACT

2-21 MB Practice Guide: CA Contract Litigation 21.55

21.55 Extrinsic Evidence Is Admissible to Prove Imperfection or Invalidity of Writing.

When the validity of a written agreement is the fact in dispute, the parol evidence rule does not exclude introduction of evidence relevant to that issue [*CCP* § 1856(e), (f)]. Even when a writing is integrated, parol evidence is admissible to prove that the instrument is void or voidable for alteration or forgery [*Pacific State Bank v. Greene* (2003) 110 CA4th 375, 387 ; see *CC* § 1640].

Judge's Perspective:

It is important to remember that the rules allowing extrinsic evidence to show false promise, fraud, mistake, or illegality are unqualified [see *CCP* § 1856]. Unlike the admission of extrinsic evidence to show a varying interpretation of the contract, which requires the court first to determine that the contract is "reasonably susceptible" of that interpretation, extrinsic evidence is always admissible to show these infirmities.

► Cross References:

Discussion of admissibility of extrinsic evidence to prove fraud, duress, and illegality, see 21.51.

Discussion of statute of frauds, see Ch. 15, Attacking or Defending Existence of Contract--Failure to Comply With Applicable Formalities.

Legal Topics:

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

Contracts Law Contract Interpretation Parol Evidence General Overview Evidence Authentication General Overview Evidence Relevance Parol Evidence



57 of 188 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 21 Asserting a Particular Construction of Contract

VI. ASSERTING OR OPPOSING USE OF EXTRINSIC EVIDENCE TO ESTABLISH TERMS OF OR TO
INTERPRET CONTRACT

2-21 MB Practice Guide: CA Contract Litigation 21.56

21.56 Extrinsic Evidence Is Admissible to Prove Lack of Consideration.

Oral evidence is admissible to show want of consideration, or even partial lack of consideration, for an instrument [*Cooper v. Cooper* (1934) 3 CA2d 154, 159, 39 P2d 820].



Cross Reference:

Discussion of lack of consideration, see Ch. 13, Attacking or Defending Existence of Contract--Absence of Essential Element.

Legal Topics:

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

Contracts LawConsiderationGeneral OverviewContracts LawContract InterpretationParol EvidenceGeneral
OverviewEvidenceRelevanceParol Evidence



58 of 188 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 21 Asserting a Particular Construction of Contract

VI. ASSERTING OR OPPOSING USE OF EXTRINSIC EVIDENCE TO ESTABLISH TERMS OF OR TO
INTERPRET CONTRACT

2-21 MB Practice Guide: CA Contract Litigation 21.57

21.57 Parol Evidence Rule Does Not Bar Evidence of Contemporaneous Written Agreement.

CCP § 1856(a) does not bar evidence of a contemporaneous written agreement that contradicts the terms of a final written agreement. On the contrary, multiple written contracts relating to the same matters, between the same parties, and made as parts of substantially one transaction, are to be taken together [*CC § 1642*].

Jury Instructions:

Several Documents Interpreted Together, see *California Forms of Jury Instruction, Ch. 3B, Instr. MB 300B.06* (Matthew Bender).

Legal Topics:

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

Contracts LawContract InterpretationParol EvidenceGeneral OverviewEvidenceRelevanceParol Evidence



59 of 188 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 21 Asserting a Particular Construction of Contract

VI. ASSERTING OR OPPOSING USE OF EXTRINSIC EVIDENCE TO ESTABLISH TERMS OF OR TO INTERPRET CONTRACT

2-21 MB Practice Guide: CA Contract Litigation 21.58

21.58 Parol Evidence Rule Does Not Bar Evidence of Subsequent Changes to Written Agreement.

21.58[1] Evidence May Show Modification by Executed Oral Agreement. The parol evidence rule restricts evidence of prior and contemporaneous agreements only [see *CCP* § 1856]. Parties to a written agreement may modify the agreement by an executed oral agreement [see *CC* § 1698(b); see also *Com Code* § 2209 (applicable to contracts for sale of goods)]. The written contract remains in effect to the extent that it has not been modified [*Conley v. Matthes* (1997) 56 CA4th 1453, 1465, 66 CR2d 518]. An oral agreement that is not fully performed is unexecuted and therefore cannot modify a written contract under *CC* § 1698(b) [*Fanucchi & Limi Farms v. United Agri Prods.* (9th Cir 2005) 414 F3d 1075, 1080-1081].

If there is sufficient consideration for an oral modification agreement, full performance by the promisee suffices to render the agreement executed and therefore enforceable under *CC* § 1698 [*Raedeke v. Gibraltar Sav. & Loan Ass'n* (1974) 10 C3d 665, 673, 111 CR 693, 517 P2d 1157].

Jury Instructions:

Contracts--Modification, see *Judicial Council of California Civil Jury Instructions*, CACI No. 313 (LexisNexis Matthew Bender).

21.58[2] Evidence May Show Modification by Oral Agreement Supported by New Consideration. A written contract may be modified by an oral agreement supported by new consideration, unless the contract provides otherwise [*CC* § 1698(c); see *Com Code* § 2209 (applicable to contracts for sale of goods)]. The parol evidence rule restricts evidence of prior and contemporaneous agreements only [see *CCP* § 1856].

Example:

A written loan agreement providing that it "may not be contradicted by evidence of any prior, contemporaneous, or subsequent oral agreements or understandings of the parties" could not be modified by an oral agreement [*Fanucchi & Limi Farms v. United Agri Prods.* (9th Cir 2005) 414 F3d 1075, 1081].

Jury Instructions:

Contracts--Modification, see *Judicial Council of California Civil Jury Instructions*, CACI No. 313

(LexisNexis Matthew Bender).

21.58[3] Evidence May Show Novation. The parol evidence rule does not invalidate a new oral agreement (a novation) made after a written contract has been orally abrogated [*Santa Clara Sand & Gravel Co. v. State Bd. of Equalization* (1964) 225 CA2d 676, 680, 37 CR 506].

Although there is language in the cases stating that a novation must be proved by clear and convincing evidence [see, e.g., *Fanucchi & Limi Farms v. United Agri Prods.* (9th Cir 2005) 414 F3d 1075, 1081-1082 ; *Alexander v. Angel* (1951) 37 C 856, 860-861,,], the California Judicial Council Commentary to CACI No. 337 takes the position that the original use of the term "clear and convincing" simply meant that a "novation must clearly be shown and may not be presumed" [Directions for Use, see *Judicial Council of California Civil Jury Instructions, CACI No. 337* (LexisNexis Matthew Bender); see *Columbia Casualty Co. v. Lewis* (1936) 14 C2d 64, 72,,]. "Thus, a party alleging novation must prove that the facts supporting the novation are more likely to be true than not true" [Directions for Use, see *Judicial Council of California Civil Jury Instructions, CACI No. 337* (LexisNexis Matthew Bender)].

Jury Instructions:

Contracts--Affirmative Defense--Novation, see *Judicial Council of California Civil Jury Instructions, CACI No. 337* (LexisNexis Matthew Bender).

21.58[4] Evidence May Show Discharge or Release. Parol evidence is admissible in determining the intention of the parties in giving and accepting a discharge or release [*Jack v. Wood* (1968) 258 CA2d 639, 648, 65 CR 856 ; cf. CC § 1541 (general release does not extend to claims creditor does not know of or suspect at time of executing release)]. The parol evidence rule does not preclude future negotiations; any contract, however made or evidenced, can be discharged or modified by subsequent agreement of the parties [*Chohon v. Kersey Kinsey Co.* (1959) 173 CA2d 548, 552, 343 P2d 614] .

Legal Topics:

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

Contracts LawContract InterpretationParol EvidenceGeneral OverviewEvidenceRelevanceParol Evidence



60 of 188 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 21 Asserting a Particular Construction of Contract

VII. ASSERTING OR OPPOSING CONSTRUCTION OF CONTRACT TERM AGAINST DRAFTER

2-21 MB Practice Guide: CA Contract Litigation 21.59

21.59 CHECKLIST: Asserting or Opposing Construction of Contract Term Against Drafter.

☐ If other canons of construction do not resolve interpretation dispute, argue that court should construe contract against drafter.

Authority:

CC § 1654

Discussion:

See 21.61

☐ Rule applies with extra force if drafter is lawyer and contract is with lawyer's client.

Authority:

Mayhew v. Benninghoff (1997) 53 CA4th 1365, 1370, 62 CR2d 27

Discussion:

See 21.62

☐ Rule does not apply if contract was jointly drafted.

Authority:

Mitchell v. Exhibition Foods, Inc. (1960) 184 CA3d 1033, 1042, 229 CR 535

Discussion:

See 21.63

☐ Argue that court should not enforce contract because it is an adhesion contract that is not within weaker party's reasonable expectations.

Authority:

Fischer v. First Int'l Bank (2003) 109 CA4th 1433, 1446

Discussion:

See 21.64

- ☐ Argue that court should not enforce contract because it is unconscionable.

Authority:

Armendariz v. Foundation Health Psychcare Servs., Inc. (2000) 24 C4th 83, 113, 99 CR2d 745, 6 P3d 669

Discussion:

See 21.65

- ☐ If applicable, review special rules for construction of insurance contracts.

Authority:

Equitable Life Assurance Soc'y v. Berry (1989) 212 CA3d 832, 837, 260 CR 819

Discussion:

See 21.66

Legal Topics:

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

Contracts LawContract InterpretationGeneral OverviewContracts LawContract InterpretationAmbiguities & Contra ProferentemGeneral OverviewContracts LawDefensesUnconscionabilityGeneral OverviewContracts LawTypes of ContractsAdhesion Contracts



61 of 188 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 21 Asserting a Particular Construction of Contract

VII. ASSERTING OR OPPOSING CONSTRUCTION OF CONTRACT TERM AGAINST DRAFTER

2-21 MB Practice Guide: CA Contract Litigation 21.60

21.60 Options and Strategy.

When other contract interpretations do not fully remove uncertainty regarding a contract's terms, *CC § 1654* provides that a contract is to be construed against the drafting party [see 21.61]. This is especially true if the contract was drafted by a lawyer [see 21.62]. In these cases, the party who did not draft the contract has the most leverage. Typically this will be a consumer or other private person, asserting this rule against a business or lawyer.

If applicable, a private party will want to urge that the contract was a contract of adhesion (that is, not subject to negotiation on any point), and that further it was both procedurally and substantively unconscionable, resulting in the contract's nonenforcement [see 21.64, 21.65]. Special rules apply to insurance contracts [see 21.66].

The party alleged to have drafted the contract, and against whom it would otherwise be construed, will want to argue that the parties were on equal footing (such as two businesses of equal bargaining power), and the contract was freely negotiated and jointly drafted, this rule of interpretation is inapplicable [see 21.63].

Legal Topics:

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

Contracts LawContract InterpretationGeneral OverviewContracts LawContract InterpretationAmbiguities & Contra ProferentemGeneral OverviewContracts LawTypes of ContractsAdhesion Contracts



62 of 188 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 21 Asserting a Particular Construction of Contract

VII. ASSERTING OR OPPOSING CONSTRUCTION OF CONTRACT TERM AGAINST DRAFTER

2-21 MB Practice Guide: CA Contract Litigation 21.61

21.61 Agreement Is Construed Against Drafter When Other Canons Fail.

In cases of uncertainty not removed by the other interpretation rules, the language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist [*CC* § 1654; *see also* *Sweat v. Big Time Auto Racing, Inc.* (2004) 117 CA4th 1301, 1306 ; *Oceanside 84, Ltd. v. Fidelity Fed. Bank* (1997) 56 CA4th 1441, 1448]. This rule applies only when there is no extrinsic evidence available to aid in the interpretation of the contract, or when the uncertainty cannot be remedied by other rules of interpretation [*Rainier Credit Co. v. Western Alliance Corp.* (1985) 171 CA3d 255, 264, 217 CR 291] .

Jury Instructions:

Contracts--Interpretation--Construction Against Drafter, *see* *Judicial Council of California Civil Jury Instructions, CACI No. 320* (LexisNexis Matthew Bender).



Cross Reference:

California Forms of Pleading and Practice, Ch. 308, Insurance (Matthew Bender).

Legal Topics:

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

Contracts LawContract InterpretationGeneral OverviewContracts LawContract InterpretationAmbiguities & Contra ProferentemGeneral Overview



63 of 188 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 21 Asserting a Particular Construction of Contract

VII. ASSERTING OR OPPOSING CONSTRUCTION OF CONTRACT TERM AGAINST DRAFTER

2-21 MB Practice Guide: CA Contract Litigation 21.62

21.62 Principle Applies With Greater Force When Drafter Is Lawyer.

The doctrine of construing ambiguous agreements against the drafter applies with even greater force when the person who prepared the writing is a lawyer, especially if the contract is between the lawyer and the client [*Mayhew v. Benninghoff* (1997) 53 CA4th 1365, 1370, 62 CR2d 27] . In *Mayhew v. Benninghoff*, which involved the fiduciary duty of a lawyer in a side business transaction with a client, the court stated that "[a]ttorneys wear different hats when they perform legal services on behalf of their clients and when they conduct business with them. As to the latter, the law presumes the hat they wear is a black one" [*Mayhew v. Benninghoff* (1997) 53 CA4th 1365, 1369, 62 CR2d 27] .

Exception:

This principle should not apply when both parties to an agreement are lawyers of similar sophistication or specialty [see 21.63].

► Cross References:

Discussion of parties' legal sophistication, use of legal counsel as evidence of contract integration, see 21.46[5].

Discussion of rules of contract interpretation, see 21.13 -21.31.

Legal Topics:

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

Contracts LawContract InterpretationGeneral OverviewContracts LawContract InterpretationAmbiguities & Contra ProferentemGeneral Overview



64 of 188 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 21 Asserting a Particular Construction of Contract

VII. ASSERTING OR OPPOSING CONSTRUCTION OF CONTRACT TERM AGAINST DRAFTER

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21.63 Principle Does Not Apply to Jointly Drafted Contract.

When an ambiguous provision was the product of the parties' joint drafting effort and the parties stand on equal footing, there is no basis for construing against the drafter [see *Mitchell v. Exhibition Foods, Inc.* (1960) 184 CA3d 1033, 1042, 229 CR 535] .

➡ **Cross Reference:**

Discussion of parties' legal sophistication, use of legal counsel as evidence of contract integration, see 21.46[5].

Legal Topics:

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

Contracts LawContract InterpretationGeneral OverviewContracts LawContract InterpretationAmbiguities & Contra ProferentemGeneral Overview



65 of 188 DOCUMENTS

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Chapter 21 Asserting a Particular Construction of Contract

VII. ASSERTING OR OPPOSING CONSTRUCTION OF CONTRACT TERM AGAINST DRAFTER

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21.64 Adhesion Contract Outside Weaker Party's Reasonable Expectations Will Not Be Enforced.

Contracts of adhesion generally are enforceable according to their terms, but a provision in such a contract cannot be enforced if it does not fall within the reasonable expectations of the weaker or "adhering" party [*Fischer v. First Int'l Bank* (2003) 109 CA4th 1433, 1446].

The term "contract of adhesion" refers to a standardized contract prepared entirely by one party for acceptance by the other party. Because of a great disparity in bargaining power between the parties, a contract of adhesion embodies an offer the second party must accept or reject on a "take it or leave it" basis without an opportunity to bargain and under such conditions that the party accepting (or adhering to) the offer cannot obtain the product or service except by acquiescing to the form agreement [*Steven v. Fidelity & Cas. Co.* (1962) 58 C2d 862, 882, 27 CR 172, 377 P2d 284] .

Distinguish:

Adhesion contracts are usually procedurally unconscionable, but are not necessarily substantively unconscionable [*Flores v. Transamerica Homefirst Inc.* (2001) 93 CA4th 846, 852-853, 113 CR2d 376 ; see 21.65 (analysis of unconscionable contracts)].



Cross Reference:

Discussion of adhesion contracts, see Ch. 18, Asserting or Defending Claim That Contract Is Illegal, Contrary to Public Policy, or Unconscionable.

Legal Topics:

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

Contracts LawContract InterpretationGeneral OverviewContracts LawTypes of ContractsAdhesion Contracts



66 of 188 DOCUMENTS

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Chapter 21 Asserting a Particular Construction of Contract

VII. ASSERTING OR OPPOSING CONSTRUCTION OF CONTRACT TERM AGAINST DRAFTER

2-21 MB Practice Guide: CA Contract Litigation 21.65

21.65 Unconscionable Contract Will Not Be Enforced.

A contract or provision, including an adhesion contract, even if consistent with the parties' reasonable expectations, will not be enforced if, considered in its context, it is unduly oppressive or unconscionable [*Armendariz v. Foundation Health Psychcare Servs., Inc.* (2000) 24 C4th 83, 113, 99 CR2d 745, 6 P3d 669].

Determining whether a particular contractual provision is unconscionable has both a procedural and a substantive element. The procedural element focuses on oppression or surprise. "Oppression" arises from an inequality of bargaining power that results in no real negotiation and an absence of meaningful choice. "Surprise" involves the extent to which the supposedly agreed-on terms are hidden in a prolix printed form drafted by the party seeking to enforce them. The substantive element has to do with the effects of the contractual terms and whether they are overly harsh or one-sided [*Flores v. Transamerica Homefirst Inc.* (2001) 93 CA4th 846, 852-853, 113 CR2d 376 ; see *A & M Produce Co. v. FMC Corp.* (1982) 135 CA3d 473, 486-491, 186 CR 114] .

Analysis of unconscionability begins with an inquiry into whether the contract was a contract of adhesion--a standardized contract, imposed on the subscribing party without an opportunity to negotiate the terms. A finding of a contract of adhesion is essentially a finding of procedural unconscionability. However, this does not mean that an adhesion contracts will necessarily involve substantive unconscionability, which depends on the terms of the particular contract [*Flores v. Transamerica Homefirst Inc.* (2001) 93 CA4th 846, 853, 113 CR2d 376 ; see 21.64 (adhesion contracts)].



Cross Reference:

More detailed discussion of voiding adhesion contracts, see Ch. 18, Asserting or Defending Claim That Contract Is Illegal, Contrary to Public Policy, or Unconscionable.

Legal Topics:

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

Contracts LawContract InterpretationGeneral OverviewContracts LawContract InterpretationAmbiguities & Contra ProferentemGeneral OverviewContracts LawDefensesUnconscionabilityGeneral OverviewContracts

LawDefensesUnconscionabilityAdhesion Contracts



67 of 188 DOCUMENTS

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Chapter 21 Asserting a Particular Construction of Contract

VII. ASSERTING OR OPPOSING CONSTRUCTION OF CONTRACT TERM AGAINST DRAFTER

2-21 MB Practice Guide: CA Contract Litigation 21.66

21.66 Special Construction Rules Apply to Insurance Contracts.

The canons of construction governing insurance contracts are independently applied even though the applicable principles grew out of the law relating to contracts of adhesion [*Equitable Life Assurance Soc'y v. Berry* (1989) 212 CA3d 832, 837, 260 CR 819] .



Cross References:

California Forms of Pleading and Practice, Ch. 308, Insurance (Matthew Bender).

California Points and Authorities, Ch. 120, Insurance (Matthew Bender).

Legal Topics:

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

Contracts LawContract InterpretationGeneral OverviewInsurance LawClaims & ContractsPolicy InterpretationGeneral OverviewInsurance LawClaims & ContractsPolicy InterpretationAdhesion Contracts



68 of 188 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 21 Asserting a Particular Construction of Contract
VIII. SUPPLYING MISSING TERMS OR ASSERTING IMPLIED TERMS

2-21 MB Practice Guide: CA Contract Litigation 21.67

21.67 CHECKLIST: Supplying Missing Terms or Asserting Implied Terms.

☐ Argue that court's job is to interpret contract, not to insert terms that have been omitted or omit terms that have been inserted.

Authority:

CCP § 1858

Discussion:

See 21.69

☐ Request that party with discretion to do so fill in open contract terms within standard of good faith and fair dealing.

Authority:

Perdue v. Crocker Nat'l Bank (1985) 38 C3d 913, 924, 216 CR 345, 702 P2d 503

Discussion:

See 21.75

☐ If term essential to determining parties' rights is missing, propose reasonable term for court to supply.

Authority:

CC §§ 1655, 1656; Okun v. Morton (1988) 203 CA3d 805, 817, 250 CR 220

Discussion:

See 21.72

☐ Draw inferences from contract and extrinsic evidence to supply missing terms.

Authority:

CC §§ 1655, 1656; Okun v. Morton (1988) 203 CA3d 805, 817, 250 CR 220

Discussion:

See 21.72

- ☐ Resolve uncertainty by applying rules of contract interpretation.

Authority:

CC §§ 1635-1663; CCP §§ 1856-1866

Discussion:

See 21.73

- ☐ Introduce evidence of parties' course of performance before controversy arose as evidence of their intentions.

Authority:

CCP § 1856(c)

Discussion:

See 21.24, 21.49, 21.74

- ☐ Argue that missing term in question is essential to agreement.

Authority:

Third Story Music, Inc. v. Waits (1995) 41 CA4th 798, 804, 48 CR2d 747

Discussion:

See 21.70

- ☐ Demonstrate that subject is not completely covered in agreement, so that additional term may be implied.

Authority:

CC §§ 1655, 1656; Third Story Music, Inc. v. Waits (1995) 41 CA4th 798, 804, 48 CR2d 747

Discussion:

See 21.70

- ☐ Look to statute or policy for implied term.

Authority:

CC §§ 1655, 1656

Discussion:

See 21.71

- ☐ Look to laws in existence at execution of contract for implied terms.

Authority:

California Ass'n of Highway Patrolmen v. Department of Pers. Admin. (1986) 185 CA3d 352, 364, 229 CR 729 ; *Torrance v. Workers' Comp. Appeals Bd.* (1982) 32 C3d 371, 379, 185 CR 645, 650 P2d 1162 , *appeal dismissed*, 461 US 921 (1983)

Discussion:

See 21.76, 21.77

- ☐ Show that both parties considered missing term obvious.

Authority:

Third Story Music, Inc. v. Waits (1995) 41 CA4th 798, 804, 48 CR2d 747 ; CC §§ 1655, 1656

Discussion:

See 21.70

- ☐ Show that implied term does not vary express terms.

Authority:

Bionghi v. Metropolitan Water Dist. (1999) 70 CA4th 1358, 1368 n6, 83 CR2d 388

Discussion:

See 21.78

- ☐ Remember that duty of good faith and fair dealing is implied in every contract.

Authority:

Cates Constr., Inc. v. Talbot Partners (1999) 21 C4th 28, 43, 86 CR2d 855, 980 P2d 407

Discussion:

See 21.79

Legal Topics:

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

Contracts LawContract InterpretationGeneral OverviewContracts LawContract InterpretationParol EvidenceGeneral Overview



69 of 188 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 21 Asserting a Particular Construction of Contract
VIII. SUPPLYING MISSING TERMS OR ASSERTING IMPLIED TERMS

2-21 MB Practice Guide: CA Contract Litigation 21.68

21.68 Options and Strategy.

To avoid asking the court explicitly to fill a gap in a contract, a concerned party should consider whether to propound a broad reading of the contract's express terms [see 21.69]. If this method is not successful, then, although implied covenants are disfavored, contract terms may be implied by statutes of public policy, and accordingly may be asserted [see 21.70, 21.71]. The general rule provides that existing laws (as of the time of formation) are implied in a contract, not laws later enacted [see 21.72, 21.73]. Note that implied terms cannot alter express terms [see 21.78]. A party wishing to clarify or expand the terms in the contract can assert any of these matters to complete the coverage of the contract.



Strategic Point:

A party challenging any such clarification or expansion will want to assert, as in other cases, that the contract is clear, complete, and fully integrated and not subject to further interpretation. Such a party may argue that there are no missing terms, and no terms need to be implied to complete the contract. Further, such a party can challenge that any provision of implied or missing terms amounts to an improper judicial rewriting of the contract, altering the express terms of the contract [see 21.78].

Both parties are subject to a duty of good faith and fair dealing, and a party that has discretion to fill in contract terms must do so in good faith. Either party may readily assert that the other party has not met the standard of good faith and fair dealing [see 21.75, 21.79].

Legal Topics:

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

Commercial Law (UCC) General Provisions (Article 1) Application & Construction Gap-Filler Provisions Contracts Law Contract Interpretation General Overview Contracts Law Contract Interpretation Parol Evidence General Overview



70 of 188 DOCUMENTS

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Chapter 21 Asserting a Particular Construction of Contract
VIII. SUPPLYING MISSING TERMS OR ASSERTING IMPLIED TERMS

2-21 MB Practice Guide: CA Contract Litigation 21.69

21.69 Court Will Not Insert Omitted Terms or Omit Inserted Terms.

The judge's role is simply to ascertain and declare what is in the agreement [*CCP § 1858*].

Jury Instructions:

Contracts--Implied-in-Fact Contract, see *Judicial Council of California Civil Jury Instructions, CACI No. 305* (LexisNexis Matthew Bender).

Contracts--Unformalized Agreement, see *Judicial Council of California Civil Jury Instructions, CACI No. 306* (LexisNexis Matthew Bender).

➡ Cross Reference:

Discussion of essential elements of valid contract, see Ch. 13, *Attacking or Defending Existence of Contract--Absence of Essential Element*.

Legal Topics:

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

Commercial Law (UCC)General Provisions (Article 1)Application & ConstructionGap-Filler ProvisionsContracts
LawContract InterpretationGeneral OverviewContracts LawContract InterpretationParol EvidenceGeneral Overview



71 of 188 DOCUMENTS

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Chapter 21 Asserting a Particular Construction of Contract
VIII. SUPPLYING MISSING TERMS OR ASSERTING IMPLIED TERMS

2-21 MB Practice Guide: CA Contract Litigation 21.70

21.70 Implied Covenants Are Disfavored.

Before a court will imply a covenant in an agreement, all of the following conditions must exist [*Third Story Music, Inc. v. Waits* (1995) 41 CA4th 798, 804, 48 CR2d 747 ; CC §§ 1655, 1656]:

- The implication must arise from the language used or it must be indispensable to effectuate the intention of the parties;
- It must appear from the language used that it was so clearly within the contemplation of the parties that they deemed it unnecessary to express it;
- Inclusion of the covenants is justified only on the grounds of legal necessity; and
- It can be rightfully assumed that the covenant would have been made if attention had been called to it.

A court will not imply a covenant simply because the proposed implied provision is necessary to make the contract fair or that without such covenant, the contract will operate unjustly [*In re Marriage of Corona* (2009) 172 CA4th 1205, 1223, 92 CR3d 17 (rejecting husband's claim that marital settlement agreement requiring the husband to pay half of the wife's income tax obligation should be interpreted to include an implied requirement that the wife select a tax filing status that minimized her tax liability)].

There can be no implied covenant when the subject is completely covered by the contract [*Third Story Music, Inc. v. Waits* (1995) 41 CA4th 798, 804, 48 CR2d 747] .



Cross Reference:

Discussion of role of parties' intentions in interpretation of contract, see 21.14.

Legal Topics:

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

Contracts LawContract Conditions & ProvisionsImplied WarrantiesGeneral OverviewContracts LawContract InterpretationGeneral OverviewContracts LawTypes of ContractsCovenants



72 of 188 DOCUMENTS

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Chapter 21 Asserting a Particular Construction of Contract
VIII. SUPPLYING MISSING TERMS OR ASSERTING IMPLIED TERMS

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21.71 Term May Be Implied by Statute or Policy.

When a contract is governed by a statutory scheme, specific contract terms may be required by statute [*see CC §§ 1655, 1656*].

Example:

Contracts for the sale of goods are governed by an extensive body of law in Division 2 of the Uniform Commercial Code [*see, e.g., Com Code § 2101 et seq.*].



Cross Reference:

Discussion of specific terms required by statute, see Ch. 13, Attacking or Defending Existence of Contract--Absence of Essential Element.

Legal Topics:

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



73 of 188 DOCUMENTS

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Chapter 21 Asserting a Particular Construction of Contract
VIII. SUPPLYING MISSING TERMS OR ASSERTING IMPLIED TERMS

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21.72 Court May Choose Among Conflicting Meanings and Fill Gaps in Contract.

In an effort to supply a deficiency in an agreement, the following may be used as a source of missing terms if they do not alter or vary the terms of the agreement [see *Binder v. Aetna Life Ins. Co.* (1999) 75 CA4th 832, 852, 89 CR2d 540 ; see also *Okun v. Morton* (1988) 203 CA3d 805, 817, 250 CR 220]:

- The usual and reasonable terms found in similar contracts.
- Unexpressed provisions may be inferred from the writing.
- Relevant external facts.
- Custom and usage of trade.

Stipulations necessary to make a contract reasonable or conformable to usage are implied if the contract manifests no contrary intention [CC § 1655]. All things that in law or usage are considered incidental to a contract or necessary to carry it into effect are implied from the contract unless some are expressly mentioned, in which case all other things of the same class are deemed to be excluded [CC § 1656].



Cross References:

Discussion of rules of contract interpretation, see 21.13 -21.31.

Alleging and proving contract ambiguities, see 21.32 -21.37.

Effect of missing contract term, see Ch. 13, Attacking or Defending Existence of Contract--Absence of Essential Element.

Legal Topics:

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

Commercial Law (UCC)General Provisions (Article 1)Application & ConstructionGap-Filler ProvisionsContracts
LawContract InterpretationGeneral Overview



74 of 188 DOCUMENTS

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Chapter 21 Asserting a Particular Construction of Contract
VIII. SUPPLYING MISSING TERMS OR ASSERTING IMPLIED TERMS

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21.73 Contract Interpretation Rules May Resolve Uncertainty.

The rules of interpretation of written contracts [see *CC* §§ 1635-1663; *CCP* §§ 1856-1866] are for the purpose of ascertaining the meaning of the words used in the contracts. Evidence cannot be admitted to show any intention independent of the contract instrument [*Department of Indus. Relations v. UI Video Stores, Inc.* (1997) 55 CA4th 1084, 1094, 64 CR2d 457].

 Cross Reference:

Discussion of rules of contract interpretation, see 21.13 -21.31.

Legal Topics:

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



75 of 188 DOCUMENTS

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Chapter 21 Asserting a Particular Construction of Contract
VIII. SUPPLYING MISSING TERMS OR ASSERTING IMPLIED TERMS

2-21 MB Practice Guide: CA Contract Litigation 21.74

21.74 Parties' Course of Performance Under Contract Before Controversy Is Evidence of Their Intention.

The terms of a writing can be explained or supplemented by course of dealing or usage of trade or by course of performance [*CCP* § 1856(c)].

► **Cross References:**

Discussion of role of course of dealing, trade usage, and course of performance in interpretation, see 21.24.

Extrinsic evidence admissible to establish course of dealing, trade usage, and course of performance, see 21.49.

Parties' conduct may render contract enforceable, see Ch. 13, Attacking or Defending Existence of Contract--Absence of Essential Element.

Legal Topics:

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

Contracts LawContract InterpretationGeneral OverviewContracts LawContract InterpretationParol EvidenceCourse of Dealing



76 of 188 DOCUMENTS

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Chapter 21 Asserting a Particular Construction of Contract
VIII. SUPPLYING MISSING TERMS OR ASSERTING IMPLIED TERMS

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21.75 Party With Discretion to Fill in Terms Must Do So in Good Faith.

If an agreement permits one party to unilaterally determine a term of the contract, that party must exercise its discretion in good faith in an objectively reasonable way [*Perdue v. Crocker Nat'l Bank* (1985) 38 C3d 913, 923-924, 216 CR 345, 702 P2d 503 ; cf. *Third Story Music, Inc. v. Waits* (1995) 41 CA4th 798, 804-808, 48 CR2d 747 (duty to act in good faith does not necessarily mean parties' original agreement was good bargain, or that it will be altered if it was a bad bargain)].

Jury Instructions:

Implied Covenant of Good Faith and Fair Dealing Requires Party to Act Reasonably in Exercising Discretionary Power, see *California Forms of Jury Instruction, Ch. 3B, Instr. MB 300B.09* (Matthew Bender).



Cross References:

Discussion of covenant of good faith and fair dealing, see 21.79.

Legal Topics:

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

Contracts LawContract InterpretationGeneral OverviewContracts LawContract InterpretationGood Faith & Fair Dealing



77 of 188 DOCUMENTS

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Chapter 21 Asserting a Particular Construction of Contract
VIII. SUPPLYING MISSING TERMS OR ASSERTING IMPLIED TERMS

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21.76 Laws in Existence at Execution Are Implied Into Contract.

Ordinarily, all applicable laws in existence when an agreement is made enter into the contract and form a part of it, without any stipulation to that effect [*Edwards v. Arthur Andersen LLP* (2008) 44 C4th 937, 954, 81 CR3d 282, 189 P3d 285 (interpreting a contract provision releasing "any and all" claims not to encompass nonwaivable statutory protections, such as the employee indemnity protection of *Lab Code § 2802*)]. "Existing law" includes decisions of the appellate courts interpreting statutes [*California Ass'n of Highway Patrolmen v. Department of Pers. Admin.* (1986) 185 CA3d 352, 364, 229 CR 729].

Legal Topics:

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



78 of 188 DOCUMENTS

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Chapter 21 Asserting a Particular Construction of Contract
VIII. SUPPLYING MISSING TERMS OR ASSERTING IMPLIED TERMS

2-21 MB Practice Guide: CA Contract Litigation 21.77

21.77 Laws Enacted After Execution Ordinarily Are Not Implied Into Contract.

Laws enacted after execution of an agreement ordinarily are not deemed part of the agreement unless the language of the agreement clearly indicates that was the parties' intention [*Torrance v. Workers' Comp. Appeals Bd. (1982) 32 C3d 371, 379, 185 CR 645, 650 P2d 1162*].

Legal Topics:

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



79 of 188 DOCUMENTS

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Chapter 21 Asserting a Particular Construction of Contract
VIII. SUPPLYING MISSING TERMS OR ASSERTING IMPLIED TERMS

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21.78 Implied Terms Cannot Vary Express Terms.

It is not possible to have a valid express contract and a valid implied contract, each embracing the same subject but requiring different results; the terms of the express contract control [*Bionghi v. Metropolitan Water Dist. (1999) 70 CA4th 1358, 1368 n6, 83 CR2d 388*] .

➡ **Cross Reference:**

Discussion of parol evidence rule, see 21.38 -21.58.

Legal Topics:

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

Contracts LawContract InterpretationGeneral OverviewContracts LawContract InterpretationAmbiguities & Contra ProferentemGeneral OverviewContracts LawContract InterpretationParol EvidenceGeneral Overview



80 of 188 DOCUMENTS

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Chapter 21 Asserting a Particular Construction of Contract
VIII. SUPPLYING MISSING TERMS OR ASSERTING IMPLIED TERMS

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21.79 Duty of Good Faith and Fair Dealing Is Implied in Every Contract.

A covenant of good faith and fair dealing is implicit in every contract. The essence of the implied covenant is that neither party to a contract will do anything to injure the right of the other to receive the benefits of the contract [*Cates Constr., Inc. v. Talbot Partners* (1999) 21 C4th 28, 43, 86 CR2d 855, 980 P2d 407] .

Jury Instructions:

Contracts--Breach of Covenant of Good Faith and Fair Dealing--Essential Factual Elements, see Judicial Council of California *Civil Jury Instructions*, CACI No. 325 (LexisNexis Matthew Bender).

Implied Covenant of Good Faith and Fair Dealing, see *California Forms of Jury Instruction*, Ch. 3B, Instr. MB 300B.08 (Matthew Bender).

➤ Cross References:

Discussion of duty of party with discretionary power, see 21.75.

Discussion of duty of good faith and fair dealing, see Ch. 23, Suing or Defending Action for Breach of Duty of Good Faith and Fair Dealing.

Legal Topics:

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

Contracts LawContract InterpretationGeneral OverviewContracts LawContract InterpretationGood Faith & Fair Dealing



81 of 188 DOCUMENTS

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Chapter 21 Asserting a Particular Construction of Contract
IX. FORMS

2-21 MB Practice Guide: CA Contract Litigation 21.80

21.80 Answer to Complaint for Breach of Contract With Affirmative Defense Based on Contract Interpretation.**Answer to Complaint for Breach of Contract With Affirmative Defense Based on Contract Interpretation.**

_____[Name of attorney]
 _____[Street address]
 _____[City, state, and ZIP]
 _____[Area code and phone number]
 _____[State Bar no. of attorney]
 Attorney for _____[name of party]

SUPERIOR COURT OF CALIFORNIA,
 COUNTY OF _____

[name] _____,	)	
Plaintiff,	)	NO.
vs.	)	_____
[name] _____,	)	_____
Defendant.	)	ANSWER OF
	)	_____
	)	_____ [identify defendant, e.g.,
		DEFENDANT MARY JONES] TO COMPLAINT
		OF
		_____ [identify plaintiff, e.g.,
		PLAINTIFF JOHN SMITH]
		[LIMITED CIVIL CASE]
		Judge:

		Department:

Defendant answers the complaint as follows:

[Include general denial below, or set forth, in numbered paragraphs, specific denials, admissions, and allegations in response to those in complaint, in the order in which they are alleged in complaint:]

1. Pursuant to *Code of Civil Procedure Section 431.30(b)(1)*, Defendant generally denies each and every allegation of Plaintiff's Complaint, including all the purported causes of action contained therein, and further denies that Plaintiff is entitled to any equitable or legal relief, or any damages whatsoever.

[Defendant asserts the following affirmative defenses. By doing so, Defendant shall not be deemed to have assumed the burden of proving any matters that otherwise would be Plaintiff's burden.]

[Allege any affirmative defenses, e.g.,]

[EITHER, if alleging affirmative defense that contract is too ambiguous to be enforced]

FIRST AFFIRMATIVE DEFENSE

(Ambiguity of Contract)

2. The *[alleged]* contract referenced in Plaintiff's complaint is so ambiguous as to be unenforceable in whole or in part [in that *(specify nature of ambiguity)* _____].

[OR, if asserting particular construction of contract and asking court to act pursuant to its terms]

SECOND AFFIRMATIVE DEFENSE

(Plaintiff Not Entitled to Recovery Under Terms of Contract *[or specify another, more specific description of defense]*)

2. Paragraph *[or Section]* _____ *[number]* of the *[alleged]* _____ contract referenced in Plaintiff's complaint provides that _____ *[state what contract provides, e.g., that all disputes arising out of Plaintiff's employment are subject to mandatory arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association as modified by the employment agreement].* _____ *[State defendant's interpretation of contract term in light of the relevant facts, and specify how that interpretation negates plaintiff's right to recover; e.g., Plaintiff's claim is one "arising out of" Plaintiff's employment, and this court therefore lacks jurisdiction over Plaintiff's claim].*

[ADD additional affirmative defenses, if any]

[CONTINUE]

WHEREFORE, Defendant prays as follows:

1. That Plaintiff take nothing by his/her complaint herein;
2. For costs of suit; and
3. For such other and further relief as the court deems proper.

Dated: _____

_____ [firm name, if any]

By: _____ [signature]

_____ [typed name]

Attorney for Defendant _____

[ADD verification, if applicable, such as when complaint is verified]

VERIFICATION

I am the defendant in the above entitled action; I have read the foregoing answer and know the contents thereof. The same is true of my own knowledge, except as to those matters that are stated therein on information and belief, and, as to those matters, I believe it to be true.

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

_____ [date]

_____ [signature]

_____ [typed name]

NOTES.

Authority:

CCP § 431.30(b)(2); CC § 1550

Raising Affirmative Defenses in Answer:

See 21.04[2][e]

Legal Topics:

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

Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsAffirmative DefensesGeneral OverviewCivil
ProcedurePleading & PracticePleadingsAnswersContracts LawBreachCauses of ActionGeneral OverviewContracts
LawDefensesGeneral Overview

Matthew Bender Practice Guide: California Contract Litigation

Chapter 21 Asserting a Particular Construction of Contract

IX. FORMS

21.81 Notice of Motion for Summary Judgment--Parol Evidence Rule Bars Evidence of Implied Contract Alleged by Plaintiff.

Notice of Motion for Summary Judgment--Parol Evidence Rule Bars Evidence of Implied Contract Alleged by Plaintiff.

_____[Street address]
 _____[City, state, and ZIP]
 _____[Area code and phone number]
 _____[State Bar no. of attorney]
 Attorney for _____[name of party]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF

[name] _____,	)	
Plaintiff,	)	NO.
vs.	)	_____
[name] _____,	)	_____
Defendant.	)	NOTICE OF MOTION AND MOTION BY
	)	_____ [identify party, e.g., De-
	)	fendant Mary Jones] FOR SUMMARY JUDGMENT,
	)	SEPARATE STATEMENT OF UNDISPUTED
	)	FACTS, SUPPORTING MEMORANDUM, AND
	)	SUPPORTING EVIDENCE
		Date:

		Time:

2-21 MB Practice Guide: CA Contract Litigation 21.81

Location:

Judge:

Date Action Filed:

Trial Date:

_____ To [identify party, e.g., Plaintiff John Smith] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [date], at _____ [time], or as soon thereafter as the matter may be heard, in _____ (Department or Division) of this court, located at _____ [street address], _____ [city], _____ [specify party, e.g., Defendant Mary Jones] will, and hereby does, move for an order that judgment be entered in favor of _____ [specify moving party, e.g., Defendant Mary Jones] as prayed for in _____ [specify pleading, e.g., Defendant's answer]. The motion is made on the grounds that there was no implied contract between the parties, and, in any event, the extrinsic evidence proffered by the Plaintiff is barred by the parol evidence rule. The facts of the case are undisputed, the determinations of whether the parties' written agreement is integrated and whether the evidence is admissible are questions of law. There is no triable issue of material fact, and _____ [specify moving party, e.g., Defendant Mary Jones] is entitled to judgment as a matter of law.

The motion is based on this notice of motion, the attached declaration(s) of _____ [name(s)], [the affidavit(s) of (name(s)) _____], [the answers to interrogatories by (name(s)) _____], [the attached request for judicial notice], the attached separate statement of undisputed material facts, the attached memorandum, the papers, records, and file herein, and such evidence as may be presented at the hearing of the motion.

Dated: _____

_____ [firm name, if any]

By: _____ [signature]

_____ [typed name]

Attorney for _____

[specify party, e.g., Defendant Mary Jones]

NOTES.

Authority:

CCP § 437c; CC § 1550

Motion for Summary Judgment Based on Application of Parol Evidence Rule:

See 21.04[2][g]

Related Form for Declaration in Support of Motion for Summary

Judgment:

See 21.82

Legal Topics:

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

Civil ProcedureSummary JudgmentMotions for Summary JudgmentWritten MotionsCivil ProcedureSummary JudgmentNoticesContracts LawContract InterpretationParol EvidenceGeneral OverviewContracts LawTypes of ContractsImplied-in-Fact ContractsEvidenceRelevanceParol Evidence

Matthew Bender Practice Guide: California Contract Litigation

Chapter 21 Asserting a Particular Construction of Contract

IX. FORMS

21.82 Declaration in Support of Motion for Summary Judgment--Parol Evidence Rule Bars Evidence of Implied Contract Alleged by Plaintiff.

Declaration in Support of Motion for Summary Judgment--Parol Evidence Rule Bars Evidence of Implied Contract Alleged by Plaintiff.

_____[Street address]
 _____[City, state, and ZIP]
 _____[Area code and phone number]
 _____[State Bar no. of attorney]
 Attorney for _____[name of party]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF

[<i>name</i>] _____,	)	
Plaintiff,	)	NO.
vs.	)	_____
[<i>name</i>] _____,	)	_____
Defendant.	)	DECLARATION OF [<i>name</i>]
	)	_____
	)	_____ IN SUPPORT OF MO-
	)	TION FOR SUMMARY JUDGMENT
	)	Date:
	)	_____

		Time:

		Location:

Judge:

Date Action Filed:

Trial Date:

I, _____ [name], declare:

1. I am _____ [identify declarant, e.g., the Defendant in the above-entitled action or other statement as appropriate].

2. _____ [Here and in subsequent paragraphs state evidentiary facts with particularity, to establish that defendant's actions cannot reasonably be viewed as giving rise to implied contract, e.g., The employee handbook contained prominent statements that employment was at will; Plaintiff signed yearly acknowledgments of at-will status; and Defendant never gave any assurances of job security].

3. _____ [Here and in subsequent paragraphs state evidentiary facts with particularity, to establish that written agreement is fully integrated, so parol evidence rule bars any proof of implied agreement that would vary, supplement, or contradict it, e.g., The parties negotiated the terms of their written agreement; it contains an integration clause and a provision prohibiting oral modifications; Plaintiff is legally sophisticated; and the clear and unambiguous wording of the written agreement is not reasonably susceptible to the meaning asserted by Plaintiff].

4. I have personal knowledge of the foregoing facts, and if called as a witness can and will competently testify to them under oath.

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

_____ [date]

_____ [signature]

_____ [typed name]

NOTES.

Authority:

CCP § 437c; CC § 1550

Motion for Summary Judgment Based on Application of Parol Evidence Rule:

See 21.04[2][g]

Determination That Agreement Is Integrated:

See 21.44 -21.46

Related Notice of Motion for Summary Judgment:

See 21.81

Discussion and Forms Concerning Affidavits and Declarations:

See California Forms of Pleading and Practice, Ch. 15, Affidavits, Certificates, and Declarations
(Matthew Bender)

Legal Topics:

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

Civil ProcedureSummary JudgmentSupporting MaterialsAffidavitsContracts LawContract InterpretationParol
EvidenceGeneral OverviewContracts LawTypes of ContractsImplied-in-Fact ContractsEvidenceRelevanceParol
Evidence



84 of 188 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 21 Asserting a Particular Construction of Contract
IX. FORMS

2-21 MB Practice Guide: CA Contract Litigation 21.83

21.83 Memorandum--Contract Is Ambiguous.

Memorandum--Contract Is Ambiguous.

[Include following, if appropriate under circumstances of case, in memorandum by party proffering extrinsic evidence.]

WHEN A CONTRACT IS AMBIGUOUS OR UNCERTAIN, THE PARTIES MUST HAVE A FULL OPPORTUNITY TO PRODUCE EVIDENCE OF THE FACTS, CIRCUMSTANCES, AND CONDITIONS SURROUNDING ITS EXECUTION AND THE PARTIES' CONDUCT.

A. Contract Is Ambiguous When Susceptible to Two Different Meanings. When parties dispute the meaning of a contract term, the trial court's first step is to determine whether the term is ambiguous; that is, whether it is "reasonably susceptible" to either of the meanings urged by the parties [*Curry v. Moody* (1995) 40 Cal. App. 4th 1547, 1552, 48 Cal. Rptr. 2d 627].

B. Right to Introduce Evidence Concerning Ambiguous Contract. If the language of a contract is reasonably susceptible to more than one interpretation, parol evidence is admissible to aid in interpreting the agreement, thereby presenting a question of fact that precludes summary judgment if the evidence is contradictory [*Wolf v. Superior Court* (2004) 114 Cal. App. 4th 1343, 1351, 8 Cal. Rptr. 3d 649].

NOTES.

Raising Contract Interpretation Issues:

See 21.04

Alleging and Proving Ambiguities:

See 21.32 -21.37

Moving or Opposing Admission of Parol Evidence:

See 21.36, 21.37

Detailed Discussion of Format/Skeletal Forms for Memoranda:

California Points and Authorities, Ch. 1, Writing Legal Memoranda and Briefs (Matthew Bender)

Additional Memoranda Relating to Contracts:

California Points and Authorities, Ch. 50, Contracts (Matthew Bender)

Legal Topics:

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

Contracts LawContract InterpretationGeneral OverviewContracts LawContract InterpretationAmbiguities & Contra
ProferentemGeneral Overview



85 of 188 DOCUMENTS

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Chapter 21 Asserting a Particular Construction of Contract
IX. FORMS

2-21 MB Practice Guide: CA Contract Litigation 21.84

21.84 Memorandum--Contract Is Not Ambiguous.

Memorandum--Contract Is Not Ambiguous.

[Include following, if appropriate under circumstances of case, in memorandum in support of summary judgment.]

_____. SUMMARY JUDGMENT FOR
THE [PLAINTIFF or _____
DEFENDANT] IS PROPER WHEN THERE IS NO CONFLICT AS TO THE TERMS OF THE CONTRACT AND
ITS PROVISIONS ARE NOT UNCERTAIN OR AMBIGUOUS, THERE IS OTHERWISE NO TRIABLE ISSUE OF
FACT AS TO WHETHER THE DEFENDANT BREACHED THE CONTRACT, AND AS A MATTER OF LAW,
JUDGMENT SHOULD BE RENDERED IN FAVOR OF THE [PLAINTIFF or DEFENDANT].

A. Meaning of Unambiguous Contract Is Question of Law. The resolution of an ambiguity is a question of law if no
parol evidence is admitted or if the parol evidence is not in conflict [*Beard v. Goodrich* (2003) 110 Cal. App. 4th
1031, 1037, 2 Cal. Rptr. 3d 160] .

B. Interpretation Issue May be Resolved on Summary Judgment if Facts Are Undisputed. The defendant may
move for summary judgment provided that the evidence is undisputed and interpretation of the contract is a question of
law [see *Code Civ. Proc.* § 437c].

NOTES.

Raising Contract Interpretation Issues:

See 21.04

Court Ascertains Parties' Intent From Writing Alone If Possible:

See 21.17

Detailed Discussion of Format/Skeletal Forms for Memoranda:

California Points and Authorities, Ch. 1, Writing Legal Memoranda and Briefs (Matthew Bender)

Additional Memoranda Relating to Contracts:

California Points and Authorities, Ch. 50, Contracts (Matthew Bender)

Legal Topics:

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

Contracts LawContract InterpretationGeneral OverviewContracts LawContract InterpretationAmbiguities & Contra
ProferentemGeneral Overview



86 of 188 DOCUMENTS

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Chapter 21 Asserting a Particular Construction of Contract
IX. FORMS

2-21 MB Practice Guide: CA Contract Litigation 21.85

21.85 Memorandum--Plaintiff Must Allege Construction of Ambiguous Contract Terms.

Memorandum--Plaintiff Must Allege Construction of Ambiguous Contract Terms.

[Include following, if appropriate under circumstances of the case, in memorandum by party opposing admission of extrinsic evidence.]

THE PLAINTIFF MUST ALLEGE THE MEANING OF ANY AMBIGUOUS CONTRACT TERM IN THE COMPLAINT.

Plaintiff Must Allege Meaning of Ambiguous Contract in Complaint. The pleader has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense asserted [*Evid Code* § 500]. If a written instrument is ambiguous, the pleader must allege the meaning he or she ascribes to it [*see Hayter Trucking, Inc. v. Shell W. E&P, Inc. (1993) 18 Cal. App. 4th 1, 18, 22 Cal. Rptr. 2d 229*].

NOTES.

Discussion:

See 21.04

Detailed Discussion of Format/Skeletal Forms for Memoranda:

California Points and Authorities, Ch. 1, Writing Legal Memoranda and Briefs (Matthew Bender)

Additional Memoranda Relating to Contracts:

California Points and Authorities, Ch. 50, Contracts (Matthew Bender)

Legal Topics:

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

Contracts LawContract InterpretationAmbiguities & Contra ProferentemGeneral Overview



87 of 188 DOCUMENTS

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Chapter 21 Asserting a Particular Construction of Contract
IX. FORMS

2-21 MB Practice Guide: CA Contract Litigation 21.86

21.86 Memorandum--On Demurrer, Plaintiff's Interpretation of Ambiguous Terms Must Be Accepted.

Memorandum--On Demurrer, Plaintiff's Interpretation of Ambiguous Terms Must Be Accepted.

[Include the following, if appropriate under the circumstances of the case, in a memorandum by the party proffering extrinsic evidence.]

IF AN INSTRUMENT PLEADED IN A COMPLAINT IS AMBIGUOUS, THE CONSTRUCTION, IF REASONABLE, THAT IS ADOPTED IN THE COMPLAINT MUST BE ACCEPTED BY THE COURT IN RULING ON A GENERAL DEMURRER.

A. Demurrer Tests Pleading, Not Evidence. When a complaint is based on a written contract that it sets out in full, a general demurrer admits not only the contents of the instrument but also any pleaded meaning to which the instrument is reasonably susceptible. While the plaintiff's interpretation ultimately may prove invalid, it is improper to resolve the issue solely on the pleading [*Aragon-Haas v. Family Sec. Ins. Servs., Inc.* (1991) 231 Cal. App. 3d 232, 239, 282 Cal. Rptr. 233].

B. On Demurrer, Court Assumes Truth of Factual Allegations in the Complaint. A demurrer tests the pleading alone, not the evidence that will be offered to interpret the contract. Objections not appearing on the face of the pleading are raised by answer [*Hayter Trucking, Inc. v. Shell W. E&P, Inc.* (1993) 18 Cal. App. 4th 1, 17, 22 Cal. Rptr. 2d 229].

NOTES.

Discussion:

See 21.04[2][b]

Detailed Discussion of Format/Skeletal Forms for Memoranda:

California Points and Authorities, Ch. 1, Writing Legal Memoranda and Briefs (Matthew Bender)

Additional Memoranda Relating to Contracts:

California Points and Authorities, Ch. 50, Contracts (Matthew Bender)

Legal Topics:

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

Civil Procedure Pleading & Practice Defenses, Demurrers & Objections Demurrers Contracts Law Contract Interpretation Ambiguities & Contra Proferentem General Overview



88 of 188 DOCUMENTS

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Chapter 21 Asserting a Particular Construction of Contract
IX. FORMS

2-21 MB Practice Guide: CA Contract Litigation 21.87

21.87 Memorandum--Contract Stipulations Generally Are Interpreted As Covenants, Not Conditions.

Memorandum--Contract Stipulations Generally Are Interpreted As Covenants, Not Conditions.

[Include the following, if appropriate under the circumstances of the case, in a memorandum.]

STIPULATIONS IN A CONTRACT ARE TO BE CONSTRUED AS COVENANTS, NOT AS CONDITIONS PRECEDENT; AND PERFORMANCE, OR AN EXCUSE FOR NONPERFORMANCE, MUST BE ALLEGED, UNLESS A CONSTRUCTION AS CONDITIONS PRECEDENT IS REQUIRED BY CLEAR, UNAMBIGUOUS LANGUAGE.

A. Stipulations Must Be Construed As Covenants When Possible. Conditions precedent are not favored in the law, and courts may not construe a contract term so as to establish a condition precedent absent plain and unambiguous contract language to that effect [*Frankel v. Board of Dental Exams* (1996) 46 Cal. App. 4th 534, 550, 54 Cal. Rptr. 2d 128] Instead, whenever possible the courts will construe promises in a bilateral contract as mutually dependent and concurrent [*Rubin v. Fuchs* (1969) 1 Cal. 3d 50, 53, 81 Cal. Rptr. 373, 459 P.2d 925] .

[Optional] **B. Condition That Third Party Must Take Action Is Construed As Covenant.** A condition that a third party must take some action should be construed against the party relying upon it. When possible, it should be construed as a covenant, rather than a condition [*Patrick J. Ruane, Inc. v. Parker* (1960) 185 Cal. App. 2d 488, 504, 8 Cal. Rptr. 379] .

[Optional] **C. Stipulations Are Covenants When Forfeiture or Inequitable Consequences Are Involved.** A condition involving a forfeiture must be strictly interpreted against the party for whose benefit it is created [Civ. Code § 1442]. A forfeiture can never take place by implication, but must be effected by express, unambiguous language [*ABI, Inc. v. City of Los Angeles* (1984) 153 Cal. App. 3d 669, 681-682, 200 Cal. Rptr. 563] .

NOTES.

Discussion of Conditions Precedent:

See Ch. 22, *Suing or Defending Action for Breach of Contract*, 22.19, 22.21[3], 22.62[3], 22.66

Jury Instructions:

Contracts--Existence of Condition Precedent Disputed, see *Judicial Council of California Civil Jury Instructions*, CACI No. 321 (LexisNexis Matthew Bender)

Contracts--Occurrence of Agreed Condition Precedent, see *Judicial Council of California Civil Jury Instructions*, CACI No. 322 (LexisNexis Matthew Bender)

Contracts--Waiver of Condition Precedent, see *Judicial Council of California Civil Jury Instructions*, CACI No. 323 (LexisNexis Matthew Bender)

Detailed Discussion of Format/Skeletal Forms for Memoranda:

California Points and Authorities, Ch. 1, Writing Legal Memoranda and Briefs (Matthew Bender)

Additional Memoranda Relating to Contracts:

California Points and Authorities, Ch. 50, Contracts (Matthew Bender)

Legal Topics:

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

Contracts LawContract Conditions & ProvisionsConditions PrecedentContracts LawContract Conditions & ProvisionsConditions SubsequentContracts LawContract Conditions & ProvisionsExpress ConditionsGeneral OverviewContracts LawContract InterpretationGeneral Overview



89 of 188 DOCUMENTS

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Chapter 21 Asserting a Particular Construction of Contract
IX. FORMS

2-21 MB Practice Guide: CA Contract Litigation 21.88

21.88 Memorandum--Evidence Is Barred by Parol Evidence Rule.

Memorandum--Evidence Is Barred by Parol Evidence Rule.

[Include the following, if appropriate under the circumstances of the case, in a memorandum opposing admission of extrinsic evidence.]

THE PAROL EVIDENCE RULE PROHIBITS INTRODUCTION OF EXTRINSIC EVIDENCE TO VARY, ALTER OR ADD TO THE TERMS OF AN INTEGRATED WRITTEN INSTRUMENT.

A. The Extrinsic Evidence Is Irrelevant and Incompetent. As a matter of law, when parties embody the complete terms of their agreement in a writing (the "integration"), the writing becomes the agreement [*Casa Herrera, Inc. v. Beydoun* (2004) 32 C4th 336, 344, 9 CR3d 97, 83 P3d 497] .

B. Written Contract Supersedes Prior and Contemporaneous Agreements. The execution of a contract in writing, whether the law requires it to be written or not, supersedes all the negotiations or stipulations concerning its matter which preceded or accompanied the execution of the instrument [*Civ. Code § 1625*]. If a written contract is integrated, the presumption that it supersedes prior or contemporaneous oral agreements cannot be overcome [*Wagner v. Glendale Adventist Med. Ctr.* (1989) 216 Cal. App. 3d 1379, 1385, 265 Cal. Rptr. 412].

NOTES.

Discussion:

See 21.44

Detailed Discussion of Format/Skeletal Forms for Memoranda:

California Points and Authorities, Ch. 1, Writing Legal Memoranda and Briefs (Matthew Bender)

Additional Memoranda Relating to Contracts:

California Points and Authorities, Ch. 50, Contracts (Matthew Bender)

Legal Topics:

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

Contracts LawContract InterpretationParol EvidenceGeneral OverviewEvidenceDocumentary EvidenceParol EvidenceEvidenceRelevanceParol Evidence



90 of 188 DOCUMENTS

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Chapter 21 Asserting a Particular Construction of Contract
IX. FORMS

2-21 MB Practice Guide: CA Contract Litigation 21.89

21.89 Memorandum--Evidence Is Not Barred by Parol Evidence Rule.

Memorandum--Evidence Is Not Barred by Parol Evidence Rule.

[Include the following, if appropriate under the circumstances of the case, in a memorandum supporting admission of extrinsic evidence.]

THE PAROL EVIDENCE RULE DOES NOT PROHIBIT INTRODUCTION OF EXTRINSIC EVIDENCE TO EXPLAIN THE MEANING OF A WRITTEN CONTRACT IF THE MEANING URGED IS ONE TO WHICH THE WRITTEN CONTRACT TERMS ARE REASONABLY SUSCEPTIBLE.

A. Extrinsic Evidence Is Admissible To Interpret Agreement. The parol evidence rule does not exclude evidence to explain an extrinsic ambiguity or otherwise interpret the terms of an agreement. [*Code Civ. Proc. § 1856(g)*]. Rational interpretation requires at least a preliminary consideration of all credible evidence offered to prove the intention of the parties [*Pacific Gas & Elec. Co. v. G. W. Thomas Drayage & Rigging Co. (1968) 69 Cal. 2d 33, 39-40, 69 Cal. Rptr. 561, 442 P.2d 641*] .

B. Several Exceptions to Rule Allow Admission of Extrinsic Evidence. Even if a written agreement is fully integrated, extrinsic evidence is admissible of the parties' course of dealing or course of performance, trade usage, the parties' mistake, an imperfection of the writing, the validity or invalidity of the agreement, the circumstances of its formation, illegality, or fraud. [*Code Civ. Proc. § 1856(g)*].

NOTES.

Discussion:

See 21.41 -21.58, 21.33 -21.37

Detailed Discussion of Format/Skeletal Forms for Memoranda:

California Points and Authorities, Ch. 1, Writing Legal Memoranda and Briefs (Matthew Bender)

Additional Memoranda Relating to Contracts:

California Points and Authorities, Ch. 50, Contracts (Matthew Bender)

Legal Topics:

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

Contracts LawContract InterpretationParol EvidenceGeneral OverviewEvidenceDocumentary EvidenceParol EvidenceEvidenceRelevanceParol Evidence



91 of 188 DOCUMENTS

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Chapter 21 Asserting a Particular Construction of Contract
IX. FORMS

2-21 MB Practice Guide: CA Contract Litigation 21.90

21.90 Memorandum--Written Contract Was Modified by Oral Agreement Supported by New Consideration.

Memorandum--Written Contract Was Modified by Oral Agreement Supported by New Consideration.

[Include the following, if appropriate under the circumstances of the case, in a memorandum.]

THE WRITTEN CONTRACT WAS MODIFIED BY AN ORAL AGREEMENT SUPPORTED BY A NEW CONSIDERATION BETWEEN THE PARTIES, AND THE DEFENDANT HAS FULFILLED HIS/HER OBLIGATIONS UNDER THE CONTRACT AS MODIFIED.

A. Modification Defined. A modification of a contract is a change in one or more respects that introduces new elements into the details of the contract, or cancels some of them but leaves the general purpose and effect of the contract undisturbed [*Grant v. The Aerodraulics Co. (1949) 91 Cal. App. 2d 68, 74, 204 P.2d 683*] .

[AND/OR]

B. Modification of Written Contract by Oral Agreement Supported by New Consideration. Unless the contract otherwise expressly provides, a contract in writing may be modified by an oral agreement supported by new consideration [Civ. Code § 1698(c)].

NOTES.

Discussion:

See 21.58[2]

Detailed Discussion of Format/Skeletal Forms for Memoranda:

California Points and Authorities, Ch. 1, Writing Legal Memoranda and Briefs (Matthew Bender)

Additional Memoranda Relating to Contracts:

California Points and Authorities, Ch. 50, Contracts (Matthew Bender)

Legal Topics:

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

Contracts LawContract InterpretationParol EvidenceGeneral OverviewContracts LawContract ModificationsOral Modifications



92 of 188 DOCUMENTS

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Chapter 21 Asserting a Particular Construction of Contract
IX. FORMS

2-21 MB Practice Guide: CA Contract Litigation 21.91

21.91 Memorandum--Written Contract Was Modified by Executed Oral Agreement.

Memorandum--Written Contract Was Modified by Executed Oral Agreement.

[Include the following, if appropriate under the circumstances of the case, in a memorandum.]

THE WRITTEN CONTRACT WAS MODIFIED BY AN EXECUTED ORAL AGREEMENT BETWEEN THE PARTIES, AND THE DEFENDANT HAS FULFILLED HIS/HER OBLIGATIONS UNDER THE CONTRACT AS MODIFIED.

A. Modification Defined. A modification of a contract is a change in one or more respects that introduces new elements into the details of the contract, or cancels some of them but leaves the general purpose and effect of the contract undisturbed [*Grant v. The Aerodraulics Co. (1949) 91 Cal. App. 2d 68, 74, 204 P.2d 683*] .

[AND/OR]

B. Modification of Written Contract by Executed Oral Agreement. A contract in writing may be modified by an oral agreement to the extent that the oral agreement is executed by the parties [*Civ. Code § 1698(b)*].

C. Executed Oral Agreement Is Sufficient to Modify Written Contract Without Consideration. The parties to a written agreement may modify it by an executed oral agreement. The written contract remains in effect to the extent it has not been modified [*Civ. Code § 1698(b)*; *Conley v. Matthes (1997) 56 Cal. App. 4th 1453, 1465, 66 Cal. Rptr. 2d 518*] .

[Optional] **D. Performance by Promisee Alone Is Sufficient When Oral Modification Is Supported by Consideration.** If there exists sufficient consideration for an oral modification agreement, then full performance by the promisee alone suffices to render the agreement executed and therefore enforceable under *Civ. Code § 1698* [*Raedeke v. Gibraltar Sav. & Loan Ass'n (1974) 10 Cal. 3d 665, 111 Cal. Rptr. 693*].

[Optional] **E. Effect of Contract Provision Requiring Written Modification.** An executed oral agreement may alter a written contract, even though the original contract provides that all changes must be in writing *Miller v. Brown*

(1955) 136 Cal. App. 2d 763, 775, 289 P.2d 572 ; but see Civ. Code § 1698(c); *Marani v. Jackson* (1986) 183 Cal. App. 3d 695, 228 Cal. Rptr. 518] .

[Optional] **F. Nonperformance Is Execution of Oral Agreement Not to Perform.** When the parties orally modify a written contract by agreeing that a certain act contemplated by the contract will not be performed, the modification is to be deemed executed, within the meaning of Civ. Code § 1698, when the party who was to perform the act does not perform it and the other party does not demand performance [*Sanders Construction Co. v. San Joaquin First Fed. Sav. & Loan Ass'n* (1982) 136 CA3d 387, 396, 186 CR 218].

[Optional] **G. Burden of Proof.** An oral modification of a written contract, to be sustained, need be proved only by a preponderance of the evidence, and it is prejudicial error to instruct the jury that the elements of an oral modification must be proved by clear and convincing evidence [*Barrett v. Bank of Am.* (1986) 183 Cal. App. 3d 1362, 1370-1371, 229 Cal. Rptr. 16] .

NOTES.

Discussion:

See 21.58[1]

Detailed Discussion of Format/Skeletal Forms for Memoranda:

California Points and Authorities, Ch. 1, Writing Legal Memoranda and Briefs (Matthew Bender)

Additional Memoranda Relating to Contracts:

California Points and Authorities, Ch. 50, Contracts (Matthew Bender)

Legal Topics:

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

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93 of 188 DOCUMENTS

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Chapter 22 Suing or Defending Action for Breach of Contract

2-22 MB Practice Guide: CA Contract Litigation 22.syn

§ 22.syn Synopsis to Chapter 22: Suing or Defending Action for Breach of Contract

22.01 Scope.

22.02 Objective and Strategy.

22.03 CHECKLIST: Establishing Elements of Breach of Contract.

22.04 Options and Strategy.

22.05 Elements of Cause of Action for Breach of Contract.

22.06 Basic Statute of Limitations.

22.07 Plaintiff Must Show Existence of Contract Between Parties.

22.08 Plaintiff Must Show Tender, Performance, or Excuse From Performance of Obligations Under Contract.

22.08[1] Plaintiff Must Plead and Prove Performance or Ability to Perform.

22.08[2] Substantial Performance Satisfies Requirement of Performance.

22.08[2][a] Plaintiff Must Establish No Willful Departure From Contract Terms and That Defects Are Easily Remedied.

22.08[2][b] Substantial Performance Is Question of Fact.

22.08[2][c] Substantial Performance Is Enough to Support Plaintiff's Recovery.

22.08[3] Tender of Performance Satisfies Performance Requirement.

22.08[3][a] Tender Extinguishes Obligation to Perform.

22.08[3][b] Tender Must Not Contain New Conditions.

22.08[3][c] Proper Persons Must Be Party to Tender.

22.08[3][d] Tender Must Be in Proper Place.

22.08[3][e] Tender Must Be at Proper Time.

22.08[4] Defendant's Prevention of Performance May Excuse Performance.

22.08[5] Inducement Not to Perform May Excuse Performance.

22.08[5][a] Acts to Induce Plaintiff Not to Perform Excuse Performance.

22.08[5][b] Waiver May Excuse Performance of Condition.

22.09 Breach Occurred If Defendant Failed to Perform or Prevented Plaintiff From Performing.

22.10 Demand for Defendant's Performance May Be Required.

22.11 Damages Must Be Proximately Caused by Defendant's Breach.

22.12 Pleading Requirements for Breach of Contract.

22.12[1] Pleading Must Specify Whether Contract Is Written, Oral, or Implied.

22.12[2] Pleading for Written Contract Must Include Essential Terms.

22.12[3] Pleading for Oral Contract Must Allege Legal Effect, Consideration, and Nature of Contract.

22.12[4] Pleading for Implied-in-Fact Contract Must Include Allegations of Conduct.

22.12[5] Pleading for Ambiguous Contract Must Include Ascribed Meaning.

22.12[6] Pleading Must Include Allegation of Performance of Conditions Precedent.

22.12[6][a] General Allegation of Conditional Act Is Adequate.

22.12[6][b] Specific Allegation of Conditional Event Is Required.

22.12[7] Pleading Must Include Allegation of Plaintiff's Performance or Specific Allegation of Plaintiff's Excuse From Performance.

22.12[8] Unequivocal Breach Must Be Alleged.

22.12[9] Facts Establishing Damages Caused by Breach Must Be Alleged.

22.13 CHECKLIST: Establishing Nonperformance of Contract.

22.14 Options and Strategy.

22.15 Elements of Nonperformance of Contract.

22.16 Nonperformance Constitutes Breach of Contract.

22.16[1] Plaintiff May Show That Defendant Failed to Fully Perform Contractual Obligation.

22.16[2] Substantial Performance Does Not Constitute Breach.

22.16[3] Performance by Unauthorized Party That Was Tendered, but Not Accepted, Constitutes Nonperformance.

22.16[4] Failure to Fully Perform Is Partial Breach.

22.16[5] Performance Must Be Accepted.

22.16[6] Performance Must Be Made to Proper Party.

22.16[7] Performance Must Be Made in Proper Place.

22.17 No Demand for Performance Is Necessary.

22.18 Debtor's Failure to Perform Obligation in Manner Specified by Creditor Constitutes Breach of Contract.

22.19 Nonoccurrence of Condition Precedent May Give Rise to Breach.

22.19[1] Condition Precedent Is Occurrence of Event That Triggers Duty to Perform.

22.19[2] Plaintiff Has Burden to Show Occurrence of Condition Precedent.

22.19[3] Defendant's Failure to Fulfill Promise to Perform Condition Precedent Is Ground for Breach.

22.19[4] Defendant's Prevention of Happening of Condition Precedent Is Breach.

22.20 Defendant's Failure or Inability to Perform Condition Concurrent Is Ground for Breach.

22.20[1] Conditions Concurrent Must Be Tendered or Performed Concurrently.

22.20[2] Defendant's Failure to Perform Condition Concurrent Is Ground for Breach.

22.21 Plaintiff May Sue for Breach When Plaintiff's Failure to Perform Is Excused, but Defendant's Nonperformance Is Not Excused.

22.21[1] Plaintiff's Performance Is Excused When Defendant Repudiates Contract.

22.21[2] Plaintiff May Sue When Nonperformed Condition Was Solely for Plaintiff's Benefit.

22.21[3] Plaintiff May Sue When Defendant Waives Condition Precedent.

22.22 Plaintiff May Establish Breach by Nonperformance When Performance Was Only Temporarily Impossible or Unlawful.

22.23 Plaintiff May Sue Based on Defendant's Anticipatory Breach.

22.23[1] Plaintiff Must Show Definite and Unconditional Repudiation of Contract Before Performance Is Due.

- 22.23[1][a] Anticipatory Breach Occurs Before Time Performance Is Due.
- 22.23[1][b] Repudiation May Be Express.
- 22.23[1][c] Repudiation May Be Implied.
- 22.23[1][d] Notice of Repudiation Excuses Plaintiff From Further Performance Unless Repudiation Is Retracted.
- 22.23[1][e] Repudiation Is Question of Fact.
- 22.23[2] Plaintiff May Sue for Breach Immediately on Receiving Notice of Anticipatory Breach.
- 22.23[3] Plaintiff May Ignore Repudiation and Wait to Sue Until Promised Performance Is Due.
- 22.23[4] If Defendant Retracted Repudiation Before Defendant's Performance Is Due, Plaintiff Must Show Detrimental Change in Position Due to Repudiation.
- 22.23[5] Repudiation Does Not Alter Statute of Limitations.
- 22.24 CHECKLIST: Determining Materiality of Breach.
- 22.25 Options and Strategies.
- 22.26 Mechanics of Material Breach.
- 22.27 Breach Must Be Total to Constitute Material Breach.
- 22.28 Materiality of Breach Is Primarily Question of Fact.
- 22.29 Importance or Seriousness of Breach Determines Materiality.
- 22.29[1] Court Considers Circumstances of Breach in Determining Whether It Is Material.
- 22.29[2] Slight Breach at Outset May Be Material Breach.
- 22.29[3] Slight Breach After Considerable Performance That Does Not Materially Impact Contract Is Not Material.
- 22.29[4] Partial Breach Combined With Repudiation Is Material Breach.
- 22.30 CHECKLIST: Establishing Partial Breach of Contract.
- 22.31 Failure to Fully Perform Indivisible Obligation Is Partial Breach of Contract.
- 22.32 Injured Party May Treat Total Breach As Partial.
- 22.33 Injured Party Need Not Wait Indefinitely for Unfinished Performance.
- 22.34 Plaintiff May Recover Damages for Defendant's Partial, Nonmaterial Breach.
- 22.35 Partial Performance of Severable Contract Does Not Bar Action for Defendant's Breach of Severable Part.

22.35[1] Contract With Separate Consideration for Separate Obligations Is Severable.

22.35[2] Plaintiff May Recover for Partial Performance of Severable Part of Contract.

22.35[3] Party Who Induced Part of Divisible Contract by Fraud May Not Enforce Any Part of Contract.

22.36 CHECKLIST: Establishing Breach Due to Performance Not in Accord With Contract Terms.

22.37 Plaintiff May Recover If Defendant's Performance Was Substantial but Not in Strict Compliance With Contract Terms.

22.37[1] Substantial Performance Occurs When Variance From Specifications Is Minimal and Object of Contract Is Achieved.

22.37[2] Plaintiff May Recover for Damages Associated With Lack of Strict Compliance.

22.38 Improper Termination, Cancellation, or Rescission Constitutes Breach.

22.39 Defendant's Performance in Different Location May Constitute Breach.

22.40 Plaintiff May Establish Breach for Defective Performance Based on Implicit Duty.

22.41 If Contract Provides for Alternative Means of Performance, Defendant's Failure to Perform Alternative Constitutes Breach.

22.41[1] Failure to Perform Entire Alternative Constitutes Breach.

22.41[2] Defendant's Failure to Give Timely Notice of Selection of Alternative Performance Gives Plaintiff Right to Make Selection.

22.41[3] If One Alternative Is Unlawful or Impossible to Perform, Defendant Breaches by Failing to Perform Other Alternative.

22.42 CHECKLIST: Establishing Timeliness of Performance.

22.43 Failure to Perform at Time Specified in Contract Is Breach.

22.44 Party Can Waive Timeliness Requirement.

22.45 Breach Generally Occurs at Time Performance Is Due.

22.46 Reasonable Time Is Allowed When Contract Does Not Specify Time of Performance.

22.47 "Reasonable" Amount of Time Is Question Fact When Facts Are Disputed.

22.48 Payment of Money Normally Must Be Made Immediately.

22.48[1] Absent Specified Time in Contract, Payment Is Due Immediately.

22.48[2] Contract Requiring Immediate Payment Permits Reasonable Time for Processing Payment.

22.48[3] Statutory Extension for Holidays.

22.48[4] Statutory Exceptions May Alter Terms of Obligations.

22.49 Delayed Performance May Cause Material Breach When Harm From Delay Cannot Be Compensated.

22.50 Delayed Performance Is Material Breach When Contract Explicitly Provides "Time Is of the Essence."

22.51 CHECKLIST: Recovering for Improper Assignment.

22.52 Elements of Improper Assignment.

22.53 Assignment Consists of Transferring Title, Contractual Right, or Chose in Action to Another Person.

22.53[1] Transfer of Title, Contractual Right, or Chose in Action Is Assignment.

22.53[2] Assignment Transfers Incidents of Thing Assigned.

22.53[3] Absent Prohibition on Assignment, Assignment May Be Made With or Without Consideration.

22.53[4] Assignment Made With Consideration Is Subject to Contract Law.

22.54 Contractual Rights May Be Assigned Unless Prohibited by Law or Contract.

22.54[1] Contractual Rights Presumptively May Be Assigned.

22.54[2] Assignment May Be Oral or Written.

22.54[3] Contract May Expressly or Implicitly Prohibit Assignment.

22.54[4] Authorization to Assign Tenant's Lease May Not Be Unreasonably Withheld.

22.54[5] No Enforcement of Assignment of Contract for Performance Based on Personal Qualities.

22.54[6] Statutes Prohibit Certain Assignments.

22.54[7] Rights on Personal Property May Be Assigned.

22.54[8] Rights on Personal Torts and Legal Malpractice Claims May Not Be Assigned.

22.54[9] Rights to Recover Statutory Penalties May Not Be Assigned.

22.55 Improper Assignment Renders Contract Voidable.

22.56 Nonassigning Party May Waive Breach by Assignment.

22.56[1] Party to Whom Benefit of Nonassignment Runs May Object to Assignment.

22.56[2] Waiver May Be Implied When Nonassigning Party Either Performs or Accepts Performance by Assignee.

22.57 Assignor Remains Liable to Nonassigning Party.

22.58 Assignor May Be Liable to Assignee.

22.58[1] Assignor May Explicitly Warrant Rights Assigned.

22.58[2] Statutes Impose Warranties on Assignment.

22.58[3] Assignment Contains Implied Warranty of Valid and Existing Rights.

22.59 Nonassigning Party May Be Liable to Assignee.

22.59[1] After Notice of Assignment, Assignee May Sue for Obligor's Failure to Confer Performance to Assignee.

22.59[2] Absent Notice of Assignment, Obligor's Performance to Assignor Discharges Performance.

22.60 Assignee May Be Liable for Breach of Contract.

22.60[1] Assignee Generally Does Not Assume Obligations of Contract.

22.60[2] Assignee Becomes Liable to Obligor on Acceptance of Obligor's Performance.

22.60[3] Assignee Is Liable on Assumption of Obligation.

22.61 CHECKLIST: Defending Action for Breach of Contract.

22.62 Options and Strategy.

22.62[1] Asserting Appropriate Response Including Applicable Affirmative Defenses.

22.62[2] Refuting Nonperformance or Materiality of Breach With Substantial Performance.

22.62[3] Asserting Nonperformance of Condition Precedent.

22.62[4] Establishing Justification, Excuse, and Other Affirmative Defenses for Nonperformance.

22.63 No Liability When Plaintiff Fails to Establish Elements of Breach.

22.64 No Liability When Nonperformance Is Justified by Failure of Consideration.

22.65 No Liability When Nonperformance Is Excused.

22.65[1] Impossible or Impracticable Performance May Be Excused.

22.65[1][a] Complete Impossibility Excuses Performance.

22.65[1][b] Impracticability Excuses Performance.

22.65[1][c] Temporary Impossibility or Impracticability Suspends Duty to Perform.

22.65[2] Frustration of Purpose May Excuse Performance.

22.65[3] Unlawful Performance May Be Excused.

22.65[4] Unconscionable Performance May Be Excused.

22.65[5] Waiver May Excuse Performance of Condition.

22.65[6] Release May Excuse Performance.

22.65[7] Plaintiff's Prevention of Defendant's Performance Excuses Defendant's Performance.

22.65[8] Defendant Has Burden of Proof to Establish Excuse.

22.66 Nonoccurrence of Condition Precedent Precludes Liability for Nonperformance.

22.66[1] Failure to Satisfy Condition Precedent Precludes Liability.

22.66[2] Unmet Condition of Satisfaction Precludes Liability.

22.66[2][a] "Reasonable Person" Standard Applies to Commercial Value, Mechanical Ability, or Operational Fitness.

22.66[2][b] Good-Faith Subjective Standard Applies When Satisfaction Involves Fancy, Taste, or Judgment.

22.67 Occurrence of Condition Subsequent Before Performance Precludes Liability.

22.67[1] Condition Subsequent Is Future Event That Relieves Obligation.

22.67[2] No Liability When Occurrence of Condition Subsequent Precedes Time Performance Is Due.

22.68 Party May Waive Breach.

22.68[1] Conduct That Induces Reasonable Person to Conclude Aggrieved Party Has Relinquished Right Constitutes Waiver.

22.68[2] Continued Performance With Knowledge of Breach and Acceptance of Further Performance Constitutes Implied Waiver.

22.68[3] Implied Waiver Is Question of Fact.

22.68[4] Burden of Proof Is on Party Asserting Waiver.

22.68[5] Plaintiff's Waiver of Right to Rescission Restricts Claim of Damages to Those Caused by Breach.

22.68[6] No Waiver When Delay in Seeking Remedy Made at Breaching Party's Request.

22.68[7] No Waiver When Breaching Party Has Continuing Covenant.

22.68[8] No Waiver When Breach Is Latent.

22.69 Substantial Performance Is Defense to Claim of Breach.

22.70 Statute of Limitations Bars Relief When Action Is Not Filed Within Limitations Period.

22.70[1] Action on Written Contract Must Be Filed Within Four Years.

22.70[2] Action on Oral or Implied Contract Must Be Filed Within Two Years.

22.70[3] Action Accrues at Time Performance Was Due but Not Delivered.

22.70[4] Limitation Period Begins to Run at Time of Breach.

22.70[5] Absence From State Tolls Limitations Period.

22.71 Defendant May Object to Complaint by Answer or Demurrer.

22.72 Pleading Denials and Affirmative Defenses.

22.72[1] General Denial Refutes Breach in Answer to Unverified Complaint.

22.72[2] Specific Denial Refutes Breach in Answer to Verified Complaint.

22.72[3] Pleading of Affirmative Defenses Is Necessary to Assert Excuse, Waiver, and Release.

22.72[3][a] Defendant Must Allege Affirmative Defenses in Answer.

22.72[3][b] Excuse for Nonperformance Must Be Affirmatively Pleaded.

22.72[3][c] Waiver of Breach Must Be Affirmatively Pleaded.

22.72[3][d] Release Must Be Affirmatively Pleaded.

22.72[4] Advisable to Affirmatively Allege Defense Based on Payment.

22.72[5] Statute of Limitations Must Be Affirmatively Pleaded.

22.72[6] Failure to Mitigate Damages Is Affirmative Defense.

22.73 Complaint for Breach of Written Contract.

Complaint for Breach of Written Contract.

22.74 Complaint for Breach of Oral Contract.

Complaint for Breach of Oral Contract.

22.75 Answer to Complaint for Breach of Contract.

Answer to Complaint for Breach of Contract.

22.76 Memorandum for Party Asserting Anticipatory Breach of Contract.

Memorandum for Party Asserting Anticipatory Breach of Contract.

22.77 Memorandum for Party Denying Anticipatory Breach of Contract.

Memorandum for Party Denying Anticipatory Breach of Contract.

22.78 Memorandum for Party Asserting Material Breach of Contract.

Memorandum for Party Asserting Material Breach of Contract.

22.79 Memorandum for Party Denying Material Breach of Contract.

Memorandum for Party Denying Material Breach of Contract.



94 of 188 DOCUMENTS

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Chapter 22 Suing or Defending Action for Breach of Contract

I. STRATEGY

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22.01 Scope.

This chapter covers:

- Objectives and strategy for suing for breach of contract [see 22.02].
- Determining the basic elements of a cause of action for breach of contract [see 22.05 -22.12], including:
 - ☐ The existence of a contract between the parties [see 22.07].
 - ☐ That plaintiff fully performed, substantially performed, tendered performance, or was excused from performing, a plaintiff's obligations under the contract [see 22.08].
 - ☐ That defendant failed to perform, or prevented plaintiff from performing, obligations under the contract [see 22.09].
 - ☐ Damages proximately caused by the breach [see 22.11].
 - ☐ Identifying matters necessary to include in pleading a breach of contract claim [see 22.12].
- Determining whether grounds exist to sue for nonperformance of the contract [see 22.15 -22.23].
- Determining whether a breach of contract is material [see 22.24 -22.29].
- Determining whether a breach is only partial, and the consequences of a partial breach [see 22.30 -22.35].
- Determining whether a breach resulted from performance not in accord with contract terms [see 22.36 -22.41].

- Determining timeliness of performance, and whether a breach resulted from untimeliness [*see* 22.42 -22.50].
- Determining whether a breach of contract claim may be brought based on improper assignment [*see* 22.51 -22.60].
- Identifying defenses to a claim for breach of contract [*see* 22.61 -22.72].

Core Statutes:

CC §§ 1434-1441, 1448-1451, 1473, 1475, 1477, 1485, 1486, 1489, 1495, 1511-1515, 1541, 1657, 3300; *CCP* §§ 337, 339, 430.10(g), 457

Legal Topics:

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

Contracts LawBreachCauses of ActionGeneral OverviewContracts LawBreachCauses of ActionElements of ClaimsContracts LawBreachMaterial BreachContracts LawBreachNonperformanceContracts LawBreachPartial Breach



95 of 188 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 22 Suing or Defending Action for Breach of Contract

I. STRATEGY

*2-22 MB Practice Guide: CA Contract Litigation 22.02***22.02 Objective and Strategy.**

The purpose of a breach of contract action is to allow a party who has not received the benefit of a bargain to recover compensation for the other party's failure to fully perform. Because of the bilateral nature of most contracts, many breach-of-contract plaintiffs may also become cross-defendants, and may have grounds to assert cross-complaints. In particular, when one party fails to perform a contractual obligation, that party is very likely to contend that the failure to perform was justified or excused because of the other party's failure to satisfy some other contractual duty. For example, a builder may sue a homeowner for failure to pay for construction on the home [see 22.16]. The homeowner typically will defend the claim on the ground that the performance rendered was defective [see 22.63], but may also have grounds to cross-complain for damages associated with the builder's breach due to performance not in accord with contract specifications [see 22.37, 22.40]. The builder in turn may defend the cross-complaint on the grounds of substantial performance [see 22.69].

Strategic Point:

Counsel should keep in mind that once the plaintiff sues for breach of contract, the defendant is unlikely to continue any further performance. Accordingly, before filing suit, it is worth determining whether any further performance by the defendant can be expected, absent suit, and if so, whether that performance can be sacrificed without harm.

Strategic Point--Analyze All Aspects of Case:

Counsel must fully analyze both the offensive and defensive postures of the client's case, whether the client seeks representation initially as a plaintiff or defendant. This chapter sets forth the considerations for asserting both breach of contract claims and defenses. If the contract involves more than two parties, or if there are multiple contracts involving more than two parties, counsel must perform the same analysis for each of the parties who might participate in the litigation. In the hypothetical example given above, for example, after having been sued by the homeowner, the builder might cross-claim against the architect on the grounds that the architect prevented the builder from fully performing, and so on.

**Cross References:**

Discussion of elements of claim for breach of contract, see 22.03 -22.12.

Discussion of grounds for nonperformance of contract, see 22.13 -22.23.

Discussion of materiality of breach, see 22.24 -22.29.

Discussion of partial breach, see 22.30 -22.35.

Discussion of breach due to performance not in accord with contract, see 22.36 -22.41.

Discussion of timeliness of performance, see 22.42 -22.50.

Discussion of improper assignment, see 22.51 -22.60.

Discussion of defenses to breach of contract claims, see 22.61 -22.72.

Forms for use in asserting and defending action for breach of contract, see 22.73 -22.79.

Detailed discussion of breach of contract actions, with forms, see California Forms of Pleading and Practice, Ch. 140, Contracts (Matthew Bender).

Detailed discussion of contract law in transactional context, see California Legal Forms, Ch. 75, Formation of Contracts and Standard Contractual Provisions (Matthew Bender).

Memorandum for use in breach of contract actions, see California Points and Authorities, Ch. 50, Contracts (Matthew Bender).

For tips on updating case law and expanding your research with additional resources, see **How to Use Lexis.com With This Publication** at the front of this volume.

Legal Topics:

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

Contracts LawBreachCauses of ActionGeneral OverviewContracts LawBreachCauses of ActionElements of ClaimsContracts LawDefensesGeneral Overview



96 of 188 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 22 Suing or Defending Action for Breach of Contract

II. ESTABLISHING BREACH OF CONTRACT

2-22 MB Practice Guide: CA Contract Litigation 22.03

22.03 CHECKLIST: Establishing Elements of Breach of Contract.

☐ Confirm that valid contract exists.

Authority:

Acoustics, Inc. v. Trepte Constr. Co. (1971) 14 CA3d 887, 913, 92 CR 723

Discussion:

See 22.07

☐ Assert that plaintiff performed all obligations under contract.

Authority:

Cockrill v. Boas (1931) 213 C 490, 492, 2 P2d 774

Discussion:

See 22.08[1]

☐ If plaintiff did not perform all obligations, assert that plaintiff substantially performed those obligations because:

☐ Variance in performance from contract specifications does not impair object of contract;

☐ Object of contract can be used as intended; or

☐ Plaintiff acted in good faith in doing all that was required under contract.

Authority:

Thomas Haverty Co. v. Jones (1921) 185 C 285, 290, 197 P 105

Discussion:

See 22.08[2]

- ☐ If plaintiff did not perform obligations, assert that plaintiff tendered performance.

Authority:

CC §§ 1485, 1493, 1500

Discussion:

See 22.08[3]

- ☐ If plaintiff did not perform or tender performance, assert that plaintiff is excused from performance because:

- ☐ Defendant prevented plaintiff from performing.

Authority:

CC § 1511(1)

Discussion:

See 22.08[4]

- ☐ Defendant induced plaintiff not to perform.

Authority:

CC § 1511(3)

Discussion:

See 22.08[5]

- ☐ Assert that defendant failed to perform or prevented plaintiff from performing.

Authority:

Sackett v. Spindler (1967) 248 CA2d 220, 227, 56 CR 435 ; Jacobs v. Tenneco W., Inc. (1986) 186 CA3d 1413, 1417, 231 CR 351

Discussion:

See 22.09

- ☐ Assert that defendant's breach proximately caused plaintiff's damages.

Authority:

Acoustics, Inc. v. Trepte Constr. Co. (1971) 14 CA3d 887, 913, 92 CR 723

Discussion:

See 22.11

- ☐ Include all necessary allegations in complaint, including:

- ☐ Whether contract is written or oral.

Authority:

CCP § 430.10(g)

Discussion:

See 22.12[1]

- ☐ If contract is written, all essential terms.

Authority:

International Billing Servs., Inc. v. Emigh (2000) 84 CA4th 1175, 1187, 101 CR2d 532

Discussion:

See 22.12[1], [2]

- ☐ If contract is oral, legal effect, consideration, and nature of contract.

Authority:

Weitzenkorn v. Lesser (1953) 40 C2d 778, 780, 792, 256 P2d 947

Discussion:

See 22.12[3]

- ☐ If contract is implied-in-fact, description of conduct from which contract may be implied.

Authority:

Youngman v. Nevada Irrigation Dist. (1969) 70 C2d 240, 247, 74 CR 398, 449 P2d 462

Discussion:

See 22.12[4]

- ☐ If contract terms are ambiguous, client's understanding of their meanings.

Authority:

Kaufman & Broad Bldg. Co. v. City & Suburban Mortgage Co. (1970) 10 CA3d 206, 211, 215, 217, 88 CR 858

Discussion:

See 22.12[5]

- ☐ Plaintiff's performance or excuse from performance of conditions precedent or conditions concurrent.

Authority:

CC § 1439

Discussion:

See 22.12[6]

- ☐ Plaintiff's performance or excuse from performance of obligations under contract.

Authority:

CC § 1495; *Daum v. Superior Court* (1964) 228 CA2d 283, 287-289, 39 CR 443

Discussion:

See 22.12[7]

- ☐ Defendant's unequivocal breach.

Authority:

Gautier v. General Tel. Co. (1965) 234 CA2d 302, 305, 44 CR 404

Discussion:

See 22.12[8]

- ☐ Damages proximately caused by breach.

Authority:

Gautier v. General Tel. Co. (1965) 234 CA2d 302, 305, 44 CR 404

Discussion:

See 22.12[9]

Legal Topics:

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

Contracts LawBreachGeneral OverviewContracts LawBreachCauses of ActionGeneral OverviewContracts LawBreachCauses of ActionElements of Claims



97 of 188 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 22 Suing or Defending Action for Breach of Contract
II. ESTABLISHING BREACH OF CONTRACT

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22.04 Options and Strategy.

When a client comes to discuss the possibility of a breach of contract, the first consideration must be to determine whether a valid contract exists [*see Acoustics, Inc. v. Trepte Constr. Co. (1971) 14 CA3d 887, 913, 92 CR 723*].

➡ **Cross Reference:**

Discussion of existence or validity of contract, see Ch. 13, Attacking or Defending Existence of Contract--Absence of Essential Element; and
Ch. 18, Asserting or Defending Claim That Contract Is Illegal, Contrary to Public Policy, or Unconscionable.

If there is some defect that calls into questions the existence of the contract, counsel should consider whether quantum meruit (or quantum valebant) is available as an alternate basis for recovery.

➡ **Cross Reference:**

Discussion of quantum meruit (and quantum valebant), see Ch. 9, Seeking or Opposing Quantum Meruit or Quantum Valebant Recovery in Contract Actions.

Once counsel establishes that a valid contract exists, the next step is to determine whether conditions precedent or concurrent have been satisfied [*see 22.12[6], 22.19*]. If the contract contains any such conditions, and one or more were not satisfied, counsel must determine whether the failure to satisfy them is excused for some reason [*see 22.21*]. If not, no liability attaches, unless the condition was waived or substantially performed, or it was solely for plaintiff's benefit [*see 22.21[2], [3]*]. Counsel also must determine whether the contract contains any conditions subsequent. If the breach occurred after a condition subsequent extinguished the other contracting party's obligations, then there can be no recovery under the contract [*see 22.67*].

If counsel determines that the contract is valid and that conditions precedent or concurrent have been met or waived, the next inquiry is whether the client performed and, if not, the reason for the client's failure to perform [*see 22.09*]. If the client performed or was excused from performing, the extent, if any, of the other contracting party's performance must be determined. If the other party failed to perform partly or entirely, the extent to which that party may claim to be excused from performing must be assessed [*see 22.65*]. If that party's likely arguments for excuse do not seem convincing, counsel should determine the materiality of the breach; that is, the importance or seriousness of the breach [*see 22.24 -22.29*]. If the breach arguably is material, counsel should determine the extent of damages to the client

proximately caused by the breach [*see* 22.11; Ch. 7, Seeking or Opposing Damages in Contract Actions]. The client then may elect a remedy, including specific performance, rescission and restitution, damages, injunction, declaratory relief, or ejectment or quiet title. In some circumstances, tort remedies may be available.

Cross References:

Discussion of provisional contract remedies, see Ch. 6, Using or Opposing Provisional Remedies in Contract Actions.

Determining and alleging damages, see Ch. 7, Seeking or Opposing Damages in Contract Actions.

Seeking equitable remedies for a breach of contract, see Ch. 8, Seeking or Opposing Equitable Remedies in Contract Actions.

Seeking statutory remedies in conjunction with remedies for breach of contract, see Ch. 10, Seeking or Opposing Statutory Remedies in Contract Actions.

Declaratory relief, see Ch. 11, Seeking or Opposing Declaratory Relief in Contract Matters.

Discussion of potential availability of tort remedies in contract actions, see Ch. 2, Determining What Causes of Action Exist.

If the client cannot establish that the breach is material, the client may still seek recovery for damages resulting from a partial, nonmaterial breach [*see* 22.30 -22.35].

Because attorneys' fees ordinarily are not provided for by statute in contract cases, the existence (or nonexistence) of an attorney's fees provision in a contract factors heavily in many cases, especially cases with strong liability and causation but relatively small damages.

Cross Reference:

Recovering costs and fees in breach of contract actions, see Ch. 12, Recovering Attorney's Fees and Costs in Contract Litigation.

Legal Topics:

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

Contracts LawBreachGeneral OverviewContracts LawBreachCauses of ActionGeneral OverviewContracts LawBreachCauses of ActionElements of Claims



98 of 188 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 22 Suing or Defending Action for Breach of Contract
II. ESTABLISHING BREACH OF CONTRACT

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22.05 Elements of Cause of Action for Breach of Contract.

To establish a claim for breach of contract, the plaintiff must plead and prove each of these elements [*Acoustics, Inc. v. Trepte Constr. Co.* (1971) 14 CA3d 887, 913, 92 CR 723].

- The existence of a contract [see 22.07].
- Plaintiff's performance or excuse for nonperformance [see 22.08].
- That all conditions required for defendant's performance occurred [see 22.19].
- Defendant's breach [see 22.09].
- Plaintiff's damages proximately caused by defendant's breach [see 22.11].

Jury Instructions:

Breach of Contract--Essential Factual Elements, see *Judicial Council of California Civil Jury Instructions, CACI No. 303* (LexisNexis Matthew Bender).

Breach, see *California Forms of Jury Instruction, Ch. 3D, Instr. MB 300D.03* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:

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99 of 188 DOCUMENTS

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Chapter 22 Suing or Defending Action for Breach of Contract
II. ESTABLISHING BREACH OF CONTRACT

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22.06 Basic Statute of Limitations.

An action based on breach of a written contract normally must be brought within four years from the time the cause of action accrues [CCP § 337(1)]. An action for breach of an oral or implied contract must be filed within two years from the time the cause of action accrues [CCP § 339(1)].



Cross Reference:

Discussion of application for statute of limitations, see *Ch. 4, Determining Applicable Statute of Limitations and Effect on Potential Action, 4.03 -4.16.*

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawDefensesStatutes of LimitationsGovernmentsLegislationStatutes of LimitationsGeneral
OverviewGovernmentsLegislationStatutes of LimitationsTime Limitations



100 of 188 DOCUMENTS

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Chapter 22 Suing or Defending Action for Breach of Contract
II. ESTABLISHING BREACH OF CONTRACT

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22.07 Plaintiff Must Show Existence of Contract Between Parties.

To establish breach of contract, there must be a contract in existence [*Acoustics, Inc. v. Trepte Constr. Co.* (1971) 14 CA3d 887, 913, 92 CR 723]. This requires a showing that the contracting parties were capable of contracting, achieved mutual consent, provided adequate consideration, and that the contract had a lawful objective [CC § 1550].

Jury Instructions:

Breach of Contract--Essential Factual Elements, see *Judicial Council of California Civil Jury Instructions*, CACI No. 303 (LexisNexis Matthew Bender).

Essential Factual Elements, see *Judicial Council of California Civil Jury Instructions*, CACI No. 300 (LexisNexis Matthew Bender).

► Cross References:

Discussion of existence of a contract, see Ch. 13, Attacking or Defending Existence of Contract--Absence of Essential Element;
Ch. 14, Attacking or Defending Existence of Contract--Lack of Capacity; and
Ch. 15, Attacking or Defending Existence of Contract--Failure to Comply With Applicable Formalities.

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawBreachGeneral OverviewContracts LawBreachCauses of ActionGeneral OverviewContracts LawBreachCauses of ActionElements of Claims



101 of 188 DOCUMENTS

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Chapter 22 Suing or Defending Action for Breach of Contract
II. ESTABLISHING BREACH OF CONTRACT

2-22 MB Practice Guide: CA Contract Litigation 22.08

22.08 Plaintiff Must Show Tender, Performance, or Excuse From Performance of Obligations Under Contract.

22.08[1] Plaintiff Must Plead and Prove Performance or Ability to Perform. Absent an excuse for performance, the plaintiff must establish that he or she performed or had the ability to perform under the contract [see CC § 1495]. A plaintiff's failure to establish this element bars relief [see *Cockrill v. Boas* (1931) 213 C 490, 492, 2 P2d 774].

Example--Specific Performance:

A court denied specific performance to a land purchaser who failed to plead or prove that he had performed or was able to perform or had made payment, and whose testimony indicated that he was unable to pay [*Cockrill v. Boas* (1931) 213 C 490, 492, 2 P2d 774].



Warning:

A complaint must include an allegation that the plaintiff duly performed all the conditions on the plaintiff's part or was excused from performing [CCP § 457]. If counsel pleads specific allegations that do not constitute due performance, the complaint is subject to demurrer [*Willis v. Page* (1937) 19 CA2d 508, 512, 65 P2d 944]. It is safer to confine the pleading to a general allegation when the plaintiff alleges that the conditions were met. If the plaintiff is asserting that the conditions were excused, the plaintiff must include a specific allegation to that effect [*Careau & Co. v. Security Pac. Bus. Credit, Inc.* (1990) 222 CA3d 1371, 1391, 272 CR 387].



Cross References:

Discussion of pleading breach of contract, see 22.12.
Discussion of use of demurrer and answer, see 22.71.
Form for complaint for breach of written contract, see 22.73.
Form for complaint for breach of oral contract, see 22.74.

22.08[2] Substantial Performance Satisfies Requirement of Performance.

22.08[2][a] Plaintiff Must Establish No Willful Departure From Contract Terms and That Defects Are Easily Remedied. To bring an action notwithstanding a lack of strict compliance with one's obligations, the plaintiff

may show he or she has "substantially performed." To establish substantial performance, the plaintiff must show that there was no willful departure from the terms of the contract and that any defects can be easily remedied or compensated for, so that the other party practically got what was contracted for [*Posner v. Grunwald-Marx, Inc.* (1961) 56 C2d 169, 186-187, 14 CR 297, 363 P2d 313; *Murray's Iron Works, Inc. v. Boyce* (2008) 158 CA4th 1279, 1291-1293, 71 CR3d 317].

Example:

A construction company completed 98 percent of construction on a project, and was prevented by the other contracting party from completing the project. The court held that the construction company had substantially performed and was entitled to recover for the other party's breach of the payment obligation [*Lowy v. United Pac. Ins. Co.* (1967) 67 C2d 87, 92-93, 60 CR 225, 429 P2d 577].

Jury Instructions:

Substantial Performance, see *Judicial Council of California Civil Jury Instructions, CACI No. 312* (LexisNexis Matthew Bender).

Waiver of Defects in Offer of Performance, see *California Forms of Jury Instruction, Ch. 3F, Instr. MB 300F.23* (Matthew Bender).

22.08[2][b] Substantial Performance Is Question of Fact. Whether a party has substantially performed an obligation is a question of fact [*Posner v. Grunwald-Marx, Inc.* (1961) 56 C2d 169, 187, 14 CR 297, 363 P2d 313].

22.08[2][c] Substantial Performance Is Enough to Support Plaintiff's Recovery. Despite the lack of strict performance of a contractual obligations, the plaintiff's showing of substantial performance renders the defendant's breach actionable, although recovery is reduced by the amount necessary to compensate the defendant either for the lack of strict compliance [*Posner v. Grunwald-Marx, Inc.* (1961) 56 C2d 169, 186-187, 14 CR 297, 363 P2d 313] or for the reduced value of the partial but substantial performance.

 Cross References:

Discussion of substantial performance in context of recovery for performance not in accord with contract terms, see 22.37.

Discussion of substantial performance as a defense to claim for breach, see 22.69.

22.08[3] Tender of Performance Satisfies Performance Requirement.

22.08[3][a] Tender Extinguishes Obligation to Perform. The plaintiff may satisfy the requirement of performance by establishing tender of performance. Tender of performance is a good-faith offer of performance with the intent to extinguish the obligation. The offer extinguishes the obligation when made in conformity with the other requirements of the Civil Code [CC §§ 1485, 1493, 1500]. The offer must have been for full performance; an offer of partial (not substantial) performance has no effect [CC § 1486]. In addition, the party making the tender must have been able and willing to perform according to the offer [CC § 1494]. It is not necessary that the thing to be delivered, if any, was actually produced, unless the offer was accepted [CC § 1496].

Example--Valid Tender:

Purchaser contracted with seller to purchase 10,000 cases of peach pulp, or fewer in the event of short supply. Seller offered to deliver 8,727 cases because of short supply, and offered the sale on a pro rata basis as provided in the contract. The purchaser refused delivery, claiming substandard quality. The court held that a finding that the quality was standard was supported by the evidence, and that the partial tender, in the circumstances, was proper [*Harbor City Canning Co. v. Dant* (1927) 201 C 79, 83-85, 255 P 795].

Jury Instructions:

Definition of Tender, see *California Forms of Jury Instruction, Ch. 3D, Instr. MB 300D.50* (Matthew Bender).

Offer of Full Performance Required, see *California Forms of Jury Instruction, Ch. 3D, Instr. MB 300D.51* (Matthew Bender).

22.08[3][b] Tender Must Not Contain New Conditions. The offer to perform must not contain any conditions to which the defendant was not already bound [CC § 1494]. If the plaintiff offers performance on additional conditions, the offer does not constitute a tender and does not satisfy the performance element of the cause of action. However, if the defendant is entitled to the performance of a condition precedent to or concurrent with performance, the plaintiff can properly make the offer dependent on the performance of that condition [CC § 1498].

Example--Invalid Tender:

A purchaser of land agreed to pay the unpaid part of the purchase price over 35 months at a specified amount per month. At the end of that time and after full payment, the seller was to deliver title. The purchaser offered to pay the lump sum remaining due early in exchange for the title. The seller refused to accept the tender of performance. The court held that the tender was invalid, noting that the demand for the seller's performance in advance of the time specified in the contract was at variance with the contract term that title be delivered at the end of the 35 months [*Hanson v. Fox* (1909) 155 C 106, 107, 99 P 489].

Jury Instructions:

Unwarranted Conditions, see *California Forms of Jury Instruction, Ch. 3D, Instr. MB 300D.54* (Matthew Bender).

 Cross Reference:

Discussion of conditions precedent and concurrent, see 22.19, 22.20, 22.66.

22.08[3][c] Proper Persons Must Be Party to Tender. To be effective as a tender, the offer of performance must be made by the party required to perform or someone authorized to make the offer on that party's behalf [CC § 1487]. In addition, the offer must be made to the party entitled to performance, to any of joint parties entitled to performance, or to a person authorized by one of them to receive what is due under the obligation [CC § 1488].

 Cross Reference:

Discussion of persons who may act on behalf of contracting parties, see Ch. 20, Asserting Agency Issues in Contract Actions.

22.08[3][d] Tender Must Be in Proper Place. Absent an express provision in the contract to the contrary, the offer of performance must be made at one of the following places [CC § 1489]:

- Any place appointed by the defendant.
- Wherever the defendant can be found.
- At the residence or place of business of the defendant, if that person cannot, with reasonable diligence, be found in California, and within a reasonable distance from the defendant's residence or place of business, if the defendant evades the plaintiff.
- Any place in California, if the tender cannot be made at the residence or place of business of the

defendant.

22.08[3][e] Tender Must Be at Proper Time. If the contract sets a time for performance, the tender must be made at the specified time, within reasonable hours [CC § 1490]. If no time is specified, the tender can be made any time before the defendant, on a reasonable demand, has refused to perform [CC § 1492].

22.08[4] Defendant's Prevention of Performance May Excuse Performance. The requirement that plaintiff perform is excused when the defendant's conduct prevents the plaintiff from performing [CC § 1511(1)]. When this occurs, the plaintiff is entitled to all the benefits of the contract had it been performed by both parties [CC § 1512]. Plaintiff's performance is thereby excused even when the parties have stipulated that defendant's prevention of performance will not excuse plaintiff's performance [CC § 1511(1)].

Example--Defendant's Prevention of Performance:

A plaintiff had contracted to cut timber on the defendant's property. Thereafter, the defendant instructed the plaintiff to stop cutting trees until further notice. The court held that the plaintiff was excused from performing because the defendant's instruction prevented the plaintiff from entering defendant's land to perform the obligation [*Crawford v. Pioneer Box & Lumber Co. (1930) 105 CA 760, 768, 288 P 694*].



Warning:

A contract may expressly provide that a party who relies on CC § 1511 must give written notice within a reasonable time to the other party of an intent to claim an extension of time, bring suit, or other related acts [see CC § 1511(1)]. If the contract includes such a provision, the plaintiff must comply with its requirements. If the plaintiff fails to provide notice, the plaintiff may avoid this provision only by establishing that the notice requirement is not "reasonable and just" [see CC § 1511(1)].

22.08[5] Inducement Not to Perform May Excuse Performance.

22.08[5][a] Acts to Induce Plaintiff Not to Perform Excuse Performance. If a defendant does some act naturally tending to induce the plaintiff not to perform, the plaintiff's failure to perform is excused [CC § 1511(3)]. To be excused, the inducement must be made at or before the time performance was due [CC § 1511(3)].

Example:

A borrower, who had pledged a mink coat as security for a loan, was told by the lender that she could repay the loan within a week. Within the week, she returned to repay the loan and redeem her coat, but was told that the coat was sold and the account closed. The court held that the borrower was excused from tendering the amount of loan, and that she was properly awarded damages (for conversion) [*Wade v. Markwell & Co. (1953) 118 CA2d 410, 420, 430, 258 P2d 497*].

22.08[5][b] Waiver May Excuse Performance of Condition. A party claiming breach may be excused from performance of a condition of the contract if the other party either expressly or implicitly waived that condition [see, e.g., *Atkinson v. Pacific Fire Extinguisher Co. (1953) 40 C2d 192, 194-195, 253 P2d 18* (plaintiff excused from timely performance of payments when defendant waived right by accepting late payment)].

In attempting to recover for breach, a plaintiff may not claim waiver for failing to perform a material part of the contract [see CC § 1541 (requiring either new consideration or writing to extinguish contractual obligation)].

Jury Instructions:

Waiver of Condition Precedent, see *Judicial Council of California Civil Jury Instructions, CACI No. 323* (LexisNexis Matthew Bender).

Waiver Defined, see *California Forms of Jury Instruction, Ch. 3F, Instr. MB 300F.20* (Matthew

Bender).

Waiver by Conduct, see *California Forms of Jury Instruction, Ch. 3F, Instr. MB 300F.21* (Matthew Bender).

 Cross References:

Discussion of performance of conditions to a contract, see 22.19, 22.20, 22.66, 22.67.

Discussion of materiality of terms of contract, see 22.24 -22.29.

Discussion of meanings of the term waiver, see 22.21[3], 22.68.

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawBreachCauses of ActionGeneral OverviewContracts LawBreachCauses of ActionElements of ClaimsContracts LawPerformanceGeneral OverviewContracts LawPerformanceTender & Delivery



102 of 188 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 22 Suing or Defending Action for Breach of Contract
II. ESTABLISHING BREACH OF CONTRACT

2-22 MB Practice Guide: CA Contract Litigation 22.09

22.09 Breach Occurred If Defendant Failed to Perform or Prevented Plaintiff From Performing.

The plaintiff may establish a breach by showing that the defendant failed to perform an obligation under the contract without justification or excuse [*see, e.g., Sackett v. Spindler (1967) 248 CA2d 220, 227, 56 CR 435*]. Alternatively, the plaintiff may show that the defendant prevented the plaintiff from performing under the contract [*see, e.g., Jacobs v. Tenneco W., Inc. (1986) 186 CA3d 1413, 1417, 231 CR 351*]. The plaintiff may also establish breach by showing defendant's repudiation of the contract [*see, e.g., Gold Mining & Water Co. v. Swinerton (1943) 23 C2d 19, 29, 142 P2d 22*].

► **Cross References:**

Discussion of defendant's prevention of plaintiff's performance, *see* 22.08[4], 22.09.

Discussion of breach by defendant's repudiation, *see* 22.23.

Discussion of failure to perform under the California Commercial Code, *see* Ch. 28, Contract for Sale of Goods--Suing or Defending Action for Breach of Contract Under California Commercial Code.

Legal Topics:

For related research and practice materials, *see* the following legal topics:

Contracts LawBreachGeneral OverviewContracts LawBreachCauses of ActionElements of ClaimsContracts LawPerformanceGeneral Overview



103 of 188 DOCUMENTS

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Chapter 22 Suing or Defending Action for Breach of Contract
II. ESTABLISHING BREACH OF CONTRACT

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22.10 Demand for Defendant's Performance May Be Required.

When the defendant had an unconditional duty to perform, the plaintiff has no obligation to demand performance before bringing suit [*McDonald v. Filice* (1967) 252 CA2d 613, 623, 60 CR 832]. On the other hand, if the defendant had a conditional duty to perform and the contract did not specify the time for performance, a demand for performance generally must be made within a reasonable time before a suit may be brought [*Woollomes v. Gomes* (1938) 26 CA2d 461, 465, 79 P2d 728].

► Cross References:

Discussion of conditions, see 22.19, 22.20, 22.66, 22.67.

Discussion of demand for performance under California Commercial Code, see Ch. 28, Contract for Sale of Goods--Suing or Defending Action for Breach of Contract Under California Commercial Code.

Discussion of demand for performance generally, see *California Forms of Pleading and Practice*, § 140.42 (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawBreachCauses of ActionElements of ClaimsContracts LawPerformanceGeneral Overview



104 of 188 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 22 Suing or Defending Action for Breach of Contract
II. ESTABLISHING BREACH OF CONTRACT

2-22 MB Practice Guide: CA Contract Litigation 22.11

22.11 Damages Must Be Proximately Caused by Defendant's Breach.

Damages are an essential element of the cause of action for breach of contract [*Acoustics, Inc. v. Trepte Constr. Co.* (1971) 14 CA3d 887, 913, 92 CR 723]. The measure of damages is the amount that will compensate the nonbreaching party for the harm proximately caused by, or likely to result from, the breach [CC § 3300].

Jury Instructions:

Breach of Contract--Essential Factual Elements, see *Judicial Council of California Civil Jury Instructions*, CACI No. 303 (LexisNexis Matthew Bender).

Judge's Perspective:

The party to a breach of contract case should focus on damages right away in trial preparation and discovery, and avoid the temptation to focus disproportionately on issues of formation or performance. For one thing, it will not be possible to value the case for settlement purposes until both sides can confidently predict the range of damages the plaintiff will receive at trial. For another, in many cases there will be no doubt that the defendant has breached the contract, but it can be shown that the plaintiff suffered no damages, or that the damages are speculative.

➡ Cross References:

Discussion of pleading and proving contract damages, the measure of damages, and establishing causation, see Ch. 7, Seeking or Opposing Damages in Contract Actions.

Discussion of damages in breach of sale of goods, see Ch. 26, Contract for Sale of Goods--Seeking Remedies Under California Commercial Code.

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawBreachCauses of ActionElements of ClaimsContracts LawRemediesCompensatory DamagesContracts

LawRemediesForeseeable DamagesGeneral OverviewContracts LawRemediesReliance Damages



105 of 188 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 22 Suing or Defending Action for Breach of Contract
II. ESTABLISHING BREACH OF CONTRACT

2-22 MB Practice Guide: CA Contract Litigation 22.12

22.12 Pleading Requirements for Breach of Contract.

22.12[1] Pleading Must Specify Whether Contract Is Written, Oral, or Implied. The complaint must make clear whether the contract is written, oral, or implied by conduct [*CCP* § 430.10(g)].

 Cross Reference:

Demurrer to complaint on grounds that contract does not specify whether it is written, oral, or implied, see *Ch. 15, Attacking or Defending Existence of Contract--Failure to Comply With Applicable Formalities*, 15.13.

Form for demurrer on ground that contract fails to specify whether it is written, oral, or implied, see *Ch. 15, Attacking or Defending Existence of Contract--Failure to Comply With Applicable Formalities*, 15.36.

22.12[2] Pleading for Written Contract Must Include Essential Terms. A complaint alleging breach of a written contract must include allegations of the essential terms of the contract, or, if done carefully, by alleging the import of the terms [*International Billing Servs., Inc. v. Emigh* (2000) 84 CA4th 1175, 1187, 101 CR2d 532]. It is customary to attach a copy of a written contract to the complaint. Typically this is done by attaching a complete copy and incorporating it in the complaint by reference [*International Billing Servs., Inc. v. Emigh* (2000) 84 CA4th 1175, 1187, 101 CR2d 532].



Strategic Point--Plaintiff:

The better practice is to attach a copy of the written contract, whether or not the relevant parts of the contract are described with certainty in the complaint. Attaching the contract to the complaint will make life easier throughout the course of the litigation if the plaintiff does so (and if the defendant does not challenge its authenticity). Otherwise, hearings, depositions, meeting and other events can get bogged down looking for an authentic copy of the contract. If the plaintiff does not do so, the defendant may choose to attach the contract to the answer. Note that all operative addenda, modifying documents, and the like, should be included. In addition, a complaint that does not attach the written contract and does not sufficiently describe the provisions at issue is subject to demurrer for uncertainty. Further, failure to

attach the contract means the plaintiff must plead the relevant terms verbatim or plead the "import" of the terms (which must be "done cautiously") [*International Billing Servs., Inc. v. Emigh* (2000) 84 CA4th 1175, 1187, 101 CR2d 532]. Attaching a copy leaves no doubt as to what the terms are, and allows the pleader to include only the terms deemed relevant in the complaint.

The consideration for the contract need not be alleged [CC § 1614].

Cross References:

Form for complaint for written contract, see 22.73.

Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, Ch. 7, Complaints.

Discussion of pleading written contracts, see *California Forms of Pleading and Practice*, § 140.100 (Matthew Bender).

22.12[3] Pleading for Oral Contract Must Allege Legal Effect, Consideration, and Nature of Contract.

Because of the difficulty in recalling verbatim an oral contract, a plaintiff must instead allege the legal effect, the consideration, and the nature of an oral contract [see, e.g., *Weitzenkorn v. Lesser* (1953) 40 C2d 778, 780, 792, 256 P2d 947].

Strategic Point--Plaintiff:



Although the terms of an oral contract need not be pleaded verbatim, plaintiff's counsel should conduct thorough pre-filing discovery to determine the plaintiff's best recollection of exactly what the parties said in forming the contract, so that the complaint will be consistent with the facts as they unfold during pre-trial discovery.

Cross References:

Form for complaint for breach of oral contract, see 22.74.

Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, Ch. 7, Complaints.

Discussion of pleading oral contracts, see *California Forms of Pleading and Practice*, § 140.104 (Matthew Bender).

22.12[4] Pleading for Implied-in-Fact Contract Must Include Allegations of Conduct. A pleading for an implied-in-fact contract must include allegations depicting the conduct and circumstances from which a finder of fact could conclude the existence of an implied agreement [see, e.g., *Youngman v. Nevada Irrigation Dist.* (1969) 70 C2d 240, 247, 74 CR 398, 449 P2d 462].

The plaintiff must show conduct by both parties that is intentional and that both parties know, or have reason to know, that the other would interpret as an agreement to enter into a contract [*Marvin v. Marvin* (1976) 18 C3d 660, 678 n16, 134 CR 815, 557 P2d 106].

Jury Instructions:

Implied-in-Fact Contract, see *Judicial Council of California Civil Jury Instructions*, CACI No. 305 (LexisNexis Matthew Bender).

Cross References:

Discussion of pleading implied in fact contracts, see *California Forms of Pleading and Practice*, § 140.110 (Matthew Bender).

Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, Ch. 7, Complaints.

22.12[5] Pleading for Ambiguous Contract Must Include Ascribed Meaning. When the terms of a contract are ambiguous, the plaintiff must allege in the complaint the meaning of the ambiguous terms, including particular customs or usages of a trade or geographic area [see, e.g., *Kaufman & Broad Bldg. Co. v. City & Suburban Mortgage Co.* (1970) 10 CA3d 206, 217, 88 CR 858].



Warning:

Counsel should keep in mind that alleging that a contract contains ambiguous terms opens the door to parol evidence.



Cross Reference:

Discussion of interpretation of ambiguous terms, see Ch. 21, Asserting a Particular Construction of Contract.

22.12[6] Pleading Must Include Allegation of Performance of Conditions Precedent.

22.12[6][a] General Allegation of Conditional Act Is Adequate. A party must fulfill all conditions precedent, and be able and offer to fulfill all conditions concurrent, before demanding performance by the other party [CC § 1439]. Thus, the plaintiff must include allegations of performance of these conditions in the complaint [*Daum v. Superior Court* (1964) 228 CA2d 283, 287, 39 CR 443]. However, when the conditions require performance by the plaintiff, the complaint need only state generally that the party "duly performed all the conditions on his [or her] part" [CCP § 457]. Only if the defendant controverts this allegation does the plaintiff need to establish at trial the facts showing performance of the conditions [CCP § 457; but see 22.12[6][b] (conditional event must be specifically alleged)].



Warning:

Specific allegations control over general allegations. If the plaintiff alleges due performance of all conditions but includes specific allegations that controvert that performance, the specific allegations control and the complaint is subject to demurrer [*Careau & Co. v. Security Pac. Bus. Credit, Inc.* (1990) 222 CA3d 1371, 1389-1390, 272 CR 387].

Distinguish--Condition Subsequent:

The plaintiff need not allege performance of a condition subsequent, because that condition is an affirmative defense for the defendant [see *Blasingame v. Home Ins. Co.* (1888) 75 C 633, 635, 17 P 925]. Nevertheless, when a condition subsequent is present, the plaintiff must allege that performance became due before occurrence of the condition subsequent [see *Rizzuto v. National Reserve Ins. Co.* (1949) 92 CA2d 143, 146, 206 P2d 431] or that the condition was satisfied in a timely manner.

22.12[6][b] Specific Allegation of Conditional Event Is Required. Although the plaintiff may include a general allegation regarding a conditional act [see 22.12[6][a]], the plaintiff *must* include specific allegations when the condition precedent required the occurrence of an event [*Careau & Co. v. Security Pac. Bus. Credit, Inc.* (1990) 222 CA3d 1371, 1389, 272 CR 387].

22.12[7] Pleading Must Include Allegation of Plaintiff's Performance or Specific Allegation of Plaintiff's Excuse From Performance. Absent an excuse from performance, the plaintiff must allege performance or tender of performance [see CC § 1495]. When the plaintiff did not perform because of some excuse, the plaintiff must specifically allege the facts establishing excuse from performance [see, e.g., *Daum v. Superior Court* (1964) 228 CA2d

283, 287-289, 39 CR 443 (allowing amended complaint when plaintiff included specific allegations of anticipatory breach as excuse for plaintiff's nonperformance)].

22.12[8] Unequivocal Breach Must Be Alleged. The plaintiff must allege facts constituting the unequivocal breach [*Gautier v. General Tel. Co.* (1965) 234 CA2d 302, 305, 44 CR 404]. The allegations must specify the particular conduct that violated the specific obligations under the contract [*Wise v. Southern Pac. Co.* (1963) 223 CA2d 50, 60, 35 CR 652 , *overruled on other grounds by* *Applied Equip. Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 C4th 503, 510, 28 CR2d 475, 869 P2d 454].

Judge's Perspective:

It is difficult to identify this standard precisely, because in many of the reported cases the plaintiffs failed to meet it by such a wide mark. In the *Gautier* case, the plaintiff failed to allege any facts that would constitute a breach of contract. Thus, the court was left in the dark as to whether any breach at all occurred [see *Gautier v. General Tel. Co.* (1965) 234 CA2d 302, 305, 44 CR 404]. Other cases are to similar effect [see, e.g., *Otworth v. Southern Pac. Transp. Co.* (1985) 166 CA3d 452, 459, 212 CR 743 ("Otworth's complaint makes no mention of whether the contract is written or oral, sets forth none of the alleged contract's terms, and includes no assertion that Otworth has either performed the contract or is excused from performing")]. The drafter of the complaint should ask, "Do these allegations leave the reader certain that the contract has been breached?" If so, the allegations in the complaint are probably adequate. Thus, for example, the plaintiff might allege that the defendant agreed to pay 30 cents per pound for all the tomatoes the plaintiff could produce, provided that the tomatoes were of a certain quality and that they were tendered to the defendant's weighing facility by May 1; that the plaintiff tendered four tons of tomatoes to the proper facility on April 10; that the tomatoes were of the required quality; that the plaintiff demanded \$2,400 pursuant to the terms of the contract; and that the defendant refused to pay that amount or any amount.

22.12[9] Facts Establishing Damages Caused by Breach Must Be Alleged. The complaint must contain facts that establish the damages proximately caused by the breach [CC § 3300; *Gautier v. General Tel. Co.* (1965) 234 CA2d 302, 305, 44 CR 404]. Damages recoverable are limited to those that are clearly ascertainable in their nature and origin [CC § 3301].



Strategic Point--Plaintiff:

Ordinarily, damages do not have to be quantified or even estimated in the complaint. It is common to state merely that damages are "subject to proof at trial." All that is required to avoid ambiguity is a general description of the manner in which damages were caused and the general nature of them.



Search California Forms of Pleading and Practice:

Use *lexis.com* to search for forms for complaints for use in contract actions:

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Sample Search: To find sample and Judicial Council complaint forms in California for actions based on breach of contract, try: *heading (complaint) AND section (breach!)*.



Cross Reference:

Discussion of recoverable damages in contract actions, see Ch. 7, Seeking or Opposing Damages in

Contract Actions.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Pleading & Practice Pleadings Complaints Requirements Contracts Law Breach Causes of Action General
Overview Contracts Law Breach Causes of Action Elements of Claims



106 of 188 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 22 Suing or Defending Action for Breach of Contract
III. ESTABLISHING NONPERFORMANCE OF CONTRACT

2-22 MB Practice Guide: CA Contract Litigation 22.13

22.13 CHECKLIST: Establishing Nonperformance of Contract.

☐ Determine whether elements of nonperformance are present, including:

☐ Defendant failed to confer full performance under contract.

Authority:

CC § 1473

Discussion:

See 22.16[1], [2]

☐ Someone other than party to contract tendered performance, and that performance was not accepted by plaintiff.

Authority:

CC § 1473

Discussion:

See 22.16[3]

☐ Performance was accepted by other than one of the parties to whom performance was due.

Authority:

CC §§ 1473, 1475

Discussion:

See 22.16[5], [6]

☐ Determine if any of following occurred:

- ☐ Partial performance was made by defendant, but not accepted by plaintiff.

Authority:

CC § 1477

Discussion:

See 22.16[4]

- ☐ Debtor failed to make payment in a manner specified by creditor.

Authority:

CC § 1476

Discussion:

See 22.18

- ☐ Defendant promised but failed to perform condition precedent.

Authority:

Kulawitz v. Pacific Woodenware & Paper Co. (1944) 25 C2d 664, 669, 155 P2d 24

Discussion:

See 22.19

- ☐ Defendant prevented occurrence of a condition precedent.

Authority:

Jacobs v. Tenneco W., Inc. (1986) 186 CA3d 1413, 1418, 231 CR 351

Discussion:

See 22.19

- ☐ Defendant failed to perform a condition concurrent when plaintiff performed the corresponding condition.

Authority:

Groobman v. Kirk (1958) 159 CA2d 117, 123, 323 P2d 867

Discussion:

See 22.20

- ☐ Plaintiff's failure to perform is excused, but defendant's nonperformance is not excused, because:

- ☐ Defendant repudiated contract.

Authority:

CC § 1440

Discussion:

See 22.21[1]

- ☐ Plaintiff waived condition solely benefitting plaintiff.

Authority:

Crescenta Valley Moose Lodge v. Bunt (1970) 8 CA3d 682, 687, 87 CR 428

Discussion:

See 22.21[2]

- ☐ Defendant waived condition solely benefitting defendant.

Authority:

Kellogg v. Snell (1928) 93 CA 717, 721, 270 P 232

Discussion:

See 22.21[3]

- ☐ Defendant's performance was suspended only temporarily by temporary impossibility or legal prohibition.

Authority:

Bergin v. van der Steen (1951) 107 CA2d 8, 16

Discussion:

See 22.22

- ☐ Defendant repudiated contract before time when performance was due (anticipatory repudiation), by one of following methods:

- ☐ Defendant expressly repudiated contract.

Authority:

Gold Mining & Water Co. v. Swinerton (1943) 23 C2d 19, 29, 142 P2d 22

Discussion:

See 22.23[1]

- ☐ Defendant implicitly repudiated contract through conduct.

Authority:

Taylor v. Johnston (1975) 15 C3d 130, 137, 123 CR 641, 539 P2d 425

Discussion:

See 22.23[1][c]

- ☐ Defendant repudiated contract and the retracted repudiation, but plaintiff detrimentally relied on repudiation before retraction.

Authority:

Guerrieri v. Severini (1958) 51 C2d 12, 19, 330 P2d 635

Discussion:

See 22.23[4]

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawBreachGeneral OverviewContracts LawBreachNonperformanceContracts LawPerformanceGeneral Overview



107 of 188 DOCUMENTS

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Chapter 22 Suing or Defending Action for Breach of Contract
III. ESTABLISHING NONPERFORMANCE OF CONTRACT

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22.14 Options and Strategy.

It is crucial for the plaintiff in a breach of contract action to establish that the plaintiff performed, tendered performance, or was excused from performance, and that the defendant did not perform as required in the contract [see 22.21]. Nonperformance is the linchpin of breach of contract, including partial performance or a failure to make payment [see 22.16, 22.31, 22.18]. The plaintiff need not make any particular demand for performance [see 22.17]. The plaintiff also should strive to show that conditions precedent or concurrent were not fulfilled [see 22.19, 22.20]. In appropriate circumstances, the plaintiff can prevail by showing that the defendant was guilty of anticipatory repudiation (that is, breaching in advance of the time for performance) [see 22.23].

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawBreachCauses of ActionElements of ClaimsContracts LawPerformanceGeneral OverviewContracts LawPerformanceTender & Delivery



108 of 188 DOCUMENTS

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Chapter 22 Suing or Defending Action for Breach of Contract
III. ESTABLISHING NONPERFORMANCE OF CONTRACT

2-22 MB Practice Guide: CA Contract Litigation 22.15

22.15 Elements of Nonperformance of Contract.

When a contract is entire, as opposed to severable, nonperformance occurs when a party unjustifiably fails to perform a material promise or obligation under the contract [*Woodard v. Glenwood Lumber Co. (1915) 171 C 513, 522, 153 P 951*].

Cross References:

Discussion of materiality of breach, see 22.24 -22.29.

Discussion of whether a contract is entire or severable, see 22.31, 22.35[1].

Discussion of nonperformance in sale of goods, see Ch. 28, Contract for Sale of Goods--Suing or Defending Action for Breach of Contract Under California Commercial Code.

Legal Topics:

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109 of 188 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 22 Suing or Defending Action for Breach of Contract
III. ESTABLISHING NONPERFORMANCE OF CONTRACT

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22.16 Nonperformance Constitutes Breach of Contract.

22.16[1] Plaintiff May Show That Defendant Failed to Fully Perform Contractual Obligation. The first element of nonperformance is the failure to fully perform a material promise or obligation under the contract [CC § 1473]. At common law, full performance was required before the obligor was entitled to be paid [*Thomas Haverty Co. v. Jones* (1921) 185 C 285, 288-289, 197 P 105]. This requirement has been relaxed by the doctrine of substantial performance [see 22.16[2]].

22.16[2] Substantial Performance Does Not Constitute Breach. To mitigate the harshness of common-law requirement of strict compliance with full performance, the courts developed the doctrine of substantial performance, allowing a party who substantially performs in good faith to recover the contract price, less the amount allowed as damages for the failure of strict performance [*Thomas Haverty Co. v. Jones* (1921) 185 C 285, 289, 197 P 105] .

Jury Instructions:

Substantial Performance, see *California Forms of Jury Instruction, Ch. 3D, Instr. MB 300D.02* (Matthew Bender).

➤ Cross References:

Discussion of substantial performance as element of claim for breach, see 22.08[2].

Discussion of substantial performance as a defense to action for breach of contract, see 22.69.

22.16[3] Performance by Unauthorized Party That Was Tendered, but Not Accepted, Constitutes Nonperformance. Nonperformance may be established when an unauthorized party tenders performance, unless the promisee accepts the performance by the unauthorized party [CC § 1473].

Jury Instructions:

Person Required to Make Offer, see *California Forms of Jury Instruction, Ch. 3D, Instr. MB 300D.52* (Matthew Bender).

Performance by Another, see *California Forms of Jury Instruction, Ch. 3D, Instr. MB 300D.15* (Matthew Bender).

 Cross Reference:

Discussion of tendering performance, see 22.08[3].

22.16[4] Failure to Fully Perform Is Partial Breach. When a promisor performs part of an indivisible obligation, a corresponding part of the obligation is extinguished if the promisee voluntarily retains the benefit of the performance [CC § 1477]. The failure to perform the remaining part of the obligation is a partial breach [see *Linden Partners v. Wilshire Linden Assocs.* (1998) 62 CA4th 508, 531, 73 CR2d 708].

 Cross Reference:

Complete discussion of breach of indivisible obligation, see 22.31.

22.16[5] Performance Must Be Accepted. The performance must be accepted by the promisee to extinguish the obligation [CC § 1473]. However, acceptance may be made by one of joint promisee, even though the remaining joint parties do not receive the benefit of the performance [see CC § 1475; *Cober v. Connolly* (1942) 20 C2d 741, 744, 128 P2d 519]. Similarly, the promisee need not necessarily be a party to the contract. For example, the performance may be owed to a third party beneficiary, who would then be the promisee.

Jury Instructions:

Performance to Satisfaction of Third Party, see *California Forms of Jury Instruction, Ch. 3D, Instr. MB 300D.14* (Matthew Bender).

 Cross Reference:

Discussion of issues relating to third-party beneficiaries, see Ch. 19, Seeking or Opposing Recovery As Third Party Beneficiary of Contract.

22.16[6] Performance Must Be Made to Proper Party. In general, when an obligation runs in favor of joint parties, performance rendered to any one party extinguishes the obligation [CC § 1475]. This provision does not apply in cases involving deposits made by owners in common, or in joint ownership, which is regulated by the law relating to deposits [CC § 1475].

Jury Instructions:

Person to Whom Offer Must Be Made, see *California Forms of Jury Instruction, Ch. 3D, Instr. MB 300D.53* (Matthew Bender).

22.16[7] Performance Must Be Made in Proper Place. Performance must be made in the place specified in the contract or a place reasonably inferred from the contract [*Burr v. Western States Life Ins. Co.* (1931) 211 C 568, 575, 296 P 273]. If it is unclear where the performance is to be made, the promisor normally must seek out the other party for performance [*Burr v. Western States Life Ins. Co.* (1931) 211 C 568, 575, 296 P 273]. The place for performance is a question of fact [*Hale v. Bohannon* (1952) 38 C2d 458, 466, 241 P2d 4].

Jury Instructions:

Place of Offer, see *California Forms of Jury Instruction, Ch. 3D, Instr. MB 300D.56* (Matthew Bender).

 Search California Published Cases:

Use *lexis.com* to search for cases on failing or refusing to perform under a contract:

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Sample Search: To find California case law on a party's failure or refusal to perform

a contract or agreement in accordance with its terms, try: *contract! OR agree! /5 fail! OR refus! /5 perform! OR execut! /5 terms OR provi!.*

**Cross Reference:**

Discussion of nonperformance in sale of goods, see Ch. 28, Contract for Sale of Goods--Suing or Defending Action for Breach of Contract Under California Commercial Code.

Legal Topics:

For related research and practice materials, see the following legal topics:

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110 of 188 DOCUMENTS

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Chapter 22 Suing or Defending Action for Breach of Contract
III. ESTABLISHING NONPERFORMANCE OF CONTRACT

2-22 MB Practice Guide: CA Contract Litigation 22.17

22.17 No Demand for Performance Is Necessary.

Unless the contract specifies that a demand for performance must be made before a party is in breach, no demand is necessary [*McDonald v. Filice* (1967) 252 CA2d 613, 623, 60 CR 832]. The promisee may bring suit as soon as the promisor fails to perform as required under the contract [see CC § 1657].

 Cross References:

Discussion of timeliness of performance and accrual of cause of action, see 22.42 -22.50, 22.70[3].

Discussion of demand requirement in sale of goods, see Ch. 28, Contract for Sale of Goods--Suing or Defending Action for Breach of Contract Under California Commercial Code.

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawBreachCauses of ActionElements of ClaimsContracts LawBreachNonperformanceContracts LawPerformanceGeneral Overview



111 of 188 DOCUMENTS

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Chapter 22 Suing or Defending Action for Breach of Contract
III. ESTABLISHING NONPERFORMANCE OF CONTRACT

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22.18 Debtor's Failure to Perform Obligation in Manner Specified by Creditor Constitutes Breach of Contract.

If a creditor directs a debtor to perform an obligation in a particular manner, the debtor must perform in the specified manner in order to extinguish the obligation [CC § 1476]. This requirement applies specifically to the payment of debt, rather than all types of performance [see, e.g., *Cornwell v. Bank of Am.* (1990) 224 CA3d 995, 998, 999, 274 CR 322]. If performed in the specified manner, the obligation is extinguished, even if the creditor does not receive the benefit of performance [CC § 1476].



Cross Reference:

Discussion of failure to make payment in sale of goods, see Ch. 28, Contract for Sale of Goods--Suing or Defending Action for Breach of Contract Under California Commercial Code.

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawBreachGeneral OverviewContracts LawBreachCauses of ActionElements of ClaimsContracts LawPerformanceGeneral Overview



112 of 188 DOCUMENTS

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Chapter 22 Suing or Defending Action for Breach of Contract
III. ESTABLISHING NONPERFORMANCE OF CONTRACT

2-22 MB Practice Guide: CA Contract Litigation 22.19

22.19 Nonoccurrence of Condition Precedent May Give Rise to Breach.

22.19[1] Condition Precedent Is Occurrence of Event That Triggers Duty to Perform. A condition precedent is an uncertain event that must be performed, or must occur, before some right accrues or some act must be performed [CC §§ 1434, 1436]. The condition may be expressed in or implied by the contract [*Sosin v. Richardson* (1962) 210 CA2d 258, 264, 26 CR 610].

Example--Conditional Act:

A provision in an installment contract that requires all payments to be made at specified times before transfer of the title is a conditional act [see, e.g., *Major-Blakeney Corp. v. Jenkins* (1953) 121 CA2d 325, 331, 263 P2d 655]. The condition precedent is the act of making all payments at the specified times. The right that accrues is the right to obtain transfer of the title [see 22.12[6][a]].

Example--Conditional Event:

A provision in an employment contract that requires an employee to be on "active employment" on a certain date to be entitled to vacation is a conditional event [see, e.g., *Division of Labor Law Enforcement v. Standard Coil Prods. Co.* (1955) 136 CA2d Supp 919, 923, 288 P2d 637]. The conditional event is that the employee be on active employment on a certain date. The right that accrues is the right to take vacation [see 22.12[6][b]].

Jury Instructions:

Occurrence of Agreed Condition Precedent, see *Judicial Council of California Civil Jury Instructions*, CACI No. 322 (LexisNexis Matthew Bender).

Condition Defined, see *California Forms of Jury Instruction*, Ch. 3D, Instr. MB 300D.30 (Matthew Bender).

Due Diligence in Seeking to Cause Condition Precedent to Occur, see *California Forms of Jury Instruction*, Ch. 3D, Instr. MB 300D.31 (Matthew Bender).

22.19[2] Plaintiff Has Burden to Show Occurrence of Condition Precedent. When a promisor's duty to perform is conditioned on the occurrence of an event, the promisee has the burden to prove the occurrence of the event [

Consolidated World Invs., Inc. v. Lido Preferred, Ltd. (1992) 9 CA4th 373, 380, 11 CR2d 524].

The promisee need not prove the occurrence of the event unless the promisor first comes forth with evidence that the condition did not occur. Further, when the existence of the condition is in dispute, the promisor has the burden to show the parties agreed to the condition [see *Consolidated World Invs., Inc. v. Lido Preferred Ltd.* (1992) 9 CA4th 373, 380, 11 CR2d 524].

Jury Instructions:

Occurrence of Agreed Condition Precedent, see *Judicial Council of California Civil Jury Instructions*, CACI No. 322 (LexisNexis Matthew Bender).

Existence of Condition Precedent Disputed, see *Judicial Council of California Civil Jury Instructions*, CACI No. 321 (LexisNexis Matthew Bender).

22.19[3] Defendant's Failure to Fulfill Promise to Perform Condition Precedent Is Ground for Breach.

When a party to the contract promises to make a condition precedent occur, the condition precedent is a covenant, the breach of which gives rise to an action for nonperformance [*Kulawitz v. Pacific Woodenware & Paper Co.* (1944) 25 C2d 664, 669, 155 P2d 24].

Example:

A commercial furniture store lease included a covenant that the lessor would not lease other space in the same building for another furniture store. The court held that this covenant was a condition precedent to the lessee's beneficial enjoyment of the property. The lessor's violation of the condition precedent resulted in a constructive eviction of the lessee, and relieved the lessee of the duty to make rental payments after the violation of the restrictive covenant [*Kulawitz v. Pacific Woodenware & Paper Co.* (1944) 25 C2d 664, 669, 670, 155 P2d 24].



Strategic Point--Both Parties:

Courts avoid, if possible, interpreting parts of contracts as conditions precedent, unless the terms are unambiguous and the intention of the parties clear [see *Frankel v. Board of Dental Exam'rs* (1996) 46 CA4th 534, 550, 54 CR2d 128]. In the absence of clarity, the court examines the whole document to determine the purpose and intention of the parties [*Pacific Allied v. Century Steel Prods., Inc.* (1958) 162 CA2d 70, 80, 327 P2d 547]. If the purpose and intention remain unclear, the court will interpret the provision as a covenant, rather than strictly a condition precedent, to avoid destroying all rights under the contract [*Division of Labor Law Enforcement v. Ryan Aeronautical Co.* (1951) 106 CA2d Supp 833, 836, 236 P2d 236 ; see *RC Royal Development and Realty Corp. v. Standard Pacific Corp.* (2009) 177 CA4th 1410, 1422, 100 CR3d 115 (language in real estate brokerage agreement referring to "escrow" set time in which commission was to be paid and did not make escrow a condition precedent to earning of commission itself)]. The party seeking enforcement or damages from breach therefore should argue that the condition is a covenant, or at a minimum is ambiguous. The opposing party must argue that both parties understood the provision as a condition precedent.

Jury Instructions:

Due Diligence in Seeking to Cause Condition Precedent to Occur, see *California Forms of Jury Instruction*, Ch. 3D, Instr. MB 300D.31 (Matthew Bender).



Cross Reference:

Discussion of condition precedent as defense to breach of contract, see 22.66.

22.19[4] Defendant's Prevention of Happening of Condition Precedent Is Breach. A party who prevents or makes impossible the fulfillment of a condition precedent cannot claim to have been excused from performing, and cannot rely on the nonoccurrence of the condition to defeat liability [*Jacobs v. Tenneco W., Inc. (1986) 186 CA3d 1413, 1418, 231 CR 351*].

Example:

Buyers of agricultural land sued for specific performance for sale of the land. The sellers argued that approval by the seller's board of directors was a condition precedent to the sale, and that the board did not approve it. The court held that the seller's failure to submit the sale to the board barred the seller from using that condition precedent to preclude liability, absent proof that the board would not have approved the sale [*Jacobs v. Tenneco W., Inc. (1986) 186 CA3d 1413, 1418-1419, 231 CR 351*].



Warning--Defendant:

Excuse for nonperformance of a condition precedent is an affirmative defense, so that the burden of proof is on the party in breach [*Jacobs v. Tenneco W., Inc. (1986) 186 CA3d 1413, 1417, 231 CR 351*]. Accordingly, the defendant should plead excuse and marshal appropriate evidence to support this defense.



Cross Reference:

Discussion of excuse for nonperformance of condition precedent, see 22.08[4].

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawBreachGeneral OverviewContracts LawContract Conditions & ProvisionsConditions Precedent



113 of 188 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 22 Suing or Defending Action for Breach of Contract
 III. ESTABLISHING NONPERFORMANCE OF CONTRACT

2-22 MB Practice Guide: CA Contract Litigation 22.20

22.20 Defendant's Failure or Inability to Perform Condition Concurrent Is Ground for Breach.

22.20[1] Conditions Concurrent Must Be Tendered or Performed Concurrently. Conditions concurrent are conditions that are mutually dependent, and are to be performed at the same time [CC § 1437]. Tender of performance (that is, an offer of performance) by one party is sufficient to satisfy a condition concurrent [*Diamond v. Huenergardt* (1959) 175 CA2d 214, 220, 346 P2d 37].

Example:

In the sale of real property, the obligation of the buyer to put money in the escrow account and the obligation of the seller to deliver the deed into escrow are conditions concurrent [*Diamond v. Huenergardt* (1959) 175 CA2d 214, 220, 346 P2d 37].

Jury Instructions:

Condition Concurrent, see *California Forms of Jury Instruction, Ch. 3D, Instr. MB 300D.32* (Matthew Bender).

➡ Cross Reference:

Discussion of tender of performance, see 22.08[3].

22.20[2] Defendant's Failure to Perform Condition Concurrent Is Ground for Breach. A party to a contract with conditions concurrent must be fully able to perform or tender performance to put the other party in default [*Katemis v. Westerlind* (1953) 120 CA2d 537, 546, 261 P2d 553]. Once a party fails to perform or tender performance of the other condition concurrent, the other party may put the first party in default if the other party is able to perform [*Groobman v. Kirk* (1958) 159 CA2d 117, 123, 126, 323 P2d 867].

Example:

A contract for the sale of land contained conditions concurrent to place funds and the deed in escrow. The buyer placed a part of the payment amount in escrow. A preliminary title report indicated that the property had a 10-year lease on it. When the buyer demanded that clear title be tendered and that the buyer was tendering the balance of the purchase price, the seller was unable to provide the deed. The court held that the buyer had the right to specific performance and damages for defect in title due to the seller's failure to perform on the buyer's tender of performance [*Groobman v. Kirk* (1958) 159 CA2d

117, 123, 323 P2d 867].

Jury Instructions:

Condition Concurrent, see *California Forms of Jury Instruction, Ch. 3D, Instr. MB 300D.32* (Matthew Bender).

**Cross Reference:**

Discussion of concurrent conditions, see *California Forms of Pleading and Practice, § 140.44* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawBreachGeneral OverviewContracts LawBreachCauses of ActionElements of ClaimsContracts LawPerformanceTender & Delivery



114 of 188 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 22 Suing or Defending Action for Breach of Contract
 III. ESTABLISHING NONPERFORMANCE OF CONTRACT

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22.21 Plaintiff May Sue for Breach When Plaintiff's Failure to Perform Is Excused, but Defendant's Nonperformance Is Not Excused.

22.21[1] Plaintiff's Performance Is Excused When Defendant Repudiates Contract. A party is excused from performing conditions and may sue for nonperformance if the other party to a contract notifies the first party of an intention not to perform, and does not retract the notice of repudiation before the time performance is due [CC § 1440]. Under these circumstances, the party to whom notice was given may sue for nonperformance without having previously performed or offered to perform any conditions [CC § 1440; see *Tatum v. Ackerman* (1905) 148 C 357, 360, 83 P 151].

Jury Instructions:

Notice of Refusal or Inability to Perform, see *California Forms of Jury Instruction, Ch. 3D, Instr. MB 300D.72* (Matthew Bender).



Warning:

The repudiating party may retract the notice before the time performance is due [CC § 1440]. If a retraction is made, the other party is no longer excused from performance and must proceed under the contract.



Cross Reference:

Discussion of anticipatory repudiation, see 22.23.

22.21[2] Plaintiff May Sue When Nonperformed Condition Was Solely for Plaintiff's Benefit. If a condition is included in a contract that is solely for the benefit of one party and that party attempts in good faith to perform the condition, that party may waive the condition and sue for nonperformance by the opposing party [*Crescenta Valley Moose Lodge v. Bunt* (1970) 8 CA3d 682, 687, 87 CR 428].

Example:

A buyer contracted to purchase real property, fixtures, and a liquor license from a seller. The buyer's state application for transfer of the liquor license was denied. The court held that the buyer could sue, because the condition was solely for the buyer's benefit and the buyer therefore could waive this

condition [*O'Connell v. Zimmerman* (1958) 157 CA2d 330, 336, 321 P2d 161].



Strategic Point--Defendant:

Whether a condition is solely for the benefit of one party is a question of fact [*Crescenta Valley Moose Lodge v. Bunt* (1970) 8 CA3d 682, 687, 87 CR 428]. Any slight benefit to the defendant from the condition prevents the plaintiff from waiving the condition.

22.21[3] Plaintiff May Sue When Defendant Waives Condition Precedent. A party is excused from performing a condition precedent included for the benefit of the opposing party when the opposing party waives the need for its performance [*Kellogg v. Snell* (1928) 93 CA 717, 721, 270 P 232]. A party therefore may sue even when that party fails to perform a condition precedent if the other party waives that requirement.

The plaintiff bears the burden of proof in establishing defendant's waiver of the condition precedent [*Roseleaf Corp. v. Radis* (1953) 122 CA2d 196, 206, 264 P2d 964].

Example:

A buyer agreed to purchase shares of stock in a bank in exchange for the bank's agreement to hire him as a cashier or manager. The contract allowed the parties to sever the buyer's employment on condition that the buyer provide 60 days written notice. The bank hired the buyer as a teller, but failed to offer him a job as a cashier or manager. The buyer left after giving five days notice, and the bank's president expressly waived the requirement that the buyer stay with the bank for the full 60 days. The court held that the president's waiver of this condition precluded him from asserting that the buyer failed to fulfill the conditions of the contract, and allowed the buyer's recovery on the contract [*Kellogg v. Snell* (1928) 93 CA 717, 719-721, 270 P 232].



Warning:

A party may retract a waiver before the other party materially changes his or her position in reliance on it [see *Tas-T-Nut Co. v. Continental Nut Co.* (1954) 125 CA2d 351, 358, 270 P2d 43 (plaintiff's failure to bring suit during period following defendant's waiver of right to arbitrate permitted defendant to retract waiver and insist on arbitration)].

Jury Instructions:

Waiver of Condition Precedent, see *Judicial Council of California Civil Jury Instructions*, CACI No. 323 (LexisNexis Matthew Bender).



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Use *lexis.com* to search for discussion of excused performance in contract cases:

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Sample Search: To find CEB material on situations where performance under the terms of a contract is excused, try: *excus! /5 perform! /10 contract! OR oblig! OR agree!*.

Legal Topics:

For related research and practice materials, see the following legal topics:

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115 of 188 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 22 Suing or Defending Action for Breach of Contract
III. ESTABLISHING NONPERFORMANCE OF CONTRACT

2-22 MB Practice Guide: CA Contract Litigation 22.22

22.22 Plaintiff May Establish Breach by Nonperformance When Performance Was Only Temporarily Impossible or Unlawful.

When the obligations due under a contract are temporarily rendered impossible or unlawful, the obligations are generally suspended during the period of impossibility or legal prohibition, and are reinstated following that period [Bergin v. van der Steen (1951) 107 CA2d 8, 16, 236 P2d 613 (operation of concession stand suspended during period of war)]. Failure to perform following termination of period of impossibility or legal prohibition thereafter may result in breach by nonperformance.

➡ Cross Reference:

Discussion of discharge of duty for impossibility of performance, see 22.65[1].

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawBreachGeneral OverviewContracts LawBreachNonperformanceContracts LawDefensesIllegal BargainsContracts LawPerformanceImpossibility of PerformanceGeneral Overview



116 of 188 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 22 Suing or Defending Action for Breach of Contract
III. ESTABLISHING NONPERFORMANCE OF CONTRACT

2-22 MB Practice Guide: CA Contract Litigation 22.23

22.23 Plaintiff May Sue Based on Defendant's Anticipatory Breach.

22.23[1] Plaintiff Must Show Definite and Unconditional Repudiation of Contract Before Performance Is Due.

22.23[1][a] Anticipatory Breach Occurs Before Time Performance Is Due. Anticipatory breach is the repudiation of a bilateral contract before the time performance is due [*Gold Mining & Water Co. v. Swinerton* (1943) 23 C2d 19, 29, 142 P2d 22]. There can be no anticipatory breach of a unilateral contract [*Harris v. Time, Inc.* (1987) 191 CA3d 449, 457, 237 CR 584]. Nor may a party anticipate the breach of a contract made unilateral by one party's complete performance [*Maudlin v. Pac. Decision Scis. Corp.* (2006) 137 CA4th 1001, 1018, 40 CR3d 724] .

Jury Instructions:

Clear and Definite Notice, see *California Forms of Jury Instruction, Ch. 3D, Instr. MB 300D.76* (Matthew Bender).

Refusal in Advance to Accept Offer of Performance, see *California Forms of Jury Instruction, Ch. 3D, Instr. MB 300D.74* (Matthew Bender).

► Cross Reference:

Discussion of anticipatory breach in sale of goods, see *Ch. 28, Contract for Sale of Goods--Suing or Defending Action for Breach of Contract Under California Commercial Code, 28.45*.

22.23[1][b] Repudiation May Be Express. The anticipatory repudiation may be an express statement that the party will not or cannot substantially perform the obligations under the contract [*Gold Mining & Water Co. v. Swinerton* (1943) 23 C2d 19, 29, 142 P2d 22]. The repudiation must be a clear, positive, and unequivocal refusal to perform [*Taylor v. Johnston* (1975) 15 C3d 130, 137, 123 CR 641, 539 P2d 425].

Examples:

- A landowner entered a joint venture agreement with the defendant to develop his land. A year later, after the defendant expended resources to develop the land, the landowner notified the defendant that he

was rescinding the agreement, and his estate sued to quiet title against claims by the defendant. The court held that the owner's notice of rescission and the following suit constituted a repudiation of the contract [*Mayo v. Pacific Project Consultants, Inc.* (1969) 1 CA3d 1013, 1017, 82 CR 117].

■ A construction company entered into an agreement with the defendant for construction work. Several months after the construction company began work on the project, the defendant informed the construction company that it had no ability or intent to make any more payments on the contract. This communication demonstrated anticipatory breach [*Howard S. Wright Constr. Co. v. BBIC Investors, LLC* (2006) 136 CA4th 228, 243, 38 CR3d 769] .

Jury Instructions:

Anticipatory Breach, see *Judicial Council of California Civil Jury Instructions*, CACI No. 324 (LexisNexis Matthew Bender).

Clear and Definite Notice, see *California Forms of Jury Instruction*, Ch. 3D, Instr. MB 300D.76 (Matthew Bender).

22.23[1][c] Repudiation May Be Implied. The anticipatory repudiation may be implied when the promisor voluntarily puts the ability to perform out of its power so as to make substantial performance impossible [*Taylor v. Johnston* (1975) 15 C3d 130, 137, 123 CR 641, 539 P2d 425].

Example--Implied Repudiation:

A partnership issued a promissory note to a creditor. Before the note was due, the partners liquidated the business without going through bankruptcy, and the funds were paid to other creditors. The court held that the liquidation was voluntary, resulted in the partnership's inability to perform the contract, and rendered the duty to perform the obligations under the contract absolute [*Zogarts v. Smith* (1948) 86 CA2d 165, 172, 194 P2d 143].

Example--No Implied Repudiation:

A contract to breed the plaintiff's horses was not repudiated by conduct when postponing the date for breeding made the contract difficult, but not impossible, to perform [*Taylor v. Johnston* (1975) 15 C3d 130, 139, 123 CR 641, 539 P2d 425].

Jury Instructions:

Anticipatory Breach, see *Judicial Council of California Civil Jury Instructions*, CACI No. 324 (LexisNexis Matthew Bender).

Implied Repudiation, see *California Forms of Jury Instruction*, Ch. 3D, Instr. MB 300D.77 (Matthew Bender).

22.23[1][d] Notice of Repudiation Excuses Plaintiff From Further Performance Unless Repudiation Is Retracted. A party who has received notice of repudiation is excused from further performance unless the repudiation is retracted [CC § 1440; *Guerrieri v. Severini* (1958) 51 C2d 12, 18-19, 330 P2d 635].

Example:

Wife unequivocally repudiated postmarital agreement when she stated in her petition for dissolution and her verified responses to interrogatories that the agreement was void and unenforceable. As a result, the husband was excused from making any further payment under the agreement [*In re Marriage of Burkle* (2006) 139 CA4th 712, 749-751, 43 CR3d 181] .

Jury Instructions:

Performance Excused by Material Breach, see *California Forms of Jury Instruction, Ch. 3D, Instr. MB 300D.78* (Matthew Bender).

22.23[1][e] Repudiation Is Question of Fact. Whether a party has repudiated a contract ordinarily is a question of fact and intent, which must be separately determined in each case [*Gold Mining & Water Co. v. Swinerton* (1943) 23 C2d 19, 28, 142 P2d 22].

Distinguish:

A notice of rescission establishes rescission of the contract as a matter of law. Evidence of a subsequent act designed to prevent performance on the contract constitutes a factual basis to establish repudiation [*Mayo v. Pacific Project Consultants, Inc.* (1969) 1 CA3d 1013, 1017, 82 CR 117].

 Cross References:

Discussion of rescission, see Ch. 8, Seeking or Opposing Equitable Remedies in Contract Actions.

Discussion of rescission of sale of goods contract, see Ch. 26, Contract for Sale of Goods--Seeking Remedies Under California Commercial Code.

22.23[2] Plaintiff May Sue for Breach Immediately on Receiving Notice of Anticipatory Breach. On receipt of a notice of repudiation, the plaintiff may sue for breach immediately, even if the plaintiff has not yet performed [CC § 1440; *Daum v. Superior Court* (1964) 228 CA2d 283, 287, 39 CR 443].

22.23[3] Plaintiff May Ignore Repudiation and Wait to Sue Until Promised Performance Is Due. A party who has received notice of an anticipatory breach may ignore a notice of repudiation and wait until the time for performance is due before bringing suit [*April Enterprises, Inc. v. KTTV* (1983) 147 CA3d 805, 824 n10, 195 CR 421].

The injured party retains the right to treat a repudiation as an anticipatory breach until the repudiation is nullified. A repudiation is nullified if the injured party disregards the repudiation and treats the contract as still in force, and the repudiation is retracted prior to the time of performance [*Central Valley General Hospital v. Smith* (2008) 162 CA4th 501, 517, 75 CR3d 771].

Jury Instructions:

Waiver of Right to Treat Breach as Repudiation, see *California Forms of Jury Instruction, Ch. 3F, Instr. MB 300F.26* (Matthew Bender).

22.23[4] If Defendant Retracted Repudiation Before Defendant's Performance Is Due, Plaintiff Must Show Detrimental Change in Position Due to Repudiation. A repudiating party may retract the repudiation before the time for performance is due. If a repudiation is retracted, the plaintiff can obtain relief for breach only on a showing that the plaintiff's position was detrimentally changed in reliance on the repudiation [*Guerrieri v. Severini* (1958) 51 C2d 12, 19, 330 P2d 635 ; see 22.23[4] (plaintiff may wait until performance is due to sue, or see if defendant retracts repudiation and performs)].

Jury Instructions:

Change of Position Based on Notice of Refusal to Perform, see *California Forms of Jury Instruction, Ch. 3D, Instr. MB 300D.75* (Matthew Bender).

 Cross Reference:

Discussion of repudiation in sale of goods, see Ch. 28, Contract for Sale of Goods--Suing or Defending Action for Breach of Contract Under California Commercial Code.

22.23[5] Repudiation Does Not Alter Statute of Limitations. Even when a party commits an anticipatory breach,

the statute of limitations does not begin to run until the time performance is due under the contract [*Ross v. Tabor* (1921) 53 CA 605, 613, 200 P 971]. However, the statute of limitations is tolled following the giving of a notice of anticipatory breach until the time performance is due [*April Enterprises, Inc. v. KTTV* (1983) 147 CA3d 805, 824 n10, 195 CR 421].



Search California Published Cases:

Use *lexis.com* to search for contract cases discussing anticipatory repudiation:

■ California > Cases > CA Published Cases, Combined



Sample Search: For California caselaw on anticipatory repudiation, try: *anticipat! /5 repudiat!.*



Cross Reference:

Discussion of statute of limitations for breach of contract, see 22.70.

Legal Topics:

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Contracts LawBreachGeneral OverviewContracts LawBreachAnticipatory RepudiationGeneral OverviewContracts LawBreachCauses of ActionGeneral Overview



117 of 188 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 22 Suing or Defending Action for Breach of Contract
IV. DETERMINING MATERIALITY OF BREACH

2-22 MB Practice Guide: CA Contract Litigation 22.24

22.24 CHECKLIST: Determining Materiality of Breach.

☐ Determine if partial breach is a material breach based on following considerations:

- ☐ What benefit, if any, nonbreaching party actually received.
- ☐ Whether nonbreaching party can be adequately compensated in damages for lack of complete performance.
- ☐ Whether party in breach has failed to perform or made preparations for performing.
- ☐ Any hardship on party failing to perform, if court terminates contract.
- ☐ Willful, negligent, or innocent behavior of party failing to perform.
- ☐ Likelihood that breaching party will perform remainder of contract.
- ☐ Timing of breach.

Authority:

Sackett v. Spindler (1967) 248 CA2d 220, 229, 56 CR 435

Discussion:

See 22.29[1]

☐ Determine whether slight breach is a material breach based on following considerations:

- ☐ Slight breach at outset of contract is more likely to be total.

Authority:

Associated Lathing & Plastering Co. v. Louis C. Dunn, Inc. (1955) 135 CA2d 40, 50, 286 P2d 825

Discussion:

See 22.29[2]

- ☐ Slight breach that follows considerable performance and does not go to the root of contract is likely not to be material.

Authority:

Karz v. Department of Prof'l & Vocational Standards (1936) 11 CA2d 554, 557, 54 P2d 35

Discussion:

See 22.29[3]

- ☐ Partial performance followed by repudiation is likely a material breach.

Authority:

Gold Mining & Water Co. v. Swinerton (1943) 23 C2d 19, 29, 142 P2d 22

Discussion:

See 22.29[4]

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawBreachMaterial Breach



118 of 188 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 22 Suing or Defending Action for Breach of Contract
IV. DETERMINING MATERIALITY OF BREACH

2-22 MB Practice Guide: CA Contract Litigation 22.25

22.25 Options and Strategies.

Whether a breach is material determines the type and extent of recovery to which the nonbreaching party is entitled. If the breach is material, the nonbreaching party may elect to sue for a variety of remedies, including damages [CC § 3300], depending on the circumstances.

If a breach is partial, the nonbreaching party must consider whether the breach is sufficiently important or serious to be considered a material breach [*see Whitney Inv. Co. v. Westview Dev. Co. (1969) 273 CA2d 594, 601-602, 78 CR 302*]. In making this determination, the nonbreaching party should consider the nature of the relationship with the breaching party, and whether attempts to continue performance under the contract may be preferable to immediate termination. Even if a breach is not material, a nonbreaching party still may seek damages to compensate for the effects of the partial breach. However, in this instance the nonbreaching party must establish his or her own performance before seeking damages for the partial breach [*see CC § 3300; see also Restatement (Second) of Contracts § 241*].

► Cross References:

Discussion of provisional remedies for breach of contract, see Ch. 6, Using or Opposing Provisional Remedies in Contract Actions.

Discussion of damages for breach, see Ch. 7, Seeking or Opposing Damages in Contract Actions.

Discussion of equitable remedies, see Ch. 8, Seeking or Opposing Equitable Remedies in Contract Actions.

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawBreachGeneral OverviewContracts LawBreachCauses of ActionGeneral OverviewContracts LawBreachMaterial Breach



119 of 188 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 22 Suing or Defending Action for Breach of Contract
IV. DETERMINING MATERIALITY OF BREACH

2-22 MB Practice Guide: CA Contract Litigation 22.26

22.26 Mechanics of Material Breach.

The total failure to perform under a contract constitutes a failure of consideration, and automatically makes the nonbreaching party eligible for the full range of remedies available for breach of contract. When a party only partially performed, the failure to fully perform may still be material if the breach is sufficiently important to the main object of the contract and indicates a probability that the nonbreaching party is unlikely to obtain substantial performance [see *Gold Mining & Water Co. v. Swinerton* (1943) 23 C2d 19, 26-27, 142 P2d 22 ; *Whitney Inv. Co. v. Westview Dev. Co.* (1969) 273 CA2d 594, 601-602, 78 CR 302].

► **Cross Reference:**

Discussion of circumstances constituting material breach, see 22.29[1].

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawBreachMaterial BreachContracts LawPerformanceFailure of Consideration



120 of 188 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 22 Suing or Defending Action for Breach of Contract
IV. DETERMINING MATERIALITY OF BREACH

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22.27 Breach Must Be Total to Constitute Material Breach.

To constitute a material breach, the breach must be considered total. A total breach may result from an anticipatory breach before any performance was made, or a partial breach in conjunction with repudiation [see *Gold Mining & Water Co. v. Swinerton* (1943) 23 C2d 19, 29, 142 P2d 22].

Jury Instructions:

Substantial Performance, see *California Forms of Jury Instruction, Ch. 3D, Instr. MB 300D.02* (Matthew Bender).

 Cross References:

Discussion of partial breach, see 22.30 -22.35.

Discussion of repudiation, see 22.23.

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawBreachAnticipatory RepudiationGeneral OverviewContracts LawBreachMaterial BreachContracts LawBreachPartial Breach



121 of 188 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 22 Suing or Defending Action for Breach of Contract
IV. DETERMINING MATERIALITY OF BREACH

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22.28 Materiality of Breach Is Primarily Question of Fact.

Whether a breach is material is primarily a question of fact to be determined from all the facts and circumstances in evidence [*Associated Lathing & Plastering Co. v. Louis C. Dunn, Inc. (1955) 135 CA2d 40, 49, 286 P2d 825*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsProvince of Court & JuryContracts LawBreachMaterial Breach



122 of 188 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 22 Suing or Defending Action for Breach of Contract
IV. DETERMINING MATERIALITY OF BREACH

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22.29 Importance or Seriousness of Breach Determines Materiality.

22.29[1] Court Considers Circumstances of Breach in Determining Whether It Is Material. To determine whether a breach is material, a court considers the following factors [*Sackett v. Spindler* (1967) 248 CA2d 220, 229, 56 CR 435]:

- Whether the aggrieved party will obtain the substantial benefit that could reasonably be anticipated from the bargain.
- Whether the aggrieved party can be adequately compensated by damages for the lack of complete performance.
- Whether the party in breach failed to perform or made preparations for performing.
- The hardship on the party failing to perform if the court terminates the contract.
- The willful, negligent, or innocent behavior of the party failing to perform.
- The degree of certainty that the breaching party will perform the remainder of the contract.
- The timing of the breach; a slight breach at the outset is more likely to justify termination than a similar breach later in performance, which may be insubstantial.

Jury Instructions:

Substantial Performance, see *California Forms of Jury Instruction, Ch. 3D, Instr. MB 300D.02* (Matthew Bender).

► Cross References:

Form for memorandum supporting materiality of breach, see 22.78.
Form for memorandum opposing materiality of breach, see 22.79.

22.29[2] Slight Breach at Outset May Be Material Breach. If a party breaches a contract slightly at the outset of performance, a court may determine that the breach is material. This determination will be made if the court determines that the breach indicates that the party in breach is likely to breach other obligations during the course of the contract [*Associated Lathing & Plastering Co. v. Louis C. Dunn, Inc.* (1955) 135 CA2d 40, 50, 286 P2d 825].

Example:

A subcontractor contracted with a general contractor to provide lathing and plastering for the construction of a hospital. The general contractor had problems with the subcontractor from the outset, including obtaining the subcontractor's signature on the contract, obtaining pricing and federally required information from the subcontractor, and getting the subcontractor to install wire hangers. The court held that the general contractor was not required to endure the uncertainty of the subcontractor's performance and was justified in treating the initial nonperformance as a total breach [*Associated Lathing & Plastering Co. v. Louis C. Dunn, Inc.* (1955) 135 CA2d 40, 42-43, 51, 286 P2d 825].

22.29[3] Slight Breach After Considerable Performance That Does Not Materially Impact Contract Is Not Material. Once considerable performance has been made, a slight breach that does not go to the root of the contract is not material [*Karz v. Department of Prof'l & Vocational Standards* (1936) 11 CA2d 554, 557, 54 P2d 35].

22.29[4] Partial Breach Combined With Repudiation Is Material Breach. A party who has partially performed, but then repudiates the contract, is in total breach of the contract [*Gold Mining & Water Co. v. Swinerton* (1943) 23 C2d 19, 29, 142 P2d 22].

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawBreachImmaterial BreachContracts LawBreachMaterial BreachContracts LawBreachPartial Breach



123 of 188 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 22 Suing or Defending Action for Breach of Contract
V. ESTABLISHING PARTIAL BREACH OF CONTRACT

2-22 MB Practice Guide: CA Contract Litigation 22.30

22.30 CHECKLIST: Establishing Partial Breach of Contract.

- ☐ Determine whether contractual obligations is indivisible.

Authority:

Gold Mining & Water Co. v. Swinerton (1943) 23 C2d 19, 30, 142 P2d 22

Discussion:

See 22.31

- ☐ If obligation in question is indivisible, determine whether defendant provided some performance that was accepted voluntarily by plaintiff.

Authority:

CC § 1477

Discussion:

See 22.31

- ☐ If plaintiff voluntarily accepted partial performance, determine whether unperformed portion constitutes material breach.

Authority:

Linden Partners v. Wilshire Linden Assocs. (1998) 62 CA4th 508, 531, 73 CR2d 708

Discussion:

See 22.24 -22.29, 22.34

- ☐ Decide whether to treat breach as partial, in which case plaintiff may recover for damages incurred up to time of trial caused by failure to complete performance.

Authority:

Coughlin v. Blair (1953) 41 C2d 587, 598, 262 P2d 305

Discussion:

See 22.32

- ☐ Determine whether contract is severable.

Authority:

Lowy v. United Pac. Ins. Co. (1967) 67 C2d 87, 91-92, 60 CR 225, 429 P2d 577

Discussion:

See 22.35

- ☐ If contract is severable, determine whether defendant failed to fully perform a severable obligation, justifying recovery for breach of that obligation.

Authority:

Lowy v. United Pac. Ins. Co. (1967) 67 C2d 87, 91-92, 60 CR 225, 429 P2d 577

Discussion:

See 22.35[2]

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawBreachGeneral OverviewContracts LawBreachPartial Breach



124 of 188 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 22 Suing or Defending Action for Breach of Contract
V. ESTABLISHING PARTIAL BREACH OF CONTRACT

2-22 MB Practice Guide: CA Contract Litigation 22.31

22.31 Failure to Fully Perform Indivisible Obligation Is Partial Breach of Contract.

Any failure to perform a duty under a contract when it is due is a breach [*Linden Partners v. Wilshire Linden Assocs.* (1998) 62 CA4th 508, 531, 73 CR2d 708]. When a promisor performs part of an indivisible obligation, a corresponding part of the obligation is extinguished if the promisee voluntarily retains the benefit of the performance [CC § 1477]. The failure to perform the remaining part of the obligation is a partial breach [see *Linden Partners v. Wilshire Linden Assocs.* (1998) 62 CA4th 508, 531, 73 CR2d 708].

An obligation is "indivisible" when the acts to be performed are connected, and the thing to be accomplished under the contract is an entirety [*Gold Mining & Water Co. v. Swinerton* (1943) 23 C2d 19, 30, 142 P2d 22].

Strategic Point--Plaintiff:

When a promisor performs part of an indivisible obligation, but the promisee does not voluntarily accept the performance, no part of the obligation to perform is extinguished [see CC § 1477]. The nonbreaching party then may sue for nonperformance.

Jury Instructions:

Partial Performance--Indivisible Contract, see *California Forms of Jury Instruction, Ch. 3D, Instr. MB 300D.07* (Matthew Bender).

**Cross References:**

Discussion of partial performance of severable contract, see 22.35.

Discussion of nonperformance following rejection of partial performance, see 22.16[4].

Discussion of partial performance in contract for sale of goods, see Ch. 28, Contract for Sale of Goods--Suing or Defending Action for Breach of Contract Under California Commercial Code.

Legal Topics:

For related research and practice materials, see the following legal topics:

[Contracts LawBreachGeneral Overview](#)[Contracts LawBreachPartial Breach](#)



125 of 188 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 22 Suing or Defending Action for Breach of Contract
V. ESTABLISHING PARTIAL BREACH OF CONTRACT

2-22 MB Practice Guide: CA Contract Litigation 22.32

22.32 Injured Party May Treat Total Breach As Partial.

Unless the breaching party repudiates the contract, the nonbreaching party can treat a breach of an indivisible obligation as a partial breach [*Coughlin v. Blair* (1953) 41 C2d 587, 598-599, 262 P2d 305]. Similarly, if the injured party to a bilateral contract has fully performed, the court is likely to treat the breach as partial unless it appears that performance of the obligation is unlikely and the injured party may only be protected by recovery for full value of the promise [*Coughlin v. Blair* (1953) 41 C2d 587, 599, 262 P2d 305].

Strategic Point--Plaintiff:

In deciding whether to seek relief for total or partial breach, plaintiffs must balance their need to mitigate, their desire to get as much performance as possible from the defendant, and their inclination to rid themselves of a breaching defendant and move on. This will be determined individually under the particular facts of each case.

If the nonbreaching party treats the breach as partial, the contract remains in force, and the party in breach remains obligated to perform the remaining obligations under the contract [see *McCowen v. Pew* (1905) 147 C 299, 304, 81 P 958 (party may seek specific performance for unperformed part of contract and seek damages for other part of same contract that had been partially breached)]. The plaintiff must determine whether additional performance is likely. If not, remedies for total breach may be justified and desirable.

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawBreachGeneral OverviewContracts LawBreachPartial BreachContracts LawBreachTotal Breach



126 of 188 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 22 Suing or Defending Action for Breach of Contract
V. ESTABLISHING PARTIAL BREACH OF CONTRACT

2-22 MB Practice Guide: CA Contract Litigation 22.33

22.33 Injured Party Need Not Wait Indefinitely for Unfinished Performance.

Because a contract remains in effect after a partial breach, the injured party can continue to urge performance. After a reasonable period of time, if further performance is not forthcoming, the injured party can treat a partial breach as a total breach, even in the absence of repudiation [*Coughlin v. Blair* (1953) 41 C2d 587, 599-600, 262 P2d 305].

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawBreachPartial BreachContracts LawBreachTotal BreachContracts LawPerformancePartial
PerformanceGeneral Overview



127 of 188 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 22 Suing or Defending Action for Breach of Contract
V. ESTABLISHING PARTIAL BREACH OF CONTRACT

2-22 MB Practice Guide: CA Contract Litigation 22.34

22.34 Plaintiff May Recover Damages for Defendant's Partial, Nonmaterial Breach.

A party may recover the amount that will compensate that party for all the detriment proximately caused by a partial, nonmaterial breach [see *CC* § 3300]. A plaintiff seeking recovery for partial breach may recover only for damages incurred up to the time of trial. No recovery is available for future nonperformance [*Coughlin v. Blair* (1953) 41 C2d 587, 598, 262 P2d 305].

► Cross Reference:

Discussion of damages for breach of contract, see Ch. 7, Seeking or Opposing Damages in Contract Actions.

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawBreachCauses of ActionGeneral OverviewContracts LawBreachPartial Breach



128 of 188 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 22 Suing or Defending Action for Breach of Contract
V. ESTABLISHING PARTIAL BREACH OF CONTRACT

2-22 MB Practice Guide: CA Contract Litigation 22.35

22.35 Partial Performance of Severable Contract Does Not Bar Action for Defendant's Breach of Severable Part.

22.35[1] Contract With Separate Consideration for Separate Obligations Is Severable. If a contract, by its terms, is divided into multiple parts, so that the number of parts due from each party is the same and the performance of each part by one party is the agreed exchange for a corresponding part by the other party, the contract is severable [*Lowy v. United Pac. Ins. Co.* (1967) 67 C2d 87, 91-92, 60 CR 225, 429 P2d 577].

Consider:

In terms of analysis, it is helpful to think of a severable contract as separate, non-integrated contracts. Each part must be analyzed on its own terms, and the remedies (except the right to offset) applicable to one part of the severable contract are independent of the remedies applicable to the other parts.

Example--Severable Contract:

Landowners contracted with a construction company to perform excavation, grading, and street improvement within a subdivision. The contract provided a computational method to determine payment for street improvements, but excluded payment for grading from that computation. The contract then provided payment for grading in a lump sum. The court held that this was a severable contract [see *Lowy v. United Pac. Ins. Co.* (1967) 67 C2d 87, 91-92, 60 CR 225, 429 P2d 577].

The fact that payments are made in installments does not of itself mean that a contract is severable [*Jozovich v. Central Cal. Berry Growers Ass'n* (1960) 183 CA2d 216, 223-224, 6 CR 617]. If a contract contains multiple performances that are interrelated, a material breach of one part is a material breach of the entire contract [*Jozovich v. Central Cal. Berry Growers Ass'n* (1960) 183 CA2d 216, 224, 6 CR 617].

Example--Entire Contract:

A manufacturer's contract with a company to make improvements to a machine it built called for installment payments during the time improvements were to be made. The court rejected severability of the contract, noting that the parties did not equate two partial payments with the installation of particular parts, and that the parties bargained for the performance of the whole mechanism [*Jozovich v. Central Cal. Berry Growers Ass'n* (1960) 183 CA2d 216, 222, 6 CR 617].

Jury Instructions:

Waiver of Timely Payments, see *California Forms of Jury Instruction, Ch. 3F, Instr. MB 300F.22* (Matthew Bender).

Waiver of Right to Installment Payment on Indivisible Contract, see *California Forms of Jury Instruction, Ch. 3D, Instr. MB 300D.09* (Matthew Bender).

 Cross Reference:

Discussion of contract interpretation to determine severability, see Ch. 21, Asserting a Particular Construction of Contract.

22.35[2] Plaintiff May Recover for Partial Performance of Severable Part of Contract. When a contract is severable, a party who partially performs a severable part may recover for the corresponding unperformed obligation even if that party fails to perform the other severable parts [*Lowy v. United Pac. Ins. Co. (1967) 67 C2d 87, 92, 60 CR 225, 429 P2d 577*].

Example:

In a severable construction contract, the construction company delivered substantial performance of excavation and grading, but failed to perform the severable promise of making street improvements. The court held that the construction company was entitled to recover for the substantial performance of the grading, even though it had breached the severable part of the contract for street improvement [*Lowy v. United Pac. Ins. Co. (1967) 67 C2d 87, 92, 60 CR 225, 429 P2d 577*].

Jury Instructions:

Right to Recover for Performance of Part of Severable Contract, see *California Forms of Jury Instruction, Ch. 3D, Instr. MB 300D.10* (Matthew Bender).

 Cross Reference:

Discussion of substantial performance, see 22.08[2], 22.37[1], 22.69.

22.35[3] Party Who Induced Part of Divisible Contract by Fraud May Not Enforce Any Part of Contract. When one party has defrauded another party into entering a part of a divisible contract by fraud, the inducing party may not enforce any part of the contract--even parts not so induced [*Filet Menu, Inc. v. C.C.L. & G., Inc. (2000) 79 CA4th 852, 861, 94 CR2d 438*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawBreachCauses of ActionGeneral OverviewContracts LawBreachPartial BreachContracts LawContract Conditions & ProvisionsSeverability ClausesContracts LawContract InterpretationSeverabilityContracts LawPerformancePartial PerformanceGeneral Overview



129 of 188 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 22 Suing or Defending Action for Breach of Contract

VI. ESTABLISHING BREACH DUE TO PERFORMANCE NOT IN ACCORD WITH CONTRACT TERMS

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22.36 CHECKLIST: Establishing Breach Due to Performance Not in Accord With Contract Terms.

☐ Determine whether defendant substantially performed obligation, based on following considerations [*Thomas Haverty Co. v. Jones (1921) 185 C 285, 290, 197 P 105*]:

☐ Variance of defendant's performance from contract specifications either:

☐ Does not impair object of contract; or

☐ Is so slight as not to impair value of object of contract.

☐ Object of contract can be used for its intended purpose.

☐ Defendant acted in good faith to do what was required.

Authority:

Thomas Haverty Co. v. Jones (1921) 185 C 285, 290, 197 P 105

Discussion:

See 22.37[1]

☐ If counsel determines that defendant substantially performed, calculate costs necessary to bring performance into full compliance with contract specifications.

Authority:

Thomas Haverty Co. v. Jones (1921) 185 C 285, 290, 197 P 105

Discussion:

See 22.37[2]

- ☐ If contract was terminated, canceled, or rescinded, determine if defendant followed terms of contract, requirements of statute, or terms of subsequent agreement in terminating, canceling, or rescinding.

Authority:

Glens Falls Ins. Co. v. Founders' Ins. Co. (1962) 209 CA2d 157, 168, 25 CR 753 ; *JRS Prods., Inc. v. Matsushita Elec. Corp. of Am.* (2004) 115 CA4th 168, 173, 177-178

Discussion:

See 22.38

- ☐ If defendant failed to perform at location specified by contract, calculate resulting damages, if any.

Authority:

Blumer v. Kirkman Corp. (1952) 38 C2d 480, 485, 241 P2d 17

Discussion:

See 22.39

- ☐ Determine if defendant's performance is defective due to failure to satisfy implicit duty.

Authority:

Jonathan Neil & Assoc., Inc. v. Jones (2004) 33 C4th 917, 937

Discussion:

See 22.40

- ☐ If contract provided for alternative performances:

- ☐ Determine if defendant notified plaintiff of which one of alternative performances defendant intended to perform.

Authority:

CC § 1448

Discussion:

See 22.41[2]

- ☐ If defendant failed to notify plaintiff of alternatives, determine if plaintiff selected an alternative performance.

Authority:

CC § 1449

Discussion:

See 22.41[2]

- ☐ Determine whether any alternatives are unlawful or otherwise unenforceable.

Authority:

CC § 1451

Discussion:

See 22.41[3]

☐ Determine whether defendant fully performed alternative that was selected or that remained enforceable.

Authority:

CC § 1450

Discussion:

See 22.41[1]

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawBreachGeneral OverviewContracts LawPerformanceSubstantial Performance



130 of 188 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 22 Suing or Defending Action for Breach of Contract

VI. ESTABLISHING BREACH DUE TO PERFORMANCE NOT IN ACCORD WITH CONTRACT TERMS

2-22 MB Practice Guide: CA Contract Litigation 22.37

22.37 Plaintiff May Recover If Defendant's Performance Was Substantial but Not in Strict Compliance With Contract Terms.

22.37[1] Substantial Performance Occurs When Variance From Specifications Is Minimal and Object of Contract Is Achieved. A defendant "substantially performs" when [*Thomas Haverty Co. v. Jones* (1921) 185 C 285, 290, 197 P 105]:

- The variance from the contract specifications is minimal;
- The variance does not impair the object of the contract; and
- The object can be used for its intended purpose.

The omission in performance must be so slight that it will not impair the value of the object of the contract, and the defendant acted in good faith to do all that was required [*Thomas Haverty Co. v. Jones* (1921) 185 C 285, 290, 197 P 105].

Jury Instructions:

Substantial Performance, see *California Forms of Jury Instruction, Ch. 3D, Instr. MB 300D.02* (Matthew Bender).

► Cross References:

Discussion of plaintiff's substantial performance as basis to assert claim for breach, see 22.08[2].

Discussion of defendant's substantial performance as a defense to claim of breach, see 22.69.

22.37[2] Plaintiff May Recover for Damages Associated With Lack of Strict Compliance. Although a defendant may establish substantial performance, the plaintiff nevertheless may recover the costs necessary to bring performance into full compliance with the contract specifications [*Thomas Haverty Co. v. Jones* (1921) 185 C 285, 289, 290, 197 P 105].

► Cross References:

Discussion of amount of recoverable damages, see Ch. 7, Seeking or Opposing Damages in Contract Actions.

Discussion of nonconforming goods in contract for sale of goods, see Ch. 28, Contract for Sale of Goods--Suing or Defending Action for Breach of Contract Under California Commercial Code.

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawBreachGeneral OverviewContracts LawPerformanceSubstantial PerformanceContracts LawRemediesCompensatory DamagesGeneral Overview



131 of 188 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 22 Suing or Defending Action for Breach of Contract

VI. ESTABLISHING BREACH DUE TO PERFORMANCE NOT IN ACCORD WITH CONTRACT TERMS

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22.38 Improper Termination, Cancellation, or Rescission Constitutes Breach.

A contract may be properly terminated, canceled, or rescinded in accordance with contract terms, governing statutes, or subsequent agreement [see *Glens Falls Ins. Co. v. Founders' Ins. Co.* (1962) 209 CA2d 157, 168, 25 CR 753]. However, failure to follow the relevant contractual terms, statutes, or subsequent agreement results in a breach of the contract [see *JRS Prods., Inc. v. Matsushita Elec. Corp. of Am.* (2004) 115 CA4th 168, 173, 177-178].

Example--Breach of Implied Contractual Term:

A franchisor and franchisee entered into a contract that could be terminated without cause on 90 days' written notice. The franchisor gave a 90-day written notice without good cause and without opportunity to cure. The California Franchise Relations Act forbids termination of a franchise agreement without good cause and without an opportunity to cure. The court held that the contract term conflicting with the statute was void, that the statutory requirements applied to the contract, and that the franchisor's failure to terminate the contract in accordance with those terms gave rise to a claim for breach of contract [*JRS Prods., Inc. v. Matsushita Elec. Corp. of Am.* (2004) 115 CA4th 168, 173, 177-178].

► Cross References:

Discussion of rescission, see Ch. 8, Seeking or Opposing Equitable Remedies in Contract Actions.

Discussion of rescission in contract for sale of goods, see Ch. 26, Contract for Sale of Goods--Seeking Remedies Under California Commercial Code.

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawBreachGeneral OverviewContracts LawRemediesRescission & RedhibitionGeneral Overview



132 of 188 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 22 Suing or Defending Action for Breach of Contract

VI. ESTABLISHING BREACH DUE TO PERFORMANCE NOT IN ACCORD WITH CONTRACT TERMS

2-22 MB Practice Guide: CA Contract Litigation 22.39

22.39 Defendant's Performance in Different Location May Constitute Breach.

A contract may specify, expressly or implicitly, the location where performance must be made. If the defendant performs in a different location, the plaintiff may establish breach [*Blumer v. Kirkman Corp.* (1952) 38 C2d 480, 485, 241 P2d 17]. When a contract is silent on the location for performance, the place for performance is the location of the creditor or the creditor's place of business [see CC §§ 1488, 1489].

**Strategic Point:**

Place of performance issues often arise in the context of whether venue is proper for the filing of the complaint [see *Blumer v. Kirkman Corp.* (1952) 38 C2d 480, 482, 241 P2d 17 ; *Burr v. Western States Life Ins. Co.* (1931) 211 C 568, 576, 296 P 273]. Plaintiff's counsel should review the contract and relevant venue statutes to determine the appropriate place for filing. Defense counsel should do the same to determine whether a motion for change of venue is appropriate.

Jury Instructions:

Place of Offer, see *California Forms of Jury Instruction, Ch. 3D, Instr. MB 300D.56* (Matthew Bender).

**Cross References:**

Discussion of filing in proper venue, and challenging improper venue, see Ch. 3, Determining Jurisdiction and Venue in Contract Actions.

Discussion of improper place of performance in contract for sale of goods, see Ch. 28, Contract for Sale of Goods--Suing or Defending Action for Breach of Contract Under California Commercial Code.

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawBreachGeneral OverviewContracts LawPerformanceGeneral Overview



133 of 188 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 22 Suing or Defending Action for Breach of Contract

VI. ESTABLISHING BREACH DUE TO PERFORMANCE NOT IN ACCORD WITH CONTRACT TERMS

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22.40 Plaintiff May Establish Breach for Defective Performance Based on Implicit Duty.

Every contract contains implied duties, such as the covenant of good faith and fair dealings [see, e.g., *Jonathan Neil & Assoc., Inc. v. Jones* (2004) 33 C4th 917, 937]. Breach of this implied duty gives rise to contract damages [*Jonathan Neil & Assoc., Inc. v. Jones* (2004) 33 C4th 917, 937].



Strategic Point--Plaintiff:

Breach of the covenant of good faith and fair dealing typically is made as a back-up argument to plain-vanilla breach of contract claims, especially when the contract in dispute is vague, so that technical breach under the letter of the contract is less than obvious.

Jury Instructions:

Breach of Covenant of Good Faith and Fair Dealing--Essential Factual Elements, see *Judicial Council of California Civil Jury Instructions*, CACI No. 325 (LexisNexis Matthew Bender).



Cross References:

Discussion of the implied duty of good faith and fair dealing, see Ch. 23, Suing or Defending Action for Breach of Duty of Good Faith and Fair Dealing.

Discussion of breach of warranty, see Ch. 24, Suing or Defending Action for Breach of Warranty.

Discussion of breach of warranty in contract for sale of goods, see Ch. 28, Contract for Sale of Goods--Suing or Defending Action for Breach of Contract Under California Commercial Code.

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawBreachGeneral OverviewContracts LawContract InterpretationGood Faith & Fair Dealing



134 of 188 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 22 Suing or Defending Action for Breach of Contract

VI. ESTABLISHING BREACH DUE TO PERFORMANCE NOT IN ACCORD WITH CONTRACT TERMS

2-22 MB Practice Guide: CA Contract Litigation 22.41

22.41 If Contract Provides for Alternative Means of Performance, Defendant's Failure to Perform Alternative Constitutes Breach.

22.41[1] Failure to Perform Entire Alternative Constitutes Breach. A contract may provide that a party must perform only one of various acts. Once the party selects an alternative, the promisor must fully perform that alternative, and not perform parts of more than one alternative without the consent of the other party [CC § 1450]. Unsatisfactory performance of one alternative does not satisfy performance, and the promisee may recover on an alternative obligation [*Conner v. Conner* (1999) 76 CA4th 646, 651, 90 CR2d 687].

Example:

Two brothers owned stock in a business. One brother purchased shares in the business from the other brother by way of a promissory note executed by the business, secured by the purchasing brother's personal guarantee. The business filed for bankruptcy, and sought to satisfy the promissory note through the bankruptcy court. The selling brother rejected the alternative offered through the bankruptcy court, insisting on satisfaction of the personal guarantee. The court ruled in favor of the selling brother, holding that he was entitled to the alternative to recover the guaranteed amount from the guarantor [*Conner v. Conner* (1999) 76 CA4th 646, 652, 90 CR2d 687].

Distinguish:

If the selling owner had accepted the manner of performance determined by the bankruptcy court, he could not later seek enforcement of the personal guarantee [see *Durgin v. Kaplan* (1968) 68 C2d 81, 89, 65 CR 158, 436 P2d 70]. This is because the principal would have performed the obligation, and the surety would then be exonerated [see CC § 2839].

**Strategic Point:**

This type of claim is difficult to bring as a stand-alone claim. Typically it is alleged as a backup claim.

Jury Instructions:

Performance of Alternative Duty, see *California Forms of Jury Instruction, Ch. 3D, Instr. MB 300D.06* (Matthew Bender).

22.41[2] Defendant's Failure to Give Timely Notice of Selection of Alternative Performance Gives Plaintiff Right to Make Selection. Unless the contract dictates which alternative must be performed, the party required to perform has the right of selection [CC § 1448]. If that party fails to give notice within the time specified in the contract or, if no time is specified before the performance is due, the other party has the right to make the selection [CC § 1449].

Jury Instructions:

Performing Party's Right to Select Alternative Performance, see *California Forms of Jury Instruction*, Ch. 3D, Instr. MB 300D.04 (Matthew Bender).

22.41[3] If One Alternative Is Unlawful or Impossible to Perform, Defendant Breaches by Failing to Perform Other Alternative. When a contract provides for alternative modes of performance and an alternative is illegal or impossible to perform, failure to perform an alternative mode is a breach for which plaintiff may recover [see CC § 1451].

Jury Instructions:

Performing Party's Right to Demand Choice of Performance, see *California Forms of Jury Instruction*, Ch. 3D, Instr. MB 300D.04 (Matthew Bender).

 Cross Reference:

Discussion of nonconforming goods in contract for sale of goods, see Ch. 28, Contract for Sale of Goods--Suing or Defending Action for Breach of Contract Under California Commercial Code.

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawBreachGeneral OverviewContracts LawPerformanceGeneral Overview



135 of 188 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 22 Suing or Defending Action for Breach of Contract
VII. ESTABLISHING TIMELINESS OF PERFORMANCE

2-22 MB Practice Guide: CA Contract Litigation 22.42

22.42 CHECKLIST: Establishing Timeliness of Performance.

☐ If contract provides that "time is of the essence," determine if performance was rendered within time specified by contract.

Authority:

Johnson v. Alexander (1976) 63 CA3d 806, 813, 134 CR 101

Discussion:

See 22.50

☐ If contract does not provide that "time is of the essence," determine if performance was rendered within a reasonable time.

Authority:

CC § 1657; Patel v. Liebermensch (2008) 45 C4th 344, 351, 86 CR3d 366, 197 P3d 177

Discussion:

See 22.46, 22.47

☐ If performance was not rendered within a reasonable time, determine whether other party waived the tardy performance.

Authority:

Galdjie v. Darwish (2003) 113 CA4th 1331, 1339

Discussion:

See 22.44

☐ If other party did not waive time requirement, determine whether delay in performance caused sufficient harm that constitutes a material breach.

Authority:

CC § 1492; Becker v. Becker (1950) 36 C2d 324, 326-327, 223 P2d 479

Discussion:

See 22.49

☐ If performance required payment of money, determine if payment was made immediately.

Authority:

CC § 1657

Discussion:

See 22.48

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawBreachGeneral OverviewContracts LawContract Conditions & ProvisionsExpress ConditionsTime LimitationsContracts LawPerformanceGeneral OverviewReal Property LawPurchase & SaleContracts of SalePeriod Between Execution & ClosingTime of Performance



136 of 188 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 22 Suing or Defending Action for Breach of Contract
VII. ESTABLISHING TIMELINESS OF PERFORMANCE

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22.43 Failure to Perform at Time Specified in Contract Is Breach.

When a contract specifies a time for performance, that time normally is the expected time of performance, and failure to perform within that time is technically a breach [*Taylor v. Johnston* (1975) 15 C3d 130, 137, 123 CR 641, 539 P2d 425]. However, delay in performance generally is a material breach only if "time is of the essence" of the contract [*Johnson v. Alexander* (1976) 63 CA3d 806, 813, 134 CR 101 ; see 22.50]. A material breach also occurs if the harm from the delay cannot be compensated [see CC § 1492; *Becker v. Becker* (1950) 36 C2d 324, 326-327, 223 P2d 479 ; see 22.49].

Jury Instructions:

Time for Performance: Time Is of the Essence, see *California Forms of Jury Instruction, Ch. 3D, Instr. MB 300D.34* (Matthew Bender).

**Search California Published Cases:**

Use *lexis.com* to search for cases on timeliness of performance:

- Legal > States Legal--U.S. > California > Find Cases > CA Published Cases, Combined



Sample Search: To find California case law on timeliness of performance, try:

timeliness OR timely /5 perform! /50 contract! OR agree!.

**Cross Reference:**

Discussion of materiality breach, see 22.24 -22.29.

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawBreachGeneral OverviewContracts LawContract Conditions & ProvisionsExpress ConditionsTime LimitationsContracts LawPerformanceGeneral OverviewReal Property LawPurchase & SaleContracts of SalePeriod

Between Execution & ClosingTime of Performance



137 of 188 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 22 Suing or Defending Action for Breach of Contract
VII. ESTABLISHING TIMELINESS OF PERFORMANCE

2-22 MB Practice Guide: CA Contract Litigation 22.44

22.44 Party Can Waive Timeliness Requirement.

Whether the timeliness requirement is implied by law or contained explicitly in the contract, a party can waive this requirement by words or conduct [*Galdjie v. Darwish* (2003) 113 CA4th 1331, 1339].

Example--Waiver by Conduct:

A real estate contract included a "time is of the essence" clause, which required closing by a specific date on the satisfaction of certain conditions, including obtaining financing. The purchaser was unable to obtain financing by the closing date, but the agent for the seller continued to assist the seller in finding financing after the closing date. The court held that the seller's assistance constituted a waiver of the timeliness requirement [*Galdjie v. Darwish* (2003) 113 CA4th 1331, 1341].

Jury Instructions:

Waiver of Timely Payments, see *California Forms of Jury Instruction, Ch. 3F, Instr. MB 300F.22* (Matthew Bender).

➡ Cross Reference:

Discussion of timeliness in contract for sale of goods, see Ch. 28, Contract for Sale of Goods--Suing or Defending Action for Breach of Contract Under California Commercial Code.

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawContract Conditions & ProvisionsExpress ConditionsTime LimitationsContracts LawContract Conditions & ProvisionsWaiversGeneral OverviewContracts LawContract Conditions & ProvisionsWaiversAcceptance of Late PaymentContracts LawContract Conditions & ProvisionsWaiversContinued PerformanceReal Property LawPurchase & SaleContracts of SalePeriod Between Execution & ClosingTime of Performance



138 of 188 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 22 Suing or Defending Action for Breach of Contract
VII. ESTABLISHING TIMELINESS OF PERFORMANCE

2-22 MB Practice Guide: CA Contract Litigation 22.45

22.45 Breach Generally Occurs at Time Performance Is Due.

When performance has not been tendered or delivered at the time the performance is due, an actual breach occurs at that time [*Taylor v. Johnston (1975) 15 C3d 130, 137, 123 CR 641, 539 P2d 425*].

Distinguish:

An actual breach occurs at the time performance is due, and not rendered, whereas an anticipatory breach occurs before performance is due, communicated by the breaching party or implied by conduct [*Taylor v. Johnston (1975) 15 C3d 130, 137, 123 CR 641, 539 P2d 425* ; *see 22.23[1]*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawBreachGeneral OverviewContracts LawContract Conditions & ProvisionsExpress ConditionsTime LimitationsContracts LawPerformanceGeneral OverviewReal Property LawPurchase & SaleContracts of SalePeriod Between Execution & ClosingTime of Performance



139 of 188 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 22 Suing or Defending Action for Breach of Contract
VII. ESTABLISHING TIMELINESS OF PERFORMANCE

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22.46 Reasonable Time Is Allowed When Contract Does Not Specify Time of Performance.

In the absence of a specified time for performance, a party has a reasonable time to perform [CC § 1657; *Patel v. Liebermensch* (2008) 45 C4th 344, 351, 86 CR3d 366, 197 P3d 177] .

Jury Instructions:

Time of Offer, see *California Forms of Jury Instruction, Ch. 3D, Instr. MB 300D.55* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawBreachGeneral OverviewContracts LawContract Conditions & ProvisionsGeneral OverviewContracts LawContract Conditions & ProvisionsExpress ConditionsTime LimitationsContracts LawPerformanceGeneral OverviewReal Property LawPurchase & SaleContracts of SalePeriod Between Execution & ClosingTime of Performance



140 of 188 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 22 Suing or Defending Action for Breach of Contract
VII. ESTABLISHING TIMELINESS OF PERFORMANCE

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22.47 "Reasonable" Amount of Time Is Question Fact When Facts Are Disputed.

The amount of time that is reasonable is a question of fact that depends on the situation of the parties, the nature of the transaction, and the facts of the particular case [*Sawday v. Vista Irrigation Dist.* (1966) 64 C2d 833, 836, 52 CR 1, 415 P2d 816].

Example--Reasonable Time:

A buyer contracted to purchase an exotic sports car from a dealer under a contract that contained no specified date for delivery. When the car was not delivered several weeks after the contract was executed, the buyer tried to rescind. The car was eventually delivered six months after the contract was executed. In holding that six months was a reasonable time for delivery, the court considered the facts that the car manufacturer was a small firm with limited production and distribution capabilities, that it had its own manner of doing things, and that the buyer and dealer had negotiated for two and a half years before execution of the contract [see *Eidsmore v. RBB, Inc.* (1994) 25 CA4th 189, 198, 30 CR2d 357].

Exception--Undisputed Facts:

When the facts are not in dispute, the court may determine the amount of time that is reasonable as a matter of law [*Jozovich v. Central Cal. Berry Growers Ass'n* (1960) 183 CA2d 216, 228, 6 CR 617].

Consider:

What constitutes a "reasonable amount of time" may be different from industry to industry and place to place. Parties asserting unconventional definitions of "reasonable" should be prepared to supply expert testimony to support their assertions.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Province of Court & Jury Contracts Law Breach General Overview Contracts Law Contract Conditions & Provisions Express Conditions Time Limitations Contracts Law Performance General Overview Real Property Law Purchase & Sale Contracts of Sale Period Between Execution & Closing Time of Performance



141 of 188 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 22 Suing or Defending Action for Breach of Contract
VII. ESTABLISHING TIMELINESS OF PERFORMANCE

2-22 MB Practice Guide: CA Contract Litigation 22.48

22.48 Payment of Money Normally Must Be Made Immediately.

22.48[1] Absent Specified Time in Contract, Payment Is Due Immediately. When a contract is silent as to the time for performance, and is capable of being performed instantly, such as for payment of money, the performance must be done immediately on ascertaining the exact amount due [see CC § 1657; *Patel v. Liebermensch* (2008) 45 C4th 344, 351, 86 CR3d 366, 197 P3d 177] .

Exception:

The general rule regarding immediate payment of money does not apply when the contract allows the debtor to pay "when able." Under these circumstances, performance is not "capable of being done instantly" because the obligor is not necessarily able to pay immediately [see *Van Buskirk v. Kuhns* (1913) 164 C 472, 474, 129 P 587] .

 Cross Reference:

Discussion of time for payment in contract for sale of goods, see Ch. 28, Contract for Sale of Goods--Suing or Defending Action for Breach of Contract Under California Commercial Code.

22.48[2] Contract Requiring Immediate Payment Permits Reasonable Time for Processing Payment. When a contract requires payment "immediately," the contract necessarily allows a reasonable time to process the payment [*Integrated, Inc. v. Alec Fergusson Elec. Contractor* (1967) 250 CA2d 287, 295, 58 CR 503] .

22.48[3] Statutory Extension for Holidays. Generally, if an act to be performed under a contract falls due on a holiday, the obligor may perform on the next business day without being untimely [CC § 11]. This statutory extension applies only to acts of a secular nature and those that are "other than a work of necessity or mercy" [CC § 11]. Holidays subject to this statute include Sundays and holidays specified in the Government Code [see CC § 7]. Optional bank holidays normally do not permit the extension of time to perform under a contract [CC § 9].

22.48[4] Statutory Exceptions May Alter Terms of Obligations. State and federal laws may allow judicial and administrative agencies to stay civil liability proceedings, including contract actions, particularly as to people on active military duty [see, e.g., 50 USC app § 501 et seq. (Servicemembers Civil Relief Act); M&V Code § 400 et seq.].

**Warning:**

Be sure to check the applicable statutes in relevant cases.



Cross Reference:

Discussion of Servicemembers Civil Relief Act, see *California Forms of Pleading and Practice*, § 501.60 (*Matthew Bender*).

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawContract Conditions & ProvisionsExpress ConditionsTime LimitationsContracts

LawPerformanceGeneral OverviewReal Property LawPurchase & SaleContracts of SalePeriod Between Execution & ClosingTime of Performance



142 of 188 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 22 Suing or Defending Action for Breach of Contract
VII. ESTABLISHING TIMELINESS OF PERFORMANCE

2-22 MB Practice Guide: CA Contract Litigation 22.49

22.49 Delayed Performance May Cause Material Breach When Harm From Delay Cannot Be Compensated.

When the contract is silent as to time, the plaintiff may establish that delayed performance is a material breach on a showing that the harm from the delay cannot be fully compensated [see *CC § 1492*; *Becker v. Becker* (1950) 36 C2d 324, 326-327, 223 P2d 479].



Cross Reference:

Discussion of material breach, see 22.24 -22.29.

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawBreachMaterial BreachContracts LawPerformanceGeneral OverviewReal Property LawPurchase & SaleContracts of SalePeriod Between Execution & ClosingTime of Performance



143 of 188 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 22 Suing or Defending Action for Breach of Contract
VII. ESTABLISHING TIMELINESS OF PERFORMANCE

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22.50 Delayed Performance Is Material Breach When Contract Explicitly Provides "Time Is of the Essence."

A delay in performance normally constitutes a material breach when the contract provides that "time is of the essence"; that is, by the express language of the contract or by its very nature, prompt performance is a vital matter [*Johnson v. Alexander* (1976) 63 CA3d 806, 813, 134 CR 101].

Example:

Time is normally of the essence in an option contract [see *Holiday Inns of Am., Inc. v. Knight* (1969) 70 C2d 327, 330, 74 CR 722, 450 P2d 42].

Jury Instructions:

Time for Performance: Time Is of the Essence, see *California Forms of Jury Instruction, Ch. 3D, Instr. MB 300D.34* (Matthew Bender).

Time is not of the essence of a contract unless it is so declared [*Baypoint Mortgage Corp. v. Crest Premium Real Estate Invs. Ret. Trust* (1985) 168 CA3d 818, 825-826, 214 CR 531], or unless it clearly appears from the terms of the contract, in the light of all the circumstances, that it was the intention of the parties [*Henck v. Lake Hemet Water Co.* (1937) 9 C2d 136, 143, 69 P2d 849].

**Strategic Point:**

Parties can elevate the materiality of otherwise trivial or at least secondary concerns--such as timing--by stipulating to their importance. A defendant who has so stipulated that time is of the essence, then performs late, would seem to be contractually estopped from arguing that timing was immaterial.

One case has held that a "time is of the essence" clause is not definitive on whether delayed performance is a material breach, but that the inclusion of this clause highly suggests that such conduct is a material breach [see *Nash v. Superior Court* (1978) 86 CA3d 690, 696-697, 150 CR 394 , *overruled on other grounds*, *Malcolm v. Superior Court* (1981) 29 C3d 518, 528, 174 CR 694, 629 P2d 495]. *Nash* requires a determination of the intent of the parties based on what is expressly said and on the surrounding circumstances [*Nash v. Superior Court* (1978) 86 CA3d 690, 696, 150 CR 394 , *overruled on other grounds*, *Malcolm v. Superior Court* (1981) 29 C3d 518, 528, 174 CR 694, 629 P2d 495].

Example:

Buyers failed to deposit funds into escrow by the date provided in an executory contract for the sale of land. The sellers agreed to extend the date for the deposit until a specified date, expressly providing that the failure to make the deposit by that date would terminate the buyer's right to purchase. The court determined that the parties made a binding agreement that the right to purchase would terminate if the payment was not made by the time indicated [*Nash v. Superior Court* (1978) 86 CA3d 690, 697-698, 150 CR 394 , *overruled on other grounds*, *Malcolm v. Superior Court* (1981) 29 C3d 518, 528, 174 CR 694, 629 P2d 495].

Exception--Installment Land Sale Contract:

A buyer made several installment payments for the purchase of land pursuant to a contract that contained a "time is of the essence" clause. The buyer then refused to make additional payments, claiming she was owed credit for the removal of natural resources from the land. The court held that this type of contract is the functional equivalent of a security device to which the law provides an opportunity to cure, notwithstanding that the cure is tardy [*MacFadden v. Walker* (1971) 5 C3d 809, 816, 97 CR 537, 488 P2d 1353].



Cross Reference:

Discussion of material breach, see 22.24 -22.29.

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawBreachMaterial BreachContracts LawContract Conditions & ProvisionsExpress ConditionsTime LimitationsContracts LawPerformanceGeneral OverviewReal Property LawPurchase & SaleContracts of SalePeriod Between Execution & ClosingTime of Performance



144 of 188 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 22 Suing or Defending Action for Breach of Contract
VIII. RECOVERING FOR IMPROPER ASSIGNMENT

2-22 MB Practice Guide: CA Contract Litigation 22.51

22.51 CHECKLIST: Recovering for Improper Assignment.

- ☐ Determine whether contractual right or responsibility transferred consists of title, right, or chose in action, such that transfer constitutes an assignment.

Authority:

CC §§ 953, 954

Discussion:

See 22.53

- ☐ If assignment occurred, determine body of law that applies to assess validity of assignment:

- ☐ If no consideration was provided, apply law of gifts.

Authority:

Ballinger v. Ballinger (1937) 9 C2d 330, 333-334, 70 P2d 629

Discussion:

See 22.53[3]

- ☐ If consideration was provided, apply law of contracts.

Authority:

Johnston v. Landucci (1942) 21 C2d 63, 67, 71, 130 P2d 405

Discussion:

See 22.53[4]

- ☐ Determine whether client may void assignment for any of following reasons:

- ☐ Contract expressly or implicitly prohibits assignment, and prohibition was intended for benefit of client.

Authority:

Masterson v. Sine (1968) 68 C2d 222, 230, 65 CR 545, 436 P2d 561

Discussion:

See 22.54[3]

- ☐ Contract requires personal qualities for performance of contract.

Authority:

Teel v. Bank of Eureka (1941) 42 CA2d 807, 809, 110 P2d 78

Discussion:

See 22.54[5]

- ☐ Statute prohibits assignment of right or responsibility.

Authority:

Ginsberg v. Butler (1933) 217 C 467, 470-471, 19 P2d 790

Discussion:

See 22.54[6]

- ☐ Matter assigned is right to recover an ownership interest in real property.

Authority:

Martin v. Bridgeport Community Assn., Inc. (2009) 173 CA4th 1024, 1033, 93 CR3d 405 .

Discussion:

See 22.54[7]

- ☐ Matter assigned is right to recover on a personal tort.

Authority:

Goodley v. Wank & Wank, Inc. (1976) 62 CA3d 389, 393-394, 133 CR 83

Discussion:

See 22.54[8]

- ☐ Determine whether client waived objection to assignment either expressly or implicitly, such as by accepting performance by assignee.

Authority:

Trubowitch v. Riverbank Canning Co. (1947) 30 C2d 335, 342, 182 P2d 182

Discussion:

See 22.56

- ☐ If client would benefit from nonassignment, determine if client withheld consent to assignment.

Authority:

CC § 1457

Discussion:

See 22.55, 22.57

- ☐ If client is assignee, determine whether or not client received the rights assigned.

Authority:

Budget Fin. Plan v. Sav-On Food Club, Inc. (1955) 44 C2d 565, 567, 570, 283 P2d 694

Discussion:

See 22.58

- ☐ If client is assignee, determine whether client can recover for breach of contract against nonassigning party for that party's failure to confer performance after notice of valid assignment.

Authority:

Fricker v. Uddo & Taormina Co. (1957) 48 C2d 696, 701, 312 P2d 1085

Discussion:

See 22.59

- ☐ If client is nonassigning party, determine whether client may sue assignee for breach because:

- ☐ Assignee accepted benefits of nonassigning client's performance and had knowledge or constructive knowledge of obligations due to nonassigning client.

Authority:

Melchior v. New Line Prods., Inc. (2003) 106 CA4th 779, 790, 131 CR2d 347

Discussion:

See 22.60[2]

- ☐ Assignee expressly assumed obligations of contract.

Authority:

Bruce v. Mieir (1932) 120 CA 287, 290, 7 P2d 1037

Discussion:

See 22.60[3]

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawPerformanceAssignmentGeneral OverviewContracts LawPerformanceAssignmentConsentContracts
LawPerformanceAssignmentNonassignability ClausesContracts LawThird PartiesDelegation of Performance



145 of 188 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 22 Suing or Defending Action for Breach of Contract
VIII. RECOVERING FOR IMPROPER ASSIGNMENT

2-22 MB Practice Guide: CA Contract Litigation 22.52

22.52 Elements of Improper Assignment.

The transfer of a thing in action or an obligee's right is brought about by an assignment (from the assignor to the assignee), which is governed by contract law if consideration is involved [*Commercial Disc. Co. v. Cowen* (1941) 18 C2d 610, 614, 116 P2d 599 ; see 22.53]. Some contracts may not be assigned either because of a contractual or legal prohibition of assignment of rights. If a party assigns the rights notwithstanding a contractual prohibition, the other party may establish a breach by showing that the nonassignment clause was included for the benefit of the nonbreaching party, and that the nonbreaching party properly terminated the contract as a result of the improper assignment [*Guerin v. Blair* (1949) 33 C2d 744, 747, 204 P2d 884].

**Strategic Point--Plaintiff:**

An action also may be brought against the assignee of a contract that was subject to a nonassignment clause. To establish a claim against the assignee, the plaintiff must show that the assignee, either expressly or implicitly, intended to be bound by the assignor's obligations under the contract [*Enterprise Leasing Corp. v. Shugart Corp.* (1991) 231 CA3d 737, 745-746, 282 CR 620].

If a party assigns a contract notwithstanding a contractual or legal prohibition on assignment, the assignment is voidable, and the nonassigning party may properly defend against an assignee's suit to recover on the contract [*Ginsberg v. Butler* (1933) 217 C 467, 470-471, 19 P2d 790].

**Search California Continuing Education of the Bar Publications:**

Use *lexis.com* to search for discussion of assignee liability in contract cases:

● Legal > States Legal--U.S. > California > Search Analysis & CLE Materials > Continuing Education of the Bar (CEB), CA > CEB Combined Publications



Sample Search: To find CEB material on assignee liability and breach of contract, try: *assign! /5 contract! /10 breach!*.

**Cross Reference:**

Discussion of assignments, see California Forms of Pleading and Practice, Ch. 60, Assignments (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawBreachGeneral OverviewContracts LawPerformanceAssignmentGeneral OverviewContracts LawPerformanceAssignmentConsentContracts LawPerformanceAssignmentNonassignability Clauses



146 of 188 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 22 Suing or Defending Action for Breach of Contract
VIII. RECOVERING FOR IMPROPER ASSIGNMENT

2-22 MB Practice Guide: CA Contract Litigation 22.53

22.53 Assignment Consists of Transferring Title, Contractual Right, or Chose in Action to Another Person.

22.53[1] Transfer of Title, Contractual Right, or Chose in Action Is Assignment. A right to recover money or other personal property by judicial proceeding is a so-called "chose in action" and is assignable when it arises out of an obligation or a violation of a property right [CC §§ 953, 954]. Similarly, title to property may be assigned by conveying the title from one person to another [CC § 1040].

Jury Instructions:

Assignment of Rights, see *California Forms of Jury Instruction, Ch. 3H, Instr. MB 300H.74* (Matthew Bender).

22.53[2] Assignment Transfers Incidents of Thing Assigned. An assignment transfers all incidents of the thing assigned, unless expressly excepted from the transfer [CC § 1084]. For example, if a party assigns a debt secured by a mortgage, the assignment includes both the debt and the mortgage [CC § 2936].

22.53[3] Absent Prohibition on Assignment, Assignment May Be Made With or Without Consideration. A party may assign his or her interest in a contract with or without consideration. For example, an assignment may be a gift [see, e.g., *Ballinger v. Ballinger* (1937) 9 C2d 330, 333-334, 70 P2d 629]. An assignment also may constitute the consideration for another contract [see, e.g., *Johnston v. Landucci* (1942) 21 C2d 63, 67, 71, 130 P2d 405].

➤ Cross Reference:

Discussion of law applicable to assignments, see *California Forms of Pleading and Practice, Ch. 60, Assignments* (Matthew Bender).

22.53[4] Assignment Made With Consideration Is Subject to Contract Law. When a party assigns a contract to another party in exchange for consideration, the assignment itself is a contract, subject to the law governing contracts [see *Johnston v. Landucci* (1942) 21 C2d 63, 66-67, 130 P2d 405].

Example:

A landowner sought to purchase land from a neighbor, who purchased the neighboring land on an installment contract from a third party. The neighbor agreed to assign his installment purchase contract to the landowner in exchange for a promissory note secured by an assignment of the landowner's interest in

his own land. The court held that the assignment of the installment purchase contract was valid consideration for the contract to sell the neighbor's land, so that the judgment to foreclose on the lien could be enforced [*Johnston v. Landucci* (1942) 21 C2d 63, 67, 71, 130 P2d 405].

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawPerformanceAssignmentGeneral OverviewContracts LawThird PartiesDelegation of Performance



147 of 188 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 22 Suing or Defending Action for Breach of Contract
VIII. RECOVERING FOR IMPROPER ASSIGNMENT

2-22 MB Practice Guide: CA Contract Litigation 22.54

22.54 Contractual Rights May Be Assigned Unless Prohibited by Law or Contract.

22.54[1] Contractual Rights Presumptively May Be Assigned. In the absence of an express or implied intent to prohibit assignment, contractual rights may be assigned [*El Escorial Owners' Assn. v. DLC Plastering, Inc.* (2007) 154 CA4th 1337, 1360, 65 CR3d 524] . For example, an option contract is presumed to be assignable if it contains no provision forbidding assignment and does not require performance based on personal qualities of the contracting party [see *Masterson v. Sine* (1968) 68 C2d 222, 229, 65 CR 545, 436 P2d 561] .

22.54[2] Assignment May Be Oral or Written. A transfer or assignment of a right may be made without a writing, whenever a writing is not expressly required by statute [CC § 1052]. All that is required is evidence that the owner manifested an intention to transfer the right to the person to whom the intention was manifested [*Cockerell v. Title Ins. & Trust Co.* (1954) 42 C2d 284, 291, 267 P2d 16] .

Jury Instructions:

Contracts--Assignment Contested, see *Judicial Council of California Civil Jury Instructions*, CACI No. 326 (LexisNexis Matthew Bender).

22.54[3] Contract May Expressly or Implicitly Prohibit Assignment. Contracting parties may expressly or implicitly prohibit assignment in the contract [*Masterson v. Sine* (1968) 68 C2d 222, 230, 65 CR 545, 436 P2d 561 ; see CC § 1995.230 (restriction on transfer of tenant's interest in lease)].

Example--Implied Nonassignment:

In a transfer of land between family members, an option clause to repurchase the land contained in the deed was silent as to whether the option could be assigned. Notwithstanding the presumption in favor of assignability [see 22.54[1]], the court noted that even when there is no written or oral agreement that contract duties will be personal, the court must effectuate the presumed intent of the parties. The court therefore considered the family circumstances and parole evidence to determine that the parties intended that the contract not be assigned [*Masterson v. Sine* (1968) 68 C2d 222, 228-230, 65 CR 545, 436 P2d 561] .

Exception:

General assignment clauses prohibiting a party from assigning its rights and obligations under a contract

do not preclude assignments that occur by operation of law [*National Union Fire Ins. Co. of Pittsburgh, PA v. Cambridge Integrated Services Group, Inc.* (2009) 171 CA4th 35, 55, 89 CR3d 473 (because subrogation is effectively an assignment by operation of law, a general assignment clause in a claims administration contract between a claims administrator and an insured did not preclude an insurer's equitable subrogation rights against the claims administrator)].

22.54[4] Authorization to Assign Tenant's Lease May Not Be Unreasonably Withheld. When a tenant's lease contains a clause that prohibits assignment absent the landlord's consent but is silent as to the conditions for refusing consent, the landlord may not withhold consent unreasonably [CC § 1995.260]. Whether consent was withheld unreasonably is a question of fact for the tenant to prove [CC § 1995.260]. The tenant may meet this burden with proof of a written request for a statement of reasons for withholding consent, and that the landlord failed to provide a written response within a reasonable time [CC § 1995.260].

 Cross Reference:

Discussion of landlord-tenant issues, including assignments, see Matthew Bender[(R)] Practice Guide: California Landlord-Tenant Litigation.

22.54[5] No Enforcement of Assignment of Contract for Performance Based on Personal Qualities. When a contractual obligation requires the particular skill, credit or other personal quality of a particular contracting party, assignment of the right to performance of that obligation cannot be enforced [*Teel v. Bank of Eureka* (1941) 42 CA2d 807, 809, 110 P2d 78].



Strategic Point--Defendant:

Even when the contract contains an explicit contractual statement that the contract is binding on assigns, the court must consider the terms and tenor of the entire contract, and sometimes additional facts and circumstances, to determine whether the parties intended that the contract be personal and not assignable [see *Davis v. Basalt Rock Co.* (1951) 107 CA2d 436, 444, 237 P2d 338]. If the client did not confer performance to the assignee, counsel should examine whether the terms of the entire contract and circumstances indicate that the parties intended the contract to be personal.

22.54[6] Statutes Prohibit Certain Assignments. Assignments may be prohibited by statute. For example, the following may not be assigned:

- Wages earned by an employee, except under specified conditions [see *Lab Code* § 300(b)].
- Specified actions under commercial rent control ordinances [see *CC* § 1954.25 *et seq.*].
- Specified actions relating to consumer credit contracts [see *CC* § 1799.91].
- Actions against an enrollee or subscriber of a health care service plan [see *H&S Code* § 1379].
- Claims under California's unfair competition law [*B&P Code* §§ 17200 *et seq.*], which requires the plaintiff to be one "who has suffered injury in fact and has lost money or property as a result of the unfair competition" [*Amalgamated Transit Union, Local 1756, AFL-CIO v. Superior Court* (2009) 46 C4th 993, 1003, 95 CR3d 605, 209 P3d 937] .

 Cross Reference:

Discussion of statutory limitations on assignments, see California Forms of Pleading and Practice, Ch.

60, Assignments (Matthew Bender).

22.54[7] Rights on Personal Property May Be Assigned. A chose in action, or right to recover money or other personal property, may be assigned when it arises out of an obligation or property right [CC §§ 953, 954, 1458].

Distinguish:

A right to recover an ownership interest in real property is not assignable [*Martin v. Bridgeport Community Assn., Inc.* (2009) 173 CA4th 1024, 1033, 93 CR3d 405] .

22.54[8] Rights on Personal Torts and Legal Malpractice Claims May Not Be Assigned. A chose in action that arises out of a personal tort, such as personal injury or damage to reputation, may not be assigned [see *Goodley v. Wank & Wank, Inc.* (1976) 62 CA3d 389, 393-394, 133 CR 83].

Claims for legal malpractice may not be assigned because of the uniquely personal and confidential attorney-client relationship [*Goodley v. Wank & Wank, Inc.* (1976) 62 CA3d 389, 395, 133 CR 83]. The prohibition of assignments for legal malpractice claims extends to claims of attorney fraud [*Jackson v. Rogers & Wells* (1989) 210 CA3d 336, 348, 258 CR 454].

22.54[9] Rights to Recover Statutory Penalties May Not Be Assigned. The right to recover a statutory penalty may not be assigned [*Amalgamated Transit Union, Local 1756, AFL-CIO v. Superior Court* (2009) 46 C4th 993, 1004, 95 CR3d 605, 209 P3d 937 (aggrieved employee cannot assign claim for statutory penalties under Labor Code Private Attorneys General Act of 2004, *Lab Code § 2698 et seq.*)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawPerformanceAssignmentGeneral OverviewContracts LawPerformanceAssignmentNonassignability
Clauses



148 of 188 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 22 Suing or Defending Action for Breach of Contract
VIII. RECOVERING FOR IMPROPER ASSIGNMENT

2-22 MB Practice Guide: CA Contract Litigation 22.55

22.55 Improper Assignment Renders Contract Voidable.

Whether it is a contractual provision or a statute that imposes a prohibition on contract assignment, this renders the contract voidable by the party intended to benefit from the prohibition of assignment [*see, e.g., Ginsberg v. Butler* (1933) 217 C 467, 470-471, 19 P2d 790].

Example:

Beneficiaries of a death benefit issued by a fraternal society had assigned their interest in the benefits as security for a loan. The society's bylaws and the contract for death benefits stated that any assignment of the benefits was void. The Tennessee statute governing the fraternal society provided that benefits to be paid by the society could not be paid on the debt or liability of a member. Because the society was the party benefitting from the prohibition on assignment, the contract was voidable by the society [*Ginsberg v. Butler* (1933) 217 C 467, 472-473, 19 P2d 790].

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawPerformanceAssignmentGeneral OverviewContracts LawPerformanceAssignmentConsentContracts LawPerformanceAssignmentNonassignability Clauses



149 of 188 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 22 Suing or Defending Action for Breach of Contract
VIII. RECOVERING FOR IMPROPER ASSIGNMENT

2-22 MB Practice Guide: CA Contract Litigation 22.56

22.56 Nonassigning Party May Waive Breach by Assignment.

22.56[1] Party to Whom Benefit of Nonassignment Runs May Object to Assignment. A nonassignment clause generally runs in favor of a particular contracting party. If the party not benefitted by the assignment assigns the contract, that party is bound by the assignment, and may not later claim that the assignment is invalid because of the nonassignment clause [*E-P Constructors, Inc. v. Peterson Tractor Co.* (1961) 192 CA2d 518, 523, 13 CR 569].

22.56[2] Waiver May Be Implied When Nonassigning Party Either Performs or Accepts Performance by Assignee. When a party assigns a contract notwithstanding a prohibition on assignment, the other party may waive the prohibition on assignment. In particular, if the nonassigning party knows about the assignment and subsequently deals with the assignee, the nonassigning party waives the objection to the assignment [*Trubowitch v. Riverbank Canning Co.* (1947) 30 C2d 335, 342, 182 P2d 182].

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawContract Conditions & ProvisionsWaiversGeneral OverviewContracts
LawPerformanceAssignmentGeneral Overview



150 of 188 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 22 Suing or Defending Action for Breach of Contract
VIII. RECOVERING FOR IMPROPER ASSIGNMENT

2-22 MB Practice Guide: CA Contract Litigation 22.57

22.57 Assignor Remains Liable to Nonassigning Party.

When a party assigns a bilateral contract, that party assigns only the benefits [CC § 1458]. The obligations cannot be assigned without consent from the party benefitting from the obligation [CC § 1457]. Thus, when a party assigns a contract and the assignee assumes the contractual obligations, the nonassigning party still may seek recovery from the assignor absent consent from the nonassigning party [see *AICCO, Inc. v. Insurance Co. of N. Am.* (2001) 90 CA4th 579, 588, 109 CR2d 359].

Example:

An insurance company sought to stop selling insurance, assign its obligations to a reinsurer, and be released from its obligations to its insureds. Although the reinsurer became primarily liable under the assignment and assumption contract, the insurance company remained liable to its insureds, absent their consent to the assignment [*Travelers Indem. Co. v. Gillespie* (1990) 50 C3d 82, 95-96, 266 CR 117, 785 P2d 500].

Jury Instructions:

When Assignment of Benefits Includes Assumption of Obligations, see *California Forms of Jury Instruction*, Ch. 3C, Instr. MB 300C.93 (Matthew Bender).

➡ Cross Reference:

Discussion of nonassigning party's claims and assignor's defenses, see *California Forms of Pleading and Practice*, Ch. 60, Assignments (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawPerformanceAssignmentGeneral OverviewContracts LawPerformanceAssignmentConsentContracts

LawThird PartiesDelegation of Performance



151 of 188 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 22 Suing or Defending Action for Breach of Contract
VIII. RECOVERING FOR IMPROPER ASSIGNMENT

2-22 MB Practice Guide: CA Contract Litigation 22.58

22.58 Assignor May Be Liable to Assignee.

22.58[1] Assignor May Explicitly Warrant Rights Assigned. On assignment, the assignor typically guarantees performance of the contract and warrants the existence of the rights assigned [*see, e.g., Budget Fin. Plan v. Sav-On Food Club, Inc. (1955) 44 C2d 565, 567, 570, 283 P2d 694*]. These guarantees and warranties provide the basis for liability against the assignor if the assignee does not receive the benefit of the matters assigned [*see Budget Fin. Plan v. Sav-On Food Club, Inc. (1955) 44 C2d 565, 567, 570, 283 P2d 694*].

22.58[2] Statutes Impose Warranties on Assignment. Statutory warranties may form the basis of assignor liability [*see, e.g., Com Code §§ 3417, 4207* (pertaining to banking transfers)].

Example:

A person who assigns a securities certificate warrants that the certificate is genuine, that the assignor has the capacity to transfer the certificate, and that the certificate is in the amount the issuer is authorized to issue [*Com Code § 8202*].

➤ Cross References:

Discussion of warranties for assignments associated with sale of goods, see Ch. 28, Contract for Sale of Goods--Suing or Defending Action for Breach of Contract Under California Commercial Code.

Discussion of assignee's claims and assignor's defenses, see California Forms of Pleading and Practice, Ch. 60, Assignments (Matthew Bender).

22.58[3] Assignment Contains Implied Warranty of Valid and Existing Rights. In assignments, the common law implies a warranty that the rights assigned are valid and existing [*see Mary Pickford Co. v. Bayly Bros., Inc. (1939) 12 C2d 501, 518, 86 P2d 102* (sale of securities)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawPerformanceAssignmentGeneral Overview



152 of 188 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 22 Suing or Defending Action for Breach of Contract
VIII. RECOVERING FOR IMPROPER ASSIGNMENT

2-22 MB Practice Guide: CA Contract Litigation 22.59

22.59 Nonassigning Party May Be Liable to Assignee.

22.59[1] After Notice of Assignment, Assignee May Sue for Obligor's Failure to Confer Performance to Assignee. When there is no prohibition on assignment, once the nonassigning party receives notice of assignment of an executory contract, the obligor must confer performance to the assignee [*Fricker v. Uddo & Taormina Co.* (1957) 48 C2d 696, 701, 312 P2d 1085 ; but see *Producers Cotton Oil Co. v. Amstar Corp.* (1988) 197 CA3d 638, 657, 242 CR 914 (contending that *Fricker* is no longer the law in California with respect to secured creditors)]. Failure of the nonassigning party with notice to do so is grounds to assert a claim for breach of contract against the assignor [see *Fricker v. Uddo & Taormina Co.* (1957) 48 C2d 696, 701, 312 P2d 1085].

Jury Instructions:

When Assignment of Benefits Includes Assumption of Obligations, see *California Forms of Jury Instruction, Ch. 3C, Instr. MB 300C.93* (Matthew Bender).

 Cross Reference:

Discussion of assignee's claims, see *California Forms of Pleading and Practice, Ch. 60, Assignments* (Matthew Bender).

22.59[2] Absent Notice of Assignment, Obligor's Performance to Assignor Discharges Performance. If the nonassigning party receives no notice of the assignment, performance to the assignor discharges the nonassigning party's performance, and the assignee cannot recover from the nonassigning party [*Mutual Bldg. & Loan Ass'n v. Corum* (1936) 16 CA2d 212, 215, 60 P2d 316].

**Strategic Point--Assignee:**

If performance was rendered to the assignor, the assignee should seek recovery on the assignment from the assignor. Counsel should examine the assignment to determine whether the assignor breached a requirement to give notice to the obligor. Counsel also should consider a cause of action based on breach of warranty or guarantee of rights assigned [see *Budget Fin. Plan v. Sav-On Food Club, Inc.* (1955) 44 C2d 565, 567, 570, 283 P2d 694].

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawPerformanceAssignmentGeneral Overview



153 of 188 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 22 Suing or Defending Action for Breach of Contract
VIII. RECOVERING FOR IMPROPER ASSIGNMENT

2-22 MB Practice Guide: CA Contract Litigation 22.60

22.60 Assignee May Be Liable for Breach of Contract.

22.60[1] Assignee Generally Does Not Assume Obligations of Contract. Generally, an assignee does not assume the obligations of a contract when accepting an assignment [*Melchior v. New Line Prods., Inc. (2003) 106 CA4th 779, 789, 131 CR2d 347*].

22.60[2] Assignee Becomes Liable to Obligor on Acceptance of Obligor's Performance. An exception from the general rule regarding assignee liability occurs when a party voluntarily accepts the benefit of a transaction. When this occurs, the party also consents to the obligations to the extent the facts are known or ought to be known to the person accepting the benefit [CC § 1589]. The nonassigning party then has grounds to sue the assignee for nonperformance, even when the assignment agreement explicitly rejects assumption of the obligation to perform under the original contract [*Melchior v. New Line Prods., Inc. (2003) 106 CA4th 779, 790, 131 CR2d 347*].

Example--Assignee Liable:

An author and a film production company entered a release agreement in which the company agreed to pay the author a percentage of a film's gross receipts, if it was produced. The company assigned the release agreement to a second production company, who agreed only to pay a certain percentage of the first company's gross receipts from a participation fee to be paid by the second company. The second company then made the film, but failed to pay the author the percentage of gross receipts. The court held that the second company received the benefits of the original contract, and therefore assumed the first company's obligation to pay the author the percentage of gross receipts [*Melchior v. New Line Prods., Inc. (2003) 106 CA4th 779, 790, 131 CR2d 347*].

Examples--No Assignee Liability:

- A film producer contracted with a film distributor for a 70/30 split of profits from home videos of a film. The distributor then contracted with a subdistributor for a 50/50 split of the profits from the home videos. The subdistributor was not aware of the contract between the film producer and the film distributor. The film producer sued the sub-distributor for recovery of 70 percent of the profits. The court held that the subdistributor was not liable, because the subdistributor did not receive the benefit of the original contract and did not have constructive knowledge of the terms of the original contract [

Recorded Picture Co. (Prods.) v. Nelson Entm't, Inc. (1997) 53 CA4th 350, 363, 366-367, 61 CR2d 742].

■ Assuming that beverage manufacturer had agreed to continue to use plaintiff as its exclusive distributor unless it had good cause for terminating the relationship, manufacturer's assignee did not assume that obligation because there was no evidence the assignee even knew of the assignor's supposed obligation not to terminate its relationship with plaintiff without good cause [*Unterberger v. Red Bull North America, Inc.* (2008) 162 CA4th 414, 421, 75 CR3d 368] .

Jury Instructions:

When Assignment of Benefits Includes Assumption of Obligations, see *California Forms of Jury Instruction, Ch. 3C, Instr. MB 300C.93* (Matthew Bender).

22.60[3] Assignee Is Liable on Assumption of Obligation. When an assignee expressly assumes the obligations of a contract, the assignee is bound to perform them for the benefit of the nonassigning party [*Bruce v. Mieir* (1932) 120 CA 287, 290, 7 P2d 1037]. The nonassigning client then may sue the assignee for breach of contract if full performance is not rendered.

Jury Instructions:

When Assignment of Benefits Includes Assumption of Obligations, see *California Forms of Jury Instruction, Ch. 3C, Instr. MB 300C.93* (Matthew Bender).

 Cross References:

Discussion of breach resulting from nonperformance, see 22.13 -22.23.

Discussion of breach resulting from performance not in accord with contract terms, see 22.36 -22.41.

Discussion of claims and defenses against assignee, see *California Forms of Pleading and Practice, Ch. 60, Assignments* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawBreachGeneral OverviewContracts LawPerformanceAssignmentGeneral OverviewContracts LawPerformanceAssignmentNonassignability Clauses



154 of 188 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 22 Suing or Defending Action for Breach of Contract

IX. DEFENDING ACTION FOR BREACH OF CONTRACT

2-22 MB Practice Guide: CA Contract Litigation 22.61

22.61 CHECKLIST: Defending Action for Breach of Contract.

☐ If defendant failed to perform, assert that defendant had legal basis for not performing, such as that defendant was:

☐ Justified in not performing.

Authority:

CC § 1689(b)(4)

Discussion:

See 22.64

☐ Excused because of impossible or impracticable conditions.

Authority:

CC § 1511(2)

Discussion:

See 22.65[1]

☐ Excused because purpose of contract was frustrated.

Authority:

Dorn v. Goetz (1948) 85 CA2d 407, 410, 193 P2d 121

Discussion:

See 22.65[2]

☐ Excused because performance would be unlawful.

Authority:

CC § 1667

Discussion:

See 22.65[3]

- ☐ Excused because performance would be unconscionable.

Authority:

CC § 1670.5

Discussion:

See 22.65[4]

- ☐ Excused because plaintiff waived performance.

Authority:

Noel v. Dumont Builders, Inc. (1960) 178 CA2d 691, 696-697, 3 CR 220

Discussion:

See 22.65[5]

- ☐ Excused because plaintiff released defendant from performance.

Authority:

CC § 1541

Discussion:

See 22.65[6]

- ☐ Not obligated to perform because a condition precedent did not occur.

Authority:

Britschgi v. McCall (1953) 41 C2d 138, 144, 257 P2d 977 ; American Federation of State, County & Municipal Employees v. Metropolitan Water District (2005) 126 CA4th 247, 264-265

Discussion:

See 22.66

- ☐ Not obligated to perform because contract conditions plaintiff's performance on defendant's satisfaction, and:

☐ Defendant was not satisfied; and

☐ Contract pertains to mechanical device or operative fitness, and reasonable person would not be satisfied.

Authority:

LeBoire v. Royce (1960) 53 C2d 659, 672, 2 CR 745, 349 P2d 513

Discussion:

See 22.66[2][a]

- ☐ Not obligated to perform because contract pertains to fancy, taste or judgment, and defendant's dissatisfaction is in good faith.

Authority:

Tiffany v. Pacific Sewer Pipe Co. (1919) 180 C 700, 702, 182 P 428

Discussion:

See 22.66[2][b]

- ☐ Not obligated to perform because of occurrence of a condition subsequent.

Authority:

Ransom v. Penn Mut. Life Ins. Co. (1954) 43 C2d 420, 425, 274 P2d 633

Discussion:

See 22.67

- ☐ Not obligated to perform because plaintiff's conduct constitutes waiver of defendant's breach.

Authority:

CC § 1511(3)

Discussion:

See 22.68

- ☐ If plaintiff engaged in conduct potentially implying waiver of breach, determine plaintiff's probable counter-contentions, including:

- ☐ Waiver pertained to remedy for rescission, so that plaintiff may still recover damages.

Authority:

McMillan Process Co. v. Brown (1939) 33 CA2d 279, 285, 91 P2d 613

Discussion:

See 22.68[5]

- ☐ Conduct indicated that waiver was made at defendant's request.

Authority:

Woodard v. Glenwood Lumber Co. (1915) 171 C 513, 523, 153 P 951

Discussion:

See 22.68[6]

- ☐ Contract provides for continuing covenant, such that waiver of earlier breach does not waive

subsequent breach.

Authority:

Woodard v. Glenwood Lumber Co. (1915) 171 C 513, 523, 153 P 951

Discussion:

See 22.68[7]

- ☐ Breach was latent.

Authority:

Banducci v. Frank T. Hickey, Inc. (1949) 93 CA2d 658, 662, 209 P2d 398

Discussion:

See 22.68[8]

- ☐ Consider viability of following potential defenses:

- ☐ Defendant substantially performed obligations.

Authority:

Thomas Haverty Co. v. Jones (1921) 185 C 285, 294, 197 P 105

Discussion:

See 22.69

- ☐ Breach, if any, occurred beyond limitations period, based on following considerations:

☐ If contract was written, complaint was not filed within four years from time performance was due.

Authority:

CCP § 337

Discussion:

See 22.70[1]

- ☐ If contract was oral, complaint was not filed within two years from time performance was due.

Authority:

CCP § 339

Discussion:

See 22.70[2]

- ☐ Performance was due, but obligations allegedly were not performed.

Authority:

Waxman v. Citizens Nat'l Trust & Sav. Bank (1954) 123 CA2d 145, 149, 266 P2d 48

Discussion:

See 22.70[3]

☐ Whether statute of limitations was tolled because client was out of California following accrual of cause of action.

Authority:

CCP § 351

Discussion:

See 22.70[5]

☐ Include appropriate affirmative defenses in answer:

☐ Excuse for nonperformance.

Authority:

Eucalyptus Growers Ass'n v. Orange County Nursery & Land Co. (1917) 174 C 330, 335, 163 P 45

Discussion:

See 22.72[3][b]

☐ Plaintiff's waiver of breach.

Authority:

Williams v. Marshall (1951) 37 C2d 445, 456, 235 P2d 372

Discussion:

See 22.72[3][c]

☐ Release.

Authority:

Hildebrand v. Stonecrest Corp. (1959) 174 CA2d 158, 165, 344 P2d 378

Discussion:

See 22.72[3][d]

☐ Defendant's payment.

Authority:

Snodgrass v. Snodgrass (1927) 81 CA 360, 363, 253 P 755

Discussion:

See 22.72[4]

- ☐ Statute of limitations.

Authority:

Union Sugar Co. v. Hollister Estate Co. (1935) 3 C2d 740, 744, 47 P2d 273

Discussion:

See 22.72[5]

- ☐ Plaintiff's failure to mitigate damages.

Authority:

Mass v. Board of Educ. (1964) 61 C2d 612, 616, 39 CR 739, 394 P2d 579

Discussion:

See 22.72[6]

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawBreachGeneral OverviewContracts LawBreachCauses of ActionGeneral OverviewContracts LawDefensesGeneral Overview



155 of 188 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 22 Suing or Defending Action for Breach of Contract
IX. DEFENDING ACTION FOR BREACH OF CONTRACT

2-22 MB Practice Guide: CA Contract Litigation 22.62

22.62 Options and Strategy.

22.62[1] Asserting Appropriate Response Including Applicable Affirmative Defenses. When presented with a complaint for breach of contract, the first analysis must be to determine whether the complaint includes all of the necessary allegations to state a cause of action [see 22.63]. If it does not, then a demurrer may be proper [see 22.71]. If the complaint appears complete, a general denial in the answer is appropriate [see 22.71], if the complaint is not verified [see 22.72[1]]. If the complaint is verified, then the answer also must be verified, and a general denial is not appropriate. In preparing a defense, counsel must assess whether an element of the claim can be negated, so that the plaintiff will be unable to establish a basis for recovery [see 22.03 -22.12]. Counsel also must assess the facts to determine the relevant affirmative defenses to include in the answer [see 22.72[3] -[6]].

➡ Cross References:

Discussion of preparing demurrer, see Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, Ch. 11, Demurrers and Motions for Judgment on the Pleadings.

Discussion of preparing an answer, see Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, Ch. 14, Answers.

22.62[2] Refuting Nonperformance or Materiality of Breach With Substantial Performance. Negating the element of nonperformance is central to defeating a claim for breach of contract. Although the common law required strict performance, modern case law allows a party to defeat the element of nonperformance by establishing substantial performance [see 22.69]. Similarly, if the plaintiff asserts that the breach was material, the defendant may counter that:

- Defendant substantially performed [see 22.08[2]];
- That the lack of strict performance accordingly was not a material breach [see 22.24 -22.29, 22.69];
and
- That the plaintiff should be limited to recovering the minimal costs associated with the lack of strict performance [see 22.34].

 Cross References:

Discussion of materiality of breach, see 22.24 -22.29.

Discussion of substantial performance as basis for recovery for breach, see 22.16[2].

Discussion of substantial performance in context of recovery for performance not in accord with contract terms, see 22.37.

22.62[3] Asserting Nonperformance of Condition Precedent. The defendant may establish that there was no duty to perform, because a condition precedent was not met [see 22.66], or because a condition subsequent occurred [see 22.67]. Although the plaintiff has the burden of proof on the occurrence of a condition precedent, the defendant must first come forward with evidence that the condition did not occur [*Consolidated World Invs., Inc. v. Lido Preferred, Ltd.* (1992) 9 CA4th 373, 380, 11 CR2d 524 ; see 22.19[2]].

22.62[4] Establishing Justification, Excuse, and Other Affirmative Defenses for Nonperformance. Counsel must determine if there is evidence to support any appropriate affirmative defenses. There are many affirmative defenses, including, among others:

- Justification or excuse for nonperformance [see 22.64, 22.65].
- That the plaintiff waived the breach [see 22.65[5]].
- Failure to mitigate damages [see 22.72[6]], and the statute of limitations [see 22.72[5]].

Of course, the facts of each case will determine the applicability of various affirmative defenses.

 Cross Reference:

Discussion of mitigation of damages, see Ch. 7, Seeking or Opposing Damages in Contract Actions.

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawBreachGeneral OverviewContracts LawBreachCauses of ActionGeneral OverviewContracts LawDefensesGeneral Overview



156 of 188 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 22 Suing or Defending Action for Breach of Contract
IX. DEFENDING ACTION FOR BREACH OF CONTRACT

2-22 MB Practice Guide: CA Contract Litigation 22.63

22.63 No Liability When Plaintiff Fails to Establish Elements of Breach.

The most basic defense to a breach of contract action is that the plaintiff failed to plead or establish all of the elements of the cause of action for breach of contract, including the existence of a contract, plaintiff's performance or excuse from performance, defendant's breach, and damages proximately caused by the breach [see *Acoustics, Inc. v. Trepte Constr. Co.* (1971) 14 CA3d 887, 913, 92 CR 723]. The defendant should refute any of these elements in an answer or demurrer, as appropriate, to defeat the plaintiff's claim.

Jury Instructions:

Breach, see *California Forms of Jury Instruction, Ch. 3D, Instr. MB 300D.03* (Matthew Bender).

➡ Cross References:

Discussion of elements of cause of action for breach of contract, see 22.03 -22.12.
Discussion of responding by demurrer or answer, see 22.71.

Discussion of existence of a contract, see Ch. 13, Attacking or Defending Existence of Contract--Absence of Essential Element;

Ch. 14, Attacking or Defending Existence of Contract--Lack of Capacity;

Ch. 15, Attacking or Defending Existence of Contract--Failure to Comply With Applicable Formalities;

Ch. 16, Attacking or Defending Existence of Contract--Mistake;

Ch. 17, Attacking or Defending Existence of Contract--Fraud, Duress, Menace, and Undue Influence;

and

Ch. 18, Asserting or Defending Claim That Contract Is Illegal, Contrary to Public Policy, or Unconscionable.

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawBreachCauses of ActionElements of ClaimsContracts LawDefensesGeneral Overview



157 of 188 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 22 Suing or Defending Action for Breach of Contract
IX. DEFENDING ACTION FOR BREACH OF CONTRACT

2-22 MB Practice Guide: CA Contract Litigation 22.64

22.64 No Liability When Nonperformance Is Justified by Failure of Consideration.

A plaintiff may not recover for a defendant's breach if the defendant's failure to perform is justified, such as when the consideration due to defendant fails [*see CC § 1689(b)(4)*].

Example--Justified Failure to Perform:

A machine shop issued a promissory note representing the unpaid amount on the purchase of a press from a third party. A finance company was to pay the third party for the press. The finance company's check to the seller was dishonored, and the press was not delivered to the machine shop. The finance company sued the machine shop for payment on the promissory note. The machine shop could assert failure of consideration as a defense against its failure to perform payment on the promissory note [*Commercial Credit Corp. v. Orange County Mach. Works (1950) 34 C2d 766, 771, 214 P2d 819*].

Example--Unjustified Failure to Perform:

An irrigation district sued a landowner for failing to make payments to provide water to the land pursuant to a contract that released the irrigation district from liability for insufficient water supplies. The landowner argued that the failure to pay was justified because the irrigation district did not provide the water. Because of the release, the irrigation district's failure to deliver water for part of the term of the contract was not a failure of consideration, and the landowner's failure to pay was neither excused nor justified [*Consolidated Irrigation Dist. v. Crawshaw (1933) 130 CA 455, 460-461, 20 P2d 119*].

➡ Cross Reference:

Discussion of requirement that plaintiff show performance or excuse from performance, see 22.08.

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawBreachNonperformanceContracts LawDefensesGeneral OverviewContracts LawPerformanceFailure of Consideration



158 of 188 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 22 Suing or Defending Action for Breach of Contract
IX. DEFENDING ACTION FOR BREACH OF CONTRACT

2-22 MB Practice Guide: CA Contract Litigation 22.65

22.65 No Liability When Nonperformance Is Excused.

22.65[1] Impossible or Impracticable Performance May Be Excused.

22.65[1][a] Complete Impossibility Excuses Performance. Unless the parties expressly agree to the contrary, the defendant's performance may be excused when the defendant is prevented by "an irresistible, superhuman cause" or by the act of public enemies of California or the United States [CC § 1511(2)]. Under these circumstances, the court considers the lack of performance a failure of consideration, rather than a breach, and rescission is the appropriate remedy [see *Riff v. Mayhew* (1949) 90 CA2d 712, 717, 203 P2d 812 ; see also CC § 1689(b)(3), (4)].

Example--Impossibility:

A contract that calls for the unique personal services of the contracting party is rendered impossible by the death of that party [*Charles B. Webster Real Estate v. Rickard* (1971) 21 CA3d 612, 618, 98 CR 559]. The defendant's estate is excused from performance, and is not in breach.

Jury Instructions:

Impossibility, see *California Forms of Jury Instruction, Ch. 3F, Instr. MB 300F.70* (Matthew Bender).

Requirement of Objective Impossibility, see *California Forms of Jury Instruction, Ch. 3F, Instr. MB 300F.72* (Matthew Bender).

22.65[1][b] Impracticability Excuses Performance. When performance under a contract has become impracticable due to excessive or unreasonable expense or difficulty, it may be excused due to impracticability, a form of legal impossibility [*Mineral Park Land Co. v. Howard* (1916) 172 C 289, 293, 156 P 458].

Example--Impracticability:

A builder contracted to excavate gravel from plaintiff's land, but during the course of excavation, the builder ceased excavation because the remaining gravel was under water. The court held that the defendant builder was excused because of the extraordinarily increased difficulty of excavation [*Mineral Park Land Co. v. Howard* (1916) 172 C 289, 293, 156 P 458].

Judge's Perspective:

Impracticability is a large topic, and it is beyond the scope of this treatise to address it fully. It is

important to note that impracticability, like impossibility and frustration of purpose, are questions of law to be decided by the court, not questions of fact [for related jury instruction, see *Judicial Council of California Civil Jury Instructions*, CACI No. 300 (LexisNexis Matthew Bender)]. The circumstances that might make performance "impracticable" are numerous and varied. The Restatement Second of Contracts states that when, after a contract is made, a party's performance is made impracticable without his or her fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, the duty to render that performance is discharged, unless the language or the circumstances indicate the contrary [Restatement (Second) of Contracts § 261].

Impracticability does not mean *impossibility*; the defendant can usually still perform the contract, albeit at a substantially higher price. Generally, the mere fact of increased cost or difficulty is insufficient to release a party from that party's contractual obligations [see *Oosten v. Hay Haulers Dairy Employees & Helpers Union* (1955) 45 C2d 784, 789, 291 P2d 17 ("labor trouble" on part of milk farmer did not excuse milk processor from accepting deliveries of farmer's milk); see also *Corbin on Contracts* § 74.7 (discovery of facts that make promised performance more difficult or expensive, or occurrence of subsequent events having this effect, has usually been held not to discharge contractor from duty, at least when facts or events are reasonably foreseeable or within reasonable contemplation of parties at time of contracting)]. At some point, the increase will rise to the level of impracticability [see, e.g., *City of Vernon v. City of Los Angeles* (1955) 45 C2d 710, 719, 290 P2d 841 (defendant's costs increased dramatically when it was required to handle plaintiff's sewage in manner other than originally contemplated)]. When this point is reached is fact specific, and will be determined not only by reference to existing case law, but also to the customs and expectations of the relevant industry.

Jury Instructions:

Impracticability, see *California Forms of Jury Instruction*, Ch. 3F, Instr. MB 300F.71 (Matthew Bender).

22.65[1][c] Temporary Impossibility or Impracticability Suspends Duty to Perform. When the conditions rendering performance impossible or impracticable are temporary, the defendant is excused from performing during the period of impossibility or impracticability [see *Bergin v. Van Der Steen* (1951) 107 CA2d 8, 16]. The defendant may also establish that performance following the temporary impossibility is so burdensome due to the period of impossibility that the duty to perform should be permanently excused [see *Bergin v. Van Der Steen* (1951) 107 CA2d 8, 16].

Jury Instructions:

Partial Impossibility, see *California Forms of Jury Instruction*, Ch. 3F, Instr. MB 300F.78 (Matthew Bender).

22.65[2] Frustration of Purpose May Excuse Performance. Performance may be excused when the value of the performance (that is, the purpose of the contract) has been destroyed by a supervening and unforeseen event [*Dorn v. Goetz* (1948) 85 CA2d 407, 410, 193 P2d 121]. The court may reject this defense if it determines that the loss is so severe that it cannot fairly be determined to be within the risk assumed by the plaintiff [see *FPI Dev., Inc. v. Nakashima* (1991) 231 CA3d 367, 399, 282 CR 508].

Examples:

- A developer agreed to transfer land to an organization to satisfy a mitigation condition required by an environmental impact report. On its motion for summary judgment, the developer made an adequate showing to shift the burden to show a triable issue to the plaintiff by arguing that because the organization had been found unqualified to hold the mitigation land, the developer's performance was excused under the doctrine of commercial frustration [*Habitat Trust for Wildlife, Inc. v. City of Rancho*

Cucamonga (2009) 175 CA4th 1306, 1336, 96 CR3d 813 .

■ A business contracted to lease an electrical lighting display, for which the defendant built a neon sign. The government subsequently banned outside lighting at night due to wartime lighting restrictions, and the business refused to make payments on the leased display. The court held that the purpose of the contract was to advertise the business at night, that the purpose was frustrated by the government's ban, and that the business was therefore excused from performing under the contract. Although the government lifted the ban 14 months later, the court rejected the notion that the obligation was only temporarily suspended, because the ban was indefinite in duration at the time it was imposed [*20th Century Lites, Inc. v. Goodman (1944) 64 CA2d Supp 938, 943-945*].

Jury Instructions:

Frustration of Purpose, see *California Forms of Jury Instruction, Ch. 3F, Instr. MB 300F.76* (Matthew Bender).

Destruction of Value Defined, see *California Forms of Jury Instruction, Ch. 3F, Instr. MB 300F.77* (Matthew Bender).

22.65[3] Unlawful Performance May Be Excused. When a contract calls for performance of an unlawful act, or performance that is contrary to the policy of express law or otherwise contrary to good morals, the court may excuse the nonperformance of the act [see *CC § 1667*].

Exception:

Under certain circumstances, the plaintiff may recover for breach even when the contract calls for unlawful performance, such as to avert subversion of the particular law at issue [see, e.g., *South Tahoe Gas Co. v. Hofmann Land Improvement Co. (1972) 25 CA3d 750, 760, 102 CR 286*].

Jury Instructions:

Object of Contract Must Be Legal, see *California Forms of Jury Instruction, Ch. 3F, Instr. MB 300F.90* (Matthew Bender).

Cross Reference:

Discussion of unlawful contract terms, see Ch. 18, Asserting or Defending Claim That Contract Is Illegal, Contrary to Public Policy, or Unconscionable.

22.65[4] Unconscionable Performance May Be Excused. A court may refuse to enforce a contract, enforce only part of it, or limit the application of a part of the contract if it determines as a matter of law that the contract or any clause of it was unconscionable at the time the contract was entered into [*CC § 1670.5*].

Cross Reference:

Discussion of unconscionable contract terms, see Ch. 18, Asserting or Defending Claim That Contract Is Illegal, Contrary to Public Policy, or Unconscionable.

22.65[5] Waiver May Excuse Performance of Condition. The defendant may be excused from performing a condition of the contract if the plaintiff either expressly or implicitly waives that condition [see, e.g., *Noel v. Dumont Builders, Inc. (1960) 178 CA2d 691, 696, 3 CR 220*].

Example--Implied Waiver:

Homeowners contracted to build a new house conditioned on the sale of their current house. The court determined that the homeowners waived the condition after approving building plans, authorizing construction, and making changes to the plans [*Noel v. Dumont Builders, Inc. (1960) 178 CA2d 691,*

696, 3 CR 220].

Jury Instructions:

Waiver Defined, see *California Forms of Jury Instruction, Ch. 3F, Instr. MB 300F.20* (Matthew Bender).

Cross References:

Discussion of performance of conditions to a contract, see 22.21[2], [3], 22.66, 22.67.

Discussion of different possible meanings of term "waiver," see 22.68[3].

22.65[6] Release May Excuse Performance. An obligation is extinguished by a release if the obligor gives consideration to the obligee for the release or if the obligee provides a written release, with or without consideration [CC § 1541]. Accordingly, if the defendant secured a valid release from the contract, the defendant is excused from performance.



Strategic Point--Plaintiff:

The Restatement (Second) of Contracts indicates that the plaintiff may prevent the defendant from asserting a release to excuse performance on a showing that the plaintiff retracted the release before the defendant detrimentally relied it. If the plaintiff has evidence of a timely retraction, the plaintiff may cite this to defeat release as a basis for excuse from performance [Restatement (Second) of Contracts § 84(2)].

Consider--Plaintiff:

If a release is obtained with additional consideration, the release agreement itself is subject to the law of contracts. If the defendant fails to supply the additional consideration under the release agreement, the release agreement may be rescinded [see CC § 1989(b)(2)-(4)] and the defendant is in breach of the underlying contract.

22.65[7] Plaintiff's Prevention of Defendant's Performance Excuses Defendant's Performance. If the plaintiff prevents the defendant from performing the defendant's obligation, the plaintiff cannot establish breach by the defendant [CC § 1512; *Pacific Venture Corp. v. Huey* (1940) 15 C2d 711, 717, 104 P2d 641].

22.65[8] Defendant Has Burden of Proof to Establish Excuse. An excuse for nonperformance is an affirmative defense. Accordingly, the defendant has the burden of proof of establishing that the defendant's nonperformance is excused [see *Jacobs v. Tenneco W., Inc.* (1986) 186 CA3d 1413, 1417, 231 CR 351].

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawBreachNonperformanceContracts LawDefensesGeneral OverviewContracts LawPerformanceImpossibility of PerformanceGeneral OverviewContracts LawPerformanceImpossibility of PerformanceFrustration of PurposeContracts LawPerformanceImpossibility of PerformanceImpracticability



159 of 188 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 22 Suing or Defending Action for Breach of Contract
IX. DEFENDING ACTION FOR BREACH OF CONTRACT

2-22 MB Practice Guide: CA Contract Litigation 22.66

22.66 Nonoccurrence of Condition Precedent Precludes Liability for Nonperformance.

22.66[1] Failure to Satisfy Condition Precedent Precludes Liability. Absent contract language imposing a duty to fulfill a condition precedent, the failure of a condition precedent to occur excuses performance, and no basis for damages arises [*Britschgi v. McCall* (1953) 41 C2d 138, 144, 257 P2d 977 ; *American Federation of State County and Municipal Employees v. Metropolitan Water District* (2005) 126 CA4th 247, 264-265].

Examples:

- A developer agreed to transfer land to an organization to satisfy a mitigation condition required by an environmental impact report. Because approval of the organization as an entity qualified to receive the transfer was necessary to fulfill the purpose of the agreement, approval of the organization was an implied condition of the contract. When the city determined that the organization was not a proper entity to receive the mitigation land, the developer had no duty to perform under the agreement [*Habitat Trust for Wildlife, Inc. v. City of Rancho Cucamonga* (2009) 175 CA4th 1306, 1335, 96 CR3d 813].

- A building contract requiring a party to request alternative dispute resolution before a specified time created a condition precedent to the use of alternative dispute resolution. The construction company's failure to request arbitration before the specified time precluded the construction company from compelling the use of arbitration [*Platt Pac., Inc. v. Andelson* (1993) 6 C4th 307, 313-314, 24 CR2d 597, 862 P2d 158].

Exception:

Nonoccurrence of a condition precedent may be equitably excused when the nonoccurrence would work a forfeiture [*Root v. American Equity Specialty Ins. Co.* (2005) 130 CA4th 926, 939].

The defendant must prove that the parties agreed to the condition precedent, while the plaintiff must prove that the condition occurred. If the plaintiff cannot meet the burden of proof, the defendant is not required to perform the duty [*Consolidated World Invs., Inc. v. Lido Preferred, Ltd.* (1992) 9 CA4th 373, 380, 11 CR2d 524].

Jury Instructions:

Existence of Condition Precedent Disputed, see *Judicial Council of California Civil Jury Instructions*, CACI No. 321 (LexisNexis Matthew Bender).

Occurrence of Agreed Condition Precedent, see *Judicial Council of California Civil Jury Instructions*, CACI No. 322 (LexisNexis Matthew Bender).

Cross Reference:

Discussion of plaintiff's burden to show occurrence of condition, see 22.19[2].

22.66[2] Unmet Condition of Satisfaction Precludes Liability.

22.66[2][a] "Reasonable Person" Standard Applies to Commercial Value, Mechanical Ability, or Operational Fitness. Some contracts provide that one party's performance must be satisfactory to the other party before liability for performance attaches. This type of provision constitutes a condition precedent to performance by the party who must be satisfied [*LeBoire v. Royce* (1960) 53 C2d 659, 672, 2 CR 745, 349 P2d 513]. Absent contractual language governing the test for satisfaction, courts generally interpret this kind of condition as requiring performance that would be satisfactory to a reasonable person, especially when the contract is for commercial value, mechanical ability, or operational fitness [see *LeBoire v. Royce* (1960) 53 C2d 659, 672, 2 CR 745, 349 P2d 513]. The assertion of arbitrary, capricious or unreasonable dissatisfaction does not excuse the condition, and no liability may attach [*Collins v. Vickter Manor, Inc.* (1957) 47 C2d 875, 882, 306 P2d 783].

Example:

A contract for the purchase of elevators and controlling devices gave the buyer sole discretion to determine satisfactory working order of the elevators and devices. The court applied the "reasonable person" standard, and found that the buyer acted reasonably in rejecting the defective devices, but did not act reasonably in rejecting the operational elevators. The contractor was entitled to recover for the construction and installation of the elevators, less damages [*Bryan Elevator Co. v. Law* (1916) 31 CA 204, 215-216, 160 P 170].

Jury Instructions:

Reasonable Satisfaction Requirement, see *California Forms of Jury Instruction*, Ch. 3D, Instr. MB 300D.11 (Matthew Bender).

22.66[2][b] Good-Faith Subjective Standard Applies When Satisfaction Involves Fancy, Taste, or Judgment.

Contracts that involve personal fancy, taste, or judgment may have satisfaction provisions. In these circumstances, the courts require only that the party determine satisfaction in good faith [see *Tiffany v. Pacific Sewer Pipe Co.* (1919) 180 C 700, 702, 182 P 428]. Absent explicit direction in the contract or implied from the subject matter of the contract, courts prefer to apply the "reasonable person" test [*Guntert v. City of Stockton* (1974) 43 CA3d 203, 209, 117 CR 601].

Example:

An employee was hired to produce enameled and glazed brick in certain quantities and to the satisfaction of the employer. The employer terminated the employee. Noting that there was no evidence that the employer was satisfied with the work, the court held that the employer's stated dissatisfaction was conclusive and the employer could not recover for wrongful termination [*Tiffany v. Pacific Sewer Pipe Co.* (1919) 180 C 700, 702, 182 P 428].

Jury Instructions:

Performance to Satisfaction of Other Party's Taste, see *California Forms of Jury Instruction*, Ch. 3D, Instr. MB 300D.12 (Matthew Bender).

Performance to Satisfaction of Other Party When Type of Satisfaction Is Jury Issue, see *California Forms of Jury Instruction, Ch. 3D, Instr. MB 300D.13* (Matthew Bender).

 Cross Reference:

Discussion of duty of good faith, see Ch. 23, Suing or Defending Action for Breach of Duty of Good Faith and Fair Dealing.

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawBreachCauses of ActionGeneral OverviewContracts LawBreachNonperformanceContracts LawContract Conditions & ProvisionsConditions Precedent



160 of 188 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 22 Suing or Defending Action for Breach of Contract
IX. DEFENDING ACTION FOR BREACH OF CONTRACT

2-22 MB Practice Guide: CA Contract Litigation 22.67

22.67 Occurrence of Condition Subsequent Before Performance Precludes Liability.

22.67[1] Condition Subsequent Is Future Event That Relieves Obligation. A condition subsequent is a possible future event that, if it occurs, relieves a party from an obligation, if the party chooses to be so relieved [CC § 1438]. A court determines whether a condition is subsequent or precedent based on the circumstances [see, e.g., *Ransom v. Penn Mut. Life Ins. Co.* (1954) 43 C2d 420, 425, 274 P2d 633]. A condition subsequent may be expressed or implied [*Lowe v. Copeland* (1932) 125 CA 315, 321, 13 P2d 522].

Jury Instructions:

Condition Subsequent, see *California Forms of Jury Instruction, Ch. 3D, Instr. MB 300D.33* (Matthew Bender).

22.67[2] No Liability When Occurrence of Condition Subsequent Precedes Time Performance Is Due. An interpretation of a condition as being subsequent, rather than precedent, means that the obligations of the contract must be performed until the condition subsequent occurs [CC § 1438]. On the occurrence of the condition, the defendant is relieved of the obligation to perform.

Consider--Plaintiff:

The failure of a party to perform before the occurrence of the condition subsequent will render that party in breach [see *Ransom v. Penn Mut. Life Ins. Co.* (1954) 43 C2d 420, 425, 274 P2d 633].

Example--Condition Construed As Condition Subsequent:

A man applied for, and paid the first premium on, a life insurance policy. The policy application indicated that the policy would cover the applicant following payment of the first premium, provided the insurance company was satisfied of the insured's acceptability at the date of the application. The man died pending the results of an additional medical examination. The court held that the contract arose at the time the application and premium payment was received. Because of the ambiguous language and to avoid an unconscionable result, the insurer's satisfaction was construed as a condition subsequent that would have entitled the insurer to terminate the insurance contract after additional risk might become known [*Ransom v. Penn Mut. Life Ins. Co.* (1954) 43 C2d 420, 425, 274 P2d 633].

► Cross Reference:

Discussion of unconscionable contracts, see Ch. 18, Asserting or Defending Claim That Contract Is Illegal, Contrary to Public Policy, or Unconscionable.

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawBreachCauses of ActionGeneral OverviewContracts LawBreachNonperformanceContracts LawContract
Conditions & ProvisionsConditions Subsequent



161 of 188 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 22 Suing or Defending Action for Breach of Contract
IX. DEFENDING ACTION FOR BREACH OF CONTRACT

2-22 MB Practice Guide: CA Contract Litigation 22.68

22.68 Party May Waive Breach.

22.68[1] Conduct That Induces Reasonable Person to Conclude Aggrieved Party Has Relinquished Right Constitutes Waiver. A party may assert that the opposing party waived the contract breach entirely. To establish waiver, the party in breach may show evidence of an express waiver or evidence of conduct that would induce a reasonable person to conclude that the nonbreaching party relinquished the right [CC § 1511(3); *Rubin v. Los Angeles Fed. Sav. & Loan Ass'n* (1984) 159 CA3d 292, 298, 205 CR 455].

Distinguish:

The term "waiver" is susceptible of different meanings. "Waiver" may refer to the voluntary relinquishment of a known right [see *Platt Pac., Inc. v. Andelson* (1993) 6 C4th 307, 314, 24 CR2d 597, 862 P2d 158], and may also refer to the loss of an opportunity or right as a result of a party's failure to perform, regardless of whether the party knowingly or voluntarily relinquished the right [see *Platt Pac., Inc. v. Andelson* (1993) 6 C4th 307, 315, 24 CR2d 597, 862 P2d 158]. This section discusses the voluntary relinquishment of a known right.

Jury Instructions:

Waiver Defined, see *California Forms of Jury Instruction, Ch. 3F, Instr. MB 300F.20* (Matthew Bender).

► Cross Reference:

Discussion of waiver in contract for sale of goods, see Ch. 28, Contract for Sale of Goods--Suing or Defending Action for Breach of Contract Under California Commercial Code.

22.68[2] Continued Performance With Knowledge of Breach and Acceptance of Further Performance Constitutes Implied Waiver. A breaching party may establish waiver by showing that the nonbreaching party continued to perform under the contract without claiming breach, thereby indicating acceptance [*A.B.C. Distrib. Corp. v. Distillers Distrib. Co.* (1957) 154 CA2d 175, 187, 316 P2d 71].

Jury Instructions:

Waiver of Defects in Offer of Performance, see *California Forms of Jury Instruction, Ch. 3F, Instr. MB 300F.23* (Matthew Bender).

22.68[3] Implied Waiver Is Question of Fact. The determination of whether a nonbreaching party waived a breach of the contract is a question of fact [*Banducci v. Frank T. Hickey, Inc. (1949) 93 CA2d 658, 663, 209 P2d 398*].

22.68[4] Burden of Proof Is on Party Asserting Waiver. The burden of proving waiver of a breach is on the party alleging reliance on it [*Mayer v. Northwood Textile Mills, Inc. (1951) 105 CA2d 406, 409, 233 P2d 657*].

22.68[5] Plaintiff's Waiver of Right to Rescission Restricts Claim of Damages to Those Caused by Breach. If a nonbreaching party waives the right to rescind the contract and continues to perform under the contract, the party's remedy is restricted to damages from the breach [*McMillan Process Co. v. Brown (1939) 33 CA2d 279, 285, 91 P2d 613*].



Cross Reference:

Discussion of damages, see Ch. 7, Seeking or Opposing Damages in Contract Actions.

22.68[6] No Waiver When Delay in Seeking Remedy Made at Breaching Party's Request. Although the nonbreaching party may waive a breach by continued performance, a court will not recognize a waiver when the nonbreaching party's continued performance was an accommodation to the breaching party's request [*Woodard v. Glenwood Lumber Co. (1915) 171 C 513, 523, 153 P 951*].

22.68[7] No Waiver When Breaching Party Has Continuing Covenant. When the contract provides for continuing performance, the nonbreaching party's waiver of an earlier breach does not waive subsequent breaches [*Woodard v. Glenwood Lumber Co. (1915) 171 C 513, 523, 153 P 951*].

Example:

A lumber company contracted to cut down trees, process them into lumber, and ship the lumber in exchange for payment to a landowner. The contract gave the lumber company possession of the property for 10 years with an option to purchase at the end of the period. The lumber company ceased performance, but the landowner did not seek rescission of the contract until two years later. The court held that the lumber company had a continuing covenant to perform, so that even though the landowner waived the initial breach, the landowner could sue for the subsequent breaches [*Woodard v. Glenwood Lumber Co. (1915) 171 C 513, 516-517, 523, 153 P 951*].

22.68[8] No Waiver When Breach Is Latent. When a defective performance is latent, that is, when the nonbreaching party had no reasonable means of ascertaining that the breaching party's performance was defective, the nonbreaching party does not affect a waiver by continuing performance [*Banducci v. Frank T. Hickey, Inc. (1949) 93 CA2d 658, 662, 209 P2d 398*]. However, the nonbreaching party must give timely notice when the defect does become apparent [*Banducci v. Frank T. Hickey, Inc. (1949) 93 CA2d 658, 662, 209 P2d 398*].

Jury Instructions:

Hidden Defects, see *California Forms of Jury Instruction, Ch. 3F, Instr. MB 300F.24* (Matthew Bender).



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OR oblig! OR duty.

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawBreachGeneral OverviewContracts LawContract Conditions & ProvisionsWaiversGeneral Overview



162 of 188 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 22 Suing or Defending Action for Breach of Contract
IX. DEFENDING ACTION FOR BREACH OF CONTRACT

2-22 MB Practice Guide: CA Contract Litigation 22.69

22.69 Substantial Performance Is Defense to Claim of Breach.

The defendant may refute the element of breach by establishing that the defendant completed substantial performance [see *Barkis v. Scott* (1949) 34 C2d 116, 123, 208 P2d 367]. To establish substantial performance, the defendant must show that there was no willful departure from the terms of the contract and that any defects can be easily remedied or compensated for, so that the other party practically got what was contracted for [*Posner v. Grunwald-Marx, Inc.* (1961) 56 C2d 169, 186-187, 14 CR 297, 363 P2d 313].

Example--Substantial Performance:

A builder contracted to have plumbing, heating, and ventilation installed in a four-story building. The contractor used materials that did not meet the contract specifications, but the evidence indicated that the substitutions did not affect the usefulness of the systems or impair the efficiency, durability, or serviceability. Noting that the amount of damages due to the alterations was trivial compared to the extent and magnitude of the work contemplated by the contract, the court held that the contractor substantially performed, and that the builder was entitled to recover only damages [*Thomas Haverty Co. v. Jones* (1921) 185 C 285, 294, 197 P 105].

Example--No Substantial Performance:

Homeowners refused to pay their contractor for the installation of a new roof, which leaked. The contractor claimed substantial performance entitled it to payment less damages for defect. The court rejected this argument, citing evidence that the roof had no value because of the difficulty in repairing the leak [*Williams v. Elliott* (1954) 127 CA2d 357, 364, 273 P2d 953].

Jury Instructions:

Substantial Performance, see *Judicial Council of California Civil Jury Instructions*, CACI No. 312 (LexisNexis Matthew Bender).

► Cross References:

Discussion of elements of substantial performance, see 22.08[2].

Discussion of substituted performance in contract for sale of goods, see Ch. 28, Contract for Sale of Goods--Suing or Defending Action for Breach of Contract Under California Commercial Code.

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawBreachGeneral OverviewContracts LawDefensesGeneral OverviewContracts
LawPerformanceSubstantial Performance



163 of 188 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 22 Suing or Defending Action for Breach of Contract
IX. DEFENDING ACTION FOR BREACH OF CONTRACT

2-22 MB Practice Guide: CA Contract Litigation 22.70

22.70 Statute of Limitations Bars Relief When Action Is Not Filed Within Limitations Period.

22.70[1] Action on Written Contract Must Be Filed Within Four Years. An action based on the breach of most written contracts must be brought within four years from the time the cause of action accrues [*CCP* § 337(1)].

Exception--Corporate Obligations, Notes, Deeds of Trust:

An action on publicly held bonds, notes debentures, issued by a corporation, or coupons issued therewith, must be brought within six years from the time the cause of action accrues [*CCP* § 336a(1)]. An action on a mortgage, deed of trust, or other agreement pursuant to which bonds, notes, or debentures were issued must be filed within six years [*CCP* § 336a(2)]. This limitations period does not apply to public district or corporation bonds or indebtedness [*CCP* § 336a(2)].

► Cross References:

Discussion of accrual of cause of action, see 22.70[3].

Discussion of statute of limitations for breach of contract, see Ch. 4, Determining Applicable Statute of Limitations and Effect on Potential Action.

22.70[2] Action on Oral or Implied Contract Must Be Filed Within Two Years. An action for breach of an oral or implied contract must be filed within two years from the time the cause of action accrues [*CCP* § 339(1)].

► Cross References:

Discussion of accrual of cause of action, see 22.70[3].

Discussion of statute of limitations for breach of contract, see Ch. 4, Determining Applicable Statute of Limitations and Effect on Potential Action.

22.70[3] Action Accrues at Time Performance Was Due but Not Delivered. The cause of action for breach of contract accrues when the promisor fails to perform at the time and in the manner specified by the contract [*Waxman v. Citizens Nat'l Trust & Sav. Bank* (1954) 123 CA2d 145, 149, 266 P2d 48].

22.70[4] Limitation Period Begins to Run at Time of Breach. The period of time within which an action must

be brought normally begins at the time of breach [*Barlow v. Collins* (1958) 166 CA2d 274, 278-279, 333 P2d 64].

In installment contracts, the limitations period begins to run at the time each payment becomes due [*Tillson v. Peters* (1940) 41 CA2d 671, 676, 107 P2d 434].

Exception--Anticipatory Breach:

Although an anticipatory breach occurs at the time of repudiation, the limitations period does not begin to run until the time performance is due under the contract [*Brewer v. Simpson* (1960) 53 C2d 567, 593, 2 CR 609, 349 P2d 289].

 Cross References:

Discussion of anticipatory breach, see 22.23.

Further discussion of statute of limitations for breach of contract, see Ch. 4, Determining Applicable Statute of Limitations and Effect on Potential Action.

Discussion of anticipatory breach in contract for sale of goods, see Ch. 28, Contract for Sale of Goods--Suing or Defending Action for Breach of Contract Under California Commercial Code.

22.70[5] Absence From State Tolls Limitations Period. The limitations period is tolled for the period of time a defendant is out of California following the accrual of the cause of action, if the out-of-state travel is unrelated to interstate commerce [CCP § 351; *Filet Menu, Inc. v. Cheng* (1999) 71 CA4th 1276, 1284, 84 CR2d 384].

 Cross Reference:

Discussion of statute of limitations in contract actions, see Ch. 4, *Determining Applicable Statute of Limitations and Effect on Potential Action*, 4.21.

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawBreachCauses of ActionGeneral OverviewContracts LawDefensesStatutes of Limitations



164 of 188 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 22 Suing or Defending Action for Breach of Contract
IX. DEFENDING ACTION FOR BREACH OF CONTRACT

2-22 MB Practice Guide: CA Contract Litigation 22.71

22.71 Defendant May Object to Complaint by Answer or Demurrer.

An objection to a complaint for breach of contract may be raised in an answer or demurrer. The defendant can object that the complaint or cross-complaint does not state facts sufficient to plead a cause of action or defense. In addition, the demurrer or answer can argue that the pleading is uncertain or that it cannot be ascertained from the pleading whether the contract is written, oral, or implied by conduct [*see CCP § 430.10(e), (g)*].

If the defendant can make an objection on any ground that appears on the face of the complaint, use of a demurrer is appropriate. If the ground for the objection does not appear on the face of the complaint, the defendant must object by use of an answer [*see CCP § 430.30(a), (b)*].



Cross Reference:

Discussion of denials and affirmative defenses, see 22.72.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsDemurrersCivil ProcedurePleading & PracticePleadingsAnswersContracts LawBreachCauses of ActionGeneral Overview



165 of 188 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 22 Suing or Defending Action for Breach of Contract
IX. DEFENDING ACTION FOR BREACH OF CONTRACT

2-22 MB Practice Guide: CA Contract Litigation 22.72

22.72 Pleading Denials and Affirmative Defenses.

22.72[1] General Denial Refutes Breach in Answer to Unverified Complaint. In response to an unverified complaint, a general denial is sufficient to put at issue the material allegations of the complaint [*CCP* § 431.30(d)]. Because the allegations in the complaint regarding breach are material allegations [*see CCP* § 431.10(a)], a general denial is sufficient to put the allegations regarding breach at issue.

► Cross Reference:

Discussion of preparing an answer to an unverified complaint, see Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, Ch. 14, Answers.

22.72[2] Specific Denial Refutes Breach in Answer to Verified Complaint. If the complaint is verified, the defendant must deny the allegations of breach either positively (specifically) or according to information and belief [*see CCP* § 431.30(d)].

► Cross Reference:

Discussion of preparing an answer to a verified complaint, see Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, Ch. 14, Answers.

22.72[3] Pleading of Affirmative Defenses Is Necessary to Assert Excuse, Waiver, and Release.

22.72[3][a] Defendant Must Allege Affirmative Defenses in Answer. To the extent a defendant intends to raise any new matter constituting a defense (in other words, an affirmative defense), the defendant must include allegations of that new matter in the answer [*CCP* § 431.30(c)]. Each affirmative defense must be separately pleaded [*CCP* § 431.30(g)].

► Cross Reference:

Discussion of preparing affirmative defenses in an answer, see Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, Ch. 14, Answers.

22.72[3][b] Excuse for Nonperformance Must Be Affirmatively Pled. If the defendant's failure to perform is

excused, the defendant must include allegations to support the excuse as an affirmative defense in the answer [*Eucalyptus Growers Ass'n v. Orange County Nursery & Land Co. (1917) 174 C 330, 335, 163 P 45*].

Exception:

If the excuse for nonperformance is apparent from the face of the contract, that excuse need not be affirmatively pleaded in the answer [*Corson v. Brown Motel Invs., Inc. (1978) 87 CA3d 422, 425, 151 CR 385*]. For example, a contract required defendant to pay a sum if plaintiff "did not receive a leasehold." Although the defendant did not affirmatively plead that it was excused from performance because plaintiff did procure the leasehold, such an allegation was not necessary because the defense was expressly stated in the contract [*Corson v. Brown Motel Invs., Inc. (1978) 87 CA3d 422, 425, 151 CR 385*].

► **Cross Reference:**

Discussion of excuses for nonperformance, see 22.65.

22.72[3][c] Waiver of Breach Must Be Affirmatively Pled. Waiver is an affirmative defense, and must be affirmatively pleaded in the answer to be preserved as a defense [*Williams v. Marshall (1951) 37 C2d 445, 456, 235 P2d 372*].

► **Cross Reference:**

Discussion of waiver as defense to breach of contract, see 22.65[5], 22.68.

22.72[3][d] Release Must Be Affirmatively Pled. If the defendant obtained a release of liability from the plaintiff, the existence of the release must be affirmatively alleged in the answer [*Hildebrand v. Stonecrest Corp. (1959) 174 CA2d 158, 165, 344 P2d 378*].

► **Cross Reference:**

Discussion of release, see 22.65[6].

22.72[4] Advisable to Affirmatively Allege Defense Based on Payment. Reported California opinions indicate uncertainty as to whether the issue of payment can be raised by denial in the answer or whether it must be pleaded as an affirmative defense [compare *Snodgrass v. Snodgrass (1927) 81 CA 360, 363, 253 P 755*, with *Pastene v. Pardini (1902) 135 C 431, 434, 67 P 681*]. To be cautious, therefore, defense counsel should include an affirmative allegation regarding payment.

► **Cross Reference:**

Discussion of payment as performance, see 22.18.

22.72[5] Statute of Limitations Must Be Affirmatively Pled. The defense of the statute of limitations must be affirmatively pleaded in the answer. The defendant may also file a demurrer on the ground of statute of limitations [*Union Sugar Co. v. Hollister Estate Co. (1935) 3 C2d 740, 744, 47 P2d 273*].

22.72[6] Failure to Mitigate Damages Is Affirmative Defense. To assert the defense of the plaintiff's failure to mitigate damages, the defendant must allege it in the answer [*Mass v. Board of Educ. (1964) 61 C2d 612, 616, 39 CR 739, 394 P2d 579*].

► **Cross Reference:**

Discussion of mitigation of damages, see Ch. 7, Seeking or Opposing Damages in Contract Actions.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsAffirmative DefensesGeneral OverviewCivil
ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsDenials



166 of 188 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 22 Suing or Defending Action for Breach of Contract
X. FORMS

2-22 MB Practice Guide: CA Contract Litigation 22.73

22.73 Complaint for Breach of Written Contract.**Complaint for Breach of Written Contract.**

[Name of attorney]

_____[Street address]

_____[City, state, and ZIP]

_____[Area code and phone number]

_____[State Bar no. of attorney]

Attorney for _____[name of party]

SUPERIOR COURT OF CALIFORNIA,

COUNTY OF _____

[name(s)] _____,

Plaintiff(s)

vs.

[name(s)] _____

[and DOES 1 THROUGH _____]

Defendant(s).

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NO.

COMPLAINT FOR DAMAGES (Breach of Written Contract)

[LIMITED CIVIL CASE]

[Amount Demanded _____]

_____(Exceeds or Does Not Exceed) \$25,000]

Plaintiff _____[name] alleges:

[For an individual plaintiff]

1. Plaintiff is an individual residing in _____ [city, if any, and county], California, [in the (name of judicial district, if any) _____], [and therein doing business under the fictitious business name of _____].

_____. Plaintiff has duly complied in all respects with the requirements of *Business and Professions Code Sections 17910 through 17917* with respect to this fictitious business name].

[OR, for a domestic corporation or domestic limited liability company]

1. Plaintiff _____ [name] is, and at all times herein mentioned was, a _____ [corporation or limited liability company] organized and existing under the laws of California, with its principal place of business in _____ [city, if any, and county], California [in the (name of judicial district, if any) _____], [and therein doing business under the fictitious business name of _____]. Plaintiff has duly complied in all respects with the requirements of *Business and Professions Code Sections 17910 through 17917* with respect to this fictitious business name].

[OR, for a foreign corporation or foreign limited liability company]

1. Plaintiff _____ [name] is, and at all times herein mentioned was, a _____ [corporation or limited liability company] organized and existing under the laws of _____ [state or foreign country], and _____ [for foreign corporation authorized to do business and doing business in California or, for foreign limited liability company maintaining action or intrastate business, and registered to transact intrastate business in California], with its principal place of business in California in _____ [city, if any, and county], California [in the (name of judicial district, if any) _____].

[OR, for a general or limited partnership or an unincorporated association]

1. Plaintiff _____ [name] is, and at all times herein mentioned was, a _____ [partnership or unincorporated association] with its principal place of business in _____ [city, if any, and county], California [in the (name of judicial district, if any) _____], [and therein doing business under the fictitious business name of _____]. Plaintiff has duly complied in all respects with the requirements of *Business and Professions Code Sections 17910 through 17917* with respect to this fictitious business name].

[CONTINUE]

[For an individual defendant]

2. Defendant _____ [name] is an individual residing in _____ [city, if any, and county]

], California [in the *(name of judicial district, if any)* _____] [and doing business therein under the fictitious business name of _____].

[OR, for a domestic corporation or domestic limited liability company]

2. Defendant _____ [name] is, and at all times herein mentioned was, a _____ [corporation or limited liability company] organized and existing under the laws of California, [with its principal place of business in _____ (city, if any, and county), California, (in the _____ [name of judicial district, if any])].

[OR, for a foreign corporation or foreign limited liability company]

2. Defendant _____ [name] is, and at all times herein mentioned was, a _____ [corporation or limited liability company] organized and existing under the laws of _____ [state or foreign country], [with its principal place of business in _____ (city, if any, and county), California, (in the _____ [name of judicial district, if any])].

[OR, for a general or limited partnership or an unincorporated association]

2. Defendant _____ [name] is, and at all times herein mentioned was, _____ [a partnership or an unincorporated association] sued herein under the name _____ [it has assumed or by which it is known], [with its principal place of business in _____ (city, if any, and county), California, (in the _____ [name of judicial district, if any])]. [Defendants (names of individual partners or members) _____ are, and at all times herein mentioned were, members of that _____ (partnership or unincorporated association) (and are, and at all times herein mentioned were, residents of _____ County, California)].

[CONTINUE]

3. Plaintiff is ignorant of the true names and capacities of Defendants sued herein as DOES 1 through _____ [numeral, e.g., 50], inclusive, and therefore sues these Defendants by these fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when ascertained. [Plaintiff is informed and believes and thereon alleges that each of the fictitiously named Defendants is responsible in some manner for the occurrences herein alleged, and that Plaintiff's damages as herein alleged were proximately caused by those Defendants.]

4. Plaintiff is informed and believes and thereon alleges that at all times material to this complaint, _____ [identify Defendants to whom agency allegation applies, e.g., each of the Defendants or each of the individual Defendants or Defendant Harry Jones], [and each of the Defendants fictitiously named in this complaint,] in addition to acting for himself, herself, or itself and on

his, her, or its own behalf individually, is and was acting as the agent, servant, employee and representative of, and with the knowledge, consent and permission of, and in conspiracy with, each and all of the Defendants and within the course, scope and authority of that agency, service, employment, representation, and conspiracy. Plaintiff further alleges on information and belief that the acts of each of the Defendants were fully ratified by each and all of the Defendants. Specifically, and without limitation, Plaintiff alleges on information and belief that the actions, failures to act, breaches, conspiracy, and misrepresentations alleged herein and attributed to one or more of the specific Defendants were approved, ratified, and done with the cooperation and knowledge of each and all of the Defendants.

5. This action is subject to the provisions of _____

_____. *[(insert appropriate venue statute, Section 1812.10 of the Civil Code or Section 2984.4 of the Civil Code or Section 395(b) of the Code of Civil Procedure).]*

6. On or about _____ [date], at _____ [city],

_____ County, California, Plaintiff and Defendant entered into a written agreement,

_____. *[if Plaintiff has possession of written contract, specify, e.g., a copy of which is attached as Exhibit A and incorporated by reference, or in the alternative, plead contract according to its legal effect or set it forth in its exact words].*

7. Plaintiff has performed all conditions, covenants, and promises required on his/her/its part to be performed in accordance with the terms and conditions of the contract [except (specify conditions not performed)

_____]. Plaintiff did not perform

_____ (this or these) condition(s) because (specify facts showing excuse for nonperformance)

_____].

8. On or about _____ [date], Plaintiff requested that Defendant perform his/her/its obligations under the contract.

9. On or about _____ [date], Defendant breached the contract by _____ [specify acts or omissions constituting breach].

10. As a result of Defendant's breach of the contract, Plaintiff has _____ [specify items of damage], to his/her/its damage in the sum of \$ _____.

WHEREFORE, Plaintiff prays judgment against Defendant[s, and each of them,] as follows:

1. For compensatory damages in the sum of

\$ _____;

2. For interest on the sum of \$ _____ from and after _____ [date];

[3. For reasonable attorney's fees _____ (of \$ _____ or according to proof);]

4. For costs of suit; and

5. For such other and further relief as the court may deem proper.

[firm name, if any] _____

By: [signature] _____

[typed name] _____

Attorney for Plaintiff [name] _____

[ADD following verification, if applicable]

VERIFICATION

I am the plaintiff in the above entitled action; I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein stated on information and belief, and, as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

[date] _____

[signature] _____

[typed name] _____

NOTES.

Authority:

Acoustics, Inc. v. Trepte Constr. Co. (1971) 14 CA3d 887, 913, 92 CR 723 ; *International Billing Servs., Inc. v. Emigh* (2000) 84 CA4th 1175, 1187, 101 CR2d 532

Elements of Breach of Contract:

See 22.05

Pleading Requirements for Written Contract:

See 22.12[2]

Requirements of Pleading Satisfaction of Conditions and Performance:

See 22.12[6], [7]

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Pleading & Practice Pleadings Complaints General Overview Contracts Law Breach Causes of Action General Overview Contracts Law Types of Contracts Executed Contracts



167 of 188 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 22 Suing or Defending Action for Breach of Contract
X. FORMS

2-22 MB Practice Guide: CA Contract Litigation 22.74

22.74 Complaint for Breach of Oral Contract.**Complaint for Breach of Oral Contract.**

[Name of attorney]

_____[Street address]

_____[City, state, and ZIP]

_____[Area code and phone number]

_____[State Bar no. of attorney]

Attorney for _____[name of party]

SUPERIOR COURT OF CALIFORNIA,

COUNTY OF _____

[name(s)] _____,

Plaintiff(s)

vs.

[name(s)] _____

[and DOES 1 THROUGH

_____]

_____]

Defendant(s).

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NO.

COMPLAINT FOR DAMAGES (Breach of Oral Contract)

[LIMITED CIVIL CASE]

[Amount Demanded

_____(Exceeds or Does Not
Exceed) \$25,000]

Plaintiff _____[name] alleges:

[For an individual plaintiff]

1. Plaintiff is an individual residing in _____ [city, if any, and county], California, [in the (name of judicial district, if any) _____], [and therein doing business under the fictitious business name of _____].

_____. Plaintiff has duly complied in all respects with the requirements of *Business and Professions Code Sections 17910 through 17917* with respect to this fictitious business name].

[OR, for a domestic corporation or domestic limited liability company]

1. Plaintiff _____ [name] is, and at all times herein mentioned was, a _____ [corporation or limited liability company] organized and existing under the laws of California, with its principal place of business in _____ [city, if any, and county], California [in the (name of judicial district, if any) _____], [and therein doing business under the fictitious business name of _____]. Plaintiff has duly complied in all respects with the requirements of *Business and Professions Code Sections 17910 through 17917* with respect to this fictitious business name].

[OR, for a foreign corporation or foreign limited liability company]

1. Plaintiff _____ [name] is, and at all times herein mentioned was, a _____ [corporation or limited liability company] organized and existing under the laws of _____ [state or foreign country], and _____ [for foreign corporation authorized to do business and doing business in California or, for foreign limited liability company maintaining action or intrastate business, and registered to transact intrastate business in California], with its principal place of business in California in _____ [city, if any, and county], California [in the (name of judicial district, if any) _____].

[OR, for a general or limited partnership or an unincorporated association]

1. Plaintiff _____ [name] is, and at all times herein mentioned was, a _____ [partnership or unincorporated association] with its principal place of business in _____ [city, if any, and county], California [in the (name of judicial district, if any) _____], [and therein doing business under the fictitious business name of _____]. Plaintiff has duly complied in all respects with the requirements of *Business and Professions Code Sections 17910 through 17917* with respect to this fictitious business name].

[CONTINUE]

[For an individual defendant]

2. Defendant _____ [name] is an individual residing in _____ [city, if any, and county]

], California [in the *(name of judicial district, if any)* _____] [and doing business therein under the fictitious business name of _____].

[OR, for a domestic corporation or domestic limited liability company]

2. Defendant _____ [name] is, and at all times herein mentioned was, a _____ [corporation or limited liability company] organized and existing under the laws of California, [with its principal place of business in _____ (city, if any, and county), California, (in the _____ [name of judicial district, if any])].

[OR, for a foreign corporation or foreign limited liability company]

2. Defendant _____ [name] is, and at all times herein mentioned was, a _____ [corporation or limited liability company] organized and existing under the laws of _____ [state or foreign country], [with its principal place of business in _____ (city, if any, and county), California, (in the _____ [name of judicial district, if any])].

[OR, for a general or limited partnership or an unincorporated association]

2. Defendant _____ [name] is, and at all times herein mentioned was, _____ [a partnership or an unincorporated association] sued herein under the name _____ [it has assumed or by which it is known], [with its principal place of business in _____ (city, if any, and county), California, (in the _____ [name of judicial district, if any])]. [Defendants *(names of individual partners or members)* _____ are, and at all times herein mentioned were, members of that _____ (partnership or unincorporated association) (and are, and at all times herein mentioned were, residents of _____ County, California)].

[CONTINUE]

3. Plaintiff is ignorant of the true names and capacities of Defendants sued herein as DOES 1 through _____ [numeral, e.g., 50], inclusive, and therefore sues these Defendants by these fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when ascertained. [Plaintiff is informed and believes and thereon alleges that each of the fictitiously named Defendants is responsible in some manner for the occurrences herein alleged, and that Plaintiff's damages as herein alleged were proximately caused by those Defendants.]

4. Plaintiff is informed and believes and thereon alleges that at all times material to this complaint, _____ [identify Defendants to whom agency allegation applies, e.g., each of the Defendants or each of the individual Defendants or Defendant Harry Jones], [and each of the Defendants fictitiously named in this complaint,] in addition to acting for himself, herself, or itself and on

his, her, or its own behalf individually, is and was acting as the agent, servant, employee and representative of, and with the knowledge, consent and permission of, and in conspiracy with, each and all of the Defendants and within the course, scope and authority of that agency, service, employment, representation, and conspiracy. Plaintiff further alleges on information and belief that the acts of each of the Defendants were fully ratified by each and all of the Defendants. Specifically, and without limitation, Plaintiff alleges on information and belief that the actions, failures to act, breaches, conspiracy, and misrepresentations alleged herein and attributed to one or more of the specific Defendants were approved, ratified, and done with the cooperation and knowledge of each and all of the Defendants.

5. On or about _____ [date], Plaintiff and Defendant entered into an oral agreement whereby Plaintiff agreed to _____ [specify] and Defendant agreed to _____ [specify].

6. Plaintiff has performed all conditions, covenants, and promises required on his/her/its part to be performed in accordance with the terms and conditions of the contract [except (*specify conditions not performed*) _____], the performance of which was excused on the ground that (*specify*) _____].

7. On or about _____ [date], Defendant breached the oral agreement by _____ [specify acts or omissions constituting breach].

8. As a result of Defendant's breach of the contract, Plaintiff has _____ [specify items of damage], to his/her/its damage in the sum of \$ _____.

WHEREFORE, Plaintiff prays judgment against Defendant[s, and each of them,] as follows:

1. For compensatory damages in the sum of \$ _____;

2. For interest on the sum of \$ _____ from and after _____ [date];

3. For reasonable attorney's fees _____ [of \$ _____ or according to proof];

4. For costs of suit; and

5. For such other and further relief as the court may deem proper.

[firm name, if any] _____

By: [signature] _____

[typed name] _____

Attorney for Plaintiff [name of Plaintiff] _____

[ADD following verification, if applicable]

VERIFICATION

I am the plaintiff in the above entitled action; I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein stated on information and belief, and, as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

[date] _____

[signature] _____

[typed name] _____

NOTES.**Authority:**

CC §§ 1622, 3300

Allegations for Breach of Oral Contract:

See 22.12[3]

Requirements of Pleading Satisfaction of Conditions and Performance:

See 22.12[6]

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Pleading & Practice Pleadings Complaints General Overview Contracts Law Breach Causes of Action General Overview Contracts Law Types of Contracts Oral Agreements



168 of 188 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 22 Suing or Defending Action for Breach of Contract
X. FORMS

2-22 MB Practice Guide: CA Contract Litigation 22.75

22.75 Answer to Complaint for Breach of Contract.**Answer to Complaint for Breach of Contract.**

[Name of attorney]

_____[Street address]

_____[City, state, and ZIP]

_____[Area code and phone number]

_____[State Bar no. of attorney]

Attorney for _____[name of party]

SUPERIOR COURT OF CALIFORNIA,

COUNTY OF _____

[name] _____)

Plaintiff(s),)

vs.)

[names] _____)

and DOES I THROUGH [insert number of estimated)

DOES])

_____)

_____)

Defendant(s).)

NO.

ANSWER OF

_____ [identify Defendant, e.g.,

DEFENDANT MARY JONES] TO COMPLAINT
OF

_____ [identify Plaintiff, e.g.,

PLAINTIFF JOHN SMITH]

[LIMITED CIVIL CASE]

Judge:

Department:

Defendant answers the complaint as follows:

[Include general denial below, or set forth, in numbered paragraphs, specific denials, admissions, and allegations in response to those in complaint, in the order in which they are alleged in complaint:]

1. Pursuant to *Code of Civil Procedure Section 431.30(b)(1)*, Defendant generally denies each and every allegation of Plaintiff's complaint, including all the purported causes of action contained therein, and further denies that Plaintiff is entitled to any equitable or legal relief, or any damages whatsoever.

[OR, include specific denial if answering verified complaint:]

1. Defendant _____ *[name]* admits all statements in the complaint except as follows:
 _____ *[specify]*.

[CONTINUE]

[Defendant asserts the following affirmative defenses. By doing so, Defendant shall not be deemed to have assumed the burden of proving any matters that otherwise would be Plaintiff's burden.]

[Allege any affirmative defenses, e.g.,]

[EITHER, if alleging that plaintiff waived defendant's breach of contract]

FIRST AFFIRMATIVE DEFENSE (Plaintiff Waived Breach of Contract)

1. On _____ *[date]*, Plaintiff had full knowledge that Defendant had not
 _____ *[specify performance or lack of performance constituting breach]*, and Plaintiff waived the right to performance on that date, in that Plaintiff elected to treat the contract as still in effect, viable, and binding, and Plaintiff accepted further performance of the contract from Defendant in that _____ *[specify performance that plaintiff accepted]*.

[AND/OR, if alleging that defendant's performance was made impossible]

SECOND AFFIRMATIVE DEFENSE (Impossibility of Performance)

[EITHER]

2. The _____ [specify condition or object] of the contract alleged in the complaint was impossible to _____ [fulfill or perform] at the time Defendant was to have _____ [fulfilled or performed] it, in that _____ [specify basis for impossibility].

[OR]

2. Defendant's performance of the obligation to _____ [specify nature of obligation] was prevented by _____ [an irresistible, superhuman cause or the act of public enemies], in that _____ [specify the cause act that rendered performance impossible].

[AND/OR, if alleging that defendant already made payment due payment]

THIRD AFFIRMATIVE DEFENSE (Payment of Obligation)

3. On or about _____ [date], the obligation set forth in the complaint was fully discharged by Defendant's payment to Plaintiff of the sum of \$ _____ [set forth amount paid], which was the full amount due and was accepted by Plaintiff in full payment of the obligation.

[AND/OR, if alleging that defendant made tender of payment to plaintiff, include Paragraphs 4 through 6, below]

FOURTH AFFIRMATIVE DEFENSE (Tender of Payment by Deposit and Notice)

4. On or about _____ [date], Defendant tendered to Plaintiff at _____ [city], California, \$ _____ [amount tendered] in full payment of the alleged claim set forth in the complaint. Plaintiff refused, and continues to refuse, to accept the sum tendered.

5. On that date, Defendant deposited to the credit of Plaintiff in _____ [name of bank or savings and loan association], a _____ [specify type of entity, e.g., federal savings and loan association] located at _____ [specify address], California, the sum of \$ _____ [specify amount deposited] in accordance with Civil Code Section 1500.

6. On _____ [date], Defendant notified Plaintiff of the deposit, in writing by _____ [specify method of delivery of notice, e.g., certified mail, return receipt requested] addressed to _____ [give address to which notice was mailed or at which it was served]. A copy of the notice is attached as Exhibit _____ [specify which exhibit] and incorporated by reference.

[AND/OR, if alleging that plaintiff prevented defendant's performance, include Paragraphs 7 through 9, below]

FIFTH AFFIRMATIVE DEFENSE (Prevention of Performance)

7. Defendant has performed all of the conditions of the contract on his/her/its part to be performed except _____ [specify condition not performed]. Defendant failed to perform the condition of _____ [specify condition] because Plaintiff prevented Defendant's performance by _____ [specify plaintiff's acts preventing defendant's performance, e.g., barring Defendant from the premises where Defendant was supposed to do the work required by the terms of the contract].

8. At all times mentioned Defendant was and is ready, willing, and able to perform the condition, but Plaintiff has prevented and continues to prevent Defendant's performance.

9. On _____ [date], Defendant gave notice to Plaintiff that _____ [specify contents of notice, e.g., Defendant intended to claim an extension of time to complete performance of the contract].

[AND/OR, if alleging failure of consideration by plaintiff, include Paragraphs 10 and 11, below]

SIXTH AFFIRMATIVE DEFENSE (Failure of Consideration)

10. Defendant admits failing to perform the obligation described in the complaint but alleges that the failure resulted from Plaintiff's failure to _____ [specify], as required by the terms of the contract, and that performance on Plaintiff's part was a _____ [condition precedent to or concurrent condition with] the performance of Defendant's obligation.

11. Because of Plaintiff's failure and refusal to perform the obligation on Plaintiff's part to be performed, Defendant, on or about _____ [date], rescinded the contract by _____ [specify manner of rescission] and _____ [restored or offered to restore] to Plaintiff everything of value that Defendant had received under the contract.

[AND/OR, if alleging action is barred by statute of limitations]

SEVENTH AFFIRMATIVE DEFENSE (Statute of Limitations)

12. The alleged breach described in Plaintiff's complaint occurred on or about _____ [date], while the complaint was filed on _____ [date]. Because the contract at issue is _____ [written or oral], the complaint is barred by the statute of limitations under _____ [Code of Civil Procedure Section 337(1) or Code of Civil Procedure Section 339(1)].

[ADD additional affirmative defenses, if any]

[CONTINUE]

Wherefore, Defendant prays as follows:

1. That Plaintiff take nothing by his/her complaint herein;
2. For costs of suit; and
3. For such other and further relief as the court deems proper.

Date: _____

[firm name, if any] _____

By: [signature] _____

[typed name] _____

Attorney for Defendant

[ADD following verification, if applicable]

VERIFICATION

I am the defendant in the above entitled action; I have read the foregoing answer and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein stated on information and belief, and, as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

[date] _____

[signature] _____

[typed name] _____

NOTES.

Authority:

CC §§ 1441, 1478, 1500, 1511(1), (2), (3), 1596, 1689(b)(2)

Affirmative Defense of Waiver of Breach:

See 22.68

Affirmative Defense of Impossibility:

See 22.65[1]

Affirmative Defense of Payment of Obligation:

See 22.72[4]

Affirmative Defense of Tender of Payment by Deposit and Notice:

See 22.08[3], 22.72[4]

Affirmative Defense of Prevention of Performance:

See 22.65[7]

Affirmative Defense of Failure of Consideration:

See 22.64

Affirmative Defense of Statute of Limitations:

See 22.70

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Pleading & Practice Pleadings Answers Contracts Law Breach Causes of Action General
Overview Contracts Law Defenses General Overview



169 of 188 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 22 Suing or Defending Action for Breach of Contract
X. FORMS

2-22 MB Practice Guide: CA Contract Litigation 22.76

22.76 Memorandum for Party Asserting Anticipatory Breach of Contract.

Memorandum for Party Asserting Anticipatory Breach of Contract.

[Include the following argument, if appropriate under the circumstances of the case, in a memorandum by the party asserting anticipatory breach of contract, along with factual discussion demonstrating how the principles of law stated below are applicable to the particular case]

THE DEFENDANT IS LIABLE UNDER THE CONTRACT BECAUSE THE DEFENDANT COMMITTED
ANTICIPATORY BREACH OF THE CONTRACT

Obligor's Statement of Intended Breach Constitutes Repudiation. An obligor's statement to the obligee indicating that the obligor will breach an important contractual promise, thereby substantially impairing the value of the contract, constitutes repudiation of the contract (*Mobil Oil Exploration & Producing Southeast, Inc. v. United States* (2000) 530 U.S. 604, 622-624, 120 S. Ct. 2423, 147 L. Ed.2d 528).

NOTES.

Authority:

CC § 1495; *Mobil Oil Exploration & Producing Southeast, Inc. v. United States* (2000) 530 US 604, 622-624, 120 S Ct 2423, 147 L Ed2d 528

Ability of Plaintiff to Perform Obligation:

See 22.08

Anticipatory Breach:

See 22.23

Detailed Discussion of Format/Skeletal Forms for Memoranda:

California Forms of Pleading and Practice, Ch. 417, Points and Authorities (Matthew Bender); and
California Points and Authorities, Ch. 1, Writing Legal Memoranda and Briefs (Matthew Bender)

Additional Memoranda Relating to Contracts:

California Points and Authorities, Ch. 50, Contracts (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawBreachAnticipatory RepudiationGeneral Overview



170 of 188 DOCUMENTS

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Chapter 22 Suing or Defending Action for Breach of Contract
X. FORMS

2-22 MB Practice Guide: CA Contract Litigation 22.77

22.77 Memorandum for Party Denying Anticipatory Breach of Contract.

Memorandum for Party Denying Anticipatory Breach of Contract.

[Include the following argument, if appropriate under the circumstances of the case, in a memorandum by the party denying the existence of an anticipatory breach of contract, along with factual discussion demonstrating how the principles of law stated below are applicable to the particular case]

THE DEFENDANT IS NOT LIABLE UNDER THE CONTRACT BECAUSE THE DEFENDANT DID NOT COMMIT ANTICIPATORY BREACH OF THE CONTRACT

Obligor's Statement Was Not Unequivocal Refusal to Perform Amounting to Anticipatory Breach. Because repudiation of a contract requires a finding of clear, positive, and unequivocal refusal to perform, when the court finds that there was no clear, positive, and unequivocal refusal there is no anticipatory breach of the contract (*Taylor v. Johnston* (1975) 15 Cal. 3d 130, 137, 123 Cal. Rptr. 641, 539 P.2d 425).

NOTES.

Authority:

Taylor v. Johnston (1975) 15 C3d 130, 137, 123 CR 641, 539 P2d 425

Anticipatory Breach:

See 22.23

Improper Rescission:

See Ch. 8, Seeking or Opposing Equitable Remedies in Contract Actions

Detailed Discussion of Format/Skeletal Forms for Memoranda:

See California Forms of Pleading and Practice, Ch. 417, Points and Authorities (Matthew Bender); and California Points and Authorities, Ch. 1, Writing Legal Memoranda and Briefs (Matthew Bender)

Additional Memoranda Relating to Contracts:

See California Points and Authorities, Ch. 50, Contracts (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawBreachAnticipatory RepudiationGeneral Overview



171 of 188 DOCUMENTS

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Chapter 22 Suing or Defending Action for Breach of Contract
X. FORMS

2-22 MB Practice Guide: CA Contract Litigation 22.78

22.78 Memorandum for Party Asserting Material Breach of Contract.

Memorandum for Party Asserting Material Breach of Contract.

[Include the following argument, if appropriate under the circumstances of the case, in a memorandum by the party asserting material breach of contract, along with factual discussion demonstrating how the principles of law stated below are applicable to the particular case]

THE DEFENDANT HAS NOT SUBSTANTIALLY PERFORMED THE CONTRACT IN THAT DEFENDANT HAS NOT FULLY PERFORMED HIS/HER/ITS OBLIGATIONS UNDER THE CONTRACT AND THE DEVIATIONS FROM FULL PERFORMANCE SUBSTANTIALLY AFFECT THE USEFULNESS OF THE CONSIDERATION

A. General Rule Requiring Full Performance. When a person agrees to do a thing for another for a specified sum of money to be paid on full performance, he or she is not entitled to any part of the sum until he or she has done the thing as agreed, unless full performance has been excused, prevented, or delayed by the act of the other party, by operation of law, or by an act of God or a public enemy (*Lowy v. United Pac. Ins. Co.* (1967) 67 Cal. 2d 87, 92, 60 Cal. Rptr. 225, 429 P.2d 577 ; *Thomas Haverty Co. v. Jones* (1921) 185 Cal. 285, 288-289, 197 P. 105).

B. Substantial Performance Is Question of Fact. What constitutes substantial performance is always a question of fact, a matter of degree, and a question that must be determined relative to all of the other factors that exist (*Thomas Haverty Co. v. Jones* (1921) 185 Cal. 285, 291, 197 P. 105 ; *Tolstoy Constr. Co. v. Minter* (1978) 78 Cal. App. 3d 665, 672, 143 Cal. Rptr. 570).

[Optional] **C. No Substantial Performance When Usefulness of Consideration Is Substantially Affected.** The doctrine of substantial performance cannot be applied when the deviations from full performance substantially affect the usefulness of the consideration for which the nonbreaching party bargained (*Tolstoy Constr. Co. v. Minter* (1978) 78 Cal. App. 3d 665, 672-673, 143 Cal. Rptr. 570 ; *Williams v. Elliott* (1954) 127 Cal. App. 2d 357, 364, 273 P.2d 953).

[Optional] **D. Substantial Performance Exists Only When Deviations Are Inadvertent.** The doctrine of substantial performance is available only when the omissions or deviations from full performance are the result of mistake or inadvertence, not when the omissions or deviations are intentional or fraudulent (*Perry v. Quackenbush* (1894) 105

Cal. 299, 309, 38 P. 740 ; Shell v. Schmidt (1958) 164 Cal. App. 2d 350, 365-366, 330 P.2d 817).

[Optional] **E. Substantial Performance Exists Only When Damages Can Compensate for Deviations.** The doctrine of substantial performance can be applied only if the failure to make full performance can be compensated in damages to be deducted from the price or allowed on a cross-complaint (*Lowy v. United Pac. Ins. Co. (1967) 67 Cal. 2d 87, 92-93, 60 Cal. Rptr. 225, 429 P.2d 577 ; Thomas Haverty Co. v. Jones (1921) 185 Cal. 285, 289, 197 P. 105).*

[Optional] **F. Accumulation of Trivial Defects Negates Substantial Performance.** Performance rendered under a contract may be held to be less than substantial by reason of the accumulation of many defects, although any one of them standing alone would be minor in character (*Tolstoy Constr. Co. v. Minter (1978) 78 Cal. App. 3d 665, 673, 143 Cal. Rptr. 570).*

NOTES.

Authority:

Lowy v. United Pac. Ins. Co. (1967) 67 C2d 87, 92, 60 CR 225, 429 P2d 577 ; Thomas Haverty Co. v. Jones (1921) 185 C 285, 288-289, 197 P 105 ; Tolstoy Constr. Co. v. Minter (1978) 78 CA3d 665, 672, 143 CR 570

Considerations to Determine Material Breach:

See 22.29

Detailed Discussion of Format/Skeletal Forms for Memoranda:

See California Forms of Pleading and Practice, Ch. 417, Points and Authorities (Matthew Bender); and California Points and Authorities, Ch. 1, Writing Legal Memoranda and Briefs (Matthew Bender)

Additional Memoranda Relating to Contracts:

See California Points and Authorities, Ch. 50, Contracts (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawBreachMaterial Breach



172 of 188 DOCUMENTS

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Chapter 22 Suing or Defending Action for Breach of Contract
X. FORMS

2-22 MB Practice Guide: CA Contract Litigation 22.79

22.79 Memorandum for Party Denying Material Breach of Contract.

Memorandum for Party Denying Material Breach of Contract.

[Include the following argument, if appropriate under the circumstances of the case, in a memorandum by the party denying material breach of contract, along with factual discussion demonstrating how the principles of law stated below are applicable to the particular case]

THE DEFENDANT HAS SUBSTANTIALLY PERFORMED HIS/HER/ITS OBLIGATIONS UNDER THE CONTRACT, AND THE DEFENDANT MAY NOT BE DENIED THE BENEFIT OF THE BARGAIN BECAUSE OF MINOR DEPARTURES FROM COMPLETE PERFORMANCE OF THE CONTRACT

Substantial Performance of Contract. When the party who is bound to make payment has enjoyed the fruits of the other party's good faith substantial performance of the contract, if the failure to make full performance can be reflected in damages to be deducted from the price, and if the omissions or deviations from complete performance were not willful or fraudulent and do not substantially affect the purpose for which the paying party made the contract, the performing party, in an action on the contract, may recover the amount of the contract price that remains unpaid, less the amount allowed as damages for the failure to strictly perform (*Lowy v. United Pac. Ins. Co.* (1967) 67 Cal. 2d 87, 92-93, 60 Cal. Rptr. 225, 429 P.2d 577 ; *Thomas Haverty Co. v. Jones* (1921) 185 Cal. 285, 289-291, 197 P. 105).

NOTES.

Authority:

CC § 1657; *Lowy v. United Pac. Ins. Co.* (1967) 67 C2d 87, 92-93, 60 CR 225, 429 P2d 577 ;
Thomas Haverty Co. v. Jones (1921) 185 C 285, 289-291, 197 P 105

Considerations to Determine Material Breach:

See 22.29[1]

Materiality of Timeliness of Performance:

See 22.29[3]

Detailed Discussion of Format/Skeletal Forms for Memoranda:

California Forms of Pleading and Practice, Ch. 417, Points and Authorities (Matthew Bender); and
California Points and Authorities, Ch. 1, Writing Legal Memoranda and Briefs (Matthew Bender)

Additional Memoranda Relating to Contracts:

California Points and Authorities, Ch. 50, Contracts (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawBreachMaterial Breach



173 of 188 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 23 Suing or Defending Action for Breach of Duty of Good Faith and Fair Dealing

2-23 MB Practice Guide: CA Contract Litigation 23.syn

§ 23.syn Synopsis to Chapter 23: Suing or Defending Action for Breach of Duty of Good Faith and Fair Dealing

23.01 Scope.

23.02 Objective and Strategy.

23.02[1] Suing for Breach of Duty of Good Faith and Fair Dealing.

23.02[2] Defending Action for Breach of Duty of Good Faith and Fair Dealing.

23.03 CHECKLIST: Establishing Breach of Duty of Good Faith and Fair Dealing.

23.03[1] Checklist for Party Claiming Breach of Duty.

23.03[2] Checklist for Party Defending Claim of Breach.

23.04 Elements of Breach of Duty of Good Faith and Fair Dealing.

23.05 Covenant of Good Faith and Fair Dealing Is Implied in Every Contract.

23.06 Express Contractual Relationship Is Required.

23.06[1] Existence of Contract Is Prerequisite to Action.

23.06[2] Breach of Express Contract Provision Is Not Required.

23.07 Nature and Extent of Duty Depends on Contract Purpose.

23.07[1] Covenant Assures Compliance With Express Terms of Contract.

23.07[2] Covenant Does Not Create Obligations Not Contemplated by Contract.

23.07[3] Covenant Does Not Supersede Specific Contractual Provisions.

23.07[4] Covenant Requires That Discretion Be Exercised in Good Faith.

23.07[5] Conduct May Constitute Breach of Covenant Regardless of Actor's Motive.

23.08 Asserting Breach of Duty of Good Faith and Fair Dealing in Contract Action.

23.08[1] Allegations Must Go Beyond Mere Contract Breach.

23.08[2] Statute of Limitations for Breach of Contract Action Applies.

23.08[3] Issue of Breach Is Generally Question of Fact.

23.09 Determining Remedies for Breach of Duty of Good Faith and Fair Dealing in Contract Action.

23.09[1] Tort Damages Are Available Only for Breach of Duty in Insurance Context.

23.09[2] Only Contract Damages Are Recoverable in Noninsurance Context.

23.10 Complaint for Breach of Duty of Good Faith and Fair Dealing in Contract Action.

Complaint for Breach of Duty of Good Faith and Fair Dealing in Contract Action.

23.11 Answer to Complaint for Breach of Duty of Good Faith and Fair Dealing in Contract Action With Affirmative Defenses.

Answer to Complaint for Breach of Duty of Good Faith and Fair Dealing in Contract Action With Affirmative Defenses.

23.12 Points and Authorities for Party Claiming Breach of Duty of Good Faith and Fair Dealing in Contract Action--Covenant of Good Faith and Fair Dealing Protects Party's Rights to Benefits of Contract.

Points and Authorities for Party Claiming Breach of Duty of Good Faith and Fair Dealing in Contract Action--Covenant of Good Faith and Fair Dealing Protects Party's Rights to Benefits of Contract.

23.13 Points and Authorities for Party Claiming Breach of Duty of Good Faith and Fair Dealing in Contract Action--Breach of Express Contract Provision Is Not Required for Cause of Action.

Points and Authorities for Party Claiming Breach of Duty of Good Faith and Fair Dealing in Contract Action--Breach of Express Contract Provision Is Not Required for Cause of Action.

23.14 Points and Authorities for Party Defending Claim of Breach of Duty of Good Faith and Fair Dealing in Contract Action--Covenant of Good Faith and Fair Dealing Does Not Create Obligations Not Contemplated by Contract.

Points and Authorities for Party Defending Claim of Breach of Duty of Good Faith and Fair Dealing in Contract Action--Covenant of Good Faith and Fair Dealing Does Not Create Obligations Not Contemplated by Contract.

23.15 Points and Authorities for Party Defending Claim of Breach of Duty of Good Faith and Fair Dealing in Contract Action--Tort Damages Are Not Available Except in Insurance Context.

Points and Authorities for Party Defending Claim of Breach of Duty of Good Faith and Fair Dealing in Contract

Action--Tort Damages Are Not Available Except in Insurance Context.



174 of 188 DOCUMENTS

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Chapter 23 Suing or Defending Action for Breach of Duty of Good Faith and Fair Dealing
I. STRATEGY

2-23 MB Practice Guide: CA Contract Litigation 23.01

23.01 Scope.

This chapter covers:

- Objective and strategy for suing or defending an action for breach of the duty of good faith and fair dealing [see 23.02].
- The elements of a claim of breach of the duty of good faith and fair dealing in a contract action [see 23.04].
- The duty imposed by the implied covenant of good faith and fair dealing [see 23.05].
- Determining the nature and extent of that duty, based on express contractual relationship of parties [see 23.06, 23.07].
- Asserting or opposing a claim for breach of the duty of good faith and fair dealing in a contract action [see 23.03, 23.08; Forms: see 23.10 -23.15], including:
 - Allegations required to state a cause of action distinct from ordinary breach of contract [see 23.08[1]]; and
 - Applicable statute of limitations [see 23.08[2]].
- Determining remedies for breach of the duty of good faith and fair dealing in a contract action [see 23.09], including the availability of tort damages only in an insurance context [see 23.09[1]].

Core Cases:

Freeman & Mills, Inc. v. Belcher Oil Co. (1995) 11 C4th 85, 44 CR2d 420, 900 P2d 669 ; Comunale v. Traders & Gen. Ins. Co. (1958) 50 C2d 654, 328 P2d 198

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawBreachCauses of ActionGeneral OverviewContracts LawContract InterpretationGood Faith & Fair
DealingContracts LawRemediesGeneral OverviewTortsBusiness TortsGeneral Overview



175 of 188 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 23 Suing or Defending Action for Breach of Duty of Good Faith and Fair Dealing
I. STRATEGY

2-23 MB Practice Guide: CA Contract Litigation 23.02

23.02 Objective and Strategy.

23.02[1] Suing for Breach of Duty of Good Faith and Fair Dealing. The parties to a contract are bound not only by the express covenants of the agreement, but also by the implied covenant of good faith and fair dealing [see 23.05]. The covenant of good faith and fair dealing is implied in every contract to prevent one party from unfairly frustrating the other party's rights to the benefits of the agreement [see 23.05].

Consider:

The precise nature and extent of the parties' duty of good faith and fair dealing depends on the express agreement [see 23.07]. Although the covenant of good faith and fair dealing is implied to assure compliance with the express provisions of the contract, the covenant cannot be used to create obligations not contemplated by the contract, or to vary the express terms of the parties' agreement [see 23.07].



Strategic Point--When to Sue for Breach of Covenant:

A party to a contract should consider suing for breach of the duty of good faith and fair dealing when the other party's conduct frustrates his or her rights to the benefits contemplated by the agreement, but technically does not transgress the express provisions of the contract [*Love v. Fire Ins. Exch.* (1990) 221 CA3d 1136, 1153, 271 CR 246 ; see 23.07[1]].



Strategic Point--Use in Conjunction With Breach of Contract Claim:

A party to a contract should also consider suing for breach of the duty of good faith and fair dealing as a back-up to a breach of contract claim. To be successful, this supplementary use of the covenant must be accompanied by factual allegations over and above--but not inconsistent with--those alleged as the basis of the breach; for example, a typical successful use of the covenant involves allegations that defendant prevented plaintiff from performing under the contract. Thus, pleading a breach of the covenant in addition to a breach of contract may be useful when a defendant can be expected to mount a technical defense based on defendant's strict interpretation of the contract; that is, not denying the alleged misconduct, but merely denying that it was a breach of the parties' contract as properly interpreted.

Judge's Perspective:

A claim for breach of the covenant of good faith and fair dealing is most often presented when the defendant had the discretion to act in more than one way, and exercised that discretion in a way that frustrated plaintiff's ability to enjoy the benefits of the contract. Often, the defendant's conduct will not have violated the contract per se, but will be inconsistent with the parties' expressed purpose as described by the terms of that contract. Because the covenant may require conduct that is not specifically set forth in the contract, it can be a matter of serious dispute as to what conduct it actually requires. The purpose of the covenant is not to protect the general interests of the parties, nor to require them to act fairly for its own sake. The purpose is to protect the promises made in the contract itself [*Carma Developers (Cal.), Inc. v. Marathon Dev. Cal., Inc.* (1992) 2 C4th 342, 373, 6 CR2d 467, 826 P2d 710]. Thus, the plaintiff will most often bring a claim for breach of the covenant when plaintiff feels that the defendant's conduct (or omission) has prevented the plaintiff from getting everything he or she expected from the contract, and the defendant will most often claim that the plaintiff is seeking to add terms to the contract.

Detailed Discussion/Forms: California Forms of Pleading and Practice, Ch. 140, Contracts; Ch. 177, Damages (Matthew Bender).

California Points and Authorities, Ch. 50, Contracts; Ch. 65, Damages (Matthew Bender).

23.02[2] Defending Action for Breach of Duty of Good Faith and Fair Dealing. The party defending an action for breach of the duty of good faith and fair dealing should scrutinize the express terms of the agreement to determine whether the plaintiff is attempting to create obligations not contemplated by the contract or at variance with the contract's express terms [see 23.07]. The party defending the action also should consider whether the validity or existence of the alleged contract between the parties can be attacked. The existence of a contractual relationship between the parties is a prerequisite for the action [see 23.06].

**Strategic Point--Defendant:**

The defendant also should determine whether the plaintiff's claim for breach of the duty of good faith and fair dealing is merely a reiteration of an accompanying claim for breach of contract. If the plaintiff alleges both a breach of contract and a breach of the duty of good faith and fair dealing, the claim for breach of the duty of good faith and fair dealing must allege conduct by the defendant *beyond* that directly actionable as a breach of contract in order to constitute a separate cause of action [see 23.07[2]].

As with any claim, the action must be brought in a timely manner. An action for breach of the duty of good faith and fair dealing is subject to the same statute of limitations as any action for breach of the underlying contract [see 23.08[2]].

In the context of insurance policies, a breach of the implied covenant of good faith and fair dealing may be the basis for recovery of tort damages [see 23.09[1]]. However, outside the insurance context, recovery is limited to contract damages [see 23.09[2]]. The defendant therefore should determine whether the plaintiff is seeking an unavailable or inappropriate measure of damages [see 23.09].

The defendant should oppose the claim for breach of the duty of good faith and fair dealing with a demurrer or answer [see CCP §§ 430.10(e), 430.30, 431.30], as appropriate. If the plaintiff is improperly seeking tort damages in the contract action, defendant should consider a motion to strike the claim for such damages [see CCP §§ 435-437].

**Strategic Point--Defendant:**

Although the issue of breach generally is a question of fact, a claim for breach of the duty of good faith and fair dealing may be subject to summary judgment or summary adjudication [see *CCP* § 437c] when there are no issues of triable fact [see 23.08[3]].



Cross References:

Form for answer with affirmative defense(s), see 23.11.

Detailed discussion of demurrers, see Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, Ch. 11, Demurrers and Motions for Judgment on the Pleadings.

Detailed discussion of answers, see Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, Ch. 14, Answers.

Detailed discussion of motions to strike, see Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, Ch. 12, Motions to Strike.

Detailed discussion of motions for summary judgment, see Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, Ch. 38, Summary Judgment.

For Tips on updating case law and expanding your research with additional resources, see **How to Use Lexis.com With This Publication** at the front of this volume.

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawBreachCauses of ActionGeneral OverviewContracts LawContract InterpretationGood Faith & Fair DealingTortsBusiness TortsGeneral OverviewTortsBusiness TortsBad Faith Breach of ContractGeneral Overview



176 of 188 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 23 Suing or Defending Action for Breach of Duty of Good Faith and Fair Dealing
II. ESTABLISHING BREACH OF DUTY OF GOOD FAITH AND FAIR DEALING

2-23 MB Practice Guide: CA Contract Litigation 23.03

23.03 CHECKLIST: Establishing Breach of Duty of Good Faith and Fair Dealing.

23.03[1] Checklist for Party Claiming Breach of Duty.

- ☐ Determine whether requisite contractual relationship exists between parties.

Authority:

Smith v. City & County of San Francisco (1990) 225 CA3d 38, 49, 275 CR 17

Discussion:

See 23.06

- ☐ Determine nature and extent of implied covenant of good faith and fair dealing under circumstances, to assure compliance with express terms of contract.

Authority:

Racine & Laramie, Ltd. v. Department of Parks & Recreation (1992) 11 CA4th 1026, 1031, 14 CR2d 335

Discussion:

See 23.07

- ☐ Determine whether defendant's conduct constituted breach of implied covenant of good faith and fair dealing because it unfairly prevented plaintiff from receiving benefits that he or she was entitled to receive under contract.

Authority:

Comunale v. Traders & Gen. Ins. Co. (1958) 50 C2d 654, 658, 328 P2d 198

Discussion:

See 23.05, 23.07

Forms:

See 23.12, 23.13 (points and authorities for party claiming breach)

- ☐ Determine damages.

Authority:

Freeman & Mills, Inc. v. Belcher Oil Co. (1995) 11 C4th 85, 102, 44 CR2d 420, 900 P2d 669

Discussion:

See 23.09

- ☐ File complaint alleging cause of action for breach of implied covenant of good faith and fair dealing in contract action.

Authority:

CCP § 425.10; Guz v. Bechtel Nat'l, Inc. (2000) 24 C4th 317, 352, 100 CR2d 352, 8 P3d 1089

Discussion:

See 23.08

Form:

See 23.10 (complaint for breach of duty of good faith and fair dealing in contract action)

23.03[2] Checklist for Party Defending Claim of Breach.

- ☐ Determine whether statute of limitations has run on plaintiff's claim for breach of implied covenant of good faith and fair dealing.

Authority:

CCP §§ 337(1), 339(1)

Discussion:

See 23.08[2]

- ☐ Determine whether plaintiff's claim for breach of covenant can be challenged as not constituting a separate cause of action because acts on which it is based are directly actionable as a breach of contract.

Authority:

Guz v. Bechtel Nat'l, Inc. (2000) 24 C4th 317, 352, 100 CR2d 352, 8 P3d 1089

Discussion:

See 23.08[1]

- ☐ Determine whether claim for breach of covenant can be challenged because:

- ☐ No contractual relationship exists between parties.

Authority:

Smith v. City & County of San Francisco (1990) 225 CA3d 38, 49, 275 CR 17

Discussion:

See 23.06

☐ Alleged breach of covenant did not deprive plaintiff of any benefits of contract to which he or she was entitled.

Authority:

Comunale v. Traders & Gen. Ins. Co. (1958) 50 C2d 654, 658, 328 P2d 198

Discussion:

See 23.05, 23.07[1]

☐ Plaintiff's claim of breach of implied covenant attempts to create obligations not contemplated by contract.

Authority:

Racine & Laramie, Ltd. v. Department of Parks & Recreation (1992) 11 CA4th 1026, 1032, 14 CR2d 335

Discussion:

See 23.07[2]

Form:

See 23.14 (points and authorities for party defending claim of breach)

☐ Plaintiff's claim of breach of implied covenant attempts to vary express terms of contract.

Authority:

Wolf v. Walt Disney Pictures & Television (2008) 162 CA4th 1107, 1120, 76 CR3d 585

Discussion:

See 23.07[3]

Form:

See 23.14 (points and authorities for party defending claim of breach)

☐ Determine whether plaintiff is improperly seeking tort damages.

Authority:

Freeman & Mills, Inc. v. Belcher Oil Co. (1995) 11 C4th 85, 102, 44 CR2d 420, 900 P2d 669

Discussion:

See 23.09[1]

Form:

See 23.15 (points and authorities for party defending claim of breach)

- ☐ Determine whether contract damages sought by plaintiff can be contested.

Authority:

CC § 3300

Discussion:

See 23.09[2]

- ☐ Oppose claim of breach of implied covenant with appropriate responsive pleading:

☐ Demurrer for failure to state a cause of action, if failure appears from face of complaint or from matter of which court may take judicial notice;

☐ Answer, with affirmative defense(s); or

☐ Motion to strike.

Authority:

CCP §§ 430.10(e), 430.30, 431.30, 435-437

Discussion:

See 23.02[2]

Forms:

See 23.11 (answer with affirmative defense(s)), 23.15 (points and authorities for party defending claim of breach)

- ☐ Seek summary adjudication in defendant's favor of claim of breach of implied covenant, if appropriate, when there are no triable issues of fact.

Authority:

CCP § 437c

Discussion:

See 23.02[2], 23.08[3]

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts Law Breach Causes of Action Elements of Claims Contracts Law Contract Conditions & Provisions Implied Warranties General Overview Contracts Law Contract Interpretation Good Faith & Fair Dealing Contracts Law Remedies General Overview Torts Business Torts Bad Faith Breach of Contract Elements



177 of 188 DOCUMENTS

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Chapter 23 Suing or Defending Action for Breach of Duty of Good Faith and Fair Dealing
II. ESTABLISHING BREACH OF DUTY OF GOOD FAITH AND FAIR DEALING

2-23 MB Practice Guide: CA Contract Litigation 23.04

23.04 Elements of Breach of Duty of Good Faith and Fair Dealing.

All of the following elements must be satisfied to state a claim for breach of the duty of good faith and fair dealing in a contract action:

- There must be a contractual relationship between the parties [*Smith v. City & County of San Francisco* (1990) 225 CA3d 38, 49, 275 CR 17 ; see 23.06].
- Plaintiff must have performed, or have been excused from performing, his or her obligations under the contract [see CC § 1439].
- Defendant must have unfairly prevented plaintiff from receiving the benefits that plaintiff was entitled to receive under the contract [*Racine & Laramie, Ltd. v. Department of Parks & Recreation* (1992) 11 CA4th 1026, 1031, 14 CR2d 335 ; see 23.05, 23.07].
- Defendant's conduct must have resulted in harm to plaintiff [CC § 3300; *Cates Constr., Inc. v. Talbot Partners* (1999) 21 C4th 28, 60-61, 86 CR2d 855, 980 P2d 407 ; see 23.09[2]].

Jury Instructions:

Breach of Covenant of Good Faith and Fair Dealing--Essential Factual Elements, see *Judicial Council of California Civil Jury Instructions*, CACI No. 325 (LexisNexis Matthew Bender).

Breach of the Implied Covenant of Good Faith and Fair Dealing--Essential Factual Elements, see *Judicial Council of California Civil Jury Instructions*, CACI No. 2423 (LexisNexis Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts Law Breach Causes of Action Elements of Claims Contracts Law Contract Conditions & Provisions Implied Warranties General Overview Contracts Law Contract Interpretation Good Faith & Fair Dealing Torts Business Torts General Overview



178 of 188 DOCUMENTS

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Chapter 23 Suing or Defending Action for Breach of Duty of Good Faith and Fair Dealing
II. ESTABLISHING BREACH OF DUTY OF GOOD FAITH AND FAIR DEALING

2-23 MB Practice Guide: CA Contract Litigation 23.05

23.05 Covenant of Good Faith and Fair Dealing Is Implied in Every Contract.

There is an implied covenant of good faith and fair dealing in every contract that neither party will do anything to injure the right of the other party to receive the benefits of the agreement [*Comunale v. Traders & Gen. Ins. Co.* (1958) 50 C2d 654, 658, 328 P2d 198].

The covenant of good faith and fair dealing not only imposes on each contracting party the duty to refrain from doing anything that would render performance of the contract impossible by any act of his or her own, but also the duty to do everything that the contract presupposes that he or she will do to accomplish its purpose [*Harm v. Frasher* (1960) 181 CA2d 405, 417, 5 CR 367].

Example:

An event producer agreed to pay for improvements to an amphitheater owned by a city. The city agreed to give the producer credit, equal to the amount paid for the improvements, to be applied against license fees that the producer would otherwise be charged for producing events in the amphitheater. The parties' agreement contemplated that the producer would submit applications for approval of events that it intended to produce in 2000 and 2001. Although the city did not guarantee that any of the applications would be approved, the city was required, under the implied covenant of good faith and fair dealing, to consider proposals submitted by the producer. When the city barred the producer from submitting any proposals in 2001, the producer could allege a breach of the covenant of good faith and fair dealing [*Pasadena Live, LLC v. City of Pasadena* (2004) 114 CA4th 1089, 1092-1093].

Jury Instructions:

Implied Covenant of Good Faith and Fair Dealing, see *California Forms of Jury Instruction, Ch. 3B, Instr. MB 300B.08* (Matthew Bender).

Implied Covenant of Good Faith and Fair Dealing, see *California Forms of Jury Instruction, Ch. 3I, Instr. MB 300I.32* (Matthew Bender).



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Legal Topics:

For related research and practice materials, see the following legal topics:

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179 of 188 DOCUMENTS

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Chapter 23 Suing or Defending Action for Breach of Duty of Good Faith and Fair Dealing
II. ESTABLISHING BREACH OF DUTY OF GOOD FAITH AND FAIR DEALING

2-23 MB Practice Guide: CA Contract Litigation 23.06

23.06 Express Contractual Relationship Is Required.

23.06[1] Existence of Contract Is Prerequisite to Action. The prerequisite for any action for breach of the implied covenant of good faith and fair dealing is the existence of a contractual relationship between the parties, because the covenant is an implied term in the contract [*Smith v. City & County of San Francisco* (1990) 225 CA3d 38, 49, 275 CR 17].

Example:

After working for a public university for over 25 years, plaintiff was transferred, allegedly forced to work overtime, and terminated. Plaintiff could not state a claim for breach of contract or breach of the implied covenant of good faith and fair dealing because public employment in California is held by statute, rather than by contract [*Kim v. Regents of Univ. of Cal.* (2000) 80 CA4th 160, 164-165, 95 CR2d 10].



Warning:

The alleged breach of the covenant must have occurred after the contract took effect, not during negotiations [see *Racine & Laramie, Ltd. v. Department of Parks & Recreation* (1992) 11 CA4th 1026, 1034, 14 CR2d 335 ("the fact that parties commence negotiations looking to a contract, or to the amendment of an existing contract, does not by itself impose any duty on either party not to be unreasonable or not to break off negotiation, for any reason or for no reason")].

23.06[2] Breach of Express Contract Provision Is Not Required. Although the parties must have an express contractual relationship, breach of a specific provision of the contract is not a prerequisite for an action for breach of the implied covenant of good faith and fair dealing [*Carma Developers (Cal.), Inc. v. Marathon Dev. Cal., Inc.* (1992) 2 C4th 342, 373, 6 CR2d 467, 826 P2d 710].

Example:

An event producer agreed to pay for improvements to an amphitheater owned by a city. The city agreed to give the producer credit, in the amount paid for the improvements, for license fees that the producer would otherwise be charged for producing events in the amphitheater. The parties' agreement contemplated that the producer would submit applications for approval of events that it intended to

produce in 2000 and 2001. Although the city did not guarantee that any of the applications would be approved, the city was required, under the implied covenant of good faith and fair dealing, to consider proposals submitted by the producer. When the city barred the producer from submitting any proposals in 2001, the producer could allege a breach of the covenant of good faith and fair dealing. The alleged breach of the covenant of good faith and fair dealing constituted a breach of contract for which the producer could recover damages [*Pasadena Live, LLC v. City of Pasadena (2004)* 114 CA4th 1089, 1090, 1092-1093].

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawBreachCauses of ActionElements of ClaimsContracts LawContract Conditions & ProvisionsImplied WarrantiesGeneral OverviewContracts LawContract InterpretationGood Faith & Fair DealingTortsBusiness TortsGeneral Overview



180 of 188 DOCUMENTS

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Chapter 23 Suing or Defending Action for Breach of Duty of Good Faith and Fair Dealing
II. ESTABLISHING BREACH OF DUTY OF GOOD FAITH AND FAIR DEALING

2-23 MB Practice Guide: CA Contract Litigation 23.07

23.07 Nature and Extent of Duty Depends on Contract Purpose.

23.07[1] Covenant Assures Compliance With Express Terms of Contract. The covenant of good faith and fair dealing is read into contracts to protect the express covenants or promises of the contract [*Racine & Laramie, Ltd. v. Department of Parks & Recreation* (1992) 11 CA4th 1026, 1031, 14 CR2d 335]. The covenant is implied as a supplement to the express contractual covenants, to prevent a contracting party from engaging in conduct that, while not technically transgressing the express covenants, frustrates the other party's rights to the benefits of the contract [*Racine & Laramie, Ltd. v. Department of Parks & Recreation* (1992) 11 CA4th 1026, 1031-1032, 14 CR2d 335].

Example--Breach:

When benefits are due an insured under an insurance policy, delayed payment based on inadequate or tardy investigations, oppressive conduct by claims adjusters, seeking to reduce the amounts legitimately payable, and other similar tactics, while not technically breaching the express covenants of the policy, may breach the implied covenant of good faith and fair dealing because such conduct frustrates the insured's right to receive prompt compensation for losses [*Love v. Fire Ins. Exch.* (1990) 221 CA3d 1136, 1153, 271 CR 246].

Example--No Breach:

An insured's allegations that an insurer did not properly investigate her claim for theft loss did not support a cause of action for breach of the implied covenant of good faith and fair dealing. Because it was undisputed that the policy at issue provided absolutely no coverage for theft loss, there was nothing that an investigation could have revealed to the insured's benefit [*Rios v. Scottsdale Ins. Co.* (2004) 119 CA4th 1020, 1028].

➡ Cross Reference:

Form for points and authorities for party claiming breach of duty of good faith and fair dealing, see 23.12, 23.13.

23.07[2] Covenant Does Not Create Obligations Not Contemplated by Contract. The implied covenant of good faith and fair dealing is limited to assuring compliance with the express terms of the contract and cannot be extended to create obligations not contemplated in the contract [*Racine & Laramie, Ltd. v. Department of Parks & Recreation* (1992) 11 CA4th 1026, 1032, 14 CR2d 335].

Examples:

■ A concessionaire operated a tobacco shop and wine tasting facility in a state park under a contract with the Department of Parks and Recreation. The concessionaire sought to modify the existing and unexpired concession contract to allow the operation of a restaurant and the on-premises sale of alcoholic beverages. When negotiations to modify the contract broke down, the concessionaire sued the Department, alleging, among other things, breach of the covenant of good faith and fair dealing. Because there was no express contractual obligation to negotiate a modification of the existing contract, there was no implied obligation to bargain for a new or amended contract in good faith [*Racine & Laramie, Ltd. v. Department of Parks & Recreation* (1992) 11 CA4th 1026, 1032-1034, 14 CR2d 335].

■ The former sales manager for two radio stations sued the owner of the stations upon termination of his employment alleging, among other things, breach of the implied covenant of good faith and fair dealing. The employment agreement specifically stated that the manager's employment was "at-will." Because the implied covenant cannot impose substantive duties or limits on the contracting parties beyond those incorporated in the specific terms of the agreement, the implied covenant did not impose a duty on the owner to terminate the employment only for good cause [*Agosta v. Astor* (2004) 120 CA4th 596, 607-608].

 Cross References:

Form for answer with affirmative defense(s), see 23.11.

Forms for points and authorities for party defending claim of breach of duty of good faith and fair dealing, see 23.14, 23.15.

23.07[3] Covenant Does Not Supersede Specific Contractual Provisions. The implied covenant of good faith and fair dealing cannot be used to vary the express terms of a contract [*Wolf v. Walt Disney Pictures & Television* (2008) 162 CA4th 1107, 1120, 76 CR3d 585] .

Thus, the parties, by express provisions of the contract, may grant the right to engage in the very acts and conduct that would otherwise have been forbidden by an implied covenant of good faith and fair dealing [*Carma Developers (Cal.), Inc. v. Marathon Dev. Cal., Inc.* (1992) 2 C4th 342, 374, 6 CR2d 467, 826 P2d 710].

Example:

A sales representative agreement provided that the agreement would be effective until 30 days after notice of termination given by either party. The agreement also expressly provided that notice of termination could be given at any time and for any reason. The implied covenant of good faith and fair dealing could not be used to impose a requirement of good cause for termination, contrary to the express contract provision. No obligation could be implied that would result in the obliteration of a right expressly given under the written contract [*Gerdlund v. Electronic Dispensers Int'l* (1987) 190 CA3d 263, 277, 235 CR 279].

Parties who are not acting with undue influence or unconscionability may agree to a contract containing terms that would violate the covenant of good faith and fair dealing. If they have bargained for those terms, then the court may not imply a term that deviates from it. To do so would be unfair to the party who bargained for the unfair provision [*Gerdlund v. Electronic Dispensers Int'l* (1987) 190 CA3d 263, 277, 235 CR 279].

Distinguish:

Although the rights granted by the covenant of good faith and fair dealing can be specifically bargained

away, the covenant of good faith and fair dealing cannot be waived [see *Milton v. Hudson Sales Corp.* (1957) 152 CA2d 418, 432, 313 P2d 936].

Cross References:

Form for answer with affirmative defense(s), see 23.11.

Forms for points and authorities for party defending claim for breach of duty of good faith and fair dealing, see 23.14, 23.15.

23.07[4] Covenant Requires That Discretion Be Exercised in Good Faith. The covenant of good faith and fair dealing particularly applies if one party is invested with a discretionary power affecting the rights of another. Such a power must be exercised in good faith [*Carma Developers (Cal.), Inc. v. Marathon Dev. Cal., Inc.* (1992) 2 C4th 342, 372, 6 CR2d 467, 826 P2d 710]. The standard for judging whether a party acted in good faith is one of objective reasonableness rather than subjective fancy, taste or judgment [*Peak-Las Positas Partners v. Bollag* (2009) 172 CA4th 101, 106, 90 CR3d 775 (seller of real property acted unreasonably in refusing to extend escrow period)].

Example:

Plaintiff entered into a development agreement with defendant. Under the terms of the agreement, defendant guaranteed plaintiff a certain amount of compensation over a period of three years, and plaintiff agreed to submit her proposals for motion pictures to defendant. Although defendant paid plaintiff the full amount of the guaranteed compensation, defendant did not develop any of plaintiff's proposed projects or hire her to direct any films. Although defendant was entitled to reject plaintiff's proposals based on its subjective dissatisfaction, the evidence raised a triable issue of material fact as to whether the defendant breached the implied covenant of good faith and fair dealing by categorically refusing to work with plaintiff without regard to the merits of her proposed projects [*Locke v. Warner Bros., Inc.* (1997) 57 CA4th 354, 364-367, 66 CR2d 921].

Jury Instructions:

Implied Covenant of Good Faith and Fair Dealing Requires Party to Act Reasonably in Exercising Discretionary Power, see *California Forms of Jury Instruction, Ch. 3B, Instr. MB 300B.09* (Matthew Bender).

23.07[5] Conduct May Constitute Breach of Covenant Regardless of Actor's Motive. The opposing party's conduct allegedly constituting a breach of good faith and fair dealing need not have been dishonest; the covenant of good faith and fair dealing can be breached through objectively unreasonable conduct, regardless of the actor's motive [*Carma Developers (Cal.), Inc. v. Marathon Dev. Cal., Inc.* (1992) 2 C4th 342, 373, 6 CR2d 467, 826 P2d 710].

Legal Topics:

For related research and practice materials, see the following legal topics:

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181 of 188 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 23 Suing or Defending Action for Breach of Duty of Good Faith and Fair Dealing
II. ESTABLISHING BREACH OF DUTY OF GOOD FAITH AND FAIR DEALING

2-23 MB Practice Guide: CA Contract Litigation 23.08

23.08 Asserting Breach of Duty of Good Faith and Fair Dealing in Contract Action.

23.08[1] Allegations Must Go Beyond Mere Contract Breach. A plaintiff alleging breach of the implied covenant of good faith and fair dealing must plead and prove each fact that is essential to the claim [*see Evid Code § 500*].

**Warning:**

If the plaintiff's allegations of breach of the implied covenant of good faith and fair dealing do not go beyond the statement of a mere contract breach, and simply rely on the same acts alleged in a companion breach of contract cause of action, the allegations may be disregarded as superfluous [*Guz v. Bechtel Nat'l, Inc.* (2000) 24 C4th 317, 352, 100 CR2d 352, 8 P3d 1089 ; *Careau & Co. v. Security Pac. Bus. Credit, Inc.* (1990) 222 CA3d 1371, 1395, 272 CR 387].

Example:

A water district terminated its contract with a company that provided the district with temporary employees, in accordance with the termination provision of the contract. The company sued for breach of contract, claiming that good cause was required for termination and alleging breach of the covenant of good faith and fair dealing. Because the unambiguous language of the contract did not require good cause for termination, the water district was entitled to summary adjudication on the claim for breach of contract. Because the claim for breach of the implied covenant relied on the same acts and sought the same damages as the breach of contract claim, defendant was also entitled to summary adjudication on that claim [*Bionghi v. Metropolitan Water Dist.* (1999) 70 CA4th 1358, 1363, 1370, 83 CR2d 388].

**Strategic Point--Party Alleging Breach of Covenant:**

The plaintiff should take particular care to allege facts indicating that defendant's conduct that constituted a breach of the implied covenant was distinct from any alleged breach of an express covenant of the contract, yet prevented plaintiff from receiving benefits to which he or she was entitled under the contract.

► Cross References:

Form for complaint for breach of duty of good faith and fair dealing in contract action, see 23.10.
Form for answer with affirmative defenses, see 23.11.

23.08[2] Statute of Limitations for Breach of Contract Action Applies. Because a claim for breach of the covenant of good faith and fair dealing in a contract action is based on an implied contractual promise, the claim is subject to the same statute of limitations as any action for breach of the underlying contract [*Love v. Fire Ins. Exch.* (1990) 221 CA3d 1136, 1144 n4, 271 CR 246]:

- When the parties have a written contract, a claim for breach of the covenant of good faith and fair dealing is subject to the four-year limitation of CCP § 337(1) [*Love v. Fire Ins. Exch.* (1990) 221 CA3d 1136, 1144 n4, 271 CR 246].

- If the claim is based on the existence of an oral contract, the claim is subject to the two-year statute of limitations in CCP § 339(1) [see *Mullins v. Rockwell Int'l Corp.* (1997) 15 C4th 731, 736, 63 CR2d 636, 936 P2d 1246].



Strategic Point:

If the claim of breach of the implied covenant is based on an alleged oral contract, defendant also should consider whether the claim is subject to a defense based on the statute of frauds [see CC § 1624].

► Cross References:

Form for answer with affirmative defense of statute of limitations, see 23.11.

Discussion of statute of frauds issues, see Ch. 15, Attacking or Defending Existence of Contract--Failure to Comply With Applicable Formalities.

23.08[3] Issue of Breach Is Generally Question of Fact. The issue of whether the implied covenant of good faith and fair dealing has been breached ordinarily is a question of fact, unless only one inference can be drawn from the evidence [*Hicks v. E.T. Legg & Assocs.* (2001) 89 CA4th 496, 509, 108 CR2d 10].

Judge's Perspective:

Because the covenant of good faith and fair dealing looks to the parties' reasonable expectations regarding the performance of the contract's terms, preparing to assert or defend a claim for breach of the covenant is similar to preparing a claim for breach of the contract itself when the terms are ambiguous. In either case, the question is what the parties reasonably expected each other to do to satisfy their contractual obligations. In defending a claim for breach of the covenant, however, practitioners also must make sure to pin down:

- What benefit the parties each expected to receive from the contract.
- What term of the contract was expected to produce that benefit.
- How the alleged violation of the covenant frustrated the plaintiff's receipt of the expected benefit.

Example--Issue of Fact:

Plaintiff entered into a development agreement with defendant. Under the terms of the agreement,

defendant guaranteed plaintiff a certain amount of compensation over a period of three years, and plaintiff agreed to submit her proposals for motion pictures to defendant. Although defendant paid plaintiff the full amount of the guaranteed compensation, defendant did not develop any of plaintiff's proposed projects or hire her to direct any films. Although defendant was entitled to reject plaintiff's proposals based on its subjective dissatisfaction, the evidence raised a triable issue of material fact as to whether the defendant breached the implied covenant of good faith and fair dealing by categorically refusing to work with plaintiff without regard to the merits of her proposed projects [*Locke v. Warner Bros., Inc.* (1997) 57 CA4th 354, 364-367, 66 CR2d 921].

Examples--No Issue of Fact:

- The former sales manager for two radio stations sued the owner of the stations upon termination of his employment alleging, among other things, breach of the implied covenant of good faith and fair dealing. The employment agreement specifically stated that the manager's employment was "at-will." Because the implied covenant cannot impose substantive duties or limits on the contracting parties beyond those incorporated in the specific terms of the agreement, the implied covenant did not impose a duty on the owner to terminate the employment only for good cause. The owner was entitled to summary adjudication in his favor on the cause of action for breach of the implied covenant [*Agosta v. Astor* (2004) 120 CA4th 596, 607-608].

- A mobilehome owners association alleged that the city breached the implied covenant of good faith and fair dealing when it announced that it planned to sell the mobilehome park to a nonprofit housing corporation using tax exempt bond financing, rather than sell the park to the owners. The court observed that it was undisputed that the city had notified the owners association in a timely manner of its intent to sell the park, as required by the leases between the city and tenants of the park. Although the owners alleged that the notice was a sham because the city had no intent to sell the park to the owners, the court concluded that neither the lease nor CC § 798.80(a), which was incorporated into the lease, required the city to offer the park to the residents under any particular terms. Moreover, the court held that the allegation that the notice the city gave was a "sham" was an unsupported conclusion of fact or law the court was not bound to accept as true. Accordingly, the court properly sustained the city's demurrer [*Poway Royal Mobilehome Owners Assn. v. City of Poway* (2007) 149 CA4th 1460, 1477-1478, 58 CR3d 153].

- An author sued a production company, alleging the production company had failed to fully compensate the author for its exploitation of the cartoon characters depicted in the author's novel. The author argued that the production company breached the implied covenant of good faith and fair dealing by purposefully orchestrating promotional agreements for which it received no monetary consideration. The trial court properly directed a verdict for the production company because there were no disputed factual issues for the jury to decide. Because the parties' agreement gave the production company unfettered discretion to license or not license the characters as it "saw fit," recognizing an implied term limiting that discretion would be at odds with the express terms of the agreement [*Wolf v. Walt Disney Pictures & Television* (2008) 162 CA4th 1107, 1121-1123, 76 CR3d 585].

Consider:

Since breach of the covenant of good faith and fair dealing is a question of fact, an assertion that a breach has occurred, if properly pled, is unlikely to be decided one way or the other on summary judgment.

Jury Instructions:

Breach of the Implied Covenant of Good Faith and Fair Dealing--Good Faith Mistaken Belief Defense,

see *Judicial Council of California Civil Jury Instructions, CACI No. 2424* (LexisNexis Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:

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182 of 188 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 23 Suing or Defending Action for Breach of Duty of Good Faith and Fair Dealing
II. ESTABLISHING BREACH OF DUTY OF GOOD FAITH AND FAIR DEALING

2-23 MB Practice Guide: CA Contract Litigation 23.09

23.09 Determining Remedies for Breach of Duty of Good Faith and Fair Dealing in Contract Action.

23.09[1] Tort Damages Are Available Only for Breach of Duty in Insurance Context. In the context of insurance policies, a breach of the implied covenant of good faith and fair dealing may be the basis for recovery of tort damages [see *Comunale v. Traders & Gen. Ins. Co. (1958) 50 C2d 654, 658, 328 P2d 198*]. Because the breach may be the basis for tort liability, punitive damages may also be available in insurance cases [see *CC § 3294*].



Warning:

Although tort damages may be available in an insurance context, tort remedies are not necessarily available for *all* disputes arising in the insurance context [see, e.g., *Jonathan Neil & Assocs., Inc. v. Jones (2004) 33 C4th 917, 941* (retroactive overcharging of premium insurer knew was not owed was not basis for tort action for breach of covenant of good faith and fair dealing)].

Breach of the implied duty of good faith and fair dealing in a noninsurance contract does not give rise to tort liability in the absence of violation of an independent duty arising from tort law other than the bad faith denial of the existence of, or liability under, the breached contract [*Freeman & Mills, Inc. v. Belcher Oil Co. (1995) 11 C4th 85, 102, 44 CR2d 420, 900 P2d 669*].



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Use *lexis.com* to search for current cases on damages for breach of the duty of good faith and fair dealing:

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Strategic Point--Defendant:

If plaintiff has improperly made a claim for tort damages for breach of the duty of good faith and fair dealing, consider filing a demurrer or motion to strike the claim for such damages [see CCP §§ 435-437].



Cross References:

Forms for points and authorities for party defending claim of breach of duty of good faith and fair dealing, see 23.14, 23.15.

Detailed discussion of motions to strike, see Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, Ch. 12, Motions to Strike.

Discussion of the unavailability of tort damages for breach of the duty of good faith and fair dealing in an employment context, see California Forms of Pleading and Practice, Ch. 249, Employment Law: Termination and Discipline (Matthew Bender).

Detailed discussion of breach of the duty of good faith and fair dealing in insurance context and availability of tort remedies, see *California Insurance Law & Practice*, Ch. 13, *Claims Handling and the Duty of Good Faith*, § 13.03 (Matthew Bender).

23.09[2] Only Contract Damages Are Recoverable in Noninsurance Context. Tort remedies are unavailable for breach of the implied covenant of good faith and fair dealing outside the insurance context [*Cates Constr., Inc. v. Talbot Partners* (1999) 21 C4th 28, 60-61, 86 CR2d 855, 980 P2d 407 ; see *Spinks v. Equity Residential Briarwood Apartments* (2009) 171 CA4th 1004, 1054-1055, 90 CR3d 453 (no punitive damages for breach of the implied covenant of good faith and fair dealing in noninsurance cases)].

A party claiming breach of the implied covenant in a noninsurance context is therefore limited to contract damages [*Cates Constr., Inc. v. Talbot Partners* (1999) 21 C4th 28, 60-61, 86 CR2d 855, 980 P2d 407]. Unless otherwise expressly provided by statute, the measure of damages for breach of an obligation arising from contract is the amount that will compensate the aggrieved party for all the detriment proximately caused by the breach, or which, in the ordinary course of things, would be likely to result from the breach [CC § 3300].



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Sample Search: To find general, secondary material on remedies and breach of contract actions, try: *remedy /5 breach! /5 contract!*.

Consider:

Although the breach of the implied covenant of good faith and fair dealing in a noninsurance context does not give rise to tort liability, if the defendant's conduct also violates an independent duty arising from principles of tort law, the plaintiff may be able to allege both contract and tort causes of action [see *Applied Equip. Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 C4th 503, 515, 28 CR2d 475, 869 P2d 454 ; *Spinks v. Equity Residential Briarwood Apartments* (2009) 171 CA4th 1004, 1055, 90 CR3d 453] .

**Cross Reference:**

Discussion of determining the measure of contract damages, pleading damages, and contesting damages sought, see Ch. 7, Seeking or Opposing Damages in Contract Actions.

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawBreachCauses of ActionElements of ClaimsContracts LawContract InterpretationGood Faith & Fair DealingContracts LawRemediesGeneral OverviewInsurance LawClaims & ContractsGood Faith & Fair DealingGeneral OverviewTortsBusiness TortsGeneral Overview



183 of 188 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 23 Suing or Defending Action for Breach of Duty of Good Faith and Fair Dealing
III. FORMS

2-23 MB Practice Guide: CA Contract Litigation 23.10

23.10 Complaint for Breach of Duty of Good Faith and Fair Dealing in Contract Action.**Complaint for Breach of Duty of Good Faith and Fair Dealing in Contract Action.**

[Name of attorney]

_____[Street address]

_____[City, state, and ZIP]

_____[Area code and phone number]

_____[State Bar no. of attorney]

Attorney for _____[name of party]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____[name(s)],)

Plaintiff(s))

vs.)

_____[name(s)])

[and DOES 1 THROUGH _____])

Defendant(s).)

)

)

)

)

NO. _____

COMPLAINT FOR DAMAGES FOR BREACH OF

DUTY OF GOOD FAITH AND FAIR DEALING

[LIMITED CIVIL CASE]

[Amount Demanded _____]

(Exceeds or Does Not Exceed) \$10,000]

Plaintiff _____[name] alleges:

[For an individual plaintiff]

1. Plaintiff is an individual residing in _____[city, if any, and county], California, [in the

_____ (name of judicial district, if any)] [, and therein doing business under the fictitious business name of _____. Plaintiff has duly complied in all respects with the requirements of *Business and Professions Code Sections 17910 through 17917* with respect to this fictitious business name].

[OR, for a domestic corporation or domestic limited liability company]

1. Plaintiff _____ [name] is, and at all times herein mentioned was, a _____ [corporation or limited liability company] organized and existing under the laws of California, with its principal place of business in _____ [city, if any, and county], California [in the _____ (name of judicial district, if any)], and therein doing business under the fictitious business name of _____. Plaintiff has duly complied in all respects with the requirements of *Business and Professions Code Sections 17910 through 17917* with respect to this fictitious business name].

[OR, for a foreign corporation or foreign limited liability company]

1. Plaintiff _____ [name] is, and at all times herein mentioned was, a _____ [corporation or limited liability company] organized and existing under the laws of _____ [state or foreign country], and _____ [for foreign corporation authorized to do business and doing business in California or, for foreign limited liability company maintaining action or intrastate business, and registered to transact intrastate business in California], with its principal place of business in California in _____ [city, if any, and county], California [in the _____ (name of judicial district, if any)].

[OR, for a general or limited partnership or an unincorporated association]

1. Plaintiff _____ [name] is, and at all times herein mentioned was, a _____ [partnership or unincorporated association] with its principal place of business in _____ [city, if any, and county], California [in the _____ (name of judicial district, if any)], and therein doing business under the fictitious business name of _____. Plaintiff has duly complied in all respects with the requirements of *Business and Professions Code Sections 17910 through 17917* with respect to this fictitious business name].

[CONTINUE]

[For an individual defendant]

2. Defendant _____ [name] is an individual residing in _____ [city, if any, and county], California [in the _____ (name of judicial district, if any)] [and doing business therein under the fictitious business name of _____].

[OR, for a domestic corporation or domestic limited liability company]

2. Defendant _____ [name] is, and at all times herein mentioned was, a _____ [corporation or limited liability company] organized and existing under the laws of California [, with its principal place of business in _____ (city, if any, and county), California (, in the _____ [name of judicial district, if any])].

[OR, for a foreign corporation or foreign limited liability company]

2. Defendant _____ [name] is, and at all times herein mentioned was, a _____ [corporation or limited liability company] organized and existing under the laws of _____ [state or foreign country][, with its principal place of business in _____ (city, if any, and county), California (, in the _____ [name of judicial district, if any])].

[OR, for a general or limited partnership or an unincorporated association]

2. Defendant _____ [name] is, and at all times herein mentioned was, _____ [a partnership or an unincorporated association] sued herein under the name _____ [it has assumed or by which it is known][, with its principal place of business in _____ (city, if any, and county), California (, in the _____ [name of judicial district, if any])]. [Defendants _____ (names of individual partners or members) are, and at all times herein mentioned were, members of that _____ (partnership or unincorporated association) (and are, and at all times herein mentioned were, residents of _____ County, California)].

[CONTINUE]

3. Plaintiff is ignorant of the true names and capacities of Defendants sued herein as DOES 1 through _____ [numeral, e.g., 50], inclusive, and therefore sues these Defendants by these fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when ascertained. [Plaintiff is informed and believes and thereon alleges that each of the fictitiously named Defendants is responsible in some manner for the occurrences herein alleged, and that Plaintiff's damages as herein alleged were proximately caused by those Defendants.]

4. Plaintiff is informed and believes and thereon alleges that at all times material to this complaint, _____ [identify defendants to whom agency allegation applies, e.g., each of the Defendants or each of the individual Defendants or Defendant Harry Jones], [and each of the Defendants fictitiously named in this complaint,] in addition to acting for himself, herself, or itself and on his, her, or its own behalf individually, is and was acting as the agent, servant, employee and representative of, and with the knowledge, consent and permission of, and in conspiracy with, each and all of the Defendants and within the course, scope and authority of that agency, service, employment, representation, and conspiracy. Plaintiff further alleges on information and belief that the acts of each of the Defendants were fully ratified by each and all of the Defendants. Specifically, and without limitation, Plaintiff alleges on information and belief that the actions, failures to act, breaches, conspiracy, and misrepresentations alleged herein and attributed to one or more of the specific Defendants were approved, ratified, and done with the cooperation and knowledge of each and all of the Defendants.

5. On or about _____ [date], Plaintiff and Defendant entered into a written agreement ("the contract") [, a copy of which is attached as Exhibit A and incorporated by reference]. Pursuant to the contract, Plaintiff agreed to _____ [state essential terms of plaintiff's obligation under agreement, e.g., pay for improvements to a theater owned and operated by Defendant], and Defendant agreed to _____ [state essential terms of defendant's obligation under agreement, e.g., credit the amounts expended by Plaintiff for those improvements against fees that Plaintiff otherwise would be charged to produce events at the theater in the future]. [State any other facts relevant to obligations of parties under contract, e.g., In entering into the contract, the parties contemplated that Plaintiff would submit proposals to Defendant to produce events at the theater.]

6. Plaintiff has performed all conditions, covenants, and promises required on Plaintiff's part to be performed in accordance with the terms and conditions of the contract [, and has expended to date the sum of \$_____ for _____ (*purpose of expenses, e.g., improvements to the theater*) in furtherance of Plaintiff's obligations under the contract]. _____ [*State any other facts relevant to plaintiff's performance, e.g., Plaintiff has also submitted applications for the approval of six events that he intended to produce at the theater.*]

7. _____ [*State facts concerning defendant's breach of the implied covenant of good faith and fair dealing that unfairly prevented plaintiff from receiving the benefits of the contract, e.g., After Plaintiff had paid for the improvements as required by the contract, Defendant refused to approve any of Plaintiff's applications to produce events at the theater, and subsequently barred, and continues to bar Plaintiff from submitting any further proposals to produce events at the theater. Defendant, by these actions, effectively made it impossible for Plaintiff to recoup any of the money Plaintiff had expended under the contract for the improvements to the theater.*] In acting in the manner described in this Paragraph, Defendant violated the implied covenant of good faith and fair dealing that exists in the contract between Plaintiff and Defendant.

8. As a result of Defendant's breach, Plaintiff has suffered damages based on _____ [*specify items of damage, e.g., the amounts Plaintiff paid for improvements to the theater*] in the sum of \$_____.

WHEREFORE, Plaintiff prays judgment against Defendant as follows:

1. For compensatory damages, in the sum of \$_____;

2. For interest at the _____ [*legal rate or specify other rate provided by contract*] on the sum of \$_____ from and after _____ [*date*];

[*ADD, if provided by contract or statute*]

3. For reasonable attorneys fees _____ [*specify amount or according to proof*];

[*CONTINUE*]

4. For costs of suit; and

5. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[*ADD verification, if desired*]

VERIFICATION

I am the plaintiff in the above entitled action; I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein stated on information and belief, and, as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [date]

_____ [signature]

_____ [typed name]

NOTES.

Authority:

CCP § 425.10; *Guz v. Bechtel Nat'l, Inc.* (2000) 24 C4th 317, 352, 100 CR2d 352, 8 P3d 1089 ;
Freeman & Mills, Inc. v. Belcher Oil Co. (1995) 11 C4th 85, 102, 44 CR2d 420, 900 P2d 669 ;
Pasadena Live, LLC v. City of Pasadena (2004) 114 CA4th 1089, 1092-1093

Drafting Complaints:

See Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, Ch. 7, Complaints

Elements of Breach of Duty of Good Faith and Fair Dealing:

See 23.04

Damages Recoverable for Breach of Duty of Good Faith and Fair Dealing in Contract Action:

See 23.09

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Pleading & Practice Pleadings Complaints General Overview Contracts Law Breach Causes of Action General Overview Contracts Law Contract Interpretation Good Faith & Fair Dealing Insurance Law Claims & Contracts Good Faith & Fair Dealing General Overview Torts Business Torts General Overview



184 of 188 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 23 Suing or Defending Action for Breach of Duty of Good Faith and Fair Dealing
III. FORMS

2-23 MB Practice Guide: CA Contract Litigation 23.11

23.11 Answer to Complaint for Breach of Duty of Good Faith and Fair Dealing in Contract Action With Affirmative Defenses.**Answer to Complaint for Breach of Duty of Good Faith and Fair Dealing in Contract Action With Affirmative Defenses.**

[Name of attorney]

_____[Street address]

_____[City, state, and ZIP]

_____[Area code and phone number]

_____[State Bar no. of attorney]

Attorney for _____[name of party]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____[name],

Plaintiff,

vs.

_____[name],

Defendant.

)

)

)

)

)

)

)

NO. _____

ANSWER OF _____[identify de-
fendant, e.g., DEFENDANT MARY JONES] TOCOMPLAINT OF _____[identify
plaintiff, e.g., PLAINTIFF JOHN SMITH]

[LIMITED CIVIL CASE]

Judge: _____

Department: _____

Defendant answers the complaint as follows:

[Include general denial below, or set forth, in numbered paragraphs, specific denials, admissions, and allegations in

response to those in complaint, in the order in which they are alleged in complaint:]

1. Pursuant to *Code of Civil Procedure Section 431.30(b)(1)*, Defendant generally denies each and every allegation of Plaintiff's Complaint, including all the purported causes of action contained therein, and further denies that Plaintiff is entitled to any equitable or legal relief, or any damages whatsoever.

[Defendant asserts the following affirmative defenses. By doing so, Defendant shall not be deemed to have assumed the burden of proving any matters that otherwise would be Plaintiff's burden.]

[Allege any affirmative defenses, e.g.,]

[EITHER, if alleging that no contract exists because defendant is not identified as a party]

FIRST AFFIRMATIVE DEFENSE (Statute of Limitations)

2. Plaintiff's cause of action for breach of the duty of good faith and fair dealing is barred by the statute of limitations.

[AND/OR, if alleging that there is no contractual relationship between the parties]

SECOND AFFIRMATIVE DEFENSE (No Contract Between Parties)

3. There is no contractual relationship between the parties, and therefore no duty of good faith and fair dealing existed between the parties on which Plaintiff's claim can be based.

[AND/OR, if alleging that purported breach did not deprive plaintiff of any benefits of the contract to which he/she was entitled]

THIRD AFFIRMATIVE DEFENSE (Plaintiff Not Deprived of Benefits of Contract)

4. Defendant's alleged breach of the duty of good faith and fair dealing did not deprive Plaintiff of any benefits to which Plaintiff was entitled under the contract.

[AND/OR, if alleging that plaintiff's claim of breach attempts to create obligations not contemplated by the contract]

FOURTH AFFIRMATIVE DEFENSE (Plaintiff's Claim Attempts to Create Obligations Not Contemplated by Contract)

5. By alleging that Defendant breached the implied covenant of good faith and fair dealing, Plaintiff is attempting to impose on Defendant an obligation that was not contemplated by the contract, in that _____ [

summarize, e.g., the contract did not require or obligate Defendant to authorize Plaintiff to produce any events at the theater].

[AND/OR, if alleging that plaintiff's claim attempts to vary express terms of the contract]

FIFTH AFFIRMATIVE DEFENSE

(Plaintiff's Claim Attempts to Vary Express Terms of Contract)

6. Plaintiff's claim of an alleged breach of duty of good faith and fair dealing attempts to vary or contradict the express terms of the contract in that _____ *[summarize, e.g., the contract expressly permitted Defendant to deny Plaintiff authorization to produce any event at the theater if, in Defendant's judgment, the event failed to satisfy the usual and customary criteria applied by Defendant in determining whether or not to authorize such events, and Defendant did apply those criteria in refusing to authorize Plaintiff to produce events at the theater].*

[ADD additional affirmative defenses, if any]

[CONTINUE]

WHEREFORE, Defendant prays as follows:

1. That Plaintiff take nothing by his/her complaint herein;
2. For costs of suit; and
3. For such other and further relief as the court deems proper.

Dated: _____

_____ *[firm name, if any]*

By: _____ *[signature]*

_____ *[typed name]*

Attorney for Defendant

[ADD following verification, if applicable]

VERIFICATION

I am the defendant in the above entitled action; I have read the foregoing answer and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein stated on information and belief, and, as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [date]

_____ [signature]

_____ [typed name]

NOTES.

Authority:

CCP § 431.30(b)(2)

Drafting Answer:

See Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, Ch. 14, Answers

Statute of Limitations:

See 23.08[2]

Requirement of Contractual Relationship:

See 23.06

Extent of Duty of Good Faith and Fair Dealing:

See 23.07

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsAffirmative DefensesGeneral OverviewCivil ProcedurePleading & PracticePleadingsAnswersContracts LawBreachCauses of ActionGeneral OverviewContracts LawContract InterpretationGood Faith & Fair DealingInsurance LawClaims & ContractsGood Faith & Fair DealingGeneral Overview



185 of 188 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 23 Suing or Defending Action for Breach of Duty of Good Faith and Fair Dealing
III. FORMS

2-23 MB Practice Guide: CA Contract Litigation 23.12

23.12 Points and Authorities for Party Claiming Breach of Duty of Good Faith and Fair Dealing in Contract Action--Covenant of Good Faith and Fair Dealing Protects Party's Rights to Benefits of Contract.

Points and Authorities for Party Claiming Breach of Duty of Good Faith and Fair Dealing in Contract Action--Covenant of Good Faith and Fair Dealing Protects Party's Rights to Benefits of Contract.

[Include the following, if appropriate under the circumstances of the case, in a memorandum of points and authorities by the party claiming breach of the duty of good faith and fair dealing, along with factual discussion demonstrating how the principles of law stated below are applicable to the particular case]

DEFENDANT'S CONDUCT BREACHED THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING BECAUSE IT PREVENTED PLAINTIFF FROM RECEIVING THE BENEFITS OF THE CONTRACT

A. Covenant Is Implied in Every Contract. There is an implied covenant of good faith and fair dealing in every contract that neither party will do anything to injure the right of the other party to receive the benefits of the agreement (*Comunale v. Traders & Gen. Ins. Co. (1958) 50 Cal. 2d 654, 658, 328 P.2d 198*).

B. Covenant Imposes Duty to Do Everything Required to Accomplish Contract's Purpose. The covenant of good faith and fair dealing not only imposes on each contracting party the duty to refrain from doing anything that would render performance of the contract impossible by any act of his or her own, but also the duty to do everything that the contract presupposes that he or she will do to accomplish its purpose (*Harm v. Frasher (1960) 181 Cal. App. 2d 405, 417, 5 Cal. Rptr. 367*).

C. Covenant Prohibits Conduct That Frustrates Other Party's Rights to Benefits of Contract. The covenant of good faith and fair dealing is implied as a supplement to the express contractual covenants, to prevent a contracting party from engaging in conduct that, while not technically transgressing the express covenants, frustrates the other party's rights to the benefits of the contract (*Racine & Laramie, Ltd. v. Department of Parks & Recreation (1992) 11 Cal. App. 4th 1026, 1031-1032, 14 Cal. Rptr. 2d 335*).

NOTES.

Covenant Implied in Every Contract:

See 23.05

Nature and Extent of Duty of Good Faith and Fair Dealing:

See 23.07

Detailed Discussion of Format/Skeletal Forms for Points and Authorities:

California Forms of Pleading and Practice, Ch. 417, Points and Authorities (Matthew Bender);
California Points and Authorities, Ch. 1, Writing Legal Memoranda and Briefs (Matthew Bender)

Additional Points and Authorities Relating to Contracts:

California Points and Authorities, Ch. 50, Contracts (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawBreachCauses of ActionGeneral OverviewContracts LawContract Conditions & ProvisionsImplied
WarrantiesGeneral OverviewContracts LawContract InterpretationGood Faith & Fair DealingInsurance LawClaims &
ContractsGood Faith & Fair DealingGeneral OverviewTortsBusiness TortsGeneral Overview



186 of 188 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 23 Suing or Defending Action for Breach of Duty of Good Faith and Fair Dealing
III. FORMS

2-23 MB Practice Guide: CA Contract Litigation 23.13

23.13 Points and Authorities for Party Claiming Breach of Duty of Good Faith and Fair Dealing in Contract Action--Breach of Express Contract Provision Is Not Required for Cause of Action.

Points and Authorities for Party Claiming Breach of Duty of Good Faith and Fair Dealing in Contract Action--Breach of Express Contract Provision Is Not Required for Cause of Action.

[Include the following, if appropriate under the circumstances of the case, in a memorandum of points and authorities by the party claiming breach of the duty of good faith and fair dealing, along with factual discussion demonstrating how the principles of law stated below are applicable to the particular case]

PLAINTIFF IS NOT REQUIRED TO ALLEGE BREACH OF AN EXPRESS TERM OF THE CONTRACT TO MAINTAIN AN ACTION FOR BREACH OF THE DUTY OF GOOD FAITH AND FAIR DEALING

Breach of Express Contract Provision Is Not Required. Breach of a specific provision of the contract is not a prerequisite for an action for breach of the implied covenant of good faith and fair dealing (*Carma Developers (Cal.), Inc. v. Marathon Dev. Cal., Inc. (1992) 2 Cal. 4th 342, 373, 6 Cal. Rptr. 2d 467, 826 P.2d 710*).

NOTES.

Breach of Express Provision Not Required:

See 23.06[2]

Detailed Discussion of Format/Skeletal Forms for Points and Authorities:

California Forms of Pleading and Practice, Ch. 417, Points and Authorities (Matthew Bender); and
California Points and Authorities, Ch. 1, Writing Legal Memoranda and Briefs (Matthew Bender)

Additional Points and Authorities Relating to Contracts:

California Points and Authorities, Ch. 50, Contracts (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawBreachCauses of ActionGeneral OverviewContracts LawContract Conditions & ProvisionsImplied
WarrantiesGeneral OverviewContracts LawContract InterpretationGood Faith & Fair DealingInsurance LawClaims &
ContractsGood Faith & Fair DealingGeneral OverviewTortsBusiness TortsGeneral Overview



187 of 188 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 23 Suing or Defending Action for Breach of Duty of Good Faith and Fair Dealing
III. FORMS

2-23 MB Practice Guide: CA Contract Litigation 23.14

23.14 Points and Authorities for Party Defending Claim of Breach of Duty of Good Faith and Fair Dealing in Contract Action--Covenant of Good Faith and Fair Dealing Does Not Create Obligations Not Contemplated by Contract.

Points and Authorities for Party Defending Claim of Breach of Duty of Good Faith and Fair Dealing in Contract Action--Covenant of Good Faith and Fair Dealing Does Not Create Obligations Not Contemplated by Contract.

[Include the following, if appropriate under the circumstances of the case, in a memorandum of points and authorities by the party claiming breach of the duty of good faith and fair dealing, along with factual discussion demonstrating how the principles of law stated below are applicable to the particular case]

PLAINTIFF CANNOT USE THE COVENANT OF GOOD FAITH AND FAIR DEALING TO IMPOSE OBLIGATIONS ON DEFENDANT THAT WERE NOT CONTEMPLATED BY THE CONTRACT

A. Covenant Is Limited to Assuring Compliance With Express Terms of Contract. The implied covenant of good faith and fair dealing is limited to assuring compliance with the express terms of the contract and cannot be extended to create obligations not contemplated in the contract (*Racine & Laramie, Ltd. v. Department of Parks & Recreation* (1992) 11 Cal. App. 4th 1026, 1032, 14 Cal. Rptr. 2d 335).

[ADD, if appropriate]

B. Covenant Cannot Be Used to Vary Express Contractual Provisions. The implied covenant of good faith and fair dealing cannot be used to vary the express terms of a contract (*Carma Developers (Cal.), Inc. v. Marathon Dev. Cal., Inc.* (1992) 2 Cal. 4th 342, 374, 6 Cal. Rptr. 2d 467, 826 P.2d 710).

Covenant Limited to Assuring Compliance With Express Terms of Contract:
See 23.07[2]

Covenant Does Not Supersede Specific Contractual Provisions:
See 23.07[3]

Detailed Discussion of Format/Skeletal Forms for Points and Authorities:

California Forms of Pleading and Practice, Ch. 417, Points and Authorities (Matthew Bender);
California Points and Authorities, Ch. 1, Writing Legal Memoranda and Briefs (Matthew Bender)

Additional Points and Authorities Relating to Contracts:

California Points and Authorities, Ch. 50, Contracts (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawBreachCauses of ActionGeneral OverviewContracts LawContract Conditions & ProvisionsImplied
WarrantiesGeneral OverviewContracts LawContract InterpretationGood Faith & Fair DealingInsurance LawClaims &
ContractsGood Faith & Fair DealingGeneral OverviewTortsBusiness TortsGeneral Overview



188 of 188 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 23 Suing or Defending Action for Breach of Duty of Good Faith and Fair Dealing
III. FORMS

2-23 MB Practice Guide: CA Contract Litigation 23.15

23.15 Points and Authorities for Party Defending Claim of Breach of Duty of Good Faith and Fair Dealing in Contract Action--Tort Damages Are Not Available Except in Insurance Context.

Points and Authorities for Party Defending Claim of Breach of Duty of Good Faith and Fair Dealing in Contract Action--Tort Damages Are Not Available Except in Insurance Context.

[Include the following, if appropriate under the circumstances of the case, in a memorandum of points and authorities by the party claiming breach of the duty of good faith and fair dealing, along with factual discussion demonstrating how the principles of law stated below are applicable to the particular case]

PLAINTIFF CANNOT RECOVER TORT DAMAGES FOR THE ALLEGED BREACH OF THE COVENANT OF GOOD FAITH AND FAIR DEALING

A. Breach of Covenant Does Not Give Rise to Tort Liability in Noninsurance Context. Breach of the implied duty of good faith and fair dealing in a noninsurance contract does not give rise to tort liability in the absence of violation of an independent duty arising from tort law other than the bad faith denial of the existence of, or liability under, the breached contract (*Freeman & Mills, Inc. v. Belcher Oil Co.* (1995) 11 Cal. 4th 85, 102, 44 Cal. Rptr. 2d 420, 900 P.2d 669).

B. Party Claiming Breach of Covenant in Noninsurance Context Is Limited to Contract Damages. A party claiming breach of the implied covenant in a noninsurance context is limited to contract damages (*Cates Constr., Inc. v. Talbot Partners* (1999) 21 Cal. 4th 28, 60-61, 86 Cal. Rptr. 2d 855, 980 P.2d 407). Unless otherwise expressly provided by statute, the measure of damages is the amount that will compensate the aggrieved party for all the detriment proximately caused by the breach, or which, in the ordinary course of things, would be likely to result from the breach (CC § 3300).

Unavailability of Tort Damages:

See 23.09[1]

Recovery of Contract Damages:

See 23.09[2]

Detailed Discussion of Format/Skeletal Forms for Points and Authorities:

California Forms of Pleading and Practice, Ch. 417, Points and Authorities (Matthew Bender); and
California Points and Authorities, Ch. 1, Writing Legal Memoranda and Briefs (Matthew Bender)

Additional Points and Authorities Relating to Contracts:

California Points and Authorities, Ch. 50, Contracts (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawContract InterpretationGood Faith & Fair DealingContracts LawRemediesGeneral OverviewInsurance
LawBad Faith & Extracontractual LiabilityRemediesGeneral OverviewInsurance LawClaims & ContractsGood Faith &
Fair DealingGeneral OverviewTortsBusiness TortsGeneral Overview



1 of 196 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 24 Suing or Defending Action for Breach of Warranty

2-24 MB Practice Guide: CA Contract Litigation 24.syn

§ 24.syn Synopsis to Chapter 24: Suing or Defending Action for Breach of Warranty

24.01 Scope.

24.02 Objective and Strategy.

24.03 CHECKLIST: Reviewing Application of California Warranty Statutes.

24.04 Commercial Code Provides Foundation for California Commercial Warranty Law.

24.04[1] Commercial Code Warranties Apply to Transactions in Goods.

24.04[2] Commercial Code Is Inapplicable to Warranties for Services.

24.05 Song-Beverly Act Governs Warranties in Consumer Transactions.

24.05[1] Song-Beverly Act Provides Additional Consumer Warranty Rules.

24.05[2] Song-Beverly Act Warranties Apply to Sales of New Consumer Goods.

24.05[3] Limited Application to Sales of Used Goods.

24.05[4] Song-Beverly Act Imposes Repair and Service Obligations on Consumer Warrantors.

24.06 Federal Magnuson-Moss Act Provides Additional Warranty Protection.

24.07 Consumer Goods Must Be Installed in Good and Workmanlike Manner.

24.08 Warranties Can Apply to Construction Projects.

24.09 Other Specialized Warranty Schemes Exist.

24.10 CHECKLIST: Determining If Warranty Exists.

24.11 Options and Strategy.

24.12 Express Warranties Are Created by Contract and Seller's Actions.

24.12[1] Any Affirmation of Fact or Promise Creates Express Warranty.

24.12[2] Use of Formal Words Is Not Necessary to Create Express Warranty.

24.12[3] Specific Intent to Create Express Warranty Is Not Necessary.

24.12[4] Creation of Express Warranty Is Not Limited to Contract Language.

24.12[4][a] Any Affirmation of Fact or Promise Will Suffice.

24.12[4][b] Description of Goods May Create Express Warranty.

24.12[4][c] Technical Specifications May Create Express Warranty.

24.12[4][d] Sample or Model May Create Express Warranty.

24.12[4][e] Offer of Examination May Create Express Warranty.

24.12[4][f] Advertisements May Create Express Warranty.

24.12[4][g] Course of Dealing May Create Express Warranty.

24.12[5] Statements of Seller's Opinion or Commendation Do Not Create Express Warranty.

24.12[6] Seller's Statements During Negotiation Are Presumed to Be Affirmations of Fact.

24.12[7] Express Warranty Does Not Require Privity of Contract.

24.13 Implied Warranties May Be Imposed by Statute.

24.13[1] Implied Warranty of Merchantability Exists If Seller Is Merchant With Respect to Goods Sold.

24.13[2] Implied Warranty of Merchantability Exists for All Consumer Goods Sold at Retail.

24.13[3] Implied Warranty of Fitness Exists If Seller Knows Goods Are for Particular Purpose and That Buyer Is Relying on Seller's Skill and Judgment.

24.13[4] Implied Warranty of Fitness Exists for All Consumer Goods Sold at Retail for Particular Purpose.

24.13[5] Vertical Privity of Contract Is Required for Implied Warranties of Fitness and Merchantability.

24.14 Contract for Sale of Goods Includes Warranties of Title.

24.14[1] Sale of Goods Includes Warranty of Good Title.

24.14[2] Sale of Goods Includes Warranty That Goods Are Free From Liens or Encumbrances.

24.14[3] Warranties May Be Modified Only by Express Language or Special Circumstances.

24.14[4] Warranty Is Inapplicable If Seller's Compliance With Buyer's Specifications Causes "Breach."

24.14[5] Warranty of Title Is Not Considered an "Implied" Warranty.

24.14[6] Warranties of Title Apply to Sales of Consumer Goods.

24.15 Commercial Code Warranties May Be Disclaimed or Limited.

24.15[1] Words or Conduct Creating and Negating Express Warranties Will Be Construed As Consistent.

24.15[2] Implied Warranty of Merchantability May Be Disclaimed or Limited by Conspicuous Language.

24.15[3] Implied Warranty of Fitness May Be Disclaimed by Conspicuous Language.

24.15[4] "As Is" or Similar Language Is Sufficient to Disclaim All Implied Warranties.

24.15[5] Examination of Sample or Model Defeats Implied Warranties.

24.15[6] Implied Warranties May Be Excluded or Modified by Trade Usage or Course of Dealing.

24.15[7] Buyer Must Be Placed on Fair Notice of and Agree to Any Disclaimer or Modification.

24.15[8] "Conspicuous" Means Written So Reasonable Person Ought to Notice It.

24.16 Implied Warranties in Consumer Transactions Generally Cannot Be Disclaimed.

24.16[1] Song-Beverly Act Generally Prohibits Disclaimers.

24.16[2] Express Warranties May Not Limit Implied Warranties.

24.16[3] Exception Exists for "As Is" Sales.

24.17 Commercial Code Warranties Are Construed As Consistent With Each Other.

24.17[1] Warranties Are Construed As Consistent and Cumulative When Possible.

24.17[2] If Multiple Warranties Contradict Each Other, Parties' Intention Determines Dominant Warranty.

24.17[3] Rules of Construction for Determining Parties' Intent May Be Disproved by Evidence That Conditions Made Them Unreasonable.

24.18 CHECKLIST: Determining If Warranty Has Been Breached.

24.19 Options and Strategy.

24.20 Breach Occurs When Goods Do Not Conform to Warranty Terms.

24.21 Breach May Be Question of Law or Fact.

24.22 Compliance With Implied Warranty of Merchantability Is Determined With Reference to Statutory Criteria.

24.22[1] Commercial Code Specifies Attributes of Merchantable Goods.

24.22[2] Goods Must Pass Without Objection in Trade.

24.22[3] Fungible Goods Must Be Fair Average Quality.

24.22[4] Goods Must Be Fit for Ordinary Purposes.

24.22[5] Goods Must Be of Even Kind, Quality, and Quantity.

24.22[6] Goods Must Be Adequately Contained, Packaged, and Labeled.

24.22[7] Goods Must Conform to Promises or Affirmations of Fact on Label.

24.23 Breach of Warranty of Fitness Is Determined With Reference to Seller's Particular Use.

24.24 Warranty of Title Is Breached by Seller's Failure to Deliver Clear Title to Goods.

24.25 Warranty Must Be in Effect At Time Breach Occurs.

24.25[1] Breach Normally Occurs When Tender of Delivery Is Made.

24.25[2] Exception Exists for Warranties Relating to Future Performance.

24.25[3] Implied Warranties in Consumer Contracts Are Subject to Special Rules.

24.25[3][a] Duration of Implied Warranties Is Determined With Reference to Express Warranties.

24.25[3][b] Duration of Implied Warranty Is Set by Statute in Absence of Express Warranty.

24.26 CHECKLIST: Determining Remedies for Breach of Warranty

24.27 Options and Strategy.

24.28 General Measure of Damages Is Difference Between Value of Goods Accepted and Value of Goods Complying With Warranty.

24.28[1] Value Is Measured at Time and Place of Acceptance.

24.28[2] Buyer May Recover Incidental and Consequential Damages.

24.28[3] Buyer Who Rejects Goods May Cover and Recover Damages.

24.28[4] If Nonconformity Would Have Justified Revocation, Time and Place of Acceptance Is Determined As of Buyer's Decision Not to Revoke.

24.28[5] Strict Liability Governs Personal and Property Damage.

24.29 Equitable Remedies Are Available.

- 24.30 Seller Liable for Injury If Buyer Reasonably Used Goods Without Inspection.
- 24.31 Contract May Limit Remedies for Breach of Warranty.
- 24.32 Special Remedies Provisions Apply to Warranty Actions Involving Consumer Goods.
 - 24.32[1] Consumer May Seek Damages and Equitable Relief.
 - 24.32[2] Measure of Damages Includes Replacement or Reimbursement.
 - 24.32[3] Consumer May Recover Additional Civil Penalties in Specified Cases.
 - 24.32[4] Consumer May Recover Attorney's Fees.
- 24.33 CHECKLIST: Asserting Claim for Breach of Express or Implied Warranty.
- 24.34 Options and Strategy.
- 24.35 Commercial Code Requires That Buyer Must First Give Seller Timely Notice of Breach.
 - 24.35[1] Notice Must Be Given Within Reasonable Time After Discovery of Breach.
 - 24.35[2] Time of Notification Is Determined by Applying Commercial Standards.
 - 24.35[3] Content of Notification Must Be Sufficient to Let Seller Know That Buyer Claims Breach.
- 24.36 Complaint Under Commercial Code Must Plead Essential Elements of Breach of Warranty.
 - 24.36[1] Plaintiff Must Prove Elements of Warranty.
 - 24.36[2] Complaint for Breach of Warranty Must Allege Essential Elements of Claim.
 - 24.36[3] Plaintiff Need Not Plead Breach of Contract.
 - 24.36[4] Seller Has Burden of Proving Representation Did Not Form Basis of Bargain.
- 24.37 Complaint for Breach of Warranty for Consumer Goods Must Plead Essential Elements Under Song-Beverly Act.
- 24.38 Statute of Limitations Is Four Years Unless Shortened by Contract.
 - 24.38[1] Four-Year Period Generally Applies.
 - 24.38[2] Commercial Code Statute of Limitations Applies to Actions Under Song-Beverly Act.
 - 24.38[3] Contract May Shorten Period to Not Less Than One Year, but May Not Extend It Past Four Years.
 - 24.38[4] Limitations Period Runs From Time of Breach.
 - 24.38[5] Action for Warranty As to Future Performance Accrues When Breach Is Discovered.

24.38[6] Attempt to Cure Tolls Limitations Period.

24.38[7] Limitation Period Does Not Apply in Action Against Manufacturer.

24.39 CHECKLIST: Opposing Claim for Breach of Express or Implied Warranty.

24.40 Options and Strategy.

24.41 Defendant Can Demur If Clear Contractual Language of Waiver or Modification Is Attached to Complaint.

24.42 Numerous Potential Affirmative Defenses Exist.

24.42[1] Loss May Have Resulted From Action or Event Following Delivery of Goods.

24.42[2] Agreement Between Parties May Have Limited Available Remedies.

24.42[3] Express Warranty May Have Been Negated by Words or Conduct.

24.42[4] All Implied Warranties May Have Been Excluded by "As Is" Contract Language.

24.42[5] Implied Warranty of Merchantability May Have Been Excluded or Modified by Conspicuous Language Mentioning Merchantability.

24.42[6] Implied Warranty of Fitness May Have Been Excluded by Conspicuous Writing.

24.42[7] Implied Warranty May Have Been Excluded or Modified by Course of Dealing or Trade Usage.

24.42[8] Warranty May Have Been Excluded by Plaintiff's Opportunity to Examine Goods Prior to Forming Contract.

24.42[9] Buyer May Have Had Reason to Know Seller Did Not Claim Title.

24.42[10] Goods May Have Complied With Specifications Supplied by Buyer.

24.42[11] Buyer Cannot Claim Benefit of Express Warranty That Buyer Did Not Know About at Time of Contracting.

24.42[12] Seller May Have Made No Affirmation of Fact or Promise.

24.43 Buyer Sued by Third Party May Give Seller Opportunity to Defend ("Vouch In").

24.44 Complaint for Damages for Breach of Express Warranty--Commercial Code.

Scope

24.45 Complaint for Damages for Breach of Implied Warranties of Fitness and/or Merchantability, or Warranty of Title--Commercial Code.

Scope

24.46 Answer to Complaint Alleging Breach of Express Warranty.

Scope

24.47 Answer to Complaint Alleging Breach of Implied Warranty.

Scope



2 of 196 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 24 Suing or Defending Action for Breach of Warranty

I. STRATEGY

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24.01 Scope.

This chapter covers:

- Reviewing and applying the California statutes that govern warranty law [see 24.03 -24.09].
- Determining if a contract contains express or implied warranties [see 24.10 -24.13].
- Determining if contractual warranties have been validly limited or disclaimed [see 24.15 -24.17].
- Determining if warranties have been breached [see 24.18 -24.25].
- Determining the available remedies for breach of warranty [see 24.26 -24.32].
- Asserting a claim for breach of warranty [see 24.33 -24.37; complaints with allegations, see 24.44, 24.45].
- Statute of limitations for actions based on a breach of warranty [see 24.38].
- Opposing a breach of warranty action with a demurrer or affirmative defense [see 24.41, 24.42; answers with affirmative defenses, see 24.46, 24.47].

Core Statutes:

Com Code §§ 2312-2317; CC § 1790 et seq. (Song-Beverly Consumer Warranty Act)



3 of 196 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 24 Suing or Defending Action for Breach of Warranty

I. STRATEGY

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24.02 Objective and Strategy.

A purchaser who is dissatisfied with the quality or suitability of goods received under a contract may look to a breach of warranty action to recoup damages or obtain other relief. When a contract relates to the sale of goods, it may contain both express and implied promises that the goods will conform to specified standards. These promises are known as warranties, and may provide an alternate or additional basis for seeking recovery on a contract, especially when it is unclear whether or not a breach in the seller's performance would otherwise exist.

Strategic Point--Plaintiff/Purchaser:



A purchaser who is dissatisfied with the goods typically will attempt to assert that:

- Warranties exist by virtue of either the language of the contract, the conduct of the seller, or the applicable law;
- One or more of those warranties was breached; and
- The dissatisfied party is entitled to damages or other relief for the breach.

Strategic Point--Defendant/Seller:



Conversely, the seller typically will contend that:

- No implied warranties arise from the contract;
- Representations by the seller did not rise to the level of an enforceable warranty; and/or
- Any warranties imposed by law were either modified by the terms of the contract or were inapplicable in the situation in question.

- The goods in question conformed to the requirements of any express or implied warranties.

The attorney may find warranty law confusing because it is governed by a number of overlapping statutes. Generally, California transactions among manufacturers, distributors, retailers, and nonconsumer purchasers (i.e., businesses and other entities) are governed by Division 2 of the California Commercial Code [*see Com Code § 2102*], whereas warranties in consumer sales are governed primarily by the Song-Beverly Consumer Warranty Act, as amplified by nonconflicting Commercial Code provisions [*CC §§ 1790.2* (Song-Beverly prevails over Commercial Code to extent of any conflict), *1791(a)* (definition of "consumer goods"); *see CC § 1790 et seq.*]. Other statutes also can have an impact on warranties. Although there is nothing to restrict parties from warranting services as well as goods, the principal statutes mentioned above generally are inapplicable to warranties for services [*see CC § 1791(a); Com Code § 2102*], with the significant exception that service contracts relating to consumer goods are governed by very specific and detailed Song-Beverly Act provisions [*see, e.g., CC §§ 1793.6, 1794.4, 1794.41*].

This chapter focuses on warranties under the Commercial Code and, to a lesser extent, to the consumer warranty requirements of the Song-Beverly Act, since those two statutes govern the majority of warranty transactions. This chapter does not cover in detail the extensive warranty requirements of the Song-Beverly Act relating to repair or replacement of defective or damaged goods. Other specialized statutes also may impose warranty requirements in specific situations. Cross References to some of these specific warranty statutes are included for reference.

Conduct giving constituting a breach of warranty also may result in personal injuries. Breach of warranty in the products liability context is beyond the scope of this publication but should of course be considered in appropriate situations.



Search Matthew Bender Analytical Materials:

Use *lexis.com* to search for documents discussing warranties under the UCC:

- Area of Law--By Topic > Commercial Law (UCC) > Treatises & Analytical Materials > Matthew Bender[(R)] > Commercial and Consumer Warranties--Drafting, Performing & Litigating



Sample Search: For general information regarding warranties available under the Uniform Commercial Code, try: *warrant! /5 commercial code OR u.c.c. OR ucc.*



Search Matthew Bender Analytical Materials:

Use *lexis.com* to search for documents discussing consumer warranties:

- Area of Law--By Topic > Commercial Law (UCC) > Treatises & Analytical Materials > Matthew Bender[(R)] > Forms & Procedures Under the UCC



Sample Search: For information on warranties under state consumer statutes, generally, try: *warrant! /25 consumer /5 statut!.*



Cross References:

Repair and warranty requirements under the Song-Beverly Act, see *California Forms of Pleading and Practice*, §§ 502.40 -502.53 .

Discussion of damages for personal injury and property damage, see *California Forms of Pleading and*

Practice, § 502.28[3] (*Matthew Bender*); or
California Torts, Ch. 51, Recovery for Pain and Suffering; and
Ch. 52, Recovery for Medical Expenses and Economic Loss (*Matthew Bender*).

Discussion of products liability law, see California Forms of Pleading and Practice, Ch. 460, Products Liability (*Matthew Bender*).

For Tips on updating case law and expanding your research with additional resources, see **How to Use Lexis.com With This Publication** at the front of this volume.



4 of 196 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 24 Suing or Defending Action for Breach of Warranty
II. REVIEWING APPLICATION OF CALIFORNIA WARRANTY STATUTES

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24.03 CHECKLIST: Reviewing Application of California Warranty Statutes.

☐ Determine whether Commercial Code warranty provisions apply to contract.

☐ Does contract involve transaction in goods?

☐ Is seller "merchant" for purposes of implied warranty of merchantability?

Authority:

Com Code §§ 2102, 2105, 2314(1)

Discussion:

See 24.04

☐ Determine whether Song-Beverly Consumer Warranty Act applies to contract.

☐ Is contract one for sale of new consumer goods?

☐ Do goods consist of either:

☐ New product or part thereof that is used, bought, or leased for use primarily for personal, family, or household purposes, except for clothing and consumables; or

☐ New and used assistive devices (that is, items used to assist persons with disabilities) sold at retail.

Authority:

CC §§ 1790.3, 1791(a), 1792-1792.2

Discussion:

See 24.05[1], [2]

- ☐ Is contract one for sale of used consumer goods for which an express warranty is given?

Authority:

CC § 1795.5

Discussion:

See 24.05[3]

- ☐ Determine whether federal Magnuson-Moss Act applies to transaction.

Authority:

15 USC § 2301 *et seq*

Discussion:

See 24.06

- ☐ Determine whether Civil Code provisions governing installation or repair of consumer goods apply to transaction.

Authority:

CC § 1796

Discussion:

See 24.07

- ☐ Determine if contract is subject to law governing construction warranties.

Authority:

Corporation of Presiding Bishop v. Cavanaugh (1963) 217 CA2d 492, 504, 32 CR 144

Discussion:

See 24.08

- ☐ Determine if contract is subject to any specialized warranty schemes, such as those applicable to the following:

☐ Auctions and auctioneers.

☐ Automobiles.

☐ Electrical contractors.

☐ Insurance contracts.

- ☐ Mobilehomes.
- ☐ Lease of real property.

Authority:

Com Code § 2328; see CC §§ 1812.605 (auctioneers), 1793.22 (automobiles), 1797 et seq. (mobilehomes), 1940 et seq. (lease of real property); Ins Code § 440 et seq. (insurance contracts); Smith v. Shasta Elec. Co. (1961) 190 CA2d 728, 730, 12 CR 167 (electrical contracts)

Discussion:

See 24.09



5 of 196 DOCUMENTS

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Chapter 24 Suing or Defending Action for Breach of Warranty
II. REVIEWING APPLICATION OF CALIFORNIA WARRANTY STATUTES

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24.04 Commercial Code Provides Foundation for California Commercial Warranty Law.

24.04[1] Commercial Code Warranties Apply to Transactions in Goods. Division 2 of the Commercial Code, including its warranty provisions, apply to "transactions in goods" [*Com Code* § 2102]--that is, all things that are moveable at the time of identification to the contract other than money, investment securities, and things in action [*Com Code* § 2105]. This generally includes all transactions involving sales of goods, regardless of whether or not the parties are dealers or merchants, except that the implied warranty of merchantability applies only when the seller is a merchant with respect to goods of that kind [*Com Code* § 2314(1); see 24.13[1]]. Division 2 applies to both new and used goods.

The Song-Beverly Consumer Warranty Act [*CC* § 1790 *et seq.*; see 24.05] preempts the Commercial Code only to the extent that the rights under the Song-Beverly Act to buyers of consumer goods conflict with the provisions of the Commercial Code [*CC* § 1790.3].

► **Cross References:**

Warranties under Division 2 of the Commercial Code, see *California Forms of Pleading and Practice*, §§ 502.20 -502.28 (Matthew Bender).

Discussion of Song-Beverly Act, see 24.05; see also *California Forms of Pleading and Practice*, Ch. 502, Sales: Warranties (Matthew Bender).

24.04[2] Commercial Code Is Inapplicable to Warranties for Services. The Commercial Code controls the sale of goods and affiliated warranties, and its warranty law is rarely applied outside of the sales context or to the sale of services [see *Gautier v. General Tel. Co.* (1965) 234 CA2d 302, 306, 44 CR 404].

Example:

Plaintiffs filed suit against a telephone company for defective telephone service, alleging several theories of liability, including breach of the implied warranty of merchantability. The trial court dismissed the action after sustaining defendants' demurrer. The court of appeal affirmed, holding that there is no liability for breach of implied warranty based on a transaction that is construed as the furnishing of services, rather than a sale of chattels [*Gautier v. General Tel. Co.* (1965) 234 CA2d 302, 306, 44 CR 404].

 Cross Reference:

Checklists, discussion, and forms for breach of contract action, see Ch. 22, Suing or Defending Action for Breach of Contract.



6 of 196 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 24 Suing or Defending Action for Breach of Warranty
II. REVIEWING APPLICATION OF CALIFORNIA WARRANTY STATUTES

2-24 MB Practice Guide: CA Contract Litigation 24.05

24.05 Song-Beverly Act Governs Warranties in Consumer Transactions.

24.05[1] Song-Beverly Act Provides Additional Consumer Warranty Rules. The basic warranty law as codified in the Commercial Code is amplified for consumer sales (and related wholesale transactions) by the Song-Beverly Consumer Warranty Act [CC § 1790 *et seq.*]. The provisions of the Song-Beverly Act do not affect rights and obligations under the Commercial Code except when the two conflict; in that case, the Song-Beverly Act prevails [CC § 1790.3]. The remedies provided by the Song-Beverly Act are cumulative and do not restrict any remedy that is otherwise available [CC § 1790.3].

24.05[2] Song-Beverly Act Warranties Apply to Sales of New Consumer Goods. The Song-Beverly warranty provisions apply to sales of consumer goods [see, e.g., CC §§ 1792-1792.2; see also CC § 1791(n) (definition of "sale")]. For purposes of the Song-Beverly Act requirements, consumer goods are [CC § 1791(a)]:

- Any new product or part thereof that is used, bought, or leased for use primarily for personal, family, or household purposes, except for clothing and consumables.
- New and used assistive devices (that is, items used to assist persons with medical conditions and disabilities [see CC § 1791(p) (definition)]) sold at retail.

Jury Instructions:

Song-Beverly Consumer Warranty Act, see *Judicial Council of California Civil Jury Instructions CACI No. 3200 et seq.* (LexisNexis Matthew Bender).

➤ Cross References:

Discussion and forms relating to Song-Beverly Act, see California Forms of Pleading and Practice, Ch. 502, Sales: Warranties (Matthew Bender).

Forms for memoranda relating to the Song-Beverly Act, see California Points and Authorities, Ch. 206, Sales (Matthew Bender).

24.05[3] Limited Application to Sales of Used Goods. Song-Beverly Act warranty provisions also apply to transactions in used goods in which an express warranty is given, with limitations. Although the Song-Beverly Act

provisions governing the implied warranties of fitness and merchantability apply by their express terms to "every sale of consumer goods" [see CC §§ 1792-1792.2], which is defined to mean *new* goods, CC § 1795.5(c) nevertheless places limits on the implied warranties [CC § 1791.1] of fitness and merchantability *when express warranties are given in a sale of used goods*. The effect of this provision on claims that the implied warranties of fitness and/or merchantability apply to used goods when express warranties are *not* present is not entirely clear.

 Cross References:

Discussion of implied warranty of merchantability in Song-Beverly transactions, see 24.13[1], [2], [5].

Discussion of implied warranty of fitness in Song-Beverly transactions, see 24.13[3] -[5].

24.05[4] Song-Beverly Act Imposes Repair and Service Obligations on Consumer Warrantors.

The Song-Beverly Act contains extensive provisions dealing with the obligations of manufacturers, distributors, and retailers who make express remedies with respect to the repair and replacement of consumer goods [see CC §§ 1793.03-1795.7], including the well-known "lemon law" relating to repair and replacement of motor vehicles [see CC § 1793.22]. Basically, every manufacturer of consumer goods sold with express warranties in California must maintain service and repair facilities reasonably close to all areas where the consumer goods are sold [CC § 1793.3(c)]. Alternatively, the manufacturer may designate independent repair or service facilities [CC § 1793.3(c)]. Detailed coverage of these requirements is beyond the scope of this publication, but attorneys should be aware of their importance and the fact that they affect the availability of judicial remedies arising out of breaches of express warranties under the Song-Beverly Act.

 Cross References:

Discussion of warrantor obligations under Song-Beverly Act, see *California Forms of Pleading and Practice*, §§ 502.40 -502.53 (Matthew Bender).

Discussion of California "lemon law" with respect to automobile warranties, see *California Forms of Pleading and Practice*, §§ 91.10 *et seq.*



7 of 196 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 24 Suing or Defending Action for Breach of Warranty
II. REVIEWING APPLICATION OF CALIFORNIA WARRANTY STATUTES

2-24 MB Practice Guide: CA Contract Litigation 24.06

24.06 Federal Magnuson-Moss Act Provides Additional Warranty Protection.

Consumer protection with respect to warranties in the sale of goods is further extended, primarily through disclosure requirements, and otherwise given support concurrent with or residual to the state scheme, through the federal Magnuson-Moss Warranty--Federal Trade Commission Improvement Act [15 USC § 2301 *et seq.*]. The Magnuson-Moss Act applies to consumer products "distributed in commerce" [15 USC § 2301(13); *see* 15 USC § 2301(14) ("commerce" defined)]. Although the Magnuson-Moss Act, as a federal statute, is beyond the scope of this publication, attorneys should be aware that the Magnuson-Moss Act compares with the Song-Beverly Act and Division 2 of the Commercial Code as follows:

- A written warranty may be made by a "supplier," which includes anyone in the business of making the goods available to consumers [*see* 15 USC § 2301(4)] and is at least as comprehensive as the group of marketing parties listed under the Song-Beverly Act [*see* CC § 1791(e), (j), (l)], while the Commercial Code is confined to the acts of sellers [*see* Com Code § 2103(1)(d)].
- The federal act's provisions extend only to a "written" warranty [*see* 15 USC § 2301(6)], which is similar to an express warranty regulated under the Song-Beverly Act and contained in a written statement arising in a sale [*see* CC § 1791.2(a)(1)].
- Although the federal law refers to affirmations of fact and promises as giving rise to one type of warranty subject to the law's provisions, similar to the Commercial Code [*see* Com Code § 2313(1)(a)] but not the Song-Beverly Act, the law restricts covered affirmations to those without inherent faults or that meet a specified level of performance for a specified duration [*see* 15 USC § 2301(6)(A)]--neither of which is directly designated under California consumer warranty law.
- The type of warranty subject to the provision of the federal law when an undertaking is made to carry out some remedial action (including recompense) if the product does not live up to its specifications [*see* 15 USC § 2301(6)(B)] is similar to, but broader than, the type of warranty under the Song-Beverly Act consisting of an undertaking to keep up utility or performance, or to make payment otherwise.
- The federal law requires that the warranty be part of the basis of the bargain, an element present under the Commercial Code [*see* Com Code § 2313(1)] but absent from the Song-Beverly Act [*see* CC §

1791.2(a)].

 Cross References:

Discussion and forms relating to Magnuson-Moss Act, see California Forms of Pleading and Practice, Ch. 502, Sales: Warranties (Matthew Bender).

Forms for memoranda relating to the Magnuson-Moss Act, see California Points and Authorities, Ch. 206, Sales (Matthew Bender).



8 of 196 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 24 Suing or Defending Action for Breach of Warranty
II. REVIEWING APPLICATION OF CALIFORNIA WARRANTY STATUTES

2-24 MB Practice Guide: CA Contract Litigation 24.07

24.07 Consumer Goods Must Be Installed in Good and Workmanlike Manner.

A statutory standard of performance by service personnel applies with respect to installation of new or used consumer goods [see CC § 1796]. Any individual, partnership, corporation, association, or other legal entity that engages in the business of installing new or used consumer goods has a duty to the buyer to install them in a "good and workmanlike" manner [CC § 1796]. If the entity engages in the business of providing service or repair to new or used consumer goods, it has a duty to the purchaser to perform those services in a "good and workmanlike" manner [CC § 1796.5]. Note that while these provisions complement California's consumer warranty legislation, they are not part of the Song-Beverly Act.

Consider:

These provisions do not provide a specific remedy for violation.



9 of 196 DOCUMENTS

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Chapter 24 Suing or Defending Action for Breach of Warranty
II. REVIEWING APPLICATION OF CALIFORNIA WARRANTY STATUTES

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24.08 Warranties Can Apply to Construction Projects.

The essence of a warranty in the context of construction is a material promise or a material affirmation of fact by the builder from which a contractual or quasi-contractual obligation may be implied [*Corporation of Presiding Bishop v. Cavanaugh* (1963) 217 CA2d 492, 504, 32 CR 144]. Representations that merely express an opinion, belief, judgment, or estimate do not constitute a warranty [*Corporation of Presiding Bishop v. Cavanaugh* (1963) 217 CA2d 492, 504, 32 CR 144].

When the work is done according to plans and specifications drawn up by the owner's architect, a query by the owner as to the merits of specified materials is merely a request for an opinion, and the builder's reply does not constitute a warranty [*Corporation of Presiding Bishop v. Cavanaugh* (1963) 217 CA2d 492, 504-505, 32 CR 144].

In limited circumstances, the Commercial Code provisions on express warranty can apply to the construction of real property [see *Com Code* § 2313].

Example:

When the manufacturer of a one-ply roofing product sold that product as a roofing system to be installed under the supervision of the manufacturer's representative, the transaction was a sale of goods and was covered by the Uniform Commercial Code. The promises made in the roofing manufacturer's brochures and advertisements therefore were express contractual warranties governed by *Com Code* § 2313 [see *Mennonite Deaconess Home & Hosp., Inc. v. Gates Eng'g Co.* (1985) 219 Neb 303, 311-312, 363 NW2d 155].

Jury Instructions:

Matthew Bender Construction Contract Instructions, see California Forms of Jury Instruction, Ch. 3I, MB Instrs. 300I.01 -300I.123 (Matthew Bender).



10 of 196 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 24 Suing or Defending Action for Breach of Warranty
II. REVIEWING APPLICATION OF CALIFORNIA WARRANTY STATUTES

2-24 MB Practice Guide: CA Contract Litigation 24.09

24.09 Other Specialized Warranty Schemes Exist.

Warranty rules in other areas are governed by specific statutory provisions and case law outside of the UCC and consumer protection laws. These include:

- Auctions and auctioneers [*Com Code* § 2328; see *CC* § 1812.605].
- Automobiles [see *CC* §§ 1793.22 (lemon law provisions of Song-Beverly Act)].
- Electrical contractors [see *Smith v. Shasta Elec. Co.* (1961) 190 CA2d 728, 730, 12 CR 167].
- Insurance contracts [see *Ins Code* § 440 et seq.].
- Mobilehomes [see *CC* § 1797 et seq.].
- Leases of real property [see *CC* § 1940 et seq.].

► Cross References:

Discussion, checklists and forms relating to landlord--tenant law, including warranty of habitability, see *Matthew Bender[(R)] Practice Guide: California Landlord-Tenant Litigation*, 3.19.

Discussion and forms relating to auctions and auctioneers, see *California Forms of Pleading and Practice*, Ch. 77, Auctions and Auctioneers (Matthew Bender).

Discussion and forms relating to automobile warranties, see *California Forms of Pleading and Practice*, Ch. 91, Automobiles: Actions Involving Defects and Repairs (Matthew Bender).

Discussion and forms relating to an electrical contractor's breach of warranty, see *California Forms of Pleading and Practice*, Ch. 277, Gas and Electricity (Matthew Bender).

Discussion and forms relating to insurance contract warranties, see *California Forms of Pleading and Practice*, Ch. 308, Insurance (Matthew Bender).

Discussion and forms relating to mobilehome warranties, see California Forms of Pleading and Practice, Ch. 369, Mobilehomes and Mobilehome Parks (Matthew Bender).



11 of 196 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 24 Suing or Defending Action for Breach of Warranty

III. DETERMINING IF WARRANTY EXISTS

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24.10 CHECKLIST: Determining If Warranty Exists.

☐ Determine if any express warranties apply to transaction.

☐ If transaction involves sale of consumer goods to consumer, determine if contract and related documents contain any written statement under which manufacturer, distributor, or retailer undertakes to either:

☐ Preserve or maintain utility or performance of goods; or

☐ Provide compensation if there is a failure of utility of performance.

Authority:

CC § 1791.2(a)(1)

Discussion:

See 24.12[1]

☐ For all other contracts for sale of goods, examine written contract, if any, to determine whether it contains any affirmation of fact or promise relating to goods that are subject of contract, such as:

Authority:

Com Code § 2313(1)(a)

Discussion:

See 24.12[1], [2]

☐ Provisions expressly stating that anything is warranted or guaranteed, or specifically denominated as a warranty.

Authority:*Com Code § 2313(1)(a)***Discussion:**

See 24.12[2]

- ☐ Description of goods that are subject matter of contract.

Authority:*Com Code § 2313(1)(b)***Discussion:**

See 24.12[4][b]

- ☐ Technical specifications incorporated into contract.

Authority:*Com Code § 2313, UCC § 2-313, official cmt 5***Discussion:**

See 24.12[4][c]

- ☐ Any other affirmation or fact relating to goods, regardless of how characterized or expressed.

Authority:*Com Code § 2313(1)(a)***Discussion:**

See 24.12[1]

- ☐ Investigate whether seller made other affirmations of fact or promises to buyer apart from written contract, such as:

- ☐ Statements of fact by seller or seller's sales personnel.

Authority:*Com Code § 2313(1)(a)***Discussion:**

See 24.06[4][a]

- ☐ Description of goods, including labels, manuals, and other written statements.

Authority:*Com Code § 2313(1)(a); Nunes Turfgrass, Inc. v. Vaughan-Jacklin Seed Co., Inc. (1988) 200 CA3d 1518, 1532, 246 CR 823***Discussion:**

See 24.06[4][b]

☐ Technical specifications.

Authority:

Com Code § 2313, UCC § 2-313, official cmt 5

Discussion:

See 24.12[4][c]

☐ Sample or model.

Authority:

Com Code § 2313, UCC § 2-313, official cmt 6; see CC § 1791.2(a)(2)

Discussion:

See 24.12[4][d]

☐ Offer of examination coupled with words concerning merchantability of specific attributes of goods.

Authority:

Com Code § 2316, UCC § 2-316, official cmt 8

Discussion:

See 24.12[4][e]

☐ Advertisements.

Authority:

Thomas v. Olin Mathieson Chem. Corp. (1967) 255 CA2d 806, 811, 63 CR 454

Discussion:

See 24.12[4][g]

☐ Course of dealing or practice in the trade.

Authority:

Com Code § 2313, UCC § 2-313, official cmts 4, 5

Discussion:

See 24.12[4][f]

☐ Evaluate whether seller's statements and representations are mere statements of opinion or commendation, or true affirmations creating express warranty.

Authority:

Com Code § 2313(2)

Discussion:

See 24.12[5]

☐ Evaluate whether seller's statements occurred during negotiations and therefore are presumed to be affirmations of fact.

Authority:

Keith v. Buchanan (1985) 173 CA3d 13, 21, 220 CR 392 ; Com Code § 2313, UCC § 2-313, official cmt 3; Com Code § 2313(1)(b)

Discussion:

See 24.12[6]

☐ Determine what implied warranties exist under contract.

☐ Implied warranty of merchantability exists if either:

☐ Contract is for sale of goods, seller is merchant with respect to type of goods sold,
and

Authority:

Com Code § 2314(1)

Discussion:

See 24.13[1]

☐ Parties have not limited or excluded implied warranty of merchantability, and

Authority:

Com Code § 2316

Discussion:

See 24.15[2]

☐ Sale is not an "as is" sale.

Authority:

Com Code § 2316(3)

Discussion:

See 24.15[4]

☐ Contract is for sale of consumer goods, and sale is not an "as is" sale.

Authority:

CC § 1792

Discussion:

See 24.13[2]

- ☐ Vertical privity exists between plaintiff and defendant.

Authority:

All West Elecs., Inc. v. M-B-W, Inc. (1998) 64 CA4th 717, 725-727, 75 CR2d 509

Discussion:

See 24.13[5]

- ☐ Implied warranty of fitness exists if either:

- ☐ Contract is for sale of goods, and all of the following apply.

- ☐ Seller, at time of contracting, had reason to know:

- ☐ Any particular purpose for which goods were required; and

- ☐ That buyer was relying on seller's skill or judgment to select or furnish suitable goods.

Authority:

Com Code § 2315

Discussion:

See 24.13[3]

- ☐ Parties have not limited or excluded implied warranty of fitness.

Authority:

Com Code § 2316

Discussion:

See 24.15[3]

- ☐ Sale is not an "as is" sale.

Authority:

Com Code § 2316(3)

Discussion:

See 24.15[4]

- ☐ Contract is for sale of consumer goods, and sale is not an "as is" sale.

Authority:

CC §§ 1792.1, 1792.2

Discussion:

See 24.13[4]

- ☐ Vertical privity exists between plaintiff and defendant.

Authority:

All West Elecs., Inc. v. M-B-W, Inc. (1998) 64 CA4th 717, 725-727, 75 CR2d 509

Discussion:

See 24.13[5]

- ☐ Warranties of title exist for all sales of goods unless:

- ☐ Modified by express language or special circumstances; or
- ☐ Seller's compliance with buyer's specifications would cause breach of warranty of title.

Authority:

Com Code § 2312(1)

Discussion:

See 24.14

- ☐ Determine if any express or implied warranties are limited or disclaimed by contract.

- ☐ Express remedies can be limited by words or conduct.

☐ Warranty and limitations will be construed as consistent with one another if possible.

☐ Negation or limitation is inoperable to extent that such a construction is unreasonable.

☐ Commercial Code rules on parol evidence apply.

Authority:

Com Code § 2316

Discussion:

See 24.15

- ☐ Implied warranty of merchantability may be disclaimed if either of the following apply:

☐ Contract is for sale of goods, seller is merchant with respect to type of goods sold, and:

☐ Language specifically mentions merchantability and is conspicuous; or

Authority:

Com Code § 2316

Discussion:

See 24.15[2], [8]

☐ Sale is an "as is" sale.

Authority:

Com Code § 2316(3)

Discussion:

See 24.15[4]

☐ Contract is for sale of consumer goods, and sale is an "as is" sale.

Authority:

CC §§ 1792.3, 1792.5; see CC § 1791.3

Discussion:

See 24.16

☐ Implied warranty of fitness may be disclaimed if either of the following apply:

☐ Contract is for sale of goods, seller is merchant with respect to type of goods sold, and:

☐ Exclusion is in writing and conspicuous; or

Authority:

Com Code § 2316

Discussion:

See 24.15[3], [8]

☐ Sale is an "as is" sale.

Authority:

Com Code § 2316(3)

Discussion:

See 24.15[4]

- ☐ Contract is for sale of consumer goods, and sale is an "as is" sale.

Authority:

CC §§ 1792.3, 1792.5; see CC § 1791.3

Discussion:

See 24.16

- ☐ Determine if buyer's examination of goods before entering contract waived implied warranties as to defects that examination should have revealed.

Authority:

Com Code § 2316(3)(b)

Discussion:

See 24.15[5]

- ☐ Determine if implied warranties were excluded or modified by parties' course of dealing or usage of trade.

Authority:

Com Code § 2316(3)(c)

Discussion:

See 24.15[7]

- ☐ Determine if buyer was placed on fair notice and agreed to any disclaimer or modification of warranties.

Authority:

Com Code § 2316(3)

Discussion:

See 24.15[6]

- ☐ If contract contains multiple warranties, determine how they will be construed in relation to one another.

☐ If contract is for sale of consumer goods, express warranties may not limit implied warranties, except as to duration of time.

Authority:

CC § 1793

Discussion:

See 24.17[1]

☐ If contract is for sale of goods:

- ☐ Warranties will be construed as consistent and cumulative if possible.

Authority:

Com Code § 2317

Discussion:

See 24.17[1]

☐ If warranties cannot reasonably be construed consistently, parties' intentions determine which is dominant.

Authority:

Com Code § 2317

Discussion:

See 24.17[2]

☐ Determine if any evidence of conditions during contractual period may be used to show parties' intent.

Authority:

Com Code § 2317, UCC § 2-317, official cmt 2

Discussion:

See 24.17[3]



12 of 196 DOCUMENTS

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Chapter 24 Suing or Defending Action for Breach of Warranty
III. DETERMINING IF WARRANTY EXISTS

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24.11 Options and Strategy.

In order to determine whether or not a client can recover from another party for breach of warranty, it must first be determined whether or not any warranty in fact exists. Assuming that there is a written contract, the first step is to examine the contract itself to determine if the contract contains any express warranties. Often express warranties are clearly identified as such, but it is possible that contract language may operate to create such a warranty even if it is not clearly denominated as one. If the attorney is satisfied that the written contract itself does not create any language that might be construed to create a warranty, the next step is to consider whether other acts, representations, or conduct of the other party has operated to create an express warranty [see 24.12]. In the case of an oral contract, a similar determination must be made.

Whether or not the contract or the attendant activities create any express warranties, the attorney should next consider whether or not any warranties are implied by law. To do this, the attorney must determine what laws govern the transaction, examine the applicable statutes to determine what implied warranties, if any, those statutes provide, and then ascertain whether or not those warranties apply to the particular agreement of the parties [see 24.13, 24.14 -24.17].

Finally, the attorney must determine how any express warranties in the contract interact with any implied warranties imposed by law, and determine what, ultimately, is the warranty available to the client [see 24.15].

Consider:

In determining whether a warranty has been created, courts tend to implement a policy generally favoring protection for buyers, and thus resolving doubt in favor of creation of a warranty, unless there has been a clear disclaimer or waiver.



13 of 196 DOCUMENTS

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Chapter 24 Suing or Defending Action for Breach of Warranty
III. DETERMINING IF WARRANTY EXISTS

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24.12 Express Warranties Are Created by Contract and Seller's Actions.

24.12[1] Any Affirmation of Fact or Promise Creates Express Warranty. Under the Commercial Code, any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods will conform to the affirmation or promise [*Com Code* § 2313(1)(a)].

To be a basis of the bargain, a statement constituting an express warranty need be only one factor or consideration in inducing the buyer to enter the bargain [*Keith v. Buchanan* (1985) 173 CA3d 13, 23, 220 CR 392].

Distinguish--Consumer Warranties:

Under the Song-Beverly Act, an express warranty is a *written statement* arising out of the sale of a consumer good to a consumer, under which the seller *undertakes to preserve or maintain the utility or performance of the consumer good or provide compensation if there is a failure in utility or performance* [CC § 1791.2(a)]. Although this definition is somewhat more limited than the Commercial Code rule, it appears to prevail over the Commercial Code definition in actions to which the Song-Beverly Act applies [see CC § 1790.3]. However, there are statements in the case law that the Song-Beverly Act is intended to *broaden* the remedies set out in the Commercial Code, not restrict them [see *Mocek v. Alfa Leisure, Inc.* (2003) 114 CA4th 402, 407-408 (implied warranty case)]. Since the Song-Beverly Act definition of express warranty is more restrictive in some circumstances, an argument can be made that it should not be construed to preempt the Commercial Code provision [*but see Mocek v. Alfa Leisure, Inc.* (2003) 114 CA4th 402, 408 (rejecting argument that Commercial Code provision takes precedence over Song-Beverly under *Com Code* § 1104, which provides that no part of Commercial Code "shall be deemed to be impliedly repealed by subsequent legislation if such construction can reasonably be avoided," on grounds that two statutes in question simply dealt with different subjects)].

Example--No Warranty:

In an action for damages for delay resulting from defendants' failure to deliver a purchased truck scale on the agreed date, only breach of the contract provision for delivery by a certain date was actionable, and theories of warranty were inapplicable because the delivery date was not a basis for entering into the contract [*A.A. Baxter Corp. v. Colt Indus., Inc.* (1970) 10 CA3d 144, 153, 88 CR 842].

Jury Instructions:

Express Warranty Defined, see *California Forms of Jury Instruction, Ch. 3H, Instr. MB 300H.145* (Matthew Bender).

► Cross References:

Discussion of express warranties, see *California Forms of Pleading and Practice, § 502.23* (Matthew Bender).

Discussion of express warranties under the Song-Beverly Act, see *California Forms of Pleading and Practice, §§ 502.42 -502.50* (Matthew Bender).

Discussion of written warranties under the Magnuson-Moss Act, see *California Forms of Pleading and Practice, § 502.62* (Matthew Bender).

24.12[2] Use of Formal Words Is Not Necessary to Create Express Warranty. Although an express warranty can be (and generally is) created by the use of formal words like "warranty" or "guarantee" [see *CC § 1791.2(b)*], use of those words is not necessary to create an express warranty [*CC § 1791.2(b)*; *Com Code § 2313(2)*; *Keith v. Buchanan* (1985) 173 CA3d 13, 19, 220 CR 392].

24.12[3] Specific Intent to Create Express Warranty Is Not Necessary. It is not necessary that the seller have a specific intention to create an express warranty under the Commercial Code [*Com Code § 2313(2)*]. No specific intention to make a warranty is necessary if seller's affirmation of fact, description or sample is made part of the basis of the bargain [*Com Code § 2313(1)*].

24.12[4] Creation of Express Warranty Is Not Limited to Contract Language.

24.12[4][a] Any Affirmation of Fact or Promise Will Suffice. The creation of an express warranty is not limited to the language of the written contract [see *Com Code § 2313(1)* ("any affirmation" will suffice)]. Outside sources such as the seller's literature, statements of fact by seller's agents, and anything else that forms a basis for the bargain between buyer and seller can create an express warranty by making an affirmation of fact [see *Com Code § 2313(1)*].

Distinguish--Consumer Warranties:

The Song-Beverly Act definition of "express warranty" is more limited. It requires that the statement be written, and that there be an undertaking to preserve or maintain the utility or performance of the consumer good, or provide compensation if there is a failure in utility [*CC § 1791.2(a)(1)*].

24.12[4][b] Description of Goods May Create Express Warranty. Any description of the goods that is made part of the basis of the bargain creates an express warranty that the goods will conform to the description [*Com Code § 2313(1)(a)*].

Examples:

- Failure of the content of seed bags to conform to the description of the percentage of seed variety on the label was a breach of an express warranty [*Nunes Turfgrass, Inc. v. Vaughan-Jacklin Seed Co.* (1988) 200 CA3d 1518, 1532, 246 CR 823].

- Defendant made no oral or written representations that tubing was fit for a particular surgical procedure, although it stated that the tubing was useful for moving fluids into and from body cavities, and the surgeon inferred from that the tubing was suitable for a particular operation. The court held that

questions of fact existed regarding whether defendant made an express warranty, and whether defendant breached the warranty; that is, whether the tubing was reasonably fit for the purpose intended [*Putensen v. Clay Adams, Inc.* (1970) 12 CA3d 1062, 1079-1080, 91 CR 319].



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Sample Search: For information on breach of express warranty under the UCC, try:

breach! /5 express! /3 warrant! /10 commercial code OR u.c.c. OR ucc.

24.12[4][c] Technical Specifications May Create Express Warranty. Technical specifications, blueprints, and the like can provide a more exact description than mere language. If these descriptions are made part of the basis of the bargain, the goods must conform to them [*Com Code* § 2313, *UCC* § 2-313, *official cmt* 5].

24.12[4][d] Sample or Model May Create Express Warranty. Under both the Commercial Code and the Song-Beverly Act, any sample or model that is made part of the basis of the bargain creates an express warranty that the whole of the goods will conform to the sample or model [*CC* § 1791.2(a)(2); *Com Code* § 2313(1)(c)]. For purposes of the Commercial Code warranty provisions, if the sample has been drawn from an existing bulk supply, unless it is accompanied by a disclaimer, the sample must be regarded as describing values of the goods contracted for. However, if a model of the desired merchandise is shown to the buyer during negotiations, the presumption that the model is a literal description of the subject matter is not as strong. This is particularly true if the sample is modified at the request of the buyer, and the modification impairs any feature of the model [*Com Code* § 2313, *UCC* § 2-313, *official cmt* 6].

Example:

When a retailer of mobile homes stated that a mobile home contained the same one-quarter inch plywood sheathing as the model shown to the purchaser, the purchaser had a cause of action against the retailer for breach of express warranty under the UCC when there was delivery of a non-conforming mobile home [*see Town & Country Mobile Homes, Inc. v. Benfer* (1975) 527 SW2d 523, 525].



Cross References:

Discussion of creation of express warranty by sample or model, see *California Forms of Pleading and Practice*, § 502.23[3] (Matthew Bender).

Jury Instructions:

Express Warranty Defined, *California Forms of Jury Instruction*, Ch. 3H, *Instr.* MB 300H.145 (Matthew Bender).

24.12[4][e] Offer of Examination May Create Express Warranty. If an offer of examination by the seller is accompanied by words concerning the merchantability of specific attributes of the goods, and the buyer clearly indicates reliance on those words rather than on the examination, the words give rise to an express warranty under the Commercial Code. The question then is whether or not a warranty of merchantability has been expressly incorporated in the agreement [*Com Code* § 2316, *UCC* § 2-316, *official cmt* 8].



Cross References:

Discussion of factors indicating statement of opinion, see 24.12[5].

Discussion of implied warranty of merchantability, see 24.13[1], [2].

Jury Instructions:

Express Warranties Arising From a Course of Dealing or Usage of Trade, see *California Forms of Jury Instruction, Ch. 3H, Instr. MB 300H.147* (Matthew Bender).

24.12[4][f] Advertisements May Create Express Warranty. Product advertisements may create an express warranty under the Commercial Code [*Thomas v. Olin Mathieson Chem. Corp. (1967) 255 CA2d 806, 811, 63 CR 454*].

Example:

A trial court was not entitled to conclude, without a trial, that class action plaintiffs could not maintain a breach of warranty action against a manufacturer based on defective wheels, when manufacturer's nationwide advertisements extolled the excellence and reliability of its products and a plate attached to each truck referred to a user's manual which asserted that the wheels, if loaded within stated limits, were safe and adequate for loads in question [*Anthony v. General Motors Corp. (1973) 33 CA3d 699, 706-707, 109 CR 254*].

24.12[4][g] Course of Dealing May Create Express Warranty. Under the Commercial Code, an express warranty can be created by a prior course of dealing if the buyer has an expectation that goods will conform to the quality of prior shipments [see *Com Code § 2313(1)(a)*, UCC § 2-313, official cmt 5].

Past deliveries may set the description of quality, either expressly, impliedly, or by course of dealing. All descriptions by merchants must be read against applicable trade usages, with the general rules as to merchantability resolving any doubts [*Com Code § 2313, UCC § 2-313, official cmt 5*].



Warning:

Even if an agreement contains an express warranty, the parties can modify that warranty by course of dealing or trade practice [*Com Code § 2313, UCC § 2-313, official cmt 7*].

Jury Instructions:

Express Warranties Arising From a Course of Dealing or Usage of Trade, see *California Forms of Jury Instruction, Ch. 3H, Instr. MB 300H.147* (Matthew Bender).

24.12[5] Statements of Seller's Opinion or Commendation Do Not Create Express Warranty. An affirmation of the value of goods, or a statement purporting to be merely the seller's opinion or commendation of the goods, does not create an express warranty [*Com Code § 2313(2)*].

The determination of whether a particular statement is an expression of opinion or an affirmation of a fact forming the basis for an express warranty is dependent upon the facts and circumstances existing at the time the statement is made [*Keith v. Buchanan (1985) 173 CA3d 13, 21, 220 CR 392*]. Courts have noted several factors that indicate an opinion statement [*Keith v. Buchanan (1985) 173 CA3d 13, 21, 220 CR 392*]:

- A lack of specificity in the statement made.
- A statement that is made in an equivocal manner.
- A statement revealing that the goods are experimental in nature.

Example--Affirmation of Fact:

The court concluded that representations in the sales brochure describing a vessel as "a picture of

sure-footed seaworthiness" and "a carefully well-equipped and very seaworthy vessel" were affirmations of fact relating to the quality or condition of the boat [see *Keith v. Buchanan* (1985) 173 CA3d 13, 21, 220 CR 392].

Example--Expression of Opinion:

Merely depicting young people sitting or standing in the cargo bed of pickup trucks in an advertisement did not constitute an express warranty that riding in the back of the trucks was safe [see *Chambliss v. GMC* (9th Cir 1997) 108 F3d 1176].



Strategic Point:

Keith v. Buchanan (1985) 173 CA3d 13, 21, 220 CR 392 , noted above, demonstrates the advisability of arguing that statements that might appear to be mere "puffery" are actually factual affirmations. Contrary to the finding of the *Keith* court, many would probably conclude that the description of any ship as "sure-footed" is mere sales banter.

Distinguish:

Seller's statements during negotiation are presumptively considered to be affirmations of fact [see 24.12[6]].

Jury Instructions:

Statement of Fact Distinguished From Expression of Opinion, see *California Forms of Jury Instruction*, Ch. 3H, Instr. MB 300H.146 (Matthew Bender).

Cross References:

Supporting contention that seller is liable for breach of warranty, see California Points and Authorities, Ch. 206, Sales, Form 60 (Matthew Bender).

Discussion of "puffery" not forming express warranty under UCC, see *California Forms of Pleading and Practice*, § 502.23[4] (Matthew Bender).

Discussion of "puffery" not forming express warranty under Song-Beverly Act, see *California Forms of Pleading and Practice*, § 502.42[3] (Matthew Bender).

24.12[6] Seller's Statements During Negotiation Are Presumed to Be Affirmations of Fact. Statements made by a seller during the course of negotiation over a contract presumptively are affirmations of fact unless it can be demonstrated that the buyer could only have reasonably considered the statement to be the seller's opinion [*Keith v. Buchanan* (1985) 173 CA3d 13, 21, 220 CR 392]. Affirmations of fact by the seller about the goods, made during a bargain, are regarded as part of their description [*Com Code* § 2313, *UCC* § 2-313, *official cmt* 3], and thereby create an express warranty that the goods will conform to the description [*Com Code* § 2313(1)(b)].

Facts intended to remove the affirmations from the agreement require clear, affirmative proof. The issue normally is one of fact [*Com Code* § 2313, *UCC* § 2-313, *official cmt* 3].

Conversely, no particular reliance on the seller's statements during negotiation needs to be shown to integrate them into the agreement [*Com Code* § 2313, *UCC* § 2-313, *official cmt* 3].

24.12[7] Express Warranty Does Not Require Privity of Contract. Privity of contract is not required for an action based on express warranty [*Rodrigues v. Campbell Indus.* (1978) 87 CA3d 494, 500-501, 151 CR 90].

Example:

In an action for damages for personal injuries brought by a patient against a manufacturer of tubing used in a heart catheterization undergone by the patient, any express warranties as to the tubing made to the hospital or the physician who performed the procedure would inure to the benefit of the patient, even though the patient was not a buyer of the tubing, because the hospital and the physician were acting as agents of the patient in the use of the tubing upon her person in conjunction with the procedure [*Putensen v. Clay Adams, Inc.* (1970) 12 CA3d 1062, 1079, 91 CR 319].

Distinguish:

Vertical privity between the plaintiff and defendant is a requirement for actions based on the implied warranty of merchantability or the implied warranty of fitness [*All West Elecs., Inc. v. M-B-W, Inc.* (1998) 64 CA4th 717, 725-727, 75 CR2d 509].

**Cross References:**

Discussion of privity requirement for implied warranties, see 24.13[4].

Discussion of absence of privity requirement for express warranties, see *California Forms of Pleading and Practice*, § 502.23[5] (Matthew Bender).



14 of 196 DOCUMENTS

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Chapter 24 Suing or Defending Action for Breach of Warranty
III. DETERMINING IF WARRANTY EXISTS

2-24 MB Practice Guide: CA Contract Litigation 24.13

24.13 Implied Warranties May Be Imposed by Statute.

24.13[1] Implied Warranty of Merchantability Exists If Seller Is Merchant With Respect to Goods Sold.

Under the Commercial Code, an implied warranty that the goods are "merchantable" exists in a contract for the sale of goods if the seller is a merchant with respect to goods of that kind, unless the parties have excluded or modified the warranty [*Com Code* § 2314(1)]. A person is a "merchant" if the person deals in goods of that kind or otherwise by occupation holds himself or herself out as having knowledge or skill peculiar to the practices or goods involved, or to whom such knowledge or skill may be attributed by employment of an agent, broker, or other intermediary who by occupation holds himself or herself out as having such knowledge or skill [*Com Code* § 2104(1)].



Warning:

The parties can modify or exclude the implied warranty of merchantability by agreement [*see* 24.15[2]].

Distinguish:

Merchantability pertains to whether or not goods are fit for their ordinary purpose. This is distinct from fitness for a *particular* purpose. Thus, the purpose for which goods are intended distinguishes the warranties of fitness and merchantability [*see Com Code* § 2315, *UCC* § 2-315, *official cmt* 2].

Exception:

There is no implied warranty of merchantability in a finance lease [*Com Code* § 10212(a); *Arriaga v. CitiCapital Commercial Corp.* (2008) 167 CA4th 1527, 1542, 85 CR3d 143].



Cross Reference:

Discussion of standards of merchantability for goods for purposes of implied warranty, *see* 24.22.



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 Sample Search: For information on breach of implied warranty under the UCC, try:
breach! /5 impl! /3 warrant! /10 commercial code OR u.c.c. OR ucc.

24.13[2] Implied Warranty of Merchantability Exists for All Consumer Goods Sold at Retail. Under the Song-Beverly Act, every sale of consumer goods sold at retail in California is deemed to be accompanied by the manufacturer and retail seller's implied warranty that the goods are merchantable [CC § 1792]. The Song-Beverly Act definition of the warranty is almost identical to that used in the Commercial Code [see CC § 1791.1 (definition of "implied warranty of merchantability"); *compare Com Code § 2314(2)*]. The retail seller has a right of indemnity against the manufacturer for the amount of any liability under such a warranty [CC § 1792].

The duration of the implied warranty of fitness is coextensive with any express warranty accompanying the goods, provided the term is reasonable and has a duration of not less than 60 days nor more than one year. If there is no express warranty, the duration of the implied warranty is one year [CC § 1791.1(c)].

Implied warranties of merchantability under the Song-Beverly Act cannot be waived by the parties, except in the case of a sale of consumer goods on an "as is" or "with all faults" basis [CC § 1792.3], in which the sale must comply with the special provisions applicable to such sales [see CC § 1792.4].

24.13[3] Implied Warranty of Fitness Exists If Seller Knows Goods Are for Particular Purpose and That Buyer Is Relying on Seller's Skill and Judgment. Under the Commercial Code, if the seller at the time of contracting had reason to know any particular purpose for which the goods are required and that the buyer was relying on the seller's skill or judgment to select or furnish suitable goods, there is an implied warranty that the goods will be fit for that purpose [Com Code § 2315].



Warning:

The parties can modify or exclude the implied warranty of fitness by their agreement [see 24.15[2]].

Example:

In an action arising from the failure of steel tubing used in radiant heating systems installed in several homes, implied warranties of fitness and merchantability bound the sellers of the tubing. The contractors relied on the sellers' skill and judgment, and the tubing, bought by description from the sellers, was manufactured, among other purposes, for use in concrete slab radiant heating systems, and was not suitable for that purpose [*Eichler Homes, Inc. v. Anderson* (1970) 9 CA3d 224, 231, 87 CR 893].

Distinguish:

While goods are warranted to be fit for a particular purpose, merchantability pertains to fitness for an ordinary purpose. Thus, the purpose for which goods are intended distinguishes the warranties of fitness and merchantability [see Com Code § 2315, UCC § 2-315, official cmt 2].

Jury Instructions:

Implied Warranty of Fitness for Purpose Defined, see *California Forms of Jury Instruction, Ch. 3H, Instr. MB 300H.149* (Matthew Bender).

Seller's Knowledge of Buyer's Purpose, see *California Forms of Jury Instruction, Ch. 3H, Instr. MB 300H.150* (Matthew Bender).

Buyer's Reliance on Seller's Skill, see *California Forms of Jury Instruction, Ch. 3H, Instr. MB 300H.151* (Matthew Bender).

 Cross References:

Discussion of implied warranty of merchantability, see 24.13[1].

Discussion of implied warranty of fitness, see *California Forms of Pleading and Practice*, § 502.24[4] (Matthew Bender).

24.13[4] Implied Warranty of Fitness Exists for All Consumer Goods Sold at Retail for Particular Purpose.

Under the Song-Beverly Act, every sale of consumer goods sold at retail in California by a manufacturer, retailer, or distributor who has reason to know at the time of the sale that the goods are required for a particular purpose and that the buyer is relying on the manufacturer's, retailer's, or distributor's skill or judgment to select or furnish suitable goods, is deemed to be accompanied by the manufacturer's, retailer's, or distributor's implied warranty of fitness [CC §§ 1792.1 (manufacturers), 1792.2 (retailers and distributors); see CC § 1791.1(b) ("implied warranty of fitness" defined)]. Sales of assistive devices [see CC § 1791(p) (definition)] are deemed to be accompanied by the retail seller's implied warranty that the device is specially fit for the particular needs of the buyer [CC § 1792.2(b)].

The duration of the implied warranty of fitness is coextensive with any express warranty accompanying the goods, provided the term is reasonable and has a duration of not less than 60 days nor more than one year. If there is no express warranty, the duration of the implied warranty is one year [CC § 1791.1(c)].

Implied warranties of fitness under the Song-Beverly Act cannot be waived by the parties, except in the case of a sale of consumer goods on an "as is" or "with all faults" basis [CC § 1792.3], in which the sale must comply with the special provisions applicable to such sales [see CC § 1792.4].

Jury Instructions:

Implied Warranties of Fitness for Purpose Defined, see *California Forms of Jury Instruction*, Ch. 3H, Instr. MB 300H.149 (Matthew Bender).

Seller's Knowledge of Buyer's Purpose, see *California Forms of Jury Instruction*, Instr. MB 300H.150 (Matthew Bender).

Buyer's Reliance on Seller's Skill, see *California Forms of Jury Instruction*, Ch. 3H, Instr. MB 300H.151 (Matthew Bender).

 Cross References:

Discussion of implied warranty of fitness under Song-Beverly Act, see *California Forms of Pleading and Practice*, § 502.51[2] (Matthew Bender).

Discussion of implied warranties under the Magnuson-Moss Act, see *California Forms of Pleading and Practice*, § 502.64 (Matthew Bender).

24.13[5] Vertical Privity of Contract Is Required for Implied Warranties of Fitness and Merchantability.

Vertical privity between the plaintiff and defendant is a requirement for actions based on the implied warranty of merchantability or the implied warranty of fitness when only economic damages are claimed [*All West Elecs., Inc. v. M-B-W, Inc.* (1998) 64 CA4th 717, 725-727, 75 CR2d 509 ; see *Blanco v. Baxter Healthcare Corp.* (2008) 158 Cal. App. 4th 1039, 1059, 70 CR3d 566 (no privity of contract between patient and manufacturer of medical device)].

Distinguish:

- This is not true for actions involving personal injury, in which members of the buyer's family and the buyer's employees can sue for breach of the implied warranties of fitness and merchantability [*Hauter v. Zogarts* (1975) 14 C3d 104, 114 n8, 120 CR 681, 534 P2d 377 ; *Peterson v. Lamb Rubber Co.* (1960) 54 C2d 339, 347, 5 CR 863, 353 P2d 575].

- Privity is not required for an action based on express warranty [*Rodrigues v. Campbell Indus.* (1978) 87 CA3d 494, 500-501, 151 CR 90].

- Whether there is privity between the manufacturer and the lessee in a financing lease arrangement under which the manufacturer sold to finance lessor, which then leased to plaintiff, it is a question of fact to be determined from the totality of the circumstances, not just from the "paper transaction" [see *U.S. Roofing, Inc. v. Credit Alliance Corp.* (1991) 228 CA3d 1431, 1441-1442, 1445, 279 CR 533].

- When a manufacturer or supplier affirmatively engages in conduct directly with the purchaser that functionally places the party in the position of the direct seller, an implied warranty claim may be upheld despite an absence of privity [*Cardinal Health 301, Inc. v. Tyco Electronics Corp.* (2008) 169 CA4th 116, 134-137, 87 CR3d 5] .

Cross Reference:

Discussion of privity requirement for implied warranties, see *California Forms of Pleading and Practice*, § 502.24[7] (Matthew Bender).



15 of 196 DOCUMENTS

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Chapter 24 Suing or Defending Action for Breach of Warranty
III. DETERMINING IF WARRANTY EXISTS

2-24 MB Practice Guide: CA Contract Litigation 24.14

24.14 Contract for Sale of Goods Includes Warranties of Title.

24.14[1] Sale of Goods Includes Warranty of Good Title. A contract for sale of goods includes a warranty that the seller is conveying good title and the transfer is rightful [*Com Code* § 2312(1)(a)]. The warranty extends to a buyer whether or not the seller was in possession of the goods at the time the sale or contract to sell was made [*Com Code* § 2312, *UCC* § 2-312, *official cmt 1*].

Jury Instructions:

Terms of Warranty of Title, see *California Forms of Jury Instruction, Ch. 3H, Instr. MB 300H.141* (Matthew Bender).

➤ Cross Reference:

Discussion of warranty of title, see *California Forms of Pleading and Practice, § 502.24[4]* (Matthew Bender).

24.14[2] Sale of Goods Includes Warranty That Goods Are Free From Liens or Encumbrances. A contract for sale includes the warranty of title that the goods are free from any security interest or other lien or encumbrance of which the buyer at the time of contracting has no knowledge [*Com Code* § 2312(1)(b)].

Jury Instructions:

Terms of Warranty of Title, see *California Forms of Jury Instruction, Ch. 3H, Instr. MB 300H.141* (Matthew Bender).

24.14[3] Warranties May Be Modified Only by Express Language or Special Circumstances. A warranty of title can be excluded or modified only by specific language or by circumstances that give the buyer reason to know that the person selling does not claim title in himself or herself, or that the seller is purporting to sell only such right or title as the seller or a third person may have [*Com Code* § 2312(2)].

Jury Instructions:

Terms of Warranty of Title, see *California Forms of Jury Instruction, Ch. 3H, Instr. MB 300H.141* (Matthew Bender).

Exclusion or Modification of Warranty of Title, see *California Forms of Jury Instruction, Ch. 3H, Instr. MB 300H.141* (Matthew Bender).

24.14[4] Warranty Is Inapplicable If Seller's Compliance With Buyer's Specifications Causes "Breach." A buyer who furnishes specifications to the seller must hold the seller harmless against any breaches of warranty of title, and any resulting claims, which arise out of compliance with the buyer's specifications [*Com Code § 2312(3)*].

24.14[5] Warranty of Title Is Not Considered an "Implied" Warranty. The warranty of title has not been designated an "implied" warranty, and thus it is not subject to the restrictions applicable to implied warranties [*Com Code § 2312, UCC § 2-312, official cmt 6*], nor is it excluded in the manner described specifically for implied warranties [*Com Code § 2316*].



Warning:

Because it is neither an express nor an implied warranty, it is doubtful that a contract of sale that excludes "all warranties, express or implied" necessarily excludes the warranty of title as well [*Com Code § 2312, UCC § 2-312, official cmt 6; Com Code § 2316*].



Cross References:

Discussion of exclusion of implied warranties, see *24.15[2] -[6]*.

Discussion of negation of express warranties, see *24.15[1]*.

24.14[6] Warranties of Title Apply to Sales of Consumer Goods. The Song-Beverly Act does not contain any provision granting or denying any warranties of title. Therefore, it appears that the Commercial Code provisions governing warranty of title do not conflict with the Song-Beverly Act, and are not preempted by the latter statute [*see CC § 1790.3*].



16 of 196 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 24 Suing or Defending Action for Breach of Warranty
III. DETERMINING IF WARRANTY EXISTS

2-24 MB Practice Guide: CA Contract Litigation 24.15

24.15 Commercial Code Warranties May Be Disclaimed or Limited.

24.15[1] Words or Conduct Creating and Negating Express Warranties Will Be Construed As Consistent.

Since express warranties are, by definition, created by the words and conduct of the parties, and the parties, if they desire, may create no express warranties at all, the parties clearly are free to structure or limit any such warranties in whatever manner they desire. However, issues can arise when some words or conduct would create express warranties, while other words or conduct would negate them. In this situation, words or conduct relevant to the creation of a warranty and words or conduct tending to limit a warranty will be construed whenever reasonable as consistent with one another [*Com Code § 2316(1)*].

If they cannot reasonably be construed as consistent, negation or limitation is inoperable to the extent that such a construction is unreasonable [*Com Code § 2316(1)*]. Because a disclaimer or modification is inconsistent with an express warranty, words of disclaimer or modification give way to words of warranty unless some clear agreement between the parties dictates the contrary [*Hauter v. Zogarts (1975) 14 C3d 104, 119, 120 CR 681, 534 P2d 377*].

Consider:

The rules on construction of express warranties are subject to the Commercial Code rules on parol evidence [*Com Code § 2316(1)*]. Under these rules, parol evidence cannot be used to contradict the terms of a writing intended by the parties as a final expression of their agreement, but may be explained or supplemented by the course of dealing or usage of trade, or by evidence of consistent additional terms unless the court finds the writing to have been intended as a complete and exclusive statement of the terms of the agreement [*Com Code § 2202*].

Example:

The scope of an express warranty that a golfer training device was completely safe was held not to be limited by reference to a picture in an instruction manual showing the correct use of the device or the general understanding that golf is a dangerous game [*Hauter v. Zogarts (1975) 14 C3d 104, 118, 120, 120 CR 681, 534 P2d 377*].

Jury Instructions:

Disclaimer of Express Warranties, see *California Forms of Jury Instruction, Ch. 3H, Instr. MB 300H.157* (Matthew Bender).

 Cross Reference:

Use of parol evidence in Commercial Code contracts, see *Ch. 27, Contract for Sale of Goods--Attacking or Defending Existence of Contract Under California Commercial Code*, 27.14.

24.15[2] Implied Warranty of Merchantability May Be Disclaimed or Limited by Conspicuous Language. In order to exclude or modify the implied warranty of merchantability, the language must mention merchantability and, in the case of a writing, must be conspicuous [*Com Code* § 2316(2)].

Distinguish--Consumer Sales:

Note that the Song-Beverly Act does not permit waiver of the implied warranty of merchantability in sales of consumer goods, with the limited exception of "as is" sales [*CC* § 1792.3].

Jury Instructions:

Disclaimer of Implied Warranties, see *California Forms of Jury Instruction*, Ch. 3H, Instr. MB 300H.156 (Matthew Bender).

 Cross References:

Discussion of exclusion or modification of implied warranties, see *California Forms of Pleading and Practice*, § 502.24[8] -[10] (Matthew Bender).

No exclusion of implied warranty of fitness in sales of consumer goods under the Song-Beverly Act, see 24.16[1].

24.15[3] Implied Warranty of Fitness May Be Disclaimed by Conspicuous Language. The implied warranty of fitness may be excluded only by a writing, and the exclusion must be conspicuous. Language excluding all implied warranties of fitness is sufficient if it states "there are no warranties which extend beyond the description on the face hereof," or language of similar import [*Com Code* § 2316(2)].

Distinguish:

- Unlike the implied warranty of merchantability, implied warranties of fitness for a particular purpose may be excluded by general language, but only if it is in writing and conspicuous [see *Com Code* § 2316(2); *Com Code* § 2316, *UCC* § 2-316, *official cmt* 4].

- Note that the Song-Beverly Act does not permit waiver of the implied warranty of fitness in sales of consumer goods, with the limited exception of "as is" sales [*CC* § 1792.3].

Jury Instructions:

Disclaimer of Implied Warranties, see *California Forms of Jury Instruction*, Ch. 3H, Instr. MB 300H.156 (Matthew Bender).

 Cross References:

Discussion of exclusion or modification of implied warranties, see *California Forms of Pleading and Practice*, § 502.24[8] -[10] (Matthew Bender).

No exclusion of implied warranty of fitness in sales of consumer goods under the Song-Beverly Act, see 24.16[1].

24.15[4] "As Is" or Similar Language Is Sufficient to Disclaim All Implied Warranties. Unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like "as is," "with all faults," or other language that calls the buyer's attention to the exclusion of warranties and makes it plain that there is no implied warranty [*Com Code § 2316(3)(a)*].

Exception:

General language of exclusion such as "as is" does not operate to exclude the warranty of title [*see 24.14[3]*].

Distinguish:

The Song-Beverly Act also permits "as is" sales, but under different and specific criteria [*see CC §§ 1791.3, 1792.3-1792.5*].

 Cross Reference:

"As is" sales of consumer goods under the Song-Beverly Act, *see 24.16[3]*.

24.15[5] Examination of Sample or Model Defeats Implied Warranties. If the buyer, before entering into the contract, has examined the goods or the sample or model as fully as desired, or has refused to examine the goods, there is no implied warranty with regard to defects that an examination should have revealed [*Com Code § 2316(3)(b)*].

It is not sufficient that the goods are simply available for inspection. The seller must demand that the buyer examine them fully. The demand puts the buyer on notice that the seller is assuming the risk of defects that the examination ought to reveal [*Com Code § 2316, UCC § 2-316, official cmt 8*].

The buyer's skill and the normal method of examining goods in the circumstances determine what defects are excluded by the examination. Latent defects are not included. [*Com Code 2316, UCC 2-316, official cmt 8; Garlock Sealing Technologies, LLC v. NAK Sealing Technologies Corp. (2007) 148 CA4th 937, 950, 56 CR3d 177*]. A professional buyer will be held to have assumed the risk as to all defects that a professional in the field ought to observe, while a nonprofessional buyer will be held to have assumed the risk only for such defects as a layman might be expected to observe [*Com Code § 2316, UCC § 2-316, official cmt 8*].

Distinguish:

- If the seller's offer of examination is accompanied by words as to their merchantability or specific attributes, and the buyer indicates clearly that he or she is relying on those words rather than on his examination, they give rise to an express warranty. In such cases it is a question of fact whether a warranty of merchantability has been expressly incorporated in the agreement [*Com Code § 2316, UCC § 2-316, official cmt 8*].

- The buyer's inspection of the goods before purchase does not necessarily waive the express warranties for those goods [*see Keith v. Buchanan (1985) 173 CA3d 13, 21, 220 CR 392*]. However, a failure to inspect when it would have been reasonable to do so may prevent the buyer from asserting applicable warranties [*see Com Code § 2316, UCC § 2-316, official cmt 8*].

Example--Examination Did Not Defeat Implied Warranty of Merchantability When Latent Defect Existed.

The implied warranty of merchantability was not excluded under *Com Code § 2316(3)(b)* when the latent abrasive characteristic of oil seals was not a defect that was, or ought to have been, revealed to the buyer under the circumstances or prevailing testing methodologies [*Garlock Sealing Technologies, LLC v. NAK Sealing Technologies Corp. (2007) 148 CA4th 937, 950, 56 CR3d 177*].

24.15[6] Implied Warranties May Be Excluded or Modified by Trade Usage or Course of Dealing. An implied warranty also can be excluded or modified by course of dealing, course of performance, or usage of trade [*Com Code* § 2316(3)(c)].

24.15[7] Buyer Must Be Placed on Fair Notice of and Agree to Any Disclaimer or Modification. The purchaser must be placed on fair notice of any disclaimer or modification of a warranty and must freely agree to the seller's terms [*Hauter v. Zogarts* (1975) 14 C3d 104, 119-120, 120 CR 681, 534 P2d 377]. If a contract has been completed containing a warranty, a unilateral non-warranty cannot be given thereafter [*Hauter v. Zogarts* (1975) 14 C3d 104, 119-120, 120 CR 681, 534 P2d 377].

Example:

A disclaimer of consequential damages, not specifically bargained for and given to the buyer after signing the contract, was not binding [see *Dorman v. International Harvester Co.* (1975) 46 CA3d 11, 19-20, 120 CR 516].

24.15[8] "Conspicuous" Means Written So Reasonable Person Ought to Notice It. "Conspicuous" means that the language is so written, displayed, or presented that a reasonable person against whom it is to operate ought to have noticed it. Conspicuous terms include the following [*Com Code* § 1201(10)]:

- A heading in capitals equal to or greater in size than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same or lesser size.
- Language in the body of a record or display in larger type than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same size, or set off from surrounding text of the same size by symbols or other marks that call attention to the language.

A disclaimer should be in clear and distinct language prominently set forth in large, bold print, in such a position as to compel notice [*Dorman v. International Harvester Co.* (1975) 46 CA3d 11, 18-19, 120 CR 516].

Example:

A disclaimer provision was held unenforceable because it only slightly contrasted with the rest of the contract, failed to have a heading, was not accompanied by the express warranty provided by the seller, and emphasized words which implied that the excluded implied warranties might actually be available [*Dorman v. International Harvester Co.* (1975) 46 CA3d 11, 18-19, 120 CR 516].



17 of 196 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 24 Suing or Defending Action for Breach of Warranty
III. DETERMINING IF WARRANTY EXISTS

2-24 MB Practice Guide: CA Contract Litigation 24.16

24.16 Implied Warranties in Consumer Transactions Generally Cannot Be Disclaimed.

24.16[1] Song-Beverly Act Generally Prohibits Disclaimers. The Song-Beverly Act, unlike the Commercial Code, generally prohibits waiver of the implied warranties of merchantability and fitness in consumer transactions [CC § 1792.3].

Cross References:

Discussion of contracts subject to Song-Beverly Act, see 24.05.

Discussion of exclusion or modification of implied warranties under the Song-Beverly Act, see *California Forms of Pleading and Practice*, § 502.51[7] -[9] (Matthew Bender).

24.16[2] Express Warranties May Not Limit Implied Warranties. The Song-Beverly Act, like the Commercial Code, permits manufacturers, distributors, and sellers to make express warranties. However, unlike the Commercial Code, these express warranties cannot be used to limit, modify, or disclaim the implied warranties provided by the Act [CC § 1792.3].

Distinguish:

In contrast, the Commercial Code permits the parties to modify any express or implied warranty in accordance with the applicable standards for modification [see *Com Code* § 2316(2)].

Exception:

While the scope of the Song-Beverly Act implied warranties cannot be limited in scope, they can be restricted in duration. In the absence of any limitation, the implied warranties of merchantability and fitness have a duration of one year. However, if the contract contains an express warranty, that warranty may be limited in duration to as little as 60 days, providing the limitation period is reasonable. The limitation period in the express warranty operates to limit the implied warranties as well [CC § 1791.1(c)].

Cross Reference:

Modification of Commercial Code warranties, see 24.15.

24.16[3] Exception Exists for "As Is" Sales. An exception to the general rule of nondisclaimer of implied warranties in sales of consumer goods exists when the sale is on an "as is" or "with all faults" basis [CC §§ 1792.3, 1792.5; *see* CC § 1791.3]. For this exception to apply, strict compliance with the Song-Beverly Act provisions governing such sales is required [CC § 1792.3]. A conspicuous written notice must be attached to the goods prior to the sale [*see* CC § 1792.4(a) (content of notice)], or included in the description of goods in any mail order catalog if the goods are sold by mail [CC § 1792.4(b)].



Cross Reference:

"As is" sales under the Commercial Code, *see* 24.15[4].



18 of 196 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 24 Suing or Defending Action for Breach of Warranty
III. DETERMINING IF WARRANTY EXISTS

2-24 MB Practice Guide: CA Contract Litigation 24.17

24.17 Commercial Code Warranties Are Construed As Consistent With Each Other.

24.17[1] Warranties Are Construed As Consistent and Cumulative When Possible. When multiple warranties apply to a single Commercial Code transaction, they will be construed as consistent with each other, and as cumulative. This is true whether the warranties are express or implied [*Com Code § 2317*].

Distinguish--Consumer Contracts:

Because the implied warranties of merchantability and fitness ordinarily cannot be waived or limited in transactions involving the sale of consumer goods under the Song-Beverly Act, any express warranty in such a contract would be void to the extent it operated to limit, modify, or negate those implied warranties [*CC § 1793*]-regardless of the parties' actual intent.

24.17[2] If Multiple Warranties Contradict Each Other, Parties' Intention Determines Dominant Warranty.

If construction of warranties as consistent and cumulative would produce an unreasonable result, the parties' intention determines which warranty is dominant [*Com Code § 2317*; see 24.16[2]]. The following rules apply in making this determination [*Com Code § 2317(a)-(c)*]:

- Exact or technical specifications displace an inconsistent sample or model or general language of description.
- A sample from an existing bulk displaces inconsistent general language of description.
- Express warranties displace inconsistent implied warranties other than an implied warranty of fitness for a particular purpose.

Consider--Reconciling Implied Warranties of Merchantability and Fitness:

A contract often will contain implied warranties of both fitness and merchantability. When this is the case, the Commercial Code rules governing inconsistency control, and any question of fact as to which warranty was intended by the parties to apply must be resolved in favor of the implied warranty of fitness as against all other warranties, except when the buyer has furnished the technical specifications [*Com Code § 2315*, *UCC § 2-315*, *official cmt 2*].

 Cross References:

Discussion of rules for compatibility among warranties, see *California Forms of Pleading and Practice*, § 502.27 (Matthew Bender).

24.17[3] Rules of Construction for Determining Parties' Intent May Be Disproved by Evidence That Conditions Made Them Unreasonable. The rules of construction in *Com Code* § 2317 [see 24.16[1]] are not absolute and may be changed by evidence showing that the conditions which existed during the contractual period make those rules of construction inconsistent or unreasonable [*Com Code* § 2317, *UCC* § 2-317, *official cmt* 3].

**Strategic Point--Buyer:**

A seller who has led the buyer to believe that all warranties can be performed is estopped from setting up any essential inconsistency as a defense [*Com Code* § 2317, *UCC* § 2-317, *official cmt* 2].



19 of 196 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 24 Suing or Defending Action for Breach of Warranty
IV. DETERMINING IF WARRANTY HAS BEEN BREACHED

2-24 MB Practice Guide: CA Contract Litigation 24.18

24.18 CHECKLIST: Determining If Warranty Has Been Breached.

☐ Determine if performance complies with terms of all applicable warranties.

☐ If warranty is express, does performance (i.e., goods) conform to requirements stated in warranty?

Authority:

Com Code § 2314; Putensen v. Clay Adams, Inc. (1970) 12 CA3d 1062, 1079-1080, 91 CR 319

Discussion:

See 24.20

☐ If contract is for sale of consumer goods, has party asserting breach of warranty complied with Song-Beverly Act provisions relating to repair and replacement of consumer goods?

Authority:

CC §§ 1793.03-1795.7

Discussion:

See 24.20

☐ Has seller delivered merchantable goods?

Authority:

Com Code § 2314(2); CC § 1791.1(a)

Discussion:

See 24.22

- ☐ If warranty of fitness applies to transaction, has seller delivered goods fit for seller's particular use?

Authority:

Com Code § 2315; CC § 1791.1(b)

Discussion:

See 24.23

- ☐ Has seller delivered good title to goods, free of liens and encumbrances?

Authority:

Com Code § 2312(1)

Discussion:

See 24.24

- ☐ Was warranty in effect at time breach occurred?

Authority:

Com Code §§ 2725(1), (2); CC §§ 1791.1(d), 1795.5(c)

Discussion:

See 24.25



20 of 196 DOCUMENTS

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Chapter 24 Suing or Defending Action for Breach of Warranty

IV. DETERMINING IF WARRANTY HAS BEEN BREACHED

2-24 MB Practice Guide: CA Contract Litigation 24.19

24.19 Options and Strategy.

After the attorney has determined whether or not a warranty exists, the next step is to determine if the warranty has been breached. Breach is established by proving that the sale item's nonconformity to the warranty, express or implied, was the proximate cause of the plaintiff's alleged damages.



21 of 196 DOCUMENTS

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Chapter 24 Suing or Defending Action for Breach of Warranty
IV. DETERMINING IF WARRANTY HAS BEEN BREACHED

2-24 MB Practice Guide: CA Contract Litigation 24.20

24.20 Breach Occurs When Goods Do Not Conform to Warranty Terms.

In an action based on breach of warranty, it is necessary to show [*Com Code § 2314, UCC § 2-314, official cmt 13*]:

- The existence of the warranty.
- The fact that the warranty was broken.
- That the breach of the warranty was the proximate cause of the loss sustained.

An express or implied warranty is broken, i.e., breached, when the sale item does not conform to the promises made in the warranty [*see Putensen v. Clay Adams, Inc. (1970) 12 CA3d 1062, 1079-1080, 91 CR 319*].



Strategic Point--Seller:

An affirmative showing by the seller that the loss resulted from some action or event following the seller's own delivery of the goods can operate as a defense. Evidence indicating that the seller exercised care in the manufacture, processing or selection of the goods is relevant to the issue of whether the warranty was in fact broken. Action by the buyer following an examination of the goods which ought to have indicated the defect complained of can be shown as matter bearing on whether the breach itself was the cause of the injury [*Com Code § 2314, UCC § 2-314, official cmt 13*].

Distiguish--Express Warranties in Contracts for Consumer Goods:

The Song-Beverly Act contains extensive provisions dealing with the obligations of manufacturers, distributors, and retailers who make express warranties with respect to the repair and replacement of consumer goods [*see CC §§ 1793.03-1795.7*], including the well-known "lemon law" relating to repair and replacement of motor vehicles [*see CC § 1793.22*]. Detailed coverage of these requirements is beyond the scope of this publication, but attorneys should be aware that they affect the availability of judicial remedies arising out of breaches of express warranties.



22 of 196 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 24 Suing or Defending Action for Breach of Warranty
IV. DETERMINING IF WARRANTY HAS BEEN BREACHED

2-24 MB Practice Guide: CA Contract Litigation 24.21

24.21 Breach May Be Question of Law or Fact.

Whether the item conforms to the warranty terms can be either a question of fact or law [see *Putensen v. Clay Adams, Inc.* (1970) 12 CA3d 1062, 1079-1080, 91 CR 319].

Example:

A heart patient brought an action against a surgical tubing manufacturer and others, based on injuries incurred when the surgical tubing kinked during a heart operation. The court held that questions of fact existed regarding whether defendant made an express warranty, and whether defendant breached the warranty, that is, whether the tubing was reasonably fit for the purpose intended [see *Putensen v. Clay Adams, Inc.* (1970) 12 CA3d 1062, 1079-1080, 91 CR 319].



23 of 196 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 24 Suing or Defending Action for Breach of Warranty
IV. DETERMINING IF WARRANTY HAS BEEN BREACHED

2-24 MB Practice Guide: CA Contract Litigation 24.22

24.22 Compliance With Implied Warranty of Merchantability Is Determined With Reference to Statutory Criteria.

24.22[1] Commercial Code Specifies Attributes of Merchantable Goods. The Commercial Code specifies particular minimum attributes that determine whether goods are merchantable [*see Com Code § 2314(2)*]. Thus, whether or not the Commercial Code's implied warranty of merchantability has been breached must be determined by whether or not the goods satisfy these criteria. However, these criteria do not exhaust the meaning of "merchantable," nor do they negate any of its attributes arising by usage of trade or through case law [*Com Code § 2314, UCC § 2-314, official cmt 6*]. Thus, if appropriate, the parties can raise other attributes that may be relevant to the question of whether or not the goods are "merchantable."

To be merchantable, the goods, at a minimum, must [*Com Code § 2314(2)*]:

- Pass without objection in the trade under the contract description [*see 24.22[2]*].
- In the case of fungible goods, be of fair average quality within the description [*see 24.22[3]*].
- Be fit for the ordinary purposes for which such goods are used [*see 24.22[4]*].
- Run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved [*see 24.22[5]*].
- Be adequately contained, packaged, and labeled as the agreement may require [*see 24.22[6]*].
- Conform to any promises or affirmations of fact made on the container or label [*see 24.22[7]*].

Distinguish:

Merchantability pertains to whether goods are fit for their ordinary purpose. This is distinguished from fitness for a particular purpose. Thus, the purpose for which goods are intended distinguishes the warranties of fitness and merchantability [*see Com Code § 2315, UCC § 2-315, official cmt 2*].

Distinguish--Contracts for Consumer Goods:

If the contract is one for the sale of consumer goods governed by the Song-Beverly Act, the criteria for determining merchantable goods is essentially identical to the list above, except that the second requirement relating to quality of fungible goods, and the fourth requirement regarding evenness of kind and quality among units, are inapplicable when the Song-Beverly Act applies [see CC § 1791.1(a)].

Jury Instructions:

Implied Warranty of Merchantability Defined, see *California Forms of Jury Instruction, Ch. 3H, Instr. MB 300H.153* (Matthew Bender).

Definition of Merchant and Transactions Between Merchants, see *California Forms of Jury Instruction, Ch. 3H, Instr. MB 300H.06* (Matthew Bender).

Cross References:

Discussion of implied warranty of merchantability, see 24.13[2].

Discussion of implied warranty of merchantability, see *California Forms of Pleading and Practice, § 502.24[2]* (Matthew Bender).

Discussion of implied warranty of merchantability under Song-Beverly Act, see *California Forms of Pleading and Practice, § 502.51[1]* (Matthew Bender).

Discussion of California lemon law, see *California Forms of Pleading and Practice, § 91.10* (Matthew Bender).

24.22[2] Goods Must Pass Without Objection in Trade. In order to be merchantable, goods must "pass without objection in the trade under the description in the contract," meaning that the goods must be of a quality comparable to what is usually acceptable in the relevant trade [see *Com Code § 2314(2)(a)*].

Example--No Warranty:

A patron injured by a one-inch chicken bone in a chicken enchilada served by the restaurant could not bring an action for breach of the implied warranty of merchantability against the restaurant because a patron who eats a meat dish ought to anticipate the presence of bones which are naturally occurring substances in meat, and the patron can be expected to be on guard against such an occurrence [*Mexicali Rose v. Superior Court* (1992) 1 C4th 617, 633, 4 CR2d 145, 822 P2d 1292].

24.22[3] Fungible Goods Must Be Fair Average Quality. Merchantable fungible goods are implied to be of fair average quality within the contract description [*Com Code § 2314(2)(b)*].

"Fair average" means goods centering around the middle belt of quality, not the least or the worst that can be understood in the particular trade by the designation, but such as can pass "without objection." The term has particular relevance to agricultural products. A fair percentage of the least quality is permissible, but the goods are not "fair average" if they are all of the least or worst quality possible under the description [see *Com Code § 2314, UCC § 2-314, official cmt 7*].

Example:

Seller of walnut trees breached implied warranty of merchantability by selling trees that were infected with crown gall disease; although walnut trees are highly susceptible to the disease, the degree of the disease in the trees sold by the seller was much higher than that reasonably found in trees of this type [*Brittalia Ventures v. Stuke Nursery Co., Inc.* (2007) 153 CA4th 17, 27, 62 CR3d 467].

**Strategic Point:**

In cases of doubt as to what quality is intended, the price at which a merchant closes a contract is an excellent index of the nature and scope of the obligation [see *Com Code* § 2314, *UCC* § 2-314, *official cmt* 7].

Jury Instructions:

Definition of Merchant and Transactions Between Merchants, see *California Forms of Jury Instruction*, Ch. 3H, Instr. MB 300H.06 (Matthew Bender).

Implied Warranty of Merchantability Defined, see *California Forms of Jury Instruction*, Ch. 3H, Instr. MB 300H.153 (Matthew Bender).

24.22[4] Goods Must Be Fit for Ordinary Purposes. Merchantable goods are implied to be fit for the ordinary purposes for which those goods are used [*Com Code* § 2314(2)(c); see *Garlock Sealing Technologies, LLC v. NAK Sealing Technologies Corp.* (2007) 148 CA4th 937, 953-954, 56 CR3d 177]. This means that merchantable goods must be "honestly" resalable in the normal course of business [see *Com Code* § 2314, *UCC* § 2-314, *official cmt* 8].

Example:

A vehicle that smells, lurches, clanks, and emits smoke over an extended period of time is not fit for its intended purpose; it is not sufficient for the implied warranty of merchantability that a vehicle merely provides transportation from point A to point B [*Isip v. Mercedes-Benz USA, LLC* (2007) 155 CA4th 19, 27, 65 CR3d 695] .

Jury Instructions:

Definition of Merchant and Transactions Between Merchants, see *California Forms of Jury Instruction*, Ch. 3H, Instr. MB 300H.06 (Matthew Bender).

Implied Warranty of Merchantability Defined, see *California Forms of Jury Instruction*, Ch. 3H, Instr. MB 300H.153 (Matthew Bender).

24.22[5] Goods Must Be of Even Kind, Quality, and Quantity. Merchantable goods are implied to run, within the variations permitted by the agreement, of even kind, quality, and quantity within each unit and among all units involved [*Com Code* § 2314(2)(d)]. However, usage of trade may permit substantial variations both with and without an allowance or an obligation to replace the varying units [see *Com Code* § 2314, *UCC* § 2-314, *official cmt* 9].

Jury Instructions:

Definition of Merchant and Transactions Between Merchants, see *California Forms of Jury Instruction*, Ch. 3H, Instr. MB 300H.06 (Matthew Bender)

Implied Warranty of Merchantability Defined, see *California Forms of Jury Instruction*, Ch. 3H, Instr. MB 300H.153 (Matthew Bender).

24.22[6] Goods Must Be Adequately Contained, Packaged, and Labeled. Merchantable goods are implied to be adequately contained, packaged, and labeled as the agreement may require [*Com Code* § 2314(2)(e)]. This requirement applies only when the nature of the goods and of the transaction require a certain type of container, package or label [see *Com Code* § 2314, *UCC* § 2-314, *official cmt* 10].

Jury Instructions:

Definition of Merchant and Transactions Between Merchants, see *California Forms of Jury Instruction*, Ch. 3H, Instr. MB 300H.06 (Matthew Bender).

Implied Warranty of Merchantability Defined, see *California Forms of Jury Instruction, Ch. 3H, Instr. MB 300H.153* (Matthew Bender).

24.22[7] Goods Must Conform to Promises or Affirmations of Fact on Label. Merchantable goods are implied to conform to the promises or affirmations of fact made on the container or label, if any [*Com Code § 2314(2)(f)*].

Distinguish:

Unlike the requirement that the goods be packaged or labeled [*see 24.22[6]*], this requirement applies wherever there is a label or container on which representations are made, even if the original contract, either by express terms or usage of trade, may not have required either the labeling or the representation [*see Com Code § 2314, UCC § 2-314, official cmt 10*].

Jury Instructions:

Definition of Merchant and Transactions Between Merchants, see *California Forms of Jury Instruction, Ch. 3H, Instr. MB 300H.06* (Matthew Bender).

Implied Warranty of Merchantability Defined, see *California Forms of Jury Instruction, Ch. 3H, Instr. MB 300H.153* (Matthew Bender).



24 of 196 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 24 Suing or Defending Action for Breach of Warranty
IV. DETERMINING IF WARRANTY HAS BEEN BREACHED

2-24 MB Practice Guide: CA Contract Litigation 24.23

24.23 Breach of Warranty of Fitness Is Determined With Reference to Seller's Particular Use.

The Commercial Code warranty of fitness is determined with reference to whether or not the goods in question are suitable for the seller's particular use, as opposed to the more general requirements of the implied warranty of merchantability [*Com Code* § 2315]. A "particular purpose" differs from the ordinary purpose for which the goods are used in that it envisages a specific use by the buyer which is peculiar to the nature of the buyer's business, whereas the ordinary purposes for which goods are used are those envisaged in the concept of merchantability and go to uses which are customarily made of the goods in question [*Com Code* § 2315, *UCC* § 2-315, *official cmt 2*].

Example:

Shoes are generally used for the purpose of walking on ordinary ground, but a seller may know that a particular pair was selected to be used for climbing mountains [*Com Code* § 2315, *UCC* § 2-315, *official cmt 2*].

Distinguish--Contracts for Consumer Goods:

If the contract is one for the sale of consumer goods governed by the Song-Beverly Act, the criteria for determining whether the warranty of fitness has been breached is essentially identical to that used under the Commercial Code [*see CC* § 1791.1(b) (note that a special rule applies to manufacturers of assistive devices)].



25 of 196 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 24 Suing or Defending Action for Breach of Warranty
IV. DETERMINING IF WARRANTY HAS BEEN BREACHED

2-24 MB Practice Guide: CA Contract Litigation 24.24

24.24 Warranty of Title Is Breached by Seller's Failure to Deliver Clear Title to Goods.

The Commercial Code's warranty of title is breached if the seller fails to do either of the following [*see Com Code § 2312(1)*]:

- Convey good title to the goods, by a rightful transfer.
- Deliver the goods free from any security interest, lien, or encumbrance that the buyer did not know about at the time of entering into the contract. The buyer must have actual knowledge, as distinct from notice [*Com Code § 2312, UCC § 2-312, official cmt 1*].



26 of 196 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 24 Suing or Defending Action for Breach of Warranty
IV. DETERMINING IF WARRANTY HAS BEEN BREACHED

2-24 MB Practice Guide: CA Contract Litigation 24.25

24.25 Warranty Must Be in Effect At Time Breach Occurs.

24.25[1] Breach Normally Occurs When Tender of Delivery Is Made. The Commercial Code does not specify time period during which warranties will remain in effect. However, a breach of a Commercial Code warranty ordinarily is deemed to occur when tender of delivery is made, unless the warranty extends to future performance of the goods [*Com Code* § 2725(2)]. The cause of action accrues at that time, regardless of whether or not the aggrieved party knows of the breach. The plaintiff then must bring suit within the applicable statute of limitations, which can be from one to four years [*see Com Code* § 2725(1)].

Consider:

The accrual statutes effectively define the duration of the warranty by measuring any breach from the time of tender of performance (rather than discovery), thereby precluding claims that the goods were nonconforming after the fact, except with respect to warranties of future performance [*see* 24.25[2]]. Thus, a party cannot base a claim on the failure of goods to conform to the warranty at some point after delivery has occurred, since the breach by definition occurs on tender of delivery [*see Com Code* § 2725(2)]. Warranties affecting future performance, of course, are the major exception to this rule [*see Com Code* § 2725(2); *see also* 24.25[2]].

► Cross Reference:

Discussion of statute of limitations for breach of Commercial Code warranty, *see* 24.38.

24.25[2] Exception Exists for Warranties Relating to Future Performance. If a warranty relates to future performance of goods, a breach of warranty occurs when the time of that performance occurs and the breach is or should have been discovered [*Com Code* § 2725(2)]. Thus, as to warranties affecting future performance, the duration of the warranty is not defined with reference to the time of performance. The statute does not specify what the duration of a warranty of future performance is in the absence of any limitation in the warranty itself. However, the parties are permitted to limit the period by contract [*see Com Code* § 1302(b) (general powers of parties to vary Commercial Code provisions by agreement)], and express warranties guaranteeing future performance typically will limit the time during which future performance is guaranteed.

24.25[3] Implied Warranties in Consumer Contracts Are Subject to Special Rules.

24.25[3][a] Duration of Implied Warranties Is Determined With Reference to Express Warranties. If a contract for consumer goods contains an express warranty, the duration of the implied warranties of merchantability and fitness are coextensive with the period of the express warranty [CC §§ 1791.1(c), 1795.5(c)], provided that the terms of the implied warranties must be:

- For new goods, at least 60 days and a maximum of one year following sale to a retail buyer [CC § 1791.1(c); see *Atkinson v. Elk Corporation of Texas* (2006) 142 CA4th 212, 231, 48 CR3d 247] .
- For used goods, at least 30 days and a maximum of three months following sale to a retail buyer [CC § 1795.5(c)].

24.25[3][b] Duration of Implied Warranty Is Set by Statute in Absence of Express Warranty. If a contract for sale of consumer goods does not contain an express warranty that provides a specific duration, the implied warranties of fitness and merchantability in contracts have a one-year duration for new goods and a three-month duration for used goods [CC §§ 1791.1(c), 1795.5(c)].



Cross References:

Discussion of duration of warranties under Song-Beverly Act, see *California Forms of Pleading and Practice*, §§ 502.51[5], [6], 502.53[1][c] (Matthew Bender).



27 of 196 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 24 Suing or Defending Action for Breach of Warranty
V. DETERMINING REMEDIES FOR BREACH OF WARRANTY

2-24 MB Practice Guide: CA Contract Litigation 24.26

24.26 CHECKLIST: Determining Remedies for Breach of Warranty

☐ If buyer has accepted goods, determine measure of damages by taking difference between value of goods as warranted and value as accepted.

Authority:

Com Code § 2714(2)

Discussion:

See 24.28[1]

☐ Determine what incidental or consequential damages buyer may claim.

Authority:

Com Code §§ 2714(3), 2715

Discussion:

See 24.28[2]

☐ If buyer has rejected goods, determine whether to:

☐ "Cover" and seek damages for difference between contract price and cost of cover;

or

☐ Seek damages for repudiation.

Authority:

Com Code §§ 2711(1)(a), 2712, 2713

Discussion:

See 24.28[3]

- ☐ Determine if strict liability rules, which cover personal injury and harm to other property, have been violated.

Authority:

Greenman v. Yuba Power Prods., Inc. (1963) 59 C2d 57, 63, 27 CR 697, 377 P2d 897

Discussion:

See 24.28[5]

- ☐ Determine whether to seek equitable relief.

Authority:

Com Code § 2716

Discussion:

See 24.29

- ☐ Determine if remedies are limited by terms of contract.

Authority:

Com Code §§ 2316(3), 2718, 2719

Discussion:

See 24.31

- ☐ If plaintiff is consumer, determine what remedies to seek under Song-Beverly Act:

- ☐ Damages.
- ☐ Equitable relief.
- ☐ Cost of replacement or reimbursement of nonconforming goods.
- ☐ Civil penalties.
- ☐ Costs and attorney's fees

Authority:

CC § 1794

Discussion:

See 24.32



28 of 196 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 24 Suing or Defending Action for Breach of Warranty
V. DETERMINING REMEDIES FOR BREACH OF WARRANTY

2-24 MB Practice Guide: CA Contract Litigation 24.27

24.27 Options and Strategy.

After determining that grounds exist for alleging a breach of warranty, the attorney should determine what remedies are appropriate and, if damages are among them, the measure of damages that will apply in the transaction.



29 of 196 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 24 Suing or Defending Action for Breach of Warranty
V. DETERMINING REMEDIES FOR BREACH OF WARRANTY

2-24 MB Practice Guide: CA Contract Litigation 24.28

24.28 General Measure of Damages Is Difference Between Value of Goods Accepted and Value of Goods Complying With Warranty.

24.28[1] Value Is Measured at Time and Place of Acceptance. The measure of damages for breach of warranty is the difference, at the time and place of acceptance, between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount [Com Code § 2714(2); see 24.28[5], 24.30 for discussions of damages for injuries]. The value of the goods had they been as warranted may or may not be the contract price, and the cost of repairing defective goods may be accepted as the measure of damages [see *City of New York v. Pullman, Inc.* (2d Cir 1981) 662 F2d 910, 918 ; *Cardinal Health 301, Inc. v. Tyco Electronics Corp.* (2008) 169 CA4th 116, 150-153, 87 CR3d 5 (in an action by plaintiff healthcare products company against a parts manufacturer for supplying defective parts, the cost of replacing the part in all machines that had a one percent failure rate was a proper damage measure, but the evidence did not support an award of future damages because there was no evidence as to the percentage of parts that were likely to fail during the useful life of the product)].

Examples:

- A computer system, had it been as warranted, was worth over four times the contract price [see *Chatlos Sys., Inc. v. National Cash Register Corp.* (3d Cir 1982) 670 F2d 1304, 1305-1306].
- The value of a computer system, if it had been as warranted, was the contract price [see *Schatz Distrib. Co. Inc. v. Olivetti Corp. of Am.* (Kan 1982) 7 KA2d 676, 681, 647 P2d 820].

Consider:

- Remedies available to the buyer after revocation of acceptance and rejection of goods are based on an action for breach of contract, not breach of warranty. Therefore, recovery of costs for "covering," for example, technically are not available for a breach of warranty action--although a breach of warranty

does provide grounds for a breach of contract action and associated remedies.

- Despite the absence of an express provision precluding the recovery of losses that the buyer could have prevented, a buyer's general obligation to mitigate damages may apply [*Com Code § 2714, UCC § 2-714, official cmt 2*].

Jury Instructions:

Buyer's Damages for Accepted Goods and for Breach of Warranty, see *California Forms of Jury Instruction, Ch. 3H, Instr. MB 300H.258* (Matthew Bender).

Cross References:

Discussion of damages in contract actions, see Ch. 7, Seeking or Opposing Damages in Contract Actions.

Discussion of remedies under the UCC, see Ch. 26, Contract for Sale of Goods--Seeking Remedies Under California Commercial Code.

Discussion of damages in warranty actions, see *California Forms of Pleading and Practice, § 502.28[2]* (Matthew Bender).

Discussion of damages and other special remedies under Song-Beverly Act warranty actions, see *California Forms of Pleading and Practice, § 502.53[1] -[3]* (Matthew Bender).

24.28[2] Buyer May Recover Incidental and Consequential Damages. Incidental and consequential damages may also be recovered in a proper case [*Com Code § 2714(3)*]. Incidental damages include expenses reasonably incurred in inspection, receipt, transportation and care and custody of goods rightfully rejected, any commercially reasonable charges, expenses or commissions in connection with effecting cover, and any other reasonable expense incident to the delay or other breach [*Com Code § 2715(1)*]. Consequential damages include [*Com Code § 2715(2)*]:

- Any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise.
- Injury to person or property proximately resulting from any breach of warranty.

The above requirement that the seller "had reason to know" of the buyer's needs is an objective rather than a subjective standard. Actual knowledge by the seller of the buyer's requirements is not required. The only requirement is that the seller reasonably should have been expected to know of the buyer's exposure to loss [*Garlock Sealing Technologies, LLC v. NAK Sealing Technologies Corp. (2007) 148 CA4th 937, 957, 56 CR3d 177*] .

24.28[3] Buyer Who Rejects Goods May Cover and Recover Damages. A buyer who rightfully rejects the goods may cancel the contract, recover any part of the price already paid, and may also either [*Com Code § 2711(1)*]:

- "Cover" (obtain substitute goods) and recover damages for the difference between the cost of cover and the contract price [*Com Code § 2712(2)*]; or
- Obtain damages for nondelivery or repudiation, consisting of the difference between the contract price and the market price at the time when the buyer learned of the breach [*see Com Code § 2713(1)*].

Cross References:

Remedies of buyer on rightful rejection of goods, see Ch. 26, Contract for Sale of Goods--Seeking

Remedies Under California Commercial Code, 26.23 -26.25.

Discussion of measure of damages for rejected goods under the Commercial Code, see *Ch. 26, Contract for Sale of Goods--Seeking Remedies Under California Commercial Code, 26.17 et seq.*

24.28[4] If Nonconformity Would Have Justified Revocation, Time and Place of Acceptance Is Determined As of Buyer's Decision Not to Revoke. If the nonconformity of the goods would have justified revocation of acceptance, the time and place of acceptance is determined as the buyer's decision not to revoke [*Com Code § 2714, UCC § 2-714, official cmt 3*].

Jury Instructions:

Buyer's Damages for Accepted Goods and for Breach of Warranty, see *California Forms of Jury Instruction, Ch. 3H, Instr. MB 300H.258* (Matthew Bender).

24.28[5] Strict Liability Governs Personal and Property Damage. Consequential damages resulting from the seller's breach include injury to person or property proximately resulting from any breach of warranty [*Com Code § 2715(2)(b)*]. However, with the introduction of the doctrine of strict liability in tort for injuries resulting from defective products, warranty law was relegated to governing the consensual economic relationship between the parties, while strict liability governs both personal injury and physical injury to property based on duties imposed by law [*Greenman v. Yuba Power Prods., Inc. (1963) 59 C2d 57, 63, 27 CR 697, 377 P2d 897*; see *Seely v. White Motor Co. (1965) 63 C2d 9, 15-16, 18-19, 45 CR 17, 403 P2d 145*].

Jury Instructions:

Buyer's Consequential Damages, see *California Forms of Jury Instruction, Ch. 3H, Instr. MB 300H.255* (Matthew Bender).

 Cross Reference:

Discussion of damages for personal injury and property damage, see *California Forms of Pleading and Practice, § 502.28[3]*; see generally *California Forms of Pleading and Practice, Ch. 460, Products Liability* (Matthew Bender).

Tort damages for breach of warranty, see *California Torts, Ch. 50, Damages, Costs, Attorneys' Fees, and Interest*.



30 of 196 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 24 Suing or Defending Action for Breach of Warranty
V. DETERMINING REMEDIES FOR BREACH OF WARRANTY

2-24 MB Practice Guide: CA Contract Litigation 24.29

24.29 Equitable Remedies Are Available.

Specific performance or replevin are available in appropriate cases [*see Com Code § 2716*].



Cross Reference:

Equitable remedies in actions under Commercial Code, see Ch. 26, Contract for Sale of Goods--Seeking Remedies Under California Commercial Code.



31 of 196 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 24 Suing or Defending Action for Breach of Warranty
V. DETERMINING REMEDIES FOR BREACH OF WARRANTY

2-24 MB Practice Guide: CA Contract Litigation 24.30

24.30 Seller Liable for Injury If Buyer Reasonably Used Goods Without Inspection.

If injury to person or property follows the use of goods without discovery of the defect causing the damage, liability arises only if it was reasonable for the buyer to use the goods without an inspection which would have revealed the defects [*Com Code § 2715, UCC § 2-715, official cmt 5* (no proximate cause if it was unreasonable for buyer to use goods without inspection)].



32 of 196 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 24 Suing or Defending Action for Breach of Warranty
V. DETERMINING REMEDIES FOR BREACH OF WARRANTY

2-24 MB Practice Guide: CA Contract Litigation 24.31

24.31 Contract May Limit Remedies for Breach of Warranty.

Remedies for breach of warranty can be limited in accordance with the provisions on liquidation or limitation of damages, and on contractual modification of remedy [*see Com Code §§ 2316(3), 2718, 2719*].

 Cross References:

Discussion of damages in contract actions, see Ch. 7, Seeking or Opposing Damages in Contract Actions.

Discussion of contractual limitation of damages under the UCC, see *California Forms of Pleading and Practice*, § 500.72 (*Matthew Bender*).



33 of 196 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 24 Suing or Defending Action for Breach of Warranty
V. DETERMINING REMEDIES FOR BREACH OF WARRANTY

2-24 MB Practice Guide: CA Contract Litigation 24.32

24.32 Special Remedies Provisions Apply to Warranty Actions Involving Consumer Goods.

24.32[1] Consumer May Seek Damages and Equitable Relief. A buyer of consumer goods who is damaged by a failure to comply with any obligation under the Song-Beverly Act under an implied or express warranty or service contract may bring an action for damages and legal and equitable relief.

If the buyer has rightfully rejected or justifiably revoked acceptance of the goods, he or she can "cover" (obtain substitute goods) and recover damages for repudiation under the Commercial Code [CC § 1794(b)(1); *see Com Code* §§ 2711, 2712, 2713]. If the buyer has accepted the goods, the Commercial Code measure of damages applies, and the measure of damages includes the cost of repairs necessary to make the goods conform [CC § 1794(b)(2); *see Com Code* §§ 2714, 2715].

➡ **Cross References:**

Measure of damages for accepted goods under the Commercial Code, *see* 24.28[1].

Measure of damages for rejected goods under the Commercial Code, *see* 24.28[3].

24.32[2] Measure of Damages Includes Replacement or Reimbursement. The measure of the buyer's damages in an action under the Song-Beverly Act include the rights of replacement or reimbursement [CC § 1794(b); *see CC* § 1793.2(d)].

24.32[3] Consumer May Recover Additional Civil Penalties in Specified Cases. If the buyer establishes that the seller's failure to comply with an express warranty was willful, the judgment may include a civil penalty of up to twice the actual damages, in addition to damages otherwise recovered. This penalty is not available if the claim is based solely on a breach of an implied warranty [CC § 1794(c)].

A similar penalty exists for violation of the "lemon law" requirements relating to the repair or replacement of motor vehicles [CC § 1794(e)(1); *see CC* § 1793.2(d)(2); *but see CC* § 1794(e)(2) (inapplicability if manufacturer maintains qualified third-party resolution process)], provided the buyer gives the manufacturer written notice requesting that the manufacturer comply with those requirements and the manufacturer does not comply within 30 days thereafter [CC §§ 1794, (4)]. No showing of willfulness is required in this case [*see CC* § 1794(e)]. This penalty is available only if the vehicle was purchased in California [*Cummins, Inc. v. Superior Court* (2005) 36 C4th 478, 483, 115 P3d 98].

24.32[4] Consumer May Recover Attorney's Fees. A prevailing buyer in an action under the Song-Beverly Act is entitled to recover his or her aggregate amount of costs and expenses, including attorney's fees based on actual time expended, determined by the court to have been reasonably incurred by the buyer in connection with the commencement and prosecution of the action [*CC § 1794(d)*].



Cross Reference:

Recovery of attorney's fees in contract actions, see Ch. 12, Recovering Attorney's Fees and Costs in Contract Litigation.



34 of 196 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 24 Suing or Defending Action for Breach of Warranty
VI. ASSERTING CLAIM FOR BREACH OF EXPRESS OR IMPLIED WARRANTY

2-24 MB Practice Guide: CA Contract Litigation 24.33

24.33 CHECKLIST: Asserting Claim for Breach of Express or Implied Warranty.

☐ Determine if buyer has met Commercial Code requirement that seller be notified of breach within a reasonable time.

Authority:

Com Code § 2607(3)

Discussion:

See 24.35

☐ If action is being brought under Commercial Code, allege all essential elements for Commercial Code breach of warranty in complaint:

Authority:

Com Code §§ 2204, 2313, 2314, 2315, 2607, 2714

Discussion:

See 24.36

☐ Sale of goods to which warranty relates.

☐ For an express warranty, allege:

☐ Allegation that contract contained warranty language.

☐ Seller's affirmation of fact or promise that became part of bargain.

☐ For a breach of implied warranty of merchantability, allege:

- ☐ That seller is a merchant with respect to goods of the kind at issue.
- ☐ That implied warranty of merchantability existed with respect to goods.
- ☐ For breach of implied warranty of fitness, allege:
 - ☐ That seller, at time of sale, had reason to know of particular purpose for which buyer required goods.
 - ☐ That buyer was relying on seller's skill and judgment to furnish suitable goods.
 - ☐ That implied warranty of fitness therefore existed with respect to the goods.
- ☐ That goods did not meet specifications of warranty.
- ☐ That plaintiff notified defendant of the nonconformity, and defendant was unwilling and/or unable to correct it.
- ☐ Plaintiff's damages from the breach of warranty.
- ☐ Plaintiff's incidental and consequential damages.
- ☐ If action is being brought on behalf of a consumer, allege all essential elements for breach of warranty under Song-Beverly Act in complaint.

Authority:

CC §§ 1791.1, 1791.2, 1792, 1792.1, 1792.2, 1794, 1795.5

Discussion:

See 24.37

- ☐ That plaintiff was a buyer of consumer goods.
- ☐ That defendant is engaged in business of manufacturing, distributing, or selling consumer goods at retail.
- ☐ Sale of goods to which warranty relates.
- ☐ For an express warranty:

- ☐ That manufacturer, dealer, or distributor provided written statement undertaking to preserve or maintain utility or performance of consumer good or provide compensation if there was a failure of utility or performance; or
- ☐ That plaintiff relied on a sample of model.
- ☐ For implied warranty of merchantability, fact that warranty existed with respect to the goods.
- ☐ For implied warranty of fitness:
 - ☐ That manufacturer, distributor, and/or dealer had reason to know at time of sale that:
 - ☐ Goods were required for a particular purpose, and
 - ☐ Buyer was relying on seller's skill and judgment to furnish suitable goods.
 - ☐ That implied warranty of fitness therefore existed with respect to goods.
- ☐ Plaintiff's compliance with terms of any express warranty, including, as applicable:
 - ☐ Notice to defendant of any breach.
 - ☐ Compliance with warranty provisions relating to service and repair of goods.
- ☐ Ineffectiveness of any repair attempts to correct problems.
- ☐ Plaintiff's damages.
- ☐ Any other relief requested by plaintiff.
- ☐ Determine if action is brought within four-year statute of limitations, or any shorter period specified in contract.

Authority:

Com Code § 2725(1); Krieger v. Nick Alexander Imps., Inc. (1991) 234 CA3d 205, 215

Discussion:

See 24.38[3]



35 of 196 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 24 Suing or Defending Action for Breach of Warranty

VI. ASSERTING CLAIM FOR BREACH OF EXPRESS OR IMPLIED WARRANTY

2-24 MB Practice Guide: CA Contract Litigation 24.34

24.34 Options and Strategy.

The focus of most warranty disputes is whether the seller's words or actions actually created a warranty, whether the goods conformed to the warranty, and whether the warranty was effectively modified or negated. However, in asserting a claim for breach of warranty, proof of notice and proof of the existence of the warranty as described by the plaintiff can be equally important. The Commercial Code provides detailed notice requirements that the buyer must adhere to before bringing suit, primarily so the seller is given an opportunity to remedy the breach.

► Cross Reference:

Discussion of buyer's additional duties in complying with a consumer warranty under the Song-Beverly and Magnuson-Moss Acts, see *California Forms of Pleading and Practice*, §§ 502.53[4], 502.62[5][c] (*Matthew Bender*).



36 of 196 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 24 Suing or Defending Action for Breach of Warranty
VI. ASSERTING CLAIM FOR BREACH OF EXPRESS OR IMPLIED WARRANTY

2-24 MB Practice Guide: CA Contract Litigation 24.35

24.35 Commercial Code Requires That Buyer Must First Give Seller Timely Notice of Breach.

24.35[1] Notice Must Be Given Within Reasonable Time After Discovery of Breach. If the buyer has accepted tender of the goods, the buyer must notify the seller of the breach within a reasonable time after he or she discovers or should have discovered it, or be barred from any remedy [*Com Code § 2607(3)(a)*; *Cardinal Health 301, Inc. v. Tyco Electronics Corp.* (2008) 169 CA4th 116, 135-137, 87 CR3d 5] .



Warning:

If the breach was not discovered on a timely basis, the time for giving notice begins running when the breach should have been discovered [*Com Code § 2607(3)(a)*].

Jury Instructions:

Notice of Breach of Warranty, see *California Forms of Jury Instruction, Ch. 3H, Instr. MB 300H.155* (Matthew Bender).



Cross Reference:

Discussion of notice requirement, see *California Forms of Pleading and Practice, § 502.28[4]* (Matthew Bender).

24.35[2] Time of Notification Is Determined by Applying Commercial Standards. The time of notification is to be determined by applying commercial standards to a merchant buyer [*see Com Code § 2607, UCC § 2-607, official cmt 4*; *see Britalia Ventures v. Stuke Nursery Co., Inc.* (2007) 153 CA4th 17, 28, 62 CR3d 467 (buyer of walnut trees gave adequate notice to seller by several times bringing problem to the attention of the seller, who refused to discuss the problem)]. The question of what constitutes a reasonable time under *Com Code § 2607(3)(a)* for giving notice usually is a question of fact for the jury [*Los Angeles Nut House v. Holiday Hardware Corp.* (9th Cir 1987) 825 F2d 1351, 1354].

Distinguish:

A reasonable time for notification from a retail consumer is to be judged by different standards than those used for a merchant buyer, and may be extended [*see Com Code § 2607, UCC § 2-607, official cmt 4*].

Jury Instructions:

Notice of Breach of Warranty, see *California Forms of Jury Instruction, Ch. 3H, Instr. MB 300H.155* (Matthew Bender).

Definition of Merchant and Transactions Between Merchants, see *California Forms of Jury Instruction, Ch. 3H, Instr. MB 300H.06* (Matthew Bender).

24.35[3] Content of Notification Must Be Sufficient to Let Seller Know That Buyer Claims Breach. The notice merely needs to let the seller know that the transaction is claimed to involve a breach. It does not need to contain a clear statement of all the objections that will be relied on by the buyer, and it need not be a claim for damages, nor to threaten litigation or other resort to remedy [*Com Code § 2607, UCC § 2-607, official cmt 4*].

Jury Instructions:

Notice of Breach of Warranty, see *California Forms of Jury Instruction, Ch. 3H, Instr. MB 300H.155* (Matthew Bender).



37 of 196 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 24 Suing or Defending Action for Breach of Warranty
VI. ASSERTING CLAIM FOR BREACH OF EXPRESS OR IMPLIED WARRANTY

2-24 MB Practice Guide: CA Contract Litigation 24.36

24.36 Complaint Under Commercial Code Must Plead Essential Elements of Breach of Warranty.

24.36[1] Plaintiff Must Prove Elements of Warranty. In an action based on breach of warranty under the Commercial Code, it is necessary to show not only the existence of the warranty, but also the fact that the warranty was broken and that the breach of the warranty was the proximate cause of the loss sustained [*Com Code § 2314, UCC § 2-314, official cmt 13*]. The burden is on the buyer to show any breach [*Com Code § 2607(4)*].

24.36[2] Complaint for Breach of Warranty Must Allege Essential Elements of Claim. In general, a complaint for breach of an express or implied warranty under the Commercial Code should allege the following elements:

- The sale of goods to which the warranty relates [*Com Code § 2204*].
- For an express warranty, the seller's affirmation of fact or promise that became a part of the basis of the bargain [*Com Code § 2313*], such as:
 - ☐ Allegation that contract contained warranty language.
 - ☐ Allegation that a specified description of the goods in or outside the written contract, such as a product manual, inventory list, package, or advertisement, was relied on by the buyer and became part of the basis of the bargain.
 - ☐ Allegation that buyer relied on a sample or model.
- For the implied warranty of merchantability [*Com Code § 2314(1)*]:
 - ☐ That the seller is a merchant with respect to goods of the kind at issue in the contract; and
 - ☐ That the implied warranty of merchantability therefore existed with respect to the

goods.

- For the implied warranty of fitness [*Com Code* § 2315]:

☐ That the seller, at the time of selling, had reason to know of the particular purpose for which the buyer required the goods;

☐ That the buyer was relying on the seller's skill and judgment to furnish suitable goods; and

☐ That the implied warranty of fitness therefore existed with respect to the goods.

- That the goods did not conform to the requirements of the warranty, and that the nonconformity constituted a breach [*Com Code* § 2607(4)].

- Plaintiff's notification of the breach, and the defendant's inability or unwillingness to correct it [*Com Code* § 2607(3)(A)].

- Damages from the breach [*Com Code* § 2714(2)].

- Incidental and consequential damages [*Com Code* §§ 2714(3), 2715].

Cross References:

Forms for complaint alleging breach of express and implied warranties, see 24.44, 24.45.

Discussion of elements of breach of warranty claim, see *California Forms of Pleading and Practice*, § 502.28[1] (Matthew Bender).



Strategic Point--All Parties:

Affirmations of fact by the seller about the goods, made during a bargain, are regarded as part of their description, and no particular reliance on the statements needs to be shown to integrate them into the agreement [*Com Code* § 2313, *UCC* § 2-313, *official cmt* 3]. Facts intended to remove the affirmations from the agreement require clear, affirmative proof. The issue normally is one of fact [*Com Code* § 2313, *UCC* § 2-313, *official cmt* 3].

Jury Instructions:

Breach of Express Warranty--Burden of Proof, see *California Forms of Jury Instruction*, Ch. 3H, Instr. MB 300H.148 (Matthew Bender).

Breach of Implied Warranty of Fitness, see *California Forms of Jury Instruction*, Ch. 3H, Instr. MB 300H.152 (Matthew Bender).

Breach of Implied Warranty of Merchantability, see *California Forms of Jury Instruction*, Ch. 3H, Instr. MB 300H.154 (Matthew Bender).

Cross Reference:

Discussion of reliance in warranty actions, see *California Forms of Pleading and Practice*, § 502.23[1] (Matthew Bender).

24.36[3] Plaintiff Need Not Plead Breach of Contract. While a claim for breach of warranty under the Commercial Code requires the existence of a contract for sale [see 24.04[1]], it does not require pleading that the primary contract has also been breached [see *Com Code* §§ 2313, 2607(3)(a), (4), 2714; *Keith v. Buchanan* (1985) 173 CA3d 13, 20, 220 CR 392]. Hence, it is unnecessary to include the standard allegations usually included in a traditional breach of contract claim.



Strategic Point:

When an expression in or part of a contract is capable of being interpreted as a warranty or as an integral element or condition of the primary contract of sale, the plaintiff likely has a cause of action for both breach of warranty and breach of the sales contract [see *Com Code* § 2701 (Commercial Code does not impair remedies for breach of collateral or ancillary obligation)]. If a breach of contract action is included, the plaintiff, of course, then must plead all the necessary elements to state a cause of action for breach of contract.



Cross References:

Discussion, checklists and forms for pleading breach of contract actions, see Ch. 22, Suing or Defending Action for Breach of Contract.

Discussion of nature of warranty action and choice between breach of contract and warranty, see *California Forms of Pleading and Practice*, § 502.12 (Matthew Bender).

24.36[4] Seller Has Burden of Proving Representation Did Not Form Basis of Bargain. A warranty statement made by the seller is presumptively is part of the basis of the bargain and the burden rests on the seller to prove that the resulting bargain does not rest at all on the representation [*Keith v. Buchanan* (1985) 173 CA3d 13, 23, 220 CR 392]. Therefore, it should not be essential to allege that the representation became a basis of the bargain. Nevertheless, good practice suggests alleging this, for clarity and because it is done with only a few additional words.



Cross Reference:

Forms for complaint alleging breach of express and implied warranties, see 24.44, 24.45.



38 of 196 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 24 Suing or Defending Action for Breach of Warranty
VI. ASSERTING CLAIM FOR BREACH OF EXPRESS OR IMPLIED WARRANTY

2-24 MB Practice Guide: CA Contract Litigation 24.37

24.37 Complaint for Breach of Warranty for Consumer Goods Must Plead Essential Elements Under Song-Beverly Act.

In an action for breach of warranty under the Song-Beverly Act, the plaintiff must allege the following elements:

- That plaintiff was a buyer of consumer goods; that is:
 - ☐ Any new product or part thereof that is used, bought, or leased for use primarily for personal, family, or household purposes, except for clothing and consumables, or any assistive device [see CC §§ 1791(a) ("consumer goods"), (b) ("buyer"), ("clothing"), (d) ("consumables"), (p)("assistive device"), 1794 (buyer's right to recovery)]; or
 - ☐ Any used consumer goods in a sale in which an express warranty is given.
- That defendant is engaged in the business of manufacturing, distributing, or selling consumer goods at retail [see CC § 1791(b)].
- The sale of goods to which the warranty relates, including fact that they were sold at retail in California [see CC §§ 1792, 1792.1, 1792.2].
- For an express warranty [CC § 1791.2]:
 - ☐ Either:
 - That manufacturer, distributor, or retailer provided a written statement undertaking to preserve or maintain the utility or performance of the consumer good or provide compensation if there was a failure of utility or performance; or
 - That buyer relied on a sample or model.
 - ☐ Terms of express warranty.

■ For the implied warranty of merchantability [CC § 1792], fact that the implied warranty of merchantability existed with respect to the goods.

■ For the implied warranty of fitness:

☐ That the manufacturer, and/or dealer, and/or distributor, as appropriate, had reason to know at the time of the sale that [see CC §§ 1792.1, 1792.2]:

☐ The goods were required for a particular purpose; and

☐ The buyer was relying on the seller's skill and judgment to furnish suitable goods.

☐ That an implied warranty of fitness therefore existed with respect to the goods [see CC §§ 1792.1, 1792.2].

■ That the goods did not conform to the requirements of the warranty, and that the nonconformity constituted a breach.

■ Plaintiff's compliance with the terms of any express warranty, including:

☐ Notification to defendant of breach.

☐ Compliance with warranty provisions relating to service and repair of goods [see CC §§ 1793.02-1793.5].

■ Ineffectiveness of any repair attempts to correct problem with the goods.

■ Plaintiff's damages from the breach [see CC § 1794].

■ Any other relief requested by plaintiff [see CC § 1794].

► **Cross References:**

Damages in actions under Song-Beverly Act, see 24.28 -24.32.

Detailed discussion of service and repair obligations under Song-Beverly Act, and forms, see *California Forms of Pleading and Practice*, § 502.43 (Matthew Bender).

Special requirements for motor vehicles under the California "Lemon Law" (CC § 1793.22, 1793.23), and forms, see *California Forms of Pleading and Practice*, § 91.10 et seq. (Matthew Bender)



39 of 196 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 24 Suing or Defending Action for Breach of Warranty
VI. ASSERTING CLAIM FOR BREACH OF EXPRESS OR IMPLIED WARRANTY

2-24 MB Practice Guide: CA Contract Litigation 24.38

24.38 Statute of Limitations Is Four Years Unless Shortened by Contract.

24.38[1] Four-Year Period Generally Applies. An action for breach of a Commercial Code warranty must be commenced within four years after the cause of action accrued [*Com Code* § 2725(1)].

► **Cross Reference:**

General discussion of statute of limitations issues in contract actions, see Ch. 4, Determining Applicable Statute of Limitations and Effect on Potential Action.

24.38[2] Commercial Code Statute of Limitations Applies to Actions Under Song-Beverly Act. The four-year period of *Com Code* § 2725 also governs actions under the Song-Beverly Act [*Krieger v. Nick Alexander Imps., Inc.* (1991) 234 CA3d 205, 215, 285 CR 717 ; see CC § 1790.3].

24.38[3] Contract May Shorten Period to Not Less Than One Year, but May Not Extend It Past Four Years. By the original agreement, the parties can reduce the statute of limitations period on a breach of warranty action under the Commercial Code to not less than one year. The parties may not extend the limitations period beyond the statutory four year period [*Com Code* § 2725(1)].

► **Cross Reference:**

Discussion of contractual reduction of statute of limitations, see *California Forms of Pleading and Practice*, § 502.28[6][a] (Matthew Bender).

24.38[4] Limitations Period Runs From Time of Breach. A breach of warranty occurs, and the statute of limitations begins to run, when tender of delivery is made by the seller, regardless of whether or not the aggrieved party knew about the breach [*Com Code* § 2725(2)]. An exception exists for warranties relating to future performance [see 24.38[5]].

24.38[5] Action for Warranty As to Future Performance Accrues When Breach Is Discovered. When a warranty explicitly extends to future performance of the goods, and discovery of the breach must await the time of that performance, the cause of action accrues when the breach is, or should have been, discovered [*Com Code* § 2725(2)].

Example-Future Performance Exception Applies:

Defendant car retailer represented that it would repair plaintiff's vehicle for 36 months or 36,000 miles. This was a warranty of future performance, which extended the limitations period for an additional four years. Causes of action under the Commercial Code and the Song-Beverly Act accrued when the plaintiff determined that the first dealership could not fix the car, and plaintiff had four years thereafter to file suit [*Krieger v. Nick Alexander Imps., Inc.* (1991) 234 CA3d 205, 218-219, 285 CR 717].

Examples-Future Performance Exception Does Not Apply:

- A promise by a manufacturer that a part would work for 50,000 cycles did not bring the warranty within the "future performance" exception because it did not specify a date or time in the future [*Cardinal Health 301, Inc. v. Tyco Electronics Corp.* (2008) 169 CA4th 116, 131-132, 87 CR3d 5] .

- Generalized assertions in advertisements and literature do not rise to the level of a warranty explicitly extending to "future performance" [*Carrau v. Marvin Lumber & Cedar Co.* (2001) 93 CA4th 281, 290-292, 112 CR2d 869].

Cross Reference:

Discussion of statute of limitations for warranties under Song-Beverly Act, see *California Forms of Pleading and Practice*, § 502.52 (Matthew Bender).

24.38[6] Attempt to Cure Tolls Limitations Period. The statute of limitations adopted for sales contracts and breaches of warranty does not alter the law on the tolling of the statute [*Com Code* § 2725(4)]. Whenever the breaching party claims that the defect can be repaired, then the limitation period is tolled while he or she attempts to make repairs [*Krieger v. Nick Alexander Imps., Inc.* (1991) 234 CA3d 205, 218-219, 285 CR 717].

Cross Reference:

Discussion of tolling of statute of limitations, see *Ch. 4, Determining Applicable Statute of Limitations and Effect on Potential Action*, 4.21.

24.38[7] Limitation Period Does Not Apply in Action Against Manufacturer. The Commercial Code limitations period applies only when a contract of sale exists between a buyer and the seller. It does not apply to actions brought by the buyer against the manufacturer of the unsatisfactory product [*Fundin v. Chicago Pneumatic Tool Co.* (1984) 152 CA3d 951, 960, 199 CR 789].

Cross Reference:

Discussion of strict products liability, see *California Forms of Pleading and Practice*, § 460.13 (Matthew Bender).



40 of 196 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 24 Suing or Defending Action for Breach of Warranty
VII. OPPOSING CLAIM FOR BREACH OF EXPRESS OR IMPLIED WARRANTY

2-24 MB Practice Guide: CA Contract Litigation 24.39

24.39 CHECKLIST: Opposing Claim for Breach of Express or Implied Warranty.

☐ Determine if demurrer can be filed on ground of failure to state cause of action because complaint contains clear contractual language modifying or excluding warranty.

Authority:

CCP § 430.10(e)

Discussion:

See 24.41

☐ Determine whether any of following affirmative defenses are available:

☐ Defect in goods is due to action by seller.

Authority:

Com Code § 2314(e); see CC §§ 1791.1, 1791.2, 1792, 1792.1

Discussion:

See 24.42[1]

☐ Agreement between parties limited available remedy.

Authority:

Com Code § 2316(4); see CC § 1792.3

Discussion:

See 24.42[2]

☐ Express warranty was negated by seller's words or conduct.

Authority:

Com Code § 2316(1); but see CC § 1791.2(a)(1), (2)

Discussion:

See 24.42[3]

- ☐ Implied warranties were excluded by "as is" language.

Authority:

Com Code § 2316(3); but see CC §§ 1792.3, 1792.4

Discussion:

See 24.42[4]

- ☐ Implied warranty of merchantability was waived by appropriate contract language.

Authority:

Com Code § 2316(2); but see CC § 1792.3

Discussion:

See 24.42[5]

- ☐ Implied warranty of fitness was waived by appropriate contract language.

Authority:

Com Code § 2316(2); but see CC § 1792.3

Discussion:

See 24.42[6]

- ☐ Implied warranties were excluded or modified by course of dealing or trade usage.

Authority:

Com Code § 2316(3)(c); but see CC § 1792.3

Discussion:

See 24.42[7]

- ☐ Implied warranties were excluded by plaintiff's opportunity to examine goods prior to forming contract.

Authority:

Com Code § 2316(3)(b); but see CC § 1792.3

Discussion:

See 24.42[8]

- ☐ Warranty of title was waived by virtue of fact that buyer had reason to know that seller did not claim title.

Authority:

Com Code § 2312(2)

Discussion:

See 24.42[9]

☐ Warranty of title is inapplicable because claim resulted from seller's compliance with buyer's specifications.

Authority:

Com Code § 2312(3)

Discussion:

See 24.42[10]

☐ Buyer was unaware of warranty at time of contracting.

Authority:

Appalachian Ins. Co. v. McDonnell Douglas Corp. (1989) 214 CA3d 1, 34, 262 CR 716
; but see *CC §§ 1791.1, 1791.2*

Discussion:

See 24.42[11]

☐ Seller made no affirmation of fact or promise.

Authority:

Pisano v. American Leasing (1983) 146 CA3d 194, 197-198, 194 CR 77

Discussion:

See 24.42[12]

☐ If defendant bought goods from manufacturer or other third party, determine whether defendant should "vouch in" seller and give seller opportunity to defend.

Authority:

Com Code § 2607(5)(a)

Discussion:

See 24.43



41 of 196 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 24 Suing or Defending Action for Breach of Warranty
VII. OPPOSING CLAIM FOR BREACH OF EXPRESS OR IMPLIED WARRANTY

2-24 MB Practice Guide: CA Contract Litigation 24.40

24.40 Options and Strategy.

The essential inquiry in many breach of warranty cases is not whether the warranty was breached, but whether the warranty actually exists. Therefore, many of the seller's possibilities for defense come in the form of a demurrer or affirmative defense asserting, on various grounds, that the agreement either did not include the warranty [*see* 24.12, 24.13] or effectively modified or negated it [*see* 24.15, 24.16]. It also may be necessary to present evidence demonstrating that statements or actions did not create an express warranty, or that custom and usage has modified or eliminated an implied warranty [*see* 24.15[6]].

➡ **Cross Reference:**

Discussion, forms and checklists regarding the existence or validity of contract generally, see Ch. 27, Contract for Sale of Goods--Attacking or Defending Existence of Contract Under California Commercial Code.



42 of 196 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 24 Suing or Defending Action for Breach of Warranty

VII. OPPOSING CLAIM FOR BREACH OF EXPRESS OR IMPLIED WARRANTY

2-24 MB Practice Guide: CA Contract Litigation 24.41

24.41 Defendant Can Demur If Clear Contractual Language of Waiver or Modification Is Attached to Complaint.

If the warranty alleged to have been breached is contained in a written contract of sale that has been appended to the complaint and that contains specific language excluding or modifying the warranty, defendant may demur on the ground that the complaint fails to state facts sufficient to constitute a cause of action [*see CCP § 430.10(e)*]

► Cross References:

Discussion of exclusion, negation, and modification of warranties, see 24.15.

Waiver modification generally, see Ch. 13, Attacking or Defending Existence of Contract--Absence of Essential Elements.

Discussion, forms and checklists for demurrer, see Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, Ch. 11, Demurrers and Motions for Judgment on the Pleadings.



43 of 196 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 24 Suing or Defending Action for Breach of Warranty
VII. OPPOSING CLAIM FOR BREACH OF EXPRESS OR IMPLIED WARRANTY

2-24 MB Practice Guide: CA Contract Litigation 24.42

24.42 Numerous Potential Affirmative Defenses Exist.

24.42[1] Loss May Have Resulted From Action or Event Following Delivery of Goods. An affirmative showing by the seller that the loss resulted from some action or event following the seller's own delivery of the goods can operate as a defense [*Com Code § 2314, UCC § 2-314, official cmt 13*].

Distinguish--Consumer Sales:

This defense also is available under the Song-Beverly Act if the defendant can show that the action in question was covered neither by any express warranty of the seller, nor by the implied warranties of merchantability and fitness [*see CC §§ 1791.1, 1791.2, 1792, 1792.1*].

► Cross Reference:

Forms for answer with affirmative defenses to complaint alleging breach of express and implied warranties, see 24.46, 24.47.

24.42[2] Agreement Between Parties May Have Limited Available Remedies. If the contract for the sale of goods contains provisions limiting the remedies available for the breach of warranty, the defendant can raise those provisions as an affirmative defense if the plaintiff is seeking more than was allowed by the contract [*Com Code § 2316(4)*].

Distinguish--Consumer Sales:

The Song-Beverly Act does not permit waiver of the implied warranties of merchantability or fitness, except in the case of "as is" sales [*CC § 1792.3*].

► Cross References:

Forms for answer to complaint alleging breach of express and implied warranties, see 24.46, 24.47.

Discussion, checklists and forms relating to remedies under the Commercial Code, see Ch. 26, Contract for Sale of Goods--Seeking Remedies Under California Commercial Code.

24.42[3] Express Warranty May Have Been Negated by Words or Conduct. If seller negated or limited any express warranty by words or conduct, he or she can raise the negation or limitation as an affirmative defense in an

action for breach of express warranty [see *Com Code* § 2316(1)].

Distinguish--Consumer Sales:

Since the Song-Beverly Act provides that express warranties must either be written [CC § 1791.2(a)(1)] or consist of a sample of model [CC § 1791.2(a)(2)], they cannot be negated by words or conduct

Jury Instructions:

Disclaimer of Express Warranties, see *California Forms of Jury Instruction, Ch. 3H, Instr. MB 300H.157* (Matthew Bender).

 Cross References:

Discussion of negation of express warranties, see 24.15[1].

Form for answer to complaint alleging breach of express warranty, see 24.46.

Discussion of negation of express warranty, see *California Forms of Pleading and Practice*, § 502.23[6] (Matthew Bender).

24.42[4] All Implied Warranties May Have Been Excluded by "As Is" Contract Language. All implied warranties (including the implied warranty of merchantability) are excluded by expressions such as "as is," "with all faults," or other language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty [*Com Code* § 2316(3)]. If such language was included in the agreement, defendant may raise it as an affirmative defense or by a demurrer [see 24.41].

 Warning:

A warranty of title is not designated an implied warranty [*Com Code* § 2312, *UCC* § 2-312, *official cmts* 1, 6], and therefore most likely will not be excluded by language excluding implied warranties in general [see 24.14[5]].

Distinguish--Consumer Sales:

This defense is also available under the Song-Beverly Act, provided the applicable notice requirements have been met [see CC §§ 1792.3, 1792.4].

Jury Instructions:

Disclaimer of Implied Warranties, see *California Forms of Jury Instruction, Ch. 3H, Instr. MB 300H.156* (Matthew Bender).

 Cross References:

Discussion of implied warranties, see 24.13.

Discussion of warranties of title, see 24.14.

Discussion of exclusion of implied warranties, see 24.15[2] -[6].

Form for answer to complaint alleging breach of implied warranty, see 24.47.

Detailed discussion of exclusion or modification of implied warranties, see *California Forms of Pleading and Practice*, § 502.24[8] -[10] (Matthew Bender).

24.42[5] Implied Warranty of Merchantability May Have Been Excluded or Modified by Conspicuous Language Mentioning Merchantability. To exclude or modify the implied warranty of merchantability, in the absence of a general negation of implied warranties [see 24.42[4]], the language must specifically mention merchantability. In the case of a writing, that language must be conspicuous [*Com Code* § 2316(2)]. However, even if the word "merchantability" is not used, a seller may limit the scope of the implied warranty by specifying that the product should

be used with caution or in a certain prescribed manner [see *Harris v. Belton* (1968) 258 CA2d 595, 605-607, 65 CR 808]. If any such language was included in the agreement, defendant may raise it as an affirmative defense or a demurrer [see 24.41].

Example:

There was no breach of the implied warranty of merchantability when a customer developed a skin irritation after the application of a product which advertised itself as appropriate for use on the skin but cautioned that certain skin might be sensitive to the product and that sample testing should be tried and its use discontinued if any irritation developed [*Harris v. Belton* (1968) 258 CA2d 595, 606-607, 65 CR 808].

Distinguish--Consumer Sales:

Except in the case of "as is" sales [see 24.42[4]], the implied warranty of merchantability under the Song-Beverly Act may not be disclaimed [CC § 1792.3].

Jury Instructions:

Disclaimer of Implied Warranties, see *California Forms of Jury Instruction, Ch. 3H, Instr. MB 300H.156* (Matthew Bender).

 Cross References:

Discussion of implied warranty of merchantability, see 24.13[1].

Discussion of modification of warranties, see 24.15[2].

Form for answer to complaint alleging breach of implied warranty, see 24.47.

Detailed discussion of exclusion or modification of implied warranties, see *California Forms of Pleading and Practice, § 502.24[8] -[10]* (Matthew Bender).

24.42[6] Implied Warranty of Fitness May Have Been Excluded by Conspicuous Writing. To exclude or modify the implied warranty of fitness, in the absence of a general negation of implied warranties [see 24.42[4]], the exclusion must be in writing in a conspicuous fashion. Language to exclude all implied warranties of fitness is sufficient if it states, for example, that "there are no warranties which extend beyond the description on the face hereof" [*Com Code § 2316(2)*]. If such language was included in the agreement, defendant may raise it as an affirmative defense or a demurrer [see 24.41].

Distinguish--Consumer Sales:

Except in the case of "as is" sales [see 24.42[4]], the implied warranty of fitness under the Song-Beverly Act may not be disclaimed [CC § 1792.3].

Jury Instructions:

Disclaimer of Implied Warranties, see *California Forms of Jury Instruction, Ch. 3H, Instr. MB 300H.156* (Matthew Bender).

 Cross References:

Discussion of implied warranty of fitness, see 24.13[2].

Discussion of modification of warranties, see 24.15[3].

Form for answer to complaint alleging breach of implied warranty, see 24.47.

Detailed discussion of exclusion or modification of implied warranties, see *California Forms of Pleading and Practice, § 502.24[8] -[10]* (Matthew Bender).

24.42[7] Implied Warranty May Have Been Excluded or Modified by Course of Dealing or Trade Usage.

The seller may raise as an affirmative defense to any action on an implied warranty that the implied warranty was excluded or modified by course of dealing or course of performance or by usage of trade [*Com Code* § 2316(3)]. These rules take precedence over the special provisions for exclusion of the individual types of implied warranties [*Com Code* § 2316(3); see 24.42[4] -[7]].

Distinguish--Consumer Sales:

Except in the case of "as is" sales, the implied warranties of merchantability and fitness cannot be waived [*CC* § 1792.3]. Nothing in the Song-Beverly Act permits trade usage to be a basis for claiming exclusion or modification of implied warranties.

Jury Instructions:

Disclaimer of Implied Warranties, see *California Forms of Jury Instruction, Ch. 3H, Instr. MB 300H.156* (Matthew Bender).

 Cross References:

Modification of implied warranties, see 24.15[2] -[6].

Form for answer to complaint alleging breach of implied warranty, see 24.47.

Detailed discussion of exclusion or modification of implied warranties, see *California Forms of Pleading and Practice*, § 502.24[8] -[10] (Matthew Bender).

24.42[8] Warranty May Have Been Excluded by Plaintiff's Opportunity to Examine Goods Prior to Forming Contract. When the buyer, before entering into the contract, has examined the goods, or the sample or model, as fully as he or she desired, or has refused to examine them, there is no implied warranty with regard to defects which an examination would have revealed [*Com Code* § 2316(3)]. If the buyer discovers the defect and uses the goods anyway, or if the buyer unreasonably fails to examine the goods before using them, any injuries that occur will be considered to result from the buyer's own action, rather than proximately from a breach of warranty [*Com Code* § 2316, *UCC* § 2-316, *official cmt 8*].

Distinguish--Consumer Sales:

Although the Song-Beverly Act provides that a sample or model may be the basis for formation of an express warranty [*CC* § 1791.2(a)(2)], a refusal to examine the sample or model is not classified as a waiver. Implied warranties can be waived only in the case of an "as is" sale complying with the applicable notice requirements [*CC* § 1792.3; see *CC* § 1792.4 (notice requirements)].



Strategic Point--All Parties:

A buyer is deemed to have refused to examine goods only if the seller first demands that the buyer examine the goods fully, thereby putting the buyer on notice that he or she assumes the risk of defects which the examination ought to reveal [*Com Code* § 2316, *UCC* § 2-316, *official cmt 8*]. The particular buyer's skill and the normal method of examining goods under the circumstances determine which defects are excluded by the examination [*Com Code* § 2316, *UCC* § 2-316, *official cmt 8*].

Distinguish:

Examination by the buyer is not synonymous with inspection before acceptance or at any other time after the contract has been made [*Com Code* § 2316, *UCC* § 2-316, *official cmt 8*]. Rather, examination signifies the nature of the responsibility assumed by the seller at the time of making the contract. Thus, if the buyer discovers the defect and uses the goods anyway, or unreasonably fails to examine the goods before using them, any injuries that occur may be found to result from the buyer's own action rather than proximately from a breach of warranty [*Com Code* § 2316, *UCC* § 2-316, *official cmt 8*]. However, a

buyer is deemed to have refused to examine goods only if the seller first demands that the buyer examine the goods fully, thereby putting the buyer on notice that he or she assumes the risk of defects which the examination ought to reveal, and the buyer thereafter fails to examine the goods [*Com Code § 2316, UCC § 2-316, official cmt 8*].

 Cross References:

Discussion of inspection by buyer, see 24.30.

Form for answer to complaint alleging breach of implied warranty, see 24.47.

Example:

A failure to notice defects that are obvious cannot excuse the buyer. However, an examination under circumstances that do not permit chemical or other testing of the goods would not exclude defects which could be ascertained only by that testing. Latent defects are not excluded by a simple examination. A professional buyer examining a product in his or her field of expertise is held to have assumed the risk as to all defects that a professional ought to observe. A nonprofessional buyer is held only to the standard of what a layperson might have found to be defects [*Com Code § 2316, UCC § 2-316, official cmt 8*].

Jury Instructions:

Disclaimer of Implied Warranties, see *California Forms of Jury Instruction, Ch. 3H, Instr. MB 300H.156* (Matthew Bender).

24.42[9] Buyer May Have Had Reason to Know Seller Did Not Claim Title. The seller may raise as an affirmative defense the fact that buyer had reason to know that the seller did not claim title [*Com Code § 2312(2)*].

Distinguish--Consumer Sales:

The Song-Beverly Act does not cover warranties of title. Since there is no conflict between the Song-Beverly Act and the Commercial Code in this regard, the Commercial Code provisions governing warranties of title apparently apply to consumer sales as well [*see CC § 1790.3*].

Jury Instructions:

Exclusion or Modification of Warranty of Title, see *California Forms of Jury Instruction, Ch. 3H, Instr. MB 300H.142* (Matthew Bender).

 Cross References:

Discussion of warranty of title, see 24.14.

Form for answer to complaint alleging breach of implied warranty, see 24.47.

24.42[10] Goods May Have Complied With Specifications Supplied by Buyer. A buyer who furnishes specifications to the seller must hold the seller harmless against any breaches of warranty of title, and any resulting claims, which arise out of compliance with the buyer's specifications [*Com Code § 2312(3)*]. The seller can raise compliance with the buyer's specifications as an affirmative defense.

Distinguish--Consumer Sales:

The Song-Beverly Act does not cover warranties of title. Since there is no conflict between the Song-Beverly Act and the Commercial Code in this regard, the Commercial Code provisions governing warranties of title apparently apply to consumer sales as well [*see CC § 1790.3*].

Jury Instructions:

Warranty Against Infringement, see *California Forms of Jury Instruction, Ch. 3H, Instr. MB 300H.143* (Matthew Bender).

 Cross References:

Buyer specifications--warranty of title, see 24.14[4].

Form for answer to complaint alleging breach of implied warranty, see 24.47.

24.42[11] Buyer Cannot Claim Benefit of Express Warranty That Buyer Did Not Know About at Time of Contracting. A buyer cannot claim the benefit of an express warranty of which it had no knowledge at the time of contracting [*Appalachian Ins. Co. v. McDonnell Douglas Corp. (1989) 214 CA3d 1, 34, 262 CR 716*].

Example:

An express warranty in a contract between a seller and one of the seller's subcontractors was not discovered by the buyer until after the primary contract, which contained a warranty disclaimer, was executed. The buyer was not entitled to avail itself of a warranty of which it was not aware at the time of contracting, and the disclaimer barred the buyer's claim [see *Appalachian Ins. Co. v. McDonnell Douglas Corp. (1989) 214 CA3d 1, 34-35, 262 CR 716*].

Distinguish--Consumer Sales:

The Song-Beverly Act, unlike the Commercial Code, applies whether or not the consumer was aware of the warranties [see CC §§ 1791.1, 1791.2 (definitions of express and implied warranties)]. Therefore, this defense is inapplicable in a consumer warranty action.

 Cross Reference:

Discussion of express warranty, see 24.12.

24.42[12] Seller May Have Made No Affirmation of Fact or Promise. A buyer cannot recover damages under the theory of breach of express warranty in the absence of any affirmations of fact or promises made by defendants to plaintiff [*Pisano v. American Leasing (1983) 146 CA3d 194, 197-198, 194 CR 77*].

Distinguish--Consumer Sales:

Since the Song-Beverly Act does not actually *require* the seller to provide express warranties, this defense presumably could be raised if a buyer in a consumer sale claimed breach of an express warranty that the seller never made. In such a case, however, the buyer might well have a claim for breach of implied warranties, which exist without regard to any express actions by the seller and cannot be waived (except in the case of an "as is" sale) [CC §§ 1792, 1792.1, 1792.3].

 Cross Reference:

Discussion of express warranty, see 24.12.



44 of 196 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 24 Suing or Defending Action for Breach of Warranty
VII. OPPOSING CLAIM FOR BREACH OF EXPRESS OR IMPLIED WARRANTY

2-24 MB Practice Guide: CA Contract Litigation 24.43

24.43 Buyer Sued by Third Party May Give Seller Opportunity to Defend ("Vouch In").

A buyer who is being sued in connection with a product furnished by a manufacturer/seller may "vouch in" the manufacturer by giving the manufacturer written notice of the litigation [*Com Code § 2607(5)(A)*]. The notice should state that [*see Com Code § 2607(5)(A)*]:

- Litigation is occurring which concerns a product sold or manufactured by the seller/manufacture;
- The seller may come in and defend; and
- If the seller does not do so, the seller/manufacture will be bound in any action the buyer brings against the seller/manufacture by any determination of fact common to the two litigations.

Strategic Point--Buyer:



This "vouching in" procedure has a collateral estoppel effect against the manufacturer if the buyer and manufacturer are both liable but the manufacturer is not joined as a defendant, as when the manufacturer is in a different jurisdiction and thus, is not able to be joined [*see Com Code § 2607[5][A]*].



Trap--Buyer:

If the buyer is sued for breach of a warranty or other obligation for which the seller is answerable, and the claim is one for infringement or the like, the original seller may demand in writing that the buyer turn over control of the litigation or else be barred from any remedy [*Com Code § 2607(5)(B)*]. If the seller also agrees to bear all expense and to satisfy any adverse judgment, then unless the buyer, after receipt of the demand, does turn over control, the buyer is barred from any remedy [*Com Code § 2607(5)(B)*].



Warning:

In most cases, one letter from the buyer to the seller cannot double as both a breach of warranty letter under *Com Code § 2607(3)(a)* and a "vouching in" letter under *Com Code*

§ 2607(5)(A). The vouching in letter must meet far more stringent statutory requirements. If a litigant is to be bound by application of *Com Code* § 2607(5)(A), due process demands that the literal requirements be strictly obeyed [*Bendix-Westinghouse Auto. Air Brake Co. v. Swan Rubber Co.* (1976) 55 CA3d 256, 261-262, 127 CR 571].

Distinguish--Consumer Sales:

The Song-Beverly Act does not contain any "vouch-in" provisions. Since there is no conflict between the Song-Beverly Act and the Commercial Code in this regard, the Commercial Code provisions governing "vouching in" of sellers appear to apply to consumer sales as well [see *CC* § 1790.3], although this is less likely to be significant in consumer sales transactions.

 Cross References:

Discussion of notice of breach of warranty, see 24.35.

Discussion of "vouching in," see *California Forms of Pleading and Practice*, § 502.28[5] (Matthew Bender).



45 of 196 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 24 Suing or Defending Action for Breach of Warranty
VIII. FORMS

2-24 MB Practice Guide: CA Contract Litigation 24.44

24.44 Complaint for Damages for Breach of Express Warranty--Commercial Code.

_____ [Name of attorney]
 _____ [Street address]
 _____ [City, state, and ZIP]
 _____ [Area code and phone number]
 _____ [State Bar no. of attorney]
 Attorney for _____ [name of party]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

[name(s)] _____,	)	
Plaintiff(s),	)	NO.
vs.	)	_____
[name(s)] _____,	)	_____
[and DOES 1 through _____,]	)	COMPLAINT FOR BREACH OF EXPRESS WAR-
Defendant[s].	)	RANTY
	)	[LIMITED CIVIL CASE]
	)	[Amount Demanded
		_____ (Exceeds or Does Not
		Exceed) \$10,000]

Plaintiff _____ [name] alleges:

[For an individual plaintiff]

1. Plaintiff is an individual residing in _____ [city, if any, and county], California, [in the (name of judicial district, if any) _____], [and therein doing business under the fictitious business name of _____].
 Plaintiff has duly complied in all respects with the requirements of *Business and Professions Code Sections 17910 through 17917* with respect to this fictitious business name].

[OR, for a domestic corporation or domestic limited liability company]

1. Plaintiff _____ [name] is, and at all times herein mentioned was, a _____ [corporation or limited liability company] organized and existing under the laws of California, with its principal place of business in _____ [city, if any, and county], California [in the (name of judicial district, if any) _____], [and therein doing business under the fictitious business name of _____].
 Plaintiff has duly complied in all respects with the requirements of *Business and Professions Code Sections 17910 through 17917* with respect to this fictitious business name].

[OR, for a foreign corporation or foreign limited liability company]

1. Plaintiff _____ [name] is, and at all times herein mentioned was, a _____ [corporation or limited liability company] organized and existing under the laws of _____ [state or foreign country], and _____ [for foreign corporation authorized to do business and doing business in California or, for foreign limited liability company maintaining action or intrastate business, and registered to transact intrastate business in California], with its principal place of business in California in _____ [city, if any, and county], California [in the (name of judicial district, if any) _____].

[OR, for a general or limited partnership or an unincorporated association]

1. Plaintiff _____ [name] is, and at all times herein mentioned was, a _____ [partnership or unincorporated association] with its principal place of business in _____ [city, if any, and county], California [in the (name of judicial district, if any) _____], [and therein doing business under the fictitious business name of _____].
 _____ Plaintiff has duly complied in all respects with the requirements of *Business and Professions Code Sections 17910 through 17917* with respect to this fictitious business name].

[CONTINUE]

[For an individual defendant]

2. Defendant _____ [name] is an individual residing in _____ [city, if any, and county], California [in the (name of judicial district, if any) _____] [and doing business therein under the fictitious business name of _____].

[OR, for a domestic corporation or domestic limited liability company]

2. Defendant _____ [name] is, and at all times herein mentioned was, a _____ [corporation or limited liability company] organized and existing under the laws of California, [with its principal place of business in _____ (city, if any, and county), California, (in the _____ [name of judicial district, if any])].

[OR, for a foreign corporation or foreign limited liability company]

2. Defendant _____ [name] is, and at all times herein mentioned was, a _____ [corporation or limited liability company] organized and existing under the laws of _____ [state or foreign country], [with its principal place of business in _____ (city, if any, and county), California, (in the _____ [name of judicial district, if any])].

[OR, for a general or limited partnership or an unincorporated association]

2. Defendant _____ [name] is, and at all times herein mentioned was, _____ [a partnership or an unincorporated association] sued herein under the name _____ [it has assumed or by which it is known], [with its principal place of business in _____ (city, if any, and county), California, (in the _____ [name of judicial district, if any])]. [Defendants (names of individual partners or members) _____ are, and at all times herein mentioned were, members of that _____ (partnership or unincorporated association) (and are, and at all times herein mentioned were, residents of _____ County, California)].

[CONTINUE]

3. Plaintiff is ignorant of the true names and capacities of Defendants sued herein as DOES 1 through _____ [numeral, e.g., 50], inclusive, and therefore sues these Defendants by these fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when ascertained. [Plaintiff is informed and believes and thereon alleges that each of the fictitiously named Defendants is responsible in some manner for the occurrences herein alleged, and that Plaintiff's damages as herein alleged were proximately caused by those Defendants.]

4. Plaintiff is informed and believes and thereon alleges that at all times material to this complaint, _____ [identify defendants to whom agency

allegation applies, e.g., each of the Defendants or each of the individual Defendants or Defendant Harry Jones], [and each of the Defendants fictitiously named in this complaint,] in addition to acting for himself, herself, or itself and on his, her, or its own behalf individually, is and was acting as the agent, servant, employee and representative of, and with the knowledge, consent and permission of, and in conspiracy with, each and all of the Defendants and within the course, scope and authority of that agency, service, employment, representation, and conspiracy. Plaintiff further alleges on information and belief that the acts of each of the Defendants were fully ratified by each and all of the Defendants. Specifically, and without limitation, Plaintiff alleges on information and belief that the actions, failures to act, breaches, conspiracy, and misrepresentations alleged herein and attributed to one or more of the specific Defendants were approved, ratified, and done with the cooperation and knowledge of each and all of the Defendants.

[ADD for general allegation of breach of express warranty]

5. On or about _____ [date], at _____, California, Plaintiff and Defendant entered into _____ [an oral or a written] contract under which Plaintiff agreed to buy, and Defendant agreed to sell, _____ [description and quantity of goods, e.g., 750 Model KHB12 carrying cases for digital cameras], for the price of \$ _____ [or describe other relevant terms of sale]. Prior to entering into that contract, in the course of the negotiations, Defendant _____ represented and warranted to Plaintiff, _____ [orally and/or in writing] that _____ [describe representation relating to goods, e.g., the outer cases were made of high quality stainless steel]. That _____ [affirmation or promise] became part of the basis of the bargain between the parties and therefore constituted an express warranty [if appropriate, add; and was incorporated into the written contract between the parties]. [Add, if appropriate: A copy of the _____ (contract or writing) is attached as Exhibit A and incorporated by reference.]

[OR, use for allegation of breach of express warranty based on sample or model]

5. On or about _____ [date], at _____, California, Plaintiff and Defendant entered into _____ [an oral or a written] contract under which Plaintiff agreed to buy, and Defendant agreed to sell, _____ [description and quantity of goods, e.g., 750 Model KHB12 carrying cases for digital cameras], for the price of \$ _____ [or describe other relevant terms of sale]. Prior to entering into that contract, in the course of the negotiations, Defendant exhibited to Plaintiff a _____ [sample or model] of the goods and warranted and represented to Plaintiff that the goods delivered under the contract would conform to the features of the sample of model. Among other features, this _____ [sample or model] had _____ [describe feature or features forming basis of warranty claim; e.g., an outer case made of high quality stainless steel]. Plaintiff inspected the _____ [sample or model], and agreed on the basis of that inspection to purchase the goods from Defendant. An express warranty that the goods would conform to the _____ [sample or model] therefore became part of the basis of the bargain between the parties.

[OR, use for allegation of breach of express warranty based on description of goods]

5. On or about _____ [date], at _____, California, Plaintiff and Defendant entered into _____ [an oral or a written] contract under which Plaintiff agreed to buy, and Defendant agreed to sell, _____ [description and quantity of goods, e.g., 750 Model KHB12 carrying cases for digital cameras], for the price of \$ _____ [or describe other relevant terms of sale]. Prior to entering into that contract, in the course of the negotiations, Plaintiff referred to a description of goods _____ [specify source of description, e. g., in the manufacturer's sales brochure for the product or on the back of a package for the item or in the technical specifications for the particular model which are posted on the manufacturer's website]. [Add, if appropriate: A true copy of the description is attached as Exhibit _____ and incorporated by reference]. This description stated, among other things, that the goods had _____ [describe feature or features forming basis of warranty claim; e.g., an outer case made of high quality stainless steel]. On the basis of this description, Plaintiff agreed to purchase the goods from Defendant. An express warranty that the goods would conform to the description therefore became part of the basis of the bargain between the parties.

[CONTINUE]

6. Plaintiff has performed all conditions, covenants, and promises required on his/her/its part to be performed in accordance with the terms and conditions of the contract [except (specify conditions not performed) _____]. Plaintiff did not perform _____ (this or these) condition (s) because (specify facts showing excuse for nonperformance) _____].

7. The goods Plaintiff received from Defendant under the above contract did not conform to the express warranty of Defendant as alleged above, in that _____ [specify how goods did not conform to warranty, e.g., the outer of cases were not made of high quality stainless steel as Defendant warranted, but in fact were made of thin plastic that cracks, scratches, and chips easily].

8. Plaintiff discovered Defendant's breach of warranty on or about _____ [date]. On or about _____ [date], Plaintiff notified Defendant of this breach by _____ [manner of notice, e.g., registered mail] that the goods supplied by Defendant did not conform to Defendant's express warranty as specified above. [A copy of that _____ (letter or other form of notice) is attached to this complaint as Exhibit B and incorporated by reference].

9. Defendant failed and refused, and still fails and refuses, to replace the nonconforming goods with goods conforming to Defendant's express warranty, or to compensate Plaintiff in any way for the diminished value of the goods Defendant supplied.

[Use for allegation of damages without special circumstances]

10. As a proximate result of Defendant's breach of warranty, Plaintiff has been damaged in the amount of \$ _____, representing _____ [specify basis of damages, e.g., the difference between the retail value of the good had they conformed to Defendant's express warranty and the retail value of the goods actually delivered to Plaintiff].

[OR, use to allege damages with special circumstances]

10. As a proximate result of Defendant's breach of warranty, Plaintiff has been damaged [in the amount of \$ _____] as a result of special circumstances in that _____ [describe circumstances, e.g., Plaintiff, in reliance on Defendant's express warranty, represented to potential buyers that the goods were as Defendant warranted them to be, and as a result received advance orders for approximately 500 units from buyers who, relying on Plaintiff, believed that the goods conformed to Defendant's warranty. As a result, Plaintiff has incurred harm to his/her business reputation and goodwill, as well as damages resulting from returned goods, storage of the nonconforming goods, costs of advertisement and publicity relating to Plaintiff's sales campaign for the goods, and other expenses]. These damages are not all assessable at this time, but Plaintiff will amend this complaint to state the damages when Plaintiff becomes able to determine them.

[CONTINUE]

11. Plaintiff has been further damaged as a result of this breach in that _____ [describe incidental or consequential damages, e.g., Plaintiff was required to transport the goods to an overseas retailer for sale outside the United States, at a cost of \$ _____. Defendant also knew that Plaintiff needed the goods as demonstration wares, and Plaintiff was forced to arrange to procure replacement goods for these purposes through travel and negotiations, in the total amount of \$ _____].

WHEREFORE, Plaintiff prays judgment against Defendant as follows:

1. For damages in the sum of \$ _____;
2. For damages for _____ [specify incidental or consequential damages, e.g., transportation of goods, and travel expenses] in the sum of \$ _____;
3. For costs of suit herein incurred, including attorney's fees, if appropriate; and
4. For such other and further relief as the court may deem proper.

[firm name, if any] _____

By: [signature] _____

[typed name] _____

Attorney for Plaintiff _____

NOTES.

Authority:

Com Code §§ 2607(5)(a), 2316(4), 2313(1)

Elements of Breach of Warranty Claim:

See 24.36

Determining If Warranty Has Been Breached:

See 24.18

Express Warranty Defined:

See 24.12

Requirement of Notification:

See 24.35

Allegations Required for Breach of Warranty:

See 24.36

Remedies for Breach of Warranty:

See 24.28



46 of 196 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 24 Suing or Defending Action for Breach of Warranty
VIII. FORMS

2-24 MB Practice Guide: CA Contract Litigation 24.45

24.45 Complaint for Damages for Breach of Implied Warranties of Fitness and/or Merchantability, or Warranty of Title--Commercial Code.

_____ [Name of attorney]
 _____ [Street address]
 _____ [City, state, and ZIP]
 _____ [Area code and phone number]
 _____ [State Bar no. of attorney]
 Attorney for _____ [name of party]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

[name(s)] _____,	)	
Plaintiff(s),	)	NO.
vs.	)	_____
[name(s)] _____,	)	_____
[and DOES 1 through _____,]	)	BREACH OF
Defendant[s].	)	_____
	)	_____ [IMPLIED WAR-
	)	RANTY OF
		_____ (MERCHANTABILITY
		or FITNESS) or WARRANTY OF TITLE]
		[LIMITED CIVIL CASE]
		[Amount Demanded
		_____ (Exceeds or Does Not
		Exceed) \$10,000]

Plaintiff _____ [name] alleges:

[For an individual plaintiff]

1. Plaintiff is an individual residing in _____ [city, if any, and county], California, [in the (name of judicial district, if any) _____], [and therein doing business under the fictitious business name of _____]. Plaintiff has duly complied in all respects with the requirements of *Business and Professions Code Sections 17910 through 17917* with respect to this fictitious business name].

[OR, for a domestic corporation or domestic limited liability company]

1. Plaintiff _____ [name] is, and at all times herein mentioned was, a _____ [corporation or limited liability company] organized and existing under the laws of California, with its principal place of business in _____ [city, if any, and county], California [in the (name of judicial district, if any) _____], [and therein doing business under the fictitious business name of _____]. Plaintiff has duly complied in all respects with the requirements of *Business and Professions Code Sections 17910 through 17917* with respect to this fictitious business name].

[OR, for a foreign corporation or foreign limited liability company]

1. Plaintiff _____ [name] is, and at all times herein mentioned was, a _____ [corporation or limited liability company] organized and existing under the laws of _____ [state or foreign country], and _____ [for foreign corporation authorized to do business and doing business in California or, for foreign limited liability company maintaining action or intrastate business, and registered to transact intrastate business in California], with its principal place of business in California in _____ [city, if any, and county], California [in the (name of judicial district, if any) _____].

[OR, for a general or limited partnership or an unincorporated association]

1. Plaintiff [name] _____ is, and at all times herein mentioned was, a _____ [partnership or unincorporated association] with its principal place of business in [city, if any, and county] _____, California [in the (name of judicial district, if any) _____], [and therein doing business under the fictitious business name of _____]. Plaintiff has duly complied in all respects with the requirements of *Business and Professions Code Sections 17910 through 17917* with respect to this fictitious business name].

[CONTINUE]

[For an individual defendant]

2. Defendant _____ [name] is an individual residing in _____ [city, if any, and county], California [in the (name of judicial district, if any) _____] [and doing business therein under the fictitious business name of _____].

[OR, for a domestic corporation or domestic limited liability company]

2. Defendant _____ [name] is, and at all times herein mentioned was, a _____ [corporation or limited liability company] organized and existing under the laws of California, [with its principal place of business in _____ (city, if any, and county), California, (in the _____ [name of judicial district, if any])].

[OR, for a foreign corporation or foreign limited liability company]

2. Defendant _____ [name] is, and at all times herein mentioned was, a _____ [corporation or limited liability company] organized and existing under the laws of _____ [state or foreign country], [with its principal place of business in _____ (city, if any, and county), California, (in the _____ [name of judicial district, if any])].

[OR, for a general or limited partnership or an unincorporated association]

2. Defendant _____ [name] is, and at all times herein mentioned was, _____ [a partnership or an unincorporated association] sued herein under the name _____ [it has assumed or by which it is known], [with its principal place of business in _____ (city, if any, and county), California, (in the _____ [name of judicial district, if any])]. [Defendants (names of individual partners or members) _____ are, and at all times herein mentioned were, members of that _____ (partnership or unincorporated association) (and are, and at all times herein mentioned were, residents of _____ County, California)].

[CONTINUE]

3. Plaintiff is ignorant of the true names and capacities of Defendants sued herein as DOES 1 through _____ [numeral, e.g., 50], inclusive, and

therefore sues these Defendants by these fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when ascertained. [Plaintiff is informed and believes and thereon alleges that each of the fictitiously named Defendants is responsible in some manner for the occurrences herein alleged, and that Plaintiff's damages as herein alleged were proximately caused by those Defendants.]

4. Plaintiff is informed and believes and thereon alleges that at all times material to this complaint, _____ [identify defendants to whom agency allegation applies, e.g., each of the Defendants or each of the individual Defendants or Defendant Harry Jones], [and each of the Defendants fictitiously named in this complaint,] in addition to acting for himself, herself, or itself and on his, her, or its own behalf individually, is and was acting as the agent, servant, employee and representative of, and with the knowledge, consent and permission of, and in conspiracy with, each and all of the Defendants and within the course, scope and authority of that agency, service, employment, representation, and conspiracy. Plaintiff further alleges on information and belief that the acts of each of the Defendants were fully ratified by each and all of the Defendants. Specifically, and without limitation, Plaintiff alleges on information and belief that the actions, failures to act, breaches, conspiracy, and misrepresentations alleged herein and attributed to one or more of the specific Defendants were approved, ratified, and done with the cooperation and knowledge of each and all of the Defendants.

5. On or about _____ [date], at _____, California, Defendant sold to Plaintiff certain goods, consisting of _____ [describe quantity and nature of goods, e.g., 10,000 rolls of 35 millimeter camera film], and Plaintiff bought those goods from Defendant for the total amount of \$_____ [or describe other consideration]. [The contract of sale between the parties was oral (if sale price was \$500 or more, add: and a true copy of a memorandum of the sale is attached to this complaint as Exhibit A and incorporated by reference) or A true copy of the contract of sale is attached as Exhibit A and incorporated by reference.]

[If plaintiff is claiming breach of implied warranty of merchantability, use the following Paragraphs 6 and 7]

6. Defendant was and is a merchant with respect to goods of the kind that Defendant sold to Plaintiff, and there was in the sale to Plaintiff an implied warranty that those goods were merchantable.

7. Defendant breached the implied warranty of merchantability with respect to the above described goods in that those goods _____ [describe legal basis of breach, e.g., could not pass without objection in the trade under the contract description or, if fungible goods: were not of fair average quality within the description or were not fit for the ordinary purposes for which those goods are used or did not run, within the variations permitted by the agreement, of even kind, quality, and quantity within each unit and among all units involved or were not adequately contained, packaged, and labeled as the agreement required or did not conform to the _____ (promises or affirmations of fact) made on the _____ (container or label)] [if appropriate, add specifics of defects in goods, e.g., because the manufacturer's expiration date on all 10,000 rolls of film was less than six months after the date of Defendant's sale to Plaintiff, thereby making them too old for normal retail sale]. As a result, Plaintiff did not receive goods as impliedly warranted by Defendant to be merchantable.

[OR, if plaintiff is claiming breach of the implied warranty of fitness, use the following paragraphs 6, and 7]

6. At the time Plaintiff and Defendant entered into the contract for the goods, Plaintiff required the goods for the particular purpose of _____ [specify, e.g.,

low-light photography of concerts and theatrical events promoted by Plaintiff]. Defendant had reason to know of Plaintiff's particular purpose for acquiring the goods, by virtue of the fact that

_____. [state how defendant knew, e.g., Plaintiff expressly communicated this purpose to Defendant in requesting the goods]. In entering into the contract with Defendant, Plaintiff relied on Defendant's

_____ [skill or judgment or both] to
_____ [select or furnish or both] suitable goods for Plaintiff's purpose. Defendant had reason to know of Plaintiff's reliance by virtue of the fact that

_____. [e.g., Plaintiff told Defendant that Plaintiff was not an expert in photography and was relying on Defendant to recommend a film that was suitable for the specialized use that Plaintiff intended]. As a result, an implied warranty of fitness arose with respect to the goods that they were fit for Plaintiff's intended use.

7. Defendant breached the implied warranty of fitness because the goods Plaintiff received were not fit for the particular purpose (s) for which they were required, in that

_____ [specify, e.g., the film Defendant sold Plaintiff was not sufficiently sensitive to allow suitable quality low-light photography of Plaintiff's events].

[OR, if plaintiff is claiming breach of the warranty of title, use the following paragraphs 6, and 7]

6. Under *Commercial Code Section 2312*, the sale was subject to a warranty that Defendant would convey good and rightful title to the goods to Plaintiff, and that the goods would be delivered free from any security interest or other lien or encumbrance not known to Plaintiff. At the time of sale of the goods by Defendant to Plaintiff, Plaintiff was unaware of any security interest, lien, or encumbrance on the goods.

7. Defendant breached the warranty of title specified above, in that

_____ [describe breach, e.g., a third party, (name of third party) _____, was actually the true and lawful owner of the goods at the time of their sale to Plaintiff, and at the time of the sale the goods were not a lawful part of Defendant's inventory for sale and Defendant had no true or lawful title to them to rightfully transfer to Plaintiff]. As a result, Plaintiff in fact did not receive good title to these goods from Defendant nor a rightful transfer of title.

[CONTINUE]

8. Plaintiff discovered Defendant's breach of warranty on or about _____ [date]. On or about

_____ [date], Plaintiff notified Defendant by _____ [manner of notice, e.g., registered mail] that the goods supplied by Defendant did not conform to the warranty of

_____ [merchantability or fitness or title] as specified above. [A copy of that _____ (letter or other form of notice) is attached to this complaint as Exhibit B and incorporated by reference].

9. Defendant failed and refused, and still fails and refuses, to replace the nonconforming goods with goods conforming to Defendant's warranty of _____ [merchantability or fitness or title], [or to compensate Plaintiff in any way for the diminished value of the goods Defendant supplied.]

[Use for allegation of damages without special circumstances]

10. As a proximate result of Defendant's breach of warranty, Plaintiff has been damaged in the amount of \$_____.

[OR, use to allege damages with special circumstances]

10. As a proximate result of Defendant's breach of warranty, Plaintiff has been damaged [in the amount of \$_____] as a result of special circumstances in which _____ [describe circumstances, e.g., Plaintiff, in reliance on Defendant's warranty, resold the goods to other retailers in the belief that the goods would be of good and merchantable quality. As a result, Plaintiff has incurred harm to his/her business reputation and goodwill, as well as damages resulting from returned goods and storage of the nonconforming goods]. These damages are not all assessable at this time, but Plaintiff will amend this complaint to state the damages when Plaintiff becomes able to determine them.

[CONTINUE]

11. Plaintiff has been further damaged as a result of this breach in that _____ [describe incidental or consequential damages, e.g., Plaintiff was required to transport the goods to an overseas retailer for sale outside the United States, at a cost of \$_____].

WHEREFORE, Plaintiff prays judgment against Defendant as follows:

1. For damages in the sum of \$_____;
2. For damages for _____ [specify incidental or consequential damages, e.g., transportation of goods, and travel expenses] in the sum of \$_____;
3. For costs of suit herein incurred, including attorney's fees, if appropriate; and
4. For such other and further relief as the court may deem proper.

[firm name, if any] _____

By: [signature] _____

[typed name] _____

Attorney for Plaintiff _____

NOTES.

Authority:

Com Code §§ 2314, 2315, 2312(1)(a), 2312(3)

Elements of Breach of Warranty Claim:

See 24.36

Determining If Warranty Has Been Breached:

See 24.18

Implied Warranty Defined:

See 24.13

Warranty of Title Defined:

See 24.14

Requirement of Notification:

See 24.35

Allegations Required for Breach of Warranty:

See 24.36

Remedies for Breach of Warranty:

See 24.28



47 of 196 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 24 Suing or Defending Action for Breach of Warranty
VIII. FORMS

2-24 MB Practice Guide: CA Contract Litigation 24.46

24.46 Answer to Complaint Alleging Breach of Express Warranty.

_____ [Name of attorney]
 _____ [Street address]
 _____ [City, state, and ZIP]
 _____ [Area code and phone number]
 _____ [State Bar no. of attorney]
 Attorney for _____ [name of party]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

[name(s)] _____,	)	
Plaintiff(s),	)	NO.
vs.	)	_____
[name(s)] _____,	)	_____
[and DOES 1 through _____,]	)	ANSWER OF
Defendant[s].	)	_____
	)	_____ [identify Defendant, e.g.,
	)	DEFENDANT MARY JONES] TO COMPLAINT
	)	OF
		_____ [identify Plaintiff, e.g.,
		PLAINTIFF JOHN SMITH]
		[LIMITED CIVIL CASE]
		Judge:

		Department:

Defendant answers the complaint as follows:

[Include general denial below, or set forth, in numbered paragraphs, specific denials, admissions, and allegations in response to those in complaint, in the order in which they are alleged in complaint:]

1. Pursuant to *Code of Civil Procedure Section 431.30(b)(1)*, Defendant generally denies each and every allegation of Plaintiff's Complaint, including all the purported causes of action contained therein, and further denies that Plaintiff is entitled to any equitable or legal relief, or any damages whatsoever.

[Defendant asserts the following affirmative defenses. By doing so, Defendant shall not be deemed to have assumed the burden of proving any matters that otherwise would be Plaintiff's burden.]

[Allege any affirmative defenses, e.g.,]

AS A _____ *(if more than one, specify number, e.g., FIRST)* SEPARATE AND AFFIRMATIVE DEFENSE *[if more than one cause of action alleged, state: _____ TO THE (specify, e.g., SECOND) CAUSE OF ACTION]*, Defendant alleges:

[If defendant alleges that warranty was limited by terms of contract:]

FIRST AFFIRMATIVE DEFENSE
(Warranty Limited by Terms of Contract)

2. The contract of sale between Plaintiff and Defendant limits the remedies that may be obtained by Plaintiff for any alleged breach of warranty, in that Plaintiff is entitled under the contract to seek only _____ *[describe, e.g., liquidated damages in the amount of \$ _____, which amount is reasonable in light of the anticipated and alleged actual harm caused by the alleged breach, the difficulties of proof of loss, and the inconvenience or nonfeasibility of otherwise obtaining an adequate remedy or the return of the goods and repayment of the price or the repayment and replacement of nonconforming goods or parts].*

[AND/OR, if defendant alleges that express warranty was negated by other terms of contract:]

SECOND AFFIRMATIVE DEFENSE
(Negation or Limitation of Express Warranty)

3. At the time of sale, Defendant expressly _____ *[negated or limited]* any express warranty on the goods sold to Plaintiff in that _____ *[describe, e.g., Defendant explained that notwithstanding terms of the warranty printed on the package, these goods were manufacturer's "seconds" and were*

sold at a discounted price without the usual warranties that applied to Defendant's products. Further, Defendant stamped "AS IS--NO WARRANTY" on the sales invoice to make clear that Defendant's usual express warranties were not applicable to these particular goods].

[AND/OR, if defendant alleges that no affirmation or promise was made with respect to goods:]

THIRD AFFIRMATIVE DEFENSE

(No Affirmation of Fact or Promise)

4. Defendant is not liable to Plaintiff for breach of an express warranty in the sale of _____ *[specify, e.g., the yacht]* that is the subject of the action because Defendant made no affirmation of fact or promise of any kind to Plaintiff regarding _____ *[specify, e.g., the seaworthiness of the yacht for ocean travel]*.

[AND/OR, if defendant alleges that action was not filed within the applicable statute of limitations:]

FOURTH AFFIRMATIVE DEFENSE

(Action Barred by Statute of Limitations)

5. Plaintiff's claim for breach of warranty is barred by Plaintiff's failure to file this action within the applicable statute of limitations.

[ADD additional affirmative defenses, if any]

[CONTINUE]

Wherefore, Defendant prays as follows:

1. That Plaintiff take nothing by his/her complaint herein;
2. For costs of suit; and
3. For such other and further relief as the court deems proper.

Date: _____

[firm name, if any] _____

By: *[signature]* _____

[typed name] _____

Attorney for Defendant _____

[ADD following verification, if applicable]

VERIFICATION

I am the defendant in the above entitled action; I have read the foregoing answer and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein stated on information and belief, and, as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

[date] _____

[signature] _____

[typed name] _____

NOTES.

Authority:

Com Code § 2316(1), (4)

Express Warranty Defined:

See 24.12

Negation of Express Warranty:

See 24.15[1]

Statute of Limitations:

See 24.38



48 of 196 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 24 Suing or Defending Action for Breach of Warranty
VIII. FORMS

2-24 MB Practice Guide: CA Contract Litigation 24.47

24.47 Answer to Complaint Alleging Breach of Implied Warranty.

_____ [Name of attorney]
 _____ [Street address]
 _____ [City, state, and ZIP]
 _____ [Area code and phone number]
 _____ [State Bar no. of attorney]
 Attorney for _____ [name of party]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

[name(s)] _____,	)	
Plaintiff(s),	)	NO.
vs.	)	_____
[name(s)] _____,	)	_____
[and DOES 1 through _____,]	)	ANSWER OF
Defendant[s].	)	_____
	)	_____ [identify Defendant, e.g.,
	)	DEFENDANT MARY JONES] TO COMPLAINT
	)	OF
		_____ [identify Plaintiff, e.g.,
		PLAINTIFF JOHN SMITH]
		[LIMITED CIVIL CASE]
		Judge:

		Department:

Defendant answers the complaint as follows:

[Include general denial below, or set forth, in numbered paragraphs, specific denials, admissions, and allegations in response to those in complaint, in the order in which they are alleged in complaint:]

1. Pursuant to *Code of Civil Procedure Section 431.30(b)(1)*, Defendant generally denies each and every allegation of Plaintiff's Complaint, including all the purported causes of action contained therein, and further denies that Plaintiff is entitled to any equitable or legal relief, or any damages whatsoever.

[Defendant asserts the following affirmative defenses. By doing so, Defendant shall not be deemed to have assumed the burden of proving any matters that otherwise would be Plaintiff's burden.]

[Allege any affirmative defenses, e.g.,]

AS A [_____] (if more than one, specify number, e.g., FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [if more than one cause of action alleged, state TO THE _____ (specify, e.g., SECOND) CAUSE OF ACTION], Defendant alleges:

[To allege that one or more implied warranties are inapplicable because the sale was an "as is" sale:]

FIRST AFFIRMATIVE DEFENSE

(Sale Was as "As Is" (or "With all Faults"))

2. Defendant is not liable for breach of the implied

_____ [warranty or warranties] of
 _____ [merchantability or fitness or
 merchantability and fitness] with respect to the sale of goods alleged in Plaintiff's complaint because, prior to the time of sale, Defendant excluded any implied warranty of any kind by
 _____ [expressly stating to Plaintiff that or
 delivering to Plaintiff a writing, a true copy of which is attached as Exhibit
 _____ and incorporated by reference,
 containing the statement that] the goods were being sold
 _____ ["as is" or "with all faults" or other
 language which in common understanding called buyer's attention to the exclusion of warranties and made plain there was no implied warranty].

[AND/OR, to allege that the implied warranty of merchantability is inapplicable because it has been excluded or modified by the contract:]

SECOND AFFIRMATIVE DEFENSE

(Warranty of Merchantability Excluded (or Modified) by Contract)

3. Defendant is not liable for breach of the implied warranty of merchantability with respect to the sale of goods alleged in Plaintiff's complaint because Defendant

_____ [excluded or modified] any implied warranty of merchantability by _____ [expressly stating to Plaintiff or delivering to Plaintiff a writing, a true copy of which is attached as Exhibit _____ and incorporated by reference, containing a conspicuous statement] that

_____ [recite or summarize statement, e.g., "THERE IS NO IMPLIED WARRANTY OF MERCHANTABILITY WITH RESPECT TO THESE GOODS" or the implied warranty of merchantability was limited only to the warranty that the goods would conform to the promises or affirmations of fact made on their container].

[AND/OR, to allege that the implied warranty of fitness is inapplicable because it has been excluded or modified by the contract:]

THIRD AFFIRMATIVE DEFENSE

(Warranty of Fitness Excluded (or Modified) by Contract)

4. Defendant is not liable for breach of the implied warranty of fitness with respect to the sale of goods alleged in Plaintiff's complaint because Defendant

_____ [excluded or modified] any implied warranty of fitness by delivering to Plaintiff a writing, true copy of which is attached as Exhibit _____ and incorporated by reference, containing a conspicuous statement that

_____ [recite or summarize statement, e.g., "THERE ARE NO WARRANTIES WHICH EXTEND BEYOND THE DESCRIPTION ON THE FACE OF THIS STATEMENT" or any implied warranty of fitness is limited exclusively to use of the goods for personal, family, or household purposes].

[AND/OR, to allege that one or more implied warranties are inapplicable because they have been excluded or modified by the parties' course of dealing or the usage of trade:]

FOURTH AFFIRMATIVE DEFENSE

(Exclusion of Implied Warranty (or Warranties) Based On Course of Dealing or Usage of Trade)

5. Defendant is not liable for breach of the implied

_____ [warranty or warranties] of _____ [merchantability or fitness or merchantability and fitness] with respect to the sale of goods alleged in Plaintiff's complaint because any implied warranty of _____ [merchantability (as to _____ [describe any particular aspect involved, e.g., the fungible goods being of fair average quality within the description]) or fitness or other] with regard to the goods sold to Plaintiff was _____ [excluded or modified] by the _____ [course of dealing or usage of trade], in that

_____ [describe, e.g., the parties have dealt with one another for many years in products of this same type with the express understanding, based on their earliest dealings, that Defendant made no representation or guarantee as to the character of the goods or it has long been the

practice in Defendant's industry in dealing with any and all customers to sell all goods without warranting in any manner their character in any respect].

[AND/OR, to allege that the implied warranties of merchantability and/or fitness are inapplicable because the buyer was given the opportunity to examine the goods prior to the sale:]

FIFTH AFFIRMATIVE DEFENSE

(Buyer Had Opportunity to Examine Goods)

6. Defendant is not liable for breach of the implied

_____ [warranty or warranties] of
 _____ [merchantability or fitness or
 merchantability and fitness] with respect to the sale of goods alleged in Plaintiff's complaint because, before entering into the alleged contract that is the subject of Plaintiff's complaint, Defendant made available [a
 _____ (sample or model) of] the goods for
 Plaintiff's examination, and expressly invited and encouraged Plaintiff to examine
 _____ [them or that
 _____ (sample or model)],
 _____ [and Plaintiff did or but Plaintiff
 declined to] make such an examination. The defects alleged by Plaintiff to have been present in the goods would have been revealed to Plaintiff by such an examination.

[AND/OR, to allege that the implied warranty of title is inapplicable because it has been excluded or modified by the contract:]

SIXTH AFFIRMATIVE DEFENSE

(Exclusion or Modification of Warranty of Title by Specific Language)

7. Defendant is not liable for breach of the warranty of title with respect to the sale of goods alleged in Plaintiff's complaint because, at the time of the sale alleged in the complaint, Defendant expressly and by specific language

_____ [excluded or modified] any warranty
 of title in the goods by _____ [describe,
e.g., expressly stating to Plaintiff that Defendant could guarantee good title to the goods only as of
 _____ (date) or handing Plaintiff a printed statement at the time of closing, a true copy of which is
 attached as Exhibit A and incorporated by reference, explaining that Defendant would convey to Plaintiff only such title
 as may have attached to the goods when they came into Defendant's possession or calling Plaintiff's attention to signs
 posted prominently at Defendant's sales counter explaining the lack of a warranty of title in these goods by stating "NO
 WARRANTY OF TITLE IS CONTAINED IN ANY CONTRACT OF SALE FOR GOODS AT THIS
 ESTABLISHMENT"].

[AND/OR, to allege that the implied warranty of title is inapplicable because the plaintiff had reason to know that the defendant was not warranting unencumbered title to the goods:]

SEVENTH AFFIRMATIVE DEFENSE

(Buyer Had Reason to Know of Lack or Limitation of Title)

8. Defendant is not liable for breach of the warranty of title with respect to the sale of goods alleged in Plaintiff's

complaint because the circumstances existing at the time of sale gave Plaintiff reason to know that Defendant _____ [did not claim title personally to or was purporting to sell only what right or title Defendant or any third person might have in] the goods, in that _____ [describe circumstances, e.g., Defendant informed Plaintiff that he/she was selling the goods in a private sale in order to foreclose his/her security interest in the goods and collect on an obligation that a third-party debtor owed to Defendant].

[AND/OR, if defendant alleges that action was not filed within the applicable statute of limitations:]

EIGHTH AFFIRMATIVE DEFENSE
(Action Barred by Statute of Limitations)

9. Plaintiff's claim for breach of the _____ [implied warranty of _____ (merchantability or fitness) or warranty of title] is barred by Plaintiff's failure to file this action within the applicable statute of limitations.

[ADD additional affirmative defenses, if any]

[CONTINUE]

Wherefore, Defendant prays as follows:

1. That Plaintiff take nothing by his/her complaint herein;
2. For costs of suit; and
3. For such other and further relief as the court deems proper.

Date: _____

[firm name, if any] _____

By: [signature] _____

[typed name] _____

Attorney for Defendant _____

[ADD following verification, if applicable]

VERIFICATION

I am the defendant in the above entitled action; I have read the foregoing answer and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein stated on information and belief, and, as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

[date] _____

[signature] _____

[typed name] _____

NOTES.

Authority:

Com Code §§ 2312(2), (3), 2314, 2315, 2316(2), (3)(a)- (c)

Implied Warranty Defined:

See 24.13

Exclusion of Implied Warranty:

See 24.15[2] -[6]

Statute of Limitations:

See 24.38

Affirmative Defenses:

See 24.42



49 of 196 DOCUMENTS

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Chapter 25 Seeking Recovery for Unauthorized Disclosure of Confidential or Proprietary Information

2-25 MB Practice Guide: CA Contract Litigation 25.syn

§ 25.syn Synopsis to Chapter 25: Seeking Recovery for Unauthorized Disclosure of Confidential or Proprietary Information

25.01 Scope.

25.02 Objective and Strategy.

25.03 CHECKLIST: Determining What Causes of Action Exist for Unauthorized Disclosure of Confidential or Proprietary Information.

25.04 Cause of Action May Be Based on Breach of Contract.

25.05 Cause of Action May Be Based on Misappropriation of Trade Secret.

25.06 Cause of Action May Be Based on Unfair Competition Claim.

25.07 Cause of Action May Be Based on Breach of Confidence Claim.

25.08 Complaint May Consist of Multiple Causes of Action.

25.09 CHECKLIST: Determining Enforceability of Agreements and Contract Provisions Governing Confidentiality.

25.10 Contract Provisions Governing Treatment of Confidential Information Are Enforceable to Protect Trade Secrets.

25.11 Confidentiality Agreements May Be Invalid If They Are Unconscionable or Violate Public Policy.

25.11[1] Confidentiality Agreement May Be Held Unconscionable.

25.11[2] Confidentiality Agreement May Violate Public Policy.

25.12 CHECKLIST: Establishing Obligation of Confidentiality and Proving Disclosure.

25.13 Confidentiality Agreements Have Been Characterized as Reasonable Step to Ensure Secrecy of Information.

- 25.14 Implied Obligation Can Exist in Absence of Contractual Provision.
- 25.15 Obligation of Confidentiality May Affect Agents of Party to Contract.
- 25.16 Information Disclosed Must Be Confidential or Proprietary.
- 25.16[1] "Confidential Information" Is Often Defined by Agreement.
- 25.16[2] Uniform Trade Secrets Act Provides Statutory Definition.
- 25.16[3] Confidentiality of Information Ultimately Is Question of Fact.
- 25.16[4] Agreement May Provide Exceptions Specifying When Disclosure Is Permissible.
- 25.17 Proving Disclosure of Confidential and Proprietary Information.
- 25.18 CHECKLIST: Determining Remedies for Breach of Contract Action for Unauthorized Disclosure of Confidential Information.
- 25.19 Remedies for Breach of Contract Action May Differ Depending on Determination of Material Breach.
- 25.19[1] Determining Appropriate Response on Material Breach.
- 25.19[2] Factors Court Considers in Assessing Materiality of Breach.
- 25.19[3] Materiality of Breach Is Primarily Question of Fact.
- 25.20 Remedies for Breach of Contract May Include Damages and Injunctive Relief.
- 25.20[1] Monetary Damages May Be Awarded for Unauthorized Disclosure of Confidential Information.
- 25.20[1][a] Pleading Damages in General.
- 25.20[1][b] Amount of Damages Recoverable.
- 25.20[1][c] Damages Limited to Amount From Full Performance.
- 25.20[1][d] Punitive Damages Not Available in Contract Actions.
- 25.20[1][e] Plaintiff Must Mitigate Damages.
- 25.20[2] Injunctive Relief May Be Appropriate Remedy in Addition to or in Lieu of Monetary Damages.
- 25.21 CHECKLIST: Filing Contract Action for Disclosure of Confidential Information.
- 25.22 Allegations Necessary for Complaint for Unauthorized Disclosure of Confidential Information.
- 25.22[1] Required Contents of Complaint for Breach of Contract.
- 25.22[2] Plaintiff Must Allege Valid Agreement.

25.22[3] Plaintiff Must Allege Performance or Ability to Perform.

25.22[4] Plaintiff Must Allege That Defendant Breached Contract.

25.22[5] Plaintiff Must Allege That Plaintiff Suffered Damage From Unauthorized Disclosure.

25.23 CHECKLIST: Responding to Action for Disclosure of Confidential Information.

25.24 Response to Complaint for Unauthorized Disclosure May Be by Answer, Demurrer, or Summary Judgment Motion.

25.24[1] Defendant May Respond by Filing Answer.

25.24[2] Defendant May Respond by Filing Demurrer.

25.24[3] Defendant May Respond by Filing Motion for Summary Judgment or Summary Adjudication.

25.25 Attacking Complaint for Failure to Allege Essential Element.

25.25[1] No Valid Agreement Existed for Nondisclosure of Confidential or Proprietary Information.

25.25[2] Defendant Did Not Breach Contract.

25.25[3] Plaintiff Suffered No Harm From Disclosure.

25.26 Defendant Should Assert Any Appropriate Affirmative Defenses.

25.26[1] Defendant Can Assert Unconscionability As Affirmative Defense.

25.26[2] Defendant Can Assert Public Policy As Affirmative Defense.

25.26[3] Defendant Can Assert Statute of Limitations As Affirmative Defense.

25.26[4] Defendant Can Assert Failure to Mitigate Damages As Affirmative Defense.

25.27 Complaint for Breach of Contract Based on Disclosure of Confidential Information.

Complaint for Breach of Contract Based on Disclosure of Confidential Information.

25.28 Answer to Complaint and Affirmative Defenses for Breach of Contract Based on Disclosure of Confidential Information.

Answer to Complaint and Affirmative Defenses for Breach of Contract Based on Disclosure of Confidential Information.



50 of 196 DOCUMENTS

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Chapter 25 Seeking Recovery for Unauthorized Disclosure of Confidential or Proprietary Information

I. STRATEGY

2-25 MB Practice Guide: CA Contract Litigation 25.01

25.01 Scope.

This chapter covers the violation of contractual provisions respecting the confidentiality of information disclosed by one party to another in the course of performing the contract; specifically:

- Objectives and strategy for recovery for unauthorized disclosure of confidential information [see 25.02].
- Determining what causes of action exist for the unauthorized disclosure of confidential or proprietary information [see 25.03 -25.08], including:
 - ☐ Cause of action for breach of contract [see 25.04];
 - ☐ Cause of action for misappropriation of trade secret [see 25.05];
 - ☐ Cause of action for unfair competition [see 25.06];
 - ☐ Cause of action for breach of confidence [see 25.07]; and
 - ☐ Multiple causes of action [see 25.08].
- Determining the enforceability of agreements and contract provisions governing confidentiality [see 25.09 -25.11].
- Establishing the obligation of confidentiality and proving disclosure [see 25.12 -25.17].
- Determining appropriate remedies for breach of contract due to unauthorized disclosure of confidential information, including money damages and injunctive relief [see 25.18 -25.20].
- Filing a breach of contract action for unauthorized disclosure of confidential information [see 25.21, 25.22].

■ Responding to a breach of contract action for disclosure of confidential information [see 25.23-25.26], including:

- ☐ Responding to a complaint [see 25.24];
- ☐ Failure to allege essential elements as basis for attacking complaint [see 25.25]; and
- ☐ Unconscionability and violation of public policy as affirmative defenses to complaint [see 25.26].

Core Statutes:

B&P Code § 16600; CC §§ 1549, 1550, 1670.5, 3300, 3358; CCP §§ 422.10, 430.10, 437c(a), 526

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawBreachCauses of ActionGeneral OverviewTortsBusiness TortsUnfair Business PracticesGeneral OverviewTrade Secrets LawBreach of ContractGeneral OverviewTrade Secrets LawBreach of ContractBreach of ConfidenceGeneral OverviewTrade Secrets LawCivil ActionsGeneral Overview



51 of 196 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 25 Seeking Recovery for Unauthorized Disclosure of Confidential or Proprietary Information

I. STRATEGY

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25.02 Objective and Strategy.

Contracts or contract provisions specifically prohibiting the disclosure of information that is confidential, proprietary, and/or a trade secret, are frequently encountered in a variety of situations. Common situations in which nondisclosure and confidentiality provisions are used in contracts include the following:

- Sales, distribution, or marketing agreements in which one party needs access to another's customer lists and related information in order to perform the terms of the agreement.
- Agreements relating to research and development in which processes and/or technology are at issue.
- Employment agreements, usually but not always in conjunction with noncompetition clauses. This category has been a frequent source of litigation because the right to restrict competition is very limited under California law [*see generally B&P Code § 16600 et seq.*].

An action for the unauthorized disclosure of confidential information may be founded on a number of causes of action, including breach of contract and tort causes of action such as misappropriation of trade secret, unfair competition, and breach of confidence [*see 25.03 -25.08*]. This chapter provides an overview of all these relevant causes of action, but its main focus is on recovering for unauthorized disclosure under a breach of contract theory. For extensive discussion of tort theories of recovery for disclosure of confidential information, see the companion publication to this one, Matthew Bender[(R)] Practice Guide: California Unfair Competition and Business Torts, Ch. 2, Unfair Competition, and Ch. 8, Trade Secrets.

In practice, breach of contract claims based on the disclosure of confidential information usually are combined with tort claims, sometimes seemingly more or less as an afterthought [*see 25.08*]. The majority of reported opinions dealing with issues relating to disclosure of confidential information fall into the tort category. However, some of the substantive issues considered in the misappropriation or unfair competition context--especially with respect to what is or is not confidential information [*see 25.16*] or whether disclosure occurred [*see 25.17*]--are relevant to the resolution of breach of contract issues as well.

On the other hand, nondisclosure agreements are governed by the same basic contract principles that apply to all contracts. A cause of action for breach of a nondisclosure agreement must be proven under basic contract principles, and when reported decisions dealing specifically with breach of nondisclosure agreements are lacking, resort must be

made to general principles of contract law. Thus, many of the authorities cited in this chapter deal with general principles of contract law that apply to all contracts, rather than specifically to nondisclosure and confidentiality agreements.



Strategic Point--Plaintiff:

A party bringing a disclosure action based on breach of contract must plead and prove the parties had a valid contract [see *Evid Code* § 500], and all the essential elements for a breach of contract action [CC § 1550; see 25.21, 25.22]. The plaintiff must establish the existence of a valid nondisclosure or confidentiality agreement [see 25.09 -25.11], and must show that the information disclosed to the defendant is within the realm of "confidential" information as defined in the agreement or determined by law [see 25.16]. It is also beneficial for the plaintiff to show that the confidential information in question does not fall within any exclusion provided for in the agreement [see 25.12 -25.17]. The plaintiff also must show that the defendant disclosed the information in an unauthorized manner that was not contemplated by the agreement, and that as a result of the disclosure, the plaintiff suffered damage.



Strategic Point--Defendant:

In opposing an action for unauthorized disclosure of confidential information, the defendant should try to attack the existence of a valid contract, argue that no breach occurred because the information was not confidential or the disclosure was made in accordance with the agreement, or try to show that any disclosure did not proximately cause damage to the plaintiff [see 25.23 -25.26]. The defendant should determine if the disclosed information falls within an exclusion that may be in the agreement, or provided by law, and whether the information was disclosed in a manner not contemplated under the agreement. If the plaintiff successfully alleged a breach of contract action, the defendant may assert any applicable affirmative defense, such as unconscionability or violation of public policy in response [see 25.26].



Strategic Point--Defendant:

It is a common practice in trade secret cases for the defendant to argue that the plaintiff's identification of its trade secrets does not comply with the "reasonable particularity" requirement of *CCP* § 2019.210 [see, e.g., *Neothermia Corp. v. Rubicor Med., Inc.* (ND Cal 2004) 345 F Supp2d 1042, 1044-1045]. This can have the dual advantage of postponing the defendant's discovery obligations and forcing a more precise description of the trade secret. In effect, this gets the defendant more early discovery from the plaintiff.

Detailed Discussion/Forms:

California Forms of Pleading and Practice, Ch. 140, Contracts (Matthew Bender).

California Points and Authorities, Ch. 50, Contracts (Matthew Bender).

Matthew Bender[(R)] Practice Guide: California Unfair Competition and Business Torts, Ch. 2, Unfair Competition;.



Cross Reference:

For Tips on updating case law and expanding your research with additional resources, see **How to Use Lexis.com With This Publication** at the front of this volume.

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawBreachCauses of ActionGeneral OverviewTortsBusiness TortsUnfair Business PracticesGeneral
OverviewTrade Secrets LawBreach of ContractBreach of ConfidenceGeneral OverviewTrade Secrets LawCivil
ActionsGeneral OverviewTrade Secrets LawCivil ActionsRemediesGeneral Overview



52 of 196 DOCUMENTS

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Chapter 25 Seeking Recovery for Unauthorized Disclosure of Confidential or Proprietary Information
II. DETERMINING WHAT CAUSES OF ACTION EXIST FOR UNAUTHORIZED DISCLOSURE OF
CONFIDENTIAL OR PROPRIETARY INFORMATION

2-25 MB Practice Guide: CA Contract Litigation 25.03

25.03 CHECKLIST: Determining What Causes of Action Exist for Unauthorized Disclosure of Confidential or Proprietary Information.

- ☐ Determine whether cause of action for breach of contract exists:
- ☐ Did plaintiff and defendant enter into valid contract for nondisclosure of confidential or proprietary information?
 - ☐ Did plaintiff disclose information to defendant that is defined as "confidential" in the agreement?
 - ☐ Does confidential information fall within any exclusions provided by agreement?
 - ☐ Did defendant disclose confidential information in an unauthorized manner?
 - ☐ Did plaintiff suffer harm from defendant's unauthorized disclosure?

Authority:

CC § 1549 et seq.

Discussion:

See 25.04, 25.22

Form:

See 25.27

- ☐ Determine whether action for misappropriation of trade secret exists:

- ☐ Was plaintiff owner of trade secret?
- ☐ Did defendant use or disclose trade secret without plaintiff's express or implied consent?
- ☐ Did defendant do any of following?
 - ☐ Use improper means to acquire knowledge of trade secret?
 - ☐ With respect to manner in which trade secret was acquired, did defendant do any of following:
 - ☐ Know or have reason to know that its knowledge of trade secret was derived from or through person who had used improper means to acquire it;
 - ☐ Acquire trade secret under circumstances giving rise to duty to maintain its secrecy or limit its use; or
 - ☐ Derive trade secret from or through person who owed duty to person seeking relief to maintain its secrecy or limit its use?
 - ☐ Before material change of defendant's position, did defendant:
 - ☐ Know or have reason to know that information was trade secret; and
 - ☐ Acquire knowledge of trade secret by accident or mistake?

Authority:*CC § 3426.1(b)(1)***Discussion:**

See 25.05

- ☐ Determine whether action for unfair competition exists:
 - ☐ Did defendant engage in business act or practice that consisted of:
 - ☐ Unlawful act or practice;
 - ☐ Fraudulent act or practice;
 - ☐ Unfair act or practice; or

☐ Unfair or false advertising?

Authority:

B&P Code § 17200 et seq.

Discussion:

See 25.06

☐ Determine whether action for breach of confidence exists:

☐ Did plaintiff offer protectable idea to defendant in confidence?

☐ Did defendant:

☐ Voluntarily receive idea in confidence?

☐ Understand that idea:

☐ Was not to be disclosed to others; and

☐ Was not to be used by defendant for purposes beyond limits of confidence without plaintiff's permission?

Authority:

Tele-Count Eng'rs, Inc. v. Pacific Tel. & Tel. Co. (1985) 168 CA3d 455, 463, 214 CR 276

Discussion:

See 25.07

☐ Determine what causes of action are appropriate to plead in complaint.

Discussion:

See 25.08

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawBreachCauses of ActionGeneral OverviewTortsBusiness TortsUnfair Business PracticesGeneral OverviewTrade Secrets LawBreach of ContractBreach of ConfidenceGeneral OverviewTrade Secrets LawCivil ActionsGeneral OverviewTrade Secrets LawMisappropriation ActionsGeneral Overview



53 of 196 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 25 Seeking Recovery for Unauthorized Disclosure of Confidential or Proprietary Information
 II. DETERMINING WHAT CAUSES OF ACTION EXIST FOR UNAUTHORIZED DISCLOSURE OF
 CONFIDENTIAL OR PROPRIETARY INFORMATION

2-25 MB Practice Guide: CA Contract Litigation 25.04

25.04 Cause of Action May Be Based on Breach of Contract.

Unauthorized disclosure of confidential information may give rise to breach of contract claim if the basic requirements for a breach of contract claim exist. In the context of an action for breach of contract based on unauthorized disclosure of confidential or proprietary information requires, the plaintiff must prove all the following elements [CC § 1550]:

- Plaintiff and defendant entered into a valid contract for the nondisclosure of confidential or proprietary information.
- Plaintiff performed or substantially performed his or her obligations.
- All conditions required for the defendant's performance of nondisclosure occurred.
- Defendant disclosed confidential or proprietary information in an unauthorized manner.
- The plaintiff suffered harm from the unauthorized disclosure.

Basic Statute of Limitations:

Four years for written contract; two years for oral or implied contract [CCP §§ 337(1), 339(1)].



Strategic Point--All Parties:

A breach of contract action for unauthorized disclosure of confidential information may be used when the information disclosed cannot be classified as a trade secret and no action for misappropriation of trade secret is available.

Jury Instructions:

Breach of Contract--Essential Factual Elements, see *Judicial Council of California Civil Jury Instructions, CACI No. 303 (LexisNexis Matthew Bender)*.



Cross References:

Discussion of essential contractual elements, see Ch. 13, Attacking or Defending Existence of

Contract--Absence of Essential Element.

Discussion of action for breach of contract, see Ch. 22, Suing or Defending Action for Breach of Contract.

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawBreachCauses of ActionGeneral OverviewTrade Secrets LawBreach of ContractGeneral OverviewTrade
Secrets LawBreach of ContractBreach of ConfidenceGeneral OverviewTrade Secrets LawBreach of ContractBreach of
ConfidenceConfidential RelationshipsTrade Secrets LawBreach of ContractImplied Contracts



54 of 196 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 25 Seeking Recovery for Unauthorized Disclosure of Confidential or Proprietary Information
 II. DETERMINING WHAT CAUSES OF ACTION EXIST FOR UNAUTHORIZED DISCLOSURE OF
 CONFIDENTIAL OR PROPRIETARY INFORMATION

2-25 MB Practice Guide: CA Contract Litigation 25.05

25.05 Cause of Action May Be Based on Misappropriation of Trade Secret.

A cause of action for misappropriation based on unauthorized disclosure of a trade secret requires proof of all of the following elements [see *CC* § 3426.1(b)(1)]:

- That the plaintiff owns a trade secret.
- That the defendant used or disclosed the trade secret without the plaintiff's express or implied consent.
- That the defendant either:
 - ☐ Used improper means to acquire knowledge of the trade secret; or
 - ☐ Did one or more of the following:
 - Knew or had reason to know that knowledge of the trade secret was derived from or through a person who had used improper means to acquire it;
 - Acquired it under circumstances giving rise to a duty to maintain its secrecy or limit its use, or derived it from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use; or
 - Before a material change of defendant's position, knew or had reason to know that the information was a trade secret, and the defendant acquired knowledge of it by accident or mistake.

Basic Statute of Limitations:

Three years [*CC* § 3426.6].

Jury Instructions:

Elements of Plaintiff's Cause of Action for Misappropriation of Trade Secrets Based on Improper Use or Disclosure, see *California Forms of Jury Instruction, Ch. 33A, Instr. MB 3300A.80* (Matthew Bender).

**Search California Continuing Education of the Bar publications:**

Use *lexis.com* to search for discussion of misappropriation of trade secrets by an employee:

● Legal > States Legal-U.S. > California > Search Analytical & CLE Materials > Continuing Education of the Bar (CEB), CA > Reference Titles > Advising California Employers



Sample Search: For information about relief and remedies when former employees have misappropriated confidential or proprietary information like customer lists, trade secrets, restrictive covenants, search this source on your topic: *breach! /5 contract! or agreement and customer list or confidential or trade secret.*

**Cross Reference:**

Proving claim for trade secret misappropriation, see *Matthew Bender[(R)] Practice Guide: California Unfair Competition and Business Torts*, 8.10.

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawBreachCauses of ActionGeneral OverviewTortsBusiness TortsUnfair Business PracticesGeneral OverviewTrade Secrets LawMisappropriation ActionsGeneral OverviewTrade Secrets LawMisappropriation ActionsElementsGeneral Overview



55 of 196 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 25 Seeking Recovery for Unauthorized Disclosure of Confidential or Proprietary Information
 II. DETERMINING WHAT CAUSES OF ACTION EXIST FOR UNAUTHORIZED DISCLOSURE OF
 CONFIDENTIAL OR PROPRIETARY INFORMATION

2-25 MB Practice Guide: CA Contract Litigation 25.06

25.06 Cause of Action May Be Based on Unfair Competition Claim.

An action for unauthorized disclosure of confidential information may be brought as a tort claim for unfair competition under *B&P Code § 17200 et seq.* To be actionable, the statute requires that defendant have engaged in [*B&P Code § 17200*]:

- An unlawful business act or practice.
- A fraudulent business act or practice.
- An unfair business act or practice.
- Unfair, deceptive, untrue, or misleading advertising.

Basic Statute of Limitations:

Four years [*B&P Code § 17208*].

➡ **Cross Reference:**

Identifying actionable unfair competition, see *Matthew Bender[(R)] Practice Guide: California Unfair Competition and Business Torts, 2.04*.

Legal Topics:

For related research and practice materials, see the following legal topics:

Antitrust & Trade Law Trade Practices & Unfair Competition General Overview Contracts Law Breach Causes of Action General Overview Torts Business Torts Unfair Business Practices General Overview Trade Secrets Law Misappropriation Actions General Overview Trade Secrets Law Misappropriation Actions Unfair Competition



56 of 196 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 25 Seeking Recovery for Unauthorized Disclosure of Confidential or Proprietary Information
 II. DETERMINING WHAT CAUSES OF ACTION EXIST FOR UNAUTHORIZED DISCLOSURE OF
 CONFIDENTIAL OR PROPRIETARY INFORMATION

2-25 MB Practice Guide: CA Contract Litigation 25.07

25.07 Cause of Action May Be Based on Breach of Confidence Claim.

Secret information that does not fall within the definition of a trade secret, such as an idea, may still be protected against misappropriation under the cause of action for breach of confidence [see *Tele-Count Eng'rs, Inc. v. Pacific Tel. & Tel. Co. (1985) 168 CA3d 455, 463, 214 CR 276*].

An action for breach of confidence exists when [*Tele-Count Eng'rs, Inc. v. Pacific Tel. & Tel. Co. (1985) 168 CA3d 455, 463, 214 CR 276* ; *Faris v. Enberg (1979) 97 CA3d 309, 323, 158 CR 704*]:

- A protectable idea is offered to another person in confidence.
- The idea is voluntarily received by the offeree in confidence with the understanding that it is not to be disclosed to others.
- The person had an opportunity to decline the disclosure.
- The idea is not to be used by the offeree for the purposes beyond the limits of the confidence without the offeror's permission.

Jury Instructions:

Breach of Confidence--Burden of Proof, see California Forms of Jury Instruction, Ch. 33A, Instr. MB 3300A.100 (Matthew Bender).

Damages for Breach of Confidence, see California Forms of Jury Instruction, Ch. 33A, Instr. MB 3300A.101 (Matthew Bender).



Search Milgrim on Trade Secrets:

Use *lexis.com* to search for discussion of recovery for breach of confidence:

■ Legal > Area of Law-By Topic > Trademarks > Search Analysis, Law Reviews & Journals > Milgrim on Trade Secrets

○ Sample Search: For information concerning recovery or damages for breach of contract based on breach of confidentiality, try: *recover! OR damag! /20 breach! /3 contract! OR agree! /20 breach! /5 confidential!*.

Judge's Perspective:

The tort of breach of confidence is not well defined in the cases. The tort is taken from the Restatement (First) of Torts, which provides, "One who discloses or uses another's trade secret, without a privilege to do so, is liable to the other if (a) he discovered the secret by improper means, or (b) his disclosure or use constitutes a breach of confidence reposed in him by the other in disclosing the secret to him, or (c) he learned the secret from a third person with notice of the facts that it was a secret and that the third person discovered it by improper means or that the third person's disclosure of it was otherwise a breach of his duty to the other, or (d) he learned the secret with notice of the facts that it was a secret and that its disclosure was made to him by mistake" [Restatement (First) of Torts § 757]. In the *Thompson* case, the court followed the Restatement analysis but determined that "under appropriate circumstances these principles apply to information which is not a trade secret ..." [*Thompson v. California Brewing Co.* (1957) 150 CA2d 469, 476, 310 P2d 436]. Thus, information may still be "confidential" without rising to a level of trade secret.

Although the tort of breach of confidence is based on the idea of an implied obligation, it is not an obligation arising from the apparent intentions of the parties, but rather is created by law for reasons of justice [*Tele-Count Eng'rs, Inc. v. Pacific Tel. & Tel. Co.* (1985) 168 CA3d 455, 464, 214 CR 276]. The underlying premise of this cause of action is an understanding between the parties that an idea was offered on a condition of confidence.

To prevent the unwarranted creation or extension of a monopoly and restraint on progress in art, a confidential relationship will not be created from the mere submission of an idea to another person. There must be evidence of the communication of the confidentiality of the submission or evidence from which a confidential relationship can be inferred [*Faris v. Enberg* (1979) 97 CA3d 309, 323, 158 CR 704].

The California Supreme Court has expressly left open the issue of whether a cause of action for breach of confidence exists [see *Davies v. Krasna* (1975) 14 C3d 502, 506-508, 121 CR 705, 535 P2d 1161], but a number of appellate courts have concluded that a cause of action does exist [see *Tele-Count Eng'rs, Inc. v. Pacific Tel. & Tel. Co.* (1985) 168 CA3d 455, 461-466, 214 CR 276 ; *Faris v. Enberg* (1979) 97 CA3d 309, 321, 158 CR 704 ; see also *Self Directed Placement Corp. v. Control Data Corp.* (9th Cir 1990) 908 F2d 462, 467 (relying on *Tele-Count* and *Faris* to hold that complaint stated causes of action for breach of confidential relationship and common-law misappropriation)].

It is not clear what statute of limitations applies to a breach of confidence claim. A claim for misappropriation of a trade secret must be brought within three years [CC § 3426.6], while a claim for breach of an implied contract must be brought within two years [CCP § 339(1)].

Distinguish:

Although the two actions are related, the tort of breach of confidence, which rests in part on the existence of an implied contract, should be distinguished from an action for breach of an implied-in-fact contract [see *Thompson v. California Brewing Co.* (1957) 150 CA2d 469, 474-476, 310 P2d 436].



Cross References:

Discussion of breach of contract, see Ch. 22, Suing or Defending Action for Breach of Contract.

Discussion of trade secrets, see *Matthew Bender[(R)] Practice Guide: California Unfair Competition and Business Torts*, 8.02.

Discussion of intentional torts and other theories of recovery, see *California Torts*, § 40.57.

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawBreachCauses of ActionGeneral OverviewTortsBusiness TortsUnfair Business PracticesGeneral
OverviewTrade Secrets LawBreach of ContractBreach of ConfidenceGeneral OverviewTrade Secrets LawBreach of
ContractBreach of ConfidenceConfidential RelationshipsTrade Secrets LawBreach of ContractBreach of
ConfidenceLack of Good Faith



57 of 196 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 25 Seeking Recovery for Unauthorized Disclosure of Confidential or Proprietary Information
 II. DETERMINING WHAT CAUSES OF ACTION EXIST FOR UNAUTHORIZED DISCLOSURE OF
 CONFIDENTIAL OR PROPRIETARY INFORMATION

*2-25 MB Practice Guide: CA Contract Litigation 25.08***25.08 Complaint May Consist of Multiple Causes of Action.**

A plaintiff may want to allege multiple causes of action in a complaint for breach of contract for unauthorized disclosure, because recovery under one cause of action will not necessarily be limited by recovery under another cause of action, and this approach increases the possible counts on which to base remedies. In addition, different burdens of proof may apply depending on the nature of the cause of action, which may give a plaintiff a cause of action in tort if a contract cause of action does not exist.

Examples:

- An action under the Uniform Trade Secrets Act for trade secret misappropriation does not limit other contractual, civil, or criminal remedies that may be available to an aggrieved party [CC § 3426.7(b)].
- Information that does not fall within the definition of a "trade secret" may still be protected against misappropriation under a breach of confidence action [*Tele-Count Eng'rs, Inc. v. Pacific Tel. & Tel. Co.* (1985) 168 CA3d 455, 463, 214 CR 276 ; see 25.07].

**Strategic Point--Plaintiff:**

Trade secret claims generally are regarded as the most powerful, and yield the most potential for extraordinary relief such as punitive damages and injunctions, but are the most difficult claims to prove. The statutory burdens are rigorous and the available defenses (plaintiff's failure to maintain secrecy, independent availability of the information) are numerous. Breach of contract claims generally are the easiest claims to prove, assuming admissible proof of the contract, because they avoid the "he said, she said" difficulties of proving breach of confidence cases. Breach of confidence claims are the last resort among the three causes of action. However, generally speaking it is advisable to plead at least two, if not all three, and see what discovery bears out.

**Cross References:**

Discussion of potential causes of action, see Ch. 2 Determining What Causes of Action Exist.

Discussion of trade secrets, see Matthew Bender[(R)] Practice Guide: California Unfair Competition and Business Torts, Ch. 8, Trade Secrets.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Pleading & Practice Pleadings Complaints General Overview Contracts Law Breach Causes of Action General Overview Trade Secrets Law Breach of Contract Breach of Confidence General Overview Trade Secrets Law Misappropriation Actions General Overview Trade Secrets Law Misappropriation Actions Unfair Competition



58 of 196 DOCUMENTS

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Chapter 25 Seeking Recovery for Unauthorized Disclosure of Confidential or Proprietary Information
III. DETERMINING ENFORCEABILITY OF AGREEMENTS AND CONTRACT PROVISIONS GOVERNING
CONFIDENTIALITY

2-25 MB Practice Guide: CA Contract Litigation 25.09

25.09 CHECKLIST: Determining Enforceability of Agreements and Contract Provisions Governing Confidentiality.

☐ Determine enforceability of confidentiality agreement or provision:

☐ Did plaintiff and defendant enter into written agreement for nondisclosure of confidential information?

Authority:

Westinghouse Elec. Corp. v. Newman & Holtzinger, P.C. (1995) 39 CA4th 1194, 1205, 46 CR2d 151

Discussion:

See 25.10

☐ Determine whether confidentiality agreement or provision is unconscionable:

☐ Was there procedural unconscionability because agreement had elements of adhesion or unequal bargaining power?

☐ Was there substantive unconscionability because agreement lacked elements of basic fairness?

Authority:

CC § 1670.5

Discussion:

See 25.11[1]

☐ Determine whether confidentiality agreement or provision is against public policy if agreement, coupled with noncompetition agreement or other provision, places restraints on trade.

Authority:

B&P Code § 16600; Gordon v. Landau (1958) 49 C2d 690, 321 P2d 456 ; Winston Research Corp. v. Minnesota Mining & Mfg. Co. (9th Cir 1965) 350 F2d 134, 140 ; Rigging Int'l Maint. Co. v. Gwin (1982) 128 CA3d 594, 614, 180 CR 451

Discussion:

See 25.11[2]

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawContract Conditions & ProvisionsGeneral OverviewContracts LawDefensesUnconscionabilityGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsConditions & TermsTrade Secrets & Unfair CompetitionNoncompetition & Nondisclosure AgreementsLabor & Employment LawEmployment RelationshipsEmployment ContractsConditions & TermsTrade Secrets & Unfair CompetitionTrade SecretsTrade Secrets LawBreach of ContractImplied Contracts



59 of 196 DOCUMENTS

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Chapter 25 Seeking Recovery for Unauthorized Disclosure of Confidential or Proprietary Information
 III. DETERMINING ENFORCEABILITY OF AGREEMENTS AND CONTRACT PROVISIONS GOVERNING
 CONFIDENTIALITY

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25.10 Contract Provisions Governing Treatment of Confidential Information Are Enforceable to Protect Trade Secrets.

Contract provisions and nondisclosure agreements that prohibit disclosure of confidential or proprietary information can be valid if they relate to trade secrets and do not unduly restrain people from engaging in a lawful profession, trade, or business [*Gordon v. Landau* (1958) 49 C2d 690, 694, 321 P2d 456 ; see *Thompson v. Impaxx, Inc.* (2003) 113 CA4th 1425, 1428-1432 (analyzing cases dealing with validity of noncompetition agreements); see also *Zahodnick v. IBM* (4th Cir 1997) 135 F3d 911, 915].

Consider:

The use of an express nondisclosure or confidentiality agreement provides a firm written basis for traditional contract remedies and informs the parties of their obligations not to divulge the confidential or proprietary information.



Warning:

A preexisting nondisclosure agreement between the parties is extinguished on incorporation into a court order. Once the agreement is merged into the order, the parties no longer have a right of action based on that agreement. The obligations are no longer imposed by the agreement, but rather by the court order, and are enforceable through contempt and other sanctions available to the court [*Westinghouse Elec. Corp. v. Newman & Holtzinger, P.C.* (1995) 39 CA4th 1194, 1205, 46 CR2d 151].

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawContract Conditions & ProvisionsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsConditions & TermsTrade Secrets & Unfair CompetitionNoncompetition & Nondisclosure AgreementsLabor & Employment LawEmployment RelationshipsEmployment ContractsConditions &

TermsTrade Secrets & Unfair CompetitionTrade SecretsTrade Secrets LawBreach of ContractGeneral OverviewTrade
Secrets LawProtection of SecrecyReasonable MeasuresConfidentiality Agreements



60 of 196 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 25 Seeking Recovery for Unauthorized Disclosure of Confidential or Proprietary Information
 III. DETERMINING ENFORCEABILITY OF AGREEMENTS AND CONTRACT PROVISIONS GOVERNING
 CONFIDENTIALITY

2-25 MB Practice Guide: CA Contract Litigation 25.11

25.11 Confidentiality Agreements May Be Invalid If They Are Unconscionable or Violate Public Policy.

25.11[1] Confidentiality Agreement May Be Held Unconscionable. A court may refuse to enforce a contract or provision that is unconscionable [CC § 1670.5; see *Graham v. Scissor-Tail, Inc.* (1984) 28 C3d 807, 821-828, 171 CR 604, 623 P2d 165]. Unconscionability in the context of nondisclosure agreements may arise when nondisclosure provisions are included in noncompetition agreements with employees.

A confidentiality agreement or provision is more likely to be held unconscionable if it is coupled with a noncompetition agreement or other agreement that places restraints on trade [see 25.11[1]]. This is because B&P Code § 16600 precludes the enforceability of nondisclosure and noncompetition agreements beyond the protection of confidential information [*Rigging Int'l Maint. Co. v. Gwin* (1982) 128 CA3d 594, 614, 180 CR 451 ; see 25.11[2]].

If a court finds a contract to have been unconscionable, it may do any of the following [CC § 1670.5(a)]:

- Refuse to enforce the contract [*Abramson v. Juniper Networks, Inc.* (2004) 115 CA4th 638, 668].
- Enforce the remainder of the contract without the unconscionable clause [*Little v. Auto Stiegler, Inc.* (2003) 29 C4th 1064, 1072-1074, 1076].
- Limit the application of any unconscionable clause so as to avoid an unconscionable result.



Cross References:

Discussion of claims of unconscionability and public policy, see Ch. 18, Asserting or Defending Claim That Contract Is Illegal, Contrary to Public Policy, or Unconscionable.

Discussion of unconscionable contracts generally, see *California Forms of Pleading and Practice*, §§ 140.25, 140.64 (Matthew Bender).

25.11[2] Confidentiality Agreement May Violate Public Policy. Confidentiality or nondisclosure agreements may be unenforceable if they violate public policy. For example, a provision in a settlement agreement prohibiting a

securities customer from discussing an agent's misconduct with regulatory authorities has been invalidated on public policy grounds [*Cariveau v. Hafferty* (2000) 83 CA4th 126, 138, 99 CR2d 417]. Not all confidentiality provisions violate public policy, however [see *Sanchez v. County of San Bernardino* (2009) 176 CA4th 516, 527, 98 CR3d 96 (county's agreement not to disclose facts giving rise to employee's severance agreement did not violate public policy)].

Public policy issues also may arise when a nondisclosure clause is part of a noncompetition agreement. A contract that restrains any person from engaging in a lawful profession, trade, or business of any kind is void to that extent [B&P Code § 16600]. Any attempt to restrict competition by a former employee by contract is likely to be doomed under B&P Code § 16600 unless the restriction is carefully limited and the agreement protects merely a proprietary or property right of the employer recognized as entitled to protection under the general principles of unfair competition [*Metro Traffic Control, Inc. v. Shadow Traffic Network* (1994) 22 CA4th 853, 861, 27 CR2d 573].

In determining whether a confidentiality agreement violates public policy, a distinction may be made between confidentiality agreements with a noncompetition clause--which, subject to certain exceptions, violate public policy under B&P Code § 16600--and confidentiality agreements that seek to prohibit a party from disclosing confidential information and trade secrets, which do not violate B&P Code § 16600 [see *Gordon v. Landau* (1958) 49 C2d 690, 321 P2d 456 ; *The Retirement Group v. Galante* (2009) 176 CA4th 1226, 1239-1240, 98 CR3d 585 (unfair competition or misuse of trade secret information may be enjoined, but solicitation of customers may not)]. California courts generally will not enforce noncompetition agreements that violate California's definition of reasonable scope and time limitations, even if another state's law is chosen under the agreement and it is part of an otherwise enforceable agreement [see, e.g., *Application Group, Inc. v. Hunter Group, Inc.* (1998) 61 CA4th 881, 899-902, 72 CR2d 73].



Cross Reference:

Claims of unconscionability and public policy, see Ch. 18, Asserting or Defending Claim That Contract Is Illegal, Contrary to Public Policy, or Unconscionable.

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawDefensesPublic Policy ViolationsContracts LawDefensesUnconscionabilityGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsConditions & TermsTrade Secrets & Unfair CompetitionNoncompetition & Nondisclosure AgreementsLabor & Employment LawEmployment RelationshipsEmployment ContractsConditions & TermsTrade Secrets & Unfair CompetitionTrade SecretsTrade Secrets LawProtection of SecrecyReasonable MeasuresConfidentiality Agreements



61 of 196 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 25 Seeking Recovery for Unauthorized Disclosure of Confidential or Proprietary Information
IV. ESTABLISHING OBLIGATION OF CONFIDENTIALITY AND PROVING DISCLOSURE

2-25 MB Practice Guide: CA Contract Litigation 25.12

25.12 CHECKLIST: Establishing Obligation of Confidentiality and Proving Disclosure.

- ☐ Determine whether plaintiff and defendant signed express agreement for nondisclosure of confidential or proprietary information.

Authority:

Whyte v. Schlage Lock Co. (2002) 101 CA4th 1443, 1454, 125 CR2d 277

Discussion:

See 25.13

- ☐ In absence of written agreement, determine whether implied contract exists because acts, conduct, and relationship of parties suggest existence of implied contract to protect confidential or proprietary information.

Authority:

CC §§ 1619-1621; Del E. Webb Corp. v. Structural Materials Co. (1981) 123 CA3d 593, 611, 176 CR 824

Discussion:

See 25.14

- ☐ In absence of written or implied nondisclosure agreement, is action for unauthorized disclosure available under tort theory of misappropriation of trade secrets or breach of confidence?

Authority:

Loral Corp. v. Moyes (1985) 174 CA3d 268, 275, 219 CR 836

Discussion:

See 25.05 -25.08, 25.14

- ☐ Determine whether obligation of confidentiality applies to agents of party to contract.

Authority:

CC § 2295 et seq.

Discussion:

See 25.15

- ☐ Determine whether information disclosed was confidential or proprietary.

- ☐ Did agreement define which information was considered confidential or proprietary?
- ☐ Was information marked as confidential and/or proprietary?
- ☐ Was there implication of confidentiality in absence of clear definition or marking of confidentiality?
- ☐ Did information fall within exclusion that may be stated in agreement?
- ☐ Was information disclosed actually confidential or proprietary, or a trade secret, regardless of how characterized in agreement?

Authority:

See *Thompson v. Impaxx, Inc. (2003) 113 CA4th 1425, 1434, ; CC § 3426.1*

Discussion:

See 25.16

- ☐ Determine if plaintiff showed facts to indicate cause of action for breach of contract due to unauthorized disclosure.

- ☐ Was there a valid agreement?
- ☐ Did plaintiff disclose confidential information to defendant?
- ☐ Did defendant disclose confidential information in unauthorized manner?
- ☐ Did plaintiff suffer damage as result of unauthorized disclosure?

Authority:

CC § 1550; In re Providian Credit Card Cases (2002) 96 CA4th 292, 304, 116 CR2d 833

Discussion:

See 25.17, 25.21, 25.22

Legal Topics:

For related research and practice materials, see the following legal topics:

TortsBusiness TortsUnfair Business PracticesElementsTrade Secrets LawCivil ActionsGeneral OverviewTrade Secrets
LawMisappropriation ActionsAccidental & Mistaken DisclosureTrade Secrets LawMisappropriation
ActionsElementsGeneral OverviewTrade Secrets LawProtection of SecrecyReasonable MeasuresConfidentiality
Agreements



62 of 196 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 25 Seeking Recovery for Unauthorized Disclosure of Confidential or Proprietary Information
IV. ESTABLISHING OBLIGATION OF CONFIDENTIALITY AND PROVING DISCLOSURE

2-25 MB Practice Guide: CA Contract Litigation 25.13

25.13 Confidentiality Agreements Have Been Characterized as Reasonable Step to Ensure Secrecy of Information.

Confidentiality agreements have been judicially characterized as a "reasonable step" to ensure secrecy of information [*Whyte v. Schlage Lock Co.* (2002) 101 CA4th 1443, 1454, 125 CR2d 277 ; *MAI Sys. Corp. v. Peak Computer, Inc.* (9th Cir 1993) 991 F2d 511, 521 (requiring employees to sign agreements was a reasonable step to insure secrecy of agreements)].

Consider:

It is common for a nondisclosure agreement to specify the actual obligation of confidentiality. For example, a typical agreement may require a party not to disclose the information to third parties, to use it only for stated purpose, and not to use it for a recipient's own benefit [see 25.16].

Legal Topics:

For related research and practice materials, see the following legal topics:

Labor & Employment Law Employment Relationships Employment Contracts Conditions & Terms Trade Secrets & Unfair Competition Noncompetition & Nondisclosure Agreements Trade Secrets Law Protection of Secrecy General Overview Trade Secrets Law Protection of Secrecy Duty to Safeguard Trade Secrets Law Protection of Secrecy Reasonable Measures General Overview Trade Secrets Law Protection of Secrecy Reasonable Measures Confidentiality Agreements



63 of 196 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 25 Seeking Recovery for Unauthorized Disclosure of Confidential or Proprietary Information
IV. ESTABLISHING OBLIGATION OF CONFIDENTIALITY AND PROVING DISCLOSURE

2-25 MB Practice Guide: CA Contract Litigation 25.14

25.14 Implied Obligation Can Exist in Absence of Contractual Provision.

Contracts can be created by the conduct of the parties, depending on all the surrounding circumstances [see CC §§ 1619-1621; *Marvin v. Marvin* (1976) 18 C3d 660, 678 n16, 134 CR 815, 557 P2d 106; *Del E. Webb Corp. v. Structural Materials Co.* (1981) 123 CA3d 593, 611, 176 CR 824].

If an implied contract of confidentiality is not established, recovery for unauthorized disclosure of confidential information may be found under theories of trade secret misappropriation, unfair competition, and breach of confidence [*Loral Corp. v. Moyes* (1985) 174 CA3d 268, 275, 219 CR 836; see 25.05 -25.08].

Jury Instructions:

Implied in Fact Contract, see *Judicial Council of California Civil Jury Instructions*, CACI No. 305 (LexisNexis Matthew Bender).



Cross References:

Discussion of alternative theories of recovery for unauthorized disclosure of confidential information, see 25.03 -25.08.

Discussion of implied contracts, see California Forms of Pleading and Practice, Ch. 140, Contracts (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawContract Conditions & ProvisionsImplied WarrantiesGeneral OverviewContracts LawContract InterpretationFiduciary ResponsibilitiesLabor & Employment LawEmployment RelationshipsEmployment ContractsConditions & TermsTrade Secrets & Unfair CompetitionGeneral OverviewTrade Secrets LawBreach of ContractBreach of ConfidenceConfidential RelationshipsTrade Secrets LawBreach of ContractImplied Contracts



64 of 196 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 25 Seeking Recovery for Unauthorized Disclosure of Confidential or Proprietary Information
IV. ESTABLISHING OBLIGATION OF CONFIDENTIALITY AND PROVING DISCLOSURE

2-25 MB Practice Guide: CA Contract Litigation 25.15

25.15 Obligation of Confidentiality May Affect Agents of Party to Contract.

The acts of an agent within the scope of the agent's authority are considered the acts of the principal, even if not specifically authorized by or known to the principal, and third parties with whom an agent deals are entitled to enforce contracts entered into by the agent on behalf of the principal [*see Madden v. Kaiser Found. Hosps. (1976) 17 C3d 699, 707-709, 131 CR 882, 552 P2d 1178*]. Most confidentiality and nondisclosure agreements contain a provision specifying that the agreement will apply to employees, contracts, and affiliates, if there is a need to know the confidential information. It is common for this type of provision to be included in an agency agreement. The provisions typically included require agents to execute nondisclosure agreements that are similar in terms to the primary agreement executed by the principal.

➤ Cross References:

Discussion of agency issues, see Ch. 20, Asserting Agency Issues in Contract Actions.

Discussion of principals and agents generally, see California Forms of Pleading and Practice, Ch. 427, Principal and Agent (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts Law Contract Interpretation Fiduciary Responsibilities Contracts Law Third Parties General Overview Trade Secrets Law Civil Actions General Overview Trade Secrets Law Misappropriation Actions Elements Confidentiality Trade Secrets Law Protection of Secrecy General Overview



65 of 196 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 25 Seeking Recovery for Unauthorized Disclosure of Confidential or Proprietary Information
IV. ESTABLISHING OBLIGATION OF CONFIDENTIALITY AND PROVING DISCLOSURE

2-25 MB Practice Guide: CA Contract Litigation 25.16

25.16 Information Disclosed Must Be Confidential or Proprietary.

25.16[1] "Confidential Information" Is Often Defined by Agreement. In many instances, the information to be considered confidential or proprietary is clearly defined in the nondisclosure or confidentiality agreement. Confidential information typically is defined in confidentiality agreements to mean any technical, business, financial, contractual terms and conditions, or other information or data furnished by one party to the other party that is either marked or identified as "confidential" [see *Glue-Fold, Inc. v. Slautterback Corp.* (2000) 82 CA4th 1018, 1022 n2, 98 CR2d 661 (agreement defined "confidential information" as information, technical data, or know-how, including but not limited to research, products, software, services, development, inventions, ideas, processes, designs, drawings, engineering, marketing, or finances, disclosed either directly or indirectly in writing, orally or by drawings or inspection of parts or equipment; it was not limited to materials marked "confidential information")].

Information defined as confidential typically may include, but is not necessarily limited to, the following:

- Patents.
- Patent applications.
- Trade secrets.
- Trademark applications.
- Mask works.
- Ideas.
- Samples.
- Drawings.
- Inventions.

- Know-how.
- Processes.
- Equipment.
- Software.
- Financial information.
- Employee lists.
- Customer lists.

Customer lists and similar records generally are recognized as trade secrets if they are truly confidential [see *Courtesy Temp. Serv., Inc. v. Camacho* (1990) 222 CA3d 1278, 1289-1290 (customer list held to be trade secret under UTSA); *ReadyLink Healthcare v. Cotton* (2005) 126 CA4th 1006, 1017-1021 (UTSA and unfair competition); *Klamath-Orleans Lumber, Inc. v. Miller* (1978) 87 CA3d 458, 466, 151 CR 118 (unfair competition); *Greenly v. Cooper* (1978) 77 CA3d 382, 392, 143 CR 514 (unfair competition); but see *American Paper & Packaging Prods., Inc. v. Kirgan* (1986) 183 CA3d 1318, 1324, 1326, 228 CR 713 (customer lists can be protectable under UTSA, but list at issue was not protectable under circumstances)]. In addition, customer lists of telephone answering services and employment agencies are specifically recognized by statute as trade secrets [B&P §§ 16606, 16607].

25.16[2] Uniform Trade Secrets Act Provides Statutory Definition. The Uniform Trade Secrets Act (UTSA) [CC § 3426 *et seq.*] authorizes damages and injunctive relief for misappropriation of trade secrets [see CC §§ 3426.2, 3426.3]. Although UTSA authorizes a tort cause of action and hence is not directly applicable to an action for breach of contract, breach of contract actions are often if not usually brought in connection with misappropriation and unfair competition claims, and so the UTSA definition of "trade secrets" is useful in defining the scope of information that is confidential for purposes of a nondisclosure agreement. The Act defines "trade secret" as information, including a formula, pattern, compilation, program, device, method, technique, or process, that [CC § 3426.1(d); see *ABBA Rubber Co. v. Seaquist* (1991) 235 CA3d 1, 18, 286 CR 528]:

- Derives independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use; and
- Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

25.16[3] Confidentiality of Information Ultimately Is Question of Fact. Regardless of whether or not an agreement characterizes information as confidential, its confidentiality is a fact question. The issue of whether information constitutes a trade secret is a question of fact. Labeling information as a trade secret or as confidential information does not conclusively establish that the information fits this description [*Thompson v. Impaxx, Inc.* (2003) 113 CA4th 1425, 1430]. However, it is an important factor in establishing the value that was placed on the information and that it could not be readily derived from publicly available sources [*Morlife, Inc. v. Perry* (1997) 56 CA4th 1514, 1522, 66 CR2d 731].

Consider:

A nondisclosure agreement or provision typically will provide that the information covered must be marked as confidential or proprietary. The marking of confidential information is intended to show the intent of the parties to consider the marked information as being protected. Some nondisclosure

agreements provide that if confidential or proprietary information is disclosed orally, it must be summarized in writing within a certain time frame.

25.16[4] Agreement May Provide Exceptions Specifying When Disclosure Is Permissible. A nondisclosure agreement may permit disclosure of otherwise-confidential information under specified circumstances. Whether or not these circumstances exist is a question of fact for a court to determine [see *Metro Traffic Control, Inc. v. Shadow Traffic Network* (1994) 22 CA4th 853, 860-862, 27 CR2d 573].

Consider:

Nondisclosure and confidentiality agreements typically provide that the obligation of confidentiality is excluded for specific classes of information, which may include, but is not limited to, the following:

- Information already known to the recipient at the time of disclosure.
- Information rightfully received from a third party without restriction on disclosure.
- Information that becomes publicly known through no wrongful act of recipient.
- Information that has been independently developed by the recipient, without breach of the nondisclosure agreement.
- Information that has been given by the originally disclosing party to others without a restriction on disclosure.
- Information not marked or identified as confidential as required by the nondisclosure agreement.
- The disclosure of the information was granted written approval for disclosure by the originally disclosing party.
- Information that was required to be disclosed pursuant to court order.



Search Milgrim on Trade Secrets:

Use *lexis.com* to search for discussion of disclosure of proprietary information:

■ Legal > Area of Law-By Topic > Trademarks > Search Analysis, Law Reviews & Journals > Milgrim on Trade Secrets



Sample Search: To find material on proprietary information and breach of duty or confidence related thereto, use: *proprietary /5 information AND breach! /5 duty OR confid! OR oblig!*.

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawBreachCauses of ActionElements of ClaimsTrade Secrets LawBreach of ContractBreach of

ConfidenceGeneral OverviewTrade Secrets LawMisappropriation ActionsElementsConfidentiality



66 of 196 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 25 Seeking Recovery for Unauthorized Disclosure of Confidential or Proprietary Information
IV. ESTABLISHING OBLIGATION OF CONFIDENTIALITY AND PROVING DISCLOSURE

2-25 MB Practice Guide: CA Contract Litigation 25.17

25.17 Proving Disclosure of Confidential and Proprietary Information.

As in all cases, the plaintiff must present sufficient evidence to establish a prima facie case on the cause of action [*Schroeder v. Irvine City Council* (2002) 97 CA4th 174, 184, 118 CR2d 330]. In a cause of action for breach of contract relating to confidential or proprietary information, the plaintiff must plead and prove the existence of the contract [see *Walsh v. West Valley Mission Cmty. Coll. Dist.* (1998) 66 CA4th 1532, 1545, 78 CR2d 725 ; see also *Metro Traffic Control, Inc. v. Shadow Traffic Network* (1994) 22 CA4th 853, 860-862, 27 CR2d 573].

► Cross References:

Proving existence of essential elements of contract, see *Ch. 13, Attacking or Defending Existence of Contract--Absence of Essential Element*, 13.04 -13.10.

Alleging essential elements of breach of contract, see *Ch. 22, Suing or Defending Action for Breach of Contract*, 22.12.

Proving trade secret claims on tort causes of action, see Matthew Bender[(R)] Practice Guide: Unfair Competition and Business Torts, Ch. 8, Trade Secrets.

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawBreachCauses of ActionElements of ClaimsLabor & Employment LawEmployment RelationshipsEmployment ContractsConditions & TermsTrade Secrets & Unfair CompetitionGeneral OverviewTrade Secrets LawCivil ActionsEvidenceTrade Secrets LawMisappropriation ActionsElementsDisclosure



67 of 196 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 25 Seeking Recovery for Unauthorized Disclosure of Confidential or Proprietary Information
V. DETERMINING REMEDIES FOR BREACH OF CONTRACT ACTION FOR UNAUTHORIZED DISCLOSURE
OF CONFIDENTIAL INFORMATION

2-25 MB Practice Guide: CA Contract Litigation 25.18

25.18 CHECKLIST: Determining Remedies for Breach of Contract Action for Unauthorized Disclosure of Confidential Information.

- ☐ Determine whether disclosure of information in question was material breach of contract.

Authority:

Sackett v. Spindler (1967) 248 CA2d 220, 229, 56 CR 435

Discussion:

See 25.19

- ☐ Determine what remedies may be appropriate:

☐ Are monetary damages adequate?

☐ Is injunctive relief appropriate?

Authority:

CC §§ 3300, 3358; CCP § 526

Discussion:

See 25.20

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts Law Remedies General Overview Torts Business Torts Bad Faith Breach of Contract Remedies Trade Secrets Law Breach of Contract General Overview Trade Secrets Law Civil Actions Remedies Damages General Overview Trade Secrets Law Civil Actions Remedies Injunctive Relief General Overview



68 of 196 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 25 Seeking Recovery for Unauthorized Disclosure of Confidential or Proprietary Information
 V. DETERMINING REMEDIES FOR BREACH OF CONTRACT ACTION FOR UNAUTHORIZED DISCLOSURE
 OF CONFIDENTIAL INFORMATION

2-25 MB Practice Guide: CA Contract Litigation 25.19

25.19 Remedies for Breach of Contract Action May Differ Depending on Determination of Material Breach.

25.19[1] Determining Appropriate Response on Material Breach. To constitute a material breach of contract, the breach must be considered total. A total breach may result from an anticipatory breach before any performance was made, or a partial breach in conjunction with repudiation [see *Gold Mining & Water Co. v. Swinerton* (1943) 23 C2d 19, 29, 142 P2d 22]. An aggrieved party who has the option of rescission has the choice of the following remedies [*April Enterprises, Inc. v. KTTV* (1983) 147 CA3d 805, 824, 195 CR 421]:

- An action for damages.
- An action in equity for specific performance.
- An action for rescission and restitution.

Consider:

It is common for nondisclosure confidentiality agreements to provide that unauthorized disclosure will cause irreparable harm to the nondisclosing party, bolstering in advance a request for injunctive relief preventing threatened disclosure.

➡ **Cross Reference:**

Materiality of breach of contract, see *Ch. 22, Suing or Defending Action for Breach of Contract*, 22.24-22.29.

25.19[2] Factors Court Considers in Assessing Materiality of Breach. In determining the materiality of a failure to perform under a contract, the court may consider the following factors [*Whitney Inv. Co. v. Westview Dev. Co.* (1969) 273 CA2d 594, 602, 78 CR 302 ; *Sackett v. Spindler* (1967) 248 CA2d 220, 229, 56 CR 435]:

- Whether the aggrieved party will obtain the substantial benefit of the contract.
- Whether the aggrieved party can be adequately compensated by damages.

- Whether the defaulting party has partly performed.
- The hardship on the defaulting party if the court terminates the contract.
- The willfulness of defaulting party's failure to perform.
- The likelihood that the defaulting party will perform the remainder of the contract.
- The timing of the breach.

Consider:

It is common for a nondisclosure or confidentiality agreement to contain a provision providing that any unauthorized disclosure of information under the agreement will be deemed a material breach of the agreement.

**Cross References:**

Discussion of factors to determine material breach in contract actions generally, see Ch. 22, Suing or Defending Action for Breach of Contract.

Discussion of material breach generally, see *California Forms of Pleading and Practice*, § 140.52 (Matthew Bender).

25.19[3] Materiality of Breach Is Primarily Question of Fact. Whether a breach is material is primarily a question of fact to be determined from all the facts and circumstances [*Associated Lathing & Plastering Co. v. Louis C. Dunn, Inc. (1955) 135 CA2d 40, 49, 286 P2d 825 ; see 25.19[2]*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawBreachAnticipatory RepudiationGeneral OverviewContracts LawBreachMaterial BreachContracts LawBreachPartial BreachContracts LawBreachTotal BreachContracts LawRemediesGeneral Overview



69 of 196 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 25 Seeking Recovery for Unauthorized Disclosure of Confidential or Proprietary Information
 V. DETERMINING REMEDIES FOR BREACH OF CONTRACT ACTION FOR UNAUTHORIZED DISCLOSURE
 OF CONFIDENTIAL INFORMATION

2-25 MB Practice Guide: CA Contract Litigation 25.20

25.20 Remedies for Breach of Contract May Include Damages and Injunctive Relief.

25.20[1] Monetary Damages May Be Awarded for Unauthorized Disclosure of Confidential Information.

25.20[1][a] Pleading Damages in General. A complaint for damages for breach of contract based on unauthorized disclosure of confidential information sufficiently avers general damages if the plaintiff alleges facts that show the existence of injury and a prayer for a specific sum, even if there is no specific allegation of damages in a stated sum, or the pleading states facts invoking an inapplicable measure of recovery [*Domino v. Mobley* (1956) 144 CA2d 24, 29-30, 300 P2d 324]. The complaint should allege a violation of the plaintiff's legal right by the defendant and the fact of damages; detail is not required in the complaint [*Colvig v. RKO Gen., Inc.* (1965) 232 CA2d 56, 69, 42 CR 473].

➡ **Cross Reference:**

Discussion of available damages in contract actions, see Ch. 7, Seeking or Opposing Damages in Contract Actions.

25.20[1][b] Amount of Damages Recoverable. The measure of damages for the breach of a contract is the amount that will compensate the plaintiff for the harm proximately caused by the breach or an amount that would normally result from the breach [CC § 3300]. Damages must be reasonable. If an obligation of any kind appears to create a right to unconscionable and grossly oppressive damages, contrary to substantial justice, no more than reasonable damages may be recovered [CC § 3359]. Generally, the measure of damages for breach of contract includes only lost profits and prejudgment interest [*Burnett & Doty Dev. Co. v. Phillips* (1978) 84 CA3d 384, 389-392, 148 CR 569].

➡ **Cross Reference:**

Discussion of amount of damages available in contract actions, see Ch. 7, Seeking or Opposing Damages in Contract Actions.

25.20[1][c] Damages Limited to Amount From Full Performance. Except as expressly provided by statute, a plaintiff may not recover a greater amount in damages for the breach of an obligation than that plaintiff could have

gained by full performance on both sides [CC § 3358].

Cross Reference:

Discussion of limitation on damages, see *California Forms of Pleading and Practice*, § 140.56 (Matthew Bender).

25.20[1][d] Punitive Damages Not Available in Contract Actions. A plaintiff may not recover punitive or exemplary damages in an action for breach of contract [CC § 3294].



Strategic Point:

A plaintiff may recover punitive damages under a tort cause of action, if such a cause of action is justified by the circumstances [see 25.08]. Punitive damages are available, on proper proof, for trade secret misappropriation [see CC § 3426.3(c)].

Cross References:

Discussion of combining tort causes of action with breach of contract action, see 25.08.

Discussion of available damages in contract actions, see Ch. 7, Seeking or Opposing Damages in Contract Actions.

Discussion of remedies for trade secret misappropriation, see Matthew Bender[(R)] Practice Guide: California Unfair Competition and Business Torts, Ch. 8, Trade Secrets.

25.20[1][e] Plaintiff Must Mitigate Damages. A plaintiff must do everything reasonably possible to mitigate the loss and reduce the damages for which the defendant is liable. The plaintiff may not recover damages for detriment that could have been avoided by reasonable effort and without undue expense [*Sackett v. Spindler* (1967) 248 CA2d 220, 238-239, 56 CR 435].

Cross References:

Discussion of mitigating damages, see Ch. 7, Seeking or Opposing Damages in Contract Actions, 7.15.

Discussion of mitigation generally, see *California Forms of Pleading and Practice*, § 140.56 (Matthew Bender).

25.20[2] Injunctive Relief May Be Appropriate Remedy in Addition to or in Lieu of Monetary Damages.

Injunctions in the area of trade secrets are governed by the principles applicable to injunctions in general [*Hilb, Rogal & Hamilton Ins. Servs. v. Robb* (1995) 33 CA4th 1812, 1819-1820, 39 CR2d 887]. If a contract would be specifically enforceable, the aggrieved party may bring suit for an injunction [CC § 3423(e); CCP § 526(a)(1)]. CCP § 526 specifies the circumstances in which an injunction may be granted.

Consider:

It is common for nondisclosure confidentiality agreements to provide that unauthorized disclosure will cause irreparable harm to the nondisclosing party, bolstering a request for injunctive relief preventing threatened disclosure.

In deciding whether to issue a preliminary injunction, a court weighs two factors [*Hunt v. Superior Court* (1999) 21 CA4th 984, 999, 90 CR2d 236, 987 P2d 705]:

- The likelihood the moving party ultimately will prevail on the merits; and
- The relative interim harm to the parties from the issuance or nonissuance of the injunction.

Actual or threatened misappropriation can also be enjoined under the Uniform Trade Secrets Act [CC § 3426.2; see *Central Valley General Hospital v. Smith* (2008) 162 CA4th 501, 523-524, 75 CR3d 771 ; see also 25.05].

Example:

A nurse staffing company was entitled to a preliminary injunction prohibiting a former employee from soliciting its employees, nurses, healthcare providers, and others under contract with it [*ReadyLink Healthcare v. Cotton* (2005) 126 CA4th 1006, 1011].

In addition, CC § 3426.2(c) allows a court to compel affirmative acts to protect trade secrets in appropriate circumstances [*Central Valley General Hospital v. Smith* (2008) 162 CA4th 501, 531, 75 CR3d 771 (upholding injunction requiring plaintiff to return confidential materials it obtained from defendant during due diligence for planned acquisition)].

An action for injunction does not waive the plaintiff's right to assert a claim for damages in a subsequent action [*Ahlers v. Smiley* (1912) 163 C 200, 206, 124 P 827].

Consider:

Most nondisclosure agreements and confidentiality agreements specifically grant an aggrieved party the right to apply for injunctive relief in the event of a breach of the agreement.



Strategic Point:

Advantages of seeking an injunction include all of the following:

- Being able to obtain early discovery (it can be requested and is often granted in support of or more often in opposition to a motion for an injunction).
- Catching your opponent off guard and scoring an early victory that may often lead to immediate settlement favorable to your client.
- Getting the judge's mind set and perhaps obtaining useful findings or law of the case established early.

Downsides of injunctive relief include the risk of loss, which may lead to unfavorable judicial views, findings, and/or law of the case early. Preliminary injunctions are often sought before any meaningful discovery has been done, so the risk of unpleasant surprises can be high.



Warning:

The use of an injunction should not be a stunt. It should be sought only when the plaintiff is concerned about immediate and/or irrevocable harm for which damages cannot compensate. Remember that if the plaintiff prevails, the court will require the plaintiff to post a bond, which can be considerable.



Cross References:

Discussion of claim for injunctive and other equitable relief, see Ch. 8, Seeking or Opposing Equitable

Remedies in Contract Actions.

Discussion of temporary restraining orders and preliminary injunctions, see Ch. 6, Using or Opposing Provisional Remedies in Contract Actions.

Discussion of injunctions generally, see California Forms of Pleading and Practice, Ch. 303, Injunctions (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawRemediesCompensatory DamagesGeneral OverviewContracts LawRemediesEquitable ReliefInjunctive ReliefTrade Secrets LawBreach of ContractGeneral OverviewTrade Secrets LawCivil ActionsRemediesDamagesGeneral OverviewTrade Secrets LawCivil ActionsRemediesInjunctive ReliefGeneral Overview



70 of 196 DOCUMENTS

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Chapter 25 Seeking Recovery for Unauthorized Disclosure of Confidential or Proprietary Information
VI. FILING CONTRACT ACTION FOR DISCLOSURE OF CONFIDENTIAL INFORMATION

2-25 MB Practice Guide: CA Contract Litigation 25.21

25.21 CHECKLIST: Filing Contract Action for Disclosure of Confidential Information.

☐ Allege cause of action for breach of contract:

Authority:

CC § 1550; *Wise v. Southern Pac. Co.* (1963) 223 CA2d 50, 59, 35 CR 652

Discussion:

See 25.22[1]

Form:

See 25.27

☐ Allege existence of valid contract:

☐ Allege written agreement or implied agreement.

☐ Allege mutual assent and consideration for nondisclosure of confidential information.

Authority:

CC §§ 1549, 1550; *Chandler v. Roach* (1957) 156 CA2d 435, 440, 319 P2d 776

Discussion:

See 25.22[2]

☐ Allege plaintiff's performance, or excuse for any nonperformance, of agreement.

Authority:

CC § 1495; *Cockrill v. Boas* (1931) 213 C 490, 492, 2 P2d 774

Discussion:

See 25.22[3]

☐ Allege breach of agreement.

☐ Allege that defendant received confidential or proprietary information under agreement.

☐ Allege that information received is outside any exclusion provided by agreement.

☐ Allege that defendant disclosed confidential or proprietary information in an unauthorized manner.

Authority:

Metro Traffic Control, Inc. v. Shadow Traffic Network (1994) 22 CA4th 853, 859-860, 27 CR2d 573

Discussion:

See 25.22[4]

☐ Allege that plaintiff suffered damage from breach.

Authority:

CC §§ 1550, 3300; *Metro Traffic Control, Inc. v. Shadow Traffic Network* (1994) 22 CA4th 853, 859-860, 27 CR2d 573

Discussion:

See 25.22[5]

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawBreachCauses of ActionElements of ClaimsTrade Secrets LawBreach of ContractGeneral OverviewTrade Secrets LawMisappropriation ActionsElementsGeneral OverviewTrade Secrets LawProtection of SecrecyGeneral Overview



71 of 196 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 25 Seeking Recovery for Unauthorized Disclosure of Confidential or Proprietary Information
VI. FILING CONTRACT ACTION FOR DISCLOSURE OF CONFIDENTIAL INFORMATION

2-25 MB Practice Guide: CA Contract Litigation 25.22

25.22 Allegations Necessary for Complaint for Unauthorized Disclosure of Confidential Information.

25.22[1] Required Contents of Complaint for Breach of Contract. A complaint states a cause of action for breach of contract if it alleges the following [*CC § 1550; Wise v. Southern Pac. Co. (1963) 223 CA2d 50, 59, 35 CR 652*]:

- The existence of a valid contract [*see 25.22[2]*]--in this context, an agreement not to make unauthorized disclosures of confidential information.
- Whether the contract was oral, written, or implied [*see CCP § 430.10(g)*].
- The plaintiff's performance of all terms of the contract, or excuse for nonperformance [*see 25.22[3]*].
- The defendant's breach [*see 25.22[4]*]--in this context, unauthorized disclosure of the confidential information.
- Resulting damages to the plaintiff [*see 25.22[5]*].



Strategic Point--Plaintiff:

It is always a good idea to attach the contract to the complaint and incorporate it by reference. This dispenses with the need to quote extensively from the contract, and does not pin the plaintiff's position down to just the quoted contract provisions.



Cross References:

Form for complaint for breach of contract based on disclosure of confidential information, see 25.27.

Discussion of contents of complaint for breach of contract, see Ch. 22, Suing or Defending Action for Breach of Contract.

Discussion of summary judgment motions, see California Forms of Pleading and Practice, Ch. 537, Summary Judgment (Matthew Bender).

25.22[2] Plaintiff Must Allege Valid Agreement. The plaintiff must allege that the parties entered into a valid contract for the nondisclosure of confidential or proprietary information. The essential elements for a valid agreement for both an express agreement and an implied contract are the same: mutual assent and consideration [*Chandler v. Roach* (1957) 156 CA2d 435, 440, 319 P2d 776].

Cross References:

Discussion of attacking or defending existence of contract, see Ch. 13, Attacking or Defending Existence of Contract--Absence of Essential Element.

Discussion of suing for breach of contract, see Ch. 22, Suing or Defending Action for Breach of Contract.

25.22[3] Plaintiff Must Allege Performance or Ability to Perform. Absent an excuse for performance, the plaintiff must establish that he or she performed, or had the ability and willingness to perform, his or her own obligations under the contract [see CC § 1495]. A plaintiff's failure to establish this element bars relief [see *Cockrill v. Boas* (1931) 213 C 490, 492, 2 P2d 774].

Cross Reference:

Discussion of alleging plaintiff's performance, see Ch. 22, Suing or Defending Action for Breach of Contract, 22.08 -22.10, 22.13 -22.23, 22.36 -22.50.

25.22[4] Plaintiff Must Allege That Defendant Breached Contract. In pleading breach of the contract by the defendant, the plaintiff must allege sufficient facts to apprise the defendant of the specific conduct that the plaintiff claims violated the contract [*Wise v. Southern Pac. Co.* (1963) 223 CA2d 50, 60 n6, 35 CR 652]. In the context of an action for unauthorized disclosure, this means that the plaintiff must allege that defendant disclosed confidential information in violation of the contract; in other words, that:

- Defendant received the information;
- The information was confidential;
- The defendant disclosed the information to a third party; and
- The disclosure was unauthorized--that is, it was not permitted by the agreement.



Strategic Pointss--Plaintiff:

- To avoid a claim by the defendant that the plaintiff's identification of its trade secrets does not comply with the "reasonable particularity" requirement of CCP § 2019.210, the plaintiff should be sure to sufficiently describe the trade secret [see, e.g., *Neothermia Corp. v. Rubicor Med., Inc.* (ND Cal 2004) 345 F Supp2d 1042, 1044-1045].

- The plaintiff should plead that the information disclosed did not fall within common exceptions

typically addressed by confidentiality provisions, such as:

- ☐ Disclosures allowed for "need to know" situations.
- ☐ Disclosure of material within the public domain.
- ☐ Disclosures after a certain date.
- ☐ Material developed independently.
- ☐ Material disclosed in accordance with a court order.

➡ **Cross References:**

Discussion of alleging defendant's breach, see Ch. 22, Suing or Defending Action for Breach of Contract.

Discussion of attacking or defending existence of contract, see Ch. 13, Attacking or Defending Existence of Contract--Absence of Essential Element.

25.22[5] Plaintiff Must Allege That Plaintiff Suffered Damage From Unauthorized Disclosure. A complaint for breach of contract must allege that the plaintiff suffered harm as a result of the defendant's breach [CC § 1550]. The plaintiff also must establish the causal connection between the defendant's breach and the damages sought [see CC § 3300].

➡ **Cross Reference:**

Discussion of damages, see Ch. 7, Seeking or Opposing Damages in Contract Actions.

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawBreachCauses of ActionElements of ClaimsLabor & Employment LawEmployment RelationshipsEmployment ContractsBreachTrade Secrets LawBreach of ContractBreach of ConfidenceGeneral OverviewTrade Secrets LawCivil ActionsGeneral OverviewTrade Secrets LawMisappropriation ActionsElementsGeneral Overview



72 of 196 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 25 Seeking Recovery for Unauthorized Disclosure of Confidential or Proprietary Information
VII. RESPONDING TO ACTION FOR DISCLOSURE OF CONFIDENTIAL INFORMATION

2-25 MB Practice Guide: CA Contract Litigation 25.23

25.23 CHECKLIST: Responding to Action for Disclosure of Confidential Information.

☐ Decide if defendant should respond by filing answer.

☐ Does defendant want to raise issues of fact with respect to allegations pleaded in complaint?

Authority:
CCP § 422.10

Discussion:
See 25.24[1]

☐ Does defendant want to raise affirmative defenses?

Discussion:
See 25.26

Form:
See 25.28

☐ Decide if defendant should respond by filing demurrer.

☐ Does defendant want to object to complaint on ground that there is defect in pleading itself, or pleadings with judicially noticed facts?

☐ Does defendant believe defect is incurable?

Authority:

CCP § 430.10

Discussion:

See 25.24[2]

☐ Decide if defendant should respond by filing summary judgment or summary adjudication motion.

☐ Does the defendant believe there is no merit to action or any causes of action pleaded?

Authority:

CCP § 437c(a)

Discussion:

See 25.24[3]

☐ Determine if complaint lacked essential element:

☐ Was there a valid agreement?

☐ Did defendant receive information?

☐ Can information be classified as confidential?

☐ Do any exclusions to obligation of confidentiality apply?

☐ Did defendant disclose confidential information in unauthorized manner?

☐ Did plaintiff suffer harm from unauthorized disclosure of confidential information?

Authority:

CC §§ 1549, 1550

Discussion:

See 25.25

☐ Determine if an affirmative defense exists:

☐ Is contract unconscionable?

☐ Is contract potentially void as against public policy?

☐ Is claim barred by the statute of limitations?

☐ Did plaintiff fail to mitigate damages?

Authority:

B&P Code § 16600; CC § 1670.5; CCP §§ 337(1), 339(1)

Discussion:

See 25.11, 25.26

Form:

See 25.28

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsAffirmative DefensesGeneral OverviewCivil
ProcedurePleading & PracticePleadingsAnswersContracts LawDefensesGeneral OverviewTrade Secrets LawCivil
ActionsGeneral OverviewTrade Secrets LawCivil ActionsDefenses



73 of 196 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 25 Seeking Recovery for Unauthorized Disclosure of Confidential or Proprietary Information
VII. RESPONDING TO ACTION FOR DISCLOSURE OF CONFIDENTIAL INFORMATION

2-25 MB Practice Guide: CA Contract Litigation 25.24

25.24 Response to Complaint for Unauthorized Disclosure May Be by Answer, Demurrer, or Summary Judgment Motion.

25.24[1] Defendant May Respond by Filing Answer. The defendant may respond to the plaintiff's complaint by an answer [see *CCP* §§ 422.10, 431.30(a), (b)] to apprise the other party to the of the defendant's position as to the allegations in the complaint. An answer may also admit the truth of material allegations, thereby establishing them as fact and removing them from the issues to be tried [see *CCP* § 431.20(a)].

Fundamental grounds to object to a complaint by answer in a contract action include the following for an objection that does not appear on the face of the complaint [*CCP* §§ 430.10(e)-(g), 430.30(b)]:

- The pleading does not state facts sufficient to constitute a cause of action.
- The pleading is uncertain.
- It cannot be determined from the pleading whether the contract is written, oral, or implied.

An answer may include affirmative defenses [see *California Acad. of Scis. v. County of Fresno* (1987) 192 CA3d 1436, 1442, 238 CR 154 ; see also 25.26].



Cross References:

Discussion on defending action for breach of contract, see Ch. 22, Suing or Defending Action for Breach of Contract.

Discussion of answers, see Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, Ch. 14, Answers.

25.24[2] Defendant May Respond by Filing Demurrer. A defendant may object to a complaint for breach of contract for unauthorized disclosure of confidential information by filing a demurrer, if grounds for a demurrer can be shown [*CCP* § 430.10].

Fundamental grounds to object to a complaint by demurrer in a contract action include the following for an objection that appears on the face of the complaint [CCP §§ 430.10(e)-(g), 430.30(a)]:

- The pleading does not state facts sufficient to constitute a cause of action.
- The pleading is uncertain.
- It cannot be determined from the pleading whether the contract is written, oral, or implied.

A demurrer does not allege or deny facts, but objects to the pleading on the ground that it contains a defect that appears from examination of the pleading itself or from examination of the pleading together with judicially noticed facts [see CCP § 430.30]. A demurrer raises issues of law to be tried by the court [see CCP §§ 589(a), 591; *Pescosolido v. Maddock* (1985) 172 CA3d 230, 232, 218 CR 165].

Cross References:

Discussion on defending action for breach of contract, see Ch. 22, Suing or Defending Action for Breach of Contract.

Discussion of demurrers, see Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, Ch. 11, Demurrers and Motions for Judgment on the Pleadings.

25.24[3] Defendant May Respond by Filing Motion for Summary Judgment or Summary Adjudication. A defendant may move for summary judgment in any action or proceeding by contending that the action has no merit [CCP § 437c(a)]. A cause of action "has no merit" if [CCP § 437c(g)]:

- One or more of the elements of the cause of action cannot be separately established, even if that element is separately pleaded; or
- The defendant establishes an affirmative defense to the cause of action.

A motion for summary adjudication may be made by itself or as an alternative to a motion for summary judgment, and may proceed in all procedural respects as a motion for summary judgment [CCP § 437c(f)(2)].

Cross References:

Discussion of defending action for breach of contract, see Ch. 22, Suing or Defending Action for Breach of Contract.

Discussion of motions for summary judgment, see Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, Ch. 38, Summary Judgment.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsAffirmative DefensesGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsDemurrersCivil ProcedurePleading & PracticePleadingsAnswersCivil ProcedureSummary JudgmentGeneral OverviewTrade Secrets LawCivil ActionsGeneral Overview



74 of 196 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 25 Seeking Recovery for Unauthorized Disclosure of Confidential or Proprietary Information
VII. RESPONDING TO ACTION FOR DISCLOSURE OF CONFIDENTIAL INFORMATION

2-25 MB Practice Guide: CA Contract Litigation 25.25

25.25 Attacking Complaint for Failure to Allege Essential Element.

25.25[1] No Valid Agreement Existed for Nondisclosure of Confidential or Proprietary Information. A confidentiality or nondisclosure agreement, like any other contract, must include the essential elements required for all contracts [see *CC* § 1550]:

- Parties capable of contracting;
- Consent;
- A lawful object; and
- Sufficient cause or consideration.

If one of these items is missing, no contract exists [*CC* § 1550] and no action may be maintained.



Cross References:

Discussion of enforceability of nondisclosure and confidentiality agreements, see 25.10, 25.11.

Discussion of determining obligation of confidentiality, see 25.13 -25.15.

Discussion of attacking existence of contract, see Ch. 13, Attacking or Defending Existence of Contract--Absence of Essential Element.

Discussion of defending action for breach of contract, see Ch. 22, Suing or Defending Action for Breach of Contract.

25.25[2] Defendant Did Not Breach Contract. As with any other contract, the defendant may defeat a breach of contract claim simply by showing that no breach occurred [see *Acoustics, Inc. v. Trepte Constr. Co. (1971) 14 CA3d 887, 913, 92 CR 723* (general requirements for proving breach of contract)]. In the context of breach of a nondisclosure agreement or provision, the following lines of defense should be considered:

- Defendant did not disclose to third parties any information received from plaintiff.
- The information disclosed was not confidential or proprietary [see 25.16[1] -[3]].
- The disclosure did not occur in an unauthorized manner--in other words, it was permitted, or at least was not prohibited, by the terms of agreement [see 25.16[4]].

A negative answer to any of the above questions may form the basis for a successful defense to a breach of contract claim.

Cross References:

Answer with affirmative defense that information was not confidential or proprietary or was excepted from nondisclosure requirement by terms of agreement, see 25.28.

Determining whether information is confidential or proprietary, see 25.16

Proving or disproving breach of contract in general, see Ch. 22, Suing or Defending Action for Breach of Contract.

25.25[3] Plaintiff Suffered No Harm From Disclosure. Damages are an essential element of the cause of action for breach of any contract [*Acoustics, Inc. v. Trepte Constr. Co. (1971) 14 CA3d 887, 913, 92 CR 723*], and any damages must be proximately caused by, or likely to result from, the breach of contract in order for plaintiff to recover [CC § 3300]. In the context of a nondisclosure agreement, potential lines of defense to a breach of contract claim include:

- Plaintiff's inability to prove that any damage occurred as a result of the disclosure of the information;
or
- Plaintiff's inability to show that damages suffered were the result of the disclosure or misuse of confidential information. In the case of customer lists or processes, for example, plaintiff may have difficulty proving that the alleged damages actually were caused by the defendant's disclosure of the confidential information, as opposed to competition in the market or other external factors.

Example:

In a tort action based on allegedly improper solicitation of plaintiff's employees by two of its employees who were defecting to a competitor, plaintiff's allegations that the solicitation "deprived [plaintiff] of the patronage of many customers who otherwise would have patronized plaintiff, all to plaintiff's damage in amounts unknown to plaintiff" failed to allege any facts showing any connection between the purported damage and the defendants' solicitation of plaintiff's employees, and dismissal was proper since there was no obvious causal relationship between plaintiff's loss of some of its employees and a loss of its customers [*Diodes, Inc. v. Franzen (1968) 260 CA2d 244, 257, 67 CR 19*].

Cross References:

Discussion of attacking existence of contract, see Ch. 13, Attacking or Defending Existence of Contract--Absence of Essential Element.

Discussion of defending action for breach of contract, see Ch. 22, Suing or Defending Action for Breach of Contract.

Legal Topics:

For related research and practice materials, see the following legal topics:

TortsBusiness TortsUnfair Business PracticesDefensesTrade Secrets LawBreach of ContractGeneral OverviewTrade
Secrets LawCivil ActionsDefensesTrade Secrets LawMisappropriation ActionsElementsGeneral OverviewTrade
Secrets LawProtection of SecrecyReasonable MeasuresConfidentiality Agreements



75 of 196 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 25 Seeking Recovery for Unauthorized Disclosure of Confidential or Proprietary Information
VII. RESPONDING TO ACTION FOR DISCLOSURE OF CONFIDENTIAL INFORMATION

2-25 MB Practice Guide: CA Contract Litigation 25.26

25.26 Defendant Should Assert Any Appropriate Affirmative Defenses.

25.26[1] Defendant Can Assert Unconscionability As Affirmative Defense. If the confidentiality or nondisclosure agreement was executed in connection with a noncompetition agreement that arguably places restraints on trade [see *B&P Code § 16600*], or in other appropriate cases, the defendant should analyze the agreement to determine whether a defense of unconscionability may be appropriate [see 25.11[1]]. *B&P Code § 16600* precludes the enforceability of nondisclosure and noncompetition agreements beyond the protection of confidential information [see *Rigging Int'l Maint. Co. v. Gwin* (1982) 128 CA3d 594, 614, 180 CR 451].

➤ Cross References:

Discussion of unconscionability and its affect on nondisclosure and confidentiality agreements, see 25.11.

Discussion of unconscionability generally, see Ch. 18, Asserting or Defending Claim That Contract Is Illegal, Contrary to Public Policy, or Unconscionable.

Defendant's checklist of affirmative defenses, see *California Forms of Pleading and Practice*, § 140.91 (Matthew Bender).

25.26[2] Defendant Can Assert Public Policy As Affirmative Defense. If a limitation on disclosure of information arguably would violate public policy [see, e.g., *Cariveau v. Hafferty* (2000) 83 CA4th 126, 138 (prohibition on disclosure to a government agency)], or if it is part of a noncompetition agreement that operates as a restraint of trade [see *B&P Code § 16600*], defendant should consider asserting that the provision or agreement is contrary to public policy [see 25.11[2]]. In the latter case, however, defendant should bear in mind that confidentiality agreements that merely prohibit a party from disclosing confidential information and trade secrets but do not seek to restrict competition do not come within the ambit of *B&P Code § 16600* and generally are valid [*Gordon v. Landau* (1958) 49 C2d 690, 321 P2d 456 ; see *Winston Research Corp. v. Minnesota Mining & Mfg. Co.* (9th Cir 1965) 350 F2d 134, 140-141].

➤ Cross References:

Further discussion of public policy and its affect on nondisclosure and confidentiality agreements, see

25.11.

Discussion of unconscionability and public policy, see *Ch. 18, Asserting or Defending Claim That Contract Is Illegal, Contrary to Public Policy, or Unconscionable*, 18.13 et seq.

25.26[3] Defendant Can Assert Statute of Limitations As Affirmative Defense. If the plaintiff does not bring the action with the appropriate statutory period, the action can be barred by the statute of limitations. Statutes of limitation applicable in disclosure of confidential information cases include the following:

- Four years for a written contract [*CCP* § 337(1); see 25.04].
- Two years for an oral or implied contract [*CCP* § 339(1); see 25.04].
- Three years for misappropriation of a trade secret [*CC* § 3426.6; see 25.05].
- Four years for unfair competition [*B&P Code* § 17208; see 25.06].
- Three years [*CC* § 3426.6 (tort of misappropriation)] or two years [*CCP* § 339(1) (implied contract)] for breach of confidence. It is uncertain whether this action is tort-based or contract-based [see 25.07].

➡ **Cross Reference:**

Discussion of statutes of limitation in contract actions, see *Ch. 4, Determining Applicable Statutes of Limitation and Effect on Potential Action*.

25.26[4] Defendant Can Assert Failure to Mitigate Damages As Affirmative Defense. A plaintiff must do everything reasonably possible to mitigate the loss and reduce the damages for which the defendant is liable [*Sackett v. Spindler* (1967) 248 CA2d 220, 238, 56 CR 435]. Damages that the plaintiff could have avoided by making reasonable efforts or expenditures are not recoverable [*Sackett v. Spindler* (1967) 248 CA2d 220, 239-239, 56 CR 435]. A claim that the plaintiff should have mitigated damages but failed to do so must be pled as an affirmative defense (although, if the issue simply is one of computation, the court may admit evidence on that issue without an affirmative pleading) [*Erler v. Five Points Motors, Inc.* (1967) 249 CA2d 560, 568, 57 CR 516 (employment contract case); see *Carlotto, Ltd. v. County of Ventura* (1975) 47 CA3d 931, 937, 121 CR 171 (explaining *Erler* holding)].

➡ **Cross Reference:**

Discussion of mitigation as affirmative defense, see *Ch. 7, Seeking or Opposing Damages in Contract Actions*, 7.15.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Pleading & Practice Defenses, Demurrers & Objections General Overview Torts Business Torts Bad Faith Breach of Contract Defenses Torts Business Torts Unfair Business Practices Defenses Trade Secrets Law Civil Actions Defenses



76 of 196 DOCUMENTS

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Chapter 25 Seeking Recovery for Unauthorized Disclosure of Confidential or Proprietary Information
VIII. FORMS

2-25 MB Practice Guide: CA Contract Litigation 25.27

25.27 Complaint for Breach of Contract Based on Disclosure of Confidential Information.**Complaint for Breach of Contract Based on Disclosure of Confidential Information.**

[Name of attorney]

_____[Street address]

_____[City, state, and ZIP]

_____[Area code and phone number]

_____[State Bar no. of attorney]

Attorney for _____[name of party]

SUPERIOR COURT OF CALIFORNIA,

COUNTY OF _____

[name(s)] _____,

Plaintiff(s)

vs.

[name(s)] _____

[and DOES 1 THROUGH

_____] _____

Defendant(s).

)

)

)

)

)

)

)

)

NO.

COMPLAINT FOR DAMAGES (Breach of Written Contract)

[LIMITED CIVIL CASE]

[Amount Demanded

_____(Exceeds or Does Not
Exceed) \$25,000]

Plaintiff _____[name] alleges:

[For an individual plaintiff]

1. Plaintiff is an individual residing in _____ [city, if any, and county], California, [in the (name of judicial district, if any) _____] [, and therein doing business under the fictitious business name of _____.

Plaintiff has duly complied in all respects with the requirements of *Business and Professions Code Sections 17910 through 17917* with respect to this fictitious business name].

[OR, for a domestic corporation or domestic limited liability company]

1. Plaintiff _____ [name] is, and at all times herein mentioned was, a _____ [corporation or limited liability company] organized and existing under the laws of California, with its principal place of business in _____ [city, if any, and county], California [in the (name of judicial district, if any) _____] [, and therein doing business under the fictitious business name of _____.

Plaintiff has duly complied in all respects with the requirements of *Business and Professions Code Sections 17910 through 17917* with respect to this fictitious business name].

[OR, for a foreign corporation or foreign limited liability company]

1. Plaintiff _____ [name] is, and at all times herein mentioned was, a _____ [corporation or limited liability company] organized and existing under the laws of _____ [state or foreign country], and _____ [for foreign corporation authorized to do business and doing business in California or, for foreign limited liability company maintaining action or intrastate business, and registered to transact intrastate business in California], with its principal place of business in California in _____ [city, if any, and county], California [in the (name of judicial district, if any) _____].

[OR, for a general or limited partnership or an unincorporated association]

1. Plaintiff _____ [name] is, and at all times herein mentioned was, a _____ [partnership or unincorporated association] with its principal place of business in _____ [city, if any, and county], California [in the (name of judicial district, if any) _____] [, and therein doing business under the fictitious business name of _____.

Plaintiff has duly complied in all respects with the requirements of *Business and Professions Code Sections 17910 through 17917* with respect to this fictitious business name].

[CONTINUE]

[For an individual defendant]

2. Defendant _____ [name] is an individual residing in _____ [city, if any, and county]

], California [in the (*name of judicial district, if any*) _____] [and doing business therein under the fictitious business name of _____].

[OR, for a domestic corporation or domestic limited liability company]

2. Defendant _____ [name] is, and at all times herein mentioned was, a _____ [corporation or limited liability company] organized and existing under the laws of California [, with its principal place of business in _____ (city, if any, and county), California (, in the _____ [name of judicial district, if any])].

[OR, for a foreign corporation or foreign limited liability company]

2. Defendant _____ [name] is, and at all times herein mentioned was, a _____ [corporation or limited liability company] organized and existing under the laws of _____ [state or foreign country][, with its principal place of business in _____ (city, if any, and county), California (, in the _____ [name of judicial district, if any])].

[OR, for a general or limited partnership or an unincorporated association]

2. Defendant _____ [name] is, and at all times herein mentioned was, _____ [a partnership or an unincorporated association] sued herein under the name _____ [it has assumed or by which it is known][, with its principal place of business in _____ (city, if any, and county), California (, in the _____ [name of judicial district, if any])]. [Defendants (*names of individual partners or members*) _____ are, and at all times herein mentioned were, members of that _____ (partnership or unincorporated association) (and are, and at all times herein mentioned were, residents of _____ County, California)].

[CONTINUE]

3. Plaintiff is ignorant of the true names and capacities of Defendants sued herein as DOES 1 through _____ [numeral, e.g., 50], inclusive, and therefore sues these Defendants by these fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when ascertained. [Plaintiff is informed and believes and thereon alleges that each of the fictitiously named Defendants is responsible in some manner for the occurrences herein alleged, and that Plaintiff's damages as herein alleged were proximately caused by those Defendants.]

4. Plaintiff is informed and believes and thereon alleges that at all times material to this complaint, _____ [identify defendants to whom agency allegation applies, e.g., each of the Defendants or each of the individual Defendants or Defendant Harry Jones], [and each of the Defendants fictitiously named in this complaint,] in addition to acting for himself, herself, or itself and on

his, her, or its own behalf individually, is and was acting as the agent, servant, employee and representative of, and with the knowledge, consent and permission of, and in conspiracy with, each and all of the Defendants and within the course, scope and authority of that agency, service, employment, representation, and conspiracy. Plaintiff further alleges on information and belief that the acts of each of the Defendants were fully ratified by each and all of the Defendants. Specifically, and without limitation, Plaintiff alleges on information and belief that the actions, failures to act, breaches, conspiracy, and misrepresentations alleged herein and attributed to one or more of the specific Defendants were approved, ratified, and done with the cooperation and knowledge of each and all of the Defendants.

5. On or about _____ [date], at _____ [city], _____ County, California, Plaintiff and Defendant entered into a written agreement, _____ [if plaintiff has possession of written contract, specify, e.g., a copy of which is attached as Exhibit A and incorporated by reference, or in the alternative, plead contract according to its legal effect or set it forth in its exact words]. This agreement provided[, among other things,] that Defendant would preserve the confidentiality, and refrain from disclosure, of confidential information obtained from Defendant [or include more detailed description of terms of nondisclosure agreement].

6. Plaintiff has performed all conditions, covenants, and promises required on his/her/its part to be performed in accordance with the terms and conditions of the contract [except (specify conditions not performed) _____]. Plaintiff did not perform _____ (this or these) condition(s) because (specify facts showing excuse for nonperformance) _____].

7. On or about _____ [date], Defendant, in violation of the terms of the contract, disclosed certain confidential information obtained from Plaintiff, specifically _____ [specify, e.g. Plaintiff's confidential and proprietary customer list], to _____ [person or entity to whom confidential information was disclosed, e.g., its primary competitor, ABC Corporation].

8. As a result of Defendant's breach of the contract, Plaintiff has suffered damages to date based on, among other things, loss of goodwill, damage to its business reputation, and expenses incurred in its efforts to remedy the effects of Defendant's unlawful conduct, in an amount not now known, but which Plaintiff is informed and believes, and thereon alleges, exceeds the jurisdictional limit of this court. Plaintiff will seek leave of court to amend this Complaint to set forth the exact amount of damages when they have been ascertained

[Include to request injunctive relief, if applicable:]

9. Plaintiff is informed and believes, and based thereon alleges that Defendant's illegal acts as described above are a serious and continuing threat to Plaintiff's reputation, goodwill, and financial health. If Defendant is allowed to continue their wrongful acts, Plaintiff will suffer further immediate and irreparable injury, loss, and damage. Plaintiff is further informed and believes, and based thereon alleges, that, in the absence of preliminary and permanent injunctions as prayed for below, Defendant will continue to violate Plaintiff's rights by engaging in the conduct alleged above.

[Include separate counts for tort causes of action arising out of the unauthorized disclosure, if appropriate]

[CONTINUE]

WHEREFORE, Plaintiff prays judgment against Defendant[s, and each of them,] as follows:

1. For compensatory damages in the sum of
\$ _____;
2. For interest on the sum of \$ _____ from
and after _____ [date];
- [3. For reasonable attorney's fees _____ (of
\$ _____ or according to proof).]
4. For costs of suit and
5. For such other and further relief as the court may deem proper.

[firm name, if any] _____

By: [signature] _____

[typed name] _____

Attorney for Plaintiff [name] _____

[ADD following verification, if applicable]

VERIFICATION

I, _____ [name], am the plaintiff in the above-entitled action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters that are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

[date] _____

[signature] _____

[typed name] _____

NOTES.

Complaint for Damages: See Judicial Council Trial Court Pleading Form [CC § 3300] for Breach of Contract [Cal Rules of Ct, Rule 1.45(a), (b); Judicial Council Forms PLD-C-001, PLD-C-001(1)]; California Forms of Pleading and Practice, § 140.100 et seq. (Matthew Bender); and Matthew Bender[(R)] Practice Guide: California Unfair Competition and Business Torts, 1.17

Drafting Complaints:

See Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, Ch. 7, Complaints

Plaintiff's Checklist for Action for Damages:

See *California Forms of Pleading and Practice*, § 140.90 (Matthew Bender)

Suing for Breach of Contract:

See Ch. 22, Suing or Defending Action for Breach of Contract

Seeking Preliminary Relief:

See Ch. 6, Using or Opposing Provisional Remedies in Contract Actions

Trap:

Benefits and hazards of verifying a complaint, see *Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure*, 7.15

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Pleading & Practice Pleadings Complaints General Overview Torts Business Torts Bad Faith Breach of Contract General Overview Torts Business Torts Unfair Business Practices General Overview Trade Secrets Law Breach of Contract General Overview Trade Secrets Law Civil Actions General Overview



77 of 196 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 25 Seeking Recovery for Unauthorized Disclosure of Confidential or Proprietary Information
VIII. FORMS

2-25 MB Practice Guide: CA Contract Litigation 25.28

25.28 Answer to Complaint and Affirmative Defenses for Breach of Contract Based on Disclosure of Confidential Information.

Answer to Complaint and Affirmative Defenses for Breach of Contract Based on Disclosure of Confidential Information.

[Name of attorney]

_____[Street address]

_____[City, state, and ZIP]

_____[Area code and phone number]

_____[State Bar no. of attorney]

Attorney for _____[name of party]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

[name] _____,

Plaintiff,

vs.

[name] _____,

Defendants.

)

)

)

)

)

)

)

NO.

ANSWER OF

_____[identify defendant, e.g.,

DEFENDANT MARY JONES] TO COMPLAINT
OF

_____[identify plaintiff, e.g.,

PLAINTIFF JOHN SMITH

[LIMITED CIVIL CASE]

Judge:

Depart-

ment: _____

Defendant answers the complaint as follows:

[Include general denial below, or set forth, in numbered paragraphs, specific denials, admissions, and allegations in response to those in complaint, in the order in which they are alleged in complaint:]

1. Pursuant to *Code of Civil Procedure Section 431.30(b)(1)*, Defendant generally denies each and every allegation of Plaintiff's complaint, including all the purported causes of action contained therein, and further denies that Plaintiff is entitled to any equitable or legal relief, or any damages whatsoever.

[Defendant asserts the following affirmative defenses. By doing so, Defendant shall not be deemed to have assumed the burden of proving any matters that otherwise would be Plaintiff's burden.]

[Allege any affirmative defenses, e.g.,]

[EITHER, if alleging that no contract of confidentiality exists because defendant is not identified as a party]

FIRST AFFIRMATIVE DEFENSE

(Defendant Not Party to Alleged Contract)

2. Defendant was not a party to the contract alleged by Plaintiff and therefore is not subject to the provisions of that contract, including any provisions relating to confidentiality or nondisclosure of information received from Plaintiff.

[AND/OR, if alleging that the information received from defendant cannot be considered confidential or proprietary]

SECOND AFFIRMATIVE DEFENSE

(Information Received by Defendant Is Not Confidential or Proprietary)

3. The information Defendant allegedly received from Plaintiff and disclosed to others cannot be considered confidential or proprietary because _____

[reason, e.g. it falls outside the definition of confidential information as provided in the agreement or it is widely known in the trade and is readily available from other sources to anyone who wishes to know it].

[AND/OR, if alleging that the confidential information received falls within an exclusion contained in the agreement]

THIRD AFFIRMATIVE DEFENSE

(Defendant Received Information That Is Excluded by Agreement)

4. The confidential information Defendant allegedly received from Plaintiff and disclosed to others is specifically

excluded from nondisclosure under the terms of the agreement.

[AND/OR, if alleging that terms of nondisclosure agreement are unconscionable]

FOURTH AFFIRMATIVE DEFENSE
(Contract Is Unconscionable)

5. The _____ [contract alleged in the complaint is unenforceable because it was unconscionable at the time the contract was made or construction and application of (a provision of) the contract should be limited to avoid an unconscionable result], in that _____ *[specify facts, e.g., the contract was a form contract that was presented to Defendant for signature without opportunity for negotiation, and the nondisclosure requirement was only one component of a noncompetition provision the terms of which would effectively bar Defendant from employment in his/her usual occupation with anyone other than Plaintiff for an indefinite period].*

[AND/OR, if alleging that agreement is unenforceable because it is contrary to public policy]

FIFTH AFFIRMATIVE DEFENSE
(Contract Is Contrary to Public Policy)

6. The contract alleged in the complaint is unenforceable because it is contrary to _____ [the policy of express law or good morals], in that _____ *[specify facts, e.g., the contract requires Defendant not to disclose information that Defendant was obligated by law to disclose].*

[AND/OR, if alleging that agreement is unenforceable because it is barred by the statute of limitations]

SIXTH AFFIRMATIVE DEFENSE
(Claim Is Barred by Statute of Limitations)

7. Plaintiff's cause of action is barred by the statute of limitation of _____ *[specify, e.g., four] years pursuant to _____ [cite specific code section, e.g., Code of Civil Procedure Section 337(1)].*

[AND/OR, if alleging that plaintiff failed to mitigate damages]

SEVENTH AFFIRMATIVE DEFENSE
(Plaintiff Failed to Mitigate Damages)

8. Plaintiff is not entitled to recover damages from Defendant because Plaintiff has failed and refused, and continues to fail and refuse, to exercise a reasonable effort to mitigate damages, in that _____ *[specify].*

[ADD additional affirmative defenses, if any]

[CONTINUE]

WHEREFORE, Defendant prays as follows:

1. That Plaintiff take nothing by his/her complaint herein;
2. For costs of suit; and
3. For such other and further relief as the court deems proper.

Dated: _____

[firm name, if any] _____

By: [signature] _____

[typed name] _____

Attorney for Plaintiff [name] _____

[ADD following verification, if applicable]

VERIFICATION

I, _____[name], am the defendant in the above-entitled action. I have read the foregoing answer and know the contents thereof. The same is true of my own knowledge, except as to those matters that are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

[date] _____

[signature] _____

[typed name] _____

NOTES.

Authority:

CCP § 431.30(b)(2); CC §§ 1550, 1667

Answer in Action Based on Contract:

See Judicial Council Trial Court Pleading Form [Cal Rules of Ct, Rule 1.45(a), (b); Judicial Council Form PLD-C-010]; and *California Forms of Pleading and Practice*, § 140.130 et seq. (Matthew Bender)

Answer to Complaint for Breach of Contract With Affirmative Defense(s) Based on Absence of Essential Element:

See *Ch. 13, Attacking or Defending Existence of Contract--Absence of Essential Element*, 13.53

Defendant's Checklist of Affirmative Defenses:

See *California Forms of Pleading and Practice*, § 140.91 (Matthew Bender)

Defending Action for Breach of Contract:

See *Ch. 22, Suing or Defending Action for Breach of Contract*

Raising Affirmative Defenses in Answer:

See *Ch. 13, Attacking or Defending Existence of Contract--Absence of Essential Element*, 13.16

Opposing Preliminary Relief:

See *Ch. 6, Using or Opposing Provisional Remedies in Contract Actions*

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawDefensesGeneral OverviewTortsBusiness TortsBad Faith Breach of ContractDefensesTortsBusiness TortsUnfair Business PracticesDefensesTrade Secrets LawBreach of ContractGeneral OverviewTrade Secrets LawCivil ActionsGeneral Overview



78 of 196 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 26 Contract for Sale of Goods--Seeking Remedies Under California Commercial Code

2-26 MB Practice Guide: CA Contract Litigation 26.syn

§ 26.syn Synopsis to Chapter 26: Contract for Sale of Goods--Seeking Remedies Under California Commercial Code

26.01 Scope.

26.02 Objective and Strategy.

26.02[1] Objective and Strategy of Seller.

26.02[2] Objective and Strategy of Buyer.

26.03 Contract Can Limit or Modify Remedies.

26.03[1] Parties May Add or Substitute Remedies.

26.03[2] Contract Remedy Generally Is Optional Rather Than Exclusive.

26.03[3] Parties May Limit or Alter Measure of Damages.

26.03[4] Liquidated Damages Provision Must Meet Legal Standards.

26.03[5] Parties May Limit or Exclude Consequential Damages.

26.03[5][a] Consequential Damages Provision Must Not Be Unconscionable.

26.03[5][b] Limitation Respecting Commercial Loss Is Presumptively Valid.

26.03[5][c] Limitation on Consumer's Personal Injury Damages Is Presumptively Invalid.

26.03[6] Code Remedy Supplants Failed Contract Remedy.

26.03[7] Fundamental Obligations May Not Be Excluded.

- 26.04 Limitation Period for Judicial Remedy Is Four Years.
- 26.05 Compensatory Damages Are Limited by Commercial Code.
- 26.06 CHECKLIST: Pursuing Seller's Self-Help Remedies for Buyer's Breach.
- 26.07 Options and Strategies.
- 26.08 Contract Can Be Canceled.
- 26.09 Goods Being Manufactured for Buyer Can Be Resold, Finished, or Scrapped.
- 26.09[1] Seller's Options With Respect to Unfinished Goods.
- 26.09[2] Unfinished Goods Can Be Treated As Resalable.
- 26.09[3] Unfinished Goods Can Be Finished or Scrapped.
- 26.10 Goods Produced or Procured for Buyer Can Be Identified to Contract.
- 26.11 Goods Not Shipped Can Be Withheld.
- 26.12 Goods in Transit Can Be Reclaimed.
- 26.12[1] Seller May Elect to Stop Delivery.
- 26.12[2] Stoppage Right Is Limited.
- 26.12[2][a] Only Carload (or Like Shipment) Can Be Stopped Unless Buyer Is Insolvent.
- 26.12[2][b] Goods in Buyer's Actual or Constructive Custody Cannot Be Stopped.
- 26.12[3] Delivery Must Be Suspended on Seller's Notice.
- 26.12[3][a] Seller Must Give Sufficient Notice.
- 26.12[3][b] Goods Must Be Handled As Seller Directs.
- 26.12[3][c] Seller Is Liable for Ensuing Costs and Damages.
- 26.13 Goods Not Delivered Can Be Resold.
- 26.13[1] Seller May Resell Goods and Sue for Damages.
- 26.13[2] Goods Must Be Sold in Commercially Reasonable Manner.
- 26.13[2][a] Sale Can Be Public Auction or Private Sale.
- 26.13[2][b] Any Time, Place, and Manner Could Be Reasonable.
- 26.13[2][c] Resale Must Be Referenced to Broken Contract.

26.13[3] Notice to Defaulted Buyer Could Be Required.

26.13[3][a] Private Sale Requires Notice of Intent to Sell.

26.13[3][b] Public Sale Normally Requires Notice of Time and Place.

26.13[3][c] Public Sale Notice Must State Off-Site Location of Goods.

26.13[4] Public Sale Is Subject to Special Rules.

26.13[4][a] Only Identified Goods Can Be Sold.

26.13[4][b] Sale Must Be at Usual Place or Market.

26.13[4][c] Seller May Buy.

26.13[5] Good Faith Buyer Gets Clear Title.

26.13[6] Seller Keeps Any Profit From Resale.

26.14 Third Person in Position of Seller Has Similar Remedies.

26.14[1] Remedies Protect Person With Interest Similar to Seller's.

26.14[2] Person May Withhold Goods, Stop Delivery, Resell, and Recover Damages.

26.14[3] Person Must Account for Excess Resale Proceeds.

26.15 CHECKLIST: Pursuing Seller's Judicial Remedies for Buyer's Breach.

26.16 Options and Strategies.

26.17 Market Can Determine Damages for Buyer's Nonacceptance or Repudiation.

26.17[1] Seller Is Entitled to Market-Price Differential.

26.17[2] Proof of Market Price Depends on Facts.

26.17[2][a] Market Price at Time of Repudiation May Be Relevant.

26.17[2][b] Market Price at Any Reasonable Time and Place May Be Relevant.

26.17[2][c] Published Market Quotations Are Admissible.

26.18 Lost Profit Fixes Damages When Market-Price Differential Fails.

26.19 Contract Price Is Measure of Damages in Other Cases.

26.19[1] Seller Can Recover Contract-Price Differential After Reselling Goods.

26.19[2] Seller Can Recover Contract Price After Buyer's Nonpayment.

26.19[2][a] Price Is Recoverable in Specified Circumstances.

26.19[2][b] Price Is Recoverable for Goods Accepted.

26.19[2][c] Seller Must Hold Undelivered Goods for Buyer.

26.19[3] Seller May Instead Recover Damages for Nonacceptance.

26.20 Seller Recovers Incidental Damages.

26.21 CHECKLIST: Pursuing Buyer's Self-Help Remedies for Seller's Breach.

26.22 Options and Strategies.

26.23 Contract Can Be Canceled.

26.23[1] Buyer May Cancel for Any Breach by Seller.

26.23[2] Buyer Does Not Renounce Claim for Damages.

26.24 Buyer May Obtain "Cover" Goods Elsewhere.

26.24[1] Buyer May Cover by Finding Substitute Goods.

26.24[2] Cover May Entail Different Terms, Multiple Contracts, and Similar Goods.

26.24[3] Buyer Need Not First Cover Before Using Other Remedies.

26.24[4] Buyer May Replevy Goods on Failing to Cover.

26.25 Payments and Incidental Damages Can Be Recouped.

26.25[1] Buyer Has Security Interest in Goods in Possession.

26.25[2] Buyer May Deduct Damages From Payments Due.

26.25[2][a] Notice to Seller Is Required.

26.25[2][b] Notice Need Not Be Formal.

26.26 CHECKLIST: Pursuing Buyer's Judicial Remedies for Seller's Breach.

26.27 Options and Strategies.

26.28 Buyer Can Recover Costs for "Cover" Goods.

26.28[1] Buyer Can Cover and Have Damages.

26.28[2] Cost of Cover Fixes Damages.

26.29 Market Fixes Damages When Buyer Sues Without Covering.

26.29[1] Buyer Is Entitled to Market-Price Differential.

26.29[2] Proof of Market Price Depends on Facts.

26.29[2][a] Market Price at Time of Repudiation May Be Relevant.

26.29[2][b] Market Price at Place for Tender or Place of Arrival May Be Relevant.

26.29[2][c] Market Price at Any Reasonable Time and Place May Be Relevant.

26.29[2][d] Published Market Quotations Are Admissible.

26.30 Buyer Unable to Cover Can Replevy Goods.

26.30[1] Goods Must Be Identified to Contract.

26.30[2] Buyer of Consumer Goods Has Special Right.

26.31 Buyer Can Recover "Identified" Goods If They Are Consumer Goods or Seller Became Insolvent.

26.31[1] Buyer's Right Dependent on Satisfaction of Statutory Conditions.

26.31[2] Buyer Obtains Special Property by Identifying Existing Goods.

26.32 Buyer Can Obtain Specific Performance in Proper Case.

26.33 Buyer Can Recover Damages for Nonconformity of Tender.

26.33[1] Notice of Nonconformity Is Required.

26.33[2] Value of Goods Fixes Damages for Breach of Warranty.

26.34 Buyer Can Recover Incidental and Consequential Damages.

26.34[1] Damages May Be Recoverable in Any Case.

26.34[1][a] Recoverable When Seller Did Not Tender Goods or Buyer Did Not Accept Tender.

26.34[1][b] Recoverable When Buyer Accepted Goods After Nonconforming Tender.

26.34[2] Additional Expenses Generate Incidental Damages.

26.34[3] Additional Foreseeable Losses Generate Consequential Damages.

26.34[3][a] Recoverable When Buyer Had Foreseeable Needs or Requirements.

26.34[3][b] Buyer Must Show Extent of Loss.

26.34[3][c] Lost Profit on Resale Is Recoverable.

26.34[4] Injury to Person or Property From Breach of Warranty Generates Consequential Damages.

26.35 CHECKLIST: Redressing Grievances Other Than Breach of Contract.

26.36 Options and Strategies.

26.37 Seller Can Withhold or Reclaim Goods From Insolvent Buyer.

26.37[1] Seller May Refuse Delivery Except for Cash and Stop Delivery.

26.37[2] Seller May Reclaim Goods Sold on Credit.

26.37[2][a] Insolvent Buyer's Receipt of Goods on Credit Constitutes Fraud.

26.37[2][b] Seller Must Reclaim Goods Within 10 Days.

26.37[2][c] Rights of Good Faith Buyer Prevail.

26.37[2][d] Reclamation Precludes Other Remedies.

26.38 Buyer in Breach Can Obtain Restitution.

26.38[1] Seller Must Restore "Excess" Payments.

26.38[2] Seller Has Right of Setoff.

26.38[3] Payment in Goods Need Not Be Restored in Kind.

26.39 Party Can Enforce Collateral or Ancillary Obligation.

26.40 Party Can Have Remedy for Fraud.

26.41 Party Can Recover Damages for Third Person's Interference.



79 of 196 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 26 Contract for Sale of Goods--Seeking Remedies Under California Commercial Code

I. STRATEGY

2-26 MB Practice Guide: CA Contract Litigation 26.01

26.01 Scope.

This chapter covers the remedies that are available under Division 2 of the Commercial Code with respect to contracts for the sale of goods, including:

- Objective and strategy for seeking seller's and buyer's remedies under the Commercial Code [*see* 26.02].
- Contract provisions that can limit or modify remedies [*see* 26.03].
- Determining which self-help remedies the seller can pursue prior to initiating litigation [*see* 26.06 -26.13].
- Determining which judicial remedies the seller can pursue [*see* 26.15 -26.20].
- Determining which self-help remedies the buyer can pursue [*see* 26.21 -26.25].
- Determining which judicial remedies the buyer can pursue [*see* 26.26 -26.34].
- Redressing grievances other than breach of contract [*see* 26.35 -26.41].

Core Statutes:

Com Code § 2701 et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)RemediesGeneral OverviewCommercial Law (UCC)Sales (Article 2)RemediesBuyer's RemediesGeneral OverviewCommercial Law (UCC)Sales (Article 2)RemediesLimitation & ModificationGeneral OverviewCommercial Law (UCC)Sales (Article 2)RemediesSeller's RemediesGeneral OverviewCommercial Law (UCC)Sales (Article 2)RemediesStatutes of LimitationsGeneral Overview



80 of 196 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 26 Contract for Sale of Goods--Seeking Remedies Under California Commercial Code
I. STRATEGY

2-26 MB Practice Guide: CA Contract Litigation 26.02

26.02 Objective and Strategy.

26.02[1] Objective and Strategy of Seller. In determining a remedy for the seller, counsel should first assess the nature of the buyer's breach. The available remedies will vary according to the nature of the buyer's breach, which therefore provides a starting point for reviewing all the available options and then choosing the most useful option.

Example:

For instance, if the seller delivered some of the goods according to the contract, and the buyer failed to make a payment when due, then the seller has several options (and can choose all of them) [*see Com Code § 2703*]:

- Cancel the contract [*see 26.08*].
- Withhold the remaining goods from shipment [*see 26.11*].
- Stop delivery of goods in transit and reclaim them [*see 26.12*].
- Resell any of the goods withheld or reclaimed [*see 26.13*].
- Sue for the price of goods delivered and not paid for and for the price differential on resold goods [*see 26.19*].

The seller's first reaction might be to stop any goods in transit. If that is accomplished in a timely manner, then the seller may resell those goods if another buyer is readily available. When the goods are perishable or are rapidly declining in value for some other reason, the seller's repossession of the goods and resale would be more pressing than bringing an action for the price, although that option could be pursued at a later time [*see Com Code §§ 2703, 2705, 2706*].

► Current Cases Relating to California Law:

Use *lexis.com* to research current California cases covering seller's remedies:

■ Legal > Area of Law - By Topic > Commercial Law (UCC) > Find Cases > CA Uniform Commercial Code Cases



Sample Search: For current California cases discussing seller's remedies for buyer's breach involving the sale of goods, use: *seller /2 remedy /30 buyer /5 breach!*.

26.02[2] Objective and Strategy of Buyer. In determining a remedy for the buyer, counsel should first assess the nature of the seller's breach. The available remedies will vary according to the nature of the seller's breach, which therefore provides a starting point for reviewing all the options available, then choosing the most useful option.

Example:

For instance, if the seller has failed to deliver the goods in a timely manner, then the buyer has a choice of remedies:

- Effect "cover" for the goods [see 26.24], and sue for damages [see 26.28].
- Sue for damages for nondelivery [see 26.29].
- Recover goods that were identified to the contract [see 26.30, 26.31].
- Sue for specific performance [see 26.32].

The choice may be narrowed depending on the nature of goods (for example, if they are unique, that is a ground for specific performance), whether the buyer has already paid some of the price, and whether the goods have been identified to the contract. The buyer may need to cover for the goods in a timely manner so as to fulfill a contract for sale to a subsequent buyer. In that case, the buyer's most exigent remedy would be to find another seller that can provide substitute goods. The buyer would have to keep in mind that this remedy must be pursued in good faith, accomplished without undue delay; and the goods bought as cover must be substitute goods [see *Com Code* § 2712]. The buyer then may recover from the seller the costs resulting from covering [see 26.28].



Current Cases Relating to California Law:

Use *lexis.com* to research current California cases covering buyer's remedies for seller's breach:

■ Legal > Area of Law - By Topic > Commercial Law (UCC) > Find Cases > CA Uniform Commercial Code Cases



Sample Search: For current California cases discussing buyer's remedies for seller's breach involving the sale of goods, use: *buyer /2 remedy /30 seller /5 breach!*.



Cross Reference:

For Tips on updating case law and expanding your research with additional resources, see **How to Use Lexis.com With This Publication** at the front of this volume.

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)RemediesGeneral OverviewCommercial Law (UCC)Sales (Article 2)RemediesBuyer's RemediesGeneral OverviewCommercial Law (UCC)Sales (Article 2)RemediesLimitation & ModificationGeneral OverviewCommercial Law (UCC)Sales (Article 2)RemediesSeller's RemediesGeneral OverviewCommercial Law (UCC)Sales (Article 2)RemediesStatutes of LimitationsGeneral Overview



81 of 196 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 26 Contract for Sale of Goods--Seeking Remedies Under California Commercial Code
I. STRATEGY

*2-26 MB Practice Guide: CA Contract Litigation 26.03***26.03 Contract Can Limit or Modify Remedies.**

26.03[1] Parties May Add or Substitute Remedies. The agreement may provide for remedies in addition to or in substitution for those provided in Division 2 of the Commercial Code [*Com Code § 2719(1)(a)*]. However, in that case, the following code provisions will apply nevertheless:

- *Com Code § 2718* on liquidation and general limitation of damages [*see 26.03[4]*].
- *Com Code § 2719(2)* on failure of a limited or exclusive remedy [*see 26.03[6]*].
- *Com Code § 2719(3)* on limitation of consequential damages [*see 26.03[5]*].

Example:

The buyer's remedy may be limited to either or both of the following, for example [*Com Code § 2719(1)(a)*]:

- Returning the goods and receiving a refund of the price.
- Returning nonconforming goods or parts for repair or replacement.

In addition, certain fundamental obligations (such as the obligation to act in good faith) cannot be excluded [*see 26.03[7]*].

**Strategic Point:**

Any right or obligation declared by the Commercial Code is enforceable by action unless the provision declaring it specifies a different and limited effect [*Com Code § 1305(b)*].

**Cross Reference:**

Procedural guide to drafting contract for sale of goods, see *California Legal Forms*, § 52.132 (Matthew

Bender).

26.03[2] Contract Remedy Generally Is Optional Rather Than Exclusive. Resort to a remedy provided by the contract is optional unless the remedy is expressly agreed to be exclusive, in which case it is the sole remedy [*Com Code* § 2719(1)(b)].

Exception--Agreed Exclusive Remedy:

If the contract remedy is expressly agreed to be exclusive, then it is the sole remedy [*Com Code* § 2719(1)(b)].

Consider--Contractual and Statutory Remedies Presumed Cumulative:

Com Code § 2719(1)(b) creates a presumption that clauses prescribing remedies are cumulative rather than exclusive. If the parties intend the term to describe the sole remedy under the contract, this must be clearly expressed [*see Com Code* § 2719, *UCC* § 2-719, *official cmt 2* (1962)].



Strategic Point--Some Code Provisions Prevail:

Even if the contract remedy is the sole remedy, the following code provisions will apply nevertheless [*Com Code* § 2719(1)(a)]:

- *Com Code* § 2718 on liquidation and general limitation of damages [*see* 26.03[4]].
- *Com Code* § 2719(2) on failure of a limited or exclusive remedy [*see* 26.03[6]].
- *Com Code* § 2719(3) on limitation of consequential damages [*see* 26.03[5]].

26.03[3] Parties May Limit or Alter Measure of Damages. The agreement may limit or alter the measure of damages recoverable under Division 2 [*Com Code* § 2719(1)(a)].



Strategic Point--Some Code Provisions Prevail:

Even if the contract remedy limits or alters the measure of damages, the following code provisions will apply nevertheless [*Com Code* § 2719(1)(a)]:

- *Com Code* § 2718 on liquidation and general limitation of damages [*see* 26.03[4]];
- *Com Code* § 2719(2) on failure of a limited or exclusive remedy [*see* 26.03[6]]; and
- *Com Code* § 2719(3) on limitation of consequential damages [*see* 26.03[5]].



Cross Reference:

Discussion and form for clause limiting damages or remedies, *see California Legal Forms*, § 52.353 (*Matthew Bender*).

26.03[4] Liquidated Damages Provision Must Meet Legal Standards. Damages for breach by either party may be liquidated in the agreement, subject to and in compliance with *CC* § 1671 [*Com Code* § 2718(1)].


Strategic Point--Division 2 Supplants Noncompliant Provision:

If the agreement provides for liquidation of damages, and the provision does not comply with CC § 1671, a party may pursue a remedy as provided in Division 2 of the Commercial Code [Com Code § 2718(1)].

Jury Instructions:

Liquidated damages, see *California Forms of Jury Instruction, Ch. 3H, Instr. MB 300H.259* (Matthew Bender).


Cross References:

Discussion of liquidated damages, see *California Forms of Pleading and Practice, § 500.71* (Matthew Bender).

Discussion and form for liquidated damages provision, see *California Legal Forms, § 52.357* (Matthew Bender).

26.03[5] Parties May Limit or Exclude Consequential Damages.

26.03[5][a] Consequential Damages Provision Must Not Be Unconscionable. Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable [Com Code § 2719(3)].


Strategic Point:

Unconscionability generally has been recognized to include an absence of meaningful choice on the part of one of the parties together with contract terms that are unreasonably favorable to the other party [*Nunes Turfgrass, Inc. v. Vaughan-Jacklin Seed Co., Inc. (1988) 200 CA3d 1518, 1534, 246 CR 823*].


Cross Reference:

Discussion of Unconscionability in Contract Actions, see Ch. 18, Asserting or Defending Claim That Contract Is Illegal, Contrary to Public Policy, or Unconscionable.

26.03[5][b] Limitation Respecting Commercial Loss Is Presumptively Valid. Limitation of consequential damages when the loss is commercial is valid unless it is proved that the limitation is unconscionable [Com Code § 2719(3)].

Example--Valid Limitation of Seller's Damages:

A seed package label limited the seller's "liability of any kind on account of any negligence whatsoever" to the purchase price. The limitation was valid as against a sod grower whose crops were damaged by contaminated seed purchased from the seller, a seed supplier with which the grower had done business for 20 years [see *Nunes Turfgrass, Inc. v. Vaughan-Jacklin Seed Co., Inc. (1988) 200 CA3d 1518, 1536, 246 CR 823*].

Distinguish--Seller's Disclaimer of Warranties:

The seller in all cases is free to disclaim warranties in the manner provided in Com Code § 2316 [see Com Code § 2719, UCC § 2-719, official cmt 3 (1962)].


Cross References:

Discussion of contractual limitations on remedies, see *California Forms of Pleading and Practice, §*

500.72 (*Matthew Bender*).

Modification in disclaimer of Commercial Code Implied Warranties, see Ch. 24, Suing or Defending Action for Breach of Warranty.



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Use *lexis.com* to research secondary material on remedies for business entities:

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Sample Search: For information regarding remedies where either the buyer or seller is a business entity, use: *heading(business) AND buyer /5 remedy OR recover! OR damage! /30 sale OR sold OR sell! /5 goods.*

26.03[5][c] Limitation on Consumer's Personal Injury Damages Is Presumptively Invalid. Limitation of consequential damages for injury to the person, in the case of consumer goods, is invalid unless it is proved that the limitation is not unconscionable [*Com Code § 2719(3)*].

26.03[6] Code Remedy Supplants Failed Contract Remedy. If circumstances cause an exclusive or limited contract remedy to fail in its essential purpose, a party may pursue a remedy provided in the Commercial Code [*Com Code § 2719(2)*; see *Airlift Int'l, Inc. v. McDonnell Douglas Corp.* (9th Cir 1982) 685 F2d 267, 270 (*Com Code § 2719(2)* applies only when party is deprived of contract remedy)].

Consider:

Contracts modifying or limiting Commercial Code remedies must provide fair remedies for breach of the obligations or duties outlined in the contract. Thus, any unconscionable contract provision is subject to deletion. Commercial Code remedies would then apply as if the deleted clause had never existed [see *Com Code § 2719*, *UCC § 2-719*, *official cmt 1* (1962)].



Strategic Point--Failure of Essential Purpose:

A contract remedy fails of its essential purpose if the circumstances existing at the time of the agreement have changed so that a party forced to pursue the contract remedy would essentially have no remedy at all [*National Rural Telecomms. Coop. v. DIRECTV, Inc.* (CD Cal 2003) 319 F Supp2d 1040, 1055].

Example--Valid Clause Limiting Express Warranty:

In an action by a company that purchased a defective airplane, which exploded during maintenance procedures, the parties' agreement contained a valid exculpatory clause limiting the express warranty of the manufacturer. The contract remedy did not fail of its essential purpose and was available to the buyer during the warranty period [*Airlift Int'l, Inc. v. McDonnell Douglas Corp.* (9th Cir 1982) 685 F2d 267, 270].



Current Statutes Relating to Remedies:

Use *lexis.com* to research current California statutes covering remedies:

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count Rules > CA - Deering's California Codes Annotated



Sample Search: To retrieve all 27 California statutes dealing with remedies available to buyers and sellers under Division 2, Sales, use: *heading(chapter 7 remedies)*.

26.03[7] Fundamental Obligations May Not Be Excluded. The effect of provisions of the Commercial Code may be varied by agreement, except as otherwise provided in the Commercial Code; but the obligations of good faith, diligence, reasonableness, and care prescribed by the Commercial Code may not be disclaimed by agreement. However, the parties may determine, by agreement, the standards by which the performance of the obligations is to be measured, if the standards are not manifestly unreasonable [*Com Code § 1302(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:

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82 of 196 DOCUMENTS

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Chapter 26 Contract for Sale of Goods--Seeking Remedies Under California Commercial Code
I. STRATEGY

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26.04 Limitation Period for Judicial Remedy Is Four Years.

An action for breach of contract must be commenced within four years of the accrual of the cause of action [*Com Code* § 2725(1)].

 Cross Reference:

Discussion of limitation periods for contract actions generally, see *Ch. 4, Determining Applicable Statute of Limitations and Effect on Potential Action*, 4.03 -4.16.

Legal Topics:

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83 of 196 DOCUMENTS

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Chapter 26 Contract for Sale of Goods--Seeking Remedies Under California Commercial Code
I. STRATEGY

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26.05 Compensatory Damages Are Limited by Commercial Code.

The remedies provided by the Commercial Code are to be liberally administered to the end that the aggrieved party may be put in as good a position as if the other party had fully performed [*Com Code § 1305(a)*].



Strategic Point:

Neither consequential, special, nor penal damages are available, except as specifically provided in the Commercial Code or by other rule of law [*Com Code § 1305(a)*].

Consider:

Com Code § 1305(a) makes it clear that compensatory damages are limited to compensation. They do not include consequential or special damages, or penal damages. Moreover, the Commercial Code elsewhere makes it clear that damages must be minimized [*see Com Code §§ 1304, 2706(1), 2712(2)*] (obligation of good faith; seller's damages recoverable after good faith resale of rejected goods; buyer's damages recoverable after good faith attempt to "cover" for undelivered or nonconforming goods). *Com Code § 1305(a)* also rejects any doctrine that damages must be calculable with mathematical accuracy. Compensatory damages often are approximate at best--they have to be proved with whatever definiteness and accuracy the facts permit, but no more [former *Com Code § 1106* (now see *Com Code § 1305*), official cmt 1 (1962); *cf. Com Code § 2204(3)* (contract does not fail for indefiniteness just because parties left several terms open, as long as contract provides reasonably certain basis for giving appropriate remedy)].

Example:

A raisin producer contracted to sell raisins to a company that in turn contracted to resell the raisins to third parties. When bad weather ruined the crop, the producer repudiated the contract. The buyer did not cover or make any deliveries of raisins to the third parties; and the third parties did not insist on delivery, nor did they sue for nondelivery. The buyer sued the producer, however, seeking damages pursuant to *Com Code § 2713* for the difference between the market price (which was unusually high because of the bad-weather-induced shortage of raisins) and the contract price. The profit that the buyer would have received on the resale contracts would have been \$4,400. The damages represented by the market price differential would have been \$150,000. Former *Com Code § 1106* (now see *Com Code § 1305*) limited the noncovering buyer's damages to the actual loss, \$4,400, since (1) the seller knew that the buyer had a

resale contract; (2) the buyer could not show liability to the third parties--one had released the buyer; the other did not sue, and the limitation period had expired at time of litigation; and (3) the producer did not commit bad faith [*Allied Cannery & Packers, Inc. v. Victor Packing Co.* (1984) 162 CA3d 905, 915, 209 CR 60].

Exception:

However, that formula may not apply if the seller was guilty of bad faith [see *KGM Harvesting Co. v. Fresh Network* (1995) 36 CA4th 376, 388 n7, 42 CR2d 286]. Moreover, that formula may not apply if the court takes into account whether the seller's breach adversely affected the buyer's goodwill among customers with whom the buyer had contracted for resale, and whether the buyer suffered the potential loss of future contracts because of the seller's breach [see *KGM Harvesting Co. v. Fresh Network* (1995) 36 CA4th 376, 387 n5, 42 CR2d 286].

Legal Topics:

For related research and practice materials, see the following legal topics:

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84 of 196 DOCUMENTS

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Chapter 26 Contract for Sale of Goods--Seeking Remedies Under California Commercial Code

II. PURSUING SELLER'S SELF-HELP REMEDIES FOR BUYER'S BREACH

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26.06 CHECKLIST: Pursuing Seller's Self-Help Remedies for Buyer's Breach.

- ☐ Determine whether contract limits or modifies seller's Commercial Code self-help remedies.

Authority:

Com Code § 2719

Discussion:

See 26.03

- ☐ If buyer repudiated contract, or wrongfully rejected goods or revoked acceptance, or failed to make payment when due, decide which of the following remedies seller should pursue:

- ☐ Cancel contract.

Authority:

Com Code § 2703(f)

Discussion:

See 26.08

- ☐ With respect to unfinished goods being manufactured for buyer, either:

☐ Treat them as resaleable as-is (and resell them) or finish them (and identify them to contract); or

☐ Sell them for scrap or salvage value.

Authority:

Com Code §§ 2703(c), 2704(2)

Discussion:

See 26.09

☐ With respect to finished goods produced or procured for buyer, identify them to contract (and then withhold them from shipment).

Authority:

Com Code §§ 2703(c), 2704(1)

Discussion:

See 26.10

☐ Withhold goods not yet in transit to buyer.

Authority:

Com Code § 2703(a)

Discussion:

See 26.11

☐ Stop delivery of goods in transit to buyer and reclaim them.

Authority:

Com Code §§ 2703(b), 2705

Discussion:

See 26.12

☐ Decide whether seller will resell goods that have been identified to contract and that seller has either withheld from shipment or reclaimed after they were shipped.

Authority:

Com Code §§ 2703(d), 2706

Discussion:

See 26.13

☐ If some person is in position of seller (such as buyer's agent after paying for goods or becoming responsible to pay for them), decide whether that person should withhold goods, stop delivery, and resell, in same manner as seller.

Authority:

Com Code § 2707

Discussion:

See 26.14

Legal Topics:

For related research and practice materials, see the following legal topics:

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85 of 196 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 26 Contract for Sale of Goods--Seeking Remedies Under California Commercial Code
II. PURSUING SELLER'S SELF-HELP REMEDIES FOR BUYER'S BREACH

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26.07 Options and Strategies.

On the buyer's breach of the contract--whether the buyer wrongfully rejected goods or revoked acceptance, or repudiated the contract, or failed to make a payment when due--the seller's self-help options depend on the seller still having, or being able to regain, possession of the goods.

Distinguish:

In addition to the typical case of refusal to pay or default in payment, the buyer "fails to make a payment due" [*see Com Code § 2703*] when the buyer's check is dishonored on due presentment, or the buyer's draft is not accepted, and a letter of credit is not furnished as agreed [*see Com Code § 2703*, UCC § 2-703, official cmt 3 (1962)].

One option is to cancel the contract [*Com Code § 2703(f)*; *see 26.08*].

If the goods are being manufactured for the buyer, then unfinished goods can either be finished and identified to the contract (but then would be withheld from shipment; *see below*), or treated as resalable as-is, or sold for scrap or salvage value [*Com Code §§ 2703(c), 2704*; *see 26.09*].

Finished goods that have been produced or procured for the buyer can be identified to the contract (but then would be withheld from shipment) [*Com Code §§ 2703(c), 2704*; *see 26.10*].

Goods that are ready for shipment to the buyer can be withheld from shipment [*Com Code § 2703(a)*; *see 26.11*]. Goods in transit to the buyer can be stopped, and the seller can reclaim them (except in some cases) [*Com Code § 2703(b), 2705*; *see 26.12*].

The seller may resell goods that have been withheld or reclaimed [*Com Code § 2703(d)*; *see 26.13*], thus mitigating (if not obviating) damages. However, the seller may elect not to resell the goods. In that case the seller would have to rely exclusively on a judicial remedy [*see 26.15* (checklist for seller's judicial remedy)], taking the risk of being found not to have mitigated damages.



Strategic Point--Cumulative Remedies:

The seller's remedies listed in *Com Code § 2703* are essentially cumulative in nature and include all of

the available remedies for breach. Whether the pursuit of one remedy bars another depends entirely on the facts of the individual case. Moreover, the remedies under *Com Code* § 2703 apply irrespective of the situs of the title of the goods [*see Com Code* § 2703, *UCC* § 2-703, *official cmt 1* (1962)].

A person in the position of a seller (for instance, a buyer's agent that has paid the price for the goods) has the same remedies as the seller. The person may withhold the goods from shipment, stop delivery of any goods in transit and reclaim them, and resell goods withheld or reclaimed [*Com Code* § 2707; *see* 26.14].



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Sample Search: To find secondary material on seller's remedies, in general, try:
heading(seller /5 remedy).

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86 of 196 DOCUMENTS

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Chapter 26 Contract for Sale of Goods--Seeking Remedies Under California Commercial Code
II. PURSUING SELLER'S SELF-HELP REMEDIES FOR BUYER'S BREACH

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26.08 Contract Can Be Canceled.

The seller may cancel the contract with respect to any goods directly affected by the buyer's breach after the buyer has done any of the following [*Com Code § 2703(f)*]:

- Wrongfully rejected or revoked acceptance of the goods.
- Failed to make a payment due on or before delivery.
- Repudiated with respect to a part or the whole.

If the breach is of the whole contract [*see Com Code § 2612* (breach of installment contract)], then the seller may cancel with respect to the whole undelivered balance [*Com Code § 2703(f)*].



Strategic Point--Cancellation Does Not Affect Right to Damages:

Unless the contrary intention clearly appears, expressions of "cancellation" or "rescission" of the contract, or the like, are not construed as a renunciation or discharge of any claim in damages for an antecedent breach [*Com Code § 2720*].



Cross References:

Checklist for pursuing seller's judicial remedy, see 26.15.

Breach of installment contract, see *Ch. 28, Contract for Sale of Goods--Suing or Defending Action for Breach of Contract Under California Commercial Code*, 28.19[7].

Discussion of seller's remedies, see *California Forms of Pleading and Practice*, § 500.75 (Matthew Bender).

Discussion and form for notice of cancellation, see *California Legal Forms*, § 52.479 (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:

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(Article 2)RemediesSeller's RemediesResale of Goods



87 of 196 DOCUMENTS

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Chapter 26 Contract for Sale of Goods--Seeking Remedies Under California Commercial Code
II. PURSUING SELLER'S SELF-HELP REMEDIES FOR BUYER'S BREACH

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26.09 Goods Being Manufactured for Buyer Can Be Resold, Finished, or Scrapped.

26.09[1] Seller's Options With Respect to Unfinished Goods. When goods are being manufactured for the buyer, the manufacturer has two options for handling unfinished goods directly affected by the buyer's breach after the buyer has done any of the following [*Com Code § 2703(c)*]:

- Wrongfully rejected or revoked acceptance of the goods.
- Failed to make a payment due on or before delivery.
- Repudiated with respect to a part or the whole.

The manufacturer may either:

- Treat the unfinished goods as resalable in spite of being unfinished [*Com Code § 2704(1)(b)*]; see 26.09[2]; or
- Use reasonable commercial judgment about whether to complete manufacture of the unfinished goods or sell them for scrap or salvage value [*Com Code § 2704(2)*]; see 26.09[3].

If the breach is of the whole contract [*see Com Code § 2612* (breach of installment contract)], then the seller may act with respect to the whole undelivered balance [*Com Code § 2703(c)*].

Cross Reference:

Identifying finished goods to contract, see 26.10.

26.09[2] Unfinished Goods Can Be Treated As Resalable. The seller may treat as the subject of resale any unfinished goods that have demonstrably been intended for the particular contract, even though those goods are unfinished [*Com Code § 2704(1)(b)*].

Cross Reference:

Reselling goods not delivered in consequence of buyer's breach, see 26.13.

26.09[3] Unfinished Goods Can Be Finished or Scrapped. The seller, in the exercise of reasonable commercial judgment, for the purposes of loss-avoidance and effective realization, may do any of the following with respect to the unfinished goods [*Com Code* § 2704(2)]:

- Complete the manufacture and wholly identify the goods to the contract.
- Cease manufacture and resell for scrap or salvage value.
- Proceed in any other reasonable manner.

Thus, *Com Code* § 2704(2) makes the goods available for resale (the seller's primary self-help remedy) after, or without, being finished and, in a special case in which resale is not practicable, lets the seller commence a civil action for the price, which would then be necessary to give the seller the value of the contract [*Com Code* § 2704, UCC § 2-704, official cmt 1 (1962)].



Warning:

The seller should not complete manufacture of unfinished goods or procure goods for the contract if, in the exercise of reasonable commercial judgment, when the seller learns of the breach, that action will result in a material increase in damages. The burden is on the buyer to show the commercially unreasonable nature of the seller's action in completing manufacture [*see Com Code* § 2704, UCC § 2-704, official cmt 2 (1962)].



Cross References:

Reselling goods identified to contract but undelivered in consequence of buyer's breach, see 26.13.
Checklist for pursuing seller's judicial remedy, see 26.15.

Legal Topics:

For related research and practice materials, see the following legal topics:

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88 of 196 DOCUMENTS

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Chapter 26 Contract for Sale of Goods--Seeking Remedies Under California Commercial Code

II. PURSUING SELLER'S SELF-HELP REMEDIES FOR BUYER'S BREACH

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26.10 Goods Produced or Procured for Buyer Can Be Identified to Contract.

When the seller has produced or procured goods for the buyer but has not yet identified them to the contract, the seller may identify to the contract any such conforming goods directly affected by the buyer's breach after the buyer has done any of the following [*Com Code* §§ 2703(c), 2704(1)(a)]:

- Wrongfully rejected or revoked acceptance of the goods.
- Failed to make a payment due on or before delivery.
- Repudiated with respect to a part or the whole.

If the breach is of the whole contract [*see Com Code* § 2612 (breach of installment contract)], the seller may act with respect to the whole undelivered balance [*Com Code* § 2703(c)].

➡ Cross Reference:

Reselling goods identified to contract but undelivered in consequence of buyer's breach, see 26.13.

Legal Topics:

For related research and practice materials, see the following legal topics:

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89 of 196 DOCUMENTS

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Chapter 26 Contract for Sale of Goods--Seeking Remedies Under California Commercial Code
II. PURSUING SELLER'S SELF-HELP REMEDIES FOR BUYER'S BREACH

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26.11 Goods Not Shipped Can Be Withheld.

The seller may withhold delivery of any goods directly affected by the buyer's breach after the buyer has done any of the following [*Com Code* § 2703(a)]:

- Wrongfully rejected or revoked acceptance of the goods.
- Failed to make a payment due on or before delivery.
- Repudiated with respect to a part or the whole.

If the breach is of the whole contract [*see Com Code* § 2612 (breach of installment contract)], the seller may withhold delivery of the whole undelivered balance [*Com Code* § 2703(a)].

► Cross References:

Stopping goods in transit, see 26.12.

Reselling goods undelivered in consequence of buyer's breach, see 26.13.

Discussion of seller's remedies, see *California Forms of Pleading and Practice*, § 500.75 (Matthew Bender).

Discussion and form for notice of withholding goods, see *California Legal Forms*, § 52.478 (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:

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90 of 196 DOCUMENTS

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Chapter 26 Contract for Sale of Goods--Seeking Remedies Under California Commercial Code
II. PURSUING SELLER'S SELF-HELP REMEDIES FOR BUYER'S BREACH

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26.12 Goods in Transit Can Be Reclaimed.

26.12[1] Seller May Elect to Stop Delivery. If the buyer wrongfully rejects or revokes acceptance of goods, fails to make a payment due on or before delivery, or repudiates with respect to a part or the whole, then with respect to any goods directly affected and, if the breach is of the whole contract, then with respect to the whole undelivered balance, the aggrieved seller may stop delivery of goods in transit, as provided in *Com Code* § 2705 [*Com Code* § 2703(b); see *Com Code* § 2612 (breach of installment contract)].



Strategic Point:

After an effective stoppage under *Com Code* § 2705, the seller's rights in the goods are the same as if the seller had never made a delivery [see *Com Code* § 2705, *UCC* § 2-705, *official cmt* 6 (1962)].



Warning:

Improper stoppage is a breach by the seller if it effectively interferes with the buyer's right to due tender under *Com Code* § 2503, regarding the manner of tender of delivery [see *Com Code* § 2705, *UCC* § 2-705, *official cmt* 1 (1962)].



Cross References:

Reselling goods undelivered in consequence of buyer's breach, see 26.13.

Tender of delivery, see *Ch. 28, Contract for Sale of Goods--Suing or Defending Action for Breach of Contract Under California Commercial Code*, 28.09.

Discussion of seller's remedy of stopping delivery, see *California Forms of Pleading and Practice*, § 500.75 (Matthew Bender).

26.12[2] Stoppage Right Is Limited.

26.12[2][a] Only Carload (or Like Shipment) Can Be Stopped Unless Buyer Is Insolvent. The seller normally

is limited to stopping delivery of carload, truckload, or planeload (or larger) shipments, but if the seller elects to stop delivery because of discovering the buyer to be insolvent, then the seller may stop delivery of any shipment [see *Com Code § 2705(1)*].

Consider:

Because stoppage is a burden in any case to carriers, and might be a very heavy burden to them if it covered all small shipments in all these situations, the right to stop for reasons other than insolvency is limited to carload, truckload, planeload or larger shipments. A seller shipping to a buyer of doubtful credit can have protection by shipping C.O.D. [see *Com Code § 2705, UCC § 2-705, official cmt 1* (1962)].

26.12[2][b] Goods in Buyer's Actual or Constructive Custody Cannot Be Stopped. As against the buyer, the seller may stop delivery until one of the following occurs:

- The buyer receives the goods [*Com Code § 2705(2)(a)*].
- Any bailee other than a carrier acknowledges to the buyer that the bailee holds the goods for the buyer [*Com Code § 2705(2)(b)*].
- A carrier acknowledges to the buyer by reshipment or as a warehouse [*Com Code § 2705(2)(c)*].
- Negotiation to the buyer of any negotiable document of title covering the goods [*Com Code § 2705(2)(d)*].

Consider:

The purpose of *Com Code § 2705(2)(c)* is to protect a transaction between a buyer-for-resale and that buyer's customer. It protects the ultimate customer from being affected by a dispute between the buyer and the buyer's supplier, by ensuring that the goods the customer has ordered will be delivered regardless of the financial condition of the reseller/buyer [see *Butts v. Glendale Plywood Co. (9th Cir 1983) 710 F2d 504, 505*].

Example--Reshipment:

When the original buyer of two railroad cars of lumber sold the lumber while in transit to a subpurchaser, ordering the railroad to change the destination to the subpurchaser's location, and the seller, learning of its buyer's possible insolvency, ordered the railroad to stop the cars, then sold the lumber directly to the subpurchaser, the buyer's rerouting of the shipment constituted a "reshipment," which prevented the seller from stopping delivery [*Butts v. Glendale Plywood Co. (9th Cir 1983) 710 F2d 504, 505-506* (applying Oregon version of UCC)].

26.12[3] Delivery Must Be Suspended on Seller's Notice.

26.12[3][a] Seller Must Give Sufficient Notice. To stop delivery of goods in transit, the seller must give sufficient notice to enable a carrier or warehouse operator, by reasonable diligence, to prevent delivery of the goods [*Com Code § 2705(3)(a)*; see *Com Code § 2705, UCC § 2-705, official cmt 1* (1962) (statutory reference to carrier "or other bailee" makes clear that stoppage principle applies to other bailees as well as carriers)].

26.12[3][b] Goods Must Be Handled As Seller Directs. After the seller has given proper notice to enable the carrier or warehouse operator to stop delivery, the goods generally must be held and delivered according to the seller's directions [*Com Code § 2705(3)(b)*].

Prerequisite--Surrender of Title Document:

If a negotiable document of title has been issued for the goods, then the carrier or warehouse operator is not obliged to obey a stop notice until possession or control of the document is surrendered [*Com Code* § 2705(3)(c)].



Strategic Point:

A carrier or warehouse operator that has issued a nonnegotiable bill of lading is not obliged to obey a stop notice received from a person other than the consignor [*Com Code* § 2705(3)(d)].



Strategic Point:

The seller's right as against the buyer to stop delivery persists whether or not the carrier or warehouse operator is obliged to recognize the stop notice [*see Com Code* § 2705, *UCC* § 2-705, *official cmt 2* (1962)].

26.12[3][c] Seller Is Liable for Ensuing Costs and Damages. When the carrier or warehouse operator holds and delivers the goods in accordance with the seller's directions, the seller is liable for any ensuing charges or damages [*Com Code* § 2705(3)(b)].



Strategic Point:

A carrier or warehouse operator that obeys an unjustified stop notice could become liable to the buyer [*see Com Code* § 7303]. *Com Code* § 2705(3)(b) therefore gives the carrier or warehouse operator a right of indemnity as against the seller in such a case [*Com Code* § 2705, *UCC* § 2-705, *official cmt 2* (1962)].

Legal Topics:

For related research and practice materials, see the following legal topics:

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91 of 196 DOCUMENTS

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Chapter 26 Contract for Sale of Goods--Seeking Remedies Under California Commercial Code
II. PURSUING SELLER'S SELF-HELP REMEDIES FOR BUYER'S BREACH

2-26 MB Practice Guide: CA Contract Litigation 26.13

26.13 Goods Not Delivered Can Be Resold.

26.13[1] Seller May Resell Goods and Sue for Damages. The seller may resell the undelivered goods identified to the contract--then sue for damages if necessary to be made whole--and after the seller has taken any of the following steps in consequence of the buyer's breach [*see Com Code §§ 2703(d), 2706(1)*]:

- Canceled the contract [*see 26.08*].
- Made a commercially reasonable election, with respect to any unfinished goods being manufactured for the buyer, either [*see 26.09*]:
 - ☐ To finish the goods and identify them to the contract; or
 - ☐ To treat the goods as being resalable even though unfinished.
- Identified to the contract any goods specially produced or procured for the buyer [*see 26.10*].
- Withheld goods not yet shipped [*see 26.11*].
- Stopped delivery of goods in transit to the buyer [*see 26.12*].
- Reclaimed goods shipped on credit, after discovering the buyer to be insolvent [*see 26.37*].



Strategic Point--Good Faith and Reasonableness Required:

If the resale is made in good faith and in a commercially reasonable manner, the seller may recover the difference between the resale price and the contract price, together with any incidental damages allowed under Division 2 [*see Com Code § 2710*], less expenses saved in consequence of the buyer's breach [*Com Code § 2706(1)*; *see Allied Grape Growers v. Bronco Wine Co. (1988) 203 CA3d 432, 445-446, 249 CR 872* (resale to affiliated company is not prohibited and is not inherently commercially unreasonable)].

Distinguish--Different Measure of Damages When Resale Is Improper:

If the seller fails to conduct the resale in a proper manner, the seller is not entitled to the measure of damages under *Com Code* § 2706(1) but is relegated to the measure of damages provided in *Com Code* § 2708 [see *Com Code* § 2706, *UCC* § 2-706, *official cmt* 2 (1962); 26.17].

Jury Instructions:

Seller's Damages Recoverable After Resale, see *California Forms of Jury Instruction, Ch. 3H, Instr. MB 300H.251* (Matthew Bender).

 Cross References:

Checklist for pursuing seller's judicial remedy, see 26.15.

Discussion of resale after buyer's breach, see *California Forms of Pleading and Practice*, § 500.75 (Matthew Bender); or
California Legal Forms, § 52.351 (Matthew Bender).

26.13[2] Goods Must Be Sold in Commercially Reasonable Manner.

26.13[2][a] Sale Can Be Public Auction or Private Sale. Resale of goods may be at public auction or private sale, including sale by way of one or more contracts to sell or of identification to an existing contract of the seller [*Com Code* § 2706(2)].

**Strategic Points:**

- A private sale would still require a limited notice to the defaulted buyer [see 26.13[3]].
- The parties' agreement could contain an overriding provision concerning a resale [*Com Code* § 2706(2); see 26.03[3]].
- In choosing between a public auction and private sale, the seller should consider the character of the goods, and comply with the relevant trade practices and usages [see *Com Code* § 2706, *UCC* § 2-706, *official cmt* 4 (1962)].

 Cross Reference:

Discussion and forms for contract clauses specifying method of resale after buyer's breach, see *California Legal Forms*, § 52.351 (Matthew Bender).

26.13[2][b] Any Time, Place, and Manner Could Be Reasonable. Sale may be as a unit or in parcels, and at any time and place, and on any terms. However, every aspect of the sale including the method, manner, time, place and terms must be commercially reasonable [*Com Code* § 2706(2)].

**Timing:**

A reasonable time cannot be measured by any legal yardstick or divided into degrees, but rather depends on factors such as the following [see *Com Code* § 2706, *UCC* § 2-706, *official cmt* 5 (1962)]:

- Nature of the goods.
- Condition of the market.
- Other circumstances of the case.



Strategic Point:

When a seller contemplating resale receives a demand from the buyer for inspection related to preserving evidence of goods in dispute [see *Com Code* § 2515], the time for resale may be appropriately lengthened [see *Com Code* § 2706, *UCC* § 2-706, *official cmt* 5 (1962)].

26.13[2][c] Resale Must Be Referenced to Broken Contract. The resale must be reasonably identified as referring to the broken contract [*Com Code* § 2706(2)].

26.13[3] Notice to Defaulted Buyer Could Be Required.

26.13[3][a] Private Sale Requires Notice of Intent to Sell. A seller entitled to resell the goods must give the defaulted buyer reasonable notice of the intention to resell at a private sale [*Com Code* § 2706(3)].

Distinguish:

The seller need not notify the defaulted buyer of the time and place of the private sale, whereas such notice may be required for a public sale [see *Com Code* § 2706, *UCC* § 2-706, *official cmt* 8 (1962)].

➡ Cross References:

Notification requirement for public sale, see 26.13[3][b].

Discussion and form for notice of resale, see *California Legal Forms*, § 52.482 (Matthew Bender).

26.13[3][b] Public Sale Normally Requires Notice of Time and Place. A seller entitled to resell the goods must give the defaulted buyer reasonable notice of the time and place of a public resale [*Com Code* § 2706(4)(b)]; that is, a sale by auction [see *Com Code* § 2706, *UCC* § 2-706, *official cmt* 8 (1962)].

Exception--Perishable Goods or Declining Value:

The seller need not give the notice if the goods are perishable or threaten to decline in value speedily [*Com Code* § 2706(4)(b)].

➡ Cross Reference:

Notice of resale, see *California Legal Forms*, § 52.482 (Matthew Bender).

26.13[3][c] Public Sale Notice Must State Off-Site Location of Goods. If the goods are not to be within the view of those attending the sale at the place stated in the notice, the notice must state the place where the goods are located and provide for their reasonable inspection by prospective bidders [*Com Code* § 2706(4)(c)].

26.13[4] Public Sale Is Subject to Special Rules.

26.13[4][a] Only Identified Goods Can Be Sold. Normally only identified goods can be sold at public sale [*Com Code* § 2706(4)(a)].

Exception--Futures Market Exists:

If there is a recognized market for a public sale of futures in goods of the kind, then the goods can be

sold in that market [*see Com Code § 2706(4)(a)*].



Strategic Point--Seller:

The seller may use this remedy when the buyer is guilty of anticipatory repudiation of a contract for future goods, before the goods or some of them have come into existence. The seller may then exercise the right of resale, and so fix damages, by "one or more contracts to sell" [*see Com Code § 2706(2); see also 26.13[2][a]*] the quantity of conforming future goods affected by the repudiation. If the buyer is guilty of anticipatory breach after the goods have come into existence, and the goods conform to the contract, their resale will fix the seller's damages as satisfactorily as if they had been identified before the breach [*see Com Code § 2706, UCC § 2-706, official cmt 7 (1962)*].

26.13[4][b] Sale Must Be at Usual Place or Market. A public sale of goods must be made at a usual place or market for public sale if one is reasonably available [*Com Code § 2706(4)(b)*].

26.13[4][c] Seller May Buy. The seller may buy goods sold at a public sale [*Com Code § 2706(4)(d)*].



Strategic Point--Buyer:

The seller's purchase of the goods benefits the defaulted buyer by tending to increase the resale price and thus decreasing the damages the buyer will have to pay [*see Com Code § 2706, UCC § 2-706, official cmt 9 (1962)*].

26.13[5] Good Faith Buyer Gets Clear Title. A buyer who buys in good faith at the resale takes the goods free of any rights of the defaulted buyer, even if the seller failed to comply with any of the requirements of *Com Code § 2706* [*Com Code § 2706(5)*].

26.13[6] Seller Keeps Any Profit From Resale. The seller is not accountable to the buyer for any profit made on the resale [*Com Code § 2706(6)*].

Consider:

The seller retains any profit from the resale, without distinction based on whether or not the seller had a lien. Therefore, if a person "in the position of a seller" [*see Com Code § 2707*] or a buyer pursuing the buyer's remedies [*see Com Code § 2711*] exercises the right of resale under *Com Code § 2706*, the resale is only for the limited purpose of obtaining cash for a security interest in the goods. Once that purpose has been accomplished, any excess in the resale price belongs to the seller, to whom an accounting must be made [*see Com Code § 2706, UCC § 2-706, official cmt 11 (1962)*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawSales of GoodsDamages & RemediesSeller's Damages & RemediesGeneral OverviewContracts LawSales of GoodsDamages & RemediesSeller's Damages & RemediesResale of Goods



92 of 196 DOCUMENTS

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Chapter 26 Contract for Sale of Goods--Seeking Remedies Under California Commercial Code
II. PURSUING SELLER'S SELF-HELP REMEDIES FOR BUYER'S BREACH

2-26 MB Practice Guide: CA Contract Litigation 26.14

26.14 Third Person in Position of Seller Has Similar Remedies.

26.14[1] Remedies Protect Person With Interest Similar to Seller's. A "person in the position of a seller" is any person that holds a security interest in the goods or has some other right in the goods similar to that of a seller. As against a principal, an agent who has paid or become responsible for the price of the goods on behalf of the principal is a person in the position of a seller [*Com Code* § 2707(1)].

26.14[2] Person May Withhold Goods, Stop Delivery, Resell, and Recover Damages. A person in the position of a seller may withhold or stop delivery, resell, and recover incidental damages, as provided in Division 2 of the Commercial Code [*Com Code* § 2707(2); see *Com Code* §§ 2705, 2706, 2710 (withholding and stopping delivery; reselling; recovering incidental damages)].



Cross References:

Withholding delivery, see 26.11.

Stopping delivery, see 26.12.

Reselling, see 26.13.

Seller's incidental damages, see 26.20.

Discussion and form for notice of resale by person in position of seller, see *California Legal Forms*, § 52.482 (*Matthew Bender*).

26.14[3] Person Must Account for Excess Resale Proceeds. After reselling any goods, a person in the position of a seller must account to the seller for any excess over the amount of that person's security interest [*Com Code* § 2706(6)].

Legal Topics:

For related research and practice materials, see the following legal topics:

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PurchasersGeneral Overview



93 of 196 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 26 Contract for Sale of Goods--Seeking Remedies Under California Commercial Code
III. PURSUING SELLER'S JUDICIAL REMEDIES FOR BUYER'S BREACH

2-26 MB Practice Guide: CA Contract Litigation 26.15

26.15 CHECKLIST: Pursuing Seller's Judicial Remedies for Buyer's Breach.

- ☐ Determine whether contract limits or modifies Commercial Code remedies.

Authority:

Com Code § 2719

Discussion:

See 26.03

- ☐ Determine whether four-year limitation period has expired.

Authority:

Com Code § 2725

Discussion:

See 26.04

- ☐ If buyer wrongfully rejected goods or revoked acceptance:

- ☐ As to goods not resold, seller may recover market-price differential, that is, difference between market price (at time and place for tender) and contract price.

Authority:

Com Code §§ 2703(e), 2708(1)

Discussion:

See 26.17

- ☐ If market-price differential would be inadequate, seller may recover lost profit instead.

Authority:*Com Code §§ 2703(e), 2708(2)***Discussion:**

See 26.18

- ☐ As to goods that seller resold, seller may recover difference between resale price and contract price.

Authority:*Com Code §§ 2703(d), 2706(1)***Discussion:**

See 26.19[1]

- ☐ If buyer failed to make payment when due, determine which of the following remedies to seek:

- ☐ Seller may recover contract price in some cases.

Authority:*Com Code §§ 2703(e), 2709(1)***Discussion:**

See 26.19[2]

- ☐ If not entitled to recover price, seller may recover same damages as if buyer wrongfully rejected goods or revoked acceptance.

Authority:*Com Code §§ 2703(e), 2709(3)***Discussion:**

See 26.19[3]

- ☐ Determine whether to seek recovery for seller's incidental damages.

Authority:*Com Code §§ 2703, 2706(1), 2709(1), 2710***Discussion:**

See 26.20

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Contracts LawSales of GoodsDamages & RemediesGeneral OverviewContracts LawSales of GoodsDamages & RemediesSeller's Damages & RemediesGeneral OverviewContracts LawSales of GoodsDamages & RemediesSeller's Damages & RemediesConsequential DamagesActions for PriceContracts LawSales of GoodsDamages & RemediesSeller's Damages & RemediesLimitation & ModificationGeneral OverviewContracts LawSales of

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94 of 196 DOCUMENTS

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Chapter 26 Contract for Sale of Goods--Seeking Remedies Under California Commercial Code
III. PURSUING SELLER'S JUDICIAL REMEDIES FOR BUYER'S BREACH

2-26 MB Practice Guide: CA Contract Litigation 26.16

26.16 Options and Strategies.

The seller's choice of judicial remedy will depend on whether the seller retained, and resold, any of the goods after the buyer's breach [see 26.13].

If all of the goods were delivered, and the buyer's breach consists merely of nonpayment, then the seller's remedy usually is an action for the contract price [see 26.19[2]]. That remedy is not available in all cases, however; and the seller might instead have to sue for damages for nonacceptance [see 26.19[3]].

In a case of the buyer's nonacceptance of goods, or repudiation of the contract, the seller's judicial remedy depends on whether the seller resold any of the goods:

- As to goods that were resold, the seller's remedy is to recover the difference between the resale price and the contract price [see 26.19[1]].
- As to goods that the seller could not resell, or elected not to resell, the seller's remedy is to recover the market-price differential--that is, the difference between the market price of the goods (at the time and place for tender) and the contract price [see 26.17].
- However, if recovery of the market-price differential would not put the seller in as good a position as if the buyer had performed, the seller may be entitled to recover lost profit instead [see 26.18].

In all cases, the seller may recover incidental damages [see 26.20].



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Use *lexis.com* to research secondary material on UCC remedies for sellers:

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95 of 196 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 26 Contract for Sale of Goods--Seeking Remedies Under California Commercial Code
 III. PURSUING SELLER'S JUDICIAL REMEDIES FOR BUYER'S BREACH

2-26 MB Practice Guide: CA Contract Litigation 26.17

26.17 Market Can Determine Damages for Buyer's Nonacceptance or Repudiation.

26.17[1] Seller Is Entitled to Market-Price Differential. If the buyer wrongfully rejected or revoked acceptance of the goods, or repudiated with respect to a part or the whole, then with respect to any goods directly affected and, if the breach was of the whole contract [*see Com Code § 2612* (breach of installment contract)], then with respect to the whole undelivered balance, the seller may recover [*Com Code §§ 2703(e), 2708(1)*]:

- The difference between the market price at the time and place for tender and the unpaid contract price; and
- Any incidental damages provided in Division 2 of the Commercial Code [*see Com Code § 2710*], less expenses saved in consequence of the buyer's breach.

Exception:

This measure of damages is appropriate insofar as the seller was not able, or elected not to try, to resell the goods [*see Com Code § 2703(d), (e)*]. If the seller resold any of the goods [*see 26.13*], then the seller's damages, with respect to those goods, will be measured by the contract price [*Com Code § 2706(1)*; *see 26.19[1]*].

**Strategic Point:**

If the market-price differential measure of damages would be inadequate, then damages could be measured instead by the seller's lost profit [*see Com Code § 2708(2)*; *see also 26.18*].

Jury Instructions:

Seller's Damages for Buyer's Nonacceptance or Repudiation, *see California Forms of Jury Instruction, Ch. 3H, Instr. MB 300H.252* (Matthew Bender).

**Cross Reference:**

Seller's incidental damages, *see 26.20*.

26.17[2] Proof of Market Price Depends on Facts.

26.17[2][a] Market Price at Time of Repudiation May Be Relevant. If the action is based on anticipatory repudiation and comes to trial before the time for performance with respect to some or all of the goods, then the seller's damages based on market price [see *Com Code* § 2708] must be determined according to the price of the goods prevailing when the seller learned of the repudiation [*Com Code* § 2723(1)].

26.17[2][b] Market Price at Any Reasonable Time and Place May Be Relevant. If evidence of a price prevailing at the times and places that otherwise would be applicable is not readily available, the price prevailing within any reasonable time before or after the time described, or at any other place that in commercial judgment or under usage of trade would serve as a reasonable substitute for the one described may be used, making any proper allowance for the cost of transporting the goods to or from that other place [*Com Code* § 2723(2)].

Prerequisite--Notice of Evidence of Market Price:

Evidence of a relevant price prevailing at a time or place other than the one that otherwise would be applicable is not admissible unless and until the party offering the evidence has given the other party such notice as the court finds sufficient to prevent unfair surprise [*Com Code* § 2723(3)].

➡ Cross Reference:

Discussion of proof of price, see *California Forms of Pleading and Practice*, § 500.77 (*Matthew Bender*).

26.17[2][c] Published Market Quotations Are Admissible. Whenever the prevailing price or value of any goods regularly bought and sold in any established commodity market is in issue, reports in official publications or trade journals or in newspapers or periodicals of general circulation published as the reports of the market are admissible in evidence. The circumstances of the preparation of the report may be shown to affect its weight but not its admissibility [*Com Code* § 2724].

Legal Topics:

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96 of 196 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 26 Contract for Sale of Goods--Seeking Remedies Under California Commercial Code
III. PURSUING SELLER'S JUDICIAL REMEDIES FOR BUYER'S BREACH

2-26 MB Practice Guide: CA Contract Litigation 26.18

26.18 Lost Profit Fixes Damages When Market-Price Differential Fails.

If the seller would be entitled to the market price measure of damages [see *Com Code* § 2708(1); see also 26.17], but it would be inadequate to put the seller in as good a position as performance would have done, the seller may recover [Com Code §§ 2703(e), 2708(2)]:

- The profit (including reasonable overhead) that the seller would have made from full performance by the buyer; and
- Any incidental damages provided in Division 2 of the Commercial Code [see *Com Code* § 2710], with:
 - ☐ Due allowance to the seller for costs reasonably incurred; and
 - ☐ Due credit to the buyer for payments or proceeds of resale.

Exception--Lost-Volume Seller Need Not Account for Resale:

When the seller is a so-called lost-volume seller, *Com Code* § 2708 permits the recovery of lost profits without an offsetting credit for the proceeds of a resale. A lost-volume seller is a seller whose "resale" of the affected goods would have been made regardless of the buyer's breach [*National Controls, Inc. v. Commodore Bus. Machs., Inc.* (1985) 163 CA3d 688, 697, 209 CR 636]. In other words, if the defaulted buyer had performed, the seller would have realized a profit from two sales.

➡ Cross Reference:

Seller's incidental damages, see 26.20.

Legal Topics:

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LawSales of GoodsDamages & RemediesSeller's Damages & RemediesConsequential DamagesGeneral
OverviewContracts LawSales of GoodsDamages & RemediesSeller's Damages & RemediesConsequential
DamagesActions for Price



97 of 196 DOCUMENTS

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Chapter 26 Contract for Sale of Goods--Seeking Remedies Under California Commercial Code
III. PURSUING SELLER'S JUDICIAL REMEDIES FOR BUYER'S BREACH

2-26 MB Practice Guide: CA Contract Litigation 26.19

26.19 Contract Price Is Measure of Damages in Other Cases.

26.19[1] Seller Can Recover Contract-Price Differential After Reselling Goods. If the seller elected to resell any of the goods after the buyer's breach [*see Com Code § 2703(d)*], and the resale was made in good faith and in a commercially reasonable manner [*see 26.13*], then with respect to the goods resold, the seller may recover [*Com Code § 2706(1)*]:

- The difference between the resale price and the contract price; and
- Any incidental damages allowed under Division 2 of the Commercial Code [*see Com Code § 2710*], less expenses saved in consequence of the buyer's breach.

Jury Instructions:

Seller's Damages Recoverable After Resale, see *California Forms of Jury Instruction, Ch. 3H, Instr. MB 300H.251* (Matthew Bender).

► Cross Reference:

Seller's incidental damages, see 26.20.

26.19[2] Seller Can Recover Contract Price After Buyer's Nonpayment.

26.19[2][a] Price Is Recoverable in Specified Circumstances. If the buyer failed to make a payment due on or before delivery, then with respect to any goods directly affected and, if the breach is of the whole contract [*see Com Code § 2612* (breach of installment contract)], then with respect to the whole undelivered balance, the seller may recover all of the following [*Com Code § 2703(e)*]:

- The price of goods accepted [*Com Code § 2709(1)(a)*; *see 26.19[2][b]*]; and
- The price of conforming goods lost or damaged within a commercially reasonable time after risk of their loss passed to the buyer [*Com Code § 2709(1)(a)*]; and
- The price of goods identified to the contract, if either [*Com Code § 2709(1)(b)*]:

- ☐ The seller was unable after reasonable effort to resell them at a reasonable price; or
- ☐ The circumstances reasonably indicate that an effort to do so would have been unavailing.

The seller also may recover any incidental damages provided in Division 2 of the Commercial Code [*Com Code* §§ 2709, 2710].



Warning--Exclusive List:

In the list of circumstances entitling the seller to recover the contract price, *Com Code* § 2709 is exhaustive with respect to when an action for the price lies [*see Com Code* § 2709, *UCC* § 2-709, *official cmt* 6 (1962)].

Example:

Damages under *Com Code* § 2709(1)(b) were appropriate in a suit by a manufacturer of shipping containers. On receipt of the first part of the order, the buyer returned the containers as defective and refused to pay. The seller unsuccessfully attempted to resell the containers. The jury found that the containers were not defective, and the buyer was liable for the full purchase price [*Ultralite Container Corp. v. American President Lines, Ltd.* (7th Cir 1999) 170 F3d 784, 787 (applying California law)].

Distinguish:

An action for the price generally is limited to those cases in which resale of the goods is impracticable, except when the buyer accepted the goods, or when they were destroyed after the risk of loss passed to the buyer [*see Com Code* § 2709, *UCC* § 2-709, *official cmt* 2 (1962)].



Strategic Point:

If the action for the price fails, the seller may nevertheless have proved a case for damages for nonacceptance, which could be recovered in the same action [*see Com Code* § 2709(3); *Com Code* § 2709, *UCC* § 2-709, *official cmt* 7 (1962); *see also* 26.19[3]].

Jury Instructions:

Seller's Action for Contract Price, *see California Forms of Jury Instruction, Ch. 3H, Instr. MB 300H.250* (Matthew Bender).

26.19[2][b] Price Is Recoverable for Goods Accepted. Goods "accepted" by the buyer, for the purpose of fixing the seller's damages [*see Com Code* § 2709(1)(a); *see also* 26.19[2][a]], include only goods as to which there has been no justified revocation of acceptance, because revocation means that there has been a default by the seller, which would bar the seller's right to damages under *Com Code* § 2709 [*see Com Code* § 2709, *UCC* § 2-709, *official cmt* 5 (1962)].

26.19[2][c] Seller Must Hold Undelivered Goods for Buyer. When the seller sues for the price, the seller must hold for the buyer any goods that have been identified to the contract and are still in the seller's control [*Com Code* § 2709(2)].

Exception:

If resale becomes possible, the seller may resell the goods at any time before collecting a judgment. The net proceeds of that resale must be credited to the buyer. Payment of the judgment entitles the buyer to any goods not resold [*Com Code* § 2709(2)].

26.19[3] Seller May Instead Recover Damages for Nonacceptance. After the buyer has wrongfully rejected or revoked acceptance of the goods, or has failed to make a payment due, or has repudiated [*see Com Code § 2610*], if the seller is held not entitled to the price under *Com Code § 2709*, the seller nevertheless must be awarded damages for nonacceptance under *Com Code § 2708* [*Com Code § 2709(3)*].



Cross Reference:

Seller's damages for nonacceptance, see 26.17, 26.18.

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawSales of GoodsDamages & RemediesSeller's Damages & RemediesConsequential DamagesGeneral OverviewContracts LawSales of GoodsDamages & RemediesSeller's Damages & RemediesConsequential DamagesActions for Price



98 of 196 DOCUMENTS

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Chapter 26 Contract for Sale of Goods--Seeking Remedies Under California Commercial Code

III. PURSUING SELLER'S JUDICIAL REMEDIES FOR BUYER'S BREACH

2-26 MB Practice Guide: CA Contract Litigation 26.20

26.20 Seller Recovers Incidental Damages.

The seller is entitled to recover incidental damages in every case [*see Com Code §§ 2703, 2706(1), 2708, 2709(1)*]. Incidental damages to the seller include any commercially reasonable charges, expenses, and commissions resulting from the buyer's breach, including such amounts incurred in [*Com Code § 2710*]:

- Stopping of delivery of the goods.
- Transportation, care, and custody of the goods after the buyers' breach.
- Return or resale of the goods.

Jury Instructions:

Seller's Incidental Damages, see *California Forms of Jury Instruction, Ch. 3H, Instr. MB 300H.253* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawSales of GoodsDamages & RemediesSeller's Damages & RemediesGeneral OverviewContracts LawSales of GoodsDamages & RemediesSeller's Damages & RemediesIncidental Damages



99 of 196 DOCUMENTS

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Chapter 26 Contract for Sale of Goods--Seeking Remedies Under California Commercial Code
IV. PURSUING BUYER'S SELF-HELP REMEDIES FOR SELLER'S BREACH

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26.21 CHECKLIST: Pursuing Buyer's Self-Help Remedies for Seller's Breach.

- ☐ Determine whether contract limits or modifies buyer's Commercial Code self-help remedies.

Authority:

Com Code § 2719

Discussion:

See 26.03

- ☐ If seller failed to make delivery or repudiated contract, or buyer rightfully rejected goods or justifiably revoked acceptance--so that buyer did not receive all goods according to contract--decide which of the following remedies buyer should pursue:

- ☐ Cancel contract.

Authority:

Com Code § 2711(1)

Discussion:

See 26.23

- ☐ Effect cover by obtaining substitute goods elsewhere (whether or not contract was canceled).

Authority:

Com Code § 2712(1)

Discussion:

See 26.24

☐ If buyer rightfully rejected goods or justifiably revoked acceptance, decide if buyer will resell any goods in buyer's possession to recoup buyer's payments and incidental damages.

Authority:

Com Code § 2711(3)

Discussion:

See 26.25[1]

☐ Decide if buyer will deduct all or part of damages resulting from seller's breach from any part of price still due under same contract.

☐ Notify seller of buyer's intention to deduct damages from price.

Authority:

Com Code § 2717

Discussion:

See 26.25[2]

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)RemediesBuyer's RemediesGeneral OverviewCommercial Law (UCC)Sales (Article 2)RemediesBuyer's RemediesCoverCommercial Law (UCC)Sales (Article 2)RemediesBuyer's RemediesDeduction From Price



100 of 196 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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IV. PURSUING BUYER'S SELF-HELP REMEDIES FOR SELLER'S BREACH

2-26 MB Practice Guide: CA Contract Litigation 26.22

26.22 Options and Strategies.

The buyer's self-help options under the Commercial Code are limited.

One option is to cancel the contract [*see* 26.23].

If substitute goods can be obtained elsewhere, the buyer may try to effect "cover"; however, the buyer is not required to do so, but may, instead, simply sue for damages [*Com Code* § 2711(1)(a), 2712(1); *see* 26.24].

If the buyer has possession of any goods after rightful rejection or revocation of acceptance, the buyer has a security interest in those goods, to the extent necessary to recoup payments made and incidental expenses; and the buyer may resell those goods in order to cash out that security interest [*Com Code* § 2711(3); *see* 26.25[1]].

In any case, the buyer is entitled to deduct damages, resulting from the seller's breach, from any payments still due under the same contract [*Com Code* § 2717; *see* 26.25[2]].

Cross Reference:

Discussion of buyer's options following seller's breach, *see California Forms of Pleading and Practice*, § 500.76 (Matthew Bender); or
California Legal Forms, § 52.18 (Matthew Bender).

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101 of 196 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 26 Contract for Sale of Goods--Seeking Remedies Under California Commercial Code
IV. PURSUING BUYER'S SELF-HELP REMEDIES FOR SELLER'S BREACH

2-26 MB Practice Guide: CA Contract Litigation 26.23

26.23 Contract Can Be Canceled.

26.23[1] Buyer May Cancel for Any Breach by Seller. The buyer may cancel the contract with respect to any goods involved, and with respect to the whole if the breach of the whole contract [*see Com Code § 2612* (breach of installment contract)] if any of the following occur [*Com Code § 2711(1)*]:

- The seller fails to make delivery.
- The seller repudiates the contract.
- The buyer rightfully rejects or justifiably revokes acceptance.

Example:

When a seller breaches the implied warranty of merchantability under the Song-Beverly Credit Card Act of 1971 [*see CC § 1794(b)(1)*], the buyer is entitled to cancel the contract and recover as much of the price as has been paid. The seller is not entitled to require the buyer to allow repairs to be made in lieu of that remedy [*Mocek v. Alfa Leisure, Inc. (2003) 114 CA4th 402, 407-408*].

➡ Cross Reference:

Breach of warranty under the Commercial Code and the Song-Beverly Act, see Ch. 24, Suing or Defending Action for Breach of Warranty.

26.23[2] Buyer Does Not Renounce Claim for Damages. Unless the contrary intention clearly appears, expressions of "cancellation" or "rescission" of the contract or the like are not construed as a renunciation or discharge of the buyer's claim for damages for the seller's breach [*Com Code § 2720*].

Legal Topics:

For related research and practice materials, see the following legal topics:

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2) Remedies Buyer's Remedies General Overview



102 of 196 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 26 Contract for Sale of Goods--Seeking Remedies Under California Commercial Code
IV. PURSUING BUYER'S SELF-HELP REMEDIES FOR SELLER'S BREACH

2-26 MB Practice Guide: CA Contract Litigation 26.24

26.24 Buyer May Obtain "Cover" Goods Elsewhere.

26.24[1] Buyer May Cover by Finding Substitute Goods. If the seller fails to make delivery or repudiates the contract, the buyer may "cover" by making, in good faith and without unreasonable delay, any reasonable acquisition of, or contract to buy, goods in substitution for the goods due and undelivered from the seller [*Com Code* §§ 2711(1)(a), 2712(1)].

Distinguish--Merchant and Consumer:

Com Code § 2712 applies not only to merchants but also to the consumer buyer. The domestic or nonmerchant consumer is required only to act in normal good faith, while the merchant buyer also must observe all reasonable commercial standards of fair dealing in the trade [*see Com Code* § 2712, *UCC* § 2-712, *official cmt 4* (1962)].

**Strategic Point:**

The buyer need not necessarily use the cheapest or most effective method of cover. The test of proper cover is whether, at the time and place, the buyer acted in good faith and in a reasonable manner [*see Com Code* § 2712, *UCC* § 2-712, *official cmt 2* (1962)].

**Timing:**

The buyer is entitled to spend sufficient time to discover the best method for cover. The requirement that the buyer must cover "without unreasonable delay" is not intended to limit the time necessary to do so [*see Com Code* § 2712, *UCC* § 2-712, *official cmt 2* (1962)].

**Cross Reference:**

Discussion of buyer's remedy by covering, see *California Forms of Pleading and Practice*, § 500.76 (*Matthew Bender*); or *California Legal Forms*, § 52.352 (*Matthew Bender*).

26.24[2] Cover May Entail Different Terms, Multiple Contracts, and Similar Goods. "Cover" includes all of

the following [see *Com Code* § 2712, *UCC* § 2-712, *official cmt 2* (1962)]:

- A series of contracts or sales, or a single contract or sale.
- Goods not identical with those involved but commercially usable as reasonable substitutes under the circumstances of the particular case.
- Contracts on credit or delivery terms differing from the contract in breach, but reasonable under the circumstances.

26.24[3] Buyer Need Not First Cover Before Using Other Remedies. Failure of the buyer to effect cover within the provisions of *Com Code* § 2712 does not bar the buyer from any other remedy [*Com Code* § 2712(3)].



Warning:

The recovery of consequential damages [see *Com Code* § 2715(2)(a)] is limited by the damages that could have been obviated by effecting cover under *Com Code* § 2712 [see *Com Code* § 2712, *UCC* § 2-712, *official cmt 3* (1962)].



Cross Reference:

Consequential damages, see 26.34.

26.24[4] Buyer May Replevy Goods on Failing to Cover. The buyer may replevy the undelivered goods if, after reasonable effort, the buyer was unable to effect cover [see *Com Code* § 2716(3)].



Cross Reference:

Buyer's judicial remedy of replevin, see 26.30.

Legal Topics:

For related research and practice materials, see the following legal topics:

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103 of 196 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 26 Contract for Sale of Goods--Seeking Remedies Under California Commercial Code
IV. PURSUING BUYER'S SELF-HELP REMEDIES FOR SELLER'S BREACH

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26.25 Payments and Incidental Damages Can Be Recouped.

26.25[1] Buyer Has Security Interest in Goods in Possession. On rightful rejection or justifiable revocation of acceptance, the buyer has a security interest in goods in the buyer's possession or control, for any payments made on the price and any expenses reasonably incurred in inspection, receipt, transportation, care, and custody of the goods [*Com Code* § 2711(3)].

**Strategic Point:**

The buyer then is in the same position as the seller when the seller has withheld delivery, and the buyer has the same right to resell the goods. However, because the buyer's interest in the goods is limited, the buyer must account for any excess resale proceeds, over the amount of the buyer's security interest [*see Com Code* §§ 2706(6), 2711(3)].

**Cross Reference:**

Seller's resale of goods withheld from delivery, see 26.13.

26.25[2] Buyer May Deduct Damages From Payments Due.

26.25[2][a] Notice to Seller Is Required. The buyer, on notifying the seller of the buyer's intention to do so, may deduct all or any part of the buyer's damages resulting from the seller's breach of the contract from any part of the price still due under the same contract [*Com Code* § 2717].

**Warning--Notice Required to Avoid Default:**

The notice is required in order to avoid a default within the meaning of *Com Code* § 2609, regarding insecurity and the right to assurances [*see Com Code* § 2717, *UCC* § 2-717, *official cmt 2* (1962)].

Example:

An aircraft manufacturing company sold a helicopter and spraying equipment to a seed company, which experienced problems with the helicopter that resulted in its loss in a fire. The buyer promptly notified the seller of the incident, then stopped payment on the balance of the promissory note for the purchase

price and sent a written notice of breach of express and implied warranties. The seller sued for the balance on the note, and the buyer counter-complained for product liability, breach of warranty, and negligence. The trial court rendered judgment in favor of both parties on their claims, setting off the buyer's recovery from the seller's, which resulted in a \$5,000 judgment for the seller, including interest from the date of default to the date of judgment. The appellate court stated that under *Com Code § 2717*, a buyer, on notification to the seller, may deduct from the amount still owing under the contract the amount of damages flowing from the seller's breach. The buyer was entitled to deduct damages from the amount owing on the balance of the purchase price on the date the helicopter was destroyed. Inasmuch as the helicopter and spray equipment were completely destroyed, the buyer was deprived of the usual remedy of using the goods and discounting the price to the extent the goods did not live up to expectations. The buyer therefore acted reasonably in refusing to make payments on the note pending a judicial determination of the parties' rights and liabilities. The seller was not entitled to interest from the date of default to the date of judgment. Having breached the contract by selling a defective product, the seller was not entitled to recover more than the original purchase price merely because substantial time elapsed between date of breach and date of judgment [*Hughes Tool Co. v. Max Hinrichs Seed Co.* (1980) 112 CA3d 194, 202-203, 169 CR 160].

26.25[2][b] Notice Need Not Be Formal. No formality of notice is required under *Com Code § 2717*. Any language that reasonably indicates the buyer's reason for withholding payment is sufficient [see *Com Code § 2717*, *UCC § 2-717*, *official cmt 2* (1962)].



Cross Reference:

Discussion and form for notice of intent to deduct damages from price, see *California Legal Forms*, § 52.481 (*Matthew Bender*).

Legal Topics:

For related research and practice materials, see the following legal topics:

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104 of 196 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 26 Contract for Sale of Goods--Seeking Remedies Under California Commercial Code
V. PURSUING BUYER'S JUDICIAL REMEDIES FOR SELLER'S BREACH

2-26 MB Practice Guide: CA Contract Litigation 26.26

26.26 CHECKLIST: Pursuing Buyer's Judicial Remedies for Seller's Breach.

- ☐ Determine whether contract limits or modifies Commercial Code remedies.

Authority:

Com Code § 2719

Discussion:

See 26.03

- ☐ Determine whether four-year limitation period has expired.

Authority:

Com Code § 2725

Discussion:

See 26.04

- ☐ If seller failed to make delivery or repudiated contract, or buyer rightfully rejected goods or justifiably revoked acceptance--therefore, buyer did not receive all goods according to contract--determine whether buyer's judicial remedy should be:

☐ Action to recover amount of price paid and either:

- ☐ Cost of effecting cover.

Authority:

Com Code § 2711(1)(a)

Discussion:

See 26.28

☐ Damages for nondelivery.

Authority:

Com Code § 2711(1)(b)

Discussion:

See 26.29

☐ Action to replevy goods because cover could not be effected.

Authority:

Com Code §§ 2711(2)(b), 2716

Discussion:

See 26.30

☐ Action to recover goods identified to contract (without trying to effect cover).

Authority:

Com Code §§ 2502, 2711(2)(a)

Discussion:

See 26.31

☐ Action for specific performance, when goods are unique or in other proper case.

Authority:

Com Code § 2716(1), (2)

Discussion:

See 26.32

☐ If buyer accepted nonconforming tender of goods, determine whether to sue for damages for losses resulting from nonconformity of tender.

☐ Notify seller of nonconformity.

Authority:

Com Code § 2714(1)

Discussion:

See 26.33

☐ Determine whether to seek recovery for buyer's incidental and consequential damages in every case.

Authority:

Com Code §§ 2712(2), 2713(1), 2714(3), 2715

Discussion:

See 26.34

Legal Topics:

For related research and practice materials, see the following legal topics:

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105 of 196 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 26 Contract for Sale of Goods--Seeking Remedies Under California Commercial Code
V. PURSUING BUYER'S JUDICIAL REMEDIES FOR SELLER'S BREACH

*2-26 MB Practice Guide: CA Contract Litigation 26.27***26.27 Options and Strategies.**

A buyer's options for a judicial remedy are determined by the nature of the seller's breach and what the buyer did.

If the buyer did not receive all goods according to the contract--whether because the seller failed to make delivery or repudiated, or because the buyer rightfully rejected goods or revoked acceptance--the buyer has these options:

- An action to recover any payments made, together with either:
 - ☐ The cost of effecting cover [see 26.28]; or
 - ☐ Damages for nondelivery, if the buyer elected not to cover [see 26.29].
- An action to replevy the goods, because it was not possible to effect cover [see 26.30].
- An action to recover goods identified to the contract, without any attempt to effect cover (a special case) [see 26.31].
- An action for specific performance, in an appropriate case [see 26.32].

If the buyer accepted goods under a nonconforming tender, the buyer may sue for damages resulting from the nonconformity of tender [see 26.33].

In all cases, unless the contract effectively provides otherwise [see 26.03], the buyer may also recover incidental and consequential damages [see 26.34].

**Strategic Point:**

Once the seller has breached the contract by tendering nonconforming goods, the seller nevertheless could make a timely tender of conforming goods [see *Com Code* § 2508], which would effectively preclude the buyer's remedies under *Com Code* § 2711, except for any delay involved [see *Com Code* § 2711, *UCC* § 2-711, *official cmt 1* (1962)].

**Timing:**

The buyer's action must be commenced within four years of the accrual of the cause of action [*Com Code* § 2725; *see* 26.04].

**Cross References:**

Complaint for buyer's damages after rightful rejection of goods, *see Ch. 28, Contract for Sale of Goods--Suing or Defending Action for Breach of Contract Under California Commercial Code, 28.51.*

Complaint for specific performance, *see Ch. 28, Contract for Sale of Goods--Suing or Defending Action for Breach of Contract Under California Commercial Code, 28.50.*

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Sample Search: To find general information on buyer remedies under Article 2, including relevant pre-Code and non-Code law, use: *heading(buyer /2 remedy) AND article 2.*

Legal Topics:

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106 of 196 DOCUMENTS

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Chapter 26 Contract for Sale of Goods--Seeking Remedies Under California Commercial Code
V. PURSUING BUYER'S JUDICIAL REMEDIES FOR SELLER'S BREACH

2-26 MB Practice Guide: CA Contract Litigation 26.28

26.28 Buyer Can Recover Costs for "Cover" Goods.

26.28[1] Buyer Can Cover and Have Damages. If the buyer rightfully rejects the goods or justifiably revokes acceptance, then with respect to any goods involved, and with respect to the whole if the breach goes to the whole contract [*see Com Code § 2612* (breach of installment contract)], the buyer may recover as much of the price as has been paid, and may also cover and have damages under *Com Code § 2712* as to all of the goods affected, whether or not they have been identified to the contract [*Com Code § 2711(1)(a)*].

26.28[2] Cost of Cover Fixes Damages. The buyer may recover from the seller as damages [*Com Code § 2712(2)*]:

- The difference between the cost of cover and the contract price; and
- Any incidental or consequential damages [*see Com Code § 2715*], less expenses saved in consequence of the seller's breach.

Consider:

This measure of damages is appropriate even when the buyer ultimately is able to pass any additional costs to other persons. However, in the typical case, a timely covering purchase by the buyer will preclude incidental and consequential damages [*KGM Harvesting Co. v. Fresh Network* (1995) 36 CA4th 376, 383-384, 42 CR2d 286].

Jury Instructions:

Damages to Buyer Who Has Covered, see *California Forms of Jury Instruction, Ch. 3H, Instr. MB 300H.256* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:

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107 of 196 DOCUMENTS

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Chapter 26 Contract for Sale of Goods--Seeking Remedies Under California Commercial Code
V. PURSUING BUYER'S JUDICIAL REMEDIES FOR SELLER'S BREACH

2-26 MB Practice Guide: CA Contract Litigation 26.29

26.29 Market Fixes Damages When Buyer Sues Without Covering.

26.29[1] Buyer Is Entitled to Market-Price Differential. If the seller fails to make delivery or repudiates, or the buyer rightfully rejects the goods or justifiably revokes acceptance, then with respect to any goods involved, and with respect to the whole if the breach goes to the whole contract [*see Com Code § 2612* (breach of installment contract)], the buyer need not try to effect cover, but instead may sue and recover any or all of the following [*Com Code §§ 2711(1)(b), 2712(3), 2713(1)*]:

- As much of the price as has been paid.
- The difference between the market price at the time the buyer learned of the breach and the contract price.
- Incidental and consequential damages provided in *Com Code § 2715* [*see 26.34*], less expenses saved in consequence of the seller's breach.

Strategic Points:



■ *Com Code § 2713* provides a remedy that is completely alternative to the cover-and-sue remedy under *Com Code § 2712* [*see 26.24, 26.28*]. This remedy applies only when and to the extent that the buyer has not covered [*see Com Code § 2713, UCC § 2-713, official cmt 5 (1962)*].

■ Whereas the cover-and-sue remedy under *Com Code § 2712* will often put the buyer in the same economic position that performance would have, the market-price differential under *Com Code § 2713* bears no necessary relation to the change in the buyer's position that the breach caused. It is possible that this differential might yield the buyer a handsome sum even though the breach actually saved the buyer money in the long run (for instance, when a middleman buyer's resale markets dried up after the breach). It is also possible that the buyer's lost profit from resale or consumption would be greater than the cost of cover plus incidental damages [*see KGM Harvesting Co. v. Fresh Network (1995) 36 CA4th 376, 386*,

42 CR2d 286].

Exception:

Com Code § 1305(a) (former *Com Code § 1106(1)*) could limit the buyer's recovery to the actual loss if the following conditions exist [*Allied Canners & Packers, Inc. v. Victor Packing Co. (1984) 162 CA3d 905, 915, 209 CR 60*]:

- The seller knew that the buyer had a resale contract;
- The buyer was not liable to the resale buyers; and
- The seller did not act in bad faith.

Jury Instructions:

Buyer's Damages for Seller's Nondelivery or Repudiation, see *California Forms of Jury Instruction, Ch. 3H, Instr. MB 300H.257* (Matthew Bender).

 Cross Reference:

Discussion of buyer's measure of damages for nondelivery, see *California Forms of Pleading and Practice, § 500.76* (Matthew Bender); or
California Legal Forms, § 52.18 (Matthew Bender).

26.29[2] Proof of Market Price Depends on Facts.

26.29[2][a] Market Price at Time of Repudiation May Be Relevant. If the action is based on anticipatory repudiation and comes to trial before the time for performance with respect to some or all of the goods, then the buyer's damages based on market price [see *Com Code § 2713*] must be determined according to the price of the goods prevailing when the buyer learned of the repudiation [*Com Code § 2723(1)*].

26.29[2][b] Market Price at Place for Tender or Place of Arrival May Be Relevant. For the purpose of determining the buyer's damages, the market price is to be determined as of the place for tender or, in a case of rejection after arrival or revocation of acceptance, as of the place of arrival [*Com Code § 2713(2)*].

26.29[2][c] Market Price at Any Reasonable Time and Place May Be Relevant. If evidence of a price prevailing at the times and places that otherwise would be applicable is not readily available, the price prevailing within any reasonable time before or after the time described, or at any other place that in commercial judgment or under usage of trade would serve as a reasonable substitute for the one described may be used, making any proper allowance for the cost of transporting the goods to or from that other place [*Com Code § 2723(2)*].

Prerequisite--Notice of Evidence of Market Price:

Evidence of a relevant price prevailing at a time or place other than the one that otherwise would be applicable is not admissible unless and until the party offering the evidence has given the other party such notice as the court finds sufficient to prevent unfair surprise [*Com Code § 2723(3)*].

Strategic Point:



When no market price is available, evidence of spot-sale prices is proper. When there is no available

market price because of a scarcity of goods of the type involved, a good case normally is made for specific performance [see *Com Code* § 2716; see also 26.32]. Alternatively, scarcity would indicate that the price has risen, and under *Com Code* § 1305(a), which provides for liberal administration of remedies, opinion evidence as to the value of the goods should be admissible in the absence of a market price. Moreover, a liberal construction of allowable consequential damages should result [see *Com Code* § 2713, UCC § 2-713, official cmt 3 (1962)].

 Cross Reference:

Discussion of proof of price, see *California Forms of Pleading and Practice*, § 500.77 (Matthew Bender).

26.29[2][d] Published Market Quotations Are Admissible. Whenever the prevailing price or value of any goods regularly bought and sold in any established commodity market is in issue, reports in official publications, trade journals, or in newspapers or periodicals of general circulation published as the reports of the market, are admissible in evidence. The circumstances of the preparation of the report may be shown to affect its weight, but not its admissibility [*Com Code* § 2724].

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)RemediesBuyer's RemediesDamagesGeneral OverviewCommercial Law (UCC)Sales (Article 2)RemediesBuyer's RemediesDamagesBreach Following AcceptanceCommercial Law (UCC)Sales (Article 2)RemediesBuyer's RemediesDamagesIncidental & Consequential DamagesCommercial Law (UCC)Sales (Article 2)RemediesBuyer's RemediesDamagesNondelivery & Repudiation



108 of 196 DOCUMENTS

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Chapter 26 Contract for Sale of Goods--Seeking Remedies Under California Commercial Code
V. PURSUING BUYER'S JUDICIAL REMEDIES FOR SELLER'S BREACH

2-26 MB Practice Guide: CA Contract Litigation 26.30

26.30 Buyer Unable to Cover Can Replevy Goods.

26.30[1] Goods Must Be Identified to Contract. When the seller failed to deliver or repudiated, the buyer has a right of replevin [see generally CCP § 511.010 et seq. (claim and delivery)]--that is, the right to obtain possession of the property--for goods identified to the contract if any of the following circumstances exist [Com Code §§ 2711(2)(b), 2716(3)]:

- After reasonable effort, the buyer was unable to effect cover for those goods.
- The circumstances reasonably indicate that such an effort would have been unavailing.
- The goods were shipped under reservation, and satisfaction of the security interest in them was made or tendered.

Prerequisite:

The buyer must be able to prove that effecting cover was impossible, or that the attempt would have been unsuccessful, or that satisfaction of a security interest was made or tendered. However, the buyer's right of replevin does not depend on the buyer tendering any unpaid balance of the price [*In re G. Paoletti, Inc.* (ND Cal 1997) 205 BR 251, 260].

**Strategic Point:**

The buyer may replevy the goods irrespective of the situs of title [see Com Code § 2716, UCC § 2-716, official cmt 3 (1962)].

Distinguish--Negotiable Document of Title Outstanding:

If a negotiable document of title is outstanding [see generally Com Code § 7602], the buyer's right of replevin relates to the document, rather than directly to the goods [see Com Code § 2716, UCC § 2-716, official cmt 5 (1962)].

**Cross References:**

Effecting cover as buyer's self-help remedy, see 26.24.

Discussion of buyer's right of replevin, see *California Forms of Pleading and Practice*, § 500.76 (Matthew Bender); or
California Legal Forms, § 52.18 (Matthew Bender).

Discussion of action for claim and delivery, see Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, Ch. 20, Claim and Delivery; or
California Forms of Pleading and Practice, Ch. 119, Claim and Delivery (Matthew Bender).

26.30[2] Buyer of Consumer Goods Has Special Right. In the case of goods bought for personal, family, or household purposes, the buyer's right of replevin vests on acquisition of a special property by identification of the goods to the contract [see 26.31[2] (acquisition of special property in goods)], even if the seller had not then repudiated or failed to deliver [*Com Code* § 2716(3)].



Strategic Point:

The buyer in the above case might then recover the goods under *Com Code* § 2502 [see *Com Code* § 2716, *UCC* § 2-716, *official cmt* 3 (1962); see also 26.31].

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)RemediesBuyer's RemediesGeneral OverviewCommercial Law (UCC)Sales (Article 2)RemediesBuyer's RemediesCoverCommercial Law (UCC)Sales (Article 2)RemediesBuyer's RemediesReplevin & Specific Performance



109 of 196 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 26 Contract for Sale of Goods--Seeking Remedies Under California Commercial Code
V. PURSUING BUYER'S JUDICIAL REMEDIES FOR SELLER'S BREACH

2-26 MB Practice Guide: CA Contract Litigation 26.31

26.31 Buyer Can Recover "Identified" Goods If They Are Consumer Goods or Seller Became Insolvent.

26.31[1] Buyer's Right Dependent on Satisfaction of Statutory Conditions. If the seller failed to deliver or repudiated the contract, the buyer can recover the goods from the seller if all of the following conditions are satisfied [see *Com Code* § 2711(2)(a)]:

- The buyer either [*Com Code* § 2502(1)]:
 - ☐ Paid all of the price; or
 - ☐ Paid part of the price and made and kept good a tender of the unpaid portion of the price.
- Either [*Com Code* § 2502(1)]:
 - ☐ The goods are consumer goods (that is, they were bought for personal, family, or household purposes); or
 - ☐ The seller became insolvent within 10 days after receipt of the first installment on the price.
- The goods conform to the contract [*Com Code* § 2502(3)].
- The buyer acquired a special property in the goods by identification of existing goods to the contract [*Com Code* § 2502(1); see 26.31[2]].

26.31[2] Buyer Obtains Special Property by Identifying Existing Goods. The buyer obtains a special property in goods by identifying existing goods as goods to which the contract refers, even if the identified goods are nonconforming and the buyer has an option to reject them. The identification that is necessary and sufficient to create the buyer's special property in the goods can be made at any time and in any manner explicitly agreed to by the parties.

In the absence of explicit agreement, identification occurs at the following times [*Com Code* § 2501(1)]:

- If the contract is for the sale of goods already existing and identified, identification occurs when the contract is made.
- If the contract is for the sale of unborn young or future crops, identification occurs when the crops are planted or otherwise become growing crops or the young are conceived.
- If the contract is for the sale of any other kind of future goods, identification occurs when the goods are shipped, marked, or otherwise designated by the seller as goods to which the contract refers.



Strategic Point:

If the goods are consumer goods, the buyer's right to recover the goods vests on acquisition of the buyer's special property in the goods, even if the seller has not then repudiated or failed to deliver [*Com Code* § 2502(2)].



Cross Reference:

Discussion of recovery of identified goods, see *California Forms of Pleading and Practice*, § 500.76 (*Matthew Bender*).

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)RemediesBuyer's RemediesGeneral OverviewCommercial Law (UCC)Sales (Article 2)RemediesBuyer's RemediesReplevin & Specific Performance



110 of 196 DOCUMENTS

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Chapter 26 Contract for Sale of Goods--Seeking Remedies Under California Commercial Code
V. PURSUING BUYER'S JUDICIAL REMEDIES FOR SELLER'S BREACH

2-26 MB Practice Guide: CA Contract Litigation 26.32

26.32 Buyer Can Obtain Specific Performance in Proper Case.

If the seller failed to deliver or repudiated the contract, specific performance may be decreed either [*Com Code* §§ 2711(2)(b), 2716(1)]:

- When the goods are unique; or
- In other proper circumstances.

Example--Unique Goods:

Output and requirements contracts involving a particular or peculiarly available source or market are examples of the typical commercial specific performance situation for unique goods. The test of uniqueness must be made in terms of the total situation that characterizes the contract [*see Com Code* § 2716, *UCC* § 2-716, *official cmt* 2 (1962)].

Example--Other Proper Circumstances:

The buyer's inability to cover is strong evidence of other proper circumstances that would support specific performance [*see Com Code* § 2716, *UCC* § 2-716, *official cmt* 2 (1962)].

Strategic Point--Damages and Other Relief:



The decree for specific performance may include any terms and conditions as to payment of the price, damages, or other relief that the court deems just [*Com Code* § 2716(2)].

► Cross References:

Specific performance, see *Ch. 8, Seeking or Opposing Equitable Remedies in Contract Actions*, 8.33-8.58.

Discussion of buyer's right to specific performance, see *California Forms of Pleading and Practice*, § 500.76 (*Matthew Bender*); or
California Legal Forms, § 52.18 (*Matthew Bender*).

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)RemediesBuyer's RemediesGeneral OverviewCommercial Law (UCC)Sales (Article 2)RemediesBuyer's RemediesReplevin & Specific Performance



111 of 196 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 26 Contract for Sale of Goods--Seeking Remedies Under California Commercial Code
V. PURSUING BUYER'S JUDICIAL REMEDIES FOR SELLER'S BREACH

2-26 MB Practice Guide: CA Contract Litigation 26.33

26.33 Buyer Can Recover Damages for Nonconformity of Tender.

26.33[1] Notice of Nonconformity Is Required. If the buyer accepted goods and gave sufficient notice to the seller [see *Com Code* § 2607(3)(A)], the buyer may recover the following for any "nonconformity of tender" [*Com Code* § 2714(1), (3); see *Com Code* § 2714, *UCC* § 2-714, *official cmt 1* (1962) (it is assumed that time for revocation of acceptance passed)]:

- The loss resulting in the ordinary course of events from the seller's breach, as determined in any manner that is reasonable; and
- In a proper case, any incidental and consequential damages under *Com Code* § 2715 [see 26.34].

Prerequisite--Notice:

Once the buyer has accepted tender of the goods, the buyer, within a reasonable time after the buyer discovers or should have discovered the seller's breach, must notify the seller of the breach; otherwise, the buyer is barred from any remedy [*Com Code* § 2607(3)(A)].



Timing:

The time of notification is determined by applying commercial standards to a merchant buyer. A reasonable time for notification from a retail consumer is judged by different standards, so that in the consumer's case it will be extended. The rule of requiring notification is designed to defeat commercial bad faith, not to deprive a good faith consumer of a remedy [*Com Code* § 2607, *UCC* § 2-607, *official cmt 4* (1962)].



Strategic Point:

The content of the notice need merely be sufficient to let the seller know that the transaction is still troublesome and must be watched. It is not necessary that there be a clear statement of all the buyer's objections, nor that there be a claim for damages or notice of any threatened litigation or other resort to a remedy. The notice is sufficient if it informs the seller that the transaction is claimed to involve a breach

[*Com Code* § 2607, *UCC* § 2-607, *official cmt 4* (1962)].

Judge's Perspective:

The reason the buyer is required to give timely notice of breach is to avoid unnecessary damages and unnecessary litigation. Moreover, if the claim must be litigated, timely notice will allow the seller to gather evidence to support his or her position while the evidence is still fresh. "The requirement of notice of breach is based on a sound commercial rule designed to allow the defendant opportunity for repairing the defective item, reducing damages, avoiding defective products in the future, and negotiating settlements. The notice requirement also protects against stale claims" [*Pollard v. Saxe & Yolles Dev. Co.* (1974) 12 C3d 374, 380, 115 CR 648, 525 P2d 88].

Consider:

"Nonconformity of tender" includes not only breaches of warranties (that is, nonconforming goods) but also any other failure of the seller to perform obligations according to the contract [see *Com Code* § 2714, *UCC* § 2-714, *official cmt 2* (1962)].



Strategic Point:

If the buyer still owes part of the purchase price, the buyer could deduct some or all of the damages from the amount still owed [see *Com Code* § 2717; see also 26.25]. That self-help remedy can be used in conjunction with a suit for the damages [see *Com Code* § 2714, *UCC* § 2-714, *official cmt 1* (1962)].

Jury Instructions:

Buyer's Damages for Accepted Goods and for Breach of Warranty, see *California Forms of Jury Instruction*, Ch. 3H, Instr. MB 300H.258 (Matthew Bender).



Cross References:

Discussion of buyer's measure of damages for nonconforming goods, see *California Forms of Pleading and Practice*, § 500.76 (Matthew Bender).

Discussion of buyer's obligation to notify seller of breach, see *California Forms of Pleading and Practice*, Ch. 502, Sales: Warranties (Matthew Bender).

Discussion and form for notice of breach discovered after acceptance, see *California Legal Forms*, § 52.386 (Matthew Bender).

26.33[2] Value of Goods Fixes Damages for Breach of Warranty. The measure of the buyer's damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted [*Com Code* § 2714(2)].

Exception:

This formula does not apply if special circumstances show proximate damages of a different amount [*Com Code* § 2714(2)].



Strategic Point:

Although this difference-in-value standard is the usual method, and is a reasonable method, of ascertaining damages for breach of warranty, it is not exclusive [see *Com Code* § 2714, *UCC* § 2-714, *official cmt 3* (1962)].

Examples:

■ A consumer bought a \$24,000 piano from a retail store, using an installment sale contract with a finance company. The buyer attempted to cancel the contract after a protracted attempt to have serious defects repaired. The contract stated: "Any holder of this consumer credit contract is subject to all claims and defenses which the debtor [buyer] could assert against the seller of goods or services obtained pursuant hereto, or with the proceeds hereof." The seller and manufacturer offered to replace the piano but refused to cancel the contract and refund the amount the buyer had already paid. The buyer sold the piano for \$7,000 and stopped making payments. The finance company sued the buyer for breach of contract; and the buyer cross-complained for breach of warranty. The buyer was entitled to cancel the contract and recover specified damages in addition to recovering any amounts paid toward the purchase price [see CC §§ 1791.1(d), 1794(b); Com Code § 2711]. The jury found breaches of warranty, including the implied warranty of merchantability; therefore, the finance company could not recover the unpaid balance on the loan because it stood in the same position as the seller [*Music Acceptance Corp. v. Lofing* (1995) 32 CA4th 610, 622, 39 CR2d 159].

■ The measure of a grower's damages for breach of warranty based on nonconforming fruit trees that were diseased when purchased was not limited to the difference between the value of the land as planted with the trees actually delivered and the value the land would have had if the warranted trees had been planted. Rather, the damages could be determined in any manner that is reasonable, and so damages could be based on lost profits from the nonconforming goods [*Serian Bros., Inc. v. Agri-Sun Nursery* (1994) 25 CA4th 306, 315, 30 CR2d 382].

Jury Instructions:

Breach of Implied Warranty of Merchantability--Essential Factual Elements, see *Judicial Council of California Civil Jury Instructions*, CACI No. 3210 (LexisNexis Matthew Bender).

Breach of Implied Warranty of Fitness for a Particular Purpose--Essential Factual Elements, see *Judicial Council of California Civil Jury Instructions*, CACI No. 3211 (LexisNexis Matthew Bender).

Reimbursement Damages--Consumer Goods, see *Judicial Council of California Civil Jury Instructions*, CACI No. 3240 (LexisNexis Matthew Bender).

Restitution From Manufacturer--New Motor Vehicle, see *Judicial Council of California Civil Jury Instructions*, CACI No. 3241 (LexisNexis Matthew Bender).

Buyer's Damages for Accepted Goods and for Breach of Warranty, see *California Forms of Jury Instruction*, Ch. 3H, Instr. MB 300H.258 (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)RemediesBuyer's RemediesGeneral OverviewCommercial Law (UCC)Sales (Article 2)RemediesBuyer's RemediesDamagesGeneral OverviewCommercial Law (UCC)Sales (Article 2)RemediesBuyer's RemediesDamagesBreach Following Acceptance



112 of 196 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 26 Contract for Sale of Goods--Seeking Remedies Under California Commercial Code
V. PURSUING BUYER'S JUDICIAL REMEDIES FOR SELLER'S BREACH

2-26 MB Practice Guide: CA Contract Litigation 26.34

26.34 Buyer Can Recover Incidental and Consequential Damages.

26.34[1] Damages May Be Recoverable in Any Case.

26.34[1][a] Recoverable When Seller Did Not Tender Goods or Buyer Did Not Accept Tender. The buyer is entitled to recover incidental and consequential damages (in addition to compensatory damages), less expenses saved in consequence of the seller's breach, when the seller failed to make delivery or repudiated, or the buyer rightfully rejected or justifiably revoked acceptance, and the buyer either:

- Covered and now sues for resulting damages [*Com Code* §§ 2711(1)(a), 2712(2)]; or
- Did not cover and now sues for damages for nondelivery [*Com Code* §§ 2711(1)(b), 2713(1)].

► Cross References:

Compensatory damages after effecting cover, see 26.28.

Compensatory damages for nondelivery or repudiation without effecting cover, see 26.29.

Contract provision limiting or excluding consequential damages, see 26.03[5].

26.34[1][b] Recoverable When Buyer Accepted Goods After Nonconforming Tender. When the buyer accepted the goods and gave a sufficient notice of nonconformity of tender [*see Com Code* § 2607(3)(A)], the buyer is entitled, in a proper case, to recover incidental and consequential damages (in addition to compensatory damages) [*Com Code* § 2714(1), (3)].

► Cross References:

Meaning of, compensatory damages for, and requisite notice of, nonconformity of tender, see 26.33.

Contract provision limiting or excluding consequential damages, see 26.03[5].

26.34[2] Additional Expenses Generate Incidental Damages. Incidental damages resulting from the seller's breach include any reasonable expenses incident to the delay or other breach [*Com Code* § 2715(1)], such as [*see Com Code* § 2715, *UCC* § 2-715, *official cmt 1* (1962) (list is illustrative, not exhaustive)]:

- If the buyer rightfully rejected the goods: any expenses reasonably incurred in inspection, receipt, transportation, and care and custody of the goods.

- If the buyer effected cover: any commercially reasonable charges, expenses, or commissions in connection with effecting cover.

Consider:

Incidental damages are intended to provide reimbursement if the buyer incurred reasonable expenses in connection with the handling of rightfully rejected goods or goods whose acceptance the buyer justifiably revoked, or in connection with effecting cover when the seller's breach lay in nonconformity of tender or nondelivery of the goods [*Com Code* § 2715, *UCC* § 2-715, *official cmt 1* (1962)].

Jury Instructions:

Incidental Damages, see *Judicial Council of California Civil Jury Instructions*, CACI No. 3242 (*LexisNexis Matthew Bender*).

Reimbursement Damages--Consumer Goods, see *Judicial Council of California Civil Jury Instructions*, CACI No. 3240 (*LexisNexis Matthew Bender*).

Seller's Incidental Damages, see *California Forms of Jury Instruction*, Ch. 3H, Instr. MB 300H.254 (*Matthew Bender*).

 Cross Reference:

Discussion of buyer's incidental damages, see *California Forms of Pleading and Practice*, § 500.76 (*Matthew Bender*); or

California Legal Forms, § 52.353 (*Matthew Bender*).

26.34[3] Additional Foreseeable Losses Generate Consequential Damages.

26.34[3][a] Recoverable When Buyer Had Foreseeable Needs or Requirements. Consequential damages resulting from the seller's breach include any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know, which could not reasonably be prevented by cover or otherwise [*Com Code* § 2715(2)(a)].

Prerequisite:

The buyer must make particular needs known to the seller, but the buyer usually does not have to make general needs known in order to charge the seller with knowledge [see *Com Code* § 2715, *UCC* § 2-715, *official cmt 3* (1962)].

Example:

Amounts paid or owed to the buyer's financier have been held to be recoverable as consequential damages, when the seller knew of the loan [*U.S. Roofing, Inc. v. Credit Alliance Corp.* (1991) 228 CA3d 1431, 1454, 279 CR 533].

Strategic Points:

- A seller unwilling to take the risk of consequential damages can limit or exclude such damages by a contract provision [*Com Code* § 2715, UCC § 2-715, official cmt 3 (1962); see 26.03[5]]. Limitation of consequential damages when the loss is commercial is valid unless it is proved that the limitation is unconscionable [*Com Code* § 2719(3)].

- To recover consequential damages, the buyer must demonstrate that the buyer effected cover or reasonably tried to effect cover but failed [see *R.B. Matthews, Inc. v. Transamerica Transp. Servs., Inc.* (9th Cir 1991) 945 F2d 269, 275].

Jury Instructions:

Consequential Damages, see *Judicial Council of California Civil Jury Instructions*, CACI No. 3243 (*LexisNexis Matthew Bender*).

Buyer's Consequential Damages, see *California Forms of Jury Instruction*, Ch. 3H, Instr. MB 300H.255 (*Matthew Bender*).

26.34[3][b] Buyer Must Show Extent of Loss. The buyer has the burden of proving the extent of loss to be covered by consequential damages, while the seller has the burden of proving the inadequacy of the buyer's efforts to mitigate consequential damages [*Carnation Co. v. Olivet Egg Ranch* (1986) 189 CA3d 809, 818, 229 CR 261].

Distinguish:

Although the burden of proving the extent of loss is on the buyer, *Com Code* § 1103(b) rejects any doctrine of certainty that would require mathematical precision in the proof of loss. Loss may be determined in any manner that is reasonable under the circumstances [see *Com Code* § 2715, UCC § 2-715, official cmt 4 (1962)].



Warning:

The reference in *Com Code* § 2715(2)(a) to "any loss" means a monetary loss that the buyer actually incurred [*Bishop v. Hyundai Motor Am.* (1996) 44 CA4th 750, 756, 52 CR2d 134 (rejecting recovery by consumer for loss of use of car that was subject of lawsuit under Song-Beverly Credit Card Act, which references *Com Code* § 2715)].

26.34[3][c] Lost Profit on Resale Is Recoverable. If the seller knew that the buyer was in the business of reselling the goods, the seller is charged with knowledge that the buyer would be selling the goods in anticipation of a profit. Absent a contractual provision against consequential damages, a seller in breach therefore will always be liable for the buyer's resulting loss of profit [*Sun Maid Raisin Growers v. Victor Packing Co.* (1983) 146 CA3d 787, 791-792, 194 CR 612 ; see *Com Code* § 2715, UCC § 2-715, official cmt 6 (1962)].

Example:

A raisin producer repudiated a contract to sell 610 tons of raisins to the buyer after rains damaged the raisin-grape crop. The buyer attempted to cover but was able to obtain only 200 tons of comparable raisins. For the remaining 410 tons, the buyer had to purchase inferior raisins and recondition them at a substantial cost. The total cost of purchasing the 200 tons of high-quality raisins and purchasing and reconditioning the remaining 410 tons was \$377,000 over the contract price. The trial court properly awarded the buyer, as consequential damages under *Com Code* § 2715, \$295,000 for lost profits. The possibility of disastrous rains affecting the raisin-grape crop was foreseeable, and the producer knew that the buyer was buying the raisins for resale [see *Sun Maid Raisin Growers v. Victor Packing Co.* (1983) 146 CA3d 787, 791-792, 194 CR 612 ; see also *Green Wood Industrial Co. v. Forceman Int'l Development Group, Inc.* (2007) 156 CA4th 766, 774, 67 CR3d 624 (buyer who introduced substantial evidence of its purchase and resale prices was entitled to damages for lost profits)].

26.34[4] Injury to Person or Property From Breach of Warranty Generates Consequential Damages.

Consequential damages resulting from the seller's breach include injury to person or property proximately resulting from any breach of warranty [*Com Code* § 2715(2)(b)].

Consider:

If the injury followed the use of goods without discovery of the defect causing the harm, the question of proximate cause turns on whether or not it was reasonable for the buyer to use the goods without an inspection that would have revealed the defects. If it was not reasonable, or if the buyer did discover the defect before use, the injury would not proximately result from the breach of warranty [*see Com Code* § 2715, *UCC* § 2-715, *official cmt* 5 (1962)].

Example:

A buyer that accepted fruit trees that were diseased when purchased could properly recover lost profits as consequential damages for breach of an express warranty [*see Serian Bros., Inc. v. Agri-Sun Nursery* (1994) 25 CA4th 306, 315, 30 CR2d 382].

Distinguish:

Emotional distress damages are not available to a buyer in an action based on breach of a contract for the sale of an automobile, such as an action under the Song-Beverly Credit Card Act for violation of the refund-or-replace requirement [*Kwan v. Mercedes-Benz of N. Am., Inc.* (1994) 23 CA4th 174, 187-190, 28 CR2d 371 (referring to *Com Code* §§ 2711-2715)].

Strategic Point:

While the seller could raise the protection of a contract provision limiting or excluding consequential damages [*see Com Code* § 2719(3); *Com Code* § 2715, *UCC* § 2-715, *official cmt* 3 (1962); *see also* 26.03[5]], a limitation of consequential damages for injury to the person in the case of consumer goods is invalid unless it is proved that the limitation is not unconscionable [*Com Code* § 2719(3)].

Jury Instructions:

Breach of Implied Warranty of Merchantability--Essential Factual Elements, *see Judicial Council of California Civil Jury Instructions*, CACI No. 3210 (*LexisNexis Matthew Bender*).

Breach of Implied Warranty of Fitness for a Particular Purpose--Essential Factual Elements, *see Judicial Council of California Civil Jury Instructions*, CACI No. 3211 (*LexisNexis Matthew Bender*).

Consequential Damages, *see Judicial Council of California Civil Jury Instructions*, CACI No. 3243 (*LexisNexis Matthew Bender*).

Buyer's Consequential Damages, *see California Forms of Jury Instruction*, Ch. 3H, Instr. MB 300H.255 (*Matthew Bender*).

**Cross Reference:**

General discussion of breach of Commercial Code warranties, *see* Ch. 24, Suing or Defending Action for Breach of Warranty.

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)RemediesGeneral OverviewCommercial Law (UCC)Sales (Article 2)RemediesBuyer's RemediesGeneral OverviewCommercial Law (UCC)Sales (Article 2)RemediesBuyer's RemediesDamagesIncidental & Consequential Damages



113 of 196 DOCUMENTS

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Chapter 26 Contract for Sale of Goods--Seeking Remedies Under California Commercial Code

VI. REDRESSING GRIEVANCES OTHER THAN BREACH OF CONTRACT

2-26 MB Practice Guide: CA Contract Litigation 26.35

26.35 CHECKLIST: Redressing Grievances Other Than Breach of Contract.

☐ If seller has discovered that buyer is insolvent, decide whether seller wants to take any of following steps:

☐ Refuse delivery except for cash.

Authority:

Com Code § 2702(1)

Discussion:

See 26.37[1]

☐ Stop delivery of goods in transit.

Authority:

Com Code §§ 2702(1), 2705(1)

Discussion:

See 26.37[1]

☐ Reclaim goods that buyer received on credit while insolvent.



Timing:

Seller normally must reclaim goods within 10 days after buyer's receipt of goods.

Authority:

Com Code § 2702(2)

Discussion:

See 26.37[2]

- ☐ If buyer in breach made significant payments (covering more than goods actually received), decide whether buyer will seek restitution of some amount, in spite of having breached contract.

Authority:

Com Code § 2718(2)-(4)

Discussion:

See 26.38

- ☐ Determine whether either party wants to assert any of following remedies:

- ☐ Enforce collateral or ancillary obligation.

Authority:

Com Code § 2701

Discussion:

See 26.39

- ☐ Seek recovery for fraud.

Authority:

CC § 1710; Com Code § 2721

Discussion:

See 26.40

- ☐ Recover damages from third person that dealt with goods identified to contract so as to injure either party.

Authority:

Com Code § 2722

Discussion:

See 26.41

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)RemediesGeneral OverviewCommercial Law (UCC)Sales (Article 2)RemediesBuyer's RemediesGeneral OverviewCommercial Law (UCC)Sales (Article 2)RemediesFraudCommercial Law (UCC)Sales (Article 2)RemediesSeller's RemediesGeneral OverviewCommercial Law (UCC)Sales (Article 2)RemediesSeller's RemediesDiscovery of Buyer's Insolvency



114 of 196 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 26 Contract for Sale of Goods--Seeking Remedies Under California Commercial Code
VI. REDRESSING GRIEVANCES OTHER THAN BREACH OF CONTRACT

2-26 MB Practice Guide: CA Contract Litigation 26.36

26.36 Options and Strategies.

The seller and buyer may pursue remedies apart from those for breach of contract. For example, an action for fraud is available in an appropriate case, which encompasses all remedies set forth in *Com Code* § 2701 *et seq.* (the chapter on remedies) [see *Com Code* § 2721]. Therefore, counsel for either the seller or the buyer should determine whether a fraud cause of action exists. Similarly, either party may bring an action against a third person that has dealt with the goods in such a way as to injure either the seller or buyer [see *Com Code* § 2722].

If the buyer is insolvent, the seller might pursue remedies that are available irrespective of whether there has been a breach [see *Com Code* § 2722].

In addition, a buyer in breach may obtain restitution of excess payments, if the buyer made payments covering more of the goods than the buyer actually received [*Com Code* § 2718(2)-(4)].

Cross References:

Discussion of equitable remedies, see *Ch. 8, Seeking or Opposing Equitable Remedies in Contract Actions*, 8.01 *et seq.*

Discussion of fraud in contract actions, see *Ch. 17, Attacking or Defending Existence of Contract--Fraud, Duress, Menace, and Undue Influence*.

Discussion of restitution, see *California Forms of Pleading and Practice*, Ch. 490, *Rescission and Restitution* (Matthew Bender); or *California Legal Forms*, §§ 77.330 -77.356 (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)RemediesGeneral OverviewCommercial Law (UCC)Sales (Article 2)RemediesBuyer's RemediesGeneral OverviewCommercial Law (UCC)Sales (Article 2)RemediesFraudCommercial

Law (UCC)Sales (Article 2)RemediesSeller's RemediesGeneral OverviewCommercial Law (UCC)Sales (Article 2)RemediesSeller's RemediesDiscovery of Buyer's Insolvency



115 of 196 DOCUMENTS

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Chapter 26 Contract for Sale of Goods--Seeking Remedies Under California Commercial Code
VI. REDRESSING GRIEVANCES OTHER THAN BREACH OF CONTRACT

2-26 MB Practice Guide: CA Contract Litigation 26.37

26.37 Seller Can Withhold or Reclaim Goods From Insolvent Buyer.

26.37[1] Seller May Refuse Delivery Except for Cash and Stop Delivery. If the seller discovers the buyer to be insolvent, the seller may refuse delivery except for cash, including payment for all goods previously delivered under the contract, and may stop delivery under *Com Code* § 2705 [*Com Code* § 2702(1)].

A buyer is insolvent if the buyer has generally ceased to pay debts in the ordinary course of business other than as a result of bona fide dispute, or is unable to pay debts as they become due, or is insolvent within the meaning of the Bankruptcy Code [*Com Code* § 1201(23)].



Strategic Points:

- The seller has the right to withhold the goods or stop delivery on discovering the buyer's insolvency, regardless of the passage of title [*see Com Code* § 2702, *UCC* § 2-702, *official cmt 1* (1962)].
- If the buyer makes assurances of performance following the seller's stoppage of delivery on the ground that the buyer is insolvent, the seller is not entitled to resell or divert the goods. Stoppage in this case is merely a suspension of performance [*see Com Code* § 2705, *UCC* § 2-705, *official cmt 1* (1962)].

Judge's Perspective:

If the seller knows about the buyer's financial difficulties at the time the agreement is made, the seller cannot later use those same difficulties as an excuse to avoid performance, because the seller has waived that right [*Kyocera Corp. v. Prudential-Bache Trade Servs., Inc.* (2002) 299 F3d 769, 785-786 , *vacated on other grounds*, 341 F3d 987 (2003)]. Moreover, if the seller's own failure to perform the contract is the cause of the buyer's insolvency, the seller may not assert that insolvency as a reason to avoid further performance [*Kyocera Corp. v. Prudential-Bache Trade Servs., Inc.* (2002) 299 F3d 769, 785-786 , *vacated on other grounds*, 341 F3d 987 (2003)].

 Cross References:

Stopping delivery, see 26.12.

Discussion of effect of insolvency, see *California Forms of Pleading and Practice*, § 500.74 (Matthew Bender).

Discussion and form for buyer's representation of solvency, see *California Legal Forms*, § 52.331 (Matthew Bender).

26.37[2] Seller May Reclaim Goods Sold on Credit.

26.37[2][a] Insolvent Buyer's Receipt of Goods on Credit Constitutes Fraud. Any receipt of goods on credit amounts to a tacit business representation of solvency; therefore, receipt of goods on credit by an insolvent buyer is fraudulent as against the seller [see *Com Code* § 2702, *UCC* § 2-702, *official cmt 2* (1962)].

26.37[2][b] Seller Must Reclaim Goods Within 10 Days. A seller who discovers that the buyer has received goods on credit while insolvent normally may reclaim the goods on demand made within 10 days after the buyer's receipt of the goods [*Com Code* § 2702(2)].

Exceptions:

- If a misrepresentation of solvency was made to the seller in writing within three months before delivery, the 10-day limitation does not apply [*Com Code* § 2702(2)].

- Except as provided in *Com Code* § 2702(2), the seller may not base a right to reclaim goods on the buyer's fraudulent or innocent misrepresentation of solvency or of intent to pay [*Com Code* § 2702(2)].

Distinguish:

The 10-day limitation does not apply to a reclaiming cash seller under *Com Code* §§ 2507(2) and 2511(3) (concerning delivery on condition and payment by check). The seller in that case is subject only to a reasonable-time standard [*Citizens Bank v. Taggart* (1983) 143 CA3d 318, 321, 191 CR 729 (reclamation of car purchased with NSF check)].

 Cross Reference:

Discussion and form for seller's demand for goods, see *California Legal Forms*, § 52.477 (Matthew Bender).

26.37[2][c] Rights of Good Faith Buyer Prevail. The seller's right to reclaim the goods under *Com Code* § 2702(2) is subject to the rights of a buyer in ordinary course, or a good faith buyer under *Com Code* § 2403 [*Com Code* § 2702(3)].

 Cross Reference:

Discussion of rights of buyer in ordinary course or other good faith buyer, see *California Forms of Pleading and Practice*, § 500.76 (Matthew Bender); or *California Legal Forms*, § 52.17 (Matthew Bender).

26.37[2][d] Reclamation Precludes Other Remedies. Successful reclamation of the goods precludes all other remedies for the seller with respect to them [*Com Code* § 2702(3)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)RemediesSeller's RemediesGeneral OverviewCommercial Law (UCC)Sales
(Article 2)RemediesSeller's RemediesDiscovery of Buyer's Insolvency



116 of 196 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 26 Contract for Sale of Goods--Seeking Remedies Under California Commercial Code
VI. REDRESSING GRIEVANCES OTHER THAN BREACH OF CONTRACT

2-26 MB Practice Guide: CA Contract Litigation 26.38

26.38 Buyer in Breach Can Obtain Restitution.

26.38[1] Seller Must Restore "Excess" Payments. If the seller justifiably withholds delivery of goods because of the buyer's breach, the buyer is entitled to restitution of any amount by which the sum of the buyer's payments exceeds either of the following [*Com Code* § 2718(2)]:

- The amount to which the seller is entitled by virtue of terms liquidating the seller's damages in accordance with *Com Code* § 2718(1).
- In the absence of terms liquidating the seller's damages, the lesser of:
 - ☐ Twenty percent of the value of the total performance for which the buyer is obligated under the contract; or
 - ☐ \$500.

The right of restitution applies to any amount the buyer paid as a deposit or downpayment or partial payment. In the case of a deposit or trade-in of goods resold before the breach, the amount actually received on the resale is viewed as the deposit rather than the amount allowed the buyer for the trade-in. However, the seller, if knowing of the breach before the resale of the traded-in goods, must make reasonable efforts to realize their true value. This is assured by requiring the seller to comply with the conditions set forth in *Com Code* § 2706, regarding the seller's remedy of resale [see *Com Code* § 2718, *UCC* § 2-718, *official cmt 2* (1962)].

➡ **Cross References:**

Seller's remedy of resale, see 26.13.

Discussion of restitution, see California Forms of Pleading and Practice, Ch. 490, Rescission and Restitution (Matthew Bender).

26.38[2] Seller Has Right of Setoff. The buyer's right to restitution under *Com Code* § 2718(2) is subject to an

offset to the extent that the seller establishes both of the following [*Com Code* § 2718(3)]:

- A right to recover damages under the provisions of *Com Code* § 2701 *et seq.* (the chapter on remedies) other than *Com Code* § 2718(1); and
- The amount or value of any benefits received by the buyer directly or indirectly by reason of the contract.

26.38[3] Payment in Goods Need Not Be Restored in Kind. If the seller has received payment in goods, their reasonable value or the proceeds of their resale must be treated as payments for the purposes of determining a buyer's restitution following the seller's justifiable withholding of the sold goods under *Com Code* § 2718(2) [*Com Code* § 2718(4)].

Distinguish:

However, if the seller has notice of the buyer's breach before reselling goods received in part performance, the seller's resale is subject to the conditions set forth in *Com Code* § 2706 with respect to resale by an aggrieved seller [*Com Code* § 2718(4)].



Cross Reference:

Resale of goods by seller, see 26.13.

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)RemediesBuyer's RemediesGeneral OverviewCommercial Law (UCC)Sales (Article 2)RemediesLimitation & ModificationGeneral OverviewCommercial Law (UCC)Sales (Article 2)RemediesSeller's RemediesGeneral Overview



117 of 196 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 26 Contract for Sale of Goods--Seeking Remedies Under California Commercial Code
VI. REDRESSING GRIEVANCES OTHER THAN BREACH OF CONTRACT

2-26 MB Practice Guide: CA Contract Litigation 26.39

26.39 Party Can Enforce Collateral or Ancillary Obligation.

Remedies for breach of any obligation or promise collateral or ancillary to a contract for sale are not impaired by the remedies available under Division 2 of the Commercial Code [*Com Code § 2701; see Com Code § 2701 et seq.*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)RemediesGeneral OverviewCommercial Law (UCC)Sales (Article 2)RemediesBuyer's RemediesGeneral OverviewCommercial Law (UCC)Sales (Article 2)RemediesSeller's RemediesGeneral Overview



118 of 196 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 26 Contract for Sale of Goods--Seeking Remedies Under California Commercial Code
VI. REDRESSING GRIEVANCES OTHER THAN BREACH OF CONTRACT

2-26 MB Practice Guide: CA Contract Litigation 26.40

26.40 Party Can Have Remedy for Fraud.

Unless displaced by the particular provisions of the Commercial Code, principles of law and equity supplement the Commercial Code, including fraud [*Com Code § 1103(b)*]. Remedies for material misrepresentation or fraud include all remedies available under Division 2 of the Commercial Code for nonfraudulent breach [*Com Code § 2721 see Green Wood Industrial Co. v. Forceman Int'l Development Group, Inc. (2007) 156 CA4th 766, 773, 67 CR3d 624*].

Cross References:

Attacking existence of contract because of fraud, duress, menace, and undue influence, see Ch. 17, Attacking or Defending Existence of Contract--Fraud, Duress, Menace, and Undue Influence, 17.03-17.06.

Discussion of action for damages based on fraud, see California Forms of Pleading and Practice, Ch. 269, Fraud and Deceit (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)RemediesGeneral OverviewCommercial Law (UCC)Sales (Article 2)RemediesFraud



119 of 196 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 26 Contract for Sale of Goods--Seeking Remedies Under California Commercial Code
VI. REDRESSING GRIEVANCES OTHER THAN BREACH OF CONTRACT

2-26 MB Practice Guide: CA Contract Litigation 26.41

26.41 Party Can Recover Damages for Third Person's Interference.

When goods have been identified to a contract for sale, and a third person deals with the goods so as to cause actionable injury to a party to the contract, a right of action against the third person exists in favor of whichever party to the contract for sale has title to or a security interest or a special property of an insurable interest in the goods [*Com Code § 2722(a)*; see *Com Code § 2501* (special property in goods)].

Consider:

If the goods were destroyed or converted, a right of action also exists in favor the party that either bore the risk of loss under the contract for sale or, since the injury, assumed that risk as against the other [*Com Code § 2722(a)*].



Strategic Points:

- If, at the time of the injury, the plaintiff did not bear the risk of loss as against the other party to the contract for sale, and there is no arrangement between them for disposition of the recovery, then the suit or settlement is, subject to the plaintiff's own interest, pursued as a fiduciary for the other party to the contract [*Com Code § 2722(b)*].

- Either party, with the consent of the other, may sue for the benefit of whomever it may concern [*Com Code § 2722(c)*].



Cross Reference:

Rights with respect to goods identified to contract, see 26.10, 26.30, 26.31.

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Sales (Article 2)RemediesGeneral Overview



120 of 196 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 27 Contract for Sale of Goods--Attacking or Defending Existence of Contract Under California Commercial Code

2-27 MB Practice Guide: CA Contract Litigation 27.syn

§ 27.syn Synopsis to Chapter 27: Contract for Sale of Goods--Attacking or Defending Existence of Contract Under California Commercial Code

27.01 Scope.

27.02 Objective and Strategy.

27.02[1] Liberalized Contract Formation Rules.

27.02[2] Offer and Acceptance.

27.02[3] Merchant's Firm Offer.

27.02[4] Counteroffer.

27.02[5] Written Agreements and Parol Evidence.

27.02[6] Course of Performance.

27.02[7] Modification, Rescission, and Waiver.

27.02[8] Statute of Frauds.

27.03 CHECKLIST: Disproving or Avoiding Contract for Sale of Goods.

27.04 No Contract Exists If Merchant's Offer Was Revoked Before Acceptance.

27.04[1] Offer Is Revocable Unless It Is a "Firm Offer."

27.04[2] Oral Offer to Supply Construction Contractor May Be Irrevocable for Limited Period.

27.05 Merchant's Requirement for Written Rescission or Modification Is Not Enforceable.

27.06 Statute of Frauds Applies to Contract for \$500 or More.

27.06[1] Signed Memorandum Is Required.

27.06[2] Complete Signature Is Not Necessary.

27.06[3] Noncompliance Does Not Render Contract Void.

27.06[4] Contract Related to Commodity Futures Trading Is Not Covered.

27.07 CHECKLIST: Establishing Validity of Contract for Sale of Goods.

27.08 Options and Strategies.

27.09 Contract Can Be Made in Unconventional Manner.

27.09[1] Proof of Agreement Is Sufficient.

27.09[1][a] Parties Must Manifest Agreement.

27.09[1][b] Time of Agreement Is Not Determinative.

27.09[1][c] Some Terms May Be Left Open.

27.09[2] Merchant Can Make Irrevocable Offer.

27.09[2][a] Written Offer Can Be Expressly Irrevocable.

27.09[2][b] No Stated Time Implies Reasonable Period.

27.09[2][c] Separate Signature May Be Required.

27.09[3] Offer to Supply Contractor May Be Irrevocable.

27.09[3][a] Offer Must Be by Merchant.

27.09[3][b] Oral Offer of \$2,500 or More Must Be Confirmed.

27.09[4] Acceptance of Offer Can Take Any Form.

27.09[4][a] Offer Can Dictate Form of Acceptance.

27.09[4][b] Seller's Shipment of Goods Can Be Acceptance of Offer to Buy.

27.09[4][c] Acceptance by Performance Requires Notice to Offeror.

27.09[5] Counteroffer Can Be Acceptance.

27.09[5][a] Rejection of Offer Is Not Implicit in Making of Counteroffer.

27.09[5][b] Conditional Acceptance Expressly Requiring Offeror's Assent to Additional or Different Terms Does Not Operate As Acceptance Unless Offeror Assents.

27.09[5][c] Additional Terms Must Be Separately Accepted.

27.09[6] Exchange of Offer and Acceptance Between Merchants Is Special Case.

27.09[6][a] New Terms Typically Are Added to Contract.

27.09[6][b] New Terms Are Not Added When Offer Is Expressly Limited.

27.09[6][c] New Terms Are Not Added When They Materially Alter Contract.

27.09[6][d] New Terms Are Not Added When Objection Is Made.

27.09[7] Parties' Conduct Can Establish Contract.

27.10 Contract Can Be Readily Modified.

27.10[1] Consideration Is Not Required for Modification.

27.10[2] Contract May Require Written Modification or Rescission.

27.11 Waiver Can Be Retracted.

27.12 Statute of Frauds Can Be Minimally Satisfied.

27.12[1] Deficient Writing Is Not Insufficient.

27.12[1][a] Terms Can Be Omitted or Misstated.

27.12[1][b] Price Can Be Omitted.

27.12[1][c] Writing Need Not Be Signed by Both Parties or Delivered.

27.12[2] Confirmation of Contract Between Merchants Is Sufficient.

27.12[2][a] Timely Written Confirmation Is Required.

27.12[2][b] Writing Must Confirm Contract.

27.12[2][c] Unsigned Writing Can Be Sufficient.

27.12[2][d] Oral Contract Still Must Be Proved.

27.12[2][e] Oral Offer Is Revocable Before Confirmation.

27.13 Statute of Frauds Does Not Apply in Special Cases.

27.13[1] Statute Is Inapplicable If Goods Were to Be Specially Manufactured for Buyer.

27.13[2] Statute Is Inapplicable If Party Admits Existence of Contract.

27.13[3] Statute Is Inapplicable If Seller Accepted Payment.

27.13[4] Statute Is Inapplicable If Buyer Accepted Goods.

27.13[4][a] Contract Is Enforceable As to Goods Accepted.

27.13[4][b] Contract Is Enforceable If Buyer Indicated No Objection As to Conformity of Goods.

27.13[4][c] Contract Is Enforceable If Buyer Failed to Reject Goods.

27.13[4][d] Contract Is Enforceable If Buyer Acted in Contravention of Seller's Ownership.

27.13[4][e] Contract Is Enforceable If Buyer Accepted Part of Commercial Unit.

27.13[5] Equitable Estoppel Can Prevent Application of Statute.

27.14 Parol Evidence Can Be Used.

27.14[1] Written Agreement Cannot Be Contradicted.

27.14[2] Additional Terms Can Be Proved.

27.14[3] Usage of Trade Is Relevant.

27.14[3][a] Trade Usage May Explain or Supplement Express Terms.

27.14[3][b] Trade Usage Is Any Standard Practice or Method.

27.14[3][c] Trade Usage Can Be Localized.

27.14[3][d] Written Terms, Course of Performance, and Course of Dealing Supersede Trade Usage.

27.14[4] Course of Dealing Is Relevant.

27.14[4][a] Course of Dealing May Explain or Supplement Express Terms.

27.14[4][b] Course of Dealing Is Sequence of Previous Conduct Between Parties.

27.14[4][c] Written Terms and Course of Performance Supersede Course of Dealing.

27.14[5] Course of Performance Is Relevant.

27.14[5][a] Course of Performance May Explain or Supplement Express Terms.

27.14[5][b] Written Terms Supersede Course of Performance.

27.14[5][c] Course of Performance Can Show Modification or Waiver of Inconsistent Terms.

27.15 Answer to Complaint for Breach of Contract for Sale of Goods With Affirmative Defense--Commercial Code Statute of Frauds.

Answer to Complaint for Breach of Contract for Sale of Goods With Affirmative Defense--Commercial Code Statute of Frauds.

27.16 Memorandum--No Contract by Merchant Because Offer Was Revoked and Defendant Did Not Sign Assurance in Plaintiff's Form.

Memorandum--No Contract by Merchant Because Offer Was Revoked and Defendant Did Not Sign Assurance in Plaintiff's Form.

27.17 Memorandum--No Contract by Merchant Because Oral Offer to Supply Licensed Contractor Was Not Confirmed in Writing and Was Revoked.

Memorandum--No Contract by Merchant Because Oral Offer to Supply Licensed Contractor Was Not Confirmed in Writing and Was Revoked.

27.18 Memorandum--Compliance With Statute of Frauds for Sale of Goods--Deficient Writing Is Not Insufficient.

Memorandum--Compliance With Statute of Frauds for Sale of Goods--Deficient Writing Is Not Insufficient.

27.19 Memorandum--Compliance With Statute of Frauds for Sale of Goods--Confirmation of Contract Between Merchants Is Sufficient.

Memorandum--Compliance With Statute of Frauds for Sale of Goods--Confirmation of Contract Between Merchants Is Sufficient.

27.20 Memorandum--Exceptions to Statute of Frauds for Sale of Goods--Goods Were to Be Specially Manufactured for Buyer.

Memorandum--Exceptions to Statute of Frauds for Sale of Goods--Goods Were to Be Specially Manufactured for Buyer.

27.21 Memorandum--Exceptions to Statute of Frauds for Sale of Goods--Adverse Party Admits Existence of Contract.

Memorandum--Exceptions to Statute of Frauds for Sale of Goods--Adverse Party Admits Existence of Contract.

27.22 Memorandum--Exceptions to Statute of Frauds for Sale of Goods--Seller Accepted Payment.

Memorandum--Exceptions to Statute of Frauds for Sale of Goods--Seller Accepted Payment.

27.23 Memorandum--Exceptions to Statute of Frauds for Sale of Goods--Buyer Accepted Goods.

Memorandum--Exceptions to Statute of Frauds for Sale of Goods--Buyer Accepted Goods.



121 of 196 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 27 Contract for Sale of Goods--Attacking or Defending Existence of Contract Under California Commercial Code

I. STRATEGY

2-27 MB Practice Guide: CA Contract Litigation 27.01

27.01 Scope.

This chapter covers attacking and defending a contract for the sale of goods under Division 2 of the Commercial Code. It specifically discusses the Division 2 rules for:

- Disproving the existence of a contract for the sale of goods [*see* 27.04, 27.05].
- Avoiding a contract for the sale of goods by invoking the Division 2 statute of frauds [*see* 27.06].
- Establishing that a contract for the sale of goods was made even though the parties acted in an unconventional manner, by applying the liberal Division 2 rules governing formation of contracts [*see* 27.09].
- Proving that a contract for the sale of goods was modified by the parties' agreement [*see* 27.10] or that a purported waiver was retracted [*see* 27.11].
- Proving that the Division 2 statute of frauds was satisfied [*see* 27.12].
- Preventing application of the Division 2 statute of frauds [*see* 27.13].
- Using parol evidence under Division 2 to explain or supplement (without contradicting) the written terms of the contract [*see* 27.14].

Core Statutes:

Com Code §§ 2201-2209

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentGeneral OverviewCommercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentModification, Rescission & WaiverCommercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentStatutes of FraudsGeneral Overview



122 of 196 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 27 Contract for Sale of Goods--Attacking or Defending Existence of Contract Under California Commercial Code

I. STRATEGY

2-27 MB Practice Guide: CA Contract Litigation 27.02

27.02 Objective and Strategy.

27.02[1] Liberalized Contract Formation Rules. The goal of *Com Code* §§ 2201-2209 is to validate contracts and facilitate legitimate transactions in goods that might otherwise be void under conventional contract law. Thus, *Com Code* § 2204 expresses "the basic policy of recognizing any manner of expression of agreement, oral, written or otherwise" [*Com Code* § 2204, *UCC* § 2-204, *official cmt*; see 27.09[1]]. Therefore, when faced with a contract for the sale of goods, an attorney may find it more difficult to attack the contract than would be the case if the same contract were governed exclusively by the Civil Code.

The contract must be examined, and any challenges made, on the basis of the Commercial Code rules governing formation of contract. However, the principles of law and equity supplement the provisions of the Commercial Code unless displaced by its provisions [*Com Code* § 1103]. In the context of contract formation, this specifically means that issues of capacity, agency, estoppel, fraud, misrepresentation, duress, coercion, or mistake continue to be determined by traditional contract principles [*Com Code* § 1103].

27.02[2] Offer and Acceptance. Any reasonable manner of acceptance is available unless the offeror has clearly indicated that only a specific type of communication constitutes an acceptance [*see Com Code* § 2206]. Technical rules as to acceptance are rejected, and a criterion that the acceptance may be in any manner and by any medium reasonable under the circumstances is substituted. *Com Code* § 2206 is intended to remain flexible, and its applicability is to be enlarged as new means of communication develop or as more time saving existing means come into general use [*Com Code* § 2206, *UCC* § 2-206, *official cmt 1*; see 27.09[4]].

27.02[3] Merchant's Firm Offer. The Commercial Code modifies the common law rule that a so-called firm offer (an offer not subject to revocation for a limited period) be sustained by consideration in order to bind the offeror. Instead, *Com Code* § 2205 requires that a firm offer by a merchant must be characterized as such and be expressed in a signed writing. The primary purpose of *Com Code* § 2205 is to give effect to the deliberate intention of a merchant to make a current firm offer that is binding [*Com Code* § 2205, *UCC* § 2-205, *official cmt 2*; see 27.09[2]].

27.02[4] Counteroffer. Division 2 of the Commercial Code recognizes as a contract a proposed deal that in commercial understanding has in fact been closed. Therefore, when the offeror sends a written confirmation or a definite and seasonable expression of acceptance, any additional matter contained in it (which would, at common law

and under the Civil Code, make it a counteroffer rather than an acceptance) does not invalidate the agreement but instead will be treated as a proposal for an added term, unless the counteroffer is expressly made conditional on the other party's acceptance of the added or different terms [*Com Code § 2207, UCC § 2-207, official cmt 2; see 27.09[5], [6]*]. *Com Code § 2207* requires courts to put aside the formal and academic stereotypes of the traditional doctrine of offer and acceptance and to analyze instead what really happens [*Steiner v. Mobil Oil Corp. (1977) 20 C3d 90, 100, 141 CR 157, 569 P2d 751* (court must not refuse to enforce contract until court looks below surface of parties' disagreement as to contract terms and determines whether parties undertook to close their deal)].

27.02[5] Written Agreements and Parol Evidence. Division 2 of the Commercial Code does not assume that because a writing is final on some matters, it is to be taken as including all of the matters agreed on. Interpretation of the parties' agreement starts from the premise that the parties' language has the meaning that arises out of the commercial context in which it was used. There is no requirement that, as a condition precedent to the admissibility of relevant parol evidence, the court first must determine that the language used is ambiguous [*Com Code § 2202, UCC § 2-202, official cmt 1; see 27.14*].

27.02[6] Course of Performance. When it is difficult to determine whether a particular act by a party merely sheds light on the meaning of an agreement [*see Com Code § 1303*] or represents a waiver of a term of the agreement, the preference is in favor of waiver whenever that construction, plus the application of the provisions on the reinstatement of rights waived [*see Com Code § 2209*], is needed to preserve the flexible character of commercial contracts and to prevent surprise or other hardship [*Com Code § 2208, UCC § 2-208, official cmt 3; see 27.14[5]*].

27.02[7] Modification, Rescission, and Waiver. *Com Code § 2209* protects and makes effective all necessary and desirable modifications of sales contracts without regard to the technicalities that otherwise might hamper those adjustments [*Com Code § 2209, UCC § 2-209, official cmt 1; see 27.10, 27.11*].

27.02[8] Statute of Frauds. Strict adherence to the statute of frauds has been abandoned in favor of certain limited exceptions to promote equity and fair dealing between the parties [*Distribu-Dor, Inc. v. Karadanis (1970) 11 CA3d 463, 469, 90 CR 231; see Com Code § 2201; see also 7.13*].

Detailed Discussion/Forms: California Forms of Pleading and Practice, Ch. 500, Sales: Sales Under the Uniform Commercial Code (Matthew Bender).

California Forms of Jury Instruction, Ch. 3H, Matthew Bender Commercial Code Sales Contracts Instructions (Matthew Bender).

California Legal Forms, Ch. 52, Sales of Goods Under the Uniform Commercial Code (Matthew Bender).

California Points and Authorities, § 206.30 et seq (Matthew Bender).



California Lien Filings:

Use *lexis.com* to search for lien filings in California:

■ Public Records > Public Records > Courts & Filings > Uniform Commercial Code Filings > CA Uniform Commercial Code Lien Filings



Sample Search: To find lien filings in California, and where a contract for goods or services is used as collateral, use your own date restriction or remove the date restriction and insert terms after the 'and', and try: *collateral (contract! /5 good OR service) AND date is 1/2005*.

 Cross Reference:

For Tips on updating case law and expanding your research with additional resources, see **How to Use Lexis.com With This Publication** at the front of this volume.

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentFirm OffersCommercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentModification, Rescission & WaiverCommercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentOffer & AcceptanceCommercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentParol EvidenceGeneral OverviewCommercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentStatutes of FraudsGeneral Overview



123 of 196 DOCUMENTS

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Chapter 27 Contract for Sale of Goods--Attacking or Defending Existence of Contract Under California Commercial Code

II. DISPROVING OR AVOIDING CONTRACT FOR SALE OF GOODS

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27.03 CHECKLIST: Disproving or Avoiding Contract for Sale of Goods.

☐ Determine whether merchant's offer was revoked before acceptance if either:

☐ Merchant did not sign term of assurance in offeree's form.

Authority:

Com Code § 2205(a)

Discussion:

See 27.04[1]

Form:

See 27.16 (memorandum for party attacking existence of contract)

☐ Merchant's oral offer to supply contractor for \$2,500 or more was not confirmed in writing.

Authority:

Com Code § 2205(b)

Discussion:

See 27.04[2]

Form:

See 27.17 (memorandum for party attacking existence of contract)

☐ Determine whether merchant's requirement for written rescission or modification is unenforceable, if either:

☐ Other party attempted to rescind contract; or

- ☐ Other party asserts modification of contract.

Authority:

Com Code § 2209(2)

Discussion:

See 27.05

- ☐ Determine whether Division 2 statute of frauds applies because:

- ☐ Contract concerns sale of goods for \$500 or more.

Authority:

Com Code § 2201(1)

Discussion:

See 27.06[1]

Form:

See 27.15 (answer with affirmative defense)

- ☐ Contract does not relate to commodity futures trading.

Authority:

Com Code § 2201(4)

Discussion:

See 27.06[4]

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentModification, Rescission & WaiverCommercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentOffer & AcceptanceCommercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentStatutes of FraudsGeneral Overview



124 of 196 DOCUMENTS

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Chapter 27 Contract for Sale of Goods--Attacking or Defending Existence of Contract Under California Commercial Code

II. DISPROVING OR AVOIDING CONTRACT FOR SALE OF GOODS

*2-27 MB Practice Guide: CA Contract Litigation 27.04***27.04 No Contract Exists If Merchant's Offer Was Revoked Before Acceptance.**

27.04[1] Offer Is Revocable Unless It Is a "Firm Offer." Generally, an offer may be revoked at any time before its acceptance is communicated to the offeror [CC § 1586]. An offer by a merchant to buy or sell goods in a signed writing that by its terms gives assurance that it will be held open is not revocable, for lack of consideration, during the time stated [see 27.09[2]]. However, if the term of assurance is on a form supplied by the offeree, it must be separately signed by the merchant [Com Code § 2205(a)].

**Strategic Point:**

To protect the merchant against inadvertently signing a firm offer that is contained in a form prepared by the offeree, *Com Code § 2205(a)* requires that such a clause be separately authenticated. Thus, if the firm offer clause in the offeree's form is called to the merchant's attention, and the merchant separately authenticates it, the merchant will be bound [*Com Code § 2205, UCC § 2-205, official cmt 4*]. Therefore, whenever the separate signature requirement applied and was not met, the merchant may be able to establish that no contract was made, as long as the merchant effectively revoked the offer.

**Warning--Not Restricted to Dealings Between Merchants:**

Com Code § 2205(a) applies to "[a]n offer by a merchant to buy or sell goods," but the statute is not limited in application to dealings between merchants. The statute can apply in any case in which the offeror is a merchant, whether or not the offeree is also a merchant.

Distinguish--Firm Offer With No Stated Time:

If an offer gives assurance that it will be held open, but no time is stated, then the offer is not revocable, for lack of consideration, for a reasonable time, but in no event will the period of irrevocability exceed three months [*Com Code § 2205(a)*]. The three-month period need not be stated by days or by date. If the offer states that it is "guaranteed" or "firm" until the happening of a contingency that will occur within the three-month period, it will remain irrevocable until that event. A promise made for a longer period will operate to bind the offeror only for the first three months of the period but may be renewed [*Com*

Code § 2205, UCC § 2-205, official cmt 3].

Distinguish--Firm Offer With Consideration:

If a firm offer is supported by consideration, it may remain irrevocable for as long as the parties specify. *Com Code § 2205(a)* deals only with an offer that is not supported by consideration [*Com Code § 2205, UCC § 2-205, official cmt 3*].

Jury Instructions:

Definition of Merchant and Transactions Between Merchants, see *California Forms of Jury Instruction, Ch. 3H, Instr. MB 300H.06* (Matthew Bender).

Definition of a Writing and Written, see *California Forms of Jury Instruction, Ch. 3H, Instr. MB 300H.21* (Matthew Bender).

Definition of Signed, see *California Forms of Jury Instruction, Ch. 3H, Instr. MB 300H.20* (Matthew Bender).

Revocable and Irrevocable Offers, see *California Forms of Jury Instruction, Ch. 3H, Instr. MB 300H.43* (Matthew Bender).



Cross References:

Memorandum for merchant seeking to disprove contract, see 27.16.

Revocation of offer, and form for answer alleging revocation as affirmative defense, see *Ch. 13, Attacking or Defending Existence of Contract--Absence of Essential Element, 13.23, 13.53*.

27.04[2] Oral Offer to Supply Construction Contractor May Be Irrevocable for Limited Period. When a merchant renders an offer to supply goods to a licensed construction contractor, the offer may be irrevocable for a limited period, notwithstanding lack of consideration [see 27.09[3] for discussion]. However, such an offer is not irrevocable if all of the following conditions are satisfied [*Com Code § 2205(b)*]:

- The merchant's offer is oral.
- The price is \$2,500 or more.
- The offer is not confirmed in writing by the contractor or the contractor's agent within 48 hours after it is rendered.

If a contract satisfies the above criteria, the contractor's failure to confirm the offer in writing releases the merchant from the offer [*Com Code § 2205(b)*].



Strategic Point:

When a construction contractor sues a merchant for breach of an alleged contract to furnish construction supplies, and the specified conditions can be proved, the supplier may be able to establish that no contract was made, as long as the supplier effectively revoked the offer. An offer may be revoked at any time before its acceptance is communicated to the offeror [*CC § 1586*].



Warning:

Com Code § 2205(b), which is not a uniform provision in the Commercial Code, uses the undefined verb "render" instead of a defined term such as "send" [see *Com Code § 1201(36)* (definition)], and it is not clear what constitutes the "rendering" of an offer by a merchant, or when an offer is "rendered," in the context of the statute.

Jury Instructions:

Definition of Merchant and Transactions Between Merchants, see *California Forms of Jury Instruction, Ch. 3H, Instr. MB 300H.06* (Matthew Bender).

Firm Offer by Merchant to Construction Contractor, see *California Forms of Jury Instruction, Ch. 3H, Instr. MB 300H.44* (Matthew Bender).

Definition of a Writing and Written, see *California Forms of Jury Instruction, Ch. 3H, Instr. MB 300H.21* (Matthew Bender).

Revocable and Irrevocable Offers, see *California Forms of Jury Instruction, Ch. 3H, Instr. MB 300H.43* (Matthew Bender).



Cross References:

Memorandum for merchant seeking to disprove contract, see 27.17.

Revocation of offer, and form for answer alleging revocation as affirmative defense, see *Ch. 13, Attacking or Defending Existence of Contract--Absence of Essential Element, 13.23, 13.53*.

Legal Topics:

For related research and practice materials, see the following legal topics:

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125 of 196 DOCUMENTS

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Chapter 27 Contract for Sale of Goods--Attacking or Defending Existence of Contract Under California Commercial Code

II. DISPROVING OR AVOIDING CONTRACT FOR SALE OF GOODS

2-27 MB Practice Guide: CA Contract Litigation 27.05

27.05 Merchant's Requirement for Written Rescission or Modification Is Not Enforceable.

When the contract is on a form supplied by a merchant and provides that modification or rescission of the contract may be effected only by a signed writing, the provision embodying that requirement generally must be separately signed by the other party [*Com Code* § 2209(2)].

Exception--Between Merchants:

Between merchants, the separate signature requirement does not apply [*see Com Code* §§ 2209(2), 2104(3) (definition of "between merchants")].

**Strategic Point:**

If the separate signature requirement applies and is not met, the merchant will be unable to enforce the contract by relying on noncompliance with the requirement that modification or rescission can be effected only in a signed writing. Consequently, the other party may either:

- Enforce a modification of the contract that was effected in some manner other than by a signed writing (thus the other party could avoid the original contract); or
- Invalidate the contract if rescission was effected in some manner other than by a signed writing.

Jury Instructions:

Definition of Merchant and Transactions Between Merchants, see *California Forms of Jury Instruction*, Ch. 3H, Instr. MB 300H.06 (Matthew Bender).

**Cross Reference:**

Written contract can require written modification or rescission, see 27.10[2].

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentGeneral OverviewCommercial Law
(UCC)Sales (Article 2)Form, Formation & ReadjustmentModification, Rescission & Waiver



126 of 196 DOCUMENTS

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Chapter 27 Contract for Sale of Goods--Attacking or Defending Existence of Contract Under California Commercial Code

II. DISPROVING OR AVOIDING CONTRACT FOR SALE OF GOODS

2-27 MB Practice Guide: CA Contract Litigation 27.06

27.06 Statute of Frauds Applies to Contract for \$500 or More.

27.06[1] Signed Memorandum Is Required. Generally, a contract for the sale of goods for the price of \$500 or more is not enforceable by way of action or defense unless both of the following conditions are satisfied [*Com Code* § 2201(1)]:

- There is some writing sufficient to indicate that a contract for sale has been made between the parties [*see Com Code* § 1201(43) ("writing" defined)].
- It is signed by the party against whom enforcement is sought or by that party's authorized agent or broker [*see Com Code* § 1201(37) ("signed" defined)].

Exceptions:

A contract that is valid in other respects does not have to satisfy the requirements above if it meets any of the following criteria [*Com Code* § 2201(3)]:

- The goods are to be specially manufactured for the buyer [*see* 27.13[1]].
- The party against whom enforcement is sought admits the existence of the contract [*see* 27.13[2]].
- The seller has accepted any payment [*see* 27.13[3]].
- The buyer has accepted any of the goods [*see* 27.13[4]].



Strategic Point:

There are only three definite and invariable requirements for the anti-fraud memorandum [*Com Code* § 2201(1); *Com Code* § 2201, *UCC* § 2-201, *official cmt 1*]:

- First, it must evince a contract for the sale of goods [see, e.g., *In re Financial Computer Sys., Inc.* (9th Cir 1973) 474 F2d 1258, 1259-1260 (document in form of lease for air conditioning units, which did not mention alleged option to purchase and did not otherwise reference any sale of units, could not be taken as indicating that contract for sale of goods had been made)].
- Second, it must be "signed"--a term that includes any symbol identifying the party to be charged [see *Com Code § 1201(37)*].
- Third, it must specify a quantity of goods.



Strategic Point--Output Contract or Requirements Contract:

A writing does not fail to specify a quantity of goods when the contract in question is an output contract or a requirements contract. Since a written contract for output or requirements is binding [see *Com Code § 2306(1)*], it follows that a writing is sufficient if it indicates that there has been a real transaction for the sale of output or for the purchase of requirements [*Seaman's Direct Buying Serv., Inc. v. Standard Oil Co.* (1984) 36 C3d 752, 764, 206 CR 354, 686 P2d 1158 , disapproved on another issue, *Della Penna v. Toyota Motor Sales, U.S.A., Inc.* (1995) 11 C4th 376, 393, 45 CR2d 436, 902 P2d 740 , overruled on another issue, *Freeman & Mills, Inc. v. Belcher Oil Co.* (1995) 11 C4th 85, 87, 44 CR2d 420, 900 P2d 669].

Jury Instructions:

Definition of Contract and Contract for Sale, see *California Forms of Jury Instruction, Ch. 3H, Instr. MB 300H.08* (Matthew Bender).

Definition of a Writing and Written, see *California Forms of Jury Instruction, Ch. 3H, Instr. MB 300H.21* (Matthew Bender).

Statute of Frauds Generally, see *California Forms of Jury Instruction, Ch. 3H, Instr. MB 300H.30* (Matthew Bender).

Agreement in Signed Writing, see *California Forms of Jury Instruction, Ch. 3H, Instr. MB 300H.31* (Matthew Bender).



Cross References:

Statute of frauds can be minimally satisfied, see 27.12.

Equitable estoppel to prevent application of statute of frauds, see 27.13[5].

27.06[2] Complete Signature Is Not Necessary. "Signed" for purposes of the Commercial Code includes using any symbol executed or adopted with present intention to adopt or accept a writing [*Com Code § 1201(37)*]. A complete signature is not necessary. The symbol may be printed, stamped, or written. It may be by initials or by thumbprint. It may be on any part of the document and in appropriate cases may be found in a billhead or letterhead. No catalog of possible situations can be complete, and a court must use common sense and commercial experience in passing on these matters. The question always is whether the symbol was executed or adopted by the party with present intention to adopt or accept the writing [*Com Code § 1201, UCC § 1-201, official cmt 37*].

Example--Newspaper Advertisement Can Be Signed Writing:

When an advertisement constitutes an offer by a merchant, the printed name of the merchant is intended to authenticate the advertisement as that of the merchant. In other words, when the advertisement

reasonably justifies the recipient's understanding that the communication was intended as an offer, the offeror's intent to authenticate the offeror's name as a signature can be established from the face of the advertisement [*Donovan v. RRL Corp.* (2001) 26 C4th 261, 277-278, 109 CR2d 807, 27 P3d 702].

Jury Instructions:

Definition of Signed, see *California Forms of Jury Instruction, Ch. 3H, Instr. MB 300H.20* (Matthew Bender).

27.06[3] Noncompliance Does Not Render Contract Void. Failure to satisfy the requirements of *Com Code* § 2201(1) does not render the contract void for all purposes, but merely prevents it from being judicially enforced in favor of a party to the contract. For example, a buyer who takes possession of goods as provided in an oral contract, which the seller has not meanwhile repudiated, is not a trespasser. Nor would the statute of frauds be a defense to a third person who wrongfully induces a party to refuse to perform an oral contract, even if the injured party cannot maintain an action for damages against the party refusing to perform [*Com Code* § 2201, *UCC* § 2-201, *official cmt 4*].

27.06[4] Contract Related to Commodity Futures Trading Is Not Covered. If a contract for the sale of goods meets the definition of "qualified financial contract" in *CC* § 1624(b)(2)--which defines certain contracts that are related to commodity futures trading--then it is subject to the special statute of frauds in *CC* § 1624(b) and would not be subject to *Com Code* § 2201(1) unless specified conditions for the application of *CC* § 1624(b) did not exist [*Com Code* § 2201(4)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentStatutes of FraudsGeneral
OverviewCommercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentStatutes of FraudsFormal
Requirements



127 of 196 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 27 Contract for Sale of Goods--Attacking or Defending Existence of Contract Under California Commercial Code

III. ESTABLISHING VALIDITY OF CONTRACT FOR SALE OF GOODS

2-27 MB Practice Guide: CA Contract Litigation 27.07

27.07 CHECKLIST: Establishing Validity of Contract for Sale of Goods.

☐ If manner of making contract was unconventional, determine whether it was nevertheless effective because either:

☐ Parties manifested agreement, even though either:

☐ Time of agreement cannot be determined; or

☐ Some terms were left open.

Authority:

Com Code § 2204

Discussion:

See 27.09[1]

☐ One party made irrevocable offer (which other party accepted), if either:

☐ Merchant's written offer was expressly irrevocable.

Authority:

Com Code § 2205(a)

Discussion:

See 27.09[2]

☐ Merchant made offer to supply contractor.

Authority:*Com Code § 2205(b)***Discussion:***See 27.09[3]*

☐ Acceptance by performance was effective when:

☐ Seller shipped goods in response to purchase order (offer to buy).

☐ Offeree gave notice of acceptance by performance.

Authority:*Com Code § 2206***Discussion:***See 27.09[4]*

☐ Counteroffer was acceptance, in which case:

☐ Except between merchants, additional or different terms are disregarded.

Authority:*Com Code § 2207(1)***Discussion:***See 27.09[5]*

☐ Between merchants, additional terms are included in contract, unless either:

☐ Offer expressly limits acceptance to terms of offer.

☐ Adding those terms would materially alter contract.

☐ Objection to additional terms was duly given.

Authority:*Com Code § 2207(2)***Discussion:***See 27.09[6]*

☐ Parties' conduct establishes existence of contract.

Authority:*Com Code § 2207(3)*

Discussion:

See 27.09[7]

☐ Determine if it is necessary to prove either of following:

☐ Contract was effectively modified by agreement without consideration.

Authority:

Com Code § 2209(1)-(4)

Discussion:

See 27.10

☐ Waiver was effectively retracted.

Authority:

Com Code § 2209(5)

Discussion:

See 27.11

☐ Determine whether statute of frauds was minimally satisfied because either:

☐ Deficient writing is not insufficient.

Authority:

Com Code § 2201(1)

Discussion:

See 27.12[1]

Form:

See 27.18 (memorandum for party asserting existence of contract)

☐ Confirmation of contract between merchants is sufficient.

Authority:

Com Code § 2201(2), (3)

Discussion:

See 27.12[2]

Form:

See 27.19 (memorandum for party asserting existence of contract)

☐ Determine whether statute of frauds is inapplicable because any of following apply:

- ☐ Goods were specially manufactured for buyer.

Authority:

Com Code § 2201(3)(a)

Discussion:

See 27.13[1]

Form:

See 27.20 (memorandum for party asserting existence of contract)

- ☐ Party admits existence of contract.

Authority:

Com Code § 2201(3)(b)

Discussion:

See 27.13[2]

Form:

See 27.21 (memorandum for party asserting existence of contract)

- ☐ Seller accepted payment.

Authority:

Com Code § 2201(3)(c)

Discussion:

See 27.13[3]

Form:

See 27.22 (memorandum for party asserting existence of contract)

- ☐ Buyer accepted goods when either:

☐ Buyer indicated no objection as to conformity of goods.

☐ Buyer failed to reject goods.

☐ Buyer acted in contravention of seller's ownership.

☐ Buyer accepted part of commercial unit.

Authority:

Com Code § 2201(3)(c)

Discussion:

See 27.13[4]

Form:

See 27.23 (memorandum for party asserting existence of contract)

- ☐ Equitable estoppel can be invoked to prevent application of statute.

Authority:

Monarco v. Lo Greco (1950) 35 C2d 621, 623-624, 220 P2d 737 ; *Allied Grape Growers v. Bronco Wine Co.* (1988) 203 CA3d 432, 444, 249 CR 872

Discussion:

See 27.13[5]

- ☐ Determine to what extent written contract either:

- ☐ Cannot be contradicted by parol evidence.

Authority:

Com Code § 2202

Discussion:

See 27.14[1]

- ☐ Is susceptible to proof of additional terms by parol evidence.

Authority:

Com Code § 2202(b)

Discussion:

See 27.14[2]

- ☐ Determine whether written contract can be explained or supplemented by parol evidence concerning either:

- ☐ Usage of trade.

Authority:

Com Code §§ 2202(a), 1303(d)

Discussion:

See 27.14[3]

- ☐ Course of dealing.

Authority:

Com Code §§ 2202(a), 1303(d)

Discussion:

See 27.14[4]

☐ Course of performance.

Authority:

Com Code §§ 2202(a), 1303(d)

Discussion:

See 27.14[5]

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentGeneral OverviewCommercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentFirm OffersCommercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentOffer & Acceptance



128 of 196 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 27 Contract for Sale of Goods--Attacking or Defending Existence of Contract Under California Commercial Code

III. ESTABLISHING VALIDITY OF CONTRACT FOR SALE OF GOODS

2-27 MB Practice Guide: CA Contract Litigation 27.08

27.08 Options and Strategies.

The party who stands on the contract has the burden of proving the existence of the contract, but this may be more easily done under the Commercial Code for contracts for the sale of goods than in other cases because:

- Numerous rules in *Com Code* §§ 2204-2207 will support a finding that a valid contract exists when the contract was made in an unconventional manner [*see* 27.09; *see also* 27.02 (general purpose and effect of those rules)].
- A party needing to prove either a modification [*see* 27.10] or the retraction of a waiver [*see* 27.11] has the benefit of the facilitating rules of *Com Code* § 2209.
- Issues of interpretation can be resolved under the relatively relaxed parol evidence rules of *Com Code* § 2202 [*see* 27.14].

When the statute of frauds has been asserted as an affirmative defense, the plaintiff is entitled to present any relevant evidence to show either compliance [*see* 27.12] or an exception [*see* 27.13], and no pleading by the plaintiff is necessary to support the introduction of such evidence [see *Siam Numhong Prods. Co. v. Eastimpex (ND Cal 1994)* 866 *F Supp* 445, 448 n5 (plaintiff was entitled to prove facts showing equitable estoppel as exception to statute of frauds defense)].

**Search California Points and Authorities:**

Use Lexis.com to find information on formation of contracts under the Commercial Code:

■ Legal > States Legal-U.S. > California > Search Analysis & CLE Materials > CA Treatises & Analytical Materials > California Points & Authorities



Sample Search: For information on formation of contract under the Commercial Code in California, use: *formation /10 contract! OR agree! /25 commercial code.*


Search Matthew Bender Analytical Material:

Use *lexis.com* to find information on offer and acceptance under the UCC:

■ Legal > Area of Law--By Topic > Commercial Law (UCC) > Search Analysis, Law Reviews & Journals > Forms & Procedures Under the UCC

○ Sample Search: To find information on offer and acceptance in the formation of a contract, use: *offer! /5 accept! /10 formation.*

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentGeneral OverviewCommercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentFirm OffersCommercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentModification, Rescission & WaiverCommercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentOffer & AcceptanceCommercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentParol EvidenceGeneral Overview



129 of 196 DOCUMENTS

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Chapter 27 Contract for Sale of Goods--Attacking or Defending Existence of Contract Under California Commercial Code

III. ESTABLISHING VALIDITY OF CONTRACT FOR SALE OF GOODS

2-27 MB Practice Guide: CA Contract Litigation 27.09

27.09 Contract Can Be Made in Unconventional Manner.

27.09[1] Proof of Agreement Is Sufficient.

27.09[1][a] Parties Must Manifest Agreement. A contract for the sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties that recognizes the existence of such a contract [*Com Code* § 2204(1)].

Jury Instructions:

Formation of Contracts for the Sale of Goods, see *California Forms of Jury Instruction, Ch. 3H, Instr. MB 300H.40* (Matthew Bender).

Offer and Acceptance Generally, see *California Forms of Jury Instruction, Ch. 3H, Instr. MB 300H.41* (Matthew Bender).

Offer Defined, see *California Forms of Jury Instruction, Ch. 3H, Instr. MB 300H.42* (Matthew Bender).



Cross Reference:

Parties' conduct can establish contract, see 27.09[7].

27.09[1][b] Time of Agreement Is Not Determinative. An agreement sufficient to constitute a contract for the sale of goods may be found even though the moment of its making is undetermined [*Com Code* § 2204(2)].

Consider:

This rule is directed primarily to the situation in which the communications between the parties do not disclose the exact point at which their deal was closed, but the actions of the parties indicate that a binding obligation has been undertaken [*Com Code* § 2204, *UCC* § 2-204, *official cmt*].

27.09[1][c] Some Terms May Be Left Open. Even if the parties have left one or more of the terms open, a contract for the sale of goods does not fail for indefiniteness if both of the following conditions are satisfied [*Com Code* § 2204(3)]:

- The parties have intended to make a contract.
- There is a reasonably certain basis for giving an appropriate remedy.

Strategic Point--All Parties:

Under the rules noted above, the parties to a contract for a sale of goods need not assent to all essential terms. A court may enforce a contract for the sale of goods if the court reaches two essential conclusions [*Steiner v. Mobil Oil Corp. (1977) 20 C3d 90, 104, 141 CR 157, 569 P2d 751*]:

- Initially, the court must find some basis for concluding that the parties engaged in a process of offer and acceptance rather than inconclusive negotiations.
- The court then must conclude that it has sufficient information about the parties' incomplete transaction that it can apply the provisions of the Commercial Code that fill the gaps in the parties' contract.

Those gap filling provisions include *Com Code* § 2207 (acceptance that varies from the offer) [*see 27.09[1][c], [5] -[7]*] as well as, for example, *Com Code* §§ 2305 (open price terms), 2307 (open delivery provisions), and 2309 (duration for otherwise indefinite contracts).

Consider--Meeting of Minds Is Not Entirely Necessary:

Com Code § 2204(3) establishes that a meeting of the minds on the essential features of the agreement is not required. The parties, if they so intend, can conclude a contract for the sale of goods even though they do not agree as to, for example [*Steiner v. Mobil Oil Corp. (1977) 20 C3d 90, 104-105, 141 CR 157, 569 P2d 751* ; *Com Code* § 2305(1); *Com Code* § 2204, *UCC* § 2-204, *official cmt*]:

- The price;
- The terms of payment;
- The time or place for performance; or
- The quantity of the goods sold.



Warning--Absence of Agreement on "Important" Terms Could Be Significant:

While the "serious nature" of a contract provision in dispute would not necessarily preclude a finding that the parties intended to make a contract (bearing in mind that the parties' negotiating procedure should reveal their intent), in some cases, in which negotiations are not well organized, the importance of a term that the parties left open may very well be a decisive measure of whether the parties intended to enter into a contract [*Steiner v. Mobil Oil Corp. (1977) 20 C3d 90, 106 n8, 141 CR 157, 569 P2d 751*].



Warning--Absence of Agreement on Numerous Terms Could Be Significant:

The number of terms that the parties left open also may be significant. The more terms the parties leave open, the less likely it is that they have intended to conclude a binding agreement. However, the parties' actions may be conclusive on the matter despite the omissions [*Com Code* § 2204, *UCC* § 2-204, *official*

cmt]. The ultimate inquiry must be whether the parties' conduct indicates a consummated process of offer and acceptance, and thus the intent to contract, or mere negotiations that have not culminated in an agreement [*Steiner v. Mobil Oil Corp.* (1977) 20 C3d 90, 106 n8, 141 CR 157, 569 P2d 751].

Cross Reference:

Open price terms, open delivery provisions, and duration of indefinite contracts, see *Ch. 28, Contract for Sale of Goods--Suing or Defending Action for Breach of Contract Under California Commercial Code*, 28.05[1][a], 28.28, 28.38.

27.09[2] Merchant Can Make Irrevocable Offer.

27.09[2][a] Written Offer Can Be Expressly Irrevocable. An offer by a merchant to buy or sell goods in a signed writing that by its terms gives assurance that it will be held open is not revocable, for lack of consideration, during the time stated [*Com Code § 2205(a)*].



Warning--Not Restricted to Dealings Between Merchants:

Com Code § 2205(a) applies to "[a]n offer by a merchant to buy or sell goods," but the statute is not limited in application to dealings between merchants. The statute can apply in any case in which the offeror is a merchant, whether or not the offeree also is a merchant.



Strategic Point--"Signed Writing" Need Not Be Actually Signed:

"Signed" includes authentication, but the reasonableness of the authentication must be determined in view of the purpose of the rule (which is to give effect to the deliberate intention of a merchant to be bound by a current firm offer). The circumstances surrounding the signing may justify something less than a formal signature or initialing, but typically the kind of authentication involved in this situation would consist at least in initialing the clause involved. A handwritten memorandum on the writer's letterhead purporting in its terms to "confirm" a firm offer already made would be enough to satisfy the requirement even though the memorandum is not subscribed, since under the circumstances it could not be considered a memorandum of mere negotiation and would adequately show its own authenticity. Similarly, an authorized telegram will suffice, even if the original draft contained only a typewritten signature [*Com Code § 2205, UCC § 2-205, official cmt 2*].



Strategic Point--Course of Dealing or Trade Usage Cannot Excuse Absence of Authentication:

Notwithstanding any applicable settled course of dealing or usage of the trade allowing a firm offer to be made by oral communication and to be relied on without more evidence, such an offer will remain revocable under Division 2 of the Commercial Code, since authentication by a writing is the essence of *Com Code § 2205(a)* [*Com Code § 2205, UCC § 2-205, official cmt 2*].

Jury Instructions:

Definition of Merchant and Transactions Between Merchants, see *California Forms of Jury Instruction, Ch. 3H, Instr. MB 300H.06* (Matthew Bender).

Definition of a Writing and Written, see *California Forms of Jury Instruction, Ch. 3H, Instr. MB 300H.21* (Matthew Bender).

Definition of Signed, see *California Forms of Jury Instruction, Ch. 3H, Instr. MB 300H.20* (Matthew

Bender).

Revocable and Irrevocable Offers, see *California Forms of Jury Instruction, Ch. 3H, Instr. MB 300H.43* (Matthew Bender).

27.09[2][b] No Stated Time Implies Reasonable Period. If no time is stated during which the offer will be held open, then the offer is not revocable, for lack of consideration, for a reasonable time, but in no event may such a period of irrevocability exceed three months [*Com Code § 2205(a)*].



Strategic Point:

The three-month period need not be stated by days or by date. If the offer states that it is "guaranteed" or "firm" until the happening of a contingency that will occur within the three-month period, it will remain irrevocable until that event. A promise made for a longer period will operate to bind the offeror only for the first three months of the period but may be renewed [*Com Code § 2205, UCC § 2-205, official cmt 3*].

Distinguish--Firm Offer With Consideration:

If a firm offer is supported by consideration, it may remain irrevocable for as long as the parties specify. *Com Code § 2205(a)* deals only with an offer that is not supported by consideration [*Com Code § 2205, UCC § 2-205, official cmt 3*].

27.09[2][c] Separate Signature May Be Required. Any term agreeing to hold an offer open that is on a form supplied by the offeree must be separately signed by the offeror [*Com Code § 2205(a)*].



Cross Reference:

Invalidation of alleged contract when offeror did not sign term of assurance in form supplied by offeree, see 27.04[1].

27.09[3] Offer to Supply Contractor May Be Irrevocable.

27.09[3][a] Offer Must Be by Merchant. When a merchant renders an offer, oral or written, to supply goods to a licensed construction contractor, the offer usually is irrevocable, notwithstanding lack of consideration, if all of the following conditions are satisfied [*Com Code § 2205(b)*]:

- The contractor is licensed in California or in another state.
- The merchant has actual or imputed knowledge that the contractor is licensed.
- The merchant has actual or imputed knowledge that the offer will be relied on by the contractor in the submission of a bid for a construction contract with a third person.



Timing:

The offer remains irrevocable for 10 days after the awarding of the contract to the prime contractor (the offeree), but in no event for more than 90 days after the date the offer was rendered by the merchant [*Com Code § 2205(b)*].

Exception:

The merchant may provide in the offer that it will remain open for a period shorter than the statutory period [*Com Code § 2205(b)*].

**Warning:**

Com Code § 2205(b), which is not a uniform provision in the Commercial Code, uses the undefined verb "render" instead of a defined term such as "send" [see *Com Code* § 1201(36) (definition)], and it is not clear what constitutes the "rendering" of an offer by a merchant, or when an offer is "rendered," in the context of the statute.

Jury Instructions:

Definition of Merchant and Transactions Between Merchants, see *California Forms of Jury Instruction*, Ch. 3H, Instr. MB 300H.06 (Matthew Bender).

Firm Offer by Merchant to Construction Contractor, see *California Forms of Jury Instruction*, Ch. 3H, Instr. MB 300H.44 (Matthew Bender).

Definition of a Writing and Written, see *California Forms of Jury Instruction*, Ch. 3H, Instr. MB 300H.21 (Matthew Bender).

Revocable and Irrevocable Offers, see *California Forms of Jury Instruction*, Ch. 3H, Instr. MB 300H.43 (Matthew Bender).

27.09[3][b] Oral Offer of \$2,500 or More Must Be Confirmed. A merchant's oral offer to supply a construction contractor for a price of \$2,500 or more is irrevocable only if confirmed in writing by the contractor or the contractor's agent within 48 hours after it is rendered. The contractor's failure to confirm the offer in writing releases the merchant from the offer [*Com Code* § 2205(b)].

**Cross Reference:**

Invalidation of alleged contract when oral offer at \$2,500 or more is not confirmed in writing, see 27.04[2].

27.09[4] Acceptance of Offer Can Take Any Form.

27.09[4][a] Offer Can Dictate Form of Acceptance. Unless otherwise unambiguously indicated by the language or circumstances, an offer to make a contract will be construed as inviting acceptance in any manner and by any medium reasonable in the circumstances [*Com Code* § 2206(1)(a)].

Jury Instructions:

Acceptance Generally, see *California Forms of Jury Instruction*, Ch. 3H, Instr. MB 300H.45 (Matthew Bender).

**Search Matthew Bender Analytical Material:**

Use *lexis.com* to find information on limiting acceptance:

● Legal > Area of Law--By Topic > Commercial Law (UCC) > Search Analysis, Law Reviews & Journals > Forms & Procedures Under the UCC



Sample Search: For information regarding limiting acceptance to the terms of an offer, try this search: *limit! /5 term! /5 offer!*.

27.09[4][b] Seller's Shipment of Goods Can Be Acceptance of Offer to Buy. Unless otherwise unambiguously

indicated by the language or circumstances, an order or other offer to buy goods for prompt or current shipment will be construed as inviting acceptance by either of two means [*Com Code* § 2206(1)(b)]:

- A prompt promise to ship; or
- The prompt or current shipment [*see Com Code* § 2504 (what constitutes shipment)] of conforming or nonconforming goods.

Exception--No Acceptance by Accommodation Shipment:

A shipment of nonconforming goods does not constitute an acceptance if the seller seasonably notifies the buyer that the shipment is offered only as an accommodation to the buyer [*Com Code* § 2206(1)(b)].

Distinguish--Shipment of Nonconforming Goods:

Com Code § 2206(1)(b) deals with the situation of a shipment made following an order, when the shipment is shown by a notification to the buyer to be referable to that order but has a defect. Such a nonconforming shipment normally is to be understood as intended to close the bargain, even though it proves to have been at the same time a breach. However, the seller, by stating that the shipment is nonconforming and is offered only as an accommodation to the buyer, keeps the shipment or notification from operating as an acceptance [*Com Code* § 2206, *UCC* § 2-206, *official cmt* 4].

Jury Instructions:

Acceptance by Shipment, see *California Forms of Jury Instruction, Ch. 3H, Instr. MB 300H.46* (Matthew Bender).

27.09[4][c] Acceptance by Performance Requires Notice to Offeror. When the beginning of a requested performance is a reasonable mode of acceptance, and the offeror is not notified of acceptance within a reasonable time, the offeror may treat the offer as having lapsed before acceptance [*Com Code* § 2206(2); *Harris v. Time, Inc.* (1987) 191 CA3d 449, 456-457, 237 CR 584].

Consider:

The beginning of performance by the offeree can be effective as acceptance so as to bind the offeror only if the beginning of performance is followed within a reasonable time by notice to the offeror. Such a beginning of performance must unambiguously express the offeree's intention to accept the offer. For the protection of both parties, it is essential that notice follow in due course to constitute acceptance. Nothing in *Com Code* § 2206(2), however, bars the possibility that under the common law, performance begun may have an intermediate effect of temporarily barring revocation of the offer or, at the offeror's option, final effect in constituting acceptance [*Com Code* § 2204, *UCC* § 2-206, *official cmt* 3].

27.09[5] Counteroffer Can Be Acceptance.

27.09[5][a] Rejection of Offer Is Not Implicit in Making of Counteroffer. A definite and seasonable expression of acceptance or a written confirmation that is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed on [*Com Code* § 2207(1); e.g., *Lockheed Elecs. Co. v. Keronix, Inc.* (1981) 114 CA3d 304, 311-312, 170 CR 591 (seller's acceptance of purchase order was not expressly conditional on buyer's assent to additional terms stated in acceptance; therefore seller's acceptance created contract even though buyer did not assent to those additional terms)].

Distinguish--Acceptance Need Not Be Definite:

In *Com Code* § 2207(1), "definite" modifies "expression," not "acceptance," and refers to the process of offer and acceptance, not to the terms of the acceptance [*Steiner v. Mobil Oil Corp.* (1977) 20 C3d 90, 107, 141 CR 157, 569 P2d 751].

Example:

Plaintiff, contemplating the purchase of a service station, offered to enter into a 10-year dealer contract with defendant oil company only if defendant, among other things, agreed to advance plaintiff \$30,000 and to give plaintiff a 1.4-cents-per-gallon competitive discount on the price of defendant's gasoline for the duration of the contract. When plaintiff phoned defendant's employee with whom plaintiff had negotiated, to inquire as to the fate of his offer, the employee told plaintiff that defendant had a check for him, that he should open an escrow account, and that he should go ahead with the purchase of the service station property--in context, a clear statement that defendant had approved the deal. Defendant thus provided a "definite and seasonable expression of acceptance" under *Com Code § 2207(1)*. Through a different employee, defendant sent to plaintiff various executed documents in an envelope unaccompanied by any cover letter. The documents provided written confirmation of the deal but also stated that defendant could reduce or cancel plaintiff's competitive discount at will. The fact that defendant returned the documents without in any way calling plaintiff's attention to them was further evidence that defendant regarded the process of negotiation as over and the deal as complete. Despite the fact that the terms of defendant's acceptance departed partially from the terms of plaintiff's offer, defendant and plaintiff did form a contract [*Steiner v. Mobil Oil Corp. (1977) 20 C3d 90, 100-101, 141 CR 157, 569 P2d 751*].

27.09[5][b] Conditional Acceptance Expressly Requiring Offeror's Assent to Additional or Different Terms Does Not Operate As Acceptance Unless Offeror Assents. If the offeree's acceptance is expressly made conditional on the offeror's assent to additional or different terms, there is no acceptance of the original offer unless that condition is satisfied [see *Com Code § 2207(1)*], and the conditional acceptance in that case necessarily must operate only as a counteroffer. Conditional acceptance by the offeree requires nothing more than a clear expression, in a manner sufficient to notify the offeror, that the offeree is unwilling to proceed with the transaction unless the additional or different terms are included in the contract [*PMC, Inc. v. Porthole Yachts, Ltd. (1998) 65 CA4th 882, 888, 76 CR2d 832* (cover letter, prepared by offeree's agent, accompanying proposed addendum was sufficient expression; offer was not accepted because offeror did not assent to addendum)].

Distinguish--Condition Must Be Expressed:

A "conditional" acceptance does not amount to a counteroffer unless the acceptance is "expressly made conditional" on assent to the additional or different terms [*Steiner v. Mobil Oil Corp. (1977) 20 C3d 90, 107, 141 CR 157, 569 P2d 751*].

Example:

Acceptance of a purchase order (that is, an offer to buy) was expressly conditioned on the buyer's assent to additional limitation of liability terms contained in the seller's invoice, when the seller stated that the purchase order was accepted "only on the express condition that you assent to the terms" contained in the seller's invoice [*Transwestern Pipeline Co. v. Monsanto Co. (1996) 46 CA4th 502, 514, 53 CR2d 887*].

Consider--Offeror's Assent May Be Implied:

When acceptance is expressly made conditional on the offeror's assent to additional or different terms, the offeror's assent need not be expressed. It could be implied, as in a course of dealing [see *Transwestern Pipeline Co. v. Monsanto Co. (1996) 46 CA4th 502, 514-519, 53 CR2d 887* (evidence failed to establish course of dealing by which offeree's limitation of liability conditions could have become part of parties' contract)].

Jury Instructions:

Acceptance or Confirmation Stating Additional Terms, see *California Forms of Jury Instruction, Ch. 3H, Instr. MB 300H.47* (Matthew Bender).

27.09[5][c] Additional Terms Must Be Separately Accepted. The additional terms are to be construed as

proposals for addition to the contract [*Com Code* § 2207(2)].

Exception:

Between merchants, the additional terms normally become part of the contract (but not in all cases) [*see* 27.09[6]].

Jury Instructions:

Added Terms in Non-Merchant's Acceptance or Confirmation, *see California Forms of Jury Instruction, Ch. 3H, Instr. MB 300H.63* (Matthew Bender).

27.09[6] Exchange of Offer and Acceptance Between Merchants Is Special Case.

27.09[6][a] New Terms Typically Are Added to Contract. Between merchants, additional terms stated in an acceptance or a written confirmation normally become part of the contract [*Com Code* § 2207(2); *see Com Code* § 2104(3) (definition of "between merchants")].

Distinguish:

Com Code § 2207(2) deals with a typical situation between merchants, in which a wire or letter expressed and intended as an acceptance or the closing of an agreement adds further minor suggestions or proposals such as "ship by Tuesday," "rush," "ship draft against bill of lading inspection allowed," or the like. If no answer is received within a reasonable time after additional terms are proposed between merchants, it is both fair and commercially sound to assume that their inclusion in the parties' contract has been assented to [*Com Code* § 2207, UCC § 2-207, official cmt 1]. However, the added terms are not to be incorporated in the contract if they materially alter the original bargain [*see* 27.09[6][c]]--unless the other party expressly agrees to the terms--or if notice of objection to them has already been given or is given within a reasonable time [*Com Code* § 2207, UCC § 2-207, official cmt 3; *see* 27.09[6][d]].

Exceptions:

Additional terms are *not* automatically added to the contract between merchants in the following situations [*Com Code* § 2207(2)]:

- The offer expressly limits acceptance to the terms of the offer [*see* 27.09[6][b]].
- Adding the terms would materially alter the contract [*see* 27.09[6][c]].
- Objection to the additional terms is duly given [*see* 27.09[6][d]].

These three exceptional situations are stated as alternatives. If one of these situations is shown to exist, it is immaterial whether either or both of the others can be negated [*Steiner v. Mobil Oil Corp.* (1977) 20 C3d 90, 102, 141 CR 157, 569 P2d 751].

Example--Typical Transaction:

A frequent example is the exchange of a printed purchase order form and a printed acceptance form (sometimes called an acknowledgment). Because each form is oriented to the thinking of the drafting party, usually the seller's form contains terms different from or additional to the terms stated in the buyer's form. Nevertheless, the parties proceed with the transaction [*Com Code* § 2207, UCC § 2-207, official cmt 1].

Examples--Terms to Be Incorporated:

Examples of added terms that normally would not materially affect the contract and, therefore, could be

incorporated in a contract between merchants, unless notice of objection were seasonably given [see 27.09[6][d]], are:

- Terms setting forth and perhaps enlarging slightly on the seller's exemption because of supervening causes beyond the seller's control, similar to those covered by the Commercial Code's provision on a merchant's excuse by failure of presupposed conditions [see *Com Code* § 2615], or terms fixing in advance any reasonable formula of proration under such circumstances [*Com Code* § 2207, *UCC* § 2-207, *official cmt 5*].
- Terms fixing a reasonable time for complaints within customary limits; or in the case of a purchase for subsequent sale, terms providing for inspection by the subsequent purchaser [*Com Code* § 2207, *UCC* § 2-207, *official cmt 5*].
- Terms providing for interest on overdue invoices [e.g., *Kawasho Int'l, U.S.A., Inc. v. Lakewood Pipe Serv., Inc.* (1983) 152 CA3d 785, 792, 201 CR 640] or fixing the seller's standard credit terms when they are within the range of trade practice and do not limit any credit bargained-for [*Com Code* § 2207, *UCC* § 2-207, *official cmt 5*; see, e.g., *Southwest Concrete Prods. v. Gosh Constr. Corp.* (1990) 51 C3d 701, 709, 274 CR 404, 798 P2d 1247 (late charge to be imposed on overdue payment; fact that charge was expressed in seller's invoice form in terms of specified percentage and described as "interest per month" on late payments was not relevant); *O'Connor v. Televideo Sys., Inc.* (1990) 218 CA3d 709, 719, 267 CR 237 (percentage charge per month for late payment constituted valid liquidated damages provision)].
- Terms limiting the right of rejection for defects falling within the customary trade tolerances for acceptance "with adjustment" or otherwise limiting a remedy in a reasonable manner [*Com Code* § 2207, *UCC* § 2-207, *official cmt 5*].
- A provision for attorney's fees [see *Boyd v. Oscar Fisher Co.* (1989) 210 CA3d 368, 379]--which, by application of *CC* § 1717, regardless of what the provision actually says, could be equally advantageous to either party [see *Frank M. Booth, Inc. v. Reynolds Metals Co.* (ED Cal 1991) 754 F Supp 1441, 1448].
- A provision shortening the limitation period for suit on the contract (normally four years) to one year [*Therma-Coustics Mfg., Inc. v. Borden, Inc.* (1985) 167 CA3d 282, 295-296, 213 CR 611 ; see *Com Code* § 2725(1) (normal period is four years, but parties may agree to shorten it to not less than one year)].

Jury Instructions:

Definition of Merchant and Transactions Between Merchants, see *California Forms of Jury Instruction*, Ch. 3H, Instr. MB 300H.06 (Matthew Bender).

Added Terms in Merchants' Acceptance or Confirmation, see *California Forms of Jury Instruction*, Ch. 3H, Instr. MB 300H.64 (Matthew Bender).



Cross References:

Failure of condition, see Ch. 28, *Contract for Sale of Goods--Suing or Defending Action for Breach of Contract Under California Commercial Code*, 28.43.

Modification of statute of limitations, see Ch. 4, *Determining Applicable Statute of Limitations and*

Effect on Potential Action, 4.11.

Recovery of attorney's fees under CC § 1717, see Ch. 12, *Recovering Attorney's Fees and Costs in Contract Litigation, 12.06.*

27.09[6][b] New Terms Are Not Added When Offer Is Expressly Limited. Between merchants, additional terms stated in an acceptance or a written confirmation do not become part of the contract when the offer expressly limits acceptance to the terms of the offer [*Com Code § 2207(2)(a)*].

Examples--Offer Expressly Limits Acceptance:

- A purchase order (that is, an offer to buy) expressly limited acceptance to the terms of the offer in these words: "This order expressly limits acceptance to the terms stated herein, and any additional or different terms proposed by the Seller are rejected unless expressly assented to in writing by Buyer" [*Lockheed Elecs. Co. v. Keronix, Inc. (1981) 114 CA3d 304, 311, 170 CR 591*].

- A purchase order expressly limited acceptance to the terms of the offer in these words: "This order may not be varied or changed, nor any of its provisions waived except in writing, signed by an authorized representative of the Purchaser Terms of Seller's order, shipment or approval which are not identical with the terms of this order are not a part of the contract between Seller and Purchaser" [*Lounge-A-Round, Inc. v. GCM Mills, Inc. (1980) 109 CA3d 190, 195, 166 CR 920*].

- In negotiating a 10-year service station dealer's contract with an oil company, the dealer said that he needed a firm competitive per-gallon discount on gasoline for the term of the agreement. This was agreed, but subsequently the oil company presented a standard form stating that the discount would be revocable at will. The dealer promptly informed the oil company that he would not go ahead with the deal if the oil company could revoke the discount at any time, and demanded assurance that no such revocation would occur. This was forthcoming in a letter from the oil company's negotiator stating, "The ten year Retail Dealer Contract dated December 15, 1971, effective January 1, 1972, is signed by you on the basis that Mobil grant a \$30,000 Prepaid Competitive Allowance, and a \$.014 [per gallon] Competitive Allowance at time of delivery. If Mobil management does not accept in full the above conditions outlined in your competitive offer, the above mentioned contract will be void." Thus, the evidence showed that the dealer made (and the oil company accepted) an offer expressly limiting acceptance to the terms of the offer [*Steiner v. Mobil Oil Corp. (1977) 20 C3d 90, 95-96, 101, 141 CR 157, 569 P2d 751*].

Distinguish--Acceptance With Other Terms Is Counteroffer:

When the offer is expressly limited, an acceptance that includes additional or different terms necessarily operates only as a counteroffer. There can be no contract unless either [*Textile Unlimited, Inc. v. A..BMH & Co. (9th Cir 2001) 240 F3d 781, 787* ; see 27.09[5][b]]:

- The counteroffer is duly accepted; or
- The parties' conduct establishes the existence of a contract [see *Com Code § 2207(3)*; see also 27.09[7]].



Strategic Point--Objection to Terms Is Not Required:

If an expressly limiting offer is proved, it is immaterial if the offeror did not object to the additional or different terms stated in the acceptance [see 27.09[6][d]], as no objection was necessary [*Lockheed Elecs. Co. v. Keronix, Inc.* (1981) 114 CA3d 304, 313, 170 CR 591].

27.09[6][c] New Terms Are Not Added When They Materially Alter Contract. Between merchants, additional terms stated in an acceptance or a written confirmation do not become part of the contract when they would materially alter the parties' contract [Com Code § 2207(2)(b)]--unless the other party expressly agrees [Com Code § 2207, UCC § 2-207, official cmt 3]. An alteration is material if it would result in surprise or hardship if incorporated without express awareness by the other party [*Steiner v. Mobil Oil Corp.* (1977) 20 C3d 90, 102, 141 CR 157, 569 P2d 751].

Examples--Terms That Could Materially Alter Contract:

Examples of typical terms that could materially alter the contract, because the result would be surprise or hardship if they were incorporated without express awareness by the other party, are terms and provisions that:

- Negate a standard warranty such as the warranty of merchantability or the warranty of fitness for a particular purpose, in circumstances in which the warranty normally attaches [Com Code § 2207, UCC § 2-207, official cmt 4].
- Require a guaranty of 90 percent or 100 percent deliveries in a case (such as a contract by a cannery) in which usage of the trade allows more leeway [Com Code § 2207, UCC § 2-207, official cmt 4].
- Reserve to the seller a power to cancel on the buyer's failure to pay any invoice when due [Com Code § 2207, UCC § 2-207, official cmt 4].
- Require that complaints be made within a period materially shorter than what is customary or reasonable [Com Code § 2207, UCC § 2-207, official cmt 4].
- Require arbitration [*Windsor Mills, Inc. v. Collins & Aikman Corp.* (1972) 25 CA3d 987, 995, 101 CR 347].

27.09[6][d] New Terms Are Not Added When Objection Is Made. Between merchants, additional terms stated in an acceptance or a written confirmation do not become part of the contract when notification of objection to them has already been given or is given within a reasonable time after notice of them is received [Com Code § 2207(2)(c); see Com Code § 1201(26)-(27) (giving and receiving notice or notification)].

When terms on confirming forms sent by both parties conflict, each party must be assumed to object to the conflicting terms of the other. As a result, the requirement that notice of objection has "already been given" is satisfied in such a case, and the conflicting terms do not become a part of the contract [see, e.g., *Transwestern Pipeline Co. v. Monsanto Co.* (1996) 46 CA4th 502, 516, 53 CR2d 887]. The contract then consists of the terms originally expressly agreed to, terms on which the exchanged confirmations agree, and terms supplied by the Commercial Code [Com Code § 2207, UCC § 2-207, official cmt 6].

When the offer is not expressly limited, and the additional terms would not materially alter the contract, a failure to object will result in incorporation of the additional terms [*Kawasho Int'l, U.S.A., Inc. v. Lakewood Pipe Serv., Inc.* (1983) 152 CA3d 785, 792, 201 CR 640 (seller's form for sale contract added that "interest will be charged ... from due date to actual date of payment"; in absence of buyer's timely objection, that became part of parties' contract)].

Jury Instructions:

Giving Notice or Notification, see *California Forms of Jury Instruction, Ch. 3H, Instr. MB 300H.17* (Matthew Bender).

Receiving Notice, see *California Forms of Jury Instruction, Ch. 3H, Instr. MB 300H.18* (Matthew Bender).

Definition of Reasonable Time, see *California Forms of Jury Instruction, Ch. 3H, Instr. MB 300H.14* (Matthew Bender).

27.09[7] Parties' Conduct Can Establish Contract. Conduct by both parties that recognizes the existence of a contract is sufficient to establish a contract for sale even if the writings of the parties do not otherwise establish a contract. In such a case, the terms of the contract consist of [*Com Code* § 2207(3)]:

- Those terms on which the writings of the parties agree; and
- Any supplementary terms incorporated under the Commercial Code.

Thus, even if the offeree's acceptance is expressly made conditional on the offeror's assent to the offeree's additional terms [see 27.09[6][b]], but no such assent is given, the existence of a contract and its terms may be inferred if the parties' conduct recognizes the existence of a contract [*Transwestern Pipeline Co. v. Monsanto Co. (1996) 46 CA4th 502, 514, 53 CR2d 887*].

Example:

A buyer sent a purchase order (an offer to buy) for switchboard gear to a seller. The seller's invoice contained materially differing terms from the purchase order in that, while the purchase order imposed broad warranty coverage, the invoice disclaimed all warranties. The parties nonetheless, by their conduct, manifested an agreement, since the seller supplied and the buyer accepted the switchboard gear. Hence, under *Com Code* § 2207(3), there was a contract, which consisted of the terms on which the purchase order and the invoice agreed, supplemented by the applicable provisions of the Commercial Code. The Code imposes a warranty of merchantability by operation of law absent contractual modification or disclaimer, including a warranty of fitness, absent contractual exclusion or modification, if the seller knows the buyer's purpose for the goods and knows that the buyer is relying on the seller's judgment to furnish suitable goods [see *Com Code* § 2314]. If the seller did not wish to supply the equipment on the terms specified in the purchase order, then the seller was free to withhold the equipment unless and until the buyer agreed to the seller's terms [*Steiny & Co., Inc. v. California Elec. Supply Co. (2000) 79 CA4th 285, 295, 93 CR2d 920*].

**Strategic Point--Supplementary Terms:**

The "supplementary terms" incorporated under any provision of the Commercial Code may include terms incorporated as a result of usage of the trade [see 27.14[3]] or the parties' course of dealing [*Transwestern Pipeline Co. v. Monsanto Co. (1996) 46 CA4th 502, 516, 53 CR2d 887* ; see 27.14[4]] or course of performance [see 27.14[5]].

**Strategic Point--Disputed Terms:**

All of the terms on which the parties' writings do not agree drop out, and the Commercial Code supplies any missing terms [*Transwestern Pipeline Co. v. Monsanto Co. (1996) 46 CA4th 502, 515, 53 CR2d*

887]. If there is no basis in the Commercial Code for incorporating a disputed term, it remains out of the contract [*Textile Unlimited, Inc. v. A..BMH & Co.* (9th Cir 2001) 240 F3d 781, 788 (Commercial Code contains no provision supporting inclusion of arbitration requirement)].



Strategic Point--Apparently Conflicting Terms Can Be Reconciled:

It is possible that terms on which the parties' writings do not agree can be brought into agreement, for purposes of fleshing out the parties' contract under *Com Code* § 2207(3), by application of a reconciling rule. For instance, if the seller's form provided for attorney's fees to the seller, while the buyer's form provided for attorney's fees to the buyer, then the parties' writings would not be in agreement regarding the right to attorney's fees. However, those conflicting provisions need not be dropped. *CC* § 1717 brings the two provisions into agreement by converting such provisions into clauses permitting the prevailing party to recover attorney's fees for any dispute on the contract [*Frank M. Booth, Inc. v. Reynolds Metals Co.* (ED Cal 1991) 754 F Supp 1441, 1448 ; see *Com Code* § 1201(12) ("contract" as used in Commercial Code means "the total legal obligation which results from the parties' *agreement as affected by this code and any other applicable rules of law*"; emphasis added); see also *Com Code* § 1201(3) (definition of "agreement")].

Distinguish--Goods Shipped, Accepted, and Paid For:

In many cases, and typically when goods are shipped, accepted, and paid for before any dispute arises, there is no question whether a contract has been made. In such a case, if the writings of the parties do not establish a contract, it is not necessary to determine which act or document constituted the offer and which the acceptance. The only question is what terms are included in the contract. *Com Code* § 2207(3) furnishes the governing rule [*Com Code* § 2207, *UCC* § 2-207, *official cmt* 7].

Jury Instructions:

Agreement Evidenced by Conduct, see *California Forms of Jury Instruction, Ch. 3H, Instr. MB 300H.48* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentGeneral OverviewCommercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentFirm OffersCommercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentOffer & AcceptanceCommercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentParol EvidenceGeneral OverviewCommercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentStatutes of FraudsFormal Requirements



130 of 196 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 27 Contract for Sale of Goods--Attacking or Defending Existence of Contract Under California Commercial Code

III. ESTABLISHING VALIDITY OF CONTRACT FOR SALE OF GOODS

2-27 MB Practice Guide: CA Contract Litigation 27.10

27.10 Contract Can Be Readily Modified.

27.10[1] Consideration Is Not Required for Modification. An agreement modifying a contract within Division 2 of the Commercial Code needs no consideration to be binding [*Com Code* § 2209(1)].



Warning--Statute of Frauds Can Apply:

The requirements of the statute of frauds in *Com Code* § 2201 must be satisfied [see 27.06[1]] if the contract as modified is within its provisions [*Com Code* § 2209(3)].

Distinguish--Noncompliance Amounting to Waiver:

If an attempt at modification does not satisfy the requirements of the statute of frauds (when the contract as modified would be within its provisions), it can nevertheless operate as a waiver [*Com Code* § 2209(4)].



Strategic Point--Other Contract Elements:

While *Com Code* § 2209(1) dispenses with the requirement of consideration, a valid modification nevertheless requires proof of the other elements essential to the validity of a contract [*PMC, Inc. v. Porthole Yachts, Ltd.* (1998) 65 CA4th 882, 887, 76 CR2d 832 (mutual assent must be shown)].



Cross Reference:

Elements of contract, see *Ch. 13, Attacking or Defending Existence of Contract--Absence of Essential Element*, 13.04.

27.10[2] Contract May Require Written Modification or Rescission. A signed agreement that excludes modification or rescission except by a signed writing cannot be otherwise modified or rescinded [*Com Code* § 2209(2)].



Warning--Merchant's Form Contract:

Except between merchants, such a requirement on a form supplied by a merchant must be separately

signed by the other party [*Com Code* § 2209(2); see *Com Code* § 2104(3) (definition of "between merchants")].



Strategic Point:

When the contract contains such a requirement and it is enforceable, the party standing on the contract may assert a failure to comply with the requirement if the other party asserts modification or rescission by way of avoidance.

Distinguish--Noncompliance Amounting to Waiver:

If an attempt at modification or rescission does not satisfy the statutory requirements (as applicable), it can nevertheless operate as a waiver [see *Com Code* § 2209(4)].

Jury Instructions:

Requirement of Written Modification or Rescission, see *California Forms of Jury Instruction, Ch. 3H, Instr. MB 300H.70* (Matthew Bender).

Definition of Signed, see *California Forms of Jury Instruction, Ch. 3H, Instr. MB 300H.20* (Matthew Bender).

Definition of a Writing and Written, see *California Forms of Jury Instruction, Ch. 3H, Instr. MB 300H.21* (Matthew Bender).

Definition of Merchant and Transactions Between Merchants, see *California Forms of Jury Instruction, Ch. 3H, Instr. MB 300H.06* (Matthew Bender).



Cross Reference:

Rescission or modification requirement in merchant's form contract was not separately signed, see 27.05.

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentGeneral OverviewCommercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentModification, Rescission & Waiver



131 of 196 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 27 Contract for Sale of Goods--Attacking or Defending Existence of Contract Under California Commercial Code

III. ESTABLISHING VALIDITY OF CONTRACT FOR SALE OF GOODS

2-27 MB Practice Guide: CA Contract Litigation 27.11

27.11 Waiver Can Be Retracted.

A party who has made a waiver affecting an executory portion of the contract may retract the waiver by reasonable notification, received by the other party, that strict performance will be required of any term waived [*Com Code* § 2209(5)].

Exception--Detrimental Reliance:

An attempted retraction will not be effective if it would be unjust in view of a material change of position in reliance on the waiver [*Com Code* § 2209(5)].

Jury Instructions:

Waiver, see *California Forms of Jury Instruction, Ch. 3H, Instr. MB 300H.71* (Matthew Bender).

Retraction of Waiver, see *California Forms of Jury Instruction, Ch. 3H, Instr. MB 300H.72* (Matthew Bender).

Giving Notice or Notification, see *California Forms of Jury Instruction, Ch. 3H, Instr. MB 300H.17* (Matthew Bender).

Receiving Notice, see *California Forms of Jury Instruction, Ch. 3H, Instr. MB 300H.18* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentGeneral OverviewCommercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentModification, Rescission & Waiver



132 of 196 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 27 Contract for Sale of Goods--Attacking or Defending Existence of Contract Under California Commercial Code

III. ESTABLISHING VALIDITY OF CONTRACT FOR SALE OF GOODS

2-27 MB Practice Guide: CA Contract Litigation 27.12

27.12 Statute of Frauds Can Be Minimally Satisfied.

27.12[1] Deficient Writing Is Not Insufficient.

27.12[1][a] Terms Can Be Omitted or Misstated. A writing is not insufficient to satisfy the statute of frauds because it omits or incorrectly states a term agreed on, but the contract is not enforceable beyond the quantity of goods shown in the writing [*Com Code § 2201(1)*].



Strategic Point:

The required writing need not contain all of the material terms of the contract. Such material terms as are stated need not be precisely stated. All that is required is a writing that affords a basis for believing that the offered oral evidence rests on a real transaction--it may be written in lead pencil on a scratch pad, for example. Nor is it necessary to indicate which party is the buyer and which the seller. The only term that must appear is the quantity term, which need not be accurately stated (but recovery is limited to the amount stated). The price, the time and place of payment or delivery, the general quality of the goods, and any particular warranties all may be omitted [*Com Code § 2201, UCC § 2-201, official cmt 1*].



Cross References:

Memorandum for party seeking to prove contract, see 27.18.

Compliance with general statute of frauds, see *Ch. 15, Attacking or Defending Existence of Contract--Failure to Comply With Applicable Formalities*, 15.07, 15.08.

27.12[1][b] Price Can Be Omitted. One of the terms that may be omitted in the anti-fraud memorandum is the price--unless the price happens to reference a quantity of goods rather than money, in which case that quantity of goods must be stated [*Com Code § 2201, UCC § 2-201, official cmt 1*].



Strategic Point:

In many valid contracts for sale the parties do not mention the price in express terms, the buyer being bound to pay and the seller bound to accept a reasonable price, which the trier of the fact may be trusted to determine. Often the price is not mentioned because the parties have based their agreement on a price list or catalogue known to both of them, which serves as an efficient safeguard against perjury. In addition, any market prices and valuations that are current in the vicinity would constitute a similar check. Thus if the price is not stated in the anti-fraud memorandum, it can normally be supplied without danger of fraud [*Com Code § 2201, UCC § 2-201, official cmt 1*].

27.12[1][c] Writing Need Not Be Signed by Both Parties or Delivered. The anti-fraud memorandum need not be signed or authenticated by both parties (but it is not sufficient against one who has not signed it), and need not be delivered to anyone. Until a dispute arises, no one can determine which party's signing of the memorandum will be necessary; but from the time of contracting, each party's interest is that a sufficient memorandum has been signed by the other party [*Com Code § 2201, UCC § 2-201, official cmt 6*].

27.12[2] Confirmation of Contract Between Merchants Is Sufficient.

27.12[2][a] Timely Written Confirmation Is Required. A writing sent and received between merchants satisfies the statute of frauds against the party receiving it if all of the following requirements are met [*Com Code § 2201(2)*]:

- The writing is "in confirmation of the contract" [*see 27.12[2][b]*].
- The writing is "sufficient against the sender" [*see 27.12[2][c]*].
- The writing is received within a reasonable time.
- The party receiving it has reason to know its contents.
- The party receiving it does not give written notice of objection to its contents within 10 days after it is received.

There must be evidence that the writing in question was sent by one party and received by the other party [*see Dairyman's Cooperative Creamery Assn. v. Leipold (1973) 34 CA3d 184, 187, 109 CR 753 (Com Code § 2201(2))* could not be applied in absence of evidence that seller sent and buyer received shipping order and invoice)].



Strategic Point:

If the evidence will not support the application of *Com Code § 2201(2)* so as to find that the statute of frauds was satisfied, it may nevertheless be adequate to support application of one of the provisions in *Com Code § 2201(3)*, describing exceptional situations in which the statute of frauds does not apply [*see, e.g., Dairyman's Cooperative Creamery Assn. v. Leipold (1973) 34 CA3d 184, 188, 109 CR 753* (evidence brought case within *Com Code § 2201(3)(c)*); *see also 27.13*].

Jury Instructions:

Confirming Writing Between Merchants, *see California Forms of Jury Instruction, Ch. 3H, Instr. MB 300H.32* (Matthew Bender).

Definition of Merchant and Transactions Between Merchants, *see California Forms of Jury Instruction, Ch. 3H, Instr. MB 300H.06* (Matthew Bender).

Definition of Send, *see California Forms of Jury Instruction, Ch. 3H, Instr. MB 300H.19* (Matthew

Bender).

Receiving Notice, see *California Forms of Jury Instruction, Ch. 3H, Instr. MB 300H.18* (Matthew Bender).

Notice of a Fact, see *California Forms of Jury Instruction, Ch. 3H, Instr. MB 300H.16* (Matthew Bender).

Definition of Reasonable Time, see *California Forms of Jury Instruction, Ch. 3H, Instr. MB 300H.14* (Matthew Bender).

Giving Notice or Notification, see *California Forms of Jury Instruction, Ch. 3H, Instr. MB 300H.17* (Matthew Bender).

Cross References:

Memorandum for party seeking to prove contract, see 27.19.

Compliance with general statute of frauds, see *Ch. 15, Attacking or Defending Existence of Contract--Failure to Comply With Applicable Formalities, 15.07, 15.08.*

27.12[2][b] Writing Must Confirm Contract. A writing that references the future making of an agreement, without recognizing the present existence of an agreement between the parties, or that acknowledges the other party's stated intention not to be bound by certain terms, is not a writing "in confirmation of the contract" as required by *Com Code* § 2201(2) [*C.R. Fedrick, Inc. v. Borg-Warner Corp.* (9th Cir 1977) 552 F2d 852, 855-856].

Example--Invoice or Purchase Order Confirms Contract:

The typical example of a writing that confirms a contract between merchants is a seller's invoice (which would be sufficient against the seller) [*e.g., Debruyne Produce Co. v. Richmond Produce Co.* (Bankr ND Cal 1990) 112 BR 364, 374]. A buyer's purchase order (which would be sufficient against the buyer) would likewise confirm a contract.

27.12[2][c] Unsigned Writing Can Be Sufficient. *Com Code* § 2201(2) requires a "writing in confirmation of the contract and sufficient against the sender." It does not specify that the writing must be signed. Interpreting "sufficient against the sender" to include the requirement of a signature would defeat the goal of quick, informal confirmation of business deals and lacks support in the Commercial Code [*Procyon Corp. v. Components Direct, Inc.* (1988) 203 CA3d 409, 412, 249 CR 813].

Example--Letter of Credit Is Sufficient Writing:

A buyer sued a seller for breach of contract after the seller failed to deliver goods under an oral agreement supported by an irrevocable letter of credit. The trial court correctly concluded that the buyer's irrevocable letter of credit satisfied *Com Code* § 2201(2). Since the irrevocable letter of credit fully bound the buyer to the terms of the contract, the document more than satisfied the writing requirement of *Com Code* § 2201(2) (in fact, the letter went a step further, not only memorializing the oral contract terms but also guaranteeing payment on delivery of the goods). It was "sufficient against the sender" because the buyer directed its bank to issue the letter and supplied the relevant contract terms for incorporation in the document, and in this limited sense, the bank was acting as the buyer's agent when it sent the letter. The bank's signature was thus "adopted by [the buyer] with present intention to authenticate" the letter of credit [*Procyon Corp. v. Components Direct, Inc.* (1988) 203 CA3d 409, 413, 249 CR 813 ; (interpreting former *Com Code* § 1201(39) (definition of "signed"); now see *Com Code* § 1201(37))].

27.12[2][d] Oral Contract Still Must Be Proved. Between merchants, failure to answer a written confirmation of a contract within 10 days of receipt is tantamount to a writing [*Com Code* § 2201(2)] that is sufficient against both parties [*Com Code* § 2201(1)]. The only effect, however, is to take away from the defaulting merchant the defense of the statute of frauds. The burden of persuading the trier of fact that a contract was in fact made orally, prior to the sending of the written confirmation, is unaffected [*Com Code* § 2201, *UCC* § 2-201, *official cmt* 3].

27.12[2][e] Oral Offer Is Revocable Before Confirmation. Until the offeror receives a sufficient written confirmation from the offeree within a reasonable time after making an oral offer (and has reason to know the contents of the writing), the offer is revocable. If, in that time frame, the offeror changes the offer (for instance, in view of the parties' further negotiation as to the price or some other term), that change in position by the offeror is in effect a revocation of the original offer [*C.R. Fedrick, Inc. v. Borg-Warner Corp.* (9th Cir 1977) 552 F2d 852, 855]. It follows that a subsequently received written confirmation of the original (now revoked) offer would have no effect under *Com Code* § 2201(2).

Exception:

In a departure from the uniform provisions of the Commercial Code, *Com Code* § 2205(b) provides a special rule of limited irrevocability for an offer by a merchant to provide construction materials or supplies, when the merchant knows that the construction contractor will rely on the offer in submitting a bid for a job [*see* 27.09[3]].

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentStatutes of FraudsGeneral
OverviewCommercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentStatutes of FraudsFormal
Requirements



133 of 196 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 27 Contract for Sale of Goods--Attacking or Defending Existence of Contract Under California Commercial Code

III. ESTABLISHING VALIDITY OF CONTRACT FOR SALE OF GOODS

2-27 MB Practice Guide: CA Contract Litigation 27.13

27.13 Statute of Frauds Does Not Apply in Special Cases.

27.13[1] Statute Is Inapplicable If Goods Were to Be Specially Manufactured for Buyer. A contract that does not meet the writing requirement of *Com Code* § 2201(1) [see 27.06[1]] but is valid in other respects is enforceable if all of the following conditions are satisfied [*Com Code* § 2201(3)(a)]:

- The goods are to be specially manufactured for the buyer.
- The goods are not suitable for sale to others in the ordinary course of the seller's business.
- The seller, before notice of repudiation is received and under circumstances reasonably indicating that the goods are for the buyer, has made either a substantial beginning of their manufacture or commitments for their procurement.

**Strategic Point--Contract Covering Both Unique Goods and Common Goods:**

When an oral contract is enforceable under this rule, and the contract calls for the seller to deliver not only goods specially manufactured for the buyer (such as mirrors made and cut so as to fit into particular wall spaces) but also goods that are commonly obtainable and readily saleable to others in the ordinary course of the seller's business (such as ordinary bathroom fixtures), there is no reason to enforce the contract only with respect to the unique goods and not also with respect to the common goods [*Distribu-Dor, Inc. v. Karadanis* (1970) 11 CA3d 463, 468, 90 CR 231]. Enforcement of the contract as to the common goods could be justified under the equitable estoppel doctrine [see 27.13[5]] when the seller can claim lost profit damages as a volume seller or a middleman. *Com Code* § 2201(3)(a) clearly is a codification of one aspect of the general rule that does not permit a party to plead the bar of the statute of frauds if that party represented to the other an intention to make an oral contract, and the other party changed position in reliance on that representation [*Distribu-Dor, Inc. v. Karadanis* (1970) 11 CA3d 463, 469, 90 CR 231].

Jury Instructions:

Confirmation of Contract by Seller's Performance, see *California Forms of Jury Instruction, Ch. 3H, Instr. MB 300H.33* (Matthew Bender).

 Cross Reference:

Memorandum for party seeking to prove contract, see 27.20.

27.13[2] Statute Is Inapplicable If Party Admits Existence of Contract. A contract that does not meet the writing requirement of *Com Code* § 2201(1) [see 27.06[1]] but is valid in other respects is enforceable if the party against whom enforcement is sought admits in his or her pleading or testimony, or otherwise in court, that a contract for sale was made [*Com Code* § 2201(3)(b)].

Distinguish:

The contract is not enforceable beyond the quantity of goods admitted [*Com Code* § 2201(3)(b)].



Strategic Point:

If the making of a contract is admitted in court, whether in a written pleading, by stipulation, or by oral statement before the court, no additional writing is necessary for protection against fraud. Therefore, it is not possible to admit the contract in court and still plead the statute of frauds as a defense. However, the contract is not conclusively established by such an admission. The party's admission is evidence against that party of the truth of the facts admitted and nothing more; and as against the other party, the admission is not evidence at all [*Com Code* § 2201, *UCC* § 2-201, *official cmt* 7].

Jury Instructions:

Admission That Contract Was Made, see *California Forms of Jury Instruction, Ch. 3H, Instr. MB 300H.35* (Matthew Bender).

 Cross Reference:

Memorandum for party seeking to prove contract, see 27.21.

27.13[3] Statute Is Inapplicable If Seller Accepted Payment. A contract that does not meet the writing requirement of *Com Code* § 2201(1) [see 27.06[1]] but is valid in other respects is enforceable with respect to goods for which payment has been made and accepted [*Com Code* § 2201(3)(c)].



Strategic Point:

Partial performance as a substitute for the required anti-fraud memorandum can validate the contract only for the goods for which payment has been made and accepted. Part performance by the buyer requires the delivery of something that is accepted by the seller as performance. Thus, part payment may be made by money or check, accepted by the seller. If the agreed price consists of goods or services, then they must have been delivered and accepted. Receipt and acceptance of the price constitutes an unambiguous overt admission by both parties that a contract actually exists. If the court can make a just apportionment, therefore, the price having been paid, the seller can be forced to deliver an apportionable part of the goods. The overt actions of the parties justify admitting evidence of the other terms of the contract necessary to make a just apportionment. This is true even though the actions of the parties are not in themselves inconsistent with a different transaction such as a consignment for resale or a mere loan of money [*Com Code* § 2201, *UCC* § 2-201, *official cmt* 2].

Distinguish--Partial Payment for Sale of Single Item:

When there is a partial payment instead of a memorandum, the partial payment evinces the existence of a contract and identifies the party to be charged, namely, the seller who received the money. There can be no dispute over quantity when only one item is involved [*Lockwood v. Smigel* (1971) 18 CA3d 800, 802-804, 96 CR 289 (oral contract to sell 1967 Rolls Royce Silver Shadow for \$11,400; buyer paid and seller accepted \$100 when deal was made, and seller's acceptance of that amount proved existence of contract)].

Jury Instructions:

Confirmation of Contract by Acceptance of Payment or Delivery, see *California Forms of Jury Instruction*, Ch. 3H, Instr. MB 300H.34 (Matthew Bender).



Cross Reference:

Memorandum for party seeking to prove contract, see 27.22.

27.13[4] Statute Is Inapplicable If Buyer Accepted Goods.

27.13[4][a] Contract Is Enforceable As to Goods Accepted. A contract that does not meet the writing requirement of *Com Code* § 2201(1) [see 27.06[1]] but is valid in other respects is enforceable with respect to goods that have been received and accepted [*Com Code* § 2201(3)(c)]. The buyer must pay at the contract rate for the goods accepted [*Com Code* § 2207(1)]. Acceptance could have occurred in any of the following ways [see *Com Code* § 2606(1)]:

- The buyer signified that the goods were conforming or that any nonconformity would be disregarded [see 27.13[4][b]].
- The buyer failed to reject the goods [see 27.13[4][c]].
- The buyer acted in contravention of the seller's ownership of the goods [see 27.13[4][d]].



Strategic Point:

Partial performance as a substitute for the required anti-fraud memorandum can validate the contract only for the goods that have been received and accepted [*Allied Grape Growers v. Bronco Wine Co.* (1988) 203 CA3d 432, 443, 249 CR 872]. Receipt and acceptance of goods constitutes an unambiguous overt admission by both parties that a contract actually exists. If the court can make a just apportionment, therefore, the agreed price of any goods actually delivered can be recovered without a writing. The overt actions of the parties justify admitting evidence of the other terms of the contract necessary to make a just apportionment. This is true even though the actions of the parties are not in themselves inconsistent with a different transaction such as a consignment for resale or a mere loan of money [*Com Code* § 2201, *UCC* § 2-201, *official cmt 2*].



Strategic Point--Goods Delivered to Third Person:

The seller's delivery of the goods to a third person at the direction of the buyer, and the third person's acceptance of the goods, will be sufficient for invoking *Com Code* § 2201(3)(c). It is not necessary that the buyer directly (or through an authorized agent) receive and accept the goods [*Dairymen's Cooperative Creamery Assn. v. Leipold* (1973) 34 CA3d 184, 188, 109 CR 753].

Distinguish:

Acceptance of the goods by the buyer does not of itself impair any remedy provided by Division 2 of the Commercial Code for nonconformity [*Com Code* § 2607(2)].

Jury Instructions:

Confirmation of Contract by Acceptance of Payment or Delivery, see *California Forms of Jury Instruction, Ch. 3H, Instr. MB 300H.34* (Matthew Bender).

Acceptance and Rejection Generally, see *California Forms of Jury Instruction, Ch. 3H, Instr. MB 300H.220* (Matthew Bender).

Acceptance by Buyer, see *California Forms of Jury Instruction, Ch. 3H, Instr. MB 300H.221* (Matthew Bender).

 Cross References:

Memorandum for party seeking to prove contract, see 27.23.

What constitutes acceptance of goods, see *Ch. 28, Contract for Sale of Goods--Suing or Defending Action for Breach of Contract Under California Commercial Code, 28.19[3]*.

27.13[4][b] Contract Is Enforceable If Buyer Indicated No Objection As to Conformity of Goods. Acceptance of goods, sufficient to validate a contract to the extent of the accepted goods [see 27.13[4][a]], occurred if the buyer signified to the seller that the goods were conforming or that the buyer would take or retain them in spite of their nonconformity [*Com Code* § 2606(1)(a)].

Prerequisite:

The buyer must have had a reasonable opportunity to inspect the goods before signifying either fact to the seller [*Com Code* § 2606(1)(a)].

Distinguish:

Acceptance of goods by the buyer, if made with knowledge of a nonconformity, cannot be revoked because of the nonconformity unless the acceptance was on the reasonable assumption that the nonconformity would be seasonably cured [*Com Code* § 2207(2); see *Com Code* § 2608 (revocation of acceptance of lot or commercial unit whose nonconformity substantially impairs its value); see also *Com Code* § 2105(5), (6) (definitions of "lot" and "commercial unit")].

Jury Instructions:

Definition of Conforming Goods and Performance, see *California Forms of Jury Instruction, Ch. 3H, Instr. MB 300H.01* (Matthew Bender).

 Cross Reference:

Revocation of acceptance, see *Ch. 28, Contract for Sale of Goods--Suing or Defending Action for Breach of Contract Under California Commercial Code, 28.23, 28.40*.

27.13[4][c] Contract Is Enforceable If Buyer Failed to Reject Goods. Acceptance of goods, sufficient to validate a contract to the extent of the accepted goods [see 27.13[4][a]], occurred if the buyer failed to make an effective rejection [*Com Code* § 2606(1)(b); see *Com Code* §§ 2602-2605 (rejection of goods)].

Prerequisite:

The buyer's failure to make an effective rejection must have occurred after the buyer had a reasonable opportunity to inspect the goods [*Com Code* § 2606(1)(b)].

**Warning:**

Rejection of goods must have occurred within a reasonable time after their delivery or tender. It is ineffective unless the buyer seasonably notifies the seller [*Com Code* § 2602(1)].

**Strategic Point:**

Acceptance of goods by the buyer generally precludes rejection of the goods accepted, unless the acceptance was on the reasonable assumption that the nonconformity would be cured [*Com Code* § 2607(2)].

Jury Instructions:

Requirements of an Effective Rejection, see *California Forms of Jury Instruction, Ch. 3H, Instr. MB 300H.224* (Matthew Bender).

Definition of Reasonable Time, see *California Forms of Jury Instruction, Ch. 3H, Instr. MB 300H.14* (Matthew Bender).

Definition of Seasonably, see *California Forms of Jury Instruction, Ch. 3H, Instr. MB 300H.15* (Matthew Bender).

Giving Notice or Notification, see *California Forms of Jury Instruction, Ch. 3H, Instr. MB 300H.17* (Matthew Bender).

27.13[4][d] Contract Is Enforceable If Buyer Acted in Contravention of Seller's Ownership. Acceptance of goods, sufficient to validate a contract to the extent of the accepted goods [see 27.13[4][a]], occurred if the buyer did any act inconsistent with the seller's ownership of the goods [*Com Code* § 2606(1)(c)].

Distinguish--Act Wrongful As to Seller:

If the act was wrongful as against the seller, it was an acceptance only if ratified by the seller [*Com Code* § 2606(1)(c)].

27.13[4][e] Contract Is Enforceable If Buyer Accepted Part of Commercial Unit. Acceptance of a part of any commercial unit is acceptance of that entire unit [*Com Code* § 2606(2); see *Com Code* § 2105(6) (definition of "commercial unit")].

Jury Instructions:

Definition of Commercial Unit, see *California Forms of Jury Instruction, Ch. 3H, Instr. MB 300H.03* (Matthew Bender).

27.13[5] Equitable Estoppel Can Prevent Application of Statute. Generally, when a party would suffer an unconscionable injury if a statute of frauds were applied to prevent enforcement of an oral contract, that party may invoke the doctrine of equitable estoppel to overcome a failure to meet the writing requirement [*Allied Grape Growers v. Bronco Wine Co.* (1988) 203 CA3d 432, 444, 249 CR 872 ; see *Siam Numhong Prods. Co. v. Eastimpex* (ND Cal 1994) 866 F Supp 445, 448 n5 (equitable estoppel is additional exception to statute of frauds defense); *Com Code* § 1103 (principles of law and equity, including estoppel, supplement provisions of Commercial Code); see also *Com Code* § 1304 (any contract subject to Commercial Code imposes obligation of good faith in its performance)].

**Strategic Point--Proof Supporting Equitable Estoppel:**

In California, the doctrine of estoppel is applicable when one party would suffer an unconscionable injury if the statute of frauds were asserted to prevent enforcement of an oral contract. Proof of the unconscionable injury that would result from denying enforcement of the contract depends on evidence either that one party was induced by the other party to seriously change position by relying on the oral agreement or that the other party would be unjustly enriched if the contract were not enforced [*Monarco v. Lo Greco* (1950) 35 C2d 621, 623-624, 220 P2d 737 ; *Allied Grape Growers v. Bronco Wine Co.* (1988) 203 CA3d 432, 444, 249 CR 872].

Distinguish--Buyer's Loss of Profit Is Not Unconscionable Injury:

The fact that the buyer will lose a profit due to being unable to resell goods that the buyer expected to obtain under the oral contract, is not alone sufficient to show that an unconscionable injury would result to the buyer unless the contract were enforced [*C.R. Fedrick, Inc. v. Borg-Warner Corp.* (9th Cir 1977) 552 F2d 852, 857-858 ; *Caplan v. Roberts* (9th Cir 1974) 506 F2d 1039, 1041].



Cross Reference:

Discussion of statute of frauds generally and equitable estoppel, see *Ch. 15, Attacking or Defending Existence of Contract--Failure to Comply With Applicable Formalities, 15.07, 15.08.*

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentStatutes of FraudsGeneral OverviewCommercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentStatutes of FraudsExceptionsGeneral OverviewCommercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentStatutes of FraudsExceptionsEstoppelCommercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentStatutes of FraudsExceptionsMerchant RuleCommercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentStatutes of FraudsExceptionsStatutory Exceptions



134 of 196 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 27 Contract for Sale of Goods--Attacking or Defending Existence of Contract Under California Commercial Code

III. ESTABLISHING VALIDITY OF CONTRACT FOR SALE OF GOODS

2-27 MB Practice Guide: CA Contract Litigation 27.14

27.14 Parol Evidence Can Be Used.

27.14[1] Written Agreement Cannot Be Contradicted. No evidence of any prior agreement or of a contemporaneous oral agreement may contradict either of the following [*Com Code § 2202*]:

- Terms with respect to which the confirmatory memoranda of the parties agree; or
- Terms that are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to the terms included in it.

Distinguish--Usage of Trade, Course of Dealing, and Course of Performance:

Written terms that cannot be contradicted by parol evidence may be explained or supplemented by evidence of a usage of trade [*see 27.14[3]*], evidence of a course of dealing [*see 27.14[4]*], or evidence of a course of performance [*see 27.14[5]*]. The hierarchy of evidence is:

- Express terms of the parties' agreement control the other three forms of evidence [*Com Code § 1303(e)(1)*].
- Course of performance controls both course of dealing and usage of trade [*Com Code § 1303(e)(2)*].
- Course of dealing controls usage of trade [*Com Code § 1303(e)(3)*].



Strategic Point:

The rule in *Com Code § 2202* is identical in all material respects to the general parol evidence rule in *CCP § 1856(a)* [*see Continental Airlines, Inc. v. McDonnell Douglas Corp. (1989) 216 CA3d 388, 418 n17, 264 CR 779*]. Therefore, cases applying that general rule may be relevant in a case governed by Division 2 of the Commercial Code.

Jury Instructions:

Contract Terms--General Instruction, see *California Forms of Jury Instruction, Ch. 3H, Instr. MB 300H.60* (Matthew Bender).

Definition of Agreement, see *California Forms of Jury Instruction, Ch. 3H, Instr. MB 300H.07* (Matthew Bender).

Definition of Contract Terms, see *California Forms of Jury Instruction, Ch. 3H, Instr. MB 300H.09* (Matthew Bender).

Evidence Supplementing and Explaining Terms, see *California Forms of Jury Instruction, Ch. 3H, Instr. MB 300H.61* (Matthew Bender).

Interpretation of Contract Terms, see *California Forms of Jury Instruction, Ch. 3H, Instr. MB 300H.90* (Matthew Bender).

➡ Cross Reference:

Parol evidence rule of CCP § 1856(a), see *Ch. 21, Asserting a Particular Construction of Contract, 21.41 -21.43, 21.53, 21.57, 21.58*.

27.14[2] Additional Terms Can Be Proved. Written terms that cannot be contradicted by parol evidence [see 27.14[1]] may be explained or supplemented by evidence of consistent additional terms [*Com Code* § 2202(b)].

Exception:

Evidence of consistent additional terms is not admissible if the court finds that the parties intended the writing to be a complete and exclusive statement of the terms of their agreement [*Com Code* § 2202(b)]. In other words, when the additional terms are such that, if agreed on, they would certainly have been included in the parties' written agreement in the view of the court, evidence of their alleged making must be kept from a jury [*Com Code* § 2202, *UCC* § 2-202, *official cmt 3*].

Consider:

Rather than assuming that the parties intended a fully integrated agreement, *Com Code* § 2202(b) assumes that a written contract for the sale of goods does not express the full agreement of the parties unless the court expressly so finds [*Balfour, Guthrie & Co., Ltd. v. Gourmet Farms* (1980) 108 CA3d 181, 188, 166 CR 422 ; see *In re Pacific Sunwest Printing* (Bankr SD Cal 1980) 6 BR 408, 413 (whether written contract for sale of goods is intended by parties as final expression of their agreement is question of fact to be determined by court after reviewing all evidence, extrinsic or otherwise)].

Example--Finding of Integrated Agreement:

A seller sold a machine to a buyer pursuant to a written contract stating that it superseded "all prior oral or written agreements or representations" and excluded all warranties "not set forth in a writing signed by an authorized representative" of the seller. The trial court correctly found that the parties meant what they said in their contract. Therefore, the seller was not bound by a representation (that proved to be materially inaccurate) about what the machine could do, which was stated in a separate letter signed on the seller's behalf by someone other than "an authorized representative" of the seller [*S.M. Wilson & Co. v. Smith Int'l, Inc.* (9th Cir 1978) 587 F2d 1363, 1370-1371].

**Strategic Point:**

The rule in *Com Code* § 2202(b) is comparable to the general parol evidence rule in CCP § 1856(b) [see

FPI Dev., Inc. v. Nakashima (1991) 231 CA3d 367, 387, 282 CR 508 ; *Continental Airlines, Inc. v. McDonnell Douglas Corp.* (1989) 216 CA3d 388, 418 n18, 264 CR 779 (essentially same provision)]. Therefore, cases applying that general rule may be relevant in a case governed by Division 2 of the Commercial Code.

Jury Instructions:

Evidence of Consistent Additional Terms, see *California Forms of Jury Instruction, Ch. 3H, Instr. MB 300H.62* (Matthew Bender).



Cross Reference:

Parol evidence rule of CCP § 1856(b), see Ch. 21, *Asserting a Particular Construction of Contract*, 21.41 -21.43, 21.53, 21.57, 21.58.

27.14[3] Usage of Trade Is Relevant.

27.14[3][a] Trade Usage May Explain or Supplement Express Terms. Written terms that cannot be contradicted by parol evidence [see 27.14[1]] may be explained or supplemented by evidence of usage of trade [Com Code § 2202(a)].

Any usage of trade in the vocation or trade in which the parties are engaged or of which they are or should be aware is relevant in ascertaining the meaning of the parties' agreement, may give particular meaning to specific terms of the agreement, and may supplement or qualify the terms of the agreement. A usage of trade applicable in the place in which part of the performance under the agreement is to occur may be so utilized as to that part of the performance [Com Code § 1303(d)].



Strategic Point--Ambiguity Is Not Required:

Com Code § 2202(a) permits a trade usage to be put in evidence in aid of interpretation without requiring proof of ambiguity [*Balfour, Guthrie & Co., Ltd. v. Gourmet Farms* (1980) 108 CA3d 181, 190, 166 CR 422 (trial court properly admitted testimony of expert on subject of custom and usage in grain brokerage industry in aid of interpreting pricing mechanism in contract to buy and sell wheat, even though pricing terms were complete and unambiguous)]. The parties' writings are to be read on the assumption that the usages of trade were taken for granted when the writings were phrased. Therefore, unless carefully negated, the usages of trade have become an element of the meaning of the words used [*Hegglblade-Marguleas-Tenneco, Inc. v. Sunshine Biscuit, Inc.* (1976) 59 CA3d 948, 954-955, 131 CR 183 ; Com Code § 2202, UCC § 2-202, official cmt 2].

Examples:

- A written "sales and marketing agreement" between strawberry growers and a broker of fresh strawberries contained provisions, the meaning of which the parties disputed, concerning loans by the broker to assist the growers in producing their crops. In upholding a trial court's conclusion about the meaning of that agreement, an appellate court first pointed out the parties' course of performance [see 27.14[5]] then observed, "Furthermore, when considered together with the circumstances of its execution--including the [separate] financing statement, the past relationship between [the broker] and the growers, and *general practice in the strawberry production industry*--this document should be read to encompass the growers' obligation to repay loans made by [the broker] to assist them in financing production of their strawberry crop" [*New W. Fruit Corp. v. Coastal Berry Corp.* (1991) 1 CA4th 92,

100, 1 CR2d 664, 11 CR2d 664 (emphasis added)].

■ A food product company contracted to buy 100,000 sacks of potatoes from a grower, whereupon the grower undertook to plant the potatoes. By the time the potatoes were grown, the food product company's requirements had declined, and it needed only 60,000 sacks. The grower sued for damages. At trial the food product company offered testimony as to the custom and usage of the potato processing industry, to the effect that the quantity specified in such a contract is only an estimate and that the buyer would not be obligated to take more than the buyer's actual requirements. On appeal the grower contended that the quantity terms in the contract were definite and unambiguous, hence it was error to admit into evidence the custom of the industry to regard the amounts specified as reasonable estimates. The appellate court held that contention to be without merit [*Heggblade-Marguleas-Tenneco, Inc. v. Sunshine Biscuit, Inc.* (1976) 59 CA3d 948, 954, 131 CR 183].

Prerequisite:

Evidence of a relevant usage of trade offered by one party is not admissible unless that party has given the other party notice that the court finds sufficient to prevent unfair surprise to the other party [*Com Code § 1303(g)*].



Strategic Point:

The rule in *Com Code § 2202(a)* is comparable to the general parol evidence rule in *CCP § 1856(c)*. Therefore, cases applying that general rule may be relevant in a case governed by Division 2 of the Commercial Code.



Cross Reference:

Parol evidence rule of *CCP § 1856(c)*, see *Ch. 21, Asserting a Particular Construction of Contract*, 21.41 -21.43, 21.53, 21.57, 21.58.

27.14[3][b] Trade Usage Is Any Standard Practice or Method. A usage of trade is any practice or method of dealing having such regularity of observance in a place, vocation, or trade as to justify an expectation that it will be observed with respect to the transaction in question [*Com Code § 1303(c)*].



Strategic Point--Proof of Trade Usage:

The existence and scope of a usage of trade are to be proved as facts [*Com Code § 1303(c)*; *Board of Trade v. Swiss Credit Bank* (9th Cir 1979) 597 F2d 146, 149 (evidence concerning usage of trade was admissible and created triable issue of fact as to meaning intended by parties for phrase "full set clean on board bills of lading")].



Strategic Point--Knowledge of Trade Usage Assumed:

Persons carrying on a particular trade are deemed to be aware of prominent trade customs applicable to their industry. The knowledge may be actual or constructive. It is constructive if the custom is of such general and universal application that the party must be presumed to know of it. The party to be bound by constructive knowledge is not required to have been engaged in the industry for any length of time [*Heggblade-Marguleas-Tenneco, Inc. v. Sunshine Biscuit, Inc.* (1976) 59 CA3d 948, 956-957, 131 CR 183].

**Strategic Point--Legal Issue:**

If it is established that a usage of trade is embodied in a trade code or similar record, the interpretation of the record is a question of law [*Com Code § 1303(c)*].

Jury Instructions:

Usage of Trade Defined, see *California Forms of Jury Instruction, Ch. 3H, Instr. MB 300H.12* (Matthew Bender).

27.14[3][c] Trade Usage Can Be Localized. A usage of trade applicable in the place in which part of the performance under the agreement is to occur may be so utilized as to that part of the performance [*Com Code § 1303(d)*].

27.14[3][d] Written Terms, Course of Performance, and Course of Dealing Supersede Trade Usage. The express terms of an agreement and any applicable usage of trade must be construed whenever reasonable as consistent with each other. However, if such a construction is unreasonable, the following rules apply [*Com Code § 1303(e)*]:

- Express terms prevail over course of performance [*see 27.14[5]*], course of dealing [*see 27.14[4]*], and usage of trade.
- Course of performance prevails over course of dealing and usage of trade.
- Course of dealing prevails over usage of trade.

27.14[4] Course of Dealing Is Relevant.

27.14[4][a] Course of Dealing May Explain or Supplement Express Terms. Written terms that cannot be contradicted by parol evidence [*see 27.14[1]*] may be explained or supplemented by evidence of a course of dealing [*Com Code § 2202(a)*]. A course of dealing is relevant in ascertaining the meaning of the parties' agreement, may give particular meaning to specific terms of the agreement, and may supplement or qualify the terms of the agreement [*Com Code § 1303(d)*].

Consider:

The parties' writings are to be read on the assumption that prior dealings between the parties were taken for granted when the writings were phrased. Therefore, unless carefully negated, the course of dealing has become an element of the meaning of the words used [*Com Code § 2202, UCC § 2-202, official cmt 2*].

Example:

A written "sales and marketing agreement" between strawberry growers and a broker of fresh strawberries contained provisions, the meaning of which the parties disputed, concerning loans by the broker to assist the growers in producing their crops. In upholding a trial court's conclusion about the meaning of that agreement, an appellate court first pointed out the parties' course of performance [*see 27.14[5]*] then observed, "Furthermore, when considered together with the circumstances of its execution--including the [separate] financing statement, *the past relationship between [the broker] and the growers*, and general practice in the strawberry production industry--this document should be read to encompass the growers' obligation to repay loans made by [the broker] to assist them in financing production of their strawberry crop" [*New W. Fruit Corp. v. Coastal Berry Corp. (1991) 1 CA4th 92, 100, 1 CR2d 664, 11 CR2d 664* (emphasis added)].

**Strategic Point:**

The rule in *Com Code* § 2202(a) is comparable to the general parol evidence rule in *CCP* § 1856(c). Therefore, cases applying that general rule may be relevant in a case governed by Division 2 of the Commercial Code.

**Cross Reference:**

Parol evidence rule of *CCP* § 1856(c), see *Ch. 21, Asserting a Particular Construction of Contract*, 21.41 -21.43, 21.53, 21.57, 21.58.

27.14[4][b] Course of Dealing Is Sequence of Previous Conduct Between Parties. A course of dealing is a sequence of conduct concerning previous transactions between the parties to a particular transaction that is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct [*Com Code* § 1303(b)].

Jury Instructions:

Course of Dealing Defined, see *California Forms of Jury Instruction, Ch. 3H, Instr. MB 300H.11* (Matthew Bender).

27.14[4][c] Written Terms and Course of Performance Supersede Course of Dealing. The express terms of an agreement and an applicable course of dealing must be construed wherever reasonable as consistent with each other; but when such a construction is unreasonable, the following rules apply [*Com Code* § 1303(e)]:

- Express terms prevail over course of performance [see 27.14[5]], course of dealing, and usage of trade [see 27.14[3]].
- Course of performance prevails over course of dealing and usage of trade.
- Course of dealing prevails over usage of trade.

27.14[5] Course of Performance Is Relevant.

27.14[5][a] Course of Performance May Explain or Supplement Express Terms. Written terms that cannot be contradicted by parol evidence [see 27.14[1]] may be explained or supplemented by evidence of a course of performance [*Com Code* § 2202(a)]. If the contract for sale involves repeated occasions for performance by either party with knowledge of the nature of the performance and opportunity for objection to it by the other, any course of performance accepted or acquiesced in without objection will be relevant to determine the meaning of the agreement [*Com Code* § 1303(d)].

Example:

A written "sales and marketing agreement" between strawberry growers and a broker of fresh strawberries contained provisions, the meaning of which the parties disputed, concerning loans by the broker to assist the growers in producing their crops. In upholding a trial court's conclusion about the meaning of that agreement, an appellate court observed, "Finally, the record indicates that after the agreement was executed, [the broker] continued making loans to the growers and deducting the amounts they owed from the proceeds of strawberry sales; *the growers' acquiescence in this course of performance indicates this exchange was mutually understood to be within the scope of the ongoing relationship* between the growers and [the broker]" [*New W. Fruit Corp. v. Coastal Berry Corp.* (1991) 1 CA4th 92, 100, 1 CR2d 664, 11 CR2d 664 (emphasis added)].

**Strategic Point:**

The rule in *Com Code* § 2202(a) is comparable to the general parol evidence rule in *CCP* § 1856(c). Therefore, cases applying that general rule may be relevant in a case governed by Division 2 of the Commercial Code.

Jury Instructions:

Course of Performance Defined, see *California Forms of Jury Instruction, Ch. 3H, Instr. MB 300H.13* (Matthew Bender).

**Cross Reference:**

Parol evidence rule of *CCP* § 1856(c), see *Ch. 21, Asserting a Particular Construction of Contract, 21.41 -21.43, 21.53, 21.57, 21.58.*

27.14[5][b] Written Terms Supersede Course of Performance. The express terms of an agreement and any course of performance, as well as any course of dealing [see 27.14[4]] and usage of trade [see 27.14[3]], must be construed whenever reasonable as consistent with each other; but when such a construction is unreasonable, the following rules apply [*Com Code* § 1303(e)]:

- Express terms prevail over course of performance [see 27.14[5]], course of dealing, and usage of trade [see 27.14[3]].
- Course of performance prevails over course of dealing and usage of trade.
- Course of dealing prevails over usage of trade.

27.14[5][c] Course of Performance Can Show Modification or Waiver of Inconsistent Terms. Subject to the provisions of *Com Code* § 2209 on modification [see 27.10] and waiver [see 27.11], a course of performance is relevant to show a waiver or modification of any term inconsistent with that course of performance [*Com Code* § 1303(f)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentParol EvidenceGeneral
 OverviewCommercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentParol EvidenceAdditional
 TermsCommercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentParol EvidenceGap-Filler Provisions



135 of 196 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 27 Contract for Sale of Goods--Attacking or Defending Existence of Contract Under California Commercial Code
IV. FORMS

2-27 MB Practice Guide: CA Contract Litigation 27.15

27.15 Answer to Complaint for Breach of Contract for Sale of Goods With Affirmative Defense--Commercial Code Statute of Frauds.

Answer to Complaint for Breach of Contract for Sale of Goods With Affirmative Defense--Commercial Code Statute of Frauds.

[Name of attorney]

_____[Street address]

_____[City, state, and ZIP]

_____[Area code and phone number]

_____[State Bar no. of attorney]

Attorney for _____[name of party]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

[name] _____,

Plaintiff,

vs.

[name] _____,

Defendant.

)

)

)

)

)

)

)

NO.

ANSWER OF

_____[identify defendant, e.g.,
DEFENDANT MARY JONES] TO COMPLAINT
OF

_____[identify plaintiff, e.g.,
PLAINTIFF JOHN SMITH] [LIMITED CIVIL CASE]
Judge:

Department:

Defendant answers the complaint as follows:

[Include general denial below, or set forth, in numbered paragraphs, specific denials, admissions, and allegations in response to those in complaint, in order in which they are alleged in complaint:]

1. Pursuant to *Code of Civil Procedure Section 431.30(b)(1)*, Defendant generally denies each and every allegation of Plaintiff's complaint, including all the purported causes of action contained therein, and further denies that Plaintiff is entitled to any equitable or legal relief, or any damages whatsoever.

[Defendant asserts the following affirmative defense(s). By doing so, Defendant shall not be deemed to have assumed the burden of proving any matters that otherwise would be Plaintiff's burden.]

[Allege any affirmative defenses, e.g.,]

FIRST AFFIRMATIVE DEFENSE
(Commercial Code Statute of Frauds)

2. The contract alleged in the complaint is for the sale of goods for a price of \$500 or more, and _____ [there is no writing or the writing that allegedly embodies the alleged contract is not] sufficient to indicate that a contract for sale was made between the parties and signed by Defendant or by Defendant's authorized agent or broker.

[ADD additional affirmative defenses, if any; see Ch. 13, Attacking or Defending Existence of Contract--Absence of Essential Element, 13.16]

[CONTINUE]

WHEREFORE, Defendant prays as follows:

1. That Plaintiff take nothing by his complaint herein;
2. For costs of suit; and
3. For such other and further relief as the court deems proper.

Dated: _____

[firm name, if any] _____

By: [signature] _____

[typed name] _____

Attorney for Defendant

[ADD following verification, if applicable]

VERIFICATION

I am the defendant in the above entitled action; I have read the foregoing answer and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein stated on information and belief, and, as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

[date] _____

[signature] _____

[typed name] _____

NOTES.

Authority:

CCP § 431.30(b); Com Code § 2201(1)

Defense of Statute of Frauds:

See 27.06

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Pleading & Practice Defenses, Demurrers & Objections Affirmative Defenses General Overview Civil Procedure Pleading & Practice Pleadings Answers Commercial Law (UCC) Sales (Article 2) Breach, Repudiation & Excuse General Overview Commercial Law (UCC) Sales (Article 2) Form, Formation & Readjustment Statutes of Frauds General Overview



136 of 196 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 27 Contract for Sale of Goods--Attacking or Defending Existence of Contract Under California Commercial Code
IV. FORMS

2-27 MB Practice Guide: CA Contract Litigation 27.16

27.16 Memorandum--No Contract by Merchant Because Offer Was Revoked and Defendant Did Not Sign Assurance in Plaintiff's Form.

Memorandum--No Contract by Merchant Because Offer Was Revoked and Defendant Did Not Sign Assurance in Plaintiff's Form.

[Include the following, if appropriate, in a memorandum by a merchant seeking, as defendant, to prove the absence of a contract for the sale of goods, along with factual discussion demonstrating how the principles of law stated below are applicable to the particular case.]

NO CONTRACT EXISTED BECAUSE DEFENDANT REVOKED THE OFFER BEFORE PLAINTIFF'S ACCEPTANCE WAS COMMUNICATED TO DEFENDANT. THE OFFER WAS NOT IRREVOCABLE EVEN THOUGH IT WAS IN A SIGNED WRITING THAT BY ITS TERMS GAVE ASSURANCE THAT IT WOULD BE HELD OPEN, BECAUSE THAT ASSURANCE WAS IN A FORM SUPPLIED BY PLAINTIFF, AND DEFENDANT DID NOT SEPARATELY SIGN IT.

Merchant Must Sign Assurance in Offeree's Form. An offer by a merchant to buy or sell goods in a signed writing that by its terms gives assurance that it will be held open is not revocable, for lack of consideration, during the time stated or, if no time is stated, for a reasonable time not exceeding three months; but any such term of assurance on a form supplied by the offeree must be separately signed by the offeror (*Com. Code § 2205(a)*).

NOTES.

Merchant Did Not Sign Term of Assurance in Offeree's Form: See 27.04[1]

Detailed Discussion of Format/Skeletal Forms for Memoranda:

California Forms of Pleading and Practice, Ch. 417, Points and Authorities (Matthew Bender); and California Points and Authorities, Ch. 1, Writing Legal Memoranda and Briefs (Matthew Bender)

Additional Memoranda Relating to Contracts:

California Points and Authorities, § 206.30 et seq (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentGeneral OverviewCommercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentFirm OffersCommercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentOffer & Acceptance



137 of 196 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 27 Contract for Sale of Goods--Attacking or Defending Existence of Contract Under California Commercial Code
IV. FORMS

2-27 MB Practice Guide: CA Contract Litigation 27.17

27.17 Memorandum--No Contract by Merchant Because Oral Offer to Supply Licensed Contractor Was Not Confirmed in Writing and Was Revoked.

Memorandum--No Contract by Merchant Because Oral Offer to Supply Licensed Contractor Was Not Confirmed in Writing and Was Revoked.

[Include the following, if appropriate, in a memorandum by a merchant seeking, as defendant, to prove the absence of a contract for the sale of goods, along with factual discussion demonstrating how the principles of law stated below are applicable to the particular case.]

NO CONTRACT EXISTED BECAUSE DEFENDANT REVOKED THE OFFER BEFORE PLAINTIFF'S ACCEPTANCE WAS COMMUNICATED TO DEFENDANT. THE OFFER WAS NOT IRREVOCABLE BECAUSE IT WAS AN ORAL OFFER TO SUPPLY GOODS TO A LICENSED CONTRACTOR FOR A PRICE OF \$2,500 OR MORE, AND IT WAS NOT CONFIRMED IN WRITING BY PLAINTIFF OR PLAINTIFF'S AGENT WITHIN 48 HOURS AFTER IT WAS RENDERED.

Oral Offer to Supply Contractor Must Be Confirmed in Writing. When a merchant renders an offer to supply goods to a licensed contractor, and the merchant has knowledge that the contractor is duly licensed and that the offer will be relied on by the contractor in the submission of a bid for a construction contract with a third person, the offer is irrevocable, notwithstanding lack of consideration, for 10 days after the awarding of the contract to the prime contractor but in no event more than 90 days after the date the bid or offer was rendered by the merchant, except that an oral offer for a price of \$2,500 or more must be confirmed in writing by the contractor or his or her agent within 48 hours after it is rendered. Failure by the contractor to confirm such an offer in writing releases the merchant from the offer (*Com. Code* § 2205(b)).

NOTES.

Oral Offer to Supply Contractor Was Not Confirmed in Writing: See 27.04[2]

Detailed Discussion of Format/Skeletal Forms for Memoranda:

California Forms of Pleading and Practice, Ch. 417, Points and Authorities (Matthew Bender); and California Points and Authorities, Ch. 1, Writing Legal Memoranda and Briefs (Matthew Bender)

Additional Memoranda Relating to Contracts:

California Points and Authorities, § 206.30 et seq (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentGeneral OverviewCommercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentFirm OffersCommercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentOffer & Acceptance



138 of 196 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 27 Contract for Sale of Goods--Attacking or Defending Existence of Contract Under California Commercial Code
IV. FORMS

2-27 MB Practice Guide: CA Contract Litigation 27.18

27.18 Memorandum--Compliance With Statute of Frauds for Sale of Goods--Deficient Writing Is Not Insufficient.

Memorandum--Compliance With Statute of Frauds for Sale of Goods--Deficient Writing Is Not Insufficient.

[Include the following, if appropriate, in a memorandum by the party seeking to prove a contract for the sale of goods, along with factual discussion demonstrating how the principles of law stated below are applicable to the particular case.]

_____ EVEN IF THE WRITING THAT
INDICATES THE PARTIES' CONTRACT [OMITS
_____ (specify omitted terms, e.g., THE
DELIVERY DATE) or _____
INCORRECTLY STATES (specify incorrectly stated terms, e.g.,
_____ THE PRICE)], THE WRITING IS
NOT INSUFFICIENT ON ACCOUNT OF THAT [OMISSION or ERROR].

Deficient Writing Is Not Insufficient. A writing, if sufficient to indicate that a contract for the sale of goods for a price of \$500 or more has been made between the parties and signed by the party against whom enforcement is sought or by his or her authorized agent or broker, is not insufficient because it omits or incorrectly states a term agreed on, but the contract is not enforceable on this ground beyond the quantity of goods shown in the writing (*Com. Code* § 2201(1)).

NOTES.

Deficiency in Writing:

See 27.12[1]

Detailed Discussion of Format/Skeletal Forms for Memoranda:

California Forms of Pleading and Practice, Ch. 417, Points and Authorities (Matthew Bender); and

California Points and Authorities, Ch. 1, Writing Legal Memoranda and Briefs (Matthew Bender)

Additional Memoranda Relating to Contracts:

California Points and Authorities, § 206.30 et seq (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentStatutes of FraudsGeneral
OverviewCommercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentStatutes of FraudsFormal
Requirements



139 of 196 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 27 Contract for Sale of Goods--Attacking or Defending Existence of Contract Under California Commercial Code
IV. FORMS

2-27 MB Practice Guide: CA Contract Litigation 27.19

27.19 Memorandum--Compliance With Statute of Frauds for Sale of Goods--Confirmation of Contract Between Merchants Is Sufficient.

Memorandum--Compliance With Statute of Frauds for Sale of Goods--Confirmation of Contract Between Merchants Is Sufficient.

[Include the following, if appropriate, in a memorandum by the party seeking to prove a contract for the sale of goods, along with factual discussion demonstrating how the principles of law stated below are applicable to the particular case.]

THE COMMERCIAL CODE STATUTE OF FRAUDS (*COMMERCIAL CODE SECTION 2201*
_____) HAS BEEN SATISFIED
BECAUSE PLAINTIFF AND DEFENDANTS ARE BOTH MERCHANTS AND *[name of party against whom enforcement is sought, e.g., DEFENDANT]* RECEIVED, WITHIN A REASONABLE TIME, A WRITTEN CONFIRMATION OF THE CONTRACT, HAD REASON TO KNOW ITS CONTENTS, AND FAILED TO GIVE WRITTEN NOTICE OF OBJECTION WITHIN 10 DAYS AFTER RECEIVING IT.

Confirmation of Contract Between Merchants Is Sufficient. Between merchants, if within a reasonable time, a writing in confirmation of a contract for the sale of goods for a price of \$500 or more, which is sufficient against the sender, is received, and the party receiving it has reason to know its contents, then it satisfies the requirements of *Commercial Code Section 2201(1)*, against the receiving party, unless written notice of objection to its contents is given within 10 days after it is received (*Com. Code § 2201(2)*).

NOTES.

Confirmation of Contract Between Merchants:

See 27.12[2]

Detailed Discussion of Format/Skeletal Forms for Memoranda:

California Forms of Pleading and Practice, Ch. 417, Points and Authorities (Matthew Bender); and California Points and Authorities, Ch. 1, Writing Legal Memoranda and Briefs (Matthew Bender)

Additional Memoranda Relating to Contracts:

California Points and Authorities, § 206.30 et seq (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentStatutes of FraudsGeneral
OverviewCommercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentStatutes of
FraudsExceptionsGeneral OverviewCommercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentStatutes
of FraudsExceptionsMerchant Rule



140 of 196 DOCUMENTS

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Chapter 27 Contract for Sale of Goods--Attacking or Defending Existence of Contract Under California Commercial Code
IV. FORMS

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27.20 Memorandum--Exceptions to Statute of Frauds for Sale of Goods--Goods Were to Be Specially Manufactured for Buyer.

Memorandum--Exceptions to Statute of Frauds for Sale of Goods--Goods Were to Be Specially Manufactured for Buyer.

[Include the following, if appropriate, in a memorandum by the party seeking to prove a contract for the sale of goods, along with factual discussion demonstrating how the principles of law stated below are applicable to the particular case.]

ALTHOUGH THE PARTIES' CONTRACT DOES NOT SATISFY THE REQUIREMENTS OF COMMERCIAL CODE SECTION 2201 (1), IT IS ENFORCEABLE BECAUSE IT SATISFIES ALL OF THE FOLLOWING REQUIREMENTS:

1. IT IS VALID IN OTHER RESPECTS.
2. IT REQUIRES THAT THE GOODS BE SPECIALLY MANUFACTURED FOR THE BUYER.
3. THE GOODS ARE NOT SUITABLE FOR SALE TO OTHERS IN THE ORDINARY COURSE OF THE SELLER'S BUSINESS.
4. THE SELLER MADE _____ [A SUBSTANTIAL BEGINNING OF THEIR MANUFACTURE *or* COMMITMENTS FOR THEIR PROCUREMENT].
5. THE SELLER MADE _____ [THAT BEGINNING *or* THOSE COMMITMENTS BEFORE NOTICE OF REPUDIATION WAS RECEIVED AND UNDER CIRCUMSTANCES WHICH REASONABLY INDICATED THAT THE GOODS WERE FOR THE BUYER.

Contract Is Enforceable If Goods Are Specially Manufactured for Buyer. A contract that does not satisfy the requirements of *Commercial Code Section 2201(1)*, but that is valid in other respects, is enforceable if the goods are to

be specially manufactured for the buyer and are not suitable for sale to others in the ordinary course of the seller's business and the seller, before notice of repudiation is received and under circumstances that reasonably indicate that the goods are for the buyer, has made either a substantial beginning of their manufacture or commitments for their procurement (*Com. Code § 2201(3)(a)*).

NOTES.

Goods Specially Manufactured:

See 27.13[1]

Detailed Discussion of Format/Skeletal Forms for Memoranda:

California Forms of Pleading and Practice, Ch. 417, Points and Authorities (Matthew Bender); and
California Points and Authorities, Ch. 1, Writing Legal Memoranda and Briefs (Matthew Bender)

Additional Memoranda Relating to Contracts:

California Points and Authorities, § 206.30 et seq (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentStatutes of FraudsExceptionsGeneral
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FraudsExceptionsStatutory Exceptions



141 of 196 DOCUMENTS

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Chapter 27 Contract for Sale of Goods--Attacking or Defending Existence of Contract Under California Commercial Code
IV. FORMS

2-27 MB Practice Guide: CA Contract Litigation 27.21

27.21 Memorandum--Exceptions to Statute of Frauds for Sale of Goods--Adverse Party Admits Existence of Contract.

Memorandum--Exceptions to Statute of Frauds for Sale of Goods--Adverse Party Admits Existence of Contract.

[Include the following, if appropriate, in a memorandum by the party seeking to prove a contract for the sale of goods, along with factual discussion demonstrating how the principles of law stated below are applicable to the particular case.]

ALTHOUGH THE PARTIES' CONTRACT DOES NOT SATISFY THE REQUIREMENTS OF COMMERCIAL CODE SECTION 2201(1), IT IS VALID IN OTHER RESPECTS, AND THE CONTRACT IS ENFORCEABLE TO THE EXTENT OF THE QUANTITY OF GOODS ADMITTED BECAUSE THE

_____ [DEFENDANT or
_____ PLAINTIFF] HAS ADMITTED [IN
A PLEADING or IN TESTIMONY or specify other circumstances of admission in court, e.g., THROUGH
COUNSEL'S STATEMENT IN OPEN COURT] THAT A CONTRACT FOR SALE WAS MADE.

Contract Is Enforceable If Party Admits Existence of Contract. A contract that does not satisfy the requirements of *Commercial Code Section 2201(1)*, but that is valid in other respects, is enforceable if the party against whom enforcement is sought admits in a pleading, in testimony, or otherwise in court that a contract for sale was made, but the contract is not enforceable on that ground beyond the quantity of goods admitted (*Com. Code § 2201(3)(b)*).

NOTES.

Party Admits Existence of Contract:

See 27.13[2]

Detailed Discussion of Format/Skeletal Forms for Memoranda:

California Forms of Pleading and Practice, Ch. 417, Points and Authorities (Matthew Bender); and
California Points and Authorities, Ch. 1, Writing Legal Memoranda and Briefs (Matthew Bender)

Additional Memoranda Relating to Contracts:

California Points and Authorities, § 206.30 et seq (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentStatutes of FraudsExceptionsGeneral
OverviewCommercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentStatutes of
FraudsExceptionsEstoppelCommercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentStatutes of
FraudsExceptionsStatutory Exceptions



142 of 196 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 27 Contract for Sale of Goods--Attacking or Defending Existence of Contract Under California Commercial Code
IV. FORMS

2-27 MB Practice Guide: CA Contract Litigation 27.22

27.22 Memorandum--Exceptions to Statute of Frauds for Sale of Goods--Seller Accepted Payment.

Memorandum--Exceptions to Statute of Frauds for Sale of Goods--Seller Accepted Payment.

[Include the following, if appropriate, in a memorandum by the party seeking to prove a contract for the sale of goods, along with factual discussion demonstrating how the principles of law stated below are applicable to the particular case.]

ALTHOUGH THE PARTIES' CONTRACT DOES NOT SATISFY THE REQUIREMENTS OF COMMERCIAL CODE SECTION 2201(1), IT IS VALID IN OTHER RESPECTS, AND THE CONTRACT IS ENFORCEABLE [WITH RESPECT TO THE GOODS FOR WHICH PAYMENT WAS ACCEPTED] BECAUSE _____ [DEFENDANT or PLAINTIFF] HAS ACCEPTED PAYMENT [FOR SOME OF THE GOODS].

Contract Is Enforceable If Seller Accepted Payment. A contract that does not satisfy the requirements of *Commercial Code Section 2201(1)*, but that is valid in other respects, is enforceable with respect to goods for which payment has been made and accepted (*Com. Code § 2201(3)(c)*).

NOTES.

Seller Accepted Payment: See 27.13[3]

Detailed Discussion of Format/Skeletal Forms for Memoranda:

California Forms of Pleading and Practice, Ch. 417, Points and Authorities (Matthew Bender); and
California Points and Authorities, Ch. 1, Writing Legal Memoranda and Briefs (Matthew Bender)

Additional Memoranda Relating to Contracts:

California Points and Authorities, § 206.30 et seq (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentStatutes of FraudsExceptionsGeneral
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143 of 196 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 27 Contract for Sale of Goods--Attacking or Defending Existence of Contract Under California Commercial Code
IV. FORMS

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27.23 Memorandum--Exceptions to Statute of Frauds for Sale of Goods--Buyer Accepted Goods.

Memorandum--Exceptions to Statute of Frauds for Sale of Goods--Buyer Accepted Goods.

[Include the following, if appropriate, in a memorandum by the party seeking to prove a contract for the sale of goods, along with factual discussion demonstrating how the principles of law stated below are applicable to the particular case.]

ALTHOUGH THE PARTIES' CONTRACT DOES NOT SATISFY THE REQUIREMENTS OF COMMERCIAL CODE SECTION 2201(1), IT IS VALID IN OTHER RESPECTS, AND THE CONTRACT IS ENFORCEABLE [WITH RESPECT TO THE GOODS THAT WERE ACCEPTED] BECAUSE

_____ [DEFENDANT or PLAINTIFF]
HAS ACCEPTED [SOME OF] THE GOODS.

A. Contract Is Enforceable When Buyer Accepted Goods. A contract that does not satisfy the requirements of *Commercial Code Section 2201(1)*, but that is valid in other respects, is enforceable with respect to goods that have been received and accepted (*Com. Code § 2201(3)(c)*).

[EITHER, if buyer has affirmatively accepted goods]

B. Buyer Accepted Goods. For purposes of *Commercial Code Section 2201(3)*, acceptance of goods occurs when the buyer, after a reasonable opportunity to inspect the goods, signifies to the seller that the goods are conforming or that the buyer will take or retain them in spite of their nonconformity (*Com. Code §§ 2201(3)(c), 2606(1)(a)*).

[OR, or buyer failed to reject goods after reasonable opportunity to inspect them]

B. Buyer Accepted Goods By Failure to Reject Them. For purposes of *Commercial Code Section 2201(3)*, acceptance of goods occurs when the buyer fails to make an effective rejection, but such an acceptance does not occur until the buyer has had a reasonable opportunity to inspect them (*Com. Code §§ 2201(3)(c), 2606(1)(b)*).

[OR, if buyer has performed an act that is inconsistent with seller's ownership of goods]

B. Buyer Accepted Goods by Action. For purposes of *Commercial Code Section 2201(3)*, acceptance of goods occurs when the buyer does any act inconsistent with the seller's ownership; but if that act is wrongful as against the seller, it is an acceptance only if ratified by the seller (*Com. Code §§ 2201(3)(c), 2606(1)(c)*).

[CONTINUE]

[Optional] **C. Acceptance of Part of Commercial Unit Is Acceptance of Entire Unit.** For purposes of *Commercial Code Section 2201(3)*, acceptance of a part of any commercial unit is acceptance of that entire unit (*Com. Code §§ 2201(3)(c), 2606(2)*).

NOTES.

Buyer Accepted Goods:

See 27.13[4]

Detailed Discussion of Format/Skeletal Forms for Memoranda:

California Forms of Pleading and Practice, Ch. 417, Points and Authorities (Matthew Bender); and
California Points and Authorities, Ch. 1, Writing Legal Memoranda and Briefs (Matthew Bender)

Additional Memoranda Relating to Contracts:

California Points and Authorities, § 206.30 et seq (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentStatutes of FraudsExceptionsGeneral
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FraudsExceptionsStatutory Exceptions



144 of 196 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 28 Contract for Sale of Goods--Suing or Defending Action for Breach of Contract Under California Commercial Code

2-28 MB Practice Guide: CA Contract Litigation 28.syn

§ 28.syn Synopsis to Chapter 28: Contract for Sale of Goods--Suing or Defending Action for Breach of Contract Under California Commercial Code

28.01 Scope.

28.02 Objective and Strategy.

28.03 CHECKLIST: Identifying Seller's Breach--Shipment and Delivery Problems.

28.04 Options and Strategies.

28.05 Contract Can Control Shipping and Risk of Loss.

28.05[1] Seller Makes Shipping Choices When Contract Is Silent.

28.05[1][a] Shipping Terms Can Be Left Open.

28.05[1][b] Seller Arranges for Shipment.

28.05[2] Buyer Bears Risk of Loss Under "Shipment" Agreement.

28.05[2][a] No Destination Is Specified.

28.05[2][b] Seller Chooses Carrier and Makes Transportation Contract.

28.05[2][c] Material Delay or Loss Entitles Buyer to Reject Goods.

28.05[3] Seller Bears Risk of Loss Under "Destination" Agreement.

28.05[4] Standard Shipping Terms Can Establish Obligations.

28.05[4][a] F.O.B. at Place of Shipment Means Seller Delivers Goods to Carrier.

28.05[4][b] F.O.B. by Specified Vessel Means Seller Loads Goods.

28.05[4][c] F.A.S. Means Seller Delivers Goods Alongside Vessel.

28.05[4][d] Buyer Provides F.A.S. and F.O.B. Instructions.

28.05[4][e] "Ex-Ship" Means Seller Delivers From Vessel.

28.05[4][f] "No Arrival, No Sale" Means Seller Ships and Tenders Without Promising Goods Arrival.

28.05[4][g] C.I.F. and C. & F. Mean Price Includes Insurance and Freight.

28.06 Commercial Impracticability Justifies Substitute Shipping.

28.07 Seller May Ship Under Reservation.

28.08 Party in Breach Assumes Risk of Loss.

28.08[1] Seller Who Makes Nonconforming Tender Assumes Risk.

28.08[2] Buyer's Rightful Revocation of Acceptance Places Risk on Seller.

28.08[3] Buyer in Breach Bears Risk.

28.08[3][a] Seller May Treat Risk of Loss As Resting on Buyer.

28.08[3][b] Conforming Goods Must Have Been Identified to Contract.

28.08[3][c] Buyer Is Liable for Seller's Insurance Deficit.

28.08[3][d] Parties May Agree Otherwise.

28.09 Manner of Delivery Is Determined by Contract and Commercial Code.

28.09[1] "Tender" Requires Due Performance.

28.09[2] Seller Must Put Goods at Buyer's Disposition.

28.09[3] Seller Must Notify Buyer of Tender.

28.09[4] Tender Must Be at Reasonable Hour.

28.09[5] Destination Contract Requires Tender Documents.

28.09[6] Buyer Must Provide Facilities for Receipt.

28.10 Place for Delivery Is Seller's Place of Business or Location of Identified Goods.

28.11 Time for Shipment or Delivery Must Be Reasonable.

28.12 CHECKLIST: Identifying Seller's Breach--Nonconforming Goods.

28.13 Options and Strategies.

28.14 Conforming Goods Must Meet Contract Requirements.

28.15 Seller May Cure Nonconforming Performance If Time for Performance Has Not Expired.

28.16 Seller May Cure Nonconforming Performance If Seller Reasonably Believed It Would Be Acceptable.

28.17 CHECKLIST: Identifying Buyer's Breach--Improper Rejection of Goods.

28.18 Options and Strategies.

28.19 Nonconforming Goods Can Be Accepted or Rejected.

28.19[1] Buyer May Reject Nonconforming Goods.

28.19[2] Acceptance of Goods Precludes Rejection.

28.19[3] Acceptance May Occur by Acts or Conduct.

28.19[3][a] Acceptance Occurs If Buyer Signifies Retention of Goods.

28.19[3][b] Acceptance Occurs If Buyer Fails to Reject Goods After Inspection.

28.19[3][c] Acceptance Occurs If Buyer Does Anything Inconsistent With Seller's Ownership.

28.19[4] Buyer Must Pay at Contract Rate for Accepted Goods.

28.19[5] Buyer Must Notify Seller of Breach After Acceptance.

28.19[6] Buyer Must Take Appropriate Steps to Return or Dispose of Rejected Goods.

28.19[6][a] Merchant Buyer Must Follow Seller's Reasonable Instructions After Rejection.

28.19[6][b] Buyer Must Make Effort to Sell Perishable Goods.

28.19[6][c] Buyer May Store, Reship, or Sell Rejected Goods.

28.19[7] Buyer Can Reject Single Installment Under Installment Contract.

28.19[7][a] Installment Contract Authorizes Delivery in Separate Lots.

28.19[7][b] Buyer Can Reject Installment With Uncurable Nonconformity.

28.19[7][c] Buyer Must Accept Installment on Adequate Assurance of Cure.

28.19[7][d] Nonconformity Impairing Whole Contract Is Breach of the Whole.

28.20 Buyer Has Right to Inspect Goods.

28.20[1] Buyer Can Inspect When Goods Are Tendered, Delivered, or Identified.

28.20[2] Buyer Pays Expenses Subject to Reimbursement.

28.20[3] Buyer May Not Inspect Before Payment Against Documents or for C.O.D. Delivery.

28.20[4] Agreed Place and Method of Inspection Are Exclusive.

28.21 Contract Can Require Payment Before Inspection.

28.22 Buyer May Avoid Contract or Modify Price After Identified Goods Suffer Casualty.

28.23 Buyer May Revoke Acceptance of Nonconforming Lot or Commercial Unit.

28.23[1] Acceptance Revocable When Nonconformity Substantially Impairs Value of Goods.

28.23[2] Acceptance Revocable When It Was Predicated on Cure.

28.23[3] Acceptance Revocable When Induced by Seller or Circumstances.

28.23[4] Revocation Must Be Timely and With Notice to Seller.

28.23[5] Revocation Equates to Rejection.

28.24 Sale on Approval and Sale-or-Return Contract Allow Return of Conforming Goods.

28.24[1] Sale on Approval Covers Goods Primarily for Buyer's Use.

28.24[1][a] Goods Must Be for Buyer's Use.

28.24[1][b] Use of Goods to Try Them Does Not Constitute Acceptance.

28.24[1][c] Risk of Loss and Title Pass to Buyer on Acceptance.

28.24[1][d] Buyer's Creditors Cannot Claim Goods.

28.24[2] Sale-or-Return Contract Covers Goods for Resale.

28.24[2][a] Goods Must Be for Resale.

28.24[2][b] Return Is at Buyer's Risk and Expense.

28.24[2][c] Creditor Can Claim Goods in Buyer's Possession.

28.25 CHECKLIST: Identifying Buyer's Breach--Payment Problems.

28.26 Options and Strategies.

28.27 Price Can Be Made Payable in Money, Goods, Real Estate, or Anything Else of Value.

28.28 Price Can Be Left Open.

28.28[1] Open Price Will Be Set at Reasonable Price.

28.28[2] Price May Be Fixed in Good Faith by One Party.

28.28[3] Party Without Fault May Cancel Contract or Fix Price.

28.28[4] Parties Can Agree Not to Be Bound If Price Is Not Fixed.

28.29 Price May Be Demanded for Each Lot.

28.30 CHECKLIST: Pleading Breach of Contract for Sale of Goods.

28.31 Options and Strategies.

28.32 Complaint Must Allege Breach and Damages.

28.33 CHECKLIST: Pleading Defenses to Complaint for Breach of Contract for Sale of Goods.

28.34 Options and Strategies.

28.35 Many Traditional Affirmative Defenses Are Available Under Commercial Code.

28.36 Plaintiff's Nonperformance or Defective Performance Can Be Defense.

28.37 Usage of Trade Is Defense.

28.38 Intent Not to Be Bound by Open-Price Term Is Defense.

28.39 Status As Nonmerchant Can Be Defense.

28.40 Buyer's Ineffectual Attempt to Revoke Acceptance Is Defense.

28.41 Buyer's Improper Attempt to Reject Goods Is Defense.

28.41[1] Rejection Without Seasonable Notice Is Ineffective.

28.41[2] Failure to Identify Curable Defect Makes Rejection Ineffectual.

28.41[3] Buyer's Payment Without Reservation of Rights Is Waiver of Defect in Documents.

28.42 Substitute Performance Can Replace Agreed Means of Shipment or Payment.

28.42[1] Parties Must Accept Commercially Reasonable Substitute.

28.42[2] Seller May Stop Delivery When Government Regulation Blocks Payment.

28.42[2][a] Seller Must Accept Equivalent Means of Payment.

28.42[2][b] Seller Must Accept Payment According to Regulation.

28.43 Performance Is Excused by Failure of Presupposed Conditions.

28.43[1] Seller's Performance Is Impracticable.

28.43[2] Seller Must Allocate Available Production and Deliveries.

28.43[3] Seller Must Notify Buyer.

28.44 Party May Demand Assurances.

28.45 Anticipatory Repudiation Invites Defensive Tactics.

28.45[1] Aggrieved Party Has Options.

28.45[2] Repudiation Can Be Retracted.

28.45[3] Retraction Must Indicate Intent to Perform.

28.45[4] Contract Is Reinstated With Due Excuses and Allowances for Delay.

28.46 Complaint for Breach of Contract for Goods--By Seller Against Buyer--General Form.

Complaint for Breach of Contract for Goods--By Seller Against Buyer--General Form.

28.47 Complaint for Breach of Contract for Goods--By Seller Against Buyer--To Recover Price.

Complaint for Breach of Contract for Goods--By Seller Against Buyer--To Recover Price.

28.48 Complaint for Breach of Contract for Goods--By Seller Against Buyer--Requirements Contract.

Complaint for Breach of Contract for Goods--By Seller Against Buyer--Requirements Contract.

28.49 Complaint for Breach of Contract for Goods--By Buyer Against Seller--Seller's Firm Offer to Supply Goods.

Complaint for Breach of Contract for Goods--By Buyer Against Seller--Seller's Firm Offer to Supply Goods.

28.50 Complaint for Breach of Contract for Goods--By Buyer Against Seller--For Specific Performance.

Complaint for Breach of Contract for Goods--By Buyer Against Seller--For Specific Performance.

28.51 Complaint for Breach of Contract for Goods--By Buyer Against Seller--Rightful Rejection of Defective Goods.

Complaint for Breach of Contract for Goods--By Buyer Against Seller--Rightful Rejection of Defective Goods.

28.52 Answer to Complaint for Breach of Contract for Goods With Affirmative Defenses Based on Custom and Usage, Nonmerchant Defendant, and Lack of Intent to Be Bound While Price Term Remained Open.

Answer to Complaint for Breach of Contract for Goods With Affirmative Defenses Based on Custom and Usage, Nonmerchant Defendant, and Lack of Intent to Be Bound While Price Term Remained Open.



145 of 196 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 28 Contract for Sale of Goods--Suing or Defending Action for Breach of Contract Under California
Commercial Code
I. STRATEGY

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28.01 Scope.

This chapter covers breach of contract actions under Division 2 of the Commercial Code, including:

- Objective and strategy when suing for breach of contract under the Commercial Code [see 28.02].
- Determining shipping obligations created by the parties' agreement [see 28.05].
- Identifying risk-of-loss obligations created by the agreement [see 28.08].
- Identifying proper tender of the goods [see 28.09].
- Determining fulfillment of delivery obligations [see 28.10, 28.11].
- Determining conformity of the goods to the contract [see 28.14].
- Applying rules for rejecting nonconforming goods [see 28.19].
- Assessing whether rejection of goods has been precluded by acceptance [see 28.19[2], [3]].
- Taking into account the buyer's inspection of the goods [see 28.20, 28.21].
- Avoiding the contract after casualty to the goods [see 28.22].
- Revoking acceptance of nonconforming goods [see 28.23].
- Establishing whether a "sale on approval" or "sale or return" agreement allows the return of conforming goods [see 28.24].
- Determining the parties' obligations regarding payment of the contract price [see 28.25 -28.29].
- Properly pleading a breach of contract action [see 28.30 -28.32].

- Assessing available affirmative defenses [*see* 28.33], including:
 - ☐ Compliance with usage of trade [*see* 28.37];
 - ☐ Specific intent not to be bound while a price term is open [*see* 28.38];
 - ☐ Defendant's status as a nonmerchant [*see* 28.39];
 - ☐ The buyer's ineffectual attempt to revoke acceptance [*see* 28.40]; and
 - ☐ Improper rejection of the goods [*see* 28.41].
- Availability of substitute performance [*see* 28.42].
- Determining whether performance is excused [*see* 28.43].
- Determining whether a party can demand assurances from the other party [*see* 28.44].
- Evaluating each party's options after anticipatory repudiation [*see* 28.45]

Core Statutes:

Com Code §§ 2303-2311, 2319-2327, 2501 et seq., 2601 et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Breach, Repudiation & ExcuseGeneral OverviewCommercial Law (UCC)Sales (Article 2)Breach, Repudiation & ExcuseAcceptance of GoodsGeneral OverviewCommercial Law (UCC)Sales (Article 2)Breach, Repudiation & ExcuseBuyer's Rights on Improper DeliveryCommercial Law (UCC)Sales (Article 2)Breach, Repudiation & ExcuseCasualty to Identified GoodsCommercial Law (UCC)Sales (Article 2)Breach, Repudiation & ExcuseRightful Rejection



146 of 196 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 28 Contract for Sale of Goods--Suing or Defending Action for Breach of Contract Under California
Commercial Code
I. STRATEGY

2-28 MB Practice Guide: CA Contract Litigation 28.02

28.02 Objective and Strategy.

The general and residual rule of the Commercial Code is that the parties may agree to vary the effect of almost all code provisions. The phrase "unless otherwise agreed" does not imply that the effect of other provisions may not be varied by agreement [*Com Code* § 1302(c)]. Any divergence from the standard rules in the Commercial Code can be the result of an express agreement or the attending circumstances [*Com Code* § 2303, UCC § 2-303, official cmt 2]. Therefore all aspects of the agreement, not simply the governing Commercial Code provisions, must be considered. While the obligations of good faith, diligence, reasonableness, and care may not be disclaimed by agreement, the parties may determine by agreement the standards by which the performance of those obligations will be measured, provided those standards are not manifestly unreasonable [*Com Code* § 1302(b)]. The conduct of the parties may be sufficient to show such an agreement [*see Com Code* §§ 1201(3), 1303(e), 2204(1), 2207(3)].

In order to promote the continued expansion of commerce, the formation of contracts is construed liberally under the Commercial Code. The fact that parties more easily find themselves bound to vague contracts for the sale of goods is tempered by the duties of cooperation, good faith, and fair dealing, as well as a body of procedural requirements relating to difficulties and disputes in the execution of a contract [*see Com Code* § 2311]. Therefore, when evaluating whether or not to sue for breach, a party's attorney must make sure that the client has first taken all of the steps required by the Code.

 Cross References:

Discussion of remedies available under Division 2 of the Commercial Code, see Ch. 26, Contract for Sale of Goods--Seeking Remedies Under California Commercial Code.

Discussion of the formation of contracts for the sale of goods under Division 2 of the Commercial Code, see Ch. 27, Contract for Sale of Goods--Attacking or Defending Existence of Contract Under California Commercial Code.

Discussion of breach of warranty actions under Division 2 of the Commercial Code, see Ch. 24, Suing or Defending Action for Breach of Warranty.

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Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Breach, Repudiation & ExcuseGeneral OverviewCommercial Law
(UCC)Sales (Article 2)Contract TermsGeneral OverviewCommercial Law (UCC)Sales (Article 2)Form, Formation &
ReadjustmentGeneral Overview



147 of 196 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 28 Contract for Sale of Goods--Suing or Defending Action for Breach of Contract Under California
Commercial Code

II. IDENTIFYING SELLER'S BREACH--SHIPMENT AND DELIVERY PROBLEMS

2-28 MB Practice Guide: CA Contract Litigation 28.03

28.03 CHECKLIST: Identifying Seller's Breach--Shipment and Delivery Problems.

☐ Determine what shipping obligations are created by agreement.

☐ Parties can create shipping obligations as they see fit.

Authority:

Com Code § 2303

Discussion:

See 28.05[1]

☐ Unless otherwise agreed, if initial agreement leaves shipping terms open, specifications are left up to seller.

Authority:

Com Code § 2311(2)

Discussion:

See 28.05[1]

☐ "Shipment" agreement does not require delivery at specific location, and buyer bears risk during transit.

Authority:

Com Code §§ 2504, 2509(1)

Discussion:

See 28.05[2][a]

☐ "Destination" agreement requires delivery at specific location, and seller bears risk during transit.

Authority:

Com Code § 2503(3)

Discussion:

See 28.05[3]

☐ Determine what standard shipping terms are used in agreement.

☐ F.O.B. ("free on board") at place of shipment requires seller to bear expense and risk of putting goods into carrier's possession.

Authority:

Com Code § 2319

Discussion:

See 28.05[4][a]

☐ F.O.B. by specified vessel, car, or other mode of transport requires seller to bear expense and risk of putting goods into possession of carrier and of loading goods onto vessel, car, or other mode of transport.

Authority:

Com Code § 2319(1)(c)

Discussion:

See 28.05[4][b]

☐ F.A.S. ("free alongside") requires seller to deliver goods alongside specified vessel, at seller's risk and expense.

Authority:

Com Code § 2319(2)

Discussion:

See 28.05[4][c]

☐ "Ex-ship" requires seller to deliver from ship that has reached named port of destination.

Authority:

Com Code § 2322(1), (2)

Discussion:

See 28.05[4][e]

☐ "No arrival, no sale" requires seller to ship conforming goods and tender on arrival without assuming any obligation that goods actually will arrive.

Authority:

Com Code § 2324(a)

Discussion:

See 28.05[4][f]

- ☐ Determine whether seller has shipped under reservation.

Authority:

Com Code § 2310(b)

Discussion:

See 28.07

- ☐ Determine risk of loss obligations created by breach.

- ☐ Risk of loss generally is on seller if tender or delivery fails to conform to contract.

Authority:

Com Code § 2510(1)

Discussion:

See 28.08[1]

- ☐ If buyer rightfully revokes acceptance, risk of loss is on seller to extent of deficiency in buyer's effective insurance coverage.

Authority:

Com Code § 2510(2)

Discussion:

See 28.08[2]

- ☐ Risk of loss passes to buyer guilty of breach.

Authority:

Com Code § 2510(3)

Discussion:

See 28.08[3]

- ☐ Determine whether parties have created alternative risk-of-loss agreement.

Authority:

Com Code § 2303

Discussion:

See 28.08[3][d]

- ☐ Determine whether seller has effected proper tender.

- ☐ Seller must put and hold goods at buyer's disposition for tender of delivery.

Authority:

Com Code § 2503(1)

Discussion:

See 28.09[1], [2]

- ☐ Seller must give buyer notification of tender of goods.

Authority:

Com Code § 2503(1)

Discussion:

See 28.09[3]

- ☐ Tender of delivery must be at reasonable hour.

Authority:

Com Code § 2503(1)(a)

Discussion:

See 28.09[4]

- ☐ Destination contract requires seller to tender documents.

Authority:

Com Code § 2503(1)

Discussion:

See 28.09[5]

- ☐ Determine whether parties have fulfilled delivery obligations.

- ☐ Buyer generally must provide facilities for receipt of goods.

Authority:

Com Code § 2503(1)(b)

Discussion:

See 28.09[6]

- ☐ Place of delivery is seller's place of business or location of identified goods, unless otherwise agreed.

Authority:

Com Code § 2308(a)

Discussion:

See 28.10

- ☐ Determine whether shipment or delivery occurred within reasonable time, unless parties agreed otherwise.

Authority:

Com Code § 2309(1)

Discussion:

See 28.11

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Breach, Repudiation & ExcuseGeneral OverviewCommercial Law (UCC)Sales (Article 2)Breach, Repudiation & ExcuseBuyer's Rights on Improper DeliveryCommercial Law (UCC)Sales (Article 2)Breach, Repudiation & ExcuseCasualty to Identified Goods



148 of 196 DOCUMENTS

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Chapter 28 Contract for Sale of Goods--Suing or Defending Action for Breach of Contract Under California Commercial Code

II. IDENTIFYING SELLER'S BREACH--SHIPMENT AND DELIVERY PROBLEMS

*2-28 MB Practice Guide: CA Contract Litigation 28.04***28.04 Options and Strategies.**

Breach of a contract for the sale of goods may occur when a party has not met shipment or risk-of-loss obligations. Risk of loss often is established by the use of standard shipping terms, although, as in most matters governed by the Division 2 of the Commercial Code, the parties are free to create an alternative arrangement. A party's attorney must first establish the obligations of the agreement, including those created by course of performance and usage of trade, and then determine whether the parties met their respective shipping obligations and, in the event of loss, whether the party bearing the risk has paid for the loss.

When the seller makes the goods available to the buyer in the manner prescribed by the Commercial Code or the agreement--that is, when the seller "tenders" the goods--the buyer generally must accept conforming goods [*Com Code* § 2503]. Whether a party has properly performed, as well as who bears the risk of loss, frequently will hinge on whether or not the goods were properly tendered.

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Use *lexis.com* to find information on risk of loss and shipping:

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Sample Search: For information on risk of loss, breach, and shipping, try: *breach!*
/10 ship! AND risk! /3 loss.

Legal Topics:

For related research and practice materials, see the following legal topics:

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II. IDENTIFYING SELLER'S BREACH--SHIPMENT AND DELIVERY PROBLEMS

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28.05 Contract Can Control Shipping and Risk of Loss.

28.05[1] Seller Makes Shipping Choices When Contract Is Silent.

28.05[1][a] Shipping Terms Can Be Left Open. The parties may leave shipping requirements to be specified later without invalidating their original agreement [*Com Code § 2311(1)*].

Cross Reference:

Commercial Code's liberal approach to contract formation, see *Ch. 27, Contract for Sale of Goods--Attacking or Defending Existence of Contract Under California Commercial Code*, 27.02.

28.05[1][b] Seller Arranges for Shipment. Unless otherwise agreed, the shipping specifications are left up to the seller [*Com Code § 2311(2)*]. The seller's specifications must be in good faith and commercially reasonable [*Com Code § 2311(1)*].

Jury Instructions:

Performance to Be Specified by a Party, see *California Forms of Jury Instruction, Ch. 3H, Instr. MB 300H.124* (Matthew Bender).

Did Parties "Otherwise Agree," see *California Forms of Jury Instruction, Ch. 3H, Instr. MB 300H.126* (Matthew Bender).

28.05[2] Buyer Bears Risk of Loss Under "Shipment" Agreement.

28.05[2][a] No Destination Is Specified. Under a "shipment" agreement, the seller is required or authorized to ship the goods to the buyer, but not to a particular destination [*Com Code § 2504*]. Once the goods are delivered to the carrier, the buyer bears the risk of loss during transit [*Com Code § 2509(1)(a)*].

The standard indicia of a "shipment" agreement are [*Com Code § 2504*]:

- The seller must put the goods in the possession of a carrier that is a reasonable choice in view of the

nature of the goods and other circumstances of the case [see 28.05[2][b]].

- The seller must make a contract for transportation of the goods that is reasonable in view of the nature of the goods and other circumstances of the case [see 28.05[2][b]].
- The seller must obtain and promptly deliver or tender in due form any document necessary to enable the buyer to obtain possession of the goods or otherwise required by the agreement or by usage of trade.
- The seller must promptly notify the buyer of the shipment.

28.05[2][b] Seller Chooses Carrier and Makes Transportation Contract. The seller must choose a carrier and make a contract for transportation of the goods. Both the carrier and the contract must be reasonable in view of the nature of the goods and other circumstances [Com Code § 2504].

In the absence of a controlling agreement, the Commercial Code provisions on options and cooperation respecting performance give the seller the choice of any reasonable carrier, routing, and other arrangements. Whether or not the shipment is at the buyer's expense, the seller must see to any arrangements reasonable under the circumstances--such as refrigeration, the watering of livestock, protection against cold, sending along any necessary help, selection of specialized cars, and the like. *Com Code § 2504(a)* is intended to cover all necessary arrangements, whether made by contract with the carrier or otherwise [Com Code § 2504, UCC § 2-504, official cmt 3].

Exception:

These requirements are relaxed if the buyer is in a position to make the appropriate arrangements and the seller gives reasonable notice that the buyer needs to do so [Com Code § 2504, UCC § 2-504, official cmt 3].



Warning:

When the contract between the buyer and seller places the risk of shipment on the seller, an agreement between the seller and the carrier to a valuation below the true value of the goods--thereby cutting of the buyer's opportunity to recover from the carrier in the event of loss--is an improper contract under *Com Code § 2504(a)* [Com Code § 2504, UCC § 2-504, official cmt 3].

28.05[2][c] Material Delay or Loss Entitles Buyer to Reject Goods. The seller's failure to notify the buyer of the shipment or to make a proper contract for transportation is a ground for the buyer's rejection of the goods only if material delay or loss ensued [Com Code § 2504].

Example:

Frequently an agreement expressly requires prompt notification, such as by wire or cable (or e-mail). Such a term may be of the essence, and *Com Code § 2504(c)* does not prevent the parties from making this a particular ground for rejection. To have this vital and irreparable effect on the seller's duties, such a term should be part of the "dickered" terms written in any "form," or should otherwise be called seasonably (that is, at or within the time agreed or, if no time is agreed, at or within a reasonable time [Com Code § 1205(b)]) and sharply to the seller's attention [Com Code § 2504, UCC § 2-504, official cmt 5].

Jury Instructions:

Tender by Seller Under Shipment and Destination Contracts, see *California Forms of Jury Instruction, Ch. 3H, Instr. MB 300H.211* (Matthew Bender).



Cross Reference:

Discussion and form for general shipping agreement, see *California Legal Forms*, § 52.124 (Matthew Bender).

28.05[3] Seller Bears Risk of Loss Under "Destination" Agreement. Under a "destination" agreement, the seller is required to deliver the goods to a particular destination [*Com Code* § 2503(3)]. The risk of loss is on the seller until the goods are tendered for the buyer's possession at the destination [*Com Code* § 2509(1)(b)].

Jury Instructions:

Tender by Seller Under Shipment and Destination Contracts, see *California Forms of Jury Instruction*, Ch. 3H, Instr. MB 300H.211 (Matthew Bender).

 Cross Reference:

Discussion and form for general shipping agreement, see *California Legal Forms*, § 52.124 (Matthew Bender).

28.05[4] Standard Shipping Terms Can Establish Obligations.

28.05[4][a] F.O.B. at Place of Shipment Means Seller Delivers Goods to Carrier. Under an agreement specifying F.O.B. ("free on board") at the place of shipment, the seller bears the expense and risk of putting the goods into possession of the carrier [*Com Code* § 2319(1)(a)].

Jury Instructions:

General Shipping Terms Definition, see *California Forms of Jury Instruction*, Ch. 3H, Instr. MB 300H.170 (Matthew Bender).

F.O.B. Definition, see *California Forms of Jury Instruction*, Ch. 3H, Instr. MB 300H.171 (Matthew Bender).

 Cross Reference:

Discussion of delivery F.O.B., see *California Forms of Pleading and Practice*, § 500.52[5][a] (Matthew Bender).

28.05[4][b] F.O.B. by Specified Vessel Means Seller Loads Goods. Under an agreement specifying F.O.B. at the place of shipment and also specifying "vessel" (that is, a vessel, car, or other mode of transport), the seller bears the expense and risk of putting the goods into the carrier's possession and the expense and risk of loading the goods on the shipping vessel [*Com Code* § 2319(1)(c)]. If the shipment is to be F.O.B. vessel, and overseas shipment is contemplated, then the seller must obtain a negotiable bill of lading [*Com Code* §§ 2319(1)(c), 2323(1)].

Distinguish:

Com Code § 2319(1)(c) not only specifies the duties of a seller who engages to deliver F.O.B. vessel, or the like, but should make clear to attorneys that an agreement is not soundly drawn when, for instance, it looks to reshipment from San Francisco or New York, but speaks merely of "F.O.B." and specifies the place [*Com Code* § 2319, UCC § 2-319, official cmt 2].

Jury Instructions:

General Shipping Terms Definition, see *California Forms of Jury Instruction*, Ch. 3H, Instr. MB 300H.170 (Matthew Bender).

F.O.B. Definition, see *California Forms of Jury Instruction*, Ch. 3H, Instr. MB 300H.171 (Matthew Bender).

 Cross Reference:

Discussion of delivery F.O.B., see *California Forms of Pleading and Practice*, § 500.52[5][a] (Matthew Bender).

28.05[4][c] F.A.S. Means Seller Delivers Goods Alongside Vessel. Under an agreement specifying F.A.S. ("free alongside"), the seller delivers the goods alongside the vessel at the seller's risk and expense in the manner usual in the port or on the dock designated and provided by the buyer [*Com Code* § 2319(2)(a)]. The seller must obtain and tender a receipt for the goods, in exchange for which the carrier is under a duty to issue a bill of lading [*Com Code* § 2319(2)(b)].

Jury Instructions:

General Shipping Terms Definition, see *California Forms of Jury Instruction*, Ch. 3H, Instr. MB 300H.170 (Matthew Bender).

F.A.S. Definition, see *California Forms of Jury Instruction*, Ch. 3H, Instr. MB 300H.172 (Matthew Bender).

 Cross Reference:

Discussion of delivery F.A.S., see *California Forms of Pleading and Practice*, § 500.52[5][a] (Matthew Bender).

28.05[4][d] Buyer Provides F.A.S. and F.O.B. Instructions. Unless otherwise agreed, under F.A.S. and F.O.B. agreements the buyer must seasonably (that is, at or within the time agreed or, if no time is agreed, at or within a reasonable time [*Com Code* § 1205(b)]), give any needed instructions for making delivery, the loading berth of the vessel, and in an appropriate case its name and sailing date [*Com Code* § 2319(3)]. The seller may treat the failure of needed instructions as a failure of cooperation [*Com Code* § 2319(3); see *Com Code* § 2311 (duty to cooperate)]. The seller also may move the goods in any reasonable manner preparatory to delivery or shipment [*Com Code* § 2319(3)].



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Sample Search: For information regarding sales, F.O.B. or F.A.S., use: ((free board)
OR fob OR f.o.b.) OR ((free alongside) OR fas OR f.a.s.).

Jury Instructions:

Did Parties "Otherwise Agree"?, see *California Forms of Jury Instruction*, Ch. 3H, Instr. MB 300H.126 (Matthew Bender).

28.05[4][e] "Ex-Ship" Means Seller Delivers From Vessel. Under an agreement specifying "ex-ship" as the delivery method, the seller must deliver from a carrying vessel that has reached a place at the named port of destination where goods of the kind are usually discharged [*Com Code* § 2322(1)]. The seller must discharge all liens arising out of the carriage and furnish the buyer with a direction that puts the carrier under a duty to deliver the goods [*Com Code* § 2322(2)(a)].

Jury Instructions:

General Shipping Terms Definition, see *California Forms of Jury Instruction*, Ch. 3H, Instr. MB

300H.170 (Matthew Bender).

Ex-Ship Definition, see *California Forms of Jury Instruction, Ch. 3H, Instr. MB 300H.176* (Matthew Bender).

Cross Reference:

Discussion and forms relating to ex-ship agreement, see *California Forms of Pleading and Practice, § 500.52[5][c]* (Matthew Bender).

28.05[4][f] "No Arrival, No Sale" Means Seller Ships and Tenders Without Promising Goods Arrival. Under an agreement specifying "no arrival, no sale," the seller ships conforming goods and, if they arrive by any means, tenders them on arrival, without assuming any obligation to ensure that the goods will arrive [*Com Code § 2324(a)*].

Jury Instructions:

General Shipping Terms Definition, see *California Forms of Jury Instruction, Ch. 3H, Instr. MB 300H.170* (Matthew Bender).

No Arrival; No Sale, see *California Forms of Jury Instruction, Ch. 3H, Instr. MB 300H.175* (Matthew Bender).

28.05[4][g] C.I.F. and C. & F. Mean Price Includes Insurance and Freight. The term "C.I.F." means that the price includes in a lump sum the cost of the goods and insurance and freight to the named destination. The term "C. & F." (or "C.F.") means that the price includes the cost of the goods and freight to the named destination, but not insurance [*Com Code § 2320(1)*]. Unless otherwise agreed, and even though used only in connection with the stated price and destination, the term "C.I.F. destination" or its equivalent requires the seller, at the seller's expense and risk, to do all of the following [*Com Code § 2320(2)(a)-(e)*]:

- Put the goods into the possession of a carrier at the port for shipment and obtain negotiable bills of lading covering the entire transportation to the named destination.
- Load the goods and obtain a receipt from the carrier (which may be contained in a bill of lading) showing that the freight has been paid or provided for.
- Obtain a policy or certificate of insurance, including any war risk insurance, of a kind and on terms then current at the port of shipment, in the usual amount, in the currency of the contract, shown to cover the same goods covered by the bills of lading and providing for payment of loss to the order of the buyer or for the account of whomever it may concern (but the seller may add to the price the amount of the premium for any such war risk insurance). The statute does not specify whether this requirement requires force majeure coverage other than war risk; it would seem that whether or not such coverage is required would depend on the terms then current at the port of shipment.
- Prepare an invoice of the goods and procure any other documents required to effect shipment or to comply with the contract.
- Forward and tender with commercial promptness all of the documents in due form and with any indorsement necessary to perfect the buyer's rights.

Under both C.I.F. and C. & F. contracts, unless otherwise agreed, the buyer must make payment against tender of the required documents, and the seller may not tender, nor may the buyer demand, delivery of the goods in substitution for the documents [*Com Code § 2320(4)*].

Distinguish:

The insurance stipulated by the C.I.F. term is for the buyer's benefit, to protect against the risk of loss or damage to the goods in transit. A clause in a C.I.F. contract such as "insurance for the account of sellers" should be viewed in its ordinary mercantile meaning: that the seller must pay for the insurance, not that the insurance is intended to run to the seller's benefit [*Com Code* § 2320, UCC § 2-320, official cmt 3].

Example:

Mail order company did not bear the risk of loss of goods in transit when nothing in the company's conduct, and nothing in the delivery or insurance terms of the company's mail order forms, suggested that it was offering anything other than a standard, C.I.F.-type shipment contract, which its customers agreed to when they used the company's mail order form to purchase goods [*Wilson v. Brawn of Cal., Inc.* (2005) 132 CA4th 549, 557].

Jury Instructions:

General Shipping Terms Definition, see *California Forms of Jury Instruction, Ch. 3H, Instr. MB 300H.170* (Matthew Bender).

C.I.F. Definition, see *California Forms of Jury Instruction, Ch. 3H, Instr. MB 300H.173* (Matthew Bender).

C. & F. Definition, see *California Forms of Jury Instruction, Ch. 3H, Instr. MB 300H.174* (Matthew Bender).

Did Parties "Otherwise Agree"?, see *California Forms of Jury Instruction, Ch. 3H, Instr. MB 300H.126* (Matthew Bender).

**Cross Reference:**

Discussion of C.I.F. and C. & F. agreement, see *California Forms of Pleading and Practice, § 500.52[5][b]* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:

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150 of 196 DOCUMENTS

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28.06 Commercial Impracticability Justifies Substitute Shipping.

When, without fault of either party, the agreed berthing, loading, or unloading facilities fail, or an agreed type of carrier becomes unavailable, or the agreed manner of delivery otherwise becomes commercially impractical but a commercially reasonable substitute is available, the substitute performance must be tendered and accepted [*Com Code* § 2614(1)], in the absence of specific agreement to the contrary [*Com Code* § 2614, UCC § 2-614, official cmt 1].



Cross Reference:

Discussion of substitute performance of delivery, see *California Forms of Pleading and Practice*, § 500.32[4] (*Matthew Bender*).

Legal Topics:

For related research and practice materials, see the following legal topics:

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151 of 196 DOCUMENTS

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28.07 Seller May Ship Under Reservation.

In the absence of a controlling agreement, a seller authorized to ship goods may ship under reservation and tender documents of title, although the buyer may inspect before payment unless inspection is inconsistent with the terms of the contract [*Com Code § 2310(b)*].

Distinguish:

Shipment under reservation allows the buyer to inspect the goods before paying for them, but does not require the seller to give up possession of the goods until the buyer has paid for them, unless the contract allows the buyer to buy on credit [*Com Code § 2310*, UCC § 2-310, official cmt 2; see *Com Code § 2513(3)* (times when buyer is not entitled to inspect before payment)].

➤ Cross References:

Discussion of shipment under reservation, see *California Forms of Pleading and Practice*, § 500.35[6] (*Matthew Bender*).

Discussion and form dealing with buyer's right to inspect goods, see *California Legal Forms*, § 52.311[1] (*Matthew Bender*).

Legal Topics:

For related research and practice materials, see the following legal topics:

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152 of 196 DOCUMENTS

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28.08 Party in Breach Assumes Risk of Loss.

28.08[1] Seller Who Makes Nonconforming Tender Assumes Risk. If the buyer has a right of rejection because of the seller's nonconforming tender or delivery, the risk of loss remains on the seller until either [*Com Code § 2510(1)*]:

- The nonconformity is cured; or
- The buyer accepts despite the nonconformity.

Cross References:

Nonconforming goods, see 28.14.

Discussion of risk of loss in general, see *California Forms of Pleading and Practice*, § 500.50 (Matthew Bender).

28.08[2] Buyer's Rightful Revocation of Acceptance Places Risk on Seller. On rightfully revoking acceptance, the buyer may treat the risk of loss as resting on the seller from the outset, to the extent of any deficiency in the buyer's effective insurance coverage [*Com Code § 2510(2)*].

Consider:

The word "effective" as applied to insurance coverage is used to meet the case of supervening insolvency of the insurer [*Com Code § 2510*, UCC § 2-510, official cmt 3]. "Deficiency" means such deficiency in the insurance coverage as exists without subrogation. This rule merely distributes the risk of loss as stated and is not intended to be disturbed by any subrogation of an insurer [*Com Code § 2510*, UCC § 2-510, official cmt 3].

Cross Reference:

Revocation of acceptance, see 28.23

28.08[3] Buyer in Breach Bears Risk.

28.08[3][a] Seller May Treat Risk of Loss As Resting on Buyer. If the buyer repudiates or otherwise breaches the contract before the risk of loss has passed to the buyer, the seller may treat the risk of loss as having rested on the buyer for a commercially reasonable time [*Com Code* § 2510(3)].

28.08[3][b] Conforming Goods Must Have Been Identified to Contract. In order for the risk of loss to pass to a buyer in breach, the conforming goods must already be identified to the contract at the time of breach [*Com Code* § 2510(3)].

28.08[3][c] Buyer Is Liable for Seller's Insurance Deficit. A buyer guilty of breach is liable for the risk of loss to the extent that the seller's effective insurance coverage is deficient [*Com Code* § 2510(3)].

Consider:

The word "effective" as applied to insurance coverage is used to meet the case of supervening insolvency of the insurer [*Com Code* § 2510, UCC § 2-510, official cmt 3]. "Deficiency" means such deficiency in the insurance coverage as exists without subrogation. This rule merely distributes the risk of loss as stated and is not intended to be disturbed by any subrogation of an insurer [*Com Code* § 2510, UCC § 2-510, official cmt 3].

28.08[3][d] Parties May Agree Otherwise. The parties may create an alternative agreement governing the risk of loss in the event of a breach [*Com Code* § 2303].

Legal Topics:

For related research and practice materials, see the following legal topics:

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153 of 196 DOCUMENTS

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II. IDENTIFYING SELLER'S BREACH--SHIPMENT AND DELIVERY PROBLEMS

2-28 MB Practice Guide: CA Contract Litigation 28.09

28.09 Manner of Delivery Is Determined by Contract and Commercial Code.

28.09[1] "Tender" Requires Due Performance. "Tender" connotes such performance by the tendering party as puts the other party in default if the other party fails to proceed in some appropriate manner. However, the term "tender" is used in the Commercial Code in two different senses [*Com Code* § 2503, UCC § 2-503, official cmt 1]:

- In one sense it refers to "due tender," which contemplates an offer coupled with a present ability to fulfill all conditions resting on the tendering party and must be followed by actual performance if the other party is evidently ready to proceed. Unless the context unmistakably indicates otherwise, this is the meaning of "tender" in the Commercial Code, and the occasional addition of the word "due" is only for clarity and emphasis.
- At other times "tender" is used to refer to an offer of goods or documents under a contract as if in fulfillment of its conditions even though there is a defect when measured against the contract obligation.

Jury Instructions:

Tender of goods generally, see *California Forms of Jury Instruction, Ch. 3H, Instr. MB 300H.210* (Matthew Bender).

➤ Cross References:

General discussion of tender, see *California Forms of Pleading and Practice, § 500.35* (Matthew Bender).

Discussion of tender of goods, see *California Legal Forms, § 52.262* (Matthew Bender).

28.09[2] Seller Must Put Goods at Buyer's Disposition. To complete tender of delivery, the seller must put and hold conforming goods at the buyer's disposition in accordance with the agreement [*Com Code* § 2503(1)].

28.09[3] Seller Must Notify Buyer of Tender. On tender of delivery, the seller must give the buyer any notification reasonably necessary to enable the buyer to take delivery [*Com Code* § 2503(1)].

28.09[4] Tender Must Be at Reasonable Hour. Tender must be at a reasonable hour, and the goods must be kept available for the period reasonably necessary to enable the buyer to take possession [*Com Code* § 2503(1)(a)]. Usage of the trade and the attending circumstances will determine what is a reasonable hour for tender and what constitutes a reasonable period of holding the goods available [*Com Code* § 2503, UCC § 2-503, official cmt 3].

28.09[5] Destination Contract Requires Tender Documents. If the seller is required to deliver to a particular destination (a "destination contract"), tender requires that the seller follow the provisions of *Com Code* §§ 2503(1) and 2503(4), (5):

- If the goods are in the possession of a bailee, the seller must either tender a negotiable document of title covering the goods or procure acknowledgment by the bailee of the buyer's right to possession of the goods.
- If the contract requires the seller to deliver documents, the seller must tender all such documents in correct form. Tender through customary banking channels is sufficient and dishonor of a draft accompanying or associated with the documents constitutes nonacceptance or rejection. Documents are never "required" except when there is an express contract term or it is plainly implicit in the peculiar circumstances of the case or in a usage of trade [*Com Code* § 2503, UCC § 2-503, official cmt 7].

Jury Instructions:

Tender by Seller Under Shipment and Destination Contracts, see California Forms of Jury Instruction, Ch. 3H, Instr. MB 300H.211 (Matthew Bender).

28.09[6] Buyer Must Provide Facilities for Receipt. Unless otherwise agreed, the buyer must provide the proper facilities for receipt of the goods [*Com Code* § 2503(1)(b)].

Jury Instructions:

Did Parties "Otherwise Agree"?, see *California Forms of Jury Instruction*, Ch. 3H, Instr. MB 300H.126 (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Breach, Repudiation & ExcuseGeneral OverviewCommercial Law (UCC)Sales (Article 2)Breach, Repudiation & ExcuseBuyer's Rights on Improper DeliveryCommercial Law (UCC)Sales (Article 2)Contract TermsGap-Filler ProvisionsDelivery & Shipping TermsCommercial Law (UCC)Sales (Article 2)PerformanceTender, Shipment, Delivery & Cure



154 of 196 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 28 Contract for Sale of Goods--Suing or Defending Action for Breach of Contract Under California
Commercial Code

II. IDENTIFYING SELLER'S BREACH--SHIPMENT AND DELIVERY PROBLEMS

2-28 MB Practice Guide: CA Contract Litigation 28.10

28.10 Place for Delivery Is Seller's Place of Business or Location of Identified Goods.

Absent an alternative arrangement, the place for delivery of goods is the seller's place of business (or residence, if the seller has no place of business) [*Com Code* § 2308(a)]. If the goods are already identified when the contract is made, the place for delivery is the location of those identified goods, unless otherwise agreed [*Com Code* § 2308].

Jury Instructions:

Place for Delivery of Goods, see *California Forms of Jury Instruction, Ch. 3H, Instr. MB 300H.117* (Matthew Bender).

Did Parties "Otherwise Agree"?, see *California Forms of Jury Instruction, Ch. 3H, Instr. MB 300H.126* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Breach, Repudiation & ExcuseGeneral OverviewCommercial Law (UCC)Sales (Article 2)Breach, Repudiation & ExcuseBuyer's Rights on Improper DeliveryCommercial Law (UCC)Sales (Article 2)Contract TermsGap-Filler ProvisionsDelivery & Shipping TermsCommercial Law (UCC)Sales (Article 2)PerformanceTender, Shipment, Delivery & Cure



155 of 196 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 28 Contract for Sale of Goods--Suing or Defending Action for Breach of Contract Under California
Commercial Code

II. IDENTIFYING SELLER'S BREACH--SHIPMENT AND DELIVERY PROBLEMS

2-28 MB Practice Guide: CA Contract Litigation 28.11

28.11 Time for Shipment or Delivery Must Be Reasonable.

If the parties do not agree to a specific time for shipment or delivery, the goods are to be delivered at a reasonable time [*Com Code* § 2309(1)].



Strategic Point:

Reasonableness in this context depends on what constitutes acceptable commercial conduct in view of the nature, purpose, and circumstances of the action to be taken. Agreement as to a definite time, however, may be found in a term implied in the contractual circumstances, usage of trade, or course of dealing or performance, as well as in an express term. Such cases fall outside *Com Code* § 2309(1) since in them the time for action is "agreed" by usage [*Com Code* § 2309, UCC § 2-309, official cmt 1].

Consider:

When the time for delivery is left open, unreasonably early offers of or demands for delivery are intended to be read under the Commercial Code as expressions of desire or intention, requesting the assent or acquiescence of the other party, not as final positions that may amount, without more, to breach, or may create breach by the other side [*Com Code* § 2309, UCC § 2-309, official cmt 4].

Jury Instructions:

Time for Shipment or Delivery, see *California Forms of Jury Instruction, Ch. 3H, Instr. MB 300H.118* (Matthew Bender)



Cross Reference:

Discussion of time for shipment or delivery, see *California Forms of Pleading and Practice, § 500.36* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Breach, Repudiation & ExcuseGeneral OverviewCommercial Law (UCC)Sales (Article 2)Breach, Repudiation & ExcuseBuyer's Rights on Improper DeliveryCommercial Law (UCC)Sales (Article 2)Contract TermsGap-Filler ProvisionsDelivery & Shipping TermsCommercial Law (UCC)Sales (Article 2)PerformanceTender, Shipment, Delivery & Cure



156 of 196 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 28 Contract for Sale of Goods--Suing or Defending Action for Breach of Contract Under California
Commercial Code

III. IDENTIFYING SELLER'S BREACH--NONCONFORMING GOODS

2-28 MB Practice Guide: CA Contract Litigation 28.12

28.12 CHECKLIST: Identifying Seller's Breach--Nonconforming Goods.

- ☐ Determine whether goods conform to contract.

Authority:

Com Code § 2106(2)

Discussion:

See 28.14

- ☐ Determine whether any express or implied warranty applies.

Authority:

Com Code §§ 2312-2317

Discussion:

See Ch. 24, Suing or Defending Action for Breach of Warranty, 24.06, 24.07

- ☐ If goods did not initially conform to contract, did seller subsequently cure problem by making conforming delivery?

- ☐ Did seller seasonably notify buyer of intent to cure nonconformity?
- ☐ Was nonconformity cured before time for performance had expired?
- ☐ Did seller reasonably believe that original tender would be acceptable?

Authority:

Com Code § 2508

Discussion:

See 28.15, 28.16

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Breach, Repudiation & ExcuseGeneral OverviewCommercial Law (UCC)Sales (Article 2)Breach, Repudiation & ExcuseAcceptance of GoodsRevocation of AcceptanceNonconforming GoodsCommercial Law (UCC)Sales (Article 2)Breach, Repudiation & ExcuseBuyer's Rights on Improper Delivery



157 of 196 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 28 Contract for Sale of Goods--Suing or Defending Action for Breach of Contract Under California
Commercial Code

III. IDENTIFYING SELLER'S BREACH--NONCONFORMING GOODS

2-28 MB Practice Guide: CA Contract Litigation 28.13

28.13 Options and Strategies.

The seller's primary obligation regarding the goods is that they must conform to the contract. However, as with all contracts under Division 2 of the Commercial Code, usage of trade and course of dealing can determine the degree to which the goods must conform exactly to the contract.

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Breach, Repudiation & ExcuseGeneral OverviewCommercial Law
(UCC)Sales (Article 2)PerformanceGeneral Overview



158 of 196 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 28 Contract for Sale of Goods--Suing or Defending Action for Breach of Contract Under California Commercial Code

III. IDENTIFYING SELLER'S BREACH--NONCONFORMING GOODS

*2-28 MB Practice Guide: CA Contract Litigation 28.14***28.14 Conforming Goods Must Meet Contract Requirements.**

Goods are "conforming" or conform to the contract when they are in accordance with the obligations under the contract [*Com Code* § 2106(2)].

**Strategic Point--Seller:**

The general policy of Division 2 of the Commercial Code requires exact performance of the seller's obligations as a condition to the right to require acceptance by the buyer [*Com Code* § 2106, UCC § 2-106, official cmt 2]. Note that nothing in Division 2 specifically requires that a nonconformity be "material" as that term generally is used in contract law [*but see Com Code* § 1103 (general principles of law supplement commercial code provisions); *see Ch. 22, Suing or Defending Action for Breach of Contract*, 22.24 et seq.]. However, the seller is in part safeguarded against surprise as a result of sudden technicality on the buyer's part by *Com Code* § 2508, which allows the seller to cure improper tender or delivery [*Com Code* § 2106, UCC § 2-106, official cmt 2; *see 28.14, 28.16*]. Moreover, usage of trade frequently permits commercial leeways in performance, and the language of the agreement must be read in the light of such custom or usage and also any prior course of dealing and, in a long-term contract, the course of performance [*Com Code* § 2106, UCC § 2-106, official cmt 2].

Jury Instructions:

Definition of Conforming Goods and Performance, *see California Forms of Jury Instruction, Ch. 3H, Instr. MB 300H.01* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Breach, Repudiation & ExcuseGeneral OverviewCommercial Law (UCC)Sales (Article 2)Breach, Repudiation & ExcuseAcceptance of GoodsGeneral OverviewCommercial Law (UCC)Sales (Article 2)Breach, Repudiation & ExcuseBuyer's Rights on Improper DeliveryCommercial Law

(UCC)Sales (Article 2)PerformanceGeneral Overview



159 of 196 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 28 Contract for Sale of Goods--Suing or Defending Action for Breach of Contract Under California
Commercial Code

III. IDENTIFYING SELLER'S BREACH--NONCONFORMING GOODS

2-28 MB Practice Guide: CA Contract Litigation 28.15

28.15 Seller May Cure Nonconforming Performance If Time for Performance Has Not Expired.

If the seller has rejected any tender or delivery as nonconforming, and the time for performance has not yet expired, the seller may seasonably (that is, at or within the time agreed or, if no time is agreed, at or within a reasonable time [*Com Code § 1205(b)*]) notify the buyer of the seller's intention to cure the defect, and then may make a conforming delivery within the contract time [*Com Code § 2508(1)*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)PerformanceGeneral OverviewCommercial Law (UCC)Sales (Article 2)PerformanceTender, Shipment, Delivery & Cure



160 of 196 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 28 Contract for Sale of Goods--Suing or Defending Action for Breach of Contract Under California
Commercial Code

III. IDENTIFYING SELLER'S BREACH--NONCONFORMING GOODS

2-28 MB Practice Guide: CA Contract Litigation 28.16

28.16 Seller May Cure Nonconforming Performance If Seller Reasonably Believed It Would Be Acceptable.

If the buyer rejected a nonconforming tender that the seller reasonably believed would be acceptable, with or without a money allowance, the seller may have an additional reasonable time to substitute a conforming tender. The seller is required to seasonably notify the buyer of intent to do so [*Com Code* § 2508(2)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)PerformanceTender, Shipment, Delivery & Cure



161 of 196 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 28 Contract for Sale of Goods--Suing or Defending Action for Breach of Contract Under California
Commercial Code

IV. IDENTIFYING BUYER'S BREACH--IMPROPER REJECTION OF GOODS

2-28 MB Practice Guide: CA Contract Litigation 28.17

28.17 CHECKLIST: Identifying Buyer's Breach--Improper Rejection of Goods.

☐ Nonconforming goods may be rejected.

Authority:

Com Code § 2601

Discussion:

See 28.19[1]

☐ Determine whether buyer has accepted goods.

☐ Did buyer signify to seller that buyer would retain goods?

Authority:

Com Code § 2606(1)

Discussion:

See 28.19[3][a]

☐ Did buyer fail to reject goods after reasonable opportunity to inspect?

Authority:

Com Code § 2606(1)(b)

Discussion:

See 28.19[3][b]

☐ Did buyer do anything inconsistent with seller's ownership of goods?

Authority:

Com Code § 2606(1)(c)

Discussion:

See 28.19[3][c]

- ☐ Determine whether buyer notified seller of nonconformity within reasonable time after acceptance.

Authority:

Com Code § 2607(3)(a)

Discussion:

See 28.19[5]

- ☐ Determine whether merchant buyer has taken proper steps after rejection.

- ☐ Merchant buyer must follow instructions if seller has no agent or place of business at market of rejection.

Authority:

Com Code § 2603(1)

Discussion:

See 28.19[6][a]

- ☐ Merchant buyer must make reasonable efforts to sell perishable goods in absence of instruction.

Authority:

Com Code § 2603(1)

Discussion:

See 28.19[6][b]

- ☐ Merchant buyer may store, reship, or sell rejected nonperishable goods in absence of instruction.

Authority:

Com Code § 2604

Discussion:

See 28.19[6][c]

- ☐ If contract was installment contract, determine if buyer has taken proper steps to reject goods under such a contract.

- ☐ Buyer can reject single nonconforming installment in installment contract.

Authority:

Com Code § 2612(1)

Discussion:

See 28.19[7][a]

- ☐ Buyer can reject installment with uncurable nonconformity or defect in required documents.

Authority:

Com Code § 2612(2)

Discussion:

See 28.19[7][b]

- ☐ Buyer must accept installment on adequate assurance of cure.

Authority:

Com Code § 2612(2)

Discussion:

See 28.19[7][c]

- ☐ Buyer can reject whole contract if nonconforming installment impaired value of whole contract.

Authority:

Com Code § 2612(3)

Discussion:

See 28.19[7][d]

- ☐ Buyer has right of inspection, but contract can require payment before inspection.

Authority:

Com Code §§ 2512, 2513

Discussion:

See 28.20, 28.21

- ☐ Buyer may avoid contract or modify price if identified goods suffer casualty without fault of either party.

Authority:

Com Code § 2613

Discussion:

See 28.22

- ☐ Buyer may revoke acceptance of nonconforming lot or commercial unit.

- ☐ Nonconformity must substantially impair value of goods to buyer.

Authority:

Com Code § 2608(1)

Discussion:

See 28.23[1]

- ☐ Revocation is allowed if nonconforming goods were accepted on reasonable assumption of cure.

Authority:

Com Code § 2608(1)(a)

Discussion:

See 28.23[2]

- ☐ Revocation is allowed if acceptance without discovery of nonconformity was induced by seller or circumstances.

Authority:

Com Code § 2608(1)(b)

Discussion:

See 28.23[3]

- ☐ Buyer must notify seller of revocation within reasonable time.

Authority:

Com Code § 2608(2)

Discussion:

See 28.23[4]

- ☐ Revocation has same effect as rejection of goods.

Authority:

Com Code § 2608(3)

Discussion:

See 28.23[5]

- ☐ "Sale on approval" and "sale or return" contracts allow buyer to return conforming goods.

Authority:

Com Code § 2327

Discussion:

See 28.24

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Breach, Repudiation & ExcuseAcceptance of GoodsGeneral

OverviewCommercial Law (UCC)Sales (Article 2)Breach, Repudiation & ExcuseAcceptance of GoodsNotice
RequirementsGeneral OverviewCommercial Law (UCC)Sales (Article 2)Breach, Repudiation & ExcuseAcceptance of
GoodsRevocation of AcceptanceBuyer's Duties & RightsCommercial Law (UCC)Sales (Article 2)Breach, Repudiation
& ExcuseRightful Rejection



162 of 196 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 28 Contract for Sale of Goods--Suing or Defending Action for Breach of Contract Under California
Commercial Code

IV. IDENTIFYING BUYER'S BREACH--IMPROPER REJECTION OF GOODS

2-28 MB Practice Guide: CA Contract Litigation 28.18

28.18 Options and Strategies.

To further the expansion of commerce and preserve the contract whenever possible, Division 2 of the Commercial Code provides guidelines for dealing with nonconforming goods. Counsel for both parties should carefully examine whether the buyer properly rejected nonconforming goods. Whether or not there has been proper grounds for any rejection may determine who is liable for any breach of the contract that occurred. The threshold issue for both parties, of course, is whether or not the goods were in fact nonconforming [*see* 28.12 -28.16]. If they are arguably nonconforming, the seller will want to show either:

- That the buyer, by words or conduct, accepted the goods, and that any subsequent revocation of that acceptance was ineffective; or
- That the buyer's rejection of the goods was unjustified and will not excuse the buyer from liability under the contract.

Conversely, the buyer will want to show either:

- That buyer rejected the goods, or that any acceptance of the goods was subsequently revoked; and/or
- That any rejection of the goods was effective and did not constitute a breach of the contract on the buyer's part.

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Breach, Repudiation & ExcuseAcceptance of GoodsGeneral
OverviewCommercial Law (UCC)Sales (Article 2)Breach, Repudiation & ExcuseAcceptance of GoodsNotice
RequirementsGeneral OverviewCommercial Law (UCC)Sales (Article 2)Breach, Repudiation & ExcuseAcceptance of
GoodsRevocation of AcceptanceBuyer's Duties & RightsCommercial Law (UCC)Sales (Article 2)Breach, Repudiation
& ExcuseRightful RejectionCommercial Law (UCC)Sales (Article 2)PerformanceTender, Shipment, Delivery & Cure



163 of 196 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 28 Contract for Sale of Goods--Suing or Defending Action for Breach of Contract Under California
Commercial Code

IV. IDENTIFYING BUYER'S BREACH--IMPROPER REJECTION OF GOODS

*2-28 MB Practice Guide: CA Contract Litigation 28.19***28.19 Nonconforming Goods Can Be Accepted or Rejected.**

28.19[1] Buyer May Reject Nonconforming Goods. Unless otherwise agreed by contractual limitation of remedy, if the goods or the tender of delivery fail in any respect to conform to the contract, the buyer may either [*Com Code* § 2601]:

- Reject the whole;
- Accept the whole; or
- Accept any commercial unit or units and reject the rest.

**Timing:**

The buyer may reject nonconforming goods within a reasonable time after tender or delivery [*Com Code* § 2602(1)].

**Strategic Point:**

Rejection is ineffective unless the buyer seasonably notifies the seller [*Com Code* § 2602(1)].

**Warning:**

A tender or delivery of goods made pursuant to a contract of sale, even though wholly nonconforming, requires affirmative action by the buyer to avoid acceptance [*Com Code* § 2602, UCC § 2-602, official cmt 1].

Jury Instructions:

Acceptance and Rejection Generally, see *California Forms of Jury Instruction, Ch. 3H, Instr. MB 300H.220* (Matthew Bender).

Requirements of an Effective Rejection, see *California Forms of Jury Instruction, Ch. 3H, Instr. MB 300H.224* (Matthew Bender).

Did Parties "Otherwise Agree"?, see *California Forms of Jury Instruction, Ch. 3H, Instr. MB 300H.126* (Matthew Bender).

Cross Reference:

Discussion of buyer's rejection of goods, see *California Forms of Pleading and Practice, § 500.60[1]* (Matthew Bender).

28.19[2] Acceptance of Goods Precludes Rejection. The buyer's acceptance of goods precludes rejection of those goods [*Com Code § 2607(2)*].



Strategic Pointss--All Parties:

- If the buyer accepts with knowledge of a nonconformity, the acceptance cannot be revoked later because of the nonconformity, unless the acceptance was on the reasonable assumption that the nonconformity would be seasonably cured [*Com Code § 2607(2)*]. However, the goods still can be returned thereafter if the buyer revokes the acceptance under *Com Code § 2608* [*Com Code § 2608, UCC § 2-608, official cmt 2*], which allows for revocation under limited circumstances.

- Acceptance does not of itself impair any other remedies for nonconformity [*Com Code § 2607(2)*].

Cross References:

Revocation of acceptance, see 28.23.

Discussion of acceptance of nonconforming goods, see *California Forms of Pleading and Practice, § 500.76[4][b]* (Matthew Bender).

28.19[3] Acceptance May Occur by Acts or Conduct.

28.19[3][a] Acceptance Occurs If Buyer Signifies Retention of Goods. Acceptance results if, after a reasonable opportunity to inspect goods, the buyer signifies to the seller that the goods are conforming or that the buyer will take or retain them despite a nonconformity [*Com Code § 2606(1)(a)*].

For purposes of Division 2 of the Commercial Code, "acceptance" as applied to goods means that the buyer, pursuant to the contract, takes particular goods that have been appropriated to the contract as being the buyer's own, whether or not the buyer is obligated to do so, and whether the buyer does so by words, action, or silence when it is time to speak [*Com Code § 2606, UCC § 2-606, official cmt 1*].



Strategic Points:

- Despite the buyer's initial communication of rejection, a subsequent communication of acceptance

will be binding [*Com Code § 2606*, UCC § 2-606, official cmt 4].

- Payment made after tender is always one circumstance tending to signify acceptance of the goods, but in itself it can never be more than one circumstance and is not conclusive. Furthermore, a conditional communication of acceptance always remains subject to its expressed conditions [*Com Code § 2606*, UCC § 2-606, official cmt 3].

Jury Instructions:

Acceptance and Rejection Generally, see *California Forms of Jury Instruction, Ch. 3H, Instr. MB 300H.220* (Matthew Bender).

Acceptance by Buyer, see *California Forms of Jury Instruction, Ch. 3H, Instr. MB 300H.221* (Matthew Bender).

28.19[3][b] Acceptance Occurs If Buyer Fails to Reject Goods After Inspection. The buyer has accepted the goods if, after a reasonable opportunity to inspect the goods, the buyer fails to make an effective rejection [*Com Code § 2606(1)(b)*].

Jury Instructions:

Acceptance and Rejection Generally, see *California Forms of Jury Instruction, Ch. 3H, Instr. MB 300H.220* (Matthew Bender).

Acceptance by Buyer, see *California Forms of Jury Instruction, Ch. 3H, Instr. MB 300H.221* (Matthew Bender).

28.19[3][c] Acceptance Occurs If Buyer Does Anything Inconsistent With Seller's Ownership. If the buyer does any act inconsistent with the seller's ownership of the goods, that act constitutes acceptance, even if the buyer communicated a rejection before the act [*Com Code § 2606*, UCC § 2-606, official cmt 4].

Distinguish:

If the act is wrongful as against the seller, it constitutes an acceptance by the buyer only if ratified by the seller [*Com Code § 2606(1)(c)*].

Jury Instructions:

Acceptance and Rejection Generally, see *California Forms of Jury Instruction, Ch. 3H, Instr. MB 300H.220* (Matthew Bender).

Acceptance by Buyer, see *California Forms of Jury Instruction, Ch. 3H, Instr. MB 300H.221* (Matthew Bender).

28.19[4] Buyer Must Pay at Contract Rate for Accepted Goods. The buyer must pay the contract rate for goods accepted [*Com Code § 2607(1)*].

28.19[5] Buyer Must Notify Seller of Breach After Acceptance. The buyer, within a reasonable time after discovering (or after the buyer should have discovered) any breach, must notify the seller of the breach or be barred from any remedy [*Com Code § 2607(3)(a)*].

Strategic Point:



The content of the notification need be sufficient merely to let the seller know that the transaction is still troublesome and must be watched. There is no reason to require that the notification include a clear

statement of all the objections that will be relied on by the buyer to preserve the buyer's rights [*Com Code* § 2607, UCC § 2-607, official cmt 4].



Timing:

The time of notification is to be determined by applying commercial standards to a merchant buyer. A reasonable time for notification for a nonmerchant buyer (that is, a consumer) is extended depending on the case. The rule requiring notification is designed to defeat commercial bad faith, not to deprive a good faith consumer of his or her remedy [*Com Code* § 2607, UCC § 2-607, official cmt 4].

Jury Instructions:

Giving Notice or Notification, see *California Forms of Jury Instruction, Ch. 3H, Instr. MB 300H.17* (Matthew Bender).

Notice of Breach as to Accepted Goods, see *California Forms of Jury Instruction, Ch. 3H, Instr. MB 300H.222* (Matthew Bender).



Cross References:

Discussion of notification of breach, see *California Forms of Pleading and Practice, § 500.60[2][b]* (Matthew Bender).

Discussion and form for notice of breach, see *California Legal Forms, § 52.386* (Matthew Bender).

28.19[6] Buyer Must Take Appropriate Steps to Return or Dispose of Rejected Goods.

28.19[6][a] Merchant Buyer Must Follow Seller's Reasonable Instructions After Rejection. When the seller has no agent or place of business at the market of rejection, a merchant buyer is under a duty, after rejection of goods in the buyer's possession or control, to follow any reasonable instructions received from the seller with respect to the goods [*Com Code* § 2603(1)].

Distinguish:

Instructions are not reasonable if, on demand, indemnity for expenses is not forthcoming [*Com Code* § 2603(1)].

28.19[6][b] Buyer Must Make Effort to Sell Perishable Goods. If the seller does not provide instructions, a merchant buyer must make reasonable efforts to sell the goods for the seller's account if they are perishable or threaten to decline in value speedily [*Com Code* § 2603(1)].

Distinguish:

The duty to resell covers only goods in the buyer's "possession or control," but those are intended as words of wide, rather than narrow, import. In effect, the measure of "control" is whether the buyer can practicably effect control without undue commercial burden [*Com Code* § 2603, UCC § 2-603, official cmt].



Warning:

A buyer that fails to make a salvage sale when the duty to do so has arisen is subject to damages for the value of the goods [*Com Code* § 2603, UCC § 2-603, official cmt 2].

Jury Instructions:

Definition of Merchant and Transactions Between Merchants, see *California Forms of Jury Instruction, Ch. 3H, Instr. MB 300H.06* (Matthew Bender).

Cross References:

Discussion of merchant's duties respecting rejected goods, see *California Forms of Pleading and Practice*, § 500.60[1][b], [c] (Matthew Bender).

Discussion and form for clause for duties of merchant relating to rejected goods, see *California Legal Forms*, § 52.324 (Matthew Bender).

28.19[6][c] Buyer May Store, Reship, or Sell Rejected Goods. If the seller gives no instructions within a reasonable time after notification of rejection, the buyer may store the rejected goods for the seller's account or reship them to the seller or resell them for the seller's account with reimbursement for costs [*Com Code* § 2604].

28.19[7] Buyer Can Reject Single Installment Under Installment Contract.

28.19[7][a] Installment Contract Authorizes Delivery in Separate Lots. An "installment contract" is one that requires or authorizes the delivery of goods in separate lots to be separately accepted, even if the contract contains a clause such as "each delivery is a separate contract" or its equivalent [*Com Code* § 2612(1)].

28.19[7][b] Buyer Can Reject Installment With Uncurable Nonconformity. The buyer may reject any nonconforming installment under an installment contract if the nonconformity either [*Com Code* § 2612(2)]:

- Substantially impairs the value of that installment and cannot be cured; or
- Is a defect in the required documents.

Example--Substantial Impairment:

Substantial impairment of the value of an installment can turn not only on the quality of the goods but also on such factors as time, quantity, assortment, and the like. It must be judged in terms of the normal or specifically known purposes of the contract [*Com Code* § 2612, UCC § 2-612, official cmt 4].

Example--Defect in Required Documents:

A defect in required documents could consist of such matters as the absence of insurance documents under a C.I.F. contract, falsity of a bill of lading, or one failing to show shipment within the contract period or to the contract destination. Even in such cases, however, the provisions on cure of tender apply if appropriate documents are readily procurable [*Com Code* § 2612, UCC § 2-612, official cmt 4].



Strategic Point:

An installment agreement may require accurate conformity in quality as a condition to the right to acceptance if it is made clear either by express provision or by the circumstances. The effect of such an agreement is to define explicitly what amounts to a substantial impairment of value that is impossible to cure. A clause requiring accurate compliance as a condition to the right to acceptance, however, must have some basis in reason, must avoid imposing hardship by surprise, and is subject to waiver or to displacement by practical construction [*Com Code* § 2612, UCC § 2-612, official cmt 4].

28.19[7][c] Buyer Must Accept Installment on Adequate Assurance of Cure. If the seller gives adequate assurance of cure, the buyer must accept the installment, unless the nonconformity impairs the value of the whole contract [*Com Code* § 2612(2)].

28.19[7][d] Nonconformity Impairing Whole Contract Is Breach of the Whole. Whenever the nonconformity or default of one or more of the installments substantially impairs the value of the whole contract, there is a breach of

the whole. The contract is reinstated, however, if the buyer accepts a nonconforming installment without seasonably notifying of cancellation or if the buyer brings an action only for past installments or demands performance of future installments [*Com Code* § 2612(3)].



Cross References:

General discussion of installment contracts, see *California Forms of Pleading and Practice*, § 500.62 (*Matthew Bender*).

Discussion and form for clause specifying when nonconforming installment breaches entire contract, see *California Legal Forms*, § 52.333 (*Matthew Bender*).

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Breach, Repudiation & ExcuseAcceptance of GoodsGeneral
OverviewCommercial Law (UCC)Sales (Article 2)Breach, Repudiation & ExcuseAcceptance of GoodsNotice
RequirementsGeneral OverviewCommercial Law (UCC)Sales (Article 2)Breach, Repudiation & ExcuseAcceptance of
GoodsRevocation of AcceptanceNonconforming GoodsCommercial Law (UCC)Sales (Article 2)Breach, Repudiation &
ExcuseBuyer's Rights on Improper Delivery



164 of 196 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 28 Contract for Sale of Goods--Suing or Defending Action for Breach of Contract Under California
Commercial Code

IV. IDENTIFYING BUYER'S BREACH--IMPROPER REJECTION OF GOODS

*2-28 MB Practice Guide: CA Contract Litigation 28.20***28.20 Buyer Has Right to Inspect Goods.**

28.20[1] Buyer Can Inspect When Goods Are Tendered, Delivered, or Identified. When goods are tendered or delivered or identified to the contract for sale, the buyer has a right before payment or acceptance to inspect them at any reasonable place and time and in any reasonable manner [*Com Code § 2513(1)*]. When the seller is required or authorized to send the goods to the buyer, the inspection may be made after their arrival [*Com Code § 2513(1)*].

No agreement by the parties can displace the entire right of inspection except when the contract is simply for the sale of "this thing." Even in a sale of boxed goods sold "as is," inspection is a right of the buyer, since if the boxes prove to contain some other merchandise altogether, the price can be recovered [*Com Code § 2513*, UCC § 2-513, official cmt 1].

**Strategic Point:**

It is not necessary that the buyer select the most appropriate time, place, or manner to inspect or that buyer's selection be the customary one in the trade or locality. Reasonableness will be determined by trade usage, past practices between the parties, and the other circumstances of the case [*Com Code § 2513*, UCC § 2-513, official cmt 3].

Example:

The buyer needed to replace its standard 18-tooth gear assembly with a 36-tooth gear to perform a subcontract for precision lathe work. The buyer's employee submitted a written purchase order when he picked up the specialized gear but did not count the teeth before installing it. The buyer did not discover that the seller had provided the wrong assembly until after the lathe had incorrectly threaded screws for 15 days. The seller argued that the buyer failed in its duty to examine the gear to determine whether it filled the contract. The court reasoned that the seller could not be insulated from liability simply because the buyer's messenger had an opportunity to make a cursory, over-the-counter inspection before he accepted the incorrect merchandise for delivery to his employer [*Square Deal Mach. Co. v. Garret Corp.* (1954) 128 CA2d 286, 275 P2d 46].

Jury Instructions:

Did Parties "Otherwise Agree"?, see *California Forms of Jury Instruction, Ch. 3H, Instr. MB 300H.126* (Matthew Bender).

28.20[2] Buyer Pays Expenses Subject to Reimbursement. Expenses of inspection must be borne by the buyer but may be recovered from the seller if the goods do not conform and are rejected [*Com Code* § 2513(2)]. Demonstrable and reasonable costs of the inspection are part of the buyer's incidental damages after the seller's breach [*Com Code* § 2513, UCC § 2-513, official cmt 4].

28.20[3] Buyer May Not Inspect Before Payment Against Documents or for C.O.D. Delivery. Unless otherwise agreed, the buyer is not entitled to inspect the goods before payment of the price when the contract provides for either [*Com Code* § 2513(3)]:

- Delivery C.O.D. or on other like terms; or
- Payment against documents of title (except when payment is due only after the goods become available for inspection).

28.20[4] Agreed Place and Method of Inspection Are Exclusive. A place or method of inspection fixed by the parties is presumed to be exclusive, but unless otherwise expressly agreed that does not postpone identification to the contract or shift the place for delivery or for passing the risk of loss. If compliance becomes impossible, inspection will be as provided in the governing code provisions [see 28.20[1]] unless the place or method fixed was clearly intended as an indispensable condition, failure of which avoids the contract [*Com Code* § 2513(4)].

**Cross Reference:**

Discussion of buyer's right to inspection, see *California Forms of Pleading and Practice*, § 500.37[2] (Matthew Bender); or *California Legal Forms*, § 52.311[2] (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Breach, Repudiation & ExcuseBuyer's Rights on Improper DeliveryCommercial Law (UCC)Sales (Article 2)PerformanceBuyer's Rights



165 of 196 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 28 Contract for Sale of Goods--Suing or Defending Action for Breach of Contract Under California
Commercial Code

IV. IDENTIFYING BUYER'S BREACH--IMPROPER REJECTION OF GOODS

2-28 MB Practice Guide: CA Contract Litigation 28.21

28.21 Contract Can Require Payment Before Inspection.

When the contract requires payment before inspection, nonconformity of the goods does not excuse the buyer from making payment unless either [*Com Code § 2512(1)*]:

- The nonconformity appears without inspection in the mere taking of delivery; or
- Despite tender of the required documents, the circumstances would justify injunction against honoring the instrument, due to fraud or the like [*see Com Code § 5109(b)*].

Payment under such a contract does not constitute an acceptance of goods or impair the buyer's right to inspect or any of the buyer's remedies [*Com Code § 2512(2)*].

Jury Instructions:

Time for Payment of Contract Price, see *California Forms of Jury Instruction, Ch. 3H, Instr. MB 300H.121* (Matthew Bender).



Cross Reference:

Discussion and form for clause for payment before inspection, see *California Legal Forms, § 52.310* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)PerformanceGeneral OverviewCommercial Law (UCC)Sales (Article 2)PerformanceBuyer's RightsCommercial Law (UCC)Sales (Article 2)PerformancePayment by CheckCommercial Law (UCC)Sales (Article 2)PerformancePayment Tender



166 of 196 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 28 Contract for Sale of Goods--Suing or Defending Action for Breach of Contract Under California
Commercial Code

IV. IDENTIFYING BUYER'S BREACH--IMPROPER REJECTION OF GOODS

2-28 MB Practice Guide: CA Contract Litigation 28.22

28.22 Buyer May Avoid Contract or Modify Price After Identified Goods Suffer Casualty.

If the contract requires goods identified when the contract was made, and the goods suffered casualty without the fault of either party before the risk of loss passed to the buyer, or in a proper case under a "no arrival, no sale" term [see 28.05[4][f]], then the buyer has the following options [Com Code § 2613]:

- If the loss is total, the contract is avoided.
- If the loss is partial or the goods have so deteriorated as no longer to conform to the contract, the buyer may nevertheless demand inspection and either:
 - ☐ Treat the contract as avoided; or
 - ☐ Accept the goods with due allowance from the contract price for the deterioration or the deficiency in quantity but without further right against the seller.

Example:

A casualty to goods can be a physical change, or can be a delay when the contract is a "no arrival, no sale" agreement [Com Code § 2613, UCC § 2-613, official cmt 3].



Cross Reference:

Discussion of casualty to goods without fault, see *California Forms of Pleading and Practice*, § 500.52[6] (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Breach, Repudiation & ExcuseCasualty to Identified GoodsCommercial Law (UCC)Sales (Article 2)Contract TermsGap-Filler ProvisionsDelivery & Shipping TermsCommercial Law (UCC)Sales

(Article 2)PerformanceRisk of Loss



167 of 196 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 28 Contract for Sale of Goods--Suing or Defending Action for Breach of Contract Under California
Commercial Code

IV. IDENTIFYING BUYER'S BREACH--IMPROPER REJECTION OF GOODS

2-28 MB Practice Guide: CA Contract Litigation 28.23

28.23 Buyer May Revoke Acceptance of Nonconforming Lot or Commercial Unit.

28.23[1] Acceptance Revocable When Nonconformity Substantially Impairs Value of Goods. The buyer may revoke acceptance of a lot or commercial unit whose nonconformity substantially impairs its value to the buyer [*Com Code* § 2608(1)].

Example:

When a financing lessor validly disclaimed all warranties and the goods conformed to the lease, the lessee could not revoke acceptance as to the lessor but could revoke as to the manufacturer [*U.S. Roofing, Inc. v. Credit Alliance Corp.* (1991) 228 CA3d 1431, 1459-1453, 279 CR 533].

Jury Instructions:

Substantial Impairment, see *California Forms of Jury Instruction, Ch. 3H, Instr. MB 300H.191* (Matthew Bender).

28.23[2] Acceptance Revocable When It Was Predicated on Cure. The buyer may revoke if the buyer accepted the goods on the reasonable assumption that the nonconformity would be cured, and it was not seasonably cured [*Com Code* § 2608(1)(a)].

28.23[3] Acceptance Revocable When Induced by Seller or Circumstances. The buyer may revoke if the buyer did not discover the nonconformity because acceptance was reasonably induced either by the difficulty of discovery before acceptance or by the seller's assurances [*Com Code* § 2608(1)(b)].

Jury Instructions:

Grounds for Revocation of Acceptance, see *California Forms of Jury Instruction, Ch. 3H, Instr. MB 300H.223* (Matthew Bender).



Cross Reference:

General discussion of revocation of acceptance, see *California Forms of Pleading and Practice, § 500.60[2][c]* (Matthew Bender).

28.23[4] Revocation Must Be Timely and With Notice to Seller. Revocation of acceptance must occur within a reasonable time after the buyer discovers or should have discovered the nonconformity and before any substantial change in condition of the goods not caused by their own defects. Revocation is not effective until the buyer notifies the seller of it [*Com Code* § 2608(2)].

Jury Instructions:

Giving Notice or Notification, see *California Forms of Jury Instruction, Ch. 3H, Instr. MB 300H.17* (Matthew Bender).

28.23[5] Revocation Equates to Rejection. When the buyer revokes, the buyer has the same rights and duties with regard to the goods involved as if the buyer had rejected them [*Com Code* § 2608(3)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Breach, Repudiation & ExcuseAcceptance of GoodsRevocation of AcceptanceGeneral OverviewCommercial Law (UCC)Sales (Article 2)Breach, Repudiation & ExcuseAcceptance of GoodsRevocation of AcceptanceBuyer's Duties & RightsCommercial Law (UCC)Sales (Article 2)Breach, Repudiation & ExcuseAcceptance of GoodsRevocation of AcceptanceNonconforming Goods



168 of 196 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 28 Contract for Sale of Goods--Suing or Defending Action for Breach of Contract Under California
Commercial Code

IV. IDENTIFYING BUYER'S BREACH--IMPROPER REJECTION OF GOODS

2-28 MB Practice Guide: CA Contract Litigation 28.24

28.24 Sale on Approval and Sale-or-Return Contract Allow Return of Conforming Goods.

28.24[1] Sale on Approval Covers Goods Primarily for Buyer's Use.

28.24[1][a] Goods Must Be for Buyer's Use. A transaction is a "sale on approval" if the goods are delivered primarily for use. Unless otherwise agreed, they may be returned by the buyer even if they conform to the contract [*Com Code* § 2326(1)(a)]. The buyer's willingness to receive and test the goods is the consideration for the seller's engagement to deliver and sell [*Com Code* § 2326, UCC § 2-326, official cmt 1].

Distinguish:

The fact that a company permitted a customer to return goods for a refund was a benefit to the customer, but did not in and of itself suggest that the parties intended the seller to retain an interest in the goods until some time after they were delivered to the customer, and did not convert a routine sale with a right to return into a sale on approval [*Wilson v. Brawn of Cal., Inc. (2005) 132 CA4th 549, 559-560*].

Jury Instructions:

Did Parties "Otherwise Agree"?, see *California Forms of Jury Instruction, Ch. 3H, Instr. MB 300H.126* (Matthew Bender).

28.24[1][b] Use of Goods to Try Them Does Not Constitute Acceptance. Use of the goods consistent with the purpose of trying is not acceptance, but failure seasonably to notify the seller of election to return the goods is acceptance. If the goods conform to the contract, acceptance of any part is acceptance of the whole [*Com Code* § 2327(1)(b)].

28.24[1][c] Risk of Loss and Title Pass to Buyer on Acceptance. Under a sale on approval, unless otherwise agreed, although the goods are identified to the contract, the risk of loss and the title do not pass to the buyer until acceptance [*Com Code* § 2327(1)(a)].

Example--Parties Otherwise Agreed:

Contract that specifically and expressly called for the buyer to pay for shipping and insurance could not be a sale on approval because it placed the risk of loss in transit on the buyer goods [*Wilson v. Brawn of Cal., Inc. (2005) 132 CA4th 549, 557-558*].

After due notification of election to return, the return is at the seller's risk and expense, but a merchant buyer must follow any reasonable instructions [*Com Code* § 2327(1)(c)].

Jury Instructions:

Did Parties "Otherwise Agree"?, see *California Forms of Jury Instruction, Ch. 3H, Instr. MB 300H.126* (Matthew Bender).



Cross Reference:

Identifying goods to contract, see 26.10.

28.24[1][d] Buyer's Creditors Cannot Claim Goods. If the buyer is holding the goods under a sale on approval, the buyer's creditors cannot claim the goods until acceptance [*Com Code* § 2326(2)].



Cross References:

Discussion of sale-on-approval and sale-or-return contract, see *California Forms of Pleading and Practice*, § 500.38 (Matthew Bender).

Discussion and form for sale-on-approval or sale-or-return agreement, see *California Legal Forms*, § 52.282 (Matthew Bender).

28.24[2] Sale-or-Return Contract Covers Goods for Resale.

28.24[2][a] Goods Must Be for Resale. Under a sale-or-return contract, the goods are delivered primarily for resale, and unless otherwise agreed, they may be returned by the buyer even though they conform to the contract [*Com Code* § 2326(1)(b)].

Jury Instructions:

Did Parties "Otherwise Agree"?, see *California Forms of Jury Instruction, Ch. 3H, Instr. MB 300H.126* (Matthew Bender).

28.24[2][b] Return Is at Buyer's Risk and Expense. If the buyer elects to return the goods under a sale-or-return contract, the return is at the buyer's risk and expense [*Com Code* § 2327(2)(b)].

28.24[2][c] Creditor Can Claim Goods in Buyer's Possession. Goods held by the buyer under a sale-or-return contract are subject to claims of the buyer's creditors while in the buyer's possession [*Com Code* § 2326(2)].

Example:

A trial court order holding that a third party claimant's title to and possession of a car it sold to the defendant was superior to the creditor-plaintiff's was reversed, because the conclusive presumption under the Commercial Code was that the car had been transferred to the defendant as a sale-or-return item, and plaintiff's right as an attaching creditor was superior to that of the claimant [*Minor v. Stevenson* (1991) 227 CA3d 1613, 278 CR 558].



Cross References:

Discussion of sale-on-approval and sale-or-return contract, see *California Forms of Pleading and Practice*, § 500.38 (Matthew Bender).

Discussion and form for sale-on-approval or sale-or-return agreement, see *California Legal Forms*, § 52.282 (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Contract TermsSales on Approval or Return



169 of 196 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 28 Contract for Sale of Goods--Suing or Defending Action for Breach of Contract Under California
Commercial Code

V. IDENTIFYING BUYER'S BREACH--PAYMENT PROBLEMS

2-28 MB Practice Guide: CA Contract Litigation 28.25

28.25 CHECKLIST: Identifying Buyer's Breach--Payment Problems.

☐ Determine if buyer paid price in accordance with contract terms.

☐ Parties can make price payable in money, goods, real estate, or otherwise.

Authority:

Com Code § 2304(1)

Discussion:

See 28.27

☐ If parties concluded contract without settling on price, determine price and related rights of parties.

☐ Open price is to be reasonable price at time of delivery.

Authority:

Com Code § 2305(1)

Discussion:

See 28.28[1]

☐ Price to be fixed by one party must be fixed in good faith.

Authority:

Com Code § 2305(2)

Discussion:

See 28.28[2]

- ☐ If price is not fixed through fault of one party, other party may cancel contract or fix price.

Authority:

Com Code § 2305(3)

Discussion:

See 28.28[3]

- ☐ If parties agree not to be bound until price is fixed, contract is canceled if price is not fixed.

Authority:

Com Code § 2305(4)

Discussion:

See 28.28[4]

- ☐ If delivery is made in lots, determine whether to demand payment of a portion of the total price upon delivery of each lot.

Authority:

Com Code § 2307

Discussion:

See 28.29

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Contract TermsGap-Filler ProvisionsOpen PriceCommercial Law (UCC)Sales (Article 2)PerformancePayment by CheckCommercial Law (UCC)Sales (Article 2)PerformancePayment Tender



170 of 196 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 28 Contract for Sale of Goods--Suing or Defending Action for Breach of Contract Under California
Commercial Code

V. IDENTIFYING BUYER'S BREACH--PAYMENT PROBLEMS

2-28 MB Practice Guide: CA Contract Litigation 28.26

28.26 Options and Strategies.

The parties have obligations in setting the price, even though the price is not an essential term of the contract under Division 2 of the Commercial Code. A reasonable price will be set if the parties fail to agree.

Cross Reference:

Discussion and forms for price provisions, see *California Legal Forms*, § 52.230 (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Breach, Repudiation & ExcuseGeneral OverviewCommercial Law
(UCC)Sales (Article 2)Contract TermsGap-Filler ProvisionsOpen PriceCommercial Law (UCC)Sales (Article
2)PerformancePayment by CheckCommercial Law (UCC)Sales (Article 2)PerformancePayment Tender



171 of 196 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 28 Contract for Sale of Goods--Suing or Defending Action for Breach of Contract Under California
Commercial Code

V. IDENTIFYING BUYER'S BREACH--PAYMENT PROBLEMS

2-28 MB Practice Guide: CA Contract Litigation 28.27

28.27 Price Can Be Made Payable in Money, Goods, Real Estate, or Anything Else of Value.

The price can be made payable in money or otherwise. If it is payable in whole or in part in goods, each party is a seller of the goods that party is to transfer [*Com Code* § 2304(1)].

Distinguish:

Even if all or part of the price is payable in an interest in real estate, the transfer of the goods and the seller's obligations with reference to them are subject to the Commercial Code, but the transfer of the interest in real estate and the transferor's connected obligations are not subject to the Code [*Com Code* § 2304(2)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Contract TermsGap-Filler ProvisionsOpen PriceCommercial Law (UCC)Sales (Article 2)PerformanceGeneral OverviewCommercial Law (UCC)Sales (Article 2)PerformancePayment by CheckCommercial Law (UCC)Sales (Article 2)PerformancePayment Tender



172 of 196 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 28 Contract for Sale of Goods--Suing or Defending Action for Breach of Contract Under California
Commercial Code

V. IDENTIFYING BUYER'S BREACH--PAYMENT PROBLEMS

2-28 MB Practice Guide: CA Contract Litigation 28.28

28.28 Price Can Be Left Open.

28.28[1] Open Price Will Be Set at Reasonable Price. The parties can conclude a contract for sale even if the price is not settled. If the price is not settled, the price is a reasonable price at the time for delivery if any of the following applies [*Com Code* § 2305(1)(a)-(c)]:

- Nothing is said as to price;
- The price is left to be agreed by the parties and they fail to agree; or
- The price is to be fixed in terms of some agreed market or other standard as set or recorded by a third person or agency, and it is not so set or recorded.

Example:

There may be cases in which a particular person's judgment is not chosen merely as a barometer or index of a fair price, but rather is an essential condition to the parties' intent to make a contract. For example, the case in which a known and trusted expert is to "value" a particular painting for which there is no market standard differs sharply from the situation in which a named expert is to determine the grade of cotton. The difference would support a finding that in the one case the parties did not intend to make a binding agreement if that expert were unavailable whereas in the other they did so intend. Other circumstances would of course affect the validity of such a finding [*Com Code* § 2305, UCC § 2-305, official cmt 4].

➡ Cross Reference:

Discussion of enforceability of contract with open price term, see *California Forms of Pleading and Practice*, §§ 500.20[1], 500.33[2] (Matthew Bender).

28.28[2] Price May Be Fixed in Good Faith by One Party. A price to be fixed by the seller alone or by the buyer alone must be fixed in good faith [*Com Code* § 2305(2)].

Consider:

Good faith includes observance of reasonable commercial standards of fair dealing in the trade if the party is a merchant. In the normal case a "posted price" or a future seller's or buyer's "given price," "price in effect," "market price," or the like, satisfies the good faith requirement [*Com Code* § 2305, UCC § 2-305, official cmt 3].

Jury Instructions:

One Party to Set Price, see *California Forms of Jury Instruction, Ch. 3H, Instr. MB 300H.111* (Matthew Bender).

28.28[3] Party Without Fault May Cancel Contract or Fix Price. When a price left to be fixed otherwise than by agreement of the parties fails to be fixed through the fault of one party, the other party may either [*Com Code* § 2305(3)]:

- Treat the contract as canceled; or
- Fix a reasonable price.

Jury Instructions:

Open Price Term: Reasonable Price, see *California Forms of Jury Instruction, Ch. 3H, Instr. MB 300H.110* (Matthew Bender).

Failure to Cooperate in Setting a Price, see *California Forms of Jury Instruction, Ch. 3H, Instr. MB 300H.112* (Matthew Bender).

28.28[4] Parties Can Agree Not to Be Bound If Price Is Not Fixed. When the parties intend not to be bound unless the price is fixed or agreed, and it is not fixed or agreed, there is no contract. In such a case the buyer must return any goods already received--or if unable to do so, the buyer must pay the reasonable value of the goods at the time of delivery--and the seller must return any portion of the price paid on account [*Com Code* § 2305(4)].



Strategic Point:

Under some circumstances the postponement of agreement on price will mean that no deal has really been concluded. Whether this is so is, in most cases, a question to be determined by the trier of fact [*Com Code* § 2305, UCC § 2-305, official cmt 2].

Jury Instructions:

Open Price Term: Reasonable Price, see *California Forms of Jury Instruction, Ch. 3H, Instr. MB 300H.110* (Matthew Bender).



Cross References:

Price can be omitted from Commercial Code contract, see *Ch. 27, Contract for Sale of Goods--Attacking or Defending Existence of Contract Under California Commercial Code, 27.12[1][b]*.

Answer including defense based on intent not to be bound while price remains open, see 28.52.

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Contract TermsGap-Filler ProvisionsOpen Price



173 of 196 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 28 Contract for Sale of Goods--Suing or Defending Action for Breach of Contract Under California
Commercial Code

V. IDENTIFYING BUYER'S BREACH--PAYMENT PROBLEMS

2-28 MB Practice Guide: CA Contract Litigation 28.29

28.29 Price May Be Demanded for Each Lot.

Unless otherwise agreed, all goods called for by a contract for sale must be tendered in a single delivery, and payment is due only on such tender. When the circumstances give either party the right to make or demand delivery in lots, the price, if it can be apportioned, may be demanded for each lot [*Com Code* § 2307].

Example:

It is not commercially feasible to deliver or to receive the goods in a single lot when the contract calls for the shipment of, for example, 10 carloads of coal, but only three cars are available at a given time.

Similarly, in a contract involving brick necessary to build a building, the buyer's storage space may be limited so that it would be impossible to receive the entire amount of brick at once, or it may be necessary to assemble the goods as in the case of cattle on the range, or to mine them. In such cases the undelivered balance of goods under the contract must be forthcoming within a reasonable time and in a reasonable manner [*Com Code* § 2307, UCC § 2-307, official cmt 3].

Jury Instructions:

Number of Deliveries and Payments, see *California Forms of Jury Instruction, Ch. 3H, Instr. MB 300H.116* (Matthew Bender).

Did Parties "Otherwise Agree"?, see *California Forms of Jury Instruction, Ch. 3H, Instr. MB 300H.126* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)PerformanceGeneral OverviewCommercial Law (UCC)Sales (Article 2)PerformancePayment TenderCommercial Law (UCC)Sales (Article 2)PerformanceTender, Shipment, Delivery & Cure



174 of 196 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 28 Contract for Sale of Goods--Suing or Defending Action for Breach of Contract Under California
Commercial Code

VI. PLEADING BREACH OF CONTRACT FOR SALE OF GOODS

2-28 MB Practice Guide: CA Contract Litigation 28.30

28.30 CHECKLIST: Pleading Breach of Contract for Sale of Goods.

☐ Allege existence of enforceable contract.

Standard Procedure Checklist:

*See Ch. 27, Contract for Sale of Goods--Attacking or Defending Existence of Contract
Under California Commercial Code, 27.07*

☐ Allege facts showing:

☐ Breach; and

☐ Damages.

Standard Procedure Checklist:

See Ch. 22, Suing or Defending Action for Breach of Contract, 22.03

Discussion:

See 28.32

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Breach, Repudiation & ExcuseGeneral OverviewCommercial Law
(UCC)Sales (Article 2)Breach, Repudiation & ExcuseAcceptance of GoodsBurdens of Proof



175 of 196 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 28 Contract for Sale of Goods--Suing or Defending Action for Breach of Contract Under California
Commercial Code

VI. PLEADING BREACH OF CONTRACT FOR SALE OF GOODS

2-28 MB Practice Guide: CA Contract Litigation 28.31

28.31 Options and Strategies.

Once a dispute over a contract for the sale of goods has reached the pleading stage, the standard rules governing contract actions apply. Where an action under the Commercial Code differs from other contract actions is in proving the existence of the contract. The Commercial Code provides liberal rules under which proof of the making of a contract for the sale of goods is comparatively easy [*see Com Code § 2201 et seq.*].

Example:

A general contractor was sued by an aircraft company after the explosion of an electric switchboard. The contractor settled the action and then sued the subcontractor that installed the switchboard, seeking indemnity. The evidence concerning the contract included the subcontractor's purchase order and the seller's invoice, which contained conflicting provisions concerning warranties. Neither party signed the other party's document, and the evidence was in conflict regarding which party's document was first tendered to the other. The court held that the parties manifested an agreement by their conduct: the seller supplied the switchboard gear, and the subcontractor accepted it. Under *Com Code § 2207(3)* there was a contract, which consisted of the terms on which the two writings agreed, supplemented by the provisions of the code [*Steiny & Co., Inc. v. California Elec. Supply Co., Inc. (2000) 79 CA4th 285, 93 CR2d 920*].

➡ Cross Reference:

Proof of contract under Division 2 of Commercial Code, see *Ch. 27, Contract for Sale of Goods--Attacking or Defending Existence of Contract Under California Commercial Code, 27.03 -27.06.*

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Breach, Repudiation & ExcuseGeneral Overview



176 of 196 DOCUMENTS

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Chapter 28 Contract for Sale of Goods--Suing or Defending Action for Breach of Contract Under California Commercial Code

VI. PLEADING BREACH OF CONTRACT FOR SALE OF GOODS

2-28 MB Practice Guide: CA Contract Litigation 28.32

28.32 Complaint Must Allege Breach and Damages.

The complaint in an action under Division 2 of the Commercial Code should conform to the pleading requirements that apply in any conventional action for breach of contract. Thus, the complaint must allege the following:

- The facts leading to the legal conclusion that the parties made a contract [*see Acoustics, Inc. v. Trepte Constr. Co. (1971) 14 CA3d 887, 913, 92 CR 723*]. These facts must show all of the following elements [*CC § 1550*]:

- ☐ Parties capable of contracting.

- ☐ Mutual consent.

- ☐ Adequate consideration.

- ☐ A lawful purpose.

- Whether the contract is written, oral, or implied [*see CCP § 430.10(g)*].

- ☐ For a written contract, include the essential terms [*International Billing Servs., Inc. v. Emigh (2000) 84 CA4th 1175, 1187, 101 CR2d 532*] and attach a copy of the contract (or all documents collectively comprising the contract) to be incorporated by reference.

- ☐ For an oral contract, allege the legal effect, consideration, and the nature of the contract [*Weitzenkorn v. Lesser (1953) 40 C2d 778, 780, 792, 256 P2d 947*].

- ☐ For an implied-in-fact contract, include allegations of the conduct from which the contract can be inferred [*Youngman v. Nevada Irrigation Dist. (1969) 70 C2d 240, 247*,

74 CR 398, 449 P2d 462].

- For an ambiguous contract, the meaning that the plaintiff ascribes to the parties' language [*Kaufman & Broad Bldg. Co. v. City & Suburban Mortgage Co. (1970) 10 CA3d 206, 211, 215, 217, 88 CR 858*].
- The satisfaction of any conditions precedent [see CC § 1439].
 - ☐ A general allegation of the performance of conditional acts (for instance, that the plaintiff "duly performed all the conditions on his part") is adequate [CCP § 457].
 - ☐ A specific allegation of the occurrence of a conditional event is required [*Careau & Co. v. Security Pac. Bus. Credit, Inc. (1990) 222 CA3d 1371, 1389, 272 CR 387*].
- The plaintiff's performance, or a specific allegation of the plaintiff's excuse for nonperformance [CC § 1495; *Daum v. Superior Court (1964) 228 CA2d 283, 287, 289, 39 CR 443*].
- The defendant's breach, which must be alleged with certainty [*Gautier v. General Tel. Co. (1965) 234 CA2d 302, 305, 44 CR 404*].
- Facts establishing the damages caused by the breach [*Gautier v. General Tel. Co. (1965) 234 CA2d 302, 305, 44 CR 404*].



Cross Reference:

Discussion and forms for complaints and allegations for use in conventional breach of contract action, see Ch. 22, Suing or Defending Action for Breach of Contract.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Pleading & Practice Pleadings Complaints General Overview Commercial Law (UCC) Sales (Article 2) Breach, Repudiation & Excuse General Overview Commercial Law (UCC) Sales (Article 2) Remedies Buyer's Remedies General Overview Commercial Law (UCC) Sales (Article 2) Remedies Buyer's Remedies Damages General Overview Commercial Law (UCC) Sales (Article 2) Remedies Seller's Remedies Damages General Overview



177 of 196 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 28 Contract for Sale of Goods--Suing or Defending Action for Breach of Contract Under California
Commercial Code

VII. PLEADING DEFENSES TO COMPLAINT FOR BREACH OF CONTRACT FOR SALE OF GOODS

2-28 MB Practice Guide: CA Contract Litigation 28.33

28.33 CHECKLIST: Pleading Defenses to Complaint for Breach of Contract for Sale of Goods.

☐ Determine what affirmative defenses are available to defendant:

☐ Defenses generally available in other types of contract actions, including:

☐ Absence of capacity to contract.

☐ Agency issues.

☐ Fraud or misrepresentation.

☐ Duress.

☐ Mistake.

☐ Bankruptcy.

☐ Other invalidating causes.

Authority:

Com Code § 1103 (principles of law and equity supplement provisions of Commercial Code)

Discussion:

See 28.35

☐ Defenses arising out of plaintiff's own nonperformance or defective performance, typically involving:

- ☐ Plaintiff seller's own failure to ship or deliver goods in manner required by contract.
- ☐ Plaintiff seller's failure to provide goods that conform to contract specifications.
- ☐ Plaintiff buyer's failure to pay for goods in amount and/or manner required by contract.

Authority:

Com Code §§ 2507, 2511

Discussion:

See 28.36

☐ Compliance with usage of trade.

Authority:

Com Code § 1303(d)

Discussion:

See 28.37

☐ Specific intent not to be bound while price term was open.

Authority:

Com Code § 2305(4)

Discussion:

See 28.38

☐ Status as nonmerchant.

Authority:

Com Code § 2104(1)

Discussion:

See 28.39

☐ If defendant is seller, assertion that buyer did not effectively revoke acceptance.

Authority:

Com Code § 2608(2)

Discussion:

See 28.40

☐ If defendant is seller, assertion that buyer did not properly reject goods.

- ☐ Buyer must state defect if seller can cure or merchant seller requests statement.

Authority:

Com Code § 2605(1)(a), (b)

Discussion:

See 28.41[1]

- ☐ Buyer may not recover payment made without reservation of rights against documents with apparent defect.

Authority:

Com Code § 2605(2)

Discussion:

See 28.41[3]

- ☐ Determine whether substitute performance is allowed.

- ☐ Commercially reasonable substitute must be tendered and accepted if agreed shipping method is unavailable without fault.

Authority:

Com Code § 2614(1)

Discussion:

See 28.42[1]

- ☐ Seller may stop delivery if governmental regulation makes agreed means of payment impossible.

Authority:

Com Code § 2614(2)

Discussion:

See 28.42[2]

- ☐ Determine whether performance was excused by failure of presupposed conditions.

- ☐ Delay or nondelivery is not breach if performance is made impracticable.

Authority:

Com Code § 2615(a)

Discussion:

See 28.43[1]

- ☐ Seller must allocate available production and deliveries among customers.

Authority:

Com Code § 2615(b)

Discussion:

See 28.43[2]

- ☐ Seller must notify buyer of limited performance or inability to perform.

Authority:

Com Code § 2615(c)

Discussion:

See 28.43[3]

- ☐ Determine whether defendant appropriately demanded assurance of due performance and thereafter suspended performance.

Authority:

Com Code § 2609

Discussion:

See 28.44

- ☐ Determine whether defendant made appropriate elections after plaintiff's anticipatory repudiation:

- ☐ Defendant awaited performance by plaintiff for commercially reasonable time.

Authority:

Com Code § 2610(a)

Discussion:

See 28.45[1]

- ☐ Defendant suspended performance.

Authority:

Com Code § 2610(c)

Discussion:

See 28.45[1]

- ☐ Defendant seller proceeded to identify goods or salvage unfinished goods.

Authority:

Com Code § 2610(c)

Discussion:

See 28.45[1]

☐ Determine whether repudiating party retracted repudiation before next performance.

☐ Aggrieved party must not have indicated that repudiation was final.

Authority:

Com Code § 2611(1)

Discussion:

See 28.45[2]

☐ Retraction must clearly indicate intent to perform.

Authority:

Com Code § 2611(2)

Discussion:

See 28.45[3]

☐ Contract is reinstated with due excuses and allowances to aggrieved party for delay.

Authority:

Com Code § 2611(3)

Discussion:

See 28.45[4]

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Pleading & Practice Defenses, Demurrers & Objections Affirmative Defenses General
Overview Commercial Law (UCC) Sales (Article 2) Breach, Repudiation & Excuse General Overview Commercial Law
(UCC) Sales (Article 2) Remedies General Overview



178 of 196 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 28 Contract for Sale of Goods--Suing or Defending Action for Breach of Contract Under California
Commercial Code

VII. PLEADING DEFENSES TO COMPLAINT FOR BREACH OF CONTRACT FOR SALE OF GOODS

2-28 MB Practice Guide: CA Contract Litigation 28.34

28.34 Options and Strategies.

In examining potential defenses in an action for the sale of goods, counsel first should consider the defenses that are available under contract law generally. A number of these "traditional" defenses are specifically made applicable to contracts governed by Division 2 of the Commercial Code [*Com Code* § 1103; *see* 28.35]. Note that other "traditional" defenses, such as those involving formation and terms of a contract and performance-related issues, may be governed by the Commercial Code rather than the Civil Code provisions and so may have to be tailored to accommodate the Commercial Code's rules regarding contract formation (as discussed in Ch. 27, Contract for Sale of Goods--Attacking or Defending Existence of Contract Under California Commercial Code) and performance (as discussed in this chapter).

In addition to the traditional contract defenses noted above, counsel should consider defenses framed by the terms of the Commercial Code. These defenses generally are performance-related and involve the specific obligations with respect to performance, acceptance, rejection and so on, imposed by Division 2. Such defenses usually are based on allegations that the plaintiff did not meet obligations directly affecting the alleged breach. This is so because the Commercial Code generally does not allow for the abandonment of contractual obligations merely because the other party's performance appears to be nonconforming.

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Breach, Repudiation & ExcuseGeneral OverviewCommercial Law
(UCC)Sales (Article 2)Breach, Repudiation & ExcuseExcuse From PerformanceCommercial Law (UCC)Sales (Article
2)RemediesGeneral Overview



179 of 196 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 28 Contract for Sale of Goods--Suing or Defending Action for Breach of Contract Under California
Commercial Code

VII. PLEADING DEFENSES TO COMPLAINT FOR BREACH OF CONTRACT FOR SALE OF GOODS

2-28 MB Practice Guide: CA Contract Litigation 28.35

28.35 Many Traditional Affirmative Defenses Are Available Under Commercial Code.

Many defenses generally available to other contract claims are specifically made applicable to actions under the Commercial Code by *Com Code § 1103*, which generally provides that the principles of law and equity will supplement the Commercial Code unless displaced by its provisions. Such "traditional" defenses specifically made applicable to contracts governed by Division 2 of the Commercial Code include [*Com Code § 1103* (general principles of law and equity supplement Commercial Code)]:

- Capacity to contract.
- Agency issues.
- Fraud and misrepresentation.
- Duress and coercion.
- Mistake.
- Bankruptcy.
- Other invalidating causes.



Cross References:

Capacity to contract, see Ch. 14, *Attacking or Defending Existence of Contract--Lack of Capacity*.

Agency issues in contract actions, see Ch. 20, *Asserting Agency Issues in Contract Actions*, 20.01 et seq.

Fraud and misrepresentation, see Ch. 17, *Attacking or Defending Existence of Contract--Fraud, Duress, Menace, and Undue Influence*, 17.03 -17.13.

Duress and coercion, see Ch. 17, *Attacking or Defending Existence of Contract--Fraud, Duress, Menace, and Undue Influence*, 17.20 -17.24.

Mistake, see Ch. 16, Attacking or Defending Existence of Contract--Mistake.

Illegality, unconscionability, and public policy, see Ch. 18, Asserting or Defending Claim That Contract Is Illegal, Contrary to Public Policy, or Unconscionable.

Defenses based on absence of an essential element of a contract *not* governed by the Commercial Code, see Ch. 13, Attacking or Defending Existence of Contract--Absence of Essential Element.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Pleading & Practice Defenses, Demurrers & Objections Affirmative Defenses General
Overview Commercial Law (UCC) Sales (Article 2) Breach, Repudiation & Excuse General Overview Contracts
Law Defenses General Overview



180 of 196 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 28 Contract for Sale of Goods--Suing or Defending Action for Breach of Contract Under California
Commercial Code

VII. PLEADING DEFENSES TO COMPLAINT FOR BREACH OF CONTRACT FOR SALE OF GOODS

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28.36 Plaintiff's Nonperformance or Defective Performance Can Be Defense.

As with any other contract action, the plaintiff's own nonperformance or defective performance of his or her own part of the bargain can be a defense to an action.

Distinguish:

The Commercial Code avoids use of the familiar term "condition precedent," but the framework of reciprocal and interdependent rights and duties it creates among the parties has an analogous effect. For example, unless otherwise agreed, the seller's tender of delivery is a condition to the buyer's duty to accept the goods and, unless otherwise agreed, to the duty to pay for them [*Com Code § 2507(1)*]. Conversely, unless otherwise agreed, tender of payment is a condition to the seller's duty to tender and complete any delivery [*Com Code § 2511(1)*].

Whether and to what extent a plaintiff's violation of his or her own duties under Division 2 creates an affirmative defense must be analyzed in the context of the rules governing the specific aspect of performance involved. The obligations of the parties in this regard are discussed throughout this chapter and can be categorized as follows:

- If defendant is the buyer, defenses may be afforded by plaintiff seller's:

- ☐ Failure to ship or deliver the goods in the manner required by the contract.
- ☐ Failure to provide goods that conform to the contract specifications.

- If defendant is the seller, a defense may be afforded by the plaintiff buyer's failure to pay for the goods in the amount and/or manner required by the contract.

➡ Cross References:

Shipment issues, see 28.03 -28.11.

Nonconforming goods, see 28.12 -28.24.

Payment issues, see 28.25 -28.29.

Conditions precedent in contracts generally, see *Ch. 22, Suing or Defending Action for Breach of Contract*, 22.19, 22.66.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Pleading & Practice Defenses, Demurrers & Objections Affirmative Defenses General
Overview Commercial Law (UCC) Sales (Article 2) General Overview Commercial Law (UCC) Sales (Article 2) Breach,
Repudiation & Excuse Excuse From Performance Contracts Law Defenses General Overview



181 of 196 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 28 Contract for Sale of Goods--Suing or Defending Action for Breach of Contract Under California
Commercial Code

VII. PLEADING DEFENSES TO COMPLAINT FOR BREACH OF CONTRACT FOR SALE OF GOODS

2-28 MB Practice Guide: CA Contract Litigation 28.37

28.37 Usage of Trade Is Defense.

The defense of custom and usage is appropriate in any action under the Commercial Code based on an agreement [see *Com Code § 1303(d)* (usage of trade supplements agreement)] unless the parties have specifically agreed that usage of trade should not be construed as a part of the agreement [*Heggblade-Marguleas-Tenneco, Inc. v. Sunshine Biscuit, Inc.* (1976) 59 CA3d 948, 955, 131 CR 183].

Examples:

- The contracts in question were silent about the applicability of trade usage and custom. Evidence of trade usage and custom was admissible to explain the meaning of quantity figures in the contracts. Because the credibility of the witnesses and the meaning to be given to contradictory inferences arising from evidence extrinsic to the terms of a written contract were for the trier of fact, a factual question arose as to whether the parties intended to exclude the custom from the contract. The trial court properly admitted the evidence of usage and custom to explain the meaning of the quantity figures in the contracts [*Heggblade-Marguleas-Tenneco, Inc. v. Sunshine Biscuit, Inc.* (1976) 59 CA3d 948, 131 CR 183].

- The buyer was a corporate grain broker; the seller was a wheat grower. They contracted in writing for wheat to be delivered as it was harvested. The price of the wheat was to be set in the future according to a contract-specified formula, and the seller accepted the risk of price fluctuation. A dispute arose, and the buyer was awarded a money judgment. Trade usage was properly put into evidence as an instrument of interpretation, and an expert's evidence of custom and usage to explain and supplement the pricing term of the contract was proper [*Balfour, Guthrie & Co., Ltd. v. Gourmet Farms* (1980) 108 CA3d 181, 166 CR 422].

Jury Instructions:

Usage of Trade Defined, see *California Forms of Jury Instruction, Ch. 3H, Instr. MB 300H.12* (Matthew Bender).

➡ Cross Reference:

Answer alleging affirmative defense that defendant complied with usage of trade, see 28.52.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Pleading & Practice Defenses, Demurrers & Objections Affirmative Defenses General
Overview Commercial Law (UCC) Sales (Article 2) Breach, Repudiation & Excuse General Overview Contracts
Law Defenses General Overview



182 of 196 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 28 Contract for Sale of Goods--Suing or Defending Action for Breach of Contract Under California
Commercial Code

VII. PLEADING DEFENSES TO COMPLAINT FOR BREACH OF CONTRACT FOR SALE OF GOODS

2-28 MB Practice Guide: CA Contract Litigation 28.38

28.38 Intent Not to Be Bound by Open-Price Term Is Defense.

The defense of no intention to be bound unless the price term has been agreed on is appropriate when the agreement contains an open price term and either [*Com Code* § 2305(4)]:

- The parties have failed to agree on a price; or
- A price has not been fixed as agreed, and the parties did not intend to be bound unless the price was set according to the terms of the agreement.

Jury Instructions:

Open Price Term: Reasonable Price, see *California Forms of Jury Instruction, Ch. 3H, Instr. MB 300H.110* (Matthew Bender).

➡ Cross References:

Answer alleging affirmative defense that defendant is not bound by open price term, see 28.52.

Discussion of open price terms, see *California Forms of Pleading and Practice, §§ 500.33[2], 500.101* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Breach, Repudiation & ExcuseGeneral OverviewCommercial Law (UCC)Sales (Article 2)Contract TermsGap-Filler ProvisionsOpen PriceContracts LawDefensesGeneral Overview



183 of 196 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 28 Contract for Sale of Goods--Suing or Defending Action for Breach of Contract Under California
Commercial Code

VII. PLEADING DEFENSES TO COMPLAINT FOR BREACH OF CONTRACT FOR SALE OF GOODS

2-28 MB Practice Guide: CA Contract Litigation 28.39

28.39 Status As Nonmerchant Can Be Defense.

The defense that a party is not a merchant is available in any action in which the defendant is inappropriately being:

- Charged with having knowledge or skill peculiar to the practices or goods involved in the transaction [see *Com Code* § 2104(1)]; or

- Held to a standard of performance required of merchants in certain situations, such as those involving any of the following:

- ☐ Good faith [see *Com Code* § 1201(20)].
- ☐ Firm offers [see *Com Code* § 2205].
- ☐ Rejected goods [see *Com Code* §§ 2603, 2605(1)(b)].

► Cross References:

Merchant's duties relating to rejected goods, see 28.19[6].

Answer alleging affirmative defense based on defendant's nonmerchant status, see 28.52.

Discussion of merchant's knowledge or skill and good faith, see *California Forms of Pleading and Practice*, § 500.11[3] (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Breach, Repudiation & ExcuseGeneral OverviewCommercial Law

(UCC)Sales (Article 2)Form, Formation & ReadjustmentStatutes of FraudsExceptionsMerchant RuleCommercial Law
(UCC)Sales (Article 2)Subject MatterDefinitionsMerchantContracts LawDefensesGeneral Overview



184 of 196 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 28 Contract for Sale of Goods--Suing or Defending Action for Breach of Contract Under California
Commercial Code

VII. PLEADING DEFENSES TO COMPLAINT FOR BREACH OF CONTRACT FOR SALE OF GOODS

2-28 MB Practice Guide: CA Contract Litigation 28.40

28.40 Buyer's Ineffectual Attempt to Revoke Acceptance Is Defense.

Revocation of acceptance is not effective until the buyer notifies the seller of it. Revocation must occur within a reasonable time after the buyer discovers or should have discovered the grounds for revocation and before any substantial change in condition of the goods not caused by their own defects [*Com Code* § 2608(2)].



Cross References:

Revocation of acceptance, see 28.23.

Answer alleging affirmative defense based on buyer's ineffective revocation, see 28.52.

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Breach, Repudiation & ExcuseGeneral OverviewCommercial Law

(UCC)Sales (Article 2)Breach, Repudiation & ExcuseAcceptance of GoodsRevocation of AcceptanceGeneral Overview



185 of 196 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 28 Contract for Sale of Goods--Suing or Defending Action for Breach of Contract Under California
Commercial Code

VII. PLEADING DEFENSES TO COMPLAINT FOR BREACH OF CONTRACT FOR SALE OF GOODS

*2-28 MB Practice Guide: CA Contract Litigation 28.41***28.41 Buyer's Improper Attempt to Reject Goods Is Defense.**

28.41[1] Rejection Without Seasonable Notice Is Ineffective. A rejection of goods must be made within a reasonable time after their delivery or tender. Rejection is ineffective unless the buyer seasonably (that is, at or within the time agreed or, if no time is agreed, at or within a reasonable time [*Com Code § 1205(b)*]) notifies the seller [*Com Code § 2602(1)*]. After rejection, any exercise of ownership by the buyer with respect to any commercial unit is wrongful against the seller [*Com Code § 2602(2)(a)*]. If the buyer has taken physical possession of the goods before rejecting them, and the buyer does not have a security interest, the buyer is under a duty after rejection to hold the goods with reasonable care at the seller's disposition for a time sufficient to permit the seller to remove them [*Com Code § 2602(2)(b)*]. A nonmerchant buyer has no further obligations with regard to goods rightfully rejected [*Com Code § 2602(2)(c)*].

➤ **Cross Reference:**

Merchant buyer's duties on rejection of goods, see 28.19[6].

28.41[2] Failure to Identify Curable Defect Makes Rejection Ineffectual. The buyer's failure to state, in connection with rejection, a particular defect that is ascertainable by reasonable inspection precludes the buyer from relying on the unstated defect to justify rejection or to establish breach if [*Com Code § 2605(1)(a), (b)*]:

- The seller could have cured it if stated seasonably; or
- Between merchants, the seller has after rejection made a request in writing for a full and final written statement of all defects on which the buyer proposes to rely.

Jury Instructions:

Buyer's Failure to Specify Defects, see *California Forms of Jury Instruction, Ch. 3H, Instr. MB 300H.225* (Matthew Bender).

➤ **Cross References:**

Buyer's inspection of goods, see 28.20.

Answer alleging affirmative defense based on ineffectual rejection, see 28.52.

28.41[3] Buyer's Payment Without Reservation of Rights Is Waiver of Defect in Documents. Payment against documents made without reservation of rights precludes recovery of the payment for defects apparent in the documents [*Com Code* § 2605(2)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Breach, Repudiation & ExcuseGeneral OverviewCommercial Law (UCC)Sales (Article 2)Breach, Repudiation & ExcuseAcceptance of GoodsGeneral OverviewCommercial Law (UCC)Sales (Article 2)Breach, Repudiation & ExcuseRightful Rejection



186 of 196 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 28 Contract for Sale of Goods--Suing or Defending Action for Breach of Contract Under California
Commercial Code

VII. PLEADING DEFENSES TO COMPLAINT FOR BREACH OF CONTRACT FOR SALE OF GOODS

2-28 MB Practice Guide: CA Contract Litigation 28.42

28.42 Substitute Performance Can Replace Agreed Means of Shipment or Payment.

28.42[1] Parties Must Accept Commercially Reasonable Substitute. When, without fault of either party, the agreed berthing, loading, or unloading facilities fail, or an agreed type of carrier becomes unavailable, or the agreed manner of delivery otherwise becomes commercially impracticable, but a commercially reasonable substitute is available, the substitute performance must be tendered and accepted [*Com Code* § 2614(1)].

Jury Instructions:

Substitution of Delivery Arrangements, see *California Forms of Jury Instruction, Ch. 3H, Instr. MB 300H.244* (Matthew Bender).

Commercial Impracticability Defined, see *California Forms of Jury Instruction, Ch. 3H, Instr. MB 300H.245* (Matthew Bender).



Cross Reference:

Discussion of substitute performance, see *California Forms of Pleading and Practice, § 500.32[4]* (Matthew Bender).

28.42[2] Seller May Stop Delivery When Government Regulation Blocks Payment.

28.42[2][a] Seller Must Accept Equivalent Means of Payment. If the agreed means or manner of payment fails because of domestic or foreign governmental regulation, the seller may withhold or stop delivery unless the buyer provides a means or manner of payment that is commercially a substantial equivalent [*Com Code* § 2614(2)].



Cross Reference:

Discussion of substitute performance, see *California Forms of Pleading and Practice, § 500.32[4]* (Matthew Bender).

28.42[2][b] Seller Must Accept Payment According to Regulation. If delivery has already been taken, payment by the means or in the manner sanctioned under applicable regulation discharges the buyer's obligation unless the regulation is discriminatory, oppressive, or predatory [*Com Code* § 2614(2)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Breach, Repudiation & ExcuseSubstituted PerformanceCommercial Law (UCC)Sales (Article 2)Contract TermsGap-Filler ProvisionsDelivery & Shipping TermsCommercial Law (UCC)Sales (Article 2)PerformanceTender, Shipment, Delivery & Cure



187 of 196 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 28 Contract for Sale of Goods--Suing or Defending Action for Breach of Contract Under California
Commercial Code

VII. PLEADING DEFENSES TO COMPLAINT FOR BREACH OF CONTRACT FOR SALE OF GOODS

2-28 MB Practice Guide: CA Contract Litigation 28.43

28.43 Performance Is Excused by Failure of Presupposed Conditions.

28.43[1] Seller's Performance Is Impracticable. Delay in delivery or nondelivery in whole or in part by a seller who complies with *Com Code* § 2615(b) and (c) [see 28.43[2], [3]] is not a breach of the seller's duty under a contract for sale if performance as agreed has been made impracticable by either of the following [*Com Code* § 2615(a)]:

- The occurrence of a contingency the nonoccurrence of which was a basic assumption on which the contract was made; or
- Compliance in good faith with any applicable foreign or domestic governmental regulation or order, whether or not it later proves to be invalid.

Examples:

- Increased cost alone does not excuse nonperformance unless the rise in cost is due to some unforeseen contingency that alters the essential nature of the performance [*Com Code* § 2615, UCC § 2-615, official cmt 4].
- A rise or collapse in the market in itself is not a justification, because that is exactly the type of business risk that business contracts made at fixed prices are intended to cover [*Com Code* § 2615, UCC § 2-615, official cmt 4].
- A severe shortage of raw materials or supplies because of a contingency such as war, embargo, local crop failure, unforeseen shutdown of major sources of supply, or the like, which either causes a marked increase in cost or prevents the seller from obtaining supplies necessary to the seller's performance, is within the contemplation of this rule [*Com Code* § 2615, UCC § 2-615, official cmt 4].

Jury Instructions:

Excuse of Performance--Special Findings, see *California Forms of Jury Instruction, Ch. 3H, Instr. MB*

300H.240 (Matthew Bender).

Excuse of Performance for Increased Cost, see *California Forms of Jury Instruction, Ch. 3H, Instr. MB 300H.241* (Matthew Bender).

 Cross Reference:

Discussion of impossibility of performance, see *California Forms of Pleading and Practice, § 500.63* (Matthew Bender).

28.43[2] Seller Must Allocate Available Production and Deliveries. When only a part of the seller's capacity to perform has been adversely affected by a specified cause [see 28.43[1]], the seller must allocate production and deliveries among customers, but may include regular customers not then under contract and also may meet the seller's own requirements for further manufacture. The seller may allocate in any manner that is fair and reasonable [*Com Code § 2615(b)*].

Jury Instructions:

Seller's Duty to Allocate Supply, see *California Forms of Jury Instruction, Ch. 3H, Instr. MB 300H.242* (Matthew Bender).

28.43[3] Seller Must Notify Buyer. The seller must notify the buyer seasonably (that is, at or within the time agreed or, if no time is agreed, at or within a reasonable time [*Com Code § 1205(b)*]) that there will be a delay or nondelivery and, when allocation is required [see 28.43[2]], notify the buyer of the estimated quota thus made available for the buyer [*Com Code § 2615(c)*].

 Cross Reference:

Discussion and form for notice of excuse for nonperformance, see *California Legal Forms, § 52.320* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Breach, Repudiation & ExcuseExcuse From Performance



188 of 196 DOCUMENTS

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Chapter 28 Contract for Sale of Goods--Suing or Defending Action for Breach of Contract Under California
Commercial Code

VII. PLEADING DEFENSES TO COMPLAINT FOR BREACH OF CONTRACT FOR SALE OF GOODS

*2-28 MB Practice Guide: CA Contract Litigation 28.44***28.44 Party May Demand Assurances.**

When reasonable grounds for insecurity arise with respect to the performance of either party, the other party, in writing, may demand adequate assurance of due performance; and until that assurance is received, the demanding party may suspend, if commercially reasonable, any performance for which the party has not already received the agreed return [*Com Code § 2609(1)*].

Between merchants the reasonableness of grounds for insecurity and the adequacy of any assurance offered will be determined according to commercial standards [*Com Code § 2609(2)*].

Consider:

A contract for sale imposes an obligation on each party that the other's expectation of receiving due performance will not be impaired [*Com Code § 2609(1)*].

**Strategic Point:**

Acceptance of any improper delivery or payment does not prejudice the aggrieved party's right to demand adequate assurance of future performance [*Com Code § 2609(3)*].

**Warning:**

Failure to provide assurance of due performance that is adequate under the circumstances of the particular case, within a reasonable time (not exceeding 30 days) after the receipt of a justified demand for such assurance, is a repudiation of the contract [*Com Code § 2609(4)*].

Jury Instructions:

Demand for Adequate Assurance, see *California Forms of Jury Instruction, Ch. 3H, Instr. MB 300H.193* (Matthew Bender).

Grounds for Insecurity, see *California Forms of Jury Instruction, Ch. 3H, Instr. MB 300H.194* (Matthew Bender).

Adequate Assurance, see *California Forms of Jury Instruction, Ch. 3H, Instr. MB 300H.195* (Matthew Bender).



Cross Reference:

Discussion of demand of adequate assurance on reasonable ground of insecurity, see *California Forms of Pleading and Practice, § 500.32[3]* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Breach, Repudiation & ExcuseAssurances of Performance



189 of 196 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 28 Contract for Sale of Goods--Suing or Defending Action for Breach of Contract Under California
Commercial Code

VII. PLEADING DEFENSES TO COMPLAINT FOR BREACH OF CONTRACT FOR SALE OF GOODS

2-28 MB Practice Guide: CA Contract Litigation 28.45

28.45 Anticipatory Repudiation Invites Defensive Tactics.

28.45[1] Aggrieved Party Has Options. When either party has repudiated the contract with respect to a performance not yet due, and the loss of that performance will substantially impair the value of the contract to the other party, the aggrieved party may make the following elections [*Com Code § 2610*]:

- For a commercially reasonable time, await performance by the repudiating party; or
- Resort to any remedy for breach [*see Com Code §§ 2703, 2711*], even after urging retraction [*see 28.45[2]*] and giving notice to the repudiating party that the aggrieved party would await performance; and
- In either case, suspend performance.

If the buyer is the repudiating party, the seller also has the option of exercising the seller's right to identify goods to the contract notwithstanding breach, or to salvage unfinished goods [*Com Code § 2610(c)*; *see Com Code § 2704* (seller's rights); *see Ch. 26, Contract for Sale of Goods--Seeking Remedies Under California Commercial Code, 26.09, 26.10*].

Jury Instructions:

Repudiation, *see California Forms of Jury Instruction, Ch. 3H, Instr. MB 300H.190* (Matthew Bender).



Cross References:

Remedies for breach, *see Ch. 26, Contract for Sale of Goods--Seeking Remedies Under California Commercial Code, 26.17*.

Anticipatory breach of contract in general, *see Ch. 22, Suing or Defending Action for Breach of Contract, 22.23*.

Discussion of anticipatory repudiation in general, *California Forms of Pleading and Practice, § 500.61* (Matthew Bender).

Discussion of client considerations in anticipatory repudiation, *California Legal Forms*, § 52.147 (Matthew Bender).

28.45[2] Repudiation Can Be Retracted. Until the repudiating party's next performance is due, that party can retract the repudiation, unless the aggrieved party, since the repudiation, has canceled the contract, or materially changed position, or otherwise indicated that the repudiation is treated as final [*Com Code* § 2611(1)].

Jury Instructions:

Retraction of Repudiation, see *California Forms of Jury Instruction*, Ch. 3H, Instr. MB 300H.192 (Matthew Bender).

 Cross References:

Anticipatory breach of contract in general, see Ch. 22, *Suing or Defending Action for Breach of Contract*, 22.23.

Discussion of retraction of repudiation, see *California Forms of Pleading and Practice*, § 500.61[2] (Matthew Bender).

Discussion and form for notice retraction of repudiation, see *California Legal Forms*, § 52.451 (Matthew Bender).

28.45[3] Retraction Must Indicate Intent to Perform. Retraction may be made by any method that clearly indicates to the aggrieved party that the repudiating party intends to perform, but in every case it must include any assurance justifiably demanded under *Com Code* § 2609 [*Com Code* § 2611(2)].

 Cross Reference:

Demanding assurance, see 28.44.

28.45[4] Contract Is Reinstated With Due Excuses and Allowances for Delay. Retraction reinstates the repudiating party's rights under the contract, with due excuse and allowance to the aggrieved party for any delay occasioned by the repudiation [*Com Code* § 2611(3)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Breach, Repudiation & ExcuseAnticipatory Repudiation



190 of 196 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 28 Contract for Sale of Goods--Suing or Defending Action for Breach of Contract Under California
Commercial Code
VIII. FORMS

*2-28 MB Practice Guide: CA Contract Litigation 28.46***28.46 Complaint for Breach of Contract for Goods--By Seller Against Buyer--General Form.****Complaint for Breach of Contract for Goods--By Seller Against Buyer--General Form.**

_____[Name of attorney]
 _____[Street address]
 _____[City, state, and ZIP]
 _____[Area code and phone number]
 _____[State Bar no. of attorney]
 Attorney for _____[name of party]

SUPERIOR COURT OF CALIFORNIA,
 COUNTY OF _____

[name(s)] _____,	)	
Plaintiff(s)	)	NO.
vs.	)	_____
[name(s)] _____	)	_____
[and DOES 1 THROUGH	)	COMPLAINT FOR BREACH OF CONTRACT
_____]	)	FOR SALE OF GOODS
Defendant(s).	)	[LIMITED CIVIL CASE]
	)	[Amount Demanded
		_____ (Exceeds or Does Not
		Exceed) \$10,000]

Plaintiff _____[name] alleges:

[For an individual plaintiff]

1. Plaintiff is an individual residing in _____ [city, if any, and county], California, [in the (name of judicial district, if any) _____] [, and therein doing business under the fictitious business name of _____]. Plaintiff has duly complied in all respects with the requirements of *Business and Professions Code Sections 17910 through 17917* with respect to this fictitious business name].

[OR, for a domestic corporation or domestic limited liability company]

1. Plaintiff _____ [name] is, and at all times herein mentioned was, a _____ [corporation or limited liability company] organized and existing under the laws of California, with its principal place of business in _____ [city, if any, and county], California [in the (name of judicial district, if any) _____] [, and therein doing business under the fictitious business name of _____]. Plaintiff has duly complied in all respects with the requirements of *Business and Professions Code Sections 17910 through 17917* with respect to this fictitious business name].

[OR, for a foreign corporation or foreign limited liability company]

1. Plaintiff _____ [name] is, and at all times herein mentioned was, a _____ [corporation or limited liability company] organized and existing under the laws of _____ [state or foreign country], and _____ [for foreign corporation authorized to do business and doing business in California or, for foreign limited liability company maintaining action or intrastate business, and registered to transact intrastate business in California], with its principal place of business in California in _____ [city, if any, and county], California [in the (name of judicial district, if any) _____].

[OR, for a general or limited partnership or an unincorporated association]

1. Plaintiff _____ [name] is, and at all times herein mentioned was, a _____ [partnership or unincorporated association] with its principal place of business in _____ [city, if any, and county], California [in the (name of judicial district, if any) _____] [, and therein doing business under the fictitious business name of _____]. Plaintiff has duly complied in all respects with the requirements of *Business and Professions Code Sections 17910 through 17917* with respect to this fictitious business name].

[CONTINUE]

[For an individual defendant]

2. Defendant _____ [name] is an individual residing in _____ [city, if any, and county], California [in the (name of judicial district, if any) _____] [and doing business therein under the fictitious business name of _____].

[OR, for a domestic corporation or domestic limited liability company]

2. Defendant _____ [name] is, and at all times herein mentioned was, a _____ [corporation or limited liability company] organized and existing under the laws of California [, with its principal place of business in _____ (city, if any, and county), California (, in the _____ [name of judicial district, if any])].

[OR, for a foreign corporation or foreign limited liability company]

2. Defendant _____ [name] is, and at all times herein mentioned was, a _____ [corporation or limited liability company] organized and existing under the laws of _____ [state or foreign country][, with its principal place of business in _____ (city, if any, and county), California (, in the _____ [name of judicial district, if any])].

[OR, for a general or limited partnership or an unincorporated association]

2. Defendant _____ [name] is, and at all times herein mentioned was, _____ [a partnership or an unincorporated association] sued herein under the name _____ [it has assumed or by which it is known][, with its principal place of business in _____ (city, if any, and county), California (, in the _____ [name of judicial district, if any])]. [Defendants (names of individual partners or members) _____ are, and at all times herein mentioned were, members of that _____ (partnership or unincorporated association) (and are, and at all times herein mentioned were, residents of _____ County, California)].

[CONTINUE]

3. Plaintiff is ignorant of the true names and capacities of Defendants sued herein as DOES 1 through _____ [numeral, e.g., 50], inclusive, and therefore sues these Defendants by these fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when ascertained. [Plaintiff is informed and believes and thereon alleges that each of the fictitiously named Defendants is responsible in some manner for the occurrences herein alleged, and that Plaintiff's damages as herein alleged were proximately caused by those Defendants.]

4. Plaintiff is informed and believes and thereon alleges that at all times material to this complaint, _____ [identify defendants to whom agency

allegation applies, e.g., each of the Defendants or each of the individual Defendants or Defendant Harry Jones], [and each of the Defendants fictitiously named in this complaint,] in addition to acting for himself, herself, or itself and on his, her, or its own behalf individually, is and was acting as the agent, servant, employee and representative of, and with the knowledge, consent and permission of, and in conspiracy with, each and all of the Defendants and within the course, scope and authority of that agency, service, employment, representation, and conspiracy. Plaintiff further alleges on information and belief that the acts of each of the Defendants were fully ratified by each and all of the Defendants. Specifically, and without limitation, Plaintiff alleges on information and belief that the actions, failures to act, breaches, conspiracy, and misrepresentations alleged herein and attributed to one or more of the specific Defendants were approved, ratified, and done with the cooperation and knowledge of each and all of the Defendants.

[Include if plaintiff is a merchant:]

5. Plaintiff is a merchant engaged in the [retail or wholesale or other description] sale of _____ [specify products or product lines, e.g., widgets].

[Include if defendant is a merchant:]

6. Defendant is a merchant engaged in the [retail or wholesale or other description] sale of _____ [specify products or product lines, e.g., widgets].

[CONTINUE]

[EITHER, if agreement is evidenced by written contract]

7. On _____ [date], Plaintiff and Defendant executed a contract for the purchase of goods. The contract, a copy of which is attached as Exhibit A and incorporated by reference, provides that _____ [describe essential terms of contract, e.g., Plaintiff would sell 5,000 widgets to Plaintiff, and obligated Defendant to pay Plaintiff the sum of \$_____ on delivery].

[OR, if no written contract is in existence]

7. _____ [Allege facts showing making and substance of agreement, e.g., On January 1, 2005, at the special instance and request of Defendant, and in consideration of Defendant's promise to pay the purchase price, Plaintiff shipped and delivered to Defendant the goods, wares and merchandise shown on the attached Exhibit B, which is incorporated by reference].

[CONTINUE]

8. Plaintiff fully performed Plaintiff's part of the agreement described in Paragraph 7, in that, on _____ [date], Plaintiff _____ [delivered or tendered delivery of] the goods to Defendant in the time and manner and at the place required by the agreement.

9. Defendant, in violation of Defendant's promises and obligations under the agreement described in Paragraph 7, _____ [describe Defendant's breach, e.g., wrongfully refused to accept delivery of the goods or wrongfully revoked acceptance of the goods or wrongfully fails and refuses to make payment due for the goods].

[EITHER, if resale was at public sale]

10. _____ [Set forth plaintiff's actions in response to defendant's breach, e.g., Following Defendant's breach of the contract as described in Paragraph 9, Plaintiff attempted to locate another party willing to purchase the goods. After giving Defendant reasonable notice of the time and place of the resale of the goods, Plaintiff sold the goods to the highest bidder for cash in a public sale conducted in good faith and in a commercially reasonable manner].

[OR, if resale was at private sale]

10. _____ [Set forth plaintiff's actions in response to defendant's breach, e.g., Following Defendant's breach of the contract as described in Paragraph 9, Plaintiff attempted to locate another party willing to purchase the goods. After giving Defendant reasonable notice of his/her/its intention to resell the goods, Plaintiff sold the goods in a commercially reasonable manner and in good faith to (name of buyer) _____. The resale contract, a copy of which is attached as Exhibit B and incorporated by reference, provides for the sale by Plaintiff to (name of buyer) _____ on the following terms: (in general terms, state contract price, delivery terms, etc., of resale contract) _____].

[CONTINUE]

[EITHER, if damages are based on resale]

11. _____ [Set forth claim for damages, e.g., The price received by Plaintiff from the resale of the goods described in Paragraph 10 is \$ _____. The price Defendant contracted and agreed to pay for these goods, as described in Paragraph 7, is \$ _____. As a direct and proximate result of Defendant's breach of contract, Plaintiff has suffered damages in the sum of \$ (difference between contract price and actual resale price) _____].

[OR, if resale damages are not sought, and claim is for lost profits for completed goods]

11. _____ [Set forth claim for damages for lost profits, e.g., The price Defendant contracted and agreed to pay for the goods, as described in Paragraph 7, is \$ _____. Plaintiff's costs directly attributable to the manufacture of these goods are \$ (specify variable costs only, not fixed costs) _____. The damages specified in Commercial Code Section 2708(1) would be inadequate to put Plaintiff in as good a position as performance would

have done, because Plaintiff was operating at less than full capacity at the time of Defendant's breach, and Plaintiff's volume of sales was decreased by Defendant's breach. Thus, as a direct and proximate result of Defendant's breach of contract, Plaintiff has suffered damages in the sum of \$_____].

[OR, if resale damages are not sought, and claim is for lost profits as "lost volume seller"]

11. _____ [Set forth claim for damages for lost profits, e.g., The price Defendant contracted and agreed to pay for the goods, as described in Paragraph 7, is \$_____. Plaintiff's costs directly attributable to the manufacture of these goods are \$ (specify variable costs only, not fixed costs) _____. The damages specified in *Commercial Code Section 2708(1)* would be inadequate to put Plaintiff in as good a position as performance would have done, because Plaintiff would have made the sale referred to in Paragraph 10 even if Defendant had not breached the contract described in Paragraph 7. Thus, if Defendant had not breached the contract described in Paragraph 7, Plaintiff would have earned the profits from both the sale to Defendant and the sale described in Paragraph 10. The damages specified in *Commercial Code Section 2708(1)* therefore are inadequate because they would compensate Plaintiff only for the loss of profits on one sale. Thus, as a direct and proximate result of Defendant's breach of contract, Plaintiff has suffered damages in the sum of \$_____].

[OR, if resale damages are not sought, and claim is for lost profit for incomplete goods]

11. _____ [If goods were incomplete at time of breach and manufacture of goods was not completed following breach, set forth claim for lost profits, e.g., The price Defendant contracted and agreed to pay for the goods, as described in Paragraph 7, is \$_____. Plaintiff's costs incurred in the manufacture of the goods up to the time of Defendant's breach, including fixed expenses attributable to the contract, are \$_____. However, Plaintiff saved expenses in the amount of \$_____ by not being required to complete manufacture because of Defendant's breach, and Plaintiff was able to recoup \$_____ of the expenses incurred by selling the partially manufactured goods. It was not commercially reasonable to complete manufacture of the goods under the contract. As a direct and proximate result of Defendant's breach of contract, Plaintiff has suffered damages in the sum of \$_____].

[CONTINUE]

[OPTIONAL PROVISIONS]

[EITHER, if contract included liquidated damages provision]

12. The parties agreed in paragraph _____ of the contract that _____ [specify conditions under which liquidated damages provision would apply, e.g., in the event of a breach by either party,] Plaintiff would be entitled to recover _____ [specify amount of damages and/or formula for determining amount].

[OR, if defendant has made deposit that will be treated as liquidated damages in event of breach]

12. On entering into the contract with Plaintiff, Defendant provided a deposit of \$_____ as security for the performance of Defendant's contractual obligations. The contract provided that this deposit would be liquidated damages in the event of a breach of the contract. Since Defendant has breached the contract as herein alleged, Plaintiff is entitled to the sum of \$_____ as damages.

[CONTINUE]

13. As a further direct result of Defendant's breach of contract, Plaintiff was caused to incur the following commercially reasonable charges, expenses, and commissions:

_____ [state incidental damages, e.g.,

Transportation costs to and from Defendant's warehouse:

\$_____

Storage for _____ (describe storage period, e.g., 14 days): \$_____

Auctioneer's commission: \$_____

Total: \$_____]

WHEREFORE, Plaintiff prays judgment against Defendant as follows:

[EITHER]

1. For damages in the sum of \$_____;

[OR, if agreement provides for liquidated damages]

1. For liquidated damages according to the agreement of the parties in the sum of \$_____;

[CONTINUE]

2. For incidental damages in the sum of \$_____;

3. For interest on the sum of \$_____ from and after _____ [date amount of damages was capable of being made certain or date action was filed];

4. For costs of suit herein incurred; and

5. For such other further relief as the court may deem proper.

Dated: _____

[firm name, if any] _____

By: [signature] _____

[typed name] _____

Attorney for Plaintiff

[ADD following verification, if applicable]

VERIFICATION

I am the plaintiff in the above entitled action; I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein stated on information and belief, and, as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

[date] _____

[signature] _____

[typed name] _____

NOTES.

Authority:

Com Code §§ 2703(e), 2704, 2706, 2708-2710

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Pleading & Practice Pleadings Complaints General Overview Commercial Law (UCC) Sales (Article 2) Breach, Repudiation & Excuse General Overview Commercial Law (UCC) Sales (Article 2) Remedies Seller's Remedies General Overview



191 of 196 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 28 Contract for Sale of Goods--Suing or Defending Action for Breach of Contract Under California
Commercial Code
VIII. FORMS

*2-28 MB Practice Guide: CA Contract Litigation 28.47***28.47 Complaint for Breach of Contract for Goods--By Seller Against Buyer--To Recover Price.****Complaint for Breach of Contract for Goods--By Seller Against Buyer--To Recover Price.**

_____[Name of attorney]
 _____[Street address]
 _____[City, state, and ZIP]
 _____[Area code and phone number]
 _____[State Bar no. of attorney]
 Attorney for _____[name of party]

SUPERIOR COURT OF CALIFORNIA,
 COUNTY OF _____

[name(s)] _____,	)	
Plaintiff(s)	)	NO.
vs.	)	_____
[name(s)] _____	)	_____
[and DOES 1 THROUGH	)	COMPLAINT FOR BREACH OF CONTRACT
_____]	)	FOR SALE OF GOODS
Defendant(s).	)	[LIMITED CIVIL CASE]
	)	[Amount Demanded
		_____ (Exceeds or Does Not
		Exceed) \$10,000]

Plaintiff _____[name] alleges:

[For an individual plaintiff]

1. Plaintiff is an individual residing in _____ [city, if any, and county], California, [in the (name of judicial district, if any) _____] [, and therein doing business under the fictitious business name of _____]. Plaintiff has duly complied in all respects with the requirements of *Business and Professions Code Sections 17910 through 17917* with respect to this fictitious business name].

[OR, for a domestic corporation or domestic limited liability company]

1. Plaintiff _____ [name] is, and at all times herein mentioned was, a _____ [corporation or limited liability company] organized and existing under the laws of California, with its principal place of business in _____ [city, if any, and county], California [in the (name of judicial district, if any) _____] [, and therein doing business under the fictitious business name of _____]. Plaintiff has duly complied in all respects with the requirements of *Business and Professions Code Sections 17910 through 17917* with respect to this fictitious business name].

[OR, for a foreign corporation or foreign limited liability company]

1. Plaintiff _____ [name] is, and at all times herein mentioned was, a _____ [corporation or limited liability company] organized and existing under the laws of _____ [state or foreign country], and _____ [for foreign corporation authorized to do business and doing business in California or, for foreign limited liability company maintaining action or intrastate business, and registered to transact intrastate business in California], with its principal place of business in California in _____ [city, if any, and county], California [in the (name of judicial district, if any) _____].

[OR, for a general or limited partnership or an unincorporated association]

1. Plaintiff _____ [name] is, and at all times herein mentioned was, a _____ [partnership or unincorporated association] with its principal place of business in _____ [city, if any, and county], California [in the (name of judicial district, if any) _____] [, and therein doing business under the fictitious business name of _____]. Plaintiff has duly complied in all respects with the requirements of *Business and Professions Code Sections 17910 through 17917* with respect to this fictitious business name].

[CONTINUE]

[For an individual defendant]

2. Defendant _____ [name] is an individual residing in _____ [city, if any, and county], California [in the (name of judicial district, if any) _____] [and doing business therein under the fictitious business name of _____].

[OR, for a domestic corporation or domestic limited liability company]

2. Defendant _____ [name] is, and at all times herein mentioned was, a _____ [corporation or limited liability company] organized and existing under the laws of California [, with its principal place of business in _____ (city, if any, and county), California (, in the _____ [name of judicial district, if any])].

[OR, for a foreign corporation or foreign limited liability company]

2. Defendant _____ [name] is, and at all times herein mentioned was, a _____ [corporation or limited liability company] organized and existing under the laws of _____ [state or foreign country][, with its principal place of business in _____ (city, if any, and county), California (, in the _____ [name of judicial district, if any])].

[OR, for a general or limited partnership or an unincorporated association]

2. Defendant _____ [name] is, and at all times herein mentioned was, _____ [a partnership or an unincorporated association] sued herein under the name _____ [it has assumed or by which it is known][, with its principal place of business in _____ (city, if any, and county), California (, in the _____ [name of judicial district, if any])]. [Defendants (names of individual partners or members) _____ are, and at all times herein mentioned were, members of that _____ (partnership or unincorporated association) (and are, and at all times herein mentioned were, residents of _____ County, California)].

[CONTINUE]

3. Plaintiff is ignorant of the true names and capacities of Defendants sued herein as DOES 1 through _____ [numeral, e.g., 50], inclusive, and therefore sues these Defendants by these fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when ascertained. [Plaintiff is informed and believes and thereon alleges that each of the fictitiously named Defendants is responsible in some manner for the occurrences herein alleged, and that Plaintiff's damages as herein alleged were proximately caused by those Defendants.]

4. Plaintiff is informed and believes and thereon alleges that at all times material to this complaint, _____ [identify defendants to whom agency

allegation applies, e.g., each of the Defendants or each of the individual Defendants or Defendant Harry Jones], [and each of the Defendants fictitiously named in this complaint,] in addition to acting for himself, herself, or itself and on his, her, or its own behalf individually, is and was acting as the agent, servant, employee and representative of, and with the knowledge, consent and permission of, and in conspiracy with, each and all of the Defendants and within the course, scope and authority of that agency, service, employment, representation, and conspiracy. Plaintiff further alleges on information and belief that the acts of each of the Defendants were fully ratified by each and all of the Defendants. Specifically, and without limitation, Plaintiff alleges on information and belief that the actions, failures to act, breaches, conspiracy, and misrepresentations alleged herein and attributed to one or more of the specific Defendants were approved, ratified, and done with the cooperation and knowledge of each and all of the Defendants.

[Include if plaintiff is a merchant:]

5. Plaintiff is a merchant engaged in the [retail or wholesale or other description] sale of _____ [specify products or product lines, e.g., widgets].

[Include if defendant is a merchant:]

6. Defendant is a merchant engaged in the [retail or wholesale or other description] sale of _____ [specify products or product lines, e.g., widgets].

[CONTINUE]

7. On _____ [date], Plaintiff and Defendant executed a contract for the purchase of goods. The contract, a copy of which is attached as Exhibit A and incorporated by reference, provides that _____ [describe essential terms of contract, e.g., Plaintiff would sell 5,000 widgets to Plaintiff], and obligated Defendant to pay Plaintiff on delivery _____ [the sum of \$ _____ or a reasonable price, as determined by the parties at the time of delivery or a reasonable price to be fixed in terms of _____ (set forth agreed market or other standard by which price was to be fixed, e.g., a multiple of the Chicago Board of Trade spot price for steel on the delivery date)].

8. Plaintiff fully performed Plaintiff's part of the agreement described in Paragraph 7, in that, on _____ [date], Plaintiff _____ [delivered or tendered delivery of] the goods to Defendant in the time and manner and at the place required by the agreement.

9. Defendant, in violation of Defendant's promises and obligations under the agreement described in Paragraph 7, _____ [describe defendant's breach, e.g., wrongfully refused to accept delivery of the goods or wrongfully revoked acceptance of the goods or wrongfully fails and refuses to make payment due for the goods].

[EITHER, if contract had open price term]

10. Plaintiff and Defendant have been unable to agree on the price of the goods delivered.

[OR]

10. The price of the goods delivered has not been fixed in terms of _____

_____ [set forth agreed market or other standard by which price was to be fixed, e.g., a multiple of the Chicago Board of Trade spot price for steel on the delivery date] because _____ [allege reason why price has not been fixed as provided for in contract, e.g., the Chicago Board of Trade does not set a spot price for steel, which the parties did not know when they made their contract].

[CONTINUE]

11. _____ [If defendant has not accepted delivery of goods, add either Plaintiff has made a reasonable effort to resell the goods described in Paragraph 7 at a reasonable price but has been unable to do so or Circumstances reasonably indicated at all times herein alleged that any effort by Plaintiff to resell the goods described in Paragraph 7 would be impracticable].

12. _____ [Set forth claim for price, e.g., The reasonable price of the goods described in Paragraph 7 is \$ _____ per unit, and a total of \$ _____ for the units delivered and accepted by the Defendant. Thus, as a direct and proximate result of Defendant's breach of contract, Plaintiff has suffered damages in the sum of \$ (state either contract price or reasonable price of goods described in Paragraph 7) _____].

13. As a further direct result of Defendant's breach of contract, Plaintiff was caused to incur the following commercially reasonable charges, expenses, and commissions:

_____ [state incidental damages, e.g.,

Transportation costs to and from Defendant's warehouse:

\$ _____

Storage for _____ (describe storage period, e.g., 14 days): \$ _____

Auctioneer's commission: \$ _____

Total: \$ _____]

WHEREFORE, Plaintiff prays judgment against Defendant as follows:

1. For the price of the goods in the sum of \$ _____ [state either contract price or, if contract had open price term, reasonable price of goods];

2. For incidental damages in the sum of

\$ _____;

3. For interest on the sum of \$ _____ from
and after _____ [date amount of damages was capable of being made certain or date action was filed];

4. For costs of suit herein incurred; and

5. For such other and further relief as the court may deem proper.

Dated: _____

[firm name, if any] _____

By: [signature] _____

[typed name] _____

Attorney for Plaintiff

[ADD following verification, if applicable]

VERIFICATION

I am the plaintiff in the above entitled action; I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein stated on information and belief, and, as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

[date] _____

[signature] _____

[typed name] _____

NOTES.

Authority:

Com Code §§ 2703(e), 2709

Seller's Judicial Remedy for Buyer's Breach:

See Ch. 26, Contract for Sale of Goods--Seeking Remedies Under California Commercial Code, 26.15-26.20

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Pleading & Practice Pleadings Complaints General Overview Commercial Law (UCC) Sales (Article

2)Breach, Repudiation & ExcuseGeneral OverviewCommercial Law (UCC)Sales (Article 2)RemediesSeller's
RemediesGeneral OverviewCommercial Law (UCC)Sales (Article 2)RemediesSeller's RemediesDamagesAction for
Price



192 of 196 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 28 Contract for Sale of Goods--Suing or Defending Action for Breach of Contract Under California
Commercial Code
VIII. FORMS

2-28 MB Practice Guide: CA Contract Litigation 28.48

28.48 Complaint for Breach of Contract for Goods--By Seller Against Buyer--Requirements Contract.**Complaint for Breach of Contract for Goods--By Seller Against Buyer--Requirements Contract.**

_____[Name of attorney]
 _____[Street address]
 _____[City, state, and ZIP]
 _____[Area code and phone number]
 _____[State Bar no. of attorney]
 Attorney for _____[name of party]

SUPERIOR COURT OF CALIFORNIA,
 COUNTY OF _____

[name(s)] _____,	)	
Plaintiff(s)	)	NO.
vs.	)	_____
[name(s)] _____	)	_____
[and DOES 1 THROUGH	)	COMPLAINT FOR BREACH OF CONTRACT
_____]	)	FOR SALE OF GOODS
Defendant(s).	)	[LIMITED CIVIL CASE]
	)	[Amount Demanded
		_____ (Exceeds or Does Not
		Exceed) \$10,000]

Plaintiff _____[name] alleges:

[For an individual plaintiff]

1. Plaintiff is an individual residing in _____ [city, if any, and county], California, [in the (name of judicial district, if any) _____] [, and therein doing business under the fictitious business name of _____]. Plaintiff has duly complied in all respects with the requirements of *Business and Professions Code Sections 17910 through 17917* with respect to this fictitious business name].

[OR, for a domestic corporation or domestic limited liability company]

1. Plaintiff _____ [name] is, and at all times herein mentioned was, a _____ [corporation or limited liability company] organized and existing under the laws of California, with its principal place of business in _____ [city, if any, and county], California [in the (name of judicial district, if any) _____] [, and therein doing business under the fictitious business name of _____]. Plaintiff has duly complied in all respects with the requirements of *Business and Professions Code Sections 17910 through 17917* with respect to this fictitious business name].

[OR, for a foreign corporation or foreign limited liability company]

1. Plaintiff _____ [name] is, and at all times herein mentioned was, a _____ [corporation or limited liability company] organized and existing under the laws of _____ [state or foreign country], and _____ [for foreign corporation authorized to do business and doing business in California or, for foreign limited liability company maintaining action or intrastate business, and registered to transact intrastate business in California], with its principal place of business in California in _____ [city, if any, and county], California [in the (name of judicial district, if any) _____].

[OR, for a general or limited partnership or an unincorporated association]

1. Plaintiff _____ [name] is, and at all times herein mentioned was, a _____ [partnership or unincorporated association] with its principal place of business in _____ [city, if any, and county], California [in the (name of judicial district, if any) _____] [, and therein doing business under the fictitious business name of _____]. Plaintiff has duly complied in all respects with the requirements of *Business and Professions Code Sections 17910 through 17917* with respect to this fictitious business name].

[CONTINUE]

[For an individual defendant]

2. Defendant _____ [name] is an individual residing in _____ [city, if any, and county], California [in the (name of judicial district, if any) _____] [and doing business therein under the fictitious business name of _____].

[OR, for a domestic corporation or domestic limited liability company]

2. Defendant _____ [name] is, and at all times herein mentioned was, a _____ [corporation or limited liability company] organized and existing under the laws of California [, with its principal place of business in _____ (city, if any, and county), California (, in the _____ [name of judicial district, if any])].

[OR, for a foreign corporation or foreign limited liability company]

2. Defendant _____ [name] is, and at all times herein mentioned was, a _____ [corporation or limited liability company] organized and existing under the laws of _____ [state or foreign country][, with its principal place of business in _____ (city, if any, and county), California (, in the _____ [name of judicial district, if any])].

[OR, for a general or limited partnership or an unincorporated association]

2. Defendant _____ [name] is, and at all times herein mentioned was, _____ [a partnership or an unincorporated association] sued herein under the name _____ [it has assumed or by which it is known][, with its principal place of business in _____ (city, if any, and county), California (, in the _____ [name of judicial district, if any])]. [Defendants (names of individual partners or members) _____ are, and at all times herein mentioned were, members of that _____ (partnership or unincorporated association) (and are, and at all times herein mentioned were, residents of _____ County, California)].

[CONTINUE]

3. Plaintiff is ignorant of the true names and capacities of Defendants sued herein as DOES 1 through _____ [numeral, e.g., 50], inclusive, and therefore sues these Defendants by these fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when ascertained. [Plaintiff is informed and believes and thereon alleges that each of the fictitiously named Defendants is responsible in some manner for the occurrences herein alleged, and that Plaintiff's damages as herein alleged were proximately caused by those Defendants.]

4. Plaintiff is informed and believes and thereon alleges that at all times material to this complaint, _____ [identify defendants to whom agency

allegation applies, e.g., each of the Defendants or each of the individual Defendants or Defendant Harry Jones], [and each of the Defendants fictitiously named in this complaint,] in addition to acting for himself, herself, or itself and on his, her, or its own behalf individually, is and was acting as the agent, servant, employee and representative of, and with the knowledge, consent and permission of, and in conspiracy with, each and all of the Defendants and within the course, scope and authority of that agency, service, employment, representation, and conspiracy. Plaintiff further alleges on information and belief that the acts of each of the Defendants were fully ratified by each and all of the Defendants. Specifically, and without limitation, Plaintiff alleges on information and belief that the actions, failures to act, breaches, conspiracy, and misrepresentations alleged herein and attributed to one or more of the specific Defendants were approved, ratified, and done with the cooperation and knowledge of each and all of the Defendants.

[Include if plaintiff is a merchant:]

5. Plaintiff is a merchant engaged in the [retail or wholesale or other description] sale of _____ [specify products or product lines, e.g., widgets].

[Include if defendant is a merchant:]

6. Defendant is a merchant engaged in the [retail or wholesale or other description] sale of _____ [specify products or product lines, e.g., widgets].

[CONTINUE]

7. On _____ [date], Plaintiff and Defendant executed a contract for the purchase of goods. The contract, a copy of which is attached as Exhibit A and incorporated by reference, provides that _____ [describe essential terms of contract, e.g., Plaintiff will specially manufacture for Defendant, and Defendant agrees to purchase, widgets, and obligates Defendant to purchase these widgets in such quantity as Defendant, in good faith, requires for its manufacturing needs. Defendant agreed to pay \$ _____ per unit with certain discounts that would depend on the size of orders placed from time to time. The contract also provides that delivery will be made from time to time as ordered and required by Defendant].

8. _____ [Allege defendant's estimation of its anticipated requirements, if any, e.g., Defendant's requirements were estimated by the Defendant to be at least (number) _____ units, and further units would be required depending on the demand for the goods by Defendant's dealers].

9. Plaintiff fully performed Plaintiff's part of the agreement described in Paragraph 7, in that Plaintiff proceeded to specially manufacture for Defendant _____ [number] units of the goods described in Paragraph 7, and notified Defendant that at all times Plaintiff was ready and able to deliver those goods.

10. _____ [Allege any additional facts relevant to history of dealings between parties, e.g., On May 1, 2005, Plaintiff delivered (number) _____ units of the goods described in Paragraph 7 to the Defendant at \$ _____ each, for which Defendant paid the sum of _____]

\$_____].

11. Defendant was obligated under its agreement with Plaintiff to

_____ [allege defendant's breach of contract, e.g., make the subject goods available to its dealers and in good faith to ascertain from all of its dealers in the United States which of those dealers desired to distribute the subject goods. Defendant, in violation of its promises and obligations described in Paragraph 7, failed to acquaint all of its dealers with Plaintiff's goods, did not request its division managers to make the subject goods available to its dealers, and did not give all of its dealers an opportunity to order the subject goods. Defendant advised Plaintiff on (date)

_____ that Defendant rejected any further purchase of the goods described in Paragraph 7, because the majority of its divisions did not feel that they could distribute them to its dealers in sufficient quantities].

12. The price Defendant contracted and agreed to pay for the goods, as described in Paragraph 7, is

\$_____ per unit. Defendant was obligated to purchase its good faith requirements for the goods described in Paragraph 7 from Plaintiff under the subject agreement. The number of units of goods that the Defendant would have required in good faith was easily ascertainable by Defendant and would not have been below _____ [number] units. Thus, as a direct and proximate result of Defendant's breach of contract, Plaintiff has suffered damages in the sum of \$_____ [aggregate price of number of units of goods that defendant would have required in good faith].

13. As a further direct result of Defendant's breach of contract, Plaintiff was caused to incur the following commercially reasonable charges, expenses, and commissions:

_____ [state incidental damages, e.g.,

Transportation costs to and from Defendant's warehouse:

\$_____

Storage for _____ (describe storage period, e.g., 14 days): \$_____

Auctioneer's commission: \$_____

Total: \$_____]

WHEREFORE, Plaintiff prays judgment against Defendant as follows:

1. For the price of the goods in the sum of \$_____ [state either contract price or, if contract had open price term, reasonable price of goods];

2. For incidental damages in the sum of \$_____;

3. For interest on the sum of \$_____ from and after _____ [date amount of damages was capable of being made certain or date action was filed];

4. For costs of suit herein incurred; and

5. For such other and further relief as the court may deem proper.

Dated: _____

[firm name, if any] _____

By: [signature] _____

[typed name] _____

Attorney for Plaintiff

[ADD following verification, if applicable]

VERIFICATION

I am the plaintiff in the above entitled action; I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein stated on information and belief, and, as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

[date] _____

[signature] _____

[typed name] _____

NOTES.

Authority:

Com Code §§ 2306, 2703(e), 2709

Seller's Judicial Remedy for Buyer's Breach:

See Ch. 26, Contract for Sale of Goods--Seeking Remedies Under California Commercial Code, 26.15-26.20

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Contract TermsGap-Filler ProvisionsOutput, Exclusive & Requirements
AgreementsCommercial Law (UCC)Sales (Article 2)RemediesSeller's RemediesGeneral Overview



193 of 196 DOCUMENTS

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Chapter 28 Contract for Sale of Goods--Suing or Defending Action for Breach of Contract Under California
Commercial Code
VIII. FORMS

2-28 MB Practice Guide: CA Contract Litigation 28.49

28.49 Complaint for Breach of Contract for Goods--By Buyer Against Seller--Seller's Firm Offer to Supply Goods.

Complaint for Breach of Contract for Goods--By Buyer Against Seller--Seller's Firm Offer to Supply Goods.

_____[Name of attorney]
 _____[Street address]
 _____[City, state, and ZIP]
 _____[Area code and phone number]
 _____[State Bar no. of attorney]
 Attorney for _____[name of party]

SUPERIOR COURT OF CALIFORNIA,
 COUNTY OF _____

[name(s)] _____,	)	
Plaintiff(s)	)	NO.
vs.	)	_____
[name(s)] _____	)	_____
[and DOES 1 THROUGH	)	COMPLAINT FOR BREACH OF CONTRACT
_____]	)	FOR SALE OF GOODS
Defendant(s).	)	[LIMITED CIVIL CASE]
	)	[Amount Demanded
		_____ (Exceeds or Does Not
		Exceed) \$10,000]

Plaintiff _____ [name] alleges:

[For an individual plaintiff]

1. Plaintiff is an individual residing in _____ [city, if any, and county], California, [in the (name of judicial district, if any) _____] [, and therein doing business under the fictitious business name of _____.

Plaintiff has duly complied in all respects with the requirements of *Business and Professions Code Sections 17910 through 17917* with respect to this fictitious business name].

[OR, for a domestic corporation or domestic limited liability company]

1. Plaintiff _____ [name] is, and at all times herein mentioned was, a _____ [corporation or limited liability company] organized and existing under the laws of California, with its principal place of business in _____ [city, if any, and county], California [in the (name of judicial district, if any) _____] [, and therein doing business under the fictitious business name of _____.

Plaintiff has duly complied in all respects with the requirements of *Business and Professions Code Sections 17910 through 17917* with respect to this fictitious business name].

[OR, for a foreign corporation or foreign limited liability company]

1. Plaintiff _____ [name] is, and at all times herein mentioned was, a _____ [corporation or limited liability company] organized and existing under the laws of _____ [state or foreign country], and _____ [for foreign corporation authorized to do business and doing business in California or, for foreign limited liability company maintaining action or intrastate business, and registered to transact intrastate business in California], with its principal place of business in California in _____ [city, if any, and county], California [in the (name of judicial district, if any) _____]].

[OR, for a general or limited partnership or an unincorporated association]

1. Plaintiff _____ [name] is, and at all times herein mentioned was, a _____ [partnership or unincorporated association] with its principal place of business in _____ [city, if any, and county], California [in the (name of judicial district, if any) _____] [, and therein doing business under the fictitious business name of _____.

Plaintiff has duly complied in all respects with the requirements of *Business and Professions Code Sections 17910 through 17917* with respect to this fictitious business name].

[CONTINUE]

[For an individual defendant]

2. Defendant _____ [name] is an individual residing in _____ [city, if any, and county], California [in the (name of judicial district, if any) _____] [and doing business therein under the fictitious business name of _____].

[OR, for a domestic corporation or domestic limited liability company]

2. Defendant _____ [name] is, and at all times herein mentioned was, a _____ [corporation or limited liability company] organized and existing under the laws of California [, with its principal place of business in _____ (city, if any, and county), California (, in the _____ [name of judicial district, if any])].

[OR, for a foreign corporation or foreign limited liability company]

2. Defendant _____ [name] is, and at all times herein mentioned was, a _____ [corporation or limited liability company] organized and existing under the laws of _____ [state or foreign country][, with its principal place of business in _____ (city, if any, and county), California (, in the _____ [name of judicial district, if any])].

[OR, for a general or limited partnership or an unincorporated association]

2. Defendant _____ [name] is, and at all times herein mentioned was, _____ [a partnership or an unincorporated association] sued herein under the name _____ [it has assumed or by which it is known][, with its principal place of business in _____ (city, if any, and county), California (, in the _____ [name of judicial district, if any])]. [Defendants (names of individual partners or members) _____ are, and at all times herein mentioned were, members of that _____ (partnership or unincorporated association) (and are, and at all times herein mentioned were, residents of _____ County, California)].

[CONTINUE]

3. Plaintiff is ignorant of the true names and capacities of Defendants sued herein as DOES 1 through _____ [numeral, e.g., 50], inclusive, and therefore sues these Defendants by these fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when ascertained. [Plaintiff is informed and believes and thereon alleges that each of the fictitiously named Defendants is responsible in some manner for the occurrences herein alleged, and that Plaintiff's damages as herein alleged were proximately caused by those Defendants.]

4. Plaintiff is informed and believes and thereon alleges that at all times material to this complaint, _____ [identify defendants to whom agency allegation applies, e.g., each of the Defendants or each of the individual Defendants or Defendant Harry Jones], [and each of the Defendants fictitiously named in this complaint,] in addition to acting for himself, herself, or itself and on his, her, or its own behalf individually, is and was acting as the agent, servant, employee and representative of, and with the knowledge, consent and permission of, and in conspiracy with, each and all of the Defendants and within the course, scope and authority of that agency, service, employment, representation, and conspiracy. Plaintiff further alleges on information and belief that the acts of each of the Defendants were fully ratified by each and all of the Defendants. Specifically, and without limitation, Plaintiff alleges on information and belief that the actions, failures to act, breaches, conspiracy, and misrepresentations alleged herein and attributed to one or more of the specific Defendants were approved, ratified, and done with the cooperation and knowledge of each and all of the Defendants.

[Include if plaintiff is a merchant:]

5. Plaintiff is a merchant engaged in the [retail or wholesale or other description] sale of _____ [specify products or product lines, e.g., widgets].

[Include if defendant is a merchant:]

6. Defendant is a merchant engaged in the [retail or wholesale or other description] sale of _____ [specify products or product lines, e.g., widgets].

[CONTINUE]

7. On _____ [date], Plaintiff requested Defendant to submit an offer to supply _____ [describe goods, e.g., widgets], for purchase by Plaintiff.

8. By a writing dated _____ [date], a true copy of which is attached as Exhibit A and incorporated by reference, Defendant offered to supply the goods described in Paragraph 7 to Plaintiff for the total price of \$ _____.

9. Plaintiff advised Defendant that Plaintiff would accept Defendant's offer for the goods described in Paragraph 7 [add any relevant conditions, e.g., provided Plaintiff received orders for the goods from Plaintiff's distributors within two weeks from the date of the offer].

10. _____ [Allege facts showing defendant's assurance to hold offer open, e.g., Defendant assured Plaintiff that Defendant would hold the offer open for a period of 20 days and, at Plaintiff's request, Defendant reduced that assurance to a separate writing dated _____, a true copy of which is attached as Exhibit B and incorporated by reference].

11. _____ [Allege facts showing plaintiff's reliance on defendant's firm offer, e.g., Relying on Defendant's firm offer described in Paragraph 8, Plaintiff quoted a firm price to Plaintiff's distributors for the goods described in Paragraph 7, which was accepted by them on (date) _____].

_____].

12. Subsequent to Plaintiff's acts in reliance on Defendant's firm offer, as described in Paragraph 11, _____ [allege defendant's revocation of offer, e.g., on (date) _____, and before (date firm offer became revocable under terms of writing described in Paragraph 10) _____], Defendant withdrew the firm offer to supply the goods described in Paragraph 7, which were necessary for Plaintiff to complete numerous contracts with Plaintiff's distributors, as described in Paragraph 11].

13. _____ [Set forth plaintiff's actions in response to defendant's breach, e.g., On (date) _____], in good faith and without unreasonable delay, Plaintiff entered into another contract with a different supplier, a true copy of which is attached as Exhibit C and incorporated by reference, for the purchase of an equal quantity of the goods described in Paragraph 7].

[EITHER, if damages are based on cover]

14. The cover price that Plaintiff paid for the goods sold to Plaintiff by the other supplier, as described in Paragraph 13, was \$ _____ per unit, for a total of \$ _____. The price for which Defendant offered to sell these goods to Plaintiff, as described in Paragraph 8, is \$ _____. As a direct and proximate result of Defendant's revocation of the firm offer, Plaintiff has been compelled to expend an additional \$ _____ to obtain substitute goods and has suffered damages in the sum of \$ _____. Defendant's breach of contract did not result in any saving of expenses to Plaintiff.

[OR, if damages based on cover are not sought]

14. The price for which the Defendant made a firm offer to sell the goods, as described in Paragraph 8, is \$ _____. The market price of the goods described in Paragraph 8 on _____ [date plaintiff learned of defendant's revocation of firm offer] was \$ _____. Thus, as a direct and proximate result of Defendant's revocation of the firm offer, Plaintiff has suffered damages in the sum of \$ _____. Defendant's breach of contract did not result in any saving of expenses to Plaintiff.

[CONTINUE]

15. As a further direct result of Defendant's breach of contract, Plaintiff was caused to incur the following commercially reasonable charges, expenses, and commissions:

_____ [state incidental damages, e.g.,

Transportation costs to and from Defendant's warehouse:

\$ _____

Storage for _____ (describe storage period, e.g., 14 days): \$ _____

Auctioneer's commission: \$ _____

Total: \$ _____]

16. As a further result of Defendant's revocation of the firm offer, Plaintiff suffered the following consequential loss and damage in the sum of \$ _____. This sum is the discount that Plaintiff was required to give to distributors when Plaintiff was unable to deliver the goods described in Paragraph 7 on the date promised. _____

[Allege defendant's knowledge of circumstances giving rise to consequential damages claim, e.g., Defendant knew of Plaintiff's commitment to furnish these goods to Plaintiff's distributors at the time of the making of the contract between Plaintiff and Defendant].

WHEREFORE, Plaintiff prays judgment against Defendant as follows:

1. For damages in the sum of \$ _____;

2. For incidental damages in the sum of \$ _____;

3. For consequential damages in the sum of \$ _____;

4. For interest on the sum of \$ _____ from and after _____ [date amount of damages was capable of being made certain or date action was filed];

5. For costs of suit herein incurred; and

6. For such other and further relief as the court may deem proper.

Dated: _____

[firm name, if any] _____

By: [signature] _____

[typed name] _____

Attorney for Plaintiff

[ADD following verification, if applicable]

VERIFICATION

I am the plaintiff in the above entitled action; I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein stated on information and belief, and,

as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

[date] _____

[signature] _____

[typed name] _____

NOTES.

Authority:

Com Code §§ 2711(1), 2712, 2713

Merchant's Firm Offer Is Irrevocable for Limited Period:

See Ch. 27, Contract for Sale of Goods--Attacking or Defending Existence of Contract Under California Commercial Code, 27.09[2][b]

Buyer's Judicial Remedy for Seller's Breach:

See Ch. 26, Contract for Sale of Goods--Seeking Remedies Under California Commercial Code, 26.26-26.34

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentFirm OffersCommercial Law (UCC)Sales (Article 2)RemediesBuyer's RemediesGeneral Overview



194 of 196 DOCUMENTS

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Chapter 28 Contract for Sale of Goods--Suing or Defending Action for Breach of Contract Under California
Commercial Code
VIII. FORMS

*2-28 MB Practice Guide: CA Contract Litigation 28.50***28.50 Complaint for Breach of Contract for Goods--By Buyer Against Seller--For Specific Performance.****Complaint for Breach of Contract for Goods--By Buyer Against Seller--For Specific Performance.**

_____[Name of attorney]
 _____[Street address]
 _____[City, state, and ZIP]
 _____[Area code and phone number]
 _____[State Bar no. of attorney]
 Attorney for _____[name of party]

SUPERIOR COURT OF CALIFORNIA,
 COUNTY OF _____

[name(s)] _____,	)	
Plaintiff(s)	)	NO.
vs.	)	_____
[name(s)] _____	)	_____
[and DOES 1 THROUGH	)	COMPLAINT FOR BREACH OF CONTRACT
_____]	)	FOR SALE OF GOODS
Defendant(s).	)	[LIMITED CIVIL CASE]
	)	[Amount Demanded
		_____ (Exceeds or Does Not
		Exceed) \$10,000]

Plaintiff _____[name] alleges:

[For an individual plaintiff]

1. Plaintiff is an individual residing in _____ [city, if any, and county], California, [in the (name of judicial district, if any) _____] [, and therein doing business under the fictitious business name of _____]. Plaintiff has duly complied in all respects with the requirements of *Business and Professions Code Sections 17910 through 17917* with respect to this fictitious business name].

[OR, for a domestic corporation or domestic limited liability company]

1. Plaintiff _____ [name] is, and at all times herein mentioned was, a _____ [corporation or limited liability company] organized and existing under the laws of California, with its principal place of business in _____ [city, if any, and county], California [in the (name of judicial district, if any) _____] [, and therein doing business under the fictitious business name of _____]. Plaintiff has duly complied in all respects with the requirements of *Business and Professions Code Sections 17910 through 17917* with respect to this fictitious business name].

[OR, for a foreign corporation or foreign limited liability company]

1. Plaintiff _____ [name] is, and at all times herein mentioned was, a _____ [corporation or limited liability company] organized and existing under the laws of _____ [state or foreign country], and _____ [for foreign corporation authorized to do business and doing business in California or, for foreign limited liability company maintaining action or intrastate business, and registered to transact intrastate business in California], with its principal place of business in California in _____ [city, if any, and county], California [in the (name of judicial district, if any) _____].

[OR, for a general or limited partnership or an unincorporated association]

1. Plaintiff _____ [name] is, and at all times herein mentioned was, a _____ [partnership or unincorporated association] with its principal place of business in _____ [city, if any, and county], California [in the (name of judicial district, if any) _____] [, and therein doing business under the fictitious business name of _____]. Plaintiff has duly complied in all respects with the requirements of *Business and Professions Code Sections 17910 through 17917* with respect to this fictitious business name].

[CONTINUE]

[For an individual defendant]

2. Defendant _____ [name] is an individual residing in _____ [city, if any, and county], California [in the (name of judicial district, if any) _____] [and doing business therein under the fictitious business name of _____].

[OR, for a domestic corporation or domestic limited liability company]

2. Defendant _____ [name] is, and at all times herein mentioned was, a _____ [corporation or limited liability company] organized and existing under the laws of California [, with its principal place of business in _____ (city, if any, and county), California (, in the _____ [name of judicial district, if any])].

[OR, for a foreign corporation or foreign limited liability company]

2. Defendant _____ [name] is, and at all times herein mentioned was, a _____ [corporation or limited liability company] organized and existing under the laws of _____ [state or foreign country][, with its principal place of business in _____ (city, if any, and county), California (, in the _____ [name of judicial district, if any])].

[OR, for a general or limited partnership or an unincorporated association]

2. Defendant _____ [name] is, and at all times herein mentioned was, _____ [a partnership or an unincorporated association] sued herein under the name _____ [it has assumed or by which it is known][, with its principal place of business in _____ (city, if any, and county), California (, in the _____ [name of judicial district, if any])]. [Defendants (names of individual partners or members) _____ are, and at all times herein mentioned were, members of that _____ (partnership or unincorporated association) (and are, and at all times herein mentioned were, residents of _____ County, California)].

[CONTINUE]

3. Plaintiff is ignorant of the true names and capacities of Defendants sued herein as DOES 1 through _____ [numeral, e.g., 50], inclusive, and therefore sues these Defendants by these fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when ascertained. [Plaintiff is informed and believes and thereon alleges that each of the fictitiously named Defendants is responsible in some manner for the occurrences herein alleged, and that Plaintiff's damages as herein alleged were proximately caused by those Defendants.]

4. Plaintiff is informed and believes and thereon alleges that at all times material to this complaint, _____ [identify defendants to whom agency

allegation applies, e.g., each of the Defendants or each of the individual Defendants or Defendant Harry Jones], [and each of the Defendants fictitiously named in this complaint,] in addition to acting for himself, herself, or itself and on his, her, or its own behalf individually, is and was acting as the agent, servant, employee and representative of, and with the knowledge, consent and permission of, and in conspiracy with, each and all of the Defendants and within the course, scope and authority of that agency, service, employment, representation, and conspiracy. Plaintiff further alleges on information and belief that the acts of each of the Defendants were fully ratified by each and all of the Defendants. Specifically, and without limitation, Plaintiff alleges on information and belief that the actions, failures to act, breaches, conspiracy, and misrepresentations alleged herein and attributed to one or more of the specific Defendants were approved, ratified, and done with the cooperation and knowledge of each and all of the Defendants.

[Include if plaintiff is a merchant:]

5. Plaintiff is a merchant engaged in the [retail or wholesale or other description] sale of _____ [specify products or product lines, e.g., widgets].

[Include if defendant is a merchant:]

6. Defendant is a merchant engaged in the [retail or wholesale or other description] sale of _____ [specify products or product lines, e.g., widgets].

[CONTINUE]

7. On _____ [date], Plaintiff and Defendant executed a contract for the purchase of goods. The contract, a copy of which is attached as Exhibit A and incorporated by reference, provides that _____ [describe essential terms of contract, e.g., Plaintiff would sell 5,000 widgets to Plaintiff, and obligated Defendant to pay Plaintiff the sum of \$_____ on delivery].

8. Plaintiff fully performed Plaintiff's part of the agreement described in Paragraph 7, in that, on _____ [date], Plaintiff _____ [delivered or tendered delivery of] the goods to Defendant in the time and manner and at the place required by the agreement.

9. Defendant, in violation of Defendant's promises and obligations under the agreement described in Paragraph 7, _____ [describe defendant's breach, e.g., wrongfully refused to accept delivery of the goods or wrongfully revoked acceptance of the goods or wrongfully fails and refuses to make payment due for the goods].

10. At all times referred to herein, Defendant was, and now is, the owner and in possession of the goods described in Paragraph 7.

11. The goods described in Paragraph 7 are unique in character in that _____ [describe why goods are unique, e.g., Defendant is the only manufacturer of goods of that type whose products are recognized around the world as being the best and most reliable products of the kind, and Plaintiff's customers have come to expect that Plaintiff will supply them

with such goods from no other producer, with the result that unless Plaintiff can obtain and distribute the very same goods described in the contract, Plaintiff's business will almost certainly go into bankruptcy]. Therefore, Plaintiff has no plain, speedy, or adequate remedy in the ordinary course of law, and damages, if awarded, cannot be properly ascertained and would be inadequate to compensate Plaintiff for the detriment suffered as a result of Defendant's breach.

12. At the time the agreement described in Paragraph 7 was entered into, on _____ [date], the goods described therein were reasonably worth \$ _____; accordingly, that agreement is just, fair, and reasonable as to Defendant, and the consideration therefor accruing to Defendant is adequate.

13. As a further result of Defendant's breach of contract, Plaintiff suffered the following consequential loss and damage in the sum of \$ _____.
 _____ [Describe loss, e.g., This sum is the penalty Plaintiff was required to pay to (name) _____ when Plaintiff was unable to forward to (name) _____ on schedule the goods Defendant failed to deliver to Plaintiff. Defendant knew of Plaintiff's commitment to furnish these unique goods to (name) _____ at the time of the making of the contract between Plaintiff and Defendant.] This consequential loss to Plaintiff could not reasonably be prevented by cover or otherwise.

WHEREFORE, Plaintiff prays judgment against Defendant as follows:

1. That the court decree specific performance of the agreement described in Paragraph 7;
2. That Defendant be specifically ordered to deliver to Plaintiff the goods described in Paragraph 7;
3. For consequential damages in the sum of \$ _____;

[4. For interest on the sum of \$ _____ from _____ and after (date amount of consequential damages was capable of being made certain or date action was filed) _____;]

5. For costs of suit herein incurred; and

6. For such other and further relief as the court may deem proper.

Dated: _____

[firm name, if any] _____

By: [signature] _____

[typed name] _____

 _____ Attorney for Plaintiff

[ADD following verification, if applicable]

VERIFICATION

I am the plaintiff in the above entitled action; I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein stated on information and belief, and, as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

[date] _____

[signature] _____

[typed name] _____

NOTES.**Authority:**

CC § 3384; Com Code § 2716

Buyer's Judicial Remedy for Seller's Breach:

See Ch. 26, Contract for Sale of Goods--Seeking Remedies Under California Commercial Code, 26.26-26.34

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Breach, Repudiation & ExcuseGeneral OverviewCommercial Law (UCC)Sales (Article 2)RemediesBuyer's RemediesReplevin & Specific Performance



195 of 196 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 28 Contract for Sale of Goods--Suing or Defending Action for Breach of Contract Under California
Commercial Code
VIII. FORMS

2-28 MB Practice Guide: CA Contract Litigation 28.51

28.51 Complaint for Breach of Contract for Goods--By Buyer Against Seller--Rightful Rejection of Defective Goods.

Complaint for Breach of Contract for Goods--By Buyer Against Seller--Rightful Rejection of Defective Goods.

_____[Name of attorney]
 _____[Street address]
 _____[City, state, and ZIP]
 _____[Area code and phone number]
 _____[State Bar no. of attorney]
 Attorney for _____[name of party]

SUPERIOR COURT OF CALIFORNIA,
 COUNTY OF _____

[name(s)] _____,	)	
Plaintiff(s)	)	NO.
vs.	)	_____
[name(s)] _____	)	_____
[and DOES 1 THROUGH	)	COMPLAINT FOR BREACH OF CONTRACT
_____]	)	FOR SALE OF GOODS
Defendant(s).	)	[LIMITED CIVIL CASE]
	)	[Amount Demanded
		_____ (Exceeds or Does Not
		Exceed) \$10,000]

Plaintiff _____ [name] alleges:

[For an individual plaintiff]

1. Plaintiff is an individual residing in _____ [city, if any, and county], California, [in the (name of judicial district, if any) _____] [, and therein doing business under the fictitious business name of _____.

Plaintiff has duly complied in all respects with the requirements of *Business and Professions Code Sections 17910 through 17917* with respect to this fictitious business name].

[OR, for a domestic corporation or domestic limited liability company]

1. Plaintiff _____ [name] is, and at all times herein mentioned was, a _____ [corporation or limited liability company] organized and existing under the laws of California, with its principal place of business in _____ [city, if any, and county], California [in the (name of judicial district, if any) _____] [, and therein doing business under the fictitious business name of _____.

Plaintiff has duly complied in all respects with the requirements of *Business and Professions Code Sections 17910 through 17917* with respect to this fictitious business name].

[OR, for a foreign corporation or foreign limited liability company]

1. Plaintiff _____ [name] is, and at all times herein mentioned was, a _____ [corporation or limited liability company] organized and existing under the laws of _____ [state or foreign country], and _____ [for foreign corporation authorized to do business and doing business in California or, for foreign limited liability company maintaining action or intrastate business, and registered to transact intrastate business in California], with its principal place of business in California in _____ [city, if any, and county], California [in the (name of judicial district, if any) _____]].

[OR, for a general or limited partnership or an unincorporated association]

1. Plaintiff _____ [name] is, and at all times herein mentioned was, a _____ [partnership or unincorporated association] with its principal place of business in _____ [city, if any, and county], California [in the (name of judicial district, if any) _____]], and therein doing business under the fictitious business name of _____.

Plaintiff has duly complied in all respects with the requirements of *Business and Professions Code Sections 17910 through 17917* with respect to this fictitious business name].

[CONTINUE]

[For an individual defendant]

2. Defendant _____ [name] is an individual residing in _____ [city, if any, and county], California [in the (name of judicial district, if any) _____] [and doing business therein under the fictitious business name of _____].

[OR, for a domestic corporation or domestic limited liability company]

2. Defendant _____ [name] is, and at all times herein mentioned was, a _____ [corporation or limited liability company] organized and existing under the laws of California [, with its principal place of business in _____ (city, if any, and county), California (, in the _____ [name of judicial district, if any])].

[OR, for a foreign corporation or foreign limited liability company]

2. Defendant _____ [name] is, and at all times herein mentioned was, a _____ [corporation or limited liability company] organized and existing under the laws of _____ [state or foreign country][, with its principal place of business in _____ (city, if any, and county), California (, in the _____ [name of judicial district, if any])].

[OR, for a general or limited partnership or an unincorporated association]

2. Defendant _____ [name] is, and at all times herein mentioned was, _____ [a partnership or an unincorporated association] sued herein under the name _____ [it has assumed or by which it is known][, with its principal place of business in _____ (city, if any, and county), California (, in the _____ [name of judicial district, if any])]. [Defendants (names of individual partners or members) _____ are, and at all times herein mentioned were, members of that _____ (partnership or unincorporated association) (and are, and at all times herein mentioned were, residents of _____ County, California)].

[CONTINUE]

3. Plaintiff is ignorant of the true names and capacities of Defendants sued herein as DOES 1 through _____ [numeral, e.g., 50], inclusive, and therefore sues these Defendants by these fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when ascertained. [Plaintiff is informed and believes and thereon alleges that each of the fictitiously named Defendants is responsible in some manner for the occurrences herein alleged, and that Plaintiff's damages as herein alleged were proximately caused by those Defendants.]

4. Plaintiff is informed and believes and thereon alleges that at all times material to this complaint, _____ [identify defendants to whom agency allegation applies, e.g., each of the Defendants or each of the individual Defendants or Defendant Harry Jones], [and each of the Defendants fictitiously named in this complaint,] in addition to acting for himself, herself, or itself and on his, her, or its own behalf individually, is and was acting as the agent, servant, employee and representative of, and with the knowledge, consent and permission of, and in conspiracy with, each and all of the Defendants and within the course, scope and authority of that agency, service, employment, representation, and conspiracy. Plaintiff further alleges on information and belief that the acts of each of the Defendants were fully ratified by each and all of the Defendants. Specifically, and without limitation, Plaintiff alleges on information and belief that the actions, failures to act, breaches, conspiracy, and misrepresentations alleged herein and attributed to one or more of the specific Defendants were approved, ratified, and done with the cooperation and knowledge of each and all of the Defendants.

[Include if plaintiff is a merchant:]

5. Plaintiff is a merchant engaged in the [retail or wholesale or other description] sale of _____ [specify products or product lines, e.g., widgets].

[Include if defendant is a merchant:]

6. Defendant is a merchant engaged in the [retail or wholesale or other description] sale of _____ [specify products or product lines, e.g., widgets].

[CONTINUE]

7. On _____ [date], Plaintiff and Defendant executed a contract for the purchase of goods. The contract, a copy of which is attached as Exhibit A and incorporated by reference, provides that _____ [describe essential terms of contract, e.g., Defendant would sell 5,000 widgets to Plaintiff, obligates Plaintiff to pay Defendant the sum of \$ _____ on delivery of the goods, and further provides that there would be no acceptance of the goods unless they remained free of defects for _____ (specify period, e.g., three months)].

8. Plaintiff fully and in all things performed Plaintiff's part of the agreement described in Paragraph 7, in that on _____ [date], Plaintiff paid the purchase price to Defendant on delivery of the goods].

9. _____ [Allege facts showing grounds for Plaintiff's rightful rejection of goods, e.g., Approximately _____ (specify period, e.g., three months) after delivery of the goods described in Paragraph 7, on (date) _____, Plaintiff discovered substantial defects in those goods in that _____ (describe all defects), which resulted in Plaintiff's inability to use those goods for the purpose for which they were purchased].

10. _____ [Allege facts showing plaintiff's

seasonable notification of Defendant of grounds for rejection, e.g., Plaintiff notified Defendant that Plaintiff had discovered the defects described in Paragraph 8, by sending a letter dated _____,

_____, a true copy of which is attached as Exhibit B and incorporated by reference].

11. Defendant breached the agreement described in Paragraph 7, in that _____

_____ [allege defendant's breach of contract, e.g., Defendant acknowledged that the defects described in Paragraph 9 existed but failed to cure them or to make any attempt to cure them within a reasonable time].

12. _____ [Allege plaintiff's seasonable notification to defendant of plaintiff's rightful rejection, within reasonable time, e.g., By letter dated _____,

_____, a true copy of which is attached as Exhibit C and incorporated by reference, Plaintiff notified Defendant that Plaintiff was invoking the right to reject the goods described in Paragraph 7 on the basis of the defects described in Paragraph 9 and Defendant's failure to cure those defects, as alleged in Paragraph 11].

13. _____ [If plaintiff is merchant, allege plaintiff's compliance with duties as to rightfully rejected goods pursuant to Com. Code § 2603(1), e.g., Plaintiff

received no instructions from Defendant with respect to the rejected goods in Plaintiff's possession, and Plaintiff had no good faith duty to attempt resale of those goods for Defendant's account because those goods are not perishable and do not threaten to decline in value speedily].

14. On _____ [date], in good faith and without unreasonable delay, Plaintiff entered into another contract with a different supplier, a true copy of which is attached as Exhibit C and incorporated by reference, for the purchase of an equal quantity of the goods described in Paragraph 7.

[EITHER, if damages are based on cover]

15. The cover price paid by Plaintiff for the goods sold by the other supplier, as described in Paragraph 14, was

\$ _____ per unit, for a total of \$ _____. The price for which Defendant

sold these goods to Plaintiff, as described in Paragraph 7, was

\$ _____. As a direct and proximate result of Defendant's breach, Plaintiff has been compelled to expend an additional

\$ _____ to obtain substitute goods and has suffered damages in the sum of \$ _____.

Defendant's breach of contract did not result in any saving of expenses to Plaintiff.

[OR, if damages based on cover are not sought]

16. The price for which the Defendant sold the goods to Plaintiff, as described in Paragraph 7, is

\$ _____. The market price of the goods described in Paragraph 7 on _____ [date Plaintiff learned of breach] was

\$ _____. Thus, as a direct and proximate result of Defendant's breach, Plaintiff has suffered damages in the sum of

\$ _____. Defendant's breach of contract did not result in any saving of expenses to Plaintiff.

[CONTINUE]

17. As a further direct result of Defendant's breach of contract, Plaintiff was caused to incur the following commercially reasonable charges, expenses, and commissions:

_____ [state incidental damages, e.g.,

Transportation costs to and from Defendant's warehouse:

\$ _____

Storage for _____ (describe storage period, e.g., 14 days): \$ _____

Auctioneer's commission: \$ _____

Total: \$ _____]

18. As a further result of Defendant's breach of contract, Plaintiff suffered consequential loss and damages in the sum of \$ _____, consisting of

_____ [set forth consequential damages, e.g., the commission that Plaintiff would have collected from (name)

_____ for supplying the nondefective goods that Defendant failed to deliver to Plaintiff. Defendant knew of Plaintiff's commitment to furnish these goods to (name) _____ at the time of the making of the contract between Plaintiff and Defendant]. This consequential loss to Plaintiff could not reasonably be prevented by cover or otherwise.

WHEREFORE, Plaintiff prays judgment against Defendant as follows:

1. For damages in the sum of \$ _____;

2. For incidental damages in the sum of \$ _____;

3. For consequential damages in the sum of \$ _____;

4. For interest on the sum of \$ _____ from and after _____ [date amount of damages was capable of being made certain or date action was filed];

5. For costs of suit herein incurred; and

6. For such other and further relief as the court may deem proper.

Dated: _____

[firm name, if any] _____

By: [signature] _____

[typed name] _____

Attorney for Plaintiff

[ADD following verification, if applicable]

VERIFICATION

I am the plaintiff in the above entitled action; I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein stated on information and belief, and, as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

[date] _____

[signature] _____

[typed name] _____

NOTES.

Authority:

Com Code §§ 2601(a), 2602, 2711(1), 2712, 2713

Nonconforming Goods Can Be Accepted or Rejected:

See 28.19

Buyer's Judicial Remedy for Seller's Breach:

See Ch. 26, Contract for Sale of Goods--Seeking Remedies Under California Commercial Code, 26.26-26.34

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Breach, Repudiation & ExcuseGeneral OverviewCommercial Law (UCC)Sales (Article 2)Breach, Repudiation & ExcuseRightful RejectionCommercial Law (UCC)Sales (Article 2)RemediesBuyer's RemediesGeneral Overview



196 of 196 DOCUMENTS

Matthew Bender Practice Guide: California Contract Litigation

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Chapter 28 Contract for Sale of Goods--Suing or Defending Action for Breach of Contract Under California
Commercial Code
VIII. FORMS

2-28 MB Practice Guide: CA Contract Litigation 28.52

28.52 Answer to Complaint for Breach of Contract for Goods With Affirmative Defenses Based on Custom and Usage, Nonmerchant Defendant, and Lack of Intent to Be Bound While Price Term Remained Open.

Answer to Complaint for Breach of Contract for Goods With Affirmative Defenses Based on Custom and Usage, Nonmerchant Defendant, and Lack of Intent to Be Bound While Price Term Remained Open.

_____[Name of attorney]
 _____[Street address]
 _____[City, state, and ZIP]
 _____[Area code and phone number]
 _____[State Bar no. of attorney]
 Attorney for _____[name of party]

SUPERIOR COURT OF CALIFORNIA,
 COUNTY OF _____

[name] _____,	)	
Plaintiff,	)	NO.
vs.	)	_____
[name] _____,	)	
Defendant.	)	ANSWER OF
	)	_____
	)	_____ [identify Defendant, e.g.,
		DEFENDANT MARY JONES] TO COMPLAINT
		OF
		_____ [identify Plaintiff, e.g.,
		PLAINTIFF JOHN SMITH]
		[LIMITED CIVIL CASE]
		Judge:

Department:

Defendant answers the complaint as follows:

[Include general denial below, or set forth, in numbered paragraphs, specific denials, admissions, and allegations in response to those in complaint, in the order in which they are alleged in complaint:]

1. Pursuant to *Code of Civil Procedure Section 431.30(b)(1)*, Defendant generally denies each and every allegation of Plaintiff's Complaint, including all the purported causes of action contained therein, and further denies that Plaintiff is entitled to any equitable or legal relief, or any damages whatsoever.

[Defendant asserts the following affirmative defenses. By doing so, Defendant shall not be deemed to have assumed the burden of proving any matters that otherwise would be Plaintiff's burden.]

[Allege any affirmative defenses, e.g.,]

[EITHER, to allege that defendant acted in accordance with an established custom and usage in the trade, include Paragraphs 2 and 3, below]

FIRST AFFIRMATIVE DEFENSE

(Custom and Usage of Trade)

2. At all times mentioned in Plaintiff's complaint herein, there existed and still exists, in the _____ *[describe type of business in which parties are engaged]* business, a well-established and well-understood custom and usage in _____ *[set out locality, e.g., the state of California]* to the effect that _____ *[describe custom and usage]*. Plaintiff had notice of that custom and usage, and the contract referred to in Plaintiff's complaint was made by the parties with reference to, and with knowledge of, that custom and usage.

3. In accordance with custom and usage, Defendant _____ *[set forth actions under custom and usage that Defendant relies on to constitute defense]*.

[AND/OR, to allege that the parties did not intend to be bound by an open price term under the circumstances, include Paragraphs 4 through 7, below]

SECOND AFFIRMATIVE DEFENSE

(Specific Intent Not to Be Bound to Open Price Term)

4. The terms of the transaction described in Paragraph _____ of the complaint provided that the price of the subject _____ *[describe in general terms goods, wares, or merchandise made subject of agreement]* was to be determined _____ *[by mutual agreement of the parties or by (set forth agreed market or other standard by which price was to be fixed)]* no later than _____ *[date]*.

5. Plaintiff and Defendant did not intend to be bound to the agreement described in Paragraph _____ of the complaint unless a price for the subject goods was _____ *[agreed on by mutual consent of the parties or fixed according to the method described]*.

6. _____ Plaintiff and Defendant were unable to agree on a price for the subject goods before _____ *[date]*, and _____ *[have never agreed on a price or a price has never been set according to the method described]* before the service of the complaint herein, on _____ *[date]*.

7. The transaction described in Paragraph _____ of the complaint herein did not, therefore, result in a binding agreement, and Defendant has no further duties thereunder.

[AND/OR, to allege that the defendant was not a merchant, include paragraphs 8 through 10, below]

THIRD AFFIRMATIVE DEFENSE

(Defendant Not a Merchant)

8. Defendant is an inexperienced _____ *[buyer or seller]* of _____ *[describe goods, wares or merchandise involved in contract]*.

9. Defendant is not a merchant of _____ *[describe goods, wares, or merchandise made subject of contract]* as defined by *Commercial Code Section 2104(1)* and has no knowledge of the customs and practices peculiar to the _____ *[selling or marketing]* of those goods.

10. Defendant is a _____ *[describe Defendant's business or profession]*.

[AND/OR, to allege that plaintiff's revocation of acceptance was ineffective, include paragraphs 11 through 17, below]

FOURTH AFFIRMATIVE DEFENSE

(Ineffective Revocation of Acceptance)

[Include if plaintiff is a merchant:]

11. Plaintiff is a merchant engaged in the [retail or wholesale or other description] sale of _____ [specify products or product lines, e.g., widgets].

[Include if plaintiff is a merchant:]

12. Defendant is a merchant engaged in the [retail or wholesale or other description] sale of _____ [specify products or product lines, e.g., widgets].

13. On _____ [date], Defendant delivered _____ [describe goods, wares or merchandise made subject of agreement] to Plaintiff [in accordance with the specifications contained in the contract between Plaintiff and Defendant, a true copy of which is attached as Exhibit A and incorporated by reference].

14. _____ [Set forth facts showing plaintiff's alleged revocation, e.g., On May 1, 2005, Plaintiff notified Defendant by letter, a true copy of which is attached as Exhibit B and incorporated by reference, that Plaintiff was dissatisfied with the subject goods and was placing them in storage. That notification was not made within a reasonable time after Plaintiff should have discovered any defects in the subject goods].

15. _____ [Allege facts showing defendant's response to plaintiff's alleged revocation, e.g., By letter dated _____, a true copy of which is attached as Exhibit C and incorporated by reference, Defendant requested that Plaintiff particularize Plaintiff's dissatisfaction with the accepted goods, but Defendant received no further communication from Plaintiff until the service of the complaint in this action on (date) _____].

[16. Before the filing of the complaint herein, Plaintiff never asserted to Defendant that the alleged nonconformity in (describe subject goods) _____ substantially impaired the value of those goods.]

17. _____ [Allege grounds for defense of ineffective revocation, e.g., Plaintiff's failure to particularize any alleged defects in the subject goods, and thus the failure to allow Defendant an opportunity to cure them, and Plaintiff's failure to notify Defendant of any alleged nonconformity in the subject goods within a reasonable time after Plaintiff should have discovered any defects, precludes Plaintiff from recovering from Defendant any damages resulting from any alleged breach by Defendant].

[ADD additional affirmative defenses, if any]

[CONTINUE]

WHEREFORE, Defendant prays as follows:

1. That Plaintiff take nothing by his/her complaint herein;

2. For costs of suit; and

3. For such other and further relief as the court deems proper.

Dated: _____

[firm name, if any] _____

By: [signature] _____

[typed name] _____

Attorney for Defendant

[ADD following verification, if applicable]

VERIFICATION

I am the defendant in the above entitled action; I have read the foregoing answer and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein stated on information and belief, and, as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

[date] _____

[signature] _____

[typed name] _____

NOTES.

Authority:

Com Code §§ 1303, 2104(1), 2305(4), 2608

Usage of Trade Is Defense:

See 28.37

Intent Not to Be Bound by Open Price Term Is Defense:

See 28.38

Status As Nonmerchant Is Defense:

See 28.39

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Contract TermsGap-Filler ProvisionsOpen PriceCommercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentOffer & AcceptanceCommercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentParol EvidenceGeneral Overview