



1 of 178 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

I. INTRODUCTION

A. Judicial Remedies.

1. Judicial and Legislative Acts Distinguished.

3 *Witkin Cal. Proc. Actions* § 1

[§ 1] Judicial and Legislative Acts Distinguished.

(1) *In General. Marin Water & Power Co. v. Railroad Com. of Calif.* (1916) 171 C. 706, 154 P. 864, quotes the following definition of the judicial function: "A judicial inquiry investigates, declares, and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end." (171 C. 712.)

In *People v. Oakland Bd. of Education* (1880) 54 C. 375, the court adopted the following language from a leading federal case distinguishing judicial and legislative acts: "The one determines what the law is, and what the rights of the parties are, with reference to transactions already had; the other prescribes what the law shall be in future cases arising under it. Wherever an act undertakes to determine a question of right or obligation, or of property, as the foundation upon which it proceeds, such act is to that extent a judicial one, and not the proper exercise of legislative functions." (54 C. 376.)

Similar language appears in *Smith v. Strother* (1885) 68 C. 194, 8 P. 852: "The legislature makes a general rule for the regulation of conduct and the admeasurement of right; the judiciary makes a special rule regarding a state of facts which have occurred after the enactment of the general rule by the former, by applying such general rule to the state of facts. The former defines rights and wrongs by a rule laid down in advance; the latter enforces rights and redresses wrongs in cases arising on past occurrences." (68 C. 197.)

(2) *Importance of Distinction.* The distinction is important in applying the constitutional doctrine of separation of powers, e.g., judicial power cannot be exercised by the Legislature or another nonjudicial body, and legislative power cannot be exercised by or delegated to courts. (See 7 *Summary* (10th), *Constitutional Law*, §137 et seq.)

Another familiar application is in the field of extraordinary writs. One of the conditions for the issuance of certiorari or prohibition is that the act to be reviewed must be judicial in nature. (*Quinchard v. Board of Trustees of Alameda* (1896) 113 C. 664, 669, 45 P. 856; *O'Brien v. Olson* (1941) 42 C.A.2d 449, 453, 109 P.2d 8; see 8 *Cal. Proc.* (5th), *Extraordinary Writs*, §§33, 48.)

SUPPLEMENT: [This section is current through the latest supplement]



2 of 178 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

I. INTRODUCTION

A. Judicial Remedies.

2. Nature of Judicial Remedy.

3 *Witkin Cal. Proc. Actions* § 2

[§ 2] Nature of Judicial Remedy.

(1) *In General.* Judicial remedies are those that "are administered by the Courts of justice, or by judicial officers empowered for that purpose by the Constitution and statutes of this State." (C.C.P. 20.) The Code Commissioners' Note adds: "Every original application to a Court of justice for a judgment or order is a remedy." Judicial remedies are classified as actions and special proceedings. (C.C.P. 21; see *infra*, §62 et seq.) A fundamental distinction is made in the law of pleading between the "cause of action" and the "remedy or relief." (See 4 *Cal. Proc.* (5th), *Pleading*, §40.) And the distinction between a substantive right and the remedy to enforce it is important in the modern approach to the doctrine of "election of remedies." (See *infra*, §179 et seq.) (On distinction between "substance" and "procedure," see *infra*, §45.)

(2) *"Remedy" Used Alone.* The term "remedy," used alone, sometimes means judicial remedy. (See *Bauer v. Neuzil* (1944) 66 C.A.2d Supp. 1020, 1029, 152 P.2d 47 [quoting Corpus Juris Secundum: "[T]he judicial means or method whereby a cause of action may be enforced; the judicial means for enforcing a right or redressing a wrong"].) It is this sense that was, no doubt, intended in C.C. 3523, declaring: "For every wrong there is a remedy." (See *infra*, §5.) As the court observed in *Painter v. Berglund* (1939) 31 C.A.2d 63, 87 P.2d 360: "This maxim of jurisprudence bestows upon the person who may be wronged the right to seek redress in an action, and the basis or ground thereof is denominated the cause of action." (31 C.A.2d 70.)

But "remedy" has a broader meaning, for not every legal remedy is a judicial remedy. A remedy "is the means authorized by law to be employed in preserving or enforcing a civil right, or preventing the happening of a threatened injury, or in securing redress for that which already has illegally resulted in damage." (*Jewett v. City Transfer & Storage Co.* (1933) 128 C.A. 556, 558, 18 P.2d 351; see 1 *Am.Jur.2d* (2005 ed.), *Actions* §2.) The remedy may be self-help, e.g., the ejection of a trespasser or the recapture of personal property tortiously taken. (See *Rest., Restitution* §4, Comment b; 5 *Summary* (10th), *Torts*, §§419, 422.) A more formal nonjudicial remedy, also a type of self-help, is the sale of personal property by the holder of a possessory lien. (*Rest., Restitution* §4, Comment b.) A sale by a mortgagee or pledgee is similar. (See *Jewett v. City Transfer & Storage Co.*, *supra*, 128 C.A. 561 [warehouseperson's public sale of stored property; "[i]n effecting his object ... he neither requires nor seeks the aid of any court, or public officer of any kind"].)

West's Key Number Digest, Action 1 et seq.

SUPPLEMENT: [This section is current through the latest supplement]



3 of 178 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

I. INTRODUCTION

A. Judicial Remedies.

3. Judicial Remedy Where None Is Prescribed by Statute.

a. Statutory Declarations.

3 Witkin Cal. Proc. Actions § 3

[§ 3] Statutory Declarations.

A judicial remedy available at common law or in equity may still be available in the absence of a statute abolishing or superseding it (see *infra*, §8 et seq.); and a remedy may be entirely created by judicial decision where a statutory procedure for the enforcement of a right is lacking. (See 77 *Harv. L. Rev.* 285 [implying civil causes of action and remedies from federal regulatory statutes]; on inherent powers of courts, see 2 *Cal. Proc.* (5th), *Courts*, §173 et seq.) Three statutes are often cited in this connection:

(1) An obligation arising from the operation of law may be enforced in the manner provided by law, or by a civil action or proceeding. (C.C. 1428; see *infra*, §4.)

(2) "For every wrong there is a remedy." (C.C. 3523; see *infra*, §5.)

(3) When jurisdiction is conferred on a court or judicial officer by the Constitution, the Code of Civil Procedure, or any other statute, all the means necessary to carry it into effect are also given. In the exercise of this jurisdiction, if the course of proceeding is "not specifically pointed out by this Code or the statute, any suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of this code." (C.C.P. 187; see *infra*, §§6, 7.)

SUPPLEMENT: [This section is current through the latest supplement]



4 of 178 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

I. INTRODUCTION

A. Judicial Remedies.

3. Judicial Remedy Where None Is Prescribed by Statute.

b. Obligation May Be Enforced.

3 Witkin Cal. Proc. Actions § 4

[§ 4] Obligation May Be Enforced.

(1) *Illustration: Action for Support.* C.C. 1428 (supra, §3) was invoked in *Paxton v. Paxton* (1907) 150 C. 667, 89 P. 1083, an action by an adult son against his father and mother for support. Because the Civil Code failed to specify any procedure, defendants contended that it could not be judicially enforced. "According to this contention said section is merely an ornamental enunciation of a moral principle which ought to be observed by good people ... but is not a law in the sense of a rule of action which such people are legally bound to obey." (150 C. 670.) The court, in rejecting the argument, said: "But where the right is given by statute without any prescribed remedy, it may be enforced by any appropriate method recognized by the general law of procedure. This principle is crystallized in *section 1428 of the Civil Code*. ... And a suit in equity is peculiarly an appropriate remedy for the enforcement of the duty imposed by said section." (150 C. 670.) (See *Southern Calif. Acoustics Co. v. C.V. Holder* (1969) 71 C.2d 719, 727, 79 C.R. 319, 456 P.2d 975, *infra*, §5 [citing *Paxton* in support of holding under C.C. 3523].)

(2) *Illustration: Action for Inverse Condemnation.* A similar result was reached, without reference to C.C. 1428, under former Cal. Const., Art. I, §14 (now Cal. Const., Art. I, §19) declaring that private property may not be damaged for public use without compensation. The provision was held to be self-executing and the right enforceable by a common law action. (*Rose v. California* (1942) 19 C.2d 713, 724, 123 P.2d 505; see 8 *Summary* (10th), *Constitutional Law*, §1143 et seq.; 5 *Cal. Proc.* (5th), *Pleading*, §689.)

SUPPLEMENT: [This section is current through the latest supplement]



5 of 178 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

I. INTRODUCTION

A. Judicial Remedies.

3. Judicial Remedy Where None Is Prescribed by Statute.

c. Remedy for Every Wrong.

3 *Witkin Cal. Proc. Actions* § 5

[§ 5] Remedy for Every Wrong.

(1) *Nature of Maxim.* The ancient maxim in C.C. 3523 (*supra*, §3) is the most nebulous of the declarations of this type. In its literal and broadest meaning it cannot be true, because moral "wrongs" of many kinds are not subject to legal redress. Its application is usually restricted to traditional "legal wrongs" that give rise to corresponding legal rights and liabilities. (See *Finch v. Western Nat. Bank of San Francisco* (1914) 24 C.A. 331, 338, 141 P. 261; *infra*, §64.) Thus, its coverage would seem to be about the same as that of C.C. 1428. (See *Siminoff v. Jas. H. Goodman & Co. Bank* (1912) 18 C.A. 5, 14, 121 P. 939 [wrongful dishonor of check; limited contract measure of damages was rejected on theory that maxim calls for "a remedy in some degree commensurate with the injury inflicted"]; *Sapiro v. Frisbie* (1928) 93 C.A. 299, 312, 270 P. 280 [right created by zoning ordinance; injured property owner was entitled to enjoin violation by defendant]; *Darmour Productions Corp. v. Herbert M. Baruch Corp.* (1933) 135 C.A. 351, 353, 27 P.2d 664 [action by employer for injury to employee; maxim was mentioned in connection with enforcement of right declared in C.C. 49]; 1 *Am.Jur.2d* (2005 ed.), *Actions* §35.)

(2) *Illustrations.* In *Southern Calif. Acoustics Co. v. C.V. Holder* (1969) 71 C.2d 719, 79 C.R. 319, 456 P.2d 975, plaintiff subcontractor submitted a telephone bid to defendant contractor to furnish acoustical tile on a school district job. Defendant, pursuant to former Govt.C. 4104 (now *Pub.Contr.C. 4104*), listed plaintiff as a subcontractor and was awarded the prime contract. Later defendant, asserting that he had inadvertently listed plaintiff instead of an intended subcontractor, obtained consent of the district to substitute the one intended. Plaintiff, alleging that it had refrained from seeking other jobs in order to remain within bonding limits, sued the district and the contractor. *Held*, the action was proper. Former Govt.C. 4107 (now *Pub.Contr.C. 4107*) made it unlawful for the prime contractor and the awarding authority to substitute another subcontractor unless the listed person was unable or unwilling to perform. The purpose of the statute was to protect the public and subcontractors from unfair bid peddling and shopping. Hence, the statute conferred a right on the listed subcontractor, and it could be enforced by an action for damages against the prime contractor to recover the benefit of the bargain he would have realized. (71 C.2d 727, citing *Paxton v. Paxton* (1907) 150 C. 667, 89 P. 1083, *supra*, §4, and C.C. 3523.)

Sometimes the maxim is merely recited in connection with the application of some distinct and adequate legal remedy. In *Wuest v. Wuest* (1942) 53 C.A.2d 339, 127 P.2d 934, the court emphasized the flexible powers of equity to

contrive remedies corresponding to wrongs, but the complaint stated a well-recognized cause of action to vacate an interlocutory divorce decree rendered in excess of jurisdiction. (53 C.A.2d 346.)

Other cases are to the same effect. (See *Ward v. Taggart* (1959) 51 C.2d 736, 743, 336 P.2d 534, *infra*, §164; *Kohn v. Superior Court* (1936) 12 C.A.2d 459, 464, 55 P.2d 1186 [prohibition issued to protect interest in private papers]; *Laczko v. Jules Meyers* (1969) 276 C.A.2d 293, 295, 80 C.R. 798 [violation of statutory duty was actionable in tort although no specific remedy was provided in statute; C.C. 3523 was not mentioned]; *River Garden Farms v. Superior Court* (1972) 26 C.A.3d 986, 1001, 103 C.R. 498, 5 *Summary* (10th), *Torts*, §78.)

SUPPLEMENT: [This section is current through the latest supplement]



6 of 178 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

I. INTRODUCTION

A. Judicial Remedies.

3. Judicial Remedy Where None Is Prescribed by Statute.

d. Illustrations.

3 *Witkin Cal. Proc. Actions* § 6

[§ 6] Illustrations.

C.C.P. 187 (see *supra*, §3) has been invoked in many cases. The following are illustrations:

Maxson v. Superior Court (1899) 124 C. 468, 474, 57 P. 379 [power of superior court, on appeal from justice court, to exercise auxiliary authority, in aid of its appellate jurisdiction, to reverse with directions].

Crane v. Cummings (1902) 137 C. 201, 203, 69 P. 984 [statute authorized sale of real estate for nonpayment of delinquent street assessment; court could choose method of appointing commissioner to make sale].

People v. Chew (1904) 141 C. 550, 553, 75 P. 186 [statute granted power to trial judge to determine degree of crime; court could devise procedure, including taking of evidence, to make determination].

In re Hallinan (1954) 43 C.2d 243, 254, 272 P.2d 768 [power of Supreme Court to adopt suitable procedure in disciplinary proceedings initiated on its own motion].

Citizens Util. Co. of Calif. v. Superior Court (1963) 59 C.2d 805, 813, 31 C.R. 316, 382 P.2d 356 [condemnation of water system; it was proper to advance valuation date to time of trial where condemnee was public utility compelled by law to make improvements until transfer of possession].

Rosemont v. Superior Court (1964) 60 C.2d 709, 713, 36 C.R. 439, 388 P.2d 671 [power to stay taking of deposition pending decision on motion for protective order].

Roche v. Superior Court (1916) 30 C.A. 255, 260, 157 P. 830 [contest of local option election; general statutes on election contests were not directly applicable and court could adopt procedure permitting interested persons to appear].

In re Reader (1939) 32 C.A.2d 309, 313, 89 P.2d 654 [special proceeding; statute did not expressly authorize filing of answer, but court could permit filing].

Bixby v. Hotchkis (1945) 72 C.A.2d 368, 374, 164 P.2d 808 [*C.C.P. 170* required hearing of trial judge's

disqualification by another judge; summary and ex parte consideration of evidence was proper].

Smith v. Smith (1954) 125 C.A.2d 154, 166, 270 P.2d 613 [power of court to devise procedure for implementing Reciprocal Enforcement of Support Law].

Holibaugh v. Stokes (1961) 192 C.A.2d 564, 568, 13 C.R. 528 [lender loaned money to borrower to purchase real property on borrower's promise to execute note and deed of trust, but borrower failed to do so, borrowed money from second lender, and gave second lender deed to property as security; trial judge could issue decree recognizing title in borrower, decreeing second lender's deed to be mortgage, and giving first lender lien subordinate to mortgage].

SUPPLEMENT: [This section is current through the latest supplement]



7 of 178 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

I. INTRODUCTION

A. Judicial Remedies.

3. Judicial Remedy Where None Is Prescribed by Statute.

e. Exceptions.

3 *Witkin Cal. Proc. Actions* § 7

[§ 7] Exceptions.

The power to devise procedure under *C.C.P. 187* (supra, §3) is subject to two obvious exceptions that appear from the language of the section:

(1) *Jurisdiction Must Be Conferred.* If the court lacks jurisdiction, it cannot act at all. In *Traffic Truck Sales Co. of Calif. v. Justice's Court* (1923) 192 C. 377, 220 P. 306, the state liquor control statute provided for forfeiture of a vehicle used in illegal transportation, without establishing any procedure. *Held*, a competent court might order a public sale of the seized vehicle after notice, but respondent justice court, lacking jurisdiction, could not do so. (192 C. 382.)

(2) *Existing Statutes Must Fail To Provide Procedure.* The court's power is subject to the proviso of *C.C.P. 187* that the proceeding "be not specifically pointed out by this Code or the statute." As the court in *McKendrick v. Western Zinc Mining Co.* (1913) 165 C. 24, 130 P. 865, observed: "The power, of course, should not be resorted to in any case where the existing statute may reasonably be construed to provide for process." (165 C. 30.) (See *Pierce v. Superior Court* (1934) 1 C.2d 759, 778, 37 P.2d 460 [concurring opinion].)

SUPPLEMENT: [This section is current through the latest supplement]



8 of 178 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

I. INTRODUCTION

A. Judicial Remedies.

4. Statutory Remedy Is Exclusive.

a. General Rule.

3 *Witkin Cal. Proc. Actions* § 8

[§ 8] General Rule.

It is frequently declared that when a new right has been created by statute, and a statutory remedy for its infringement is provided, the statutory remedy is exclusive and no other remedy will be allowed. (See cases cited in *Orloff v. Los Angeles Turf Club* (1947) 30 C.2d 110, 112, 180 P.2d 321; *Gold v. Los Angeles Democratic League* (1975) 49 C.A.3d 365, 373, 122 C.R. 732, 5 *Summary* (10th), *Torts*, §747 [statutory remedy of injunction precluded action for damages]; 1 *Am.Jur.2d* (2005 ed.), *Actions* §53.) The decisions appear to fall into three main classes:

(1) *Conditions Precedent*. Where the statute requires compliance with certain conditions precedent as a basis for recovery. Thus, the statutory right to sue public entities requires the filing of a claim with the proper authorities within a prescribed time. (See *infra*, §231.) Illustrative cases are *Cook v. Superior Court* (1936) 12 C.A.2d 608, 610, 55 P.2d 1227 [action against owner of automobile under *Veh.C.* 17152; recourse first against operator]; *Carpenter v. Eureka Cas. Co.* (1936) 14 C.A.2d 533, 536, 58 P.2d 682 [filing of claim with court in proceeding to liquidate insurance company].

(2) *Special Procedure*. Where the statute establishes a special, detailed procedure as the remedy. Here, the legislative intention appears, by clear implication, to make that procedure the sole method of enforcing the right. Illustrations are furnished by various special proceedings. (See *Wright v. Superior Court* (1903) 139 C. 469, 473, 73 P. 145 [statutory ancillary procedure for depositions has rendered equitable "bill of discovery" obsolete]; *Woods-Drury v. Superior Court* (1936) 18 C.A.2d 340, 344, 63 P.2d 1184 [unlawful detainer]; *Strauss v. A.L. Randall Co.* (1983) 144 C.A.3d 514, 518, 520, 194 C.R. 520 [statutory remedy for wrongful discharge of employee because of age discrimination].)

(3) *Single Remedy Authorized*. Where, by express characterization of the remedy as exclusive, or by express prohibition of other remedies, the Legislature has plainly limited the parties to the single remedy. (See *Corp.C.* 317 [reimbursement of directors and officers for litigation expense; see 9 *Summary* (10th), *Corporations*, §81 et seq.]; *Modern Barber Colleges v. California Emp. Stabilization Com.* (1948) 31 C.2d 720, 723, 724, 192 P.2d 916 [review of legality of tax assessment; statute prohibited injunction, mandamus, or other legal or equitable process to prevent collection, thus limiting taxpayer to action to recover taxes after payment]; *Treat v. Los Angeles Gas & Elec. Corp.*

(1927) 82 C.A. 610, 615, 256 P. 447 [remedy under Workers' Compensation Act; see 2 *Summary* (10th), *Workers' Compensation*, §24 et seq..)]

SUPPLEMENT: [This section is current through the latest supplement]



9 of 178 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

I. INTRODUCTION

A. Judicial Remedies.

4. Statutory Remedy Is Exclusive.

b. Exceptions: Where Other Remedies Are Allowed.

1. Preexisting Right.

3 Witkin Cal. Proc. Actions § 9

[§ 9] Preexisting Right.

If a right was established at common law or by statute before the new statutory remedy was created, the statutory remedy is usually regarded as merely cumulative, and the older remedy may be pursued at the plaintiff's election. (See *Jewett v. City Transfer & Storage Co.* (1933) 128 C.A. 556, 559, 18 P.2d 351; *Estate of Ward* (1932) 127 C.A. 347, 354, 15 P.2d 901; *Shell v. Schmidt* (1954) 126 C.A.2d 279, 287, 272 P.2d 82; *Glaser v. Meyers* (1982) 137 C.A.3d 770, 774, 187 C.R. 242, citing the text; *McKee v. Bell-Carter Olive Co.* (1986) 186 C.A.3d 1230, 1241, 1242, 1244, 1245, 231 C.R. 304; 1 *Am.Jur.2d* (2005 ed.), *Actions* §54.) The following cases are illustrative:

Rojo v. Kliger (1990) 52 C.3d 65, 79, 276 C.R. 130, 801 P.2d 373, 8 *Summary* (10th), *Constitutional Law*, §952, citing the text [Fair Employment and Housing Act did not supplant other statutory or common law claims for sexual discrimination in employment].

Manufacturers Life Ins. Co. v. Superior Court (1995) 10 C.4th 257, 272, 41 C.R.2d 220, 895 P.2d 56, 1 *Summary* (10th), *Contracts*, §592 [enactment of Unfair Insurance Practices Act (UIPA) (*Ins.C.* 790 et seq.; see 2 *Summary* (10th), *Insurance*, §252 et seq.) did not abolish remedies provided by Cartwright Act (*B. & P.C.* 16720 et seq.; see 1 *Summary* (10th), *Contracts*, §591 et seq.) or Unfair Competition Law (*B. & P.C.* 17200 et seq.; see 13 *Summary* (10th), *Equity*, §105 et seq.) for conduct that UIPA also proscribes].

Gray v. Sutherland (1954) 124 C.A.2d 280, 290, 268 P.2d 754 [former *Corp.C.* 824 (now *Corp.C.* 316), dealing with liability for certain unlawful corporate acts, was not inconsistent with common law directors' liability for violation of fiduciary duty].

Alameida v. State Personnel Bd. (2004) 120 C.A.4th 46, 59, 15 C.R.3d 383, 8 *Summary* (10th), *Constitutional Law*, §963, citing the text [*Govt.C.* 3309.5(c) did not vest in courts exclusive initial jurisdiction over violations of Public Safety Officers Procedural Bill of Rights Act, where right to administrative review predated statute].

SUPPLEMENT: [This section is current through the latest supplement]

See *Boston v. Penny Lane Centers* (2009) 170 C.A.4th 936, 947, 88 C.R.3d 707, citing the text [therapist in treatment program for juveniles complained to employer that staffing ratios were inadequate and that work environment was unsafe; therapist could sue for common law wrongful termination of employment, even though statutory remedy under CalOsha was not available].



10 of 178 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

I. INTRODUCTION

A. Judicial Remedies.

4. Statutory Remedy Is Exclusive.

b. Exceptions: Where Other Remedies Are Allowed.

2. Statutory Remedy Is Inadequate.

3 *Witkin Cal. Proc. Actions* § 10

[§ 10] Statutory Remedy Is Inadequate.

In *Orloff v. Los Angeles Turf Club* (1947) 30 C.2d 110, 180 P.2d 321, the court reexamined and relaxed the supposed general rule of exclusiveness of a statutory remedy. The rule, said the court, "is a corollary of, a consequence flowing from, or a specific application of, the general common law rule of statutory construction that statutes in derogation of the common law will be strictly construed. ... But that rule does not prevail in this state, at least, as to the provisions of the four original codes." And, in any event, the rule does not apply where the statutory remedy is inadequate. Accordingly, it was held that a suit could be maintained for injunctive relief against defendants, who had refused to allow plaintiff access to a public horse racing exhibition. The decision was on the ground that the statutory remedy of compensatory damages plus a \$ 100 penalty was not an adequate means of redress, because the actual damages would be difficult to prove, and the penalty was relatively insignificant. (30 C.2d 113.) (To same effect, see *Kold Kist v. Amalgamated Meat Cutters & Butchers Workmen of North America, Local No. 421* (1950) 99 C.A.2d 191, 203, 221 P.2d 724; 1 Am.Jur.2d (2005 ed.), Actions §53.)

It should be noted that the *Orloff* court, correctly repudiating the doctrine of strict construction of new statutory remedies, indirectly disapproved the reasoning on which many of the cases stating the general rule are based. (See, e.g., *Cook v. Superior Court* (1936) 12 C.A.2d 608, 611, 55 P.2d 1227 [heavily stressing strict construction theory].)

SUPPLEMENT: [This section is current through the latest supplement]



11 of 178 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

I. INTRODUCTION

A. Judicial Remedies.

4. Statutory Remedy Is Exclusive.

b. Exceptions: Where Other Remedies Are Allowed.

3. Quia Timet Relief.

3 Witkin Cal. Proc. Actions § 11

[§ 11] Quia Timet Relief.

In *Escrow Agents' Fidelity Corp. v. Superior Court* (1992) 4 C.A.4th 491, 5 C.R.2d 698, petitioners sought relief on the theory of quia timet, "an equitable remedy which allows an aggrieved party to obtain prejudgment relief to prevent an anticipated injury." (4 C.A.4th 493.) The trial judge sustained a demurrer on the ground that the remedy no longer existed in California. *Held*, mandamus was granted to compel overruling of the demurrer.

(a) "Quia timet (literal translation, 'because he fears'), is an action for equitable relief against an anticipated injury. 'Bills *quia timet* are in the nature of writs known at the common law as *brevia anticipantia*, or writs of prevent, to accomplish the ends of precautionary justice. They are ordinarily applied to prevent wrongs or anticipated mischief, and not merely to redress them when done.' " (4 C.A.4th 494.)

(b) Traditionally the remedy was used in real property cases, and to a lesser extent in personal property cases. (4 C.A.4th 494.) "Today, it has for the most part been forsaken in favor of statutory remedies. For example, a party who wants to enjoin a foreclosure sale, prevent a nuisance, or otherwise assert a right to real property (the traditional uses for quia timet), would seek injunctive relief and make effective use of the *lis pendens* statutes. ... An aggrieved creditor might avail himself of the attachment law ... , provided he is fortunate enough to have a debtor with assets to attach. An individual with a claim to personal property has at his disposal the claim and delivery statutes." (4 C.A.4th 495.)

(c) "Had those statutory remedies completely replaced quia timet, however, it would have been news to the fidelity and surety bond industry, and to those judges of the Los Angeles Superior Court who have granted relief in cases similar to this one." (4 C.A.4th 495.) As the United States Court of Appeals explained in a 1971 case: "No principle in equity is more familiar, or more firmly established, than that a surety, *after the debt for which he is liable has become due*, without paying or being called on to pay it, may file a bill in equity in the nature of a bill quia timet to compel the principal to exonerate him from liability by its payment, provided no rights of the creditor are prejudiced thereby. ... The doctrine is not premised on mere fear of loss or liability prior to an obligation's maturity. Rather, only after the obligation becomes payable, the surety, before he pays it, may maintain a suit in equity against the debtor in the nature of a bill quia timet to compel the latter to pay the debt or perform the obligation, provided the creditor could enforce

payment or performance but neglects or refuses to do it." (4 C.A.4th 495.)

(d) The remedy is especially suited to surety cases. "Although a surety may file an action at law to compel its principal to perform the obligation on a bond when due ... , the fact that it may eventually obtain a judgment against the principal is of little comfort to the surety if, in the interim, the principal has absconded with the very funds which could have been used to satisfy the bond. Quia timet allows the surety to prevent the principal from dissipating those funds if the surety knows it will be called upon to 'pay the debt or perform the obligation' on the bond, suspects that the principal has some or all of the necessary funds to do so, and fears that the principal may abscond with those funds." (4 C.A.4th 496.)

SUPPLEMENT: [This section is current through the latest supplement]



12 of 178 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

I. INTRODUCTION

B. Survival or Abatement of Actions.

1. Survival After Death of Plaintiff or Defendant.

a. Nature of Topic.

3 *Witkin Cal. Proc. Actions* § 12

[§ 12] Nature of Topic.

(1) *In General.* The procedural topic of the survival or abatement of actions is mainly concerned with the effect of death of the actual or prospective plaintiff or defendant on causes of action that accrued during his or her lifetime.

Under former law, some actions abated; i.e., the action could not be commenced or maintained by or against the executor or administrator of the decedent plaintiff or defendant. The objection was that no cause of action was stated, and it could be raised by a general demurrer or its equivalent, a motion to dismiss. (See *Blodgett v. Greenfield* (1929) 101 C.A. 399, 400, 281 P. 694.)

In an entirely different sense a pending action may be stayed or "abated" (usually temporarily only) for certain defects in pleading or parties such as the incapacity to sue, the misjoinder of parties, the nonjoinder of parties, and another action pending. These objections must be raised by "pleas in abatement" in a demurrer or answer, or they are waived. (See 5 *Cal. Proc.* (5th), *Pleading*, §1129.)

The topic of "abatement and revival," appearing in many of the older treatments of this subject, emphasizes the procedural aspect of "reviving," or continuing an action that does survive by substituting the executor or administrator for the decedent. (See *Cort v. Steen* (1950) 36 C.2d 437, 442, 224 P.2d 723; *Grant v. McAuliffe* (1953) 41 C.2d 859, 865, 264 P.2d 944.) The term "revival" seems of little value; the survivable action does not really abate and revive, but is temporarily stayed pending the substitution. (See 4 *Cal. Proc.* (5th), *Pleading*, §259.)

(2) *Statutory Rules.* As part of a comprehensive revision of the statutes governing litigation involving decedents, the Legislature enacted new statutes in 1992 on the effect of death on parties to civil actions (*C.C.P.* 377.10 et seq.; see *infra*, §15 et seq.). (For detailed treatment, see 14 *Summary* (10th), *Wills and Probate*, §518 et seq.)

West's Key Number Digest, Abatement and Revival 1 et seq.

SUPPLEMENT: [This section is current through the latest supplement]



13 of 178 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

I. INTRODUCTION

B. Survival or Abatement of Actions.

1. Survival After Death of Plaintiff or Defendant.

b. Former Law: Survivable Claims.

3 *Witkin Cal. Proc. Actions* § 13

[§ 13] Former Law: Survivable Claims.

Traditionally, both assignability and survivability were the rule; causes of action that were nonassignable and abated on death were the exception. (See *Estate of Baker* (1915) 170 C. 578, 587, 150 P. 989 ["the tendency of modern jurisprudence strongly favors the assignability and survivability of things in action"]; 1 *Summary* (10th), *Contracts*, §712 et seq.) Thus, under former statutes and decisions, the following types of actions survived:

(1) *Express or Implied Contract*. An accrued cause of action, seeking any kind of remedy for breach of any kind of enforceable contract. (C.C. 954; former Prob.C. 573; see *Estate of Caldwell* (1933) 129 C.A. 613, 614; 19 P.2d 9; *Smith v. Minnesota Mut. Life Ins. Co.* (1948) 86 C.A.2d 581, 591, 195 P.2d 457.)

(2) *Quasi-Contract*. Causes of action in quasi-contract survived on two theories: (a) The cause of action is contractual; (b) an action for the restitution of money or the value of property is an action for the recovery of property or injuries to it. (C.C. 954; former Prob.C. 573; see *Wikstrom v. Yolo Fliers Club* (1929) 206 C. 461, 464, 274 P. 959; *Vraghizian v. Savings Union Bank & Trust Co.* (1916) 31 C.A. 709, 712, 161 P. 507; *Stockton Morris Plan Co. v. Carpenter* (1936) 18 C.A.2d 205, 210, 211, 63 P.2d 859; 25 So. Cal. L. Rev. 344.)

(3) *Judgment*. A judgment was generally regarded as contractual within the rule of survivability, irrespective of whether the original obligation or cause of action was survivable. (See *Newman v. Burwell* (1932) 216 C. 608, 610, 15 P.2d 511; *Taylor v. George* (1949) 34 C.2d 552, 557, 212 P.2d 505; 22 Cal. L. Rev. 79; 62 Harv. L. Rev. 1079.)

(4) *Statutory Liabilities*. A cause of action based on a compensatory statutory liability, i.e., one in which the recovery is measured by the loss sustained, survived, usually on the theory of "injury to property." (See *Auslen v. Thompson* (1940) 38 C.A.2d 204, 213, 101 P.2d 136; *Los Angeles v. Howard* (1947) 80 C.A.2d 728, 730, 182 P.2d 278.)

(5) *Property Rights*. Property actions of every kind survived. (C.C. 954; former Prob.C. 573; see *George v. McManus* (1915) 27 C.A. 414, 416, 150 P. 73; *Hardy v. Marcus* (1936) 15 C.A.2d 244, 59 P.2d 421; *Stockton Morris Plan Co. v. Carpenter*, *supra*, 18 C.A.2d 209; *Sanders v. Allen* (1948) 83 C.A.2d 362, 367, 188 P.2d 760.)

(6) *Personal Injury and Wrongful Death*. Originally California followed the general common law rules that actions for personal injuries abate on the death of the injured party or the tortfeasor, and actions for wrongful death abate on the death of the tortfeasor. (See 48 *Harv. L. Rev.* 1008; 24 *So. Cal. L. Rev.* 417; 25 *So. Cal. L. Rev.* 343.) But in *Hunt v. Authier* (1946) 28 *C.2d* 288, 169 *P.2d* 913, an action for wrongful death against the administrator of the deceased tortfeasor was allowed on the novel theory that personal injury or wrongful death constitute an injury to "property" within the meaning of former Prob.C. 574. "Injuries suffered by the plaintiffs by the lessening of their estate and the invasion and deprivation of their pecuniary interest and right to future support from their decedent by the commission of the wrongful act is ... a destruction of or injury to property." (28 *C.2d* 296.)

Despite criticism of the reasoning of *Hunt* (see 34 *Cal. L. Rev.* 613; 37 *Cal. L. Rev.* 70; 20 *So. Cal. L. Rev.* 239), its result--abolition of the common law rule of abatement of these actions--received wide approval, and later cases reaffirmed and clarified the survival doctrine. (See *Moffat v. Smith* (1949) 33 *C.2d* 905, 907, 206 *P.2d* 353 [personal injuries; action by injured person against executor of tortfeasor]; *Mecum v. Ott* (1949) 92 *C.A.2d* 735, 739, 207 *P.2d* 831 [same]; *Nash v. Wright* (1947) 82 *C.A.2d* 475, 186 *P.2d* 691 [wrongful death; action by heirs of deceased victim against executor of tortfeasor].)

SUPPLEMENT: [This section is current through the latest supplement]



14 of 178 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

I. INTRODUCTION

B. Survival or Abatement of Actions.

1. Survival After Death of Plaintiff or Defendant.

c. Former Law: Nonsurvivable Claims.

3 *Witkin Cal. Proc. Actions* § 14

[§ 14] Former Law: Nonsurvivable Claims.

The expansion of the "injury to property" concept in *Hunt v. Authier* (1946) 28 C.2d 288, 169 P.2d 913, *supra*, §13, reduced the list of nonsurvivable actions to three classes:

(1) *Statutory Penalties*. Unlike a compensatory liability created by statute (see *supra*, §13), the right of action for a penalty (imposed to punish, and not measured by the actual loss sustained) did not survive. (See *Western Mortg. & Guaranty Co. v. Gray* (1932) 215 C. 191, 203, 8 P.2d 1016.)

(2) *Personal Torts Not Constituting Injuries to Property*. In view of the *Hunt* theory that any wrong that caused a "lessening of plaintiff's estate" was an injury to property and therefore survivable, there was considerable doubt as to the scope of this second class. (See 37 *Cal. L. Rev.* 72, 659.)

(3) *Actions for Divorce and Separate Maintenance*. (See *infra*, §18.)

SUPPLEMENT: [This section is current through the latest supplement]



15 of 178 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

I. INTRODUCTION

B. Survival or Abatement of Actions.

1. Survival After Death of Plaintiff or Defendant.

d. Current Rule of Survivability.

3 *Witkin Cal. Proc. Actions* § 15

[§ 15] Current Rule of Survivability.

(1) *Statutory Development.* In 1949, the Legislature enacted comprehensive survival provisions for personal injury and wrongful death actions. (See *Cort v. Steen* (1950) 36 C.2d 437, 440, 224 P.2d 723; *Grant v. McAuliffe* (1953) 41 C.2d 859, 862, 264 P.2d 944; *Hume v. Lacey* (1952) 112 C.A.2d 147, 150, 245 P.2d 672; *Smith v. Finley* (1952) 112 C.A.2d 599, 600, 246 P.2d 989; *Burgos v. Tamulonis* (1994) 28 C.A.4th 757, 761, 33 C.R.2d 728; 25 So. Cal. L. Rev. 112; 13 A.L.R.4th 1060 [effect of death of beneficiary upon survival of action under wrongful death statute]; 5 *Summary* (10th), *Torts*, §23.)

In 1961, acting on a recommendation of the California Law Revision Commission, the Legislature further modernized the law, and the classification of survivable and nonsurvivable causes of action became virtually obsolete. (See *Fazio v. Hayhurst* (1966) 247 C.A.2d 200, 202, 55 C.R. 370, citing the text; *Elliott v. Superior Court* (1968) 265 C.A.2d 825, 831, 71 C.R. 807, citing the text; *Estate of Hoertkorn* (1979) 88 C.A.3d 461, 465, 151 C.R. 806; *Sacks v. FSR Brokerage* (1992) 7 C.A.4th 950, 956, 9 C.R.2d 306.)

(2) *Current Statute.* In 1992, new statutes were adopted as follows:

(a) "Except as otherwise provided by statute, a cause of action for or against a person is not lost by reason of the person's death, but survives subject to the applicable limitations period." (C.C.P. 377.20(a).)

(b) An action that survives may be commenced by the decedent's personal representative or, if none, by the decedent's successor in interest. (C.C.P. 377.30.)

(c) Subject to *Prob.C.* 9000 et seq. governing creditor claims in the administration of estates (see 14 *Summary* (10th), *Wills and Probate*, §612 et seq.), a cause of action that survives may be asserted against the decedent's personal representative or, to the extent provided by statute, against the decedent's successor in interest. (C.C.P. 377.40.) These statutes apply retroactively. (*Parsons v. Tickner* (1995) 31 C.A.4th 1513, 1523, 37 C.R.2d 810.) (See 14 *Summary* (10th), *Wills and Probate*, §518 et seq.)

It is not necessary that a complete cause of action exist at the time of death in order for rights to survive that may later mature into an actionable claim. (*Carr v. Progressive Cas. Ins. Co. (1984) 152 C.A.3d 881, 891, 199 C.R. 835* [third-party claimant's administrator could sue insurer for bad faith failure to settle, although cause of action had not accrued at time of claimant's death (because his action against insured tortfeasor had not been concluded)].)

It is likewise unnecessary that the action be instituted prior to death. (See *Dunwoody v. Trapnell (1975) 47 C.A.3d 367, 370, 120 C.R. 859*; *Carr v. Progressive Cas. Ins. Co., supra*, 152 C.A.3d 892; 30 A.L.R.4th 707.)

(3) *Simultaneous Death of Tortfeasor*. The contention has sometimes been advanced that, if the tortfeasor dies before or at the same time that the victim is injured, the cause of action cannot survive because the tortfeasor is not in existence. The theory is expressly repudiated by *C.C.P. 377.20(b)*: "This section applies even though a loss or damage occurs simultaneously with or after the death of a person who would have been liable if the person's death had not preceded or occurred simultaneously with the loss or damage."

SUPPLEMENT: [This section is current through the latest supplement]



16 of 178 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

I. INTRODUCTION

B. Survival or Abatement of Actions.

1. Survival After Death of Plaintiff or Defendant.

e. Limitations on Recovery.

1. Statutory Rules and Exceptions.

3 *Witkin Cal. Proc. Actions* § 16

[§ 16] Statutory Rules and Exceptions.

(1) *Decedent's Cause of Action.* The survival statutes place limitations on recoverable damages in an action by the personal representative or successor in interest on the decedent's cause of action:

(a) *No recovery for pain and suffering where death occurs before judgment.* The recovery of damages for pain and suffering was the subject of some dispute, and the final legislative decision was to eliminate them. "[T]he damages recoverable are limited to the loss or damage that the decedent sustained or incurred before death, including any penalties or punitive or exemplary damages that the decedent would have been entitled to recover had the decedent lived, and do not include damages for pain, suffering, or disfigurement." (*C.C.P.* 377.34; see *Los Angeles v. Superior Court (Schonert)* (1999) 21 *C.4th* 292, 300, 87 *C.R.2d* 441, 981 *P.2d* 68 [*C.C.P.* 377.34 applies to federal civil rights actions and is not preempted by federal law]; 14 *Summary* (10th), *Wills and Probate*, §519.)

(b) *No recovery of postdeath damages.* Damages recoverable by a personal representative or successor in interest are limited to those "sustained or incurred before death." (*C.C.P.* 377.34; see *Pease v. Beech Aircraft Corp.* (1974) 38 *C.A.3d* 450, 459, 113 *C.R.* 416; *Stencel Aero Engineering Corp. v. Superior Court* (1976) 56 *C.A.3d* 978, 986, 128 *C.R.* 691; 14 *Summary* (10th), *Wills and Probate*, §519.)

(c) *Exception: elder abuse cases.* Recovery for pain, suffering, or disfigurement, up to \$ 250,000, is permitted where a person with a cause of action for elder abuse dies before judgment. (*Welf.C.* 15657(b); see 6 *Summary* (10th), *Torts*, §1686.) (See *ARA Living Centers - Pac. v. Superior Court* (1993) 18 *C.A.4th* 1556, 1564, 23 *C.R.2d* 224 [statute is not retroactive].)

(d) *Exception: where prevailing plaintiff dies pending appeal.* *C.C.P.* 377.34 does not bar the recovery of pain and suffering damages awarded by the trial court if the plaintiff dies after judgment is rendered, but while an appeal is pending. (*Sullivan v. Delta Air Lines* (1997) 15 *C.4th* 288, 305, 63 *C.R.2d* 74, 935 *P.2d* 781, 14 *Summary* (10th), *Wills and Probate*, §519; *Cadlo v. Metalclad Insulation Corp.* (2007) 151 *C.A.4th* 1311, 1323, 61 *C.R.3d* 104.)

(2) *Cause of Action Against Decedent*. In an action brought against a personal representative or, to the extent provided by statute, a successor in interest, recoverable damages do not include those recoverable under C.C. 3294 or other "punitive or exemplary damages." (C.C.P. 377.42; see 108 *Harv. L. Rev.* 1785 [arguing that pain and suffering tort damages should be permitted in accident cases]; 30 *A.L.R.4th* 707 [claim for punitive damages in tort action as surviving death of tortfeasor or person wronged]; 14 *Summary* (10th), *Wills and Probate*, §520.)

SUPPLEMENT: [This section is current through the latest supplement]



17 of 178 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

I. INTRODUCTION

B. Survival or Abatement of Actions.

1. Survival After Death of Plaintiff or Defendant.

e. Limitations on Recovery.

2. Illustrations.

3 *Witkin Cal. Proc. Actions* § 17

[§ 17] Illustrations.

In *Williamson v. Plant Insulation Co.* (1994) 23 C.A.4th 1406, 28 C.R.2d 751, plaintiff brought a personal injury action alleging that he had contracted asbestosis from asbestos products distributed and installed by defendant in the refinery in which plaintiff worked. The action was bifurcated with issues of the statute of limitations, causation, and damages to be tried in the first phase, and issues of liability and comparative fault in the second. The jury returned a first-phase special verdict, finding that the claim for damages from asbestosis was timely and that exposure to asbestos was a legal cause of plaintiff's loss, and determining total damages, which included both noneconomic and anticipated economic losses. Plaintiff died during the second phase of the trial, but the trial court sent the case to the jury and it found defendant liable for specified percentages of plaintiff's illnesses. The trial judge then entered judgment on the verdicts, nunc pro tunc, as of the day before plaintiff died. *Held*, the awards of noneconomic damages and anticipated economic damages were abated by plaintiff's death.

(a) *Noneconomic damages were abated.*

(1) Neither the common law power of nunc pro tunc entry (see 7 *Cal. Proc.* (5th), *Judgment*, §62), nor *C.C.P.* 669 (judgment on verdict where party dies after verdict but before judgment; see 7 *Cal. Proc.* (5th), *Judgment*, §5), allowed the trial court to rescue plaintiff's noneconomic damages for pain and suffering from abatement under former Prob.C. 573(c) (now *C.C.P.* 377.34; see *supra*, §16). Plaintiff died during, not after, trial; although the live testimony had been completed, evidentiary exhibits had still to be admitted or excluded, instructions to be given, and jury argument to be made. Nor had the trial reached the stage of a jury verdict on which judgment could be entered. (23 *C.A.4th* 1414.)

(2) "A rule of law that requires noneconomic damages found by a jury to be reversed because the plaintiff died a few days before his trial could be completed may appear somewhat arbitrary. ... Nonetheless, a line must be drawn if section 573(c) is to have any effect at all, and in that section, the Legislature drew a clear line: noneconomic damages do not survive if the plaintiff dies before judgment. The cases on nunc pro tunc entry of judgment push that line back a short distance, to the time when judgment *could* have been rendered even if it was not. That movement rests on a sound rationale--that a party should not suffer from the court's own delay in giving judgment--and it would be neither wise nor

within our authority to erase the line thus drawn." (23 C.A.4th 1417.)

(b) *The award of economic damages must be reversed because it included abated anticipated economic damages.* Under former Prob.C. 573(c) (now C.C.P. 377.34), damages not incurred prior to plaintiff's death were not recoverable in the decedent's action (see supra, §14). From the record on appeal, it could not be determined what amount, if any, the jury awarded in anticipated economic damages, or what portion of these might actually have been suffered prior to plaintiff's death. All that could be said from the record was that the jury did not give plaintiff everything he asked for in economic damages and that its award probably did include some amount of anticipated future losses. There was also no record of what losses plaintiff actually incurred between the time of this verdict and his death. (23 C.A.4th 1418.)

SUPPLEMENT: [This section is current through the latest supplement]



18 of 178 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

I. INTRODUCTION

B. Survival or Abatement of Actions.

2. Abatement of Family Law Actions.

3 *Witkin Cal. Proc. Actions* § 18

[§ 18] Abatement of Family Law Actions.

(1) *Dissolution of Marriage and Legal Separation.* When either party in an action for dissolution of marriage or for legal separation dies before entry of judgment determining their marital status (i.e., dissolution of the marriage or legal separation of the parties), the action abates and the court may not make further orders regarding property rights, spousal support, costs, or attorneys' fees. However, when the action is bifurcated (see 11 *Summary* (10th), *Husband and Wife*, §105), and a party dies after entry of a judgment determining their marital status but before the determination of other reserved issues, the court retains jurisdiction to decide the reserved issues. The proper procedure is to substitute the personal representative of the deceased spouse as a party. (*In re Marriage of Hilke* (1992) 4 C.4th 215, 220, 14 C.R.2d 371, 841 P.2d 891, 11 *Summary* (10th), *Community Property*, §221; *In re Marriage of Allen* (1992) 8 C.A.4th 1225, 1229, 10 C.R.2d 916.) (See C.E.B., Practice Under the California Family Code, §§17.42, 17.63; Rutter Group, Family Law §§3:19 et seq., 8:47 et seq., 15:290 et seq.; 33 A.L.R.4th 47, 58 [effect of death of party to divorce proceeding pending appeal]; 11 *Summary* (10th), *Husband and Wife*, §72.)

(2) *Nullity of Marriage.* An action for nullity of marriage may not be commenced after the death of either putative spouse. (*Greene v. Williams* (1970) 9 C.A.3d 559, 562, 88 C.R. 261, 11 *Summary* (10th), *Husband and Wife*, §§152, 160 [parent's action to annul minor's marriage because he had married without parental consent did not survive minor's death].) However, unlike an action for dissolution of marriage or legal separation, a nullity action that is commenced while both putative spouses are alive is not abated by the subsequent death of either spouse before entry of judgment. The action may be continued by the personal representative of the deceased spouse's estate. The rationale for this distinction is that the former actions seek to terminate the marital status, and this purpose is abruptly accomplished by the death of one of the spouses, while the latter action seeks to inquire whether any such status ever existed, and the death of a spouse is irrelevant to this inquiry. (*In re Marriage of Goldberg* (1994) 22 C.A.4th 265, 267, 271, 27 C.R.2d 298 [distinguishing *Greene*].) (See C.E.B., Practice Under the California Family Code, §§17.42, 17:63; Rutter Group, Family Law §§3:20.1, 8:47.1; 11 *Summary* (10th), *Husband and Wife*, §152.)

(3) *Child Support.* In the absence of a prior agreement or court order fixing support, the liability for child support does not survive the death of a parent or putative parent. (See 10 *Summary* (10th), *Parent and Child*, §418.)

SUPPLEMENT: [This section is current through the latest supplement]



19 of 178 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

I. INTRODUCTION

B. Survival or Abatement of Actions.

3. Abatement by Statutory Repeal.

a. Repeal of Jurisdictional Statute.

3 *Witkin Cal. Proc. Actions* § 19

[§ 19] Repeal of Jurisdictional Statute.

(1) *In General.* A statute (or a self-executing constitutional provision) may repeal the grant of jurisdiction of the subject matter of a particular court over a class of cases, without a saving clause protecting the jurisdiction over pending actions. The effect of the repeal is to deprive the court of its competency or power to deal with that type of case, and the pending action in that court may abate. (*Bruner v. United States* (1952) 343 U.S. 112, 72 S.Ct. 581, 584, 96 L.Ed. 786, 790 [quoting earlier decision; "when the jurisdiction of a cause depends upon a statute the repeal of the statute takes away the jurisdiction"]; *In re Cavitt* (1941) 47 C.A.2d 698, 701, 118 P.2d 846 [criminal prosecution; "When by operation of law a court is divested of jurisdiction, it is without power to inflict a punishment or enforce a penalty for violations of law committed while it had jurisdiction, and a court under such circumstances is equally without power to proceed in a matter of which it had jurisdiction at the time the action was commenced, unless some special provision be made for that purpose by statute"].)

(2) *Ways of Avoiding Result.* Although the foregoing rule is technically correct, the destruction of a cause of action by the repeal of a jurisdictional statute is extremely rare. This result is usually avoided in one of the following ways:

(a) A general statute may prohibit a dismissal for lack of jurisdiction and provide for a transfer to a court with jurisdiction. (See *C.C.P.* 396; 2 *Cal. Proc.* (5th), *Jurisdiction*, §399; *Dillon v. Superior Court* (1950) 98 C.A.2d 437, 439, 220 P.2d 553 [dissent urging this as reason for retroactive application of repeal statute, i.e., no harm would result].)

(b) Deprivation of jurisdiction of a particular court does not affect the cause of action, which still may be asserted in a court with jurisdiction if the statute of limitations has not run. (On whether commencement of action in court without jurisdiction should toll statute of limitations, see dissent in *Taylor v. Datig* (1932) 123 C.A. Supp. 782, 789, 11 P.2d 98.)

(c) Even in the absence of an express saving clause, the preferred statutory construction against retroactivity of the repealing statute may preserve jurisdiction over pending cases. (See *In re Cate* (1929) 207 C. 443, 279 P. 131; *Hopkins v. Anderson* (1933) 218 C. 62, 67, 21 P.2d 560; *Architectural Tile Co. v. Superior Court* (1930) 108 C.A. 369, 291 P. 586; *Taylor v. Datig*, *supra*, 123 C.A. Supp. 783 [dictum]; *Dillon v. Superior Court*, *supra*.)

(3) *Grant of Jurisdiction.* A distinct but related problem arises when there is a statutory grant of jurisdiction. The same theory of prospective construction is generally followed, with the result that an action filed in the court before it has jurisdiction is not saved by the subsequent grant. (*Taylor.*) This rule was vigorously attacked as "irrational" by a dissenting judge in *Taylor*, where plaintiff's action on a \$ 1,000 note with \$ 100 attorneys' fees was filed in a municipal court before its jurisdiction was changed from \$ 1,000 to \$ 2,000. The dissenting opinion argues that the main (if not the only) justification for the nonretroactive rule in statutory repeal cases is hardship, while in the case of a statutory grant a retroactive construction avoids hardship. "Here an amendment opens a court theretofore closed; and it seems to me to be in furtherance of the administration of justice, which should not require futile acts, that the court should be open not only to new suits filed therein but to those which had been filed, in error it is true, but which nevertheless were pending in it, and now fall within its jurisdiction." (123 C.A. Supp. 788.)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Ways of Avoiding Result.*(a) *Statute prohibiting dismissal and providing for transfer:* C.C.P. 396 was amended in 2008 to delete provisions that have become obsolete as a result of the unification of the trial courts.



20 of 178 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

I. INTRODUCTION

B. Survival or Abatement of Actions.

3. Abatement by Statutory Repeal.

b. Repeal of Statute Creating Cause of Action.

3 *Witkin Cal. Proc. Actions* § 20

[§ 20] Repeal of Statute Creating Cause of Action.

(1) *In General.* If the right of action did not exist at common law and was created by statute (or a self-executing constitutional provision), the repeal of the statute before final judgment may not only destroy a cause of action but also abate an action already commenced. (See *Ball v. Tolman* (1902) 135 C. 375, 380, 67 P. 339 [statute repealed after judgment for plaintiff but while defendant's new trial motion was pending; judgment held void]; *People v. Bank of San Luis Obispo* (1910) 159 C. 65, 112 P. 866 [exhaustive review of earlier authorities, but judgment was held final before repeal]; *Moss v. Smith* (1916) 171 C. 777, 786, 155 P. 90; *Southern Service Co. v. Los Angeles* (1940) 15 C.2d 1, 11, 97 P.2d 963; *International Assn. of Cleaning & Dye House Workers v. Landowitz* (1942) 20 C.2d 418, 423, 126 P.2d 609; *Younger v. Superior Court* (1978) 21 C.3d 102, 109, 145 C.R. 674, 577 P.2d 1014 [rule applied]; *Lemon v. Los Angeles Terminal Ry. Co.* (1940) 38 C.A.2d 659, 669, 102 P.2d 387; *Western Hardwood Lumber Co. v. California Emp. Com.* (1943) 58 C.A.2d 403, 411, 137 P.2d 76; *Department of Social Welfare v. Wingo* (1946) 77 C.A.2d 316, 320, 175 P.2d 262; *Beckman v. Thompson* (1992) 4 C.A.4th 481, 489, 6 C.R.2d 60, 2 Cal. Proc. (5th), *Jurisdiction*, §384 [repeal of C.C.P. 410.30, providing that party's residence does not preclude dismissal, required appellate court to apply former case law precluding dismissal of California plaintiff's action].)

(2) *Ways of Avoiding Result.* However, this theoretical rule seldom operates in practice:

(a) An express saving clause in the repealing statute or in general laws may allow the pending action to be prosecuted to judgment. (*Peterson v. Ball* (1931) 211 C. 461, 464, 296 P. 291 [general saving clause applicable to statutes involving corporations]; *Traub v. Edwards* (1940) 38 C.A.2d 719, 721, 102 P.2d 463 [dictum]; *Davis v. Stroud* (1942) 52 C.A.2d 308, 320, 126 P.2d 409.)

(b) Despite the absence of a saving clause, the statute will usually be construed as prospective, and existing actions will be unaffected by the repeal. (*Krause v. Rarity* (1930) 210 C. 644, 655, 293 P. 62 [guest law operating as repeal of statutory cause of action for wrongful death of guest in vehicle].) In *Traub*, a short statute of limitations on new actions (60 days to file after effective date of statute) was held to disclose a legislative intention to preserve pending actions. (See *Alameda v. Kuchel* (1948) 32 C.2d 193, 198, 195 P.2d 17 [legislative intention may appear without express saving clause].)

(c) Even though the legislative intention is to have the repeal operate retroactively, if the plaintiff's claim is based on a contractual or property right, the constitutional guarantees of due process and against impairment of the obligation of contract will preclude retroactive application. (*Coombes v. Getz* (1932) 285 U.S. 434, 52 S.Ct. 435, 436, 76 L.Ed. 866, 871; *Meza v. Sword* (1934) 136 C.A. 292, 294, 28 P.2d 684; see 8 *Summary* (10th), *Constitutional Law*, §1278 et seq.)

(3) *Distinction: Revision of Existing Law.* Of course, if a statute does not wholly repeal but merely revises existing law, so that the statutory cause of action in modified form remains, no abatement occurs. (See *Krause v. Rarity*, supra, 210 C. 655; *Cook v. La Vina Land Co.* (1934) 3 C.A.2d 21, 30, 39 P.2d 458.) The same is true where, as part of a plan of statutory consolidation or recodification, a new statute repeals an older one but reenacts the same provisions. (*Sobey v. Molony* (1940) 40 C.A.2d 381, 385, 104 P.2d 868; see *Hume v. Lacey* (1952) 112 C.A.2d 147, 150, 245 P.2d 672 [statute on survival of action for personal injury moved from Probate Code to Civil Code].)

(4) *Repeal of Criminal Statutes.* The repeal of criminal statutes raises special problems, which are treated elsewhere. (See 1 *Cal. Crim. Law* (3d), *Introduction to Crimes*, §66 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General.* See *Rankin v. Longs Drug Stores Calif.* (2009) 169 C.A.4th 1246, 1257, 87 C.R.3d 543 [federal Combat Methamphetamine Epidemic Act, which allows employers to ask applicants about certain controlled substances convictions notwithstanding state law, partially repealed *Lab.C.* 432.7 (see 3 *Summary* (10th), *Agency and Employment*, §356); thus, applicant's action, alleging that employer violated *Lab.C.* 432.7 by asking applicant whether he had been convicted of specified crimes during preceding 7 years, was abated, because action was pending when federal act became effective]; *Beverly Hilton Hotel v. Work. Comp. App. Bd.* (2009) 176 C.A.4th 1597, 1607, 99 C.R.3d 50 [because there was no savings clause in former *Lab.C.* 139.5, providing for workers' compensation vocational rehabilitation benefits (see 2 *Summary* (10th), *Workers' Compensation*, §282), repeal of statute extinguished rights to benefits for orders or awards that were not final on effective date of repeal].



21 of 178 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

I. INTRODUCTION

C. Necessity of Justiciable Controversy.

1. In General.

a. California Doctrine.

3 Witkin Cal. Proc. Actions § 21

[§ 21] California Doctrine.

(1) *In General*. "[A]n action not founded upon an actual controversy between the parties to it, and brought for the purpose of securing a determination of a point of law, is collusive, and will not be entertained; and the same is true of a suit the sole object of which is to settle rights of third persons who are not parties." (*Golden Gate Bridge & Highway Dist. v. Felt* (1931) 214 C. 308, 316, 5 P.2d 585, *infra*, §27; see *People v. Pratt* (1866) 30 C. 223, 225, *infra*, §24.)

The terms "justiciable controversy" and "justiciability" have more than one meaning. "The concept of justiciability involves the intertwined criteria of ripeness and standing. A controversy is 'ripe' when it has reached, but has not passed, the point that the facts have sufficiently congealed to permit an intelligent and useful decision to be made. One who invokes the judicial process does not have 'standing' if he, or those whom he properly represents, does not have a real interest in the ultimate adjudication because the actor has neither suffered nor is about to suffer any injury of sufficient magnitude reasonably to assure that all of the relevant facts and issues will be adequately presented. When justiciability in a jurisdictional sense exists, the ripeness and standing concepts are metamorphosed in a declaratory relief action into guides for the exercise of judicial discretion in granting or withholding that remedy, and the trial court's exercise of discretion will not be disturbed on appeal unless its discretion has been abused." (*California Water & Tel. Co. v. Los Angeles* (1967) 253 C.A.2d 16, 22, 61 C.R. 618, citing the text; see *Pacific Legal Foundation v. California Coastal Com.* (1982) 33 C.3d 158, 170, 188 C.R. 104, 655 P.2d 306, *infra*, §26; *Municipal Court v. Superior Court* (1988) 202 C.A.3d 957, 962, 249 C.R. 182, quoting the text.)

The following cases are illustrative:

In re Joshua S. (2007) 41 C.4th 261, 272, 59 C.R.3d 460, 159 P.3d 49 [issue whether children were eligible for AFDC benefits while in grandmother's custody in Canada was ripe for review, even though children had not applied for benefits].

Holmes v. California Nat. Guard (2001) 90 C.A.4th 297, 314, 109 C.R.2d 154, citing the text [National Guard officer discharged from federal active duty for violation of "Don't Ask, Don't Tell" policy had standing to challenge National Guard regulation that made federal discharge under policy "for cause" termination, rendering him ineligible to

serve on *state* active duty].

Action Apartment Assn. v. Santa Monica Rent Control Bd. (2001) 94 C.A.4th 587, 609, 114 C.R.2d 412 [landlords' inverse condemnation action challenging rent control board's requirement that they pay interest rate on security deposits in excess of what banks paid on deposits was sufficiently ripe, because it posed definite issues and involved concrete injury].

Coral Const. v. San Francisco (2004) 116 C.A.4th 6, 25, 10 C.R.3d 65 [action by public works contractor challenging constitutionality of city ordinance granting bidding preference to women and minorities was ripe for review based on contractor's potential future injury, even though contractor did not identify contract on which it intended to bid in near future].

Teachers' Retirement Bd. v. Genest (2007) 154 C.A.4th 1012, 1040, 65 C.R.3d 326 [challenge to legislation reducing state's obligation to fund teachers' retirement fund by \$ 500 million for 1 fiscal year was ripe for fiscal review, despite unmeritorious claim that it was speculative whether diversion would ever have negative effect].

(2) *Classification of Cases.* The principle is difficult to state and its application is somewhat uncertain. Although the typical adjectives (moot, abstract, academic, collusive) are often used interchangeably, the objectionable proceedings appear to fall into two classes:

(a) Those in which parties seek a judicial declaration on a question of law, though no actual dispute or controversy ever existed between them requiring the declaration for its determination. (See *infra*, §24 et seq.)

(b) Those in which an actual controversy did exist but, by the passage of time or a change in circumstances, ceased to exist. (See *infra*, §32.)

A related, although perhaps distinct, principle applies to cases in which, by untruthful pleading or the concealment of facts, a false issue is presented. The court is said to have inherent power to dismiss such a suit as "sham" or "fictitious" and a fraud on the court. (See 5 *Cal. Proc.* (5th), *Pleading*, §1013.) And policy considerations call for the avoidance of judicial determinations of political controversies (see *infra*, §37) and ecclesiastical controversies (see *infra*, §39 et seq.).

(3) *Advisory Opinions.* In a few states, advisory opinions by the highest court, usually on the validity of a legislative or an executive action, are authorized by Constitution or statute. (See 69 *Harv. L. Rev.* 1302; 20 *Am.Jur.2d* (2005 ed.), *Courts* §37.) In California, C.R.C., Rule 8.548 sets forth a procedure by which courts of other jurisdictions may request from the California Supreme Court an authoritative answer on a question of California law. (For comprehensive coverage, see 9 *Cal. Proc.* (5th), *Appeal*, §§14, 15.)

West's Key Number Digest, Declaratory Judgment 61 et seq.

SUPPLEMENT: [This section is current through the latest supplement]



22 of 178 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

I. INTRODUCTION

C. Necessity of Justiciable Controversy.

1. In General.

b. Federal Doctrine.

3 *Witkin Cal. Proc. Actions* § 22

[§ 22] Federal Doctrine.

The federal courts are restricted by the "case or controversy" limitation on jurisdiction, and the requirement of "standing" to request the adjudication of a particular issue. (See *Doremus v. Board of Education of Borough of Hawthorne* (1952) 342 U.S. 429, 72 S.Ct. 394, 396, 96 L.Ed. 475, 478; *Baker v. Carr* (1962) 369 U.S. 186, 82 S.Ct. 691, 700, 7 L.Ed.2d 663, 678, 7 Summary (10th), *Constitutional Law*, §294; *Flast v. Cohen* (1968) 392 U.S. 83, 88 S.Ct. 1942, 1949, 20 L.Ed.2d 947, 958, 7 Summary (10th), *Constitutional Law*, §81; *Valley Forge Christian College v. Americans United for Separation of Church & State* (1982) 454 U.S. 464, 102 S.Ct. 752, 762, 70 L.Ed.2d 700, 714; *Bender v. Williamsport Area School Dist.* (1986) 475 U.S. 534, 106 S.Ct. 1326, 1323, 89 L.Ed.2d 501, 512 [school board member has no standing to appeal from judgment against board, where relief was not sought against him in his individual capacity, and he had no personal stake by virtue of being sued in his official capacity]; *Diamond v. Charles* (1986) 476 U.S. 54, 106 S.Ct. 1697, 1704, 90 L.Ed.2d 48, 59 [pediatrician who intervened to defend validity of state abortion statute has no standing to appeal where state does not]; *Arizonans for Official English v. Arizona* (1997) 520 U.S. 43, 117 S.Ct. 1055, 1068, 137 L.Ed.2d 170, 193 [controversy must exist at all stages of review, and not only when complaint is filed]; 83 *Cal. L. Rev.* 1309 [justiciability and theory of social choice]; 66 *Harv. L. Rev.* 1531; 82 *Harv. L. Rev.* 224 [*Flast*]; 83 *Harv. L. Rev.* 690 [selective service directives]; 96 *Harv. L. Rev.* 196 [*Valley Forge*]; 109 *Harv. L. Rev.* 1066 [application of doctrine to future injury plaintiffs]; 58 *Hastings L. J.* 1331 [*Flast*]; 25 *So. Cal. L. Rev.* 371; 67 *So. Cal. L. Rev.* 1321 [use of sequential game theory to examine standing and other justiciability doctrines in federal courts]; 67 *So. Cal. L. Rev.* 689 [separation of powers and standing to sue government]; 14 *Southwestern U. L. Rev.* 46 [historical perspective]; 14 *Stanf. L. Rev.* 433, 453; 16 *U.C.L.A. L. Rev.* 444 [*Flast*]; 42 *U.C.L.A. L. Rev.* 717, 727 [justiciability of consolidated cases].)

West's Key Number Digest, Declaratory Judgment 61 et seq.; Federal Courts 12 et seq.

SUPPLEMENT: [This section is current through the latest supplement]



23 of 178 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

I. INTRODUCTION

C. Necessity of Justiciable Controversy.

1. In General.

c. Illustrations: Standing and Ripeness.

3 *Witkin Cal. Proc. Actions* § 23

[§ 23] Illustrations: Standing and Ripeness.

In *Sherwyn v. Department of Social Services* (1985) 173 C.A.3d 52, 218 C.R. 778, plaintiffs were attorneys representing over 100 couples involved in surrogate parenting arrangements in which the sperm of the fertile husband was used to artificially inseminate the surrogate mother in order to provide a child for the husband and his infertile wife. Plaintiffs brought a declaratory action attacking the constitutionality, as applied to these arrangements, of the following: (a) former C.C. 7005(b) (sperm donor is not to be regarded as natural father; now *Family C. 7613*); (b) former Ev.C. 621 (conclusive presumption that issue of married woman cohabiting with husband is issue of the marriage; now *Family C. 7540, 7541*); and (c) an all-county letter requiring the married couple to proceed by an independent, rather than a stepparent, adoption. The trial judge entered judgment against plaintiffs. *Held*, the judgment was vacated; there was no justiciable controversy.

(a) *Standing*. Plaintiffs did not allege that they themselves were, or planned to be, parties to a surrogate parenting arrangement; hence, they lacked standing. (173 C.A.3d 58.) To allow attorneys to bring declaratory relief actions merely because their clients need guidance and the law is uncertain would flood the courts with lawsuits. (173 C.A.3d 59.)

(b) *Ripeness*. In the context of a declaratory judgment action, ripeness requires that the controversy be "one which admits of definitive and conclusive relief by judgment within the field of judicial administration, as distinguished from an advisory opinion upon a particular or hypothetical state of facts." (173 C.A.3d 58.) Under this standard, the present case does not present a justiciable controversy. (173 C.A.3d 59.) Hence, even though it is likely that the statutes do not apply to the type of arrangement involved here, and the judgment was to this effect, it was an abuse of discretion for the trial judge to declare the rights of the parties under these circumstances. (173 C.A.3d 59.)

SUPPLEMENT: [This section is current through the latest supplement]

In *Urban Habitat Program v. Pleasanton* (2008) 164 C.A.4th 1561, 80 C.R.3d 300, plaintiffs, a nonprofit housing corporation and a low-income single mother, brought a petition for a writ of mandamus and a complaint for declaratory and injunctive relief against defendant city alleging that defendant failed to provide a sufficient number of low-income housing units as mandated by regional housing plans and the Fair Employment and Housing Act (FEHA). The trial judge dismissed the action on grounds that it was not ripe and that plaintiffs lacked standing. *Held*, reversed.

(a) *Ripeness*. The fact that plaintiffs did not challenge denial of a specific housing permit was of no import. The action was sufficiently definite and concrete, because it alleged a conflict between the numerical growth control measure and the local entity's obligation to meet its share of regional housing needs. (164 C.A.4th 1580, citing *Building Industry Assn. v. Oceanside* (1994) 27 C.A.4th 744, 33 C.R.2d 137, 8 Summary (10th), *Constitutional Law*, §§1021, 1029.) Further, defendant's alleged failure to meet its affordable housing obligations under state law "without question" harms the parties and the general public. (164 C.A.4th 1580.)

(b) *Standing*. In a citizen's action to enforce a public duty, it is sufficient that the plaintiff be interested as a citizen in having the laws executed and the public duty enforced; so long as the public duty is sharp and the public need weighty a citizen has a sufficient interest to confer standing. "Without question" the city's duty to enforce the shortage of affordable housing was sharp and the public's need for that housing was weighty. Plaintiff nonprofit housing corporation had standing under FEHA to bring a claim for housing discrimination against defendant based on its low-income housing regulations. FEHA permits an organization to bring suit to enforce FEHA, and the complaint alleged facts establishing that defendant's housing policies would drain the organization's resources and frustrate its mission, which was sufficient to establish that it was an aggrieved party. (164 C.A.4th 1581.)



24 of 178 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

I. INTRODUCTION

C. Necessity of Justiciable Controversy.

2. No Actual Controversy.

a. California Doctrine.

3 *Witkin Cal. Proc. Actions* § 24

[§ 24] California Doctrine.

In *People v. Pratt* (1866) 30 C. 223, the relator, an attorney, arranged with friendly opposing counsel and the lower court to have an objection made and sustained to his legal right to appear as counsel, in order to test the legal question involved in his appearance. This petition for mandamus to compel the lower court to allow him to appear was rejected. "[I]t is no part of our duty to investigate and decide questions not regularly arising in the due course of litigation, for the gratification of the curiosity of counsel, or to serve some ulterior purpose of parties who choose to procure them to be raised against themselves by others who feel no interest in the contest." (30 C. 225.) (See *People v. Superior Court (Lynch)* (1970) 1 C.3d 910, 912, 83 C.R. 670, 464 P.2d 126 ["The rendering of advisory opinions falls within neither the functions nor the jurisdiction of this court"]; *Younger v. Superior Court* (1978) 21 C.3d 102, 119, 145 C.R. 674, 577 P.2d 1014 [following *People v. Superior Court (Lynch)*]; *Pacific Legal Foundation v. California Coastal Com.* (1982) 33 C.3d 158, 188 C.R. 104, 655 P.2d 306, *infra*, §26.)

In *Wilson v. Transit Authority of City of Sacramento* (1962) 199 C.A.2d 716, 19 C.R. 59, a bus operators union had a collective labor agreement with defendant, a charter-created authority operating a public transportation system in Sacramento. On the advice of the city attorney that the compulsory arbitration clause was illegal, defendant dropped it from the contract on its yearly renewal. On the advice of independent counsel that the clause was legal, plaintiffs, officers of the union, brought this action for declaratory relief, seeking a determination that the clause could lawfully be included. *Held*, judgment on demurrer for defendants affirmed. One ground of the opinion was that discretion to deny declaratory relief had been properly exercised (see 5 *Cal. Proc.* (5th), *Pleading*, §866); the other was that the complaint failed to state facts of a justiciable controversy. There was no allegation of an unsettled grievance, and the object of the action was merely to obtain an advisory opinion on the validity of a provision not in the existing contract. (199 C.A.2d 724.)

A number of decisions illustrate the application of the doctrine:

Neill v. Five C. Refining Co. (1947) 79 C.A.2d 191, 193, 179 P.2d 818 [action to determine oil interests; agreement between plaintiff and two other parties to divide recovery, if any of them was successful, rendered action moot].

Young v. Young (1950) 100 C.A.2d 85, 223 P.2d 25 [complaint by wife to establish validity of foreign divorce decree and property settlement in her favor; demurrer was sustained for lack of allegation that defendant had failed to comply with decree or agreement].

Jennings v. Strathmore Public Util. Dist. (1951) 102 C.A.2d 548, 550, 227 P.2d 838 [citizen's attack on public utility district contract, no interest was shown].

Southern Calif. Edison Co. v. State Farm Mut. Auto. Ins. Co. (1969) 271 C.A.2d 744, 747, 76 C.R. 909 [public utility filed odd pleading, in nature of bill of peace, seeking decision on issues involved in pending and future actions].

Sanctity of Human Life Network v. California Highway Patrol (2003) 105 C.A.4th 858, 871, 129 C.R.2d 708 [declaratory relief action by abortion protesters who had been prohibited by police from waving protest signs on freeway overpasses during rush hour presented no actual controversy outside context of rush hour traffic congestion; court could only speculate about conditions of future encounters between protestors and police].

Santa Monica v. Stewart (2005) 126 C.A.4th 43, 63, 24 C.R.3d 72 [declaratory relief action by city to determine constitutionality of voter initiative (preventing city officials from receiving advantages from persons who derived benefit from decisions made by officials) was not ripe; action was insufficiently concrete, withholding judicial determination would not result in imminent, significant hardship, and action could not be maintained as validation suit or because it involved issues of public concern].

SUPPLEMENT: [This section is current through the latest supplement]

The following decisions also illustrate the application of the no actual controversy doctrine:

Stonehouse Homes LLC v. Sierra Madre (2008) 167 C.A.4th 531, 539, 84 C.R.3d 223 [following *Santa Monica v. Stewart* (2005) 126 C.A.4th 43, 24 C.R.3d 72, text, p. 89; developer's declaratory relief action challenging city's moratorium resolution was not ripe; action was not sufficiently concrete, resolution merely gave notice of potential legislation, and adoption of resolution alone did not implicate rights of developer].

Otay Land Co. v. Royal Indem. Co. (2008) 169 C.A.4th 556, 566, 86 C.R.3d 408, citing the text [owner of contaminated property was premature in claiming actual controversy about its current or future rights under prior owner's liability insurance policy, and, thus, owner could not bring declaratory judgment action against insurer; coverage issues were still being litigated in federal court].



25 of 178 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

I. INTRODUCTION

C. Necessity of Justiciable Controversy.

2. No Actual Controversy.

b. Federal Doctrine.

3 *Witkin Cal. Proc. Actions* § 25

[§ 25] Federal Doctrine.

In *International Longshoremen's & Warehousemen's Union, Local 37 v. Boyd* (1954) 347 U.S. 222, 74 S.Ct. 447, 98 L.Ed. 650, a question of construction arose as to the application of the Immigration Act to permanent alien residents of the United States who did temporary work in Alaska canneries in the summer. Plaintiff union sought an injunction and declaratory relief against the district director of immigration to prevent him from carrying out his announced policy of treating those aliens as if entering the United States for the first time (i.e., examining and possibly excluding them on various grounds). *Held*, the complaint should be dismissed. "Appellants in effect asked the District Court to rule that a statute the sanctions of which had not been set in motion against individuals on whose behalf relief was sought, because an occasion for doing so had not arisen, would not be applied to them if in the future such a contingency should arise. That is not a lawsuit to enforce a right; it is an endeavor to obtain a court's assurance that a statute does not govern hypothetical situations that may or may not make the challenged statute applicable. Determination of the scope and constitutionality of legislation in advance of its immediate adverse effect in the context of a concrete case involves too remote and abstract an inquiry for the proper exercise of the judicial function." (74 S.Ct. 448, 98 L.Ed. 652.) (See 68 *Harv. L. Rev.* 172, 1132, 1350, 1371.)

In *United States v. Fruehauf* (1961) 365 U.S. 146, 81 S.Ct. 547, 5 L.Ed.2d 476, defendants were charged with violation of §302(a) of the Labor Management Relations Act (giving a thing of value to an employee representative). In pretrial proceedings, it appeared that the Government was attempting to prove a loan by the employer, either as a sham or on the theory that a loan came within the statute. The trial judge, construing the statute, dismissed the indictment on the ground that a loan did not violate it. On appeal, the Supreme Court refused to decide the issue. The government would not be precluded in further proceedings from relying on any of the other theories; hence, the parties were merely seeking an advisory opinion on an abstract issue. "Such opinions, such advance expressions of legal judgment upon issues which remain unfocused because they are not pressed before the Court with that clear concreteness provided when a question emerges precisely framed and necessary for decision from a clash of adversary argument exploring every aspect of a multi-faced situation embracing conflicting and demanding interests, we have consistently refused to give." (81 S.Ct. 554, 5 L.Ed.2d 483.)

SUPPLEMENT: [This section is current through the latest supplement]



26 of 178 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

I. INTRODUCTION

C. Necessity of Justiciable Controversy.

2. No Actual Controversy.

c. Challenge to Administrative Regulations.

3 *Witkin Cal. Proc. Actions* § 26

[§ 26] Challenge to Administrative Regulations.

(1) *Challenge Not Ripe for Review.* In *Pacific Legal Foundation v. California Coastal Com.* (1982) 33 C.3d 158, 188 C.R. 104, 655 P.2d 306, plaintiffs, a group of coastal property owners, challenged defendant's public access guidelines as facially invalid. They pointed out that a number of other cases were pending in the superior court and the Court of Appeal involving particular dedication of easement conditions. The attack, however, was not directed at specific applications of the guidelines; it was a general challenge on statutory and constitutional grounds to the Commission's access policies contained in the guidelines. *Held*, the trial court properly refused to decide the merits.

(a) *Nature of ripeness doctrine.* "It is rooted in the fundamental concept that the proper role of the judiciary does not extend to the resolution of abstract differences of legal opinion. It is in part designed to regulate the workload of courts by preventing judicial consideration of lawsuits that seek only to obtain general guidance, rather than to resolve specific legal disputes. However, the ripeness doctrine is primarily bottomed on the recognition that judicial decisionmaking is best conducted in the context of an actual set of facts so that the issues will be framed with sufficient definiteness to enable the court to make a decree finally disposing of the controversy. On the other hand, the requirement should not prevent courts from resolving concrete disputes if the consequence of a deferred decision will be lingering uncertainty in the law, especially when there is widespread public interest in the answer to a particular legal question." (33 C.3d 170.)

(b) *Approach of federal courts.* The attempt to obtain review of administrative regulations prior to their application to the challenging party has been the subject of a number of federal decisions, and the approach was summarized in *Abbott Laboratories v. Gardner* (1967) 387 U.S. 136, 87 S.Ct. 1507, 1515, 18 L.Ed.2d 681, 691, as follows: "The injunctive and declaratory judgment remedies are discretionary, and courts traditionally have been reluctant to apply them to administrative determinations unless these arise in the context of a controversy 'ripe' for judicial resolution. Without undertaking to survey the intricacies of the ripeness doctrine it is fair to say that its basic rationale is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties. The problem is best seen in a twofold aspect, requiring us to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of

withholding court consideration." (33 C.3d 171.)

(c) *First aspect: issues not appropriate for immediate judicial resolution.* Although the parties' interests are adverse, and the issues have been thoroughly addressed in voluminous briefs, it is difficult to evaluate even the issues relating to consistency of the guidelines with the statute. "Plaintiffs are in essence inviting us to speculate as to the type of developments for which access conditions might be imposed, and then to express an opinion on the validity and proper scope of such hypothetical exactions." (33 C.3d 172.)

(d) *Second aspect: no hardship in withholding consideration.*

(1) Coastal landowners are not immediately faced with the dilemma of either complying with the guidelines or risking penalties for violating them; as far as the parties are concerned, the most significant effect of the guidelines has been to generate a difference of opinion about their validity. "The presence of the guidelines may tend to inhibit property owners from planning improvements on their land because of the possibility that they will have to comply with access conditions, should they apply for a development permit. However, the hardship inherent in further delay is not imminent or significant enough to compel an immediate resolution of the merits of plaintiffs' claims, at least under the federal standards." (33 C.3d 173.) (On hardship to parties as basis for challenging regulation, see *infra*, §30.)

(2) *Selby Realty Co. v. San Buenaventura* (1973) 10 C.3d 110, 109 C.R. 799, 514 P.2d 111, denying a landowner's challenge to a general zoning plan by an action for declaratory relief, supports this analysis. There the plan was tentative and subject to change, and that whether any part of plaintiff's land would be taken was unpredictable. "The plaintiff in *Selby* thus could allege no direct and immediate effects on the use of his land arising from the mere adoption of the general plan; he was simply anticipating that the plan would someday be implemented at his expense." (33 C.3d 174.) The same is true here. "Although it may be predicted with assurance that some of the plaintiff landowners will eventually wish to make improvements on their property, it is sheer guesswork to conclude that the Commission will abuse its authority by imposing impermissible conditions on any permits required. The guidelines are not mandatory. They do not require the Commission to impose access conditions in any particular circumstances, but rather adopt a flexible approach: the Commission is to determine the appropriateness of access exactions on a case-by-case basis. Thus, the potential effects of the guidelines are even less concrete than those of the general plan at issue in *Selby*. If the Commission does impose questionable conditions, the affected landowners may of course pursue their remedy of a petition for writ of administrative mandamus to review the factual and legal bases for the conditions imposed." (33 C.3d 174.) (See *Milagra Ridge Partners, Ltd. v. Pacifica* (1998) 62 C.A.4th 108, 116, 72 C.R.2d 394, 8 Summary (10th), *Constitutional Law*, §1165 [inverse condemnation action against city was not ripe for review; plaintiff did not submit application to develop property under current zoning regulations after denial under former regulations].)

(2) *Challenge Ripe for Review.* Other cases have held that a challenge to an administrative regulation was sufficiently ripe for review. (See *Suitum v. Tahoe Regional Planning Agency* (1997) 520 U.S. 725, 117 S.Ct. 1659, 1664, 137 L.Ed.2d 980, 989 [landowner's claim of state agency's regulatory taking by determining that her residential lot could not be developed; that she had not tried to sell transferable development rights to which she was entitled as owner of lot ineligible for development was of no import]; *Farm Sanctuary v. Department of Food & Agriculture* (1998) 63 C.A.4th 495, 502, 74 C.R.2d 75 [challenge to regulation allowing state agency to approve religious ritualistic slaughter of poultry; regulation was final and allegedly invalid under state law, and delay would result in inhumane slaughter].)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Challenge Ripe for Review.* See *Environmental Defense Project of Sierra County v. Sierra* (2008) 158 C.A.4th 877, 886, 70 C.R.3d 474 [actual controversy existed in declaratory action to determine whether defendant county's streamlined zoning process violated notice requirements of Planning and Zoning Law, even though parties had resolved dispute over plaintiff's specific project; parties differed in their interpretation of notice requirements, and unlike *Pacific Legal Foundation v. California Coastal Com.* (1982) 33 C.3d 158, 188 C.R. 104, 655 P.2d 306, text, p. 90, it was clear how defendant would interpret and implement those requirements].



27 of 178 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

I. INTRODUCTION

C. Necessity of Justiciable Controversy.

2. No Actual Controversy.

d. Distinctions and Exceptions.

1. Friendly Suit.

3 *Witkin Cal. Proc. Actions* § 27

[§ 27] Friendly Suit.

In the leading California case of *Golden Gate Bridge & Highway Dist. v. Felt* (1931) 214 C. 308, 5 P.2d 585, the Legislature created a bridge district and authorized the issuance of bonds, supported by the power of taxation, to finance the project. Bids for the bonds were conditioned on a judicial determination of their validity. To obtain a determination, respondent, the secretary of the district, refused to sign the proposed bonds, and the district petitioned for mandamus to compel him to sign. Amici curiae representing certain nonparty taxpayers moved to dismiss the proceeding as collusive. *Held*, the motion should be denied and the case considered on the merits.

(a) The principal ground of attack was that the litigation expenses of respondent secretary were guaranteed by the bidders for the bonds, and that he was admittedly desirous of a decision against his legal position. However, the bonds recited the power of taxation, and the secretary, in signing them, would be representing this fact to the public and might conceivably incur some personal liability in the event that the recital was legally false. Hence, a genuine controversy existed between petitioner and respondent. (214 C. 316.)

(b) Able counsel were engaged by respondent, and their good faith and diligence in presenting the case were not questioned. Moreover, petitioner and the court invited amici curiae (who made the motion to dismiss) to bring their clients into the proceeding by intervention, and the court also offered them the opportunity, without intervention, to present their objections to the bonds. "It surely cannot be said that this proceeding was brought to reach a collusive determination of the rights of such third parties, when they were urged to come into court and present their own views of the case." (214 C. 319.)

This decision was followed in *San Francisco v. Boyd* (1943) 22 C.2d 685, 140 P.2d 666, where an additional factor caused two dissenting justices to condemn the proceeding as collusive. The validity of a San Francisco ordinance fixing the salaries of street car and bus operators was questioned. The city brought this mandamus proceeding against its controller, to compel him to audit and approve wage claims, and the board of supervisors appropriated money for the controller to employ counsel to represent him. *Held*, the suit was not thereby rendered collusive, although the payment of all fees by one party may result in a dismissal of private litigation as collusive. Here, despite the common source of

payment, counsel for both sides presented the case ably and in good faith. (22 C.2d 693.)

Thus, it appears that a friendly suit to determine the validity of public bonds or contracts cannot be attacked on the fundamental ground that the "controversy" is a purely technical or verbal one between parties whose interests and objectives are identical. For the traditional requirement of opposing parties, the court has simply substituted the practical requirement of opposing counsel. Adequate presentation of the case is assured only if reputable attorneys perform their duties in good faith, and the court undoubtedly can and will dismiss as collusive a proceeding in which counsel are obviously perfunctory in their efforts. The danger of the friendly suit displacing litigation by the real parties in interest is minimized by a liberal practice of allowing intervention or its equivalent--briefs and oral argument by amici curiae. (See *United States v. Interstate Commerce Com.* (1949) 337 U.S. 426, 69 S.Ct. 1410, 1414, 93 L.Ed. 1451, 1458, 4 Cal. Proc. (5th), *Pleading*, §68 [it is proper for Attorney General to appear on both sides of proceeding where real parties in interest are also represented]; 72 Harv. L. Rev. 733, 735.)

If the formal steps are not taken, the suit may fail, e.g., where the district brings the action against its officer before the actual printing and submission of the bonds to the officer for his or her signature. (See *Northridge Park County Water Dist. v. McDonell* (1958) 158 C.A.2d 123, 129, 322 P.2d 25, 8 Cal. Proc. (5th), *Extraordinary Writs*, §79.)

SUPPLEMENT: [This section is current through the latest supplement]



28 of 178 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

I. INTRODUCTION

C. Necessity of Justiciable Controversy.

2. No Actual Controversy.

d. Distinctions and Exceptions.

2. Declaratory Relief and Agreed Case.

3 *Witkin Cal. Proc. Actions* § 28

[§ 28] Declaratory Relief and Agreed Case.

The opposition to "advisory opinions" in advance of an actual justiciable controversy is lessening as the scope of declaratory relief under *C.C.P. 1060* is increasing. (See 5 *Cal. Proc. (5th), Pleading*, §849.) And an agreed case under *C.C.P. 1138* (see 6 *Cal. Proc. (5th), Proceedings Without Trial*, §79) may, in matters of public interest, achieve the objective denounced in the more conservative opinions.

Colusa v. Strain (1963) 215 C.A.2d 472, 30 C.R. 415, is an instructive example. Plaintiff county, to provide property owners with advance protection against surface drainage caused by altering the grade of land, adopted an ordinance requiring a permit to level a parcel larger than five acres. Defendant did some unauthorized grading, was charged with violation--a misdemeanor--and the trial ended in a jury disagreement. Thereafter, the county and defendant filed an agreed case, in which it was stated that defendant owned additional land and was contemplating leveling it without a permit; also, that his operation did not in fact interfere with natural drainage of contiguous property. Judgment was given for the county, declaring the validity of the ordinance and further declaring that an injunction should issue to restrain defendant from leveling without a permit. *Held*, affirmed.

(a) The requirement of a "question in difference" (*C.C.P. 1138*) is the same as the "actual controversy" requirement for declaratory relief. "The parties to this action thus seek a judicial declaration which, in advance of actual conduct, will determine whether or not that conduct will render a citizen amenable to criminal punishment under a county ordinance which he asserts to be unconstitutional." (215 C.A.2d 477.)

(b) There is authority to sustain a declaratory action where a going business enterprise is faced with sanctions under a claimed violation of a statute or an ordinance. Because of the interest that defendant alleges in the future leveling of his property and because the ordinance affects a substantial segment of the economy in plaintiff Colusa County (predominantly agricultural), "it is entirely appropriate that we pass upon the ordinance." (215 C.A.2d 478.)

SUPPLEMENT: [This section is current through the latest supplement]

Declaratory relief: See *Environmental Defense Project of Sierra County v. Sierra* (2008) 158 C.A.4th 877, 887, 70

C.R.3d 474 [actual controversy existed in action to determine whether defendant county's streamlined zoning process violated notice requirements of Planning and Zoning Law, even without showing of prejudice, substantial injury, and probability of different result; notice requirements only mandated that showing where action sought to overturn administrative decision, not where, as here, action sought only declaratory relief].



29 of 178 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

I. INTRODUCTION

C. Necessity of Justiciable Controversy.

2. No Actual Controversy.

d. Distinctions and Exceptions.

3. Public Interest in Question.

3 *Witkin Cal. Proc. Actions* § 29

[§ 29] Public Interest in Question.

(1) *Public Interest Justified Deciding Case.* The refusal to decide a case lacking in actual controversy is usually regarded as an exercise of discretion. (See 2 *Cal. Proc.* (5th), *Jurisdiction*, §395.) Hence, a court will occasionally depart from its practice in order to decide a matter of public interest. In *Collier v. Lindley* (1928) 203 C. 641, 266 P. 526, a trustor created a charitable trust and, to obtain an immediate adjudication of its validity, added a provision that if it were adjudged invalid, C should be paid \$ 500 out of the corpus. C then commenced a proceeding under *C.C.P. 1138* (agreed case; see 6 *Cal. Proc.* (5th), *Proceedings Without Trial*, §79), against the trustees to determine the issue. The court noted that C was not related to the trustor and was not required to perform any service for the \$ 500. The trust provision was described as "a thinly veiled attempt to engage the attention and compel the labors of the several courts of record of this state in order to effectuate a judicial determination of the validity or invalidity of said trust at once and in advance of any real contest or controversy between the parties in interest." (203 C. 644.) This was in plain violation of the statute (*C.C.P. 1138* requires a real controversy) and the general principle against deciding moot cases; the insertion of the clause was therefore "unreservedly" disapproved. "[W]e would have no hesitation in carrying our aforesaid disapproval to the extent of ordering a dismissal of this appeal but for the fact that there are certain questions of public interest which are involved therein and which arise entirely apart from the interest of the parties to the immediate proceeding." (203 C. 645.) The court then proceeded, in a lengthy opinion, to decide this leading case on charitable trusts in California.

Other cases are to the same effect. (See *Kirstowsky v. Superior Court* (1956) 143 C.A.2d 745, 300 P.2d 163, *infra*, §34; *Azevedo v. Jordan* (1965) 237 C.A.2d 521, 525, 47 C.R. 125, *infra*, §34; *California Water & Tel. Co. v. Los Angeles* (1967) 253 C.A.2d 16, 26, 61 C.R. 618 [whether utility furnishing water is subject to local control is matter of substantial public concern; declaratory relief was proper]; *Hayward Area Planning Assn. v. Alameda County Trans. Authority* (1999) 72 C.A.4th 95, 104, 84 C.R.2d 744 [case involving voter-approved sales and use tax to implement construction of highway extension project was subject of widespread public interest].)

(2) *Public Interest Did Not Justify Deciding Case.* The public interest is not always compelling. (See *Campbell v. Superior Court* (1932) 126 C.A. 652, 653, 14 P.2d 925, *infra*, §32; *Northridge Park County Water Dist. v. McDonell*

(1958) 158 C.A.2d 123, 129, 322 P.2d 25, 8 Cal. Proc. (5th), *Extraordinary Writs*, §79 ["we have considered seriously the propriety of examining into the merits of the controversy in view of the alleged urgency, but have concluded that it would be improper for us to do so"]; *Consumer Cause v. Johnson & Johnson* (2005) 132 C.A.4th 1175, 1186, 34 C.R.3d 258, citing the text [action for injunctive relief against manufacturers for failing to warn consumers about nickel in stainless steel surgical devices was not ripe once plaintiffs discovered that defendants had not and were not violating law; public interest was not implicated because there was only abstract possibility of violation, rather than actual threat of violation].)

SUPPLEMENT: [This section is current through the latest supplement]



30 of 178 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

I. INTRODUCTION

C. Necessity of Justiciable Controversy.

2. No Actual Controversy.

d. Distinctions and Exceptions.

4. Hardship to Parties.

3 *Witkin Cal. Proc. Actions* § 30

[§ 30] Hardship to Parties.

The court in *Pacific Legal Foundation v. California Coastal Com.* (1982) 33 C.3d 158, 188 C.R. 104, 655 P.2d 306, supra, §26, while refusing to consider the merits of a challenge made to administrative regulations prior to their application to the challenging party, noted that consideration may be justified where further delay would work an imminent and significant hardship on the parties. (33 C.3d 173.)

The court in *B. C. Cotton v. Voss* (1995) 33 C.A.4th 929, 39 C.R.2d 484, relied on this rationale in agreeing to consider a challenge to a regulatory scheme. Plaintiffs, growers and breeders of a new variety of cotton, challenged a state regulatory scheme governing cotton-growing and administratively interpreted as requiring plaintiffs to agree to make their new varieties available to all growers in the regulated district as a condition of permission to develop the new variety. *Held*, plaintiffs had standing to challenge the regulatory scheme, even though they had not yet submitted their varieties of cotton for regulatory approval.

(a) The development of a new variety of cotton can be an extremely costly and time-consuming process, and plaintiffs were entitled to know whether any success achieved would be assumed into the public domain, which was a sufficient interest to establish standing to challenge the statutory and regulatory scheme. (33 C.A.4th 948.)

(b) The administrative interpretation of the statutes and regulations constituted an actual injury suffered by plaintiffs, giving them standing to object to the application and interpretation of the law. (33 C.A.4th 948.)

Other cases are to the same effect. (See *Blue Cross of Calif. v. Superior Court* (1998) 67 C.A.4th 42, 47, 78 C.R.2d 779 [appellate review of pretrial order authorizing classwide arbitration of class action was ripe; to have allowed discovery to proceed without deciding issue would have burdened parties with unnecessary expense and delay; citing *Pacific Legal Foundation*]; *Hayward Area Planning Assn. v. Alameda County Trans. Authority* (1999) 72 C.A.4th 95, 104, 84 C.R.2d 744 [case involving construction of voter-approved sales and use tax to implement highway extension project required prompt review to prevent expenditure of large sums of public money on highly controversial, and possibly illegal, project]; *Caloca v. San Diego* (2002) 102 C.A.4th 433, 442, 126 C.R.2d 3 [county's appeal of deputy

sheriff's challenge to county civil service commission procedures for administrative review of civilian review board's finding of misconduct required prompt review, even though procedures had not yet been approved by board of supervisors; issues involved presented real controversies and county would suffer significant harm if review were delayed].)

SUPPLEMENT: [This section is current through the latest supplement]



31 of 178 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

I. INTRODUCTION

C. Necessity of Justiciable Controversy.

2. No Actual Controversy.

d. Distinctions and Exceptions.

5. Concealment Does Not Bar Determination.

3 *Witkin Cal. Proc. Actions* § 31

[§ 31] Concealment Does Not Bar Determination.

An occasional case may be found in which the action appears to be collusive, but the court, instead of dismissing, cites the bad faith of the plaintiff as additional support for a decision against the plaintiff on the merits. In *White v. Citizens Nat. Trust & Savings Bank of Los Angeles* (1941) 46 C.A.2d 418, 116 P.2d 117, the father of plaintiffs, beneficiaries of a trust, was guilty of defalcations while acting as the trustee's agent. The beneficiaries brought this action to recover from the trustee for his negligence in supervision. The guilty father, who was also a substantial beneficiary, and would gain by recovery in the action, was joined as a defendant but not served. Instead he was subsequently eliminated by dismissal and became plaintiffs' main witness. The court observed that, from the record, the case was the father's "brain child" and "is tainted with collusion." Nevertheless the action was tried, and was decided on appeal on the merits, with judgment for defendant trustee. (46 C.A.2d 424.)

On the other hand, several California decisions have allowed recovery by plaintiffs who were parties to collusive agreements relating to bringing and maintaining the action. In *Pellett v. Sonotone Corp.* (1945) 26 C.2d 705, 160 P.2d 783, an action was brought against defendant C and defendant S Corp. Plaintiff and defendant C agreed that C should defend, but, if judgment were recovered, no demand for payment would be made against him. In reversing judgment for defendants on a directed verdict, the court said that it did not approve of the agreement which "might lead to a fraud upon the court by concealing the position of a party who is an important witness in the action." (26 C.2d 713.) But, because the court and all parties were fully informed of the agreement, there was no fraud as a matter of law. (See *Burum v. State Comp. Ins. Fund* (1947) 30 C.2d 575, 184 P.2d 505, 1 Cal. Proc. (5th), Attorneys, §118; *Critz v. Farmers Ins. Group* (1964) 230 C.A.2d 788, 803, 41 C.R. 401, 2 Summary (10th), Insurance, §261.)

SUPPLEMENT: [This section is current through the latest supplement]



32 of 178 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

I. INTRODUCTION

C. Necessity of Justiciable Controversy.

3. Moot Case.

a. What Constitutes Moot Case.

3 *Witkin Cal. Proc. Actions* § 32

[§ 32] What Constitutes Moot Case.

(1) *California Court Doctrine*. "[A]lthough a case may originally present an existing controversy, if before decision it has, through act of the parties or other cause, occurring after the commencement of the action, lost that essential character, it becomes a moot case or question which will not be considered by the court." (*Wilson v. Los Angeles County Civil Service Com.* (1952) 112 C.A.2d 450, 453, 246 P.2d 688 [quoting *Corpus Juris Secundum*, and dismissing proceeding challenging validity of civil service eligible list long since expired and superseded by new list].) (See 62 *Cal. L. Rev.* 1385 [Mootness in Judicial Proceedings: Toward a Coherent Theory]; 35 *Stanf. L. Rev.* 897 [Bridging the Mootness Gap in Federal Court Class Actions].)

In *Campbell v. Superior Court* (1932) 126 C.A. 652, 14 P.2d 925, after a canvass of votes at a primary election, petitioner was declared the nominee for Congress. G instituted an election contest in the superior court, charging improper conduct of election officials. While a recount was in progress, petitioner obtained an alternative writ of prohibition to restrain the superior court from making a decision, on the ground that G's affidavit was insufficient. The counting, however, was not stopped, and by the time of oral argument on the writ, the recount was completed and showed that petitioner had rightly been chosen as the nominee. *Held*, the alternative writ should be vacated and the writ proceeding dismissed. Although both parties urged that the court should decide the important legal question (the sufficiency of an election contest affidavit mainly on information and belief), the question had become moot, and the "demands of actual, practical litigation are too pressing to permit the examination or discussion of academic questions." (126 C.A. 654.)

In *Coyne v. Superior Court* (1947) 80 C.A.2d 898, 183 P.2d 36, H brought an unlawful detainer action against C in the justice court, which transferred it to the superior court for supposed lack of jurisdiction. The superior court gave judgment for H, and C was evicted. On appeal it was held that the justice court had jurisdiction, and the case was ordered retransferred to the justice court. C then filed this petition for mandamus to compel the superior court to restore her to possession. However, after the issuance of the alternative writ of mandamus, the justice court tried the case, H prevailed again, and the judgment in his favor became final. *Held*, the alternative writ should be discharged and a peremptory writ denied. The final judgment of the justice court that H was entitled to possession rendered the mandamus proceeding moot. "It would be a futile and useless gesture to order the superior court to quash its writ of

possession and to restore [C] to possession only to have her immediately evicted under the writ issued by the justice's court." (80 C.A.2d 901.)

In *Paoli v. California & Hawaiian Sugar Refining Corp.* (1956) 140 C.A.2d 854, 296 P.2d 31, plaintiff sued for damages and an injunction for breach of a collective bargaining contract. The contract expired September 1, 1954, and judgment was not filed until January 10, 1955. *Held*, judgment granting an injunction reversed. (140 C.A.2d 856.) (Normally the reversal would have been with express directions to dismiss the action.)

In *Pittenger v. Home Savings & Loan Assn. of Los Angeles* (1958) 166 C.A.2d 32, 332 P.2d 399, defendant Home held plaintiffs' \$ 25,000 note and deed of trust, which required the debtor to carry fire insurance satisfactory to the holder. Home claimed the right to select the insurer and the form of the policy. Plaintiffs sued for declaratory and injunctive relief, alleging that they tendered a proper policy, which Home arbitrarily refused. Clearly a good cause of action for declaratory relief was stated; but, subsequent to the commencement of the action, Home sold to Western, which notified plaintiffs of its acceptance of the tendered policy. In holding the action moot, the court disposed of plaintiffs' three main arguments:

(a) Mere voluntary discontinuance by a defendant of wrongful conduct ordinarily does not eliminate the controversy; but the sale by Home to Western divested Home of any further power to continue its conduct. (166 C.A.2d 36.)

(b) Joinder of Western as a defendant by amended complaint did not establish a controversy with that defendant, there being no showing of any likelihood of its taking the arbitrary position of its predecessor. (166 C.A.2d 37.)

(c) The general allegation that the rights of thousands of debtors under similar deeds of trust are involved does not justify invoking the extraordinary exception of "question of public interest," for no showing was made of any other existing controversies. (166 C.A.2d 38.)

(2) *Federal Court Doctrine.* In *United States v. W.T. Grant Co.* (1953) 345 U.S. 629, 73 S.Ct. 894, 97 L.Ed. 1303, the Government sought to enjoin defendant H from violating the interlocking directorate prohibition of the Clayton Act. Thereupon H, though refusing to concede illegality and making no promise as to the future, resigned his position on the boards of all but one of the competing companies. *Held*, the district court did not abuse its discretion in denying relief.

(a) If the case were moot, defendant would have been entitled to a dismissal as a matter of right. But it was not; defendant was free to continue the prohibited practice, the controversy remained, and the public interest would be served by deciding this case of first impression. (73 S.Ct. 900, 97 L.Ed. 1309.)

(b) Nevertheless, the voluntary cessation of the allegedly illegal conduct was a factor to be considered in determining the need for injunctive relief, and the district court's conclusion that the government had failed to show the necessity for an injunction was a proper exercise of discretion. (73 S.Ct. 900, 97 L.Ed. 1309.) (See 105 Harv. L. Rev. 603 [U.S. Const., Art. III and federal constitutional doctrine]; 6 Cal. Proc. (5th), *Provisional Remedies*, §343.)

SUPPLEMENT: [This section is current through the latest supplement]



33 of 178 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

I. INTRODUCTION

C. Necessity of Justiciable Controversy.

3. Moot Case.

b. Distinctions and Exceptions.

1. Substantial Issue Remaining.

3 *Witkin Cal. Proc. Actions* § 33

[§ 33] Substantial Issue Remaining.

If a substantial issue remains, the case is not moot, and too narrow a view of the object of the proceeding must be avoided. In *Terry v. Civil Service Com.* (1952) 108 C.A.2d 861, 240 P.2d 691, petitioners sought mandamus in the superior court to compel defendant commission to allow them to take a civil service examination, contending that a rule that excluded persons in their class was arbitrary. An alternative writ was issued, with an order to permit them to take the examination scheduled for the next day. They took the examination and failed. Before judgment, defendant moved to dismiss the proceeding. *Held*, the proceeding was not moot. "The question here involved is the legal right of respondents to take the examination, not the right to pass it. The rule here involved applies not only to this examination but to many other positions, and to future examinations." The court also noted that the public interest was involved (see *infra*, §34). (108 C.A.2d 872.)

In *Plymouth v. Superior Court* (1970) 8 C.A.3d 454, 96 C.R. 636, the city of Plymouth undertook sewer improvements financed by a bond issue. Property owners made due protest to the city council, and then filed a timely action to enjoin selling the bonds or collecting assessments, alleging that the assessment was arbitrary and a denial of due process to them because their lands would receive no benefits. But they did not seek a restraining order, and the city, relying on the curative statute (*Sts. & H.C.* 8655), sold the bonds to a federal agency. Then the city petitioned for prohibition on the ground that the case had become moot. *Held*, writ was denied; the case was not moot. The curative statute did not overcome constitutional defects, and the property owners were entitled to a factual determination of this issue. (8 C.A.3d 461.) (See *Davis v. Superior Court* (1985) 169 C.A.3d 1054, 1057, 1060, 215 C.R. 721 [action challenging housing plan did not automatically become moot upon revision of plan; adversarial hearing was required to determine if revision corrected alleged invalidity].)

SUPPLEMENT: [This section is current through the latest supplement]



34 of 178 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

I. INTRODUCTION

C. Necessity of Justiciable Controversy.

3. Moot Case.

b. Distinctions and Exceptions.

2. Public Interest in Question.

3 *Witkin Cal. Proc. Actions* § 34

[§ 34] Public Interest in Question.

The courts sometimes assert an almost whimsical "discretion" to decide the merits of a moot case where the public interest is said to be involved. In *Kirstowsky v. Superior Court* (1956) 143 C.A.2d 745, 300 P.2d 163, B, on trial for murder, obtained an order excluding the public so that she could testify freely to abnormal sexual practices forced upon her. Petitioners, newspaper publishers in the area, sought mandamus to compel the trial judge to vacate the order. After an alternative writ had issued, the trial was completed and B was convicted and sentenced. The appellate court recognized that the question had then become moot, but nevertheless proceeded to determine it on the merits (adversely to petitioners) for the following reason: "Since the problem presented and the principle involved in the instant proceedings are of great importance in the administration of the criminal law and are likely to arise in the future, we deem it appropriate to discuss the questions involved, even though, so far as the issuance of a writ is concerned, the matter has become moot." (143 C.A.2d 749.)

In *Azevedo v. Jordan* (1965) 237 C.A.2d 521, 47 C.R. 125, the issue was the constitutionality of an amendment to the Elections Code changing the methods of appointment of members of the Republican State Central Committee, thereby increasing its membership. This was "of significance" to all existing members of the committee, and of "general public interest"; hence, it did not become moot merely because "the ensuing judgment may not afford the precise relief sought by a particular party to the action." (237 C.A.2d 525.)

SUPPLEMENT: [This section is current through the latest supplement]



35 of 178 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

I. INTRODUCTION

C. Necessity of Justiciable Controversy.

3. Moot Case.

b. Distinctions and Exceptions.

3. Moot Case on Appeal.

3 *Witkin Cal. Proc. Actions* § 35

[§ 35] Moot Case on Appeal.

An appeal may be dismissed when the issues on appeal are moot. (See *Arizonans for Official English v. Arizona* (1997) 520 U.S. 43, 117 S.Ct. 1055, 1069, 137 L.Ed.2d 170, 194 [state employee's appeal against state became moot when he resigned]; *California Pac. Title & Trust Co. v. California Mining & Dredging Syndicate* (1936) 17 C.A.2d 353, 354, 61 P.2d 1181; 9 Cal. Proc. (5th), Appeal, §749.) But the fact that the issues of the case are moot is not necessarily a ground for dismissal of the appeal; it may be the very reason why the appeal should not be dismissed. (See 9 Cal. Proc. (5th), Appeal, §761.)

In re Rosegarten (1947) 81 C.A.2d 126, 183 P.2d 360, is an illustration. This was an appeal by the People from an order of the superior court on habeas corpus discharging the defendant from custody. At the hearing it appeared that defendant had surrendered and directed his attorney to abandon all proceedings for his release. *Held*, the issue on appeal (the legality of defendant's custody) had become moot and would not be decided. But to dismiss the appeal would leave the superior court's order in effect, resulting in defendant's discharge, which he did not seek and to which he was not entitled. Hence, the proper course was to decide the appeal, by reversing the order of discharge with directions to the lower court to vacate that order and dismiss the habeas corpus proceeding. (81 C.A.2d 127.) (See *U.S. Bancorp Mortg. Co. v. Bonner Mall Partnership* (1994) 513 U.S. 18, 115 S.Ct. 386, 388, 130 L.Ed.2d 233, 238 [mootness by reason of settlement of case after appeal is filed or certiorari is sought does not justify federal appellate court vacating trial court's civil judgment, but Supreme Court was not precluded from deciding vacation issue merely because case mooted]; 85 Cal. L. Rev. 867 [U.S. Bancorp Mortg. Co.]; 48 *Hastings L. J.* 9 [same].)

Jennings v. Strathmore Public Util. Dist. (1951) 102 C.A.2d 548, 227 P.2d 838, overlooks this distinction. Plaintiff sought to enjoin and declare invalid a public utility district contract after the contract had been let and work was well under way. The trial court dismissed the action as moot and also because of plaintiff's lack of standing. Plaintiff appealed, the work was fully completed pending appeal, and the appellate court dismissed the appeal. This is clearly wrong. The issue on appeal was whether there was a justiciable controversy, i.e., whether the action was maintainable. Both parties to the appeal were entitled to a determination of that issue, and the correct determination should have been an affirmance of the trial court's judgment of dismissal. The erroneous appellate order had the identical effect of a

correct order in this case merely because the trial court was right. But suppose the trial court had refused to dismiss, and defendant had appealed. In that situation the appellate opinion would be the same (moot case, no standing), but the correct order (as in *Rosegarten*) would be reversal with directions to dismiss. (102 C.A.2d 551.)

SUPPLEMENT: [This section is current through the latest supplement]



36 of 178 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

I. INTRODUCTION

C. Necessity of Justiciable Controversy.

3. Moot Case.

b. Distinctions and Exceptions.

4. Mootness Is Not Jurisdictional.

3 *Witkin Cal. Proc. Actions* § 36

[§ 36] Mootness Is Not Jurisdictional.

Even if the case is clearly moot, the court has authority to try it; i.e., mootness is not a jurisdictional defect. (*Plymouth v. Superior Court* (1970) 8 C.A.3d 454, 460, 96 C.R. 636, citing the text ["Petitioner has cited no authority which holds that a court acts without or in excess of jurisdiction when it proceeds to the trial of a moot case, nor have we discovered any such authority"].)

SUPPLEMENT: [This section is current through the latest supplement]



37 of 178 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

I. INTRODUCTION

C. Necessity of Justiciable Controversy.

4. Political Controversies.

a. General Rule.

3 *Witkin Cal. Proc. Actions* § 37

[§ 37] General Rule.

(1) *Statement of Rule.* Cases in which the issues presented are wholly political in nature are beyond the province of the courts. (See *Gilligan v. Morgan* (1973) 413 U.S. 1, 93 S.Ct. 2440, 2446, 37 L.Ed.2d 407, 413, 7 Summary (10th), *Constitutional Law*, §147 [students' class action to enjoin Governor and leaders of National Guard from ordering troops to duty in civil disorders; relief sought would invade areas of legislative and executive power]; 38 *Harv. L. Rev.* 296; 75 *Harv. L. Rev.* 74; 106 *Harv. L. Rev.* 1980 [review of Franck, "Political Questions/Judicial Answers: Does the Rule of Law Apply to Foreign Affairs?"]; 17 *U.C.L.A. L. Rev.* 1135; 7 Summary (10th), *Constitutional Law*, §§87, 88; 2 *Cal. Proc.* (5th), *Jurisdiction*, §366.) However, the earlier conservative view of the United States Supreme Court was radically changed by the reapportionment cases. (See *Baker v. Carr* (1962) 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663, and subsequent decisions, 7 Summary (10th), *Constitutional Law*, §294.)

In re McGee (1951) 36 C.2d 592, 226 P.2d 1, held that a statute that authorized an election contest in the superior court could not constitutionally be applied to a member of the California Assembly. The reason is that, under the California Constitution, the Legislature has exclusive power to judge the qualifications of its members. "The court had no jurisdiction to entertain the proceeding." (36 C.2d 599.) (See *Jones v. McCollister* (1958) 159 C.A.2d 708, 713, 324 P.2d 639 [decided prior to Truth in Endorsements Law; no jurisdiction to supervise and regulate election campaign advertising].)

In *Spindulys v. Los Angeles Olympic Organizing Committee* (1985) 175 C.A.3d 206, 220 C.R. 565, plaintiffs, unincorporated associations consisting of individuals of Lithuanian, Latvian, and Estonian ancestry, sought an injunction against defendant organizing committee of the XXIIIrd Olympiad, alleging violation of the Unruh Civil Rights Act by restricting participation in the ceremonies to individuals of a nation approved by the International Olympic Committee. The International Committee had determined that the three countries should be represented by the U.S.S.R. *Held*, the issue was whether a foreign government should be recognized, and it was not within the province of a court to do so. (175 C.A.3d 209, 210, following holding of New York Court of Appeals on similar issue.)

(2) *Exception.* Where the legal rights of members or officers of a political party are involved, e.g., in the handling of party funds or property, the matter is appropriate for judicial determination. (*Malone v. Superior Court* (1953) 40

C.2d 546, 551, 254 P.2d 517.)

SUPPLEMENT: [This section is current through the latest supplement]



38 of 178 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

I. INTRODUCTION

C. Necessity of Justiciable Controversy.

4. Political Controversies.

b. Act of State Doctrine.

3 Witkin Cal. Proc. Actions § 38

[§ 38] Act of State Doctrine.

(1) *In General.* Under the "act of state doctrine," the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. (See *Underhill v. Hernandez* (1897) 168 U.S. 250, 18 S.Ct. 83, 84, 42 L.Ed. 456, 457 [assault and detention of American citizen by foreign military commander]; *Banco Nacional de Cuba v. Sabbatino* (1964) 376 U.S. 398, 84 S.Ct. 923, 940, 11 L.Ed.2d 804, 823 [nationalization of Cuban enterprise, stock of which was principally held by Americans]; *Rest.3d, Foreign Relations Law of the United States* §443; 78 Harv. L. Rev. 300; 35 Southwestern U. L. Rev. 253; 12 U.C.L.A. L. Rev. 107; 1 U.S.F. L. Rev. 49.)

As a result of the *Sabbatino* decision, Congress amended the Foreign Assistance Act to authorize a determination on the merits of cases involving the confiscation of property by foreign sovereigns in violation of international law, unless the President determines that application of the act of state doctrine is required in that particular case by United States foreign policy. (See 22 U.S.C., §2370(e)(2); *First Nat. City Bank v. Banco Nacional de Cuba* (1972) 406 U.S. 759, 92 S.Ct. 1808, 1810, 32 L.Ed.2d 466, 479 [doctrine was not applicable]; *Alfred Dunhill of London v. Republic of Cuba* (1976) 425 U.S. 682, 96 S.Ct. 1854, 1859, 48 L.Ed.2d 301, 309 [same]; 86 Harv. L. Rev. 284 [*First Nat. City Bank*]; 90 Harv. L. Rev. 265 [*Dunhill*]; 9 Southwestern U. L. Rev. 1 [*Sabbatino* and *Dunhill*]; 16 Southwestern U. L. Rev. 787 [doctrine in international banking cases]; 18 Southwestern U. L. Rev. 255 [doctrine in *Republic of Philippines v. Marcos*]; U.S. Court of Appeals cases; 20 Stanf. L. Rev. 858; 11 West L.A. L. Rev. 15 [*Dunhill*].)

(2) *Applicability of Doctrine to Cases Not Involving Confiscation of Property.* *Sabatino* involved the confiscation by a foreign state of property located in its territory, and it has been urged that the doctrine should be limited to such acts, and in practice, the doctrine has predominantly been applied in that context. However, *Underhill v. Hernandez*, *supra*, applied the doctrine to a suit for damages for assault and detention by a foreign military commander. That precedent and the rationale of the doctrine have led federal district courts and circuit courts of appeal to apply it in some cases not involving property. (*Rest.3d, Foreign Relations Law of the United States* §443, Comments a and c.)

"In general, whether a particular act of a foreign state not involving expropriation comes under the act of state doctrine depends on the extent to which adjudication of the challenge would require the United States court to consider the propriety of the acts and policies, or probe the motives, of the foreign government. A claim arising out of an alleged

violation of fundamental human rights--for instance, a claim on behalf of a victim of torture or genocide--would (if otherwise sustainable) probably not be defeated by the act of state doctrine, since the accepted international law of human rights is well established and contemplates external scrutiny of such acts. ... Whether, as suggested by four Justices in *Dunhill*, ... the act of state doctrine is inapplicable to commercial acts of foreign states, such as ordinary breaches of contract or warranty of product or title, has not yet been decided." (*Rest.3d, Foreign Relations Law of the United States* §443, Comment c.)

(3) *Doctrine Is Not Applicable Where Validity of Foreign State's Official Act Is Not in Issue.* In *W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp. Int.* (1990) 493 U.S. 400, 110 S.Ct. 701, 107 L.Ed.2d 816, the Court said:

(a) "In this case we must decide whether the act of state doctrine bars a court in the United States from entertaining a cause of action that does not rest upon the asserted invalidity of an official act of a foreign sovereign, but that does require imputing to foreign officials an unlawful motivation (the obtaining of bribes) in the performance of such an official act." (110 S.Ct. 702, 107 L.Ed.2d 820.)

(b) "The short of the matter is this: Courts in the United States have the power, and ordinarily the obligation, to decide cases and controversies properly presented to them. The act of state doctrine does not establish an exception for cases and controversies that may embarrass foreign governments, but merely requires that, in the process of deciding, the acts of foreign sovereigns taken within their own jurisdiction shall be deemed valid. That doctrine has no application to the present case because the validity of no foreign act is at issue." (110 S.Ct. 707, 107 L.Ed.2d 825.)

SUPPLEMENT: [This section is current through the latest supplement]



39 of 178 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

I. INTRODUCTION

C. Necessity of Justiciable Controversy.

5. Ecclesiastical Controversies.

a. Church Policy: Jurisdiction Declined.

3 *Witkin Cal. Proc. Actions* § 39

[§ 39] Church Policy: Jurisdiction Declined.

Controversies involving only church policy or discipline are not a proper subject for judicial determination or review. "Where the subject matter of a dispute is purely ecclesiastical in its character, a matter which concerns church discipline or the conformity of its members to the standard of morals required of them, the decision of the church tribunal will not be interfered with by the secular courts either by reviewing their acts or by directing them to proceed in a certain manner, or, in fact, to proceed at all. If the civil courts undertook so to do, they would deprive such bodies of their right of construing their own church laws including doctrinal theology and the uses and customs of every religious denomination." (*Maxwell v. Brouger* (1950) 99 C.A.2d 824, 826, 222 P.2d 910; see *Presbyterian Church in United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church* (1969) 393 U.S. 440, 89 S.Ct. 601, 607, 21 L.Ed.2d 658, 665, 7 Summary (10th), *Constitutional Law*, §514; *Serbian Eastern Orthodox Diocese for United States of Amer. & Canada v. Milivojevich* (1976) 426 U.S. 696, 96 S.Ct. 2372, 2380, 49 L.Ed.2d 151, 152; *Korean United Presbyterian Church v. Presbytery of the Pac.* (1991) 230 C.A.3d 480, 502, 281 C.R. 396 [trial judge was bound by church governing body's determination on which of two factions of local congregation constituted "true church"]; *Vukovich v. Radulovich* (1991) 235 C.A.3d 281, 291, 286 C.R. 547 [reviewing cases]; *Korean Philadelphia Presbyterian Church v. California Presbytery* (2000) 77 C.A.4th 1069, 1085, 92 C.R.2d 275 [because no property issue was at stake, court could not decide validity of local church's decision to disaffiliate with regional and national hierarchies of church]; *Metropolitan Philip v. Steiger* (2000) 82 C.A.4th 923, 928, 98 C.R.2d 605 [following *Korean United Presbyterian Church*]; 43 *Cal. L. Rev.* 322; 43 *Harv. L. Rev.* 1023; 75 *Harv. L. Rev.* 1142; 15 *Hastings Const. L. Q.* 7 [role of church hierarchy in supervising teachers at church-run colleges; cases on strict deference doctrine reviewed]; 51 *U.C.L.A. L. Rev.* 1645 [state interest in development of religious doctrine]; 31 *A.L.R.4th* 851 [termination of pastor's employment by local church as ecclesiastical matter, and limited scope of judicial review of termination].)

In *Erickson v. Gospel Foundation of Calif.* (1954) 43 C.2d 581, 275 P.2d 474, the court took note of the minority decisions allowing review of an action expelling an officer such as a trustee, but held that here the record showed notice and hearing, compliance with the procedural rules of the organization, and action taken in good faith. (43 C.2d 581.)

SUPPLEMENT: [This section is current through the latest supplement]



40 of 178 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

I. INTRODUCTION

C. Necessity of Justiciable Controversy.

5. Ecclesiastical Controversies.

b. Common Law Torts in Performance of Church Functions.

3 *Witkin Cal. Proc. Actions* § 40

[§ 40] Common Law Torts in Performance of Church Functions.

In *Higgins v. Maher* (1989) 210 C.A.3d 1168, 258 C.R. 757, plaintiff, a Catholic priest, filed a complaint against defendant Bishop and the Catholic Diocese, alleging facts constituting the common law torts of invasion of privacy, defamation, wrongful termination of employment, and negligent and intentional infliction of emotional distress. *Held*, judgment on demurrer for defendants affirmed.

(a) "[S]ecular courts will not attempt to right wrongs related to the hiring, firing, discipline or administration of clergy. Implicit in this statement of the rule is the acknowledgment that such wrongs may exist, that they may be severe, and that the administration of the church itself may be inadequate to provide a remedy. The preservation of the free exercise of religion is deemed so important a principle as to overshadow the inequities which may result from its liberal application. In our society, jealous as it is of separation of church and state, one who enters the clergy forfeits the protection of the civil authorities in terms of job rights." (210 C.A.3d 1175.)

(b) "[T]he Bishop is answerable only to canonical authorities for its misdeeds in the wrongful treatment of a priest, in terms of *ecclesiastical* as distinguished from civil spheres. If, as part of procedures resulting in the defrocking of a priest, the Bishop makes false accusations, we restrain the civil authorities from becoming involved. ... When we *know* that torts such as those of which Higgins complains occurred as inseparable parts of a process of divestiture of priestly authority, we are most reluctant to sever them from the privileged aura of what might be called ecclesiastical exemption." (210 C.A.3d 1176.)

(c) "Regardless of the church's motives or objectives, or the circumstances giving rise, we would probably agree that torts such as battery, false imprisonment or conversion cannot be perpetrated upon its members with civil impunity. We find, however, that at least in the context of Higgins averments, the torts recited are simply too close to the peculiarly religious aspects of the transaction to be segregated and treated separately--as simple civil wrongs. The making of accusations of misconduct; the discussion of same within the order; the infliction, whether intentionally or negligently, of emotional distress--these are all activities and results which will often, if not usually, attend the difficult process by which priestly faculties are terminated. If our civil courts enter upon disputes between bishops and priests because of allegations of defamation, mental distress and invasion of privacy, it is difficult to conceive the termination

case which could not result in a sustainable lawsuit." (210 C.A.3d 1176.) (See *Schmoll v. Chapman University* (1999) 70 C.A.4th 1434, 1436, 83 C.R.2d 426, 8 Summary (10th), *Constitutional Law*, §918 [following *Higgins*; Free Exercise and Establishment Clauses of First Amendment barred judicial review of chaplain's action for employment discrimination against church-affiliated university].)

SUPPLEMENT: [This section is current through the latest supplement]

See *Gunn v. Mariners Church* (2008) 167 C.A.4th 206, 216, 84 C.R.3d 1 [applying rule of *Higgins v. Maher* (1989) 210 C.A.3d 1168, 258 C.R. 757, text, p. 107, to bar action by worship director against church for defamation, invasion of privacy, and intentional infliction of emotional distress based on statements by pastor that director had been terminated for engaging in "sinful" homosexual acts].



41 of 178 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

I. INTRODUCTION

C. Necessity of Justiciable Controversy.

5. Ecclesiastical Controversies.

c. Determination of Civil or Property Rights.

3 *Witkin Cal. Proc. Actions* § 41

[§ 41] Determination of Civil or Property Rights.

(1) *In General.* If civil or property rights are asserted, the courts sometimes take jurisdiction. (See *Rosicrucian Fellowship v. Rosicrucian Fellowship Non-Sectarian Church* (1952) 39 C.2d 121, 131, 245 P.2d 481; *Providence Baptist Church of San Francisco v. Superior Court* (1952) 40 C.2d 55, 60, 251 P.2d 10; *In re Metropolitan Baptist Church of Richmond* (1975) 48 C.A.3d 850, 859, 121 C.R. 899 [cy pres doctrine applied in distribution of property on dissolution of church]; *Presbytery of Riverside v. Community Church of Palm Springs* (1979) 89 C.A.3d 910, 920, 152 C.R. 854 [authorities reviewed]; *Conley v. Roman Catholic Archbishop of San Francisco* (2000) 85 C.A.4th 1126, 1130, 102 C.R.2d 679 [reversible error to dismiss action by priest alleging that church retaliated against him, in violation of statute, for reporting child molestation by another priest]; *Church of Christ in Hollywood v. Superior Court* (2002) 99 C.A.4th 1244, 1256, 121 C.R.2d 810, 7 Summary (10th), *Constitutional Law*, §319 [ecclesiastical controversies doctrine did not preclude church's request to restrain expelled member from engaging in disruptive conduct on church property, where church's principal claim was for trespass]; 75 *Harv. L. Rev.* 1142; 80 *Harv. L. Rev.* 1352; 15 *A.L.R.3d* 297 [change of denominational relations or fundamental doctrines by majority faction of church as ground for award of property to minority faction]; 52 *A.L.R.3d* 324 [determination of rights between local church and parent church body; modern view].)

(2) *"Neutral Principles of Law" Approach.* *Jones v. Wolf* (1979) 443 U.S. 595, 99 S.Ct. 3020, 61 L.Ed.2d 775, states the limitations that the First Amendment places on a civil court in resolving church property disputes:

(a) The court cannot resolve the dispute on the basis of religious doctrine and practice; it must defer to the resolution of issues of religious doctrine by the highest tribunal of the church organization. (99 S.Ct. 3025, 61 L.Ed.2d 785.)

(b) The court should follow the "neutral principles of law" approach, applying established concepts of trust and property law. This approach permits flexibility in ordering private rights and obligations to reflect the intentions of the parties; and religious societies, through appropriate reversionary clauses and trust provisions, can specify what is to happen to church property in a particular contingency, or what religious body will determine ownership. (99 S.Ct. 3025, 61 L.Ed.2d 785.)

Other cases have applied this now controlling rule to the same effect. (See *Protestant Episcopal Church v. Barker* (1981) 115 C.A.3d 599, 614, 171 C.R. 541 [conflicting claims to church property by local churches that seceded from regional and national organizations; "California has rejected the hierarchical theory ... and has adopted in its place neutral principles of law"]; *St. Sava Mission Corp. v. Serbian Eastern Orthodox Diocese for the United States of America & Canada* (1990) 223 C.A.3d 1354, 1368, 273 C.R. 340 ["a state, if it so desires, may resolve disputes over church property through use of neutral principles of law without violating the First and Fourteenth Amendments. ... The First Amendment does not require the states to adopt a rule of compulsory deference to religious authority in resolving church property disputes where no issue of doctrinal controversy is involved"]; *Korean United Presbyterian Church v. Presbytery of the Pac.* (1991) 230 C.A.3d 480, 503, 506, 281 C.R. 396 [under "neutral principles of law," minister's faction obtained control of nonprofit corporation unlawfully and church property was held in trust for national governing body]; *Singh v. Singh* (2004) 114 C.A.4th 1264, 1281, 9 C.R.3d 4 [trial court had jurisdiction to resolve intrachurch election dispute]; *Concord Christian Center v. Open Bible Standard Churches* (2005) 132 C.A.4th 1396, 1413, 34 C.R.3d 412 [trial court properly refrained from deciding propriety of religious denomination's revocation of minister credentials of affiliated church's pastor, but properly decided that affiliated church's attempt to withdraw affiliation was ineffective, and that denomination thus had supervision and control over affiliated church and its assets]; 69 Cal. L. Rev. 1378 [Judicial Resolution of Internal Church Disputes]; 7 *Hastings Const. L. Q.* 374; 13 *Loyola L.A. L. Rev* 109; 41 *Stanf. L. Rev.* 719 [Courts Examine Congregationalism]; 16 *U.S.F. L. Rev.* 463 [Structuring California Church Corporations To Allow Judicial Identification of Charitable Trustees in Church Property Disputes].)

(3) *Freedom of Religion Analysis*. Even a proper action may, however, be nonjusticiable if the issue necessarily involves the constitutional guarantee of freedom of religion. (See *Presbyterian Church in United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church* (1969) 393 U.S. 440, 89 S.Ct. 601, 607, 21 L.Ed.2d 658, 666 [Georgia court, applying state law "departure-from-doctrine" element of implied trust theory, made its own interpretation of church doctrine, violating First Amendment].)

In *Snyder v. Evangelical Orthodox Church* (1989) 216 C.A.3d 297, 264 C.R. 640, 5 *Summary* (10th), *Torts*, §427, the trial judge dismissed certain claims for lack of subject matter jurisdiction. The Court of Appeal reversed, reasoning as follows:

(a) Dismissal on the ground that defendants' conduct was immune religious conduct requires affirmative answers to two preliminary questions: Is a religion involved, and does the conduct alleged qualify as religious expression? Here, the trial judge could conclude that defendant church was a religion, but the second question was never asked, and could not have been answered on the record. "The trial court was not told, and we do not know ... whether it is a canon of respondents' belief that confessions (penitential or not) are revealed to the congregation unless the offender repents; whether it is church practice for the substance of a confession to be shared among church officials; or whether it is consistent with church doctrine to reveal the substance of a confession to anyone outside the church, and if so, under what circumstances." (216 C.A.3d 307.)

(b) Although the courts must refrain from extensive inquiry into matters of religious doctrine and practice, the procedure followed here, i.e., strict deference to defendants' contention that religious expression was involved raises even greater constitutional problems. "We therefore hold that on a motion to dismiss for lack of jurisdiction, it is insufficient for respondents to no more than generally allege, as a substantive defense to tort liability, that their conduct was religious in nature." (216 C.A.3d 310.)

(c) "If the trial court on remand should determine ... that there was no religious purpose for the disclosure of appellants' confidential communications, respondent church's conduct in making these disclosures will not qualify as religious expression and enjoy the possibility of constitutional immunity. If the court concludes, however, that this or any of the other alleged conduct on which appellants' claims are based qualifies as religious expression, the trial court must balance the importance to the state of the interest invaded against the burden which would result from imposing tort liability for such a claim. Even if the burden is significant, appellants' claims will survive a motion to dismiss if the state's interests are significant, and no less restrictive burden than the possibility of eventual tort liability is available."

(216 C.A.3d 310.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General.* See *Central Coast Baptist Assn. v. First Baptist Church of Las Lomas* (2007) 171 C.A.4th 822, 116, 124, 65 C.R.3d 100 [trial judge had jurisdiction to determine whether local church had de facto dissolved]; 35 *Pepperdine L. Rev.* 399 [constitutional standards for legal resolution of church property disputes in time of escalating interdenominational strife]. (2) *"Neutral Principles of Law" Approach.* To the extent that California courts can resolve church property disputes without reference to church doctrine, they should employ the "neutral principles of law" approach enunciated in *Jones v. Wolf* (1979) 443 U.S. 595, 99 S.Ct. 3020, 61 L.Ed.2d 775, text, p. 109, and consider sources such as deeds to the property in dispute, the local church's articles of incorporation, the general church's constitution, canons, and rules, and relevant statutes, including statutes specifically concerning religious property, such as *Corp.C.* 9142 (action to remedy breach of trust under which nonprofit religious corporation assets are held; see 9 *Summary* (10th), *Corporations*, §384). (*Episcopal Church Cases* (2009) 45 C.4th 467, 485, 87 C.R.3d 275, 198 P.3d 66 [question whether general church acted properly under its own rules in adopting canon reciting that property of local parish was held in trust for general church, was question regarding religious doctrine; thus, court was required to defer to general church's resolution of that question in deciding dispute over ownership of parish property after parish church disaffiliated from general church].) (See *Iglesia Evangelica Latina v. Southern Pac. Latin Amer. Dist. of the Assemblies of God* (2009) 173 C.A.4th 420, 439, 93 C.R.3d 75 [district church council's assumption of control over local church and conveyance of its property was improper]; *Huber v. Jackson* (2009) 175 C.A.4th 663, 672, 96 C.R.3d 346 [parish church's purported disaffiliation from hierarchical general church caused parish property to revert to general church].) (3) *Freedom of Religion Analysis.* See *Central Coast Baptist Assn. v. First Baptist Church of Las Lomas*, *supra* [trial judge lacked jurisdiction to determine whether church had ceased to be Southern Baptist].



42 of 178 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

I. INTRODUCTION

D. Conflict of Laws.

1. Nature of Conflict of Laws Doctrines.

3 Witkin Cal. Proc. Actions § 42

[§ 42] Nature of Conflict of Laws Doctrines.

Each state in a sense applies and enforces its own law. But the rules of conflict of laws are a branch of the law of the state and, pursuant to those rules, one state will in many situations protect rights and interests created in other states and will apply the law of other states to the legal controversy before it. (See *Rest.2d, Conflict of Laws* §§1, 2, 5, 6, 9; 37 *U.C. Davis L. Rev.* 925 [Hairsplitting and Complexity in Conflict of Laws: The Paradox of Formalism]; Scoles & Hay 3d, §1.1; 16 *Am.Jur.2d* (1998 ed.), *Conflict of Laws* §1 et seq.; on obligatory enforcement of other state's statutes and judgments under Full Faith and Credit Clause, see 7 *Summary* (10th), *Constitutional Law*, §30 et seq.; on determination of foreign law by presumptions, see 51 *Cal. L. Rev.* 632; McDougal, *American Conflicts Law* 5th, §119; Scoles & Hay 3d, §12.15; on judicial notice of foreign law, see McDougal, *American Conflicts Law* 5th, §119; Scoles & Hay 3d, §12.15 et seq.; 1 *Cal. Evidence* (4th), *Judicial Notice*, §27 et seq.)

Viewed in this light, the rules of conflict of laws are not wholly discretionary; the fact that they rest entirely on "comity" does not mean that a court has freedom to depart from them in a particular case. They are like other legal rules of general application. A state may adopt a particular conflicts doctrine at variance with that of a majority of other states, but the doctrine should thereafter be uniformly followed in that state unless and until it is authoritatively rejected by the appellate courts of the state. (See Scoles & Hay 3d, §3.20 et seq.; *Rest.2d, Conflict of Laws* §5 [to extent that conflict of laws rules are decisional, they are "as open to reexamination as any other common law rules"].)

West's Key Number Digest, Federal Courts 409 et seq.

SUPPLEMENT: [This section is current through the latest supplement]



43 of 178 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

I. INTRODUCTION

D. Conflict of Laws.

2. Second Restatement.

3 *Witkin Cal. Proc. Actions* § 43

[§ 43] Second Restatement.

(1) *Criticism of First Restatement.* The rigid, doctrinal approach of the first Restatement was subjected to increasing criticism by writers, and progressive courts have taken a more flexible approach to both substantive and procedural problems. (See *Reich v. Purcell* (1967) 67 C.2d 551, 553, 63 C.R. 31, 432 P.2d 727, 5 Summary (10th), *Torts*, §191; *Rest.2d, Conflict of Laws* §6; 49 Cal. L. Rev. 240; 49 Cal. L. Rev. 845; 53 Cal. L. Rev. 535; 54 Cal. L. Rev. 1584; 16 *Hastings L. J.* 21; 1 Summary (10th), *Contracts*, §§61, 62; 5 Summary (10th), *Torts*, §189 et seq.)

(2) *Response of Second Restatement.* The *Second Restatement, Conflict of Laws* §6, following the modern approach, lists "the factors relevant to the choice of the applicable rule of law" in the absence of a statutory directive of the forum:

- (a) The needs of the interstate and international systems.
- (b) The relevant policies of the forum.
- (c) The relevant policies of other interested states and the relative interests of those states in the determination of the particular issue.
- (d) The protection of justified expectations.
- (e) The basic policies underlying the particular field of law.
- (f) Certainty, predictability, and uniformity of result.
- (g) Ease in the determination and application of the law to be applied.

(3) *Commentary.* Commentary on the subject has been extensive. (See 9 Cal. Western L. Rev. 136 [Due Process in Choice-of-Law: The Role of Fundamental Fairness]; 109 *Harv. L. Rev.* 2038 [conflict of laws and recognition of same-sex marriages]; 9 *Hastings Const. L. Q.* 851 [due process limitations on state choice of law rules]; 32 *Hastings L. J.* 1609 [Reflections on Conflict-of-Laws Methodology]; 38 *Hastings L. J.* 1041 [comprehensive survey of choice of

law decisions nationwide]; 19 *San Diego L. Rev.* 313 [Justified Party Expectations in Choice-of-Law and Jurisdiction: Constitutional Significance or Bootstrapping?]; 22 *Southwestern U. L. Rev.* 159 [Federal Arbitration Right, Choice-of-Law Clauses and State Rules and Procedure]; 26 *U.C. Davis L. Rev.* 1045 [Let the Chips Fall Where They May: Choice of Law in Computer Bulletin Board Defamation Cases]; 7 *U.C.L.A. L. Rev.* 1 [choice of law rules]; 12 *U.C.L.A. L. Rev.* 29; 16 *Am.Jur.2d* (1998 ed.), *Conflict of Laws* §1 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]



44 of 178 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

I. INTRODUCTION

D. Conflict of Laws.

3. Governmental Interest Approach.

3 Witkin Cal. Proc. Actions § 44

[§ 44] Governmental Interest Approach.

(1) *Nature of Approach.* The governmental interest approach to conflict of laws issues was adopted by the California Supreme Court in 1967 as the chosen method for resolving conflict of laws disputes in tort and contract cases. (See *Reich v. Purcell* (1967) 67 C.2d 551, 555, 63 C.R. 31, 432 P.2d 727, 5 Summary (10th), *Torts*, §191 [tort conflicts]; *Travelers Ins. Co. v. Work. Comp. App. Bd.* (1967) 68 C.2d 7, 11, 64 C.R. 440, 434 P.2d 992, 1 Summary (10th), *Contracts*, §62 [contract conflicts]; 1 Summary (10th), *Contracts*, §63; 5 Summary (10th), *Torts*, §189 et seq.) In addition, some California Courts of Appeal have even extended this approach to the traditionally procedural area of statute of limitations conflicts. (See *infra*, §54.)

The governmental interest approach does not disregard the relevant factors stressed by the Second Restatement (see *supra*, §43) in resolving conflicts, but examines them with the primary objective of ensuring that the application of the law in a particular context serves the purposes for which the law is created. (See *Dixon Mobile Homes v. Walters* (1975) 48 C.A.3d 964, 972, 122 C.R. 202, 1 Summary (10th), *Contracts*, §63.)

(2) *Inquiry.* The approach calls for a three-part inquiry:

- (a) The specific law in each state that governs the disputed legal issue is identified.
- (b) The precise policies that the respective laws were intended to implement are determined.
- (c) Each state's factual relationship with the litigation is examined and a determination is made whether or not the application of a particular state's law would be consistent with the purposes identified as supporting that law.

(3) *Determination.* After that inquiry is concluded, three rules of determination govern:

- (a) If application of neither law would serve the purposes behind that law, the case is an "unprovided-for case" and the law of the forum should be applied.
- (b) If application of one law would further the purposes behind that law, but application of the other law would not serve a purpose, a "false conflict" is presented and the former law should be applied.

(c) If application of either law would serve the purposes behind that law, a "true conflict" is presented.

(4) *Options To Resolve "True Conflict."* Several options are available to resolve a true conflict (the importance of which vary from state to state):

(a) The forum law may be applied.

(b) The forum law may be disregarded if its application is unnecessary to achieve its purpose. However, if a court remains convinced that the forum's governmental interests are implicated (as is likely in most cases), the forum law should be applied.

(c) The law of the state whose interests would be most impaired by not having its law enforced should be applied. This so-called comparative impairment option was adopted by the California Supreme Court in *Bernhard v. Harrah's Club* (1976) 16 C.3d 313, 317, 128 C.R. 215, 546 P.2d 719, 5 Summary (10th), Torts, §192. The approach has been followed in several decisions. (See *Kearney v. Salomon Smith Barney* (2006) 39 C.4th 95, 123, 128, 45 C.R.3d 730, 137 P.3d 914 [California law governed issue whether Georgia financial services company's secret recording of California clients' telephone conversations was invasion of privacy; but Georgia law governed issue of company's potential liability for past conduct]; *Havlicek v. Coast-To-Coast Analytical Services* (1995) 39 C.A.4th 1844, 1851, 46 C.R.2d 696, 9 Summary (10th), Corporations, §85 [action by directors of Delaware corporation seeking order to inspect books and records of corporation at its principal place of business in California was governed by California law]; *Castro v. Budget Rent-A-Car System* (2007) 154 C.A.4th 1162, 1178, 65 C.R.3d 430 [Alabama's common law doctrine of permissive use of motor vehicle governed negligence action by California resident who was injured while passenger in vehicle that collided in Alabama with truck leased by company to shipper].)

(d) Another choice of law theory may be used as a tie-breaker. (See 38 *Hastings L. J.* 1041, 1047.)

(5) *Advantages and Disadvantages of Approach.* One commentator has critiqued the approach as follows: "The virtue of the interest analysis theory lies in its sensitivity to the substantive aspects of the laws being considered. It is not a jurisdiction-selecting tool but a law-selecting tool. It makes the choice of law painless in many situations by rejecting the application of a given law only if applying that law would fail to further the legislature's purposes in enacting it. The primary difficulty with the theory, however, has been its historical failure to deal with the resolution of true conflicts: what is to be done when the purposes behind either law would be served by its application? As it has been suggested, there is no one satisfactory answer to the question. Additionally, the theory is quite manipulable. A court can alter the result in many cases merely by identifying alternative governmental interests or by describing alternative purposes for the creation of one law. Finally, interest analysis, especially in the pure form advocated by Professor Currie, is heavily forum-favoring in operation: the categories of true conflicts and unprovided-for cases will constitute a substantial percentage of the total number of cases encountered by a court. In each of these categories, Currie favors application of forum law." (38 *Hastings L. J.* 1041, 1048.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Nature of Approach.* See *Vaughn v. LJ Int.* (2009) 174 C.A.4th 213, 227, 94 C.R.3d 166, citing the text [governmental interest approach did not apply to California shareholder's derivative action against corporation incorporated in British Virgin Islands; local statute requires permission from high court to sue corporation incorporated there].



45 of 178 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

I. INTRODUCTION

D. Conflict of Laws.

4. Distinction Between Substance and Procedure.

3 Witkin Cal. Proc. Actions § 45

[§ 45] Distinction Between Substance and Procedure.

(1) *Traditional Approach.* Matters of "substance" or "substantive" matters deal with legal rights. Matters of "procedure" deal with remedies. (See *Grant v. McAuliffe* (1953) 41 C.2d 859, 264 P.2d 944; *King v. Schumacher* (1939) 32 C.A.2d 172, 181, 89 P.2d 466 [defining "practice" and "procedure"]; Scoles & Hay 3d, §3.8.)

The distinction is admittedly shadowy and difficult to draw, but, when made, enters into the solution of problems in a number of different fields, of which the following are the most important:

(a) The test of retroactive legislation, usually upheld if procedural, and declared invalid if substantive. (See 7 *Summary* (10th), *Constitutional Law*, §623 et seq.)

(b) Application of the Rules of Decision Act in federal court actions, requiring federal courts to follow state substantive law but not state procedure. (See *Cohen v. Beneficial Industrial Loan Corp.* (1949) 337 U.S. 541, 69 S.Ct. 1221, 1230, 93 L.Ed. 1528, 1541; 62 *Harv. L. Rev.* 1030; 66 *Harv. L. Rev.* 1516; 7 *Summary* (10th), *Constitutional Law*, §60.)

(c) Application of state procedural rules in state court actions under a federal statute such as the Employers' Liability Act. Although the state's procedure applies (see *King v. Schumacher*, *supra*, 32 C.A.2d 182), a state rule of "practice" may not be employed with the substantive effect of defeating the federal right. (See *Brown v. Western Ry. of Alabama* (1949) 338 U.S. 294, 70 S.Ct. 105, 106, 94 L.Ed. 100, 102; *Chavez v. Keat* (1995) 34 C.A.4th 1406, 1413, 41 C.R.2d 72, citing the text [California rule requiring punitive damages award to be supported by evidence of defendant's financial condition did not apply to federal civil rights action under 42 U.S.C., §1983 brought in state court]; *Garcia v. Superior Court* (1996) 42 C.A.4th 177, 181, 49 C.R.2d 580 [C.C.P. 377.34, precluding recovery of damages for pain and suffering in action by decedent's personal representative or successor, applied to federal civil rights action]; 2 *Stanf. L. Rev.* 594.)

(d) The scope of the rulemaking power over "procedure and practice." (See 45 *Cal. L. Rev.* 785 [federal rules]; 70 *Harv. L. Rev.* 1471 [same]; 2 *Cal. Proc. (5th), Courts*, §181 et seq.)

With a few exceptions, this distinction has been the basis of many conflicts rules, pursuant to the general principle that matters of procedure are governed by the law of the forum. (See *infra*, §46.) But the difficult and controversial preliminary determination whether the matter is one of procedure or substance must necessarily be made by the court of the forum. Accordingly, one state may treat a particular matter as procedural, applying the law of the forum, while another may treat it as substantive, applying foreign law. (See *Grant v. McAuliffe*, *supra*, 41 C.2d 862; McDougal, American Conflicts Law 5th, §§110, 111; Scoles & Hay 3d, §3.8 et seq.; *infra*, §46 et seq.)

(2) *Modern Approach*. The *Second Restatement, Conflict of Laws* §122, abandons this classification, substituting the general proposition that a court "usually applies its own local law rules prescribing how litigation shall be conducted."

The substance-procedure dichotomy is disparaged in Comment b: "The courts have traditionally approached issues falling within the scope of the rule of this Section by determining whether the particular issue was 'procedural' and *therefore* to be decided in accordance with the forum's local law rule, or 'substantive' and *therefore* to be decided by reference to the otherwise applicable law. These characterizations, while harmless in themselves, have led some courts into unthinking adherence to precedents that have classified a given issue as 'procedural' or 'substantive', regardless of what purposes were involved in the earlier classifications. Thus, for example, a decision classifying burden of proof as 'procedural' for local law purposes, such as in determining the constitutionality of a statute that retroactively shifted the burden, might mistakenly be held controlling on the question whether burden of proof is 'procedural' for choice-of-law purposes. To avoid encouraging errors of that sort, the rules stated in this Chapter do not attempt to classify issues as 'procedural' or 'substantive'. Instead they face directly the question whether the forum's rule should be applied."

However, the results reached under the Second Restatement approach, as well as under the governmental interest approach, which implements the Second Restatement analysis (see *supra*, §44), generally parallel those found in the California decisions applying the traditional substance-procedure classification. (See *infra*, §46 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Traditional Approach*. See *Vaughn v. LJ Int.* (2009) 174 C.A.4th 213, 220, 94 C.R.3d 166, citing the text [British Virgin Islands statute that limited entitlement to sue corporations to those shareholders who had complied with its provisions, including receipt of permission from court, addressed substantive issue of standing to sue and thus applied in shareholder's derivative action brought in California, despite shareholder's argument that statute was merely procedural and thus should not apply in forum in which litigation was prosecuted].



46 of 178 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

I. INTRODUCTION

D. Conflict of Laws.

5. Procedural Matters.

3 *Witkin Cal. Proc. Actions* § 46

[§ 46] Procedural Matters.

(1) *General Rule: Law of Forum Governs.* The basic rule is well settled that matters of procedure are governed by the law of the forum. (See *Klaffki v. Kauffman* (1921) 52 C.A. 48, 50, 198 P. 36 [stating rule and distinguishing substantive right]; *Rest.2d, Conflict of Laws* §122; 47 *Harv. L. Rev.* 315; 50 *Harv. L. Rev.* 1202; 58 *Harv. L. Rev.* 153; McDougal, *American Conflicts Law* 5th, §110 et seq.; Scoles & Hay 3d, §3.8 et seq.; 16 *Am.Jur.2d* (1998 ed.), *Conflict of Laws* §151 et seq.)

(2) *Illustrations.* The important illustrations are as follows:

(a) *Parties.* Real party in interest, proper parties, and necessary parties. (See *Tornquist v. Johnson* (1932) 124 C.A. 634, 641, 13 P.2d 405; *Rest.2d, Conflict of Laws* §125; 50 *Harv. L. Rev.* 1204; 62 *A.L.R.2d* 486 [proper party plaintiff in contract action].)

(b) *Form of Action.* Equity or law, tort or contract, etc., insofar as it indicates the proper court or makes other procedural rules applicable. (See *Rest.2d, Conflict of Laws* §§123, 124.)

(c) *Pleading.* The form and sufficiency of the pleadings, including such matters as the joinder of causes, counterclaims, and amendment. (See *Rest.2d, Conflict of Laws* §§127, 128.)

(d) *Commencement of Action and Process.* Subject to the constitutional requirements of due process, the forum determines the sufficiency of process or other notice, and the time when the action is deemed commenced. (See *Lewis v. Le Baron* (1967) 254 C.A.2d 270, 278, 61 C.R. 903 [service on foreign corporation]; *Rest.2d, Conflict of Laws* §126.) (On direct-action statute, see *infra*, §51.)

(e) *Dismissal for Failure To Prosecute.* (See *St. Louis-San Francisco Ry. Co. v. Superior Court* (1969) 276 C.A.2d 762, 766, 81 C.R. 705 [California 3-year statute (after reversal on appeal) governed although cause of action--personal injuries for collision of automobile and train--arose in Arkansas, which gives 10 years from rendition of judgment for retrial on reversal].)

(f) *Settlement.* (See *Scruton v. Korean Air Lines Co., Ltd.* (1995) 39 C.A.4th 1596, 1603, 46 C.R.2d 638, 4 *Cal.*

Proc. (5th), *Pleading*, §80 [in wrongful death action resulting from airplane crash in foreign country, California procedural law governed enforcement of settlement agreement, regardless of whether action was brought under federal statute or international treaties].)

(g) *Ancillary Remedies*. Attachment, injunction, receiver, etc., designed to aid the plaintiff in obtaining effective relief in the main action. (See *Rest.2d, Conflict of Laws* §130.) Arbitration statutes are also generally treated as procedural. (See 47 *Harv. L. Rev.* 318.)

(h) *Trial*. All matters connected with trial, such as the right to a jury, the method and sufficiency of proof (including presumptions and inferences), the competency and credibility of witnesses, and the admissibility of evidence. (See *Pfingsten v. Westenhaver* (1952) 39 C.2d 12, 19, 244 P.2d 395 [sufficiency of evidence]; *Cobb v. Lawrence* (1942) 54 C.A.2d 630, 633, 129 P.2d 462 [whether issue is triable by jury]; *Hamlet v. Hook* (1951) 106 C.A.2d 791, 794, 236 P.2d 196 [presumption]; *Sadberry v. Griffiths* (1961) 191 C.A.2d 610, 613, 12 C.R. 773 [presumption]; *Marquis v. St. Louis-San Francisco Ry. Co.* (1965) 234 C.A.2d 335, 341, 44 C.R. 367 [same]; *National Steel Products Co. v. Superior Court* (1985) 164 C.A.3d 476, 485, 210 C.R. 535 [work product privilege for report]; *Rest.2d, Conflict of Laws* §§127, 129, 133, 134, 135, 137, 138, 139; 58 *Harv. L. Rev.* 153; 59 *Harv. L. Rev.* 505; McDougal, *American Conflicts Law* 5th, §110 et seq.; 35 *A.L.R.3d* 289 [presumptions and burden of proof].)

(i) *Verdict and Judgment*. The procedure of rendition, form, and methods of review, and the validity and finality of a judgment. (See *Gagnon Co. v. Nevada Desert Inn* (1955) 45 C.2d 448, 454, 289 P.2d 466 [whether judgment is res judicata]; *King v. Schumacher* (1939) 32 C.A.2d 172, 182, 89 P.2d 466 [procedure on appeal]; *Smith v. Smith* (1952) 115 C.A.2d 92, 99, 251 P.2d 720 [power of Kansas court to correct clerical error by nunc pro tunc judgment]; *Rest.2d, Conflict of Laws* §127.)

(j) *Recognition and Enforcement of Foreign Judgment*. (See *Weir v. Corbett* (1964) 229 C.A.2d 290, 293, 40 C.R. 161, *infra*, §57; *Rest.2d, Conflict of Laws* §93 et seq.)

(k) *Execution and Exemptions from Execution*. (See *In re Marriage of De Lotel* (1977) 73 C.A.3d 21, 24, 140 C.R. 553 [California exemption laws applied in action to enforce child and spousal support against husband who became Oregon resident]; *Rest.2d, Conflict of Laws* §§131, 132 [local law of state of dominant interest for exemptions]; 100 *A.L.R.3d* 1235 [choice of law as to exemption of property from execution].)

SUPPLEMENT: [This section is current through the latest supplement]



47 of 178 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

I. INTRODUCTION

D. Conflict of Laws.

6. Substantive Matters in Procedural Form.

a. Parol Evidence Rule.

3 Witkin Cal. Proc. Actions § 47

[§ 47] Parol Evidence Rule.

The generalization that matters relating to pleading, parties, trial, and judgment are procedural (see *supra*, §46) is not entirely safe. Some matters that appear in a procedural aspect are nevertheless held to be substantive in nature and not subject to the law of the forum. Thus, the parol evidence rule is governed by the law of the state that determines the obligation of the contract. (*Hutchinson v. Hutchinson* (1941) 48 C.A.2d 12, 19, 119 P.2d 214; *Crumley v. The Walter M. Ballard Corp.* (1950) 100 C.A.2d 698, 702, 224 P.2d 455; *Rest.2d, Conflict of Laws §140*, Comment c; McDougal, *American Conflicts Law* 5th, §114; Scoles & Hay 3d, §18.38; on substantive nature of rule, see 2 *Cal. Evidence* (4th), *Documentary Evidence*, §62.)

SUPPLEMENT: [This section is current through the latest supplement]



48 of 178 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

I. INTRODUCTION

D. Conflict of Laws.

6. Substantive Matters in Procedural Form.

b. Statute of Frauds.

3 *Witkin Cal. Proc. Actions* § 48

[§ 48] Statute of Frauds.

The statute of frauds is more difficult to classify than the parol evidence rule (*supra*, §47). Some states treat it as purely evidentiary (procedural), others as a substantive matter. (See *Bernkrant v. Fowler* (1961) 55 C.2d 588, 596, 12 C.R. 266, 360 P.2d 906, 1 Summary (10th), *Contracts*, §83 [weighing state interests involved]; *Rest.2d, Conflict of Laws* §141, Comment b; 47 *Harv. L. Rev.* 320; McDougal, *American Conflicts Law* 5th, §114; Scoles & Hay 3d, §18.38.)

SUPPLEMENT: [This section is current through the latest supplement]



49 of 178 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

I. INTRODUCTION

D. Conflict of Laws.

6. Substantive Matters in Procedural Form.

c. Measure of Damages.

1. In General.

3 Witkin Cal. Proc. Actions § 49

[§ 49] In General.

Ordinarily the amount of recovery, including interest on the obligation itself and penalties that are part of the obligation, is substantive. (*Klaffki v. Kauffman* (1921) 52 C.A. 48, 50, 198 P. 36; see *Perkins v. Benguet Consol. Mining Co.* (1942) 55 C.A.2d 720, 768, 132 P.2d 70 [dictum that liability for interest and rate of interest are, under California rule, governed by law of forum]; McDougal, American Conflicts Law 5th, §115.)

The dictum in *Perkins* was rejected as to tort actions in *Zinn v. Ex-Cell-O Corp.* (1957) 148 C.A.2d 56, 306 P.2d 1017. A judgment in favor of plaintiffs for damages for fraud by defendants in inducing plaintiffs to sell their stock was affirmed. But the wrong occurred in Washington, where (it was claimed) the law does not allow interest in a fraud action (as does C.C. 3288 in the court's discretion). *Held*, the law of the place of wrong governed. Prior California cases applying the law of the forum were contract actions. In tort actions, California courts follow the Restatement rule (§412) that the measure of damages is determined by the law of the place of wrong. "[I]f California, in effect, adopts the Restatement as to the general measure of damages in a fraud case, it should adopt it as to one of the elements of damages--interest." (148 C.A.2d 80.)

The traditional Restatement rule, followed in *Zinn*, was dropped by the Second Restatement, which makes the measure of damages determinable by the local law of the state with the "dominant interest in the determination" of this issue. (*Rest.2d, Conflict of Laws* §§171, 178 [death actions].)

SUPPLEMENT: [This section is current through the latest supplement]



50 of 178 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

I. INTRODUCTION

D. Conflict of Laws.

6. Substantive Matters in Procedural Form.

c. Measure of Damages.

2. Limitation on Amount Recoverable.

3 *Witkin Cal. Proc. Actions* § 50

[§ 50] Limitation on Amount Recoverable.

Under the traditional conflict of laws rule that the measure of damages is determined by the place of wrong (*supra*, §49), a limitation imposed in that state on the amount recoverable would be binding. (See *Victor v. Sperry* (1958) 163 C.A.2d 518, 523, 329 P.2d 728.) However, a limitation imposed by the law of the forum might be applied to causes arising elsewhere if it were viewed as an expression of a strong local policy. (McDougal, *American Conflicts Law* 5th, §115; Scoles & Hay 3d, §17.9; see 74 *Harv. L. Rev.* 1652 [limitation of amount and measure of damages in death actions]; 92 *A.L.R.2d* 1180 [same].)

Both of these doctrinal approaches were rejected in *Reich v. Purcell* (1967) 67 C.2d 551, 555, 63 C.R. 31, 432 P.2d 727, 5 *Summary* (10th), *Torts*, §191 [in wrongful death action arising from accident occurring in Missouri, but involving parties and decedents residing in California and Ohio, Missouri law limiting damages to \$ 25,000 did not have to be applied], and *Sommer v. Gabor* (1995) 40 C.A.4th 1455, 1469, 48 C.R.2d 235 [in defamation action involving article published in German magazine, German law precluding recovery of presumed and punitive damages did not have to be applied]. Under these decisions and the Second Restatement, using the modern governmental interest approach to conflict of laws problems (see *supra*, §44), the law of the state with the most significant relationship to the occurrence and the parties is determinative. (*Rest.2d, Conflict of Laws* §171, Comment a; §178, Comment a [death action].) (On *Reich*, see 56 *Cal. L. Rev.* 1635; 81 *Harv. L. Rev.* 1342; 19 *Hastings L. J.* 949; 5 *San Diego L. Rev.* 365.)

SUPPLEMENT: [This section is current through the latest supplement]



51 of 178 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

I. INTRODUCTION

D. Conflict of Laws.

6. Substantive Matters in Procedural Form.

d. Direct-Action Statute.

3 Witkin Cal. Proc. Actions § 51

[§ 51] Direct-Action Statute.

In *Roberts v. Home Ins. Indem. Co.* (1975) 48 C.A.3d 313, 121 C.R. 862, plaintiff, domiciled in California, sued S Hotel, of Shreveport, Louisiana, in the California superior court, for injuries allegedly suffered as a result of negligent maintenance of the hotel. He also sued defendant, the hotel's liability insurance carrier, under a Louisiana statute, which allowed a direct action against the insurer of an alleged tortfeasor. Home contended that the Louisiana statute could not be applied to authorize a California action. *Held*, the action was properly brought here.

(a) Application of the Louisiana direct action statute would not violate California law. California's statute allows an action against an insurer after judgment has been obtained against the insured (*Ins.C. 11580 et seq.*, 2 *Summary* (10th), *Insurance*, §301 et seq.), but is silent on a direct action prior to judgment. There is nothing in California's statutory or decisional law that prohibits the action if the Louisiana statute applies under California's rules of conflict of laws. (48 C.A.3d 318.)

(b) Procedural matters are governed by the law of the forum (see *supra*, §46), and for some purposes the direct-action statute has been considered procedural in the Louisiana courts. However, other Louisiana decisions point out that the statute creates a substantive right in the insured, and this has been the view of some federal courts and most of the commentators. (48 C.A.3d 319.) Moreover, the reasonable expectations of litigants is an important consideration in determining whether a foreign statute is substantive or procedural (*Rest.2d, Conflict of Laws §122, Comment*); and in view of these holdings insurers could reasonably expect to defend a direct action in any state that has jurisdiction of the action. (48 C.A.3d 320.)

(c) Policy considerations support this result. Although the Louisiana and California statutes differ, they both express a similar concern: "[A]n injured person has an interest in an insured tortfeasor's insurance contract which should be protected." (48 C.A.3d 321.) (See 83 A.L.R.3d 308 [conflict of laws as to right of insured to bring direct action under uninsured motorist clause]; 83 A.L.R.3d 338 [extraterritorial application of direct action statute].)

SUPPLEMENT: [This section is current through the latest supplement]



52 of 178 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

I. INTRODUCTION

D. Conflict of Laws.

7. Survival or Abatement.

3 *Witkin Cal. Proc. Actions* § 52

[§ 52] Survival or Abatement.

(1) *Traditional Rule: Survival as Substantive.* The First Conflicts Restatement and other authorities regarded survival as substantive. (See 47 *Harv. L. Rev.* 317; 1 *Am.Jur.2d* (2005 ed.), *Abatement, Survival, and Revival* §90.)

(2) *California Rule: Survival as Procedural.* California took the opposite position in *Grant v. McAuliffe* (1953) 41 *C.2d* 859, 264 *P.2d* 944, where plaintiffs, injured by the negligence of decedent in an automobile collision in Arizona, sued his estate in California under the California survival statute (*supra*, §15 et seq.). Observing that all the parties were California residents and that the estate was being administered here, the court said: "Survival is not an essential part of the cause of action itself but relates to the procedures available for the enforcement of the legal claim for damages. Basically the question is one of the administration of decedents' estates, which is a purely local proceeding." (41 *C.2d* 866.) (See 42 *Cal. L. Rev.* 803; 68 *Harv. L. Rev.* 1260; 9 *Hastings L. J.* 128; 27 *So. Cal. L. Rev.* 468; 10 *Stanf. L. Rev.* 205; 13 *Stanf. L. Rev.* 729; 1 *U.C.L.A. L. Rev.* 380; 42 *A.L.R.2d* 1170 [conflict of laws as to survival of cause of action and revival of pending action on death of party].)

(3) *Second Restatement Rule: Choice of Law Principles Apply.* The Second Restatement uses a different approach from both the First Restatement and *Grant*, applying choice of law rules to the survival problem. (*Rest.2d, Conflict of Laws* §167.)

SUPPLEMENT: [This section is current through the latest supplement]



53 of 178 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

I. INTRODUCTION

D. Conflict of Laws.

8. Statute of Limitations.

a. General Rule: Law of Forum Governs.

1. Traditional Substance-Procedure Approach.

3 *Witkin Cal. Proc. Actions* § 53

[§ 53] Traditional Substance-Procedure Approach.

Statutes of limitation and similar time provisions raise exceedingly difficult problems in the field of conflict of laws. The starting point under the traditional substance-procedure approach to conflict of laws issues is the notion that the statute is procedural and therefore governed by the law of the forum. Hence, the action is barred if the limitations period of the forum has run, even though the action might still be maintainable elsewhere. (See *Wells v. Simonds Abrasive Co.* (1953) 345 U.S. 514, 73 S.Ct. 856, 858, 97 L.Ed. 1211, 1215; *Ohio v. Porter* (1942) 21 C.2d 45, 47, 129 P.2d 691; *Littlepage v. Morck* (1932) 120 C.A. 88, 89, 7 P.2d 716; *Sullivan v. Shannon* (1938) 25 C.A.2d 422, 425, 77 P.2d 498; *Weir v. Corbett* (1964) 229 C.A.2d 290, 294, 40 C.R. 161, *infra*, §57 [California statute applies to action on sister-state judgment, whether California time period was shorter or longer than that of state of rendition]; *Firemen's Ins. Co. of Newark, New Jersey v. Diskin* (1967) 255 C.A.2d 502, 510, 63 C.R. 177 [California 1-year statute governed right of California insured to file action or seek arbitration under uninsured motorist coverage of policy, although accident happened in Florida, which had 4-year limitations period for personal injury actions]; 50 *Harv. L. Rev.* 1203; 63 *Harv. L. Rev.* 1260; 76 *Harv. L. Rev.* 1306; 4 *Hastings L. J.* 208 [federal court applying state statute of limitations]; 2 *U.C.L.A. L. Rev.* 558 [rule applied to action in federal court on cause of action arising under statute of foreign country]; McDougal, *American Conflicts Law* 5th, §116; Scoles & Hay 3d, §3.9; 29 *A.L.R.2d* 295, 311 [actions concerning partnership matters]; 36 *A.L.R.2d* 567 [action on foreign judgment]; 41 *A.L.R.2d* 1044, 1058 [action by employer or insurance carrier against third person for injury to employee]; 78 *A.L.R.3d* 639 [contract actions]; 51 *Am.Jur.2d* (2000 ed.), *Limitation of Actions* §99 et seq.) (For exceptions to general rule, see *infra*, §56 et seq.; for Uniform Conflict of Laws--Limitations Act, adopted in 1982, see 12 U.L.A. (Master Ed.), p. 155.)

The forum also determines the incidental matters of accrual of the cause of action and suspension of the period. (See 50 *Harv. L. Rev.* 1203; 63 *Harv. L. Rev.* 1260.)

SUPPLEMENT: [This section is current through the latest supplement]



54 of 178 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

I. INTRODUCTION

D. Conflict of Laws.

8. Statute of Limitations.

a. General Rule: Law of Forum Governs.

2. Modern Approach.

3 *Witkin Cal. Proc. Actions* § 54

[§ 54] Modern Approach.

(1) *Second Restatement Approach.* As under the traditional substance-procedural approach (see *supra*, §53), the Second Restatement adopts a decided forum bias. With certain exceptions (see *infra*, §56 et seq.), the local law of the forum determines the statute of limitations when conflicts arise. (*Rest.2d, Conflict of Laws* §142(1); see Scoles & Hay 3d, §3.9.)

(2) *Governmental Interest Approach.* Similarly, the governmental interest approach for resolving choice of law conflicts (see *supra*, §44), based on Second Restatement principles, has been applied in favor of the law of the forum state. (See 38 *Hastings L. J.* 1041, 1048.) Generally, this has been the result in California decisions employing the approach to resolve statute of limitations conflict.

In *American Bank of Commerce v. Corondoni* (1985) 169 C.A.3d 368, 215 C.R. 331, plaintiff obtained a money judgment against defendant in a New Mexico court. He filed an action 7 1/2 years later to enforce the judgment in California under the Sister State Money Judgments Act (C.C.P. 1710.10 et seq.; see 8 *Cal. Proc.* (5th), *Enforcement of Judgment*, §449 et seq.). Defendant, who had been living in California for 5 years at the time, filed a motion to vacate the judgment on the ground that enforcement was barred by New Mexico's 7-year statute of limitations. *Held*, order denying the motion affirmed; California's 10-year statute of limitations applied.

(a) Under C.C.P. 1710.40(a), a judgment entered pursuant to the Sister State Money Judgments Act can be vacated "on any ground which would be a defense to an action in this state on the sister state judgment" (see 8 *Cal. Proc.* (5th), *Enforcement of Judgment*, §459). One defense would be that enforcement is barred by the statute of limitations in the state where enforcement is sought; but the California 10-year period had not run and was not a defense. (169 C.A.3d 371.)

(b) Under the governmental interest approach to conflict of laws problems, California law applies. (169 C.A.3d 372.) Defendant had become a California resident, and New Mexico's interest in protecting its residents from stale claims would not be furthered if its limitations period were applied. (169 C.A.3d 373.) Also, the fact that the New

Mexico period was later extended to 14 years shows that California's 10-year period does not offend current New Mexico public policy. (169 C.A.3d 373.)

(c) Under another New Mexico statute, the 7-year period is tolled when the judgment debtor is "absent from the state." Defendant's residence in California satisfies the tolling provision; hence, the New Mexico 7-year period would not protect him even if he were a New Mexico resident. (169 C.A.3d 373.)

Other cases are to the same effect. (See *Ashland Chemical Co. v. Provence* (1982) 129 C.A.3d 790, 795, 181 C.R. 340 [California 4-year statute applied to bar recovery on promissory note, even though note provided that it was to be governed by Kentucky law, which had 15-year limitations period]; *North Amer. Asbestos Corp. v. Superior Court* (1986) 180 C.A.3d 902, 905, 225 C.R. 877 [California law imposing no time limitation for suing dissolved corporation for injuries arising out of predissolution activities (*Corp.C.* 2010; see 9 *Summary* (10th), *Corporations*, §212) applied to Illinois corporation, and prevailed over 2-year survival statute of Illinois]; but see *Hambrech & Quist Venture Partners v. American Med. Int.* (1995) 38 C.A.4th 1532, 1544, 46 C.R.2d 33, 1 *Summary* (10th), *Contracts*, §70, citing the text [enforcing contractual choice of law provision requiring application of Delaware's shorter statute of limitations in contract dispute].)

SUPPLEMENT: [This section is current through the latest supplement]



55 of 178 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

I. INTRODUCTION

D. Conflict of Laws.

8. Statute of Limitations.

a. General Rule: Law of Forum Governs.

3. Constitutionality of Rule.

3 Witkin Cal. Proc. Actions § 55

[§ 55] Constitutionality of Rule.

Sun Oil Co. v. Wortman (1988) 486 U.S. 717, 108 S.Ct. 2117, 100 L.Ed.2d 743, rejected challenges, based on full faith and credit and due process, to the general rule that the law of the forum governs statute of limitations conflicts.

(a) "This Court has long and repeatedly held that the Constitution does not bar application of the forum State's statute of limitations to claims that in their substance are and must be governed by the law of a different State." (108 S.Ct. 2121, 100 L.Ed.2d 752.)

(b) Petitioner's contention that a statute of limitations may today be considered sufficiently substantive to require full faith and credit is unacceptable. "[L]ong established and still subsisting choice-of-law practices that come to be thought, by modern scholars, unwise, do not thereby become unconstitutional. If current conditions render it desirable that forum States no longer treat a particular issue as procedural for conflict of laws purposes, those States can themselves adopt a rule to that effect." (108 S.Ct. 2125, 100 L.Ed.2d 756.)

(c) As to due process: "Here again neither the tradition in place when the constitutional provision was adopted nor subsequent practice supports the contention. At the time the Fourteenth Amendment was adopted, this Court had not only explicitly approved (under the Full Faith and Credit Clause) forum-state application of its own statute of limitations, but the practice had gone essentially unchallenged. And it has gone essentially unchallenged since." (108 S.Ct. 2125, 100 L.Ed.2d 757.) (See *Clay v. Sun Ins. Office, Ltd.* (1964) 377 U.S. 179, 84 S.Ct. 1197, 1198, 12 L.Ed.2d 229, 231, *infra*, §61 [forum state may constitutionally apply its own longer limitations period despite contract providing for shorter period].)

SUPPLEMENT: [This section is current through the latest supplement]



56 of 178 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

I. INTRODUCTION

D. Conflict of Laws.

8. Statute of Limitations.

b. Exceptions.

1. The "Borrowing Statute."

3 Witkin Cal. Proc. Actions § 56

[§ 56] The "Borrowing Statute."

(1) *Scope of Statute.* If the law of the forum determines the running of the statute of limitations, it would normally follow that the action is not barred if the period of the forum has not run, despite the running of the period in the state where the cause arose. (See *Rest.2d, Conflict of Laws §142(2)*.) So, if a cause of action arose in State A, where the parties resided, and became barred there, the plaintiff might still be able to sue the defendant at a later date in State B. This is because State B's statute would not run while the defendant was a nonresident. (See *infra*, §711.)

Most states have enacted legislation to restrict this practice, by making the foreign limitation applicable ("borrowing it") to bar the claim. The California statute provides: "When a cause of action has arisen in another State, or in a foreign country, and by the laws thereof an action thereon cannot there be maintained against a person by reason of the lapse of time, an action thereon shall not be maintained against him in this State, except in favor of one who has been a citizen of this State, and who has held the cause of action from the time it accrued." (*C.C.P.* 361.) (See *Cope v. Anderson* (1947) 331 U.S. 461, 67 S.Ct. 1340, 1343, 91 L.Ed. 1602, 1608; *Nolan v. Transocean Air Lines* (1961) 365 U.S. 293, 81 S.Ct. 555, 5 L.Ed.2d 571 [California statute applied in New York federal action]; *Biewend v. Biewend* (1941) 17 C.2d 108, 115, 109 P.2d 701 [rule stated but defendant failed to raise question properly on appeal from adverse judgment]; *Rest.2d, Conflict of Laws §142*, Comment f; McDougal, *American Conflicts Law* 5th, §117; Scoles & Hay 3d, §3.11; 51 *Harv. L. Rev.* 1290; 63 *Harv. L. Rev.* 1262; 74 *Harv. L. Rev.* 606; 78 *Harv. L. Rev.* 881; 67 *A.L.R.2d* 216 [statutory actions]; 78 *A.L.R.3d* 639, 664 [contract actions]; 41 *A.L.R.4th* 1025 [nonstatutory personal injury actions]; 51 *Am.Jur.2d* (2000 ed.), *Limitation of Actions §108 et seq.*)

While the overriding purpose of borrowing statutes is to curtail forum shopping, *C.C.P.* 361 does not inquire into a plaintiff's subjective intentions in suing in California. Thus, *C.C.P.* 361 applies even where the plaintiff does not file an action in California solely to avoid a limitations period that has lapsed in a foreign state. (*Giest v. Sequoia Ventures* (2000) 83 C.A.4th 300, 303, 99 C.R.2d 476 [Montana limitations period was borrowed to bar action, even though plaintiff brought action in California only because several defendants could not be served in Montana].)

(2) *Exceptions.* The California borrowing statute does not apply in two situations:

(a) Where the cause of action is held by a citizen of this state from the time it accrued. (See *Stewart v. Spaulding* (1887) 72 C. 264, 266, 13 P. 661; *Cossmann v. DaimlerChrysler Corp.* (2003) 108 C.A.4th 370, 378, 133 C.R.2d 376 [exception requires that plaintiff be California citizen at time that cause of action accrues].)

(b) Where the cause of action is barred only in the state in which the defendant resided.

Some statutes borrow the limitation of the state of the defendant's residence; most, like California's, take the limitation of the state where the cause arose. (See *McKee v. Dodd* (1908) 152 C. 637, 640, 93 P. 854; 51 Harv. L. Rev. 1290; 63 Harv. L. Rev. 1262.)

In *Ginise v. Zaharia* (1964) 224 C.A.2d 153, 36 C.R. 406, plaintiff, a Connecticut resident, suffered personal injuries in Connecticut on December 7, 1959. He filed his complaint in California on December 7, 1960, but did not serve the defendant until April 29, 1961. Under the California "borrowing statute" the Connecticut limitations period governed. This is the same as California's (1 year); and Connecticut case law adopts the same method of computing the period as California does (excluding the first day). But Connecticut cases hold that an action is commenced by serving the defendant, and if that rule were applied under the borrowing statute, the action would be barred. *Held*, it was timely; the method of commencing an action is "procedural" and governed by the law of the forum. The opinion relies on two cases (federal District Court and New York), but concedes that there is doubt as to the correct rule. (224 C.A.2d 158.) This doubt is justified; there is no real "borrowing" if the action, barred in Connecticut under valid and binding Connecticut law, can be maintained in California.

SUPPLEMENT: [This section is current through the latest supplement]



57 of 178 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

I. INTRODUCTION

D. Conflict of Laws.

8. Statute of Limitations.

b. Exceptions.

2. Limitation on Substantive Right.

3 *Witkin Cal. Proc. Actions* § 57

[§ 57] Limitation on Substantive Right.

(1) *Statement of Rule.* The ordinary statute of limitations is to be distinguished from a time provision that is made a condition of the right itself. If the right has expired in the state that created it, no action may be brought on it elsewhere. (See *Wilson v. Lockheed Aircraft Corp.* (1962) 210 C.A.2d 451, 454, 26 C.R. 626; *Giest v. Sequoia Ventures* (2000) 83 C.A.4th 300, 304, 99 C.R.2d 476 [Montana statute of repose barred California wrongful death action, arising from decedent's exposure to asbestos in Montana]; *Rest.2d, Conflict of Laws* §143; 63 *Harv. L. Rev.* 1260; 2 *U.C.L.A. L. Rev.* 558; 95 *A.L.R.2d* 1162 [extraterritorial operation of limitation applicable to statutory action, other than by reason of borrowing statute]; 51 *Am.Jur.2d* (2000 ed.), *Limitation of Actions* §105; on what time provisions come within this classification, see *infra*, §441 et seq.)

(2) *Exceptions.* A conclusion apparently contrary to this principle was reached in *Weir v. Corbett* (1964) 229 C.A.2d 290, 40 C.R. 161, on questionable reasoning. On October 11, 1956, in the state of Washington, plaintiff received judgment against defendants. The Washington statute provides that 6 years after entry, a judgment shall cease to be a lien, "and no suit, action or other proceeding shall ever be had on any judgment rendered in this state by which the lien or duration of such judgment, claim or demand, shall be extended or continued in force for any greater or longer period than six years from the date of the entry of the original judgment." The Washington Supreme Court construed the statute as not a mere limitation affecting the remedy, but as taking away all right of renewal or action on the judgment. Plaintiff brought an action on the judgment in California on October 2, 1961, and summary judgment was entered in his favor on October 16, 1961. The 6-year period expired October 19, 1961, and defendants appealed, contending that the California judgment could have no effect beyond that period. *Held*, judgment affirmed.

(a) The Washington judgment merely determined the duty; it did not give any remedy in California. The enforcement procedure on a foreign judgment is governed by the law of the forum; and the fact that California gives a more effective remedy, or makes it available for a longer time, is not a failure to give full faith and credit to the Washington judgment. (229 C.A.2d 293.)

(b) The expiration of the Washington judgment is not a controlling factor. While the duty existed, plaintiff obtained

a California remedy; the subsequent expiration of the Washington remedy did not nullify the effect of the California judgment. (229 C.A.2d 295.)

A more reasonable escape from the operation of this principle was approved in *Parhm v. Parhm* (1969) 2 C.A.3d 311, 82 C.R. 570. Plaintiff wife and defendant husband were divorced in Washington in 1949, and he was ordered to pay \$ 40 per month for each child during minority. In 1965, plaintiff brought a California action to establish the decree as a California judgment and collect alleged arrears of \$ 22,360. The Washington statute of limitations extinguishes a judgment in 6 years (see *Weir*); hence, the obligation remained only as to severable installments falling due within the 6 years immediately preceding the action (from 1959 on). This would have given plaintiff a substantial recovery, except that defendant started making payments in 1959 and met all installments due since that time. The trial judge accordingly decided that all unpaid installments were barred, and denied recovery. *Held*, reversed. Under C.C. 1479, unless the debtor expressly directs payment to a specific obligation, the creditor can determine whether to apply it to the current or most remote installment. (2 C.A.2d 316; see 1 *Summary* (10th), *Contracts*, §765.) Plaintiff was therefore entitled to credit payments received after 1959 on any back installments not then wholly extinguished by the 6-year limitation. To determine those which she was entitled to credit and those which she could not, an accounting was ordered. (2 C.A.2d 317.)

Usually, the time provisions governing a substantive right are invoked to defeat recovery at the forum. Suppose, however, that the statute limiting the right has a longer period than that of the local statute of limitations. Does the foreign statute protect the right of action in the forum, or is the plaintiff in the same position as any other litigant with a valid foreign claim who must comply with the procedural rules of the forum? The authorities are divided. (See *Rest.2d, Conflict of Laws* §175, Comment g; 63 *Harv. L. Rev.* 1261; 23 *So. Cal. L. Rev.* 586.) And the United States Supreme Court has held that the forum state, while free to entertain the action despite the running of its own local statute, need not do so; i.e., the Full Faith and Credit Clause does not compel the forum state to use the limitations period of the foreign statute. (*Wells v. Simonds Abrasive Co.* (1953) 345 U.S. 514, 73 S.Ct. 856, 858, 97 L.Ed. 1211, 1215.)

SUPPLEMENT: [This section is current through the latest supplement]



58 of 178 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

I. INTRODUCTION

D. Conflict of Laws.

8. Statute of Limitations.

b. Exceptions.

3. Limitation in Federal Statute.

aa. Federal Statute Without Express Limitation.

3 *Witkin Cal. Proc. Actions* § 58

[§ 58] Federal Statute Without Express Limitation.

(1) *General Rule: Borrow From State Statute.* Rights under federal statutes without express limitations are governed by the limitations of the forum state. (See *Board of Regents of University of State of New York v. Tomanio* (1980) 446 U.S. 478, 100 S.Ct. 1790, 1795, 64 L.Ed.2d 440, 447 [action under federal Civil Rights Act of 1871]; *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson* (1991) 501 U.S. 350, 111 S.Ct. 2773, 2780, 115 L.Ed.2d 321, 335 [determining appropriate statute of limitations applicable to private action under Securities Exchange Act, §10b]; *North Star Steel Co. v. Thomas* (1995) 515 U.S. 29, 115 S.Ct. 1927, 1929, 132 L.Ed.2d 27, 30 [limitations period for action alleging violation of Worker Adjustment and Retraining Notification Act (WARN Act; see 3 *Summary* (10th), *Agency and Employment*, §214) is governed by state law]; *Rossiter v. Benoit* (1979) 88 C.A.3d 706, 715, 152 C.R. 65, *infra*, §665; 77 Cal. L. Rev. 133; 105 Harv. L. Rev. 399; 19 *Pepperdine L. Rev.* 485 [Uniform Statute of Limitations for Federal Securities Fraud Actions].)

In *Wilson v. Garcia* (1985) 471 U.S. 261, 105 S.Ct. 1938, 85 L.Ed.2d 254, an action under 42 U.S.C., §1983, based on alleged police brutality, was brought in New Mexico. The court made the following holdings in determining which New Mexico statute of limitations to borrow:

(a) Federal law governs the characterization of a §1983 claim. (105 S.Ct. 1943, 85 L.Ed.2d 261.)

(b) All §1983 claims must be characterized in the same way, regardless of the varying factual circumstances and legal theories presented in each case. (105 S.Ct. 1944, 85 L.Ed.2d 263.)

(c) Personal injury action is the characterization that best describes §1983 claims. (105 S.Ct. 1947, 85 L.Ed.2d 266.)

(d) The appropriate statute here is therefore the New Mexico statute providing a 3-year limitations period for personal injury actions. (105 S.Ct. 1942, 85 L.Ed.2d 260.)

Later cases have followed the analysis of *Wilson*. (See *West v. Conrail* (1987) 481 U.S. 35, 107 S.Ct. 1538, 95 L.Ed.2d 32 [when statute is borrowed, action is not barred if "commenced" in compliance with Federal Rules of Civil Procedure]; *Goodman v. Lukens Steel Co.* (1987) 482 U.S. 656, 107 S.Ct. 2617, 2620, 96 L.Ed.2d 572, 581 [applying *Wilson* to 42 U.S.C., §1981 action and borrowing Pennsylvania's 2-year statute of limitations for personal injury action]; *Parker v. Superior Court* (1985) 175 C.A.3d 1082, 1089, 223 C.R. 292 [*Wilson* applied prospectively only].)

Wilson solved the problem in states where one statute of limitations applies to all personal injury actions. Where state law provides multiple statutes of limitations for these actions, courts considering §1983 claims should borrow the general or residual statute for personal injury actions. (*Owens v. Okure* (1989) 488 U.S. 235, 109 S.Ct. 573, 577, 582, 102 L.Ed.2d 594, 606; *Huntington Park v. Superior Court* (1995) 34 C.A.4th 1293, 1297, 41 C.R.2d 68 [California's statute of limitations for personal injuries (see *infra*, §552 et seq.) applies to state court action under 42 U.S.C., §1983].)

(2) *Distinction: State Tolling Provisions Must Also Be Borrowed.* If a California statute of limitations is applied to a federal civil rights action under 42 U.S.C., §1983, California's tolling provisions for imprisonment (C.C.P. 352.1; see *infra*, §§702, 703) and for minority and insanity (C.C.P. 352; see *infra*, §696 et seq.) must also be applied. (C.C.P. 352.1(c); *Hardin v. Straub* (1989) 490 U.S. 536, 109 S.Ct. 1998, 104 L.Ed.2d 582 [imprisonment]; *Huntington Park v. Superior Court*, *supra*, 34 C.A.4th 1298 [minority and insanity].)

(3) *Distinction: Borrow From Another Federal Statute.* Although the most analogous state statute of limitations is generally applied when a federal statute contains no limitation, the limitations period found in another federal statute will be used instead when it "provides a closer analogy than available state statutes, and when the federal policies at stake and the practicalities of litigation make that rule a significantly more appropriate vehicle for interstitial lawmaking." (*Del Costello v. International Brotherhood of Teamsters* (1983) 462 U.S. 151, 103 S.Ct. 2281, 2294, 76 L.Ed.2d 476, 493; see *Agency Holding Corp. v. Malley-Duff & Associates* (1987) 483 U.S. 143, 107 S.Ct. 2759, 2763, 97 L.Ed.2d 121, 126 [uniform application of 4-year statute in Clayton Act (15 U.S.C., §15b) to civil enforcement actions under RICO Act (18 U.S.C., §1964(c)); quoting *Del Costello*]; 156 A.L.R. Fed 361 [accrual and tolling of civil RICO Act actions in aftermath of *Agency Holding Corp.*].)

(4) *Distinction: Federal "Catch-All" Statute of Limitations.* In 1990, Congress enacted a 4-year catch-all statute of limitations for actions arising under federal statutes enacted after December 1, 1990, that do not contain their own limitations period. (See 28 U.S.C., §1658.) This statute applies whenever a post-1990 federal enactment "creates a new right to maintain an action." (*Jones v. R.R. Donnelley & Sons Co.* (2004) 541 U.S. 369, 124 S.Ct. 1836, 1845, 158 L.Ed.2d 645, 657 [action alleging violation of 42 U.S.C., §1981 (see 8 Summary (10th), *Constitutional Law*, §814), as amended by Civil Rights Act of 1991 (see 8 Summary (10th), *Constitutional Law*, §849), was governed by 28 U.S.C., §1658, rather than by personal injury statute of limitations of forum state]; see *Sznytter v. Malone* (2007) 155 C.A.4th 1152, 1166, 66 C.R.3d 633, citing the text [action alleging violation of Telephone Consumer Protection Act of 1991 (47 U.S.C., §1227) was governed by 28 U.S.C., §1658, rather than by C.C.P. 338(a) (see *infra*, §664 et seq.), governing liability created by statute].)

SUPPLEMENT: [This section is current through the latest supplement]



59 of 178 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

I. INTRODUCTION

D. Conflict of Laws.

8. Statute of Limitations.

b. Exceptions.

3. Limitation in Federal Statute.

bb. Federal Statute With Express Limitation.

3 *Witkin Cal. Proc. Actions* § 59

[§ 59] Federal Statute With Express Limitation.

If the federal statute contains its own limitation, this will govern. (See 15 *Cal. L. Rev.* 173; 63 *Harv. L. Rev.* 1266; 70 *Harv. L. Rev.* 566; 71 *Harv. L. Rev.* 1567; 20 *Southwestern U. L. Rev.* 495 [comprehensive coverage of federal statutes of limitation, 1991 update]; 22 *Southwestern U. L. Rev.* 505 [same, 1993 update]; 24 *Southwestern U. L. Rev.* 511 [same, 1995 (and final) update]; 51 *Am.Jur.2d* (2000 ed.), *Limitation of Actions* §§119, 120.) The following cases are illustrative:

Engel v. Davenport (1926) 271 U.S. 33, 46 S.Ct. 410, 412, 70 L.Ed. 813, 817 [2-year federal limitations period protected action brought after California 1-year statutory period elapsed].

Angeles Chemical Co. v. Spencer & Jones (1996) 44 C.A.4th 112, 119, 51 C.R.2d 594 [in state action alleging hazardous waste contamination, limitations period in federal Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (see 12 *Summary* (10th), *Real Property*, §903) prevailed over California statutes of limitations].

Professional Collection Consultants v. Hanada (1997) 53 C.A.4th 1016, 1018, 62 C.R.2d 182 [assignee of FDIC was entitled to longer federal statute of limitations applicable to FDIC actions to enforce notes from failed banks, and was not governed by California statute of limitations].

Bunnell v. Department of Corrections (1998) 64 C.A.4th 1360, 1368, 76 C.R.2d 58 [Govt.C. 945.3 (false arrest action against peace officer is tolled while criminal charges are pending against plaintiff) did not toll action for illegal wiretapping under federal law, where federal statute had its own limitations period].

LPP Mortg. v. Bizar (2005) 126 C.A.4th 773, 777, 24 C.R.3d 598 [following *Professional Collection Consultants*; in action on promissory note by assignee to Small Business Administration, longer federal statute of limitations applicable to actions by federal Government for breach of contract prevailed over shorter California statute of

limitations governing breach of contract].

SUPPLEMENT: [This section is current through the latest supplement]



60 of 178 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

I. INTRODUCTION

D. Conflict of Laws.

8. Statute of Limitations.

b. Exceptions.

4. Action on Revived Judgment.

3 *Witkin Cal. Proc. Actions* § 60

[§ 60] Action on Revived Judgment.

(1) *General Rule.* If revival proceedings are viewed as creating a new judgment, this is enforceable under the Full Faith and Credit Clause, even though an action on the original judgment would have been barred by limitations in the forum. (*Union Nat. Bank of Wichita, Kansas v. Lamb* (1949) 337 U.S. 38, 69 S.Ct. 911, 93 L.Ed. 1190; see 63 Harv. L. Rev. 1262; 2 U.C.L.A. L. Rev. 467.) Whether the proceeding is to be considered a new action or a continuation of the old action in which the judgment was rendered is determined by the law of the state that rendered the judgment, not the foreign forum in which the revived judgment is sought to be enforced. (*Jacobs v. Sprague* (1955) 131 C.A.2d Supp. 885, 887, 280 P.2d 919.)

(2) *Constitutionality of Rule.* In *Watkins v. Conway* (1966) 385 U.S. 188, 87 S.Ct. 357, 17 L.Ed.2d 286, W was given a judgment against C in Florida on October 5, 1955. Florida had a 20-year statute of limitations on judgments. Over 5 years later W sued on the judgment in Georgia. Defendant was granted summary judgment based on the Georgia 5-year statute of limitations, and W challenged the constitutionality of the Georgia law. *Held*, there was no constitutional infirmity. If Georgia had discriminated against foreign judgments by imposing a shorter statute of limitations than on domestic judgments, W might have had a constitutional objection. But the Georgia statute bars suits on foreign judgments only if they cannot be revived in the state of rendition. W could still go back there and revive it, and the Georgia statute would then run from the latest revival. In other words, Georgia gave full faith and credit to the law of the judgment state; and if the judgment state had a short statute of limitations, the bar imposed by Georgia would be merely that of the state of rendition. (87 S.Ct. 358, 17 L.Ed.2d 288.)

SUPPLEMENT: [This section is current through the latest supplement]



61 of 178 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

I. INTRODUCTION

D. Conflict of Laws.

8. Statute of Limitations.

b. Exceptions.

5. Limitation Shortened by Contract.

3 Witkin Cal. Proc. Actions § 61

[§ 61] Limitation Shortened by Contract.

A contractual provision shortening the limitations period also might be viewed as part of the obligation, a matter of substance. On this theory, if valid under the law governing the contract, it could not be disregarded by the forum. (See 63 *Harv. L. Rev.* 1182.) It has been held, however, that a forum state may constitutionally apply its own longer limitations period despite a contractual provision shortening the limitations period (see *infra*, §469 et seq.). In *Clay v. Sun Ins. Office, Ltd.* (1964) 377 U.S. 179, 84 S.Ct. 1197, 12 L.Ed.2d 229, plaintiff, a citizen of Illinois, bought a personal property floater policy from defendant insurance company, a British corporation. Then he became a resident and citizen of Florida, and the loss occurred there. Under the policy, a claim was barred in 12 months, this provision being valid under Illinois law. Two years after the loss, he brought suit in the Florida federal district court, relying on Florida statutes nullifying such clauses if they require suit in less than 5 years. In a prior decision, the case was sent back for construction of Florida law, and the Florida Supreme Court answered the question in favor of plaintiff. Then the Court of Appeals decided that it was a violation of due process for Florida to apply its statute to the Illinois contract. *Held*, reversed.

(a) The contract was ambulatory, suit could be brought in any state, and the forum state did not have to substitute the contracting state's statute for its own. (84 S.Ct. 1198, 12 L.Ed.2d 231.)

(b) Cases in which activities in the forum state are nonexistent or too slight to make application of the local law consistent with due process are distinguishable. The policy was described as "World Wide." Insurance companies promised protection for personal property anywhere; and the company was licensed to do business in Florida. (84 S.Ct. 1199, 12 L.Ed.2d 232.) *Order of United Commercial Travelers of America v. Wolfe* (1947) 331 U.S. 586, 67 S.Ct. 1355, 91 L.Ed. 1687, 7 Summary (10th), *Constitutional Law*, §34, is "a highly specialized decision dealing with unique facts" (fraternal society with "indivisible unity"). "We do not extend that rule nor apply it here." (84 S.Ct. 1199, 12 L.Ed.2d 232.) (See McDougal, *American Conflicts Law* 5th, §§51, 52 [limitation provisions in insurance contracts].)

A more recent California decision opted to disregard the law of the forum. Employing the modern governmental interest approach to conflict of laws problems (see *supra*, §44), the court upheld a contractual choice of law provision

requiring application of Delaware's shorter statute of limitations in a dispute over the purchase of shares of stock in a leveraged buyout. (*Hambrecht & Quist Venture Partners v. American Med. Int.* (1995) 38 C.A.4th 1532, 1544, 46 C.R.2d 33, 1 Summary (10th), Contracts, §70, citing the text; see 1 Summary (10th), Contracts, §66 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]



62 of 178 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

II. TYPES OF ACTIONS AND SPECIAL PROCEEDINGS

A. Nature of Action.

1. Definition and Distinctions.

3 *Witkin Cal. Proc. Actions* § 62

[§ 62] Definition and Distinctions.

(1) *Definition.* "An action is an ordinary proceeding in a court of justice by which one party prosecutes another for the declaration, enforcement, or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense." (*C.C.P.* 22.) Thus, so far as civil actions are concerned (see *C.C.P.* 30, *infra*, §68), an "action" means the same thing as a "suit." (See *16 Am.Jur.2d* (1998 *ed.*), *Conflict of Laws* §151 et seq.) (On meaning of "cause of action," see 4 *Cal. Proc.* (5th), *Pleading*, §34 et seq.)

The broad definition covers the following:

(a) Suits at law or in equity. (*Coleman v. Los Angeles* (1919) 180 C. 714, 720, 182 P. 440.)

(b) Certain adversary proceedings that take place during a probate proceeding. (*Estate of Morrison* (1932) 125 C.A. 504, 508, 14 P.2d 102 [contest to revoke probate of will].)

(c) Actions for declaratory relief. (*Maguire v. Hibernia Savings & Loan Soc.* (1944) 23 C.2d 719, 733, 146 P.2d 673.)

(d) Actions for dissolution of marriage. (*In re Marriage of Galis* (1983) 149 C.A.3d 147, 153, 196 C.R. 659.)

(2) *Distinction: Demurrer.* Defensive matter raised in a demurrer does not constitute an "action." (*Salawy v. Ocean Towers Housing Corp.* (2004) 121 C.A.4th 664, 673, 17 C.R.3d 427, citing the text.)

(3) *Distinction: Administrative Proceeding.* The phrase "suit or action" "unambiguously applies to proceedings in court and does not encompass administrative proceedings that do not involve a lawsuit." (*Lockheed Martin Corp. v. Continental Ins. Co.* (2005) 134 C.A.4th 187, 200, 35 C.A.4th 799, quoting the text.)

West's Key Number Digest, Action 16 et seq.

SUPPLEMENT: [This section is current through the latest supplement]



63 of 178 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

II. TYPES OF ACTIONS AND SPECIAL PROCEEDINGS

A. Nature of Action.

2. Classification of Actions.

3 *Witkin Cal. Proc. Actions* § 63

[§ 63] Classification of Actions.

(1) *In General.* There are various methods of describing the meaning and scope of the term "action." (See *1 Am.Jur.2d* (2005 ed.), *Actions* §26 et seq.) A broad classification is made by dividing actions into civil and criminal. (*C.C.P.* 24; see *infra*, §68.) For purposes of determining jurisdiction, venue, the statute of limitations, and other matters, there may be forms of action, classified according to the nature of the substantive right or the remedy sought, e.g., legal and equitable, tort and contract, in personam and in rem, etc. (See *infra*, §118 et seq.)

(2) *Disfavored Actions.* It is occasionally suggested that certain types of actions, e.g., malicious prosecution actions, are "disfavored." The Supreme Court in *Jaffe v. Stone* (1941) 18 C.2d 146, 114 P.2d 335, observed that this label merely indicates that the nature of the tort and its defenses place a heavy burden of proof on the plaintiff. (18 C.2d 159.) (See 5 *Cal. Proc.* (5th), *Pleading*, §750.)

SUPPLEMENT: [This section is current through the latest supplement]



64 of 178 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

II. TYPES OF ACTIONS AND SPECIAL PROCEEDINGS

B. Nature of Special Proceeding.

1. Distinguished From Action.

3 Witkin Cal. Proc. Actions § 64

[§ 64] Distinguished From Action.

(1) *Characteristics of Special Proceedings.* "Every other remedy is a special proceeding." (C.C.P. 23.) Thus, a legal proceeding that, under the common law and equity practice, was not an action at law or a suit in equity, is a special proceeding.

The two chief characteristics of special proceedings are: (a) They are established by statute, and (b) the statutes usually (though not invariably) create new remedies unknown to the common law or equity courts. (See *Carpenter v. Pacific Mut. Life Ins. Co. of Calif.* (1937) 10 C.2d 307, 327, 74 P.2d 761 [proceeding to rehabilitate or liquidate insurance company; court pointed out that Commissioner was not seeking to enforce private right or redress or prevent private wrong, and hence was not prosecuting "action"]; *Tide Water Associated Oil Co. v. Superior Court* (1955) 43 C.2d 815, 823, 279 P.2d 35 [action under Pub.Res.C. 3310 and 3312 to enjoin unreasonable waste of gas is special proceeding "by which the People are prosecuting other parties for the enforcement or protection of a right and the prevention of a wrong"]; *Woods-Drury v. Superior Court* (1936) 18 C.A.2d 340, 344, 63 P.2d 1184 ["Since special proceedings are created and authorized by statute, the jurisdiction over any special proceeding is limited by the terms and conditions of the statute under which it was authorized"]; *Boggs v. North Amer. Bond & Mortg. Co.* (1937) 20 C.A.2d 316, 319, 66 P.2d 1253 ["Special proceedings being of statutory origin, do not proceed according to the course of the common law but give new rights and afford new remedies"]; *Rosner v. Benedict Heights* (1963) 219 C.A.2d 1, 6, footnote 3, 32 C.R. 764, quoting the text; *McRae v. Superior Court* (1963) 221 C.A.2d 166, 170, 34 C.R. 346.)

(2) *Rejection of "New Remedies" Theory.* The theory has been advanced that the code classification of special proceedings, coupled with the maxim "for every wrong there is a remedy" (supra, §5), is a source of new remedies. The reasoning is that if a wrong is shown and no appropriate traditional action at law or in equity is discovered, necessarily the remedy for that wrong must be a special proceeding, the only other kind of legal proceeding left. The courts, however, have rejected this approach, treating C.C.P. 23 as a mere label or classification applicable to a limited group of proceedings created and defined by express statute.

In *Gillette v. Gillette* (1932) 122 C.A. 640, 10 P.2d 760, the court refused to entertain a petition for an accounting, which sought a court determination of the compensation of trustees and their attorneys, though no dispute was alleged. "In the absence of statutory provisions authorizing special proceedings, the mere fact that a private transaction does not

involve 'the enforcement or protection of a right, the redress or prevention of a wrong or the punishment of a public offense' does not necessarily constitute it a special proceeding over which a court may exercise jurisdiction. If this were true our courts would be overwhelmed with a multitude of duties such as adjusting private accounts and furnishing advice upon law and facts where no controversy exists." (122 C.A. 643.) (See *Oil Well Supply Co. v. Superior Court* (1935) 9 C.A.2d 624, 626, 51 P.2d 908.)

West's Key Number Digest, Action 20

SUPPLEMENT: [This section is current through the latest supplement]



65 of 178 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

II. TYPES OF ACTIONS AND SPECIAL PROCEEDINGS

B. Nature of Special Proceeding.

2. Statutory Classes.

3 *Witkin Cal. Proc. Actions* § 65

[§ 65] Statutory Classes.

Special proceedings are found in Part III of the Code of Civil Procedure (*C.C.P. 1063 et seq.*), and also in various places throughout the other codes. The following are among the more important ones:

(1) *Petitions for Writs.*

(a) Certiorari (writ of review). (*C.C.P. 1067 et seq.*; see 14 *Am.Jur.2d* (2000 ed.), *Certiorari* §1 et seq.; 5B *Am.Jur. P.P. Forms* (2004 ed.), *Certiorari*, Form 1 et seq.; 8 *Cal. Proc.* (5th), *Extraordinary Writs*, §5.)

(b) Mandamus. (*C.C.P. 1084 et seq.*; see 17 *Am.Jur. P.P. Forms* (2000 ed.), *Mandamus*, Form 1 et seq.; 8 *Cal. Proc.* (5th), *Extraordinary Writs*, §23.)

(c) Prohibition. (*C.C.P. 1102 et seq.*; see 20B *Am.Jur. P.P. Forms* (2008 ed.), *Prohibition*, Form 1 et seq.; 8 *Cal. Proc.* (5th), *Extraordinary Writs*, §18.)

(2) *Summary Proceedings for Forcible Entry and Unlawful Detainer.* (*C.C.P. 1159 et seq.*; see 35A *Am.Jur.2d* (2001 ed.), *Forcible Entry and Detainer* §1 et seq.; 12 *Am.Jur. P.P. Forms* (1999 ed.), *Forcible Entry and Detainer*, Form 1 et seq.; 8B *Am.Jur. Legal Forms 2d* (2007 ed.), §121:1 et seq.; 12 *Summary* (10th), *Real Property*, §703 et seq.; 5 *Cal. Proc.* (5th), *Pleading*, §§638 et seq., 649 et seq., 653; 7 *Cal. Proc.* (5th), *Judgment*, §33.)

(3) *Contempt.* (*C.C.P. 1209 et seq.*; see 17 *Am.Jur.2d* (2004 ed.), *Contempt* §1 et seq.; 7 *Am.Jur. P.P. Forms* (2002 ed.), *Contempt*, Form 1 et seq.; 7 *Cal. Proc.* (5th), *Trial*, §168 et seq.; 8 *Cal. Proc.* (5th), *Enforcement of Judgment*, §340 et seq.; *infra*, §69.)

(4) *Enforcement of Liens.* (*C.C.P. 1180, 1203.50 et seq.*; see 16B *Am.Jur. P.P. Forms* (2000 ed.), *Liens*, Form 20 et seq.; 12 *Am.Jur. Legal Forms 2d* (1998 ed.), §165:3 et seq.; 4 *Summary* (10th), *Secured Transactions in Personal Property*, §13 [chattel mortgage], §18 [inventory lien], §171 et seq. [procedures under Uniform Commercial Code]; 13 *Summary* (10th), *Personal Property*, §222 et seq. [hotelkeeper's lien], §§228 and 229 [warehouseman's lien], §230 [self-service storage facility owner's lien], §231 [carrier's lien], §232 [household goods carrier's lien], §233 et seq. [statutory improvers' and storage liens], §242 [towing and storage lien], §243 [aircraft keeper's or repairer's lien], §244

[hospital's lien on damages], §245 [agricultural supply liens].)

(5) *Proceedings for Summary Relief*. Proceedings for summary relief without usual trial proceedings, such as confession of judgment without action and submission of controversy without action. (*C.C.P.* 1132 et seq., 1138 et seq.; see 46 *Am.Jur.2d* (2006 ed.), *Judgments* §183 et seq.; 15 *Am.Jur. P.P. Forms* (2005 ed.), *Judgments*, Form 129 et seq.; 6 *Cal. Proc.* (5th), *Proceedings Without Trial*, §§79, 80 [submission of controversy without action], §128 et seq. [confession of judgment].)

(6) *Arbitration Proceedings*. (*C.C.P.* 1141.10 et seq. [judicial arbitration]; *C.C.P.* 1280 et seq. [arbitration agreements]; see C.E.B., 2 *Real Property Remedies and Damages* 2d, Chap. 14 [alternative dispute resolution for real property actions]; 5 *Am.Jur.2d* (2007 ed.), *Alternative Dispute Resolution* §1 et seq.; 11 *Am.Jur. Trials* 327 [management representation in labor dispute]; 2A *Am.Jur. P.P. Forms* (2000 ed.), *Arbitration and Award*, Form 1 et seq.; 2A *Am.Jur. Legal Forms* 2d (2004 ed.), §23:1 et seq.; 6 *Cal. Proc.* (5th), *Proceedings Without Trial*, §499 et seq. [arbitration agreements], §579 et seq. [judicial arbitration].)

(7) *Dissolution of Corporations*. (*Corp.C.* 1900 et seq.; see *Cal. Transactions Forms*, 3 *Business Entities* §13:1 et seq.; 19 *Am.Jur.2d* (2004 ed.), *Corporations* §2348 et seq.; 7B *Am.Jur. P.P. Forms* (2000 ed.), *Corporations*, Forms 367 et seq., 410 et seq.; 6 *Am.Jur. Legal Forms* 2d (2002 ed.), §74:1619 et seq.; 9 *Summary* (10th), *Corporations*, §211 et seq.)

(8) *Eminent Domain*. (*C.C.P.* 1230.010 et seq.; see 26 *Am.Jur.2d* (2004 ed.), *Eminent Domain* §1 et seq.; 4 *Proof of Facts* 649 [damages]; 8 *Am.Jur. Trials* 57 [rural property]; 11 *Am.Jur. Trials* 189 [urban property]; 9A *Am.Jur. P.P. Forms* (2005 ed.), *Eminent Domain*, Form 1 et seq.; 7B *Am.Jur. Legal Forms* 2d (2006 ed.), §97:1 et seq.; 8 *Summary* (10th), *Constitutional Law*, §1170 et seq.)

(9) *Escheat of Unclaimed Property*. (*C.C.P.* 1300 et seq., 1500 et seq., 1600 et seq.; see *Cal. Transactions Forms*, 3 *Business Entities* §23:1 et seq.; 1 *Am.Jur.2d* (2005 ed.), *Abandoned, Lost, and Unclaimed Property* §§43, 48; 9A *Am.Jur. P.P. Forms* (2005 ed.), *Escheat*, Form 1 et seq.; 13 *Summary* (10th), *Personal Property*, §37 et seq.)

(10) *Change of Personal Name*. (*C.C.P.* 1275 et seq.; see 13 *Summary* (10th), *Personal Property*, §23 et seq.)

(11) *Contesting Elections*. (*Elec.C.* 11000 et seq.; see 26 *Am.Jur.2d* (2004 ed.), *Elections* §381 et seq.; 9 *Am.Jur. P.P. Forms* (2006 ed.), *Elections*, Form 77 et seq.)

(12) *Probate and Related Proceedings*.

(a) Probate of wills and administration of estates of decedents. (*Prob.C.* 7000 et seq.; see 25 *Am.Jur. P.P. Forms* (2001 ed.), *Wills*, Form 55 et seq.; 14 *Summary* (10th), *Wills and Probate*, §404 et seq.)

(b) Determining heirship. (*Prob.C.* 11700 et seq.; see 9 *Proof of Facts* 1 [establishing family relationship]; 8B *Am.Jur. P.P. Forms* (2006 ed.), *Descent and Distribution*, Form 1 et seq.; 14 *Summary* (10th), *Wills and Probate*, §719 et seq.)

(c) Establishing fact of death. (*Prob.C.* 200 et seq.; see 22A *Am.Jur.2d* (2003 ed.), *Death* §423 et seq.; 4 *Proof of Facts* 1; 7A *Am.Jur. Legal Forms* 2d (2007 ed.), §85:1 et seq.; 14 *Summary* (10th), *Wills and Probate*, §13 et seq.)

(d) Escheat of decedents' estates. (*Prob.C.* 6404, 6800, 6806; see 27A *Am.Jur.2d* (2008 ed.), *Escheat* §1 et seq.; 9A *Am.Jur. P.P. Forms* (2005 ed.), *Escheat*, Form 1 et seq.; 14 *Summary* (10th), *Wills and Probate*, §98 et seq.; *infra*, §71.)

(e) Guardianship. (*Prob.C.* 1500 et seq.; see *Cal. Civil Practice*, 4 *Probate and Trust Proceedings*, Chaps. 25, 26, and 28; C.E.B., *California Guardianship Practice*; *Cal. Transactions Forms*, 4 *Estate Planning* §§19:93 et seq., 19:139 et seq.; 39 *Am.Jur.2d* (1999 ed.), *Guardian and Ward* §1 et seq.; 13 *Am.Jur. P.P. Forms* (1999 ed.), *Guardian and Ward*,

Form 1 et seq.; 9A Am.Jur. Legal Forms 2d (2002 ed.), §133:1 et seq.; 14 *Summary* (10th), *Wills and Probate*, §916 et seq.)

(f) Probate conservatorship. (*Prob.C.* 1800 et seq.; see Cal. Civil Practice, 4 Probate and Trust Proceedings, Chaps. 25, 27, 28, and 29; C.E.B., California Conservatorship Practice; 39 *Am.Jur.2d* (1999 ed.), *Guardian and Ward* §1 et seq.; 13 Am.Jur. P.P. Forms (1999 ed.), *Guardian and Ward*, Form 1 et seq.; 9A Am.Jur. Legal Forms 2d (2002 ed.), §133:1 et seq.; 14 *Summary* (10th), *Wills and Probate*, §932 et seq.)

(13) *Compromise of Minor's Claim*. (*Prob.C.* 3500; see 10 *Summary* (10th), *Parent and Child*, §297.)

(14) *Termination of Parental Relationship*. (*Family C.* 7800 et seq.; see 10 *Summary* (10th), *Parent and Child*, §307 et seq.)

(15) *Adoption*. (*Family C.* 8500 et seq.; see 2 *Am.Jur.2d* (2004 ed.), *Adoption* §§1, 4, 5; 1 *Proof of Facts* 199; 1B Am.Jur. P.P. Forms (2003 ed.), *Adoption*, Form 1 et seq.; 1A Am.Jur. Legal Forms 2d (2007 ed.), §9:1 et seq.; 10 *Summary* (10th), *Parent and Child*, §70 et seq.)

(16) *Mechanics' Liens*. (*C.C.* 3109 et seq.; see C.E.B., *Mechanics' Liens* 3d; 17B Am.Jur. P.P. Forms (2000 ed.), *Mechanics' Liens*, Form 1 et seq.; 12A Am.Jur. Legal Forms 2d (1999 ed.), §173:1 et seq.; 4 *Summary* (10th), *Security Transactions in Real Property*, §26 et seq.; *infra*, §217 et seq.)

(17) *Conservatorship Proceeding Against Insolvent Insurance Company*. (*Ins.C.* 1011; see 43 *Am.Jur.2d* (2003 ed.), *Insurance* §93 et seq.; 2 *Summary* (10th), *Insurance*, §11; 7 *Summary* (10th), *Constitutional Law*, §678.)

(18) *Proceeding To Restore Lost or Destroyed Document*. (*C.C.P.* 1953.10 et seq.; see 2 *Cal. Evidence* (4th), *Documentary Evidence*, §56.)

(19) *Trial of Present Sanity of Criminal Defendant*. (*P.C.* 1368; 5 *Cal. Crim. Law* (3d), *Criminal Trial*, §694 et seq.; *infra*, §79.)

(20) *Civil Commitment and Related Proceedings*.

(a) Commitment proceedings under Lanterman-Petris-Short Act against mentally disordered persons (*Welf.C.* 5000 et seq., *infra*, §80 et seq.), alcoholics (*Welf.C.* 5170 et seq., 5225 et seq., *infra*, §88), and users of controlled substances (*Welf.C.* 5340 et seq., *infra*, §89).

(b) Commitment proceedings for mentally disordered minors under Children's Civil Commitment and Mental Health Treatment Act. (*Welf.C.* 5585 et seq., *infra*, §90.)

(c) Proceedings for judicial commitment of narcotic addicts (*Welf.C.* 3050 et seq., 3100 et seq., *infra*, §91), mentally retarded persons (*Welf.C.* 6500 et seq., *infra*, §92 et seq.), and sexually violent predators (*Welf.C.* 6600 et seq., *infra*, §96).

(d) Juvenile court placements of dependent children (*Welf.C.* 362), wards adjudged for delinquency (*Welf.C.* 727), wards adjudged for crime (*Welf.C.* 727, 730), and mentally disordered or mentally retarded minors (*Welf.C.* 6550, 6551, *infra*, §95).

(e) Proceedings for conservatorship of gravely disabled persons. (*Welf.C.* 5350 et seq., *infra*, §97 et seq.)

(f) Proceedings for conservatorship of endangered elder and dependent adults. (*Welf.C.* 15700 et seq., *infra*, §§116, 117.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Petitions for Writs.*

(a) *Certiorari (writ of review).* See 14 Am.Jur.2d (2009 ed.), *Certiorari* §1 et seq.

(2) *Summary Proceedings for Forcible Entry and Unlawful Detainer.* See 12 Am.Jur. P.P. Forms (2008 ed.), *Forcible Entry and Detainer*, Form 1 et seq.(4) *Enforcement of Liens.* See 12 Am.Jur. Legal Forms 2d (2008 ed.), §165:1 et seq.(12) *Probate and Related Proceedings.*

(e) *Guardianship.* See 39 Am.Jur.2d (2008 ed.), *Guardian and Ward* §1 et seq.; 13 Am.Jur. P.P. Forms (2009 ed.), *Guardian and Ward*, Form 1 et seq.

(f) *Probate conservatorship.* See 39 Am.Jur.2d (2008 ed.), *Guardian and Ward* §1 et seq.; 13 Am.Jur. P.P. Forms (2009 ed.), *Guardian and Ward*, Form 1 et seq.(16) *Mechanics' Liens.* See 12A Am.Jur. Legal Forms 2d (2008 ed.), §173:1 et seq.



66 of 178 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

II. TYPES OF ACTIONS AND SPECIAL PROCEEDINGS

B. Nature of Special Proceeding.

3. General Policy of Uniformity in Procedure.

3 *Witkin Cal. Proc. Actions* § 66

[§ 66] General Policy of Uniformity in Procedure.

(1) *Nature of Policy.* The theory of the Code of Civil Procedure is that practice and procedure must be as nearly uniform as is practicable, and the statutes seek to carry out this object in two different ways:

(a) By using similar language in the statutes regulating various remedies.

(b) By a series of catch-all provisions in the various chapters of the Code of Civil Procedure establishing special proceedings, which usually read as follows: "Except as otherwise provided in this title, the provisions of part two of this code are applicable to and constitute the rules of practice in the proceedings mentioned in this title." (See, e.g., *C.C.P. 1109, 1177, 1230.040*; *C.C. 3259*; see also *C.C.P. 363* ["action," as used in title on statutes of limitation, "is to be construed, whenever it is necessary so to do, as including a special proceeding"]; *C.C.P. 2016.020(a)* ["action" includes "special proceeding" in discovery statutes]; *Prob.C. 1000* [unless special rule applies, general rules of civil practice govern probate proceedings]; *Barnes v. Glide* (1897) 117 C. 1, 6, 48 P. 804 [mandamus proceeding is subject to statutes of limitation]; *W.R. Grace & Co. v. California Emp. Com.* (1944) 24 C.2d 720, 726, 151 P.2d 215 [mandamus proceeding is subject to defense of another action pending, pursuant to *C.C.P. 1089* and *1109*]; *Estate of Jacobson* (1942) 56 C.A.2d 255, 257, 132 P.2d 229 [proceeding involving incompetent's estate is subject to statute of limitations]; *Vladu v. California* (1959) 175 C.A.2d 50, 52, 345 P.2d 302 [statute on mandatory dismissal for failure to prosecute applied to special proceeding by alien heirs under *C.C.P. 1353* to recover escheated funds]; on applicability of limitation statutes to special proceedings, see *infra*, §447.)

(2) *Purpose of Policy.* In *Holman v. Toten* (1942) 54 C.A.2d 309, 128 P.2d 808, the court, discussing the various catch-all provisions mentioned above, said: "Evidently a common purpose was to be carried out by all of these sections. That purpose was to make the 'rules of practice' in all of these special proceedings identical, so far as not otherwise specially provided, with those prevailing in civil actions generally." The court then sharply distinguished the general rules of practice in actions, thus made applicable to special proceedings, from certain special rules of practice found in Code of Civil Procedure, Part II, Title X, governing "actions in particular cases." Accordingly, *C.C.P. 726*, the statute on the particular action to foreclose a mortgage, was held inapplicable to the special proceeding for foreclosure of a mechanic's lien. (54 C.A.2d 316.)

SUPPLEMENT: [This section is current through the latest supplement]



67 of 178 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

II. TYPES OF ACTIONS AND SPECIAL PROCEEDINGS

B. Nature of Special Proceeding.

4. Principal Procedural Differences.

3 *Witkin Cal. Proc. Actions* § 67

[§ 67] Principal Procedural Differences.

Notwithstanding the general objective of uniformity (see *supra*, §66), the statutes creating special proceedings often contain distinct procedural provisions, or are so drafted as to make the application of ordinary procedural rules inconsistent. The following cases are illustrative:

Carpenter v. Pacific Mut. Life Ins. Co. of Calif. (1937) 10 C.2d 307, 327, 74 P.2d 761 [no findings required in special proceeding unless statute so provides].

Carroll v. Carroll (1940) 16 C.2d 761, 768, 108 P.2d 420 [decree in special proceeding for restoration to competency was not governed by statutes relating to entry of judgment in civil action].

Misrach v. Liederman (1936) 14 C.A.2d Supp. 757, 760, 58 P.2d 746 [no right to jury trial in special proceeding unless expressly given by statute].

Boggs v. North Amer. Bond & Mortg. Co. (1937) 20 C.A.2d 316, 318, 66 P.2d 1253 [statute on admission from failure to deny allegations of complaint was not applicable to petition in particular statutory special proceeding].

People v. One 1941 Chrysler 6 Touring Sedan, Engine No C34-9458 (1947) 81 C.A.2d 18, 30, 183 P.2d 368 [former proceeding to forfeit vehicle used in illegal transportation of narcotics; notice of seizure distinguished from summons].

Horney v. Superior Court (1948) 83 C.A.2d 262, 267, 188 P.2d 552 [will contest; probate citation distinguished from summons].

Kinder v. Superior Court (1978) 78 C.A.3d 574, 581, 144 C.R. 291 [Insurance Commissioner's liquidation of insolvent insurance company; no right to jury trial or to findings].

SUPPLEMENT: [This section is current through the latest supplement]



68 of 178 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

II. TYPES OF ACTIONS AND SPECIAL PROCEEDINGS

C. Civil, Criminal, and Quasi-Criminal Proceedings.

1. Civil and Criminal Actions.

3 Witkin Cal. Proc. Actions § 68

[§ 68] Civil and Criminal Actions.

The distinction between civil and criminal actions is fundamental. A separate branch of the law covers crimes, the jurisdiction of courts over criminal proceedings, and criminal procedure. (See *42 Hastings L. J.* 1325 [Constitutional Limits on Using Civil Remedies To Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction]; *4 Cal. Crim. Law (3d)*, *Introduction to Criminal Procedure*, §1 et seq.; *4 Cal. Crim. Law (3d)*, *Jurisdiction and Venue*, §1 et seq.) The nature of the action is determined under mutually exclusive statutory definitions. "A civil action is prosecuted by one party against another for the declaration, enforcement or protection of a right, or the redress or prevention of a wrong." (*C.C.P.* 30.) "The proceeding by which a party charged with a public offense is accused and brought to trial and punishment, is known as a criminal action." (*P.C.* 683.) "A criminal action is prosecuted in the name of the people of the State of California, as a party, against the person charged with the offense." (*P.C.* 684.) (See *People v. Ferrera (1957)* 149 *C.A.2d* 850, 853, 309 *P.2d* 533, quoting the text; *Lam v. Bureau of Sec. & Investigative Services (1995)* 34 *C.A.4th* 29, 37, 40 *C.R.2d* 137 [administrative mandamus proceeding seeking to overturn revocation of locksmith's permit based on commission of misdemeanor was civil, not criminal or quasi-criminal; thus, general statute of limitations for misdemeanors could not be borrowed]; 2 *Am.Jur.2d (2005 ed)*, *Actions* §32.)

Thus, it is easy to distinguish a civil action (A v. B) from a criminal action (People v. B). But a more careful analysis is required in the case of special proceedings. (See *supra*, §64 et seq.)

West's Key Number Digest, Action 18

SUPPLEMENT: [This section is current through the latest supplement]



69 of 178 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

II. TYPES OF ACTIONS AND SPECIAL PROCEEDINGS

C. Civil, Criminal, and Quasi-Criminal Proceedings.

2. Contempt.

3 *Witkin Cal. Proc. Actions* § 69

[§ 69] Contempt.

(1) *Nature of Proceeding.* Although prosecuted under the title of the main action or proceeding, contempt is nevertheless a separate proceeding. (See *In re Wales* (1957) 153 C.A.2d 117, 119, 315 P.2d 433; *American Fire Protection Service v. Williams* (1959) 171 C.A.2d 397, 402, 340 P.2d 644.) And, although the proceedings are located in the Code of Civil Procedure with other "special proceedings of a civil nature" (C.C.P. 1209 et seq.), they have long been held to be quasi-criminal in character. (See *Culver City v. Superior Court* (1952) 38 C.2d 535, 541, 241 P.2d 258; *Safer v. Superior Court* (1975) 15 C.3d 230, 235, footnote 8, 124 C.R. 174, 540 P.2d 14, 8 Cal. Proc. (5th), *Enforcement of Judgment*, §341 [district attorney may not institute C.C.P. 1209 contempt proceeding regardless of characterization as criminal or civil]; *Turkington v. Municipal Court* (1948) 85 C.A.2d 631, 635, 193 P.2d 795.)

The peculiar character of contempt proceedings was emphasized in *Vallindras v. Massachusetts Bonding & Ins. Co.* (1954) 42 C.2d 149, 265 P.2d 907. An order of commitment for contempt was held void for defects in specifying the act to be performed (C.C.P. 1219). *Held*, however, this did not necessarily entitle plaintiff to maintain an action for false imprisonment against the sheriff who took him into custody; i.e., the right to release from custody is determined by rules of criminal law while the right to damages for false imprisonment depends on rules of civil law. "[I]t is proper to recognize one standard for obtaining relief from imprisonment for contempt by the use of habeas corpus or certiorari and another standard for obtaining damages from the ministerial officer in a civil suit. ... Or it may be said that on the one hand when contempt proceedings, criminal in their nature, are reviewed by habeas corpus or certiorari and the limited jurisdiction of the court to punish for contempt is brought into question, the presumptions indulged in support of ordinary judgments do not apply and the judgment is strictly construed in favor of the accused ... whereas, as previously indicated, a sheriff, when he receives an order directing him to imprison a person for contempt, while obliged to use reasonable diligence to perform the duties of his office in a lawful manner, is not bound at his peril to anticipate that a court higher than the one which made the order will not uphold its validity." (42 C.2d 155.)

(2) *Civil and Criminal Contempt Distinguished.* A significant distinction, however, is made between civil and criminal contempt:

(a) Civil contempt is a process for the enforcement of certain kinds of judgments--an alternative remedy of the successful litigant. (See *United Farm Workers Organizing Committee, AFL-CIO v. Superior Court* (1968) 265 C.A.2d

212, 213, 71 C.R. 513; *In re Witherspoon* (1984) 162 C.A.3d 1000, 1001, 209 C.R. 67 [because civil contempt proceeding is criminal in nature, alleged contemnors are entitled to most constitutional rights guaranteed to all criminally accused persons, including right against self-incrimination]; 8 Cal. Proc. (5th), *Enforcement of Judgment*, §340.)

(b) Criminal contempt is a sanction for an act against the court or judicial process. The guilty party may be prosecuted in a criminal action (see 2 Cal. Crim. Law (3d), *Crimes Against Governmental Authority*, §§29, 30), or charged and tried by the court in which the contempt occurred. If the contempt is direct, i.e., in the presence of the court, adjudication may be summary, without a hearing. (See 7 Cal. Proc. (5th), *Trial*, §177.) If the contempt is constructive, e.g., by publication, charges must be drawn and a hearing held. (See 7 Cal. Proc. (5th), *Trial*, §175.)

(3) *Right to Jury Trial*. It was formerly settled that the constitutional right to trial by jury did not apply in contempt proceedings. This is still true in civil contempt (*United Farm Workers Organizing Committee, AFL-CIO v. Superior Court*, *supra*), and in criminal contempt where the penalty brings it within the class of petty offenses (*Cheff v. Schnackenberg* (1966) 384 U.S. 373, 86 S.Ct. 1523, 1524, 16 L.Ed.2d 629, 631, 5 Cal. Crim. Law (3d), *Criminal Trial*, §439; 7 Summary (10th), *Constitutional Law*, §§211, 213). But where the punishment is substantial, e.g., over 6 months' imprisonment, a jury trial is an element of federal due process, in both federal and state courts. (*Bloom v. Illinois* (1968) 391 U.S. 194, 88 S.Ct. 1477, 1480, 20 L.Ed.2d 522, 526, 5 Cal. Crim. Law (3d), *Criminal Trial*, §439; see 7 Summary (10th), *Constitutional Law*, §§211, 213.)

(4) *No Damages for Civil Contempt*. Another distinction of importance is that no damages can be awarded in a civil contempt proceeding. (See 8 Cal. Proc. (5th), *Enforcement of Judgment*, §360.)

West's Key Number Digest, Contempt 1 et seq.

SUPPLEMENT: [This section is current through the latest supplement]



70 of 178 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

II. TYPES OF ACTIONS AND SPECIAL PROCEEDINGS

C. Civil, Criminal, and Quasi-Criminal Proceedings.

3. Forfeiture Proceedings.

3 *Witkin Cal. Proc. Actions* § 70

[§ 70] Forfeiture Proceedings.

(1) *Nature of Proceeding.* A statutory proceeding to forfeit property used in illegal activity is civil in nature, but quasi-criminal in effect. Thus, the statutes usually provide for pleadings and trial and appeal in the manner of civil proceedings. And prior acquittal in a criminal prosecution involving identical facts is not a bar to a forfeiture proceeding. (See *People v. One 1952 Chevrolet Bel Aire* (1954) 128 C.A.2d 414, 419, 275 P.2d 509; *People v. One 1950 Cadillac 2-Door Club Coupe, Engine No. 506263120* (1955) 133 C.A.2d 311, 318, 284 P.2d 118.)

On the other hand, the quasi-criminal character of the action makes applicable the rule excluding evidence obtained in violation of the constitutional guarantee against unreasonable search and seizure. (*One 1958 Plymouth Sedan v. Pennsylvania* (1965) 380 U.S. 693, 85 S.Ct. 1246, 1250, 14 L.Ed.2d 170, 175.)

(2) *Types of Forfeiture Proceedings.* Forfeiture proceedings authorized by California statutes include the following:

(a) Abatement of a building or place used for the unlawful sale of liquor. (P.C. 11200 et seq.)

(b) Abatement of a building or place used for illegal gambling, lewdness, assignation, or prostitution. (P.C. 11225 et seq.; see *Board of Supervisors of Los Angeles v. Simpson* (1951) 36 C.2d 671, 674, 227 P.2d 14 [proceeding is penal, as distinguished from civil proceeding to abate public nuisance].)

(c) Abatement of a means of conveyance to a gambling ship. (P.C. 11305 et seq.)

(d) Abatement of a building or place used for the purpose of unlawfully selling, serving, storing, keeping, or giving away controlled substances. (*Health & Saf.C. 11570.*)

(e) Forfeiture of alcoholic beverages or other property, except vehicles seized under the Alcoholic Beverage Control Act. (*B. & P.C. 25360 et seq.*)

(f) Summary forfeiture or destruction of property connected with the commission of a crime. (See 3 *Cal. Crim. Law* (3d), *Punishment*, §201 et seq.) (On federal civil forfeiture actions under federal drug laws, see *Austin v. United States* (1993) 509 U.S. 602, 113 S.Ct. 2801, 2804, 125 L.Ed.2d 488, 496, 3 *Cal. Crim. Law* (3d), *Punishment*, §207; 24

Southwestern U. L. Rev. 251.)

West's Key Number Digest, Criminal Law 130 et seq.

SUPPLEMENT: [This section is current through the latest supplement]



71 of 178 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

II. TYPES OF ACTIONS AND SPECIAL PROCEEDINGS

C. Civil, Criminal, and Quasi-Criminal Proceedings.

4. Escheat Proceedings.

3 Witkin Cal. Proc. Actions § 71

[§ 71] Escheat Proceedings.

Several statutes authorize proceedings, civil in nature, to escheat to the state property not subject to a valid claim:

(1) *C.C.P. 1440 et seq.* Proceedings for the escheat of (a) a decedent's estate and undistributed and unclaimed estate assets (see *C.C.P. 1443 et seq.*; 14 *Summary* (10th), *Wills and Probate*, §98 et seq.) and (b) unclaimed assets under state institutional custody (see *C.C.P. 1446 et seq.*).

(2) *C.C.P. 1500 et seq.* Proceedings for the escheat of unclaimed tangible and intangible personal property. (See 13 *Summary* (10th), *Personal Property*, §37 et seq.)

(3) *C.C.P. 1600 et seq.* Determination of the state's interest in unclaimed tangible and intangible personal property in the custody of officers, departments, and agencies of the United States.

These statutes are subject to certain general provisions (see *C.C.P. 1300 et seq.*), administrative requirements for receiving and expending funds, paying claims, and managing unclaimed property (see *C.C.P. 1310 et seq.*), and procedural rules (see *C.C.P. 1410 et seq.*).

West's Key Number Digest, Escheat 130 et seq.

SUPPLEMENT: [This section is current through the latest supplement]



72 of 178 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

II. TYPES OF ACTIONS AND SPECIAL PROCEEDINGS

C. Civil, Criminal, and Quasi-Criminal Proceedings.

5. Juvenile Court Proceedings.

3 *Witkin Cal. Proc. Actions* § 72

[§ 72] Juvenile Court Proceedings.

(1) *Nature of Proceeding.* In its early development, the juvenile court session was regarded as a kind of guardianship proceeding, in no sense criminal; accordingly, the minor, although charged with a crime, was not entitled to the special rights of a criminal defendant. The modern view is still that the court seeks to give the delinquent minor custody and care, and that the proceeding is not criminal in nature. (See 10 *Summary* (10th), *Parent and Child*, §440.)

(2) *Constitutional Protections for Criminal Proceedings.* In a proceeding based on a charge of a crime, the important constitutional rights of a criminal defendant, such as the right to appointed counsel, the privilege against self-incrimination, the rights to confront and cross-exam witnesses, *Miranda* rights, protection against double jeopardy, and the exclusion of illegally obtained evidence, are now recognized. (See *In re Gault* (1967) 387 U.S. 1, 87 S.Ct. 1428, 1438, 18 L.Ed.2d 527, 537, 10 *Summary* (10th), *Parent and Child*, §783; 10 *Summary* (10th), *Parent and Child*, §782 et seq.) And where a charge of a crime is the basis of the proceeding, the constitutional presumption of innocence with its requirement of proof beyond a reasonable doubt applies. (See *In re Winship* (1970) 397 U.S. 358, 90 S.Ct. 1068, 1075, 25 L.Ed.2d 368, 377, 10 *Summary* (10th), *Parent and Child*, §878.)

West's Key Number Digest, Infants 191 et seq.

SUPPLEMENT: [This section is current through the latest supplement]



73 of 178 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

II. TYPES OF ACTIONS AND SPECIAL PROCEEDINGS

C. Civil, Criminal, and Quasi-Criminal Proceedings.

6. Habeas Corpus.

a. In General.

3 *Witkin Cal. Proc. Actions* § 73

[§ 73] In General.

(1) *Nature of Remedy.* The writ of habeas corpus is mainly designed to test the validity of imprisonment or other restraint of liberty. (See 78 So. Cal. L. Rev. 1125 [The Deconstruction and Reconstruction of Habeas]; 39 Am.Jur.2d (1999 ed.), *Habeas Corpus and Postconviction Remedies* §1 et seq.; 13 Am.Jur. P.P. Forms (1999 ed.), *Habeas Corpus*, Form 1 et seq.; 20 Am.Jur. Trials 1; 39 Am.Jur. Trials 157 [Historical Aspects and Procedural Limitations of Federal Habeas Corpus]; 6 Cal. Crim. Law (3d), *Criminal Writs*, §10 et seq.) It does not come within the definition of a criminal action, but its most common use is by persons charged with or convicted of crimes, and it is classified with "special proceeding of a criminal nature." (P.C. 1473, 1562.)

(2) *Availability of Remedy.* The writ of habeas corpus is available in a number of civil proceedings, including the following:

(a) Where the petitioner is wrongfully imprisoned for contempt because of disobedience to a judgment or order, such as violation of an injunction, refusal to pay spousal or child support, or refusal to testify or comply with a subpoena duces tecum. (See *In re Johnson* (1949) 92 C.A.2d 467, 472, 207 P.2d 123 [alimony]; 39 Am.Jur.2d (1999 ed.), *Habeas Corpus and Postconviction Remedies* §83 et seq.; 11 Summary (10th), *Husband and Wife*, §258 et seq.; 2 Cal. Evidence (4th), *Discovery*, §243; 8 Cal. Proc. (5th), *Enforcement of Judgment*, §362.)

(b) Where the petitioner, incarcerated as an insane person, seeks release on the ground that the petitioner has recovered his or her sanity. (See *In re Clary* (1906) 149 C. 732, 738, 87 P. 580; 39 Am.Jur.2d (1999 ed.), *Habeas Corpus and Postconviction Remedies* §75; 21 A.L.R.2d 1004 [habeas corpus on ground of restoration to sanity of one confined as an incompetent other than in connection with crime].)

(c) Where a parent seeks the custody of a child living with another. (See *In re Kyle* (1947) 77 C.A.2d 634, 638, 176 P.2d 96; 39 Am.Jur.2d (1999 ed.), *Habeas Corpus and Postconviction Remedies* §§78 et seq., 88; 10 Summary (10th), *Parent and Child*, §360 et seq.; on unavailability of habeas corpus to collaterally attack final judgment in adoption-related case, see *infra*, §74.)

(d) Where the petitioner is invalidly committed to a state hospital for the mentally disordered. (Welf.C. 7250; see 39 *Am.Jur.2d* (1999 ed.), *Habeas Corpus and Postconviction Remedies* §73 et seq.)

(e) Where the petitioner, detained by certification for intensive treatment as mentally disordered, inebriated, or suicidal, seeks release after the petitioner (or a person acting on the petitioner's behalf) has requested his or her release. (Welf.C. 5275; see *infra*, §83.)

(f) Where a conservatee committed under the Lanterman-Petris-Short Act as a gravely disabled person seeks to challenge his or her placement or the conditions of confinement. (See *In re Gandolfo* (1984) 36 C.3d 889, 898, 206 C.R. 149, 686 P.2d 669, 2 *Cal. Proc.* (5th), *Jurisdiction*, §446; *infra*, §106.)

(g) Where a minor is confined under an invalid commitment order. (See *In re Butterfield* (1967) 253 C.A.2d 794, 796, 61 C.R. 874; 10 *Summary* (10th), *Parent and Child*, §§716, 920.)

(h) Where the petitioner is invalidly committed as a narcotic addict. (See *In re De La O* (1963) 59 C.2d 128, 156, 28 C.R. 489, 378 P.2d 793; *In re Trummer* (1964) 60 C.2d 658, 36 C.R. 281, 388 P.2d 177; C.E.B., 1 Appeals and Writs in Criminal Cases 3d, §9.42; 6 *Cal. Crim. Law* (3d), *Criminal Writs*, §13.)

(i) Where a prisoner seeks to have his or her civil rights restored to the limited extent of permitting the prisoner to employ counsel to defend a civil action. (*In re McNally* (1956) 144 C.A.2d 531, 301 P.2d 385.)

(j) Where a petitioner is seeking judicial review of admission to a state hospital as a developmentally disabled person. (Welf.C. 4800; *In re Hop* (1981) 29 C.3d 82, 86, 171 C.R. 721, 623 P.2d 282 [public defender had standing to bring habeas corpus petition challenging state hospital admission under Welf.C. 4825 of developmentally disabled woman]; see *infra*, §94.)

West's Key Number Digest, Habeas Corpus 1 et seq.

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Nature of Remedy.* See 39 *Am.Jur.2d* (2008 ed.), *Habeas Corpus and Postconviction Remedies* §1 et seq.; 13 *Am.Jur. P.P. Forms* (2009 ed.), *Habeas Corpus*, Form 1 et seq.

(2) *Availability of Remedy.*

(a) *Where petitioner is wrongfully imprisoned for contempt:* See 39 *Am.Jur.2d* (2008 ed.), *Habeas Corpus and Postconviction Remedies* §77 et seq.

(b) *Where petitioner, incarcerated as insane person, seeks release after recovering sanity:* See 39 *Am.Jur.2d* (2008 ed.), *Habeas Corpus and Postconviction Remedies* §69.(c) *Where parent seeks custody of child living with another:* See 39 *Am.Jur.2d* (2008 ed.), *Habeas Corpus and Postconviction Remedies* §§72 et seq., 81.

(d) *Where petitioner is invalidly committed to state mental hospital:* See 39 *Am.Jur.2d* (2008 ed.), *Habeas Corpus and Postconviction Remedies* §67 et seq.



74 of 178 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

II. TYPES OF ACTIONS AND SPECIAL PROCEEDINGS

C. Civil, Criminal, and Quasi-Criminal Proceedings.

6. Habeas Corpus.

b. Distinction: Collateral Attack on Judgment in Adoption Case.

3 *Witkin Cal. Proc. Actions* § 74

[§ 74] Distinction: Collateral Attack on Judgment in Adoption Case.

In *Adoption of Alexander S.* (1988) 44 C.3d 857, 245 C.R. 1, 750 P.2d 778, N, a recent immigrant from Romania, consented to the adoption of her child by plaintiffs after being advised of her alternatives by a Department of Social Services social worker. However, 1 month later, she contacted T (the natural father) in Romania, ascertained his opposition to the adoption, and changed her mind. In the adoption proceeding, she filed a petition under former C.C. 226a (now C.C.P. 224.64) to withdraw consent to adoption, and a petition under former C.C. 7006 (now *Family C.* 7630 et seq.) to declare the existence of a father-son relationship between T and the child. A judgment denying the petition to withdraw consent was entered on January 3, 1985, and a judgment on the C.C. 7006 petition, terminating T's custody rights, was entered on April 30, 1985. N filed a timely notice of appeal from the latter judgment, but not from the judgment denying the petition to withdraw consent. Although the notice of appeal made no mention of the petition to withdraw consent, N raised this issue in her appellate brief. The Court of Appeal affirmed the denial of the C.C. 7006 petition and, on its own initiative, treated N's belated challenge of the denial of the petition to withdraw consent as a petition for habeas corpus. Concluding that N had been denied effective assistance of counsel, the court granted the writ. The Supreme Court vacated the portion of the judgment pertaining to the petition to withdraw consent on the ground that the Court of Appeal lacked jurisdiction to consider that matter (see 9 *Cal. Proc.* (5th), *Appeal*, §614) and, in addition, held that habeas corpus was not available under the facts of this case.

(a) *No precedent supporting court's action.*

(1) The Court of Appeal's action was based on its conclusion that habeas corpus is an appropriate remedy for obtaining custody of a child. (44 C.3d 857.) However, research discloses that, within this general category of child custody cases, habeas corpus has been held to be available only for the following six purposes: (a) to enforce an existing right to physical custody established by a prior order (see *In re Richard M.* (1975) 14 C.3d 783, 790, 122 C.R. 531, 537 P.2d 363, 10 *Summary* (10th), *Parent and Child*, §362); (b) to determine physical custody in the first instance where there is no previous custody order (see *In re Croze* (1956) 145 C.A.2d 492, 494, 302 P.2d 595, 10 *Summary* (10th), *Parent and Child*, §362); (c) to modify a modifiable order (see *In re Wren* (1957) 48 C.2d 159, 165, 308 P.2d 329, 10 *Summary* (10th), *Parent and Child*, §361); (d) to protect a child from imminent danger (see *In re Dowell* (1935) 4 C.A.2d 688, 689, 41 P.2d 596); (e) to challenge an adoption, by an original action, where the consent of a natural parent

lacking custody was required, but not obtained (see *In re Reyna* (1976) 55 C.A.3d 288, 126 C.R. 138); (f) to collaterally attack a prior order where the court issuing it lacked jurisdiction (see *In re Barr* (1952) 39 C.2d 25, 27, 243 P.2d 787). (44 C.3d 867.)

(2) "This case does not fall within any of these subcategories. Category one is inapplicable because there is no prior custody order for [N] to enforce in her favor. Category two is equally inapplicable because custody has already been determined in the first instance. Categories three and four are irrelevant to this case. Category five is also inapposite. [N] was the petitioner of record in both the petition to withdraw consent and the petition to declare a father-child relationship. Her consent was obtained. Moreover, although [T] did not consent to the adoption, the Court of Appeal affirmed the trial court's determination that his consent was not necessary because he was not a 'presumed' father." (44 C.3d 867.) And category six is inapplicable because the trial judge had jurisdiction to render the judgment denying the petition to withdraw consent. (44 C.3d 867.)

(b) *Holding for future cases.*

(1) This decision does not rest merely on the fact that precedent has established that habeas corpus was inappropriate here. That limited holding would not prevent future application of habeas corpus in adoption cases under slightly changed circumstances. Hence, "[o]ut of concern for the welfare of children in adoption actions, we hold that habeas corpus may not be used to collaterally attack a final nonmodifiable judgment in an adoption-related action where the trial court had jurisdiction to render the final judgment." (44 C.3d 867.)

(2) This holding rests on the sound public policy of protecting the child from harm caused by protracted litigation. "The facts of this case provide a perfect example of the kind of delay that should be avoided. The adoption proceeding has now been stayed for over three years while the courts attempted to resolve the withdrawal-of-consent issue. If [N] is allowed to collaterally attack the trial court's final judgment, the case will be remanded to the trial court. Following the trial court's judgment on remand, a new round of appeals will likely be brought. If the withdrawal-of-consent issue is eventually resolved against [N], still more hearings will be necessary to finalize the adoption. Meanwhile, Alexander must live with uncertainty. Such delay is made all the more intolerable by the fact that [N] failed to avail herself of her right to appeal." (44 C.3d 868.)

(3) Judgments that are modifiable upon a showing of changed circumstances (see 10 *Summary* (10th), *Parent and Child*, §249 et seq.) are distinguishable from judgments, such as those under former C.C. 226a (now C.C.P. 224.64), which are not similarly modifiable. This decision does not address the use of habeas corpus to challenge a modifiable judgment. (44 C.3d 866, footnote 8.)

SUPPLEMENT: [This section is current through the latest supplement]



75 of 178 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

II. TYPES OF ACTIONS AND SPECIAL PROCEEDINGS

C. Civil, Criminal, and Quasi-Criminal Proceedings.

7. Coram Nobis.

3 *Witkin Cal. Proc. Actions* § 75

[§ 75] Coram Nobis.

(1) *Nature of Remedy.* The common law writ of error coram nobis was brought into California procedure at a late date by judicial decision. The writ is employed to secure relief, in the same court in which a judgment was entered, from an error of fact alleged to have occurred at the trial, as distinguished from an error of law. (See C.E.B., 1 Appeals and Writs in Criminal Cases 3d, §11.1 et seq.; 16 *Am.Jur.2d* (1999 ed.), *Habeas Corpus and Postconviction Remedies* §227 et seq.; 7B *Am.Jur. P.P. Forms* (2002 ed.), Coram Nobis, Form 1 et seq.; 6 *Cal. Crim. Law* (3d), *Criminal Judgment*, §182 et seq.) Use of the writ in California has been almost exclusively confined to criminal cases, and coram nobis "must be regarded as part of the proceedings in a criminal case" when used for challenging a criminal conviction. (See *In re Paiva* (1948) 31 *C.2d* 503, 510, 190 *P.2d* 604 [right to free transcript on appeal from denial of writ]; *People v. Shipman* (1965) 62 *C.2d* 226, 231, 42 *C.R. 1*, 397 *P.2d* 993, 6 *Cal. Crim. Law* (3d), *Criminal Judgment*, §193 [right to counsel at hearing on writ].) (On writ addressed to appellate court, technically coram vobis, see 6 *Cal. Crim. Law* (3d), *Criminal Writs*, §99; for federal procedure, see *F.R. Civ. P.*, Rule 60(b) and (e) [coram nobis abolished; relief obtainable by appropriate motion]; 28 *U.S.C.*, §2255 [modern statutory version of coram nobis]; 79 *So. Cal. L. Rev.* 909; 11 *Federal Practice & Procedure* (Wright & Miller) §2867.)

(2) *Availability of Remedy.* The availability of the writ in civil cases, first recognized by dicta (see *In re Dyer* (1948) 85 *C.A.2d* 394, 400, 193 *P.2d* 69; *Page v. Insurance Co. of North America* (1969) 3 *C.A.3d* 121, 83 *C.R. 44*), has been the subject of two conflicting decisions of the Court of Appeal. (See *Rollins v. San Francisco* (1974) 37 *C.A.3d* 145, 149, 112 *C.R. 168* [writ is available where time for new trial motion has expired]; *Los Angeles Airways v. Hughes Tool Co.* (1979) 95 *C.A.3d* 1, 9, 156 *C.R. 805* [contra; *Rollins* was "an abrupt departure from precedent"]; for full discussion of these cases, see 8 *Cal. Proc.* (5th), *Attack on Judgment in Trial Court*, §4.)

West's Key Number Digest, Criminal Law 997 et seq.

SUPPLEMENT: [This section is current through the latest supplement]



76 of 178 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

II. TYPES OF ACTIONS AND SPECIAL PROCEEDINGS

C. Civil, Criminal, and Quasi-Criminal Proceedings.

8. Mandamus.

3 *Witkin Cal. Proc. Actions* § 76

[§ 76] Mandamus.

The theory of coram nobis (supra, §75) was applied to mandamus in *Bravo v. Cabell* (1974) 11 C.3d 834, 114 C.R. 618, 523 P.2d 658. Petitioners B and C were charged with crimes in complaints filed in the municipal court. B moved for pretrial discovery, her motion was denied, and she sought mandamus in the superior court without payment of the filing fee. C moved for pretrial discovery, his motion was granted, the prosecution petitioned for mandamus to set the order aside, the court issued an alternative writ, and C sought to file a return, consisting of an answer and demurrer, without payment of the filing fee. In both instances the clerk refused. B and C then sought mandamus in the Supreme Court to compel the clerk to allow filing. *Held*, writs granted.

(a) *Govt.C. 26857* formerly exempted criminal prosecutions from the requirement of clerk's fees. The question here was whether a special proceeding, such as this writ proceeding, normally regarded as civil, could be considered a part of a criminal prosecution for purposes of *Govt.C. 26857*, because the writ proceeding was integrally connected with the prosecution. The answer was yes, under *In re Paiva* (1948) 31 C.2d 503, 190 P.2d 604. "We discern no significant difference between a review of a criminal proceeding by an appeal from a judgment of conviction and a review of part of the same criminal proceeding by prerogative writ to justify the conclusion that while the former process of review retains the criminal character of the proceeding below, the latter process is in some mysterious way substantially, if not entirely, metamorphosed." (11 C.3d 839.) Thus, both methods of review were limited to issues involved in the criminal prosecution, and they had the common objective of correcting or preventing error in the prosecution. A criminal defendant may find it essential to use the writ to secure a change of venue for a fair trial, a speedy trial, a substitution of appointed counsel, or, as here, pretrial discovery. (11 C.3d 839.)

(b) No fee was required for filing a petition for a writ in the Court of Appeal or Supreme Court where the petition related to criminal proceedings in the superior court. It would be anomalous to have a different rule for a writ application in the superior court where the criminal action was in the municipal court. (11 C.3d 840.)

West's Key Number Digest, Mandamus 1 et seq.

SUPPLEMENT: [This section is current through the latest supplement]



77 of 178 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

II. TYPES OF ACTIONS AND SPECIAL PROCEEDINGS

C. Civil, Criminal, and Quasi-Criminal Proceedings.

9. Peace Bond Proceedings.

3 *Witkin Cal. Proc. Actions* § 77

[§ 77] Peace Bond Proceedings.

On a charge of a threat to commit a breach of the peace, a magistrate may issue a warrant, arrest the offender, take evidence, and require the guilty party to give an undertaking to keep the peace. (P.C. 701 et seq.; see *12 Am.Jur.2d* (1997 ed.), *Breach of Peace and Disorderly Conduct* §39 et seq.) This proceeding, designed to prevent the commission of a crime, is not a criminal proceeding to punish for a crime; hence, though "quasi-criminal," it does not come within the scope of the constitutional guarantee of a jury trial. (*In re Way* (1943) 56 C.A.2d 814, 816, 133 P.2d 637.)

SUPPLEMENT: [This section is current through the latest supplement]

See *12 Am.Jur.2d* (2009 ed.), *Breach of Peace and Disorderly Conduct* §38 et seq.



78 of 178 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

II. TYPES OF ACTIONS AND SPECIAL PROCEEDINGS

C. Civil, Criminal, and Quasi-Criminal Proceedings.

10. Administrative Disciplinary Proceedings.

3 *Witkin Cal. Proc. Actions* § 78

[§ 78] Administrative Disciplinary Proceedings.

(1) *State Bar Disciplinary Proceedings Against Attorneys.* Proceedings before the State Bar to discipline an attorney have been regarded, for some procedural purposes, as "quasi-criminal." (See 1 *Cal. Proc.* (5th), *Attorneys*, §560.)

(2) *Disciplinary Proceedings by Licensing Boards.* Proceedings by a regulatory administrative board to revoke or suspend a professional license are also loosely termed "penal" or "quasi-criminal." They are not criminal actions, however, and are not subject to the rules of criminal procedure. (*Webster v. Board of Dental Examiners of Calif.* (1941) 17 C.2d 534, 537, 110 P.2d 992; *Kendall v. Board of Osteopathic Examiners* (1951) 105 C.A.2d 239, 248, 233 P.2d 107; but see *Shively v. Stewart* (1966) 65 C.2d 475, 479, 55 C.R. 217, 421 P.2d 65, 1 *Cal. Evidence* (4th), *Introduction*, §76 [right to discovery in criminal cases applied to physicians in disciplinary action against them for performing illegal abortions].)

SUPPLEMENT: [This section is current through the latest supplement]



79 of 178 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

II. TYPES OF ACTIONS AND SPECIAL PROCEEDINGS

D. Civil Commitment and Related Proceedings.

1. Trial of Present Competence of Defendant.

3 *Witkin Cal. Proc. Actions* § 79

[§ 79] Trial of Present Competence of Defendant.

(1) *In General.* No person can be tried for a crime or adjudged to punishment while mentally incompetent. (P.C. 1367.) Where a doubt arises in the mind of the judge about the mental competence of the defendant, the court must recess the proceedings to permit counsel to confer with the defendant and advise the court whether counsel believes the defendant to be mentally incompetent. If counsel informs the court that counsel believes the defendant to be mentally incompetent, the question of defendant's mental competence must be determined in a hearing. A hearing may be held even if counsel advises the court that he or she believes the defendant to be mentally competent. (P.C. 1368.) (See 5 *Cal. Crim. Law* (3d), *Criminal Trial*, §699 et seq.)

A similar procedure is available for determining the competency to stand trial of a misdemeanor defendant whom the judge has reason to believe is mentally disordered. (P.C. 1367.1.) The process provides for evaluation and treatment, and a hearing to determine competency if the judge has reason to believe that the defendant, despite the treatment, may be incompetent to stand trial. (P.C. 1367.1(b), (d).) (See 5 *Cal. Crim. Law* (3d), *Criminal Trial*, §§696, 699, 709, 711.)

A hearing on mental competence is not a criminal proceeding. (*People v. Fields* (1965) 62 C.2d 538, 540, 42 C.R. 833, 399 P.2d 369; *People v. Bye* (1981) 116 C.A.3d 569, 573, 172 C.R. 186; see 5 *Cal. Crim. Law* (3d), *Criminal Trial*, §697.) Accordingly, a defendant has no constitutional right to a jury trial; and, where no demand for a jury is made pursuant to statutory authorization, a determination of competence by the trial judge is proper. (*People v. Rojas* (1981) 118 C.A.3d 278, 287, 173 C.R. 64.) (See 5 *Cal. Crim. Law* (3d), *Criminal Trial*, §708.)

However, an order of commitment under P.C. 1367 et seq., formerly held to be appealable as a final judgment in a civil special proceeding (*People v. Fields, supra*), is now within the class of orders deemed final judgments for purposes of a criminal appeal. (P.C. 1237(a); see 6 *Cal. Crim. Law* (3d), *Criminal Appeal*, §46.)

(2) *Proceeding To Determine Present Sanity of Convicted Person Sentenced to Death.* A proceeding under P.C. 3701 to determine the present sanity of a convicted person sentenced to death is a special proceeding of a civil nature. Although this statute requires that the issue be tried by a jury, a unanimous verdict is not required. (*People v. Riley* (1951) 37 C.2d 510, 518, 235 P.2d 381; see 6 *Cal. Crim. Law* (3d), *Criminal Judgment*, §172.)

West's Key Number Digest, Criminal Law 623 et seq.

SUPPLEMENT: [This section is current through the latest supplement]



80 of 178 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

II. TYPES OF ACTIONS AND SPECIAL PROCEEDINGS

D. Civil Commitment and Related Proceedings.

2. Commitment Under Lanterman-Petris-Short Act.

a. Mentally Disordered Person.

1. Nature of Act.

3 Witkin Cal. Proc. Actions § 80

[§ 80] Nature of Act.

(1) *In General.* The Lanterman-Petris-Short Act establishes procedures for the involuntary commitment of mentally disordered persons. (See Welf.C. 5000 et seq.; 7 *Golden Gate L. Rev.* 733 [critique of operation of Act]; 28 *Hastings L. J.* 1407 [same]; 54 *Hastings L. J.* 493 [same]; 7 *Loyola L.A. L. Rev.* 93 [same]; 31 *Loyola L.A. L. Rev.* 983 [same]; 10 *Santa Clara Lawyer* 77; 61 *So. Cal. L. Rev.* 273, 291; on former legislation and need for reform, see 6 *Cal. Western L. Rev.* 149; 19 *Stanf. L. Rev.* 992; 14 *U.C.L.A. L. Rev.* 822.)

(2) *Purpose of Act.* The Act has been described as "a new statutory scheme repealing the indeterminate commitment, removing the legal disabilities previously imposed upon persons adjudicated to be mentally ill, and enacting an extensive scheme of community-based services, emphasizing voluntary treatment and providing for periods of involuntary observation and crisis treatment for persons who are unable to care for themselves or whose condition makes them a danger to themselves or others." (*Thorn v. Superior Court* (1970) 1 *C.3d* 666, 668, 83 *C.R.* 600, 464 *P.2d* 56, *infra*, §87.) (See 59 *Cal. L. Rev.* 81 [analysis and criticism of Act in light of *Thorn*]; 62 *Cal. L. Rev.* 671 [trend toward voluntary treatment]; 62 *Cal. L. Rev.* 850 [parental commitment of children]; 6 *Cal. Western L. Rev.* 153; 79 *Harv. L. Rev.* 1288 [theories and procedures of involuntary commitment statutes]; 87 *Harv. L. Rev.* 1201 [exhaustive study of commitment standards]; 87 *Harv. L. Rev.* 1265 [exhaustive study of involuntary commitment procedures]; 48 *Hastings L. J.* 1137 [protecting children from involuntary civil commitment because of sexual orientation]; 10 *Santa Clara Lawyer* 74 [analysis of Act]; 14 *Southwestern U. L. Rev.* 238 [exhaustive study of involuntary civil commitment in Los Angeles County]; 31 *Stanf. L. Rev.* 425 [burden and standard of proof in short-term civil commitment]; 17 *U.C.L.A. L. Rev.* 851.)

(3) *Problems in Implementation.* Problems arising in implementation of the Act have been the subject of continual study by commentators. (On right to effective treatment after commitment, see 86 *Harv. L. Rev.* 1282; 87 *Harv. L. Rev.* 1316; on nature and probative value of medical decision to commit, see 62 *Cal. L. Rev.* 693; 13 *Santa Clara Lawyer* 379, 400, 447, 616; on placement of patients in local communities, see 4 *Pacific L. J.* 595; 7 *U.C. Davis L. Rev.* 150; on morals and science in mental health law, see 51 *Cal. L. Rev.* 527; on applicability of Act to court commitments of mentally ill persons made under prior law, see *In re Gonzales* (1971) 6 *C.3d* 346, 99 *C.R.* 17, 491 *P.2d* 809; on

commitment of incompetent criminal defendant under Act (Welf.C. 5008), see *Conservatorship of Hofferber* (1980) 28 C.3d 161, 167 C.R. 854, 616 P.2d 836; 7 *Pacific L. J.* 405, 407; on vicarious liability of regional centers for negligent mistreatment of patients by residential care facilities, see *Morohoshi v. Pacific Home* (2004) 34 C.4th 482, 486, 20 C.R.3d 890, 100 P.3d 433; on conservatorship of gravely disabled persons, see *infra*, §97 et seq.)

(4) *Immunity From Liability.* Health care professionals furnishing emergency medical treatment at a general acute care hospital to a mentally disordered or gravely disabled person may not be held civilly or criminally liable for detaining the person or for the person's actions after release from the hospital. (*Health & Saf.C. 1799.111.*) The exemption does not extend to certain mental health facilities designated by a county as specified in the Welfare and Institutions Code. Welf.C. 5278 affords civil and criminal immunity to individuals authorized under the Lanterman-Petris-Short Act to detain, evaluate, or certify for treatment mentally disordered persons. (See 5 *Summary* (10th), *Torts*, §136.)

(5) *Demonstration Project: Alternative Outpatient Treatment.* Counties may choose to participate in a demonstration program to provide assisted outpatient services to specified mentally disordered persons in lieu of involuntary commitment. (Welf.C. 5345 et seq.) Unless extended, the program expires on January 1, 2013. (Welf.C. 5349.5(a).) (See 34 *McGeorge L. Rev.* 485.)

West's Key Number Digest, Mental Health 31 et seq.

SUPPLEMENT: [This section is current through the latest supplement]



81 of 178 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

II. TYPES OF ACTIONS AND SPECIAL PROCEEDINGS

D. Civil Commitment and Related Proceedings.

2. Commitment Under Lanterman-Petris-Short Act.

a. Mentally Disordered Person.

2. Detention for Observation and Evaluation.

3 *Witkin Cal. Proc. Actions* § 81

[§ 81] Detention for Observation and Evaluation.

(1) *Requirements for Detention.* A person who, "as a result of mental disorder, is a danger to others, or to himself or herself, or gravely disabled" may be taken into custody and placed in a county-designated facility approved by the State Department of Mental Health for treatment and evaluation. (Welf.C. 5150 et seq. [application by peace officer, staff member of evaluation facility, mobile mental health crisis intervention team, or other professional person designated by the county]; Welf.C. 5200 et seq. [application by any individual for court-ordered evaluation].)

(2) *Duration of Detention.* The maximum period of detention is 72 hours. Weekends and holidays may be excluded from the 72-hour period if the Department of Mental Health certifies that evaluation and treatment services cannot reasonably be made available on those days. The certificate must be renewed every 2 years, and the department must adopt regulations defining criteria for making these determinations. (Welf.C. 5151; see 10 *Pacific L. J.* 266.)

(3) *Notice of Rights After Detention.* The party who takes a patient into custody must orally advise the patient of the nature and purpose of the detention, and the custodial facility must provide the patient, orally and in writing, with information concerning the reasons for and purpose of the detention, and of the right to counsel, an interpreter, etc., if the patient is not released within 72 hours. (Welf.C. 5157; see 9 *Pacific L. J.* 575.)

SUPPLEMENT: [This section is current through the latest supplement]



82 of 178 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

II. TYPES OF ACTIONS AND SPECIAL PROCEEDINGS

D. Civil Commitment and Related Proceedings.

2. Commitment Under Lanterman-Petris-Short Act.

a. Mentally Disordered Person.

3. Certification for Intensive Treatment.

3 *Witkin Cal. Proc. Actions* § 82

[§ 82] Certification for Intensive Treatment.

(1) *Persons Subject to Additional Treatment.* At the end of the 72-hour period (see *supra*, §81), a patient who refuses further voluntary hospitalization may be certified for an additional 14-day period of intensive treatment. (Welf.C. 5250 et seq.) A suicidal person may also be certified for an additional 14-day period. (Welf.C. 5260.) A patient who remains gravely disabled as a result of a mental disorder or impairment by chronic alcoholism and is unwilling or unable to accept treatment voluntarily may be certified for an additional 30-day period. (Welf.C. 5270.15; see Welf.C. 5270.12 [Welf.C. 5270.15 et seq. apply only in counties that authorize their application].)

(2) *Notice.* Copies of the certification notice must be personally delivered to the patient certified or to the patient's attorney or advocate. The patient certified must be asked, when he or she is capable, to designate a person to be informed regarding the certification. (Welf.C. 5253.) Patients certified as gravely disabled due to chronic alcoholism pursuant to Welf.C. 5270.15 et seq. must be served with a second certification notice. (Welf.C. 5270.20 et seq.)

(3) *Review Proceeding.* There is an automatic certification review proceeding for patients certified for intensive treatment. These patients retain the right to seek judicial review by habeas corpus in place of the review proceeding. (Welf.C. 5275; see *infra*, §83.) But if habeas corpus relief is not sought, the review proceeding must be held within 4 days of the initial detention. The patient certified or his or her attorney or representative may request a postponement of not more than 48 hours, or in counties with populations of 100,000 or less, until the next regularly scheduled hearing date. (Welf.C. 5256.)

The certification review hearing is conducted by a court-appointed commissioner or a referee, or by a certification review hearing officer. (Welf.C. 5256.1.) The patient certified is entitled to be represented by an attorney or other advocate, to present evidence, to question witnesses, and to make reasonable requests for the attendance of facility employees with knowledge of the certification. (Welf.C. 5256.4(a).) The hearing officer is not bound by formal rules of evidence, and all evidence relevant to the issue of the patient's condition is admissible. (Welf.C. 5256.4(b), (c).)

If the evidence establishes probable cause that the patient certified is, as a result of mental disorder or impairment

by chronic alcoholism, a danger to himself or herself or to others, or is gravely disabled, the patient may be detained beyond the initial 72-hour detention period pursuant to Welf.C. 5250 or 5270.15. (Welf.C. 5256.6.)

(4) *Decision.* The patient certified must be given oral notification of the decision at the conclusion of the hearing. His or her attorney or advocate and the director of the facility where the person is being treated must be given written notification of the decision, including the reasons for it and the evidence relied upon; the attorney or advocate must then inform the patient certified of the right to request release and to have a hearing before the superior court as provided in Welf.C. 5375 et seq. A copy of the decision must be submitted to the superior court. (Welf.C. 5256.7; see *14 Pacific L. J.* 654.)

SUPPLEMENT: [This section is current through the latest supplement]



83 of 178 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

II. TYPES OF ACTIONS AND SPECIAL PROCEEDINGS

D. Civil Commitment and Related Proceedings.

2. Commitment Under Lanterman-Petris-Short Act.

a. Mentally Disordered Person.

4. Right to Counsel and Habeas Corpus.

3 *Witkin Cal. Proc. Actions* § 83

[§ 83] Right to Counsel and Habeas Corpus.

(1) *Right to Counsel.* The person delivering the notice of certification to the patient (see *supra*, §82) must inform the patient of the right to counsel, including court-appointed counsel, and of the right to judicial review by habeas corpus after the patient has asked to be released. (Welf.C. 5254.1, 5275; see *Thorn v. Superior Court* (1970) 1 C.3d 666, 83 C.R. 600, 464 P.2d 56, *infra*, §87; 17 U.C.L.A. L. Rev. 851; 26 Am.Jur. Trials 97; Judicial Council Form No. MC-265 [Petition for Writ of Habeas Corpus--LPS Act (Mental Health)].)

The public defender is required to represent a patient who is financially unable to employ counsel in a Lanterman-Petris-Short Act proceeding, on request as well as on court order. (*Govt.C. 27706(d)*; see 62 Cal. L. Rev. 816 [role of counsel]; 87 Harv. L. Rev. 1376 [exhaustive study].) (On procedure for compensation of attorneys representing patients under the Act, see C.R.C., Rule 7.750 et seq.; 14 *Summary* (10th), *Wills and Probate*, §1044; on reimbursement of cost of court-appointed counsel, see *Govt.C. 27712*; 10 *Pacific L. J.* 422.)

(2) *Habeas Corpus.* The court must either release the patient or order an evidentiary hearing to be held within 2 judicial days after the petition is filed. (Welf.C. 5276.) On habeas corpus from certification, the county bears the burden of proving the lawfulness of the detention by a preponderance of evidence. (*In re Azzarella* (1989) 207 C.A.3d 1240, 1246, 254 C.R. 922; see *In re Lois M.* (1989) 214 C.A.3d 1036, 1039, 263 C.R. 100 [following *In re Azzarella*; challenge to appointment of temporary conservator and confinement; government has burden of proving lawfulness of detention by preponderance of evidence with no presumption of regularity].)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Right to Counsel.* See 46 *San Diego L. Rev.* 283 [assessing competence of counsel in mental health conservatorship proceedings].



84 of 178 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

II. TYPES OF ACTIONS AND SPECIAL PROCEEDINGS

D. Civil Commitment and Related Proceedings.

2. Commitment Under Lanterman-Petris-Short Act.

a. Mentally Disordered Person.

5. Postcertification Commitment.

3 *Witkin Cal. Proc. Actions* § 84

[§ 84] Postcertification Commitment.

(1) *Patients Subject to Commitment.* A patient may be involuntarily confined for an additional period, up to 180 days, if, as a result of mental disorder or defect, the patient poses a danger of inflicting physical harm on others and if the patient has done any of the following:

(a) Attempted, inflicted, or made a serious threat of physical harm to another after being taken into custody. (Welf.C. 5300(a).)

(b) Attempted or inflicted physical harm on another and that act resulted in the patient being taken into custody. (Welf.C. 5300(b).)

(c) Made a serious threat of physical harm to another within 7 days before being taken into custody and the threat was at least partly the cause of the custody. (Welf.C. 5300(c).)

An unspecified period of additional commitment is available in appropriate cases. (Welf.C. 5304.)

A patient need not be convicted of a crime to be committed under the statute. "Demonstrated danger" is to be based on the person's present mental condition, which in turn is based on behavior during the past 6 years and other relevant evidence. (Welf.C. 5300.5.)

(2) *Right to Counsel and to Jury Trial.* The patient must be advised of the right to counsel, including court-appointed counsel, and of the right to demand a jury trial. (Welf.C. 5302.) If the patient requests a jury trial, the jury's verdict must be unanimous. (Welf.C. 5303.)

(3) *Outpatient Status.* A patient may be transferred to outpatient status if it is determined that he or she no longer presents a danger to the health and safety of others. Notice must be given to specified parties, including the public officer designated by Welf.C. 5114 as being the appropriate person to present allegations, at a judicial proceeding, that the patient is a danger to himself or herself or to others or is gravely disabled; notice must also be given to the patient's

counsel, the court, and the county mental health director. Any of those parties may request a court hearing to oppose the transfer. In these cases, the release on outpatient status may not take effect until it is approved by the court following the hearing. Progress reports on the patient are required at 90-day intervals; a final status report is required in all cases at the end of the initial 180-day commitment. (Welf.C. 5305.)

A person's outpatient status may be revoked at the request of the outpatient treatment supervisor or the public officer pursuant to Welf.C. 5114. In either case, a court hearing on the revocation must be held within 15 days of the request or petition for revocation of outpatient status. (Welf.C. 5306.5, 5307.)

Immediate confinement of a person on outpatient status is available if it is determined by the county mental health officer that the person is dangerous to himself or herself or to others while on outpatient status and that delay in confinement until the revocation hearing would pose "a demonstrated danger of harm" to the patient or to others. (Welf.C. 5308.)

(4) *Unconditional Release.* A patient may obtain unconditional release during the 180-day commitment period if the psychiatrist "directly responsible" for the patient's treatment or a psychiatrist designated by the hospital director determines that the patient "no longer constitutes a demonstrated danger of substantial physical harm to others." Actual notice must be given to the public officer pursuant to Welf.C. 5114, the patient's counsel, the court, and the county mental health officer, any of whom may request a court hearing which must then be conducted before the unconditional release takes effect. (Welf.C. 5309; see *14 Pacific L. J.* 653.)

SUPPLEMENT: [This section is current through the latest supplement]



85 of 178 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

II. TYPES OF ACTIONS AND SPECIAL PROCEEDINGS

D. Civil Commitment and Related Proceedings.

2. Commitment Under Lanterman-Petris-Short Act.

a. Mentally Disordered Person.

6. Antipsychotic Medication.

3 *Witkin Cal. Proc. Actions* § 85

[§ 85] Antipsychotic Medication.

(1) *In General.* The Lanterman-Petris-Short Act prescribes the procedures for administering antipsychotic medication to persons subject to detention as a result of mental disorder. (See 23 *Pacific L. J.* 661.) "Antipsychotic medication" means "any medication customarily prescribed for the treatment of symptoms of psychoses and other severe mental and emotional disorders." (Welf.C. 5008(l).)

(2) *Voluntary Administration.* A patient subject to detention under the Act has the right to refuse treatment with antipsychotic medication. (Welf.C. 5325.2; see *Heater v. Southwood Psychiatric Center* (1996) 42 *C.A.4th* 1068, 1081, 49 *C.R.2d* 880, 6 *Summary* (10th), *Torts*, §989 [patient's consent was not required for administration of short-acting tranquilizer that was not antipsychotic medication]; 32 *San Diego L. Rev.* 343 [assessing competence of mental patients to refuse treatment]; 22 *U.S.F. L. Rev.* 341 [proposed right of all mental patients to refuse antipsychotic drugs].) However, that medication may be administered if the patient does not refuse it following disclosure of the right of refusal and the probable effects and possible side effects of the medication. (Welf.C. 5332(a).)

(3) *Involuntary Administration.* If the patient orally refuses treatment with antipsychotic medication, or otherwise indicates that refusal, the medication may only be administered after the patient has been found incapable of refusing treatment in a hearing held for that purpose. (Welf.C. 5332(b).)

(4) *Emergency Administration.* In an emergency, the patient may be treated with antipsychotic medication over his or her objection prior to a capacity hearing. However, only medication required to treat the emergency condition may be used, and it must be administered in the manner least restrictive to the patient's personal liberty. (Welf.C. 5332(e).)

"Emergency" refers to a situation in which involuntary treatment is immediately necessary to preserve life or prevent serious bodily harm to the patient or others, but it is not necessary that harm have occurred or become unavoidable. (Welf.C. 5008(m).)

(5) *Hearing To Determine Capacity To Refuse Antipsychotic Medication.* A petition for a capacity hearing must be

filed with the superior court. (Welf.C. 5333(b).) The hearing must be held within 24 hours, whenever possible, and within 72 hours in any event. (Welf.C. 5334(a).) The patient has the right to be represented at the hearing by an advocate or legal counsel. (Welf.C. 5333(a).)

The hearing must be conducted by a superior court judge, a court-appointed commissioner or referee, or a court-appointed hearing officer in an appropriate location at the treatment facility, and must be conducted in the manner that is least disruptive of the treatment being provided. (Welf.C. 5334(b), (c).)

(6) *Notification of Determination.* The patient must be orally notified of the capacity determination at the conclusion of the hearing. As soon thereafter as practicable, the patient or his or her advocate or counsel must be given written notification of the determination, including a statement of the evidence relied on and the reasons for the determination. (Welf.C. 5334(d).)

(7) *Review.* The patient subject to the hearing may appeal the determination to the superior court or the Court of Appeal or may bring a writ of habeas corpus (Welf.C. 5334(e)(1), (e)(4)), and the person who filed the petition for the hearing may request the district attorney or county counsel to appeal on behalf of the state (Welf.C. 5334(e)(2)). All appeals to the superior court are subject to de novo review. (Welf.C. 5334(f).)

Treatment with antipsychotic medication may be initiated pending appeal of a determination of incapacity to refuse the treatment. (Welf.C. 5334(e)(3).)

(8) *Duration of Determination.* A determination of a patient's incapacity to refuse treatment with antipsychotic medication remains in effect only for the duration of the detention period or until capacity has been restored according to standards developed by the treating facility or by court determination, whichever is sooner. (Welf.C. 5336.)

SUPPLEMENT: [This section is current through the latest supplement]

(3) *Involuntary Administration.* See *Conservatorship of George H. (2008) 169 C.A.4th 157, 166, 86 C.R.3d 666* [conservatee was properly required to be treated with psychotropic medication; evidence showed that he suffered from mental illness requiring medication, and that he often refused to take medication].



86 of 178 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

II. TYPES OF ACTIONS AND SPECIAL PROCEEDINGS

D. Civil Commitment and Related Proceedings.

2. Commitment Under Lanterman-Petris-Short Act.

a. Mentally Disordered Person.

7. Civil Rights of Patient.

3 *Witkin Cal. Proc. Actions* § 86

[§ 86] Civil Rights of Patient.

(1) *Scope of Rights.* A patient who has been involuntarily detained, or certified for intensive treatment or postcertification treatment, is entitled to those rights specified by the Lanterman Petris-Short Act and all rights not specifically denied. (Welf.C. 5327.) The patient may wear his or her own clothes; keep and use his or her personal possessions; keep and spend his or her money; have access to individual storage space for private use; see visitors each day; have reasonable access to telephones, both to make and receive confidential calls; have ready access to letter writing materials; and mail and receive unopened correspondence. The patient may refuse convulsive treatment and psychosurgery. (Welf.C. 5325; see 87 *A.L.R.5th* 277 [construction and application of state patient bill of rights statutes].) (On right to refuse treatment with antipsychotic medication, see *supra*, §85; on confidentiality of records obtained in course of providing mental health services under Lanterman-Petris-Short Act and other statutes, see Welf.C. 5328 et seq.; on informed consent of mental patients, see 5 *Summary* (10th), *Torts*, §§389, 390, 392.)

Mentally ill persons have the same legal rights and responsibilities as are guaranteed to other persons by the federal and state Constitutions and laws, unless specific limitations are imposed by federal or state laws or regulations. (Welf.C. 5325.1; see 62 *Cal. L. Rev.* 788 [sex-based discrimination]; 62 *Cal. L. Rev.* 957 [institutionalizing rights of mental patients]; 7 *U.C. Davis L. Rev.* 128 [substantive constitutional rights]; *infra*, §87 [constitutional rights].)

(2) *Notice of Rights.* The patient's rights must be explained in a language or "modality" accessible to the patient. Further, the patient must be notified of other constitutional and statutory rights that the state Department of Health finds to be frequently misunderstood or denied and must be provided with a copy of the department's "Patient's Rights Handbook." (Welf.C. 5325; see 8 *Pacific L. J.* 576.)

(3) *Denial of Rights for Good Cause.* The patient's rights may be denied for "good cause" by the professional person in charge of the facility, or by his or her designee. (Welf.C. 5326.)

SUPPLEMENT: [This section is current through the latest supplement]

(3) *Denial of Rights for Good Cause.* See *Conservatorship of George H.* (2008) 169 *C.A.4th* 157, 166, 86 *C.R.3d* 666

[conservatee's driving privilege and right to contract were properly suspended; evidence showed that he suffered from mental illness requiring psychotropic medication, that he often refused to take medication, and that he suffered delusional beliefs and auditory hallucinations].



87 of 178 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

II. TYPES OF ACTIONS AND SPECIAL PROCEEDINGS

D. Civil Commitment and Related Proceedings.

2. Commitment Under Lanterman-Petris-Short Act.

a. Mentally Disordered Person.

8. Constitutional Rights of Patient.

3 *Witkin Cal. Proc. Actions* § 87

[§ 87] Constitutional Rights of Patient.

In *Thorn v. Superior Court* (1970) 1 C.3d 666, 83 C.R. 600, 464 P.2d 56, the carefully drafted protections of the Lanterman-Petris-Short Act were augmented by judicially declared procedural guidelines designed to meet the demands of constitutional due process. Petitioner, a psychiatric foundation, operated hospitals in San Diego for the treatment of acutely mentally ill persons, which were designated by the county as facilities for the evaluation and treatment of involuntary patients (Welf.C. 5150). The Act required that the person delivering the notice of certification to the patient inform the patient of his or her rights, and that a copy of the notice go to his or her attorney or the public defender. (See *supra*, §82.) San Diego had no public defender, but it did have "Defenders," a nonprofit corporation established to provide legal services for indigents accused of crimes. The superior court judge appointed the staff of Defenders as attorneys for all persons detained for involuntary 14-day treatment. Petitioner refused to permit them to see the patients, and the judge then made a continuing order that, unless the attorneys were admitted, the judge would issue writs of habeas corpus to all patients and have them brought before the court. The judge's theory was that, because a patient was given involuntary treatment after refusing consent to voluntary treatment, Welf.C. 5275, giving a right to hearing by habeas corpus once a request for release was made, automatically came into play. Petitioner sought prohibition. *Held*, writ denied; the judge's interpretation was in accord with the legislative intent and with the requirements of due process.

(a) *The patient's rights had to be effectively protected.* An allegedly dangerous or gravely disabled patient might not be able to comprehend the nature of the notice of certification or his rights to counsel and habeas corpus, explained to him only by the nonlegal staff of the institution (with a possible conflicting function). (1 C.3d 674.)

(b) *The order was one permissible method.* Involuntary certification demonstrated the patient's lack of consent, and was "tantamount to a request for release, thereby triggering the patient's right to counsel and to seek habeas corpus." Thus the judge could properly order that, upon certification, the patient should promptly be visited by appointed counsel. (1 C.3d 675.) (See 59 Cal. L. Rev. 81; 87 Harv. L. Rev. 1245 [commitment and least restrictive alternative doctrine]; 13 Santa Clara Lawyer 503 [critique of balancing rationale to justify commitment]; 17 U.C. Davis L. Rev. 653 [civil commitment due process]; 17 U.C.L.A. L. Rev. 851.)

Since *Thorn* was decided, the Act has been amended by the addition of provisions creating automatic certification review proceedings for persons who have been certified for intensive treatment and granting the right to assistance by an attorney or patient advocate. (Welf.C. 5250 et seq.; see supra, §§82, 83.)

SUPPLEMENT: [This section is current through the latest supplement]



88 of 178 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

II. TYPES OF ACTIONS AND SPECIAL PROCEEDINGS

D. Civil Commitment and Related Proceedings.

2. Commitment Under Lanterman-Petris-Short Act.

b. Alcoholic.

3 *Witkin Cal. Proc. Actions* § 88

[§ 88] Alcoholic.

(1) *In General.* The Lanterman-Petris-Short Act (*supra*, §80) also provides for the medical treatment of persons who are dangerous or disabled as a result of inebriation (Welf.C. 5170 et seq.) or chronic alcoholism (Welf.C. 5225 et seq.).

(2) *Inebriate.* A person who is a "danger to others, or to himself, or gravely disabled as a result of inebriation" may be detained, without a court order, at an evaluation facility for a period of 72 hours for evaluation and detoxification and other treatment. (Welf.C. 5170, 5171.) If, as a result of impairment by chronic alcoholism, an inebriate is a danger to himself or herself or to others or is gravely disabled, the inebriate may be certified for further intensive treatment pursuant to Welf.C. 5250 et seq. (see *supra*, §82), or must have a temporary conservator appointed pursuant to Welf.C. 5350 et seq. (see *infra*, §97 et seq.). (Welf.C. 5172.)

(3) *Chronic Alcoholic in Criminal Case.* If a criminal defendant appears "as a result of chronic alcoholism ... , to be a danger to others, to himself, or to be gravely disabled," a judge of the superior court may order his or her detention for evaluation and treatment for a period of 72 hours, if facilities are available. (Welf.C. 5225.) The defendant may elect instead to immediately continue with the criminal proceedings, and he or she must be advised of this right and of the right to counsel. (Welf.C. 5226.) The criminal proceedings are suspended during this detention. (Welf.C. 5226.1.) At the completion of the 72 hours, the defendant must be released if the criminal charges have been dismissed (Welf.C. 5230); otherwise, the proceedings on the criminal charge are resumed (Welf.C. 5226.1). If the defendant has been recommended for conservatorship (see *infra*, §97 et seq.), and the charges have not been dismissed, the court may order his or her detention in the facility until the time proceedings on the criminal charge are resumed. (Welf.C. 5226.1, 5230.)

SUPPLEMENT: [This section is current through the latest supplement]



89 of 178 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

II. TYPES OF ACTIONS AND SPECIAL PROCEEDINGS

D. Civil Commitment and Related Proceedings.

2. Commitment Under Lanterman-Petris-Short Act.

c. User of Controlled Substance.

3 *Witkin Cal. Proc. Actions* § 89

[§ 89] User of Controlled Substance.

(1) *In General.* A user of controlled substances who is a "danger to others or to himself or herself, or gravely disabled" as a result of those substances, is subject to involuntary detention, evaluation, and treatment in accordance with certain provisions of the Lanterman-Petris-Short Act (*supra*, §80). (Welf.C. 5340 et seq.) He or she may be detained with or without a court order and may be certified for intensive treatment. He or she has all the civil rights of mentally disordered persons and the same right to judicial review by habeas corpus, or, if he or she does not seek habeas corpus, to an automatic certification review proceeding. (Welf.C. 5343; see *supra*, §81 et seq.) However, all proceedings must "only be related to and concerned with" the problem of controlled substance use (Welf.C. 5343), and persons subject to these provisions are not to be considered mentally disordered (Welf.C. 5340).

(2) *Minors.* If a minor who "appears to be a danger to himself or herself or others" as a result of the use of controlled substances is brought before a juvenile court judge, the judge may continue the hearing and order the minor to be taken to a facility for 72 hours for evaluation and treatment. (Welf.C. 708.) Thereafter the provisions of Welf.C. 5343 apply, except that a written report of the evaluation must be made to the court. (Welf.C. 708.)

(3) *Criminal Defendants.* If a criminal defendant appears "as a result of the use of narcotics or restricted dangerous drugs, to be a danger to others, to himself, or to be gravely disabled," he or she may be detained for evaluation and treatment. (Welf.C. 5225.) The procedure is the same as that prescribed for a chronic alcoholic in a criminal case. (See *supra*, §88.)

SUPPLEMENT: [This section is current through the latest supplement]



90 of 178 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

II. TYPES OF ACTIONS AND SPECIAL PROCEEDINGS

D. Civil Commitment and Related Proceedings.

3. Commitment Under Children's Civil Commitment and Mental Health Treatment Act.

3 Witkin Cal. Proc. Actions § 90

[§ 90] Commitment Under Children's Civil Commitment and Mental Health Treatment Act.

(1) *Enactment and Purpose of Act.* The Children's Civil Commitment and Mental Health Treatment Act of 1988 (Welf.C. 5585 et seq.) was enacted to provide prompt identification, evaluation, and treatment of mentally disordered minors. (Welf.C. 5585.10.)

(2) *Scope of Act.* The Act applies to the initial 72 hours of mental health evaluation and treatment provided to a minor. Evaluation and treatment beyond 72 hours are governed by the Lanterman-Petris-Short Act (supra, §80 et seq.). To the extent that the Act conflicts with other provisions of law, it prevails. (Welf.C. 5585.20.) Legally emancipated minors requiring involuntary treatment are considered adults and are not subject to the Act. (Welf.C. 5585.59.)

(3) *Detention.* When, as a result of mental disorder, a minor is gravely disabled or a danger to himself or herself or to others and authorization for voluntary treatment is not available, the minor may, on probable cause, be taken into custody and placed in an approved facility. The facility must require a written application specifying the circumstances and the probable cause justifying the detention. (Welf.C. 5585.50; for definition of "gravely disabled minor," see Welf.C. 5585.25.)

(4) *Evaluation.* The minor receives a clinical multidisciplinary evaluation by properly qualified professionals. (Welf.C. 5585.52.) If treatment is recommended, a written treatment plan must identify the "least restrictive placement alternative." Every effort must be taken to contact the minor's family, guardian, or caretaker before treatment and placement. (Welf.C. 5585.53.)

(5) *Commitment.* A minor committed for involuntary treatment must be placed in an approved health facility, and, subject to specified exceptions, minors under 16 may not be held with adults receiving psychiatric treatment. (Welf.C. 5585.55.) An aftercare plan must be developed for a mentally ill minor who is being considered for release from involuntary treatment. The plan must include education or training, if necessary for the minor's well being. (Welf.C. 5585.57.)

West's Key Number Digest, Infants 227; Mental Health 31 et seq.

SUPPLEMENT: [This section is current through the latest supplement]



91 of 178 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

II. TYPES OF ACTIONS AND SPECIAL PROCEEDINGS

D. Civil Commitment and Related Proceedings.

4. Judicial Commitments.

a. Narcotic Addict.

3 Witkin Cal. Proc. Actions § 91

[§ 91] Narcotic Addict.

Statutes governing judicial commitment of narcotic addicts provide for the following:

- (1) Involuntary commitment of a narcotic addict convicted of a crime. (Welf.C. 3050 et seq.)
- (2) Involuntary commitment of a narcotic addict not charged with a crime. (Welf.C. 3100 et seq.)

West's Key Number Digest, Chemical Dependents 10 et seq.

SUPPLEMENT: [This section is current through the latest supplement]



92 of 178 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

II. TYPES OF ACTIONS AND SPECIAL PROCEEDINGS

D. Civil Commitment and Related Proceedings.

4. Judicial Commitments.

b. Mentally Retarded Person.

1. In General.

3 *Witkin Cal. Proc. Actions* § 92

[§ 92] In General.

(1) *Persons Subject to Commitment.* Proceedings are authorized for commitment to the State Department of Developmental Services of mentally retarded persons who are dangerous to themselves or others. For this purpose, "dangerousness to self or others" includes a finding of incompetence to stand trial on specified criminal charges involving physical violence or danger to others. (Welf.C. 6500 et seq.; see *People v. Alvas* (1990) 221 C.A.3d 1459, 1467, 271 C.R. 131 ["dangerousness" construed to mean "the potential for infliction of substantial harm upon the defendant himself or upon others"; hence, Welf.C. 6500 is not unconstitutionally vague]; see 9 *Pacific L. J.* 483.)

The Lanterman Developmental Disabilities Services Act (Welf.C. 4500 et seq.) defines "developmental disability" as including mental retardation (Welf.C. 4512(a)) and provides that, although persons dangerous to themselves or others may be judicially committed if evidence of that danger is presented in court, developmental disability alone will not justify judicial commitment; rather, developmentally disabled persons must receive services pursuant to the Act (Welf.C. 4507).

In *Money v. Krall* (1982) 128 C.A.3d 378, 180 C.R. 376, appellant, who was civilly committed after findings that he was mentally retarded and dangerous to others, argued on habeas corpus that, although he was dangerous to others, he was not mentally retarded, and that Welf.C. 6500 was unconstitutionally vague for failure to define "mentally retarded" persons. *Held*, commitment affirmed. The term "mentally retarded" is one having general medical meaning and is not vague; it cannot be given more precision in the statute because medical science itself lacks a more precise explanation for the condition. (128 C.A.3d 398, 399.) Although appellant's IQ scores alone would not place him in the category of mentally retarded, his scores, when coupled with his asocial, sexually deviant, and assaultive behavior, established his overall retardation. (128 C.A.3d 400, 401.)

(2) *No Requirement of Recent Overt Act.* If a mentally retarded person is in the care or treatment of a state hospital, developmental center, or other facility at the time a commitment petition is filed, proof of a recent overt act while in that treatment or care is not required to find that the person is a danger to himself or herself or to others. (Welf.C. 6500.)

(3) *Causation Requirement*. California law is unsettled whether there must be proof that a person's retardation caused the person to have serious difficulty in controlling his or her dangerous behavior in order to justify commitment under Welf.C. 6500. *People v. Quinn* (2001) 86 C.A.4th 1290, 1294, 103 C.R.2d 915, held that neither Welf.C. 6500 nor equal protection concerns require such a causative link. (86 C.A.4th 1293.) However, *People v. Bailie* (2006) 144 C.A.4th 841, 50 C.R.3d 761, reached a contrary result on due process grounds. The court relied on *In re Howard N.* (2005) 35 C.4th 117, 24 C.R.3d 866, 106 P.3d 305, 10 Summary (10th), *Parent and Child*, Supp., §965, 3 Cal. Crim. Law (3d), *Punishment*, Supp., §87, and *People v. Galindo* (2006) 142 C.A.4th 531, 48 C.R.3d 241, which held, respectively, that due process required that causative link to permit extended commitment under Welf.C. 1800 et seq. (dangerous delinquent minor based on mental or physical deficiency; see 10 Summary (10th), *Parent and Child*, §965 et seq., 3 Cal. Crim. Law (3d), *Punishment*, §87) and *Pen.C. 1026.5* (criminally insane defendant; see 6 Cal. Crim. Law (3d), *Criminal Trial*, §693). (144 C.A.4th 847.)

West's Key Number Digest, Mental Health 31 et seq.

SUPPLEMENT: [This section is current through the latest supplement]

(3) *Causation Requirement*. See *People v. Sweeney* (2009) 175 C.A.4th 210, 221, 95 C.R.3d 557 [following *People v. Bailie* (2006) 144 C.A.4th 841, 50 C.R.3d 761, text, p. 166, and *In re Howard N.* (2005) 35 C.4th 117, 24 C.R.3d 866, 106 P.3d 305, text, p. 166, and declining to follow *People v. Quinn* (2001) 86 C.A.4th 1290, 103 C.R.2d 915, text, p. 166].



93 of 178 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

II. TYPES OF ACTIONS AND SPECIAL PROCEEDINGS

D. Civil Commitment and Related Proceedings.

4. Judicial Commitments.

b. Mentally Retarded Person.

2. Procedure.

3 *Witkin Cal. Proc. Actions* § 93

[§ 93] Procedure.

(1) *Right to Counsel.* The court must inform the allegedly retarded person of the right to counsel. If he or she does not have an attorney, the court must immediately appoint the public defender or another attorney to represent him or her, although he or she must, if able, pay for legal service. (Welf.C. 6500.)

(2) *Petition and Hearing.* The proceeding is commenced by filing a petition. The district attorney of the county in which the petition is filed presents it, unless the board of supervisors delegates that authority to the county counsel. (Welf.C. 6500.)

In cases involving mentally retarded persons found incompetent to stand trial and charged with an offense described in Welf.C. 6500, the petition may be filed in the county in which the question of mental competence was determined. In all other cases, the petition may be filed in the county where the person is physically located. (Welf.C. 6502.)

(3) *Right to Jury Trial.* After the petition is filed, a noticed hearing is held. (Welf.C. 6503 et seq.)

In *O'Brien v. Superior Court* (1976) 61 C.A.3d 62, 132 C.R. 13, the court followed the reasoning of *In re Gary W.* (1971) 5 C.3d 296, 96 C.R. 1, 486 P.2d 1201, a case concerning the commitment of a Youth Authority ward, and held that an allegedly retarded person has a right to a jury trial in commitment or recommitment proceedings. "The same fundamental interest (personal liberty) and the same procedural safeguard (jury trial) are involved in the same type of proceeding (involuntary commitment). The state has not attempted to justify denial of jury trial in commitment or recommitment proceedings by reference to any compelling interest, and we are disinclined to search for one." (61 C.A.3d 69.) (See *People v. Alvas* (1990) 221 C.A.3d 1459, 1464, 271 C.R. 131 [due process and equal protection require that defendant in Welf.C. 6500 proceeding be advised of right to jury trial]; *People v. Bailie* (2006) 144 C.A.4th 841, 844, 50 C.R.3d 761 [following *People v. Alvas*].)

(4) *Effect on Pending Proceeding.* In a juvenile court proceeding or a criminal prosecution, if it appears to the court

that the person is mentally retarded, either before or after adjudication in the juvenile court or after conviction in the criminal proceedings, the proceedings may be adjourned or sentence suspended, and a civil proceeding for commitment instituted. (Welf.C. 6512.) (On commitment of mentally retarded juvenile court ward, see *infra*, §95.)

(3) *Commitment Orders*. Placement of committed mentally retarded persons is to be in "the least restrictive residential placement necessary to achieve the purposes of treatment." The court also may release a mentally retarded person subject to conditions for safeguarding the person and others. (Welf.C. 6509(a).) To implement this policy, an examination of the allegedly mentally retarded person and a report and recommendation of the appropriate facility for placement are required. (Welf.C. 6504.5.)

The placement facility and appropriate law enforcement officials must be notified if the mentally retarded person was *ever* found to be mentally incompetent to stand trial for a felony sexual offense specified in P.C. 290. (Welf.C. 6509(b).) On request, 15 days' notice of a proposed change in placement must be given, and the change must be approved by the court. (Welf.C. 6509(c).)

Commitment orders under Welf.C. 6500 et seq. expire automatically 1 year after they are made, but recommitments are permitted thereafter. (Welf.C. 6500; see 7 *Pacific L. J.* 424; on detention beyond period of sentence after conviction without finding under commitment law, see *McNeil v. Director, Patuxent Institution* (1972) 407 U.S. 245, 92 S.Ct. 2083, 2087, 32 L.Ed.2d 719, 722.)

A mentally retarded person who is not a resident of the state may be committed for purposes of transportation to his or her legal residence. (Welf.C. 6509(a).)

SUPPLEMENT: [This section is current through the latest supplement]

(3) *Right to Jury Trial*. Being a danger to oneself or others is an element of a proceeding under Welf.C. 6500 for the civil commitment of a mentally retarded person dangerous to himself, herself, or others. Thus, where that danger is proved by a predicate felony charge, whether the felony involves death, great bodily injury, or an act posing a serious threat of bodily harm to another person, due process requires that the determination be made by a jury, not by the trial court. (See *People v. Sweeney* (2009) 175 C.A.4th 210, 216, 218, 95 C.R.3d 557 [rejecting, however, claim that practice also denies equal protection by treating incompetent mentally retarded people differently from incompetent mentally ill people, because statute treats both groups similarly].)



94 of 178 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

II. TYPES OF ACTIONS AND SPECIAL PROCEEDINGS

D. Civil Commitment and Related Proceedings.

4. Judicial Commitments.

b. Mentally Retarded Person.

3. Civil Rights of Patient.

3 Witkin Cal. Proc. Actions § 94

[§ 94] Civil Rights of Patient.

(1) *Scope of Rights.* Certain rights are guaranteed by the Lanterman-Petris-Short Act (Welf.C. 5325; see *supra*, §86) to a mentally retarded person committed to a state hospital, and by the Lanterman Developmental Disabilities Services Act (Welf.C. 4503) to a "developmentally disabled" person (including a mentally retarded person) committed to a state hospital or other facility. Both statutes provide for the right to keep and store personal possessions, to have visitors, telephone calls and private correspondence, to refuse specified convulsive therapy, and to refuse psychosurgery. (See *Conservatorship of Pamela J. (2005) 133 C.A.4th 807, 823, 35 C.R.3d 228* [trial judge's error in determining patient's capacity to consent to electroconvulsive treatment while she was absent from proceeding was prejudicial]; *87 A.L.R.5th 277* [construction and application of state patient bill of rights statutes].)

The Lanterman Developmental Disabilities Services Act additionally permits patients to refuse behavior modification techniques causing pain or trauma. (Welf.C. 4503(g).) And the Lanterman-Petris-Short Act specifically guarantees the right to the services of a patient advocate (Welf.C. 5325(h)) and to refuse antipsychotic medication (Welf.C. 5325.2; *supra*, §85).

Each statute includes provisions, more elaborate in the case of the Lanterman-Petris-Short Act, concerning the requirements for bringing these rights to the attention of patients. (Welf.C. 4503 [Lanterman Developmental Disabilities Services Act]; Welf.C. 5325 [Lanterman-Petris-Short Act].) (See *60 Cal. L. Rev. 438* [comprehensive analysis of California law and practice]; *62 Cal. L. Rev. 917* [sterilization]; *4 Pacific L. J. 438* [consent required for certain forms of treatment].)

(2) *Denial of Rights.* The Lanterman Developmental Disabilities Services Act permits all rights to be denied for good cause, except the right to refuse electroconvulsive therapy, psychosurgery, and behavior modification techniques causing pain or trauma. (Welf.C. 4504.) A similar provision in the Lanterman-Petris-Short Act permits denial of all rights except the rights to refuse psychosurgery and to have the services of a patient advocate. (Welf.C. 5326.) In addition, this provision limits denial of the right to refuse convulsive treatment to those patients judicially determined not to have the capacity to give informed consent to the treatment (see Welf.C. 5326.7(g)). (Welf.C. 5326.)

SUPPLEMENT: [This section is current through the latest supplement]



95 of 178 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

II. TYPES OF ACTIONS AND SPECIAL PROCEEDINGS

D. Civil Commitment and Related Proceedings.

4. Judicial Commitments.

c. Juvenile Court Ward.

3 *Witkin Cal. Proc. Actions* § 95

[§ 95] Juvenile Court Ward.

(1) *Procedure.* If the juvenile court finds that a minor is a delinquent child, or that the minor has committed a crime or violated a court order (see 10 *Summary* (10th), *Parent and Child*, §949 et seq.), but is in doubt whether the minor is mentally disordered or mentally retarded, it may continue the hearing and institute proceedings for the minor's detention and evaluation. (Welf.C. 6550, 6551.) If the professional person in charge of the evaluation facility reports to the court that the minor is not affected with a mental disorder requiring intensive treatment or with mental retardation, the minor is returned to the court and the proceedings are resumed. (Welf.C. 6551.) If the minor is found to be mentally disordered, he or she may be certified for involuntary intensive treatment, including additional treatment for suicidal persons, and postcertified as an imminently dangerous person in accordance with the provisions of the Lanterman-Petris-Short Act (*supra*, §80). (Welf.C. 6551.) If the minor is found to be mentally retarded, the juvenile court may direct the filing of a petition for his or her commitment as a mentally retarded person. (Welf.C. 6551; see *supra*, §93.)

(2) *Incarceration Credit.* In some circumstances, a minor committed by the Division of Juvenile Facilities within the Department of Corrections and Rehabilitation is entitled to credit for time spent in a mental hospital under the Lanterman-Petris-Short Act. (See *In re Robert B.* (1995) 39 C.A.4th 1816, 1823, 46 C.R.2d 691, 10 *Summary* (10th), *Parent and Child*, §962.)

(3) *Jurisdiction of Juvenile Court.* The jurisdiction of the juvenile court is suspended (a) during the time the minor is subject to the jurisdiction of the court in which the petition for postcertification treatment or for commitment as a mentally retarded person is filed, or (b) during the time the minor is under remand for 90 days for intensive treatment or commitment ordered by the court. (Welf.C. 6551.)

The juvenile court has no jurisdiction, independent of Welf.C. 6550 and 6551, to order a minor placed in a state mental hospital for treatment of a mental disorder. (*In re L. L.* (1974) 39 C.A.3d 205, 213, 215, 114 C.R. 11.)

SUPPLEMENT: [This section is current through the latest supplement]



96 of 178 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

II. TYPES OF ACTIONS AND SPECIAL PROCEEDINGS

D. Civil Commitment and Related Proceedings.

4. Judicial Commitments.

d. Sexually Violent Predator.

3 *Witkin Cal. Proc. Actions* § 96

[§ 96] Sexually Violent Predator.

(1) *Nature of Act.* Statutes enacted in 1995 prescribe a civil procedure to determine, prior to their release from custody, if certain prison inmates are likely to commit acts of sexually violent criminal behavior, and, if so, to confine and treat them until they are determined to no longer be a present threat to society. (Welf.C. 6600 et seq.) (For more comprehensive coverage of law, see 3 *Cal. Crim. Law (3d), Punishment*, §193 et seq.)

(2) *Who Is Sexually Violent Predator.* The inmate, referred to under the statutes as a "sexually violent predator," is a person who (a) has been convicted of a sexually violent offense against one or more victims, and (b) has a diagnosed mental disorder making the person a danger to the health and safety of others due to the likelihood of engaging in sexually violent criminal behavior. An offender may be deemed a "sexually violent predator" based on certain prior offenses, even if the offender did not receive a determinate sentence for those offenses. (Welf.C. 6600(a)(1).) What constitutes "conviction of a sexually violent offense" is enumerated in Welf.C. 6600(a)(2).

As originally enacted, the statute required that a sexually violent predator be convicted of a sexually violent offense against two or more victims. However, Proposition 83, adopted by the voters at the November 2006 general election, amended Welf.C. 6600(a)(1) to decrease the required number to one victim. (See 3 *Cal. Crim. Law (3d), Punishment, Supp.*, §194.)

(3) *Screening Procedure.* Inmates subject to the procedure are those in custody under the jurisdiction of the Department of Corrections and Rehabilitation who are either serving a determinate prison sentence or have had their parole revoked. Inmates are screened by the Department of Corrections and Rehabilitation and the Board of Parole Hearings 6 months prior to their scheduled release and evaluated by the Department of Mental Health to determine whether they meet the specified criteria. The Department of Mental Health must request that a commitment petition be filed against a qualified inmate by designated county counsel. If an inmate is received by the Department of Corrections and Rehabilitation with less than 9 months remaining to serve on his or her sentence, or if the inmate's release date is modified, the inmate may be referred for evaluation at a date that is less than 6 months prior to the scheduled release date. (Welf.C. 6601; see 3 *Cal. Crim. Law (3d), Punishment*, §195.)

A petition filed against an inmate otherwise subject to the procedure may not be dismissed based on a later judicial or administrative determination that the inmate's custody was unlawful, if the custody was due to a good faith mistake of fact or law. (Welf.C. 6601; see Stats. 1999, Chap. 136, §3 [legislative intent]; 3 *Cal. Crim. Law (3d)*, *Punishment*, §195.)

(4) *Rights of Inmates*. If the county counsel decides to file a petition, the affected inmate is entitled to a probable cause hearing (Welf.C. 6602) and a jury trial, with the full assistance of counsel (Welf.C. 6603). To justify commitment, the jury (or court, if the inmate does not request a jury trial) must determine beyond a reasonable doubt that the inmate is a sexually violent predator. An inmate adjudged to be a sexually violent predator is committed to an "indeterminate term" of confinement and treatment. (Welf.C. 6604.)

SUPPLEMENT: [This section is current through the latest supplement]



97 of 178 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

II. TYPES OF ACTIONS AND SPECIAL PROCEEDINGS

D. Civil Commitment and Related Proceedings.

5. Conservatorship of Gravely Disabled Person.

a. In General.

3 *Witkin Cal. Proc. Actions* § 97

[§ 97] In General.

(1) *Nature of Act.* The Lanterman-Petris-Short Act (supra, §80 et seq.) authorizes conservatorship proceedings for the person, the estate, or the person and the estate of a person who is "gravely disabled as a result of mental disorder or impairment by chronic alcoholism." (Welf.C. 5350 et seq.; see C.E.B., 2 California Conservatorship Practice, Chap. 23; Cal. Civil Practice, 4 Probate and Trust Proceedings, Chap. 30; Rutter Group, Probate §1:112 et seq.; on detention and treatment of chronic alcoholics, see supra, §88.) The purpose of the conservatorship is "to provide individualized treatment, supervision, and placement." (Welf.C. 5350.1; see Welf.C. 5352.6 [individualized treatment plan]; 10 *Pacific L. J.* 266.) A conservatee may also be subject to certain legal disabilities, e.g., prohibitions against possessing a motor vehicle operator's license, voting, entering into a contract, or possessing a firearm. (See Welf.C. 5357.)

(2) *Who Is Gravely Disabled.* For purposes of the Act, "gravely disabled" means any of the following:

(a) A condition in which the conservatee, as a result of a mental disorder, is unable to provide for his or her basic personal needs for food, clothing, or shelter. (Welf.C. 5008(h)(1)(A).) (See *Conservatorship of Guerrero* (1999) 69 *C.A.4th* 442, 445, 81 *C.R.2d* 541 [upholding jury instruction that conservatee could be considered gravely disabled if he would not take medication for his mental disorder, and that without medication he would be unable to provide for his basic needs].)

(b) A condition in which a conservatee has been found mentally incompetent under P.C. 1370 (5 *Cal. Crim. Law* (3d), *Criminal Trial*, §710 et seq.) and all of the following facts exist: (1) the indictment or information pending against the defendant at the time of commitment charges a felony involving death, great bodily harm, or a serious threat to the physical well-being of another person; (2) the indictment or information has not been dismissed; and (3) due to mental disorder, the defendant is unable to understand the nature and purpose of the proceedings or to assist in the conduct of the defense. (Welf.C. 5008(h)(1)(B).)

(c) A condition in which a conservatee, as a result of impairment by chronic alcoholism, is unable to provide for his or her basic personal needs for food, clothing, or shelter. (Welf.C. 5008(h)(2).)

(3) *Immunity From Liability.* Health care professionals furnishing emergency medical treatment at a general acute care hospital to a mentally disordered or gravely disabled person may not be held civilly or criminally liable for detaining the person, or for the person's actions after release from the hospital. (*Health & Saf.C. 1799.111.*) The exemption does not extend to certain mental health facilities designated by a county as specified in the Welfare and Institutions Code. Welf.C. 5278 affords civil and criminal immunity to individuals authorized under the Lanterman-Petris-Short Act to detain, evaluate, or certify for treatment mentally disordered persons. (See 5 *Summary* (10th), *Torts*, §136.)

West's Key Number Digest, Chemical Dependents 10 et seq.; Mental Health 31 et seq.

SUPPLEMENT: [This section is current through the latest supplement]



98 of 178 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

II. TYPES OF ACTIONS AND SPECIAL PROCEEDINGS

D. Civil Commitment and Related Proceedings.

5. Conservatorship of Gravely Disabled Person.

b. Factors That Preclude Finding of Gravely Disabled.

3 Witkin Cal. Proc. Actions § 98

[§ 98] Factors That Preclude Finding of Gravely Disabled.

For purposes of the Lanterman-Petris-Short Act (*supra*, §80 et seq.), the following factors may preclude a finding that a person is gravely disabled:

(1) *Mental Retardation Alone*. Mentally retarded persons are not gravely disabled solely by reason of being mentally retarded. (Welf.C. 5008(h)(3).)

(2) *Survival With Assistance*. Originally, a judicially created rule provided that persons who were capable of surviving safely in freedom with the help of willing and responsible family members, friends, or third parties were not gravely disabled. (See *Conservatorship of Early* (1983) 35 C.3d 244, 197 C.R. 539, 673 P.2d 209; *Conservatorship of Davis* (1981) 124 C.A.3d 313, 321, 177 C.R. 369; *Conservatorship of Baber* (1984) 153 C.A.3d 542, 200 C.R. 262; *Conservatorship of Smith* (1986) 187 C.A.3d 903, 905, 232 C.R. 277 [because she was able to obtain food, clothing and shelter, in part by accepting assistance, paranoid woman who maintained vigil outside church and who repeatedly disrupted services was not gravely disabled]; *Conservatorship of Neal* (1987) 190 C.A.3d 685, 235 C.R. 577 [willingness of common law wife to take care of conservatee precluded finding of grave disability].)

These earlier decisions examined each case based on the specific facts and circumstances of the proposed conservatee, and by no means held that a gravely disabled classification was precluded. (See, e.g., *Conservatorship of Walker* (1989) 206 C.A.3d 1572, 1577, 254 C.R. 552 [finding that appellant was gravely disabled was supported by sufficient evidence]; *Conservatorship of Symington* (1989) 209 C.A.3d 1464, 1467, 257 C.R. 860 [finding that appellant was gravely disabled was affirmed; finding that proposed conservatee was unable or unwilling to accept treatment was not required].) (On who qualifies as responsible third party, see *Conservatorship of Jones* (1989) 208 C.A.3d 292, 300, 256 C.R. 415 [Department of Corrections does not provide third-party assistance].)

This rule was codified in 1989, and amended in 1995. A person found gravely disabled based on inability to provide for basic personal needs (see Welf.C. 5008(h)(1)(A), *supra*, §97) is not gravely disabled if he or she "can survive safely without involuntary detention with the help of responsible family, friends, or others who are both willing and able to help provide for the person's basic personal needs for food, clothing, or shelter," and who so specifically

state in writing. (Welf.C. 5350(e)(1), (e)(2), (e)(3); on "survive safely" requirement, see *Conservatorship of Johnson* (1991) 235 C.A.3d 693, 697, 1 C.R.2d 46 [assistance offered by mother did not meet "survive safely" requirement where conservatee needed close and continuous supervision].)

However, this preclusion does not apply to a person found gravely disabled due to mental incompetency under P.C. 1370 (see Welf.C. 5008(h)(1)(B), *supra*, §97). (Welf.C. 5350(e)(4).)

(3) *Lack of Present Disability*. A person who poses a danger of relapse or who may otherwise become disabled in the future, but who is not presently gravely disabled, does not meet the statutory definition. (See *Conservatorship of Murphy* (1982) 134 C.A.3d 15, 18, 19, 184 C.R. 363 [person likely to return to use of alcohol was not gravely disabled]; *Conservatorship of Benvenuto* (1986) 180 C.A.3d 1030, 1034, 226 C.R. 33 [trial judge erred in finding conservatee still gravely disabled on basis of possibility that if released he would fail to take his medication and regress].)

SUPPLEMENT: [This section is current through the latest supplement]



99 of 178 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

II. TYPES OF ACTIONS AND SPECIAL PROCEEDINGS

D. Civil Commitment and Related Proceedings.

5. Conservatorship of Gravely Disabled Person.

c. Constitutionality of Gravely Disabled Classification.

3 *Witkin Cal. Proc. Actions* § 99

[§ 99] Constitutionality of Gravely Disabled Classification.

In *Conservatorship of Chambers* (1977) 71 C.A.3d 277, 139 C.R. 357, C, a 24-year-old male with a long history of alcoholism, drug abuse, and commitments to mental institutions, pushed and punched his mother when she destroyed his drugs. On readmission to Napa State Hospital, his condition was diagnosed as a type of chronic undifferentiated schizophrenia, and a petition for conservatorship was filed. After consulting counsel, C waived an adversary hearing and agreed to be bound by the decision of the trial judge. The judge ordered appointment of a conservator. *Held*, order affirmed.

(a) The Lanterman-Petris-Short Act balances the need to provide prompt medical treatment and the equally valid aim of ensuring that those subject to its provisions are not denied due process. (71 C.A.3d 282.) It enumerates the rights of the conservatee, provides procedural due process, and ensures that the civil commitment will not exceed the period of disability. (71 C.A.3d 283.)

(b) "The term 'gravely disabled' is sufficiently precise to exclude the unusual or nonconformist lifestyles. It connotes an inability or refusal ... to care for basic personal needs of food, clothing and shelter. It also provides fair notice of the proscribed conduct to the proposed conservatee who must be presumed to be a person of common intelligence for the purpose of determining the sufficiency of the statute." (71 C.A.3d 284.) Consequently, there is no need to require dangerousness to self or others, as has been done by other courts dealing with different statutes with few if any procedural protections. "We hold that in the context of the LPS, the gravely disabled standard is constitutionally precise and, as it requires a causal link between a specifically defined and diagnosed mental disorder and an inability to care for one's basic personal needs, the term is neither vague nor overbroad." (71 C.A.3d 285.)

SUPPLEMENT: [This section is current through the latest supplement]



100 of 178 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

II. TYPES OF ACTIONS AND SPECIAL PROCEEDINGS

D. Civil Commitment and Related Proceedings.

5. Conservatorship of Gravely Disabled Person.

d. Procedure.

1. In General.

3 *Witkin Cal. Proc. Actions* § 100

[§ 100] In General.

(1) *Nature of Procedure.* The conservatorship procedure is the same as that set forth in *Prob.C. 1400* et seq. governing probate conservatorships (see 14 *Summary* (10th), *Wills and Probate*, §903 et seq.; for forms, see Cal. Civil Practice, 4 Probate and Trust Proceedings §30:41 et seq.), except as follows:

(a) A conservator may be appointed for a minor. (Welf.C. 5350(a).)

(b) In appointing a conservator for a proposed conservatee, including a person found gravely disabled based on inability to provide for basic personal needs (see Welf.C. 5008(h)(1)(A), *supra*, §97), the court *may* consider the order of preferences set forth in *Prob.C. 1812* (see 14 *Summary* (10th), *Wills and Probate*, §936). (Welf.C. 5350(b)(1).) However, in appointing a conservator for a person found gravely disabled based on mental incompetency under P.C. 1370 (see Welf.C. 5008(h)(1)(B), *supra*, §97), the court *must* consider the purposes of "protection of the public" and "the treatment of the conservatee." The court may not appoint the conservator if the court determines that the appointment "will not result in adequate protection of the public." (Welf.C. 5350(b)(2).)

(c) A conservator of the estate may not be appointed under the Welfare Code if a conservatorship or guardianship of the estate exists under the Probate Code. If a conservatorship or guardianship of the person exists under the Probate Code, the Welfare Code proceeding "shall not terminate the prior proceedings but shall be concurrent with and superior thereto." The court in the Welfare Code proceeding, however, may appoint the existing guardian or conservator or another person. (Welf.C. 5350(c).) Notice of the proceeding must be given to an existing guardian or conservator of the person or the estate under the Probate Code. (Welf.C. 5350(g).)

(d) The person for whom a conservatorship is sought has the right to demand a court or jury trial on the issue whether he or she is gravely disabled. (Welf.C. 5350(d); see *infra*, §104.)

(e) Conservatorship investigations must be conducted under the Lanterman-Petris-Short Act, and are not subject to *Prob.C. 1826* or *1850* et seq. (Welf.C. 5350(f); see *infra*, §101.)

(2) *Termination or Renewal of Conservatorship.* A conservatorship automatically terminates after 1 year, but may be renewed on petition. (Welf.C. 5361; see *Conservatorship of James M.* (1994) 30 C.A.4th 293, 297, 35 C.R.2d 567 [expiration of prior conservatorship does not divest court of power to reappoint conservator].)

SUPPLEMENT: [This section is current through the latest supplement]



101 of 178 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

II. TYPES OF ACTIONS AND SPECIAL PROCEEDINGS

D. Civil Commitment and Related Proceedings.

5. Conservatorship of Gravely Disabled Person.

d. Procedure.

2. Investigation and Report.

3 *Witkin Cal. Proc. Actions* § 101

[§ 101] Investigation and Report.

(1) *In General.* Conservatorship investigations must be conducted under the Lanterman-Petris-Short Act and are not subject to *Prob.C. 1826* or *1850* et seq. (*Welf.C. 5350(f).*)

In a county acting jointly with another public agency under an agreement to jointly exercise common powers (see *Govt.C. 6500* et seq.), the governing board must designate the agency that is to provide conservatorship investigations, and may designate that those services be provided by the public guardian or an agency providing guardian services. (*Welf.C. 5351(f).*)

(2) *Recommendation and Report.* When the professional in charge of an agency or facility providing comprehensive evaluation or intensive treatment determines that a person in its care is gravely disabled and is unwilling or unable to accept treatment voluntarily, the professional may recommend conservatorship to the investigating officer. If the investigating officer concurs with the recommendation, the officer must petition the superior court in the county in which the proposed conservatee resides to establish conservatorship. (*Welf.C. 5352*; see *Kaplan v. Superior Court* (1989) 216 C.A.3d 1354, 1356, 265 C.R. 408 [only county's designated investigation officer may file and prosecute petition]; *People v. Karriker* (2007) 149 C.A.4th 763, 782, 57 C.R.3d 412 [citing *Kaplan*; criminal court did not have authority to order public conservator to file petition].)

After investigating all available alternatives to conservatorship, the investigating officer must submit a written report to the court and may recommend a conservatorship only if no suitable alternatives are available. The report must be comprehensive and contain all relevant aspects of the proposed conservatee's medical, psychological, financial, family, vocational, and social condition; information obtained from the proposed conservatee's family members, close friends, social worker, and principal therapist; and all available information concerning the proposed conservatee's real and personal property. (*Welf.C. 5354.*)

The investigating officer's report must set forth the recommendations concerning the powers to be granted to and the duties to be imposed on the conservator, the legal disabilities to be imposed on the conservatee, and the proper

placement for the conservatee (Welf.C. 5356), on the basis of the determination of the professional who recommended conservatorship (Welf.C. 5360). (On powers and duties of conservator and proper placement of conservatee, see *infra*, §112; on legal disabilities of conservatee, see Welf.C. 5357.)

(3) *Service of Report.* A copy of the report must be transmitted to the professional who originally recommended the conservatorship, to the proposed conservator, if any, and to the proposed conservatee. (Welf.C. 5354; see *Conservatorship of Ivey* (1986) 186 C.A.3d 1559, 1563, 1566, 231 C.R. 376 [at minimum, report should have been mailed to proposed conservatee, not merely to his attorney; but failure to do so was not prejudicial where attorney communicated contents of report to conservatee].)

(4) *Use of Report as Evidence.* The court may receive the report in evidence and may read and consider its contents in rendering judgment. (Welf.C. 5354; see *Conservatorship of Manton* (1985) 39 C.3d 645, 651, 217 C.R. 253, 703 P.2d 1147 [report is admissible in initial hearing, but not in subsequent trial]; *Conservatorship of Jones* (1986) 188 C.A.3d 306, 311, 232 C.R. 600 [same].)

SUPPLEMENT: [This section is current through the latest supplement]



102 of 178 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

II. TYPES OF ACTIONS AND SPECIAL PROCEEDINGS

D. Civil Commitment and Related Proceedings.

5. Conservatorship of Gravely Disabled Person.

d. Procedure.

3. Hearing.

3 *Witkin Cal. Proc. Actions* § 102

[§ 102] Hearing.

(1) *Right to Hearing.* On proper notice (see Welf.C. 5350.2), a hearing on a petition under the Lanterman-Petris-Short Act for the conservatorship of a gravely disabled person generally must be held within 30 days after the petition is filed. (Welf.C. 5365; see Welf.C. 5358.3 [conservatee is entitled to hearing to contest rights denied under Welf.C. 5357 and 5358, *infra*, §112]; *Conservatorship of Walker* (1987) 196 C.A.3d 1082, 1101, 242 C.R. 289 [abuse of discretion to appoint public conservator in absence of hearing to determine whether friend or family member was able or willing to serve].)

However, the general provisions of Welf.C. 5365 do not control the more specific provisions of Welf.C. 5362, which provide for notice and a special ex parte procedure when a petition to reestablish a conservatorship is filed under Welf.C. 5361. (*Conservatorship of Moore* (1986) 185 C.A.3d 718, 731, 229 C.R. 875 [formal hearing was not required where conservatee chose not to contest ex parte proceeding]; see *Conservatorship of Delay* (1988) 199 C.A.3d 1031, 1035, 1037, 245 C.R. 216 [rejecting due process challenges to Welf.C. 5361]; *Conservatorship of Cabanne* (1990) 223 C.A.3d 199, 202, 272 C.R. 407 [successor public conservator did not lack authority to petition for reestablishment of conservatorship, although notice of her appointment was not provided to conservatee].)

(2) *Right to Rehearing.* A conservatee is also entitled to a rehearing on his or her status. (Welf.C. 5364.)

(3) *Waiver of Right To Be Present at Hearing.* By waiving the presence of both the conservatee and counsel at the hearing, the conservatee admits that the conservatorship is justified. (*Conservatorship of Pollock* (1989) 208 C.A.3d 1406, 1410, 257 C.R. 14 [hearing on reestablishment of conservatorship].)

(4) *Waiver of Physician's Appearance at Hearing.* A conservatee or proposed conservatee may, on the advice of counsel, waive the presence at the hearing of the physician or other professional recommending the conservatorship and the physician providing evaluation or intensive treatment. In the event of a waiver, the physician or professional may not be required to be present at the hearing if it is stipulated that the recommendation and records concerning the mental condition and treatment of the conservatee or proposed conservatee may be received in evidence. (Welf.C. 5365.1.)

Conservatorship of Scharles (1990) 220 C.A.3d 247, 269 C.R. 398, construes this statute as follows:

(a) Welf.C. 5365.1 applies to both initial establishment hearings and reestablishment hearings. The basic purpose of the statute "is to provide a procedure allowing admission of written records and recommendations without a formal foundation being laid in court." If a statutory waiver of presence is made, medical records and recommendations are "fully admissible 'at any hearing under this chapter.'" (220 C.A.3d 254.)

(b) Welf.C. 5365.1 provides a permissive procedure for the receipt of written evidence; it does not create a mandatory requirement that dictates the manner in which the conservator must carry the burden of proving beyond a reasonable doubt that the person is gravely disabled. "A failure to utilize the waiver procedure to facilitate admission of evidence does not create any affirmative rights to the presence at trial of a recommending or a treating doctor. Moreover, nothing in the section interferes with the receipt of otherwise admissible evidence, such as expert testimony." (220 C.A.3d 254, 255.)

(5) *Waiver of Rights Under Prob.C. 1828*. A proposed conservatee's right under *Prob.C. 1828* to be advised of the nature, purpose, and effect of a conservatorship proceeding (see 14 *Summary* (10th), *Wills and Probate*, §946) is not constitutionally required and may be waived by counsel. (*Conservatorship of Mary K.* (1991) 234 C.A.3d 265, 272, 285 C.R. 618.)

(6) *Waiver of Fundamental Rights by Conservatee's Attorney*. A conservatee's attorney may not stipulate to a judgment on such fundamental issues as placement, disabilities, and the conservator's powers without the trial judge obtaining the conservatee's on-record consent. (*Conservatorship of Christopher A.* (2006) 139 C.A.4th 604, 613, 43 C.R.3d 427.) However, an affidavit signed by a conservatee's attorney under penalty of perjury attesting to the conservatee's agreement to the reestablishment of a conservatorship without a hearing is a sufficient waiver, where the conservatee receives a copy of the reestablishment petition and the accompanying medical statement and is aware of the proposed placement and disabilities, where the conservatee receives written notice of the right to a hearing and a jury trial if the conservatee opposes reestablishment of the conservatorship, and where the conservatee's attorney meets with the conservatee in person and discusses these matters. (*Conservatorship of Tian L.* (2007) 149 C.A.4th 1022, 1031, 57 C.R.3d 382 [distinguishing *Christopher A.*].)

(7) *Ex Parte Communications*. *Prob.C. 1051* restricts ex parte communications between parties, attorneys, and the court. (See 14 *Summary* (10th), *Wills and Probate*, Supp., §378.) The statute applies to proceedings for the conservatorship of a gravely disabled person. (Welf.C. 5372.)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Right to Rehearing*. See *Conservatorship of Amanda B.* (2009) 173 C.A.4th 1380, 1384, 93 C.R.3d 817 [under Welf.C. 5364, authorizing rehearing "at any time," except that no request for rehearing may be filed for 6 months after first request, conservatee need not wait 6 months after commitment before making first request for rehearing].



103 of 178 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

II. TYPES OF ACTIONS AND SPECIAL PROCEEDINGS

D. Civil Commitment and Related Proceedings.

5. Conservatorship of Gravely Disabled Person.

d. Procedure.

4. Representation by Counsel.

3 *Witkin Cal. Proc. Actions* § 103

[§ 103] Representation by Counsel.

(1) *In General.* In a hearing on a petition under the Lanterman-Petris-Short Act for the conservatorship of a gravely disabled person (see *supra*, §102), the court must appoint the public defender or other attorney for the conservatee or proposed conservatee within 5 days after the petition is filed. (Welf.C. 5365.)

In *Conservatorship of Scharles* (1991) 233 C.A.3d 1334, 285 C.R. 325, the conservatee, represented by pro bono counsel, petitioned under Welf.C. 5364 for a rehearing of her conservatorship status, and moved for an independent psychiatric examination at county expense. The trial judge denied the motion on the ground that under the county's system, she was not entitled to the service unless represented by the public defender. The issue on appeal was whether denial of her motion deprived her of the statutory right to a meaningful rehearing by restricting her ability to present evidence. Although the issue became moot when she subsequently changed her mind on termination of the conservatorship, the court emphatically declared that the refusal to grant the motion was an abuse of discretion, as well as contrary to policy:

"[T]he trial court's decision here appears short-sighted, discouraging County and statewide policies encouraging attorneys to perform pro bono services. Contrary to the trial court's characterization of Scharles's counsel's desire to have the County underwrite his practice so he could carry it on, he sought funds simply to present his conservatee's case, funds necessary to permit adequate preparation so Scharles could meet her burden of proof. ... Moreover, the trial court's ruling not only outrightly conflicted with statewide policy encouraging attorneys to perform pro bono services, but also avoided the opportunity to consider whether the County's established system for providing legal services to indigent conservatees could be modified so that the County could administratively oversee and coordinate volunteer lawyers providing pro bono services in this area of the law. Such a rational approach to this problem would not only support the state policy in encouraging counsel to provide pro bono services, but it would also save the County the cost of attorney's fees." (233 C.A.3d 1342.)

(2) *No Right of Self-Representation.* A proposed conservatee has no constitutional or statutory right to represent himself or herself in commitment proceedings under the Lanterman-Petris-Short Act, but the trial judge has discretion

to permit or deny self-representation. (*Conservatorship of Joel E.* (2005) 132 C.A.4th 429, 441, 33 C.R.3d 704 [distinguishing *Conservatorship of Roulet* (1979) 23 C.3d 219, 230, 152 C.R. 425, 590 P.2d 1, *infra*, §108, and *Conservatorship of Margaret L.* (2001) 89 C.A.4th 675, 107 C.R.2d 542, *infra*, §111; upholding trial judge's denial of self-representation request].)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General.* See *Conservatorship of David L.* (2008) 164 C.A.4th 701, 709, 79 C.R.3d 530 [conservatee who requests substitute appointed counsel must be given full opportunity to state reasons for request; thus, trial judge improperly denied request at hearing at which conservatee was absent, even though conservatee's original appointed counsel summarized conservatee's reasons for request at hearing].



104 of 178 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

II. TYPES OF ACTIONS AND SPECIAL PROCEEDINGS

D. Civil Commitment and Related Proceedings.

5. Conservatorship of Gravely Disabled Person.

d. Procedure.

5. Right to Jury Trial.

aa. Nature of Right and Procedure.

3 *Witkin Cal. Proc. Actions* § 104

[§ 104] Nature of Right and Procedure.

(1) *Nature of Right.* A proposed conservatee has the right to demand a court or jury trial on the issue whether he or she is gravely disabled. This right also applies in subsequent proceedings to reestablish the conservatorship. (Welf.C. 5350(d); see Welf.C. 5362 [requisite notice of right to court or jury trial in proceeding to reestablish conservatorship]; but see Welf.C. 5358.3 [no right to jury trial in proceeding to contest rights denied under Welf.C. 5357, 5358; see *infra*, §112]; *Baber v. Superior Court* (1980) 113 C.A.3d 955, 963, 170 C.R. 353 [no right to jury trial on petition for rehearing under Welf.C. 5364, *supra*, §102].)

(2) *Demand.* A demand for a jury trial must be made within 5 days after the hearing on the conservatorship petition. A demand made before the date of the hearing constitutes a waiver of the hearing. The court or jury trial must commence within 10 days of the demand, unless the court, on the request of the proposed conservatee's counsel, continues the trial date for a period not to exceed 15 days. (Welf.C. 5350(d).)

In *Conservatorship of Kevin M.* (1996) 49 C.A.4th 79, 56 C.R.2d 765, the trial judge in conservatorship proceedings under the Lanterman-Petris-Short Act permitted the conservatee to exercise his right to a jury trial during the conservatorship under the county superior court's unwritten procedure permitting conservatees to reserve the right to a jury trial, and to exercise that right once at any time during the year-long conservatorship. *Held*, the unwritten procedure was fatally inconsistent with the requirement that a demand for a jury trial be made within 5 days of the hearing on the conservatorship petition under Welf.C. 5350(d), but the conservator was estopped from challenging the court's jurisdiction to proceed with the jury trial.

(a) *Invalidity of procedure.* Although the 5-day demand requirement of Welf.C. 5350(d) is mandatory, not jurisdictional (49 C.A.4th 87), the superior court's procedure cannot coexist with the statute (49 C.A.4th 89). The procedure ignores a mandatory time limit established by the Legislature for the conservatee to claim his or her jury trial right, resulting in a transfer of the jury trial right from the hearing establishing the conservatorship to a rehearing on the continued existence of the conservatee's disability. (49 C.A.4th 90.)

(b) *Estoppel*. The county counsel, representing the conservator, was familiar with the unwritten procedure reserving jury trials and voiced no objection. (49 C.A.4th 91.) A party's consent to a court's action in excess of jurisdiction may estop the party from subsequently contesting that act. The judge's ruling was supported by the record and by public policy favoring the preservation of jury trial rights. The conservator acquiesced in the reservation of the conservatee's statutory right to a jury trial on the issue of his grave disability, and to its exercise at a later time. The conservator thus enjoyed the advantage of establishment of the conservatorship with the cooperation of the conservatee and without the expense of a jury trial. (49 C.A.4th 92.)

(3) *Peremptory Challenges*. An objector to a conservatorship is entitled to only six peremptory challenges (C.C.P. 231(c); see 7 Cal. Proc. (5th), Trial, §126) in a jury trial, not 12 challenges as provided criminal defendants. (*Conservatorship of Gordon* (1989) 209 C.A.3d 364, 367, 257 C.R. 365.)

(4) *Right to Unanimous Verdict*. A proposed conservatee is entitled to a unanimous jury determination of whether he or she is gravely disabled (*Conservatorship of Roulet* (1979) 23 C.3d 219, 230, 152 C.R. 424, 590 P.2d 1, *infra*, §108), as well as of all other questions involved in the imposition of a conservatorship (*Conservatorship of Davis* (1981) 124 C.A.3d 313, 329, 177 C.R. 369). However, a jury finding that a proposed conservatee is *not* gravely disabled need not be unanimous; a three-fourths majority is sufficient. (*Conservatorship of Rodney M.* (1996) 50 C.A.4th 1266, 1270, 58 C.R.2d 513.)

SUPPLEMENT: [This section is current through the latest supplement]

(5) *(New) No Right to Jury Instructions on Court's Own Motion*. The trial court's duty in criminal cases to instruct, on its own motion, on the general principles of law relevant to the issues raised by the evidence (see 5 Cal. Crim. Law (3d), Criminal Trial, §609 et seq.) does not apply to jury trials in proceedings under the Lanterman-Petris-Short Act for the appointment of a conservator, because these are civil, not criminal, proceedings. (*Conservatorship of George H.* (2008) 169 C.A.4th 157, 161, 86 C.R.3d 666.)



105 of 178 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

II. TYPES OF ACTIONS AND SPECIAL PROCEEDINGS

D. Civil Commitment and Related Proceedings.

5. Conservatorship of Gravely Disabled Person.

d. Procedure.

5. Right to Jury Trial.

bb. Waiver of Jury Trial.

3 *Witkin Cal. Proc. Actions* § 105

[§ 105] Waiver of Jury Trial.

In *Conservatorship of Maldonado* (1985) 173 C.A.3d 144, 218 C.R. 796, the trial judge, sitting without a jury, found plaintiff "gravely disabled" as a result of a mental disorder, within the meaning of Welf.C. 5008(h)(1) (see *supra*, §97), and ordered a conservatorship of the person. Plaintiff appealed, contending that he was denied his right to a jury trial. *Held*, order affirmed.

(a) "The constitutional right to a jury trial exists only with respect to those actions in which the right existed at common law at the time the California Constitution was adopted. ... Since conservatorship proceedings were unknown to the common law, the right to a jury trial therein exists only as provided by statute." (173 C.A.3d 147.)

(b) *Conservatorship of Roulet* (1979) 23 C.3d 219, 152 C.R. 424, 590 P.2d 1, *infra*, §108, "held that due process requires proof beyond a reasonable doubt and jury unanimity in conservatorship proceedings. However, subsequent appellate court decisions have not extended the application of criminal law concepts in this area. ... We are persuaded and therefore hold that civil procedural law determines whether an individual has waived the right to a jury trial in a conservatorship proceeding." (173 C.A.3d 147, 148.)

(c) C.C.P. 631(3) (now C.C.P. 631(d)) provides that a trial by jury may be waived by oral consent, in open court, entered in the minutes or docket. Even though no personal explicit waiver was shown in the record, the clerk's transcript disclosed that when the case was called for trial from the master calendar, appellant's counsel announced a jury waiver. "We find that this evidence of appellant's waiver serves the statutory purpose and thus substantially complies with its requirements." (173 C.A.3d 148.)

Conservatorship of Chambers (1977) 71 C.A.3d 277, 139 C.R. 357, *supra*, §99, and *Maldonado* were distinguished in *Conservatorship of Benvenuto* (1986) 180 C.A.3d 1030, 226 C.R. 33. The *Benvenuto* court held that the failure to send the conservatee written notice of his right to a jury trial, as required by Welf.C. 5362, was reversible error where there was no indication on the record that the conservatee was orally advised of this right by the trial judge, as required

by *Prob.C. 1828*, incorporated by *Welf.C. 5350*. (*180 C.A.3d 1037, 1038*.) In *Chambers* and *Maldonado*, the conservatee was present when counsel waived a jury trial on the record, whereas there was no on-the-record waiver here. (*180 C.A.3d 1038*.) (See *Conservatorship of Mary K. (1991) 234 C.A.3d 265, 271, 285 C.R. 618* [following *Maldonado*; validating waiver of jury trial by plaintiff's counsel].)

SUPPLEMENT: [This section is current through the latest supplement]



106 of 178 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

II. TYPES OF ACTIONS AND SPECIAL PROCEEDINGS

D. Civil Commitment and Related Proceedings.

5. Conservatorship of Gravely Disabled Person.

d. Procedure.

6. Habeas Corpus.

3 *Witkin Cal. Proc. Actions* § 106

[§ 106] Habeas Corpus.

A conservatee committed under the Lanterman-Petris-Short Act as a gravely disabled person has a right to challenge his or her placement or conditions of confinement. (See *In re Gandolfo* (1984) 36 C.3d 889, 898, 206 C.R. 149, 686 P.2d 669, 2 Cal. Proc. (5th), *Jurisdiction*, §446 [although conservatee committed under Lanterman-Petris-Short Act has right to review every 6 months, extraordinary circumstances may arise justifying habeas corpus].)

Notwithstanding the continuing jurisdiction of the court that appointed the conservator, judicial review of a challenge may be in the county (1) where the conservatorship was established or (2) where the conservatee is placed or confined. A conservatee who is released as a result of the hearing must be returned to the county where the conservatorship originated. (Welf.C. 5358.7.)

SUPPLEMENT: [This section is current through the latest supplement]



107 of 178 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

II. TYPES OF ACTIONS AND SPECIAL PROCEEDINGS

D. Civil Commitment and Related Proceedings.

5. Conservatorship of Gravely Disabled Person.

d. Procedure.

7. Physical Restraint of Conservatee.

3 Witkin Cal. Proc. Actions § 107

[§ 107] Physical Restraint of Conservatee.

In *Conservatorship of Warrack* (1992) 11 C.A.4th 641, 14 C.R.2d 99, the conservatee was restrained by leather restraining devices on both his wrists and ankles during a trial that resulted in the reestablishment of his conservatorship under the Lanterman-Petris-Short Act based upon a jury finding that he was gravely disabled. *Held*, reestablishment affirmed.

(a) *No restraint without necessity.* *People v. Duran* (1976) 16 C.3d 282, 127 C.R. 618, 545 P.2d 1322, 5 Cal. Crim. Law (3d), *Criminal Trial*, §11, held that a criminal defendant may not be shackled absent facts justifying extraordinary restraint. "We believe the risk to the integrity of the factfinding process caused by the use of physical restraints is just as great in LPS proceedings as it is in criminal--perhaps more so. The proposed conservatee is on trial to determine whether the person is gravely disabled because of mental illness. The image of a person bound hands and feet with leather restraints and closely attended, as in this case, with two male nurses gives an image of a person out of control. That image presented to the lay jurors in the context of a claimed mental illness could well be potent, though unexamined, evidence of disability. Thus, we hold a proposed conservatee in a jury trial under the LPS Act may not be physically restrained unless the trial court follows the procedures outlined in *People v. Duran*." (11 C.A.4th 647.)

(b) *Evidence justified restraint.* When the issue of restraint was presented by counsel, the trial judge inquired of both attorneys and then heard testimony from one of the conservatee's treating psychologists that established a pattern of escape, violence, and disruptive behavior. Although the conservatee had been in court a short time before this trial without incident, the psychologist testified that the conservatee's condition had worsened since then and that he was now unpredictable and dangerous. Based on this testimony, the trial judge was well within his discretion in ordering the conservatee to be physically restrained. (11 C.A.4th 648.)

(c) *Trial judge should have given warning.* When physical restraints are visible to the jury, *Duran* requires the trial judge, without request, to advise the jurors that the restraints are not evidence of guilt and that they should not speculate as to the reasons for the restraints. Here, the trial judge's failure to give such a warning was error, but it was harmless in view of the fact that both counsel, on voir dire and in closing argument, concurred that the restraints were not evidence

of disability and that the jurors should not speculate as to the reasons for them. (*11 C.A.4th 648.*)

SUPPLEMENT: [This section is current through the latest supplement]



108 of 178 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

II. TYPES OF ACTIONS AND SPECIAL PROCEEDINGS

D. Civil Commitment and Related Proceedings.

5. Conservatorship of Gravely Disabled Person.

d. Procedure.

8. Standard of Proof.

aa. General Rule: Beyond Reasonable Doubt.

3 Witkin Cal. Proc. Actions § 108

[§ 108] General Rule: Beyond Reasonable Doubt.

In *Conservatorship of Roulet* (1979) 23 C.3d 219, 152 C.R. 424, 590 P.2d 1, the Santa Barbara Public Guardian was named the conservator of the person and estate of appellant, a woman of 58. She was placed in Camarillo State Hospital for a year, and thereafter the public guardian petitioned under Welf.C. 5350 and 5361 to reestablish the conservatorship for an additional year. Appellant then demanded a jury trial under Welf.C. 5350 on the issue whether she was gravely disabled, and at the trial, requested instructions on proof beyond a reasonable doubt and unanimous verdict. The trial judge, however, instructed on preponderance of evidence and sufficiency of a verdict agreed to by nine jurors. The jury verdict was that appellant was gravely disabled, and the order reestablishing the conservatorship was made. *Held*, reversed.

(a) *Proof beyond reasonable doubt.* The proper standard of proof is that which applies in criminal trials.

(1) *People v. Burnick* (1975) 14 C.3d 306, 319, 121 C.R. 488, 535 P.2d 352, held that the standard applies to mentally disordered sex offender proceedings (see 6 Cal. Crim. Law (3d), *Criminal Judgment*, §126 et seq.). (23 C.3d 223.)

(2) The logic of *Burnick* is applicable to the appointment of a conservator for an individual in a grave disability proceeding, where the result is involuntary confinement for an unbroken and indefinite period. The deprivation of liberty occurs, despite the label of "civil" confinement, and regardless of the fact that the confinement is allegedly for the individual's own good. (23 C.3d 224, 225.) The fact that the confinement is not in a prison or similar institution designed for punishment is likewise not controlling; conservatees are frequently confined in the same institutions as persons convicted of crimes, and lose many liberties in addition to freedom from physical restraint. (23 C.3d 226, 227, 228.)

(3) The logic of *Burnick* is also applicable because of the stigma and threat to reputation resulting from the finding of grave disability due to a mental disorder. (23 C.3d 228, 229.)

(b) *Unanimous jury*. The civil nature of the proceeding is an insufficient excuse for allowing loss of liberty and good name without a unanimous verdict. No criminal conviction can be had without it. The need is also apparent on a consideration of the uncertainties of psychiatric diagnoses. (23 C.3d 230.) (For commentary on *Roulet*, see 68 Cal. L. Rev. 716; 6 Hastings Const. L. Q. 1061; 33 U.S.F. L. Rev. 59 [arguing that courts are ignoring case].)

SUPPLEMENT: [This section is current through the latest supplement]



109 of 178 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

II. TYPES OF ACTIONS AND SPECIAL PROCEEDINGS

D. Civil Commitment and Related Proceedings.

5. Conservatorship of Gravely Disabled Person.

d. Procedure.

8. Standard of Proof.

bb. Exceptions: Preponderance of Evidence.

3 *Witkin Cal. Proc. Actions* § 109

[§ 109] Exceptions: Preponderance of Evidence.

(1) *Temporary Conservatorship. In re Lois M.* (1989) 214 C.A.3d 1036, 263 C.R. 100, involved a challenge by habeas corpus to a temporary confinement and the appointment of a temporary conservator under Welf.C. 5352.1, 5353, and 5358. *Held*, the "principles of due process mandate that the government carry the burden of proof on the issue of the lawfulness of the detention without the benefit of any presumption of regularity, and that the standard of proof is that of a preponderance of the evidence." (214 C.A.3d 1040.)

(2) *Petition for Rehearing: Motion for Nonsuit. In Conservatorship of Everette M.* (1990) 219 C.A.3d 1567, 269 C.R. 182, a conservatee petitioned for a rehearing, under Welf.C. 5364, on the ground he was no longer gravely disabled. The conservatee presented evidence showing that he had a place to reside on termination of the conservatorship (his mother's home for several months), an income (assuming the Social Security benefits would continue), and a budget that would provide for food, clothing, and other basic necessities. The evidence also showed that his medical needs would be taken care of by the Veterans' Administration, with the assistance of his mother and his fiancée. In her testimony on behalf of the conservatee, his mother conceded that she had once had to call the police because of the conservatee's behavior, but did so because she lacked transportation to take him to the hospital. She also testified that he had once started a fire on a table in her home when he was attempting to fix himself a meal. County counsel, representing the conservator, moved for a nonsuit. The trial judge granted the motion, finding that the conservatee was still gravely disabled and unable to provide for his basic needs without third-party assistance. The conservatee contended on appeal that he presented sufficient evidence for his petition to survive the motion for nonsuit. *Held*, judgment of nonsuit reversed.

(a) "In a petition for rehearing, the conservatee carries the burden of producing evidence and proving by a preponderance of that evidence that he is no longer gravely disabled." (219 C.A.3d 1572.)

(b) However, a nonsuit may be granted only if plaintiff fails to present a prima facie case. Plaintiff's burden to present a prima facie case has been summarized as follows: "At a rehearing, the only fact needed to be shown 'to present

a prima facie case' is that, since the prior establishment or reestablishment of the conservatorship, the conservatee's situation has changed so that he is no longer gravely disabled." (219 C.A.3d 1573, citing *Baber v. Superior Court* (1980) 113 C.A.3d 955, 963, 170 C.R. 353, supra, §104.)

(c) "We cannot say appellant's offer of proof was so deficient it did not constitute a prima facie showing he is no longer gravely disabled. Likewise, as a matter of law, we cannot say a trier of fact could not legally conclude appellant has met his burden of proof." (219 C.A.3d 1574.)

SUPPLEMENT: [This section is current through the latest supplement]



110 of 178 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

II. TYPES OF ACTIONS AND SPECIAL PROCEEDINGS

D. Civil Commitment and Related Proceedings.

5. Conservatorship of Gravely Disabled Person.

d. Procedure.

9. Exclusionary Rule Is Not Applicable.

3 Witkin Cal. Proc. Actions § 110

[§ 110] Exclusionary Rule Is Not Applicable.

In *Conservatorship of Susan T.* (1994) 8 C.4th 1005, 36 C.R.2d 40, 884 P.2d 988, petitioner, a county health department, dispatched a crisis worker to T's apartment. after investigating a treating physician's report that T, a schizophrenic, was a danger to herself and to others. The crisis worker discovered that she was living amidst bagged human and animal waste, without water, heat, or electricity, and took her to a psychiatric hospital. Several hours later, another mental health worker returned to the apartment and photographed its interior, recording the conditions under which T had been living. The public guardian subsequently petitioned for the appointment of a conservator under Welf.C. 5352. At a jury trial, the photographs were admitted over T's objection. After the jury found that she was gravely disabled, the trial judge appointed the public guardian as her conservator. *Held*, the photographs, even if the result of a search, were properly admitted; the exclusionary rule does not apply to conservatorship proceedings under the Lanterman-Petris-Short Act.

(a) *Balancing deterrent effect against social cost in applying exclusionary rule.* Courts generally do not apply the exclusionary rule in civil proceedings, unless a proceeding, such as a forfeiture action (see supra, §70), a deportation proceeding, or a proceeding to commit a narcotic addict (see supra, §91), has punishment or deterrence as its object. Against this deterrent effect, courts balance the social cost of applying the exclusionary rule. (8 C.4th 1016, 1017.)

(b) *Deterrent effect of applying rule is marginal.*

(1) The deterrent effect of the rule is strongest when the governmental agent knows that the fruit of a search will be used in a criminal prosecution. Not every detention under the Act leads to a conservatorship proceeding. Therefore, it is unlikely that a mental health worker will tailor conduct in anticipation of whether evidence will be excluded. (8 C.4th 1018, 1019.)

(2) The longer the detainee remains in treatment under the interim involuntary commitment provisions of the Act (see supra, §81 et seq.), the less need the petitioner has to rely on evidence extrinsic to the detainee's commitment to demonstrate grave disability; the most relevant evidence of that disability will be derived primarily from the detainee.

The exclusion of earlier seized evidence would therefore have little effect on the outcome of the proceeding, and the deterrent effect of the rule would be proportionately weaker. (8 C.4th 1019.)

(3) "An exclusionary rule precluding the use of evidence in a *conservatorship proceeding* would have little or no deterrent effect on a mental health worker whose first concern most likely is securing for a gravely disabled person immediate or interim treatment under the *14-day* or *30-day certifications*, in which no exclusionary rule applies." (8 C.4th 1019.)

(c) *Social cost of applying rule is pronounced.* "[A]mong the primary purposes of conservatorship proceedings are the prompt evaluation and treatment of persons who are gravely disabled, the provision for such persons of individualized treatment, supervision and placement services, and the guarantee and protection of public safety." (8 C.4th 1019, 1020.) "These goals are frustrated if the best and most complete evidence concerning the detainee's mental condition is withheld from the trier of fact." (8 C.4th 1020.)

A strong concurring and dissenting opinion by one justice argued that the exclusionary rule should apply to conservatorship proceedings under the Act (using the same analysis as that of the majority opinion), but that the admission of the photographs, though improper, was harmless error. (8 C.4th 1021.) (See 23 *Pepperdine L. Rev.* 332 [*Conservatorship of Susan T.*].)

SUPPLEMENT: [This section is current through the latest supplement]



111 of 178 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

II. TYPES OF ACTIONS AND SPECIAL PROCEEDINGS

D. Civil Commitment and Related Proceedings.

5. Conservatorship of Gravely Disabled Person.

d. Procedure.

10. Appeal.

3 *Witkin Cal. Proc. Actions* § 111

[§ 111] Appeal.

(1) *Rules for Criminal Appeals Apply.* The rules governing appeals from the superior court in criminal cases apply to an appeal from a judgment or order made pursuant to Welf.C. 5350, except where otherwise expressly provided by C.R.C., Rule 8.480. (C.R.C., Rule 8.480(a).)

(2) *Contents of Record.* The record on appeal (which constitutes the normal record) includes the following:

(a) A clerk's transcript must contain the following: the petition; any demurrer or other plea; any written motion with supporting and opposing memoranda and attachments; any filed medical or social worker reports; all court minutes; all instructions submitted in writing, each noting the party requesting it; any verdict; any written opinion of the court; the judgment or order appealed from; the notice of appeal; and any application for additional record and any order on the application. (C.R.C., Rule 8.480(b).)

(b) A reporter's transcript must contain all oral proceedings, excluding the voir dire examination of jurors and any opening statement of counsel. (C.R.C., Rule 8.480(c).)

(3) *Transmission.* A copy of the record must be transmitted to the parties, but need not be provided to the district attorney or the Attorney General unless that office represents a party. (C.R.C., Rule 8.480(d).)

(4) *Briefs.* Briefs must be served on the parties, but not on the district attorney or the Attorney General unless that office represents a party. (C.R.C., Rule 8.480(e); see *Conservatorship of Besoyan* (1986) 181 C.A.3d 34, 36, 38, 226 C.R. 196 [where appellate counsel files brief that raises no issues, court must review entire record for error]; *Conservatorship of Margaret L.* (2001) 89 C.A.4th 675, 679, 107 C.R.2d 542 [following *Besoyan*].)

(5) *Service.* C.R.C., Rule 8.304 et seq., governing service in appeals in criminal cases, apply to an appeal from a judgment or order made pursuant to Welf.C. 5350.

(6) *Free Transcript to Indigent Conservatee.* An indigent conservatee is entitled to a free transcript for purposes of

prosecuting or defending an appeal. (*Waltz v. Zumwalt* (1985) 167 C.A.3d 835, 213 C.R. 529, 9 Cal. Proc. (5th), *Appeal*, §630.)

(7) *Independent Review of Record Is Not Required.* In *Conservatorship of Ben C.* (2007) 40 C.4th 529, 53 C.R.3d 856, 150 P.3d 738, the Supreme Court held that, unlike in an indigent criminal defendant's first appeal as a matter of right (see 3 Cal. Crim. Law (3d), *Criminal Appeal*, §39), where appellate counsel files a brief in an appeal of a commitment under the Lanterman-Petris-Short (LPS) Act that raises no issues, neither due process, nor equal protection, nor the court's inherent power over appellate procedure requires independent judicial review of the entire record for error. The court reasoned as follows:

(a) A conservatee is not a criminal defendant and the proceedings are civil in nature. (40 C.4th 537.)

(b) The absence of independent review does not significantly increase the risk of an erroneous resolution. (40 C.4th 539.) Before a person may be found to be gravely disabled and committed for a year, the LPS Act provides for a carefully calibrated series of temporary detentions for evaluation and treatment, culminating in a proceeding where the proposed conservatee is entitled to a jury trial, the right to counsel, proof beyond a reasonable doubt, and a verdict by a unanimous jury. After commitment, the conservatee may twice petition for a rehearing and need only prove by a preponderance of the evidence that commitment is not justified. (40 C.4th 541.) Commitment automatically terminates at the end of 1 year. The conservatee is afforded other procedural safeguards if the conservator seeks to extend the commitment or where the conservatee appeals a commitment. (40 C.4th 542.)

(c) If appointed counsel finds no arguable issues, counsel need not and should not file a motion to withdraw. Instead, counsel should inform the appellate court that counsel has found no arguable issues to be pursued on appeal and file a brief setting out the applicable facts and the law. The brief should provide an adequate basis for the appellate court to dismiss the appeal on its own motion without issuing a written opinion. (40 C.4th 544.)

(d) *Conservatorship of Besoyan*, *supra*, and *Conservatorship of Margaret L.*, *supra*, are disapproved to the extent that they hold to the contrary. (40 C.4th 544.)

SUPPLEMENT: [This section is current through the latest supplement]



112 of 178 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

II. TYPES OF ACTIONS AND SPECIAL PROCEEDINGS

D. Civil Commitment and Related Proceedings.

5. Conservatorship of Gravely Disabled Person.

e. Powers and Duties of Conservator.

3 *Witkin Cal. Proc. Actions* § 112

[§ 112] Powers and Duties of Conservator.

(1) *In General.* The powers and duties of a conservator are specified (Welf.C. 5357, 5360), the appointment of a temporary conservator is authorized (Welf.C. 5352.1), and detention of the conservatee or proposed conservatee in a psychiatric or other facility is allowed (Welf.C. 5353, 5358).

(2) *Placement of Conservatee Unable To Provide for Basic Needs.* For a conservatee found gravely disabled based on inability to provide for his or her basic personal needs (see Welf.C. 5008(h)(1)(A), *supra*, §97), the court must determine, and the conservator subsequently must select, the least restrictive and most appropriate facility for placement of the conservatee. (Welf.C. 5358(a)(1)(A), (c)(1); see *Conservatorship of Amanda B. (2007) 149 C.A.4th 342, 351, 56 C.R.3d 901* [court must designate appropriate level of placement; thus, court here erred in designating two suitable placements from which conservator had discretion to choose].) At the same time, the court must also determine which persons are to be notified in the event of a change of placement. (Welf.C. 5358(c)(1).)

The conservator may transfer the conservatee to a less restrictive placement without further hearing or court approval, or place the conservatee in a more restrictive environment if the conservator has reasonable cause to believe that the conservatee's condition has changed so that the conservatee poses an immediate and substantial danger to himself or herself or to others. The conservator must provide written notice of the change and the reasons for it to the conservatee's attorney, the county patient's rights advocate and other persons designated by the court. (Welf.C. 5358(d)(1).)

(3) *Placement of Conservatee Found Mentally Incompetent in Criminal Proceeding.* For a conservatee found gravely disabled due to mental incompetency under P.C. 1370 (see Welf.C. 5008(h)(1)(B), *supra*, §97), the court must give first priority in determining an appropriate facility for placement to achieving the purposes of treatment of the conservatee and protection of the public, and the conservator is required to select a placement in accord with the court's determination. (Welf.C. 5358(a)(1)(B), (c)(2).) When making that determination, the court must also designate the persons to be notified if there is a change in placement and additionally require the conservator on that occurrence to notify the district attorney of the county that made the original placement. (Welf.C. 5358(c)(2).)

The conservator may not transfer the conservatee without giving written notice of the change to the court, the conservatee's attorney, the county patient's rights advocate, the district attorney for the county that made the commitment, and any other persons designated by the court to receive notice. If a person designated to receive the notice objects, a hearing must be scheduled and court approval obtained. At a hearing to seek a less restrictive placement, the court may not approve the transfer if it determines by a preponderance of the evidence that the transfer poses a threat to the safety of the public, the conservatee, or any other individual, and hearings may not be held more than once every 6 months. None of these requirements applies to a transfer of a conservatee between state hospitals. (Welf.C. 5358(d)(2), (d)(3), (d)(4).)

(4) *Power To Request Medical Treatment.* In *Maxon v. Superior Court* (1982) 135 C.A.3d 626, 185 C.R. 516, the conservatee had premalignant cervical cancer, and her conservator sought a court order for a hysterectomy (see Welf.C. 5358.2). The trial judge thought himself bound by the statute dealing with probate conservatorship, which provided that no ward or conservatee could be sterilized (*Prob.C. 2356*). *Held*, mandamus issued directing entry of an order authorizing the operation. Sterilization of a mentally defective person for supposed eugenic reasons is no longer justifiable; but, on clear and convincing evidence of medical necessity, an operation that incidentally results in sterilization may be ordered. "Transcending Alexandra's fundamental rights to privacy and to bear children is her paramount right to life itself." (135 C.A.3d 634.)

Prob.C. 2356 was subsequently amended to prohibit only the sterilization of minors under the Guardianship-Conservatorship Law.

Under Welf.C. 5357, 5358, and 5358.2, a conservator has discretionary power to obtain a court order under which the conservator may require the conservatee to receive routine medical treatment unrelated to an existing medical condition. (See *Conservatorship of Amanda B.*, *supra*, 149 C.A.4th 347; 22 *Pacific L. J.* 599.)

SUPPLEMENT: [This section is current through the latest supplement]



113 of 178 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

II. TYPES OF ACTIONS AND SPECIAL PROCEEDINGS

D. Civil Commitment and Related Proceedings.

6. Protection of Developmentally Disabled or Mentally Ill Persons.

a. In General.

3 Witkin Cal. Proc. Actions § 113

[§ 113] In General.

(1) *1991 Enactment.* Finding that persons with developmental disabilities or mental illness were vulnerable to abuse and serious injury and were subject to neglect, the 1991 Legislature enacted a new Division of the Welfare and Institutions Code (Welf.C. 4900 et seq.). The statutes were designed to bring California law into compliance with federal requirements concerning the authority of the federally mandated protection and advocacy agency; to acknowledge the agency's authority to investigate incidents of abuse and neglect; and to pursue all appropriate remedies on behalf of persons with developmental disabilities or mental illness. The Legislature did not intend to establish an agency or other entity to replace other protection and advocacy services performed by other entities, or to limit the authority of these entities from fulfilling their responsibilities to persons with mental illness or developmental disabilities. (Stats. 1991, Chap. 534, §1.)

(2) *2003 Revision.* The 2003 Legislature substantially revised Welf.C. 4900 et seq. The original purpose of California's protection and advocacy agency was limited to serving persons with developmental disabilities. Since then, the federal mandate of these agencies has expanded to include anyone with a disability as defined by federal law. Because of the multiple federal statutory and regulatory schemes pertaining to the agency, and because California law is outdated, confusion has resulted in delays in investigations and in mandated services, sometimes resulting in death. (Stats. 2003, Chap. 878, §1(a)(2), (a)(7).) The revised statute is intended to (a) ensure that agency services are available to all persons with disabilities as defined in state law, even if that definition is broader than the definition of disability under federal law; and (b) clarify and provide that the agency's authority under state law is the same as its authority under federal law. (Stats. 2003, Chap. 878, §1(b).) State law may not diminish the authority of the agency under federal law. (Stats. 2003, Chap. 878, §1(a)(8).) (On agency's expanded powers, see *infra*, §114.)

(3) *Scope of Statutes.* For purposes of Welf.C. 4900 et seq., disability means any of the following:

(a) A developmental disability, as defined in 42 U.S.C., §15002(8) of the federal Developmental Disabilities Assistance and Bill of Rights Act of 2000.

(b) A mental illness, as defined in 42 U.S.C., §10802(4) of the federal Protection and Advocacy for Mentally Ill

Individuals Amendments Act of 1991.

(c) A physical or mental disability, as defined in 42 *U.S.C.*, §12102(2) of the federal Americans with Disabilities Act of 1990.

(d) A mental or physical disability, as defined in *Govt.C.* 12926(i) or (k) of the California Fair Employment and Housing Act. (*Welf.C.* 4900(d).)

West's Key Number Digest, Mental Health 31 et seq.

SUPPLEMENT: [This section is current through the latest supplement]



114 of 178 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

II. TYPES OF ACTIONS AND SPECIAL PROCEEDINGS

D. Civil Commitment and Related Proceedings.

6. Protection of Developmentally Disabled or Mentally Ill Persons.

b. Protection and Advocacy Agency.

3 Witkin Cal. Proc. Actions § 114

[§ 114] Protection and Advocacy Agency.

(1) *In General.* As used in Welf.C. 4900 et seq. (see supra, §113), the phrase "protection and advocacy agency" refers to the private nonprofit corporation designated by the Governor under federal law to protect and advocate the rights of any of the following:

(a) Persons with developmental disabilities, as authorized under the federal Developmental Disabilities Assistance and Bill of Rights Act of 2000 (PADD Act) (42 U.S.C., §15001 et seq.).

(b) Persons with mental illness, as authorized under the federal Protection and Advocacy for Mentally Ill Individuals Amendments Act of 1991 (PAIMI Act) (42 U.S.C., §10801 et seq.). (See 191 A.L.R. Fed 205 [validity, construction, and operation of Act].)

(c) Persons with physical or mental disabilities, as defined in 42 U.S.C., §12102(2) of the federal Americans with Disabilities Act of 1990, who are not developmentally disabled, as defined in 42 U.S.C., §15002(8) of the PADD Act.

(d) Persons with mental illness, as defined in 42 U.S.C., §10802(4) of the PAIMI Act, who are receiving services under the federal Protection and Advocacy of Individual Rights Act, as defined in 29 U.S.C., §794e.

(e) Persons with mental or physical disabilities, as defined in Govt.C. 12926(i) or (k) of the California Fair Employment and Housing Act. (Welf.C. 4900(i).)

The protection and advocacy agency must meet all of the requirements of federal law applicable to protection and advocacy systems, including the requirement of establishing a grievance procedure to ensure that persons with disabilities or mental illness have full access to the services of the system. (Welf.C. 4901(a).)

The Governor has designated Protection & Advocacy Inc. (PAI) as California's private nonprofit protection and advocacy agency. PAI has an administrative office in Sacramento and legal offices in Sacramento, Oakland, Los Angeles, and San Diego. PAI's website is <http://www.pai-ca.org>.

(2) *Powers of Agency.* In protecting and advocating the rights of persons who have disabilities, the agency may do all of the following: (a) investigate incidents of abuse and neglect; (b) pursue administrative, legal, and other appropriate remedies or approaches; and (c) provide information and training on, and referral to, appropriate programs and services, including information and training about individual rights and the services available from the agency. (Welf.C. 4902(a).)

The agency must be given reasonable access to the facilities or programs providing treatment to persons with disabilities, as well as access to the persons themselves. (Welf.C. 4902(b).) Facilities, programs, or services that deny or delay agency access must promptly provide the agency with a written statement of reasons and, if denial is due to an alleged lack of authorization, with the name, address, and telephone number of the guardian, conservator, or other legal representative of the disabled person. (Welf.C. 4902(c).)

The agency may not enter an individual residence or apartment of a client or the client's family without the consent of an adult occupant, or unless it has obtained the legal authority to enforce its access powers through the legal remedies available under state and federal law. (Welf.C. 4902(d).)

(3) *Access to Records.* Under Welf.C. 4903(a), the protection and advocacy agency must be given access to the records of the following persons with disabilities:

(a) A client of the agency, or any person who has requested assistance from the agency, if that person's agent or legal representative has authorized the agency to have access to the records and if that person has not expressly denied access to the agency after being notified of his or her right to deny access.

(b) A person without a legal representative who is unable to authorize the agency to have access to his or her records and about whom the agency has received a complaint, or determined that there is probable cause to believe, that the person has been subject to abuse or neglect.

(c) A person who is deceased and about whom the agency has received a complaint, or determined that there is probable cause to believe, that the person has been subject to abuse or neglect.

(d) A person who has a legal representative and with respect to whom a complaint has been received by the agency, or with respect to whom the agency has determined that probable cause exists to believe that the person has been subjected to abuse or neglect, if the representative has failed to act on behalf of the person after being offered assistance by the agency.

The information and records available to the agency include (a) information and records prepared in the course of providing intake, assessment, evaluation, training, or other supportive services; (b) reports prepared by an investigating agency that describe the abuse, neglect, injury, or death occurring at the treatment program, facility, or service, the steps taken to investigate the incidents, and reports or records, including staff personnel records; and (c) discharge planning records. (Welf.C. 4903(b).)

Special rules apply to agency access to information, reports, and records in connection with the agency's investigation of abuse or neglect in treatment facilities, programs, or services pursuant to Welf.C. 4902(a). (Welf.C. 4903(c), (e).)

(4) *Disclosure of Records.* Confidential information kept or obtained by the protection and advocacy agency must remain confidential and is not subject to disclosure. However, the agency may (a) share the information with the subject of the record or report, or with his or her authorized representative; (b) issue a public report of the results of an investigation that maintains the confidentiality of service recipients; (c) report investigation results to responsible investigative or enforcement agencies, if the investigation reveals information concerning the treatment facility warranting possible sanctions or corrective action; (d) pursue alternative remedies, including the initiation of legal action; (e) report suspected elder or dependent adult abuse under Welf.C. 15600 et seq. (Welf.C. 4903(f).)

The agency must inform and train employees as appropriate about the confidentiality of client records. (Welf.C. 4903(g).)

(5) *Fee for Copying Records.* A care provider that is required to respond to agency requests for records may charge a reasonable fee to cover the cost of copying records. (Welf.C. 4902(e).)

(6) *Prohibition Against Use of Physical Force.* The agency also may not obtain access to treatment facilities, programs, service recipients, residents, or records by use of physical force if access is denied. (Welf.C. 4906(a).) However, this prohibition does not preclude the agency from pursuing appropriate legal remedies to enforce its access powers under state and federal law. (Welf.C. 4906(b).)

SUPPLEMENT: [This section is current through the latest supplement]



115 of 178 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

II. TYPES OF ACTIONS AND SPECIAL PROCEEDINGS

D. Civil Commitment and Related Proceedings.

6. Protection of Developmentally Disabled or Mentally Ill Persons.

c. Immunity of Agency and Employees.

3 Witkin Cal. Proc. Actions § 115

[§ 115] Immunity of Agency and Employees.

(1) *In General.* The protection and advocacy agency (see supra, §114), its employees, and its agents are not liable for any injury resulting from an employee's or agent's act or omission that was the result of the good faith exercise of discretion. (Welf.C. 4904(a).) These parties are not liable for punitive damages. (Welf.C. 4904(b).)

When filing a complaint or providing information or participating in a judicial proceeding, the agency and its employees and agents are presumed to be acting in good faith. Unless this presumption is rebutted, they are immune from civil and criminal liability, as well as from any penalty, sanction, or restriction that might be incurred or imposed. (Welf.C. 4904(c).)

(2) *No Retaliation by Treatment Facility.* No employee or agent of a treatment facility or program may subject a person with disabilities to reprisal or harassment or take, or threaten to take, any action to prevent the person, his or her representative, or family member from reporting to the agency any information relating to the suspected abuse, neglect, or other violation of the person's rights. (Welf.C. 4905(a).)

Any attempt to remove a person with disabilities from a treatment facility or program, or to deny the person any rights or privileges without good cause, raises a presumption that the action was taken in retaliation for the filing of a complaint by or for the person with the protection and advocacy agency, if the retaliatory action was taken within 60 days after the date the complaint was made or within 60 days after the conclusion of any proceeding resulting from the complaint. (Welf.C. 4905(b).)

SUPPLEMENT: [This section is current through the latest supplement]



116 of 178 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

II. TYPES OF ACTIONS AND SPECIAL PROCEEDINGS

D. Civil Commitment and Related Proceedings.

7. Protection of Endangered Adults.

a. In General.

3 Witkin Cal. Proc. Actions § 116

[§ 116] In General.

(1) *Legislative Findings and Intent.* Finding that elder and dependent adults may be subjected to abuse, neglect, or abandonment by their families or caretakers, the 1996 Legislature enacted a new chapter of the Welfare and Institutions Code (Welf.C. 15700 et seq.). Provisions defining important terms were revised and reorganized in 2002. The statutes are intended to provide a mechanism for temporary emergency protective custody of elderly or dependent adults who are suspected victims of abuse or neglect or who are found to be in a situation that poses an immediate risk of serious injury or death, and when no other means are available to mitigate that risk. (Welf.C. 15700.)

The procedure may *not* be used (a) to circumvent or supplant the involuntary detention, evaluation, and commitment process for mentally disordered persons under Welf.C. 5150 et seq. (see *supra*, §81 et seq.) of the Lanterman-Petris-Short Act (Welf.C. 15701.05(d), 15705.40), or (b) to effectuate placement in jails or correctional treatment centers, as defined in *Health & Saf.C. 1250(j)(1)* (Welf.C. 15701.05(e)).

(2) *Implementation.* The statutes become operative in a county only if the county board of supervisors adopts a conforming resolution. (Welf.C. 15701.37.)

(3) *Definitions.* Important terms are defined in Welf.C. 15600 et seq. and 15701 et seq. They include the following:

(a) "Dependent adult" refers to a person between ages 18 and 64 who either (1) resides in California and has a physical or mental limitation that restricts his or her ability to carry out normal activities or to protect his or her rights, including, but not limited to, a person who has physical or developmental disabilities, or whose physical or mental capacities have diminished because of age; or (2) is admitted as an inpatient to a 24-hour health facility, as defined in *Health & Saf.C. 1250, 1250.2, 1250.3.* (Welf.C. 15610.23.)

(b) "Endangered adult" is a dependent or elder adult who is at immediate risk of serious injury or death, due to suspected abuse or neglect, and who demonstrates an inability to take action to protect himself or herself from the consequence of remaining in that situation or condition. (Welf.C. 15701.25.) A person may not be deemed an endangered adult solely because he or she voluntarily relies on treatment by spiritual means through prayer alone, in

lieu of medical treatment. (Welf.C. 15701.05(d).)

(c) "Appropriate temporary protective services" are services provided to protect an endangered adult from the immediate risk of serious injury or death due to suspected abuse or neglect in accordance with his or her needs. These services may include (1) social services case work and case management, (2) the development of an individualized service plan, (3) referral and emergency response services, (4) counseling, (5) temporary shelter, (6) emergency services, (7) respite services, (8) alternative housing and housing assistance, (9) in-home supportive services, (10) adaptive equipment, (11) transportation, (12) psychology services, and (13) other health-related services and referrals to legal services and advocate agencies. (Welf.C. 15701.4.)

West's Key Number Digest, Mental Health 31 et seq.

SUPPLEMENT: [This section is current through the latest supplement]



117 of 178 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

II. TYPES OF ACTIONS AND SPECIAL PROCEEDINGS

D. Civil Commitment and Related Proceedings.

7. Protection of Endangered Adults.

b. Procedure.

3 Witkin Cal. Proc. Actions § 117

[§ 117] Procedure.

(1) *Detention.* When, from personal observation, an authorized law enforcement officer or county social services or mental health department employee determines that an adult is endangered, the officer or employee may take the adult into temporary emergency protective custody and initiate adult protective proceedings. The officer or employee must transport the adult to a hospital as soon as possible if medical evaluation and treatment are required, and must notify the superior court, the adult's next of kin, and adult protective services. (Welf.C. 15703.)

(2) *Evaluation.* If the treating physician determines that the adult is endangered, the physician may delay release until a local law enforcement agency (a) takes the adult into custody, (b) decides that the adult is not endangered, or (c) takes other appropriate action to ensure the adult's safety. (Welf.C. 15703.05.)

(3) *Commitment.* An endangered adult taken into temporary protective custody must be placed in an appropriate temporary residence (see Welf.C. 15701.05), pending the outcome of an investigation and judicial hearing. The maximum period of detention is 72 hours. (Welf.C. 15703.1.)

(4) *Investigation, Petition, and Hearing.* Within 24 hours after the adult has been taken into custody, a designated county agency must initiate an investigation and file a petition for issuance of an emergency protective services order. A judicial hearing on the petition must be held by the first court day following 48 hours of detention, and a decision must be rendered by the first court day following 72 hours of detention. (Welf.C. 15705.) (On notice, see Welf.C. 15705.25; on petition, see Welf.C. 15705.2.)

(5) *Decision.* If, as a result of the hearing, the court determines that there is no probable cause to continue temporary emergency protective custody, the adult must be released. (Welf.C. 15705.05.) However, if the court determines that there is probable cause, it may issue an order (see Welf.C. 15705.15) for protective services on an emergency basis. The court must make findings, on the record and based on clear and convincing evidence, (a) that the adult is endangered, and (b) that no other appropriate means are available to mitigate the situation that placed the adult at risk of serious bodily harm or death. (Welf.C. 15705.1.)

(6) *Procedural Rights of Adult.* At the hearing on the petition, the adult is entitled to be present unless the adult waives that right, to be represented by counsel, to present evidence and cross-examine witnesses, to receive 24 hours' advance notice of the hearing, and to receive a statement of findings in support of any order for emergency protective services. (Welf.C. 15705.30.)

SUPPLEMENT: [This section is current through the latest supplement]



118 of 178 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

III. FORMS OF ACTION

A. Importance of Distinctions.

3 Witkin Cal. Proc. Actions § 118

[§ 118] Importance of Distinctions.

The code pleading system establishes one form of action, consolidates law and equity, and supports the general doctrine that an action cannot be defeated on the ground that the form of remedy has been mistaken by the pleader. The effect of this "abolition of forms of action" is relatively clear with respect to pleading; it is unnecessary to think in terms of outmoded common law forms of action in drafting a complaint. (See 4 *Cal. Proc.* (5th), *Pleading*, §30 et seq.) But it is misleading to think in terms of one single kind of action. Distinctions between "forms," "types," "classes," or "kinds" of actions and special proceedings still remain, with various procedural and substantive effects. (See 1 *Am.Jur.2d* (2005 ed.), *Actions* §5 et seq.)

The most important classifications are the following:

- (1) Legal and equitable actions. (See *infra*, §119 et seq.)
- (2) Contract and tort actions. (See *infra*, §139 et seq.)
- (3) Actions in personam and in rem. (See 2 *Cal. Proc.* (5th), *Jurisdiction*, §§106 et seq., 243 et seq.)
- (4) Actions and special proceedings. (See *supra*, §62 et seq.)
- (5) Civil and criminal actions. (See *supra*, §68.)

The matters chiefly affected by the distinctions are jurisdiction of courts, venue, statute of limitations, release of joint wrongdoers, contribution between joint wrongdoers, joinder of causes of action, service by publication, attachment, injunction, trial by jury or court, measure of damages, conditions for equitable relief and equitable defenses, and conflict of laws.

In the present topic the discussion will be confined to the two major classes: legal and equitable actions, and contract and tort actions. (See *infra*, §§119 et seq., 139 et seq.) The tests will be examined and illustrated, but the practical effect of the distinction will only be incidentally mentioned. Thus, in distinguishing tort and contract actions, all useful cases will be discussed regardless of whether they arise in the topics of venue, attachment, statute of limitations, etc. Elsewhere, in these special topics, the distinctions and tests will be applied and their practical effect

illustrated, without undue repetition of the present discussion of principles.

West's Key Number Digest, Action 16 et seq.

SUPPLEMENT: [This section is current through the latest supplement]



119 of 178 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

III. FORMS OF ACTION

B. Legal and Equitable Actions.

1. Distinction.

3 *Witkin Cal. Proc. Actions* § 119

[§ 119] Distinction.

(1) *Difficulty in Drawing Distinction.* The distinction between legal and equitable actions is chiefly important in the subjects of jurisdiction of courts (see 2 *Cal. Proc.* (5th), *Jurisdiction*, §50 et seq.) and trial (see 7 *Cal. Proc.* (5th), *Trial*, §84 et seq.). (For illustrations, see *infra*, §120 et seq.)

Actions at law usually seek a money judgment for damages, while equitable actions seek some form of specific relief and equity decrees are usually in personam. (See *De Garmo v. Goldman* (1942) 19 C.2d 755, 760, 123 P.2d 1, *infra*, §121 ["the relief which may be obtained is characteristic of a court of equity in that it acts on the person of the defendant"]; 1 *Am.Jur.2d* (2005 ed.), *Actions* §§6, 11; 13 *Summary* (10th), *Equity*, §2; 2 *Cal. Proc.* (5th), *Jurisdiction*, §§48, 50.)

But this is not invariably true, and, indeed, it is doubtful whether any satisfactory rule of thumb can be devised. "In reality the distinction between the two classes of remedies is more or less arbitrary and groundless. It is well said also that the courts of equity are reaching into new fields of operation and the courts of law are encroaching upon the former territory of the courts of equity." (*Philpott v. Superior Court* (1934) 1 C.2d 512, 515, 36 P.2d 635; see *De Garmo v. Goldman, supra*, 19 C.2d 759 ["Since the distinctions between actions at law and proceedings in equity have been abolished, considerable difficulty has often been encountered in defining them"]; *Reay v. Reay* (1929) 97 C.A. 264, 274, 275 P. 533; 65 *Harv. L. Rev.* 456; 19 *Hastings L. J.* 1017.)

(2) *Tests.* In lieu of a clear definition, the courts rely on two tests, with results not always consistent: (a) the historical basis of the right (*infra*, §120) and (b) the nature of the relief sought (*infra*, §121).

SUPPLEMENT: [This section is current through the latest supplement]



120 of 178 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

III. FORMS OF ACTION

B. Legal and Equitable Actions.

2. Tests.

a. Historical Basis of Right.

3 *Witkin Cal. Proc. Actions* § 120

[§ 120] Historical Basis of Right.

The usual test of an equitable action is whether it would have been within the jurisdiction of the English court of chancery and similar courts in the early American judicial system. "We must therefore find the distinction between the two forms of action in their history and development rather than in their intrinsic differences in theory or philosophy ... to give a proper classification to a cause of action we should seek to find its counterpart in the history of the English law in the light of such modifications thereof as have taken place under our own system." (*Philpott v. Superior Court* (1934) 1 C.2d 512, 516, 36 P.2d 635; see *Ripling v. Superior Court* (1952) 112 C.A.2d 399, 402, 247 P.2d 117, *infra*, §131 ["Although the common law forms of action are abolished and law and equity are united in one forum, the problem of right to a jury trial must still be approached in the context of 1850 common law pleading"]; *Lenard v. Edmonds* (1957) 151 C.A.2d 764, 772, 312 P.2d 308, citing the text; *Tibbitts v. Fife* (1958) 162 C.A.2d 568, 571, 328 P.2d 212; *Frahm v. Briggs* (1970) 12 C.A.3d 441, 444, 90 C.R. 725 [action to establish easement by prescription]; 65 *Harv. L. Rev.* 454.)

SUPPLEMENT: [This section is current through the latest supplement]



121 of 178 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

III. FORMS OF ACTION

B. Legal and Equitable Actions.

2. Tests.

b. Nature of Relief Sought.

3 *Witkin Cal. Proc. Actions* § 121

[§ 121] Nature of Relief Sought.

(1) *Nature of Tests.* The historical test (*supra*, §120) is useful but not conclusive. New remedies are constantly being created by statute, and in their statutory form, these were of course unknown to the English court of chancery. To classify all new statutory remedies as legal, rather than equitable, would defeat the purposes of the classification. Accordingly the courts will consider the nature of the new remedy, and thus we have, in practice, a double test: (a) look to the English practice for a classification of legal and equitable actions based on certain differences in nature; (b) if the action is not one of those listed under the old classification, examine its nature and treat it as equitable if it resembles a traditional equitable remedy.

(2) *Illustrations: Equitable Actions.* In *De Garmo v. Goldman* (1942) 19 C.2d 755, 760, 123 P.2d 1, a shareholder-director brought a representative suit under former C.C. 310 (now *Corp.C. 304*) to remove defendant directors for alleged gross abuse of authority and fraud. After judgment for plaintiff, defendants appealed to the Supreme Court. Classification of the action as equitable was necessary under existing law to establish appellate jurisdiction of the Supreme Court, and was also relevant in connection with the defense of "clean hands." *Held*, the action was equitable.

(a) The historical basis test is not always accurate. "The equitable characteristics of the relief sought must be considered, for the courts of chancery have always claimed and exercised the right to provide a remedy for every wrong not cognizable by courts of law, and the complexities of the present social order have brought about conditions which were unknown when the English courts of equity were established." (19 C.2d 759.)

(b) The action was based on breach of a fiduciary duty and was analogous to the equitable suit for removal of a trustee. In addition, the statute authorizes a form of injunctive relief--a judgment barring the removed director from reelection. (19 C.2d 760.)

Other cases are to the same effect. (See *Trubowitch v. Riverbank Canning Co.* (1947) 30 C.2d 335, 347, 182 P.2d 182 [statutory proceeding was in substance action in equity for specific performance of contract to arbitrate]; *Booge v. First Trust & Savings Bank of Pasadena* (1941) 46 C.A.2d Supp. 879, 882, 116 P.2d 503 [action by judgment creditor to

reach debtor's property in possession of third person, although recognized by statute, was similar to old creditor's bill, and was therefore action in equity].)

(3) *Illustrations: Legal Actions.* If the new statutory remedy is in nature and substance similar to a common law action triable by jury, it will be deemed a legal action and triable by jury today. (See *People v. One 1941 Chevrolet Coupe* (1951) 37 C.2d 283, 299, 231 P.2d 832 [former statutory proceeding to forfeit automobile used in illegal transportation of narcotics]; *Grossblatt v. Wright* (1951) 108 C.A.2d 475, 486, 239 P.2d 19 [action for treble damages under federal housing law for rent overcharge; similar to common law action of debt for recovery of penalty].)

SUPPLEMENT: [This section is current through the latest supplement]



122 of 178 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

III. FORMS OF ACTION

B. Legal and Equitable Actions.

2. Tests.

c. Defendant's Pleading.

3 *Witkin Cal. Proc. Actions* § 122

[§ 122] Defendant's Pleading.

(1) *General Rule.* Examination of the complaint (supra, §121) is not always sufficient. The plaintiff may have intended to bring either an equitable or a legal action, but the defendant's pleading--answer or cross-complaint--may add to or change its nature. The rule is, therefore, that all of the pleadings must be examined to determine whether the case is at law or in equity, or a combination of both. (See *Woolsey v. Woolsey* (1932) 121 C.A. 576, 581, 9 P.2d 605; *Bixby v. Hotchkis* (1943) 58 C.A.2d 445, 454, 136 P.2d 597; *Campbell v. Rustigian* (1943) 60 C.A.2d 500, 503, 140 P.2d 998; *Estate of Cazaurang* (1946) 75 C.A.2d 217, 225, 170 P.2d 694; *Holt v. Parmer* (1951) 106 C.A.2d 329, 332, 235 P.2d 43; 2 Cal. Proc. (5th), *Jurisdiction*, §50.)

(2) *Illustrations.* In *O'Dea v. Hibernia Savings & Loan Soc.* (1932) 119 C.A. 622, 7 P.2d 318, the action was against a bank to enforce a decedent's gift causa mortis--an order to transfer money in a savings bank. One count of the complaint was in the form of a legal action for money had and received, and plaintiff demanded a jury trial. But plaintiff had joined the decedent's administrator and heirs as defendants, and in their answers they attacked the validity of the gift. Hence, the case became one to determine adverse claims to the money, with the bank in the position of a mere stakeholder. Because the action, at the time of trial, was substantially an interpleader suit, it was equitable and a jury trial was properly denied. (119 C.A. 623.)

In *Swinney v. Legg* (1933) 129 C.A. 476, 18 P.2d 970, plaintiff holder sued to recover on promissory notes. Defendants answered and cross-complained seeking cancellation. *Held*, the issues were almost wholly equitable and there was no right to a jury trial. (129 C.A. 477.)

SUPPLEMENT: [This section is current through the latest supplement]



123 of 178 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

III. FORMS OF ACTION

B. Legal and Equitable Actions.

2. Tests.

d. Matters That Are Not Controlling.

1. Label or Designation.

3 *Witkin Cal. Proc. Actions* § 123

[§ 123] Label or Designation.

In classifying an action as legal or equitable, the court will look to its substance, i.e., to the nature of the right involved and the remedy sought. The label or title of the complaint is never controlling. (See *Ballin v. Los Angeles County Fair* (1941) 43 C.A.2d Supp. 884, 888, 111 P.2d 753 [plaintiff in justice court added label for "declaratory relief," but, in absence of sufficient allegations or prayer, this did not oust justice court's jurisdiction]; *Hutchason v. Marks* (1942) 54 C.A.2d 113, 114, 128 P.2d 573 ["complaint for cancellation of instruments and for equitable relief," on examination, raised legal issues requiring jury trial]; *Fearey v. Gough* (1943) 61 C.A.2d 778, 779, 143 P.2d 711 ["complaint for money held in trust" was actually legal action for money had and received (quasi-contract), and superior court had no jurisdiction]; *Dills v. Delira Corp.* (1956) 145 C.A.2d 124, 130, 302 P.2d 397, *infra*, §135; *Paularena v. Superior Court* (1965) 231 C.A.2d 906, 911, 42 C.R. 366.)

SUPPLEMENT: [This section is current through the latest supplement]



124 of 178 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

III. FORMS OF ACTION

B. Legal and Equitable Actions.

2. Tests.

d. Matters That Are Not Controlling.

2. Cause of Action or Governing Principles.

3 *Witkin Cal. Proc. Actions* § 124

[§ 124] Cause of Action or Governing Principles.

It is technically inaccurate to use the conventional phrase "cause of action in equity," because the cause of action and the remedy or relief are distinct. (See 4 *Cal. Proc.* (5th), *Pleading*, §40.) This elliptical expression occasionally leads to incorrect results in the classification of actions. In pleading and proving a cause of action, the plaintiff may invoke principles developed in chancery courts and described as "equitable," but the action does not thereby become equitable unless the plaintiff demands some form of equitable relief. The following are illustrative:

(1) *Restitution of Money Wrongfully Obtained*. The "equitable" basis of restitution after unilateral rescission influenced the Supreme Court some years ago to depart from precedent and declare the action "equitable." Later decisions made it clear that the remedy sought--restitution of money wrongfully obtained--was not characteristically equitable relief, and that the action was one at law. (See *infra*, §130.)

(2) *Fraud by Fiduciary*. The same problem arises where the plaintiff brings an action based on the fraud of a fiduciary. In *Mortimer v. Loynes* (1946) 74 C.A.2d 160, 168 P.2d 481, plaintiff commissioner, as the statutory liquidator of a building and loan company, brought this action against defendant, its former president and manager, to recover a secret profit wrongfully withheld from the company. The prayer was for actual damages in the amount of the profit plus interest, and for exemplary damages. *Held*, the action was at law, and the trial judge erred in denying a jury trial. "From the fact that equitable principles are thus used to establish the alleged liability of the defendants, it does not necessarily follow that the action to enforce that liability is equitable. The law courts now recognize and apply many equitable principles and grant relief based thereon where, as here, legal relief is sought in the form of a judgment for a specific amount. ... None of the extraordinary powers of a court of equity are required in order to give plaintiff the relief that he seeks. A court of law can afford complete relief." (74 C.A.2d 168.) (See *Ripling v. Superior Court* (1952) 112 C.A.2d 399, 402, 247 P.2d 117, *infra*, §131.)

(3) *Probate Proceedings*. The probate court has no general equity jurisdiction and equitable actions cannot be brought there; but in the trial of matters within its jurisdiction, it may freely apply equitable principles. (See 14 *Summary* (10th), *Wills and Probate*, §347 et seq.)

(4) *Subrogation*. Subrogation is an equitable doctrine, but today a subrogee may invoke the doctrine to establish the right to sue as the real party in interest, and may bring a legal action. (See *Offer v. Superior Court* (1924) 194 C. 114, 120, 228 P. 11; 4 Cal. Proc. (5th), Pleading, §132.)

(5) *Abandonment of Equitable Demand and Promissory Estoppel*. The question whether application of equitable principles makes the action "equitable" was left in some doubt in *Raedeke v. Gibraltar Savings & Loan Assn.* (1974) 10 C.3d 665, 111 C.R. 693, 517 P.2d 1157. Plaintiffs gave a \$ 730,000 note secured by a deed of trust on their hotel. They became delinquent, and defendant G, the beneficiary, gave notice of default and election to sell. Plaintiffs alleged that thereafter, at their request, G orally agreed to postpone the sale if plaintiffs procured a willing responsible buyer; that they procured a buyer, but that G violated its promise, held the sale, purchased for the unpaid balance of the loan, and converted plaintiffs' personal property on the premises. The original complaint sought to set aside the sale and to recover damages for breach of contract. However, at the trial, to insure a jury trial, plaintiffs abandoned their equitable demand (setting aside the sale), and relied solely on their demand for damages for breach of the oral contract to continue the sale. The jury gave them a verdict of \$ 475,000, with special findings in their favor on the facts. The judge, treating the action as equitable, with the verdict only advisory, made contrary findings on the facts and reduced the judgment to \$ 14,000, the value of the personal property converted. *Held*, reversed.

(a) *Election to abandon equitable demand*. Plaintiffs overcame their first obstacle to a jury trial by electing to abandon the claim for equitable relief and to seek only damages. (10 C.3d 671.)

(b) *Issue of promissory estoppel*. Defendant G argued that plaintiffs' cause of action on the oral promise without consideration was based on promissory estoppel, a doctrine that employs equitable principles, and that the judge properly treated this cause of action as equitable. The court gave alternative answers to this contention:

(1) Plaintiffs did not rely on promissory estoppel; i.e., they did not seek to enforce a contract lacking in consideration by showing justifiable reliance and detriment. They showed consideration. Their procurement of a purchaser was properly found to have been "the bargained-for performance necessary" to support the promise to postpone the sale. (10 C.3d 673.)

(2) "[E]ven as to plaintiffs' reliance upon promissory estoppel, there is some basis for holding that the action remained one at law." In other words, equitable principles may be applied in an action at law without changing the character of the action. (10 C.3d 674, footnote 4.)

SUPPLEMENT: [This section is current through the latest supplement]



125 of 178 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

III. FORMS OF ACTION

B. Legal and Equitable Actions.

2. Tests.

d. Matters That Are Not Controlling.

3. Prayer.

3 *Witkin Cal. Proc. Actions* § 125

[§ 125] Prayer.

(1) *Nature of Problem.* The prayer or demand of the complaint is the obvious place to discover the nature of the relief sought (see 4 *Cal. Proc.* (5th), *Pleading*, §495), and it is of course helpful in discovering the legal or equitable nature of the action. But it is not conclusive. The prayer does not necessarily indicate the legal or equitable nature of the relief; e.g., a demand for \$ 5,000 may be a claim of damages (law) or the amount of trust funds wrongfully withheld by a trustee (equity) or the price in a vendor's action for specific performance (equity). And the pleader will often demand a variety of remedies and will pray "for such other relief as may be proper," regardless of whether the body of the complaint supports the demand. (See *Merrill v. Hare* (1934) 139 C.A. 462, 464, 34 P.2d 194, 2 *Cal. Proc.* (5th), *Jurisdiction*, §51 [prayer sought injunction, but allegations were insufficient for that relief; thus, superior court lacked jurisdiction]; *Reardon v. Melbourne* (1942) 53 C.A.2d 257, 259, 127 P.2d 618, 2 *Cal. Proc.* (5th), *Jurisdiction*, §51 [prayer sought specific performance, but allegations were insufficient for that relief; thus, superior court lacked jurisdiction]; *Hutchason v. Marks* (1942) 54 C.A.2d 113, 116, 128 P.2d 573 [prayer in form sought only equitable relief, but complaint was found to allege damage from fraud, giving right to jury trial].)

(2) *Resolution by Courts.* To address this problem, the practice of the court is to examine the allegations of the complaint in reaching its determination about the kind of action the plaintiff is bringing. In many cases the combination of caption, prayer, and allegations will give a fairly accurate indication. (See *Becker v. Superior Court* (1907) 151 C. 313, 316, 90 P. 689; *Silverman v. Greenberg* (1938) 12 C.2d 252, 254, 83 P.2d 293; *Wight v. Rohlfss* (1934) 137 C.A. 730, 732, 31 P.2d 419; but see *supra*, §122.)

SUPPLEMENT: [This section is current through the latest supplement]



126 of 178 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

III. FORMS OF ACTION

B. Legal and Equitable Actions.

3. Equitable Actions.

a. Actions Arising Out of Contract.

3 *Witkin Cal. Proc. Actions* § 126

[§ 126] Actions Arising Out of Contract.

There are three common types of contract actions in equity:

(1) *Specific Performance*. (See *Schaefer v. United Bank & Trust Co. of Calif.* (1930) 104 C.A. 635, 642, 286 P. 723 [no right to jury trial]; *Crouser v. Boice* (1942) 51 C.A.2d 198, 204, 124 P.2d 358 [same]; *Benach v. Los Angeles* (2007) 149 C.A.4th 836, 846, 57 C.R.3d 363, citing the text [same]; 65 *Harv. L. Rev.* 464.)

A vendor's action for the purchase price of land is an action for specific performance. (*Laske v. Lampasona* (1948) 89 C.A.2d 284, 288, 200 P.2d 871, 13 *Summary* (10th), *Equity*, §29.) And a statutory proceeding to compel arbitration is regarded as an action in equity for specific performance of a contract to arbitrate. (*Trubowitch v. Riverbank Canning Co.* (1947) 30 C.2d 335, 347, 182 P.2d 182.)

(2) *Reformation*. (See *Martinez v. Martinez* (1950) 99 C.A.2d 425, 428, 221 P.2d 986.)

(3) *Injunction*. Actions seeking injunctive relief are, of course, equitable in nature. Although most arise out of torts (*infra*, §127), injunctions are occasionally granted in contract actions; e.g., the indirect enforcement of a contract for unique personal services by enjoining the breach of a negative promise (forbidding the defendant to perform services for others). (See 6 *Cal. Proc.* (5th), *Provisional Remedies*, §306.)

SUPPLEMENT: [This section is current through the latest supplement]



127 of 178 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

III. FORMS OF ACTION

B. Legal and Equitable Actions.

3. Equitable Actions.

b. Actions Arising Out of Tort.

3 *Witkin Cal. Proc. Actions* § 127

[§ 127] Actions Arising Out of Tort.

(1) *In General*. Injunction is a typical form of equitable relief, and an action in which injunctive relief is sought is an action in equity. (See *St. James Church of Christ Holiness v. Superior Court* (1955) 135 C.A.2d 352, 361, 287 P.2d 387.)

(2) *Action To Abate Nuisance*. "The prevention or abatement of a nuisance is to be accomplished by means of an injunction either prohibitive or mandatory, and an action therefor is within the equitable jurisdiction of the court." (*McCarthy v. Gaston Ridge Mill & Mining Co.* (1904) 144 C. 542, 545, 78 P. 7 [jury's verdict is advisory and may be disregarded]; see *People v. Frangadakis* (1960) 184 C.A.2d 540, 545, 7 C.R. 776 [action to abate restaurant illegally serving liquor without license as public nuisance under *B. & P.C. 25604*]; 65 *Harv. L. Rev.* 464.)

In *Carse v. Marsh* (1922) 189 C. 743, 210 P. 257, a statute declared the place where liquor was sold a nuisance. *Held*, the superior court had jurisdiction to abate it within the county "whether it is declared to be a nuisance by an act of Congress or by the state legislature, or whether it is of such a character as would be a nuisance by common law." (189 C. 744.) In *McLaughlin v. Del Re* (1884) 64 C. 472, 2 P. 244, an action was brought to restrain dumping of debris and to recover damages for past acts. *Held*, it was an equitable action to restrain a continuing trespass or nuisance. Hence, it should have been tried by the court, and findings made; a judgment based on a general verdict of the jury was improper. (64 C. 474.)

(3) *Other Equitable Actions*. Other equitable actions to obtain relief against torts include injunctions against violation of a trade secret, against unfair competition, and against violation of personal rights. (See 13 *Summary* (10th), *Equity*, §71 et seq.; 5 *Cal. Proc.* (5th), *Pleading*, §§829, 830, 832; 6 *Cal. Proc.* (5th), *Provisional Remedies*, §292.)

SUPPLEMENT: [This section is current through the latest supplement]



128 of 178 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

III. FORMS OF ACTION

B. Legal and Equitable Actions.

3. Equitable Actions.

c. Actions Involving Trusts, Mortgages, or Equitable Liens.

3 Witkin Cal. Proc. Actions § 128

[§ 128] Actions Involving Trusts, Mortgages, or Equitable Liens.

(1) *Actions To Establish or To Enforce Trusts.* Actions to establish or to enforce trusts are traditionally equitable. (See *Reay v. Reay* (1929) 97 C.A. 264, 270, 275 P. 533 [action on confused theory, but seeking recovery of property held by defendants in violation of trust; jury verdict was advisory and thus disregarded]; *Woolsey v. Woolsey* (1932) 121 C.A. 576, 581, 9 P.2d 605 [action to establish trust in bank account, praying for money judgment; jury verdict was advisory and thus disregarded]; *Lane v. Whitaker* (1942) 50 C.A.2d 327, 331, 123 P.2d 53 [action to compel trustee to account for value of trust property; jury trial was properly denied]; *Tibbitts v. Fife* (1958) 162 C.A.2d 568, 572, 328 P.2d 212 [no right to jury trial]; 5 Cal. Proc. (5th), *Pleading*, §833; but see *Ripling v. Superior Court* (1952) 112 C.A.2d 399, 407, 247 P.2d 117, *infra*, §131.) (On judicial proceedings concerning trusts generally, see *Prob.C. 17000 et seq.*; 13 *Summary* (10th), *Trusts*, §217 *et seq.*)

The action by a putative spouse to establish rights in what would have been community property of a valid marriage was developed under the general principles of equity and is an equitable action. (*Pack v. Vartanian* (1965) 232 C.A.2d 466, 476, 42 C.R. 729; see *Family C. 2251* and *2252* [codifying rules on what is now termed "quasi-marital property"]; 11 *Summary* (10th), *Community Property*, §260 *et seq.*)

(2) *Actions To Foreclose Mortgages or Liens.* Equity has jurisdiction over the foreclosure of mortgages and other liens. (See *Hibernia Savings & Loan Soc. v. London & Lancashire Fire Ins. Co.* (1903) 138 C. 257, 259, 71 P. 334 [equitable foreclosure of judgment lien]; *Proctor v. Arakelian* (1929) 208 C. 82, 98, 280 P. 368; *Brichetto v. Raney* (1926) 76 C.A. 232, 240, 245 P. 235 [jury verdict was only advisory]; *Holbrook v. Phelan* (1931) 121 C.A. Supp. 781, 783, 6 P.2d 356 [complaint to foreclose lien on real property is action in equity]; *Elmore Jameson Co. v. Smith* (1939) 34 C.A.2d 609, 616, 93 P.2d 1063 [foreclosure of crop mortgage; equity jurisdiction to impose charge on proceeds to reimburse junior lienholder for expenditures and services]; *Sperber v. Robinson* (1994) 26 C.A.4th 736, 742, 31 C.R.2d 659 [psychologist's action to establish equitable lien for amount of patient's bill and expert witness services rendered; no right to jury trial except to extent claimant also seeks personal judgment against debtor].)

In *Weldon v. Superior Court* (1903) 138 C. 427, 71 P. 502, an unpaid materialman who had furnished materials for construction gave notice to the owner, and claimed a prior right to be paid out of funds in the owner's hands. The

general contractor objected that the amount of the claim was within the jurisdiction of the justice court. *Held*, the superior court had jurisdiction. The court quoted Pomeroy's description of equitable remedies of this type: "They assume that the creditor has, either by operation of law, or from contract, or from some acts or omission of the debtor, a lien, or charge, or encumbrance upon some fund or funds belonging to the latter, either land, chattels, things in action, or even money; and the *form* of the remedy requires that this lien or charge should be established, and then enforced, and the amount due obtained by a sale, total or partial, of the fund, or by a sequestration of its rents, profits, and proceeds." (138 C. 431.) (See *Whiting-Mead Co. v. West Coast Bond & Mortg. Co. (1944)* 66 C.A.2d 460, 464, 468, 152 P.2d 629 [action in equity to establish priority of claims of laborers and materialmen to funds in hands of mortgagee; jurisdiction of superior court upheld on theories of (a) trust (duty of trustee to pay over trust funds); (b) preventing multiplicity of suits].)

SUPPLEMENT: [This section is current through the latest supplement]



129 of 178 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

III. FORMS OF ACTION

B. Legal and Equitable Actions.

3. Equitable Actions.

d. Miscellaneous Actions.

3 Witkin Cal. Proc. Actions § 129

[§ 129] Miscellaneous Actions.

The following actions fall under no particular classification except that they are equitable in nature.

(1) *Accounting*. (See *Prince v. Lamb* (1900) 128 C. 120, 125, 60 P. 689; *Freeman v. Donohoe* (1923) 65 C.A. 65, 79, 223 P. 431; 65 Harv. L. Rev. 460; 5 Cal. Proc. (5th), *Pleading*, §819; but see *Ripling v. Superior Court* (1952) 112 C.A.2d 399, 407, 247 P.2d 117, *infra*, §131.)

(2) *Interpleader*. (See *Union Mut. Life Ins. Co. v. Broderick* (1925) 196 C. 497, 502, 238 P. 1034 [no right to jury trial]; *O'Dea v. Hibernia Savings & Loan Soc.* (1932) 119 C.A. 622, 624, 7 P.2d 318, *supra*, §122; *Coggins v. Superior Court* (1932) 127 C.A. 412, 416, 16 P.2d 148 [cross-complaint for interpleader brought case within superior court jurisdiction]; 4 Cal. Proc. (5th), *Pleading*, §237.)

(3) *Partition*. (See *Akley v. Bassett* (1922) 189 C. 625, 647, 209 P. 576; *Elbert, Ltd. v. Clare* (1953) 40 C.2d 498, 501, 254 P.2d 20; 5 Cal. Proc. (5th), *Pleading*, §679.)

(4) *Cancellation of Void Instrument*. This action under C.C. 3412 is sometimes called an action "to remove a cloud," and is based on the equitable bill quia timet. (See *Castro v. Barry* (1889) 79 C. 443, 446, 21 P. 946 [distinguishing statutory action to quiet title]; *Rocha v. Rocha* (1925) 197 C. 396, 402, 240 P. 1010; *Santa Ana Mortg. & Inv. Co. v. Kinslow* (1938) 30 C.A.2d 107, 110, 85 P.2d 899 [jury trial was properly denied]; *Porter v. Superior Court* (1977) 73 C.A.3d 793, 799, 141 C.R. 59, citing the text; 25 Cal. L. Rev. 566; 5 Cal. Proc. (5th), *Pleading*, §671; *supra*, §11.)

(5) *Creditor's Bill in Equity*. Under the old equity practice, a judgment creditor could reach assets of the debtor in possession of a third person by a creditor's bill in equity--an action against the third person. California statutory proceedings supplemental to execution recognize this independent action as one in equity. (See C.C.P. 708.210; *Bond v. Bulgheroni* (1932) 215 C. 7, 10, 8 P.2d 130; *Booge v. First Trust & Savings Bank of Pasadena* (1941) 46 C.A.2d Supp. 879, 882, 116 P.2d 503; 8 Cal. Proc. (5th), *Enforcement of Judgment*, §291 et seq.)

(6) *Creditor's Action Disregarding Corporate Entity*. An action by a creditor to hold an individual liable on a corporate obligation, on allegations justifying disregard of the separate corporate entity, is "essentially equitable in nature." (*Castellini v. Municipal Court* (1970) 7 C.A.3d 174, 176, 86 C.R. 698.)

(7) *Bill of Peace*. Equity occasionally takes jurisdiction over an action normally legal in character when necessary to prevent a multiplicity of suits. (See 4 Cal. Proc. (5th), *Pleading*, §348.)

(8) *Declaratory Relief*. (See *Adams v. Cook* (1940) 15 C.2d 352, 362, 101 P.2d 484; *Cook v. Winklepleck* (1936) 16 C.A.2d Supp. 759, 765, 59 P.2d 463; *Ralphs Grocery Co. v. Amalgamated Meat Cutters & Butcher Workmen of North America, Local No. 439* (1950) 98 C.A.2d 539, 542, 220 P.2d 802; 28 Cal. L. Rev. 638; 62 Harv. L. Rev. 799; 5 Cal. Proc. (5th), *Pleading*, §849; but see *Dills v. Delira Corp.* (1956) 145 C.A.2d 124, 130, 302 P.2d 397, *infra*, §135.)

(9) *Independent Action in Equity To Set Aside Judgment Obtained by Extrinsic Fraud or Mistake*. (See *Holt v. Parmer* (1951) 106 C.A.2d 329, 332, 235 P.2d 43; 8 Cal. Proc. (5th), *Attack on Judgment in Trial Court*, §215.)

(10) *Action Based on Promissory Estoppel*. (See *C & K Engineering Contractors v. Amber Steel Co.* (1978) 23 C.3d 1, 7, 9, 11, 151 C.R. 323, 587 P.2d 1136; *A-C Co. v. Security Pac. Nat. Bank* (1985) 173 C.A.3d 462, 472, 219 C.R. 62; 31 *Hastings L. J.* 697.)

(11) *Certain Shareholders' Actions*.

(a) Representative (derivative) suit. (See *Whitten v. Dabney* (1915) 171 C. 621, 630, 154 P. 312; *Rosenfeld v. Zimmer* (1953) 116 C.A.2d 719, 722, 254 P.2d 137; 9 *Summary* (10th), *Corporations*, §170 et seq.) (For different view of derivative suits, see *Ross v. Bernhard* (1970) 396 U.S. 531, 90 S.Ct. 733, 735, 24 L.Ed.2d 729, 733 [jury trial in federal court on legal issues].)

(b) Statutory action to determine validity of election or appointment of director or officer. (See *Lawrence v. I.N. Parlier Estate Co.* (1940) 15 C.2d 220, 227, 100 P.2d 765; *Columbia Engineering Co. v. Joiner* (1965) 231 C.A.2d 837, 842, 42 C.R. 241.)

(c) Statutory action to remove director for fraud or gross abuse of authority. (See *De Garmo v. Goldman* (1942) 19 C.2d 755, 760, 123 P.2d 1, *supra*, §121.)

SUPPLEMENT: [This section is current through the latest supplement]



130 of 178 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

III. FORMS OF ACTION

B. Legal and Equitable Actions.

4. Legal Action for Restitution.

3 *Witkin Cal. Proc. Actions* § 130

[§ 130] Legal Action for Restitution.

(1) *Former Action for Rescission Was Equitable.* The traditional action for rescission, i.e., to have a rescission adjudged, was equitable. (See *Whittaker v. E.E. McCalla Co.* (1932) 127 C.A. 583, 588, 16 P.2d 282; *Bank of America v. Greenbach* (1950) 98 C.A.2d 220, 225, 219 P.2d 814; *Fairbairn v. Eaton* (1935) 6 C.A.2d 264, 268, 43 P.2d 1113; 36 Cal. L. Rev. 606; 65 Harv. L. Rev. 461.) This action was abolished in California by the repeal of C.C. 3406 in 1961. (See 1 *Summary* (10th), *Contracts*, §930.)

(2) *Restitution After Completed Unilateral Rescission Is Legal.* Unilateral rescission can be effected without action, by notice. This was the usual method under former California law and is now the sole method. (See C.C. 1691 et seq.; 1 *Summary* (10th), *Contracts*, §936 et seq.) Thereafter, the party rescinding has an action for restitution to recover the consideration that the party gave. (See *Runyan v. Pacific Air Industries* (1970) 2 C.3d 304, 312, 85 C.R. 138, 466 P.2d 682, *infra*, §182; *Paularena v. Superior Court* (1965) 231 C.A.2d 906, 913, 42 C.R. 366; *Nelson v. Sperling* (1969) 270 C.A.2d 194, 195, 76 C.R. 481.)

An unfortunate mistake in *Stone v. Superior Court* (1931) 214 C. 272, 273, 4 P.2d 777, an attachment case, described this action as one "for equitable relief," and led to a number of decisions denying the jurisdiction of former municipal and inferior courts over restitution actions. (See, e.g., *Fair View Farms Co. v. Superior Court* (1932) 123 C.A. 9, 10 P.2d 1011.) This mistake was corrected in *Philpott v. Superior Court* (1934) 1 C.2d 512, 522, 36 P.2d 635, involving jurisdiction of the municipal court, and in *McCall v. Superior Court* (1934) 1 C.2d 527, 538, 36 P.2d 642, involving the right to attachment, and overruling *Stone*. It is now settled, under these decisions, that an action for restitution after a completed rescission, usually pleaded in the form of a common count for money had and received, is an action at law. (See *Ito v. Watanabe* (1931) 213 C. 487, 489, 2 P.2d 799 [right to jury trial]; *Davis v. Security-First Nat. Bank of Los Angeles* (1934) 1 C.2d 541, 542, 36 P.2d 649 [same]; *Fearey v. Gough* (1943) 61 C.A.2d 778, 779, 143 P.2d 711 [municipal court had jurisdiction]; 21 Cal. L. Rev. 130; 23 Cal. L. Rev. 638; 36 Cal. L. Rev. 613; 7 So. Cal. L. Rev. 41.)

SUPPLEMENT: [This section is current through the latest supplement]



131 of 178 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

III. FORMS OF ACTION

B. Legal and Equitable Actions.

5. Actions Based on Fraud.

a. Legal Relief Sought.

3 *Witkin Cal. Proc. Actions* § 131

[§ 131] Legal Relief Sought.

(1) *In General.* The ordinary tort action for damages for fraud is of course an action at law. (See 5 *Cal. Proc.* (5th), *Pleading*, §709.) And if the plaintiff's money has been obtained by false representations, the plaintiff may bring an action in quasi-contract for restitution, which is a legal action. (*Long v. Harrison* (1931) 113 C.A. 321, 324, 298 P. 148; see supra, §130, and infra, §164.) This is so, even though "equitable principles" are invoked in determining liability and the action is against a trustee or other fiduciary. (*Sturgeon v. Security-First Nat. Bank* (1934) 139 C.A. 197, 33 P.2d 874 [action against fiduciary to recover damages; municipal court had jurisdiction]; *Mortimer v. Loynes* (1946) 74 C.A.2d 160, 168, 168 P.2d 481, supra, §124.)

(2) *Trust Actions.* *Ripling v. Superior Court* (1952) 112 C.A.2d 399, 247 P.2d 117, indicates that caution must be observed in following the theory that actions involving trusts and the obligations of trustees are exclusively equitable (see supra, §128). Plaintiff, as the guardian of N, an incompetent, alleged that defendant R orally agreed to hold N's money for N's benefit and that, after demand, R refused to repay it. One count pleaded the facts; the other was a common count for money had and received. The prayer was for an accounting, a money judgment, and a declaration of constructive trust. Defendant R admitted receiving money for that purpose and affirmatively alleged full repayment. *Held*, defendant R, the petitioner here, was entitled to a jury trial against plaintiff's objection. *Woolsey v. Woolsey* (1932) 121 C.A. 576, 9 P.2d 605, and *Lane v. Whitaker* (1942) 50 C.A.2d 327, 331, 123 P.2d 53, are distinguishable on the ground that those actions were brought to establish a constructive trust against a defendant who denied the fiduciary obligation. (112 C.A.2d 407.) Here, plaintiff could have sued in equity to establish a constructive trust, and perhaps this was his original intention as indicated in the prayer. But he also obtained an attachment on the ground that defendant was indebted to him on contract. Hence, if he had an election of equitable or legal actions, he had elected the action at law. (112 C.A.2d 408.)

What is the legal action that the *Ripling* plaintiff elected? Formerly the common law action of account was available against a fiduciary who refused to pay money for which he or she was bound to account; and, when the action of account became obsolete, the actions of debt or assumpsit (common counts) covered the same ground. The legal remedy lies where the trustee is under an immediate and unconditional duty to pay, and the existence of this duty was the issue raised by both pleadings. "Our own case is not for the declaration of a trust, existence of which the defendant

admits, but presents the simple question whether trust money is still held by the trustee. Under the issues the balance, if any, is admittedly payable to plaintiff." (112 C.A.2d 407.) (See *Rest.2d, Trusts* §198(1); 65 *Harv. L. Rev.* 460.)

SUPPLEMENT: [This section is current through the latest supplement]



132 of 178 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

III. FORMS OF ACTION

B. Legal and Equitable Actions.

5. Actions Based on Fraud.

b. Equitable Relief Sought.

3 Witkin Cal. Proc. Actions § 132

[§ 132] Equitable Relief Sought.

If the party injured by fraud seeks only equitable remedies such as reformation, an accounting, or the establishment of a constructive trust or an equitable lien, the action is equitable. (See *supra*, §§126, 127.) In *Woolsey v. Woolsey* (1932) 121 C.A. 576, 9 P.2d 605, plaintiffs sued an executor to establish a trust in favor of plaintiffs of money wrongfully obtained by defendant from the testator. *Held*, the action was equitable, and the jury's verdict was only advisory, despite the fact that the prayer was for a money judgment in the amount of the fund. "The demand for a judgment for a specific sum is dependent upon the equitable establishment of the alleged trust." (121 C.A. 581.) (See *Tibbitts v. Fife* (1958) 162 C.A.2d 568, 572, 328 P.2d 212.)

SUPPLEMENT: [This section is current through the latest supplement]



133 of 178 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

III. FORMS OF ACTION

B. Legal and Equitable Actions.

6. Actions To Quiet Title.

a. Nature of Problem.

3 *Witkin Cal. Proc. Actions* § 133

[§ 133] Nature of Problem.

(1) *Former Statutory Action.* The statutory quiet title action under former C.C.P. 738 was distinct from the equitable action to remove a cloud, and was not known in its modern form in the early equity courts. Hence, the test was whether the relief sought was characteristic of an action at law or in equity. Unfortunately former C.C.P. 738 was very broad in its coverage, and added the proviso that "nothing herein contained shall be construed to deprive a party of the right to a jury trial in any case where, by the law, such right is now given." Accordingly it was clear that in some quiet title actions a jury trial was a matter of right, i.e., some were legal actions. But the statutory proviso itself did not furnish a guide; it "did not purport to grant the right of trial by jury in actions wherein a jury was not theretofore available nor did it purport to deny a jury trial where a right to a jury formerly existed." (*Rocha v. Rocha* (1925) 197 C. 396, 402, 240 P. 1010.)

Later cases clarified the situation by pointing out that the action is normally equitable, but becomes a legal action when it takes on the character of an ejectment proceeding, i.e., when the issue is the right to recover possession lost by recent ouster. (See *Thomson v. Thomson* (1936) 7 C.2d 671, 681, 62 P.2d 358; 25 Cal. L. Rev. 565; 65 Harv. L. Rev. 458; *infra*, §134; on distinction between ejectment and quiet title, see 5 Cal. Proc. (5th), *Pleading*, §655.)

(2) *Current Statutory Action.* Former C.C.P. 738 was repealed in 1980 on the enactment of the revised law on quiet title actions (C.C.P. 760.010 et seq., 5 Cal. Proc. (5th), *Pleading*, §656 et seq.). The proviso on right to jury trial is now in C.C.P. 764.020(b), the section dealing with the validity or interpretation of a gift, devise, bequest, or trust under a will.

SUPPLEMENT: [This section is current through the latest supplement]



134 of 178 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

III. FORMS OF ACTION

B. Legal and Equitable Actions.

6. Actions To Quiet Title.

b. Determining Whether Action Is Legal or Equitable.

3 *Witkin Cal. Proc. Actions* § 134

[§ 134] Determining Whether Action Is Legal or Equitable.

(1) *No Possession*. A simple action to quiet title, not involving the possession of the property, is equitable. (*Santa Ana Mortg. & Inv. Co. v. Kinslow* (1938) 30 C.A.2d 107, 110, 85 P.2d 899; *Campbell v. Rustigian* (1943) 60 C.A.2d 500, 503, 140 P.2d 998.)

(2) *No Ouster or Ouster Long Past*. Where the plaintiff is in possession and the right of possession is involved, the action nevertheless remains equitable if the defendant does not claim that he or she was ousted, or if the defendant claims that he or she was ousted at a time long prior to the action. Where the plaintiff is and has been in actual possession for a considerable time, and the defendant has not been in possession, the defendant's answer alleging a right to possession and praying to be put into possession does not change the equitable character of the action. (*Angus v. Craven* (1901) 132 C. 691, 699, 64 P. 1091; *McNeil v. Morgan* (1910) 157 C. 373, 377, 108 P. 69; *Rablin v. Greiner* (1935) 4 C.2d 255, 257, 48 P.2d 696; *Thomson v. Thomson* (1936) 7 C.2d 671, 681, 62 P.2d 358 [where defendant answered and cross-complained, alleging ouster by plaintiff over 2 years before the action, defendant was not entitled to jury trial].)

(3) *Plaintiff in Possession by Recent Ouster*. If the plaintiff is in possession, but the defendant alleges (by answer or cross-complaint) that he or she was recently ousted by the plaintiff, the action becomes partly legal and partly equitable. (*Donahue v. Meister* (1891) 88 C. 121, 129, 25 P. 1096; see *infra*, §136.)

(4) *Recovery of Possession by Plaintiff*. If the plaintiff is out of possession and seeks to recover possession by a quiet title action, the action is legal. (*Southern Pac. Land Co. v. Dickerson* (1922) 188 C. 113, 116, 204 P. 576; *Baar v. Smith* (1927) 201 C. 87, 96, 255 P. 827; *Medeiros v. Medeiros* (1960) 177 C.A.2d 69, 72, 1 C.R. 696.)

SUPPLEMENT: [This section is current through the latest supplement]



135 of 178 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

III. FORMS OF ACTION

B. Legal and Equitable Actions.

7. Actions Involving Both Legal and Equitable Issues.

a. Plaintiff's Demand.

3 *Witkin Cal. Proc. Actions* § 135

[§ 135] Plaintiff's Demand.

(1) *General Rule.* If the action raises some legal and some equitable issues, a party is entitled to a jury trial on the legal issues. In that case, although in theory there is only a single trial, a single judgment, and a single appeal, as a practical matter there may be two separate and distinct proceedings. Sometimes the entire trial will be by jury, but the court will treat the verdict on the equitable issues as advisory only. (See 7 *Cal. Proc.* (5th), *Trial*, §§86, 109.)

(2) *Illustrations.* In the early case of *Hughes v. Dunlap* (1891) 91 C. 385, 27 P. 642, plaintiff sought damages for past trespasses and an injunction against future trespasses. Defendant demanded a jury and received a verdict, but the court disregarded it and gave judgment for plaintiff. *Held*, this was error; although legal and equitable remedies may be sought in the same action, "each remedy must be governed by the same law that would apply to it if the other remedy had not also been asked for." (91 C. 388.) It was for the judge to determine whether an injunction should issue; but it was for the jury to determine whether damages should be awarded for alleged past trespasses.

In *Farrell v. Ontario* (1919) 39 C.A. 351, 178 P. 740, plaintiff alleged that defendants had diverted storm waters on his lands, and prayed for damages and an injunction. The jury's verdict was in his favor but the court disregarded it and gave judgment for defendants. *Held*, judgment for damages should be entered in accordance with the verdict. "He might have prosecuted separate actions for these two remedies concurrently. In that case the facts alleged in the two actions would have been the same, except that in the action at law he would have alleged the money value of the injuries suffered, and in the suit in equity he would have alleged the facts showing a threat of future repetitions thereof. Under those circumstances, it will be conceded that the plaintiff would have been entitled as of right to a trial by jury of the legal issues as to damages. Instead of doing this, he accepted the invitation held out to him by our laws and joined his two actions in one. He should not be held to have thereby forfeited his right to a jury trial of the legal issues." (39 C.A. 354.)

In *Dills v. Delira Corp.* (1956) 145 C.A.2d 124, 302 P.2d 397, plaintiff asked for a declaration of his interest in a partnership, an accounting, and the recovery of profits. The court, referring to modern writers, criticized the common statement that an action for declaratory relief is always equitable in nature, and suggested that this characterization should not be used to determine the right to a jury trial. On an examination of the pleading, the court concluded that this

was an equitable action for the dissolution of a partnership and an accounting, that the trial judge properly tried the equitable issues first, and that, after determining that plaintiff was not a partner, the legal issues raised by common counts for money had and received as profits did not require a trial. (145 C.A.2d 128.)

The following decisions have firmly established this rule:

Pacific Western Oil Co. v. Bern Oil Co. (1939) 13 C.2d 60, 66, 87 P.2d 1045 [injunction against removal of oil by slant drilling, and damages; denial of jury trial was error, although not reversible error under circumstances].

Robinson v. Puls (1946) 28 C.2d 664, 665, 171 P.2d 430 [complaint for declaratory relief, cancellation of notes, accounting, or, as alternative, money judgment; trial judge erred in denying jury trial].

Peterson v. Peterson (1946) 74 C.A.2d 312, 321, 168 P.2d 474 [complaint to cancel deed of trust, quiet title, recover reasonable rental value of property, and recover damages for fraud; trial judge erred in denying jury trial].

Patterson v. Insurance Co. of North America (1970) 6 C.A.3d 310, 315, 85 C.R. 665, citing the text [allegation of breach of contract to defend action; issue was properly submitted to jury despite declaratory relief label].

SUPPLEMENT: [This section is current through the latest supplement]



136 of 178 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

III. FORMS OF ACTION

B. Legal and Equitable Actions.

7. Actions Involving Both Legal and Equitable Issues.

b. Defendant's Demand.

3 *Witkin Cal. Proc. Actions* § 136

[§ 136] Defendant's Demand.

(1) *In General*. The necessity for a separate trial of issues may arise from the defendant's pleading. Thus, the complaint may seek equitable relief alone, but the plaintiff may not, by the form in which he or she casts the action, deprive the defendant of a jury trial on legal issues actually involved in the controversy. So if the defendant cross-complains for a money judgment, the defendant raises a legal issue and a jury trial on that issue is a matter of right. (*Connell v. Bowes* (1942) 19 C.2d 870, 872, 123 P.2d 456 ["it does not seem desirable to force a party to give up his right to a jury trial as an alternative to utilizing the advantages of modern code procedure designed to permit settlement of various issues in a single action"]; *Robinson v. Puls* (1946) 28 C.2d 664, 171 P.2d 430 [cross-complaint for money judgment on book accounts].)

(2) *Action To Quiet Title*. The quiet title cases developed this view at an early date. Suppose, in the plaintiff's quiet title action, the defendant by answer or cross-complaint alleges prior rightful possession in himself or herself and ouster by the plaintiff. If the defendant had brought a separate action in ejectment against the plaintiff with the same allegations and seeking a recovery of possession, the action would have been clearly legal and a jury trial would have been a matter of right. Hence, the answer or cross-complaint raises legal issues, and the plaintiff may not, by framing the complaint in the form of an equitable action to quiet title, deprive the defendant of a jury trial. (*Donahue v. Meister* (1891) 88 C. 121, 128, 25 P. 1096; *Thomson v. Thomson* (1936) 7 C.2d 671, 681, 62 P.2d 358 [summarizing principles and approving (but holding inapplicable) this rule]; 25 *Cal. L. Rev.* 571.)

SUPPLEMENT: [This section is current through the latest supplement]



137 of 178 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

III. FORMS OF ACTION

B. Legal and Equitable Actions.

7. Actions Involving Both Legal and Equitable Issues.

c. Damages Award Where Equitable Relief Is Unwarranted or Unobtainable.

3 *Witkin Cal. Proc. Actions* § 137

[§ 137] Damages Award Where Equitable Relief Is Unwarranted or Unobtainable.

(1) *Nature of Problem.* Another problem arises where the complaint is framed as an action wholly equitable, but (a) the plaintiff fails in pleading or proof to support a demand for equitable relief and is entitled only to damages; or (b) although the plaintiff fully establishes a right to equitable relief, the defendant is unable or unwilling to comply with the decree, in which situation the plaintiff is entitled to damages. Stated theoretically, the question is whether granting damages in these situations is a determination of a legal issue, or an exercise of "equitable" jurisdiction to decide the entire controversy. Stated practically, the question is whether, at this stage of the trial of an equitable action, the defendant is entitled to a jury to try the issue of damages. The request for a jury will normally be made by the defendant; the plaintiff who brings an equitable action does not contemplate a jury trial.

(2) *Equitable Relief Unwarranted: Defendant Is Entitled To Jury Trial.* In the first situation, the defendant is entitled to a jury trial on the damage issue. The reason seems obvious: Otherwise the plaintiff, by an insubstantial or fictitious pleading seeking equitable relief, could defeat the defendant's right to a jury trial in an action that is essentially legal. (See *Farnsworth v. Hunter* (1938) 11 C.2d 27, 32, 77 P.2d 840 [dictum, relying on suggestion in 22 Cal. L. Rev. 217]; 65 Harv. L. Rev. 465.)

(3) *Equitable Relief Unobtainable: Defendant Is Not Entitled To Jury Trial.* In the second situation, the defendant is not entitled to a jury. In *Crouser v. Boice* (1942) 51 C.A.2d 198, 124 P.2d 358, the complaint sought specific performance or, if defendants could not perform, specified damages. The trial judge rendered judgment accordingly. Thus, the action was purely equitable, and plaintiff established his right to equitable relief; damages were awarded only in the event that defendants failed to convey. *Held*, the award of damages in that situation is the exercise of equity jurisdiction (equity having jurisdiction over a controversy will decide the whole issue) and no jury was required. (51 C.A.2d 202.)

SUPPLEMENT: [This section is current through the latest supplement]



138 of 178 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

III. FORMS OF ACTION

B. Legal and Equitable Actions.

7. Actions Involving Both Legal and Equitable Issues.

d. One Issue Incidental.

3 *Witkin Cal. Proc. Actions* § 138

[§ 138] One Issue Incidental.

(1) *Former Law: Judge Could Decide All Issues.* In *Union Oil Co. of Calif. v. Reconstruction Oil Co.* (1937) 20 C.A.2d 170, 66 P.2d 1215, plaintiffs, the lessee and lessor of oil land, sued defendants, adjoining oil well drillers, alleging subsurface trespass by slant drilling. Because defendants' well was not yet in production, plaintiffs had suffered no money damages, and prayed only for an injunction. During the trial, the well was brought in and oil was taken. Plaintiffs did not file a supplemental complaint. *Held*, the court could award injunctive relief and damages. The only issue when the action was filed was equitable and, having once taken jurisdiction, the court could determine the incidental legal issue, i.e., damages accruing during the trial, without submitting it to a jury. "[I]t would seem proper that, in an action which is admittedly strictly equitable in character wherein the equitable relief of injunction is sought and an issue of damages is raised which is incidental to the principal issue which is whether or not an injunction shall issue, a trial by jury of the issue of damages does not exist as a matter of right and the grant or denial of a demand for a jury to try such an issue is entirely discretionary with the court." (20 C.A.2d 190.)

(2) *Current Law: Right To Jury Trial of Legal Issues.* The result reached in *Union Oil Co.* was apparently correct, for the court observed that no jury could properly have returned a different verdict. But the rule laid down is difficult to apply, and it is doubtful whether the case represents a controlling precedent. At the time of the decision there was a conflict of California authority on the question whether there was a right to a jury trial of legal issues in an equity case. This conflict was later resolved with the approval of the rule authorizing the right in *Hughes v. Dunlap* (1891) 91 C. 385, 388, 27 P. 642, and *Farrell v. Ontario* (1919) 39 C.A. 351, 354, 178 P. 740, *supra*, §135, and disapproval of the contrary view represented by such cases as *Bettencourt v. Bank of Italy Nat. Trust & Savings Assn.* (1932) 216 C. 174, 180, 13 P.2d 659. (See *Connell v. Bowes* (1942) 19 C.2d 870, 871, 123 P.2d 456 [pointing out that *Union Oil Co.* relies on overruled *Bettencourt* case]; *Pigeon Point Ranch v. Perot* (1963) 59 C.2d 227, 232, 28 C.R. 865, 379 P.2d 321; *Moss v. Bluemm* (1964) 229 C.A.2d 70, 73, 40 C.R. 50 [legal action for personal injuries; judge properly tried equitable issue of estoppel to set up bar of statute of limitations].)

(3) *Federal Law.* Federal law follows the California rule. (See *Dairy Queen v. Wood* (1962) 369 U.S. 469, 82 S.Ct. 894, 900, 8 L.Ed.2d 44, 52 [action for injunction, accounting, and damages for breach of trademark licensing agreement was triable by jury as matter of right]; *Ross v. Bernhard* (1970) 396 U.S. 531, 90 S.Ct. 733, 735, 24 L.Ed.2d 729, 733

[following *Dairy Queen*; right to jury trial on legal issues in shareholder's derivative suit].)

SUPPLEMENT: [This section is current through the latest supplement]



139 of 178 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

III. FORMS OF ACTION

C. Contract and Tort Actions.

1. Distinction.

3 Witkin Cal. Proc. Actions § 139

[§ 139] Distinction.

(1) *In General.* In most cases contract and tort actions are readily distinguished on the basis of the substantive law that identifies the particular wrong as a breach of contract or a tort. (See C.E.B., 1 Civil Proc. Before Trial 4th, §15.22 et seq.; 8 U.C.L.A. L. Rev. 276, 307, 322; 1 Am.Jur.2d (2005 ed.), Actions §§7, 10; 3 Am.Jur. Trials 648; 1 Summary (10th), Contracts, §847 et seq.; 5 Summary (10th), Torts, §1 et seq.) Some contract and tort actions, however, call for special mention. (See *infra*, §140 et seq.)

The distinction is significant in many areas, including the following:

- (a) Statute of limitations. (See *infra*, §§508 et seq., 549 et seq.)
- (b) Venue. (See *infra*, §831 et seq.)
- (c) Joinder of causes of action. (See 4 Cal. Proc. (5th), Pleading, §333 et seq.)
- (d) Attachment. (See 6 Cal. Proc. (5th), Provisional Remedies, §58.)
- (e) Damages. (See *infra*, §145 et seq.)
- (f) Bankruptcy. (See 8 Cal. Proc. (5th), Enforcement of Judgment, §514 et seq.)
- (g) Illegality of contract (no bar to tort action). (See *infra*, §153.)
- (h) Filing of claim against public entity. (See *infra*, §237 et seq.)

(2) *Effect of Statutory Changes.* Statutory changes have eliminated some effects of the distinction:

- (a) Survival: tort actions now survive. (See *supra*, §15.)
- (b) Release of, and contribution among, joint obligors and wrongdoers: statutory procedures govern release of and contribution involving joint tortfeasors. (C.C.P. 875 et seq.; see 5 Summary (10th), Torts, §71 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]



140 of 178 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

III. FORMS OF ACTION

C. Contract and Tort Actions.

2. Contract Actions.

a. Quasi-Contract or Other Implied Obligation.

3 *Witkin Cal. Proc. Actions* § 140

[§ 140] Quasi-Contract or Other Implied Obligation.

(1) *Quasi-Contract Action.* Actions in quasi-contract are, for most purposes, regarded as actions on contract, i.e., they were classified at common law as actions "ex contractu." (See *Philpott v. Superior Court* (1934) 1 C.2d 512, 518, 525, 36 P.2d 635; *Rest.*, *Restitution* §5; *infra*, §§156, 164.)

(2) *Action Against Drawer of Check.* An action by the payee or holder against the drawer of a check is an action on contract, because the check "imports an obligation or engagement on the part of the drawer to pay." (*Roff v. Crenshaw* (1945) 69 C.A.2d 536, 539, 159 P.2d 661 [venue].)

(3) *Action on Implied Warranty in Lease.* Similar reasoning has been applied to an action on an implied warranty in a lease. In *Voth v. Wasco Public Util. Dist.* (1976) 56 C.A.3d 353, 128 C.R. 608, plaintiffs leased agricultural land from defendant public utility district. The land was adjacent to defendant's sewage disposal plant, and the lease required use of the defendant's sewage water for irrigation. Plaintiffs' alfalfa crop produced a poor yield, allegedly due to some impurity in the sewage water, and they sued for damages for breach of the lease. The theory of the complaint was that defendant impliedly promised and warranted the waters to be reasonably suited for irrigation. The claim against defendant was filed more than 100 days but within 1 year after accrual of the cause of action. *Held*, the claim was filed in time; the former 100-day period for tort claims (now 6 months) was not applicable, and the 1-year period for contract claims was applicable.

(a) Cases involving negligent performance or failure to perform a legal duty arising out of contract, such as *Jones v. Kelly* (1929) 208 C. 251, 280 P. 942, *infra*, §145, are distinguishable. There were no allegations of negligence in the present complaint, and defendant's liability, if any, would be established on proof of the defective quality of the water as a proximate cause of the failure of the crop. (56 C.A.3d 357, 358.)

(b) Cases holding that the 1-year statute of limitations (now 2 years) applies to personal injury actions arising from breach of warranty, such as *Becker v. Volkswagen of America* (1975) 52 C.A.3d 794, 125 C.R. 326, *infra*, §559, are also distinguishable. The warranty is imposed as a matter of public policy rather than by contract, and the theory of the action is strict liability in tort. (56 C.A.3d 359.)

SUPPLEMENT: [This section is current through the latest supplement]



141 of 178 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

III. FORMS OF ACTION

C. Contract and Tort Actions.

2. Contract Actions.

b. Action on Judgment.

3 *Witkin Cal. Proc. Actions* § 141

[§ 141] Action on Judgment.

(1) *Statute Referring to Contract Actions.* For some procedural purposes, e.g., the interpretation and application of an attachment statute referring to actions "arising upon contract," a judgment is treated as a contract, and an action on a judgment is a contract action. In *Grotheer v. Meyer Rosenberg* (1936) 11 C.A.2d 268, 53 P.2d 996, the court observed that "this is so irrespective of the nature of the transaction on which the judgment is founded ... and even though the judgment be rendered upon an unassignable cause of action for tort ... it being held in this regard that after the recovery of the judgment, whether it is for a tort or upon contract, the judgment becomes a debt which the judgment debtor is obligated to pay and the law implies a contract on his part to pay it." (11 C.A.2d 272.) (See *Becker v. Becker* (1950) 36 C.2d 324, 326, 223 P.2d 479; 3 *Stanf. L. Rev.* 545.)

(2) *Statute Referring to Contracts and Judgments.* The rule is different, however, where the statute has express provisions referring separately to contracts and judgments, e.g., the statute of limitations. (See *infra*, §675.)

SUPPLEMENT: [This section is current through the latest supplement]



142 of 178 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

III. FORMS OF ACTION

C. Contract and Tort Actions.

2. Contract Actions.

c. Unlawful Detainer Proceeding.

3 *Witkin Cal. Proc. Actions* § 142

[§ 142] Unlawful Detainer Proceeding.

In *Fragomeno v. Insurance Co. of the West* (1989) 207 C.A.3d 822, 255 C.R. 111, plaintiffs leased premises from E & L for the operation of a dry cleaning business, and obtained a comprehensive insurance policy for dry cleaners and laundry owners from defendant insurer ICW. The policy contained a "Personal Injury Liability Insurance Endorsement" that covered liability of the insured for personal injury arising out of "wrongful entry or eviction, or other invasion of the right of private occupancy." The lessor (E & L) filed an unlawful detainer action against plaintiffs alleging various breaches of their lease agreement and seeking recovery of the premises and damages. ICW denied coverage and refused to defend, and plaintiffs brought this action for declaratory relief, breach of contract, and breach of the covenant of good faith and fair dealing. *Held*, summary judgment for defendant affirmed.

(a) The policy clearly covers only tort liability, and the issue here is whether unlawful detainer sounds in contract or tort. Dicta in a few decisions suggests that it sounds in tort (207 C.A.3d 828), but these cases dealt with a lessee unlawfully holding over and becoming a trespasser. Other cases describe the action as a statutory proceeding. (207 C.A.3d 830, citing *Fifth & Broadway Partnership v. Kimny* (1980) 102 C.A.3d 195, 162 C.R. 271, and *Kwok v. Bergren* (1982) 130 C.A.3d 596, 181 C.R. 795.)

(b) The proper characterization depends on the facts giving rise to the proceeding. "If the right to recover realty emanates from the breach of a lease provision occurring during an unexpired term of a lease, then the right to recover has its inception in a contractual arrangement between the parties. If the right to recovery is based upon a civil wrong such as possession of property by trespasser *ab initio*, or by a holdover tenant as a resulting trespasser, or by an encroacher then the right to recover possession of the property by way of the summary and statutory procedure of unlawful detainer has its inception in tortious conduct." (207 C.A.3d 830.) Here, the undisputed facts show that the lessor's right to recover the property emanated from a breach of the lease within the unexpired term, and the proceeding was contractual. (207 C.A.3d 831.)

A strong dissent, discussing case law at length, disagrees with this conclusion: "In sum, all available authorities recognize the damages recoverable in an unlawful detainer action sound in tort." (207 C.A.3d 836.)

SUPPLEMENT: [This section is current through the latest supplement]



143 of 178 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

III. FORMS OF ACTION

C. Contract and Tort Actions.

3. Actions To Enforce Statutory Liability.

3 Witkin Cal. Proc. Actions § 143

[§ 143] Actions To Enforce Statutory Liability.

(1) *General Rule.* A liability established by statute is sometimes classified separately as such in a procedural statute, e.g., the statute of limitations. (See *infra*, §664.) When it is not so classified, the tendency is to treat it as quasi-contractual, i.e., as a contract "implied" in law.

(2) *Attachment Cases.* The general rule seems settled for purposes of attachment. (See *Hays v. Bank of America* (1945) 71 C.A.2d 301, 306, 162 P.2d 679 [right to decedent's overtime wages and liquidated damages under federal statute was contractual or quasi-contractual and was barred for failure to file claim against estate]; *Anderson v. Doolittle* (1950) 97 C.A.2d 836, 838, 218 P.2d 848 [usury penalty; "upon payment of the usurious interest by respondent, an implied contract that appellant would respond in treble damages arose in her favor"].)

(3) *Venue Cases.* The general rule in venue cases is not so clear. In *People v. Zegras* (1946) 29 C.2d 67, 172 P.2d 883, the state sued under the Fire Liability Law to recover the expense of fighting a fire negligently started by defendants. The statute provides that such expenses shall be "a charge" against the person liable and "shall constitute a debt," collectible "in the same manner as in the case of an obligation under a contract, expressed or implied." *Held*, the Legislature thereby made applicable the procedure for contract actions, including the venue of contract actions. "It is immaterial, therefore, whether the statutory obligation for the expense of extinguishing a fire is classified as one sounding in tort, or a quasi contract, or a liability in the nature of a penalty." (29 C.2d 68, 69.)

In *Cate v. Stapleton* (1941) 43 C.A.2d 492, 111 P.2d 437, plaintiff, a trustee in bankruptcy, sued defendants to set aside a voidable preference and to recover the money and property that the bankrupt had transferred to them. *Held*, defendants were entitled to trial at their residence. Pointing out that statutory liabilities are not necessarily contractual, and that a preference is treated by the Bankruptcy Law as a wrongful act that interferes with the rights of other creditors, the court said: "In practical effect the action sounds more in tort than in contract, being based upon the wrongful act of the parties, resulting in harm to others, when they had knowledge of the conditions at the time they acted. The duty to return the property arises from the express provisions of the statute irrespective of any contract, express or implied." (43 C.A.2d 496.)

SUPPLEMENT: [This section is current through the latest supplement]



144 of 178 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

III. FORMS OF ACTION

C. Contract and Tort Actions.

4. Alternative Tort or Contract Actions.

a. Nature of Problem.

3 *Witkin Cal. Proc. Actions* § 144

[§ 144] Nature of Problem.

(1) *Election of Remedies Theory*. Ordinarily, the form of the action will be either contract or tort, not both. In some situations, however, the same wrongful act may constitute both a breach of contract (or ground for rescission) and the invasion of an interest protected by the law of torts. It would seem to be the privilege of the plaintiff, as the injured party, to bring either type of action, or to file one action pleading both causes of action in separate counts, whenever it would be to the plaintiff's advantage to do so. Of course, the plaintiff would be required to elect, at some stage, between inconsistent remedies, and would not be entitled to a double recovery. (See *infra*, §179 et seq.) But, subject to these limitations, there generally appears to be no objection on principle to the plaintiff suing either in contract or in tort (see *infra*, §§145 et seq., 156 et seq.), at the plaintiff's election. (See *Better Food Markets v. American Dist. Tel. Co.* (1953) 40 C.2d 179, 188, 253 P.2d 10, 1 Summary (10th), *Contracts*, §§506, 508 [limitation of liquidated damage provision remained despite alternative action in tort]; *Crisci v. Security Ins. Co. of New Haven, Connecticut* (1967) 66 C.2d 425, 432, 58 C.R. 13, 426 P.2d 173, *infra*, §147; *Pintor v. Ong* (1989) 211 C.A.3d 837, 841, 842, 259 C.R. 577, *infra*, §146, citing the text [refusal of assignees of beneficiary of trust deed to execute full reconveyance on satisfaction of underlying debt]; 1 *Am.Jur.2d* (2005 ed.), *Actions* §25; 2 *Summary* (10th), *Insurance*, §257 et seq. [liability insurer's breach of duty to settle].)

(2) *Nature of Relief Theory*. It is often declared that, in determining whether the action is in tort or contract, the court will look to the "nature of the grievance," "the substance of the right," or the "gravamen of the complaint," rather than to the label or form of the pleading. This theory reaches a desirable result when it sustains recovery in the particular action that the plaintiff elected to bring. (See *Jones v. Kelly* (1929) 208 C. 251, 254, 280 P. 942, *infra*, §145; *Dougherty v. California Kettleman Oil Royalties* (1939) 13 C.2d 174, 183, 88 P.2d 690, *infra*, §157; *Buxbom v. Smith* (1944) 23 C.2d 535, 145 P.2d 305, *infra*, §146; *L.B. Laboratories v. Mitchell* (1952) 39 C.2d 56, 60, 244 P.2d 385, *infra*, §162; *Siminoff v. Jas. H. Goodman & Co. Bank* (1912) 18 C.A. 5, 18, 121 P. 939; *Berning v. Colodny & Colodny* (1930) 103 C.A. 188, 191, 284 P. 496; *Nathan v. Locke* (1930) 108 C.A. 158, 161, 291 P. 286, *infra*, §158; *Automobile Ins. Co. of Hartford, Connecticut v. Union Oil Co. of Calif.* (1948) 85 C.A.2d 302, 306, 193 P.2d 48, *infra*, §145.)

Frequently, however, this "liberal" interpretation of the pleadings (looking to substance rather than form) reaches a result that is neither liberal nor sound on principle. The courts in these cases proceed on the assumption that the action is

solely in one form or the other, and arbitrarily designate it as contract or tort, according to its "substance" or "gravamen." The practical result of refusing to allow the election of alternative remedies may be to deny recovery or to defeat a provisional remedy. (See *Rushing v. Pickwick Stages System* (1931) 113 C.A. 240, 298 P. 150; *Williamson v. Pacific Greyhound Lines* (1944) 67 C.A.2d 250, 252, 153 P.2d 990; *DeMirjian v. Ideal Heating Corp.* (1949) 91 C.A.2d 905, 908, 206 P.2d 20, *infra*, §165.)

(3) *Contract Actions*. A breach of contract is of course actionable regardless whether the act is independently wrongful as a tort. Usually the tort remedy is considered the more advantageous (see *infra*, §146 et seq.), but the contract remedy may be elected (see *infra*, §156 et seq.).

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Election of Remedies Theory*. See 39 A.L.R.6th 155 [application of doctrine where one claim sounds in tort and other claim sounds in contract].



145 of 178 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

III. FORMS OF ACTION

C. Contract and Tort Actions.

4. Alternative Tort or Contract Actions.

b. Election Allowed: Tort Actions.

1. Breach of Legal Duty Arising Out of Contract.

3 *Witkin Cal. Proc. Actions* § 145

[§ 145] Breach of Legal Duty Arising Out of Contract.

(1) *Statement of Rule.* If a contract creates an interest protected by the law of torts, breach of the contract may constitute a tort, and the plaintiff's election to sue in tort is generally recognized. The principle is stated in the early case of *Sloane v. Southern Calif. Ry. Co.* (1896) 111 C. 668, 44 P. 320, where plaintiff was wrongfully ejected from a train without personal violence. Defendant railroad contended that plaintiff could only recover contract damages (the price of the ticket plus compensation for loss of time). "The plaintiff's right of action against the defendant is not, however, limited to the breach of its contract to carry her ... but includes full redress for the wrongs sustained by her by reason of the defendant's violation of the obligations which it assumed in entering into such contract. If she was wrongfully prevented by the defendant from completing the passage ... for which it had contracted with her, she could either bring an action simply for the breach of this contract, or she could sue it in tort for its violation of the duty as common carrier, which it assumed upon entering into such contract." (111 C. 676.) (See *Weaver v. Bank of America* (1963) 59 C.2d 428, 431, 30 C.R. 4, 380 P.2d 644 [either tort or contract action is permissible, and no election is required].)

(2) *Illustrations.* In *Jones v. Kelly* (1929) 208 C. 251, 280 P. 942, plaintiff tenant sued defendant landlord for maliciously cutting off his essential water supply in violation of their agreement. Defendant objected to plaintiff's demand for exemplary damages on the ground that only a breach of contract was involved. The court said that the duty to refrain from injuring the rights of another "is independent of the contract and attaches over and above the terms of the contract. This being so, the plaintiffs may treat the injury as a tort or as a breach of contract at their election." (208 C. 255.)

In *Acadia, Calif. v. Herbert, Ltd.* (1960) 54 C.2d 328, 5 C.R. 686, 353 P.2d 294, landowners sold land to plaintiff's predecessors with an agreement to furnish water. Then they sold the part with the water distribution system to defendant, who assumed the obligation. Defendants wilfully cut down the pressure. *Held*, following *Jones*, plaintiffs could elect to sue for breach of the contract to furnish water or for the tort of maliciously shutting off their water supply. The complaint sought damages and declaratory and injunctive relief, and the court instructed the jury that they could not award damages under both theories but should select the one supported by the evidence. The jury gave compensatory and punitive damages. This was an implied finding that defendant had committed a tort and also had acted with malice.

(54 C.2d 336.)

In *Automobile Ins. Co. of Hartford, Connecticut v. Union Oil Co. of Calif.* (1948) 85 C.A.2d 302, 193 P.2d 48, plaintiff insurers brought an action to recover for fire damage to property of their insured, after they had paid the loss. The complaint alleged that defendant had sold a flammable cleaning solvent to the insured in violation of express and implied warranties, and that defendant had misrepresented its nature and failed to warn of the danger. The defense was the 2-year statute of limitations on contracts not in writing. *Held*, the 3-year statute on tortious injury to property applied. "[T]he contract as pleaded had nothing whatever to do with the liability other than to create a duty on the part of respondent herein, and the action is grounded not upon the contract, but upon the duty springing from the relation created by it. While appellants might have elected to sue either in tort or in contract, it clearly appears to us that the instant action is based upon the injury done to property. ... Count 3 sounds in tort because it definitely charges that the fire and consequent damage to property was occasioned by the negligence of respondent wholly separate and apart from any obligation arising out of the contract or from the negligent performance thereof." (85 C.A.2d 307.)

In *Ritchie v. Anchor Cas. Co.* (1955) 135 C.A.2d 245, 286 P.2d 1000, plaintiffs, engaged in selling food products, obtained a comprehensive products liability policy from defendant insurer, covering "liability imposed upon the assured by law for damages," and "caused by accident." Plaintiffs sold rancid peanut oil to a buyer, and, in an action for the price, the buyer cross-complained for damages. Defendant insurer refused to defend the action, which plaintiffs compromised. *Held*, defendant insurer was liable for the amount of the settlement and attorneys' fees. The buyer's theory may have been breach of implied warranty, but, under *Rubino v. Utah Canning Co.* (1954) 123 C.A.2d 18, 266 P.2d 163, *infra*, §565, and *Gosling v. Nichols* (1943) 59 C.A.2d 442, 139 P.2d 86, the cause of action may be regarded as sounding in tort, and therefore a liability imposed "by law." (135 C.A.2d 255.) This case is complicated by the circumstance that it was the buyer's election to sue in contract or tort that determined the responsibility of the insurer to the insured. As far as the buyer was concerned, he could have elected to sue either in contract (warranty) or tort (negligence). (135 C.A.2d 251.)

Many other cases illustrate situations that give rise to alternative tort actions:

Eads v. Marks (1952) 39 C.2d 807, 810, 249 P.2d 257 [plaintiffs could sue in tort for breach of agreement not to leave dairy products or glass containers at plaintiffs' residence except in refrigerator in house, where defendants left glass container on back porch of residence, and plaintiffs' minor child picked up container and fell off porch]; see 27 So. Cal. L. Rev. 216 [Eads].

Langley v. Pacific Gas & Elec. Co. (1953) 41 C.2d 655, 662, 262 P.2d 846, *infra*, §162 [negligent failure to supply electricity sounded in tort and contract].

Tameny v. Atlantic Richfield Co. (1980) 27 C.3d 167, 174, 164 C.R. 839, 610 P.2d 1330, *infra*, §149 [employee could sue in tort for wrongful termination in violation of public policy].

Siminoff v. Jas. H. Goodman & Co. Bank (1912) 18 C.A. 5, 18, 121 P. 939 [dishonor of check; tort measure of damages]; *Abramowitz v. Bank of America* (1955) 131 C.A.2d Supp. 892, 895, 281 P.2d 380 [same].

Richardson v. Pridmore (1950) 97 C.A.2d 124, 129, 217 P.2d 113 [shock and physical injury resulting from wrongful eviction of tenant; plaintiff "may waive the breach of contract and sue in tort"].

Stoiber v. Honeychuck (1980) 101 C.A.3d 903, 917, 162 C.R. 194, *infra*, §150 [tenant could sue in tort for breach of warranty of habitability].

North Amer. Chemical Co. v. Superior Court (1997) 59 C.A.4th 764, 773, 69 C.R.2d 466, 6 Summary (10th), *Torts*, §1516, citing the text [failure to perform service contract with reasonable care gave rise to action for negligence, not merely for breach of contract].

SUPPLEMENT: [This section is current through the latest supplement]



146 of 178 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

III. FORMS OF ACTION

C. Contract and Tort Actions.

4. Alternative Tort or Contract Actions.

b. Election Allowed: Tort Actions.

2. Breach of Contract as a Tort.

aa. In General.

3 *Witkin Cal. Proc. Actions* § 146

[§ 146] In General.

(1) *Interference With Business.* A mere breach of contract is generally thought to give rise only to a contract action. But in *Buxbom v. Smith* (1944) 23 C.2d 535, 145 P.2d 305, defendants contracted with plaintiff for the distribution of defendants' publication. After plaintiff had trained a crew, defendants breached the contract and hired plaintiff's crew themselves, thus obtaining the fruits of plaintiff's efforts. The contract measure of damages would have been inadequate; the serious injury was the loss of the business and goodwill. *Held*, the complaint fairly stated a tort action for intentional and unprivileged interference with business. "Although defendant's conduct may not have been tortious if he had merely broken the contract and subsequently decided to hire plaintiff's employees, an additional factor is present ... the breach, at the time it was made, was intended as a means of facilitating defendant's hiring of plaintiff's employees. A breach of contract is a wrong and in itself actionable. It is also wrongful when intentionally utilized as the means of depriving plaintiff of his employees, and ... constitutes an unfair method of interference with advantageous relations. ... It follows that said defendant was guilty of a tortious interference in the relationship between plaintiff and his employees." (23 C.2d 548.) (See 32 Cal. L. Rev. 205; 41 Cal. L. Rev. 47; 41 Harv. L. Rev. 340; 5 Summary (10th), Torts, §741 et seq.)

(2) *Picketing.* Another illustration is picketing in violation of a collective labor agreement prohibiting it. An ordinary action for breach of contract is seldom an adequate remedy, and the employer usually seeks an injunction. Peaceful and truthful picketing is a privileged act if its object is proper, but the object may be improper when it involves violation of the contract. (See 3 Summary (10th), *Agency and Employment*, §643.)

(3) *Negligence by Title Insurer.* A title insurance company or abstractor of title is liable for negligence in searching the record and furnishing false information about the state of the title. A contract action may be brought (*J.H. Trisdale v. Shasta County Title Co.* (1956) 146 C.A.2d 831, 837, 304 P.2d 832), but the plaintiff may elect to sue in tort (*Hawkins v. Oakland Title Ins. & Guaranty Co.* (1958) 165 C.A.2d 116, 123, 331 P.2d 742). (See 45 Harv. L. Rev. 164.)

(4) *Statutory Failure To Reconvey Trust Deed.* In *Pintor v. Ong* (1989) 211 C.A.3d 837, 259 C.R. 577, plaintiff

executed a note and deed of trust on his home, made all the payments, and requested defendants, the assignees of the note and deed of trust, to execute and record a certificate of discharge or deed of reconveyance pursuant to C.C. 2941. Defendants persistently refused for over 2 years, demanding more money assertedly owed to them by their predecessor assignor of the instruments. Plaintiff brought this action, seeking damages for emotional distress resulting from defendants' refusal to comply with C.C. 2941. *Held*, judgment for \$ 15,000 affirmed.

(a) Defendants contended that a C.C. 2941 action is contractual in nature because it is brought on the terms of the underlying contract and deed of trust, hence that only contract damages can be recovered. This is incorrect. The action is in tort because it seeks damages for violation of a statutory duty; tort damages, including damages for emotional distress, may be recovered. The act constitutes both a breach of a contract and a tort, and the injured plaintiff can elect his remedy. (211 C.A.3d 841, 842, citing the text.)

(b) *Young v. Bank of America* (1983) 141 C.A.3d 108, 190 C.R. 122, affirming an award of damages for emotional distress suffered by reason of a violation of the Credit Card Act, supports the result here. Like the Credit Card Act, C.C. 2941 is remedial in nature. (211 C.A.3d 843.) And it was not necessary for plaintiff to plead a common law tort. "He pled and successfully went to trial on an action for violation of a statutory duty, pleading and proving duty, breach of violation thereof, causation and damages. ... There was no need to plead or prove negligence, intentional tort, or tortious breach of the good faith covenant." (211 C.A.3d 843.)

But *Pintor* was distinguished in *Panagotacos v. Bank of America* (1998) 60 C.A.4th 851, 70 C.R.2d 595. Plaintiffs' emotional distress arising from their failure to purchase property was not compensable, where it was caused by their own delay in accepting sellers' payment condition, and not by defendant's failure to reconvey the trust deed. (60 C.A.4th 856.)

SUPPLEMENT: [This section is current through the latest supplement]



147 of 178 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

III. FORMS OF ACTION

C. Contract and Tort Actions.

4. Alternative Tort or Contract Actions.

b. Election Allowed: Tort Actions.

2. Breach of Contract as a Tort.

bb. Insurer's Wrongful Failure To Settle.

3 *Witkin Cal. Proc. Actions* § 147

[§ 147] Insurer's Wrongful Failure To Settle.

(1) *General Rule Recognizing Right to Election.* An action against a liability insurer for wrongful refusal to settle a claim is based on the breach of the implied covenant of good faith and fair dealing (see 2 *Summary* (10th), *Insurance*, §257 et seq.) and may be brought as a contract action (see *infra*, §160). But the insured may elect to sue in tort. In *Crisci v. Security Ins. Co. of New Haven, Connecticut* (1967) 66 C.2d 425, 58 C.R. 13, 426 P.2d 173, an insurer, relying on certain doctors' opinions, refused to settle a claim within its \$ 10,000 policy limit despite advice of its own counsel and claims manager that a \$ 100,000 verdict was possible in the claimant's action against the insured. A verdict for \$ 100,000 was rendered. The insured, who had become indigent and suffered a mental breakdown, sued the insurer for the excess of the judgment over the policy limits, which she had satisfied, and for mental suffering. *Held*, she was properly awarded judgment on both claims.

(a) The applicable "bad faith" rule for an insurer's liability did not require a showing of fraud or dishonesty. Rather, the test is whether a prudent insurer without policy limits would have accepted the offer. (66 C.2d 430.) Because the insurer knew of the risk of substantial recovery, the showing here was sufficient. (66 C.2d 434.)

(b) Although damages for mental suffering are not ordinarily recoverable if a wrongful act is only a breach of contract, an action for wrongful refusal to settle sounds in both contract and tort, and the insured may elect either form of action. (66 C.2d 432.) Hence, the insured could recover additional damages for the mental distress caused by failure to settle. (66 C.2d 433.) (See *Waters v. United Services Auto. Assn.* (1996) 41 C.A.4th 1063, 1080, 48 C.R.2d 910, 6 *Summary* (10th), *Torts*, §1708 [insured may not recover emotional distress damages in bad faith case without first establishing actual, not merely potential, financial loss]; 55 *Cal. L. Rev.* 1104; 3 *Lincoln L. Rev.* 57; 5 *San Diego L. Rev.* 228; 2 *U.S.F. L. Rev.* 1; 21 *Am.Jur. Trials* 229 et seq. [action against insurer for bad faith failure to settle claim]; 2 *Summary* (10th), *Insurance*, §241.)

(2) *Waiver of Right.* In *Purcell v. Colonial Ins. Co.* (1971) 20 C.A.3d 807, 97 C.R. 874, an automobile liability insurer refused an offer to settle within the \$ 20,000 policy limit in an action brought against its insured, and judgment

was subsequently entered for \$ 55,000. The insured paid the claimants a certain sum of money, assigned his rights against the insurer to them, and received a release. He then brought an action against the insurer seeking damages for pain and suffering allegedly caused by the insurer's failure to settle. The trial court dismissed on the ground that the statute of limitations applicable to personal injury actions had expired. *Held*, judgment affirmed, although on different grounds. The insured had possessed a single and indivisible cause of action against the insurer, albeit one that could give rise to two forms of damages--compensation for pecuniary loss and general damages for mental distress. (20 C.A.3d 812, 814.) Having assigned that cause of action to the claimants, he waived any claim for purely personal damages. (20 C.A.3d 814.)

SUPPLEMENT: [This section is current through the latest supplement]



148 of 178 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

III. FORMS OF ACTION

C. Contract and Tort Actions.

4. Alternative Tort or Contract Actions.

b. Election Allowed: Tort Actions.

2. Breach of Contract as a Tort.

cc. Insurer's Wrongful Refusal To Pay.

3 *Witkin Cal. Proc. Actions* § 148

[§ 148] Insurer's Wrongful Refusal To Pay.

(1) *Disability Insurer's Refusal To Pay*. In *Fletcher v. Western Nat. Life Ins. Co.* (1970) 10 C.A.3d 376, 89 C.R. 78, 5 Summary (10th), Torts, §459, plaintiff insured suffered a disabling injury, but defendant, intentionally and in bad faith, refused to make the required payments under its policy, and by false and threatening communications sought to settle the claim for a minimal amount. *Held*, although a mere breach of contract would not justify an award of punitive damages or recovery for emotional distress, the conduct was tortious and a large award for both was proper. Relying on the reasoning of *Crisci v. Security Ins. Co. of New Haven, Connecticut* (1967) 66 C.2d 425, 58 C.R. 13, 426 P.2d 173, supra, §147, the court said: "We hold, therefore, that defendants' threatened and actual bad faith refusals to make payments under the policy, maliciously employed by defendants in concert with false and threatening communications directed to plaintiff for the purpose of causing him to surrender his policy or disadvantageously settle a nonexistent dispute is essentially tortious in nature and is conduct that may legally be the basis for an action for damages for intentional infliction of emotional distress. We further hold that, independent of the tort of intentional infliction of emotional distress, such conduct on the part of a disability insurer constitutes a tortious interference with a protected property interest of its insured for which damages may be recovered to compensate for all detriment proximately resulting therefrom, including economic loss as well as emotional distress resulting from the conduct or from the economic losses caused by the conduct, and, in a proper case, punitive damages." (10 C.A.3d 401.)

(2) *Fire Insurer's Refusal To Pay*. In *Gruenberg v. Aetna Ins. Co.* (1973) 9 C.3d 566, 108 C.R. 480, 510 P.2d 1032, 2 Summary (10th), Insurance, §247, the court, after reviewing *Crisci*, *Fletcher*, and other cases, said: "It is manifest that a common legal principle underlies all of the foregoing decisions; namely, that in every insurance contract there is an implied covenant of good faith and fair dealing. The duty to so act is immanent in the contract whether the company is attending to the claims of third persons against the insured or the claims of the insured itself. Accordingly, when the insurer unreasonably and in bad faith withholds payment of the claim of its insured, it is subject to liability in tort." (9 C.3d 575.) Further, in response to the contention that the defendant insurer's duty is dependent on the plaintiff insured's performance of his own covenants, the court said: "Therefore, even though the duty allegedly assumed by defendant

insurers arises from an existing contractual relationship, this duty is independent of the performance of plaintiff's contractual obligations." (9 C.3d 578, citing *Jones v. Kelly* (1929) 208 C. 251, 280 P. 942, supra, §145.) (See 25 *Hastings L. J.* 699.)

(3) *Punitive Damages*. Punitive damages may be recovered in an action based on an insurer's bad faith. (See *Neal v. Farmers Ins. Exchange* (1978) 21 C.3d 910, 148 C.R. 389, 582 P.2d 980, *Egan v. Mutual of Omaha Ins. Co.* (1979) 24 C.3d 809, 157 C.R. 482, 598 P.2d 452; 2 *Summary* (10th), *Insurance*, §242.)

SUPPLEMENT: [This section is current through the latest supplement]



149 of 178 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

III. FORMS OF ACTION

C. Contract and Tort Actions.

4. Alternative Tort or Contract Actions.

b. Election Allowed: Tort Actions.

2. Breach of Contract as a Tort.

dd. Wrongful Discharge of Employee in Violation of Public Policy.

3 *Witkin Cal. Proc. Actions* § 149

[§ 149] Wrongful Discharge of Employee in Violation of Public Policy.

In *Tameny v. Atlantic Richfield Co.* (1980) 27 C.3d 167, 164 C.R. 839, 610 P.2d 1330, plaintiff alleged that he had been employed by defendant Arco for 15 years in positions of increasing importance, finally becoming a regional retail sales representative in charge of relations with independent service station dealers (franchisees); that defendant's district manager and others engaged in a combination to fix gasoline prices of franchisees, in violation of the Sherman Act, the Cartwright Act, and a specific consent decree in a federal antitrust prosecution of defendant; that defendants pressured plaintiff to "threaten [and] cajole" the dealers to set their prices as specified by Arco; and that plaintiff refused to engage in those tactics and was discharged for his refusal. The complaint mainly sought damages in tort for wrongful discharge, breach of the implied covenant of good faith and fair dealing, and interference with contractual relations. *Held*, the complaint stated a cause of action in tort for wrongful discharge, and it was unnecessary to consider the other two tort theories.

(a) Over the past several decades, California and out-of-state cases have recognized an exception to the traditional rule of *Lab.C.* 2922 that an employment contract of indefinite duration is terminable at will. They have recognized that the employer's authority to discharge may be limited by statute or considerations of public policy. (27 C.3d 172.) In *Petermann v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Local 396* (1959) 174 C.A.2d 184, 344 P.2d 25, 3 Summary (10th), *Agency and Employment*, §242, the court held that, even in the absence of an explicit statutory provision prohibiting discharge of a worker on grounds of refusal to commit an illegal act, fundamental principles of public policy bar the employer from doing so. (27 C.3d 173, 174.) And *Lab.C.* 2856, not relied on in *Petermann*, adds additional support for the holding, by declaring that an employee must comply with directions of his employer "except where such obedience is impossible or unlawful." (27 C.3d 174, footnote 8.)

(b) The allegations of the complaint therefore show a wrongful discharge, and the issue is whether the action sounds only in contract, or also in tort (with the possibility of punitive damages). California decisions support the tort theory:

(1) Early cases, commencing with *Sloane v. Southern Calif. Ry. Co.* (1896) 111 C. 668, 44 P. 320, *supra*, §145, recognized that a wrongful act committed in the course of a contractual relationship may give the injured party the election to sue in tort. (27 C.3d 174, 175, 176.) Later cases, following *Petermann*, confirm the availability of the tort cause of action. (27 C.3d 176, 177; see 3 *Summary* (10th), *Agency and Employment*, §243 et seq.)

(2) In the last half century the courts have recognized the need to protect the individual employee from discrimination, "whether it be by the all-powerful union or employer." This development at common law shows that there are limits to the employer's prerogative, and that one limit at least is the present case. (27 C.3d 178.)

(c) "We hold that an employer's authority over its employee does not include the right to demand that the employee commit a criminal act to further its interests, and an employer may not coerce compliance with such unlawful directions by discharging an employee who refuses to follow such an order. An employer engaging in such conduct violates a basic duty imposed by law upon all employers, and thus an employee who has suffered damages as a result of such discharge may maintain a tort action for wrongful discharge against the employer." (27 C.3d 178.)

The scope of the doctrine announced in *Tameny* was severely limited by subsequent decisions imposing restraints on the vitality of a tort claim alleging wrongful discharge of employment in violation of public policy. (See 3 *Summary* (10th), *Agency and Employment*, §242 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]



150 of 178 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

III. FORMS OF ACTION

C. Contract and Tort Actions.

4. Alternative Tort or Contract Actions.

b. Election Allowed: Tort Actions.

2. Breach of Contract as a Tort.

ee. Breach of Warranty of Habitability.

3 *Witkin Cal. Proc. Actions* § 150

[§ 150] Breach of Warranty of Habitability.

In *Stoiber v. Honeychuck* (1980) 101 C.A.3d 903, 162 C.R. 194, plaintiff S rented residential property from defendant E under a month-to-month tenancy in October 1974 and vacated in August 1977, after the county health department had ordered the premises destroyed for numerous housing code violations. This action for damages was brought against the landlord and the managing agents, alleging causes of action for breach of warranty of habitability, nuisance, intentional infliction of emotional distress, negligent violation of statutory duty, constructive eviction, and injunctive relief from unlawful business practices. The complaint contained allegations of agency, defendants' knowledge of defective conditions and failure to correct them, and plaintiff's lack of knowledge of defective conditions at the time of renting. Compensatory damages were sought for discomfort and annoyance, property damage, and extreme emotional distress; and allegations of malicious and oppressive conduct were made to support a claim for punitive damages. *Held*, reversing judgment on demurrer, the first five causes of action were good.

(a) *Tort action for breach of warranty of habitability.*

(1) The cause of action for breach was established by *Green v. Superior Court* (1974) 10 C.3d 616, 111 C.R. 704, 517 P.2d 1168, adopting the theory of *Hinson v. Delis* (1972) 26 C.A.3d 62, 102 C.R. 661, that C.C. 1941 et seq. do not state an exclusive remedy. (101 C.A.3d 913, 914; see 12 *Summary* (10th), *Real Property*, §624 et seq.)

(2) The damage recovery recognized in *Green* was the difference in the fair rental value of the premises. But the residential tenant usually does not lose money. He suffers annoyance and discomfort from lack of proper bathing facilities or inadequate protection against cold or heat, and the danger of disease from infested premises. (101 C.A.3d 915.) In *Quevedo v. Braga* (1977) 72 C.A.3d Supp. 1, 140 C.R. 143, 12 *Summary* (10th), *Real Property*, §627, the court rejected a demand for damages for discomfort and annoyance because the sole theory of liability was breach of the implied warranty, distinguishing cases in which the breach of contract was also a tort and a tort cause of action was alleged. (101 C.A.3d 916.)

(3) Here, a tort cause of action, with damages according to tort rules, may be stated, under the doctrine of *Rowland v. Christian* (1968) 69 C.2d 108, 70 C.R. 97, 443 P.2d 561 [liability based on broad statutory declaration of duty of care in C.C. 1714], and its application in *Brennan v. Cockrell Inv.* (1973) 35 C.A.3d 796, 111 C.R. 122, 12 Summary (10th), *Real Property*, §639. (101 C.A.3d 917, 918, quoting the text.)

(b) *Tort action for nuisance.* The tenant's interest in the property is sufficient to support an action based on nuisance--substantial interference with the use of the premises--and to justify recovery for discomfort and annoyance and mental suffering. (101 C.A.3d 919, 920.) If, as pleaded, the nuisance was intentionally maintained, punitive damages are also recoverable. (101 C.A.3d 920.)

(c) *Tort action for intentional infliction of emotional distress.* All of the elements of this tort (outrageous conduct, severe emotional distress, etc.; see 5 Summary (10th), *Torts*, §449 et seq.) were pleaded. Plaintiff alleged that she suffered extreme emotional distress as a result of defendant's "knowing, intentional, and willful" failure to correct the defective conditions. (101 C.A.3d 921.) The availability of the remedy for breach of the implied warranty does not preclude an action for intentional infliction of emotional distress. (101 C.A.3d 922.)

(d) *Tort action for negligent violation of statutory duty.* Applying the theory and tests of *Rowland v. Christian*, "a due regard for human safety and health compels the imposition on a landlord of a duty of due care in the maintenance of the premises." (101 C.A.3d 924.) Thus, plaintiff properly alleged compensatory damages for the discomfort and annoyance suffered (\$ 20 for each day she lived on the premises) and property damages (including water damage to furniture, mattress, and curtains). (101 C.A.3d 922.) By grounding the action on a violation of a statutory duty, plaintiff is entitled to invoke the presumption of the failure to exercise due care (negligence per se doctrine, codified in *Ev.C.* 669; see 6 Summary (10th), *Torts*, §871 et seq.). (101 C.A.3d 924.)

(e) *Tort action for constructive eviction.* Plaintiff alleged intolerable conditions of occupancy and forced abandonment after the county health department order; whether she abandoned within a reasonable time is a jury question. (101 C.A.3d 926.) A tenant wrongfully evicted may recover general damages representing the value of the unexpired term and expenses of removal. Moreover, a tenant who elects to sue in tort (as here) may recover damages for mental pain or physical injury, and, on a proper showing, punitive damages. (101 C.A.3d 926.)

(f) *Injunctive relief.* Plaintiff is not entitled to injunctive relief against alleged maintenance by defendants of "various" residential properties in unsafe condition. Plaintiff, at the time of filing this action, was no longer in possession of any of the properties owned or managed by defendants, and had no standing to seek an injunction. Any other tenants who may have been injured by defendants' acts have all of the common law remedies discussed above, and, on proper pleading and proof of a nuisance, injunctive relief. (101 C.A.3d 928.)

(g) *Liability of agents.* Although an agent for a disclosed principal is ordinarily not liable on a contract made for the principal, by statute the agent may be liable for his or her own torts even when acting for the principal. (101 C.A.3d 929; see 3 Summary (10th), *Agency and Employment*, §199.) Hence, plaintiff, alleging a cause of action in negligence against the landlord, may also plead a cause of action against the landlord's agents. (101 C.A.3d 930.) And the duty of care of a rental agent to the tenant is supported by the reasoning of *J'Aire Corp. v. Gregory* (1979) 24 C.3d 799, 157 C.R. 407, 598 P.2d 60, 5 Summary (10th), *Torts*, §751. The transaction between the rental agent and the landowner was clearly intended to affect the tenants, and harm was foreseeable, because the owner was located at some distance from the property and the tenant's only practical recourse was to complain to the rental agent. "Imposition of a duty on the rental agent would as a matter of public policy encourage the agent to pass the complaints along to the owner or to take action to properly maintain the property, if this is part of his responsibilities as agreed with the owner." (101 C.A.3d 931.)

SUPPLEMENT: [This section is current through the latest supplement]



151 of 178 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

III. FORMS OF ACTION

C. Contract and Tort Actions.

4. Alternative Tort or Contract Actions.

b. Election Allowed: Tort Actions.

3. Strict Tort Liability of Manufacturer or Dealer.

3 Witkin Cal. Proc. Actions § 151

[§ 151] Strict Tort Liability of Manufacturer or Dealer.

(1) *Personal Injury or Property Damage.* The traditional remedy against a manufacturer of a product that caused personal injury or physical damage to property was a tort action based on negligence. Where there was privity, as between retail dealer and a buyer, a contract action could be brought for the breach of an implied warranty. The subsequently developed doctrine of strict tort liability allows a tort action, without privity, against either the manufacturer or the dealer, free from the restrictions on warranty recovery. (See *Vandermark v. Ford Motor Co.* (1964) 61 C.2d 256, 261, 37 C.R. 896, 391 P.2d 168, 6 Summary (10th), Torts, §§1480, 1495; 4 Cal. Proc. (5th), Pleading, §627.)

(2) *Economic Loss.* Where the defective product causes only "economic loss," without personal injury or physical injury to property, California rejects the action based on strict tort liability; recovery must be sought on implied warranty, under the applicable provisions of the Uniform Commercial Code. (*Seely v. White Motor Co.* (1965) 63 C.2d 9, 18, 45 C.R. 17, 403 P.2d 145; *Sacramento Regional Transit Dist. v. Grumman Flexible* (1984) 158 C.A.3d 289, 294, 204 C.R. 736 [following *Seely*]; 6 Summary (10th), Torts, §1514 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]



152 of 178 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

III. FORMS OF ACTION

C. Contract and Tort Actions.

4. Alternative Tort or Contract Actions.

b. Election Allowed: Tort Actions.

4. Fraud in Inducement of Contract.

aa. Enforceable Contract.

3 *Witkin Cal. Proc. Actions* § 152

[§ 152] Enforceable Contract.

It is a familiar rule that where the plaintiff contracted in reliance on the fraud of the defendant, the plaintiff may elect either the contract remedy (restitution based on rescission) or the tort remedy (affirmance and damages). (See *Berning v. Colodny & Colodny* (1930) 103 C.A. 188, 194, 284 P. 496 [action was in tort and exemplary damages were properly awarded]; *Hjorth v. Bernstein* (1941) 44 C.A.2d 561, 564, 112 P.2d 643; *Karapetian v. Carolan* (1948) 83 C.A.2d 344, 346, 188 P.2d 809; 26 So. Cal. L. Rev. 157; 5 *Summary* (10th), *Torts*, §827 et seq.)

Where the defendant makes a promise without intending to perform, and later fails or refuses to perform, the defendant is guilty of the tort of fraud as well as of the breach of contract. (See 1 *Summary* (10th), *Contracts*, §497; 5 *Summary* (10th), *Torts*, §781.) The alternative remedy in tort has been recognized in California, as a basis for awarding exemplary damages, where the contract itself is valid and enforceable. (*Thompson v. Modern School of Business & Correspondence* (1920) 183 C. 112, 120, 190 P. 451; *Chelini v. Nieri* (1948) 32 C.2d 480, 487, 196 P.2d 915 ["Had this action been based upon fraud, exemplary damages might have been allowed even though the operative facts amounted also to a breach of contract"]; *Squire's Dept. Store v. Dudum* (1953) 115 C.A.2d 320, 323, 252 P.2d 418; on rules where contract is unenforceable, see *infra*, §§154, 167.)

SUPPLEMENT: [This section is current through the latest supplement]



153 of 178 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

III. FORMS OF ACTION

C. Contract and Tort Actions.

4. Alternative Tort or Contract Actions.

b. Election Allowed: Tort Actions.

4. Fraud in Inducement of Contract.

bb. Illegal Contract.

3 *Witkin Cal. Proc. Actions* § 153

[§ 153] Illegal Contract.

A tort action has been allowed where the contract is technically illegal. In *Grant v. Weatherholt* (1954) 123 C.A.2d 34, 266 P.2d 185, plaintiff, an unlicensed contractor, agreed to perform construction services in a joint venture with defendants, and to advance \$ 25,000 to the venture. After it collapsed, he sued for damages, alleging and proving a fraudulent representation of one defendant that the property was unencumbered. *Held*, although lack of a license barred his contract remedy (see 1 *Summary* (10th), *Contracts*, §485 et seq.), the tort action for fraud in inducement of the contract was maintainable. (123 C.A.2d 42.)

In *R.D. Reeder Lathing Co. v. Cypress Ins. Co.* (1970) 3 C.A.3d 995, 84 C.R. 98, plaintiff carried workers' compensation insurance with P Co., which paid a legal participating dividend out of surplus. Defendant S, the agent for defendant C Co., to induce plaintiff to transfer its insurance to C Co., falsely represented that it would rebate all premiums less 32%, an illegal rebate under Insurance Code provisions. Plaintiff transferred the insurance, paid premiums of \$ 14,760.62, and received a participating dividend of \$ 2,509.31. If it had remained with P Co., it would have received a dividend of \$ 6,333.78. Plaintiff sued, not for \$ 8,590.22 (the amount of rebate if the representations had been true), but for \$ 3,824.47 (the difference between what it received from defendant and what it would have received from P Co.), plus \$ 20,000 in exemplary damages. *Held*, judgment for defendants on demurrer reversed.

(a) If plaintiff had sued to recover the promised rebate, the action would have been to enforce the contract, and recovery would have been denied on the ground of illegality. (3 C.A.3d 998.) Here, however, the action was in tort, for damages for fraud in inducing plaintiff to enter into the contract; this was shown by the amount demanded. (3 C.A.3d 999.)

(b) The purposes of the law would not be frustrated by allowing recovery; rather, by imposing liability on defendant, the offer of illegal rebates would be discouraged. (3 C.A.3d 999.)

SUPPLEMENT: [This section is current through the latest supplement]



154 of 178 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

III. FORMS OF ACTION

C. Contract and Tort Actions.

4. Alternative Tort or Contract Actions.

b. Election Allowed: Tort Actions.

4. Fraud in Inducement of Contract.

cc. Contract in Violation of Statute of Frauds.

3 *Witkin Cal. Proc. Actions* § 154

[§ 154] Contract in Violation of Statute of Frauds.

(1) *Former Rule Denying Election.* It was formerly the rule that a tort action for damages could not be based on a false promise where the promise itself was unenforceable under the statute of frauds. Election was denied on the theory that it would permit an evasion of the policy and provisions of the statute of frauds. (See *Kroger v. Baur* (1941) 46 C.A.2d 801, 803, 117 P.2d 50 [complaint alleging that real estate broker performed services in reliance on defendant's oral false promise]; *Baron v. Lange* (1949) 92 C.A.2d 718, 719, 207 P.2d 611 [complaint alleging that defendant made oral false representations about another's credit]; *Beach v. Arblaster* (1961) 194 C.A.2d 145, 163, 14 C.R. 854; 5 *Summary* (10th), *Torts*, §783.)

The *Kroger* rule was followed for more than 40 years by Court of Appeal decisions but was criticized in *Southern Calif. Dist. Council, Assemblies of God v. Shepherd of the Hills Evangelical Lutheran Church* (1978) 77 C.A.3d 951, 958, footnote 3, 144 C.R. 46.

(2) *Election Allowed.* In *Tenzer v. Superscope* (1985) 39 C.3d 18, 216 C.R. 130, 702 P.2d 212, 5 *Summary* (10th), *Torts*, §783, the Supreme Court took note of the criticism and disapproved *Kroger*. (39 C.3d 29.) A tort action for damages may be based on a false promise where the promise itself is unenforceable under the statute of frauds. (39 C.3d 30, 31.) (On contrary rule where contract is otherwise unenforceable, see *infra*, §167.)

SUPPLEMENT: [This section is current through the latest supplement]



155 of 178 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

III. FORMS OF ACTION

C. Contract and Tort Actions.

4. Alternative Tort or Contract Actions.

b. Election Allowed: Tort Actions.

5. Inducing Breach of Contract.

3 *Witkin Cal. Proc. Actions* § 155

[§ 155] Inducing Breach of Contract.

Inducing a breach of contract is one of the most familiar bases of alternative tort actions, and its peculiar nature and expanded scope should be carefully noted:

(1) The usual tort action is brought against a third person who wrongfully induces the other contracting party to commit the breach. (See *Imperial Ice Co. v. Rossier* (1941) 18 C.2d 33, 39, 112 P.2d 631; 30 Cal. L. Rev. 181; 41 Harv. L. Rev. 728; 61 Harv. L. Rev. 897; 25 So. Cal. L. Rev. 487; 26 A.L.R.2d 1227 [liability for procuring breach of contract]; 44 A.L.R.4th 1078 [punitive damages for interference with contract or business relationship]; 5 *Summary* (10th), *Torts*, §730 et seq.; 5 *Cal. Proc.* (5th), *Pleading*, §771 et seq.)

(2) Successive actions may be brought on the separate causes of action, i.e., a contract action against the other contracting party for breach, and a tort action against the third party for inducing breach. (See *Duff v. Engelberg* (1965) 237 C.A.2d 505, 508, 47 C.R. 114, 5 *Summary* (10th), *Torts*, §740.)

(3) The tort action may be brought even though the contract is unenforceable or voidable or void by reason of the statute of frauds, lack of consideration, or uncertainty. (See *Zimmerman v. Bank of America* (1961) 191 C.A.2d 55, 58, 12 C.R. 319, 5 *Summary* (10th), *Torts*, §733; 96 A.L.R.3d 1294 [liability for interference with invalid or unenforceable contract].)

SUPPLEMENT: [This section is current through the latest supplement]



156 of 178 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

III. FORMS OF ACTION

C. Contract and Tort Actions.

4. Alternative Tort or Contract Actions.

c. Election Allowed: Contract and Quasi-Contract Actions.

1. Fraud in Inducement of Contract.

3 *Witkin Cal. Proc. Actions* § 156

[§ 156] Fraud in Inducement of Contract.

(1) *Former Law.* The defrauded party to a contract may elect the remedy of rescission and restitution. Formerly, if the defrauded party sued for rescission, the action was equitable in nature; this action, however, was abolished in 1961. Even if the defrauded party sued for restitution after a completed rescission, the action was for a time erroneously regarded as equitable, but was later classified properly as a legal action in contract or quasi-contract. (See *supra*, §130.)

Unfortunately, the same mistake in analysis that classified the action for restitution as equitable also classified it as tort. (See *Stone v. Superior Court* (1931) 214 C. 272, 274, 4 P.2d 777.) The mistake was repeated in *Postin v. Griggs* (1944) 66 C.A.2d 147, 151 P.2d 887. Plaintiff alleged that defendant partners by fraudulent representations induced him to sell them his interest in the partnership, and that on discovery of the fraud he gave notice of rescission. The prayer was for rescission and cancellation of the agreements of sale, and an accounting. The court refused to recognize contract venue (see *infra*, §834 et seq.). "[I]t is apparent that an action based on fraud, and in which plaintiff seeks rescission and an accounting, is triable in the county of the residence of the defendant regardless of where the contract sought to be canceled was executed. Such an action is not 'founded' on the contract sought to be canceled--it is not a contract action at all, but a tort action based on fraud." (66 C.A.2d 150.) (See *Sausen v. Anderton* (1954) 129 C.A.2d 324, 325, 276 P.2d 814 [following *Postin*].)

(2) *Current Law.* The classification of an action for restitution after rescission as a tort action cannot be reconciled with the decisions properly treating it as quasi-contractual in nature. (See *Philpott v. Superior Court* (1934) 1 C.2d 512, 522, 36 P.2d 635; *Fitzhugh v. University Realty Co.* (1920) 46 C.A. 198, 200; 188 P. 1023; *Engle v. Farrell* (1946) 75 C.A.2d 612, 617, 171 P.2d 588; *Filipan v. Television Mart* (1951) 105 C.A.2d 404, 405, 233 P.2d 926; 37 Am.Jur.2d (2001 ed.), *Fraud and Deceit* §372; *supra*, §130.)

SUPPLEMENT: [This section is current through the latest supplement]



157 of 178 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

III. FORMS OF ACTION

C. Contract and Tort Actions.

4. Alternative Tort or Contract Actions.

c. Election Allowed: Contract and Quasi-Contract Actions.

2. Intentional Tort Violating Contract.

aa. Conversion or Misappropriation.

3 *Witkin Cal. Proc. Actions* § 157

[§ 157] Conversion or Misappropriation.

(1) *Conversion by Bailee.* In *Edwards v. Jenkins* (1932) 214 C. 713, 7 P.2d 702, defendant stockbroker, under a contractual duty to procure and deliver stock certificates to plaintiff client on demand, instead sent them to the corporation transfer office to be reissued in plaintiff's name. *Held*, defendant was liable for their market value at the time of the first refusal of plaintiff's demand, "both in conversion and for a breach of their contract." (214 C. 719, 721.) The same view was taken in *Fisher v. Pickwick Hotel* (1940) 42 C.A.2d Supp. 823, 825, 108 P.2d 1001, where a garage owner misdelivered a parked car in violation of the contract terms of the claim check.

In *Peterson v. Sherman* (1945) 68 C.A.2d 706, 157 P.2d 863, farm machinery was delivered to defendant under a rental agreement made and to be performed in Kings County. Defendant refused a proper demand for its return and plaintiff sued in Kings County to recover possession or value, and damages for wrongful detention. Though the act was a conversion and a tort action could have been brought, it was held that the complaint stated a cause of action for breach of the agreement, and the contract venue statute applied. (68 C.A.2d 712.)

(2) *Misappropriation by Fiduciary.* Two similar cases illustrate the danger of counsel relying on liberal pleading rules and ignoring other important consequences of the choice of a "theory of the pleading" (form of action). In *Bee v. Cooper* (1932) 217 C. 96, 17 P.2d 740, a number of directors of a corporation fraudulently disposed of corporate assets to the injury of plaintiff shareholders. In *Dougherty v. California Kettleman Oil Royalties* (1939) 13 C.2d 174, 88 P.2d 690, a number of defendants, in violation of a contract, fraudulently concealed from and failed to pay oil royalties to plaintiff obligees. In each case, therefore, several defendants fraudulently acquired property in which plaintiffs had some interest; and in each case plaintiffs, for consideration, released some of the guilty parties. In *Bee*, all remaining defendants were held to be released on the ground that the action was in tort for damages for fraud, i.e., the release, according to former law, of one or more joint tortfeasors released the others. (217 C. 100; on current law to the contrary, see C.C.P. 877; 5 *Summary* (10th), *Torts*, §71 et seq.) But in *Dougherty*, it was held that the action was brought to declare the remaining defendant a constructive trustee of the unpaid oil royalties, as a means of enforcing the latter's contractual obligation to pay them. "There can be no doubt that [D] could have sued [O] and appellant for damages for

this and the other frauds, but the point is he did not, but elected to sue for the enforcement of his contract with [O]. It is elementary that a person injured under circumstances where he may sue in either tort or contract, may waive the tort and sue on the contract." (13 C.2d 183.) Hence, the release was not of joint tortfeasors but of joint contract obligors, and the appellant remained liable.

(3) *Plagiarism*. The misappropriation of a literary composition submitted pursuant to an agreement to pay for it if used is both a tort and a breach of contract. (*Weitzenkorn v. Lesser* (1953) 40 C.2d 778, 779, 780, 256 P.2d 947; see 5 Cal. Proc. (5th), *Pleading*, §707.)

SUPPLEMENT: [This section is current through the latest supplement]



158 of 178 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

III. FORMS OF ACTION

C. Contract and Tort Actions.

4. Alternative Tort or Contract Actions.

c. Election Allowed: Contract and Quasi-Contract Actions.

2. Intentional Tort Violating Contract.

bb. Wrongful Eviction by Landlord.

3 *Witkin Cal. Proc. Actions* § 158

[§ 158] Wrongful Eviction by Landlord.

In *Nathan v. Locke* (1930) 108 C.A. 158, 291 P. 286, the lessee of farm land in a prior action alleged that he had been evicted from possession, and that in consequence he had suffered the loss of certain anticipated profits from his farming operations. He recovered a judgment. In the present action plaintiff, one of the lessors, having paid the judgment, sued defendant colessors for contribution. The lessee's prior action could have been for damages for the tort (trespass), in which case no right of contribution could have been asserted under the existing law. But an examination of the complaint in the prior action showed that its theory was merely breach of the covenant of quiet enjoyment. It was therefore not a tort action against joint tortfeasors, but a contract action against joint obligors, and plaintiff was entitled to contribution. (108 C.A. 163, 164.)

SUPPLEMENT: [This section is current through the latest supplement]



159 of 178 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

III. FORMS OF ACTION

C. Contract and Tort Actions.

4. Alternative Tort or Contract Actions.

c. Election Allowed: Contract and Quasi-Contract Actions.

2. Intentional Tort Violating Contract.

cc. Wrongful Expulsion of Union Member.

3 Witkin Cal. Proc. Actions § 159

[§ 159] Wrongful Expulsion of Union Member.

It is a tort (unprivileged concerted action) for a labor union to insist on employer performance of a closed shop contract while at the same time improperly refusing to admit a worker to the union or improperly expelling an existing member. (See 3 *Summary* (10th), *Agency and Employment*, §627.)

A member of a union has contractual rights arising from membership. Hence, the wrongful expulsion of a member and the consequent prevention of opportunity for employment is also a breach of contract. (*Cason v. Glass Bottle Blowers Assn.* (1951) 37 C.2d 134, 142, 231 P.2d 6 [oral contract statute of limitations applied]; *Hopson v. National Union of Marine Cooks & Stewards* (1953) 116 C.A.2d 320, 326, 253 P.2d 733 [written contract statute of limitations applied].)

SUPPLEMENT: [This section is current through the latest supplement]



160 of 178 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

III. FORMS OF ACTION

C. Contract and Tort Actions.

4. Alternative Tort or Contract Actions.

c. Election Allowed: Contract and Quasi-Contract Actions.

2. Intentional Tort Violating Contract.

dd. Insurer's Refusal To Settle.

3 *Witkin Cal. Proc. Actions* § 160

[§ 160] Insurer's Refusal To Settle.

A liability insurer that wrongfully refuses to settle a claim is guilty of the breach of the implied covenant of good faith and fair dealing, and is liable in damages to the insured. (See 2 *Summary* (10th), *Insurance*, §257 et seq.) The action may be brought either in tort (see *supra*, §146 et seq.) or in contract. (See *Comunale v. Traders & General Ins. Co.* (1958) 50 C.2d 654, 662, 328 P.2d 198, 2 *Summary* (10th), *Insurance*, §265 [4-year contract statute of limitations]; 55 *Cal. L. Rev.* 1105; 3 *Lincoln L. Rev.* 60; 5 *San Diego L. Rev.* 233.)

In *Frazier v. Metropolitan Life Ins. Co.* (1985) 169 C.A.3d 90, 214 C.R. 883, plaintiff's husband, while returning to the dock after a fishing boat trip in March 1975, drowned when he either jumped off the boat or accidentally fell off. He was insured by defendant under a policy with a suicide exclusion. Plaintiff claimed the death benefit, and defendant paid the basic benefit of \$ 12,000 but not the double indemnity claim, and it requested further information on the question whether the death was accidental. After extensive investigation and internal disagreement in defendant's claims department, defendant denied the claim on the ground that the death was the result of suicide. In March 1978, plaintiff brought this action for bad faith breach of contract, on both contract and tort theories, seeking recovery of benefits, damages for intentional infliction of emotional distress, and punitive damages. The jury awarded damages of \$ 12,000 for the unpaid accidental means death benefit, \$ 150,000 for emotional distress, and \$ 8 million in punitive damages (reduced by the trial judge to \$ 2 million). *Held*, judgment modified to strike the award of punitive damages.

(a) The action was one arising from contract, but the breach of the implied covenant of good faith and fair dealing was also a tort. Hence, plaintiff could elect either a contract or tort action. (169 C.A.3d 100, 101, citing *Comunale, Crisci v. Security Ins. Co. of New Haven, Connecticut* (1967) 66 C.2d 425, 58 C.R. 13, 426 P.2d 173, *supra*, §147, and *Gruenberg v. Aetna Ins. Co.* (1973) 9 C.3d 566, 108 C.R. 480, 510 P.2d 1032, *supra*, §148.)

(b) Treating the complaint as an election to sue in contract, the action, although barred by the tort statute of limitations, was timely under the 4-year statute on actions for breach of contract (C.C.P. 337(1)). (169 C.A.3d 101, 102.)

(c) In this hybrid contract-tort type of action, plaintiff, although electing the contract theory to overcome the statute of limitations, was nevertheless entitled to recover for intentional infliction of emotional distress on the tort theory. (169 C.A.3d 102, 105.) But this reasoning cannot apply to recovery of punitive damages, for C.C. 3294 expressly provides that punitive damages are allowed only for breach of an obligation "not arising from contract." (169 C.A.3d 106, citing a recent federal district court case.) "When the action proceeds under alternate tort theories in addition to a contract action, then punitive damages may be awarded under the alternative tort theory. ... But if the tort cause of action is time-barred ... , plaintiff must proceed solely on her contract theory; and she may not also proceed on the time-barred tort theory to obtain punitive damages." (169 C.A.3d 106.)

(d) "It may be argued that if under ... *Crisci*, ... plaintiff is allowed to recover damages for emotional distress, why should she be barred from recovering punitive damages, since both these types of damages are tortious in nature? Here, pure logic must give way to the strict statutory prohibition of section 3294 and case authority interpreting the statute, as punitive damages in California are based upon this statute alone; and it is the statutory language which controls." (169 C.A.3d 107, citing *Murphy v. Allstate Ins. Co.* (1978) 83 C.A.3d 38, 147 C.R. 565, *infra*, §470.) (See *Krieger v. Nick Alexander Imports* (1991) 234 C.A.3d 205, 220, 285 C.R. 717 [following *Frazier*].)

SUPPLEMENT: [This section is current through the latest supplement]



161 of 178 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

III. FORMS OF ACTION

C. Contract and Tort Actions.

4. Alternative Tort or Contract Actions.

c. Election Allowed: Contract and Quasi-Contract Actions.

2. Intentional Tort Violating Contract.

ee. Fraudulent Breach of Contract.

3 *Witkin Cal. Proc. Actions* § 161

[§ 161] Fraudulent Breach of Contract.

In *Souza & McCue Const. Co. v. Superior Court* (1962) 57 C.2d 508, 20 C.R. 634, 370 P.2d 338, a city sued S Co. for damages for breach of a contract, made in June 1958, to construct a storm sewer. S Co. cross-complained for damages for the cost of extra work, alleging that the city fraudulently concealed the bad condition of the soil to induce a lower bid, and that the facts were not discovered until July 1961.

(a) Under the claims statutes then in force, S Co.'s notice of claim was timely, and its action maintainable, only under the fraud theory of postponed accrual of the cause of action until discovery of the facts. This theory was held applicable. (57 C.2d 511.)

(b) On the issue of substantive liability, the city contended that the action was in tort and that governmental immunity had been temporarily established by 1961 legislation following *Muskopf v. Corning Hosp. Dist.* (1961) 55 C.2d 211, 11 C.R. 89, 359 P.2d 457, 5 Summary (10th), Torts, §215. (57 C.2d 510.) The court held, however, that the liability asserted was contractual and consequently not subject to the immunity doctrine. "This rule is mainly based on the theory that the furnishing of misleading plans and specifications by the public body constitutes a breach of an implied warranty of their correctness. The fact that a breach is fraudulent does not make the rule inapplicable." (57 C.2d 510.) (See *Salinas v. Souza & McCue Const. Co.* (1967) 66 C.2d 217, 227, 57 C.R. 337, 424 P.2d 921 [following *Souza*].)

An odd case in this field is *Schulte v. Buben* (1932) 215 C. 172, 8 P.2d 843. Plaintiff contractor agreed to build a house for defendant and defendant agreed to pay \$ 10,440 cash and deed certain land. Defendant paid the money and tendered the deed, but plaintiff alleged that the value of defendant's land had been misrepresented to his damage in the sum of \$ 3,000. This looked like a tort action for fraud (see dissent, 215 C. 175), but plaintiff's action was to foreclose his mechanic's lien on the house he had erected. In order to make the lien cover the claim for \$ 3,000, the majority held that the action was to recover the reasonable value of materials and labor furnished, i.e., in contract, for failure to pay the contract price. (215 C. 174.)

SUPPLEMENT: [This section is current through the latest supplement]



162 of 178 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

III. FORMS OF ACTION

C. Contract and Tort Actions.

4. Alternative Tort or Contract Actions.

c. Election Allowed: Contract and Quasi-Contract Actions.

3. Negligent Violation of Contract.

aa. Election Allowed To Permit Recovery.

3 *Witkin Cal. Proc. Actions* § 162

[§ 162] Election Allowed To Permit Recovery.

The cases allowing alternative contract actions where the breach was an intentional tort (*supra*, §157 et seq.) are in sharp contrast with the authorities refusing to allow contract actions where the breach was a negligent act. (See *infra*, §§165, 166.) On principle, however, there is no reason why the plaintiff should be denied a right of action for breach of contract in this latter situation. Thus, in the early case of *Chapman v. California* (1894) 104 C. 690, 38 P. 457, plaintiff sued the state, alleging that he paid wharfage charges to its officers and that they took and negligently lost his goods. The cause arose prior to the statute allowing an action against the state for the negligence of officers, but the state was liable on contracts. *Held*, the action was properly brought as an action for damages for breach of contract. Negligence of a wharfinger "would be a breach of the terms of his contract ... and under our practice the owner or consignee may sue upon the contract for the damages sustained by reason of such negligence." (104 C. 695.)

In *Crawford v. Duncan* (1923) 61 C.A. 647, 215 P. 573, plaintiff alleged that defendant physician orally agreed in 1917 to treat a swelling on his neck with radium and orally warranted that any scar would disappear within a year or two from the time of treatment; and that in 1920, when the action was brought, a large scar remained. *Held*, the then 1-year statute of limitations for personal injuries was not a bar. "This is not an action of tort. That is, it is not an action for malpractice based upon negligence. It is an action for the breach of an alleged oral agreement whereby defendant warranted that his radium treatments would not leave a permanent scar." (61 C.A. 650.) (But see *Rubino v. Utah Canning Co.* (1954) 123 C.A.2d 18, 266 P.2d 163, *infra*, §565 [disapproving *Crawford* on limitations point]; 43 Cal. L. Rev. 546.)

This theory received additional approval in *L. B. Laboratories v. Mitchell* (1952) 39 C.2d 56, 244 P.2d 385. Defendant, an accountant, agreed in writing to prepare and file various tax returns for plaintiff. He was guilty of delay in reviewing their records, late filing of returns, and making improper deductions. As a result penalties were paid by plaintiff. Defendant contended that the action was in tort for malpractice (negligence) and governed by the 2-year statute of limitations (*infra*, §648). *Held*, the action came within the 4-year written contract statute. The complaint alleged a cause of action for breach of the contract of employment (failure to carry out his promise), and the pleader's

use of the term "negligently" did not make it a tort action. (39 C.2d 60.) Distinguishing the typical malpractice case against a physician (infra, §165), the court said that the defendant contracted to do a specific thing, i.e., to file the returns in the time required by law. "It differs in that respect from an action against a physician who does not agree to achieve any particular result; he merely agrees to act in a nonnegligent manner. Even in the physician cases it would not be doubted that if a doctor is specifically employed to remove a wart from the patient's foot but removes one from his face, there would be a breach of contract." (39 C.2d 63.)

In *Langley v. Pacific Gas & Elec. Co.* (1953) 41 C.2d 655, 262 P.2d 846, classification was unnecessary to support recovery, but the court by dictum approved the alternative theories of recovery. "By undertaking to supply electricity to plaintiff, defendant obligated itself to exercise reasonable care toward him, and failure to exercise such care has the characteristics of both a breach of contract and a tort." (41 C.2d 662.)

In *Deppenbrok v. Kaiser Foundation Health Plan* (1978) 79 C.A.3d 167, 144 C.R. 724, although a judgment for plaintiff was reversed for error in instructions, the court, following *Crawford* and similar cases, said: "[I]f a plaintiff can prove to a properly instructed jury that a surgeon has clearly promised a particular result (as distinguished from a mere generalized statement that the result will be good), and that the patient consented to an operation or other procedure in reliance on that promise, there can be recovery on the theory of warranty (or, to give the theory its more accurate name, breach of contract)." (79 C.A.3d 171.)

The issue of allowing an alternative contract or tort action for negligent performance of a contract to support recovery was presented in an unusual context in *Perry v. Robertson* (1988) 201 C.A.3d 333, 247 C.R. 74. Plaintiff engaged defendant real estate brokers to sell her home. In this action she alleged that defendants were negligent in drafting the written sales agreement and escrow instructions, as a result of which she received substantially less than the market value as the sales price. After a favorable verdict she filed a motion for an award of costs and attorneys' fees under the listing agreement, which provided that "[i]f action be instituted to enforce this agreement, the prevailing party shall receive reasonable attorney's fees and costs as fixed by the Court." Defendants opposed the motion on the ground that plaintiff had pursued her cause of action as in tort rather than in contract. The trial judge made the award and defendants appealed. *Held*, affirmed; the complaint sufficiently pleaded a claim in contract, and the damages sought were consistent with a remedy either in contract or tort.

(a) Under the statutory rule of "one form of civil action" and the "primary right" theory of pleading, a single cause of action framed in ultimate facts may sound in tort or contract. (201 C.A.3d 339, citing the text.) Thus, where a contract gives rise to a duty of care, negligence as to the duty may give rise to a cause of action for breach of contract. (201 C.A.3d 340, citing the text.)

(b) Older cases maintaining the opposing view have been criticized (201 C.A.3d 342, 343, footnote 5) and should be limited to the particular contexts in which they arose. "These cases cannot mean that the plaintiff, injured by negligent failure to perform a contractual duty, has no remedy on a breach of contract theory. If that were so the established doctrine of alternative tort/contract remedies would be utterly meaningless." (201 C.A.3d 343.)

Many other decisions recognized the right to elect the contract action to permit recovery. (See *Stark v. Wellman* (1892) 96 C. 400, 401, 31 P. 259 [negligence of bailee]; *Justis v. Atchison, Topeka & Santa Fe Ry. Co.* (1910) 12 C.A. 639, 641, 108 P. 328 [negligence of carrier resulting in personal injury to passenger]; *Jacobs, Malcolm & Burt v. Northern Pac. Ry. Co.* (1925) 71 C.A. 42, 43, 234 P. 328 [negligence of carrier resulting in injury to goods]; *J.H. Trisdale v. Shasta County Title Co.* (1956) 146 C.A.2d 831, 837, 304 P.2d 832 [purchaser's action on contract against negligent title insurance company was not barred by contributory negligence]; *Estep v. Budger Mfg. Co.* (1958) 164 C.A.2d 119, 123, 330 P.2d 298 [negligent performance of contract to install gas heater in trailer; heater blew up and injured plaintiff; contract venue was proper]; *Von Batsch v. American Dist. Tel. Co.* (1985) 175 C.A.3d 1111, 1120, 222 C.R. 239; 7 U.C. Davis L. Rev. 84 [contractual liability of physicians]; 11 A.L.R.4th 748 [action against dentist for breach of contract to achieve particular result or cure].)

SUPPLEMENT: [This section is current through the latest supplement]



163 of 178 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

III. FORMS OF ACTION

C. Contract and Tort Actions.

4. Alternative Tort or Contract Actions.

c. Election Allowed: Contract and Quasi-Contract Actions.

3. Negligent Violation of Contract.

bb. Election Allowed To Defeat Recovery.

3 *Witkin Cal. Proc. Actions* § 163

[§ 163] Election Allowed To Defeat Recovery.

The strangest of the cases permitting an alternative contract or tort action for negligent performance of a contract is one that invokes the contract theory to defeat recovery. In *Kings Laboratories v. Yucaipa Valley Fruit Co.* (1936) 18 C.A.2d 47, 62 P.2d 1054, defendant prevailed on plaintiff warehouseman to store peaches illegally at less than the statutory rate. In plaintiff's action for charges, defendant cross-complained seeking damages for deterioration of the fruit due to alleged gross negligence. Judgment for defendant was reversed. "If it be assumed that an action in tort could have been maintained," it nevertheless appeared from the allegations that the cross-complainant was relying upon "a duty arising from a special contract" and the "gravamen of the complaint is a breach of the contract." Hence, the action was one for damages for breach of contract, and illegality of the contract was a bar to recovery. (18 C.A.2d 52.) It need scarcely be pointed out that this analysis is almost the exact opposite of that employed in the carrier cases (*infra*, §§165, 166), in which the action is held to be solely in tort.

SUPPLEMENT: [This section is current through the latest supplement]



164 of 178 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

III. FORMS OF ACTION

C. Contract and Tort Actions.

4. Alternative Tort or Contract Actions.

c. Election Allowed: Contract and Quasi-Contract Actions.

4. Waiver of Tort and Suit in Quasi-Contract.

3 *Witkin Cal. Proc. Actions* § 164

[§ 164] Waiver of Tort and Suit in Quasi-Contract.

An election recognized in the early common law is allowed where the defendant wrongfully obtains benefits from the plaintiff that he or she should not, in good conscience, be allowed to retain. Normally the action would be in tort, but for various reasons, some historical only and some still important, the plaintiff may "waive the tort" and sue in quasi-contract for restitution rather than damages. The principal situations are as follows:

(1) *Conversion of Personal Property*. An action on common count for goods sold and delivered, recovery of value. (See *Corey v. Struve* (1915) 170 C. 170, 172, 149 P. 48; *Bank of America v. Hill* (1937) 9 C.2d 495, 499, 71 P.2d 258; *Canepa v. Sun Pac.* (1954) 126 C.A.2d 706, 711, 272 P.2d 860; *Haurat v. Superior Court* (1966) 241 C.A.2d 330, 337, 50 C.R. 520 [principal may elect quasi-contract or tort action, and prayer for exemplary damages stamps it as tort]; *H. Russell Taylor's Fire Prevention Service v. Coca Cola Bottling Corp.* (1979) 99 C.A.3d 711, 719, 160 C.R. 411, 4 Summary (10th), Sales, §213; 4 Cal. Proc. (5th), Pleading, §556; but see *Bechtel v. Chase* (1909) 156 C. 707, 711, 106 P. 81 [plaintiff's position was inconsistent; waiver of tort theory was rejected].)

(2) *Wrongful Occupation or Holding of Real Property*. An action for reasonable value of use. (See *Taggart v. Shepherd* (1932) 122 C.A. 755, 10 P.2d 808; *Herond v. Bonsall* (1943) 60 C.A.2d 152, 155, 140 P.2d 121.)

(3) *Money Obtained by Fraud or Misappropriation*. An action for money had and received. (See *Hill v. Superior Court* (1940) 16 C.2d 527, 530, 106 P.2d 876 [money obtained by executor's embezzlement; attachment was allowed]; *Long v. Harrison* (1931) 113 C.A. 321, 324, 298 P. 148; *Nutzel v. Kozdron* (1944) 64 C.A.2d 908, 910, 149 P.2d 411 [money obtained by robbery; attachment was allowed]; *Adams v. Harrison* (1939) 34 C.A.2d 288, 293, 93 P.2d 237; *Lewis v. Fahn* (1952) 113 C.A.2d 95, 102, 247 P.2d 831 [money paid under duress]; but see *Hallidie v. Enginger* (1917) 175 C. 505, 510, 166 P. 1 [attachment was denied on ground that complaint was framed on theory of action for damages for fraud].)

In *Ward v. Taggart* (1959) 51 C.2d 736, 336 P.2d 534, an action was brought against a real estate broker to recover secret profits obtained by fraud in the purchase of real estate by plaintiff. The court overcame the obstacles of

California's limited damage statute in fraud cases (C.C. 3343), and the rule against the award of exemplary damages in contract cases (C.C. 3294), by treating the action as quasi-contractual. (51 C.2d 743.) (See 11 *Hastings L. J.* 183; 12 *Stanf. L. Rev.* 270; 7 *U.C.L.A. L. Rev.* 147; 6 *Summary* (10th), *Torts*, §1713.)

SUPPLEMENT: [This section is current through the latest supplement]



165 of 178 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

III. FORMS OF ACTION

C. Contract and Tort Actions.

4. Alternative Tort or Contract Actions.

d. Denial of Contract Action for Negligence.

1. Theory and Illustrations.

3 *Witkin Cal. Proc. Actions* § 165

[§ 165] Theory and Illustrations.

(1) *Classification of Cases.* It has been seen that well-considered cases allow an election of a contract or quasi-contract action in various situations in which an intentional or negligent wrongful act is also a tort. (See *supra*, §156 et seq.) In strong contrast are the decisions dealing with negligent acts in which the courts have refused to permit an action in contract. There are three main classes of cases:

(a) *Carriers.* Where a carrier contracts to transport goods or passengers and causes damage to property or persons by negligent performance. The contract is regarded merely as creating the legal duty of care, and the action based on negligent performance is in tort and not in contract. (See *Basler v. Sacramento Elec., Gas & Ry. Co.* (1913) 166 C. 33, 35, 134 P. 993 [statute of limitations]; *Rushing v. Pickwick Stages System* (1931) 113 C.A. 240, 242, 298 P. 150 [venue]; *Williamson v. Pacific Greyhound Lines* (1944) 67 C.A.2d 250, 256, 153 P.2d 990 [venue].)

(b) *Medical malpractice.* Where a physician or hospital contracts to furnish medical treatment, and the action is for injury or death from negligent performance. Like the carrier cases, these are treated as actions in tort for negligence. (*Harding v. Liberty Hosp. Corp.* (1918) 177 C. 520, 524, 171 P. 98 [hospital; then 1-year statute of limitations was bar]; *Wetzel v. Pius* (1926) 78 C.A. 104, 106, 248 P. 288 [physician; then 1-year statute of limitations was not bar]; *Speer v. Brown* (1938) 26 C.A.2d 283, 293, 79 P.2d 179 [physician; action did not survive under former law].)

(c) *Impure food and drugs.* Where a seller negligently sells unwholesome food or drugs, and the plaintiff sues for damages for injury or death on the contract theory of the breach of an implied warranty. The warranty theory is rejected and the action is treated as one solely in tort for negligence. (*Singley v. Bigelow* (1930) 108 C.A. 436, 445, 291 P. 899 [drug; action did not survive death of druggist seller, under former rule on nonsurvival of torts to person]; *Gosling v. Nichols* (1943) 59 C.A.2d 442, 444, 139 P.2d 86 [food; action did not survive death of buyer under former law]; *Rubino v. Utah Canning Co.* (1954) 123 C.A.2d 18, 26, 266 P.2d 163, *infra*, §565.) Under current law the tort action could be based on strict products liability. (See *supra*, §151.)

(2) *Theory of Rule.* In its early stages of development this rule was stated as one of construction of the pleadings.

The possibility of a contract action was recognized but the action was usually held to be in tort. *Basler v. Sacramento Elec., Gas & Ry. Co.*, *supra*, is a good example. Plaintiff husband sued for injuries received by his wife through negligent operation of defendant's streetcar. The action was filed just within 2 years on the theory that it was on a contract not in writing; the defense was the then 1-year statute of limitations on personal injury actions. *Held*, the action was barred. "It is true that in many instances a person who has been injured may elect to sue either in tort or in contract, but this action is clearly based upon the injury and not upon the agreement of carriage ... there is no allegation that her husband was deprived of her services or that she was put in need of medical attention by reason of the breach of the contract of carriage. The language of the pleading which of course must be taken most strongly against the pleader does not show any reliance upon a breach of the contract of the defendant to transport Mrs. [B] safely." (166 C. 35.)

Subsequent cases contain similar suggestions of the possibility of a contract action if properly pleaded, but no hint of the proper method of pleading is given. (See, e.g., *Singley v. Bigelow*, *supra*, 108 C.A. 444; *Speer v. Brown*, *supra*, 26 C.A.2d 293, 294; *Williamson v. Pacific Greyhound Lines*, *supra*, 67 C.A.2d 255, 256.) The practical effect of these decisions was to transform the practice of strict construction of the pleading into a fixed rule of law denying election in negligence cases. Thus, a good pleading, properly alleging a contract cause of action, may be arbitrarily rejected with the explanation that the "gravamen" of the action is tort. In *DeMirjian v. Ideal Heating Corp.* (1949) 91 C.A.2d 905, 206 P.2d 20, defendant lessee rented a building and in the lease agreed to hold plaintiff lessors harmless from any damage from misuse or neglect. Plaintiffs sued for damages from a fire caused by defendant's negligence, alleging their contract right of reimbursement for the loss, and obtained a writ of attachment. *Held*, the attachment was improper. The opinion reviews the carrier, impure drugs, and malpractice cases and concludes that if the liability depends on the tort, the gravamen is tort. The court refers to "plaintiffs' artfully contrived attempt" to state a case suitable for attachment (91 C.A.2d 908) and concedes that the action "may have been technically pleaded in terms of contract." (91 C.A.2d 910.)

SUPPLEMENT: [This section is current through the latest supplement]



166 of 178 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

III. FORMS OF ACTION

C. Contract and Tort Actions.

4. Alternative Tort or Contract Actions.

d. Denial of Contract Action for Negligence.

2. Analysis and Criticism.

3 *Witkin Cal. Proc. Actions* § 166

[§ 166] Analysis and Criticism.

The cases discussed in the preceding section seem open to the following criticisms:

(1) Those that purport to construe the pleadings are wrong in following the discredited doctrine of construction against the pleader. (See 4 *Cal. Proc.* (5th), *Pleading*, §§448, 449.) And the unexplained preference for the tort form when the pleadings are uncertain is in direct conflict with other decisions (equally mystifying) stating that in doubtful cases the contract theory is favored. (See *Nathan v. Locke* (1930) 108 C.A. 158, 161, 291 P. 286; *Peterson v. Sherman* (1945) 68 C.A.2d 706, 711, 157 P.2d 863; *Estep v. Budger Mfg. Co.* (1958) 164 C.A.2d 119, 123, 330 P.2d 298.)

(2) Those that purport to declare a rule of law that the contract merely creates the legal duty of care and that the "gravamen" of the action is tort are mistaken in their analysis and wrong on principle. The substantive law gives the plaintiff a right to substantial performance of the contract, and a failure to render that performance, whether intentional or negligent, is a breach of contract. The substantive law also gives the plaintiff an interest in his or her personal security and property rights, and an invasion of either of those interests by a negligent act is a tort. The "gravamen" of the action is to be found in the right that the plaintiff chooses to assert, because he or she may assert either of the two. Of course the plaintiff cannot have double recovery for the same wrong by giving it two labels, but the election of the form of action is obviously one for the plaintiff to make, and not one for the court to force upon him or her.

(3) The underlying theory implicit in these cases appears to be that the plaintiff should not be permitted to "gain an advantage" such as a favorable limitation, venue, or attachment statute by the "arbitrary" choice of a form of action; the statutes are to be uniformly applied to all actions that in substance are the same. In *Williamson v. Pacific Greyhound Lines* (1944) 67 C.A.2d 250, 153 P.2d 990, the court said: "Any other rule would lead to hopeless confusion regarding the proper venue of an action in ordinary negligence cases for personal injuries received." (67 C.A.2d 256.) This explanation begs the question, as may be seen by recasting the proposition to reach the opposite conclusion: The plaintiff should not be put to a disadvantage and deprived of a favorable limitation, venue, or attachment statute by having an arbitrary form of action forced upon him or her. If the plaintiff has a contract right to assert, the choice of that form is no more arbitrary than that of any other plaintiff. The evil (if any) lies in the statutes that determine such matters

as venue and attachment on the basis of the tort or contract form of the action. It is possible to draft statutes that will apply uniformly to personal or property injuries regardless of the nature of the wrong. (See, e.g., alternative theory of decision in *Basler v. Sacramento Elec., Gas & Ry. Co.* (1913) 166 C. 33, 35, 134 P. 993, supra, §165 [statute of limitations "for injury" caused by "wrongful act or neglect" applies even though cause of action is contractual].) But while the statutes retain the classification of contract and tort, the plaintiff injured by a promisor has certain advantages over the plaintiff injured by a stranger, and cannot justly be deprived of them.

(4) These cases ignore an equally long and respectable line of decisions giving the plaintiff free choice of contract or tort forms of action for the express purpose of gaining such advantages as a favorable limitation, venue, or attachment statute. (See supra, §156 et seq.) If the plaintiff in the intentional tort cases may elect the contract form, and in the quasi-contract cases may benefit from a common law fiction (waiver of tort), what objection can there be to doing so in negligence cases?

(5) These cases are squarely in conflict with decisions that recognize an election of a contract action in negligence cases. (See *Justis v. Atchison, Topeka & Santa Fe Ry. Co.* (1910) 12 C.A. 639, 641, 108 P. 328; *Jacobs, Malcolm & Burt v. Northern Pac. Ry. Co.* (1925) 71 C.A. 42, 43, 234 P. 328; *Depenbrok v. Kaiser Foundation Health Plan* (1978) 79 C.A.3d 167, 171, 144 C.R. 724; supra, §162.)

(6) A distinguishable situation is presented where the allowance of the tort action would circumvent the policy of a statute. (See *Boyd v. Boyd* (1964) 228 C.A.2d 374, 382, 39 C.R. 400, 5 Summary (10th), *Torts*, §786, citing the text [C.C. 43.5 abolished actions for breach of marriage promise; no action for negligent breach of contract]; supra, §152 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]



167 of 178 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

III. FORMS OF ACTION

C. Contract and Tort Actions.

4. Alternative Tort or Contract Actions.

e. Denial of Tort Action.

1. False Promise in Unenforceable Contract.

3 Witkin Cal. Proc. Actions § 167

[§ 167] False Promise in Unenforceable Contract.

(1) *Election Allowed.* If the defendant makes an enforceable promise without intending to perform, the plaintiff may elect between the alternative remedies in contract or tort. (See *supra*, §152.) In that case, the plaintiff chooses the tort remedy of an action for damages for fraud because of some advantage that he or she will gain, e.g., a better measure of damages, the right to exemplary damages, or a favorable statute of limitations. Moreover, a plaintiff who seeks to recover on a false promise that is unenforceable in contract due to the statute of frauds may elect to sue in tort. (See *supra*, §154.)

(2) *Tort Action Denied.* If election is allowed where the contract is unenforceable under the statute of frauds, it would seem that election should be allowed when the contract is unenforceable under the parol evidence rule. But in California, an action in tort based on an oral false promise that contradicts the terms of a written agreement is denied to prevent circumvention of the parol evidence rule. (*Cobbs v. Cobbs* (1942) 53 C.A.2d 780, 783, 128 P.2d 373; *Shyvers v. Mitchell* (1955) 133 C.A.2d 569, 572, 284 P.2d 826; *Price v. Wells Fargo Bank* (1989) 213 C.A.3d 465, 484, 486, 261 C.R. 735 [noting criticism by commentators and doubting rule's continued vitality, but nevertheless concluding that rule still represents governing law]; *Alling v. Universal Mfg. Corp.* (1992) 5 C.A.4th 1412, 1436, 7 C.R.2d 718; see 38 Cal. L. Rev. 535; 49 Cal. L. Rev. 876; 2 Cal. Evidence (4th), Documentary Evidence, §98.)

It is clear, however, that a tort action should not be allowed if it would frustrate the purpose of the statute outlawing the contract action. This problem was presented in *Langley v. Schumacker* (1956) 46 C.2d 601, 297 P.2d 977, where the court held (4-3) that the legislative abolition of the cause of action for breach of marriage promise (C.C. 43.5) did not preclude an action for fraud in inducing a marriage without intention to perform. (46 C.2d 603.) This conclusion was criticized in a strong dissent, and by commentators who pointed out that the statutory prohibition could be virtually nullified by changing the form of the pleading. (46 C.2d 604.) (See 70 Harv. L. Rev. 1098; 8 Hastings L. J. 210; 9 Stanf. L. Rev. 406; 4 U.C.L.A. L. Rev. 114.) The Legislature agreed and abrogated the *Langley* rule in 1959 by the enactment of C.C. 43.4. (On application of C.C. 43.4 and 43.5, see 5 Summary (10th), Torts, §784 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]



168 of 178 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

III. FORMS OF ACTION

C. Contract and Tort Actions.

4. Alternative Tort or Contract Actions.

e. Denial of Tort Action.

2. Wrongful Discharge of Employee.

3 *Witkin Cal. Proc. Actions* § 168

[§ 168] Wrongful Discharge of Employee.

(1) *Former Rule Allowing Election.* It was formerly the rule that discharge of an at-will employee is wrongful and gives rise to an action in either contract or tort on three main theories:

(a) Violation of law or public policy. (*Tameny v. Atlantic Richfield Co.* (1980) 27 C.3d 167, 178, 164 C.R. 839, 610 P.2d 1330, *supra*, §149; see 3 *Summary* (10th), *Agency and Employment*, §242 et seq.)

(b) Breach of an implied contract. (*Cleary v. American Airlines* (1980) 111 C.A.3d 443, 454, 168 C.R. 722, 3 *Summary* (10th), *Agency and Employment*, §§239, 271; see 3 *Summary* (10th), *Agency and Employment*, §232 et seq.)

(c) Breach of the implied covenant of good faith and fair dealing. (*Wallis v. Superior Court* (1984) 160 C.A.3d 1109, 1119, 207 C.R. 123; see 3 *Summary* (10th), *Agency and Employment*, §239 et seq.)

(2) *Current Rule Denying Tort Action.* In *Foley v. Interactive Data Corp.* (1988) 47 C.3d 654, 254 C.R. 211, 765 P.2d 373, 3 *Summary* (10th), *Agency and Employment*, §271, the Supreme Court repudiated the earlier rule allowing a tort remedy for wrongful discharge of employment based on theories of implied contract or breach of the implied covenant of good faith and fair dealing, limiting such claims to traditional remedies available for breach of contract. (47 C.3d 682.) (See 3 *Summary* (10th), *Agency and Employment*, §§231 et seq., 266 et seq.)

The *Foley* court, although reaffirming the viability of a tort action for wrongful discharge of employment based on violation of law or public policy, severely restricted the availability of this theory, and subsequent decisions have imposed additional limitations. (See 3 *Summary* (10th), *Agency and Employment*, §242 et seq.; *supra*, §149.)

SUPPLEMENT: [This section is current through the latest supplement]



169 of 178 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

III. FORMS OF ACTION

C. Contract and Tort Actions.

4. Alternative Tort or Contract Actions.

e. Denial of Tort Action.

3. Bad Faith Denial That Contract Exists.

aa. Former Rule Allowing Election.

3 *Witkin Cal. Proc. Actions* § 169

[§ 169] Former Rule Allowing Election.

In *Seaman's Direct Buying Service v. Standard Oil Co.* (1984) 36 C.3d 752, 206 C.R. 354, 686 P.2d 1158, plaintiff sought to obtain a lease from the city of Eureka for operation of a marine fuel dealership. The city's bonding consultant demanded written evidence of a binding agreement with an oil supplier. Plaintiff negotiated an agreement with defendant Standard, confirmed by a letter from Standard making plaintiff a Chevron Marine Dealer for an initial term of 10 years. Plaintiff presented the letter to the city and signed a 40-year lease. Thereafter changes in market conditions and federal regulations occurred, and Standard contended that no binding agreement had been reached. Plaintiff eventually discontinued operations and brought this action against Standard on several causes of action, including breach of the implied covenant of good faith and fair dealing. The jury awarded substantial compensatory and punitive damages, and judgment was entered for plaintiff. *Held*, reversed for error in instructions.

(a) *Tort remedy for breach of implied covenant: In general.*

(1) The law implies the covenant in every contract, and contract remedies have been upheld in a wide variety of contracts. (36 C.3d 768, citing many cases.) But the extent to which breach of the covenant gives rise to a tort remedy is "not so clear." (36 C.3d 768.)

(2) The tort action has been recognized for breach of the covenant in insurance contracts, because of the "special relationship" between insurer and insured, characterized by elements of public interest, adhesion, and fiduciary responsibility. (36 C.3d 768, citing *Crisci v. Security Ins. Co. of New Haven, Connecticut* (1967) 66 C.2d 425, 58 C.R. 13, 426 P.2d 173, *supra*, §147.)

(3) It has also been recognized in cases dealing with the employment relationship, which has some of the same characteristics as the relationship between insurer and insured. (36 C.3d 769, footnote 6, citing *Tameny v. Atlantic Richfield Co.* (1980) 27 C.3d 167, 164 C.R. 839, 610 P.2d 1330, *supra*, §149.)

(b) *Restricted application to commercial contracts.* "When we move from such special relationships to consideration of the tort remedy in the context of the ordinary commercial contract, we move into largely uncharted and potentially dangerous waters. Here, parties of roughly equal bargaining power are free to shape the contours of their agreement and to include provisions for attorney fees and liquidated damages in the event of breach. They may not be permitted to disclaim the covenant of good faith but they are free, within reasonable limits at least, to agree upon the standards by which application of the covenant is to be measured. In such contracts, it may be difficult to distinguish between breach of the covenant and breach of contract, and there is the risk that interjecting tort remedies will intrude upon the expectations of the parties. This is not to say that tort remedies have no place in such a commercial context, but that it is wise to proceed with caution in determining their scope and application." (36 C.3d 769.)

(c) *Bad faith denial of contract's existence.* The broad question is not reached, and it is not even necessary to predicate liability on a breach of the implied covenant. "It is sufficient to recognize that a party to a contract may incur tort remedies when, in addition to breaching the contract, it seeks to shield itself from liability by denying, in bad faith and without probable cause, that the contract exists." (36 C.3d 769.) Thus, a party may be subject to tort liability, including punitive damages, if he or she coerces the other party to pay more than is due under the contract through the threat of a lawsuit without probable cause and with no belief in the existence of the cause of action. (36 C.3d 769.) "There is little difference, in principle, between a contracting party obtaining excess payment in such manner, and a contracting party seeking to avoid all liability on a meritorious contract claim by adopting a 'stonewall' position ('see you in court') without probable cause and with no belief in the existence of a defense. Such conduct goes beyond the mere breach of contract. It offends accepted notions of business ethics. ... Acceptance of tort remedies in such a situation is not likely to intrude upon the bargaining relationship or upset reasonable expectations of the contracting parties." (36 C.3d 769.)

(d) *Bad faith essential element of tort.* Here, the jury was instructed that where a binding contract has been made, the law implies a covenant that neither party will deny its existence. But it is not a tort for a contractual obligor to dispute his or her liability under a contract if the dispute is honest and undertaken in good faith; and similarly it is not a tort for a party to deny, in good faith, the existence of a binding contract. The instruction was therefore erroneous in failing to include the element of bad faith. (36 C.3d 770.)

The *Seaman's* decision has been the subject of much comment and criticism. (See *Gomez v. Volkswagen of America* (1985) 169 C.A.3d 921, 929, 215 C.R. 507 [following Supreme Court admonition "to proceed with caution" in applying tort remedies in contract actions]; *Kittredge Sports Co. v. Superior Court* (1989) 213 C.A.3d 1045, 1047, 261 C.R. 857 [discussing question where defendant admits existence of contract but denies liability under it]; *DuBarry Int. v. Southwest Forest Industries* (1991) 231 C.A.3d 552, 282 C.R. 181; 26 *Loyola L.A. L. Rev.* 213 [California's Detortification of Contract Law: Is the *Seaman's* Tort Dead?].) In 1995, *Seaman's* was overruled (see *infra*, §170.)

SUPPLEMENT: [This section is current through the latest supplement]



170 of 178 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

III. FORMS OF ACTION

C. Contract and Tort Actions.

4. Alternative Tort or Contract Actions.

e. Denial of Tort Action.

3. Bad Faith Denial That Contract Exists.

bb. Current Rule Denying Tort Action.

3 *Witkin Cal. Proc. Actions* § 170

[§ 170] Current Rule Denying Tort Action.

Seaman's Direct Buying Service v. Standard Oil Co. (1984) 36 C.3d 752, 206 C.R. 354, 686 P.2d 1158, *supra*, §169, was overruled as "wrongly decided" in *Freeman & Mills v. Belcher Oil Co.* (1995) 11 C.4th 85, 44 C.R.2d 420, 900 P.2d 669. Defendant oil company retained a law firm with an understanding that defendant was to pay for costs the law firm incurred on defendant's behalf, including fees for accountants. The law firm hired plaintiff accounting firm to work on defendant's case. Defendant eventually terminated the law firm and plaintiff billed the law firm for its services and costs. When both the law firm and defendant did not pay, plaintiff brought the present action, alleging breach of contract, bad faith denial of contract, and quantum meruit. The trial judge entered judgment for plaintiff on the jury's special verdict, including a finding that defendant had breached the contract and acted in bad faith, and awarded punitive damages. The Court of Appeal reversed and remanded for a retrial limited to the issue of damages under plaintiff's breach of contract cause of action, and for judgment in favor of defendant on plaintiff's bad faith denial of contract cause of action. *Held*, judgment of the Court of Appeal affirmed.

(a) "[T]he *Seaman's* decision has generated uniform confusion and uncertainty regarding its scope and application, and widespread doubt about the necessity or desirability of its holding. These doubts and criticisms, express or implied, in decisions from this state and from other state and federal courts, echoed by the generally adverse scholarly comment ... , convince us that *Seaman's* should be overruled in favor of a general rule precluding tort recovery for noninsurance contract breach, at least in the absence of 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." (11 C.4th 102, quoting *Applied Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 C.4th 503, 28 C.R.2d 475, 869 P.2d 454, 5 Summary (10th), *Torts*, §739.)

(b) "[T]he critics stress, among other factors favoring *Seaman's* abrogation, the confusion and uncertainty accompanying the decision, the need for stability and predictability in commercial affairs, the potential for excessive tort damages, and the preference for legislative rather than judicial action in this area." (11 C.4th 102.)

(c) "Even if we were unimpressed by the nearly unanimous criticism leveled at *Seaman's*, on reconsideration the analytical defects in the opinion have become apparent. It seems anomalous to characterize as 'tortious' the bad faith denial of the existence of a contract, while treating as 'contractual' the bad faith denial of liability or responsibility under an acknowledged contract. In both cases, the breaching party has acted in bad faith and, accordingly, has presumably committed acts offensive to 'accepted notions of business ethics.' ... Yet to include bad faith denials of liability within *Seaman's* scope could potentially convert every contract breach into a tort. Nor would limiting *Seaman's* tort to incidents involving 'stonewalling' adequately narrow its potential scope. Such conduct by the breaching party, essentially telling the promisee, 'See you in court,' could incidentally accompany *every* breach of contract." (11 C.4th 103.)

(d) "[N]othing we say here would prevent the Legislature from creating additional civil remedies for noninsurance contract breach, including such measures as providing litigation costs and attorney fees in certain aggravated cases, or assessing increased compensatory damages covering lost profits and other losses attributable to the breach, as well as restoration of the *Seaman's* holding if the Legislature deems that course appropriate." (11 C.4th 103.)

Later cases have applied the *Freeman & Mills* rule. (See *Norager v. Nakamura* (1996) 42 C.A.4th 1817, 1820, 50 C.R.2d 481, 9 Cal. Proc. (5th), Appeal, §547 [*Freeman & Mills* is retroactive to appeals pending on date it was decided]; *Mardula v. Rancho Dominguez Bank* (1996) 43 C.A.4th 790, 798, 51 C.R.2d 63 [following *Freeman & Mills*]; *Brown v. California Pension Administrators & Consultants* (1996) 45 C.A.4th 333, 346, 52 C.R.2d 788 [same]; *Sutherland v. Barclays Amer./Mortg. Corp.* (1997) 53 C.A.4th 299, 315, 61 C.R.2d 614 [*Freeman & Mills* rule applied retroactively to action filed 5 months earlier; following *Norager*]; 24 *Pepperdine L. Rev.* 738; BAJI, No. 10.38; CACI, Nos. 2423, 2424.)

SUPPLEMENT: [This section is current through the latest supplement]



171 of 178 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

III. FORMS OF ACTION

C. Contract and Tort Actions.

4. Alternative Tort or Contract Actions.

e. Denial of Tort Action.

4. Breach of Covenant of Good Faith and Fair Dealing.

3 Witkin Cal. Proc. Actions § 171

[§ 171] Breach of Covenant of Good Faith and Fair Dealing.

In *Sutherland v. Barclays Amer./Mortg. Corp.* (1997) 53 C.A.4th 299, 61 C.R.2d 614, plaintiff homeowner sued defendant mortgage company on both contract and tort theories. Plaintiff alleged that, after an earthquake damaged her home, defendant agreed to put a "stop" on her account for 3 months, but that at the end of that period defendant unexpectedly demanded that she make the three payments along with her current payment in a lump sum. *Held*, plaintiff was limited to contract remedies on her claim for breach of the covenant of good faith and fair dealing.

(a) Every contract imposes on each party a duty of good faith and fair dealing in its performance and its enforcement, and thus the covenant was part of the "stop" agreement. (53 C.A.4th 314.)

(b) However, tort recovery for noninsurance contract breach is generally precluded, at least in the absence of violation of an independent duty arising from principles of tort law. (53 C.A.4th 314, citing *Freeman & Mills v. Belcher Oil Co.* (1995) 11 C.4th 85, 44 C.R.2d 420, 900 P.2d 669, *supra*, §170.)

SUPPLEMENT: [This section is current through the latest supplement]



172 of 178 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

III. FORMS OF ACTION

C. Contract and Tort Actions.

5. Alternative Contract or Quasi-Contract Actions.

a. Contract Actions Against Same Person.

3 *Witkin Cal. Proc. Actions* § 172

[§ 172] Contract Actions Against Same Person.

(1) *In General.* The election between alternative actions on contract seldom involves the procedural consequences of the election between tort and contract. The reasons for preferring one contract or quasi-contract remedy over another are usually substantive (the nature of the recovery) or practical (an available or a solvent defendant).

(2) *Rescission and Restitution, Damages, and Specific Performance.* For breach of contract there are three typical remedies against the contracting party: rescission and restitution, damages, and specific performance. (See *B.C. Richter Contracting Co. v. Continental Cas. Co.* (1964) 230 C.A.2d 491, 500, 41 C.R. 98, 1 *Summary* (10th), *Contracts*, §855 [plaintiff who completes performance after breach elects remedy of damages and loses right to rescind]; 1 *Summary* (10th), *Contracts*, §855.)

(3) *Action on Old Obligation or on Accord.* An additional remedy is available for breach of an executory accord. The creditor may sue either on the old obligation or on the accord. (See *Rest.2d, Contracts* §281, Comment c; 1 *Am.Jur.2d* (2005 ed.), *Accord and Satisfaction* §§49, 50; 1 *Summary* (10th), *Contracts*, §950 et seq.)

(4) *Declaratory Relief.* Another alternative, though not a remedy in the same sense, is declaratory relief. (See *Toomey v. Toomey* (1939) 13 C.2d 317, 320, 89 P.2d 634; 63 *Harv. L. Rev.* 1066; 5 *Cal. Proc.* (5th), *Pleading*, §855.)

SUPPLEMENT: [This section is current through the latest supplement]



173 of 178 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

III. FORMS OF ACTION

C. Contract and Tort Actions.

5. Alternative Contract or Quasi-Contract Actions.

b. Contract Actions Against Different Persons.

3 *Witkin Cal. Proc. Actions* § 173

[§ 173] Contract Actions Against Different Persons.

(1) *Action by Injured Party Against Agent or Undisclosed Principal.* The injured party may have alternative remedies against an agent who signs the contract and against an undisclosed principal. (See *Imperial Valley Box Co. v. Reese* (1951) 105 C.A.2d 401, 403, 233 P.2d 629; 3 *Summary* (10th), *Agency and Employment*, §160.)

(2) *Action by Creditor Against Promisor or Promisee.* A creditor beneficiary of a third-party beneficiary contract may sue either the promisor or the promisee (the original debtor). (See *Anderson v. Calaveras Cen. Mining Corp.* (1936) 13 C.A.2d 338, 342, 57 P.2d 560; *Rest.2d, Contracts* §310; 1 *Summary* (10th), *Contracts*, §694.)

(3) *Action by Creditor Against Debtor or Surety or Guarantor.* A creditor may have an action against the debtor or the debtor's surety or guarantor. (See *Union Bank v. Gradsky* (1968) 265 C.A.2d 40, 41, 71 C.R. 64, 4 *Summary* (10th), *Security Transactions in Real Property*, §202.)

SUPPLEMENT: [This section is current through the latest supplement]



174 of 178 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

III. FORMS OF ACTION

C. Contract and Tort Actions.

5. Alternative Contract or Quasi-Contract Actions.

c. Quasi-Contract Actions.

3 Witkin Cal. Proc. Actions § 174

[§ 174] Quasi-Contract Actions.

(1) *Action by Minor or Incompetent.* Where a minor or incompetent agrees to render services, the contract may be binding on the other party but subject to disaffirmance by the party under disability. Hence, the minor or incompetent may either affirm the express contract and sue on it, or disregard it and recover in quasi-contract for the reasonable value of the services. (*Abdullah v. Abdullah (1920) 50 C.A. 115, 119, 194 P. 511*; see 1 *Summary* (10th), *Contracts*, §§31, 1042.)

(2) *Action by Creditor Against Undisclosed Principal.* Where a creditor takes a promissory note from an agent, the creditor cannot sue the agent's undisclosed principal on the note (not a party to the instrument), but the creditor can sue the principal in quasi-contract if the principal has received the benefits of the contract. (*Bank of America v. Cryer (1936) 6 C.2d 485, 491, 58 P.2d 643*; see 3 *Summary* (10th), *Agency and Employment*, §158 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]



175 of 178 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

III. FORMS OF ACTION

C. Contract and Tort Actions.

6. Alternative Tort Actions.

a. Torts to Property.

3 *Witkin Cal. Proc. Actions* § 175

[§ 175] Torts to Property.

(1) *Wrongfully Obtaining Goods*. Where the defendant obtains goods from the plaintiff by fraud, the plaintiff may sue for damages for fraud or for conversion. (*Wendling Lumber Co. v. Glenwood Lumber Co.* (1908) 153 C. 411, 414, 95 P. 1029; see *Schneider v. Union Oil Co.* (1970) 6 C.A.3d 987, 993, 86 C.R. 315 [corporation wrongfully transferred title to shareholder's stock; alternative remedies of damages for conversion and damages for breach of trust].)

(2) *Wrongful Use of Right-of-Way*. Where the defendant commits a continuing trespass or otherwise interferes with the plaintiff's possession of land by the wrongful use of a right-of-way, the plaintiff may sue to recover possession (ejectment) or may give the defendant a permanent easement by suing for present and future damages. (See *Kornoff v. Kingsburg Cotton Oil Co.* (1955) 45 C.2d 265, 269, 288 P.2d 507; *Slater v. Shell Oil Co.* (1943) 58 C.A.2d 864, 870, 137 P.2d 713.)

SUPPLEMENT: [This section is current through the latest supplement]



176 of 178 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

III. FORMS OF ACTION

C. Contract and Tort Actions.

6. Alternative Tort Actions.

b. Defamation, Disparagement, or Inducing Breach.

3 *Witkin Cal. Proc. Actions* § 176

[§ 176] Defamation, Disparagement, or Inducing Breach.

(1) *Inducing Employee's Termination.* Where the defendant by false statements about the plaintiff induces the plaintiff's employer to terminate the employment contract, the plaintiff may sue for defamation or for inducing a breach of contract. (See *Blender v. Superior Court* (1942) 55 C.A.2d 24, 26, 130 P.2d 179; *Romano v. Wilbur Ellis & Co.* (1947) 82 C.A.2d 670, 671, 186 P.2d 1012; 17 So. Cal. L. Rev. 74; 5 *Summary* (10th), *Torts*, §740.)

(2) *Disparagement of Title Resulting in Cancellation of Real Estate Contract.* Where the defendant falsely disparages the plaintiff's title to real property and causes a prospective buyer to rescind or cancel the agreement for cause, the plaintiff may sue for slander of title or for inducing a breach of contract. (See *Baker v. Kale* (1947) 83 C.A.2d 89, 93, 189 P.2d 57 [slander of title; availability of alternative remedy was not discussed, but was clearly implied]; 5 *Summary* (10th), *Torts*, §740.)

SUPPLEMENT: [This section is current through the latest supplement]



177 of 178 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

III. FORMS OF ACTION

C. Contract and Tort Actions.

6. Alternative Tort Actions.

c. Contributing Tortfeasors and Respondeat Superior.

3 Witkin Cal. Proc. Actions § 177

[§ 177] Contributing Tortfeasors and Respondeat Superior.

(1) *Contributing Tortfeasors*. Prior to the adoption of the Fair Responsibility Act of 1986 (C.C. 1431 et seq.), where the plaintiff was injured by successive contributing tortfeasors, e.g., an original negligent defendant and a physician whose subsequent negligence aggravates the injury, the plaintiff could recover the full amount of his or her damages from either. (See 5 *Summary* (10th), *Torts*, §50.) The Act, popularly known as the "Deep Pocket Initiative," retains joint and several liability for economic damages, but makes liability for noneconomic damages several (i.e., the liability of a particular defendant is limited to his or her proportion of fault). (See C.C. 1431.2; 5 *Summary* (10th), *Torts*, §50 et seq.)

(2) *Respondeat Superior*. Where an employee commits a tort in the scope of employment, the injured party may recover from either the employee or from the employer (doctrine of respondeat superior). (See 3 *Summary* (10th), *Agency and Employment*, §165 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]



178 of 178 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

III. FORMS OF ACTION

C. Contract and Tort Actions.

6. Alternative Tort Actions.

d. Action Under Federal Civil Rights Act.

3 Witkin Cal. Proc. Actions § 178

[§ 178] Action Under Federal Civil Rights Act.

A plaintiff seeking damages from law enforcement officers for battery or false imprisonment may elect to sue under the federal Civil Rights Act (42 U.S.C., §1983; see 8 *Summary* (10th), *Constitutional Law*, §814 et seq.). As long as the complaint seeks relief that is available in a Title VII action, the plaintiff may seek the federal remedy in a federal or state court, need not first resort to the California Government Claims Act, and need not comply with the claims requirement of *Govt.C. 911.2*. (*Williams v. Horvath* (1976) 16 C.3d 834, 842, 129 C.R. 453, 548 P.2d 1125; see *infra*, §245.)

SUPPLEMENT: [This section is current through the latest supplement]



1 of 192 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

IV. ELECTION OF REMEDIES

A. Nature of Doctrine.

3 *Witkin Cal. Proc. Actions* § 179

[§ 179] Nature of Doctrine.

(1) *In General.* It often happens that a person suffering a legal injury by tort, breach of contract, or otherwise has more than one remedy available. The wrong may give rise to legal or equitable remedies, alternative remedies in contract or quasi-contract, alternative remedies in tort or quasi-contract, statutory remedies, or special remedies set forth in an instrument, etc. (See *supra*, §§126 et seq., 144 et seq.) Some alternative remedies are considered inconsistent with others, so that the injured person can ultimately be entitled only to one. The doctrine of election of remedies deals with the effect of the choice of one of these inconsistent remedies, and is supposedly designed to cut down the vexatious multiplicity of actions.

In its conventional form, the doctrine is stated as follows: Where a person has two concurrent remedies to obtain relief on the same state of facts, and these remedies are inconsistent, he or she must choose or elect between them; and, a person who has clearly elected to proceed on one is bound by this election and cannot thereafter pursue the other. "Election of remedies has been defined to be the right to choose or the act of choosing between different actions or remedies where plaintiff has suffered one species of wrong from the act complained of. Broadly speaking, an election of remedies is the choice by a plaintiff to an action of one of two or more coexisting remedial rights, where several such rights arise out of the same facts, but the term has been generally limited to a choice by a party between inconsistent remedial rights, the assertion of one being necessarily repugnant to or a repudiation of the other." (*Mansfield v. Pickwick Stages, Northern Division* (1923) 191 C. 129, 130, 215 P. 389 [doctrine was not applicable].)

This generalization is restated in various ways in a number of cases. (See *Roullard v. Rosenberg Bros. & Co.* (1924) 193 C. 360, 419, 224 P. 449 [doctrine was not applicable]; *Martin Music Co. v. Robb* (1931) 115 C.A. 414, 419, 1 P.2d 1000; *Gray v. Gray* (1938) 25 C.A.2d 484, 487, 77 P.2d 908; *Lenard v. Edmonds* (1957) 151 C.A.2d 764, 768, 312 P.2d 308, *infra*, §200, citing the text; *Roam v. Koop* (1974) 41 C.A.3d 1035, 1039, 1044, 116 C.R. 539, *infra*, §202; C.E.B., 1 Civil Proc. Before Trial 4th, §15.28 et seq.; 65 *Harv. L. Rev.* 822 [doctrines of res judicata, law of the case, election of remedies, and preclusion of inconsistent positions]; 12 *Hastings L. J.* 171 [procedural control of damages by election]; 25 *Am.Jur.2d* (2004 ed.), *Election of Remedies* §1 et seq.; 9 *Am.Jur.* P.P. Forms (2006 ed.), *Election of Remedies*, Form 1 et seq. [answer, motion, order, notice, and jury instructions]; 99 *A.L.R.2d* 1315 [pleading defense]; on contractual nullification of doctrine, see *infra*, §201.)

(2) *Distinction: Requirement of Electing Remedy at Trial.* A distinction, not always clearly made in the opinions,

should be noted here. The plaintiff may file a complaint in a single action alleging inconsistent counts, although at some time before judgment the plaintiff may be required to elect one or another remedy. (See 4 *Cal. Proc.* (5th), *Pleading*, §§402, 409.) This situation does not present a problem of a binding election of remedies by a prior choice. The election doctrine as a bar (rather than as a mere requirement of election at trial) is applied only where by some prior act or prior action the plaintiff has precluded the plaintiff from bringing the present action. (See *infra*, §185.)

West's Key Number Digest, Election of Remedies 1 et seq.

SUPPLEMENT: [This section is current through the latest supplement]



2 of 192 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

IV. ELECTION OF REMEDIES

B. Modern Theory of Election of Rights.

1. Criticism of Election of Remedies Doctrine.

3 *Witkin Cal. Proc. Actions* § 180

[§ 180] Criticism of Election of Remedies Doctrine.

The doctrine of election of remedies, often invoked in the earlier cases, has been repeatedly criticized and seems to be falling into disfavor. Later California decisions illustrating binding election are comparatively rare, and the bar to a remedy is sustained on the principles of estoppel or res judicata rather than election. "At best this doctrine ... is a harsh, and now largely obsolete rule, the scope of which should not be extended." (*Perkins v. Benguet Consol. Mining Co.* (1942) 55 C.A.2d 720, 756, 132 P.2d 70, quoting U.S. Supreme Court; see *Roullard v. Rosenberg Bros. & Co.* (1924) 193 C. 360, 366, 224 P. 449; *Lenard v. Edmonds* (1957) 151 C.A.2d 764, 768, 312 P.2d 308, *infra*, §200, citing the text; *Felix v. Work. Comp. App. Bd.* (1974) 41 C.A.3d 759, 763, 116 C.R. 345, quoting the text; *Glendale Fed. Savings & Loan Assn. v. Marina View Heights Dev. Co.* (1977) 66 C.A.3d 101, 138, 135 C.R. 802, citing the text ["Election of remedies is a harsh doctrine and is currently looked upon with disfavor by courts and commentators"]; *Baker v. Superior Court* (1983) 150 C.A.3d 140, 145, 197 C.R. 480, citing the text ["The net effect of these developments has been to establish a trend in the law toward the ever greater restriction of the election of remedies doctrine"].)

Modern writers have contended that the only sound explanation for a doctrine of election of "remedies" is that, in some situations, there may be a required choice of substantive rights. Thus, no person would be entitled to claim two inconsistent rights (see *infra*, §181), but a person would be free to select and change his or her alternative remedies or legal theories of recovery, by amending the complaint or by filing a new action, until such time as one of the inconsistent rights was finally vindicated by the satisfaction of a judgment or by the application of the doctrine of res judicata or estoppel. (See *Frazier v. Metropolitan Life Ins. Co.* (1985) 169 C.A.3d 90, 101, 214 C.R. 883, *infra*, §200, citing the text; *Lake v. Lakewood Chiropractic Center* (1993) 20 C.A.4th 47, 54, 24 C.R.2d 358, citing the text; *Rest.2d, Torts* §896 et seq.; *Rest.2d, Contracts* §378 et seq.; *Rest., Restitution* §144 et seq.; 20 *Cal. L. Rev.* 206; 36 *Cal. L. Rev.* 636; 26 *Harv. L. Rev.* 707; 36 *Harv. L. Rev.* 593; 42 *Harv. L. Rev.* 704; 52 *Harv. L. Rev.* 1371, 1372; 19 *Hastings L. J.* 1233; 26 *So. Cal. L. Rev.* 157; 25 *Am.Jur.2d* (2004 ed.), *Election of Remedies* §4.)

SUPPLEMENT: [This section is current through the latest supplement]



3 of 192 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

IV. ELECTION OF REMEDIES

B. Modern Theory of Election of Rights.

2. Required Election of Rights.

3 Witkin Cal. Proc. Actions § 181

[§ 181] Required Election of Rights.

The following are illustrations of the required election between inconsistent rights (see *supra*, §180):

(1) *Breach of Contract*. On the breach of a contract, the aggrieved party must elect to affirm the contract or to terminate it. Pursuant to that election of rights, he or she may obtain appropriate remedies, such as specific performance based on affirmance, or damages or restitution based on termination. (See *Buckmaster v. Bertram* (1921) 186 C. 673, 678, 200 P. 610; *supra*, §126; *Navarro v. Perron* (2004) 122 C.A.4th 797, 802, 19 C.R.3d 198, 9 Summary (10th), *Partnership*, §34, citing the text; 1 Summary (10th), *Contracts*, §854.)

(2) *Fraudulent Inducement To Enter Contract*. Where a purchaser has been induced by the defendant's fraud to enter into a contract to buy property, the purchaser must also elect, ordinarily prior to judgment (see *supra*, §179), between the right of affirmance (with the remedy of damages) and the right of rescission (with the remedy of restitution). (See *Evans v. Rancho Royale Hotel Co.* (1952) 114 C.A.2d 503, 507, 250 P.2d 283; 26 So. Cal. L. Rev. 157; 25 Am.Jur.2d (2004 ed.), *Election of Remedies* §25; 40 A.L.R.4th 627 [necessity of election by real estate purchaser]; 5 Summary (10th), *Torts*, §829; *supra*, §§126, 131, 152 et seq.)

(3) *Conversion of Tangible Personal Property*. Where a wrongdoer has converted tangible personal property, the injured owner must elect between the right of ownership and possession (with the remedy of specific recovery), and the right to compensation (with the remedies of damages for conversion or quasi-contract recovery of value on the theory of waiver of tort). (See 1 Summary (10th), *Contracts*, §1040; 5 Summary (10th), *Torts*, §700; *supra*, §164.)

(4) *Claim Against Agent or Undisclosed Principal*. Where the plaintiff has a single claim enforceable in the alternative against either an agent or an undisclosed principal, the plaintiff must elect between one of those rights, because the defendants are not jointly liable. (See 3 Summary (10th), *Agency and Employment*, §160; *infra*, §199.)

(5) *Continuing Trespass*. Where an owner's property rights are invaded by a continuing trespass, the owner must elect either to protect his or her ownership and possession (by an action in ejectment), or to consent to permanent occupancy by the trespasser (by suing for all damages, past and prospective). (*Slater v. Shell Oil Co.* (1943) 58 C.A.2d 864, 871, 137 P.2d 713, *infra*, §185; see *Spaulding v. Cameron* (1952) 38 C.2d 265, 269, 239 P.2d 625 [plaintiff cannot

have present and future damages and also injunction to compel removal of nuisance].)

(6) *Breach of Lease*. On the breach of a lease by the tenant, the lessor must elect to affirm the lease or to terminate it. (*Treff v. Gulko* (1932) 214 C. 591, 598, 7 P.2d 697; see 12 *Summary* (10th), *Real Property*, §690 et seq.) A lessor may have the right under the lease to recover rents after the breach and abandonment by the tenant (C.C. 1951.4(b)), but the lessor is not entitled to this remedy if he or she elects to obtain possession under a judgment of unlawful detainer, unless the tenant obtains relief against the forfeiture. (C.C. 1952(c).)

SUPPLEMENT: [This section is current through the latest supplement]



4 of 192 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

IV. ELECTION OF REMEDIES

B. Modern Theory of Election of Rights.

3. Distinction: Restitution and Damages.

3 *Witkin Cal. Proc. Actions* § 182

[§ 182] Distinction: Restitution and Damages.

(1) *Vendor's Fraud*. When a purchaser rescinds because of the vendor's fraud, the purchaser's principal object is restitution, i.e., recovery of the purchase price the purchaser paid. (See *supra*, §181.) But the purchaser may also recover "consequential damages," such as the value of improvements he or she made on the land. (See 6 *Summary* (10th), *Torts*, §1712.)

(2) *Breach of Contract*. It has been said that no damages can be recovered in an action for restitution after a unilateral rescission for breach, because the theory of restitution is a promise implied by law merely to return the consideration. (See *Philpott v. Superior Court* (1934) 1 C.2d 512, 518, 36 P.2d 635, *supra*, §130; *Runyan v. Pacific Air Industries* (1970) 2 C.3d 304, 314, 85 C.R. 138, 466 P.2d 682 ["our attention has not been directed to nor has our independent research revealed, any reported California case upholding an award of damages in an action at law brought under pre-1961 law to enforce an out-of-court rescission"].) This strict limitation is unsound in principle and, if it was the law before 1961, it is no longer tenable under the revision of the rescission statutes in that year. (See 1 *Summary* (10th), *Contracts*, §§930, 936; *supra*, §130.)

In *Runyan v. Pacific Air Industries*, *supra*, plaintiff, a geologist employed by T Corp., entered into a contract with defendant, under which plaintiff paid \$ 25,000 for an exclusive franchise, and defendant undertook duties of instruction and technical assistance. Plaintiff quit his employment and began the franchise operation, but defendant failed to perform. Plaintiff gave notice of rescission for failure of consideration and fraud, and then brought this action for restitution and consequential damages. He received judgment for the \$ 25,000 paid, plus \$ 5,273.25, representing the income he would have received in his former employment, less the amount he received from the franchise operation. *Held*, affirmed.

(a) C.C. 1692 provides that the aggrieved party may claim restitution and consequential damages, and "shall be awarded complete relief," and that the court may adjust the equities but may not allow double recovery. (See 1 *Summary* (10th), *Contracts*, §936.) Under this statute, and the principle underlying the purchaser's recovery of consequential damages after rescission for fraud, necessary monetary relief may be given in an action for restitution. (2 C.3d 316, 317.) In the present case, plaintiff was properly allowed to recover the original consideration and damages he sustained in reliance on the contract, while defendant retrieved its franchise and was credited with the amount produced

by it. (2 C.3d 319.)

(b) The right to damages, however, depends on fault; there should be no such recovery where the ground of rescission was mistake. (2 C.3d 317.) (See *Jahn v. Brickey* (1985) 168 C.A.3d 399, 406, 214 C.R. 119 [under C.C. 1692, vendor was entitled to both rescission and consequential damages from defaulting purchaser].)

SUPPLEMENT: [This section is current through the latest supplement]



5 of 192 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

IV. ELECTION OF REMEDIES

C. What Constitutes Election of Remedy.

1. Older View: Manifestation of Choice.

a. Manifestation Without Suit.

3 Witkin Cal. Proc. Actions § 183

[§ 183] Manifestation Without Suit.

(1) *Rule of Binding Election.* It has been held that a party cannot be permitted to occupy inconsistent positions, that he or she must choose one of two inconsistent remedies, and that in consequence the party is bound by an unmistakable manifestation of that choice. In *Smith v. Miller* (1935) 5 C.A.2d 564, 43 P.2d 347, a conditional seller endeavored to collect the purchase price of goods by repeated demands for payment over a period of 2 or 3 years. *Held*, this was an election to treat the sale as absolute, with the resulting loss of his remedy of repossession. (5 C.A.2d 571.) In *Holt Mfg. Co. v. Ewing* (1895) 109 C. 353, 42 P. 435, the filing and allowance of a seller's claim for the price against the estate of a deceased buyer was similarly held to preclude subsequent repossession. (109 C. 356.)

(2) *Repudiation of Rule.* No satisfactory explanation has been offered for the conclusion that the plaintiff, by an unsuccessful attempt to protect his or her right by one remedy, loses the benefit of another remedy. This aspect of the doctrine has received the heaviest criticism (see *supra*, §180), and *Karapetian v. Carolan* (1948) 83 C.A.2d 344, 188 P.2d 809, suggests the possibility of an abandonment of the "manifestation" theory of election. Plaintiff purchasers gave notice of rescission for fraud and tendered their deed to the vendor, but the latter refused to return the down payment on the price. *Held*, this was not a binding election to rescind, and plaintiffs could thereafter sue for damages for fraud on the theory of an affirmance of the contract. "The notice of rescission should not be held to be an 'irrevocable' election until it is made 'effectual' by the innocent party receiving back the consideration with which he has parted." (83 C.A.2d 355.) (See 36 Cal. L. Rev. 636; 21 So. Cal. L. Rev. 399; 26 So. Cal. L. Rev. 158; 1 A.L.R.2d 1084 [notice of rescission as irrevocable election when other party refuses assent].)

The same rule is declared by statute for the other election. "A claim for damages is not inconsistent with a claim for relief based upon rescission." (C.C. 1692; see 1 *Summary* (10th), *Contracts*, §936.) Thus, only a completed rescission precludes an action based on affirmance. (*Paularena v. Superior Court* (1965) 231 C.A.2d 906, 913, 42 C.R. 366.)

SUPPLEMENT: [This section is current through the latest supplement]



6 of 192 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

IV. ELECTION OF REMEDIES

C. What Constitutes Election of Remedy.

1. Older View: Manifestation of Choice.

b. Manifestation by Suit.

3 *Witkin Cal. Proc. Actions* § 184

[§ 184] Manifestation by Suit.

(1) *Rule of Binding Election.* The election doctrine has also been applied to the commencement of an action, i.e., filing a complaint in which a particular remedy is sought. This rule appears by pronouncements (mostly dicta) in a number of cases. (See *Hines v. Ward* (1898) 121 C. 115, 120, 53 P. 427 [some cases "go to the extent of holding that, where a party has brought his action in pursuit of one remedy, he cannot, by dismissing it before judgment, be permitted to pursue another and different remedy, but that the commencement of the first is a conclusive election by which he is bound"]; *George J. Birkel Co. v. Nast* (1912) 20 C.A. 651, 654, 129 P. 945 [dictum; "[t]he legal effect of such election was, immediately upon the filing of the complaint, to transfer to and vest in defendant title"]; *De Laval Pac. Co. v. United Cleaners & Dyers Co.* (1924) 65 C.A. 584, 586, 224 P. 766, *infra*, §200 [dictum]; *Martin Music Co. v. Robb* (1931) 115 C.A. 414, 419, 1 P.2d 1000, *infra*, §188 [dictum; "according to the weight of authority the commencement of any proceeding to enforce one remedial right, in a court having jurisdiction to entertain such proceeding, is generally such a decisive act as constitutes a conclusive election, barring the subsequent prosecution of inconsistent rights"]; 20 *Cal. L. Rev.* 206; 42 *Harv. L. Rev.* 704; 6 *A.L.R.2d* 10 [commencement of action or prosecution short of judgment on merits].)

(2) *Repudiation of Rule.* Again there seems little reason for assigning this effect to the unilateral act of commencing an action. In addition, to assert as a rule of law that a plaintiff is bound by a choice of remedy on filing the complaint is to deny the plaintiff the benefits of a number of recognized procedural advantages, namely: (a) the right to plead inconsistent "counts"; (b) the right to amend the complaint to change the remedy or relief demanded; (c) the right to dismiss the action voluntarily and bring another, independent action, within the period of the statute of limitations; (d) the power of the court to award appropriate relief despite an erroneous "theory of the pleading." (See *C.C.P.* 581; 6 *Cal. Proc.* (5th), *Proceedings Without Trial*, §283 et seq.; 4 *Cal. Proc.* (5th), *Pleading*, §§402, 413, 374; 5 *Cal. Proc.* (5th), *Pleading*, §1229.)

Well-considered California cases repudiate the view that a binding election results from the mere commencement of an action. In *Brice v. Walker* (1920) 50 C.A. 49, 194 P. 721, a chattel mortgagee of an automobile had brought an action on the note alone in another state. Then, before judgment, the mortgagee had amended to omit that cause of action and limited the action to other claims against the defendant. In this present action, plaintiff, the donee of the

mortgagor, sought to recover possession of the car, arguing that the commencement of the action out of state was an election of the remedy on the note and prevented any future foreclosure of the mortgage. *Held*, there was no election, and the prior cases relied on were not controlling, because in them either the actions had been carried to judgment, or the point was unnecessary to determine. (50 C.A. 52.)

In *Roullard v. Rosenberg Bros. & Co.* (1924) 193 C. 360, 224 P. 449, two successive actions were brought against the assignee of a defaulting purchaser of real property, one for conversion of a mortgaged crop, and one to quiet title to the land. "Neither of said actions had then proceeded beyond the point of filing complaint and issuance of summons, and it could not be said that plaintiffs had 'clearly elected to proceed' upon either of them as distinguished from the other. The conclusion to be deduced from plaintiffs' conduct up to that point would be that they had not elected to pursue either remedy, but had elected rather to pursue both." (193 C. 363.)

Other cases are to the same effect. (See *Hines v. Ward* (1898) 121 C. 115, 120, 53 P. 427 [doctrine was not applicable, but under general rule there is no election until remedy is pursued to judgment]; *Steiner v. Rowley* (1950) 35 C.2d 713, 720, 221 P.2d 9 [doctrine was applicable on estoppel ground, but court declared that, because inconsistent counts may be pleaded, election could not be forced by demurrer]; *First & C Corp. v. Wencke* (1967) 253 C.A.2d 719, 724, 61 C.R. 531, quoting the text.)

On similar reasoning it is now held that bringing an action on a contract without seeking arbitration is not a waiver of the right to arbitrate. (See *infra*, §317.)

SUPPLEMENT: [This section is current through the latest supplement]



7 of 192 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

IV. ELECTION OF REMEDIES

C. What Constitutes Election of Remedy.

2. Pursuing Claim to Judgment: Merger or Bar.

3 *Witkin Cal. Proc. Actions* § 185

[§ 185] Pursuing Claim to Judgment: Merger or Bar.

(1) *Nature of Doctrines.* Satisfaction of a judgment extinguishes the right and, if it serves any purpose to think of this result in terms of election, there is clearly a binding election of remedies. A more difficult question is whether merely obtaining a final judgment is a binding election. It might be contended that the rendition of judgment is of no more significance than the commencement of the action. The plaintiff, in both situations, has manifested a choice of remedies. But, if the plaintiff has gained nothing by the choice, why should the plaintiff be denied the opportunity to pursue another alternative remedy for his or her still unsatisfied claim?

The difficulty with this reasoning is that it ignores the independent principle of res judicata, under which a final judgment between the same parties on the same cause of action may operate as a merger of the previously existing claim. Any further action would then be confined to the enforcement of the judgment and not the original cause of action. (See *Rest.2d, Judgments* §18.) Here, then, is an example of a truly irrevocable choice of remedy, although the courts tend to explain it in terms of election without inquiry into whether the situation calls for the application of the principle of res judicata.

(2) *Illustrations.* In *Salter v. Ulrich* (1943) 22 C.2d 263, 138 P.2d 7, the holder of a note secured by a deed of trust brought a personal action on the note alone, not mentioning the security, and obtained a default judgment. *Held*, this was an election, which thereafter precluded him from exercising the remedies of foreclosure or sale. (22 C.2d 268.)

In *Gray v. Gray* (1938) 25 C.A.2d 484, 77 P.2d 908, an incompetent made a gift of money, which the donee used to acquire real property. The incompetent's guardian first sued and obtained a money judgment against the donee. Later, being unable to satisfy the judgment, the guardian sought by a second action to impose a constructive trust or lien on the land. *Held*, the first action was a binding election; the plaintiff "chose" the remedy of damages, and thereby "waived" any right to sue for equitable relief. (25 C.A.2d 487.)

In *Slater v. Shell Oil Co.* (1943) 58 C.A.2d 864, 137 P.2d 713, defendant trespassed on plaintiff's land by construction and maintenance of a pipeline. Plaintiff first sued and recovered damages for the decrease in the market value of the land (i.e., past and prospective damages), and the judgment was satisfied. Later plaintiff sued in ejectment, seeking removal of the pipeline. *Held*, the first judgment was a bar; after pursuing one of two alternative remedies to

judgment, the right of action and the unused remedy are terminated. Although the opinion contains some of the terminology of the election of remedies doctrine, the court observed: "We purposely refrain from deciding upon what specific legal hypothesis this conclusion is reached." (58 C.A.2d 872.) It would seem that there was little need to invoke the doctrine of election. The judgment was clearly res judicata; moreover, further damages after the satisfaction of the first judgment would be contrary to the policy against double recovery.

In *Kaiser v. Mansfield* (1956) 141 C.A.2d 428, 297 P.2d 98, the court held that an action pursued to judgment and execution on land, on a theory of debt, was a binding election, which precluded a later claim of the land on a theory of trust. (141 C.A.2d 430, 435.)

In *Richmond Teachers Credit Union v. James F. Waters* (1960) 182 C.A.2d 110, 5 C.R. 716, plaintiff lent money to M and took a chattel mortgage on a car M was purchasing from defendant. Plaintiff sued M, attached the car, and then received judgment against M on the note. *Held*, this was a binding election, which precluded any further action against defendant in tort for the conversion of the car. (182 C.A.2d 115.)

Both doctrines--res judicata and election of remedies--were invoked in *Steiner v. Thomas* (1949) 94 C.A.2d 655, 211 P.2d 321: "Not only is a litigant barred by his former allegations and the findings thereon but when having knowledge of all the facts he has elected one of two inconsistent remedies and pursued it to judgment, he cannot thereafter proceed upon the other." (94 C.A.2d 660.)

Other cases are to the same effect. (See *Spaulding v. Cameron* (1952) 38 C.2d 265, 269, 239 P.2d 625; *Lake v. Lakewood Chiropractic Center* (1993) 20 C.A.4th 47, 54, 24 C.R.2d 358, citing the text; *Smith v. Golden Eagle Ins. Co.* (1999) 69 C.A.4th 1371, 1374, 82 C.R.2d 300; 26 So. Cal. L. Rev. 157.) (On election resulting from judgment against agent of undisclosed principal, see *infra*, §199.)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Illustrations.* See *California Golf, L.L.C. v. Cooper* (2008) 163 C.A.4th 1053, 1064, 78 C.R.3d 153, citing the text [bidders at nonjudicial foreclosure sale of realty could not claim benefit of doctrine based on earlier judicial foreclosure sale of same realty where bidders were not parties in earlier proceeding].



8 of 192 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

IV. ELECTION OF REMEDIES

C. What Constitutes Election of Remedy.

3. Modern View: Estoppel.

a. Basis of Doctrine.

3 *Witkin Cal. Proc. Actions* § 186

[§ 186] Basis of Doctrine.

Except where the principle of res judicata is involved (see *supra*, §185), the modern tendency is to explain election in terms of estoppel, i.e., to take into consideration not merely the plaintiff's manifestation of choice but also the effect on the defendant. Hence, despite a clearly manifested intention to pursue one of two inconsistent remedies, the plaintiff may thereafter seek the other remedy if the change will not work a substantial injury to the adverse party. (See *infra*, §200.) But if the change will for some reason operate to the prejudice of the defendant, the plaintiff's new remedy is barred, because the plaintiff's "election" has continued to the point where he or she is estopped to change the remedy.

That this is the present view of the California courts appears from a number of cases, most of them holding that no election had occurred. (See *Roullard v. Rosenberg Bros. & Co.* (1924) 193 C. 360, 366, 224 P. 449; *Commercial Centre Realty Co. v. Superior Court* (1936) 7 C.2d 121, 129, 59 P.2d 978 ["The doctrine of election of remedies is but a specific application of the equitable doctrine of estoppel, and it has been frequently held that a change in remedies does not bring about an election of remedies unless the change involves a prejudice to the opposing party"]; *Steiner v. Rowley* (1950) 35 C.2d 713, 720, 221 P.2d 9 ["the doctrine of election of remedies is based upon the principle of estoppel"]; *Weaver v. Bank of America* (1963) 59 C.2d 428, 432, 30 C.R. 4, 380 P.2d 644 [depositor's action for wrongful dishonor, either in contract or tort]; *De Laval Pac. Co. v. United Cleaners & Dyers Co.* (1924) 65 C.A. 584, 586, 224 P. 766, *infra*, §200; *Baumann v. Harrison* (1941) 46 C.A.2d 84, 88, 115 P.2d 530; *Perkins v. Benguet Consol. Mining Co.* (1942) 55 C.A.2d 720, 758, 132 P.2d 70 ["In some states harsh application of the doctrine of election of remedies is avoided through viewing it as an aspect of the law of res judicata, merger, waiver, estoppel and allied doctrines. In California it has been declared repeatedly that the doctrine is a phase of the law of estoppel"]; *Calhoun v. Calhoun* (1947) 81 C.A.2d 297, 305, 183 P.2d 922; *Garrick v. J.M.P.* (1957) 150 C.A.2d 232, 239, 309 P.2d 896, citing the text; *Lenard v. Edmonds* (1957) 151 C.A.2d 764, 768, 312 P.2d 308, *infra*, §200, citing the text; *Goossen v. Adair* (1960) 185 C.A.2d 810, 821, 8 C.R. 855, *infra*, §200; *Ferguson v. Fajardo* (1962) 211 C.A.2d 119, 121, 27 C.R. 72, quoting the text [plaintiff purchaser seeking amendment, over 2 years after complaint against vendor for damages, to add count for specific performance]; *Chico Tractor v. Coyle* (1963) 215 C.A.2d 483, 487, 30 C.R. 196, citing the text; *Roam v. Koop* (1974) 41 C.A.3d 1035, 1044, 116 C.R. 539, *infra*, §202; *Baker v. Superior Court* (1983) 150 C.A.3d 140, 145, 197 C.R. 480, citing the text; 19 *Hastings L. J.* 1239; 26 *So. Cal. L. Rev.* 163.)

SUPPLEMENT: [This section is current through the latest supplement]



9 of 192 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

IV. ELECTION OF REMEDIES

C. What Constitutes Election of Remedy.

3. Modern View: Estoppel.

b. Acts Amounting to Estoppel.

1. Attachment.

3 *Witkin Cal. Proc. Actions* § 187

[§ 187] Attachment.

(1) *Doctrine Applicable*. If the plaintiff has two inconsistent remedies, one in contract with the right of attachment, and one in tort without that right, the plaintiff elects the contract remedy by obtaining a writ of attachment. It is obvious that issuance of an attachment, which interferes with the defendant's possession of his or her property or requires that the defendant incur the expense and effort of a bond, is a positive act by which the plaintiff "gains an advantage" over the defendant. (See *Steiner v. Rowley* (1950) 35 C.2d 713, 720, 221 P.2d 9; *Eistrat v. Brush Industrial Lumber Co.* (1954) 124 C.A.2d 42, 45, 268 P.2d 181; *Acme Paper Co. v. Goffstein* (1954) 125 C.A.2d 175, 178, 270 P.2d 505 [conversion, complaint on common count and levy of attachment; error to award tort measure of damages]; *Richmond Teachers Credit Union v. James F. Waters* (1960) 182 C.A.2d 110, 115, 5 C.R. 716, supra, §185; *Roam v. Koop* (1974) 41 C.A.3d 1035, 1040, 116 C.R. 539, infra, §202 [stating rule but holding that defense was waived by failure to raise it in trial court].)

(2) *Doctrine Not Applicable*. In *Baker v. Superior Court* (1983) 150 C.A.3d 140, 147, 197 C.R. 480, the court found the doctrine inapplicable because the remedies sought were not inconsistent (see infra, §193 et seq.), but added this comment on the effect of attachment: "[W]e believe defendants should be required to raise any election of remedies defense as one of their grounds for opposing plaintiffs' attachments *in the first instance*. ... We also stress that even where a court determines an election of remedies defense is applicable, it should issue the right to attach order conditionally, giving the *plaintiff* the choice of electing between the writ of attachment and pursuing inconsistent remedies. These changes would reduce the possibility of procedural sandbagging which may result in depriving a plaintiff of his preferred remedy." (150 C.A.3d 147, footnote 5.)

In *Waffer Int. Corp. v. Khorsandi* (1999) 69 C.A.4th 1261, 82 C.R.2d 241, plaintiff brought an action for conversion and fraud against defendants, two individuals who had been involved with plaintiff in transactions for computer equipment. Plaintiff previously had settled an action against a corporation arising from the same transactions, and plaintiff obtained and levied a writ of attachment against that corporation for its breach of the settlement agreement. Defendants had been officers of the corporation. The trial judge granted defendants summary judgment, finding that the attachment against the corporation was an election of remedies, and thus barred plaintiff from pursuing tort remedies

against defendants. *Held*, reversed.

(a) The doctrine of election of remedies now has little or no application in the context of attachments. At one time, attachment law enabled plaintiffs to attach defendants' property easily, and courts applied the doctrine to mitigate the harsh effects of attachment. Courts created a judicial limitation on the exercise of the statutory right to attach by prohibiting the pursuit of tort claims if a litigant chose to invoke the attachment remedy. However, courts narrowed the application of the doctrine in several situations where equity was not served by its application. (69 C.A.4th 1269, 1270.) Moreover, in *Randone v. Appellate Dept.* (1971) 5 C.3d 536, 96 C.R. 709, 488 P.2d 13, 6 Cal. Proc. (5th), *Provisional Remedies*, §50, the attachment law was declared to be unconstitutional as violative of due process and overly broad, and the Legislature enacted a new attachment law (C.C.P. 481.010 et seq., 6 Cal. Proc. (5th), *Provisional Remedies*, §52 et seq.) that contains numerous procedural safeguards. (69 C.A.4th 1273, 1274.) Thus, in the attachment context, the doctrine is viewed as harsh and disfavored, and does not apply if the contract and tort claims arise from different operative facts or if the facts material to each claim occurred at different times. Also, the doctrine does not apply unless the defendant suffers substantial prejudice as a result of the attachment, which rarely occurs under current attachment law. The doctrine is simply an application of the broader concept of equitable estoppel, and it is not inequitable for a plaintiff to avail itself of protections that have been authorized by the Legislature and that may be implemented only by prior court order issued with full observance of constitutional due process requirements. (69 C.A.4th 1278, 1279.)

(b) Even if the doctrine still has some applicability in attachment cases, it did not apply to the present case. The related action against the corporation did not arise from the identical facts from which plaintiff's claim against defendants arose, and the two actions involved different parties. Also, defendants were not legally prejudiced by plaintiff's pursuit of its statutory attachment remedies. (69 C.A.4th 1280, 1281.)

SUPPLEMENT: [This section is current through the latest supplement]



10 of 192 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

IV. ELECTION OF REMEDIES

C. What Constitutes Election of Remedy.

3. Modern View: Estoppel.

b. Acts Amounting to Estoppel.

2. Claim and Delivery.

3 *Witkin Cal. Proc. Actions* § 188

[§ 188] Claim and Delivery.

The provisional remedy of claim and delivery, giving immediate possession to a plaintiff seeking specific recovery of personal property, has the same prejudicial effect on the defendant as an attachment, i.e., the defendant must either surrender possession or give a bond. Hence, if a conditional seller has the election to sue for the price or repossess the goods, he or she makes a binding election of the remedy of repossession (specific recovery) when employing the procedure of claim and delivery. (*Cocores v. Assimopoulos* (1932) 127 C.A. 360, 363, 15 P.2d 892 [rejecting conditional seller's claim that he could seek repossession and also get attachment and money judgment against defendant's buyer for unpaid *interest* in default].)

In *Martin Music Co. v. Robb* (1931) 115 C.A. 414, 1 P.2d 1000, plaintiff conditional seller (a) filed suit for the price and, after the buyer's default and voluntary petition in bankruptcy, dismissed the action; (b) filed a claim in bankruptcy, which was allowed; (c) filed a petition for reclamation, which was denied. Then, after the buyer's discharge in bankruptcy, plaintiff brought this action to repossess. *Held*, there was a binding election, either on the manifestation or estoppel theories. The estoppel arose from the facts that defendant buyer was trying to arrange to pay her creditors in installments and the first suit put an end to the negotiations; and that defendant had listed the property in her bankruptcy assets and other creditors had a right to rely on it until it was declared exempt. The opinion also invokes the *res judicata* principle by referring to the two bankruptcy orders (allowance of claim for the price and denial of petition for reclamation) as "final" and a bar to a subsequent action. (115 C.A. 422.)

SUPPLEMENT: [This section is current through the latest supplement]



11 of 192 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

IV. ELECTION OF REMEDIES

C. What Constitutes Election of Remedy.

3. Modern View: Estoppel.

b. Acts Amounting to Estoppel.

3. Creditor's Claim Against Estate.

3 Witkin Cal. Proc. Actions § 189

[§ 189] Creditor's Claim Against Estate.

Filing a creditor's claim against an estate is a binding election. In *Smith v. Greenfield State Bank* (1963) 222 C.A.2d 869, 35 C.R. 579, decedent bought a harvester on a conditional sale, and died leaving a large overdue balance. Defendant, the assignee of the conditional seller, first filed a creditor's claim for the entire balance of the price; then, 2 days later, it repossessed the machine. The claim was approved by plaintiff administrator, demand was made for return of the machine, and, on refusal, this action was brought for damages for conversion. *Held*, judgment for plaintiff affirmed. Despite the fact that the estate was insolvent, the claim for the price was inconsistent with the right to repossess and keep the title, and the assignee was not misled by anyone about the financial condition of the estate. (222 C.A.2d 873.) (On court's suggestion that conditional seller could have filed contingent claim, see 14 *Summary* (10th), *Wills and Probate*, §619.)

SUPPLEMENT: [This section is current through the latest supplement]



12 of 192 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

IV. ELECTION OF REMEDIES

C. What Constitutes Election of Remedy.

3. Modern View: Estoppel.

b. Acts Amounting to Estoppel.

4. Injunction.

3 *Witkin Cal. Proc. Actions* § 190

[§ 190] Injunction.

Writers Guild of America, West v. Screen Gems (1969) 274 C.A.2d 367, 79 C.R. 208, is an instructive example, though it does not use the language of "election of remedies." Plaintiff Guild, a writers' labor union, made a basic collective bargaining agreement with defendant television producers. Writers M and T made a production contract with defendants, negotiated by Guild, for certain merchandising and publication rights. A dispute arose over its interpretation. Guild, M, and T filed a joint action in the superior court against defendants to terminate the production contract, and set forth in the complaint their interpretation of both the basic agreement and the production contract. They also sought both a preliminary and a permanent injunction against the exercise of rights under the production contract. The court denied a preliminary injunction. Then Guild demanded arbitration, pursuant to the basic agreement, and on defendants' refusal petitioned for an order to compel it. The court found that Guild had waived the right and denied the petition. *Held*, affirmed.

(a) A judgment in the action by Guild to interpret the contracts would bind the other parties under the doctrine of collateral estoppel. Hence, by bringing it, Guild would ordinarily waive its right to arbitration of the same issues. (274 C.A.2d 375; see *infra*, §315 et seq.)

(b) The waiver by suit alone was not binding. Just as a plaintiff may voluntarily dismiss his or her action and file another where no counterclaim or request for affirmative relief has been made (see 6 *Cal. Proc.* (5th), *Proceedings Without Trial*, §283 et seq.), the plaintiff may dismiss his or her action and seek arbitration. (274 C.A.2d 373.)

(c) The waiver became binding, however, when plaintiff asked for an injunction, thereby requesting the court to give a binding construction of the disputed terms in the production contract. The injunction sought was both preliminary and permanent; hence, the theory that the mere solicitation of a provisional remedy should not interfere with the right to arbitration was untenable. (274 C.A.2d 374.) Thus, having sought a remedy in the superior court and having obtained a ruling from that court on a matter of importance, Guild could be required by its adversaries to continue in that forum. "In sporting terminology, Guild, having been called out on strikes in the first inning, is not entitled to move the ball game across the street and start over again." (274 C.A.2d 375.)

SUPPLEMENT: [This section is current through the latest supplement]

(New) Doctrine not applicable: In *Southern Christian Leadership Conference of Greater Los Angeles v. Al Malaikah Auditorium Co.* (1991) 230 C.A. 207, 281 C.R.3d 216, plaintiff concert producer brought an action for breach of contract, specific performance, and injunctive relief against defendant auditorium that accepted a deposit from plaintiff to reserve the auditorium on a specified date, but, before a lease was executed, cancelled plaintiff's reservation and returned the deposit, having received a more lucrative offer from another prospective tenant for that date. The trial judge issued a preliminary injunction enjoining defendant from allowing anyone other than plaintiff to use the auditorium on the specified date. By stipulation of both parties, the trial judge dissolved the injunction, and the matter proceeded to trial. The jury found that plaintiff breached the contract with defendant and awarded compensatory damages, and the trial judge entered judgment for plaintiff based on that verdict. *Held*, affirmed; plaintiff was not estopped by the election of remedies doctrine from bringing the breach of contract action against defendant.

(a) If the main action seeks another remedy, a preliminary injunction simply forms a provisional or auxiliary remedy to preserve the status quo until a final judgment. The grant or denial of a preliminary injunction does not adjudicate the ultimate rights in controversy. Plaintiff was not required to wait until it suffered actual harm, but could seek injunctive relief against the threatened infringement of its rights. (230 C.A.3d 223.)

(b) The holding in *Writers Guild of America, West v. Screen Gems* (1969) 274 C.A.2d 367, 79 C.R. 208, text, 190, precluding plaintiff from compelling arbitration after it had first sought injunctive relief, does not apply here. "The case at bench does not involve plaintiff's attempt to remove the case from superior court for rehearing before an arbitrator or in any other forum." (230 C.A.3d 224.) (See *Lenard v. Edmonds* (1957) 151 C.A.2d 764, 769, 312 P.2d 308, text, §200 [in action for fraud in sale of real property, purchasers sought rescission and damages, were granted preliminary injunction restraining seller from disposing of property, and thereafter, at the trial, abandoned rescission claim and obtained jury verdict for damages; preliminary injunction did not constitute election of rescission over damages].)



13 of 192 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

IV. ELECTION OF REMEDIES

D. Where Doctrine Is Not Applicable.

1. Where No Real Choice Exists.

a. Only One Remedy Is Available at Time of Action.

3 Witkin Cal. Proc. Actions § 191

[§ 191] Only One Remedy Is Available at Time of Action.

An underlying assumption of the election of remedies doctrine is that two remedies were open to the plaintiff at the time the action was commenced. If, instead, only one remedy was available then, the plaintiff had no choice, and cannot be deemed to have made an election. In *De Hart v. Allen* (1942) 49 C.A.2d 639, 122 P.2d 273, the lessors brought actions against the lessees for rent, and later took possession, relet to others, and sued for damages. *Held*, the first actions did not constitute a bar because until the lease terminated no action for damages was possible, and the first actions, for rent, were the only ones that could then be maintained. "There can be no election of remedies when there is but one remedy available." (49 C.A.2d 646.)

The same holding was made in *Roullard v. Rosenberg Bros. & Co.* (1924) 193 C. 360, 224 P. 449, where there was an executory contract for the sale of land, secured by a crop mortgage. The vendor brought action No. 1, prior to the purchaser's default, for conversion of the crop. Later he was allowed to bring action No. 2, after default, to recover the land. (193 C. 363.)

Other cases are to the same effect. (See *Prussing v. Prussing* (1941) 46 C.A.2d 347, 353, 115 P.2d 854 [first action was lost because it was prematurely brought; no election]; *Capogeannis v. Superior Court* (1993) 12 C.A.4th 668, 684, 15 C.R.2d 796, *infra*, §603, citing the text [first action on remedy was barred by statute of limitations; second action on another remedy was still available]; *Orange v. San Diego County Employees Retirement Assn.* (2002) 103 C.A.4th 45, 58, 126 C.R.2d 405 [in first action, summary judgment was granted on restitution remedy without considering plaintiff's request to add breach of contract remedy; thus, second action on breach of contract remedy was not precluded]; 37 *Harv. L. Rev.* 914 [same circumstances as in *Capogeannis*].)

SUPPLEMENT: [This section is current through the latest supplement]



14 of 192 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

IV. ELECTION OF REMEDIES

D. Where Doctrine Is Not Applicable.

1. Where No Real Choice Exists.

b. Plaintiff's Mistake: Choice of Wrong Remedy.

3 *Witkin Cal. Proc. Actions* § 192

[§ 192] Plaintiff's Mistake: Choice of Wrong Remedy.

(1) *Nature of Exception.* Sometimes the apparent choice of inconsistent remedies was not a choice at all, because one of the supposed remedies was not in fact available. Plaintiff, mistakenly and unsuccessfully seeking it, did not elect the unavailable remedy, but merely misconceived his or her true remedy. Two cautions should be observed in dealing with this exception to the doctrine of election:

(a) The mistaken plaintiff may switch remedies only if, in the meantime, the defendant has not been placed at a substantial disadvantage by acts or omissions in reliance on the plaintiff's original choice. (See *supra*, §186.)

(b) According to some authority, the mistaken plaintiff may be barred by "waiver" if he or she subsequently discovers the proper remedy and is negligent in failing promptly to employ it. (See *Gray v. Gray* (1938) 25 C.A.2d 484, 487, 77 P.2d 908 [discovery of facts prior to trial precluded change of remedy].)

(2) *Illustration: Mistaken Choice of Restitution or Damages.* A typical example of this exception is where the plaintiff is induced by the fraud of the defendant to transfer property. The plaintiff elects to rescind and sues for restitution, but is unsuccessful because the plaintiff is unable to comply with some condition of rescission, such as restoration of the consideration. After an adverse judgment in the first action, the plaintiff may bring a second action for damages for the fraud. This was the holding in *Herdan v. Hanson* (1920) 182 C. 538, 189 P. 440. Defendant argued that this was not a case of mistaken choice of the wrong remedy. Rather, he contended, plaintiff had failed to comply with the condition precedent to the remedy of rescission to which he was entitled. In rejecting this contention the court indicated the far-reaching character of the mistaken choice exception, and its relation to the modern theory that estoppel, are the basis of binding election. (182 C. 542.) The first judgment for defendant left the parties in their original position, and that "inasmuch as the attempted prior election of the plaintiff was arrested and rendered abortive before he had proceeded to a point absolutely incompatible with the institution and maintenance of the present action, the principle of estoppel arising from an election of inconsistent remedies cannot be invoked and applied." (182 C. 543.)

Other cases are to the same effect. (See *Campanella v. Campanella* (1928) 204 C. 515, 521, 269 P. 433; *Waters v. Woods* (1935) 5 C.A.2d 483, 490, 42 P.2d 1072; *Papenfus v. Webb Products Co.* (1941) 48 C.A.2d 631, 634, 120 P.2d

60 [first action for rescission, second for declaratory relief and constructive trust]; *Felix v. Work. Comp. App. Bd.* (1974) 41 C.A.3d 759, 764, 116 C.R. 345, citing the text; *Glendale Fed. Savings & Loan Assn. v. Marina View Heights Dev. Co.* (1977) 66 C.A.3d 101, 137, 135 C.R. 802, citing the text; 36 Cal. L. Rev. 640.)

(3) *Illustration: Mistaken Choice of Common Law or Statutory Remedies.* Another situation, involving mistaken choice of common law or statutory remedies, is illustrated by *Atchison, Topeka & Santa Fe Ry. Co. v. Superior Court* (1939) 12 C.2d 549, 86 P.2d 85. Plaintiff employee was injured in the course of employment by an interstate railroad. His complaint alleged violation of the federal Safety Appliance Act and common law negligence, but at the trial he relied solely on the Act, expressly abandoning the other theory. A favorable judgment, affirmed on appeal in California, was reversed by the United States Supreme Court, which held that there was no violation of the statute and that the only possible ground of recovery was common law negligence. *Held*, the reversal set the case at large ("for further proceedings not inconsistent with this opinion") and he was entitled to raise his claim of common law negligence on the retrial. The court quoted from a Massachusetts case as follows: "It is a familiar principle that, where inconsistent courses are open to an injured party and it is doubtful which ultimately may lead to full relief, he may follow one even to defeat, and then take another, or he may pursue all concurrently, until it finally is decided which affords the remedy. The assertion of one claim which turns out to be unsound so long as it goes no further, is simply a mistake. It is not and does not purport to be a final choice, nor an election. A party is not obliged to select his procedure at his peril." (12 C.2d 556.)

SUPPLEMENT: [This section is current through the latest supplement]



15 of 192 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

IV. ELECTION OF REMEDIES

D. Where Doctrine Is Not Applicable.

2. Where Alternative Remedies Are Not Actually Inconsistent.

a. Remedies Consistent Under Law.

1. In General.

3 *Witkin Cal. Proc. Actions* § 193

[§ 193] In General.

The doctrine of election presupposes that a party pursuing both remedies is occupying inconsistent positions. It does not apply where he or she may legally pursue both alternatively or concurrently, and there are no facts to raise an estoppel. (See 4 *Cal. Proc.* (5th), *Pleading*, §409.) Illustrations are numerous and are set forth in the following sections.

SUPPLEMENT: [This section is current through the latest supplement]



16 of 192 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

IV. ELECTION OF REMEDIES

D. Where Doctrine Is Not Applicable.

2. Where Alternative Remedies Are Not Actually Inconsistent.

a. Remedies Consistent Under Law.

2. Dual Remedies of Sale and Foreclosure.

3 *Witkin Cal. Proc. Actions* § 194

[§ 194] Dual Remedies of Sale and Foreclosure.

Where a mortgagee or trustee under a trust deed has the dual remedies of a foreclosure suit or a sale under the power of sale, he or she may seek one remedy first, and then change to the other. (See *Commercial Centre Realty Co. v. Superior Court* (1936) 7 C.2d 121, 129, 59 P.2d 978; *Flack v. Boland* (1938) 11 C.2d 103, 108, 77 P.2d 1090; *Baumann v. Harrison* (1941) 46 C.A.2d 84, 88, 115 P.2d 530; 25 Cal. L. Rev. 477; 27 Cal. L. Rev. 66.)

SUPPLEMENT: [This section is current through the latest supplement]



17 of 192 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

IV. ELECTION OF REMEDIES

D. Where Doctrine Is Not Applicable.

2. Where Alternative Remedies Are Not Actually Inconsistent.

a. Remedies Consistent Under Law.

3. Action for Money and Action for Property.

3 *Witkin Cal. Proc. Actions* § 195

[§ 195] Action for Money and Action for Property.

In *Crittenden v. St. Hill* (1917) 34 C.A. 107, 166 P. 1016, plaintiff landlord filed action No. 1 for rent due. While it was pending, he filed action No. 2 for unlawful detainer, to recover possession of the premises and rent. *Held*, the actions were different in purpose, one being for money due, the other mainly for possession (with incidental recovery of money due), and were not inconsistent. (34 C.A. 110.)

In *Roullard v. Rosenberg Bros. & Co.* (1924) 193 C. 360, 224 P. 449, the *Crittenden* theory was followed. Plaintiff vendors, having a crop mortgage to secure installment payments by the purchaser, filed action No. 1 against defendant company for damages for conversion of the crop. While it was pending, they filed action No. 2 against the purchaser to quiet title and recover possession of the land. *Held*, there was no inconsistency because the objects of the two actions were different, one was in tort and the other in contract, and there were different defendants. (193 C. 364.)

SUPPLEMENT: [This section is current through the latest supplement]



18 of 192 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

IV. ELECTION OF REMEDIES

D. Where Doctrine Is Not Applicable.

2. Where Alternative Remedies Are Not Actually Inconsistent.

a. Remedies Consistent Under Law.

4. Two Actions for Property.

3 *Witkin Cal. Proc. Actions* § 196

[§ 196] Two Actions for Property.

In *Mailhes v. Investors Syndicate* (1934) 220 C. 735, 32 P.2d 610, the court quoted Corpus Juris as follows: "All actions which proceed upon the theory that the title to property is in plaintiff are inconsistent with those which proceed upon the theory that title is in defendant. But there is no inconsistency between different remedies, all of which are based upon claim of title to property in plaintiff, or all of which are based upon the affirmance of title in defendant." It was held, therefore, that a landowner could pursue consecutively against a lessee the consistent remedies of unlawful detainer and quiet title. (220 C. 738.)

SUPPLEMENT: [This section is current through the latest supplement]



19 of 192 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

IV. ELECTION OF REMEDIES

D. Where Doctrine Is Not Applicable.

2. Where Alternative Remedies Are Not Actually Inconsistent.

a. Remedies Consistent Under Law.

5. Two Actions for Money.

3 Witkin Cal. Proc. Actions § 197

[§ 197] Two Actions for Money.

In *Longmaid v. Coulter* (1898) 123 C. 208, 55 P. 791, an unpaid vendor had title to land as security. First he sued and got a default judgment against the purchaser on his note. Then, after execution was returned unsatisfied (because the land was homesteaded), he brought a second action to foreclose his security interest and have the property sold in satisfaction. *Held*, the remedies were consistent and both suits could be maintained. (123 C. 214.)

In *Associated Fruit Co. v. San Joaquin Fruit Growers & Shippers* (1924) 68 C.A. 785, 230 P. 212, plaintiff selling agent was allowed to bring action No. 1 to recover on a note for money advanced to defendant, and action No. 2 for profits (commission) that would have been earned had defendant not repudiated the contract. (68 C.A. 788.)

SUPPLEMENT: [This section is current through the latest supplement]



20 of 192 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

IV. ELECTION OF REMEDIES

D. Where Doctrine Is Not Applicable.

2. Where Alternative Remedies Are Not Actually Inconsistent.

a. Remedies Consistent Under Law.

6. Miscellaneous Examples.

3 *Witkin Cal. Proc. Actions* § 198

[§ 198] Miscellaneous Examples.

Other cases, not classifiable by any unified factual situation, have held that no binding election occurred:

Schumm v. Berg (1951) 37 C.2d 174, 190, 231 P.2d 39 [illegitimate child's statutory action for support did not bar later action on contract for support].

McDanel v. General Ins. Co. of America (1934) 1 C.A.2d 454, 462, 36 P.2d 829 [insurance company first defended personal injury action on behalf of insured; later, in action by injured party on his judgment, company defended by pleading insured's breach of cooperation clause].

Los Angeles Morris Plan Co. v. O'Day (1942) 52 C.A.2d 356, 358, 126 P.2d 148 [filing action on judgment and subsequent dismissal of judgment did not bar later motion for issuance of execution after 5 (now 10) years].

Guay v. American President Lines, Ltd. (1947) 81 C.A.2d 495, 519, 184 P.2d 539 [seaman's rights to maintenance and to recovery under Jones Act were independent and cumulative, although double recovery for same compensable factors was not allowed].

Glendale Fed. Savings & Loan Assn. v. Marina View Heights Dev. Co. (1977) 66 C.A.3d 101, 137, 135 C.R. 802 [attachment was obtained on facts giving rise to contract remedy; subsequent tort action based on different facts--fraud in inducing contract--was not barred].

Baker v. Superior Court (1983) 150 C.A.3d 140, 145, 146, 197 C.R. 480, citing the text [tort and breach of contract causes arose out of different obligations].

Pat Rose Associates v. Coombe (1990) 225 C.A.3d 9, 18, 275 C.R. 1 [causes of action for fraud and breach of contract arose at different times from separate obligations and separate operative facts].

Waffer Int. Corp. v. Khorsandi (1999) 69 C.A.4th 1261, 1269, 82 C.R.2d 241, supra, §187 [election of remedies

doctrine now has little or no application in attachment cases].

Denevi v. LGCC (2004) 121 C.A.4th 1211, 1218, 18 C.R.3d 276, citing the text [election of remedies doctrine did not apply to plaintiff suing both personally and derivatively].

In *Humes v. MarGil Ventures (1985) 174 C.A.3d 486, 220 C.R. 186*, plaintiff actress brought a court action for rescission of an agency contract based on defendant's duress in getting her to sign it, and then, in a proceeding before the Labor Commissioner, sought to have the contract voided as violative of Labor Code licensing requirements. *Held*, the remedies were not inconsistent. In both, plaintiff sought to have the employment agreement declared unenforceable; the cause of action for rescission was based on facts surrounding the execution of the agreement, and the proceeding before the Labor Commissioner was based on defendant's actions under the agreement after it was executed. (174 C.A.3d 493.)

SUPPLEMENT: [This section is current through the latest supplement]



21 of 192 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

IV. ELECTION OF REMEDIES

D. Where Doctrine Is Not Applicable.

2. Where Alternative Remedies Are Not Actually Inconsistent.

b. Remedies Against Different Persons.

3 *Witkin Cal. Proc. Actions* § 199

[§ 199] Remedies Against Different Persons.

(1) *In General.* Where different persons are liable to the plaintiff on the same claim, there is only one right and normally there is no inconsistency in seeking its enforcement against both, concurrently or consecutively. Hence, unless the facts show an estoppel, or the claim itself is satisfied, suit and judgment against one is not a bar to a later suit against the other. (See *Gray v. Gray* (1938) 25 C.A.2d 484, 488, 77 P.2d 908 [dictum quoting Corpus Juris: "A party may pursue any number of consistent and concurrent remedies against different persons, until he obtains satisfaction from some of them"; here, however, persons were not different]; *Perkins v. Benguet Consol. Mining Co.* (1942) 55 C.A.2d 720, 753, 755, 758, 761, 132 P.2d 70; *Williams v. Reed* (1952) 113 C.A.2d 195, 204, 248 P.2d 147 [judgment against one of two or more joint tortfeasors or joint and several contract debtors]; 52 *Harv. L. Rev.* 1372.)

(2) *Distinction: Claim Against Agent or Undisclosed Principal.* An unfortunate departure from this view is taken where the plaintiff third party has a claim on contract against either an agent or the agent's undisclosed principal. Under the substantive law of agency the plaintiff must choose between the remedy against the contracting party (agent) or the remedy against the party on whose behalf the contract was made (principal), because their liability is not joint but merely in the alternative. Pursuing the claim to final judgment against either is an irrevocable election that discharges the other, even though the judgment is never satisfied and no elements of estoppel are present. (See *Rest.2d, Judgments* §49, Comment c; 3 *Summary* (10th), *Agency and Employment*, §160; on criticism of this view, see 39 *Cal. L. Rev.* 409; 52 *Harv. L. Rev.* 1371.)

Two exceptions to the foregoing (agency) rule should be noted:

(a) The requirement cannot be used as a procedural device to trick an uninformed or forgetful plaintiff into an election of final judgment against an insolvent defendant while the solvent defendant appeals. The defendants must affirmatively demand an election, and, if they permit judgment to be rendered against both without demand, their right to insist on an election is permanently waived. (*McEwen v. Taylor* (1951) 106 C.A.2d 25, 30, 234 P.2d 754; see 25 *So. Cal. L. Rev.* 116; 3 *Summary* (10th), *Agency and Employment*, §160.)

(b) If the plaintiff sues the agent alone while ignorant of the existence of the undisclosed principal, the prior

judgment is not an election. (See Rest.2d, Agency §210(1); 39 *Cal. L. Rev.* 418; 3 *Summary* (10th), *Agency and Employment*, §160.) This can be explained on common sense grounds (no election unless you know you have a choice), or as an application of the theory that a plaintiff's excusable mistake in choosing the wrong remedy does not bar a later action. (See *supra*, §192.)

SUPPLEMENT: [This section is current through the latest supplement]



22 of 192 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

IV. ELECTION OF REMEDIES

D. Where Doctrine Is Not Applicable.

3. Where Defendant Is Not Actually Prejudiced: No Estoppel.

3 Witkin Cal. Proc. Actions § 200

[§ 200] Where Defendant Is Not Actually Prejudiced: No Estoppel.

A number of decisions reject the election defense on the ground (usually accompanied by some other ground as well) that the defendant suffered no injury by the change of remedies. An unsuccessful attempt was made to use the doctrine to prevent a change of venue in *Mansfield v. Pickwick Stages, Northern Division* (1923) 191 C. 129, 215 P. 389. Plaintiffs filed personal injury actions in San Francisco (wrong venue). Defendant corporation moved for change to its corporate residence, Los Angeles. Plaintiffs then dismissed and filed new actions in Monterey, the place where the tort was committed (proper venue). *Held*, the first filings did not amount to an election of remedies despite the expense to defendant of preparing its motion for change of venue. (191 C. 132.)

In *De Laval Pac. Co. v. United Cleaners & Dyers Co.* (1924) 65 C.A. 584, 224 P. 766, plaintiff, the unpaid seller of a machine, demanded that defendant buyer return it. Defendant shipped it with an essential part missing; plaintiff refused to accept and returned it to defendant. Then plaintiff brought this action for the price. *Held*, there was no election of remedies. Plaintiff did not, by his demand and the subsequent acts, gain any advantage or cause defendant any damage; on return of the machine defendant was in the same position as before the demand was made. (65 C.A. 586.)

In *Pacific Coast Cheese v. Security-First Nat. Bank of Los Angeles* (1955) 45 C.2d 75, 286 P.2d 353, plaintiff filed a civil action and recovered judgment against a bookkeeper for the amount of alterations charged by defendant bank, but the judgment was not satisfied. *Held*, there was no binding election and the bank could be sued. "The doctrine is based on estoppel and, when applicable, operates only if the party asserting it has been injured." (45 C.2d 80.)

In *Lenard v. Edmonds* (1957) 151 C.A.2d 764, 312 P.2d 308, plaintiff purchasers sued for fraud in the sale of real property, seeking rescission and damages. They were granted a preliminary injunction restraining defendant from disposing of the property and other consideration, and thereafter, at the trial, abandoned the rescission count and obtained a jury verdict for damages. On appeal, defendant vendor, citing the attachment election cases (*supra*, §187), contended that by obtaining the preliminary injunction plaintiffs elected the equitable right (rescission), and lost the inconsistent legal right of affirmance and damages (*supra*, §181). *Held*, there was no election. In the contract-tort attachment case, an attachment cannot be had on the tort cause; hence issuance of attachment is a binding election of the contract remedy. But a preliminary injunction, though commonly granted in equitable actions, may also be had in legal

actions (see 6 *Cal. Proc.* (5th), *Provisional Remedies*, §§297, 298). Hence, its issuance was not a binding election of the equitable remedy. (151 *C.A.2d* 769.)

In *Goossen v. Adair* (1960) 185 *C.A.2d* 810, 8 *C.R.* 855, a dispute between realtors over the division of a commission, plaintiff and defendant agreed to arbitration. After an award in favor of plaintiff was challenged, plaintiff brought an action to recover the money and attempted to garnish. *Held*, defendant was not prejudiced by either the filing or unsuccessful garnishment; hence, a renewed arbitration and award were proper. (185 *C.A.2d* 821.)

In *Frazier v. Metropolitan Life Ins. Co.* (1985) 169 *C.A.3d* 90, 214 *C.R.* 883, plaintiff, suing defendant insurer on various theories of breach of contract and tort (see *supra*, §160), checked the tort box in the certification of assignment, but sought contract and tort remedies. The trial judge treated the action as sounding in both contract and tort, and plaintiff's theory on appeal (to overcome the statute of limitations) was based on the contract cause of action. *Held*, plaintiff's conduct did not constitute an irrevocable election of a tort action. (169 *C.A.3d* 101.)

Other cases emphasize the lack of injury. (See *Hines v. Ward* (1898) 121 *C.* 115, 120, 53 *P.* 427; *Herdan v. Hanson* (1920) 182 *C.* 538, 543, 189 *P.* 440, *supra*, §192; *Roullard v. Rosenberg Bros. & Co.* (1924) 193 *C.* 360, 366, 224 *P.* 449 ["To be sure, this defendant will be 'injured,' in the layman's sense of the word, if it is compelled to pay the judgment. ... But this does not constitute an injury, as that term is understood in law"]; *Campanella v. Campanella* (1928) 204 *C.* 515, 521, 269 *P.* 433 ["the disadvantage caused the other party by a change of remedy must be a real injury, such as would, in the contemplation of law, amount to an estoppel"]; *Commercial Centre Realty Co. v. Superior Court* (1936) 7 *C.2d* 121, 129, 59 *P.2d* 978; *Weaver v. Bank of America* (1963) 59 *C.2d* 428, 432, 30 *C.R.* 4, 380 *P.2d* 644, 4 *Summary* (10th), *Negotiable Instruments*, §126; *Medros v. Kohn* (1924) 68 *C.A.* 367, 370, 229 *P.* 873; *Waters v. Woods* (1935) 5 *C.A.2d* 483, 490, 42 *P.2d* 1072; *Prussing v. Prussing* (1941) 46 *C.A.2d* 347, 353, 115 *P.2d* 854; *Garrick v. J.M.P.* (1957) 150 *C.A.2d* 232, 239, 309 *P.2d* 896, citing the text; *Glendale Fed. Savings & Loan Assn. v. Marina View Heights Dev. Co.* (1977) 66 *C.A.3d* 101, 137, 135 *C.R.* 802, citing the text; *Baker v. Superior Court* (1983) 150 *C.A.3d* 140, 145, 146, 197 *C.R.* 480, citing the text.)

SUPPLEMENT: [This section is current through the latest supplement]



23 of 192 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

IV. ELECTION OF REMEDIES

D. Where Doctrine Is Not Applicable.

4. Statutory or Contractual Provisions.

3 *Witkin Cal. Proc. Actions* § 201

[§ 201] Statutory or Contractual Provisions.

(1) *Alternative Remedies Available by Statute.* A statute creating alternative remedies may contain an express provision negating the election doctrine. The California Revenue and Taxation Code furnishes the principal examples, in sections providing that the state's remedies are cumulative, and that no action taken by the designated board or official constitutes an election by the state to pursue one remedy to the exclusion of any other stated remedy. (See Rev.C. 6827 [sales and use tax]; Rev.C. 7982 [motor vehicle fuel license tax]; Rev.C. 9031 [use fuel tax]; Rev.C. 19251 [personal income tax and bank and corporation tax]; Rev.C. 30351 [cigarette tax]; Rev.C. 32385 [alcoholic beverage tax].)

Several provisions of the Uniform Commercial Code similarly dispense with the doctrine of election. U.C.C. 2703 provides remedies available to a seller that "are essentially cumulative in nature." (Official Comment 1; see 4 *Summary* (10th), *Sales*, §181.) U.C.C. 9601 provides for cumulative rights and remedies when a debtor is in default on a security agreement. (U.C.C. 9601(c); see 4 *Summary* (10th), *Secured Transactions in Personal Property*, §171.)

The mechanic's lien procedure furnishes another example. The claimant may file an action on the claim and at the same time apply for a stay pending arbitration of an arbitral issue. (*C.C.P.* 1281.5; see 9 *Pacific L. J.* 386.)

(2) *Alternative Remedies Available by Contract.* The election may also be nullified by special provisions in contracts. (See *Ravizza v. Budd & Quinn* (1942) 19 C.2d 289, 294, 120 P.2d 865 [conditional sale]; *Dickinson v. Electric Corp.* (1935) 10 C.A.2d 207, 212, 51 P.2d 205 [lease]; *Construction Machinery Co. v. Willard & Rodman* (1962) 208 C.A.2d 31, 37, 25 C.R. 13 [conditional sale].)

SUPPLEMENT: [This section is current through the latest supplement]



24 of 192 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

IV. ELECTION OF REMEDIES

E. Waiver of Defense.

3 *Witkin Cal. Proc. Actions* § 202

[§ 202] Waiver of Defense.

In *Roam v. Koop* (1974) 41 C.A.3d 1035, 116 C.R. 539, plaintiff sued on a number of causes of action arising out of home repair and remodeling agreements. He alleged fraud and breach of contract, and demanded compensatory and punitive damages; but he also had an attachment levied on defendant's property. The court held that the attachment was an election of the contract remedy which ordinarily would have precluded the jury's award of punitive damages. (See *supra*, §187.) But defendant did not demur to the tort count or otherwise raise the defense during the trial or on motion for new trial; he asserted it for the first time on appeal, relying on *Acme Paper Co. v. Goffstein* (1954) 125 C.A.2d 175, 270 P.2d 505, *supra*, §187. The court in this case found the reasoning in *Acme Paper* unconvincing (41 C.A.3d 1042) and refused to follow it. The correct approach, the court thought, was to start with the proposition that the election of remedies doctrine is merely an extension of the principles of equitable estoppel (see *supra*, §186). Because it is a form of estoppel, ordinarily it must, like estoppel, be pleaded, and a failure to plead it should amount to a waiver. (41 C.A.3d 1044, citing the text.) Procedural errors will ordinarily not be considered on appeal where an objection could have been made but was not made in the lower court. (41 C.A.3d 1044, citing the text.)

SUPPLEMENT: [This section is current through the latest supplement]



25 of 192 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

V. PRELIMINARY STEPS IN ACTIONS AND PROCEEDINGS

A. In General.

3 Witkin Cal. Proc. Actions § 203

[§ 203] In General.

In many situations, a party may or must take some preliminary step before commencing an action or proceeding:

(1) A plaintiff may be required to satisfy certain substantive conditions such as making a demand on the defendant, making an offer of tender, or serving notice of rescission of a contract, in order for his or her cause of action to arise. (See *infra*, §204 et seq.)

(2) A plaintiff may have to designate an agent for service of process, file articles of incorporation, or perform some other preliminary step to establish his or her capacity to sue. (See *infra*, §213.)

(3) A defendant may take steps either before or after pleading for purposes other than trial of the action, such as making a jurisdictional attack, moving for a change of venue, or making an offer of compromise. (See *infra*, §214.)

(4) A plaintiff may be required to file a notice of claim or remedy against either an ordinary defendant or a public entity. (See *infra*, §§215 et seq., 231 et seq.)

(5) A plaintiff may be required to exhaust some other remedy as a procedural condition precedent to maintaining an action. (See *infra*, §313 et seq.)

(6) A plaintiff may be required to furnish security for costs and attorneys' fees. (See *infra*, §350 et seq.)

(7) A plaintiff may put subsequent purchasers or encumbrancers of real property on constructive notice of title defects asserted in a pending action by recording a *lis pendens* in the county in which the real property is located. (See *infra*, §371 et seq.)

(8) An indigent plaintiff may seek relief from certain trial costs by filing an application to sue *in forma pauperis*. (See *infra*, §416 et seq.)

West's Key Number Digest, Action 1 et seq.

SUPPLEMENT: [This section is current through the latest supplement]



26 of 192 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

V. PRELIMINARY STEPS IN ACTIONS AND PROCEEDINGS

B. Substantive Conditions.

1. Demand.

3 Witkin Cal. Proc. Actions § 204

[§ 204] Demand.

(1) *Contract and Quasi-Contract Actions.* Demand is a necessary step before a cause of action arises in quasi-contract to recover benefits conferred by mistake (see 1 *Summary* (10th), *Contracts*, §1014) or in contract where the defendant's duty is to perform on demand (see 1 *Summary* (10th), *Contracts*, §760).

Under the federal Fair Debt Collection Practices Act (15 U.S.C., §1692 et seq.), a consumer debt collector must send written notice containing the amount of the debt, the name of the debtor, and other warnings or face civil liability. (15 U.S.C., §1692g(a).)

(2) *Conversion or Specific Recovery.* Demand is necessary where damages for conversion, or specific recovery of personal property, are sought against a defendant in lawful possession. (See 5 *Summary* (10th), *Torts*, §712; 13 *Summary* (10th), *Personal Property*, §165.)

(3) *Demand on Trustee or Director.* Where the aggrieved person is beneficially interested in the controversy but is not normally the party entitled to sue, his or her right to bring an action usually is dependent upon first having unsuccessfully demanded action by the party who should sue. Thus, the following prerequisites apply:

(a) A beneficiary's right to sue third parties for wrongs against the trust is conditioned on a showing of demand on the trustee and the latter's refusal to act. (See 4 *Cal. Proc.* (5th), *Pleading*, §138.)

(b) A shareholder's right to bring a representative (derivative) action on behalf of the corporation is dependent on a prior demand on the directors to act. (*Corp.C.* 800(b)(2); see 4 *Cal. Proc.* (5th), *Pleading*, §209; *infra*, §361 et seq.)

(4) *Demand for Retraction of Newspaper or Radio Defamation.* C.C. 48a provides for a written demand for the retraction of a defamatory charge in a newspaper or radio broadcast. The statute does not impose a condition precedent to an action for defamation, but it has a similar effect; failure to demand a retraction confines the recovery to special damages, which are difficult to prove. (See *Pridonoff v. Balokovich* (1951) 36 C.2d 788, 791, 228 P.2d 6; *Kapellas v. Kofman* (1969) 1 C.3d 20, 30, 81 C.R. 360, 459 P.2d 912; 5 *Summary* (10th), *Torts*, §629 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]



27 of 192 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

V. PRELIMINARY STEPS IN ACTIONS AND PROCEEDINGS

B. Substantive Conditions.

2. Tender.

3 *Witkin Cal. Proc. Actions* § 205

[§ 205] Tender.

Tender may be a necessary preliminary step in such situations as the following:

(1) In an action for damages for breach of contract or for specific performance where covenants are dependent (conditions concurrent): tender of performance. (See 1 *Summary* (10th), *Contracts*, §§771, 792, 809 et seq.)

(2) In an action for restitution after a unilateral notice of rescission of a contract: offer to restore consideration. (See 1 *Summary* (10th), *Contracts*, §941.)

(3) In an action to recover the possession of or to quiet title to real property sold under an invalid foreclosure sale: tender of the mortgage debt (offer to do equity). (See 4 *Summary* (10th), *Security Transactions in Real Property*, §104.)

(4) In a taxpayer's suit for equitable relief against invalid tax proceedings: tender (or an offer of tender) of the amount of tax properly due (offer to do equity). (See 9 *Summary* (10th), *Taxation*, §295.)

SUPPLEMENT: [This section is current through the latest supplement]



28 of 192 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

V. PRELIMINARY STEPS IN ACTIONS AND PROCEEDINGS

B. Substantive Conditions.

3. Notice of Rescission.

3 Witkin Cal. Proc. Actions § 206

[§ 206] Notice of Rescission.

(1) *Procedure.* Rescission of a contract is effected by an act of the aggrieved party alone, and, on rescission, he or she may sue for restitution of what was given or for its value. The usual procedure is to give notice of the rescission, together with an offer to restore the consideration received (doing equity). (See C.C. 1689 et seq.; 1 *Summary* (10th), *Contracts*, §940 et seq.)

No particular form is required. (See *Hull v. Ray* (1930) 211 C. 164, 167, 294 P. 700 [notice was sufficient, although reciting untenable ground]; *Whittaker v. E.E. McCalla Co.* (1932) 127 C.A. 583, 586, 16 P.2d 282; 7A Am.Jur. P.P. Forms (2002 ed.), *Contracts*, Form 128 et seq.) If the defendant fraudulently obtains real property from the plaintiff, the notice of rescission may be recorded as an instrument affecting the title. (*Dreifus v. Marx* (1940) 40 C.A.2d 461, 466, 104 P.2d 1080.)

Formerly the notice and offer to restore had to be made before the complaint was filed; now the service of the pleading seeking relief based on rescission will be deemed a notice or offer or both. (C.C. 1691; see 1 *Summary* (10th), *Contracts*, §944.)

(2) *Effect of Delay in Giving Notice.* There was a conflict in the earlier decisions on the effect of delay in giving notice. Some cases viewed prompt notice as a condition of the right itself; others treated delay as laches, and found it excusable where the defendant suffered no prejudice. The laches theory is codified in C.C. 1693. (See 1 *Summary* (10th), *Contracts*, §945.)

SUPPLEMENT: [This section is current through the latest supplement]



29 of 192 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

V. PRELIMINARY STEPS IN ACTIONS AND PROCEEDINGS

B. Substantive Conditions.

4. Notice of Dishonor.

3 Witkin Cal. Proc. Actions § 207

[§ 207] Notice of Dishonor.

The holder of a negotiable instrument, as a condition precedent to his or her cause of action against the indorsers and drawer, must give them prompt notice that the party primarily liable has dishonored the instrument. (U.C.C. 3503(a); see *11 Am.Jur.2d* (1997 ed.), *Bills and Notes* §361 et seq.; 4 *Summary* (10th), *Negotiable Instruments*, §63.)

SUPPLEMENT: [This section is current through the latest supplement]
See *11 Am.Jur.2d* (2009 ed.), *Bills and Notes* §328 et seq.



30 of 192 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

V. PRELIMINARY STEPS IN ACTIONS AND PROCEEDINGS

B. Substantive Conditions.

5. Exhaustion of Security or Pursuit of Principal Debtor.

3 *Witkin Cal. Proc. Actions* § 208

[§ 208] Exhaustion of Security or Pursuit of Principal Debtor.

(1) *Secured Creditors*. A secured creditor, e.g., a mortgagee, may be required to exhaust the security for a claim, by foreclosure or other sale, before seeking to enforce the personal obligation of the debtor-mortgagor. (*C.C.P.* 726; see 4 *Summary* (10th), *Security Transactions in Real Property*, §124 et seq.)

(2) *Sureties*. A surety may require that the creditor (a) exhaust the security given by the principal debtor, and (b) proceed against the debtor or pursue any other remedy available only to the creditor that would lighten the surety's burden, before seeking to enforce the obligation of the surety. (*C.C.* 2845, 2849, 2850; *Everts v. Matteson* (1942) 21 *C.2d* 437, 445, 132 *P.2d* 476; *Moffett v. Miller* (1953) 119 *C.A.2d* 712, 713, 260 *P.2d* 215; *Union Bank v. Gradsky* (1968) 265 *C.A.2d* 40, 43, 71 *C.R.* 64; *Rest.3d, Suretyship and Guaranty* §51; see *C.E.B.*, 2 Mortgage and Deed of Trust Practice 3d, §9.9; 4 *Summary* (10th), *Security Transactions in Real Property*, §202 et seq.)

(3) *Creditors of Corporations*. A creditor of a corporation must first exhaust his or her remedies against the corporation (final judgment and unsatisfied execution) before the creditor may proceed against unpaid subscribers, unless proceedings against the corporation would be useless. (*Corp.C.* 414; see 9 *Summary* (10th), *Corporations*, §185.)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Sureties*. See *C.E.B.*, 2 Mortgages, Deeds of Trust, and Foreclosure Litigation 4th, §98.9 et seq.



31 of 192 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

V. PRELIMINARY STEPS IN ACTIONS AND PROCEEDINGS

B. Substantive Conditions.

6. Certificate of Merit in Malpractice Action Against Architect, Engineer, or Land Surveyor.

3 *Witkin Cal. Proc. Actions* § 209

[§ 209] Certificate of Merit in Malpractice Action Against Architect, Engineer, or Land Surveyor.

(1) *In General.* C.C.P. 411.35 requires the plaintiff's attorney in a malpractice action against an architect, an engineer, or a licensed land surveyor to file and serve a "certificate of merit" on or before the date of service of the complaint on any defendant. (C.C.P. 411.35(a); see Cal. Civil Practice, 1 Procedure §1:9 et seq.; 27 *Pacific L. J.* 473.) Only one certification is required, even though multiple defendants have been named or may be named later. (C.C.P. 411.35(c).)

(2) *Content of Certificate.* The certificate is required to state that the attorney has reviewed the facts of the case, has consulted with and received an opinion from at least one architect, professional engineer, or land surveyor who is licensed to practice and practices in California or another state, or who teaches at an accredited college or university and is licensed to practice in California or another state, in the same discipline as the defendant or cross-defendant and who the attorney reasonably believes is knowledgeable in the relevant issues involved in the action, and that the attorney has concluded on the basis of this review and consultation that there is "reasonable and meritorious cause" for the filing of the action. The person consulted may not be a party to the litigation, and must render his or her opinion that the named defendant or cross-defendant "was negligent or was not negligent in the performance of the applicable professional services." (C.C.P. 411.35(b)(1).) (See *Ponderosa Center Partners v. McClellan/Cruz/Gaylord & Associates* (1996) 45 C.A.4th 913, 916, 53 C.R.2d 64 [consultation with structural engineer, instead of with architect who practiced in same discipline as defendant architectural firm, was sufficient to comply with statute].)

(3) *Extension of Time To Comply.* If the attorney is unable to obtain the required consultation before the statute of limitations would run, the certificate may so declare, and must be filed within 60 days after the complaint is filed. (C.C.P. 411.35(b)(2).)

(4) *Inability To Obtain Consultation.* The certificate may state that the attorney was unable to obtain the required consultation after making three unsuccessful good faith attempts with three separate architects, engineers, or surveyors. (C.C.P. 411.35(b)(3).)

(5) *Exceptions for Res Ipsa Loquitur or Failure To Warn Cases.* The requirement does not apply to a case based exclusively on res ipsa loquitur or failure to inform of the consequences of a procedure. In such a case the attorney must

certify, on filing the complaint, that he or she is relying on either or both doctrines, and for that reason is not filing the certificate of merit. (C.C.P. 411.35(d).)

(6) *Privileges of Attorney and Persons Consulted.* An attorney who submits the certificate has a privilege to refuse to disclose the identity of the consultant and the contents of the consultation. The consultant has the same privilege. However, if the attorney claims inability to obtain the required consultation, the court may require the attorney to divulge the names of architects, engineers, or land surveyors who refused. (C.C.P. 411.35(e).)

(7) *Sanctions Against Attorney for Noncompliance.* A violation of the statute may constitute unprofessional conduct and, except for the failure to file the required certificate, may be grounds for discipline against the attorney. (C.C.P. 411.35(f).)

(8) *Demurrer or Motion To Strike for Noncompliance.* Failure to file the certificate is a ground for demurrer or a motion to strike. (C.C.P. 411.35(g).) Where the defendant demurs or moves to strike for the plaintiff's failure to file an adequate certificate, the plaintiff must be granted leave to amend to comply with the statutory requirements for filing the certificate. (*Price v. Dames & Moore (2001) 92 C.A.4th 355, 360, 112 C.R.2d 65* [failure to grant leave to amend was reversible error].)

(9) *Imposition of Costs and Attorneys' Fees for Noncompliance.* On the favorable conclusion of litigation with respect to a party for whom a certificate of merit was or should have been filed, the court may verify compliance with C.C.P. 411.35 by requiring the attorney for the party required to execute the certificate to reveal, in camera, the names, addresses, and phone numbers of the persons consulted and relied on in preparing the certificate. On a finding of noncompliance, the court may order a party or the party's attorney, or both, to pay reasonable expenses, including attorneys' fees, incurred by another party as a result of the noncompliance. (C.C.P. 411.35(h); see *Korbel v. Chou (1994) 27 C.A.4th 1427, 1430, 30 C.R.2d 190* ["favorable conclusion" in C.C.P. 411.35(h) has same meaning as "favorable termination"; hence, successful settlement is "favorable conclusion" for purposes of that subdivision].)

(10) *Applicability to Complaint or Cross-Complaint for Damages and Indemnity.* For purposes of C.C.P. 411.35, "action" includes (a) a cross-complaint for damages or indemnity (C.C.P. 411.35(a)), and (b) "a complaint or cross-complaint for equitable indemnity arising out of the rendition of professional services whether or not the complaint or cross-complaint specifically asserts or utilizes the terms 'professional negligence' or 'negligence' " (C.C.P. 411.35(i)).

(11) *Former Requirement for Medical Malpractice Actions.* From 1979 through 1988, former C.C.P. 411.30 required a certificate of merit in malpractice actions against physicians, surgeons, dentists, podiatrists, and chiropractors.

(12) *Former Requirement for Malpractice Actions Against Common Interest Development Contractors.* From 1992 through 1997, former C.C.P. 411.36 required a certificate of merit in malpractice actions brought by a common interest development association under and arising out of the occupational negligence of a licensed contractor.

West's Key Number Digest, Negligence 1506

SUPPLEMENT: [This section is current through the latest supplement]



32 of 192 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

V. PRELIMINARY STEPS IN ACTIONS AND PROCEEDINGS

B. Substantive Conditions.

7. Recordation of Change in Ownership Agreement or Statement.

3 Witkin Cal. Proc. Actions § 210

[§ 210] Recordation of Change in Ownership Agreement or Statement.

No person or entity may maintain an action to enforce the terms of a real property sale contract or a mobilehome conditional sale contract providing for a change of ownership of real property or a mobilehome subject to local property taxation until the agreement is recorded or the change of ownership statement is filed with the county recorder. (*C.C.P. 1062.10.*) (On requirement of change of ownership statement where there is change of ownership, see Rev.C. 480, 9 *Summary* (10th), *Taxation*, §229.)

SUPPLEMENT: [This section is current through the latest supplement]



33 of 192 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

V. PRELIMINARY STEPS IN ACTIONS AND PROCEEDINGS

B. Substantive Conditions.

8. Order Allowing Conspiracy Action Against Attorney.

a. In General.

3 *Witkin Cal. Proc. Actions* § 211

[§ 211] In General.

(1) *Enactment of Statute. Wolfrich Corp. v. United Services Auto. Assn.* (1983) 149 C.A.3d 1206, 1210, 197 C.R. 446, 1 Cal. Proc. (5th), Attorneys, §287, held that an attorney could be found liable for participating in a civil conspiracy with his or her client. In 1988, C.C. 1714.10 was enacted to modify this holding, and the statute was expanded by subsequent amendments.

(2) *No Action Without Order.* A cause of action against an attorney for a civil conspiracy with his or her client "arising from any attempt to contest or compromise a claim or dispute, and which is based upon the attorney's representation of the client," may not be included in a complaint or other pleading (a) unless the court enters an order allowing the pleading including such a claim to be filed, (b) after the court determines that "there is a reasonable probability that the party will prevail in the action." (C.C. 1714.10(a).) The ruling, if favorable to the petitioner, "shall permit the proposed pleading to be filed." (C.C. 1714.10(a).)

In *Burtscher v. Burtscher* (1994) 26 C.A.4th 720, 31 C.R.2d 682, plaintiff brought an action against defendants--her former husband, his new wife, and their corporation--alleging ejectment and various other theories in a dispute over possession of a home. Plaintiff moved for leave to amend the complaint to add a cause of action for civil conspiracy against the attorney who had represented the husband in transactions between the former spouses regarding the home and had also represented the corporation. The trial judge found that plaintiff had made a prima facie showing under C.C. 1714.10(a), and granted the motion. *Held*, affirmed.

(a) The "reasonable probability" requirement of C.C. 1714.10(a) does not mandate that plaintiff prove that she would "more likely than not" prevail on the claim. Rather, plaintiff is only required to make a prima facie showing. (26 C.A.4th 725.)

(b) Plaintiff made the requisite showing. Defense counsel conceded that the attorney had called a locksmith to change the locks on the home, had called a storage company to take away plaintiff's possessions, had accompanied the new wife on a trip to the property, and had called the sheriff's department to eject the former wife's guest. These activities went beyond the normal role of a legal representative; self-help is not the practice of law. (26 C.A.4th 726.)

(3) *When Statute Is Not Applicable.* C.C. 1714.10 does not apply where (a) the attorney has an independent legal duty to the plaintiff (C.C. 1714.10(c)(1)), or (b) the attorney's acts go beyond the performance of a professional duty to serve the client and involve a conspiracy to violate a legal duty in furtherance of the attorney's financial gain (C.C. 1714.10(c)(2)). (See *Evans v. Pillsbury, Madison & Sutro* (1998) 65 C.A.4th 599, 605, 76 C.R.2d 679 [neither statutory exemption excused prefiling requirement for action against attorney and his law firm; although C.C. 1714.10(c)(2) applied to attorney, action included law firm, and action must survive or fail as single unit]; *Westamco Inv. Co. v. Lee* (1999) 69 C.A.4th 481, 485, 81 C.R.2d 634 [prefiling requirement did not apply where action did not allege conspiracy, but rather, alleged malicious prosecution by attorney for prosecuting claim without probable cause and adequate investigation]; *Berg & Berg Enterprises, LLC v. Sherwood Partners* (2005) 131 C.A.4th 802, 836, 32 C.R.3d 325 [neither statutory exemption excused action by creditor alleging civil conspiracy between assignee for benefit of creditors and assignee's attorney; attorney did not owe independent duty to creditor under C.C. 1714.10(c)(1), and did not receive economic gain under C.C. 1714.10(c)(2) by allegedly submitting excessive bills to assignee-client].)

(4) *Constitutionality.* C.C. 1714.10 does not violate due process, equal protection, or the right to a jury trial. (*Hung v. Wang* (1992) 8 C.A.4th 908, 919, 11 C.R.2d 113.)

West's Key Number Digest, Attorney and Client 26

SUPPLEMENT: [This section is current through the latest supplement]

(3) *When Statute Is Not Applicable.* See *Panoutsopoulos v. Chambliss* (2007) 157 C.A.4th 297, 306, 68 C.R.3d 647 [claim by lessees that lessor and its attorneys conspired to interfere with lessees' quiet possession of premises by repeatedly sending them letters was not viable under C.C. 1714.10(c)(2), because attorneys were not party to lease and therefore owed plaintiffs no contractual duty; claim by lessees that attorneys conspired with lessor to commit fraud was not viable under C.C. 1714.10(c)(2), because alleged fraud consisted of attempt that did not result in actionable harm].



34 of 192 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

V. PRELIMINARY STEPS IN ACTIONS AND PROCEEDINGS

B. Substantive Conditions.

8. Order Allowing Conspiracy Action Against Attorney.

b. Procedure.

3 *Witkin Cal. Proc. Actions* § 212

[§ 212] Procedure.

(1) *Petition, Service, Opposing Affidavits, and Decision.* The party must file a verified petition, accompanied by the proposed pleading and supporting affidavits stating the facts upon which the liability is based. The court must order service of the petition on the opposing party and permit the opposing party to submit opposing affidavits prior to making its determination. (C.C. 1714.10(a).)

In *Burtscher v. Burtscher* (1994) 26 C.A.4th 720, 31 C.R.2d 682, supra, §211, the court held that submission of (a) verified complaints and (b) supporting declarations under penalty of perjury was sufficient, even where the petition itself was not verified. (26 C.A.4th 727.)

(2) *Tolling of Limitations Period.* The filing of the petition, the proposed pleading, and accompanying affidavits tolls the running of any applicable statute of limitations until the final determination of the matter. (C.C. 1714.10(a).)

(3) *Necessity of Timely Objection to Noncompliance.* The benefit conferred by the statute is waived unless the attorney objects at the first available opportunity, by demurrer, motion to strike, or other appropriate motion. (*Villa Pac. Bldg. Co. v. Superior Court* (1991) 233 C.A.3d 8, 12, 284 C.R. 227.)

The holding in *Villa Pac. Bldg. Co.* was codified in 1991. Failure to obtain a court order where required by C.C. 1714.10(a) is a defense to an action for civil conspiracy filed in violation of the statute. The defense must be raised by the attorney of the party charged with civil conspiracy on that party's first appearance by demurrer, motion to strike, or other motion or application. Failure to timely raise the defense constitutes a waiver of the defense. (C.C. 1714.10(b).)

In *Burtscher*, the court held that plaintiff did not waive her right to amend her complaint to add a cause of action for civil conspiracy against defendant attorney. There are no time limits for filing a motion under C.C. 1714.10, and, because plaintiff made her motion within 5 months of the filing of the original complaint, there was no clear showing of laches. (26 C.A.4th 728.)

(4) *Special Civil Proceeding Subject to Appeal as Final Judgment.* C.C. 1714.10 establishes a special proceeding of

a civil nature, and an order under the statute is appealable as a final judgment in a civil action. (C.C. 1714.10(d); see C.C. 1714.10(e) [C.C. 1714.10(d) is declaratory of existing law]; *Berg & Berg Enterprises, LLC v. Sherwood Partners* (2005) 131 C.A.4th 802, 819, 32 C.R.3d 325 [relying on *Burtscher*; order granting leave to file amended complaint alleging civil conspiracy was appealable in its entirety under C.C. 1714.10(d), even though no petition was filed as required by C.C. 1714.10(a)].)

SUPPLEMENT: [This section is current through the latest supplement]



35 of 192 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

V. PRELIMINARY STEPS IN ACTIONS AND PROCEEDINGS

C. Steps Relating to Capacity of Parties.

3 *Witkin Cal. Proc. Actions* § 213

[§ 213] Steps Relating to Capacity of Parties.

(1) *Foreign Corporations.* Another type of preliminary step may be necessary before the plaintiff can sue, although it is neither a condition of a substantive right nor a procedural condition to a particular action. The principal example is the requirement of filing articles, designating an agent for service of process, and paying license taxes by a foreign corporation. Noncompliance prevents the bringing of any actions or classes of actions by depriving the party of the right of access to the courts. (See 4 *Cal. Proc.* (5th), *Pleading*, §88.) (On limited incapacity resulting from failure of partnership or individual to file certificate of doing business under fictitious name, see 9 *Summary* (10th), *Partnership*, §8.)

(2) *Minors, Incompetent Persons, and Conservatees.* A minor, an incompetent person, or a conservatee lacks capacity to sue except by a conservator, guardian, or guardian ad litem. (*C.C.P.* 372(a); see 4 *Cal. Proc.* (5th), *Pleading*, §70.) However, a minor 12 years of age or older may appear in court without a guardian, counsel, or guardian ad litem to request or oppose a request for (a) an injunction or temporary restraining order to prevent harassment, workplace violence or threats, or domestic violence, or (b) a protective order under the Uniform Parentage Act. (*C.C.P.* 372(b).) A minor under age 12 also may appear in court without counsel for those purposes, providing the minor is accompanied by an appointed guardian ad litem. (*C.C.P.* 374.) (See 4 *Cal. Proc.* (5th), *Pleading*, §73.)

(3) *Receivers.* A receiver is an officer of the court who cannot sue or be sued without permission of the court. Hence, an order of court must be obtained before commencing an action by or against the receiver. (See 4 *Cal. Proc.* (5th), *Pleading*, §148.)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Minors, Incompetent Persons, and Conservatees.* Notwithstanding *C.C.P.* 372(a), a minor may appear in court without a guardian ad litem in specified family court proceedings involving child custody, visitation, or support. If the court finds that the minor parent is unable to understand the nature of the proceedings or to assist counsel in preparing the case, the court must, on its own motion or on a motion by the minor parent or the minor parent's counsel, appoint a guardian ad litem. (*C.C.P.* 372(c), added in 2008; see 4 *Cal. Proc.* (5th), *Pleading*, Supp., §70.)



36 of 192 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

V. PRELIMINARY STEPS IN ACTIONS AND PROCEEDINGS

D. Steps by Defendant.

3 *Witkin Cal. Proc. Actions* § 214

[§ 214] Steps by Defendant.

The normal response of a defendant to the service of a complaint and summons is to plead by answer or demurrer, thus framing the issues of fact and law to be tried. There are, however, many other steps that a defendant may or should take either before or after pleading for purposes other than trial of the cause. The following are important illustrations:

(1) A jurisdictional attack on the plaintiff's action; e.g., a motion to dismiss, a motion to quash summons, a motion to transfer for lack of jurisdiction, a petition for prohibition to restrain trial, or a petition for mandamus to compel dismissal. (See 2 *Cal. Proc.* (5th), *Jurisdiction*, §§217, 398, 399.)

(2) An attack on the place of trial, by a motion for change of venue. (See *infra*, §905 et seq.)

(3) Removal of the action to federal court. (See 2 *Cal. Proc.* (5th), *Jurisdiction*, §83.)

(4) An application for a mandatory stay of proceedings under the Servicemembers Civil Relief Act. (See 7 *Cal. Proc.* (5th), *Trial*, §30.)

(5) A stipulation, or an application for a discretionary order, extending the time to plead. (See 2 *Cal. Proc.* (5th), *Jurisdiction*, §232; 4 *Cal. Proc.* (5th), *Pleading*, §10.)

(6) A formal general appearance to prevent a judgment by default. (See 2 *Cal. Proc.* (5th), *Jurisdiction*, §193.)

(7) Avoidance of the expense of trial and the liability for costs by an offer to compromise. (See 6 *Cal. Proc.* (5th), *Proceedings Without Trial*, §81 et seq.)

(8) Protection of a home against attachment or execution by recording a declaration of homestead, and safeguarding other exempt property by a claim of exemption. (See 8 *Cal. Proc.* (5th), *Enforcement of Judgment*, §§180 et seq., 215 et seq.)

(9) A demand that the plaintiff, where required by statute, furnish security for costs. (See *infra*, §353 et seq.)

(10) An objection to the sufficiency of the plaintiff's sureties on an attachment, injunction, or claim and delivery

bond. (See 6 *Cal. Proc.* (5th), *Provisional Remedies*, §§27 et seq., 116, 382 et seq.)

(11) Furnishing of a bond to protect property against the plaintiff's attachment or seizure of property under claim and delivery proceedings. (See 6 *Cal. Proc.* (5th), *Provisional Remedies*, §§213, 214, 271.)

(12) A demand for a bill of particulars. (See 4 *Cal. Proc.* (5th), *Pleading*, §499.)

(13) Obtaining proper representation of a minor or incompetent by the appointment of a guardian ad litem. (See 4 *Cal. Proc.* (5th), *Pleading*, §70.)

(14) An action to establish that a person is the victim of identity theft in connection with a claim against that person, or filing a cross-complaint to establish that fact if the claimant has brought an action to recover on the claim. A person who sufficiently proves that fact is entitled to a declaration that he or she is not obligated to the claimant on the claim, injunctive relief, dismissal of the claimant's action, actual damages, civil penalties, and other relief. (C.C. 1798.92 et seq.)

(15) Notice to another person whose interest would be affected by the litigation, or who has a duty to defend. Thus, if an action is brought against a person who has an indemnity bond or covenant, the person may give seasonable notice to the indemnitors or covenantors with permission to defend; and judgment may be rendered against them instead of the defendant. (*C.C.P.* 1055.) (See C.C. 1825 [bailee must notify bailor of proceeding by third party claiming adversely]; *Govt.C.* 825 [action against employee of public entity, duty to defend]; *Govt.C.* 995.9 [action against witness who has testified on behalf of public entity, duty to defend]; *McCormick v. Marcy* (1913) 165 C. 386, 392, 132 P. 449 ["voucher to warranty," i.e., covenantor or successor may notify covenantor to defend title to land]; *Culley v. Cochran* (1930) 107 C.A. 525, 290 P. 484 [defendant constable sold property under attachment; notice to surety on attachment bond]; *Overholtzer v. Northern Counties Title Ins. Co.* (1953) 116 C.A.2d 113, 125, 253 P.2d 116 [requirement of notice in title insurance policy]; *Zander v. Texaco* (1968) 259 C.A.2d 793, 66 C.R. 561 [notice to insurer]; C.E.B., 1 Government Tort Liability Practice 4th, §4.1 et seq. [notice to public entity to defend and indemnify employee]; 73 A.L.R.2d 504 [notice to indemnitor]; 2 *Summary* (10th), *Insurance*, §312 et seq. [cooperation clause in automobile liability insurance policy requiring that insured notify company of accident]; 5 *Summary* (10th), *Torts*, §375 et seq. [notice to public entity to defend and indemnify employee].)

SUPPLEMENT: [This section is current through the latest supplement]



37 of 192 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

VI. NOTICE OF CLAIM OR REMEDY AGAINST ORDINARY DEFENDANT

A. Creditor's Action Against Estate.

3 Witkin Cal. Proc. Actions § 215

[§ 215] Creditor's Action Against Estate.

(1) *Claim.* A creditor who seeks to recover on certain kinds of claims against a decedent's estate in probate must first file a written claim, in proper form, and within the proper time, as a condition precedent to the right to sue. The right of action is barred if the period elapses before the claim is filed. (*Prob.C. 9000* et seq.; see C.E.B., 1 Decedent Estate Practice, §12.8 et seq.; Cal. Civil Practice, 1 Procedure, §1:77 et seq.; Rutter Group, Civil Proc. Before Trial §1:825 et seq.; *31 Am.Jur.2d* (2002 ed.), *Executors and Administrators* §564 et seq.; 10 Am.Jur. P.P. Forms (2005 ed.), *Executors and Administrators*, Form 459 et seq.; 8 Am.Jur. Legal Forms 2d (2007 ed.), §104:121 et seq.; 3 Am.Jur. Trials 738 [methods of avoiding consequences of failure to present timely claim]; 14 *Summary* (10th), *Wills and Probate*, §612 et seq.)

(2) *No Tolling for Minors.* The minor's statute of limitations tolling provision (*C.C.P. 352*, infra, §§696, 697) does not apply to probate claims. (*Billups v. Tiernan* (1970) 11 C.A.3d 372, 376, 90 C.R. 246.)

(3) *Amendment of Claim.* Although a defective claim filed within the period may be amended or revised after the period has run, the amendment or revision may not increase the amount of the claim; must be filed in the same manner as the claim; and may not be made for any purpose after the earlier of (a) the time the court makes an order for final distribution, or (b) 1 year after letters are first issued to a general personal representative. (*Prob.C. 9104(a)*, (b), (c); see 14 *Summary* (10th), *Wills and Probate*, §634.)

West's Key Number Digest, *Executors and Administrators* 202 et seq.

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Claim.* See C.E.B., 2 Decedent Estate Practice 2d, §14.17 et seq.



38 of 192 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

VI. NOTICE OF CLAIM OR REMEDY AGAINST ORDINARY DEFENDANT

B. Landlord's Proceeding Against Tenant.

3 Witkin Cal. Proc. Actions § 216

[§ 216] Landlord's Proceeding Against Tenant.

(1) *Unlawful Detainer: Three-Day Notice.* A landlord who invokes the summary remedy of unlawful detainer against a tenant must give a 3-day notice as a condition precedent to filing the proceeding. (*C.C.P. 1161; Johnson v. Sanches (1942) 56 C.A.2d 115, 132 P.2d 853; see 49 Am.Jur.2d (2006 ed.), Landlord and Tenant §845 et seq.; 12 Summary (10th), Real Property, §720 et seq.*)

(2) *Reletting Premises for Tenant's Benefit.* Another notification that the landlord must sometimes give is the notice of reletting of premises for the tenant's benefit. (See *49 Am.Jur.2d (2006 ed.), Landlord and Tenant §§216, 635 et seq.; 16A Am.Jur. P.P. Forms (2000 ed.), Landlord and Tenant, Form 49 et seq.*)

Under C.C. 1951.7, a notice of reletting is required only if (a) the lessee has made an advance payment of a sum in excess of 1 month's rent, (b) the amount of rent unpaid at the time of the termination exceeds the amount of the advanced payment, and (c) the lessee has made a written request for the notice. The notice must state the name and address of the new lessee, the length of the new lease, and the amount of the rent. It must be delivered to the lessee personally or by regular mail, not later than 30 days after the new lessee takes possession. (See *12 Summary (10th), Real Property, §699.*)

SUPPLEMENT: [This section is current through the latest supplement]



39 of 192 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

VI. NOTICE OF CLAIM OR REMEDY AGAINST ORDINARY DEFENDANT

C. Enforcement of Mechanic's Lien or Stop Notice.

1. Private Property: Mechanic's Lien.

a. In General.

3 Witkin Cal. Proc. Actions § 217

[§ 217] In General.

Persons performing services or furnishing equipment or materials on any "work of improvement" (any kind of construction on or improvement of land; see C.C. 3106) have certain special remedies to secure and enforce payment of their claims. (See C.C. 3082 et seq.) The principal remedy is the recording of a mechanic's lien on privately owned property. (C.C. 3110 et seq.) (See C.E.B., Mechanics' Liens 3d, Chaps. 2 and 3; Cal. Civil Practice, 2 Real Property Litigation, Chap. 10; 54 *Cal. L. Rev.* 179; 21 *Hastings L. J.* 216; 9 Santa Clara Lawyer 111; 17B Am.Jur. P.P. Forms (2002 ed.), Mechanics' Liens, Form 1 et seq.; 27 *A.L.R.2d* 1169 [sufficiency of notice of mechanic's lien about nature of work]; 4 *Summary* (10th), *Security Transactions in Real Property*, §26 et seq.; on stop notices, see *infra*, §§219, 220; on constitutionality of provisions, see *infra*, §221.)

California's mechanic's lien statute applies only to California projects. (*Mechanical Wholesale Corp. v. Fuji Bank, Ltd.* (1996) 42 *C.A.4th* 1647, 1655, 50 *C.R.2d* 466.)

West's Key Number Digest, Mechanics' Liens 1 et seq.

SUPPLEMENT: [This section is current through the latest supplement]



40 of 192 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

VI. NOTICE OF CLAIM OR REMEDY AGAINST ORDINARY DEFENDANT

C. Enforcement of Mechanic's Lien or Stop Notice.

1. Private Property: Mechanic's Lien.

b. Preliminary Notice.

3 Witkin Cal. Proc. Actions § 218

[§ 218] Preliminary Notice.

(1) *Who Must Give Notice.* The claimant (C.C. 3085, 3110 et seq.) must give a "preliminary 20-day notice (private work)." Under C.C. 3097(a), three types of lien claimants are exempted from the preliminary notice requirement: (a) a claimant who is under direct contract with the owner, (b) a claimant who performs actual labor for wages; and (c) a claimant, whether a person or entity (including an express trust fund), to whom a portion of a laborer's compensation is paid under an agreement with the laborer or the laborer's collective bargaining agent. (See *M. Arthur Gensler, Jr. & Associates v. Larry Barrett* (1972) 7 C.3d 695, 706, 103 C.R. 247, 499 P.2d 503 [preliminary notice under former C.C.P. 1193(a) (now C.C. 3097(a)) was not required where owner had actual notice of improvements and no notice of nonresponsibility was filed]; *Schrader Iron Works v. Lee* (1972) 26 C.A.3d 621, 631, 103 C.R. 106 [same; subsequent purchaser with notice]; *Rich-Lee Equipment Rentals v. Intermountain Const. Co.* (1978) 79 C.A.3d 581, 585, 145 C.R. 106 [furnisher of labor is not within exception in C.C. 3097(a) for "one performing actual labor for wages"]; *Kim v. JF Enterprises* (1996) 42 C.A.4th 849, 855, 50 C.R.2d 141 [owner's constructive knowledge, derived from his relationship to lessee, did not exempt claimant from serving preliminary notice]; C.E.B., *Mechanics' Liens* 3d, §3.33 et seq.; 48 A.L.R.3d 153 [sufficiency of designation of owner in notice]; 53 *Am.Jur.2d* (2006 ed.), *Mechanics' Liens* §181 et seq.)

(2) *To Whom Notice Must Be Given.* The preliminary notice must be furnished to the owner, the original contractor, and the construction lender, or to a "reputed" owner, contractor, or lender. (C.C. 3097(a), (b), 3114; see *Harold L. James v. Five Points Ranch* (1984) 158 C.A.3d 1, 6, 204 C.R. 494; *Kodiak Industries v. Ellis* (1986) 185 C.A.3d 75, 81, 229 C.R. 418; 76 A.L.R.3d 605 [who is "owner" to whom notice must be given].)

Notice to the owner of the claim of lien is no longer required, but the claim must be timely recorded. (See C.C. 3115 et seq.)

Only one notice need be given for all labor and materials furnished, unless they are furnished under contracts with more than one subcontractor, in which case notice must be given to each subcontractor. (C.C. 3097(g).)

(3) *Contents of Notice.* The preliminary notice is a written notice containing such information as what labor and materials are to be furnished and an estimate of their total price; the name and address of the person furnishing the labor

and materials; the name of the person who contracted for their purchase; a description of the jobsite sufficient for identification; and a statement, addressed to the owner, warning that a lien may be placed against the property if bills are not paid for the labor and materials, even if the owner has paid the contractor. (C.C. 3097(c).)

(4) *Time for Giving Notice.* The preliminary notice must be given prior to recording the claim of lien (C.C. 3097), and not later than 20 days after the claimant first furnished labor, service, equipment, or materials to the jobsite. It may be given subsequently at any time, but in this situation the claimant is entitled to a lien only for work or materials furnished within 20 days prior to service of the notice, and at any time thereafter (C.C. 3097(d)). (See 52 *A.L.R.3d* 797 [abandonment of construction or of contract as affecting time for notice].)

(5) *Service of Notice.* C.C. 3097(f) specifies the manner of service. Proof that the notice was served in accordance with the requirements of C.C. 3097(f) must be made (a) by proof of service affidavit by the person making the service, or (b) if the notice has been mailed, by affidavit plus evidence of mailing. (C.C. 3097.1, 3114; see 7 *Pacific L. J.* 327; 11 *Pacific L. J.* 347.)

SUPPLEMENT: [This section is current through the latest supplement]



41 of 192 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

VI. NOTICE OF CLAIM OR REMEDY AGAINST ORDINARY DEFENDANT

C. Enforcement of Mechanic's Lien or Stop Notice.

2. Private Property: Stop Notice.

3 Witkin Cal. Proc. Actions § 219

[§ 219] Private Property: Stop Notice.

(1) *Nature and Purpose.* The original contractor may file a stop notice with the construction lender, but not with the owner. However, other persons entitled to file a mechanic's lien may file a stop notice with either the owner or the construction lender, or both. (C.C. 3158, 3159.) The stop notice allows an unpaid secondary improver to file a claim against undisbursed construction funds. This remedy avoids the priority problems of mechanics' liens (see 4 *Summary* (10th), *Security Transactions in Real Property*, §§69, 70), which might render the security device valueless. (See *Mechanical Wholesale Corp. v. Fuji Bank, Ltd.* (1996) 42 C.A.4th 1647, 1655, 50 C.R.2d 466 [California's stop notice provisions for private work apply only to California projects]; C.E.B., *Mechanics' Liens* 3d, §3.33 et seq.; 25 *Hastings L. J.* 1043 [due process requirements].)

(2) *Preliminary Notice.* The claimant must give a "Preliminary 20-day notice (private work)" before filing the stop notice and not later than 20 days after he or she first furnished work or materials to the jobsite. (C.C. 3097, 3160(a).) The preliminary notice may be given subsequently, as in the case of the preliminary notice for a mechanic's lien (supra, §217), but is similarly limited in coverage. (C.C. 3097(d).)

(3) *Stop Notice.* The claimant must also serve the stop notice. (For form, see Cal. Civil Practice, 2 Real Property Litigation, §10:65.) Service must be made within the time for recording a claim of mechanic's lien. (C.C. 3160(b); see C.C. 3115 et seq.) If the claimant fails to serve a stop notice after a written demand from the owner, the claimant forfeits the right to a mechanic's lien. (C.C. 3158.) (On right of original contractor to serve owner of private improvement with 10-day "stop work order" for failure to pay undisputed sums owed under written contract, see C.C. 3260.2; on condition of action on payment bond for private work, see *infra*, §222; on bonded stop notice to construction lender, see C.C. 3083.)

West's Key Number Digest, *Mechanics' Liens* 1 et seq.

SUPPLEMENT: [This section is current through the latest supplement]



42 of 192 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

VI. NOTICE OF CLAIM OR REMEDY AGAINST ORDINARY DEFENDANT

C. Enforcement of Mechanic's Lien or Stop Notice.

3. Public Property: Stop Notice.

3 *Witkin Cal. Proc. Actions* § 220

[§ 220] Public Property: Stop Notice.

(1) *Nature and Purpose.* Where public property is involved, there is no mechanic's lien (C.C. 3109), but a stop notice serves the same purpose. (C.C. 3179 et seq.; see *Miles v. Ryan* (1916) 172 C. 205, 207, 157 P. 5 [no mechanics' liens against public property]; *Pacific Employers Ins. Co. v. California* (1970) 3 C.3d 573, 576, 91 C.R. 273, 477 P.2d 129 [same]; *North Bay Const. v. Petaluma* (2006) 143 C.A.4th 552, 563, 49 C.R.3d 455, citing the text [same]; C.E.B., *Mechanics' Liens* 3d, Chap. 4.)

(2) *Preliminary Notice.* The claimant (see C.C. 3085, 3098(a)) must give a "Preliminary 20-day notice (public work)" stop notice. (C.C. 3098.) This is a written notice given to the contractor and to the relevant public agency prior to filing the stop notice, and not later than 20 days after the claimant first furnished labor, services, equipment, or materials to the jobsite. (C.C. 3098(a).) The preliminary notice may be given subsequently, as in the case of the preliminary notice for a mechanic's lien for private work (supra, §§217, 218), but the coverage is similarly limited. (C.C. 3098(d).)

(3) *Stop Notice.* The claimant must also file a stop notice with the appropriate public official within 90 days after completion or cessation of the work, or, if a notice of completion or cessation is recorded, within 30 days of recording. (C.C. 3184; see *W.F. Hayward Co. v. Transamerica Ins. Co.* (1993) 16 C.A.4th 1101, 1106, 20 C.R.2d 468 [cessation of labor for 30 days constituted "completion or cessation" within meaning of C.C. 3184, and started running of 90-day period for filing stop notice]; for form, see Cal. Civil Practice, 2 Real Property Litigation, §10:66.) (On condition of action on payment bond for public work, see *infra*, §222.)

West's Key Number Digest, Counties 22, 29; Municipal Corporations 369 et seq.

SUPPLEMENT: [This section is current through the latest supplement]



43 of 192 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

VI. NOTICE OF CLAIM OR REMEDY AGAINST ORDINARY DEFENDANT

C. Enforcement of Mechanic's Lien or Stop Notice.

4. Constitutionality of Statutes.

3 *Witkin Cal. Proc. Actions* § 221

[§ 221] Constitutionality of Statutes.

In *Connolly Dev. v. Superior Court* (1976) 17 C.3d 803, 132 C.R. 477, 553 P.2d 637, the owner and developer of a shopping center entered into a construction contract and arranged for a construction loan from a bank. An unpaid materialman recorded a mechanic's lien and filed a bonded stop notice with the bank, and later filed a complaint to foreclose the lien and enforce the stop notice. The owner and the bank demurred, raising the issue of unconstitutionality of the statutes. *Held*, they are valid.

(a) *Recording of lien and filing of stop notice constitute taking of owner's property interest.*

(1) Under the holdings of *Randone v. Appellate Dept.* (1971) 5 C.3d 536, 96 C.R. 709, 488 P.2d 13, 6 Cal. Proc. (5th), *Provisional Remedies*, §50, *Beaudreau v. Superior Court* (1975) 14 C.3d 448, 121 C.R. 585, 535 P.2d 713, *infra*, §351, and *Brooks v. Small Claims Court* (1973) 8 C.3d 661, 105 C.R. 785, 504 P.2d 1249, 2 Cal. Proc. (5th), *Courts*, §312, any significant deprivation of a property interest is a taking; it need not reach the magnitude of physical seizure. (17 C.3d 811, 812.)

(2) The lien allows the owner to retain possession and use and the right of disposition; but it may severely hamper the ability to sell or encumber, and the owner may be forced to pay a possibly invalid claim in order to clear title for a pending transaction. (17 C.3d 812.) The stop notice attaches the obligation of the lender to provide credit to the owner; it is thus a form of garnishment, and a taking under the *Randone* rule. (17 C.3d 813.) Neither the lien nor the stop notice, however, is a taking of the lender's property. (17 C.3d 813, footnote 9.)

(b) *Imposition of lien and stop notice constitutes state action.*

(1) The lien is governed by detailed statutory provisions, becomes effective only on recordation with the county recorder, and can be enforced only by resort to the state courts. The stop notice is also subject to comprehensive statutory regulation, and creates a new remedy unknown at common law; although it attaches without filing or recordation before any state official, its lien is effective only because the statute permits suit to impose personal liability on a lender or owner who disregards it. (17 C.3d 815, citing *Adams v. Department of Motor Vehicles* (1974) 11 C.3d 146, 113 C.R. 145, 520 P.2d 961, 7 Summary (10th), *Constitutional Law*, §647.)

(2) *Kruger v. Wells Fargo Bank* (1974) 11 C.3d 352, 113 C.R. 449, 521 P.2d 441, 4 Summary (10th), *Negotiable Instruments*, §83, 7 Summary (10th), *Constitutional Law*, §619, emphasized the fact that the remedy was unknown to the common law; but it was criticized on that point and the holding today does not rest merely on that ground. (17 C.3d 815, footnote 14.)

(3) Cases holding that self-help remedies do not constitute state action (e.g., *Kruger* and *Adams*) are distinguishable. The state here does not merely recognize the lawfulness of private action, but compels the owner and any subsequent purchaser or encumbrancer to recognize the priority of the mechanic's lien; and it does not merely permit the laborer and materialman to file a stop notice, but requires the lender, on pain of personal liability, to withhold the claimed funds. Also, neither can be enforced without the assistance of the state. (17 C.3d 816.)

(c) *Lien and stop notice laws comply with due process.*

(1) This issue, of first impression in California, turns on the general principles of *Sniadach v. Family Finance Corp. of Bay View* (1969) 395 U.S. 337, 89 S.Ct. 1820, 23 L.Ed.2d 349, and its progeny (see 7 Summary (10th), *Constitutional Law*, §646 et seq.; 6 Cal. Proc. (5th), *Provisional Remedies*, §246 et seq.). (17 C.3d 817.)

(2) California's mechanic's lien and stop notice laws are significantly different from the garnishment statute struck down in *North Georgia Finishing v. Di-Chem* (1975) 419 U.S. 601, 95 S.Ct. 719, 42 L.Ed.2d 751, 7 Summary (10th), *Constitutional Law*, §646. (17 C.3d 820.) And *North Georgia* did not establish inflexible requirements for summary creditors' remedies; resolution of the issue requires analysis of the governmental and private interests affected. (17 C.3d 823, 825.)

(3) As to the interest of the debtor (owner): Although taking of property by stop notice or mechanic's lien is not de minimis, it is nonetheless of relatively minor effect: The lien does not deprive the owner of possession or use of the property, and the stop notice attaches only to a limited line of credit set aside to pay construction expenses. (17 C.3d 825.)

(4) As to the interests of laborers and materialmen: These have long been favored by the law because they in part create the property on which the lien attaches; the mechanic's lien is of constitutional origin; the stop notice was created by the Legislature to meet the problem of construction loan trust deeds recorded before the commencement of construction; and the protective policy serves the needs of the construction industry. (17 C.3d 825.) (See 65 Cal. L. Rev. 513.)

SUPPLEMENT: [This section is current through the latest supplement]



44 of 192 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

VI. NOTICE OF CLAIM OR REMEDY AGAINST ORDINARY DEFENDANT

D. Action on Payment Bond for Work of Improvement.

3 *Witkin Cal. Proc. Actions* § 222

[§ 222] Action on Payment Bond for Work of Improvement.

(1) *Private Work*. A claimant seeking to enforce a payment bond for private work must give the 20-day preliminary notice (private work) specified in C.C. 3097 (see *supra*, §218). (C.C. 3242(a).)

If that preliminary notice is not given, the claimant may nevertheless enforce the claim by giving written notice to the surety and the bond principal, as provided in C.C. 3227. The written notice must be given within 15 days after recordation of a notice of completion (see C.C. 3093); if no notice of completion was recorded, the written notice is extended to 75 days after completion of the work of improvement. (C.C. 3242(b).) (See C.E.B., *Mechanics' Liens* 3d, §§2.100 et seq., 10.1 et seq.)

(2) *Public Work*. There is no right to file a mechanic's lien against public property (see *supra*, §220), but a claimant seeking to enforce a payment bond for public work must give the 20-day preliminary stop notice (public work) specified in C.C. 3098 (see *supra*, §220). (C.C. 3098, 3252(a); see *California Elec. Supply Co. v. United Pac. Life Ins. Co.* (1964) 227 C.A.2d 138, 146, 38 C.R. 479; *General Elec. Co. v. Central Surety & Ins. Corp.* (1965) 232 C.A.2d 590, 595, 43 C.R. 48; *Department of Industrial Relations v. Continental Cas. Co.* (1996) 52 C.A.4th Supp. 1, 3, 61 C.R.2d 80, citing the text [exception to preliminary notice requirement for claimant performing actual labor for wages, decided under former statutes]; *American Bldgs. Co. v. Bay Commercial Const.* (2002) 99 C.A.4th 1193, 1197, 121 C.R.2d 539 [notice may be given either under C.C. 3098 or as special notice under C.C. 3252(b)]; C.E.B., *Mechanics' Liens* 3d, §§4.92 et seq., 10.1 et seq.; but see *California v. General Ins. Co.* (1970) 13 C.A.3d 853, 96 C.R. 744 [Department of Employment does not furnish labor or materials; hence, it was not required to give prescribed written notice to contractor before bringing suit against surety on bond to collect unpaid unemployment insurance contributions]; *Granite Const. Co. v. American Motorists Ins. Co.* (1994) 29 C.A.4th 658, 663, 34 C.R.2d 835 ["90-day gap" rule (where series of independent contracts exist for material furnished under open account, claim may be made only for material delivered within 90 days of required notice) is not applicable where claimant has single contract with prime contractor, rather than series of purchase orders].)

If that preliminary notice is not given, the claimant may nevertheless enforce the claim by giving written notice to the surety and the bond principal, as provided in C.C. 3227. The written notice must be given within 15 days after recordation of a notice of completion (see C.C. 3093); if no notice of completion was recorded, the written notice is extended to 75 days after completion of the work of improvement. (C.C. 3252(b); see *Blair Excavators v. Paschen*

Contractors (1992) 9 C.A.4th 1815, 1819, 12 C.R.2d 420 [in absence of prejudice to original contractor, amount stated in former C.C. 3091 (now C.C. 3227) notice does not limit amount of recovery].)

West's Key Number Digest, Counties 123; Mechanics' Liens 218 et seq.; Municipal Corporations 344; States 101.

SUPPLEMENT: [This section is current through the latest supplement]



45 of 192 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

VI. NOTICE OF CLAIM OR REMEDY AGAINST ORDINARY DEFENDANT

E. Action for Breach of Warranty.

3 *Witkin Cal. Proc. Actions* § 223

[§ 223] Action for Breach of Warranty.

(1) *Notice Required Where Seller Is Defendant.* A buyer who accepts goods but nevertheless intends to sue for breach of warranty must give notice to the seller within a reasonable time after the buyer discovers or should have discovered the breach. (See U.C.C. 2607(3)(A); *Whitfield v. Jessup* (1948) 31 C.2d 826, 828, 193 P.2d 1; *Vogel v. Thrifty Drug Co.* (1954) 43 C.2d 184, 187, 272 P.2d 1; BAJI, No. 9.90; CACI, No. 1243; 6 A.L.R.3d 1371, 1374 [requirement of notice, by buyer of goods, of breach of warranty as applicable to actions for personal injury].)

(2) *Notice Not Required Where Manufacturer Is Defendant.* Timely notice of a breach is no longer required where the action is against a manufacturer on a warranty that arises independently of a contract of sale, such as the manufacturer's express warranty. (See *Greenman v. Yuba Power Products* (1963) 59 C.2d 57, 61, 27 C.R. 697, 377 P.2d 897, 4 Summary (10th), Sales, §202 [personal injury]; *Corporation of Presiding Bishop of Church of Jesus Christ of Latter Day-Saints v. Cavanaugh* (1963) 217 C.A.2d 492, 514, 32 C.R. 144, 4 Summary (10th), Sales, §99 [injury to property]; 51 Cal. L. Rev. 586; 6 A.L.R.3d 1371, 1377 [requirement of notice, by buyer of goods, of breach of warranty as applicable to actions for personal injury].)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Notice Required Where Seller Is Defendant.* See *Cardinal Health 301 v. Tyco Electronics Corp.* (2008) 169 C.A.4th 116, 135, 87 C.R.3d 5 [buyer's statutory notice of breach of warranty claim given to company that acquired certain assets of seller did not constitute notice to seller].



46 of 192 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

VI. NOTICE OF CLAIM OR REMEDY AGAINST ORDINARY DEFENDANT

F. Malpractice Action Against Health Care Provider.

3 *Witkin Cal. Proc. Actions* § 224

[§ 224] Malpractice Action Against Health Care Provider.

(1) *Nature and Purpose of Notice.* A plaintiff must give a health care provider notice of the intention to sue 90 days prior to the commencement of the action. (*C.C.P.* 364(a).) The purpose of this 90-day waiting period is to decrease the number of medical malpractice actions filed by establishing a procedure that encourages the parties to negotiate outside the formal litigation process. (See *Woods v. Young* (1991) 53 C.3d 315, 320, 279 C.R. 613, 807 P.2d 455, *infra*, §728; *Grimm v. Thayer* (1987) 188 C.A.3d 866, 871, 233 C.R. 687; *Gilbertson v. Osman* (1986) 185 C.A.3d 308, 317, 229 C.R. 627.) Any settlement, judgment, or arbitration award in excess of specified amounts must be reported to the appropriate licensing board by the provider or the claimant (or their counsel), and failure to comply with this requirement is a crime. (*B. & P.C.* 802.) (See *C.E.B.*, 1 Civil Proc. Before Trial 4th, §§9.31, 9.32; 6 *Summary* (10th), *Torts*, §953 et seq.)

(2) *Notice Tolls Limitations Period.* If the notice is served within 90 days of the expiration of the applicable statute of limitations, the time for the commencement of the action is extended 90 days from service of the notice. (*C.C.P.* 364(d); see *infra*, §722 et seq.)

(3) *Effect of Noncompliance.* Noncompliance with *C.C.P.* 364 is not jurisdictional, but is grounds for professional discipline against the responsible attorney. (*C.C.P.* 365; *Toigo v. Hayashida* (1980) 103 C.A.3d 267, 268, 162 C.R. 874.) However, an insufficient notice (see *C.C.P.* 364(b)) will not extend the statute of limitations. (See *infra*, §722 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]



47 of 192 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

VI. NOTICE OF CLAIM OR REMEDY AGAINST ORDINARY DEFENDANT

G. Action Under Fair Employment and Housing Act.

3 *Witkin Cal. Proc. Actions* § 225

[§ 225] Action Under Fair Employment and Housing Act.

(1) *Administrative Complaint Requirement.* A plaintiff who wishes to sue under the Fair Employment and Housing Act (FEHA) (*Govt.C. 12900* et seq.) must first file an administrative complaint with the Department of Fair Employment and Housing (DFEH) within 1 year of the alleged wrongful act of employment discrimination (*Govt.C. 12960*) and within 60 days of the alleged wrongful act of housing discrimination (*Govt.C. 12980*). If the department does not issue a timely accusation, the plaintiff may file a judicial action within 1 year of receipt of a "right to sue" letter from the department. (*Govt.C. 12965(b)* [employment discrimination]; *Govt.C. 12980(h)* [housing discrimination].) (See 8 *Summary* (10th), *Constitutional Law*, §948 et seq.)

(2) *Tolling of Time Limit.* Whether the 1-year time limit in *Govt.C. 12965(b)* is construed as a procedural statute of limitations or as a condition on a substantive right that must be fulfilled as a prerequisite to filing an action, it may be tolled by the doctrine of equitable tolling (infra, §739). (*Downs v. Department of Water & Power of Los Angeles* (1997) 58 C.A.4th 1093, 1101, footnote 3, 68 C.R.2d 590, infra, §731 [time limit was tolled during pendency of administrative proceedings before federal Equal Employment Opportunity Commission].) The holding in *Downs* has been codified. (See *Govt.C. 12965(d)*, (e), infra, §731.)

(3) *Effect of Rescission of Right To Sue Letter.* *Grant v. Comp USA* (2003) 109 C.A.4th 637, 135 C.R.2d 177, 8 *Summary* (10th), *Constitutional Law*, §952, involved a question of first impression. Plaintiff filed an administrative complaint with the DFEH against defendant, her former employer. The DFEH issued plaintiff a right-to-sue notice, but subsequently rescinded the notice because the case was being reopened (the federal Equal Employment Opportunity Commission returned the case to the DFEH for processing and investigation). More than 1 year after the administrative complaint, the DFEH proposed settlement was rejected, and plaintiff filed a civil action alleging multiple claims, including claims under FEHA. The jury awarded plaintiff \$ 2.9 million. The trial judge denied defendant's motion for judgment notwithstanding the verdict, made on the ground that plaintiff failed to exhaust her administrative remedies. *Held*, denial of judgment notwithstanding the verdict affirmed; the absence of a right-to-sue notice alone does not amount to a failure to exhaust administrative remedies. Under *Govt.C. 12965*, plaintiff's right to sue defendant under FEHA arose by operation of law when the DFEH failed to resolve the matter within 1 year from the time she filed her administrative complaint. The DFEH had a ministerial duty to issue a right-to-sue notice within 1 year. Thus, plaintiff had exhausted her administrative remedies under FEHA, notwithstanding that her previous right-to-sue notice had been rescinded and she had not requested another. (109 C.A.4th 650.)

(4) *Alternative Remedies of Public Employees*. A public employee may choose either to pursue the public agency's own internal remedies or to file an employment discrimination complaint with the DFEH without exhausting the internal remedies. Requiring public employees to pursue both remedies would frustrate the Legislature's intent in affording public employees, under the FEHA, the same tools against employment discrimination that are available to private employees. (*Schifando v. Los Angeles* (2003) 31 C.4th 1074, 1085, 1092, 6 C.R.3d 457, 79 P.3d 569; see *Williams v. Housing Authority of Los Angeles* (2004) 121 C.A.4th 708, 728, 17 C.R.3d 374 [extending *Schifando* exemption rule to action alleging both FEHA and common law wrongful termination claims, where resolution of common law claims would have had preclusive impact on FEHA claim].)

There are two qualifications to this rule. Where a public employee chooses to file an internal grievance and receives an adverse finding, that finding binds the trial court in a subsequent FEHA action, unless the finding is overturned in a mandamus proceeding. (*Johnson v. Loma Linda* (2000) 24 C.4th 61, 69, 99 C.R.2d 316, 5 P.3d 874, 8 Cal. Proc. (5th), *Extraordinary Writs*, §154.) Further, a public employee who chooses to file an internal grievance may not abandon the internal remedies to pursue a FEHA action. (*Page v. Los Angeles County Probation Dept.* (2004) 123 C.A.4th 1135, 1142, 20 C.R.3d 598.)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Tolling of Time Limit*. See *McDonald v. Antelope Valley Community College Dist.* (2008) 45 C.4th 88, 104, 84 C.R.3d 734, 194 P.3d 1026 [administrative grievance procedures for discrimination complaints support equitable tolling of statute of limitations on FEHA claim, even though exhaustion of procedures is not required to support FEHA claim; procedures afford both parties full opportunity to formally or informally resolve dispute in way that minimizes or eliminates need for further judicial proceedings].

(4) *Alternative Remedies of Public Employees*. See *McDonald v. Antelope Valley Community College Dist.*, *supra*, 45 C.4th 113 [employee who initiated community college administrative grievance procedures for discrimination complaints was not required to seek judicial relief, and thus employee's FEHA action, filed while internal grievance process was still pending, was not barred by lack of judicial exhaustion; administrative grievance process lacked judicial characteristics such as testimony under oath, opportunity to call witnesses and introduce evidence, and formal record of hearing; distinguishing *Johnson v. Loma Linda* (2000) 24 C.4th 61, 99 C.R.2d 316, 5 P.3d 874, text, p. 304, and *Page v. Los Angeles County Probation Dept.* (2004) 123 C.A.4th 1135, 20 C.R.3d 598, text, p. 304]; *Ortega v. Contra Costa Community College Dist.* (2007) 156 C.A.4th 1073, 1085, 67 C.R.3d 832 [where collective bargaining agreement required arbitration of employee disputes in which control of fact-finding process was vested in union, dismissed public employee who initiated arbitration was entitled to pursue FEHA action, even though fact-finding process during arbitration was never completed; distinguishing *Johnson and Page*]; *Ahmadi-Kashani v. Regents of Univ. of Calif.* (2008) 159 C.A.4th 449, 460, 71 C.R.3d 556 [exhaustion requirement did not apply to employee who initiated internal grievance process by meeting with employer to discuss her claim, even though employee failed to complete process; grievance process did not include quasi-judicial hearing, and thus employee was free to walk away and pursue FEHA claim in court]; *Miller v. Los Angeles* (2008) 169 C.A.4th 1373, 1382, 87 C.R.3d 510 [city employee who voluntarily dismissed administrative appeal of his termination was required to exhaust administrative remedies before filing FEHA action, where in administrative proceeding employee participated in multiple hearings, cross-examined witnesses, presented evidence, and received lengthy report and recommendation of hearing examiner; following *Johnson and Page*].



48 of 192 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

VI. NOTICE OF CLAIM OR REMEDY AGAINST ORDINARY DEFENDANT

H. Actions on Construction Defects.

3 *Witkin Cal. Proc. Actions* § 226

[§ 226] Actions on Construction Defects.

(1) *Actions by Common Interest Development Associations Against Developer and Others.* The board of directors of an association managing a common interest development (see 12 *Summary* (10th), *Real Property*, §85 et seq.) must provide written notice to members within 30 days of filing a civil action by the association against the developer, etc. of the common interest development for damage to association common areas or to separate interests that the association is obligated to maintain or repair. (C.C. 1368.5.)

Before an association files a complaint for damages for defects in the design or construction of a common interest development against the developer, builder, or general contractor, the association must serve a prescribed notice informing the defendant of the name and location of the project, a list of the defects sufficient to apprise the defendant of the general nature of the defects, a description of the known results of the defects, and other information. Service of the notice tolls all applicable statutes of limitations for up to 180 days, subject to extensions. (C.C. 1375; see *El Escorial Owners' Assn. v. DLC Plastering* (2007) 154 C.A.4th 1337, 1354, 65 C.R.3d 524 [statute of limitations was tolled under prior version of statute]; *Landale-Cameron Court v. Ahonen* (2007) 155 C.A.4th 1401, 1408, 66 C.R.3d 776 [same].)

(2) *Action for Construction Defects in Original Construction of Residence.* A 2002 statute sets forth standards for the original construction of residences and procedures for homeowners who seek to sue builders and other persons for defects based on violations of those standards. (See C.C. 895 et seq.) Before filing the action, the homeowner must first provide the builder with a prescribed written notice of the claim. The notice has the same force and effect as a notice of the commencement of a legal proceeding. (C.C. 910.) Service of the notice triggers a nonadversarial claims resolution procedure, including specified remedies if the procedure does not resolve the dispute, in which the builder may opt to participate. If the builder fails to participate within the prescribed time, the homeowner is released from further compliance with the claims requirements and may proceed with filing the action. (See C.C. 911 et seq.; 44 *Santa Clara L. Rev.* 1249; on statute of limitations, see *infra*, §617.)

SUPPLEMENT: [This section is current through the latest supplement]



49 of 192 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

VI. NOTICE OF CLAIM OR REMEDY AGAINST ORDINARY DEFENDANT

I. Miscellaneous Statutory Requirements.

3 Witkin Cal. Proc. Actions § 227

[§ 227] Miscellaneous Statutory Requirements.

(1) *Claim Against Bank in Liquidation.* A creditor who seeks to recover on a claim against a bank in liquidation, or against any property owned or held by the bank, must first present a verified, written claim to the Commissioner of Financial Institutions of the State Department of Financial Institutions within 4 months of the date of the first publication of the notice to creditors. (*Fin.C. 3118*; see *In re Yokohama Specie Bank, Ltd. (1948) 86 C.A.2d 545, 553, 195 P.2d 555* [action under former Bank Act].) However, *Fin.C. 3118* does not apply where the plaintiff's action is filed before the bank's insolvency and closure, when there is no claims requirement to be met. (*Nulph v. Federal Deposit Ins. Corp. (1987) 190 C.A.3d 1116, 1120, 235 C.R. 831.*)

(2) *Worker's Compensation Claim.* Written notice by an injured employee to his or her employer, within 30 days after the occurrence, stating the time, place, and nature of the injury, is a condition to an application for a worker's compensation award. (*Lab.C. 5400.*) Although this notice is stated to be an essential condition on the right to recover, in practice it is of little importance, because it is excused where the employer or the employer's agent has knowledge of the injury or claim, or where the employer was not misled or prejudiced by the failure to give the notice. (*Lab.C. 5402, 5403.*) (See 2 *Summary* (10th), *Workers' Compensation*, §§385, 386.)

(3) *Action Against Third-Party Tortfeasor.* An employer or employee bringing an action alone against a third-party tortfeasor must notify the other after the action is filed. (*Lab.C. 3853*; see C.E.B., *Workers' Damages Practice* 2d, §§3.30, 7.30; Cal. Civil Practice, 2 *Workers' Compensation* §16:17; 2 *Summary* (10th), *Workers' Compensation*, §69 et seq.)

(4) *Guest's Claim of Overcharge.* A guest must notify the keeper of a hotel, inn, boardinghouse, or lodginghouse of an overcharge within 30 days after payment of the charge as a condition to recovery of the statutory penalty. (C.C. 1863(b).)

(5) *Statutory Action by Consumer.* A consumer must notify the prospective defendant in writing at least 30 days before bringing an action for damages under the Consumers Legal Remedies Act. (C.C. 1782(a); see 4 *Cal. Proc.* (5th), *Pleading*, §302.)

(6) *Restraint of Trade Proceedings.* Restraint of trade is governed by the Cartwright Act (*B. & P.C. 16700 et seq.*;

see 1 *Summary* (10th), *Contracts*, §591 et seq.). Under *B. & P.C. 16750.2*, any person (other than the Attorney General or a district attorney) who institutes a proceeding by a writ or appeal in the California Supreme Court or the Court of Appeal in which a violation of the Act is alleged or its application is in issue, must serve the Attorney General with notice of the proceeding. Notice must be given within 3 days after the commencement of the proceeding, though the time may be extended if good cause is shown. No relief can be granted until proof of service of the notice is filed with the court.

(7) *Action Against Foster Parent on Claim for Which State Insurance Fund Is Liable*. A plaintiff who wishes to bring a civil action against a foster parent on a claim for which the state Foster Family Home and Small Family Home Insurance Fund (*Health & Saf.C. 1527* et seq.) is liable must first file a claim against the fund within the applicable period of limitations for the action underlying the claim. (*Health & Saf.C. 1527.6(b), 1527.6(d)*; see *Hill v. Newkirk* (1994) 26 C.A.4th 1047, 1052, 31 C.R.2d 859, 10 *Summary* (10th), *Parent and Child*, §9 [claims requirement is constitutional]; *Becerra v. Gonzales* (1995) 32 C.A.4th 584, 592, 38 C.R.2d 248 [although substantial compliance doctrine applies to Fund claims requirement, claim filed with State Board of Control (now California Victim Compensation and Government Claims Board) under Government Claims Act was insufficient to satisfy that requirement].)

The limitations period for filing the action is subject to *C.C.P. 352(a)* (suspension of statute of limitations during minority of child; see *infra*, §§696, 697). (*Health & Saf.C. 1527.6(b)*.)

SUPPLEMENT: [This section is current through the latest supplement]



50 of 192 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

VI. NOTICE OF CLAIM OR REMEDY AGAINST ORDINARY DEFENDANT

J. Contractual Requirements.

1. Action Against Carrier or Warehouseperson.

3 Witkin Cal. Proc. Actions § 228

[§ 228] Action Against Carrier or Warehouseperson.

A common provision in bills of lading and warehouse receipts calls for written notice of a claim for loss or injury to be given within a specified reasonable time. (See U.C.C. 7204(c) [authorizing "reasonable" notice of claim provision in warehouse receipt]; U.C.C. 7309(c) [same for bill of lading]; 19 Am.Jur. Legal Forms 2d (2005 ed.), §§253:1619, 253:1671, 253:1672.) Failure to give the required notice bars recovery. (See *Thayer v. Pacific Elec. Ry. Co.* (1961) 55 C.2d 430, 435, 11 C.R. 560, 360 P.2d 56 [informal notice was sufficient]; *Home Ins. Co. of New York v. Los Angeles Warehouse Co.* (1936) 16 C.A.2d 737, 740, 61 P.2d 510; *Hubbard v. Matson Navigation Co.* (1939) 34 C.A.2d 475, 478, 93 P.2d 846; *Talei v. Pan Amer. World Airways* (1982) 132 C.A.3d 904, 910, 183 C.R. 532 [action against air carrier for loss or damage to goods was barred by failure to present written claim as required by tariff]; 33 A.L.R.2d 145, 222 [claim for damages caused by deviation in transportation]; 1 *Summary* (10th), *Contracts*, §679.)

SUPPLEMENT: [This section is current through the latest supplement]



51 of 192 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

VI. NOTICE OF CLAIM OR REMEDY AGAINST ORDINARY DEFENDANT

J. Contractual Requirements.

2. Action Against Insurer.

3 *Witkin Cal. Proc. Actions* § 229

[§ 229] Action Against Insurer.

(1) *Notice and Proof of Loss.* Fire, theft, and some other types of insurance policies commonly require giving notice of loss and furnishing proof of loss within specified periods. Recovery may be denied for failure to comply with these conditions. (See *Kohner v. National Surety Co.* (1930) 105 C.A. 430, 437, 287 P. 510; *Hall v. San Jose Abstract & Title Ins. Co.* (1959) 172 C.A.2d 421, 427, 342 P.2d 362, 12 Summary (10th), *Real Property*, §367 [title insurance; oral notice was adequate where it was not objected to, insurer was not prejudiced, and written notice was waived]; 18 A.L.R.2d 443 [liability insurance]; 66 A.L.R.2d 1280 [motor vehicle theft policy]; 17 A.L.R.3d 530 [disability insurance]; 24 A.L.R.3d 1007 [property insurance]; 29 A.L.R.3d 856 [notice under one policy as notice under another policy with same insurer]; 47 A.L.R.3d 199 [timeliness of notice by additional insured]; 32 A.L.R.4th 141 [liability insurance; requirement that insurer show prejudice to escape liability for lack of notice].)

The insurer, however, may lose the defense of noncompliance by various acts amounting to a waiver of the conditions or an estoppel to assert them. (See *Ramirez v. United Firemen's Ins. Co. of Philadelphia* (1920) 46 C.A. 451, 453, 189 P. 309 [insured was led to believe that he had supplied all necessary information]; *Olson v. Standard Marine Ins. Co.* (1952) 109 C.A.2d 130, 137, 240 P.2d 379 [denial of all liability under policy prior to expiration of period for notice and proof of loss]; *Elliano v. Assurance Co. of America* (1970) 3 C.A.3d 446, 449, 83 C.R. 509 [insurance adjuster accepted insurer's written estimate and entered into lengthy settlement negotiations without requesting formal proof of loss].)

Impossibility of discovery of an insurance loss may also toll the period. In *Admiralty Fund v. Peerless Ins. Co.* (1983) 143 C.A.3d 379, 191 C.R. 753, the court pointed out that the time provisions are generally enforced despite difficulty in discovering the loss, but set forth the novel issue for California raised in this case: "whether adverse domination and control of an insured mutual fund during the discovery-of-loss period, with the resultant alleged impossibility of discovery of an insurable loss, calls for the tolling of the discovery-of-loss period." (143 C.A.3d 385.) In holding that it does, the court reasoned as follows: (a) discovery of loss clauses serve a function similar to that of statutes of limitation (143 C.A.3d 386); (b) California cases have tolled the running of the statutes of limitation during periods of adverse domination making discovery of the facts impossible (143 C.A.3d 387); (c) the same equitable tolling principles must apply to discovery of loss clauses in fidelity insurance contracts of mutual funds, for the management of the asset pool is largely in the hands of an investment adviser, and there is a great potential for abuse

(143 C.A.3d 388). (On equitable tolling of statute of limitations period in insurance cases, see *infra*, §757 et seq.)

(2) *Notice of Accident*. The effect of provisions in automobile liability or indemnity insurance policies requiring prompt notice of the accident differs in that the insured's failure to comply may bar the injured person's subsequent action on the statutory liability of the insurance company. (See 2 *Summary* (10th), *Insurance*, §§316, 318.) But failure to give the notice does not defeat the injured person's action unless the insurer was prejudiced by the delay. (See 2 *Summary* (10th), *Insurance*, §§313, 318.) This rule was applied to an accident insurance policy in *Joyce v. United Ins. Co. of America* (1962) 202 C.A.2d 654, 21 C.R. 361. The policy contained the statutory 20-day notice of claim clause (*Ins.C. 10350.5*), and the notice was delayed over 7 months. The court, finding no authority in point, held that the policy provision was neither a strict condition precedent nor a forfeiture clause, but was equivalent to a provision calling for "immediate" or "prompt" notice. Hence, where the insurer had ample notice of the facts in time to investigate, long before the filing of the claim, the delay was not fatal. (202 C.A.2d 663.)

SUPPLEMENT: [This section is current through the latest supplement]



52 of 192 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

VI. NOTICE OF CLAIM OR REMEDY AGAINST ORDINARY DEFENDANT

J. Contractual Requirements.

3. Other Actions.

3 Witkin Cal. Proc. Actions § 230

[§ 230] Other Actions.

(1) *Action Against Bank.* A bank's agreement with its depositor may contain a provision requiring notification within a certain number of days of errors in its statement of the account. Failure to notify may preclude recovery if the period is reasonable. (See 4 *Summary* (10th), *Negotiable Instruments*, §127; but see *Frankini v. Bank of America* (1939) 31 C.A.2d 666, 676, 88 P.2d 790 [period was unreasonable and provision was void].)

(2) *Action Against Employer.* A collective bargaining agreement may contain a provision that requires an employee seeking an adjustment of salary or hours (e.g., for overtime, sick leave, or vacation) to make a timely claim. (See *Breitman v. Brody* (1952) 113 C.A.2d 642, 643, 248 P.2d 932.)

(3) *Notice of Claim That Performance Is Excused.* C.C. 1511(1) gives an obligor two excuses for performance: prevention by an act of the obligee-creditor, and operation of law. The statute authorizes a provision in the contract requiring an obligor who intends to rely on either excuse to give written notice to the obligee-creditor within a reasonable time. (See 1 *Summary* (10th), *Contracts*, §836.)

SUPPLEMENT: [This section is current through the latest supplement]



53 of 192 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

VII. NOTICE OF CLAIM AGAINST PUBLIC ENTITY

A. In General.

1. Nature and Purpose of Requirement.

3 Witkin Cal. Proc. Actions § 231

[§ 231] Nature and Purpose of Requirement.

(1) *Nature of Requirement.* The governmental liability statutes make all public entities in California, state and local, liable in tort to the extent declared by statute. (See *Govt.C. 815*; 5 *Summary* (10th), *Torts*, §216 et seq.) Liability is, however, subject to a procedural condition precedent, i.e., the timely filing of a written claim in proper form with the proper officer or body. (See *Govt.C. 905, 905.2*.)

Compliance is mandatory, and cannot be excused on the theory that the entity was not surprised by the suit. "It is not the purpose of the claims statutes to prevent surprise. Rather, the purpose of these statutes is to provide the public entity sufficient information to enable it to adequately investigate claims and to settle them, if appropriate, without the expense of litigation. ... It is well-settled that claims statutes must be satisfied even in face of the public entity's actual knowledge of the circumstances surrounding the claim. Such knowledge--standing alone--constitutes neither substantial compliance nor basis for estoppel." (*San Jose v. Superior Court (Lands Unlimited)* (1974) 12 C.3d 447, 455, 115 C.R. 797, 525 P.2d 701, *infra*, §239.)

(2) *Purpose of Requirement.* The claims requirement has a twofold purpose: (a) the entity should have an opportunity to investigate promptly while the evidence and witnesses are available; (b) the entity, having obtained full information, should have an opportunity to settle meritorious claims without litigation. (See C.E.B., 1 Civil Proc. Before Trial 4th, §9.3 et seq.; C.E.B., 1 Government Tort Liability Practice 4th, Chaps. 5, 6; Cal. Civil Practice, 1 Procedure §1:52 et seq.; Rutter Group, Civil Proc. Before Trial §1:646 et seq.; 38 *Cal. L. Rev.* 259; 68 *Harv. L. Rev.* 506; 6 *Southwestern U. L. Rev.* 554, 560; 1 *U.C.L.A. L. Rev.* 201.)

(3) *Constitutionality.* The claims statutes are constitutional. (*Roberts v. California* (1974) 39 C.A.3d 844, 849, 114 C.R. 518.) (See 6 *Pacific L. J.* 30, 45 [suggesting equal protection and due process objections despite *Roberts*]; 8 *U.S.F. L. Rev.* 611 [strong attack on requirement].)

West's Key Number Digest, Counties 197 et seq.; Municipal Corporations 741 et seq.; States 169 et seq.

SUPPLEMENT: [This section is current through the latest supplement]



54 of 192 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

VII. NOTICE OF CLAIM AGAINST PUBLIC ENTITY

A. In General.

2. Former Law.

3 *Witkin Cal. Proc. Actions* § 232

[§ 232] Former Law.

(1) *Early "Patch-Work" Approach.* Claims requirements were formerly set forth in a maze of statutes and local charter provisions differing in requirements of time, form, content, and place of filing. (See *Stewart v. McCollister* (1951) 37 C.2d 203, 207, 231 P.2d 48 ["The several claims statutes and charter provisions prescribing varying requirements concerning the length of time for the filing of verified claims, the contents thereof, and the manner of filing or presentation may well be said to have become traps for the unwary"]; *Adler v. Pasadena* (1962) 57 C.2d 609, 614, 21 C.R. 579, 371 P.2d 315; *Albaeck v. Santa Barbara* (1954) 123 C.A.2d 336, 339, 266 P.2d 844; *Taylor v. Los Angeles* (1960) 180 C.A.2d 255, 261, 4 C.R. 209; *Peck v. Modesto* (1960) 181 C.A.2d 465, 469, 5 C.R. 482; 23 So. Cal. L. Rev. 507; 30 Cal. L. Rev. 89; 38 Cal. L. Rev. 259; 6 U.C.L.A. L. Rev. 209.)

(2) *Enactment of General Claims Statute.* In 1959 the California Law Revision Commission, after an exhaustive study, reached the conclusion that the law "is unduly complex, inconsistent, ambiguous and difficult to find, that it is productive of much litigation and that it often results in the barring of just claims"; that the claims principle should be retained and extended to other governmental entities not now protected; but that the "glaring defects" in existing claims statutes should be eliminated by the enactment of a new general claims act drafted for the Commission. (See 6 U.C.L.A. L. Rev. 205 [exhaustive article by draftsman, based on Commission report].)

The 1959 Legislature enacted the proposed statute (former Govt.C. 700 et seq.) with minor variations, thereby eliminating the uncertainty and undesirable features of the old law. The legislation took the following form: a general claims act governing most, but not all, claims against local public entities, including counties, cities, and districts; amendments to particular provisions throughout the codes, dealing with various districts and other governmental bodies, making the general claims act applicable by cross-reference; renumbering but retention without substantial change of the existing statutes governing claims against the state and certain state agencies. No change was made in the existing law governing claims against public officers or employees. (See *infra*, §233.)

SUPPLEMENT: [This section is current through the latest supplement]



55 of 192 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

VII. NOTICE OF CLAIM AGAINST PUBLIC ENTITY

A. In General.

3. Revised Law.

3 *Witkin Cal. Proc. Actions* § 233

[§ 233] Revised Law.

(1) *Nature and Purpose of Revision.* The Law Revision Commission found that, despite the improvements made in 1959 (see *supra*, §232), the existing claims procedure was still defective, and a new, comprehensive revision was enacted in 1963. (*Govt.C. 900 et seq.*; see C.E.B., 1 Civil Proc. Before Trial 4th, §9.3 et seq.; C.E.B., 1 Government Tort Liability Practice 4th, Chap. 5, 6; Cal. Civil Practice, 1 Procedure §1:52 et seq.; Rutter Group, Civil Proc. Before Trial §1:646 et seq.)

The principal objectives sought by the Commission and embodied in the revised statute are as follows:

(a) *Unified statutory treatment.* The procedure for presenting claims against the state and local entities is substantially the same. (See *infra*, §235.)

(b) *Prompt notice.* The former statute specified short time limits on claims against local entities, but allowed 2 years to file a claim against the state. Because the purpose--to enable the governmental entity to make a prompt investigation--is the same in each case, the new statute provided short time limits for all claims. (See *infra*, §255.)

(c) *Opportunity to consider and settle claims.* Under the former law the state had an opportunity to consider a claim before an action could be brought, but an action could be commenced against a local entity immediately on filing the claim. A period for consideration, which permits negotiation and settlement without unnecessary court costs and attorneys' fees, is highly desirable, and the requirement was accordingly made applicable to local entities as well as to the state. (See *infra*, §263 et seq.)

(d) *Relief in cases of minority, incapacity or death, and excusable neglect.* The former law was inadequate in protecting the rights of persons whose failure to file a claim within the time limit was excusable. The new law established procedures for obtaining extension of time either from the governmental body or the court. (See *infra*, §286 et seq.)

(e) *Formal requisites of claim.* The necessary content of claims against the state and local entities is specified, and official forms are authorized. (See *infra*, §253.)

(f) *Time for official consideration of claim.* A fixed uniform period is provided for action by the governmental body, after which the claim is deemed rejected if not acted upon. (See *infra*, §263 et seq.)

(g) *Compromise of claims.* Broad authority is given to compromise claims and pending actions by administrative action. (See *infra*, §§263 et seq., 269 et seq.)

(h) *Payment of claims and judgments.* The statutory provisions on the enforcement of the obligations were extensively revised. (See 8 *Cal. Proc.* (5th), *Enforcement of Judgment*, §61.)

(2) *Title of Act.* Because of the broad scope of the legislation, the California Supreme Court has determined that "Government Claims Act" is a more appropriate short title than the traditional "Tort Claims Act." "Henceforth, we will refer to division 3.6, parts 1 through 7 of the Government Code (§810 et seq.) as the Government Claims Act." (*Stockton v. Superior Court* (2007) 42 C.4th 730, 742, 68 C.R.3d 295, 171 P.3d 20, *infra*, §238.)

(3) *Definitions.* The following terms used throughout the revised statute are defined:

(a) "Local public entity" includes a county, city, district, public authority, public agency, and any other political subdivision or public corporation. (*Govt.C.* 900.4.) (See *Knapp v. Palisades Charter High School* (2007) 146 C.A.4th 708, 716, 53 C.R.3d 182 [charter school, as nonprofit public benefit corporation independent from school district, was not local public entity subject to Government Claims Act].)

(b) "State" means the state and any office, officer, department, division, bureau, board, commission or agency, "claims against which are paid by warrants drawn by the Controller." (*Govt.C.* 900.6.)

(c) "Board," in the case of a local public entity, means its governing body; in the case of the state (except a judicial branch entity or judge), it means the California Victim Compensation and Government Claims Board; in the case of a judicial branch entity or judge, it means the Judicial Council. (*Govt.C.* 900.2.)

(d) "Judicial branch entity" is a public entity that includes a superior court, a Court of Appeal, the Supreme Court, the Judicial Council, or the Administrative Office of the Courts. (*Govt.C.* 900.3.)

(4) *Distinction Between Procedural Notice of Claim Requirements and Government Liability Statutes.* To make clear the distinction between the procedural notice of claim requirements and the governmental liability statutes, *Govt.C.* 905.8 provides that "[n]othing in this part imposes liability upon a public entity unless such liability otherwise exists." (For law on governmental liability, contemporaneously enacted, see 5 *Summary* (10th), *Torts*, §216 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]



56 of 192 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

VII. NOTICE OF CLAIM AGAINST PUBLIC ENTITY

A. In General.

4. Requirement as Element of Cause of Action.

3 Witkin Cal. Proc. Actions § 234

[§ 234] Requirement as Element of Cause of Action.

In *California v. Superior Court (Bodde)* (2004) 32 C.4th 1234, 13 C.R.3d 534, 90 P.3d 116, plaintiff, a state prison inmate, sued defendant state and various state agencies and state employees alleging that defendants had misdiagnosed his lung cancer as tuberculosis and had failed to provide him with proper medical care. Defendants demurred generally, alleging that plaintiff had failed to allege facts showing or excusing compliance with the claim presentation requirement. *Held*, the claim was subject to a general demurrer, because compliance with the claim presentation requirement is an element of a plaintiff's cause of action against a public agency under the Torts Claim Act.

(a) Overwhelming case law and the legislative history of the Act support this conclusion. (32 C.4th 1243.)

(b) *Radar v. Rogers* (1957) 49 C.2d 243, 317 P.2d 17, *Savage v. California* (1970) 4 C.A.3d 793, 84 C.R. 650, *infra*, §306, *Bahten v. Merced* (1976) 59 C.A.3d 101, 130 C.R. 539, *Bell v. Tri-City Hosp. Dist.* (1987) 196 C.A.3d 438, 241 C.R. 796, *infra*, §307, and similar cases are distinguishable. Unlike this case, those cases involved either the premature filing of a complaint against a public agency, but the timely presentation of a claim to the public agency, or a successful petition for leave to present a late claim. (32 C.4th 1243.) *Bell* and *Bahten* are disapproved to the extent they hold that compliance with the claim presentation requirement is not an element of a cause of action against a public entity. (32 C.4th 1244.)

SUPPLEMENT: [This section is current through the latest supplement]



57 of 192 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

VII. NOTICE OF CLAIM AGAINST PUBLIC ENTITY

B. Scope of Requirement.

1. Local and State Entities.

a. In General.

3 Witkin Cal. Proc. Actions § 235

[§ 235] In General.

(1) *Local Entities*. Under *Govt.C. 905*, the uniform claims procedure applies, with specified exceptions (see *infra*, §240 et seq.), to claims for money or damages (see *infra*, §237 et seq.) against "local public entities" (see *supra*, §233).

(2) *The State*. Under *Govt.C. 905.2(b)*, the uniform claims procedure applies to the following claims for money or damages against the state:

(a) Those for which no appropriation has been made or for which no fund is available, but settlement is provided for by statute or constitutional provision.

(b) Those for which the appropriation made or fund designated is exhausted.

(c) Those for money or damages on express contract, or for an injury for which the state is liable.

(d) Those for which settlement is not otherwise provided by statute or constitutional provision.

Claims against the Regents of the University of California are expressly exempt from the uniform procedure. (*Govt.C. 905.6*.)

(3) *Judicial Branch Entities*. The uniform claims procedure applies to a claim against a "judicial branch entity" (see *supra*, §233) for money or damages based on an express contract or for an injury for which the judicial branch entity is liable. (*Govt.C. 905.7*.)

(4) *Specialized Claims Procedure*. *Govt.C. 900* et seq. and *910* et seq. "shall not be construed to be an exclusive means for presenting claims to the Legislature," nor as preventing the Legislature from making appropriations to pay claims not presented under the statutory procedure. (*Govt.C. 905.4*.) Thus, *Govt.C. 905.4* makes the general claims presentation requirements inapplicable where a particular statute contains its own claims procedure. (*Mendocino v. California (1971) 22 C.A.3d 90, 95, 98 C.R. 904 [Emergency Flood Relief Law of 1965].*)

(5) *Agency Must Identify Itself.* "All public agencies, public entities, districts, cities, counties, and cities and counties shall, when being identified by such entity for any purpose, be identified as a public agency, public entity, district, city, county, or city and county, whichever is appropriate." (*Govt.C. 7530.*) This requirement is "deemed satisfied" if the appropriate designation appears on all letterhead, stationery, and identification cards used to identify representatives of the entities. (*Govt.C. 7530.*) (On effect of noncompliance, see *infra*, §290 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]



58 of 192 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

VII. NOTICE OF CLAIM AGAINST PUBLIC ENTITY

B. Scope of Requirement.

1. Local and State Entities.

b. Failure To Furnish Information.

3 *Witkin Cal. Proc. Actions* § 236

[§ 236] Failure To Furnish Information.

(1) *Statement of Rule.* Public agencies must furnish information for a public "Roster of Public Agencies," designed to facilitate service of process, and where an agency has failed to do so, no claim need be presented. (*Govt.C. 946.4*; see *Knapp v. Palisades Charter High School* (2007) 146 C.A.4th 708, 718, 53 C.R.3d 182 [charter school, as nonprofit public benefit corporation independent from school district, was not public agency required to furnish information for roster].) However, where the claims procedure is established by agreement pursuant to *Govt.C. 930.2* (infra, §269), this exception does not apply unless the procedure so prescribed requires presentation to a body or person listed in *Govt.C. 53051*. (See *Elmore v. Oak Valley Hosp. Dist.* (1988) 204 C.A.3d 716, 721, 251 C.R. 405, infra, §312 [in sustaining demurrer, court could properly take judicial notice of county resolution establishing defendant hospital district and of Statement of Public Agency filed under *Govt.C. 53051*]; infra, §1058.) A roster is maintained by the Secretary of State and by each county clerk. (*Govt.C. 53051(a)*.) The roster is available at the Secretary of State's website: www.ss.ca.gov.

(2) *Illustration.* In *Wilson v. San Francisco Redevelopment Agency* (1977) 19 C.3d 555, 138 C.R. 720, 564 P.2d 872, plaintiff was injured in August 1972 when he drove his car over a deep excavation in a San Francisco street. In October 1972 (78 days after the accident), he filed a timely claim with the wrong official--the city attorney. In December 1972, after the 100-day period of *Govt.C. 911.2* had run (now 6 months), the city attorney returned the claim to plaintiff, suggesting that he file it with defendant Redevelopment Agency. Plaintiff did so on the same day, and then brought this action, relying on *Govt.C. 946.4*. The section provides that failure to present a claim is not a bar if, during the 70 days immediately following the accrual of the cause of action, the public agency fails to file an information statement for the Roster of Public Agencies in the office of the Secretary of State and with the county clerk in each county in which the agency maintains an office. (See *Govt.C. 53051*, infra, §1058.) *Held*, judgment for defendant on demurrer reversed.

(a) An agency's failure to comply with *Govt.C. 53051* entitles the claimant to ignore the claim-filing requirement; i.e., it is not merely a ground for a request for relief from late filing (see infra, §286). (*19 C.3d 560*.)

(b) *Govt.C. 946.4* also applies where the plaintiff has in fact filed a claim, but late; i.e., the statutory language ("the failure to present a claim") is not strictly construed, for it would place a person who made a belated attempt to comply

with the requirement in a worse position than one who made no attempt to comply. (19 C.3d 561.)

(c) The complaint is silent on whether plaintiff was in fact misled or confused by defendant's failure to comply with *Govt.C. 53051*, but *Govt.C. 946.4* contains no requirement of that showing. To induce public agencies to comply with the roster requirement, "prejudice resulting from incomplete or incorrect roster information should be presumed to exist, so long as the error or omission is a 'substantial' one." (19 C.3d 562.)

SUPPLEMENT: [This section is current through the latest supplement]



59 of 192 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

VII. NOTICE OF CLAIM AGAINST PUBLIC ENTITY

B. Scope of Requirement.

2. Claims.

a. Included Claims.

1. Tort Claims.

3 *Witkin Cal. Proc. Actions* § 237

[§ 237] Tort Claims.

(1) *Negligent and Intentional Torts.* The claims statute covers both negligent and intentional torts. (See *Tietz v. Los Angeles Unified School Dist.* (1965) 238 C.A.2d 905, 911, 48 C.R. 245; *Burgdorf v. Funder* (1966) 246 C.A.2d 443, 446, 54 C.R. 805; *Bates v. Franchise Tax Bd.* (2004) 124 C.A.4th 367, 385, 21 C.R.3d 285 [claims seeking money damages for emotional distress for violation of Information Practice Act were subject to Tort Claim Act filing requirement].)

(2) *Claim for Partial Indemnity.* A claim for partial indemnity is one for money or damages and subject to the claims presentation requirement. (*Gehman v. Superior Court* (1979) 96 C.A.3d 257, 261, 158 C.R. 62.)

(3) *Tort Action by Worker Against Coworker.* A tort action by a worker against a fellow employee under *Lab.C. 3601(a)* (see 2 *Summary* (10th), *Workers' Compensation*, §§25, 67, 68) is not within the exception for workers' compensation proceedings (see *infra*, §240), and a claim must be filed. (*Miner v. Superior Court* (1973) 30 C.A.3d 597, 601, 106 C.R. 416.)

(4) *Nuisance Action.* An action seeking damages for a nuisance (C.C. 3479; see 13 *Summary* (10th), *Equity*, §133 et seq.) is subject to the claims presentation requirement. (*California v. Superior Court (Hall)* (1984) 159 C.A.3d 331, 338, 205 C.R. 518.)

(5) *Claim for Incidental Damages and Equitable Relief.* A claim seeking only incidental monetary damages, when joined with a request for equitable relief, is subject to the claims presentation requirement. (*TrafficSchoolOnline v. Clarke* (2003) 112 C.A.4th 736, 739, 5 C.R.3d 408.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Negligent and Intentional Torts.* On exemption of claims made against local public entity for recovery of damages suffered as result of childhood sexual abuse (see text, §593 et seq.) arising out of conduct occurring on or after January 1, 2009, see *Govt.C. 905(m)*, added in 2008.

(2) *Claim for Partial Indemnity.* See *Sparks v. Kern County Bd. of Supervisors* (2009) 173 C.A.4th 794, 797, 93 C.R.3d 173 [sheriff's action to recover from county costs he incurred in successful defense of county's action alleging falsification of department payroll records was subject to claims presentation requirement; sheriff was not seeking injunctive relief and did not file claim based on obligation to return specific property, but rather sought reimbursement of defense costs already incurred].



60 of 192 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

VII. NOTICE OF CLAIM AGAINST PUBLIC ENTITY

B. Scope of Requirement.

2. Claims.

a. Included Claims.

2. Other Money Claims.

3 *Witkin Cal. Proc. Actions* § 238

[§ 238] Other Money Claims.

(1) *Statutory Provisions.* Some actions, other than in tort, are covered by the general statutory catch-all coverage of claims for "money or damages" (See *Govt.C. 905* ["claims for money or damages against local public entities"]; *Govt.C. 905.2(b)(3)* [claims against state "[f]or money or damages on express contract, or for an injury for which the state is liable."]; *Govt.C. 905.7* [claim against judicial branch entity for money or damages based on express contract or for injury for which judicial branch entity is liable]; *Govt.C. 945.4* [with certain exceptions, "no suit for money or damages" may be brought against public entity until claim has been presented].)

(2) *Conflict in Courts of Appeal.* Prior to the enactment of the Government Claims Act, the claims presentation statutes were inconsistent about whether an action against a public entity on a contract was within the purview of the claims presentation requirements. Even after the Act was passed, confusion persisted. Some Court of Appeal decisions held that contract claims were subject to the Act. In *Loehr v. Ventura County Community College Dist.* (1983) 147 C.A.3d 1071, 195 C.R. 576, plaintiff, an executive employee of defendant Community College District, was discharged from his position. He brought this action seeking damages for wrongful termination and reinstatement, but failed to file a timely claim. *Held*, judgment for defendant on demurrer affirmed.

(a) The phrase "money or damages" is not statutorily defined, but "it is comprehensive in scope and includes tort claims arising out of negligence, nuisance, breach of statutory duties, and intentional wrongs. ... Actions for breach of contract *also* fall within the scope of claims for 'money or damages.'" (147 C.A.3d 1079.)

(b) Although *Govt.C. 814* provides an exemption from the immunity provisions of the Act for breach of contract actions (see 5 *Summary* (10th), *Torts*, §218), this section is totally unrelated to the claims filing requirements. "The purposes served by the act clearly apply whether an underlying action sounds in tort or in contract." (147 C.A.3d 1079.)

The court in *Alliance Financial v. San Francisco* (1998) 64 C.A.4th 635, 75 C.R.2d 341, *infra*, §284, reasoned that, based on the language of current *Govt.C. 945.4*, and in light of the former broad statute and the inconsistency of former law, it was clear that the Legislature intended the claims presentation statutes to apply not only to tort claims, but also to

claims for money due under a contract. (64 C.A.4th 641.)

Baines Pickwick Ltd. v. Los Angeles (1999) 72 C.A.4th 298, 85 C.R.2d 74, held that the statutory scheme demonstrated that the Legislature did not intend to exempt contract claims from the Act. In several instances, the statutory language unambiguously makes clear that the Act applies to any action for money or damages against a public entity, including contract claims. Also, the Legislature did not give the Act a short title, and while it has become commonly known as the Tort Claims Act, that name is a misnomer, and the Act is more accurately described as the Government Claims Act. Thus, before a vendor, such as plaintiff in this case, may bring suit against a local public entity for failure to pay for goods or services rendered, the vendor is required to comply with the claims presentation requirements. (72 C.A.4th 304, 310.) "[G]iven the ongoing confusion in this area, the broad importance of the question presented and the likelihood this issue will recur, we respectfully invite either the Legislature to declare its intent or the Supreme Court to clarify the matter at the earliest opportunity." (72 C.A.4th 310.)

Other cases are to the same effect. (See *Dilts v. Cantua Elementary School Dist.* (1987) 189 C.A.3d 27, 31, 234 C.R. 612 [teacher's action to recover balance due under employment contract following termination is for monetary damages and subject to claims requirements, rather than for amounts previously earned and exempt under *Govt.C. 905(c), (f)*]; *Hart v. Alameda* (1999) 76 C.A.4th 766, 778, 90 C.R.2d 386 [following *Baines Pickwick Ltd.*]; *Gatto v. Sonoma* (2002) 98 C.A.4th 744, 760, 120 C.R.2d 550, *infra*, §558 [following *Loehr*; civil rights action arising from plaintiff's ejection from county fair for refusing to remove vest that bore insignia of motorcycle club was subject to claims presentation requirement, because plaintiff primarily sought monetary damages rather than injunctive relief]; *Bates v. Franchise Tax Bd.* (2004) 124 C.A.4th 367, 385, 21 C.R.3d 285 [claims seeking money damages for emotional distress for violation of Information Practice Act were not exempt from claims presentation requirement]; *Lozada v. San Francisco* (2006) 145 C.A.4th 1139, 1153, 52 C.R.3d 209 [following *Gatto*; police officer's action under Public Safety Officers Procedural Bill of Rights Act (*Govt.C. 3300 et seq.*; see 8 *Summary* (10th), *Constitutional Law*, §963) was subject to Government Claims Act, where claims for damages and civil penalties were primary focus of action and not incidental to claims for injunctive and declaratory relief]; *Canova v. Trustees of Imperial Irr. Dist. Employee Pension Plan* (2007) 150 C.A.4th 1487, 1496, 1498, 59 C.R.3d 587 [claim of public employees seeking to invalidate reduction of their pension benefits was subject to Government Claims Act, but claim seeking to invalidate termination of pension plan and compel employer to perform its contractual duties under plan was not covered by Act].)

Other decisions, however, took a contrary position. In *National Auto. & Cas. Ins. Co. v. Pitchess* (1973) 35 C.A.3d 62, 110 C.R. 649, an action by an attaching creditor against a sheriff and the county to recover funds wrongfully paid to an execution creditor inferior in right, the court, relying on *Govt.C. 814*, held that the cause of action was either in equity or contract, not in tort, and that no claim was required. (35 C.A.3d 65.)

Harris v. State Personnel Bd. (1985) 170 C.A.3d 639, 216 C.R. 274, sided with *National Auto.*, and held that a reinstated public employee's action to recover back pay was contractual in nature and hence, under *Govt.C. 814*, exempt from the claim filing requirement. (170 C.A.3d 643.) The employee's action was also held exempt on the ground that it was merely incidental to an action that was itself exempt, i.e., the employee's action for reinstatement, which was not one for "money or damages." (170 C.A.3d 643.)

(3) *Resolution by Supreme Court.* *Stockton v. Superior Court* (2007) 42 C.4th 730, 68 C.R.3d 295, 171 P.3d 20, resolved the conflict in the Courts of Appeal about whether the claims presentation requirements of the Government Claims Act apply to contract claims. Plaintiff developer filed an action against defendant city for breach of a development contract to rehabilitate and operate a hotel and to construct an adjacent cinema. Defendant demurred to plaintiff's complaint on the ground that plaintiff had failed to present a claim under the Act, but the trial judge overruled defendant's demurrer. Defendant petitioned the Court of Appeal for mandamus relief, and the Court of Appeal granted the petition and issued a writ directing the trial judge to sustain defendant's demurrer. Plaintiff then petitioned the California Supreme Court for mandamus relief. *Held*, opinion of the Court of Appeal affirmed with modifications by unanimous decision; the statutory claims presentation requirements apply to contract claims.

(a) *Claims presentation requirements.*

(1) Under *Govt.C. 905*, "all claims for money or damages" must be presented to the local public entity (see *supra*, §235 et seq.). (42 C.4th 737.) The plain meaning and legislative history of this provision and other claims presentation statutes confirm that they were intended by the Legislature to include contract claims. (42 C.4th 738.) "In view of these provisions, it is no surprise that courts have routinely applied the claim requirements to contract causes of action against local government defendants." (42 C.4th 739, citing *Loehr*, *Dilts*, *Alliance Financial*, *Baines Pickwick Ltd.*, and other cases.)

(2) Plaintiff's contrary view is based primarily on *Govt.C. 814*, which provides: "Nothing in this part affects liability based on contract or the right to obtain relief other than money or damages against a public entity or public employee." Some Courts of Appeal have read *Govt.C. 814* to exclude contract claims from the scope of the claim requirements. (42 C.4th 740, citing *National Auto.*, *Harris*, and *Gonzales v. California* (1977) 68 C.A.3d 621, 628, 137 C.R. 681, *infra*, §244.) Other courts have rejected that view, reasoning that *Govt.C. 814* pertains only to immunity from liability, and has no effect on the claims requirements. (42 C.4th 740, citing *Loehr* and *Baines*.) The reasoning in this second line of cases "finds ample support in the language, structure, and purpose of the statutes." (42 C.4th 740.)

(3) Plaintiff contended that its contract claims were based on the law of restitution, and therefore were exempt from the claims statutes under the rule of *Minsky v. Los Angeles* (1974) 11 C.3d 113, 113 C.R. 102, 520 P.2d 726, *infra*, §244, and *Holt v. Kelly* (1978) 20 C.3d 560, 143 C.R. 625, 574 P.2d 441, *infra*, §244. (42 C.4th 742.) However, that contention is without merit. Neither of those decisions involved a government contract. Further, plaintiff's action was not based on a governmental obligation to return specific property. (42 C.4th 743.)

(b) *Estoppel*. Defendant's assurances during negotiations that plaintiff's interests would be protected did not estop defendant from asserting the claims filing requirements, in absence of any conduct that might have deterred plaintiff from presenting a claim after defendant allegedly failed to keep its promises. (42 C.4th 744.)

(c) *Waiver*. Defendant did not waive its Government Claims Act defense by failing to advise plaintiff in correspondence between the parties that the correspondence was insufficient to state a Government Claims Act claim. Nothing in the correspondence indicated that litigation might ensue if defendant did not comply with the terms under discussion. (42 C.4th 744.) Further, any delay by defendant in asserting the Government Claims Act filing requirements as a defense did not waive the defense, because the Act clearly required the filing of a claim before the initiation of an action. (42 C.4th 746.)

(d) *Leave to amend*. Plaintiff was entitled to leave to amend its complaint to meet defendant's Government Claims Act defense. Although plaintiff had yet to advance a successful argument against that defense, the operative complaint did not on its face foreclose any reasonable possibility of a valid amendment. (42 C.4th 747.)

SUPPLEMENT: [This section is current through the latest supplement]



61 of 192 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

VII. NOTICE OF CLAIM AGAINST PUBLIC ENTITY

B. Scope of Requirement.

2. Claims.

a. Included Claims.

3. Claims in Class Actions.

3 Witkin Cal. Proc. Actions § 239

[§ 239] Claims in Class Actions.

(1) *General Rule: Claims Presentation Requirement Is Applicable.* In *San Jose v. Superior Court (Lands Unlimited)* (1974) 12 C.3d 447, 115 C.R. 797, 525 P.2d 701, 4 Cal. Proc. (5th), *Pleading*, §290, a class action was brought on theories of inverse condemnation and nuisance to recover damages for diminution in value of property of the class members located in the vicinity of the San Jose municipal airport. Plaintiff contended that the claims presentation requirement should not apply because a number of persons potentially within the class had filed claims in preceding years and that the city was consequently not surprised. Defendant contended that the claims requirement should apply to the claims asserted and that it would be impossible for a class to meet the requirement, thus eliminating class actions on any claim subject to the statute. *Held*, the claims requirement applied, despite the fact that the city was not surprised (see *supra*, §231), but a class claim could be filed.

(a) The test of a valid claim is substantial compliance with the statutory requirements. (12 C.3d 456; see *infra*, §275 et seq.)

(b) "Claimant," under *Govt.C. 910*, could be equated with each class member, but should not be; to demand an individual claim from each member in advance of the complaint would thwart class action relief. The claimant, therefore, is "the class itself." This interpretation is consistent with the pleading requirement. *C.C.P. 422.40* requires naming the "parties" in a complaint, but a class action complaint need not name each member of the class. "Thus, to satisfy the claims statutes, the class claim must provide the name, address, and other specified information concerning the *representative* plaintiff and then sufficient information to identify and make ascertainable the class itself. Because such information would meet the statutory requirements of name and address, *any* effort to identify the class would satisfy the *some compliance test*. Beyond this, the sufficiency of the identifying information must be measured by the *substantial compliance test*." (12 C.3d 457.)

(c) The action failed to meet the conditions of a proper class action (see 4 Cal. Proc. (5th), *Pleading*, §290), and extraordinary relief by writ was not available to challenge defective compliance with claims statutes (nonjurisdictional; see 2 Cal. Proc. (5th), *Jurisdiction*, §102). Hence, the issue of sufficiency of the class description here (persons

"similarly situated") was not decided. (12 C.3d 458.)

The *San Jose* decision has been frequently invoked and applied. (See *Eaton v. Ventura Port Dist.* (1975) 45 C.A.3d 862, 868, 119 C.R. 746 [no substantial compliance; "at a minimum ... it must contain sufficient information to enable the governmental entity, either from its own records ... or from the claim itself, to reasonably determine the circumstances which it is claimed give rise to liability and the possible outer limits of that liability"]; *Pacific Tel. & Tel. Co. v. Riverside* (1980) 106 C.A.3d 183, 190, 165 C.R. 29 [rejecting contention that employer's claim for compensation payments be treated as class claim for widow of decedent employee]; *Dhuyvetter v. Fresno* (1980) 110 C.A.3d 659, 664, 168 C.R. 61 [claim was sufficient under *San Jose* test; later decertification of class did not nullify claim]; 76 A.L.R.3d 1244 [*San Jose*].)

(2) *Exception: Tax Refund Claims.* At one time, the *San Jose* rule applied to tax refund class actions. (See *Santa Barbara Optical Co. v. State Bd. of Equalization* (1975) 47 C.A.3d 244, 247, 248, 120 C.R. 609 [claim for refund of sales taxes]; *Lattin v. Franchise Tax Bd.* (1977) 75 C.A.3d 377, 381, 142 C.R. 130 [affirming order dismissing class action where only individual claims were filed for refund of income taxes].) However, more recent decisions have held that taxpayers seeking refunds in a class action do not have to satisfy the claims presentation requirement. (See *Woosley v. California* (1992) 3 C.4th 758, 789, 13 C.R.2d 30, 838 P.2d 758, 9 Summary (10th), *Taxation*, §86 [disapproving *Santa Barbara Optical Co.* and *Lattin v. Franchise Tax Bd.*]; *Neecke v. Mill Valley* (1995) 39 C.A.4th 946, 959, 46 C.R.2d 266, 9 Summary (10th), *Taxation*, §135 [following *Woosley*]; *Thomas v. East Palo Alto* (1997) 53 C.A.4th 1084, 1095, 62 C.R.2d 185 [following *Woosley* and *Neecke*]; *Howard Jarvis Taxpayers Assn. v. Los Angeles* (2000) 79 C.A.4th 242, 246, 93 C.R.2d 742 [following *Woosley* and *Thomas*].)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Exception: Tax Refund Claims.* See *Los Angeles v. Superior Court (Oronoz)* (2008) 159 C.A.4th 353, 367, 71 C.R.3d 485 [exception did not apply to class action for refund of county utility user taxes, because taxes were not governed by specific tax refund statute; distinguishing *Woosley v. California* (1992) 3 C.4th 758, 13 C.R.2d 30, 838 P.2d 758, text, p. 322].



62 of 192 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

VII. NOTICE OF CLAIM AGAINST PUBLIC ENTITY

B. Scope of Requirement.

2. Claims.

b. Excluded Claims.

1. In General.

3 Witkin Cal. Proc. Actions § 240

[§ 240] In General.

Govt.C. 905 expressly excludes from the operation of the general claims procedures certain types of claims against local entities. Among those excluded claims are the following:

- (1) Claims for tax refunds, exemptions, etc. (*Govt.C. 905(a).*)
- (2) Claims in connection with mechanic's, laborer's, or materialperson's liens. (*Govt.C. 905(b)*; see *infra*, §243.)
- (3) Claims by public employees for fees, salaries, expenses, etc. (*Govt.C. 905(c)*; see *infra*, §241.)
- (4) Claims for workers' compensation. (*Govt.C. 905(d).*) This exception applies to claims for compensation within the exclusive remedy provision of the Workers' Compensation Act (see 2 *Summary* (10th), *Workers' Compensation*, §24 et seq.); a tort action outside the Act (see 2 *Summary* (10th), *Workers' Compensation*, §43 et seq.) is subject to the claims requirement. (*Miner v. Superior Court* (1973) 30 C.A.3d 597, 601, 106 C.R. 416.)
- (5) Claims for public assistance. (*Govt.C. 905(e).*)
- (6) Claims for benefits under public retirement or pension systems. (*Govt.C. 905(f)*; see *infra*, §242.)
- (7) Claims for principal or interest on bonds, etc. (*Govt.C. 905(g).*)
- (8) Claims relating to a special assessment, by offset of a claim for damages or by delivery of a warrant or bond. (*Govt.C. 905(h).*)
- (9) Claims by the state or its agency, another local public entity, or a judicial branch entity. (*Govt.C. 905(i).*) (See *Wells v. One2One Learning Foundation* (2006) 39 C.4th 1164, 1214, 48 C.R.3d 108, 141 P.3d 225 [False Claims Act actions by Attorney General or local prosecutors in their official capacities are exempt from Government Claims Act under *Govt.C. 905(i)*].)

(10) Claims arising under the Unemployment Insurance Code. (*Govt.C. 905(j).*)

(11) Claims for the recovery of penalties or forfeitures under *Lab.C. 1720* et seq. (public works). (*Govt.C. 905(k).*)

(12) Claims governed by the Pedestrian Mall Law of 1960. (*Govt.C. 905(l).*)

SUPPLEMENT: [This section is current through the latest supplement]

Excluded claims:(13) (*New*) Claims made against a local public entity for the recovery of damages suffered as a result of childhood sexual abuse (see text, §593 et seq.) arising out of conduct occurring on or after January 1, 2009. (*Govt.C. 905(m)*, added in 2008.)



63 of 192 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

VII. NOTICE OF CLAIM AGAINST PUBLIC ENTITY

B. Scope of Requirement.

2. Claims.

b. Excluded Claims.

2. Claims by Public Employees for Fees, Salaries, or Expenses.

3 *Witkin Cal. Proc. Actions* § 241

[§ 241] Claims by Public Employees for Fees, Salaries, or Expenses.

Claims against local entities by public employees for fees, salaries, expenses, etc., are expressly excepted from the operation of the general claims procedures. (*Govt.C. 905(c)*; see *Longshore v. Ventura* (1979) 25 C.3d 14, 22, 157 C.R. 706, 598 P.2d 866 [retired county employee's claim for overtime service before retirement].)

In *Loehr v. Ventura County Community College Dist.* (1983) 147 C.A.3d 1071, 195 C.R. 576, *supra*, §238, the court pointed out that the exemption is narrowly applied. (147 C.A.3d 1080.) Under *Hanson v. Garden Grove Unified School Dist.* (1982) 129 C.A.3d 942, 946, 181 C.R. 378, a former school district employee suing in tort for damages suffered from denial of reemployment was not seeking wages or benefits and came within the claims requirement. Thus, the exemption is for "claims for salaries and wages which have been earned but not paid"; i.e., earned but unpaid salary or wages are vested property rights, and claims for them are not claims for monetary damages. (147 C.A.3d 1080.)

SUPPLEMENT: [This section is current through the latest supplement]



64 of 192 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

VII. NOTICE OF CLAIM AGAINST PUBLIC ENTITY

B. Scope of Requirement.

2. Claims.

b. Excluded Claims.

3. Claims for Benefits Under Public Retirement or Pension System.

3 *Witkin Cal. Proc. Actions* § 242

[§ 242] Claims for Benefits Under Public Retirement or Pension System.

(1) *Nature of Exception.* Claims against local governments for benefits under a public retirement or pension system are expressly excepted from the operation of the general claims procedures. (*Govt.C. 905(f)*.) (See *Blue v. Los Angeles Unified School Dist.* (1994) 26 C.A.4th Supp. 12, 14, 31 C.R.2d 923 [plaintiff's action against unified school district for life insurance benefits upon death of his wife, who was employed by district, was subject to exception].) And the exception is limited to benefits earned while employed. (*Hanson v. Garden Grove Unified School Dist.* (1982) 129 C.A.3d 942, 946, 181 C.R. 378; *Loehr v. Ventura County Community College Dist.* (1983) 147 C.A.3d 1071, 1080, 195 C.R. 576, *supra*, §238.)

(2) *Limited Scope of Exception.* This exception only applies where the plaintiff seeks money due under the terms of an existing pension system. Where the plaintiff alleges that the defendant treated the plaintiff unfairly in administering the pension plan, the Government Claims Act filing requirements apply. (See *Baillargeon v. Department of Water & Power* (1977) 69 C.A.3d 670, 681, 138 C.R. 338 [claim based on promissory estoppel seeking recovery of benefits not provided by the retirement plan]; *Canova v. Trustees of Imperial Irr. Dist. Employee Pension Plan* (2007) 150 C.A.4th 1487, 1497, 59 C.R.3d 587 [claim of public employees seeking to invalidate changes that reduced amount of their pension benefits].)

In *Dalton v. East Bay Mun. Util. Dist.* (1993) 18 C.A.4th 1566, 23 C.R.2d 230, plaintiffs, former employees of defendant utility district, had been participants in the "1955 Formula" of defendant retirement system. Defendant district also maintained a formula known as the "1980 Formula," which required smaller employee contributions than the "1955 Formula," but also paid lower retirement benefits. Based on an actuary's report showing that the 1955 Formula participants were overcontributing to the retirement system, while the 1980 participants were undercontributing, defendant district amended both formulas in 1989. These amendments retroactively increased the retirement benefits for the 1980 Formula participants without requiring them to pay an additional contribution for the increased benefits for past service. The amendments also reduced the contribution rate for the 1955 Formula participants, but did not give them any refund of contributions that they had made at the higher rate in past years. Arguing that they were within the exception provided by *Govt.C. 905(f)*, plaintiffs failed to present a claim before bringing the present action against the

district, the retirement system, and the district retirement board for breach of fiduciary duty and denial of equal protection. *Held*, judgment for defendants on demurrer affirmed.

(a) On first impression plaintiffs' claims appear to fall squarely within the *Govt.C. 905(f)* exception, i.e., they are claims for money or benefits under a public retirement or pension system. And the cases relied on by defendants, which held that *Govt.C. 905(f)* was limited to benefits earned while employed, are inapplicable here, because plaintiffs are claiming money under a pension system for work already performed. (*18 C.A.4th 1573*, distinguishing *Baillargeon, Hanson, Loehr, and Dilts v. Cantua Elementary School Dist.* (1987) 189 C.A.3d 27, 234 C.R. 612, *supra*, §238, and *infra*, §280.)

(b) However, this does not end the analysis. Relying on the legislative history of *Govt.C. 905*, commentators have construed the statutory exceptions as applying essentially to nontortious claims for which some other claims procedure exists or for which the Government Claims Act's procedural protection is unnecessary. "The instant action is not such a case. Plaintiffs are basically alleging tortious wrongdoing by defendants. They do not seek money due to them under the terms of the existing pension system; rather, they claim defendants treated them unfairly in administering the system and seek to change the 1989 administrative decisions. Consequently, we conclude plaintiffs were required to file a claim." Having failed to do so, their action is barred. (*18 C.A.4th 1574.*)

SUPPLEMENT: [This section is current through the latest supplement]



65 of 192 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

VII. NOTICE OF CLAIM AGAINST PUBLIC ENTITY

B. Scope of Requirement.

2. Claims.

b. Excluded Claims.

4. Mechanics' Liens.

3 *Witkin Cal. Proc. Actions* § 243

[§ 243] Mechanics' Liens.

Claims against local entities in connection with mechanics' liens and similar liens are expressly excepted from the operation of the general claims procedure. (*Govt.C. 905(b)*.) However, the exception applies only to a stop notice or notice of lien under C.C. 3181, 3184, 3185, 3187, 3193, or 3196 that lays the foundation for a lawsuit based on the facts and legal theory of the notice. In *C.A. Magistretti Co. v. Merced Irr. Dist.* (1972) 27 C.A.3d 270, 103 C.R. 555, plaintiff, an unpaid subcontractor, filed a claim of lien, under the predecessor to those statutes, against defendant district, and thereafter filed a complaint for money due for work, labor, and materials, seeking recovery on the surety bond of the prime contractor. When it appeared that the bond was for faithful performance only, and did not cover labor and materials, plaintiff filed a supplemental complaint on a new theory, seeking damages against members of defendant district's board of directors for negligence in failing to obtain the labor and material bond required by statute. *Held*, judgment for defendants affirmed.

(a) The district and its officers might be liable under *Govt.C. 815.6* (failure to perform a mandatory duty; see 5 *Summary* (10th), *Torts*, §245 et seq.), but the point was not decided. (27 C.A.3d 274.)

(b) Assuming that liability exists, neither the district nor its officers or employees could be held liable where no claim was filed; and the claim filed under the predecessor statute did not fulfill the requirements or carry out the statutory purposes of a claim under *Govt.C. 910*. (27 C.A.3d 275.)

(c) "To interpret subdivision (b) of section 905 to dispense with the timely presentation of a claim containing the essential information required by *Government Code section 910*, in a case such as this, would make it possible for a person who has elected to seek relief from a public entity under one statutory theory, several years later, to sue an employee of the entity under an entirely different statutory theory even though the employee has had no notice of the potential liability. Of even greater consequence, the unconscionable delay could be accomplished in contradiction of ordinary rules of pleading because the so-called amendment to [plaintiff]'s initial complaint not only brought in respondents as new parties to the action, but it changed the factual background, the nature of the cause of action and the basis for recovery." (27 C.A.3d 276.)

SUPPLEMENT: [This section is current through the latest supplement]



66 of 192 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

VII. NOTICE OF CLAIM AGAINST PUBLIC ENTITY

B. Scope of Requirement.

2. Claims.

b. Excluded Claims.

5. Claims for Specific Recovery.

3 *Witkin Cal. Proc. Actions* § 244

[§ 244] Claims for Specific Recovery.

(1) *Nature of Exception.* In *Minsky v. Los Angeles* (1974) 11 C.3d 113, 113 C.R. 102, 520 P.2d 726, the complaint alleged the following: M was arrested by the police, who took \$ 7,720 from his person as evidence. After disposition of the criminal charges, M demanded the money and, on refusal, assigned his interest to his attorney, who assigned to plaintiff. The demand was for recovery of money wrongfully converted. *Held*, judgment on demurrer reversed; the claims statute did not apply.

(a) *Govt.C. 905* applies only to claims for "money or damages." A claim for specific recovery has never been considered one for money or damages within the meaning of such statutes. (11 C.3d 121, quoting the text on election between remedy of specific recovery and damages for conversion.)

(b) The government, in taking possession of property that is not contraband, is a bailee (e.g., of an impounded vehicle after a traffic accident). (11 C.3d 121.)

(c) If a defendant in a criminal proceeding may obtain a writ of mandamus to compel return of personal property wrongfully withheld by custodial officers (see *Buker v. Superior Court* (1972) 25 C.A.3d 1085, 1089, 102 C.R. 494, 4 Cal. Crim. Law (3d), *Illegally Obtained Evidence*, §141), the plaintiff who proceeds by a civil action should have the same right. (11 C.3d 123.)

(d) The fact that the city took the further wrongful step of disposing of the money by mingling it with nontraceable funds does not defeat the claim for specific recovery and leave only the remedy of damages subject to the defense of the claims statute. (11 C.3d 121, 122, footnote 14.)

Minsky was followed in *Holt v. Kelly* (1978) 20 C.3d 560, 143 C.R. 625, 574 P.2d 441, and the rule was applied to a claim for the value of the property. A sheriff's deputy arrested petitioner, and a footlocker was taken from him by the booking officer. The officers negligently lost most of its contents, and petitioner sought mandamus against respondent sheriff to compel return of the property or its value. *Held*, writ granted; no claim was required. (20 C.3d 564.)

Other cases are to the same effect. (See *Gonzales v. California* (1977) 68 C.A.3d 621, 628, 137 C.R. 681 [following *Minsky*; no claim was required in action for restitution from person unjustly enriched]; *Hibbard v. Anaheim* (1984) 162 C.A.3d 270, 275, 208 C.R. 733 [following *Minsky* and *Holt*; no claim was required in action for return of property seized under search warrant but subsequently suppressed, or for damages in lieu of return]; *Long v. Los Angeles* (1998) 68 C.A.4th 782, 785, 80 C.R.2d 583 [following *Minsky* and *Holt*; no claim was required in action for wrongful seizure of birds, seeking injunction for return of birds who survived, and damages for birds that perished]; *Escamilla v. California Dept. of Corrections & Rehabilitation* (2006) 141 C.A.4th 498, 509, 46 C.R.3d 408 [following *Minsky*, *Holt*, and *Long*; no claim was required in prisoner's action for confiscation of personal property].)

(2) *Distinction: Where Nonmonetary Relief Is Incidental to Damages.* This exception does not apply, however, where the demand for nonmonetary relief is merely incidental or ancillary to a prayer for damages. (See *Loehr v. Ventura County Community College Dist.* (1983) 147 C.A.3d 1071, 1081, 195 C.R. 576, *supra*, §238; *Hart v. Alameda* (1999) 76 C.A.4th 766, 779, 90 C.R.2d 386 [claim was required in action against county by civil litigants seeking recovery of unused jury fee deposits transferred from superior court to county's general fund; distinguishing *Minsky*, *Holt*, and *Long*].)

SUPPLEMENT: [This section is current through the latest supplement]

(3) *(New) Distinction: Where Claim Is Not Based on Governmental Obligation To Return Specific Property.* The exception for specific recovery does not apply where the claim for "money or damages" is not based on a governmental obligation to return specific property. The exception is limited to situations in which the defendant had a duty to return seized property, enforceable by way of mandamus. Where a claim for money or damages is not based on a governmental obligation to return specific property, it is subject to the general claims procedure. See *Los Angeles v. Superior Court (Collins)* (2008) 168 C.A.4th 422, 429, 85 C.R.3d 560 [class action by plaintiffs arrested for driving under influence seeking recovery of money paid to city for emergency response services was claim for "money or damages" subject to general claims procedure; claim was not based on obligation to return specific property held by the city as bailee, because city did not seize money from plaintiffs and hold it for them as bailee, and city was not obligated to return specific property; following *Stockton v. Superior Court* (2007) 42 C.4th 730, 68 C.R.3d 295, 171 P.3d 20, text, §238, relying on dictum in *Hart v. Alameda* (1999) 76 C.A.4th 766, 90 C.R.2d 386, text, p. 327, and distinguishing *Minsky v. Los Angeles* (1974) 11 C.3d 113, 113 C.R. 102, 520 P.2d 726, text, p. 326].



67 of 192 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

VII. NOTICE OF CLAIM AGAINST PUBLIC ENTITY

B. Scope of Requirement.

2. Claims.

b. Excluded Claims.

6. Civil Rights Actions.

3 Witkin Cal. Proc. Actions § 245

[§ 245] Civil Rights Actions.

(1) *General Rule.* In *Williams v. Horvath* (1976) 16 C.3d 834, 129 C.R. 453, 548 P.2d 1125, plaintiffs brought a tort action for damages against police officers under the federal Civil Rights Act (42 U.S.C., §1983; see 8 *Summary* (10th), *Constitutional Law*, §814 et seq.). The lower court sustained a demurrer on the ground that no claim had been filed within the 100-day requirement of *Govt.C. 911.2* (now 6 months). *Held*, judgment on demurrer reversed.

(a) The federal Civil Rights Act has no limitations period, and the courts typically apply the state statute of limitations by analogy. (16 C.3d 838.) But the claims requirement is not a procedural statute of limitations; it is a condition on the right to sue the public entity, which, except as provided by statute, is immune. (16 C.3d 839.)

(b) The purposes underlying 42 U.S.C., §1983--"to serve as an antidote to discriminatory state laws, to protect federal rights where state law is inadequate, and to protect federal rights where state processes are available in theory but not in practice"--may not be frustrated by state substantive limitations couched in procedural language. (16 C.3d 841.)

(c) Thus, while it is constitutionally permissible for the Legislature to place this substantive condition on the state cause of action, the Supremacy Clause will not permit an abrogation of the federal remedy. (16 C.3d 842.) (See *Rossiter v. Benoit* (1979) 88 C.A.3d 706, 713, 152 C.R. 65, *infra*, §665 [Williams language is broad enough to embrace proposition that "no part of the California Tort Claims Act, including but not limited to the statute of limitations stated therein, is applicable when the federal Civil Rights Act is invoked"].)

In *Felder v. Casey* (1988) 487 U.S. 131, 108 S.Ct. 2302, 101 L.Ed.2d 123, the United States Supreme Court held the Wisconsin notice of claim statute inapplicable to an action under 42 U.S.C., §1983 brought in the state court. "In enacting §1983, Congress entitled those deprived of their civil rights to recover full compensation from the governmental officials responsible for those deprivations. A state law that conditions that right of recovery upon compliance with a rule designed to minimize governmental liability, and that directs injured persons to seek redress in the first instance from the very targets of the federal legislation, is inconsistent in both purpose and effect with the

remedial objectives of the federal civil rights law. Principles of federalism, as well as the Supremacy Clause, dictate that such a state law must give way to vindication of the federal right when that right is asserted in state court." (108 S.Ct. 2314, 101 L.Ed.2d 147.)

(2) *Distinction: Where Relief Is Not Available in Title VII Action.* Where the complaint seeks relief not available in a Title VII action, there is no exemption from the claim filing requirement. Thus, in *Garcia v. Los Angeles Unified School Dist.* (1985) 173 C.A.3d 701, 219 C.R. 544, plaintiff schoolteacher brought an action seeking compensatory and punitive damages against defendant school district for intentional infliction of emotional distress resulting from its discriminatory conduct. Plaintiff attempted to characterize her action as one brought under Title VII and exempt from the claim filing requirement of Govt.C. 911.2. *Held*, the filing requirement applied. (173 C.A.3d 709.) The remedies available in a Title VII action include back pay and "any other equitable relief as the court deems appropriate" (42 U.S.C., §2000e-5(g)). Because the emotional and punitive damages sought by plaintiff were not equitable relief or back pay, as allowed by Title VII, her action could not be construed as an exempt Title VII action. (173 C.A.3d 710.)

SUPPLEMENT: [This section is current through the latest supplement]



68 of 192 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

VII. NOTICE OF CLAIM AGAINST PUBLIC ENTITY

B. Scope of Requirement.

2. Claims.

b. Excluded Claims.

7. Actions Under Fair Employment and Housing Act.

3 Witkin Cal. Proc. Actions § 246

[§ 246] Actions Under Fair Employment and Housing Act.

In *Snipes v. Bakersfield* (1983) 145 C.A.3d 861, 193 C.R. 760, an applicant who was denied a job in a city police department brought an employment discrimination action against the city and the police department under the Fair Employment and Housing Act (FEHA) (*Govt.C. 12900 et seq.*). *Held*, the action was not subject to the filing requirements of *Govt.C. 945.4*.

(a) The purposes and procedures of FEHA, which not only create a statutory cause of action but also set out a comprehensive scheme for administrative enforcement, including specific limitations periods, demonstrate a legislative intent to exempt actions under FEHA from general Government Claims Act requirements. (145 C.A.3d 868.)

(b) In any event, the applicant's claim, which was for injunctive relief and incidental back pay and damages, was not one "for money or damages" within the scope of the Government Claims Act notice of claim provisions (*Govt.C. 905, 945.4*); because the claim for damages and back pay was incidental to the claim for injunctive relief, the action was basically nonpecuniary. (145 C.A.3d 870, 871.)

Other cases are to the same effect. (See *Garcia v. Los Angeles Unified School Dist.* (1985) 173 C.A.3d 701, 710, 219 C.R. 544 [following *Snipes*]; *Murray v. Oceanside Unified School Dist.* (2000) 79 C.A.4th 1338, 1358, 95 C.R.2d 28 [following *Garcia*].)

SUPPLEMENT: [This section is current through the latest supplement]



69 of 192 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

VII. NOTICE OF CLAIM AGAINST PUBLIC ENTITY

B. Scope of Requirement.

2. Claims.

b. Excluded Claims.

8. Cross-Complaints in Actions by State.

3 Witkin Cal. Proc. Actions § 247

[§ 247] Cross-Complaints in Actions by State.

(1) *Contract Actions.* In *People v. West-A-Rama* (1973) 35 C.A.3d 786, 111 C.R. 197, the state filed an action against defendant seeking recovery on a written contract. Defendant cross-complained against the state for declaratory relief and damages. The trial judge sustained a demurrer for failure to file a claim. *Held*, this was error.

(a) The state has never been protected by the doctrine of sovereign immunity as to contract liability; hence, the claims statutes do not relinquish any immunity but merely require notice sufficient to permit a prompt investigation and an opportunity to settle. Here, the state presumably made a full investigation before initiating the action, and chose to litigate rather than settle. (35 C.A.3d 794.)

(b) Because sovereign immunity is not involved and the purposes of the claims statutes have been satisfied, there is no reason to insist on compliance here. "On the contrary, it is manifestly unjust to allow State to bring a suit upon a contract and then to use what amounts to a notice statute to shield itself from a cross-complaint asserted by the defendant in the same suit and arising from that very contract." (35 C.A.3d 794.)

(2) *Tort Actions.* In *Krainock v. Superior Court* (1990) 216 C.A.3d 1473, 265 C.R. 715, the court agreed with criticism of *People v. West-A-Rama* and its apparent limitation of its holding to contract actions, and concluded that the same policy considerations applied to tort actions as well. (216 C.A.3d 1478.) The court then adopted three rules for determining the applicability of the claims requirements to defensive cross-complaints:

(a) The action should be one initiated by the public entity, as opposed to one initiated by a third party in which a defendant seeks to cross-complain against a public entity not previously a party to the action. (216 C.A.3d 1478.)

(b) The defensive pleading must arise out of the same transaction or event forming the basis of the plaintiff's claim. (216 C.A.3d 1478.)

(c) The cross-complaint may assert only defensive matter, not claims for affirmative relief. (216 C.A.3d 1478.)

SUPPLEMENT: [This section is current through the latest supplement]



70 of 192 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

VII. NOTICE OF CLAIM AGAINST PUBLIC ENTITY

B. Scope of Requirement.

2. Claims.

b. Excluded Claims.

9. Actions on Judgment.

3 Witkin Cal. Proc. Actions § 248

[§ 248] Actions on Judgment.

An action on a judgment against a public entity is not subject to the claim filing requirements of *Govt.C. 905* and *945.4*. Those requirements are intended to give the public entity the opportunity to investigate the factual basis of the claim while the evidence is fresh, to settle meritorious cases without litigation, and to consider the fiscal implications of potential liability. These purposes are clearly related to unadjudicated claims, and not to final judgments. (*Barkley v. Blue Lake* (1996) *47 C.A.4th* 309, 316, *54 C.R.2d* 679.)

SUPPLEMENT: [This section is current through the latest supplement]



71 of 192 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

VII. NOTICE OF CLAIM AGAINST PUBLIC ENTITY

B. Scope of Requirement.

2. Claims.

b. Excluded Claims.

10. Claims Seeking Performance of Mandatory Duty.

3 Witkin Cal. Proc. Actions § 249

[§ 249] Claims Seeking Performance of Mandatory Duty.

In *Board of Administration of the Public Employees' Retirement System v. Wilson* (1997) 52 C.A.4th 1109, 61 C.R.2d 207, the Board of Administration of the California Public Employees' Retirement System brought a mandamus action against the Governor challenging legislation (*Govt.C. 20822*) enacting "in arrears" financing of the California Public Employees' Retirement Fund on various grounds, including violation of the constitutional right to be free of impairment of contracts. *Held*, the claims statute did not apply.

(a) Case law holds that a claim is not required where the primary outcome sought by an action is not money or damages, but an order compelling the performance of a mandatory duty. *Eureka Teachers Assn. v. Board of Education* (1988) 199 C.A.3d 353, 244 C.R. 240, held that a teacher's claim for back pay was incidental to her mandamus action for reemployment, and thus was exempt from the claims filing requirement. *Sacramento v. Lackner* (1979) 97 C.A.3d 576, 159 C.R. 1, held that a mandamus action to compel a state officer to disburse funds to a county under Medi-Cal statutes was exempt from the claim-filing requirement. *Forde v. Cory* (1977) 66 C.A.3d 434, 135 C.R. 903, held that a mandamus proceeding to compel a state officer to pay a lump sum death benefit on behalf of a judge who died before retirement was an action to compel performance of an express statutory duty, not a money action, and thus was exempt from the claims filing requirement. (52 C.A.4th 1125.)

(b) Similarly, the present action "sought performance of a mandatory duty, and the judgment in this case ordered issuance of a writ directing return to the quarterly payment schedule and transfer to the retirement fund of all payments due under that schedule. The action was thus exempt from the claim-filing requirement." (52 C.A.4th 1126.) (See *Branciforte Heights, LLC v. Santa Cruz* (2006) 138 C.A.4th 914, 929, 42 C.R.3d 96 [following *Forde*; mandamus action to require city to grant open space credit against park fees assessed against developer was not subject to claim presentation requirement].)

SUPPLEMENT: [This section is current through the latest supplement]



72 of 192 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

VII. NOTICE OF CLAIM AGAINST PUBLIC ENTITY

B. Scope of Requirement.

2. Claims.

c. Insurer's Reliance on Insured's Claim.

3 Witkin Cal. Proc. Actions § 250

[§ 250] Insurer's Reliance on Insured's Claim.

(1) *Insurer Suing To Recover Workers' Compensation Benefits.* In *San Diego Unified Port Dist. v. Superior Court* (1988) 197 C.A.3d 843, 243 C.R. 163, an employee of a cafeteria located in a public airport was seriously injured when a rat bit her and she fell, hitting her head. She received workers' compensation benefits from her employer, and also filed a tort claim against defendant airport district. After defendant's rejection of the claim, the employee filed a timely action. The workers' compensation insurer for the employer attempted to intervene in the employee's action to recover compensation benefits paid, but failed to file its own claim. *Held*, no separate claim was required.

(a) Defendant's decision not to settle with the employee was not affected by the insurer's failure to file a claim, and the district could not be prejudiced by that failure. The employee's claim for damages was all-inclusive, and a separate claim by the insurer was not necessary to implement the purpose of the *Government Claims Act*. (197 C.A.3d 848.)

(b) The contention that the insurer's intervention creates a greater potential for liability because the employee might abandon or dismiss her action is without merit. When the insurer pursues its claim, defendant's liability exposure has not been increased; it was there when the employee initially filed her claim. (197 C.A.3d 848.)

(c) Defendant's insistence on a claim by the insurer also ignores the settlement process in which many of these cases are resolved:

(1) An insurer who has not filed a claim can nonetheless obtain a valid lien to secure the payment of benefits; there is nothing in the *Government Code* that conditions the validity of this lien on filing a claim. And when the case is settled, the claimant must relinquish part of the settlement proceeds to satisfy the lien. (197 C.A.3d 849.)

(2) The statute requires notice to the insurer before a settlement between the claimant and the third party can be effected. "As a practical matter, as most settlement judges are well aware, the proffered settlement is frequently inadequate to fully satisfy the demands of the claimant and the carrier. Settlement in these cases is sometimes reached by the parties compromising their respective demands and taking a smaller piece of the settlement pie. There are cases, however, in which the carrier concludes that a sliver of the settlement pie is simply inadequate. To resolve the impasse

in such cases, settlement is frequently effected between the claimant and the third party by severing the respective interests of the carrier and the injured party permitting the carrier to litigate its claim against the third party in a separate action." (197 C.A.3d 849.)

(3) "There are benefits to this approach. The claim of the injured party with his or her substantially larger demand for damages has been fairly resolved with a minimum of litigation expense while the controverted issues between the carrier and the third party can still be resolved in a relatively simple lawsuit without the complexities of placing a value on damages for pain and suffering and economic loss. Moreover an accurate determination can be made of the employer's comparative negligence, if any, which should fairly reduce the carrier's portion of the recovery." (197 C.A.3d 849.)

(4) Defendant's position would upset the "delicate balance" involved in settlement proceedings. If an employee settles his or her action excluding compensation benefits, under *Lab.C. 3859(b)*, the carrier would have the right to proceed against the third party under *Lab.C. 3852* to recover those benefits. "However, the carrier's right would be meaningless if the governmental entity could bar its action because of the carrier's failure to file a separate timely claim. The settlement process would be chilled if settlement could be effected only at the expense of squeezing out the legitimate interest of the carrier who had failed to file a written claim for no reason other than the carrier's reasonable belief that its interest would be protected in the lawsuit of the injured party. With fewer settlements effected, the larger and more complex plaintiffs' cases would then proceed to trial with emotional and financial burdens to the parties. We see no reason to reach this costly and unnecessary result when the purposes of the Act and the Labor Code are both served by treating the filing of the written claim by the injured party as sufficient to satisfy the written claim requirement of the carrier." (197 C.A.3d 850.)

(d) "We therefore conclude there is no reason to defeat the comprehensive and rational statutory scheme established by the Legislature to reimburse an employer or a carrier by requiring what would be in effect a duplicate written claim against the public entity. We believe that our decision not only furthers the purposes of the Labor Code's statutory scheme to reimburse carriers for compensation benefits paid, but is consistent with the non-fault nature of workers' compensation law. The overall purpose of workers' compensation law is to provide compensation to injured employees regardless of fault. Therefore, as explained to us at oral argument by the carrier's attorney, upon notification of a claim a carrier does not normally institute a full-scale investigation into the circumstances of the worker's injury. The carrier normally relies on the employee to pursue actions against third party tortfeasors. If the carrier is unable to rely on an employee's claim filed against a governmental entity, the carrier would be required to expeditiously investigate any accident to determine whether a public entity was involved. This would not only create a difficult administrative burden, but result in increased costs for the carrier which must ultimately be borne by the employer. Since the purposes of the claims statute are served by the filing of the employee's claim, we see no reason to impose this added burden on our workers' compensation system." (197 C.A.3d 852.)

(2) *Insurer Suing as Subrogee*. An insurer who has paid a claim by an insured whom it is required to indemnify is subrogated to the insured's right to indemnity from a third party who has contributed to the loss. The subrogee's right is equal to that of the insured, and its right of action is not independent and separate. Hence, "requiring the filing of a separate claim would be redundant and superfluous." (*Smith v. Parks Manor* (1987) 197 C.A.3d 872, 881, 243 C.R. 256.)

SUPPLEMENT: [This section is current through the latest supplement]



73 of 192 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

VII. NOTICE OF CLAIM AGAINST PUBLIC ENTITY

B. Scope of Requirement.

3. Public Employees.

a. In General.

3 Witkin Cal. Proc. Actions § 251

[§ 251] In General.

(1) *Former Law.* Claims requirements in actions against public employees were formerly set forth in two broad statutes and various charter and ordinance provisions. (See *Stewart v. McCollister* (1951) 37 C.2d 203, 206, 231 P.2d 48; *Davis v. Kendrick* (1959) 52 C.2d 517, 519, 341 P.2d 673; *Huffaker v. Decker* (1946) 77 C.A.2d 383, 389, 175 P.2d 254; *Chavez v. Sprague* (1962) 209 C.A.2d 101, 105, 25 C.R. 603.) The differing procedures constituted procedural traps; e.g., the statutes were limited to negligence claims, but charters and ordinances often required presentation of claims for intentional torts. Also, different requirements applied to claims against public employees, public officers, and state employees. (See 20 So. Cal. L. Rev. 365; 23 So. Cal. L. Rev. 515; 1 U.C.L.A. L. Rev. 205; 8 U.C.L.A. L. Rev. 497.)

(2) *Nature and Scope of Revised Law.* Claims against public employees are now governed exclusively by the statutory procedure; local claims provisions are invalid. (Govt.C. 950.8; see C.E.B., 1 Government Tort Liability Practice 4th, §3.7 et seq.; Cal. Civil Practice, 1 Procedure, §1:52 et seq.; 6 Southwestern U. L. Rev. 556.) The statute applies to any "cause of action against a public employee or former public employee for injury resulting from an act or omission in the scope of his employment as a public employee." (Govt.C. 950.2.) (See *Neal v. Gatlin* (1973) 35 C.A.3d 871, 875, 111 C.R. 117 [analysis and application of scope of employment test; action was barred]; *Fowler v. Howell* (1996) 42 C.A.4th 1746, 1750, 50 C.R.2d 484, 5 Summary (10th), *Torts*, §240 [public employee who complained of coworker's sexual harassment was acting within scope of her employment; thus, coworker's subsequent malicious prosecution action against her was properly dismissed for failure to file claim with public employer].)

Judicial officers are expressly included in the definition of public employees for purposes of the claim provisions. (Govt.C. 810.2.)

SUPPLEMENT: [This section is current through the latest supplement]



74 of 192 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

VII. NOTICE OF CLAIM AGAINST PUBLIC ENTITY

B. Scope of Requirement.

3. Public Employees.

b. Requirement of Claim Against Entity.

3 *Witkin Cal. Proc. Actions* § 252

[§ 252] Requirement of Claim Against Entity.

(1) *Statement of Rule.* An action against a public employee is barred if an action against the employing public entity would be barred by the failure to satisfy the entity claims requirements. (*Govt.C. 950.2*; see *Miller v. Hoagland* (1966) 247 C.A.2d 57, 61, 55 C.R. 311 [defamation action was barred]; *Meester v. Davies* (1970) 11 C.A.3d 342, 347, 89 C.R. 711; *C.A. Magistretti Co. v. Merced Irr. Dist.* (1972) 27 C.A.3d 270, 274, 103 C.R. 555, *supra*, §243; *Mazzola v. Feinstein* (1984) 154 C.A.3d 305, 310, 201 C.R. 148; *Briggs v. Lawrence* (1991) 230 C.A.3d 605, 619, 281 C.R. 578 [plaintiff's malpractice complaint against county public defenders was insufficient for failure to allege that claim had been filed with county]; C.E.B., 1 Government Tort Liability Practice 4th, §5.61 et seq.)

In other words, a claim must be presented to the employing entity in order to sue the employee if a claim would be required to sue the entity. This rule applies even though the entity is immune from liability. (*Govt.C. 950.2*.) As the Law Revision Commission Comment explains: "[T]he presentation of a claim to the employing public entity is a prerequisite to suit against an employee notwithstanding the fact that the applicable substantive law may declare the entity to be immune from liability for the injury. Because the employing public entity is financially responsible for judgments against its employees [(*Govt.C. 825*)], the presentation of a claim is required in all cases."

(2) *Exception: Plaintiff Ignorant of Public Employment.* An exception exists where the plaintiff is ignorant of the public employment. The plaintiff is relieved from filing a claim where the plaintiff pleads and proves that he or she did not know or have reason to know within the prescribed claim period "that the injury was caused by an act or omission of the public entity or by an act or omission of an employee of the public entity in the scope of his employment as a public employee." (*Govt.C. 950.4*.) But this statute does not furnish an exception where the claimant was aware of the involvement of some public entity and failed to exercise reasonable diligence in ascertaining the facts concerning responsibility of the public employee. (*Leake v. Wu* (1976) 64 C.A.3d 668, 673, 134 C.R. 616; *Moore v. Morhar* (1977) 65 C.A.3d 896, 902, 135 C.R. 626.)

(3) *Claim Must Be Rejected.* Where a claim has been presented to the entity, no action may be brought against the employee until the claim has been rejected by the entity. (*Govt.C. 950.6(a)*.)

SUPPLEMENT: [This section is current through the latest supplement]



75 of 192 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

VII. NOTICE OF CLAIM AGAINST PUBLIC ENTITY

C. Content and Form of Claim.

1. Statutory Requirements.

3 *Witkin Cal. Proc. Actions* § 253

[§ 253] Statutory Requirements.

(1) *Content.* *Govt.C. 910* prescribes the contents of a claim. It must show all of the following:

- (a) The name and post office address of the claimant. (*Govt.C. 910(a).*)
- (b) The post office address to which the person presenting the claim desires notices to be sent. (*Govt.C. 910(b).*)
- (c) The date, place, and other circumstances of the occurrence or transaction that gave rise to the claim. (*Govt.C. 910(c).*)
- (d) A general description of the known indebtedness, obligation, injury, damage, or loss incurred. (*Govt.C. 910(d).*)
- (e) The names of the public employees causing the injury, damage, or loss, if known. (*Govt.C. 910(e).*)
- (f) The amount claimed if it totals less than \$ 10,000 as of the date of the presentation of the claim, including the estimated amount of any known prospective injury, damage, or loss, together with the basis for the computation. If the amount claimed exceeds \$ 10,000, no dollar amount may be included in the claim, but the claim must indicate whether it would be a "limited civil case" (e.g., a claim of \$ 25,000 or less; see 2 *Cal. Proc.* (5th), *Courts*, §241 et seq.). (*Govt.C. 910(f).*) (See C.E.B., 1 Government Tort Liability Practice 4th, §6.1 et seq.; Cal. Civil Practice, 1 Procedure, §1:76; Rutter Group, Civil Proc. Before Trial §1:681 et seq.; 6 Southwestern U. L. Rev. 556; 24 *A.L.R.3d* 965 [effect of amount claimed on recovery]; 53 *A.L.R.5th* 617 [sufficiency of claim against local government as to claimant's identity, name, address, and residence].)

(2) *Verification and Signing.* The claim need not be verified, but only signed by the claimant or by someone on his or her behalf. (*Govt.C. 910.2* [adding exception from signing requirement for claims against local entities for supplies or services presented on billhead or invoice].) (See *Lacy v. Monrovia* (1974) 44 *C.A.3d* 152, 155, 118 *C.R.* 277 [husband could file and sign single claim for himself and wife]; C.E.B., 1 Government Tort Liability Practice 4th, §§6.6, 6.7.)

(3) *Official Forms.* A local or state board must provide official forms for claims against the state or a judicial branch entity. Claimants must use the forms when presenting claims to be deemed in conformity with the claims

presentation statutes. A claim not presented on an official form may be returned, but the claim may be resubmitted on the appropriate form. (*Govt.C. 910.4*; see C.E.B., 1 Government Tort Liability Practice 4th, §6.8 et seq.)

(4) *Filing Fee for Claims Against State.* A claimant must pay a \$ 25 filing fee to present a claim against the state. The filing fee requirement is waived for indigent persons and similar individuals. (*Govt.C. 905.2(c)-(g)*.) (On rules governing commencement of action based on payment or waiver of filing fee, see *Govt.C. 911.2(b)*, *infra*, §255.)

SUPPLEMENT: [This section is current through the latest supplement]



76 of 192 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

VII. NOTICE OF CLAIM AGAINST PUBLIC ENTITY

C. Content and Form of Claim.

2. Illustrations.

3 *Witkin Cal. Proc. Actions* § 254

[§ 254] Illustrations.

(1) *Claim Sufficient.* In *Blair v. Superior Court* (1990) 218 C.A.3d 221, 267 C.R. 13, plaintiff, a passenger in a pickup truck, was injured when the truck went out of control on an icy highway and collided with a tree. Plaintiff filed a timely claim against the Department of Transportation, pursuant to *Govt.C. 945.4*, stating that his theory of liability was the department's negligent maintenance and construction of the highway surface and failure to sand and care for the highway. After the claim was rejected, plaintiff filed an action against the department, alleging that there was no guardrail and that there were other defects in the road not specified in the claim. Defendant moved to strike portions of the complaint on the ground that the challenged allegations predicated liability on facts different from those set forth in the claim. The trial judge granted the motion. *Held*, plaintiff's claim was sufficient to support the allegations of the complaint.

(a) *Govt.C. 945.4* simply states that no action may be commenced against a public entity unless a claim that satisfies *Govt.C. 910* (supra, §253) has been submitted and denied. *Govt.C. 910* prescribes the information that the claim must contain. However, "the written claim must correspond with the facts alleged in the complaint; even if the claim were timely, the complaint is vulnerable to a demurrer if it alleges a factual basis for recovery which is not fairly reflected in the written claim." (218 C.A.3d 223, 224.)

(b) As long as the general elements of a claim prescribed in *Govt.C. 910* are present, it is not necessary that the claim comply with formal pleading standards. The purpose of the claim is to present sufficient detail to reasonably enable the public entity to make an adequate investigation of the merits of the claim and to settle it without the expense of a lawsuit. Plaintiff's claim met the minimum requirements of *Govt.C. 910* by setting forth the date, place, and circumstances of the accident. Allegations, in response to questions on the claim form, as to the particular act or omission of state officers alleged to have caused the injury or damage, were surplusage. Moreover, additional allegations in the complaint relating to the lack of guardrails, the slope of the road, and failure to warn were elaborations of the claim and were not substantially different from the original claim. (218 C.A.3d 224, 225.)

(c) "It is apparent that in each of the decisions [relied on by defendant] the plaintiff did not merely elaborate or add further detail to a claim which was predicated on the same fundamental facts set forth in the complaint. Rather, there was a complete shift in allegations, usually involving an effort to premise civil liability on acts or omissions committed

at different times or by different persons than those described in the claim. In contrast, the claim and the complaint in this action are premised on essentially the same foundation, that because of its negligent construction or maintenance, the highway at the scene of the accident constituted a dangerous condition of public property." (218 C.A.3d 226.)

(2) *Claim Insufficient.* In *Wood v. Riverside General Hosp.* (1994) 25 C.A.4th 1113, 31 C.R.2d 8, a medical malpractice action against defendant county hospital, the question was whether a letter by plaintiff's mother, reciting numerous instances of mistreatment, submitted to defendant while plaintiff was hospitalized, substantially complied with the claims requirement. *Held*, the letter was insufficient as a matter of law. Although the letter satisfied some of the requirements of Govt.C. 910 (supra, §253), it was not directed to one of the persons specified in Govt.C. 915 (infra, §262), and it did not contain anything constituting notice of the amount of a claim, as required by Govt.C. 910(f). Thus, the letter provided no opportunity to investigate or settle the claim. (25 C.A.4th 1116.)

SUPPLEMENT: [This section is current through the latest supplement]



77 of 192 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

VII. NOTICE OF CLAIM AGAINST PUBLIC ENTITY

D. Time of Filing.

1. Statutory Requirements.

3 Witkin Cal. Proc. Actions § 255

[§ 255] Statutory Requirements.

(1) *Two Time Periods.* *Govt.C. 911.2* specifies two time periods for filing claims. (See C.E.B., 1 Government Tort Liability Practice 4th, §6.11 et seq.; Rutter Group, Civil Proc. Before Trial §1:710 et seq.; 6 Southwestern U. L. Rev. 569.) The periods are:

(a) *Death or injury to person or property.* The time for filing a claim for "death or for injury to person or to personal property or growing crops" is 6 months. (*Govt.C. 911.2(a)*.) Before a 1987 amendment, the period was 100 days. (See *Collins v. Los Angeles* (1966) 241 C.A.2d 451, 454, 50 C.R. 586 [false arrest and imprisonment]; *Baillargeon v. Department of Water & Power* (1977) 69 C.A.3d 670, 682, 138 C.R. 338 [claim for infliction of emotional distress]; *Taylor v. Mitzel* (1978) 82 C.A.3d 665, 671, 672, 147 C.R. 323 [same]; *Los Angeles v. Superior Court (Los Angeles)* (1990) 223 C.A.3d 163, 166, 272 C.R. 600 [1987 amendment increasing filing period to 6 months applies to action based on acts or omissions occurring on or after January 1, 1988; actions based on pre-1988 acts or omissions are subject to former 100-day period].) (On tort defendant's claim for partial indemnity, see *infra*, §§260, 261.)

(b) *Other causes of action.* The time for filing a claim "relating to any other cause of action" is 1 year. (*Govt.C. 911.2(a)*); see *Mosesian v. Fresno* (1972) 28 C.A.3d 493, 495, 104 C.R. 655; *Baillargeon v. Department of Water & Power*, *supra*, 69 C.A.3d 682 [claim based on equitable estoppel]; *Wheeler v. San Bernardino* (1978) 76 C.A.3d 841, 846, 143 C.R. 295 [claim for injury to real property]; *Westcon Const. Corp. v. Sacramento* (2007) 152 C.A.4th 183, 190, 61 C.R.3d 89 [breach of contract claim].)

The broad language of the provision governing injury to growing crops is narrowed by the intended scope of the provision; i.e., the 6-month period applies only to tort claims. If the action for injury to growing crops is based on breach of contract, express or implied, the 1-year period ("any other cause of action") applies. (*Voth v. Wasco Public Util. Dist.* (1976) 56 C.A.3d 353, 356, 128 C.R. 608, *supra*, §140 [construing former 100-day limitations period].)

(2) *Commencement of Claim Against State.* For purposes of determining whether a claim against the state was timely commenced, the date the claim was presented to the California Victim Compensation and Government Claims Board is one of the following:

(a) When the claim is submitted with the required \$ 25 fee (see *supra*, §253). (*Govt.C. 911.2(b)(1).*)

(b) If a fee waiver is granted, when the claim was submitted with the affidavit requesting waiver. (*Govt.C. 911.2(b)(2).*)

(c) If a fee waiver is denied, when the claim was submitted with the affidavit requesting the fee waiver, provided the filing fee is paid to the board within 10 calendar days of the mailing of the notice of the denial of the fee waiver. (*Govt.C. 911.2(b)(3).*)

SUPPLEMENT: [This section is current through the latest supplement]



78 of 192 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

VII. NOTICE OF CLAIM AGAINST PUBLIC ENTITY

D. Time of Filing.

2. Time Runs From Accrual of Cause of Action.

a. Statute of Limitations Rule Governs.

3 *Witkin Cal. Proc. Actions* § 256

[§ 256] Statute of Limitations Rule Governs.

(1) *In General.* The time runs from the date of accrual of the cause of action within the meaning of the applicable statute of limitations. (*Govt.C.* 901; see *Collins v. Los Angeles* (1966) 241 C.A.2d 451, 454, 50 C.R. 586; *Wozniak v. Peninsula Hosp.* (1969) 1 C.A.3d 716, 725, 82 C.R. 84 [applying medical malpractice rule of postponed accrual until facts are discoverable with reasonable diligence (infra, §577 et seq.)]; *Whitfield v. Roth* (1974) 10 C.3d 874, 885, 112 C.R. 540, 519 P.2d 588 [following *Wozniak*]; *Amador Valley Investors v. Livermore* (1974) 43 C.A.3d 483, 490, 117 C.R. 749 [continuing discharge of treated sewage water; judgment for damages sustained within 1 year of claim was proper]; *Stone v. Los Angeles* (1975) 51 C.A.3d 987, 996, 124 C.R. 822 [continuing delay in condemnation action; damages limited to those sustained within 1 year of claim]; *Martinez v. Los Angeles* (1978) 78 C.A.3d 242, 245, 144 C.R. 123 [medical malpractice; time begins to run only on date of actual or constructive discovery]; *Reyes v. Los Angeles* (1988) 197 C.A.3d 584, 590, 591, 243 C.R. 35 [same]; *Zuniga v. Housing Authority of Los Angeles* (1995) 41 C.A.4th 82, 100, 48 C.R.2d 353, 5 *Summary* (10th), *Torts*, §267 [claim made 6 months after fire was timely as to damages attributable to fire and its aftermath, even if claim was untimely as to damages attributable to pre-fire activities]; *Fantazia v. Stanislaus* (1996) 41 C.A.4th 1444, 1449, 49 C.R.2d 177 [legal malpractice claim against public defender; accrual delayed until actual injury]; *Stonewall Ins. Co. v. Palos Verdes Estates* (1996) 46 C.A.4th 1810, 1843, 54 C.R.2d 176 [continuing property damage from erosion caused by negligently maintained storm drain; accrual delayed until situation stabilized]; *Hernandez v. Garcetti* (1998) 68 C.A.4th 675, 680, 80 C.R.2d 443 [third-party spoliation of evidence claim against district attorney; accrual delayed until plaintiff discovered that third party (who concealed sale) had sold evidence, not until plaintiff later learned that evidence could not be located]; *Westcon Const. Corp. v. Sacramento* (2007) 152 C.A.4th 183, 191, 61 C.R.3d 89 [breach of contract claim was untimely as matter of law where all three asserted accrual dates rendered claim untimely; defendant was not required to prove which date was correct one]; C.E.B., 1 *Government Tort Liability Practice* 4th, §6.16 et seq.) (On rules for commencement of claims against state, see *supra*, §255; on accrual for purposes of statute of limitations, see *infra*, §493 et seq.)

(2) *Accrual of Minor's Claim.* Where accrual depends on the knowledge of the facts, and the plaintiff is a minor, the knowledge or lack of knowledge of the minor's parents determines accrual. (*Whitfield v. Roth*, *supra*; *Reyes v. Los Angeles*, *supra* [following *Whitfield*].)

For purposes of the claims statutes, "a minor's medical malpractice cause of action against a government defendant accrues when the minor's parent or guardian knew or should have known through the exercise of reasonable diligence that a negligent wrongful act of medical care caused the child's injuries." (*Torres v. Los Angeles* (1989) 209 C.A.3d 325, 335, 257 C.R. 211; see *Curtis T. v. Los Angeles* (2004) 123 C.A.4th 1405, 1422, 21 C.R.3d 208 [action against county alleging that child, at ages 5 through 8, had been molested by another child while living in foster home operated under auspices of county; accrual was delayed until plaintiff's mother discovered molestation, based on plaintiff's youth, ignorance, and inexperience, and on foster parent's alleged complicity in abuse]; *V.C. v. Los Angeles Unified School Dist.* (2006) 139 C.A.4th 499, 514, 43 C.R.3d 103 [relying on *Los Angeles v. Superior Court (N.L.)* (2005) 127 C.A.4th 1263, 26 C.R.3d 445, *infra*, §689; in action against school district for sexual abuse of minor, longer limitations period in C.C.P. 340.1 did not expand accrual limits of claims presentation requirements in *Govt.C. 911.2 or 911.4*].) (On statute of limitations in minor's malpractice action under C.C.P. 340.5, see *infra*, §586 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Accrual of Minor's Claim.* See *K.J. v. Arcadia Unified School Dist.* (2009) 172 C.A.4th 1229, 1243, 92 C.R.3d 1 [accrual of student's negligent supervision claim against school district, based on sexual abuse by teacher, was postponed under delayed discovery rule during period she was unaware that she had been victimized; teacher exploited student's vulnerability to seduce her into unlawful and harmful sexual relationship, and student believed that she was in love with teacher and that he had done nothing wrong, even after student disclosed teacher's conduct and teacher was arrested].



79 of 192 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

VII. NOTICE OF CLAIM AGAINST PUBLIC ENTITY

D. Time of Filing.

2. Time Runs From Accrual of Cause of Action.

b. Postponed Accrual and Tolling.

1. In General.

3 Witkin Cal. Proc. Actions § 257

[§ 257] In General.

(1) *False Arrest Claims.* Govt.C. 945.3 prohibits a person charged with a criminal offense from initiating a civil action for false arrest against a peace officer or public entity employing the officer while criminal charges are pending, and tolls the statute of limitations for prosecuting the civil action during that period. However, Govt.C. 945.3 expressly provides that its prohibition and tolling provisions do not apply to a claim filed under the Government Claims Act. Thus, failure to file a claim within the prescribed period may result in its dismissal. (See *Mohlmann v. Burbank* (1986) 179 C.A.3d 1037, 1042, 1043, 225 C.R. 109; *McMartin v. Los Angeles* (1988) 202 C.A.3d 848, 855, 249 C.R. 53.)

(2) *Claims by Military Personnel.* Under the Servicemembers Civil Relief Act, the claim period is tolled for a claimant on active military service. (50 U.S.C. Appx., §526.) The Act's provisions are mandatory. Once the fact of the claimant's active duty service is established, the court has no discretion to determine if that service actually prevented presentation of a timely claim. (*Syzemore v. Sacramento* (1976) 55 C.A.3d 517, 522, 127 C.R. 741.)

(3) *Public Contract Claims.* Under Pub.Contr.C. 20104.2(e), the time for filing a disputed claim, about a contract governed by the Public Contract Code, between a local public entity and a contractor is tolled from the time the claimant submits the claim until the time the claim is denied as a result of a statutorily required meet and confer process. *Westcon Const. Corp. v. Sacramento* (2007) 152 C.A.4th 183, 61 C.R.3d 89, held that there was no tolling under the statute where the claimant failed to raise that issue in the trial court, and where the claim was untimely even if the tolling period were applied on appeal. (152 C.A.4th 196.)

(4) *Equitable Tolling.* The doctrine of equitable tolling, developed in cases dealing with the statutes of limitations (see infra, §694 et seq.), applies if the conditions for application of the doctrine are met. (See *Loehr v. Ventura County Community College Dist.* (1983) 147 C.A.3d 1071, 1084, 195 C.R. 576, supra, §238 [no tolling where untenable federal Civil Rights Act action was brought for different wrong and alleged different facts]; *Curtis T. v. Los Angeles* (2004) 123 C.A.4th 1405, 1422, 21 C.R.3d 208 [action against county alleging that child, at ages 5 through 8, had been molested by another child while living in foster home operated under auspices of county; accrual was delayed until plaintiff's mother discovered molestation, based on plaintiff's youth, ignorance, and inexperience, and on foster parent's alleged

complicity in abuse].)

SUPPLEMENT: [This section is current through the latest supplement]



80 of 192 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

VII. NOTICE OF CLAIM AGAINST PUBLIC ENTITY

D. Time of Filing.

2. Time Runs From Accrual of Cause of Action.

b. Postponed Accrual and Tolling.

2. Tolling by Payment of Damages.

3 *Witkin Cal. Proc. Actions* § 258

[§ 258] Tolling by Payment of Damages.

(1) *In General.* The tort claims time provisions are tolled if advance or partial damage payments are made on the behalf of a public entity and the recipient has not been notified in writing of the time limits for filing claims. (*Ins.C. 11583*; see *Maisel v. San Francisco State University* (1982) 134 C.A.3d 689, 692, 184 C.R. 694.)

(2) *Where Plaintiff Subsequently Retains Attorney.* *Ins.C. 11583* was amended in 1985 to add the sentence: "That notification shall not be required if the recipient is represented by an attorney." In *Associated Truck Parts v. Superior Court* (1991) 228 C.A.3d 864, 279 C.R. 76, the issue was what effect the subsequent retention of counsel has on the tolling provisions. After an elaborate analysis of the possible interpretations of the ambiguous statute (228 C.A.3d 868), the court reached the following conclusions:

(a) "The words of the sentence which were added in 1985 demonstrate an unambiguous legislative intent to relieve the insurer of the duty to provide the claimant with this protection where he or she has counsel upon whom the law imposes an identical duty." (228 C.A.3d 868.)

(b) *Ins.C. 11583* tolls the statute of limitations from the date of the advance payment to the date on which the claimant retains counsel or gives the statutory notice, whichever comes first. "This interpretation is consistent with all applicable principles of statutory interpretation. It executes the unambiguous intent of the Legislature to limit, rather than expand, the duty imposed upon the insurance company and the concomitant protection to the claimant. It also harmonizes and gives significance to every sentence of the statute." (228 C.A.3d 870.)

(3) *Statute Is Tolloed Only as to Recipient of Notice.* In *Evans v. Dayton Hudson Corp.* (1991) 234 C.A.3d 49, 285 C.R. 550, the question was whether the spouse of an injured person who received advance payments under *Ins.C. 11583* was entitled to rely on the statutory tolling provision with respect to a cause of action for loss of consortium. (234 C.A.3d 51.) *Held*, the statute was not tolloed.

(a) *Ins.C. 11583* requires notice to "the recipient" of the payments of the statute of limitations "applicable to the

cause of action which such recipient may bring." "By specifying that the recipient--and not anyone else--shall be notified of the limitations period for the *recipient's* cause of action, the Legislature made clear that the benefit of tolling the limitations period contained in section 11583 was not intended to apply to persons beyond the recipient of advance or partial payments of claims for damages." (234 C.A.3d 53.)

(b) Plaintiff wife argued that her cause of action was "derivative" of her husband's personal injury cause of action; and that, having properly joined her cause of action with his, the tolling of the statute as to his cause of action should automatically toll the statute as to hers. (234 C.A.3d 54.) This reasoning is unsound. A wife's cause of action for loss of consortium is separate and distinct from a husband's cause of action for personal injuries; and, though joinder is the preferred method of asserting the wife's claim, she may bring a separate action. (234 C.A.3d 54; see 6 *Summary* (10th) *Torts*, §1679 et seq.)

(4) *Warning on Back of Bank Draft Is Insufficient Notice*. In *Conlin v. Del Mar Paving* (1991) 234 C.A.3d Supp. 6, 286 C.R. 33, the notice was in the following language: "THE STATUTE OF LIMITATIONS FOR ANY PHYSICAL INJURY CLAIM WILL RUN ONE (1) YEAR FROM THE DATE OF THE ACCIDENT." But it was on the back of a draft tendered as partial payment. *Held*, the notice was insufficient.

(a) It was in writing, and therefore complied with the letter of the statutory requirement. But it was placed on the back of a document that would not be retained by the claimant. While plaintiff may have read the notice when he endorsed the draft, he could have retained the notice as documentation of his claim only by keeping the draft uncashed or by obtaining a copy of the back before cashing it. The statutory requirement of "written notice" "implies that the notice will remain in the claimant's possession, not be read and returned." (234 C.A.3d Supp. 10.) "In fact, a notice in writing that cannot be retained by the recipient is little better than an oral notice--the functional equivalent of a written notice printed in disappearing ink." (234 C.A.3d Supp. 10.)

(b) In addition, the language "would not notify a claimant unfamiliar with legal terminology that he or she must file a lawsuit on his or her personal injury claim within a year of the accident or forgo it forever. In dealing with its own insureds, e.g., in drafting insurance policies, an insurer must not mislead by the use of technical language or 'legalese.' ... The Legislature, having been so careful to require clarity of expression in dealing with the public as insureds, could not have intended to condone unintelligibility when dealing with them as claimants." (234 C.A.3d Supp. 11.)

SUPPLEMENT: [This section is current through the latest supplement]



81 of 192 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

VII. NOTICE OF CLAIM AGAINST PUBLIC ENTITY

D. Time of Filing.

2. Time Runs From Accrual of Cause of Action.

b. Postponed Accrual and Tolling.

3. Postponed Accrual for Subrogation Claim.

3 Witkin Cal. Proc. Actions § 259

[§ 259] Postponed Accrual for Subrogation Claim.

In *Allstate Ins. Co. v. Alameda* (1973) 33 C.A.3d 418, 109 C.R. 53, an insured was injured by an uninsured driver. The insurer paid the insured, and then filed a subrogation claim under *Ins.C. 11580.2* (see 2 *Summary* (10th), *Insurance*, §181) against defendant county on the theory of a dangerous and defective condition of the road. The claim was filed within 100 days from the date of payment to the insured but more than 100 days from the date of the accident. *Held*, the claim under the former 100-day time requirement of *Govt.C. 911.2* (now 6 months) was timely. The cause of action of the insured against the county arose at the time of the accident, but that of the insurer did not arise until the time it paid the insured and its right of subrogation arose. Hence, to give effect to the subrogation right established by *Ins.C. 11580.2(g)*, an exception must be read into *Govt.C. 911.2*; and, in this respect, the subrogee (insurer) has a greater right than the subrogor (insured). (33 C.A.3d 421.) *Liberty Mut. Ins. Co. v. Fales* (1973) 8 C.3d 712, 106 C.R. 21, 505 P.2d 213, *infra*, §451, dealing with the statute of limitations, is persuasive. (33 C.A.3d 423.)

Allstate is limited to *Ins.C. 11580.2(g)* situations (claims paid under uninsured motorist endorsements). The general rule that a subrogee has no greater rights than those of his subrogor applied where an insurer sought recovery as subrogee of amounts payable under the insured's policy for property damage. (*Commercial Union Assur. Co. v. San Jose* (1982) 127 C.A.3d 730, 735, 179 C.R. 814.)

SUPPLEMENT: [This section is current through the latest supplement]



82 of 192 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

VII. NOTICE OF CLAIM AGAINST PUBLIC ENTITY

D. Time of Filing.

2. Time Runs From Accrual of Cause of Action.

c. Tort Defendant's Indemnity Claim.

1. Former Rule of Postponed Accrual.

3 *Witkin Cal. Proc. Actions* § 260

[§ 260] Former Rule of Postponed Accrual.

In *People v. Superior Court (Frost)* (1980) 26 C.3d 744, 163 C.R. 585, 608 P.2d 673, plaintiff P was injured in a three-car collision on a state highway in December 1973. In October 1974, he filed a complaint against four defendants as owners and operators of the other vehicles; he did not file a timely claim against the state or join the state as a defendant. In April 1978, shortly after the decision in *American Motorcycle Assn. v. Superior Court* (1978) 20 C.3d 578, 146 C.R. 182, 578 P.2d 899, 6 Summary (10th), Torts, §1357, 5 Cal. Proc. (5th), Pleading, §1171, the four defendants attempted to cross-complain against the state for equitable indemnity, based on its alleged negligence in maintaining the highway in a dangerous condition. The state set up the failure to file a claim as a defense. *Held*, the cross-complaints for equitable indemnity were properly filed.

(a) *Accrual of cause of action determines time for filing claim.* Under Govt.C. 911.2, a claim must be filed for personal injury or property damage not later than 100 days (now 6 months), and for any other cause of action not later than 1 year, "after the accrual of the cause of action." And Govt.C. 901 states that the date of accrual is the date on which the cause of action would accrue within the meaning of the applicable statute of limitations if there were no claim requirement. Thus, although there may be some question as to which period applies to a claim for equitable indemnity arising out of a governmental entity's tort, in either case the time for filing does not expire until after accrual of the cause of action. (26 C.3d 750.)

(b) *Cause of action for indemnity does not accrue until loss is suffered.* The tort defendants' cause of action for equitable indemnity is separate and distinct from the injured plaintiff's claim. Hence, that cause of action does not accrue at the time of commission of the tort, but rather when the equitable indemnity claimant suffers loss through payment of a settlement or judgment. This is the settled law in California and elsewhere. (26 C.3d 751, 752.)

(c) *Defendants' cause of action for indemnity is not barred by plaintiff's failure to file claim.* Because the tort defendants' cause of action for indemnity is separate and distinct from the injured person's cause of action, expiration of the time to file a timely claim against the state did not bar the cross-complaint for indemnity. The state's contention would mean that the indemnity cause of action would be barred before it came into existence--an untenable position.

(26 C.3d 752, 753, 754.) *Allstate Ins. Co. v. Alameda* (1973) 33 C.A.3d 418, 109 C.R. 53, supra, §259, dealing with an insurer's subrogation claim, refutes the state's contention. (26 C.3d 755.)

(d) *American Motorcycle did not alter established accrual rule.* The state contended that the established rule governing indemnity actions does not apply to the action for "partial" or "comparative" equitable indemnity established by *American Motorcycle*. But nothing in the opinion in that case suggests that it created a new kind of indemnity action; it merely modified the all-or-nothing aspect of the previous doctrine to permit partial indemnification. (26 C.3d 756, 757.) Decisions in other jurisdictions, after *American Motorcycle*, also refute the state's contention. (26 C.3d 758.) The fact that *American Motorcycle* permitted the assertion of the partial indemnity claim by a cross-complaint for declaratory relief in no way distinguishes the claim from a traditional equitable indemnity claim, for the propriety of such a cross-complaint was established before *American Motorcycle*, by the legislative codification of the rule of *Roylance v. Doelger* (1962) 57 C.2d 255, 19 C.R. 7, 368 P.2d 535, 5 Cal. Proc. (5th), *Pleading*, §§1156, 1171. (26 C.3d 759.) And *E.L. White v. Huntington Beach* (1978) 21 C.3d 497, 146 C.R. 614, 579 P.2d 505, 5 Summary (10th), *Torts*, §123, also supports the conclusion that, although a defendant is permitted to file a declaratory cross-complaint in the tort action, the statute of limitations does not accrue until he or she has suffered actual loss through payment. (26 C.3d 759; see footnote 5, disapproving contrary holding in *Gehman v. Superior Court* (1979) 96 C.A.3d 257, 158 C.R. 62.)

(e) *Accrual rule does not thwart purposes of Government Claims Act.* The state argues that the protection given to governmental entities by the short claims filing periods is lost by this holding, and that preservation of the defendant's indemnity rights indirectly permits an injured plaintiff to avoid the effect of the claims statute. These arguments are not persuasive. The state's reading would frustrate the other legislative object of affording claimants a fair opportunity to present their claims; and, as a practical matter, would allow the injured plaintiff to forfeit a defendant's indemnity rights by delaying the filing of his or her action until after the claims period had run. (26 C.3d 761.) There is no "indirect" avoidance of the claims statutes; a plaintiff who fails to file a claim may recover only against the private party defendants, even though the evidence at the trial discloses the governmental entity's liability; and if the indemnitees (private party defendants) are insolvent and incur no financial loss, the governmental entity escapes from liability. (26 C.3d 761.)

(f) *No claim against state is required.* When a tort defendant uses the third-party procedure by filing a cross-complaint for indemnity before his indemnity claim has accrued, filing a claim would be either meaningless or superfluous. The tort defendant who has as yet suffered no liability cannot give the most crucial information contemplated by the claims provisions--the amount of the claim; and serving the cross-complaint will provide the governmental entity with prompt notice of the potential claim. (26 C.3d 763.) Hence, "when an equitable indemnity action is pursued prior to the accrual of the cause of action through a third party cross-complaint, no prior claim need be filed." (26 C.3d 763.)

SUPPLEMENT: [This section is current through the latest supplement]



83 of 192 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

VII. NOTICE OF CLAIM AGAINST PUBLIC ENTITY

D. Time of Filing.

2. Time Runs From Accrual of Cause of Action.

c. Tort Defendant's Indemnity Claim.

2. Legislative Repudiation of Rule.

3 *Witkin Cal. Proc. Actions* § 261

[§ 261] Legislative Repudiation of Rule.

In response to *People v. Superior Court (Frost)* (1980) 26 C.3d 744, 163 C.R. 585, 608 P.2d 673, supra, §260, the 1981 Legislature amended Govt.C. 901 to add the following sentence: "However, the date upon which a cause of action for equitable indemnity or partial equitable indemnity accrues shall be the date upon which a defendant is served with the complaint giving rise to the defendant's claim for equitable indemnity or partial equitable indemnity against the public entity." (See *California v. Superior Court (Shortstop)* (1983) 143 C.A.3d 754, 757, 192 C.R. 198 [amendment was applicable as of effective date to defendants deemed served with complaint before effective date]; *Greyhound Lines v. Santa Clara* (1986) 187 C.A.3d 480, 484, 231 C.R. 702 [late-discovery exception to accrual rules (see infra, §496 et seq.) is not applicable to Govt.C. 901]; 13 *Pacific L. J.* 613; 20 *Pepperdine L. Rev.* 1407 [action for indemnity as means of avoiding 4-year statute of limitations under U.C.C. 2725].)

SUPPLEMENT: [This section is current through the latest supplement]



84 of 192 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

VII. NOTICE OF CLAIM AGAINST PUBLIC ENTITY

E. Manner of Presentation.

3 *Witkin Cal. Proc. Actions* § 262

[§ 262] Manner of Presentation.

(1) *Who May Present Claim.* The claim may be presented by the claimant or a person acting on the claimant's behalf. (*Govt.C. 910.*) (See C.E.B., 1 *Government Tort Liability Practice* 4th, §§6.7, 7.31.)

(2) *Claim Against Local Entity.* The claim may be presented by (a) delivering it to the clerk, secretary, or auditor of the entity; or (b) mailing it to the clerk, secretary or auditor or to the governing body at its principal office. (*Govt.C. 915(a)*; see *Wood v. Riverside General Hosp. (1994) 25 C.A.4th 1113, 1116, 31 C.R.2d 8, supra, §254*; C.E.B., 1 *Government Tort Liability Practice* 4th, §6.29.)

(3) *Claim Against State.* The claim may be presented by (a) delivering it to an office of the California Victim Compensation and Government Claims Board; or (b) mailing it to the California Victim Compensation and Government Claims Board. (*Govt.C. 915(b)*; see C.E.B., 1 *Government Tort Liability Practice* 4th, §6.29.)

(4) *Claim Against Judicial Branch Entity or Judge.* A claim against a judicial entity or judge must be presented as follows (*Govt.C. 915(c)*):

(a) A claim against a superior court or a judge or employee of that court must be delivered or mailed to the court executive officer.

(b) A claim against the Court of Appeal or a judge of that court must be delivered or mailed to the clerk or administrator of the court.

(c) A claim against the Supreme Court or a judge of that court must be delivered or mailed to the Clerk of the Supreme Court.

(d) A claim against the Judicial Council or the Administrative Office of the Courts must be delivered or mailed to the secretariat of the Judicial Council.

(5) *Claim Against Other Public Agency.* For a claim against an agency defined in *Govt.C. 53050* (district, public authority, public agency, and any other political subdivision or public corporation, excluding the state or a county, city and county, or city), by delivering or mailing in conformity with information in the Roster of Public Agencies on file

with the Secretary of State or county clerk. (*Govt.C. 915(e)*.) (On roster, see *supra*, §236.)

A claim or other document properly mailed is deemed to have been presented and received at the time of deposit in the mail. Any period of notice and any duty to respond after receipt of service of a claim or other document is extended for 5 days on service of mail if the address is within California, for 10 days if the address is within the United States, and for 20 days if the address is outside the United States. (*Govt.C. 915.2*; see *Call v. Los Angeles County General Hosp.-USC Med. Center* (1978) 77 C.A.3d 911, 916, 143 C.R. 845 [proof of mailing by return receipt is better evidence of fact than proof by affidavit].) And even though the document is not delivered or mailed in accordance with the statute, the claim is deemed presented if actually received in time. (*Govt.C. 915(d)*.) (See C.E.B., 1 Government Tort Liability Practice 4th, §6.29.)

SUPPLEMENT: [This section is current through the latest supplement]



85 of 192 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

VII. NOTICE OF CLAIM AGAINST PUBLIC ENTITY

F. Action by Agency.

1. Local Agency.

a. Allowance, Rejection, Partial Rejection, or Compromise.

3 *Witkin Cal. Proc. Actions* § 263

[§ 263] Allowance, Rejection, Partial Rejection, or Compromise.

(1) *In General.* A local public agency may act on a claim in one of the following ways: (a) completely reject it; (b) allow it in full; (c) where the claim is proper but for a greater amount than is justly due, completely reject it or allow it in part and reject the balance; (d) where legal liability or the amount due is disputed, reject or compromise the claim. (*Govt.C. 912.6(a).*) (See C.E.B., 1 Government Tort Liability Practice 4th, §6.31.)

(2) *Payment.* If the claim is allowed in whole or part, or compromised, the agency may require the claimant to accept the amount allowed or offered as settlement of the entire claim. (*Govt.C. 912.6(b).*) Payment of compromised claims must be "in the same manner as if the claimant had obtained a final judgment" but may be paid in up to 10 equal annual installments only if the claimant agrees in writing. (*Govt.C. 912.6(c).*)

SUPPLEMENT: [This section is current through the latest supplement]



86 of 192 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

VII. NOTICE OF CLAIM AGAINST PUBLIC ENTITY

F. Action by Agency.

1. Local Agency.

b. Time To Act.

3 *Witkin Cal. Proc. Actions* § 264

[§ 264] Time To Act.

(1) *In General.* The local agency must act within 45 days after the claim (or amended claim) has been presented, unless the time is extended by the written agreement of the claimant and the agency before the expiration of the period, or after its expiration if an action has not been commenced and is not barred by the limitations period of *Govt.C. 945.6* (infra, §688 et seq.). If the agency fails or refuses to act within the prescribed or extended time, the claim is deemed rejected on the last day to act. (*Govt.C. 912.4.*) (See C.E.B., 1 Government Tort Liability Practice 4th, §§6.29, 6.30.)

(2) *Reexamination of Rejected Claim.* The agency may, in its discretion, within the time for commencing an action on a rejected claim, reexamine the claim in order to consider a settlement. (*Govt.C. 913.2*; see C.E.B., 1 Government Tort Liability Practice 4th, §6.36 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]



87 of 192 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

VII. NOTICE OF CLAIM AGAINST PUBLIC ENTITY

F. Action by Agency.

1. Local Agency.

c. Notice of Action Taken.

3 *Witkin Cal. Proc. Actions* § 265

[§ 265] Notice of Action Taken.

(1) *In General.* Written notice of any action taken, or of the inaction deemed to be rejection of the claim, must be given (*Govt.C. 913(a)*), unless the claim fails to state an address (*Govt.C. 915.4(b)*). If the claim is rejected in whole or in part, the notice must include a warning, in substantially the statutory form, that the claimant has 6 months from the date of delivery or deposit of the notice to commence an action on the claim, and that the claimant may consult an attorney. (*Govt.C. 913(b)*.) (See *Chalmers v. Los Angeles* (1985) 175 C.A.3d 461, 465, 466, 221 C.R. 19 [substantial compliance].) The failure of the local agency to give that notice extends the limitations period for the commencement of the action. (*Govt.C. 945.6(a)(2)*, *infra*, §688.) (See C.E.B., 1 Government Tort Liability Practice 4th, §6.33 et seq.)

(2) *Illustration: Defective Notice.* In *Jenkins v. Contra Costa* (1985) 167 C.A.3d 152, 213 C.R. 126, both a timely claim and an unnecessary application for leave to file a late claim were presented at the same time. The public entity denied the application, but took no action on the claim itself. *Held*, this did not constitute a rejection of the claim under *Govt.C. 913*. Under these circumstances, the entity was not entitled to assume that it was being requested to act only on the application for leave to file a late claim. (167 C.A.3d 156.)

(3) *Illustrations: Adequate Notice.* In *Dowell v. Contra Costa* (1985) 173 C.A.3d 896, 219 C.R. 341, plaintiff claimant filed a timely claim for wrongful death and received a mailed notice of rejection from defendant county specifying the date of rejection and containing the required warning that she had 6 months from the date the notice was mailed in which to file a court action. Plaintiff contended that the notice was defective in that it did not specify the date of mailing, and was not accompanied by a proof of service, as required by either *Govt.C. 913* or procedural due process. *Held*, the notice was adequate.

(a) *Govt.C. 913* does not specifically require that the notice state the date of mailing. Having filed a timely claim and been informed of its rejection and of the fact that the 6-month period commences to run on the date of mailing, the claimant had the duty to ascertain the exact date on which the notice was mailed. (173 C.A.3d 901.)

(b) Requiring a claimant to ascertain the date of mailing of a notice complying with *Govt.C. 913* does not violate procedural due process. Requiring notices of rejection to specify the date of mailing rather than the irrelevant date of

rejection might be wise, but that change must be made by the *Legislature*. (173 C.A.3d 902.)

(c) Plaintiff's suit for wrongful death was filed against both the county and the state, and she contended that the statute of limitations on her cause of action against the county was tolled during the pendency of her claim against the state. This contention is without merit, for the claim proceedings against the state and county were entirely separate. Her "failure to file suit against the County until action on her claim against the state did not provide the County with notice of her intention to bring suit or prevent prejudice to the County in gathering information and preparing its defense." (173 C.A.3d 903.)

In *Him v. San Francisco* (2005) 133 C.A.4th 437, 34 C.R.3d 838, plaintiffs' claim that they did not receive defendant's city's rejection notices was without merit. The proofs of service substantially complied with C.C.P. 1013a (see 6 Cal. Proc. (5th), *Proceedings Without Trial*, §23), even if the proofs of service did not state where the notices were deposited in mail. Each proof of service expressly represented that on a specific day, the notice had been sealed in a postage-paid envelope addressed to plaintiffs' attorney and deposited in the United States mail, and that the city's claims adjuster's business address was located in the city. (133 C.A.4th 444.)

SUPPLEMENT: [This section is current through the latest supplement]



88 of 192 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

VII. NOTICE OF CLAIM AGAINST PUBLIC ENTITY

F. Action by Agency.

2. State.

3 *Witkin Cal. Proc. Actions* § 266

[§ 266] State.

(1) *Time To Act or To Reject Claim.* The California Victim Compensation and Government Claims Board must act within the same time as the board of a local agency. (*Govt.C. 912.6*; see *supra*, §264.) The board must give written notice of its action and a warning in the case of rejection in the same manner. (*Govt.C. 913*, *supra*, §265; *McLaughlin v. Superior Court* (1972) 29 C.A.3d 35, 38, 105 C.R. 384, *infra*, §303.) The board has the same power to reexamine a rejected claim (*Govt.C. 913.2*, *supra*, §264). (See C.E.B., 1 Government Tort Liability Practice 4th, §6.31.)

(2) *Procedure of Consideration and Action.* The procedure of consideration and action, however, is to be prescribed by board rule (see 2 *Cal. Code Reg. §630 et seq.*); the board may hear evidence, and, with the approval of the Governor, report facts and recommendations to the Legislature; and it may state and use any official or personal knowledge of a member concerning a claim. The board may authorize any state employee to perform its functions. (*Govt.C. 912.8.*)

SUPPLEMENT: [This section is current through the latest supplement]



89 of 192 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

VII. NOTICE OF CLAIM AGAINST PUBLIC ENTITY

F. Action by Agency.

3. Judicial Branch Entity.

3 Witkin Cal. Proc. Actions § 267

[§ 267] Judicial Branch Entity.

(1) *In General.* Separate procedures govern claims against judicial branch entities. For this purpose, "judicial branch entity" means a public entity that includes a superior court, a Court of Appeal, the Supreme Court, the Judicial Council, or the Administrative Office of the Courts. (*Govt.C. 900.3.*)

(2) *Time To Act or To Reject Claim.* The Judicial Council must act on a claim against a judicial branch entity or judge within the same time as the board of a local agency. (*Govt.C. 912.4*; see *supra*, §264.) The Judicial Council must give written notice of its action and a warning in the case of rejection in the same manner. (*Govt.C. 913(b)*; see *supra*, §265.) The Judicial Council has the same power to reexamine a rejected claim. (*Govt.C. 913.2*; see *supra*, §264.)

(3) *Procedure of Consideration and Action.* The procedure of consideration and action, however, is to be prescribed by the Judicial Council by court rule. The Judicial Council may authorize any of its committees or any employee of the Administrative Office of the Courts to perform its functions. (*Govt.C. 912.7.*) (See C.R.C., Rule 10.201 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]



90 of 192 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

VII. NOTICE OF CLAIM AGAINST PUBLIC ENTITY

F. Action by Agency.

4. Notice of Rejection of Late Claim.

3 *Witkin Cal. Proc. Actions* § 268

[§ 268] Notice of Rejection of Late Claim.

(1) *Time for Giving Notice.* Where a claim that is required by *Govt.C. 911.2* to be presented not later than 6 months after the accrual of the cause of action is thereafter presented without an application to the public entity for leave to file a late claim under *Govt.C. 911.4* (see *infra*, §299 et seq.), the governing board of the agency (or its designee) may, at any time within 45 days after the claim is presented, give written notice to the claimant that the claim was not filed timely and that the claim is being returned without further action. (*Govt.C. 911.3(a).*)

Any defense as to the time limit for presenting a claim described in *Govt.C. 911.3(a)* is waived by failure to give the prescribed notice within 45 days after the claim is presented, except that no notice need be given and no waiver will result when the claim as presented fails to state either an address to which the person presenting the claim desires notices to be sent or the address of the claimant. (*Govt.C. 911.3(b).*)

(2) *Form of Notice.* *Govt.C. 911.3(b)* provides that the notice must be in substantially the following form:

"The claim you presented to the (insert title of board or officer) on (indicate date) is being returned because it was not presented within six months after the event or occurrence as required by law. See *Sections 901 and 911.2 of the Government Code*. Because the claim was not presented within the time allowed by law, no action was taken on the claim."

"Your only recourse at this time is to apply without delay to (name of public entity) for leave to present a late claim. See *Sections 911.4 to 912.2, inclusive, and Section 946.6 of the Government Code*. Under some circumstances, leave to present a late claim will be granted. See *Section 911.6 of the Government Code*."

"You may seek the advice of an attorney of your choice in connection with this matter. If you desire to consult an attorney, you should do so immediately."

(3) *Late-Claim Procedure as "Only Recourse."* Notwithstanding the advisement in *Govt.C. 911.3* that a claimant's "only recourse at this time is to apply without delay" for leave to present a late claim, a claimant who seeks to challenge the public entity's determination of the timeliness of the claim may only do so by filing a civil action for damages. Thus,

a claimant who wishes to preserve both issues of timeliness and of excusable lateness must file both a civil action and an application with the public entity under *Govt.C. 911.4*. (See *Rason v. Santa Barbara City Housing Authority* (1988) 201 C.A.3d 817, 828, 247 C.R. 492, *infra*, §305.)

In *Dixon v. Turlock* (1990) 219 C.A.3d 907, 268 C.R. 510, plaintiff filed a personal injury action against defendant city. The trial judge sustained the city's general demurrer without leave to amend to the amended complaint and dismissed, on the ground that neither the original claim nor the amended claim against the city was filed within 1 year of the accrual of the alleged cause of action, as required by *Govt.C. 911.2*, and no request to file a late claim was made. Plaintiff appealed, contending that the city was barred from asserting the untimeliness of the claim as a defense because it had given plaintiff notice that she had 6 months to file a court action after rejection of the amended claim, and that the city thereby consented to be sued. *Held*, judgment affirmed. Because the original claim was properly rejected in full compliance with *Govt.C. 911.3*, there was no reason for the warning of untimeliness to be repeated, as an amended claim relates back to the original claim. Plaintiff thus had actual notice regarding the untimeliness of her claim and no waiver or consent to be sued occurred. (219 C.A.3d 912, 913.)

SUPPLEMENT: [This section is current through the latest supplement]



91 of 192 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

VII. NOTICE OF CLAIM AGAINST PUBLIC ENTITY

G. Special Claims Procedures.

1. Local Agency.

a. In General.

3 *Witkin Cal. Proc. Actions* § 269

[§ 269] In General.

(1) *Procedures Established by Agreement.* The governing body of a local public agency may include a claims procedure in any written agreement to which it or any board or employee is a party in an official capacity, and the agreement may incorporate by reference claim provisions in an ordinance or resolution already adopted. (*Govt.C. 930.2.*)

This agreement "exclusively governs" those claims, subject to the exceptions for late filing. (*Govt.C. 930.4.*) And the requirement of action by the board may be included in the agreement. (*Govt.C. 930.6.*)

(2) *Payment by Claims Board or Authorized Employee.* The local agency may establish a claims board or commission of not less than three members to perform its functions under the claims statutes. (*Govt.C. 935.2.*) By charter, ordinance, or resolution, an employee may be so authorized. However, an employee cannot be authorized to allow, compromise, or settle a claim of over \$ 50,000 except by charter provision, providing the governing body adopts an implementing ordinance or resolution. (*Govt.C. 935.4.*)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Procedures Established by Agreement.* See *Arntz Builders v. Berkeley* (2008) 166 C.A.4th 276, 289, 82 C.R.3d 605 [local agency's contractual claims procedure is alternative to, rather than addition to, statutory claims procedure; thus, contractor who complied with local agency procedure was not also required to file statutory claim where local agency procedure did not require filing].



92 of 192 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

VII. NOTICE OF CLAIM AGAINST PUBLIC ENTITY

G. Special Claims Procedures.

1. Local Agency.

b. Excluded Claims Governed by Local Procedures.

3 Witkin Cal. Proc. Actions § 270

[§ 270] Excluded Claims Governed by Local Procedures.

(1) *In General.* The claims excluded by *Govt.C. 905* from the operation of the general claims statute (see *supra*, §240 et seq.), and not expressly covered by any other statute or regulation, are governed by the procedure set forth in a charter, ordinance, or regulation. (*Govt.C. 935(a)*; see *Pasadena Hotel Dev. Venture v. Pasadena* (1981) 119 C.A.3d 412, 414, 174 C.R. 52 [claim for tax refund; charter's 1-year period was valid]; *Tapia v. San Bernardino* (1994) 29 C.A.4th 375, 384, 34 C.R.2d 431 [deputy sheriff's claim under *Govt.C. 31725* (reinstatement after inconsistent administrative decisions on public employee's disability status); claims presentation requirement of county ordinance was valid]; *California School Employees Assn. v. Governing Bd. of the South Orange County Community College Dist.* (2004) 124 C.A.4th 574, 578, 21 C.R.3d 451 [relying on *Tapia*; employees' action against community college district for lost wages; although *Govt.C. 905(c)* generally excepts claims for lost wages from Government Claims Act (see *supra*, §241), action was subject to school district's policy abrogating that exception].)

However, the procedure so prescribed may not require a shorter time than that provided in *Govt.C. 911.2* (*supra*, §255), nor a longer time for action on the claim than that provided in *Govt.C. 912.4* (*infra*, §688 et seq.). (*Govt.C. 935(c), (d).*)

In *Ontario v. Superior Court* (1993) 12 C.A.4th 894, 16 C.R.2d 32, the state filed an equitable indemnity action against a city without complying with the city's claim procedure adopted pursuant to *Govt.C. 935(a)*. The state argued that the case was governed by *Govt.C. 905(i)* (*supra*, §240 et seq.), which provides that state actions against local entities are exempt from the general claims procedures. *Held*, the state's action was barred; *Govt.C. 935* permits local entities to override the *Govt.C. 905* exemptions by enactment.

(a) The state argued that *Govt.C. 905* is primarily concerned with "types" of claims not directly covered by the Government Claims Act, but that *Govt.C. 905(i)*, exempting "claims by the State," includes all claims by a particular claimant whether otherwise covered by the Government Claims Act or not. Thus, in the state's view, because *Govt.C. 905(i)* is unique within the statute, "claims by the State" are not to be lumped in with the other "types" of claims when the effect of *Govt.C. 935* is considered. (12 C.A.4th 894.)

(b) The state's position is without merit. Courts should not imaginatively construe statutes that are clearly written, and *Govt.C. 905* and *935*, when read together, are perfectly clear. "Section 905 creates exemptions from the state-mandated claims procedure; section 935 permits local public entities to enact their own procedures to cover the exempted claims. Section 935, by its terms, covers *all* '[c]laims against a local public entity for money or damages which are excepted by Section 905' It does not incorporate any suggestion whatsoever that it does not apply to claims by the State." (*12 C.A.4th 901.*)

(c) The purposes of the Government Claims Act are to give the public entity the opportunity to investigate the facts while the evidence is fresh and to make appropriate financial planning decisions. "We are unable to see how these beneficial goals would be served by permitting the State to spring demands upon local public entities without following the claims procedures, or how they would be hampered if the State is compelled to join with all other claimants in submitting timely notification of its demands under the local ordinance." (*12 C.A.4th 903.*)

(2) *Late Filing.* If the procedure requires presentation of a claim within less than 1 year after accrual of the cause of action, and the filing is late, an application for leave to file may be made pursuant to *Govt.C. 911.6* or *946.6* (see *infra*, §286). (*Govt.C. 935(e).*)

(3) *Action by Agency.* If a requirement of presentation and agency action is made a prerequisite to suit, the action is subject to the provisions of *Govt.C. 945.6* (statutes of limitations for actions against public entities; see *infra*, §688 et seq.) and *Govt.C. 946* (effect of claimant's acceptance of amount allowed on right to maintain suit). (*Govt.C. 935(b).*)

SUPPLEMENT: [This section is current through the latest supplement]



93 of 192 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

VII. NOTICE OF CLAIM AGAINST PUBLIC ENTITY

G. Special Claims Procedures.

2. State.

a. Procedure Established by Agreement.

3 Witkin Cal. Proc. Actions § 271

[§ 271] Procedure Established by Agreement.

(1) *In General.* The California Victim Compensation and Government Claims Board may, by rule, authorize any state agency to include in any written agreement with a party provisions on presentation, consideration, and payment of claims that are required to be presented. (*Govt.C. 930.*) The agreement, except as to late filing, "exclusively governs" those claims. (*Govt.C. 930.4.*)

(2) *Late Filing.* If the procedure requires presentation of a claim within less than 1 year after accrual of the cause of action, and the filing is late, an application for leave to file may be made pursuant to *Govt.C. 911.6* or *946.6* (*infra*, §286). (*Govt.C. 930.4.*)

(3) *Action by Board.* The agreement may include a requirement that the claim be presented and acted upon as a prerequisite to suit. In that case, the action is subject to the provisions of *Govt.C. 945.6* (statutes of limitations for actions against public entities; see *infra*, §688 et seq.) and *Govt.C. 946* (effect of claimant's acceptance of amount allowed on right to maintain suit). (*Govt.C. 930.6.*)

SUPPLEMENT: [This section is current through the latest supplement]



94 of 192 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

VII. NOTICE OF CLAIM AGAINST PUBLIC ENTITY

G. Special Claims Procedures.

2. State.

b. Payment by Controller or Authorized State Agency.

3 Witkin Cal. Proc. Actions § 272

[§ 272] Payment by Controller or Authorized State Agency.

(1) *State Controller.* A claim against the state for which appropriations have been made, or for which state funds are available (except claims for expenses of legislators and official salaries), may be presented to the Controller pursuant to rules adopted by the California Victim Compensation and Government Claims Board. (*Govt.C. 925 et seq.*) If the Controller disapproves it, an appeal lies to the board (*Govt.C. 926.4*) and, ultimately, to the Legislature (*Govt.C. 926.6*).

(2) *Authorized State Agency.* The board may authorize any state agency or officer to adjust and pay claims where the settlement does not exceed \$ 1,000, or a lesser amount as the board may determine. Alternatively, the board may authorize the agency to reject the claim and give the prescribed notice under *Govt.C. 913* (see *supra*, §266). (*Govt.C. 935.6*.)

SUPPLEMENT: [This section is current through the latest supplement]



95 of 192 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

VII. NOTICE OF CLAIM AGAINST PUBLIC ENTITY

G. Special Claims Procedures.

3. Judicial Branch Entity.

3 *Witkin Cal. Proc. Actions* § 273

[§ 273] Judicial Branch Entity.

(1) *Payment by Judicial Council or Authorized Designate.* The Judicial Council is authorized to adjust and pay any claim arising out of the activities of judicial branch entities or judges. The Judicial Council may adopt rules of court authorizing any of its committees or any employee of the Administrative Office of the Courts to perform these functions. (*Govt.C.* 935.8.) (See *C.R.C.*, Rule 10.201 et seq.)

(2) *Procedures Established by Agreement.* The procedures authorize state agencies to include provisions on presentation, consideration, and payment of claims in any written agreement with a party (*Govt.C.* 930, 930.4, 930.6; see *supra*, §271) apply to every state agency, including any board against which are paid state warrants. (*Govt.C.* 930(b).) The term "board," in the case of a judicial branch entity or judge, includes the Judicial Council (*Govt.C.* 900.2(c); see *supra*, §233); thus, those procedures apply to the Judicial Council as to claims against a judicial branch entity or judge.

SUPPLEMENT: [This section is current through the latest supplement]



96 of 192 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

VII. NOTICE OF CLAIM AGAINST PUBLIC ENTITY

H. Defective Compliance.

1. Early Rule of Strict Compliance.

3 Witkin Cal. Proc. Actions § 274

[§ 274] Early Rule of Strict Compliance.

The earlier cases repeatedly declared that the statutory and charter requirements were mandatory and that strict compliance with their terms was essential to the maintenance of the action. They also refused to apply the doctrines of waiver or estoppel, or to imply special exceptions for persons under disability.

Artukovich v. Astendorf (1942) 21 C.2d 329, 131 P.2d 831, states the position of the court in this period as follows: "The underlying principles upon which the authorities are based are (1) that neither the state nor any of its political subdivisions may be sued in the absence of specific statutory permission; (2) that where a right of action against the state or any of its political subdivisions is created by statute, such right may be circumscribed by any conditions that the Legislature may see fit to impose; and (3) that when the Legislature enacts a mandatory provision requiring in general terms that all claims must be presented before any action may be brought thereon, compliance with such condition is an indispensable prerequisite to the bringing of any such action by any person, regardless of his age or his physical or mental condition." (21 C.2d 331.) (See *Powers Farms v. Consolidated Irr. Dist.* (1941) 19 C.2d 123, 130, 119 P.2d 717 ["The long established rule in this state is that the courts may allow no exceptions to the plain provisions of a claim statute under the guise of interpretation or construction. Compliance with the statute is mandatory and the requirement may not be waived"]; *Wilkes v. San Francisco* (1941) 44 C.A.2d 393, 397, 112 P.2d 759 ["the right and the remedy must be in pursuance of the provisions of the statute, and are exclusive"].)

Recovery was denied for failure to file a claim even though the defendant, through oral and written communications from the plaintiff, had actual knowledge of damage to the plaintiff's property. (*Powers Farms v. Consolidated Irr. Dist.*, *supra*.) Similar holdings were made where it was alleged that the city attorney had told plaintiffs' counsel that it was unnecessary to file a claim within the charter period (*First Trust & Savings Bank of Pasadena v. Pasadena* (1942) 21 C.2d 220, 223, 130 P.2d 702); where it was alleged that during the claim period plaintiff was incapacitated and also relied on representations of defendant's agents that the claim would be settled (*Johnson v. Fresno* (1944) 64 C.A.2d 576, 149 P.2d 38); and where the defendant district referred plaintiff's oral claim to its insurance carrier and the latter represented that it would be settled (*Brown v. Sequoia Union High School Dist.* (1949) 89 C.A.2d 604, 201 P.2d 66).

The rule also invalidated many claims actually filed that did not strictly conform to the requirements. The following

are illustrations:

(1) *Late presentation.* (See *Gale v. Santa Barbara* (1953) 118 C.A.2d 451, 257 P.2d 1000.)

(2) *Wrong agency, department, or officer.* (See *Douglass v. Los Angeles* (1935) 5 C.2d 123, 128, 53 P.2d 353 [claim filed with Board of Public Works instead of with clerk of city council]; *Wilkes v. San Francisco*, *supra* [claim filed with city controller pursuant to charter requirement instead of with clerk or board of supervisors as required by statute].)

(3) *Defects in form or content.* (See *Hall v. Los Angeles* (1941) 19 C.2d 198, 201, 120 P.2d 13 [failure to state place where accident happened]; *Cooper v. Butte* (1936) 17 C.A.2d 43, 46, 61 P.2d 516 [claim not verified]; *Bradshaw v. Glenn-Colusa Irr. Dist.* (1948) 87 C.A.2d 882, 198 P.2d 106 [same]; *Ghiozzi v. South San Francisco* (1946) 72 C.A.2d 472, 476, 164 P.2d 902 [failure to state date or place].)

SUPPLEMENT: [This section is current through the latest supplement]



97 of 192 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

VII. NOTICE OF CLAIM AGAINST PUBLIC ENTITY

H. Defective Compliance.

2. Later Rule of Substantial Compliance.

a. Nature and Scope of Rule.

3 *Witkin Cal. Proc. Actions* § 275

[§ 275] Nature and Scope of Rule.

(1) *Justification for Substantial Compliance Rule.* The harsh and unreasonable character of the rule of strict compliance readily appears from an examination of the facts of some of the cases cited in the preceding section. The plaintiffs in those actions were faced with a welter of badly drafted and conflicting provisions of statutes and charters, raising difficult legal problems as to the form, time, and place of filing. As a result an injured party who sought to avoid litigation (the main purpose of the statute), and who dealt in good faith with public officials without immediately employing skilled counsel, was often deprived of a legitimate recovery.

A few courts took the position that substantial compliance that fulfilled every purpose of the requirement was sufficient. Some of the cases were contemporaneous and irreconcilable with the harsh decisions applying the strict compliance rule, while others, later in time, started the trend away from the earlier rule. Nearly all, however, qualified their holdings, and distinguished apparently contrary decisions, by observing that there could be no substantial compliance if there was an entire absence of some essential element. (See, e.g., *Knight v. Los Angeles* (1945) 26 C.2d 764, 769, 160 P.2d 779.)

This distinction seems thin, if not wholly immaterial. The substantial compliance theory is justified by considering the purposes of the statute, i.e., if the governmental agency is furnished with sufficient information to investigate the claim and no prejudice appears from the defect, the claim is upheld. (See *Dillard v. Kern* (1943) 23 C.2d 271, 278, 144 P.2d 365; *Knight v. Los Angeles*, *supra*, 26 C.2d 767; *Holm v. San Diego* (1950) 35 C.2d 399, 401, 217 P.2d 972; *Kelso v. Board of Education of Glendale* (1941) 42 C.A.2d 415, 422, 109 P.2d 29; *Ridge v. Boulder Creek Union Junior-Senior High School Dist. of Santa Cruz* (1943) 60 C.A.2d 453, 458, 140 P.2d 990.) If this is shown, what difference should it make whether the claim defectively states or wholly omits an item? The only objection to the defective statement of an item is that it cannot be used for its purpose, i.e., it is equivalent to no statement at all; and the harsh cases on strict compliance are at least consistent in making no distinction between the two situations. Moreover, it is by no means clear what is meant by total absence of an item. (See, e.g., dispute between members of the court in *Holm v. San Diego*, *supra*.) It would seem, therefore, that the "total absence" of an item is not in itself a reason for refusal, in a proper case, to apply the doctrine of substantial compliance.

In *Alderson v. Santa Clara* (1954) 124 C.A.2d 334, 268 P.2d 792, plaintiff mother filed a claim for general damages on behalf of two minors, but did not file a separate claim on her own behalf for medical expenses. *Held*, defendant had full information, could not have been prejudiced by failure to file a separate claim in a matter so connected, and, under the modern liberal approach, literal compliance with the statute is not required. "Because of the close relationship of the parties and the subject matter of their causes of action, we are constrained to hold that there was a substantial compliance with the claim statute." (124 C.A.2d 344.)

(2) *Tests for Substantial Compliance Rule.* Substantial compliance, however, cannot be predicated on no compliance. "[T]o gauge the sufficiency of a particular claim, two tests shall be applied: Is there *some* compliance with *all* of the statutory requirements; and, if so, is this compliance sufficient to constitute *substantial* compliance?" (*San Jose v. Superior Court (Lands Unlimited)* (1974) 12 C.3d 447, 456, 115 C.R. 797, 525 P.2d 701, *supra*, §239; see *Toscano v. Los Angeles* (1979) 92 C.A.3d 775, 782, 155 C.R. 146; *Pacific Tel. & Tel. Co. v. Riverside* (1980) 106 C.A.3d 183, 190, 165 C.R. 29; C.E.B., 1 Government Tort Liability Practice 4th, §5.71 et seq.; 45 A.L.R.5th 109 [complaint as satisfying claim requirement]; 45 A.L.R.5th 173 [persons or entities on whom claim against state or state agencies may or must be served].)

In *Loehr v. Ventura County Community College Dist.* (1983) 147 C.A.3d 1071, 195 C.R. 576, *supra*, §238, the purported claim was a letter by plaintiff employee to defendant Community College District demanding that the board reinstate him to his position or face legal action; it made no claim for money damages and did not set forth any of the circumstances of the alleged wrongful acts. *Held*, the claim was insufficient. "The doctrine of substantial compliance ... cannot cure total omission of an essential element from the claim or remedy a plaintiff's failure to comply meaningfully with the statute." (147 C.A.3d 1083.)

In *Nguyen v. Los Angeles County Harbor/UCLA Med. Center* (1992) 8 C.A.4th 729, 10 C.R.2d 709, the court held that a second party injured in the same transaction could not rely on the claim filed by the original claimant. Plaintiff minor child filed a tort claim against defendant County alleging that she had sustained personal injuries as a result of negligent medical treatment, and then filed her medical malpractice action. Plaintiff parents did not file a claim, but did file an action for negligent infliction of emotional distress. The trial judge granted a nonsuit as to the parents' action. *Held*, affirmed.

(a) Plaintiff parents argued that their claim was derivative of their child's claim, and therefore they were entitled to rely on her claim. However, the second injured party may not rely on the claim filed by the original claimant if the injury suffered by the second party was separate and distinct, i.e., different in kind and nature. (8 C.A.4th 733, 734, citing *Pacific Tel. & Tel. Co.* and other cases.)

(b) Here the parents' causes of action arose out of the same transaction, but the injuries allegedly suffered by them were separate and distinct. "The plaintiff parents' claims were for emotional injuries as witnesses to their daughter's injuries and for emotional injuries and economic damages as direct victims of the County's negligence. The alleged emotional injuries and economic damages were personal to the plaintiff parents." (8 C.A.4th 734.) (See *Nelson v. Los Angeles* (2003) 113 C.A.4th 783, 796, 6 C.R.3d 650 [following *Nguyen*; claim filed by mother of decedent in her personal capacity did not preserve claims filed by decedent's estate].)

SUPPLEMENT: [This section is current through the latest supplement]



98 of 192 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

VII. NOTICE OF CLAIM AGAINST PUBLIC ENTITY

H. Defective Compliance.

2. Later Rule of Substantial Compliance.

b. Illustrations.

1. Agency, Department, or Officer.

aa. Compliance Sufficient.

3 Witkin Cal. Proc. Actions § 276

[§ 276] Compliance Sufficient.

In *Peters v. San Francisco* (1953) 41 C.2d 419, 260 P.2d 55, the claim was held sufficient, though filed with the controller instead of the clerk of the board of supervisors, where a copy was filed with the clerk of the board. (41 C.2d 426.)

Jamison v. California (1973) 31 C.A.3d 513, 107 C.R. 496, extended the doctrine of substantial compliance to a claim filed with the wrong governmental agency. The injury was caused by an employee of the State Department of Water Resources. The claim was filed with that agency, instead of with the State Board of Control (now the California Victim Compensation and Government Claims Board). The state filed an answer on the merits and, many months later, filed a motion for judgment on the pleadings on the ground of failure to comply with the claims statute. The lower court dismissed the action. *Held*, reversed. Under *Govt.C. 915(c)*, a claim is deemed presented if actually received at an office of the State Board of Control; but the claimant may not be in a position to establish this fact at the pleading stage, before discovery; and the record here was silent about whether the board did receive this claim. However, because the claim was presented to an officer of the agency allegedly responsible for the tort, it was incumbent on him to forward it to the board. "Certainly, any responsible officer or employee of a major state agency knows, or should know ... that it should be forwarded to the Board of Control. In the event the officer or employee actually receiving the claim does not know the proper agency, then a simple inquiry to the Attorney General's office would result in advice as to the proper agency." Hence, regardless of whether the claim was received by the board, "it should have been," and there was substantial compliance with *Govt.C. 915*. (31 C.A.3d 518.) (For cases criticizing *Jamison*, see *infra*, §277.)

In *Elias v. San Bernardino County Flood Control Dist.* (1977) 68 C.A.3d 70, 135 C.R. 621, plaintiff filed a claim with the board of supervisors of the county for damages caused by the alleged defective condition of a road owned by defendant flood district. The claim was denied, suit was filed against the county, and the county answered but did not set up the lack of ownership of the road as a defense. Over a year later the county was granted a summary judgment on that ground. Plaintiff then served the district as a Doe defendant, but it also received a summary judgment for failure to file a timely claim against it. *Held*, reversed.

(a) Although the county and district were separate entities, the board and county officers were responsible for the district, and the claim "may be deemed to have been presented to the board of supervisors as the governing body of the District." (68 C.A.3d 75.)

(b) *Jackson v. Board of Education of Los Angeles* (1967) 250 C.A.2d 856, 58 C.R. 763, *infra*, §277, is not controlling. There the claim was not filed with a subordinate officer of the entity against which liability was asserted; here the claim was filed with officials responsible for evaluating claims against the district as well as the county. (68 C.A.3d 77.) (See *Carlino v. Los Angeles County Flood Control Dist.* (1992) 10 C.A.4th 1526, 1533, 13 C.R.2d 437 [following *Elias*].)

SUPPLEMENT: [This section is current through the latest supplement]



99 of 192 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

VII. NOTICE OF CLAIM AGAINST PUBLIC ENTITY

H. Defective Compliance.

2. Later Rule of Substantial Compliance.

b. Illustrations.

1. Agency, Department, or Officer.

bb. Compliance Insufficient.

3 *Witkin Cal. Proc. Actions* § 277

[§ 277] Compliance Insufficient.

In *Santee v. Santa Clara County Office of Education* (1990) 220 C.A.3d 702, 269 C.R. 605, plaintiffs filed an application for leave to present a late-claim application with the wrong public entity, which granted the application but later notified plaintiffs that it was the wrong entity. Despite this knowledge, plaintiffs did not contact or attempt to file a late-claim application with the correct public entity until well over 1 year after the wrongful act occurred. The trial judge denied plaintiffs' petition for relief from the claim presentation requirements as well as their motion for reconsideration. Plaintiffs appealed, contending that their late-claim application was timely as a result of its acceptance by the wrong public entity. *Held*, judgment affirmed.

(a) Filing with the board of supervisors rather than the Office of Education did not constitute substantial compliance with the claim presentation requirements because the board and the Office of Education were two distinct public entities. (220 C.A.3d 713.)

(b) Plaintiffs could not rely on estoppel because the board informed plaintiffs that it was not the correct entity at a time when plaintiffs still had time to submit a timely application to the correct entity, but plaintiffs failed to do so. (220 C.A.3d 715.)

In *Life v. Los Angeles* (1991) 227 C.A.3d 894, 278 C.R. 196, the court criticized and refused to follow *Jamison v. California* (1973) 31 C.A.3d 513, 107 C.R. 496, *supra*, §276. Plaintiff's attorney mailed a claim to the legal department of the county medical center where plaintiff had been treated, instead of to the county board of supervisors, and there was no showing that the claim actually reached the board. *Held*, summary judgment for defendant county affirmed.

(a) *Jamison* "deems the presentation of a claim to a public employee to amount to substantial compliance, irrespective of whether the claim actually reaches the body responsible for evaluating it." (227 C.A.3d 901.) This is inconsistent with the doctrine, codified in former Govt.C. 915(c) (now Govt.C. 915(d)), that requires the misdirected claim be "actually received" by the appropriate person or board. (227 C.A.3d 901.)

(b) "*Jamison's* reliance on a public entity's internal transmittal of a claim conflicts with section 915, which requires the *claimant* to file with the appropriate official or board. By focusing on the duty of a public employee in receipt of a claim to forward the claim to the proper agency, *Jamison* inappropriately shifts responsibility for filing a claim with the proper official or body from the claimant to the public entity." (227 C.A.3d 901.)

Many other cases hold that compliance was insufficient:

Jackson v. Board of Education of Los Angeles (1967) 250 C.A.2d 856, 857, 58 C.R. 763 [claim filed with city clerk instead of Board of Education was fatally defective; for criticism of holding, see *Elias v. San Bernardino County Flood Control Dist.* (1977) 68 C.A.3d 70, 77, 135 C.R. 621, *supra*, §276].

Johnson v. San Diego Unified School Dist. (1990) 217 C.A.3d 692, 696, 266 C.R. 187 [doctrine of substantial compliance was inapplicable where claim was presented to State Board of Control (now California Victim Compensation and Government Claims Board) rather than to local school district, a separate public entity].

Tapia v. San Bernardino (1994) 29 C.A.4th 375, 384, 34 C.R.2d 431 [distinguishing *Jamison*; letters by dismissed deputy sheriff's attorney to sheriff seeking back pay and reinstatement, rather than to county board or its risk manager, as required by county ordinance, were insufficient].

Munoz v. California (1995) 33 C.A.4th 1767, 1780, 39 C.R.2d 860 [late application by deceased prisoner's daughter sent to California Correctional Institution, rather than to State Board of Control (now California Victim Compensation and Government Claims Board), was insufficient].

Del Real v. Riverside (2002) 95 C.A.4th 761, 768, 115 C.R.2d 705 [disagreeing with *Jamison*; in action against police officer and city, letter to officer's counsel was insufficient notice to city, where it was sent to officer personally and did not communicate plaintiff's intention to sue].

SUPPLEMENT: [This section is current through the latest supplement]



100 of 192 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

VII. NOTICE OF CLAIM AGAINST PUBLIC ENTITY

H. Defective Compliance.

2. Later Rule of Substantial Compliance.

b. Illustrations.

2. Place of Accident.

3 *Witkin Cal. Proc. Actions* § 278

[§ 278] Place of Accident.

In *Johnson v. Los Angeles* (1955) 134 C.A.2d 600, 285 P.2d 713, an inadvertent error reciting the "southeast" corner of 82nd and Main Street instead of the "southwest" corner was held not fatal to the sufficiency of the claim. (134 C.A.2d 602.)

Johnson was followed in a still more liberal decision in *Parodi v. San Francisco* (1958) 160 C.A.2d 577, 325 P.2d 224. An elderly woman, injured in a trolley coach, stated the location as an intersection 11 blocks from the place at which, according to her trial testimony, the accident occurred. *Held*, the circumstances of good faith, reasonable mistake, and no prejudice to the defendant (all relevant facts were discoverable when plaintiff was removed from the coach) made this a substantial compliance. (160 C.A.2d 581.)

Many other cases are to the same effect. (See *Johnson v. Oakland* (1961) 188 C.A.2d 181, 184, 10 C.R. 409 [place of accident was stated as 1819 35th Avenue instead of 34th Avenue; substantial compliance was question of fact and summary judgment for defendant was reversed]; *Mace v. Pasadena* (1962) 199 C.A.2d 522, 525, 18 C.R. 692 [place of accident was described by wrong intersecting street about one block away; following *Johnson*]; *Rowan v. San Francisco* (1966) 244 C.A.2d 308, 312, 53 C.R. 88 [following *Johnson* and *Parodi*]; *Smith v. Los Angeles* (1989) 214 C.A.3d 266, 279, 262 C.R. 754 [following *Parodi*]; 52 A.L.R.2d 966 [variance between notice and proof with respect to cause, manner, or locality of accident]; 63 A.L.R.2d 863 [description of personal injury or property damage]; 69 A.L.R.4th 484 [classification and discussion of cases holding claim insufficient or sufficient].)

SUPPLEMENT: [This section is current through the latest supplement]



101 of 192 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

VII. NOTICE OF CLAIM AGAINST PUBLIC ENTITY

H. Defective Compliance.

2. Later Rule of Substantial Compliance.

b. Illustrations.

3. Address of Claimant.

3 *Witkin Cal. Proc. Actions* § 279

[§ 279] Address of Claimant.

In *Ridge v. Boulder Creek Union Junior-Senior High School Dist. of Santa Cruz* (1943) 60 C.A.2d 453, 140 P.2d 990, the claim did not give the home address of plaintiffs (father and son), but did state that they were "residents of the County of Santa Cruz" and that the son was a "student at said Boulder Creek Union High School." *Held*, the second recital made it possible to reach the son personally or by letter during school hours, or to obtain his home address by inquiry at the school. The father could be reached by a letter sent to the school, or his home address could probably be obtained there since the school authorities presumably had it through his son's registration. "In deciding what is in fact substantial compliance with a statute no weight should be given to the fact that the information imparted was not intended to comply with the statute. The only issue, as we see it and as the doctrine is enunciated in the cases, concerns the purpose of the statute and whether in fact the acts done subserved the purpose of the statute, complying therewith in substance but not in the exact form prescribed." (60 C.A.2d 458.) (See *Stewart v. Rio Vista* (1950) 72 C.A.2d 279, 281, 164 P.2d 274 [no address of claimants, but verification, by their attorney, gave his office address]; *Anderson v. San Joaquin* (1950) 97 C.A.2d 330, 217 P.2d 479 [no address of claimants but claim was drawn and verified by attorneys on paper with printed name and address of law firm]; 53 A.L.R.5th 617 [sufficiency of notice of claim against local governmental unit with respect to identity, name, address, and residence of claimant].)

The most liberal of these decisions is *Holm v. San Diego* (1950) 35 C.2d 399, 217 P.2d 972, where a claim based on negligent operation of a city vehicle totally omitted plaintiffs' address. The requirement was held substantially satisfied by a recital of a trip "to San Diego from Lakeside" and the statement at the end of the claim, just before the signatures: "Signed at Lakeside or La Mesa, Calif." The court pointed out that these two small towns are close together and concluded that there was sufficient information from which the city authorities, without undue trouble, could locate and interview the claimants. (35 C.2d 401.)

SUPPLEMENT: [This section is current through the latest supplement]



102 of 192 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

VII. NOTICE OF CLAIM AGAINST PUBLIC ENTITY

H. Defective Compliance.

2. Later Rule of Substantial Compliance.

b. Illustrations.

4. Series of Writings as Claim.

3 *Witkin Cal. Proc. Actions* § 280

[§ 280] Series of Writings as Claim.

In *Dilts v. Cantua Elementary School Dist.* (1987) 189 C.A.3d 27, 234 C.R. 612, an action by a discharged teacher for breach of his employment contract, plaintiff contended that a series of letters between the parties' attorneys was a claim to which the substantial compliance rule could be applied. In rejecting this theory, the court said: "The established procedure for the filing of claims pursuant to the Tort Claims Act would become totally unworkable if this court were to hold that a series of writings could collectively be considered a claim." (189 C.A.3d 35.) "If a series of letters received over a period of time could collectively constitute a claim, it would be impossible to ascertain whether a claim had been presented within the ... time limitation as specified in section 911.2. ... It would be difficult for the public entity to identify whether a particular letter were a claim and which letter triggered its obligation to accept or deny a claim if a series of correspondence could be considered collectively to constitute a claim. If an agency was unable to determine whether a claim had been filed or when the claim had been filed, it would be equally difficult for the court to determine which statute of limitation applied or when the statute of limitation began to run." (189 C.A.3d 36.)

Later cases are to the same effect. (See *Tapia v. San Bernardino* (1994) 29 C.A.4th 375, 384, 34 C.R.2d 431 [letters by dismissed deputy sheriff's attorney to sheriff seeking back pay and reinstatement were insufficient]; *Schaefer Dixon Associates v. Santa Ana Watershed Project Authority* (1996) 48 C.A.4th 524, 532, 55 C.R.2d 698 [following *Dilts*; series of letters by contractor to local watershed agency demanding additional fees and threatening litigation were insufficient]; cf. *Alliance Financial v. San Francisco* (1998) 64 C.A.4th 635, 646, 75 C.R.2d 341, *infra*, §284 [two letters were sufficient claim of nonpayment of money due on invoices; disagreeing with *Schaefer Dixon Associates*].)

SUPPLEMENT: [This section is current through the latest supplement]



103 of 192 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

VII. NOTICE OF CLAIM AGAINST PUBLIC ENTITY

H. Defective Compliance.

2. Later Rule of Substantial Compliance.

b. Illustrations.

5. Other Defects.

3 *Witkin Cal. Proc. Actions* § 281

[§ 281] Other Defects.

(1) *Verification*. The former verification requirement (since eliminated) was liberally interpreted in several cases. (See *Kelso v. Board of Education of Glendale* (1941) 42 C.A.2d 415, 421, 109 P.2d 29 [claim of minor child was sufficient, even though verification was by father describing himself as "claimant"]; *Germ v. San Francisco* (1950) 99 C.A.2d 404, 413, 222 P.2d 122 [immaterial that plaintiff did not personally appear before notary who verified signature at request of plaintiff's attorney]; *Osborn v. Whittier* (1951) 103 C.A.2d 609, 618, 230 P.2d 132 [slight variations from typical form]; but see *Baker v. Cohen* (1956) 139 C.A.2d 842, 294 P.2d 518, *infra*, §309 [total absence of verification was fatal].)

(2) *Date of Occurrence*. In *Knight v. Los Angeles* (1945) 26 C.2d 764, 160 P.2d 779, plaintiff's land was injured by defendant city's failure to maintain proper drainage facilities. The claim, undated, recited that damage of a "continuous and continuing character" had been "caused to this date" by reason of negligence of defendant's employees "on or about and during the months of February and March, 1941." *Held*, this was sufficient. The continuing nature of the injury made it impossible to specify an exact day when the "accident occurred," and the reference to the 2 months sufficiently showed duration without the necessity of listing each day of those months. "To this date" means the date of the claim, and the lack of a date in the body of the claim is immaterial, for the verification supplies the date. Preceding this analysis the court flatly declared that "we must be guided by the rule that substantial compliance with claim provisions, whether in a statute or charter, is all that is required." (26 C.2d 766.)

(3) *Injury, Damage, or Loss*. In *White v. Moreno Valley Unified School Dist.* (1986) 181 C.A.3d 1024, 226 C.R. 742, a claim was sufficient to permit a minor to recover medical expenses, where it referred to personal injuries of the minor and medical expenses of the parents, and also specified combined damages of all claimants in excess of \$ 500,000, including medical specials. (181 C.A.3d 1031.) (See *Smith v. Los Angeles* (1989) 214 C.A.3d 266, 279, 262 C.R. 754 [following *White*]; *Connelly v. Fresno* (2006) 146 C.A.4th 29, 39, 52 C.R.3d 720 [personal injury claim by motorist for "unspecified medical, lost income, future medical" was sufficient, even though claim did not specifically state that motorist suffered personal injuries and did not describe injuries]; but see *Alliance Financial v. San Francisco* (1998) 64 C.A.4th 635, 646, 75 C.R.2d 341, *infra*, §284 [invoice is not sufficient claim until party seeking to collect on it notifies public entity that it is unpaid and that failure to resolve dispute may result in litigation].)

SUPPLEMENT: [This section is current through the latest supplement]

(3) *Injury, Damage, or Loss.* See *Sparks v. Kern County Bd. of Supervisors* (2009) 173 C.A.4th 794, 799, 93 C.R.3d 173 [in action by sheriff seeking to recover from county costs he incurred in successfully defending county's underlying action against him, sheriff's letter to county's legal counsel requesting that sheriff be provided with defense was not request for legal representation, and his letter to county board of supervisors urging board to deny county's request for future litigation costs and fees in underlying action did not refer to sheriff's defense costs; thus, neither letter substantially complied with claims presentation requirement].



104 of 192 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

VII. NOTICE OF CLAIM AGAINST PUBLIC ENTITY

I. Defects of Form.

1. Correction by Amendment.

3 *Witkin Cal. Proc. Actions* § 282

[§ 282] Correction by Amendment.

(1) *Right To Amend.* A claim may be amended "if the claim as amended relates to the same transaction or occurrence which gave rise to the original claim." (*Govt.C. 910.6(a).*) (See *Janis v. California State Lottery Com. (1998) 68 C.A.4th 824, 832, 80 C.R.2d 549* ["amendment" alleging that Commission breached statutory duty to return 50% of Keno proceeds as prizes did not relate back to original claim alleging deception by promoting illegal game]; *C.E.B., 1 Government Tort Liability Practice 4th, §5.82 et seq.*)

(2) *Time of Amendment.* The amendment may be made at any time before expiration of the time to file, or before final action by the board, whichever is later. (*Govt.C. 910.6(a).*) (See *C.E.B., 1 Government Tort Liability Practice 4th, §5.82 et seq.*)

SUPPLEMENT: [This section is current through the latest supplement]



105 of 192 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

VII. NOTICE OF CLAIM AGAINST PUBLIC ENTITY

I. Defects of Form.

2. Waiver of Defects.

a. Statutory Procedure.

3 *Witkin Cal. Proc. Actions* § 283

[§ 283] Statutory Procedure.

The judicially developed doctrine of "substantial compliance" (see *supra*, §275 et seq.) was recognized and implemented by statute as follows:

(1) If the board thinks the claim "fails to comply substantially" with the statutory requirements, it may, within 20 days after presentation, give written notice of its insufficiency, "stating with particularity the defects or omissions therein." (*Govt.C. 910.8*; see *Lacy v. Monrovia* (1974) 44 C.A.3d 152, 157, 118 C.R. 277 ["Respondent not only had notice of the occurrence giving rise to the claim but also had the names of all persons seeking damages and the amount of damages claimed. There was no attempt to mislead respondent and no evidence that respondent was misled or prejudiced in any way"]; C.E.B., 1 Government Tort Liability Practice 4th, §5.85 et seq.; 6 Southwestern U. L. Rev. 564; 7 A.L.R.4th 1063 [actual notice or knowledge of injury or incident as sufficient claim or notice of claim].) This notice may be given personally or by mail. (*Govt.C. 915.4(a)*.) However, notice need not be given if the claim fails to state an address. (*Govt.C. 915.4(b)*.)

(2) No action may be taken on the claim for 15 days after the notice. (*Govt.C. 910.8*.)

(3) Any defense as to the sufficiency of the claim based upon a defect or omission in the claim as presented is waived by the board's failure to give notice of insufficiency, except where the claim completely lacks an address. (*Govt.C. 911*; see C.E.B., 1 Government Tort Liability Practice 4th, §5.85 et seq.)

(4) Even though notice is given and the claimant fails or refuses to amend the claim, that failure or refusal is not a defense if the court finds that the claim did comply substantially with the statutory requirements. (*Govt.C. 910.6(b)*.)

SUPPLEMENT: [This section is current through the latest supplement]



106 of 192 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

VII. NOTICE OF CLAIM AGAINST PUBLIC ENTITY

I. Defects of Form.

2. Waiver of Defects.

b. Illustrations: Defects Waived.

3 *Witkin Cal. Proc. Actions* § 284

[§ 284] Illustrations: Defects Waived.

Foster v. McFadden (1973) 30 C.A.3d 943, 106 C.R. 685, gave Govt.C. 910.8 an extremely liberal application to a document neither labeled nor intended as a claim, and lacking in much of the required content of a claim. Plaintiff was injured by defendant John McFadden, an employee of defendant district. Plaintiff's attorney wrote a letter addressed to "Mr. John McFallon" in care of the district, advising him of plaintiff's claim for damages arising out of the described accident, and asking that the addressee have his insurance carrier contact the attorney. The district's secretary responded with the name of the district's insurance carrier and suggested that further correspondence be directed to it. Negotiations were inconclusive, an action was filed, and the trial judge gave judgment for defendants on the ground of failure to file a timely claim. *Held*, reversed.

(a) The letter was not a substantial compliance with Govt.C. 910 and 910.2. (30 C.A.3d 947.)

(b) The letter was, however, a "claim," because, though not so labeled or described, "it clearly, if inferentially," suggested the elements and "performed the function of a claim," and the district by its reply "identified the letter for what it was--an unlabeled and deficient claim by plaintiff against the district for unstated damages for undescribed injuries he allegedly suffered in an identified but undescribed recent accident involving a specified employee of the district." (30 C.A.3d 947.)

(c) Govt.C. 910.8 therefore applied. Its purpose is "to protect claimants whose claims did not substantially comply with the claims act, but which, nevertheless, were readily identifiable as claims." And, the district's failure to give plaintiff notice of the insufficiency of his claim waived the district's right to assert noncompliance with the claim statutes. (30 C.A.3d 948.)

In *Phillips v. Desert Hosp. Dist.* (1989) 49 C.3d 699, 263 C.R. 119, 780 P.2d 349, plaintiff had surgery performed in defendant's hospital, and suffered complications allegedly due to negligence of the surgeon. Her attorney mailed a typed notice of intent to commence action pursuant to C.C.P. 364, and, after no response was received, filed this malpractice action. Defendant demurred on the ground that plaintiffs had failed to comply with the notice of claim provisions. Plaintiffs sought to amend the complaint to remedy the defect by stating, "Plaintiffs have complied with the

provisions of *Government Code* § 900 et seq.," and by attaching and incorporating by reference applications they had made for leave to present a late claim. The trial judge sustained a demurrer to the amended complaint and the Court of Appeal affirmed the resulting judgment for defendant. *Held*, judgment of Court of Appeal reversed.

(a) *Notice and defense-waiver provisions of Government Claims Act.*

(1) If a public entity determines that a claim fails to comply substantially with *Govt.C.* 910 and 910.2, it must either give written notice of insufficiency within 20 days or it waives the defense. If it does not send a notice, it may not take further action on the defective claim for 15 days after the notice is given. And whether or not it decides to give a notice of insufficiency, the public entity must notify the claimant within 45 days after the claim is presented whether the claim, defective or otherwise, was timely filed. "Thus, if a section 910.8 notice of insufficiency is sent, the board must make a timeliness determination within 10 days after the last date the claimant could amend the claim to cure the insufficiency identified. Failure to provide such notice of timeliness waives a public entity's defense based on untimeliness even if the claim is otherwise insufficient, unless the claimant has failed to state in the claim an address where the notices should be sent." (49 C.3d 705.)

(2) "The Legislature has thus provided a comprehensive scheme which requires a claimant to notify the appropriate public entity of a claim. This notification in turn allows the public entity an opportunity to determine expeditiously the claim's timeliness and sufficiency. If the notice is untimely or lacks any of the information required by sections 910 and 910.2, the public entity may require the claimant to justify the delay or supply the missing data. If the public entity fails to require the claimant to cure such defects, then it waives certain defenses which are otherwise available to challenge a lawsuit based upon the claim. This possibility of waiver encourages public entities to investigate claims promptly, and to make and notify claimants of their determinations, thus enabling the claimants to perfect their claims. The overall result is an incentive to public entities to manage and control the claims made against them." (49 C.3d 706.)

(b) *Govt.C. 910 requirements and defective claims.*

(1) *Govt.C.* 910 sets forth the information a proper notice of claim should include (see *supra*, §§253, 254), and defendant hospital contends that only the filing of a complete and valid claim triggers the notice and defense-waiver provisions. This is a mistaken view, resulting from the Legislature's use of the term "claim" to describe two distinct situations: (a) a notice that complies with *Govt.C.* 910 and 910.2; and (b) a "claim as presented" that is defective due to failure to comply with *Govt.C.* 910 and 910.2, and triggers the notice and defense-waiver provisions. (49 C.3d 707.)

(2) Defendant hospital attempts to distinguish between defective "claims" and other notices of possible claims (such as plaintiffs' *C.C.P.* 364 notice), arguing that the latter may be ignored. This is unsound. A notice that discloses the existence of a claim must be treated as a defective "claim" that activates the notice and defense-waiver provisions. (49 C.3d 707.)

(3) *Lutz v. Tri-City Hosp.* (1986) 179 C.A.3d 807, 224 C.R. 787, held that a *C.C.P.* 364 notice does not constitute the filing of a claim, on the ground that failure to comply with that section is not a jurisdictional defect, while compliance with *Govt.C.* 900 et seq. is a condition precedent to a tort action. (49 C.3d 708.) But the distinction is not significant. "The disparate jurisdictional effects flowing respectively from noncompliance with section 364 and the claim presentation requirements ... relate only to whether a *lawsuit* may be filed. ... [T]he crucial issue here is the preliminary one of whether plaintiffs' 364 notice constituted a 'claim as presented,' requiring notification or waiver of its deficiencies as a claim. ... We conclude, therefore, that a document constitutes a 'claim as presented' triggering sections 910.8, 911 and 911.3, if it discloses the existence of a 'claim' which, if not satisfactorily resolved, will result in a lawsuit against the entity. ... A public entity's receipt of written notice that a claim for monetary damages exists and that litigation may ensue places upon the public entity the responsibility, and gives it the opportunity, to notify the potential plaintiff pursuant to sections 910.8 and 911 of the defects that render the document insufficient under sections 910 and 910.2 and thus might hamper investigation and possible settlement of the claim. Such a written notice claiming monetary damages thereby satisfies the purposes of the claims act--to facilitate investigation of disputes and their

settlement without trial if appropriate." (49 C.3d 709.)

(4) Defendant hospital contended that plaintiffs could never have intended their C.C.P. 364 notice to function as a claim because they were not aware of the hospital's status as a public entity. But the claimant's intent is not relevant; it is sufficient that the notice disclosed to the hospital that plaintiffs had a claim which, if not satisfactorily resolved, would result in the filing of an action. (49 C.3d 709.)

(5) The Court of Appeal expressed concern over the possibility that a letter captioned "Intention to Commence Action" would require treatment of all such letters by dissatisfied patients as "claims," requiring notice of insufficiency or untimeliness. "But, provided the existence of a claim for monetary damages is definitely disclosed by the document, that burden upon the public entity is precisely the intended effect of the statutory notice and defense-waiver provisions." (49 C.3d 710, citing *Foster*.)

In *Alliance Financial v. San Francisco* (1998) 64 C.A.4th 635, 75 C.R.2d 341, plaintiff sued defendant city and county for money due on invoices. Prior to the litigation, plaintiff's first letter to defendant, although not styled as a claim, stated the existence of the debt, asserted a right to payment, spoke of avoiding litigation, pointed out that a failure to pay would result in interest and "possible future court costs," and asked for information so that litigation might be avoided. Plaintiff's second letter informed defendant that the claim was ripe and that litigation could be expected if the matter was not resolved. *Held*, any defects were waived. Even though the expression of an intent to sue was equivocal, the second letter communicated a basis for a lawsuit and an intent to sue, at some time, if the claim was not resolved. No more was required. (64 C.A.4th 646, disagreeing with *Schaefer Dixon Associates v. Santa Ana Watershed Project Authority* (1996) 48 C.A.4th 524, 55 C.R.2d 698, *infra*, §285.)

Other cases have also held that defects were waived. (See *Wilson v. Tri-City Hosp. Dist.* (1990) 221 C.A.3d 441, 450, 270 C.R. 436 [following *Phillips* and holding that *Phillips* should be given normal retroactive effect, and thus was applicable to present case that was pending on appeal when *Phillips* was filed]; *Mandjik v. Eden Township Hosp. Dist.* (1992) 4 C.A.4th 1488, 1503, 6 C.R.2d 582; *Watts v. Valley Med. Center* (1992) 8 C.A.4th 1050, 1057, 10 C.R.2d 794; 17 *Pepperdine L. Rev.* 1148 [note on *Phillips*]; but see *Green v. State Center Community College Dist.* (1995) 34 C.A.4th 1348, 41 C.R.2d 140, *infra*, §285 [distinguishing both *Phillips* and *Foster*].)

SUPPLEMENT: [This section is current through the latest supplement]



107 of 192 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

VII. NOTICE OF CLAIM AGAINST PUBLIC ENTITY

I. Defects of Form.

2. Waiver of Defects.

c. Illustrations: Defects Not Waived.

3 *Witkin Cal. Proc. Actions* § 285

[§ 285] Illustrations: Defects Not Waived.

Foster v. McFadden (1973) 30 C.A.3d 943, 106 C.R. 685, supra, §284, and *Phillips v. Desert Hosp. Dist.* (1989) 49 C.3d 699, 263 C.R. 119, 780 P.2d 349, supra, §284, were discussed and distinguished in *Green v. State Center Community College Dist.* (1995) 34 C.A.4th 1348, 41 C.R.2d 140, a premises liability action against defendant community college district. In holding that defendant's failure to respond to a letter from plaintiff's counsel did not waive the claim presentation requirements, the court noted that, unlike the letters in *Phillips* and *Foster*, the letter here did not remotely imply that a demand was being made on defendant, or that plaintiff's counsel would initiate litigation if plaintiff's demand was not satisfied. "Counsel's letter does not even indicate that an accident occurred on respondent's property." (34 C.A.4th 1359.)

Other cases have refused to waive defects. (See, e.g., *Schaefer Dixon Associates v. Santa Ana Watershed Project Authority* (1996) 48 C.A.4th 524, 534, 55 C.R.2d 698 [series of letters did not constitute sufficient claim, where they failed to advise defendant that litigation was imminent, and where plaintiff and his attorneys did not view them as claim]; but see *Alliance Financial v. San Francisco* (1998) 64 C.A.4th 635, 646, 75 C.R.2d 341, supra, §284 [disagreeing with *Schaefer Dixon Associates*, and reaching contrary result].)

SUPPLEMENT: [This section is current through the latest supplement]

See *Sparks v. Kern County Bd. of Supervisors* (2009) 173 C.A.4th 794, 800, 93 C.R.3d 173 [in action by sheriff seeking to recover from county costs he incurred in successfully defending county's underlying action against him, sheriff's letters to county did not disclose existence of claim for reimbursement, and thus county did not waive sheriff's failure to comply with claim presentation requirement].



108 of 192 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

VII. NOTICE OF CLAIM AGAINST PUBLIC ENTITY

J. Relief From Late Filing.

1. In General.

3 Witkin Cal. Proc. Actions § 286

[§ 286] In General.

(1) *Statutory Grounds.* The 6-month time limit for most claims (*Govt.C. 911.2(a)*, supra, §255) may operate harshly on persons who function under disability or are excusably neglectful. The statutes provide for relief from the failure to present a timely claim, first by an application to the agency, and then, on denial, by a petition to the superior court. (*Govt.C. 911.6(b)*, 946.6(c); see C.E.B., 1 Government Tort Liability Practice 4th, Chap. 7; Cal. Civil Practice, 1 Procedure §1:79; Rutter Group, Civil Proc. Before Trial §1:757 et seq.)

Under *Govt.C. 911.6(b)*, the agency "shall grant the application" where one or more of the following is applicable:

(a) Mistake, inadvertence, surprise, or excusable neglect, where the public entity was not prejudiced. (See *infra*, §290 et seq.)

(b) The person who sustained injury, damage, or loss was a minor during all of the time. (See *infra*, §287.)

(c) The injured person was physically or mentally incapacitated during all of the time and failed to present the claim by reason of the disability. (See *infra*, §289.)

(d) The injured person died before expiration of the time.

(2) *Nonstatutory Grounds.* A nonstatutory ground for relief was recognized in *Myers v. Orange* (1970) 6 C.A.3d 626, 86 C.R. 198: The period is tolled during a reasonable attempt to obtain administrative relief. Decedent was discharged from his position by defendant county. Plaintiff, his widow and administrator, sought recovery of death benefits and other sums on the theory of wrongful discharge. The 1-year period expired before the claim was filed, but during the period she attempted to obtain relief without suit, first by seeking relief from the county appeal board, then by mandamus to review its denial. *Held*, the 240 days consumed in this pursuit of the administrative remedy (even if exhaustion was not required) should not be counted. The court relied on statute of limitations cases such as *Tu-Vu Drive-In Corp. v. Davies* (1967) 66 C.2d 435, 58 C.R. 105, 426 P.2d 505, and *Santa Clara v. Hayes Co.* (1954) 43 C.2d 615, 275 P.2d 456, *infra*, §730: "We see no good reason, therefore, why the rule of *Tu-Vu* and [*Santa Clara*,] tolling statutes of limitation, should not be applied to toll the running of the one-year claim period, particularly in a case such

as this where the plaintiff's communications with the governmental entity gave ample information well within the one-year claim period to satisfy the purposes of the claims statute." (6 C.A.3d 637.)

In *Scott v. Los Angeles* (1977) 73 C.A.3d 476, 140 C.R. 785, the agency rejected a malpractice claim as untimely; and a second claim, apparently designed to circumvent the issue of accrual date of the malpractice cause, was treated as an application for late filing and also rejected. Because the issues of when the cause accrued and whether the statute of limitations was tolled were critical to both compliance with the claims statute and timeliness of the complaint, the agency acted improperly in unilaterally determining that the original claim was untimely. The court declared that the late claims procedure "cannot be viewed as giving the governmental entity the power to determine for itself factual questions related to the statute of limitations nor does it give the power to the governmental entity, by the manner in which it treats the claim, i.e., by rejecting it as untimely rather than on its merits, to deny a claimant his or her right to a jury trial on disputed factual issues." (73 C.A.3d 482.) (See *Ngo v. Los Angeles* (1989) 207 C.A.3d 946, 950, 255 C.R. 140 [following *Scott*].)

SUPPLEMENT: [This section is current through the latest supplement]



109 of 192 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

VII. NOTICE OF CLAIM AGAINST PUBLIC ENTITY

J. Relief From Late Filing.

2. Minority.

3 *Witkin Cal. Proc. Actions* § 287

[§ 287] Minority.

(1) *Former Law: No Excuse or Relief.* The former law recognized no excuse or tolling of the time period by minority; the minor was held to the same requirement of timely filing as an adult. (See *Artukovich v. Astendorf* (1942) 21 C.2d 329, 333, 131 P.2d 831; *Fonseca v. Santa Clara* (1968) 263 C.A.2d 257, 260, 69 C.R. 357; 29 Cal. L. Rev. 245.)

(2) *Current Law: Mandatory Relief on Application.* Current law does not directly excuse filing or extend the period for a minor. In computing the 1-year absolute limit for claim applications (see *infra*, §299), the time during which the claimant is a minor (and not a dependent child of the juvenile court) is counted. (*Govt.C. 911.4(c)*; see *infra*, §§300, 301.) However, the minor may seek relief by an application to the agency or a petition to the superior court (see *infra*, §§299 et seq., 303 et seq.), and if the minor does so, relief must be granted. (*Govt.C. 911.6(b)(2)*; see *supra*, §286.) (See C.E.B., 1 Government Tort Liability Practice 4th, §§5.30, 7.27, 7.34, 7.35; 58 A.L.R.4th 402 [law in other jurisdictions].)

If the minor fails to seek relief, the claim will be barred. (See *Ridley v. San Francisco* (1969) 272 C.A.2d 290, 292, 77 C.R. 199.) And it will also be barred if the minor fails to apply for relief within a "reasonable time" (*infra*, §299). (See *Hom v. Chico Unified School Dist.* (1967) 254 C.A.2d 335, 339, 61 C.R. 920 [application 15 months after accident was properly rejected].)

(3) *Constitutionality of Claims Requirement.* The constitutionality of the claims requirement as applied to minors has been affirmed by decisions rejecting due process and equal protection challenges. (See *Stanley v. San Francisco* (1975) 48 C.A.3d 575, 578, 121 C.R. 842; *Carr v. California* (1976) 58 C.A.3d 139, 143, 129 C.R. 730.)

SUPPLEMENT: [This section is current through the latest supplement]



110 of 192 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

VII. NOTICE OF CLAIM AGAINST PUBLIC ENTITY

J. Relief From Late Filing.

3. Incapacity.

a. Former Law.

3 *Witkin Cal. Proc. Actions* § 288

[§ 288] Former Law.

The cases applying the former claims provisions held that incapacity was not an excuse for late filing. (See *Johnson v. Glendale* (1936) 12 C.A.2d 389, 393, 55 P.2d 580 [mental incapacity]; *Wicklund v. Plymouth Elementary School Dist.* (1940) 37 C.A.2d 252, 99 P.2d 314 [same]; *Rounds v. Brown* (1953) 121 C.A.2d 642, 645, 263 P.2d 620 [imprisonment]; C.E.B., 1 Government Tort Liability Practice 4th, §5.30.)

A narrow exception was declared in *Schulstad v. San Francisco* (1946) 74 C.A.2d 105, 168 P.2d 68. Plaintiff, injured by a municipal bus, filed his claim some months after the 60-day charter period. The complaint alleged that he was "wholly incapacitated mentally by reason of the above described injuries" until the time of actual filing. *Held*, a cause of action was stated. The theory of the opinion, supported by quotation from a number of outside cases, appears to be a combination of two maxims: (a) no one can take advantage of his own wrong; and (b) the law does not seek to compel the impossible. The precise holding, however, was limited to the situation covered by the first maxim: Late filing is excused where the plaintiff is rendered incapable of timely filing by the tortious injury for which he seeks to recover. (74 C.A.2d 107.)

The 1959 amendments (see *supra*, §232) authorized the court to grant relief if the entity would not be unduly prejudiced. (See *Thompson v. Fresno* (1963) 59 C.2d 686, 689, 31 C.R. 44, 381 P.2d 924; *Gonzales v. Merced* (1963) 214 C.A.2d 761, 763, 29 C.R. 675; *O'Brien v. Santa Monica* (1963) 220 C.A.2d 67, 72, 33 C.R. 770.)

SUPPLEMENT: [This section is current through the latest supplement]



111 of 192 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

VII. NOTICE OF CLAIM AGAINST PUBLIC ENTITY

J. Relief From Late Filing.

3. Incapacity.

b. Current Law: Mandatory Relief on Application.

3 *Witkin Cal. Proc. Actions* § 289

[§ 289] Current Law: Mandatory Relief on Application.

(1) *General Rule.* Relief must be granted, on application, where the claimant (a) was "physically or mentally incapacitated" during the entire time period for presentation of the claim (see *supra*, §255), and (b) failed to present a timely claim "by reason of such disability." (*Govt.C. 911.6(b)(3)*.) No showing of lack of prejudice is required. (See *Santa Clara v. Superior Court* (1971) 4 C.3d 545, 553, 94 C.R. 158, 483 P.2d 774, *infra*, §294; *Baber v. Napa State Hosp.* (1984) 154 C.A.3d 514, 518, 201 C.R. 432 [plaintiff was involuntarily confined in state hospital as gravely disabled conservatee], C.E.B., 1 Government Tort Liability Practice 4th, §§5.30, 7.25, 7.34; 18 *Pepperdine L. Rev.* 1069; 44 *A.L.R.3d* 1108 [incapacity caused by accident as affecting notice of claim required to hold local governmental entity liable for personal injury].)

In computing the 1-year absolute limit for claim applications (see *infra*, §299), the time during which the claimant is mentally incapacitated and without a guardian or conservator of the person generally is not counted. (*Govt.C. 911.4(c)(1)*; see *infra*, §§300, 301.)

(2) *Illustration.* In *Draper v. Los Angeles* (1990) 52 C.3d 502, 276 C.R. 864, 802 P.2d 367, the issue was whether plaintiff, physically unable to file a claim against a governmental entity within the former 100-day period (now 6 months) after the accident, could be denied relief under *Govt.C. 946.6(c)(3)* because an attorney, purporting to act on her behalf, filed a timely claim against a different governmental entity. The trial judge denied relief and the Supreme Court reversed.

(a) As to the first prong of the test, doctors' declarations established that plaintiff was both physically and mentally incapacitated during the period. (52 C.3d 504, 506.)

(b) The second prong of the test requires a showing that "by reason of such disability" the claimant failed to present a claim. Defendant city argued that this second prong was not met because an attorney filed a claim on plaintiff's behalf within the time period; hence, plaintiff's incapacity did not cause her failure to file a claim. (52 C.3d 508.) But it is undisputed that plaintiff was just emerging from a long coma and that her ability to reason was severely impaired. "In such circumstances it is inconceivable that she could have authorized the filing of the claim. Nor can we uphold the

ruling on the basis of an assumption that some unnamed person retained [the attorney] to file a claim for plaintiff." (52 C.3d 508.)

(c) Under *Govt.C. 911.6(b)(3)*, it is the incapacity of the person who failed to file a claim that is in issue. The sentence starts out with the words "The person," and obviously refers to the injured person. (52 C.3d 508.) "Construction of the subdivision in the manner the city advocates would require us to add words to the sentence so that the last clause would read, 'and by reason of such disability the injured person or someone with authority to appoint another to act on the injured person's behalf failed to present a claim.' " (52 C.3d 509.)

(d) This court's construction does not render superfluous the last clause of the provision ("and by reason of such disability failed to present a claim"). "The subdivision is designed to assure both that the claimant was disabled during the filing period and that the disability was the reason the claimant could not file timely. A person can be disabled yet be able to file a timely claim. ... For example, in *Tammen v. County of San Diego* ... we held the fact that the plaintiff consulted attorneys and dealt with insurance adjusters within the filing period was evidence that her failure to present a timely claim was not caused by her incapacity. ... Here, by contrast, there can be little doubt that plaintiff's incapacity prevented her from taking any such actions." (52 C.3d 509.)

Three justices joined in a strong dissent, asserting that plaintiff was a victim not of the judicial process but of incompetent counsel. (52 C.3d 510.) The dissenters further assert that the lead opinion substitutes its judgment for that of the trial court (52 C.3d 511); that there was not excusable neglect, just neglect (52 C.3d 515); that the lead opinion fails to mention plaintiff's own admission that she hired her present counsel almost 3 months before her discharge from the hospital (52 C.3d 516); and that the decision "is an aberration and should remain one" (52 C.3d 517).

SUPPLEMENT: [This section is current through the latest supplement]



112 of 192 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

VII. NOTICE OF CLAIM AGAINST PUBLIC ENTITY

J. Relief From Late Filing.

4. Mistake or Excusable Neglect.

a. Theory of Relief.

3 *Witkin Cal. Proc. Actions* § 290

[§ 290] Theory of Relief.

Relief must be granted where the failure to present the claim "was through mistake, inadvertence, surprise or excusable neglect and the public entity was not prejudiced in its defense of the claim" by the delay. (*Govt.C. 911.6*.) The significant language in this provision was taken from the general relief from default statute, *C.C.P. 473* (see 8 *Cal. Proc.* (5th), *Attack on Judgment in Trial Court*, §144), and the same rules apply. (See *Viles v. California* (1967) 66 C.2d 24, 29, 56 C.R. 666, 423 P.2d 818, *infra*, §291; *Nilsson v. Los Angeles* (1967) 249 C.A.2d 976, 979, 58 C.R. 20, *infra*, §292; *Dockter v. Santa Ana* (1968) 261 C.A.2d 69, 75, 67 C.R. 686; C.E.B., 1 Government Tort Liability Practice 4th, §7.8 et seq.; 55 *A.L.R.3d* 930 [attorney's mistake or neglect].) Thus, the following rules apply:

(1) The showing required is the same, and cases on *C.C.P. 473* may therefore be cited in support of or in opposition to relief. (*Viles v. California, supra*; *Nilsson v. Los Angeles, supra*.)

(2) The same policy of liberal relief from default is followed. (See *Viles v. California, supra*, 66 C.2d 32; *Ebersol v. Cowan* (1983) 35 C.3d 427, 435, 197 C.R. 601, 673 P.2d 271; *Bettencourt v. Los Rios Community College Dist.* (1986) 42 C.3d 270, 275, 276, 281, 228 C.R. 190, 721 P.2d 71, *infra*, §293; *Nilsson v. Los Angeles, supra*; *Kaslavage v. West Kern County Water Dist.* (1978) 84 C.A.3d 529, 538, 148 C.R. 729, citing the text; *Moore v. California* (1984) 157 C.A.3d 715, 721, 203 C.R. 847; 8 *Cal. Proc.* (5th), *Attack on Judgment in Trial Court*, §144.)

(3) Under *C.C.P. 473*, a *mea culpa* declaration by an attorney establishing that a default, default judgment, or dismissal was entered against the client as the result of the attorney's neglect deprives the trial judge of discretion to deny relief, even without a showing that the neglect was excusable (see 8 *Cal. Proc.* (5th), *Attack on Judgment in Trial Court*, §193). However, when an aggrieved party is not challenging a default, default judgment, or dismissal, *C.C.P. 473* still requires that an attorney's neglect be excusable before relief may be granted. That standard is expressly retained in *Govt.C. 946.6*. (*Tackett v. Huntington Beach* (1994) 22 C.A.4th 60, 64, 65, 27 C.R.2d 133.)

(4) The same discretion is exercised by the trial judge, and the denial of relief will be upheld unless discretion was clearly abused. (See *Tammen v. San Diego* (1967) 66 C.2d 468, 478, 58 C.R. 249, 426 P.2d 753, *infra*, §296; *Dockter v. Santa Ana, supra* [denial affirmed]; *Martin v. Madera* (1968) 265 C.A.2d 76, 70 C.R. 908, *infra*, §296; *Ebersol v.*

Cowan, supra; DeYoung v. Del Mar Thoroughbred Club (1984) 159 C.A.3d 858, 864, 206 C.R. 28; 8 Cal. Proc. (5th), Attack on Judgment in Trial Court, §191.)

SUPPLEMENT: [This section is current through the latest supplement]



113 of 192 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

VII. NOTICE OF CLAIM AGAINST PUBLIC ENTITY

J. Relief From Late Filing.

4. Mistake or Excusable Neglect.

b. Illustrations of Relief Granted.

1. Mistake of Law.

3 *Witkin Cal. Proc. Actions* § 291

[§ 291] Mistake of Law.

In *Viles v. California* (1967) 66 C.2d 24, 56 C.R. 666, 423 P.2d 818, plaintiff's car was involved in a collision that caused the death of his wife, injury to his minor son, and property damage to his car. His cause of action against the state was based on the allegedly dangerous condition of the highway. The accident occurred September 12, 1963. He was informed by insurance company adjusters that he had 1 year to file an action, and did not consult an attorney until June 2, 1964. He then learned of the claim requirement, and applied for relief from late filing. The state granted relief as to the minor son, but denied it as to plaintiff, and the superior court judge also denied relief to plaintiff. *Held*, order reversed.

(a) Although not every mistake of law is excusable, an "honest mistake" is, and the determining factor is the "reasonableness of the misconception." (66 C.2d 29.) Plaintiff's reliance on information from experienced insurance adjusters was not unreasonable. (66 C.2d 29.)

(b) There was no prejudice to the state, for the accident had been fully investigated and pictures of the condition of the highway were available. (66 C.2d 31, 32.)

(c) The application for relief was made within a reasonable time (see *infra*, §299). Even though this was almost 9 months after the accident, plaintiff could not have applied until he had discovered the mistake, and the delay was therefore reasonable under the circumstances. (66 C.2d 32.)

In *Powell v. Long Beach* (1985) 172 C.A.3d 105, 218 C.R. 97, plaintiff longshoreman did not file a timely claim for injuries suffered in a work-related accident because he believed that the recovery of workers' compensation benefits was his exclusive remedy. It was not until he consulted an attorney (because he objected to his employer's demand that he see a company physician) that he learned that the accident site was publicly owned. *Held*, plaintiff's belief concerning the exclusivity of workers' compensation benefits and his failure to file a timely claim were reasonable: (a) the accident occurred while he was on the job; (b) he had learned from 32 years' work experience that these benefits were his only remedy; (c) until he saw the attorney, he received the benefits without having to file a claim against a public entity; (d)

there were no signs identifying the owner of the accident site, and his paychecks were signed by his employer, thereby justifying his belief that his employer owned the property. (172 C.A.3d 110.) (See *Syzemore v. Sacramento* (1976) 55 C.A.3d 517, 524, 127 C.R. 741 [serviceman was unaware of possible claim until advised by Judge Advocate, who did not know of 100-day requirement and was inexperienced in legal matters; no prejudice shown].)

SUPPLEMENT: [This section is current through the latest supplement]



114 of 192 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

VII. NOTICE OF CLAIM AGAINST PUBLIC ENTITY

J. Relief From Late Filing.

4. Mistake or Excusable Neglect.

b. Illustrations of Relief Granted.

2. Calendaring Mistake.

3 *Witkin Cal. Proc. Actions* § 292

[§ 292] Calendaring Mistake.

In *Nilsson v. Los Angeles* (1967) 249 C.A.2d 976, 58 C.R. 20, plaintiff had a cause of action against defendant city for alleged false imprisonment arising out of an arrest on December 29, 1963. She consulted an attorney immediately, but he didn't file the claim until May 19, 1964, more than a month after expiration of the former 100-day period (now 6 months). Her application for relief was denied. *Held*, reversed.

(a) Cases decided under *C.C.P.* 473 hold that various types of attorney neglect, particularly mistakes in calendaring or forgetfulness of dates, may be excusable. (249 C.A.2d 980, citing the text; see 8 *Cal. Proc.* (5th), *Attack on Judgment in Trial Court*, §161 et seq.)

(b) The attorney's affidavit stated the conclusion that, because of "an error in calendaring" in his office, the claim was not filed in time. The affidavit was defective in failing to state the facts of how it occurred, who was responsible, and what office procedure was followed. But the city made no objection to the conclusional averments, and they were therefore sufficient. (249 C.A.2d 982.)

(c) The city filed no opposing affidavits, hence failed to show prejudice. (249 C.A.2d 982.)

(d) In *Viles v. California* (1967) 66 C.2d 24, 56 C.R. 666, 423 P.2d 818, *supra*, §291, in which relief was also granted, the showing was much weaker. The plaintiff there waited 9 months to consult a lawyer who promptly filed; plaintiff here immediately consulted a lawyer who waited some months before filing. The remedial purpose of the statute would not be served by giving relief to a neglectful claimant and denying it to a diligent claimant whose attorney was neglectful. (249 C.A.2d 982.)

Later cases are to the same effect. (See *Flores v. Board of Supervisors* (1970) 13 C.A.3d 480, 483, 91 C.R. 717 [late claim was excused where attorney failed to open file for case, resulting in filing deadline not being calendared]; *Renteria v. Juvenile Justice, Dept. of Corrections & Rehabilitation* (2006) 135 C.A.4th 903, 910, 37 C.R.3d 777 [following *Nilsson*; secretary of plaintiff's attorney removed claim limitations period from calendaring system because

she mistakenly believed that state had been notified of claim after she received letter from state agreeing to preserve evidence about dispute; attorney's reliance on calendaring system was reasonable[.])

SUPPLEMENT: [This section is current through the latest supplement]



115 of 192 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

VII. NOTICE OF CLAIM AGAINST PUBLIC ENTITY

J. Relief From Late Filing.

4. Mistake or Excusable Neglect.

b. Illustrations of Relief Granted.

3. Mistake About Proper Defendant.

3 *Witkin Cal. Proc. Actions* § 293

[§ 293] Mistake About Proper Defendant.

In *Lawrence v. California* (1985) 171 C.A.3d 242, 217 C.R. 200, plaintiff retained counsel within 5 weeks after he was injured by stepping on a sharp piece of metal protruding from a public sidewalk. In conducting an investigation to determine which entity to present with the claim, counsel's secretary was informed by the county sheriff's department that the area was under county control. Counsel filed a timely claim against the county, which promptly acknowledged receipt. Counsel then brought suit when the county took no action on the claim during the allotted 45-day period (see *supra*, §264). More than 3 months after receiving the claim, the county informed counsel that the accident site was actually under the state's jurisdiction. By this time, the former 100-day period (now 6 months) had lapsed. Plaintiff's application for relief was denied by both the board and the trial judge. *Held*, reversed; the failure to file was due to excusable neglect.

(a) Although the secretary's investigation would have been more complete had she double-checked with another county agency, it was sufficient considering the apparent lack of complexity of the assignment. The short time allowed for filing claims affords the typical busy law office little time for double-checking something so deceptively simple as the ownership of a particular sidewalk. (171 C.A.3d 246.)

(b) By promptly acknowledging receipt of the claim and then failing to disclaim responsibility during the remainder of the 100-day period, the county, which should be thoroughly familiar with the stringent time requirements for filing claims, behaved as though it was deliberately attempting to sabotage plaintiff's action. In view of the county's conduct, it was entirely reasonable that plaintiff's counsel did not catch the error. (171 C.A.3d 246.)

(c) "Under these circumstances it is more appropriate for the state, which has never hinted that it has been prejudiced by the relatively short delay, to yield to its injured citizen." (171 C.A.3d 246.)

In *Bettencourt v. Los Rios Community College Dist.* (1986) 42 C.3d 270, 228 C.R. 190, 721 P.2d 71, plaintiff's counsel was retained to bring an action for wrongful death of a student of Sacramento City College who drowned while on a college-sponsored field trip. Counsel filed the claim with the State Board of Control (now California Victim

Compensation and Government Claims Board) under the mistaken belief that the college employees were employees of the state. Promptly on discovery of the fact that they were employees of defendant Los Rios Community College District, he petitioned for leave to present a late claim (about 19 days late). *Held*, denial of the petition was an abuse of discretion.

(a) Counsel did not practice in Sacramento County, and it was not unreasonable for him to assume that the City College was part of the statewide higher education system. (42 C.3d 276, 277.) And, although he made this one error, he was otherwise diligent in investigation of the case. (42 C.3d 278, 279.)

(b) *Shank v. Los Angeles* (1983) 139 C.A.3d 152, 188 C.R. 644, is distinguishable. In *Shank*, plaintiff's counsel received a letter from defendant hospital with a letterhead that clearly identified the hospital as a public entity within the claim statute. Here, defendant sent requested materials to counsel with a cover letter, and the letterhead identified the district; but counsel's attention was primarily directed to the enclosures and his failure to notice the letterhead was excusable. (42 C.3d 280.) (See *Cabamongan v. Long Beach* (1989) 208 C.A.3d 946, 949, 951, 256 C.R. 621 [Bettencourt; order of denial reversed]; but see *Spencer v. Merced County Office of Education* (1997) 59 C.A.4th 1429, 1438, 1439, 69 C.R.2d 750, *infra*, §297 [distinguishing *Bettencourt* and reaching contrary result].)

SUPPLEMENT: [This section is current through the latest supplement]



116 of 192 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

VII. NOTICE OF CLAIM AGAINST PUBLIC ENTITY

J. Relief From Late Filing.

4. Mistake or Excusable Neglect.

b. Illustrations of Relief Granted.

4. Delay Due to Trauma.

3 *Witkin Cal. Proc. Actions* § 294

[§ 294] Delay Due to Trauma.

The lower court's order granting relief on a weak showing was affirmed in *Santa Clara v. Superior Court* (1971) 4 C.3d 545, 94 C.R. 158, 483 P.2d 774. Plaintiffs' son suffered injuries, was treated in the county hospital, and sued defendant county for personal injuries resulting from alleged malpractice. The son died during the trial. Plaintiffs failed to file their claim for wrongful death within the 100-day statutory period (now 6 months), and applied for leave to present a late claim under C.C.P. 946.6. The showing was a declaration of the attorney who had represented the son and the parents, that the claim was delayed pending determination of the cause of the death and the desire of plaintiffs to sue. This excuse was obviously inadequate, and at the hearing the attorney stated that he could amend his declaration and could testify that the delay was caused by emotional trauma suffered by plaintiffs on their son's death. The judge said, "Yes, the matter is submitted," and later granted the motion for relief. Defendant county sought prohibition. *Held*, writ denied; the offer to prove emotional trauma supported the order. The judge's equivocal language, construed in favor of the order, was an implied acceptance of the offer, despite his failure to require a written amendment or detailed facts; having observed decedent and the parents during the trial the judge did not need such details. (4 C.3d 553.) The total delay, only about 30 days, was less than that in any other reported decision denying relief; and no prejudice was asserted. (4 C.3d 554.)

In *Ramariz v. Merced* (1987) 194 C.A.3d 684, 239 C.R. 774, plaintiff, who was rendered a quadriplegic following a swimming accident in a lake operated by defendant county, filed his formal notice of claim 255 days after the accident. On remand following an appeal holding that plaintiff's failure to timely file his claim was the result of excusable neglect, and that his application for leave to file a late claim was made within a reasonable time, the trial judge ruled that defendant had been prejudiced by the delay and dismissed the complaint. *Held*, dismissal was an abuse of discretion. "Defendants' declarations show only that they have been unable to find any witnesses having knowledge of plaintiff's alleged injury nor any physical evidence which may have contributed to said injury and have been unable to determine where the alleged injury is supposed to have occurred. Completely absent is any showing that any such witness or physical evidence would have been discoverable had plaintiff filed a claim within the 100-day statutory period, or any change of circumstances which could have affected the location of the incident causing plaintiff's injury,

such as a change in the water level of the lake. On the basis of the evidence before the trial court, whether there ever were any such witnesses, physical evidence or change of circumstance are matters of pure speculation. Under these circumstances, there was no substantial evidence to support the trial court's finding that defendants suffered prejudice." (194 C.A.3d 691; on extension of claims presentation period to 6 months, see *supra*, §255.) (See *Alameda v. Superior Court* (1987) 196 C.A.3d 619, 625, 242 C.R. 215 [evidence that accident and surgery had "profound" mental effect on plaintiff and that use of medication impaired his thinking supported finding of excusable neglect].)

SUPPLEMENT: [This section is current through the latest supplement]



117 of 192 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

VII. NOTICE OF CLAIM AGAINST PUBLIC ENTITY

J. Relief From Late Filing.

4. Mistake or Excusable Neglect.

b. Illustrations of Relief Granted.

5. Failure To File Second Claim.

3 *Witkin Cal. Proc. Actions* § 295

[§ 295] Failure To File Second Claim.

In *Moore v. California* (1984) 157 C.A.3d 715, 203 C.R. 847, the court confronted "unusual if not unprecedented" circumstances. Plaintiff, a patient in a state hospital, was assaulted by another patient and sustained a fractured jaw. She filed a timely claim alleging negligence of hospital employees in failing to restrain the assailant. On September 15, 1981, while the claim was under consideration by the State Board of Control (now California Victim Compensation and Government Claims Board), her counsel discovered evidence showing that her major injuries were caused by improper treatment of the fracture. On the same day the Board of Control denied the claim, but did not mail notice of denial until December 3, 1981. Plaintiff then filed an action against the state for "medical negligence"; the state demurred on the ground that the claim did not support the cause of action pleaded, and the demurrer was sustained. On September 10, 1982, 3 days after the ruling, plaintiff filed an application with the board for leave to present a late claim under *Govt.C. 911.4* (see *infra*, §299 et seq.); the board failed to act within 45 days and the petition was deemed denied. Plaintiff then filed a petition for relief with the court under C.C.P. 946.6 (see *infra*, §§303, 304). The trial judge denied the petition. *Held*, reversed.

(a) Plaintiff was personally free from blame. Although she was a 63-year-old recent mental patient, she promptly retained counsel to pursue her claim; and to deny her relief would leave her with the speculative remedy of a malpractice action against her counsel. (157 C.A.3d 722.)

(b) Her counsel's conduct was different from that of counsel in other cases who entirely failed to invoke the claims procedure. Counsel did file a timely claim in good form, but failed to anticipate the trial judge's holding that the claim was not drafted with sufficient specificity to support a different cause of action. This was a mistake of law, and the test for relief under C.C.P. 473 is whether it was honest and reasonable. The decisions dealing with sufficiency of a claim to support a particular cause of action make this a debatable issue; hence, counsel's mistake was reasonable and excusable. (157 C.A.3d 722, 723, 734.)

(c) The application for leave to present a late claim must be made within a reasonable time (see *infra*, §299), and this requirement was met here. The application was made within 1 year after accrual of the cause of action for medical

negligence, and only 3 days after the state's demurrer had been sustained. (157 C.A.3d 725.)

(d) Relief may be denied if the public entity establishes prejudice (see *infra*, §304), but the state offered no evidence to that effect. Instead, the state argued that it had no burden of proving prejudice until the claimant satisfied the court that his failure was excusable. The cases contain such statements as dicta (in each instance it had been found that the plaintiff had not made his own showing); but it does not follow that a public entity that offers no evidence of prejudice at the hearing on the petition is entitled to a second chance to present evidence on reversal of a determination adverse to the plaintiff. The result would be piecemeal litigation of the issues and, in some cases, fragmentary appeals from repeated adverse decisions. (157 C.A.3d 726, 727.) Hence, plaintiff is now entitled to relief, and the reversal is with directions to enter an order granting the petition. (157 C.A.3d 727, 728.)

SUPPLEMENT: [This section is current through the latest supplement]



118 of 192 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

VII. NOTICE OF CLAIM AGAINST PUBLIC ENTITY

J. Relief From Late Filing.

4. Mistake or Excusable Neglect.

c. Illustrations of Relief Denied.

1. Ignorance of Filing Requirement or Time Limitation.

3 *Witkin Cal. Proc. Actions* § 296

[§ 296] Ignorance of Filing Requirement or Time Limitation.

In *Tammen v. San Diego* (1967) 66 C.2d 468, 58 C.R. 249, 426 P.2d 753, decedent was killed when his automobile struck two horses, which had strayed onto a state highway. In discussions with insurance adjusters acting for the owner of the horses, a possible claim against a city was raised, and an investigation would have revealed the same possibility of a claim against defendant county. Plaintiff widow was represented by counsel, but the claim was filed late. *Held*, denial of relief was proper; the attorney's excuse--uncertainty as to the law--was not the kind of excusable mistake of law found sufficient in *Viles v. California* (1967) 66 C.2d 24, 56 C.R. 666, 423 P.2d 818, *supra*, §291. (66 C.2d 478.)

In *Martin v. Madera* (1968) 265 C.A.2d 76, 70 C.R. 908, the denial of relief was upheld on two grounds: (a) plaintiff was a businessman, and his failure to file in time was a result of mere ignorance of law and neglect to seek legal advice; (b) he did not apply within a reasonable time (see *infra*, §299); his action was for injuries suffered from drinking contaminated water, and he did not seek relief until more than 11 months after he became ill. (265 C.A.2d 80.)

Later cases are to the same effect. (See *Shaddox v. Melcher* (1969) 270 C.A.2d 598, 601, 76 C.R. 80 [presence of state emblem on car that struck plaintiff contradicted contention that she was unaware that car was owned by state]; *Bennett v. Los Angeles* (1970) 12 C.A.3d 116, 120, 90 C.R. 479, *infra*, §298; *Black v. Los Angeles* (1970) 12 C.A.3d 670, 675, 91 C.R. 104 [attorney's reliance on erroneous newspaper account of accident location was insufficient, where police report indicating correct location was available]; *Roberts v. California* (1974) 39 C.A.3d 844, 848, 114 C.R. 518; *Tsingaris v. California* (1979) 91 C.A.3d 312, 314, 154 C.R. 135; *El Dorado Irr. Dist. v. Superior Court* (1979) 98 C.A.3d 57, 62, 159 C.R. 267; *Fresno v. Superior Court* (1980) 104 C.A.3d 25, 31, 163 C.R. 807; *DeYoung v. Del Mar Thoroughbred Club* (1984) 159 C.A.3d 858, 864, 206 C.R. 28 [unreasonable for plaintiff's attorney to rely on racetrack's claim that it, and not state, was responsible party]; *Harrison v. Del Norte* (1985) 168 C.A.3d 1, 6, 213 C.R. 658 [lack of knowledge of cause of action against public entity and failure to consult attorney until time to file claim had expired]; *Garcia v. Los Angeles Unified School Dist.* (1985) 173 C.A.3d 701, 708, 219 C.R. 544 [even assuming that plaintiff's ignorance of filing requirement was excusable, failure to consult attorney within claim period, despite knowledge of claim, was not]; *Lutz v. Tri-City Hosp.* (1986) 179 C.A.3d 807, 810, 224 C.R. 787 [plaintiff failed to carry burden of proving unawareness that defendant was public hospital]; *Rojas v. Riverside General Hosp.* (1988) 203 C.A.3d 1151,

1163, 250 C.R. 435 [plaintiff failed to carry burden of proving unawareness that defendant was public entity]; *Greene v. California* (1990) 222 C.A.3d 117, 120, 272 C.R. 52 [police report clearly reflected that accident occurred on State Route 1, state ownership and control of highway was established by statute, and late-claim application was presented nearly 5 months thereafter].)

SUPPLEMENT: [This section is current through the latest supplement]



119 of 192 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

VII. NOTICE OF CLAIM AGAINST PUBLIC ENTITY

J. Relief From Late Filing.

4. Mistake or Excusable Neglect.

c. Illustrations of Relief Denied.

2. Unreasonable Mistake About Proper Defendant.

3 *Witkin Cal. Proc. Actions* § 297

[§ 297] Unreasonable Mistake About Proper Defendant.

Spencer v. Merced County Office of Education (1997) 59 C.A.4th 1429, 69 C.R.2d 750, involved a personal injury action against defendant county *office of education* and one of its employees. Plaintiff's first attorney had completed (but not filed) a claim form listing the employee's employer as the *county*, and plaintiff's second attorney, on the basis of that claim form, filed a tort claim against the county, which it denied. The second attorney then filed suit against the employee and the county. Defendant accepted service and answered the complaint, but simultaneously filed a motion for summary judgment on the ground that the wrong public entity had been served. Plaintiff moved for leave to file a late claim, but his motion was denied on the ground that his second attorney's mistake in filing a claim with the wrong entity was not excusable. *Held*, affirmed.

Plaintiff's first attorney had received both a letter from a county representative and a police report indicating that defendant, rather than the county, was the employee's employer. The second attorney had both documents in the file he received from the first attorney, and there was no indication in that file that the first attorney had conducted an adequate investigation to determine the proper entity. Under these circumstances, a reasonable person would have conducted a further inquiry. Yet, there was no indication that the second attorney had consulted the roster of public agencies or otherwise investigated the matter. (59 C.A.4th 1438, 1439, distinguishing *Bettencourt v. Los Rios Community College Dist.* (1986) 42 C.3d 270, 228 C.R. 190, 721 P.2d 71, *supra*, §293.) (See *Department of Water & Power v. Superior Court* (2000) 82 C.A.4th 1288, 1292, 99 C.R.2d 173 [injured motorist sued other driver but failed to timely discover that water department work may have also caused accident; no excuse where information was readily available but motorist did not investigate].)

SUPPLEMENT: [This section is current through the latest supplement]



120 of 192 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

VII. NOTICE OF CLAIM AGAINST PUBLIC ENTITY

J. Relief From Late Filing.

4. Mistake or Excusable Neglect.

c. Illustrations of Relief Denied.

3. Other Excuses.

3 *Witkin Cal. Proc. Actions* § 298

[§ 298] Other Excuses.

A number of cases find the showing insufficient, and uphold the judge's discretion in denying relief, based on presentation of the following excuses:

(1) *Ignorance of Existence of Cause of Action*. (See *Torbitt v. California* (1984) 161 C.A.3d 860, 864, 208 C.R. 1 [failure of attorney to research law]; *Mitchell v. Department of Trans.* (1985) 163 C.A.3d 1016, 1020, 210 C.R. 266; *Rodriguez v. Los Angeles* (1985) 171 C.A.3d 171, 175, 217 C.R. 69 [contention that plaintiff learned of daughter's cause of death after filing period had expired was rebutted by death certificate issued within filing period and showing same cause of death allegedly resulting from county hospital's negligence]; *Hernandez v. Garcetti* (1998) 68 C.A.4th 675, 682, 80 C.R.2d 443 [it was unreasonable for attorney to assume that third-party spoliation of evidence claim accrued later than on discovery of sale of evidence, and hinged on when he later subjectively determined that evidence could not be located]; *People v. Superior Court (Isenhower)* (2003) 105 C.A.4th 39, 44, 129 C.R.2d 60 [plaintiff failed to consult attorney within claims period].)

(2) *Delay Due to Trauma*. (See *Clark v. Compton* (1971) 22 C.A.3d 522, 526, 99 C.R. 613 [plaintiff's incapacity was not sufficiently lengthy or severe]; *Cole v. Los Angeles* (1986) 187 C.A.3d 1369, 1375, 232 C.R. 624 [insufficient evidence that "considerable pain" from fall on sidewalk kept plaintiff from completing forms]; *Drummond v. Fresno* (1987) 193 C.A.3d 1406, 1410, 238 C.R. 613 [late claim was not made within reasonable time and plaintiff was sufficiently healthy to have contacted attorney before claims period expired].)

In *Bennett v. Los Angeles* (1970) 12 C.A.3d 116, 90 C.R. 479, plaintiffs, claiming damages for the death of their son in the fall of a cement wall in the city's airport, were 19 days late in filing their claim, and sought relief on the ground of unawareness of the claim requirement and upset emotional condition. The trial judge denied relief and the order was affirmed. The court pointed out that, although a denial of relief is "scanned more carefully" than a grant, the trial judge's discretion must be upheld where, as here, no abuse was shown. (12 C.A.3d 120.) Plaintiffs' sparse showing did not indicate any basis for relief; they were fully aware of a litigable claim. And their contention that the city's letter of condolence implied that they would be voluntarily reimbursed was found unwarranted by the trial judge. (12 C.A.3d

121.)

(3) *Tactical Decision To Delay*. (See *Sacramento v. Superior Court (Hardy)* (1980) 105 C.A.3d 898, 902, 164 C.R. 724; *Rivera v. Carson* (1981) 117 C.A.3d 718, 724, 173 C.R. 4 [attorney's belief that filing claim might adversely affect criminal proceedings against plaintiff].)

(4) *Claim Filed by Another Party*. (See *Roberts v. California* (1974) 39 C.A.3d 844, 848, 114 C.R. 518 [compliance by decedent's employer and its workers' compensation insurer was insufficient excuse for widow]; *Pacific Tel. & Tel. Co. v. Riverside* (1980) 106 C.A.3d 183, 190, 165 C.R. 29 [same].)

(5) *Delay Attributable to Defendant*. (See *Dockter v. Santa Ana* (1968) 261 C.A.2d 69, 75, 67 C.R. 686 [city insurer's alleged representation that it would "handle claim"]; *Toscano v. Los Angeles* (1979) 92 C.A.3d 775, 784, 155 C.R. 146 [deputy sheriffs' alleged representation that plaintiffs' assault and battery arrest records would be expunged if plaintiffs did not file civil action]; *Munoz v. California* (1995) 33 C.A.4th 1767, 1780, 39 C.R.2d 860 [state hospital's alleged delay in furnishing plaintiff with medical records in medical malpractice action].)

SUPPLEMENT: [This section is current through the latest supplement]



121 of 192 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

VII. NOTICE OF CLAIM AGAINST PUBLIC ENTITY

J. Relief From Late Filing.

5. Application to Agency.

a. In General.

3 *Witkin Cal. Proc. Actions* § 299

[§ 299] In General.

(1) *Application With Attached Claim.* The late claimant may make a written application to the public entity for leave to present the claim, stating the reason for the delay, and attaching the proposed claim. (*Govt.C. 911.4(a), (b)*; see *C.E.B., 1 Government Tort Liability Practice* 4th, §7.31 et seq.)

(2) *Time.* The application must be made "within a reasonable time not to exceed one year after the accrual of the cause of action." (*Govt.C. 911.4(b)*; see *Viles v. California* (1967) 66 C.2d 24, 32, 56 C.R. 666, 423 P.2d 818, supra, §291; *Wall v. Sonora Union High School Dist.* (1966) 240 C.A.2d 870, 873, 50 C.R. 178; *Martin v. Madera* (1968) 265 C.A.2d 76, 80, 70 C.R. 908, supra, §296; *Carr v. California* (1976) 58 C.A.3d 139, 145, 129 C.R. 730 [application nearly 21/2 years after accrual of cause of action was barred]; *Greyhound Lines v. Santa Clara* (1986) 187 C.A.3d 480, 488, 231 C.R. 702 [time is jurisdictional]; *Munoz v. California* (1995) 33 C.A.4th 1767, 1779, 39 C.R.2d 860 [same; citing *Greyhound Lines*]; *C.E.B., 1 Government Tort Liability Practice* 4th, §7.32 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]



122 of 192 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

VII. NOTICE OF CLAIM AGAINST PUBLIC ENTITY

J. Relief From Late Filing.

5. Application to Agency.

b. Claim by Mentally Incapacitated Person.

3 *Witkin Cal. Proc. Actions* § 300

[§ 300] Claim by Mentally Incapacitated Person.

(1) *Tolling for Mentally Incapacitated Claimant Without Guardian or Conservator.* The time during which a claimant is mentally incapacitated and without a guardian or conservator of the person is excluding in computing the time period for filing an application. (*Govt.C. 911.4(c)(1)*; see *Rousseau v. San Carlos* (1987) 192 C.A.3d 498, 501, 236 C.R. 299; C.E.B., 1 Government Tort Liability Practice 4th, §§5.30, 7.25, 7.34.)

(2) *Tolling for Mentally Incapacitated Claimant With Only Public Guardian.* *Kagy v. Napa State Hosp.* (1994) 28 C.A.4th 1, 33 C.R.2d 741, draws a distinction for purposes of former Govt.C. 911.4(b) (now Govt.C. 911.4(c)(1)) for a late claim filed by a mentally incapacitated claimant, whether a minor or adult, who is represented by a public guardian serving as conservator of the person during incapacity, rather than as a conservator of the estate. Plaintiff petitioned for leave to file a late claim under Govt.C. 911.4 against defendant state hospital and various staff members for serious injuries sustained more than 1 year earlier when plaintiff, a suicide risk, ingested a sharp pencil given to her by defendant staff member. Plaintiff argued that under former Govt.C. 911.4(b), the limitations period was tolled for a 2- to 3-month period when she was mentally incapacitated and her interests were represented only by a public guardian. Discounting this period of time, plaintiff's claim would have been timely. The trial judge denied her petition. *Held*, reversed; the statute was tolled for this time period.

(a) Although the statute does not except public guardians or conservators of the person, the rationale behind its tolling provisions compels the conclusion that the statute's time period should be tolled for any time during which the claimant's only representative is the public guardian or other conservator of the person (at least when that guardian or conservator lacks the authority to prosecute the claim). To give effect to the legislative intent, the 1-year period for filing an application to file a late claim will be tolled for any period during which the claimant is mentally incapacitated and has no conservator or guardian other than one lacking the authority to prosecute the claim. A showing by the claimant that his only representative is the public guardian as conservator of the person is prima facie evidence that no one has the authority to prosecute the claim. (28 C.A.4th 6, 7.)

(b) Here, for a significant period of time when plaintiff was mentally incapacitated, her interests were represented only by the public guardian, who had no power to file a claim on her behalf and no apparent interest in doing so, and

may not even have had notice of the injuries. (28 C.A.4th 7.)

(3) *Tolling for Mentally Incapacitated Claimant With Conservator Who Is Unaware of Claim.* In *Favorite v. Los Angeles* (1998) 68 C.A.4th 835, 80 C.R.2d 656, plaintiff, a mentally ill woman, sued defendant county alleging that while she resided at a treatment center operated by defendant, an orderly sexually harassed and assaulted her. Defendant denied the claim as untimely, and the trial judge denied plaintiff's petition to file a late claim, in which she asserted that she was unable to appreciate and communicate the sexual misbehavior because she had been taking psychotropic medications. The judge found that plaintiff was represented by a conservator of her estate (her mother) during the entire time period at issue, and thus could not benefit from the tolling provision in former Govt.C. 911.4(b) (now Govt.C. 911.4(c)(1)). *Held*, reversed and remanded.

(a) Under former Govt.C. 911.4(b), the time within which to file a late claim was tolled even if a mentally incapacitated claimant has a conservator of the estate, where the conservator does not and could not have known of the claim. If a conservatee is mentally incapacitated and under a heavy regimen of medication, it is unreasonable to assume that his or her conservator knew or should have known that the conservatee, while drugged, had suffered a sexual assault at a hospital. Under these circumstances, the conservatee is effectively in the same position as if he or she had no conservator. (68 C.A.4th 839, 840, drawing analogy to *Kagy*.)

(b) Even in the absence of a declaration from plaintiff's conservator, there was no evidence in the present case that the conservator knew of the alleged assault. Nor should she be deemed to have known of it. (68 C.A.4th 841.)

SUPPLEMENT: [This section is current through the latest supplement]



123 of 192 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

VII. NOTICE OF CLAIM AGAINST PUBLIC ENTITY

J. Relief From Late Filing.

5. Application to Agency.

c. Claim by Minor.

3 *Witkin Cal. Proc. Actions* § 301

[§ 301] Claim by Minor.

(1) *General Rule: No Tolling During Minority.* In computing the 1-year absolute limit for claim applications (see *supra*, §299), the time during which the claimant is a minor is counted. (*Govt.C. 911.4(c)(1)*; see *Rousseau v. San Carlos* (1987) 192 C.A.3d 498, 501, 236 C.R. 299 [if claim is filed within 1-year limit, negligence of parents may not be imputed to minor for purposes of determining whether minor acted diligently in filing late claim].)

(2) *Exceptions.* There are two exceptions to the general rule precluding tolling during minority:

(a) The time during which a claimant is detained or adjudged to be a dependent child under the Juvenile Court Law (Welf.C. 200 et seq.; see 10 *Summary* (10th), *Parent and Child*, §440 et seq.) is excluded in computing the time limit, if all of the following conditions exist: (1) The claimant is in the custody and control of the public entity to which a claim is to be presented; (2) that entity is required by statute or other law to report any injury, neglect, or abuse to the juvenile court or to the claimant's attorney; and (3) the entity has failed to timely make that report. (*Govt.C. 911.4(c)(2)*.)

(b) The time during which a claimant is adjudged to be a dependent child under the Juvenile Court Law is excluded in computing the time period, if the minor is without a guardian ad litem or conservator for purposes of filing civil actions. (*Govt.C. 911.4(c)(3)*.) (See C.E.B., 1 Government Tort Liability Practice 4th, §§5.30, 7.27, 7.34, 7.35.)

(3) *No Tolling for Mentally Incapacitated Minor Where Parents Fail To File Claim.* Earlier decisions held that the tolling provision in *Govt.C. 911.4(c)(1)* applies to a mentally incapacitated minor whose parents fail to file a timely claim; had the Legislature intended a contrary result, it would have used the term "natural guardian," rather than "guardian." (*California v. Superior Court (Waring)* (1978) 86 C.A.3d 475, 481, 482, 150 C.R. 308; *David L. v. Riverside* (1983) 140 C.A.3d 282, 285, 189 C.R. 333.)

However, those decisions were expressly disapproved by *Hernandez v. Los Angeles* (1986) 42 C.3d 1020, 232 C.R. 519, 728 P.2d 1154. A late-claim application under *Govt.C. 911.4* was filed on behalf of plaintiff, a mentally incapacitated minor, approximately 41/2 months after accrual of his personal injury action against defendant county. (At that time, *Govt.C. 911.2* and *911.4* required claims to be filed within 100 days after accrual of the cause of action.) The

application was denied by the county and, after a petition was filed under *Govt.C. 946.6* (infra, §303 et seq.), by the trial judge. Plaintiff argued that, as a mentally incapacitated minor without a guardian or conservator, he was within the tolling provision of *Govt.C. 911.4*. Because by this reasoning the 1-year late-claim period never began to run, plaintiff contended that the application was filed within "a reasonable time" as a matter of law. *Held*, the tolling provision is inapplicable to mentally incapacitated minors.

(a) By explicitly providing in *Govt.C. 911.4* that the "time during which the person who sustained the alleged injury ... is a minor shall be counted" in computing the late-claim filing period, the Legislature evidently concluded that it was reasonable to assume that a parent would file a late-claim application on behalf of his child within 1 year of the accrual of the cause of action. (42 C.3d 1025.) However, the Legislature also concluded that a similar assumption could not be made for mentally incapacitated adults who lack a guardian or conservator. (42 C.3d 1025.)

(b) "Given this legislative scheme we conclude that an injured minor who has parents capable of acting on his behalf may not invoke the tolling provisions ... even if the minor is mentally incapacitated. A contrary conclusion would mean that in a substantial number of cases in which a child is injured, the time for filing a late-claim application would be extended considerably beyond the one-year period, even though the child's mental incapacity has no realistic effect on the claim-filing process." (42 C.3d 1025.)

(c) The reasoning in *David L. and Waring*, i.e., that the term "guardian" in the tolling provision refers only to a court-appointed guardian, logically suggests that the time for filing a late claim on a minor's behalf should be tolled in all cases until his parent is formally appointed guardian ad litem. However, *Govt.C. 911.4* is clear that the time for filing a late claim is not tolled simply because the plaintiff is a minor. As such, it reflects the Legislature's conclusion that a parent can file an application on a minor's behalf without the necessity of a formal court appointment. (42 C.3d 1026.)

(4) *Tolling for Mentally Incapacitated Minor Without Parent or Guardian Even If Represented by Counsel*. The tolling provision in former *Govt.C. 911.4(c)* (now *Govt.C. 911.4(c)(1)*) applies to a claim filed by a minor who has no parent or guardian legally authorized to act on his or her behalf, even where the minor is represented by court-appointed, independent counsel. The rationale is that an independent counsel is not equivalent to a parent, guardian, or conservator of the estate. The latter three are charged with representing the minor's interest, even as against the interests of others who may be acting against, or failing to act in, the minor's best interests. Conversely, an independent counsel does not necessarily represent the minor's best interests; for example, an independent counsel is likely to report to the juvenile court misconduct committed by the minor. (*Los Angeles v. Superior Court (Crystal B.)* (2001) 91 C.A.4th 1303, 1315, 1316, 111 C.R.2d 471.)

SUPPLEMENT: [This section is current through the latest supplement]



124 of 192 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

VII. NOTICE OF CLAIM AGAINST PUBLIC ENTITY

J. Relief From Late Filing.

5. Application to Agency.

d. Action by Agency.

3 *Witkin Cal. Proc. Actions* § 302

[§ 302] Action by Agency.

(1) *Time for Grant or Denial.* The agency must grant or deny the application within 45 days after its presentation, unless the period is extended by written agreement. (*Govt.C. 911.6(a).*) If the agency does not act, the application is deemed denied on the 45th day, or the last day of any period of extension by agreement. (*Govt.C. 911.6(c).*)

(2) *Notice to Claimant.* The agency must give personal or mailed notice of its action, unless there is no address on the application or the claim. (*Govt.C. 911.8, 915.4.*) The notice must contain a warning similar to that given when a claim is rejected (see *supra*, §265), i.e., a petition must be filed within 6 months of the denial of the application for relief. (*Govt.C. 911.8; see 6 Pacific L. J. 232.*)

(3) *Effect of Granting Relief.* If relief is granted, the claim is deemed to have been presented on the day of granting. (*Govt.C. 912.2.*)

SUPPLEMENT: [This section is current through the latest supplement]



125 of 192 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

VII. NOTICE OF CLAIM AGAINST PUBLIC ENTITY

J. Relief From Late Filing.

6. Petition to Superior Court.

a. In General.

3 *Witkin Cal. Proc. Actions* § 303

[§ 303] In General.

(1) *Statutory Requirement.* If an application is made to the agency and denied or deemed denied pursuant to *Govt.C. 911.6* (supra, §302), relief may be obtained from a proper court on the same grounds. (*Govt.C. 946.6(c).*) *Govt.C. 946.6(a)* provides for "an order relieving the petitioner from Section 945.4." Thus, if relief is granted, the plaintiff need not file a claim. (See *Savage v. California* (1970) 4 C.A.3d 793, 797, 84 C.R. 650, infra, §306; *Williams v. Mariposa County Unified School Dist.* (1978) 82 C.A.3d 843, 848, 147 C.R. 452 [mother's petition was properly denied because she failed to apply for leave to file late claim]; C.E.B., 1 Government Tort Liability Practice 4th, §7.40 et seq.)

(2) *Estoppel To Assert Noncompliance.* The public entity may be estopped to set up noncompliance with the mandatory provisions of *Govt.C. 946.6(c)*. This decision was made on unusual facts in *McLaughlin v. Superior Court* (1972) 29 C.A.3d 35, 105 C.R. 384. Plaintiff failed to present his claim against the state within the 100-day period (now 6 months); he applied to the State Board of Control (now California Victim Compensation and Government Claims Board) for leave to file a late claim and the board denied the request; then, without seeking a court order for relief, plaintiff filed an action within the 6-month period for actions after rejected claims (see supra, §263 et seq.; infra, §689). The state's motion for summary judgment was denied because of the board's misleading letter to plaintiff in response to his application for leave to file a late claim: The letter itself plainly stated the rejection of the application; but at the bottom it contained the statutory warning (*Govt.C. 913*; supra, §§264, 265) that the claimant had 6 months to file an action on the rejected claim. Thus, "the written notice he received from the board misled him into believing that the board had rejected his *claim* rather than his *application for leave to present a claim.*" (29 C.A.3d 40.) (See *Dujardin v. Ventura County General Hosp.* (1977) 69 C.A.3d 350, 360, 138 C.R. 20 [following *McLaughlin*].)

SUPPLEMENT: [This section is current through the latest supplement]



126 of 192 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

VII. NOTICE OF CLAIM AGAINST PUBLIC ENTITY

J. Relief From Late Filing.

6. Petition to Superior Court.

b. Filing and Service of Petition.

3 *Witkin Cal. Proc. Actions* § 304

[§ 304] Filing and Service of Petition.

(1) *Proper Court.* The petition should be filed "in a superior court that would be a proper court for trial" of an action on the claim. If the petition is filed in the wrong court, the proceeding must be transferred to a proper court on the motion of any party. If an action on the claim would be a limited civil case (see 2 *Cal. Proc.* (5th), *Courts*, §241 et seq.), the proceeding pursuant to *Govt.C.* 946.6 is a limited civil case. (*Govt.C.* 946.6(a).)

(2) *Time for Filing.* The petition must be filed within 6 months after the denial or the deemed denial of the application to the agency. (*Govt.C.* 946.6(b); see *Rason v. Santa Barbara City Housing Authority* (1988) 201 C.A.3d 817, 823, 247 C.R. 492, *infra*, §305 [petition filed within 6 months after date notice of denial was received (33 days after date of denial), but more than 6 months after date of denial itself, was untimely].) The time requirement is mandatory. (*Lineaweaver v. Southern Calif. Rapid Transit Dist.* (1983) 139 C.A.3d 738, 740, 189 C.R. 29; *Los Angeles v. Superior Court (Katz)* (1993) 14 C.A.4th 621, 626, 17 C.R.2d 703 [where *Govt.C.* 946.6 petition was filed 5 days after expiration of 6-month period, no action on claim could be maintained].) However, the period is not jurisdictional, and is tolled by operation of *C.C.P.* 352 during a plaintiff's minority. (*Los Angeles City School Dist. v. Superior Court* (1970) 9 C.A.3d 459, 463, 88 C.R. 286.) The period is also extended by operation of the 90-day period of *C.C.P.* 364(d) (notice of intent to file medical malpractice action; see *infra*, §723 et seq.). (*Wurts v. Fresno* (1996) 44 C.A.4th 380, 383, 51 C.R.2d 689, 6 *Summary* (10th), *Torts*, §955.)

(3) *Content of Petition.* The petition must show that the application was denied or deemed denied, the reason for failure to present the claim within the required time, and the information required for any claim by *Govt.C.* 910 (*supra*, §§253, 254). (*Govt.C.* 946.6(b); see *C.E.B.*, 1 Government Tort Liability Practice 4th, §7.44.)

(4) *Service of Copies.* A copy of the petition and written notice of the time and place of hearing must be served as follows (*Govt.C.* 946.6(d)):

(a) Service must be made before the hearing as prescribed by *C.C.P.* 1005 (see 6 *Cal. Proc.* (5th), *Proceedings Without Trial*, §15).

(b) Service is on the clerk or secretary of the board, if the respondent is a local public entity, or on the Attorney General, if the respondent is the state. If the petition involves a claim arising out of alleged actions or inactions of the Department of Transportation, service must be made on the Attorney General or the Director of Transportation.

(c) Service on the Attorney General may be accomplished at any of the Attorney General's offices in Los Angeles, Sacramento, San Diego, or San Francisco. Service on the Director of Transportation may be accomplished only at the department's headquarters office in Sacramento.

(d) Service on a judicial branch entity is on (1) the court executive officer, if the claim is against a superior court or one of its judges or employees; (2) the clerk or administrator of the Court of Appeal, if the claim is against that court or a judge of that court; (3) the Clerk of the Supreme Court, if the claim is against that court or a judge of that court; or (4) the secretariat of the Judicial Council, if the claim is against the Judicial Council or the Administrative Office of the Courts.

(5) *Effect of Delay.* Where the length of time between (a) the day the public entity denies the petitioner's request to file a late claim (see *supra*, §302) and (b) the day the petitioner serves the petition and notice is unreasonably long, prejudice to the public entity is presumed from the delay, and denying the petition is not an abuse of discretion. (*Han v. Pomona* (1995) 37 C.A.4th 552, 558, 43 C.R.2d 616 [petition was properly denied where it was served more than 2 years after it was filed and 4 years after action had accrued].)

SUPPLEMENT: [This section is current through the latest supplement]



127 of 192 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

VII. NOTICE OF CLAIM AGAINST PUBLIC ENTITY

J. Relief From Late Filing.

6. Petition to Superior Court.

c. Hearing and Determination.

3 *Witkin Cal. Proc. Actions* § 305

[§ 305] Hearing and Determination.

(1) *Nature of Hearing.* "The court shall make an independent determination upon the petition. The determination shall be made upon the basis of the petition, any affidavits in support of or in opposition to the petition, and any additional evidence received at the hearing on the petition." (*Govt.C. 946.6(e)*; see *Bettencourt v. Los Rios Community College Dist.* (1986) 42 C.3d 270, 228 C.R. 190, 721 P.2d 71, *supra*, §293 [showing was sufficient]; *Hasty v. Los Angeles* (1976) 61 C.A.3d 623, 626, 131 C.R. 347 [showing was insufficient]; *Williams v. Mariposa County Unified School Dist.* (1978) 82 C.A.3d 843, 851, 147 C.R. 452 [sufficient]; *Shank v. Los Angeles* (1983) 139 C.A.3d 152, 156, 188 C.R. 644 [insufficient]; *Baber v. Napa State Hosp.* (1984) 154 C.A.3d 514, 518, 201 C.R. 432 [sufficient].)

There is no right to a jury trial of factual issues. (*Sacramento v. Superior Court (James)* (1974) 42 C.A.3d 135, 139, 116 C.R. 602.)

(2) *Relief Granted.* The order granting relief is interlocutory and nonappealable; it is reviewable by the entity only on its appeal from a final judgment in favor of the plaintiff in the action. (*Church v. Humboldt* (1967) 248 C.A.2d 855, 857, 57 C.R. 79; see *Alameda v. Superior Court* (1987) 196 C.A.3d 619, 623, 242 C.R. 215 [recognizing possibility of review by mandamus on proper showing of inadequacy of remedy by appeal].)

(3) *Relief Denied.* The effect of the order is to finally foreclose the plaintiff's right to recover on the claim; hence, it is appealable as a final judgment. (See *Dockter v. Santa Ana* (1968) 261 C.A.2d 69, 74, 67 C.R. 686, citing the text.) If, however, no appeal or other attack is made on the order, it is a conclusive determination of the issues, and operates as a collateral estoppel against alleging compliance with the claim requirements in an action against the public entity. (*Gurrola v. Los Angeles* (1984) 153 C.A.3d 145, 151, 152, 153, 200 C.R. 157; *Los Angeles v. Superior Court (Isela B.)* (1985) 169 C.A.3d 1095, 1100, 215 C.R. 699 [following *Gurrola*; failure to appeal denial prevents relitigation, in subsequent action, of issue (date of accrual of malpractice action) on which denial was based].)

In *Rason v. Santa Barbara City Housing Authority* (1988) 201 C.A.3d 817, 247 C.R. 492, plaintiffs' claim against defendant Housing Authority for unlawful eviction was returned as untimely. As required by *Govt.C. 911.3*, plaintiffs were given notice that their "only recourse" was to initiate the late-claim procedure under *Govt.C. 911.4* (see *supra*,

§299 et seq.) and *Govt.C. 946.6* (see *supra*, §304). In their petition under *Govt.C. 946.6*, plaintiffs contended that their claim was timely filed and, in the alternative, that any late filing was due to mistake or excusable neglect (see *supra*, §290 et seq.). The trial judge dismissed the petition on the ground that it was not filed within the requisite 6-month period (see *supra*, §304). Plaintiffs appealed from the dismissal, but also filed a complaint for damages, in which they again argued that their original claim had been timely filed. *Held*, plaintiffs were not estopped from raising this issue.

(a) A trial judge hearing a *Govt.C. 946.6* petition cannot consider whether a claim was untimely filed, because that issue is not within the scope of the proceeding. (*201 C.A.3d 827*.)

(b) In *Gurrola*, the trial judge, although lacking authority to do so, nevertheless determined that the claim was untimely filed, and this ruling was not appealed. Hence, the ruling, though improper, was presumptively valid, and the claimant was estopped from challenging it in a later proceeding. (*201 C.A.3d 827*, footnote 4.) In the present case the timeliness issue, though raised, was not decided; hence, plaintiffs were not only not estopped from raising the issue in their complaint for damages—they had no other way of doing so. (*201 C.A.3d 828*.)

(c) The Government Claims Act nowhere instructs a claimant on how to dispute a determination that his claim was untimely, but the "only recourse" language in *Govt.C. 911.3* could mistakenly lead him to conclude that the issues of timeliness and excusable mistake or neglect must both be raised by the late-claim procedure. (*201 C.A.3d 828*.) Because this approach is not available, the cautious claimant who wishes to preserve both issues must file a complaint in court, as well as a late-claim application. By so doing, he or she will not be forced to make an "agonizing choice between two exclusive remedies." (*201 C.A.3d 828*.)

Seeking relief under *Govt.C. 946.6* is not an election of remedies that, if unsuccessful, subjects the petitioner to a collateral estoppel as to factual findings made in the proceeding. A trial judge's grant of relief under *Govt.C. 946.6* "is not a determination of compliance but one of excusing compliance. Similarly, a trial court's denial of relief is not a determination of lack of compliance but only that compliance will *not* be excused." (*Ngo v. Los Angeles* (1989) 207 C.A.3d 946, 951, 255 C.R. 140 [citing *Rason*]; but see *Santee v. Santa Clara County Office of Education* (1990) 220 C.A.3d 702, 711, 269 C.R. 605, *supra*, §277 ["the issue of timely filing of a claim may be determined in a claim-relief proceeding"; disagreeing with *Rason* and *Ngo* on this point].)

SUPPLEMENT: [This section is current through the latest supplement]



128 of 192 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

VII. NOTICE OF CLAIM AGAINST PUBLIC ENTITY

J. Relief From Late Filing.

6. Petition to Superior Court.

d. Suit After Relief Is Granted.

1. Time and Statute of Limitations.

3 *Witkin Cal. Proc. Actions* § 306

[§ 306] Time and Statute of Limitations.

(1) *Time Limit: 30 Days.* If relief is granted, an action must be filed in the granting court within 30 days after the order. (*Govt.C. 946.6(f)*; see *Wilson v. People* (1969) 271 C.A.2d 665, 668, 76 C.R. 906; *Ard v. Contra Costa* (2001) 93 C.A.4th 339, 343, 112 C.R.2d 886.) The statute bars an action not filed within 30 days despite the minority of the claimant or the alleged negligence of the claimant's attorney in failing to file within the required time. (*Todd v. Los Angeles* (1977) 74 C.A.3d 661, 664, 666, 141 C.R. 622.) And a complaint filed after the 30-day period is demurrable; i.e., the time provision is a statute of limitations, and the court has no power to grant relief from late filing. (*Tuolumne Air Service v. Turlock Irr. Dist.* (1978) 87 C.A.3d 248, 252, 150 C.R. 809.)

The period begins to run when the order is made; the commencement is not extended until actual notification. (*Fritts v. Kern* (1982) 135 C.A.3d 303, 306, 185 C.R. 212.) Unless there is a directive in the court's minute order or a local rule requiring that a formal order be prepared, the 30-day period starts to run from the date the court enters a minute order granting relief. (*Nevada v. Superior Court* (1986) 183 C.A.3d 806, 808, 809, 228 C.R. 447, citing the text [under local rule requiring prevailing party to prepare written order unless otherwise directed, court was deemed to have directed preparation of formal order despite lack of express instruction in minute order; hence, 30-day period ran from date written order was filed, not from date of entry of minute order]; *Mandjik v. Eden Township Hosp. Dist.* (1992) 4 C.A.4th 1488, 1497, 6 C.R.2d 582 [citing *Nevada*]; see 7 *Cal. Proc. (5th), Judgment*, §56.)

(2) *Statute of Limitations Overcome.* *Govt.C. 946.6(f)* may overcome the apparent running of the statute of limitations. In *Savage v. California* (1970) 4 C.A.3d 793, 84 C.R. 650, plaintiffs were injured in a collision involving a state car. The accident occurred on November 6, 1966. On November 1, 1967, they applied for leave to present a late claim, and on November 2, 1967, they filed their complaint in the action. They could not allege the condition precedent of presentation of the claim and its rejection, so their complaint was technically defective; they did, however, allege the pending application for relief. The board denied the application, but the superior court granted their petition on January 8, 1968, and they set up this fact by supplemental complaint. Defendant state contended that the original complaint stated no cause of action, and that the statute of limitations (1 year) had run at the time the supplemental complaint was filed. *Held*, judgment for state on demurrer reversed. When relief is granted under *Govt.C. 946.6*, no claim need be

presented; and it is immaterial whether the relief is granted before the action (the usual situation) or, as here, after its commencement. Thus, the supplemental complaint cured the defect in the original complaint, which was on file within the limitations period. (4 C.A.3d 797.)

The approach of *Savage* was followed in *Bahten v. Merced* (1976) 59 C.A.3d 101, 130 C.R. 539. Plaintiffs' original complaint failed to allege compliance with the claims requirement, but they obtained an order granting relief, and then filed an amended complaint 45 days after the order. Defendant demurred and moved to strike, arguing that the original complaint failed to state a cause of action; it was superseded by the amended complaint; and the amended complaint was fatally defective because it was filed more than 30 days after the order. *Held*, the complaint was good. The original complaint, although prematurely filed, was sufficient to satisfy Govt.C. 946.6(f), for defendant made no attempt to abate the prematurely filed action, and at the time of the demurrer and motion to strike, the defect had been cured and the objection waived. (59 C.A.3d 112; see 5 Cal. Proc. (5th), *Pleading*, §1152.)

Govt.C. 946.6(f) prevails over the statute of limitations for personal injury actions. In *Brown v. Huntington Beach Union High School Dist.* (1971) 15 C.A.3d 640, 93 C.R. 417, plaintiff claimed damages for personal injuries suffered April 28, 1968. The claim was late, an application for relief was made, and it was granted by the court on April 16, 1969. The complaint was filed May 7, 1969, within the 30-day period of Govt.C. 946.6(f), but after the 1-year statute of limitations (now 2 years; see C.C.P. 335.1, *infra*, §552) for personal injury actions had run. *Held*, the language of Govt.C. 946.6(f) indicated a legislative intent to permit an action to be filed within 30 days after the order granting relief. (15 C.A.3d 645.)

SUPPLEMENT: [This section is current through the latest supplement]



129 of 192 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

VII. NOTICE OF CLAIM AGAINST PUBLIC ENTITY

J. Relief From Late Filing.

6. Petition to Superior Court.

d. Suit After Relief Is Granted.

2. Where Original Complaint Is on File.

3 Witkin Cal. Proc. Actions § 307

[§ 307] Where Original Complaint Is on File.

In *Davalos v. Los Angeles* (1983) 142 C.A.3d 57, 190 C.R. 711, plaintiff's husband died February 6, 1975, while a patient at a Los Angeles County hospital. Plaintiff filed a complaint for wrongful death based on medical malpractice on February 2, 1976, in order to avoid the bar of the 1-year statute of limitations. But she had not yet complied with the claims requirement of Govt.C. 945.4, and the complaint was premature. Accordingly, she sought leave to present a late claim under Govt.C. 946.6. Her petition was granted by an order entered on September 24, 1976, giving her 30 days to file a new action. She chose, however, to proceed in the original action without a new complaint. *Held*, compliance with the claims statute was excused. If there had been no complaint on file at the time relief was granted, a complaint within 30 days was required. But where the original complaint on file at the time the order granting relief was made gave adequate notice to the defendant, refiling to comply with Govt.C. 946.6(f) would have been a useless formality, and was not necessary. (142 C.A.3d 61.)

In *Bell v. Tri-City Hosp. Dist.* (1987) 196 C.A.3d 438, 241 C.R. 796, a technically defective complaint was held sufficient to bring this rule into operation. Plaintiff husband suffered injuries from unsuccessful surgeries performed in May 1983, and thereafter. In August 1984, plaintiffs filed a complaint for medical malpractice and products liability against fictitiously named defendants. On September 7, 1984, plaintiffs served defendant district with their claim, and on September 27, 1984, applied for leave to file a late claim, which was denied. On December 5, 1984, plaintiffs filed an amended complaint naming certain physicians and the manufacturer of allegedly defective products in addition to 600 Doe defendants. Defendant district was not named in the caption or preliminary allegations, but was named in the eighth cause of action alleging that it negligently granted staff privileges to the negligent physicians. The prayer sought an award of damages against "defendants" without further specification. On June 3, 1985, plaintiffs obtained a court order granting relief from late filing of the claim. On August 8, 1985, they filed an amendment to the complaint substituting defendant district for Doe 402, and the trial judge sustained defendant's demurrer. *Held*, reversed.

(a) Plaintiffs' counsel argued that the Doe amendments related back to the date of the original complaint, and that the 30-day requirement of Govt.C. 946.6(f) does not limit the time within which amendments may be filed. But this is not a situation in which a complaint is filed against a Doe defendant and is later amended to substitute the defendant's

true name. The complaint stated a cause of action against a named defendant, but omitted that name from the caption. (196 C.A.3d 443.)

(b) Although some cases have suggested that compliance with the claim requirements is an element of the cause of action against a public entity, other decisions have reached a different conclusion. (196 C.A.3d 443, citing *Savage v. California* (1970) 4 C.A.3d 793, 84 C.R. 650, and *Bahten v. Merced* (1976) 59 C.A.3d 101, 130 C.R. 539, supra, §306.) These cases rely on *Radar v. Rogers* (1957) 49 C.2d 243, 317 P.2d 17, 5 Cal. Proc. (5th), *Pleading*, §1153, and support the view that a complaint naming a public entity can be filed before compliance with the claim procedures is achieved or excused. (196 C.A.3d 444.) Thus, plaintiffs' amended complaint naming defendant district in the eighth cause of action constituted a premature complaint under *Bahten* that could obviate the need for plaintiffs to take any action within the 30-day period. (196 C.A.3d 445.) (But for a later case distinguishing *Radar*, *Bell*, *Bahten*, and *Savage*, and disapproving *Bell* and *Bahten*, see *California v. Superior Court (Bodde)* (2004) 32 C.4th 1234, 1244, 13 C.R.3d 534, 90 P.3d 116, supra, §234.)

(c) The failure to identify defendant district in the caption did not render the complaint insufficient for this purpose. Under California and federal practice, omission of a named defendant from the caption is only a formal defect curable by amendment. (196 C.A.3d 445, 446.)

(d) Defendant district finally contends that the rule does not apply because plaintiffs' counsel, at oral argument, expressly conceded that he did not intend to name defendant district as a defendant. However, a reviewing court is not bound to accept concessions of parties as establishing the law applicable to a case (196 C.A.3d 449, citing *Desny v. Wilder* (1956) 46 C.2d 715, 299 P.2d 257, 9 Cal. Proc. (5th), *Appeal*, §704) and the test is an objective one: whether a reasonable defendant would have understood the complaint to allege that it was in some way responsible for plaintiff's injury. The answer is clearly in the affirmative. (196 C.A.3d 449.)

SUPPLEMENT: [This section is current through the latest supplement]



130 of 192 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

VII. NOTICE OF CLAIM AGAINST PUBLIC ENTITY

J. Relief From Late Filing.

6. Petition to Superior Court.

d. Suit After Relief Is Granted.

3. Effect of New Facts Not in Original Claim.

3 Witkin Cal. Proc. Actions § 308

[§ 308] Effect of New Facts Not in Original Claim.

In *Williams v. Braslow* (1986) 179 C.A.3d 762, 224 C.R. 895, plaintiff's proposed claim for medical malpractice, submitted with her application under *Govt.C. 911.4* (supra, §299 et seq.), named defendant physician as the public employee who caused her injury. After denial of her application, she petitioned the superior court under *Govt.C. 946.6* (supra, §304) and also filed a complaint naming defendant physician and two other physicians. The petition under *Govt.C. 946.6* was granted. Defendant county then moved for summary judgment in the action on the ground that defendant physician had never been a county employee, and the motion was granted. *Held*, reversed.

(a) Under the general rule, the factual content of the claim prescribes the limits of any later action. (179 C.A.3d 769, 770.) When relief is granted under *Govt.C. 946.6*, logic compels the conclusion that the cause of action ordinarily should be similarly limited by the factual allegations of the proposed claim. (179 C.A.3d 770, 771.)

(b) Under *Govt.C. 910(e)* (supra, §253), a claim or proposed claim must state the name of the public employee only if known. And under *Govt.C. 910.6(a)* (supra, §282), a claim may be amended, but only within the time limit for filing the original claim. (179 C.A.3d 771.) The result is that, while a claimant is required to state the employee's name only if known, the claimant is prevented from adding the name when it becomes known after expiration of the time for filing the claim. (179 C.A.3d 772.)

(c) The solution to this dilemma is that "the same extenuating circumstances which were deemed sufficient to support the granting of a petition pursuant to section 946.6 should similarly, in any later pursuit of the claim in a court action, permit plaintiff to rely on facts unknown at the time the proposed claim was prepared." (179 C.A.3d 772.) Hence, after obtaining relief, plaintiff should be permitted to plead "the extenuating circumstances which precluded her from gaining timely knowledge of the identity of the public employee or employees who had caused her injury and damages." (179 C.A.3d 772.)

(d) *Govt.C. 950* et seq., permitting similar relief in actions against government employees, provide a persuasive analogy for this type of treatment. (179 C.A.3d 772.) Hence, if plaintiff can amend her pleading and prove that she

neither knew nor had reason to know the identities of the responsible public employees within 100 days (now 6 months) of the accrual of her cause of action, thus bringing herself within the exculpatory provisions of *Govt.C. 950.4*, she will not be limited in her proof by the reference to only one employee in her proposed claim. (179 C.A.3d 773, 774.)

SUPPLEMENT: [This section is current through the latest supplement]



131 of 192 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

VII. NOTICE OF CLAIM AGAINST PUBLIC ENTITY

K. Estoppel.

1. Development of Doctrine.

3 Witkin Cal. Proc. Actions § 309

[§ 309] Development of Doctrine.

The harsh results of the early rule of strict compliance (*supra*, §274) gave rise to a series of decisions applying the doctrine of estoppel against the governmental entity challenging late filing or defects in the content of the claim.

In the leading case, *Farrell v. Placer* (1944) 23 C.2d 624, 145 P.2d 570, plaintiff sued two counties for injuries resulting from the defective condition of a bridge. Her claim was filed after the then 90-day statutory period. She alleged, however, that she had been confined in the hospital for over 3 months, much of the time in pain and under opiates; that 13 days after the accident, defendant's agent and a stenographer called on her and at their request she stated her claim in all required details; that the agent advised her to settle and not to employ an attorney; that subsequently he assured her that she could wait until her recovery before specifying the amount of her damages; and that in reliance on these representations she did not engage an attorney for several months. *Held*, a cause of action was stated. After distinguishing prior holdings and criticizing dicta, the court said: "It has been intimated by some authorities that the claim statute is the measure of the power of the governmental agency in paying the tort claims involved, and hence any deviation from that procedure cannot be dispensed with by waiver, estoppel, or otherwise. That conclusion, at least with respect to the time of filing the claim, is not supported by the statute or reason. ... Hence the filing of the claim within ninety days, while mandatory upon the claimant and a condition precedent to his cause of action, is nothing more than a procedural requirement as to the agency, which, as to the claimant, may be excused by estoppel." (23 C.2d 630.)

In *Mendibles v. San Diego* (1950) 100 C.A.2d 502, 224 P.2d 42, plaintiff, with a cause of action under the former Public Liability Act, mistakenly filed her claim with the city controller (the officer designated in the charter) instead of with the clerk of the city council (as required by the governing statute). But it appeared that plaintiff's counsel, on inquiry of the mayor, was advised to file with the controller, and that the city council had considered and rejected the claim on its merits. *Held*, because the purposes of the claims statute had been fully served and the defective filing had been induced by the acts of defendant, the latter was estopped to set up the defense. (100 C.A.2d 506.)

In *Cruise v. San Francisco* (1951) 101 C.A.2d 558, 225 P.2d 988, a claim against defendant city for injuries due to negligence of a city bus driver was filed 10 days after the 60-day charter period. Plaintiff alleged that the city's claims adjuster called on her, obtained a full report on all required items, and advised her that the claim would be settled if she furnished a doctor's report and union's statement of loss of working time; that she furnished the information, was

advised to wait, and heard nothing further until a communication advising her to file a written claim was received on the evening of the day the time expired. "The old doctrine of strict and literal compliance, with its attendant harsh and unfair results, has disappeared from our law." (101 C.A.2d 563.) "The government should not be permitted to avoid liability by tactics that would never be countenanced between private parties." (101 C.A.2d 565.)

In *Orinda-County Fire Protection Dist. v. Frederickson & Watson Co.* (1959) 174 C.A.2d 589, 344 P.2d 873, plaintiff fire protection district sued defendant Contra Costa County for damages caused by the diversion of waters. Failure to file within the then 90-day statutory period was excused on the following showing: The damage was reported to the Board of Supervisors (which governs both plaintiff district and defendant county). The district attorney (who represents both) advised both that the private contractor was solely liable. *Held*, the district had the right to rely on that advice; and defendant county also relied on it in telling plaintiff not to file a claim because the district was not liable. (See *Lorenson v. Los Angeles* (1953) 41 C.2d 334, 340, 260 P.2d 49; *Bruce v. Jefferson Union High School Dist. of San Mateo* (1962) 210 C.A.2d 632, 635, 26 C.R. 762; 44 Cal. L. Rev. 347; 65 A.L.R.2d 1278, 1284 [estoppel to assert failure to give required notice of claim of injury to municipality, county, or other governmental agency]; 64 A.L.R.5th 519 [same; modern status].)

Those decisions involved affirmative representations or acts by the governmental agency or its representative, inducing reliance by the claimant. And where no affirmative act of inducement is shown, there is ordinarily no basis for an estoppel. (See *Peck v. Modesto* (1960) 181 C.A.2d 465, 468, 5 C.R. 482.) But in a rare case where a confidential relationship exists between the government's representative and the claimant, there is a duty of disclosure and silence alone may give rise to the estoppel. Hence, in *Dettamanti v. Lompoc Union School Dist. of Santa Barbara* (1956) 143 C.A.2d 715, 723, 300 P.2d 78, delayed filing was excused because plaintiff's original attorney was also the deputy district attorney representing the school district against which the claim was made. (See 1 Cal. Proc. (5th), Attorneys, §109.)

In *Baker v. Cohen* (1956) 139 C.A.2d 842, 294 P.2d 518, the court held in effect that the governmental agency may avoid liability by a carefully phrased, noncommittal acknowledgment that does not legally (though it may in fact) induce reliance. The claim was filed in time, but lacked the verification then required by law. The city attorney wrote plaintiff stating, "A copy of your letter of January 4th, addressed to the City Clerk ... regarding a fall which you had ... has been forwarded to the Fireman's Fund Indemnity Insurance Company of Los Angeles." The complaint alleged reliance on this letter and the silence of other officials. *Held*, there was no estoppel. "The city attorney's letter gave plaintiff no assurances of any kind, offered no compromise, suggested no course of action for plaintiff to take. In fact, it did not expressly recognize plaintiff's letter as a claim." As to the forwarding statement: "This carries an implication of existing insurance protecting the city against such liability ... but it cannot be said that the reference to the insurance company would convey to the mind of layman or lawyer any promise or prediction of payment, compromise, or altruistic consideration. Casualty insurance companies are in business for profit and their handling of such matters, as is well known, must be conducted upon a strictly business basis." (139 C.A.2d 845.)

Farrell, *Mendibles*, and *Cruise* were approved, and *Baker* was disapproved, in *Fredrichsen v. Lakewood* (1971) 6 C.3d 353, 357, 99 C.R. 13, 491 P.2d 805, *infra*, §312.

SUPPLEMENT: [This section is current through the latest supplement]



132 of 192 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

VII. NOTICE OF CLAIM AGAINST PUBLIC ENTITY

K. Estoppel.

2. Continuing Validity.

3 *Witkin Cal. Proc. Actions* § 310

[§ 310] Continuing Validity.

(1) *In General.* The statutes on amendment, waiver of defects, and relief from late filing (see *supra*, §282 et seq.) reduced the importance of estoppel against public entities, but the doctrine is nevertheless applicable and occasionally useful. (See *Govt.C. 7530*, *supra*, §235; *Tammen v. San Diego* (1967) 66 C.2d 468, 480, 58 C.R. 249, 426 P.2d 753, *supra*, §296, citing the text [no affirmative representation or reliance, no estoppel]; *Fredrichsen v. Lakewood* (1971) 6 C.3d 353, 356, footnote 3, 99 C.R. 13, 491 P.2d 805, *infra*, §312 [statute "does not preclude reliance on the doctrine of estoppel where the governmental agency's conduct furnishes the basis for relief"]; *Stockton v. Superior Court* (2007) 42 C.4th 730, 744, 68 C.R.3d 295, 171 P.3d 20, *supra*, §238 [defendant's assurances during negotiations that plaintiff's interests would be protected did not estop defendant from asserting claims filing requirements, where plaintiff was not deterred from presenting claim after defendant allegedly failed to keep its promises]; *Harvey v. Holtville* (1967) 252 C.A.2d 595, 598, 60 C.R. 635 [representations of authorized employee of entity; issue was factual and not resolved]; *Bertorelli v. Tulare* (1986) 180 C.A.3d 432, 439, 225 C.R. 582 [estoppel found where adjuster for city had ongoing settlement discussions with plaintiff during and after period for filing claim]; *Cole v. Los Angeles* (1986) 187 C.A.3d 1369, 1375, 232 C.R. 624 [estoppel not found; no evidence of reliance on clerk's alleged misstatement on time limit; even if reliance were implied, court could have properly concluded that written information precluded reliance]; *Utility Audit Co. v. Los Angeles* (2003) 112 C.A.4th 950, 959, 5 C.R.3d 520 [in action by utility against city seeking to recover interest on sewer service fee refunds, city did not waive claims filing requirement by refunding overcharges in full without interest]; *Sofranek v. Merced* (2007) 146 C.A.4th 1238, 1250, 53 C.R.3d 426 [county was estopped from asserting 6-month claims bar (see *infra*, §689), where county sent defendant two rejection notices, each advising claimant of 6 months to sue, and defendant filed claim within 6 months of second notice]; C.E.B., 1 Government Tort Liability Practice 4th, §5.77 et seq.; Rutter Group, Civil Proc. Before Trial §1:757 et seq.)

In *Rand v. Andreatta* (1964) 60 C.2d 846, 36 C.R. 846, 389 P.2d 382, *infra*, §312, the court briefly disposed of the troublesome point that the statutes expressly provided for relief in three situations (minors, incapacitated persons, and dead persons; see *supra*, §286), and that the Legislature disregarded the Law Revision Commission's recommendation of an estoppel statute: "Nor can it be contended that the section impliedly shows a legislative intent to abolish estoppel by making the conditions outlined therein the only ones under which a late filing may be excused. Though the Law Revision Commission recommended that an express section with regard to estoppel be enacted and none was, it cannot

be held that the Legislature intended to limit the assertion of estoppel against a public agency to the situations set forth in former section 716." (60 C.2d 851.)

It has been held that a plaintiff relying on estoppel must nevertheless pursue the statutory remedy of application for relief (supra, §299 et seq.). (See *Kendrick v. La Mirada* (1969) 272 C.A.2d 325, 327, 77 C.R. 444.)

(2) *School Molestation Cases*. In *Ortega v. Pajaro Valley Unified School Dist.* (1998) 64 C.A.4th 1023, 75 C.R.2d 777, citing the text, Mona Lisa and Victoria brought a negligence and conspiracy action against defendant school district 7 years and 4 years, respectively, after they were molested by A, their teacher, while they were minors. The jury found that the late filing was excused under the doctrine of equitable estoppel because of the unconscionable actions of defendant, found defendant liable, and awarded plaintiffs over \$ 4 million in damages. *Held*, affirmed in part, and reversed in part.

(a) *Application of equitable estoppel in molestation cases*. The claim presentation requirements are tolled during that period when a school district's affirmative acts deter the filing of a claim. However, the party seeking to assert the doctrine must file a claim within a reasonable time, usually within 1 year, after the delay-inducing acts have ended. (64 C.A.4th 1044, citing the text and several cases discussed there.)

(b) *Estoppel applied as to Mona Lisa's claim*. Defendant or its agents (which included A) engaged in affirmative acts that deterred Mona Lisa from filing her claim until A admitted his pedophilia by pleading no contest in another criminal molestation case: The teacher, A, threatened Mona Lisa with suspension if she "disrespected" him; school officials mistreated her and her family both when she reported the incident and afterwards; A's attorney had other teachers call the sheriff to speak positively about A and negatively against Mona Lisa; school officials concealed previous molestation accusations against A; Mona Lisa and her family received harassing calls from students; a public address announcement at the school stated that A had been cleared of all charges; A brought a defamation action against Mona Lisa; and he drove by her worksite on several occasions to dissuade her from reviving claims against him. (64 C.A.4th 1050.) Mona Lisa filed her claim within 2 months and 1 week of A's plea in the other molestation case; this clearly was within a reasonable time after defendant's delay-inducing acts ceased. (64 C.A.4th 1052.)

(c) *No estoppel as to Victoria's claim*. The filing deadline may have been tolled while Victoria was still attending school and was still in contact with A, because she was "scared to death" of him while he was molesting her. However, after she left school (about 4 years before she filed her claim), she never saw him again. Neither defendant nor its agents threatened or otherwise dissuaded her from filing a claim, or even knew she had been molested, until well after the filing deadline had expired subsequent to her leaving school. (64 C.A.4th 1053.) "[W]hile we are sympathetic with Victoria's situation, ... we must conclude that there is no substantial evidence in the record that Victoria filed her government claim within a reasonable period after any event justifying an estoppel ceased to operate." (64 C.A.4th 1056.)

Other cases are to the same effect. (See *John R. v. Oakland Unified School Dist.* (1989) 48 C.3d 438, 445, 256 C.R. 766, 769 P.2d 948, *infra*, §312 [error to grant nonsuit; on remand, trial court must make factual determination]; *Christopher P. v. Mojave Unified School Dist.* (1993) 19 C.A.4th 165, 172, 173, 23 C.R.2d 353 [estoppel could be found where teacher, as authority figure, directed child not to tell anyone that teacher had molested him]; *Doe v. Bakersfield City School Dist.* (2006) 136 C.A.4th 556, 570, 39 C.R.3d 79 [following *John R.* and *Christopher P.*; school district was estopped from asserting claims statute against former student, who failed to file claim that he was sexually molested by guidance counselor beginning at age 13; although student was now adult, counselor had continued to abuse him until he was age 19 and had threatened to humiliate him publicly if he disclosed abuse].)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *School Molestation Cases*. See *K.J. v. Arcadia Unified School Dist.* (2009) 172 C.A.4th 1229, 1240, 92 C.R.3d 1 [school district was not equitably estopped from asserting claims statute against student's claim of negligent supervision based on sexual abuse by teacher; there was no evidence of violence or intimidation intended to deter student from

presenting claim to district, or misleading statements made by teacher about need for, or advisability of, claim].



133 of 192 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

VII. NOTICE OF CLAIM AGAINST PUBLIC ENTITY

K. Estoppel.

3. Complete Failure To File May Be Excused.

a. Former Law Rejecting Doctrine.

3 Witkin Cal. Proc. Actions § 311

[§ 311] Former Law Rejecting Doctrine.

(1) *Statement of Rule.* In *Johnson v. Fresno (1944) 64 C.A.2d 576, 149 P.2d 38*, plaintiff sued defendant county for injuries received in an automobile collision, without filing a claim. The complaint alleged that during the then 90-day period (a) plaintiff was mentally incapacitated; (b) defendant's agents falsely represented that it was unnecessary for him to employ an attorney because they were making an immediate settlement; and (c) they furnished him with free medical care. *Held*, although these allegations would have excused late filing under *Farrell v. Placer (1944) 23 C.2d 624, 145 P.2d 570*, supra, §309, plaintiff should have filed his claim within a reasonable time after recovery and discovery of the fraud. Thus, the case holds that neither incapacity from the injury nor fraud will excuse a complete failure to file the claim. *Johnson* was followed in *Brown v. Sequoia Union High School Dist. (1949) 89 C.A.2d 604, 605, 201 P.2d 66*, another fraud case, and in *Slavin v. Glendale (1950) 97 C.A.2d 407, 410, 217 P.2d 984*. (See 1 U.C.L.A. L. Rev. 209.)

(2) *Criticism of Rule.* This view seems wholly unsound. The statutory requirements and the judicial rule of strict compliance have both been justified on the ground that the governmental agency must have prompt and adequate notice in order to investigate the claim while the facts are available. Late notice and defective notice have been rejected as equivalent to no notice at all because they do not serve the statutory purpose. It follows that if estoppel or incapacity excuses late notice, it should excuse no notice. The late notice within the unspecified "reasonable time" mentioned by the court would serve no statutory purpose. Indeed, it would be an idle gesture in the estoppel cases where the theory of the action is that the defendant, with full knowledge of all facts that the claim would disclose, induces the plaintiff to omit filing the claim. If the useless formality of an actual claim is the pound of flesh the statute demands, the plaintiffs in *Johnson* and *Brown* ought to have been permitted to file them during the actions.

Subsequent to *Johnson* and *Brown*, *Cruise v. San Francisco (1951) 101 C.A.2d 558, 225 P.2d 988*, supra, §309, produced two strong dicta suggesting the opposite result: (a) estoppel may excuse "non or late compliance" (*101 C.A.2d 563*), and (b) the government "should not be permitted to avoid liability by tactics that would never be countenanced between private parties" (*101 C.A.2d 565*).

SUPPLEMENT: [This section is current through the latest supplement]



134 of 192 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

VII. NOTICE OF CLAIM AGAINST PUBLIC ENTITY

K. Estoppel.

3. Complete Failure To File May Be Excused.

b. Current Law Applying Doctrine.

3 *Witkin Cal. Proc. Actions* § 312

[§ 312] Current Law Applying Doctrine.

In *Rand v. Andreatta* (1964) 60 C.2d 846, 36 C.R. 846, 389 P.2d 382, an uneducated woman relied on representations of defendant county's claims agent that she need not obtain counsel and that all her rights would be protected. Her action, commenced without prior notice of the claim, resulted in judgment for defendants on that ground. *Held*, reversed; the facts showed an estoppel, and estoppel may excuse no notice as well as late notice. The court, citing *Cruise v. San Francisco* (1951) 101 C.A.2d 558, 225 P.2d 988, *supra*, §309, and the text, disapproved contrary statements in *Johnson v. Fresno* (1944) 64 C.A.2d 576, 149 P.2d 38, *supra*, §311, *Brown v. Sequoia Union High School Dist.* (1949) 89 C.A.2d 604, 201 P.2d 66, *supra*, §311, and *Slavin v. Glendale* (1950) 97 C.A.2d 407, 217 P.2d 984, *supra*, §311. (60 C.2d 850.)

In *Fredrichsen v. Lakewood* (1971) 6 C.3d 353, 99 C.R. 13, 491 P.2d 805, plaintiff's complaint alleged the following: On May 10, 1969, she was injured in a fall on a defectively maintained sidewalk in the city of Lakewood. Prior to May 15, 1969, she telephoned the city, requesting a damage claim form. The clerk's office instead sent her a copy of a letter dated May 15, 1969, to P Corp. (a sublessee), stating that responsibility for maintenance of the sidewalk rested with L Corp. (lessor). Relying on this representation she negotiated unsuccessfully with P Corp. until April 1970, when she filed an action against P Corp. Thereafter, in May 1970, her attorney discovered that the sidewalk was in fact maintained by the city, and he joined the city as a defendant. The city's demurrer was sustained on the ground of failure to file a claim. *Held*, judgment on demurrer reversed.

(a) Prior cases on estoppel of the governmental agency involved representations by claims agents. But reliance on the appropriate ministerial agent (here the city clerk) is even more justified, for the claims agent acts in a known adverse capacity. (6 C.3d 357.)

(b) The relevant factors are stated in *Driscoll v. Los Angeles* (1967) 67 C.2d 297, 61 C.R. 661, 431 P.2d 245, a statute of limitations case; as pointed out in *Farrell v. Placer* (1944) 23 C.2d 624, 145 P.2d 570, *supra*, §309, the policy considerations are the same. (6 C.3d 357.)

(c) Application of the *Driscoll* factors disclosed that the inaccurate information was negligently given, for correct

information was readily available; the city, by failing to furnish the form and giving implicit advice as to the proper defendant, purported to give plaintiff procedural directions and substantive advice; and there was no reason to believe that plaintiff would have any knowledge of the facts. (6 C.3d 358, 359.)

(d) The element of confidential relationship in *Driscoll*, absent here, was not controlling. "Estoppel is available in all circumstances where, as in the instant case, the complaint alleges facts which, if true, would establish that the government had acted in an unconscionable manner." (6 C.3d 359.)

(e) The theory of *Baker v. Cohen* (1956) 139 C.A.2d 842, 294 P.2d 518, supra, §309, that an estoppel arises in claim cases only where there is a promise or assurance, a compromise offer, or erroneous advice as to procedure, was based in part on the mistaken holdings in earlier cases disapproved in *Rand* and is unsound. "The estoppel doctrine should not be limited to such situations but should extend to any cases where the considerations discussed in *Driscoll* would warrant a finding of unconscionable action. *Baker* is disapproved insofar as it is contrary to the views expressed herein." (6 C.3d 359.)

In *Elmore v. Oak Valley Hosp. Dist.* (1988) 204 C.A.3d 716, 251 C.R. 405, plaintiffs alleged that defendant was estopped to assert plaintiffs' noncompliance with the claims-filing requirement because of misleading information provided in the Statement of Public Agency filed under Govt.C. 53051 (see supra, §236). Specifically, plaintiffs alleged that (a) defendant was a public agency doing business under the name of "Oak Valley District Hospital"; (b) the statement filed with the Secretary of State listed defendant as "Oak Valley Hospital District"; (c) plaintiffs' attorney was informed by the Secretary of State's office that "Oak Valley District Hospital" was not listed on the Roster of Public Agencies, and as a result he filed no claim; and (d) defendant's actions misled plaintiffs and estopped it from relying on their failure to file a claim. *Held*, judgment for defendant on demurrer reversed. The facts alleged were sufficient to constitute an estoppel, as defined in *Driscoll*. However, proof of those factual questions, whether defendant was informed of the potential for confusion and intended possible claimants to assume that its name was as represented in its records, and whether plaintiffs reasonably relied upon such representation, cannot be resolved on demurrer. (204 C.A.3d 724.)

In *John R. v. Oakland Unified School Dist.* (1989) 48 C.3d 438, 256 C.R. 766, 769 P.2d 948, John, a ninth-grade junior high school student, was pressured by his mathematics teacher into sexual acts by threats of failing grades, and was threatened with further retaliation if he told his parents about the acts. Ten months later, John told his parents, and his mother took the matter up with school authorities and the police. She then consulted an attorney, who advised her to wait for a criminal investigation before pursuing a civil remedy. Thereafter, John's parents brought an action for damages against defendant school district, alleging direct liability as employer for negligent hiring and supervision of the teacher. The issue of estoppel arose as follows:

(a) Under the statute, plaintiffs were required to present a written claim within 100 days of the accrual of their causes of action, measured by the date John was molested; and they did not seek leave to file a late claim within 1 year under Govt.C. 911.4(b). The statute of limitations does not run against minors until 1 year after reaching majority (C.C.P. 352(a)), but the claims statute does run (C.C.P. 352(b); former Govt.C. 911.4(b), now Govt.C. 911.4(c)(1)). (48 C.3d 444, footnote 1.)

(b) The Court of Appeal held that the causes of action did not accrue until John told his parents about the incidents, and this holding raised a serious question whether the delayed-discovery theory applied under these facts. However, the doctrine of estoppel may apply even if the delayed-discovery theory would not. (48 C.3d 444.)

(c) A public entity may be estopped from setting up the limitations of the claims statute where its agents or employees have prevented or deterred the filing of a timely claim by some affirmative act; e.g., misleading statements about the need for a claim. (48 C.3d 445, citing *Fredrichsen* and *Rand*.) "A fortiori, estoppel may certainly be invoked when there are acts of *violence* or *limitation* that are *intended* to prevent the filing of a claim." (48 C.3d 445.)

(d) Although the threats here were motivated largely by the teacher's self-interest rather than to prevent filing of a claim, it would be inconsistent with the equitable underpinnings of the estoppel doctrine to permit the district to benefit by those threats. "Plaintiffs alleged that the district's own negligent conduct--e.g., the failure to make an adequate investigation of the teacher's background before hiring him and failure to guarantee that the extracurricular program was properly supervised--renders it liable for their injuries. Assuming plaintiffs can establish their case, it would plainly be inequitable to permit the district to escape liability only because the teacher's threats succeeded in preventing his victim from disclosing the molestation until the time for filing a claim against the district had elapsed." (48 C.3d 445.)

(e) The estoppel issue is one of fact for the trial judge, who must take into account the nature of the conduct and whether plaintiffs acted within a reasonable time as well as prejudice to defendants in the delay. (48 C.3d 446, footnote 6.)

Later cases have applied the doctrine. (See *Ocean Services Corp. v. Ventura Port Dist.* (1993) 15 C.A.4th 1762, 1776, 19 C.R.2d 750 [entity could not rely on claims statute where it had induced plaintiff not to file claim, but to wait until situation causing conflict was resolved]; *Doe v. Bakersfield City School Dist.* (2006) 136 C.A.4th 556, 570, 39 C.R.3d 79 [following *John R. and Christopher P. v. Mojave Unified School Dist.* (1993) 19 C.A.4th 165, 23 C.R.2d 353, supra, §310; school district was estopped from asserting claims statute against former student, who failed to file claim that he was sexually molested by guidance counselor beginning at age 13; although student was now adult, counselor had continued to abuse him until he was age 19 and had threatened to humiliate him publicly if he disclosed abuse].)

SUPPLEMENT: [This section is current through the latest supplement]



135 of 192 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

VIII. EXHAUSTION OF OTHER REMEDIES

A. In General.

3 Witkin Cal. Proc. Actions § 313

[§ 313] In General.

In a number of situations an action or other legal proceeding may not be maintained until some other remedy has first been employed. The theory is that, although a cause of action has arisen that is properly triable in the courts, exhaustion of that remedy is a procedural condition precedent to the action. The other remedy may be any of the following:

- (1) A private or contract remedy. (See *infra*, §314 et seq.)
- (2) An administrative remedy. (See *infra*, §325 et seq.)
- (3) A judicial remedy. (See *infra*, §347 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]



136 of 192 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

VIII. EXHAUSTION OF OTHER REMEDIES

B. Private or Contract Remedy.

1. Arbitration as Condition Precedent.

a. General Rule.

3 *Witkin Cal. Proc. Actions* § 314

[§ 314] General Rule.

(1) *Statement of Rule.* If a contract has an enforceable arbitration clause, arbitration or an unsuccessful attempt to obtain it is a condition precedent to an action for breach of the contract. (See *Clogston v. Schiff-Lang Co.* (1935) 2 C.2d 414, 415, 41 P.2d 555; *Krug v. Republic Pictures Corp.* (1953) 120 C.A.2d 593, 596, 261 P.2d 562 [judgment reversed with directions to order arbitration]; *Tas-T-Nut Co. v. Continental Nut Co.* (1954) 125 C.A.2d 351, 356, 270 P.2d 43; *Johnson v. Hydraulic Research & Mfg. Co.* (1977) 70 C.A.3d 675, 681, 684, 139 C.R. 136 [action for conspiracy to violate physician-patient privilege, wrongful interference with contractual relations with physician, and defamation arising from disclosure of drug-related illness on job; action was barred for failure to pursue arbitration].) (On contractual arbitration generally, see 6 *Cal. Proc.* (5th), *Proceedings Without Trial*, §499 et seq.; on defenses to enforcement of arbitration agreement in general, see 6 *Cal. Proc.* (5th), *Proceedings Without Trial*, §531 et seq.; on special statutory rule for actions to enforce mechanic's lien, see *supra*, §201.)

(2) *Collective Bargaining Agreements.* Where a collective bargaining contract provides grievance and arbitration machinery for the settlement of disputes, the remedy thus provided must be exhausted before resort to the courts. (See *Cone v. Union Oil Co. of Calif.* (1954) 129 C.A.2d 558, 563, 277 P.2d 464 [action by employee against employer for damages for violation of agreement; summary judgment for defendant was properly granted]; *Terrell v. Local Lodge 758, Int. Assn. of Machinists* (1956) 141 C.A.2d 17, 21, 296 P.2d 100; *Williams v. Pacific Elec. Ry. Co.* (1956) 147 C.A.2d 1, 6, 304 P.2d 715 [complaint failed to allege submission to arbitration or excuse; demurrer was properly sustained]; *Hagin v. Pacific Gas & Elec. Co.* (1957) 152 C.A.2d 93, 98, 312 P.2d 356; *Don daRoza v. Northern Calif. Dist. Council of Hod Carriers, etc.* (1965) 233 C.A.2d 96, 102, 43 C.R. 264; *Gutierrez v. Gaffers & Sattler Corp.* (1970) 4 C.A.3d 731, 735, 84 C.R. 571; 30 *So. Cal. L. Rev.* 440 [*Cone*]; 72 *A.L.R.2d* 1439 [exhaustion of grievance procedures or of remedies provided in collective bargaining agreement as condition of employee's resort to civil courts for assertedly wrongful discharge]; but see *Veguez v. Governing Bd. of Long Beach Unified School Dist.* (2005) 127 C.A.4th 406, 416, 25 C.R.3d 526 [teacher was not required to exhaust grievance procedures of collective bargaining agreement about dispute over differential-pay sick leave under *Educ.C.* 44977; action to enforce right guaranteed by Education Code is not subject to exhaustion requirement].)

(3) *Government Contracts.* An arbitration provision may also be found in a government contract. (See *A. Teichert*

& *Son v. California* (1965) 238 C.A.2d 736, 746, 48 C.R. 225 [contract incorporating Standard Specifications, which called for settlement procedure established by State Contract Act]; *Clack v. California* (1969) 275 C.A.2d 743, 746, 80 C.R. 274 [same].)

(4) *Distinction: Where Promise To Arbitrate Binds Third Persons.* A distinction has been recognized where a party who agreed to arbitration dies. It has been held that the decedent's agreement does not bar a wrongful death action by the decedent's heirs. (See *Rhodes v. California Hosp. Med. Center* (1978) 76 C.A.3d 606, 609, 143 C.R. 59 [plaintiff husband had executed agreement as deceased wife's agent].)

In *Herbert v. Superior Court* (1985) 169 C.A.3d 718, 215 C.R. 477, however, a wrongful death action by decedent's widow and eight children, decedent's health plan included a provision requiring arbitration by a member or a member's heirs. Decedent had enrolled his wife and five minor children in the plan, but not his three adult children. Defendant hospital petitioned to compel arbitration as to all the heirs; the trial judge ruled that the provision applied only to the widow and minor children. *Held*, it applied to all the heirs.

(a) The widow and five minor heirs became bound by the arbitration provision by being enrolled in the plan. (169 C.A.3d 724.) A decedent's power to bind his heirs in this manner was established in *Hawkins v. Superior Court* (1979) 89 C.A.3d 413, 152 C.R. 491, 3 *Summary* (10th), *Agency and Employment*, §135, and *Doyle v. Giuliani* (1965) 62 C.2d 606, 43 C.R. 697, 401 P.2d 1, 1 *Summary* (10th), *Contracts*, §49. (169 C.A.3d 723.)

(b) The three adult heirs must also be bound by the arbitration provision in order to effectuate the legislative policy that a single cause of action exists in the heirs for the wrongful death of the decedent (see 6 *Summary* (10th), *Torts*, §1385 et seq.). (169 C.A.3d 725.) Requiring only partial arbitration would split the litigation into different tribunals and frustrate this policy. (169 C.A.3d 725.)

Herbert has been both approved and criticized in subsequent cases. (See, e.g., *Baker v. Birnbaum* (1988) 202 C.A.3d 288, 291, 294, 248 C.R. 336 [agreement by wife to arbitrate her medical malpractice claims did not require husband, who was not party to arbitration agreement, to arbitrate his cause of action for loss of consortium; following *Rhodes*, and both distinguishing and disagreeing with *Herbert*]; *Gross v. Recabaren* (1988) 206 C.A.3d 771, 778, 781, 253 C.R. 820 [husband's agreement to arbitrate "any dispute as to medical malpractice" extended to nonsignatory wife's loss of consortium claim; following *Herbert* and disagreeing with *Baker*]; *Keller Const. Co. v. Kashani* (1990) 220 C.A.3d 222, 225, 226, footnote 3, 229, 269 C.R. 259 [sole general partner of a limited partnership was bound by arbitration clause in construction contract entered into by partnership and third party; *Rhodes* and *Baker* "constitute a minority view as to the rights of a nonsignatory to an arbitration agreement to pursue an action in the courts as distinguished from arbitration"].)

West's Key Number Digest, Arbitration 9 et seq.

SUPPLEMENT: [This section is current through the latest supplement]



137 of 192 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

VIII. EXHAUSTION OF OTHER REMEDIES

B. Private or Contract Remedy.

1. Arbitration as Condition Precedent.

b. Waiver of Right.

1. In General.

3 *Witkin Cal. Proc. Actions* § 315

[§ 315] In General.

(1) *General Principles.* The right to arbitrate may be waived. (See, e.g., *Davis v. Blue Cross of Northern Calif.* (1979) 25 C.3d 418, 424, 158 C.R. 828, 600 P.2d 1060, 6 Cal. Proc. (5th), *Proceedings Without Trial*, §551 [waiver by failure to inform insured of remedy]; *National Farm Workers Service Center v. M. Caratan* (1983) 146 C.A.3d 796, 803, 194 C.R. 617 [waiver by suggestion that "court ruling" be sought and, after complaint was filed, by failure to assert right to arbitrate]; 6 Cal. Proc. (5th), *Proceedings Without Trial*, §545 et seq.) However, no waiver results from the repudiation of the contract for breach (see *infra*, §317), or from the mere filing of an action (see *infra*, §318).

Where the plaintiff waives arbitration and elects to file an action, but the defendant successfully seeks arbitration by filing a petition, it may be error to order the plaintiff to pay the arbitration fee, which is much larger than the filing fee for an action. (*Spence v. Omnibus Industries* (1975) 44 C.A.3d 970, 975, 119 C.R. 171, 1 Summary (10th), *Contracts*, §327 [interpreting contract of adhesion against defendant].)

(2) *Failure To Plead.* The appropriate objection to failure to arbitrate is that the action is prematurely brought; if not raised promptly by a plea in abatement, it is waived. (See *Local 659, I.A.T.S.E. v. Color Corp. of America* (1956) 47 C.2d 189, 194, 302 P.2d 294 [right to arbitration may be waived by litigating dispute without raising question]; 98 A.L.R.3d 767 [defendant's participation in action as waiver of right]; 5 Cal. Proc. (5th), *Pleading*, §1152.)

SUPPLEMENT: [This section is current through the latest supplement]



138 of 192 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

VIII. EXHAUSTION OF OTHER REMEDIES

B. Private or Contract Remedy.

1. Arbitration as Condition Precedent.

b. Waiver of Right.

2. Delay in Demanding Arbitration.

3 *Witkin Cal. Proc. Actions* § 316

[§ 316] Delay in Demanding Arbitration.

(1) *Where Agreement Does Not Specify Time for Demand.* A delay in demanding arbitration may amount to waiver. When an arbitration agreement does not specify the time within which arbitration must be demanded, a reasonable time is allowed; a party who does not demand arbitration within a reasonable time is deemed to have waived the right to arbitration. 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. Among the facts a court may consider is any prejudice the opposing party suffered because of the delay. (*Spear v. California State Auto. Assn.* (1992) 2 C.4th 1035, 1043, 9 C.R.2d 381, 831 P.2d 821; see 6 Cal. Proc. (5th), *Proceedings Without Trial*, §546.)

(2) *Where Agreement Does Specify Time for Demand.* Where the arbitration agreement does specify a deadline for a demand, satisfying the deadline is a condition precedent to the right to compel arbitration. In the absence of a legal excuse, a party's failure to timely demand arbitration results in the contractual forfeiture of the right to arbitration. (*Platt Pac. v. Andelson* (1993) 6 C.4th 307, 318, 319, 24 C.R.2d 597, 862 P.2d 158; see 6 Cal. Proc. (5th), *Proceedings Without Trial*, §546.)

SUPPLEMENT: [This section is current through the latest supplement]



139 of 192 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

VIII. EXHAUSTION OF OTHER REMEDIES

B. Private or Contract Remedy.

1. Arbitration as Condition Precedent.

b. Waiver of Right.

3. No Waiver by Repudiation for Breach.

3 *Witkin Cal. Proc. Actions* § 317

[§ 317] No Waiver by Repudiation for Breach.

In *New Linen Supply v. Eastern Environmental Controls* (1979) 96 C.A.3d 810, 158 C.R. 251, EEC appointed Western its exclusive distributor for manufactured products. Shortly thereafter, EEC, dissatisfied with Western's alleged failure to make timely payments, wrote that it was canceling the contract for breach, but was ready to negotiate a new contract on condition that Western pay amounts currently owed. Western first requested arbitration under the contract clause, but neither party took any steps in this direction. Several months later Western filed the present complaint for unfair competition, and EEC filed its petition to compel arbitration. *Held*, order denying arbitration reversed.

(a) The issue is whether a party who declared a contract terminated because of an alleged breach may nevertheless invoke the arbitration clause of the contract for a determination of damages arising from that breach. Although it is "tempting, and certainly human," to give a negative answer, in view of the strong policy favoring arbitration "the tactics involved may not be used as the rationale to deny arbitration as the means of resolving the controversy in the absence of actual prejudice." (96 C.A.3d 816.)

(b) *Bertero v. Superior Court* (1963) 216 C.A.2d 213, 30 C.R. 719, 1 Summary (10th), *Contracts*, §820, is distinguishable. There, the repudiating party asserted that no binding contract existed; when the other party brought his action it was too late for the repudiator to retract and seek arbitration under the contract. (96 C.A.3d 816.) (See 6 *Cal. Proc.* (5th), *Proceedings Without Trial*, §545.)

SUPPLEMENT: [This section is current through the latest supplement]



140 of 192 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

VIII. EXHAUSTION OF OTHER REMEDIES

B. Private or Contract Remedy.

1. Arbitration as Condition Precedent.

b. Waiver of Right.

4. No Waiver by Filing Action.

3 *Witkin Cal. Proc. Actions* § 318

[§ 318] No Waiver by Filing Action.

A number of Court of Appeal decisions, including *Titan Enterprises v. Armo Const.* (1973) 32 C.A.3d 828, 832, 108 C.R. 456, and *Maddy v. Castle* (1976) 58 C.A.3d 716, 722, 130 C.R. 160, by holding or dicta approved the rule that bringing an action on a contract without seeking arbitration is a waiver of the right. However, *Doers v. Golden Gate Bridge, Highway & Trans. Dist.* (1979) 23 C.3d 180, 151 C.R. 837, 588 P.2d 1261, repudiated this rule. Filing the action does not in itself preclude a demand for arbitration; "it is the judicial *litigation* of the merits of arbitrable issues which waives a party's right to arbitration." (23 C.3d 188, disapproving *Maddy*, *Titan*, and other cases.) (See 6 Cal. Proc. (5th), *Proceedings Without Trial*, §547.)

SUPPLEMENT: [This section is current through the latest supplement]



141 of 192 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

VIII. EXHAUSTION OF OTHER REMEDIES

B. Private or Contract Remedy.

1. Arbitration as Condition Precedent.

b. Waiver of Right.

5. Distinction: Action Filed Solely for Discovery.

3 *Witkin Cal. Proc. Actions* § 319

[§ 319] Distinction: Action Filed Solely for Discovery.

Under *Doers v. Golden Gate Bridge, Highway & Trans. Dist.* (1979) 23 C.3d 180, 151 C.R. 837, 588 P.2d 1261, supra, §318, waiver does not occur by a mere participation in litigation filed in good faith by the plaintiff. There must be judicial litigation of the merits of arbitral issues. (33 C.3d 188.) *Doers* was distinguished in *Christensen v. Dewor Dev.* (1983) 33 C.3d 778, 191 C.R. 8, 661 P.2d 1088, 6 Cal. Proc. (5th), *Proceedings Without Trial*, §548, holding that an action seeking to discover defendant's legal theories in the event of arbitration was filed in bad faith and constituted a waiver of plaintiffs' right to compel arbitration. (33 C.3d 783.)

SUPPLEMENT: [This section is current through the latest supplement]



142 of 192 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

VIII. EXHAUSTION OF OTHER REMEDIES

B. Private or Contract Remedy.

2. Internal Remedy of Unincorporated Association.

a. Exhaustion Requirement.

1. In General.

3 *Witkin Cal. Proc. Actions* § 320

[§ 320] In General.

(1) *Statement of Doctrine.* Nonprofit associations such as fraternal societies, mutual benefit associations, and labor unions usually provide, in their constitutions or bylaws, a procedure for the settlement of disputes. The constitution and bylaws are a contract between the association and the members, and the "internal" or "private administrative remedy" must ordinarily be employed unsuccessfully before resort to the courts will be allowed. (See 29 U.S.C., §411(a)(4) [member of labor organization may be required to exhaust reasonable hearing procedures within organization, not to exceed 4-month period, before instituting legal or administrative proceedings against organization or its members]; *Robinson v. Templar Lodge, No. 17, I.O.O.F.* (1897) 117 C. 370, 376, 49 P. 170; *Holderby v. International Union of Operating Engineers, Local Union No. 12* (1955) 45 C.2d 843, 849, 291 P.2d 463, *infra*, §322; *Westlake Community Hosp. v. Superior Court* (1976) 17 C.3d 465, 474, 131 C.R. 90, 551 P.2d 410, *infra*, §321; *Neto v. Conselho Amor da Sociedade No. 41* (1912) 18 C.A. 234, 238, 122 P. 973; *Coffey v. Los Angeles Firemen's Relief Assn.* (1937) 22 C.A.2d 510, 511, 71 P.2d 328 [failure to apply for reinstatement]; *Simpson v. Salvation Army* (1942) 49 C.A.2d 371, 374, 121 P.2d 847 [failure to await outcome of appeal to higher officer]; *Stoica v. International Alliance of Theatrical Stage Employees & Moving Picture Machine Operators of United States & Canada* (1947) 78 C.A.2d 533, 536, 178 P.2d 21 [failure to appeal to general executive board of international union]; *Killeen v. Hotel & Restaurant Employees' Int. Alliance & Bartenders' Int. League of America* (1948) 84 C.A.2d 87, 91, 190 P.2d 30 [same]; *Zepeda v. International Hodcarriers' Bldg. & Common Laborers' Union, Local 89* (1956) 143 C.A.2d 609, 614, 300 P.2d 251 [summary judgment against plaintiff]; *De Gonia v. Building Material & Dump Truck Drivers Local Union* 420 (1957) 155 C.A.2d 573, 578, 318 P.2d 486 [judgment on the pleadings against plaintiffs]; *Petermann v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Local 396* (1959) 174 C.A.2d 184, 191, 344 P.2d 25, *infra*, §323; *American Soc. of Composers, Authors & Publishers v. Superior Court* (1962) 207 C.A.2d 676, 684, 24 C.R. 772 [although defense is jurisdictional, issues whether remedy was exhausted or exceptions were applicable are for trial judge; hence, prohibition will not lie to prevent action]; 76 *Harv. L. Rev.* 985, 1069 [Developments in the Law--Judicial Control of Actions of Private Associations]; 20 *A.L.R.2d* 344, 384 [suspension or expulsion from social club or similar society]; 20 *A.L.R.2d* 421, 486 [suspension or expulsion from church or religious society]; 20 *A.L.R.2d* 531, 564 [suspension or expulsion from professional association]; 87 *A.L.R.2d* 1099 [labor union].) (For distinguishable rule

against judicial interference with internal affairs of church, see *supra*, §39.)

(2) *Distinction: Employee Action Against Union.* A distinction is recognized for an employee's action against his or her union. In *Jacobs v. Retail Clerks Union, Local No. 1222* (1975) 49 C.A.3d 959, 123 C.R. 309, J, a union member employed as its organizer, sued for severance pay allegedly due on his voluntary retirement. The trial judge rejected the defense of failure to exhaust internal remedies, and entered summary judgment for J. *Held*, affirmed. The suit was based on J's employment by the union, not his membership in it. "His right to judicial determination of his wage claim is no more limited by the provisions in the union's constitution regulating its internal affairs than it would have been had he been injured and filed a claim for workers' compensation benefits." (49 C.A.3d 964.)

SUPPLEMENT: [This section is current through the latest supplement]

(3) *(New) Distinction: Union Action Against Employee Asserting Counterclaim.* A distinction to the exhaustion doctrine is recognized where an employee is asserting a counterclaim in an action brought against the employee by his or her union. In *CDF Firefighters v. Maldonado* (2008) 158 C.A.4th 1226, 70 C.R.3d 667, a union sued two former members for breach of contract in failing to pay fines imposed by the union. The trial judge found that the union members were precluded from challenging the fines because they had failed to exhaust internal remedies required under a union bylaw, and entered summary judgment for the union. *Held*, reversed. The exhaustion requirement in the bylaw was not applicable, because it was the union that resorted to a judicial proceeding to enforce the disciplinary fines. (158 C.A.4th 1238.)



143 of 192 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

VIII. EXHAUSTION OF OTHER REMEDIES

B. Private or Contract Remedy.

2. Internal Remedy of Unincorporated Association.

a. Exhaustion Requirement.

2. Tort Action for Damages.

3 *Witkin Cal. Proc. Actions* § 321

[§ 321] Tort Action for Damages.

In *Westlake Community Hosp. v. Superior Court* (1976) 17 C.3d 465, 478, 131 C.R. 90, 551 P.2d 410, Dr. K was denied admission to the staff of L Hospital and her privileges at W Hospital were revoked. She brought a tort action for damages against both hospitals on causes of action for intentional interference with the right to pursue a lawful calling, conspiracy to restrain competition, intentional infliction of emotional distress, and fraud and deceit. Defendants pleaded privilege and failure to exhaust internal remedies, and moved for summary judgment, which the trial judge denied. Defendant sought prohibition. *Held*:

(a) Although the question is one of first impression in California, out-of-state cases have applied the exhaustion doctrine to cases in which the plaintiff sought only tort damages and neither reinstatement nor admission. And the same policy considerations call for its application: (1) it serves the salutary function of eliminating or mitigating damages by allowing the organization to reverse an erroneous decision; (2) it recognizes the expertise of the organization's quasi-judicial tribunal in initially adjudicating the merits of the plaintiff's claim; and (3) the prior administrative proceeding promotes judicial efficiency by unearthing the relevant evidence and providing a record that the court may review. (17 C.3d 476.) "Accordingly, we conclude that the exhaustion of remedies doctrine fully applies to actions seeking damages for an allegedly wrongful termination of or exclusion from membership in a private association." (17 C.3d 476.)

(b) However, in the present case it is not clear that an administrative remedy was provided by L's bylaws for an applicant denied membership, and L never informed plaintiff of any such right. Hence, the exhaustion doctrine was not a defense, and an immediate tort action for damages was proper. (17 C.3d 478.)

Later cases have applied the *Westlake* requirement. (See *Joel v. Valley Surgical Center* (1998) 68 C.A.4th 360, 366, 80 C.R.2d 247 [policy considerations were not furthered, and thus exhaustion was not required; during administrative process, parties had settled by awarding physician maximum benefit he could have been afforded administratively, i.e., reinstatement]; *Gupta v. Stanford University* (2004) 124 C.A.4th 407, 411, 21 C.R.3d 192 [failure of private university student to challenge suspension for cheating by administrative mandamus precluded action for damages]; *Kaiser*

Foundation Hosp. v. Superior Court (2005) 128 C.A.4th 85, 91, 99, 26 C.R.3d 744 [failure of hospital to begin peer review hearing of terminated physician within statutory period did not excuse physician from completing peer review process before filing tort action; citing *Westlake*]; *Lee v. Blue Shield of Calif.* (2007) 154 C.A.4th 1369, 1378, 65 C.A.4th 612 [health plan's mistaken belief that it had right to terminate peer review hearing did not excuse physician from completing peer review process before filing damages action for wrongful termination of his provider status; citing *Westlake* and *Kaiser Foundation Hosp.*]; 32 A.L.R.4th 350 [employee's failure to exhaust remedies under union contract as affecting right to sue employer for wrongful discharge]; 9 *Summary* (10th), *Corporations*, §§44, 45 [medical staff cases]; for holding that mandamus proceeding is prerequisite to tort action, see *infra*, §§348, 349.)

SUPPLEMENT: [This section is current through the latest supplement]

The following case has also applied the requirement in *Westlake Community Hosp. v. Superior Court* (1976) 17 C.3d 465, 131 C.R. 90, 551 P.2d 410, text, p. 415.

Smith v. Selma Community Hosp. (2008) 164 C.A.4th 1478, 1508, 80 C.R.3d 745, citing the text [in action challenging hospital committee's decision to terminate physician's staff privileges based on termination of his privileges at two other hospitals, physician was not required to exhaust administrative remedies of two other hospitals before challenging their findings in present action].



144 of 192 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

VIII. EXHAUSTION OF OTHER REMEDIES

B. Private or Contract Remedy.

2. Internal Remedy of Unincorporated Association.

b. Exceptions.

1. Violation of Internal Rules.

3 *Witkin Cal. Proc. Actions* § 322

[§ 322] Violation of Internal Rules.

A salutary exception is recognized where the association has acted arbitrarily in violation of its own laws and thus has rendered its internal remedies futile or inadequate.

An early case, *Schou v. Sotoyome Tribe, No. 12, I.O.R.M., of Calif.* (1903) 140 C. 254, 73 P. 996, states the principle. A member of a tribe (lodge) of Redmen became insane and entitled to sick benefits. Plaintiff wife and her attorneys were unsuccessful in obtaining either benefits or information, and the organization failed to follow its prescribed procedure for reviewing a denial of benefits. *Held*, plaintiff was entitled to maintain this action for the money due. "Before an order can hold a member to strict observance of its rules regulating procedure on appeal it must show that in all matters touching his substantial rights it has itself observed these regulations. ... Its dereliction in this regard excuses a claimant from exhausting his remedy within the rules of the order." (140 C. 259.) (See *Weber v. Marine Cooks' & Stewards' Assn. of Pac. Coast* (1949) 93 C.A.2d 327, 338, 208 P.2d 1009; *Harris v. National Union of Marine Cooks & Stewards* (1950) 98 C.A.2d 733, 736, 221 P.2d 136 [plaintiff was expelled from union membership contrary to recommendation of trial committee, hence in violation of rules]; *Swital v. Real Estate Com.* (1953) 116 C.A.2d 677, 680, 254 P.2d 587 [expulsion without notice or hearing].)

In *Gonzales v. International Assn. of Machinists* (1956) 142 C.A.2d 207, 298 P.2d 92, petitioner, expelled from a union for questioning the motives of an officer, was ordered to pay a \$ 500 fine and make an apology before he could appeal to higher officials. The union constitution and laws did not provide for an apology. Hence, the exception (violation of its own rules) applied and exhaustion of the remedy was excused, for if petitioner won he could only get back his fine and could not erase the apology. (142 C.A.2d 212.) (See 87 A.L.R.2d 1099, 1118 [exhaustion of remedies within labor union as condition of resort to civil courts by expelled or suspended member].)

The general rule was applied, and the exception of *Schou* and *Weber* limited, in *Holderby v. International Union of Operating Engineers, Local Union No. 12* (1955) 45 C.2d 843, 291 P.2d 463. Plaintiff was expelled from a union in violation of its constitutional provisions. He brought an action for reinstatement and damages without any attempt to obtain an internal appeal, contending that where an organization has arbitrarily violated its own laws, the internal

remedy need not be exhausted. *Held*, the *Weber* doctrine only applies where the organization violates its rules for appellate review, or upon a showing that it would be futile to invoke them. "A violation of other laws and wrongs done within the organization are intended to be conciliated and corrected by the appellate machinery provided therein, if properly invoked by an aggrieved party and applied by the organization. If recourse to such appellate machinery is not sought an aggrieved party foregoes his right to a judicial review regardless of the breach of its own rules by the organization in causing the grievance in the first instance. If the organization fails to apply its appellate machinery after it is properly invoked and in effect prevents an appeal from being taken, the aggrieved party, under the Schou case, need not pursue such an appeal further." (45 C.2d 849.)

SUPPLEMENT: [This section is current through the latest supplement]



145 of 192 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

VIII. EXHAUSTION OF OTHER REMEDIES

B. Private or Contract Remedy.

2. Internal Remedy of Unincorporated Association.

b. Exceptions.

2. No Effective Remedy.

3 *Witkin Cal. Proc. Actions* § 323

[§ 323] No Effective Remedy.

Where the association rules furnish no effective remedy, insistence on the exhaustion requirement would serve no justifiable purpose, and compliance may be excused. In *De Monbrun v. Sheet Metal Workers Int. Assn.* (1956) 140 C.A.2d 546, 295 P.2d 881, defendant, an international union president, took over the affairs of a local union. A complaint filed by members of the local alleged mismanagement and diversion of its funds. *Held*, the requirement of exhaustion of internal remedy is less stringently applied where mishandling of finances is charged, and here an appeal from each separate act of misappropriation would not be a real remedy. "It cannot fairly be said that an internal appeal or series of appeals from fiscal mismanagement of the daily affairs of the local could be anything other than a futile pursuit of a putative remedy." (140 C.A.2d 563.) (See 64 *Harv. L. Rev.* 1086; 76 *Harv. L. Rev.* 1072; 4 *Stanf. L. Rev.* 202; 87 *A.L.R.2d* 1099, 1122 [exhaustion of remedies within labor union as condition of resort to civil courts by expelled or suspended member].)

In *Petermann v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Local 396* (1959) 174 C.A.2d 184, 344 P.2d 25, the complaint of plaintiff business agent alleged that he was wrongfully discharged from his union and was given an "Honorable Withdrawal Card." *Held*: (a) as to discharge from his position, exhaustion of internal remedies was not required because the union constitution provided no procedure to review the discharge of an employee, as distinguished from an officer (174 C.A.2d 190); (b) as to the exclusion from the union, he had a right of appeal and an opportunity to seek readmission, and these remedies should have been pursued before seeking relief in the courts (174 C.A.2d 191).

Many other cases illustrate this exception. (See *Clayton v. International Union, United Auto., Aerospace & Agricultural Implement Workers of America* (1981) 451 U.S. 679, 101 S.Ct. 2088, 2097, 68 L.Ed.2d 538, 546 [aggrieved employee could not obtain either substantive relief or reactivation of grievance by internal union procedures]; *Westlake Community Hosp. v. Superior Court* (1976) 17 C.3d 465, 478, 131 C.R. 90, 551 P.2d 410, *supra*, §321; *Anton v. San Antonio Community Hosp.* (1977) 19 C.3d 802, 828, 140 C.R. 442, 567 P.2d 1162, 8 *Cal. Proc.* (5th), *Extraordinary Writs*, §§265, 295 [no effective means to challenge procedural fairness of bylaw]; *Tiernan v. Trustees of Calif. State University & Colleges* (1982) 33 C.3d 211, 218, 188 C.R. 115, 655 P.2d 317; *In re Marriage of*

Campa (1979) 89 C.A.3d 113, 119, 152 C.R. 362, citing the text [decision certain to be adverse by reason of prior position of association trustees]; *Haller v. Burbank Community Hosp. Foundation* (1983) 149 C.A.3d 650, 656, 657, 197 C.R. 45; *Pasillas v. Agricultural Lab. Rel. Bd.* (1984) 156 C.A.3d 312, 357, 202 C.R. 739; *Sahlolbei v. Providence Healthcare* (2003) 112 C.A.4th 1137, 1152, 5 C.R.3d 598 [physician whose staff privileges were not renewed was not required to pursue hospital's internal remedies before seeking injunctive relief, where internal remedies did not comply with B. & P.C. 809.1 et seq. (requiring hearing before staff privileges may be terminated)]; *Payne v. Anaheim Memorial Med. Center* (2005) 130 C.A.4th 729, 744, 30 C.R.3d 230, 8 Summary (10th), *Constitutional Law*, Supp., §899 [exhaustion doctrine did not preclude physician from suing hospital for violation of Unruh Act and infliction of emotional distress, where hospital afforded no quasi-judicial internal process by which he could contest hospital's rejection of his complaint of racism and hospital's subsequent decision to blame him for surgical complication he believed was result of that racism].)

SUPPLEMENT: [This section is current through the latest supplement]



146 of 192 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

VIII. EXHAUSTION OF OTHER REMEDIES

B. Private or Contract Remedy.

2. Internal Remedy of Unincorporated Association.

b. Exceptions.

3. Refusal To Allow Inspection of Records.

3 Witkin Cal. Proc. Actions § 324

[§ 324] Refusal To Allow Inspection of Records.

Another exception is recognized where a union member is denied the right to inspect the union's financial records. "The inspection of records is merely a preliminary step, and if the manner, time and place are reasonable, the examination cannot harm any proper union activity. Only after examination of the records can it be determined whether or not conditions exist which require correction. To deny a member access to the records and require him to exhaust all internal remedies in the preliminary matter of inspection would unduly hamper the member's right and possibly defeat the purpose of the investigation. On the other hand, it is to the best interests of the union that any misuse of its funds be immediately revealed, and it would serve no useful purpose to require that the examination of the books be delayed until the member has followed the procedure required by the union in ordinary matters." (*Mooney v. Bartenders Union Local No. 284* (1957) 48 C.2d 841, 844, 313 P.2d 857.) (See 9 *Hastings L. J.* 96.)

SUPPLEMENT: [This section is current through the latest supplement]



147 of 192 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

VIII. EXHAUSTION OF OTHER REMEDIES

C. Administrative Remedy.

1. Exhaustion Requirement.

a. In General.

3 *Witkin Cal. Proc. Actions* § 325

[§ 325] In General.

(1) *Requirement Is Jurisdictional.* The requirement of the exhaustion of an administrative remedy is more fundamental than that discussed in the preceding sections. The administrative tribunal is created by law to adjudicate the issue sought to be presented to the court. The claim or "cause of action" is within the special jurisdiction of the administrative tribunal, and the courts may act only to review the final administrative determination. If a court allowed an action to be maintained prior to a final administrative determination, it would be interfering with the subject matter jurisdiction of another tribunal. Accordingly, the exhaustion of an administrative remedy has been held jurisdictional in California. (See 2 *Cal. Proc.* (5th), *Jurisdiction*, §92; but see *Green v. Oceanside* (1987) 194 *C.A.3d* 212, 222, 239 *C.R.* 470, 2 *Cal. Proc.* (5th), *Jurisdiction*, §93 [doctrine does not implicate subject matter jurisdiction, but rather is procedural prerequisite, and thus may be waived].) (On administrative proceedings generally, see 9 *Cal. Proc.* (5th), *Administrative Proceedings*.)

(2) *Federal Practice.* Federal courts also apply the doctrine. (See *McCarthy v. Madigan* (1992) 503 *U.S.* 140, 112 *S.Ct.* 1081, 10888, 117 *L.Ed.2d* 291, 302; 24 *Southwestern U. L. Rev.* 213, 248 [arguing for requirement of exhaustion of remedies before FTC prior to filing federal suit for false advertising]; 169 *A.L.R. Fed* 439 [exhaustion as prerequisite to action under Americans with Disabilities Act]; 2 *Cal. Proc.* (5th), *Jurisdiction*, §94.)

(3) *Commentary and Practice Works.* Commentary on the subject has been extensive. (See e.g., C.E.B., *Administrative Mandamus* 2d, §2:25 et seq.; Rutter Group, *Civil Proc. Before Trial* §1:906.1 et seq.; 29 *Cal. L. Rev.* 515; 68 *Harv. L. Rev.* 170; 16 *Hastings L. J.* 590; 19 *So. Cal. L. Rev.* 415; 2 *Am.Jur.2d* (2004 ed.), *Administrative Law* §474 et seq.)

West's Key Number Digest, Administrative Law and Procedure 229

SUPPLEMENT: [This section is current through the latest supplement]



148 of 192 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

VIII. EXHAUSTION OF OTHER REMEDIES

C. Administrative Remedy.

1. Exhaustion Requirement.

b. Nature and Scope of Requirement.

3 *Witkin Cal. Proc. Actions* § 326

[§ 326] Nature and Scope of Requirement.

(1) "*Quasi-Legislative*" and "*Quasi-Administrative*" Remedies. In *Redevelopment Agency of Riverside v. Superior Court* (1991) 228 C.A.3d 1487, 279 C.R. 558, the court declared that the question whether the court's adoption of redevelopment plans was "quasi-legislative" or "quasi-administrative" was not material to the issue of exhaustion. (228 C.A.3d 1493.) "Whatever one wants to call an adoption of a redevelopment plan, the critical question is whether there exists an administrative procedure to challenge such an adoption. The exhaustion doctrine speaks to whether or not an administrative *remedy* for questionable governmental action exists, not to the character of the underlying governmental action itself." (228 C.A.3d 1492.) "The exhaustion doctrine is a judicially created doctrine (notwithstanding the fact that it has now been codified in various statutes) that assures that certain prerequisites are met before an action is brought--irrespective of the type of action that is brought." (228 C.A.3d 1493.)

(2) *Remedy Created by Rule and Remedy Created by Statute*. The doctrine applies where the remedy is created by a rule of an administrative agency that has the force and effect of a statute. (*Lopez v. Civil Service Com.* (1991) 232 C.A.3d 307, 311, 314, 283 C.R. 447, citing the text.)

(3) *Nonstatutory Action*. If the action is brought on nonstatutory grounds, the exhaustion doctrine does not apply. (*Rojo v. Kliger* (1990) 52 C.3d 65, 88, 276 C.R. 130, 801 P.2d 373, 8 *Summary* (10th), *Constitutional Law*, §952 [employee's common law action alleging employment termination in violation of public policy]; *Walrath v. Sprinkel* (2002) 99 C.A.4th 1237, 1242, 121 C.R.2d 806 [same]; *Lance Camper Mfg. Corp. v. Republic Indem. Co. of America* (1996) 44 C.A.4th 194, 198, 51 C.R.2d 622 [employer was not required to exhaust administrative remedies with Insurance Commissioner before suing its workers' compensation insurer for breach of contract and bad faith].)

(4) *Purely Legal Questions*. The exhaustion doctrine applies to purely legal issues that can be decided on undisputed facts. Both factual and legal conclusions of an agency are binding in later litigation if they are not challenged in the administrative proceeding. (*Fair Political Practices Com. v. Californians Against Corruption* (2003) 109 C.A.4th 269, 282, 134 C.R.2d 659 [refusing to consider constitutionality of fine imposed by Fair Political Practices Commission for failure to raise issue in administrative proceeding].)

SUPPLEMENT: [This section is current through the latest supplement]



149 of 192 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

VIII. EXHAUSTION OF OTHER REMEDIES

C. Administrative Remedy.

1. Exhaustion Requirement.

c. Duplicative Remedy Need Not Be Exhausted.

3 *Witkin Cal. Proc. Actions* § 327

[§ 327] Duplicative Remedy Need Not Be Exhausted.

Where an appropriate administrative remedy is exhausted, an additional duplicative remedy need not be. (*Los Angeles v. Superior Court (Burns)* (1973) 8 C.3d 723, 731, 106 C.R. 15, 505 P.2d 207 [charter provisions dealing with discharge of police officers]; *Soldinger v. Northwest Airlines* (1996) 51 C.A.4th 345, 380, 58 C.R.2d 747 [plaintiff exhausted administrative remedies as to allegations in amended civil complaint, where they were reasonably related to those in her administrative accusation]; *Evans v. San Jose* (2005) 128 C.A.4th 1123, 1137, 27 C.R.3d 675 [individual challenging redevelopment plan at administrative hearing need not personally raise each issue at hearing, but may rely on issues raised or objections made by others, even though they do not later join in subsequent lawsuit, so long as agency had opportunity to respond].)

In *Leff v. Monterey Park* (1990) 218 C.A.3d 674, 267 C.R. 343, petitioner and other city residents filed a petition for ordinary mandamus, administrative mandamus, and declaratory relief against the city and its planning commission, challenging variances and conditional use permits granted for the operation of a home for the aged in a residential neighborhood. The trial judge sustained a demurrer directed solely at petitioner, on the ground that he had failed to exhaust his administrative remedies before commencing the action. *Held*, judgment reversed.

(a) *Friends of Mammoth v. Board of Supervisors* (1972) 8 C.3d 247, 104 C.R. 761, 502 P.2d 1049, held that where two unnamed plaintiffs in a class action had previously sought administrative relief, they had expressed the position of the representative plaintiff in the class action; and the policies of the exhaustion doctrine were fulfilled. The administrative tribunal had its opportunity to act and to render litigation unnecessary, if it had chosen to do so. "Nothing more could effectuate the policy of the exhaustion doctrine. To require [the named plaintiffs] to have personally appeared, in addition to the others, ... would serve no additional useful purpose." (218 C.A.3d 681, 682.)

(b) Pursuant to *Mammoth*, petitioner stated facts that satisfied the intent of the exhaustion doctrine by alleging that his copetitioners repeatedly appeared before the administrative bodies below and asserted the objections that are the basis of his action. (218 C.A.3d 681.)

(c) Respondent contended that the rationale of *Mammoth* was inapplicable to the present case because petitioner

failed to commence his litigation as a class action. "We think that is a distinction without a difference." Had petitioner brought a class action, copetitioners, as city residents and property owners, would have fallen within the represented group because they shared with petitioner a "community of interest" in challenging the decisions of the municipality's agencies. (218 C.A.3d 682.)

SUPPLEMENT: [This section is current through the latest supplement]

See *Tarkington v. California Unemp. Ins. App. Bd.* (2009) 172 C.A.4th 1494, 1508, 92 C.R.3d 131 [following rule of *Friends of Mammoth v. Board of Supervisors* (1972) 8 C.3d 247, 104 C.R. 761, 502 P.2d 1049, text, p. 422].



150 of 192 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

VIII. EXHAUSTION OF OTHER REMEDIES

C. Administrative Remedy.

1. Exhaustion Requirement.

d. Administrative Enforcement of Appellate Ruling.

3 *Witkin Cal. Proc. Actions* § 328

[§ 328] Administrative Enforcement of Appellate Ruling.

In *Sacramento County Deputy Sheriffs' Assn. v. Sacramento* (1990) 220 C.A.3d 280, 269 C.R. 6, plaintiff association brought a declaratory relief action against defendant county, seeking a determination that its members were entitled to rain gear at the county's expense pursuant to statute (*Lab.C. 6401*). Defendant demurred on the ground that plaintiff should have exhausted available administrative remedies under Cal-OSHA. The trial judge overruled the demurrer and gave judgment for plaintiff. *Held*, reversed.

(a) Whether jurisdictional or procedural, the doctrine of exhaustion, when timely raised, is a prerequisite to judicial relief. (220 C.A.3d 286; see 2 *Cal. Proc.* (5th), *Jurisdiction*, §92.)

(b) The trial judge reasoned that the issue of the right to rain gear under *Lab.C. 6401* was one of law, and had already been resolved in favor of public employees in an appellate decision before the effective date of Cal-OSHA. However, even if that decision was entirely dispositive of the issue, "this does not make the Division incompetent to enforce the holding administratively such that the exhaustion requirement should be ignored." (220 C.A.3d 287.) It is better that the ministerial act of carrying out the mandate of the appellate decision be resolved at the administrative level than by litigation; and the exception urged "could quickly swallow the rule of exhaustion, given the frequency with which administrative agencies merely apply principles of law laid down by the courts." (220 C.A.3d 287.)

SUPPLEMENT: [This section is current through the latest supplement]



151 of 192 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

VIII. EXHAUSTION OF OTHER REMEDIES

C. Administrative Remedy.

1. Exhaustion Requirement.

e. Application for Rehearing by Administrative Body.

3 *Witkin Cal. Proc. Actions* § 329

[§ 329] Application for Rehearing by Administrative Body.

In *Alexander v. State Personnel Bd.* (1943) 22 C.2d 198, 137 P.2d 433, a split court took the extreme position that the exhaustion doctrine included a requirement of application to the administrative body for a rehearing of its final determination. (See *Child v. State Personnel Bd.* (1950) 97 C.A.2d 467, 469, 218 P.2d 52.) This view was later repudiated by statute, both for the Personnel Board (*Govt.C. 19588*) and for agencies under the Administrative Procedure Act (*Govt.C. 11523*).

In *Sierra Club v. San Joaquin Local Agency Formation Com.* (1999) 21 C.4th 489, 87 C.R.2d 702, 981 P.2d 543, the California Supreme Court overruled *Alexander*.

(a) "The *Alexander* rule has received little attention since its promulgation, and several legal scholars and at least one Court of Appeal have expressed the belief that the rule has been abandoned or legislatively abrogated. That conclusion was premature; the rule remains controlling law. However, as it serves little practical purpose and is inconsistent with procedure in parallel contexts, we hereby abandon it." (21 C.4th 493.) "We simply see no necessity that parties file pro forma requests for reconsideration raising issues already fully argued before the agency, and finally decided in the administrative decision, solely to satisfy the procedural requirement imposed in *Alexander*." (21 C.4th 494.)

(b) "We emphasize this conclusion does not mean the failure to request reconsideration or rehearing may never serve as a bar to judicial review. Such a petition remains necessary, for example, to introduce evidence or legal arguments before the administrative body that were not brought to its attention as part of the original decisionmaking process. ... Our reasoning here is not addressed to new evidence, changed circumstances, fresh legal arguments, filings by newcomers to the proceedings and the like. Likewise, a rehearing petition is necessary to call to the agency's attention errors or omissions of fact or law in the administrative decision itself that were not previously addressed in the briefing, in order to give the agency the opportunity to correct its own mistakes before those errors or omissions are presented to a court. ... Our decision is limited to the narrow situation where one would be required, after a final decision by an agency, to raise for a second time the same evidence and legal arguments one has previously raised solely to exhaust administrative remedies under *Alexander*." (21 C.4th 510.)

SUPPLEMENT: [This section is current through the latest supplement]



152 of 192 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

VIII. EXHAUSTION OF OTHER REMEDIES

C. Administrative Remedy.

1. Exhaustion Requirement.

f. Primary Jurisdiction Doctrine Compared.

3 *Witkin Cal. Proc. Actions* § 330

[§ 330] Primary Jurisdiction Doctrine Compared.

"The judicially created doctrine of 'primary jurisdiction' (also referred to as the doctrine of 'prior resort' or 'preliminary jurisdiction')" was mainly developed in the federal courts. (*Farmers Ins. Exchange v. Superior Court* (1992) 2 *C.4th* 377, 386, 6 *C.R.2d* 487, 826 *P.2d* 730; for comprehensive coverage of doctrine, see 9 *Cal. Proc.* (5th), *Administrative Proceedings*, §126 et seq.) The court in *Farmers* discussed the similarities and differences in the primary jurisdiction and exhaustion of remedies doctrines as follows:

(a) "Both are essentially doctrines of comity between courts and agencies. They are two sides of the timing coin: Each determines whether an action may be brought in a court or whether an agency proceeding, or further agency proceeding, is necessary." (2 *C.4th* 390.) Exhaustion applies where a claim is cognizable in the first instance by an administrative agency alone; judicial interference is withheld until the administrative process has run its course. Primary jurisdiction applies where a claim is originally cognizable in the courts, and comes into play whenever the enforcement of the claim requires the resolution of issues that have been placed within the special competence of an administrative body; in that case the judicial process is suspended pending referral of those issues to the administrative body for its views. (2 *C.4th* 390.)

(b) "The policy reasons behind the two doctrines are similar and overlapping. The exhaustion doctrine is principally grounded on concerns favoring administrative autonomy (i.e., courts should not interfere with an agency determination until the agency has reached a final decision) and judicial efficiency (i.e., overworked courts should decline to intervene in an administrative dispute unless absolutely necessary)." (2 *C.4th* 391.)

(c) "No rigid formula exists for applying the primary jurisdiction doctrine. ... Instead, resolution generally hinges on a court's determination of the extent to which the policies noted above are implicated in a given case. ... This discretionary approach leaves courts with considerable flexibility to avoid application of the doctrine in appropriate situations, as required by the interests of justice." (2 *C.4th* 391.)

A strong dissenting opinion asserts that the primary jurisdiction doctrine has never before been recognized in this state, and argues that even if it should be necessary to judicially legislate the doctrine, the facts of the present case do

not justify the application. (2 *C.4th* 402.)

SUPPLEMENT: [This section is current through the latest supplement]



153 of 192 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

VIII. EXHAUSTION OF OTHER REMEDIES

C. Administrative Remedy.

2. Illustrations of Doctrine.

a. In General.

3 *Witkin Cal. Proc. Actions* § 331

[§ 331] In General.

The doctrine has been successfully invoked as a bar to legal proceedings in a wide variety of situations:

(1) *Action Involving Agricultural Rule or Regulation.* (See *United States v. Superior Court* (1941) 19 C.2d 189, 194, 120 P.2d 26 [failure of shippers and handlers of oranges to administratively challenge handling order]; *Brock v. Superior Court* (1952) 109 C.A.2d 594, 609, 241 P.2d 283 [failure of dealers and growers of lima beans to administratively challenge marketing order]; *McKee v. Bell-Carter Olive Co.* (1986) 186 C.A.3d 1230, 1234, 231 C.R. 304 [failure of olive producer, who claimed that processor failed to compensate him in accordance with their contract, to pursue remedies with Bureau of Marketing Enforcement]; *Wallich's Ranch Co. v. Kern County Citrus Pest Control Dist.* (2001) 87 C.A.4th 878, 883, 104 C.R.2d 875 [failure of grower contesting imposition of citrus pest control assessments to challenge budget before county's citrus pest control district].)

(2) *Action Challenging Zoning Restriction.* (See *Metcalf v. Los Angeles* (1944) 24 C.2d 267, 269, 148 P.2d 645 [failure to seek variance]; *Mountain View Chamber of Commerce v. Mountain View* (1978) 77 C.A.3d 82, 88, 143 C.R. 441 [same]; *Pan Pac. Properties v. Santa Cruz* (1978) 81 C.A.3d 244, 249, 146 C.R. 428 [same]; *Redevelopment Agency of Riverside v. Superior Court* (1991) 228 C.A.3d 1487, 1493, 279 C.R. 558, *supra*, §326 [failure of challengers to county's adoption of redevelopment plans to pursue administrative remedies under Community Redevelopment Law].)

(3) *Action Involving Bank or Other Financial Institution.* (See *Woodard v. Broadway Fed. Savings & Loan Assn. of Los Angeles* (1952) 111 C.A.2d 218, 220, 244 P.2d 467 [failure of members of savings and loan association to seek administrative review of validity of election of association directors]; *Federal Savings & Loan Ins. Corp. v. Superior Court* (1986) 180 C.A.3d 336, 344, 225 C.R. 422 [federal law, establishing administrative process for resolving claims when savings and loan association is placed in receivership, required dismissal of previously filed state action against savings and loan]; *2974 Properties v. Resolution Trust Corp.* (1994) 23 C.A.4th 871, 876, 28 C.R.2d 667 [same, but applying similar successor federal law to federally chartered bank].)

(4) *Action Involving Insurance Rule or Regulation.* (See *United Ins. Co. of Chicago, Illinois v. Maloney* (1954) 127

C.A.2d 155, 158, 273 P.2d 579 [failure of insurer to make constitutional challenge at administrative hearing to accusation that insurer had misrepresented disability policies]; *Los Angeles v. Farmers Ins. Exchange* (1982) 132 C.A.3d 77, 83, 182 C.R. 879 [failure of objectors to insurers' use of certain geographic areas for automobile insurance rating to exhaust remedies before Insurance Commissioner]; *Karlin v. Zalta* (1984) 154 C.A.3d 953, 979, 201 C.R. 379 [failure of consumer, alleging conspiracy by insurers to fix medical malpractice premium rates at excessive levels, to exhaust administrative remedies under Insurance Code]; *Barnes v. State Farm Mut. Auto. Ins. Co.* (1993) 16 C.A.4th 365, 380, 20 C.R.2d 87 [failure of policyholder, seeking to compel insurer to distribute "excess" surplus funds to policyholders, to exhaust administrative remedies in California and state in which insurer was incorporated]; *P.W. Stephens v. State Comp. Ins. Fund* (1994) 21 C.A.4th 1833, 1839, 27 C.R.2d 107 [insured's failure to exhaust administrative remedies concerning premium surcharges imposed by State Compensation Insurance Fund].)

(5) *Action by Public Employee Challenging Discipline or Conditions of Employment.* (See *Campbell v. Regents of Univ. of Calif.* (2005) 35 C.4th 311, 317, 25 C.R.3d 320, 106 P.3d 976, *infra*, §337 [failure of dismissed state university employee to exhaust university's internal grievance procedures before suing under *Govt.C. 12653(c)* and *Lab.C. 1102.5* ("whistleblower" statutes; see 3 *Summary* (10th), *Agency and Employment*, §§284, 288, 349)]; *Blake v. Public Util. Com. of San Francisco* (1953) 120 C.A.2d 671, 673, 261 P.2d 773 [failure of discharged employee to pursue administrative remedies]; *Humbert v. Castro Valley County Fire Protection Dist.* (1963) 214 C.A.2d 1, 6, 29 C.R. 158 [same]; *Edgren v. Regents of Univ. of Calif.* (1984) 158 C.A.3d 515, 520, 205 C.R. 6 [same]; *Fresno v. Superior Court* (1987) 188 C.A.3d 1484, 1490, 234 C.R. 136 [same]; *Baiza v. Southgate Recreation & Park Dist.* (1976) 59 C.A.3d 669, 674, 130 C.R. 836, citing the text [failure of employee seeking relocation benefits to file formal claim with employer]; *Los Angeles County Employees Assn. v. Los Angeles* (1976) 61 C.A.3d 926, 931, 132 C.R. 807 [failure of employees challenging downrating of job classifications to pursue remedies with Civil Service Commission]; *Tielsch v. Anaheim* (1984) 160 C.A.3d 570, 574, 206 C.R. 738 [failure of employee to use grievance procedure to challenge assignment to new position]; *Lopez v. Civil Service Com.* (1991) 232 C.A.3d 307, 311, 312, 283 C.R. 447, citing the text [failure of employee to administratively appeal civil service commission's failure to include certain salary data in determining salaries]; *Hood v. Hacienda La Puente Unified School Dist.* (1998) 65 C.A.4th 435, 439, 76 C.R.2d 448 [failure of dismissed state employee to pursue administrative remedies under *Govt.C. 8547 et seq.*, protecting whistleblowers who disclose improper governmental activities (see 3 *Summary* (10th), *Agency and Employment*, §285)]; *Palmer v. Regents of Univ. of Calif.* (2003) 107 C.A.4th 899, 906, 132 C.R.2d 567 [same].)

(6) *Action Under Pollution Laws.* (See *People v. New Penn Mines* (1963) 212 C.A.2d 667, 675, 28 C.R. 337 [failure of Attorney General to comply with procedures of Water Pollution Control Board before seeking to abate drainage of industrial waste into river]; *Hampson v. Superior Court* (1977) 67 C.A.3d 472, 484, 136 C.R. 722 [developer's failure to administratively appeal water quality control board's denial of request for exemption from waste discharge restriction]; *Alta Loma School Dist. v. San Bernardino County Com. on School Dist. Reorganization* (1981) 124 C.A.3d 542, 554, 177 C.R. 506 [failure of school districts to pursue remedies under California Environmental Quality Act before challenging county reorganization plan].) (On application of doctrine to proceedings under California Environmental Quality Act (*Pub.Res.C. 21000 et seq.*), see 12 *Summary* (10th), *Real Property*, §855.)

(7) *Action Involving License or Permit.* (See *Top Hat Liquors v. Department of Alcoholic Beverage Control* (1974) 13 C.3d 107, 110, 118 C.R. 10, 529 P.2d 42 [failure of liquor licensee to administratively challenge imposition of cumulative penalties in single accusation]; *Bleeck v. State Bd. of Optometry* (1971) 18 C.A.3d 415, 431, 95 C.R. 860, quoting the text [failure of optometrist, who sought to transfer licenses to branch offices, to pursue remedies with State Board of Optometry]; *Subriar v. Bakersfield* (1976) 59 C.A.3d 175, 190, 194, 130 C.R. 853 [failure of owner of ambulance business to seek certificate of convenience and necessity from city before challenging certificate requirement]; *Board of Police Commrs. v. Superior Court* (1985) 168 C.A.3d 420, 431, 214 C.R. 493 [failure of possessor of dance hall and cafe entertainment permits to administratively challenge revocation]; *Marquez v. Gourley* (2002) 102 C.A.4th 710, 713, 125 C.R.2d 784, 3 *Cal. Crim. Law* (3d), *Punishment, Supp.*, §238 [failure of driver to seek administrative hearing under *Veh.C. 13558* before judicially challenging suspension of license for operating motor vehicle with blood-alcohol level of 0.08% or more; distinguishing *Sierra Club v. San Joaquin Local Agency Formation*

Com. (1999) 21 C.4th 489, 87 C.R.2d 702, 981 P.2d 543, *supra*, §329]; *Richards v. Department of Alcoholic Beverage Control* (2006) 139 C.A.4th 304, 315, 42 C.R.3d 782 [tavern buyer's failure to apply for transfer of new alcoholic beverage license precluded his action against licensing authority challenging previous tavern owner's surrender of license to authority].)

(8) *Action Under Fair Employment and Housing Act.* (See *Bennett v. Borden* (1976) 56 C.A.3d 706, 709, 128 C.R. 627 [failure of discharged employee to seek administrative accusation against employer]; *Myers v. Mobil Oil Corp.* (1985) 172 C.A.3d 1059, 1063, 218 C.R. 630 [same]; *Okoli v. Lockheed Technical Operations Co.* (1995) 36 C.A.4th 1607, 1612, 43 C.R.2d 57 [same; failure to amend accusation to include employer's subsequent retaliatory actions]; *Robinson v. Department of Fair Emp. & Housing* (1987) 192 C.A.3d 1414, 1416, 239 C.R. 908 [failure of employer seeking withdrawal of administrative accusation to pursue remedies with Fair Employment and Housing Commission].)

(9) *Action by Prisoner Challenging Prison Regulation.* (See *In re Serna* (1978) 76 C.A.3d 1010, 1014, 143 C.R. 350 [prisoners' failure to pursue prison procedures for challenging prohibition against depositing funds in outside bank account before filing habeas corpus petition]; *Wright v. California* (2004) 122 C.A.4th 659, 671, 19 C.R.3d 92, citing the text [prisoner's failure to exhaust prison procedures before filing tort action, even though prison procedures did not provide for money damages]; on exhaustion requirement under federal Prison Litigation Reform Act of 1996 (PLRA; 42 U.S.C., §1997e(a)), see *infra*, §346.)

(10) *Action Involving Reimbursement of State-Mandated Cost.* (See *Contra Costa v. California* (1986) 177 C.A.3d 62, 77, 222 C.R. 750, quoting the text [failure of counties to pursue administrative procedure for reimbursement for state-mandated costs before seeking to judicially invalidate bills containing mandates]; *Los Angeles v. McMahon* (1995) 39 C.A.4th 1432, 1444, 46 C.R.2d 550 [failure of county, challenging validity of state regulation limiting reimbursement for emergency shelter costs, to seek administrative determination of number of personnel involved, costs of services, and nature of tasks performed during relevant audit periods]; *Tri-County Special Education Local Plan Area v. Tuolumne* (2004) 123 C.A.4th 563, 574, 19 C.R.3d 884 [failure of local education agencies to exhaust administrative remedies before suing to compel county to continue providing mental health services and to repay agencies for funds spent to provide those services after county terminated them].)

(11) *Other Actions.* (See *Abelleira v. District Court of App., Third Dist.* (1941) 17 C.2d 280, 291, 109 P.2d 942 [employer's failure to administratively appeal award of unemployment compensation benefits before seeking mandamus relief]; *Flores v. Los Angeles Turf Club* (1961) 55 C.2d 736, 747, 13 C.R. 201, 361 P.2d 921 [failure of patron excluded from horse racing track to pursue remedies with Horse Racing Board before suing racetrack]; *Morton v. Hollywood Park* (1977) 73 C.A.3d 248, 254, 139 C.R. 584, *infra*, §337 [same]; *Bollengier v. Doctors Med. Center* (1990) 222 C.A.3d 1115, 1123, 272 C.R. 273 [failure of physician to exhaust remedies with hospital medical review committee before judicially challenging suspension of staff privileges]; *NBS Imaging Systems v. State Bd. of Control* (1997) 60 C.A.4th 328, 336, 70 C.R.2d 237 [prejudicial error to grant relief to unsuccessful bidder on state contract on basis of legal theories that were not presented in administrative proceedings]; *Eight Unnamed Physicians v. Medical Executive Committee of Med. Staff of Washington Township Hosp.* (2007) 150 C.A.4th 503, 511, 59 C.R.3d 100 [following *Bollengier*; failure of physicians to exhaust remedies with hospital medical review committee before judicially challenging committee's refusal to provide consolidated disciplinary hearing rather than separate hearings]; *Conservatorship of Whitley* (2007) 155 C.A.4th 1447, 1464, 66 C.R.3d 808 [Lanterman Developmental Disabilities Services Act (see *supra*, §92 et seq.) provided exclusive means for conservator to challenge community placement of conservatee; thus, because of exhaustion doctrine, trial judge lacked jurisdiction to review propriety of that placement]; *infra*, §332 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]

(6) *Action Under Pollution Laws.* See *California Water Impact Network v. Newhall County Water Dist.* (2008) 161 C.A.4th 1464, 1489, 75 C.R.3d 393 [nonprofit agency was required to exhaust administrative remedies with city before challenging water supply assessment prepared by water district for city as part of city's environmental impact report (EIR) required under state pollution laws]; but see *O.W.L. Foundation v. Rohnert Park* (2008) 168 C.A.4th 568, 584, 86

C.R.3d 1 [distinguishing *California Water Impact Network*; plaintiff could appeal water supply assessment by city even though city had not made final decision on EIR; city had certified EIR while appeal was pending and EIR was being challenged on same grounds in another action].(7) *Action Involving License or Permit*. See *Thomas v. Shewry* (2009) 170 C.A.4th 1480, 1485, 89 C.R.3d 105 [provider of Medi-Cal services who failed to contest administratively his liability for benefit overpayment could not challenge denial of his application for reenrollment for not repaying overpayment].(11) *Other Actions*. See *In re Darlene T.* (2008) 163 C.A.4th 929, 938, 78 C.R.3d 119 [minors' caregiver was required to exhaust administrative remedies before suing to require county social services agency to pay retroactive AFDC benefits, where no exception to doctrine applied]; *Cloverdale v. Department of Trans.* (2008) 166 C.A.4th 488, 498, 82 C.R.3d 744, citing the text [city was required to exhaust administrative remedies with Department of Transportation before judicially challenging department's relinquishment of allegedly defective drainage channel to city, where city had adequate notice of proposed relinquishment].



154 of 192 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

VIII. EXHAUSTION OF OTHER REMEDIES

C. Administrative Remedy.

2. Illustrations of Doctrine.

b. Common Law Disputes Involving Motor Vehicle Dealerships and Franchises.

3 *Witkin Cal. Proc. Actions* § 332

[§ 332] Common Law Disputes Involving Motor Vehicle Dealerships and Franchises.

(1) *Earlier Rule Granting Administrative Agency Plenary Authority.* Early decisions held that the California New Motor Vehicle Board had plenary authority over common law claims involving motor vehicle dealerships and franchises, and thus applied the doctrine of exhaustion of administrative remedies to preclude judicial actions involving those disputes. (See, e.g., *Yamaha Motor Corp., U.S.A. v. Superior Court* (1986) 185 C.A.3d 1232, 1240, 230 C.R. 382 [failure of motorcycle dealer involved in dispute with franchisor to exhaust remedies before New Motor Vehicle Board precluded judicial action]; *Mathew Zaheri Corp. v. Mitsubishi Motor Sales* (1993) 17 C.A.4th 288, 295, 21 C.R.2d 325 [failure of franchisee dissatisfied with franchisor's chargeback of warranty claims to exhaust remedies before New Motor Vehicle Board precluded judicial action]; but see *Automotive Management Group v. New Motor Vehicle Bd.* (1993) 20 C.A.4th 1002, 1015, 24 C.R.2d 904 [automobile dealer, whose dealership termination protest to New Motor Vehicle Board was ruled untimely by administrative law judge, was not required to submit matter to board, where judge stated that "[t]here shall be no further proceedings in this cause before the Board"].)

(2) *Legislative Repudiation of Rule.* The 1997 Legislature enacted *Veh.C. 3050(e)*, providing that, notwithstanding the board's authority to consider automobile dealership and franchise matters, courts have jurisdiction over all common law and statutory claims originally cognizable by a court, and that a party may directly initiate that type of claim in a court of competent jurisdiction. (See *Miller v. Superior Court* (1996) 50 C.A.4th 1665, 1674, 58 C.R.2d 584 [doctrine does not require that all disputes between automobile manufacturers and dealers be brought before New Motor Vehicle Board; declining to follow *Yamaha*, *Mathew Zaheri*, and similar cases]; *Hardin Oldsmobile v. New Motor Vehicle Bd.* (1997) 52 C.A.4th 585, 593, 60 C.R.2d 583 [doctrine did not permit New Motor Vehicle Board to decide automobile franchise dispute, because board had no jurisdiction over claims]; *Tovas v. American Honda Motor Co.* (1997) 57 C.A.4th 506, 511, 67 C.R.2d 145 [following *Miller* and *Hardin*]; *Kemp v. Nissan Motor Corp.* (1997) 57 C.A.4th 1527, 1529, 67 C.R.2d 794 [same]; *South Bay Creditors Trust v. General Motors Acceptance Corp.* (1999) 69 C.A.4th 1068, 1079, 82 C.R.2d 1, 9 *Cal. Proc.* (5th), *Administrative Proceedings*, §127 ["1997 amendment ... reflects the Legislature's disapproval of the *Yamaha* cases and confirms that *Miller* and *Hardin* correctly rejected the proposition that the Board has plenary authority over common law claims by motor vehicle dealers against manufacturers"]; *DaimlerChrysler Motors Co. v. Lew Williams* (2006) 142 C.A.4th 344, 352, 48 C.R.3d 233 [following *Hardin*].) (On motor vehicle

franchises generally, see 3 *Summary* (10th), *Agency and Employment*, §12.)

SUPPLEMENT: [This section is current through the latest supplement]



155 of 192 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

VIII. EXHAUSTION OF OTHER REMEDIES

C. Administrative Remedy.

2. Illustrations of Doctrine.

c. Tax Proceedings.

3 *Witkin Cal. Proc. Actions* § 333

[§ 333] Tax Proceedings.

(1) *Application of Doctrine.* The doctrine of exhaustion of administrative remedies has been frequently applied to tax proceedings. (See *Stenocord Corp. v. San Francisco* (1970) 2 C.3d 984, 987, 88 C.R. 166, 471 P.2d 966 [assessor's valuation; taxpayer must seek relief by application to county Board of Equalization]; *People v. Sonleitner* (1960) 185 C.A.2d 350, 361, 8 C.R. 528 [failure to file effective request for redetermination of motor vehicle fuel license taxes]; *Horack v. Franchise Tax Bd.* (1971) 18 C.A.3d 363, 368, 95 C.R. 717 [jeopardy income tax assessment; relief should be sought by petition for reassessment before Franchise Tax Board and further review by State Board of Equalization]; *McHugh v. Santa Cruz* (1973) 33 C.A.3d 533, 539, 109 C.R. 149 [assessor's valuation]; *Westinghouse Elec. Corp. v. Los Angeles* (1974) 42 C.A.3d 32, 37, 116 C.R. 742 [alleged discriminatory assessment ratio]; *Mercury Cas. Co. v. State Bd. of Equalization* (1986) 179 C.A.3d 34, 40, 41, 224 C.R. 781 [check marked "paid under protest subject to claim for refund" was not claim for refund of taxes as required by Rev.C. 12979, and pendency of other action challenging earlier tax assessments did not excuse filing of claim as idle act]; *Park 'N Fly of San Francisco v. South San Francisco* (1987) 188 C.A.3d 1201, 1207, 234 C.R. 23 [taxpayer failed to seek reclassification using procedure in tax ordinance]; *C.H.B. Foods v. Los Angeles* (1987) 195 C.A.3d 821, 823, 241 C.R. 18 [failure to pursue claim of discriminatory misclassification of personal property before assessment appeals board]; *American Employers Group v. Employment Dev. Dept.* (2007) 154 C.A.4th 836, 844, 65 C.R.3d 233 [plaintiff employer should have administratively challenged unemployment tax assessment, despite plaintiff's claim that it was seeking to correct deficiencies in assessment system generally; even if other employers had same complaint as plaintiff, plaintiff was seeking specific relief for itself].) (On application of doctrine to local property tax proceedings, see 9 *Summary* (10th), *Taxation*, §§286, 287.)

In *Patane v. Kiddoo* (1985) 167 C.A.3d 1207, 214 C.R. 9, plaintiff employer sought a refund of taxes paid as unemployment insurance contributions. After plaintiff's claim for refund was denied by both the Employment Development Department and an administrative law judge, he brought a court action for a refund. In order to comply with the statutory requirement of an appeal to the Unemployment Insurance Appeals Board (*Unemp.Ins.C. 1224(a)*), plaintiff amended his complaint to allege that he had filed an appeal "before" the board from the denial of his claim for a refund. Defendant argued that, instead, plaintiff had appealed to the administrative law judge, as allowed by *Unemp.Ins.C. 1222*, but that he had failed to appeal to the board from the judge's denial of his claim. *Held*, plaintiff

failed to exhaust his administrative remedies.

(a) *Was there triable issue of fact?* Instead of referring to an appeal, plaintiff's original complaint alleged that he had filed a "Petition from Denial of Claim for Refund." Attached to this complaint was a copy of the administrative law judge's decision, accompanied by a notice explaining plaintiff's right of further appeal to the board. The amended complaint, which characterized plaintiff's action as an appeal, was also accompanied by the administrative law judge's decision, but not by the notice of right of further appeal. Because it appears that the amendments were designed to conceal a fundamental weakness in plaintiff's case, rather than to correct errors resulting from mistake, inadvertence, or inadequate knowledge of the facts, the original complaint and supporting papers may be considered in determining whether there was a triable issue of fact concerning the required appeal to the board. (167 C.A.3d 1213, citing the text.) And these papers establish beyond dispute that no appeal was filed. (167 C.A.3d 1214.)

(b) *Was failure to file excused?* Plaintiff claimed that he was excused from the requirement of appeal because the board's decision was certain to be adverse (see *infra*, §340). However, even if this were true, none of the exceptions was judicially created to promote comity and relieve court congestion. On the other hand, the right to bring an action to recover a tax paid is granted by the Constitution (Cal. Const., Art. XIII, §32) and implemented by the Legislature (*Unemp.Ins.C.* 1179, 1224, 1241), which has created an administrative procedure and specifically required that it be exhausted before a court action to recover paid unemployment insurance taxes can be maintained. Hence, "[w]e are not at liberty to alter the constitutionally authorized process by engrafting onto it exceptions borrowed from the judicially fashioned doctrine of exhaustion of administrative remedies." (167 C.A.3d 1214.)

(2) *Distinction: Declaratory Relief Action Attacking Policy of Board of Equalization.* A taxpayer is not required to exhaust administrative remedies before bringing a declaratory relief action attacking a policy of the State Board of Equalization. (See *Agnew v. State Bd. of Equalization* (1999) 21 C.4th 310, 320, 87 C.R.2d 423, 981 P.2d 52, *infra*, §336.)

SUPPLEMENT: [This section is current through the latest supplement]



156 of 192 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

VIII. EXHAUSTION OF OTHER REMEDIES

C. Administrative Remedy.

2. Illustrations of Doctrine.

d. Actions Raising Constitutional Issues.

3 *Witkin Cal. Proc. Actions* § 334

[§ 334] Actions Raising Constitutional Issues.

(1) *Application of Doctrine.* The doctrine applies to actions raising constitutional issues. (See *Banville v. Los Angeles* (1960) 180 C.A.2d 563, 571, 4 C.R. 458 [attack on zoning ordinance; failure to seek exception]; *Dunham v. Westminster* (1962) 202 C.A.2d 245, 249, 20 C.R. 772 [constitutional challenge to zoning ordinance without seeking variance]; *People v. Coit Ranch* (1962) 204 C.A.2d 52, 57, 58, 21 C.R. 875 [doctrine applies even though challenge is to constitutionality and administrative remedy is stated in permissive language]; *Morton v. Superior Court* (1970) 9 C.A.3d 977, 983, 88 C.R. 533 [plaintiff police officers in labor dispute sued defendant city and its chief of police, without pursuing city manager's grievance procedure]; *Griswold v. Mt. Diablo Unified School Dist.* (1976) 63 C.A.3d 648, 652, 134 C.R. 3 [disciplined teacher's free speech claim]; *Mountain View Chamber of Commerce v. Mountain View* (1978) 77 C.A.3d 82, 96, 143 C.R. 441 [constitutional attack on zoning ordinance on grounds of free speech and inadequate standards]; *Contra Costa v. California* (1986) 177 C.A.3d 62, 74, 222 C.R. 750, citing the text [constitutional attack on 23 bills enacted by Legislature imposing state-mandated costs without subvention of funds to counties; failure to seek state reimbursement]; *C.H.B. Foods v. Los Angeles* (1987) 195 C.A.3d 821, 824, 241 C.R. 18 [challenge alleging discriminatory misclassification of personal property without appealing to assessment appeals board]; *Flying Dutchman Park v. San Francisco* (2001) 93 C.A.4th 1129, 1141, 113 C.R.2d 690 [taxpayer challenging tax must exhaust administrative remedies even where challenge is based on alleged unconstitutionality]; *Service Employees Int. Union, Local 1000 v. Department of Personnel Administration* (2006) 142 C.A.4th 866, 872, 48 C.R.3d 457 [drawing analogy to *Mountain View Chamber of Commerce*; state employees union was required to arbitrate partisan nature of materials state refused to allow to be distributed at worksite before judicially challenging refusal on constitutional grounds].)

It also applies despite the assertion of a denial of procedural due process. (*Roth v. Los Angeles* (1975) 53 C.A.3d 679, 687, 126 C.R. 163 [no showing that administrative procedures, if exhausted, would deny procedural rights]; *Edgren v. Regents of Univ. of Calif.* (1984) 158 C.A.3d 515, 522, 205 C.R. 6; *Bockover v. Perko* (1994) 28 C.A.4th 479, 485, 34 C.R.2d 423 [employee of state university laboratory, put on leave without pay for failure to obtain security clearance, was not excused on due process grounds from utilizing university's grievance procedure before filing action for back pay, even though she alleged that she was not entitled to subpoena witness or documentary evidence and that administrative decision was advisory only]; *Imagistics Int. v. Department of General Services* (2007) 150 C.A.4th 581,

591, 59 C.R.3d 18 [unsuccessful bidder on public contract was not excused from administratively protesting award of contract, because administrative protest procedure did not violate due process].)

(2) *Distinction: Action Challenging Constitutionality of Agency's Statute.* The doctrine does not, however, apply to an action challenging the constitutionality of the authorizing agency's statute. (See *California v. Superior Court (Veta Co.)* (1974) 12 C.3d 237, 251, 115 C.R. 497, 524 P.2d 1281, *infra*, §344; *Unnamed Physician v. Board of Trustees of St. Agnes Med. Center* (2001) 93 C.A.4th 607, 621, 113 C.R.2d 309, 9 Cal. Proc. (5th), *Appeal*, §966.)

SUPPLEMENT: [This section is current through the latest supplement]



157 of 192 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

VIII. EXHAUSTION OF OTHER REMEDIES

C. Administrative Remedy.

2. Illustrations of Doctrine.

e. Claim of Exemption From Coastal Zone Regulations.

3 *Witkin Cal. Proc. Actions* § 335

[§ 335] Claim of Exemption From Coastal Zone Regulations.

In *South Coast Regional Com. v. Gordon* (1977) 18 C.3d 832, 135 C.R. 781, 558 P.2d 867, G obtained a building permit from Los Angeles County to construct a home in Malibu, and commenced construction in January 1973. In May 1973, the South Coast Regional Commission filed an action against G, alleging that he was acting in the permit area of the coastal zone without a permit, and demanding an injunction and penalties (see *Pub.Res.C. 30600* et seq.). G claimed that he had a vested right to complete the structure, and the lower court ruled in his favor. *Held*, judgment reversed. Under *California v. Superior Court (Veta)* (1974) 12 C.3d 237, 115 C.R. 497, 524 P.2d 1281, *infra*, §344, G was required to present his exemption claim to the commission as a condition of raising it in the trial court.

(a) *Veta* held that the Commission acted within the scope of its powers in enacting regulations requiring a party to file a claim of exemption with information necessary to support it. (18 C.3d 834.)

(b) In *Veta* the developer sought equitable relief; here G raised the exemption claim, based on vested right, as a defense to the commission's action against him. This distinction is not significant. The exhaustion of administrative remedy doctrine applies where the matter is initially committed to the determination of the administrative body; and the situation is analogous to one in which a defendant, in an action alleging a violation of zoning laws, asserts by way of defense that he is entitled to a variance, even though he did not apply for one to the appropriate body. (18 C.3d 836.)

(c) A United States Supreme Court decision on draft evasion is distinguishable. The court declared that application of the exhaustion doctrine in criminal prosecutions can be harsh. (18 C.3d 837.) More on point is *McGee v. United States* (1971) 402 U.S. 479, 91 S.Ct. 1565, 29 L.Ed.2d 47, where failure to assert a conscientious objector claim before the local board or to take an administrative appeal barred the registrant from raising the claim as an affirmative defense in the action against him. (18 C.3d 837.) "Here, as in *McGee*, the question of entitlement to an exemption involves the marshalling of facts, and if the necessity for the commissioner's determination is not upheld it is likely that other developers will sense the advantage in bypassing commission exemption proceedings. If developers were allowed to resort to the courts in the first instance, it would not only frustrate one of the underlying purposes of the exhaustion doctrine, i.e., the need for judicial intervention might be obviated by the outcome of the administrative proceedings, but would also reward developers who made no attempt to fulfill the requirements of the act and the regulations, while

penalizing those who made a good faith effort to comply. It would obviously be discriminatory to allow [G], who did not apply either for a permit or an exemption prior to institution of the present action ... to avoid exemption proceedings before the commission, while compelling the builder in *Veta*, who had applied for but was refused a permit, to obtain a commission determination of exemption as a predicate to raising that issue in court." (18 C.3d 838.)

(d) The argument that exhaustion of the administrative remedy should be excused because the Commission had already reached a determination adverse to G is unsound. The fact that the Attorney General, as the commission's representative, had taken an adverse position, is not the equivalent of a Commission's determination by vote after a public hearing. And "the exhaustion doctrine has been applied even under circumstances in which the government has conceded in court that the defendant would have prevailed if he had exhausted his administrative remedies." (18 C.3d 838.) (See *Frisco Land & Mining Co. v. California* (1977) 74 C.A.3d 736, 754, 141 C.R. 820 [applying reasoning of *Veta* and *Gordon* to review of denial of permit and grant of permit subject to challenged conditions].)

SUPPLEMENT: [This section is current through the latest supplement]



158 of 192 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

VIII. EXHAUSTION OF OTHER REMEDIES

C. Administrative Remedy.

3. Exceptions.

a. No Effective Remedy.

1. In General.

3 *Witkin Cal. Proc. Actions* § 336

[§ 336] In General.

The exhaustion requirement is not applicable where an effective administrative remedy is wholly lacking. (See *Glendale City Employees' Assn. v. Glendale* (1975) 15 C.3d 328, 342, 124 C.R. 513, 540 P.2d 609; *Ross v. Superior Court* (1977) 19 C.3d 899, 912, 141 C.R. 133, 569 P.2d 727; *White v. California* (1987) 195 C.A.3d 452, 466, 240 C.R. 732, citing the text; *ABC Plumbing & Heating Co. v. Vernon Savings & Loan Assn.* (1989) 208 C.A.3d 1370, 1381, 257 C.R. 139; *Murrieta Valley Unified School Dist. v. Riverside* (1991) 228 C.A.3d 1212, 1227, 279 C.R. 421, citing the text; *Highland v. San Bernardino* (1992) 4 C.A.4th 1174, 1194, 6 C.R.2d 346, citing the text; *Venice Town Council v. Los Angeles* (1996) 47 C.A.4th 1547, 1568, 55 C.R.2d 465; 29 Cal. L. Rev. 518; 60 Cal. L. Rev. 1016.)

In *Ramos v. Madera* (1971) 4 C.3d 685, 94 C.R. 421, 484 P.2d 93, plaintiffs, recipients of state aid for dependent children and the blind, brought a class action against the county, seeking declaratory relief for the class and damages for the individual plaintiffs. The complaint alleged that welfare payments were terminated for refusal to send their children to work in the fields during the grape harvest. The trial judge sustained a general demurrer solely on the ground of failure to exhaust administrative remedies. *Held*, reversed. The hearing scheme of the Welfare and Institutions Code is based on the individual treatment of claims; i.e., an individual must apply for a hearing on his application for aid. The statute does not contemplate class actions, and does not provide any remedy for a person seeking damages in tort; hence, the defense of failure to exhaust was untenable. (4 C.3d 690, 691.)

In *Agnew v. State Bd. of Equalization* (1999) 21 C.4th 310, 87 C.R.2d 423, 981 P.2d 52, 9 Summary (10th), *Taxation*, §375, plaintiff filed an action seeking a declaratory judgment ordering defendant State Board of Equalization to refrain from requiring payment of interest as a precondition to acting on an administrative tax refund request when the sales and use tax had already been paid in full, as it was in plaintiff's case. *Held*, plaintiff was not required to first exhaust his administrative remedies. Consideration of the validity of defendant's policy, a question properly raised through a declaratory relief action under *Govt.C. 11350(a)*, did not involve an issue subject to determination through the administrative refund remedy available to plaintiff. (21 C.4th 320.) Furthermore, the validity of the defendant's policy could not be raised in the taxpayer's pending actions for return of the tax, because under *Rev.C. 6933*, only grounds set forth in the administrative refund claim may be asserted in those actions. (21 C.4th 320.)

In *Hollon v. Pierce* (1967) 257 C.A.2d 468, 64 C.R. 808, plaintiff, claiming discriminatory discharge from a school district position, properly filed a complaint with the Fair Employment Practice Commission under former Lab.C. 1410 et seq., and normally would have been required to exhaust that remedy before seeking judicial relief. But the Commission, after starting an investigation, dropped it on the ground that a civil action would be filed. This made the administrative agency's jurisdiction "merely colorable," and there was no further reason to pursue the administrative remedy. "The rule of initial resort to the administrative agency demands exhaustion of the remedy, not attrition of the litigant." (257 C.A.2d 476.)

The following cases also illustrate the principle:

Rosenfield v. Malcolm (1967) 65 C.2d 559, 565, 55 C.R. 505, 421 P.2d 697 [where no specific remedy is provided, mere existence of general supervisory power in some official body is not remedy to be exhausted].

Eye Dog Foundation v. State Bd. of Guide Dogs for the Blind (1967) 67 C.2d 536, 542, 63 C.R. 21, 432 P.2d 717 [at time of plaintiff's action, there was no administrative remedy to be exhausted, because board had not instituted proceeding and plaintiff could not have done so itself].

Bernstein v. Smutz (1947) 83 C.A.2d 108, 115, 188 P.2d 48 [local agency lacked power to grant relief under applicable zoning ordinance].

Henry George School of Social Science of San Diego v. San Diego Unified School Dist. (1960) 183 C.A.2d 82, 85, 6 C.R. 661 [no specific remedy was provided by statute or rule].

Martino v. Concord Community Hosp. Dist. (1965) 233 C.A.2d 51, 56, 43 C.R. 255 [district's bylaws on procedure for hearing and determination were too vague to constitute adequate remedy].

Diaz v. Quitoriano (1969) 268 C.A.2d 807, 812, 74 C.R. 358 [mandamus proceeding in nature of class action to determine rights of members; administrative appeal could not give relief sought].

Alta-Dena Dairy v. San Diego (1969) 271 C.A.2d 66, 73, 76 C.R. 510 [no clearly defined machinery for reviewing action].

Environmental Law Fund v. Corte Madera (1975) 49 C.A.3d 105, 115, 122 C.R. 282, *infra*, §345 [state statute limited appeal of tentative approval of subdivision maps to subdividers only; thus, general right of appeal under local ordinance was inoperative].

Sunnyvale Public Safety Officers Assn. v. Sunnyvale (1976) 55 C.A.3d 732, 735, 127 C.R. 863 [administrative procedure for settlement of employee grievances did not provide hearing before city council].

Huntington Beach Police Officers' Assn. v. Huntington Beach (1976) 58 C.A.3d 492, 497, 129 C.R. 893 [grievance procedure was not applicable].

Superior Strut & Hanger Co. v. Port of Oakland (1977) 72 C.A.3d 987, 1002, 140 C.R. 515, citing the text [no procedures for taking evidence, etc.].

Associated Calif. Loggers v. Kinder (1978) 79 C.A.3d 34, 43, 44, 144 C.R. 786 [no procedure for persons affected by order to intervene in administrative process].

Rose v. Hayward (1981) 126 C.A.3d 926, 935, 179 C.R. 287, citing *Ramos* [Public Employees' Retirement System's remedies did not provide for class action relief].

Farmer v. Inglewood (1982) 134 C.A.3d 130, 137, 138, 185 C.R. 9 [because of absence of reasons in notice of employee discharge, period for requesting hearing never began to run].

Los Angeles County Employees Assn. v. Los Angeles (1985) 168 C.A.3d 683, 686, 214 C.R. 350 [action by unions to compel county to make agreed contributions to health insurance plan; because county's inaction would be immediately reflected in employees' lower paychecks, administrative procedure was too slow to be effective].

Park 'N Fly of San Francisco v. South San Francisco (1987) 188 C.A.3d 1201, 1208, 234 C.R. 23 [taxing ordinance provided no mechanism for challenging its validity or raising constitutional questions].

Action Apartment Assn. v. Santa Monica Rent Control Bd. (2001) 94 C.A.4th 587, 611, 114 C.R.2d 412 [because rent differs from security deposits, landlords were not required to pursue rent adjustment administrative remedies before suing for inverse condemnation based on defendant's requirement that they pay interest rate on security deposits in excess of what banks paid on deposits].

Lindelli v. San Anselmo (2003) 111 C.A.4th 1099, 1105, 4 C.R.3d 453 [opportunity to participate in public hearing prior to legislative action does not constitute administrative remedy that must be exhausted before challenging action].

Goehring v. Chapman University (2004) 121 C.A.4th 353, 381, 17 C.R.3d 39, citing the text [exhaustion doctrine did not apply to law students' action seeking tuition refund from law school for violating B. & P.C. 6061 (duty to disclose accreditation status), where statute and State Bar rule did not set forth administrative procedure for resolving dispute].

County Sanitation Dist. No. 2 of Los Angeles County v. Kern (2005) 127 C.A.4th 1544, 1616, 27 C.R.3d 28 [exhaustion doctrine did not apply to sanitation agencies' action challenging county's biosolids ordinance as invalid local fee for road use, because there was no administrative procedure for asserting that claim].

Unfair Fire Tax Committee v. Oakland (2006) 136 C.A.4th 1424, 1430, 39 C.R.3d 701 [ordinance allowing appeal of city's creation of fire suppression district was inadequate administrative remedy, because it lacked procedure for submission, evaluation, and resolution of appeal].

Andal v. Stockton (2006) 137 C.A.4th 86, 92, 40 C.R.3d 34, citing the text [plaintiffs could challenge constitutionality of fee for 911 communication system without first exhausting administrative remedies, where those remedies neither mentioned constitutional challenges nor referred to legal remedy other than refund, money, or damages].

Branciforte Heights, LLC v. Santa Cruz (2006) 138 C.A.4th 914, 932, 42 C.R.3d 96 [exhaustion doctrine did not apply to action to require city to grant open space credit against park fees assessed against developer; administrative remedies afforded only minor adjustments of fees, which was much less than what developer was seeking].

SUPPLEMENT: [This section is current through the latest supplement]



159 of 192 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

VIII. EXHAUSTION OF OTHER REMEDIES

C. Administrative Remedy.

3. Exceptions.

a. No Effective Remedy.

2. Distinctions.

3 *Witkin Cal. Proc. Actions* § 337

[§ 337] Distinctions.

(1) *Initial Absence of Remedy.* In *Frisco Land & Mining Co. v. California* (1977) 74 C.A.3d 736, 141 C.R. 820, a subdivider contended that he was not required to exhaust his administrative remedy before the state regulatory commission because it was not yet in existence. *Held*, the requirement applied, for it was clear from the statute that a commission would be appointed, and when it was appointed the subdivider had an opportunity for a full hearing. (74 C.A.3d 755.)

(2) *Hearing Erroneously Denied by Administrative Agency.* In *Morton v. Hollywood Park* (1977) 73 C.A.3d 248, 139 C.R. 584, plaintiff was ejected from defendant's racetrack by defendant's agents acting under the authority of state Horse Racing Law (B. & P.C. 19400 et seq.). Under the rules of the Horse Racing Board he was entitled to an administrative hearing and judicial review of the administrative determination, and he applied for a hearing. The Attorney General's office advised both parties that there were no grounds for ejection for misconduct, that the board had no jurisdiction to grant a hearing, and that consequently plaintiff had no right to a hearing. Relying on this advice, plaintiff brought this action for injunctive relief and damages. The lower court concluded that plaintiff had not exhausted his administrative remedies and dismissed the action. *Held*, affirmed in part.

(a) The arbitrary refusal of the board to grant a hearing, in reliance on the mistaken advice of the board's attorney, did not excuse the failure to exhaust the administrative remedy. Plaintiff merely invoked, but did not exhaust the remedy; exhausting it required invoking the writ procedure under C.C.P. 1085 (mandamus) to review the board's order. (73 C.A.3d 254.)

(b) The exhaustion requirement applies not only to the cause of action for injunctive relief, but also to the cause of action for damages; i.e., the rule of *Westlake Community Hosp. v. Superior Court* (1976) 17 C.3d 465, 131 C.R. 90, 551 P.2d 410, supra, §321, laid down in a case involving exhaustion of the internal remedy of an unincorporated association, is equally applicable to the failure to exhaust an administrative remedy. The result is that, in the trial of his cause of action for damages, plaintiff cannot show that defendants' ejection of him was unprivileged; he will be deemed a trespasser, and can recover only on showing violation of a legal duty to him as a trespasser. (73 C.A.3d 257.)

Accordingly the judgment of dismissal must be affirmed as to the injunction count, but reversed as to the damages count in order to permit plaintiff to litigate the issue of breach of legal duty to a trespasser. (73 C.A.3d 257.)

(3) *High Filing Fee*. In *Sea & Sage Audubon Soc. v. Planning Com.* (1983) 34 C.3d 412, 194 C.R. 357, 668 P.2d 664, the court considered and rejected the contention that failure to exhaust the administrative remedy should be excused because of a relatively high filing fee charged by the city for an administrative appeal. The court declared that, in the absence of an evidentiary record, it could not determine the reasonableness of a particular fee; and plaintiff, having failed to meet its burden of an evidentiary showing in the trial court, could not challenge reasonableness on appeal. (34 C.3d 421, 422.) Three justices dissented on this point, asserting that the appeal fee formula was arbitrary and unreasonable as a matter of law. (34 C.3d 426.)

(4) *Money Damages Not Available in Administrative Proceeding*. In *Campbell v. Regents of Univ. of Calif.* (2005) 35 C.4th 311, 25 C.R.3d 320, 106 P.3d 976, plaintiff architect brought an action against her former employer, defendant public university, alleging retaliatory termination in violation of Govt.C. 12653(c) and Lab.C. 1102.5 ("whistleblower" statutes; see 3 Summary (10th), *Agency and Employment*, §§284, 288, 349) for reporting her former supervisor's circumvention of competitive bidding laws. The trial judge dismissed the action for plaintiff's failure to first exhaust defendant's internal administrative remedies, despite plaintiff's claim that those procedures were inadequate because she was seeking money damages in addition to reinstatement and back wages. *Held*, affirmed.

(a) The internal remedies allowed defendant to provide plaintiff with "any appropriate relief" and to impose sanctions on offending employees "in accordance with existing disciplinary policies or contract provisions." (35 C.4th 323.)

(b) The policy considerations that support imposition of the exhaustion requirement apply even where no internal damage remedy is available, or where a plaintiff seeks only money damages, so that resort to the courts is inevitable. Courts have found the exhaustion requirement only inapplicable where the agency lacks authority to hear a complaint, not when the administrative procedures arguably limit the remedy the agency may award. Internal remedies still promote judicial efficiency by unearthing relevant evidence and by providing a record that a court may review. (35 C.4th 323.)

SUPPLEMENT: [This section is current through the latest supplement]



160 of 192 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

VIII. EXHAUSTION OF OTHER REMEDIES

C. Administrative Remedy.

3. Exceptions.

b. Agency Is Without Jurisdiction.

1. In General.

3 *Witkin Cal. Proc. Actions* § 338

[§ 338] In General.

An exception is necessarily recognized where the agency lacks jurisdiction of the subject matter. (See *Los Angeles v. Department of Social Welfare* (1953) 41 C.2d 455, 457, 260 P.2d 41; *Alpine v. Tuolumne* (1958) 49 C.2d 787, 798, 322 P.2d 449; *Coachella Valley Mosquito & Vector Control Dist. v. California Public Emp. Relations Bd.* (2005) 35 C.4th 1072, 1081, 29 C.R.3d 234, 112 P.3d 623 [exception applied to public employer defending unfair labor practice charge by public employee union, where agency lacked jurisdiction to decide employer's statute of limitations defense]; *Residents for Adequate Water v. Redwood Valley County Water Dist.* (1995) 34 C.A.4th 1801, 1808, 41 C.R.2d 123, 9 Cal. Proc. (5th), Appeal, §201, citing the text; *People v. Triplett* (1996) 48 C.A.4th 233, 240, 55 C.R.2d 610; *Buckley v. California Coastal Com.* (1998) 68 C.A.4th 178, 191, 80 C.R.2d 562; *Lodi v. Randtron* (2004) 118 C.A.4th 337, 360, 13 C.R.3d 107, citing the text.)

In *Larwood Co. v. San Diego Fed. Savings & Loan Assn.* (1960) 185 C.A.2d 450, 8 C.R. 362, plaintiff borrowed money from defendant, a federal savings and loan association, and brought this action for usurious interest paid, damages for breach of contract, and similar relief. The trial judge ruled that plaintiff should first seek redress before the federal Home Loan Bank Board. *Held*, judgment on demurrer reversed. Where the law "arguably vests jurisdiction in an administrative body," as a general rule the agency involved should initially be given the opportunity to decide whether the controversy lies within its powers. But on a fair construction of the statute and the practice of 27 years, private disputes between the association and borrowers of many kinds have always been taken to the courts without interposition of the administrative process; only disputes relating to internal operation or organizational affairs have been held subject to the rule of exhaustion. (185 C.A.2d 453.)

SUPPLEMENT: [This section is current through the latest supplement]

See *California-Nevada Annual Conference of the United Methodist Church v. San Francisco* (2009) 173 C.A.4th 1559, 1568, 94 C.R.3d 64 [church was not required to exhaust administrative remedies and could obtain judicial relief under Government Code exemptions for local landmark ordinances from city's designation of church property as landmark; even though city had not made final decision, church had strong legal argument that city lacked jurisdiction to designate

property as landmark; relying on *Coachella Valley Mosquito & Vector Control Dist. v. California Public Emp. Relations Bd.* (2005) 35 C.4th 1072, 29 C.R.3d 234, 112 P.3d 623, text, p. 441].



161 of 192 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

VIII. EXHAUSTION OF OTHER REMEDIES

C. Administrative Remedy.

3. Exceptions.

b. Agency Is Without Jurisdiction.

2. Distinctions.

3 Witkin Cal. Proc. Actions § 339

[§ 339] Distinctions.

(1) *Lack of Evidence*. This exception cannot be invoked on the mere claim of the absence of any competent evidence to support the decision. (*Blake v. Public Util. Com. of San Francisco* (1953) 120 C.A.2d 671, 261 P.2d 773.)

(2) *Agency's Inability To Award Damages, Costs, or Attorneys' Fees*. The subject of the controversy may not be deemed outside the jurisdiction of the administrative body because it cannot award damages, costs, or attorneys' fees. (*Edgren v. Regents of Univ. of Calif.* (1984) 158 C.A.3d 515, 521, 205 C.R. 6.)

(3) *Agency's Reasonable Claim of Jurisdiction*. In *Public Emp. Relations Bd. v. Superior Court* (1993) 13 C.A.4th 1816, 17 C.R.2d 323, the Public Employment Relations Board filed a complaint based on an unfair practice charge filed by two unions, alleging that the employer, i.e., the state and the Governor, violated the Dills Act (Govt.C. 3512 et seq.; see 3 Summary (10th), *Agency and Employment*, §604 et seq.) by failing to meet and confer with the unions before proposing legislation affecting the terms of state employment. A hearing was set and the board issued subpoenas to several officials of the Department of Personnel Administration, but the officials refused to comply. The board's subsequent request for a court order requiring compliance with the subpoenas was denied on the ground that the board lacked jurisdiction to proceed because the Dills Act does not extend to a Governor's proposals for legislation. The board then sought mandamus. *Held*, writ granted; the superior court must defer to the board's initial determination that it had jurisdiction.

(a) *Applicability of exhaustion doctrine*.

(1) A court's authority to inquire into an agency's jurisdiction, as a predicate to the denial of the enforcement of an administrative subpoena, is governed by the general doctrine of exhaustion of administrative remedies. Hence, a subpoena should be enforced regardless of objections based on claimed defenses to the charges in the administrative proceeding, unless those claimed defenses present a sufficient ground to overcome the rule precluding a judicial remedy until the administrative agency has reached a final decision. (13 C.A.4th 1825, citing *Myers v. Bethlehem Shipbuilding Corp.* (1938) 303 U.S. 41, 58 S.Ct. 459, 82 L.Ed. 638, 9 Cal. Proc. (5th), *Administrative Proceedings*, §125, and *Oklahoma*

Press Publishing Co. v. Walling (1946) 327 U.S. 186, 66 S.Ct. 494, 90 L.Ed. 614.)

(2) The case law applying the exhaustion doctrine to a court's authority to inquire into an agency's jurisdiction is not clear. As an example, *United States v. Superior Court* (1941) 19 C.2d 189, 120 P.2d 26, states that an administrative agency has the power to determine in the first instance whether a given controversy falls within the statutory grant of jurisdiction. (13 C.A.4th 1828.) However, *Alpine v. Tuolumne* (1958) 49 C.2d 787, 322 P.2d 449, held that the doctrine was inapplicable where the agency had no jurisdiction to make a judicial determination of the type involved. (13 C.A.4th 1829.)

(b) *Guide for applying doctrine.* A leading commentator has proposed the following guide to understanding and applying the exhaustion doctrine to claims of lack of agency jurisdiction: "When pursuing the administrative remedy will cause irreparable injury and the lack of agency jurisdiction clearly appears from considerations that are not within the agency's specialized understanding, exhaustion should not be required. But when the administrative proceeding involves no unusual expense and when the agency's specialized understanding may contribute to a proper determination, a requirement of exhaustion may be desirable. Nearly all the difficult cases lie between these extremes, and what is needed is a guide for deciding such cases. ... The proposal is that to determine whether or not a court should decide a question of administrative jurisdiction without requiring exhaustion of administrative remedies, a court should consider three factors--extent of injury from pursuit of administrative remedy, degree of apparent clarity or doubt about administrative jurisdiction, and involvement of specialized administrative understanding in the question of jurisdiction." (13 C.A.4th 1829.) This framework is adopted for the analysis and resolution of the issues raised in this case. (13 C.A.4th 1830.)

(c) *Application of guide.*

(1) Here, the only injury attributable to requiring exhaustion of the administrative remedy is the cost of participating in the board proceeding. However, such an injury is always present and, absent some unusual or extraordinary burden, does not favor judicial preemption. No such burden appears in this case. (13 C.A.4th 1830.)

(2) *Govt.C. 3516.5*, the statute upon which the unfair practice charge is based, requires the employer to meet and confer with all employee organizations affected by any "law" (relating to matters within the scope of representation) proposed to be *adopted* by the employer. The Department of Personnel Administration's argument that the board has no jurisdiction to determine whether the meet and confer requirement applies to statutes proposed by the Governor is based on the reasoning that statutes cannot be "adopted" by the Governor, and hence are not "laws" within the meaning of *Govt.C. 3516.5*. Additionally, the department argued that a contrary interpretation would violate the separation of powers doctrine of the California Constitution (Cal. Const., Art. III, §3) by infringing upon the Governor's constitutional prerogative to propose legislation (Cal. Const., Art. IV, §12; Cal. Const., Art. V, §3). Neither of these arguments justifies judicial intervention under the facts presented here. (13 C.A.4th 1831.)

(3) The department's reading of *Govt.C. 3516.5* involves a straightforward question of statutory construction, and does not implicate a subject matter on which the board is entitled to deference based upon its special expertise. Although this removes one obstacle to judicial intervention, it does not afford a reason to intervene. "Regardless of special expertise, the considered determination of meaning by the agency charged with administration of a statute is of interest. Notwithstanding that resolution of the question of construction is ultimately for the court, the court may elect to defer to the views of the agency, especially where the question of meaning is closely balanced." (13 C.A.4th 1831.)

(4) It is not necessary to resolve the department's argument concerning the ambiguity of *Govt.C. 3516.5*. For purposes of resolving the exhaustion question it is sufficient to say that the claimed ambiguity in this statute might be resolved against the department. (13 C.A.4th 1832.) Nor is it necessary to resolve the department's separation of powers argument. "It suffices to note that the constitutional claim is novel, the claimed proscription does not plainly appear from the text of the Constitution, no closely analogous and compelling authority is offered, and the Legislature may ordinarily constitutionally proscribe rules regulating the exercise of power by the executive branch." (13 C.A.4th 1832.)

(5) "In sum, there is no clear failure to state a cause of action and hence no clear lack of Board jurisdiction which affords a warrant for judicial intervention prior to a final determination by the Board. For these reasons we conclude that the trial court erred in failing to grant the application of the Board for the enforcement of the subpoenas." (13 C.A.4th 1832.)

Other cases are to the same effect. (See *Campbell v. Regents of Univ. of Calif.* (2005) 35 C.4th 311, 323, 25 C.R.3d 320, 106 P.3d 976, supra, §337 [exception did not apply to dismissed state university employee who failed to exhaust university's internal grievance procedures before suing under Govt.C. 12653(c) and Lab.C. 1102.5 ("whistleblower" statutes; see 3 Summary (10th), *Agency and Employment*, §§284, 288, 349); internal review board did not lack jurisdiction; it was not required to decide legality of employer's policies before considering legality of employer's actions]; *McAllister v. Monterey* (2007) 147 C.A.4th 253, 283, 54 C.R.3d 116 [distinguishing *Alpine*, supra; exception did not apply to objector to county's approval of coastal development permit; objector was not excused from appealing action to California Coastal Commission, even though objector asserted that county's action was legally void, where Commission had fundamental subject matter jurisdiction to review county's action]; *San Francisco v. International Union of Operating Engineers, Local 39* (2007) 151 C.A.4th 938, 949, 60 C.R.3d 516 [exception did not apply to city seeking to compel employee union to submit labor dispute to binding arbitration, where administrative agency had jurisdiction over dispute].)

SUPPLEMENT: [This section is current through the latest supplement]



162 of 192 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

VIII. EXHAUSTION OF OTHER REMEDIES

C. Administrative Remedy.

3. Exceptions.

c. Agency Decision Is Known.

1. In General.

3 *Witkin Cal. Proc. Actions* § 340

[§ 340] In General.

An exception is recognized where the administrative remedy would obviously be ineffective because the agency's decision is certain to be adverse. (See *Huntington Beach Police Officers' Assn. v. Huntington Beach* (1976) 58 C.A.3d 492, 499, 129 C.R. 893; *Doster v. San Diego* (1988) 203 C.A.3d 257, 261, 262, 251 C.R. 507, citing the text; *Department of Personnel Administration v. Superior Court* (1992) 5 C.A.4th 155, 171, 6 C.R.2d 714.)

In *Ogo Associates v. Torrance* (1974) 37 C.A.3d 830, 112 C.R. 761, defendant city enacted ordinances declaring a moratorium on building permits and a permanent rezoning ordinance preventing plaintiff's contemplated land use. Plaintiff sought mandamus, challenging the permanent ordinance, and defendant contended that an application for a variance should have been sought. *Held*, the record conclusively demonstrated that the city council, which had rezoned the area to prevent the very use intended by plaintiff, would not have granted a variance. "To require appellants to apply to the city council for a variance on behalf of this project would be to require them to pump oil from a dry hole." (37 C.A.3d 834.)

The following cases are illustrative:

Hittle v. Santa Barbara County Employees Retirement Assn. (1985) 39 C.3d 374, 384, 216 C.R. 733, 703 P.2d 73 [because county employee repeatedly and unsuccessfully sought relief from appropriate county officials concerning denial of his petition to be reinstated in county retirement association, it was unnecessary that he also invoke hearing procedure of which he was not apprised].

San Diego v. California (1997) 15 C.4th 68, 89, 61 C.R.2d 134, 931 P.2d 312 [county could adjudicate claim against state for reimbursement for state-mandated program without first seeking relief from Commission on State Mandates, where commission had earlier rejected another county's identical claim].

In re Joshua S. (2007) 41 C.4th 261, 275, 59 C.R.3d 460, 159 P.3d 49 [children could seek judicial determination as to their eligibility for AFDC benefits while in grandmother's custody in Canada without first applying for benefits

and seeking administrative relief if request were denied; because grandmother was legal guardian, and not foster parent, children were not eligible for AFDC benefits, and it would have been futile for children to apply for benefits].

Kirkpatrick v. Oceanside (1991) 232 C.A.3d 267, 278, 283 C.R. 191 [plaintiffs were not required to use alternative administrative procedure for obtaining rent control relief where it was clear that defendant would not afford them fair hearing].

Automotive Management Group v. New Motor Vehicle Bd. (1993) 20 C.A.4th 1002, 1015, 24 C.R.2d 904 [automobile dealer, whose dealership termination protest to New Motor Vehicle Board was ruled untimely by administrative law judge, was not required to submit matter to board, where judge stated: "There shall be no further proceedings in this cause before the Board"].

CAT Partnership v. Santa Cruz (1998) 63 C.A.4th 1071, 1079, 74 C.R.2d 652 [plaintiff partner could adjudicate adverse property tax ruling of assessment board, even though plaintiff was not applicant in board proceedings; other partners were applicants and board also treated plaintiff as if it were applicant].

In re Locks (2000) 79 C.A.4th 890, 893, 94 C.R.2d 495, 5 Cal. Crim. Law (3d), *Criminal Trial*, Supp., §678 [inmate found not guilty by reason of insanity and committed to state hospital could adjudicate whether he was competent to refuse to take psychotropic medication without first exhausting administrative remedies; Attorney General had stated that it was state policy that prior court determination of insanity was conclusive evidence that inmate was without competence to oppose medication].

Reidy v. San Francisco (2004) 123 C.A.4th 580, 594, 19 C.R.3d 894 [residential hotel owner was not required to exhaust administrative remedies before suing city under Ellis Act to expunge recorded notices requiring compliance with local ordinance mandating that residential units converted to other uses meet certain requirements; under ordinance, city agencies had no authority to waive replacement housing requirement, let alone determine whether ordinance was preempted by Ellis Act].

Sanchez v. Los Angeles (2006) 140 C.A.4th 1069, 1079, 45 C.R.3d 188 [police officer's failure to raise statute of limitations and due process defenses in administrative proceedings challenging imposition of discipline did not preclude him from raising those issues in civil action, because department's unyielding position rendered administrative challenge on those grounds futile].

SUPPLEMENT: [This section is current through the latest supplement]

The following case is also illustrative of the exception to the exhaustion doctrine where the administrative remedy would be ineffective because the agency's decision is certain to be adverse:

Farahani v. San Diego Community College Dist. (2009) 175 C.A.4th 1486, 1497, 96 C.R.3d 900 [community college professor could file mandamus proceeding challenging his termination without exhausting internal remedies, because he had been terminated under agreement with college district purporting to waive his statutory right to appeal].



163 of 192 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

VIII. EXHAUSTION OF OTHER REMEDIES

C. Administrative Remedy.

3. Exceptions.

c. Agency Decision Is Known.

2. Distinctions.

3 *Witkin Cal. Proc. Actions* § 341

[§ 341] Distinctions.

(1) *Agency Will Not Apply Exception.* The futility exception will be rejected where it is possible that the agency will make an exception to its alleged preexisting policy in a particular case on the showing made. (See *Frisco Land & Mining Co. v. California* (1977) 74 C.A.3d 736, 757, 141 C.R. 820; *In re Serna* (1978) 76 C.A.3d 1010, 1014, 143 C.R. 350; *Mountain View Chamber of Commerce v. Mountain View* (1978) 77 C.A.3d 82, 91, 143 C.R. 441.)

(2) *Agency's Decision Is Not Positively Known.* The exception may be invoked only when a petitioner can positively state that the administrative agency has declared what its ruling will be in a particular case. (See *Gantner & Mattern Co. v. California Emp. Com.* (1941) 17 C.2d 314, 318, 109 P.2d 932; *Sea & Sage Audubon Soc. v. Planning Com.* (1983) 34 C.3d 412, 418, 194 C.R. 357, 668 P.2d 664 [exception was not available where agency merely indicated its view of legislative policy in relation to matter and never addressed or decided legal issue]; *Coachella Valley Mosquito & Vector Control Dist. v. California Public Emp. Relations Bd.* (2005) 35 C.4th 1072, 1081, 29 C.R.3d 234, 112 P.3d 623 [exception was not available to public employer defending unfair labor practice charge by public employee union, where employer, though able to show how agency would rule on statute of limitations defense, was unable to show how agency would decide outcome of case]; *Doyle v. Chino* (1981) 117 C.A.3d 673, 683, 172 C.R. 844; *Edgren v. Regents of Univ. of Calif.* (1984) 158 C.A.3d 515, 522, 205 C.R. 6; *Contra Costa v. California* (1986) 177 C.A.3d 62, 77, 78, 222 C.R. 750; *Twain Harte Associates, Ltd. v. Tuolumne* (1990) 217 C.A.3d 71, 90, 265 C.R. 737 [question is one of fact]; *Economic Empowerment Foundation v. Quackenbush* (1997) 57 C.A.4th 677, 690, 67 C.R.2d 323, citing the text [exception was not available where agency had taken no position on merits of issue in case, even if agency had treated plaintiff unfairly in other, unrelated proceedings]; *Imagistics Int. v. Department of General Services* (2007) 150 C.A.4th 581, 590, 59 C.R.3d 18 [plaintiff's reliance solely on historical statistics purporting to show that administrative procedure was sham was unavailing]; *San Francisco v. International Union of Operating Engineers, Local 39* (2007) 151 C.A.4th 938, 947, 60 C.R.3d 516 [city seeking to compel employee union to submit labor dispute to binding arbitration was not excused from pursuing remedies with Public Employment Relations Board merely because board had earlier denied emergency injunction sought by city to require union to participate in collective bargaining impasse procedures].)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Agency Decision Is Not Positively Known.* See *Grossmont Union High School Dist. v. State Dept. of Education* (2008) 169 C.A.4th 869, 884, 86 C.R.3d 890 [exception was not available to excuse school district, challenging unfunded state mandate to pay costs of providing mental health services to special education students, from submitting claim to state agency; it was not certain that agency would find that costs were federal, as opposed to state, mandate].



164 of 192 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

VIII. EXHAUSTION OF OTHER REMEDIES

C. Administrative Remedy.

3. Exceptions.

d. Irreparable Injury.

3 *Witkin Cal. Proc. Actions* § 342

[§ 342] Irreparable Injury.

(1) *Exception Applied.* An exception is sometimes recognized where irreparable damage would occur from denial of judicial relief. (See *Sail'er Inn v. Kirby* (1971) 5 C.3d 1, 7, 95 C.R. 329, 485 P.2d 529 [conflict of federal and state statutes faced petitioners with choice of penalty under whichever law they chose to disobey]; *Greenblatt v. Munro* (1958) 161 C.A.2d 596, 607, 326 P.2d 929 [risk of revocation of liquor license]; *Department of Personnel Administration v. Superior Court* (1992) 5 C.A.4th 155, 170, 6 C.R.2d 714; C.E.B., Administrative Mandamus 2d, §§2.48, 2.49; 70 Harv. L. Rev. 536.)

(2) *Exception Rejected.* The exception was considered and rejected as inapplicable to the particular facts in several decisions. (See *United Ins. Co. of Chicago, Illinois v. Maloney* (1954) 127 C.A.2d 155, 158, 273 P.2d 579; *In re Serna* (1978) 76 C.A.3d 1010, 1014, 143 C.R. 350; *Mountain View Chamber of Commerce v. Mountain View* (1978) 77 C.A.3d 82, 91, 143 C.R. 441; *Board of Police Commrs. v. Superior Court* (1985) 168 C.A.3d 420, 433, 434, 214 C.R. 493 [potential permit loss; penalty or harm was uncertain]; *Eight Unnamed Physicians v. Medical Executive Committee of Med. Staff of Washington Township Hosp.* (2007) 150 C.A.4th 503, 514, 59 C.R.3d 100 [physicians judicially challenging hospital medical review committee's refusal to provide consolidated disciplinary hearing failed to demonstrate that irreparable harm would occur if separate hearings were held]; *San Francisco v. International Union of Operating Engineers, Local 39* (2007) 151 C.A.4th 938, 948, 60 C.R.3d 516 [exception did not apply to city seeking to compel employee union to submit labor dispute to binding arbitration; there was no urgent need for resolution because dispute involved single union and single memorandum of understanding and administrative agency had asserted jurisdiction over dispute].)

SUPPLEMENT: [This section is current through the latest supplement]



165 of 192 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

VIII. EXHAUSTION OF OTHER REMEDIES

C. Administrative Remedy.

3. Exceptions.

e. Alternative Remedy.

3 *Witkin Cal. Proc. Actions* § 343

[§ 343] Alternative Remedy.

(1) *Alternative Judicial Remedy*. "[W]here a statute provides an administrative remedy and also provides an alternative judicial remedy the rule requiring exhaustion of the administrative remedy has no application if the person aggrieved and having both remedies afforded him by the same statute, elects to use the judicial one." (*Susanville v. Lee C. Hess Co.* (1955) 45 C.2d 684, 689, 290 P.2d 520; see *McKee v. Bell-Carter Olive Co.* (1986) 186 C.A.3d 1230, 1240, 1244, 1245, 1246, 231 C.R. 304 [reviewing cases]; *San Elijo Ranch v. San Diego* (1998) 65 C.A.4th 608, 612, 76 C.R.2d 601 [action under Integrated Waste Management Act (*Pub.Res.C. 40000* et seq.; see 12 *Summary* (10th), *Real Property*, §908)]; *Syngenta Crop Protection v. Helliker* (2006) 138 C.A.4th 1135, 1159, 42 C.R.3d 191 [challenges to pest control regulations].)

(2) *Concurrent Jurisdiction*. In the rare situations in which an administrative board and a court have concurrent jurisdiction over the matter at issue, there is no need to exhaust the administrative remedy before invoking the judicial remedy. (See *National Audubon Soc. v. Superior Court* (1983) 33 C.3d 419, 452, 189 C.R. 346, 658 P.2d 709, 12 *Summary* (10th), *Real Property*, §920 [state Water Resources Control Board and superior court]; *Elmore v. Imperial Irr. Dist.* (1984) 159 C.A.3d 185, 192, 205 C.R. 433 [same].)

Under *Govt.C. 3309.5(c)*, the superior court "shall have initial jurisdiction" over an action seeking relief for violation of the Public Safety Officers Procedural Bill of Rights Act (*Govt.C. 3300* et seq.; see 8 *Summary* (10th), *Constitutional Law*, §963). *Mounger v. Gates* (1987) 193 C.A.3d 1248, 239 C.R. 18, held that the legislative history shows that this section was designed to allow an officer to pursue a judicial remedy immediately without exhausting administrative remedies. (193 C.A.3d 1256.) Moreover, *Gales v. Superior Court* (1996) 47 C.A.4th 1596, 1602, 55 C.R.2d 460, 8 *Summary* (10th), *Constitutional Law*, §963, held that judicial relief may be sought under the Act, without exhausting administrative remedies, even *after* the employer has issued its final decision. (47 C.A.4th 1602.)

SUPPLEMENT: [This section is current through the latest supplement]



166 of 192 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

VIII. EXHAUSTION OF OTHER REMEDIES

C. Administrative Remedy.

3. Exceptions.

f. Constitutional Challenge to Agency.

3 *Witkin Cal. Proc. Actions* § 344

[§ 344] Constitutional Challenge to Agency.

Walker v. Munro (1960) 178 C.A.2d 67, 2 C.R. 737, took the position that an action challenging the constitutionality of a provision in the statute creating an administrative agency could not be brought without first raising the issue before the agency itself. This view has been criticized by commentators, and was rejected in *California v. Superior Court (Veta)* (1974) 12 C.3d 237, 115 C.R. 497, 524 P.2d 1281. "It would be heroic indeed to compel a party to appear before an administrative body to challenge its very existence and to expect a dispassionate hearing before its preponderantly lay membership on the constitutionality of the statute establishing its status and functions." (12 C.3d 251.)

Later cases have applied the *Veta* rule. (See *Lund v. California State Employees Assn.* (1990) 222 C.A.3d 174, 183, 271 C.R. 425 [following *Veta*; constitutional challenge to statute mandating that state Department of Personnel Administration hear claims for out-of-class compensation]; *Unnamed Physician v. Board of Trustees of St. Agnes Med. Center* (2001) 93 C.A.4th 607, 621, 113 C.R.2d 309, 9 Cal. Proc. (5th), Appeal, §966 [exhaustion doctrine also does not apply where challenge is to constitutionality of agency's procedures].)

SUPPLEMENT: [This section is current through the latest supplement]



167 of 192 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

VIII. EXHAUSTION OF OTHER REMEDIES

C. Administrative Remedy.

3. Exceptions.

g. Public Rights Involved.

3 *Witkin Cal. Proc. Actions* § 345

[§ 345] Public Rights Involved.

(1) *Exception Applied.* In *Environmental Law Fund v. Corte Madera* (1975) 49 C.A.3d 105, 122 C.R. 282, a local planning commission, after public hearings, granted a conditional use permit for a proposed development. This action was not appealed to the town council, as permitted by ordinance; instead, plaintiffs sought administrative mandamus and declaratory relief, contesting the validity of the permit. The trial judge found that the local procedures violated state zoning laws, and ordered the town to rescind the permit. *Held*, despite the failure to take an administrative appeal, affirmed. None of the respondents attended or had notice of the public hearings; their action did not seek preservation of private rights or vindication of private grievances; and they acted solely as members of the public seeking protection of the public interest. To require exhaustion of administrative remedies by nonparties could permanently insulate illegal zoning from review, contrary to the interests of the public. (49 C.A.3d 113, 114.)

(2) *Exception Rejected.* In *Kane v. Redevelopment Agency of Hidden Hills* (1986) 179 C.A.3d 899, 224 C.R. 922, a city council adopted a redevelopment plan that required preparation of an environmental impact report (EIR) by its redevelopment agency. Although he neither owned property nor resided in the city, plaintiff sought mandamus and an injunction, claiming that the EIR did not comply with the California Environmental Quality Act (CEQA). The trial judge issued a writ of mandamus. *Held*, reversed.

(a) CEQA is intended to further the public interest, and attempts to do so by its stress on wide public involvement in the administrative process leading to approval of projects. However, this broad public interest may not be used to permit any California resident to avoid the exhaustion doctrine by claiming to act as a member of the affected public. (179 C.A.3d 905, 907.)

(b) A party who relies on the *Corte Madera* public interest exception to the exhaustion requirement must do more than make a factually unsupported allegation that he or she is acting as a concerned member of the public. The party must allege and prove the facts that bring the party within the "affected public" exception. Plaintiff here failed to do so. (179 C.A.3d 908.) (See *Redevelopment Agency of Riverside v. Superior Court* (1991) 228 C.A.3d 1487, 1498, 279 C.A.3d 558, *supra*, §326 [public interest exception did not apply to failure of challengers of redevelopment plans to participate in statutory hearing process of Community Redevelopment Law, where notice of meetings at which plans

were adopted was published].)

SUPPLEMENT: [This section is current through the latest supplement]



168 of 192 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

VIII. EXHAUSTION OF OTHER REMEDIES

C. Administrative Remedy.

3. Exceptions.

h. Civil Rights Actions.

3 *Witkin Cal. Proc. Actions* § 346

[§ 346] Civil Rights Actions.

(1) *Federal Actions: No Exhaustion of State Remedies.* Based on the legislative histories of both 42 U.S.C., §1983 and 42 U.S.C., §1997e of the federal civil rights statutes, "we conclude that exhaustion of state administrative remedies should not be required as a prerequisite to bringing an action pursuant to § 1983. We decline to overturn our prior decisions holding that such exhaustion is not required." (*Patsy v. Board of Regents of Florida* (1982) 457 U.S. 496, 102 S.Ct. 2557, 2568, 73 L.Ed.2d 172, 187.) (See *White v. California* (1987) 195 C.A.3d 452, 466, 240 C.R. 732 [following *Patsy*]; 96 Harv. L. Rev. 207.) (On requirement of exhausting state administrative mandamus remedies as prerequisite to tort action alleging federal civil rights violation, see *infra*, §349; on actions under 42 U.S.C., §1983, see 8 *Summary* (10th), *Constitutional Law*, §814 et seq.)

(2) *Federal Actions: Exhaustion Required for Prisoner Suing Over Prison Conditions.* The federal Prison Litigation Reform Act of 1996 (PLRA; 42 U.S.C., §1997e(a)) requires a prisoner to exhaust available administrative remedies before bringing a federal civil rights action over prison conditions. Exhaustion is required under the Act, even where the prisoner only seeks money damages and the administrative grievance process does not permit the award of money damages, so long as the grievance tribunal has the authority to take some action in response to the prisoner's complaint. (*Booth v. Churner* (2001) 532 U.S. 731, 121 S.Ct. 1819, 1821, 149 L.Ed.2d 958, 962 [state prisoner's action seeking money damages under federal Civil Rights Act (42 U.S.C., §1983) for assault by state correctional officers was properly dismissed for failure to exhaust administrative remedies]; *Woodford v. Ngo* (2006) 548 U.S. 81, 126 S.Ct. 2378, 2387, 165 L.Ed.2d 368, 380; [state prisoner's action under federal Civil Rights Act (42 U.S.C., §1983) challenging restrictions on his participation in special programs was properly dismissed for failure to exhaust administrative remedies, where prisoner filed untimely or otherwise procedurally defective administrative grievance]; 44 *San Diego L. Rev.* 387 [criticizing *Woodford*].)

Exhaustion of administrative remedies is required under the PLRA for all prisoner suits seeking redress for prison circumstances or occurrences, regardless of whether they involve general circumstances of incarceration or particular episodes, and regardless of whether they allege violation of the Eighth Amendment based on the use of excessive force or some other wrong. (*Porter v. Nussle* (2002) 534 U.S. 516, 122 S.Ct. 983, 988, 152 L.Ed.2d 12, 22 [exhaustion requirement applied to state law claims seeking money damages for assault and battery and violation of federal Civil

Rights Act against state correctional officers in their individual capacities brought by state inmate, who alleged that he was beaten by officers without justification]; 41 Cal. Western L. Rev. 277 [*Porter*]; 39 U.C. Davis L. Rev. 247 [discussing whether exhaustion doctrine establishes pleading requirement or affirmative defense].)

(3) *California Actions*. A plaintiff who wishes to sue under the Fair Employment and Housing Act (FEHA; Govt.C. 12900 et seq.) generally must first file an administrative complaint with the Department of Fair Employment and Housing within 1 year of the alleged wrongful act of employment discrimination (Govt.C. 12960) and within 60 days of the alleged wrongful act of housing discrimination (Govt.C. 12980). (See *supra*, §225.)

SUPPLEMENT: [This section is current through the latest supplement]



169 of 192 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

VIII. EXHAUSTION OF OTHER REMEDIES

D. Judicial Remedy.

1. In General.

3 *Witkin Cal. Proc. Actions* § 347

[§ 347] In General.

In some situations one judicial remedy must be exhausted as a prerequisite to the use of another. There are no general principles, but merely a group of scattered rules based upon differing principles.

(1) *Relief Requested in Lower Court.* Where a writ of prohibition or mandamus is sought to restrain or compel action by a lower court, the petitioner must show that he has made an attempt to seek relief in the lower court by motion, application, or other appropriate means. Failure to exhaust this opportunity for relief in the lower court usually results in denial of the writ. (See 8 *Cal. Proc.* (5th), *Extraordinary Writs*, §140.)

(2) *Exhaustion of State Court Remedy.* In some situations a party seeking relief in the federal courts must show that he or she has exhausted remedies in the state courts. (See 2 *Cal. Proc.* (5th), *Jurisdiction*, §365; 6 *Cal. Crim. Law* (3d), *Criminal Appeal*, §180.)

(3) *Distinction: Relief From Judgment for Extrinsic Fraud or Mistake by Independent Action.* The view of the Restatement of Judgments is that one who seeks, by an independent action in equity, to set aside a judgment for extrinsic fraud or mistake, must show that he or she has exhausted all remedies in the original action, such as motion for new trial and appeal. (*Rest.2d, Judgments* §78.) This view has found some support in California, usually by dicta in cases in which the aggrieved party could be charged with negligence or laches in failing to appeal from the judgment in the original action. (See, e.g., *Doran v. Sherman* (1937) 18 *C.A.2d* 479, 480, 64 *P.2d* 442; *Harpke v. Lankershim Estate* (1950) 101 *C.A.2d* 49, 50, 224 *P.2d* 899.)

Although this procedure has been acknowledged to be the better practice purely as a matter of law, this view has been repudiated, and the California rule is contra. (See *Rohrbasser v. Lederer* (1986) 179 *C.A.3d* 290, 297, 224 *C.R.* 791, 8 *Cal. Proc.* (5th), *Attack on Judgment in Trial Court*, §§220, 221.)

SUPPLEMENT: [This section is current through the latest supplement]



170 of 192 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

VIII. EXHAUSTION OF OTHER REMEDIES

D. Judicial Remedy.

2. Judicial Mandamus Proceeding as Prerequisite to Tort Action.

3 *Witkin Cal. Proc. Actions* § 348

[§ 348] Judicial Mandamus Proceeding as Prerequisite to Tort Action.

In *Westlake Community Hosp. v. Superior Court* (1976) 17 C.3d 465, 131 C.R. 90, 551 P.2d 410, supra, §321, plaintiff's hospital privileges were revoked, and she exhausted all of her internal remedies. Then, without seeking judicial review by mandamus to compel reinstatement, she sued in tort for damages. *Held*, a successful mandamus proceeding was an essential condition for the tort action. The situation is analogous to a malicious prosecution action, which cannot be maintained until the prior allegedly malicious proceeding has been terminated in favor of the plaintiff; and the general policy underlying the favorable termination requirement applies: (a) the requirement accords a proper respect to an association's quasi-judicial procedure; (b) it simplifies court procedures by providing a uniform practice of judicial rather than jury review of quasi-judicial administrative decisions; (c) it affords a justified measure of protection to the board members who, often without remuneration, take on the difficult, time-consuming and socially important task of policing medical personnel. (17 C.3d 484.)

Later cases have applied the *Westlake* rule. (See *McNair v. Pasadena Hosp. Assn. Ltd.* (1980) 111 C.A.3d 841, 845, 169 C.R. 39 [*Westlake* rule applied where hospital did not completely terminate privileges but took less drastic action]; *Holder v. California Paralyzed Veterans Assn.* (1980) 114 C.A.3d 155, 170 C.R. 455 [*Westlake* applied where member was expelled from unincorporated veterans association]; *Interior Systems v. Del E. Webb Corp.* (1981) 121 C.A.3d 312, 319, 175 C.R. 301 [following *Westlake* on different facts]; but see *Payne v. Anaheim Memorial Med. Center* (2005) 130 C.A.4th 729, 745, 30 C.R.3d 230, 8 Summary (10th), *Constitutional Law*, Supp., §899 [judicial mandamus prerequisite did not preclude physician from suing hospital for violation of Unruh Act and infliction of emotional distress, where hospital afforded him with no internal remedy for court to enforce].)

SUPPLEMENT: [This section is current through the latest supplement]



171 of 192 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

VIII. EXHAUSTION OF OTHER REMEDIES

D. Judicial Remedy.

3. Administrative Mandamus Proceeding as Prerequisite to Tort Action.

3 *Witkin Cal. Proc. Actions* § 349

[§ 349] Administrative Mandamus Proceeding as Prerequisite to Tort Action.

(1) *General Requirement.* *C.C.P. 1094.5* requires that a writ of mandamus be filed and adjudicated in a California court to review the validity of a final determination of an administrative agency made as the result of a proceeding in which a hearing is required to be given, evidence is required to be taken, and discretion in the determination of facts is vested in the administrative agency. (See 8 *Cal. Proc.* (5th), *Extraordinary Writs*, §300 et seq.)

Knickerbocker v. Stockton (1988) 199 C.A.3d 235, 244 C.R. 764, makes clear the distinction between exhaustion of an administrative remedy and exhaustion of a judicial remedy (see *supra*, §347). Plaintiff, a police lieutenant, was discharged by defendant city. In an ensuing Civil Service Commission hearing, the commission found grounds for discipline, but ordered him reinstated at the rank of sergeant with back pay. He did not seek a judicial review by administrative mandamus under *C.C.P. 1094.5*, but instead brought a tort action against defendant city and four of its employees for wrongful termination and intentional infliction of emotional distress. The trial judge sustained a general demurrer to the entire complaint. *Held*, reversed; the cause of action for emotional distress could be maintained.

(a) The doctrine of exhaustion of administrative remedies does not apply; judicial review of an agency determination by administrative mandamus is not an administrative remedy. (199 C.A.3d 240, 241.) Plaintiff exhausted his administrative remedy by seeking relief from the *Civil Service Commission*. (199 C.A.3d 241.)

(b) Defendants are really asserting failure to exhaust a judicial remedy, as in *Westlake Community Hosp. v. Superior Court* (1976) 17 C.3d 465, 131 C.R. 90, 551 P.2d 410, *supra*, §348. (199 C.A.3d 240, citing the text.) And the requirement of exhaustion of judicial remedies is an aspect of collateral estoppel (or issue preclusion), which bars the relitigating of issues previously resolved in an administrative hearing by an agency acting in a judicial capacity. (199 C.A.3d 241, 242, citing *People v. Sims* (1982) 32 C.3d 468, 186 C.R. 77, 651 P.2d 321, 7 *Cal. Proc.* (5th), *Judgment*, §398.)

(c) *Interior Systems v. Del E. Webb Corp.* (1981) 121 C.A.3d 312, 319, 175 C.R. 301, *supra*, §348, and *Logan v. Southern Calif. Rapid Transit Dist.* (1982) 136 C.A.3d 116, 123, 185 C.R. 878, which held that a discharged employee's failure to seek review by administrative mandamus barred a tort or contract action for damages against his employer and union, reached the correct result, though the opinions mistakenly speak of exhaustion of administrative remedies. "It

would have been less misleading if the *Logan* court had simply explained that the determination of the administrative hearing, when unchallenged by writ, became final and thus collaterally estopped the employee from relitigating the validity of hearing or its adjudications. In this sense, the failure to overturn the administrative determination is a bar to the lawsuit because the disgruntled employee is bound by the adverse determination." (199 C.A.3d 243.)

(d) Hence, some of plaintiff's causes of action involve issues previously litigated and decided adversely to him; these are barred because he never overturned the finding of the Commission that there was justification for his demotion, not because he failed to exhaust his administrative remedies. "Exhaustion of judicial relief simply means that if he wishes to attack the administrative determination he must launch that assault in an administrative mandamus proceeding and not in a lawsuit for damages." (199 C.A.3d 244.)

(e) The adverse determination in the Commission hearing (demotion justified for disciplinary reasons) barred his causes of action for lost wages, salary, benefits, pension and retirement, for he was not wrongfully deprived of any of them. But the Commission, though finding that defendant city and its employees had grounds for demoting him, did not find that they had grounds to discharge him; and if he is able to prove that he suffered emotional distress from the improper firing as distinguished from that related to his proper demotion, the prior adjudication does not prevent him from doing so. (199 C.A.3d 245.)

Other cases are to the same effect. (See *Johnson v. Loma Linda* (2000) 24 C.4th 61, 69, 99 C.R.2d 316, 5 P.3d 874, 8 Cal. Proc. (5th), *Extraordinary Writs*, §154 [requirement of first seeking administrative mandamus relief also applies to state FEHA actions]; *Summers v. Cathedral City* (1990) 225 C.A.3d 1047, 1064, 275 C.R. 594 [following *Knickerbocker*]; *Gill v. Hughes* (1991) 227 C.A.3d 1299, 1304, 278 C.R. 306 [following *Westlake*]; *Swartzendruber v. San Diego* (1992) 3 C.A.4th 896, 903, 905, 5 C.R.2d 64 [following *Knickerbocker*]; *Risam v. Los Angeles* (2002) 99 C.A.4th 412, 419, 121 C.R.2d 267 [following *Johnson*; FEHA action was barred]; *Briggs v. Rolling Hills Estates* (1995) 40 C.A.4th 637, 644, 47 C.R.2d 29 [failure to first seek administrative mandamus relief precluded homeowners' challenge to city zoning ordinance, seeking damages and injunctive relief under federal Civil Rights Act]; *Claudio v. Regents of Univ. of Calif.* (2005) 134 C.A.4th 224, 252, 35 C.R.3d 837 [employee's failure to first seek administrative mandamus relief from adverse decisions in union grievance process precluded FEHA action].) (On requirement that landowner seeking inverse condemnation damages based on administrative agency's regulatory taking first petition for administrative mandamus relief, see 8 *Summary* (10th), *Constitutional Law*, §1165.)

(2) *Action for Violation of Public Safety Officers Procedural Bill of Rights*. A police officer who elects to seek judicial relief for violation of his or her rights under the Public Safety Officers Procedural Bill of Rights Act (*Govt.C.* 3300 et seq.; see *supra*, §343, and 8 *Summary* (10th), *Constitutional Law*, §963) after the officer's employer has rendered its final decision must concurrently file a petition for administrative mandamus to challenge the validity of that decision. (*Gales v. Superior Court* (1996) 47 C.A.4th 1596, 1603, 55 C.R.2d 460, 8 *Summary* (10th), *Constitutional Law*, §963.)

(3) *Distinction: No Quasi-Judicial Hearing*. *Swartzendruber*, *Briggs*, and other cases holding that failure to pursue state administrative mandamus remedies may collaterally estop a federal civil rights action were distinguished in *McDaniel v. Board of Education* (1996) 44 C.A.4th 1618, 52 C.R.2d 448. After plaintiff's request for early retirement from her nursing position with defendant school district was rejected as untimely, she filed a formal claim with defendant school board. She asserted that the rejection was in retaliation for her public criticism of defendants. After defendant school board notified her in writing that her claim was again rejected as untimely, she sued defendants in state court, alleging violations of federal civil rights laws. *Held*, plaintiff was not required to seek administrative mandamus relief under *C.C.P.* 1094.5 before filing her action.

(a) *C.C.P.* 1094.5 applies only to a final administrative order or decision made as the result of a proceeding in which a hearing is required to be given, evidence is required to be taken, and discretion in the determination of facts is vested in the inferior tribunal, corporation, board, or officer. (44 C.A.4th 1621; see 8 *Cal. Proc.* (5th), *Extraordinary Writs*, §267.)

(b) Unlike *Briggs* and similar cases, the record here did not show that plaintiff's administrative claim was one on which a hearing was required to be given and evidence taken. (44 C.A.4th 1621.) Where the governmental action being challenged by a federal civil rights lawsuit is not the result of a quasi-judicial hearing, the collateral estoppel rule does not apply and does not require the plaintiff first to seek another state judicial remedy. (44 C.A.4th 1621, 1622.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *General Requirement.* See *McDonald v. Antelope Valley Community College Dist.* (2008) 45 C.4th 88, 113, 84 C.R.3d 734, 194 P.3d 1026 [employee who initiated community college administrative grievance procedure for discrimination complaints was not required to seek judicial relief, and thus employee's FEHA action, filed while internal grievance process was still pending, was not barred by lack of judicial exhaustion; administrative grievance process lacked judicial characteristics such as testimony under oath, opportunity to call witnesses and introduce evidence, and formal record of hearing]; *Miller v. Los Angeles* (2008) 169 C.A.4th 1373, 1382, 87 C.R.3d 510 [following *Johnson v. Loma Linda* (2000) 24 C.4th 61, 99 C.R.2d 316, 5 P.3d 874, text, p. 455]. (3) *Distinction: No Quasi-Judicial Hearing.* See *Y.K.A. Industries v. Redevelopment Agency of San Jose* (2009) 174 C.A.4th 339, 362, 94 C.R.3d 424 [exhaustion doctrine was not applicable where city redevelopment agency and city employee failed to show that there was quasi-judicial decision adverse to subcontractor on issue of subcontractor's obligation to pay prevailing wages; distinguishing *Briggs v. Rolling Hills Estates* (1995) 40 C.A.4th 637, 47 C.R.2d 29, text, p. 456].



172 of 192 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

IX. SECURITY FOR COSTS

A. Former Law and Revision.

1. In General.

3 *Witkin Cal. Proc. Actions* § 350

[§ 350] In General.

The California Codes formerly contained 13 provisions requiring plaintiffs in certain types of actions to furnish bonds to secure costs. Some were successfully challenged on constitutional grounds. (See *infra*, §351.) Thereafter, some were amended to meet the constitutional objections and others were repealed. (See *infra*, §352.)

(1) *Action Against Public Entity or Employee (Repealed)*. Former Govt.C. 947 and 951 authorized a defendant public entity or public employee to file and serve a demand for a written undertaking in the amount of \$ 100 or a greater sum fixed by the court on good cause shown. (See *Beaudreau v. Superior Court* (1975) 14 C.3d 448, 453, 121 C.R. 585, 535 P.2d 713, *infra*, §351.)

(2) *Action Against Regents of University of California (Repealed)*. The security for costs requirement in actions against public entities was inapplicable to actions against the Regents, and the gap was filled by former Educ.C. 92650, with provisions similar to those in former Govt.C. 947. (See *infra*, §352.)

(3) *Action for Defamation (Repealed)*. Former C.C.P. 830 et seq. required the clerk in an action for libel or slander to require a bond to secure the costs of trial and appeal in the sum of \$ 500 before issuing the summons. (See *Shell Oil Co. v. Superior Court* (1934) 2 C.A.2d 348, 356, 37 P.2d 1078; *Writers Guild of America, West v. Superior Court* (1969) 273 C.A.2d 841, 846, 78 C.R. 520.) The requirement was held inapplicable to a cause of action pleaded by a defendant as a cross-complaint (see *Kennaley v. Superior Court* (1954) 43 C.2d 512, 514, 275 P.2d 1), and a plaintiff could sometimes escape from the requirement by pleading and proving a different additional tort based on the same wrongful act (see *Blender v. Superior Court* (1942) 55 C.A.2d 24, 26, 130 P.2d 179 [inducing breach of contract by defamatory statements]). The statute was held unconstitutional (see *infra*, §351) and was repealed (see *infra*, §352).

(4) *Action by Nonresident or Foreign Corporation Plaintiff (Amended)*. (See *infra*, §353 et seq.)

(5) *Action Against Architect, Engineer, or Related Professional (Amended)*. (See *infra*, §358.)

(6) *Action Against Physician or Related Professional (Amended)*. (See *infra*, §359.)

(7) *Shareholder's Derivative Suit (Amended)*. (See *infra*, §361 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]



173 of 192 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

IX. SECURITY FOR COSTS

A. Former Law and Revision.

2. Former Statutes Unconstitutional.

3 *Witkin Cal. Proc. Actions* § 351

[§ 351] Former Statutes Unconstitutional.

In *Nork v. Superior Court* (1973) 33 C.A.3d 997, 109 C.R. 428, the security for costs provision applicable to doctor defendants (C.C.P. 1029.6, *infra*, §359) was held violative of the due process principles laid down in *Sniadach v. Family Finance Corp. of Bay View* (1969) 395 U.S. 337, 89 S.Ct. 1820, 23 L.Ed.2d 349, and *Fuentes v. Shevin* (1972) 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556, 7 Summary (10th), *Constitutional Law*, §646 et seq., 6 Cal. Proc. (5th), *Provisional Remedies*, §246 et seq.

The constitutional defects in security for costs statutes were more elaborately considered in *Beaudreau v. Superior Court* (1975) 14 C.3d 448, 121 C.R. 585, 535 P.2d 713, dealing with the requirement in actions against a public entity or employee (*supra*, §350). Plaintiffs, 16 public school students and seven parents, sued defendant school district and a number of its officers, alleging violation of the federal Elementary and Secondary Education Act. Defendants demanded undertakings, which the lower court set in the aggregate amount of \$ 20,900. *Held*, mandamus issued to compel respondent superior court to permit the prosecution of the action without the filing of an undertaking.

(a) *Nature and effect of statutes.* The purpose of the security for costs requirement is to protect public entities and public employees against unmeritorious and frivolous litigation. But the requirement is not imposed on plaintiffs in actions against private persons or corporations, and the procedure prescribed does not distinguish between classes of plaintiffs on the basis of the merit of their actions; the undertaking must be furnished in "any action." And both the minimum undertaking (\$ 100 per plaintiff), and the larger undertaking fixed on a showing of good cause, are required without any prior hearing afforded the plaintiff on the questions of good cause or reasonably greater amount. (14 C.3d 453, 454.)

(b) *Prior decisions on due process.* The theory of *Sniadach* and its progeny was the basis of the decision in *Brooks v. Small Claims Court* (1973) 8 C.3d 661, 105 C.R. 785, 504 P.2d 1249, 2 Cal. Proc. (5th), *Courts*, §312, holding unconstitutional the requirement of an undertaking on a defendant's appeal from a judgment of the small claims court. (14 C.3d 455.)

(c) *Unconstitutionality: taking of property.* The statutes involve a twofold taking: (1) If the plaintiff furnishes a bond he is deprived of his nonrefundable premium, and if he deposits money in lieu of a bond he is deprived of its use

during the pendency of the action; (2) if he does not furnish a bond his action is dismissed, and, if his claim is bona fide and potentially meritorious, he loses a property interest. (14 C.3d 456, quoting *Board of Regents of State Colleges v. Roth* (1972) 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548, 7 Summary (10th), *Constitutional Law*, §691.) Unlike filing fees, which are exacted in payment for a service, the bonds afford no benefit to the plaintiff, but help only the defendant. And the statutes are no less offensive to due process principles because, unlike the situations in previous decisions, the "taking" is suffered by the plaintiff rather than the defendant. (14 C.3d 457.)

(d) *Unconstitutionality: denial of prior hearing.* Because the statutes result in a taking of property, due process requires some form of notice and hearing. Its form may vary, but it must be meaningful and appropriate to the nature of the case. (14 C.3d 458.) Under the analysis in *Bell v. Burson* (1971) 402 U.S. 535, 91 S.Ct. 1586, 29 L.Ed.2d 90, 7 Summary (10th), *Constitutional Law*, §662, and *Nork*, the statutes fail to meet this test, because they do not afford a prior hearing on the merit of the plaintiff's action and the reasonableness of the amount of the undertaking; they specify no standards for determining the reasonable amount; they do not define "good cause" and allow no hearing on this issue. (14 C.3d 459, 460.)

(e) *Answers to defendant's arguments.* Defendants advance a number of untenable arguments to support the statutes:

(1) The contention that bringing an action against a public entity or employee is a privilege, rather than a right, is contrary to the modern view rejecting the right-privilege distinction (see 7 Summary (10th), *Constitutional Law*, §660); and California, by the Government Claims Act, has clearly conferred the right to sue public entities and employees. (14 C.3d 461.)

(2) Former Corp.C. 834 (now Corp.C. 800), requiring security in derivative stockholders' suits (see *infra*, §361), is not analogous; it provides for an evidentiary hearing on the merit of the plaintiff's action and the reasonableness of the expenses likely to be incurred by the defendant; and these factors "undoubtedly" persuaded the Court of Appeal in *Nork* to recommend that statute as a model for a doctors security provision (see *infra*, §359). (14 C.3d 462.)

(3) The argument that the current trend of United States Supreme Court decisions indicates a retreat from the position that a prior hearing is required in the absence of emergency circumstances is based on the holdings in *Mitchell v. W.T. Grant Co.* (1974) 416 U.S. 600, 94 S.Ct. 1895, 40 L.Ed.2d 406, 7 Summary (10th), *Constitutional Law*, §646, 6 Cal. Proc. (5th), *Provisional Remedies*, §248, and *Arnett v. Kennedy* (1974) 416 U.S. 134, 94 S.Ct. 1633, 40 L.Ed.2d 15. But these cases are not controlling. The decision in the present case rests on the due process provisions of the California Constitution as well as those of the federal Constitution. The statutes approved by the United States Supreme Court provided various predeprivation procedural safeguards that minimized the risk of error in the initial removal decision. The procedures approved in these statutes operated in circumstances that might necessitate prompt action, so that a prior hearing could frustrate legitimate interests of the state or of another individual. (14 C.3d 463.) The statutes provided for prompt postdeprivation due process hearings. In *Mitchell* both parties had interests in the property, and the decision took account of these competing interests; in the present case the statutes deprive the plaintiff of property in which the defendant has no competing interest. (14 C.3d 464.) In *North Georgia Finishing v. Di-Chem* (1975) 419 U.S. 601, 95 S.Ct. 719, 42 L.Ed.2d 751, 7 Summary (10th), *Constitutional Law*, §646, the court held that due process at least requires judicial participation in the initial taking decision and an early hearing at which the party demonstrates probable cause to justify the taking. "In the instant case, such probable cause would consist of a prima facie showing on the issues of lack of merit and potential costs." (14 C.3d 465.)

Other cases are to the same effect. (See *Allen v. Jordanos*' (1975) 52 C.A.3d 160, 164, 125 C.R. 31 [under principles set forth in *Beaudreau*, bond requirement of C.C.P. 830 (*supra*, §350) was unconstitutional]; *Gonzales v. Fox* (1977) 68 C.A.3d Supp. 16, 18, 137 C.R. 312 [same as to C.C.P. 1030]; 54 Cal. L. Rev. 635; 89 Harv. L. Rev. 1006.)

SUPPLEMENT: [This section is current through the latest supplement]



174 of 192 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

IX. SECURITY FOR COSTS

A. Former Law and Revision.

3. Statutory Revision.

3 Witkin Cal. Proc. Actions § 352

[§ 352] Statutory Revision.

Following the decisions holding particular claims statutes unconstitutional (*Beaudreau v. Superior Court* (1975) 14 C.3d 448, 121 C.R. 585, 535 P.2d 713; *Nork v. Superior Court* (1973) 33 C.A.3d 997, 109 C.R. 428; *Allen v. Jordanos'* (1975) 52 C.A.3d 160, 125 C.R. 31; *Gonzales v. Fox* (1977) 68 C.A.3d Supp. 16, 137 C.R. 312; see *supra*, §351), the Law Revision Commission made a study of the 13 cost bond statutes, to determine what corrective legislation was needed. (See 14 Cal. Law Rev. Com. Reports, p. 319 et seq.) Its recommendation was that all but three should be repealed, and that the remaining three should be amended. (14 Cal. Law Rev. Com. Reports, p. 328.) The Commission pointed out that the need for this deterrent of frivolous actions is no longer acute in view of the remedies of summary judgment, judgment on the pleadings, general demurrers, and objections to all evidence; also, the administrative and financial burdens that would result from compliance with the *Beaudreau* standards would be substantial. (14 Cal. Law Rev. Com. Reports, p. 327.) (See 6 *Pepperdine L. Rev.* 191.)

The 1980 Legislature enacted legislation in accordance with the recommendation as follows:

(1) *Statutes Repealed*: C.C.P. 830, 831, 832, 833, 834, 835; *Educ.C.* 92650; *Govt.C.* 947, 951 (see *supra*, §350).

(2) *Statutes Amended*: C.C.P. 1029.5 (see *infra*, §358); C.C.P. 1029.6 (see *infra*, §359); C.C.P. 1030 (see *infra*, §353 et seq.); *Mil. & Vet.C.* 393 (action against active member of militia; requirement of bond for costs deleted). (See 12 *Pacific L. J.* 302.)

West's Key Number Digest, Costs 105 et seq.

SUPPLEMENT: [This section is current through the latest supplement]



175 of 192 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

IX. SECURITY FOR COSTS

B. Nonresident or Foreign Corporation Plaintiff.

1. In General.

3 *Witkin Cal. Proc. Actions* § 353

[§ 353] In General.

(1) *Former Law Unconstitutional.* *C.C.P. 1030* originally provided that "when the plaintiff in an action or special proceeding resides out of the state, or is a foreign corporation, security for the costs and charges, which may be awarded against such plaintiff, may be required by the defendant," and for failure to furnish the bond the court "may" dismiss the action or proceeding. This provision was held unconstitutional in not providing a hearing to determine the validity of the claim, the reasonableness of the amount of the security, and the nonresident's ability to pay. (See *Gonzales v. Fox* (1977) 68 *C.A.3d Supp.* 16, 18, 137 *C.R.* 312, applying theory of *Beaudreau v. Superior Court* (1975) 14 *C.3d* 448, 121 *C.R.* 585, 535 *P.2d* 713, *supra*, §351.)

(2) *Revised Law.* Pursuant to the Law Revision Commission recommendation (see *supra*, §352), the section was entirely rewritten in 1980; it was later amended. Now a defendant in any action or special proceeding brought by a nonresident plaintiff or foreign corporation may "at any time" apply by noticed motion to require an undertaking to secure costs and "reasonable" attorneys' fees otherwise authorized by statute or contract. (*C.C.P. 1030(a)*.) (See *Shannon v. Sims Service Center* (1985) 164 *C.A.3d* 907, 914, 210 *C.R.* 861 [upholding constitutionality of revised *C.C.P. 1030*]; *Cal. Civil Practice*, 2 Procedure, §§10:169 et seq., 10.196; *Rutter Group*, *Civil Proc. Before Trial* §11:280.2 et seq.; 7C *Am.Jur. P.P. Forms* (2002 ed.), *Costs*, Form 1 et seq.) (On discretion to impose this requirement by local rule or practice in federal courts, see 12 *Federal Practice & Procedure* (Wright & Miller) §3154.)

SUPPLEMENT: [This section is current through the latest supplement]



176 of 192 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

IX. SECURITY FOR COSTS

B. Nonresident or Foreign Corporation Plaintiff.

2. Actual Residence.

3 *Witkin Cal. Proc. Actions* § 354

[§ 354] Actual Residence.

(1) *In General.* Both the former and the current version of *C.C.P. 1030* contain the phrase "resides out of the state." This was construed in California for the first time in *Myers v. Carter* (1960) 178 C.A.2d 622, 3 C.R. 205. The term "residence" is frequently regarded as equivalent to "domicile," but the proper construction depends upon the purpose of the particular statute. And the purpose of *C.C.P. 1030*, to cope with the difficulty of enforcing judgments against persons not physically within the court's jurisdiction, is best served by construing the phrase as referring to actual residence rather than legal domicile. (a) At the time of suit, in April 1957, plaintiff was domiciled in California but living in other states temporarily because of his wife's health and employment; *Held*, defendant's motion for security was properly granted; (b) in February 1959, plaintiff moved to reconsider, his affidavit showing that he was residing in California and employed here. The trial judge granted the motion to reconsider, but thereafter dismissed the action for failure to file the bond. *Held*, reversed. When the motion to reconsider was granted, the earlier ruling was vacated, the issue was at large, and the uncontradicted affidavit showed that *C.C.P. 1030* did not apply.

(2) *Proof of Nonresidence.* The fact that the plaintiff is a foreign corporation cannot of course be a matter of dispute; but nonresidence of a plaintiff is a debatable question of fact and law. The statute makes no provision for trial of this issue and, although the plaintiff may undoubtedly contest the claim, the defendant is not required initially to submit proof of nonresidence with his demand. (*Gadette v. Recorder's Court of East San Diego* (1921) 53 C.A. 72, 74, 199 P. 817.) (See *Shannon v. Sims Service Center* (1985) 164 C.A.3d 907, 911, 210 C.R. 861 [plaintiff's sworn, uncontroverted answers to interrogatories were sufficient to establish his nonresidence]; 7C Am.Jur. P.P. Forms (2002 ed.), Costs, Form 1 et seq.)

(3) *Effect of Joinder of Resident and Nonresident.* When a nonresident plaintiff is joined with a resident plaintiff, only the nonresident need give security. (*Taylor v. Powell* (1962) 200 C.A.2d 780, 785, 19 C.R. 536 [alternative ground of decision].)

SUPPLEMENT: [This section is current through the latest supplement]



177 of 192 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

IX. SECURITY FOR COSTS

B. Nonresident or Foreign Corporation Plaintiff.

3. Cross-Complainant Need Not Post Security.

3 Witkin Cal. Proc. Actions § 355

[§ 355] Cross-Complainant Need Not Post Security.

Yao v. Superior Court (2002) 104 C.A.4th 327, 127 C.R.2d 912, considered a question of first impression. Plaintiff, a California resident, sued an out-of-state defendant who responded with a cross-complaint. *Held*, plaintiff could not move the trial court to require defendant to post security under *C.C.P. 1030* in order to prosecute the cross-complaint.

(a) *C.C.P. 1030* unambiguously refers only to a "plaintiff," and when the Legislature intends for a specific statutory provision to apply to both a plaintiff and a cross-complainant, it expressly indicates that intent. (*104 C.A.4th 331, 332.*)

(b) To construe the statute to include an out-of-state cross-complainant would not promote the policy served by the statute. The purpose of *C.C.P. 1030* is to protect California residents who are sued by out-of-state plaintiffs where there is no reasonable possibility that the out-of-state plaintiff will prevail. The statute protects California residents by requiring the out-of-state plaintiff to post security to insure the payment of costs and attorneys' fees (if recoverable) in the likely event that the plaintiff's action is defeated. This purpose is attenuated where, as in this case, a California resident has initiated a lawsuit against an out-of-state defendant and that defendant has responded, in part, by filing a cross-complaint. (*104 C.A.4th 331, 333.*)

SUPPLEMENT: [This section is current through the latest supplement]



178 of 192 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

IX. SECURITY FOR COSTS

B. Nonresident or Foreign Corporation Plaintiff.

4. Motion and Stay.

3 *Witkin Cal. Proc. Actions* § 356

[§ 356] Motion and Stay.

(1) *Grounds*. The motion must be made on the grounds that the plaintiff is a nonresident or a foreign corporation and "that there is a reasonable possibility that the moving defendant will obtain judgment in the action or special proceeding." (*C.C.P. 1030(b)*.) (See *Shannon v. Sims Service Center* (1985) 164 C.A.3d 907, 914, 210 C.R. 861 [if there has been prior arbitration award, trial judge may consider it in determining possibility that defendant will be successful].)

(2) *Supporting Papers*. The motion must be supported by an affidavit and memorandum of points and authorities. The affidavit must "set forth the nature and amount of the costs and attorney's fees the defendant has incurred and expects to incur by the conclusion of the action or special proceeding." (*C.C.P. 1030(b)*.)

(3) *Stay Pending Determination of Motion*. A stay is discretionary:

(a) If the defendant's motion is filed not later than 30 days after service of the summons, further proceedings may be stayed in the court's discretion, on an application by noticed motion. The hearing on the application must be held no later than 60 days after service of the summons. Proceedings are stayed until 10 days after the motion for the undertaking is denied, or, if the motion is granted, until 10 days after the undertaking has been filed and the defendant has been served with a copy of it. (*C.C.P. 1030(e)*.)

(b) If the defendant's motion is granted but the defendant objects to the undertaking, the court may stay the proceedings not longer than 10 days after a sufficient undertaking has been filed and the defendant has been served with a copy of it. (*C.C.P. 1030(e)*.) (See 7C Am.Jur. P.P. Forms (2002 ed.), Costs, Form 1 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]



179 of 192 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

IX. SECURITY FOR COSTS

B. Nonresident or Foreign Corporation Plaintiff.

5. Hearing, Determination, and Undertaking.

3 *Witkin Cal. Proc. Actions* § 357

[§ 357] Hearing, Determination, and Undertaking.

(1) *Hearing and Determination.* If the court determines that the grounds exist, it must order the plaintiff to file an undertaking in a specified amount. (*C.C.P. 1030(c)*.) An order granting or denying an undertaking is not appealable. (*C.C.P. 1030(g)*.) The court's determinations with respect to an undertaking "have no effect on the determination of any issues on the merits ... and may not be given in evidence nor referred to in the trial." (*C.C.P. 1030(f)*.) (See *Baltayan v. Estate of Getemyan* (2001) 90 C.A.4th 1427, 1432, 1433, 110 C.R.2d 72 [arbitration award in defendants' favor, letter by arbitrator, and police accident report were sufficient to show that defendants were likely to prevail, justifying order that plaintiff post undertaking; plaintiff's weak and incomplete showing of indigency did not warrant relief on that ground].)

(2) *Undertaking.* The plaintiff must file the undertaking within 30 days of the court's order or such longer period ordered by the court. (*C.C.P. 1030(d)*); for Bond and Undertaking Law, see 6 *Cal. Proc.* (5th), *Provisional Remedies*, §8 et seq.) The 30-day provision is not jurisdictional; the trial judge, on a showing of good cause, has discretion to reduce the time for compliance. (See *Shannon v. Sims Service Center* (1985) 164 C.A.3d 907, 916, 210 C.R. 861 [13-day period, set to coincide with trial date, was proper].)

(3) *Dismissal for Noncompliance.* If the plaintiff fails to file the undertaking as ordered by the court, the action or special proceeding "shall be dismissed as to the defendant in whose favor the order requiring the undertaking was made." (*C.C.P. 1030(d)*.) (See 7C Am.Jur. P.P. Forms (2002 ed.), Costs, Form 37 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Hearing and Determination.* See *Alshafie v. Lallande* (2009) 171 C.A.4th 421, 431, 89 C.R.3d 788 [trial judge abused discretion in granting defendants' motion to require out-of state plaintiff to post undertaking, and in subsequently dismissing action for plaintiff's failure to post undertaking, without first providing plaintiff with meaningful opportunity to demonstrate his financial inability to post undertaking and to address judge's concerns about plaintiff's showing; discussing *Baltayan v. Estate of Getemyan* (2001) 90 C.A.4th 1427, 110 C.R.2d 72, text, p. 464].



180 of 192 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

IX. SECURITY FOR COSTS

C. Action Against Architect, Engineer, or Related Professional.

3 Witkin Cal. Proc. Actions § 358

[§ 358] Action Against Architect, Engineer, or Related Professional.

C.C.P. 1029.5 establishes a security for costs requirement in actions against a licensed "architect, landscape architect, engineer, building designer, or land surveyor," to recover damages for error, omission, or professional negligence in the preparation of "plans, specifications, designs, reports or surveys" that are the basis for work on real property. (*C.C.P. 1029.5(a)*.) The statute does not apply to actions for bodily injury or wrongful death, or to small claims court actions. (*C.C.P. 1029.5(b)*.) (See Cal. Civil Practice, 2 Procedure, §§10:183 et seq., 10:198; Rutter Group, Civil Proc. Before Trial §§1:186, 11:280.1., 11:280.4, 11:280.5.)

The procedure is as follows:

(1) The motion for an order to furnish security may be made within 30 days after service of summons. (*C.C.P. 1029.5(a)*.)

(2) It must be supported by an affidavit "showing that the claim against the defendant is frivolous." (*C.C.P. 1029.5(a)*.)

(3) The court must make the order if the defendant shows that (a) the plaintiff would suffer no undue economic hardship in filing the undertaking, and (b) there is "no reasonable possibility that the plaintiff has a cause of action against each named defendant with respect to whom the plaintiff would otherwise be required to file the undertaking." (*C.C.P. 1029.5(a)*.)

(4) The undertaking must be in a sum not to exceed \$ 500 for each defendant, and not to exceed a total of \$ 3,000. (*C.C.P. 1029.5(a), (c)*.)

(5) If the undertaking is not furnished as to a defendant "within such reasonable time as may be fixed by the court" the action must be dismissed as to that defendant. (*C.C.P. 1029.5(a)*.)

(6) On dismissal of the action or award of judgment to the defendant, the plaintiff must pay the defendant's costs, and the sureties are liable for them in an amount not to exceed \$ 500 or the amount of the undertaking, whichever is less, for each defendant for whom they furnished an undertaking. (*C.C.P. 1029.5(d)*.)

The order, either granting or denying the motion, is not appealable. (*C.C.P. 1029.5(a)*.) And the determination that security shall or shall not be furnished "shall not be deemed a determination of any one or more issues in the action or of the merits thereof" (i.e., it is not a collateral estoppel). (*C.C.P. 1029.5(a)*.)

SUPPLEMENT: [This section is current through the latest supplement]



181 of 192 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

IX. SECURITY FOR COSTS

D. Action Against Physician or Related Professional.

3 *Witkin Cal. Proc. Actions* § 359

[§ 359] Action Against Physician or Related Professional.

C.C.P. 1029.6 establishes a security for costs requirement for physicians and many others in the healing arts, similar to that provided for architects and engineers (*supra*, §358). (See *Cal. Civil Practice*, 2 *Procedure*, §§10:186 et seq., 10:198; *Rutter Group*, *Civil Proc. Before Trial* §§1:186, 11:280, 11:280.4, 11:280.5.)

(1) *Defendants Protected*. The statute lists "a physician and surgeon, dentist, registered nurse, dispensing optician, optometrist, pharmacist, registered physical therapist, podiatrist, licensed psychologist, osteopathic physician and surgeon, chiropractor, clinical laboratory bioanalyst, clinical laboratory technologist, or veterinarian, duly licensed ... , or a licensed hospital as the employer of any such person." (*C.C.P. 1029.6(a)*.)

(2) *Actions Covered*. The requirement applies to an action for damages for personal injuries based on (a) "error, omission, or negligence in the performance of professional services," or (b) "performance of professional services without consent." (*C.C.P. 1029.6(a)*.) Small claims court actions are excluded. (*C.C.P. 1029.6(b)*.)

(3) *Motion*. The motion for an order to furnish security may be made by a defendant within 6 months after service of summons, on notice to the plaintiff and all appearing defendants. Any other defendant may, within 30 days after receipt of notice, join in the request; failure to join precludes the defendant from subsequently requesting an order. (*C.C.P. 1029.6(a)*.)

(4) *Affidavit*. The motion must be supported by an affidavit showing that the claim is frivolous. (*C.C.P. 1029.6(a)*.)

(5) *Defendant's Showing*. The court must make the order on a showing that the plaintiff would not suffer undue economic hardship and that there is no reasonable possibility that the plaintiff has a cause of action. (*C.C.P. 1029.6(a)*.)

(6) *Undertaking*. The undertaking must be in a sum "not to exceed" \$ 500 for each defendant, with a total limit of \$ 1,000. (*C.C.P. 1029.6(a), (c)*.)

(7) *Dismissal for Failure To Furnish*. If the undertaking is not furnished within such reasonable time as the court fixes, the action must be dismissed. (*C.C.P. 1029.6(a)*.)

(8) *Costs Where Defendant Prevails*. On dismissal of the action or judgment for the defendant, the plaintiff must

pay the defendant's costs. The sureties are liable for not over \$ 500 or the amount of the undertaking, whichever is less, to each defendant for whom they furnished an undertaking. (*C.C.P. 1029.6(d)*.)

(9) *Costs Where Plaintiff Prevails.* If the plaintiff prevails against any defendant to whom an undertaking has been furnished, that defendant must pay the plaintiff the cost of defending the dismissal motion. (*C.C.P. 1029.6(d)*.)

(10) *Alternative to Summary Judgment.* The statute prohibits what would in effect be duplicating motions based on a similar showing. A defendant making or joining in a motion for security is precluded from subsequently filing a motion for summary judgment (*C.C.P. 1029.6(e)*), and a defendant who files a motion for summary judgment is precluded from subsequently making or joining in a motion for security (*C.C.P. 1029.6(f)*).

SUPPLEMENT: [This section is current through the latest supplement]



182 of 192 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

IX. SECURITY FOR COSTS

E. Action Challenging Construction Project.

3 Witkin Cal. Proc. Actions § 360

[§ 360] Action Challenging Construction Project.

Two statutes permit a noticed motion to require an undertaking if a plaintiff has taken action that may delay or prevent construction:

(1) *C.C.P. 529.1* applies when a plaintiff has been granted an injunction against a legally approved construction project. The defendant may apply for an order requiring the plaintiff to give an undertaking as security for the defendant's costs and damages resulting from delay of the project. (See *11 Pacific L. J. 367.*)

(2) *C.C.P. 529.2* applies when an action or proceeding has been brought for an injunction or other relief to challenge a low- or moderate-income development project; it similarly allows the defendant to seek an undertaking as security for costs and damages from resulting delay. (See *13 Pacific L. J. 618.*)

Both statutes provide that a plaintiff's liability for costs and damages may not exceed \$ 500,000.

SUPPLEMENT: [This section is current through the latest supplement]



183 of 192 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

IX. SECURITY FOR COSTS

F. Shareholder's Derivative Suit.

1. Nature and Scope of Requirement.

3 *Witkin Cal. Proc. Actions* § 361

[§ 361] Nature and Scope of Requirement.

(1) *In General.* An unusual type of security requirement has been imposed in many states to prevent unwarranted derivative suits by minority shareholders against corporations. (See 9 *Summary* (10th), *Corporations*, §§176, 177.) The California statute (*Corp.C. 800*) calls for a motion by the defendant to require security for costs and attorneys' fees, fixed by the court, with dismissal as the penalty for failure to comply. (See *Hogan v. Ingold* (1952) 38 C.2d 802, 808, 243 P.2d 1; *Beyerbach v. Juno Oil Co.* (1954) 42 C.2d 11, 19, 265 P.2d 1; *Melancon v. Superior Court* (1954) 42 C.2d 698, 707, 268 P.2d 1050; *Wood v. Gordon* (1952) 112 C.A.2d 374, 376, 246 P.2d 84; *Barber v. Lewis & Kaufman* (1954) 125 C.A.2d 95, 97, 269 P.2d 929; *Olson v. Basin Oil Co. of Calif.* (1955) 136 C.A.2d 543, 555, 288 P.2d 952; *Chase v. Super-Cold Corp.* (1958) 163 C.A.2d 83, 85, 328 P.2d 812; *Toboni v. Pennington Millinery Co.* (1959) 172 C.A.2d 47, 53, 341 P.2d 845; *Bailey v. Fosca Oil Co.* (1960) 180 C.A.2d 289, 293, 4 C.R. 474; *Ensher v. Ensher, Alexander & Barsoom* (1960) 187 C.A.2d 407, 410, 9 C.R. 732; *Burt v. Irvine Co.* (1965) 237 C.A.2d 828, 869, 47 C.R. 392; C.E.B., 2 Civil Proc. Before Trial 4th, §29.26 et seq.; 37 *Cal. L. Rev.* 399; 41 *Cal. L. Rev.* 546; 23 *So. Cal. L. Rev.* 19; 1 *U.C.L.A. L. Rev.* 84; *Cal. Civil Practice*, 2 Procedure §§10:176 et seq., 10:1197; *Cal. Civil Practice*, 1 Business Litigation, §§2:9 et seq., 2:22; *Rutter Group, Civil Proc. Before Trial* §1:187; on federal court actions, see 45 *Cal. L. Rev.* 80; 69 *Harv. L. Rev.* 1504; 73 *Harv. L. Rev.* 1222.)

The statute also applies to a similar action involving an unincorporated association. (*Corp.C. 800(a).*)

(2) *Right To Make Motion.* The right to make the motion is restricted to the corporation or any defendant who is an officer or director of the corporation or who was an officer or director at the time of the events that are the subject of the plaintiff's complaint. (*Corp.C. 800(c).*)

(3) *"Strike Suits."* The contention that the statute should be interpreted to apply only to "strike suits" and not to those brought by bona fide shareholders with substantial interest has been rejected. (See *Suburban Water Systems v. Superior Court* (1968) 264 C.A.2d 956, 960, 71 C.R. 45 [lower court denied motion on ground that plaintiffs' holdings amounted to 5% of stock; mandamus granted to compel vacation of order on this nonstatutory erroneous ground].)

SUPPLEMENT: [This section is current through the latest supplement]



184 of 192 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

IX. SECURITY FOR COSTS

F. Shareholder's Derivative Suit.

2. Requirement Is Not Applicable to Personal Action.

3 *Witkin Cal. Proc. Actions* § 362

[§ 362] Requirement Is Not Applicable to Personal Action.

The statutory security requirement for shareholders' derivative suits "applies only to actions by shareholders *in the right of a corporation*. It does not authorize the requiring of security from shareholders who seek to vindicate their personal rights, even though they allege facts that would also give rise to a corporate cause of action." (*Hagan v. Superior Court* (1960) 53 C.2d 498, 503, 2 C.R. 288, 348 P.2d 896.)

In *Hagan*, the majority directors and attorney F, allegedly in control of B Corporation, filed a complaint for involuntary dissolution. The corporation's default was entered. More than a year later petitioners, shareholders, learned of the proceedings and filed a complaint in intervention, alleging their shareholder status, refusal of defendants to recognize them, unauthorized expenditure of corporate funds and wrongful diversion of assets. They sought the following relief: (a) register of their shares and issuance of new certificates, (b) injunction against F paying out assets, (c) order setting aside corporation's default and permitting petitioners to answer in its behalf, (d) order requiring F to post a bond equal to the assets. Defendants moved for an order that petitioners post security for costs. The judge ordered them to post \$ 3,500 and threatened to hold them in contempt if they took any further action without compliance. *Held*, prohibition granted to prevent the judge from enforcing the order, which was in excess of jurisdiction. The allegations of refusal to recognize their rights as shareholders and prevention from participation in the corporate affairs asserted rights personal to them. "Even if other parts of the complaint in intervention set forth derivative causes of action, they would not give respondent court jurisdiction to require security ... with regard to independent personal causes of action." (53 C.2d 503.)

SUPPLEMENT: [This section is current through the latest supplement]



185 of 192 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

IX. SECURITY FOR COSTS

F. Shareholder's Derivative Suit.

3. Motion and Order.

3 *Witkin Cal. Proc. Actions* § 363

[§ 363] Motion and Order.

(1) *Motion*. The motion may be made at any time within 30 days after service of summons on the corporation or other defendant. The time may, however, be extended on a showing of good cause for additional periods not exceeding 60 days. (*Corp.C. 800(c)*.)

(2) *Grounds*. The grounds may be either of the following:

(a) That there is no reasonable possibility that the prosecution of the cause of action alleged in the complaint against the moving party will benefit the corporation or its shareholders. (*Corp.C. 800(c)(1)*.)

(b) That the moving party, if other than the corporation, did not participate in the transaction complained of in any capacity. (*Corp.C. 800(c)(2)*.)

In *Bailey v. Fosca Oil Co.* (1960) 180 C.A.2d 289, 4 C.R. 474, plaintiffs set forth three causes of action. The trial judge refused to order security because defendants' showing was only sufficient as to the third cause. *Held*, reversed; it was not necessary to make a showing that all causes would not benefit the corporation. Otherwise plaintiffs could include a large number of unjustified causes in a complaint containing one good one, and defeat the purposes of the statute. (180 C.A.2d 293.)

(3) *Review of Order*. The order granting the motion is not directly appealable by the plaintiff; an appeal lies only from the judgment of dismissal following failure to post security (*infra*, §364). (*Woodman v. Ackerman* (1967) 249 C.A.2d 644, 652, 57 C.R. 687.)

(4) *Order Is Not Determination of Merits*. The grant or denial of the motion "shall not be a determination of any issue in the action or of the merits thereof." (*Corp.C. 800(d)*.)

SUPPLEMENT: [This section is current through the latest supplement]



186 of 192 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

IX. SECURITY FOR COSTS

F. Shareholder's Derivative Suit.

4. Security.

3 *Witkin Cal. Proc. Actions* § 364

[§ 364] Security.

(1) *Nature and Amount.* The security is furnished for "reasonable expenses, including attorneys' fees, which may be incurred by the moving party and the corporation in connection with the action, including expenses for which the corporation may become liable" pursuant to *Corp.C. 317*. The court fixes "the nature and amount," but it must not exceed \$ 50,000. (*Corp.C. 800(d)*; see *Hale v. Southern Calif. IPA Med. Group (2001) 86 C.A.4th 919, 927, 103 C.R.2d 773* [plaintiff may only be required to post security in aggregate amount of \$ 50,000 as to *all* moving parties].) (On Bond and Undertaking Law, see 6 *Cal. Proc. (5th), Provisional Remedies*, §8 et seq.)

(2) *Subsequent Increase or Decrease.* *Corp.C. 800* does not cover an increase or decrease in the amount of the security. However, the Bond and Undertaking Law (*C.C.P. 995.010* et seq.; see 6 *Cal. Proc. (5th), Provisional Remedies*, §8 et seq.) permits the increase or decrease of the undertaking if it is insufficient (*C.C.P. 996.010*) or excessive (*C.C.P. 996.030*). (See 6 *Cal. Proc. (5th), Provisional Remedies*, §29 et seq.)

(3) *Filing Before or After Motion.* The plaintiff may avoid the inconvenience and delay of the motion proceeding by voluntarily posting a bond in the aggregate amount of \$ 50,000, either before or after a motion is made. This will be deemed full compliance, and any pending motion must be dismissed. (*Corp.C. 800(e)*.)

(4) *Dismissal for Failure To File.* Unless the security is furnished within a reasonable time fixed by the court, the action must be dismissed as to any defendant for whom it was ordered. (*Corp.C. 800(d)*.)

The statute is intended to create a fund for attorneys' fees in the security; it does not deal with the situation where the plaintiff's action is dismissed for failure to furnish security. In that circumstance, the general rule that attorneys' fees are not recoverable as costs applies. (*Freeman v. Goldberg (1961) 55 C.2d 622, 625, 12 C.R. 668, 361 P.2d 244.*)

SUPPLEMENT: [This section is current through the latest supplement]



187 of 192 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

IX. SECURITY FOR COSTS

G. Vexatious Litigant.

1. In General.

3 *Witkin Cal. Proc. Actions* § 365

[§ 365] In General.

(1) *Nature and Purpose of Statute.* The 1963 Legislature enacted a security for costs statute (*C.C.P.* 391 et seq.) to curb the abuse of vexatious litigation, modeled after the statute applicable to shareholders' suits (*supra*, §361). (See *Muller v. Tanner* (1969) 2 *C.A.3d* 445, 450, 82 *C.R.* 738; 52 *Cal. L. Rev.* 204; 54 *Cal. L. Rev.* 1769; 72 *So. Cal. L. Rev.* 275 [statute as judicial tool to deny access to litigation to clever obstructionists]; *Cal. Civil Practice*, 2A Procedure §15:1 et seq.; Rutter Group, *Civil Proc. Before Trial* §1:914 et seq.)

"The unreasonable burden placed upon the courts by groundless litigation prevents the speedy consideration of proper litigation and the tremendous time and effort consumed by unjustifiable suits makes it imperative that the courts enforce the vexatious litigant statutes enacted by the Legislature. ... The court cannot permit such litigation to continue without offering the protection provided in the vexatious litigant statutes to the targets of the repeated attempts to relitigate the same issues." (*First Western Dev. Corp. v. Superior Court* (1989) 212 *C.A.3d* 860, 870, 261 *C.R.* 116.)

(2) *Scope of Statute.* The statute applies to the filing of a "civil action or proceeding." (*C.C.P.* 391(a).)

(3) *Applicability to Writ Proceedings and Appeals.* The vexatious litigant statutes apply not only to parties in trial courts, but also to parties in civil appeals and writ proceedings. This does not mean that appellate courts will routinely reject proper attempts by vexatious litigants to appeal or to file writ petitions, but only that those courts will require litigants subject to prefilings orders to seek the permission of the presiding justice before proceeding. The decision whether to allow the litigant to proceed will be made on an individual basis, taking into account such factors as the nature of the action below, the nature of the lower court's ruling, whether writ or appeal is the appropriate procedure for seeking review, the litigant's claims of error, and whether the litigant has demonstrated improper reasons for bringing the original litigation or for taking it to the next court level. (*McColm v. Westwood Park Assn.* (1998) 62 *C.A.4th* 1211, 1216, 1219, 73 *C.R.2d* 288, *infra*, §369.)

A prison inmate who has been declared a vexatious litigant nevertheless retains the right to file a petition for a writ of habeas corpus, unencumbered by the vexatious litigant statute. The petition does not meet that statutory definition of a civil action or proceeding. (*In re Bittaker* (1997) 55 *C.A.4th* 1004, 1006, 1008, 64 *C.R.2d* 679, citing the text [disagreeing with contrary dictum in *Wolfgram v. Wells Fargo Bank* (1997) 53 *C.A.4th* 43, 61 *C.R.2d* 694]; *People v.*

Harrison (2001) 92 C.A.4th 780, 785, 112 C.R.2d 91 [following Bittaker].)

(4) *Applicability to Guardianship Proceedings.* A person may be declared a vexatious litigant for purposes of C.C.P. 391 et seq. (see infra, §366 et seq.) if he or she has filed repeated petitions for visitation, termination of guardianship, or instruction to the guardian that are unmeritorious or intended to harass or annoy the guardian. (*Prob.C. 1611.*)

(5) *Constitutionality of Statutes.* The vexatious litigant statutes are constitutional. (*Taliaferro v. Hoogs (1965) 236 C.A.2d 521, 46 C.R. 147, 8 Summary (10th), Constitutional Law, §792; In re Whitaker (1992) 6 C.A.4th 54, 56, 8 C.R.2d 249; Childs v. Paine Webber (1994) 29 C.A.4th 982, 993, 35 C.R.2d 93 [citing Whitaker]; Wolfgram v. Wells Fargo Bank, supra, 53 C.A.4th 55, 59, 60 [statute does not chill right to petition against government, constitute prior restraint, or deny due process].)*

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Nature and Purpose of Statute.* See 29 California Lawyer 42 (August 2009) [Handling Vexatious Litigants]; 45 A.L.R.6th 493 [validity, construction, and application of state vexatious litigant statutes].(3) *Applicability to Writ Proceedings and Appeals.* California law is unsettled on whether a person who has been determined to be a vexatious litigant in prior unrelated litigation must seek leave of the court before filing an appeal in a case in which he or she is the defendant.

In *Mahdavi v. Superior Court (2008) 166 C.A.4th 32, 82 C.R.3d 121*, plaintiff landlord brought an unlawful detainer action against defendant, who had been found by the Courts of Appeal to be a vexatious litigant based on his conduct in prior litigation and who was subject to an order prohibiting the filing of new litigation without court permission (see text, §370). The trial judge entered judgment in plaintiff's favor. Defendant appealed to the appellate division of the superior court, but the appellate division dismissed the appeal because defendant, subject to a vexatious litigant prefiling order, failed to request permission from the presiding judge to maintain the appeal. *Held*, mandamus was issued to reinstate defendant's appeal.

(a) A careful reading of the definitions of "plaintiff" and "defendant" in C.C.P. 391(d) and (e), together with the security provisions of the vexatious litigant statute (see text, §369), indicates that the statute was not intended to apply to an appellant defendant who has been declared a vexatious litigant in unrelated litigation. (*166 C.A.4th 39.*) A defendant who appeals an adverse ruling is not filing or maintaining "new litigation" within the meaning of the vexatious litigant statute, but rather, is attempting to undo the results of litigation that has been instituted against him or her. (*166 C.A.4th 41.*) The intent of the vexatious litigant statute is to protect defendants from continued and repeated unmeritorious lawsuits initiated by plaintiffs. This intent would not be served by imposing the statute's limitations on one who is a defendant in an action, even if that individual has previously brought frivolous claims against others. (*166 C.A.4th 42.*)

(b) *McColm v. Westwood Park Assn. (1998) 62 C.A.4th 1211, 73 C.R.2d 288*, text, p. 471, involved an appellant who had been declared a vexatious litigant in prior litigation and who was the *plaintiff* in the underlying litigation, and correctly held that the appellant could be required to seek court permission to file an appeal. However, dicta in *McColm* stating that a vexatious litigant *defendant* may be required to apply to a court for permission to file an appeal is incorrect. (*166 C.A.4th 42.*)

Mahdavi was criticized in *In re R.H. (2009) 170 C.A.4th 678, 88 C.R.3d 650*, a juvenile dependency proceeding in which defendant, the father of a dependent son, appealed from an adverse order of the trial judge. Defendant had previously filed 13 unsuccessful in pro. per. appeals or writ petitions relating to his son's dependency in the preceding 7 years. *Held*, based on defendant's previous filings, he was declared a vexatious litigant and was required to obtain court permission to file new litigation, including this appeal.

(a) *Defendant was vexatious litigant.* Defendant met the definition of a "vexatious litigant" under C.C.P. 391(b)(1)

(see text, §366), based on his filing of the unsuccessful 13 in pro. per. appeals and writ proceedings relating to his son's dependency in the 7 years preceding his current appeal, including 5 matters that did not even present an arguable issue. (170 C.A.4th 693.)

(b) *Mahdavi case*. *Mahdavi* is distinguishable because it involved an appellant who had been declared a vexatious litigant and was subject to a prefiling order. In this case, the question was whether to declare defendant a vexatious litigant for purposes of issuing a prefiling order under C.C.P. 391.7. However, even assuming that *Mahdavi* is relevant to the issue addressed here, "we are not persuaded by it." (170 C.A.4th 694.) C.C.P. 391.7 is a separate and distinct remedy available to courts in dealing with vexatious litigants. In contrast to the security provisions of the vexatious litigant statute, the remedy in C.C.P. 391.7 is not limited to a defendant seeking a prefiling order against a plaintiff. Unlike the security provisions, C.C.P. 391.7 authorizes a court "on its own motion" to enter a prefiling order. (170 C.A.4th 694.) Also, *Mahdavi* "took too narrow a view of the vexatious litigant law and its purpose." (170 C.A.4th 695.) It is appropriate to take the broader view of the statute's purpose of also protecting the court system and its resources as well as other litigants. (170 C.A.4th 696.)

(c) *Applicability of statute to juvenile dependency proceedings*. The vexatious litigation statute applies to child dependency proceedings, even though the Welfare and Institutions Code provisions governing these proceedings are silent as to the statute's applicability. Application of the statute in the case of a parent, such as defendant, who abuses the appellate process is consistent with the state's body of dependency law. (170 C.A.4th 678.) The fact that C.C.P. 391.7(d) states that the statute is applicable to proceedings under the Family and Probate Codes, but is silent as to the Welfare and Institutions Code, is of no import. This position is too narrow a view and ignores the broad purpose of the vexatious litigant law. (170 C.A.4th 699, 700.)

(d) *Right to counsel*. Requiring defendant to obtain court permission before filing his appeal does not deprive him of his right to counsel. An appellant's right to court-appointed counsel presumes an entitlement to an appeal. A vexatious litigant, however, is not entitled to that presumption. Defendant also ignored the fact that he had court-appointed trial counsel to advise him on his appellate rights. (170 C.A.4th 700.)

(e) *Attack under California Constitution*. Requiring defendant to obtain permission from the presiding justice of the court before filing his appeal does not require a judgment on the merits. Thus, application of the vexatious litigant statute to defendant's appeal did not violate the requirement in Cal. Const., Art. VI, §3, that an appellate court conduct itself as a three-judge court with a concurrence of two judges for a judgment, or the requirement in Cal. Const., Art. VI, §14, that an appellate court must determine causes in writing with written reasons. (170 C.A.4th 701.)

(f) *Attack under federal Constitution*. Requiring defendant to obtain court permission before filing his appeal does not violate his First Amendment right to petition the Government for redress of grievance. The requirement is aimed at curbing waste of court time and taxpayer resources. (170 C.A.4th 703.)

(5) *Constitutionality of Statutes*. See *In re R.H.*, *supra*, 170 C.A.4th 700, 701 [requiring vexatious litigant defendant to obtain permission from presiding justice of Court of Appeal before filing new appeal does not violate state or federal Constitution].



188 of 192 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

IX. SECURITY FOR COSTS

G. Vexatious Litigant.

2. Who Is Vexatious Litigant.

a. Statutory Definition.

3 *Witkin Cal. Proc. Actions* § 366

[§ 366] Statutory Definition.

C.C.P. 391(b) defines a vexatious litigant as a person who satisfied one of four alternatives:

(1) *Brings Five Unmeritorious Cases in Preceding 7 Years.* A vexatious litigant is a person who, in the immediately preceding 7 years "has commenced, prosecuted, or maintained" in pro. per. at least five litigations, other than in a small claims court, that have been (a) finally determined adversely to the person, or (b) unjustifiably permitted to remain pending at least 2 years without having been brought to trial or hearing. (*C.C.P. 391(b)(1)*; see *Tokerud v. Capitolbank Sacramento* (1995) 38 *C.A.4th* 775, 778, 45 *C.R.2d* 345 [reliance on prior unmeritorious case that plaintiff had filed, but then voluntarily dismissed without prejudice, was valid]; *Holcomb v. U.S. Bank Nat. Assn.* (2005) 129 *C.A.4th* 1494, 1501, 29 *C.R.3d* 578 [reliance on prior unmeritorious case was invalid, where earlier case involved cross-complaint filed against plaintiff].)

Filing the motion for an order requiring the plaintiff to furnish security (see *infra*, §368) establishes the date from which the 7-year period of *C.C.P. 391(b)(1)* must be measured. (*Stolz v. Bank of America* (1993) 15 *C.A.4th* 217, 224, 19 *C.R.2d* 19.)

In *Stolz*, plaintiff commenced an action in pro. per. on May 27, 1983. The 7-year period established by *C.C.P. 391(b)(1)* commenced on September 13, 1984. On October 23, 1984, plaintiff substituted counsel in the action, and on May 16, 1988, the action was dismissed for inexcusable delay in prosecution. *Held*, the action satisfied the requirements of *C.C.P. 391(b)(1)*.

(a) The fact that the action was commenced outside the 7-year period is irrelevant; under *C.C.P. 391(b)(1)* it is sufficient that the action be "maintained" within that period. Here, the action was "maintained" in pro. per. within the 7-year period for 40 days, i.e., from September 13, 1984 (the date the period commenced) to October 23, 1984 (the date on which counsel was substituted). (15 *C.A.4th* 225.)

(b) This period was sufficient. "The forty days between September 13 and October 23, 1984, must be considered in their context, connected to a period of one year and four months (from May 27, 1983) during which *Stolz* 'maintained'

the litigation in propria persona. In that context, the link between Stolz's status as a pro per plaintiff and the unjustifiable delay ultimately found is not tenuous." (15 C.A.4th 225.)

(2) *Repeatedly Relitigates Against Same Defendant.* A vexatious litigant is a person who, after a litigation has been finally determined against the person, repeatedly relitigates or attempts to relitigate in pro. per. either (a) the validity of the determination against the same defendant or defendants as to whom the litigation was finally determined, or (b) "the cause of action, claim, controversy, or any of the issues of fact or law, determined or concluded by the final determination against the same defendant or defendants as to whom the litigation was finally determined." (C.C.P. 391(b)(2); see *First Western Dev. Corp. v. Superior Court* (1989) 212 C.A.3d 860, 864, 261 C.R. 116 [phrase "final determination" refers to judgment that is final for all purposes after all avenues for direct review have been exhausted; action here was final]; *Childs v. Paine Webber* (1994) 29 C.A.4th 982, 993, 35 C.R.2d 93 [same; action was not final].)

(3) *Engages in Repeated Frivolous or Unnecessary Delaying Tactics.* A vexatious litigant is a person who, in any litigation while acting in pro. per., (a) repeatedly files unmeritorious motions, pleadings, or other papers; (b) conducts unnecessary discovery, or (c) engages in other tactics that are frivolous or solely intended to cause unnecessary delay. (C.C.P. 391(b)(3); see *In re Luckett* (1991) 232 C.A.3d 107, 109, 283 C.R. 312 [party had filed at least 34 unmeritorious motions, pleadings, or other papers, and had engaged in other frivolous tactics]; *Holcomb v. U.S. Bank Nat. Assn.*, *supra*, 129 C.A.4th 1506 [showing in prior case was insufficient, where plaintiff accused of discovery abuses had been represented by counsel during most of litigation, evidence was primarily based on docket sheet that made it difficult to discern nature of litigant's tactics, and trial judge had denied defendant's motion to have plaintiff declared vexatious litigant].) (On similar definition for purposes of guardianship proceedings, see *Prob.C. 1611*, *supra*, §365.)

(4) *Has Been Declared Vexatious Litigant.* A vexatious litigant is a person who has previously been declared to be a vexatious litigant by a state or federal court of record in an action or proceeding "based upon the same or substantially similar facts, transaction, or occurrence." (C.C.P. 391(b)(4); see *In re Shieh* (1993) 17 C.A.4th 1154, 1166, 21 C.R.2d 886, *infra*, §370 [party had been declared vexatious litigant in federal court and by two state court judges in three distinct cases, all involving similar facts and claims].)

The phrase "substantially similar" is satisfied when both proceedings arise from essentially the same facts, transaction, or occurrence. This may be determined by examination of the factual circumstances that underlie the two proceedings and of the pleadings. The provision does not require that the parties be the same. (*Devereaux v. Latham & Watkins* (1995) 32 C.A.4th 1571, 1581, 38 C.R.2d 849 [law firm's replevin action against discharged paralegal, in which she was named vexatious litigant, was substantially similar to her subsequent indemnity and injunction action against law firm; both actions arose from her unauthorized removal of documents from law firm and her production of them at deposition in another action].)

(5) *Nonrepresentative Class Action Member.* A nonrepresentative class action member who objects to a proposed settlement does not "commence, institute or maintain" a class action in which he or she is a member, and thus may not be declared a vexatious litigant under C.C.P. 391(b)(1). Neither C.C.P. 391(b)(2) nor (b)(3) requires the nonrepresentative class member to bring an action; instead, each provision focuses on other conduct by that person during litigation. Because a nonrepresentative class member has the right to participate in a class action by filing objections or challenging an order rejecting those objections on appeal, such a person may engage in behavior that would otherwise qualify as being a vexatious litigant under either of the latter two provisions. (*In re Natural Gas Antitrust Cases I, II, III & IV* (2006) 137 C.A.4th 387, 395, 39 C.R.3d 909 [nonrepresentative class member's conduct did not warrant declaring him vexatious litigant].)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Brings Five Unmeritorious Cases in Preceding 7 Years.* See *In re R.H.* (2009) 170 C.A.4th 678, 693, 88 C.R.3d 650, *Supp.*, *supra*, §365 [defendant appealing adverse ruling in dependency proceeding involving his son had previously filed 13 unsuccessful in pro. per. appeals or writ petitions relating to son's dependency in preceding 7 years, including 5 matters that did not present arguable issue]. (3) *Engages in Repeated Frivolous or Unnecessary Delaying Tactics.* See

Morton v. Wagner (2007) 156 C.A.4th 963, 972, 67 C.R.3d 818 [party who filed 3 unsuccessful, but not sham, motions relating to 2 separate judgments over 3-year period did not meet statutory definition].



189 of 192 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

IX. SECURITY FOR COSTS

G. Vexatious Litigant.

2. Who Is Vexatious Litigant.

b. Litigant Acting in Pro. Per.

3 *Witkin Cal. Proc. Actions* § 367

[§ 367] Litigant Acting in Pro. Per.

(1) *In General.* *C.C.P. 391(b)* defines a vexatious litigant as a person who has in the past appeared in pro. per. (See *supra*, §366.) However, *Camerado Ins. Agency v. Superior Court* (1993) 12 *C.A.4th* 838, 16 *C.R.2d* 42, held that the trial judge erred in construing *C.C.P. 391(b)* as applying only to litigants acting in pro. per. in the civil action in which the vexatious litigant motion is brought. "The language of this statute leaves little room for interpretation. The defendant who moves for security must prove the plaintiff is a vexatious litigant. A plaintiff is a person who commences, institutes or maintains a litigation. The Legislature defined a plaintiff as a person, not as a person acting in propria persona. A vexatious litigant is a person who engages in, or has engaged in, any of the four types of conduct specified in section 391, subdivision (b). Of the four defining acts that transform a plaintiff into a vexatious litigant, each refers to acts committed while the person was in propria persona. Although the second and third acts described in the statute refer to a person acting in propria persona in the very proceeding in which a defendant attempts to obtain an order requiring the plaintiff to furnish security, the first and fourth do not. A plain reading of the statute indicates the Legislature intended it to apply, at least as to the first and fourth described acts (§ 391, subd. (b)(1) and (b)(4)), to persons currently represented by counsel whose conduct was vexatious when they represented themselves in the past." (12 *C.A.4th* 842.)

(2) *Corporations.* A corporation may not appear in pro. per. except in some small claims litigation. However, when well-established principles concerning disregard of the corporate fiction and utilization of a corporation to avoid a statute are applicable in a given case, a corporation is subject to the vexatious litigation law. (*Say & Say v. Ebershoff* (1993) 20 *C.A.4th* 1759, 1766, 25 *C.R.2d* 703 [corporation was vexatious litigant where plaintiff attorney, who had been declared vexatious litigant in past and who dominated and controlled corporation, named corporation as coplaintiff merely to avoid vexatious litigant law].)

SUPPLEMENT: [This section is current through the latest supplement]



190 of 192 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

IX. SECURITY FOR COSTS

G. Vexatious Litigant.

3. Procedure.

a. Motion and Grounds.

3 Witkin Cal. Proc. Actions § 368

[§ 368] Motion and Grounds.

(1) *Motion*. The defendant makes a noticed motion that the plaintiff be required to furnish security. The motion may be made at any time before entry of final judgment. (*C.C.P.* 391.1.) If it is made prior to trial, litigation is stayed and the moving defendant need not plead until 10 days after the motion has been denied, or, if the motion is granted, until 10 days after the required security has been furnished and the defendant has been given written notice of it. If the motion is made any time thereafter, the litigation must be stayed for a period after denial of the motion or furnishing of security as the court determines. (*C.C.P.* 391.6.) (See 7 *Pacific L. J.* 319.)

(2) *Grounds*. The motion must be supported by a showing that (a) the plaintiff is a vexatious litigant (see *supra*, §§366, 367), and (b) "there is not a reasonable probability that he will prevail in the litigation against the moving defendant." (*C.C.P.* 391.1.)

The supporting papers must present evidence; mere conclusions in the statutory language are insufficient. (*Muller v. Tanner* (1969) 2 *C.A.3d* 445, 464, 82 *C.R.* 738.) In determining whether the plaintiff has a reasonable probability of prevailing, the trial court may weigh the evidence presented on the motion. The court is not required to assume the truth of the plaintiff's alleged facts and to determine whether the claim is foreclosed as a matter of law. (*Moran v. Murtaugh Miller Meyer & Nelson, LLP* (2007) 40 *C.4th* 780, 782, 55 *C.R.3d* 112, 152 *P.3d* 416 [disapproving *Devereaux v. Latham & Watkins* (1995) 32 *C.A.4th* 1571, 38 *C.R.2d* 849, to extent that it is inconsistent with this view].)

(3) *Effect of Prefiling Order*. A defendant is not precluded from filing a motion under *C.C.P.* 391.1 against a plaintiff who earlier has obtained a prefiling order under *C.C.P.* 391.7 (see *infra*, §370) requiring a vexatious litigant to seek court approval to commence new litigation. The fact that the court finds that the new litigation has "merit" for purposes of *C.C.P.* 391.7 does not preclude a later finding that the plaintiff has no reasonable probability of prevailing, as is required under *C.C.P.* 391.1. (*Devereaux v. Latham & Watkins, supra*, 32 *C.A.4th* 1587.)

SUPPLEMENT: [This section is current through the latest supplement]



191 of 192 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

IX. SECURITY FOR COSTS

G. Vexatious Litigant.

3. Procedure.

b. Hearing, Determination, and Security.

3 *Witkin Cal. Proc. Actions* § 369

[§ 369] Hearing, Determination, and Security.

(1) *Hearing and Determination.* The judge must consider evidence, written or oral, by witness or affidavit, material to the ground of the motion. (C.C.P. 391.2.) The grant or denial of the motion is not a determination of any issue on the merits. (C.C.P. 391.2.)

(2) *Security.* If the motion is granted, the judge orders the plaintiff to furnish "security," i.e., an undertaking, to assure payment of reasonable expenses, including attorneys' fees, and not limited to taxable costs. (C.C.P. 391(c), 391.3.) However, there is nothing in the language of these provisions that limits security to the amount of attorneys' fees that the defendant may recover if it is the successful party. (*Singh v. Lipworth* (2005) 132 C.A.4th 40, 45, 47, 33 C.R.3d 178 [plaintiff was properly ordered to post security to cover defendants' potential attorneys' fees, despite plaintiff's claim that there was no contractual or statutory provision authorizing defendants to recover attorneys' fees from him; C.C.P. 391(c) and 391.3 provide independent basis for awarding attorneys' fees, and thus justified order].)

The amount and the time for furnishing the undertaking are fixed by the judge. The Bond and Undertaking Law (C.C.P. 995.010 et seq.; see 6 *Cal. Proc.* (5th), *Provisional Remedies*, §8 et seq.) permits an increase or decrease of the undertaking if it is insufficient (C.C.P. 996.010) or excessive (C.C.P. 996.030). The amount of the security must also be based on evidence; an order made without some showing of support is an abuse of discretion. (See *Muller v. Tanner* (1969) 2 C.A.3d 445, 465, 82 C.R. 738 ["From all that appears in the record of this case the sum of \$ 5,000 was picked out of thin air"].) However, the court is not required to consider the plaintiff's means in determining the amount of the security. (*Devereaux v. Latham & Watkins* (1995) 32 C.A.4th 1571, 1588, 38 C.R.2d 849.)

An order to post security does not require formal findings; on appeal, the court presumes that the order is correct and implies such findings as are necessary to support it. (*Devereaux v. Latham & Watkins*, *supra*, 32 C.A.4th 1582.) The court in *McColm v. Westwood Park Assn.* (1998) 62 C.A.4th 1211, 73 C.R.2d 288, *supra*, §365, made the following observations about the requirements for ordering a vexatious litigant to post an undertaking:

(a) Neither C.C.P. 391.3 nor *Devereaux* requires an evidentiary hearing to support the order. (62 C.A.4th 1218.)

(b) Because a judge need not consider a vexatious litigant's means in determining the amount of the undertaking, the fact that the litigant has been granted a waiver of costs or has qualified for social services due to low income does not excuse him from posting the undertaking. (62 C.A.4th 1218, 1219, citing *Devereaux*.)

(c) Although a judge may waive an undertaking, he or she is not required to do so. (62 C.A.4th 1222.)

(3) *Dismissal for Failure To Post Security*. If the security ordered is not furnished, the litigation must be dismissed as to the defendant for whose benefit it was ordered. (C.C.P. 391.4.) Review of the order requiring security may be had on appeal from the judgment of dismissal. (See *Muller v. Tanner*, *supra*.)

If a complaint is dismissed solely because the plaintiff failed to post security, the defendant may not recover attorneys' fees under the vexatious litigant statutes. (*Lockett v. Keylee* (2007) 147 C.A.4th 919, 926, 54 C.R.3d 718 [observing that attorneys' fees could have been awarded under C.C.P. 128.7 (filing frivolous or meritless pleading), but that defendants here failed to move for sanctions under that statute].)

SUPPLEMENT: [This section is current through the latest supplement]



192 of 192 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

IX. SECURITY FOR COSTS

G. Vexatious Litigant.

3. Procedure.

c. Order Prohibiting Filing of New Litigation.

3 *Witkin Cal. Proc. Actions* § 370

[§ 370] Order Prohibiting Filing of New Litigation.

(1) *In General.* In addition to any other relief under *C.C.P.* 391 et seq. (see supra, §§368, 369), a court, on its own motion or the motion of any party, may enter a prefiling order that prohibits a vexatious litigant (see supra, §§366, 367) from filing any new litigation in the California courts in pro. per. without first obtaining leave of the presiding judge of the court where the litigation is proposed to be filed. Disobedience of the order by a vexatious litigant may be punished as a contempt of court. (*C.C.P.* 391.7(a); see *In re Luckett* (1991) 232 C.A.3d 107, 110, 283 C.R. 312 [order that vexatious litigant could not file new litigation without leave of presiding judge, and directing that copy of opinion and order be sent to Judicial Council and to presiding judges and clerks of county superior and municipal courts]; *In re Whitaker* (1992) 6 C.A.4th 54, 57, 8 C.R.2d 249 [same]; *Andrisani v. Hoodack* (1992) 9 C.A.4th 279, 281, 11 C.R.2d 511 [same]; *PBA, LLC v. KPOD, Ltd.* (2003) 112 C.A.4th 965, 976, 5 C.R.3d 532 [at minimum, vexatious litigant determination and imposition of prefiling order may be reversed only on finding of change of circumstances]; *Holcomb v. U.S. Bank Nat. Assn.* (2005) 129 C.A.4th 1494, 1499, 29 C.R.3d 578 [plaintiff did not have to seek court permission to appeal order declaring him to be vexatious litigant, requiring him to post security, and dismissing his complaint when he failed to do so, because trial judge did not issue prefiling order under *C.C.P.* 391.7]; *Forrest v. Department of Corps.* (2007) 150 C.A.4th 183, 195, 58 C.R.3d 466 [trial judge properly dismissed action by plaintiff subject to *C.C.P.* 391.7 prefiling order after plaintiff's attorney withdrew from case].)

(2) *Forms.* The Judicial Council has adopted a mandatory form for a prefiling order. (See Judicial Council Form No. MC-700 [Prefiling Order--Vexatious Litigant].) The Judicial Council has adopted an optional form by which a person declared a vexatious litigant may request an order to file new litigation. (See Judicial Council Form No. MC-701 [Request and Order to File New Litigation by Vexatious Litigant].)

(3) *Applicability to Small Claims Courts.* *Banks v. California* (1993) 14 C.A.4th 1147, 18 C.R.2d 127, held that an order under *C.C.P.* 391.7 did not apply to small claims court actions, reasoning that the version of *C.C.P.* 391(a) then in effect defined "litigation" as a civil action commenced in a "court of record," and that a small claims court was not such a court. (14 C.A.4th 1149.) The court's rationale was abrogated by the elimination of the phrase "of record" from that definition in 1994.

(4) *Applicability to Family Code and Probate Code.* A prefiling order may be obtained to prohibit a vexatious litigant from filing a new petition, application, or motion other than a discovery motion in a proceeding under the Family Code or Probate Code. (C.C.P. 391.7(d).)

(5) *Order Is Not Limited to Pro. Per. Litigation.* *In re Shieh* (1993) 17 C.A.4th 1154, 21 C.R.2d 886, involved an attorney (Shieh) found to be a vexatious litigant under C.C.P. 391(b)(4) (see supra, §366). Rather than following the normal procedure of issuing a prefiling order under C.C.P. 391.7 limited to new litigation filed in pro. per., the Court of Appeal extended the order to include any new action filed through an attorney. Specifically, the order provided that, whether in pro. per. or through an attorney, Shieh was prohibited from (a) filing any new litigation in the California courts without first obtaining leave of the presiding judge of the court in which he proposes to file the litigation and (2) filing appeals or writ petitions in the Court of Appeal without first seeking leave from the Administrative Presiding Justice. Noting that it was clear from the syntax, grammar, style, and tone that most of the pleadings and other documents filed by Shieh were written by the same person, regardless of whether Shieh was represented by counsel, the court said: "In short, it is clear that Shieh does not engage attorneys as neutral assessors of his claims, bound by ethical considerations not to pursue unmeritorious or frivolous matters on behalf of a prospective client. ... Rather, these attorneys who ostensibly 'represent' Shieh serve as mere puppets. Based on these facts, we conclude a prefiling order limited to Shieh's in propria persona activities would be wholly ineffective as a means of curbing his out-of-control behavior." (17 C.A.4th 1167.)

(6) *Order Need Not Be Made During Pending Litigation.* A motion for a prefiling order under C.C.P. 391.7 is not required to be made during pending litigation, as does a motion for security under C.C.P. 391.1. By its very nature, the prefiling order of C.C.P. 391.7 affects a vexatious litigant's future filings. The remedy is directed at precluding the initiation of a meritless lawsuit and the costs associated with defending that litigation. Thus, C.C.P. 391.7 affords protection to defendants named in pleadings not yet filed with the court. If individuals named as defendants in these lawsuits were required to wait until the action was pending, the prefiling order provided for in C.C.P. 391.7 would be illusory. (*Bravo v. Ismaj* (2002) 99 C.A.4th 211, 222, 120 C.R.2d 879.)

(7) *Hearing Is Required.* The court is required to conduct a hearing on whether the plaintiff is a vexatious litigant for purposes of imposing the prefiling order against him or her, even though C.C.P. 391.7 does not state the manner in which a plaintiff's vexatious litigant status is determined for that remedy. (*Bravo v. Ismaj*, supra [holding that error was harmless under facts of case].)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General.* See *Kobayashi v. Superior Court* (2009) 175 C.A.4th 536, 541, 96 C.R.3d 99 [discussing proper approach for resolving claim that person was mistakenly identified as subject to prefiling order, and holding that appellant in this case falsely claimed not to be vexatious litigant]. (4a) (*New*) *Applicability to Juvenile Dependency Proceedings.* A prefiling order may be obtained against a party in a juvenile dependency proceeding governed by the Welfare and Institutions Code. (*In re R.H.* (2009) 170 C.A.4th 678, 699, 700, 88 C.R.3d 650, Supp., supra, §365.) (8) (*New*) *Lifting Order.* *Lockett v. Panos* (2008) 161 C.A.4th 77, 73 C.R.3d 745, is apparently the first published opinion to decide whether and how a vexatious litigant may have a prefiling order lifted. In a case involving a claim against an estate, the trial judge refused to lift a prefiling order entered against plaintiff by the Court of Appeal in a prior case because plaintiff had filed 34 frivolous appeals or writ petitions. *Held*, affirmed.

(a) *Venue.* An attempt to have a vexatious litigant prefiling order rescinded should be brought in the forum that originally entered the prefiling order. (161 C.A.4th 95.)

(b) *Statutory authority to lift order.* A prefiling order is an injunction, as defined by C.C.P. 525 (see 6 Cal. Proc. (5th), *Provisional Remedies*, §274), because it requires a vexatious litigant to refrain from doing a particular act (i.e., filing new litigation without permission) and is punishable by contempt. Therefore, as an injunction, the order may be modified, including rescinded, as provided in C.C.P. 533 (see 6 Cal. Proc. (5th), *Provisional Remedies*, §399 et seq.). (161 C.A.4th 85.)

(c) *Appealability of order denying lifting of order.* Applying the rule of liberal construction of notices of appeal found in C.R.C., Rule 8.100(a)(2), the trial judge's denial of lifting the prefiling order was appealable under C.C.P. 904.1(a)(6) (see 6 Cal. Proc. (5th), *Provisional Remedies*, §402) as the denial of a request to dissolve a permanent injunction. (161 C.A.4th 90.)

(d) *Required showing to lift order.* To lift a prefiling order, the vexatious litigant must present substantial evidence that he or she has mended his or her offending conduct. (161 C.A.4th 83.) The following are some of the factors for such a showing:

(1) A propensity for honesty in the vexatious litigant's application to lift the order. That means an accurate confrontation with the facts on which the prior vexatious litigant finding was made, as well as intervening facts that might not put the application in a favorable light. In those cases where a vexatious litigant claims *in forma pauperis* status (see text, §416 et seq.), honesty also means that the vexatious litigant has notified the court of a change in financial circumstances or settlements received that would require him or her to pay even a portion of the fees otherwise waived by the *in forma pauperis* status. (161 C.A.4th 93.)

(2) Some genuine remorse for the costs of litigation inflicted on the defendants who were the object of the previous actions. (161 C.A.4th 93, 94.)

(3) Consistent with the vexatious litigant's financial situation, a genuine effort at making restitution to the previous victims of his or her litigation, including actually paying costs ordered by courts in that litigation. (161 C.A.4th 95.)

(4) Giving up the habit of suing people as a way of life. A vexatious litigant who demonstrates that he or she has had some *success* in past litigation does not show a change in circumstances sufficient to rescind a prefiling order. (161 C.A.4th 94.)

(e) *Denial of order in this case was proper.* The trial judge was correct in refusing to lift the prefiling order in this case, because plaintiff did not show that he had mended his conduct. (161 C.A.4th 91.) Plaintiff continued to file suits for 16 years after being designated a vexatious litigant and continued to make misleading statements to the court in those cases. Although plaintiff obtained permission to file those actions, some of which were settled, he did not prove that they were meritorious, because some defendants may have paid token amounts to make the litigation go away. (161 C.A.4th 92.)



1 of 190 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

X. LIS PENDENS

A. In General.

1. Nature and Purpose.

3 *Witkin Cal. Proc. Actions* § 371

[§ 371] Nature and Purpose.

(1) *Constructive Notice of Action.* At common law a transferee or encumbrancer of land took with constructive notice of title defects asserted in any pending action. This harsh rule was designed to prevent the frustration of the court's judgment by transfers during the litigation. The lis pendens statutes are designed to provide the same safeguard in a more practical manner. The statutes provide that there is no constructive notice of the action unless a lis pendens, i.e., a notice of its pendency, is filed in the county where the land is situated. Thus, a lis pendens "is the mode substituted by the legislature for the constructive notice to all the world of the pendency of such an action which formerly arose, *ipso facto*, upon the institution of the suit. ... The purpose of the legislature was thus to furnish the most certain means of notifying all persons of the pendency of the action, and thereby warning them against attempting to acquire a legal or equitable interest in the property." (*Blackburn v. Bucksport & Elk River R. Co.* (1908) 7 C.A. 649, 653, 95 P. 668.)

The lis pendens is not a condition to the maintenance of an action; the plaintiff may freely disregard the statutory permission to record a claim. The only effect of this failure will be that, although the plaintiff may prevail in the action, bona fide purchasers or encumbrancers whose rights arise after the commencement of the action and who are first of record will take free from the plaintiff's judgment. (See *Alpha Stores, Ltd. v. Nobel* (1943) 57 C.A.2d 867, 870, 135 P.2d 625 [execution purchaser]; 25 Cal. L. Rev. 480; *infra*, §§387, 388.)

A number of practice works deal with this subject. (See C.E.B., 2 Real Property Remedies and Damages 2d, Chap. 13; 36 *Hastings L. J.* 255 [filing in California of lis pendens in connection with action in another state affecting California property]; Cal. Civil Practice, 1 Procedure, §1:146 et seq.; Cal. Civil Practice, 1 Real Property Litigation, Chap. 6; 5 Miller & Starr 3d, §11:134 et seq.; Rutter Group, Civil Proc. Before Trial §9:421 et seq.; Rutter Group, Real Property Transactions §1:600 et seq.; 8 A.L.R.2d 986 [duration as dependent on diligent prosecution of action]; 52 A.L.R.2d 1308 [right to obtain new or successive notice in same or new action after loss or cancellation of original notice]; 17 Am.Jur. P.P. Forms (2002 ed.), Lis Pendens, Form 1 et seq.; 51 Am.Jur.2d (2000 ed.), *Lis Pendens* §1 et seq.; for implementing legislation, see *infra*, §373 et seq.)

(2) *No Absolute Privilege.* Under former law, the recording of the notice was a publication in the course of a judicial proceeding and absolutely privileged, and could not be the basis of an action for slander of title. (*Albertson v. Raboff* (1956) 46 C.2d 375, 379, 295 P.2d 405 [construing former provision of C.C. 47].) The Legislature subsequently

amended C.C. 47 to provide that a recorded lis pendens is not privileged unless it identifies an action (a) that was previously filed with a court of competent jurisdiction, and (b) that affects title or right to possession of real property, as authorized or required by law. (C.C. 47(b)(4); see 5 *Summary* (10th), *Torts*, §648.) And even prior to the amendment, a nonjudicial notification of a claim of interest in the land, designed to circumvent a motion for expungement (*infra*, §391 et seq.), was not privileged. (*Earp v. Nobmann* (1981) 122 C.A.3d 270, 282, 285, 175 C.R. 767, 5 *Summary* (10th), *Torts*, §648.)

(3) *Exercise of Court's Inherent Power.* A trial court's inherent power to condition a stay on such terms as may be just includes the authority to provide for security against an eventual judgment by requiring either a lis pendens notice or a bond in lieu of a lis pendens. (*Klein v. Superior Court* (1988) 198 C.A.3d 894, 915, 244 C.R. 226 [decided under former lis pendens procedure; authorizing order refusing to expunge lis pendens].)

(4) *Civil Penalty for Recordation To Harass or Influence Public Officer or Employee.* A person who knowingly records or files (or directs another to record or file) a false lawsuit, lien, or other encumbrance, including a lis pendens, against a public officer or employee with the intent to harass or influence or hinder official duties is liable to the officer or employee or to the owner of the affected property for a civil penalty. The lawsuit, lien, or other encumbrance must pertain to actions that arise in the course and scope of the officer's or employee's duties. (C.C.P. 765.040; Govt.C. 6223; on procedure for seeking penalty and other relief, see C.C.P. 765.010 et seq., 6 *Cal. Proc.* (5th), *Proceedings Without Trial*, §58.)

West's Key Number Digest, Lis Pendens 1 et seq.

SUPPLEMENT: [This section is current through the latest supplement]



2 of 190 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

X. LIS PENDENS

A. In General.

2. Former Law.

3 *Witkin Cal. Proc. Actions* § 372

[§ 372] Former Law.

(1) *General Statute.* California adopted its first statutory lis pendens procedure in 1851. Former C.C.P. 409, adopted in 1872, covered the following subjects:

(a) The availability of the lis pendens procedure. (Former C.C.P. 409(a); see *infra*, §375 et seq.)

(b) A description of the form and procedure for recording a lis pendens. (Former C.C.P. 409(a), (b), (c), (d); see *infra*, §382 et seq.)

(2) *Post-Deprivation Statutes.* Reform legislation adopted since the enactment of the original lis pendens statute has mostly been directed at curbing the most onerous effects of the recordation of a lis pendens:

(a) In 1968, former C.C.P. 409.1, 409.2, 409.3, 409.4, 409.5, and 409.6 were enacted to provide a property owner with a postdeprivation hearing, by means of a motion to expunge the lis pendens, under certain circumstances. (See *infra*, §389 et seq.)

(b) In 1974, former C.C.P. 409.7 was added to require recordation of a lis pendens in a condemnation action. (See *infra*, §378.)

(c) In 1982, former C.C.P. 409.55 was enacted to permit the withdrawal of a lis pendens (see *infra*, §412), and former C.C.P. 409.8 was added to provide for the free transferability of real property after expungement or withdrawal of a lis pendens (see *infra*, §414).

(d) In 1989, former C.C.P. 409.9 was adopted to require any person who had entered into a contract to transfer an interest in real property to notify, on receipt of a lis pendens concerning that property, all prospective transferees of the receipt of the notice. (See *infra*, §386.)

SUPPLEMENT: [This section is current through the latest supplement]



3 of 190 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

X. LIS PENDENS

A. In General.

3. 1992 Revision.

3 *Witkin Cal. Proc. Actions* § 373

[§ 373] 1992 Revision.

(1) *Enactment.* The former lis pendens statutes were criticized as subject to abuse. (See C.E.B., 2 Real Property Remedies and Damages 2d, §13.3; 70 *Cal. L. Rev.* 909; 6 *Pacific L. J.* 62; 24 *Pacific L. J.* 989.) The 1992 Legislature repealed the former statutes (former C.C.P. 409 et seq.; see supra, §372), and replaced them with new Title 4.5 (C.C.P. 405 et seq.), entitled "Recording Notice of Certain Actions." (See 24 *Pacific L. J.* 989.)

(2) *Statutory Framework.* Title 4.5 is divided into five Chapters:

(a) *Definitions and General Provisions.* (C.C.P. 405 et seq.; see infra, §§374, 378.)

(b) *Recordation, Service and Filing.* (C.C.P. 405.20 et seq.; see infra, §382 et seq.)

(c) *Expungement and Other Relief.* (C.C.P. 405.30 et seq.; see infra, §389 et seq.)

(d) *Withdrawal.* (C.C.P. 405.50; see infra, §412.)

(e) *Effect of Withdrawal or Expungement of Notice.* (C.C.P. 405.60, 405.61; see infra, §413 et seq.)

(3) *Comments of Real Property Law Section of State Bar.* The new law was drafted by the Real Property Law Section of the State Bar, and the text of the proposed bill was set forth in full in its official publication, California Real Property Journal, Volume 9, No. 3 (Summer 1991), with detailed interpretive comments prepared by the Reporter. The draft was circulated among interested organizations and groups, and the Assembly Committee on the Judiciary, with the assistance of the Legislative Counsel, prepared the bill that subsequently became the new law. With only minor modifications, these comments were adopted on August 26, 1993, by the Legislature as "an accurate, contemporaneous expression" of its intent in enacting C.C.P. 405 et seq. The Legislature entitled the comments "Code Comments of the Real Property Law Section of the State Bar of California" (hereafter referred to as Real Property Law Section Comments). They are set forth in their entirety in the Assembly Journal.

The comments were relied on by the Legislature in enacting the 1992 revision of the lis pendens statute and indicate the legislative intent. (*BGJ Associates, LLC v. Superior Court* (1999) 75 C.A.4th 952, 955, 89 C.R.2d 693.)

(4) *Remedies Are Cumulative.* Nothing in the new law precludes any party from seeking an attachment, injunction, or other relief in connection with a real property claim or the expungement of a notice of pending action. (*C.C.P.* 405.8.)

SUPPLEMENT: [This section is current through the latest supplement]



4 of 190 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

X. LIS PENDENS

A. In General.

4. Definitions.

3 Witkin Cal. Proc. Actions § 374

[§ 374] Definitions.

The following terms governing construction are defined:

(1) "Claimant" means "a party to an action who asserts a real property claim and records a notice of the pendency of the action." (*C.C.P. 405.1.*)

(2) "Notice of pendency of action" or "notice" means "a notice of the pendency of an action in which a real property claim is alleged." (*C.C.P. 405.2.*)

(3) "Probable validity," with respect to a real property claim, means "that it is more likely than not that the claimant will obtain a judgment against the defendant on the claim." (*C.C.P. 405.3.*)

(4) "Real property claim" means "the cause or causes of action in a pleading which would, if meritorious, affect (a) title to, or the right to possession of, specific real property or (b) the use of an easement identified in the pleading, other than an easement obtained pursuant to statute by any regulated public utility." (*C.C.P. 405.4*; on requirement of satisfying this definition in order to record lis pendens, see *infra*, §376; on requirement in order to resist expungement motion, see *infra*, §396 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]



5 of 190 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

X. LIS PENDENS

B. Availability of Lis Pendens Procedure.

1. In General.

3 *Witkin Cal. Proc. Actions* § 375

[§ 375] In General.

(1) *Lis Pendens Statute*. Under the general statute, a lis pendens may be recorded for the following types of actions:

- (a) An action in which a real property claim is alleged. (See *infra*, §376.)
- (b) An action concerning real property filed in a federal district court. (See *infra*, §377.)
- (c) An action to declare a building uninhabitable. (See *infra*, §381.)

Although the general statute implicitly acknowledges that a condemnation action may support a lis pendens, the statute expressly provides that the lis pendens procedures for that action are exclusively governed by the Eminent Domain Law. (See *infra*, §378.)

Rules of Court provide that a family law proceeding concerning real property is governed by the procedures of the general statute. (See *infra*, §379.) (See generally C.E.B., 2 Real Property Remedies and Damages 2d, §13.17 et seq.)

(2) *Other Statutes*. In addition to the general statute, several other statutes *permit* the recordation of a lis pendens in specified actions (see *infra*, §380), while various other statutes *require* its recordation in other specified actions (see *infra*, §381).

SUPPLEMENT: [This section is current through the latest supplement]

(3) *(New) California Statute Does Not Authorize Recording Lis Pendens in Another State*. California's lis pendens statute does not authorize the recording of a lis pendens in the court of another state. (*The Formula v. Superior Court* (2008) 168 C.A.4th 1455, 1459, 86 C.R.3d 341 [issue of first impression].)

(4) *(New) Arbitration Proceeding Is Not Action in Which Lis Pendens May Be Recorded*. A party to a pending arbitration may not record a lis pendens without first filing a civil action in superior court, because an arbitration is not an "action" within the meaning of the lis pendens statute. (*Manhattan Loft, LLC v. Mercury Liquors* (2009) 173 C.A.4th 1040, 1051, 93 C.R.3d 457 [relying on *The Formula*].)



6 of 190 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

X. LIS PENDENS

B. Availability of Lis Pendens Procedure.

2. Real Property Claim.

3 *Witkin Cal. Proc. Actions* § 376

[§ 376] Real Property Claim.

(1) *Former Law.* Former C.C.P. 409(a) authorized the recordation of a lis pendens in an action "concerning real property or affecting the title or the right of possession of real property." (See *Kendall-Brief Co. v. Superior Court* (1976) 60 C.A.3d 462, 466, 131 C.R. 515, *infra*, §401; 6 *Pacific L. J.* 62.)

The statute, as originally enacted, did not contain the phrase "concerning real property." This was added in 1959 when the lis pendens was authorized in federal court actions (see *infra*, §377), and the object was merely to conform to the language of the federal act. Hence, it did not broaden the scope of the former statute to include actions that only remotely "concern" real property. (*Allied Eastern Financial v. Goheen Enterprises* (1968) 265 C.A.2d 131, 133, 71 C.R. 126.)

A leasehold estate in land came within the broad language of former C.C.P. 409, and a lis pendens could properly be recorded in an action affecting a leasehold interest. (*Parker v. Superior Court* (1970) 9 C.A.3d 397, 400, 88 C.R. 352.) (See *Goldstein v. Ray* (1981) 118 C.A.3d 571, 575, 173 C.R. 550 [following *Parker*]; 67 A.L.R.3d 743 [*Parker*].)

Former law was not clear regarding the availability of the lis pendens procedure in cases involving constructive trusts, equitable liens, or easements. (See *infra*, §§398, 399, 401; see also Real Property Law Section Comments to C.C.P. 405.4.)

(2) *Revised Law.* The 1992 revision sought to clarify some of the uncertainty of former law by authorizing recordation of a lis pendens in an action in which a real property claim is alleged. (C.C.P. 405.20; see *infra*, §385.) C.C.P. 405.4 (see *supra*, §374) defines that term as "the cause or causes of action in a pleading which would, if meritorious, affect (a) title to, or the right of possession to, specific real property or (b) the use of an easement identified in the pleading, other than an easement obtained pursuant to statute by any regulated public utility."

The phrase "affect title to, or right of possession of, specific real property" replicates a similar phrase in the former statute. Thus, in construing the statute California courts are likely to look to decisions under the former statute such as *Parker*, holding that a real property lease is subject to the lis pendens procedure, or decisions determining whether a lis pendens should be expunged for failure to state a valid real property claim (see *infra*, §396 et seq.).

Omitted from the new definition as redundant is the phrase "concerning real property" contained in former C.C.P. 409(a), which was added to assure the availability of the lis pendens procedure in federal cases. With one exception, the definition expressly makes easements subject to the lis pendens procedure. And, the definition neither includes nor excludes claims of constructive trusts or equitable liens (see *infra*, §§398, 399). (Real Property Law Section Comments to C.C.P. 405.4; see *Gale v. Superior Court* (2004) 122 C.A.4th 1388, 1390, 1398, 19 C.R.3d 554 [family law petition for dissolution of marriage that did not allege community interest in specific real property did not state real property claim sufficient to support filing lis pendens against that property; C.C.P. 405.4 requires pleading alleging claim that affects title or possession to "specific real property"].) (For situations in which the notice is outside the scope of the statute and ineffective, see *infra*, §388.)

SUPPLEMENT: [This section is current through the latest supplement]



7 of 190 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

X. LIS PENDENS

B. Availability of Lis Pendens Procedure.

3. Federal District Court Action.

3 Witkin Cal. Proc. Actions § 377

[§ 377] Federal District Court Action.

(1) *Former Law.* A federal statute enacted in 1958 (28 U.S.C., §1964) gives litigants in federal courts the right to use state lis pendens statutes where authorized by state law. California accordingly added the following sentence to former C.C.P. 409(a): "This section authorizes a notice of an action concerning real property pending in any United States district court to be recorded and indexed in the same manner and in the same place as herein provided with respect to notices of action pending in courts of this state." (See *Allied Eastern Financial v. Goheen Enterprises* (1968) 265 C.A.2d 131, 133, 71 C.R. 126.)

(2) *Revised Law.* C.C.P. 405.5 restates former law "in language consistent with the terminology of the revised lis pendens statute" (see Real Property Law Section Comments to C.C.P. 405.5): "This title applies to an action pending in any United States District Court in the same manner that it applies to an action pending in the courts of this state."

SUPPLEMENT: [This section is current through the latest supplement]



8 of 190 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

X. LIS PENDENS

B. Availability of Lis Pendens Procedure.

4. Condemnation Action.

3 Witkin Cal. Proc. Actions § 378

[§ 378] Condemnation Action.

The lis pendens procedures in a condemnation action are exclusively governed by the Eminent Domain Law (*C.C.P. 1230.010 et seq.*), as specified in *C.C.P. 1250.150* (see 8 *Summary* (10th), *Constitutional Law*, §1207). (*C.C.P. 405.6.*)

SUPPLEMENT: [This section is current through the latest supplement]



9 of 190 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

X. LIS PENDENS

B. Availability of Lis Pendens Procedure.

5. Family Law Proceeding.

3 *Witkin Cal. Proc. Actions* § 379

[§ 379] Family Law Proceeding.

(1) *General Rule.* Early California cases took the position that a lis pendens filed in a divorce action had no legal significance. (See *Mayberry v. Whittier* (1904) 144 C. 322, 326, 78 P. 16.) But the Family Code recognizes the equal rights of the spouses in marital property (see 11 *Summary* (10th), *Community Property*, §130), and C.R.C., Rules 5.21 and 5.22 state that all provisions of law applicable to civil actions generally apply to proceedings under the Family Code. (See 65 *A.L.R.4th* 522 [lis pendens in action for separation or dissolution].)

(2) *Effect of Recordation.* The effect of a recordation of a lis pendens was considered in *Head v. Crawford* (1984) 156 C.A.3d 11, 202 C.R. 534, a case decided under the predecessor lis pendens statute. Plaintiff wife and husband separated. The husband was arrested, and signed a bail bond agreement giving defendant bondsman a lien on the spouses' community property residence as security for a \$ 25,000 bond. Plaintiff then brought a dissolution proceeding and recorded a lis pendens describing the property. The husband disappeared, his bail was forfeited, and defendant recorded the bond agreement. On receiving a final decree awarding her the property, the wife filed this action to cancel the security agreement and quiet title in her as sole owner. *Held*, judgment for defendant affirmed.

(a) "A spouse who files a lis pendens to draw attention to the dissolution petition *may* obtain priority over a creditor of the other spouse if the creditor either acts with constructive notice or fails to record a lien document until after the filing of the lis pendens." (156 C.A.3d 16.) But in making use of the lis pendens the spouse will be estopped from later challenging the creditor who relies on the spouse's representations in the pleadings. Here plaintiff, in her petition and lis pendens, acknowledged that the property was community, and the lis pendens only fortified the right of defendant bondsman to rely on the husband's similar statement. (156 C.A.3d 16.)

(b) The trial judge therefore properly held that the husband had the power, after the separation, to encumber his one-half interest in the community real property without plaintiff's knowledge. (156 C.A.3d 17.) Hence, plaintiff may clear only one-half the property from the defendant's lien. Defendant is entitled to have the other half-interest sold, and, after such a sale the buyer would become a tenant in common with plaintiff. (156 C.A.3d 19.) (See *Mitchell v. American Reserve Ins. Co.* (1980) 110 C.A.3d 220, 223, 167 C.R. 760, 11 *Summary* (10th), *Community Property*, §148.)

SUPPLEMENT: [This section is current through the latest supplement]



10 of 190 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

X. LIS PENDENS

B. Availability of Lis Pendens Procedure.

6. Specific Permissive Statutes.

3 Witkin Cal. Proc. Actions § 380

[§ 380] Specific Permissive Statutes.

Several additional code sections expressly authorize the filing of a lis pendens in particular actions:

(1) *C.C.P. 996.510* et seq. (action by state to enforce bond in favor of state; upon receipt of affidavit stating that defendant liable on bond has interest in real property in designated county, clerk must certify notice of pendency to county recorder where real property sought to be charged is situated).

(2) *Govt.C. 65908* (action by agency to enforce zoning regulation; plaintiff may file notice of pendency with county recorder where property is situated).

(3) *C.C. 3146* (action to foreclose mechanic's lien; plaintiff may file notice of pendency to give constructive notice to purchaser or encumbrancer).

It was formerly held that a lis pendens was unnecessary in an action to foreclose a mechanic's lien on real property, for filing the lien served the same purpose. (See *Tulloh v. Boyce* (1918) 37 C.A. 761, 763, 174 P. 680, 177 P. 847.) A 1959 amendment, however, authorized use of the lis pendens in mechanic's lien foreclosure actions, and provided that only from the time of filing the notice should a purchaser or encumbrancer have constructive notice of the pendency of the action. This provision is now contained in C.C. 3146. (See *Packard Bell Electronics Corp. v. Theseus* (1966) 244 C.A.2d 355, 363, 53 C.R. 300; 14 U.C.L.A. L. Rev. 1339.) However, the fact that a notice is filed pursuant to C.C. 3146 does not excuse failure to file a complaint in the proper court within 90 days of the recording of the lien. (*Douglas v. Donner Pines* (1977) 73 C.A.3d 268, 272, 140 C.R. 839.)

SUPPLEMENT: [This section is current through the latest supplement]



11 of 190 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

X. LIS PENDENS

B. Availability of Lis Pendens Procedure.

7. Specific Mandatory Statutes.

3 Witkin Cal. Proc. Actions § 381

[§ 381] Specific Mandatory Statutes.

A number of statutes provide that the plaintiff "shall file" or "must record" the lis pendens, or that it "shall be recorded":

(1) C.C. 1013.5(b) (action by innocent improver of real property against owner and encumbrancers of record; lis pendens "shall be recorded").

(2) C.C.P. 405.7 (requiring public agency to record notice of action to declare building uninhabitable).

(3) C.C.P. 751.13 (action to reestablish lost land records; plaintiff must record notice of pendency at time of filing complaint).

(4) C.C.P. 761.010(b) (quiet title action; notice of pendency must be filed immediately upon commencement of action).

(5) C.C.P. 801.5 (action to determine adverse interests in, liens, or clouds upon title to real property arising out of public improvement assessment; notice of pendency must be filed within 10 days after filing complaint).

(6) C.C.P. 872.250(a), (b), (c) (action to partition real or personal property; notice of pendency must be filed immediately after filing complaint; supplemental notice must be filed when partition of additional property is sought in same action; court is authorized to order notice when it is not given as required).

(7) C.C.P. 1250.150 (proceeding in eminent domain; notice of pendency must be recorded at commencement of proceeding in recorder's office in any county in which property described in complaint is located, and copy of notice must be served with summons and complaint).

(8) C.C.P. 1355 (claim against state for escheated property; notice of pendency must be filed to give constructive notice of pendency of action).

(9) C.C.P. 1410 (action by Attorney General to escheat real property; notice must be filed to give constructive

notice).

(10) *Health & Saf.C. 17985* (notice of actions to abate public nuisance).

(11) P.C. 186.4 (forfeiture of property acquired from criminal profiteering activity; if real property is involved, lis pendens must be recorded, at time forfeiture petition is filed, in each county where property is located).

(12) *Prob.C. 9354(b)* (action to enforce claim rejected by executor or administrator of decedent's estate; notice of pendency must be filed with clerk of probate court).

(13) Rev.C. 3956 (action by purchaser to quiet title to tax deeded property; notice of pendency must be filed within 10 days).

(14) *Sts. & H.C. 6619* (action on improvement bond; notice of pendency must be filed with treasurer).

Generally, the mandatory language used in these statutes is misleading. The function of the lis pendens even when required is still that of giving constructive notice to future purchasers or encumbrancers, and the failure to record it does not deprive the court of jurisdiction of the subject matter or the parties. (*Blackburn v. Bucksport & Elk River R. Co.* (1908) 7 C.A. 649, 653, 95 P. 668 [quiet title; former C.C.P. 749]; *Housing Authority of Oakland v. Forbes* (1942) 51 C.A.2d 1, 9, 124 P.2d 194 [eminent domain; former C.C.P. 1243]; see 27 So. Cal. L. Rev. 111.)

However, in a quiet title action in which service has been by publication, the court, before hearing the case, must require proof that the notice has been filed. (See *C.C.P. 763.040*.)

SUPPLEMENT: [This section is current through the latest supplement]



12 of 190 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

X. LIS PENDENS

C. Procedure.

1. Form of Notice.

3 Witkin Cal. Proc. Actions § 382

[§ 382] Form of Notice.

A notice of pendency must contain "the names of all parties to the action," and "a description of the property affected by the action." (*C.C.P. 405.20.*) (See *C.E.B.*, 2 Real Property Remedies and Damages 2d, §13.24 et seq.; for form of notice, see *Cal. Civil Practice*, 1 Procedure, §1:164; *Cal. Civil Practice*, 1 Real Property Litigation, §6:24; 17 *Am.Jur.* P.P. Forms (2002 ed.), *Lis Pendens*, Form 7 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]



13 of 190 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

X. LIS PENDENS

C. Procedure.

2. Signature of Attorney or Approval of Court.

3 *Witkin Cal. Proc. Actions* § 383

[§ 383] Signature of Attorney or Approval of Court.

(1) *In General.* An attorney of record in an action may sign a lis pendens; alternatively, a judge of the court in which an action that includes a real property claim is pending may, on request of a party acting in pro. per., approve the lis pendens after the party signs it. A lis pendens may not be recorded unless (a) it has been signed by the attorney of record, (b) it has been signed by the party acting in prop. per. and approved by the judge, or (c) the action is one in eminent domain and subject to *C.C.P. 405.6* (see supra, §378). (*C.C.P. 405.21.*)

(2) *Real Property Law Section Comments.* Former law did not define the scope of a court's duties with respect to a party appearing in pro. per. who requested approval of a lis pendens; current law makes those duties clear. "In the event of such a request, it is the duty of the court ... to confirm that an action containing a real property claim, as defined by *C.C.P. 405.4*, is pending, and to approve a lis pendens proper in form if such a claim is pending. The procedures for hearing and ruling upon such requests, and for establishing a record of approval or rejection, are left to determination by the courts. However, it is expected that an approval will be endorsed upon or appended to the lis pendens document for the information of the recorder and persons referring to land title records." (Real Property Law Section Comments to *C.C.P. 405.21.*)

"This section continues the rule of former *C.C.P. 409(b)* that, except for eminent domain actions, a lis pendens may not be recorded unless it is signed by an attorney of record or has been preapproved by the court. The court's supervisory powers over attorneys should have a deterrent effect upon abuse of lis pendens procedures in actions prosecuted by an attorney of record. The court's duty to review a lis pendens proposed by a party *in propria persona* prior to its recordation is intended to aid in avoiding abuse of its lis pendens procedures in actions prosecuted by parties *in propria persona.*" (Real Property Law Section Comments to *C.C.P. 405.21.*)

SUPPLEMENT: [This section is current through the latest supplement]



14 of 190 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

X. LIS PENDENS

C. Procedure.

3. Service and Filing.

3 Witkin Cal. Proc. Actions § 384

[§ 384] Service and Filing.

C.C.P. 405.22 provides as follows:

(1) Except in eminent domain actions subject to *C.C.P. 405.6* (see *supra*, §378), the claimant, prior to recordation, must mail a copy of the notice by registered or certified mail, return receipt requested, to "all known addresses of the parties to whom the real property claim is adverse and to all owners of record of the real property affected by the real property claim as shown by the latest county assessment roll."

(2) Where no address for service on an adverse party or owner is known, a sworn declaration to that effect may be recorded instead of the proof of service.

(3) Immediately following recordation, a copy of the notice must be filed with the court in which the action is pending.

(4) Service must also be made "immediately and in the same manner" on each adverse party (if any) subsequently joined in the action.

SUPPLEMENT: [This section is current through the latest supplement]



15 of 190 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

X. LIS PENDENS

C. Procedure.

4. Recordation.

3 *Witkin Cal. Proc. Actions* § 385

[§ 385] Recordation.

(1) A party to an action who asserts a real property claim may record the notice of pendency of action in the office of the recorder "of each county in which all or part of the real property is situated." (*C.C.P. 405.20*; see *Arrow Sand & Gravel v. Superior Court* (1985) 38 C.3d 884, 889, 215 C.R. 288, 700 P.2d 1290 [decided under predecessor statute; exclusion from lis pendens procedure of defendant who did not cross-complain did not deny equal protection].)

(2) A notice is "void and invalid" as to any adverse party or owner of record unless the filing and service requirements of *C.C.P. 405.22* (supra, §384) are met for that party or owner and proof of service in the form and content specified in *C.C.P. 1013a* has been recorded with the lis pendens. (*C.C.P. 405.23*.) (On expungement of void and invalid lis pendens, see *infra*, §395; on proof of service by mail under *C.C.P. 1013a*, see 6 *Cal. Proc.* (5th), *Proceedings Without Trial*, §23.)

SUPPLEMENT: [This section is current through the latest supplement]



16 of 190 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

X. LIS PENDENS

C. Procedure.

5. No Duty To Notify Prospective Transferees.

3 Witkin Cal. Proc. Actions § 386

[§ 386] No Duty To Notify Prospective Transferees.

Under former C.C.P. 409.9, any person who had entered into a contract to transfer an interest in real property was required, on receipt of a lis pendens concerning that property, to notify as specified "all prospective transferees" of the receipt of the notice, and a person who "willfully or negligently" failed to do so was liable for the amount of actual damages suffered by a transferee. These provisions were not continued when the lis pendens statutes were revised in 1992.

SUPPLEMENT: [This section is current through the latest supplement]



17 of 190 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

X. LIS PENDENS

D. Effect of Recordation.

1. Constructive Notice.

3 Witkin Cal. Proc. Actions § 387

[§ 387] Constructive Notice.

(1) *In General.* From the time of recording a lis pendens, "a purchaser, encumbrancer, or other transferee of the real property described in the notice shall be deemed to have constructive notice of the pendency of the noticed action as it relates to the real property and only of its pendency against parties not fictitiously named." (*C.C.P. 405.24*; but see *Lewis v. Superior Court* (1994) 30 C.A.4th 1850, 1866, 37 C.R.2d 63, *infra*, §400 [lis pendens recorded before purchasers acquired title, but indexed afterward, was insufficient to provide them with constructive notice; see 12 *Summary* (10th), *Real Property*, §324]; *Dyer v. Martinez* (2007) 147 C.A.4th 1240, 1243, 54 C.R.3d 907 [following *Lewis*].) (See C.E.B., 2 *Real Property Remedies and Damages* 2d, §13.8 et seq.)

(2) *Relation Back.* "The rights and interest of the claimant in the property, as ultimately determined in the pending noticed action, shall relate back to the date of the recording of the notice." (*C.C.P. 405.24*.)

(3) *Actual Notice.* *C.C.P. 405.24* is not intended to affect existing law regarding the effect of actual notice. (*Real Property Law Section Comments.*)

SUPPLEMENT: [This section is current through the latest supplement]



18 of 190 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

X. LIS PENDENS

D. Effect of Recordation.

2. Where Notice Is Ineffective.

3 *Witkin Cal. Proc. Actions* § 388

[§ 388] Where Notice Is Ineffective.

The following situations do not come within the protection of the constructive notice normally afforded by a lis pendens:

(1) *Personal Property*. The lis pendens statutes apply only to actions concerning real property, and a buyer of specific personal property without actual notice of the pendency of an action involving rights to the property is not bound by the judgment. (*MacDermot v. Hayes* (1917) 175 C. 95, 109, 170 P. 616 [decided under former lis pendens procedure]; see 5 *Cal. L. Rev.* 498; 47 *Harv. L. Rev.* 1023.)

(2) *Negotiable Note*. Where the action involves a negotiable note secured by a real property mortgage or deed of trust, the holder in due course of the note is not affected by constructive notice from the recordation of a lis pendens. (*Ross v. Title Guarantee & Trust Co.* (1934) 136 C.A. 393, 399, 29 P.2d 236 [construing predecessor statute]; see 23 *Cal. L. Rev.* 108; 22 *Cal. L. Rev.* 681.)

(3) *Prior Recordation*. A purchaser or encumbrancer who takes and records prior to the commencement of the action is unaffected by the later filing of a lis pendens. (*C.C.P.* 405.24, *supra*, §387; see *Lee v. Silva* (1925) 197 C. 364, 373, 240 P. 1015 [construing predecessor statute].)

(4) *Vendor Not Named as Defendant*. Where the purchaser or encumbrancer takes from a person not named as a defendant in the original complaint or lis pendens, and the lis pendens is not corrected after amendment adding the name to the complaint, the purchaser or encumbrancer will prevail. (*Ross v. Title Guarantee & Trust Co.*, *supra*, 136 C.A. 402 [construing predecessor statute]; see 23 *Cal. L. Rev.* 108.)

(5) *Different Cause of Action in Cross-Complaint*. Where the defendant sets up an entirely different cause of action by cross-complaint, the notice recorded by the plaintiff does not protect the defendant; the latter should record his or her own lis pendens. (See *Orekar v. Lager* (1932) 122 C.A. 370, 10 P.2d 178 [construing predecessor statute]; *Fremont Indem. Co. v. Du Alba* (1986) 187 C.A.3d 474, 476, 231 C.R. 683 [same]; 6 *So. Cal. L. Rev.* 346.)

(6) *No Judgment in Underlying Action*. Where the action is not prosecuted to judgment but instead is settled and

dismissed, the subsequent purchaser or encumbrancer is unaffected by the lis pendens, for he or she takes subject only to a judgment concerning the title. (*Olson v. Cornwell* (1933) 134 C.A. 419, 427, 25 P.2d 879 [construing predecessor statute]; *Harris v. Whittier Bldg. & Loan Assn.* (1936) 18 C.A.2d 260, 266, 63 P.2d 840 [same]; see C.E.B., 2 Real Property Remedies and Damages 2d, §13.111 [stating that some further documentation is normally required in case of settlement to render lis pendens ineffective to bind any future purchaser or encumbrancer].)

(7) *Where Action in Which Notice Was Filed Is No Longer Pending.* The lis pendens is incidental to the action in which it is filed, and is ineffective to give notice of a future, though similar, action. (*Garcia v. Pinhero* (1937) 22 C.A.2d 194, 70 P.2d 675 [construing predecessor statute]; see C.E.B., 2 Real Property Remedies and Damages 2d, §§13.49, 13.110.)

SUPPLEMENT: [This section is current through the latest supplement]



19 of 190 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

X. LIS PENDENS

E. Expungement and Other Relief.

1. Nature and Purpose of Legislation.

a. Former Law.

3 *Witkin Cal. Proc. Actions* § 389

[§ 389] Former Law.

The original lis pendens procedure, easily invoked with little hazard to cloud titles and force settlement of groundless actions, was the subject of much criticism and of proposals for reform. (See 30 *So. Cal. L. Rev.* 107.) The right to have an improper notice expunged was judicially recognized in a few cases. (See *Brownlee v. Vang* (1962) 206 C.A.2d 814, 816, 24 C.R. 158; *Allied Eastern Financial v. Goheen Enterprises* (1968) 265 C.A.2d 131, 134, 71 C.R. 126.) In 1968 the Legislature enacted remedial legislation, derived mainly from a New York statute, authorizing expungement of a notice wrongfully recorded (see *infra*, §402), or a good notice on furnishing bond (see *infra*, §404 et seq.). (Former C.C.P. 409.1 et seq.; see *Malcolm v. Superior Court* (1981) 29 C.3d 518, 525, 174 C.R. 694, 629 P.2d 495, *infra*, §402; *Peery v. Superior Court* (1981) 29 C.3d 837, 843, 845, 176 C.R. 533, 633 P.2d 198, *infra*, §392; *United Professional Planning v. Superior Court* (1970) 9 C.A.3d 377, 384, 388, 88 C.R. 551, *infra*, §§392, 402; *Sheets v. Superior Court* (1978) 86 C.A.3d 68, 70, 149 C.R. 912, citing the text [denial of motion upheld]; *Nash v. Superior Court* (1978) 86 C.A.3d 690, 692, 700, 150 C.R. 394 [granting of motion upheld]; 70 *Cal. L. Rev.* 909 [same]; 6 *Pacific L. J.* 62 [suggesting that statute did not meet procedural due process standards].)

Former C.C.P. 409.1 was amended in 1976 to make expungement easier to obtain and to authorize the requirement of an undertaking. (See *infra*, §404 et seq.) However, the remedy under this section did not affect or limit liability otherwise existing for damages proximately caused by the recordation of a lis pendens. (Former C.C.P. 409.6; see *Askari v. R & R Land Co.* (1986) 179 C.A.3d 1101, 1109, 1110, 225 C.R. 285 [statute could not support award of consequential damages resulting from filing notice; but award was permissible under general contract principles, if buyer breached land sales contract and, by filing notice, prevented resale of property during pendency of litigation].)

SUPPLEMENT: [This section is current through the latest supplement]



20 of 190 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

X. LIS PENDENS

E. Expungement and Other Relief.

1. Nature and Purpose of Legislation.

b. 1992 Revision.

3 *Witkin Cal. Proc. Actions* § 390

[§ 390] 1992 Revision.

(1) *In General.* The 1992 revision (see *supra*, §373) continued the intent of prior revisions to correct past abuses of the statutory lis pendens procedure by restricting the recording party's ability to maintain a lis pendens on the property while the action is pending, and to make the procedure more workable and understandable by likening the provisions to those governing attachment. (See Real Property Law Section Comments to *C.C.P.* 405.32.) (On attachment, see 6 *Cal. Proc.* (5th), *Provisional Remedies*, §46 et seq.)

The most significant changes in the expungement procedure are the following:

(a) The grounds for expungement have been expanded. (See *C.C.P.* 405.30 et seq.; *infra*, §§395 et seq., 409.)

(b) The burden has been placed on the claimant to demonstrate that the action supporting the lis pendens asserts a valid real property claim. (See *C.C.P.* 405.30, *infra*, §394.)

(c) The rule that an expungement motion does not involve a review of the evidentiary merits of the claim on which the lis pendens is premised and cannot constitute a minitrial on the merits was abrogated. (See Real Property Law Section Comments to *C.C.P.* 405.32.)

(2) *Types of Relief Available.* A court may order the following types of relief pursuant to a motion for expungement or for an undertaking:

(a) Expungement without an undertaking on the grounds set forth in *C.C.P.* 405.23, 405.31, or 405.32. (See *infra*, §395 et seq.)

(b) Expungement conditioned on an undertaking by the moving party that secures adequate relief to the claimant who recorded the lis pendens as provided by *C.C.P.* 405.33. (See *infra*, §404 et seq.)

(c) Continued maintenance of the lis pendens conditioned on the filing of an undertaking by the claimant who recorded the lis pendens as provided by *C.C.P.* 405.34. (See *infra*, §§408, 409.) (See *C.E.B.*, 2 Real Property Remedies

and Damages 2d, §13.44 et seq.; Cal. Civil Practice, 1 Procedure, §1:155 et seq.; Cal. Civil Practice, 1 Real Property Litigation, §6:12 et seq.; 5 Miller & Starr 3d, §11:139 et seq.; Rutter Group, Civil Proc. Before Trial §9:421 et seq.; Rutter Group, Real Property Transactions §11:705 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]



21 of 190 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

X. LIS PENDENS

E. Expungement and Other Relief.

2. Expungement: Procedure.

a. In General.

3 *Witkin Cal. Proc. Actions* § 391

[§ 391] In General.

(1) *Who May Bring Motion.* In addition to a party, "any nonparty with an interest in the real property affected thereby" may apply to the court to expunge the notice. However, a nonparty "shall obtain leave to intervene" from the court "at or before the time the party brings the motion to expunge." (*C.C.P. 405.30.*) (For form of noticed motion, see *Cal. Civil Practice*, 1 Procedure, §§1:156, 1:165; *Cal. Civil Practice*, 1 Real Property Litigation, §6:26.)

(2) *Grounds.* There are four grounds on which a motion to expunge an improper lis pendens may be brought under *C.C.P. 405.30* (see *Real Property Law Section Comments*):

(a) The lis pendens is void and invalid for failure to comply with technical filing and service requirements. (*C.C.P. 405.23*; see *infra*, §395.)

(b) The pleading does not set forth a real property claim. (*C.C.P. 405.31*; see *infra*, §396 et seq.)

(c) The lis pendens fails to establish the probable validity of a real property claim. (*C.C.P. 405.32*; see *infra*, §§402, 403.)

(d) The real property claim has probable validity, but adequate monetary relief may be secured by an undertaking. (*C.C.P. 405.33*; see *infra*, §404 et seq.)

There is a separate procedure for an expungement motion brought on the ground that the claimant who recorded the lis pendens failed to file an undertaking to maintain it as ordered. (*C.C.P. 405.34*; see *infra*, §§408, 409.)

(3) *Service.* *C.C.P. 405.30* creates no timing or service requirements peculiar to a motion to expunge. The standard notice of motion requirements of *C.C.P. 1005(b)* apply. (See *Real Property Law Section Comments to C.C.P. 405.30.*)

(4) *Attorneys' Fees and Costs.* The prevailing party on any motion under *C.C.P. 405.30* et seq. is entitled to an award of attorneys' fees and costs. (*C.C.P. 405.38*; see *infra*, §410.)

(5) *Review by Mandamus.* Any aggrieved party may seek review of an order made on a motion under *C.C.P. 405.30* et seq. by writ of mandamus. (*C.C.P. 405.39*; see *infra*, §411.)

SUPPLEMENT: [This section is current through the latest supplement]



22 of 190 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

X. LIS PENDENS

E. Expungement and Other Relief.

2. Expungement: Procedure.

b. Time For Bringing Motion.

3 *Witkin Cal. Proc. Actions* § 392

[§ 392] Time For Bringing Motion.

(1) *In General.* An expungement motion may be made at any time after the lis pendens has been recorded. (*C.C.P.* 405.30.) The motion may be renewed after an initial denial, and the court may consider and correct its prior ruling. (See *Greenberg v. Superior Court* (1982) 131 C.A.3d 441, 449, 182 C.R. 466; C.E.B., 2 Real Property Remedies and Damages 2d, §13.51.)

(2) *After Entry of Judgment.* Normally the motion will be made in the trial court before a judgment, but there is no such limitation; it may be made after the entry of a judgment, and even after a notice of appeal has been filed. (See C.E.B., 2 Real Property Remedies and Damages 2d, §13.49; 49 A.L.R.4th 242 [grounds for cancellation of lis pendens prior to termination of underlying action].)

In *United Professional Planning v. Superior Court* (1970) 9 C.A.3d 377, 88 C.R. 551, *infra*, §402, the court held that a defendant's motion to expunge filed under former C.C.P. 409.1 was a collateral matter within the trial court's jurisdiction despite the pendency of an appeal by the plaintiff from the judgment for defendant. The action was for specific performance, and plaintiff argued that expungement of his lis pendens would render the suit ineffective, hence that the matter should be one stayed by the appeal. But the court found strong considerations favoring retention of the power by the trial court:

(a) The statute authorized the expungement of an improper notice but did not provide for the dismissal of the action; the court could, after expunging the notice, try the case, and could render a judgment for the plaintiff. Thus, expungement was necessarily collateral to the judgment. (9 C.A.3d 383.)

(b) The motion is determined on a consideration of evidence (*infra*, §§393, 394), and the trial court is better equipped for this purpose. (9 C.A.3d 384.)

(c) Because mandamus is the method of review (*infra*, §411), an initial determination by the appellate court would call for review in the Supreme Court, placing an unwarranted burden on that court. (9 C.A.3d 385.) (See *California-Hawaii Dev. v. Superior Court* (1980) 102 C.A.3d 293, 297, 162 C.R. 365 [action was still "pending" within

meaning of former C.C.P. 409.1 after grant of partial summary judgment, a nonappealable ruling, on issue affecting title or possession of real property].)

In *Peery v. Superior Court* (1981) 29 C.3d 837, 176 C.R. 533, 633 P.2d 198, Beneficial sued Marriott for specific performance of an alleged contract to convey real property and recorded a lis pendens. Marriott then sold to petitioners P and A, who sued Beneficial to remove the cloud on their title. The P and A quiet title action was consolidated with the Beneficial action, and summary judgment was granted to P and A and Marriott. Beneficial appealed, and the other parties moved in the trial court to expunge the lis pendens under the former expungement statute, which required the plaintiff to prove that he has commenced or prosecuted the action for a proper purpose and in good faith. (29 C.3d 843; see infra, §402.) *Held*, mandamus granted to compel consideration of the motion.

(a) *Procedure in postjudgment motion to expunge.* (1) The proper practice is to make the motion in the trial court. (29 C.3d 842, citing *United Professional*.) (2) The lis pendens may remain on record while the appeal is pending, subject to the right of the adversely affected party to move to expunge. (29 C.3d 842, citing *United Professional* and *California-Hawaii*.)

(b) *Effect of judge's decision at trial.* The findings and judgment are entitled to considerable weight, for even a case that appears legally sound and factually strong at trial may leave no significant issue once the trier of fact has credited the defendant's proof rather than the plaintiff's. And the patent lack of merit of an appeal from a sound judgment is demonstrative of both bad faith and improper purpose. (29 C.3d 844.) "Therefore, to avoid expungement after judgment, the losing party must demonstrate that he will raise a substantial issue for review." (29 C.3d 844, 845, adding, however, that a weak case does not by itself demonstrate an improper motive.) "[A] relevant finding may be accepted as conclusive unless the appellant proves that it is subject to substantial challenge on appeal for lack of adequate evidentiary support." (29 C.3d 846.)

(c) *Effect of judge's decision granting summary judgment.* "[A]lthough expungement will often be appropriate after summary judgment, the appellant should be given the opportunity to prove that the summary judgment raises substantial issues for appellate review and to otherwise demonstrate his good faith." (29 C.3d 846.) Because the judge erred in refusing to consider any substantive allegations or evidence in denying the expungement motion, and resolution of the issues will likely require presentation of evidence by affidavit or other appropriate method, the motion should be considered again. (29 C.3d 846.) (See *Mason v. Superior Court* (1985) 163 C.A.3d 989, 994, 210 C.R. 63 [following *Peery*; ordering lis pendens expunged solely on basis of summary judgment for defendants was error]; 70 Cal. L. Rev. 909 [*Peery*].)

Peery was criticized in *Mix v. Superior Court* (2004) 124 C.A.4th 987, 21 C.R.3d 826. *Mix* involved a question of first impression: in construing the 1992 revised lis pendens statute, what is the proper standard to review a motion to expunge a lis pendens where the trial judge has already substantively rejected the recording party's claim? Prior to 1992, the proper standard was articulated in *Peery*: If the claimant shows that a substantial issue exists for appeal, the motion to expunge should be denied, even though the claimant has already lost at the trial level. *Held*, this standard was abrogated by the 1992 revision of the lis pendens statute.

(a) *Former standard.* The *Peery* standard was rooted in former C.C.P. 409.1, which determined the validity of a lis pendens based on the claimant's state of mind, i.e., was the lis pendens recorded with a "proper purpose" and in "good faith." (124 C.A.4th 989, 992.) "For claimants it was a pretty easy standard, and hence their lis pendens were likely to stay on the property for the duration of any appeal." (124 C.A.4th 989.)

(b) *Current standard.* When former C.C.P. 409.1 was replaced by C.C.P. 405.32 (infra, §403) in 1992, "all language focused on subjectivity came out. The new language required the claimant to establish by a 'preponderance of the evidence the probable validity of the real property claim.' In fact, the phrase 'probable validity' is used twice in the statute." (124 C.A.4th 989; see infra, §403.) Thus, C.C.P. 405.32 requires the trial judge to expunge a lis pendens where the claimant is unsuccessful at trial, unless the judge finds that his or her own decision is likely to be reversed on appeal.

(124 C.A.4th 989, 996.) "Of course, it is going to be a rare case indeed where the trial court will be willing to state on the record that its decision in a case will 'probably' be reversed. Ninety-nine-point-ninety-nine percent of the time expungement will be required." (124 C.A.4th 989.) There is an important safeguard in those cases where reversal may seem probable to the appellate court: the aggrieved claimant may seek a stay pending appeal. (124 C.A.4th 989, 996.) (See *Amalgamated Bank v. Superior Court* (2007) 149 C.A.4th 1003, 1017, 57 C.R.3d 686 [reaffirming validity of *Mix* rule; standard for deciding whether to issue writ of mandamus under C.C.P. 405.39 (see *infra*, §411) to vacate postjudgment expungement order is whether petitioner's real property claim has probable validity].)

SUPPLEMENT: [This section is current through the latest supplement]



23 of 190 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

X. LIS PENDENS

E. Expungement and Other Relief.

2. Expungement: Procedure.

c. Evidence and Discovery.

3 *Witkin Cal. Proc. Actions* § 393

[§ 393] Evidence and Discovery.

The court may hear oral testimony and may make orders for "discovery by any party affected by a motion to expunge." Documentary evidence or declarations may be filed with the expungement motion. (*C.C.P. 405.30.*) The moving party may, but is not necessarily required to, file evidence with the moving papers. Whether the moving party is required to file evidence with the moving papers depends upon which party bears the burden of proof. (See Real Property Law Section Comments; on burden of proof, see *infra*, §394.)

SUPPLEMENT: [This section is current through the latest supplement]



24 of 190 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

X. LIS PENDENS

E. Expungement and Other Relief.

2. Expungement: Procedure.

d. Burden and Degree of Proof.

3 *Witkin Cal. Proc. Actions* § 394

[§ 394] Burden and Degree of Proof.

(1) *Former Law.* As a result of a 1976 amendment, former C.C.P. 409.1 shifted the burden of proof from the party seeking expungement to the claimant who recorded the lis pendens, and changed the degree of proof from clear and convincing evidence to a preponderance of the evidence. (See *Malcolm v. Superior Court* (1981) 29 C.3d 518, 525, 174 C.R. 694, 629 P.2d 495, *infra*, §402; *Coppinger v. Superior Court* (1982) 134 C.A.3d 883, 889, 185 C.R. 24, *infra*, §398 [party who filed lis pendens could rely on own verified pleading to oppose motion to expunge]; *Burger v. Superior Court* (1984) 151 C.A.3d 1013, 1019, 199 C.R. 227, *infra*, §398 [showing by unverified complaint and declaration with information-and-belief verification was not sufficient].)

(2) *Revised Law.* Under current law, which party bears the burden of proof depends on the ground on which the expungement motion is brought:

(a) The claimant, and not the moving party, bears the burden of proof on a motion to expunge brought under C.C.P. 405.31 (pleading does not set forth real property claim; see *infra*, §396 et seq.) or C.C.P. 405.32 (no probable validity to real property claim; see *infra*, §403). (C.C.P. 405.30.)

(b) C.C.P. 405.30 is silent as to the burden of proof for an expungement motion brought under C.C.P. 405.23 (lis pendens is void and invalid; see *infra*, §395) or C.C.P. 405.33 (adequate monetary relief may be secured by undertaking; see *infra*, §404 et seq.). However, the Real Property Law Section Comments to C.C.P. 405.30 state that the burden of proof resides with the claimant on a C.C.P. 405.23 motion, and with the moving party on a C.C.P. 405.33 motion, by operation of Ev.C. 500 and 550 (see 1 *Cal. Evidence* (4th), *Burden of Proof and Presumptions*, §4 et seq.).

"As to those motions to expunge on which the burden of proof rests upon the claimant, and as to which the moving party need not initially support the motion with evidence, the court's power to award sanctions pursuant to C.C.P. 128.5 and attorney's fees under C.C.P. 405.38 is deemed sufficient to deter frivolous motions designed to harass the claimant." (Real Property Law Section Comments to C.C.P. 405.30; on sanctions pursuant to C.C.P. 128.5, see 7 *Cal. Proc.* (5th), *Trial*, §227 et seq.; on attorneys' fees under C.C.P. 405.38, see *infra*, §410.)

The degree of proof required to prevail on a motion under *C.C.P. 405.30* continues to be a preponderance of the evidence, whether expressly stated as such by the lis pendens statutes (see *C.C.P. 405.3, 405.32, 405.33*), or because of the operation of *Ev.C. 115* (except as otherwise provided by law, burden of proof is proof by preponderance of evidence; see *1 Cal. Evidence (4th), Burden of Proof and Presumptions, §35*).

SUPPLEMENT: [This section is current through the latest supplement]



25 of 190 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

X. LIS PENDENS

E. Expungement and Other Relief.

3. Expungement: Showing Required.

a. Invalid and Void Lis Pendens.

3 *Witkin Cal. Proc. Actions* § 395

[§ 395] Invalid and Void Lis Pendens.

(1) *Former Law.* Under our prior lis pendens statutes, a notice that did not comply with the technical service and filing requirements was void and invalid, and thus was subject to expungement. (*McKnight v. Superior Court* (1985) 170 C.A.3d 291, 300, 215 C.R. 909.)

However, case law created an exception. In *Biddle v. Superior Court* (1985) 170 C.A.3d 135, 215 C.R. 848, plaintiffs mailed a copy of the notice to defendants' business address but, in violation of former C.C.P. 409(c), failed to either request a return receipt or to send a copy to defendants' home address. On this basis, the trial judge granted defendants' motion to expunge, even though defendants had received actual notice and had not raised the technical defects on two previous motions to expunge. *Held*, granting the motion to expunge was error. By conveying prompt actual notice to defendants, plaintiffs satisfied the purpose of the statute. Requiring slavish adherence to the technical service requirements would defeat the overall legislative objective. (170 C.A.3d 138.) Also, defendants' failure to raise the defects on the earlier motions constituted a waiver. (170 C.A.3d 138.)

(2) *Revised Law.* C.C.P. 405.23 (see supra, §385) continues prior law by permitting expungement if the claimant can establish that the lis pendens is invalid and void pursuant to *McKnight*, unless the exception stated in *Biddle* applies. (Real Property Law Section Comments to C.C.P. 405.23.)

SUPPLEMENT: [This section is current through the latest supplement]



26 of 190 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

X. LIS PENDENS

E. Expungement and Other Relief.

3. Expungement: Showing Required.

b. Lack of Real Property Claim.

1. In General.

3 *Witkin Cal. Proc. Actions* § 396

[§ 396] In General.

(1) *Real Property Claim.* *C.C.P. 405.31*, enacted as part of the 1992 revision (see *supra*, §373), mandates the expungement of a lis pendens if the pleading does not contain a real property claim. A "real property claim" is an action in which the pleading, if meritorious, would affect (a) the title or right to possession of specific real property (see *infra*, §397 et seq.) or (b) the use of an easement (see *infra*, §401). (*C.C.P. 405.4*, *supra*, §374.) (For situations in which notice is outside scope of statute and ineffective, see *supra*, §388; on recordation of lis pendens based on real property claim, see *supra*, §376.)

(2) *Applicable Standard.* Prior law governing expungement became confused because of the failure of the courts to distinguish between allegations (pleadings) and evidence. *C.C.P. 405.31* concerns the judicial examination of allegations only. The judicial examination of factual evidence is separately governed by *C.C.P. 405.32*. (See *infra*, §403.) The analysis required by *C.C.P. 405.31* is analogous to, but more limited than, the analysis undertaken by a court on a general demurrer. Rather than analyzing whether the pleading states any claim at all, the court must undertake the more limited analysis of whether the pleading states a real property claim. (See Real Property Law Section Comments to *C.C.P. 405.31*.)

The claimant bears the burden of proof on a motion under *C.C.P. 405.31*. (See *C.C.P. 405.30*, *supra*, §394.)

(3) *Expungement May Not Be Conditioned on Undertaking.* The court may not order an undertaking to be given as a condition of expungement if it finds that the pleading does not contain a real property claim. (*C.C.P. 405.31*.)

(4) *Continuing Validity of Case Law.* Because the former and current expungement statutes are nearly identical, prior case law construing the former expungement statute (see *infra*, §397 et seq.) should be useful in interpreting the current statute. (See C.E.B., 2 Real Property Remedies and Damages 2d, §13.63.)

SUPPLEMENT: [This section is current through the latest supplement]



27 of 190 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

X. LIS PENDENS

E. Expungement and Other Relief.

3. Expungement: Showing Required.

b. Lack of Real Property Claim.

2. Action Challenging Government Housing Program.

3 *Witkin Cal. Proc. Actions* § 397

[§ 397] Action Challenging Government Housing Program.

In *Moseley v. Superior Court* (1986) 177 C.A.3d 672, 223 C.R. 116, decided under the former statute, defendant county amended its housing program to repeal resale controls on bond-financed units. Petitioners brought an action seeking the repeal of the amendment, and filed a lis pendens against 491 condominium units formerly subject to the resale controls. A motion to expunge the lis pendens was granted, and petitioners sought mandamus. *Held*, writ denied. Neither petitioners nor the county had a claim of interest in the ownership or possession of the condominium units, and the owners of the units were not even parties to the action. (177 C.A.3d 676.) The underlying action concerned the legality of an amendment to the county housing element, not the condominium units or their title or possession. (177 C.A.3d 676, 677, 678, distinguishing *Coppinger v. Superior Court* (1982) 134 C.A.3d 883, 185 C.R. 24, *infra*, §398, and *Kendall-Brief Co. v. Superior Court* (1976) 60 C.A.3d 462, 131 C.R. 515, *infra*, §401.)

SUPPLEMENT: [This section is current through the latest supplement]



28 of 190 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

X. LIS PENDENS

E. Expungement and Other Relief.

3. Expungement: Showing Required.

b. Lack of Real Property Claim.

3. Action To Impose Constructive Trust.

3 *Witkin Cal. Proc. Actions* § 398

[§ 398] Action To Impose Constructive Trust.

(1) *Lis Pendens Statutes*. Case law, decided primarily under former law, is in conflict regarding the availability of the lis pendens procedure in actions claiming a constructive trust (see *infra*, this section) or an equitable lien (see *infra*, §399). The definition of a real property claim (*C.C.P.* 405.4; see *supra*, §374) neither includes nor excludes these claims, leaving that resolution to judicial development. The Real Property Law Section Comments to *C.C.P.* 405.4 note that if case law continues to allow use of the lis pendens procedure in these cases, any abuse that might have previously occurred should be mitigated by the following:

(a) *C.C.P.* 405.32 (requiring proof by the claimant of probable validity of claim; see *infra*, §403).

(b) *C.C.P.* 405.34 (allowing court to require bond from claimant to continue lis pendens; see *infra*, §§408, 409).

(c) *C.C.P.* 405.8 (availability of injunction, attachment, or other relief in connection with real property claim; see *supra*, §373).

(2) *Action Affects Title or Possession*. In *Coppinger v. Superior Court* (1982) 134 C.A.3d 883, 185 C.R. 24, the court pointed out that an action to impose a constructive trust (see 13 *Summary* (10th), *Trusts*, §319 et seq.) has been held to be one for the recovery of real property within the meaning of *C.C.P.* 318 (statute of limitations, *infra*, §681). The court therefore concluded that the action affects title to or possession of real property for purposes of the lis pendens expungement statute. (134 C.A.3d 891.) (See 24 *Santa Clara L. Rev.* 137 [constitutional implications of holding].)

(3) *Action Does Not Affect Title or Possession*. *Coppinger* was distinguished, and the broad sweep of its holding was criticized, in *Burger v. Superior Court* (1984) 151 C.A.3d 1013, 199 C.R. 227. Plaintiff, a church, brought an action against various defendants, alleging in substance that money it had advanced to them for church purposes was used to construct improvements on their own property. Plaintiff first recorded a lis pendens reciting that the action "does not affect the title and right of possession" of the real property, and that its object was to obtain reimbursement. An

amended lis pendens was filed later, asserting that the object was to obtain a judgment affecting "title and/or the right to possession," and this was followed by an amendment to the complaint alleging that defendants obtained the money by fraud and should be deemed constructive trustees of the property. *Held*, the lis pendens should be expunged.

(a) In *Coppinger*, the defendant allegedly used ill-gotten proceeds to *acquire* real property; here defendant Burger's property was allegedly *improved* by a third-party wrongdoer. The remedy of constructive trust--to compel transfer of the property to the party entitled to it--is inappropriate where only the value of improvements, considerably less than the overall value of the property, is involved. (151 C.A.3d 1018.)

(b) Similar objections apply to the possible alternative claim of an equitable lien (see *infra*, §399), in lieu of using the attachment procedure. "Lis pendens is one of the few remaining provisional remedies available at its inception without notice to the adversary. Due process is said to be provided for by subsequent notice and an expungement procedure which casts the burden upon the proponent of the lis pendens, but a lis pendens may cause substantial hardship to the property owner before relief can be obtained." (151 C.A.3d 1018.) In essence plaintiff brought an action for money; and its claim "is similar to that of almost any lender of money to a defaulting debtor who happens to own real property." (151 C.A.3d 1019.)

Pacific Lumber Co. v. Superior Court (1990) 226 C.A.3d 371, 276 C.R. 425, was a class action on behalf of a defunct corporation's former shareholders to rescind a merger and restore to them ownership of the corporation and its assets, including certain timberland in California. Plaintiff alleged that through defendants' fraud the MAXXAM corporation had acquired title to all of the defunct corporation's shares and had transferred them to its wholly owned subsidiary, which then merged with the defunct corporation. On the same date that the complaint was filed, plaintiff filed a lis pendens against the timberland, and the subsidiary immediately moved to expunge it. In addition to his opposition to the motion to expunge, plaintiff filed an amended complaint seeking a constructive trust on the timberland and stating that the suit was brought as a derivative action on behalf of the defunct corporation. The trial judge denied the motion to expunge, and the subsidiary sought mandamus. *Held*, petition granted; plaintiff did not meet the burden of showing that his action affected title to or right of possession of real property.

(a) To the extent that the action merely seeks a rescission of the acquisition of corporate shares, it does not affect title to or possession of real property. Even if the former shareholders succeeded in obtaining the return of their shares in the defunct corporation, the corporation, not the shareholders, would have the title to, and the right of possession of, the timberland. Hence, neither title nor possession would be directly affected. (226 C.A.3d 375, citing the text.)

(b) Only if the transactions that resulted in the subsidiary's becoming the owner of the timberland were unraveled to the extent that ownership of the property was again in the defunct corporation would rescission affect title or possession. Accomplishment of this change of ownership could only be made through a derivative action, which is designed to recover assets for the corporation, rather than for the shareholders as individuals. However, because plaintiff was not a shareholder of the defunct corporation either when he filed the action or when the alleged fraudulent transactions were undertaken, he is prohibited by *Corp.C. 800(b)(1)* (9 *Summary* (10th), *Corporations*, §171) from maintaining a derivative action. (226 C.A.3d 376.)

(c) Relying on *Coppinger*, plaintiff argued that title to the timberland was affected by his attempt to impose a constructive trust on it. This contention must fail because plaintiff pleaded no facts that, if proven, would support a constructive trust on the *real property*. (226 C.A.3d 377.)

(d) The property that was allegedly acquired by fraud was the stock of the defunct corporation, now held by MAXXAM. In an attempt to show that the timberland, which is held by the subsidiary, is also held by MAXXAM, plaintiff argued that the corporate veil should be pierced and MAXXAM found to be the owner of the timberland, as well as the stock. However, plaintiff cannot fit his action into a constructive trust theory by alleging that MAXXAM is the subsidiary's alter ego. A constructive trust is designed not only to prevent unjust enrichment, but also to enforce *restitution*. And the former shareholders of the defunct corporation are not entitled to restitution of the timberland, but

only to restitution of the shares. (226 C.A.3d 378.)

(e) Although a right to those shares carries an indirect right to exercise control over the timberland through the voting rights of the former shareholders, that right is too indirect an interest to support a lis pendens. (226 C.A.3d 378.)

A host of other cases have refused to follow the *Coppinger* holding. (See *Deane v. Superior Court* (1985) 164 C.A.3d 292, 297, 210 C.R. 406 [distinguishing *Coppinger*; money owed to real estate agent for services rendered in connection with purchase of property was only debt, and did not entitle him to impose constructive trust on property and record lis pendens]; *Westbrook v. Superior Court* (1986) 176 C.A.3d 703, 710, 714, 222 C.R. 317 [contract to leave leasehold to plaintiff by will; defendant had right to dispose of it during his lifetime, hence no basis for constructive trust]; *Urez Corp. v. Superior Court* (1987) 190 C.A.3d 1141, 1144, 1149, 235 C.R. 837, *infra*, §399 [following *Burger* and *Moseley v. Superior Court* (1986) 177 C.A.3d 672, 223 C.R. 116, *supra*, §397, and rejecting *Coppinger's* reasoning]; *La Paglia v. Superior Court* (1989) 215 C.A.3d 1322, 1326, 1328, 264 C.R. 63 [discussing cases criticizing *Coppinger* and concluding that it was incorrectly decided]; *Lewis v. Superior Court* (1994) 30 C.A.4th 1850, 1862, 37 C.R.2d 63, *infra*, §400; *BGJ Associates, LLC v. Superior Court* (1999) 75 C.A.4th 952, 970, 89 C.R.2d 693 [complaint seeking both monetary damages and imposition of constructive trust was insufficient to maintain lis pendens, given judicial policy of interpreting lis pendens statute narrowly to prevent abuse of coercing settlements].)

SUPPLEMENT: [This section is current through the latest supplement]



29 of 190 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

X. LIS PENDENS

E. Expungement and Other Relief.

3. Expungement: Showing Required.

b. Lack of Real Property Claim.

4. Action To Impose Equitable Lien.

3 *Witkin Cal. Proc. Actions* § 399

[§ 399] Action To Impose Equitable Lien.

(1) *Lis Pendens Statutes*. As under former law, the definition of a real property claim (C.C.P. 405.4; see *supra*, §374) in the lis pendens statutes neither includes nor excludes claims for a constructive trust or equitable lien, leaving that resolution to judicial development. (See *supra*, §398.) Thus cases decided under the former statute should be useful in construing the current lis pendens statute.

(2) *Action Affects Title or Possession*. In *Okuda v. Superior Court* (1983) 144 C.A.3d 135, 192 C.R. 388, plaintiffs contracted to purchase a house from defendants, and added substantial improvements to the property before discovering that defendants had not transferred title to them. Plaintiffs surrendered possession, and brought an action for breach of contract and fraud, adding a count for relief as good faith improvers, and praying for an amount equal to the cost of the improvements and an equitable lien on the property as security for the payment of that amount. They then recorded a lis pendens. *Held*, the lis pendens was proper. Constructive trusts and equitable liens are similar in their basic purposes, and *Coppinger v. Superior Court* (1982) 134 C.A.3d 883, 185 C.R. 24, *supra*, §398, supports the lis pendens recorded in this case. (144 C.A.3d 141.)

The court rejected the contention that the Legislature did not intend to permit the use of lis pendens in actions under the good faith improver statute. (See 12 *Summary* (10th), *Real Property*, §461.)

(3) *Action Does Not Affect Title or Possession*. In *Urez Corp. v. Superior Court* (1987) 190 C.A.3d 1141, 235 C.R. 837, the court said: "[A]llegations of equitable remedies, even if colorable, will not support a lis pendens if, ultimately, those allegations act only as a collateral means to collect money damages. It must be borne in mind that the true purpose of the lis pendens statute is to provide notice of pending litigation and not to make plaintiffs secured creditors of defendants nor to provide plaintiffs with additional leverage for negotiating purposes." (190 C.A.3d 1149.)

Several other cases have rejected the equitable lien theory of *Okuda*. (See *Burger v. Superior Court* (1984) 151 C.A.3d 1013, 199 C.R. 227, *supra*, §398 [rejection in distinguishable situation]; *Elder v. Carlisle Ins. Co.* (1987) 193 C.A.3d 1313, 1320, footnote 8, 238 C.R. 897, *infra*, §407 [disagreeing with *Okuda* and following *Urez*]; *Wardley Dev.*

v. Superior Court (1989) 213 C.A.3d 391, 394, 395, 262 C.R. 87 [following *Urez* and rejecting attempted distinctions]; *Campbell v. Superior Court* (2005) 132 C.A.4th 904, 919, 34 C.R.3d 68 [1992 revision of lis pendens statutes does not affect validity of rejection of equitable lien theory of *Okuda*, as stated in *Urez*; 24 *Santa Clara L. Rev.* 137.)

SUPPLEMENT: [This section is current through the latest supplement]



30 of 190 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

X. LIS PENDENS

E. Expungement and Other Relief.

3. Expungement: Showing Required.

b. Lack of Real Property Claim.

5. Action To Set Aside Fraudulent Conveyance.

3 *Witkin Cal. Proc. Actions* § 400

[§ 400] Action To Set Aside Fraudulent Conveyance.

(1) *Action Affects Title or Possession.* In *Hunting World v. Superior Court* (1994) 22 C.A.4th 67, 26 C.R.2d 923, a creditor filed an action against a debtor in federal court alleging trademark infringement and counterfeiting of the creditor's merchandise. After the debtor quitclaimed to his wife his real property interest in their residence, the creditor filed a state court action against them to set aside the transfer as fraudulent (see C.C. 3439; 8 *Cal. Proc.* (5th), *Enforcement of Judgment*, §479 et seq.). The debtor then recorded a notice of pendency of the state action--not the federal action, which did not affect title to or the right to possession of real property, and thus could not support a lis pendens. After hearing arguments that equated the fraudulent transfer action with an action seeking to impose a constructive trust or equitable lien pursuant to *Urez Corp. v. Superior Court* (1987) 190 C.A.3d 1141, 235 C.R. 837, supra, §399, and *Wardley Dev. v. Superior Court* (1989) 213 C.A.3d 391, 395, 262 C.R. 87, the trial judge expunged the notice of lis pendens. The judge implicitly found that the fraudulent transfer action did not affect title to or the right to possession of real property because the creditor was not seeking title to the real property, but a way to reach the debtor's assets in the event of a money judgment in the federal action against him. *Held*, this was error; the judge could not properly expunge the notice of lis pendens.

(a) "Extension of the *Urez/Wardley* line of decisions is not warranted because the clear wording of the 'real property claim' prong of lis pendens law covers a claim to set aside a conveyance of real property. In *Urez*, *Wardley*, most of their precursors, and their progeny, constructive trust or equitable lien causes of action were *appended to* lawsuits centering on money damages. Those courts could conclude that the actions covered by those notices of lis pendens *primarily* sought money damages and did not affect title to real property. ... Here, the action covered by the notice of lis pendens *affects only title to real property.*" (22 C.A.4th 73.)

(b) Permitting the lis pendens here does not impose an intolerable burden on the debtor. If the transfer alleged to be fraudulent was legitimate, the debtor could defeat the lawsuit by demurrer, summary judgment motion, or prompt trial, and could seek to expunge the notice of lis pendens at any stage of the fraudulent transfer proceedings and be entitled to attorneys' fees and costs if successful. (22 C.A.4th 74.)

(c) Sanctions under *C.C.P. 128.5* (see 7 *Cal. Proc.* (5th), *Trial*, §227 et seq.) are also available against parties and attorneys who file actions without merit or to harass the opposing party. (22 *C.A.4th* 74.) (See *Kirkeby v. Superior Court* (2004) 33 *C.4th* 642, 651, 15 *C.R.3d* 805, 93 *P.3d* 395 [reaffirming rule of *Hunting World*].)

(2) *Action Does Not Affect Title or Possession.* In *Lewis v. Superior Court* (1994) 30 *C.A.4th* 1850, 37 *C.R.2d* 63, the Ls purchased real property from S. F recorded a federal lis pendens against the property prior to the Ls' acquisition of title, but the lis pendens was not indexed until the day after. The underlying federal action alleged that S had defrauded F and placed the money in various assets that the suit sought to reach by imposition of a constructive trust. F and another party then brought the present action against S and the Ls alleging that transfer of the property was a fraudulent conveyance. Pursuant to a partial settlement, the lis pendens was withdrawn, but the trial judge denied the Ls' motions for summary judgment and expungement of the lis pendens. *Held*, this was error.

(a) *Constructive trust claim does not support lis pendens.* The essence of the federal action supporting the lis pendens was an effort to impose a constructive trust on the property (see *supra*, §398). That claim does not permit the recording of a lis pendens. The fact that S may have purchased the property with stolen money did not make the victim an owner of the property as a matter of real property law. That fact would merely entitle the victim to pursue the thief and to recover a money judgment. The 1992 revisions to the lis pendens law, making it easier to expunge a lis pendens, were not intended to change the scope of the term "real property claim" in that law. The fact that the Legislature made no definitional change creates a strong presumption that it was satisfied with the restrictive interpretation given to the statute by the overwhelming majority of decisions. (30 *C.A.4th* 1862, reaffirming *Urez, supra*, and *La Paglia v. Superior Court* (1989) 215 *C.A.3d* 1322, 264 *C.R.* 63.) Language in *Hunting World* refusing to extend the *Urez/Wardley* line of decisions was merely dictum, because *Hunting World* involved an entirely conventional fraudulent conveyance claim. (30 *C.A.4th* 1863, 1864.)

(b) *Fraudulent conveyance claim does not support lis pendens.* Although a fraudulent conveyance claim may support a lis pendens, F's federal complaint, unlike the one in *Hunting World*, did not allege any conveyance of real property. Rather, it alleged that S wrongfully took F's money and used the money to buy the property. F "merely re-alleged its constructive trust claim, which the overwhelming weight of authority holds cannot support a lis pendens." (30 *C.A.4th* 1865.)

(c) *Quiet title claim does not support lis pendens.* A quiet title claim in the federal action was insufficient to support the lis pendens: (1) the complaint alleged only a theft of money, used to purchase the property at issue; (2) F never had standing to bring a quiet title action because whatever interest it might have in the property was only equitable, the holder of equitable title being unable to maintain a quiet title action against the legal owner; and (3) the complaint was not verified. (30 *C.A.4th* 1866.)

(d) *No constructive notice.* Even if the lis pendens were valid, the fact that it was indexed after the Ls took title prevented it from giving them constructive notice. (30 *C.A.4th* 1866; see 12 *Summary* (10th), *Real Property*, §324, and *supra*, §387.)

(e) *Withdrawal of lis pendens eliminates any claim.* Withdrawal of the lis pendens pursuant to the settlement eliminates any possible claim against the Ls. Under *C.C.P. 405.61* (*infra*, §414), on the withdrawal or expungement of a lis pendens, even a person with actual knowledge of a claim is not bound by it. The statute provides for the absolute and complete free transferability of real property after the expungement or withdrawal of a notice of pendency of an action. While the expungement statute speaks in terms of persons dealing with property after the withdrawal of the lis pendens, that description would apply to anyone who acquired title from the purchasers, which result functionally makes them bona fide purchasers retroactively, because otherwise they could not transfer clear title. (30 *C.A.4th* 1871.)

SUPPLEMENT: [This section is current through the latest supplement]



31 of 190 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

X. LIS PENDENS

E. Expungement and Other Relief.

3. Expungement: Showing Required.

b. Lack of Real Property Claim.

6. Claim of Easement.

3 *Witkin Cal. Proc. Actions* § 401

[§ 401] Claim of Easement.

(1) *Case Law*. The former lis pendens statutes did not expressly state that they applied to actions affecting easements. However, that issue was considered in *Kendall-Brief Co. v. Superior Court* (1976) 60 C.A.3d 462, 131 C.R. 515. K Co., the owner and developer of lots in Tract 6349, claimed an easement on behalf of lot owners over a private road in adjoining Tract 6353. Plaintiffs, owners of lots in Tract 6353, brought an action to enjoin the Tract 6349 lot owners from using the road, and recorded a lis pendens describing both the road and Tract 6349. Defendant K Co. moved to expunge the lis pendens as to its property (Tract 6349), and, after denial of the motion, petitioned for mandamus. *Held*, writ denied.

(a) *Construction of statutes*. Former C.C.P. 409 authorized recordation of a lis pendens in an action "concerning real property or affecting the title or the right of possession of real property." Thus, the plaintiff need not claim the title; it was enough that the action concern or affect it. (60 C.A.3d 465.) Former C.C.P. 409.1 permitted expungement if the action did not "affect" title or possession. Plaintiffs contended that this difference in language should permit the filing of a lis pendens (and prevent expungement) where the action "concerns" real property, even though it does not "affect title." But the sections pertain to the same subject matter and should be construed together to achieve a uniform and consistent legislative purpose. Hence, "concerning" should be given the same meaning as "affecting the title or the right of possession." (60 C.A.3d 466, 467.)

(b) *Claim of easement did not affect title*. Plaintiffs contended that defendant's claim of appurtenant easements in their property affected the title of defendant's property because the easement attached to each lot in defendant's tract and would pass to any grantee. Defendant contended that its title to the dominant tenement (the lots in its tract) would be unaffected by loss of its claimed easement. Defendant's contention was supported by *Hocking v. Title Ins. & Trust Co.* (1951) 37 C.2d 644, 234 P.2d 625, 12 Summary (10th), *Real Property*, §360, in which it was held that the plaintiff could not recover damages under a title insurance policy where roads described on a recorded map had not been constructed; i.e., the loss of the effective use of the easement impaired the market value of the property but did not affect marketability of the title. (60 C.A.3d 467.) *Hocking* is in point here: "If title to the dominant tenement is unaffected when an easement is virtually unusable, it must likewise be unaffected when an easement is nonexistent."

(60 C.A.3d 468.)

(c) *Claim of easement affected right of possession.* Although title to defendant's dominant tenement would not be affected by a judgment against it in the main action, its right of possession clearly would be affected, because access to the property would be impaired. "In our view, 'right of possession' encompasses more than mere ownership of a lot in a land-locked subdivision; it includes the right to have access to and to occupy such property." (60 C.A.3d 468.)

(2) *Codification.* The *Kendall-Brief Co.* holding was codified in 1992. *C.C.P.* 405.4 and 405.31, read together, provide that an expungement motion premised on the failure to plead a real property claim may be successfully resisted by showing that the action was based on a pleading that would affect the use of an easement identified in the pleading (other than an easement obtained pursuant to statute by any regulated public utility). (On recordation of lis pendens affecting use of easement, see *supra*, §376.)

SUPPLEMENT: [This section is current through the latest supplement]



32 of 190 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

X. LIS PENDENS

E. Expungement and Other Relief.

3. Expungement: Showing Required.

c. Failure To Establish Probable Validity of Real Property Claim.

1. Former Law.

3 *Witkin Cal. Proc. Actions* § 402

[§ 402] Former Law.

(1) *Original Statute*. Originally, former C.C.P. 409.1 (*supra*, §391 et seq.) called for a dual showing: a lack of good faith and a finding of improper purpose. This element is described in *Albertson v. Raboff* (1956) 46 C.2d 375, 295 P.2d 405, *supra*, §371, in terms of the Restatement of Torts: an action instituted because of hostility or ill will, or solely to deprive a person of the beneficial use of his property, or to force a settlement with no relation to the merits of the claim.

In *United Professional Planning v. Superior Court* (1970) 9 C.A.3d 377, 88 C.R. 551, *supra*, §392, the court followed *Albertson*, and laid down the following rule: "[T]o be successful in a motion for expungement on the grounds of 'improper purpose' and 'not in good faith,' the moving party must show that the other party commenced or prosecuted his action without believing in its validity ('not in good faith') and the existence of one of the other enumerated situations ('improper purpose')." (9 C.A.3d 389.)

(2) *1976 Revision*. Because the Legislature was presumably aware of this interpretation of former C.C.P. 409.1, and retained parallel language in the revised statute, that interpretation controlled. Hence, under the revised statute, the determination whether the party filing the lis pendens acted "for a proper purpose or in good faith" continued to depend on the party's motive and state of mind, rather than on the likely outcome of the action. (*Malcolm v. Superior Court* (1981) 29 C.3d 518, 528, 174 C.R. 694, 629 P.2d 495; *Peery v. Superior Court* (1981) 29 C.3d 837, 843, 845, 176 C.R. 533, 633 P.2d 198, *supra*, §392.)

In *Malcolm*, plaintiff sued for specific performance of an alleged oral agreement by decedent to sell her real property for \$ 20,000 in return for plaintiff's payment of rent and maintenance of the property. The complaint alleged expenditures of more than \$ 17,000 in reliance on the agreement, and the refusal of defendant executor to fulfill its terms. Plaintiff then recorded a lis pendens on the property, and defendants (executor and beneficiaries of the estate), seeking to sell it, moved to expunge. Defendants' motion was accompanied by verified declarations stating facts that they claimed demonstrated the invalidity of plaintiff's claim. Plaintiff filed an answering verified declaration setting forth the substance of the oral agreement and other facts supporting the allegations of the complaint. After a hearing the judge denied the motion and defendants sought mandamus. *Held*, writ denied.

(a) *Court cannot consider relative merits of parties' cases as revealed by conflicting affidavits.*

(1) The plaintiff had the burden of proving by a preponderance of the evidence that the action was brought for a proper purpose and in good faith (see *supra*, §394). Plaintiff's declaration contained facts sufficient for the trial judge to find that the burden had been met. (29 C.3d 525, 526.)

(2) Defendants contended that the judge should consider the conflicting affidavits and grant the motion if he thinks the plaintiff is unlikely to prevail on the merits. This contention is unsound. "There is nothing in the language of the statute to suggest that the Legislature intended to require a plaintiff to demonstrate the likelihood of its success at trial in order to avoid the expungement of a *lis pendens*; likewise, there is nothing in the language of the statute to indicate that the Legislature intended to transform the pretrial expungement procedure into any type of minitrial on the merits of the case." (29 C.3d 526.)

(3) The proper inquiry, as pointed out in *United Professional Planning*, is into the plaintiff's state of mind or motive in prosecuting the action. (29 C.3d 528, citing *California-Hawaii Dev. v. Superior Court* (1980) 102 C.A.3d 293, 162 C.R. 365, and disapproving, to the extent inconsistent, *Nash v. Superior Court* (1978) 86 C.A.3d 690, 150 C.R. 394.)

(b) *Proper limited consideration of merits.* Because a person's motive relates primarily to his or her subjective state of mind, the issue must often be determined by inference from circumstantial evidence; and "in some instances the patent lack of merit of a lawsuit may strongly suggest that the plaintiff has not filed the action for a proper purpose or in good faith." (29 C.3d 528.) Hence, the following apply:

(1) If the plaintiff does not present by affidavit or other means even a "prima facie" case on the merits, the judge could appropriately conclude that he had failed to meet his burden. And, even if a prima facie case is presented, if the defendant introduces evidence of bad faith or improper purpose independent of the alleged weakness of the case, the judge may properly consider the evidence relating to the merits in determining whether or not to credit the independent evidence of bad faith. (29 C.3d 528.)

(2) But when the plaintiff has met his burden by a verified complaint and verified declaration, the defendant cannot rebut the showing simply by presenting counteraffidavits that raise triable issues of fact on the merits; he must offer independent evidence of bad faith or improper purpose. (29 C.3d 529.)

Other cases are to the same effect. (See *Erb v. Superior Court* (1988) 205 C.A.3d 1156, 1162, 252 C.R. 881; *Hilberg v. Superior Court* (1989) 215 C.A.3d 539, 543, 263 C.R. 675; 70 Cal. L. Rev. 909.) (On legislative abrogation of *Malcolm* and *Peery*, see *infra*, §403.)

SUPPLEMENT: [This section is current through the latest supplement]



33 of 190 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

X. LIS PENDENS

E. Expungement and Other Relief.

3. Expungement: Showing Required.

c. Failure To Establish Probable Validity of Real Property Claim.

2. Current Law.

3 *Witkin Cal. Proc. Actions* § 403

[§ 403] Current Law.

(1) *Finding on Probable Validity of Claim.* In a significant change, the 1992 Legislature enacted *C.C.P. 405.32*, requiring a court to order expungement if it finds that the claimant "has not established by a preponderance of the evidence the probable validity of the real property claim." (See *Ziello v. Superior Court* (1995) 36 *C.A.4th* 321, 331, 332, 42 *C.R.2d* 251, 4 *Summary* (10th), *Security Transactions in Real Property*, §83 [expungement was proper]; on definition of real property claim, see *supra*, §374.)

The term "probable validity" (see *supra*, §374) is drawn from the Attachment Law (see *C.C.P. 484.090(a)(2)*, 6 *Cal. Proc.* (5th), *Provisional Remedies*, §§108, 111), and the statute is intended to require a hearing on the factual merits of the same type as those conducted in attachment and claim and delivery proceedings (see 6 *Cal. Proc.* (5th), *Provisional Remedies*, §§106 et seq., 258). A demurrer-like review of the pleading is available under *C.C.P. 405.31* (see *supra*, §396 et seq.). (See Real Property Law Section Comments to *C.C.P. 405.32*.)

The claimant bears the burden of proof on a motion under *C.C.P. 405.32*. (*C.C.P. 405.30*, *supra*, §394.)

(2) *Consideration of Merits.* *C.C.P. 405.32* disapproves *Malcolm v. Superior Court* (1981) 29 *C.3d* 518, 174 *C.R.* 694, 629 *P.2d* 495, *supra*, §402, and "other cases which have held that the court on a motion to expunge may not conduct a 'minitrial' on the merits of the case. This section is intended to change California law and to require judicial evaluation of the merits." (See Real Property Law Section Comments.)

"As a result of the historic growth in secured real property financing and the now nearly universal use of title insurance to insure title, the recordation of a lis pendens gives a claimant a de facto, if not de jure, provisional remedy. The cloud created on title generally precludes either sale or encumbrance of the affected property for the duration of the action. The rule of *Malcolm* that the merits may not be considered on an expungement motion therefore created an anomaly in California law. In every analogous situation, judicial review of the merits is a prerequisite to obtaining relief of this nature." (See Real Property Law Section Comments.)

(3) *Abrogation of Good Faith and Improper Purpose Grounds.* Former law required the proponent of a lis pendens to prove that he was proceeding in good faith and for a proper purpose. (See *supra*, §402.) "This language was construed by the courts to require an inquiry into the proponent's subjective state of mind. ... Questions of subjective state of mind are more appropriate to criminal law notions of moral culpability than to resolution of real property disputes. The provisions regarding proper purpose, good faith and subjective state of mind are superseded in the new statute by the new requirement that the claimant objectively establish the probable validity of the real property claim." (See Real Property Law Section Comments.) (See *Mix v. Superior Court (2004)* 124 C.A.4th 987, 989, 21 C.R.3d 826, *supra*, §392 [adopting this view and criticizing contrary view in *Peery v. Superior Court (1981)* 29 C.3d 837, 176 C.R. 533, 633 P.2d 198, *supra*, §392].)

(4) *Expungement May Not Be Conditioned on Undertaking.* The court may not order an undertaking to be given as a condition of expungement if it finds that the claimant has not established the probable validity of the claim. (C.C.P. 405.32.)

SUPPLEMENT: [This section is current through the latest supplement]



34 of 190 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

X. LIS PENDENS

E. Expungement and Other Relief.

3. Expungement: Showing Required.

d. Expungement Conditioned on Undertaking.

1. In General.

3 *Witkin Cal. Proc. Actions* § 404

[§ 404] In General.

(1) *Statutory Authorization.* The owner of property may obtain expungement if the court finds that the real property claim has probable validity, but that adequate relief can be secured to the claimant by the giving of an undertaking. The expungement is conditioned on furnishing an undertaking of such nature and in such an amount to indemnify the claimant for all damages proximately resulting from the expungement that the claimant may incur if the notice is expunged and the claimant prevails on the real property claim (see *infra*, §405). (*C.C.P.* 405.33.)

(2) *Probable Validity of Real Property Claim.* The court must order expungement whenever an undertaking would afford adequate relief, even if the claimant can show the probable validity of the claimant's real property claim under *C.C.P.* 405.32 (see *supra*, §403). (*C.C.P.* 405.33.) If the claimant cannot make that showing, expungement should be ordered under *C.C.P.* 405.32. Establishment of probable validity does not constitute a meritorious opposition to a motion under *C.C.P.* 405.33; the focus of the statute is on whether monetary damages will fully compensate the claimant. (See Real Property Law Section Comments to *C.C.P.* 405.33.)

(3) *Presumption That Real Property Is Unique.* Case law regarding whether real property other than a single-family dwelling may be considered unique is not completely consistent. (See *Sheets v. Superior Court* (1978) 86 C.A.3d 68, 70, 149 C.R. 912 [commercial property was unique]; *Stewart Dev. Co. v. Superior Court* (1980) 108 C.A.3d 266, 273, 274, 166 C.R. 450 [same]; *Jessen v. Keystone Savings & Loan Assn.* (1983) 142 C.A.3d 454, 459, 191 C.R. 104 [contra].) "With respect to commercial real estate, a presumption of uniqueness is often inappropriate. The essence of commercial activity is the earning of money; loss of a commercial investment opportunity can normally be offset by a pecuniary award." (See Real Property Law Section Comments to *C.C.P.* 405.33.)

The matter has been resolved by statute. For purposes of determining whether monetary damages--as opposed to specific performance--are adequate, the presumption of the uniqueness of real property (*C.C.* 3387; see 13 *Summary* (10th), *Equity*, §28) does not apply, except in the case of a single-family dwelling that the owner intends to occupy. (*C.C.P.* 405.33.)

In the case of a single-family dwelling, there is a conclusive presumption that the breach of an agreement to transfer the property cannot be adequately relieved by monetary compensation, where the party seeking performance of the agreement intends to occupy the dwelling. (C.C. 3387.) In all other cases, the presumption under C.C. 3387 merely affects the burden of proof, placing it on the moving party. However, this latter rule is one of form over substance: Elimination of the presumption is of no effect, because *C.C.P. 405.33* already places the burden of proof on the moving party. (See *supra*, §394.) "This section nevertheless makes the presumption inapplicable to property other than single family dwellings for the purpose of clarifying that the moving party's burden is not a heavy or extraordinary one, but rather one which can be satisfied by a simple preponderance of the evidence. ... *Sheets* and *Steward Development* are disapproved to the extent inconsistent with this purpose." (See Real Property Law Section Comments to *C.C.P. 405.33*.)

SUPPLEMENT: [This section is current through the latest supplement]



35 of 190 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

X. LIS PENDENS

E. Expungement and Other Relief.

3. Expungement: Showing Required.

d. Expungement Conditioned on Undertaking.

2. Amount and Nature of Undertaking.

3 *Witkin Cal. Proc. Actions* § 405

[§ 405] Amount and Nature of Undertaking.

(1) *In General.* The "amount and nature" of the undertaking must be sufficient to indemnify "the claimant for all damages proximately resulting from the expungement which the claimant may incur" if the notice is expunged and the claimant prevails on the real property claim. (*C.C.P.* 405.33.) Because of the similarity between this statutory language and that of its predecessors (former *C.C.P.* 409.1, 409.2), decisions construing the predecessor statutes should be reliable in ascertaining the meaning of the current statute:

(2) *Discretion of Trial Court.* The statutory phrase--"all damages ... which the claimant may incur"--does not mean the total relief that the plaintiff seeks; if it did the defendant could rarely meet the requirement and the statute would have little remedial effect. The Legislature intended that the trial judge should have broad discretion in the matter. (*Howden-Goetzl v. Superior Court* (1970) 7 *C.A.3d* 135, 139, 86 *C.R.* 323.) In *Howden*, the judge fixed the bond at \$ 10,000 and plaintiffs sought mandamus to have the expunging order vacated or the bond increased to \$ 670,000. In denying the writ the court said: "[I]t was proper for the trial court to fix the amount of the bond upon an appraisal of all of the evidentiary material presented on the motion, including the evidence received at trial; the judge was not required to speculate on the prospects of the litigation on the basis of a mere glance at the pleadings; he knew that, subject to possible reversal on appeal, the factual issues in the case had already been resolved in favor of the moving party." (7 *C.A.3d* 140.) (See *Trapasso v. Superior Court* (1977) 73 *C.A.3d* 561, 568, 140 *C.R.* 820 [upholding exercise of discretion].)

(3) *Damages That Claimant May Incur.* In *Stewart Dev. Co. v. Superior Court* (1980) 108 *C.A.3d* 266, 166 *C.R.* 450, plaintiff purchaser sued defendant vendors for specific performance of an alleged contract to purchase 23 acres of unimproved industrially zoned land. Defendants moved to expunge the lis pendens. The trial judge granted the motion on condition of a \$ 600,000 bond, ruling that the proper measure of damages would be the difference between the contract price and the market value at the time of trial. *Held*, the judge's ruling was correct; statutory language (former *C.C.P.* 409.2) requiring that the amount of the undertaking be sufficient to indemnify plaintiff for all "damages which plaintiff may incur," refers to the damages resulting from the expungement of the lis pendens, not to the damages flowing from the breach of contract. The latter are so limited (*C.C.* 3306; see 1 *Summary* (10th), *Contracts*, §899) that,

if the plaintiff could recover only those he could never be afforded adequate relief by a bond. In the present case the proper measure would be the difference between the contract price and the market value at the time of trial; uncertainty of the success of the development plan would rule out expected profits as entirely too speculative. However, this may not always be true, and the specific items recoverable as damages must be left to adjudication on a case-by-case basis. (108 C.A.3d 276, 277.) (See *Howden-Goetzl v. Superior Court*, *supra*, 7 C.A.3d 139; *CMSH Co. v. Antelope Dev.* (1990) 223 C.A.3d 174, 176, 179, 272 C.R. 605 [inflation, as reflected in consumer price index, is not factor to be considered in fixing damages, where fair market value of real property actually appreciates during lis pendens period].)

After the *Stewart* decision, C.C. 3306 was amended to authorize the recovery of consequential damages and interest. Thus, the amount of an undertaking may include these additional items.

SUPPLEMENT: [This section is current through the latest supplement]



36 of 190 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

X. LIS PENDENS

E. Expungement and Other Relief.

3. Expungement: Showing Required.

d. Expungement Conditioned on Undertaking.

3. Deed of Trust as Alternative to Undertaking.

3 *Witkin Cal. Proc. Actions* § 406

[§ 406] Deed of Trust as Alternative to Undertaking.

Markley v. Superior Court (1992) 5 C.A.4th 738, 7 C.R.2d 328, involved the question whether a deed of trust can serve as an alternative to the undertaking. Plaintiff sued to rescind a sale of real property to defendants and recorded a notice of lis pendens, which defendants moved to expunge. As a condition of denying the motion to expunge, the trial judge initially required plaintiff to post an undertaking of \$ 2 million. However, after hearing evidence that posting such a large bond would cause plaintiff considerable financial hardship, the judge allowed plaintiff to execute and file a deed of trust, in favor of the court clerk, on other property he owned, along with an authorization for enforcement. *Held*, this was improper.

(a) The Bond and Undertaking Law (C.C.P. 995.010 et seq.; see 6 *Cal. Proc.* (5th), *Provisional Remedies*, §8 et seq.) applies to undertakings in proceedings to expunge lis pendens unless, as argued by plaintiff, the court's power under the expungement statute to prescribe "the nature" of the undertaking created one of the exceptions provided in C.C.P. 995.020(a); i.e., the Bond and Undertaking Law is inapplicable where a statute prescribes "a different rule or is inconsistent." Plaintiff's position was without merit for the following reasons:

(1) The Law Revision Commission comment to the Bond and Undertaking Law explains that the rules applicable to such matters as the ability to give a cash or equivalent deposit in lieu of a bond or undertaking are the same for all bonds and undertakings. (5 C.A.4th 746.)

(2) The term "undertaking" has a specific definition (see C.C.P. 995.190). This definition, which does not include the filing of a deed of trust, is not subject to substantial alteration by any power given to the trial judge to delineate an undertaking's "nature." (5 C.A.4th 747.)

(3) Former C.C.P. 409.1 was intended to provide monetary compensation for any damages resulting from the expungement or nonexpungement of a lis pendens. "An expeditious, legally unambiguous method of successfully enforcing such compensation is as necessary in this context as any other, and we will not presume that the Legislature intended to give any lesser protection to those on the losing end of a motion to expunge than to those otherwise entitled

to require the other party to give an undertaking." (5 C.A.4th 747.)

(b) Plaintiff was not within the scope of *C.C.P.* 995.240, which permits the court to waive a bond in cases of indigency, because although he would have had great difficulty posting a \$ 2 million undertaking, he clearly was not an indigent. (5 C.A.4th 748.) Nor was he protected by the court's common law power to waive bond where equity requires. This power is designed to guarantee that no citizen will be denied access to the courts because of poverty, not to cure mere inconvenience or hardship. Here, if plaintiff could not post the undertaking, he would have lost the benefit provided by the *lis pendens*, but he would not have to abandon his suit for damages. Hence, he could not be equated with an indigent entitled to lenience under either *C.C.P.* 995.240 or the common law. (5 C.A.4th 749.)

(c) *Davis v. Custom Component Switches* (1970) 13 C.A.3d 21, 91 C.R. 181, 9 Cal. Proc. (5th), *Appeal*, §289, and *Estate of Murphy* (1971) 16 C.A.3d 564, 94 C.R. 141, 9 Cal. Proc. (5th), *Appeal*, §289, which waived the statutory requirement that a bond be posted in order to stay judgment pending appeal, are not applicable here. Those decisions relied on *C.C.P.* 923, which allows an appellate court to take "any appropriate action" to preserve the status quo. There is, however, no comparable sweeping grant of authority empowering the trial court to modify or disregard the statutory requirement as to undertakings with respect to the expungement of a *lis pendens*. (5 C.A.4th 750.) Furthermore, *Davis* and *Murphy* were based on the potentially irreparable harm that the appellants might suffer if a stay was not imposed. But plaintiff would have suffered no such harm if the *lis pendens* was expunged and the property was sold by defendants, because he could still have been adequately compensated in money damages. (5 C.A.4th 749.)

SUPPLEMENT: [This section is current through the latest supplement]



37 of 190 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

X. LIS PENDENS

E. Expungement and Other Relief.

3. Expungement: Showing Required.

d. Expungement Conditioned on Undertaking.

4. Procedure.

3 *Witkin Cal. Proc. Actions* § 407

[§ 407] Procedure.

(1) *Noticed Motion and Order.* The motion is made on notice under *C.C.P. 405.30*. (See *supra*, §391 et seq.) The motion will be granted if the court finds that the real property claim has probable validity but that adequate relief can be secured to the claimant by the giving of an undertaking (see *supra*, §404 et seq.), with the moving party bearing the burden of proof (see *Ev.C. 500, 550, supra*, §394). The nature and amount of the undertaking are fixed by the court. (*C.C.P. 405.33*; *Howden-Goetzl v. Superior Court* (1970) 7 *C.A.3d* 135, 138, 86 *C.R.* 323 [construing predecessor statutes]; see *supra*, §405.)

Although *C.C.P. 405.33* requires a finding ("if the court finds"), formal written findings are not essential. As in motion procedure generally, a ruling on a motion implies a finding by the court of every fact necessary to support the ruling. (*Trapasso v. Superior Court* (1977) 73 *C.A.3d* 561, 567, 140 *C.R.* 820 [construing predecessor statute].) However, where an affidavit is the sole evidentiary basis for the order, the facts stated in the affidavit must constitute sufficient grounds for the relief sought, or the order will be vacated. (*Swanston v. Superior Court* (1971) 15 *C.A.3d* 355, 357, 92 *C.R.* 572 [construing predecessor statute].)

(2) *Return Date for Showing Compliance.* In its order conditionally expunging the lis pendens, the court must set a return date for the moving party to show the fulfillment of the condition. If the moving party fails to make that showing on the return date, the court must deny expungement without further notice or a hearing. (*C.C.P. 405.33*.)

(3) *Exoneration or Modification of Undertaking.* After notice and a hearing, the court may, "for good cause and upon such terms as are just," exonerate or modify any undertaking ordered under either *C.C.P. 405.33* or a stipulation made in lieu of that order. An order exonerating or modifying the undertaking may be made conditional upon the giving of a new undertaking. (*C.C.P. 405.37*.)

(4) *Attorneys' Fees and Costs.* The prevailing party is entitled to an award of attorneys' fees and costs. (*C.C.P. 405.38*; see *infra*, §410.)

(5) *Review by Mandamus.* Any aggrieved party may seek review by a writ of mandamus. (*C.C.P.* 405.39; see *infra*, §411.)

(6) *Enforcement of Liability on Undertaking.* Recovery may be had on the undertaking pursuant to *C.C.P.* 996.440, which provides that liability on an undertaking may be enforced on a motion without the necessity of an independent action (see 6 *Cal. Proc.* (5th), *Provisional Remedies*, §39). (*C.C.P.* 405.33.)

A successful defendant may recover attorneys' fees to which it is entitled (see *infra*, §410) from the lis pendens bond filed by the plaintiff. Thus, it is error to refuse to credit the amount the defendant recovers under the bond against the award of attorneys' fees. (*On v. Cow Hollow Properties* (1990) 222 *C.A.3d* 1568, 1572, 272 *C.R.* 535 [decided under predecessor statute].)

In *Elder v. Carlisle Ins. Co.* (1987) 193 *C.A.3d* 1313, 238 *C.R.* 897, decided under the former lis pendens statutes, plaintiffs sued for alleged breach of an option to purchase real property, and recorded a lis pendens. Defendants moved to expunge, furnished an undertaking, and at trial, judgment was rendered in favor of plaintiffs on the basis of unjust enrichment. The trial judge then ordered that plaintiffs satisfy their judgment out of the undertaking. *Held*, this was error.

(a) Under plaintiffs' theory, a party who improperly recorded a lis pendens and then became a beneficiary of an undertaking ordered as a condition of expungement would be in a better position than a party who properly refrained from recording an unjustified lis pendens. This interpretation would lead to the type of abuse that led to the creation of the expungement statutes. (193 *C.A.3d* 1319.)

(b) The only interpretation that gives meaning to all of the relevant statutory language and avoids unfair results is that the undertaking serves to protect "only against damages that actually result from the expungement or nonexpungement." (193 *C.A.3d* 1319.) Hence, "a party who is given an undertaking as a condition of the expungement of a lis pendens ... and who prevails in the underlying action solely on a cause of action that does not support the recordation of a lis pendens, may not satisfy that judgment out of the undertaking." (193 *C.A.3d* 1319.) (See *CMSH Co. v. Antelope Dev.* (1990) 223 *C.A.3d* 174, 180, 272 *C.R.* 605 [same].)

SUPPLEMENT: [This section is current through the latest supplement]



38 of 190 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

X. LIS PENDENS

E. Expungement and Other Relief.

4. Maintaining Lis Pendens on Condition of Undertaking.

a. Nature and Purpose of Remedy.

3 Witkin Cal. Proc. Actions § 408

[§ 408] Nature and Purpose of Remedy.

Subject to the provisions of *C.C.P. 405.31* (supra, §396 et seq.) and *C.C.P. 405.32* (supra, §403), "and regardless of whether a motion to expunge has been filed," the court may require the claimant to give the moving party an undertaking as a condition of maintaining the lis pendens in the record title. (*C.C.P. 405.34*.)

C.C.P. 405.33, drawn from former *C.C.P. 409.2*, authorizes a court to require the proponent of a lis pendens to give the other party an undertaking as a condition of the denial of an expungement motion. (See supra, §404 et seq.) *C.C.P. 405.34*, which has no direct predecessor statute, nevertheless continues the court's authority under prior case law to order the claimant to give an undertaking, but allows the court to order it on a motion independent of a motion to expunge. The Real Property Law Section Comments to *C.C.P. 405.34* note that the statute serves two purposes:

(1) It brings lis pendens undertaking procedures in line with provisional remedy practice generally, in which the party receiving the provisional relief typically is required to provide an undertaking (see 6 *Cal. Proc. (5th)*, *Provisional Remedies*, §115).

(2) The former inclusion of the undertaking authority within the provisions dealing with expungement led some courts to regard an undertaking as an alternative to expungement. *C.C.P. 405.31* and *405.32* now make clear that a lis pendens must be expunged if the claimant cannot meet the statutory tests. *C.C.P. 405.34* authorizes the court to require an undertaking when appropriate, even if the claimant does meet the statutory tests.

SUPPLEMENT: [This section is current through the latest supplement]



39 of 190 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

X. LIS PENDENS

E. Expungement and Other Relief.

4. Maintaining Lis Pendens on Condition of Undertaking.

b. Procedure.

3 *Witkin Cal. Proc. Actions* § 409

[§ 409] Procedure.

(1) *Noticed Motion*. The undertaking may be requested "upon motion by any person with an interest in the property" at any time after the lis pendens has been recorded. (*C.C.P. 405.34*; for form of notice, see *Cal. Civil Practice*, 1 *Procedure*, §1:166; *Cal. Civil Practice*, 1 *Real Property Litigation*, §6:25.)

(2) *Intervention by Nonparty*. A person who is not a party must obtain leave to intervene from the court "at or before the time the person moves to require an undertaking." (*C.C.P. 405.34*.)

(3) *Expungement Motion Is Not Required*. A court may order the undertaking whether or not an expungement motion has been filed. (*C.C.P. 405.34*.)

(4) *Undertaking Is Subject to C.C.P. 405.31 and 405.32*. *C.C.P. 405.34* does not authorize a court to require an undertaking in lieu of outright expungement under *C.C.P. 405.31* (see *supra*, §396 et seq.) or *C.C.P. 405.32* (see *supra*, §403). When the circumstances set forth in these two statutes are present, the lis pendens must be expunged without an undertaking. (See *Real Property Law Section Comments*.)

(5) *Evidence and Discovery*. The court may permit oral testimony and may make any orders it deems just for "discovery by any affected party." (*C.C.P. 405.34*.)

(6) *Nature and Amount of Undertaking*. The undertaking "shall be of such nature and in such amount as the court may determine to be just." (*C.C.P. 405.34*.) (On construction of similar provision contained in *C.C.P. 405.33*, see *supra*, §405.) Decisions regarding the undertaking are to be governed by normally applicable equitable principles. (See *Real Property Law Section Comments*.)

(7) *Return Date for Showing of Compliance*. In its order the court "shall set a return date for the claimant to show compliance," and if the claimant fails to show compliance on that date, "the court shall order the notice of pendency of action expunged without further notice or hearing." (*C.C.P. 405.34*.)

(8) *Enforcement of Liability on Undertaking*. Recovery may be had in an amount not to exceed the undertaking,

pursuant to *C.C.P.* 996.440 (liability on undertaking may be enforced on motion without necessity of independent action; see 6 *Cal. Proc.* (5th), *Provisional Remedies*, §39) "upon a showing (a) that the claimant did not prevail on the real property claim and (b) that the person seeking recovery suffered damages as a result of the maintenance of the notice. In assessing these damages, the court shall not consider the claimant's intent or the presence or absence of probable cause." (*C.C.P.* 405.34.)

These provisions "make clear that recovery may be had upon the undertaking upon a showing of the two elements specified and that the amount of such recovery is determined solely by the amount of damage suffered by the moving party. The claimant's subjective intent or the strength of his claim are not relevant." (See Real Property Law Section Comments.)

(9) *Exoneration or Modification of Undertaking.* After notice and a hearing, the court may, "for good cause and upon such terms as are just," exonerate or modify any undertaking ordered under either *C.C.P.* 405.34 or a stipulation made in lieu of that order. An order exonerating or modifying the undertaking may be made conditional on the giving of a new undertaking. (*C.C.P.* 405.37.)

(10) *Attorneys' Fees and Costs.* The prevailing party is entitled to an award of attorneys' fees and costs. (*C.C.P.* 405.38; see *infra*, §410.)

(11) *Review by Mandamus.* Any aggrieved party may seek review by a writ of mandamus. (*C.C.P.* 405.39; see *infra*, §411.)

SUPPLEMENT: [This section is current through the latest supplement]



40 of 190 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

X. LIS PENDENS

E. Expungement and Other Relief.

5. Attorneys' Fees and Costs.

3 *Witkin Cal. Proc. Actions* § 410

[§ 410] Attorneys' Fees and Costs.

(1) *Statutory Provision.* The court must direct that the party prevailing on a motion under *C.C.P. 405.30* et seq. for expungement (see *supra*, §395 et seq.) or requiring an undertaking (see *supra*, §404 et seq.) be awarded reasonable attorneys' fees and costs for making or opposing the motion, unless the court finds that the other party acted with substantial justification or that other circumstances make the imposition of attorneys' fees and costs unjust. (*C.C.P. 405.38.*)

(2) *Who Is Prevailing Party.* Where an order is made under *C.C.P. 405.23* (*supra*, §395), *C.C.P. 405.31* (*supra*, §396 et seq.), or *C.C.P. 405.32* (*supra*, §403), the moving party is the prevailing party. This is not necessarily true where the order is made under *C.C.P. 405.33* (*supra*, §404 et seq.): If the moving party offers an undertaking that the court finds adequate, the moving party is the prevailing party. But if the court finds it inadequate and grants the motion only on condition that greater security be furnished, the moving party is not the prevailing party; i.e., the resisting party was justified in resisting the motion on the ground of inadequate security. (*Trapasso v. Superior Court* (1977) 73 C.A.3d 561, 570, 140 C.R. 820 [interpreting predecessor statutes; defendant's offered security was inadequate and motion to expunge was granted only on condition that defendant file greater undertaking; award of attorneys' fees to defendant annulled].)

It may be difficult to determine who is the prevailing party in a motion made under *C.C.P. 405.34* (*supra*, §§408, 409). The moving party is not seeking expungement, but maintenance of the lis pendens conditioned on imposition of an undertaking. The propriety of recording the lis pendens is not at issue. Thus, it may not be just to make an award to either party even when the moving party's request for an undertaking is granted. (See C.E.B., 2 Real Property Remedies and Damages 2d, §13.55.)

When a lis pendens is withdrawn while a motion to expunge is pending, the moving party is neither automatically entitled to, nor automatically denied, attorneys' fees under *C.C.P. 405.38*. Rather, using a "practical approach," the trial court has discretion to award attorneys' fees based on a determination of who would have prevailed on the motion, and whether the lis pendens claimant acted with substantial justification in withdrawing the lis pendens, or whether, in light of all the circumstances, the imposition of attorneys' fees would otherwise be unjust. (*Castro v. Superior Court* (2004) 116 C.A.4th 1010, 1024, 10 C.R.3d 865 [no determination on merits was made because parties settled and dismissed

action, and appeal therefore was moot].)

(3) *No Award Against Attorney for Losing Party.* In *Doyle v. Superior Court* (1991) 226 C.A.3d 1355, 277 C.R. 630, decided under the former statute, the trial judge awarded \$ 4,200 to defendants as reasonable attorneys' fees, and defendants then prepared and the trial judge issued an order imposing the award against plaintiffs and their counsel. *Held*, the portion of the order imposing the award against counsel was unauthorized. The expungement statute is silent as to whom the award must run against; and an award against an attorney as a sanction for frivolous or bad faith tactics must be sought under C.C.P. 128.5 (see 7 Cal. Proc. (5th), Trial, §227 et seq.; supra, §394). (226 C.A.3d 1359.)

(4) *Award Reviewable by Mandamus.* An order awarding attorneys' fees is incidental to the expungement, and both orders are reviewable in the mandamus proceeding authorized by the lis pendens procedure (see infra, §411). (See *Trapasso v. Superior Court*, supra, 73 C.A.3d 569; *Shah v. McMahon* (2007) 148 C.A.4th 526, 529, 55 C.R.3d 792 [appeal of order awarding attorneys' fees in expungement proceeding was dismissed, because review was only by mandamus].)

SUPPLEMENT: [This section is current through the latest supplement]



41 of 190 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

X. LIS PENDENS

E. Expungement and Other Relief.

6. Review by Mandamus.

3 *Witkin Cal. Proc. Actions* § 411

[§ 411] Review by Mandamus.

(1) *In General.* An order under *C.C.P. 405.30* et seq. granting or denying a motion to expunge (see supra, §395 et seq.) or a motion for an undertaking (see supra, §404 et seq.) is not appealable. (See *Woodridge Escondido Property Owners Assn. v. Nielsen* (2005) 130 C.A.4th 559, 577, 30 C.R.3d 15 [appellate court had no authority to review either trial court's order granting motion to expunge or appellate court's subsequent writ decision denying expungement].) However, prompt review is available by a writ of mandamus. (*C.C.P. 405.39*; see *Trapasso v. Superior Court* (1977) 73 C.A.3d 561, 569, 140 C.R. 820 [decided under former C.C.P. 409.4; order awarding attorneys' fees was reviewable]; *Peery v. Superior Court* (1981) 29 C.3d 837, 841, 176 C.R. 533, 633 P.2d 198, supra, §392 [same; nonparties beneficially interested in outcome of motion to expunge proceeding were entitled to seek mandamus].)

(2) *Procedure.* The petition for the writ may be filed by any aggrieved party within 20 days of service of written notice of the order by the court or any party. Time may be extended during the initial 20-day period by the court that issued the order for one additional period not to exceed 10 days. A copy of the petition must be delivered to the clerk of the court that issued the order with a request that it be placed in the court file. (*C.C.P. 405.39*.)

SUPPLEMENT: [This section is current through the latest supplement]



42 of 190 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

X. LIS PENDENS

E. Expungement and Other Relief.

7. Withdrawal of Notice.

3 Witkin Cal. Proc. Actions § 412

[§ 412] Withdrawal of Notice.

"At any time after notice of pendency of an action has been recorded pursuant to this title or other law, the notice may be withdrawn by recording in the office of the recorder in which the notice of pendency was recorded a notice of withdrawal executed by the party who recorded the notice of pendency of action or by the party's successor in interest. The notice of withdrawal shall be acknowledged." (*C.C.P. 405.50*; for form of notice, see *Cal. Civil Practice*, 1 *Procedure*, §§1:160, 1:167; *Cal. Civil Practice*, 1 *Real Property Litigation*, §6:27.)

SUPPLEMENT: [This section is current through the latest supplement]



43 of 190 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

X. LIS PENDENS

E. Expungement and Other Relief.

8. Effect of Expungement or Withdrawal.

a. When Expungement Becomes Effective.

3 *Witkin Cal. Proc. Actions* § 413

[§ 413] When Expungement Becomes Effective.

(1) *Expiration of Time for Filing Writ of Mandamus.* An order expunging a lis pendens is not effective, and may not be recorded, until the time within which a petition for a writ of mandamus may be filed under *C.C.P. 405.39* (see *supra*, §411) has expired. (*C.C.P. 405.35*.)

(2) *Expiration of Time for Adjudicating Writ Proceeding.* After a petition for a writ of mandamus has been timely filed, an order expunging a lis pendens is not effective, and may not be recorded, until the proceeding commenced by the petition is finally adjudicated. (*C.C.P. 405.35*.)

(3) *Recorder's Duties.* The county recorder has no duty to determine whether the requirements of *C.C.P. 405.35* or of any order expunging a notice have been met. (*C.C.P. 405.35*.)

(4) *Appellate Court May Render Expungement Ineffective.* An appellate court may order that a recorded expungement order shall have no effect pending review by writ proceedings. (*Rebco Dev. v. Superior Court* (1977) 67 *C.A.3d* 13, 18, 136 *C.R.* 351, *infra*, §414.)

SUPPLEMENT: [This section is current through the latest supplement]



44 of 190 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

X. LIS PENDENS

E. Expungement and Other Relief.

8. Effect of Expungement or Withdrawal.

b. Recording Expungement Order or Notice of Withdrawal.

3 *Witkin Cal. Proc. Actions* § 414

[§ 414] Recording Expungement Order or Notice of Withdrawal.

(1) *No Actual or Constructive Notice.* On withdrawal or on recordation of a certified copy of an order expunging a notice, "neither the notice nor any information derived from it, prior to the recording of a certified copy of the judgment or decree issued in the action, shall constitute actual or constructive notice of any of the matters contained, claimed, alleged, or contended therein, or of any of the matters related to the action, or create a duty of inquiry in any person thereafter dealing with the affected property." (*C.C.P.* 405.60.)

(2) *No Actual Knowledge by Subsequent Transferee.* On the withdrawal or the recordation of a certified copy of an order expunging a notice, "no person except a nonfictitious party to the action at the time of recording of the notice of withdrawal or order, who thereafter becomes, by conveyance recorded prior to the recording of a certified copy of the judgment or decree issued in the action, a purchaser, transferee, mortgagee, or other encumbrancer for a valuable consideration of any interest in the real property subject to the action, shall be deemed to have actual knowledge of the action or any of the matters contained, claimed, or alleged therein, or of any of the matters related to the action, irrespective of whether that person possessed actual knowledge of the action or matter and irrespective of when or how the knowledge was obtained." (*C.C.P.* 405.61; see *Lewis v. Superior Court* (1994) 30 *C.A.4th* 1850, 1871, 37 *C.R.2d* 63, *supra*, §400.)

(3) *Legislative Intent: Complete Transferability.* "It is the intent of the Legislature that this section shall provide for the absolute and complete free transferability of real property after the expungement or withdrawal of a notice of pendency of action." (*C.C.P.* 405.61.)

To effectuate this purpose, *C.C.P.* 405.61 is to be interpreted as former *C.C.P.* 409.8 was interpreted in *Knapp Dev. & Design v. Pal-Mal Properties* (1987) 195 *C.A.3d* 786, 789, 240 *C.R.* 920. (See Real Property Law Section Comments to *C.C.P.* 405.60.) *Knapp Development & Design* involved the following facts: "(1) an action by KDD to foreclose a mechanic's lien, (2) a duly recorded lis pendens, (3) a judgment against plaintiff KDD, (4) a recorded order expunging the lis pendens, (5) an appeal from the judgment, (6) reversal of the judgment, (7) sale of the property to a nonparty, and (8) new judgment against plaintiff based on sale to the bona fide purchaser who takes the property free of any mechanic's lien." (195 *C.A.3d* 790.) "The impact of section 409.8 on these facts is obvious: although the purchaser may

have had actual knowledge of the pendency of the action, since the sale took place after recordation of the order expunging the lis pendens the purchaser is statutorily without such notice and therefore takes title to the property free of the mechanic's lien." (195 C.A.3d 791.)

(4) *Prior Order Is Not Conclusive*. In *Rebco Dev. v. Superior Court* (1977) 67 C.A.3d 13, 136 C.R. 351, decided under the former statute, plaintiff purchaser sued for specific performance of a contract to sell a parcel of land and recorded a lis pendens. On defendant vendor's motion it was expunged on posting of an undertaking, and plaintiff's petition for mandamus was denied for lack of timely filing. Defendant then sold the parcel to third parties, and plaintiff brought a second action against them to set aside the sale and deed, and recorded a new lis pendens. The third-party grantees moved to expunge, and the judge granted the order solely on the ground that the original order of expungement operated as a collateral estoppel and compelled granting of the second motion for expungement. *Held*, order vacated; the doctrine of collateral estoppel was not applicable.

(a) An order of expungement is not a final appealable order (it is reviewable only by mandamus). (67 C.A.3d 17.)

(b) The issues at the first and second hearings were not identical (see 7 Cal. Proc. (5th), *Judgment*, §434); i.e., at the second hearing the factor of the resale agreement to third parties would be relevant to determination of the amount of the undertaking on the second expungement motion. (67 C.A.3d 17, 18.)

(5) *Lis Pendens Does Not Extinguish Prior Recorded Abstract of Judgment*. A judgment lien created by a recorded abstract of judgment (see 12 Summary (10th), *Real Property*, §333; 8 Cal. Proc. (5th), *Enforcement of Judgment*, §70) is different from a lis pendens. Transfer of property after recordation of a lis pendens binds transferees to the judgment subsequently rendered, but does not make the party recording the lis pendens a secured creditor. Conversely, an abstract of judgment makes a judgment creditor a secured creditor and is extinguished only by recording acknowledgment of the satisfaction of judgment or by creditor's release. Also, there is no statutory procedure for "expunging" abstracts. Thus, recordation of a lis pendens does not extinguish a previously recorded abstract of judgment involving the same property. (*Federal Deposit Ins. Corp. v. Charlton* (1993) 17 C.A.4th 1066, 1070, 21 C.R.2d 686.)

(6) *No Right To Sue for Fraudulent Withdrawal of Lis Pendens*. Once a lis pendens has been withdrawn, a purchaser's title is protected against matters that inquiry concerning the underlying action would have revealed. However, the purchaser is not entitled to recover damages for fraudulent concealment of those matters, despite wilful ignorance or actual knowledge of them by another. Although the Legislature intended to protect purchasers, it did not intend to give them, as a bonus, a fraud cause of action that would not otherwise exist. (*Bishop Creek Lodge v. Scira* (1996) 46 C.A.4th 1721, 1733, 54 C.R.2d 745, 5 Summary (10th), *Torts*, §813 [purchaser of parcel benefited by covenant, recorded in lis pendens, was not entitled to sue owners of burdened parcel for fraud after they and sellers of benefited parcel secretly agreed to abrogate covenant and withdraw lis pendens].)

SUPPLEMENT: [This section is current through the latest supplement]



45 of 190 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

X. LIS PENDENS

E. Expungement and Other Relief.

8. Effect of Expungement or Withdrawal.

c. Second Notice Requires Court Approval.

3 *Witkin Cal. Proc. Actions* § 415

[§ 415] Second Notice Requires Court Approval.

(1) *Rule of Ranchito Case.* In *Ranchito Ownership Co. v. Superior Court* (1982) 130 C.A.3d 764, 182 C.R. 54, decided under the former lis pendens statutes, R entered into an agreement to sell property to B. The Ks, alleging an assignment to them by B of his contract rights, brought an action against R for specific performance, and filed a lis pendens. R moved to expunge for failure of the purchaser to perform and the Ks' failure to diligently prosecute their action. (See *supra*, §389 et seq.) Judge No. 1 granted the motion. Later the Ks moved to reconsider the expunging order, and then recorded a new notice. R filed a new motion to expunge, but Judge No. 2 denied the motion. *Held*, mandamus granted to require an order expunging the notice.

(a) *Policy objections to unrestricted second notice.* The expunging order is made after a hearing at which the court decides that the moving party is entitled to deal with the property unencumbered by the other party's notice. If the latter records a second notice, the effect is to obstruct, for an appreciable time, exactly what the order of expungement was designed to accomplish. The motion to expunge cannot be heard in less than 20 days, and an order expunging a notice cannot be effective until the time within which a petition for mandamus may be filed (at least 20 days). An encumbrance for this 40-day period may impose a severe hardship upon a record owner, particularly if a plan to sell or encumber the property is pending. (130 C.A.3d 770.) "To allow a party to record, at will, a second notice of lis pendens after the first had been expunged would simply invite more of the abuse which the statute was intended to cure. Such a tactic, undertaken without the prior consent of the court, should be recognized for what it is: An ex parte interference with the status established by the court's order." (130 C.A.3d 771.)

(b) *Trial judge's power to allow second notice.* Although New York cases have held that a second notice cannot be filed after an expungement order (130 C.A.3d 771, 772), the California statutes did not expressly prohibit a judicial reconsideration of the expunging order, and there was no policy reason for declaring an absolute prohibition against a second notice (130 C.A.3d 773). Here, however, the Ks failed to make a sufficient showing of proper purpose and good faith, and R's motion to expunge the second notice should have been granted. (130 C.A.3d 773, 774.)

(2) *Codification of Ranchito Rule.* The rule of *Ranchito Ownership Co.* was codified in 1992: "Once a notice of pending action has been expunged, the claimant may not record another notice of pending action as to the affected

property without leave of the court in which the action is pending." (*C.C.P.* 405.36.)

In *McKnight v. Superior Court* (1985) 170 C.A.3d 291, 215 C.R. 909, decided before the enactment of *C.C.P.* 405.36, the court noted that a lis pendens expunged as void and invalid for defects in service, recording, or filing (see *supra*, §395) could be rerecorded. (170 C.A.3d 303.) Although *C.C.P.* 405.36 now requires leave for rerecording any expunged lis pendens, "[i]t is expected that leave to re-record a lis pendens expunged as 'void and invalid' can be obtained when appropriate at the expungement hearing." (See Real Property Law Section Comments to *C.C.P.* 405.36.)

SUPPLEMENT: [This section is current through the latest supplement]



46 of 190 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XI. IN FORMA PAUPERIS

A. Nature of Right.

1. In General.

3 Witkin Cal. Proc. Actions § 416

[§ 416] In General.

(1) *Origin of Right.* The right of an indigent person to proceed as a plaintiff *in forma pauperis*, i.e., to pursue a judicial remedy without paying court costs, was established at common law and, in some jurisdictions, is reaffirmed by statute. (See 31 Harv. L. Rev. 485; 36 Harv. L. Rev. 384; 18 Stanf. L. Rev. 1270 [federal courts]; 20 Am.Jur.2d (2005 ed.), Costs §98 et seq.; 7C Am.Jur. P.P. Forms (2002 ed.), Costs, Form 48 et seq.)

(2) *California Law.* For many years, California had no statute, but the common law right was recognized. (See *Martin v. Superior Court* (1917) 176 C. 289, 297, 168 P. 135; *Majors v. Superior Court* (1919) 181 C. 270, 276, 184 P. 18; *Ferguson v. Keays* (1971) 4 C.3d 649, 652, 94 C.R. 398, 484 P.2d 70; *Earls v. Superior Court* (1971) 6 C.3d 109, 113, 98 C.R. 302, 490 P.2d 814, *infra*, §§424, 428; *Cohen v. Board of Supervisors* (1971) 20 C.A.3d 236, 238, 97 C.R. 550, *infra*, §417; *Leslie v. Roe* (1974) 41 C.A.3d 104, 107, 116 C.R. 386; *Civil Service Com. v. Superior Court* (1976) 63 C.A.3d 627, 629, 133 C.R. 825, *infra*, §419; *In re Marriage of Reese* (1977) 73 C.A.3d 120, 124, 140 C.R. 589; C.E.B., 1 Civil Proc. Before Trial 4th, Chap. 10; Rutter Group, Civil Proc. Before Trial §1:188 et seq.; 27 Cal. L. Rev. 352 [criticizing inadequate protection and recommending statutory reforms]; 31 Cal. L. Rev. 207 [same]; 41 Hastings L. J. 281 [argument in favor of a constitutional right to expert assistance for indigents in civil cases]; *infra*, §424.)

Govt.C. 68511.3 directs the Judicial Council to adopt uniform forms and rules for *in forma pauperis* litigants, and C.R.C., Rule 3.50 et seq., adopted pursuant to the statutory directive, specifies the appropriate procedure. (See *infra*, §425 et seq.)

(3) *Federal Law.* That right has also been guaranteed by a federal statute. (28 U.S.C., §1915; see *Adkins v. E.I. DuPont de Nemours & Co.* (1948) 335 U.S. 331, 69 S.Ct. 85, 86, 93 L.Ed. 43, 45; *Neitzke v. Williams* (1989) 490 U.S. 319, 109 S.Ct. 1827, 1829, 104 L.Ed.2d 338, 334; *Rowland v. California Men's Colony, Unit II Men's Advisory Council* (1993) 506 U.S. 194, 113 S.Ct. 716, 718, 121 L.Ed.2d 656, 663 [only natural persons are eligible]; 62 Cal. L. Rev. 219 [availability of right to corporations]; 142 A.L.R. Fed 627 [fees and costs for which prepayment or posting of security by indigent is not required]; 168 A.L.R. Fed 433 [validity and construction of federal statute barring indigent prisoner from *in forma pauperis* filing of federal civil action after three prior dismissals for frivolity].) (On due process right under United States Constitution to proceed *in forma pauperis* in marital cases, see *infra*, §417.)

West's Key Number Digest, Costs 127 et seq.

SUPPLEMENT: [This section is current through the latest supplement]

(2) *California Law*.

(New) Revised in forma pauperis statutes and court rules: In 2008, the existing *in forma pauperis* statute (*Govt.C.* 68511.3) was repealed and new statutes (*Govt.C.* 68630 et seq.) were adopted, effective July 1, 2009. The 2008 Legislature also directed the Judicial Council to adopt uniform rules and forms for implementing the new legislation. The Judicial Council responded to that directive by revising C.R.C., Rule 3.50 et seq. [fee waivers in trial courts], adopting C.R.C., Rule 8.26 [fee waivers in Supreme Court or Courts of Appeal] and C.R.C., Rule 8.818 [fee waivers in appellate division of superior court], and adopting or revising unified forms, effective July 1, 2009. (See Supp., *infra*, §429A et seq.)



47 of 190 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XI. IN FORMA PAUPERIS

A. Nature of Right.

2. Constitutional Right in Marital Case.

3 *Witkin Cal. Proc. Actions* § 417

[§ 417] Constitutional Right in Marital Case.

In *Boddie v. Connecticut* (1971) 401 U.S. 371, 91 S.Ct. 780, 28 L.Ed.2d 113, plaintiffs, on welfare in Connecticut, brought a class action in the federal district court challenging the constitutionality of the state's requirement in divorce suits of a filing fee and a fee for service of process (total usually about \$ 60). The three-judge court denied relief. *Held*, reversed; due process prohibits a state from denying access to the courts for divorce on the sole ground of inability to pay fees and costs.

(a) The law of due process in judicial proceedings was developed in connection with rights of defendants, brought into court by plaintiffs using the judicial process. Seldom have plaintiffs asked courts to consider access to courts an element of due process. But, in view of the universal requirement of a court proceeding to dissolve a marriage, plaintiffs are in the same position as defendants--faced with exclusion from the only forum empowered to settle their disputes. Hence, the governing principles to be applied are those that delimit rights of defendants compelled to litigate their differences in the judicial forum. (91 S.Ct. 785, 28 L.Ed.2d 117, 118.)

(b) Due process requires, in the absence of a countervailing state interest of overriding significance, that parties be given a meaningful opportunity to be heard. (91 S.Ct. 785, 786, 28 L.Ed.2d 118.) And a statute or rule may be constitutionally valid in general but unconstitutional as applied to particular individuals. "Just as a generally valid notice procedure may fail to satisfy due process because of the circumstances of the defendant, so too a cost requirement, valid on its face, may offend due process because it operates to foreclose a particular party's opportunity to be heard. The State's obligations under the Fourteenth Amendment are not simply generalized ones; rather, the State owes to each individual that process which, in light of the values of a free society, can be characterized as due." (91 S.Ct. 787, 28 L.Ed.2d 120.)

(c) The state's interest in prevention of frivolous litigation has no relevancy; there is no connection between a litigant's assets and the seriousness of the litigant's motives. (91 S.Ct. 788, 28 L.Ed.2d 121.)

(d) This decision is limited to actions for divorce. "We do not decide that access for all individuals to the courts is a right that is, in all circumstances, guaranteed by the Due Process Clause of the Fourteenth Amendment so that its exercise may not be placed beyond the reach of any individual." (91 S.Ct. 788, 28 L.Ed.2d 122.) The requirement of

resort to the courts for adjustment of this fundamental human relationship is entirely a state-created matter. This being so, "a State may not, consistent with the obligations imposed on it by the Due Process Clause of the Fourteenth Amendment, pre-empt the right to dissolve this legal relationship without affording all citizens access to the means it has prescribed for doing so." (91 S.Ct. 789, 28 L.Ed.2d 122.)

The *Boddie* doctrine was followed in *Cohen v. Board of Supervisors* (1971) 20 C.A.3d 236, 238, 97 C.R. 550, *Earls v. Superior Court* (1971) 6 C.3d 109, 113, 98 C.R. 302, 490 P.2d 814, *infra*, §§424, 428, and *In re Marriage of Reese* (1977) 73 C.A.3d 120, 124, 140 C.R. 589.

In *Cohen*, plaintiffs brought a class proceeding for mandamus on behalf of persons seeking dissolution of marriage or declaration of nullity, but unable to pay for service by publication on spouses who could not be found for personal service. Defendants were the county board of supervisors and the State Controller, and the petition sought a writ directing them to pay the costs. *Held*, writ denied; petitioners were entitled to relief, but not the kind requested.

(a) There is no statutory duty of defendant officers to pay the cost of service by publication, and this could be a serious burden. (20 C.A.3d 238, 239.)

(b) As pointed out in *Boddie*, a reliable alternative method of service is mailing to the defendant's last known address or posting; and under C.C.P. 413.30 the court may, where no other method is specified, direct the manner of service. Because there is no practicable way to provide service by publication without cost to an indigent litigant, the lower court may direct that summons be served in a manner reasonably calculated to give notice, e.g., mailing to the defendant's last known address and posting. Thus, plaintiffs had an adequate remedy that they had not sought, and mandamus was inappropriate. (20 C.A.3d 239.) (See 85 Harv. L. Rev. 18, 104 [*Boddie*].)

SUPPLEMENT: [This section is current through the latest supplement]



48 of 190 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XI. IN FORMA PAUPERIS

B. Scope of Right.

1. Costs Excused.

a. Trial Court Costs.

3 Witkin Cal. Proc. Actions § 418

[§ 418] Trial Court Costs.

(1) *Costs Excused Under Case Law.* Except when expressly restricted by statute, courts have the inherent power to determine what costs and fees may be excused. (*Martin v. Superior Court* (1917) 176 C. 289, 297, 168 P. 135.) Pursuant to that power, courts have relieved indigents from paying the following types of costs and fees:

(a) *Filing fees and jury fees.* (See *Martin; Maldonado v. Superior Court* (1983) 143 C.A.3d 185, 187, 191 C.R. 495 [jury fees of indigent small claims court defendant on de novo review in superior court].)

(b) *Fees of discovery referee.* (See *Solorzano v. Superior Court* (1993) 18 C.A.4th 603, 615, 22 C.R.2d 401; *McDonald v. Superior Court* (1994) 22 C.A.4th 364, 369, 370, 27 C.R.2d 310 [following *Solorzano*]; 6 Cal. Proc. (5th), *Proceedings Without Trial*, §65.)

(c) *Service of process in proceedings for dissolution or nullity of marriage.* (See *Boddie v. Connecticut* (1971) 401 U.S. 371, 91 S.Ct. 780, 785, 28 L.Ed.2d 113, 1117, supra, §417; *Cohen v. Board of Supervisors* (1971) 20 C.A.3d 236, 238, 97 C.R. 550, supra, §417.)

(2) *Costs Excused Under Statute and Rule of Court.* C.R.C., Rules 3.61 and 3.62 (see infra, §425 et seq.) set forth two categories of costs and fees that that may be waived for an indigent litigant:

(a) *Costs and fees waivable at initial application.* On the grant of an initial application (see infra, §426), the court fees and costs waived include the clerk's fees for filing papers, for reasonably necessary certification and copying, for issuance of process and certificates, for transmittal of papers, and for preparing, certifying, and transmitting the clerk's transcript on appeal; court-appointed interpreter's fees for parties in small claims actions; sheriff's and marshal's fees pursuant to Govt.C. 26720 et seq.; reporter's fees for attendance at hearings and trials held within 60 days of the date of the order granting the application; and fees for telephone appearances. (C.R.C., Rule 3.61; see *Villa v. Superior Court* (1981) 124 C.A.3d 1063, 1068, 177 C.R. 752 [library fees, judges' retirement fees, and mediation fees are included; decided under former rule].)

(b) *Costs and fees waivable on additional application.* On the grant of an application for waiver of additional fees and costs (see *infra*, §426), the court fees and costs that may be waived include jury fees and expenses; court-appointed interpreter's fees for witnesses; witness fees of peace officers whose attendance is reasonably necessary for prosecution or defense of the case; reporter's fees for attendance at hearings and trials held more than 60 days after the date of the order granting the application; witness fees of court-appointed experts; and other fees or expenses as itemized in the application. (C.R.C., Rule 3.62.) (See 98 A.L.R.2d 292 [what costs or fees are contemplated by statute].)

(3) *Statutory Waiver of Filing Fee for Government Claims Act Claims Against State.* A person filing a claim against the state under the Government Claims Act must pay a \$ 25 filing fee. However, the filing fee requirement is waived for indigent persons and similar individuals. (Govt.C. 905.2(c)-(g).)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Costs Excused Under Statute and Rule of Court.*

(New) *Revised in forma pauperis statutes and court rules:* In 2008, the existing *in forma pauperis* statute (Govt.C. 68511.3) was repealed and new statutes (Govt.C. 68630 et seq.) were adopted, effective July 1, 2009. The 2008 Legislature also directed the Judicial Council to adopt uniform rules and forms for implementing the new legislation. The Judicial Council responded to that directive by revising C.R.C., Rule 3.50 et seq. [fee waivers in trial courts], adopting C.R.C., Rule 8.26 [fee waivers in Supreme Court or Courts of Appeal] and C.R.C., Rule 8.818 [fee waivers in appellate division of superior court], and adopting or revising unified forms, effective July 1, 2009. (See Supp., *infra*, §429A et seq.) Govt.C. 68631 now provides that an initial fee waiver must be granted by the court at any stage of the proceedings at both the appellate and trial court levels if an applicant meets specified eligibility criteria and application requirements. (See Supp., *infra*, §429B.) C.R.C., Rules 3.55 and 3.56, as amended and renumbered, now specify the costs excused in the trial court. (See Supp., *infra*, §429C.)



49 of 190 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XI. IN FORMA PAUPERIS

B. Scope of Right.

1. Costs Excused.

b. Costs of Appeal.

3 *Witkin Cal. Proc. Actions* § 419

[§ 419] Costs of Appeal.

(1) *Filing Fees on Appeal or in Writ Proceeding in Appellate Court.* Under case law, an indigent litigant may be excused from paying filing fees on appeal or in a writ proceeding in an appellate court. (*Ferguson v. Keays* (1971) 4 C.3d 649, 654, 94 C.R. 398, 484 P.2d 70; *In re Adrian O.* (1984) 155 C.A.3d 631, 634, 202 C.R. 287 [indigent appellant who paid \$ 200 filing fee was entitled to have it refunded].) This rule is codified in *Govt.C. 68511.3(a)(3)*. (See C.R.C., Rule 8.100(b) [indigent appellants may opt to proceed *in forma pauperis* under C.R.C., Rule 3.50 et seq.]; C.R.C., Rule 8.750(d) [same in appeal of limited civil cases to appellate division of superior court]; C.R.C., Rule 3.62(6) [waiver of other fees or expenses of indigent litigants; see *supra*, §418]; 9 *Cal. Proc.* (5th), *Appeal*, §558.)

(2) *Transcript in Administrative Mandamus.* It was formerly the rule that a public agency could not be compelled to supply an indigent petitioner with a free transcript on review by administrative mandamus. (*Civil Service Com. v. Superior Court* (1976) 63 C.A.3d 627, 629, 133 C.R. 825, 8 *Cal. Proc.* (5th), *Extraordinary Writs*, §312.)

The 1982 Legislature partially abrogated that rule by amending the administrative mandamus statute to permit a court to waive the cost of preparing the transcript on a sufficient showing of *in forma pauperis* eligibility. (*C.C.P. 1094.5(a)*.) However, *Govt.C. 11523* specifies that the costs for preparing the administrative record in proceedings under the Administrative Procedures Act (A.P.A.) (see 9 *Cal. Proc.* (5th), *Administrative Proceedings*, §34 et seq.) are to be borne by the petitioner, and does not authorize a waiver of costs of preparing a transcript for persons proceeding *in forma pauperis* under the A.P.A. The Legislature did not, either concurrently or subsequently, amend that statute to conform to the amendment to *C.C.P. 1094.5(a)*.

In *Board of Med. Quality Assur. v. Superior Court* (1988) 203 C.A.3d 691, 250 C.R. 182, *infra*, §427, the court, on an elaborate review of the statutory history, held that *Govt.C. 11523* was not intended to deny the petitioner's right to a waiver of transcript costs in a proceeding for judicial review of decisions of agencies governed by the *Administrative Procedure Act*. (203 C.A.3d 696, 697.) (For comprehensive coverage, see 8 *Cal. Proc.* (5th), *Extraordinary Writs*, §§312, 313.)

SUPPLEMENT: [This section is current through the latest supplement]

(New) Revised in forma pauperis statutes and court rules: In 2008, the existing *in forma pauperis* statute (Govt.C. 68511.3) was repealed and new statutes (Govt.C. 68630 et seq.) were adopted, effective July 1, 2009. The 2008 Legislature also directed the Judicial Council to adopt uniform rules and forms for implementing the new legislation. The Judicial Council responded to that directive by revising C.R.C., Rule 3.50 et seq. [fee waivers in trial courts], adopting C.R.C., Rule 8.26 [fee waivers in Supreme Court or Courts of Appeal] and C.R.C., Rule 8.818 [fee waivers in appellate division of superior court], and adopting or revising unified forms, effective July 1, 2009. (See Supp., infra, §429A et seq.) Govt.C. 68631 now provides that an initial fee waiver must be granted by the court at any stage of the proceedings at both the appellate and trial court levels if an applicant meets specified eligibility criteria and application requirements. (See Supp., infra, §429B.) C.R.C., Rules 8.26(e) and 8.818(d) now specify the costs excused on appeal. (See Supp., infra, §429C.)



50 of 190 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XI. IN FORMA PAUPERIS

B. Scope of Right.

2. Relief From Bond or Undertaking.

a. Security for Costs.

3 *Witkin Cal. Proc. Actions* § 420

[§ 420] Security for Costs.

(1) *Common Law Authority.* Whether the common law *in forma pauperis* power (see *supra*, §416) covered security for costs, so as to give the trial judge discretion to allow an indigent to proceed without providing that security, was answered in the affirmative in several cases. (See *Sutter v. Superior Court* (1966) 244 C.A.2d 770, 775, 53 C.R. 424 [former Govt.C. 947; action against public entity]; *Bank of America v. Superior Court* (1967) 255 C.A.2d 575, 63 C.R. 366 [C.C.P. 1030]; *Roberts v. Superior Court* (1968) 264 C.A.2d 235, 70 C.R. 226 [former C.C.P. 978; justice court appeal].)

(2) *Codification.* The common law authority was codified in C.C.P. 995.240, a provision in the Bond and Undertaking Law (C.C.P. 995.010 et seq.; see 6 *Cal. Proc.* (5th), *Provisional Remedies*, §8 et seq.). Hence, the trial judge may waive a bond or undertaking for an indigent principal. (C.C.P. 995.240.) Similar provisions are contained in C.C.P. 1029.5 (action against architect, engineer, or related professional, see *supra*, §358) and C.C.P. 1029.6 (action against physician, or other related professional, see *supra*, §359).

SUPPLEMENT: [This section is current through the latest supplement]



51 of 190 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XI. IN FORMA PAUPERIS

B. Scope of Right.

2. Relief From Bond or Undertaking.

b. Injunction Bond.

3 *Witkin Cal. Proc. Actions* § 421

[§ 421] Injunction Bond.

In *Martin v. Superior Court* (1917) 176 C. 289, 290, 168 P. 135, the court recognized the common law authority to dispense with litigation fees, and in *Sutter v. Superior Court* (1966) 244 C.A.2d 770, 772, 53 C.R. 424, the authority to dispense with bonds to secure costs was recognized.

In *Conover v. Hall* (1974) 11 C.3d 842, 114 C.R. 642, 523 P.2d 682, the reasoning of these cases was followed in an extraordinary extension of the doctrine. Plaintiffs, recipients of welfare aid (AFDC benefits), brought an action to enjoin the enforcement of the limited statutory \$ 50 per month work-expenses allowance, alleging conflict with the governing federal statute. The trial judge granted the injunction without requiring the undertaking to cover the defendants' potential damages, as prescribed by C.C.P. 529 (see 6 Cal. Proc. (5th), *Provisional Remedies*, §382). *Held*, the judge had power to dispense with the bond.

(a) The argument that cases upholding waiver of cost bonds do not support waiver of damage bonds was rejected. "We cannot discern why this factual difference has any legal significance. The function of both 'cost bonds' and 'damage bonds' is to protect the monetary interests of adversary parties in litigation; if courts have authority to waive such security in the case of cost bonds, ... then logically courts retain a similar authority to dispense with the 'damage bond' requirement." (11 C.3d 851.)

(b) "Indeed, in one respect, the argument in favor of permitting a waiver of an 'injunction bond' is even stronger than permitting waiver of a 'cost bond,' because in the 'injunction bond' context a poor litigant who is relieved of an undertaking has already prevailed on the substantive issue before the trial court and thus there is less chance that the opposing party will be injured by the waiver of the bond requirement." (11 C.3d 852, footnote 6.)

SUPPLEMENT: [This section is current through the latest supplement]



52 of 190 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XI. IN FORMA PAUPERIS

B. Scope of Right.

3. No Right to Interpreter.

3 *Witkin Cal. Proc. Actions* § 422

[§ 422] No Right to Interpreter.

In *Jara v. Municipal Court* (1978) 21 C.3d 181, 145 C.R. 847, 578 P.2d 94, a property damage action arising from an automobile accident was filed against J in the municipal court. A legal aid center staff attorney filed an answer and cross-complaint. Then J, on allegations of indigency and inability to speak or understand English, moved that the court appoint an interpreter skilled in English and Spanish without expense to himself. On denial of the motion, he sought mandamus in the superior court. *Held*, judgment denying writ affirmed.

(a) *No statutory basis for appointment.* *Ev.C.* 752 provides for a court appointment of an interpreter for a witness, who performs a different and less burdensome function than an interpreter for a party. "The witness' interpreter is essential to permit the witness to understand questions asked and to inform counsel, judge and jury of the witness' responses. By contrast, an interpreter for the litigant would interpret communications between the litigant and his counsel and all oral proceedings at trial including testimony by English-speaking witnesses, and communications of attorneys, judge, and jurors." (21 C.3d 183.)

(b) *No inherent power of trial court.* Both trial and appellate courts have inherent power to waive filing fees. (See *supra*, §§418, 419.) But *Ferguson v. Keays* (1971) 4 C.3d 649, 94 C.R. 398, 484 P.2d 70, *supra*, §419, did not reach the question whether indigents must be given funds to pay third-party charges in civil actions. Moreover, *Payne v. Superior Court* (1976) 17 C.3d 908, 132 C.R. 405, 553 P.2d 565, 1 Cal. Proc. (5th), *Attorneys*, §49, points out that although counsel must be appointed for indigent prisoner defendants in civil cases, the court does not have the power to require expenditure of public funds for this purpose. (21 C.3d 181.)

(c) *Other alternatives.* In contemporary urban society the non-English-speaking individual has access to a variety of sources for language assistance: family, friends or neighbors, and private organizations. The objection that family members and friends cannot interpret complex legal proceedings is answered in two ways: court certified interpreters are not lawyers and even if appointed the complexities remain; and it is counsel, not the client, who controls the litigation and must understand the proceedings. (21 C.3d 184, 185.)

(d) *Gardiana distinguished.* *Gardiana v. Small Claims Court* (1976) 59 C.A.3d 412, 130 C.R. 675, held that volunteer interpreters should be appointed in small claims court and that, if one is not available, an interpreter should be

appointed at public expense. The theory of the opinion was that refusal to appoint would as a practical matter restrict an indigent's access to the courts. But this reasoning must be viewed in the light of the nature of the small claims court. Its informal procedure and its spirit of compromise and conciliation require participant comprehension. The parties are usually their own witnesses and frequently the only ones. (21 C.3d 185.) "Because language assistance to indigent but unrepresented litigants appears available, we are satisfied there is no need for courts to require appointment of interpreters at public expense to assist litigants." (21 C.3d 185.)

(e) *No constitutional requirement.* The contention that J was denied equal protection and due process is untenable. "There has been no showing as to whether non-English speaking litigants, able to afford paid interpreters, are likely to secure them for consulting with counsel and translating legal proceedings." (21 C.3d 185.) *Boddie v. Connecticut* (1971) 401 U.S. 371, 91 S.Ct. 780, 28 L.Ed.2d 113, supra, §417, was limited in later decisions holding that indigents may be required to pay filing fees in bankruptcy or in review of agency determinations on welfare payments (see 7 Summary (10th), *Constitutional Law*, §§648, 649; 8 Summary (10th), *Constitutional Law*, §804), and one of the bases recognized in *Payne* for distinguishing *Boddie* was that the indigent had alternative means to secure the relief sought--other than resort to the trial court. (21 C.3d 186.) Here, the litigant has some alternative sources for language assistance. (21 C.3d 186.) "The court proceedings being controlled by counsel, we further suggest that appellant is in no worse position than the numerous represented litigants who elect not to be present in court at all." (21 C.3d 186.) (See 66 Cal. L. Rev. 573; 8 San Fernando Valley L. Rev. 95; 41 U.S.F. L. Rev. 69.)

SUPPLEMENT: [This section is current through the latest supplement]



53 of 190 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XI. IN FORMA PAUPERIS

B. Scope of Right.

4. No Right to Reporter's Transcript.

3 *Witkin Cal. Proc. Actions* § 423

[§ 423] No Right to Reporter's Transcript.

Indigency does not entitle the normal civil litigant to a reporter's transcript at public expense. (*Rucker v. Superior Court* (1930) 104 C.A. 683, 686, 286 P. 732; *Leslie v. Roe* (1974) 41 C.A.3d 104, 107, 116 C.R. 386.)

In *Graziano v. Appellate Dept.* (1978) 84 C.A.3d 799, 149 C.R. 40, G, the indigent litigant, received judgment in the municipal court, but that court then granted his adversary a new trial. G appealed, and sought mandamus to compel the Appellate Department to furnish him a transcript at public expense. *Held*, writ denied. Under the principle set forth in *Jara v. Municipal Court* (1978) 21 C.3d 181, 145 C.R. 847, 578 P.2d 94, *supra*, §422, financial assistance will not be given where the indigent has alternative means to obtain the relief sought. Here, if the appeal is unsuccessful, G will nevertheless have access to the court in the retrial; he made no effort to procure an agreed or settled statement or partial reporter's transcript. (84 C.A.3d 801.)

In *Rohnert Park v. Superior Court* (1983) 146 C.A.3d 420, 193 C.R. 33, 9 Cal. Proc. (5th), *Appeal*, §629, W and S petitioned for mandamus challenging the city of Rohnert Park's approval of a plan to construct an electronics facility within city limits. The trial judge denied the petition, and real parties filed a notice of appeal. They then filed an application in the superior court to proceed *in forma pauperis*, without payment of the \$ 200 filing fee or the cost of the clerk's and reporter's transcripts. The application was granted, and the city petitioned for mandamus to compel setting aside of the order. *Held*, writ granted.

(a) The superior court relied on Govt.C. 65811.3 (*infra*, §425), and former C.R.C., Rule 985 (now C.R.C., Rule 3.50 et seq.; see *infra*, §426 et seq.). Under Govt.C. 68511.3(a)(3), the Judicial Council rules must provide for proceeding *in forma pauperis* "at every stage of the proceedings at both the appellate and trial levels of the court system." Former C.R.C., Rule 985, adopted to implement the statute, did not specify appellate records in its list of costs that the applicant may seek to have waived, but contained a catch-all provision: "Other fees or expenses as itemized in the application." (146 C.A.3d 425.) In view of the judicially established rule that an ordinary civil litigant is not entitled to a free record, the court must decide whether the statute and rule expanded the rights of persons proceeding *in forma pauperis* or merely standardized the forms and procedures for seeking the recognized benefits. (146 C.A.3d 428.)

(b) The ambiguous language of Govt.C. 68511.3(a)(3) cannot be read as clearly expressing an intention to

overthrow the prior decisional law. (146 C.A.3d 428, 429.) And B. & P.C. 8030.2, enacted in 1980 to create a "Transcript Reimbursement Fund" for applicants who are qualified providers of legal services to the indigent, supports the view that the Legislature did not expect Govt.C. 68511.3 to empower courts to order free transcripts. There would have been no occasion to reimburse those indigents whose fees were waived by statute and rule. (146 C.A.3d 429, 430.)

(c) Former C.R.C., Rule 985 likewise cannot be read as authorizing waiver of costs of the record. "It would be curious for the Judicial Council to relegate to the category of 'other fees or expenses' the primary expenses faced by most appellants. ... The Judicial Council's failure to specify transcript preparation costs suggests that the council understood *Government Code section 68511.3* as a mandate to develop forms and rules of procedure and not as a mandate to alter the long-standing practice of denying in forma pauperis appellants free transcripts." (146 C.A.3d 430.)

SUPPLEMENT: [This section is current through the latest supplement]

(New) Revised in *forma pauperis* statutes and court rules: In 2008, the existing *in forma pauperis* statute (Govt.C. 68511.3) was repealed and new statutes (Govt.C. 68630 et seq.) were adopted, effective July 1, 2009. The 2008 Legislature also directed the Judicial Council to adopt uniform rules and forms for implementing the new legislation. The Judicial Council responded to that directive by revising C.R.C., Rule 3.50 et seq. [fee waivers in trial courts], adopting C.R.C., Rule 8.26 [fee waivers in Supreme Court or Courts of Appeal] and C.R.C., Rule 8.818 [fee waivers in appellate division of superior court], and adopting or revising unified forms, effective July 1, 2009. (See Supp., *infra*, §429A et seq.)



54 of 190 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XI. IN FORMA PAUPERIS

C. Procedure.

1. Former Judicially Established Practice.

3 Witkin Cal. Proc. Actions § 424

[§ 424] Former Judicially Established Practice.

The courts originally approved a simple application, supported by affidavits showing that the plaintiff was indigent and unable to obtain the necessary funds or security. (See *Martin v. Superior Court* (1917) 176 C. 289, 297, 168 P. 135 [rejecting technical objections to sufficiency of moving papers]; *Willis v. Superior Court* (1933) 130 C.A. 766, 20 P.2d 994 [affidavits by minor plaintiff, her guardian ad litem, and her attorney]; *Fuller v. California* (1969) 1 C.A.3d 664, 670, 82 C.R. 78 [affidavits were insufficient].)

An affidavit of merits by the attorney was often made but was not required. (See *Willis v. Superior Court*, *supra*, 130 C.A. 768; *Martin v. Superior Court*, *supra*, 176 C. 299 [not essential to application though trial court may call for it as it may call for any similar evidence].) However, a nebulous sort of discretion in the trial judge to consider the merits of the cause was recognized. In *Majors v. Superior Court* (1919) 181 C. 270, 184 P. 18, the court declared that this discretion "should be exercised with a view to confine the privilege most strictly to those who, having a substantial right to enforce or preserve, are absolutely unable otherwise to so do, and who, once having been admitted to proceed *in forma pauperis*, diligently pursue a course free from unreasonable delay or vexatious conduct of any kind." (181 C. 280.) (See *People v. Sparks* (1952) 112 C.A.2d 120, 121, 246 P.2d 64.)

In *Earls v. Superior Court* (1971) 6 C.3d 109, 98 C.R. 302, 490 P.2d 814, *infra*, §428, the court specified the following procedure for guidance of trial courts:

(a) "[W]henver a motion to proceed in forma pauperis is supported by an affidavit sufficient on its face to show indigency the court must grant the motion unless it has good reason to doubt the truthfulness of the factual allegations in the affidavit." (6 C.3d 114.)

(b) "[I]n that event it may decide the matter on conflicting affidavits, or in unusual circumstances order a hearing for the purpose of inquiring into the matter." (6 C.3d 114.) Usually a hearing would be a burden on litigants, volunteer attorneys, and the court; hence, under ordinary circumstances the application should be determined on the basis of affidavits. (6 C.3d 114, footnote 4, citing the text.) But a hearing may be held if the court has more than mere suspicion to disbelieve the affiant. (6 C.3d 114, footnote 4.)

(c) "If the petitioner's affidavit is not sufficient the court must give its reasons for denying leave to proceed in forma pauperis. ... A statement of reasons for denial is essential not only to enable a prospective litigant to renew his application before the trial court if the defect can be corrected, but also to provide an appellate court with a basis for reviewing the trial court's denial." (6 C.3d 115.) (See *In re Marriage of Reese* (1977) 73 C.A.3d 120, 124, 140 C.R. 589.)

SUPPLEMENT: [This section is current through the latest supplement]



55 of 190 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XI. IN FORMA PAUPERIS

C. Procedure.

2. Legislative Directive to Judicial Council.

3 *Witkin Cal. Proc. Actions* § 425

[§ 425] Legislative Directive to Judicial Council.

Govt.C. 68511.3 directs the Judicial Council to adopt uniform forms and rules for *in forma pauperis* litigants. (See *14 Pacific L. J. 510*; Cal. Civil Practice, 1 Procedure, §1:128 et seq.)

(1) *Contents of Rules.* Under *Govt.C. 68511.3(a)*, the rules adopted by the Judicial Council must provide for the following:

(a) Standard procedures for considering and determining applications for permission to proceed *in forma pauperis*, including, in the event of a denial of permission, a written statement detailing the reasons for denial and an evidentiary hearing where there is a substantial evidentiary conflict.

(b) Standard procedures to toll relevant time limitations when a pleading or other paper accompanied by the application is timely lodged with the court and delay is caused due to the processing of the *in forma pauperis* application.

(c) Proceeding *in forma pauperis* at every stage of the proceedings at both the appellate and trial levels of the court system.

(d) The confidentiality of financial information provided to the court by such litigants.

(e) Authorization for an appropriate county officer to make reasonable efforts to verify a litigant's financial condition without compromising the confidentiality of the application.

(f) Permission to proceed *in forma pauperis* granted to specified low-income litigants and persons receiving welfare assistance.

(2) *Forms.* In order to aid the court in determining the litigant's ability to pay all or a portion of the fees and costs, the forms and rules must provide for the disclosure of the litigant's current address, occupation and employer, monthly income and expenses, address and value of real property owned directly or beneficially by the litigant, and personal property exceeding \$ 500 in value. (*Govt.C. 68511.3(c)*.) (See Cal. Civil Practice, 1 Procedure, §1:140 et seq.; *infra*,

§426.)

Litigants receiving welfare assistance *must* declare under penalty of perjury that they are receiving that assistance, and *may* disclose their dates of birth and Social Security numbers or their Medi-Cal identification numbers to verify their receipt of the assistance. Except for defendants in unlawful detainer actions, litigants who choose not to disclose their Social Security numbers may be required to furnish certain financial information. All other *in forma pauperis* litigants must file a financial statement under oath. (*Govt.C. 68511.3(b)*.)

(3) *Repayment of Costs and Fees*. Repayment of costs and fees in the event of a change in the litigant's financial condition is provided for, as are procedures to effectuate repayment. (*Govt.C. 68511.3(d)*.)

(4) *Payment of Filing Fee by Inmate*. A state prison or county jail inmate proceeding *in forma pauperis* in a civil action or appeal must pay an initial partial filing fee from his or her prison or jail account, and then must make subsequent monthly payments from the account up to the full amount of the filing fee. However, an inmate may not be prohibited from bringing the proceeding based on his inability to pay the initial filing fee. (*Govt.C. 68511.3(e)*.) (See *Sanders v. Yarborough* (2006) 137 C.A.4th 764, 770, 40 C.R.3d 565 [dismissal of inmate's action simply for failing to file certified statement of jail account was improper; proper sanction was to require inmate to pay full amount of fees].)

SUPPLEMENT: [This section is current through the latest supplement]

(*New*) *Revised in forma pauperis statutes and court rules*: In 2008, the existing *in forma pauperis* statute (*Govt.C. 68511.3*) was repealed and new statutes (*Govt.C. 68630 et seq.*) were adopted, effective July 1, 2009. (See Supp., *infra*, §429A *et seq.*) *Govt.C. 68641* directs the Judicial Council to adopt uniform rules and forms for implementing the new legislation. The Judicial Council responded to that directive by substantially revising C.R.C., Rule 3.50 *et seq.* [fee waivers in trial courts], adopting C.R.C., Rule 8.26 [fee waivers in Supreme Court or Courts of Appeal] and C.R.C., Rule 8.818 [fee waivers in appellate division of superior court], and adopting or revising unified forms, effective July 1, 2009. (See Supp., *infra*, §429E.)



56 of 190 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XI. IN FORMA PAUPERIS

C. Procedure.

3. Application and Forms.

3 *Witkin Cal. Proc. Actions* § 426

[§ 426] Application and Forms.

The Judicial Council has responded to the legislative directive to formulate and adopt rules and uniform forms for litigants proceeding *in forma pauperis* (see *supra*, §425) by adopting C.R.C., Rule 3.50 et seq. (See C.R.C., Rule 3.50.)

(1) *Application*. A litigant must file an initial application on Judicial Council Form No. FW-001 [Application for Waiver of Court Fees and Costs] to establish the right to proceed *in forma pauperis* and to obtain the waiver of costs necessary for, or incidental to, the initial prosecution or defense of the action. (C.R.C., Rules 3.51(a), 3.61; on type of costs excused, see *supra*, §418; on grounds for application, see *infra*, §427.)

The litigant may subsequently file an application for the waiver of additional fees and costs on Judicial Council Form No. FW-002 [Application for Waiver of Additional Court Fees and Costs] if the litigant incurs costs and fees other than those provided for in the initial application. (C.R.C., Rules 3.51(a), 3.62.)

The clerk of the court must provide those forms without charge to any person who requests them or indicates that he or she is unable to pay costs and fees. (C.R.C., Rule 3.51(a).)

No applicant may be required to complete any form other than those adopted by the Judicial Council, except prisoner applicants proceeding under *Govt.C. 68511.3(e)* (see *supra*, §425). The clerk is directed to immediately file applications and any other pleading or other paper presented by the applicant. (C.R.C., Rule 3.51(b).)

(2) *Verification of Applicant's Financial Condition*. The court may authorize the clerk, a county financial officer, or another appropriate county officer to make reasonable efforts to verify an applicant's financial condition. With the exception of prisoner applicants proceeding under *Govt.C. 68511.3(e)* (see *supra*, §425), a blanket rule requiring all applicants to submit documentation to support the financial information in their applications is prohibited. (C.R.C., Rule 3.53(a).) Additional documentation may be demanded only if the applicant fails to provide information required by the application form, or if the court has good reason to doubt the truthfulness of the factual allegations in the application. If additional information is warranted, the appropriate county official must do all of the following:

(a) Inform the litigant of the information in the application that is insufficient or that the court believes may not be

truthful. (C.R.C., Rule 3.53(b)(1).)

(b) Inform the litigant of the specific type of documentation that must be submitted. (C.R.C., Rule 3.53(b)(2).)

(c) Require the litigant to submit only documentation in his or her possession or that the litigant can obtain with reasonable effort. (C.R.C., Rule 3.53(b)(3).)

(d) Require the litigant to submit only documentation that will clarify or prove the truthfulness of the factual allegations in the application. (C.R.C., Rule 3.53(b)(4).) (See *Cruz v. Superior Court* (2004) 120 C.A.4th 175, 186, 14 C.R.3d 917 [trial court's informal practice of denying *Govt.C. 68511.3(a)(6)(C)* fee waiver requests (see *infra*, §427) unless accompanied by supplemental documentation justifying waiver violated predecessor statute].)

(3) *Confidentiality*. Access to the application is limited to the court and its authorized personnel, persons authorized by C.R.C., Rules 3.53, 3.59(c) (*infra*, §427), and *Govt.C. 68511.3* (*supra*, §425) to verify the information, and persons authorized by the applicant. No person may reveal information contained in the application except as authorized by law. (C.R.C., Rule 3.60.)

(4) *Posted Notice of In Forma Pauperis Right*. Each trial court must conspicuously post a notice near the filing window advising litigants in English and Spanish that they may ask the court to waive fees and costs. The notice must be substantially as follows: "NOTICE: If you are unable to pay fees and costs, ask the court to permit you to proceed without paying them. Ask the clerk for the *Information Sheet on Waiver of Court Fees and Costs* and the *Application for Waiver of Court Fees and Costs*." (C.R.C., Rule 3.63.) (See Judicial Council Form No. FW-001-INFO [Information Sheet on Waiver of Court Fees and Costs].)

(5) *Forms*. The following forms for *in forma pauperis* litigants are mandatory:

<i>Form No.</i>	<i>Title</i>
FW-001	Application for Waiver of Court Fees and Costs (Fee Waiver)
FW-001-INFO	Information Sheet on Waiver of Court Fees and Costs
FW-002	Application for Waiver of Additional Court Fees and Costs
FW-003	Order on Application for Waiver of Court Fees and Costs
FW-004	Order on Application for Waiver of Additional Court Fees and Costs
	sts
FW-005	Notice of Waiver of Court Fees and Costs

SUPPLEMENT: [This section is current through the latest supplement]

(*New*) *Revised in forma pauperis statutes and court rules*: In 2008, the existing *in forma pauperis* statute (*Govt.C. 68511.3*) was repealed and new statutes (*Govt.C. 68630* et seq.) were adopted, effective July 1, 2009. The 2008 Legislature also directed the Judicial Council to adopt uniform rules and forms for implementing the new legislation. The Judicial Council responded to that directive by adopting new and revised unified rules and forms, effective July 1, 2009. (See Supp., *infra*, §429A et seq.) C.R.C., Rule 3.50 et seq., discussed in the text, were substantially revised. Requirements for applications and forms are now contained in *Govt.C. 68633*, C.R.C., Rule 3.50 et seq. [fee waivers in trial courts], C.R.C., Rule 8.26 [fee waivers in Supreme Court or Courts of Appeal], and C.R.C., Rule 8.818 [fee waivers in appellate division of superior court]. (See Supp., *infra*, §§429F, 429G.)



57 of 190 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XI. IN FORMA PAUPERIS

C. Procedure.

4. Determination of Application.

3 Witkin Cal. Proc. Actions § 427

[§ 427] Determination of Application.

The following procedure governs the grant or denial of either an initial application for the waiver of fees and costs or a subsequent application for the waiver of additional fees and costs:

(1) *Pleading*. The application must be determined on its own merits, without regard to any other pleadings or papers that are filed. (C.R.C., Rule 3.54.) A party whose application is denied has 10 days after being notified of the denial to pay the required fees; upon payment of the fees, the pleadings or other papers are deemed filed as of the date they were originally presented to the clerk for the purpose of determining whether the action was commenced within the applicable statute of limitations. (C.R.C., Rule 3.55.)

(2) *Grounds*. Under *Govt.C. 68511.3(a)(6)*, as implemented by C.R.C., Rule 3.52, the application must be granted if the applicant receives certain government benefits or has an income that is close to poverty level. The court may, in its discretion, grant the application if the applicant is unable to proceed without using money needed for the common necessities of life. (See *infra*, §428.)

(3) *Application Granted After 5 Court Days*. The application is automatically granted if the court takes no action within 5 days after it is filed. In those situations, the clerk must execute a Notice of Waiver of Court Fees and Costs (see Judicial Council Form No. FW-005). (C.R.C., Rule 3.57.)

(4) *Hearing*. A hearing on the applicant's status is authorized if, within 5 court days after the application is filed, the court determines that there exists substantial evidentiary conflict regarding the applicant's eligibility. In that event, the court clerk must give the applicant no less than 10 days' written notice. (C.R.C., Rule 3.58(a).) To maintain confidentiality of the applicant's financial status, the hearing must be conducted in private, with all persons excluded except authorized court personnel, the applicant, persons present with the applicant's consent, and any witness under examination. (C.R.C., Rule 3.58(b).) (See *Cruz v. Superior Court (2004) 120 C.A.4th 175, 187, 14 C.R.3d 917* [trial court's denial of *Govt.C. 68511.3(a)(6)(C)* fee waiver requests without hearing was improper].)

(5) *Decision and Order*. The court must determine the applicant's eligibility in accordance with *Govt.C. 68511.3*. If the application is granted, an order granting the waiver of fees and costs must be prepared on Judicial Council Form No.

FW-003 [Order on Application for Waiver of Court Fees and Costs] or Judicial Council Form No. FW-004 [Order on Application for Waiver of Additional Court Fees and Costs]. Denial of the application in whole or in part must include a statement of reasons. If the application is not granted in full, the clerk is required to immediately mail or deliver a copy of the order to the applicant's attorney or to the applicant if not represented. If the application is denied in full, notice must also be given to each of the parties who has made an appearance. The court may delegate to the clerk authority to grant applications that meet the eligibility requirements of *Govt.C. 68511.3*. Authority to deny an application may not be granted. (C.R.C., Rule 3.56.) (See Judicial Council Form No. FW-005 [Notice of Waiver of Court Fees and Costs].)

Orders granting the application may waive payment of part or all of the fees and costs of an action and may impose a lien on any money recovered by the applicant as payment for the waived fees and costs. The latter are then deemed to be taxable costs. The court may authorize the clerk of the court, a county financial officer, or another appropriate county officer to make reasonable efforts to verify the applicant's financial condition. (C.R.C., Rule 3.52(b).)

(6) *Changed Circumstances*. An applicant who has been found eligible for *in forma pauperis* status must promptly notify the court of any change in financial condition affecting his or her ability to pay costs and fees. (C.R.C., Rule 3.59(a).) The court may only reconsider the applicant's eligibility in connection with an application for waiver of additional court fees and costs under C.R.C., Rule 3.62 (see *supra*, §426) or in accordance with *Govt.C. 68511.3(d)* (*supra*, §425). (C.R.C., Rule 3.59(b), codifying rule of *Board of Med. Quality Assur. v. Superior Court* (1988) 203 C.A.3d 691, 703, 250 C.R. 182.)

The court may authorize the clerk of the court, the county financial officer, or another appropriate county officer to determine whether the litigant's financial condition has changed, enabling the litigant to pay all or a portion of the costs and fees, under the following procedures:

(a) The authorized officer must notify the litigant personally or in writing that the litigant must complete a new application and file it with the clerk. (C.R.C., Rule 3.59(c)(1).)

(b) The notice must be accompanied by a blank Judicial Council application form. (See Judicial Council Form No. FW-001 [Application for Waiver of Court Fees and Costs]; Judicial Council Form No. FW-002 [Application for Waiver of Additional Court Fees and Costs].) (C.R.C., Rule 3.59(c)(2).)

(c) No applicant may be required to submit a new application more frequently than once every 4 months. (C.R.C., Rule 3.59(c)(3).)

(d) If, after reviewing the new application, the authorized officer determines that the litigant's financial condition has changed, the court may order the litigant to pay costs and fees in an amount and manner that the court believes is compatible with the litigant's financial ability. (C.R.C., Rule 3.59(c)(4).)

SUPPLEMENT: [This section is current through the latest supplement]

(New) *Revised in forma pauperis statutes and court rules:* In 2008, the existing *in forma pauperis* statute (*Govt.C. 68511.3*) was repealed and new statutes (*Govt.C. 68630 et seq.*) were adopted, effective July 1, 2009. The 2008 Legislature also directed the Judicial Council to adopt uniform rules and forms for implementing the new legislation. The Judicial Council responded to that directive by adopting new and revised uniform rules and forms, effective July 1, 2009. (See *Supp.*, *infra*, §429A et seq.) Requirements for determining applications are now contained in *Govt.C. 68634 et seq.*, C.R.C., Rules 3.52 and 3.54 [fee waivers in trial courts], C.R.C., Rule 8.26 [fee waivers in Supreme Court or Courts of Appeal], and C.R.C., Rule 8.818 [fee waivers in appellate division of superior court]. (See *Supp.*, *infra*, §429H et seq.)



58 of 190 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XI. IN FORMA PAUPERIS

D. What Constitutes Indigence.

1. In General.

3 *Witkin Cal. Proc. Actions* § 428

[§ 428] In General.

(1) *Case Law*. Some of the earlier cases seemingly approved the harsh view that the applicant must be entirely destitute, i.e., wholly without funds or property that could be used to meet the costs. In *Alexander v. Superior Court* (1938) 29 C.A.2d 538, 84 P.2d 1061, petitioner alleged that he had no means of paying jury fees, but testified that his average income for the previous year was \$ 110-\$ 115 per month. The appellate court denied mandamus in a brief opinion declaring that "indigent means destitute of property" and, under his own testimony of receipt of income, petitioner was not indigent. (29 C.A.2d 539.) (See *Jenkins v. Superior Court* (1929) 98 C.A. 729, 730, 277 P. 757 [administrator who was one of two heirs asserted indigence, but failed to show inability of other heir to advance costs of litigation].)

A more reasonable approach would be that of the exemption statutes. Allow the privilege to those who, though possessed of some property or receiving some income, are, because of dependents and personal needs, practically unable to apply any of it to litigation expense. As the court observed in *Adkins v. E.I. DuPont de Nemours & Co.* (1948) 335 U.S. 331, 69 S.Ct. 85, 93 L.Ed. 43: "To say that no persons are entitled to the statute's benefits until they have sworn to contribute to payment of costs, the last dollar they have or can get, and thus make themselves and their dependents wholly destitute, would be to construe the statute in a way that would throw its beneficiaries into the category of public charges. The public would not be profited if relieved of paying costs of a particular litigation only to have imposed on it the expense of supporting the person thereby made an object of public support. Nor does the result seem more desirable if the effect of this statutory interpretation is to force a litigant to abandon what may be a meritorious claim in order to spare himself complete destitution." (69 S.Ct. 89, 93 L.Ed. 49.)

A similar liberal view was expressed in *Earls v. Superior Court* (1971) 6 C.3d 109, 98 C.R. 302, 490 P.2d 814, supra, §424. Petitioner, a married woman with four minor children, sought dissolution of her marriage from her husband, an indigent living out of state. She filed a petition *in forma pauperis*, supported by an affidavit sufficient in form, showing no assets, a total income of \$ 263 per month in welfare aid, and expenses consuming the entire amount. The petition was twice denied summarily. Thereafter, at a hearing, a welfare investigator testified that petitioner could barter food stamps for certain other personal needs, thus creating a surplus sufficient to meet the filing fee of \$ 27 and anticipated \$ 30 for publication of summons. The judge denied her motion, finding her not indigent, and also finding that she could set aside \$ 10 per month for the period necessary to raise the needed amount. *Held*, mandamus granted to

compel granting the motion.

(a) The suggestion that the food stamps could be used for other than food items, in violation of federal law, was palpably devoid of merit. (6 C.3d 116.)

(b) No authority supports denial of the motion on the ground that the indigent might deny himself or herself necessities of life to save a sum over a period of months. "Indigents are entitled not merely to access to the courts but to timely access. They may not be subjected to unreasonable delays in securing fundamental rights solely by reason of their poverty." (6 C.3d 117.) (See *In re Marriage of Reese* (1977) 73 C.A.3d 120, 124, 140 C.R. 589 [following *Earls*; earnings of \$ 30 to \$ 45 two days a week as musician, living expenses of \$ 270 per month].)

(2) *Statutory Eligibility Standards.* Under eligibility standards set by Govt.C. 68511.3(a)(6)(A), 68511.3(a)(6)(B), 68511.3(a)(6)(C), and implemented by C.R.C., Rules 3.52 and 3.53 (supra, §§426, 427), recipients of state supplemental security income, state supplemental payments benefits, and benefits under the CalWORKs program, and recipients of food stamps under federal or state programs must be granted permission to proceed *in forma pauperis*, along with persons with incomes 125% or less of the federally established poverty threshold. The court has discretion to grant permission in other cases if the litigant cannot proceed without using money necessary to provide common necessities of life for himself or herself or for the litigant's family. (See *Simpson v. Superior Court* (2001) 92 C.A.4th Supp. 1, 5, 111 C.R.2d 819 [construing substantially similar former court rule; trial judge's refusal to waive court fees for SSI recipient because she failed to state her occupation was reversible error as violative of statutory eligibility standards].)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Statutory Eligibility Standards.*

(New) *Revised in forma pauperis statutes and court rules:* In 2008, the existing *in forma pauperis* statute (Govt.C. 68511.3) was repealed and new statutes (Govt.C. 68630 et seq.) were adopted, effective July 1, 2009. The 2008 Legislature also directed the Judicial Council to adopt uniform rules and forms for implementing the new legislation. The Judicial Council responded to that directive by revising C.R.C., Rule 3.50 et seq. [fee waivers in trial courts], adopting C.R.C., Rule 8.26 [fee waivers in Supreme Court or Courts of Appeal] and C.R.C., Rule 8.818 [fee waivers in appellate division of superior court], and adopting or revising unified forms, effective July 1, 2009. (See Supp., infra, §429A et seq.) C.R.C., Rules 3.52 and 3.53, establishing eligibility standards, were repealed. Eligibility standards are now contained in Govt.C. 68632. (See Supp., infra, §429D.)



59 of 190 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XI. IN FORMA PAUPERIS

D. What Constitutes Indigence.

2. Contingent Fee Is Not Bar.

3 *Witkin Cal. Proc. Actions* § 429

[§ 429] Contingent Fee Is Not Bar.

(1) *Former Rule.* It was formerly the rule in California that a plaintiff, though indigent, could not sue *in forma pauperis* if his or her attorney had a contingent interest in the recovery. (*Gomez v. Superior Court* (1933) 134 C.A. 19, 20, 24 P.2d 856; see 48 Harv. L. Rev. 127; 11 A.L.R.2d 607 [right to sue or appeal *in forma pauperis* as dependent on showing of financial disability of attorney or other nonparty or nonapplicant]; but see *Willis v. Superior Court* (1933) 130 C.A. 766, 767, 20 P.2d 994 [attorney's affidavit waiving any right in judgment was sufficient to support application]; *Emerson v. Superior Court* (1938) 29 C.A.2d 539, 541, 84 P.2d 1059 [contingent fee contract was canceled by parties before application was made; order was improperly denied].)

(2) *Abrogation of Rule.* In *Isrin v. Superior Court* (1965) 63 C.2d 153, 45 C.R. 320, 403 P.2d 728, plaintiff brought a personal injury action, demanded a jury trial, and moved for a waiver of jury fees. She filed an affidavit of inability to pay, and her attorney filed an affidavit stating that under their contingent fee agreement she was required to advance costs and that he was unwilling to do so. The trial judge, following *Gomez v. Superior Court*, *supra*, denied the motion. *Held*, mandamus granted to compel the judge to permit prosecution of the action without prepayment of the fees. The opinion carefully examines the statutory privilege and the nature of the attorney's interest under a contingent fee agreement, and reaches the following conclusions:

(a) *Legitimate scope of Gomez case.* The object of preventing abuses of *in forma pauperis* procedure is sound, and the privilege is properly denied where the action is filed in the name of an indigent plaintiff who is merely a representative, for the benefit of a nonindigent person who is in fact the real party in interest; e.g., an executor or administrator, trustee, or guardian. (63 C.2d 156.)

(b) *Theory inapplicable to contingent fee.* The contract for a contingent fee gives the attorney no more than a "security interest in the proceeds"; the attorney does not become an equitable owner of a share in the cause of action, and is not a real party in interest with the responsibility of financing the litigation. (63 C.2d 158, 160.) The contrary view of the *Gomez* case finds no support in other jurisdictions. (63 C.2d 162.)

(c) *Policy considerations are against Gomez rule.* The effect of the rule is to deny an indigent plaintiff the right to proceed *in forma pauperis* unless the plaintiff's attorney employs the subterfuge of formal rescission of the contract (see

Emerson and Willis) or signs a pauper's affidavit himself or herself; and most attorneys, commendably, are unwilling to use either device. Thus, the plaintiff is limited to counsel who will subsidize the litigation, and not all attorneys are able or willing to do so. "The natural consequence of the *Gomez* rule is that the indigent with an uncertain claim may go without counsel and, being a layman, may simply fail to assert what rights he has. To the extent that *Gomez* thus has the practical effect of restricting an indigent's access to the courts because of his poverty, it contravenes the fundamental notions of equality and fairness which since the earliest days of the common law have found expression in the right to proceed in forma pauperis." (63 C.2d 165.) Hence, *Gomez* is "disapproved," and "the right to proceed in forma pauperis in appropriate cases may not be denied on the ground that counsel for the indigent litigant is representing him pursuant to a contingent fee contract." (63 C.2d 165.) (See 2 Cal. Western L. Rev. 116; 6 Santa Clara Lawyer 236.)

SUPPLEMENT: [This section is current through the latest supplement]



60 of 190 DOCUMENTS

Witkin California Procedure, Fifth Edition
Copyright (c) 2009 By B.E. Witkin A rticle Sixth Testamentary Trust

CHAPTER IV - Actions

XI. IN FORMA PAUPERIS

E. (New) Revised In Forma Pauperis Statutes.

1. (New) In General.

3 Witkin Cal. Proc. Actions § 429A

[§ 429A] (New) In General.

(1) *Enactment and Effective Date.* In 2008, the existing *in forma pauperis* statute (*Govt.C. 68511.3*) was repealed and new statutes (*Govt.C. 68630 et seq.*) were adopted. The new provisions are effective on July 1, 2009. (Stats. 2008, Chap. 462, §3.)

(2) *Purposes of Revision.* The new statutes were enacted for the following reasons:

(a) Because the legal system cannot provide "equal justice under law" unless all persons have access to the courts without regard to their economic means, California law and court proce- dures should ensure that court fees are not a barrier to court access for those with insufficient economic means to pay those fees. (*Govt.C. 68630(a).*)

(b) Fiscal responsibility should be tempered with concern for litigants' right to access the justice system. The procedure for allowing the poor to use court services without paying ordinary fees must be one that applies rules fairly to similarly situated persons, is accessible to those with limited knowledge of court processes, and does not delay access to court services. The procedure for determining if a litigant may file a lawsuit without paying a fee must not interfere with court access for those without the financial means to do so. (*Govt.C. 68630(b).*)

(c) Those who are able to pay court fees should do so, and courts should be allowed to recover previously waived fees if a litigant has obtained a judgment or substantial settlement. (*Govt.C. 68630(c).*)

(3) *Major Changes.* The revised statutes make the following major changes (see Legislative Counsel's Digest, Stats. 2008, Chap. 462):

(a) An initial fee waiver must be granted by the court at any stage of the proceedings at both the appellate and trial court levels if an applicant meets specified criteria for eligibility and satisfies the application requirements.

(b) Applicants for an initial fee waiver must complete application forms under penalty of perjury.

(c) Courts are authorized to reconsider the initial fee waiver and to recover fees and costs that were waived under specified circumstances.

(d) A lien in favor of the court is imposed against any settlement, compromise, award, or other recovery in excess

of \$ 10,000 by a party in a civil case whose court fees and costs were initially waived in the amount of those waived fees and costs.

(e) A party who petitions the court to enter a satisfaction of judgment must declare under penalty of perjury that any order requiring payment of waived fees and costs has been satisfied. Similarly, a party who petitions the court for dismissal in a case must declare under penalty of perjury that a lien in favor of the court against any settlement, compromise, award, or other recovery has been paid.

SUPPLEMENT: [This section is current through the latest supplement]



61 of 190 DOCUMENTS

Witkin California Procedure, Fifth Edition
Copyright (c) 2009 By B.E. Witkin A rticle Sixth Testamentary Trust

CHAPTER IV - Actions

XI. IN FORMA PAUPERIS

E. (New) Revised In Forma Pauperis Statutes.

2. (New) Scope of Right.

3 *Witkin Cal. Proc. Actions* § 429B

[§ 429B] (New) Scope of Right.

(1) *Initial Fee Waiver*. An initial fee waiver must be granted by the court at any stage of the proceedings at both the appellate and trial court levels if an applicant meets the criteria for eligibility under *Govt.C. 68632* (see Supp., infra, §429C) and the application requirements under *Govt.C. 68633* (see Supp., infra, §429E). An initial fee waiver excuses the applicant from paying fees for the first pleading or other paper, and other court fees and costs as specified in rules adopted by the Judicial Council, unless the court orders the applicant to make partial payments under *Govt.C. 68632(c)* (see Supp., infra, §429C), *Govt.C. 68636(d)* (see Supp., infra, §429-I), or *Govt.C. 68637(e)* (see Supp., infra, §429K). (*Govt.C. 68631.*)

An initial fee waiver expires 60 days after the judgment, the dismissal, or other final disposition of the case. (*Govt.C. 68639.*)

(2) *Reconsideration on Change of Circumstances*. Under circumstances set forth in *Govt.C. 68636* (see Supp., infra, §429-I), the court may, reconsider the initial fee waiver and order the fee waiver withdrawn for future fees and costs or deny the fee waiver retroactively. At the end of the case, the court may, under *Govt.C. 68637* (see Supp., infra, §429J), recover fees and costs that were initially waived. (*Govt.C. 68631.*)

(3) *Installment Payments of Fees by Ineligible Litigants*. The Judicial Council may adopt a rule of court to allow litigants who are not eligible for a fee waiver to pay court fees in installments. (*Govt.C. 68640.*)

SUPPLEMENT: [This section is current through the latest supplement]



62 of 190 DOCUMENTS

Witkin California Procedure, Fifth Edition
Copyright (c) 2009 By B.E. Witkin A rticle Sixth Testamentary Trust

CHAPTER IV - Actions

XI. IN FORMA PAUPERIS

E. (New) Revised In Forma Pauperis Statutes.

3. (New) Eligibility Criteria.

3 *Witkin Cal. Proc. Actions* § 429C

[§ 429C] (New) Eligibility Criteria.

Under *Govt.C. 68632*, permission to proceed without paying court fees and costs because of an applicant's financial condition must be granted initially to all of the following persons:

(1) *Recipient of Public Assistance*. A person who is receiving public benefits under one or more of the following programs: (a) Supplemental Security Income (SSI) and State Supplementary Payment (SSP); (b) California Work Opportunity and Responsibility to Kids Act (CalWORKs) or a federal Tribal Temporary Assistance for Needy Families (Tribal TANF) grant program; (c) Food Stamps or the California Food Assistance Program; (d) County Relief, General Relief (GR), or General Assistance (GA); (e) Cash Assistance Program for Aged, Blind, and Disabled Legal Immigrants (CAPI); (f) In-Home Supportive Services (IHSS); (g) Medi-Cal. (*Govt.C. 68632(a)*.)

(2) *Person With Income Near Federal Poverty Level*. A person whose monthly income is 125% or less of the current federal Government poverty guidelines. (*Govt.C. 68632(b)*.)

(3) *Person Who Cannot Pay for Common Necessaries of Life*. A person who, as individually determined by the court, cannot pay court fees without using money that normally would pay for the common necessities of life for the applicant and the applicant's family. If a trial court finds that an applicant can pay a portion of court fees, or can pay court fees over a period of time, or under some other equitable arrangement, without using money that normally would pay for the common necessities of life for the applicant and the applicant's family, the court may grant a partial initial fee waiver using the notice and hearing procedures set forth in *Govt.C. 68634(e)(5)* (see Supp., *infra*, §429F). "Common necessities of life" must be interpreted consistently with the use of that term in *C.C.P. 706.051(c)(1)* (exemption to garnishment of judgment debtor's wages; see 8 *Cal. Proc.* (5th), *Enforcement of Judgment*, §251). (*Govt.C. 68632(c)*.)

SUPPLEMENT: [This section is current through the latest supplement]



63 of 190 DOCUMENTS

Witkin California Procedure, Fifth Edition
Copyright (c) 2009 By B.E. Witkin A rticle Sixth Testamentary Trust

CHAPTER IV - Actions

XI. IN FORMA PAUPERIS

E. (New) Revised In Forma Pauperis Statutes.

4. (New) Procedure.

a. (New) Legislative Directive to Judicial Council.

3 *Witkin Cal. Proc. Actions* § 429D

[§ 429D] (New) Legislative Directive to Judicial Council.

Govt.C. 68641 directs the Judicial Council to adopt uniform rules and forms for *in forma pauperis* litigants including, but not limited to, the following:

(1) Considering and determining applications to proceed without paying court fees and costs at every stage of the proceedings, including at the trial and appellate levels of the court.

(2) Prescribing the court fees and costs that may be waived at every stage of the proceedings.

(3) Giving notice of liens and hearings for reconsideration and recovery of initially waived fees and costs.

(4) Collecting waived fees and costs.

(5) Requesting a hearing when an application is denied.

(6) Any other procedures necessary to implement the provisions of *Govt.C. 68630* et seq.

SUPPLEMENT: [This section is current through the latest supplement]



64 of 190 DOCUMENTS

Witkin California Procedure, Fifth Edition
Copyright (c) 2009 By B.E. Witkin A rticle Sixth Testamentary Trust

CHAPTER IV - Actions

XI. IN FORMA PAUPERIS

E. (New) Revised In Forma Pauperis Statutes.

4. (New) Procedure.

b. (New) Applications and Forms.

3 *Witkin Cal. Proc. Actions* § 429E

[§ 429E] (New) Applications and Forms.

(1) *Application by Recipient of Public Assistance.* An applicant for an initial fee waiver under *Govt.C. 68632(a)* (see Supp., supra, §429C) must complete, under penalty of perjury, a Judicial Council application form requiring the applicant to list his or her current street address (or another address where the court can contact the applicant), occupation, employer, and the type of public benefits that the applicant is receiving. At the time the application is submitted, the applicant may not be required to provide documents supporting the receipt of public benefits, to provide evidence of identity, to submit to interviews about the applicant's financial circumstances, to be physically present to file the application, or to fill out additional parts of the application form. (*Govt.C. 68633(a).*)

(2) *Application by Person With Income Near Poverty Level.* An applicant for an initial fee waiver under *Govt.C. 68632(b)* (see Supp., supra, §429C) must complete, under penalty of perjury, (a) a Judicial Council application form requiring the applicant to provide his or her current street address (or another address where the court can contact the applicant), occupation, and employer; and (b) a financial statement showing monthly or yearly income as determined under rules, and on forms, adopted by the Judicial Council. At the time the application is submitted, the applicant may not be required to provide documents to prove income, dependents, or expenses, to provide evidence of identity, to submit to interviews about the applicant's financial circumstances, to be physically present to file the application, or to fill out additional parts of the application form. (*Govt.C. 68633(b).*)

(3) *Application by Person Who Cannot Pay for Common Necessaries of Life.* An applicant for an initial fee waiver under *Govt.C. 68632(c)* (see Supp., supra, §429C) must complete, under penalty of perjury, (a) a Judicial Council application form requiring the applicant to provide his or her current street address (or another address where the court can contact the applicant), occupation, and employer; and (b) a financial statement showing monthly or yearly income and expenses and a summary of assets and liabilities as determined under rules, and on forms, adopted by the Judicial Council. At the time the application is submitted, the applicant may not be required to provide documents to prove income, dependents, or expenses, to provide evidence of identity, to submit to interviews regarding the applicant's financial circumstances, or to be physically present to file the application. (*Govt.C. 68633(c).*)

(4) *Application by Prisoner.* Special procedures apply to an application filed by a person sentenced to state prison or confined in county jail. (*Govt.C. 68635*; see Supp., infra, §429H.)

(5) *Judicial Council Forms*. The clerk of the court must provide forms adopted by the Judicial Council under *Govt.C. 68630* et seq. without charge to any person who requests those forms or indicates that he or she is unable to pay any court fees or costs. An applicant may not be required to complete any form as part of his or her application other than those forms adopted by the Judicial Council. (*Govt.C. 68633(d)*.)

(6) *Notice of Rights to Applicant*. An applicant for an initial fee waiver must be informed that, at a later date, the court may require proof of the receipt of benefits or financial information to verify eligibility under *Govt.C. 68636* (see Supp., supra, §429C), and that a trial court may seek reimbursement of initially waived fees under *Govt.C. 68637* (see Supp., infra, §§429J, 429K). This notice requirement is satisfied if the information is provided on the Judicial Council fee waiver application form. (*Govt.C. 68633(e)*.)

(7) *Confidentiality*. Financial information provided by an applicant must be kept confidential by the court. No person may have access to the application except the court, authorized court personnel, and a person authorized by the applicant. No person may reveal information contained in the application except as authorized by law. A hearing about whether to grant or deny a fee waiver request must be held in camera, and the court must exclude all persons except court staff, the applicant, those present with the applicant's consent, and any witness being examined. The fact that an applicant's fees and costs have been initially waived and the amount of the waived fees and costs are not confidential. The Judicial Council is directed to adopt procedures to keep the financial information confidential and to consider a request seeking that confidential information. (*Govt.C. 68633(f)*.)

(8) *Agreement by Counsel To Advance Costs*. Counsel representing an applicant who is filing in a general jurisdiction civil case under an agreement that counsel will advance litigation costs must indicate that agreement on the application form. The court must set a hearing to determine whether the applicant is able to pay court fees without using money that normally would pay for the common necessities of life. This requirement does not apply if the applicant is represented by counsel for, or affiliated with, a qualified legal services project under *B. & P.C. 6213* (see 1 *Cal. Proc.* (5th), *Attorneys*, §15). (*Govt.C. 68633(g)*.)

SUPPLEMENT: [This section is current through the latest supplement]



65 of 190 DOCUMENTS

Witkin California Procedure, Fifth Edition
Copyright (c) 2009 By B.E. Witkin A rticle Sixth Testamentary Trust

CHAPTER IV - Actions

XI. IN FORMA PAUPERIS

E. (New) Revised In Forma Pauperis Statutes.

4. (New) Procedure.

c. (New) Determination of Trial Court Applications.

3 *Witkin Cal. Proc. Actions* § 429F

[§ 429F] (New) Determination of Trial Court Applications.

The determination of fee waiver applications in the trial courts is governed by *Govt.C. 68634*. (*Govt.C. 68634(a)*.)
The requirements are as follows:

(1) *Mandatory Acceptance of Applications for Filing*. All applications must be accepted for filing. If an applicant submits an application without providing all required information, the clerk may request that the applicant supply the omitted information, but may not refuse to file the application, or refuse to file any plead- ings accompanying the application, on the ground that the fee has not been paid. The clerk may not request that the applicant furnish information that is not required on the Judicial Council fee waiver application form. At the time the application is submitted, the clerk may not request that the applicant provide documents to support the information other than those required under *Govt.C. 68633* (see Supp., supra, §429E). (*Govt.C. 68634(b)*.)

(2) *Mandatory Filing of Pleadings and Papers*. If a person has filed an application, the person must be permitted to file pleadings or other papers immediately, without paying fees. (*Govt.C. 68634(c)*.)

(3) *Delegation of Duties to Clerk*. The court may delegate to the clerk the authority to grant applications that meet the criteria for eligibility under *Govt.C. 68632* (see Supp., supra, §429C) and the application requirements under *Govt.C. 68633* (see Supp., supra, §429E). The court may not delegate to a clerk the authority to deny or to partially grant an application. (*Govt.C. 68634(d)*.)

(4) *Determination and Action on Application*. The application must be determined without regard to the substance of the applicant's pleading or any other paper filed. (*Govt.C. 68634(e)*.) On review of an application for an initial fee waiver the court must take the following actions, as applicable:

(a) Grant the application if the information provided on the application establishes that the applicant meets the criteria for eligibility and the application requirements. (*Govt.C. 68634(e)(1)*.)

(b) Deny the application if the application is incomplete. If the application is denied on this basis, the applicant must be given notice of the specific reason for the denial and a reasonable opportunity to submit a revised application. (*Govt.C. 68634(e)(2)*.)

(c) Deny the application if the information provided on the application conclusively establishes that the applicant is not eligible for an initial fee waiver under *Govt.C. 68632* on the grounds requested. If the application is denied on this basis, the applicant must be given notice of the specific reason for the denial and a reasonable opportunity to request a hearing. The applicant may submit additional information at the hearing. (*Govt.C. 68634(e)(3).*)

(d) Set an eligibility hearing if the court has good reason to doubt the veracity of the factual statements in the application. The applicant must be given 10 days' notice of the hearing and the specific reason the court doubts the veracity of the factual statements. The court may require that specified, reasonably available, additional information be provided about the truthfulness of the factual statements in the application, but may not require the submission of information that is not related to the criteria for eligibility and the application requirements. (*Govt.C. 68634(e)(4).*)

(e) Set an eligibility hearing if the information provided on the application does not establish that the applicant meets the criteria for eligibility and the application requirements, but that information does not conclusively establish that the applicant is not eligible for an initial fee waiver on the grounds requested. The applicant must be given 10 days' notice of the hearing and the specific reason why the court has not granted the application. The court may require that specified, reasonably available, additional information be provided, but may not require the submission of information that is not related to the criteria for eligibility and the application requirements. (*Govt.C. 68634(e)(5).*)

After notice and an opportunity to be heard, the court may require an applicant under *Govt.C. 68632(c)* (common necessities of life; see Supp., supra, §429C) to pay a portion of court fees, or to pay court fees over a period of time or under some other equitable arrangement that meets the criteria of that provision. The court must give a written statement of reasons if an application is denied in whole or in part. (*Govt.C. 68634(e).*)

(5) *Application Deemed Granted Five Days After Filing If No Court Action.* An application is deemed granted 5 court days after it is filed, unless before that time, the court gives notice of action on the application as provided in *Govt.C. 68634(e)*. Any delay by the court in processing an application for an initial fee waiver does not count against the time limits affecting the pleadings or other papers that the applicant timely filed. (*Govt.C. 68634(f).*)

(6) *Payment of Fees on Denial of Application.* If an application is denied in whole or in part, the applicant must pay the court fees and costs that ordinarily would be charged, or make the partial payment as ordered by the court, within 10 days after the clerk gives notice of the denial, unless within that time the applicant submits a new application or requests a hearing under *Govt.C. 68634(e)*. If the applicant does not pay on time, the clerk must void the papers that were filed without payment of the court fees and costs. (*Govt.C. 68634(g).*)

(7) *Disclosure of Prior Applications.* A person who applies for an initial fee waiver must indicate whether he or she has filed a prior application for an initial fee waiver in the same case within the previous 6 months and must attach a copy, if one is reasonably available. (*Govt.C. 68634(h).*)

SUPPLEMENT: [This section is current through the latest supplement]



66 of 190 DOCUMENTS

Witkin California Procedure, Fifth Edition
Copyright (c) 2009 By B.E. Witkin A rticle Sixth Testamentary Trust

CHAPTER IV - Actions

XI. IN FORMA PAUPERIS

E. (New) Revised In Forma Pauperis Statutes.

4. (New) Procedure.

d. (New) Determination of Appellate Court Applications.

3 Witkin Cal. Proc. Actions § 429G

[§ 429G] (New) Determination of Appellate Court Applications.

The determination of fee waiver applications in the appellate courts is governed by *Govt.C. 68634.5*. (*Govt.C. 68634.5(a)*.) The requirements are as follows:

(1) *Mandatory Acceptance of Applications*. All completed applications must be accepted for filing. If an application is submitted without all required information filled out on the form, the clerk may return the application to the applicant and request that the applicant supply the omitted information, but may not refuse to file any paper accompanying the application on the ground that the application is incomplete or the fee has not been paid. The clerk may not request that the applicant furnish information that is not required on the Judicial Council fee waiver application form. At the time the application is submitted, the clerk may not request that the applicant provide documents to support the information other than those required under *Govt.C. 68633* (see Supp., supra, §429E). (*Govt.C. 68634.5(b)*.)

(2) *Mandatory Filing of Papers*. A person must be permitted to file his or her papers immediately, even if the person does not present the filing fee, or an application for, or order granting, a fee waiver. (*Govt.C. 68634.5(c)*.)

(3) *Delegation of Duties to Clerk*. The court may delegate to the clerk the authority to grant applications that meet the criteria for eligibility under *Govt.C. 68632* (see Supp., supra, §429C) and the application requirements under *Govt.C. 68633* (see Supp., supra, §429E). The court may not delegate to a clerk the authority to deny an application. (*Govt.C. 68634.5(d)*.)

(4) *Determination and Action on Application*. The application must be determined without regard to the substance of any other paper filed by the applicant. (*Govt.C. 68634.5(e)*.) On review of an application, the court must take the following actions, as applicable:

(a) Grant the application if the information provided on the application establishes that the applicant meets the criteria for eligibility and the application requirements. (*Govt.C. 68634.5(e)(1)*.)

(b) Deny the application if the application is incomplete. If the application is denied on this basis, the applicant must be given notice of the specific reason for the denial and a reasonable opportunity to submit a revised application. (*Govt.C. 68634.5(e)(2)*.)

(c) Deny the application if the information provided on the application conclusively establishes that the applicant is not eligible for a fee waiver under *Govt.C. 68632* on the grounds requested. If the application is denied on this basis, the applicant must be given notice of the specific reason for the denial and a reasonable opportunity to submit additional information related to the criteria for eligibility and the application requirements. (*Govt.C. 68634.5(e)(3).*)

(d) If the court concludes that there is a substantial evidentiary question about the applicant's eligibility, the court (1) may require the applicant to provide specified, reasonably available, additional information about the factual statements in the application, but may not require the submission of information that is not related to the criteria for eligibility and the application requirements; (2) may set a hearing to consider evidence concerning the applicant's eligibility; and (3) must give a written statement of reasons if an application is denied. (*Govt.C. 68634.5(e)(4).*)

(5) *Application Deemed Granted If No Court Action.* An application is deemed granted 5 court days after it is filed, unless before that time, the court gives notice of action on the application as provided in *Govt.C. 68634.5(e)*. (*Govt.C. 68634.5(f).*)

(6) *Payment of Fees on Denial of Application.* If an application is denied, the applicant must pay the court fees and costs that ordinarily would be charged within 10 days after the clerk gives notice of the denial, unless within that time, the court grants a fee waiver based on a new application or additional information provided by the applicant under *Govt.C. 68634.5(e)*. The clerk must notify the applicant of the consequences for failure to pay the court fees. (*Govt.C. 68634.5(f).*)

(7) *Disclosure of Prior Applications.* A person who applies for an initial fee waiver must indicate whether he or she has filed a prior application for a fee waiver in the same case and must attach a copy, if one is reasonably available. (*Govt.C. 68634.5(h).*)

SUPPLEMENT: [This section is current through the latest supplement]



67 of 190 DOCUMENTS

Witkin California Procedure, Fifth Edition
Copyright (c) 2009 By B.E. Witkin A rticle Sixth Testamentary Trust

CHAPTER IV - Actions

XI. IN FORMA PAUPERIS

E. (New) Revised In Forma Pauperis Statutes.

4. (New) Procedure.

e. (New) Fee Waiver Requests by Prisoners.

3 Witkin Cal. Proc. Actions § 429H

[§ 429H] (New) Fee Waiver Requests by Prisoners.

An application by a person sentenced to state prison or confined in county jail for waiver of civil trial court fees is governed by *Govt.C. 68635*. (*Govt.C. 68635(a)* and (b).) The requirements are as follows:

(1) *Mandatory Payment of Fees*. Notwithstanding any other provision of *Govt.C. 68630* et seq., the inmate must pay the full amount of the trial court filing fees and costs to the extent provided in *Govt.C. 68635*. (*Govt.C. 68635(b)*.)

(2) *Application*. To apply for an initial fee waiver, the inmate must complete, under penalty of perjury, a Judicial Council application form giving the current address of the inmate and a statement that he or she is incarcerated, together with a statement of account for any money due to the inmate for the 6-month period immediately preceding the application. The form must be certified by the appropriate official of the Department of Corrections and Rehabilitation or the county jail. (*Govt.C. 68635(c)*.)

(3) *Partial Payment of Fees on Filing*. When pleadings or other papers are filed, the court must assess and, if funds exist, collect as partial payment a partial filing fee of 20% of the greater of either (a) the average monthly deposits to the inmate's account, or (b) the average monthly balance in the inmate's account for the 6-month period immediately preceding the application. (*Govt.C. 68635(d)*.)

(4) *Subsequent Monthly Payments of Fees*. After the initial filing fee is partially paid, the inmate must make monthly payments of 20% of the preceding month's income credited to the inmate's account. The Department of Corrections and Rehabilitation, or a county jail, must forward payments from this account to the clerk of the court each time the amount in the account exceeds \$ 10 until the filing fees are paid in full. (*Govt.C. 68635(e)*.)

(5) *Amount of Fees May Not Exceed Amount Charged to Nonprisoners*. The fees collected from an inmate applicant by the court may not exceed the amount of the fees that would be charged to a person who is not incarcerated. (*Govt.C. 68635(f)*.)

(6) *Delegation of Duties to Clerk*. The court may delegate to a clerk the authority to process requests for fee waivers from inmates under *Govt.C. 68635*. (*Govt.C. 68635(g)*.)

(7) *Right To File Papers*. An inmate may not be prohibited from filing pleadings or other papers solely because the

inmate has no assets and no means to partially pay the initial filing fee. (*Govt.C. 68635(h).*)

SUPPLEMENT: [This section is current through the latest supplement]



68 of 190 DOCUMENTS

Witkin California Procedure, Fifth Edition
Copyright (c) 2009 By B.E. Witkin A rticle Sixth Testamentary Trust

CHAPTER IV - Actions

XI. IN FORMA PAUPERIS

E. (New) Revised In Forma Pauperis Statutes.

4. (New) Procedure.

f. (New) Changed Circumstances.

3 Witkin Cal. Proc. Actions § 429-I

[§ 429-I] (New) Changed Circumstances.

(1) *Applicant's Notification Requirement.* After the court has granted an initial fee waiver in whole or in part, and before final disposition of the case, an applicant who has received an initial fee waiver must notify the court within 5 days of any change in financial circumstances that affects his or her ability to pay all or a portion of the court fees and costs that were initially waived. (*Govt.C. 68636(a).*)

(2) *Hearing on Court's Discovery of Changed Circumstances.* If, before or at the time of final disposition of the case, the court obtains information, including information derived from the court file, suggesting that an applicant who has received an initial fee waiver is not entitled to a fee waiver, or that the applicant's financial condition has changed so that he or she is no longer eligible for a fee waiver, the court may require the applicant to appear at a court hearing. The court must give the applicant no less than 10 days' written notice of the hearing and the specific reasons why the initial fee waiver might be reconsidered. The court may require the person to provide reasonably available evidence, including financial information, to support his or her eligibility for the fee waiver, but may not require the submission of information that is not related to the criteria for eligibility under *Govt.C. 68632* (see Supp., supra, §429C) and the application requirements under *Govt.C. 68633* (see Supp., supra, §429E). The court may not conduct a changed circumstances hearing more often than once every 6 months. (*Govt.C. 68636(b).*)

(3) *Hearing Without Court's Discovery of Changed Circumstances.* At the time of final disposition of the case, the court may give notice that an applicant whose fees and costs were initially waived is required to appear at a court hearing by giving the applicant no less than 10 days' written notice of the hearing. The court may require the applicant to provide reasonably available evidence, including financial information, to support his or her eligibility for the fee waiver, but may not require the submission of information that is not related to the criteria for eligibility and the application requirements. (*Govt.C. 68636(c).*)

(4) *Decision and Order.* In conducting a hearing under *Govt.C. 68636(b)* or (c), if the court determines that the applicant was not entitled to the initial fee waiver at the time it was granted, the court may order the waiver withdrawn retroactively. The court may order the applicant to pay to the court immediately, or over a period of time, all or part of the fees that were initially waived. The court must give the applicant a minimum of 10 court days to begin paying the full or partial fees. (*Govt.C. 68636(d).*)

In conducting a hearing under *Govt.C. 68636(a)*, (b), or (c), if the court determines that the applicant's financial circumstances have changed since the grant of the initial fee waiver or partial initial fee waiver, the court may order the fee waiver withdrawn prospectively from the time that the applicant no longer was eligible for a fee waiver. The court may order the applicant to pay to the court immediately, or over a period of time, all or part of the fees that were waived since the time that the applicant no longer was eligible for a fee waiver. The court may order the applicant to begin paying all or part of the court fees assessed for future activities in the case. The court must give the applicant a minimum of 10 court days to begin paying the full or partial fees. (*Govt.C. 68636(e).*)

(5) *Sanctions for Bad Faith Conduct.* If the court obtains information suggesting that an applicant whose fees and costs were waived is obtaining court services in bad faith, or for an improper purpose such as to harass or cause unnecessary delay, or to needlessly increase the costs of litigation, the court may give notice that the applicant is required to appear at a court hearing to consider whether limitations should be placed on the court services for which fees were initially waived. (*Govt.C. 68636(f).*)

SUPPLEMENT: [This section is current through the latest supplement]



69 of 190 DOCUMENTS

Witkin California Procedure, Fifth Edition
Copyright (c) 2009 By B.E. Witkin A rticle Sixth Testamentary Trust

CHAPTER IV - Actions

XI. IN FORMA PAUPERIS

E. (New) Revised In Forma Pauperis Statutes.

5. (New) Recovery of Fee Waivers.

a. (New) In General.

3 *Witkin Cal. Proc. Actions* § 429J

[§ 429J] (New) In General.

Govt.C. 68637 establishes procedures for the recovery of trial court fees waivers. (*Govt.C. 68637(a).*)

(1) *Payment of Waived Fees by Losing Party.* If a party whose trial court fees and costs were initially waived is a prevailing party within the meaning of *C.C.P. 1032* (see 7 *Cal. Proc.* (5th), *Judgment*, §88 et seq.), the judgment or the dismissal entered in favor of that party must include an order requiring that the party against whom the judgment or dismissal has been entered pay to the court the waived fees and costs. The court may refuse to enter a partial or full satisfaction of the judgment until an accompanying order requiring payment of waived fees and costs has been satisfied. (*Govt.C. 68637(b)(1).*)

A party petitioning the court to enter the satisfaction of judgment must declare, under penalty of perjury, that an order requiring the payment of waived fees and costs has been satisfied. (*Govt.C. 68637(b)(2).*)

Govt.C. 68637(b) does not apply to any of the following: (a) unlawful detainer cases; (b) family law matters, for which recovery of fees is subject to *Govt.C. 68637(d)* and (e) (see Supp., infra, §429K); (c) cases in which the judgment or dismissal is entered against a party whose fees and costs were initially waived. (*Govt.C. 68637(b)(3).*)

(2) *Repayment From Recovery and Lien.* If a party in a civil case whose trial court fees and costs were initially waived recovers \$ 10,000 or more in value by way of settlement, compromise, arbitration award, mediation settlement, or other recovery, the waived fees and costs must be paid to the court out of that recovery. (*Govt.C. 68637(c).*)

The court has a lien on the recovery in the amount of all the court fees and costs initially waived. (*Govt.C. 68637(c)(1).*) The waived fees and costs must be paid to the court before the party whose fees and costs were waived receives anything of value under the recovery. (*Govt.C. 68637(c)(2).*) Notice of the lien must be given to the parties under rules and on forms adopted by the Judicial Council, and the Judicial Council must provide by rule the procedures by which a party subject to a lien may determine the amount of the lien. (*Govt.C. 68637(c)(3).*)

The court may refuse to dismiss the case until the lien is satisfied. A party filing a petition for dismissal must declare, under penalty of perjury, that the lien has been paid, or that any recovery has a value of less than \$ 10,000. (*Govt.C. 68637(c)(4).*) In a case in which an initial waiver of fees and costs was granted, or if a petition to dismiss the

case is filed without the declaration, the court may issue an order to show cause why the lien should not be enforced and why the court should not enter a judgment making the parties jointly and severally liable to the court for waived fees and costs. (*Govt.C. 68637(c)(5).*)

SUPPLEMENT: [This section is current through the latest supplement]



70 of 190 DOCUMENTS

Witkin California Procedure, Fifth Edition
Copyright (c) 2009 By B.E. Witkin A rticle Sixth Testamentary Trust

CHAPTER IV - Actions

XI. IN FORMA PAUPERIS

E. (New) Revised In Forma Pauperis Statutes.

5. (New) Recovery of Fee Waivers.

b. (New) Family Law Cases.

3 *Witkin Cal. Proc. Actions* § 429K

[§ 429K] (New) Family Law Cases.

(1) *Recovery From Other Party.* If a judgment or an order to pay support is entered in a family law case, the trial court must consider, based on the information in the court file, whether a party who did not receive a fee waiver has the ability to pay all or part of the other party's waived fees. Any order for the payment of the other party's waived fees must be made payable only after all current support and all accrued arrears owed by the party who did not receive the fee waiver have been paid. If the court orders payment of the other party's waived fees, and the party required to pay is not present in court at the time judgment is entered, the party required to pay fees must be given notice and an opportunity for a hearing to request that the court set aside the order to pay fees. A request for a hearing must be made in writing within 30 days after service of the notice of the court order. If a request for hearing is made, the order for payment of initially waived fees may not be enforced until after the hearing. (*Govt.C. 68637(d).*)

(2) *Recovery of Initial Fee Waiver on Changed Circumstances.* If a judgment is entered in a family law case, the trial court must consider, based on the information in the court file, whether a party's circumstances have changed so that it is reasonable to require a party who received an initial fee waiver to pay all or part of the fees that were initially waived. In making this determination, the court must use the criteria for eligibility under *Govt.C. 68632* (see Supp., *infra*, §429C). In considering whether a child or spousal support order constitutes a change of circumstances allowing the party to pay fees, the court also must consider the likelihood that the support obligor will remit the payments ordered by the court. If a support order is the primary basis for the court's finding of changed circumstances, the court must order the support obligor to pay the previously waived fees subject to the provisions of *Govt.C. 68637(d)*. When the court orders the party to pay all or part of the fees that were initially waived, the party required to pay must be given notice and an opportunity for a hearing to request that the court set aside the order to pay fees. A request for a hearing must be made in writing within 30 days after service of the notice of the court order. If a request for a hearing is made, the order for payment of initially waived fees may not be enforced until after the hearing. (*Govt.C. 68637(e).*)

SUPPLEMENT: [This section is current through the latest supplement]



71 of 190 DOCUMENTS

Witkin California Procedure, Fifth Edition
Copyright (c) 2009 By B.E. Witkin A rticle Sixth Testamentary Trust

CHAPTER IV - Actions

XI. IN FORMA PAUPERIS

E. (New) Revised In Forma Pauperis Statutes.

5. (New) Recovery of Fee Waivers.

c. (New) Enforcement.

3 *Witkin Cal. Proc. Actions* § 429L

[§ 429L] (New) Enforcement.

(1) *In General.* The trial court may execute on any order for payment of waived fees and costs in the same manner as on a judgment in a civil action. (*Govt.C. 68638(a).*) The court may issue an abstract of judgment, a writ of execution, or both, for all of the following:

(a) Recovery of the waived fees and costs as ordered. (*Govt.C. 68638(a)(1).*)

(b) Fees for issuing the abstract of judgment, writ of execution, or both. (*Govt.C. 68638(a)(2).*)

(c) A \$ 25 administrative fee. (*Govt.C. 68638(a)(3).*)

(d) An amount due to levying officers for serving and collecting on the judgment that will all be added to the writ of execution. (*Govt.C. 68638(a)(4).*)

(2) *Remittance to Court.* On collection, the waived fees and costs, the fees for issuing the abstract of judgment and writ of execution, and the \$ 25 administrative fee may be remitted to the court. Thereafter, the amount due to the levying officers for serving and collecting on the judgment may be paid. (*Govt.C. 68638(b).*)

SUPPLEMENT: [This section is current through the latest supplement]



72 of 190 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XII. STATUTE OF LIMITATIONS: IN GENERAL

A. Nature of Statute.

1. Types of Limitation Statutes.

3 *Witkin Cal. Proc. Actions* § 430

[§ 430] Types of Limitation Statutes.

(1) *In General*. The collective term "statute of limitations" is commonly applied to a great number of acts that prescribe the periods beyond which actions may not be brought. (See *Utah Property & Cas. Ins. Guaranty Assn. v. United Services Auto. Assn.* (1991) 230 C.A.3d 1010, 1025, 281 C.R. 917 [quoting the text]; *Life Savings Bank v. Wilhelm* (2000) 84 C.A.4th 174, 177, 100 C.R.2d 657, 4 *Summary* (10th), *Security Transactions in Real Property*, §180 [C.C.P. 726(b), imposing 3-month deadline for party to seek deficiency judgment and determination of amount of deficiency (see 4 *Summary* (10th), *Security Transactions in Real Property*, §180), is statute of limitations]; 63 *Harv. L. Rev.* 1177 [Developments in the Law--Statutes of Limitations]; 27 *Hastings L. J.* 1 [Interest Analysis and Conflicts Between Statutes of Limitation]; 28 *Pacific L. J.* 453 [The Puzzling Purposes of Statutes of Limitation]; 37 *Stanf. L. Rev.* 1539 [need to enact comprehensive statute of limitations for lawsuits arising out of defective custom computer systems]; 51 *Am.Jur.2d* (2000 ed.), *Limitation of Actions* §1 et seq.; 17 *Am.Jur. P.P. Forms* (2000 ed.), *Limitation of Actions*, Form 1 et seq.; 12 *Am.Jur. Legal Forms 2d* (1999 ed.), §167:1 et seq.; 4 *Am.Jur. Trials* 441 [solving statute of limitations problems].) (On federal statutes of limitation, see *supra*, §§58, 59.)

(2) *Administrative Proceedings*. The general and special statutes of limitation referring to actions and special proceedings are applicable only to judicial proceedings; they do not apply to administrative proceedings. (*Bold v. Board of Med. Examiners* (1933) 133 C.A. 23, 25, 23 P.2d 826; see *Lam v. Bureau of Sec. & Investigative Services* (1995) 34 C.A.4th 29, 37, 40 C.R.2d 137 [criminal statute of limitations is not applicable to administrative proceedings].)

Limitations periods are, however, provided for in the statutes governing some administrative proceedings. (See, e.g., *B. & P.C.* 10101, 10176, 10177, 10177.5 [acts warranting suspension or revocation of real estate broker's license]; *Lab.C.* 5405 et seq., 2 *Summary* (10th), *Workers' Compensation*, §366 et seq. [workers' compensation proceedings]; *Pub.Util.C.* 735, 736, 737 [rate controversies before Public Utilities Commission]; 51 *A.L.R.4th* 1147 [applicability of statute of limitations or doctrine of laches to proceeding to revoke or suspend license to practice medicine].) And *Cuadra v. Millan* (1998) 17 C.4th 855, 72 C.R.2d 687, 952 P.2d 704, 3 *Summary* (10th), *Agency and Employment*, §318, held that the Labor Commissioner had the implied authority to impose limitations periods for proceedings under *Lab.C.* 98 (employee may seek administrative relief where employer fails to pay wages in amount, time, or manner required by contract or by statute; see 3 *Summary* (10th), *Agency and Employment*, §318 et seq.), even though the statute is silent as to time limitations. (17 C.4th 865.)

If a limitation is not asserted before the administrative tribunal, it is waived and cannot be raised in the superior court in a mandamus proceeding to review the administrative decision. (*Bohn v. Watson* (1954) 130 C.A.2d 24, 36, 278 P.2d 454 [B. & P.C. 10177].) However, unless negated by a specific statutory provision, the general principles governing suspension of the statute or estoppel to plead it (see *infra*, §§694 et seq., 762 et seq.) may be applied to administrative proceedings. (See 2 Am.Jur.2d (2004 ed.), *Administrative Law* §78 et seq.; 2 *Summary* (10th), *Workers' Compensation*, §374 et seq.)

(3) *Enforcement of Lien*. The enforcement of a lien calls for certain distinctions:

(a) There is no general statute of limitations governing actions to foreclose liens. The lien is regarded as incidental to the principal obligation, and is *extinguished* when the statute runs on the principal obligation (which may be one of several periods). (See C.C. 2911.)

(b) A number of special statutes limit actions to foreclose certain kinds of assessment liens. (See C.C. 2911; C.C.P. 329, 330; *infra*, §667.) Another special statute limits the time to foreclose mechanic's liens. (See *infra*, §477.)

(c) Formerly, there was no time limit on the exercise of a power of sale, e.g., under a deed of trust, because the statutes of limitations were held to apply only to *actions*; hence, the former rule that a deed of trust "never outlaws." (See *Flack v. Boland* (1938) 11 C.2d 103, 106, 77 P.2d 1090.) However, the rule was abrogated by the 1982 Legislature: C.C. 882.020(a) now prescribes a maximum time for the enforcement of a deed of trust (see 4 *Summary* (10th), *Security Transactions in Real Property*, §121); and C.C.P. 882.030 provides that the running of the enforcement period has the effect of a complete discharge, hence, reversing the former rule that a deed of trust barred by the statute of limitations could be equitably enforced. (See 4 *Summary* (10th), *Security Transactions in Real Property*, §122.)

(4) *Criminal Cases*. In California the statute of limitations in *criminal cases* is jurisdictional; hence it falls within the classification of limitations on the substantive right (to prosecute the defendant). (See 1 *Cal. Crim. Law* (3d), *Defenses*, §215 et seq. [statute is jurisdictional].) But absence of the defendant tolls the statute of limitations for up to 3 years. (P.C. 803(d); see 63 *Harv. L. Rev.* 1235; 1 *Cal. Crim. Law* (3d), *Defenses*, §229.)

West's Key Number Digest, Limitation of Actions 1 et seq.

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General*. See 12 Am.Jur. Legal Forms 2d (2008 ed.), §167:1 et seq. (2) *Administrative Proceedings*. B. & P.C. 10176, 10177, and 10177.5 no longer contain a limitations period. The limitations period for acts warranting the suspension or revocation of a real estate broker's license is specified in B. & P.C. 10101.



73 of 190 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XII. STATUTE OF LIMITATIONS: IN GENERAL

A. Nature of Statute.

2. Statutory Classification.

3 *Witkin Cal. Proc. Actions* § 431

[§ 431] Statutory Classification.

(1) *In General.* The chief limitations provisions are in *C.C.P.* 312 et seq., but others are scattered throughout the many special codes. The statutes of limitations are not sufficiently detailed to cover all types of actions and proceedings by specific time limits. Most of the actions or proceedings not expressly covered fall within the catch-all provision of *C.C.P.* 343 (infra, §677). Some, however, do not, because (a) an express statute or a policy precludes any limitation; or (b) the limitation is not expressed in terms of a fixed period; or (c) the nature of the right or the circumstances make any limitation improper.

(2) *Classification by Substantive Right.* Limitations are prescribed and classified mainly according to the substantive right involved (e.g., tort, contract) or the nature of the injury (e.g., to person, to personal property, to real property). Torts to the person have extremely short periods (see infra, §552 et seq.); torts to property and causes arising on contract are favored with longer periods (see infra, §§508 et seq., 596 et seq.). (For history, comparative law, and theories of classification of statutes of limitation, see 63 *Harv. L. Rev.* 1177, 1192.)

The applicable statute of limitations depends on the "substance" or "gravamen" of the action rather than on the form of the pleading. (See *Maguire v. Hibernia Savings & Loan Soc.* (1944) 23 *C.2d* 719, 733, 146 *P.2d* 673; *Leeper v. Beltrami* (1959) 53 *C.2d* 195, 213, 1 *C.R.* 12, 347 *P.2d* 12, infra, §§657, 658; *Jefferson v. J.E. French Co.* (1960) 54 *C.2d* 717, 718, 7 *C.R.* 899, 355 *P.2d* 643 ["[T]he nature of the right sued upon, not the form of action or the relief demanded, determines the applicability of the statute of limitations"]; *Reiner v. Hermann* (1947) 79 *C.A.2d* 543, 544, 180 *P.2d* 385 ["the object and purposes of the suit"]; *Edwards v. Fresno Community Hosp.* (1974) 38 *C.A.3d* 702, 704, 113 *C.R.* 579, infra, §649, citing the text; on discussion of forms of action, see supra, §118.)

(3) *Scope of Chapter.* The limitations periods and their application in civil actions and special proceedings are discussed in this chapter; first by a listing under the time periods specified (infra, §474 et seq.), then by the discussion of problems of accrual and application of particular statutes to types or forms of action (infra, §493 et seq.). Also covered in this chapter are conflict of laws (supra, §53 et seq.), legislative and contractual changes (infra, §458 et seq.), and the tolling of the statute (infra, §694 et seq.).

Related matters are considered elsewhere. (On statute in criminal cases, see 1 *Cal. Crim. Law* (3d), *Defenses*, §214

et seq.; on workers' compensation proceedings, see 2 *Summary* (10th), *Workers' Compensation*, §366 et seq.; on pleading statute as defense, and pleading to avoid bar of statute, see 5 *Cal. Proc.* (5th), *Pleading*, §929 et seq.; on trial of special issue under *C.C.P.* 597, see 7 *Cal. Proc.* (5th), *Trial*, §151; on legislative control over procedure generally, see 2 *Cal. Proc.* (5th), *Courts*, §§171, 172.)

SUPPLEMENT: [This section is current through the latest supplement]



74 of 190 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XII. STATUTE OF LIMITATIONS: IN GENERAL

A. Nature of Statute.

3. Statute Affects Remedy Only.

3 *Witkin Cal. Proc. Actions* § 432

[§ 432] Statute Affects Remedy Only.

(1) *Statement of Principle.* A statute of limitations is procedural; it affects the remedy only, not the substantive right or obligation. (See *Chase Sec. Corp. v. Donaldson* (1945) 325 U.S. 304, 65 S.Ct. 1137, 1143, 89 L.Ed. 1628, 1636, *infra*, §460; *Mitchell v. Automobile Owners Indem. Underwriters* (1941) 19 C.2d 1, 4, 118 P.2d 815; *Mudd v. McColgan* (1947) 30 C.2d 463, 467, 183 P.2d 10, *infra*, §458; *Piazza Properties, Ltd. v. Department of Motor Vehicles* (1977) 71 C.A.3d 622, 628, 138 C.R. 357, citing the text; *Nelson v. Flintkote Co.* (1985) 172 C.A.3d 727, 733, 218 C.R. 562, citing the text; 63 *Harv. L. Rev.* 1186; 70 *Harv. L. Rev.* 1471; 27 *Hastings L. J.* 1 [Interest Analysis and Conflicts Between Statutes of Limitation]; 94 *A.L.R.3d* 533 [whether running of statute of limitations on action is bar to arbitration of dispute]; 51 *Am.Jur.2d* (2000 ed.), *Limitation of Actions* §§22, 25 et seq.)

(2) *Rules Derived From Principle.* Several important rules are derived from this principle:

- (a) The defense must be raised by the defendant or is waived. (See *infra*, §440.)
- (b) Its application is ordinarily governed by the law of the forum. (See *supra*, §53 et seq.)
- (c) Legislative extension or curtailment of the period may often be retroactively applied to pending claims. (See *infra*, §458 et seq.)
- (d) In determining the amount in controversy for purposes of jurisdiction, a pleaded claim may be considered even though apparently barred on its face. (See 2 *Cal. Proc.* (5th), *Jurisdiction*, §32.)
- (e) A debt barred by limitations may be revived by a written promise or acknowledgment without new consideration. (See *infra*, §750 et seq.)
- (f) The statute may be tolled (i.e., its operation suspended) by various circumstances, events, or acts. (See *infra*, §694 et seq.)

These fundamental rules are, however, subject to an equally fundamental qualification. A time provision may be so placed or so phrased as to constitute a condition restricting the substantive right rather than as a procedural limitation.

(See *infra*, §441 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]



75 of 190 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XII. STATUTE OF LIMITATIONS: IN GENERAL

A. Nature of Statute.

4. Meritorious or Favored Defense.

a. General Rule.

3 *Witkin Cal. Proc. Actions* § 433

[§ 433] General Rule.

(1) *Nature and Purpose of Rule.* The statute has been generally described as one of "repose," to prevent the assertion of stale claims; and it is said to be "favored by the law" as a meritorious defense. "Statutes of limitation, like the equitable doctrine of laches, in their conclusive effects are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them." (*Order of R. Telegraphers v. Railway Express Agency* (1944) 321 U.S. 342, 64 S.Ct. 582, 586, 88 L.Ed. 788, 792.)

In *Shain v. Sresovich* (1894) 104 C. 402, 38 P. 51, the court quoted from a leading United States Supreme Court decision as follows: "Statutes of limitation are vital to the welfare of society, and are favored in the law. They are found and approved in all systems of enlightened jurisprudence; they promote repose by giving security and stability to human affairs; important public policy lies at their foundation; they stimulate to activity and punish negligence. While time is constantly destroying the evidence of rights, they supply its place by a presumption which renders proof unnecessary." (104 C. 406.) (See *Tynan v. Walker* (1868) 35 C. 634, 643 [opinion refers to "the well known hostility of the courts, at an early day, to Statutes of Limitation," which hostility "no longer exists"]; *Weinberger v. Weidman* (1901) 134 C. 599, 602, 66 P. 869 [policy is for Legislature to determine; court cannot disregard statute]; *Lilly-Brackett Co. v. Sonnemann* (1910) 157 C. 192, 196, 106 P. 715 ["the statute of limitations is to be viewed as a statute of repose, and, as such, is a meritorious defense"]; *Fontana Land Co. v. Laughlin* (1926) 199 C. 625, 636, 250 P. 669; *Neff v. New York Life Ins. Co.* (1947) 30 C.2d 165, 169, 175, 180 P.2d 900; *People v. Universal Film Exchanges* (1950) 34 C.2d 649, 659, 213 P.2d 697; *People v. Honey Lake Valley Irr. Dist.* (1926) 77 C.A. 367, 373, 246 P. 819; *Douglas v. Douglas* (1951) 103 C.A.2d 29, 34, 228 P.2d 603; *Scherer v. Mark* (1976) 64 C.A.3d 834, 844, 135 C.R. 90, citing the text ["The policy behind the statute of limitations is equally as meritorious a consideration as is the policy of trying cases upon their merits"]; 63 Harv. L. Rev. 1185, 1188; 27 *Hastings L. J.* 1 [Interest Analysis and Conflicts Between Statutes of Limitation]; 51 *Am.Jur.2d* (2000 ed.), *Limitation of Actions* §§5, 12.)

(2) *Distinction: Rule Is Not Appropriate for Jury Instruction.* The abstract generalization that the defense is

"meritorious" and "favored" is, however, inappropriate for a jury instruction; it conveys the unsound and misleading impression that the defense is peculiarly favored. (*Hsu v. Mt. Zion Hosp.* (1968) 259 C.A.2d 562, 576, 66 C.R. 659, *infra*, §701.)

SUPPLEMENT: [This section is current through the latest supplement]



76 of 190 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XII. STATUTE OF LIMITATIONS: IN GENERAL

A. Nature of Statute.

4. Meritorious or Favored Defense.

b. Illustrations.

3 *Witkin Cal. Proc. Actions* § 434

[§ 434] Illustrations.

Practical significance is given to the observations in the preceding section by several rules:

(1) *Executor or Administrator Must Plead Statute on Behalf of Estate.* An executor or administrator cannot relinquish the defense of the estate by neglecting to plead the statute. (See *Reay v. Heazleton* (1900) 128 C. 335, 338, 60 P. 977; *Estate of Lucas* (1943) 23 C.2d 454, 466, 144 P.2d 340 [dictum listing cases]; *Hurlimann v. Bank of America* (1956) 141 C.A.2d 801, 806, 297 P.2d 682 [conduct of decedent which might have operated to postpone accrual of cause of action was not basis for estoppel against executor]; 48 *Harv. L. Rev.* 337; 63 *Harv. L. Rev.* 1250 [protection of deceased's good name might justify privilege to pay unless distributees are unanimously opposed]; 8 *A.L.R.2d* 660 [waiver prohibited].)

(2) *Statute May Be Raised on Vacation of Default Judgment.* The defense may be set up after a default has been vacated. (See *Lilly-Brackett Co. v. Sonnemann* (1910) 157 C. 192, 196, 106 P. 715; *Denke v. Bowes* (1947) 77 C.A.2d 642, 644, 176 P.2d 81.)

(3) *Amendment May Be Allowed To Plead Statute.* An amendment to plead the statute may be allowed, even after trial. (See *Wrightson v. Dougherty* (1936) 5 C.2d 257, 265, 54 P.2d 13; *People v. Honey Lake Valley Irr. Dist.* (1926) 77 C.A. 367, 373, 246 P. 819; *Schriber v. Alameda County-East Bay Title Ins. Co.* (1958) 156 C.A.2d 700, 708, 320 P.2d 82; 29 *Cal. L. Rev.* 217; 59 *A.L.R.2d* 169 [amendment of pleadings to assert statute of limitations]; 5 *Cal. Proc.* (5th), *Pleading*, §1199; but see *L. B. Laboratories v. Mitchell* (1952) 39 C.2d 56, 61, 244 P.2d 385 [trial court has discretion to refuse to allow amendment]; *Vedder v. Superior Court* (1967) 254 C.A.2d 627, 629, 62 C.R. 222, 5 *Cal. Proc.* (5th), *Pleading*, §1203 [same]; *Hopkins v. Hopkins* (1953) 116 C.A.2d 174, 180, 253 P.2d 723 [trial court abused discretion in denying leave to correct mistake of form].)

(4) *Effect of Debt Barred by Statute.* Another impressive illustration of the favored defense theory is the situation where a debtor, e.g., a child, relative, or friend, owes money to a creditor who later dies leaving a legacy to the debtor. If the debt becomes barred by limitations, neither the creditor nor his or her personal representative may sue on the claim. May the personal representative nevertheless deduct the barred debt from the legacy? This would in effect allow a

defendant (the estate) to cross-complain against a plaintiff (the legatee) on a barred claim, which is ordinarily not permitted. (See *infra*, §448.) In some jurisdictions on "equitable" grounds the setoff is permitted; but in others, including California, the bar of limitations is recognized in this situation as in any other. (See *Estate of Schaeffer* (1921) 53 C.A. 493, 495, 200 P. 508; 63 Harv. L. Rev. 1246; 14 Summary (10th), *Wills and Probate*, §642.)

(5) *Statute With Public Policy Objective*. The defense is specially favored where the particular statute of limitations has a public policy objective. (*California Bank v. Stimson* (1949) 89 C.A.2d 552, 555, 201 P.2d 39 [short period on action for deficiency after foreclosure, intended to protect debtors; express waiver held void].) And where the federal Government has waived its sovereign immunity and allowed suit against itself, the statute of limitations will be construed strictly in its favor. (*McMahon v. United States* (1951) 342 U.S. 25, 72 S.Ct. 17, 19, 96 L.Ed. 26, 30.)

(6) *Effect of Revival of Corporate Powers Suspended for Nonpayment of Taxes*. A revival of corporate powers suspended for nonpayment of the franchise tax does not apply retroactively to avoid the running of the statute during the period of suspension. (*Welco Const. v. Modulux* (1975) 47 C.A.3d 69, 73, 120 C.R. 572.)

Similarly, the statute of limitations is not equitably tolled (see *infra*, §694 et seq.) during the time that a defendant's corporate powers are suspended for nonpayment of taxes under Rev.C. 23301 (see 9 Summary (10th), *Corporations*, §222 et seq.). (*Grell v. Laci Le Beau Corp.* (1999) 73 C.A.4th 1300, 1304, 87 C.R.2d 358 [plaintiffs' wrongful death action filed against suspended corporate defendant was time-barred].)

SUPPLEMENT: [This section is current through the latest supplement]



77 of 190 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XII. STATUTE OF LIMITATIONS: IN GENERAL

A. Nature of Statute.

4. Meritorious or Favored Defense.

c. Effect of Change in Case Law.

1. General Rule: No Tolling of Statute.

3 Witkin Cal. Proc. Actions § 435

[§ 435] General Rule: No Tolling of Statute.

A change in legal precedent does not call for tolling of the statute of limitations. In *Monroe v. Trustees of the Calif. State Colleges* (1971) 6 C.3d 399, 99 C.R. 129, 491 P.2d 1105, petitioner, a college professor, was discharged in 1950 for refusal to sign a statutory loyalty oath. The statute was upheld in *Pockman v. Leonard* (1952) 39 C.2d 676, 249 P.2d 267, and petitioner did not seek judicial review of his own dismissal. In *Vogel v. Los Angeles* (1967) 68 C.2d 18, 64 C.R. 409, 434 P.2d 961, the Supreme Court held the oath unconstitutional, overruling *Pockman*. In March 1968, petitioner sought reinstatement and reimbursement for lost salary and pension rights. His claim was rejected by defendant trustees in April 1968, and in December 1968, he filed a petition for mandamus in the superior court. If the statute of limitations ran from September 1953, when his dismissal became final, the claim was barred; if it did not run until April 1968, when the trustees denied reinstatement, it was timely. *Held*, the claim for back pay was barred but the claim for reinstatement was not.

(a) *Decision in ordinary civil case does not revive barred claim.* "The normal 'retroactivity' of most civil decisions has never been thought to supersede the operation of the statute of limitations so as to revive old claims which were not pursued because of a previously prevailing contrary rule of law, or to reincarnate dead causes which had fallen to the sword of the statute. Instead, the retroactive application of a judicial decision has traditionally meant only that the rule of law established by the new decision governs events occurring prior to the date of decision, *when such events are at issue in timely filed actions.*" (6 C.3d 406.) Retroactive application of decisions in criminal cases is distinguishable. Courts have long found it appropriate to grant the benefits of a change in constitutional standards to imprisoned individuals even though the time to challenge the conviction had expired. But this is largely due to the unique nature of the writ of habeas corpus and the understandable view that it is improper to keep a person in prison for violation of a statute after it has been declared unconstitutional. (6 C.3d 406, footnote 3.)

(b) *Decision affording grounds for reinstatement is retroactive.* The cause of action based on refusal to reinstate did not accrue until the basis of his discharge was removed by the decision and the right to reinstatement arose (see *Lerner v. Los Angeles City Bd. of Education* (1963) 59 C.2d 382, 29 C.R. 657, 380 P.2d 97, *infra*, §730). Thus, even though this is a civil and not a criminal case, "the relief afforded petitioner from the continuing disabilities of the earlier

unconstitutional action is somewhat analogous to the release of a prisoner, through habeas corpus, under a 'fully retroactive' criminal decision." (6 C.3d 406, footnote 3.) (See *Bartalo v. Superior Court* (1975) 51 C.A.3d 526, 531, 124 C.R. 370, 5 Cal. Proc. (5th), Pleading, §1224.)

SUPPLEMENT: [This section is current through the latest supplement]



78 of 190 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XII. STATUTE OF LIMITATIONS: IN GENERAL

A. Nature of Statute.

4. Meritorious or Favored Defense.

c. Effect of Change in Case Law.

2. Illustration: Product Liability Action.

3 *Witkin Cal. Proc. Actions* § 436

[§ 436] Illustration: Product Liability Action.

In *Jolly v. Eli Lilly & Co.* (1988) 44 C.3d 1103, 245 C.R. 658, 751 P.2d 923, plaintiff, who suffered injuries resulting from her mother's ingestion of the drug DES, sought to avoid the bar of the statute of limitations on three theories (see *infra*, §§500, 736). One theory was that, prior to the decision in *Sindell v. Abbott Laboratories* (1980) 26 C.3d 588, 163 C.R. 132, 607 P.2d 924, 6 Summary (10th), *Torts*, §1486, the defective "product" was defined as the specific DES pills her mother ingested, and that *Sindell* redefined that product as "generic DES," making all manufacturers of DES contributors to her injury. Defendants argued that *Sindell* merely shifted the burden of proof. *Held*, the action was barred; "we did not create an entirely new tort, nor identify a new 'product.' "

(a) "*Sindell* merely bridged the causal gap between DES manufacturers as a group and plaintiff's injury. Where the actual manufacturer of the ingested DES is unknown, causation by joined manufacturers of a substantial share of the DES that a plaintiff's mother might have taken would be presumed, subject, of course, to each drug manufacturer's ability to rebut the presumption by proving that the actual pills in question were not its product. ... [U]nder plaintiff's theory carried to its logical extreme all drug companies would be liable even if plaintiff knew the actual manufacturer of the drug." (44 C.3d 1115.)

(b) Plaintiff also argued that, prior to *Sindell*, she could not have prevailed in her action. But a change in either statute or case law does not revive claims otherwise barred. (44 C.3d 1116, citing and discussing *Monroe v. Trustees of the Calif. State Colleges* (1971) 6 C.3d 399, 99 C.R. 129, 491 P.2d 1105, *supra*, §435, and other cases.) "In all of the above-cited cases, the court recognized that the rule may work a harsh result. Nevertheless, it is justified in three ways. First, the rule encourages people to bring suit to change a rule of law with which they disagree, fostering growth and preventing legal stagnation. Second, the statute of limitations is not solely a punishment for slow plaintiffs. It serves the important function of repose by allowing defendants to be free from stale litigation, especially in cases where evidence might be hard to gather due to the passage of time. Third, to hold otherwise would allow virtually unlimited litigation every time precedent changed. ... Courts simply are not equipped to handle cases dating back many years, eventually brought because the law has changed. This prohibition against revival of claims can obviously create a hardship on such unfortunate plaintiffs (and a windfall to fortunate defendants). However, the hardship is no greater than that incurred by

plaintiffs who received an adverse final judgment based on the 'old' law and are barred from relitigating their case by res judicata." (44 C.3d 1116, 1117.)

(c) Plaintiff could have filed a timely complaint against Does under C.C.P. 474, after which she would have had 3 years to identify and serve the defendant, thus effectively enlarging the statute of limitations for 3 years; and, had she done so, her complaint would have been pending when *Sindell* was decided. (44 C.3d 1118.)

SUPPLEMENT: [This section is current through the latest supplement]



79 of 190 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XII. STATUTE OF LIMITATIONS: IN GENERAL

A. Nature of Statute.

4. Meritorious or Favored Defense.

c. Effect of Change in Case Law.

3. Illustration: Action Alleging Violation of Proposition 62.

3 *Witkin Cal. Proc. Actions* § 437

[§ 437] Illustration: Action Alleging Violation of Proposition 62.

In 1986, the voters approved Proposition 62, which resulted in statutes being passed that prohibited a general tax unless approved by the local electorate. (See *Govt.C. 53720 et seq.*, 9 *Summary* (10th), *Taxation*, §131.) This aspect of the proposition was held unconstitutional by two Court of Appeal decisions shortly after it was adopted. (See *Westminster v. Orange* (1988) 204 C.A.3d 623, 251 C.R. 511, and *Woodlake v. Logan* (1991) 230 C.A.3d 1058, 282 C.R. 27, 9 *Summary* (10th), *Taxation*, §137.) However, in 1995, the Supreme Court ruled that the proposition was constitutional. (See *Santa Clara County Local Trans. Authority v. Guardino* (1995) 11 C.4th 220, 45 C.R.2d 207, 902 P.2d 225, 9 *Summary* (10th), *Taxation*, §134.)

In *McBrearty v. Brawley* (1997) 59 C.A.4th 1441, 69 C.R.2d 862, 9 *Cal. Proc.* (5th), *Appeal*, §548, 9 *Summary* (10th), *Taxation*, §137, defendant city, without voter approval, passed an ordinance in 1991 establishing a general utility tax payable into the general fund. In 1996 plaintiff filed a petition for a writ of mandamus, alleging that defendant was required by Proposition 62 to submit the tax to a public vote, and seeking to enjoin defendant from collecting the tax pending the vote. *Held*, plaintiff's action was timely.

(a) The 3-year statute of limitations governing a liability created by statute applied here (*C.C.P. 338(a)*; see *infra*, §§664 et seq., 684). (59 C.A.4th 1446.) Plaintiff's claim did not begin to run in 1991, when defendant adopted the tax ordinance, but rather in 1995, when *Guardino* validated Proposition 62 and thus established defendant's duty to conduct an election. (59 C.A.4th 1447.)

(b) Generally, a change in the law does not revive claims otherwise barred by the statute of limitations. (59 C.A.4th 1446, citing *Monroe v. Trustees of the Calif. State Colleges* (1971) 6 C.3d 399, 99 C.R. 129, 491 P.2d 1105, *supra*, §435.) "However, strict application of the general rule in this case would have required [plaintiff] to bring a lawsuit challenging the validity of the tax at a time when the legal landscape suggested her only chance of success would be upon review of the issue by the California Supreme Court. Short of such a herculean effort, the City could at no time have been compelled to conduct an election for the tax in question. This result would essentially thwart the intent of the electorate in passing Proposition 62, despite the confirmation of the validity of the initiative provisions in *Guardino*."

(59 C.A.4th 1447.)

By a unanimous decision, the California Supreme Court disapproved the reasoning of *McBrearty*, but reached the same result on a different theory, in *Howard Jarvis Taxpayers Assn. v. La Habra* (2001) 25 C.4th 809, 107 C.R.2d 369, 23 P.3d 601. Plaintiffs, three taxpayer advocacy groups and three individual taxpayers, brought an action against defendant city seeking (a) a declaration that its utility tax was invalid as violative of Proposition 62, (b) an injunction against its enforcement, and (c) a writ of mandamus compelling defendant to cease collecting the tax until it was approved by a majority of the voters. Defendant claimed that the action accrued on the date the ordinance authorizing the tax was enacted, and that the action was therefore untimely, because it was filed more than 3 years after that date. Plaintiffs alleged that the action was timely on alternative theories: first, that accrual was delayed until *Guardino* upheld the constitutionality of Proposition 62; second, that the limitations period started to run anew each month that the tax was collected. *Held*, plaintiffs' second theory was correct and the action was timely.

(a) *Delayed accrual was not proper.* Plaintiffs may have been discouraged by adverse appellate decisions, but they were not precluded from bringing an action against defendant at the time the ordinance was enacted. A holding to the contrary would be inconsistent with the principle that a change in the substantive law governing a cause of action does not revive a claim otherwise barred by the statute of limitations. (25 C.4th 815, following *Monroe* and *Jolly v. Eli Lilly & Co.* (1988) 44 C.3d 1103, 245 C.R. 658, 751 P.2d 923, *supra*, §436, and disagreeing with *McBrearty*.) Also, plaintiffs' other claim for delayed accrual was incorrect, i.e., that a tax put into force without required voter approval has never been enacted, and therefore its validity cannot be challenged. (25 C.4th 818.)

(b) *Continuous accrual was proper.*

(1) Although plaintiffs had refrained from pursuing a refund claim, they nonetheless were entitled to base the timeliness of their claims for declaratory and mandamus relief, both challenging the validity of the ordinance's enactment and continued collection, on the tax's ongoing collection. (25 C.4th 820.)

(2) The lack of an outstanding refund claim is a distinction without a difference, because the claim did not affect the choice or application of the limitations period applicable to plaintiffs' mandamus and declaratory relief claims. Both of those claims to enforce a statutory liability must be brought within the 3-year period of C.C.P. 338(a). "That plaintiffs could have brought an action for declaratory judgment at the time of the Ordinance's enactment, before the City began actually collecting its tax, does not imply such an action was untimely because brought later, at a time when the City had collected the tax for some years and was continuing to do so. So long as an action for refund or injunction could have been brought during the period of continued collection, so could an action for declaratory relief." (25 C.4th 821.)

(3) Because the continuous accrual rule relates only to injuries occurring in the statutory 3-year period before the action was brought and applies only to plaintiffs injured by tax collections within that period, the legitimate public interest in stability of municipal finance is not imperiled. (25 C.4th 825.)

SUPPLEMENT: [This section is current through the latest supplement]



80 of 190 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XII. STATUTE OF LIMITATIONS: IN GENERAL

A. Nature of Statute.

5. Technical or Disfavored Defense.

3 *Witkin Cal. Proc. Actions* § 438

[§ 438] Technical or Disfavored Defense.

(1) *Technical Defense.* As might be expected, the broad declarations on the "meritorious defense" (supra, §433) are sometimes contradicted by statements to the effect that the statute is a "technical" defense to be strictly construed so as to avoid a "forfeiture" of rights. In *Bollinger v. National Fire Ins. Co. of Hartford, Connecticut* (1944) 25 C.2d 399, 154 P.2d 399, infra, §739, the court observed that "[s]tatutes of limitations are not so rigid as they are sometimes regarded," that "[i]t is established that the running of the statute of limitations may be suspended by causes not mentioned in the statute itself," and that "equitable considerations" justified relief under the circumstances against "this technical defense" that would have enabled the defendant "to obtain an unconscionable advantage and enforce a forfeiture." (25 C.2d 411.) (See *Chase Sec. Corp. v. Donaldson* (1945) 325 U.S. 304, 65 S.Ct. 1137, 1142, 89 L.Ed. 1628, 1635, infra, §460; *California Savings & Loan Soc. v. Culver* (1899) 127 C. 107, 111, 59 P. 292 [court must keep in mind aspect of statute "as an obstacle to just claims" and in doubtful case "will not indulge in a strained construction" to support its defense]; *Los Angeles v. Security First Nat. Bank of Los Angeles* (1948) 84 C.A.2d 575, 580, 191 P.2d 78 [same]; *L. B. Laboratories v. Mitchell* (1952) 39 C.2d 56, 61, 244 P.2d 385 [upholding denial of leave to amend to plead correct statute after mistakenly pleading wrong one]; *Freeman v. Donohoe* (1923) 65 C.A. 65, 82, 223 P. 431 ["statutes of limitation ... are not specially favored and esteemed" and "courts are very loath to permit amendments" to plead them]; *Overton v. White* (1937) 18 C.A.2d 567, 65 P.2d 99 [upholding denial of leave to amend to correct defective pleading of statute]; *Vedder v. Superior Court* (1967) 254 C.A.2d 627, 629, 62 C.R. 222 [not disfavored defense, but trial judge has discretion to refuse leave to plead it where defendant's conduct was inequitable; see 5 *Cal. Proc.* (5th), *Pleading*, §1203].)

(2) *Disfavored Defense.* The notion of a "disfavored defense" is particularly compelling when the Bar is invoked in a "favored proceeding." Thus, an extremely liberal interpretation will be indulged in favor of the claimant in a workers' compensation proceeding. (*Bianco v. Industrial Acc. Com.* (1944) 24 C.2d 584, 589, 590, 150 P.2d 806.)

Invocation of the statute as a defense also is disfavored where the party is favored, e.g., a minor. (See *Williams v. Los Angeles Metropolitan Transit Authority* (1968) 68 C.2d 599, 609, 68 C.R. 297, 320, 440 P.2d 497; infra, §741.) And the rule that an executor or administrator must set up the defense on behalf of the estate is not an objection to compromise of a claim that might perhaps be subject to the defense, for compromise may be more advantageous than litigation. (*Estate of Lucas* (1943) 23 C.2d 454, 466, 144 P.2d 340.) (See *Lackner v. LaCroix* (1979) 25 C.3d 747, 751,

159 C.R. 693, 602 P.2d 393, 5 Summary (10th), *Torts*, §502 [for purpose of applying rule of favorable termination in malicious prosecution action, termination by defense of statute of limitations is deemed technical or procedural as distinguished from substantive termination].)

In view of the long and authoritative recognition of the meritorious nature of the defense (see *supra*, §§433, 434), it would seem wise to discount the occasional disparaging remarks. Most of the decisions can be explained, without reference to the disfavored defense theory, as (a) cases involving interpretation of the statute in accordance with the usual rules of construction; (b) cases applying statutory or judicial exceptions to the running of the statute (*infra*, §694 et seq.); (c) cases holding that it is a defense only and cannot be used affirmatively (*infra*, §439); and (d) cases holding that it must be specially pleaded (see 5 *Cal. Proc.* (5th), *Pleading*, §§962, 1117).

SUPPLEMENT: [This section is current through the latest supplement]



81 of 190 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XII. STATUTE OF LIMITATIONS: IN GENERAL

A. Nature of Statute.

6. A "Shield" and Not a "Sword."

3 *Witkin Cal. Proc. Actions* § 439

[§ 439] A "Shield" and Not a "Sword."

(1) *Statement of Rule.* The statute may be used only as a "shield" and not as a "sword," i.e., it can only be set up as a defense to an action on an obligation, and cannot be invoked affirmatively by a debtor plaintiff as the foundation of a right. The principal illustrations are equitable actions by a pledgor or mortgagor to quiet title to mortgaged property or prevent a pledge sale after the statute has run on the debt; but the doctrine has been applied in other equitable actions. It rests on the equitable principle that one who seeks equity must do equity. (See *Puckhaber v. Henry* (1907) 152 C. 419, 423, 93 P. 114; *Raisch v. Myers* (1946) 27 C.2d 773, 779, 167 P.2d 198; *Lackner v. LaCroix* (1979) 25 C.3d 747, 752, 159 C.R. 693, 602 P.2d 393, 5 *Summary* (10th), *Torts*, §502, quoting the text; *Bradley Co. v. Ridgeway* (1936) 14 C.A.2d 326, 336, 58 P.2d 194; *Olinda Irr. Lands Co. v. Yank* (1938) 27 C.A.2d 56, 61, 80 P.2d 170; 63 *Harv. L. Rev.* 1248.)

(2) *Tax Cases.* The problem has arisen in tax cases where the taxpayer seeks to recover in quasi-contract for an overpayment, but challenges the government's claim for recoupment of another unpaid tax liability on which the statute has run. The recoupment is allowed because in "assumpsit" the plaintiff may recover only on the ground of unjust enrichment, by showing that the plaintiff has paid more than he or she should have, in equity and good conscience. (See *Stone v. White* (1937) 301 U.S. 532, 57 S.Ct. 851, 853, 81 L.Ed. 1265, 1269.)

In *Northrop Aircraft v. California Emp. Stabilization Com.* (1948) 32 C.2d 872, 198 P.2d 898, the court refused to apply this principle to a case where defendant Commission assessed an unemployment insurance tax at too low a rate, and made a corrected assessment after the period allowed by statute for the assessment had elapsed. The taxpayer paid the higher tax under protest and in this action was held entitled to recover. "[T]here is no doctrine of recoupment or of permissible redetermination of the tax liability which will bestow power on the taxing body to make an assessment when the exercise of that power in respect to a particular tax has been terminated by statutory provision." Also, "[F]ailure to comply with the statute deprived the plaintiff of the due process thus provided and rendered the belated assessment a nullity." (32 C.2d 881.) The distinction that the court makes appears to be this: (a) a validly assessed tax, the collection of which is barred by limitations, may be pleaded in recoupment; (b) but a purported tax, imposed after expiration of the right (power) to assess it, is not merely barred by limitations; it is void and cannot be the basis of an affirmative or defensive claim.

SUPPLEMENT: [This section is current through the latest supplement]



82 of 190 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XII. STATUTE OF LIMITATIONS: IN GENERAL

A. Nature of Statute.

7. Personal Privilege: Waiver by Defendant.

3 *Witkin Cal. Proc. Actions* § 440

[§ 440] Personal Privilege: Waiver by Defendant.

(1) *Methods of Waiver.* The statute affects the remedy only and gives the debtor a personal privilege that the debtor may or may not choose to exercise. Hence, the debtor may waive the defense, by either of two methods:

(a) Expressly in advance, by contract or other stipulation. (See *Glassell v. Glassell* (1905) 147 C. 510, 82 P. 42 [testator-debtor may waive statute by provision in will, and bind executor to pay]; *infra*, §468.)

(b) By failure to plead it in the creditor's action. (See *Mitchell v. County Sanitation Dist. Number One of Los Angeles* (1957) 150 C.A.2d 366, 371, 309 P.2d 930; *Travelers Indem. Co. of Hartford, Connecticut v. Bell* (1963) 213 C.A.2d 541, 547, 29 C.R. 67; *Getz v. Wallace* (1965) 236 C.A.2d 212, 213, 45 C.R. 910, citing the text; *Mysel v. Gross* (1977) 70 C.A.3d Supp. 10, 15, 138 C.R. 873 [pleading wrong statute of limitations was waiver]; 63 *Harv. L. Rev.* 1198; 104 *A.L.R.5th* 331 [insurer's waiver of statute of limitations]; 51 *Am.Jur.2d* (2000 ed.), *Limitation of Actions* §370 et seq.; 5 *Cal. Proc.* (5th), *Pleading*, §§962, 1117.) (On federal practice, see *F.R. Civ. P., Rules* 8(b), 8(c); 5 *Federal Practice & Procedure* (Wright & Miller) §1270; 27 *Federal Procedure*, L.Ed. §§62:81, 62:83.)

(2) *Waiver by Third Party.* Because the defense is personal to the debtor, a third person not in privity with the debtor cannot complain of the failure to set it up, even though the third person is adversely affected. (See *Goldberg, Bowen & Co. v. Demick* (1926) 77 C.A. 535, 540, 247 P. 261 [judgment creditor's action to set aside debtor's fraudulent conveyance; subsequent transferees from grantee could not raise statute where debtor did not]; *Cunha v. Cunha* (1935) 8 C.A.2d 413, 416, 48 P.2d 130 [divorce action involving division of property; defendant husband was entitled to assert his liability on barred promissory note, and plaintiff wife could not compel him to set up defense of limitations]; 63 *Harv. L. Rev.* 1250; 71 *A.L.R.2d* 1049 [creditor ordinarily cannot set up statute against another creditor].)

However, this rule does not extend to third persons who have subsequently acquired interests in secured property. Those persons may invoke the defense even though the senior creditor and the debtor have agreed between themselves to waive the statute. Nevertheless, a junior creditor's technical right to standing will have no effect on a senior creditor's security interest, where the case does not deal with a debt barred by the statute of limitations. (*Kaichen's Metal Mart v. Ferro Cast Co.* (1995) 33 C.A.4th 8, 12, 39 C.R.2d 233 [debtor's waiver of statute by acknowledging debt to senior lienholder was effective to preclude junior lienholder's assertion of statute in its subsequent action to declare senior lien

invalid].)

(3) *Waiver by Governmental Agency.* A governmental agency may waive the defense by failure to plead it, in the same manner as a private person. (*Mitchell v. County Sanitation Dist.*, *supra* [defendant district had funds collected for purpose of paying bond coupons; its attorney advised trial judge that it desired to honor outlawed claims].)

SUPPLEMENT: [This section is current through the latest supplement]



83 of 190 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XII. STATUTE OF LIMITATIONS: IN GENERAL

B. Distinctions.

1. Statute Affecting Substantive Right.

a. Significance of Distinction.

3 *Witkin Cal. Proc. Actions* § 441

[§ 441] Significance of Distinction.

(1) *Nature of Distinction.* For various reasons of policy, some time provisions, although in form similar to statutes of limitation, are treated as conditions on the substantive right, i.e., they cause the right that previously arose and on which an action could have been maintained, to expire. (See *Williams v. Pacific Mut. Life Ins. Co.* (1986) 186 C.A.3d 941, 949, 231 C.R. 234, quoting the text; 63 *Harv. L. Rev.* 1186 [origin of distinction and difficulties involved in rigid right-remedy analysis]; 27 *Hastings L. J.* 1 [Interest Analysis and Conflicts Between Statutes of Limitation]; 2 *Stanf. L. Rev.* 793; 51 *Am.Jur.2d* (2000 ed.), *Limitation of Actions* §§10, 11.)

(2) *Effects of Distinction.* This distinction has a number of significant effects:

(a) Limitations on the right are governed by the law of the state that created it, not the law of the forum. (See *supra*, §57.)

(b) The defense of the statute of limitations must be specially pleaded or otherwise appropriately raised by the defendant; but where a substantive time limit is involved, the plaintiff must allege facts showing that the right has not expired. (See 63 *Harv. L. Rev.* 1198.)

(c) The defense of the statute of limitations may be "waived" by contract (*infra*, §468); but the waiver of a condition on a right is sometimes held void. (See *Midstate Horticultural Co. v. Pennsylvania R. Co.* (1943) 320 U.S. 356, 64 S.Ct. 128, 129, 88 L.Ed. 96, 99, reversing *Pennsylvania R. Co. v. Midstate Horticultural Co.* (1942) 21 C.2d 243, 131 P.2d 544.)

(d) Legislation changing a statute of limitations may often be retroactively applied, but due process prevents the retroactive revival of an expired right. (See *Chase Sec. Corp. v. Donaldson* (1945) 325 U.S. 304, 65 S.Ct. 1137, 1142, 89 L.Ed. 1628, 1635, *infra*, §460; 63 *Harv. L. Rev.* 1189, 1191.)

(3) *Tolling Is Applicable.* A substantive time limit may be tolled in the same manner as a statute of limitations. (See *infra*, §444.)

SUPPLEMENT: [This section is current through the latest supplement]



84 of 190 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XII. STATUTE OF LIMITATIONS: IN GENERAL

B. Distinctions.

1. Statute Affecting Substantive Right.
- b. Limitation Affecting Property Right.

3 *Witkin Cal. Proc. Actions* § 442

[§ 442] Limitation Affecting Property Right.

(1) *Adverse Possession*. The typical early example of a limitation causing the right to expire is the time for the true owner to recover property held in adverse possession. Compliance with the conditions of adverse possession for the statutory period vests title in the possessor and divests the true owner of his substantive property right. (See 63 *Harv. L. Rev.* 1187; 12 *Summary* (10th), *Real Property*, §§212, 229.)

(2) *Escheat Statutes*. Similar time provisions with substantive effect are found in escheat statutes. (See, e.g., *Prob.C.* 11903 [escheat to state where no heirs; if property is not claimed within 5-year period it "vests absolutely in the State"]; 14 *Summary* (10th), *Wills and Probate*, §98 et seq.)

(3) *Exception: Enforcement of Mechanics' Liens*. C.C. 3144, specifying a 90-day period for commencing proceedings for the enforcement of mechanics' liens, is a statute of limitations, because the Constitution establishes the lien, and the Legislature consequently could only deal with the remedy. (*Robinson v. S & S Dev.* (1967) 256 C.A.2d 13, 15, 63 C.R. 663 [involving prior statute, C.C.P. 1198.1]; *Petersen v. W.T. Grant Co.* (1974) 41 C.A.3d 217, 221, 222, 115 C.R. 874 [following *Robinson*, and citing the text; waiver by failure to plead].)

SUPPLEMENT: [This section is current through the latest supplement]



85 of 190 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XII. STATUTE OF LIMITATIONS: IN GENERAL

B. Distinctions.

1. Statute Affecting Substantive Right.
- c. Limitation in Statute Creating Right.

3 *Witkin Cal. Proc. Actions* § 443

[§ 443] Limitation in Statute Creating Right.

(1) *Nature of Distinction.* If the Legislature creates a right or liability unknown at common law and, in the same statute, fixes a limitations period, the time provision is usually considered substantive. Typical examples are statutes imposing liability on directors or shareholders, and statutes imposing penalties or penal damages for violation. (See *Midstate Horticultural Co. v. Pennsylvania R. Co.* (1943) 320 U.S. 356, 64 S.Ct. 128, 129, 88 L.Ed. 96, 99 [Interstate Commerce Act]; *Roberts v. Title Ins. & Trust Co.* (1936) 6 C.2d 373, 57 P.2d 916 [90-day period to petition for relief under former Mortgage Moratorium Act]; *Ohio v. Porter* (1942) 21 C.2d 45, 53, 129 P.2d 691 [dissent]; *Mudd v. McColgan* (1947) 30 C.2d 463, 466, 183 P.2d 10, *infra*, §458 [stating rule, but holding particular time period for enforcement of tax to be statute of limitations]; *Gorbacheff v. Justice's Court* (1947) 31 C.2d 178, 180, 187 P.2d 407 [tenant's right, under federal price control act, to recover treble damages for rent overcharges; time period was jurisdictional]; *Dandini v. Dandini* (1947) 82 C.A.2d 263, 274, 186 P.2d 41 [usury law penalty]; *Goodwin v. Alston* (1952) 114 C.A.2d 713, 719, 250 P.2d 722 [same]; *Williams v. Pacific Mut. Life Ins. Co.* (1986) 186 C.A.3d 941, 949, 231 C.R. 234, quoting the text [statute of limitations for action under Fair Employment and Housing Act]; 63 *Harv. L. Rev.* 711 [Federal Employers' Liability Act]; 2 *Stanf. L. Rev.* 793 [same]; 63 *Harv. L. Rev.* 1187, 1261.)

In *Adams v. Albany* (1954) 124 C.A.2d 639, 269 P.2d 142, 40 sets of plaintiffs who had entered into agreements to purchase houses from defendants sued to recover amounts charged in excess of the maximum prices fixed by the Veterans' Emergency Housing Act of 1946. *Held*, the action on this cause of action, filed after the 1-year period allowed, was barred despite allegations of fraudulent concealment. The statute created a new right in favor of a special group, and the time limit was a condition on its exercise. (124 C.A.2d 643.)

(2) *Exceptions.* In *Myers v. Stevenson* (1954) 125 C.A.2d 399, 270 P.2d 885, the 1941 amendment to former C.C. 29 (now C.C. 43.1 and C.C.P. 340.4; see *infra*, §589), fixing a 6-year period on an action for injury to an unborn child, was held to be a statute of limitations, even though the period was added to the section that had previously been held to constitute the basis for the right. The court observed that the fact that the limitation is in the same statute is persuasive but not conclusive. And the express legislative provision that disabilities in C.C.P. 352 should not extend the time was considered an indication that the statute was procedural and that the time could be extended for other reasons (here inability to discover facts of malpractice by the exercise of reasonable diligence). (125 C.A.2d 405.)

In some jurisdictions, statutes creating liability for wrongful death are within this class (see 22A *Am.Jur.2d* (2003 ed.), *Death* §§54, 55), but the California statute of limitations (*infra*, §560) is not a part of the wrongful death section and is purely procedural. (*Wohlgemuth v. Meyer* (1956) 139 C.A.2d 326, 327, 293 P.2d 816.)

SUPPLEMENT: [This section is current through the latest supplement]



86 of 190 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XII. STATUTE OF LIMITATIONS: IN GENERAL

B. Distinctions.

1. Statute Affecting Substantive Right.

d. Tolling Substantive Time Limit.

3 *Witkin Cal. Proc. Actions* § 444

[§ 444] Tolling Substantive Time Limit.

(1) *California Law*. In some jurisdictions, circumstances or events that suspend the running of a statute of limitations (e.g., disabilities, absence of defendant; see *infra*, §694 et seq.) do not delay the expiration of a right except as provided in the statute creating the right. (See 63 *Harv. L. Rev.* 1234.) Other jurisdictions reject this distinction as legalistic and unreasonable. (See 63 *Harv. L. Rev.* 711 [substantive time limit tolled by war]; 2 *Stanf. L. Rev.* 793 [substantive time limit tolled by estoppel].)

California is definitely committed to the second position. In *Estate of Caravas* (1952) 40 *C.2d* 33, 250 *P.2d* 593, involving the 5-year period within which a nonresident alien could claim property to which he succeeded (former Prob.C. 1026), the court flatly repudiated the distinction and laid down the following rule: "[W]hether a particular statute of limitation is viewed as substantive or procedural, the consequences of a failure to commence legal proceedings within the specified time are the same insofar as the claimant is concerned and, accordingly, the same considerations that lead to the conclusion that a procedural statute is tolled by the fact that the claimant is denied access to the courts similarly lead to the conclusion that the time specified in a substantive statute of limitation must likewise be extended." (40 *C.2d* 42.)

A strong dictum in *Myers v. Stevenson* (1954) 125 *C.A.2d* 399, 270 *P.2d* 885, is to the same effect. After discussing certain federal decisions, the court said: "These cases show a judicial trend, joined in by our own Supreme Court in the *Caravas* case, to ameliorate the harshness of the rule that under no circumstances can the time limited for bringing suit be extended where the time limitation is construed as a condition of the remedy created. They indicate a tendency to hold that where actual or practical access to the courts is prevented the distinction between so-called substantive and procedural statutes of limitations may be disregarded." (125 *C.A.2d* 405.) (See *Wohlgemuth v. Meyer* (1956) 139 *C.A.2d* 326, 329, 293 *P.2d* 816 [dictum quoting *Myers* with approval]; *Firemen's Ins. Co. of Newark, New Jersey v. Diskin* (1967) 255 *C.A.2d* 502, 507, 63 *C.R.* 177 [historical review, disparaging "unenlightening dichotomies of right-remedy, statute law-common law, substance-procedure, and condition-limitation"].)

In *Estate of Horman* (1971) 5 *C.3d* 62, 95 *C.R.* 433, 485 *P.2d* 785, the court declared that the tolling circumstances of former C.C.P. 583, the mandatory dismissal statute (6 *Cal. Proc.* (5th), *Proceedings Without Trial*, §358 et seq.),

should be applied to the 5-year period set by former Prob.C. 1026 for a claim to property by a nonresident alien heir. (5 C.3d 71.) However, the facts were held insufficient to support the trial judge's determination that the period was tolled by impossibility or impracticability. Decedent died intestate in Orange County on December 25, 1961, leaving a large estate. He was survived by 24 nonresident aliens, citizens of the U.S.S.R. The public administrator was appointed in January 1962. In January 1965, before the 5-year period of former Prob.C. 1026 had elapsed, the state brought an action to determine heirship and to escheat, under the law then declared in *Estate of Gogabashvele* (1961) 195 C.A.2d 503, 16 C.R. 77, that Soviet citizens could not claim. All survivors appeared and claimed within the 5-year period except the four claimant-respondents herein. On March 17, 1967, after the period had run, attorneys for one of the timely claimants filed an amended statement seeking to include the four. Judgment was rendered for the state against all claimants on the ground of insufficient proof of relationship, and the judgment was reversed (*Estate of Horman* (1968) 265 C.A.2d 796, 71 C.R. 780). At the retrial, for the first time the state set up the four claimants' noncompliance with former Prob.C. 1026, and the four claimants argued estoppel by reason of belated assertion of the point. The trial judge gave judgment for the four claimants on a different theory, namely, that the 5-year period was tolled from November 8, 1961, the effective date of the *Gogabashvele* case, until August 2, 1966, the effective date of *Estate of Larkin* (1966) 65 C.2d 60, 52 C.R. 441, 416 P.2d 473, establishing inheritance rights of Soviet citizens. *Held*, reversed; the shares of the four claimants escheat.

(a) There was no impossibility; the four claimants could have appeared and argued for the change of law. This is what the claimants did in the *Larkin* case, and the other 20 claimants in the present case did the same. (5 C.3d 71.)

(b) Under the theory urged here, whenever a precedent is overturned and a right of action previously denied by case law is recognized, all persons aggrieved between the time of the original precedent and the new decision could file suit, no matter how many years had elapsed. This is a rejected notion. (5 C.3d 71.)

Atwater Elementary School Dist. v. California Dept. of General Services (2007) 41 C.4th 227, 232, 59 C.R.3d 233, 158 P.3d 794, citing the text, held that *Educ.C. 44944(a)*, which prohibits the introduction of evidence about matters that occurred more than 4 years before a school district files a notice of intention to dismiss a teacher, is not absolute and may be equitably estopped. (41 C. 4th 232, citing *Estate of Caravas* and *Meyers*.)

Downs v. Department of Water & Power of Los Angeles (1997) 58 C.A.4th 1093, 68 C.R.2d 590, *infra*, §731, citing the text, held that *Govt.C. 12965(b)* (1-year time limit on filing an action under the California Fair Employment and Housing Act; see *supra*, §225) was tolled during the pendency of administrative proceedings before the federal Equal Employment Opportunity Commission. Whether the limit is construed as a procedural statute of limitations or as a condition on a substantive right that must be fulfilled as a prerequisite to filing an action, it may be tolled by the doctrine of equitable tolling. (58 C.A.4th 1101, footnote 3.) The holding in *Downs* has been codified. (See *Govt.C. 12965(d)*, (e), *infra*, §731.)

(2) *Federal Law*. A strong position in favor of tolling was taken by the United States Supreme Court in *Burnett v. New York Cen. R. Co.* (1965) 380 U.S. 424, 85 S.Ct. 1050, 13 L.Ed.2d 941, *infra*, §738. The court observed that the substance-procedure distinction arose in conflict of laws cases for the distinct purpose of determining whether a foreign time limitation should be applied in the court of the forum, and declared that it was of little help in solving the problem of tolling. The problem is basically one of legislative intent, and the policy of preventing stale claims is outweighed where the interests of justice require vindication of the plaintiff's rights. (85 S.Ct. 1053, 13 L.Ed.2d 944.)

SUPPLEMENT: [This section is current through the latest supplement]



87 of 190 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XII. STATUTE OF LIMITATIONS: IN GENERAL

B. Distinctions.

2. Other Statutory Time Limits.

3 *Witkin Cal. Proc. Actions* § 445

[§ 445] Other Statutory Time Limits.

Statutes of limitation, which fix the time for commencing actions, are to be distinguished from other procedural statutes fixing time to do acts or seek judicial relief, e.g.:

(1) *Notice of Claim*. Statutes fixing the time to give notice of a claim as a condition precedent to suit. (See *supra*, §§215 et seq., 231 et seq.)

(2) *Notice of Motion*. Statutes fixing the time for notice of motion for new trial (see 8 *Cal. Proc.* (5th), *Attack on Judgment in Trial Court*, §53 et seq.) or for notice of motion for relief from default under *C.C.P.* 473 (see 8 *Cal. Proc.* (5th), *Attack on Judgment in Trial Court*, §175 et seq.).

(3) *Action by Administrative Agency*. Statutes fixing time limits for action by administrative agencies. (See *Robert F. Kennedy Med. Center v. Belshe*' (1996) 13 *C.4th* 748, 760, 55 *C.R.2d* 107, 919 *P.2d* 721 [Welf.C. 14170(a)(1), requiring Department of Health Services to audit hospital provider's cost report in 3 years, is not statute of limitations]; *Little Co. of Mary Hosp. v. Belshe*' (1997) 53 *C.A.4th* 325, 328, 61 *C.R.2d* 626 [same]; *Robert F. Kennedy Med. Center v. Department of Health Services* (1998) 61 *C.A.4th* 1357, 1361, 72 *C.R.2d* 180 [Welf.C. 14177, permitting department to recover Medi-Cal overpayment by offset against amount currently due provider, does not establish statute of limitations; citing *Little Co. of Mary Hosp.*]; but see *Fountain Valley Regional Hosp. & Med. Center v. Bonta*' (1999) 75 *C.A.4th* 316, 324, 89 *C.R.2d* 139, *infra*, §446 [shifting burden of proof on laches claim to agency because it exceeded analogous statute of limitation is not same as impermissibly applying statute to agency action; distinguishing *Little Co. of Mary Hosp.*].)

(4) *Dismissal of Pending Action*. Statutes providing for dismissal of a pending action for failure to make timely service and return of summons or to bring it to trial. (See 6 *Cal. Proc.* (5th), *Proceedings Without Trial*, §§319 et seq., 358 et seq.)

(5) *Review by Appeal*. Statutes fixing time limits for review by appeal. (See 9 *Cal. Proc.* (5th), *Appeal*, §575 et seq.)

(6) *Review by Writ.* Statutes fixing time limits for review by writ. The extraordinary writ of certiorari, which reviews a judgment or order of a lower tribunal, does not come within the scope of the general statutes of limitations governing actions. It therefore has no fixed time limit, but it has been said that the normal time, beyond which delay may justify denial of the writ for laches, is the same as that for appeal (60 days). (See *Bryant v. Superior Court* (1936) 16 C.A.2d 556, 561, 61 P.2d 483.) On the other hand, some statutory types of review, similar to certiorari, have special limitation provisions:

(a) Review of decisions of the Workers' Compensation Appeals Board. (*Lab.C.* 5950 [45 days]; see 2 *Summary* (10th), *Workers' Compensation*, §434 et seq.)

(b) Review of decisions of the Public Utilities Commission. Judicial review must be sought within 30 days after the Commission denies a rehearing. If the Commission grants a rehearing, judicial review must be sought (1) within 30 days after its decision on rehearing is issued, or (2) if no decision is issued, within 120 days after the rehearing was granted. (*Pub.Util.C.* 1756(a); see 8 *Summary* (10th), *Constitutional Law*, §1108.)

(c) Review of disciplinary decisions of the State Bar Court. (C.R.C., Rule 9.13 [60 days].)

Ordinary statutes of limitation apply, however, to mandamus proceedings. (See *infra*, §684.)

SUPPLEMENT: [This section is current through the latest supplement]



88 of 190 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XII. STATUTE OF LIMITATIONS: IN GENERAL

B. Distinctions.

3. Laches in Equitable Actions.

3 *Witkin Cal. Proc. Actions* § 446

[§ 446] Laches in Equitable Actions.

(1) *Nature of Doctrine.* The abolition of forms of action has had the result of making nearly all equitable actions subject to statutes of limitations. (See *infra*, §§447, 677 et seq.) These actions are also subject to the doctrine of laches, which, generally speaking, bars an equitable remedy when there has been an inexcusable delay on the part of the plaintiff and prejudice to the defendant. (See *Kleinclaus v. Dutard* (1905) 147 C. 245, 249, 81 P. 516; 63 *Harv. L. Rev.* 1183; 13 *Summary* (10th), *Equity*, §16 et seq.; but see *Maguire v. Hibernia Savings & Loan Soc.* (1944) 23 C.2d 719, 736, 146 P.2d 673 [declaratory relief action to determine plaintiffs' rights as successors in interest of incorporated savings and loan society member was not barred by statute of limitations or laches].)

The defense of laches, however, is confined to equitable actions; in legal actions delay and prejudice do not amount to a bar while the statute of limitations has not yet run. (See *Brownrigg v. De Frees* (1925) 196 C. 534, 539, 238 P. 714; *Bagdasarian v. Gragnon* (1948) 31 C.2d 744, 752, 192 P.2d 935; *Lubin v. Lubin* (1956) 144 C.A.2d 781, 793, 302 P.2d 49; *Perez v. Singh* (1971) 21 C.A.3d 870, 872, 97 C.R. 920; 51 *Am.Jur.2d* (2000 ed.), *Limitation of Actions* §8.)

(2) *Effect of Laches and Statute of Limitations.* The practical effect of the two defenses in equitable actions is as follows:

(a) Laches may shorten the time to sue by barring the action before the fixed period of the statute of limitations has run. (See *Smith v. Sheffey* (1952) 113 C.A.2d 741, 744, 248 P.2d 959.)

(b) In the absence of a controlling statute of limitations, excusable delay not amounting to laches may allow suit long after analogous limitations periods would have run. (See *Holmberg v. Armbrecht* (1946) 327 U.S. 392, 66 S.Ct. 582, 584, 90 L.Ed. 743, 747; 63 *Harv. L. Rev.* 1184.)

(c) Unlike the statute of limitations, which must be pleaded, laches may sometimes be raised by the court on its own motion. (See 5 *Cal. Proc.* (5th), *Pleading*, §1125.)

(d) Under appropriate circumstances, the defense of laches may operate as a bar to a claim by a public administrative agency, if the requirements of unreasonable delay and resulting prejudice are met. The element of

prejudice may be presumed if there exists a statute of limitations that is sufficiently analogous to the facts of the case, and the period of that statute of limitations has been exceeded by the public administrative agency in making its claim. The limitations period is borrowed from the analogous statute, and the burden of proof shifts to the administrative agency. To defeat a finding of laches the agency must then (1) show that the delay involved in the case was excusable, and (2) rebut the presumption that the delay resulted in prejudice to the opposing party. Thus, in cases in which no statute of limitations directly applies, such as administrative proceedings, but in which there is a statute of limitations governing an analogous action at law, the period may be borrowed as a measure of the outer limit of reasonable delay in determining laches. Whether or not a borrowing should occur depends upon the strength of the analogy. (See *Fountain Valley Regional Hosp. & Med. Center v. Bonta'* (1999) 75 C.A.4th 316, 324, 89 C.R.2d 139.)

SUPPLEMENT: [This section is current through the latest supplement]



89 of 190 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XII. STATUTE OF LIMITATIONS: IN GENERAL

C. Scope of Limitation Statutes.

1. Actions and Special Proceedings.

3 *Witkin Cal. Proc. Actions* § 447

[§ 447] Actions and Special Proceedings.

(1) *General Rule of Applicability.* Part 2, Title 2, of the Code of Civil Procedure, dealing with the statutes of limitation, begins with a reference to "civil actions" (C.C.P. 312), but also states: "The word 'action' as used in this Title is to be construed, whenever it is necessary so to do, as including a special proceeding of a civil nature." (C.C.P. 363.) Hence, generally speaking, the time provisions apply equally to actions and special proceedings. (*People v. Grant* (1942) 52 C.A.2d 794, 800, 127 P.2d 19; *Estate of Jacobson* (1942) 56 C.A.2d 255, 257, 132 P.2d 229; *Leahey v. Department of Water & Power of Los Angeles* (1946) 76 C.A.2d 281, 286, 173 P.2d 69; *Parker v. Walker* (1992) 5 C.A.4th 1173, 1186, 1187, 1188, 6 C.R.2d 908, citing the text; on applicability of other procedural statutes to special proceedings, see *supra*, §64 et seq.)

Limitation statutes apply, of course, to equitable actions. (*Moss v. Moss* (1942) 20 C.2d 640, 644, 128 P.2d 526; 63 *Harv. L. Rev.* 1183; see *infra*, §677 et seq.; on distinct defense of laches, see *supra*, §446.)

(2) *Distinction: Statute With Express Limitation.* The general provisions of C.C.P. 351 et seq. may be expressly excluded by statutes that provide their own limitations. This is common in the Revenue and Taxation Code. (See, e.g., Rev.C. 177(c), 3809, 14012; *Merchants Finance Corp. v. Mahomed* (1947) 82 C.A.2d 649, 653, 187 P.2d 39 [Rev.C. 3725]; *People v. United States Fire Ins. Co.* (1976) 61 C.A.3d 231, 236, 132 C.R. 139 [Rev.C. 6711 prescribes different period for actions to collect taxes].) (On limitations in administrative proceedings, see *supra*, §430.)

SUPPLEMENT: [This section is current through the latest supplement]



90 of 190 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XII. STATUTE OF LIMITATIONS: IN GENERAL

C. Scope of Limitation Statutes.

2. Cross-Complaint and Defensive Relief.

a. Statute Runs if Affirmative Relief Is Sought.

3 Witkin Cal. Proc. Actions § 448

[§ 448] Statute Runs if Affirmative Relief Is Sought.

(1) *Statement of Rule.* A cause of action that could have been the basis of a complaint may instead be pleaded as a cross-complaint. (See *C.C.P.* 428.80; 5 *Cal. Proc.* (5th), *Pleading*, §1167.) The statute of limitations applies in the same way, and may be set up by the plaintiff as a bar to the defendant's pleading. (*Lyon v. Petty* (1884) 65 C. 322, 325, 4 P. 103; *Jones v. Mortimer* (1946) 28 C.2d 627, 632, 170 P.2d 893 [dictum, listing cases]; see *Estate of Schaeffer* (1921) 53 C.A. 493, 495, 200 P. 508, supra, §434 [barred debt of distributee could not be offset against his distributive share]; *Bank of America v. Vannini* (1956) 140 C.A.2d 120, 127, 295 P.2d 102 [statute will not bar fraud raised as defense against plaintiff's claim (infra, §450), but will run against claim for damages for fraud asserted by cross-complaint]; *Talbot v. Wake* (1977) 74 C.A.3d 428, 441, 141 C.R. 463, citing the text; 1 *U.C.L.A. L. Rev.* 563; 1 *A.L.R.2d* 630 [claim barred by limitation as subject of setoff, counterclaim, recoupment, cross bill, or cross action]; 12 *A.L.R.2d* 815 [claim by or against taxpayer]; 48 *A.L.R.2d* 401, 407 [actions and defenses based on usury]; 72 *A.L.R.3d* 1065 [tort claim against which statute has run as subject of cross-claim arising out of same accident or incident]; 51 *Am.Jur.2d* (2000 ed.), *Limitation of Actions* §124 et seq.)

Whatever may have been the distinction between the former counterclaim and an affirmative defense (see 5 *Cal. Proc.* (5th), *Pleading*, §1163), it had no effect on the application of statutes of limitations. If the matter alleged by way of defense constitutes a claim for some affirmative relief that could have been the basis of a cause of action, the statute may be set up as a bar. Thus, in *Bradbury v. Higginson* (1914) 167 C. 553, 140 P. 254, plaintiff sued in 1912 for rent due under a lease executed in 1904, and defendant alleged rescission for failure to perform an obligation that had been omitted from the lease by mutual mistake. *Held*, the basis of the defense was a demand for reformation of the lease to state the alleged true agreement, and the cause of action for reformation was barred by the 3-year statute governing actions based on fraud or mistake. "If the defendant's right to obtain the equitable relief sought is barred by limitation, the plea of the statute may be interposed to the attempted defense just as it might have been in case the relief had been sought by an independent action. This court has held that the statute of limitations is applicable to claims asserted in an answer by way of setoff or counterclaim ... , and the same reason exists for making the statute apply to defenses based upon an equitable cause of action asserted by the defendant against the plaintiff." (167 C. 557.) (See *Hermosa Beach Land & Water Co. v. Law Credit Co.* (1917) 175 C. 493, 495, 166 P. 22 [vendor's action to quiet title; answer seeking

conveyance as specific performance]; *Strong v. Strong* (1943) 22 C.2d 540, 544, 140 P.2d 386 [action to quiet title; answer seeking to avoid deed on which plaintiff's title was based]; *Sanders v. Sanders* (1931) 117 C.A. 231, 233, 3 P.2d 599 [answer seeking reformation of contract for mutual mistake].)

The statute is a bar to the defendant's affirmative claim only if the period has already run when the complaint is filed. The filing of the complaint suspends the statute during the pendency of the action, and the defendant may set up his or her claim by appropriate pleading at any time. (See *Union Sugar Co. v. Hollister Estate Co.* (1935) 3 C.2d 740, 746, 47 P.2d 273; *Jones v. Mortimer*, *supra*, 28 C.2d 633; *Sidney v. Superior Court* (1988) 198 C.A.3d 710, 715, 244 C.R. 31, *infra*, §453, citing the text; *Luna Records Corp. v. Alvarado* (1991) 232 C.A.3d 1023, 1026, 283 C.R. 865, *infra*, §454, quoting the text; *infra*, §735.)

(2) *Distinction: Party Against Whom Cross-Complaint Is Filed.* The following distinction must be made: (a) where the cross-complaint is against codefendants or new parties, the statute is not tolled by the commencement of the plaintiff's action; but (b) where it is against the plaintiff, it is tolled, and the cross-complaint is timely despite the fact that it is filed after the period would have run on an independent action. (See *Trindade v. Superior Court* (1973) 29 C.A.3d 857, 860, 106 C.R. 48, quoting the text; *Boyer v. Jensen* (2005) 129 C.A.4th 62, 70, 28 C.R.3d 124 [tolling of limitations period as to defendant employee, arising from filing of complaint, did not prevent statute from running as to codefendant employer, even though its liability would have been vicarious; citing *Trindade*].)

SUPPLEMENT: [This section is current through the latest supplement]



91 of 190 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XII. STATUTE OF LIMITATIONS: IN GENERAL

C. Scope of Limitation Statutes.

2. Cross-Complaint and Defensive Relief.

b. When Statute Does Not Run.

1. Cross-Demands Deemed Compensated.

3 *Witkin Cal. Proc. Actions* § 449

[§ 449] Cross-Demands Deemed Compensated.

(1) *Statement of Rule.* Under *C.C.P. 431.70*, if cross-demands for money have existed between persons at a time when neither demand was barred by the statute of limitations, and one of those persons commences an action, the other may assert in his or her answer the defense of payment; i.e., the two demands are compensated to the extent that they equal each other. This is true even if, at the time of filing the answer, an independent action would be barred by the statute of limitations. However, if the cross-demand would otherwise be barred by limitations, relief may not exceed the value of the relief granted the other party.

With respect to a money judgment, which is a "demand for money" within the scope of *C.C.P. 431.70*, if the enforcement of the judgment is barred under *C.C.P. 683.010* et seq. (period for enforcement of judgments), the demand (money judgment) is barred by the statute of limitations. (*C.C.P. 431.70.*) (See *51 Am.Jur.2d (2000 ed.), Limitation of Actions* §126; *5 Cal. Proc. (5th), Pleading*, §1165.)

(2) *Exception.* The defense provided by the statute is not available if the cross-demand is one that should have been asserted by a cross-complaint in a prior action under *C.C.P. 426.30* (assertion of any related cause of action). (*C.C.P. 431.70.*)

SUPPLEMENT: [This section is current through the latest supplement]



92 of 190 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XII. STATUTE OF LIMITATIONS: IN GENERAL

C. Scope of Limitation Statutes.

2. Cross-Complaint and Defensive Relief.

b. When Statute Does Not Run.

2. Answer Pleading Defensive Matter.

3 *Witkin Cal. Proc. Actions* § 450

[§ 450] Answer Pleading Defensive Matter.

(1) *Statement of Rule.* The statute runs only against a cause of action. If the answer pleads purely defensive matter, i.e., something that constitutes a defense to the plaintiff's claim without calling for affirmative relief, this defensive relief will not be barred by limitations. This is so even though the defensive matter could have been used as the basis of a cause of action for affirmative relief, and the statute has run on any such cause of action. (See *Styne v. Stevens* (2001) 26 C.4th 42, 51, 109 C.R.2d 14, 26 P.3d 343, citing the text; *Bank of America v. Vannini* (1956) 140 C.A.2d 120, 127, 295 P.2d 102, citing the text; 63 Harv. L. Rev. 1245; 1 U.C.L.A. L. Rev. 563.)

(2) *Illustrations.* This latter principle is chiefly applied where the plaintiff sues on a contract, and the defendant denies any liability on the obligation on grounds of fraud, or lack or failure of consideration. These, and similar defenses that render the contract wholly unenforceable (such as mistake that prevents mutual assent, illegality, duress or undue influence), need not be made the basis of an action for restitution after rescission. The injured party (promisor) may allow the time for the bringing of such an action to expire, yet still defend on those grounds in the action by the plaintiff (promisee). "In such a case, neither the limitation of the statute nor the doctrine of laches will operate to bar the defense of the invalidity of the agreement upon the ground of fraud, for so long as the plaintiff is permitted to come into court seeking to enforce the agreement, the defendant may allege and prove fraud as a defense. In short, it is not incumbent upon one who has thus been defrauded to go into court and ask relief, but he may abide his time, and when enforcement is sought against him excuse himself from performance by proof of the fraud." (*Estate of Cover* (1922) 188 C. 133, 140, 204 P. 583.)

Other cases are to the same effect. (See *Cox v. Schnerr* (1916) 172 C. 371, 382, 156 P. 509 [quiet title action based on fraudulent purported deed]; *J.B. Colt Co. v. Freitas* (1926) 76 C.A. 278, 287, 244 P. 916 [fraud]; *Stiles v. Bodkin* (1941) 43 C.A.2d 839, 844, 111 P.2d 675 [same]; but see *Saratoga v. Hinz* (2004) 115 C.A.4th 1202, 1218, 9 C.R.3d 791, citing the text [exception did not apply where Sts. & H.C. 10400 (action challenging formation of special assessment district; see *infra*, §475) was broad enough to encompass defensive use of statute of limitations].)

SUPPLEMENT: [This section is current through the latest supplement]



93 of 190 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XII. STATUTE OF LIMITATIONS: IN GENERAL

C. Scope of Limitation Statutes.

2. Cross-Complaint and Defensive Relief.

b. When Statute Does Not Run.

3. Cross-Complaint by Uninsured Motorist.

3 Witkin Cal. Proc. Actions § 451

[§ 451] Cross-Complaint by Uninsured Motorist.

The statute does not run on an uninsured motorist's cross-complaint against an insurer suing under its subrogation right. This exception was declared, as a matter of statutory interpretation to avoid injustice, in *Liberty Mut. Ins. Co. v. Fales* (1973) 8 C.3d 712, 106 C.R. 21, 505 P.2d 213. M, insured by Liberty, was injured in an automobile accident with F, an uninsured motorist. Liberty paid M, and then, 14 months after the accident, sued F under its subrogation right. F cross-complained for affirmative relief. *Ins.C. 11580.2(g)* gives the insurer 3 years from the time of payment to bring such an action; but the uninsured motorist, seeking affirmative relief, was subject to the ordinary 1-year statute of limitations in former C.C.P. 340(3) (now 2-year limitations period in C.C.P. 335.1; see *infra*, §552). To establish his right to maintain the seemingly barred claim, F challenged the constitutionality of *Ins.C. 11580.2(g)*. *Held*, the constitutional issue need not be decided because the statute, liberally construed, did not bar the remedy.

(a) Normally the cause of action on the cross-complaint would have been barred because the statute had already run at the time the complaint was filed. (See *supra*, §448.) However, the purpose of the 3-year period for the subrogation claim, instead of the 1-year period, was to prevent lapse of the insurer's right before it arises (because payment may not be made until more than a year after the accident). (8 C.3d 716.) It was not intended to give the insurer-subrogee greater rights than those of its insured-subrogor. Hence, because the insured, in filing a timely action for personal injuries (within 1 year) would have been subject to the uninsured motorist's cross-complaint, the insurer-subrogee should likewise be subject to it. In other words, the Legislature did not intend to give the insurer the power, by delayed filing, to prevent any cross-complaint by the uninsured motorist. (8 C.3d 717.)

(b) This conclusion is in accord with the fundamental policy underlying statutes of limitation, and is required by considerations of justice. "It is difficult to rationally conclude that justice would be promoted by permitting [F] to show [M]'s negligence for the purpose of defending against the charge that he, [F], was the party at fault, while prohibiting him from offering the very same facts for the related purpose of recovering for his personal injuries. There is no problem here regarding the tardy revival of claims after evidence has been lost or witnesses' memories faded, since Liberty was required to prove its case on the basis of the same general facts as [F] would have utilized in his quest for affirmative relief." (8 C.3d 718.)

SUPPLEMENT: [This section is current through the latest supplement]



94 of 190 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XII. STATUTE OF LIMITATIONS: IN GENERAL

C. Scope of Limitation Statutes.

2. Cross-Complaint and Defensive Relief.

b. When Statute Does Not Run.

4. Cross-Complaint Against Suspended Corporation.

3 Witkin Cal. Proc. Actions § 452

[§ 452] Cross-Complaint Against Suspended Corporation.

In *Electronic Equipment Express v. Donald H. Seiler & Co.* (1981) 122 C.A.3d 834, 176 C.R. 239, plaintiff corporation's powers were suspended for nonpayment of its franchise taxes, but it nevertheless filed this complaint for malpractice against defendant accountants. Defendants filed a cross-complaint for the value of their services, and later filed an answer setting up the 2-year statute of limitations on plaintiff's action (C.C.P. 339(1)). Subsequently plaintiff's powers were revived. *Held*, filing the cross-complaint tolled the statute of limitations on the complaint.

(a) Filing a complaint tolls the statute as to a defendant's then unbarred causes of action arising out of the transaction. (122 C.A.3d 844, citing *Jones v. Mortimer* (1946) 28 C.2d 627, 170 P.2d 893, *supra*, §448.) Defendants contended that their cross-complaint did not come within this rule because it was involuntary; i.e., it was a transaction cross-complaint that had to be set up in order to preserve the claim (see 4 Cal. Proc. (5th), *Pleading*, §89). This contention is unsound. At the time of filing the cross-complaint, plaintiff's corporate powers were suspended and it could not prosecute or defend an action; defendants could have waited until the limitations period ran before cross-complaining; instead they voluntarily sought affirmative relief by cross-complaint and thereby waived their statute of limitations defense. (122 C.A.3d 845.)

(b) Permitting a cross-complaint to toll the statute for plaintiff corporation's action would not contravene the purpose of Rev.C. 23301 (see 9 *Summary* (10th), *Corporations*, §222 et seq.). The cross-complainant can obtain a default judgment against the suspended corporation, and the threat of such a judgment would pressure the corporation to pay its taxes. (122 C.A.3d 846.)

(c) The result reached here may also be justified by application of the equitable tolling doctrine of such cases as *Bollinger v. National Fire Ins. Co. of Hartford, Connecticut* (1944) 25 C.2d 399, 154 P.2d 399, *infra*, §739, *Elkins v. Derby* (1974) 12 C.3d 410, 115 C.R. 641, 525 P.2d 81, *infra*, §744, and *Addison v. California* (1978) 21 C.3d 313, 146 C.R. 224, 578 P.2d 941, *infra*, §741. (122 C.A.3d 847, footnote 3.) (See *American Alternative Energy Partners II v. Windridge* (1996) 42 C.A.4th 551, 564, 49 C.R.2d 686 [following *Electronic Equipment Express*].)

SUPPLEMENT: [This section is current through the latest supplement]



95 of 190 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XII. STATUTE OF LIMITATIONS: IN GENERAL

C. Scope of Limitation Statutes.

2. Cross-Complaint and Defensive Relief.

b. When Statute Does Not Run.

5. Amended Cross-Complaint.

3 *Witkin Cal. Proc. Actions* § 453

[§ 453] Amended Cross-Complaint.

In *Sidney v. Superior Court* (1988) 198 C.A.3d 710, 244 C.R. 31, on February 24, 1986, plaintiff filed a complaint for personal injury and property damage against defendant. On April 17, 1986, defendant filed a cross-complaint for property damages against plaintiff. On April 27, 1987, defendant moved for leave to amend his cross-complaint to add a cause of action for personal injuries, alleging mistake and neglect of prior counsel in failing to include this claim in the initial cross-complaint. The lower court denied the motion on the ground that the 1-year statute of limitations had run on the personal injury claim, and that the doctrine of relation back could not be applied to the new cause of action. *Held*, mandamus was granted to vacate the order denying leave to amend.

(a) Under the rule applying to an amended complaint, the trial judge's denial of leave was correct; the amended complaint relates back to the original complaint and thereby avoids the bar of the statute of limitations only if it rests on the same general set of facts and refers to the same accident and injuries. (198 C.A.3d 714; see 5 *Cal. Proc.* (5th), *Pleading*, §1188.)

(b) A cross-complaint, however, relates back and is timely if the original complaint was filed before the statute of limitations on the cross-complaint had run. (198 C.A.3d 714; see *supra*, §448.) The theory is that the plaintiff has waived the defense of the statute of limitations as to any cause of action arising out of the same transaction as the complaint. (198 C.A.3d 714, 715, citing *Trindade v. Superior Court* (1973) 29 C.A.3d 857, 106 C.R. 48, *supra*, §448, and the text.)

(c) The relation back doctrine should apply to an amended compulsory cross-complaint in the same manner as to an initial cross-complaint. "[T]he waiver principle is based on plaintiff's action in commencing the action. The reason for the rule continues to exist so long as that action is pending and is unrelated to how many times it takes defendant to assert all his related defenses and claims." (198 C.A.3d 715.)

(d) Support for this conclusion may be found in the statutory scheme set up for compulsory cross-complaints, and the legislative directive of liberality in allowing amendments to avoid forfeitures. (198 C.A.3d 717; see *C.C.P.* 426.50, 5

Cal. Proc. (5th), Pleading, §1180.)

SUPPLEMENT: [This section is current through the latest supplement]



96 of 190 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XII. STATUTE OF LIMITATIONS: IN GENERAL

C. Scope of Limitation Statutes.

2. Cross-Complaint and Defensive Relief.

b. When Statute Does Not Run.

6. Failure To File Cross-Complaint.

3 *Witkin Cal. Proc. Actions* § 454

[§ 454] Failure To File Cross-Complaint.

In *Luna Records Corp. v. Alvarado* (1991) 232 C.A.3d 1023, 283 C.R. 865, defendants, in January 1981, agreed to sell shares of stock to plaintiff for \$ 850,000. Plaintiff made an initial payment and then gave notice of rescission for the failure of the consideration. In June 1981 defendants consented to the rescission, but refused to restore the consideration. In August 1981 defendants filed a complaint in Los Angeles County for breach of contract. Plaintiff never filed an answer or cross-complaint in that action, and in August 1985 it was dismissed on the court's own motion for the lack of prosecution. In July 1988 plaintiff filed the present complaint for rescission in Sonoma County. Defendants set up the statute of limitations by a demurrer and a motion to strike, and the trial judge sustained the demurrer and granted the motion. *Held*, affirmed.

(a) "[N]either Witkin nor any authority to which we have been directed addresses the question raised in the case at bench--whether the filing of a complaint tolls the statute of limitations on a cause of action which although it could be pled as a cross-complaint is never filed in an initial action, but which is brought as a subsequent complaint by the party named as defendant in the initial action. Stated another way, may appellant here rely on an asserted tolling of the statute of limitations in a previous action although he did not respond in any way to the complaint in that action?" (232 C.A.3d 1027.)

(b) When defendants filed the Los Angeles complaint, they waived the statute of limitations as to all proper defenses to that particular cause of action. However, because plaintiff never asserted any defense or cross-complaint in that action, the purpose for the waiver rule never matured, and the suspension never took place. (232 C.A.3d 1027.) This becomes clearer if the concept is viewed not as one of tolling or suspending the statute but of "relating back" the time of filing the cross-complaint to the time of filing the complaint. It is the fact that the action is pending that triggers the relation back doctrine and allows a defendant to file in that action a cross-complaint which was viable when the complaint was filed. But if the defendant makes no appearance and offers no defense or cross-claim, there is nothing to relate back. (232 C.A.3d 1028, 1030.)

SUPPLEMENT: [This section is current through the latest supplement]



97 of 190 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XII. STATUTE OF LIMITATIONS: IN GENERAL

C. Scope of Limitation Statutes.

3. Sovereign Plaintiff.

a. United States.

3 *Witkin Cal. Proc. Actions* § 455

[§ 455] United States.

The common law doctrine of sovereign immunity from substantive liability (see 4 *Cal. Proc.* (5th), *Pleading*, §100 et seq.) had a procedural counterpart in the rule that the sovereign was exempt from the operation of the statute of limitations. And the federal Government, suing as plaintiff in either federal or state court, is not bound by the local state statute of limitations. (See *United States v. Summerlin* (1940) 310 U.S. 414, 60 S.Ct. 1019, 1020, 84 L.Ed. 1283, 1285 [Federal Housing Authority's claim against Florida estate, filed after expiration of nonclaim period under Florida law]; *United States v. John Hancock Mut. Life Ins. Co.* (1960) 364 U.S. 301, 81 S.Ct. 1, 6, 5 L.Ed.2d 1, 7; 63 *Harv. L. Rev.* 1251; 51 *Am.Jur.2d* (2000 ed.), *Limitation of Actions* §82 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]



98 of 190 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XII. STATUTE OF LIMITATIONS: IN GENERAL

C. Scope of Limitation Statutes.

3. Sovereign Plaintiff.

b. State or Political Subdivision.

3 *Witkin Cal. Proc. Actions* § 456

[§ 456] State or Political Subdivision.

(1) *State and County*. In the absence of legislation, the common law exemption (*supra*, §455) protects the state as a plaintiff suing in its own courts or in the local federal court. (See 63 *Harv. L. Rev.* 1251; 51 *Am.Jur.2d* (2000 *ed.*), *Limitation of Actions* §85 et seq.)

In California, however, the principal limitations in the Code of Civil Procedure "apply to actions brought in the name of the state or county or for the benefit of the state or county, in the same manner as to actions by private parties." (*C.C.P.* 345; see *C.C.P.* 315 [adverse possession against state]; *People v. Chambers* (1951) 37 *C.2d* 552, 558, 233 *P.2d* 557 [reviewing cases but holding particular statute inapplicable]; *State Bd. of Health of Calif. v. Alameda* (1919) 42 *C.A.* 166, 167, 183 *P.* 455; *People v. Osgood* (1930) 104 *C.A.* 133, 135, 285 *P.* 753; *Fullerton v. Orange* (1934) 140 *C.A.* 464, 470, 35 *P.2d* 397; *People v. Grant* (1942) 52 *C.A.2d* 794, 796, 127 *P.2d* 19 [construing former *C.C.P.* 340(2) (now *C.C.P.* 340(b)), on action by state to recover penalty or forfeiture]; but see *C.C.P.* 3493/4 [short limitation of 180 days on actions for underground trespass by oil well is not applicable to action by state or subdivision].)

As to limitation provisions in statutes other than those in the chapter governed by *C.C.P.* 345 (Chapter 3 of Title 2 of Part 2; *C.C.P.* 345-349.4), the general rule of exemption applies unless the particular statute clearly shows a legislative intention to bind the state. (*People v. Chambers, supra*, 37 *C.2d* 559; *Philbrick v. State Personnel Bd.* (1942) 53 *C.A.2d* 222, 228, 127 *P.2d* 634; *People v. Continental Cas. Co.* (1953) 118 *C.A.2d* 133, 257 *P.2d* 495; for statutory limitations on governmental claims for taxes, see *infra*, §§666, 667.)

(2) *City*. Although *C.C.P.* 345 in terms applies only to the state or a county, it is generally held that municipal corporations are subject to the statute of limitations. (*Los Angeles v. Los Angeles* (1937) 9 *C.2d* 624, 627, 72 *P.2d* 138 [action by city against county and railway corporation]; but see *C.C.P.* 3493/4, *supra*.)

(3) *Limitation in Federal Statute*. The federal Quiet Title Act of 1972 permits plaintiffs to name the United States as a party defendant to adjudicate title to land, but provides that any civil action is barred 12 years after accrual (see 28 *U.S.C.*, §2409a(g)). In *Block v. North Dakota* (1983) 461 *U.S.* 273, 103 *S.Ct.* 1811, 75 *L.Ed.2d* 840, North Dakota, disputing the United States' claims of title to riverbed land, argued that the limitation provision did not embrace the state

as a plaintiff because the provision did not expressly include the state. *Held*, the action was barred. Congress may expressly waive the immunity of the United States from suit, and may exempt a state from a statute of limitations; but conditions on a waiver (here the limitation provision) should be applicable to states in the absence of an express intent to the contrary. (103 S.Ct. 1820, 75 L.Ed.2d 854.)

SUPPLEMENT: [This section is current through the latest supplement]



99 of 190 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XII. STATUTE OF LIMITATIONS: IN GENERAL

C. Scope of Limitation Statutes.

3. Sovereign Plaintiff.

c. Foreign Country.

3 Witkin Cal. Proc. Actions § 457

[§ 457] Foreign Country.

A foreign sovereign that sues in the federal or state courts subjects itself to the procedural rules of the forum, including the local statute of limitations. (See *Guaranty Trust Co. of New York v. United States* (1938) 304 U.S. 126, 58 S.Ct. 785, 789, 82 L.Ed. 1224, 1230 [rule applied where United States sued as assignee of Russian Government, state limitations period having run against claim prior to its assignment]; 26 Cal. L. Rev. 713.)

This is true also where the "foreign" sovereign is an American state suing in another state or in a federal court outside its territorial boundaries. (See 63 Harv. L. Rev. 1251.)

SUPPLEMENT: [This section is current through the latest supplement]



100 of 190 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XII. STATUTE OF LIMITATIONS: IN GENERAL

D. Changes in Period.

1. Legislative Changes.

a. Before Statute Has Run.

1. Period Extended.

3 *Witkin Cal. Proc. Actions* § 458

[§ 458] Period Extended.

(1) *Statement of Rule.* Before the limitations period remedy has expired, the Legislature may amend the particular statutes so as to extend the time. The amendment may be, and as a matter of interpretation usually is, applied to the pending claim. As the court said in *Mudd v. McColgan* (1947) 30 C.2d 463, 183 P.2d 10: "It is the settled law of this state that an amendment which enlarges a period of limitation applies to pending matters where not otherwise expressly excepted. Such legislation affects the remedy and is applicable to matters not already barred, without retroactive effect. Because the operation is prospective rather than retrospective, there is no impairment of vested rights. Moreover, a party has no vested right in the running of a statute of limitation prior to its expiration. He is deemed to suffer no injury if, at the time of an amendment extending the period of limitation for recovery, he is under obligation to pay." (30 C.2d 468.) (See *Davis & McMillan v. Industrial Acc. Com.* (1926) 198 C. 631, 636, 246 P. 1046; *Evelyn v. California Emp. Stabilization Com.* (1957) 48 C.2d 588, 592, 311 P.2d 500; *Angeli v. Lischetti* (1962) 58 C.2d 474, 476, 24 C.R. 845, 374 P.2d 813; 63 *Harv. L. Rev.* 1189; 79 A.L.R.2d 1080 [validity and applicability, to causes of action not already barred, of statute enlarging limitations period]; 51 *Am.Jur.2d* (2000 ed.), *Limitation of Actions* §49 et seq.)

(2) *Illustrations.* The following cases are illustrative:

Eken v. Bosworth (1977) 72 C.A.3d 248, 252, 139 C.R. 834 [former estate claim requirement eliminated for certain claims before period had run].

Los Angeles v. Superior Court (Northrop) (1977) 73 C.A.3d 509, 512, 142 C.R. 292 [elimination of claim requirement for inverse condemnation applied to pending action].

Sanchez v. Work. Comp. App. Bd. (1990) 217 C.A.3d 346, 350, 354, 357, 266 C.R. 21 [former Lab.C. 5405.5 extended time for filing initial request for rehabilitation benefits beyond 5 years from date of injury, as long as request was filed within 1 year from board's last finding of permanent disability or within 1 year from date of board approval of compromise and release of other issues; moreover, statute applied to injuries occurring before it was enacted].

O'Loughlin v. Work. Comp. App. Bd. (1990) 222 C.A.3d 1518, 1521, 272 C.R. 499 [following *Sanchez*].

Mojica v. 4311 Wilshire, LLC (2005) 131 C.A.4th 1069, 1072, 31 C.R.3d 887 [personal injury action was pending while tolled by federal proceeding (see *infra*, §741), and thus plaintiff was entitled to take advantage of extension of limitations period from 1 to 2 years by enactment of C.C.P. 335.1 (see *infra*, §552) during federal proceeding].

(3) *Distinction: New Enactment With Penal Provisions.* An enlargement will not be retroactive where it is an entirely new enactment with penal provisions. This was the holding in *Ghera v. Sugar Pine Lumber Co.* (1964) 224 C.A.2d 88, 36 C.R. 305. Injuries to timber occurred in 1955 and 1956, and the action, filed in 1960, was barred under the limitation statute in force at the time the wrongful acts were committed (former C.C.P. 340(1)). C.C. 3346, enacted in 1957 to change the substantive law of damages for such injuries (see 6 *Summary* (10th), *Torts*, §1732 et seq.), added a new 5-year statute of limitations. *Held*, the theory of *Mudd, supra*, was inapplicable, and the action was barred, for the following reasons:

(a) Former C.C. 3346 was expressly repealed and a new section was enacted with the same number. (224 C.A.2d 90.)

(b) It was not a mere reenactment, for it increased the damages and provided a penalty instead of compensation. (224 C.A.2d 90, 91.)

(c) The limitations period was placed in the substantive statute rather than in the general statutes of limitation in the *Code of Civil Procedure*. (224 C.A.2d 91, 92.)

(d) A penal statute calls for strict construction. (224 C.A.2d 92.)

SUPPLEMENT: [This section is current through the latest supplement]



101 of 190 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XII. STATUTE OF LIMITATIONS: IN GENERAL

D. Changes in Period.

1. Legislative Changes.

a. Before Statute Has Run.

2. Period Shortened.

3 Witkin Cal. Proc. Actions § 459

[§ 459] Period Shortened.

(1) *Statement of Rule.* The legislative power to shorten the period and to make the new limitation applicable to pending claims is likewise settled, although subject to an important proviso: A reasonable time must be left in which to bring actions on preexisting obligations. (See *Doehla v. Phillips* (1907) 151 C. 488, 492, 91 P. 330; *Scheas v. Robertson* (1951) 38 C.2d 119, 125, 238 P.2d 982; *Coachella Valley Mosquito & Vector Control Dist. v. California Public Emp. Relations Bd.* (2005) 35 C.4th 1072, 1091, 29 C.R.3d 234, 112 P.3d 623; *Reynolds v. Jensen* (1936) 14 C.A.2d 558, 58 P.2d 687; *Rombotis v. Fink* (1948) 89 C.A.2d 378, 386, 201 P.2d 588; *Niagara Fire Ins. Co. v. Cole* (1965) 235 C.A.2d 40, 43, 44 C.R. 889 [1-year limitations period of former Ins.C. 11580.2(h) (uninsured motorist statute; see 2 *Summary* (10th), *Insurance*, §205 et seq.) applied to bar action accruing prior to statute's enactment, and formerly subject to 2-year tort limitations period]; *Eden v. Van Tine* (1978) 83 C.A.3d 879, 887, 148 C.R. 215, infra, §609; 63 *Harv. L. Rev.* 1190; 51 *Am.Jur.2d* (2000 ed.), *Limitation of Actions* §45 et seq.; but see *California Emp. Stabilization Com. v. Payne* (1947) 31 C.2d 210, 215, 187 P.2d 702 [proviso did not apply to state, which could retroactively cut off right of state agency to collect claim]; 7 *Summary* (10th), *Constitutional Law*, §631.)

As the court said in *Aronson v. Superior Court* (1987) 191 C.A.3d 294, 236 C.R. 347, infra, §587, citing the text: "The doctrine of retrospectivity of limitations statutes is one of constitutional dimension. In California, statutes of limitations, being procedural, are normally retroactively applied to accrued causes of action; but the court must inquire whether, in a given case, that retrospective application may violate due process by in effect eliminating the plaintiff's right. If the time left to file is reasonable, no such constitutional violation occurs, and the statute is applied as enacted. If no time is left, or only an unreasonably short time remains, then the statute cannot be applied at all." (191 C.A.3d 297.)

(2) *Illustration: Action To Set Aside Tax Deed or To Quiet Title.* The principle just stated has had an important use in making tax titles safe. Where real property is sold for delinquent taxes, the purchaser acquires a good title only if the tax proceedings were valid; and many sorts of technical errors may render the title defective. The common legislative solution for the problem is the curative statute, which validates the prior proceedings. (See 9 *Summary* (10th), *Taxation*, §283.) Unfortunately such a statute cannot cure "jurisdictional" defects, and in consequence its effect is limited and uncertain. A complete protection of the tax title may, however, be obtained by fixing a time within which the former

owner must bring an action to set aside the tax deed or quiet his title to the property. If the time is reasonable his claim will be barred no matter what the defect may be. In other words, a curative act cannot cure jurisdictional defects, but a statute of limitations can cure anything in time. (See *Tannhauser v. Adams* (1947) 31 C.2d 169, 171, 176, 187 P.2d 716; *McCaslin v. Hamblen* (1951) 37 C.2d 196, 198, 231 P.2d 1; *Elbert, Ltd. v. Gross* (1953) 41 C.2d 322, 330, 260 P.2d 35; *Davault v. Essig* (1947) 80 C.A.2d 970, 972, 183 P.2d 39.)

(3) *Illustration: Action for Injuries to Unborn Child.* Another illustration is the 6-year period for an action for injuries to an unborn child under former C.C. 29 (now C.C. 43.1 and C.C.P. 340.4; see *infra*, §589), established in 1941. It was applied to causes of action that accrued before the enactment of the statute. (See *Olivas v. Weiner* (1954) 127 C.A.2d 597, 274 P.2d 476 [former limitations period permitting action to be filed up to 22 years after child's birth (i.e., within 1 year after child reached majority) would have allowed plaintiff 16 years to commence action].)

(4) *Illustration: Statutory Tolling for Imprisonment.* C.C.P. 352.1 limits the period for tolling the applicable limitations period during imprisonment to 2 years (see *infra*, §702). It applies retroactively to tort actions accruing before its effective date (January 1, 1995), so long as that does not result in a manifest injustice. Thus, claims that accrued before January 1, 1995, were tolled for 2 years from accrual or until that date, whichever occurred later. (See *Carlson v. Blatt* (2001) 87 C.A.4th 646, 650, 105 C.R.2d 42 [professional malpractice action filed in 1997 by prisoner who was convicted in 1989, but was released in 1995, was time-barred; statutory tolling terminated on January 1, 1995].)

SUPPLEMENT: [This section is current through the latest supplement]



102 of 190 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XII. STATUTE OF LIMITATIONS: IN GENERAL

D. Changes in Period.

1. Legislative Changes.

b. Period Extended After Statute Has Run.

1. In General.

3 *Witkin Cal. Proc. Actions* § 460

[§ 460] In General.

(1) *Law of Other States: Period Is Not Extended.* When the limitations period runs, the obligor or other prospective defendant gains an immunity from liability. In many states this immunity has been regarded as a vested right, with the result that the Legislature cannot make an extension operate retroactively so as to revive a claim previously barred. (See *Chambers v. Gallagher* (1918) 177 C. 704, 708, 171 P. 931; 63 *Harv. L. Rev.* 1191; 51 *Am.Jur.2d* (2000 ed.), *Limitation of Actions* §49 et seq.)

(2) *Federal Law: Period Is Extended for Damages Action.* The United States Supreme Court has long held the contrary view, definitively stated in *Campbell v. Holt* (1885) 115 U.S. 620, 6 S.Ct. 209, 29 *L.Ed.* 483, and reaffirmed in *Chase Sec. Corp. v. Donaldson* (1945) 325 U.S. 304, 65 S.Ct. 1137, 89 *L.Ed.* 1628: If the lapse of time creates a property right, such as title by adverse possession, retroactive revival is beyond the legislative power; but if the lapse of time merely bars a personal claim for money or damages, there is no denial of due process in disappointing the hope of a complete defense. The court in *Chase* contributed the following observations in support of the "technical defense" theory: "Statutes of limitation find their justification in necessity and convenience rather than in logic. They represent expedients, rather than principles. ... They are by definition arbitrary, and their operation does not discriminate between the just and the unjust claim, or the voidable and unavoidable delay. ... Their shelter has never been regarded as what now is called a 'fundamental' right ... the history of pleas of limitation shows them to be good only by legislative grace and to be subject to a relatively large degree of legislative control." (65 S.Ct. 1142, 89 *L.Ed.* 1635.)

(3) *California Law.* Whether the limitations period is extended after the statute has run is unsettled. The decisions can be classified into three disparate groupings:

- (a) Construction to avoid retroactivity. (See *infra*, §461.)
- (b) Valid retroactive change. (See *infra*, §462 et seq.)
- (c) Invalid retroactive change. (See *infra*, §467.)

SUPPLEMENT: [This section is current through the latest supplement]



103 of 190 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XII. STATUTE OF LIMITATIONS: IN GENERAL

D. Changes in Period.

1. Legislative Changes.

b. Period Extended After Statute Has Run.

2. Construction To Avoid Retroactivity.

3 *Witkin Cal. Proc. Actions* § 461

[§ 461] Construction To Avoid Retroactivity.

In *Douglas Aircraft Co. v. Cranston* (1962) 58 C.2d 462, 24 C.R. 851, 374 P.2d 819, a provision in the Unclaimed Property Act (now C.C.P. 1570) was challenged as an invalid extension of the period of limitations. The court referred to the different rules on retroactive extension, but avoided a decision on constitutionality by construing the statute as prospective in effect. (58 C.2d 466.)

The court in *Gallo v. Superior Court* (1988) 200 C.A.3d 1375, 246 C.R. 587, citing *Chase Sec. Corp. v. Donaldson* (1945) 325 U.S. 304, 65 S.Ct. 1137, 89 L.Ed. 1628, supra, §460, and the text said: "A potential defendant has no vested right in the sense of repose conferred by his knowledge a lawsuit against him appears to be barred. The issue is one of fairness and of statutory construction, rather than constitutional right." (200 C.A.3d 1383.)

In *Barker v. Brown & Williamson Tobacco Corp.* (2001) 88 C.A.4th 42, 105 C.R.2d 531, plaintiff, whose father died as the result of a smoking-related illness in 1962, brought a wrongful death action against defendant tobacco company after the 1997 Legislature amended C.C. 1714.45 to eliminate the total immunity from tobacco-related product liability actions previously granted to tobacco manufacturers by that statute. (See 6 *Summary* (10th), *Torts*, §1534 et seq.) However, the trial judge dismissed plaintiff's action, finding that it was barred by the 1-year statute of limitations for wrongful death actions in former C.C.P. 340(3) (now 2-year limitations period in C.C.P. 335.1; see infra, §552). *Held*, affirmed.

(a) The 1997 amendments to C.C. 1714.45 did not impliedly repeal the limitations period of former C.C.P. 340(3). In claiming that the Legislature intended to abrogate the statute of limitations for tobacco-related wrongful death actions, plaintiff focused on a provision of the 1997 amendments (C.C.P. 1714.45(f)) stating that tobacco product liability actions "shall be determined on their merits, without the imposition of any claim of statutory bar or categorical defense." But plaintiff's claim ignored the context of that language, which was to eliminate the previously granted immunity for those actions. The 1997 amendments made no reference to former C.C.P. 340(3). (88 C.A.4th 47.)

(b) The Legislature did not intend the 1997 amendments to revive previously barred tobacco-related wrongful death

actions. The general rule is that legislation is to be construed to operate prospectively only and not to apply retroactively unless there is clear legislative intent for retroactive application. No such intent appears in the 1997 amendments, particularly as to a claim that was already time-barred when the statutory immunity was enacted in 1987. More specifically, there is no language in the 1997 amendments that reflects an intent to revive actions that could have been brought before 1988. (88 C.A.4th 48.) And the Legislature's declaration of intent, contained in the uncodified part of the 1997 amendments, expressed only the desire to eliminate the total immunity previously granted, not to revive long time-barred actions. (88 C.A.4th 49.) (See *McKinney v. California Portland Cement Co.* (2002) 96 C.A.4th 1214, 1234, 117 C.R.2d 849, 6 Summary (10th), *Torts*, §1642 [following *Barker*].)

SUPPLEMENT: [This section is current through the latest supplement]



104 of 190 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XII. STATUTE OF LIMITATIONS: IN GENERAL

D. Changes in Period.

1. Legislative Changes.

b. Period Extended After Statute Has Run.

3. Valid Retroactive Change.

aa. In General.

3 Witkin Cal. Proc. Actions § 462

[§ 462] In General.

In *Los Angeles v. Superior Court (Northrop)* (1977) 73 C.A.3d 509, 142 C.R. 292, an inverse condemnation action for damage from the operation of jet aircraft, the original complaint, filed in 1973, alleged a taking in 1972. The city alleged that the taking was no later than December 1971, and that the action was barred by the 1-year claim period of Govt.C. 911.2 (supra, §255). After the effective date of Govt.C. 905.1, eliminating the requirement of a claim, and before the issue of accrual had been tried, the trial judge allowed the filing of an amended complaint that alleged a taking in 1970, well within the 5-year period of C.C.P. 319 (infra, §485). *Held*, this ruling was proper. It was not established before the effective date of Govt.C. 905.1 that the inverse condemnation action was untimely filed, and thereafter "its timeliness ceased to be an issue ... because then the filing of a claim was no longer required in inverse condemnation cases." (73 C.A.3d 513.) Thus, as a pending action, it was entitled to the protection of the remedial statute. (73 C.A.3d 514.)

Prior to 1982, Sts. & H.C. 6571 provided that an action attacking the validity of a treasurer's deed issued after foreclosure of a street assessment lien had to be brought within 12 months after issuance of the deed. In *Atkins v. Kessler* (1979) 97 C.A.3d 784, 159 C.R. 231, the court held that owners of property without actual notice of foreclosure proceedings could sue to quiet title after the period had run, because the notice provision of the statute did not satisfy due process requirements. The 1982 Legislature amended Sts. & H.C. 6571 to provide that, in the case of owner-occupied residential property, (a) the action could be brought within 12 months after discovery of the issuance of the deed; and (b) as to property sold between January 1, 1969, and January 1, 1979, within 12 months after enactment of the amendment. The amendment also contained a statement of the legislative intent that, to meet the due process requirement stated in *Atkins v. Kessler*, the amendment "shall be applied retrospectively" to owners in possession whose homes were sold between the two dates.

The retroactive application of the amendment was upheld in *Battle v. Kessler* (1983) 149 C.A.3d 853, 197 C.R. 170:

(a) The Legislature, realizing that the effect of *Atkins* was to suspend the running of the statute of limitations for

persons who had lost their homes under the old defective foreclosure procedure, sought to avoid a possible flood of litigation, and therefore provided a new period of 12 months from the effective date of the new legislation. (*149 C.A.3d 859.*) The state's interest in avoiding such litigation was sufficient justification for reviving an otherwise barred cause of action. (*149 C.A.3d 860.*)

(b) The state also had a legitimate interest in attempting to right a wrong created by its own defective legislation; and retroactive application of the amendment was the only way in which this purpose could be accomplished. (*149 C.A.3d 860.*)

(c) The Legislature acted properly in balancing the competing interests of homeowners and purchasers at foreclosure sales by (1) limiting the exercise of homeowners' rights to a 12-month period, and (2) providing a complete defense to a homeowner's action where the property has been resold to a bona fide purchaser for value. (*149 C.A.3d 860.*) (On valid retroactive extension for action for sexual abuse of minor, see *infra*, §463 et seq.; on revival of action on insurance claim arising out of Northridge earthquake, see *infra*, §466.)

SUPPLEMENT: [This section is current through the latest supplement]



105 of 190 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XII. STATUTE OF LIMITATIONS: IN GENERAL

D. Changes in Period.

1. Legislative Changes.

b. Period Extended After Statute Has Run.

3. Valid Retroactive Change.

bb. Sexual Abuse of Minor: 1986 Extension of Period.

3 Witkin Cal. Proc. Actions § 463

[§ 463] Sexual Abuse of Minor: 1986 Extension of Period.

Originally, the limitations period for an action for sexual abuse of a minor was governed by former C.C.P. 340(3) (now C.C.P. 335.1) and C.C.P. 352(a), which together established a 1-year statute of limitations commencing when the plaintiff reached the age of majority at 18. C.C.P. 340.1 was enacted in 1986 to extend the limitations period to 3 years from the age of majority, and to provide for the revival of an otherwise expired action. (For current version of statute, see *infra*, §593 et seq.)

In *Liebig v. Superior Court* (1989) 209 C.A.3d 828, 257 C.R. 574, plaintiff Lisa filed a complaint on August 5, 1987, alleging sexual molestation by defendant, her grandfather, while she was between the ages of 5 and 14. At the time she reached her majority (August 7, 1985), the former 1-year limitations period had expired. Defendant demurred to the complaint, contending that the revival of the time-barred action under C.C.P. 340.1 was unconstitutional. *Held*, the retroactive statute was valid.

(a) The federal cases hold that, unless the running of the statute creates a prescriptive property right, the Legislature may revive a time-barred cause of action. (209 C.A.3d 831, citing *Campbell v. Holt* (1885) 115 U.S. 620, 6 S.Ct. 209, 29 L.Ed. 483, and *Chase Sec. Corp. v. Donaldson* (1945) 325 U.S. 304, 65 S.Ct. 1137, 89 L.Ed. 1628, *supra*, §460.)

(b) California law is "unsettled" (209 C.A.3d 832, citing the text):

(1) *Chambers v. Gallagher* (1918) 177 C. 704, 171 P. 931, *supra*, §460, *Mudd v. McColgan* (1947) 30 C.2d 463, 183 P.2d 10, *supra*, §458, and *Evelyn v. California Emp. Stabilization Com.* (1957) 48 C.2d 588, 311 P.2d 500, appear to stand for the proposition that an enlargement must occur before the period expires. But all three cases involved a limitations period for a liability created by statute. (209 C.A.3d 832.)

(2) *Mudd* suggested that the Legislature has power to expressly revive a barred claim, and this dictum was repeated in *Douglas Aircraft Co. v. Cranston* (1962) 58 C.2d 462, 24 C.R. 851, 374 P.2d 819, *supra*, §461, *Singer Co. v. Kings*

(1975) 46 C.A.3d 852, 121 C.R. 398, *infra*, §467, and *Carr v. California* (1976) 58 C.A.3d 139, 129 C.R. 730. (209 C.A.3d 832.)

(3) In *Nelson v. Flintkote Co.* (1985) 172 C.A.3d 727, 218 C.R. 562, *infra*, §568, the court, distinguishing *Chambers*, observed that no Supreme Court case has held a legislative extension invalid where a common law tort was involved. (209 C.A.3d 833.) And *Gallo v. Superior Court* (1988) 200 C.A.3d 1375, 1380, 246 C.R. 587, *supra*, §461, citing *Chase Securities*, *supra*, agreed that there was no constitutional impediment to retrospective application of a statute reviving a civil cause of action. (209 C.A.3d 834.)

(4) Even assuming that a vested right exists in repose of a cause of action, that right is not immune from retroactive laws when an important state interest is at stake. (209 C.A.3d 834, citing community property cases.) "In this case, the important state interest espoused by section 340.1 is the increased availability of tort relief to plaintiffs who had been the victims of sexual abuse while a minor. ... The language of the retroactivity provision of section 340.1 indicates a clear legislative intent to maximize claims of sexual-abuse minor plaintiffs for as expansive a period of time as possible. The public policy is manifest from the text of the law." (209 C.A.3d 834.)

(c) Retroactive extension is therefore valid for common law torts: "We adopt the distinction made in *Nelson* between statutory and common law causes of action, and conclude that *Chambers* and its cognate cases are inapposite to the common law torts alleged in Lisa's complaint. Under the rationale of *Nelson* and *Gallo*, we hold that the Legislature has the power to expressly revive time-barred civil common law causes of action. This holding is consistent with the niche in our civil law occupied by statutes of limitations." (209 C.A.3d 835, citing cases holding that limitations are technical defenses that should be strictly construed to avoid forfeitures; see *supra*, §438.)

SUPPLEMENT: [This section is current through the latest supplement]



106 of 190 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XII. STATUTE OF LIMITATIONS: IN GENERAL

D. Changes in Period.

1. Legislative Changes.

b. Period Extended After Statute Has Run.

3. Valid Retroactive Change.

cc. Sexual Abuse of Minor: 1990 Extension of Period.

3 Witkin Cal. Proc. Actions § 464

[§ 464] Sexual Abuse of Minor: 1990 Extension of Period.

(1) *Enactment of Extension.* *C.C.P. 340.1* was amended in 1990 to extend the limitations period to the plaintiff's 26th birthday or to within 3 years of discovery of the abuse, whichever is later (see *infra*, §593). In addition, former *C.C.P. 340.1(k)* was added to provide that the 1990 amendments apply to "any action commenced on or after January 1, 1991." (For current version of statute, see *infra*, §593 et seq.)

In *David A. v. Superior Court* (1993) 20 *C.A.4th* 281, 24 *C.R.2d* 537, the 25-year-old plaintiff filed a complaint in 1992 alleging childhood sexual abuse by defendants--her two stepbrothers and a neighbor boy--in 1974 when she was 7 years old. Her claims first lapsed in 1986 when she reached age 19 under former *C.C.P. 340(3)* and *C.C.P. 352(a)* (see *supra*, §463). The claims were revived on January 1, 1987 when *C.C.P. 340.1*, enacted in 1986, became effective. However, plaintiff's claims again lapsed when she turned 21 in 1988. In 1990, the statute was again amended to extend the limitations period, and plaintiff contended that the amendment revived her action. *Held*, this is incorrect, based on the literal meaning and effect of former *C.C.P. 340.1(k)*. Plaintiff reached age 21 before the amended *C.C.P. 340.1* took effect on January 1, 1991; the action was filed after the plaintiff reached age 21; and the claim was not subject to postponed accrual. (20 *C.A.4th* 288.)

(2) *1994 Clarification.* The 1994 Legislature repealed former *C.C.P. 340.1(k)* and repudiated the holding in *David A.* by expressly stating that the Legislature intended the 1990 amendments to *C.C.P. 340.1* to apply to any action commenced on or after January 1, 1991, including any action otherwise barred by the limitations period in effect prior to that date, thereby reviving those causes of action that had lapsed or technically expired under prior law. (See *C.C.P. 340.1(r), (s).*) (See *Chaney v. Superior Court* (1995) 39 *C.A.4th* 152, 155, 46 *C.R.2d* 73, 6 *Summary* (10th), *Torts*, §1058 [*C.C.P. 340.1* extension did not apply to negligent supervision action against molester's wife].)

The 1994 amendments are constitutional. (*Lent v. Doe* (1995) 40 *C.A.4th* 1177, 1183, 47 *C.R.2d* 389, *infra*, §595, citing the text [refusing to overrule *Liebig v. Superior Court* (1989) 209 *C.A.3d* 828, 257 *C.R. 574*, *supra*, §463].)

In *Tietge v. Western Province of the Servites* (1997) 55 C.A.4th 382, 64 C.R.2d 53, defendants, a religious brother and his religious order, demurred to the complaints of three plaintiffs that they had been sexually abused, on the ground that the actions were time-barred, because the alleged molestation occurred from 9 to 26 years before the actions were filed. Relying on the then-applicable statute of limitations, the trial judge sustained the demurrers without leave to amend and dismissed. *Held*, affirmed in part and reversed in part.

(a) *C.C.P. 340.1 applied to revive claims made by victim molested both as minor and adult.* Defendant religious brother contended that *C.C.P. 340.1* did not apply to revive the claims made against him by one plaintiff, who alleged that he had been molested both as a minor and as an adult. However, that contention was without merit. The statute's goal is to allow victims of childhood sexual abuse a longer time period in which to become aware of their psychological injuries and remain eligible to sue their abusers. (55 C.A.4th 387, citing *Debbie Reynolds Professional Rehearsal Studios v. Superior Court* (1994) 25 C.A.4th 222, 30 C.R.2d 514, *infra*, §594.) "The intimidation which allows an abuser to take advantage of a child does not magically or suddenly end the day the child attains majority. Indeed, it can continue into the victim's adulthood. ... Accordingly, where as here the alleged childhood sexual abuse is part of a course of conduct that continues beyond childhood, the limitations period of section 340.1 must apply. Any other conclusion would run contrary to the goal of the statute and serve only to reward perpetrators who engage in long-term abuse." (55 C.A.4th 387.)

(b) *C.C.P. 340.1 did not apply to revive claims against defendant religious order.* The statute did not apply to revive the claims against defendant religious order, because the statute applies only to intentional acts of sexual abuse, and does not apply to claims, such as those made here, seeking damages for negligent acts. (55 C.A.4th 387, citing *Debbie Reynolds* and *Chaney*, *supra*.) The current statute abrogates this holding. (See *infra*, §594.)

SUPPLEMENT: [This section is current through the latest supplement]



107 of 190 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XII. STATUTE OF LIMITATIONS: IN GENERAL

D. Changes in Period.

1. Legislative Changes.

b. Period Extended After Statute Has Run.

3. Valid Retroactive Change.

dd. Sexual Abuse of Minor: 2002 Extension of Period.

3 Witkin Cal. Proc. Actions § 465

[§ 465] Sexual Abuse of Minor: 2002 Extension of Period.

(1) *Extension Based on Vicarious Liability.* *C.C.P. 340.1(b)(1)*, added in 1998, provides that a childhood sexual abuse action against a defendant other than the perpetrator, based on a negligent or intentional act that was the legal cause of the abuse, may not be commenced on or after the plaintiff's 26th birthday. However, under a 2002 amendment, an action that was untimely as of January 1, 2003, solely because the plaintiff was age 26 or older, was revived and could be commenced within 1 year of that date where the claim was based on unlawful sexual abuse committed by the defendant's employee, volunteer, representative, or agent. To be revived, the plaintiff had to show that the defendant knew, had reason to know, or was otherwise on notice of the sexual abuse and failed to take reasonable steps and to implement reasonable safeguards to avoid future sexual abuse. A reasonable step or safeguard included, but was not limited to, preventing or avoiding placing the abuser in a function or environment in which contact with children is inherent. However, providing or requiring counseling for the abuser, in and of itself, did not constitute a reasonable step or safeguard. (*C.C.P. 340.1(b)(2)*, (c), added in 2002.) (See 31 *Pepperdine L. Rev.* 363 [sexual abuse litigation involving clergy].)

(2) *Exceptions.* Revival did not occur in either of these cases: (a) Where a claim had been litigated to finality on the merits in a court of competent jurisdiction prior to January 1, 2003. Termination of a claim on statute of limitations grounds does not constitute a final litigation on the merits. (b) Where a written, compromised settlement agreement signed by the plaintiff was entered into by the parties, if the plaintiff was represented by a California attorney at the time of the settlement. (*C.C.P. 340.1(d)*.)

(3) *Constitutionality.* There are mixed decisions on whether the 2002 extension is constitutional. *Roman Catholic Bishop of Oakland v. Superior Court* (2005) 128 C.A.4th 1155, 1165, 28 C.R.3d 355, held that the extension did not violate ex post facto constitutional principles by making punitive damages available. (128 C.A.4th 1165.) However, *Perez v. Roe 1* (2006) 146 C.A.4th 171, 52 C.R.3d 762, held that the extension violated the separation of powers doctrine by interfering with the judicial branch to the extent the extension revived lawsuits that had already been finally resolved adversely to plaintiffs on statute of limitations grounds. (146 C.A.4th 182.)

(4) *Barred Actions*. The statute did not revive the following actions:

Shirk v. Vista Unified School Dist. (2007) 42 C.4th 201, 210, 64 C.R.3d 210, 164 P.3d 630 [action against school district arising from teacher's alleged sexual abuse of plaintiff while minor was barred by plaintiff's failure to timely file government tort claim in 1980, and 2002 extension of C.C.P. 340.1 did not revive claims presentation bar].

Aaronoff v. Martinez-Senftner (2006) 136 C.A.4th 910, 920, 921, 39 C.R.3d 137 [adult daughter sued parents and their businesses alleging childhood sexual abuse by father; action against father could not be revived, because he was perpetrator; action against mother could not be revived, because abuse arose out of parental relationship, not out of parties' business relationship, even though daughter claimed that she was abused at businesses and that father was agent of mother].

Hightower v. Roman Catholic Bishop of Sacramento (2006) 142 C.A.4th 759, 766, 48 C.R.3d 420 [extension failed to revive plaintiff's claim because plaintiff's notice of intent to sue, though timely filed, was motion, not complaint, and thus was insufficient to commence action].

Dutra v. Eagleson (2006) 146 C.A.4th 216, 227, 52 C.R.3d 788 [extension did not revive action based solely on abuse by perpetrator].

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Extension Based on Vicarious Liability*. As properly construed, C.C.P. 340.1(b)(1) permits revival of a previously barred action on proof that the nonperpetrator defendant (a) had actual knowledge, had constructive knowledge as measured by the reason to know standard, or was otherwise on notice that the perpetrator had engaged in past unlawful sexual conduct with a minor, and (b) failed to take reasonable safeguards to avoid acts of future unlawful sexual conduct by the perpetrator. (*Doe v. Los Angeles* (2007) 42 C.4th 531, 549, 67 C.R.3d 330, 169 P.3d 559.) (See *Santillan v. Roman Catholic Bishop of Fresno* (2008) 163 C.A.4th 4, 11, 77 C.R.3d 343 [fact questions as to whether deceased parish housekeeper was aware that pastor was abusing plaintiffs and whether she had duty to report it to defendant bishop for purposes of determining whether defendant was on notice of abuse]; *Deutsch v. Masonic Homes of Calif.* (2008) 164 C.A.4th 748, 772, 80 C.R.3d 368 [notice requirement does not impose duty on nonperpetrator defendant to inquire about possible unlawful sexual conduct and is not satisfied by proof that that conduct was so pervasive and obvious that any reasonable person would have noticed it; rather, requirement mandates assessment of facts that defendant actually knew to determine whether reasonable person would have inferred that unlawful sexual conduct had occurred].)(3) *Constitutionality*. *Deutsch, supra*, held that the extension does not violate due process. The extension is not unconstitutional on its face, because it does not deprive a defendant of a protected liberty or property interest. (164 C.A.4th 759.) Further, the extension is not unconstitutional as applied to claims involving sexual abuse that occurred more than 30 years ago. Delay by nongovernmental plaintiffs in filing claims does not constitute state action. (164 C.A.4th 761.)

(4) *Barred Actions*. The statute also did not revive the following actions:

Doe v. Los Angeles, supra, 42 C.4th 551 [action against city based on childhood sexual molestation by police officer was not revived, because city lacked knowledge that officer had engaged in past unlawful sexual conduct with minors].

Doe v. Salesian Soc. (2008) 159 C.A.4th 474, 481, 71 C.R.3d 565 [extension did not revive action against religious order based on childhood sexual molestation by priest, absent evidence that religious order had prior knowledge of unlawful sexual conduct by priest].



108 of 190 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XII. STATUTE OF LIMITATIONS: IN GENERAL

D. Changes in Period.

1. Legislative Changes.

b. Period Extended After Statute Has Run.

3. Valid Retroactive Change.

ee. Action on Northridge Earthquake Insurance Claim.

3 Witkin Cal. Proc. Actions § 466

[§ 466] Action on Northridge Earthquake Insurance Claim.

(1) *Enactment of Revival Statute.* Under C.C.P. 340.9, added in 2000, an action on an insurance claim arising out of the 1994 Northridge earthquake that was barred as of January 1, 2001, solely because the applicable statute of limitations had expired was revived and could be commenced by January 1, 2002, if the insured had contacted the insurer before January 1, 2000, about potential damage due to that event. (C.C.P. 340.9(a); see *Arocho v. California Fair Plan Ins. Co.* (2005) 134 C.A.4th 461, 468, 36 C.R.3d 200 [insurance broker was insurer's representative for purposes of contact requirement].) An action under C.C.P. 340.9 commenced either before January 1, 2001, or by January 1, 2002, could not be barred based on this limitations period. (C.C.P. 340.9(b).) C.C.P. 340.9 did not alter the applicable limitations period of an action that was *not* time-barred as of January 1, 2001. (C.C.P. 340.9(c).) C.C.P. 340.9 did not impose on an insurer a new duty to investigate. (See *Lincoln Fountain Villas Homeowners Assn. v. State Farm Fire & Cas. Ins. Co.* (2006) 136 C.A.4th 999, 1009, 39 C.R.3d 345; *Cheviot Vista Homeowners Assn. v. State Farm Fire & Cas. Ins. Co.* (2006) 143 C.A.4th 1486, 1498, 50 C.R.3d 1 [following *Lincoln Fountain Villas Homeowners Assn.*].)

C.C.P. 340.9 did not apply to either of the following:

(a) A claim that had been litigated to finality in a court of competent jurisdiction prior to the effective date of the statute. (C.C.P. 340.9(d)(1); see *Mid-Century Ins. Co. v. Superior Court* (2006) 138 C.A.4th 769, 777, 41 C.R.3d 833 [exception in C.C.P. 340.9(d)(1) did not apply to bar action that had been decided solely on technical grounds].)

(b) A written compromised settlement agreement between an insurer and its insured, providing the insured was represented by an attorney at the time of the settlement and the attorney signed the agreement. (C.C.P. 340.9(d)(2); see *Israel-Curley v. California Fair Plan* (2005) 126 C.A.4th 123, 128, 24 C.R.3d 1 [exception in C.C.P. 304.9(d)(2) applied to bar action]; *Rosenblum v. Safeco Ins. Co.* (2005) 126 C.A.4th 847, 858, 24 C.R.3d 427 [same].)

(2) *Revived Actions.* C.C.P. 340.9 applied to revive contract claims and tort claims for insurer bad faith, because

both types of claims seek to recover damages recoverable under the policy; however, the statute did not revive fraud claims, because they do not arise from an insurer's failure to perform under the policy, but from misconduct that goes well beyond simple nonperformance. Further, the statute did not impair constitutional contract rights or deny due process. (*20th Century Ins. Co. v. Superior Court* (2001) 90 C.A.4th 1247, 1254, 1262, 109 C.R.2d 611, 6 Cal. Proc. (5th), *Proceedings Without Trial*, §52.)

The statute applied to revive claims barred not only by statutory limitations periods, but also by contractual limitations periods. (*Hellinger v. Farmers Group* (2001) 91 C.A.4th 1049, 1056, 111 C.R.2d 268; *Berger v. California Ins. Guarantee Assn.* (2005) 128 C.A.4th 989, 1002, 27 C.R.3d 583.)

The statute applied to revive claims barred either because of untimely notice to the insurer or because of untimely filing of the lawsuit, and as so construed, did not unconstitutionally impair contract rights. (*Bialo v. Western Mut. Ins. Co.* (2002) 95 C.A.4th 68, 74, 78, 115 C.R.2d 3.)

The revival of a claim for punitive damages under the statute did not violate the ex post facto prohibition in U.S. Const., Art. I, §10. (*21st Century Ins. Co. v. Superior Court* (2005) 127 C.A.4th 1351, 1366, 26 C.R.3d 476.)

(3) *Barred Actions.* The plain terms of the statute and its legislative history indicate an intention only to revive claims for damages resulting from the Northridge earthquake of January 17, 1994, not to claims arising solely out of aftershocks of the Northridge earthquake. (*Migliore v. Mid-Century Ins. Co.* (2002) 97 C.A.4th 592, 611, 118 C.R.2d 548.)

The statute did not apply to revive an insured's professional malpractice action against an insurance broker for failure to procure adequate coverage for an injury arising out of the 1994 Northridge earthquake. (*Hydro-Mill Co. v. Hayward, Tilton & Rolapp Ins. Associates* (2004) 115 C.A.4th 1145, 1167, 10 C.R.3d 582.)

Where an insured made a claim about Northridge earthquake damage in January 1994, but withdrew the claim less than 45 days later after both the insured and the insurer inspected the property and determined that the damage was below the policy's deductible, the insured's subsequent action based on that damage, filed 8 years later, was not revived by C.C.P. 340.9. The voluntary withdrawal of a damage claim by an insured has the same legal consequences as the failure to file a claim, or, after filing a claim, the failure or refusal to provide the insurer with the information necessary to adjust the claim. (*1231 Euclid Homeowners Assn. v. State Farm Fire & Cas. Co.* (2006) 135 C.A.4th 1008, 1018, 37 C.R.3d 795, 2 Summary (10th), *Insurance*, Supp., §317.)

(4) *Doctrine of Equitable Tolling Was Applicable.* The doctrine of equitable tolling (infra, §738 et seq.) could be asserted to bar an insurer from raising the statute as a defense. (See *Ashou v. Liberty Mut. Fire Ins. Co* (2006) 138 C.A.4th 748, 756, 41 C.R.3d 819 [doctrine applied to insurer that reopened and reconsidered claim].)

(5) *Doctrine of Equitable Estoppel Was Applicable.* The doctrine of equitable estoppel (infra, §762 et seq.) could be asserted to bar an insurer from raising the statute as a defense. (See *Cordova v. 21st Century Ins. Co.* (2005) 129 C.A.4th 89, 108, 28 C.R.3d 170 [plaintiff presented triable issue of fact whether insurer had failed to thoroughly investigate claim]; *Doheny Park Terrace Homeowners Assn. v. Truck Ins. Exchange* (2005) 132 C.A.4th 1076, 1091, 1096, 34 C.R.3d 157 [following *Cordova*; insured's complaint stated sufficient facts to warrant application of doctrine, based on allegations that insurer intentionally misrepresented that cost to repair earthquake damage was less than policy's deductible].)

SUPPLEMENT: [This section is current through the latest supplement]



109 of 190 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XII. STATUTE OF LIMITATIONS: IN GENERAL

D. Changes in Period.

1. Legislative Changes.

b. Period Extended After Statute Has Run.

4. Invalid Retroactive Change.

3 *Witkin Cal. Proc. Actions* § 467

[§ 467] Invalid Retroactive Change.

(1) *Revival of Action for Tax Refund.* In *Singer Co. v. Kings* (1975) 46 C.A.3d 852, 121 C.R. 398, S filed a claim for a refund of taxes, paid more than 3 years before, when a 3-year statute, measured from the time of payment, was in effect. The period was enlarged to 4 years before the claim was formally denied, and the trial judge ruled that the claim was not barred. *Held*, reversed. Under *Mudd v. McColgan* (1947) 30 C.2d 463, 183 P.2d 10, *supra*, §458, and *Douglas Aircraft Co. v. Cranston* (1962) 58 C.2d 462, 24 C.R. 851, 374 P.2d 819, *supra*, §461, an enlargement of the period applies only to pending matters unless the statute expressly provides to the contrary. Because the claim was barred when filed, the subsequent enlargement did not extend the time for its filing. (46 C.A.3d 866, 867.) (See *Carr v. California* (1976) 58 C.A.3d 139, 147, 129 C.R. 730 [citing *Singer* and the text].)

(2) *Revival of Action for Sexual Abuse of Minor.* There are mixed decisions on whether the 2002 extension to the statute of limitations reviving actions alleging the sexual abuse of a minor based on vicarious liability (see *supra*, §465) is constitutional. *Roman Catholic Bishop of Oakland v. Superior Court* (2005) 128 C.A.4th 1155, 1165, 28 C.R.3d 355, held that the extension did not violate ex post facto constitutional principles by making punitive damages available. (128 C.A.4th 1165.) However, *Perez v. Roe 1* (2006) 146 C.A.4th 171, 52 C.R.3d 762, held that the extension violated the separation of powers doctrine by interfering with the judicial branch to the extent the extension revived lawsuits that had already been finally resolved adversely to plaintiffs on statute of limitations grounds. (146 C.A.4th 182.)

SUPPLEMENT: [This section is current through the latest supplement]



110 of 190 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XII. STATUTE OF LIMITATIONS: IN GENERAL

D. Changes in Period.

2. Contractual Modifications.

a. Extending Period by Waiver.

3 *Witkin Cal. Proc. Actions* § 468

[§ 468] Extending Period by Waiver.

(1) *General Principles and Former Law.* A creditor, in an agreement such as a promissory note, may include a provision that the debtor agrees not to set up the defense of the statute of limitations. In some jurisdictions this kind of a waiver or contractual extension is void; in others it is valid if the duration is reasonable. (See 63 *Harv. L. Rev.* 1181, 1223; 84 *A.L.R.3d* 1172 [validity of contractual provision establishing period of limitations longer than that provided by state statute of limitations]; 51 *Am.Jur.2d* (2000 ed.), *Limitation of Actions* §95 et seq.) California courts, stressing the theory of "personal privilege" (supra, §440), took the extreme position that a permanent waiver (or its practical equivalent, a waiver for 99 years) was valid. (*Brownrigg v. De Frees* (1925) 196 C. 534, 541, 238 P. 714 [99 years]; *Dexter v. Pierson* (1931) 214 C. 247, 250, 4 P.2d 932 [permanent waiver]; *Hasman v. Canman* (1933) 136 C.A. 91, 95, 28 P.2d 372 [provision for permanent renewal was self-operating]; see 14 *Cal. L. Rev.* 126; 4 *Stanf. L. Rev.* 420.) However, even in California an attempted waiver may be nullified if the particular time provision has a public policy objective. (See *California Bank v. Stimson* (1949) 89 C.A.2d 552, 556, 201 P.2d 39 [time limit on action for deficiency judgment after foreclosure]; 22 *So. Cal. L. Rev.* 502.)

Waiver of the statute gives up the debtor's defense, but has no effect on others not in privity; e.g., a waiver by a mortgagor will keep its obligation alive but will not prevent the running of the statute in favor of preexisting junior encumbrancers. (See *Ekmann v. Plumas County Bank* (1932) 215 C. 671, 673, 12 P.2d 433; 4 *Summary* (10th), *Security Transactions in Real Property*, §114.)

(2) *Maximum 4-Year Waivers.* C.C.P. 360.5, enacted in 1951, provides in part that no waiver "shall be effective for a period exceeding four years from the date of expiration of the time limited for commencement of the action by this title." However, "such waiver may be renewed for a further period of not exceeding four years from the expiration of the immediately preceding waiver," and "[s]uch waivers may be made successively." Although the section is somewhat complicated, it seems clear that (a) it abolishes perpetual and longtime waivers in the original instrument; but (b) it permits a provision extending the period (up to 4 years for written contract) by an additional 4 years; and (c) it allows any number of successive but separately executed renewal agreements for additional periods of up to 4 years. (See *Cadle Co. v. World Wide Hospitality Furniture* (2006) 144 C.A.4th 504, 514, footnote 8, 50 C.R.3d 480 [action on promissory note containing waiver of defenses was timely under C.C.P. 360.5, where action was filed within 10 years

of accrual of applicable 6-year limitations period]; *Stanf. L. Rev.* 415 [exhaustive analysis of 1951 provisions].) The statute was amended in 1953 to clarify the language and specifically excluded from its coverage written waivers to a county to secure payment of indigent aid or repayment of money fraudulently or illegally obtained. (See *Santa Clara v. Vargas* (1977) 71 C.A.3d 510, 520, 139 C.R. 537 [evidence supported finding that patient's spouse waived "limitation of any statute" regarding county's right to repayment]; 27 *So. Cal. L. Rev.* 109.)

In *California First Bank v. Braden* (1989) 216 C.A.3d 672, 264 C.R. 820, plaintiff sued defendants on guaranties in a note containing the provision: "Guarantors waive the benefit of any limitations affecting their liability hereunder or the enforcement thereof to the extent permitted by law." In the present action, defendants contended that the statute was ambiguous and could reasonably be construed to limit the statutory extension to 4 years from the date of signing the waiver, even though at that time the note had not become due and unpaid, and no cause of action had accrued. *Held*, the waiver permitted suit for 4 years after the time when the statute of limitations would otherwise have run. (216 C.A.3d 676, 677, quoting the text.)

(3) *Waiver Signed by Attorney.* In *Carlton Browne & Co. v. Superior Court* (1989) 210 C.A.3d 35, 258 C.R. 118, the court construed the provision of C.C.P. 360.5 that the waiver must be signed "by the person obligated." In this case, the waiver by the corporate defendant was signed by its attorney-agent. *Held*, this was sufficient.

(a) Under fundamental principles of agency, the signature of the agent is sufficient to bind the principal, and nothing in the legislative history of C.C.P. 360.5 indicates an intention to change this rule. (210 C.A.3d 43.)

(b) A written acknowledgment signed by an authorized agent has been held to constitute a writing signed by the "party to be charged" within the meaning of C.C.P. 360 (see *infra*, §751) and C.C.P. 360.5 should receive the same construction: although C.C.P. 360 uses the term "party to be charged" and C.C.P. 360.5 refers to "the person obligated," "we do not believe that the difference in language requires a different resolution on the question of whether section 360.5 excludes agents as authorized signators." (210 C.A.3d 45.)

(4) *Contract of Sale.* The Uniform Commercial Code establishes a 4-year limitation on an action for the breach of a contract of sale, and provides that the parties may not extend the period. (U.C.C. 2725(1); see *Mysel v. Gross* (1977) 70 C.A.3d Supp. 10, 14, footnotes 2 and 3, 138 C.R. 873; 4 *Summary* (10th), *Sales*, §213.) (On shortening period, see *infra*, §473.)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Maximum 4-Year Waivers.* See *Los Angeles v. Raytheon Co.* (2008) 159 C.A.4th 27, 40, 70 C.R.3d 788 [under C.C.P. 360.5, action against county for refund of property taxes filed by taxpayers after expiration of limitations period was not time-barred, where parties had entered into written stipulation to waive limitations defense].



111 of 190 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XII. STATUTE OF LIMITATIONS: IN GENERAL

D. Changes in Period.

2. Contractual Modifications.

b. Shortening Period by Agreement.

1. General Rule: Shorter Period Is Valid If Reasonable.

3 *Witkin Cal. Proc. Actions* § 469

[§ 469] General Rule: Shorter Period Is Valid If Reasonable.

(1) *Statement of Rule.* The obligor may seek special protection by incorporating provisions in an agreement that require the commencement of an action within a shorter period than that allowed by the applicable statute of limitations. As a practical matter these provisions are found only in contracts habitually drawn by the obligor, such as bills of lading, warehouse receipts, and insurance policies. They are generally upheld if the shorter period is reasonable, i.e., if it gives sufficient time for the effective pursuit of the judicial remedy. (See *Tebbetts v. Fidelity & Cas. Co. of New York* (1909) 155 C. 137, 138, 99 P. 501; *Beeson v. Schloss* (1920) 183 C. 618, 622, 192 P. 292; *Fageol Truck & Coach Co. v. Pacific Indem. Co.* (1941) 18 C.2d 748, 753, 117 P.2d 669; *Hubbard v. Matson Navigation Co.* (1939) 34 C.A.2d 475, 477, 93 P.2d 846 [passenger's steamship ticket limiting time to sue for personal injuries]; *Ward v. System Auto Parks & Garages* (1957) 149 C.A.2d Supp. 879, 309 P.2d 577 [3-month period in contract for auto parking was not unreasonably short]; *Capehart v. Heady* (1962) 206 C.A.2d 386, 388, 23 C.R. 851 [lease; 3-month period for lessee's action upheld]; *C & H Foods Co. v. Hartford Ins. Co.* (1984) 163 C.A.3d 1055, 1063, 211 C.R. 765 [insurance contract; 1-year period was valid]; *Lawrence v. Western Mut. Ins. Co.* (1988) 204 C.A.3d 565, 571, 251 C.R. 319 [same]; *State Farm Fire & Cas. Co. v. Superior Court* (1989) 210 C.A.3d 604, 608, 610, 258 C.R. 413 [following *Lawrence*]; *Hambrecht & Quist Venture Partners v. American Med. Int.* (1995) 38 C.A.4th 1532, 1544, 46 C.R.2d 33, 1 Summary (10th), *Contracts*, §70, citing the text [agreement to purchase stock in leveraged buyout; contractual choice of law provision requiring application of Delaware's shorter statute of limitations was valid]; *CBS Broadcasting v. Fireman's Fund Ins. Co.* (1999) 70 C.A.4th 1075, 1084, 83 C.R.2d 197 [upholding 1-year limitations period in insurance policy indemnifying production costs if television show cast member was unable to perform]; *Kapsimallis v. Allstate Ins. Co.* (2002) 104 C.A.4th 667, 673, 128 C.R.2d 358 [following *Prudential-LMI Commercial Ins. v. Superior Court* (1990) 51 C.3d 674, 274 C.R. 387, 798 P.2d 1230, *infra*, §471; trial judge erred in ruling that insurer's uniform practice of using date of earthquake as "inception of loss," which commenced policy's shortened limitations period, was proper; that term is subject to delayed discovery rule]; 63 *Harv. L. Rev.* 1181; 66 *Harv. L. Rev.* 923; 6 *A.L.R.3d* 1197 [contractual limitations periods in general]; 66 *A.L.R.4th* 859 [insurance policy]; 51 *Am.Jur.2d* (2000 ed.), *Limitation of Actions* §95 et seq.; but see *Bollinger v. National Fire Ins. Co. of Hartford, Connecticut* (1944) 25 C.2d 399, 407, 154 P.2d 399, *infra*, §739.)

(2) *Statutory Conditions on Contractual Reduction.* A statute may place conditions on contractual reduction. Thus, C.C. 3239 provides that certain payment bonds may not reduce the time to a period shorter than 6 months, and that no provision limiting the normal statutory period is valid unless the bond is recorded. In *Progress Glass Co. v. American Ins. Co.* (1980) 100 C.A.3d 720, 161 C.R. 243, the court held that an unrecorded bond reducing the period to 1 year was invalid, and that the normal 4-year period applied. (100 C.A.3d 729.) (See *Hayman v. Sitmar Cruises* (1993) 14 C.A.4th 1499, 1505, 18 C.R.2d 412 [provision in cruise ticket requiring passenger to both institute action and serve process within 1 year effectively shortened limitations period to less than 1 year in violation of 46 U.S.C. Appx., §183b].)

(3) *Applicability of Discovery Rule.* In *Moreno v. Sanchez* (2003) 106 C.A.4th 1415, 131 C.R.2d 684, plaintiffs sued defendant home inspector for failing to discover and report certain defects in a house that plaintiffs purchased. Although B. & P.C. 7199 provides for a 4-year limitations period accruing from the date of inspection, the parties' home inspection contract set forth a shortened 1-year limitations period running from the date of inspection. Because plaintiffs filed their action 13 months after defendant had inspected the house they purchased, the trial judge dismissed the action as untimely. *Held*, reversed and remanded.

(a) *Applicability of discovery rule in general.* Home inspection situations share many characteristics with those involving other professionals in which delayed accrual has been recognized as appropriate and necessary. Although home inspections are not as regulated as some fields, the Legislature has recognized the significance of the role home inspectors occupy in California's economy, as well as the potential hazards of fraudulently or negligently performed inspections (see 12 *Summary* (10th), *Real Property*, §§496, 497). As with other forms of professional malpractice, specialized skill is required to analyze a residence's structural and component parts. Because of the hidden nature of the systems and components in a home, a potential homeowner may not see or recognize a home inspector's negligence and thus may not understand that he or she has been damaged until long after the inspection date. This fact, coupled with the trust the potential homeowners must necessarily place in the professional home inspector, compels the conclusion that claims for breach of a home inspector's duty of care should accrue in all cases, not on the date of the inspection, but when the homeowner discovers, or with the exercise of reasonable diligence should have discovered, the inspector's breach. (106 C.A.4th 1429.)

(b) *Applicability of discovery rule where limitations period is shortened.* For a provision in a home inspection contract shortening the statute of limitations to be enforceable, accrual also occurs not with the inspection, but with the homeowner's discovery of the breach. (106 C.A.4th 1432.) An effective judicial remedy against professionals or skilled craftspeople requires that accrual occur only on discovery of the breach, and the law will not tolerate contractual nullification of that policy. (106 C.A.4th 1433, citing the text.) Although dicta, language in *Silver v. Boatwright Home Inspection* (2002) 97 C.A.4th 443, 118 C.R.2d 475, also expressly endorses this view. (106 C.A.4th 1433.)

Later cases are to the same effect. (See *Weatherly v. Universal Music Publishing Group* (2004) 125 C.A.4th 913, 920, 23 C.R.3d 157 [following *Moreno*; discovery rule applied to action by songwriter against music publisher for breach of royalty contract, fraud, and related claims governed by shortened contractual limitations period; even though songwriter failed to exercise contractual right to conduct audit, publisher had mislead songwriter]; *Charnay v. Cobert* (2006) 145 C.A.4th 170, 183, 51 C.R.3d 471, 4 Cal. Proc. (5th), *Pleading*, §616 [following *Moreno*; discovery rule applied to preclude dismissal of action by client against attorney for breach of retainer agreement containing shortened contractual limitations period].)

SUPPLEMENT: [This section is current through the latest supplement]



112 of 190 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XII. STATUTE OF LIMITATIONS: IN GENERAL

D. Changes in Period.

2. Contractual Modifications.

b. Shortening Period by Agreement.

2. Distinctions.

3 *Witkin Cal. Proc. Actions* § 470

[§ 470] Distinctions.

(1) *Third-Party Beneficiary.* In *Olds v. General Acc. Fire & Life Assur. Corp.* (1945) 67 C.A.2d 812, 155 P.2d 676, the court held that a shortened provision in an indemnity insurance policy might be valid as to a contracting party but was invalid as to a statutory third-party beneficiary. K sued H for damages for personal injuries, defendant insurer defended, and K obtained judgment. H left the country, K died, and plaintiff, K's executor, did not sue the insurer on its statutory liability under the policy (*Ins.C. 11580*; see 2 *Summary* (10th), *Insurance*, §301 et seq.) until over a year after final judgment. Defendant set up its policy provision that an action must be brought within 12 months after the cause accrues. *Held:* (a) The provision is reasonable as to an insured, who knows when his or her right against the insurer arises; 12 months is ample time within which to bring an action to compel the insurer to reimburse the insured for a judgment he or she has paid. (b) The provision is unreasonable as to the injured plaintiff, who has no legal means of learning whether the tortfeasor is insured until after final judgment and proceedings supplementary to execution. Moreover, this is an attempt, by a contract between the insurer and the insured, to cut down the time that the injured plaintiff has to sue on the judgment (3, 4, or 5 years, depending on whether the action is viewed as one on a statutory liability, written contract, or judgment), in violation of the statute conferring the right. The essence of the holding, therefore, is not that the particular 12-month period was too short, but that no agreement between the parties to the insurance contract could validly cut down the time given by the statutes of limitation for the successful plaintiff to sue on his judgment. (67 C.A.2d 824.)

(2) *Action Must Be on Policy.* In *Murphy v. Allstate Ins. Co.* (1978) 83 C.A.3d 38, 147 C.R. 565, the court construed *Ins.C. 2070* and *2071*, containing a provision that an action on the policy for recovery of any claim must be commenced within 12 months after inception of the loss. *Held,* the sections refer only to a claim for a loss covered by the policy. Hence, plaintiffs' action alleging the wrongful conduct of the insurer in repairing damaged property, and other wrongful acts subsequent to the loss, was not an action on the policy and was not subject to this limitations period. (83 C.A.3d 44, 46, 50.) (See *Frazier v. Metropolitan Life Ins. Co.* (1985) 169 C.A.3d 90, 104, 214 C.R. 883, *supra*, §200 [following *Murphy*; policy limitation was not bar to action based on insurer's breach of implied covenant of good faith and fair dealing]; 96 A.L.R.3d 1193 [limitation of action against insurer for breach of contract to defend].)

Where a bad faith action is based on allegations relating to the handling of an insurance claim or the manner in which it is processed, it is an action "on the policy" and therefore subject to the limitations bar. (*Velasquez v. Truck Ins. Exchange* (1991) 1 C.A.4th 712, 719, 720, 5 C.R.2d 1 [following *Lawrence v. Western Mut. Ins. Co.* (1988) 204 C.A.3d 565, 571, 251 C.R. 319, supra, §469, and *Abari v. State Farm Fire & Cas. Co.* (1988) 205 C.A.3d 530, 252 C.R. 565].) The opinion in *Velasquez* makes the following observation: "The *Lawrence* and *Abari* decisions evince a trend by the appellate courts to limit the exemption from the limitations clause set forth in *Murphy* and *Frazier* to the facts of those cases. ... That exemption applies only where the events constituting bad faith occur after initial policy coverage. Where denial of the claim in the first instance is the alleged bad faith and the insured seeks policy benefits, the bad faith action is on the policy and the limitations provision applies." (1 C.A.4th 721.) (See *CBS Broadcasting v. Fireman's Fund Ins. Co.* (1999) 70 C.A.4th 1075, 1086, 83 C.R.2d 197 [following *Velasquez*]; *Jang v. State Farm Fire & Cas. Co.* (2000) 80 C.A.4th 1291, 1296, 95 C.R.2d 917 [criticizing *Murphy* and *Frazier*; even if insured alleges only tort claims, action seeking damages under policy for insured risk is still "on the policy" and thus subject to policy's limitations period].)

In *State Farm Fire & Cas. Co. v. Superior Court* (1989) 210 C.A.3d 604, 258 C.R. 413, an action on homeowners' policies, two 1-year limitations were involved. (1) *Ins.C. 2071*: "No action shall be brought" unless started within 1 year "after the occurrence" causing loss or damage; and (2) the policy provision: "No suit or action on this policy for the recovery of any claim" shall be brought unless commenced within 12 months "after inception of the loss." Held, the two provisions were substantially the same and the policy provision was valid. "Clearly 'no action shall be brought' must mean no action on the policy. ... And the differences between 'occurrence' and 'inception of the loss' are trivial; if anything, as State Farm argues, the policy provision is an improvement in the direction of plain English." (210 C.A.3d 610.) (See *Prudential-LMI Commercial Ins. v. Superior Court* (1990) 51 C.3d 674, 274 C.R. 387, 798 P.2d 1230, *infra*, §471.)

SUPPLEMENT: [This section is current through the latest supplement]



113 of 190 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XII. STATUTE OF LIMITATIONS: IN GENERAL

D. Changes in Period.

2. Contractual Modifications.

b. Shortening Period by Agreement.

3. Insured's Action Against Successive Insurers for Progressive Property Loss.

3 Witkin Cal. Proc. Actions § 471

[§ 471] Insured's Action Against Successive Insurers for Progressive Property Loss.

Prudential-LMI Commercial Ins. v. Superior Court (1990) 51 C.3d 674, 274 C.R. 387, 798 P.2d 1230, was an action involving progressive property damage to an apartment house owned by plaintiffs and insured over the years by successive insurers. Plaintiffs, trustees of a family trust, built an apartment house in 1970-1971 and insured it with four successive fire and extended coverage property insurers between 1971 and 1986. Prudential issued an all-risk homeowners policy covering the period between October 27, 1977, and October 27, 1980. The policy contained standard provisions on (a) written notice of loss and proof of loss, and (b) the 1-year limitations period of *Ins.C. 2071*. In November 1985, plaintiffs discovered an extensive crack in the foundation and floor slab of the building, and in December 1985, they filed a claim with their brokers who immediately notified all companies that had issued policies on the property during plaintiffs' ownership. Prudential, after an investigation, concluded that the crack was caused by expansive soil, and denied the claim under the policy's earth movement exclusion. Plaintiffs sued the insurers, and Prudential moved for summary judgment. The trial judge denied the motion, stating that triable issues existed whether the earth movement exclusion applied, whether the damage occurred during the policy period, and when the crack first appeared. The Court of Appeal issued a writ of mandamus to compel granting the motion; although recognizing the "delayed discovery" rule for cases of continuous and progressive loss, the court concluded that plaintiffs had failed to bring their action within 1 year after "a reasonable person" would have been placed on notice of property damage. *Held*, judgment of Court of Appeal reversed.

(a) *1-year limitation provision.* A 1-year provision has been enacted by most states as a means of preventing fraudulent claims. In California, *Ins.C. 2070.1*, the standard form policy, provides a 1-year period. With respect to soil-related claims, *Ins.C. 2070.1* requires insurance companies to notify insureds at least 30 days before expiration of the period, and provides for an automatic tolling of the period where notice is not given. (51 C.3d 682, 683.) The validity of the statutory limitation was upheld in *C & H Foods Co. v. Hartford Ins. Co.* (1984) 163 C.A.3d 1055, 211 C.R. 765. (51 C.3d 683.)

(b) *Delayed discovery and inception of loss.*

(1) The determination of when the statutory period commences to run depends on construction of the phrase "inception of the loss." Some courts define it narrowly as the occurrence of the physical event causing the loss; but California cases hold that reasonable discovery of the loss determines accrual of the cause of action. (51 C.3d 685, citing *Lawrence v. Western Mut. Ins. Co.* (1988) 204 C.A.3d 565, 251 C.R. 319.) "The insured's suit on the policy will be deemed timely if it is filed within one year after 'inception of the loss,' defined as that point in time when appreciable damage occurs and is or should be known to the insured, such that a reasonable insured would be aware that his notification duty under the policy has been triggered. To take advantage of the benefits of a delayed discovery rule, however, the insured is required to be diligent in the face of discovered facts. The more substantial or unusual the nature of the damage discovered by the insured (e.g., the greater its deviation from what a reasonable person would consider normal wear and tear), the greater the insured's duty to notify his insurer of the loss promptly and diligently." (51 C.3d 686.)

(2) Determining when appreciable damage occurs is a factual matter for the trier of fact; the insured's unreasonableness in delaying notification of the loss may be raised as a separate affirmative defense by the defendant insurer, and the insurer has the burden of proof by a preponderance of the evidence. (51 C.3d 687, citing *Olson v. Standard Marine Ins. Co.* (1952) 109 C.A.2d 130, 240 P.2d 379.) Plaintiffs should therefore be allowed to amend their complaint to allege facts showing that their discovery of the loss was reasonable. (51 C.3d 687.)

(c) *Equitable tolling.*

(1) After filing their notice of loss, plaintiffs waited more than 18 months to file the present action. But the anomalous conclusion that an insured must file an action before the insurer has completed its investigation and denied the claim has been questioned in other jurisdictions that have the same statutory scheme. And the leading New Jersey case of *Peloso v. Hartford Fire Ins. Co.*, followed by other state court decisions, takes the position that the period should be tolled until an insurer's formal denial of the claim. (51 C.3d 688, 689.)

(2) California cases have taken inconsistent approaches to the issue, but recent decisions have applied the equitable doctrines of waiver and estoppel to allow filing of an action after the limitations period expired. (51 C.3d 689, 690, quoting the text.) And equitable tolling has been applied when the plaintiff first files a claim before an administrative agency and then files a second proceeding after the limitation period has expired. (51 C.3d 690, citing *Collier v. Pasadena* (1983) 142 C.A.3d 917, 191 C.R. 681, *infra*, §746.) "We find *Peloso's* reasoning consistent with the trend in other states toward equitable tolling of the one-year suit provision in the limited circumstances in which the insurer (or other party against whom the claim has been made) has received timely notice of the loss and thus is able to investigate the claim without suffering prejudice." (51 C.3d 691.)

(3) "[T]he principle of equitable tolling presents several advantages in eliminating the unfair results that often occur in progressive property damage cases. First, it allows the claims process to function effectively, instead of requiring the insured to file suit *before* the claim has been investigated and determined by the insurer. Next, it protects the reasonable expectations of the insured by requiring the insurer to investigate the claim without later invoking a technical rule that often results in an unfair forfeiture of policy benefits. Although an insurer is not required to pay a claim that is not covered or to advise its insureds concerning what legal arguments to make, good faith and fair dealing require an insurer to investigate claims diligently before denying liability. ... Third, a doctrine of equitable tolling will further our policy of encouraging settlement between insurers and insureds, and will discourage unnecessary bad faith suits that are often the only recourse for indemnity if the insurer denies coverage after the limitations period has expired." (51 C.3d 692.)

(4) The anomaly caused by a literal application of the 1-year suit provision is demonstrated by the facts alleged in this case: plaintiffs notified Prudential of their loss in December 1985, 1 month after it was discovered. They then had 60 days to file a proof of loss. Prudential had another 60 days to determine liability, and during this time, an action would have been premature. Negotiations continued until January 1987, when Prudential indicated that coverage would be denied; in February 1987, Prudential requested that plaintiffs submit to an examination under oath; and it was not until September 1987 that the claim was denied unequivocally. Thus, if the 1-year provision applied, plaintiff's action

would have been untimely before the insurer denied coverage. (51 C.3d 692.)

(5) The *Peloso* approach is preferable to the application of the concepts of waiver and estoppel; the proper resolution of the foregoing anomaly is to allow the 1-year suit provision *Ins.C. 2071* to run from the date of inception of the loss, but to toll it ""from the time an insured gives notice of the damage to his insurer, pursuant to applicable policy notice provisions, until coverage is denied." (51 C.3d 693.)

(d) *Apportionment of damages between insurers.*

(1) The Court of Appeal by dictum declared that apportionment of damages would be governed by the "continuous exposure theory," which apportions payment between those insurers whose policies insured the risk during the period from the date when damage first occurred to the date of its discovery by the insured. (51 C.3d 693.) Prudential contends that because its policy period ended in 1980, 5 years before the damage was allegedly discovered by plaintiffs, the "manifestation rule" should apply, fixing liability for the loss solely on the insurer whose policy was in force at the time the progressive damage became appreciable or "manifest." (51 C.3d 694.)

(2) An examination of California cases (51 C.3d 694) leads to the conclusion that, in first party progressive property loss cases, when the loss occurs over several policy periods and is not discovered until several years after it commences, the manifestation rule applies. "[P]rior to the manifestation of damage, the loss is still a contingency under the policy and the insured has not suffered a compensable loss. ... Once the loss is manifested, however, the risk is no longer contingent; rather an event has occurred that triggers indemnity unless such event is specifically excluded under the policy terms. Correspondingly, in conformity with the loss-in-progress rule, insurers whose policy terms commenced after initial manifestation of the loss are not responsible for any potential claim relating to the previously discovered and manifested loss. Under this rule, the reasonable expectations of the insureds are met because they look to their present carrier for coverage. At the same time the underwriting practices of the insurer can be made predictable because the insurer is not liable for a loss once its contract with the insured ends unless the manifestation of loss occurred during its contract term." (51 C.3d 699.)

(3) The term "inception of the loss" was defined above in relation to delayed discovery and equitable tolling, and the definition of "manifestation of the loss" must be the same. "Under this standard, the date of manifestation and hence the date of inception of the loss will, in many cases, be an issue of fact for the jury to decide. When, however, the evidence supports only one conclusion, summary judgment may be appropriate. For example, when the undisputed evidence establishes that no damage has been discovered before a given date (i.e., no manifestation occurred), then insurers whose policies expired prior to that date could not be liable for the loss and would be entitled to summary judgment. The litigation can then be narrowed to include only the insurers whose policies were in effect when the damage became manifest." (51 C.3d 699.)

The *Prudential-LMI* case has been the subject of much discussion. (See, e.g., *Montrose Chemical Corp. v. Admiral Ins. Co.* (1995) 10 C.4th 645, 673, 42 C.R.2d 324, 913 P.2d 878, 2 Summary (10th), *Insurance*, §139 [adopting "continuous exposure" instead of "manifestation of loss" theory when apportioning damages in *third-party liability insurance cases* for purposes of determining coverage for progressive loss under successive insurance policies]; *Prieto v. State Farm Fire & Cas. Co.* (1990) 225 C.A.3d 1188, 1195, 275 C.R. 362 [following *Prudential-LMI*]; *San Jose Crane & Rigging v. Lexington Ins. Co.* (1991) 227 C.A.3d 1314, 1316, 1319, 1320, 278 C.R. 301 [following *Prudential-LMI*, and rejecting argument that its rule should be applied prospectively only]; *Central Nat. Ins. Co. v. Superior Court* (1992) 2 C.A.4th 926, 933, 3 C.R.2d 622 [determination of inception of loss encompasses consideration of type of policy in question]; *Tomaselli v. Transamerica Ins. Co.* (1994) 25 C.A.4th 1269, 1279, 31 C.R.2d 433 [following *Prudential-LMI*; insureds' knowledge of patio separation, cracks in stucco, bathroom, and garage, and other problems was insufficient to make them aware of loss, i.e., cracks in home's foundation slab, for purposes of commencing limitations period]; *Stanton Road Associates v. Pacific Employers Ins. Co.* (1995) 36 C.A.4th 333, 343, 43 C.R.2d 1 [under *Prudential-LMI*, equitable tolling occurs only from time insured gives notice of damage to insurer until coverage is denied, and thus did not apply to insured who failed to notify insurers until after limitations period had

expired]; *Singh v. Allstate Ins. Co.* (1998) 63 C.A.4th 135, 142, 73 C.R.2d 546, *infra*, §757 [equitable tolling doctrine does not extend to subsequent period during which insurer, as courtesy, agrees to reconsider its initial denial of claim]; 18 *Pepperdine L. Rev.* 1186.) (On equitable tolling of limitations period while title insurer investigates claim, see *infra*, §758; on equitable tolling of statute, in action against insured for breach of duty to defend, until final judgment in underlying action, see *infra*, §524.)

SUPPLEMENT: [This section is current through the latest supplement]



114 of 190 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XII. STATUTE OF LIMITATIONS: IN GENERAL

D. Changes in Period.

2. Contractual Modifications.

b. Shortening Period by Agreement.

4. Successor Insurer's Action for Contribution or Indemnity.

3 *Witkin Cal. Proc. Actions* § 472

[§ 472] Successor Insurer's Action for Contribution or Indemnity.

In *Great Amer. West v. Safeco Ins.* (1991) 226 C.A.3d 1145, 277 C.R. 349, the insureds (Abrams) filed a claim with Great American West, their homeowner's carrier, for subsidence damage. Safeco Insurance Co. had insured the Abramses several years earlier, and Great American paid the claim, intending to seek contribution or indemnity from Safeco. But the Safeco policy had a 1-year limitation, and in this action by Great American for contribution and indemnity the issue was whether that limitation was a bar. *Held*, because Safeco's responsibility for the insureds' loss was solely contractual, the time limit could not be ignored. It was unnecessary to determine whether Great American's claim was for contribution or indemnity, for on either theory it was untimely. "Limitations periods in insurance policies are not 'statutes' of limitation; they are contractual limitations on the insurer's liability. Here, Safeco bargained to indemnify the Abramses for certain losses provided claims were timely filed and suits on the policy were brought within one year. Once those contractual time limits expired--assuming no extenuating circumstances such as tolling, waiver or estoppel--there is no longer any contractual liability on which an indemnity or contribution claim against Safeco can be based." (226 C.A.3d 1151.)

SUPPLEMENT: [This section is current through the latest supplement]



115 of 190 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XII. STATUTE OF LIMITATIONS: IN GENERAL

D. Changes in Period.

2. Contractual Modifications.

b. Shortening Period by Agreement.

5. Agreements Under Uniform Commercial Code.

3 *Witkin Cal. Proc. Actions* § 473

[§ 473] Agreements Under Uniform Commercial Code.

The Uniform Commercial Code provides that the statutory 4-year limitation on an action for breach of a contract of sale may be reduced by the original agreement to not less than 1 year. (U.C.C. 2725(1); see 4 *Summary* (10th), *Sales*, §213; on prohibition against extending period, see *supra*, §468.)

U.C.C. 2207 provides in part that additional terms in an acceptance become part of the contract unless they materially alter it. (U.C.C. 2207(2)(b).) In *Therma-Coustics Mfg. v. Borden* (1985) 167 C.A.3d 282, 213 C.R. 611, this statute was construed in connection with a 1-year limitations period inserted by defendant seller in its invoice in accepting plaintiff buyer's offer to purchase. *Held*, the 1-year limitation provision was not a material alteration, and the action was barred.

(a) According to the Official Comments to the Uniform Commercial Code, a limitations period provision materially alters a contract if it establishes a period "materially shorter than customary or reasonable," but not if it allows a "reasonable time for complaints within customary limits." (Comments 4 and 5 to Unif.Com.C. §2-207.) (167 C.A.3d 296.)

(b) Several factors require the conclusion that a 1-year limitations period is reasonable and within customary limits: (1) U.C.C. 2725(1) permits parties to sales contracts to reduce the statutory 4-year period to 1 year; (2) California decisions have held that insurance contracts that shorten the limitations period to 1 year (and that presumably involve less sophisticated parties than plaintiff here) are not unfair; and (3) a recent federal district court decision held that a 1-year limitations period was not unreasonable or a material alteration within the meaning of Unif.Com.C. §2-207. (167 C.A.3d 296.)

SUPPLEMENT: [This section is current through the latest supplement]



116 of 190 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XII. STATUTE OF LIMITATIONS: IN GENERAL

E. Classification According to Periods of Limitation.

1. In General.

3 Witkin Cal. Proc. Actions § 474

[§ 474] In General.

The following sections classify the most important California statutes of limitations by prescriptive period in ascending temporal order, commencing with actions subject to 30-day limitations periods, and ending with actions governed by statutes with no limitation. Each statute contains a brief description of its scope and of the circumstances giving rise to its accrual.

For many years, the Southwestern University Law Review compiled a biannual digest of all California statutes of limitation, with case annotations and references to relevant practice works, classified according to the Codes and arranged in alphabetical order, with a topical index. (See 19 Southwestern U. L. Rev. 215 [1990 digest]; 21 Southwestern U. L. Rev. 259 [1992 digest]; 23 Southwestern U. L. Rev. 689 [1994 digest]; 25 Southwestern U. L. Rev. 745 [1996 digest]; 27 Southwestern U. L. Rev. 679 [1998 digest].) (On biannual digest of federal statutes of limitations, see *supra*, §59.)

SUPPLEMENT: [This section is current through the latest supplement]



117 of 190 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XII. STATUTE OF LIMITATIONS: IN GENERAL

E. Classification According to Periods of Limitation.

2. Thirty Days.

3 *Within Cal. Proc. Actions* § 475

[§ 475] Thirty Days.

(1) *Proceeding Challenging Public Agency Decisions Under California Environmental Quality Act (CEQA).*

(a) Proceeding alleging that public agency has improperly determined whether project may have significant effect on environment: within 30 days from filing of notice of approval of project, or determination to carry it out. (*Pub.Res.C. 21167(b).*)

(b) Proceeding challenging environmental impact report: within 30 days from filing of notice of approval of project, or determination to carry it out. (*Pub.Res.C. 21167(c).*)

(c) Proceeding alleging that public agency has improperly determined that project is not subject to CEQA under specified exceptions: within 35 days from filing of notice of approval of project, or determination to carry it out; but if no notice has been filed, within 180 days from agency's decision to carry out or approve project, or if project is undertaken without formal agency decision, within 180 days of project's commencement. (*Pub.Res.C. 21167(d).*)

(d) Challenge not subject to specific limitations provisions of *Pub.Res.C. 21167*: within 30 days from filing of notice of approval of project, or determination to carry it out. (*Pub.Res.C. 21167(e)*; see generally 12 *Summary* (10th), *Real Property*, §856.) (On longer limitations period for other CEQA proceedings, see *infra*, §480.)

(2) *Proceeding Challenging Assessment.*

(a) Contest of chartered city's assessment for public improvements: within 30 days after assessment is levied. (*C.C.P. 329.5*; see *Barratt Amer. v. San Diego* (2004) 117 C.A.4th 809, 818, 12 C.R.3d 132 [Proposition 218 (see 9 *Summary* (10th), *Taxation*, §141 et seq.), which restricts local governments' use of special assessments to fund infrastructure, does not abrogate 30-day limitations period of *C.C.P. 329.5*].)

(b) Contest of municipal assessment under Local Improvement Act of 1901: within 30 days after assessment resolution is entered in minutes of legislative body. (*C.C.P. 349.*)

(c) Contest of district assessment under Municipal Improvement Act of 1913: within 30 days after assessment is

levied. (*Sts. & H.C. 10400*; see *Allis-Chalmers v. Oxnard* (1980) 105 C.A.3d 876, 881, 165 C.R. 128; *Saratoga v. Hinz* (2004) 115 C.A.4th 1202, 1214, 9 C.R.3d 791 [*Sts. & H.C. 10400* applies to challenge both to formation of assessment district and to validity of special assessment; statute further applies to all persons, not merely to those who own property within district].)

(3) *Other Actions.*

(a) Action against state, after order granting relief from late filing: within 30 days after order. (*Govt.C. 946.6(f)*; see *Wilson v. People* (1969) 271 C.A.2d 665, 667, 76 C.R. 906.)

(b) Public agency validation action brought by party to prior validation proceeding that was dismissed by agency after party filed answer: within 30 days of filing of dismissal with court. (*C.C.P. 867.5(a)*.) However, *C.C.P. 867.5(a)* does not apply where the agency has formally rescinded the action on the matter subject to validation. (*C.C.P. 867.5(b)*.)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Proceeding Challenging Assessment.*

(c) *Contest of district assessment under Municipal Improvement Act of 1913:* See *Bonander v. Tiburon* (2009) 46 C.4th 646, 658, 94 C.R.3d 403, 208 P.3d 146 [action to contest assessment under Act is governed solely by *Sts. & H.C. 10400*, and not by general validation procedure for public agency action in *C.C.P. 860* et seq.; thus, plaintiff was not required to comply with time limitation for newspaper publication in *C.C.P. 863* (see text, §988)].



118 of 190 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XII. STATUTE OF LIMITATIONS: IN GENERAL

E. Classification According to Periods of Limitation.

3. Sixty Days or Two Months.

3 *Witkin Cal. Proc. Actions* § 476

[§ 476] Sixty Days or Two Months.

(1) *Validation Proceeding.*

(a) Contesting validity, formation, or boundary change of public entity: within 60 days of mailed notice to property owners; if no action is filed during period, proceedings "are valid and incontestable." (*C.C.P.* 349.4; see overlapping provisions of *C.C.P.* 349.1, 349.2, *infra*, §480.)

(b) Public agency validation proceedings: "upon the existence of any matter which under any other law is authorized to be determined" under *C.C.P.* 860 et seq. "and for 60 days thereafter." (*C.C.P.* 860, 863, 869; see *Friedland v. Long Beach* (1998) 62 *C.A.4th* 835, 846, 73 *C.R.2d* 427 [limitations periods in *C.C.P.* 860 et seq. govern constitutional challenges to validation proceedings]; *Embarcadero Mun. Imp. Dist. v. Santa Barbara* (2001) 88 *C.A.4th* 781, 789, 107 *C.R.2d* 6 [challenge to intermediate step in approval process may not be made more than 60 days after approval itself has become final]; *California Commerce Casino v. Schwarzenegger* (2007) 146 *C.A.4th* 1406, 1430, 53 *C.R.3d* 626 [action challenging amendments to gaming contracts between Indian tribes and state of California was subject to 60-day limitations periods in *C.C.P.* 860 et seq.]; 5 *Cal. Proc.* (5th), *Pleading*, §856.) (On 30-day limitations period for validation action by party to prior validation proceeding that was dismissed by agency after party filed answer, see *C.C.P.* 867.5, *supra*, §475.)

(2) *Challenge to Housing Element of Zoning General Plan.* Challenging adequacy of housing element of zoning general plan: within 60 days after Department of Housing and Community Development reports its findings concerning the element pursuant to *Govt.C.* 65585, or within 90 days of the legislative body's decision as specified in *Govt.C.* 65009(c)(1) (see *infra*, §477). (*Govt.C.* 65009(c)(2); see 8 *Summary* (10th), *Constitutional Law*, §1011.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Validation Proceeding.*

(b) *Public agency validation proceedings:* See *McLeod v. Vista Unified School Dist.* (2008) 158 *C.A.4th* 1156, 1169, 71 *C.R.3d* 109 [taxpayer waste action challenging school district's successful local measure authorizing issuance of bonds for school construction was subject to 60-day limitations periods in *C.C.P.* 860 et seq.].



119 of 190 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XII. STATUTE OF LIMITATIONS: IN GENERAL

E. Classification According to Periods of Limitation.

4. Ninety Days or Three Months.

3 *Witkin Cal. Proc. Actions* § 477

[§ 477] Ninety Days or Three Months.

(1) *Action for Tax Refund.*

(a) Refund of sales or use taxes: within 90 days after mailing of notice of disallowance of the claim. (Rev.C. 6933; see *Pacific Gas & Elec. Co. v. State Bd. of Equalization* (1955) 134 C.A.2d 149, 285 P.2d 305.)

(b) Refund of personal income taxes or bank or corporation taxes paid under protest: within 90 days of final board action, 1 year of date the tax was paid (see *infra*, §481), or 4 years of the last date prescribed for filing the return (see *infra*, §484). (Rev.C. 19384, 19385, 19390.)

(c) Refund of motor vehicle fuel license taxes: 90 days after mailing of notice of action on claim. (Rev.C. 8148.)

(2) *Mechanic's Lien.* Action to enforce a mechanic's lien on real property: within 90 days after lien is recorded. If credit is given after lien is recorded, within 90 days after expiration of credit, provided notice of the credit has been recorded, but in no case longer than 1 year after completion of the work. (C.C. 3144(a); see *Douglas v. Donner Pines* (1977) 73 C.A.3d 268, 271, 140 C.R. 839; *Halbert's Lumber v. Burdett* (1988) 202 C.A.3d Supp. 14, 18, 249 C.R. 285.)

(3) *Action To Enforce Payment of Claim Stated in Stop Notice.*

(a) Private works of improvement: within 90 days following expiration of period within which claims of lien must be recorded as prescribed in C.C. 3109 et seq. (but not sooner than 10 days after date of service of stop notice). (C.C. 3172.)

(b) Public works of improvement: within 90 days following expiration of period within which stop notices must be filed as provided in C.C. 3184 (but not sooner than 10 days after date of service of stop notice). (C.C. 3210.)

(4) *Action Challenging Zoning or Land Use Subdivision.*

(a) Action challenging local zoning decision: within 90 days after legislative body's decision. (*Govt.C. 65009(c)(1)*; see *Travis v. Santa Cruz* (2004) 33 C.4th 757, 771, 16 C.R.3d 404, 94 P.3d 538 [action was timely in part and untimely

in part]; *Wagner v. South Pasadena* (2000) 78 C.A.4th 943, 947, 93 C.R.2d 91 [action was untimely]; *Save Our NTC v. San Diego* (2003) 105 C.A.4th 285, 292, 129 C.R.2d 306 [action was timely]; *Royalty Carpet Mills v. Irvine* (2005) 125 C.A.4th 1110, 1119, 23 C.R.3d 282 [although timely filed, action was properly dismissed for failure to serve petition within 90-day limitations period, as required by Govt.C. 65009(c)]; *Honig v. San Francisco Planning Dept.* (2005) 127 C.A.4th 520, 527, 25 C.R.3d 649 [statute applies to action challenging building permit issued in conjunction with zoning variance, if gravamen of challenge is that variance was improperly granted]; 8 *Summary* (10th), *Constitutional Law*, §§1011, 1025, 1050 et seq.) (On alternative shortened period for action challenging adequacy of housing element of community's general plan, see *supra*, §476; on increased period for specified actions involving low or moderate income housing, see *infra*, §481.)

(b) Attack on decision of governing body concerning real estate subdivision: within 90 days after date of decision. (*Govt.C.* 66499.37; see *Griffis v. Mono* (1985) 163 C.A.3d 414, 420, 209 C.R. 519 [in action challenging tentative map extension, 90-day period begins to run when extension is granted, not when final map is approved]; *Maginn v. Glendale* (1999) 72 C.A.4th 1102, 1108, 85 C.R.2d 639 [statute continues to run until both filing of action and service of summons]; *Sprague v. San Diego* (2003) 106 C.A.4th 119, 128, 130 C.R.2d 517 [statutory requirement of both commencement of action and service of summons within 90-day period is statute of limitations]; *Legacy Group v. Wasco* (2003) 106 C.A.4th 1305, 1307, 1313, 131 C.R.2d 460 [breach of subdivision development agreement is not subject to Govt.C. 66499.37 unless act constituting breach could have been challenged under Subdivision Map Act]; *Fishback v. Ventura* (2005) 133 C.A.4th 896, 907, 35 C.R.3d 199 [claim that county zoning ordinance requiring additional fees for issuance of conditional certificates of compliance was preempted by Govt.C. 66499.35(b) of Subdivision Map Act (see 12 *Summary* (10th), *Real Property*, §822) was time-barred under Govt.C. 66499.37]; *People v. Tehama County Bd. of Supervisors* (2007) 149 C.A.4th 422, 431, 56 C.R.3d 558 [statute did not apply to proceeding to review county planning director's decision to approve lot line adjustment, because he was not advisory agency, appeal board, or legislative body within meaning of statute]; 12 *Summary* (10th), *Real Property*, §815.)

(5) *Other Actions.*

(a) Action for deficiency judgment after sale under deed of trust or power of sale mortgage: within 3 months. (*C.C.P.* 337(1), practically obsolete; see 4 *Summary* (10th), *Security Transactions in Real Property*, §199.)

(b) Action for recovery or conversion of personal property left in hotel, furnished apartment, hospital, etc.: within 90 days after departure of owner. (*C.C.P.* 341a; see *infra*, §621.)

(c) Action by city, county, or other local agency against state, state agency, or public official that challenges constitutionality of statute relating to state funding: within 90 days of effective date of statute at issue in action. (*C.C.P.* 341.5.)

(d) Contest of validity of proceedings for incorporation, annexation of territory, or consolidation of municipal corporation: within 3 months of completion of proceedings. (*C.C.P.* 3491/2.)

(e) Action by former employee in state service to enforce rights under civil service law (except to collect salary or wages where the amount is not in dispute): within 90 days after complaint, cause of action, or ground for issuance of legal remedy arose where compensation for time subsequent to that date is sought; within 1 year where no compensation is sought. (*Govt.C.* 19630.)

(f) Action on a rejected claim against an estate that is due when the notice of rejection is given: within 90 days after the notice is given; action on a rejected claim that is not yet due: within 90 days after the claim becomes due. (*Prob.C.* 9353(a); see 14 *Summary* (10th), *Wills and Probate*, §646.)

(g) Action or proceeding to contest exclusion of territory from water improvement district: within 3 months. (*Water C.* 72089.5.)

(h) Proceeding to determine validity of action taken in violation of the Bagley-Keene Open Meeting Act (see 9 *Cal. Proc.* (5th), *Administrative Proceedings*, §10 et seq.): within 90 days from the date of the action. (*Govt.C. 11130.3(a)*) [1999 amendment extends limitations period from 30 days and supersedes holding of *Regents of Univ. of Calif. v. Superior Court* (1999) 20 *C.4th* 509, 526, 85 *C.R.2d* 257, 976 *P.2d* 808, *infra*, §771].)

(i) Action to enforce liability for untrue or omitted facts regarding offer or sale of franchise: within 90 days after written notice, within 2 years of violation, or within 1 year of discovery, whichever occurs first. (*Corp.C. 31304.*)

(j) Action enforcing liability regarding sale or offer of nonexempt but unregistered franchise or one with misleading or untrue required statements: within 90 days after written notice, 4 years after violation, or 1 year after discovery, whichever expires first. (*Corp.C. 31303.*)

SUPPLEMENT: [This section is current through the latest supplement]

(4) *Action Challenging Zoning or Land Use Subdivision.*

(a) *Action challenging local zoning decision:* See *Arcadia Dev. Co. v. Morgan Hill* (2008) 169 *C.A.4th* 253, 261, 86 *C.R.3d* 598 [development company's challenge to 10-year extension of city's growth control ordinance that drastically restricted development of property within city limits accrued when measure extending ordinance was approved, not earlier when original measure was enacted; city recognized that development restriction, as originally enacted, was intended to be temporary and that it would be lifted when circumstances changed, and thus, extension of development restriction was substantive change].



120 of 190 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XII. STATUTE OF LIMITATIONS: IN GENERAL

E. Classification According to Periods of Limitation.

5. One Hundred Days.

3 Witkin Cal. Proc. Actions § 478

[§ 478] One Hundred Days.

Petition to vacate or correct arbitration award: within 100 days after service of copy of award on petitioner. (*C.C.P.* 1288; see *infra*, §687.) (On limitations period for petition to confirm arbitration award, see *infra*, §484.)

SUPPLEMENT: [This section is current through the latest supplement]



121 of 190 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XII. STATUTE OF LIMITATIONS: IN GENERAL

E. Classification According to Periods of Limitation.

6. One Hundred Twenty Days or Four Months.

3 Witkin Cal. Proc. Actions § 479

[§ 479] One Hundred Twenty Days or Four Months.

(1) *Action by Public Agency Seeking Refund or Challenging Public Utility Provider Fee.* Action by public agency seeking refund or challenging validity of fee charged by public agency for providing public utility service: within 120 days of imposition of fee. (*Govt.C. 54999.8(a).*) Unless extended, the statute expires on January 1, 2010. (*Govt.C. 54999.8(d).*)

(2) *Will Contest.* Petition to contest validity of will: within 120 days after its admission to probate. (*Prob.C. 8270*; see 14 *Summary* (10th), *Wills and Probate*, §581.)

SUPPLEMENT: [This section is current through the latest supplement]



122 of 190 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XII. STATUTE OF LIMITATIONS: IN GENERAL

E. Classification According to Periods of Limitation.

7. One Hundred Eighty Days or Six Months.

3 Witkin Cal. Proc. Actions § 480

[§ 480] One Hundred Eighty Days or Six Months.

(1) *Action Involving Taxes.*

(a) Action to recover goods, etc., seized by tax collector, or to recover value of goods or damages resulting from seizure: within 6 months. (*C.C.P. 341(1).*)

(b) Action against city or county to recover taxes after rejection of claim for refund: within 6 months after rejection of claim in whole or in part. (Rev.C. 5141; see *Geneva Towers Ltd. Partnership v. San Francisco (2003) 29 C.4th 769, 773, 129 C.R.2d 107, 60 P.3d 692, 9 Summary (10th), Taxation*, §293, citing the text [Rev.C. 5141 governs action for recovery of property tax refund, not catchall limitations period of *C.C.P. 343* (see *infra*, §677)].)

(2) *Validation Proceeding.*

(a) Action to contest validity of proceedings for formation, organization, incorporation, dissolution, consolidation, change of organization or reorganization, or change in boundaries of city, county, district, public corporation or other public entity: within 6 months after completion of proceedings. (*C.C.P. 349.1.*)

(b) Action to contest validity of acts or proceedings taken by city, etc., for authorization, issuance, or sale of its bonds: within 6 months of authorization, issuance, or sale of bonds. (*C.C.P. 349.2.*)

(c) Attack on organization of water district: within 6 months of its organization. (*Water C. 43850(a).*)

(d) Attack on inclusion or exclusion of land from water district: within 6 months from inclusion or exclusion. (*Water C. 43850(b).*)

(3) *Public Improvement Projects.*

(a) Action to enforce mechanic's lien against public improvement project subject to acceptance by city, county, or other local governmental agency: not less than 90 nor more than 180 days after last delivery of materials or performance of work. (*C.C.P. 1197.1.*)

(b) Action by claimant against surety to enforce payment bond on public improvement project: after claimant has furnished last of labor, materials, or both, but within 6 months of when stop work notices may be filed under C.C. 3184 (see *supra*, §477). (C.C. 3249; see *Department of Industrial Relations v. Seaboard Surety Co.* (1996) 50 C.A.4th 1501, 1510, 58 C.R.2d 532 [C.C. 3249 applied to administrative action on behalf of workers on public improvement project for prevailing wages against surety who had furnished payment bond].)

(4) *Action Against Public Entity or Employee*. If notice of action or inaction on the claim is given by the public entity, within 6 months after personal delivery of notice or deposit of notice in mail. (*Govt.C. 945.6(a)*; see *infra*, §688 et seq.)

(5) *Proceeding Challenging Public Agency Decision Under California Environmental Quality Act (CEQA)*.

(a) Proceeding alleging that public agency is carrying out or has approved project that may have significant effect on environment without formally deciding that issue: within 180 days of agency's decision to carry out or approve project, or if project is undertaken without formal agency decision, within 180 days of project's commencement. (*Pub.Res.C. 21167(a)*.)

(b) Proceeding alleging that public agency has improperly determined that project is not subject to CEQA under specified exceptions: if no notice of approval of project or determination to carry it out has been filed, within 180 days from agency's decision to carry out or approve project, or if project is undertaken without formal agency decision, within 180 days of project's commencement; but if notice has been filed, within 35 days from that date. (*Pub.Res.C. 21167(d)*; see 12 *Summary* (10th), *Real Property*, §856.) (On shorter limitations period for other CEQA proceedings, see *supra*, §475.)

(6) *Corporations*.

(a) Action to recover stock sold for delinquent assessment where assessment or sale is defective: within 6 months after sale. (*C.C.P. 341(2)*; *Corp.C. 423(m)*.)

(b) Action to set aside act of trustees of corporation dissolved by operation of law, including revivor of corporation: within 6 months after dissolution. (*C.C.P. 341(3)*; see *King v. Los Angeles County Fair Assn.* (1945) 70 C.A.2d 592, 595, 161 P.2d 468.)

(7) *Trespass on Oil or Gas Well*. Action for injunction, damages, or conversion based on underground trespass on oil or gas well: within 180 days of accrual. (*C.C.P. 3493/4*; on applicability, see *infra*, §622.)

(8) *Action on Recorded Mechanic's Lien Release Bond*. Action by claimant on recorded lien release bond: within 6 months of the recording. (C.C. 3144.5; see *Hutnick v. United States Fidelity & Guaranty Co.* (1988) 47 C.3d 456, 253 C.R. 236, 763 P.2d 1326; *Dennis Elec. v. United States Fidelity & Guaranty Co.* (1990) 219 C.A.3d 1228, 1230, 269 C.R. 26 [C.C. 3144.5 was not applicable where lien claimant first obtained final judgment in lien foreclosure action filed before release bond was recorded and, thereafter, filed separate action against surety to recover on release bond].)

SUPPLEMENT: [This section is current through the latest supplement]



123 of 190 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XII. STATUTE OF LIMITATIONS: IN GENERAL

E. Classification According to Periods of Limitation.

8. One Year.

3 Witkin Cal. Proc. Actions § 481

[§ 481] One Year.

(1) *Torts.*

(a) Action for libel, slander, or false imprisonment: within 1 year. (*C.C.P. 340(a)*; see *infra*, §549 et seq.)

(b) Action against person negligently injuring animal or fowl in course of boarding, feeding, or veterinary treatment: within 1 year. (*C.C.P. 340(c)*.)

(c) Action for injury or death resulting from medical malpractice: within 3 years after the injury (see *infra*, §483) or within 1 year after plaintiff discovers or should have discovered the injury. (*C.C.P. 340.5*; see *infra*, §578 et seq.)

(2) *Mechanic's Lien.* Action on mechanic's lien: if credit is given after the lien is recorded, within 90 days after expiration of the credit, but in no case longer than 1 year after completion of the work (otherwise, within 90 days after the lien is recorded). (*C.C. 3144*; see *supra*, §477.)

(3) *Action Under Fair Employment and Housing Act (FEHA).* Judicial action for employment or housing discrimination under FEHA (*Govt.C. 12900* et seq.): within 1 year of receipt of a "right to sue" letter from the Department of Fair Employment and Housing notifying the plaintiff that it will not be issuing a timely administrative accusation. (*Govt.C. 12965(b)* [employment discrimination]; *Govt.C. 12980(h)* [housing discrimination]; see 8 *Summary* (10th), *Constitutional Law*, §948 et seq.) (On administrative complaint filing requirements, see *supra*, §225.)

(4) *Certain Statutory Penalties and Liabilities.*

(a) Action by individual or state for statutory penalty or forfeiture, except where particular statute prescribes different limitation: within 1 year. (*C.C.P. 340(a)*, *340(b)*; see *Department of Social Welfare v. Stauffer* (1943) 56 *C.A.2d* 699, 702, 133 *P.2d* 692; *People v. Grant* (1942) 52 *C.A.2d* 794, 798, 127 *P.2d* 19; *infra*, §664 et seq.)

(b) Action against officer who seized property under a statutory forfeiture, for damages to property or person resulting from seizure: within 1 year. (*C.C.P. 340(c)*.)

(c) Action by former employee in state service to enforce rights under civil service law (except to collect salary or wages where amount is not in dispute): within 1 year after complaint, cause of action, or ground for issuance of writ or legal remedy arose where no compensation subsequent to that date is sought: within 90 days where compensation is sought. (Govt.C. 19630; see *Martin v. Henderson* (1953) 40 C.2d 583, 591, 255 P.2d 416; supra, §477.)

(5) *Taxes and Tax Deeds.*

(a) Proceeding to determine validity of tax deed: within 1 year after execution of deed. (Rev.C. 175; see *McCaslin v. Hamblen* (1951) 37 C.2d 196, 198, 231 P.2d 1; *Central Valley Equipment Co. v. California* (1950) 98 C.A.2d 778, 220 P.2d 811.)

(b) Proceeding based on alleged invalidity of deed issued on sale by taxing agency: within 1 year after deed is recorded. (Rev.C. 177; see 9 *Summary* (10th), *Taxation*, §288.)

(c) Proceeding attacking validity of sale of tax-deeded property to private purchaser: within 1 year after execution of tax collector's deed. (Rev.C. 3725, 3726; see 9 *Summary* (10th), *Taxation*, §288.)

(d) Application for refund of inheritance taxes: within 1 year after federal estate tax has been finally determined. (Rev.C. 13561.)

(e) Action to recover personal income taxes or bank or corporation taxes paid under protest: within 1 year of the date the tax was paid, 90 days of final board action, or 4 years of the last date prescribed for filing the return. (Rev.C. 19384, 19385, 19390.)

(6) *Action Against Defendant Based on Commission of Felony.* The action must be commenced within 1 year after judgment is pronounced, unless a longer period is prescribed for a specific action. (C.C.P. 340.3(a).) If the sentence or judgment is stayed (except by appeal or a sentence of probation), the limitation is tolled until the stay is lifted. (C.C.P. 340.3(c).) (See *Newman v. Newman* (1987) 196 C.A.3d 255, 259, 241 C.R. 712 [statute is not applicable where defendant is found not guilty by reason of insanity]; *Jamieson v. Hickey* (1988) 199 C.A.3d 595, 599, 244 C.R. 859 [statute was applicable to civil action even after defendant's probation was terminated and his offense was declared misdemeanor]; *Gallo v. Superior Court* (1988) 200 C.A.3d 1375, 1379, 246 C.R. 587, supra, §461 [statute does not apply retroactively to revive causes of action already barred]; *Snyder v. Boy Scouts of America* (1988) 205 C.A.3d 1318, 1325, 253 C.R. 156 [statute applies only where conviction arose out of conduct that involved plaintiff]; *Guardian North Bay v. Superior Court* (2001) 94 C.A.4th 963, 972, 114 C.R.2d 748 [civil action against health care provider based on felony elder abuse conviction is governed by C.C.P. 340.3, not by C.C.P. 340.5, which governs medical malpractice action].) (On longer period for action based on specified serious felonies, see *infra*, §488.)

(7) *Family Law Action.*

(a) Action to avoid instrument executed by one spouse, affecting community real property held in name of that spouse: within 1 year from recording of the instrument. (*Family C. 1102.*)

(b) Action to vacate, set aside, or otherwise nullify adoption order: on any ground except fraud, within 1 year after entry of order; on ground of fraud, within 3 years after entry of order (see *infra*, §483). (*Family C. 9102*; see 10 *Summary* (10th), *Parent and Child*, §148.)

(8) *Action Under U.C.C.*

(a) Action based on alterations or unauthorized signatures on items paid by bank: within 1 year. (U.C.C. 4406(f); see *Kiernan v. Union Bank* (1976) 55 C.A.3d 111, 115, 127 C.R. 441; *Sun 'N Sand v. United Calif. Bank* (1978) 21 C.3d 671, 697, 148 C.R. 329, 582 P.2d 920 [statute is not applicable to action based on negligence]; 4 *Summary* (10th), *Negotiable Instruments*, §130.)

(b) Action involving bulk sale against buyer, auctioneer, or liquidator: within 1 year after date of sale (U.C.C. 6110(a)), or within 1 year after plaintiff discovered or should have discovered that a concealed sale had occurred (whichever is earlier), but no later than 2 years after the date of the sale (U.C.C. 6110(b)). (See 4 *Summary* (10th), *Sales*, §227.)

(9) *Other Actions.*

(a) Action against notary public based on malfeasance or misfeasance: within 1 year after discovery of facts. (C.C.P. 338(f); see *infra*, §670.)

(b) Action by depositor against bank for payment of forged or altered check: within 1 year. (C.C.P. 340(c); see *Chatsky & Associates v. Superior Court* (2004) 117 C.A.4th 873, 878, 12 C.R.3d 154, 4 *Summary* (10th), *Negotiable Instruments*, §130 [C.C.P. 340(c) is more specific than U.C.C. 4111 (3-year limitations period for action to enforce obligation under Division 4 of U.C.C.; see 4 *Summary* (10th), *Negotiable Instruments*, §88); thus, C.C.P. 340(c) applied to action by depositor against bank for payment of forged check written on depositor's account]; *Hughes Electronics Corp. v. Citibank Delaware* (2004) 120 C.A.4th 251, 265, 15 C.R.3d 244 [following *Chatsky & Associates*].)

(c) Action by good faith improver on another's land: within 1 year from improver's discovery that he or she is not owner. (C.C.P. 340(e).)

(d) Action to enforce liability of professional person involved in preparation or certification of untrue or misleading prospectus or offering circular: within 1 year after discovery was made or should have been made and no more than 3 years after violation. (Corp.C. 25506.1; see *Bowden v. Robinson* (1977) 67 C.A.3d 705, 712, 136 C.R. 871, 9 *Summary* (10th), *Corporations*, §450.)

(e) Action challenging local zoning decision brought in support of low or moderate income housing: within 1 year after accrual of the cause of action. (Govt.C. 65009(d); see 8 *Summary* (10th), *Constitutional Law*, §1011.)

(f) Action on fire or all-risk insurance policy: within 12 months of "inception of the loss." (Ins.C. 2071; see *Michelson v. Mid-Century Ins. Co.* (2000) 83 C.A.4th 450, 455, 99 C.R.2d 804 [limitations period for action to recover for property damage caused by earthquake commenced when earthquake occurred, not when insured discovered loss].)

(g) Action attacking validity of a treasurer's deed: within 12 months. (Sts. & H.C. 6571.)

(h) Action against public utility to recover payment of reparation: within 1 year from date of order for payment. (Pub.Util.C. 735.)

(i) Action to enforce liability for untrue or omitted facts regarding offer or sale of franchise: within 1 year of discovery, within 2 years of violation, or within 90 days after written notice, whichever occurs first. (Corp.C. 31304.)

(j) Action enforcing liability regarding sale or offer of nonexempt but unregistered franchise or one with misleading or untrue required statements: within 1 year after discovery, 4 years after violation, or 90 days after written notice, whichever expires first. (Corp.C. 31303.)

SUPPLEMENT: [This section is current through the latest supplement]

(4) *Certain Statutory Penalties and Liabilities.*

(a) *Action for statutory penalty or forfeiture, except where particular statute prescribes different limitation:* See *McCoy v. Superior Court* (2007) 157 C.A.4th 225, 229, 68 C.R.3d 483 [limitations period of C.C.P. 340(a) governs action seeking only penalties for wilful failure to pay back wages to employee who quits or is discharged; action seeking both penalties and back wages is subject to longer limitations period of Lab.C. 203 (see 3 *Summary* (10th), *Agency and Employment*, §399)].



124 of 190 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XII. STATUTE OF LIMITATIONS: IN GENERAL

E. Classification According to Periods of Limitation.

9. Two Years.

3 Witkin Cal. Proc. Actions § 482

[§ 482] Two Years.

(1) *Oral or Implied Contract.*

(a) Action "upon a contract, obligation or liability not founded upon an instrument of writing," except action on account: within 2 years of accrual. (*C.C.P.* 339(1); see *infra*, §512 et seq.)

(b) Lessor's action on abandonment or termination of oral lease: within 2 years of breach and abandonment or termination of lessee's right to possession, whichever is earlier. (*C.C.P.* 339.5.)

(2) *Action Based on Rescission.* Action based upon rescission of contract not in writing: within 2 years of occurrence of facts enabling aggrieved party to rescind, or of discovery of fraud or mistake. (*C.C.P.* 339(3).)

(3) *Action on Fraudulent Stock Transfer.* Action on fraudulent stock transaction: within 5 years after act or transaction constituting violation, or 2 years after discovery of facts constituting violation, whichever period expires first. (*Corp.C.* 25506(b); see *Deveny v. Entropin* (2006) 139 C.A.4th 408, 419, 42 C.R.3d 807 [inquiry notice, and not actual knowledge, triggers discovery of facts limitations period].)

(4) *Torts.*

(a) Action for assault, battery, personal injury, or wrongful death: within 2 years of accrual. (*C.C.P.* 335.1; see *infra*, §552 et seq.)

(b) Tort actions not otherwise provided for: within 2 years of accrual. (*C.C.P.* 339(1); see *infra*, §648 et seq.)

(5) *Action Against Uninsured Motorist.* Action by insured under an uninsured motorist clause in an insurance policy: within 2 years from the date of the accident if any of the following occur: (a) suit for bodily injury has been filed against the uninsured motorist; (b) agreement as to the amount due under the policy has been concluded; or (3) the insured has formally instituted arbitration proceedings by notifying the insurer in writing. (*Ins.C.* 11580.2(i)(1)(A), (i)(1)(B), (i)(1)(C); see *Allstate Ins. Co. v. Orlando* (1968) 262 C.A.2d 858, 69 C.R. 702 [construing substantially similar predecessor statute with 1-year limitations period]; *Bullard v. California State Auto. Assn.* (2005) 129 C.A.4th

211, 219, 28 C.R.3d 225 [2003 amendment increasing limitations period from 1 to 2 years does not apply retroactively to revive already time-barred claims]; *infra*, §566.)

(6) *Breach of Duty Owed to Residential Real Estate Purchaser by Real Estate Licensee*. Action for breach of inspection and disclosure duties owed by real estate licensee to prospective purchaser of residential real estate under C.C. 1102 et seq. and 2079 et seq.: within 2 years after purchaser takes possession. (C.C. 2079.4; see *Loken v. Century 21-Award Properties* (1995) 36 C.A.4th 263, 268, 273, 42 C.R.2d 683; 12 Summary (10th), *Real Property*, §471 et seq.)

(7) *Discriminatory Wages*. Action to recover wages where plaintiff was paid at wage rate less than that paid to opposite sex for same work: within 2 years after cause of action "occurs," or within 3 years, for cause of action arising out of a wilful violation. (*Lab.C. 1197.5(h)*; see *Jones v. Tracy School Dist.* (1980) 27 C.3d 99, 104, 107, 165 C.R. 100, 611 P.2d 441 [2-year limitation imposed on recovery of back pay]; *infra*, §§483, 506.)

(8) *Action Against Public Entity or Employee*. If notice of action or nonaction on claim is not given: within 2 years after accrual of cause of action. (*Govt.C. 945.6*; see *infra*, §688 et seq.)

(9) *Other Actions*.

(a) Action for discriminatory denial or offer of credit: within 2 years of denial or offer. (C.C. 1812.35; see 11 Summary (10th), *Husband and Wife*, §23.)

(b) Action to foreclose lien securing street assessment: within 2 years from date on which last installment on assessment or bond becomes due. (*C.C.P. 329*.)

(c) Action on obligation of title insurance policy, certificate, abstract, or guaranty: within 2 years of discovery of loss. (*C.C.P. 339(1)*; see *Smeaton v. Fidelity Nat. Title* (1999) 72 C.A.4th 1000, 1003, 85 C.R.2d 591, *infra*, §530 [where plaintiff discovers loss before policy is issued, accrual occurs when policy is issued]; *infra*, §§523 et seq., 757 et seq.)

(d) Action against sheriff or coroner for act or omission in official duty, including nonpayment of money collected in enforcing judgment: within 2 years of accrual. (*C.C.P. 339(2)*; see *Medley v. Hill* (1930) 104 C.A. 309, 285 P. 891.)

(e) Action to enforce liability for untrue or omitted facts regarding offer or sale of franchise: within 2 years of violation, or within 1 year of discovery, or within 90 days after written notice, whichever occurs first. (*Corp.C. 31304*; see *People v. Speedee Oil Change Systems* (2002) 95 C.A.4th 709, 726, 116 C.R.2d 497 [2-year limitations period in *Corp.C. 31304* imposes absolute outside limit, i.e., once it expires, plaintiff's belated discovery of violation cannot extend limitations period].)

SUPPLEMENT: [This section is current through the latest supplement]



125 of 190 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XII. STATUTE OF LIMITATIONS: IN GENERAL

E. Classification According to Periods of Limitation.

10. Three Years.

3 *Witkin Cal. Proc. Actions* § 483

[§ 483] Three Years.

(1) *Sexual Abuse of Minor*. Action for childhood sexual abuse: within 8 years of date the plaintiff attains age of majority or within 3 years of date the plaintiff discovers or reasonably should have discovered that the psychological injury or illness occurring after the age of majority was caused by sexual abuse, whichever occurs later. (*C.C.P. 340.1(a)*.) A childhood sexual abuse action against a defendant other than the perpetrator, based on a negligent or intentional act that was the legal cause of the abuse, may not be commenced on or after the plaintiff's 26th birthday. (*C.C.P. 340.1(b)(2)*.)

(2) *Domestic Violence*. Action based on domestic violence: within 3 years of either the last act giving rise to the action, or the date when the plaintiff discovers or reasonably should have discovered that an injury or illness resulted from an act of domestic violence, whichever occurs later. (*C.C.P. 340.15(a)*); see *Pugliese v. Superior Court* (2007) 146 C.A.4th 1444, 1452, 53 C.R.3d 681 [action filed within 3 years of last act of continuing course of abusive conduct was timely].) "Domestic violence" for this purpose is defined in *Family C. 6211* (see 11 *Summary* (10th), *Husband and Wife*, §374). (*C.C.P. 340.15(b)*.)

(3) *Gender Violence*. Action based on gender violence: within 3 years of the act giving rise to the action. If the plaintiff was a minor when the act occurred, within 8 years of the date the plaintiff attains the age of majority or within 3 years of the date the plaintiff discovers or reasonably should have discovered that psychological injury or illness occurring after the age of majority was caused by the act, whichever period expires later. (*C.C. 52.4(b)*.) "Gender violence" for this purpose is defined in *C.C. 52.4(c)*.

(4) *Action Arising From Violence, Intimidation, or Threat Based on Discrimination*. Action under *C.C. 51.7* of the Ralph Civil Rights Act (see 8 *Summary* (10th), *Constitutional Law*, §895), guaranteeing freedom from violence, intimidation, or threats based on discrimination: within 3 years of accrual. (*C.C.P. 338(n)*.) Action under Unruh Civil Rights Act by victim of discrimination to recover civil penalty based on violation of *C.C. 51.7*: within 3 years of accrual. (*C.C. 52(b)(2)*.)

(5) *Trespass or Injury to Real Property*. Action for trespass or injury to real property: within 3 years of accrual. (*C.C.P. 338(b)*); see *infra*, §596 et seq.) But where the injury is to trees, the period is 5 years. (*C.C. 3346*; see *infra*,

§485.)

(6) *Physical Damage to Private Property Under Inverse Condemnation*. Constitutional action to recover for physical damage to private property due to inverse condemnation: within 3 years of accrual. (C.C.P. 338(j); see infra, §605.)

(7) *Action Against Landscape Architect*. Action against landscape architect: within 3 years after State Board discovers act or omission, or within 6 years of act or omission, whichever occurs first. (B. & P.C. 5661.)

(8) *Torts to or Adverse Possession of Personal Property*. Action for taking, detaining, injuring, or for specific recovery of, personal property: within 3 years of accrual. (C.C.P. 338(c); see infra, §619.)

(9) *Fraud or Mistake*. Action for relief on ground of fraud or mistake: within 3 years of discovery of facts. (C.C.P. 338(d); see infra, §653 et seq.)

(10) *Fraudulent Claim Presented to Public Officer or Employee*. Action for treble damages arising from false or fraudulent claim presented to state or local entity, officer, or employee: within 3 years of discovery of false claim or within 10 years of violation. (Govt.C. 12654; see *Debro v. Los Angeles Raiders* (2001) 92 C.A.4th 940, 953, 112 C.R.2d 329 [limitations period commences when responsible official knows of false claim or knows of facts that would lead reasonably prudent person to suspect it]; *California v. Hewlett-Packard Co.* (2007) 153 C.A.4th 307, 314, 62 C.R.3d 762 [*qui tam* plaintiff, who was employee of government vendor, was not public official for purposes of statute, and thus his discovery of vendor's wrongdoing did not commence limitations period]; 19 *Pacific L. J.* 678.)

(11) *Misappropriation Under Uniform Trade Secrets Act*. Action for misappropriation under the Uniform Trade Secrets Act: within 3 years of discovery of misappropriation. A continuing misappropriation constitutes a single claim. (C.C. 3426.6; see 13 *Summary* (10th), *Equity*, §88.)

(12) *Statutory Liability*.

(a) Action "upon a liability created by statute, other than a penalty or forfeiture": within 3 years of accrual. (C.C.P. 338(a); see infra, §664 et seq.)

(b) Action against directors, shareholders, or members of a corporation to recover penalty, forfeiture or liability created by law: within 3 years of discovery of facts. (C.C.P. 359; infra, §671.)

(13) *Action on Bond of Official or Representative*.

(a) Action on bond of a public official based on fraud or embezzlement: within 3 years of discovery of facts. (C.C.P. 338(e); see infra, §670.)

(b) Action against notary public on bond or in official capacity based on malfeasance or misfeasance: (a) within 1 year of discovery of facts, or (b) within 3 years of performance of the notarial act giving rise to the action, whichever is later; but (c) in any event, within 6 years. (C.C.P. 338(f); see infra, §670.)

(14) *Pollution Violations*.

(a) Action commenced under the Porter-Cologne Water Quality Control Act (*Water C. 13000* et seq.): within 3 years of discovery of facts. (C.C.P. 338(i).)

(b) Action under *Health & Saf.C. 39000* et seq. (provisions relating to air quality control): within 3 years of discovery of facts. (C.C.P. 338(k); see *People v. Wilmshurst* (1999) 68 C.A.4th 1332, 1341, 81 C.R.2d 221.)

(c) Action commenced under specified provisions for protection of fish and wildlife: within 3 years of discovery of

facts. (*C.C.P.* 338(l).)

(d) Action to recover costs of removing or remedying hazardous substance release: within 3 years of certification that removal or remedy has been completed. (*Health & Saf.C.* 25360.4.)

(15) *Enforcement of Obligation Under Article 3 of U.C.C.*

(a) Action to enforce obligation to pay unaccepted draft (other than certified, teller's, cashier's, or traveler's check): within 3 years of its dishonor or within 10 years of its date (see *infra*, §488), whichever period expires first. (*U.C.C.* 3118(c).)

(b) Action to enforce obligation of acceptor of certified, teller's, cashier's, or traveler's check: within 3 years of demand. (*U.C.C.* 3118(d).)

(c) Action (unless governed by other laws as to indemnity or contribution claims) (1) for conversion of instrument, (2) for money had and received or like action based on conversion, or (3) for breach of warranty under Article 3 and not governed by *U.C.C.* 3118: within 3 years of accrual of cause of action. (*U.C.C.* 3118(g).)

These provisions are covered more comprehensively elsewhere. (See 4 *Summary* (10th), *Negotiable Instruments*, §37.)

(16) *Other Actions.*

(a) Action against real property securities dealer: within 3 years of transaction. (*B. & P.C.* 10238.7.)

(b) Action for slander of title to real property: within 3 years of accrual. (*C.C.P.* 338(g); see *Arthur v. Davis* (1981) 126 *C.A.3d* 684, 690, 178 *C.R.* 920, *infra*, §618.)

(c) Action under *B. & P.C.* 17536 for false advertising: within 3 years of discovery of facts. (*C.C.P.* 338(h); see 4 *Pacific L. J.* 236.)

(d) Action based on professional liability for corporate security prospectus: within 1 year of discovery of facts, but in any event, within 3 years. (*Corp.C.* 25506.1; see *Bowden v. Robinson* (1977) 67 *C.A.3d* 705, 712, 136 *C.R.* 871, 9 *Summary* (10th), *Corporations*, §450; *supra*, §481.)

(e) Insurer's subrogation action under uninsured motorist law: within 3 years of date of payment of claim. (*Ins.C.* 11580.2(g); see *Interinsurance Exchange of the Auto. Club of Southern Calif. v. Harmon* (1968) 266 *C.A.2d* 758, 72 *C.R.* 352; *infra*, §566.)

(f) Action to recover wages where plaintiff was paid at wage rate less than that paid to opposite sex for same work: within 3 years after cause of action "occurs" for wilful violation; within 2 years for other violation. (*Lab.C.* 1197.5(h); see *infra*, §506.)

(g) Action against public utility for damages from unlawful rate charges: within 3 years of accrual. (*Pub.Util.C.* 736.)

(h) Claim for refund of vehicle license fees erroneously paid: within 3 years of payment or collection. (*Veh.C.* 42231, 42232; see *Piazza Properties, Ltd. v. Department of Motor Vehicles* (1977) 71 *C.A.3d* 622, 629, 138 *C.R.* 357.)

(i) Action to recover value of state health care benefits where third party is liable: within 3 years of accrual. (*Welf.C.* 14124.72(a).)

(j) Action challenging validity of special tax levied by local agency on a per parcel basis: within 3 years of accrual.

(C.C.P. 338(m).)

(k) Action to vacate, set aside, or otherwise nullify adoption order: if on ground of fraud, within 3 years after entry of order; on any other ground, within 1 year after entry of order (see *supra*, §481). (*Family C. 9102*; see 10 *Summary* (10th), *Parent and Child*, §148.)

(l) Action against person who coerces another to undergo subcutaneous implanting of identification device: within 3 years after the device was implanted. If the victim was a dependent adult or minor: within 3 years after the plaintiff or his or her parent or guardian discovers or reasonably should have discovered the implant, or within 8 years after the plaintiff attains the age of majority, whichever occurs later. However, the statute of limitations may not run against a dependent adult or minor plaintiff simply because a guardian ad litem has been appointed, and failure to bring a plaintiff's action within the applicable limitations period does not prejudice the plaintiff's right to do so. (C.C. 52.7; see 5 *Summary* (10th), *Torts*, Supp., §468B.)

SUPPLEMENT: [This section is current through the latest supplement]

(10) *Fraudulent Claim Presented to Public Officer or Employee*. The action now accrues within 3 years of the discovery of the false claim *by the Attorney General or a prosecuting authority with jurisdiction to act* or within 10 years of violation. (*Govt.C. 12654*, as amended in 2009.)



126 of 190 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XII. STATUTE OF LIMITATIONS: IN GENERAL

E. Classification According to Periods of Limitation.

11. Four Years.

3 Witkin Cal. Proc. Actions § 484

[§ 484] Four Years.

(1) *Written Contract.*

(a) Action "upon any contract, obligation or liability founded upon an instrument in writing": within 4 years of accrual. Exceptions are an action on corporation bonds (within 6 years; see *infra*, §486), and an action for a deficiency judgment after sale under a deed of trust or power of sale mortgage (within 3 months; see *supra*, §477). (*C.C.P.* 337(1); see *infra*, §508.)

(b) Lessor's action on abandonment or termination of lease: within 4 years of breach and abandonment or termination of lessee's right to possession, whichever is earlier. (*C.C.P.* 337.2.)

(2) *Contract of Sale, Written or Oral.* Action for breach of contract of sale: within 4 years of accrual. The parties may, by their original agreement, reduce the period to not less than 1 year, but may not extend it. (*U.C.C.* 2725(1); see *infra*, §519.)

(3) *Accounts.* Actions on (a) book account of one or more entries; (b) account stated based on an account in writing; (c) balance due on a mutual, open, and current account, items of which are in writing: ordinarily, within 4 years of last item. (*C.C.P.* 337(2), 344; see *infra*, §§515 et seq., 540 et seq.)

(4) *Judgment of Nullity of Marriage.*

(a) On ground that petitioner spouse was under age of legal consent: within 4 years after arriving at age of consent; or where parent, guardian, conservator, or other person was in charge of underage spouse: at any time before arriving at age of legal consent. (*Family C.* 2211(a).)

(b) On ground of fraud: within 4 years of discovery of facts. (*Family C.* 2211(d); see *infra*, §497.)

(c) On ground that consent was obtained by force, or on ground of incurable physical incapacity: within 4 years after marriage. (*Family C.* 2211(e), 2211(f).)

(5) *Confirmation of Arbitration Award*. Petition for confirmation of arbitration award: within 4 years of service of copy of award on petitioner. (C.C.P. 1288.) (On limitations period for petition to vacate or correct arbitration award, see *supra*, §478, and *infra*, §687.)

(6) *Defective Construction on Real Property*. Action to recover damages from a person "performing or furnishing the design, specifications, surveying, planning, supervision or observation of construction or construction of an improvement to real property": within 4 years after substantial completion of the improvement. This limitation applies to actions based on *patent* deficiencies (see *infra*, §§606, 607). (C.C.P. 337.1(a); on limitations period for actions based on latent deficiencies, see *infra*, §608 et seq.) C.C.P. 337.1 does not apply to an action by a homeowner for defects in the original construction of a residence; that action is governed by the 10-year limitations period of C.C. 941(a). (C.C. 941(a), (d); see *infra*, §617.)

(7) *Action Under Unfair Competition Law*. Action under Unfair Competition Law (B. & P.C. 17200 et seq.): within 4 years of accrual. (B. & P.C. 17208; see *Cortez v. Purolator Air Filtration Products Co.* (2000) 23 C.4th 163, 178, 96 C.R.2d 518, 999 P.2d 706 [action is subject to 4-year limitations period of B. & P.C. 17208, even if action could have been pursued under some other statute]; *Snapp & Associates Ins. Services v. Robertson* (2002) 96 C.A.4th 884, 891, 117 C.R.2d 331 [discovery rule does not apply to unfair competition actions]; 13 *Summary* (10th), *Equity*, §128.)

(8) *Action for Violation of Political Reform Act*. Action for violation of campaign reporting or statement requirements: within 4 years after an audit could begin or 1 year after a completed audit, whichever period is less. Actions for other violations: within 4 years of the violation. (Govt.C. 91011; see *McCauley v. Howard Jarvis Taxpayers Assn.* (1998) 68 C.A.4th 1255, 1260, 80 C.R.2d 900.)

(9) *Other Actions*.

(a) Civil action for violation of provisions of Business and Professions Code relating to combinations in restraint of trade: within 4 years of accrual. (B. & P.C. 16750.1; see 9 *Pacific L. J.* 314.)

(b) Action by state to recover statutory penalty for conspiracy in restraint of trade: within 4 years from commission of last act. (B. & P.C. 16755(b).)

(c) Action for foreclosure of street improvement bond: within 4 years of due date. (C.C. 2911, C.C.P. 330; see *infra*, §667.)

(d) Action for recovery of money for support of patient at state or county hospital: within 4 years of last date of service or payment. (C.C.P. 345; see *Estate of Jacobson* (1942) 56 C.A.2d 255, 258, 132 P.2d 229; *Santa Clara v. Vargas* (1977) 71 C.A.3d 510, 518, 139 C.R. 537.)

(e) Action enforcing liability regarding sale or offer of nonexempt but unregistered franchise or one with misleading or untrue required statements: within 4 years after violation, 1 year after discovery, or 90 days after written notice, whichever expires first. (Corp.C. 31303; see *People v. Speedee Oil Change Systems* (2002) 95 C.A.4th 709, 726, 116 C.R.2d 497 [4-year limitations period in Corp.C. 31303 imposes absolute outside limit, i.e., once it expires, plaintiff's belated discovery of violation cannot extend limitations period].)

(f) Action on guardian's or conservator's bond: within 4 years after discharge or removal of guardian or conservator, or within 4 years from order of surcharge, whichever is later. (Prob.C. 2333(b); see *infra*, §543.)

(g) Action to recover personal income taxes or bank or corporation taxes paid under protest: within 4 years of the last date prescribed for filing the return, 90 days of final board action, or 1 year of the date the tax was paid. (Rev.C. 19384, 19385, 19390.)

(10) *Actions Not Otherwise Provided For*. "An action for relief not hereinbefore provided for must be commenced

within four years after the cause of action shall have accrued." (*C.C.P.* 343; see *infra*, §§677, 678.)

SUPPLEMENT: [This section is current through the latest supplement]

(7) *Action Under Unfair Competition Law.* The Supreme Court has not yet decided, and the Courts of Appeal are in disagreement, whether the delayed discovery rule (see text, §497 et seq.) applies to a UCL action. (See *Grisham v. Philip Morris U.S.A.* (2007) 40 C.4th 623, 634, footnote 7, 54 C.R.3d 735, 151 P.3d 1151, text, §576 [noting that law is unsettled and refusing to address issue]; *Snapp & Associates Ins. Services v. Robertson* (2002) 96 C.A.4th 884, 891, 117 C.R.2d 331, text p. 623 [discovery rule does not apply to unfair competition action]; *Massachusetts Mut. Life Ins. Co. v Superior Court* (2002) 97 C.A.4th 1282, 1295, 119 C.R.2d 190, 4 Summary (10th), Sales, §296 [discovery rule "probably" applies to UCL action based on defendant's nondisclosure of material information about "vanishing" insurance premium policies]; *Broberg v. Guardian Life Ins. Co. of America* (2009) 171 C.A.4th 912, 920, 90 C.R.3d 225 [discovery rule applies to UCL action based on defendant's allegedly deceptive marketing materials and sales practices].)

(9) *Other Actions.(h) (New):* Action for damages under Welf.C. 15657.5 and 15657.6 (see 6 Summary (10th), Torts, Supp., §1686) for financial abuse of elder or dependent adult: within 4 years after plaintiff discovers or should have discovered the facts constituting the financial abuse. (Welf.C. 15657.7, added in 2008.)



127 of 190 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XII. STATUTE OF LIMITATIONS: IN GENERAL

E. Classification According to Periods of Limitation.

12. Five Years.

3 *Witkin Cal. Proc. Actions* § 485

[§ 485] Five Years.

(1) *Adverse Possession of Real Property*. No action by a private individual for recovery of real property or of its possession can be maintained unless the plaintiff or his predecessor "was seized or possessed of the property in question, within 5 years before commencement of the action." (*C.C.P.* 318; see *Borden v. Boyvin* (1942) 55 C.A.2d 432, 435, 130 P.2d 718; *McKelvey v. Rodriguez* (1943) 57 C.A.2d 214, 223, 134 P.2d 870; *Ocean Shore R. Co. v. Santa Cruz* (1961) 198 C.A.2d 267, 270, 17 C.R. 892 [inverse condemnation]; *Frustuck v. Fairfax* (1963) 212 C.A.2d 345, 374, 28 C.R. 357 [same]; *Garden Water Corp. v. Fambrough* (1966) 245 C.A.2d 324, 327, 53 C.R. 862 [same]; 12 *Summary* (10th), *Real Property*, §233; for trespass distinction, see *infra*, §596.)

Although a different provision governs adverse possession against the state (see *infra*, §488), the 5-year period applies to an action to recover land conveyed under a void state patent, after a judgment determining its invalidity, whether the action is brought by the People, a subsequent patentee, or the trustee's successor. (*C.C.P.* 317.)

(2) *Mesne Profits in Real Property*. Action for mesne profits of real property: within 5 years of accrual. (*C.C.P.* 336(a); see *C.C.P.* 319 [plaintiff or predecessor must have been "seized or possessed" of premises within 5 years before commencement of the act that gives rise to the action].)

(3) *Violation of Restriction on Use of Real Property*. Action under C.C. 784 for violation of restriction on use of real property contained in deed, declaration, or other instrument: within 5 years of discovery of restriction. (*C.C.P.* 336(b).)

(4) *Action on Fraudulent Stock Transfer*. Action on fraudulent stock transaction: within 5 years after act or transaction constituting violation, or 2 years after discovery of facts constituting violation, whichever period expires first. (*Corp.C.* 25506(b); see *Deveny v. Entropin* (2006) 139 C.A.4th 408, 419, 42 C.R.3d 807 [inquiry notice, and not actual knowledge, triggers discovery of facts limitations period].)

(5) *Other Actions*.

(a) Action for "wrongful injuries to timber, trees, or underwood upon the land of another, or removal thereof" while

trespassing: within 5 years of trespass. (C.C. 3346(c); see *Ghera v. Sugar Pine Lumber Co.* (1964) 224 C.A.2d 88, 36 C.R. 305, supra, §458.)

(b) Action to recover civil penalties or punitive damages under hazardous waste control statutes: within 5 years of discovery of facts. (C.C.P. 338.1.)

(c) Proceeding to recover escheated property: within 5 years of judgment or notice by publication. (C.C.P. 1355; Prob.C. 11903; see *Estate of Lindquist* (1944) 25 C.2d 697, 711, 154 P.2d 879.)

(d) Action to claim property before it permanently escheats to state: within 5 years of entry of judgment that property belongs to state, or if personalty worth \$ 1,000 or less, within 5 years of completion of notice of publication of escheatment action. (C.C.P. 1430.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Adverse Possession of Real Property.* See *Hauselt v. Butte* (2009) 172 C.A.4th 550, 565, 91 C.R.3d 343 [inverse condemnation]. (3) *Violation of Restriction on Use of Real Property.* See *Pacific Hills Homeowners Assn. v. Prun* (2008) 160 C.A.4th 1557, 1563, 73 C.R.3d 653 [C.C.P. 336(b) applies not only to actions based on recorded instruments but also to actions based on unrecorded ones].



128 of 190 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XII. STATUTE OF LIMITATIONS: IN GENERAL

E. Classification According to Periods of Limitation.

13. Six Years.

3 Witkin Cal. Proc. Actions § 486

[§ 486] Six Years.

(1) *Action To Enforce Obligation Under Article 3 of U.C.C.*

(a) Action to enforce obligation to pay note payable at definite time (other than certificate of deposit): within 6 years of due date or accelerated due date. (U.C.C. 3118(a).)

(b) Action to enforce note payable on demand (other than certified, teller's, cashier's, or traveler's check or certificate of deposit): within 6 years of demand, or within 10 years of nonpayment of principal or interest on note if no demand was made (see *infra*, §488). (U.C.C. 3118(b).)

(c) Action to enforce obligation to pay certificate of deposit: within 6 years of demand, but if instrument has due date and maker is not required to pay before then, within 6 years of demand and passage of due date. (U.C.C. 3118(e).)

(d) Action to enforce obligation to pay accepted draft (other than certified check): within 6 years of due date or acceptance if obligation is payable at definite time, or within 6 years of acceptance if obligation is payable on demand. (U.C.C. 3118(f).)

These provisions are covered more comprehensively elsewhere. (See 4 *Summary* (10th), *Negotiable Instruments*, §37.)

(2) *Action on Corporate Bond or Underlying Agreement.*

(a) Action on corporation bonds, etc., issued to public pursuant to permit, or on coupons issued therewith: within 6 years of accrual. (C.C.P. 336a(1).)

(b) Action on a mortgage, deed of trust, or other agreement pursuant to which bonds, etc., were issued: within 6 years of accrual. (C.C.P. 336a(2); see *Read v. Mills Bldg. Co.* (1940) 39 C.A.2d 140, 143, 102 P.2d 542; 9 So. Cal. L. Rev. 337.) (On period applicable to public bonds, see C.C.P. 337.5, *infra*, §488.)

(3) *Action for Injuries to Unborn Child.* Action for injuries to unborn child (sustained prior to or in course of birth):

within 6 years of birth. (*C.C.P.* 340.4; see *Myers v. Stevenson* (1954) 125 C.A.2d 399, 270 P.2d 885, supra, §§443, 444 [time extended in accordance with usual rule where plaintiff was unable to discover facts of malpractice by exercise of reasonable diligence]; *Call v. Kezirian* (1982) 135 C.A.3d 189, 185 C.R. 103 [same]; *Fay v. Mundy* (1966) 246 C.A.2d 231, 236, 54 C.R. 591; infra, §589.)

(4) *Other Actions.*

(a) Action against landscape architect: within 3 years after State Board discovers act or omission, or within 6 years of act or omission, whichever occurs first. (*B. & P.C.* 5661.)

(b) Action against notary public on bond or in official capacity: within 6 years of accrual. (*C.C.P.* 338(f); for exceptions, see supra, §483.)

(c) Action by state against taxpayer to recover statutory penalty for false personal income tax return: within 6 years of commission of the offense. (Rev.C. 19704.)

SUPPLEMENT: [This section is current through the latest supplement]



129 of 190 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XII. STATUTE OF LIMITATIONS: IN GENERAL

E. Classification According to Periods of Limitation.

14. Eight Years.

3 Witkin Cal. Proc. Actions § 487

[§ 487] Eight Years.

(1) *Sexual Abuse of Minor.* Action for childhood sexual abuse: within 8 years of date the plaintiff attains age of majority or within 3 years of date the plaintiff discovers or reasonably should have discovered that the psychological injury or illness occurring after the age of majority was caused by sexual abuse, whichever occurs later. (C.C.P. 340.1(a).) A childhood sexual abuse action against a defendant other than the perpetrator, based on a negligent or intentional act that was the legal cause of the abuse, may not be commenced on or after the plaintiff's 26th birthday. (C.C.P. 340.1(b)(2).) (See *infra*, §593 et seq.)

(2) *Gender Violence Against Minor.* Action based on gender violence against minor: within 8 years of the date the plaintiff attains the age of majority or within 3 years of the date the plaintiff discovers or reasonably should have discovered that psychological injury or illness occurring after the age of majority was caused by the act, whichever period expires later. (C.C. 52.4(b).) "Gender violence" for this purpose is defined in C.C. 52.4(c).

(3) *Coercing Another To Undergo Subcutaneous Implanting of Identification Device.* Action against person who coerces another to undergo subcutaneous implanting of identification device: within 3 years after the device was implanted. If the victim was a dependent adult or minor: within 3 years after the plaintiff or his or her parent or guardian discovers or reasonably should have discovered the implant, or within 8 years after the plaintiff attains the age of majority, whichever occurs later. However, the statute of limitations may not run against a dependent adult or minor plaintiff simply because a guardian ad litem has been appointed, and failure to bring a plaintiff's action within the applicable limitations period does not prejudice the plaintiff's right to do so. (C.C. 52.7; see 5 *Summary* (10th), *Torts*, Supp., §468B.)

SUPPLEMENT: [This section is current through the latest supplement]



130 of 190 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XII. STATUTE OF LIMITATIONS: IN GENERAL

E. Classification According to Periods of Limitation.

15. Ten Years.

3 *Witkin Cal. Proc. Actions* § 488

[§ 488] Ten Years.

(1) *Adverse Possession Against State*. No action by the state involving title to real property or its issues or profits may be brought unless (a) right or title accrued within 10 years before commencement of action, or (b) state or predecessor received some rents and profits within 10 years. (*C.C.P.* 315; see *People v. Chambers* (1951) 37 *C.2d* 552, 556, 233 *P.2d* 557 [statute was not applicable]; *C.C.P.* 316 [action by grantee from state].)

(2) *Public Bonds*. Action on (a) bonds or coupons of State of California; (b) general obligation bonds or coupons, not secured by lien on real property, of county, city and county, municipal corporation, district, or other political subdivision: within 10 years of accrual. (*C.C.P.* 337.5.)

(3) *Judgment*. Action on judgment of federal or state court: within 10 years of judgment. (*C.C.P.* 337.5(3); see *Angeli v. Lischetti* (1962) 58 *C.2d* 474, 476, 24 *C.R.* 845, 374 *P.2d* 813; *Gay v. Straube* (1966) 245 *C.A.2d* 683, 54 *C.R.* 293 [decree of distribution]; *United States Capital Corp. v. Nickelberry* (1981) 120 *C.A.3d* 864, 867, 174 *C.R.* 814; *Green v. Zissis* (1992) 5 *C.A.4th* 1219, 1222, 7 *C.R.2d* 406; *infra*, §675.)

(4) *Action Against Defendant Based on Commission of Serious Felony*. An action against a defendant based on the conviction of specified serious felonies must be brought within 10 years of the defendant's discharge from parole. (*C.C.P.* 340.3(b).) Actions subject to the extension include, with a few exceptions, those commenced on, before, or after the statute's effective date, including actions already time-barred, thereby reviving them. (*C.C.P.* 340.3(d).) If the sentence or judgment is stayed (except by appeal or a sentence of probation), the limitation is tolled until the stay is lifted. (*C.C.P.* 340.3(c).) The action must be commenced within 1 year after judgment is pronounced, unless a longer period is prescribed for a specific action. (*C.C.P.* 340.3(a).) (On overlapping shorter period, see *supra*, §481.)

(5) *Enforcement of Charitable Trust*. Action by Attorney General against trustees, charitable corporation, or director or officer: within 10 years of accrual. (*Govt.C.* 12596.)

(6) *Personal Income Tax*. Action by Franchise Tax Board to collect personal income tax due: within 10 years of determination of liability, or within 10-year period during which lien remains in effect following recording or filing of notice of state tax lien or recording of abstract of judgment. (*Rev.C.* 19203, 19371; see *infra*, §666.)

(7) *Defects in Construction of Residence*. Action by homeowner against builder or similar person for defects in original construction of residence: within 10 years after substantial completion of development, but not later than 10 years after recordation of valid notice of completion. (C.C. 941(a); see *infra*, §617.)

(8) *Latent Defects in Real Property*. Action against person who develops real property, or furnishes various services in construction of improvement to real property, to recover damages for latent deficiency in services rendered or injury to real or personal property arising out of latent deficiency: within 10 years from "substantial completion" (C.C.P. 337.15(a)), but not later than 10 years from earliest of four specified events (C.C.P. 337.15(g)). (See *infra*, §608 et seq.; on 4-year limitations period for patent defects, see *infra*, §§606, 607.) C.C.P. 337.15 does not apply to an action by a homeowner for defects in the original construction of a residence; that action is governed by the 10-year limitations period of C.C. 941(a). (C.C. 941(a), (d).)

(9) *Inheritance Tax*. Issuance of warrant for enforcement of state lien for estate taxes or for collection of estate tax due: within 10 years after last recording or filing of notice of state tax lien or within 10 years after delinquency in payment of taxes due. (Rev.C. 13615; see *infra*, §666.)

(10) *Action To Enforce Obligation Under Article 3 of U.C.C.*

(a) Action to enforce note payable on demand (other than certified, teller's, cashier's, or traveler's check or certificate of deposit): within 10 years of nonpayment of principal or interest on note if no demand was made, or within 6 years of demand (see *supra*, §486). (U.C.C. 3118(b).)

(b) Action to enforce obligation to pay unaccepted draft (other than certified, teller's, cashier's, or traveler's check): within 10 years of date of draft or 3 years of its dishonor (see *supra*, §483), whichever period expires first. (U.C.C. 3118(c).)

These provisions are covered more comprehensively elsewhere. (See 4 *Summary* (10th), *Negotiable Instruments*, §37.)

SUPPLEMENT: [This section is current through the latest supplement]



131 of 190 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XII. STATUTE OF LIMITATIONS: IN GENERAL

E. Classification According to Periods of Limitation.

16. No Limitation.

a. Express Statutory Provisions.

3 *Witkin Cal. Proc. Actions* § 489

[§ 489] Express Statutory Provisions.

In a few situations, by express provision, the legislative intent is clearly manifested to allow an action to be brought at any time.

(1) *Money or Property in Financial Institution.* "To actions brought to recover money or other property deposited with any bank, banker, trust company, building and loan association, or savings and loan society or evidenced by a certificate issued by an industrial loan company or credit union there is no limitation." (*C.C.P.* 348; see *Neustadt v. Skernswell* (1955) 133 *C.A.2d* 163, 165, 283 *P.2d* 787 [statute does not apply to action to declare resulting trust against title company acting as mere stakeholder (escrow holder)]; *Morse v. Crocker Nat. Bank* (1983) 142 *C.A.3d* 228, 233, 190 *C.R.* 839 [statute does not apply to actions in which debtor-creditor relationship is absent, and therefore did not apply to rescission action brought by remaindermen of inter vivos trust against trustee bank, seeking restitution of trust assets]; *Bank of America v. Cory* (1985) 164 *C.A.3d* 66, 74, 210 *C.R.* 351 [in action involving dormant bank accounts under Unclaimed Property Law (*C.C.P.* 1500 et seq.; see 13 *Summary* (10th), *Personal Property*, §37 et seq.), Controller stands in depositors' shoes; hence, Controller is not subject to ordinary statute of limitations]; *Duty v. Abex Corp.* (1989) 214 *C.A.3d* 742, 749, 263 *C.R.* 13, citing the text.)

However, if the institution is being liquidated, the statute commences to run from the beginning of liquidation. (*C.C.P.* 348; see *King v. Mortimer* (1948) 83 *C.A.2d* 153, 160, 188 *P.2d* 502.) The 1-year period governing actions on forged checks or indorsements is another exception. (See *C.C.P.* 340(c); *U.C.C.* 4406(f).) *Far West Citrus v. Bank of America* (1979) 91 *C.A.3d* 913, 917, 154 *C.R.* 464, held that an action for disbursements without a required second signature was governed by *C.C.P.* 348, not by *U.C.C.* 4406. However, that holding was abrogated by 1993 amendments to *U.C.C.* 4406 (see 4 *Summary* (10th), *Negotiable Instruments*, §130). (*Edward Fineman Co. v. Superior Court* (1998) 66 *C.A.4th* 1110, 1118, 78 *C.R.2d* 478.)

(2) *Escheat of Abandoned or Unclaimed Property.* The expiration of a limitations period for an action for damages or recovery of abandoned or unclaimed property does not prevent the abandonment or escheat of the property. (*C.C.P.* 1476, 1570.)

(3) *Adverse Possession of Property Devoted to Public Use*. There can be no adverse possession of property devoted to a public use. (C.C. 1007; see *People v. Chambers* (1951) 37 C.2d 552, 556, 233 P.2d 557; *Marin Healthcare Dist. v. Sutter Health* (2002) 103 C.A.4th 861, 880, 127 C.R.2d 113 [C.C. 1007 does not preclude application of statute of limitations to action by state to void lease of public-use property]; 12 *Summary* (10th), *Real Property*, §§213, 214.)

(4) *Nuisance*. "No lapse of time can legalize a public nuisance, amounting to an actual obstruction of public right." (C.C. 3490; see *Turlock v. Bristow* (1930) 103 C.A. 750, 756, 284 P. 962; 13 *Summary* (10th), *Equity*, §135.)

(5) *Judgment of Nullity of Marriage*. A proceeding for a judgment of nullity of marriage for bigamy or unsound mind may be brought at any time before the death of either party. (*Family C. 2211(b)*, (c); for 4-year statute on other grounds, see *supra*, §484.)

SUPPLEMENT: [This section is current through the latest supplement]



132 of 190 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XII. STATUTE OF LIMITATIONS: IN GENERAL

E. Classification According to Periods of Limitation.

16. No Limitation.

b. Quiet Title by Owner in Possession.

3 Witkin Cal. Proc. Actions § 490

[§ 490] Quiet Title by Owner in Possession.

In some situations the nature of the right or the circumstances prevent the statute from running. An example is the action, by an owner in possession, to quiet title; the statute does not begin to run because while the owner is in possession he or she is not likely to have knowledge of adverse claims of persons out of possession. (See *Tannhauser v. Adams* (1947) 31 C.2d 169, 175, 187 P.2d 716; *Muktarian v. Barmby* (1965) 63 C.2d 558, 560, 47 C.R. 483, 407 P.2d 659, citing the text; *Oates v. Nelson* (1969) 269 C.A.2d 18, 22, 74 C.R. 475; *Ankoanda v. Walker-Smith* (1996) 44 C.A.4th 610, 616, 52 C.R.2d 39 [possession required to toll statute must be exclusive and undisputed].)

The contention, based on a dictum in *Tannhauser*, that an owner has unlimited time to attack a tax deed to the state, was repudiated in *Sears v. Calaveras* (1955) 45 C.2d 518, 289 P.2d 425. The action, brought in 1948, sought to attack tax deeds recorded in 1943. *Held*, the 1-year limitation of Rev.C. 175 and former Rev.C. 3521 applied, and barred the action. The court assumed that a general statute of limitations would not run against such an owner bringing an action to remove a cloud on title, but held that the special statute governing the taxpayer's action did apply: "If the contention of the plaintiffs should prevail the finality of tax proceedings would be thrown into confusion. The validity of tax deeds as against an owner in possession of real property would be placed in suspension for an indefinite period and until at his election he chose to attack it. Without limit of time he could defend against it. There appears to be no reason why an owner of land, although in exclusive and undisputed possession, should not be required to be alert to protect his rights as against his own delinquency in the payment of taxes. He is charged with notice that if he claims the invalidity of a tax deed to the state or of the proceedings leading up to it he must bring his action for that purpose within the statutory time." (45 C.2d 521.)

SUPPLEMENT: [This section is current through the latest supplement]

See *Crestmar Owners Assn. v. Stapakis* (2007) 157 C.A.4th 1223, 1230, 69 C.R.3d 231 [statute was tolled because possession was exclusive and undisputed].



133 of 190 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XII. STATUTE OF LIMITATIONS: IN GENERAL

E. Classification According to Periods of Limitation.

16. No Limitation.

c. Cancellation of Void Instrument.

3 *Witkin Cal. Proc. Actions* § 491

[§ 491] Cancellation of Void Instrument.

Hironymous v. Hiatt (1921) 52 C.A. 727, 199 P. 850, held that an instrument wholly void may be disregarded and an action to cancel it under C.C. 3412 may be brought at any time. (52 C.A. 736.) However, *Hironymous* was sharply criticized in *Robertson v. Superior Court* (2001) 90 C.A.4th 1319, 109 C.R.2d 650. Plaintiff brought an action to cancel under C.C. 3412, both individually and as a representative of his deceased mother's estate, against 25 individuals claiming legal or equitable interest in 35 acres of real property. Plaintiff sought to have declared void a 1949 quitclaim deed and related instruments pertaining to the property on the ground that his mother was mentally incompetent at the time she executed the deed. One defendant, whose title to real property was implicated by the complaint, filed a demurrer based on statute of limitations grounds. Relying on *Hironymous*, the trial judge overruled the demurrer, finding that an action under C.C. 3412 to cancel a wholly void instrument may be brought at any time. *Held*, mandamus issued to vacate the order overruling the demurrer and to compel a new order sustaining the demurrer.

(a) C.C. 3412 is not a statute of limitations and does not contain one within it. (90 C.A.4th 1325.) Although there are some actions without a statute of limitations (see *supra*, §489 et seq.), an action to cancel an instrument under C.C. 3412 is not one of them; *Hironymous* is "flatly wrong" in holding to the contrary. (90 C.A.4th 1325, 1326.)

(b) Decisions subsequent to *Hironymous* have held that an action under C.C. 3412 based on a ground other than fraud or mistake is subject to the 4-year limitations period of C.C.P. 343, governing actions not otherwise provided for (see *infra*, §677 et seq.). (90 C.A.4th 1326, citing *Moss v. Moss* (1942) 20 C.2d 640, 128 P.2d 526, *infra*, §677, *Zakaessian v. Zakaessian* (1945) 70 C.A.2d 721, 161 P.2d 677, and other cases.)

(c) The *Hironymous* rule is "especially inappropriate" when applied, as here, to actions involving real property. The Code of Civil Procedure contains several limitation of action provisions expressly applicable to actions involving the title to or possession of real property, including C.C.P. 318 (5-year limitations for action to recover possession of real property; see *supra*, §485), C.C.P. 319 (5-year limitations period for action affecting title to real property; see *supra*, §485), and C.C.P. 328 (tolling of limitations period for disability, up to 20 years, for action to recover real property from adverse claimant; see *infra*, §695). (90 C.A.4th 1327.) The overall effect of these statutes is that actions relating to either the possession of or title to real property must be commenced within 5 years from the end of possession or seisin

of that property by the claimant (or his or her predecessor in interest), unless tolled because the claimant's chain of title includes a person with a statutory disability. The instant action was clearly encompassed by these provisions. (90 C.A.4th 1328.)

SUPPLEMENT: [This section is current through the latest supplement]



134 of 190 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XII. STATUTE OF LIMITATIONS: IN GENERAL

E. Classification According to Periods of Limitation.

16. No Limitation.

d. Other Proceedings.

3 *Witkin Cal. Proc. Actions* § 492

[§ 492] Other Proceedings.

(1) *Cotenant Partition*. No statute of limitations runs on the right of a cotenant to bring an action for partition. (*Adams v. Hopkins* (1904) 144 C. 19, 27, 77 P. 712; *Elbert, Ltd. v. Nolan* (1948) 32 C.2d 610, 616, 197 P.2d 537; *Duty v. Abex Corp.* (1989) 214 C.A.3d 742, 749, 263 C.R. 13, citing the text.)

(2) *Support of Minor Child*. The statute of limitations does not bar the continuing duty of a parent to support his or her child. (*Fernandez v. Aburrea* (1919) 42 C.A. 131, 132, 183 P. 366.)

(3) *Dissolution of Marriage*. The Family Code places no time limitation on a proceeding for dissolution of a marriage or legal separation on either of the statutory grounds--irreconcilable differences or incurable insanity. (See *Family C.* 2310.)

SUPPLEMENT: [This section is current through the latest supplement]



135 of 190 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XII. STATUTE OF LIMITATIONS: IN GENERAL

F. Periods and Accrual.

1. General Rule: Accrual When Wrongful Act Is Done.

a. What Constitutes Accrual.

3 *Witkin Cal. Proc. Actions* § 493

[§ 493] What Constitutes Accrual.

(1) *Statement of Rule.* C.C.P. 312, the section introducing the limitation provisions of the Code of Civil Procedure, states that civil actions can only be commenced within the prescribed periods "after the cause of action shall have accrued." The cause of action ordinarily accrues when, under the substantive law, the wrongful act is done and the obligation or liability arises, i.e., when an action may be brought. (See *Lattin v. Gillette* (1892) 95 C. 317, 319, 30 P. 545; *Irvine v. Bossen* (1944) 25 C.2d 652, 658, 155 P.2d 9; *Dillon v. Board of Pension Commrs. of Los Angeles* (1941) 18 C.2d 427, 430, 116 P.2d 37; *Tahoe Pines Co. v. Newman* (1922) 59 C.A. 186, 190, 210 P. 445; *Reuter v. Pacific Mut. Life Ins. Co. of America* (1935) 5 C.A.2d 333, 336, 43 P.2d 576; *Turner v. Donovan* (1942) 52 C.A.2d 236, 238, 126 P.2d 187; *Leahey v. Department of Water & Power of Los Angeles* (1946) 76 C.A.2d 281, 286, 173 P.2d 69; *Merchants Fire Assur. Corp. of New York v. Retail Credit Co.* (1962) 206 C.A.2d 55, 58, 23 C.R. 544, citing the text; *Collins v. Los Angeles* (1966) 241 C.A.2d 451, 454, 50 C.R. 586; *Rutherford v. Johnson* (1967) 250 C.A.2d 316, 318, footnote 1, 58 C.R. 546, citing the text; *Menefee v. Ostawari* (1991) 228 C.A.3d 239, 245, 278 C.R. 805, citing the text; *Rest.2d, Torts* §899; 63 *Harv. L. Rev.* 1200; 57 *A.L.R.3d* 867 [accrual of claim for contribution or indemnity based on tort]; 51 *Am.Jur.2d* (2000 ed.), *Limitation of Actions* §147 et seq.) (On periods and accrual in specific actions, see *infra*, §508 et seq.)

(2) *Illustrations.* The following decisions are illustrative:

Los Angeles v. Metropolitan Cas. Ins. Co. of New York (1933) 135 C.A. 26, 28, 26 P.2d 699, 27 P.2d 914 [cause of action does not "accrue" until party owning it is entitled to begin and prosecute action thereon; it accrues at moment when party has legal right to sue on it, and not earlier].

Institoris v. Los Angeles (1989) 210 C.A.3d 10, 18, 258 C.R. 418 [in inverse condemnation action involving overflight aircraft noise, cause of action accrued when flights interfered with use and enjoyment of plaintiff's property and resulted in diminution of its market value, not when interference later fell below that level].

Lee v. Bank of America (1994) 27 C.A.4th 197, 205, 32 C.R.2d 388 [wrongful termination action accrued when defendant fired plaintiff, not when defendant had earlier demoted her; declining to follow *Honig v. Financial Corp. of*

America (1992) 6 C.A.4th 960, 7 C.R.2d 922, 5 Cal. Proc. (5th), Pleading, §1239].

Vista v. Robert Thomas Sec. (2000) 84 C.A.4th 882, 887, 101 C.R.2d 237 [where monetary damages are element of cause of action, accrual does not occur until actual, pecuniary loss is suffered].

SUPPLEMENT: [This section is current through the latest supplement]



136 of 190 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XII. STATUTE OF LIMITATIONS: IN GENERAL

F. Periods and Accrual.

1. General Rule: Accrual When Wrongful Act Is Done.

b. Ignorance of Cause of Action.

3 *Witkin Cal. Proc. Actions* § 494

[§ 494] Ignorance of Cause of Action.

(1) *Judicial Rule.* Under the principle previously stated (*supra*, §493), accrual is determined by the defendant's acts. The general rule is that the statute will begin to run despite the plaintiff's ignorance of the cause of action or of the identity of the wrongdoer. (See *Lattin v. Gillette* (1892) 95 C. 317, 320, 30 P. 545; *Lambert v. McKenzie* (1901) 135 C. 100, 103, 67 P. 6; *Easton v. Geller* (1931) 116 C.A. 577, 580, 3 P.2d 74; *Medley v. Hill* (1930) 104 C.A. 309, 311, 285 P. 891; *Rose v. Dunk-Harbison Co.* (1935) 7 C.A.2d 502, 505, 46 P.2d 242; *First Nat. Bank in Richmond v. Thompson* (1943) 60 C.A.2d 79, 83, 140 P.2d 75; *Rubino v. Utah Canning Co.* (1954) 123 C.A.2d 18, 27, 266 P.2d 163, *infra*, §565; *Collins v. Los Angeles* (1966) 241 C.A.2d 451, 455, 458, 50 C.R. 586; *Calabrese v. Monterey* (1967) 251 C.A.2d 131, 141, 59 C.R. 224, citing the text; *Howe v. Pioneer Mfg. Co.* (1968) 262 C.A.2d 330, 340, 68 C.R. 617, citing the text; *Piazza Properties, Ltd. v. Department of Motor Vehicles* (1977) 71 C.A.3d 622, 630, 138 C.R. 357 [ignorance of right to refund of license fees; general rule applied]; *Priola v. Paulino* (1977) 72 C.A.3d 380, 389, 140 C.R. 186, citing the text [where fact of injury and identity of party responsible are known, failure to discover some or most of resulting damage will not toll statute]; 10 *So. Cal. L. Rev.* 101; 51 *Am.Jur.2d* (2000 ed.), *Limitation of Actions* §215; for exceptions to rule, see *infra*, §537.)

(2) *Codification.* The Uniform Commercial Code codified this rule for breach of warranty in contracts of sale. The statute begins to run despite the plaintiff's lack of knowledge of the breach. (U.C.C. 2725(2); see *infra*, §496 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]



137 of 190 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XII. STATUTE OF LIMITATIONS: IN GENERAL

F. Periods and Accrual.

1. General Rule: Accrual When Wrongful Act Is Done.

c. Cause Accruing Before Substantial Damage.

3 *Witkin Cal. Proc. Actions* § 495

[§ 495] Cause Accruing Before Substantial Damage.

Another corollary of the strict accrual theory is that occasionally the statute may begin to run even though the defendant's wrongful act has not yet caused substantial damage. In *McCusker v. Walker* (1888) 77 C. 208, 19 P. 382, an attachment was levied on M's personal property in August 1881. After various proceedings, M obtained a decision on appeal that the attachment was improper, whereupon it was dissolved in June 1884. M's present action for damages for malicious abuse of process was held barred by the 2-year statute (*C.C.P.* 339(1)), because the wrongful act took place at the time of the levy and the action could have been brought then, without dissolution of the attachment. (77 C. 211.) (See *Sonbergh v. MacQuarrie* (1952) 112 C.A.2d 771, 247 P.2d 133 [assault and battery]; 63 Harv. L. Rev. 1201; 4 *Hastings L. J.* 208; for exceptions to this rule, see *infra*, §501 et seq.; on problem presented by statute purporting to make cause accrue and statute run before action could be brought, see *infra*, §543.)

SUPPLEMENT: [This section is current through the latest supplement]



138 of 190 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XII. STATUTE OF LIMITATIONS: IN GENERAL

F. Periods and Accrual.

2. Exceptions: Postponed Accrual.

a. In General.

3 *Witkin Cal. Proc. Actions* § 496

[§ 496] In General.

To avoid the harsh and unjust effects of a rigid adherence to the general rule of accrual at the time of the wrongful act (*supra*, §493), a number of departures have been made by statute and judicial decision:

- (1) Accrual on discovery of the facts. (See *infra*, §497 et seq.)
- (2) Accrual when damage results. (See *infra*, §501 et seq.)
- (3) Accrual postponed by condition precedent. (See *infra*, §504.)
- (4) Accrual postponed as to particular plaintiff. (See *infra*, §505.)
- (5) Alternative remedy with longer period. (See *infra*, §506.)

The foregoing rules of delayed accrual are to be distinguished from rules that, despite accrual of the cause of action, toll or suspend the running of the statute. (See *General Motors Corp. v. Superior Court* (1996) 48 C.A.4th 580, 587, 55 C.R.2d 871, 4 Cal. Proc. (5th), *Pleading*, §485 [delayed accrual distinguished from tolling under C.C.P. 474, suing defendant by fictitious name where plaintiff is ignorant of true name of defendant, existence of cause of action, or both]; see *infra*, §694 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]



139 of 190 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XII. STATUTE OF LIMITATIONS: IN GENERAL

F. Periods and Accrual.

2. Exceptions: Postponed Accrual.

b. Accrual on Discovery of Facts.

1. In General.

3 *Witkin Cal. Proc. Actions* § 497

[§ 497] In General.

The most important exception to the general rule of accrual (*supra*, §493) is the frequent statutory provision or judicially developed rule postponing the accrual of certain causes of action until the time of discovery of (or opportunity to discover) the facts. (See *Evans v. Eckelman* (1990) 216 C.A.3d 1609, 1613, 265 C.R. 605, *infra*, §595 [discussing principle at length].) The principal situations are the following:

- (1) Action based on fraud or mistake. (*C.C.P.* 338(d); see *infra*, §659 et seq.)
- (2) Action based on breach of fiduciary duty. (See *infra*, §§679, 682.)
- (3) Action for medical malpractice. (See *infra*, §577 et seq.)
- (4) Action for legal malpractice. (*C.C.P.* 340.6(a); see *infra*, §626 et seq.)
- (5) Action based on progressively developing or continuing wrong where nature, extent, or permanence of the harm is difficult to discover. (See *infra*, §§501 et seq., 567 et seq., 601 et seq.)
- (6) Action for breach of warranty construed as prospective. (See *infra*, §§538, 539.)
- (7) Action based on rescission of contract. (*C.C.P.* 337(3) [contract in writing]; *C.C.P.* 339(3) [contract not in writing]; see *infra*, §686.)
- (8) Action for damages under Invasion of Privacy Act. (See *Montalti v. Catanzariti* (1987) 191 C.A.3d 96, 99, 236 C.R. 231 [damages for telephone eavesdropping].)
- (9) Action under ordinance permitting eviction for benefit of designated relative. (See *Sylve v. Riley* (1993) 15 C.A.4th 23, 27, 18 C.R.2d 608 [when former tenant knew, or should have known, that relative never moved in, so as to trigger running of statute of limitations for wrongful eviction, was question of fact].)

(10) Action upon liability created by statute (*C.C.P.* 338(a); see *infra*, §664 et seq.) California law is unsettled whether the discovery rule applies to an action subject to *C.C.P.* 338(a). (See *Craig v. Poway* (1994) 28 C.A.4th 319, 342, 33 C.R.2d 528 [discovery rule applies]; *Hogar Dulce Hogar v. Community Dev. Com. of Escondido* (2003) 110 C.A.4th 1288, 1296, 2 C.R.3d 497 [distinguishing and expressing doubt about continuing validity of *Craig*]; *infra*, §673.)

(11) Other actions. A number of other statutes provide for delayed accrual:

(a) Statutory liability of corporate director or stockholder. (*C.C.P.* 359; see *infra*, §671.)

(b) Bond of public official. (*C.C.P.* 338(e); see *infra*, §670.)

(c) Bond of notary public. (*C.C.P.* 338(f); see *infra*, §670.)

(d) Title certificate or policy. (*C.C.P.* 339(1); see *infra*, §523 et seq.)

(e) Bulk sales. (U.C.C. 6110; see *supra*, §481.)

(f) Fraudulent stock transactions. (*Corp.C.* 25506.)

(g) Value of good faith improvements made on another's land. (*C.C.P.* 340(e).)

(h) False advertising. (*C.C.P.* 338(h); see *supra*, §483.)

(i) Slander of title to real property. (*C.C.P.* 338(g); see *infra*, §618.)

(j) Breach of contract committed in secret. (*C.C.P.* 339; see *infra*, §529.)

(k) An action to set aside the sale of a security not qualified for sale must be brought within 2 years after the violation on which it is based, or within 1 year after the discovery by the plaintiff of the facts constituting the violation, whichever first expires. (*Corp.C.* 25507(a).) By its plain language ("discovery ... of the facts"), *Corp.C.* 25507(a) requires "actual knowledge," not just "inquiry notice," before the 1-year statute commences to run. (*Eisenbaum v. Western Energy Resources* (1990) 218 C.A.3d 314, 325, 267 C.R. 5.)

An action to recover the monetary forfeiture authorized by *C.C.* 2941 for failing to follow the requirements for recording a reconveyance of a trust deed after the borrower pays the secured loan is subject to the delayed discovery doctrine. (See *Prudential Home Mortg. Co. v. Superior Court* (1998) 66 C.A.4th 1236, 1241, 78 C.R.2d 566 [delayed discovery doctrine applied to 1-year period (*C.C.P.* 340, *infra*, §668); plaintiffs were entitled to expect defendants to perform act required by penal statute].)

An action for breach of a home inspector's duty of care should accrue in all cases not on the date of the inspection, but when the homeowner discovers, or with the exercise of reasonable diligence should have discovered, the inspector's breach. (*Moreno v. Sanchez* (2003) 106 C.A.4th 1415, 1429, 1432, 131 C.R.2d 684, *supra*, §469 [applying rule where inspection contract shortened 4-year limitations period of *B. & P.C.* 7199, accruing on inspection, to 1 year].)

SUPPLEMENT: [This section is current through the latest supplement]

See *Cleveland v. Internet Specialties West* (2009) 171 C.A.4th 24, 33, 88 C.R.3d 892 [when limitations period is dependent on discovery of cause of action, resolution of statute of limitations issue is normally question of fact; thus, summary judgment was not appropriate to resolve delayed discovery issues in fraud action, where more than one reasonable inference could be drawn from undisputed facts].



140 of 190 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XII. STATUTE OF LIMITATIONS: IN GENERAL

F. Periods and Accrual.

2. Exceptions: Postponed Accrual.
 - b. Accrual on Discovery of Facts.
2. Discovery of Defendant's Negligence.
 - aa. Awareness of Injury and Its Cause.

3 Witkin Cal. Proc. Actions § 498

[§ 498] Awareness of Injury and Its Cause.

In *Leaf v. San Mateo* (1980) 104 C.A.3d 398, 163 C.R. 711, plaintiffs purchased land in 1972 on which a duplex had been built in 1963. Shortly after occupying it they discovered uneven floors and cracks in the exterior. Engineering consultants concluded that the cause of the structural problems was subsidence of the fill on their lot through water absorption, and recommended construction of a subsurface drainage system. Plaintiffs sued S, the developer-builder, in 1974, and obtained a settlement in 1976. With the proceeds of the settlement plaintiffs commenced construction of the drainage system, and in 1976 a cave-in revealed that (a) defendant city's storm and sewer trenches on and near their property had not been compacted and were acting as subterranean water channels, and (b) a sewer main was located too close to the foundation, depriving the building of lateral and subjacent support. Plaintiffs filed this action against defendant city in 1976, alleging inverse condemnation, continuing nuisance, and a dangerous and defective condition of public property. The trial judge gave summary judgment on the ground that the statute of limitations had run. *Held*, reversed.

(a) *Ten-year period for latent construction defect is inapplicable.* The overall limit for latent construction defects does not protect a person in actual possession or control of the defective property (C.C.P. 337.15(e)). Defendant city was in possession and control of the storm and sanitary sewer easements and could not raise this statute as a defense. (104 C.A.3d 405.)

(b) *Three-year period for injury to real property: accrual on discovery.*

(1) Defendant contended that plaintiffs' cause of action under former C.C.P. 338(2) (now C.C.P. 338(b)) accrued when plaintiffs became aware of the *damage* to the property (uneven floors and cracks) in 1972, shortly after purchase; if this position is sound the statute had run. (104 C.A.3d 406.) Plaintiffs contended that the statute did not begin to run merely on awareness of the *damage* but on awareness of the *negligent cause* of the damage, after the cave-in of 1976. (104 C.A.3d 406.)

(2) Plaintiffs' position on the "rule of discovery" is supported by a number of recent cases; i.e., the cause of action accrues when "plaintiff either (1) actually discovered his injury and its negligent cause or (2) could have discovered injury and cause through the exercise of reasonable diligence." (104 C.A.3d 407, citing a long list of cases dealing with various torts, including *Allred v. Bekins Wide World Van Services* (1975) 45 C.A.3d 984, 120 C.R. 312, *infra*, §502.) "[W]e do not think that plaintiffs' cause of action in this case should accrue from the occurrence of the last essential fact, nor from discovery of the damage to their property, as defendant contends, but rather from the point in time when plaintiffs became aware of defendant's negligence as a cause, or could have become so aware through the exercise of reasonable diligence." (104 C.A.3d 408.)

(3) Policy considerations likewise support plaintiffs' position. The discovery rule protects a plaintiff who is "blamelessly ignorant" of his or her cause of action; and plaintiffs here, by consulting professional engineers, made reasonable efforts to identify the negligent cause of damage. (104 C.A.3d 408.) (See *Kensinger v. Abbott Laboratories* (1985) 171 C.A.3d 376, 217 C.R. 313, *infra*, §499; *Jolly v. Eli Lilly & Co.* (1988) 44 C.3d 1103, 245 C.R. 658, 751 P.2d 923, *infra*, §500; 11 A.L.R.5th 438 [statute of limitations in private tort actions based on injury caused by underground flow of contaminants]; 33 A.L.R.5th 1 [application of discovery rule to building and construction contracts].)

In *Wilshire Westwood Associates v. Atlantic Richfield Co.* (1993) 20 C.A.4th 732, 24 C.R.2d 562, plaintiffs entered into an agreement in 1982 to purchase a parcel of real property that had been leased to defendant gasoline company for operation of a gasoline service station in conjunction with defendant sublessee. As a condition of the purchase agreement, plaintiffs engaged a soil engineer who inspected the parcel and reported no unusual soil difficulties. Plaintiffs then expressly waived the soil contingency in May 1983, and took title to the parcel in October 1984. When plaintiffs began excavation in 1985, they discovered gasoline contamination. Plaintiffs subsequently filed suit against defendants--more than 3 years after waiving the soil condition--alleging negligence, ultrahazardous activity, and other causes of action. Plaintiffs also filed a malpractice action against the soil engineer. It was consolidated with the instant action, but was later settled and dismissed. *Held*, both the negligence and ultrahazardous activity causes commenced when plaintiffs discovered (or should have discovered) the injury and its cause, i.e., when they waived the soil condition; thus, they were barred by the 3-year limitation of C.C.P. 338(b) (injury to land; see *infra*, §596 et seq.).

(a) Under the purchase agreement, plaintiffs undertook an investigation of the soil, and it was undisputed that a reasonably diligent inspection would have revealed the contamination more than 3 years before the action was filed. (20 C.A.4th 740.)

(b) Plaintiffs claimed that the knowledge that they should have obtained from their soil engineer could not be imputed to them. This is wrong: the burden of the engineer's incorrect advice fell on plaintiffs, rather than on defendants, and to the extent plaintiffs suffered injury from the investigation, they were entitled to, and did, seek a remedy against the engineer. But plaintiffs could not assert that a reasonable investigation would have revealed the contamination at the time of the soils report, and at the same time claim they did not have presumptive notice of the contamination. (20 C.A.4th 741, 742, citing *Gutierrez v. Mofid* (1985) 39 C.3d 892, 218 C.R. 313, 705 P.2d 886, *infra*, §580.)

(c) Citing *Baright v. Willis* (1984) 151 C.A.3d 303, 198 C.R. 510, *infra*, §643, and *Leaf*, plaintiffs also contended that they were entitled to rely on the professional advice they had received from the soil engineer. This was not so. "*Baright* did not involve the tolling of the statute of limitations for a third party lawsuit; it only addressed the statute of limitations for legal malpractice. The court's conclusion that the statute was tolled as to the negligent attorney until the client discovered the legal malpractice is consistent with the conclusion in *Gutierrez* that where an attorney causes a delay in filing an action, it is the attorney, not the ... 'innocent ... defendant,' who should be charged with the consequences. ... The same considerations are applicable to appellants' action against the soils engineer." (20 C.A.4th 742, 743.) "The factual question in *Leaf* regarding diligent discovery is not present in our case. It is undisputed that through the exercise of reasonable diligence, any existing soil contamination could and should have been discovered by May 1983." (20 C.A.4th 743.)

SUPPLEMENT: [This section is current through the latest supplement]



141 of 190 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XII. STATUTE OF LIMITATIONS: IN GENERAL

F. Periods and Accrual.

2. Exceptions: Postponed Accrual.

b. Accrual on Discovery of Facts.

2. Discovery of Defendant's Negligence.

bb. Prior Rule: Actual Knowledge of Wrongdoing.

3 *Witkin Cal. Proc. Actions* § 499

[§ 499] Prior Rule: Actual Knowledge of Wrongdoing.

In *Kensinger v. Abbott Laboratories* (1985) 171 C.A.3d 376, 217 C.R. 313, plaintiff sued a number of pharmaceutical companies, including Lilly, alleging that she contracted cancer in utero by reason of her mother's ingestion of DES in 1958 and 1959. In 1974, plaintiff's condition was diagnosed, treatment began, and her doctors told her that the cancer was caused by the DES taken by her mother. In 1977, when she reached majority, she learned that Lilly was the probable manufacturer of the drug taken by her mother; but her mother was advised by a lawyer that a successful suit could not be brought. In 1980, she learned from newspaper articles that DES victims had a right to sue without identifying the particular manufacturer (see *Sindell v. Abbott Laboratories* (1980) 26 C.3d 588, 163 C.R. 132, 607 P.2d 924, 6 Summary (10th), Torts, §1486), and she consulted an attorney who filed the action in November 1984. Held, reversing summary judgment for defendants, the action was not barred.

(a) Accrual of the cause of action is governed by the "rule of discovery." Defendants contended that plaintiff had notice of her injuries and their negligent cause by the time she reached her majority (1977). But, under the rule of discovery, the period runs from the date that the plaintiff was first aware of both *the harm suffered* and *its wrongful cause*. (171 C.A.3d 381.)

(b) The period is tolled by belated discovery of *facts*; it is not tolled by belated discovery of legal theories. "It is the occurrence of a cognizable event rather than knowledge of its legal significance that starts the running of the statute of limitations." (171 C.A.3d 384.) The distinction is not always easy to draw. "In the context of drug product liability cases, a plaintiff may be aware of an injury and its cause, while possessing no knowledge of facts indicating wrongdoing by a particular defendant. In such a situation, litigation might be premature for lack of knowledge of any factual basis for imputing fault to a manufacturer rather than ignorance of supportive legal theories." (171 C.A.3d 384.)

(c) The correct approach, adopted here, is set forth in a 1985 Rhode Island case. "[I]n a drug product-liability action where the manifestation of an injury, the cause of that injury, and the person's knowledge of the wrongdoing by the manufacturer occur at different points in time, the running of the statute of limitations would begin when the person

discovers, or with reasonable diligence should have discovered, the wrongful conduct of the manufacturer." (171 C.A.3d 385.)

(d) In the instant case, although plaintiff knew that DES was responsible for her injuries by the time she reached her majority in 1977, the record does not show facts demonstrating as a matter of law that she should have been aware of a basis for her action against Lilly before 1980. (171 C.A.3d 386.) (See 17 Pacific L. J. 1531 [*Kensinger*]; for disapproval of *Kensinger*, see *infra*, §500.)

SUPPLEMENT: [This section is current through the latest supplement]



142 of 190 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XII. STATUTE OF LIMITATIONS: IN GENERAL

F. Periods and Accrual.

- 2. Exceptions: Postponed Accrual.
 - b. Accrual on Discovery of Facts.
- 2. Discovery of Defendant's Negligence.
- cc. Current Rule: Suspicion of Wrongdoing.

3 Witkin Cal. Proc. Actions § 500

[§ 500] Current Rule: Suspicion of Wrongdoing.

In *Jolly v. Eli Lilly & Co.* (1988) 44 C.3d 1103, 245 C.R. 658, 751 P.2d 923, plaintiff, born in 1951, learned in 1972 that her mother had taken DES, and that DES daughters could suffer injuries. She immediately had a medical check-up that revealed a precancerous condition, had surgery in 1976, and underwent a hysterectomy and partial vaginectomy in 1978. "As of 1972, plaintiff was aware, or at least suspected, that her condition was a result of her mother's ingestion of DES during pregnancy." (44 C.3d 1107.) In 1972 and subsequent years, she attempted without success to discover the manufacturer, believing that she had no cause of action unless she could identify the producer of the drug her mother took. In March, 1980, *Sindell v. Abbott Laboratories* (1980) 26 C.3d 588, 163 C.R. 132, 607 P.2d 924, 6 Summary (10th), Torts, §1486, was decided, and almost 1 year later plaintiff brought this action, contending that the statute of limitations did not commence to run until she learned of that decision, because only then did she realize she could make her claim. Her theory was that *Sindell* created a new cause of action by redefining "causation." The trial court gave summary judgment for defendant drug companies; the Court of Appeal reversed, not on plaintiff's theory, but in reliance on *Kensinger v. Abbott Laboratories* (1985) 171 C.A.3d 376, 217 C.R. 313, supra, §499. Held, judgment of Court of Appeal reversed; the action was barred. (On holding refusing to apply doctrine of equitable tolling, see *infra*, §736.)

(a) *Kensinger* reasoned that ignorance of a "critical fact" was knowledge of some wrongful conduct. "Accordingly, the *Kensinger* court held that the statutory clock did not begin to tick until the plaintiff knew or reasonably should have known of the facts constituting wrongful conduct, as well as the fact of her injury and its relation to DES." (44 C.3d 1110.)

(b) "The rule proposed in *Kensinger* goes too far." (44 C.3d 1110.) The limitations period begins once the plaintiff has notice or information of circumstances to put a reasonable person on inquiry. (44 C.3d 1110, 1111, citing *Gutierrez v. Mofid* (1985) 39 C.3d 892, 218 C.R. 313, 705 P.2d 886, *infra*, §580.) "A plaintiff need not be aware of the specific 'facts' necessary to establish the claim; that is a process contemplated by pretrial discovery. Once the plaintiff has a suspicion of wrongdoing, and therefore an incentive to sue, she must decide whether to file suit or sit on her rights. So long as a suspicion exists, it is clear that the plaintiff must go find the facts; she cannot wait for the facts to find her."

(44 C.3d 1111.) "To the extent that *Kensinger* ... conflicts with the foregoing, it is disapproved." (44 C.3d 1112, footnote 8.)

(c) Plaintiff admitted that as early as 1978 she was interested in obtaining information about DES because she wanted to make a claim. Thus, she suspected that defendants' conduct was wrongful well over a year before she filed the action; and a timely investigation would have disclosed the many DES suits filed throughout the country. (44 C.3d 1112.) And her contention that the *Sindell* decision provided the crucial "fact" necessary for her to suspect wrongdoing is without merit. It is the discovery of facts, not their legal significance, that starts the statute running, and all of the facts of *Sindell* relevant to her case were already known in 1978 or could have been discovered through a reasonable investigation. (44 C.3d 1113.)

Other cases have applied this rule:

Rose v. Fife (1989) 207 C.A.3d 760, 771, 255 C.R. 440 [following *Jolly*]; *Goldrich v. Natural Y Surgical Specialties* (1994) 25 C.A.4th 772, 778, 31 C.R.2d 162 [same].

Mark K. v. Roman Catholic Archbishop of Los Angeles (1998) 67 C.A.4th 603, 610, 79 C.R.2d 73 [negligence and fraud action against church by adults who alleged that they were sexually molested by parish priest when they were minors accrued when they reached age of majority; accrual was not delayed where plaintiffs were aware of priest's identity, his connection with church, and wrongfulness of his conduct].

Kitzig v. Nordquist (2000) 81 C.A.4th 1384, 1391, 97 C.R.2d 762 [in dental malpractice action, mere fact that plaintiff consulted second practitioner did not satisfy suspicion of wrongdoing requirement for accrual].

Clark v. Baxter Healthcare Corp. (2000) 83 C.A.4th 1048, 1055, 100 C.R.2d 223 [summary judgment for defendants was reversed in action alleging that latex gloves caused nurse to have allergic reaction; accrual did not necessarily occur when nurse learned of allergy, but could have occurred later when she discovered that defendants' wrongdoing may have affected gloves].

Nelson v. Indevus Pharmaceuticals (2006) 142 C.A.4th 1202, 1205, 48 C.R.3d 668, citing the text ["constructive suspicion," i.e., notice based on published media reports, is not sufficient to trigger accrual].

SUPPLEMENT: [This section is current through the latest supplement]

See *Unruh-Haxton v. Regents of Univ. of Calif.* (2008) 162 C.A.4th 343, 364, 76 C.R.3d 146 [following *Nelson v. Indevus Pharmaceuticals* (2006) 142 C.A.4th 1202, 48 C.R.3d 668, text, p. 643].



143 of 190 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XII. STATUTE OF LIMITATIONS: IN GENERAL

F. Periods and Accrual.

2. Exceptions: Postponed Accrual.

c. Accrual When Damage Results.

1. General Rule: Insurance Cases.

3 *Witkin Cal. Proc. Actions* § 501

[§ 501] General Rule: Insurance Cases.

In *United States Liab. Ins. Co. v. Haidinger-Hayes* (1970) 1 C.3d 586, 83 C.R. 418, 463 P.2d 770, plaintiff, an out-of-state insurance company, entered into a general agency contract with H Corp., a licensed California insurance agent. Defendant H Corp., through its president H, negligently negotiated a liability policy for C Co., a bad risk, with too low a premium. Plaintiff later rescinded the C Co. policy and sued defendant agent and its president for damages. The act of negligence took place in October 1961, when the policy was issued; the action was not filed until November 1965. *Held*, nevertheless, the 4-year statute of limitations on an obligation based on a contract in writing (*infra*, §508) was not a bar. The fiduciary relationship did not terminate until December 1963, when the agency agreement was cancelled; no damage was sustained by plaintiff until January 1963, and actual discovery of the harm did not occur until January 1965. Thus, on several theories the action was timely. (1 C.3d 598.)

In *Walker v. Pacific Indem. Co.* (1960) 183 C.A.2d 513, 6 C.R. 924, M ordered his broker to get him truck liability insurance with a \$ 50,000 limit. The broker obtained a \$ 15,000 limit policy. In an accident, W received judgment for \$ 100,000, the insurer paid \$ 15,000, and M assigned his claim against the broker to W, who sued for the \$ 35,000 difference. *Held*, judgment for plaintiff affirmed.

(a) Defendant contended that the statute began to run when he procured the wrong policy, or at the latest when the accident occurred. But at these times M had not yet suffered injury. Thus when the accident occurred the only loss was of the security of the policy, but whether that would constitute an ultimate injury remained to be determined; any action brought at that time would have given no more than nominal damages. Defendant relied on *Lewis v. Security-First Nat. Bank of Los Angeles* (1943) 58 C.A.2d 827, 137 P.2d 864, where a cause of action for a bank's breach of an oral contract to procure insurance on a building was held to accrue not later than the date of completion of the building, and the action was barred by the 2-year statute. The court observed that in the *Lewis* case defendant bank was not a licensed insurance agent, and that the opinion does not disclose whether the fire insurance was to be procured only for the benefit of the bank to protect its security, or whether the loan remained unpaid at the time of the fire. "Admittedly, these distinctions are somewhat thin. However, we elect not to extend the rather harsh rule of *Lewis* beyond the precise facts there presented." (183 C.A.2d 518.)

(b) "Until judgment in the personal injury action, no liability was imposed upon the insured as to which he could allege a cause of action against the broker from whom he had ordered indemnity in excess of that furnished." (183 C.A.2d 519.)

Other cases are to the same effect. (See *Merchants Fire Assur. Corp. of New York v. Retail Credit Co.* (1962) 206 C.A.2d 55, 59, 23 C.R. 544 [following *Walker*]; *Butcher v. Truck Ins. Exchange* (2000) 77 C.A.4th 1442, 1467, 92 C.R.2d 521, 7 Cal. Proc. (5th), *Judgment*, §415 [relying on *Walker*; accrual occurred when insurer refused to defend insured, not when agent delivered nonconforming policy]; 95 A.L.R.2d 1023 [action on standard form fire insurance policy as accruing at time of fire or time loss is payable]; on acts causing consequential injury to real property, see *infra*, §604; on actions based on progressive property loss, see *supra*, §471; on actions for breach of duty to defend, see *infra*, §523 et seq.; on equitable tolling in insurance cases in general, see *infra*, §757 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]

See *Williams v. Hilb, Rogal & Hobbs Ins. Services of Calif.* (2009) 177 C.A.4th 624, 641, 98 C.R.3d 910 [relying on *Walker v. Pacific Indem. Co.* (1960) 183 C.A.2d 513, 6 C.R. 924, text, p. 643; accrual of claim against insurance agency for negligently advising on, procuring, and maintaining insurance package that did not include workers' compensation coverage occurred when injured worker was awarded judgment against insured business, not when insured discovered lack of coverage or when worker filed lawsuit].



144 of 190 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XII. STATUTE OF LIMITATIONS: IN GENERAL

F. Periods and Accrual.

2. Exceptions: Postponed Accrual.

c. Accrual When Damage Results.

2. General Rule: Professional Negligence Cases.

3 *Witkin Cal. Proc. Actions* § 502

[§ 502] General Rule: Professional Negligence Cases.

In *Allred v. Bekins Wide World Van Services* (1975) 45 C.A.3d 984, 990, 120 C.R. 312, the action was for personal injuries and property damage against a packer of household goods shipped from Pakistan to the United States. Plaintiff and her husband (since deceased) had developed skin infections from vermin-infested straw in which the goods had been packed, and the goods were also damaged. The packing was done in July 1968; discovery of the cause of the infection and the damage to the goods occurred in July or November 1970; the action was commenced in June 1972. The court, reversing a judgment for defendant on demurrer, followed the rule laid down in legal malpractice cases (see *infra*, §§627, 628), that the statutes did not run until the plaintiff suffered damage and discovered or should have discovered the cause of action. (45 C.A.3d 990, 991.) Accordingly, the then 1-year statute on personal injuries (now 2 years) was a bar to that cause of action, but the 3-year statute on property damage had not run. (45 C.A.3d 991.) (See *Priola v. Paulino* (1977) 72 C.A.3d 380, 388, 140 C.R. 186, citing the text [rule did not apply because some damage had been sustained]; *Martinez-Ferrer v. Richardson-Merrell* (1980) 105 C.A.3d 316, 322, 164 C.R. 591, *infra*, §591.)

In *McKeown v. First Interstate Bank* (1987) 194 C.A.3d 1225, 240 C.R. 127, the complaint alleged the following: Plaintiffs borrowed money from defendant bank in 1971 to purchase 75% of the stock of an automobile dealership corporation in which they already owned 25% of the stock; defendant represented that they would incur no tax liability for the payments; the Internal Revenue Service sent them notices of deficiency, and in January 1977, they paid their attorney a \$ 1,000 retainer for handling the tax court litigation; a tax judgment was entered against them in February 1980, and taxes were assessed in June 1980. In this action, filed in February 1982, plaintiffs contended that the 4-year statute for breach of fiduciary duty (C.C.P. 343) had not run, because they did not suffer any appreciable harm until the tax court judgment against them became final. *Held*, the action was barred.

(a) Cases involving malpractice of attorneys (see *infra*, §§627, 628) are analogous: A client may suffer appreciable harm before he sustains all or even the greater part of the damages occasioned by the attorney's negligence. (194 C.A.3d 1229, citing *Budd v. Nixen* (1971) 6 C.3d 195, 98 C.R. 849, 491 P.2d 433, *infra*, §628.) Here, plaintiffs suffered appreciable harm in January 1977 when they paid attorneys' fees for representation in tax court proceedings. (194 C.A.3d 1229, 1230.)

(b) *Day v. Rosenthal* (1985) 170 C.A.3d 1125, 217 C.R. 89, held that the plaintiff's failure to discover attorney malpractice was excused where the defendant attorney continued to be "investment adviser, tax accountant and lawyer" until they received a notice of tax deficiency. Here, however, plaintiffs were represented by their own counsel as early as 1974, prior to the notice of deficiency; and they did not show either a continuing relationship with defendant or fraudulent concealment by it. (194 C.A.3d 1231.)

In *Slavin v. Trout* (1993) 18 C.A.4th 1536, 23 C.R.2d 219, plaintiff lender relied on an appraisal by defendant in making a real estate loan secured by a second deed of trust. The parties agreed that plaintiff's action for professional negligence was subject to the 2-year statute of limitations provided by C.C.P. 339(1). However, the parties disagreed whether the cause of action accrued on the date that the borrower defaulted on the loan, which was more than 2 years before the action was commenced, or on the date that plaintiff acquired the property by foreclosure, which was within the 2-year period. *Held*, accrual occurred on the latter date because plaintiff suffered no damage until he had actually acquired the property. "During the substantial period before the lender can acquire the property, circumstances can change so as to render unnecessary the lender's resort to the property or to moot any issue about a prior overappraisal of the property. The borrower may cure the default and reinstate the loan and trust obligations. The borrower may find refinancing which would pay off the entire amount of the obligation. The real estate market or the value of the particular property might go up. Therefore, the borrower's default, alone, is not sufficient to show that the lender has suffered actual damage from a negligent appraisal overvaluing the property. Whether the lender will actually suffer from the erroneous appraisal depends on the value of the property when the lender acquires it, for it is then that the lender resorts to the security." (18 C.A.4th 1542.)

SUPPLEMENT: [This section is current through the latest supplement]



145 of 190 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XII. STATUTE OF LIMITATIONS: IN GENERAL

F. Periods and Accrual.

2. Exceptions: Postponed Accrual.
- c. Accrual When Damage Results.
3. Distinction: Remedy Uncertain or Ineffective.

3 Witkin Cal. Proc. Actions § 503

[§ 503] Distinction: Remedy Uncertain or Ineffective.

In *Davies v. Krasna* (1975) 14 C.3d 502, 121 C.R. 705, 535 P.2d 1161, plaintiff's decedent, a writer, submitted a story to defendant producer in confidence, in 1951. The producer wrongfully disclosed it to persons in the entertainment industry in 1954, and used it in a successful play in 1958. Decedent learned of the disclosures in 1955, and plaintiff filed an action for damages in 1959. The trial court held the action barred by the 2-year statute of limitations (C.C.P. 339(1); see *infra*, §648 et seq.). *Held*, affirmed. Assuming that an action lies for breach of artistic confidence (an unsettled point, but determined for this appeal by a prior Court of Appeal decision that was the law of the case; 14 C.3d 507), the 2-year statute applied (14 C.3d 509, 511), and the cause of action accrued not later than 1955. Plaintiff's contention, that the running of the statute should not begin until the injured party has an effective remedy, was examined and rejected, as follows:

(a) Modern decisions have approved the view that accrual should be delayed in some kinds of cases until the injured party discovers or should have discovered the facts. (14 C.3d 512, 513, citing the text.) And the older rule that the period commences when the defendant's act or omission constitutes a legal wrong has given way to the view "that the period cannot run before plaintiff possesses a true cause of action, by which we mean that events have developed to a point where plaintiff is entitled to a legal remedy, not merely a symbolic judgment such as an award of nominal damages." (14 C.3d 513, quoting *Walker v. Pacific Indem. Co.* (1960) 183 C.A.2d 513, 6 C.R. 924, *supra*, §501, and *Budd v. Nixen* (1971) 6 C.3d 195, 98 C.R. 849, 491 P.2d 433, *infra*, §628.)

(b) These decisions, however, support the rule that "the infliction of appreciable and actual harm, however uncertain in amount, will commence the statutory period." And "neither uncertainty as to the amount of damages nor difficulty in proving damages tolls the period of limitations." (14 C.3d 514.)

(c) In the present case the trial judge found that defendant's disclosure of the story in 1954 substantially destroyed its marketability. Hence, at the time decedent learned of the disclosure (1955) he had incurred actual and appreciable damage, and neither the speculative character of damages nor the difficulty of proof tolled the period. He could have sought injunctive relief to prevent further unauthorized disclosure, and collected for past damage and demonstrable

prospective damage. (14 C.3d 514.)

(d) To delay the running of the period until defendant's acts furnished a more certain proof of damages would also contravene the principle that a victim of legal wrong should seek to minimize damages. "If convinced that his story had serious profit potential" he should have acted promptly on learning that defendant's act had injured its marketability. "He cannot be permitted to rest on his rights, shifting to defendant the risk and expense attendant upon commercial exploitation of his idea, and then assert his claim only when that exploitation had yielded a net profit." (14 C.3d 515.) (See *Barton v. New United Motor Mfg.* (1996) 43 C.A.4th 1200, 1209, 51 C.R.2d 328, *infra*, §563, citing the text [following *Davies*].)

SUPPLEMENT: [This section is current through the latest supplement]



146 of 190 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XII. STATUTE OF LIMITATIONS: IN GENERAL

F. Periods and Accrual.

2. Exceptions: Postponed Accrual.

d. Postponement by Condition Precedent.

3 Witkin Cal. Proc. Actions § 504

[§ 504] Postponement by Condition Precedent.

Where the right to sue is subject to a condition precedent, such as filing a claim with an estate or governmental body, a statute may provide that the limitations period begins to run only from the time of rejection of the claim. However, the plaintiff seldom benefits from these provisions, for they usually contain a new and extremely short period, such as 3 months or 6 months. (See 63 *Harv. L. Rev.* 1209; 51 *Am.Jur.2d* (2000 ed.), *Limitation of Actions* §152 et seq.; supra, §§477, 480.) And the plaintiff cannot delay accrual of the cause of action by failure or refusal to perform a condition such as demand, for demand must be made within a reasonable time. (See *infra*, §532.)

SUPPLEMENT: [This section is current through the latest supplement]



147 of 190 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XII. STATUTE OF LIMITATIONS: IN GENERAL

F. Periods and Accrual.

2. Exceptions: Postponed Accrual.

e. Postponement as to Particular Plaintiff.

3 *Witkin Cal. Proc. Actions* § 505

[§ 505] Postponement as to Particular Plaintiff.

A cause of action may arise in favor of one person and the statute may bar his or her right without affecting the similar right of another person. Thus, an adverse possessor may start the period running against a life tenant, but not against the remainderman whose cause of action does not accrue while he is not entitled to possession. (See 12 *Summary* (10th), *Real Property*, §§222, 234.)

Similar in effect, but based on a different principle, is the rule that a cause of action for wrongful death may accrue, so as to permit either an adult or a minor dependent to sue, but will run only against the adult. (See *infra*, §707.)

SUPPLEMENT: [This section is current through the latest supplement]



148 of 190 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XII. STATUTE OF LIMITATIONS: IN GENERAL

F. Periods and Accrual.

3. Alternative Remedy With Longer Period.

3 Witkin Cal. Proc. Actions § 506

[§ 506] Alternative Remedy With Longer Period.

In a few situations the plaintiff, though entitled to exercise a remedy at an earlier time, may elect to use a different remedy that becomes available later or that has a longer period. Although a cause of action undoubtedly exists at the earlier time, the running of the statutory period on the first remedy will not be a bar. The following are illustrative:

- (1) The plaintiff may sue for anticipatory breach, or wait for actual breach. (See *infra*, §527.)
- (2) The plaintiff may be entitled to sue for declaratory relief, but the existence of an actual controversy does not start the statute running on the cause of action until an actual breach. (See *infra*, §685.)
- (3) The wrongful act may give rise to alternative remedies in tort or contract. Sometimes the courts arbitrarily assign a "gravamen" to the suit, subjecting it to the shorter tort statute (see *supra*, §165, and *infra*, §552), but it would seem that the plaintiff's election of the contract remedy should provide the benefits of the longer contract statute. (See *supra*, §162.)
- (4) The wrongful act may give rise to alternative tort remedies with different limitations. (See *Schneider v. Union Oil Co. (1970) 6 C.A.3d 987, 86 C.R. 315* [corporation wrongfully transferred plaintiff's stock; plaintiff could elect remedy of action for conversion (3 years) or action for damages for breach of trust (4 years)].)
- (5) A plaintiff who is a victim of defamatory statements involving the same subject matter but separate publications may elect to sue on the later defamatory statement. (*Schneider v. United Airlines (1989) 208 C.A.3d 71, 77, 256 C.R. 71*, citing the text ["If a plaintiff is aware of the facts giving rise to a course of action which accrued before the cause of action on which he is suing based on the same defamatory matter as his earlier cause of action but based on a *separate publication*, the statute of limitations on the later cause of action does not run from the time of the accrual of the first cause of action"].)
- (6) A statute may provide alternative periods of limitation or accrual. The following are illustrative:
 - (a) *C.C.P. 340.5* (action for medical malpractice): 1 year after discovery of injury, or 3 years after injury. (See *infra*, §578 et seq.)

(b) *C.C.P. 860, 863, 869* (public validation proceeding): within 60 days of existence of matter to be determined or, for purposes of filing cross-complaint, within time specified in summons. (See *Moorpark Unified School Dist. v. Superior Court* (1990) 223 C.A.3d 954, 958, 273 C.R. 18, citing the text.)

(c) *Govt.C. 945.6(a)* (action against public entity or employee): within 6 months after notice is mailed or delivered, or 2 years after accrual if no notice is given. (See *infra*, §688 et seq.)

(d) *Govt.C. 19630* (action by former employee under civil service law): 90 days after accrual where back compensation is sought, or 1 year after accrual where no such compensation is sought.

(e) *Lab.C. 1197.5(h)* (action to recover wages lost because of discrimination based on sex): 2 years after violation, or 3 years if cause of action arises from wilful violation.

(f) *Rev.C. 19384, 19385, 19390* (action to recover taxes paid under protest): 90 days after final notice of board action, 1 year after payment, or 4 years after date for filing return.

SUPPLEMENT: [This section is current through the latest supplement]



149 of 190 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XII. STATUTE OF LIMITATIONS: IN GENERAL

F. Periods and Accrual.

4. Computing Time.

3 *Witkin Cal. Proc. Actions* § 507

[§ 507] Computing Time.

(1) *General Rule.* The same general rule applies to the computation of time under any procedural statute; i.e., the first day is excluded and the last is included. (*C.C.P. 12*; see *First Nat. Bank of Long Beach v. Ziegler* (1914) 24 C.A. 503, 504, 141 P. 938 [demand note dated April 12, 1908, was not barred on April 12, 1912]; *Ziganto v. Taylor* (1961) 198 C.A.2d 603, 607, 18 C.R. 229 [mechanic's lien extension agreement, dictum]; 63 *Harv. L. Rev.* 1200; 98 A.L.R.2d 1331 [inclusion or exclusion of first and last days in computing time for performance of act or event that must take place before known future date].)

Such language as "within one year" does not call for a different interpretation: "There are already enough legal subtleties without adding the further refinement that one rule of time computation must be applied to certain statutes of limitation and still another to procedural situations." (*Wixted v. Fletcher* (1961) 192 C.A.2d 706, 709, 13 C.R. 734 [personal injury February 5, 1959; action filed February 5, 1960, held timely].)

(2) *Holidays.* When the last day to perform an act falls on a holiday, it may be done the following day. (*C.C.P. 12*.) Hence, the plaintiff, who is entitled to the full statutory period in which to sue, may have an extra day when the last day is a holiday. (*Mox v. Leventhal* (1928) 89 C.A. 253, 257, 264 P. 562; *Tilden Lumber Co. v. Perino* (1934) 2 C.A.2d 133, 37 P.2d 466.) But intervening holidays do not extend the period to do an act. (See 2 *Cal. Proc.* (5th), *Courts*, §51.)

SUPPLEMENT: [This section is current through the latest supplement]



150 of 190 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XIII. STATUTE OF LIMITATIONS: CONTRACT ACTIONS

A. Limitation Statutes.

1. Written Instruments: Four Years.

a. Action on Written Contract.

3 *Witkin Cal. Proc. Actions* § 508

[§ 508] Action on Written Contract.

(1) *Applicability of 4-Year Statute.* C.C.P. 337(1) provides for a 4-year period for an "action upon any contract, obligation or liability founded upon an instrument in writing." This section applies to actions for the breach of most types of written contracts regardless of the remedy sought. (See 63 *Harv. L. Rev.* 1195; 3 *A.L.R.2d* 809 [what constitutes contract in writing]; 2 *A.L.R.4th* 677 [what statute of limitations controls actions arising out of credit card transactions]; 51 *Am.Jur.2d* (2000 ed.), *Limitation of Actions* §§134 et seq., 160 et seq.) (On restitution after rescission, see *infra*, §686; on breach of contract of sale, see *infra*, §519; on actions under C.C. 1951.2 on written lease, see C.C.P. 337.2, *supra*, §484; on actions to enforce obligations on negotiable instruments under Article 3 of U.C.C., see 4 *Summary* (10th), *Negotiable Instruments*, §37.)

The following cases are illustrative:

Spear v. California State Auto. Assn. (1992) 2 *C.4th* 1035, 1043, 9 *C.R.2d* 381, 831 *P.2d* 821, 2 *Summary* (10th), *Insurance*, §207 [action to compel arbitration of uninsured motorist claim].

Pioneer Fruit Co. v. Southern Pac. Co. (1920) 47 *C.A.* 44, 45, 190 *P.* 50 [action for damages, on bill of lading].

Bank of America v. Dennison (1935) 8 *C.A.2d* 173, 180, 47 *P.2d* 296 [action for deficiency judgment against assuming grantee from mortgagor; deed placed direct obligation of payment on grantee who accepted it, despite fact that he did not sign it].

Gallagher v. California Pac. Title & Trust Co. (1936) 13 *C.A.2d* 482, 487, 57 *P.2d* 195 [action for damages against escrow agent for violation of written agreement to report on title and pay out money according to its terms].

Bank of America v. Security-First Nat. Bank of Los Angeles (1939) 32 *C.A.2d* 647, 651, 90 *P.2d* 335 [action by drawee on express written guaranty of prior indorsements placed on cashier's check].

Perkins v. Benguet Consol. Mining Co. (1942) 55 *C.A.2d* 720, 771, 132 *P.2d* 70 [action by stockholder of record to recover dividend declared in his favor].

San Filippo v. Griffiths (1975) 51 C.A.3d 640, 645, 124 C.R. 399 [where gravamen of action is enforcement of written agreement, 4-year statute applies despite pleading of acts of fraudulent character].

Woolett v. American Employers Ins. Co. (1978) 77 C.A.3d 619, 624, 625, 143 C.R. 799 [actions for failure to pay judgment against insured and for failure to settle within policy limits].

Anderson v. Brouwer (1979) 99 C.A.3d 176, 181, 160 C.R. 65 [action on construction contract for known defects].

Kaichen's Metal Mart v. Ferro Cast Co. (1995) 33 C.A.4th 8, 13, 39 C.R.2d 233 [action relating to personal property security interest under U.C.C.].

Cutujian v. Benedict Hills Estates Assn. (1996) 41 C.A.4th 1379, 1384, 49 C.R.2d 166 [action to enforce written affirmative covenants running with land, including duties in declaration of conditions, covenants, and restrictions].

Estate of Brenzikofer (1996) 49 C.A.4th 1461, 1468, 57 C.R.2d 401, *infra*, §513 [action for quasi-specific performance by imposition of constructive trust on real property pursuant to oral agreement to devise property by will].

In *Reiner v. Hermann* (1947) 79 C.A.2d 543, 180 P.2d 385, plaintiff alleged a written promise by decedent that, if plaintiff would marry decedent, he would convey his real property to her. The marriage took place in May 1940, and the action was brought in June 1944. Plaintiff contended that this was an action for the recovery of real property, and timely within the 5-year statute (C.C.P. 318), on the theory that equitable conversion took place and gave her an interest in the real property. *Held*, although the object of the action was to obtain the title and possession of the property, it was in nature a action for specific performance of the contract. "A contract for the sale of land cannot be taken out of the statute of limitations governing contract actions by converting the action into one for the recovery of real property through the invocation of the doctrine of equitable conversion." (79 C.A.2d 546.)

(2) *Distinctions.* Despite the apparent simplicity of this classification of actions on written contracts, careful discrimination is necessary in its application, and difficult distinctions must be made:

(a) If the "gravamen" of the action is held to be tort, the action, though in the form one for breach of contract, is subject to the tort limitations period. (See 63 *Harv. L. Rev.* 1192; *supra*, §165, and *infra*, §552; but see *L. B. Laboratories v. Mitchell* (1952) 39 C.2d 56, 60, 244 P.2d 385, *supra*, §162 [accountant's negligent breach of written contract; 4-year statute governed].)

(b) If the written instrument is not the basis of the obligation, the 4-year limitation is inapplicable even though the writing is indirectly involved. (See *infra*, §§510, 511.)

(c) Despite the shorter limitations periods for medical malpractice actions set forth in C.C.P. 340.5 (*infra*, §578 et seq.), the 4-year period for contract actions applies to an action to compel arbitration of a medical malpractice claim pursuant to an arbitration agreement. (See *Meyer v. Carnow* (1986) 185 C.A.3d 169, 173, 229 C.R. 617; 25 Cal. Western L. Rev. 395; 77 A.L.R.4th 1071 [*Meyer*].)

(d) Actions on a few special types of contracts have been taken out of the 4-year statute and given longer periods; these include private corporation bonds and mortgage bonds (6 years; see *supra*, §486), and state and governmental subdivision bonds (10 years; see *supra*, §488). And some contract actions have been given shorter periods: action on forged check or indorsement (1 year; see *supra*, §481); action on title insurance policy or certificate (2 years; see *infra*, §§523 et seq., 758); action against surety on bond of public official or notary (3 years; see *infra*, §670); and action against surety on bond of guardian or conservator (3 years after removal of guardian or conservator or 3 years after order surcharging guardian or conservator, whichever is later; see *infra*, §543).

SUPPLEMENT: [This section is current through the latest supplement]



151 of 190 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XIII. STATUTE OF LIMITATIONS: CONTRACT ACTIONS

A. Limitation Statutes.

1. Written Instruments: Four Years.
- b. Action on Promise Implied From Writing.
 1. Implied Promise To Pay Money.

3 *Witkin Cal. Proc. Actions* § 509

[§ 509] Implied Promise To Pay Money.

In *O'Brien v. King* (1917) 174 C. 769, 164 P. 631, plaintiff lent money to defendant, who signed a writing that read: "Received from Miss Hannah O'Brien, on June 21st, 1911, \$ 450 ... at 5 per cent interest." The action, brought within 4 years, was held timely. The court first emphasized the basic rule that the 4-year statute applies only where the instrument itself contains the contract, and pointed out that a *mere receipt* for money lent, which neither expresses nor implies an obligation to pay, does not meet the test. But the instrument here was not a mere receipt; the words "at 5 per cent interest" meant that the instrument evidenced a loan at that interest rate, and from a loan the law implies a promise to repay. This implied promise to pay was not an independent unwritten promise governed by the 2-year statute; a writing is treated as including, as part of it, all obligations and promises that its words import. Hence, the implied promise to repay was one of the terms of the written contract of loan. (174 C. 772.)

The theory of *O'Brien* was followed in *Wilson v. Wallace* (1931) 113 C.A. 278, 298 P. 86. Plaintiff rendered services under a contract formed by several letters and telegrams, in which no express promise to pay compensation appeared. *Held*, the various writings constituted a written contract of employment, and the promise to pay for the services, implied by the law, was a part of that contract. (113 C.A.2d 286.) (See *Lawrence Barker v. Briggs* (1952) 39 C.2d 654, 661, 248 P.2d 897; *Tagus Ranch Co. v. Hughes* (1944) 64 C.A.2d 128, 130, 148 P.2d 79.)

An unusual application of the theory was made in *Division of Labor Law Enforcement, Dept. of Industrial Relations v. Dennis* (1947) 81 C.A.2d 306, 183 P.2d 932. Defendant employer made oral contracts of employment and written collective bargaining agreements with unions. He paid wages below the union scale in the agreement. Plaintiff, as assignee of employees, sued for the difference after 2 years but within 4 years. Defendant argued that the action was not founded on the written contract because the right of action was under an oral contract of employment and the identity of the employees as third-party beneficiaries of the union agreement had to be established by parol evidence. *Held*, the action was timely; though parol evidence was necessary to establish the identity of the employees, once so established, their rights as third-party beneficiaries were based on the written agreement that they were entitled to enforce. "There was a definite promise to pay to anyone of a certain class, and all that was required was for the appellant's assignors to identify themselves as members of that class and show the amount of work done." (81 C.A.2d

310.)

SUPPLEMENT: [This section is current through the latest supplement]



152 of 190 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XIII. STATUTE OF LIMITATIONS: CONTRACT ACTIONS

A. Limitation Statutes.

1. Written Instruments: Four Years.
- b. Action on Promise Implied From Writing.
2. Other Implied Promises.

3 *Witkin Cal. Proc. Actions* § 510

[§ 510] Other Implied Promises.

(1) *Former Rule.* At an early date the 4-year statute (*C.C.P.* 337(1), *supra*, §508), was given a restricted interpretation: The provision was held to refer only to contracts, obligations, or liabilities immediately growing out of written instruments. A cause of action did not come within this statute merely because it was remotely or indirectly connected with an instrument, or because the instrument would be a link in the chain of evidence establishing the cause of action. Such cases, in which there was a written instrument that was not the basis of the obligation, were usually held subject to the 2-year period of *C.C.P.* 339(1), whether regarded as tort or contract actions.

The leading case was *Lattin v. Gillette* (1892) 95 C. 317, 30 P. 545, an action for damages against professional title searchers who negligently gave plaintiff an erroneous report and certificate of title. The court declared that the written certificate of title was not the instrument on which their liability was founded, but merely evidence of the act constituting the breach; the contract was the oral agreement of employment. (95 C. 322.)

Lattin was followed in a number of decisions of the Court of Appeal. (See *Howard v. Security Title Ins. & Guarantee Co.* (1937) 20 C.A.2d 226, 231, 66 P.2d 1247 [negligence of escrow agents]; *Meyers v. Guardian Life Ins. Co. of America* (1937) 20 C.A.2d 268, 270, 66 P.2d 753 [widow's action to enforce community property rights in life insurance policy; obligation arose from marital status, not from terms of policy]; *Shumaker v. Rippey* (1956) 138 C.A.2d 815, 816, 292 P.2d 536 [action for breach of escrow agreement for sale of real property]; *Fisher v. MacInness* (1961) 191 C.A.2d 577, 580, footnote 1, 12 C.R. 798, citing the text [defendant's oral agreement to do termite work; written certificate was not contract].)

(2) *Judicial Repudiation.* The underlying theory of the Court of Appeal cases was repudiated in *Amen v. Merced County Title Co.* (1962) 58 C.2d 528, 25 C.R. 65, 375 P.2d 33, disapproving *Howard* and *Shumaker*. Written escrow instructions, on forms prepared by defendant escrow holder, were signed by sellers of a tavern and by plaintiff purchasers. The instructions expressly stated defendant's acceptance of the escrow subject to the conditions set forth. Plaintiffs sued for damages, alleging that defendant, negligently and in breach of the agreement, closed the escrow without requiring payment by the sellers of sales taxes then due, as specified in the instructions. The instructions were

signed in April 1958; the breach (closing of the escrow without requiring tax clearance) occurred in June 1958; the complaint was filed in July 1960, more than 2 years after the cause of action accrued. *Held*, judgment for defendant on demurrer reversed.

(a) The action was on a written contract. "If the escrow instructions are in writing and the escrow holder accepts them or if the escrow holder prepares the instructions, offers to perform them, and the buyer and seller accept the offer, an action for failure to comply with the instructions is on a written contract." (58 C.2d 532.) And an "action is on a written contract, even though it is based on a promise implied from the writing." (58 C.2d 532.)

(b) A contract may be "in writing" for purposes of the statute of limitations even though it was accepted orally or by conduct; unlike the statute of frauds, the 4-year limitation provision does not require signing by the party to be charged. *Lattin* is not controlling, for in that case the contract of employment was oral. (58 C.2d 533.)

In disapproving *Howard* and *Shumaker*, and in distinguishing *Lattin*, *Amen* appears to stand for two propositions: (a) if the contract is oral, delivery of a certificate or other written evidence of the act of performance does not transform it into a written contract so as to make the 4-year statute applicable; (b) if the contract is written, the action is on that contract, and the 4-year statute applies, even though the cause of action is based not on an express covenant but on a promise implied from the contract.

On its facts, *Amen* may be classified as an action on an express rather than implied promise, for the escrow instructions were violated. (58 C.2d 531.) Application of the implied promise theory is better illustrated by other cases. (See *Comunale v. Traders & General Ins. Co.* (1958) 50 C.2d 654, 662, 328 P.2d 198, 2 Summary (10th), *Insurance*, §265 [action by insured against insurer for wrongful refusal to settle claim is both tort and breach of contract, and action for breach of implied promise is governed by 4-year statute]; *Benard v. Walkup* (1969) 272 C.A.2d 595, 601, 605, 77 C.R. 544, 1 Cal. Proc. (5th), *Attorneys*, §313 [action for professional malpractice, where employment was by written agreement]; *Worthington v. Kaiser Foundation Health Plan* (1970) 8 C.A.3d 435, 440, 87 C.R. 272 [promise to surrender leased premises in suitable condition for continued use as medical building could be inferred from written lease, and action based on breach of that promise was action on written contract (lease)]; *Bruckman v. Parliament Escrow Corp.* (1987) 190 C.A.3d 1051, 1057, 235 C.R. 813; *E.O.C. Ord v. Kovakovich* (1988) 200 C.A.3d 1194, 1199, 1200, 246 C.R. 456 [following *Amen* and *Benard*]; *Beasley v. Wells Fargo Bank* (1991) 235 C.A.3d 1383, 1401, 1 C.R.2d 446, citing the text [following *Amen* and *Bruckman*]; *Pietrobon v. Libarle* (2006) 137 C.A.4th 992, 997, 40 C.R.3d 718 [following *Amen*; 4-year limitations period applied to written settlement agreement that defendant had orally agreed to in open court, even though he did not sign agreement]; 26 Southwestern U. L. Rev. 1 [choosing proper statute of limitations for action for breach of implied covenant of good faith and fair dealing]; 68 A.L.R.2d 892 [limitation of action against liability insurer for failure to settle claim or action against insured].)

SUPPLEMENT: [This section is current through the latest supplement]



153 of 190 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XIII. STATUTE OF LIMITATIONS: CONTRACT ACTIONS

A. Limitation Statutes.

1. Written Instruments: Four Years.

b. Action on Promise Implied From Writing.

3. Distinctions.

3 *Witkin Cal. Proc. Actions* § 511

[§ 511] Distinctions.

(1) *Oral Contract Confirmed by Written Instrument.* In *Amen v. Merced County Title Co.* (1962) 58 C.2d 528, 25 C.R. 65, 375 P.2d 33, and similar cases, *supra*, §510, the writing was prepared by the defendant and the result was a written agreement. In *James De Nicholas Associates v. Heritage Const. Corp.* (1970) 5 C.A.3d 421, 425, 85 C.R. 233, defendant orally agreed to pay money, and plaintiff confirmed it by letter. *Held*, the promise was within the 2-year period of C.C.P. 339(1) for oral contracts (*infra*, §512 et seq.), i.e., defendant's obligation was based on an oral promise, and it could not be converted into a written promise by plaintiff's confirmation.

Similarly, if the contract is oral, a writing that merely evidences performance does not make the 4-year statute applicable. (*Citizens Cas. Co. v. Otis Clark & Co.* (1971) 19 C.A.3d 294, 299, 96 C.R. 838.)

(2) *Custom.* In *Bank of America v. Security Pac. Nat. Bank* (1972) 23 C.A.3d 638, 100 C.R. 438, the complaint alleged the following: A drawer drew a sight draft on Security Bank on December 12, 1965, and the payee deposited it in Bank of America on December 28, 1965. On January 3, 1966, Bank of America presented it to Security; there were sufficient funds to pay it but Security returned it on January 4, 1966, without notice of dishonor or any reason. On January 4, 1966, Bank of America re-presented it, and on March 23, 1966, Security returned it again unpaid. A local banking custom treated items not returned in 10 days after re-presentation as paid. Plaintiff Bank of America brought this action as assignee of the payees. Demurrer was sustained on the ground that the action was for conversion and barred by the 3-year statute of limitations of former C.C.P. 338(3) (now C.C.P. 338(c), *infra*, §619). *Held*, judgment on demurrer affirmed. The allegation of custom was made to support the contention that the obligation of the drawee bank was founded on a written instrument (the sight draft), hence, governed by the 4-year period of C.C.P. 337. But the *Amen* test of a written instrument was not met: Under former U.C.C. 3410 (now U.C.C. 3409), acceptance of a draft must be in writing, and until acceptance the draft is only a demand that does not contain any agreement. "We do not believe that the depository bank should be permitted to boot strap itself around the specific provisions of the various code sections hereinabove set forth by first alleging a custom on the basis of which the payor is to be held to have accepted the draft and then argue that the acceptance by custom converts the instrument into an agreement in writing to pay the draft--all in the interest of circumventing the three-year statute of limitations." (23 C.A.3d 646.)

(3) *No Privity of Contract*. In *Century Indem. Co. v. Superior Court* (1996) 50 C.A.4th 1115, 58 C.R.2d 69, plaintiff insurer sued defendant coinsurer seeking equitable contribution to recoup a pro rata share of defense costs expended by plaintiff in defense of the parties' coinsured. *Held*, although defendant's obligation to plaintiff could be said to ultimately or remotely stem from defendant's written contract of insurance with the coinsured, it was not one immediately resting in or growing out of that written instrument under C.C.P. 337, because plaintiff was not a party to defendant's insurance contract and could not sue for a breach of that contract. Instead, plaintiff had a cause of action on an implied promise to contribute pro rata, based on principles of equitable contribution or indemnity, which was governed by the 2-year limitations period of C.C.P. 339(1) (see *infra*, §512 et seq.). (50 C.A.4th 1123, 1124.)

SUPPLEMENT: [This section is current through the latest supplement]



154 of 190 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XIII. STATUTE OF LIMITATIONS: CONTRACT ACTIONS

A. Limitation Statutes.

2. Obligations Not Founded on Written Instrument: Two Years.

a. In General.

3 Witkin Cal. Proc. Actions § 512

[§ 512] In General.

(1) *Scope of Statute.* *C.C.P. 339(1)* specifies a 2-year period for an "action upon a contract, obligation or liability not founded upon an instrument of writing." This statute, superficially the counterpart of *C.C.P. 337(1)* (*supra*, §508), has an exceedingly broad scope. It covers miscellaneous tort actions (*infra*, §648 et seq.), as well as oral contract and quasi-contract actions (*infra*, §§513, 514). (On 2-year period under *C.C.P. 339(3)* for restitution after rescission, see *infra*, §686; on 2-year period under *C.C.P. 339.5* for actions on oral lease, see *supra*, §482.)

(2) *Distinction: Oral Contracts for Sale Governed by U.C.C.* The Uniform Commercial Code makes an exception for oral contracts of sale; they are governed by the same 4-year period as written contracts. (U.C.C. 2725(1); see *infra*, §519.) *C.C.P. 339(1)* incorporates the exception by adding "except as provided in *Section 2725 of the Commercial Code*."

SUPPLEMENT: [This section is current through the latest supplement]



155 of 190 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XIII. STATUTE OF LIMITATIONS: CONTRACT ACTIONS

A. Limitation Statutes.

2. Obligations Not Founded on Written Instrument: Two Years.

b. Oral Express Contracts.

3 *Witkin Cal. Proc. Actions* § 513

[§ 513] Oral Express Contracts.

(1) *Applicability of 2-Year Statute.* Many cases have held that oral contracts are within the 2-year period of C.C.P. 339(1). (See, e.g., *Gardner v. Basich Bros. Const. Co.* (1955) 44 C.2d 191, 194, 281 P.2d 521; *Church v. Public Util. Com. of Calif.* (1958) 51 C.2d 399, 401, 333 P.2d 321; *Jefferson v. J.E. French Co.* (1960) 54 C.2d 717, 719, 7 C.R. 899, 355 P.2d 643, *infra*, §683; *Crawford v. Duncan* (1923) 61 C.A. 647, 650, 215 P. 573 [action for damages for breach of doctor's oral warranty of successful result from treatment]; *Cleaveland v. Inter-City Parcel Service* (1937) 22 C.A.2d 574, 579, 72 P.2d 179; *Carrasco v. Greco Canning Co.* (1943) 58 C.A.2d 673, 675, 137 P.2d 463 [action to recover money due under oral agreement for salary increase]; *Bendien v. Solov* (1949) 89 C.A.2d 904, 907, 202 P.2d 372 [action to recover money due under oral contract to buy and sell property]; *James De Nicholas Associates v. Heritage Const. Corp.* (1970) 5 C.A.3d 421, 425, 85 C.R. 233, *supra*, §511; *Filmservice Laboratories v. Harvey Bernhard Enterprises* (1989) 208 C.A.3d 1297, 1306, 256 C.R. 735 [contract to manufacture motion picture release prints from negatives was one for service to negatives' owner, not sale of goods under U.C.C. 2725(1) (*infra*, §519)].)

(2) *Distinction: Imposition of Constructive Trust To Enforce Oral Contract To Will Real Property.* Where quasi-specific performance by imposition of a constructive trust on real property is sought on the basis of an oral agreement under which that property was to have been left by will, the 2-year period of limitations in C.C.P. 339(1) is not applicable. Under those circumstances, when the property is impressed with the qualities of a resulting trust, the action may be brought within the 4-year statute for contracts based on written instruments (C.C.P. 337(1), *supra*, §508). The theory is that the statute of frauds does not apply where the plaintiff is entitled to the imposition of a constructive trust, for that type of trust arises by operation of law. (*Estate of Brenzikofer* (1996) 49 C.A.4th 1461, 1468, 57 C.R.2d 401.)

SUPPLEMENT: [This section is current through the latest supplement]



156 of 190 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XIII. STATUTE OF LIMITATIONS: CONTRACT ACTIONS

A. Limitation Statutes.

2. Obligations Not Founded on Written Instrument: Two Years.

c. Quasi-Contract Obligations.

3 *Witkin Cal. Proc. Actions* § 514

[§ 514] Quasi-Contract Obligations.

(1) *Applicability of 2-Year Statute.* Typical examples of quasi-contract actions within the 2-year limitations period in *C.C.P.* 339(1) are actions for the value of services performed for a decedent (see *Toney v. Security First Nat. Bank of Los Angeles* (1951) 108 C.A.2d 161, 166, 238 P.2d 645; *infra*, §548), and actions for recovery of money obtained by duress (see *Marshall v. Packard-Bell Co.* (1951) 106 C.A.2d 770, 773, 236 P.2d 201; *infra*, §657).

In *Baxter v. King* (1927) 81 C.A. 192, 253 P. 172, plaintiff sued to recover dividends collected by defendant administrator and wrongfully withheld. To avoid the 2-year statute, he pleaded a cause of action for conversion of the money (3 years, *infra*, §619). *Held*, the action was barred, for it did not involve the rare case of taking specific, identified money. The court declared that plaintiff's theory "would have the effect of moving practically all actions for debt out of the two-year class into the three-year class. Nearly every creditor would have the same right as plaintiff here to claim that his debtor is in truth detaining money from him." (81 C.A. 194.)

In the absence of a valid written attorneys' fee agreement under *B. & P.C. 6148(a)* (see 1 *Cal. Proc.* (5th), *Attorneys*, §156), an attorney's action against a client for recovery of unpaid legal fees is a quasi-contract action governed by the 2-year limitations period of *C.C.P.* 339(1). (*Iverson, Yoakum, Papiano & Hatch v. Berwald* (1999) 76 C.A.4th 990, 995, 90 C.R.2d 665 [promissory note signed by client was not sufficient writing].)

(2) *Distinction: Recovery of Taxes Mistakenly Paid.* *C.C.P.* 339(1) has little, if any, application to actions for the recovery of taxes mistakenly paid. Though the basis of recovery is quasi-contract (see 9 *Summary* (10th), *Taxation*, §290 et seq.), a number of special statutory limitations govern actions for the refund of city or county taxes, inheritance taxes, personal income taxes, etc. (See *supra*, §§475, 477, 480, 481, 484.)

SUPPLEMENT: [This section is current through the latest supplement]



157 of 190 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XIII. STATUTE OF LIMITATIONS: CONTRACT ACTIONS

A. Limitation Statutes.

3. Accounts: Four Years.

a. In General.

3 Witkin Cal. Proc. Actions § 515

[§ 515] In General.

(1) *Applicability of 4-Year Statute.* C.C.P. 337(2) prescribes a 4-year limitation for actions on three kinds of accounts: (a) a book account, (b) an account stated based on an account in writing, and (c) the balance due on a mutual, open, and current account where the items are in writing. As to the second and third types of accounts, the action is on a written contractual liability, and the only reason for distinguishing actions on these accounts from actions founded on written instruments generally is in connection with the accrual of the cause of action (time runs from the date of the last item; see *infra*, §540). So far as the period is concerned, it is the same. (On account stated, see 3 *A.L.R.2d* 809, 825; 51 *A.L.R.2d* 331; on mutual account, see 45 *A.L.R.3d* 446; on open and closed accounts, see *R.N.C. v. Tsegeletos* (1991) 231 *C.A.3d* 967, 972, 283 *C.R.* 48.)

(2) *Distinction: Book Account Based on Oral Transaction.* As to a book account, the same rule of accrual (time runs from the date of the last item; see *infra*, §540) applies. But there is an additional problem of the applicable period. The original transactions may have been entirely oral, so that an action based on that type of transaction would be subject to the 2-year period (*supra*, §513). If, however, the obligation resulting from the oral transactions is, by the agreement or conduct of the parties, embodied in a book account, the creditor has 4 years to sue. (See *Furlow Pressed Brick Co. v. Balboa Land & Water Co.* (1921) 186 *C.* 754, 764, 200 *P.* 625; *Moss v. Underwriters' Report* (1938) 12 *C.2d* 266, 269, 83 *P.2d* 503; *Fresno Credit Bureau v. Batteate* (1951) 102 *C.A.2d* 545, 547, 227 *P.2d* 851; *Santa Clara v. Vargas* (1977) 71 *C.A.3d* 510, 516, 139 *C.R.* 537.)

SUPPLEMENT: [This section is current through the latest supplement]



158 of 190 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XIII. STATUTE OF LIMITATIONS: CONTRACT ACTIONS

A. Limitation Statutes.

3. Accounts: Four Years.

b. What Constitutes Book Account.

1. In General.

3 *Witkin Cal. Proc. Actions* § 516

[§ 516] In General.

(1) *Definition of Book Account.* A book account is a permanent written record, showing the name of the debtor, the date of the transaction, and the amount of the debit or credit. (See *Wright v. Loaiza* (1918) 177 C. 605, 606, 171 P. 311 [quoting Corpus Juris definition: "a detailed statement, kept in a book, in the nature of debit and credit, arising out of contract or some fiduciary relation"]; *Foothill Ditch Co. v. Wallace Ranch Water Co.* (1938) 25 C.A.2d 555, 566, 78 P.2d 215; *Tillson v. Peters* (1940) 41 C.A.2d 671, 678, 107 P.2d 434 [quoting Corpus Juris Secundum definition: "A book in which a detailed history of business transactions is entered; a record of goods sold or services rendered ... entries made in the regular course of business showing the transactions which have actually occurred in the business, and not of orders, executory contracts, things to be done subsequent to the entries"]; *Biltmore Press v. Usadel* (1970) 6 C.A.3d 896, 900, 86 C.R. 233 [no book account where no ledger or account book shown]; Cal. Civil Practice, 3 Business Litigation, Chap. 35.)

(2) *Format.* The record must appear from accounts actually kept in this form; working papers of an auditor, not a part of the bookkeeping system, will not meet the test. (*Robin v. Smith* (1955) 132 C.A.2d 288, 291, 282 P.2d 135.)

Normally the account must show the name of the debtor. *Wright* applied this rule too strictly, it would seem, to a case where the account was in the name of an agent as debtor. Because the principal's name did not appear, the court held that the action against the principal was not on a book account and therefore was barred after 2 years. The reasoning of the court is unconvincing (see dissent), and later decisions make it clear that an action may be on a book account even though the defendant's name does not appear in the account. (See *Furlow Pressed Brick Co. v. Balboa Land & Water Co.* (1921) 186 C. 754, 762, 200 P. 625 [account in name of single partner was book account as to all partners]; *Shanklin v. Scribner* (1923) 62 C.A. 487, 491, 217 P. 130 [plaintiff employee sued for salary on defendant corporation employer's books; books were book account as to defendant corporation even though they were still kept in name of its predecessor partnership].)

SUPPLEMENT: [This section is current through the latest supplement]



159 of 190 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XIII. STATUTE OF LIMITATIONS: CONTRACT ACTIONS

A. Limitation Statutes.

3. Accounts: Four Years.

b. What Constitutes Book Account.

2. Permanent Record Without Book.

3 *Witkin Cal. Proc. Actions* § 517

[§ 517] Permanent Record Without Book.

(1) *Early Fastening Rule*. The traditional ledger meets the test; but difficulty was formerly encountered where there was no "book." The early view is stated in *Foothill Ditch Co. v. Wallace Ranch Water Co.* (1938) 25 C.A.2d 555, 78 P.2d 215. "It is rather well settled that a book account cannot consist of numerous loose pages not bound together in some substantial form. To constitute a book the pages must be fastened together with some degree of substantial permanency." (25 C.A.2d 566.) Under this test some modern loose-leaf or card systems, which utilize folders, boxes, or other methods of assembling, but do not fasten pages together, could not constitute book accounts. To avoid this absurd conclusion an appellate court may simply uphold the finding of the trial judge in favor of the plaintiff. (See *Foothill*, *supra*, 25 C.A.2d 566 ["We must conclude he saw them bound in a permanent book"; testimony showed that records consisted of separate monthly statements kept in a folder].)

(2) *Later Permanency Rule*. The more realistic approach is to regard permanency of records as the test. In *Egan v. Bishop* (1935) 8 C.A.2d 119, 47 P.2d 500, plaintiff, suing as the assignee of an attorney on many matters of legal business, relied on a docket of court cases and a journal in which charges for office services were recorded. There was no single ledger account combining the entries in the other books. "The law does not prescribe any standard of bookkeeping practice which all must follow. ... We think it makes no difference whether the account is kept in one book or several so long as they are permanent records, and constitute a system of bookkeeping as distinguished from mere private memoranda." (8 C.A.2d 122.) (See *Gardner v. Rutherford* (1943) 57 C.A.2d 874, 883, 136 P.2d 48, *infra*, §§518, 541 [four separate ledger accounts treated as one book account]; *Warda v. Schmidt* (1956) 146 C.A.2d 234, 238, 303 P.2d 762 [loose-leaf ledger was sufficient].)

(3) *Codification of Permanency Rule*. The test of permanency rather than book form was codified in 1959 by the enactment of C.C.P. 337a. "The term 'book account' means a detailed statement which constitutes the principal record of one or more transactions between a debtor and a creditor arising out of a contract or some fiduciary relation, and shows the debits and credits in connection therewith, and against whom and in favor of whom entries are made, is entered in the regular course of business as conducted by such creditor or fiduciary, and is kept in a reasonably permanent form and manner and is (1) in a bound book, or (2) on a sheet or sheets fastened in a book or to backing but

detachable therefrom, or (3) on a card or cards of a permanent character, or is kept in any other reasonably permanent form and manner." (See *Tsemetzin v. Coast Fed. Savings & Loan Assn.* (1997) 57 C.A.4th 1334, 1343, 67 C.R.2d 726, citing the text [four unbound pieces of paper with four columns of information and numbers that appeared to have been prepared in anticipation of litigation did not comply with C.C.P. 337a, and thus were not book account reflecting rental arrearages under lease].)

SUPPLEMENT: [This section is current through the latest supplement]



160 of 190 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XIII. STATUTE OF LIMITATIONS: CONTRACT ACTIONS

A. Limitation Statutes.

3. Accounts: Four Years.

c. Book Account Despite Express Contract.

3 Witkin Cal. Proc. Actions § 518

[§ 518] Book Account Despite Express Contract.

(1) *Installment Contract Rule Applied.* A plaintiff sometimes seeks to evade the 2-year statute on oral contracts, or to gain a later accrual date for an action on a written contract, by pleading it in the form of an action on a book account. A rental agreement, e.g., calls for periodic payments by the defendant, and the plaintiff keeps a ledger or cash book in which the plaintiff enters charges for the accruing amounts and enters credits under the defendant's name for payments made. But these bookkeeping entries do not create a book account, for the obligation is based on the express agreement and not on a series of transactions. Hence, the usual rule on installment contracts is applied, which makes the statute run from the due date of each installment. (*Lee v. De Forest* (1937) 22 C.A.2d 351, 360, 71 P.2d 285; *Tillson v. Peters* (1940) 41 C.A.2d 671, 674, 107 P.2d 434; *Tsemetzin v. Coast Fed. Savings & Loan Assn.* (1997) 57 C.A.4th 1334, 1343, 1344, 67 C.R.2d 726, citing the text; see *infra*, §520.)

(2) *Book Account Rule Applied.* Nevertheless, the fact that a lease is the source of the obligation to pay rent does not preclude the existence of a book account. In *Gardner v. Rutherford* (1943) 57 C.A.2d 874, 136 P.2d 48, where rent was paid under an oral lease, the court distinguished *Tillson* on the theory that no showing was made that the rent transactions were actually set up and carried as a book account. In the instant case, however, the testimony showed that, pursuant to the intention of the parties, a ledger labeled "rent account" had carried a complete record of the transactions in the proper form of a book account. (57 C.A.2d 885.)

The exception to the installment contract rule was applied in *Warda v. Schmidt* (1956) 146 C.A.2d 234, 303 P.2d 762. The contracts provided for specified installment payments by defendant builder to plaintiff plastering contractor. But plaintiff's employees testified that these provisions were never followed, and that all payments made by defendant to plaintiff were on account. *Held*, following such cases as *Gardner*, parties to a written or oral contract may, by agreement or conduct, provide that money due under the contract is the subject of an account between them. (146 C.A.2d 237.)

SUPPLEMENT: [This section is current through the latest supplement]



161 of 190 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XIII. STATUTE OF LIMITATIONS: CONTRACT ACTIONS

A. Limitation Statutes.

4. Contract of Sale: Four Years.

3 *Witkin Cal. Proc. Actions* § 519

[§ 519] Contract of Sale: Four Years.

(1) *In General.* The Uniform Commercial Code contains the statute of limitations on actions for breach of a sales contract. The provision was originally rejected in California, but was restored in 1967 by the enactment of U.C.C. 2725, covering the applicable statute (U.C.C. 2725(1)), accrual of the cause of action (U.C.C. 2725(2), *infra*, §§537, 539), and tolling (U.C.C. 2725(3), 2725(4) [after voluntary termination of first action, second action for same breach must be brought within 6 months of termination and within original limitations period; regular rules of tolling are not affected]). (See 4 *Summary* (10th), *Sales*, §213.)

U.C.C. 2725(1) establishes a 4-year limitations period for "an action for breach of any contract for sale," i.e., for oral as well as written contracts. (See *Hachten v. Stewart* (1974) 42 C.A.3d Supp. 1, 3, 116 C.R. 631, citing the text [action by seller for price; U.C.C. 2725(1) applies even if contract is oral]; *Massey-Ferguson Credit Corp. v. Casaulong* (1976) 62 C.A.3d 1024, 1027, 133 C.R. 497, 4 *Summary* (10th), *Sales*, §213 [seller's action for deficiency after repossession and resale]; *Jack Heskett Lincoln-Mercury v. Metcalf* (1984) 158 C.A.3d 38, 42, 204 C.R. 355 [same, following *Massey-Ferguson*]; *H. Russell Taylor's Fire Prevention Service v. Coca Cola Bottling Corp.* (1979) 99 C.A.3d 711, 723, 724, 160 C.R. 411, 4 *Summary* (10th), *Sales*, §213 [U.C.C. 2725(1) applies to contract implied in law on waiver of tort of conversion]; *Schauer v. Mandarin Gems of Calif.* (2005) 125 C.A.4th 949, 958, 23 C.R.3d 233 [U.C.C. 2725 applied to action for breach of warranty of oral contract for sale based on salesperson's misrepresentations, rather than C.C.P. 339 (2-year limitations period for action for breach of oral contract; see *supra*, §513)]; 20 *Pepperdine L. Rev.* 1407 [action for indemnity as means of avoiding 4-year limitations period of U.C.C. 2725]; 49 *A.L.R.5th* 1 [actions governed by U.C.C. 2725].)

(2) *Applicability to Song-Beverly Consumer Warranty Act.* The Song-Beverly Consumer Warranty Act (C.C. 1790 et seq.; see 4 *Summary* (10th), *Sales*, §314 et seq.) contains no limitations period. Thus, in an action alleging both a violation of the Act and breach of an express warranty under U.C.C. 2725, the special limitations provision of U.C.C. 2725(1) prevails over the general 3-year period of C.C.P. 338(a) (liabilities created by statute; see *infra*, §664 et seq.). (*Krieger v. Nick Alexander Imports* (1991) 234 C.A.3d 205, 214, 285 C.R. 717.)

An action to impose a civil penalty under C.C. 1794(c) for wilful violation of the Act is also governed by the 4-year period of U.C.C. 2725(1), and not by the 1-year period of C.C.P. 340(a) (action for statutory penalty; see *infra*, §668),

because imposition of the penalty is discretionary and not mandatory. (*Jensen v. BMW of North America* (1995) 35 C.A.4th 112, 132, 41 C.R.2d 295.)

(3) *Contractual Reduction of Limitations Period.* As pointed out in prior sections, the contract may reduce the 4-year period to not less than 1 year, but may not extend it. (U.C.C. 2725(1), *supra*, §473.)

(4) *Distinctions.* The following distinctions should be noted:

(a) Where the cause of action is for personal injuries, the 2-year statute (*infra*, §552 et seq.) governs despite pleading on a warranty theory. (See *Becker v. Volkswagen of America* (1975) 52 C.A.3d 794, 800, 802, 125 C.R. 326 [construing prior 1-year statute]; *infra*, §565.)

(b) Where the cause of action is for damages to real or personal property, the 3-year statute (*infra*, §§596, 619) governs. (See *Mack v. Hugh W. Comstock Associates* (1964) 225 C.A.2d 583, 589, 37 C.R. 466.)

(c) Where the cause of action is against a manufacturer (not in privity with the buyer) for economic loss from failure of the product to perform as warranted, the 2-year statute (C.C.P. 339; see *supra*, §482) governs; i.e., the 4-year statute of U.C.C. 2725 "is only brought into play when a contract for sale exists between the disgruntled buyer and the one he seeks to hold liable." (*Fundin v. Chicago Pneumatic Tool Co.* (1984) 152 C.A.3d 951, 959, 960, 199 C.R. 789.)

(d) Where the "essence" of the agreement is to provide services and not to sell goods, the 2-year statute (C.C.P. 339(1)) governs. (*Filmservice Laboratories v. Harvey Bernhard Enterprises* (1989) 208 C.A.3d 1297, 1306, 256 C.R. 735.)

SUPPLEMENT: [This section is current through the latest supplement]



162 of 190 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XIII. STATUTE OF LIMITATIONS: CONTRACT ACTIONS

B. Accrual of Causes of Action.

1. Breach of Contract: In General.

a. Time of Breach.

1. General Rule.

3 *Witkin Cal. Proc. Actions* § 520

[§ 520] General Rule.

(1) *Statement of Rule.* A cause of action for breach of contract ordinarily accrues at the time of breach, and the statute begins to run at that time regardless whether any damage is apparent or whether the injured party is aware of his or her right to sue. (See *Morehouse v. Morehouse* (1903) 140 C. 88, 91, 73 P. 738 [unilateral contract; defendant's obligation to pay was breached, and plaintiff's cause of action arose, as soon as plaintiff completed performance of act requested]; *Crawford v. Duncan* (1923) 61 C.A. 647, 650, 215 P. 573 [dictum]; *Niles v. Louis H. Rapoport & Sons* (1942) 53 C.A.2d 644, 651, 128 P.2d 50; 63 Harv. L. Rev. 1201; 19 A.L.R.5th 439, 443 [when statute of limitations commences to run on action for wrongful discharge of employee]; 51 Am.Jur.2d (2000 ed.), *Limitation of Actions* §160.)

If the contract does not fix a time for that performance as payment for services continuously rendered over an indefinite period, the statute does not begin to run on the right of action for payment until the services end. (*Cullinan v. McColgan* (1927) 87 C.A. 684, 693, 263 P. 353 [services of attorney].) However, an attorney's general retainer agreement will not prevent the statute running on completed services in a particular matter. (*Osborn v. Hopkins* (1911) 160 C. 501, 507, 117 P. 519.)

(2) *Employee's Right to Accumulated Vacation Time Under Employment Contract.* There is a split in authority about when the statute of limitations accrues in a terminated employee's breach of contract action seeking to recover for accumulated vacation time. *Sequeira v. Rincon-Vitova Insectaries* (1995) 32 C.A.4th 632, 38 C.R.2d 264, held that the action accrues when vacation is earned or when the employee is eligible to take it, not when the employee is terminated. (32 C.A.4th 634.) However, *Church v. Jamison* (2006) 143 C.A.4th 1568, 50 C.R.3d 166, disagreed with *Sequeira* and held that the action accrues when the contract is breached, i.e., when the employee is terminated. (143 C.A.4th 1583.)

(3) *Third-Party Creditor Beneficiary Contracts.* In actions on third-party creditor beneficiary contracts, accrual is governed by the new third-party beneficiary agreement and not by the maturity of the original debt. (*Sherwood & Sherwood v. Gill & Lutz* (1918) 36 C.A. 707, 711, 173 P. 171; *Anderson v. Calaveras Cen. Mining Corp.* (1936) 13 C.A.2d 338, 344, 57 P.2d 560; *Pitzer v. Wedel* (1946) 73 C.A.2d 86, 90, 165 P.2d 971; *Skylawn v. Superior Court* (1979) 88 C.A.3d 316, 319, 151 C.R. 793, 1 Summary (10th), *Contracts*, §695.)

(4) *Severable Contract*. When a contract is severable, the duty to perform each part arises independently and the statute begins to run on the severable obligations from the time the performance of each is due. (See *Lee v. De Forest* (1937) 22 C.A.2d 351, 360, 71 P.2d 285 [deficiency in monthly rental was recoverable under terms of lease after lessor's lease to new tenant]; *Trigg v. Arnott* (1937) 22 C.A.2d 455, 459, 71 P.2d 330 [installment note]; *Tillson v. Peters* (1940) 41 C.A.2d 671, 674, 107 P.2d 434 [rent due under lease]; *Carrasco v. Greco Canning Co.* (1943) 58 C.A.2d 673, 675, 137 P.2d 463 [monthly salary increase]; *Conway v. Bughouse* (1980) 105 C.A.3d 194, 200, 164 C.R. 585 [buy-sell agreement with monthly payments for life]; *White v. Moriarty* (1993) 15 C.A.4th 1290, 1299, 19 C.R.2d 200 [promissory note]; 51 Am.Jur.2d (2000 ed.), *Limitation of Actions* §166.)

(5) *Marvin Agreements*. *Estate of Fincher* (1981) 119 C.A.3d 343, 352, 174 C.R. 18, and subsequent decisions have held that a cause of action for breach of an implied agreement between nonmarital cohabitants accrues at the time of the breach, i.e., when one partner terminated the relationship. *Estate of Fincher* and its progeny were criticized in *Cochran v. Cochran* (1997) 56 C.A.4th 1115, 66 C.R.2d 337. Plaintiff brought a *Marvin* action against defendant 1 month after defendant had terminated support payments to her, but 10 years after they had stopped living together. The trial judge, relying on the *Fincher* rule, found that the action had accrued when the parties separated, and thus was barred by the 2-year limitations period of C.C.P. 339(1) (see supra, §512 et seq.). *Held*, reversed; the action was timely.

(a) *Fincher* and its progeny involved factual situations in which the defendants' failure to make agreed support payments or property divisions coincided with the end of the parties' relationships. (56 C.A.4th 1122.) None of those cases considered when or whether a *Marvin* agreement is breached where, as here, the party charged with the duty of support fulfills his or her obligations after the underlying relationship ends. (56 C.A.4th 1123.)

(b) "We do not read *Fincher* and its decisional progeny as formulating some special exception to the general rule that a breach does not occur if the obligor performs. Instead, the overly broad language used by those decisions is best viewed in recognition that most *Marvin* agreements are breached when the parties separate. To the extent *Fincher* [and other cases] stand for the blanket proposition that all *Marvin* agreements are automatically breached once the parties end their relationship, we refuse to follow such a rule." (56 C.A.4th 1123.)

(c) To hold otherwise would imply that the purpose of *Marvin* agreements is to make enforceable one party's right to continue the relationship, which probably would be contrary to public policy. Moreover, if "the party claiming the duty of support or property division was the one to end the relationship, would that mean the party owing those duties had not breached the agreement?" (56 C.A.4th 1124, footnote 7.)

(d) "We hold instead that a *Marvin* agreement is breached when the party charged with a duty to perform refuses to do so. If the parties have separated, but the obligor performs as required by the *Marvin* agreement, there has been no breach, no cause of action has accrued, and the statute of limitations has not begun to run." (56 C.A.4th 1124.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Statement of Rule*. See *Tin Tin Corp. v. Pacific Rim Park, LLC* (2009) 170 C.A.4th 1220, 1234, 88 C.R.3d 816 [commercial landlord's breach of contract claim alleging that tenant had breached written lease by failing to remodel premises was untimely under C.C.P. 337(1) (see text, §508), because it was filed more than 4 years after remodeling completion date in lease; landlord's letter reminding tenant of completion date did not extend that date].



163 of 190 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XIII. STATUTE OF LIMITATIONS: CONTRACT ACTIONS

B. Accrual of Causes of Action.

1. Breach of Contract: In General.

a. Time of Breach.

2. Distinctions.

3 *Witkin Cal. Proc. Actions* § 521

[§ 521] Distinctions.

The general rule of accrual on breach starts the statute running immediately on a cause of action for nominal damages, and, if strictly applied, may bar the action before the plaintiff has suffered any substantial injury and hence before it is worth the plaintiff's while to sue. This result has been condemned as unjust and a "use of the statute of limitations for a purpose never intended." (*Miller v. Bean* (1948) 87 C.A.2d 186, 189, 190, 196 P.2d 596 [citing leading Michigan case]; see 63 *Harv. L. Rev.* 1202.) Three methods of avoiding it are sometimes employed:

- (1) Treating the promise as a continuing covenant. (See *infra*, §522 et seq.)
- (2) Treating the promise as prospective in nature. (See *infra*, §526.)
- (3) Invoking the modern theory of accrual on discovery of the cause of action. (See *supra*, §497.)

In *Seelenfreund v. Terminix of Northern Calif.* (1978) 84 C.A.3d 133, 148 C.R. 307, plaintiff hired defendant, a licensed termite inspector, to make a termite inspection and report. More than 2 years later a second inspection disclosed unreported problems that existed at the time of the first report, and plaintiff sued. The trial judge sustained a demurrer on the ground that the action was barred by the 2-year statute. *Held*, reversed. The detailed regulation of defendant's business (*B. & P.C.* 8500 et seq.) brings the case within the principles of *Neel v. Magana, Olney, Levy, Cathcart & Gelfand* (1971) 6 C.3d 176, 98 C.R. 837, 491 P.2d 421, *infra*, §627. "In *Neel*, the duty of 'full and fair disclosure' arose out of a fiduciary relationship. Here, a similar imperative of reporting arose by statutory mandate. We do not perceive that the origin of the duty should determine when the statute of limitations should run for negligent breach of that duty." (84 C.A.3d 138.) Plaintiff, "in light of the specialized knowledge required, could, with justification, be ignorant of his right to sue at the time the termite inspection was negligently made and reported." (84 C.A.3d 138, 139.) (See *April Enterprises v. KTTV* (1983) 147 C.A.3d 805, 827, 195 C.R. 421, *infra*, §529.)

SUPPLEMENT: [This section is current through the latest supplement]



164 of 190 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XIII. STATUTE OF LIMITATIONS: CONTRACT ACTIONS

B. Accrual of Causes of Action.

1. Breach of Contract: In General.

b. Continuing Covenant.

1. In General.

3 *Witkin Cal. Proc. Actions* § 522

[§ 522] In General.

One method of avoiding the harsh general rule of accrual on breach (*supra*, §520) is to construe a promise as continuing, so that each failure to perform results in a new breach, giving rise to a new cause of action. (See *McGrath v. Butte* (1939) 30 C.A.2d 734, 736, 87 P.2d 381 [county's contractual obligation to levy tax to pay for lands it purchased at delinquent sale for nonpayment of assessments on public bonds]; *Lubin v. Lubin* (1956) 144 C.A.2d 781, 790, 302 P.2d 49 [contract to be performed on death]; *Armstrong Petroleum Corp. v. Tri-Valley Oil & Gas Co.* (2004) 116 C.A.4th 1375, 1396, 11 C.R.3d 412 [monthly delivery or payment obligations of operator, owed to nonoperator, under oil and gas operating agreement were divisible; thus, obligations accrued periodically on breach]; 17 A.L.R.2d 1251 [covenant running with land and requiring affirmative acts by covenantor]; 52 A.L.R.2d 1125 [contractual obligation to pay for minor's support].) (On effect on limitations period of insurer's continuing duty under insurance policy to defend its insured, see *infra*, §523 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]



165 of 190 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XIII. STATUTE OF LIMITATIONS: CONTRACT ACTIONS

B. Accrual of Causes of Action.

1. Breach of Contract: In General.

b. Continuing Covenant.

2. Insurer's Breach of Duty To Defend.

aa. Conflict in Courts of Appeal.

3 *Witkin Cal. Proc. Actions* § 523

[§ 523] Conflict in Courts of Appeal.

The continuing covenant exception to the general rule of accrual on breach (*supra*, §520) has also been applied in cases arising from an insurer's refusal to defend its insured under an insurance policy.

(1) *Liability Insurance. Oil Base v. Continental Cas. Co.* (1969) 271 C.A.2d 378, 389, 76 C.R. 594, applied the exception in the liability insurance context. Plaintiff manufacturer sought to recover from defendant insurer expenses and fees plaintiff incurred in defending an underlying action arising out of a warehouse fire caused by its product. *Held*, the 4-year limitations period of C.C.P. 337(1) (obligation on written instrument; see *supra*, §508 et seq.) accrues on entry of final judgment in the underlying action. The duty to defend commences on tender of the defense and continues until the underlying action is concluded. (271 C.A.2d 379.)

(2) *Title Insurance.* In the title insurance context, a conflict arose in the Courts of Appeal about when the 2-year limitations period of C.C.P. 339(1) (see *supra*, §482) accrues in cases involving breach of the duty to defend, and whether the "continuing duty" analysis of *Oil Base* should be followed.

In *Central Bank v. Transamerica Title Ins. Co.* (1978) 85 C.A.3d 859, 149 C.R. 822, plaintiff insured contended that its cause of action was timely because it did not accrue until entry of final judgment in the underlying action; until then, plaintiff was unable to discover the full extent of its loss or damage. Defendant insured, however, asserted that accrual occurred earlier when plaintiff suffered "appreciable harm," and the cause of action was thus untimely. *Held*, defendant's position is correct. Plaintiff suffered appreciable harm at the earliest when it incurred attorneys' fees in defending the underlying action or, at the latest, when it subsequently refused tender of the defense. (85 C.A.3d 865.) Because both of these events occurred outside of the statute of limitations, the court did not decide which one triggers the statute. Moreover, the decision relied on rules developed in attorney malpractice cases (see *infra*, §626 et seq.), and did not discuss the "continuing duty" rationale of *Oil Base*.

However, *Israelsky v. Title Ins. Co. of Minnesota* (1989) 212 C.A.3d 611, 261 C.R. 72, disagreed with *Central Bank*

. The I's purchased land from the S's in December 1982, and obtained a title insurance policy from defendant TIM in March 1983. In April 1984, the S's sued the I's on a claim involving the boundary of the land. TIM refused repeated requests from the I's to defend, denying coverage. In August 1986, while the S litigation was still pending, the Is brought this action against TIM for breach of its obligation to defend, alleging that they incurred attorneys' fees on May 20, 1984, and that TIM rejected their tender of defense on May 31, 1984. TIM demurred on the ground that the 2-year period begins to run when the policyholder incurs attorneys' fees in defending the title. The trial court granted summary judgment for defendant. *Held*, reversed; defendant's position is supported by *Central Bank*, but the better rule is declared in *Oil Base* and should be followed.

(a) The *Oil Base* rule with respect to accrual at final judgment is in conformity with decisions in other jurisdictions (212 C.A.3d 616), and the "continuing duty" principle on which it relies is recognized in many California cases (212 C.A.3d 617). "Where the defendant, obligated to perform over a period of time, is guilty of a material breach, the plaintiff may waive it and stand on the contract until the time for final performance. Such a waiver should not prejudice him, i.e., the statute ought not to begin running until the date when the last performance is due." (212 C.A.3d 618, quoting the text and discussing *Ross v. Tabor* (1921) 53 C.A. 605, 200 P. 971.)

(b) "The rule of delayed commencement has been applied in the context of a beet farming contract ... , water delivery contracts ... , a commercial lease ... , an agreement to pay life insurance premiums ... , and the promise to levy taxes. ... Although the period between the initial breach by the respective defendants and the time for performance in these cases ranged from a few days ... to 17 years ... , in each case the statute of limitations did not commence until the time for complete performance had passed." (212 C.A.3d 618.)

(c) The rationale applies with equal vigor to claims for an insurer's breach of the duty to defend. "[T]he unexpected burden of defending an action may itself make it impractical to immediately bear the additional cost and hardship of prosecuting a collateral action against an insurer. An insured placed in this situation by the erroneous decision of his insurer should have the same option which the law has given the owners of beehives and beet farms." (212 C.A.3d 619.)

(d) There is nothing in the nature of title insurance that supports a departure from the rule of delayed commencement set forth in *Oil Base*, a liability insurance case; the same principles define the duty to defend in both kinds of policies. (212 C.A.3d 620, citing *Paramount Properties Co. v. Transamerica Title Ins. Co.* (1970) 1 C.3d 562, 83 C.R. 394, 463 P.2d 746, 12 Summary (10th), *Real Property*, §365, and other title insurance cases.)

(e) *Central Bank* relied on rules developed in attorney malpractice cases, but its conclusion that a claim against a title insurer accrues on discovery of the loss or damage does not reach the issue in the present case, i.e., whether plaintiff, having an accrued claim against TIM, may nevertheless wait until the continuing obligation has ceased before bringing suit. (212 C.A.3d 622.) "One rule is designed to prevent tort claims from expiring before they are discovered ... ; the other rule deals with the separate problem posed when a contract has been breached before complete performance is due. ... We can see no reason, and none has been suggested, why title policyholders cannot have the benefit of both rules." (212 C.A.3d 622.)

The Supreme Court ultimately resolved the conflict by approving the result reached in *Israelsky*, but disapproving its reasoning in favor of an equitable tolling approach. (See *Lambert v. Commonwealth Land Title Ins. Co.* (1991) 53 C.3d 1072, 282 C.R. 445, 811 P.2d 737, *infra*, §524.)

SUPPLEMENT: [This section is current through the latest supplement]



166 of 190 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XIII. STATUTE OF LIMITATIONS: CONTRACT ACTIONS

B. Accrual of Causes of Action.

1. Breach of Contract: In General.

b. Continuing Covenant.

2. Insurer's Breach of Duty To Defend.

bb. Accrual on Tender but Equitable Tolling Until Judgment.

3 *Witkin Cal. Proc. Actions* § 524

[§ 524] Accrual on Tender but Equitable Tolling Until Judgment.

The result in *Israelsky v. Title Ins. Co. of Minnesota* (1989) 212 C.A.3d 611, 261 C.R. 72, supra, §523, was reached on a different theory, and *Central Bank v. Transamerica Title Ins. Co.* (1978) 85 C.A.3d 859, 149 C.R. 822, supra, §523, was disapproved in *Lambert v. Commonwealth Land Title Ins. Co.* (1991) 53 C.3d 1072, 282 C.R. 445, 811 P.2d 737. In January 1984, plaintiff obtained a title insurance policy from defendant that had a clause excluding losses resulting from a claim of easement not shown by public records. In November 1984, an adjoining property owner filed an action claiming an easement by implication and seeking reformation of a recorded easement. Defendant rejected plaintiff's tender of defense and denied coverage under the policy. Plaintiff successfully defended the underlying action and judgment was entered in his favor on October 26, 1987. On October 24, 1988, plaintiff filed the present action against defendant for wrongful refusal to defend. The trial judge sustained defendant's demurrer based on the statute of limitations, and the Court of Appeal affirmed, holding that the cause of action had accrued when defendant refused to defend, more than 2 years before. *Held*, judgment of Court of Appeal reversed; although the cause accrued at that time, the period was tolled until resolution of the underlying claim.

(a) "We agree with the *result* of *Israelsky* ... , but believe its analysis is flawed in one respect. It overlooks the language of section 312 that the action must be commenced within the statutory period after the cause of action has 'accrued.' *Central Bank* and *Israelsky* are correct that the cause of action accrues upon discovery of loss or harm, i.e., when the insurer refuses to defend. An action for failure to defend may thus be filed immediately after the refusal to defend. Unless equitably tolled, however, section 312 compels the conclusion that the statute of limitations period under section 339(1) also commences on the day the insurer refuses tender of defense. We believe that, although it does not so state, *Israelsky* is in fact applying the established California doctrine of equitable tolling. ... Although the statutory period commences upon the refusal to defend, it is equitably tolled until the underlying action is terminated by final judgment." (53 C.3d 1077.)

(b) The duty to defend in title insurance policy cases, as in cases involving general liability policies, commences on tender of the defense and continues until the underlying action is concluded. Because the underlying litigation may take

over 2 years (as in this case), the *Central Bank* rule would allow expiration of the statute even before the duty itself expires. "This grim result is untenable. The insured must be allowed the option of waiting until the duty to defend has expired before filing suit to vindicate that duty." (53 C.3d 1077.) "It is harsh to require an insured--often a private homeowner--to defend the underlying action, at the homeowner's own expense, and *simultaneously* to prosecute--again at the homeowner's own expense--a separate action against the title company for failure to defend." (53 C.3d 1078.)

(c) The Legislature has enacted several tolling provisions in which certain periods are not counted toward the time limit, and California decisions have implied tolling exceptions in a variety of situations. (53 C.3d 1078, citing *Lewis v. Superior Court* (1985) 175 C.A.3d 366, 220 C.R. 594, *infra*, §709.) Because the duty to defend is a continuing duty, it is equitable and consistent with the legislative intent to toll the limitations period in which this duty continues from the date of accrual of a cause of action to final judgment. (53 C.3d 1079.) And the insurer will not be prejudiced. By tendering the defense, the insured will have put the insurer on notice that it may be required to defend and must take the steps necessary to prepare a defense. (53 C.3d 1079.)

(d) "As we have observed on other occasions, the contract of insurance is unique in that the purchaser seeks not commercial advantage, but rather peace of mind and security in the event of unforeseen calamity. ... The protection provided pursuant to a policy of title insurance would ring resoundingly hollow were the holder compelled to simultaneously enforce rights under the policy and defend a costly and potentially devastating claim against the subject property. Thus, we recognize the justice and fairness of equitably tolling the insured's action to establish coverage until resolution of the underlying claim." (53 C.3d 1081.) (See *Eaton Hydraulics v. Continental Cas. Co.* (2005) 132 C.A.4th 966, 973, 34 C.R.3d 91 [applying and following accrual rule of *Lambert*, in action by insured against excess general liability insurer for breach of duty to defend]; C.E.B., Title Insurance Practice 2d, §11.93 et seq.; 19 *Pepperdine L. Rev.* 836; 96 A.L.R.3d 1193 [limitations period for action against insurer for breach of contract to defend]; on equitable tolling of limitations period while insurer investigates claim in action for breach of insurance policy, see *infra*, §§757, 758.)

SUPPLEMENT: [This section is current through the latest supplement]



167 of 190 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XIII. STATUTE OF LIMITATIONS: CONTRACT ACTIONS

B. Accrual of Causes of Action.

1. Breach of Contract: In General.

b. Continuing Covenant.

2. Insurer's Breach of Duty To Defend.

cc. Distinction: Insured's Delay in Notifying Insurer of Loss.

3 Witkin Cal. Proc. Actions § 525

[§ 525] Distinction: Insured's Delay in Notifying Insurer of Loss.

In *Tabachnick v. Ticor Title Ins. Co.* (1994) 24 C.A.4th 70, 29 C.R.2d 59, plaintiff purchased a condominium and obtained title insurance from defendant. Plaintiff later discovered a document granting protected tenancy status to his tenant. Without submitting a notice of claim or proof of loss to defendant, plaintiff filed an action against the individuals and entities involved in his purchase of the property. Nearly 3 years after filing the action, he submitted a claim to defendant, demanding payment of the fees and costs incurred in prosecuting the lawsuit, but defendant refused the tender. Plaintiff then filed this action against defendant for breach of the duty to prosecute and for tortious breach of the covenant of good faith and fair dealing. The trial judge sustained defendant's demurrer without leave to amend and dismissed the action, finding that the action was barred by the 2-year statute of limitations (C.C.P. 339(1)). *Held*, affirmed.

(a) Plaintiff maintained that *Lambert v. Commonwealth Land Title Ins. Co.* (1991) 53 C.3d 1072, 282 C.R. 445, 811 P.2d 737, *supra*, §524, which held that accrual occurred on the insurer's refusal to defend, mandated reversal, because plaintiff's action was commenced 9 months after defendant refused to prosecute and therefore was timely. Plaintiff's reading of *Lambert* is too broad. "It suggests that, contrary to the plain language of section 339(1), the commencement of the running of the statute of limitations in title insurance cases is wholly within the power of the insured." (24 C.A.4th 74.)

(b) Defendant contended that accrual occurred when plaintiff discovered the claim against title that gave rise to defendant's potential obligations under the title policy, i.e., when he discovered his tenant's protected tenancy status. Further, defendant sought to distinguish *Lambert* by stating that it did not hold that the only time a cause of action will accrue in an action against a title insurer is when the tender of a claim by the insured is denied. However, that analysis ignored the plain language of *Lambert*: "Applying that analysis to the facts in *Lambert*, the statute in the latter case should have commenced to run ... when the insured was sued. ... However, that is not what *Lambert* said. Rather, the court concluded that the statute commenced to run six months later, when the insurer denied coverage." Moreover, defendant's attempt to reconcile that different result by noting that *Lambert* was a refusal to defend a case, while the

instant case was a refusal to prosecute, was "a distinction without a difference." (24 C.A.4th 75, 76.)

(c) *Lambert* confirmed the holding of *Central Bank v. Transamerica Title Ins. Co.* (1978) 85 C.A.3d 859, 149 C.R. 822, supra, §523, that accrual occurred on the insurer's refusal to defend, but did not expressly adopt the reasoning behind *Central Bank's* conclusion, i.e., that the insured does not suffer appreciable harm, and thus the cause of action does not accrue, until the insurer refuses coverage and the insured is forced to incur attorneys' fees or suffer a default judgment. (24 C.A.4th 76.) Thus, instead of interpreting *Lambert* to have adopted that reasoning by implication, the preferable approach is to draw an analogy to the rule applied in *Title Ins. & Trust Co. v. Los Angeles* (1923) 61 C.A. 232, 214 P. 667, to a certificate of guaranty: accrual occurs when the insured discovers the loss that may be incurred if the title is not as represented in the certificate of title. (24 C.A.4th 77.)

(d) Here, plaintiff's action accrued when he discovered the protected tenancy status of his tenant, thereby creating a title risk that the policy insured against, which occurred no later than the date he filed suit against the individuals and entities involved in his purchase of the property. And, plaintiff did not file against defendant until nearly 3 years after that date. (24 C.A.4th 77.)

SUPPLEMENT: [This section is current through the latest supplement]



168 of 190 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XIII. STATUTE OF LIMITATIONS: CONTRACT ACTIONS

B. Accrual of Causes of Action.

1. Breach of Contract: In General.

c. Prospective Promise.

3 *Witkin Cal. Proc. Actions* § 526

[§ 526] Prospective Promise.

Another method of avoiding the general rule of accrual on breach (*supra*, §520) is to construe the promise as prospective, so that its breach takes place in the future when the promise fails to materialize and substantial damage is suffered. This latter view is followed in at least two important situations:

(1) *Breach of Covenant of Warranty or Quiet Enjoyment in Deed or Lease*. The statute runs not from the time the covenant is made but only when eviction occurs. (See *Miller v. Bean* (1948) 87 C.A.2d 186, 190, 196 P.2d 596; 95 A.L.R.2d 913, 918.)

(2) *Breach of Prospective Warranty in Sale of Goods*. This general approach was used in an unusual fact situation in *Miller*. Defendant mortgagor, in violation of a covenant to pay taxes, allowed them to become delinquent in 1931. Then followed a tax sale to the state, a tax deed to the state, and in 1944 a tax sale to a private purchaser. Plaintiff, holder of the note and deed of trust, sued in 1946. Obviously, the cause of action for breach of covenant to pay taxes was barred 4 years after 1931, and the note itself was outlawed. But defendant had also covenanted in the deed of trust "to protect, preserve and defend said property and the title thereto." *Held*, the action was timely. Although the breaches before 1944 (failing to pay taxes and allowing a tax sale to the state) could have been the basis of an action by plaintiff mortgagee, his only recovery would have been nominal damages. No actual detriment (to his security interest) was suffered while the mortgagor could redeem. The actual damage occurred in 1944 when the property was sold by the state to a private purchaser free from redemption, and plaintiff's security was wiped out. The opinion advances two distinct theories in support of its conclusion that a technical breach of contract that causes no actual damage does not bar a later action when the damage occurs: (a) The statute does not run on that cause of action until actual damage is suffered (87 C.A.2d 189); or (b) a new cause of action arises when the actual damage is suffered (87 C.A.2d 190).

Other cases have followed this approach. (See *Longshore v. Ventura* (1979) 25 C.3d 14, 31, 157 C.R. 706, 598 P.2d 866 [claims for unused overtime at retirement "do not accrue *until retirement* despite an employer's premature attempts to 'cancel' the credits"]; *California Teachers' Assn. v. Governing Bd.* (1985) 169 C.A.3d 35, 44, 214 C.R. 777 [teacher whose claim for earned but unpaid salary was barred by statute of limitations could nevertheless bring action for additional service credits (used in computing retirement benefits) based on correct pay rate, because entitlement to these

credits did not accrue until retirement]; *infra*, §§538, 539.)

SUPPLEMENT: [This section is current through the latest supplement]



169 of 190 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XIII. STATUTE OF LIMITATIONS: CONTRACT ACTIONS

B. Accrual of Causes of Action.

1. Breach of Contract: In General.

d. Election of Remedies.

1. In General.

3 *Witkin Cal. Proc. Actions* § 527

[§ 527] In General.

If the law gives the plaintiff a choice of two or more remedies, both the applicable statute of limitations and the accrual of the cause of action may depend on his or her election.

(1) *Anticipatory Breach*. Where the defendant commits an anticipatory breach, the injured party may elect to sue at once, or to wait until the time when performance is due. If the injured party waits, the statute does not begin to run until that time, i.e., until the anticipatory repudiation becomes an actual breach. (*Union Sugar Co. v. Hollister Estate Co.* (1935) 3 C.2d 740, 746, 47 P.2d 273; *Brewer v. Simpson* (1960) 53 C.2d 567, 593, 2 C.R. 609, 349 P.2d 289; *Ross v. Tabor* (1921) 53 C.A. 605, 612, 613, 200 P. 971; *Trypucko v. Clark* (1983) 142 C.A.3d Supp. 1, 7, 191 C.R. 165; 63 *Harv. L. Rev.* 1208.)

(2) *Actual Breach*. Where the defendant, obligated to perform over a period of time, is guilty of a material breach, the plaintiff may waive it and stand on the contract until the time for final performance. The waiver should not prejudice the plaintiff, i.e., the statute ought not to begin running until the date when the last performance is due. (See 63 *Harv. L. Rev.* 1209.)

In *Tahoe Pines Co. v. Newman* (1922) 59 C.A. 186, 210 P. 445, a purchaser of land defaulted on installments. Although presumably the statute began to run on the liability for each maturing installment (see *supra*, §520), the vendor did not sue on each. Instead he waited until after the last installment was due, and within 4 years thereafter brought an action for specific performance. *Held*, the action was timely. (59 C.A. 188.) Prior to the due date of the last installment, neither party could sue for specific performance because of the lack of mutuality of remedy; accordingly "[t]he cause of action upon which plaintiff has elected to stand did not accrue until that time." (59 C.A. 190.) (The defense of lack of mutuality has since been abolished; see 13 *Summary* (10th), *Equity*, §54.)

Another kind of election postponing the running of the statute is illustrated in *O'Hair v. United States Fidelity & Guaranty Co.* (1935) 9 C.A.2d 307, 49 P.2d 1129. A bond to release an attachment was given in 1922. Judgment was entered in 1923 for plaintiff, and defendant appealed without an undertaking. In 1928 the appeal was dismissed, shortly

thereafter execution was returned unsatisfied, and in 1931 plaintiff sued on the bond. *Held*, the action was timely, being brought within 4 years after execution was returned unsatisfied, when the cause of action on the bond accrued.

Defendant urged that, because of the lack of an undertaking, execution was not stayed pending appeal, and plaintiff therefore had unreasonably delayed execution. The court rejected this contention. "Satisfaction of a judgment is not ordinarily sought by execution until after the judgment becomes final, and a judgment creditor should not be compelled at his peril to seek satisfaction by execution before obtaining a final judgment and he should not be prejudiced in his rights by his failure to do so." (9 C.A.2d 309.)

SUPPLEMENT: [This section is current through the latest supplement]



170 of 190 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XIII. STATUTE OF LIMITATIONS: CONTRACT ACTIONS

B. Accrual of Causes of Action.

1. Breach of Contract: In General.

d. Election of Remedies.

2. Wrongful Termination of Employment.

3 *Witkin Cal. Proc. Actions* § 528

[§ 528] Wrongful Termination of Employment.

(1) *Actual Discharge.* In *Romano v. Rockwell Int.* (1996) 14 C.4th 479, 59 C.R.2d 20, 926 P.2d 1114, citing the text, plaintiff was employed by defendant for 29 years, during which time he generally received excellent performance reviews. However, in his last position as director of human resources, he displeased defendant by allegedly mishandling a personnel matter and was notified that he would be terminated on the date he reached a certain number of points under his retirement plan. Plaintiff was ultimately terminated more than 2 years after receiving that notice, and sued for wrongful discharge on various theories, including breach of an implied contract not to discharge him without good cause and breach of the covenant of good faith and fair dealing. The trial judge ruled that the statute of limitations commenced on both claims when plaintiff received the unequivocal notice of his termination and were thus time-barred. *Held*, reversed; the limitations period did not begin to run until plaintiff was actually terminated, and thus the claims were timely.

(a) Defendant obligated itself not to terminate employment without good cause, and thus plaintiff's breach of contract claims accrued at the time of termination. (14 C.4th 490.)

(b) Alternatively, to the extent the notification of termination was an announcement of defendant's intent not to abide in the future by its contractual obligations, the notification constituted an anticipatory repudiation, providing plaintiff an election of remedies and tolling the running of the statute of limitations. The implied contract not to terminate without good cause, if established, would constitute an ongoing obligation, and plaintiff would have the right to elect whether to rely on the contract despite an initial breach--even assuming the notification were regarded as constituting a present breach. This circumstance would toll the running of the statute of limitations until termination, because plaintiff continued to perform and accept compensation until the time of actual termination, reflecting an election to treat the contract as still in effect. (14 C.4th 490.)

(c) *Marketing West v. Sanyo Fisher (USA) Corp.* (1992) 6 C.A.4th 603, 7 C.R.2d 859, held that the statute of limitations began to run in a wrongful discharge contract action when the employer threatened to fire employees, hired under an oral contract not to discharge them without good cause, if they did not sign new written contracts providing for

termination without good cause, and not later when the employees were actually fired. However, at the time of the threat, the employer had repudiated the earlier oral contract and the employees had accepted the repudiation and entered into superseding written contracts. By the time of their actual termination, the employees were performing under written contracts that provided for termination without cause. "Therefore, the termination was not in violation of their current contract, but only of a contract that had been replaced by the new contract. This circumstance distinguishes *Marketing West* from the present matter." (14 C.4th 491.) (See 31 U.C. Davis L. Rev. 1111 [*Romano*]; on accrual of plaintiff's tort claim for wrongful discharge based on violation of public policy, see *infra*, §563.)

(2) *Constructive Discharge*. *Mullins v. Rockwell Int. Corp.* (1997) 15 C.4th 731, 63 C.R.2d 636, 936 P.2d 1246, extended the accrual rule of *Romano* to a breach of contract action based on constructive termination of employment. Using the same election of remedies rationale employed in *Romano*, the *Mullins* court held that the statute of limitations begins to run when the plaintiff is actually terminated, and not earlier when he learned of the alleged intolerable working conditions. (15 C.4th 738.) The *Mullins* court labeled the concern of the Court of Appeal in *Regents of Univ. of Calif. v. Superior Court* (1995) 33 C.A.4th 1710, 39 C.R.2d 919, *infra*, §563, that the rule would improperly vest employees with sole control over the commencement of the limitations period, and would leave employers unaware of the accrual of a cause of action until an employee resigns, as "misplaced," and expressly disapproved it. (15 C.4th 740, and footnote 1.)

(a) The essence of constructive discharge is that it is a termination of employment secured by the employer through indirect means. The employer remains in control in that he coerces the employee's resignation, and is thus in the same position to be prepared for a possible lawsuit when the coerced resignation finally occurs. (15 C.4th 740.)

(b) "Because (1) constructive discharge is an employer-directed termination of employment, (2) termination normally is the breach alleged, and (3) the employee may elect to overlook earlier adverse actions of the employer in the hope of conciliation, we conclude that the statute of limitations does not begin to run until actual termination." (15 C.4th 743.)

Romano and *Mullins* together hold that an action for breach of an employment contract, based on either actual or constructive discharge, accrues when the employee is actually terminated. *Colores v. Board of Trustees of Calif. State University* (2003) 105 C.A.4th 1293, 130 C.R.2d 347, extends this accrual rule to a tort action for constructive discharge in violation of public policy. Plaintiff, a longtime employee, alleged that defendant university targeted her for removal from employment because of her involvement in uncovering unlawful activities on the campus, and that defendant's conduct exacerbated her preexisting medical problems. *Held*, plaintiff's action accrued when her employment was functionally terminated, i.e., on the day her disability retirement commenced, and not earlier when she applied for disability retirement. Thus, her action was timely filed. (105 C.A.4th 1320.)

SUPPLEMENT: [This section is current through the latest supplement]



171 of 190 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XIII. STATUTE OF LIMITATIONS: CONTRACT ACTIONS

B. Accrual of Causes of Action.

1. Breach of Contract: In General.

e. Discovery of Breach.

1. General Rule.

3 *Witkin Cal. Proc. Actions* § 529

[§ 529] General Rule.

In *April Enterprises v. KTTV* (1983) 147 C.A.3d 805, 195 C.R. 421, plaintiff, the producer of a television show, entered into several successive joint venture contracts with defendant television station. The contracts contained various provisions concerning the parties' syndication rights, and the present litigation arose out of defendant's erasure of videotapes that plaintiff desired to use for syndication. Plaintiff's complaint alleged breach of the covenant of fair dealing and breach of fiduciary duty by a joint venturer. Defendant moved for judgment on the pleadings, and later for judgment of nonsuit on plaintiff's opening statement, contending that both causes were barred by the statute of limitations. The trial judge granted the motions. *Held*, reversed.

(a) *Date of injury and time of discovery.* The cause of action for breach of fiduciary duty did not arise until the tapes were erased, despite alleged prior failure of defendant to cooperate in efforts to syndicate the show. Erasure was the first event causing the appreciable harm allegedly suffered by plaintiff. (147 C.A.3d 823, 824.) But plaintiff did not allege the date of the erasure, a matter of which defendant possessed exclusive knowledge; the complaint merely alleged discovery of the erasure shortly before filing suit. Because further proceedings may establish the date of the erasure at a time long before the suit was filed, the issue will then be whether the "discovery rule" applies, so that the statute did not begin to run until plaintiff, through the exercise of diligence, should have discovered the erasure. (147 C.A.3d 826.)

(b) *Rules compared.* The "date-of-injury" rule advances the fundamental policy underlying statutes of limitation, i.e., protecting potential defendants by affording them an opportunity to gather evidence while the facts are still fresh. (147 C.A.3d 826, citing *Davies v. Krasna* (1975) 14 C.3d 502, 121 C.R. 705, 535 P.2d 1161, *supra*, §503.) The harshness of this rule has been ameliorated in some cases where it is manifestly unjust to deprive plaintiffs of a cause of action before they are aware that they have been injured. Under the "discovery rule" a cause of action accrues when the plaintiff discovers or should have discovered all facts essential to his cause of action. (147 C.A.3d 826, citing and quoting *Leaf v. San Mateo* (1980) 104 C.A.3d 398, 163 C.R. 711, *supra*, §498.)

(c) *Discovery rule applied to breach of fiduciary relationship.* Many cases apply the rule to causes of action for breach of duty by a trustee, agent, corporate director, attorney, or other fiduciary. (147 C.A.3d 827.) "Thus, the

date-of-discovery rule is applied to a fiduciary when a strict adherence to the date of injury rule would result in unfairness to the plaintiff and would encourage wrongdoers to mislead their fiduciary to delay bringing suit. It is particularly appropriate when the defendant maintains custody and control of a plaintiff's property or interests." (147 C.A.3d 827.) The reasoning of these cases is applicable here: Plaintiff and defendant were joint venturers, each occupying a fiduciary relation to the other. "Such a relationship compels a rule of delayed accrual to avoid barring a victim of wrongful conduct from asserting a cause of action before he could reasonably be expected to discover its existence. Moreover, the wrongful act in the instant case consisted of destruction of the videotapes while they were in respondents' exclusive custody and control. Under these circumstances respondents cannot, in fairness, expect the statute of limitations to begin running the moment the clandestine act was completed. By failing to inform appellant of the tape erasure, respondents ran the risk the statute of limitations would not activate until sometime in the future when appellant discovered the injury." (147 C.A.3d 827.)

(d) *Discovery rule applied to breach of contract.*

(1) The discovery rule has been applied in so many California decisions that it "can be regarded as the general rule of accrual in many classes of cases in California." (147 C.A.3d 828.) "It has been applied to nearly every conceivable action for professional malpractice," involving doctors, escrow holders, accountants, stockbrokers, title companies, insurance agents, and attorneys. (147 C.A.3d 829.) The rule has also been applied to tort actions outside the professional malpractice context, including actions for damages from underground trespass, personal injury from negligently manufactured drugs, personal injury based on products liability, invasion of the right to privacy, libel, and damages resulting from latent defects in real property. (147 C.A.3d 829, 830.)

(2) The rule has not, as yet, been held applicable to breach of contract actions except in narrow cases involving fraud. "A common thread seems to run through all the types of actions where courts have applied the discovery rule. The injury or the act causing the injury, or both, have been difficult for the plaintiff to detect. In most instances, in fact, the defendant has been in a far superior position to comprehend the act and the injury. And in many, the defendant had reason to believe the plaintiff remained ignorant he had been wronged. Thus, there is an underlying notion that plaintiffs should not suffer where circumstances prevent them from knowing they have been harmed. And often this is accompanied by the corollary notion that defendants should not be allowed to knowingly profit from their injuree's ignorance." (147 C.A.3d 831.)

(3) The common thread is present in this action. Ordinarily accrual in contract breach begins at the time of injury, of which the plaintiff is usually aware; but here plaintiff could not have discovered the facts of defendant's secret erasure of the tapes. (147 C.A.3d 832, and footnote 15.) The broad view that the discovery rule applies to all breach of contract cases is not adopted by this opinion, but the rule may properly be applied to unusual cases such as the one presented here: "[W]e hold the discovery rule may be applied to breaches which can be, and are, committed in secret and, moreover, where the harm flowing from those breaches will not be reasonably discoverable by plaintiffs until a future time." (147 C.A.3d 832.)

Later cases have applied the discovery rule in breach of contract actions. (See *Lee v. Escrow Consultants* (1989) 210 C.A.3d 915, 922, 259 C.R. 117 [following *April Enterprises* by applying discovery rule to breach of contract by escrow agency based on unauthorized withdrawal of escrow funds under false signature]; 65 *Butterfield v. Chicago Title Ins. Co.* (1999) 70 C.A.4th 1047, 1053, 83 C.R.2d 40 [applying delayed discovery rule of *Tabachnick v. Ticor Title Ins. Co.* (1994) 24 C.A.4th 70, 29 C.R.2d 59, supra, §525; accrual in breach of title insurance action occurred when policyholder received letter from third party asserting right to easement over insured's property]; *Gryczman v. 4550 Pico Partners, Ltd.* (2003) 107 C.A.4th 1, 4, 131 C.R.2d 680 [applying delayed discovery rule of *April Enterprises*; action against property owner accrued when plaintiff discovered that defendant had secretly sold property to another in violation of parties' contract giving plaintiff right of first refusal to purchase].)

SUPPLEMENT: [This section is current through the latest supplement]



172 of 190 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XIII. STATUTE OF LIMITATIONS: CONTRACT ACTIONS

B. Accrual of Causes of Action.

1. Breach of Contract: In General.

e. Discovery of Breach.

2. Distinction: Action on Title Insurance Policy.

3 *Witkin Cal. Proc. Actions* § 530

[§ 530] Distinction: Action on Title Insurance Policy.

In *Smeaton v. Fidelity Nat. Title* (1999) 72 C.A.4th 1000, 85 C.R.2d 591, plaintiff sued defendant title insurer after it misrepresented that the property plaintiff purchased would contain access easements rights. The action was filed within 2 years after the policy was delivered to plaintiff, even though plaintiff knew of the alleged defect in the policy earlier. The trial judge ruled that the action accrued when plaintiff discovered the defect, and was thus untimely under the 2-year limitations period of *C.C.P.* 339(1) (see *supra*, §482). *Held*, reversed; the action did not accrue until the policy was issued, and the action was therefore timely.

(a) Although *C.C.P.* 339(1) provides that its limitations period does not accrue until the discovery of the loss or damage, it also expressly refers to an action founded on a contract, obligation, or liability evidenced by a policy of title insurance. A claim founded on a title policy is one that relies on the language within a written instrument or contract. Accordingly, a claim founded on a title policy does not accrue until the title policy is issued. (72 C.A.4th 1003, 1004.)

(b) It was immaterial that the policy provided coverage as of the date of recording title and that a delay in delivery after typing the policy was customary. "Any delay in typing and delivering a policy is attributable solely to, and solely within the control of, the insurer. It seems likely that most discoveries of loss or damage occur after issuance of the policy. In circumstances such as those presented here, where the discovery occurred before issuance of the policy, we find no persuasive reason to grant the benefit of the additional time to the insurer, which had exclusive control over the delay in typing and delivering the policy. Moreover, because a claim founded upon a title policy relies upon the policy's language, an insured could not institute a lawsuit prior to reviewing the policy. Although the insured may have discovered facts leading the insured to believe a claim existed, the insured could not be certain of the viability of the claim before reviewing the actual language contained in the policy." (72 C.A.4th 1004.)

SUPPLEMENT: [This section is current through the latest supplement]



173 of 190 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XIII. STATUTE OF LIMITATIONS: CONTRACT ACTIONS

B. Accrual of Causes of Action.

2. Conditional Obligations.

a. Obligation Dependent on Happening of Event.

3 Witkin Cal. Proc. Actions § 531

[§ 531] Obligation Dependent on Happening of Event.

(1) *Promise To Pay out of Particular Fund.* If the obligation of the defendant is conditional on the happening of an event or the act of a third person, the cause of action does not accrue until that time. A familiar example is a promise to pay out of a particular fund. The existence of the fund is a condition of the debtor's liability, and the statute does not begin to run until the fund is created. (*Bradley Co. v. Ridgeway* (1936) 14 C.A.2d 326, 336, 58 P.2d 194 [debtor, liable on bonds, admitted that it had failed to create fund out of which they were to be paid]; *Pitzer v. Wedel* (1946) 73 C.A.2d 86, 89, 165 P.2d 971 [promise to pay out of proceeds from sale of crops]; *Hayes v. 2831 Ellendale Place* (1963) 223 C.A.2d 362, 367, 36 C.R. 94, quoting the text [promise to pay from fund created by sale of property]; see 51 Am.Jur.2d (2000 ed.), *Limitation of Actions* §161; but see *Ritter v. Franklin* (1942) 50 C.A.2d 844, 849, 123 P.2d 866 [rule recognized but held inapplicable under facts].)

Of course, if the promise (as in a bond) is a general and unconditional obligation, the absence of a fund for payment does not prevent the running of the statute from the due date. Hence, the bondholder must sue and convert his claim into a judgment before the statutory period ends. (*Irvine v. Bossen* (1944) 25 C.2d 652, 655, 155 P.2d 9; *Farwell v. San Jacinto & Pleasant Valley Irr. Dist.* (1920) 49 C.A. 167, 171, 192 P. 1034.)

(2) *Promise To Pay Money "When Able."* The same principle applies to a debtor's promise to pay money "when able." Ability to pay is a condition precedent to the debtor's liability, and the statute does not begin to run until the debtor is able to do so. (See *Van Buskirk v. Kuhns* (1913) 164 C. 472, 474, 129 P. 587; *Horacek v. Smith* (1948) 33 C.2d 186, 191, 199 P.2d 929; *Fuller v. White* (1948) 33 C.2d 236, 238, 201 P.2d 16; *Maurer v. Bernardo* (1931) 118 C.A. 290, 294, 5 P.2d 36; 67 A.L.R.5th 479 [when statute begins to run against promise to pay debt "when able," "when convenient," etc.].)

(3) *Other Examples.* Other examples are found in the following cases: *Bartlett v. Odd Fellows' Savings Bank* (1889) 79 C. 218, 223, 21 P. 743 [attorney's contract, payment of compensation dependent on client's receiving satisfaction of claim sued on]; *Ghirardelli v. Peninsula Properties Co.* (1940) 16 C.2d 494, 498, 107 P.2d 41 [supplemental agreement suspending creditor's remedies until trustee for debtor had made accounting]; *Los Angeles v. Security First Nat. Bank of Los Angeles* (1948) 84 C.A.2d 575, 579, 191 P.2d 78 [statutory liability of indigent to

reimburse county for aid arises only when he acquires property].

(4) *Distinction: Independent Covenants.* The principle discussed above does not apply where the parties are bound by independent covenants. In that case, the defendant's independent liability may accrue and the statute may run even though the plaintiff's counterperformance has not been rendered. (*Donovan v. Judson* (1889) 81 C. 334, 338, 22 P. 682.)

SUPPLEMENT: [This section is current through the latest supplement]



174 of 190 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XIII. STATUTE OF LIMITATIONS: CONTRACT ACTIONS

B. Accrual of Causes of Action.

2. Conditional Obligations.

b. Obligation Arising on Plaintiff's Demand.

1. Demand Within Reasonable Time.

3 *Witkin Cal. Proc. Actions* § 532

[§ 532] Demand Within Reasonable Time.

In some situations the obligation of the defendant does not arise unless the plaintiff makes a demand. Superficially the problem is similar to that just considered (*supra*, §531), and it might be said that, until the condition precedent to the defendant's obligation is performed, no cause of action accrues. But the fundamental difference is that here the condition is not an event but rather an act of the plaintiff creditor; and the creditor should not be permitted to control and indefinitely suspend the running of the statute by neglecting or deliberately refusing to perform the condition precedent to the creditor's own action. Hence, the courts have taken the position that the creditor should make his or her demand within a "reasonable time," and the statute will commence to run after that time has elapsed. (See *Bass v. Hueter* (1928) 205 C. 284, 287, 270 P. 958; *Woollomes v. Gomes* (1938) 26 C.A.2d 461, 465, 79 P.2d 728; *Ilse v. Burgess* (1938) 28 C.A.2d 654, 657, 83 P.2d 527 [rule applied even though plaintiff alleged that oral agreement with decedent called for payment "when needed"; plaintiff's "need" was equivalent to "desire"]; *Stafford v. Oil Tool Corp.* (1955) 133 C.A.2d 763, 765, 284 P.2d 937; *Ginther v. Tilton* (1962) 206 C.A.2d 284, 286, 23 C.R. 601; *Phillis v. Santa Barbara* (1964) 229 C.A.2d 45, 55, 40 C.R. 27; *Cutujian v. Benedict Hills Estates Assn.* (1996) 41 C.A.4th 1379, 1385, 1387, 49 C.R.2d 166 [limitations period for action to enforce affirmative covenant running with land, and, in particular, duties included in CCRs (see 12 *Summary* (10th), *Real Property*, §114 et seq.), commences when demand for performance is made]; 63 *Harv. L. Rev.* 1211; 17 *A.L.R.2d* 1251 [covenant running with land and requiring affirmative acts by covenantor]; 51 *Am.Jur.2d* (2000 ed.), *Limitation of Actions* §§161, 162.)

SUPPLEMENT: [This section is current through the latest supplement]



175 of 190 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XIII. STATUTE OF LIMITATIONS: CONTRACT ACTIONS

B. Accrual of Causes of Action.

2. Conditional Obligations.

b. Obligation Arising on Plaintiff's Demand.

2. What Constitutes Reasonable Time.

3 *Witkin Cal. Proc. Actions* § 533

[§ 533] What Constitutes Reasonable Time.

(1) *General Rule: Double Statutory Period.* The "reasonable time" allowed to make the demand is usually said to depend on the circumstances of each particular case. But this approach would invite litigation of the issue and result in all sorts of contradictory decisions. Hence, the courts have added the qualification that, in the absence of peculiar circumstances, a period equal to that of the statute of limitations is reasonable. Under this theory the plaintiff has at most a double statutory period (4 plus 4 years on written contracts, 2 plus 2 years on unwritten obligations). (See *Bass v. Hueter* (1928) 205 C. 284, 287, 270 P. 958 [19 years too long]; *Jenkins v. Marsh* (1913) 22 C.A. 8, 9, 132 P. 1051 [oral agreement; 5 years too long]; *Fall v. Lincoln Mortg. Co.* (1931) 115 C.A. 651, 654, 2 P.2d 58 [restitution for failure of consideration: 4 1/2 years too long]; *Woollomes v. Gomes* (1938) 26 C.A.2d 461, 466, 79 P.2d 728 [9 years too long]; *Stafford v. Oil Tool Corp.* (1955) 133 C.A.2d 763, 766, 284 P.2d 937.)

In *Ginther v. Tilton* (1962) 206 C.A.2d 284, 23 C.R. 601, in August 1955, plaintiff and defendant, both carpenters, orally agreed to exchange work on each other's homes. Plaintiff worked about 300 hours on defendant's home, but advised defendant that he would not start building his home until lot payments were completed. In March 1959, he completed them and demanded defendant's performance, which was refused. *Held*, judgment of nonsuit for defendant affirmed; the time of performance was conditioned on an event wholly within plaintiff's control, and his failure to make demand within the 2-year period of the statute of limitations was fatal to his claim. (206 C.A.2d 286.)

(2) *Distinction: Where Parties Agree That Plaintiff Has Unlimited Time.* The "reasonable time" requirement is not strictly applied in cases where the parties have made it clear that the plaintiff has relatively unlimited time to make a demand and therefore have contemplated considerable delay. Thus, an agreement that defendant will repurchase stock from plaintiff "at any time after 6 months" or "at any time" does not require that plaintiff exercise a repurchase option within 4 years. (*Vickrey v. Maier* (1912) 164 C. 384, 390, 129 P. 273; *Kaplan v. Reid Bros.* (1930) 104 C.A. 268, 272, 285 P. 868.) In *Neale v. Morrow* (1907) 150 C. 414, 88 P. 815, unusual language in a note, providing for payment 5 days "after actual demand," was interpreted as an agreement that the obligation should not mature until actual demand. (150 C. 418.)

(3) *Distinction: Obligation To Pay Money on Demand.* Where the obligation is simply to pay money on demand, no "reasonable" or other time is added to the limitations period. The "demand" is not viewed as a condition but merely as an indication of the immediate maturity of the debt. Hence, the statute begins to run at the inception of the agreement, when the obligation was incurred. (*Tilden Lumber Co. v. Perino* (1934) 2 C.A.2d 133, 134, 37 P.2d 466; *Carrasco v. Greco Canning Co.* (1943) 58 C.A.2d 673, 675, 137 P.2d 463; see 63 Harv. L. Rev. 1212; 71 A.L.R.2d 284 [title]; but see 14 A.L.R.4th 1385 [accrual of action based on oral promise to pay money with no time specified for repayment].)

SUPPLEMENT: [This section is current through the latest supplement]



176 of 190 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XIII. STATUTE OF LIMITATIONS: CONTRACT ACTIONS

B. Accrual of Causes of Action.

2. Conditional Obligations.

b. Obligation Arising on Plaintiff's Demand.

3. Distinction: Other Person's Act.

3 Witkin Cal. Proc. Actions § 534

[§ 534] Distinction: Other Person's Act.

If the condition of the obligation is some other person's act, and the plaintiff's demand would merely bring pressure on that person, failure to make the demand does not start the running of the statute. In *Williams v. Bergin* (1897) 116 C. 56, 47 P. 877, plaintiff contractors were entitled to recover for street work on the street superintendent's assessment and issuance of a warrant; and, on the latter's acceptance of the work, the contractors were entitled to demand the assessment and warrant. The superintendent accepted the work but delayed issuance of the warrant for over 3 years. *Held*, on demurrer, the action thereafter was timely; the right of action was dependent on an official act of a public officer and the complaint did not show that plaintiffs, rather than the officer, were lacking in diligence. (116 C. 61.) (See *Williams v. Pacific Mut. Life Ins. Co.* (1986) 186 C.A.3d 941, 950, 231 C.R. 234, quoting the text.)

SUPPLEMENT: [This section is current through the latest supplement]



177 of 190 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XIII. STATUTE OF LIMITATIONS: CONTRACT ACTIONS

B. Accrual of Causes of Action.

2. Conditional Obligations.

c. Obligation Subject to Acceleration Clause.

3 *Witkin Cal. Proc. Actions* § 535

[§ 535] Obligation Subject to Acceleration Clause.

An acceleration clause allows a creditor to sue at once for the entire amount of an obligation if a default is made in an installment of principal or interest. If the clause is expressly optional, the statute clearly will not begin to run until the creditor elects to take advantage of it. And even though the clause is in terms absolute or automatic, it is generally held not self-operative, i.e., it is interpreted in accordance with its manifest purpose, as giving the creditor an election to declare the whole due or not. Hence, the statute does not begin to run on installments not yet due until the creditor, by some affirmative act, manifests his or her election to declare the entire sum due. (See *California Savings & Loan Soc. v. Culver* (1899) 127 C. 107, 112, 59 P. 292; *Congregational Church Bldg. Soc. v. Osborn* (1908) 153 C. 197, 201, 94 P. 881; *Jones v. Wilton* (1938) 10 C.2d 493, 500, 75 P.2d 593; *Andrews v. Zook* (1932) 125 C.A. 19, 20, 13 P.2d 518; *Stewart v. Claudius* (1937) 19 C.A.2d 349, 353, 65 P.2d 933; *Trigg v. Arnott* (1937) 22 C.A.2d 455, 458, 71 P.2d 330; 51 *Am.Jur.2d* (2000 ed.), *Limitation of Actions* §166.)

SUPPLEMENT: [This section is current through the latest supplement]



178 of 190 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XIII. STATUTE OF LIMITATIONS: CONTRACT ACTIONS

B. Accrual of Causes of Action.

2. Conditional Obligations.

d. Obligation Subject to Prepayment Fee.

3 Witkin Cal. Proc. Actions § 536

[§ 536] Obligation Subject to Prepayment Fee.

A prepayment fee clause allows a creditor to collect a reasonable charge from a debtor who elects to pay all or part of the principal of an obligation before its maturity. (See 1 *Summary* (10th), *Contracts*, §512.) In determining when a cause of action accrues for purposes of the applicable statute of limitations, there is no reason to distinguish between a payment made under a prepayment fee clause and one made on an installment note or under an acceleration clause (see *supra*, §535). In each of these cases, the cause of action accrues when the creditor demands payment or the debtor fails to pay by the due date. (*Garver v. Brace* (1996) 47 *C.A.4th* 995, 1000, 55 *C.R.2d* 220, citing the text [action to recover prepayment fee contained in promissory note accrued when creditor demanded payment, not earlier when note was executed].)

SUPPLEMENT: [This section is current through the latest supplement]



179 of 190 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XIII. STATUTE OF LIMITATIONS: CONTRACT ACTIONS

B. Accrual of Causes of Action.

3. Breach of Warranty.

a. In General.

3 Witkin Cal. Proc. Actions § 537

[§ 537] In General.

(1) *General Rule.* An action for breach of warranty is on a contract and the cause of action accrues at the time of breach. This means that, if goods sold do not conform to express or implied warranties, the statute begins to run immediately, at the time of sale. The injustice of the rule is apparent when two situations are contrasted: (a) Defendant sells defective goods by false representations or concealment amounting to actual fraud; (b) defendant sells goods equally defective and in breach of warranty but without actual fraud. After several years the defects are discovered. In each case a substantive liability is imposed on the defendant and an adequate period is allowed for plaintiff's action if plaintiff knows that he or she has a cause of action. In the first situation plaintiff's cause of action does not accrue until plaintiff discovers the facts (*infra*, §659); in the second, however, the cause accrues at once and the statute may bar the action before plaintiff is aware of the right to sue. No satisfactory reason for this difference in accrual can be given, but the general rule, although criticized, seems well established. (See *Mary Pickford Co. v. Bayly Bros.* (1939) 12 C.2d 501, 521, 525, 86 P.2d 102; 63 Harv. L. Rev. 1202.)

(2) *Uniform Commercial Code.* The Uniform Commercial Code established a 4-year limitations period for breach of warranty in all contracts of sale, oral or written (see *supra*, §519), but retained the rule on accrual "when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach." The breach occurs "when tender of delivery is made." (U.C.C. 2725(2); see *Krieger v. Nick Alexander Imports* (1991) 234 C.A.3d 205, 215, 285 C.R. 717, *infra*, §539; 4B Anderson 3d, §2-725:104 et seq.; for prospective warranty exception, see *infra*, §539; on promises or attempts by seller to repair as tolling statute, see *infra*, §760.)

However, in an action for indemnification for damages under an express or implied warranty based on a sales contract, U.C.C. 2725 does not apply; the traditional time limitations prevail, and the 4-year period for an action for indemnity (C.C.P. 337(1)) applies. (*Carrier Corp. v. Detrex Corp.* (1992) 4 C.A.4th 1522, 1527, 1528, 1529, 6 C.R.2d 565.)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Uniform Commercial Code.* See *Cardinal Health 301 v. Tyco Electronics Corp.* (2008) 169 C.A.4th 116, 134, 87 C.R.3d 5 [breach of contract claim based solely on breach of warranty is governed by limitations period in U.C.C.

2725(2)].



180 of 190 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XIII. STATUTE OF LIMITATIONS: CONTRACT ACTIONS

B. Accrual of Causes of Action.

3. Breach of Warranty.

b. Prospective Warranty.

1. Doctrine of Prospective Warranty.

3 *Witkin Cal. Proc. Actions* § 538

[§ 538] Doctrine of Prospective Warranty.

(1) *Nature of Doctrine.* A substantial departure from the harsh rule of accrual on breach is made in cases involving express warranties found to be of a "future" or "prospective" nature. Under the doctrine of prospective warranty, if the seller promises that something shall or shall not happen within a future time, the cause of action does not accrue during that time unless and until the harm occurs. The clearest examples have been cases involving warranties in the sale of nursery stock or planting seed. The description of the kind and quality is in effect a representation that, after they are planted and reach maturity, they will conform. The statute does not begin to run until, on maturity, it can be ascertained that the warranty was breached. (See *Ackerman v. A. Levy & J. Zentner Co.* (1935) 7 C.A.2d 23, 25, 45 P.2d 386; *Sweet v. Watson's Nursery* (1937) 23 C.A.2d 379, 381, 73 P.2d 284; 63 Harv. L. Rev. 1202; 21 So. Cal. L. Rev. 430.)

(2) *Illustrations.* The doctrine was given an extended examination and a broad application in *Southern Calif. Enterprises v. D. N. & E. Walter & Co.* (1947) 78 C.A.2d 750, 178 P.2d 785. An oral warranty was made that a carpet would last for 6 to 8 years. The suit, more than 2 years after the sale, was held timely. The court distinguished between (a) the cause of action for breach of warranty of present quality of the carpet, barred; and (b) the cause of action for breach of the prospective warranty, which accrued when the carpet became unusable as a result of its defective fabrication. (78 C.A.2d 753.) (See *Crawford v. Duncan* (1923) 61 C.A. 647, 651, 215 P. 573 [prospective warranty theory applied to surgeon's oral express warranty that radium treatments would not leave permanent scar]; 21 So. Cal. L. Rev. 429 [*Southern Calif. Enterprises*]; but see *Riesen v. Leeder* (1961) 193 C.A.2d 580, 582, 14 C.R. 469 [decided under former 2-year statute; where defect was discovered more than 2 years before cross-complaint was filed, cross-complainant was barred].)

SUPPLEMENT: [This section is current through the latest supplement]



181 of 190 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XIII. STATUTE OF LIMITATIONS: CONTRACT ACTIONS

B. Accrual of Causes of Action.

3. Breach of Warranty.

b. Prospective Warranty.

2. Uniform Commercial Code.

3 *Witkin Cal. Proc. Actions* § 539

[§ 539] Uniform Commercial Code.

(1) *In General.* The Uniform Commercial Code states the doctrine in the following language: "A breach of warranty occurs when tender of delivery is made, *except* that where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance the cause of action accrues when the breach is or should have been discovered." (U.C.C. 2725(2).) (See 8 *U.C.L.A. L. Rev.* 333; 4B Anderson 3d, §2-725:121 et seq.; 81 *A.L.R.5th* 483 [what constitutes warranty explicitly extending to "future performance" for purposes of statute].)

(2) *Illustrations.* The language of this provision was construed in *Krieger v. Nick Alexander Imports* (1991) 234 C.A.3d 205, 285 C.R. 717. Plaintiffs alleged that they had received a written automobile warranty that all defects would be repaired for a period of 36 months or within the first 36,000 miles of use. (234 C.A.3d 216.) Defendant took the position that it did not promise that its automobiles would perform satisfactorily during the warranty period, but only promised to repair any defects that occurred. (234 C.A.3d 217.) However, "[a] promise to repair defects that occur during a future period is the very definition of an express warranty of future performance." (234 C.A.3d 217.) Hence, an issue of material fact arose as to the applicability of the accrual on discovery rule of U.C.C. 2725(2). (234 C.A.3d 218.)

The opinion adds that its conclusion is consistent with the policy of the Song-Beverly Consumer Warranty Act (see supra, §519) requiring buyers to give the seller of a "lemon" automobile a reasonable opportunity to repair it. "If we ... held that a cause of action for breach of express warranty accrues on tender of delivery, before the seller has an opportunity to repair any defects, we would undermine the legislative purpose that the parties attempt to resolve any deficiencies in performance before resorting to the remedies provided in the Act. In light of our conclusion that actions for breach of warranty under the Act and under the California Uniform Commercial Code are governed by the same statute of limitations, the same rule of accrual must apply to both causes of action." (234 C.A.3d 218.)

In a case of first impression, *Carrau v. Marvin Lumber & Cedar Co.* (2001) 93 C.A.4th 281, 112 C.R.2d 869, discussed the scope of the "future performance" exception to the 4-year limitations period of U.C.C. 2725(2). Plaintiff purchased windows from defendant manufacturer. They were treated with an ineffective preservative and thus subject to premature rotting. Plaintiff filed an action more than 4 years after the windows had been delivered, alleging various

theories, including breach of express warranties based on defendant's advertisements that its products were "durable and long lasting." *Held*, the action was time-barred. Although no California case has decided the issue, the "future performance" exception has been applied by the majority of courts in other jurisdictions only where the seller explicitly has agreed to warrant its product for a defined period of time. (93 C.A.4th 290, 291.) In the absence of a defined period, general assertions about the performance or durability of a product, such as the assertions made by defendant's advertisements, do not explicitly extend to future performance of the product. (93 C.A.4th 292.)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Illustrations.* See *Cardinal Health 301 v. Tyco Electronics Corp.* (2008) 169 C.A.4th 116, 130, 87 C.R.3d 5 [electrical connector manufacturer's warranty that spring connections would work for 50,000 cycles did not fall within future performance exception in U.C.C. 2725(2), and thus, limitations period began to run on tender of goods; warranty did not specify future date or time and did not pertain to time period that could be determined by reference to external source, and it was possible to test connectors for defect without waiting for 50,000 cycles].



182 of 190 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XIII. STATUTE OF LIMITATIONS: CONTRACT ACTIONS

B. Accrual of Causes of Action.

4. Accounts: Date of Last Item.

a. Mutual, Open, and Current Account.

3 Witkin Cal. Proc. Actions § 540

[§ 540] Mutual, Open, and Current Account.

(1) *Statement of Rule.* The 4-year period applicable to actions on accounts (*supra*, §515) commences to run at the date of the last item. *C.C.P.* 337(2), stating the 4-year limitations period on "a mutual, open and current account," is supplemented by *C.C.P.* 344, stating that in an action to recover a balance due on an account "the cause of action is deemed to have accrued from the time of the last item proved in the account on either side." Unlike a book account between a creditor and a debtor, the mutual account is based on reciprocal demands. "It is not enough, to constitute a mutual account, that there exist debts which could be the subject of setoff; there must be an understanding, express or implied from the nature of the dealings between the parties, that charges on each side are to extinguish *pro tanto* those on the other side, so that there exists but one indivisible liability arising from the series of transactions." (*Parker v. Shell Oil Co.* (1946) 29 C.2d 503, 513, 175 P.2d 838; *Carter v. Canty* (1919) 181 C. 749, 757, 186 P. 346.)

(2) *Format.* If this test is met, no formal method of record keeping need be shown; the items may be in a book or on loose sheets or in memoranda. (See *Millet v. Bradbury* (1895) 109 C. 170, 173, 41 P. 865; *Parker v. Shell Oil Co.*, *supra*, 29 C.2d 513; *Arocena v. Sawyer* (1923) 60 C.A. 581, 589, 213 P. 523 [plaintiff employees performed services for agreed monthly wage, and time and wages were entered; defendant employer supplied them with goods from time to time, and charges were entered]; *Schwindt v. Billiwhack Stock Farms, Ltd.* (1941) 45 C.A.2d 208, 210, 113 P.2d 902.) However, claims based on an express contract cannot be saved from the bar of the statute by pleading them as mutual accounts. (See *Parker v. Shell Oil Co.*, *supra*, 29 C.2d 505 [pointing out that cases on book accounts (see *supra*, §516) are equally applicable to mutual accounts].)

SUPPLEMENT: [This section is current through the latest supplement]



183 of 190 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XIII. STATUTE OF LIMITATIONS: CONTRACT ACTIONS

B. Accrual of Causes of Action.

4. Accounts: Date of Last Item.

b. Book Account.

3 *Witkin Cal. Proc. Actions* § 541

[§ 541] Book Account.

"[T]he action is not barred piecemeal as to the several items, because in an action on the book account they are all to be regarded as a part of one entire account and cause of action." (*Egan v. Bishop* (1935) 8 C.A.2d 119, 123, 47 P.2d 500; see *Furlow Pressed Brick Co. v. Balboa Land & Water Co.* (1921) 186 C. 754, 763, 200 P. 625 [statute did not start running until date of last item of part payment, even though last item of goods was furnished long before]; *Bailey v. Hoffman* (1929) 99 C.A. 347, 350, 278 P. 498; *Davidson v. Tilden* (1978) 86 C.A.3d 283, 287, 150 C.R. 194, citing the text; *R.N.C. v. Tsegeletos* (1991) 231 C.A.3d 967, 973, 283 C.R. 48 [action accrued when last entry was made and account became settled and closed, not when debtor thereafter made partial payment of amount owed]; *supra*, §515.)

The usefulness to the creditor of the flexible concepts of "book account" and "last item" is well illustrated in *Gardner v. Rutherford* (1943) 57 C.A.2d 874, 136 P.2d 48. Plaintiff had various claims against a corporation (for advances, rent, and salary), which were carried in four separate ledger accounts. As to the loan account, after some advances in 1931 there were no advances, payments, or charges, and hence no new entries, until 1936, when new advances and payments began. *Held*, the action, brought in 1939, was timely. (a) The action was still on a book account, and the rule of accrual at the date of the last item applied despite the intervening lapse of more than 4 years between items. (b) Moreover, despite the separate ledgers and the separate counts of plaintiff's complaint based on each, the four "accounts" together comprised the complete or combined account, and on this basis the evidence showed no 4-year lapse between items. (57 C.A.2d 883.)

SUPPLEMENT: [This section is current through the latest supplement]



184 of 190 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XIII. STATUTE OF LIMITATIONS: CONTRACT ACTIONS

B. Accrual of Causes of Action.

4. Accounts: Date of Last Item.

c. Account Stated.

3 Witkin Cal. Proc. Actions § 542

[§ 542] Account Stated.

The statute dealing with account stated (*C.C.P. 337(2)*) has the following proviso: "[W]here an account stated is based upon an account of one item, the time shall begin to run from the date of said item, and where an account stated is based upon an account of more than one item, the time shall begin to run from the date of the last item." This self-explanatory language has given no trouble in interpretation, and the few cases on the statute of limitations were mainly concerned with whether the evidence showed an account stated. (See *Hallford v. Baird* (1938) 27 *C.A.2d* 384, 389, 392, 80 *P.2d* 1040 [no account stated]; 1 *Summary* (10th), *Contracts*, §974.)

SUPPLEMENT: [This section is current through the latest supplement]



185 of 190 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XIII. STATUTE OF LIMITATIONS: CONTRACT ACTIONS

B. Accrual of Causes of Action.

5. Action Against Surety.

a. Liability Accrues When Principal Obligation Matures.

3 *Witkin Cal. Proc. Actions* § 543

[§ 543] Liability Accrues When Principal Obligation Matures.

(1) *In General.* The ordinary 4-year period for an action on a written contract applies, with some exceptions, to a suretyship contract. (See *supra*, §508.) But the surety's liability is secondary and conditional, i.e., the liability does not arise until the principal obligation becomes due. Hence, the cause of action normally accrues at the same time that the cause of action accrues against the principal debtor. Applying this rule to undertakings to stay execution, the 4-year statute begins to run in favor of the surety at the time the judgment is affirmed on appeal (the time when the stay ends and the surety becomes liable). Because the judgment itself does not outlaw for 10 years (*infra*, §675), the liability of the surety may cease before that of the judgment debtor. This somewhat anomalous result is compelled by the difference in the nature of the obligations. The surety's obligation is on an instrument in writing, while the judgment debtor's obligation is on a judgment. (See *Charles F. Harper Co. v. De Witt Mortg. & Realty Co. (1938) 10 C.2d 467, 470, 75 P.2d 65*; Cal. Civil Practice, 3 Business Litigation, §38:14 et seq. [action by creditor against surety]; 44 *A.L.R.2d 807* [bond of personal representative].)

(2) *Bonds of Guardians and Conservators.* Former Prob.C. 1487 limited the action against sureties on a guardian's bond to 3 years (plus any period of disability) from the removal of the guardian. But the ward's cause of action for the guardian's misappropriation did not accrue against the sureties until the guardian's accounts were settled or an order was rendered determining the fact of the wrong and the amount due the ward. The result was that a final order of discharge of the guardian started the statute running and, unless the ward obtained a final order settling the accounts within 3 more years, the cause of action against the sureties would be barred before it had accrued. (See *Keck v. Keck (1936) 16 C.A.2d 521, 522, 61 P.2d 79* [action was barred].)

In *Burns v. Massachusetts Bonding & Ins. Co. (1944) 62 C.A.2d 962, 146 P.2d 24*, an order removing the guardian was made in July 1935; exceptions to his accounts were promptly filed in August 1935; a referee held numerous hearings and the order of settlement was made in July 1937; the guardian appealed and judgment on appeal in favor of the ward became final in April 1940, and this action against the sureties was filed in May 1940. The court held the action timely on the ground that the guardian's appeal tolled the statute. In answer to the contention (based on such cases as *Keck*) that the statute contained only a disability exception, the court said: "Thus, in nearly every case, a fraudulent guardian could defeat the ward's action against the surety by appealing from the order fixing the guardian's

liability. In nearly every case, if appellant's interpretation is correct, no matter how diligent the ward might be, the ward's action would be barred before it arose. There would be no way the ward could protect himself. It cannot be assumed that the Legislature intended any such harsh and inequitable result. In providing that guardians must give a bond to protect the ward, we must assume that the Legislature intended that such protection should be reasonably effective." (62 C.A.2d 971.)

The problem of the *Keck* holding was solved by *Prob.C. 2333* (see 14 *Summary* (10th), *Wills and Probate*, §986):

(a) The statute applies to bonds of guardians and conservators. (*Prob.C. 2333(a)*.)

(b) The action against sureties is now extended to 4 years and the limitations period begins to run from the discharge or removal of the guardian or conservator, or from the date the order surcharging the guardian or conservator becomes final, whichever is later. (*Prob.C. 2333(b)*); see *Estate of Mason* (1990) 224 C.A.3d 634, 638, 639, 274 C.R. 61 [former 3-year period of *Prob.C. 2333(b)* prevailed over 4-year period of *C.C.P. 337* (action on written instrument, *supra*, §508); statute begins to run when surcharge order becomes final].)

(c) In any case, and notwithstanding *Prob.C. 2103(a)* (fraud, conspiracy, or misrepresentation in obtaining judgment or order in guardianship or conservatorship proceeding; see 14 *Summary* (10th), *Wills and Probate*, §962), the action against the sureties must be commenced within 6 years after the date of judgment under *Prob.C. 2103(b)* or the later order under *Prob.C. 2333(b)* becomes final. (*Prob.C. 2333(c)*; see 25 *Pacific L. J.* 379.)

SUPPLEMENT: [This section is current through the latest supplement]



186 of 190 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XIII. STATUTE OF LIMITATIONS: CONTRACT ACTIONS

B. Accrual of Causes of Action.

5. Action Against Surety.

b. Liability Ceases When Principal Obligation Is Barred.

1. Former Rule Refusing To Discharge Sureties.

3 Witkin Cal. Proc. Actions § 544

[§ 544] Former Rule Refusing To Discharge Sureties.

(1) *Nature of Problem.* One of the controversial questions in the law of suretyship is whether the "collateral liability" of the surety is discharged when the statute of limitations has run on the obligation of the principal debtor. The problem may arise, e.g., where the principal debtor is a contractor liable under an oral agreement (2-year period), or is a sheriff or other public official whose liability is created by statute (3-year period). The principal obligation will be barred before the 4-year period on the written bond has elapsed. Two chief reasons have been advanced for releasing the surety:

(a) The bond is "collateral" to the principal obligation and creates no liability independent of the cause of action against the principal debtor. (See *Sonoma v. Hall* (1901) 132 C. 589, 594, 65 P. 459; *Towle v. Sweeney* (1905) 2 C.A. 29, 33, 83 P. 74 [quoting Michigan case: "It would be as difficult to conceive of a surety's liability continuing after the principal obligation was discharged as of a shadow's remaining after the substance was removed"].)

(b) A surety who pays the principal's debt after it has been barred does so voluntarily and has no right of reimbursement against his principal; hence, the creditor, who has failed diligently to pursue his remedy against the principal debtor cannot hold the surety after the latter has lost this basic right. (See *Anderson v. Shaffer* (1929) 98 C.A. 457, 460, 277 P. 185.)

The first "reason" employs a meaningless term ("collateral") which explains nothing, and the second begs the question by assuming that the surety's payment is voluntary and therefore does not carry with it a right of reimbursement. Under the reasonable view that the surety is liable to the creditor on the surety's written undertaking during the 4-year limitations period, the surety's payment is not voluntary and he or she is entitled to reimbursement from the principal debtor even though the creditor's action against the debtor has become barred. This view was followed in *Gaffigan v. Lawton* (1934) 1 C.2d 722, 37 P.2d 79. Plaintiff sued a contractor and his surety for the value of materials furnished under an oral agreement. The defense was that the liability of the contractor was barred by the 2-year statute. The Court of Appeal followed *Towle* and *Sonoma*, and refused to hold the surety liable (see 22 Cal. L. Rev. 454). But the Supreme Court, in a brief opinion taking note of the conflict of authority, overruled *Towle* and

followed earlier decisions (e.g., *Whiting v. Clark* (1861) 17 C. 407) holding the surety liable. "[T]he more reasonable and logical rule ... is that the obligation of the surety remains notwithstanding the fact that the statute of limitations has run on the obligation of the principal." (1 C.2d 723.)

Anderson was not mentioned in *Gaffigan*, but is squarely opposed in principle and relied on the contrary line of authorities. The underlying theory of *Gaffigan* is that the creditor owes the surety no duty of diligence in attempting to collect. If the surety is apprehensive that the statute is about to outlaw the principal obligation, the surety may pay the debt and then sue the principal debtor; hence, the loss of the right against the principal debtor is the surety's fault. (See *Rest.3d, Suretyship and Guaranty*, §50.)

Gaffigan was followed in *Bloom v. Bender* (1957) 48 C.2d 793, 313 P.2d 568, citing *Rest.*, *Security* §130 (now *Rest.3d, Suretyship and Guaranty* §50). *Anderson* was explained as dealing with a guarantor only, before the abolition of the distinction between sureties and guarantors in C.C. 2787. (48 C.2d 798.)

(2) *Regents Case*. *Gaffigan* and *Bloom* were followed in *Regents of Univ. of Calif. v. Hartford Acc. & Indem. Co.* (1978) 21 C.3d 624, 147 C.R. 486, 581 P.2d 197. In 1960, plaintiff contracted with an architect and general contractor to construct a student apartment project, and defendant surety executed a performance bond for the contractor. The work was substantially completed in September 1962. In January 1972, plaintiff discovered deterioration in the structure allegedly due to defects in design or construction. In July 1974, plaintiff sued the architect, contractor, and contractor's surety. C.C.P. 337.15, fixing a 10-year statute of limitations for actions against those who design or construct property, was enacted in 1971, and the lower court granted summary judgment for defendants. Plaintiff appealed from that portion of the judgment in favor of defendant surety. *Held*, reversed.

(a) *Normal limitations periods and accrual*. Plaintiff's complaint asserted causes of action against the contractor based on negligence (3-year statute: former C.C.P. 338(2), (3), now C.C.P. 338(b), (c)), and breach of warranty of work and materials furnished (4-year statute: C.C.P. 337(1)). In either case the statute did not begin to run until discovery of the defect, and suit against the contractor was filed within 3 years after the alleged time of discovery. The suit against the surety on the written bond was also governed by the 4-year period of C.C.P. 337(1), because the liability of a surety accrues at the same time as that of the principal. (21 C.3d 630.)

(b) *New limitations period of C.C.P. 337.15 is inapplicable to surety*. This section expressly refers to persons who design or construct property; it does not mention a construction surety. And prior decisions have held that a statute of limitations so worded does not govern suits against a surety. (21 C.3d 632, citing *Whiting v. Clark*, *supra*, and *Gaffigan v. Lawton*, *supra*.) Hence, the protection of C.C.P. 337.15 is not available to the surety, and C.C.P. 337(1) governs. (21 C.3d 633.)

(c) *Running of statute on principal debt does not exonerate surety*. The suretyship statutes do not clearly indicate an answer to the question whether the running of the limitations period on the principal obligation exonerates the surety. But the authorities, while conflicting, lead to the conclusion that it does not.

(1) Early cases held both ways, but in *Gaffigan*, the court, as an alternative ground of decision, expressly disapproved *Towle*, and adopted "the more reasonable and logical rule" that the obligation of the surety remains. (21 C.3d 634, 635.) *Bloom* confirmed the *Gaffigan* holding. (21 C.3d 635, 636.)

(2) *Gaffigan* and *Bloom* were subjected to some criticism in their distinction of prior contrary decisions on the ground that those decisions were rendered prior to the abolition (in 1939) of the distinctions between suretyship and guaranty. But, whatever merit there may be in the criticism, it does not justify a departure from the *Gaffigan* rule, which has been viewed as settled law by writers, is in accord with the majority view of other jurisdictions, and is supported by the *Rest.*, *Security* §130, Comment a and Illustration 2. (21 C.3d 636, 637.)

(3) The surety also contends that, if compelled to pay after the statute has run on its principal debt, it is denied the right to recover from the principal as the subrogee of the creditor's claim (C.C. 2848). But a surety who pays the

principal debt extinguishes that obligation, and cannot sue the debtor as subrogee. (21 C.3d 637.) The subrogation right of the surety is against third parties, cosureties, and property; the surety's right against the principal is on the implied obligation of reimbursement (C.C. 2847). And the action for reimbursement is a new cause of action, arising when the surety pays the creditor; hence, it is unaffected by the running of the statute on the original debt. (21 C.3d 638.) Three Court of Appeal decisions, including *Anderson*, contain language to the effect that a surety who pays after the statute has run on the principal debt has no recourse against the debtor. These decisions were rendered when controlling California precedent held that the surety was exonerated by the running of the statute, hence that its payment was voluntary. Since 1934, when the present rule of no exoneration was settled, the surety has had a right to reimbursement. (21 C.3d 638, footnote 8.)

(4) "We thus perceive no reason to overthrow well established authority or to repudiate a rule which has served as a protection to the creditor, as an incentive for the purchase of surety bonds, and as a basis for the calculation of rates. Whatever merits defendant surety's defense may suggest as an original theoretical proposition, we deal here with an established ruling, announced by one case over 40 years ago and by another almost 20 years ago. Many transactions have since been founded upon these decisions. We do not lightly disregard stare decisis, and surely not here when we can find no compelling reason, in policy or theory, which would justify such uprooting of precedent." (21 C.3d 639; see footnote 10, disapproving contrary language in *Sonoma* and *Anderson*.)

(d) *C.C.P. 337.15 does not limit substantive right*. The dissent (not the surety) contends that the section imposes a substantive limitation on the plaintiff's right against the contractor, and that the holding that the surety may seek reimbursement defeats the legislative purpose. This contention is unsound:

(1) Nothing in the placement or language of the section supports this interpretation; it is not part of a statute creating a new substantive liability, but is in the part of the Code dealing with limitations. (21 C.3d 640, citing the text.)

(2) The Legislature has responded to the rule of no accrual until discovery by enacting statutes with two-step limitations: one period measured from the date of discovery, and a second longer period measured from the event giving rise to the cause of action. *C.C.P. 337.15* enacts a two-step limitation; and to classify such two-step statutes as substantive entails a variety of consequences, not only in suretyship doctrine but in choice of law, pleading and waiver. (21 C.3d 641, citing the text.)

(3) *Balido v. Improved Machinery* (1972) 29 C.A.3d 633, 642, 105 C.R. 890, contains a dictum that because of difficulties of proof, *C.C.P. 337.15* decrees that after the time has elapsed, the causal connection between defect and injury will not be recognized. This is a mischaracterization. If the section were based on difficulties of proof it would bar suit by anyone, but it expressly excludes owners and tenants, and mentions laborers and materialmen only in connection with an action for indemnity. (21 C.3d 641, 642.)

(e) *Surety bond terms do not exonerate*. The bond's reference to liability of principal and surety as "co-extensive" does not compel the interpretation that any event which discharges the liability of the principal also exonerates the surety. If this literal meaning were given to the term, all personal defenses of the principal would inure to the surety's benefit, e.g., bankruptcy, and the protection of the bond would be illusory. (21 C.3d 643.)

SUPPLEMENT: [This section is current through the latest supplement]



187 of 190 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XIII. STATUTE OF LIMITATIONS: CONTRACT ACTIONS

B. Accrual of Causes of Action.

5. Action Against Surety.

b. Liability Ceases When Principal Obligation Is Barred.

2. Legislative Repudiation of Rule.

3 *Witkin Cal. Proc. Actions* § 545

[§ 545] Legislative Repudiation of Rule.

In response to the holding of *Regents of Univ. of Calif. v. Hartford Acc. & Indem. Co.* (1978) 21 C.3d 624, 147 C.R. 486, 581 P.2d 197, supra, §544, the 1979 Legislature amended C.C.P. 337.15(a) (see supra, §544) to extend its protection of developers to the sureties of developers: "No action may be brought to recover damages from any person, or the surety of a person, who develops real property." (See 11 *Pacific L. J.* 365.)

This amendment only overcame the *Regents* rule as applied to construction sureties; other sureties could still be sued even though the statute of limitations had run against the principal. The 1982 Legislature then enacted C.C.P. 359.5 to protect all sureties as follows: "If the obligations under a surety bond are conditioned upon performance of the principal, the expiration of the statute of limitations with respect to the obligations of the principal, other than the obligations of the principal under the bond, shall also bar an action against the principal or surety under the bond, unless the terms of the bond provide otherwise." (See 14 *Pacific L. J.* 516.)

SUPPLEMENT: [This section is current through the latest supplement]



188 of 190 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XIII. STATUTE OF LIMITATIONS: CONTRACT ACTIONS

B. Accrual of Causes of Action.

6. Quasi-Contractual Recovery.

a. Restitution Where Contract Is Void.

3 *Witkin Cal. Proc. Actions* § 546

[§ 546] Restitution Where Contract Is Void.

(1) *In General.* If a valid contract is breached, the statute may not run on the injured party's right of action until the injured party elects a remedy. (See *supra*, §527.) The same is true where a contract is voidable and the injured party has an election to disaffirm or stand on the contract. But the rule is different where the contract is wholly void. There is no election to affirm, and, if the plaintiff is entitled to restitution of money paid or goods delivered, the plaintiff's right of action arises at once (upon payment or delivery). Hence, the 2-year statute bars recovery on any money paid or goods delivered more than 2 years before the action. (*Smith v. Bach* (1921) 53 C.A. 63, 64, 199 P. 1106 [money paid under illegal contract]; see *Gamewell Fire Alarm Tel. Co. v. Los Angeles* (1919) 45 C.A. 149, 157, 187 P. 163 [goods sold to city under contract void for lack of compliance with charter provision; opinion is not clear on necessity of demand or its effect on running of statute]; 22 A.L.R.2d 1390 [money or property lost through gambling].)

(2) *Action To Recover Payment of Usurious Interest.* An odd rule of delayed accrual governs actions to recover usurious interest paid on a note. The excess over legal interest is treated as a payment on the principal; hence, no usury is deemed paid until the entire debt is satisfied, and the statute begins to run only at that time. (*Westman v. Dye* (1931) 214 C. 28, 38, 4 P.2d 134.)

SUPPLEMENT: [This section is current through the latest supplement]



189 of 190 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XIII. STATUTE OF LIMITATIONS: CONTRACT ACTIONS

B. Accrual of Causes of Action.

6. Quasi-Contractual Recovery.

b. Recovery for Services Performed.

1. In General.

3 *Witkin Cal. Proc. Actions* § 547

[§ 547] In General.

(1) *General Rule.* When services are performed at the request of another without a contract, the duty implied by law to pay for them arises immediately on performance. Hence, the statute begins to run, and the plaintiff may recover only for the value of services rendered within 2 years before the action is filed. This rule is applicable whenever there is no indication of a time of payment, whether the obligation is viewed as strictly quasi-contractual or as implied in fact. (See *Hocker v. Glover* (1931) 113 C.A. 152, 156, 298 P. 72; *Johnstone v. E. & J. Mfg. Co.* (1941) 45 C.A.2d 586, 587, 588, 114 P.2d 658; 7 A.L.R.2d 198 [claim for services rendered over extended period under indefinite employment not fixing time of payment]; 60 A.L.R.2d 1008 [action by attorney, not employed on contingent fee basis, for compensation for services].)

(2) *Services Performed in Putative Marriage or Marvin Relationship.* In an action for services by a plaintiff who mistakenly believes that he or she was married to the defendant, the cause of action does not accrue until the termination of services on the discovery of the actual facts. (See *Lazzarevich v. Lazzarevich* (1948) 88 C.A.2d 708, 722, 200 P.2d 49.) The same rule applies to an unmarried couple who hold themselves out as married. (See *Maglica v. Maglica* (1998) 66 C.A.4th 442, 452, 78 C.R.2d 101 [20-year period of cohabitation].)

SUPPLEMENT: [This section is current through the latest supplement]



190 of 190 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XIII. STATUTE OF LIMITATIONS: CONTRACT ACTIONS

B. Accrual of Causes of Action.

6. Quasi-Contractual Recovery.

b. Recovery for Services Performed.

2. Services Rendered to Decedent.

3 *Witkin Cal. Proc. Actions* § 548

[§ 548] Services Rendered to Decedent.

(1) *Nature of Problem.* Actions for the value of services rendered to decedents under unenforceable oral contracts to provide by will present a special problem. The ordinary rule, strictly applied, would often bar recovery for many years of services on the theory that the invalid oral agreement, which called for postponement of payment until death, should be wholly disregarded. This view not only operates unjustly against the person who renders services in good faith, but also invites unexpected actions against the employer during his or her lifetime, even though neither party contemplated compensation except by will. A more reasonable approach proceeds from the basic proposition that the oral agreement is only unenforceable, not void, and that the statute of frauds is only a defense and not a basis of affirmative action. (See 1 *Summary* (10th), *Contracts*, §344.) Unless the employer repudiates, there is no breach, and the employee has no right of action during the employer's lifetime. The breach occurs on the failure to leave the property by will; at that time the cause of action accrues and the statute begins to run, either on the action to enforce the oral agreement if the statute of frauds is not pleaded, or on the quasi-contract action if the lack of a writing is raised as a defense. (See 27 *Cal. L. Rev.* 473; 99 *A.L.R.2d* 251 [limitations period on physician's claim for compensation for medical services or treatment].)

(2) *Where Services Are Continuous Until Death.* The California cases have neither fully explored the theories nor agreed on a controlling principle. They have allowed recovery, however, on the ground that, where the services are continuous until death (as is almost invariably the case in the agreements to make provision by will), the law implies the promise to pay at their termination. Hence, the statute does not begin to run until the death of the decedent, and no part of the plaintiff's recovery is barred. (*Winder v. Winder* (1941) 18 *C.2d* 123, 127, 114 *P.2d* 347; *Wax v. Adair* (1936) 16 *C.A.2d* 393, 60 *P.2d* 904; *Mitchell v. Towne* (1939) 31 *C.A.2d* 259, 264, 87 *P.2d* 908; *Toney v. Security First Nat. Bank of Los Angeles* (1951) 108 *C.A.2d* 161, 166, 238 *P.2d* 645; *Estate of Brenzikofer* (1996) 49 *C.A.4th* 1461, 1468, 57 *C.R.2d* 401 [accrual on death].)

(2) *Where Services Are Not Continuous Until Death.* Where the services are not continuous until death, the rule is uncertain. In *Long v. Rumsey* (1938) 12 *C.2d* 334, 84 *P.2d* 146, plaintiff worked for 6 years, then left, and decedents died 16 years later. *Held*, the action was barred. The court thought that no oral agreement to provide by will was proved; hence, it was unnecessary to decide whether a contract would have prevented the running of the statute until death. (12

C.2d 341.) (See *Beard v. Melvin* (1943) 60 C.A.2d 421, 428, 140 P.2d 720; 27 Cal. L. Rev. 473.)

Rooney v. Sullivan (1959) 169 C.A.2d 432, 337 P.2d 543, squarely held that the statute does not run until death. Rejecting the holding in *Beard* and the dictum in *Long*, the court said: "[L]ogic compels the conclusion that no cause of action upon the contract implied in law arises until the death of the promisor without carrying out the express promise to compensate by will, since it is the failure of the promisor to carry out the express promise which gives rise to the implied promise to pay the reasonable value." (169 C.A.2d 434.) (To same effect, see *Kennedy v. Bank of America* (1965) 237 C.A.2d 637, 652, 47 C.R. 154; 12 *Hastings L. J.* 411, 415.)

SUPPLEMENT: [This section is current through the latest supplement]



1 of 145 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XIV. STATUTE OF LIMITATIONS: TORT ACTIONS

A. False Imprisonment and Defamation: One Year.

1. False Imprisonment.

3 Witkin Cal. Proc. Actions § 549

[§ 549] False Imprisonment.

C.C.P. 340(c) establishes a 1-year period for a cause of action for false arrest and imprisonment. The cause of action accrues at the time the plaintiff is released from his or her alleged illegal restraint; it is not postponed until termination of criminal proceedings, even though the plaintiff is not aware of the illegality of the arrest until that time. (*Collins v. Los Angeles* (1966) 241 C.A.2d 451, 457, 50 C.R. 586; see 49 A.L.R.2d 922 [when statute of limitations begins to run against action for false imprisonment or false arrest]; 51 Am.Jur.2d (2000 ed.), *Limitation of Actions* §142 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]



2 of 145 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XIV. STATUTE OF LIMITATIONS: TORT ACTIONS

A. False Imprisonment and Defamation: One Year.

2. Defamation.

a. In General.

3 *Witkin Cal. Proc. Actions* § 550

[§ 550] In General.

C.C.P. 340(c) establishes a 1-year period for a cause of action for libel and slander. The general rule has been that the 1-year statute begins to run when the defamatory matter is published. (See *Rutherford v. Johnson* (1967) 250 C.A.2d 316, 318, 58 C.R. 546 [affidavit filed in husband's divorce action, alleging that wife was unfit for child custody because of meretricious relationship with plaintiff; action more than 1 year after filing of affidavit was barred]; on what constitutes "publication," see 42 A.L.R.3d 807.)

However, the "rule of discovery" (see *supra*, §497) was held applicable to libel actions in *Manguso v. Oceanside Unified School Dist.* (1979) 88 C.A.3d 725, 152 C.R. 27. Plaintiff schoolteacher sued defendant F, her former school principal, and defendant school district for defamatory statements made in a letter in her permanent confidential personnel file. The letter had been placed in the file in 1960 and was read by or to prospective employers and agents, with the result that plaintiff was unable to obtain employment in the county from 1963 to the time of suit in 1976, when she discovered the existence of the letter. *Held*, under the reasoning of recent cases supporting the discovery rule (88 C.A.3d 728, 729, 730), it should apply to libel cases. (88 C.A.3d 731.) (See 35 A.L.R.4th 1002 [time of discovery as determining accrual of action]; but see *Shively v. Bozanich* (2003) 31 C.4th 1230, 1253, 7 C.R.3d 576, 80 P.3d 676, *infra*, §551 [refusing to apply discovery rule to delay accrual of claim based on private communication where defamatory statement was subsequently published in book].)

SUPPLEMENT: [This section is current through the latest supplement]

See *Burdette v. Carrier Corp.* (2008) 158 C.A.4th 1668, 1691, 71 C.R.3d 185 [discovery rule does not apply to slander actions, but even if rule did apply, slander action here was barred under facts of case]; CACI, No. 1724 [statute of limitations in defamation action as affirmative defense].



3 of 145 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XIV. STATUTE OF LIMITATIONS: TORT ACTIONS

A. False Imprisonment and Defamation: One Year.

2. Defamation.

b. Single Publication Rule.

3 *Witkin Cal. Proc. Actions* § 551

[§ 551] Single Publication Rule.

(1) *In General.* Under the Uniform Single Publication Act, only one cause of action arises on publication of an issue of a newspaper, or presentation of a radio or television broadcast, or exhibition of a moving picture. (C.C. 3425.3; see 5 *Summary* (10th), *Torts*, §538; 4 *Cal. Proc.* (5th), *Pleading*, §53.) Hence, the statute starts to run at the time of first general publication, regardless of subsequent republication. (See *McGuinness v. Motor Trend Magazine* (1982) 129 C.A.3d 59, 61, 180 C.R. 784.) The cover date is not controlling, in view of the general practice of postdating publications. (*McGuinness v. Motor Trend Magazine*, *supra*, 129 C.A.3d 62.)

The restriction to one cause of action applies to actions for libel or slander or invasion of privacy "or any other tort founded on any single publication." (C.C. 3425.3.) The statute cannot be circumvented by stating purported causes of action for fraud and deceit, where the gist of the complaint is the mass publication of an allegedly libelous article. (*Strick v. Superior Court* (1983) 143 C.A.3d 916, 925, 192 C.R. 314; see 41 A.L.R.4th 541 [what constitutes single publication].)

The California statute differs from the Uniform Act in referring to an "issue" rather than an "edition" of a newspaper. In *Belli v. Roberts Bros. Furs* (1966) 240 C.A.2d 284, 49 C.R. 625, the alleged libel was published in defendant's newspaper dated February 14, 1962. The complaint was filed February 14, 1963. If the date of the *edition* was the date of publication, the action was timely. But the issue of February 14, 1962, was in six editions (race, two-star final, three-star final, etc.), and four of them came out the night before--February 13, 1962. *Held*, the cause of action arose on that date, and the action was 1 day late. (240 C.A.2d 289.)

(2) *Discovery Rule Does Not Apply.* *Shively v. Bozanich* (2003) 31 C.4th 1230, 7 C.R.3d 576, 80 P.3d 676, considered the question whether the discovery rule should be applied to delay the accrual of a cause of action for defamation after the defamation was made public in a book. Plaintiff, a grand jury witness for the prosecution in a high-profile murder case, filed a defamation action against defendants--a former romantic partner, a deputy district attorney, the author of a book about the murder, and the book's publisher. Plaintiff's complaint alleged that the defamatory statement that she was a felony probationer was published on three separate occasions: (a) by defendant former romantic partner to defendant assistant district attorney; (b) by defendant assistant district attorney to defendant

author; and (c) by defendant author and defendant publisher in the book. The trial judge dismissed the action against all defendants as untimely, because it was filed more than 1 year after each publication was made. *Held*, affirmed.

(a) *Defamation based on publication in book.* Plaintiff claimed that her action based on the defamatory statement in the book should be subject to the discovery rule, that her action accrued when she first learned of the defamation by reading the book, that she filed the action within 1 year, and that the action therefore was timely. This claim is without merit. Under the single publication rule, an action based on defamatory statements contained in a book, magazine, or newspaper accrues when the publication is first distributed to the general public. (31 C.4th 1247.) Although a discovery rule has been applied, and is justified, when the defamation is communicated in confidence, i.e., in an inherently secretive manner, that justification does not apply when the defamation is in a publication distributed to the public. (31 C.4th 1250.) A contrary rule would undermine the single publication rule by permitting indefinite tolling of the statute of limitations. "Inquiry into whether delay in discovering the publication was reasonable has not been permitted for publications governed by the single-publication rule. Nor is adoption of the rule proposed by plaintiff appropriate simply because the originator of a privately communicated defamatory statement may, together with the author and the publisher of a book, be liable for the defamation contained in the book." (31 C.4th 1251.)

(b) *Defamation based on private publications.* The discovery rule has been applied to such inherently covert defamations as entries in personnel records and to communications by credit reporting subscribers. (31 C.4th 1252, citing *Manguso v. Oceanside Unified School Dist.* (1979) 88 C.A.3d 725, 152 C.R. 27, supra, §550, and other cases.) "These authorities might support plaintiff's position if the original defamatory statements ... had not been disseminated in the book, and if plaintiff had learned of them for the first time through, for example, an entry in a police report, an employment record, or an unexpected disclosure by someone to whom the essentially private defamations had been repeated. We believe, however, that the equitable basis for applying the discovery rule--that a plaintiff should not forfeit a cause of action based on a confidential communication that he or she had no reasonable basis for discovering--no longer exists once the original defamatory statement is published in a book that was distributed to the general public. In such circumstances, not only is the basis for the claim not hidden, but it has been trumpeted." (31 C.4th 1253.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General.* See *Hebrew Academy of San Francisco v. Goldman* (2007) 42 C.4th 883, 893, 70 C.R.3d 178, 173 P.3d 1004, 5 Summary (10th), *Torts*, Supp., §538 [single publication rule "applies to all publications, including those that receive limited circulation"]; *Christoff v. Nestle' USA* (2009) 47 C.4th 468, 137, 97 C.R.3d 798, 213 P.3d 132 [single publication rule applied to model's claim against coffee company that used his likeness on product labels and in advertisements without his permission; because it was not clear whether production of product label over period of years is single integrated publication that triggers running of limitations period when first label is distributed to public, and remand for further fact-finding was required]; *Miller v. Collectors Universe* (2008) 159 C.A.4th 988, 998, 72 C.R.3d 194 [single publication rule did not apply to 14,060 certificates of authenticity for collectible autographs and memorabilia, where certificates, although identical except for serial numbers, were issued to separate individuals to authenticate separate items]. (2) *Discovery Rule Does Not Apply.* See *Christoff v. Nestle' USA*, supra, 47 C.4th 483 [delayed discovery rule did not apply to model's claim against company that used his likeness on product labels and in advertisements without his permission, where labels were not published "in inherently secretive manner"].



4 of 145 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XIV. STATUTE OF LIMITATIONS: TORT ACTIONS

B. Injuries to Persons and Wrongful Death: Two Years.

1. In General.

3 Witkin Cal. Proc. Actions § 552

[§ 552] In General.

(1) *Increase in Limitations Period From One to Two Years.* As originally enacted, *C.C.P. 340* established a 1-year period applicable to actions for libel, slander, assault, battery, false imprisonment, personal injury, and death. (See former *C.C.P. 340(3)*.) The 2002 Legislature amended *C.C.P. 340(3)* and redesignated it as *C.C.P. 340(c)*. As amended, the 1-year period of *C.C.P. 340(c)* continues to apply to actions for false imprisonment, libel, and slander (see *supra*, §549 et seq.), but the provision no longer applies to most tort actions for personal injury or death. A new statute with a 2-year limitations period now governs these actions. (*C.C.P. 335.1*.)

In enacting the statute, the Legislature intended, in part, to rectify a prime example of the inequity caused by the former 1-year limitations period. California residents who were victims of the terrorist actions of September 11, 2001, were prematurely required to choose between litigation and federal remedies, while residents of other states had more than twice as long to pursue their remedies. Extending the limitations period also will reduce litigation because terrorist victims will have the opportunity to fully evaluate and use other alternatives, rather than being forced to litigate prematurely. (See Stats. 2002, Chap. 448, §1(c).)

(2) *Retroactive Application to September 11, 2001, Terrorist Victims.* Because of the "special injustice worked against the victims of the September 11, 2001, terrorist actions" (Stats. 2002, Chap. 448, §1(d)), *C.C.P. 335.1* was made retroactive to any personal injury or wrongful death action brought by those victims "regardless of whether that action lapsed or was otherwise barred by time" under prior California law. (*C.C.P. 340.10(b)*, added in 2002; on definition of "terrorist victim" entitled to retroactivity, see *C.C.P. 340.10(b)*.) (See *Krupnick v. Duke Energy Morro Bay, L.L.C.* (2004) 115 C.A.4th 1026, 1029, 9 C.R.3d 767 [statute did not apply retroactively to action brought by plaintiff who was not 9/11 terrorist victim].)

(3) *Two-Year Limitations Period Applies to Cases Not Time-Barred Under Former Law.* The 2-year limitations period in *C.C.P. 335.1* applies to cases that were not already time-barred by the 1-year period when *C.C.P. 335.1* became effective on January 1, 2003. (See *Andonagui v. May Dept. Stores Co.* (2005) 128 C.A.4th 435, 438, 440, 27 C.R.3d 145 [action was timely; distinguishing *Krupnick*]; *Mojica v. 4311 Wilshire, LLC* (2005) 131 C.A.4th 1069, 1072, 31 C.R.3d 887 [personal injury action was pending while tolled by federal proceeding (see *infra*, §741), and thus plaintiff was entitled to take advantage of extension of limitations period by enactment of *C.C.P. 335.1* during federal

proceeding].)

SUPPLEMENT: [This section is current through the latest supplement]

(3) *Two-Year Limitations Period Applies to Cases Not Time-Barred Under Former Law.* See *Aguilera v. Heiman* (2009) 174 C.A.4th 590, 596, 95 C.R.3d 18 [2-year limitations period in C.C.P. 335.1 did not apply retroactively to worker's action for personal injury, because his claim was already time-barred when new 2-year statute became effective; following *Krupnick v. Duke Energy Morro Bay, L.L.C.* (2004) 115 C.A.4th 1026, 9 C.R.3d 767, text, p. 703].



5 of 145 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XIV. STATUTE OF LIMITATIONS: TORT ACTIONS

B. Injuries to Persons and Wrongful Death: Two Years.

2. Scope of Statute.

3 *Witkin Cal. Proc. Actions* § 553

[§ 553] Scope of Statute.

C.C.P. 335.1, in language nearly identical to former *C.C.P. 340(3)*, provides a 2-year period for an action for "assault, battery, or injury to, or for the death of, an individual caused by the wrongful act or neglect of another." The statutory period is 2 years for the intentional torts of assault and battery, whether or not they result in actual personal injury, and for any wrongful act, whether intentional or negligent, that results in personal injury or death. *C.C.P. 340.4* contains an exception: 6 years from the date of birth to sue for injuries to an unborn child under *C.C. 43.1*. (See *infra*, §589.)

The scope of *C.C.P. 335.1* is therefore quite broad. It applies to the following:

- (1) Actions for assault and battery. (See *infra*, §554.)
- (2) Actions for malicious prosecution and abuse of process. (See *infra*, §555.)
- (3) Actions for invasion of privacy. (See *infra*, §556.)
- (4) Actions for civil conspiracy. (See *infra*, §557.)
- (5) Actions based on the violation of federal and state civil rights laws. (See *infra*, §558.)
- (6) Actions for personal injuries in the ordinary sense. (See *infra*, §559.)
- (7) Actions for wrongful death. (See *infra*, §560.)
- (8) Actions based on imputed liability. (See *infra*, §561.)
- (9) Actions by employees or employers. (See *infra*, §562 et seq.)
- (10) Actions for personal injuries brought on a breach of contract theory. (See *infra*, §565.)
- (11) Uninsured motorist proceedings. (See *infra*, §566.)

SUPPLEMENT: [This section is current through the latest supplement]



6 of 145 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XIV. STATUTE OF LIMITATIONS: TORT ACTIONS

B. Injuries to Persons and Wrongful Death: Two Years.

3. Assault and Battery.

3 Witkin Cal. Proc. Actions § 554

[§ 554] Assault and Battery.

The cause of action for assault and battery accrues on the commission of the act, and the 2-year period begins to run at that time. (*Sonbergh v. MacQuarrie* (1952) 112 C.A.2d 771, 773, 774, 247 P.2d 133 [construing 1-year limitations period in nearly identical predecessor statute]; see 90 A.L.R.2d 1230 [scope of limitations statutes specifically governing assault and battery]; 88 A.L.R.4th 1063 [application of discovery rule to postpone running of limitations against action for damages from assault]; 51 Am.Jur.2d (2000 ed.), *Limitation of Actions* §142 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]



7 of 145 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XIV. STATUTE OF LIMITATIONS: TORT ACTIONS

B. Injuries to Persons and Wrongful Death: Two Years.

4. Malicious Prosecution and Abuse of Process.

3 *Witkin Cal. Proc. Actions* § 555

[§ 555] Malicious Prosecution and Abuse of Process.

(1) *In General.* C.C.P. 335.1 applies in a peculiar manner to actions for malicious prosecution or abuse of process. They are both intentional torts (see 5 *Summary* (10th), *Torts*, §469 et seq.), and logically should have been listed in former C.C.P. 340(3), the predecessor to C.C.P. 335.1 (see *supra*, §552). However, prior to 1905, they were held to be within the 2-year miscellaneous tort coverage of C.C.P. 339(1) (*infra*, §648 et seq.).

In that year, however, former C.C.P. 340(3) was amended to add the coverage of "injury to" the person, and that language is retained in C.C.P. 335.1. The clause was construed to embrace "all infringements of personal rights as opposed to property rights." (*Simons v. Edouarde* (1950) 98 C.A.2d 826, 828, 221 P.2d 203 [abuse of process].) In other words, C.C.P. 335.1 applies to injuries to the person although they are not personal injuries. (*Stavropoulos v. Superior Court* (2006) 141 C.A.4th 190, 193, 45 C.R.3d 705 [malicious prosecution].) (On abuse of process, see *Edwards v. Fresno Community Hosp.* (1974) 38 C.A.3d 702, 704, footnote 3, 113 C.R. 579, *infra*, §649 [limiting holding in *Simons*]; *Kappel v. Bartlett* (1988) 200 C.A.3d 1457, 1467, 246 C.R. 815; 1 A.L.R.3d 953 [when statute of limitations begins to run against action for abuse of process]; 10 A.L.R.3d 533 [what statute of limitations governs action for malicious use of process or abuse of process, in absence of express provision for that tort]; on malicious prosecution, see *Storey v. Shasta Forests Co.* (1959) 169 C.A.2d 768, 769, 337 P.2d 887; *Department of Mental Hygiene v. Hsu* (1963) 213 C.A.2d 825, 826, 29 C.R. 244; *Rare Coin Galleries v. A-Mark Coin Co.* (1988) 202 C.A.3d 330, 334, 248 C.R. 341; *Feld v. Western Land & Dev. Co.* (1992) 2 C.A.4th 1328, 1334, 4 C.R.2d 23; *Bellows v. Aliquot Associates* (1994) 25 C.A.4th 426, 430, 30 C.R.2d 723; 70 A.L.R.2d 1088 [what statute of limitations, in absence of express provision for that tort, governs action for malicious prosecution]; 87 A.L.R.2d 1047 [accrual].)

(2) *Tolling by Appeal.* A malicious prosecution action accrues at the time of entry of judgment on the underlying action in the trial court; i.e., at the time of successful termination of the prior proceeding. (See 5 *Summary* (10th), *Torts*, §477 et seq.) Thus, though a malicious prosecution action is tolled during the pendency of an appeal in the underlying action, it is not tolled during the period after entry of judgment and before the filing of the notice of appeal. (*Gibbs v. Haight, Dickson, Brown & Bonesteel* (1986) 183 C.A.3d 716, 719, 722, 228 C.R. 398, citing the text [action was barred].) The fact that the time for appeal has not yet run does not prevent the action and therefore does not extend the running of the limitations period. (*Soble v. Kallman* (1976) 57 C.A.3d 719, 721, 129 C.R. 373.) And the rule applies regardless of whether the trial court is affirmed or reversed on appeal. (*White v. Lieberman* (2002) 103 C.A.4th 210,

216, 126 C.R.2d 608.)

The Courts of Appeal are divided as to when the appeal process is exhausted for purposes of determining when the tolling of the limitations period expires:

(a) In *Gibbs*, the court held that the appeal process was completed when the Supreme Court denied a petition for hearing (now review). (See *Feld v. Western Land & Dev. Co.* [following *Gibbs*].)

(b) In *Rare Coin Galleries*, the court disagreed, holding that the statute recommences to run when the remittitur issues. Although the Supreme Court may deny review on an earlier date, the Court of Appeal clerk generally does not issue the remittitur until expiration of the period during which the Supreme Court still has jurisdiction to grant review. (202 C.A.3d 336.) And in *Bellows*, the court, citing the Rules of Court, *Rare Coin Galleries*, and the text, held that a remittitur issues, for purposes of the commencement of the statute of limitations, on its entry in the record by the reviewing clerk. (25 C.A.4th 430.)

Thus, under *Rare Coin Galleries*, the statute is tolled during the pendency of the appeal, from the time notice of appeal is filed to the time the remittitur is issued by the appellate court. This same rule was applied to a pending appeal in the federal Court of Appeals which issued its "mandate" 21 days after the entry of judgment; the mandate serves the same purpose as the remittitur, and the effect on tolling was held to be the same. (*Korody-Colyer Corp. v. General Motors Corp.* (1989) 208 C.A.3d 1148, 1151, 1152, 256 C.R. 658.)

SUPPLEMENT: [This section is current through the latest supplement]



8 of 145 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XIV. STATUTE OF LIMITATIONS: TORT ACTIONS

B. Injuries to Persons and Wrongful Death: Two Years.

5. Invasion of Privacy.

3 Witkin Cal. Proc. Actions § 556

[§ 556] Invasion of Privacy.

In *Cain v. State Farm Mut. Auto. Ins. Co.* (1976) 62 C.A.3d 310, 132 C.R. 860, plaintiff brought an action against defendant insurance company alleging invasion of privacy by surveillance (see 5 *Summary* (10th), *Torts*, §§658, 659). The alleged wrongful acts took place prior to February 1969, discovery of the facts was alleged to have occurred in March 1971, and the complaint was filed in May 1971. The judge, on a trial of the special defense of limitations, gave judgment for defendant. *Held*, reversed.

(a) The applicable statute of limitations was former C.C.P. 340(3) (now C.C.P. 335.1), covering actions for injury "caused by the wrongful act or neglect of another." (62 C.A.3d 313.)

(b) The "rule of discovery" applies; i.e., in accordance with the policy governing interpretation of statutes of limitations, the period does not begin to run until the plaintiff knows, or should know, the material facts. (62 C.A.3d 314; see *infra*, §627.)

(c) Because the trial judge had rejected the rule of discovery as inapplicable, the case was remanded for consideration of the issue whether discovery could reasonably have been made at an earlier time. (62 C.A.3d 315.) (See 33 A.L.R.4th 479 [limitations period for action for invasion of privacy].)

SUPPLEMENT: [This section is current through the latest supplement]



9 of 145 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XIV. STATUTE OF LIMITATIONS: TORT ACTIONS

B. Injuries to Persons and Wrongful Death: Two Years.

6. Conspiracy: Postponed Accrual.

3 *Witkin Cal. Proc. Actions* § 557

[§ 557] Conspiracy: Postponed Accrual.

(1) *General Rule.* A civil conspiracy is not an independent tort, but rather a means by which members of a conspiracy may be held responsible without direct participation in the wrongful act; and there is no tort unless a wrongful act has been committed and has caused damage. (See 5 *Summary* (10th), *Torts*, §45 et seq.) Thus, the statute of limitations does not begin to run at the time of the agreement; the cause of action does not accrue until an overt act, constituting a tort, is done. (See 16 *Am.Jur.2d* (1998 ed.), *Conspiracy* §65.)

(2) *Tolling for Additional Wrongful Overt Act.* The important question, however, is whether the statute is, in effect, tolled by the commission of an additional wrongful act in pursuance of the conspiracy, after the statutory period has run on a prior wrongful act. In *Schessler v. Keck* (1954) 125 *C.A.2d* 827, 271 *P.2d* 588, an action for slander, the court answered this question in the affirmative. The first slander was in 1949 and the complaint was not filed until January 1953. But plaintiff alleged that all of the slanderous statements were published by defendants in furtherance of a conspiracy to defame her, and there was a further allegation of one publication by one defendant in March 1952. *Held*, the action was not barred; the statute does not commence to run until the commission of the last overt act. (125 *C.A.2d* 832.)

The law elsewhere is conflicting and uncertain. (See 16 *Am.Jur.2d* (1998 ed.), *Conspiracy* §65; 62 *A.L.R.2d* 1369, 1385 [When statute of limitations begin to run against civil action for conspiracy].) The *Schessler* holding was criticized in *Rodriguez v. North Amer. Aviation* (1967) 252 *C.A.2d* 889, 893, 61 *C.R.* 579, but approved in *Wyatt v. Union Mortg. Co.* (1979) 24 *C.3d* 773, 157 *C.R.* 392, 598 *P.2d* 45.

In *Wyatt*, defendant Union and affiliated defendant corporations were mortgage loan brokers, obtaining loans for borrowers from private noninstitutional lenders. They operated at the same headquarters; individual defendants were the controlling shareholder and officers or directors participating actively in the business. Defendant corporations engaged in a fraudulent television advertising campaign ("bait and switch") to lure potential borrowers into their offices; their loan officer made false representations to plaintiffs concerning interest charges and final balloon payments, and failed to disclose the abnormally high late charges for overdue installments. In 1966 plaintiffs, seeking funds for home improvements, signed a loan agreement negotiated by defendants in the gross amount of \$ 1,325, with monthly payments of \$ 20 for 36 months. In 1970, after several late payments, their balloon figure was \$ 1,340, and they

obtained a refinancing loan from defendants in the amount of \$ 2,000 with monthly payments of \$ 45 for 36 months. Late charges, including some that were false, resulted in a balloon demand in April 1973, of \$ 1,193.16. After repeated threats of foreclosure on their home, plaintiffs brought this action in July 1973, for damages for breach of fiduciary duty. Because the 3-year fraud statute of limitations had run on each of the wrongful acts of misrepresentation and concealment (6 years after the first loan and over 3 years after the second), they alleged a civil conspiracy, the "last overt act" consisting of defendants' collection of the final payment on the 1970 loan shortly before the trial. *Held*, judgment for compensatory and punitive damages affirmed.

(a) A mortgage loan broker is the borrower's agent in negotiating an acceptable loan; and the jury properly concluded that defendant brokers breached their fiduciary obligations to plaintiffs. (24 C.3d 783.)

(b) A civil conspiracy was proved; i.e., the jury could reasonably conclude that the breaches of fiduciary duty were undertaken pursuant to established company policies agreed to by each of defendants. (24 C.3d 784.)

(c) Under the "last overt act" doctrine, the statute of limitations does not begin to run in civil conspiracy cases until the culminating act in the conspiracy. This doctrine is consistent with the purpose of statutes of limitations; i.e., so long as a person continues to commit wrongful acts in furtherance of the conspiracy he or she cannot claim unfair prejudice or disturbance of justifiable repose. (24 C.3d 787.) Hence, the statute should be tolled, even after discovery of the fraud, "for so long as the sheer economic duress or undue influence embedded in the fraud continues to hold the victim in place." Although sometimes distinguished, *Schessler* has not been disapproved and correctly states the law of California. (24 C.3d 788.)

Wyatt was followed in *Livett v. F. C. Financial Associates, Ltd.* (1981) 124 C.A.3d 413, 177 C.R. 411. The court adopted the test of "overt act" from criminal conspiracy cases, distinguishing between (a) activities of conspirators after perpetration of the principal object of the conspiracy, which are admissible merely as evidence of the conspiracy; and (b) overt acts in furtherance of the conspiracy, which postpone accrual of the statute of limitations. (124 C.A.3d 420, 421.)

The law is clear, however, that a privileged act cannot be an overt act in furtherance of a civil conspiracy sufficient to toll the limitations period. *Thompson v. California Fair Plan Assn.* (1990) 221 C.A.3d 760, 270 C.R. 590, held that where an insurer's defense of suit was absolutely privileged under former C.C. 47(2) (now C.C. 47(b)), the defense of suit could not serve as the "last overt act" sufficient to revive plaintiff's otherwise time-barred conspiracy claim. (221 C.A.3d 766.) And in 1994, C.C. 47(b) was amended to provide that it did not make privileged "any communication made in a judicial proceeding knowingly concealing the existence of an insurance policy or policies."

SUPPLEMENT: [This section is current through the latest supplement]



10 of 145 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XIV. STATUTE OF LIMITATIONS: TORT ACTIONS

B. Injuries to Persons and Wrongful Death: Two Years.

7. Civil Rights Violations.

3 *Witkin Cal. Proc. Actions* § 558

[§ 558] Civil Rights Violations.

(1) *Federal Civil Rights Actions*. An action may be brought in a state court under the federal Civil Rights Act (42 U.S.C., §1983) for depriving a person of federal constitutional or statutory rights under color of state law. (See 8 *Summary* (10th), *Constitutional Law*, §814 et seq.) The Act does not contain a statute of limitations, and the appropriate state limitation applies (see *supra*, §58). The early case of *Rossiter v. Benoit* (1979) 88 C.A.3d 706, 717, 152 C.R. 65, *infra*, §665, held that the appropriate statute in California is the 3-year limitations period for an action on a liability created by statute (C.C.P. 338(a); see *infra*, §664 et seq.). However, *Wilson v. Garcia* (1985) 471 U.S. 261, 105 S.Ct. 1938, 85 L.Ed.2d 254, *Jackson v. Cedars-Sinai Med. Center* (1990) 220 C.A.3d 1315, 269 C.R. 877, *Huntington Park v. Superior Court* (1995) 34 C.A.4th 1293, 1297, 41 C.R.2d 68, and *Roman v. Los Angeles* (2000) 85 C.A.4th 316, 323, 102 C.R.2d 13, among other cases, now make clear that a state court action under 42 U.S.C., §1983 is governed by the state's personal injury statute of limitations. In the case of California, that is the 2-year limitations period of C.C.P. 335.1 (*supra*, §552).

(2) *Unruh Civil Rights Act Actions*. California law is unsettled as to which statute of limitations applies to an action for violation of the Unruh Civil Rights Act (C.C. 51 et seq.). The issue was addressed for the first time in *West Shield Investigations & Sec. Consultants v. Superior Court* (2000) 82 C.A.4th 935, 98 C.R.2d 612. Plaintiff's action arose out of her forced attendance at a wilderness program for troubled youth when she was a teenager. She sued defendants, a security firm that transported her to the camp and the operator of the camp, on various theories, including claims for violations of C.C. 51.9 (sexual harassment) and C.C. 52.1 (interference with civil rights). The trial judge ruled that these claims were governed by the 1-year limitations period for personal injury in former C.C.P. 340(3) (now 2-year limitations period in C.C.P. 335.1), and not the 3-year limitations period for actions on a liability created by statute in C.C.P. 338(a). *Held*, affirmed.

(a) A cause of action is based upon a liability created by statute only where the liability is embodied in a statutory provision and is of a type that did not exist at common law. Thus, where a cause of action is based upon a statute that does not create a new form of liability but merely codifies and refines existing law, the limitations period for actions based upon statutory liability does not apply. The Unruh Civil Rights Act constitutes a refinement and codification of existing common law liability for violation of civil rights. Also, the 1-year statute is a special statute controlling the time within which any action covering personal injury may be commenced, and it prevails over the general statute

applicable to actions based upon a liability created by statute. (82 C.A.4th 952.)

(b) This conclusion is consistent with rulings made in connection with analogous federal Civil Rights Act actions. (82 C.A.4th 953.)

In *Gatto v. Sonoma* (2002) 98 C.A.4th 744, 120 C.R.2d 550, plaintiff was ejected from a county fair for refusing to remove a vest that bore the insignia of a motorcycle club. Defendants, the county and the operators of the fair, had imposed a dress code proscribing "apparel or accessories intended to provoke, offend, or intimidate others." Plaintiff sued alleging violations of his right to equal access to public accommodations under the Unruh Civil Rights Act (C.C. 51(b)) and his state constitutional right to free speech, enforceable under C.C. 52.1. *Held*, plaintiff's claims were governed by the 1-year limitations period for personal injury in former C.C.P. 340(3) (now 2-year limitations period in C.C.P. 335.1), and not the 3-year limitations period for actions on a liability created by statute in C.C.P. 338(a).

(a) *West Shield* was correctly decided but "the court's analysis is incomplete and misleading." (98 C.A.4th 756.) By its own terms, the Unruh Civil Rights Act comprises only C.C. 51. However, courts, including *West Shield*, have consistently described as Unruh Civil Rights Act claims causes of action under seemingly related provisions in sections immediately following C.C. 51. *West Shield's* analysis assumed that all of these claims were subject to the same statute of limitations. "This assumption fails to attend to the complexity of the Unruh Civil Rights Act and the variety of claims that may be adjudicated under its rubric, some of which derive from the common law and some of which do not." (98 C.A.4th 757.) No single statute of limitations applies to all claims under C.C. 51 et seq. The 1-year limitations period in former C.C.P. 340(3) applies to actions under provisions that derive from the common law, and the 3-year limitations period in C.C.P. 338(a) applies to other provisions. (98 C.A.4th 759.)

(b) Plaintiff's claim alleging violation of C.C. 51(b) clearly derives from common law principles and thus is subject to the 1-year statute. Plaintiff's claim alleging violation of C.C. 52.1 is analogous to a federal Civil Rights Act claim for personal injury, which, as the *West Shield* court correctly observed, sounds in tort, and thus is also subject to former C.C.P. 340(3). (98 C.A.4th 760.) (On limitations period for employment discrimination under California Fair Employment and Housing Act, see *infra*, §564.)

SUPPLEMENT: [This section is current through the latest supplement]



11 of 145 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XIV. STATUTE OF LIMITATIONS: TORT ACTIONS

B. Injuries to Persons and Wrongful Death: Two Years.

8. Personal Injuries.

3 *Witkin Cal. Proc. Actions* § 559

[§ 559] Personal Injuries.

C.C.P. 335.1 covers personal injuries of every kind, regardless of the nature of the wrongful act. Cases construing the 2-year statute (as well as the 1-year limitations period in the prior statute) have held the following:

(1) It applies to the typical action for damages suffered from a negligent act. (See *Snow v. A. H. Robins Co.* (1985) 165 C.A.3d 120, 127, 211 C.R. 271, *infra*, §662 [action for personal injuries allegedly caused by intrauterine device (Dalkon Shield) was time-barred where, 8 years prior to filing, plaintiff knew that she was pregnant and believed that the device required her to have a therapeutic abortion to prevent blood poisoning]; *infra*, §565.)

(2) It applies to an action for personal injuries suffered from an intentional tort. (See *Groff v. Du Bois* (1922) 57 C.A. 343, 345, 207 P. 59 [injuries from malicious attempt to evict from premises]; *Benun v. Superior Court* (2004) 123 C.A.4th 113, 125, 20 C.R.3d 26 [C.C.P. 335.1 applied to action alleging that health care providers committed elder abuse by recklessly or intentionally neglecting to provide adequate custodial care to patient, rather than C.C.P. 340.5 (medical malpractice statute of limitations; see *infra*, §578)].)

(3) It applies to an action for damages suffered from emotional distress. In *Huntly v. Zurich General Acc. & Liab. Ins. Co.* (1929) 100 C.A. 201, 212, 280 P. 163, a widow's action against defendants who allegedly performed an unlawful autopsy on her deceased husband's body, the court said: "[T]here need be no physical contact with the body of a person to constitute a cause of action for personal injury. When a bodily injury occurs, the law considers the action as one for personal injuries, regardless of the nature of the breach of duty. It adopts the nature of the damage as the test, and not the nature of the breach ... it was intended to embrace therein all infringements of personal rights as distinguished from property rights." (On delayed accrual, see *infra*, §574.)

(4) It applies to an action based on products liability. (See *G.D. Searle & Co. v. Superior Court* (1975) 49 C.A.3d 22, 25, 122 C.R. 218; *Sevilla v. Stearns-Roger* (1980) 101 C.A.3d 608, 610, 161 C.R. 700, *infra*, §608.) (On delayed accrual, see *infra*, §§575, 576.)

(5) It applies to an action under the "dog bite statute" (6 *Summary* (10th), *Torts*, §1408 et seq.); the statute merely changed the proof required under the common law action for injuries suffered from a "vicious" dog. (*Pritchard v. Sharp*

(1974) 41 C.A.3d 530, 531, 116 C.R. 9.)

(6) It applies to an action based on breach of warranty. (*Becker v. Volkswagen of America* (1975) 52 C.A.3d 794, 125 C.R. 326.) In *Becker*, plaintiff contended that the enactment of U.C.C. 2725 (supra, §537) changed the law by making applicable the 4-year limitations period of that section in all cases in which damages for personal injury were sought in an action for breach of warranty. The court examined the conflicting case law in other jurisdictions and the views of Prosser and the Second Torts Restatement on products liability, and concluded that the Commercial Code section was intended to apply to commercial transactions between buyer and seller, and not to personal injury actions, whether based on negligence, strict liability, or breach of warranty. (52 C.A.3d 800, 802.) (On action for breach of sales contract, see supra, §519; on action for breach of warranty, see supra, §537.)

(7) It applies to an action for loss of consortium. (*Priola v. Paulino* (1977) 72 C.A.3d 380, 383, 140 C.R. 186.)

(8) It applies to an action based on the ingestion of a drug. (*Gray v. Reeves* (1977) 76 C.A.3d 567, 576, 142 C.R. 716.)

The statute does not apply to the following:

(a) An action against a public entity (see *infra*, §688 et seq.) or against a public employee (see *infra*, §693).

(b) An action for personal injury or death resulting from medical malpractice. (See *infra*, §578 et seq.)

(c) An action for personal injury or death resulting from exposure to a hazardous material or toxic substance other than asbestos. (See *infra*, §573.)

SUPPLEMENT: [This section is current through the latest supplement]



12 of 145 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XIV. STATUTE OF LIMITATIONS: TORT ACTIONS

B. Injuries to Persons and Wrongful Death: Two Years.

9. Wrongful Death.

3 Witkin Cal. Proc. Actions § 560

[§ 560] Wrongful Death.

The cause of action for wrongful death is distinct from that for personal injuries. Consequently, where a person sues for injuries and then dies, the decedent's dependents may bring a new action for wrongful death within 2 years after the decedent's death, even though more than 2 years have elapsed from the time of the injury. (See *C.C.P.* 335.1, *supra*, §552.) (On 1-year limitations period in prior statute, see *Tann v. Western Pac. Ry. Co.* (1919) 39 *C.A.* 377, 379, 178 *P.* 971; *Walton v. Southern Pac. Co.* (1935) 8 *C.A.2d* 290, 304, 48 *P.2d* 108; *Wohlgemuth v. Meyer* (1956) 139 *C.A.2d* 326, 327, 293 *P.2d* 816 [statute is procedural, not substantive]; *Barker v. Brown & Williamson Tobacco Corp.* (2001) 88 *C.A.4th* 42, 47, 105 *C.R.2d* 531, *supra*, §461 [1997 amendments to C.C. 1714.45, which eliminated total immunity from tobacco-related products liability suits previously granted to tobacco manufacturers by that statute (see 6 *Summary* (10th), *Torts*, §1534 et seq.), did not impliedly repeal or revive wrongful death limitations period], 63 *Harv. L. Rev.* 1253; 97 *A.L.R.2d* 1151 [accrual]; 49 *A.L.R.4th* 972 [time of discovery as affecting running of statute]; on action against public entity or employee, see *infra*, §688 et seq.; on action for death resulting from medical malpractice, see *infra*, §590; on action for death based on exposure to asbestos, see *infra*, §568 et seq.; on actions for death based on exposure to a hazardous material or toxic substance other than asbestos, see *infra*, §573; on products liability action, see *infra*, §§575, 576.)

SUPPLEMENT: [This section is current through the latest supplement]



13 of 145 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XIV. STATUTE OF LIMITATIONS: TORT ACTIONS

B. Injuries to Persons and Wrongful Death: Two Years.

10. Action Based on Imputed Liability.

3 Witkin Cal. Proc. Actions § 561

[§ 561] Action Based on Imputed Liability.

Former C.C.P. 340(3) (now *C.C.P.* 335.1) was held to apply to the liability of a parent who signs the driver's license of a negligent minor driver, and the liability of a car owner for the negligence of one who drives with the owner's permission. (*McFarland v. Cordiero* (1929) 99 C.A. 352, 278 P. 889 [minor driver]; *Franceschi v. Scott* (1935) 7 C.A.2d 494, 495, 46 P.2d 764 [driver with permission]; see 6 *Summary* (10th), *Torts*, §1256 et seq.)

One of the reasons given in *McFarland* is that the parent's liability is like that of a "bondsman" and that the surety should not be held if the principal cannot be. (99 C.A. 355.) This view was formerly rejected in California by case law (see *supra*, §544), but the better theory, now codified in *C.C.P.* 337.15 (see *supra*, §545) and set forth in *Franceschi*, is this: Superficially the vicarious liability of the parent or owner is "created by statute" and is within the 3-year provision of former C.C.P. 338(1) (now *C.C.P.* 338(a)). But the cause of action is essentially in tort for injuries from the negligence of the driver; the statute merely added new persons who could be sued; and there was no indication of a legislative intent to allow a longer period for an action against those to whom the negligence was imputed than against those whose negligence caused the injuries.

SUPPLEMENT: [This section is current through the latest supplement]



14 of 145 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XIV. STATUTE OF LIMITATIONS: TORT ACTIONS

B. Injuries to Persons and Wrongful Death: Two Years.

11. Action by Employee or Employer.

a. Personal Injury Action Against Third-Party Tortfeasor.

3 Witkin Cal. Proc. Actions § 562

[§ 562] Personal Injury Action Against Third-Party Tortfeasor.

Where an employee is injured by a third-party tortfeasor, both the employee and his or her employer have rights of action. (*Lab.C. 3852*; see 2 *Summary* (10th), *Workers' Compensation*, §69 et seq.) Despite its statutory recognition, the cause of action is not classified as a statutory liability with a 3-year period (*infra*, §664); it is governed by *C.C.P. 335.1*. The theory is that the special section on personal injuries prevails over the general section on statutory liabilities. (On 1-year limitations period in nearly identical predecessor statute, see *Aetna Cas. & Surety Co. v. Pacific Gas & Elec. Co.* (1953) 41 *C.2d* 785, 787, 264 *P.2d* 5; *Liberty Mut. Ins. Co. v. Fabian* (1964) 228 *C.A.2d* 427, 428, 39 *C.R.* 570; *Los Angeles v. Aldrich* (1966) 242 *C.A.2d* 306, 307, 51 *C.R.* 408.)

For a time a different view was taken as to the employer's action. The employer had the benefit of the 3-year period of a statutory action (*Limited Mut. Comp. Ins. Co. v. Billings* (1946) 74 *C.A.2d* 881, 883, 169 *P.2d* 673). But that view has been disapproved, and *C.C.P. 335.1* now applies in both actions. (On nearly identical predecessor statute, see *San Diego v. Sanfax Corp.* (1977) 19 *C.3d* 862, 876, 140 *C.R.* 638, 568 *P.2d* 363, 2 *Summary* (10th), *Workers' Compensation*, §83; *Liberty Mut. Ins. Co. v. Fabian*, *supra*; *Los Angeles v. Aldrich*, *supra*; *Ventura County Employees' Retirement Assn. v. Pope* (1978) 87 *C.A.3d* 938, 955, 151 *C.R.* 695 [association's subrogation rights based on its disability payments; disapproving reasoning of *Board of Retirement of Kern County Employees' Retirement Assn. v. Terry* (1974) 40 *C.A.3d* 1091, 115 *C.R.* 718, *infra*, §664, in light of *Sanfax*].)

SUPPLEMENT: [This section is current through the latest supplement]



15 of 145 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XIV. STATUTE OF LIMITATIONS: TORT ACTIONS

B. Injuries to Persons and Wrongful Death: Two Years.

11. Action by Employee or Employer.

b. Action for Termination of Employment in Violation of Public Policy.

3 *Witkin Cal. Proc. Actions* § 563

[§ 563] Action for Termination of Employment in Violation of Public Policy.

(1) *Action Based on Constructive Termination.* California law is unsettled on the issue whether a common law action for wrongful constructive termination of employment in violation of public policy is governed by the 2-year statute of limitations in *C.C.P.* 335.1 (injury caused by wrongful act of another; see *supra*, §552), the 2-year statute in *C.C.P.* 339(1) (obligation not founded on writing; see *supra*, §513), or the 4-year statute in *C.C.P.* 343 (action not otherwise provided for; see *infra*, §677). (See *Turner v. Anheuser-Busch* (1994) 7 *C.4th* 1238, 1254, footnote 7, 32 *C.R.2d* 223, 876 *P.2d* 1022, 3 *Summary* (10th), *Agency and Employment*, §225 [construing 1-year limitations period in predecessor to *C.C.P.* 335.1 and other statutes; observing uncertainty, but expressly declining to resolve issue].)

In *Regents of Univ. of Calif. v. Superior Court* (1995) 33 *C.A.4th* 1710, 1716, 39 *C.R.2d* 919, the parties agreed that the personal injury statute applied to plaintiff's common law claims for wrongful discharge in violation of public policy, so the court declined to address which statute should apply, and instead discussed when the personal injury limitations period accrued. Ultimately, the court held that plaintiff had failed to establish a constructive discharge, and thus never squarely addressed the accrual issue. (33 *C.A.4th* 1720.) However, in dicta, the court observed that *Turner v. Anheuser-Busch* does not compel the conclusion that accrual may only occur when the employee resigns. (33 *C.A.4th* 1722.) (On accrual of plaintiff's discrimination claims under Fair Employment and Housing Act (FEHA), see 8 *Summary* (10th), *Constitutional Law*, §951.)

(2) *Action Based on Actual Discharge.* *Barton v. New United Motor Mfg.* (1996) 43 *C.A.4th* 1200, 51 *C.R.2d* 328, citing the text, determined which statute of limitations applies to an action for wrongful termination of employment in violation of public policy based on an actual discharge. Plaintiff filed an action in 1994 alleging that defendant terminated his employment in 1992 in retaliation for reporting unsafe working conditions. The trial judge ruled that plaintiff's action was barred by the 1-year limitations period in former *C.C.P.* 340(3) (now 2-year limitations period in *C.C.P.* 335.1). *Held*, affirmed.

(a) *C.C.P.* 340(3) encompasses not only bodily injury, but also a broad range of infringements of personal rights. But not all tort actions are governed by that statute. *C.C.P.* 339(1) (2-year limitation for obligation not founded on writing; see *supra*, §512) applies not only to actions for breach of oral or implied contracts and to quasi-contractual

actions, but also to certain tort actions that do not come within the scope of other statutes of limitations. In determining which of these two statutes governs in a particular tort action, *C.C.P. 340(3)* applies to infringements of "personal rights," and *C.C.P. 339(1)* applies to infringement of "property rights." (43 *C.A.4th* 1205, 1206.)

(b) What is vindicated by an action for wrongful termination in violation of public policy is the public interest in preventing employers from requiring an employee to act contrary to fundamental public policy. That action must be predicated on a policy that concerns society at large instead of the individual interests of the employer or the employee. At the same time, the essential nature of the action is the protection of certain personal rights deemed to be of fundamental public importance, not the protection of property rights. Because the primary nature of the right sued upon is personal, *C.C.P. 340(3)* prevails over *C.C.P. 339(1)*. (43 *C.A.4th* 1207.)

(c) Plaintiff's claim that the judge did not have sufficient information to determine if plaintiff was entitled to the benefit of the delayed discovery rule was of no import. The infliction of actual and appreciable harm will commence the statutory period, even if there is uncertainty about the amount of damages (see *supra*, §503). Here, plaintiff suffered actual and appreciable harm when he was terminated, and thus the delayed discovery rule did not assist him. (43 *C.A.4th* 1209.)

Romano v. Rockwell Int. (1996) 14 *C.4th* 479, 59 *C.R.2d* 20, 926 *P.2d* 1114, *supra*, §528, citing the text, resolved the question of when the statute of limitations accrues, holding that the limitations period began to run when plaintiff was actually terminated, not earlier when defendant employer informed plaintiff of its unequivocal decision to terminate him in the future. (14 *C.4th* 501.)

(a) The interval between notification and actual termination of employment was more than 2 years, during which time plaintiff received his usual compensation and hoped to be able to secure a reversal of the termination decision. There is little reason to require an employee to bring a claim when the termination decision still may be reversed and compensation may never be interrupted. (14 *C.4th* 501, 502.)

(b) Defendant's reliance on *Regents of Univ. of Calif.* is misplaced. *Regents* is disapproved to the extent that it holds that the statute of limitations in an employment discrimination action under FEHA accrues when the adverse employment decision is communicated to the employee, and not at his termination. Dicta in *Regents*, expressing concern with designating resignation as the date of accrual because it allows the commencement of the limitations period to rest in the employee's sole control, is not implicated in the present case. *Regents* involved a constructive discharge (i.e., a resignation), and the present case involves an actual discharge. (14 *C.4th* 502.) (On criticism of *Regents* court's concern in context of wrongful discharge action based on breach of contract, see *Mullins v. Rockwell Int. Corp.* (1997) 15 *C.4th* 731, 740, 63 *C.R.2d* 636, 740, 936 *P.2d* 1246, *supra*, §528.) (See 31 *U.C. Davis L. Rev.* 1111 [*Romano*].)

(3) *Action Based on Denial of Public Employment for Exercise of Free Speech Rights.* In *Acun a v. Regents of Univ. of Calif.* (1997) 56 *C.A.4th* 639, 65 *C.R.2d* 388, plaintiff sued defendant University of California, alleging that his application for a tenured faculty position was denied in violation of his free speech rights (Cal. Const., Art. I, §2). The trial judge ruled that the action was barred by the 1-year statute of limitations in former *C.C.P. 340(3)* (now 2-year limitations period in *C.C.P. 335.1*). *Held*, affirmed.

(a) *Applicable limitations period.* Applying the personal rights-property rights analysis utilized in *Barton*, the court concluded that former *C.C.P. 340(3)* applied, and not the 2-year limitations period of *C.C.P. 339(1)*, because plaintiff had no property right to a tenured teaching position. (56 *C.A.4th* 646.)

(b) *Accrual.* Plaintiff's action accrued when defendant denied his application, about 15 months before plaintiff's action, and was thus untimely. Plaintiff's claim that the statute did not begin to run until after he had exhausted his administrative remedies was without merit. Plaintiff had no administrative remedy; once his application was denied, the only avenue of appeal was for the department to which he had applied to submit a request for reconsideration, which it

did not seek. (56 C.A.4th 647.)

(c) *No equitable tolling.* Defendant's letter to a member of Congress, in response to a general inquiry about the denial of plaintiff's application, did not toll the statute. Equitable tolling applies where a plaintiff has several legal remedies for the same harm and in good faith pursues one. (56 C.A.4th 647.) Plaintiff, however, did not file an administrative appeal with defendant and had no right to do so. Thus, defendant could not be estopped from asserting the statute. (56 C.A.4th 648.)

SUPPLEMENT: [This section is current through the latest supplement]



16 of 145 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XIV. STATUTE OF LIMITATIONS: TORT ACTIONS

B. Injuries to Persons and Wrongful Death: Two Years.

11. Action by Employee or Employer.

c. Employment Discrimination Action Under Fair Employment and Housing Act.

3 Witkin Cal. Proc. Actions § 564

[§ 564] Employment Discrimination Action Under Fair Employment and Housing Act.

(1) *Disability Discrimination.* In *Richards v. CH2M Hill (2001) 26 C.4th 798, 111 C.R.2d 87, 29 P.3d 175*, plaintiff, a disabled employee who resigned after 5 years' employment, brought an action under the Fair Employment and Housing Act (FEHA), alleging that defendant employer was unwilling to effectively accommodate her disability. Many of the incidents of disability discrimination occurred outside the 1-year limitations period of *Govt.C. 12960* (see *supra*, §225), but under the continuing violations doctrine, an employer may be held liable for that misconduct if it is sufficiently connected to misconduct that occurs within the limitations period. The trial judge applied one standard to find that the doctrine permitted defendant to be held liable for misconduct outside of the limitations period. The Court of Appeal applied a different standard of the doctrine to find to the contrary. *Held*, reversed and remanded; both standards were incorrect.

(a) *Proper standard for application of doctrine.* An employer's persistent failure to reasonably accommodate a disability, or to eliminate a hostile work environment targeting a disabled employee, is a continuing violation of the FEHA if the employer's unlawful actions are (1) sufficiently similar in kind (recognizing that similar kinds of unlawful employer conduct, such as acts of harassment or failures to reasonably accommodate disability, may take a number of different forms); (2) have occurred with reasonable frequency; and (3) have not acquired a degree of permanence. "Permanence," in the context of an ongoing process of accommodation of disability or ongoing disability harassment, should properly be understood to mean that an employer's statements and actions make clear to a reasonable employee that any further efforts at informal conciliation to obtain reasonable accommodation or end harassment will be futile. (26 C.4th 823.)

(b) *Accrual under doctrine.* When an employer engages in a continuing course of unlawful conduct under the FEHA by refusing reasonable accommodation of a disabled employee or engaging in disability harassment, and this course of conduct does not constitute a constructive discharge, the statute of limitations begins to run not necessarily when the employee first believes that his or her rights may have been violated, but rather, either when the course of conduct is brought to an end, as by the employer's cessation of that conduct or by the employee's resignation, or when the employee is on notice that further efforts to end the unlawful conduct will be in vain. Accordingly, an employer who is confronted with an employee seeking accommodation of disability or relief from disability harassment may assert

control over its legal relationship with the employee either by accommodating the employee's requests, or by making clear to the employee in a definitive manner that it will not be granting those requests, thereby commencing the running of the statute of limitations. (26 C.4th 823.)

(c) *Application to present case.* Neither the trial judge nor the Court of Appeal applied the proper standard for determining a continuing violation for statute of limitations purposes. The trial judge failed to consider the "permanence" of the employer's conduct, that is, whether defendant's statements and actions made clear to a reasonable employee that any further efforts at informal conciliation to obtain reasonable accommodation or end harassment would be futile. The Court of Appeal incorrectly adopted the narrow view that the statute of limitations begins to run as soon as the disabled employee is on notice that his or her rights have been violated. It thus did not consider whether defendant and plaintiff continued to be engaged in an informal conciliation process to resolve plaintiff's grievances concerning the reasonable accommodation of her disability. Thus, remand to the trial judge was necessary. (26 C.4th 824.)

(2) *Sexual Harassment.* The court in *Birschtein v. New United Motor Mfg.* (2001) 92 C.A.4th 994, 112 C.R.2d 347, used the *Richards* approach in applying the continuing violations doctrine to a FEHA action alleging sexual harassment in employment, and held that an employer could be held liable for misconduct occurring outside the limitations period. (92 C.A.4th 1003.) In *Yanowitz v. L'Oreal USA* (2005) 36 C.4th 1028, 1059, 32 C.R.3d 436, 116 P.3d 1123, the California Supreme Court used the *Richards* approach in applying the continuing violations doctrine to a FEHA action alleging *retaliation* by an employer against a sales manager for refusing to obey the employer's order to fire a female subordinate based on the manager's belief that the order constituted unlawful sexual discrimination. The court held that the employer could be held liable for discrimination occurring outside the limitations period. (36 C.4th 1059.)

(3) *Gender Discrimination.* In *Cucuzza v. Santa Clara* (2002) 104 C.A.4th 1031, 128 C.R.2d 660, the court used the *Richards* approach but refused to apply the continuing violation doctrine to extend the statute of limitations in an action alleging gender discrimination in employment. Even assuming that the isolated incidents alleged by plaintiff were sufficiently similar and frequent enough to constitute a single course of conduct, the situation had reached permanence well over 1 year before plaintiff commenced her lawsuit. Defendant's response to plaintiff's grievance concerning job duties she wanted to retain was to transfer her out of the department, and this constituted a definitive denial of her request. Although plaintiff produced evidence showing that she made later requests to be allowed to have the duties back, the evidence also showed that those requests were invariably and unequivocally denied. (104 C.A.4th 1042.)

(4) *Age Discrimination.* In *Alch v. Superior Court* (2004) 122 C.A.4th 339, 19 C.R.3d 29, the court refused to apply the *Richards* continuing violations doctrine to FEHA action by writers alleging that they did not apply for positions because of entrenched employer policy of age discrimination, holding that the doctrine has no application to a claim of ongoing, companywide, systematic discrimination against a protected class. (122 C.A.4th 372.)

SUPPLEMENT: [This section is current through the latest supplement]

(3) *Gender Discrimination.* In *Dominguez v. Washington Mut. Bank* (2008) 168 C.A.4th 714, 85 C.R.3d 705, the court used the approach in *Richards v. CH2M Hill* (2001) 26 C.4th 798, 111 C.R.2d 87, 29 P.3d 175, text, p. 717, in applying the continuing violations doctrine to a FEHA action alleging gender discrimination, and held that an employer could be held liable for misconduct occurring outside the limitations period. (168 C.A.4th 721.)



17 of 145 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XIV. STATUTE OF LIMITATIONS: TORT ACTIONS

B. Injuries to Persons and Wrongful Death: Two Years.

12. Action on Theory of Breach of Contract.

3 *Witkin Cal. Proc. Actions* § 565

[§ 565] Action on Theory of Breach of Contract.

The personal injury statute was originally applied to an action for damages for personal injuries resulting from negligence, even though a contract and breach of it were alleged. (See *Basler v. Sacramento Elec., Gas & Ry. Co.* (1913) 166 C. 33, 36, 134 P. 993 [carrier]; *Wetzel v. Pius* (1926) 78 C.A. 104, 107, 248 P. 288 [physician]; *Ehlen v. Burrows* (1942) 51 C.A.2d 141, 144, 124 P.2d 82 [physician]; *Hemingway v. Waxler* (1954) 128 C.A.2d 68, 69, 274 P.2d 699 [malpractice of physician]; *Lai Wum Chin Mock v. Belfast Beverages* (1961) 193 C.A.2d 770, 772, 14 C.R. 602 [exploding bottle]; *Weinstock v. Eissler* (1964) 224 C.A.2d 212, 227, 36 C.R. 537 [malpractice, even though cause of action was based on physician's false representations or concealment]; *Allred v. Bekins Wide World Van Services* (1975) 45 C.A.3d 984, 988, 120 C.R. 312; *Saliter v. Pierce Bros. Mortuaries* (1978) 81 C.A.3d 292, 295, 296, 146 C.R. 271; *Cardoso v. American Med. Systems* (1986) 183 C.A.3d 994, 1000, 228 C.R. 627 [personal injury limitations period applies to action for personal injuries, even though breach of warranty is alleged]; see 43 *Cal. L. Rev.* 546; 54 *Harv. L. Rev.* 516; 63 *Harv. L. Rev.* 1192, 1201; 28 *So. Cal. L. Rev.* 81; 20 *A.L.R.2d* 331 [action against carrier]; 80 *A.L.R.2d* 320 [action for personal injuries based on malpractice]; 70 *A.L.R.4th* 535 [action for wrongful death based on malpractice]; 49 *A.L.R.5th* 1 [actions governed by U.C.C. 2725].)

In *Rubino v. Utah Canning Co.* (1954) 123 C.A.2d 18, 266 P.2d 163, the court, following the *Basler* line of cases, and disapproving *Crawford v. Duncan* (1923) 61 C.A. 647, 215 P. 573, supra, §162, said that the apparent legislative intent behind the personal injury statute of limitations was not to restrict its coverage to tort actions independent of any contractual relation, but to provide a limitations period "where personal injury or death results, regardless of the tort, contract or breach of express or implied warranty aspect of the case." (123 C.A.2d 26.)

An important practical effect of this rule is illustrated in *Rodibaugh v. Caterpillar Tractor Co.* (1964) 225 C.A.2d 570, 37 C.R. 646. A defective bulldozer was sold. If the action had been based on warranty, for its failure to work properly, the limitations period would have been longer (see supra, §519), but the breach would have occurred at the time of sale and the statute would immediately have begun to run (see supra, §537). In this case, however, the employee of the buyer sued in tort for personal injury resulting from his operation of the defective machine. This cause of action accrued on the date of the injury--long after the sale of the machine--and the action, filed within 1 year after the injury, was timely under the then applicable 1-year limitations period. (225 C.A.2d 573.)

This insistence on the tort statute of limitations in actions based on breach of contract is at variance with the theory of later cases that other procedural or substantive advantages may be gained from an election of the contract remedy. (See *supra*, §§162, 163.) And the rule has been changed for medical malpractice. (See *infra*, §578 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]



18 of 145 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XIV. STATUTE OF LIMITATIONS: TORT ACTIONS

B. Injuries to Persons and Wrongful Death: Two Years.

13. Uninsured Motorist Proceeding.

3 *Witkin Cal. Proc. Actions* § 566

[§ 566] Uninsured Motorist Proceeding.

(1) *Nature and Scope of Statute.* *Ins.C. 11580.2(i)* originally contained a 1-year statute of limitations on a cause of action against an insurer by the insured arising from the uninsured motorist coverage. A 2003 amendment increased the limitations period to 2 years, but the amendment does not apply retroactively to revive already time-barred claims. (See *Bullard v. California State Auto. Assn.* (2005) 129 C.A.4th 211, 219, 28 C.R.3d 225.) The period starts running on the date of the accident, and, to preserve the cause of action, the insured must do one of three things: (a) file suit against the uninsured motorist (*Ins.C. 11580.2(i)(1)(A)*); (b) reach an agreement with the insurer for the amount due under the policy (*Ins.C. 11580.2(i)(1)(B)*); or (c) institute arbitration proceedings by notifying the insurer in writing (*Ins.C. 11580.2(i)(1)(C)*). (See *Allstate Ins. Co. v. Orlando* (1968) 262 C.A.2d 858, 865, 69 C.R. 702 [no exception for minors]; *Freeman v. State Farm Mut. Auto. Ins. Co.* (1975) 14 C.3d 473, 487, 121 C.R. 477, 535 P.2d 341 [period to institute arbitration was not tolled by prior action against one driver and fictitious defendants, where second (uninsured) driver was never made party to that action]; 2 *Summary* (10th), *Insurance*, §205 et seq.)

Arbitration proceedings commenced under the statute must be concluded (a) within 5 years of their institution (*Ins.C. 11580.2(i)(2)(A)*), or (b) if the insured has a workers' compensation claim arising from the same accident, within 3 years of the conclusion of the claim or within 5 years of institution of the arbitration proceeding, whichever occurs later (*Ins.C. 11580.2(i)(2)(B)*). However, the insurer and the insured may stipulate in writing to extend the time to conclude arbitration. (*Ins.C. 11580.2(i)(4)*.) (See *Santangelo v. Allstate Ins. Co.* (1998) 65 C.A.4th 804, 814, 76 C.R.2d 735 [statutory time limit applied to case pending at time of enactment].)

The doctrines of estoppel, waiver, impossibility, impracticability, and futility apply to excuse a party's noncompliance with the statutory time frame. (*Ins.C. 11580.2(i)(3)*.)

(2) *Notice by Insurer of Pending Bar.* The statute protects an insured who has made a claim under his or her uninsured motorist coverage but who overlooks the running of the statute on the right to bring an action. The insurer, at least 30 days before expiration of the period, must notify the insured in writing of the applicable statute; failure to do so tolls the statute for a period of 30 days from the date written notice is given. This notification is not required, however, if the insurer has received notice that the insured is represented by an attorney. (*Ins.C. 11580.2(k)*.)

(3) *Foreign Accident and Insolvent Insurer*. In *Firemen's Ins. Co. of Newark, New Jersey v. Diskin* (1967) 255 C.A.2d 502, 63 C.R. 177, the court held, on peculiar facts, that the claim against the insurer was barred before it actually accrued. In March 1962, Mr. and Mrs. D., California residents, were injured in Florida by the negligence of a taxi driver. The Florida statute of limitations was 4 years, so Mr. and Mrs. D did not promptly file a personal injury action. In January 1965, they learned that the taxi driver's insurer had become insolvent in May 1963. This made the driver an uninsured motorist (see 2 *Summary* (10th), *Insurance*, §197), and, because an action against him would be futile, the uninsured motorist coverage was the only practical source of compensation for Mr. and Mrs. D. But the former 1-year period of *Ins.C. 11580.2(i)* had seemingly expired. To overcome this objection, they contended that the statute did not begin to run until the driver became an uninsured motorist (May 1963), and therefore that the arbitration proceeding instituted against Firemen's, their insurer, in March 1964, was timely. In this action by Firemen's for declaratory relief, judgment for plaintiff was affirmed.

(a) The statutory limitation must be upheld "if at some point during the statutory period an opportunity to safeguard the claim existed." (255 C.A.2d 508.) Here the injured parties could not have commenced arbitration proceedings before they had an uninsured motorist, but they could have protected their contingent claim against the insurer by filing an action against the driver within the 1-year period. (255 C.A.2d 510.)

(b) Policy reasons support this conclusion: "Were we to extend beyond one year the financial responsibility of a person who may be derivatively liable for the fault of another we would create a supplemental liability of greater duration than the original liability, thereby holding the person secondarily responsible to a longer period of accountability than the person primarily responsible. If we applied appellants' argument to a California accident involving a motorist subsequently determined to be uninsured, we would be allowing the insured to institute a claim at a time when suit against the original tortfeasor was barred, a procedure which would nullify the insurer's right of subrogation against the tortfeasor. The language of the statute makes it highly improbable that the Legislature intended such a result. We think, rather, that the Legislature intended to assimilate and attach the uninsured motorist liability of the insurer to the original tort liability of the motorist tortfeasor as closely as possible." (255 C.A.2d 509.)

A 1970 amendment, directed at the problem of *Diskin*, provides that if the accident occurs in "any other state or foreign jurisdiction" and the insurer becomes insolvent, (a) an action under the statute may be brought within 3 months of the insolvency, but (b) not later than the limitations period of the place where the accident occurred. (*Ins.C. 11580.2(j)*.)

SUPPLEMENT: [This section is current through the latest supplement]



19 of 145 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XIV. STATUTE OF LIMITATIONS: TORT ACTIONS

B. Injuries to Persons and Wrongful Death: Two Years.

14. Postponed Accrual.

a. Progressive Disease.

3 Witkin Cal. Proc. Actions § 567

[§ 567] Progressive Disease.

(1) *Nature of Problem.* The general rule that the statute runs from the time of injury is reasonable where the plaintiff is or should be aware of both the wrongful act and the injury. If, however, the injury is not apparent at the time of the wrong, and the rule of accrual despite ignorance is applied, the plaintiff may be barred before he or she is aware of the right to sue.

(2) *Silicosis.* This problem was first presented by the workers' compensation and employer's liability proceedings involving the progressive occupational disease of silicosis. The injury is caused not by an act occurring at some particular time but by exposure to certain conditions for a period of time; and the employee can only know of the injury when its effects are felt. To avoid injustice toward favored claimants, many courts have held that accrual is postponed until substantial damage is suffered. Under this theory the statute does not begin to run until the disease culminates in disability. (*Urie v. Thompson* (1949) 337 U.S. 163, 69 S.Ct. 1018, 1025, 93 L.Ed. 1282, 1292; *Marsh v. Industrial Acc. Com. of Calif.* (1933) 217 C. 338, 351, 18 P.2d 933; 1 A.L.R.4th 117 [latent industrial or occupational disease].) (On asbestosis, see *infra*, §568 et seq.; on hazardous materials or toxic substances other than asbestos, see *infra*, §573.)

(3) *Dermatitis.* The same rule was applied to a case involving dermatitis resulting from the plaintiff working with his hands in silver cyanide solution; the statute did not begin to run until he was prevented from performing his usual work. (See *Coots v. Southern Pac. Co.* (1958) 49 C.2d 805, 810, 322 P.2d 460.)

SUPPLEMENT: [This section is current through the latest supplement]



20 of 145 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XIV. STATUTE OF LIMITATIONS: TORT ACTIONS

B. Injuries to Persons and Wrongful Death: Two Years.

14. Postponed Accrual.

b. Asbestosis.

1. Statutory Rule of Postponed Accrual.

3 *Witkin Cal. Proc. Actions* § 568

[§ 568] Statutory Rule of Postponed Accrual.

(1) *Nature of Disease.* Asbestosis is a progressive lung disease, the result of prolonged exposure to asbestos fibers and dust. The disease may be detected before there has been any significant respiratory impairment or resulting partial or total disability. (See *Velasquez v. Fibreboard Paper Products Corp.* (1979) 97 C.A.3d 881, 883, 159 C.R. 113; *Blakey v. Superior Court* (1984) 153 C.A.3d 101, 105, 200 C.R. 52, *infra*, §569; 97 *Harv. L. Rev.* 1683 [The Fairness and Constitutionality of Statutes of Limitations for Toxic Tort Suits]; 34 *Hastings L. J.* 871, 881.)

(2) *Enactment of Statutory Rule.* C.C.P. 340.2 is a special statute of limitations applicable to a civil action for injury or illness or wrongful death based upon exposure to asbestos. (On definition of disability, see *infra*, §569; on cause of disability, see *infra*, §570; on knowledge of disability, see *infra*, §571.)

C.C.P. 340.2(a) states alternative time periods governing an action for injury or illness as the later of the following:

(a) One year after the date the plaintiff first suffered disability.

(b) One year after the date the plaintiff either knew, or through the exercise of reasonable diligence should have known, that the disability was caused or contributed to by exposure to asbestos.

C.C.P. 340.2(c) states similar alternative periods governing an action for wrongful death as the later of the following:

(a) One year from the date of death.

(b) One year from "the date the plaintiff first knew, or through the exercise of reasonable diligence should have known, that the death was caused or contributed to by such exposure."

(3) *Retroactive Effect of Statute.* The act "shall apply to those causes of action which accrued prior to the change in the law made by this act and have not otherwise been extinguished by operation of law." (Stats. 1979, Chap. 513, §2.)

(See *Blakey v. Superior Court*, *supra*, 153 C.A.3d 106; *Puckett v. Johns-Manville Corp.* (1985) 169 C.A.3d 1010, 1015, 215 C.R. 726 [cause of action pending on effective date of C.C.P. 340.2, but which had not been adjudicated, was not "extinguished by operation of law," so as to preclude retroactive operation of statute]; *Nelson v. Flintkote Co.* (1985) 172 C.A.3d 727, 372, 218 C.R. 562 [C.C.P. 340.2 applies to all asbestosis victims whose claims have not been adjudicated prior to its effective date].)

(4) *Federal Jones Act Actions*. In a Jones Act action governed by federal law, the first sign of an asbestos-related disease does not trigger the running of the statute of limitations on all separate and distinct asbestos-related diseases caused by the same asbestos exposure. Rather, the statute commences on a separate and distinct disease when that disease becomes manifest. (*Wagner v. Apex Marine Ship Management Corp.* (2000) 83 C.A.4th 1444, 1449, 100 C.R.2d 533 [reversing trial judge and holding that action was timely].)

SUPPLEMENT: [This section is current through the latest supplement]



21 of 145 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XIV. STATUTE OF LIMITATIONS: TORT ACTIONS

B. Injuries to Persons and Wrongful Death: Two Years.

14. Postponed Accrual.

b. Asbestosis.

2. Definition of Disability.

3 *Witkin Cal. Proc. Actions* § 569

[§ 569] Definition of Disability.

(1) *In General.* *C.C.P. 340.2(b)* defines "disability" as "the loss of time from work" as a result of exposure to asbestos "which precludes the performance of the employee's regular occupation." (See *Puckett v. Johns-Manville Corp.* (1985) 169 C.A.3d 1010, 1017, 215 C.R. 726 [2-week absence from work did not constitute "disability"; permanent incapacity to work is required].) (On cause of disability, see *infra*, §570; on knowledge of disability, see *infra*, §571.)

Because of the difference in the meaning of "disability" in the context of a workers' compensation claim, the mere fact of filing that claim is insufficient to support the inference that the plaintiff was disabled for purposes of the limitations period specified in *C.C.P. 340.2(b)*, i.e., permanently precluded from performing his or her regular occupation. (*Anderson v. Metalclad Insulation Corp.* (1999) 72 C.A.4th 284, 296, 85 C.R.2d 331 [inference could not be drawn where defendant not only presented no evidence that plaintiff was temporarily precluded from performing his regular occupation, but also where evidence was either equivocal or contrary to that inference].)

(2) *Illustrations.* The significance of the special definition of "disability" is made clear in *Blakey v. Superior Court* (1984) 153 C.A.3d 101, 200 C.R. 52. In 1979 and 1980 plaintiffs brought actions against several asbestos producers for disability suffered from exposure during their employment, and in 1982 added F as a defendant. The trial court sustained demurrers on the ground that the allegations showed knowledge of the exposure more than 1 year before the complaints were filed. The complaints were then amended to add the allegation that plaintiffs "became disabled within the meaning of section 340.2 ... less than a year before the filing of the amended complaints." The trial court again sustained demurrers, this time without leave to amend. *Held*, mandamus issued to compel the court to overrule the demurrers.

(a) *Prior law: accrual on discovery of disease.* Before the enactment of *C.C.P. 340.2*, the cause of action for asbestos-caused injury accrued when the plaintiff knew or should have discovered that he or she was suffering from the disease. But, as pointed out in *Velasquez v. Fibreboard Paper Products Corp.* (1979) 97 C.A.3d 881, 159 C.R. 113, the plaintiff could have that knowledge before he suffered actual disability which he knew was caused by the exposure. (153 C.A.3d 105.)

(b) *New law: accrual on disability suffered.* The Legislature, aware of the long periods of time it may take for serious asbestos-related diseases to develop, provided for delayed accrual beyond the point of discovery. The statute does not commence to run until the plaintiff suffers the "disability" of loss of time from work that precludes the performance of his or her regular occupation. (153 C.A.3d 105, 106.)

In *Williamson v. Plant Insulation Co.* (1994) 23 C.A.4th 1406, 28 C.R.2d 751, plaintiff refinery worker, who had contracted asbestosis and missed 6 months of work, left his job 5 years later to sell real estate. Eight years afterwards, he was diagnosed with lung cancer, and, within 5 months, he brought an action for asbestos-related illness against a distributor of asbestos-containing products. *Held*, plaintiff's action was timely.

(a) "Disability," as used in C.C.P. 340.2, refers to a permanent termination of an individual's capacity to perform the tasks involved in his regular occupation, rather than to some temporary interference with that capacity. (23 C.A.4th 1418, 1419, citing *Puckett*.) Also, under that section, the statute of limitations will never begin to run for a plaintiff who was not an "employee," i.e., who was not part of the labor force or who retired before the onset of what would otherwise have been a disability. (23 C.A.4th 1419.)

(b) Here, the action was filed within 5 months after plaintiff was diagnosed with lung cancer, and was timely. Although plaintiff was first diagnosed as having asbestosis 13 years before filing the action and missed 6 months of work at that time, his incapacitation was not permanent, and the jury reasonably could have found that when he returned to work he was not precluded from performing his regular occupation. (23 C.A.4th 1419.)

(c) Moreover, although plaintiff left his work 5 years later, the jury was not required to find that he retired because he had suffered "disability" within the meaning of C.C.P. 340.2, because there was substantial evidence that he retired by his own choice to pursue another occupation. (23 C.A.4th 1419, distinguishing *Uram v. Abex Corp.* (1990) 217 C.A.3d 1425, 266 C.R. 695, *infra*, §570 et seq.)

(3) *Applicability to Retirees.* In *Duty v. Abex Corp.* (1989) 214 C.A.3d 742, 263 C.R. 13, plaintiff retired from her last job in 1968, and lived alone doing housework. In 1979, she had surgery for lung cancer, and in 1985 brought this action for damages due to asbestos exposure. On an analysis of the statutory language and the *Blakey* decision, *supra*, the court announced two conclusions: (a) The statutory language--"any civil action for injury or illness based upon exposure to asbestos"--is not limited to persons who are active members of the labor force; it also applies to retirees. (214 C.A.3d 749, 750.) (b) However, the definition of "disability" in C.C.P. 340.2(b) does not apply to retirees: "[T]he addition of the term 'employee' and the context of the subdivision as a whole compel us to conclude the Legislature intended 'disability' to apply only to persons employed in the labor force." (214 C.A.3d 751.) Consequently, the statute does not commence to run against a person such as plaintiff who retired before the onset of a "disability," and her action was not barred. (214 C.A.3d 745, 748.) (See *Williamson v. Plant Insulation Co.*, *supra* [following *Duty*].)

Duty was distinguished in *Darden v. General Motors Corp.* (1995) 40 C.A.4th 349, 47 C.R.2d 580, citing the text. Plaintiff retired from his position as a civilian automobile mechanic for a United States Navy base in 1982. In 1986 he was diagnosed with an asbestos-related lung disease. In 1987 plaintiff sued General Motors Corporation (GMC)--an automobile parts manufacturer--and others for personal injuries based on work-related exposure to asbestos. In June 1990, plaintiff settled the action as against certain defendants for \$ 200,000, but dismissed the action without prejudice as against other defendants, including GMC. In June 1991, plaintiff then filed a virtually identical complaint against GMC. *Held*, the 1991 action was time-barred under the 1-year limitations period of C.C.P. 340.2.

(a) Unlike the retired plaintiff in *Duty*, plaintiff here was on record, with the commencement of the first action, that he knew and believed his cause of action for asbestos-related illness had accrued. Further, there was no substantial evidence that plaintiff was not disabled when he retired in 1982. Because the evidence conclusively established that his illness at that time was related to asbestos exposure and that, at the latest, plaintiff was on notice in 1986 that he had asbestos-related lung disease, the 1991 action was untimely. (40 C.A.4th 352.)

(b) "[W]hen an individual has already announced and pursued an asbestos-related personal injury claim with a prior lawsuit, and indeed in that suit has named but not served the very defendant then pursued at a much later date, that person does not escape the limitation of section 340.2. Rather, the statute starts to run upon filing the first lawsuit." (40 C.A.4th 356.) (See *Barr v. ACandS* (1997) 57 C.A.4th 1038, 1047, 67 C.R.2d 494, citing the text [applying *Darden* retroactively to cases pending at time it became final].)

However, *Barr* and *Darden* ultimately were disapproved in *Hamilton v. Asbestos Corp., Ltd.* (2000) 22 C.4th 1127, 95 C.R.2d 701, 998 P.2d 403, which held that the 1-year limitations period of C.C.P. 340.2 did not bar an action by a worker who suffered from asbestos-related mesothelioma, and who had retired before suffering a disability as defined by the statute, even though plaintiff had brought an earlier action, more than 2 years before, against the same defendant based on asbestosis and asbestos-related pleural disease, which arose from the same asbestos exposure. (22 C.4th 1137.)

(a) Under the plain meaning of C.C.P. 340.2, the limitations period does not run from the date of injury or illness or its discovery. Rather, under C.C.P. 340.2(a), it runs from the date the plaintiff suffered disability and discovered that the disability was caused by asbestos exposure. (22 C.4th 1138.)

(b) Although C.C.P. 340.2(b) defines "disability" as the loss of time from work as a result of that exposure which precludes performance of the employee's regular occupation, plaintiff voluntarily left the work force upon reaching normal retirement age. Because plaintiff did not suffer disability within the meaning of C.C.P. 340.2, the 1-year limitations period had not begun to run when he filed the action. Accrual of the cause of action was not equal to the beginning of the limitations period. (22 C.4th 1142.)

(c) Even if the second case violated the rule against splitting a cause of action, defendant waived the defense, because it did not plead the pendency of the first case in abatement of the second. (22 C.4th 1144.)

SUPPLEMENT: [This section is current through the latest supplement]



22 of 145 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XIV. STATUTE OF LIMITATIONS: TORT ACTIONS

B. Injuries to Persons and Wrongful Death: Two Years.

14. Postponed Accrual.

b. Asbestosis.

3. Cause of Disability.

3 Witkin Cal. Proc. Actions § 570

[§ 570] Cause of Disability.

In *Uram v. Abex Corp.* (1990) 217 C.A.3d 1425, 266 C.R. 695, *infra*, §§572, 573, plaintiff worked as a machinist from 1940 to 1959, and for the last 4 years of his employment suffered from shortness of breath and a persistent cough. He obtained a disability retirement in 1959, primarily for his lung problems. In 1976 he underwent lung surgery and was first informed of his asbestos-related condition. He sought workers' compensation, but his application was denied in 1982. In 1987 he and his wife filed the present complaint seeking damages for personal injuries and loss of consortium. *Held*, plaintiff husband's claim was barred by C.C.P. 340.2, and plaintiff wife's claim (see *infra*, §572) was barred by the 1-year limitations period in former C.C.P. 340(3) (now 2-year limitations period in C.C.P. 335.1).

(a) Plaintiffs contended that the statute never commences to run under C.C.P. 340.2 unless defendants show conclusive diagnosis, rendered at the time of disability, that asbestos exposure alone caused the employee to leave his job. But the statute does not require that diagnosis and disability be contemporaneous. An examination in 1958 revealed lung rales and pleural thickening, and later events and diagnoses made clear the connection between asbestos exposure and the lung problems plaintiff husband suffered continuously from the time of his disability. (217 C.A.3d 1432.)

(b) Moreover, the statute does not require that asbestos be the sole cause of disability; it speaks in terms of a disability "caused or contributed to by such exposure" or "as a result of such exposure." All the doctors agreed that asbestos had affected his lung condition, and in his claim for workers' compensation he alleged that asbestos exposure caused his 1959 disability retirement. (217 C.A.3d 1432.) (On definition of disability, see *supra*, §569; on knowledge of disability, see *infra*, §571.)

SUPPLEMENT: [This section is current through the latest supplement]



23 of 145 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XIV. STATUTE OF LIMITATIONS: TORT ACTIONS

B. Injuries to Persons and Wrongful Death: Two Years.

14. Postponed Accrual.

b. Asbestosis.

4. Knowledge of Disability.

3 *Witkin Cal. Proc. Actions* § 571

[§ 571] Knowledge of Disability.

In *Uram v. Abex Corp.* (1990) 217 C.A.3d 1425, 266 C.R. 695, supra, §570, and infra, §572, plaintiff argued that the discovery rule in C.C.P. 340.2 calls for a "real comprehension" of the threat to his health. But under *Jolly v. Eli Lilly & Co.* (1988) 44 C.3d 1103, 245 C.R. 658, 751 P.2d 923, supra, §500, it is the discovery of facts, not their legal significance, that starts the statute running. (217 C.A.3d 1434.)

(a) "The logic of *Jolly* is equally suited to the analysis of the delayed discovery element of section 340.2. Both *Jolly* and the statute address the situation of a plaintiff exposed to a toxic substance with long-delayed but potentially life-threatening effects. In both situations, the plaintiff may only slowly gather knowledge about his or her condition and its causes. Yet at some point, the plaintiff must be held to have sufficient knowledge or suspicion to satisfy the discovery rule, whether common law or in its codified form in section 340.2." (217 C.A.3d 1434.)

(b) "Applying the *Jolly* standard here, the record is replete with evidence that Uram actually knew and believed in 1976 that his disability was caused or at least contributed to by asbestos exposure. His lung problems were explained to him by his doctors as early as 1976. The plaintiff in *Jolly* wanted to make a claim for compensation well before she eventually filed suit; Uram here went further and actually filed a claim for compensation in 1976 based on his exposure. In the course of that claim, both Uram and his attorney stated that his disability was caused by asbestos exposure. Uram expressly alleges that he was diagnosed with asbestos-related disease in 1976." (217 C.A.3d 1434.) (See *Anderson v. Metalclad Insulation Corp.* (1999) 72 C.A.4th 284, 292, 85 C.R.2d 331 [knowledge requirement of C.C.P. 340.2 was established on date that plaintiff filed workers' compensation claim based on injury described as asbestosis]; on definition of disability, see supra, §569; on cause of disability, see supra, §570.)

SUPPLEMENT: [This section is current through the latest supplement]



24 of 145 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XIV. STATUTE OF LIMITATIONS: TORT ACTIONS

B. Injuries to Persons and Wrongful Death: Two Years.

14. Postponed Accrual.

b. Asbestosis.

5. Distinction: Loss of Consortium.

3 Witkin Cal. Proc. Actions § 572

[§ 572] Distinction: Loss of Consortium.

In *Uram v. Abex Corp.* (1990) 217 C.A.3d 1425, 266 C.R. 695, supra, §§570, 571, plaintiff wife contended that C.C.P. 340.2, not former C.C.P. 340(3) (now C.C.P. 335.1; see supra, §552), was the statute of limitations for loss of consortium claims arising from asbestos-related injury to her husband. *Held*, former C.C.P. 340(3) was the governing statute and her claim was barred.

(a) Although the causes of action of husband and wife are normally joined, a loss of consortium injury is not "parasitic" upon the injured spouse's cause of action, nor is it an injury to the marital unit as a whole. (217 C.A.3d 1436, citing *Abellon v. Hartford Ins. Co.* (1985) 167 C.A.3d 21, 212 C.R. 852, 6 Summary (10th), *Torts*, §1680.)

(b) The Legislature could not have intended that C.C.P. 340.2(a) apply to the wife's cause of action because the "disability" element of accrual cannot be sensibly applied to a loss of consortium action, and even though C.C.P. 340.2(a) states that it applies to "any civil action," the similar claim of wrongful death based on asbestos exposure has a different limitation provision that omits the "disability" element. (217 C.A.3d 1436.) And because the time under C.C.P. 340.2 starts to run when the plaintiff "first suffered disability" or knew or should have known the cause of disability, it could never run against the spouse, who never suffers disability. (217 C.A.3d 1436.)

(c) "The evidence which supports the conclusion that in 1976 Joseph knew or should have known that asbestos exposure contributed to his disability, equally supports an identical conclusion with regard to Virginia. The only reasonable inference that can be drawn from her husband's diagnosis of asbestos-related fibrosis and his subsequent workers' compensation claim is that Virginia at least should have suspected that the loss of Joseph's services was due to his exposure to asbestos during his working years." (217 C.A.3d 1438.)

SUPPLEMENT: [This section is current through the latest supplement]



25 of 145 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XIV. STATUTE OF LIMITATIONS: TORT ACTIONS

B. Injuries to Persons and Wrongful Death: Two Years.

14. Postponed Accrual.

c. Exposure to Hazardous Material or Toxic Substance.

3 *Witkin Cal. Proc. Actions* § 573

[§ 573] Exposure to Hazardous Material or Toxic Substance.

(1) *Scope of Statute.* *C.C.P. 340.8* is a special statute of limitations applicable to any civil action for injury or illness or wrongful death based upon exposure to a hazardous material or toxic substance. However, the statute expressly excludes civil actions based on exposure to asbestos under *C.C.P. 340.2* (see *supra*, §568 et seq.) or professional malpractice under *C.C.P. 340.5* (see *infra*, §578 et seq.). (*C.C.P. 340.8(c)(1)*.) Also, the statute does not limit, abrogate, or change the law governing actions that are not based on exposure to a hazardous material or toxic substance. (*C.C.P. 340.8(d)*.) (See *Nelson v. Indevus Pharmaceuticals* (2006) 142 *C.A.4th* 1202, 1208, 48 *C.R.3d* 668, citing the text [statute is not limited to actions based on environmental hazards, but also applies to actions alleging personal injury by harmful chemicals, including this action alleging defective prescription diet drug].)

(2) *Accrual Rules.* *C.C.P. 340.8(a)* states alternative time periods governing an action for injury or illness as the later of the following:

(a) Two years from the date of injury.

(b) Two years after the date the plaintiff either became aware of, or reasonably should have become aware of, an injury, the physical cause of the injury, and sufficient facts to put a reasonable person on inquiry notice that the injury was caused or contributed to by the wrongful act of another.

C.C.P. 340.8(b) states alternative periods governing an action for wrongful death as the later of the following:

(a) Two years from the date of death.

(b) Two years from the first date the plaintiff is aware of, or reasonably should have become aware of, the physical cause of the death and sufficient facts to put a reasonable person on inquiry notice that the death was caused or contributed to by the wrongful act of another.

Media reports about hazardous material or toxic substance contamination do not, in and of themselves, constitute sufficient facts to put a reasonable person on inquiry notice. (*C.C.P. 340.8(c)(2)*; see *Nelson v. Indevus*

Pharmaceuticals, supra [published media reports about dangerous diet drug could not trigger accrual].)

(3) *Codification and Disapproval of Case Law.* In enacting *C.C.P. 340.8*, the Legislature intended to do the following (Stats. 2003, Chap. 873, §2):

(a) Codify the rulings in *Jolly v. Eli Lilly & Co. (1988) 44 C.3d 1103, 245 C.R. 658, 751 P.2d 923, supra, §500*, and *Clark v. Baxter Healthcare Corp. (2000) 83 C.A.4th 1048, 100 C.R.2d 223, supra, §500*.

(b) Disapprove the ruling in *McKelvey v. Boeing North Amer. (1999) 74 C.A.4th 151, 160, 86 C.R.2d 645, infra, §661*, to the extent the ruling is inconsistent with *C.C.P. 340.8(c)(2)*.

SUPPLEMENT: [This section is current through the latest supplement]



26 of 145 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XIV. STATUTE OF LIMITATIONS: TORT ACTIONS

B. Injuries to Persons and Wrongful Death: Two Years.

14. Postponed Accrual.

d. Infliction of Emotional Distress.

3 *Witkin Cal. Proc. Actions* § 574

[§ 574] Infliction of Emotional Distress.

(1) *In General.* An action for damages for emotional distress suffered from wrongful conduct is governed by the 2-year statute of *C.C.P.* 335.1 (see *supra*, §552). But where the wrongful conduct continues over a period of years, the point at which it becomes sufficiently outrageous and the plaintiff's distress sufficiently severe is a question of fact, and the cause of action may not accrue (and the statute may not begin to run) at the time the wrongful conduct is commenced. (On 1-year limitations period in predecessor statute, see *Murphy v. Allstate Ins. Co.* (1978) 83 C.A.3d 38, 51, 147 C.R. 565; *Billmeyer v. Plaza Bank of Commerce* (1995) 42 C.A.4th 1086, 1097, 50 C.R.2d 119, *infra*, §596 [*Murphy* rule was not applicable where conduct was not continuing in nature]; *Murray v. Oceanside Unified School Dist.* (2000) 79 C.A.4th 1338, 1363, 95 C.R.2d 28, citing the text [personal injury statute applied to emotional distress claim arising from workplace harassment in violation of FEHA].)

In *Kiseskey v. Carpenters' Trust for Southern Calif.* (1983) 144 C.A.3d 222, 192 C.R. 492, plaintiff employer and his wife sued defendant union and its agents for intentional infliction of emotional distress (husband's cause of action) and loss of consortium (wife's cause of action). The complaint alleged that defendant agents telephoned, threatening plaintiff's life and health and that of his family, if he did not sign another agreement with the union; and that, as a result, he suffered a heart attack. The lower court sustained a demurrer on the ground that the alleged wrongful acts (the threats) occurred on October 17, 1977, November 20, 1977, and December 20, 1977, and the complaint was not filed until January 8, 1979, more than 1 year after the last wrongful act under the former 1-year limitations period. *Held*, reversed.

(a) Mere transitory distress is insufficient to justify recovery; the tort "is not complete until the effect of a defendant's conduct results in plaintiff's severe emotional distress." And both the intensity and duration of the distress must be considered in determining its severity. (144 C.A.3d 232.)

(b) The allegation that defendants' conduct caused plaintiff's heart attack on January 9, 1978 was sufficient to state a cause of action accruing on that date. (144 C.A.3d 231, 232.) Although it may later be determined as a fact that plaintiff suffered severe emotional distress before the heart attack, and that the cause of action was barred by the 1-year period, this factual issue could not be decided on demurrer. (144 C.A.3d 232.)

(2) *Emotional Distress Suffered by Bystander*. A cause of action for damages for negligent infliction of emotional distress suffered by a bystander accrues at the time of the injury-producing event. Distress that arises from the observation of subsequent treatment or injuries does not delay that accrual, because only damages that arise directly out of plaintiff's initial observation are compensable. (*Campanano v. California Med. Center* (1995) 38 C.A.4th 1322, 1329, 1330, 45 C.R.2d 606 [action based on plaintiffs' witnessing improper infusion of fluids by intravenous line into patient's arm accrued at time of infusion, and was not delayed until plaintiffs learned that arm had to be amputated].)

SUPPLEMENT: [This section is current through the latest supplement]



27 of 145 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XIV. STATUTE OF LIMITATIONS: TORT ACTIONS

B. Injuries to Persons and Wrongful Death: Two Years.

14. Postponed Accrual.

e. Products Liability.

1. In General.

3 *Witkin Cal. Proc. Actions* § 575

[§ 575] In General.

(1) *Two-Year Period.* Personal injury or wrongful death actions based on products liability generally are governed by the 2-year statute of limitations (*C.C.P.* 335.1, *supra*, §552), but the rule of postponed accrual until discovery of the cause, developed in the medical malpractice cases (see *infra*, §§577, 578), applies to products liability actions. (See *Martinez-Ferrer v. Richardson-Merrell* (1980) 105 C.A.3d 316, 324, 164 C.R. 591, *infra*, §591 [former 1-year period]; 83 Cal. L. Rev. 1243 [insurance coverage disputes in products liability cases with delayed manifestation injuries and damages]; 30 A.L.R.5th 1 [validity of statute terminating action for product-caused injury at fixed period after product's manufacture, sale, or delivery].) (On postponed accrual in DES cases, see *supra*, §§499, 500.)

Frederick v. Calbio Pharmaceuticals (1979) 89 C.A.3d 49, 56, 57, 152 C.R. 292, was a wrongful death action construing the 1-year limitations period in former C.C.P. 340(3). Plaintiffs alleged that defendant manufacturer negligently distributed the drug Triazure for experimental use without establishing necessary safeguards; that defendant knew or should have known that thrombotic complications were risks incident to its use; that massive doses were administered to decedent from October 1974 to January 1975, and that on January 31, 1975, decedent suffered a hemorrhagic thrombus from which he died. The complaint, filed more than 1 year after the death, further alleged that plaintiffs did not discover the facts of defendant's negligence as the cause of death until August 1976, when the FDA issued a press release stating that the drug was being recalled due to incidents of thrombosis and blood clotting. *Held*, judgment of dismissal on demurrer reversed.

(a) Any general rule deferring the commencement of the limitations period for personal injury actions is also applicable to wrongful death actions. (89 C.A.3d 55.) And several prior California decisions have applied the postponed accrual theory to personal injury actions based on products liability. When the pathological effect "occurs without perceptible trauma" and the victim is "blamelessly ignorant of the cause of injury," the statute does not begin to run until the person knows, or by the exercise of reasonable diligence should have discovered, the cause. (89 C.A.3d 57.)

(b) The discovery rule results in an "open-ended" statute of limitations, and in the area of medical malpractice it was thought necessary to provide an "overall limitations period" for actions against health care providers (*C.C.P.* 340.5,

infra, §578 et seq.). But no such legislative provision was made for actions based on products liability. (89 C.A.3d 58.)

(c) The complaint was, nevertheless, defective in its pleading of the excuse for delayed discovery. It contained only the conclusionary allegation that plaintiffs could not "by the exercise of reasonable diligence have become aware" of the risk of thrombotic complications. "Some facts could have been alleged in this respect. For example, plaintiffs could have alleged that they are lay persons without medical knowledge, that no one personally advised them of the risk, that no medical treatise disclosing such risk came to their attention, and that there was no general public dissemination of warnings specifying the risk prior to the recall." (89 C.A.3d 59.) Accordingly plaintiffs, on remand, should be given the opportunity to amend the complaint. (89 C.A.3d 60.)

(2) *Dalkon Shield Actions*. A special statute governs personal injury action by or on behalf of victims of the Dalkon Shield. (See C.C.P. 340.7.)

SUPPLEMENT: [This section is current through the latest supplement]



28 of 145 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XIV. STATUTE OF LIMITATIONS: TORT ACTIONS

B. Injuries to Persons and Wrongful Death: Two Years.

14. Postponed Accrual.

e. Products Liability.

2. Suspicion of Wrongdoing.

3 *Witkin Cal. Proc. Actions* § 576

[§ 576] Suspicion of Wrongdoing.

Bristol-Myers Squibb Co. v. Superior Court (1995) 32 C.A.4th 959, 38 C.R.2d 298, was a products liability action against the manufacturer of breast implants. Following the rationale of *Bernson v. Browning-Ferris Industries* (1994) 7 C.4th 926, 30 C.R.2d 440, 873 P.2d 613, *infra*, §769, the court held that the action accrued when plaintiff knew or suspected that plaintiff's treating physician had negligently inserted implants, even though plaintiff may not have known that she had cause of action against the manufacturer. (32 C.A.4th 966.)

In *Norgart v. Upjohn Co.* (1999) 21 C.4th 383, 87 C.R.2d 453, 981 P.2d 79, plaintiffs sued defendant drug manufacturer for the wrongful death of their daughter, who committed suicide by overdosing on prescription drugs. The trial judge granted summary judgment for defendant on the ground that the action was untimely under the 1-year limitations period in former C.C.P. 340(3). The summary judgment was based on an agreement between the parties to resolve the proceedings in the trial court, following the judge's tentative ruling on the summary judgment motion, in order to hasten appellate review in light of the holding in *Bristol-Myers Squibb Co.*, that appeared to be dispositive. That holding provided that, under the discovery rule, a plaintiff discovers, or has reason to discover, a cause of action as to all defendants when he or she suspects, or has reason to suspect, a factual basis for its elements as to any defendant. However, in the present case, the Court of Appeal rejected the holding in *Bristol-Myers Squibb Co.*, and instead ruled that under the discovery rule, where there are potentially multiple, unrelated, concurring causes, a plaintiff discovers, or has reason to discover, a cause of action based on a particular act of wrongdoing by a particular defendant, only when the plaintiff suspects, or has reason to suspect, that act of wrongdoing by that defendant. Under that reasoning, the Court of Appeal reversed the grant of summary judgment to defendant. *Held*, judgment of Court of Appeal reversed.

(a) *Accrual on death.* Usually, the date of accrual of an action for wrongful death is the date of death. Thus, the 1-year limitations period barred plaintiffs' action, because they waited 5 years after their daughter's death to file their action. (21 C.4th 404.)

(b) *Discovery rule is unavailing.* Even if the discovery rule applied, plaintiffs' action was untimely, because plaintiff father admitted that, at or around the time of death, he suspected something wrong had happened to his

daughter to cause her to commit suicide. (21 C.4th 405, 406.) In making that determination, "we need not resolve any conflict between the holding of the Court of Appeal in *Bristol-Myers Squibb* and the holding of the Court of Appeal below. That is because, although the former is plainly not helpful to their position, the latter shows itself to be no better." (21 C.4th 406.) The ruling of the Court of Appeal in the present case did not apply, because the potentially multiple concurring causes of the daughter's death (i.e., the daughter's husband, doctor, psychiatrist, and the drug) were in fact related to each other through the daughter's depression and suicide. In any event, plaintiffs had reason to discover their cause of action against defendant soon after their daughter's death, when they learned of her depression and suicide attempts, including an overdose of defendant's drug. Moreover, the drug's package insert disclosed a possible connection to defendant. (21 C.4th 407.) For purposes of the discovery rule, a plaintiff need do no more than suspect a factual basis for the elements of a cause of action in order to discover the cause of action. *Bristol-Myers Squibb Co.* is disapproved to the extent it holds to the contrary. (21 C.4th 410, footnote 8.)

(c) *No fraudulent concealment or laches.* Defendant was not estopped from prevailing through the doctrine of fraudulent concealment (see *infra*, §770 et seq.), which did not apply under the facts of the case, nor was any asserted absence of prejudice from the passage of time legally material (see *supra*, §446). (21 C.4th 409.)

In *Rivas v. Safety-Kleen Corp.* (2002) 98 C.A.4th 218, 119 C.R.2d 503, plaintiff filed a products liability action against defendant manufacturers and suppliers of allegedly toxic chemicals in 1998, based on kidney damage that plaintiff attributed to his use of the chemicals at work. The trial judge ruled that the action was barred by the 1-year period of former C.C.P. 340(3). *Held*, affirmed.

(a) *Accrual on suspicion of wrongdoing.* The statute of limitations begins to run when the claimant suspects or should suspect that his or her injury was caused by someone's wrongdoing. It is not necessary that the injured party be explicitly informed by his or her doctor that a certain substance or product caused the medical disorder or that the doctor had an opportunity to personally review medical records specifying the cause of the disorder. (98 C.A.4th 228.) In the present case, plaintiff was diagnosed with a malfunctioning kidney in 1991, he provided his doctor with a list of chemicals he worked with, and he was told to stay away from a particular solvent. That alone should have been sufficient to arouse a reasonable person's suspicion and lead to further investigation. Even if the doctor's statements were deemed ambiguous, the fact that plaintiff filed a workers' compensation claim in 1996 based on exposure to toxic chemicals at work was definitive proof that he had a suspicion of wrongdoing long before his civil complaint was filed in 1998. (98 C.A.4th 228, 229.)

(b) *Fraud statute does not apply.* The action was not governed by the 3-year statute of limitations for fraud (C.C.P. 338(d); see *infra*, §653 et seq.). Although plaintiff's complaints purported to assert separate and distinct causes of action for failure to warn and fraudulent concealment, the essence of both claims was that defendants' products were defective because they lacked warnings adequate to inform plaintiff of their toxic hazards and serious effects upon the human body, and because they lacked instructions for handling and use adequate to prevent exposures to plaintiff causing serious injury. Thus, plaintiff's fraud claim was merely a failure to warn claim recast as a claim for fraudulent concealment, and there was no reason to depart from the general rule applying the 1-year statute of limitations to claims for product liability, regardless of how they are denominated. (98 C.A.4th 231.)

(c) *Action is not preempted by federal law.* Plaintiff's action was not preempted by 42 U.S.C., §9658, which is part of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA). The federal statute provides that in a state law action for personal injury caused by exposure to a hazardous substance released into the environment from a facility, the federal statute of limitations period governs if it is longer than the state limitations period. However, the statutory definition of "release" contains an express exclusion for a release, such as the one in the present action, that results in exposure to persons solely within a workplace with respect to claims those persons may assert against their employer. (98 C.A.4th 231.)

In *Fox v. Ethicon Endo-Surgery* (2005) 35 C.4th 797, 27 C.R.3d 661, 110 P.3d 914, plaintiff filed a medical malpractice action against her physician after gastric bypass surgery resulted in severe complications. In the course of

discovery, plaintiff received information more than 1 year later that a medical device used during the surgery may have malfunctioned, causing her injury. Plaintiff then amended her complaint to add a products liability cause of action against defendant, the manufacturer of the device. Relying on *Bristol-Myers Squibb Co.*, the trial judge dismissed the products liability claim as barred by the 1-year statute of limitations. *Held*, reversed. Under the delayed discovery rule, a cause of action accrues, and the statute of limitations begins to run, when plaintiff has reason to suspect an injury and some wrongful cause, unless plaintiff, as here, pleads and proves that a reasonable investigation at that time would not have revealed a factual basis for that particular cause of action. In that situation, the limitations period is tolled until such time as a reasonable investigation would have revealed its factual basis. (35 C.4th 803, 808, disapproving *Bristol-Meyers Squib Co.* to extent it is inconsistent with this view.)

In *Grisham v. Philip Morris U.S.A.* (2007) 40 C.4th 623, 54 C.R.3d 735, 151 P.3d 1151, two cigarette smokers, G and C, filed separate actions against defendant tobacco companies in federal court. G sought damages for economic injury under the Unfair Competition Law (UCL), alleging that defendants' advertising had targeted youths and minors such as she when she began smoking, and that defendants fraudulently concealed the danger and addictive nature of cigarettes and manipulated nicotine levels to induce a new generation of smokers to become addicted to smoking for defendant's economic profit. G alleged that she was unaware that she was addicted to nicotine until after she was diagnosed with emphysema and gum disease, which occurred within the limitations period. Both G and C also sought damages on various tort theories for serious physical injuries resulting from their addiction. On appeal of both actions, the Ninth Circuit Court of Appeals certified these questions to the California Supreme Court: (a) For the purpose of the statute of limitations period applicable under California law to an action alleging personal injury arising from smoking tobacco, are persons presumed to have been aware by 1988 that smoking causes addiction and other health problem? If California law recognizes such a presumption, under what circumstances is it rebuttable? (b) Under California law, if a plaintiff seeks damages resulting from an addiction to tobacco, does an action for personal injury accrue when the plaintiff recognizes that he or she is addicted to tobacco, if the plaintiff has not yet been diagnosed with an injury stemming from tobacco use? *Held*: (a) there is no conclusive presumption, but a rebuttable one that a plaintiff has knowledge of the wrongful cause of his or her injury; (b) an economic injury claim accrues when the plaintiff discovers that he or she is addicted, while a personal injury claim resulting from that addiction accrues when the injury manifests itself.

(a) *Presumptions*. Defendants were not entitled to a conclusive presumption that all plaintiffs are aware that smoking is addictive or harmful based either on a former 1987 statute immunizing tobacco sellers and manufacturers from liability for the commonly known risks of smoking or based on common knowledge. Rather, California law, as stated in *Fox*, recognizes a general, rebuttable presumption that plaintiffs have knowledge of the wrongful cause of an injury. To rebut that presumption, a plaintiff whose complaint shows on its face that a claim would be barred without the benefit of the discovery rule must specifically plead facts to show (a) the time and manner of discovery and (b) the inability to have made earlier discovery despite reasonable diligence. Thus, if a plaintiff's cause of action depends on the delayed discovery of the addiction to nicotine to be timely, the plaintiff must plead facts showing an inability to have discovered that addiction, such as a reasonable reliance on tobacco company misrepresentations. (40 C.4th 638, rejecting contrary Ninth Circuit Court of Appeals decision.)

(b) *Accrual*.

(1) Applying the *Fox* rule to G's UCL claim, G knew or should have known of her tobacco addiction and the economic injury it was causing when she joined Nicotine Anonymous in an unsuccessful attempt to overcome her addiction. That occurred outside the applicable 4-year limitations period, and G's economic damages claim was therefore untimely. (40 C.4th 638.)

(2) The discovery date for G's UCL claim for economic injury, i.e., the date she joined Nicotine Anonymous, did not commence the statute of limitations on her tort claims. Rather, the tort claims did not begin to accrue until the physical ailments themselves were, or reasonably should have been, discovered. This occurred on manifestation, which was within the then applicable 1-year limitations period, and therefore G's tort claims were timely. (40 C.4th 646.)

(3) Unlike G, C did not allege that she discovered a serious physical injury within the applicable limitations period for her tort claim, or that her justifiable reliance on defendants' misrepresentations continued into the limitations period. Whether C should be permitted to amend her pleadings or otherwise be permitted to maintain her tort action is beyond the scope of the questions certified by the *Ninth Circuit*. (40 C.4th 646.)

SUPPLEMENT: [This section is current through the latest supplement]



29 of 145 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XIV. STATUTE OF LIMITATIONS: TORT ACTIONS

B. Injuries to Persons and Wrongful Death: Two Years.

14. Postponed Accrual.

f. Medical Malpractice.

1. Former Judicially Developed Exception.

3 *Witkin Cal. Proc. Actions* § 577

[§ 577] Former Judicially Developed Exception.

(1) *In General.* The problem of a plaintiff being barred from filing a claim due to ignorance of the harm at the time of the wrong, posed in occupational disease cases (*supra*, §567), is also presented where the plaintiff is injured by the negligence of a physician but cannot reasonably discover the harm or the cause until the period has run. The ordinary rule of accrual is nevertheless applied in many states, and was formerly applied in California. (See *Gum v. Allen* (1931) 119 C.A. 293, 294, 6 P.2d 311; 63 Harv. L. Rev. 1222.) Under this rule the plaintiff, no matter how excusable his or her ignorance may be, is barred unless the statute is tolled by fraudulent concealment. (See *infra*, §§769, 770.)

The injustice of this view was recognized, and a new rule announced, in *Huysman v. Kirsch* (1936) 6 C.2d 302, 57 P.2d 908. Defendant physician, after an operation, negligently left a rubber tube inside plaintiff's body. An infection resulted, but it was not discovered until a subsequent operation, nearly 2 years later. The action was filed 4 months after discovery, and it was held that the statute did not begin to run until the discovery. Three theories were stated in support of this conclusion. (a) There was a continuing duty to remove the tube, and hence a continuing tort, giving rise to new causes of action. (6 C.2d 308.) (b) The operation might be viewed as incomplete until removal of all the appliances used. (6 C.2d 311.) (c) The principle of the occupational disease cases was applicable, i.e., the statute should not run against the cause of action for an injury during the time the plaintiff is unable, with care and diligence, to ascertain the cause. In this connection the court emphasized the fact of plaintiff's sole reliance on defendant physician for information about her condition. (6 C.2d 312.)

The only criticism that can be made of this liberal decision is that its first two artificial reasons tend to confine the rule to situations in which a surgeon has left something inside the patient. And this was the approach of some of the later cases. (See *Trombley v. Kolts* (1938) 29 C.A.2d 699, 708, 85 P.2d 541 [skin clip left inside patient]; *Ehlen v. Burrows* (1942) 51 C.A.2d 141, 145, 124 P.2d 82 [broken roots of teeth left by dentist after extraction]; *Pellett v. Sonotone Corp.* (1942) 55 C.A.2d 158, 160, 130 P.2d 181 [bit of plaster of Paris left in patient's ear].)

(2) *Theory of Continuing Relationship.* The later cases followed the third theory of *Huysman*, holding that, in any malpractice case, the continuing relationship of physician and patient, with its accompanying reliance on the physician

for information, postpones the running of the statute against the ignorant plaintiff until the relationship terminates. In *Petrucci v. Heidenreich* (1941) 43 C.A.2d 561, 111 P.2d 421, the court declared that "if a physician and surgeon performs an operation in a negligent manner and continues thereafter to treat the patient, the statute of limitations does not commence to run during the continuance of the relationship of physician and patient, unless the patient has discovered the injury or through the use of reasonable diligence should have discovered it." (43 C.A.2d 562.)

In *Agnew v. Larson* (1947) 82 C.A.2d 176, 185 P.2d 851, the only foreign substance was a drug negligently prescribed. The court said that "where injury proximately results from the negligent act of the physician and the patient has relied upon him for information as to his physical condition as well as for the results that may reasonably be anticipated from the introduction into his body of the foreign substance or matter, including drugs and medicines, the statute of limitations does not commence to run until the patient knows, or in the exercise of ordinary care should have known, the cause of his injury." (82 C.A.2d 182.)

Other cases are to the same effect. (See *Greninger v. Fischer* (1947) 81 C.A.2d 549, 553, 184 P.2d 694; *Costa v. Regents of Univ. of Calif.* (1953) 116 C.A.2d 445, 454, 254 P.2d 85; *Bowers v. Olch* (1953) 120 C.A.2d 108, 116, 260 P.2d 997 [needle left in body]; *Myers v. Stevenson* (1954) 125 C.A.2d 399, 402, 270 P.2d 885, *supra*, §§443, 444 [injury to unborn child, continuing relationship]; *Wohlgemuth v. Meyer* (1956) 139 C.A.2d 326, 330, 293 P.2d 816 [sufficiency of pleading]; *Garlock v. Cole* (1962) 199 C.A.2d 11, 15, 18 C.R. 393 [summary judgment reversed, triable issue of fact whether plaintiff relied on representations that condition was not permanent and would ultimately be cured]; *Weinstock v. Eissler* (1964) 224 C.A.2d 212, 230, 36 C.R. 537 [allegation that defendant treated plaintiff continuously up to date within 1-year period; following *Myers v. Stevenson*]; 70 A.L.R.3d 7 [action based on leaving foreign substance in patient's body]; 70 A.L.R.3d 82 [relation back of amendment purporting to change nature of action or theory of recovery after statute has run]; 70 A.L.R.3d 114 [action against unlicensed practitioner]; 93 A.L.R.3d 218 [action in connection with sterilization or birth control procedures].)

(3) *Inexcusable Ignorance of Facts*. As in fraud and mistake cases (see *infra*, §659 et seq.), the plaintiff must make a sufficient showing of an excusable late discovery of the facts; otherwise the statute runs in the usual manner. (See *Hemingway v. Waxler* (1954) 128 C.A.2d 68, 71, 274 P.2d 699 [where plaintiff actually discovered facts more than 1 year before, action was barred under then 1-year limitations period]; *Mock v. Santa Monica Hosp.* (1960) 187 C.A.2d 57, 64, 9 C.R. 555 [no pleading to explain failure to make earlier discovery]; *De Vault v. Logan* (1963) 223 C.A.2d 802, 807, 36 C.R. 145 [plaintiff had knowledge of all facts and was put on inquiry; following *Hemingway*]; *Weinstock v. Eissler*, *supra*, 224 C.A.2d 228 [as to certain counts, pleading was defective in failing to state circumstances of discovery].)

(4) *Death of Physician*. The postponed accrual theory does not fully apply where the physician dies. This unexpected result comes from a construction of the probate nonclaim statute (former Prob.C. 707, now Prob.C. 9002; see 14 *Summary* (10th), *Wills and Probate*, §612) which then required the filing of a claim against an estate within 4 months after the first publication of notice to creditors and, under the survival statute, expressly covers claims for damages for physical injuries. (*Hurlimann v. Bank of America* (1956) 141 C.A.2d 801, 805, 297 P.2d 682.) (On current time requirements for filing creditor claims against decedents' estates, see 14 *Summary* (10th), *Wills and Probate*, §633 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]



30 of 145 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XIV. STATUTE OF LIMITATIONS: TORT ACTIONS

B. Injuries to Persons and Wrongful Death: Two Years.

14. Postponed Accrual.

f. Medical Malpractice.

2. Statutory Rule: In General.

3 *Witkin Cal. Proc. Actions* § 578

[§ 578] Statutory Rule: In General.

(1) *Enactment of Statute.* The 1970 Legislature enacted *C.C.P. 340.5*, embodying the theory of cases discussed in the preceding section, but specifying alternative periods and placing a limit on postponement where no fraudulent concealment is involved. (See *Brown v. Bleiberg* (1982) 32 *C.3d* 426, 432, 186 *C.R.* 228, 651 *P.2d* 815 [background of enactment]; *Hills v. Aronsohn* (1984) 152 *C.A.3d* 753, 758, 199 *C.R.* 816, *infra*, §§580, 581, 584 [plaintiff must satisfy conditions of both 1-year and 3-year provisions]; 2 *Pacific L. J.* 663 [exhaustive analysis of statute]; 26 *Proof of Facts* 3d 185 [Discovery Date in Medical Malpractice Litigation]; 17 *A.L.R.6th* 159 [accrual in dental malpractice]; 70 *A.L.R.4th* 600 [when period begins to run on claim for optometrist's malpractice]; 5 *A.L.R.6th* 133 [validity of medical malpractice statutes of repose]; 14 *A.L.R.6th* 301 [timeliness of medical malpractice action under statute of repose not involving fraudulent concealment of patient's cause of action].)

(2) *Scope of Statute: Persons.* *C.C.P. 340.5* applies to actions against a "health care provider." The term includes all of the following (*C.C.P. 340.5(1)*):

(a) A person licensed or certified pursuant to *B. & P.C. 500* et seq., the Osteopathic Initiative Act, the Chiropractic Initiative Act, or *Health & Saf.C. 1440* et seq.

(b) A clinic, health dispensary, or health facility licensed pursuant to *Health & Saf.C. 1200* et seq.

(c) The legal representatives of a health care provider.

Chosak v. Alameda County Med. Center (2007) 153 *C.A.4th* 549, 63 *C.R.3d* 184, considered a question of first impression: does the term "health care provider," as used in *C.C.P. 340.5(1)*, include an unlicensed medical student? *Held*, a lawfully practicing but unlicensed or uncertified medical student is governed by the statute.

(a) The language and history of the statute indicate that the Legislature intended *C.C.P. 340.5* to apply to all medical malpractice actions filed in *California*. (153 *C.A.4th* 566.)

(b) Public policy is promoted by this result, because excluding medical students from the limitations period afforded licensed professionals would inflate medical malpractice insurance premiums for institutions instructing or employing medical students. (153 C.A.4th 566.)

(c) Medical students provide the same type of services as licensed professionals. Although students may be less adept than licensed professionals, medical students operate under their supervision. (153 C.A.4th 566.)

(d) Although no California case has addressed this issue, a Colorado Supreme Court decision has reached a similar result. (153 C.A.4th 567.)

(3) *Scope of Statute: Actions.* C.C.P. 340.5 applies to actions for injury or death based on the health provider's professional negligence. "Professional negligence" means a "negligent act or omission to act by a health care provider in the rendering of professional services, which act or omission is the proximate cause of a personal injury or wrongful death, provided that such services are within the scope of services for which the provider is licensed and which are not within any restriction imposed by the licensing agency or licensed hospital." (C.C.P. 340.5(2).)

In *Hedlund v. Superior Court* (1983) 34 C.3d 695, 194 C.R. 805, 669 P.2d 41, defendant psychologists breached their duty, established in *Tarasoff v. Regents of Univ. of Calif.* (1976) 17 C.3d 425, 131 C.R. 14, 551 P.2d 334, 6 Summary (10th), Torts, §1050, to recognize the danger to plaintiff from one of their patients who had made threats against her, and to warn her of the danger. The patient shot plaintiff, and plaintiff sued for personal injuries within the 3-year period of C.C.P. 340.5 (see *infra*, §581), but not within the 1-year period of former C.C.P. 340(3) (now 2-year period in C.C.P. 335.1; see *supra*, §552). *Held*, the action was governed by C.C.P. 340.5; defendants' failure to warn plaintiff constituted "professional negligence" within the meaning of that statute.

(a) Defendants contended that "professional negligence," as opposed to "ordinary negligence," involves only professional services that result in injury to the patient. This is incorrect. The statutory definition of "professional negligence" is not limited to injury to a "patient." (34 C.3d 703.) Under *Tarasoff*, the duty to recognize danger is the basis upon which the duty to warn the third-party victim is found. The two duties are thus inextricably interwoven into a single cause of action which must be subject to a single statute of limitations. (34 C.3d 703.)

(b) The definition of "professional negligence" was added to C.C.P. 340.5 in 1975 as part of the Medical Injury Compensation Reform Act, the purpose of which was to reduce health care costs by placing various restrictions on recovery in malpractice actions. The conclusion that "professional negligence" encompasses a failure to warn third persons is consistent with this Act. (34 C.3d 704.)

(c) Also, the conclusion adopted avoids the anomaly of having different limitations periods, depending on whether the victim was the patient or a third person. (34 C.3d 704.) (See 41 A.L.R.4th 1078 [*Hedlund*]; but see *Nelson v. Gaunt* (1981) 125 C.A.3d 623, 635, 178 C.R. 167 [C.C.P. 340.5 did not apply to fraud cause of action arising out of medical treatment]; *Benun v. Superior Court* (2004) 123 C.A.4th 113, 125, 20 C.R.3d 26 [C.C.P. 335.1 (statute of limitations for personal injury action), not C.C.P. 340.5, applied to custodial elder abuse action by patient's family against health care providers].)

SUPPLEMENT: [This section is current through the latest supplement]



31 of 145 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XIV. STATUTE OF LIMITATIONS: TORT ACTIONS

B. Injuries to Persons and Wrongful Death: Two Years.

14. Postponed Accrual.

f. Medical Malpractice.

3. One Year After Discovery.

aa. In General.

3 *Witkin Cal. Proc. Actions* § 579

[§ 579] In General.

The normal period is the same as that established under the former statute and postponed accrual cases (*supra*, §578): "[O]ne year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the injury." (C.C.P. 340.5; see *Brown v. Bleiberg* (1982) 32 C.3d 426, 434, 435, 436, 186 C.R. 228, 651 P.2d 815 [triable issue of fact, summary judgment for physician reversed]; *Dujardin v. Ventura County General Hosp.* (1977) 69 C.A.3d 350, 358, 138 C.R. 20 [defective birth; issue of fact whether delay was reasonable where plaintiffs failed to discover cause of action until issuance of FDA report that intrauterine devices of type used by mother were unsafe]; *Gray v. Reeves* (1977) 76 C.A.3d 567, 575, 142 C.R. 716; *Tresemmer v. Barke* (1978) 86 C.A.3d 656, 664, 150 C.R. 384 [action for damages caused by intrauterine device; both discovery of harm caused by alleged wrongful act and discovery of malpractice were required to set 1-year period in motion]; *Christ v. Lipsitz* (1979) 99 C.A.3d 894, 898, 160 C.R. 498 [1-year period began to run against action for unsuccessful vasectomy when patient's wife discovered that she was pregnant, not when child was born]; *Graham v. Hansen* (1982) 128 C.A.3d 965, 971, 180 C.R. 604 [plaintiff's knowledge of *fact* of her injury, not her knowledge of legal theory to support recovery, commenced running of statute]; *Enfield v. Hunt* (1984) 162 C.A.3d 302, 309, 208 C.R. 584 [1-year period commenced when plaintiff found that his condition was much worse after back operation than before]; *Dolan v. Borelli* (1993) 13 C.A.4th 816, 823, 16 C.R.2d 714 [1-year period began when plaintiff suspected that carpal tunnel surgery had been negligently performed, not when subsequent surgery revealed that it had not been done at all]; *Artal v. Allen* (2003) 111 C.A.4th 273, 280, 3 C.R.3d 458 [although patient suspected that throat pain was related to anesthesia intubation during first surgery, action accrued when subsequent exploratory surgery disclosed thyroid cartilage fracture, where patient was unaware that intubation during first surgery had been performed in negligent manner]; *Knowles v. Superior Court* (2004) 118 C.A.4th 1290, 1298, 13 C.R.3d 700 [action accrued when plaintiffs suspected that medical malpractice had occurred, even though they did not know then who was responsible]; 13 Southwestern U. L. Rev. 759.) (On tolling of statutory period by 90 days' notice of intent to commence action against health care provider for professional negligence, see *infra*, §722 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]

See CACI, No. 555 [1-year limitations period in *C.C.P.* 340.5 as affirmative defense].



32 of 145 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XIV. STATUTE OF LIMITATIONS: TORT ACTIONS

B. Injuries to Persons and Wrongful Death: Two Years.

14. Postponed Accrual.

f. Medical Malpractice.

3. One Year After Discovery.

bb. Illustrations.

3 *Witkin Cal. Proc. Actions* § 580

[§ 580] Illustrations.

(1) *Discovery of Negligent Cause of Injury.* In *Hills v. Aronsohn* (1984) 152 C.A.3d 753, 199 C.R. 816, plaintiff received intrabreast silicone injections from defendant doctor between April and June, 1966. She noticed lumps and experienced soreness in her breasts in March 1974. She consulted other doctors in March 1974, April 1975, and January 1977, and received reports indicating that the cause of her condition was the silicone injections and discussing surgical procedures (mastectomy and breast reconstruction) to alleviate it. Operations were performed on February 28 and March 4, 1977, and she filed the present medical malpractice action on March 1, 1978. Defendant's motion for summary judgment was granted. *Held*, as to the 1-year time period, summary judgment was improper. A triable issue of fact was presented as to the date on which plaintiff could have discovered the negligent cause of her injury. In March 1974, she was informed that the cause of her lumps was silicone deposits, but she did not necessarily know that the injections might have been negligent until the surgery was completed on March 4, 1977. (152 C.A.3d 760.) (For holding that 3-year period was bar, see *infra*, §581; on holding refusing to toll period for presence of foreign body, see *infra*, §584; and see generally, *supra*, §383.)

(2) *Reasonable Suspicion of Negligence.* In *Gutierrez v. Mofid* (1985) 39 C.3d 892, 218 C.R. 313, 705 P.2d 886, plaintiff consented to an operation for the removal of a tumor or appendix but, upon awakening, found that the physician had performed a complete hysterectomy. Plaintiff's dissatisfaction with the result continued after she left the hospital, and several physicians she consulted suggested that she sue. However, an attorney informed her that there was no provable malpractice, and her action was not filed until after she had consulted a second attorney. At this time the 1-year limitations period of C.C.P. 340.5 had expired. *Held*, the action was barred.

(a) A plaintiff "discovers" an injury, and the 1-year period begins to run, when reasonably founded suspicions have been aroused and the plaintiff has become alerted to the necessity for investigation and pursuit of his or her remedies. (39 C.3d 897.) Under this test, the limitations period began to run here no later than the date plaintiff consulted the initial attorney. (39 C.3d 902.)

(b) Plaintiff's reliance on the initial attorney's discouraging advice did not postpone the time of "discovery." (39 C.3d 899.) In malpractice actions, the discovery exception to the general rule that the limitations period begins to run on occurrence of the last element essential to the cause of action is based on the need to protect innocent plaintiffs in situations where they have no reasonable suspicion of negligence. In addition, the exception encourages physicians to fulfill their fiduciary duty of full disclosure and prevents their benefiting from breach of that duty. (39 C.3d 899.) These purposes would not be satisfied by extending the time a defendant is exposed to liability "when, despite plaintiff's discovery of the facts constituting his claim, and without defendant's fault, plaintiff is dissuaded from suit by the conduct of a third person." (39 C.3d 899.) Hence, "[w]e conclude that, for purposes of the statute of limitations, the risk that discouraging legal advice will lead to loss of a cause of action must fall upon the plaintiff who obtains that advice, rather than upon a wholly uninvolved defendant. In that situation, 'the right to be free of stale claims ... comes to prevail over the right to prosecute them.' " (39 C.3d 900.) To the extent that *Jones v. Queen of the Valley Hosp.* (1979) 90 C.A.3d 700, 153 C.R. 662, is inconsistent with this view, it is disapproved. (39 C.3d 902.)

(c) *Ebersol v. Cowan* (1983) 35 C.3d 427, 197 C.R. 601, 673 P.2d 271, holding that diligent but unsuccessful inquiries to an attorney can delay expiration of the 100-day period (now 6 months) for filing a claim against a public entity, is not applicable here. Because the 100-day period is so short and constitutes an obstacle in addition to the normal limitations period, the Legislature has provided relief in cases of excusable neglect. (39 C.3d 901.) That relief is not provided in C.C.P. 340.5 cases, where the 1-year limitations period is no shorter than the period generally applicable in personal injury actions. Under C.C.P. 340.5, the period begins to run upon discovery of the injury and expires inexorably 1 year later. "In other words, in medical malpractice cases we must examine whether plaintiff exercised 'reasonable diligence' in discovering his 'injury,' but the malpractice limitations statute forecloses a more general inquiry whether he was nonetheless diligent in bringing his action." (39 C.3d 902.)

(d) Plaintiff's remedy here is an action for *legal* malpractice, "the traditional means of resolving allegations that an attorney's misconduct caused a claim to become barred by the statute of limitations." (39 C.3d 900.)

Two justices dissented in separate opinions. (39 C.3d 903, 904.) (See *Reyes v. Los Angeles* (1988) 197 C.A.3d 584, 591, 592, 243 C.R. 35 [following *Gutierrez*; action for injuries to newborn during delivery; reliance on discouraging advice of first attorney did not postpone discovery and thus extend limitations period applicable to client who already suspected medical malpractice]; *Kleefeld v. Superior Court* (1994) 25 C.A.4th 1680, 1684, 1685, 31 C.R.2d 12 [following *Gutierrez*, and distinguishing *Steingart v. White* (1988) 198 C.A.3d 406, 243 C.R. 678; 1-year period began when plaintiff first suspected malpractice, and was not tolled when he subsequently expressed that suspicion to medical board].)

In *Unjian v. Berman* (1989) 208 C.A.3d 881, 885, 886, 256 C.R. 478, an action based on an unsuccessful face-lift operation, the court reversed a summary judgment, holding that there were triable issues of fact on the issue of diligence in discovery, where plaintiff continued under the doctor's care and was given an explanation calculated to allay any suspicion of negligence.

Henry v. Clifford (1995) 32 C.A.4th 315, 38 C.R.2d 116, involved the second of two medical malpractice actions, both of which arose after plaintiff rolled off a recovery room bed onto the floor following surgery performed by defendant physician. Plaintiff purported to distinguish the two actions by claiming that the first action, which was dismissed, had been based on postoperative negligence, while the second action was premised on negligence occurring beforehand, which plaintiff had discovered during the first action. The trial judge dismissed the second action, ruling that it was barred by the 1-year limitations period of C.C.P. 340.5. *Held*, affirmed.

(a) The second action was filed almost 3 years after the surgery, and although plaintiff tried to plead around the statute of limitations by alleging that she first learned the cause of the injuries during a deposition in the first case, 2 more years passed before the second action was commenced. (32 C.A.4th 322.)

(b) Also, plaintiff's counsel sent a letter to defendant 5 months after the surgery stating that he had consulted

experts and intended to sue for negligence. (32 C.A.4th 322.)

(c) Finally, plaintiff was not entitled to file her initial action, conduct discovery, and then file a second complaint 2 years later on the ground that it took 2 years to discover the harm. Once a plaintiff has a suspicion of wrongdoing, and thus an incentive to sue, she must decide to file suit or sit on her rights. "Presumptive" as well as "actual" knowledge commences the running of the statute. The pleadings in the first action showed that plaintiff had both actual and presumptive knowledge of the alleged harm. (32 C.A.4th 323.)

SUPPLEMENT: [This section is current through the latest supplement]



33 of 145 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XIV. STATUTE OF LIMITATIONS: TORT ACTIONS

B. Injuries to Persons and Wrongful Death: Two Years.

14. Postponed Accrual.

f. Medical Malpractice.

4. Three Years After Injury.

3 *Witkin Cal. Proc. Actions* § 581

[§ 581] Three Years After Injury.

(1) *In General.* The maximum period is 3 years after the date of injury; i.e., a "whichever occurs first" provision makes it clear that, even though the plaintiff was excusably ignorant of the facts, the action will be barred in 3 years unless the special tolling rule applies (*infra*, §582 et seq.). (*C.C.P.* 340.5.) The judicially declared discovery rule (*supra*, §497) would extend the period indefinitely where the plaintiff was excusably ignorant of the facts. But *C.C.P.* 340.5 places an outer limit (as originally enacted, 4 years; changed to 3 years in 1975) that terminates liability after the time has passed. (See *Blake v. Wernette* (1976) 57 C.A.3d 656, 660, 129 C.R. 426, citing the text; *Scott v. Los Angeles* (1977) 73 C.A.3d 476, 483, 140 C.R. 785; *Bispo v. Burton* (1978) 82 C.A.3d 824, 828, 830, 147 C.R. 442.)

(2) *"Discovery of Harm" Test.* In *Hills v. Aronsohn* (1984) 152 C.A.3d 753, 199 C.R. 816, *supra*, §580, and *infra*, §584, plaintiff sued defendant doctor for alleged negligence in giving her intrabreast silicone injections, and contended that her mastectomy operation was the date of her injury. *Held*, the 3-year statute was a bar.

(a) Under *Larcher v. Wanless* (1976) 18 C.3d 646, 135 C.R. 75, 557 P.2d 507, *infra*, §590, the term "injury" is not synonymous with "wrongful act"; but it is not correct to say that plaintiff did not experience injury until the subcutaneous mastectomy. "The mastectomy was an operation designed to cure the injury, and not the injury itself." (152 C.A.3d 762.)

(b) Thus, the event that activates the 3-year limitation is the discovery of the harm caused by the alleged negligence or, as *Larcher* puts it, the date of the damaging effect of the wrongful act rather than the date of the act. But once the damaging effect is apparent, the statute is activated even though the plaintiff may not have knowledge of its negligent cause. (152 C.A.3d 762.) Here plaintiff experienced soreness and noticed lumps in March 1974, thus clearly suffering the damaging effects of the alleged malpractice more than 3 years before filing the action. (152 C.A.3d 762, 763.)

Hills was distinguished in *Steingart v. White* (1988) 198 C.A.3d 406, 415, 243 C.R. 678, where defendant doctor allegedly failed to diagnose plaintiff's lump as cancerous, so that the damaging effect of the doctor's negligence remained unknown until a correct diagnosis, and the complaint was filed within 3 years thereafter.

The test has been applied in subsequent cases. (See *Mason v. Marriage & Family Center* (1991) 228 C.A.3d 537, 543, 279 C.R. 51 [reversing summary judgment for defendant]; *Marriage & Family Center v. Superior Court* (1991) 228 C.A.3d 1647, 1652, 1653, 279 C.R. 475 [discussing *Hills* and *Steingart*, and holding that statute had run]; *McNall v. Summers* (1994) 25 C.A.4th 1300, 1308, 30 C.R.2d 914 [same; plaintiff had suffered embolic stroke and concomitant memory loss from alleged negligent administration of electroconvulsive therapy; plaintiff's knowledge that she was mentally impaired in some way was sufficient to trigger statute, even though she may not have discovered its organic cause, i.e., the stroke, until later]; *Warren v. Schecter* (1997) 57 C.A.4th 1189, 1201, 67 C.R.2d 573, 9 Cal. Proc. (5th), Appeal, §764, citing the text [malpractice action based on lack of informed consent was timely; action accrued when undisclosed complication occurred, not earlier when disclosed complications occurred]; *Garabet v. Superior Court* (2007) 151 C.A.4th 1538, 1549, 60 C.R.3d 800 [distinguishing *Warren*; malpractice action against physician for performing LASIK surgery on plaintiff was untimely; action was based on negligence in performing surgery on unsuitable candidate, not on lack of informed consent or intentional concealment, and thus action accrued when complications occurred, not later when plaintiff's vision problems were diagnosed as stemming from surgery].)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General.* See *Roberts v. Los Angeles* (2009) 175 C.A.4th 474, 481, 96 C.R.3d 60 [3-year limitations period in C.C.P. 340.5 is outer limit within which medical malpractice claim must be filed against public entity; thus, plaintiff's medical malpractice claim against county medical center filed more than 3 years after plaintiff's injury was time-barred by C.C.P. 340.5, even though action was timely filed, after tolling during plaintiff's incapacity (see text, §289), under Government Claims Act; relying on reasoning in *Anson v. Merced* (1988) 202 C.A.3d 1195, 249 C.R. 457, text, §689]; CACI, No. 556 [3-year limitations period in C.C.P. 340.5 as affirmative defense].



34 of 145 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XIV. STATUTE OF LIMITATIONS: TORT ACTIONS

B. Injuries to Persons and Wrongful Death: Two Years.

14. Postponed Accrual.

f. Medical Malpractice.

5. Tolling of Three-Year Period.

aa. In General.

3 *Witkin Cal. Proc. Actions* § 582

[§ 582] In General.

(1) *Statute Tolled.* The 3-year maximum time limitation of *C.C.P. 340.5* (supra, §581) is tolled for the following reasons:

(a) Proof of fraud or intentional concealment. (*C.C.P. 340.5*; see *infra*, §583.)

(b) The presence of a foreign body in the injured person that has "no therapeutic or diagnostic purpose or effect." (*C.C.P. 340.5*; see *infra*, §584.)

(c) Where the plaintiff is a minor. (*C.C.P. 345.5*; see *infra*, §586 et seq.)

(d) The period is tolled by 90 days by service of a notice of intent to sue a health care provider under *C.C.P. 364(d)* (*infra*, §722 et seq.). (See *Russell v. Stanford University Hosp.* (1997) 15 *C.4th* 783, 788, 64 *C.R.2d* 97, 937 *P.2d* 640, *infra*, §§723, 728.)

(2) *Statute Not Tolled.* The 3-year limitations period in *C.C.P. 340.5* is not tolled for the following reasons:

(a) Where the plaintiff is insane or incompetent (*C.C.P. 352(a)*; see *infra*, §698 et seq.). (*Fogarty v. Superior Court* (1981) 117 *C.A.3d* 316, 320, 321, 172 *C.R.* 594.)

(b) Where the plaintiff is imprisoned (*C.C.P. 352.1*; see *infra*, §§702, 703). (*Belton v. Bowers Ambulance Service* (1999) 20 *C.4th* 928, 931, 932, 86 *C.R.2d* 107, 978 *P.2d* 591, *infra*, §585; *Hollingsworth v. Kofoed* (1996) 45 *C.A.4th* 423, 426, 52 *C.R.2d* 808.)

SUPPLEMENT: [This section is current through the latest supplement]

Correction: Page 748, line 8 of section, "C.C.P. 345.5" should be " *C.C.P. 340.5*".



35 of 145 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XIV. STATUTE OF LIMITATIONS: TORT ACTIONS

B. Injuries to Persons and Wrongful Death: Two Years.

14. Postponed Accrual.

f. Medical Malpractice.

5. Tolling of Three-Year Period.

bb. Fraud and Intentional Concealment.

3 *Witkin Cal. Proc. Actions* § 583

[§ 583] Fraud and Intentional Concealment.

In *Wells Fargo Bank v. Superior Court* (1977) 74 C.A.3d 890, 141 C.R. 836, F, the patient, was treated by Dr. H from 1967 to 1969. F then became asymptomatic but returned to Dr. H 31/2 years later when symptoms recurred. The alleged discovery of malpractice was in 1974, when F employed counsel to bring the action. Petitioner, administrator of Dr. H's estate, moved for partial summary judgment on the ground that the claim for damages for the period of 1967-1969 was barred by the then 4-year overall period of the statute. *Held*, mandamus issued directing the trial court to enter summary judgment.

(a) F invoked *Huysman v. Kirsch* (1936) 6 C.2d 302, 57 P.2d 908, *supra*, §577, as establishing a doctrine of deferred accrual during continuing treatment; and a number of decisions in other states made end-of-treatment the point to which accrual is postponed. "All these elliptical descriptions--discovery, continuing treatment, continuing relationship, end-of-treatment--are verbal variations of an underlying theme. In human transactional terms, the prime incentive of the *Huysman* deferment was the patient's continuing reliance on the professional skill of the doctor while the doctor was treating him. ... In the context of the *Huysman* facts, the various descriptive tags (discovery, continuing treatment, continuing physician-patient relationship, end-of-treatment) were roughly equivalent, for all coincided." (74 C.A.3d 897.)

(b) *Costa v. Regents of Univ. of Calif.* (1953) 116 C.A.2d 445, 254 P.2d 85, analyzing *Huysman*, held that discovery, not end-of-treatment, marked the commencement of the period. And, although that court did not discuss the reliance factor, its result was correct. It would be a rare case in which reliance did not end when discovery occurred. "*Reliance* and *discovery* are the descriptive terms which most accurately reproduce the *Huysman* concept. With all deference to the decisions which have used them, the other verbalisms (continuing treatment, end-of-treatment and physician-patient relationship) are relatively untrustworthy." (74 C.A.3d 898.)

(c) Plaintiff pleaded delayed discovery but not concealment; i.e., the complaint alleged that the doctor did not disclose his malpractice, but did not allege that he knew or should have recognized it. Hence, the 4-year overall period

was not tolled: only intentional or negligent concealment would have had this effect. (74 C.A.3d 899.)

Later cases are to the same effect. (See *Trantafello v. Medical Center of Tarzana* (1986) 182 C.A.3d 315, 320, 322, 227 C.R. 84 [intentional concealment requires more than mere nondisclosure, before and after surgery, of doctor's use of innovative procedure]; *Donabedian v. Manzer* (1986) 187 C.A.3d 1021, 1027, 232 C.R. 325 [allegation that defendants "concealed" their negligence is not sufficient pleading of intentional concealment]; 19 A.L.R.6th 475 [effect of fraudulent or negligent concealment of patient's cause of action on timeliness of action under medical malpractice statute of repose].) (On fraudulent concealment and nondisclosure as grounds for tolling any statute of limitations, see *infra*, §§769, 770 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]



36 of 145 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XIV. STATUTE OF LIMITATIONS: TORT ACTIONS

B. Injuries to Persons and Wrongful Death: Two Years.

14. Postponed Accrual.

f. Medical Malpractice.

5. Tolling of Three-Year Period.

cc. Presence of Foreign Body.

3 *Witkin Cal. Proc. Actions* § 584

[§ 584] Presence of Foreign Body.

The "foreign body" provision of *C.C.P. 340.5* (see *supra*, §582) codified the holdings in a number of prior California cases, including *Huysman v. Kirsch* (1936) 6 *C.2d* 302, 57 *P.2d* 908, *supra*, §577, and *Pellett v. Sonotone Corp.* (1942) 55 *C.A.2d* 158, 130 *P.2d* 181. "[A] common thread running through all of them is that the cause of action was based on a surgeon's alleged negligence in *failing to remove* the foreign object." (*Hills v. Aronsohn* (1984) 152 *C.A.3d* 753, 764, 199 *C.R.* 816, *supra*, §§580, 581.)

In *Hills*, plaintiff sought to invoke the tolling provision in an action for medical malpractice based on negligent intrabreast silicone injections that ultimately required major surgery. In rejecting her theory, the court declared that the period is tolled only when the foreign body has no therapeutic or diagnostic purpose. "To extend the foreign body doctrine to a substance that was introduced intentionally for a therapeutic purpose would undermine the clear legislative intent to restrict the foreign body exception to situations where the foreign substance was *unintentionally* left in a patient's body." (152 *C.A.3d* 765.) (See *Trantafello v. Medical Center of Tarzana* (1986) 182 *C.A.3d* 315, 319, 320, 227 *C.R.* 84 [provision does not apply where object is intentionally implanted for therapeutic purpose, even if it has no actual therapeutic effect]; 50 *A.L.R.4th* 250 [applicability of foreign object exception in medical malpractice statutes of limitations].)

In *Wallace v. Hibner* (1985) 171 *C.A.3d* 1042, 217 *C.R.* 748, plaintiff was operated on to remove a sewing needle which had been traumatically embedded in his foot. The doctor failed to remove the entire needle, and 13 years later plaintiff brought a malpractice action, claiming that the limitations period was tolled by the foreign body provision. *Held*, the action was barred. The Legislature intended the provision to apply only to medically inserted objects that have no therapeutic or diagnostic value. (171 *C.A.3d* 1047.)

In *Ashworth v. Memorial Hosp.* (1988) 206 *C.A.3d* 1046, 1051, 254 *C.R.* 104, the court held that (a) the foreign body tolling provision "delays the start of the medical malpractice statute of limitations ... until the patient discovers or through reasonable diligence would have discovered the 'foreign body' itself and its role as the negligent cause of her

suffering"; (b) "this tolling continues even though the plaintiff has filed an earlier action based on other forms of malpractice occurring during the same medical treatment where this earlier action has been dismissed without prejudice"; and (c) in this case, plaintiff did not discover the existence of cotton sponges in her kidney until after the dismissal of her earlier action for failure to prosecute. The court, in an elaborate opinion covering the case law background of the exception and the codification in 1975, reversed a summary judgment for defendant, and added the following observations:

(a) "The special legislative preference for this particular form of malpractice is justified by the unique characteristics of the 'foreign body' exception. In contrast to other malpractice actions, a cause of action based on the belated discovery of a 'foreign body' typically is not 'stale.' In an ordinary medical malpractice case, the negligent event will have begun and ended years earlier when the practitioner misdiagnosed the condition or committed some specific error during a treatment or operation. Only the ill effects will have surfaced late. Generally the sole evidence about what the doctor did or did not do will be found in records and recollections which may have deteriorated badly. In a 'foreign body' case, on the other hand, the negligent event, the presence of the destructive object ...--will have continued up to the moment of discovery. Moreover, that negligent cause is *palpable*. It can be seen and touched at the trial. Its connection to the injuries the patient suffered will have been examined at the time it was discovered and thus will not be dependent entirely on musty records or fading memories." (206 C.A.3d 1061.)

(b) "A commonsense interpretation of the language of section 340.5 leads to but one conclusion. The Legislature intended to leave the statute of limitations wide open whenever a 'foreign body' has been left inside a patient at least until the time this 'foreign body' is actually discovered and its role in the patient's injuries can be ascertained or through reasonable diligence would have been discovered and ascertained. It is reasonable to anticipate 'discovery' of these 'foreign bodies' often will come about as a byproduct of operations occurring much later and prompted by reasons having nothing to do with a search for what caused a certain medical injury. A patient's mere suspicion she was the victim of some sort of malpractice cannot start the statute running as to a cause of action based on the presence of 'foreign bodies.' Only discovery of those particular foreign bodies and their causal relation to the patient's injuries can start the clock." (206 C.A.3d 1062.)

SUPPLEMENT: [This section is current through the latest supplement]



37 of 145 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XIV. STATUTE OF LIMITATIONS: TORT ACTIONS

B. Injuries to Persons and Wrongful Death: Two Years.

14. Postponed Accrual.

f. Medical Malpractice.

6. Tolling of One-Year Period.

3 *Witkin Cal. Proc. Actions* § 585

[§ 585] Tolling of One-Year Period.

Unlike its 3-year maximum limitations period (*supra*, §581 *et seq.*), *C.C.P.* 340.5 contains no provision tolling its 1-year limitations period (*supra*, §§579, 580). However, other statutes and case law provide for suspension or tolling of the statute of limitation for various reasons. (See *infra*, §694 *et. seq.*) The following are worthy of note:

(1) *Tolling During Imprisonment.* *Hollingsworth v. Kofoed* (1996) 45 *C.A.4th* 423, 426, 52 *C.R.2d* 808, held that the provision for tolling where the plaintiff is imprisoned (*C.C.P.* 352.1; see *infra*, §§702, 703) does not apply to either the 1-year or 3-year limitations period of *C.C.P.* 340.5. However, the California Supreme Court disapproved, in part, the *Hollingsworth* holding. In *Belton v. Bowers Ambulance Service* (1999) 20 *C.4th* 928, 86 *C.R.2d* 107, 978 *P.2d* 591, plaintiff prisoner brought a personal injury action against defendant ambulance company. The trial judge sustained defendant's demurrer on the ground that the action was time-barred by the 1-year limitations period of *C.C.P.* 340.5. Plaintiff filed his action more than 1 year, but within 3 years, after he discovered his injury. *Held*, reversed by unanimous decision; *C.C.P.* 352.1 is applicable and extends the 1-year period of *C.C.P.* 340.5.

(a) While no tolling provision outside of the Medical Injury Compensation Reform Act (MICRA) can extend the 3-year maximum time period established by *C.C.P.* 340.5 (20 *C.4th* 931, citing *Fogarty v. Superior Court* (1981) 117 *C.A.3d* 316, 172 *C.R.* 594, *supra*, §582), that statute's 1-year limitations period is subject to the 2-year extension of *C.C.P.* 352.1 (20 *C.4th* 931, 932, disapproving *Hollingsworth*).

(b) *C.C.P.* 340.5 states that its 3-year limitations period cannot be tolled except in three specified instances, thus implicitly excluding other tolling rules. However, that language applies only to the 3-year period, not to the 1-year period. (20 *C.4th* 933, 934.)

(2) *Tolling During Insanity.* The Courts of Appeal are in conflict about whether the provision for tolling where the plaintiff is insane (*C.C.P.* 352; see *infra*, §698 *et seq.*) applies to the 1-year limitations period of *C.C.P.* 340.5. *Fogarty* and *Bennett v. Shahhal* (1999) 75 *C.A.4th* 384, 392, 89 *C.R.2d* 272, held that the 1-year limitations period of *C.C.P.* 340.5 was not tolled by the plaintiff's insanity. The court in *Bennett* observed:

(a) *C.C.P.* 352 is a general tolling statute that does not apply to MICRA actions governed by *C.C.P.* 340.5. "There is no evidence of a legislative intent ... to allow exceptions other than those listed in section 340.5. All indications of intent are to the contrary. The legislative enumeration of certain exceptions by necessary implication excludes all other exceptions." (75 *C.A.4th* 392, quoting *Fogarty*.)

(b) Plaintiff did not suffer mental problems until after his action accrued, and, in any case, failed to establish that he was mentally disabled. (75 *C.A.4th* 392.)

However, *Alcott Rehabilitation Hosp. v. Superior Court* (2001) 93 *C.A.4th* 94, 112 *C.R.2d* 807, disagreed with *Bennett* and reached the opposite result for these reasons:

(a) *C.C.P.* 340.5 does not expressly negate the application of the insanity provision in *C.C.P.* 352. Although a list of specified tolling rules in *C.C.P.* 340.5 implicitly excludes other tolling rules, these limits apply only to the 3-year period, not to the 1-year period. Also, the purpose of *C.C.P.* 340.5, i.e., to more restrictively limit actions against health care providers, does not prohibit tolling the 1-year statute of limitations when the plaintiff is insane. (93 *C.A.4th* 103, 104, relying on rationale of *Belton*.) *Fogarty* is distinguishable, because it only addressed the 3-year limitations period of *C.C.P.* 340.5. (93 *C.A.4th* 104.)

(b) The court disagreed with *Bennett* for three reasons: (1) the plaintiff in *Bennett* failed to establish his disability, so the decision's comments about the interplay between *C.C.P.* 340.5 and 352 were dicta; (2) *Bennett* ignored the Supreme Court's holding in *Belton*; and (3) *Bennett* failed to address the fact that the enumerated tolling exceptions of *C.C.P.* 340.5 specifically refer to the 3-year limitations period, not to the 1-year limitations period. (93 *C.A.4th* 104.)

(3) *Notice of Intent To File Medical Malpractice Action*. The 1-year limitations period in *C.C.P.* 340.5 is tolled by 90 days by service of a notice of intent to sue a health care provider under *C.C.P.* 364(d) (infra, §722 et seq.). (See *Woods v. Young* (1991) 53 *C.3d* 315, 325, 279 *C.R.* 613, 807 *P.2d* 455, infra, §§727, 728.)

SUPPLEMENT: [This section is current through the latest supplement]

(4) *(New) Tolling While Defendant Is Absent From State*. The 1-year limitations period in *C.C.P.* 340.5 is tolled during the time that the defendant physician is outside California under *C.C.P.* 350 (text, §710 et seq.). (See *Kaplan v. Mamelak* (2008) 162 *C.A.4th* 637, 642, 75 *C.R.3d* 861 [relying on *Belton v. Bowers Ambulance Service* (1999) 20 *C.4th* 928, 86 *C.R.2d* 107, 978 *P.2d* 591, text, p. 752].)



38 of 145 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XIV. STATUTE OF LIMITATIONS: TORT ACTIONS

B. Injuries to Persons and Wrongful Death: Two Years.

14. Postponed Accrual.

f. Medical Malpractice.

7. Action by Minor.

aa. Limitations periods.

3 *Witkin Cal. Proc. Actions* § 586

[§ 586] Limitations periods.

C.C.P. 340.5 contains two limitations periods for medical malpractice actions by minors:

(1) *Minor Under Age 6*. The action must be commenced within 3 years from the date of the alleged wrongful act or prior to the minor's 8th birthday, "whichever provides a longer period." (See *Tran v. Fountain Valley Community Hosp.* (1997) 51 *C.A.4th* 1464, 1465, 60 *C.R.2d* 91 [*C.C.P.* 12a, providing for 1-day extension where last day to do required act falls on holiday, applied to extend limitations period]; *Martell v. Antelope Valley Hosp. Med. Center* (1998) 67 *C.A.4th* 978, 981, 79 *C.R.2d* 329 [*C.C.P.* 340.5 did not extend 6-month Government Claims Act filing requirement (*Govt.C.* 945.6; see *infra*, §689) to minor's 8th birthday in medical malpractice action by minor and his parents against public hospital]; *David M. v. Beverly Hosp.* (2005) 131 *C.A.4th* 1272, 1277, 32 *C.R.3d* 649 [*C.C.P.* 340.5 applied to action against physician and hospital for negligently failing to report suspected child abuse that should have been discovered during medical examination, rather than *C.C.P.* 338(a) (limitations period for action on liability created by statute; see *infra*, §664 et seq.); thus, action filed more than 3 years after minor's 8th birthday was untimely]; 71 *A.L.R.5th* 307 [medical malpractice statutes of limitation minority provisions].)

(2) *Minor Age 6 or Over*. The action must be commenced within 3 years of the date of the wrongful act.

SUPPLEMENT: [This section is current through the latest supplement]



39 of 145 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XIV. STATUTE OF LIMITATIONS: TORT ACTIONS

B. Injuries to Persons and Wrongful Death: Two Years.

14. Postponed Accrual.

f. Medical Malpractice.

7. Action by Minor.

bb. Delayed Accrual and Tolling of Period.

3 *Witkin Cal. Proc. Actions* § 587

[§ 587] Delayed Accrual and Tolling of Period.

(1) *Minority Tolling Provisions.* The 3-year period for a minor (*supra*, §586) is tolled "for any period during which parent or guardian and defendant's insurer or health care provider have committed fraud or collusion in the failure to bring an action on behalf of the injured minor for professional negligence." (*C.C.P.* 340.5.)

The general statute of limitations tolling provision for minors (*C.C.P.* 352, *infra*, §§696, 697) does not apply to actions based on medical malpractice; the more specific provisions of *C.C.P.* 340.5 apply. (*Washington v. Nelson* (1979) 100 C.A.3d 47, 52, 160 C.R. 644.)

(2) *Adult Tolling Provisions.* In *Kite v. Campbell* (1983) 142 C.A.3d 793, 191 C.R. 363, the court interpreted the language of *C.C.P.* 340.5 as creating "a separate statute of limitations for minors incorporating common law tolling provisions as well as two additional protections." (142 C.A.3d 801.) "We believe the Legislature intended to enact a separate limitations period for minors, one which would continue the protection of common law tolling provisions during the period of minority while effecting the legislative purpose of controlling health care costs. Minors no longer may bring suit for medical malpractice at any time before the 19th birthday. Suits on behalf of a minor must now be brought within three years of the time of the alleged malpractice, unless the minor's parent or guardian has not discovered, or through the use of reasonable diligence would not be expected to discover, the injury and its negligent cause. The reason for the failure to specifically apply the three enumerated tolling provisions to minors is manifest. The three-year period is tolled for fraud, intentional concealment, and presence of a foreign body having no diagnostic or therapeutic purpose, as well as for other valid circumstances which have prevented discovery of the malpractice by someone exercising reasonable diligence." (142 C.A.3d 803.)

Kite was disapproved in *Young v. Haines* (1986) 41 C.3d 883, 226 C.R. 547, 718 P.2d 909, which held that the general tolling provisions of *C.C.P.* 340.5 (see *supra*, §582) apply to minors as well as adults, but that the delayed-discovery rule does not apply.

(a) *Kite's* reading of the statute to include the delayed-discovery rule into the provisions for minors is untenable. (41 C.3d 895, 896.) "The clear legislative purpose was to make available to malpractice plaintiffs only those tolling provisions set forth in the statute." (41 C.3d 896.)

(b) *Kite* was also incorrect in concluding that the general tolling provisions of the statute are unavailable to minors. (1) The general tolling provisions by their terms apply to *all* malpractice actions, not merely actions by adults. The tolling provision for minors simply adds an additional ground for tolling and is not inconsistent with the general tolling provisions. (41 C.3d 897, 898.) (2) The courts have repeatedly recognized the public policy in protecting the rights of minors, and, even if the statute were unclear, "this court would be reluctant to find a legislative intent to treat minors so much more harshly than adults." (41 C.3d 898.)

(c) A construction of the statute that denied minors the tolling provisions available to adults would raise serious equal protection concerns, and this court's construction of the statute avoids those problems. (41 C.3d 898, 901.) (See *Donabedian v. Manzer* (1986) 187 C.A.3d 1021, 1026, 232 C.R. 325 [following *Young*]; *Torres v. Los Angeles* (1989) 209 C.A.3d 325, 333, 257 C.R. 211 [same].)

In *Aronson v. Superior Court* (1987) 191 C.A.3d 294, 236 C.R. 347, the court said: "Although seemingly harsh, this principle is consistent with the minor's general legal situation which renders him dependent upon his parents' or legal guardian's judgment for his entire well-being in every respect. To create a particular exception where the bringing of a lawsuit is concerned is to provide a benefit for potential underage malpractice plaintiffs not accorded to minors generally who would avoid the results of their custodians' unwise choices on their behalf. Except in egregious situations calling for interference with legal custody, the parents, not the courts, make decisions for the minor. The decision to file a malpractice action is one such decision. Nowhere in the statute is there language authorizing special exceptions for the minor whose parents simply refuse to sue when, perhaps, some person would conclude they should." (191 C.A.3d 299.) A court is in no position to judge the wisdom of the parental decision to sue or not to sue. "We are not inclined to hold as a matter of law that a lawsuit is always the best use of family resources and energy. Nor are we inclined, or authorized, to take over the decisions relative to the care of minors." (191 C.A.3d 299.)

(3) *Adult Provision Delaying Accrual Until Discovery of Injury.* Although courts have held that the common law delayed discovery rule does not apply to a medical malpractice action by a minor, under C.C.P. 340.5, an adult's cause of action may accrue either from the date of injury (3-year limitations period; see supra, §581), or from the date of discovery (1-year limitations period; see supra, §579), whichever occurs first. Under the statute, a minor's cause of action, by contrast, accrues from the date of the wrongful act, rather than the date of injury (3-year limitations period, or on minor's 8th birthday if minor is under age 6, whichever occurs last; see supra, §586), and the statute contains no comparable provision permitting accrual on discovery of the injury. In *Photias v. Doerfler* (1996) 45 C.A.4th 1014, 53 C.R.2d 202, the court held that to the extent the statute makes this distinction, it denies equal protection:

(a) Although not deciding the issue presented here, the Supreme Court in *Young* recognized that equal protection problems arise if C.C.P. 340.5 is construed as treating minors more restrictively and harshly than adults. (45 C.A.4th 1018.)

(b) C.C.P. 340.5, enacted as part of the Medical Injury Compensation Reform Act (MICRA), was intended to restrict the tolling provisions in malpractice actions to reduce the number of "long tail" claims that made it difficult for insurers to set premiums at an appropriate level. "While restricting tolling provisions and, thus, addressing the 'long tail' claims attributable to those provisions is itself rationally related to the larger MICRA objective of reducing costs, the restriction is equally applicable to adults and to minors. Establishing different accrual standards for the causes of action of adults and of minors, however, does nothing to curb 'long tail' claims. The practice thus has no relation to the statutory objective." (45 C.A.4th 1020.)

(c) Although the Supreme Court has rejected equal protection challenges to other MICRA provisions, none of those challenges involved discrimination between adult and minor plaintiffs, as is implicated here. (45 C.A.4th 1020.)

(d) "[A] minor's medical malpractice cause of action ... accrues when the minor's parent or guardian knew or should have known through the exercise of reasonable diligence that a negligent wrongful act of medical care caused the child's injuries." (45 C.A.4th 1021, quoting *Torres*.)

In *Arredondo v. Regents of Univ. of Calif.* (2005) 131 C.A.4th 614, 31 C.R.3d 800, plaintiff minor sought to expand the protections afforded minors under *Torres* and *Photias* by claiming that accrual of her medical malpractice action was delayed until her mother discovered the professional negligence, which occurred within 1 year of filing the action, even though the action was filed more than 3 years after the injury manifested itself. *Held*, this claim is without merit, and plaintiff's action was untimely. Plaintiff "contends that (in addition to the statute's express tolling provision) a minor's rights under section 340.5 are greater than those of an adult." (131 C.A.4th 618.) However, the statute's plain language makes clear that accrual for an adult plaintiff's action occurs either within 3 years of manifestation of the injury or 1 year of discovery of the injury, "*whichever occurs first.*" "Because minors receive the benefits of the adult provisions in section 340.5, they are equally burdened by the restrictions imposed by the adult provisions." (131 C.A.4th 619.) To the extent that *Torres* and *Photias* are contrary to this view, they are "inconsistent with *Young* ... and, therefore, are wrong." (131 C.A.4th 619, footnote 4.)

(4) *Tolling by Service of Notice of Intent To Sue Health Care Provider.* The 3-year limitations period for minors in C.C.P. 340.5 is extended by 90 days by service of a notice of intent to sue a health care provider under C.C.P. 364(d). (*Newman v. Burnett* (1997) 54 C.A.4th 722, 724, 62 C.R.2d 175, *infra*, §723.)

SUPPLEMENT: [This section is current through the latest supplement]



40 of 145 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XIV. STATUTE OF LIMITATIONS: TORT ACTIONS

B. Injuries to Persons and Wrongful Death: Two Years.

14. Postponed Accrual.

f. Medical Malpractice.

7. Action by Minor.

cc. Effect of Reaching Majority.

3 *Witkin Cal. Proc. Actions* § 588

[§ 588] Effect of Reaching Majority.

In *Steketee v. Lintz, Williams & Rothberg* (1985) 38 C.3d 46, 210 C.R. 781, 694 P.2d 1153, the issue was whether the phrase "actions by a minor" (*C.C.P.* 340.5; see *supra*, §586) refers to a plaintiff's age at the time of the wrongful act or at the time of filing the action. In other words, does a person who is a minor at the time of the wrongful act, but who reaches 18 prior to the expiration of the 3-year period for minors, become subject to the adult provisions of *C.C.P.* 340.5 (see *supra*, §581) on his or her 18th birthday? *Held*: A person who is a minor at the time of the wrongful act remains entitled to the 3-year limitations period for minors, regardless of when he or she reached the age of majority.

(a) The phrase "actions by a minor" is also used in the provision dealing with minors under the age of 6, and there it clearly refers to age at the time of the wrongful act (otherwise, minors under 6 would automatically lose the right to file upon reaching age 7). In accordance with the rules of statutory construction, the phrase should be given the same meaning each time it appears in a statute. (38 C.3d 53.)

(b) If the "discovery" component of *C.C.P.* 340.5 (see *supra*, §579) became applicable when a minor reached 18, the 1-year limitations period would begin to run from the date of discovery, which might have occurred while he or she was still a minor. This would be in clear violation of the Legislature's intent to treat minors differently from adults. (38 C.3d 53.)

(c) If minors suddenly became subject to the adult provisions of *C.C.P.* 340.5 upon reaching 18, arbitrary and bizarre results would occur. For example, the adult 3-year limitations period of *C.C.P.* 340.5 (see *supra*, §581) begins to run from the date of injury, which refers to both negligent cause and damaging effect, and could occur much later than the date of the wrongful act, on which a minor's 3-year period commences. Hence, if the wrongful act occurred just before a victim's 15th birthday, the victim would be subject to the minor's 3-year period. However, if the act occurred just after the victim's 15th birthday, the victim could become subject to the adult 3-year period which, depending on when the "injury" occurred, could result in a much longer time in which to initiate an action. (38 C.3d 54.)

(d) The result could be equally bizarre and arbitrary if a minor suddenly became subject to the adult 1-year discovery provision (see *supra*, §579). For example, if a victim suffered a wrongful act just after turning 15 and immediately discovered the injury, and then filed an action the day prior to his or her 18th birthday, the victim would be subject to, and within, the minor's 3-year period. However, if the victim filed the action just 1 day later, on his or her 18th birthday, the adult 1-year discovery period would apply retroactively, and the action would be barred. (38 C.3d 55.)

(e) In enacting *C.C.P. 340.5*, the Legislature intended to effect a compromise between the need to reduce the exposure of physicians to malpractice liability and a desire not to bar victims from court before they have a fair chance to bring suit. The construction of the phrase "actions by a minor" adopted here is consistent with that intent. (38 C.3d 56.) It is also consistent with the public policies that minors be protected from loss of rights due to statutes of limitations and that litigation be disposed of on its merits whenever possible. (38 C.3d 57.) Moreover, the Legislature has already curtailed the time for minors to bring an action by making their period commence as of the date of the wrongful act, rather than the date of the injury. There is nothing in the language or history of *C.C.P. 340.5* to suggest an intent to further limit minors' rights by subjecting them to the additional restrictions intended for adults. (38 C.3d 56.) (See *Torres v. Los Angeles* (1989) 209 C.A.3d 325, 333, 257 C.R. 211.)

SUPPLEMENT: [This section is current through the latest supplement]



41 of 145 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XIV. STATUTE OF LIMITATIONS: TORT ACTIONS

B. Injuries to Persons and Wrongful Death: Two Years.

14. Postponed Accrual.

f. Medical Malpractice.

8. Prenatal Injuries.

3 *Witkin Cal. Proc. Actions* § 589

[§ 589] Prenatal Injuries.

An action to recover for injuries sustained by a minor prior to or in the course of birth (see C.C. 43.1) must be brought within 6 years of the minor's date of birth, with no tolling for disability under C.C.P. 352 (see *infra*, §§696, 697). (C.C.P. 340.4.) The period is tolled, however, until the minor's parents discover or should have discovered the injury and its negligent cause. (See *Call v. Kezirian* (1982) 135 C.A.3d 189, 194, 185 C.R. 103 [decided under predecessor statute, former C.C. 29]; 15 So. Cal. L. Rev. 42; *supra*, §486.)

C.C.P. 340.5, part of the Medical Injury Compensation Reform Act, does not expressly refer to C.C.P. 340.4, but supplants the period of limitations in medical malpractice actions. (*Kelemen v. Superior Court* (1982) 136 C.A.3d 861, 867, 186 C.R. 566 [construing former C.C. 29]; *Knox v. Superior Court* (1983) 140 C.A.3d 782, 784, 787, 189 C.R. 800; [same]; *Young v. Haines* (1986) 41 C.3d 883, 894, 226 C.R. 547, 718 P.2d 909, *supra*, §587 [same]; *Donabedian v. Manzer* (1986) 187 C.A.3d 1021, 1025, 232 C.R. 325 [following *Young*].)

SUPPLEMENT: [This section is current through the latest supplement]



42 of 145 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XIV. STATUTE OF LIMITATIONS: TORT ACTIONS

B. Injuries to Persons and Wrongful Death: Two Years.

14. Postponed Accrual.

f. Medical Malpractice.

9. Wrongful Death.

3 *Witkin Cal. Proc. Actions* § 590

[§ 590] Wrongful Death.

(1) *Accrual on Death of Decedent.* In *Larcher v. Wanless* (1976) 18 C.3d 646, 135 C.R. 75, 557 P.2d 507, L became seriously ill from an oral contraceptive prescribed by defendant doctors in 1966 and subsequent years. She and her husband were both aware of the physical harm in July 1972, when they filed a products liability action against the manufacturers and distributors of the drug. She died in January 1974; and in March 1974, plaintiffs, her heirs, filed a wrongful death action alleging medical malpractice on the part of defendant doctors. *Held*, C.C.P. 340.5 was not a bar to the action.

(a) Defendants contended that the word "injury" in the section refers to the harm suffered by the direct victim of the malpractice, regardless of whether the action is brought by that victim or by his or her heirs after death. Under this theory, if the victim died within a year after the event, the heirs who discovered the cause would have only the remainder of that year to file the action (a period that could be as short as a day); and if the victim died more than a year after the heirs discovered the cause, the action would be barred before the right arose. (18 C.3d 653.)

(b) The background law and legislative history do not support this interpretation. The purpose of C.C.P. 340.5 was not only to cut down the extended exposure of doctors to malpractice liability but also to protect the claims of worthy plaintiffs. Thus, the limitations period was tied to "injury" rather than to "alleged wrongful act." (18 C.3d 655.) Until the death of the decedent, her heirs had suffered no "injury" under former C.C.P. 377 (now C.C.P. 377.60 et seq.) and "[t]o the extent that statutes of limitation seek to encourage the prompt presentation of claims, this purpose is best served by a limitations period commencing on the date the cause of action first accrues--in this case when the death of the decedent creates a potential right of recovery in the heirs" under C.C.P. 377. (18 C.3d 657.)

(c) The Legislature used the phrase "injury or death" without intending to deny that a "death" could also constitute an "injury" to the heirs; therefore, the word "injury," as applied to wrongful death actions, must be read to refer to the wrongfully caused death of the plaintiff's decedent. (18 C.3d 659.)

(2) *Statute of Limitations in Cases Involving Minors.* The statute of limitations tolling provision for minors (C.C.P.

352, *infra*, §§696, 697) does not apply to wrongful death actions based on medical malpractice; the more specific provisions of C.C.P. 340.5 apply. (*Washington v. Nelson* (1979) 100 C.A.3d 47, 52, 160 C.R. 644.)

Ferguson v. Dragul (1986) 187 C.A.3d 702, 232 C.R. 79, held that the statute of limitations in C.C.P. 340.5 governs actions of minors both as victims of malpractice and as heirs of victims. (187 C.A.3d 708.) Plaintiff minor sued for the wrongful death of her mother, and defendant contended that the statute was a bar because the time commenced to run at the time of discovery of the injury from malpractice (1981) rather than from the time of the mother's death (1983). In rejecting this contention, the court pointed out that the wrongful death action is not a continuation of the decedent's claim but an entirely new cause of action, and that the event that gives rise to the cause of action is the decedent's death, the injury sustained by the heirs. (187 C.A.3d 708, 709, citing *Larcher*.)

(3) *Intervention by Time-Barred Heir*. In *Andersen v. Barton Memorial Hosp.* (1985) 166 C.A.3d 678, 212 C.R. 626, the issue was whether an alleged heir whose wrongful death action was barred by C.C.P. 340.5 could nevertheless intervene in a wrongful death action timely filed by the decedent's other heirs. *Held*, the intervenor's action was barred. The claim in intervention raised new issues, i.e., whether the intervenor was decedent's natural child, and the extent of her pecuniary loss resulting from decedent's death. As such, it constituted a new cause of action, rather than one that related back to the timely filed claims of the other heirs. (166 C.A.3d 684.) (See *San Diego Gas & Elec. Co. v. Superior Court* (2007) 146 C.A.4th 1545, 1550, 53 C.R.3d 722 [relying on *Andersen*; trial judge erred in allowing time-barred claims of omitted heir to be added by amendment in wrongful death action timely filed by other heirs].)

SUPPLEMENT: [This section is current through the latest supplement]



43 of 145 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XIV. STATUTE OF LIMITATIONS: TORT ACTIONS

B. Injuries to Persons and Wrongful Death: Two Years.

14. Postponed Accrual.

g. Distinct Injuries From Same Cause.

1. Postponed Accrual Allowed.

3 *Witkin Cal. Proc. Actions* § 591

[§ 591] Postponed Accrual Allowed.

Martinez-Ferrer v. Richardson-Merrell (1980) 105 C.A.3d 316, 164 C.R. 591, took an innovative position on delayed accrual and splitting of the cause of action. Plaintiff R, a surgeon, suffered from a high cholesterol condition, and in 1960 took the drug MER/29, provided by defendant company's salesman. He soon developed macula edema (swelling of the retina of the eye) and dermatitis on his entire body. Both conditions cleared up in months, although his vision remained "poor." In February 1976, cataracts were discovered in his eyes, and his ophthalmologist determined that they had been caused by the drug. The complaint was filed June 24, 1976, and defendants were granted summary judgment on the ground that the 1-year statute of limitations had run. *Held*, reversed.

(a) At trial it is likely to be found that MER/29 caused the 1960 dermatitis. Hence, the question is whether plaintiff can maintain an action against defendants on the theory that the 1976 cataracts were caused by the drug, years after he knew or should have known that he had suffered an earlier different injury from that drug. (105 C.A.3d 322.)

(b) Defendants rely on the traditional concept of the cause of action for personal injuries and its application to the statute of limitations: The cause of action accrues when an injury is suffered, and recovery may be had for past and future detriment; hence, the running of the statute is unaffected by additional injury suffered later. (105 C.A.3d 323.) But this approach is unrealistic and unjust as applied to the instant case. If plaintiff had sued shortly after 1960 for his dermatitis and macula edema, he could not have recovered additional damages on the speculative possibility that cataracts would later develop; yet, under the statutory requirement of diligent prosecution, he would have been unable to keep his action alive for a decade and a half. "The simple fact is that rules developed against the relatively unsophisticated backdrops of barroom brawls, intersection collisions and slips and falls lose some of their relevance in these days of miracle drugs with their wondrous, unintended, unanticipated and frequently long-delayed side effects." (105 C.A.3d 324.)

(c) Two Supreme Court decisions furnish support for plaintiff's delayed action. In *Davies v. Krasna* (1975) 14 C.3d 502, 121 C.R. 705, 535 P.2d 1161, *supra*, §503, the court declared that the period does not run before the plaintiff has a true cause of action and a genuine remedy. Plaintiff in 1960 did not know of the cause of action now alleged. (105

C.A.3d 325.) *Sindell v. Abbott Laboratories* (1980) 26 C.3d 588, 610, 163 C.R. 132, 607 P.2d 924, 6 Summary (10th), *Torts*, §1486, observed that the courts must fashion remedies to meet the changing needs brought about by advances in science and technology. In *Sindell*, recovery was allowed for cancers developed in the daughters of women who had taken the drug DES during pregnancy; the cancer manifested itself after a latent period of 10 to 12 years. "If the manufacturer of such a drug is liable for the long-delayed effects of his product, it advances no coherent public policy to absolve him of that liability simply because right after the ingestion of the drug the user suffered other, different, independent and relatively innocuous side effects for which he did not bother to sue." (105 C.A.3d 324.)

(d) The problem of splitting the cause of action still remains. Although the 1960 injuries from the drug were relatively minor, they were sufficient to permit recovery of substantial damages (including loss of earnings), and therefore a cause of action accrued at that time. To allow a second action to be brought for additional later injury suffered from the same cause would, under traditional theories, violate the prohibition against splitting the cause of action (see 4 *Cal. Proc.* (5th), *Pleading*, §45). But there is a trend away from the strict enforcement of this rule: (1) In a nuisance case, where it is uncertain whether the nuisance is permanent or temporary, the plaintiff may elect to treat it as temporary, without being met by a plea of merger if it is in fact permanent (see *infra*, §601 et seq.). (2) In cases involving progressive occupational disease, the statute does not begin to run until the disease culminates in disability (see *supra*, §567). (3) The Second Restatement of Judgments, §61.2, lists a number of exceptions to the no-splitting rule, making the general rules of merger inapplicable where the policies favoring preclusion of a second action are overcome "for an extraordinary reason," or the judgment in the first action is inconsistent with "the fair and equitable implementation of a statutory or constitutional scheme." (105 C.A.3d 326, 327.)

(e) "These developments--the nuisance cases, the progressive disease situations and the growing number of recognized exceptions to the rule of merger do not compel a holding for [R], but they certainly are straws which indicate which way the wind is blowing: away from a blind adherence to rigid concepts of what constitutes a cause of action and toward a set of rules which will enable plaintiffs to recover for just claims where that is possible without prejudice to defendants or insult to established rules of law, such as the merger aspect of the rules of *res judicata*. We make no attempt to even summarize where all this may lead. We are, however, convinced that under the peculiar circumstances of this case it would be a miscarriage of justice not to permit plaintiff to go to trial." (105 C.A.3d 327.)

The innovative approach of *Martinez-Ferrer* was the basis for a similar decision in *Zambrano v. Dorough* (1986) 179 C.A.3d 169, 224 C.R. 323. On December 31, 1976, defendant doctor misdiagnosed plaintiff's vaginal condition as the result of a miscarriage, and performed a minor operation. Although she subsequently complained of severe pain, he refused to treat her because she was not covered by insurance, and had her transferred to a hospital where a ruptured tubal pregnancy was discovered and surgery was performed. In January 1977, she discovered from statements of another doctor, and defendant's own admission, that he had misdiagnosed her original condition. At some time between January 1977 and May 1979, she became pregnant, had a child, and, as a result of additional operations, was advised that a hysterectomy was necessary. At this time she first became aware of the possible connection between these new problems and her original treatment, and her complaint for malpractice was filed on August 17, 1979. The trial judge gave judgment for defendant on demurrer, holding that the complaint had been filed more than 1 year after plaintiff had knowledge of her injury (*C.C.P.* 340.5, *supra*, §579). *Held*, reversed.

(a) Plaintiff knew of defendant's alleged negligence, in improperly diagnosing her condition and refusing to give her further treatment, more than 1 year before the complaint was filed; and the injuries suffered at that time, though minor compared with the loss of reproductive capacity, were substantial enough to give her a cause of action. Hence, the statute of limitations would normally bar the action. (179 C.A.3d 172, 173.)

(b) But the "trend away from inflexible enforcement" of the rule against splitting a cause of action, recognized in *Martinez-Ferrer*, justifies a similar departure from that rule in this case. The loss of plaintiff's reproductive capacity is an injury of a different type from the emotional distress allegedly suffered from defendant's refusal to treat her and the pain and suffering and out-of-pocket losses accompanying the negligent misdiagnosis. Her "right to be free of the transitory damages of discomfort and distress is separate from and independent of her right to have children, a much

more serious complication not apparent at the time of the earlier problems. Thus, based on the record before us, we hold the statute of limitations does not bar her cause of action for the loss of her reproductive capacity." (179 C.A.3d 174.) (See *Evans v. Eckelman* (1990) 216 C.A.3d 1609, 1618, 265 C.R. 605, *infra*, §595; for cases criticizing *Martinez-Ferrer* and *Zambrano*, see *infra*, §592.)

SUPPLEMENT: [This section is current through the latest supplement]



44 of 145 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XIV. STATUTE OF LIMITATIONS: TORT ACTIONS

B. Injuries to Persons and Wrongful Death: Two Years.

14. Postponed Accrual.

g. Distinct Injuries From Same Cause.

2. Postponed Accrual Denied.

3 *Witkin Cal. Proc. Actions* § 592

[§ 592] Postponed Accrual Denied.

More recent decisions analyzing situations involving distinct injuries from the same cause have criticized the holdings in *Martinez-Ferrer v. Richardson-Merrell* (1980) 105 C.A.3d 316, 164 C.R. 591, supra, §591, and *Zambrano v. Dorough* (1986) 179 C.A.3d 169, 224 C.R. 323, supra, §591, and have refused to permit postponed accrual or to relax the traditional prohibition against splitting causes of action.

In *DeRose v. Carswell* (1987) 196 C.A.3d 1011, 242 C.R. 368, plaintiff sued for assault and battery and intentional and negligent infliction of emotional distress, alleging that defendant, her stepgrandfather, sexually abused her, beginning when she was 4 years old and ending when she was 11 (from 1966 to 1973). Her complaint was filed in January 1986, and she sought to avoid the statute of limitations by alleging that she still continues to suffer emotional injuries, and did not discover the injuries and their cause until within the last 6 months because of the psychological mechanisms experienced to repress the underlying events. *Held*, the statute was a bar. It was tolled during plaintiff's minority (until March 1980), but then became a bar as of March 1981.

(a) The delayed discovery doctrine, illustrated in medical malpractice cases and also invoked in other contexts, applies only when a plaintiff has not discovered all of the facts essential to the cause of action. Here, the complaint alleges that the sexual assaults were committed against her will and without her consent, and the immediate harm gave her a right to sue at that time. (196 C.A.3d 1017, citing *Sonbergh v. MacQuarrie* (1952) 112 C.A.2d 771, 247 P.2d 133.)

(b) Plaintiff contended that her cause of action did not accrue until she experienced later emotional harm and recognized its connection with the earlier assaults. But an assault, which by definition is unconsented to and offensive, causes harm as a matter of law; and to hold that no cause of action accrued until 13 years later would suggest that a victim of sexual assault cannot sue unless and until there are delayed consequences. (196 C.A.3d 1018.)

(c) In 1986, the Legislature increased the statute of limitations on actions for specified types of sexual abuse to 3 years (C.C.P. 340.1, infra, §593), but C.C.P. 340.1(d), which then stated that the statute was not intended to preclude application of delayed discovery exceptions, did not change the prerequisites for applying the discovery rule. (196

C.A.3d 1020.)

(d) *Davies v. Krasna* (1975) 14 C.3d 502, 121 C.R. 705, 535 P.2d 1161, supra, §503, states the rule that nominal damages alone will not cause the statute to run as follows: "[A]lthough a right to recover nominal damages will not trigger the running of the period of limitation, the infliction of appreciable and actual harm, however uncertain in amount, will commence the statutory period." (196 C.A.3d 1022.) And there is no basis on which it can be said that the immediate harm caused by the wrongful acts alleged here was nominal or even slight. (196 C.A.3d 1022.)

(e) *Zambrano* was a far-reaching and unjustified extension of the *Davies* rule. The *Zambrano* plaintiff's earlier injuries were quite serious: an incorrect determination that the plaintiff had miscarried, an undetected pregnancy, an unnecessary dilation and curettage, acute pain, passing of large blood clots, a failure to diagnose an ectopic pregnancy, a ruptured fallopian tube, and surgery to treat the ruptured fallopian tube. The same act of malpractice eventually caused additional harm to the plaintiff's reproductive system, including the need for a hysterectomy with a resulting loss of fertility; but, while the subsequent harm was severe, that did not make the earlier harm "nominal" or even "relatively minor." The *Zambrano* court did not cite or attempt to reconcile its holding with *Davies*. (196 C.A.3d 1023.)

(f) The *Zambrano* court did not rely solely on the difference in degree between the earlier and later injuries; it also held that the earlier injury to the plaintiff's reproductive system and the subsequent loss of fertility constituted invasions of different primary rights, relying on *Martinez-Ferrer*. "It appears that the court in *Martinez-Ferrer* paved the way for *Zambrano* by reading *Davies* too restrictively. Faced with a sympathetic case but believing that *Davies* did not apply, the *Martinez-Ferrer* court simply disregarded the rule against splitting a cause of action. *Zambrano* followed, citing *Martinez-Ferrer* as evidence that 'there is a trend away from inflexible enforcement of this rule.' " (196 C.A.3d 1024.) However: "The *Martinez-Ferrer* court's assault on the rule against splitting a cause of action was completely unnecessary, because the rule in *Davies* would have permitted the *Martinez-Ferrer* plaintiff to sue for cataracts 12 years after experiencing a short-lived rash. We do not believe that the court in *Davies* can reasonably be interpreted as having used the term 'nominal' in the restrictive sense of 'one dollar.' Thus, in its result, *Martinez-Ferrer* is consistent with *Davies*; *Zambrano* is not. *Zambrano* subsumed 'significant' harm under the 'nominal' harm heading and then contradistinguished that injury from 'substantial' harm, thereby vastly expanding the rule which excuses compliance with the statute of limitations. If the facts of *Zambrano* justified application of such a rule, *Zambrano* would virtually obliterate that statute." (196 C.A.3d 1025, adding in footnote 8, that no reported case has relied on *Zambrano*.) (But see *Evans v. Eckelman* (1990) 216 C.A.3d 1609, 1618, 265 C.R. 605, infra, §595 [distinguishing *DeRose*].)

In *Miller v. Lakeside Village Condominium Assn.* (1991) 1 C.A.4th 1611, 2 C.R.2d 796, the court followed *DeRose* and repeated that opinion's criticisms of *Martinez-Ferrer*. (1 C.A.4th 1622, 1625.)

SUPPLEMENT: [This section is current through the latest supplement]



45 of 145 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XIV. STATUTE OF LIMITATIONS: TORT ACTIONS

C. Sexual Abuse of Minor: Three or Eight Years.

1. Statutory Rule.

3 Witkin Cal. Proc. Actions § 593

[§ 593] Statutory Rule.

(1) *In General.* An action to recover damages suffered as a result of childhood sexual abuse must be commenced within 8 years of the date that the plaintiff attains the age of majority or within 3 years of the date that the plaintiff discovers or reasonably should have discovered that the psychological injury or illness occurring after the age of majority was caused by the sexual abuse, whichever period expires later. (*C.C.P. 340.1(a)*.) However, under certain circumstances, an action against a defendant who is not the actual perpetrator of the abuse may not be commenced on or after the plaintiff's 26th birthday. (*C.C.P. 340.1(b)*; see *infra*, §594.) (See *Cal. Civil Practice*, 1 Procedure, §1:29 et seq.; 20 *Pepperdine L. Rev.* 1359, 1403 [application of delayed discovery rule for actions by adult survivors of childhood sexual abuse]; 25 *Southwestern U. L. Rev.* 173 [requiring clear and convincing proof in repressed memory cases]; 26 *U.C. Davis L. Rev.* 177 [When Good Intentions Fail: California's Two-Tier System for Handling Civil Suits by Adult Survivors of Childhood Sexual Abuse]; 9 *A.L.R.5th* 321 [running of limitations against action for civil damages for sexual abuse of child].) (On illustrations of delayed discovery and tolling of the statute, see *infra*, §595; on similar statute of limitations governing action to recover damages suffered as result of gender violence committed while plaintiff was minor, see *C.C. 52.4(b)*, *supra*, §§483, 487.)

(2) *"Childhood Sexual Abuse" Defined.* Under *C.C.P. 340.1(e)*, "childhood sexual abuse" includes any act committed against the plaintiff that occurred when the plaintiff was under the age of 18 years and that would have been proscribed by the following statutes:

(a) P.C. 266j (procuring child under 16 for lewd acts; see 2 *Cal. Crim. Law (3d)*, *Sex Offenses and Crimes Against Decency*, §39).

(b) P.C. 285 (incest; see 2 *Cal. Crim. Law (3d)*, *Sex Offenses and Crimes Against Decency*, §138).

(c) P.C. 286(b)(1), (b)(2), (c) (sodomy; see 2 *Cal. Crim. Law (3d)*, *Sex Offenses and Crimes Against Decency*, §25 et seq.).

(d) P.C. 288(a), (b) (lewd act with child; see 2 *Cal. Crim. Law (3d)*, *Sex Offenses and Crimes Against Decency*, §37 et seq.).

(e) P.C. 288a(b)(1), (b)(2), (c) (oral copulation; see 2 *Cal. Crim. Law* (3d), *Sex Offenses and Crimes Against Decency*, §31 et seq.).

(f) P.C. 289(h), (i), (j) (penetration by foreign object; see 2 *Cal. Crim. Law* (3d), *Sex Offenses and Crimes Against Decency*, §47 et seq.).

(g) P.C. 647.6 (annoying or molesting children; see 2 *Cal. Crim. Law* (3d), *Crimes Against Public Peace and Welfare*, §§59, 60).

(h) Any prior California laws of similar effect at the time the act was committed.

C.C.P. 340.1(e) does not limit the availability of the causes of action permitted in *C.C.P. 340.1(a)*, including an action against a defendant other than the alleged perpetrator of the abuse. (*C.C.P. 340.1(e)*.)

(3) *Certificate of Merit*. Every plaintiff 26 years of age or older at the time action is filed must file a "certificate of merit" executed by the attorney for the plaintiff and by a licensed mental health practitioner selected by the plaintiff. (*C.C.P. 340.1(g)*, (h).) Separate certificates for each defendant are required where there are multiple defendants. (*C.C.P. 340.1(i)*.)

The certificate must state that the plaintiff's attorney and at least one licensed mental health practitioner consulted by the attorney, who is neither a party to the action nor plaintiff's treating physician, have reviewed the facts of the case, that the practitioner has interviewed the plaintiff, and that both the attorney and the practitioner have concluded that there is reasonable and meritorious cause for filing the action. (*C.C.P. 340.1(h)(1)*, (h)(2).)

If the attorney is unable to obtain the required consultation before the statute of limitations would run, the certificate may so declare, and must be filed within 60 days after filing of the complaint. (*C.C.P. 340.1(h)(3)*.)

The certificates under *C.C.P. 340.1(h)(1)* and (h)(2) must be filed within the applicable limitations period for the action, or the action is subject to dismissal, where those certificates are not accompanied by a certificate under *C.C.P. 340.1(h)(3)*. (*Doyle v. Fenster* (1996) 47 C.A.4th 1701, 1706, 55 C.R.2d 327 [construing former designations of subdivision].) However, the certificate under *C.C.P. 340.1(h)(3)* may be filed with the other two certificates and need not be filed with the complaint, even if this occurs after the limitations period has run. (*McVeigh v. Doe 1 et al.* (2006) 138 C.A.4th 898, 902, 42 C.R.3d 91.)

Failure to file the certificate is a ground for demurrer (*C.C.P. 430.10*) or a motion to strike (*C.C.P. 435*). (*C.C.P. 340.1(l)*.)

(4) *"Doe" Designations*. In an action subject to *C.C.P. 340.1(g)* (i.e., plaintiff at least 26 years old who must file certificate of merit), a defendant may not be named in pleadings or other papers filed in the action except by "Doe" designation until there has been a showing of corroborative fact as to the charging allegations against that defendant. (*C.C.P. 340.1(m)*, (n), (o), (p), (q).)

(5) *Service of Complaint*. A complaint may not be served on the defendant until the court has reviewed the certificate of merit and has found, in camera, and based solely on the certificate, that there is a reasonable and meritorious cause for filing the action. The duty to serve the defendant with process does not attach until that time. (*C.C.P. 340.1(j)*.)

(6) *No Effect on Burden of Proof*. *C.C.P. 340.1* does not alter the otherwise applicable burden of proof, as defined in *Ev.C. 115* (see 1 *Cal. Evidence* (4th), *Burden of Proof and Presumptions*, §35 et seq.). (*C.C.P. 340.1(f)*.)

(7) *Sanctions Against Attorney*. "A violation of this section may constitute unprofessional conduct and may be the grounds for discipline against the attorney." (*C.C.P. 340.1(k)*.)

SUPPLEMENT: [This section is current through the latest supplement]

(2) "*Childhood Sexual Abuse*" Defined.

(a) *P.C. 266j (procuring child for lewd act)*: See *Joseph v. Johnson* (2009) 178 C.A.4th 1404, 1412, 101 C.R.3d 248 [allegations that defendant wife intentionally made plaintiff nieces available to husband for lewd conduct constituted childhood sexual abuse under C.C.P. 340.1(e), even though plaintiffs did not specifically allege that defendant violated P.C. 266j; plaintiffs alleged that defendant violated P.C. 288 (lewd act with child), and this was sufficient allegation that defendant violated P.C. 266j].(8) *(New) Exemption From Government Claims Filing Requirements*. Claims made against a local public entity for the recovery of damages suffered as a result of childhood sexual abuse arising out of conduct occurring on or after January 1, 2009, are exempt from the government claims filing requirements (see text, §231). (*Govt.C. 905(m)*, added in 2008; see Supp., supra, §240.)



46 of 145 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XIV. STATUTE OF LIMITATIONS: TORT ACTIONS

C. Sexual Abuse of Minor: Three or Eight Years.

2. Scope of Statute.

3 *Witkin Cal. Proc. Actions* § 594

[§ 594] Scope of Statute.

(1) *Perpetrator Need Not Be Member of Household.* As originally enacted, *C.C.P. 340.1* applied to abuse by a "household or family member," and was held not to apply to a Boy Scout leader who molested a scout. (*Snyder v. Boy Scouts of America* (1988) 205 C.A.3d 1318, 1325, 253 C.R. 156.) The statute was amended in 1990 to refer to "any individual." (On retroactive application of statute to revive cause of action already barred, see *supra*, §464.)

(2) *Defendant Need Not Be Actual Perpetrator.* As originally enacted, *C.C.P. 340.1* applied to "any act committed by a defendant against a plaintiff ... and which act would have been proscribed" by specified Penal Code sections, and was construed to apply only to actions against the actual perpetrator of the abuse. Thus, the statute was held not to apply to the owner and operator of a dance studio, based on defendant's alleged negligence in hiring, supervising, and retaining an instructor who molested a minor student. (*Debbie Reynolds Professional Rehearsal Studios v. Superior Court* (1994) 25 C.A.4th 222, 233, 30 C.R.2d 514; see 16 J. Juvenile Law 274 [*Debbie Reynolds Professional Rehearsal Studios*].) As amended in 1998, the statute now applies to the following:

(a) An action against the perpetrator of the abuse. (*C.C.P. 340.1(a)(1)*.)

(b) An action against a person or entity who owed a duty of care to the plaintiff, based on a negligent or wrongful act of that person or entity was the legal cause of the abuse. (*C.C.P. 340.1(a)(2)*.)

(c) An action against a person or entity, based on an intentional act of that person or entity that was the legal cause of the abuse. (*C.C.P. 340.1(a)(3)*.) (On retroactive application of statute to revive cause of action already barred, see *supra*, §464.)

An action described in *C.C.P. 340.1(a)(2)* or (a)(3) may not be commenced on or after the plaintiff's 26th birthday. (*C.C.P. 340.1(b)(1)*.) However, this prohibition does not apply if the defendant knew, should have known, or otherwise was on notice of unlawful sexual conduct by an employee, volunteer, representative, or agent, and failed to take reasonable steps, and to implement reasonable safeguards, to avoid acts of unlawful sexual conduct in the future by that person, including, but not limited to, preventing or avoiding placement of that person in a function or environment in which contact with children is an inherent part of that function or environment. Providing or requiring counseling is not

sufficient, in and of itself, to constitute a reasonable step or reasonable safeguard. (*C.C.P. 340.1(b)(2).*)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Defendant Need Not Be Actual Perpetrator. Vicarious liability exception to requirement that action be commenced by plaintiff's 26th birthday:* See *Joseph v. Johnson* (2009) 178 C.A.4th 1404, 1411, 101 C.R.3d 248 [in action by nieces against aunt, defendant's delegation to husband of responsibility for baby-sitting did not give rise to agency or volunteer relationship under *C.C.P. 340.1(b)(2)*, absent evidence that delegation gave defendant right to control husband's conduct].



47 of 145 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XIV. STATUTE OF LIMITATIONS: TORT ACTIONS

C. Sexual Abuse of Minor: Three or Eight Years.

3. Delayed Accrual and Tolling During Minority.

3 *Witkin Cal. Proc. Actions* § 595

[§ 595] Delayed Accrual and Tolling During Minority.

(1) *Delayed Accrual.* In *Evans v. Eckelman* (1990) 216 C.A.3d 1609, 265 C.R. 605, plaintiff brothers sued their uncle and former foster father in 1987, alleging sexual abuse beginning in 1966 when they were 7 and 10 years old. The trial judge rendered judgment for defendants on demurrer, on the ground that tolling of the statute of limitations ended in 1974 and 1977. *Held*, reversed; the delayed discovery rule could be applied, and plaintiffs should be allowed to amend their complaint to bring themselves within the rule.

(a) "It has been widely recognized that the shock and confusion engendered by parental molestation, together with the parent's demands for secrecy, may lead a child to deny or block the traumatic events from conscious memory, or to turn the anger and pain inward so that the child blames himself or herself for the events. ... Even where memory of the events themselves is not suppressed, it may be some time before the victim can face the full impact of the acts." (216 C.A.3d 1615.)

(b) "As a practical matter a young child has little choice but to repose his or her trust with a parent or parental figure. When such a person abuses that trust, he commits two wrongs, the first by sexually abusing the child, the second by using the child's dependency and innocence to prevent recognition or revelation of the abuse. This may be accomplished by enforcing secrecy around the acts or even by teaching the child that the sexual acts are normal or necessary to the relationship. As in the professional negligence cases, application of the delayed discovery rule would serve to prevent the molester from using the child's ignorance and trust to conceal the primary tort." (216 C.A.3d 1616.)

(c) "We conclude that the purpose of the statute of limitations and the rationale of the delayed discovery rule as it has developed in our courts require that accrual of a cause of action for child sexual abuse by a parent or similar figure of authority be delayed until the plaintiff knows or reasonably should know of the cause of action." (216 C.A.3d 1617.)

(d) Plaintiffs alleged that among the "blocking mechanisms" caused by the abuse were "internalized shame, guilt and self blame." "Construed liberally these allegations might show plaintiffs' unawareness *at the time of the abuse* that defendant was acting wrongfully. But they do not indicate how long that ignorance of wrongfulness continued. For plaintiffs to prevail they must be able to show they remained unaware of, and had no reason to suspect, the wrongfulness of the conduct until a time less than three years before this action was filed." (216 C.A.3d 1619.) On

remand they should be permitted to amend their complaint to allege unawareness lasting into adulthood that the acts were wrongful; and they could also amend to allege that they had repressed into adulthood the memory of the events themselves. (216 C.A.3d 1619.)

In *Marsha V. v. Gardner* (1991) 231 C.A.3d 265, 281 C.R. 473, plaintiff alleged that she was sexually molested by her stepfather beginning when she was age 8 and ending when she was age 17. She filed her complaint 15 years later when she was age 32. *Held*, the delayed discovery doctrine did not apply and the statute had run. (231 C.A.3d 272, citing and discussing *DeRose v. Carswell* (1987) 196 C.A.3d 1011, 242 C.R. 368, *supra*, §592.)

In *Lent v. Doe* (1995) 40 C.A.4th 1177, 47 C.R.2d 389, citing the text, plaintiff, who alleged that he was sexually abused by his uncle over 3 years beginning when he was age 12, sued the uncle in 1994 when he was age 31. Although the action was commenced more than 8 years after he reached the age of majority, plaintiff claimed that the action was timely because it fell within the 3-year delayed discovery provisions of C.C.P. 340.1(a) (see *supra*, §593 et seq.). The trial judge rejected plaintiff's theory and dismissed the action as time-barred. *Held*, reversed.

(a) Although plaintiff alleged that he had suffered actual and appreciable injury at the time of the abuse, that was not relevant. The delayed discovery provisions of the statute relate to injuries occurring after the age of majority. (40 C.A.4th 1185.)

(b) Plaintiff adequately pleaded facts supporting delayed discovery: (1) notwithstanding that the psychological injury and illness he suffered as an adult resulting from defendant's sexual misconduct, he did not discover the connection between that illness and the acts of misconduct until he began counseling 27 months before filing the action; and (2) his delay in discovering the connection was reasonable. (40 C.A.4th 1186.)

(c) That plaintiff did not repress the memories of the abuse did not mean that he could not take advantage of delayed discovery, because nothing in the statute requires that memories of abuse be repressed as a prerequisite to a delayed discovery claim. (40 C.A.4th 1186.) (See *Sellery v. Cressey* (1996) 48 C.A.4th 538, 544, 55 C.R.2d 706 [total repression of all memory of abuse is not necessary to toll statute; citing *Lent*].)

(2) *Tolling During Minority*. *Colleen L. v. Howard M.* (1989) 209 C.A.3d 542, 257 C.R. 263, holds that the tolling benefits of C.C.P. 352 (minority; see *infra*, §§696, 697) apply to actions under C.C.P. 340.1. On January 1, 1986, 1 month before her 18th birthday, plaintiff minor filed a complaint against her father, alleging sexual assaults during a 10-year period (1971-1981). Defendant contended that the 3-year period of C.C.P. 340.1 expired in 1984 and barred the action. *Held*, the action was timely. The children described by C.C.P. 340.1 have 3 years from the last injurious act to bring an action; but they are also minors entitled to invoke C.C.P. 352, which tolls the statute during minority. (209 C.A.3d 545, 546.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Delayed Accrual*. Common law equitable delayed discovery principles no longer apply to C.C.P. 340.1; the only applicable discovery rule is the one provided by the current statute. Although the 1986 and the 1990 versions of C.C.P. 340.1 expressly permitted the application of delayed discovery exceptions to the running of the limitations period, those provisions were removed when the statute was amended in 1994. Thus, it must be presumed that the Legislature intended to supplant common law delayed discovery with the statutory discovery rule that it put in place beginning in 1994.



48 of 145 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XIV. STATUTE OF LIMITATIONS: TORT ACTIONS

D. Trespass or Injury to Real Property: Three Years.

1. Scope of Statute.

3 *Witkin Cal. Proc. Actions* § 596

[§ 596] Scope of Statute.

C.C.P. 338(b) specifies a 3-year period for an "action for trespass upon or injury to real property." (See *Automobile Ins. Co. of Hartford, Connecticut v. Union Oil Co. of Calif.* (1948) 85 C.A.2d 302, 307, 193 P.2d 48 [fire damage from negligently furnished inflammable cleaning material].) A special 180-day limitation applies to an action for underground trespass to an oil well. (See *supra*, §480.)

In determining the applicability of *C.C.P. 338(b)* the following matters should be considered:

(1) Originally the section referred only to an action for trespass, and it was held that an action to recover for consequential injuries from an act originally lawful, which at common law was not "trespass" but "case," was outside its scope and within the 2-year limitation of *C.C.P. 339(1)*. (*Hicks v. Drew* (1897) 117 C. 305, 309, 49 P. 189; *Porter v. Los Angeles* (1920) 182 C. 515, 518, 189 P. 105.) In 1921 this distinction was eliminated by adding the words "or injury to." And as now phrased, the statute applies to an action for damages for injury to an easement. (*Roth v. Cottrell* (1952) 112 C.A.2d 621, 624, 246 P.2d 958 [obstruction of right-of-way]; see 15 A.L.R.3d 1228 [where injury is not common law trespass].)

(2) The 3-year limitation applies to trespass or injury to real property even though the defendant is a governmental agency or public utility that could have affirmatively exercised the power of eminent domain to authorize the act. (See *Smith v. Los Angeles* (1944) 66 C.A.2d 562, 586, 153 P.2d 69.)

(3) The 3-year limitation applies to an insurance company's action against the wrongdoer based on its right of subrogation. (*Automobile Ins. Co. of Hartford, Connecticut v. Union Oil Co. of Calif.*, *supra*, 85 C.A.2d 305 ["one who is subrogated to the rights and remedies of another should be allowed the same time in which to enforce such rights that the law would have allowed to the person to whose rights and remedies he succeeds"].)

(4) The section does not cover actions in inverse condemnation. (See *infra*, §605.)

(5) The section does not govern a personal injury action alleging emotional distress arising from a trespass on real property. Instead, that action is subject to the tort statute of limitations for personal injuries (former C.C.P. 340(3), now

C.C.P. 335.1; see *supra*, §552). (*Billmeyer v. Plaza Bank of Commerce* (1995) 42 C.A.4th 1086, 1097, 50 C.R.2d 119.)

(6) An action alleging a continuing nuisance or trespass caused by a latent construction defect is governed by the 10-year limitations period of *C.C.P. 337.15* (*infra*, §608 et seq.), and is not subject to the continuing nuisance theory of deferred accrual under *C.C.P. 338(b)* (*infra*, §601 et seq.). (*Chevron U.S.A. v. Superior Court* (1994) 44 C.A.4th 1009, 1015, 54 C.R.2d 324.)

(7) An action to enjoin a permanent encroachment is properly characterized as an action for the recovery of real property and is subject to the 5-year limitations period of *C.C.P. 318* et seq. (*supra*, §485), rather than as an action for trespass subject to the 3-year limitation of *C.C.P. 338(b)*. (*Harrison v. Welch* (2004) 116 C.A.4th 1084, 1096, 11 C.R.3d 92 [criticizing contrary view in *Troeger v. Fink* (1958) 166 C.A.2d 22, 26, 332 P.2d 779, and *Field-Escandon v. Demann* (1988) 204 C.A.3d 228, 251 C.R. 49, *infra*, §597].)

Once it has been determined that *C.C.P. 338(b)*, with its 3-year period, is applicable, the more complex problems of accrual must be considered. (See *infra*, §597 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]



49 of 145 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XIV. STATUTE OF LIMITATIONS: TORT ACTIONS

D. Trespass or Injury to Real Property: Three Years.

2. Act Causing Immediate and Permanent Injury.

a. General Rule: Accrual on Date of Wrongful Act.

3 *Witkin Cal. Proc. Actions* § 597

[§ 597] General Rule: Accrual on Date of Wrongful Act.

(1) *Trespass*. The time of the wrongful act and the time of accrual are the same (statute runs from date of act) if the defendant's act causes immediate and permanent injury, e.g., by dispossession or erection of a structure. "Where a trespass consists of a physical entry upon the lands of another and taking possession thereof under such circumstances as to indicate an intention that the trespass shall be permanent, the law may regard the wrong done in such case as complete at the time of the entry and allow recovery in a single action of all damages resulting therefrom, including prospective as well as past damages." (*Kafka v. Bozio* (1923) 191 C. 746, 750, 218 P. 753, *infra*, §601; see *Williams v. Southern Pac. R. Co.* (1907) 150 C. 624, 626, 89 P. 599 [defendant railroad unlawfully laid its track and operated its lines on plaintiff's property, obstructing plaintiff's access to street]; *Rankin v. De Bare* (1928) 205 C. 639, 641, 271 P. 1050 [building encroached on plaintiff's land; statute ran from time of construction]; *Spaulding v. Cameron* (1952) 38 C.2d 265, 267, 239 P.2d 625; *Bertram v. Orlando* (1951) 102 C.A.2d 506, 508, 227 P.2d 894 [building; quoting Corpus Juris Secundum definition of permanent structure: "one which may not be readily remedied, removed, or abated at a reasonable expense or one of a durable character evidently intended to last indefinitely, costing as much to alter as to build"]; *Troeger v. Fink* (1958) 166 C.A.2d 22, 26, 332 P.2d 779 [following *Rankin* and *Bertram*; building encroachment]; *Castelletto v. Bendon* (1961) 193 C.A.2d 64, 66, 13 C.R. 907 [same]; *Field-Escandon v. Demann* (1988) 204 C.A.3d 228, 233, 251 C.R. 49 [citing *Castelletto* and distinguishing *Kafka*; sewer line across plaintiff's lot, like the encroachment of buildings, walls, and foundations, was permanent]; *CAMSI IV v. Hunter Technology Corp.* (1991) 230 C.A.3d 1525, 1534, 282 C.R. 80, *infra*, §599, quoting the text; *Wilshire Westwood Associates v. Atlantic Richfield Co.* (1993) 20 C.A.4th 732, 739, 24 C.R.2d 562, *supra*, §498 [quoting *CAMSI IV* and discussing application of discovery rule]; *Rest.2d, Torts* §899, Comment d; 63 *Harv. L. Rev.* 1206; but see *Baugh v. Garl* (2006) 137 C.A.4th 737, 747, 40 C.R.3d 539, citing the text [accrual rule did not apply to trespass by tapping into water pipeline, because of "relative ease" in disconnecting tap].)

In *Bacon v. Glenn* (1932) 120 C.A. 112, 7 P.2d 718, plaintiff lessee sued more than 3 years after eviction, contending that the implied covenant for quiet possession (C.C. 1927) was a continuing covenant. *Held*, however, the cause of action was for trespass and accrued on his ouster, where he never attempted to regain possession. (120 C.A. 113.)

(2) *Nuisance*. The accrual rule is also applied to a nuisance which, by its nature and under the circumstances, is not likely to be discontinued, but will probably be permanent. The statute runs from the time of its creation. (See *Phillips v. Pasadena* (1945) 27 C.2d 104, 107, 162 P.2d 625 [dictum]; *Lyles v. California* (2007) 153 C.A.4th 281, 291, 62 C.R.3d 696 [county's installation of inadequate drainage system on two roadways, causing flooding on plaintiffs' property, was one-time occurrence constituting permanent nuisance].) In *Spar v. Pacific Bell* (1991) 235 C.A.3d 1480, 1 C.R.2d 480, citing the text, the court, following *Field-Escandon*, concluded that telephone lines and equipment buried by a public utility under plaintiff's property 25 years earlier were a permanent nuisance. (235 C.A.3d 1480.) A strong dissenting opinion argued that plaintiff should have been allowed to elect to treat the nuisance as continuing (235 C.A.3d 1488, 1491), and that *Field-Escandon* was distinguishable (235 C.A.3d 1493).

SUPPLEMENT: [This section is current through the latest supplement]



50 of 145 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XIV. STATUTE OF LIMITATIONS: TORT ACTIONS

D. Trespass or Injury to Real Property: Three Years.

2. Act Causing Immediate and Permanent Injury.

b. Buildings Damaged by Hazardous Substances.

3 Witkin Cal. Proc. Actions § 598

[§ 598] Buildings Damaged by Hazardous Substances.

In *San Diego v. U.S. Gypsum Co.* (1994) 30 C.A.4th 575, 35 C.R.2d 876, plaintiff city sued defendant asbestos manufacturers and distributors in 1988 for damages stemming from the installation of asbestos in buildings the city owned or leased during the 1960s and 1970s. More than 3 years prior to the action, plaintiff had conducted an extensive investigation and evaluation of asbestos-containing materials in many of its buildings, discovered degradation or deterioration of asbestos-containing materials, took certain safety measures, and filed an action in federal court against another defendant. Moreover, plaintiff admitted in the present action, and offered to stipulate, that it knew that asbestos was a dangerous and defective product and that it was in many of its buildings well before 1984. The trial judge granted summary judgment for defendants, finding that the action was time-barred by the 3-year limitations period of *C.C.P.* 338(b). *Held*, affirmed. Plaintiff claimed that the 3-year limitations period did not commence to run until a particular building was contaminated by a significant release of asbestos fibers or dust to pose a human health hazard, and that this occurred within the 3-year period. This claim is without merit.

(a) Plaintiff did not narrowly limit its claimed damages to those buildings contaminated by significant asbestos dust and fiber release, and plaintiff suffered some, albeit not all, of the pleaded damages more than 3 years before bringing its action. The statute thus commenced when these appreciable and actual damages occurred, i.e., when more than nominal damages were sustained. (30 C.A.4th 583.)

(b) The asbestos dust and fiber release occurred continuously from time of sale and installation of the asbestos-containing building material, thus demonstrating that plaintiff had already suffered appreciable damage well outside the 3-year limitations period. (30 C.A.4th 583, 584.)

(c) The federal court suit sought \$ 50 million damages, further demonstrating that the city suffered more than nominal damages before the 3-year limitations period. Even though that suit was directed against another defendant, a statute of limitations is not delayed when the plaintiff does not know the wrongdoer's identity. (30 C.A.4th 584.)

San Francisco Unified School Dist. v. W.R. Grace & Co. (1995) 37 C.A.4th 1318, 44 C.R.2d 305, criticized what it labeled the implied holding of *San Diego v. U.S. Gypsum Co.*--that the mere presence of asbestos in a building (i.e.,

economic loss) constitutes injury, necessarily finding that injury occurs before contamination (i.e., actual physical injury resulting when the asbestos becomes friable).

(a) "We find the *City of San Diego* analysis to be unsatisfactory, for several reasons. First, the *City of San Diego* court purported not to resolve the contamination issue, while acknowledging that the city's contamination argument was inconsistent with its ruling. ... Second, while it based its ruling on the appreciable harm line of cases, the Second District did not discuss whether its finding of appreciable harm was consistent with those cases requiring physical injury for purposes of strict liability or negligence causes of action. ... Instead, it applied its interpretation of what constitutes appreciable harm--anything more than nominal damages." (37 C.A.4th 1331.)

(b) "In our view, this is where the *City of San Diego* court's analysis falters. It interprets any moneys spent that constitute more than nominal damages as the appreciable harm that triggers the commencement of the statute of limitations without considering whether any physical injury has yet occurred. A careful reading of the appreciable harm cases reveals that they contrast appreciable harm with nominal damages or speculative harm or a threat of future harm. ... Testing and investigation are typically undertaken once a responsible property owner discovers that asbestos may be present in its building. But the act of testing and investigating which discloses no contamination cannot be equated with the actual harm of contamination. At best, such testing and investigation could show a threat of future harm. In light of the 'threat of future harm' cases and the unique analytical problems posed by an asbestos-in-building case, we may reasonably conclude that the California Supreme Court did not intend such a result. These expenses may be found to have been undertaken to determine when the threat of future harm ripens into appreciable, actual harm for purposes of the accrual of a tort cause of action." (37 C.A.4th 1331, 1332.)

(c) "In a strict liability or negligence case, the compensable injury must be physical harm to persons or property, not mere economic loss. Accordingly, we hold that in an asbestos-in-building case, the mere presence of asbestos constitutes only a threat of future harm. Contamination by friable asbestos is the physical injury and the actual, appreciable harm that must exist before a property owner's strict liability or tort cause of action against an asbestos manufacturer accrues and the limitations period commences." (37 C.A.4th 1335.)

Santa Clara v. Atlantic Richfield Co. (2006) 137 C.A.4th 292, 40 C.R.3d 313, involved a situation analogous to asbestos damage to buildings, i.e., lead contamination of buildings. Plaintiff governmental entities filed a class action against various lead manufacturers on various theories. The trial judge granted summary judgment for defendants, ruling that plaintiffs' claims of negligence and strict product liability accrued when paint containing lead manufactured by defendants was originally applied to the buildings' surfaces decades before plaintiffs filed their action, and thus were barred by the 3-year limitations period. *Held*, reversed.

(a) The trial judge adopted defendant's view that physical injury occurred when the paint was originally applied, while plaintiffs claimed that physical injury occurred later when the lead paint subsequently deteriorated and contaminated their property. "Our examination of this issue leads us to the conclusion that the law does not support either of the positions taken by the parties." (137 C.A.4th 318.)

(b) In *Aas v. Superior Court* (2000) 24 C.4th 627, 101 C.R.2d 718, 12 P.3d 1125, 6 Summary (10th), Torts, §1162, the Supreme Court held that plaintiffs in a construction defects case could not state claims for negligence or strict product liability based on prospective economic loss, but must allege actual physical damage to the buildings. (137 C.A.4th 319.) To prevail, plaintiffs in the present case must also have suffered physical damage to their buildings. (137 C.A.4th 320.) However, plaintiffs alleged only that the presence of lead paint (or deteriorated lead paint) required them to spend money to find and remove the lead paint; these allegations are not sufficient to establish physical damage. (137 C.A.4th 321.)

(c) *San Diego v. U.S. Gypsum Co.* "is of no assistance." The decision "avoided resolving the question of *when or if* accrual had occurred" and instead "essentially conceded that the statute of limitations barred its action even if contamination constituted physical injury and resulted in the accrual of the city's causes of action." (137 C.A.4th 322.)

(d) To the extent that *San Francisco Unified School Dist. v. W.R. Grace & Co.* holds that a building suffers physical injury when the building becomes hazardous to human beings, it is inconsistent with *Aas* and "we are bound by *Aas*." (137 C.A.4th 325.)

(e) Thus, plaintiffs' negligence and strict liability claims "simply have not accrued because plaintiffs have failed to plead the existence of any physical injury to their buildings." (137 C.A.4th 325.) However, summary judgment for defendants should be vacated, because it was based solely on the statute of limitations, and plaintiffs were not given an opportunity to respond to the unstated ground of improper pleading. (137 C.A.4th 326.) (See 33 A.L.R.5th 1 [application of discovery rule to building and construction contracts].)

SUPPLEMENT: [This section is current through the latest supplement]



51 of 145 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XIV. STATUTE OF LIMITATIONS: TORT ACTIONS

D. Trespass or Injury to Real Property: Three Years.

2. Act Causing Immediate and Permanent Injury.

c. Subsequent Owners.

3 Witkin Cal. Proc. Actions § 599

[§ 599] Subsequent Owners.

(1) *Statute Runs Against Subsequent Owner.* "[F]or limitation purposes the harm implicit in a tortious injury to property is harm to the property itself, and thus to *any* owner of the property once the property has been injured and not necessarily to a particular owner. Thus once the sewer line has been improperly located on the property ... , or the lot preparation and foundation construction have been improperly done ... , or the encroaching buildings are constructed ... , the tort is complete and the statute of limitations (unless forestalled by the 'discovery rule' or some other special doctrine) begins to run: An owner must bring its claim to court within the statutory period or the claim will be barred *for that and all subsequent owners*. Normally a subsequent owner will not be personally harmed by the tort until he or she becomes the owner, but no case has held that each new owner thus becomes entitled to a new statute of limitations against the tortfeasor." (*CAMSI IV v. Hunter Technology Corp.* (1991) 230 C.A.3d 1525, 1534, 1535, 282 C.R. 80.)

(2) *Distinction: Where Prior Owner Assists Developer in Concealing Defects.* In *Valenzuela v. Superior Court* (1992) 3 C.A.4th 1499, 5 C.R.2d 186, the issue was: "May a prior property owner's knowledge of property defects be imputed to the current owner for purposes of starting the running of the statute of limitations as to the developer when the prior owner acts as an agent of the developer in concealing defects from the current owner?" (3 C.A.4th 1500.) In holding that the prior owner's knowledge may not be imputed under such circumstances, the court explained:

"The *Bradler/CAMSI IV* imputation of knowledge rule makes sense when the prior owner is independent of the developer. If a prior owner knows about defects and fails to sue the developer or inform the current owner, the current owner is not unduly restricted if allowed to sue only the prior owner for concealing the defects (inflating the price of the property). But where, as alleged here, the prior owner acts as an agent for the developer in concealing the defects, the developer may not hide behind the statute of limitations. To rule otherwise would encourage developers to use agents to repurchase their problem properties, to sweep the problems under the rug, and to resell the properties to unsuspecting purchasers." (3 C.A.4th 1503.)

SUPPLEMENT: [This section is current through the latest supplement]



52 of 145 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XIV. STATUTE OF LIMITATIONS: TORT ACTIONS

D. Trespass or Injury to Real Property: Three Years.

2. Act Causing Immediate and Permanent Injury.

d. Injury Not Abatable at Reasonable Cost.

3 *Witkin Cal. Proc. Actions* § 600

[§ 600] Injury Not Abatable at Reasonable Cost.

In *Mangini v. Aerojet-General Corp.* (1996) 12 C.4th 1087, 51 C.R.2d 272, 912 P.2d 1220, plaintiff property owners brought an action for damages for continuing nuisance and trespass against defendant industrial manufacturer of solid fuels that had leased the property from the prior owners and had contaminated it with toxic waste during the leasehold. Following a jury trial, a verdict of \$ 13.2 million was awarded to plaintiffs. Defendant moved for judgment notwithstanding the verdict, claiming that the nuisance or trespass was permanent, not continuing, and thus was barred by the 3-year period of *C.C.P. 338(b)* (see *supra*, §596), which expired before the action was filed. *Held*, defendants were entitled to judgment; the contamination could not be abated at a reasonable cost by reasonable means, and thus was a permanent nuisance or trespass rendering the action untimely.

(a) The evidence showed that no one knew how extensive the contamination was or how to remedy it. (12 C.4th 1097.) Although something less than total decontamination may suffice to show abatability, there was no evidence to show what the level might have been. (12 C.4th 1098.) Even though plaintiffs may have shown that the technology existed to decontaminate the property, mere technological feasibility does not prove abatability. Plaintiffs were not required to show the exact cost of abatement, but they did not present even an estimate of the cost. (12 C.4th 1099.) Further, even though the contamination was unlawful in that it exceeded government standards, that did not automatically establish that the nuisance was a continuing one. (12 C.4th 1102.)

(b) Establishing a continuing nuisance or trespass was a necessary condition of plaintiffs' theory of damages. Plaintiffs were awarded damages for loss of use of the property during the 3 years before the complaint was filed. This is a species of damages available only for continuing nuisance. Because plaintiffs failed to prove a continuing nuisance, damages awarded on that theory could not stand. (12 C.4th 1103.) (See *Beck Dev. Co. v. Southern Pac. Trans. Co.* (1996) 44 C.A.4th 1160, 1219, 52 C.R.2d 518 [following *Mangini*; oil contamination was not continuing nuisance where cost of abatement would greatly exceed value of land after remediation].)

SUPPLEMENT: [This section is current through the latest supplement]



53 of 145 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XIV. STATUTE OF LIMITATIONS: TORT ACTIONS

D. Trespass or Injury to Real Property: Three Years.

3. Continuing Trespass or Nuisance.

a. In General.

3 *Witkin Cal. Proc. Actions* § 601

[§ 601] In General.

(1) *Each Repetition Is Separate Wrong.* Where the defendant's act is not a "completed wrong," i.e., it does not immediately cause a permanent injury, a difficult problem confronts the plaintiff. The plaintiff should not be forced to sue immediately upon the commission of any wrongful act of trespass or nuisance. The defendant may stop or abate the nuisance, so that it results in only temporary injury; or the possibility and extent of future damage may not be clear at the outset. In these situations of doubt as to the permanency of the injury, the better view gives the plaintiff an election (a) to sue for all present and prospective damages on the theory that a permanent injury has occurred; or (b) to treat the wrong as continuing but not necessarily permanent, and sue only for damages suffered up to the time of the action. The second election allows further actions on successive causes of action so long as the wrongful act continues to cause injury, and in any action recovery may be had for all damage suffered within 3 years of the filing of the complaint. (See *Phillips v. Pasadena* (1945) 27 C.2d 104, 107, 162 P.2d 625 [dictum applying rule to time for filing claim against municipality: "Every repetition of a continuing nuisance is a separate wrong for which the person injured may bring successive actions for damages until the nuisance is abated, even though an action based on the original wrong may be barred"]; *Spaulding v. Cameron* (1952) 38 C.2d 265, 268, 239 P.2d 625; *Polin v. Chung Cho* (1970) 8 C.A.3d 673, 678, 87 C.R. 591; *Mangini v. Aerojet-General Corp.* (1991) 230 C.A.3d 1125, 1142, 281 C.R. 827 [plaintiffs could amend complaint to state facts showing continuing nuisance]; *Lee v. Los Angeles County Metropolitan Trans. Authority* (2003) 107 C.A.4th 848, 857, 132 C.R.2d 444 [action for continuous and repeated damage to real property based on inverse condemnation and nuisance accrues until situation on plaintiff's property has stabilized]; *Shamsian v. Atlantic Richfield Co.* (2003) 107 C.A.4th 967, 980, 132 C.R.2d 635 [action for trespass and nuisance by gas station operators against gasoline company and former operator, arising from contamination to soil and groundwater caused by leakage from underground tank]; *Baugh v. Garl* (2006) 137 C.A.4th 737, 747, 40 C.R.3d 539, citing the text; *Starrh & Starrh Cotton Growers v. Aera Energy LLC* (2007) 153 C.A.4th 583, 597, 63 C.R.3d 165 [subsurface trespass on land resulting from migration of wastewater produced from oil production activities on energy company's adjacent land was continuous, where defendant could have discontinued its disposal practices]; *Rest.2d, Torts* §§899, Comment d, 930; 63 *Harv. L. Rev.* 1205; 24 *A.L.R.2d* 903 [encroachment]; 12 *A.L.R.3d* 1265 [encroachment of building or other structure on land of another]; 19 *A.L.R.4th* 456 [air pollution]; but see *Baker v. Burbank-Glendale-Pasadena Airport Authority* (1985) 39 C.3d 862, 218 C.R. 293, 705 P.2d 866, *infra*, §602 [disagreeing with dictum stated in *Phillips*].)

In *Kafka v. Bozio* (1923) 191 C. 746, 218 P. 753, the foundations of defendant's building sagged, the building tipped, and the upper part overhung plaintiffs' adjoining land, injuring plaintiffs' building. More than 3 years after the first encroachment, plaintiffs sued to abate the nuisance. *Held*, the action was timely; plaintiffs had "elected to treat the nuisance, not as a permanent injury to be fully compensated in damages, but as a temporary wrong to be abated." (191 C. 752.)

In *Nelson v. Robinson* (1941) 47 C.A.2d 520, 118 P.2d 350, water from defendant's irrigation ditch seeped into plaintiff's land in 1926, causing damage. Seepage again occurred, injuring another part of the land 1,000 feet away in 1935. *Held*, the new seepage gave rise to a new cause of action. "The damage to the first parcel flooded may have been *permanent* in respect to that, but it was not a permanent damage to other portions of the real property not yet affected." (47 C.A.2d 529.)

The plaintiff's election was strongly affirmed in *United States v. Dickinson* (1947) 331 U.S. 745, 67 S.Ct. 1382, 91 L.Ed. 1789, where the government's dam flooded plaintiff's land, and it was contended that the statute began to run at once because suit could have been brought at that time. "Assuming that such an action would be sustained, it is not a good enough reason why he must sue then or have, from that moment, the statute of limitations run against him. If suit must be brought, lest he jeopardize his rights, as soon as his land is invaded, other contingencies would be running against him--for instance, the uncertainty of the damage and the risk of res judicata against recovering later for damage as yet uncertain. The source of the entire claim--the overflow due to rises in the level of the river--is not a single event; it is continuous. And as there is nothing in reason, so there is nothing in legal doctrine, to preclude the law from meeting such a process by postponing suit until the situation becomes stabilized." (67 S.Ct. 1385, 91 L.Ed. 1794.)

The rule that each repetition is a separate wrong also applies to a continuing nuisance causing personal injuries. (*Nestle v. Santa Monica* (1972) 6 C.3d 920, 937, 101 C.R. 568, 496 P.2d 480.)

(2) *Distinction: Nuisance Caused by Latent Construction Defect.* An action alleging a continuing nuisance or trespass caused by a latent construction defect is governed by the 10-year limitations period of C.C.P. 337.15 (infra, §608 et seq.), and is not subject to the continuing nuisance theory of deferred accrual under C.C.P. 338(b). (*Chevron U.S.A. v. Superior Court* (1994) 44 C.A.4th 1009, 1015, 54 C.R.2d 324 [soil contamination caused by installation of underground fuel tanks].)

SUPPLEMENT: [This section is current through the latest supplement]



54 of 145 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XIV. STATUTE OF LIMITATIONS: TORT ACTIONS

D. Trespass or Injury to Real Property: Three Years.

3. Continuing Trespass or Nuisance.

b. Airplane Overflight.

3 *Witkin Cal. Proc. Actions* § 602

[§ 602] Airplane Overflight.

The election to treat the nuisance as continuing was affirmed on unusual facts in *Baker v. Burbank-Glendale-Pasadena Airport Authority* (1985) 39 C.3d 862, 218 C.R. 293, 705 P.2d 866. Defendant airport was a public entity owned by three cities under a joint powers agreement. Plaintiff homeowners filed an action for damages for a nuisance caused by noise, smoke, and vibrations from flights over their homes. The activities allegedly became a nuisance in January 1978, and the complaint was filed in 1982. The trial judge gave judgment for defendant on demurrer on the ground that the nuisance was permanent and the cause of action was barred by the statute of limitations. *Held*, reversed.

(a) *Permanent and continuing nuisances.* The cases finding the nuisance permanent have usually involved a single act in which permanent injury was done and present and prospective damages were awarded. (39 C.3d 868; see *supra*, §597 et seq.) But if the nuisance is a use that may be discontinued at any time, it is continuing, and the injured party may bring successive actions for damages until the nuisance is abated. "The classic example ... is an ongoing or repeated disturbance, such as the one before us today, caused by noise, vibration or foul odor." (39 C.3d 869.)

(b) *Plaintiff's election in doubtful cases.* Because of the contingencies of uncertainty of damages and statute of limitations, the courts have held that in doubtful cases the plaintiff may elect to treat the nuisance as continuing. (39 C.3d 870, citing the text.)

(c) *Spaulding dictum is not controlling.* In *Spaulding v. Cameron* (1952) 38 C.2d 265, 267, 239 P.2d 625, the court said: "The clearest case of a permanent nuisance or trespass is the one where the offending structure or condition is maintained as a necessary part of the operations of a public utility. Since such conditions are ordinarily of indefinite duration and since the utility by making compensation is entitled to continue them, it is appropriate that only one action should be allowed to recover for all the damages inflicted. It would be unfair to the utility to subject it to successive suits and unfair to the injured party if he were not allowed to recover all of his probable damages at once." (39 C.3d 871, footnote 12.) This isolated statement, read in context, does not categorize all privileged activity nuisances as permanent for the following reasons:

(1) The statement is dictum; the issue there was the necessity of election, not whether privilege precluded election. (39 C.3d 871.)

(2) The *Spaulding* election discussion was based in part on *Phillips v. Pasadena* (1945) 27 C.2d 104, 162 P.2d 625, and it is difficult to reconcile *Phillips* with an interpretation of *Spaulding* as absolutely barring election when privileged activity is involved; the two opinions are more realistically viewed as focusing the election inquiry on the ability to abate rather than on the possibility of a court order requiring abatement. (39 C.3d 871.)

(3) Public policy "mitigates against defining a nuisance as permanent or continuing on the basis of privilege alone." The doctrine of election is designed to facilitate just and equitable recovery; and, though the traditional remedy of injunctive relief may be unavailable in a given case, the damage suffered is not different from that in a case involving identical but nonprivileged activity. "Where the nuisance is a continuing one, both victims, therefore, should be able to bring successive actions as damages accrue. To hold that the statute of limitations applies to one continuing nuisance but not the other is to put the burden on the victim to choose his or her tortfeasor wisely." (39 C.3d 871.) And where some means of abatement exists, there is little incentive to make remedial efforts once the nuisance is classified as permanent. (39 C.3d 872.)

(4) The privilege in *Spaulding* is different from that claimed here. *Spaulding* described an offending structure or condition, maintained as a necessary part of the operations of a public utility, as a "clear permanent nuisance" since the utility by making compensation was "entitled to continue them." (39 C.3d 872.) The privilege involved here is not so extensive. Commercial flights operated in compliance with federal law may not be enjoined, but federal preemption of local regulation of airport noise is not absolute. "[S]tate law damage remedies remain available against an airport proprietor despite the fact that federal law precludes interference with commercial flight patterns and schedules." (39 C.3d 872.)

(d) *Defendant's continuing duty to abate nuisance.* "Not only does defendant play a proprietary role in the airport's operations, but it is expressly required by statute to make all reasonable efforts to curb noise pollution at the airport." (39 C.3d 873, quoting *Govt.C. 6546.1.*) "Thus, despite the fact that the flights to and from the airport are privileged, defendant shoulders an affirmative responsibility to minimize noise levels through the use of buffers, barriers or other noise reducing devices." (39 C.3d 873.)

Two justices joined in a strong dissent, reviewing the authorities and asserting that the majority ignored settled law and "potentially subject this airport to repeated and vexatious litigation based on the same nuisance." (39 C.3d 874.)

SUPPLEMENT: [This section is current through the latest supplement]



55 of 145 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XIV. STATUTE OF LIMITATIONS: TORT ACTIONS

D. Trespass or Injury to Real Property: Three Years.

3. Continuing Trespass or Nuisance.

c. Environmental Contamination.

3 *Witkin Cal. Proc. Actions* § 603

[§ 603] Environmental Contamination.

In *Capogeannis v. Superior Court* (1993) 12 C.A.4th 668, 15 C.R.2d 796, plaintiffs purchased land from defendants that had been contaminated by leakage from underground fuel storage tanks. By December 7, 1987, plaintiffs were fully aware of the contamination and of their responsibility, as the current owners, for cleaning it up. To recover cleanup costs, plaintiffs filed the present action on December 14, 1990, alleging various theories, including nuisance. The trial judge granted defendants' motion for summary adjudication that the cause of action for nuisance was barred by the 3-year statute of limitations provided by C.C.P. 338(b) (see *supra*, §596). *Held*, this was error; defendants failed to establish, as a matter of law, that the nuisance was permanent, rather than continuing.

(a) Most California decisions have distinguished between a permanent and a continuing nuisance on the basis of whether the nuisance can be discontinued, or abated, at any time, i.e., if the nuisance can be discontinued at any time, it is continuing; if not, it is permanent. (12 C.A.4th 677, citing *Phillips v. Pasadena* (1945) 27 C.2d 104, 162 P.2d 625.) However, because virtually every nuisance can be abated if such countervailing considerations as expense and time are disregarded, the discontinued-or-abated rubric cannot be applied mechanically. Rather, "[r]egardless of literal abatability, where as a *practical* matter either abatement or successive lawsuits would be inappropriate or unfair then the nuisance may be regarded as permanent." (12 C.A.4th 678.)

(b) To support their contention that the nuisance is continuing, plaintiffs introduced an expert's declaration that the contamination is abatable. Defendants countered with a declaration that (1) the contamination cannot be completely eradicated but at best can only be reduced to levels acceptable to the relevant regulatory agencies; and (2) even this reduction cannot be effected "at any time" but will require many years to complete. Although plaintiffs do not quarrel with these two factual premises, defendants' declaration does not compel a conclusion that the nuisance was permanent. At the very least the question whether this was a permanent or a continuing nuisance was so close as to empower plaintiffs to proceed on the theory of continuing nuisance. (12 C.A.4th 682.)

(c) It is not necessary that the contamination be wholly removed in order for it to be treated as a continuing nuisance. "We are satisfied to presume that cleanup standards set by responsible public agencies sufficiently reflect expert appraisal of the best that can be done to abate contamination in particular cases. As judges we will not presume

to insist upon absolutes these agencies do not require." (12 C.A.4th 683.)

(d) Public considerations support treating contamination as a continuing nuisance. Today's environmental awareness establishes beyond argument that there is no legitimate interest to be served by permitting this contamination to persist. Indeed, the well-documented tendency of such contamination to migrate, particularly in groundwater, strongly supports a conclusion that the contamination should be cleaned up as promptly and as thoroughly as possible. Both of these considerations support application, in this case, of the general preference for a finding of continuing nuisance, because that finding tends to encourage private abatement, and perhaps monetary cooperation in abatement efforts, if only to limit successive lawsuits. On the other hand, a finding that the nuisance is permanent would leave plaintiffs with private recourse barred, and with no practical motivation to proceed promptly beyond that provided by the enforcement practices of governmental agencies acting at public expense. (12 C.A.4th 682.)

(e) In a private action for damages it is appropriate to view the nuisance from the plaintiff's perspective in determining its nature. Here, there was no indication that the contamination was harmful to plaintiffs or to their property interests. Rather, as a practical matter, the only impact of the contamination upon plaintiffs was by way of the regulatory agencies' demands regarding the cleanup. When those demands have been met, so far as plaintiffs are concerned the nuisance will be abated. (12 C.A.4th 683.) (See 23 *Ecology L. Q.* 723 [application of continuing violations doctrine to toll limitations period in environmental law actions].)

SUPPLEMENT: [This section is current through the latest supplement]

See *Gehr v. Baker Hughes Oil Field Operations* (2008) 165 C.A.4th 660, 668, 81 C.R.3d 219 [in nuisance action for chemical pollution of realty, interest rate differential damage, caused by prospective lender's refusal to refinance mortgage, was claim based on diminution of value, rather than on loss of use of property; thus, continuing nuisance theory did not apply and action was time-barred].



56 of 145 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XIV. STATUTE OF LIMITATIONS: TORT ACTIONS

D. Trespass or Injury to Real Property: Three Years.

4. Act Causing Consequential Injuries.

3 *Witkin Cal. Proc. Actions* § 604

[§ 604] Act Causing Consequential Injuries.

If the original act is not a trespass and does not cause any immediate harm, clearly no cause of action will arise at its date. The accrual of the cause, and the running of the statute, are therefore deferred until damage occurs. The suit is based not on the original act but on the resulting "consequential injuries."

(1) *Injury From Obstructing Waters.* In *Brush v. Southern Pac. Co.* (1920) 47 C.A. 54, 190 P. 216, defendant in 1884 improperly constructed a bridge. In 1914, as a result of an unusual rain, debris collected against it, causing the water to back up onto plaintiff's land. *Held*, the statute was not a bar. The action was not based on an injury directly and immediately resulting from the construction, for the building of the bridge was neither a trespass nor a nuisance. The invasion of plaintiff's rights took place only when, because of the faulty construction, the injury was brought about by the accumulated storm waters. (47 C.A. 57.)

Brush was followed in *Smith v. Los Angeles* (1944) 66 C.A.2d 562, 153 P.2d 69, where dikes were lawfully erected by defendants, not on property of plaintiffs, and no damage occurred until many years later when the river overflowed. In holding that the statute did not begin to run until the injury took place, the court took note of the governmental defendant (city) as follows: "This principle should apply in determining when the statute of limitations starts to run in these cases, irrespective of whether the liability of a particular defendant is based on negligence" or on Cal. Const., Art. I, §14, "since, in either case, the damage is consequential in nature. To hold otherwise would be to say that the right of the plaintiffs to recover damages for the injuries they have sustained vanished before they ever had an opportunity to assert it." (66 C.A.2d 586.) (See 5 A.L.R.2d 302 [damage from overflow of land caused by artificial construction or obstruction].)

(2) *Defective Soil Preparation.* In *Oakes v. McCarthy Co.* (1968) 267 C.A.2d 231, 73 C.R. 127, plaintiff purchased a home from defendant subdivider, and moved into it in September 1956. Hairline cracks were observed in the patio and stucco when plaintiff took possession; by May 1958, the crack in the patio was a quarter-inch in width; settling took place in January 1957, and the doors were binding by February 1957. The action was filed in December 1960. The judge instructed the jury that the statute would commence to run "at the time the acts complained of first culminated in consequential damage which was appreciable," and the verdict and judgment were for plaintiff. *Held*, affirmed.

(a) The initial damage caused by the slipping or creeping of the underlying soil from negligent filling, compaction, and inspection was not visible. Until there was a subsidence or lateral movement causing changes in the surface soil or structures, defective filling could not be detected without a compaction test. (267 C.A.2d 255.)

(b) Only when the consequential damage is sufficiently appreciable to a reasonable man does the statute begin to run. And the time when the consequential damage reached this point was a question of fact, properly submitted to the jury under a correct instruction. (267 C.A.2d 255.) (See *Avner v. Longridge Estates* (1969) 272 C.A.2d 607, 617, 77 C.R. 633 [pleading was sufficient to bring plaintiff's case within *Oakes* rule].)

A special 10-year limitations period applies to actions based on latent defects in the development or improvement of real property. (See C.C.P. 337.15, *infra*, §608 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]



57 of 145 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XIV. STATUTE OF LIMITATIONS: TORT ACTIONS

D. Trespass or Injury to Real Property: Three Years.

5. Distinction: Inverse Condemnation.

3 *Witkin Cal. Proc. Actions* § 605

[§ 605] Distinction: Inverse Condemnation.

An action for damages for trespass or injury, with its 3-year limitation, is distinguishable from an action to recover possession from a defendant claiming adversely (5 years; *supra*, §485). Where the defendant is a public entity with the power of eminent domain, the plaintiff is entitled to compensation for either the taking or the damaging of his or her property for public use (see 8 *Summary* (10th), *Constitutional Law*, §§1132 et seq., 1223 et seq.). In an inverse condemnation action, two different limitations periods are prescribed, depending on whether the subject property is damaged or taken.

(1) *Damaged Property*. If the property is damaged, the 3-year limitation applies. (See *Smith v. Los Angeles* (1944) 66 C.A.2d 562, 586, 153 P.2d 69.) The *Smith* rule has been codified in C.C.P. 338(j). (See *Lee v. Los Angeles County Metropolitan Trans. Authority* (2003) 107 C.A.4th 848, 855, 857, 132 C.R.2d 444, citing the text [action for continuous and repeated damage to real property based on inverse condemnation is governed by 3-year statute, and action accrues when situation on plaintiff's property has stabilized]; *Lyles v. California* (2007) 153 C.A.4th 281, 290, 62 C.R.3d 696 [distinguishing *Lee*; applying 3-year statute, but refusing to apply stabilization rule where damage was not continuous].)

(2) *Taken Property*. If the property is taken, the 5-year limitation on actions to recover property applies. (See *Ocean Shore R. Co. v. Santa Cruz* (1961) 198 C.A.2d 267, 270, 17 C.R. 892; *Frustuck v. Fairfax* (1963) 212 C.A.2d 345, 374, 28 C.R. 357; *Garden Water Corp. v. Fambrough* (1966) 245 C.A.2d 324, 327, 53 C.R. 862; *Kong v. Hawaiian Gardens Redevelopment Agency* (2002) 108 C.A.4th 1028, 1047, 134 C.R.2d 260 [limitations period commences when government takes possession of property; thus, former sublessee's action accrued when city required plaintiff to vacate premises, and not earlier when city acquired title to premises]; 26 A.L.R.4th 68 [state statute of limitations applicable to inverse condemnation proceedings by landowner to obtain compensation for direct appropriation of land without institution or conclusion of formal proceedings against specific owner].)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Taken Property*.

Five-year limitation on actions to recover property applies: See *Hauselt v. Butte* (2009) 172 C.A.4th 550, 565, 91 C.R.3d 343.



58 of 145 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XIV. STATUTE OF LIMITATIONS: TORT ACTIONS

E. Patent Defects in Real Property: Four Years.

1. Scope of Statute.

3 *Witkin Cal. Proc. Actions* § 606

[§ 606] Scope of Statute.

(1) *In General.* An action to recover damages from a person "performing or furnishing the design, specifications, surveying, planning, supervision or observation of construction or construction of an improvement to real property" must be commenced within 4 years after the substantial completion of the improvement. (*C.C.P.* 337.1; see *Robinson v. Chin & Hensolt* (2002) 98 *C.A.4th* 702, 709, 120 *C.R.2d* 49 [cable car turnarounds were improvements to real property, rather than personal property, and thus subject to *C.C.P.* 337.1]; 122 *A.L.R.5th* 1 [what constitutes improvement to real property for purposes of statute of limitations].)

(2) *Patent Defects.* This limitation applies to actions based on patent deficiencies. (*A & B Painting & Drywall v. Superior Court* (1994) 25 *C.A.4th* 349, 356, 30 *C.R.2d* 418, *infra*, §761; see 21 *Pacific L. J.* 235.) (For limitations period on latent deficiencies, see *infra*, §608 *et seq.*)

An objective test is employed to determine whether the deficiency is patent. (See *Mattingly v. Anthony Industries* (1980) 109 *C.A.3d* 506, 511, 167 *C.R.* 292 [4-year bar applied to infant injured in unfenced swimming pool]; *Baker v. Walker & Walker* (1982) 133 *C.A.3d* 746, 763, 184 *C.R.* 245 [unexplained malfunction in product is latent defect]; *Renown v. Hensel Phelps Const. Co.* (1984) 154 *C.A.3d* 413, 420, 201 *C.R.* 242 [test is susceptibility to detection]; *Winston Square Homeowner's Assn. v. Centex West* (1989) 213 *C.A.3d* 282, 290, 261 *C.R.* 605 [drainage problems causing ponds of standing water is patent defect]; *Geertz v. Ausonio* (1992) 4 *C.A.4th* 1363, 1370, 6 *C.R.2d* 318 [statute does not expressly exempt actions by those who lacked opportunity to inspect for and find patent defects during limitations period]; 12 *A.L.R.4th* 866 [statute of limitations for actions involving defects in houses or buildings caused by soil instability].)

In *Geertz*, the court explained: "The use of an *objective* test for a patent defect effectuates the broad protection afforded contractors by the statute by eliminating the possibility that a defect could be deemed patent as to some plaintiffs and latent as to others depending on the circumstances of each person injured as a result of the defect. ... [T]he test focuses on the nature of the defect, the circumstances surrounding it, and the nature and gravity of the harm it presents. The question to be answered is whether the average consumer, during the course of a reasonable inspection, would discover the defect. The test assumes that an inspection takes place. Thus, the relevant inquiry does not encompass the factual issue as to whether the average consumer in a particular plaintiff's position would have had an

opportunity to conduct an inspection." (4 C.A.4th 1370.)

(3) *Defects That Become Patent After Substantial Completion.* In *Tomko Woll Group Architects v. Superior Court* (1996) 46 C.A.4th 1326, 54 C.R.2d 300, plaintiff brought an action for personal injuries he sustained after he tripped and fell on raised pavement designed and built by defendants. The pavement became raised sometime after substantial completion of the improvement 5 years earlier and before plaintiff's injury. *Held*, the action was barred as a matter of law by the 4-year limitations period in C.C.P. 337.1.

(a) *Substantial completion triggers statute.* It is not the plaintiff's injury resulting from a patent defect, but substantial completion of construction of a real property improvement, that triggers the limitations period of C.C.P. 337.1. The statute was intended to promote construction by providing a final point of termination of liability and to protect a specific class of defendants associated with the design and construction of real property improvements. (46 C.A.4th 1333, 1334.)

(b) *Statute applies to defects that become patent after substantial completion.*

(1) C.C.P. 337.1 applies to actions involving a patent defect, whether that defect becomes patent at the time of, or after, substantial completion of construction. This interpretation is supported by the language of C.C.P. 337.1(b), which provides for an extension of time to file an action involving an injury occurring in the fourth year after substantial completion, provided it is filed within 5 years of substantial completion. However, this interpretation applies to all parts of the statute, including the 4-year limitations period. (46 C.A.4th 1336.)

(2) Plaintiff is not without a remedy, however. Although the construction industry defendants listed in the statute cease to be liable for harm from patent defects after the limitations period elapses, C.C.P. 337.1(d) provides that liability remains in a "person in actual possession or the control" of the improvement. That person will have control over the property at the time of an accident, will be in the best position to discover a defect and to prevent injury, and will be likely to have insurance. (46 C.A.4th 1337.)

(c) *Defect was patent, not latent.* Under the objective test for determining the character of a defect, pavement, and the dangers attendant to it, are matters of such common experience that a visible defect substantial enough to cause a pedestrian to trip and fall is a patent one. The defect could not be considered a latent one simply because its cause was unknown. (46 C.A.4th 1338, 1339.)

(4) *Action for Equitable Indemnity.* The only California decision to squarely address the question whether C.C.P. 337.1 applies to actions for equitable indemnity based on patent deficiencies answered the question in the affirmative. (See *Wagner v. California* (1978) 86 C.A.3d 922, 928, 150 C.R. 489.) However, the court that decided *Wagner* subsequently refused to apply its holding to a different statute of limitations, C.C.P. 338(b) (3-year limitations period for trespass or injury to property; see *supra*, §596 et seq.). (*Mangini v. Aerojet-General Corp.* (1991) 230 C.A.3d 1125, 1142, 281 C.R. 827.) The *Mangini* court noted the general rule that a tort defendant's indemnity action is not barred merely because the plaintiff's claim is barred by the applicable statute of limitations, and concluded that *Wagner* was inapposite. "It is well settled that, in the absence of a contrary statutory command, a cause of action for equitable indemnity does not come into existence until the indemnitee has suffered loss through payment." (230 C.A.3d 1154.)

Wagner was also distinguished in *Crouse v. Brobeck, Phleger & Harrison* (1998) 67 C.A.4th 1509, 1541, 80 C.R.2d 94, *infra*, §645. *Crouse* refused to hold that a legal malpractice action based on equitable indemnity was governed by C.C.P. 340.6, the applicable statute of limitations (see *infra*, §627 et seq.) After noting differences in the language of C.C.P. 337.1 and 340.6, the court went on to observe: "Even were *Wagner* not distinguishable, we are convinced this aspect of *Wagner* should not be adopted. *Wagner* reached its conclusion without citing, accommodating or distinguishing the existing Supreme Court authority holding that claims for implied indemnity do not accrue until the indemnitee has suffered actual loss through payment." (67 C.A.4th 1542, citing *E.L. White v. Huntington Beach* (1978) 21 C.3d 497, 146 C.R. 614, 579 P.2d 505, *supra*, §260.) "Because this aspect of *Wagner* relies on inapposite California

authority, ignores governing California authority, and has never been subsequently relied on by any other California court, this aspect of *Wagner* appears to be a 'derelict on the waters of the law' which should not be perpetuated." (67 C.A.4th 1543.)

(5) *Constitutionality*. C.C.P. 337.1 does not unconstitutionally discriminate in favor of contractors because the encouragement of construction provides a rational basis for the statutory classifications. (*Salinero v. Pon* (1981) 124 C.A.3d 120, 129, 177 C.R. 204.)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Patent Defects*. See *Creekridge Townhome Owners Assn. v. C. Scott Whitten* (2009) 177 C.A.4th 251, 256, 99 C.R.3d 258 [whether reroofing defects in 11-building townhome complex were patent defects was fact question, thus precluding summary judgment for roofers; even though that resident reported broken roof tiles and moisture problem inside her window in year reroofing was performed, roofing consultant hired years later stated that roofs had many defects that would not be readily apparent to layperson].



59 of 145 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XIV. STATUTE OF LIMITATIONS: TORT ACTIONS

E. Patent Defects in Real Property: Four Years.

2. Distinctions.

3 *Witkin Cal. Proc. Actions* § 607

[§ 607] Distinctions.

(1) *Defects Corrected Before Completion.* The purpose of *C.C.P.* 337.1 is to provide a cause of action for patent deficiencies existing on the substantial completion of a project. Hence, the statute does not apply to an action to recover damages for a delay in completion caused by patent deficiencies that have been corrected by the time of the completion. (*Kralow Co. v. Sully-Miller Contracting Co.* (1985) 168 C.A.3d 1029, 1035, 214 C.R. 630 [disapproving *Nicholson-Brown v. San Jose* (1976) 62 C.A.3d 526, 133 C.R. 159, to extent that it holds that *C.C.P.* 337.1 applies to all claims arising from patently deficient construction work]; *Roger E. Smith v. SHN Consulting Engineers & Geologists* (2001) 89 C.A.4th 638, 644, 107 C.R.2d 424, citing the text [following *Kralow Co.* and declining to follow *Nicholson-Brown*].)

(2) *Owner-Occupied Single Unit Residences.* The 4-year limitations period of *C.C.P.* 337.1(a) does not apply to owner-occupied single unit residences. (*C.C.P.* 337.1(f).) Rather, actions for patent defects in these cases are governed by the 3-year limitations period of *C.C.P.* 338(b) (see *supra*, §596). The reason for the shorter limitations period is that owner-occupiers of single-family homes are in a better position to discover and correct patent defects sooner than are professionals engaged in home improvements. (*Barnhouse v. Pinole* (1982) 133 C.A.3d 171, 184, footnote 4, 183 C.R. 881; see *Preston v. Goldman* (1986) 42 C.3d 108, 124, 227 C.R. 817, 720 P.2d 476 [dicta].)

(3) *Original Construction of Residences.* C.C. 895 et seq. set forth standards for the original construction of residential dwellings and specify procedures for homeowners seeking to sue builders and other persons for defects. The statute establishes a 10-year limitations period (C.C. 941(a)), and expressly provides that *C.C.P.* 337.1 does not apply (C.C. 941(d)). (See *infra*, §617.)

(4) *Products Liability Action.* The statute does not apply to a products liability action when the product is installed in a building. (*Sevilla v. Stearns-Roger* (1980) 101 C.A.3d 608, 610, 161 C.R. 700, *infra*, §608.) In *Nichols v. Swimquip* (1985) 171 C.A.3d 216, 217 C.R. 272, plaintiff was injured while using an alleged defectively designed 3-meter diving platform designed, manufactured, and sold by defendant. Plaintiff's action for damages was brought approximately 11 years after the accident, and defendant, claiming to be a person "furnishing the design" of an "improvement to real property," moved for a nonsuit on the ground that the 4-year limitations period of *C.C.P.* 337.1 had expired. The motion was granted. *Held*, reversed.

(a) The purpose of *C.C.P. 337.1* is to protect construction contractors from extended liability. (171 C.A.3d 220.) Hence, the language describing the protected class focuses on persons directly involved in the construction industry, such as architects and contractors. It does not refer to manufacturers or suppliers. (171 C.A.3d 220.)

(b) *Sevilla and Baker v. Walker & Walker* (1982) 133 C.A.3d 746, 184 C.R. 245, held that the mere physical attachment of an item to real property does not make *C.C.P. 337.1* applicable. If it did, the development of products liability law would be severely limited and the statute would bestow protection on manufacturers, despite the complete absence of any legislative intent to do so. (171 C.A.3d 221.)

(c) Defendant mass-produced the platforms and sold them wholesale to distributors and pool contractors. Because it did not install or service them, it had no connection with the real property on which its products were eventually installed, and could not claim the protection of the statute. (171 C.A.3d 221.)

SUPPLEMENT: [This section is current through the latest supplement]



60 of 145 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XIV. STATUTE OF LIMITATIONS: TORT ACTIONS

F. Latent Defects in Real Property: Ten Years.

1. Scope of Statute.

3 *Witkin Cal. Proc. Actions* § 608

[§ 608] Scope of Statute.

(1) *In General.* Subject to certain exceptions (see *infra*, §612 et seq.), no action may be brought to recover damages against any person who develops real property or performs or furnishes various services in connection with the construction of an improvement to real property more than 10 years after the "substantial completion" of the development or improvement for (a) a latent deficiency in the services rendered or (b) an injury to real or personal property arising out of the latent deficiency. (*C.C.P.* 337.15; see 21 *Pacific L. J.* 246.) (For limitations period on patent deficiencies, see *supra*, §§606, 607.)

(2) *Actions Against Sureties.* As originally enacted, the statute did not apply to sureties. (See *Regents of Univ. of Calif. v. Hartford Acc. & Indem. Co.* (1978) 21 *C.3d* 624, 147 *C.R.* 486, 581 *P.2d* 197, *supra*, §§544, 545; see 11 *Pacific L. J.* 365.) The result was changed by a 1979 amendment.

(3) *Actions Against Governmental and Public Entities.* Because *C.C.P.* 337.15 refers to "any person," it also applies to claims against governmental and public entities engaged in one of the specified activities. (*Magnuson-Hoyt v. Contra Costa* (1991) 228 *C.A.3d* 139, 144, 278 *C.R.* 770.)

(4) *Actions Against Landfills.* A claim alleging negligent design, construction, or operation of a landfill is governed by the limitations period in *C.C.P.* 337.15, because a landfill is an "improvement" within the meaning of the statute. (*Gaggero v. San Diego* (2004) 124 *C.A.4th* 609, 613, 615, 21 *C.R.3d* 388.)

(5) *Continuing Nuisance Actions.* An action alleging a continuing nuisance or trespass caused by a latent construction defect is governed by the 10-year limitations period of *C.C.P.* 337.15, and is not subject to the continuing nuisance theory of deferred accrual under *C.C.P.* 338(b) (*supra*, §601 et seq.). (*Chevron U.S.A. v. Superior Court* (1994) 44 *C.A.4th* 1009, 1015, 54 *C.R.2d* 324 [soil contamination caused by installation of underground fuel tanks].)

(6) *Contract Actions.* *C.C.P.* 337.15 applies to actions sounding in contract, as well as those sounding in tort. (See *Moseley v. Abrams* (1985) 170 *C.A.3d* 355, 361, 216 *C.R.* 40 [action against architect, for breach of supervision and inspection provision that resulted in damages from latent defects, was barred by *C.C.P.* 337.15]; *Mills v. Forestex Co.* (2003) 108 *C.A.4th* 625, 646, 134 *C.R.2d* 273 [claims against contractor who installed siding and siding manufacturer,

for violations of Song-Beverly Consumer Warranty Act (C.C. 1790 et seq.; see 4 *Summary* (10th), *Sales*, §314 et seq.), breach of express warranty, and breach of implied warranty were barred by C.C.P. 337.15].)

(7) *Product Liability Actions*. California law is unsettled as to whether the statute applies to a product liability action. In *Sevilla v. Stearns-Roger* (1980) 101 C.A.3d 608, 161 C.R. 700, the court refused to apply the statute to a products liability action brought by plaintiff, a refinery employee. Plaintiff sought to recover damages for personal injuries he had sustained while repairing a pan used in the refinery process in an action against defendants, the designer and manufacturer of the pan. The court held that the installation of the pan in a sugar refinery did not transform it into "an improvement of real property." "The effect of such a transformation would severely limit the development of products liability law and bestow this statutory protection on manufacturers of alleged defective products. There has been no indication the state Legislature sought to protect this group from liability. Nor has any appellate court applied these statutes in the area of products liability." (101 C.A.3d 611.)

However, a more recent case, *Stoneson Dev. Corp. v. Superior Court* (1987) 197 C.A.3d 178, 242 C.R. 721, held that C.C.P. 337.15 was applicable to a products liability action for mudslide damage to a hillside property allegedly caused by negligent repair after an earlier mudslide. The court first stated that products liability actions have been extended to land development situations (see *Avner v. Longridge Estates* (1969) 272 C.A.2d 607, 77 C.R. 633, and *Kriegler v. Eichler Homes* (1969) 269 C.A.2d 224, 74 C.R. 749, 6 *Summary* (10th), *Torts*, §1501). The court then relied in part on the reasoning of *Mattingly v. Anthony Industries* (1980) 109 C.A.3d 506, 167 C.R. 292, applying the 4-year statute for actions on patent defects to a strict products liability action. (197 C.A.3d 181.) The opinion takes note of the policy argument that, since the early 1980s, homeowners insurance policies have been written without coverage for earthslide or negligent construction, and that application of C.C.P. 337.15 in a case such as this leaves the homeowner without a remedy. But the legislative intent to protect the developer from "the time-of-discovery rule's erosion" of the limitations defense in latent defect cases is clear. (197 C.A.3d 180.) (See *Mills v. Forestex Co.*, *supra*, 108 C.A.4th 647 [strict liability claim against contractor who installed siding and siding manufacturer, if adequately stated, was subject to C.C.P. 337.15].)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General*. See *Creekridge Townhome Owners Assn. v. C. Scott Whitten* (2009) 177 C.A.4th 251, 258, 99 C.R.3d 258 [whether resident's report of broken roof tiles and water moisture problem inside window constituted discovery of latent roof defects was fact question, thus precluding summary judgment for roofers; report related to only one unit of 61-unit, 11-building townhome complex].

(4) *Actions Against Landfills*. See *San Diego Unified School Dist. v. San Diego* (2009) 170 C.A.4th 288, 305, 306, 87 C.R.3d 796 [stating rule of *Gaggero v. San Diego* (2004) 124 C.A.4th 609, 21 C.R.3d 388, text, p. 792, but also distinguishing case; property owner failed to allege existence of latent construction defect on property previously leased to landfill sufficient to make C.C.P. 337.15 applicable to action].



61 of 145 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XIV. STATUTE OF LIMITATIONS: TORT ACTIONS

F. Latent Defects in Real Property: Ten Years.

2. Retroactive Application of Statute.

3 *Witkin Cal. Proc. Actions* § 609

[§ 609] Retroactive Application of Statute.

C.C.P. 337.15 was given only limited retroactive effect in *Eden v. Van Tine* (1978) 83 C.A.3d 879, 148 C.R. 215. The improvements were completed in 1963, long before the enactment of the statute in 1971. Plaintiffs purchased the property in February 1972, and discovered facts that put them on inquiry in December of that year. They filed suit 5 months later, in May 1973, and the trial judge granted summary judgment to defendants. *Held*, reversed.

(a) Plaintiffs' contention that "substantial completion" refers to the date when the property was first purchased is unsound. The phrase "refers to a point in time that is easily ascertainable," and while the date of sale may sometimes coincide with completion, that will not always be the case. The project was substantially completed when the notice of completion was recorded in February 1963, not when it was first sold in October 1963. (83 C.A.3d 885.)

(b) However, such a statute cannot be retroactively applied to defeat a claim that was not barred when it was enacted, unless a reasonable time is given to exercise the remedy. (83 C.A.3d 887; see *supra*, §459.) Under prior law, plaintiffs had 3 years to file suit on discovery of the facts. The complaint was filed approximately 5 months after discovery of the defect, and this was a reasonable time. (83 C.A.3d 887, 888.)

Later cases have addressed retroactive application of the statute. (See *Anderson v. Brouwer* (1979) 99 C.A.3d 176, 182, 160 C.R. 65 [reversing dismissal, based on *C.C.P. 337*, with leave to amend to disclose when alleged defects were discovered in support of contention that *C.C.P. 337.15* governed]; *Leaf v. San Mateo* (1980) 104 C.A.3d 398, 405, 163 C.R. 711, *supra*, §498; *Liptak v. Diane Apartments* (1980) 109 C.A.3d 762, 774, 167 C.R. 440 [5 years was reasonable time between enactment of statute and bar to plaintiffs' action]; *Barnhouse v. Pinole* (1982) 133 C.A.3d 171, 185, 187, 183 C.R. 881 [action was barred where 10-year period had expired before damage was discovered; statute applied to actions for breach of warranty and failure of duty to warn of hazard]; 12 *A.L.R.4th* 866 [defects caused by soil instability].)

SUPPLEMENT: [This section is current through the latest supplement]



62 of 145 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XIV. STATUTE OF LIMITATIONS: TORT ACTIONS

F. Latent Defects in Real Property: Ten Years.

3. Commencement of Ten-Year Period.

3 Witkin Cal. Proc. Actions § 610

[§ 610] Commencement of Ten-Year Period.

The 10-year period commences on the substantial completion of the improvement, but in no case later than the date of (1) the final inspection by the applicable public agency, (2) the recordation of a valid notice of completion, (3) the use or occupation of the improvement, or (4) 1 year after the termination or cessation of the work on the improvement, whichever comes first. (*C.C.P. 337.15(g)*.) (See *Schwetz v. Minnerly* (1990) 220 *C.A.3d* 296, 298, 269 *C.R.* 417 [for purposes of *C.C.P. 337.15(g)*, a "developer" can be an "improver" and a "development" is a "work of improvement"]; 13 *Pacific L. J.* 615.)

The period begins to run when the defendant's work on the improvement is substantially completed, even though the improvement itself is not yet substantially completed. (*Industrial Risk Insurers v. Rust Engineering Co.* (1991) 232 *C.A.3d* 1038, 1040, 283 *C.R.* 873) The court in *Industrial Risk Insurers* observed that its conclusion was consistent with the statutory purpose identified by many decisions. "A defendant's services with respect to an improvement may be completed well before the improvement itself is finished. If the limitations period does not commence until substantial completion of the improvement, construction industry members may be subject to liability for an indefinite time over 10 years after the substantial completion of their work. We do not believe that this was what the Legislature intended." (232 *C.A.3d* 1043.) (See *Nelson v. Gorian & Associates* (1998) 61 *C.A.4th* 93, 96, 71 *C.R.2d* 345 [following *Industrial Risk Insurers*; tract owners' claim for soil subsidence damage commenced when engineering and grading work was substantially completed, and not later when notice of completion was filed].)

SUPPLEMENT: [This section is current through the latest supplement]



63 of 145 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XIV. STATUTE OF LIMITATIONS: TORT ACTIONS

F. Latent Defects in Real Property: Ten Years.

4. Delayed Accrual Rules.

3 Witkin Cal. Proc. Actions § 611

[§ 611] Delayed Accrual Rules.

(1) *Single Cause of Action*. An action based on latent deficiencies in construction creates a single, rather than a continuing, cause of action. This must be distinguished from an action based on the subsidence of land resulting from the destruction of lateral and subjacent support that, under the rule of *Bellman v. Contra Costa* (1960) 54 C.2d 363, 5 C.R. 692, 353 P.2d 300, 4 Cal. Proc. (5th), *Pleading*, §60, creates a new cause of action for each new subsidence. (*McCloskey v. Carlton Builders* (1985) 165 C.A.3d 689, 691, 211 C.R. 659, 4 Cal. Proc. (5th), *Pleading*, §61; *Gaggero v. San Diego* (2004) 124 C.A.4th 609, 618, 21 C.R.3d 388.) (On tolling of statute while defendant attempts to repair defects, see *infra*, §§760, 761.)

(2) *Relationship to Other Delayed Accrual Statutes*. In *North Coast Business Park v. Nielsen Const. Co.* (1993) 17 C.A.4th 22, 21 C.R.2d 104, plaintiff contractor substantially completed a business park by late 1982. In January 1984, plaintiff discovered defects in the design and construction, and instituted the present action against defendant grading contractor in December 1988, more than 4 years after the discovery of the defects, but within 10 years after the substantial completion of the project. *Held*, the action was barred under the 4-year limitations period of C.C.P. 337 (action on contract; see *supra*, §508 et seq.) and the 3-year period of C.C.P. 338 (action for trespass or injury to real property; see *supra*, §596 et seq.). The court explained the relationship between both C.C.P. 337 and 338 and C.C.P. 337.15 as follows:

"When a defect is latent ... , sections 337 and 338 begin to run only after the damage is sufficiently appreciable to give a reasonable man notice that he has a duty to pursue his remedies. ... However, section 337.15 imposes an absolute 10-year bar, based on the date of 'substantial completion,' regardless of discovery. ... The interplay between these statutes sets up a two-step process: (1) actions for a latent defect must be filed within three years (§ 338) or four years (§ 337) of discovery, but (2) in any event must be filed within ten years (§ 337.15) of substantial completion." (17 C.A.4th 27, citing *Regents of Univ. of Calif. v. Hartford Acc. & Indem. Co.* (1978) 21 C.3d 624, 147 C.R. 486, 581 P.2d 197, *supra*, §§544, 545, and *Liptak v. Diane Apartments* (1980) 109 C.A.3d 762, 774, 167 C.R. 440.) (See *A & B Painting & Drywall v. Superior Court* (1994) 25 C.A.4th 349, 355, 30 C.R.2d 418, *infra*, §761 [following *North Coast Business Park*].)

SUPPLEMENT: [This section is current through the latest supplement]



64 of 145 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XIV. STATUTE OF LIMITATIONS: TORT ACTIONS

F. Latent Defects in Real Property: Ten Years.

5. Exceptions and Distinctions.

a. In General.

3 *Witkin Cal. Proc. Actions* § 612

[§ 612] In General.

(1) *Person In Possession or Control of Improvement to Real Property.* The 10-year limitations period of *C.C.P.* 337.15 may not be asserted as a defense "by any person in actual possession or the control, as owner, tenant or otherwise," of an improvement to real property "at the time any deficiency in the improvement constitutes the proximate cause for which it is proposed to bring an action." (*C.C.P.* 337.15(e).)

(2) *Wilful Misconduct or Fraud.* *C.C.P.* 337.15(f) excepts from the application of the 10-year statute "actions based on willful misconduct or fraudulent concealment." The term "willful misconduct" as used in the statute "encompasses not only intentional wrongdoing, but negligence of such a character as to constitute reckless disregard for the rights of others." (*Felburg v. Don Wilson Builders* (1983) 142 C.A.3d 383, 391, 191 C.R. 92.) *Felburg* was an action against a builder for damages resulting from the subsidence of plaintiff's house into an oil sump under the property. The builder had been informed of the possibility of oil sumps, a soil testing company retained by him reported discovery of an old sump in the vicinity, and a licensed building contractor gave an opinion that it would have been impossible to build the foundation of the house without seeing evidence that the lot was over an oil sump. (142 C.A.3d 391.) The court, reversing summary judgment for defendant builder, held that this evidence raised triable issues as to the builder's knowledge, actual or constructive, and possible fraudulent concealment. (142 C.A.3d 391.)

Acosta v. Glenfed Dev. Corp. (2005) 128 C.A.4th 1278, 28 C.R.3d 92, considered the question whether *C.C.P.* 337.15(f) excepts misconduct that defendants neither had actual knowledge of nor directly engaged in themselves. Plaintiff owners of homes in a residential subdivision sued defendants, the developer and general contractor, for construction defects. Although the action was filed more than 10 years after the substantial completion of their homes, plaintiffs presented expert opinion evidence of latent structural defects caused by defendants' subcontractors that (a) involved deviations from the building code and government-approved construction plans, (b) involved efforts to achieve cost savings, (c) appeared to be the result of wilful misconduct, and (d) could not have been present in the homes absent either defendants' knowledge of them or defendants' reckless failure to inspect and supervise construction. Nevertheless, the trial judge dismissed the action as time-barred. In rejecting application of the wilful misconduct exception, the judge found that plaintiffs had not connected defendants to the actual construction of the homes in general, to the specific latent defects in particular, or to a failure to provide for supervision of construction. *Held*, reversed.

(a) Defendants, the developer and general contractor, could be held liable after 10 years for the wilful misconduct of others involved in the project for the following reasons: (1) *C.C.P. 337.15(f)* does not specifically exclude a general contractor or a developer; (2) the rules regarding vicarious liability of principals are an overlay on this action; (3) case and statutory law include supervisory requirements for developers and contractors, and the responsible managing officers and employees of licensed contractors; (4) public policy considerations fully support this conclusion; and (5) *C.C.P. 337.15(f)*, by its terms, applies to an "action"--it is not limited to the conduct of a specific defendant seeking to assert a limitations defense. (*128 C.A.4th 1301, 1302.*)

(b) "The result we reach is not a judicially created *extension* or *expansion* of liability; it merely represents an application of the relevant body of law to an express statutory *exception* to the 'firm and final' 10-year limitation on a contractor's liability exposure for latent defects. Nothing in the language of section 337.15 indicates the Legislature intended to dispense with the doctrines of vicarious liability and nondelegable duties, nor with the statutory responsibilities of contractors for supervision of their work, when a defendant developer or general contractor claims a right to the 10-year limitation provision and the plaintiff asserts the willful misconduct exception to the application of that provision." (*128 C.A.4th 1302.*)

(c) Evidence existed that, if believed by the trier of fact, would support findings that (1) wilful misconduct had occurred in the construction of plaintiffs' homes and that the misconduct had caused the construction defects; and (2) defendants, as the developer and general contractor, had at least constructive knowledge of the peril created by the construction activity and the resulting defects, had at least constructive knowledge that injury or damage to future homebuyers was a probable, as opposed to a possible, result of the defects created by the construction activity, and consciously failed to take action to avoid that injury or damage. (*128 C.A.4th 1302.*)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Person In Possession or Control of Improvement to Real Property.* See *Gundogdu v. King Mai* (2009) 171 C.A.4th 310, 315, 89 C.R.3d 489 [home builder's passive ownership of property during 16-month period from time construction was completed until time of sale did not preclude builder from asserting limitations defense, absent claim that builder's conduct following completion caused homeowners' damages]. (2) *Wilful Misconduct or Fraud.* The exception applies to a cross-complaint for indemnity for a latent construction defect, because the term "action" in *C.C.P. 337.15(f)*, exempting wilful misconduct claims from the 10-year limitations period, includes derivative as well as direct actions. (See *Pine Terrace Apartments, L.P. v. Windscape, LLC* (2009) 170 C.A.4th 1, 14, 17, 87 C.R.3d 630 [cross-complaint effectively alleged wilful misconduct].)



65 of 145 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XIV. STATUTE OF LIMITATIONS: TORT ACTIONS

F. Latent Defects in Real Property: Ten Years.

5. Exceptions and Distinctions.

b. Cross-Complaint for Indemnity.

1. Exception Held Applicable.

3 *Witkin Cal. Proc. Actions* § 613

[§ 613] Exception Held Applicable.

C.C.P. 337.15 generally applies to an action for indemnity brought against a person arising out of that person's performance or furnishing of services or materials as referred to in the statute. However, a cross-complaint for indemnity may be filed against a third person under the transaction clause of *C.C.P. 428.10* (see 5 *Cal. Proc.* (5th), *Pleading*, §1171) in an action that has been filed within the 10-year limitations period of *C.C.P. 337.15*. (*C.C.P. 337.15(c)*.) In *Valley Circle Estates v. VTN Consol.* (1983) 33 *C.3d* 604, 189 *C.R.* 871, 659 *P.2d* 1160, plaintiffs' home suffered major damages through subsidence, and they brought an action against a number of defendants, including general contractor Valley Circle and subcontractor VTN, which had prepared the grading plan. The notice of the completion of the residence was recorded on March 28, 1968, and the action was filed on March 23, 1978; but the completion of VTN's services was certified in 1966. Thus, the action against Valley Circle was within the 10-year period of *C.C.P. 337.15*; but the action against VTN was not, and VTN obtained a dismissal. However, Valley Circle had filed a cross-complaint for equitable indemnity against VTN, and this was held timely.

(a) The language of *C.C.P. 337.15(c)* makes clear that "a cross-complaint for indemnity may be filed more than 10 years after the alleged indemnitor has substantially completed his services, provided that the underlying action was itself brought within the 10-year limitation period of the statute." (33 *C.3d* 609.)

(b) Policy considerations also favor this conclusion. *C.C.P. 337.15* "reflects a legislative preference that actions for indemnity in the construction industry be brought by cross-complaints rather than direct actions." (33 *C.3d* 613.) This is consistent with the policies underlying the right to indemnification and the purpose and utility of cross-complaints. (33 *C.3d* 613.) To impose on general contractors the liability of their subcontractors would be unfair and could effectively deter the activities of the construction industry; to require subcontractors to remain liable for the period during which general contractors must remain liable should promote responsibility in the construction industry and provide an incentive to subcontractors to be certain of their work. (33 *C.3d* 614.)

(c) This holding does not create an infinite period of liability of subcontractors: (1) In a direct action for damages or indemnity, a subcontractor may be held liable only for 10 years; (2) in a cross-complaint for indemnity, the

subcontractor may be held liable only so long as the general contractor can be reached in a direct action for damages, i.e., 10 years after substantial completion of the general contractor's project. (33 C.3d 614.)

Later cases are to the same effect. (See *Time for Living v. Guy Hatfield Homes/All Amer. Dev. Co.* (1991) 230 C.A.3d 30, 35, 37, 280 C.R. 904 [following *Valley Circle Estates*]; *Fleck v. Bollinger Home Corp.* (1997) 54 C.A.4th 926, 948, 63 C.R.2d 407 [following *Valley Circle Estates* and *Time for Living*].)

SUPPLEMENT: [This section is current through the latest supplement]

On applicability of exception for wilful misconduct to construction defect cross-complaints for indemnity, see *Pine Terrace Apartments, L.P. v. Windscape, LLC* (2009) 170 C.A.4th 1, 87 C.R.3d 630, Supp., supra, §612.



66 of 145 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XIV. STATUTE OF LIMITATIONS: TORT ACTIONS

F. Latent Defects in Real Property: Ten Years.

5. Exceptions and Distinctions.

b. Cross-Complaint for Indemnity.

2. Exception Held Inapplicable.

3 *Witkin Cal. Proc. Actions* § 614

[§ 614] Exception Held Inapplicable.

In *Sandy v. Superior Court* (1988) 201 C.A.3d 1277, 247 C.R. 677, S, an architect, completed work on an apartment complex. Some 13 years later an action was initiated against D, a general contractor who had purchased the complex and, through massive reconstruction, had transformed it into condominiums. D then cross-complained against S for indemnity. As in *Valley Circle Estates v. VTN Consol.* (1983) 33 C.3d 604, 189 C.R. 871, 659 P.2d 1160, supra, §613, the action against the defendant was within the 10-year period of C.C.P. 337.15, but the action against the cross-defendant was not. *Held*, *Valley Circle Estates* was not controlling; S was entitled to summary judgment and dismissal of the cross-complaint.

(a) In *Valley Circle Estates*, the cross-complaint was transactionally related within C.C.P. 428.10(b), because both parties had participated in the original construction, and the action for negligence arose out of that construction. (201 C.A.3d 1283.) Here, there were two separate projects, and there had never been any contact between D and S. Hence, because there was neither a transactional nor a joint tortfeasor relationship between them, D's cross-complaint could not qualify under C.C.P. 337.15(c) as an exception to the 10-year period. (201 C.A.3d 1283.)

(b) The statutory language supports this conclusion. C.C.P. 337.15(a) refers to the completion of "the development or improvement," and C.C.P. 337.15(c) speaks of an exception for indemnity actions arising out of performance of services "referred to in this section," i.e., services on "the development or improvement." These provisions clearly point to one project or improvement. (201 C.A.3d 1284.)

(c) "This interpretation insures a finite, predictable period of exposure to liability for completed work. Ten years after completion of a work of construction, if no complaint is yet on file against any of the participants, they may all assume their exposure has ended. Under the contrary interpretation, this repose could never occur; instead every subsequent renovation would raise the liability spectre anew. Hardy would be the person who ventured into the construction industry under such conditions, assuming he could get liability insurance at all." (201 C.A.3d 1286.)

In *Grange Debris Box & Wrecking Co. v. Superior Court* (1993) 16 C.A.4th 1349, 20 C.R.2d 515, plaintiff property

owner sued defendant oil company for soil contamination. Defendant cross-complained against a city, contending that the city had purchased the site and then negligently permitted contamination while excavating and preparing the site for construction. The city cross-complained against a wrecking company it had hired to remove debris, contending that it was contractually required to indemnify the city for liability arising from the defendant's cross-complaint or the underlying complaint. The wrecking company demurred to the city's cross-complaint on the basis of a certificate showing that it had completed its work more than 11 years before the original complaint and more than 12 years before the cross-complaint. However, relying on *C.C.P. 337.15(e)* (see *supra*, §612), which precludes a property owner from asserting the 10-year limitations period as a defense, the trial judge overruled the demurrer, reasoning that the city, as an owner, was precluded from asserting the 10-year limitations period against defendant, and the wrecking company was barred from asserting it against the city's cross-complaint for indemnity. *Held*, this was error; *C.C.P. 337.15(e)* cannot be used in this manner to extend the scope of the exception provided by *C.C.P. 337.15(c)*.

(a) *C.C.P. 337.15(c)* deals with indemnity cross-complaints, and permits a transactionally related cross-complaint to be brought outside the 10-year period if the underlying action was commenced within that period. Here, the underlying complaint, i.e., defendant's cross-complaint against the city, was not brought within the 10-year period, but it was "timely" in the sense that the city, under *C.C.P. 337.15(e)*, was precluded from raising timeliness as a defense. *C.C.P. 337.15(c)* does not cover this situation. (16 C.A.4th 1355.)

(b) The issue was, however, addressed in *Sandy*, which held that the exception provided by *C.C.P. 337.15(c)* applies only if the underlying complaint was commenced within the 10-year period. In other words, if the underlying complaint was not timely as having been filed within 10 years, but was then held to be timely only by virtue of *C.C.P. 337.15(e)* based on actual possession or control, *C.C.P. 337.15(c)* provides no exception allowing the defendant to cross-complain for indemnity beyond the 10-year period. A contrary interpretation would create a risk of perpetual exposure to liability for contractors and others in the construction industry. (16 C.A.4th 1356.)

(c) Dictum in *Martinez v. Traubner* (1982) 32 C.3d 755, 187 C.R. 251, 653 P.2d 1046, *infra*, §615, criticizing the position adopted here on the ground that it would allow a property owner to be held liable without any redress, is not controlling. That dictum, rather than dealing with indemnity for property damage, stated only that it would be unreasonable to hold a possessor of property liable for personal injury claims if a contractor created the latent defect leading to the injury. (16 C.A.4th 1359.)

(d) The city argued that *C.C.P. 337.15* does not apply to cross-complaints asserting express contractual indemnity, as was involved in this case. This position is without merit. *C.C.P. 337.15* does not distinguish between implied equitable indemnity cross-complaints and express indemnity cross-complaints; the statute broadly defines an "action" to include an action for indemnity arising out of performance or furnishing of services or materials. Adopting the exception advocated by the city would thwart the Legislature's purpose of protecting contractors from suits over construction undertaken decades earlier. (16 C.A.4th 1359, citing *Regents of Univ. of Calif. v. Hartford Acc. & Indem. Co.* (1978) 21 C.3d 624, 147 C.R. 486, 581 P.2d 197, *supra*, §§544, 545.) (See *FNB Mortg. Corp. v. Pacific General Group* (1999) 76 C.A.4th 1116, 1126, 90 C.R.2d 841, *infra*, §761 [following *Sandy*].)

SUPPLEMENT: [This section is current through the latest supplement]



67 of 145 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XIV. STATUTE OF LIMITATIONS: TORT ACTIONS

F. Latent Defects in Real Property: Ten Years.

5. Exceptions and Distinctions.

c. Personal Injury or Death.

3 *Witkin Cal. Proc. Actions* § 615

[§ 615] Personal Injury or Death.

In *Martinez v. Traubner* (1982) 32 C.3d 755, 187 C.R. 251, 653 P.2d 1046, plaintiff was injured in a fall from the collapsing roof of a house on which he was working. He sued defendant builder alleging a latent defect more than 10 years after construction was completed. *Held*, C.C.P. 337.15 was not a bar.

(a) As originally proposed, C.C.P. 337.15 expressly applied to personal injury and wrongful death. The provision was deleted before its enactment, but was retained in C.C.P. 337.1 for patent defects. (32 C.3d 758.)

(b) *Ernest W. Hahn v. Superior Court* (1980) 108 C.A.3d 567, 166 C.R. 644, involved an action for personal injuries against the owner, and a cross-complaint for indemnity by the owner against the building contractor. The court, holding that the cross-complaint for indemnity was barred, erroneously assumed, without discussion or citation of authority, that the statute barred an action for personal injuries. This interpretation is not only contrary to the express language and legislative intent, but leaves the owner or possessor in the strange position of being liable to an injured person without any right of indemnity against the contractor who created the defect. (32 C.3d 760.)

(c) The Legislature necessarily balanced conflicting public policies in enacting the two statutes, and in doing so recognized the significant differences between latent and patent defects. It included among actions barred those for personal injury based on patent defects; it could have, but did not, include those based on latent defects. (32 C.3d 761.)

Other cases are to the same effect. (See *Grimmer v. Harbor Towers* (1982) 133 C.A.3d 88, 94, 183 C.R. 634 [C.C.P. 337.15 does not apply to indemnity action arising out of suit for personal injuries caused by latent defect]; *Baker v. Walker & Walker* (1982) 133 C.A.3d 746, 755, footnote 7, 184 C.R. 245 [C.C.P. 337.15 does not apply to wrongful death action]; 5 A.L.R.6th 497 [statute of limitations for claim alleging personal injury or wrongful death, based on design or building defect, against architect, engineer, or builder].)

SUPPLEMENT: [This section is current through the latest supplement]



68 of 145 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XIV. STATUTE OF LIMITATIONS: TORT ACTIONS

F. Latent Defects in Real Property: Ten Years.

5. Exceptions and Distinctions.

d. Action by Homeowner for Defects in Original Construction of Residence.

3 Witkin Cal. Proc. Actions § 616

[§ 616] Action by Homeowner for Defects in Original Construction of Residence.

C.C. 895 et seq. set forth standards for the original construction of residential dwellings and specify procedures for homeowners seeking to sue builders and other persons for defects. The statute establishes a 10-year limitations period (C.C. 941(a)), and expressly provides that *C.C.P. 337.15* does not apply (C.C. 941(d)). (See *infra*, §617.)

SUPPLEMENT: [This section is current through the latest supplement]



69 of 145 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XIV. STATUTE OF LIMITATIONS: TORT ACTIONS

G. Defects in Construction of Residential Real Property: Ten Years.

3 Witkin Cal. Proc. Actions § 617

[§ 617] Defects in Construction of Residential Real Property: Ten Years.

(1) *Nature of Action.* C.C. 895 et seq., added in 2002, set forth standards for the original construction of residences and specify procedures for homeowners seeking to sue for defects. (See 44 *Santa Clara L. Rev.* 1249.) The statute imposes liability on a builder, general contractor, subcontractor, materials supplier, product manufacturer, or design professional for deficiencies (i.e., violations of the applicable standards) in construction, design, specifications, surveying, planning, supervision, testing, or observation of construction. (C.C. 896.) Before filing a complaint, the homeowner must serve the defendant with a prescribed written notice of claim. (C.C. 910; see supra, §226.)

(2) *Scope of Limitations period.* Subject to certain exceptions, no action may be brought more than 10 years after substantial completion of the development, but not later than 10 years after recordation of a valid notice of completion. (C.C. 941(a).) The following provisions apply:

(a) The limitations period extends to an action for indemnity arising out of the defendant's allegedly deficient performance or furnishing of services or materials. (C.C. 941(b).)

(b) The limitations period may not be asserted as a defense by anyone in actual possession or control of the improvement (as owner, tenant, or otherwise) at the time that the defect giving rise to the action was proximately caused. (C.C. 941(c).)

(c) The statutes of limitations in C.C.P. 337.1 (4-year limitations period for actions based on patent defects in realty; see supra, §§606, 607) and C.C.P. 337.15 (10-year limitations period for actions based on latent defects in realty; see supra, §608 et seq.) do not apply. (C.C. 941(d).)

(d) None of the time limitations in the statute apply to a contract action by a claimant. (C.C. 941(e).)

(3) *Delayed Accrual and Tolling.* Under the following circumstances, the limitations period in C.C. 941(a) is extended or tolled:

(a) If an action has been timely filed under C.C. 941(a), a cross-complaint for indemnity comporting with C.C.P. 428.10 may be filed after the limitations period has run. (C.C. 941(b).)

(b) Service of the requisite notice of claim triggers a prelitigation, nonadversarial claims resolution process in which the builder may opt to participate. During the process, the builder may offer to make repairs. (See C.C. 910 et seq., supra, §226.) If the statute of limitations expires during this process, the limitations period is extended from the time of the notice to 100 days after the repair is completed, regardless of whether the defect giving rise to the action is the one being repaired. (C.C. 927.) If a homeowner requests mediation of a dispute about the repair, the limitations period is tolled from the time of the request to mediate until the next court day after mediation is completed, or until expiration of the 100-day period in C.C. 927, whichever is later. (C.C. 928.)

(c) If the builder fails to timely respond to the notice of claim, elects not to participate in the claims resolution process, or fails to timely request an inspection, the limitations period is extended from the time of the notice to 45 days after the time for responding to the notice has expired. (C.C. 927.)

(d) If the builder elects to enforce its own nonadversarial claims resolution process in lieu of the statutory process, the limitations period is extended from the time of the notice of claim to 100 days after either (1) the completion of the builder's alternative process, or (2) when that process is deemed unenforceable, whichever is later. (C.C. 927.)

(e) The limitations period is subject to statutory and equitable tolling (see *infra*, §694 et seq.), with one proviso: Except for repairs made pursuant to C.C. 927, repairs made during the claims resolution process do not toll the statute. (C.C. 941(e).)

SUPPLEMENT: [This section is current through the latest supplement]



70 of 145 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XIV. STATUTE OF LIMITATIONS: TORT ACTIONS

H. Slander of Title to Real Property: Three Years.

3 Witkin Cal. Proc. Actions § 618

[§ 618] Slander of Title to Real Property: Three Years.

The statute of limitations for slander of title is 3 years. (*C.C.P.* 338(g).) Unlike most of the other subdivisions of *C.C.P.* 338, this subdivision does not contain an express statement that the cause of action accrues only after the discovery of the facts. But in *Arthur v. Davis* (1981) 126 C.A.3d 684, 178 C.R. 920, the court expressed the view that, as in defamation and privacy actions (see *supra*, §§550, 551, 556), a judicially declared rule of discovery was appropriate for slander of title actions. (126 C.A.3d 691, 692, and footnotes 5, 7.) (See *Stalberg v. Western Title Ins. Co.* (1991) 230 C.A.3d 1223, 1230, 282 C.R. 43 [landowners' action against insurer for slander of title did not accrue until they discovered that insurer had recorded deeds containing fictitious easement]; *Stalberg v. Western Title Ins. Co.* (1994) 27 C.A.4th 925, 929, 32 C.R.2d 750 [same holding on remand].)

SUPPLEMENT: [This section is current through the latest supplement]



71 of 145 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XIV. STATUTE OF LIMITATIONS: TORT ACTIONS

I. Injuries to or Conversion of Personal Property: Three Years.

1. Scope of Statute.

3 Witkin Cal. Proc. Actions § 619

[§ 619] Scope of Statute.

C.C.P. 338(c) provides a 3-year period for an "action for taking, detaining, or injuring any goods or chattels, including actions for the specific recovery of personal property."

This broad language makes the limitation applicable to all of the ordinary actions involving injuries to, conversion of, or specific recovery of tangible personal property, even though incidental equitable relief may be sought. "The obvious purpose of this provision was to include all actions for torts involving personal property ... Section 338 looks to the wrong,--to the thing itself,--and not to the particular kind of action which may be used to obtain the remedy." (*Lowe v. Ozmun* (1902) 137 C. 257, 259, 70 P. 87; see *Bell v. Bank of Calif.* (1908) 153 C. 234, 242, 94 P. 889 [statute applies to all cases of unlawful taking or detaining, "whatever the form of action"; demand for accounting was merely incidental to main purpose]; *Automobile Ins. Co. of Hartford, Connecticut v. Union Oil Co. of Calif.* (1948) 85 C.A.2d 302, 309, 193 P.2d 48 [negligent injury]; *Fabiricon Products v. United Calif. Bank* (1968) 264 C.A.2d 113, 115, 70 C.R. 50 [action for conversion of check including count for money had and received]; *Wisper Corp. v. California Commerce Bank* (1996) 49 C.A.4th 948, 955, 57 C.R.2d 141, 6 Summary (10th), *Torts*, §1643 [negligence action against bank for diversion of checks by plaintiff's employee into account at bank].)

SUPPLEMENT: [This section is current through the latest supplement]



72 of 145 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XIV. STATUTE OF LIMITATIONS: TORT ACTIONS

I. Injuries to or Conversion of Personal Property: Three Years.

2. Exceptions and Distinctions.

a. In General.

3 *Witkin Cal. Proc. Actions* § 620

[§ 620] In General.

Despite its all-inclusive language, *C.C.P.* 338(c) is subject to several distinctions and statutory exceptions:

(1) An action against a tax collector who has seized goods is governed by the 6-month limitation of *C.C.P.* 341(1). (See *supra*, §480.)

(2) An action to recover stock sold for delinquent assessment is governed by the 6-month limitation of *C.C.P.* 341(2) and *Corp.C.* 423(m). (See *supra*, §480.)

(3) An action by a guest who left property in a hotel or similar establishment is governed by the 90-day limitation of *C.C.P.* 341a. (See *infra*, §621.)

(4) An action for conversion based on underground trespass on an oil or gas well is governed by the 180-day limitation of *C.C.P.* 3493/4. (See *infra*, §622.)

(5) An action involving intangibles is governed by the 2-year limitation of *C.C.P.* 339(1). (See *infra*, §648 et seq.)

(6) An action involving quasi-contractual claims for money (except rare cases in which specific money is converted) is governed by the 2-year limitation of *C.C.P.* 339(1). (See *supra*, §512.)

(7) Where personal property is taken by fraud, the plaintiff doubtless has an election to make fraud the theory or basis of the action and thus gain the benefit of the favorable accrual statute (*C.C.P.* 338(d)). (See *infra*, §653 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]



73 of 145 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XIV. STATUTE OF LIMITATIONS: TORT ACTIONS

I. Injuries to or Conversion of Personal Property: Three Years.

2. Exceptions and Distinctions.

b. Action for Recovery or Conversion of Personal Property Left in Hotel and Similar Establishments.

3 *Witkin Cal. Proc. Actions* § 621

[§ 621] Action for Recovery or Conversion of Personal Property Left in Hotel and Similar Establishments.

(1) *Applicability of 90-Day Limitations Period.* An action by a guest for the recovery or conversion of personal property left in a hotel or similar establishment is not governed by the 3-year limitations period of *C.C.P. 338(c)* (see *supra*, §619), but by the 90-day period of *C.C.P. 341a* (see *supra*, §477). (See *Martin v. Holiday Inns (1988) 199 C.A.3d 1434, 1437, 245 C.R. 717* ["personal property" is construed as restricted to things of a nature similar to "wearing apparel, trunks, valises or baggage"; hence it did not apply to theft of plaintiffs' truck and trailer, containing all their personal possessions, from defendant hotel's parking lot].)

(2) *Exceptions.* The 90-day limitations period does not apply to actions seeking damages against a hotel based on negligence or breach of contract. In *Taylor v. Forte Hotels Int. (1991) 235 C.A.3d 1119, 1 C.R.2d 189*, plaintiff alleged that after checking out and paying her hotel bill, she asked defendant hotel's employee to safeguard her baggage while she ate breakfast in the hotel restaurant and that the employee agreed to do so but when she returned he told her the luggage had been stolen. This happened in August 1986, but she did not file the complaint until July 1988. The trial judge gave judgment for defendant on demurrer. *Held*, reversed.

(a) *Conversion.* There is no reason to believe that the Legislature used this term in any other than its ordinary legal meaning; and negligence is no part of an action for conversion. (235 C.A.3d 1123.) And, although the *act* must be intentionally done, a wrongful intent is not necessary. (235 C.A.3d 1124, citing the text; see 5 *Summary* (10th), *Torts*, §713.)

(b) *Recovery.* "Recovery" means the obtaining by judgment of some right or property. "Recovery" and "conversion" are thus separate causes of action with separate remedies; both are intentional causes of action that give no consideration to the defendant's standard of care or state of mind. (235 C.A.3d 1124.)

(c) *Legislative intent.* "If the Legislature intended for all actions against a hotelkeeper to be subject to the 90-day statute of limitations, it would have so stated." (235 C.A.3d 1126.) *C.C.P. 341a* is "merely one part of the Legislature's statutory scheme to limit the liability of hotels for claims arising from problems associated with misplaced, damaged or

lost luggage." C.C. 1859 limits the financial exposure in actions based on negligence or breach of contract. "The short statute of limitations requires aggrieved guests to promptly place the hotel on notice permitting the hotel to promptly investigate the circumstances of the alleged loss." (235 C.A.3d 1126.) (On C.C. 1859, see 13 *Summary* (10th), *Personal Property*, §168.)

(d) *Proper statutes of limitations.* The present action is subject to the 3-year limitation of C.C.P. 338(c) for "negligence resulting in damage to property" and the 2-year period of C.C.P. 339(1) for an action on an agreement not founded on an instrument in writing. In either case it was timely. (235 C.A.3d 1127.)

SUPPLEMENT: [This section is current through the latest supplement]



74 of 145 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XIV. STATUTE OF LIMITATIONS: TORT ACTIONS

I. Injuries to or Conversion of Personal Property: Three Years.

2. Exceptions and Distinctions.

c. Action for Conversion Based on Underground Trespass on Oil or Gas Well.

3 *Witkin Cal. Proc. Actions* § 622

[§ 622] Action for Conversion Based on Underground Trespass on Oil or Gas Well.

(1) *Applicability of 180-Day Limitations Period.* An action for conversion based on an underground trespass on an oil or gas well is not subject to the 3-year limitations period of C.C.P. 338(c) (see *supra*, §619), but to the 180-day period of C.C.P. 3493/4 (see *supra*, §480). (See *Alphonzo E. Bell Corp. v. Bell View Oil Syndicate* (1938) 24 C.A.2d 587, 610, 614, 76 P.2d 167; *Shell Oil Co. v. Richter* (1942) 52 C.A.2d 164, 168, 125 P.2d 930; 9 So. Cal. L. Rev. 339.)

(2) *Illustration.* In *Travelers Indem. Co. v. Redondo Beach* (1994) 28 C.A.4th 1432, 34 C.R.2d 337, plaintiff insurer, upon paying its insured after storm waves overtopped a breakwater resulting in \$ 10 million damage to the insured's inn, brought a subrogation action on various theories against defendant city and a number of Doe defendants in January 1989, for failure to construct the breakwater sufficiently high to restrain the storm waves. In February 1991, plaintiff learned that the breakwater apparently subsided 2 feet due to drilling by oil companies under contracts and leases with defendant city. Based on this information, plaintiff filed an amended complaint in January 1992, naming the oil companies as defendants and adding additional causes of action, including trespass, absolute liability for interference with lateral and subjacent support, strict liability for ultrahazardous activity, and violation of *Harb. & Nav.C.* 294. Defendants demurred to these four additional causes on the ground that they were untimely under C.C.P. 3493/4. *Held*, C.C.P. 3493/4 applied only to the trespass cause; thus, the action was timely as to the remaining causes of action, and by substituting the corporations for Doe defendants, it related back to the original complaint.

(a) C.C.P. 3493/4 contains language requiring an "underground trespass, use or occupancy" by a well drilled for oil or gas from a remote location, and its purpose is to quickly conclude claims for unintentional drilling trespass through slant drilling or whipstocking without undue damage to the oil industry. Thus, by its plain terms, the statute applied only to plaintiff's trespass claim. (28 C.A.4th 1441.)

(b) "[T]he facts which the remainder of the complaint sets forth do not constitute a 'trespass, use or occupancy ...' of its insured's land. To the contrary, the gravamen of Travelers' action against the respondents is that their oil drilling activity caused a subsidence, not on the property of Travelers' insured, but under the breakwater, resulting in a lowering of that bulwark by two feet. Travelers' insured had no right, title or interest in that breakwater," as expressly required by C.C.P. 3493/4(a). (28 C.A.4th 1441, 1442.)

(c) Relying on *Felburg v. Don Wilson Builders* (1983) 142 C.A.3d 383, 191 C.R. 92, supra, §612, defendants claimed that C.C.P. 3493/4 applies to any damage occasioned by the drilling of an oil well. "That reliance is misplaced. ... *Felburg* said no such thing, ... and certainly its unremarkable holding provides no support whatever for respondents' position." (28 C.A.4th 1442.)

(d) "While it is true, as respondents contend, that the trespass described in section 3493/4 can result from a departure of a well from the 'vertical or *otherwise*,' ... that certainly cannot be read to embrace the factual scenario which occurred here. The ocean waves which crashed down on the Portofino Inn did not amount to an indirect trespass by respondents' drilling activity. Respondents' contention to that effect is simply an artfully creative way to try and escape responsibility for their alleged misconduct under cover of section 3493/4." (28 C.A.4th 1442, 1443.)

SUPPLEMENT: [This section is current through the latest supplement]



75 of 145 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XIV. STATUTE OF LIMITATIONS: TORT ACTIONS

I. Injuries to or Conversion of Personal Property: Three Years.

3. Accrual.

a. Conversion by Original Wrongful Act.

3 Witkin Cal. Proc. Actions § 623

[§ 623] Conversion by Original Wrongful Act.

(1) *In General.* The act of the unlawful taking or disposal of the property is the wrong, and the statute starts running at the time of that act, regardless of the plaintiff's lack of knowledge. (*Coy v. E.F. Hutton & Co. (1941) 44 C.A.2d 386, 390, 112 P.2d 639; Rest.2d, Torts §899, Comment c; see 10 So. Cal. L. Rev. 101; 79 A.L.R.3d 847* [conversion by theft].) In *First Nat. Bank in Richmond v. Thompson (1943) 60 C.A.2d 79, 140 P.2d 75*, plaintiff made a conditional sale of a machine to H, and, after many defaults, gave him oral authority to sell it subject to plaintiff's approval. Instead, H, representing himself as the owner, sold it to defendants in July 1938 (unlawful act of conversion by both H and defendant buyers). The action against defendants, brought in January 1942, was held barred. (*60 C.A.2d 83.*)

In *San Francisco Credit Clearing House v. Wells (1925) 196 C. 701, 239 P. 319*, the court, applying the statute to a claim of adverse possession of personal property, denied the right to tack successive possessions. Hence, although plaintiff owner's action was brought more than 3 years after the original conversion, it was timely because defendant had purchased it (a new conversion) within 3 years of the time of the action. (*196 C. 706.*) (See *14 Cal. L. Rev. 218.*)

(2) *Delayed Accrual for Theft of Special Property.* Delayed accrual applies in the case of special property. "The cause of action in the case of theft, as defined in *Section 484 of the Penal Code*, of any article of historical, interpretive, scientific, or artistic significance, is not deemed to have accrued until the discovery of the whereabouts of the article by the aggrieved party, his or her agent, or the law enforcement agency that originally investigated the theft." (*C.C.P. 338(c).*) (See *49 Hastings L. J. 225* [applying strict discovery rule to stolen art]; *27 U.C.L.A. L. Rev. 1122* [argument for adoption of this discovery rule].)

The delayed accrual provision for stolen art works was added to *C.C.P. 338(c)*, effective January 1, 1983. Early cases held that the prior version of the statute accrued on the commission of the wrongful act, not on its discovery. Nevertheless, the court in *Naftzger v. American Numismatic Soc. (1996) 42 C.A.4th 421, 49 C.R.2d 784*, applied a discovery rule to the prior version of the statute. Plaintiff, an innocent purchaser of coins stolen from defendant museum sometime prior to 1970, sued in March 1993, seeking declaratory relief and to quiet title. Defendant cross-complained in May 1993--within 3 years of discovering that the coins were in plaintiff's possession, but at least 13 years after the theft--to recover the coins and to quiet title. *Held*, the cross-complaint was timely; the pre-1983 version of *C.C.P.*

338(c) applied, and accrual occurred when defendant discovered that plaintiff possessed the stolen coins, not when the theft took place.

(a) *First Nat. Bank*, which held that accrual occurred on conversion, is distinguishable. The property in that case was converted after it was *entrusted* to the wrongdoer. (42 C.A.4th 429.) But here, the property was stolen by an unknown thief. "In any conversion situation, the owner, upon discovering the injury, can immediately sue the person who was originally entrusted with possession. ... In the theft situation, on the other hand, the owner cannot sue the thief or the innocent purchaser prior to discovering their identities." (42 C.A.4th 431.)

(b) Moreover, the criminal limitations period for prosecuting a thief for wrongfully concealing, withholding, or selling stolen property (P.C. 496) runs anew with each violation that is independent of the initial theft. Thus, common sense dictates that a civil action for recovering stolen property under C.C.P. 338(c) does not necessarily accrue when the theft occurs, or even when the owner discovers the theft. For until the owner discovers the identity of the thief or the person in possession of the stolen property, the owner is powerless to institute a civil action for return of the stolen property. (42 C.A.4th 433.)

(c) "[W]e recognize that our holding, which applies a discovery rule of accrual to any article stolen prior to the effective date of the 1983 amendment ... is broader in scope than the amendment's discovery rule, which applies only to articles of historical, interpretive, scientific, or artistic significance." (42 C.A.4th 426.)

An identical result on similar facts, but on an entirely different rationale, was reached and the *Naftzger* holding was criticized in *Society of Calif. Pioneers v. Baker* (1996) 43 C.A.4th 774, 50 C.R.2d 865. An antique cane handle belonging to plaintiff was stolen by an employee in 1978, acquired by K in 1980, and ultimately sold to defendant, an innocent purchaser, in 1991. Shortly thereafter, plaintiff discovered that defendant possessed the cane handle, and filed a conversion action in 1992. The trial judge ruled that the pre-1983 version of C.C.P. 338(b) applied to bar plaintiff's action. *Held*, reversed.

(a) *Harpending v. Meyer* (1880) 55 C. 555, and *San Francisco Credit Clearing House* correctly state the law as it applied to actions for stolen property prior to 1983: accrual commences on conversion. And later cases, including *First Nat. Bank* and *Culp v. Signal Van & Storage* (1956) 142 C.A.2d Supp. 859, 298 P.2d 162, 5 Summary (10th), *Torts*, §716, correctly hold that the statute runs anew against a subsequent purchaser. (43 C.A.4th 782, 783, and footnote 10, disagreeing with discovery rule applied by *Naftzger* court.)

(b) Here, the cane handle was stolen in 1978, and K acquired it less than 3 years later in 1980. According to the *Harpending* rule, the statute began to run anew then. The limitations period in favor of K would have expired sometime in 1983 (43 C.A.4th 783), but not before January 1, the effective date of the amendment to the statute. Thus, the amended statute applied, making the discovery rule the appropriate measure of accrual. (43 C.A.4th 784, 785.)

(c) Regardless whether the amended statute imposed a rule of actual or constructive discovery, the evidence indicated that plaintiff did not discover the location of the cane handle until defendant purchased it in 1991. Plaintiff's action was filed within 3 years of that date, and thus was timely. (43 C.A.4th 785.)

SUPPLEMENT: [This section is current through the latest supplement]



76 of 145 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XIV. STATUTE OF LIMITATIONS: TORT ACTIONS

I. Injuries to or Conversion of Personal Property: Three Years.

3. Accrual.

b. Conversion After Lawful Possession.

3 Witkin Cal. Proc. Actions § 624

[§ 624] Conversion After Lawful Possession.

There is some reason to hold that the time starts running when the defendant (1) originally takes wrongful possession of the property or (2) after original lawful possession, refuses to surrender the property on demand, or openly repudiates the owner's title. In those situations, the plaintiff either knows or ordinarily should know of the taking. But suppose a person in lawful possession, e.g., a bailee, wrongfully and secretly converts the property. The likelihood of the plaintiff's discovery of the facts in time to sue is slight; yet a number of states, including California, follow the same rule of accrual from the time of the wrongful act.

In *Rose v. Dunk-Harbison Co. (1935) 7 C.A.2d 502, 46 P.2d 242*, the complaint alleged that defendant stockbroker had a trading account in the name of R, which was his separate property, and that on R's death in June 1927, defendant altered its books to change it to a joint tenancy account with R's wife. Distribution was decreed in September 1929, and plaintiff, heir to half the estate, became of age in June 1931. He alleged discovery of the conversion of the stocks in October 1931, and sued in June 1932. The court took the period between the conversion and the suit, subtracted the disability period of minority, and found the suit to be 3 months and 13 days too late. (*7 C.A.2d 504.*)

This result demonstrates the unsoundness of the rule, which is contrary to the statutory and judicial trend toward making the statute run from the time of discovery of a concealed wrongful act. (See *10 So. Cal. L. Rev. 101*; but see *Hillhouse v. Wolf (1958) 166 C.A.2d Supp. 833, 835, 333 P.2d 454*, citing the text [following *Rose* in action against purchaser of ranch who became involuntary bailee of machine left there; statute ran from time he used it].)

SUPPLEMENT: [This section is current through the latest supplement]



77 of 145 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XIV. STATUTE OF LIMITATIONS: TORT ACTIONS

I. Injuries to or Conversion of Personal Property: Three Years.

3. Accrual.

c. Conversion by Fiduciary or Bailee.

3 *Witkin Cal. Proc. Actions* § 625

[§ 625] Conversion by Fiduciary or Bailee.

(1) *Fiduciary*. A different approach is taken where the converter is a fiduciary and converts trust property. The trust rule (*infra*, §682) is applied by analogy; i.e., the statute does not begin to run until the repudiation has been brought to the notice of the beneficiary. (See *Bennett v. Hibernia Bank* (1956) 47 C.2d 540, 561, 305 P.2d 20; *Strasberg v. Odyssey Group* (1996) 51 C.A.4th 906, 915, 59 C.R.2d 474, citing the text [following rule of *Bennett*]; but see *Bono v. Clark* (2002) 103 C.A.4th 1409, 1433, 128 C.R.2d 31 [distinguishing *Strasberg* and *Bennett* and refusing to apply rule to conversion action by wife against deceased husband's estate, where there was no evidence of concealment by husband].)

(2) *Bailee*. For similar reasons, the statute does not run against a bailor in favor of a bailee claiming adversely until the adverse claim is brought to the notice of the bailor. (See *Niyya v. Goto* (1960) 181 C.A.2d 682, 688, 5 C.R. 642; *Bufano v. San Francisco* (1965) 233 C.A.2d 61, 70, 43 C.R. 223.)

SUPPLEMENT: [This section is current through the latest supplement]



78 of 145 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XIV. STATUTE OF LIMITATIONS: TORT ACTIONS

J. Attorney Malpractice: One or Four Years.

1. Former Law.

3 *Witkin Cal. Proc. Actions* § 626

[§ 626] Former Law.

(1) *In General.* Prior to 1978, an action for legal malpractice was governed by the 2-year limitations period in *C.C.P.* 339(1), the "catchall" torts statute of limitations. (See *Alter v. Michael* (1966) 64 C.2d 480, 481, 50 C.R. 553, 413 P.2d 153; *infra*, §648 et seq.)

(2) *No Delayed Accrual.* Originally, the theory of postponed accrual in medical malpractice actions where the plaintiff is ignorant of the facts was not applied to actions based on the negligence of an attorney; the statute began to run from the date the negligent act occurred. (See *Griffith v. Zavlaris* (1963) 215 C.A.2d 826, 828, 30 C.R. 517 [allegation of negligent advice in February 1956, resulting in loss of money by final judgment in December 1959]; *Bustamante v. Haet* (1963) 222 C.A.2d 413, 415, 35 C.R. 176 [allegation that plaintiff, relying on negligent advice, entered into proxy marriage that was annulled 7 years later]; *Fazio v. Hayhurst* (1966) 247 C.A.2d 200, 203, 55 C.R. 370; *Eckert v. Schaal* (1967) 251 C.A.2d 1, 5, 58 C.R. 817; *Yandell v. Baker* (1968) 258 C.A.2d 308, 311, 65 C.R. 606.)

The rule was subjected to strong criticism, and occasional hints that if the Legislature did not act, the court would make the change itself. (See *Heyer v. Flaig* (1969) 70 C.2d 223, 233, 74 C.R. 225, 449 P.2d 161; *Griffith v. Zavlaris*, *supra*, 215 C.A.2d 830; *Yandell v. Baker*, *supra*, 258 C.A.2d 316, footnote 3; 10 Santa Clara Lawyer 260; 15 U.C.L.A. L. Rev 230.)

(3) *Exception: Continuing Duty.* The continuing duty theory of postponed accrual, recognized in medical malpractice cases (see *supra*, §577), was also applied to legal malpractice actions. Under this theory the statute did not run during the relationship of attorney and client, which placed the attorney under a continuing duty to protect the client's interests. The period in those cases commenced when the client suffered damages from the wrongful act. (See *Fazio v. Hayhurst*, *supra*; *Chavez v. Carter* (1967) 256 C.A.2d 577, 581, 64 C.R. 350.)

In *Heyer v. Flaig*, the court upheld the right of intended beneficiaries of a testator's estate to sue the testator's attorney for negligence in drafting the will: "We note that the very theories which led to the rule in medical malpractice cases that the statute runs only from the date of discovery of the negligence could be applied to the instant situation: (1) There was a continuing duty on the part of defendant to correct the estate plan to conform in effect to the testatrix' true intentions, and hence a continuing tort up until the time of death giving rise to new causes of action. (2) The rendering

of legal services with respect to the testamentary plan might be viewed as incomplete until the testatrix' death, when the will would become effective and when the attorney could no longer correct his original mistake. (3) The fact of defendant's asserted superior knowledge and skill and the testatrix' reliance on the defendant to order her affairs competently and in conformance with her testamentary desires argues strongly that the statute should not run against the testatrix as long as she was unable, with care and diligence, to ascertain the negligence." (70 C.2d 233, footnote 7.)

SUPPLEMENT: [This section is current through the latest supplement]



79 of 145 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XIV. STATUTE OF LIMITATIONS: TORT ACTIONS

J. Attorney Malpractice: One or Four Years.

2. Judicial Rules of Delayed Accrual.

a. Accrual Delayed Until Discovery.

3 *Witkin Cal. Proc. Actions* § 627

[§ 627] Accrual Delayed Until Discovery.

In *Neel v. Magana, Olney, Levy, Cathcart & Gelfand* (1971) 6 C.3d 176, 98 C.R. 837, 491 P.2d 421, the Supreme Court repudiated the rule of accrual at the time of the negligent act, and held that "a cause of action for legal malpractice does not accrue until the client discovers, or should discover, the facts establishing the elements of his cause of action." (6 C.3d 194.) Plaintiffs engaged attorney D to file a wrongful death action in 1961. D associated defendant firm, and defendants prepared a complaint, which D filed in May 1962. Neither D nor defendants served the summons within the statutory time, and the action was dismissed in 1965. D fraudulently concealed the association of defendants and the dismissal, and plaintiffs first learned the facts in December 1967. Plaintiffs filed the present malpractice action against defendants in August 1968, within 2 years after discovery of the facts. The trial judge granted summary judgment for defendants on the ground that the action was filed more than 2 years after the wrongful omission (May 25, 1965, the last day for service of summons within the 3-year statutory period). The judge noted the fact that D, by reason of his false representations, would have been estopped to set up the statute of limitations, but concluded that defendants, who made no misrepresentations, were not. *Held*, summary judgment reversed; the statute of limitations had not run.

(a) The original "peculiar rule" was based on a mistaken headnote in the reported opinion in *Hays v. Ewing* (1886) 70 C. 127, 11 P. 602. (6 C.3d 183.) After being virtually ignored for years, the supposed rule was revived in *Griffith v. Zavlaris* (1963) 215 C.A.2d 826, 30 C.R. 517, but criticized as harsh; and later decisions, though accepting it as the law, were equally critical. (6 C.3d 186.) Then *Heyer v. Flaig* (1969) 70 C.2d 223, 74 C.R. 225, 449 P.2d 161, *supra*, §626, hinted that the time for its reexamination had arrived; the *Neel* case provided the vehicle: "[T]he rule against delayed accrual of legal malpractice actions finds many critics, but no defenders. Far from being as old or as well-established as often assumed, it rests upon a 1963 decision, *Griffith v. Zavlaris*, in which the Court of Appeal reluctantly held itself bound by ill-considered dictum of earlier cases. The current holding contrasts with the rule as to all other professional malpractice, and no one, including defendants in the present case, offer any justification for the inconsistency. We conclude that we should neither continue the automatic application of this rule nor seek to carve out a limited exception for this case; that we should, instead, reexamine the ground upon which it stands." (6 C.3d 187.)

(b) In other professional malpractice, running of the statute is postponed until discovery. (6 C.3d 186.) This rule is justified by the special nature of the relationship between the professional and his or her client. (6 C.3d 188.) The

professional's duty is not merely to exercise ordinary care but to use the skill, prudence, and diligence commonly exercised by members of the profession; and for that reason the layperson is seldom able to recognize negligence. Not only may the layperson fail to recognize negligence, often he or she will lack any opportunity to see it. The relationship is fiduciary and calls for full disclosure. "Thus the fact that a client lacks awareness of a practitioner's malpractice implies, in many cases, a second breach of duty by the fiduciary, namely, a failure to disclose material facts to his client. Postponement of accrual of the cause of action until the client discovers, or should discover, the material facts in issue vindicates the fiduciary duty of full disclosure; it prevents the fiduciary from obtaining immunity for an initial breach of duty by a subsequent breach of the obligation of disclosure." (6 C.3d 189.)

(c) These reasons for delayed accrual in malpractice generally apply to legal malpractice. "An immunity from the statute of limitations for practitioners at the bar not enjoyed by other professions is itself suspicious, but when conferred by former practitioners who now sit upon the bench, it is doubly suspicious. We therefore hold that in an action for professional malpractice against an attorney, the cause of action does not accrue until the plaintiff knows, or should know, all material facts essential to show the elements of that cause of action." (6 C.3d 190.)

(d) There is no fundamental objection to retroactivity of the new rule. Presumably attorneys do not commit malpractice in reliance on the statute of limitations; they usually retain records for more than 2 years. And a change in the accrual rule could fairly have been foreseen, in view of the continuous criticism of the old rule. (6 C.3d 193, 194.) (See 24 *Hastings L. J.* 796; 4 *Southwestern U. L. Rev.* 143; 7 *U.S.F. L. Rev.* 87; 13 *A.L.R.6th* 1 [application of rule to providing client with negligent advice or failing to advise]; 14 *A.L.R.6th* 1 [application of rule to litigational malpractice or delay in conducting client's affairs]; 15 *A.L.R.6th* 427 [application of rule to property, estate, corporate, and document cases]; 16 *A.L.R.6th* 653 [application of rule to negligent representation, failure to supervise junior counsel, conflict of interest, billing disputes, and unspecified acts of negligence]; for codification, see *infra*, §629 et seq.)

Knowledge of the facts, not discovery of legal theories of recovery, starts the statute running. (*McGee v. Weinberg* (1979) 97 C.A.3d 798, 803, 159 C.R. 86.)

SUPPLEMENT: [This section is current through the latest supplement]



80 of 145 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XIV. STATUTE OF LIMITATIONS: TORT ACTIONS

J. Attorney Malpractice: One or Four Years.

2. Judicial Rules of Delayed Accrual.

b. Accrual Delayed Until Damage.

3 *Witkin Cal. Proc. Actions* § 628

[§ 628] Accrual Delayed Until Damage.

In *Budd v. Nixen* (1971) 6 C.3d 195, 98 C.R. 849, 491 P.2d 433, the court announced an additional rule of delayed accrual: Even if the client has knowledge of the facts, the statute does not begin to run until he or she suffers damage from the negligent act. In 1962, M filed an action against H Corp. and B, its president, for breach of contract. The corporation and B retained defendant attorney, who filed answers, but negligently failed to allege that B had acted on behalf of the corporation and not personally. Defendant was relieved and new counsel discovered the facts in September 1964. In October 1964, the trial judge ordered judgment against both defendants. A motion for new trial was denied, an appeal was dismissed as late, and in September 1966 B was compelled to pay half of a \$ 75,000 judgment. The present action by B against defendant attorney for malpractice was filed in September 1967. Summary judgment was given for defendant on the ground that the statute of limitations ran from the time of filing the answer (July 1963). The Supreme Court also noted that more than 3 years had elapsed from the time of discovery of the negligent act. The issue, then, was whether plaintiff acquired an accrued cause of action prior to September 1965. *Held*, "a cause of action for legal malpractice does not accrue until the client suffers damage." This is an issue of fact, and the judgment was reversed for further proceedings.

(a) The general rule, applicable to attorneys' negligence, postpones accrual until negligent conduct causes damage. (6 C.3d 200.) When this occurs the statute begins to run even though not all the damages are sustained. "Any appreciable and actual harm flowing from the attorney's negligent conduct establishes a cause of action upon which the client may sue." (6 C.3d 201.)

(b) Ordinarily the client has already suffered damage when the client discovers the negligence, as in *Neel v. Magana, Olney, Levy, Cathcart & Gelfand* (1971) 6 C.3d 176, 98 C.R. 837, 491 P.2d 421, *supra*, §627; in other cases infliction of the damage will alert the client to the attorney's negligence; only in the unusual case will the client discover the negligence without having suffered damage. (6 C.3d 201.)

(c) In the present case the evidence may show that plaintiff suffered damage as far back as April and September of 1964, when he was compelled to pay attorneys' fees and costs. He contends, however, that he suffered no damage until entry of judgment against him in November 1965, when he was faced with the necessity of paying a large sum or

posting a large bond on appeal. (6 C.3d 202.) Because the new rule of *Neel* was not before the trial court and the statute had presumably run, the factual issue of damage was not resolved. It must be resolved, on the retrial, under the new rule that "the cause of action in tort does not accrue until the client both sustains damage, and discovers, or should discover, his cause of action." (6 C.3d 203.)

(d) The rule in contract actions must be distinguished, for the complaint contained a count for breach of an oral contractual warranty and also alleged a contract theory of malpractice. The cause of action for breach of contract arises on breach without damage suffered (*supra*, §520); hence, the contract count was barred, under *Neel*, when the client knew or should have known of the breach. (6 C.3d 203, footnote 6.) (See 24 *Hastings L. J.* 804; 7 *U.S.F. L. Rev.* 87.)

SUPPLEMENT: [This section is current through the latest supplement]



81 of 145 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XIV. STATUTE OF LIMITATIONS: TORT ACTIONS

J. Attorney Malpractice: One or Four Years.

3. Codification.

a. Nature and Scope of Statute.

3 *Witkin Cal. Proc. Actions* § 629

[§ 629] Nature and Scope of Statute.

(1) *In General.* The 1977 Legislature enacted C.C.P. 340.6, incorporating the holdings of *Neel v. Magana, Olney, Levy, Cathcart & Gelfand* (1971) 6 C.3d 176, 98 C.R. 837, 491 P.2d 421, supra, §627, and *Budd v. Nixen* (1971) 6 C.3d 195, 98 C.R. 849, 491 P.2d 433, supra, §628, and establishing alternative limitations periods for legal malpractice actions (see infra, §630) similar to those applicable in medical malpractice actions (see supra, §§579, 581). (See 9 *Pacific L. J.* 676; 32 *A.L.R.4th* 260 [when statute of limitations begins to run on action against attorney for malpractice].)

(2) *Prospective Application.* In accordance with the presumption in favor of prospective operation unless the statutory language clearly indicates the contrary, the new limitations periods were held nonretroactive. (*Krusesky v. Baugh* (1982) 138 C.A.3d 562, 566, 188 C.R. 57 [statutory period commenced on January 1, 1978, effective date of statute, rather than in 1969, when negligent act occurred]; *Rubinstein v. Barnes* (1987) 195 C.A.3d 276, 279, 240 C.R. 535 [C.C.P. 340.6 applied prospectively from date of enactment where wrongful act occurred prior to enactment and both discovery of act and filing of claim occurred more than 4 years after enactment]; *Radovich v. Locke-Paddon* (1995) 35 C.A.4th 946, 968, footnote 1, 41 C.R.2d 573, infra, §637 [following *Krusesky*].)

(3) *Scope.* The section applies to actions "against an attorney for a wrongful act or omission, other than for actual fraud, arising in the performance of professional services." (C.C.P. 340.6(a); see *Southland Mechanical Constructors Corp. v. Nixen* (1981) 119 C.A.3d 417, 431, 173 C.R. 917 [term "wrongful act or omission" applies to malpractice actions based upon breach of contract as well as those based upon tortious conduct]; *Stoll v. Superior Court* (1992) 9 C.A.4th 1362, 1366, 12 C.R.2d 354 [following *Southland Mechanical Constructors Corp.*; C.C.P. 340.6 applies to action for breach of fiduciary duty]; *Knoell v. Petrovich* (1999) 76 C.A.4th 164, 169, 90 C.R.2d 162 [nonclient may not invoke C.C.P. 340.6 to toll statute of limitations when suing attorney for defamation].)

In *Quintilliani v. Mannerino* (1998) 62 C.A.4th 54, 72 C.R.2d 359, plaintiffs, the promoters of an unsuccessful concert, sued defendant attorney, who had contracted to provide both legal and "administrative consulting" services for the concert, for negligent performance of services, breach of an independent contractor agreement, breach of fiduciary duty, and negligent misrepresentation. Plaintiffs filed the action more than 1 year after defendant terminated his

representation, and more than 1 year after the failure of the concert. The trial judge granted defendant's motion for summary judgment, ruling that the action was barred by the 1-year limitations period of *C.C.P. 340.6(a)*. *Held*, affirmed in part, and reversed in part.

(a) *Negligent performance of consulting services claim was not time-barred*. This claim was not governed by *C.C.P. 340.6(a)*. An attorney who becomes involved in nonlegal business activities may not claim protection of the legal malpractice statute, because the basis for a legal malpractice action is a claim of professional negligence. The statute only applies to the performance of legal services. (62 *C.A.4th* 64.)

(b) *Remaining claims were time-barred*. The remaining claims were subject to *C.C.P. 340.6(a)*, because the allegations common to all did not differentiate between defendant's legal and nonlegal duties, but inextricably intertwined the two. Furthermore, even though negligent misrepresentation is a species of fraud, the exception for actual fraud in *C.C.P. 340.6* was intended to apply to intentional fraud, not to constructive fraud resulting from negligent misrepresentation. (62 *C.A.4th* 69.)

Crouse v. Brobeck, Phleger & Harrison (1998) 67 *C.A.4th* 1509, 80 *C.R.2d* 94, *infra*, §645, held that *C.C.P. 340.6* does not bar claims for equitable indemnity. The court reasoned as follows: A tort defendant's equitable indemnity action is separate and distinct from the plaintiff's tort action against the defendant and does not arise for statute of limitations purposes until the defendant pays a judgment or settlement for which he or she is entitled to indemnity. Moreover, because the defendant's equitable indemnity claim is independent of the plaintiff's action, the defendant does not lose his or her right to seek equitable indemnity from another tortfeasor simply because the plaintiff's action against the other tortfeasor may be barred by the statute of limitations; instead, the defendant may pursue the indemnity action so long as the statute of limitations on the indemnity action has not expired. Furthermore, *C.C.P. 340.6* refers only to the time limits for a plaintiff's claim and makes no mention of either a cross-complainant or claim for equitable indemnity. (67 *C.A.4th* 1541, disagreeing with *Wagner v. California* (1978) 86 *C.A.3d* 922, 150 *C.R.* 489, *supra*, §606.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General*. The 2009 Legislature has established a 2-year limitations period for a plaintiff who is required to establish factual innocence of an underlying criminal charge as an element of a legal malpractice claim. (See *C.C.P. 340.6(a)*, *Supp.*, *infra*, §630.)



82 of 145 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XIV. STATUTE OF LIMITATIONS: TORT ACTIONS

J. Attorney Malpractice: One or Four Years.

3. Codification.

b. Alternative Periods.

3 *Witkin Cal. Proc. Actions* § 630

[§ 630] Alternative Periods.

(1) *First Alternative: 1 Year After Discovery.* The normal period is "one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered the facts constituting the wrongful act or omission." (*C.C.P.* 340.6(a); see 13 *A.L.R.6th* 1 [cases applying rule where attorney provides negligent advice or fails to advise]; 14 *A.L.R.6th* 1 [cases applying rule to attorney's conduct of litigation and delay or inaction in conducting client's affairs]; but see *California Aviation v. Leeds* (1991) 233 *C.A.3d* 724, 734, 284 *C.R.* 687 [where Chapter 11 bankruptcy petition is filed before legal malpractice action is time-barred under *C.C.P.* 340.6, 2-year extension period of 11 *U.S.C.*, §108(a)(2) governs].)

(2) *Second Alternative: 4 Years From Act or Omission.* The maximum period (i.e., unless the 1-year period has run) is 4 years "from the date of the wrongful act or omission." And "[i]n no event shall the time ... exceed four years except that the period shall be tolled" by specified acts or circumstances (see *infra*, §631 et seq.). (*C.C.P.* 340.6(a); see 11 *A.L.R.6th* 1 [view that statute begins to run from time of occurrence of negligent act or omission].)

In *Ruchti v. Goldfein* (1980) 113 *C.A.3d* 928, 170 *C.R.* 375, plaintiff's attorney obtained a dissolution of marriage for her with no adjudication of any community property rights in her husband's military retirement benefits (at that time not judicially established). *Held*, the damage sustained by plaintiff arose when the judgment of dissolution became final, and the action was barred 4 years later. (113 *C.A.3d* 933.)

McCann v. Welden (1984) 153 *C.A.3d* 814, 200 *C.R.* 703, was a malpractice action based on a stipulation prepared by plaintiff's attorney in connection with a dissolution of marriage proceeding. In 1977, plaintiff learned from another attorney that the stipulation contained certain drafting errors that might constitute malpractice; but plaintiff elected not to sue at that time because the expected recovery was small. In August and November of 1978, in connection with a motion to terminate his spousal support payments, plaintiff learned from a third attorney that the stipulation contained two additional errors: (a) It stated that plaintiff's purchase of a house terminated his spousal support payments; and (b) it identified a savings account as the former spouse's separate property, rather than community property. The malpractice action was filed on February 23, 1979. The trial judge granted summary judgment for defendant on the ground that the discovery of any act or omission believed to be negligent (here 1977) starts the period running for an action based on

any related act or omission even if undiscovered. *Held*, reversed; discovery starts the statute running only as to the wrongful act or omission on which the action was based. (153 C.A.3d 820.) (See *Radovich v. Locke-Paddon* (1995) 35 C.A.4th 946, 970, 41 C.R.2d 573, *infra*, §637 ["the four-year period is indeed an *occurrence* period which will run whether or not the plaintiff has discovered the malpractice"].)

The 4-year limitations period is constitutional. (See *Rubinstein v. Barnes* (1987) 195 C.A.3d 276, 282, 240 C.R. 535.)

(3) *Burden of Proof*. In enacting C.C.P. 340.6(a), the Legislature provided an affirmative defense to a cause of action for attorney malpractice. Thus, under the traditional statutory rule for allocating the burden of proof in *Ev.C. 500* (see 1 *Cal. Evidence* (4th), *Burden of Proof and Presumptions*, §6 et seq.), the defendant bears the burden of proving, by a preponderance of the evidence, the facts necessary to establish that an attorney malpractice action is untimely under either the 1-year or 4-year limitations periods of C.C.P. 340.6(a). (*Samuels v. Mix* (1999) 22 C.4th 1, 7, 91 C.R.2d 273, 989 P.2d 701 [trial judge committed reversible error in instructing jury that plaintiff had burden of proving that action was filed within 1-year limitations period].)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *First Alternative: 1 Year After Discovery*. See CACI, No. 610 [1-year limitations period in C.C.P. 340.6 as affirmative defense].

(2) *Second Alternative: 4 Years From Act or Omission*. See CACI, No. 611 [4-year limitations period in C.C.P. 340.6 as affirmative defense]. (2a) *(New) Third Alternative: 2 Years From Postconviction Exoneration for Plaintiff Required To Establish Factual Innocence*. A plaintiff who is required to establish his or her factual innocence of an underlying criminal charge as an element of the legal malpractice claim now must commence the action within 2 years of achieving postconviction exoneration in the form of a final judicial disposition of the criminal case. Accrual of this limitations period is excepted from the maximum 4-year limitations period otherwise applicable to legal malpractice actions. (C.C.P. 340.6(a), as amended in 2009.) For this purpose, "a factually innocent person" is "a person who was convicted of a crime that either was not committed or, if committed, was not committed by him or her." (See Stats. 2009, Chap. 432, §1(b).)



83 of 145 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XIV. STATUTE OF LIMITATIONS: TORT ACTIONS

J. Attorney Malpractice: One or Four Years.

3. Codification.

c. Statutory Tolling Provisions.

3 Witkin Cal. Proc. Actions § 631

[§ 631] Statutory Tolling Provisions.

(1) *In General.* *C.C.P. 340.6(a)* provides that the periods are tolled during the time that any of the following exist:

(a) The plaintiff has not sustained actual injury. (*C.C.P. 340.6(a)(1)*); see *11 A.L.R.6th 1* [statute begins to run from time of occurrence of negligent act or omission]; *12 A.L.R.6th 1* [statute begins to run from time of occurrence of sustaining damage or injury]; *infra*, §632 et seq.)

(b) The attorney continues to represent the plaintiff about the specific subject matter in which the alleged wrongful act or omission occurred. (*C.C.P. 340.6(a)(2)*); see *infra*, §643 et seq.)

(c) The attorney wilfully conceals known facts constituting the wrongful act or omission. This provision tolls only the 4-year limitation (see *supra*, §630). (*C.C.P. 340.6(a)(3)*); see *43 A.L.R.3d 429* [fraud, misrepresentation, or deception as estopping reliance on statute of limitations]; *67 A.L.R.5th 587* [when statute begins to run for deliberate wrongful acts or omissions].)

(d) The plaintiff is under a legal or physical disability that restricts his or her ability to commence legal action. (*C.C.P. 340.6(a)(4)*); see *infra*, §646.)

(2) *Action Based on Writing Effective on Happening of Event.* In an action based on an instrument in writing, the effective date of which depends on some act or event of the future, the period commences to run "upon the occurrence of such act or event." (*C.C.P. 340.6(b)*.) (See *9 Pacific L. J. 676*.)

(3) *Tolling Provisions Are Exclusive.* By including the limitation that "in no event" shall the prescriptive period be tolled except under those circumstances specified in *C.C.P. 340.6(a)*, the Legislature intended to disallow tolling under any other circumstances. (*Gordon v. Law Offices of Aguirre & Meyer (1999) 70 C.A.4th 972, 979, 83 C.R.2d 119, infra*, §647 [equitable tolling doctrine (*infra*, §694 et seq.) does not apply to *C.C.P. 340.6*]; see *87 A.L.R.5th 473* [tolling or other exceptions to running of statute of limitations].)

SUPPLEMENT: [This section is current through the latest supplement]



84 of 145 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XIV. STATUTE OF LIMITATIONS: TORT ACTIONS

J. Attorney Malpractice: One or Four Years.

4. Tolling Until Actual Injury.

a. Litigational Malpractice.

1. Conflicting Decisions in Courts of Appeal.

3 *Witkin Cal. Proc. Actions* § 632

[§ 632] Conflicting Decisions in Courts of Appeal.

When does actual injury occur for purposes of statutory tolling where the malpractice is committed during the course of litigation? *Neel v. Magana, Olney, Levy, Cathcart & Gelfand* (1971) 6 C.3d 176, 98 C.R. 837, 491 P.2d 421, *supra*, §627, and *Budd v. Nixen* (1971) 6 C.3d 195, 98 C.R. 849, 491 P.2d 433, *supra*, §628, did not expressly determine whether actual injury occurs (a) when the client suffers an adverse judgment in the trial court in the underlying action, or (b) when an appeal of right of that judgment is also decided against the client. However, dicta in *Budd* noted that a client *may* suffer harm when he or she incurs monetary damages in the underlying action as a result of the malpractice, while dicta in *Neel* stated that the date of the trial judge's dismissal of the underlying action is the crucial point at which the statute should run. Consequently, two distinct lines of cases emerged:

(1) *Actual Injury Occurs After Appeal of Underlying Action*. Relying on the "monetary damage" language in *Budd*, some courts equated "actual injury" for purposes of statutory tolling with the prediscovery rule standard of "irremediable damage" enunciated in *Heyer v. Flaig* (1969) 70 C.2d 223, 74 C.R. 225, 449 P.2d 161, *supra*, §626: i.e., before the statute of limitations begins to run, the client's injury must be irremediable. (See *Southland Mechanical Constructors Corp. v. Nixen* (1981) 119 C.A.3d 417, 433, 173 C.R. 917 [clients suffered irremediable damage when they lost their right to recover on claim that attorney had been engaged to pursue]; *Bell v. Hummel* (1982) 136 C.A.3d 1009, 1017, 186 C.R. 688 [client suffered irremediable damage from attorney's negligent failure to join wife as coplaintiff in medical malpractice when court denied right to join her]; *Robinson v. McGinn* (1987) 195 C.A.3d 66, 74, 240 C.R. 423.)

Under this reasoning, "actual injury" does not occur until the efforts of the client's new attorney to rectify the malpractice in the underlying action are ultimately unsuccessful, i.e., until any appeal of the underlying adverse judgment in the trial court is also decided against the client. This was the analysis employed in *Robinson v. McGinn*. Plaintiff policeman filed a malpractice action in 1980 against attorney M and his law firm for negligence in representing him in a personal injury action, as well as in proceedings to recover workers' compensation benefits and a disability pension should he be unable to return to work. On the advice of M, plaintiff resigned in 1978. His attempts to be reinstated, initiated by new counsel, were unsuccessful; and in 1981, his employer ruled that he was ineligible for a

disability pension. In support of their statute of limitations defense, defendants argued that the cause of action had accrued when plaintiff resigned, because it was then that he suffered actual damage, i.e., loss of his job and prejudice to his claim for a disability pension. The trial judge entered summary judgment for defendants on the part of the complaint based on loss of disability pension. *Held*, reversed.

(a) Harm is actual and appreciable only when it becomes irremediable. (195 C.A.3d 74.) This reasoning is consistent with the holding in *Bell*, that the harm did not become actual until the new lawyer's attempts to rectify the malpractice by judicial action proved to be unsuccessful. "We see no reason to reach a different conclusion merely because the new lawyer in the instant case sought to rectify the defendant's alleged malpractice through administrative rather than judicial action. The appellant here had a due process and statutory right to a hearing on his employment status and pension claim. Therefore, the statute of limitations was tolled while the appellant pursued the administrative remedies which were available to him as a matter of right. Only when the appellant had exhausted his administrative remedies did the limitations period begin to run." (195 C.A.3d 75.)

(b) Defendants contend that clients who are unhappy with their attorney's performance should be required to file an action within 1 year and then stay the action pending accrual of actual damages. While this proposal might afford some protection against stale claims, it would further burden the already overcrowded court calendars with potentially meritless lawsuits by plaintiffs waiting to learn whether they will suffer irremediable harm. (195 C.A.3d 77.) Although victims of attorney malpractice should take some steps to mitigate damages, they are not required to take expensive and burdensome steps, such as initiating legal action. Here, new counsel attempted to obtain a ruling on plaintiff's employment status and a hearing on his disability pension. These were appropriate steps to minimize damages, because they could well have rectified the problems created by defendants' alleged malpractice and rendered this action unnecessary. (195 C.A.3d 78.)

(2) *Actual Injury Occurs When Client Suffers Adverse Judgment in Trial Court.* Other courts, relying on the *Neel* dicta, held that when the client is a losing plaintiff in the underlying action, actual injury occurs on dismissal of the negligent attorney (see *infra*, §643 et seq.) and entry of an adverse judgment in the trial court; for these courts, the date of injury is not affected by any subsequent appeal. (*Troche v. Daley* (1990) 217 C.A.3d 403, 410, 266 C.R. 34 [while defendant's alleged negligence occurred when he failed to effect service, plaintiff did not suffer injury from that negligence until her lawsuit was dismissed; plaintiff's unsuccessful attempts to appeal dismissal of action did not affect date she suffered actual harm]; *Worton v. Worton* (1991) 234 C.A.3d 1638, 1651, 286 C.R. 410 [actual injury to plaintiff, who alleged that her attorney in marital dissolution action had negligently failed to discover spouse's excess assets, occurred on entry of dissolution judgment].)

In *Turley v. Wooldridge* (1991) 230 C.A.3d 586, 281 C.R. 441, plaintiff alleged that in June 1982 defendant, her attorney, negligently negotiated a marriage termination agreement in which she received less than half of the community property and no spousal support. She filed her complaint in June 1987, after the 4-year period had run. She contended that the tolling provisions applied because she did not suffer "actual injury" until the time that she was no longer able to modify the final judgment or dissolution (July 1983). *Held*, the statute was a bar. She suffered "actual injury" from the allegedly unequal community property division when she executed the agreement; she suffered "actual injury" in connection with spousal support when the introductory judgment of dissolution was entered; and both events occurred more than 4 years before she filed her malpractice action. (230 C.A.3d 593.)

The Supreme Court ultimately resolved the dispute among the Courts of Appeal in favor of the adverse judgment line of cases, and disapproved in part those cases holding that damages must be irremediable before the statute of limitations begins to run. (See *Laird v. Blacker* (1992) 2 C.4th 606, 7 C.R.2d 550, 828 P.2d 691, *infra*, §633; 24 Southwestern U. L. Rev. 1, 10 [conflict among Courts of Appeal and its resolution in *Laird*].)

SUPPLEMENT: [This section is current through the latest supplement]



85 of 145 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XIV. STATUTE OF LIMITATIONS: TORT ACTIONS

J. Attorney Malpractice: One or Four Years.

4. Tolling Until Actual Injury.

a. Litigational Malpractice.

2. Laird Rule: Adverse Judgment or Dismissal.

3 *Witkin Cal. Proc. Actions* § 633

[§ 633] Laird Rule: Adverse Judgment or Dismissal.

In *Laird v. Blacker* (1992) 2 C.4th 606, 7 C.R.2d 550, 828 P.2d 691, plaintiff, a television writer, retained the law firm of B & S to prosecute a lawsuit against S-G, a television production company, for allegedly using her script without acknowledgment or credit. B & S failed to pursue the matter, and she then retained attorneys P and W. On October 20, 1981, the action was dismissed for lack of prosecution. On December 7, 1981, plaintiff discharged P and W and filed a notice of appeal in pro. per. because she could not afford fees for the appeal. On September 15, 1982, she settled with S-G for \$ 1,000 and voluntarily dismissed her appeal. She filed the present malpractice against B & S 19 months after her underlying action against S-G was dismissed and 17 months after P and W were discharged, but only 8 months after she voluntarily dismissed her appeal. In February 1986 she amended the complaint to add P and W as defendants. She settled with B & S for \$ 50,000, and proceeded to trial against P and W. Defendants moved for a nonsuit, on the ground that the 1-year limitations period of C.C.P. 340.6(a) began running when her action against S-G was dismissed, regardless of her appeal from the dismissal. The trial judge denied the motion, and the jury awarded plaintiff \$ 1.7 million in damages. The Court of Appeal reversed the judgment, holding that the statute of limitations began to run at the time her case was dismissed and judgment was entered against her, and that it was not tolled during the appeal. *Held*, Court of Appeal decision affirmed.

(a) C.C.P. 340.6, adopted in 1977, codified the discovery rule of *Budd v. Nixen* (1971) 6 C.3d 195, 98 C.R. 849, 491 P.2d 433, supra, §628, and *Neel v. Magana, Olney, Levy, Cathcart & Gelfand* (1971) 6 C.3d 176, 98 C.R. 837, 491 P.2d 421, supra, §627, that the cause of action accrues when the client suffers appreciable and actual harm from the malpractice. (2 C.4th 611.) But *Budd's* reference to "monetary damage" caused conflict in the decisions of the *Courts of Appeal*. (2 C.4th 612; see supra, §632.) Recent cases hold that when the client is a losing plaintiff in the underlying action, an appeal from the dismissal of the action does not affect the date of actual harm, i.e., adverse judgment and dismissal of the negligent attorney. (2 C.4th 612, citing *Troche v. Daley* (1990) 217 C.A.3d 403, 266 C.R. 34, and *Turley v. Wooldridge* (1991) 230 C.A.3d 586, 281 C.R. 441, supra, §632.) "The foregoing cases recognize that the focus of section 340.6 is on *discovery* of the malpractice and actual injury, not success on appeal or proof of the total amount of monetary damages suffered by the former client." (2 C.4th 614.) Plaintiff sustained actual injury when the trial judge

dismissed her underlying action and she was compelled to incur legal costs and expenditures in pursuing an appeal. (2 C.4th 615.)

(b) Plaintiff contended that she did not suffer actual injury until her appeal was dismissed, because until that point her damages were only speculative. But plaintiff confuses the distinction between fact and knowledge of damage and the amount of damage. (2 C.4th 615.) *Heyer v. Flaig* (1969) 70 C.2d 223, 74 C.R. 225, 449 P.2d 161, supra, §626, *Bell v. Hummel* (1982) 136 C.A.3d 1009, 186 C.R. 688, *Southland Mechanical Constructors Corp. v. Nixen* (1981) 119 C.A.3d 417, 173 C.R. 917, and *Robinson v. McGinn* (1987) 195 C.A.3d 66, 240 C.R. 423, supra, §632, are disapproved to the extent that they conflict with this view. (2 C.4th 617.)

(c) "The policy behind the limited tolling periods in the statute is clear. If we nonetheless hold that the statute is tolled pending an appeal, we allow clients, with knowledge that they have suffered actual injury, unilaterally to control the commencement of the statute of limitations and hence undermine the legislative goal of resolving cases while the evidence is fresh, witnesses are available, and memories have not faded." (2 C.4th 618.)

Although *Laird* definitely (a) decided that the statute of limitations is not tolled during an appeal of an underlying action, and (b) repudiated the "irremediable damage" analysis of *Heyer v. Flaig*, it did not conclusively resolve the question of when actual injury occurs in all cases. As one commentator has observed:

"On the one hand, *Laird* states flatly that 'the statute for legal malpractice actions commences on entry of adverse judgment or final order of dismissal.' On the other hand, *Laird* also states that the plaintiff 'sustained actual injury when the trial court dismissed her underlying action and she was compelled to incur legal costs and expenditures in pursuing an appeal.' In addition, the court in *Laird* relied heavily on the opinion in *Budd v. Nixen*, in which the court held that it was a question of fact whether the plaintiff suffered damage upon entry of judgment or when 'he was compelled to incur and pay attorney's fees and legal costs and expenditures.' ... Because of this ambiguity in *Laird*, subsequent California cases have been sharply divided." (24 Southwestern U. L. Rev. 1, 12; 14 A.L.R.6th 1 [tolling of statute based on attorney's conduct of litigation and delay or inaction in conducting client's affairs]; see *infra*, §634 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]



86 of 145 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XIV. STATUTE OF LIMITATIONS: TORT ACTIONS

J. Attorney Malpractice: One or Four Years.

4. Tolling Until Actual Injury.

a. Litigational Malpractice.

3. Distinction: Negligent Advice About Settlement.

3 *Witkin Cal. Proc. Actions* § 634

[§ 634] Distinction: Negligent Advice About Settlement.

Laird v. Blacker (1992) 2 C.4th 606, 7 C.R.2d 550, 828 P.2d 691, *supra*, §633, was distinguished in cases in which the alleged malpractice consisted of inducing plaintiffs to enter into unfavorable settlement agreements.

In *Hensley v. Caietti* (1993) 13 C.A.4th 1165, 16 C.R.2d 837, the parties negotiated a stipulated settlement at a settlement conference. The trial judge approved the stipulation, informed the parties that it was effective immediately, and directed defendant to prepare the judgment. However, judgment was not entered until 2 months later because plaintiff discharged defendant and retained a new attorney before the proposed judgment could be agreed upon. *Held*, for purposes of C.C.P. 340.6(a)(1), plaintiff sustained actual injury when she entered into the marital settlement agreement, not when the agreement was subsequently incorporated in the judgment.

(a) *Laird* is inapposite, and "cannot reasonably be construed to have addressed the point whether events other than entry of an adverse judgment can satisfy the criteria of actual injury." (13 C.A.4th 1174.) "Negligent legal advice which induces a client to enter into a binding contract resolving marital property and support issues results in actual injury at the point of entry." (13 C.A.4th 1175, citing *Turley v. Wooldridge* (1991) 230 C.A.3d 586, 281 C.R. 441, *supra*, §632.)

(b) Here, the contract allegedly deprived defendant of her fair share of community property, and the stipulation approving the agreement was effective immediately. (13 C.A.4th 1175.) The injury was a consequence of entry into the contract, and the fact that some or all of the provisions of the agreement were subsequently incorporated in the judgment did not delay actual injury until the judgment took effect. (13 C.A.4th 1175, 1176.) (For issue whether statute is tolled where defendant continues to represent plaintiff, see *infra*, §643 et seq.)

In *Bennett v. McCall* (1993) 19 C.A.4th 122, 126, 23 C.R.2d 268, plaintiff entered into a binding settlement agreement, but decided the next day that it was unfavorable. Defendants advised him that the settlement was advantageous but commenced negotiations to attempt to revise it. When the negotiations ultimately proved unsuccessful, defendants withdrew their representation. Nearly 10 months after plaintiff had entered into the settlement, he retained substitute counsel and paid that counsel \$ 1,500. About 10 months later, the final judgment of dissolution,

incorporating the settlement agreement, was entered. *Held*, plaintiff suffered actual injury when he was compelled, as a result of defendants' error, to incur attorneys' fees for substitute counsel, and not when the judgment was entered. (19 C.A.4th 126.)

In *Tchorbadjian v. Western Home Ins. Co.* (1995) 39 C.A.4th 1211, 46 C.R.2d 370, plaintiffs filed a legal malpractice action against defendant, who had been retained by their homeowners insurer to defend them in an underlying action brought by a visitor injured while on their premises. *Held*, for purposes of C.C.P. 340.6(a)(1), plaintiffs sustained actual injury when they entered into an adverse settlement of the underlying action, and not earlier either when they discovered the conduct constituting the alleged malpractice, or when they incurred attorneys' fees in hiring another attorney to protect their interests and to represent them in a declaratory relief action instituted by the insurer. (39 C.A.4th 1223.)

In *Pompilio v. Kosmo, Cho & Brown* (1995) 39 C.A.4th 1324, 46 C.R.2d 409, plaintiffs settled an underlying action during binding arbitration proceedings, but then reneged. At a second arbitration hearing, the arbitrator upheld the settlement, and his ruling was confirmed in a judgment entered against plaintiffs 3 years later. Plaintiffs then brought a legal malpractice action against defendant attorneys who negotiated the settlement for them. *Held*, for purposes of C.C.P. 340.6(a)(1), plaintiffs sustained actual injury when they agreed to settle the dispute, and not later when the adverse judgment confirming the settlement was entered. That plaintiffs resisted the enforcement of the settlement and sought to set it aside was of no import. (39 C.A.4th 1327, distinguishing *Laird*.) (See 13 A.L.R.6th 1 [tolling of statute where attorney provides negligent advice or fails to advise]; 14 A.L.R.6th 1 [tolling of statute based on attorney's conduct of litigation and delay or inaction in conducting client's affairs].)

SUPPLEMENT: [This section is current through the latest supplement]



87 of 145 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XIV. STATUTE OF LIMITATIONS: TORT ACTIONS

J. Attorney Malpractice: One or Four Years.

4. Tolling Until Actual Injury.

b. Transactional Malpractice.

1. Conflicting Decisions in Courts of Appeal.

3 *Witkin Cal. Proc. Actions* § 635

[§ 635] Conflicting Decisions in Courts of Appeal.

Laird v. Blacker (1992) 2 C.4th 606, 7 C.R.2d 550, 828 P.2d 691, *supra*, §633, dealt with when actual injury occurs for purposes of statutory tolling where it is alleged that the malpractice occurred in the course of litigation. Subsequent cases struggled with the similar question of when actual injury occurs in a case involving "transactional malpractice," i.e., malpractice involving nonlitigational legal services, whether simply oral or written advice or the preparation of contractual or other documents, that thereafter result in litigation or otherwise cause harm for the client. (See *ITT Small Business Finance Corp. v. Niles* (1994) 9 C.4th 245, 250, 36 C.R.2d 552, 885 P.2d 965, *infra*, §636 [negligent preparation of documents]; *Karno v. Biddle* (1995) 36 C.A.4th 622, 629, 42 C.R.2d 318 [construing *ITT* definition to also include negligent oral or written advice].)

In transactional malpractice cases, does actual injury occur when the plaintiff incurs attorneys' fees or any other kind of monetary injury in defending his legal position as a result of the transactional malpractice? Or does actual injury occur later when the malpractice results in an adverse settlement, dismissal, or judgment?

Kovacevich v. McKinney & Wainwright (1993) 16 C.A.4th 337, 19 C.R.2d 692, endorses the first view. Defendant attorney and others solicited plaintiff to enter a joint venture to organize a new bank, and plaintiff became a member of the bank's interim board of directors. An existing lender bank extended credit to the new bank, requiring that each interim director sign personal guaranties, which plaintiff did. The new bank's charter was eventually revoked and the notes from the lender bank went into default, prompting the lender bank to sue plaintiff and others. *Held*, plaintiff suffered actual injury when he incurred attorneys' fees in retaining new counsel to represent him in the bank's action against him, not when he subsequently suffered an adverse judgment in that action. "[U]nlike *Laird*, in which attorney fees arising out of the alleged malpractice were not generated until *after* the underlying action was dismissed and plaintiff appealed, here, actual damages in the form of attorney fees were incurred ... *prior* to the entry of the adverse summary judgment in the underlying action." (16 C.A.4th 343.) (See also pre-*Laird* case of *Johnson v. Simonelli* (1991) 231 C.A.3d 105, 109, 282 C.R. 205 [plaintiff suffered actual damage from promissory note secured by inadequate and defective collateral when buyers defaulted on note, at which point plaintiff was deprived of sufficient security and value of fees he had paid to defendants for their services].)

In *Foxborough v. Van Atta* (1994) 26 C.A.4th 217, 31 C.R.2d 525, defendant attorney drafted an agreement in 1980 for plaintiff, a real estate development general partnership, to convert an apartment complex plaintiff owned into condominiums, transfer them to a corporation in a property exchange, and secure the right to develop a smaller parcel with condominiums that plaintiff could automatically annex to the apartment complex at any time without the approval of the corporation or the condominium owners. However, a state administrative regulation limited that automatic annexation to 3 years, i.e., until 1983. In 1984, plaintiff began developing the smaller parcel, but learned in 1985 that the regulatory period for automatic annexation had expired, and retained defendant to pursue its legal remedies against the corporation. Later that year, plaintiff hired new counsel and filed an action against the corporation for failure to notify plaintiff of the regulatory period before its expiration. When the corporation prevailed in that litigation in 1990, plaintiff brought this legal malpractice action for defendant's failure to advise plaintiff of the existence and effect of the regulation or on how automatic annexation otherwise could have been accomplished. The trial judge granted summary judgment for defendant on the ground that the action was untimely. *Held*, affirmed; there was no basis for tolling the statute.

(a) Citing *Laird*, plaintiff contended that it did not suffer actual injury until it lost its litigation with the corporation in 1990. This is wrong; the malpractice alleged in *Laird* was based on defendants' failure to prosecute the plaintiff's underlying action, thereby creating the legal basis for its dismissal. Before entry of adverse judgment in that lawsuit, the *Laird* defendants' malpractice had produced only potential injury. (26 C.A.4th 225.) Here, the adverse judgment in the litigation with the corporation was not the first injury resulting from defendant's alleged negligence, but rather, was merely the loss of an alternative means for obtaining monetary relief from that injury. (26 C.A.4th 226.)

(b) Plaintiff suffered actual injury when the 3-year regulatory period expired, which was well outside the statutory limitation. Until then, the alleged negligence created only the potential for harm, because plaintiff could have proceeded with development and automatic annexation; thereafter, plaintiff could not obtain automatic annexation--one of its key objectives. (26 C.A.4th 227.)

However, *Sirrott v. Latts* (1992) 6 C.A.4th 923, 8 C.R.2d 206, appears to support both views. Plaintiff physician followed defendant attorneys' advice that he did not have to pay his malpractice insurer a \$ 50,000 premium for "tail" medical malpractice coverage. Thereafter, plaintiff was sued for medical malpractice and retained new counsel to represent him in that action at his own expense. Attorneys' fees for the representation were incurred on January 20, 1987, when plaintiff's retained counsel filed a demurrer to the medical malpractice complaint on his behalf. Defendants' attempt to reinstate plaintiff's tail malpractice insurance ended in failure on August 7, 1987, when an arbitration proceeding by the insurer against plaintiff resulted in an award determining that the insurer was not obligated to defend or indemnify plaintiff in the medical malpractice action. This award was confirmed by judgment entered on January 7, 1988. On January 11, 1990, plaintiff paid \$ 230,000 to settle the medical malpractice action, and on January 31, 1990, plaintiff instituted the present legal malpractice action alleging that, but for defendants' negligent advice, he would have had full coverage for defense and indemnity costs in the medical malpractice action. *Held*, the action was barred by C.C.P. 340.6(a); over 1 year had expired after plaintiff sustained actual injury.

(a) Under C.C.P. 340.6, the 1-year statute of limitations does not begin to run simply when the plaintiff knows, or should know, of the attorney's negligence; the plaintiff must also sustain actual and appreciable harm. (6 C.A.4th 928, citing *Budd v. Nixen* (1971) 6 C.3d 195, 98 C.R. 849, 491 P.2d 433, *supra*, §628.) Here, plaintiff sustained harm on January 20, 1987, when he incurred attorneys' fees as a result of the demurrer filed on his behalf. It is irrelevant that these fees did not exceed the \$ 50,000 premium that plaintiff would have been required to pay had he not followed defendants' advice. Plaintiff cited no authority for the proposition that injury suffered by the client may be negated in this manner (a form of offset) for purposes of determining when the statute of limitations for legal malpractice begins to run. (6 C.A.4th 929.)

(b) In any event, plaintiff suffered additional actual harm on January 7, 1988, the date the arbitration award was confirmed. On that date plaintiff suffered actual damage by the irretrievable loss of the right to tail medical malpractice insurance coverage. For purposes of C.C.P. 340.6, actual damage need not be defined in terms of monetary amount. (6

C.A.4th 929, citing *Laird*.)

(c) Plaintiff contended that the harm he sustained on account of defendants' alleged negligence did not become irremediable until January 11, 1990, i.e., the date he agreed to settle the medical malpractice action for \$ 230,000, because prior to that date his medical negligence was merely speculative. This argument is without merit in view of the holding in *Laird v. Blacker* that the damage need not be irremediable before the statute of limitations for legal malpractice begins to run. (6 *C.A.4th 929*.)

(d) Plaintiff sustained actual damage on entry of the judgment confirming the arbitration award (January 7, 1988) because at that point it was judicially determined that he was not entitled to tail malpractice insurance coverage, and he was compelled to pay the expenses of defending the medical malpractice action regardless of the outcome of that action. Hence, the 1-year statute of limitations began to run on that date. And this result is not changed by the fact that plaintiff suffered additional damages from defendants' negligence when he paid \$ 230,000 to settle the medical malpractice action. It is not necessary that the plaintiff sustain all, or even the greater part, of the damages occasioned by his attorney's negligence to begin the running of the 1-year limitations period. (6 *C.A.4th 930*, citing *Budd v. Nixen*.) (See strong dissenting opinion, 6 *C.A.4th 930*.)

SUPPLEMENT: [This section is current through the latest supplement]



88 of 145 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XIV. STATUTE OF LIMITATIONS: TORT ACTIONS

J. Attorney Malpractice: One or Four Years.

4. Tolling Until Actual Injury.

b. Transactional Malpractice.

2. ITT Rule: Adverse Judgment, Settlement, or Dismissal.

3 *Witkin Cal. Proc. Actions* § 636

[§ 636] ITT Rule: Adverse Judgment, Settlement, or Dismissal.

In *ITT Small Business Finance Corp. v. Niles* (1994) 9 C.4th 245, 36 C.R.2d 552, 885 P.2d 965, plaintiff lender brought a legal malpractice action alleging that defendant attorney had negligently prepared loan documents, requiring plaintiff to defend the adequacy of the loan documentation in an adversary proceeding brought by the debtor. Ultimately, the debtor's proceeding was settled adversely to plaintiff. The malpractice action was filed less than 2 months after the settlement, but over 2 years after the commencement of the adversary proceeding. *Held*, the action was not barred by the 1-year limitations period; in "transactional malpractice" cases, actual injury, for purposes of the tolling provision of C.C.P. 340.6(a)(1), occurs on entry of adverse judgment, settlement, or dismissal in the trial court of the third-party action.

(a) *Nature of problem.*

(1) Since *Laird v. Blacker* (1992) 2 C.4th 606, 7 C.R.2d 550, 828 P.2d 691, *supra*, §633, several Courts of Appeal have struggled with the question of when actual injury occurs under C.C.P. 340.6(a)(1) in cases involving transactional malpractice. "This is an issue separate from that addressed in *Laird*, but one subject to analogous reasoning. Unlike the *Laird* plaintiff, who sought to toll the statute of limitations during the pendency of an *appeal* of an adverse judgment caused by her former attorney's negligent representation, the plaintiff here seeks to toll the statute of limitations while the adequacy of the documents that formed the basis of the transaction is initially litigated. In other words, plaintiff is claiming that actual injury does not occur until judgment or settlement of the transactional litigation." (9 C.4th 250, 251; see *supra*, §635.)

(2) Conversely, defendant asserted that the better rule is stated in Court of Appeal cases concluding that actual injury occurs when the plaintiff incurs attorneys' fees either (a) in defending the adequacy of the documentation in the third-party action, or (b) in defending its reliance on the allegedly negligent attorney in that action. (9 C.4th 251.)

(b) *Case law not applicable.* The cases cited by defendant are either wrongly decided, distinguishable, or in accord with the decision here:

(1) *Sirott v. Latts* (1992) 6 C.A.4th 923, 8 C.R.2d 206, supra, §635, does not conflict with our holding here. In that case, defendant attorneys negligently advised plaintiff physician that he did not have to purchase a specific type of medical malpractice insurance. When plaintiff was sued for medical malpractice, he commenced an unsuccessful arbitration proceeding to reinstate the insurance, requiring plaintiff to bear the costs of defending and settling the malpractice case. *Sirott* did not hold that the legal fees incurred in litigating the arbitration proceeding itself represented sufficient actual injury; rather, it held that the legal malpractice action accrued once the arbitration judgment was entered, necessarily determining that defendants' advice was negligent. (9 C.4th 251, 252.) "In the present case, the adversary proceeding is analogous to the arbitration in *Sirott*. Here, there was no indication the attorney's alleged negligent preparation of documents would cause ITT loss until it was forced to settle on adverse terms with its debtor." (9 C.4th 252.)

(2) *Johnson v. Simonelli* (1991) 231 C.A.3d 105, 282 C.R. 205, incorrectly determined that plaintiff suffered actual injury when the buyers defaulted on a negligently drafted promissory note, rather than when the collateral securing the note was sold for less than the balance, and is disapproved. (9 C.4th 253.)

(3) *Kovacevich v. McKinney & Wainwright* (1993) 16 C.A.4th 337, 19 C.R.2d 692, supra, §635, erred in holding that plaintiff suffered actual injury when he incurred legal fees after hiring substitute counsel to mitigate the harm caused by signing a personal guarantee for notes securing lines of credit to establish a new bank, rather than when an adverse summary judgment was entered against him, and thus is also disapproved. (9 C.4th 253, 254.)

(4) *Hensley v. Caietti* (1993) 13 C.A.4th 1165, 16 C.R.2d 837, supra, §634, is distinguishable. The malpractice there consisted of inducing plaintiff to enter into an unfavorable marital settlement agreement. Actual injury occurred when plaintiff stipulated to the agreement, and not on entry of the subsequent dissolution judgment, because the stipulation acted immediately to deprive plaintiff of certain property. (9 C.4th 255, noting that *Bennett v. McCall* (1993) 19 C.A.4th 122, 126, 23 C.R.2d 268, supra, §634, is to the same effect.) Here, ITT did not suffer actual injury until it entered into the adverse settlement agreement with the debtor. (9 C.4th 255.)

(c) *Plaintiff's defense in adversary proceeding does not conclusively determine accrual.* Defendant claimed that plaintiff's defense of the loan documentation in the adversary proceeding amounted to a judicial admission that was conclusive evidence that plaintiff had discovered the malpractice and suffered actual injury at the time it defended the adversary proceeding. This claim is without merit. Both knowledge and actual injury must be present before a legal malpractice cause of action will accrue. Thus, plaintiff's statement in its pleadings that it defended the documentation in the adversary proceeding in an attempt to mitigate its damages might indicate that plaintiff discovered the potential malpractice at the time the adversary proceeding was filed, but did not conclusively establish or admit that plaintiff was actually damaged by the malpractice. (9 C.4th 256, 257.)

(d) *Public policy considerations.* The actual injury rule here does not conflict with *Laird's* holding that tolling periods should be limited to avoid allowing clients unilaterally to control the commencement of the statute of limitations and hence undermine the legislative goal of resolving cases while evidence is fresh, witnesses are available, and memories have not faded. This policy is applicable where the client has discovered the malpractice and suffered actual injury; in the lender's case, actual injury did not result until the adverse settlement. Plaintiff here notified defendant that he should contact his malpractice insurer as soon as plaintiff realized it would have to defend the documentation prepared by defendant, and it would be wasteful to require both the adversary proceeding and the attorney malpractice action to be litigated simultaneously. (9 C.4th 257.)

(e) *Accrual on entry of adverse judgment, settlement, or dismissal of underlying action.* "[W]e conclude that in transactional legal malpractice cases, when the adequacy of the documentation is the subject of dispute, an action for attorney malpractice accrues on entry of adverse judgment, settlement, or dismissal of the underlying action. It is at this point that the former client has discovered the fact of damage *and* suffered 'actual injury' due to the malpractice under section 340.6. Therefore, in the present case, the statute of limitations of section 340.6 was tolled until the action contesting the documentation was concluded." (9 C.4th 258.) (See 23 *Pepperdine L. Rev.* 705.)

SUPPLEMENT: [This section is current through the latest supplement]



89 of 145 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XIV. STATUTE OF LIMITATIONS: TORT ACTIONS

J. Attorney Malpractice: One or Four Years.

4. Tolling Until Actual Injury.

b. Transactional Malpractice.

3. Problems With ITT Rule.

3 *Witkin Cal. Proc. Actions* § 637

[§ 637] Problems With ITT Rule.

After the Supreme Court issued its ruling in *ITT Small Business Finance Corp. v. Niles* (1994) 9 C.4th 245, 36 C.R.2d 552, 885 P.2d 965, supra, §636, problems immediately arose. Some Courts of Appeal struggled to apply the *ITT* rule that actual injury in transactional malpractice occurs on the entry of an adverse judgment, a settlement, or a dismissal of the underlying action, while other Court of Appeal decisions distinguished the rule.

(1) *ITT Rule Followed*. A number of cases have followed the *ITT* rule. (See *Karno v. Biddle* (1995) 36 C.A.4th 622, 627, 42 C.R.2d 318 [defendants failed to advise plaintiff mobilehome park owners that they were required to give residents notice as condition of changing parks' rules and regulations to conform to federal legislation prohibiting housing discrimination against families with children; actual injury occurred when action by residents against plaintiffs was settled and dismissed]; *Baltins v. James* (1995) 36 C.A.4th 1193, 42 C.R.2d 896 [defendant negligently advised plaintiff husband and wife about transferring property while plaintiff husband appealed order setting aside his property settlement with his former spouse; actual injury occurred when judgment in dissolution action held that husband had breached fiduciary duties owed to former spouse and denied him reimbursement credits with respect to transferred property]; *Levin v. Graham & James* (1995) 37 C.A.4th 798, 803, 44 C.R.2d 69 [defendant negligently prepared city ballot initiative; actual injury occurred when court declared initiative invalid]; *Marshall v. Gibson, Dunn & Crutcher* (1995) 37 C.A.4th 1397, 1405, 44 C.R.2d 339 [defendant negligently prepared and gave advice about partnership compensation plan; actual injury occurred when arbitrator issued adverse rule affecting plaintiff's rights under plan in underlying proceeding].)

(2) *ITT Rule Distinguished: No Independent Proceeding*. *ITT* was distinguished in *Radovich v. Locke-Paddon* (1995) 35 C.A.4th 946, 968, 41 C.R.2d 573. Plaintiff R sued defendant attorney for malpractice and breach of fiduciary duty after defendant prepared a new will for plaintiff's wife that named plaintiff as a beneficiary, but that had not been executed when the wife died. The trial judge ruled that the action was time barred, because plaintiff had sustained actual injury more than 4 years earlier when he executed a prenuptial agreement relinquishing community property rights in his wife's estate. *Held*, affirmed.

(a) *Governing rule: "empirical certainty."*

(1) As an abstract proposition, the search for the first actual injury under *C.C.P. 340.6* should be easy. The first injury of any kind to the plaintiff, attributable to the defendant attorney's malfeasance or nonfeasance, should suffice. But to apply the abstract proposition to real facts is not invariably easy. The effect of asserted legal malpractice should not be identified as actual injury until it has reached a point (on a continuum between the asserted malpractice and the point at which its injurious effects become "irremediable") at which injury has been made to appear with an empirical certainty sufficient to allay the law's distaste for speculation. (35 *C.A.4th* 971.)

(2) "When the issue of actual injury will or may be resolved in a dispute-resolution proceeding separate from the malpractice action itself, the more recent cases have manifested unwillingness to find sufficient empirical certainty before initial disposition (by settlement, judgment, or otherwise) of the separate proceeding, and neither the occurrence nor the cost of the separate proceeding will itself be regarded as 'actual injury.' " (35 *C.A.4th* 972, citing and discussing *ITT*.)

(3) However: "In a case ... where the separate proceeding apparently would provide no occasion to assess whether the client had suffered actual injury, or in a case in which there is no separate proceeding at all, the Supreme Court has indicated it would consider other empirical indicia of actual injury." (35 *C.A.4th* 973, citing and discussing *ITT* and *Foxborough v. Van Atta* (1994) 26 *C.A.4th* 217, 31 *C.R.2d* 525, *supra*, §635.)

(b) *ITT and Foxborough distinguished.* "The matter before us, although it involves allegations of breach of fiduciary duty rather than of legal malpractice as such, is, like *ITT* and *Foxborough*, a case of asserted malfeasance in a transactional setting. But unlike *ITT* and *Foxborough* it involved no independent dispute-resolution proceeding at all: so far as the record reflects, until R sued the defendants themselves he had neither brought nor been called upon to defend a proceeding of any kind. Thus, because there is no 'underlying action,' this matter does not come within *ITT*'s 'narrow' holding that actual injury in a transaction malpractice case is to be established by 'entry of adverse judgment, settlement, or dismissal of the underlying action.' " (35 *C.A.4th* 974.)

(c) *Turley and Hensley followed.* The matter here is analogous to *Turley v. Wooldridge* (1991) 230 *C.A.3d* 586, 281 *C.R. 441*, *supra*, §632, and *Hensley v. Caietti* (1993) 13 *C.A.4th* 1165, 16 *C.R.2d* 837, *supra*, §634. "[I]n each ... a Court of Appeal found actual injury upon execution of an agreement dividing marital property in the course of dissolution proceedings. In each instance the client asserted that the attorney had given inadequate advice and representation in connection with the agreement; in each instance the ongoing dissolution proceeding gave no occasion to test the client's hypothesis that the asserted malpractice had injured the client." (35 *C.A.4th* 976.) "[T]here was sufficient empirical certainty of actual injury in 1957, when R executed the prenuptial agreement, as well as in 1974 and again in 1985 when he reaffirmed in writing the apparent effect of the 1957 agreement." (35 *C.A.4th* 977.)

(3) *ITT Rule Distinguished: Missed Opportunity Malpractice.* In *Sindell v. Gibson, Dunn & Crutcher* (1997) 54 *C.A.4th* 1457, 63 *C.R.2d* 594, plaintiffs sued defendant law firm for malpractice in its handling of their deceased father's estate plan. Plaintiffs alleged that defendant negligently failed to obtain the consent of K, the father's second wife (who was not plaintiffs' mother), to the characterization of the estate plan property as the father's separate property. K subsequently became mentally incompetent to give that consent, resulting in plaintiffs' being sued by K's children over what property was included in the father's estate when he died. Relying on *ITT*, the trial judge ruled as a matter of law that plaintiffs had not sustained actual injury under *C.C.P. 340.6(a)(1)* until that litigation was resolved, and dismissed plaintiffs' action as premature. *Held*, reversed.

(a) *Actual injury occurred when plaintiffs incurred attorneys' fees in defending pending litigation.* Unlike *ITT*, the malpractice here did *not* involve the adequacy of defendant's estate plan documentation, e.g., its completeness as to formalities, its compliance with law, its specificity as to assets conveyed, its description of persons to be benefited, or its usefulness in avoiding adverse tax consequences. Instead, defendant's failure to obtain K's consent, when she was willing and able to give it, made possible litigation asserting a community property claim that could not have otherwise

been raised, or if raised, could have been summarily disposed of. (54 C.A.4th 1468, 1469.) The pending litigation against plaintiffs represented the loss of the bargained for benefit, and was itself the event constituting damage, measured by the attorneys' fees incurred in defending the action. The outcome of the pending litigation was relevant only to the amount of plaintiffs' damages, not to the fact of their injury. Thus, the malpractice action was not premature. (54 C.A.4th 1470, 1471.)

(b) *Determination of actual injury is question of fact.* Although not a "missed statute of limitations" case, the present action is nevertheless analogous to *Adams v. Paul* (1995) 11 C.4th 583, 46 C.R.2d 594, 904 P.2d 1205, *infra*, §640, and thus the question of actual injury is a question of fact that cannot be resolved as a matter of law. (54 C.A.4th 1472.) The defendants' failure to timely obtain consent to the transfers and gifts contemplated by decedent's estate plan is "analogous to the 'missed' opportunities malpractice presented in ... *Adams*." (54 C.A.4th 1472, footnote 10.) "Whether plaintiffs have in fact sustained the damages which they claim, and when, are matters which they will have to prove." (54 C.A.4th 1473.)

(4) *ITT Overruled.* The Supreme Court ultimately overruled *ITT* to the extent it declared a broad categorical rule that in transactional legal malpractice cases where the adequacy of the documentation is the subject of dispute, actual injury occurs on entry of adverse judgment, settlement, or dismissal of the underlying action. (See *Jordache Enterprises v. Brobeck, Phleger & Harrison* (1998) 18 C.4th 739, 763, 76 C.R.2d 749, 958 P.2d 1062, *infra*, §638.)

SUPPLEMENT: [This section is current through the latest supplement]



90 of 145 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XIV. STATUTE OF LIMITATIONS: TORT ACTIONS

J. Attorney Malpractice: One or Four Years.

4. Tolling Until Actual Injury.

b. Transactional Malpractice.

4. ITT Rule Overruled: Malpractice Is Question of Fact.

3 *Witkin Cal. Proc. Actions* § 638

[§ 638] ITT Rule Overruled: Malpractice Is Question of Fact.

In *Jordache Enterprises v. Brobeck, Phleger & Harrison* (1998) 18 C.4th 739, 76 C.R.2d 749, 958 P.2d 1062, a 5-2 majority of the Supreme Court clarified prior rulings on tolling of the 1-year statute of limitations in a legal malpractice action until the plaintiff sustains actual injury (C.C.P. 340.6(a)(1)). Plaintiff client retained defendant attorneys in 1984 to defend it against an action filed by a third party. Defendants did not advise plaintiff that its liability insurance might cover the third-party action. However, when plaintiff switched attorneys 3 years later in 1987, the new attorneys so advised plaintiff, but cautioned that its delay in notifying its insurers might jeopardize coverage. After plaintiff's insurers did, in fact, refuse to cover the third-party action, plaintiff sued them for \$ 30 million for failure to defend, but ultimately accepted a settlement of \$ 12 million in 1990. Plaintiff then brought the present malpractice action within 1 year of the settlement, alleging that defendants' failure to investigate the possibility of insurance coverage hindered its ability to defend itself in the third-party action and forced it to pay millions of dollars in attorneys' fees. Plaintiff claimed that the legal malpractice action was timely, because it was tolled until plaintiff sustained actual injury, i.e., when plaintiff settled with its insurers for less than the full amount. The trial judge disagreed, ruling that the actual injury occurred in 1987 when plaintiff first discovered defendants' malpractice, and dismissed the action as time-barred. *Held*, affirmed.

(a) *Actual injury in general.* *Adams v. Paul* (1995) 11 C.4th 583, 46 C.R.2d 594, 904 P.2d 1205, *infra*, §640, the most recent Supreme Court decision to consider the actual injury provision, was a plurality opinion. However, the *Jordache* court adopted its conclusions (18 C.4th 743, 748):

- (1) Determining actual injury is predominantly a factual inquiry.
- (2) Actual injury may occur without prior adjudication, judgment, or settlement.
- (3) Nominal damages, speculative harm, and the mere threat of future harm are not actual injury.
- (4) The relevant consideration is the fact of damage, not the amount.

These propositions follow from *Budd v. Nixen* (1971) 6 C.3d 195, 98 C.R. 849, 491 P.2d 433, supra, §628, which the Legislature intended to codify in C.C.P. 340.6. In sum: "Actual injury occurs when the client suffers any loss or injury legally cognizable as damages in a legal malpractice action based on the asserted errors or omissions." (18 C.4th 743, 751.)

(b) *Actual injury in present case.* Defendants' alleged negligence, which plaintiff admitted it discovered more than 1 year before filing the action, allowed plaintiff's insurers to raise an objectively viable defense to coverage. The insurers' assertion of this defense necessarily increased plaintiff's costs to litigate its coverage claims and reduced the settlement value of those claims. Moreover, plaintiff was required to provide its own defense in the third-party action for several years. Thus, plaintiff not only lost a primary benefit of liability insurance, it also lost profitable alternative uses for the substantial sums it paid in defense costs. (18 C.4th 743, 752.) These detrimental effects were not contingent on the outcome of the insurance coverage action. Further, that action could not establish either a breach of a duty to provide timely insurance advice or a causal relationship between the alleged neglect and the claimed damages. Instead, the coverage action settlement simply reflected plaintiff's preexisting predicament--defendants' alleged negligence had diminished plaintiff's right to its liability insurance benefits, and the loss or diminution of a right or remedy constitutes injury or damage. Neither uncertainty of amount nor difficulty of proof renders that injury speculative or inchoate. The coverage action settlement was not the first realization of injury from the alleged malpractice; the settlement simply resolved one alternative means to mitigate that injury. (18 C.4th 744, 752.)

(c) *Public policy does not require different result.*

(1) The rule that limitations statutes should be strictly construed to avoid forfeiture of just claims is subject to two caveats: A defendant's right to be free of stale claims takes precedence; and C.C.P. 340.6 reflects a legislative balance between a plaintiff's interest in pursuing a meritorious claim and the public policy interests in prompt assertion of known claims. In any event, the statute's discovery rule and continuous representation tolling provision (see supra, §§631, 632) provide sufficient protection. (18 C.4th 756.)

(2) Concern about judicial economy from premature lawsuits due to the actual injury tolling provision is accommodated by the legislative scheme: a plaintiff still has 1 year after sustaining actionable injury to assess whether and how to pursue a remedy; and the limitations period is tolled while a plaintiff is under a legal or physical disability that restricts his or her ability to sue (see infra, §646). (18 C.4th 756.) "Except for the circumstances specified in the statute, however, the Legislature expressly intended to disallow tolling or extension of the limitations period for other reasons." (18 C.4th 758.)

(3) Concern that attorney-client relationships and privileged matters would be disrupted if clients had to sue their attorneys while pursuing related litigation is addressed by the statute's continuous representation tolling provision. Moreover, case management tools, including stays and protective orders, are available to trial judges. (18 C.4th 758.)

(d) *Effect of ruling on prior decisions.*

(1) The following decisions are either in accord, or do not conflict, with the ruling in this case: *Sirott v. Latts* (1992) 6 C.A.4th 923, 8 C.R.2d 206, supra, §635; *Foxborough v. Van Atta* (1994) 26 C.A.4th 217, 31 C.R.2d 525, supra, §635; *Baltins v. James* (1995) 36 C.A.4th 1193, 42 C.R.2d 896, supra, §637. (18 C.4th 758.)

(2) *International Engine Parts v. Feddersen & Co.* (1995) 9 C.4th 606, 614, 38 C.R.2d 150, 888 P.2d 1279, infra, §652, held that an accountant malpractice action based on negligent preparation of tax returns did not accrue until a tax deficiency was assessed by the Internal Revenue Service. *Feddersen* is distinguishable; it involved a different statute of limitations that is not comparable to the attorney malpractice statute in this case. (18 C.4th 762.)

(3) *ITT Small Business Finance Corp. v. Niles* (1994) 9 C.4th 245, 36 C.R.2d 552, 885 P.2d 965, supra, §636, is overruled to the extent it declared a broad categorical rule that in transactional legal malpractice cases where the adequacy of the documentation is the subject of dispute, actual injury occurs on entry of adverse judgment, settlement,

or dismissal of the underlying action. *C.C.P. 340.6(a)(1)* requires that the facts of each case be examined in light of the specific malpractice alleged in each case. (18 C.4th 763.) This determination "cannot depend on facile, 'bright line' rules." (18 C.4th 764.)

One justice concurred, but would have also overruled *Feddersen*. (18 C.4th 765.) Two justices dissented in separate opinions, arguing that public policy concerns and common sense require a "bright line" rule. (18 C.4th 766, 767.)

Other cases have applied the *Jordache Enterprises* rule. (See 13 A.L.R.6th 1 [tolling of statute where attorney provides negligent advice or fails to advise].) The following are illustrative:

Village Nurseries, L.P. v. Greenbaum (2002) 101 C.A.4th 26, 39, 123 C.R.2d 555 [relying on *Jordache*; in malpractice action against law firms that allegedly misadvised building contractor about protecting its mechanics' liens, plaintiff, who subsequently declared bankruptcy, sustained actual harm when bankruptcy trustee and bankruptcy court questioned validity of liens, and not later when court declared liens invalid].

In re Marriage of Klug (2005) 130 C.A.4th 1389, 1401, 31 C.R.3d 327 [relying on *Jordache*; in malpractice action by wife alleging negligent preparation of family limited partnership by former husband's attorney, injury occurred when husband was able to transfer partnership assets to offshore accounts, and not earlier when wife signed partnership agreement].

Peregrine Funding v. Sheppard Mullin Richter & Hampton LLP (2005) 133 C.A.4th 658, 685, 35 C.R.3d 31 [in action by defrauded investors against attorney for owner of investment company who allegedly aided company and owner in fraud, injury occurred when investors learned of fraud, not when they realized that attorney owed professional duty to them (when they reviewed certain documents and found that attorney possessed details about individual investors' financial contributions to investment funds), which was ancillary to allegations of misconduct in complaint].

Fritz v. Ehrmann (2006) 136 C.A.4th 1374, 1383, 39 C.R.3d 670 [in action alleging negligent preparation of promissory note, actual injury did not occur when note was signed or when interest was prepaid on note, because injury was still speculative and contingent].

SUPPLEMENT: [This section is current through the latest supplement]



91 of 145 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XIV. STATUTE OF LIMITATIONS: TORT ACTIONS

J. Attorney Malpractice: One or Four Years.

4. Tolling Until Actual Injury.

c. Missed Filing Malpractice.

1. Conflicting Decisions in Courts of Appeal.

3 *Witkin Cal. Proc. Actions* § 639

[§ 639] Conflicting Decisions in Courts of Appeal.

Two Court of Appeal cases have expressed opposite views on when actual injury occurs for purposes of statutory tolling when the defendant misses the statute of limitations for filing an underlying action.

In *Finlayson v. Sanbrook* (1992) 10 C.A.4th 1436, 13 C.R.2d 406, plaintiff retained defendant law firm in 1981 to represent him in a workers' compensation claim involving injuries caused by exposure to asbestos. When defendant failed to file a third-party action against the manufacturers and suppliers of asbestos within the 1-year period applicable to asbestos injuries (C.C.P. 340.2), plaintiff filed a malpractice action against it in 1983, as well as a third-party action against the manufacturers and suppliers (through a new attorney). The 1983 malpractice action was dismissed in February 1989 for failure to bring it to trial within 5 years (C.C.P. 583.310). The 1983 third-party claim resulted in a summary judgment against plaintiff, on limitations grounds, on May 26, 1988. On February 6, 1989, plaintiff filed the present legal malpractice action against defendant. The allegations in this action were identical to those in the 1983 malpractice action, with the exception that plaintiff now alleged that he sustained actual injury on May 26, 1988, the date on which summary judgment was rendered against him in the 1983 third-party action. *Held*, the 1989 action was barred by C.C.P. 340.6.

(a) *Case law not applicable.*

(1) Relying on the statement in *Laird v. Blacker* (1992) 2 C.4th 606, 7 C.R.2d 550, 828 P.2d 691, *supra*, §633, that a plaintiff suffers actual injury within the meaning of C.C.P. 340.6 only when there is "an adverse judgment or order of dismissal in the underlying action on which the malpractice action is based," plaintiff contended that he did not suffer such injury until May 1988, when the court granted summary judgment in favor of numerous asbestos defendants. Defendant argued that in "failure to file" cases, such as this one, *Laird* holds that a client suffers actual injury on the date the statute of limitations expired. Defendant's position is correct, but its reliance on *Laird* is misplaced. The malpractice in *Laird* consisted of an attorney's failure to prosecute, which resulted in a dismissal of the action. Hence, because it assumed an "underlying action," *Laird* did not enunciate a rule in failure to file cases. (10 C.A.4th 1440.)

(2) The other cases relied on by defendant, *Johnson v. Haberman & Kassoy* (1988) 201 C.A.3d 1468, 247 C.R. 614, infra, §643, and *Panattoni v. Superior Court* (1988) 203 C.A.3d 1092, 1097, 250 C.R. 390, are also inapplicable. Although they contain some dicta in support of defendant's position, neither case addressed the issue of when actual injury occurs when an attorney fails to file an action within the applicable statute of limitations. (10 C.A.4th 1441.)

(b) *C.C.P. 340.6 commences to run when limitations period for underlying cause of action expires.*

(1) By providing that the 1-year limitations period of *C.C.P. 340.6* does not begin to run until the plaintiff has sustained actual injury, it is clear that the Legislature intended to commence the statute upon discovery of the *fact* of damage, rather than on the *amount* of damage. (10 C.A.4th 1442.) *Laird* supports this conclusion. (10 C.A.4th 1444.) Within the context of an attorney's failure to file before expiration of the applicable limitations period, the fact of damage occurs when a right or remedy is lost due to that failure, even though the amount of damage may not be ascertainable until later. (10 C.A.4th 1442.)

(2) *Laird* specifically repudiated cases holding that damage must be "irremediable" before it becomes "actual injury" within the meaning of *C.C.P. 340.6*. "Thus plaintiff's attempt to 'remedy' some of the harm by filing a third party action ... did not delay accrual of the statute of limitations. Once plaintiff's right was lost, he was damaged even though the amount of his damages had not yet been ascertained." (10 C.A.4th 1443.)

(3) "Although *Laird* repeatedly asserted without qualification that 'actual injury' for purposes of section 340.6 occurs when a client suffers an adverse judgment or order of dismissal in the underlying action ... , we believe that the rule must be qualified to those situations in which there exists a timely filed underlying action. If the *Laird* rule demanded an adverse judgment in missed statute cases, the limitations period could be indefinitely extended simply by filing a time-barred action however late and then by waiting until an adverse judgment is rendered." (10 C.A.4th 1444.)

(c) *Application of rule to present case.* Under *C.C.P. 340.6*, a legal malpractice action must be filed within 1 year after the plaintiff discovered the facts constituting the wrongful omission. Here, the wrongful omission, i.e., defendant's failure to bring a third-party action within 1 year after plaintiff discovered that his disability was caused by exposure to asbestos, occurred in 1982. This omission resulted in "actual injury" to plaintiff because it caused him to lose his cause of action against potential asbestos defendants. Plaintiff discovered the facts constituting the wrongful omission no later than 1983 when he filed his first legal malpractice action against defendant. Also in 1983, defendant ceased representing plaintiff regarding this subject matter. Hence, the limitations period of *C.C.P. 340.6* commenced in 1983, and plaintiff's 1989 malpractice action is time-barred. (10 C.A.4th 1445.)

Finlayson v. Sanbrook was criticized in *Pleasant v. Celli* (1993) 18 C.A.4th 841, 22 C.R.2d 663, a legal malpractice action in which defendant's malpractice consisted of allowing the statute of limitations to expire on plaintiff's medical malpractice claim. The action was filed more than 1 year after the medical malpractice defendant raised the statute of limitations as a defense but less than 1 year after the medical malpractice case was dismissed. Defendant contended that the action was barred by the statute of limitations because plaintiff failed to file the action within 1 year after defendant's negligence came to light. *Held*, the action was timely; plaintiff's cause of action for legal malpractice did not accrue until the trial judge entered judgment against her in the underlying medical malpractice action.

(a) In *Laird*, the Supreme Court resolved a conflict among Court of Appeal decisions in holding that the statute of limitations for legal malpractice actions commences on entry of an adverse judgment or a final order of dismissal. (18 C.A.4th 847.) Here, defendant relies on *Finlayson v. Sanbrook*, which purports to hold that *Laird* does not apply to cases where the legal malpractice consists of missing a statute of limitations. *Finlayson* "does not offer a compelling reason to disregard the bright line rule" established in *Laird*. "The decision seems to assume that it is obvious at what point the statutory deadline expires, even though this is often a hotly contested issue, given the various tolling and estoppel principles that can be asserted." Nor does *Finlayson* explain why "missed statute of limitations cases are different from any other attorney negligence cases." (18 C.A.4th 848.)

(b) While purportedly relying on the distinction between the fact of damage and the amount of damage, *Finlayson* actually focused on the dichotomy between the moment the attorney commits the wrong and the moment substantial harm occurs. While the wrong and the harm may be concurrent, they frequently are not. Here, defendant committed the wrong the day the statute of limitations expired, but actual harm to defendant was merely prospective until the medical defendant recognized and asserted a potential defense, fought plaintiff's tolling and other arguments, and succeeded in having the case dismissed. Until that point, defendant's breach caused only an "unrealized threat of future harm." Actual and appreciable harm may never occur in statute of limitations cases. Thus, "[i]t is unproductive to require a plaintiff to file a precautionary legal malpractice suit in anticipation of losing on an issue that may never arise, or if it does arise, may be resolved against the defendants in the underlying suit." (18 C.A.4th 850.)

The Supreme Court disapproved the reasoning in *Finlayson v. Sanbrook* and *Pleasant v. Celli* to the extent they are inconsistent with the view that, in legal malpractice missed statute of limitation cases, actual injury for tolling purposes is a question of fact, and may only be decided as a matter of law on undisputed facts. (See *Adams v. Paul* (1995) 11 C.4th 583, 588, 46 C.R.2d 594, 904 P.2d 1205, *infra*, §640.)

SUPPLEMENT: [This section is current through the latest supplement]



92 of 145 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XIV. STATUTE OF LIMITATIONS: TORT ACTIONS

J. Attorney Malpractice: One or Four Years.

4. Tolling Until Actual Injury.

c. Missed Filing Malpractice.

2. Adams Rule: Question of Fact.

3 *Witkin Cal. Proc. Actions* § 640

[§ 640] Adams Rule: Question of Fact.

In *Adams v. Paul* (1995) 11 C.4th 583, 46 C.R.2d 594, 904 P.2d 1205, plaintiff brought a legal malpractice action against defendant attorney for allegedly having misadvised her concerning the time within which to file a wrongful death action against her husband's estate. The underlying action was ultimately dismissed as untimely after the husband's estate moved for summary judgment on that ground. The trial judge dismissed the present action as untimely, finding that, under *Finlayson v. Sanbrook* (1992) 10 C.A.4th 1436, 13 C.R.2d 406, supra, §639, actual injury occurred when the limitations period for the underlying action expired, which was more than 1 year before the present action was filed. The Court of Appeal affirmed, but on a different rationale: Actual injury occurred when plaintiff unsuccessfully opposed the summary judgment motion in the underlying action, which also was more than 1 year before the present action was filed. *Held*, reversed and remanded.

(a) "Question of fact" is governing rule. *Budd v. Nixen* (1971) 6 C.3d 195, 98 C.R. 849, 491 P.2d 433, supra, §628, established the applicable rule for determining legal malpractice actions statute of limitations issues, including when actual injury occurs for tolling purposes: resolution is generally a question of fact. And the Legislature, in enacting C.C.P. 340.6(a)(1), did not intend to alter this rule. (11 C.4th 588.) The myriad of circumstances under which statute of limitations issues may arise in missed statute cases sharply illustrates the practicality of applying this rule. "The number of potential variables, which do not necessarily follow a set pattern, precludes defining the point of harm as a fixed point or event because reasonable application becomes too problematic. ... The issue may be resolved 'as a matter of law' only if the facts are undisputed." (11 C.4th 588, 589.)

(b) *Nature of rule.*

(1) Application of the "question of fact" rule requires observance of the following two principles: (a) the fact of damage, rather than its amount, is the relevant consideration; and (b) the character or quality of the injury must be manifest and palpable--mere breach of a professional duty causing only nominal damages, speculative harm, or the threat of not-yet-realized future harm is insufficient. (11 C.4th 589, citing and quoting *Laird v. Blacker* (1992) 2 C.4th 606, 7 C.R.2d 550, 828 P.2d 691, supra, §633.)

(2) "In the 'classic' missed statute situation, in which the attorney negligently fails to file the underlying lawsuit within the applicable statutory period and does nothing further, the plaintiff suffers actual harm at the time the statutory period lapses because ... the right and/or remedy of recovery has been substantially impaired." (11 C.4th 589, citing *Finlayson* and other cases.)

(3) Where the attorney's negligence consists of failure to advise, or of misadvice, as to the applicable limitations in the underlying action, the attorney's negligence may have created only the potential for future harm. And, notwithstanding apparent expiration of the statutory period, questions of waiver, estoppel, or even the applicable limitations period may raise factual issues concerning when the attorney's negligence caused definite and certain injury or more than nominal or insubstantial damages. In situations of contingent or speculative harm, the determination of actual injury does not necessarily depend on or require some form of final adjudication, as by judgment or settlement. Actual injury may occur when the plaintiff is required to pay attorneys' fees or other costs as a result of the malpractice. (11 C.4th 590, 591.)

(4) To the extent *Finlayson* and *Pleasant v. Celli* (1993) 18 C.A.4th 841, 22 C.R.2d 663, supra, §639, "failed to apply a factual analysis consistent with the principles articulated herein, their reasoning is disapproved." (11 C.4th 591, footnote 4.)

(c) *Application of rule.* The trial judge found this action untimely as a legal question rather than as a matter of law on undisputed facts, while the Court of Appeal reached the same result without consideration of any factual record. "Both determinations were inconsistent with the rule we reaffirm that actual injury is generally a question of fact. On remand, the matter should be reconsidered and resolved on that basis." (11 C.4th 593.) (See 24 *Pepperdine L. Rev.* 806 [Adams].)

Although *Adams* was a plurality opinion, a 5-2 majority of the Supreme Court subsequently adopted its conclusions. (See *Jordache Enterprises v. Brobeck, Phleger & Harrison* (1998) 18 C.4th 739, 743, 748, 76 C.R.2d 749, 958 P.2d 1062, supra, §638.)

SUPPLEMENT: [This section is current through the latest supplement]



93 of 145 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XIV. STATUTE OF LIMITATIONS: TORT ACTIONS

J. Attorney Malpractice: One or Four Years.

4. Tolling Until Actual Injury.

c. Missed Filing Malpractice.

3. Illustrations.

3 *Witkin Cal. Proc. Actions* § 641

[§ 641] Illustrations.

In *Moss v. Stockdale, Peckham & Werner* (1996) 47 C.A.4th 494, 54 C.R.2d 805, plaintiff filed a legal malpractice action less than 1 year after her underlying action was dismissed for failing to bring the case to trial within 5 years (C.C.P. 583.310; see 6 Cal. Proc. (5th), *Proceedings Without Trial*, §358 et seq.), but more than 1 year after that 5-year deadline had expired. The trial judge ruled that plaintiff suffered actual injury when the 5-year deadline expired, and not later when the underlying action was dismissed, and granted summary judgment for defendant attorney and law firm on the ground that the action was barred by the 1-year statute of limitations. *Held*, reversed; when plaintiff suffered actual injury involved fact questions.

(a) Expiration of the 5-year deadline did not by itself establish that plaintiff suffered actual injury, because there is a tolling exception when bringing the action would have been impossible, impracticable, or futile (C.C.P. 583.340; see 6 Cal. Proc. (5th), *Proceedings Without Trial*, §395 et seq.). (47 C.A.4th 501.)

(b) Further, defendant attorney's neglect was so inexcusable and extreme, amounting to positive misconduct, that a trier of fact could have found that it was not chargeable to plaintiff. (47 C.A.4th 502.)

(c) Also, there was a possible factual issue whether there was an attorney-client relationship between defendant law firm and plaintiff. (47 C.A.4th 504.)

In *Gailing v. Rose, Klein & Marias* (1996) 43 C.A.4th 1570, 51 C.R.2d 381, plaintiff estate sued defendant law firm for malpractice in failing to bring the decedent's underlying asbestosis personal injury action to trial before his death, resulting in the loss of the right to general damages for pain and suffering (see 14 *Summary* (10th), *Wills and Probate*, §518 et seq.). The trial judge entered summary judgment for defendant, finding that the action was time-barred under the 1-year period of C.C.P. 340.6(a) (supra, §630). *Held*, affirmed.

(a) "A negligent failure to bring a case to trial before the plaintiff's death is akin to missing a statute of limitations for pain and suffering damages. But a plaintiff's death is unlike the running of a statute of limitations in an important

aspect. The statute of limitations is not jurisdictional. It is an affirmative defense. The defendant must raise it or the plaintiff has every right to collect a full judgment. ... Conversely, the right to general damages for pain and suffering is lost as a matter of law by statute when the plaintiff dies. Even if the defendant did not raise the issue, the trial court should instruct the jury that pain and suffering damages are not available because the plaintiff died." (43 C.A.4th 1577.)

(b) Thus, if the defendant here was negligent in not bringing the case to trial before the decedent died, actual injury occurred, for purposes of statutory tolling, immediately on death when plaintiff was deprived of the opportunity to collect pain and suffering damages, and not later when the suit was settled. Unlike *Adams v. Paul* (1995) 11 C.4th 583, 46 C.R.2d 594, 904 P.2d 1205, supra, §640, the matter here was properly determined on a motion for summary judgment on undisputed facts. No questions of waiver or estoppel were raised. Plaintiff suffered damage as a matter of fact when the decedent died before trial, and the malpractice action was not brought within 1 year thereafter. (43 C.A.4th 1577.) (See 14 A.L.R.6th 1 [tolling of statute based on attorney's conduct of litigation and delay or inaction in conducting client's affairs].)

SUPPLEMENT: [This section is current through the latest supplement]



94 of 145 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XIV. STATUTE OF LIMITATIONS: TORT ACTIONS

J. Attorney Malpractice: One or Four Years.

4. Tolling Until Actual Injury.

d. Criminal Case Malpractice.

3 *Witkin Cal. Proc. Actions* § 642

[§ 642] Criminal Case Malpractice.

(1) *Actual Injury on Sentencing*. In an action for legal malpractice arising out of an attorney's representation of a defendant in a criminal case, the plaintiff sustains actual injury, for purposes of *C.C.P.* 340.6(a)(1), at the latest on the date that the plaintiff's sentence in the underlying criminal case is ordered executed. (*Fantazia v. Stanislaus* (1996) 41 *C.A.4th* 1444, 1451, 49 *C.R.2d* 177 [citing *Laird v. Blacker* (1992) 2 *C.4th* 606, 7 *C.R.2d* 550, 828 *P.2d* 691, *supra*, §633; actual injury occurred on sentencing in first trial, and not 2 years later on dismissal in retrial after original conviction was set aside].)

(2) *Innocence in Underlying Suit as Prerequisite*. In *Wiley v. San Diego* (1998) 19 *C.4th* 532, 536, 79 *C.R.2d* 672, 966 *P.2d* 983, 1 *Cal. Proc.* (5th), *Attorneys*, §314, the Supreme Court held that, when a criminal defendant sues his or her attorney for legal malpractice, the former client's actual innocence of the underlying criminal charges is a necessary element of the malpractice cause of action. *Wiley* left open the question whether exoneration by postconviction relief was a predicate to proving factual innocence. The Supreme Court answered that question in the affirmative in *Coscia v. McKenna & Cuneo* (2001) 25 *C.4th* 1194, 1201, 108 *C.R.2d* 471, 25 *P.3d* 670, 1 *Cal. Proc.* (5th), *Attorneys*, §315. But that holding also required the *Coscia* court to address a related issue of first impression: What effect does the postconviction relief requirement have on the running of the statute of limitations? Defendant attorneys claimed that accrual of the underlying action either should be delayed or should be tolled under *C.C.P.* 340.6(a)(1) (tolling until actual injury) or *C.C.P.* 340.6(a)(4) (tolling while plaintiff is under legal disability) until postconviction relief is obtained, as is the rule in some states. However, other jurisdictions have adopted a so-called two-track approach: A criminal defendant must initiate the malpractice action within the applicable statute of limitations, and then stay the civil action while pursuing postconviction relief in the criminal prosecution. *Held*, the two-track approach is adopted in California.

(a) *Defendants' proposed rule is without merit*. As to delayed accrual, the "wrongful act or omission giving rise to a criminal malpractice action necessarily occurred during the course of the attorney's representation of the client--not at some time thereafter, when the client obtained postconviction relief." (25 *C.4th* 1210.) As to tolling, "we decline to adopt the legal fiction that an innocent person convicted of a crime suffered no actual injury until he or she was exonerated through postconviction relief." Criminal conviction constitutes appreciable harm. (25 *C.4th* 1210.) Nor does

the tolling provision for legal disability apply. Plaintiff was not prevented by circumstances beyond his control, such as minority, mental illness, or incarceration, from pursuing his legal remedy. (25 C.4th 1210.) In sum, defendants' proposed rule is inimical to the fundamental purpose underlying statutes of limitations, i.e., to protect defendants from having to defend stale claims. "This purpose is of particular concern in the present context, when years, even decades, may elapse before the wrongfully convicted criminal defendant obtains postconviction relief." (25 C.4th 1210.)

(b) *Two-track approach applies.* This approach is most consistent with the requirements of C.C.P. 340.6(a) and the interests of fairness to both plaintiffs and defendants in criminal malpractice cases. Thus, a plaintiff in a criminal malpractice action must file a claim within the 1-year or the 4-year limitations period set forth in C.C.P. 340.6(a). Although the action is subject to demurrer or summary judgment while the plaintiff's conviction remains intact, the court should stay the malpractice action during the period a plaintiff timely and diligently pursues postconviction remedies, thus ensuring that a plaintiff's claim will not be barred prematurely by the statute of limitations. (25 C.4th 1210, 1211.) (See *Rose v. Hudson* (2007) 153 C.A.4th 641, 652, 63 C.R.3d 248 [*Coscia* applies retroactively to cases pending when it was decided].)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Actual Injury on Sentencing.* See *Ovando v. Los Angeles* (2008) 159 C.A.4th 42, 62, 71 C.R.3d 415 [before conviction, plaintiff's belief that he was innocent, his dismay that his attorney did not believe him, and fact that he hired civil attorney to pursue civil rights action were not sufficient as matter of law to establish that plaintiff reasonably suspected at sentencing that his legal representation was inadequate].

(2) *Innocence in Underlying Suit as Prerequisite.* See *Ovando v. Los Angeles*, *supra*, 159 C.A.4th 69 [accrual of plaintiff's legal malpractice action, arising out of his criminal attorney's negligent representation, was not delayed, as matter of law, until his convictions were subsequently set aside].

(New) *Two-Year Limitations Period To Establish Factual Innocence:* The 2009 Legislature has established a 2-year limitations period for a plaintiff who is required to establish factual innocence of an underlying criminal charge as an element of a legal malpractice claim. (See C.C.P. 340.6(a), Supp., *supra*, §630.)



95 of 145 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XIV. STATUTE OF LIMITATIONS: TORT ACTIONS

J. Attorney Malpractice: One or Four Years.

5. Tolling While Attorney Continues To Represent Plaintiff.

a. Statute Told.

3 *Witkin Cal. Proc. Actions* § 643

[§ 643] Statute Told.

In *Gurkewitz v. Haberman* (1982) 137 C.A.3d 328, 187 C.R. 14, the court pointed out that C.C.P. 340.6(a)(2) (supra, §631) is similar to the "continuous representation" rule of the New York courts, derived from concepts developed in medical malpractice cases. (137 C.A.3d 333.) Here, after an appeal had become final, the costs on appeal were still in controversy, and defendant attorneys were communicating with counsel for another party. Thus, although *the action was no longer pending*, defendants were continuing to represent plaintiffs, and the statute was tolled. (137 C.A.3d 333.)

In *Baright v. Willis* (1984) 151 C.A.3d 303, 198 C.R. 510, plaintiff's attorney, hired to recover all damages resulting from a personal injury accident, filed a workers' compensation claim, but failed to file an action against third-party tortfeasors within the applicable period, which expired on September 28, 1977. However, the attorney continued to represent plaintiff on the workers' compensation claim until plaintiff discharged him on November 14, 1979. A malpractice action for failure to file the third-party action was initiated on October 15, 1981. *Held*, the statute was tolled. Because the attorney was hired to recover all damages, the "specific subject matter" of the relationship included the third-party action even after it became barred. (151 C.A.3d 309.)

A continued representation was found, and the statute was tolled, in *Johnson v. Haberman & Kassoy* (1988) 201 C.A.3d 1468, 247 C.R. 614. Plaintiff was a limited partner who suspected the general partners of fraud. To investigate the situation and advise him of his rights, he hired defendant attorneys and, on their advice, sold his partnership interest at a substantial loss. Prior to the sale, defendants had begun representing the general partners without formally terminating their relationship with plaintiff. *Held*, defendants were estopped from denying a continued relationship with plaintiff.

(a) Failure to formally withdraw, by itself, does not constitute continued representation for the purpose of tolling C.C.P. 340.6. (201 C.A.3d 1475, citing *Shapero v. Fliegel* (1987) 191 C.A.3d 842, 236 C.R. 696, *infra*, §644.) Here, however, plaintiff also alleged conduct violating the Rules of Professional Conduct, i.e., acting contrary to the interests of a present or former client, accepting employment on a matter of controversy in which the attorney formerly represented the client, and simultaneously representing clients with differing interests. (201 C.A.3d 1475; see 1 *Cal. Proc.* (5th), *Attorneys*, §103 et seq.)

(b) Defendants' conduct was egregious. Without ever obtaining a waiver from plaintiff, they undertook to represent the very persons whom they were supposed to investigate. They should have made a formal written withdrawal, and obtained plaintiff's written consent, before engaging in that representation, but instead they recommended that plaintiff sell out. Under these circumstances, defendants "should be estopped from claiming that their representation of the original client did not continue." (201 C.A.3d 1475.)

In *Worthington v. Rusconi* (1994) 29 C.A.4th 1488, 1498, 35 C.R.2d 169, the court, after reversing summary judgment for defendant on the ground that the action was time-barred, noted that the trial judge had applied the incorrect test in finding that the statute of limitations was not tolled after defendant's representation of plaintiff terminated when plaintiff lost confidence in him and consulted another attorney. "Continuity of representation ultimately depends, not on the client's subjective beliefs, but rather on evidence of an ongoing *mutual* relationship and of activities in furtherance of the relationship. ... In summary, we disagree with [defendant's] contention ... 'that the attorney-client relationship ends when there is a lack of trust or confidence and a belief on the part of the client that the relationship has terminated.' We believe that a better approach is to analyze the facts from an objective point of view." (29 C.A.4th 1498, but stating that application of this objective standard would have resulted in the same conclusions reached by *Hensley v. Caietti* (1993) 13 C.A.4th 1165, 16 C.R.2d 837, *infra*, §644, *O'Neill v. Tichy* (1993) 19 C.A.4th 114, 25 C.R.2d 162, and *Gurkewitz*.)

In *Gonzalez v. Kalu* (2006) 140 C.A.4th 21, 43 C.R.3d 866, plaintiff hired defendant attorney to represent her in a claim arising from her sexual harassment by a coemployee. After filing an administrative complaint against plaintiff's employer, defendant told plaintiff that the case was going to take "a very long" time and that defendant would call plaintiff or send her a letter. However, defendant had no contact with plaintiff for almost 3 years and never filed a lawsuit on her behalf. Plaintiff filed an action for legal malpractice and other claims alleging that defendant failed to adequately and timely prosecute her case. After rejecting plaintiff's claim that the statute was tolled under the continuous representation doctrine during the time that defendant failed to communicate with plaintiff, the trial judge granted summary judgment to defendant on the ground that the action was time-barred. *Held*, reversed.

(a) In a case where an attorney unilaterally withdraws or abandons a client, representation ends when the client actually has, or reasonably should have, no expectation that the attorney will provide further legal services. That may occur when the attorney expressly notifies the client that the attorney will perform no further services, or may be inferred from the circumstances if the attorney remains silent. (140 C.A.4th 30.) The determination "is predominantly a question of fact for the trier of fact, but can be decided as a question of law if the undisputed facts can support only one conclusion." (140 C.A.4th 31.)

(b) In the present case, there was no evidence that defendant had informed plaintiff, or that plaintiff knew, that the administrative complaint was likely to lead to the relatively prompt issuance of a right to sue letter as opposed to a lengthy period of administrative review, that a civil action must be filed within 1 year of receiving that letter, or that defendant informed plaintiff about the timing of the litigation apart from saying that the case was going to take a very long time. Rather, the evidence supported the conclusion that plaintiff reasonably believed that by filing an administrative complaint defendant had commenced the prosecution of her claim, that defendant would continue to take all measures reasonably necessary to prosecute the claim, that the matter would not be resolved for a very long time, and that defendant would contact plaintiff at the appropriate time. Thus, summary judgment for defendant was improper. (140 C.A.4th 32.)

The following cases hold that the limitations period was tolled under the continuing representation doctrine:

Kulesa v. Castleberry (1996) 47 C.A.4th 103, 109, 54 C.R.2d 669, 6 Cal. Proc. (5th), *Proceedings Without Trial*, §219 [continuing representation doctrine is unaffected by events that might otherwise trigger commencement of limitations period, including plaintiff suffering actual damage].

Beane v. Paulsen (1993) 21 C.A.4th 89, 99, 26 C.R.2d 486, *infra*, §645 ["tolling for reasons of continuous

representation has an 'all for one and one for all' application when one (or more) of several former partners continue to represent the allegedly wronged client"].

Crouse v. Brobeck, Phleger & Harrison (1998) 67 C.A.4th 1509, 1526, 1535, 80 C.R.2d 94, *infra*, §645 [disagreeing with, and declining to follow *Beane*; limitations period was tolled against attorney while he represented client but not against attorney's former law firm after attorney left firm and brought client with him; on California Supreme Court's subsequent adoption of *Crouse* holding, and disapproval of contrary holding in *Beane*, see *Beal Bank, SSB v. Arter & Hadden, LLP* (2007) 42 C.4th 503, 511, 66 C.R.3d 52, 167 P.3d 666, *infra*, §645].

Lockley v. Law Office of Cantrell, Green, Pekich, Cruz & McCort (2001) 91 C.A.4th 875, 887, 110 C.R.2d 877 [relying on *Worthington* and *Crouse*; statute was tolled for malpractice claim based on attorney's negligent representation of client as to compromise and release claim against his employer, where attorney continued to represent client in related workers' compensation claim].

Gold v. Weissman (2004) 114 C.A.4th 1195, 1200, 8 C.R.3d 480 [relying on *Gurkewitz*, *Crouse*, and *Lockley*; statute was tolled for malpractice claim based on attorney's failure to timely file medical malpractice action against client's doctor, where attorney continued to represent client in related professional discipline proceeding against doctor].

Fritz v. Ehrmann (2006) 136 C.A.4th 1374, 1391, 39 C.R.3d 670 [statute is tolled so long as attorney, as in this case, continues to represent client who comes to attorney after potential malpractice manifests itself and before statute has run in effort to rectify problem or mitigate damages].

SUPPLEMENT: [This section is current through the latest supplement]

See *Nielsen v. Beck* (2007) 157 C.A.4th 1041, 1050, 69 C.R.3d 435 [following *Worthington v. Rusconi* (1994) 29 C.A.4th 1488, 35 C.R.2d 169, text, p. 848, by disapproving subjective standard utilized in *Hensley v. Caietti* (1993) 13 C.A.4th 1165, 16 C.R.2d 837, text, §644, and instead applying objective test; when defendant attorney's representation ended and whether defendant's representation involved same subject matter were fact questions for purposes of tolling statute under C.C.P. 340.6(a)(2)].



96 of 145 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XIV. STATUTE OF LIMITATIONS: TORT ACTIONS

J. Attorney Malpractice: One or Four Years.

5. Tolling While Attorney Continues To Represent Plaintiff.

b. Statute Not Tolloed.

3 *Witkin Cal. Proc. Actions* § 644

[§ 644] Statute Not Tolloed.

Where the attorney's acts are only "tangentially related to the legal representation" the tolling provision does not apply. (*Von Rott v. Johnson* (1983) 148 C.A.3d 608, 613, 196 C.R. 55 [attorney acted as pledgeholder of shares, not performing any legal services].)

In *Shapero v. Fliegel* (1987) 191 C.A.3d 842, 236 C.R. 696, plaintiff wife retained defendant attorney to represent her in a dissolution action against her then husband L, who had agreed to pay defendant's legal fees. In 1978, a dispute arose as to the fees, and defendant, angered by plaintiff's conduct, told her to get another lawyer, and followed up the oral statement with a letter stating that he would do no further work until paid. Communications between plaintiff and defendant soon ceased, and in 1982 plaintiff retained another law firm to represent her. In March 1985, plaintiff sued defendant for malpractice, contending that the statute of limitations had been tolled by defendant's failure to formally withdraw as her attorney under C.C.P. 285.1. *Held*, failure to formally withdraw will not, standing alone, toll the statute.

(a) The purpose of C.C.P. 285.1 is to allow an attorney in a domestic relations case to serve notice to third parties that the attorney-client relationship has terminated. (191 C.A.3d 847; see 1 *Cal. Proc.* (5th), *Attorneys*, §71.) C.C.P. 340.6 was enacted 14 years later, the Legislature was presumably familiar with the earlier statute, and there is no indication of a legislative intent that the presence or absence of a formal withdrawal should be dispositive of the continued representation issue. (191 C.A.3d 847.)

(b) The New York rule of continuous representation, approved in *Gurkewitz v. Haberman* (1982) 137 C.A.3d 328, 187 C.R. 14, *supra*, §643, envisions "a relationship which is not sporadic but developing and involves a continuing of the professional services from which the alleged malpractice stems." (191 C.A.3d 848, quoting New York case.) The trial judge, applying that rule, properly concluded that, regardless of defendant's technical status as plaintiff's attorney of record, the relationship terminated in 1978. (191 C.A.3d 848.)

In *Hensley v. Caietti* (1993) 13 C.A.4th 1165, 16 C.R.2d 837, plaintiff had been represented in a dissolution action by defendant attorney, whose alleged malpractice consisted of inducing plaintiff to enter into an unfavorable marital

settlement agreement. At a meeting on November 3, 1989, to review the proposed judgment after the settlement agreement was approved, plaintiff and defendant argued. Plaintiff considered the attorney-client relation terminated at that point, and retained a new attorney 3 days later, on November 6, 1989. Defendant received plaintiff's substitution of attorney document on November 16, 1989, and signed it on November 20, 1989. In this malpractice action, filed November 15, 1990, defendant raised *C.C.P. 340.6(a)(2)* as a defense. *Held*, summary judgment for defendant affirmed; the 1-year period began to run from November 6, 1989, the date plaintiff acted on her decision to discharge defendant by engaging new counsel.

(a) When a client has discovered an attorney's negligence, the purpose of *C.C.P. 340.6(a)(2)* is to toll the limitations period during the time the client cannot reasonably be expected to initiate a malpractice action because doing so would disrupt an ongoing attorney-client relationship. "Once the client unequivocally decides that the relationship is over application of the tolling provision can no longer serve its purpose and it should be applied no further." (*13 C.A.4th 1171.*)

(b) Viewing the question of representation from the client's perspective tailors the rule of the statute to the purpose it serves. Here, plaintiff's opinion that the relationship was over was acted upon when she hired replacement counsel on November 6, 1989, and at that point the tolling afforded by *C.C.P. 340.6(a)(2)* ended. (*13 C.A.4th 1172.*) Having discovered the alleged negligence and unmistakably acting to end the attorney-client relationship, plaintiff "has no equitable claim for a limitations period longer than that afforded a person who discovers negligence after the discharge or withdrawal of counsel." (*13 C.A.4th 1173.*)

Other cases hold that the limitations period was not tolled under the continuing representation doctrine. (See *Rubinstein v. Barnes* (1987) 195 C.A.3d 276, 283, 240 C.R. 535 [following *Shapero*]; *Panattoni v. Superior Court* (1988) 203 C.A.3d 1092, 1097, 250 C.R. 390 [same]; *Foxborough v. Van Atta* (1994) 26 C.A.4th 217, 228, 31 C.R.2d 525, supra, §635 [plaintiff's retention of new counsel to initiate litigation, plaintiff's lack of any contact with defendant for prolonged period, and significant change in defendant's role from plaintiff's representative in prelitigation negotiations to expert witness for new counsel demonstrated that defendant did not continue to represent plaintiff after litigation commenced]; *Gailing v. Rose, Klein & Marias* (1996) 43 C.A.4th 1570, 1577, 51 C.R.2d 381, supra, §641 [defendant's representation of widow as dependent in workers' compensation matter based on decedent's injury was not continuous representation of underlying personal injury action by decedent and his heirs based on same injury]; *Crouse v. Brobeck, Phleger & Harrison* (1998) 67 C.A.4th 1509, 1535, 80 C.R.2d 94, infra, §645.) (On whether statute was tolled until plaintiff suffered actual injury, see supra, §632 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]



97 of 145 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XIV. STATUTE OF LIMITATIONS: TORT ACTIONS

J. Attorney Malpractice: One or Four Years.

5. Tolling While Attorney Continues To Represent Plaintiff.

c. Tolling After Attorney Leaves Law Firm.

3 Witkin Cal. Proc. Actions § 645

[§ 645] Tolling After Attorney Leaves Law Firm.

(1) *Conflict in Court of Appeal. Beane v. Paulsen* (1993) 21 C.A.4th 89, 98, 26 C.R.2d 486, in holding that the statute was tolled for defendant attorneys based on the representation of their former partners, observed: "[T]olling for reasons of continuous representation has an 'all for one and one for all' application when one (or more) of several former partners continue to represent the allegedly wronged client." (21 C.A.4th 99.)

In *Crouse v. Brobeck, Phleger & Harrison* (1998) 67 C.A.4th 1509, 80 C.R.2d 94, plaintiff brought a legal malpractice action against Boatwright, her attorney; Brobeck, Phleger, & Harrison (Brobeck), the law firm of which Boatwright was originally a partner; and Page, Polin, Busch & Boatwright (Page), a second law firm where Boatwright subsequently became a partner. Plaintiff had retained Boatwright in 1987 to assist her in the sale of her limited partnership. In the sale, plaintiff was to receive a promissory note, but Boatwright did not deliver the note to her. Boatwright left Brobeck in 1989 and joined Page in April 1990, but continued to represent plaintiff. Later in 1990, the obligors on the note sought to renegotiate its terms. The parties reached an agreement to restructure the note, but when Boatwright was unable to find the note and to surrender it, the obligors refused to close the deal, believing that the original note would still be negotiable. In October 1990, a different restructuring of the note was closed. Also in October 1990, separate counsel advised plaintiff of a possible malpractice claim against defendants, and in December 1993, plaintiff and defendants entered into an agreement tolling the statute of limitations. Plaintiff filed her action in August 1994. The trial judge dismissed as untimely plaintiff's action against Boatwright and Brobeck for any malpractice occurring after 1990 while Boatwright was a partner with Page. *Held*, reversed in part and affirmed in part.

(a) *Statute was tolled as to claim against Boatwright.* Plaintiff's action arose in October 1990 when she was damaged and learned from independent attorneys of her malpractice claims against defendants. Because of the tolling agreement among the parties, the operative date of the action for statute of limitations purposes was December 1993. (67 C.A.4th 1526.) The statute of limitations was tolled until July 1993 because Boatwright continued to represent plaintiff, and thus her claim was timely. Although Brobeck ceased representing plaintiff, there was a triable issue of fact whether Boatwright was responsible for losing the note. (67 C.A.4th 1527.) Further, Boatwright's later representation of plaintiff involved the same specific subject matter. Although the original note was replaced by novation, there was no different subject matter of representation. Boatwright's later actions related to the objectives of the original retention and

involved efforts to protect the interests the client had acquired in the original transaction. (67 C.A.4th 1528.)

(b) *Statute was not tolled as to claim against Brobeck.* The limitations period was not tolled as to plaintiff's claim against Brobeck, and thus that claim was time-barred. Ordinarily, tolling under C.C.P. 340.6(a)(2) applies only to the attorney who continues to represent the client, not to other attorneys. The right to interpose the statute of limitations as a defense is a privilege personal to the defendant, and this defense may not be waived without his or her consent by the conduct or agreements of others. Moreover, the objective of the tolling provision, which is preserving the client's relationship with the attorney, gives the negligent attorney an opportunity to correct an error by continuing to represent the client and avoiding an immediate lawsuit. This purpose is not furthered by imposing the attorney's election to continue representation on the attorney's former partners. (67 C.A.4th 1535, disagreeing with, and declining to follow *Beane*.)

(2) *Resolution by Supreme Court. Beal Bank, SSB v. Arter & Hadden, LLP (2007) 42 C.4th 503, 66 C.R.3d 52, 167 P.3d 666*, resolved the split of authority in the Court of Appeal about whether the continuous representation of a client by an attorney tolls the statute only against the attorney when the attorney leaves the firm and brings the client with him or her, as held in *Crouse*; or whether the attorney's continuous representation also tolls the limitations period against the attorney's former law firm, as held in *Beane*. *Held*, under the most natural reading of the statute, the *Crouse* holding is the better view. There are two legislative purposes of the tolling provision: (a) to avoid the disruption of an attorney client relationship by a lawsuit while enabling the attorney to correct or minimize an apparent error, and (b) to prevent an attorney from defeating a malpractice claim by continuing to represent the client until the limitations period has expired. These purposes are only minimally implicated in the present case. "There is no risk the firm will attempt to run out the clock on the statute of limitations by offering reassurances and blandishments about the state of the case. Conversely, the firm loses all ability to mitigate any damage to the client. ... Nor is there any ongoing firm-client relationship to disrupt." (42 C. 4th 511, 512; disapproving *Beane* to extent it is inconsistent.)

SUPPLEMENT: [This section is current through the latest supplement]



98 of 145 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XIV. STATUTE OF LIMITATIONS: TORT ACTIONS

J. Attorney Malpractice: One or Four Years.

6. Tolling While Plaintiff Is Under Legal or Physical Disability.

3 *Witkin Cal. Proc. Actions* § 646

[§ 646] Tolling While Plaintiff Is Under Legal or Physical Disability.

Bledstein v. Superior Court (1984) 162 C.A.3d 152, 166, 208 C.R. 428, made the following observations about the effect of a client's legal disability due to imprisonment under former C.C.P. 352(a)(3) (now C.C.P. 352.1; see *infra*, §§702, 703) for purposes of tolling the limitations period under C.C.P. 340.6(a)(4) (*supra*, §631):

(a) C.C.P. 340.6(a)(4) must be interpreted consistently with the latter statute's definition of legal disability. Hence, even though prison inmates now have the legal capacity to sue (see 4 *Cal. Proc.* (5th), *Pleading*, §119), the limitations period of C.C.P. 340.6 is tolled when a person is "imprisoned on a criminal charge, or in execution under the sentence of a criminal court for a term less than for life." (162 C.A.3d 160.)

(b) Time spent in a federal halfway house is within this definition and hence also tolls the C.C.P. 340.6 limitations period. (162 C.A.3d 169, declining to decide whether time spent in a *state* halfway house also tolls the period.) (But see *Coscia v. McKenna & Cuneo* (2001) 25 C.4th 1194, 1210, 108 C.R.2d 471, 25 P.3d 670, *supra*, §642 [statute not tolled].)

SUPPLEMENT: [This section is current through the latest supplement]



99 of 145 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XIV. STATUTE OF LIMITATIONS: TORT ACTIONS

J. Attorney Malpractice: One or Four Years.

7. Equitable Tolling and Estoppel Doctrines.

3 *Witkin Cal. Proc. Actions* § 647

[§ 647] Equitable Tolling and Estoppel Doctrines.

(1) *Equitable Tolling Doctrine Is Not Applicable.* In *Gordon v. Law Offices of Aguirre & Meyer* (1999) 70 C.A.4th 972, 83 C.R.2d 119, plaintiffs, who were Arizona residents, purchased securities from a securities company with a small downpayment, and signed promissory notes for the balance. Plaintiffs subsequently retained defendants, who were California attorneys, to sue the security company for violating securities laws, and the parties settled in 1991. However, in September 1994, the holder of the notes sued plaintiffs for the unpaid balances. Plaintiffs then sued defendants for legal malpractice in Arizona in April 1995, claiming that defendants had misadvised plaintiffs that the settlement would absolve them of liability on the notes. After the Arizona lawsuit was dismissed for lack of personal jurisdiction over defendants, plaintiffs ultimately brought the present action in California, alleging identical facts, in December 1996. The trial judge ruled that the 1-year limitations period of C.C.P. 340.6 (see *supra*, §630) commenced in September 1994 when plaintiffs were sued on the notes, that the statute was not equitably tolled during the pendency of plaintiffs' Arizona lawsuit (see *infra*, §§739, 740), and that the action therefore was untimely. *Held*, affirmed; the doctrine of equitable tolling does not apply to C.C.P. 340.6.

(a) By including the limitation that "[i]n no event shall the time for commencement of legal action exceed four years" except under those circumstances specified in C.C.P. 340.6, the Legislature intended to disallow tolling under any other circumstances. (70 C.A.4th 977, 980, citing *Laird v. Blacker* (1992) 2 C.4th 606, 7 C.R.2d 550, 828 P.2d 691, *supra*, §633, and *Bledstein v. Superior Court* (1984) 162 C.A.3d 152, 208 C.R. 428, *supra*, §646.)

(b) The same exclusivity construction has been given to similar language governing the tolling provisions of C.C.P. 340.5, the statute of limitations for medical malpractice (see *supra*, §582 et seq.). (70 C.A.4th 980, citing *Fogarty v. Superior Court* (1981) 117 C.A.3d 316, 172 C.R. 594, and *Hollingsworth v. Kofoed* (1996) 45 C.A.4th 423, 52 C.R.2d 808, *supra*, §582; but see language disapproving *Hollingsworth* in *Belton v. Bowers Ambulance Service* (1999) 20 C.4th 928, 931, 932, 86 C.R.2d 107, 978 P.2d 591, *supra*, §585.)

(2) *Equitable Estoppel Doctrine Is Applicable.* Although *Gordon* is correct in holding that equity will not toll or extend the 1-year limitations period of C.C.P. 340.6, the defendant nevertheless may be equitably estopped (*infra*, §762 et seq.) from asserting the statute as a defense. Although courts frequently discuss "equitable tolling," the concepts of equitable estoppel and tolling are distinct. Further, an examination of the legislative history of C.C.P. 340.6 does not

demonstrate an intent to abandon the long-established policy of equitable estoppel. (*Leasequip v. Dapeer* (2002) 103 C.A.4th 394, 406, 407, 126 C.R.2d 782 [attorney was equitably estopped from asserting statute as defense in legal malpractice action by suspended corporation, where suspension resulted from attorney's negligent advice].)

SUPPLEMENT: [This section is current through the latest supplement]



100 of 145 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XIV. STATUTE OF LIMITATIONS: TORT ACTIONS

K. Miscellaneous Torts: Two Years.

1. Scope of Statute.

a. In General.

3 Witkin Cal. Proc. Actions § 648

[§ 648] In General.

C.C.P. 339(1), the 2-year statute covering an action on "a contract, obligation or liability not founded upon an instrument of writing," is not restricted to unwritten contract and quasi-contract actions (*supra*, §512). The provision is a catchall for unusual tort actions not otherwise provided for. (See *infra*, §§649, 650.)

To understand its scope it is necessary to eliminate all of the following:

(1) Actions based on intentional or negligent wrongs that result in injuries to reputation or to the person. (See *supra*, §§549 et seq., 552 et seq.)

(2) Actions based on intentional or negligent wrongs that result in injury to or loss of real property or tangible personal property. (See *supra*, §§596 et seq., 619 et seq.)

(3) Actions based on attorney malpractice. (See *supra*, §626 et seq.)

(4) Actions based on fraud or statutory liabilities. (See *infra*, §§653 et seq., 664 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]



101 of 145 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XIV. STATUTE OF LIMITATIONS: TORT ACTIONS

K. Miscellaneous Torts: Two Years.

1. Scope of Statute.

b. Intentional Wrongs.

3 *Witkin Cal. Proc. Actions* § 649

[§ 649] Intentional Wrongs.

Actions based on intentional wrongs that are governed by C.C.P. 339(1) include the following:

(1) *Intentional Wrongs Involving Intangibles*. (See *Neel v. Magana, Olney, Levy, Cathcart & Gelfand* (1971) 6 C.3d 176, 182, footnote 12, 98 C.R. 837, 491 P.2d 421, supra, §627, citing the text [construing statute prior to enactment of attorney's malpractice statute of limitations (C.C.P. 340.6; see supra, §639 et seq.); same statute applies whether client elects to sue in tort or contract]; *Davies v. Krasna* (1975) 14 C.3d 502, 509, 121 C.R. 705, 535 P.2d 1161, supra, §503, citing the text [action for breach of confidence, by author against producer, whether regarded as in quasi-contract or tort]; *Italiani v. Metro-Goldwyn-Mayer Corp.* (1941) 45 C.A.2d 464, 467, 114 P.2d 370 [misappropriation of intangible right in literary property (plagiarism)]; *McFaddin v. H.S. Crocker Co.* (1963) 219 C.A.2d 585, 591, 33 C.R. 389 [interference with business]; *Tu-Vu Drive-In Corp. v. Davies* (1967) 66 C.2d 435, 437, 58 C.R. 105, 426 P.2d 505 [same]; *Kenworthy v. Brown* (1967) 248 C.A.2d 298, 301, 56 C.R. 461 [inducing breach of contract]; *McWilliams v. Holton* (1967) 248 C.A.2d 447, 454, 56 C.R. 574 [same]; 79 A.L.R.3d 820 [wrongful appropriation of literary property or idea; note on *Davies*]; 58 A.L.R.3d 1027 [interference with contract or other economic relations].)

The cause of action for inducing breach of contract accrues at the date of the wrongful act; and this rule applies to inducing breach of an attorney's contingent fee contract, even though the distinct cause of action against the client on the contract would not accrue until a recovery was obtained for the client by the new attorney. (*Trembath v. Digardi* (1974) 43 C.A.3d 834, 837, 118 C.R. 124.)

(2) *Trade Libel*. In *Guess v. Superior Court* (1986) 176 C.A.3d 473, 222 C.R. 79, the issue was whether a trade libel action (see 5 *Summary* (10th), *Torts*, §§640, 641, 645) was governed by the 1-year period of former C.C.P. 340(3) (now C.C.P. 340(c); see supra, §§550, 551) or the 2-year period of C.C.P. 339(1). *Held*, C.C.P. 339(1) applies.

(a) In choosing between former C.C.P. 340(3) and C.C.P. 339(1), California courts have applied the former to all alleged infringements of personal rights, and the latter to infringements of property rights, including tortious interference with business. (176 C.A.3d 478.)

(b) Unlike classic defamation that is directed at the plaintiff's personal reputation, trade libel is directed at the goods the plaintiff sells or the character of the plaintiff's business. (176 C.A.3d 479.) Decisions from other jurisdictions that have applied the statute of limitations for personal defamation are based on a mistaken analogy between slander and trade libel. (176 C.A.3d 479, quoting Prosser & Keeton (5th ed.).)

(3) *Insurer's Bad Faith Refusal To Pay Medical Expenses Incurred in Accident*. In *Richardson v. Allstate Ins. Co.* (1981) 117 C.A.3d 8, 172 C.R. 423, defendant insurer contended that plaintiff, in seeking damages for emotional distress, necessarily alleged infringement of a personal right, making applicable the 1-year period in former C.C.P. 340(3) (now 2-year period in C.C.P. 335.1; see supra, §552 et seq.). In rejecting the contention, the court observed that to subject a cause of action to multiple limitations periods depending on the damages sought would produce much confusion. "Breach of the implied covenant of good faith is actionable because such conduct causes financial loss to the insured, and it is the financial loss or risk of financial loss which defines the cause of action. Mental distress is compensable as an aggravation of the financial damages, not as a separate cause of action." (117 C.A.3d 13.)

(4) *Wrongful Denial of Hospital Privileges*. In *Edwards v. Fresno Community Hosp.* (1974) 38 C.A.3d 702, 113 C.R. 579, plaintiff alleged that he was a qualified specialist in surgery and gynecology, and that defendant, a charitable hospital, wrongfully denied him adequate privileges for the practice of those specialties. The complaint was filed about a year and a half after the asserted wrongful act. *Held*, the statute was not a bar.

(a) In *Simons v. Edouarde* (1950) 98 C.A.2d 826, 221 P.2d 203, an abuse of process case, the court assumed that a wrongful eviction violated only a personal right to possession of an apartment, and that the 1-year statute applied. This assumption led to the statement of an unnecessarily broad rule, and the case is not controlling here. (38 C.A.3d 706, footnote 3.)

(b) The doctor's right to hospital privileges is not merely a personal right. The right to practice medicine is a property right, and it follows that the right to use hospital facilities to practice a specialty also involves a property right. (38 C.A.3d 705.)

(c) C.C.P. 339(1) has been held to cover tortious interference with contract, trade, or business. (38 C.A.3d 706, citing the text.) The present action essentially involves economic injury to a professional career, and is closely analogous. (38 C.A.3d 706.) (See 3 A.L.R.4th 1214 [what statute of limitations applies to a doctor's action for wrongful denial of hospital privileges].)

SUPPLEMENT: [This section is current through the latest supplement]



102 of 145 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XIV. STATUTE OF LIMITATIONS: TORT ACTIONS

K. Miscellaneous Torts: Two Years.

1. Scope of Statute.

c. Negligent Wrongs.

3 *Witkin Cal. Proc. Actions* § 650

[§ 650] Negligent Wrongs.

(1) *Negligent Performance of Professional Services.* C.C.P. 339(1) governs actions based on negligent wrongs not involving injuries to person or real or tangible personal property, e.g., an action for negligent performance of professional services. (See *Stark v. Pioneer Cas. Co.* (1934) 139 C.A. 577, 582, 34 P.2d 731 [negligent failure of insurance agent to obtain issuance of casualty insurance policy]; *Southern Counties Thrift Co. v. Rairdon* (1941) 47 C.A.2d 770, 771, 118 P.2d 828 [negligence of corporate directors]; *Burt v. Irvine Co.* (1965) 237 C.A.2d 828, 865, 47 C.R. 392 [same]; *Moonie v. Lynch* (1967) 256 C.A.2d 361, 362, 64 C.R. 55, *infra*, §651 [accountant]; *Herbert A. Crocker & Co. v. Transamerica Title Ins. Co.* (1994) 27 C.A.4th 1722, 1727, 33 C.R.2d 313 [negligent failure of title insurer to discover and disclose existence of easement on insured's property]; *Ventura County Nat. Bank v. Macker* (1996) 49 C.A.4th 1528, 1530, 57 C.R.2d 418 [accounting malpractice action styled as fraud action was nevertheless governed by C.C.P. 339(1), where essential allegation was tortious invasion of property right, and not fraud]; *Hydro-Mill Co. v. Hayward, Tilton & Rolapp Ins. Associates* (2004) 115 C.A.4th 1145, 1159, 10 C.R.3d 582, citing the text [insured's claim against insurance broker styled as breach of fiduciary duty claim was nevertheless governed by C.C.P. 339(1), where essential allegation was negligent failure to procure adequate coverage]; 7 A.L.R.5th 852 [accountant]; 121 A.L.R.5th 365 [insurance brokers or agents as professionals or nonprofessionals for purposes of malpractice statutes of limitations]; on accrual of cause of action for accountant malpractice, see *infra*, §§651, 652; on accrual of action for medical malpractice under C.C.P. 340.5, see *supra*, §577 et seq.)

Prior to 1978, an action for legal malpractice was governed by the 2-year limitations period in C.C.P. 339(1). (See *Alter v. Michael* (1966) 64 C.2d 480, 481, 50 C.R. 553, 413 P.2d 153). But the 1977 Legislature enacted C.C.P. 340.6, establishing alternative limitations periods of 1 and 4 years. (See *supra*, §629 et seq.)

(2) *Negligent Breach of Contract.* If the defendant's negligent act is a breach of a written contract, it is possible to state a cause of action in contract and thus to obtain the benefit of the 4-year statute (C.C.P. 337(1), *supra*, §508 et seq.). (See *L. B. Laboratories v. Mitchell* (1952) 39 C.2d 56, 60, 244 P.2d 385, *supra*, §162; *Benard v. Walkup* (1969) 272 C.A.2d 595, 601, 77 C.R. 544, 1 Cal. Proc. (5th), Attorneys, §313.)

(3) *Negligent Spoliation of Evidence.* In *Augusta v. United Service Auto. Assn.* (1993) 13 C.A.4th 4, 16 C.R.2d 400,

the complaint alleged that the negligent destruction of plaintiff's vehicle's speedometer precluded him from proving his personal injury claim against the manufacturer. The issue was whether a cause of action for negligent spoliation of evidence (see 3 *Cal. Evidence (4th), Presentation at Trial, §117*) was governed by the 1-year period in former C.C.P. 340(3) (now 2-year period in C.C.P. 335.1; see *supra*, §552 et seq.) or the 2-year period in C.C.P. 339(1). *Held*, C.C.P. 339(1) applies. A cause of action for spoliation of evidence involves an interference with a property interest (not a personal injury), and is founded on precepts of interference with prospective economic advantage to which the 2-year limitations period applies. (13 *C.A.4th* 10, citing *Edwards v. Fresno Community Hosp. (1974)* 38 *C.A.3d* 702, 113 *C.R.* 579, *supra*, §649, and *Coca-Cola Bottling Co. v. Superior Court (1991)* 233 *C.A.3d* 1273, 286 *C.R.* 855, 2 *Summary* (10th), *Workers' Compensation*, §55.) (See 24 *Southwestern U. L. Rev.* 123, 136 [Augusta].)

SUPPLEMENT: [This section is current through the latest supplement]



103 of 145 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XIV. STATUTE OF LIMITATIONS: TORT ACTIONS

K. Miscellaneous Torts: Two Years.

2. Accrual: Accountant Malpractice.

a. Accrual Delayed Until Discovery.

3 *Witkin Cal. Proc. Actions* § 651

[§ 651] Accrual Delayed Until Discovery.

In *Moonie v. Lynch* (1967) 256 C.A.2d 361, 64 C.R. 55, plaintiff CPA in May 1963, filed an action against defendant client for accounting services rendered between January 1959, and January 1961. In November 1963, defendant cross-complained, alleging that plaintiff negligently prepared defendant's 1956 federal income tax return and that, as a result, defendant suffered a penalty assessment. *Held*, the statute was not a bar to defendant's cross-claim. The question of accrual in an action against a member of this particular class of professionals was new; and naturally the accountant argued for the then prevailing legal malpractice rule (*supra*, §626), while the client argued for the medical malpractice rule (*supra*, §577). In the absence of controlling authority, "we see no reason to apply the 'harsh' rule of the attorney's malpractice cases to this case." (256 C.A.2d 365.) The facts demonstrated the appropriateness of postponing accrual. Until the client was informed of the penalty he had no way of knowing that his return had been improperly prepared and that he had a cause of action for negligence. "We, therefore, hold that in a malpractice action against an accountant the statute of limitations does not run until the negligent act is discovered, or with reasonable diligence could have been discovered." (256 C.A.2d 365.)

Later cases are to the same effect. (See *International Engine Parts v. Feddersen & Co.* (1995) 9 C.4th 606, 613, 614, 38 C.R.2d 150, 888 P.2d 1279, *infra*, §652 [reaffirming delayed accrual rule of *Moonie*]; *Bedolla v. Logan & Frazer* (1975) 52 C.A.3d 118, 131, 125 C.R. 59 [rule of delayed accrual applied, but evidence showed knowledge of facts imputed from limited partner and statute barred action]; 26 *Am.Jur.2d Trials* 1 [accountant malpractice]; 7 *A.L.R.5th* 852 [statute of limitations in action against public accountant for breach of duty].)

SUPPLEMENT: [This section is current through the latest supplement]



104 of 145 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XIV. STATUTE OF LIMITATIONS: TORT ACTIONS

K. Miscellaneous Torts: Two Years.

2. Accrual: Accountant Malpractice.

b. Accrual Delayed Until Damage.

3 *Witkin Cal. Proc. Actions* § 652

[§ 652] Accrual Delayed Until Damage.

In *Schrader v. Scott* (1992) 8 C.A.4th 1679, 11 C.R.2d 433, plaintiffs sued defendants for accountant malpractice. Defendants moved for summary judgment, and the parties agreed to the following facts: (a) Defendants had advised plaintiffs that investment in certain tax shelters would reduce their income tax liability; (b) in reliance on this advice, plaintiffs made the investments and claimed losses related to these investments on their income tax returns; (c) in 1982, plaintiffs became aware that the IRS was disallowing these loss deductions; (d) in 1986, plaintiffs concluded that defendants had been negligent; (e) in December 1986, plaintiffs paid over \$ 240,000 in back taxes and interest; (f) in December 1988 plaintiffs and the IRS signed a closing agreement that finally determined plaintiffs' administrative appeal from the IRS assessments; but (g) as of October 1990, plaintiffs' administrative appeal from the assessments by the California Franchise Tax Board (FTB) had not been concluded. The trial judge granted defendants' motion for summary judgment, rejecting plaintiffs' contention that the statute of limitations was tolled while they were exhausting their administrative remedies. *Held*, judgment for defendants affirmed.

(a) "[T]he dispositive issues in this appeal are (1) whether the statute of limitations ... began to run when plaintiffs sustained actual or appreciable harm as a result of such negligence, or (2) whether the commencement date was tolled until defendants' professional negligence, which caused the harm, had become irremediable and (3) whether 'irremediability' would occur only when the administrative appeals concerning plaintiffs' tax liability had been finally exhausted and resolved by the IRS and FTB." (8 C.A.4th 1684.)

(b) Plaintiffs relied on *Robinson v. McGinn* (1987) 195 C.A.3d 66, 240 C.R. 423, supra, §632, a legal malpractice case. But *Laird v. Blacker* (1992) 2 C.4th 606, 7 C.R.2d 550, 828 P.2d 691, supra, §633, disapproved *Robinson* and similar cases to the extent that they held that the statute of limitations was tolled until the attorney's error could no longer be remedied, i.e., until the appellate process had been exhausted. (8 C.A.4th 1685.) The holding in *McKeown v. First Interstate Bank* (1987) 194 C.A.3d 1225, 240 C.R. 127, supra, §502, is in keeping with *Laird*, and the same is true of the holding in *Moonie v. Lynch* (1967) 256 C.A.2d 361, 64 C.R. 55, supra, §651. (8 C.A.4th 1685, 1686, 1687.) Under these decisions summary judgment was properly granted. (8 C.A.4th 1687.)

In *International Engine Parts v. Feddersen & Co.* (1995) 9 C.4th 606, 38 C.R.2d 150, 888 P.2d 1279, plaintiff

corporation and its subsidiary sued defendant accounting company for malpractice. Plaintiffs had hired defendant to prepare tax returns for the years 1983 and 1984, but defendant failed to file documents that were necessary to retain an advantageous tax status for plaintiff subsidiary. In 1986, the IRS advised plaintiffs that the failure to file would result in loss of plaintiff subsidiary's status, and, in June 1987, the IRS issued a preliminary report indicating that it intended to disqualify plaintiff subsidiary from its status and impose tax deficiencies against both plaintiffs. The IRS imposed the deficiencies on May 16, 1988, and plaintiffs filed this action on May 15, 1990. The trial judge granted summary judgment for defendant, finding that the action was time-barred. The Court of Appeal affirmed, concluding that plaintiffs suffered actual harm, thereby triggering the statute of limitations, either in 1986, when the apparent tax liability resulted in a reduction in plaintiff subsidiary's financial line of credit, or in 1987, when the IRS prepared the preliminary report. *Held*, judgment reversed; the statute of limitations in an accountant malpractice case alleging the negligent preparation of tax returns commences when the tax deficiency is assessed by the IRS, and thus, plaintiffs' action was timely.

(a) There are two requirements to commence the running of the statute of limitations in an accountant malpractice case: first, the discovery of the negligence by the plaintiff, as announced in *Moonie*; and second, actual injury sustained by the plaintiff, as adopted in *Neel v. Magana, Olney, Levy, Cathcart & Gelfand* (1971) 6 C.3d 176, 98 C.R. 837, 491 P.2d 421, supra, §627, and *Budd v. Nixen* (1971) 6 C.3d 195, 98 C.R. 849, 491 P.2d 433, supra, §628, in the attorney malpractice context. (9 C.4th 613, 614.)

(b) Actual injury occurred in 1988 when the tax deficiency was assessed by the IRS, and not before. The disposition of the underlying case is the point of actual harm; it is not deferred until the point of "irremediable damage," i.e., when the appeal process has been completed or the accountant's malpractice cannot be remedied. The preliminary report is merely the determination of tax liability, and harm to plaintiff is still contingent on a finalization of the audit process. The deficiency assessment serves as a finalization of the audit process and the commencement of actual injury, because it is the trigger that allows the IRS to collect amounts due. (9 C.4th 615.)

(c) The foregoing rule in the context of negligent preparation of income tax returns both conserves judicial resources and avoids forcing the client to sue the accountant for malpractice while the audit is pending. It also avoids requiring the client to allege facts in the malpractice action that could be used against him or her in the audit, without first allowing the accountant to correct the error (or mitigate the consequences) during the audit process. And, the rule is in accord with authority from other jurisdictions. (9 C.4th 620.)

One justice in a separate opinion concurred in the result "only under compulsion of *Laird v. Blacker*." (9 C.4th 622, 623.) A second justice in a separate concurring and dissenting opinion argued that actual harm could occur when the client-taxpayer incurs nontrivial costs to respond to an IRS audit, including accounting and legal fees, but that here the limitations period had not run under the continuous representation doctrine (see supra, §§631, 643 et seq.). (9 C.4th 623.)

The holding in *Feddersen* was distinguished in *Van Dyke v. Dunker & Aced* (1996) 46 C.A.4th 446, 53 C.R.2d 862. Plaintiffs, relying on defendant accountant's advice about the amount of an income tax deduction they would receive for a charitable donation of real estate, conveyed the property in 1990. When plaintiffs' income tax returns for the period were prepared and filed in 1991, they learned that the advice was incorrect and incurred taxes greater than expected. Plaintiffs filed the present professional malpractice action in June 1994. The IRS finally determined plaintiffs' 1990 tax obligations in December 1994 during an audit requested by plaintiffs for an unrelated purpose. *Held*, plaintiffs suffered actual injury, not in 1994 when the IRS finally determined their 1990 tax obligation, but in 1990 when they donated the property, or in 1991 when they paid taxes in excess of the amount they expected. In either case, the 2-year statute of limitations had expired prior to the commencement of their action.

(a) *Feddersen* involved the negligent preparation of tax returns, while plaintiffs' claim here was based on allegedly erroneous tax advice on which they relied to their detriment. (46 C.A.4th 454.) Unlike the taxpayer in *Feddersen*, whose damages were speculative or merely potential before completion of the IRS audit, plaintiffs here suffered out-of-pocket

losses in 1991 by paying more taxes than they expected. (46 C.A.4th 455.)

(b) Unlike *Feddersen*, the IRS audit here involved an unrelated matter that only indirectly affected the value of the charitable deduction. (46 C.A.4th 455.) Thus, there would be no waste of judicial resources if plaintiffs prosecuted their malpractice action while the audit was pending (46 C.A.4th 456), and plaintiffs had already suffered actual injury, regardless of the outcome of that audit (46 C.A.4th 457).

Other cases have applied the rule. (See *Jordache Enterprises v. Brobeck, Phleger & Harrison* (1998) 18 C.4th 739, 76 C.R.2d 749, 958 P.2d 1062, supra, §638 [distinguishing *Feddersen* in legal malpractice context; but see dissent, arguing that *Feddersen* should be overruled]; *Curtis v. Kellogg & Andelson* (1999) 73 C.A.4th 492, 499, 86 C.R.2d 536 [following *Feddersen*]; *Apple Valley Unified School Dist. v. Vavrinek, Trine, Day & Co.* (2002) 98 C.A.4th 934, 942, 120 C.R.2d 629 [distinguishing *Feddersen* and following legal malpractice accrual rule of *Jordache*; in school district's action against accountants for faulty audit that mistakenly induced plaintiff to give funds to charter school, injury occurred when plaintiff incurred expenses in engaging new accountant and legal counsel in effort to limit its liability]; *Sahadi v. Scheaffer* (2007) 155 C.A.4th 704, 727, 733, 66 C.R.3d 517 [extending *Feddersen* rule in action alleging negligence in preparation of tax returns and during audit process; injury occurred when final federal audit was completed and tax deficiency was withdrawn, even though clients had incurred substantial costs associated with audit prior to its conclusion].)

SUPPLEMENT: [This section is current through the latest supplement]



105 of 145 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XV. STATUTE OF LIMITATIONS: ACTIONS FOR FRAUD OR MISTAKE

A. Three-Year Limitation: Scope of Statute.

1. Form of Action or Relief Is Not Controlling.

3 *Witkin Cal. Proc. Actions* § 653

[§ 653] Form of Action or Relief Is Not Controlling.

(1) *Broad Scope of Statute.* C.C.P. 338(d) establishes a 3-year period (after discovery of the facts) for an "action for relief on the ground of fraud or mistake." This language is comprehensive and the statute, with its favorable accrual rule, is accordingly applied to any form of action, for any kind of relief. In other words, if fraud or mistake is the basis of the legal injury (the "ground" of the action), the section applies regardless of whether the complaint seeks legal or equitable relief or pleads a cause of action in tort or contract. (See *Lightner Mining Co. v. Lane* (1911) 161 C. 689, 702, 120 P. 771; *People v. Union Oil Co. of Calif.* (1957) 48 C.2d 476, 482, 310 P.2d 409 [state's action to recover interest paid on tax refund under mistake]; *Leeper v. Beltrami* (1959) 53 C.2d 195, 207, 1 C.R. 12, 347 P.2d 12, *infra*, §§657, 658; *Pacific Nat. Bank of San Francisco v. Corona Nat. Bank* (1931) 113 C.A. 366, 374, 298 P. 144; *Ponti v. Farrell* (1961) 194 C.A.2d 676, 682, 15 C.R. 500 [action for money had and received based on fraudulent representations]; *Marin Assn. of Firefighters v. Marin County Employees' Retirement Assn.* (1994) 30 C.A.4th 1638, 1651, 36 C.R.2d 736 [action by firefighters union for relief after county mistakenly failed to include firefighters' holiday pay as final compensation for purposes of computing retirement benefits; action was governed by delayed discovery rule of C.C.P. 338(d), and not by C.C.P. 338(a) (limitations period for liability created by statute; see *infra*, §664)]; 63 *Harv. L. Rev.* 1213, 1217.)

(2) *Excluded Actions.* C.C.P. 338(d) does not govern the following:

(a) An action by a residential real estate purchaser against a real estate agent or broker for negligent misrepresentation for failure to inspect and disclose defects. That action is governed by the 2-year limitations period of C.C. 2079.4. (*Loken v. Century 21-Award Properties* (1995) 36 C.A.4th 263, 268, 42 C.R.2d 683, 12 *Summary* (10th), *Real Property*, §476.)

(b) An action for accounting malpractice, even if it is styled as an action for fraud, where the essence of the action involves the tortious invasion of a property right, and not fraud. Instead, the action is governed by the 2-year limitations period of C.C.P. 339(1) (*supra*, §648 *et seq.*). (*Ventura County Nat. Bank v. Macker* (1996) 49 C.A.4th 1528, 1530, 57 C.R.2d 418.)

(c) A products liability claim alleging personal injury that is simply disguised as a claim based on failure to warn. (

Rivas v. Safety-Kleen Corp. (2002) 98 C.A.4th 218, 231, 119 C.R.2d 503, supra, §576.)

(d) An action challenging a Public Employees' Retirement System (PERS) Board reclassification decision. No statute of limitations applies, because the PERS Board has plenary authority over the PERS under Cal. Const., Art. XVI, §17, and courts must defer to the board absent some showing of an arbitrary, irrational exercise of its power. In addition, *Govt.C. 20160(e)* expresses a statutory preference for retroactive correction of errors by the board. The board's duty to correct misclassifications continues throughout the lifetimes of retirees and members. However, the challenge is subject to time limits applicable to mandamus proceedings and to the doctrine of laches. (*Oakland v. Public Employees' Retirement System* (2002) 95 C.A.4th 29, 38, 115 C.R.2d 151, citing the text [declining to follow, and effectively abrogating, its earlier decision in *Mono v. Public Employees' Retirement System* (1999) 69 C.A.4th 1105, 1115, 82 C.R.2d 130, to extent it is contrary].)

(e) *C.C.P. 338(d)* establishes the time at which a cause of action for fraud or mistake accrues; it does not fix the time at which the injury giving rise to the cause of action occurred. Thus, the statute's delayed discovery rule does not determine an insurance policy's coverage of a claim of negligent misrepresentation brought against an insured by a third party, where the policy unambiguously limits coverage to liability arising from a loss occurring during the policy period, and where, although actual discovery of the loss is made during that period, the events constituting the damage predate the policy period. (*Tijsseling v. General Acc. Fire & Life Assur. Corp.* (1976) 55 C.A.3d 623, 628, 127 C.R. 681.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Broad Scope of Statute.* See *Estate of Young* (2008) 160 C.A.4th 62, 78, 72 C.R.3d 520 [action by administrator of decedent's estate to establish estate's ownership of property obtained by trusts by fraud and undue influence during decedent's lifetime].



106 of 145 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XV. STATUTE OF LIMITATIONS: ACTIONS FOR FRAUD OR MISTAKE

A. Three-Year Limitation: Scope of Statute.

2. Tort Action.

3 *Witkin Cal. Proc. Actions* § 654

[§ 654] Tort Action.

The fraud statute (*C.C.P. 338(d)*, *supra*, §653) applies to the following tort actions:

(1) An action at law for damages for fraud and deceit. (*Galusha v. Fraser* (1918) 178 C. 653, 656, 174 P. 311; *Nelson v. Gaunt* (1981) 125 C.A.3d 623, 636, 178 C.R. 167 [fraud action based on medical treatment]; see *infra*, §659 et seq.)

(2) An action for damages for fraudulent inducement of breach of contract. This is not an ordinary deceit action, for the defendant's misrepresentations were made to and relied on by a third person (the other party to the plaintiff's contract). Nevertheless, the fraud statute has been held applicable. (*Romano v. Wilbur Ellis & Co.* (1947) 82 C.A.2d 670, 673, 186 P.2d 1012.) Where the inducement is not fraudulent, the 2-year period applies. (See *supra*, §649.)

(3) An action against a surety on the surety's bond where liability results from fraud of a fiduciary who is not a public officer. (*Haswell v. Costellenos* (1932) 126 C.A. 427, 433, 14 P.2d 846 [surety of fraudulent real estate broker].)

SUPPLEMENT: [This section is current through the latest supplement]



107 of 145 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XV. STATUTE OF LIMITATIONS: ACTIONS FOR FRAUD OR MISTAKE

A. Three-Year Limitation: Scope of Statute.

3. Equitable Action.

3 *Witkin Cal. Proc. Actions* § 655

[§ 655] Equitable Action.

The fraud statute (*C.C.P.* 338(d), *supra*, §653) applies to the following equitable actions:

(1) A contract action for reformation on the ground of fraud, innocent misrepresentation, or mistake. (See *Bradbury v. Higginson* (1914) 167 C. 553, 557, 140 P. 254 [mistake; reformation sought by answer]; *Goodfellow v. Barritt* (1933) 130 C.A. 548, 557, 20 P.2d 740 [fraud or mistake]; *Davis Welding & Mfg. Co. v. Advance Auto Body Works* (1940) 38 C.A.2d 270, 273, 100 P.2d 1067 [mistake]; 36 A.L.R.2d 687 [what statute of limitations governs action to reform instrument].)

(2) An equitable action to establish a constructive trust on the ground of fraud. (See *Unkel v. Robinson* (1912) 163 C. 648, 126 P. 485; *Pacific Nat. Bank of San Francisco v. Corona Nat. Bank* (1931) 113 C.A. 366, 374, 298 P. 144; *Douglas v. Douglas* (1951) 103 C.A.2d 29, 32, 228 P.2d 603; *infra*, §680 et seq.)

(3) An action to set aside a conveyance made with the intent to defraud creditors. (See *Richardson v. Michel* (1941) 45 C.A.2d 188, 195, 113 P.2d 916; 52 Harv. L. Rev. 840; 63 Harv. L. Rev. 1218; 100 A.L.R.2d 1094 [when statute of limitations or laches begins to run for action to set aside fraudulent conveyance or transfer in fraud of creditors]; but see *Knapp v. Elliott* (1947) 81 C.A.2d 667, 675, 184 P.2d 934 [action to restrain execution sale and to quiet title to real property; fraud statute was not applicable where assignee denied plaintiff's title and alleged that plaintiff held property in trust for judgment debtor].) (On creditor's action under Bulk Sales Act, U.C.C. 6110(b), see 4 *Summary* (10th), *Sales*, §227, and *supra*, §481.)

(4) An action for equitable relief against a judgment obtained by extrinsic fraud or mistake. (*Scott v. Dilks* (1941) 47 C.A.2d 207, 117 P.2d 700; *Turner v. Milstein* (1951) 103 C.A.2d 651, 659, 230 P.2d 25; *Hart v. Gudger* (1957) 153 C.A.2d 217, 232, 314 P.2d 549; *Zastrow v. Zastrow* (1976) 61 C.A.3d 710, 714, 132 C.R. 536, citing the text.)

SUPPLEMENT: [This section is current through the latest supplement]



108 of 145 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XV. STATUTE OF LIMITATIONS: ACTIONS FOR FRAUD OR MISTAKE

A. Three-Year Limitation: Scope of Statute.

4. Quasi-Contract Action.

a. Money Obtained by Fraud or Mistake.

3 *Witkin Cal. Proc. Actions* § 656

[§ 656] Money Obtained by Fraud or Mistake.

A quasi-contract action, in the form of a common count for money had and received, to recover money obtained by fraud (waiver of tort) or mistake, is governed by the fraud statute (*C.C.P. 338(d)*, supra, §653). (See *Shain v. Sresovich* (1894) 104 C. 402, 405, 38 P. 51 [excess payment on account, made by mistake]; *First Nationwide Savings v. Perry* (1992) 11 C.A.4th 1657, 1670, 15 C.R.2d 173, quoting the text [unjust enrichment action based on mistaken reconveyance of deed of trust]; 41 *Harv. L. Rev.* 1051; 79 *A.L.R.3d* 754 [money paid by mistake].)

In *Agair v. Shaeffer* (1965) 232 C.A.2d 513, 42 C.R. 883, defendants, employees of plaintiff, wrote several substantial unauthorized checks without his knowledge. The action to recover the money was brought within 3 years after discovery of the facts, but more than 2 years after the checks were drawn and defendants' employment was terminated. *Held*, reversing the trial court, the action was not barred. Defendants contended that the action was for breach of their oral contract of employment, and inept pleading, which alleged the oral contract, lent some support to their theory. But the substance of the wrong was violation of the confidential relationship by misappropriation of property. "There is a significant distinction between a situation of suing for monies due under an oral contract, as contrasted with an attempt to recover funds paid by mistake or obtained through fraud: one is based purely upon an obligation arising out of *agreement*; the other, out of *mistake* or by reason of one or more of the multifarious forms that *fraud* may assume." (232 C.A.2d 518.)

In *Creditors Collection Service v. Castaldi* (1995) 38 C.A.4th 1039, 45 C.R.2d 511, plaintiff, the assignee of a bank, sued defendants, two former bank customers, seeking repayment for a check drawn by defendants that the bank had honored but mistakenly neglected to debit from defendants' account. The bank honored the check in November 1988, and defendants closed the account in June 1989. On August 24, 1989, the bank realized its mistake and requested that defendants repay the money. Plaintiff filed this action in 1992. *Held*, the applicable statute of limitations was *C.C.P. 338(d)*, and because the action was filed within 3 years of the discovery of the mistake, it was timely.

(a) *C.C.P. 338(d)* applied, because the substance of the action was the recovery of money paid to defendants by mistake. (38 C.A.4th 1043, citing the text.)

(b) The 1-year limitations period of former C.C.P. 340(3) (now *C.C.P. 340(c)*) did not apply, because that section applies only to an action by a depositor against a bank for payment of a forged check. (38 *C.A.4th* 1043.)

(c) The 2-year limitations period of *C.C.P. 339*, which applies generally to quasi-contract actions such as actions on a contract, obligation, or liability not founded on an instrument in writing (see *supra*, §514), did not apply, because a specific limitations provision prevails over a more general provision, and *C.C.P. 338(d)* applied more specifically to this action. (38 *C.A.4th* 1043, 1044.)

SUPPLEMENT: [This section is current through the latest supplement]

See *Federal Deposit Ins. Corp. v. Dintino* (2008) 167 *C.A.4th* 333, 348, 84 *C.R.3d* 38 [bank's action against borrower for unjust enrichment based on bank's mistaken request for recordation of reconveyance of unpaid trust deed on borrower's home was governed by 3-year limitations period of *C.C.P. 338(d)*, where bank's mistaken request resulted in loss of its security interest in borrower's property and its ability to foreclose on trust deed on borrower's default on note].



109 of 145 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XV. STATUTE OF LIMITATIONS: ACTIONS FOR FRAUD OR MISTAKE

A. Three-Year Limitation: Scope of Statute.

4. Quasi-Contract Action.

b. Money Paid Under Duress.

3 *Witkin Cal. Proc. Actions* § 657

[§ 657] Money Paid Under Duress.

In *Leeper v. Beltrami* (1959) 53 C.2d 195, 1 C.R. 12, 347 P.2d 12, plaintiffs filed a complaint alleging that, at a time when they were financially involved, defendants B and S filed a false foreclosure suit to collect a debt already satisfied, and caused them to sell one of the parcels for a third of its value to defendant S. The court held that a cause of action was stated against B and S for recovery of money paid under duress. (See 1 *Summary* (10th), *Contracts*, §1032, for full discussion.) But the principal problems concerned the statute of limitations. As to the cause of action against B and S, the theory of plaintiffs' demand for relief might be restitution or damages, but the basic nature of the wrong was money obtained by duress. Duress may be regarded as a species of fraud, and should be considered fraud for the purpose of the statute of limitations. "A person who presses an unfounded claim to obtain money from an innocent party, who finds he must pay because of the circumstances in which he finds himself, is certainly guilty of fraudulent conduct. The entire conduct reeks of fraud. The very pressing of a false claim with knowledge of its falsity constitutes a misrepresentation, which is the backbone of what we know as ordinary fraud." (53 C.2d 207.) Hence, former C.C.P. 338(4) (now C.C.P. 338(d)) applied. (53 C.2d 208.) (As to tolling of cause, see *infra*, §702.)

SUPPLEMENT: [This section is current through the latest supplement]



110 of 145 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XV. STATUTE OF LIMITATIONS: ACTIONS FOR FRAUD OR MISTAKE

A. Three-Year Limitation: Scope of Statute.

5. Recovery of Real Property.

3 Witkin Cal. Proc. Actions § 658

[§ 658] Recovery of Real Property.

(1) *Nature of Problem.* The statute on an action to recover real property is 5 years, and accrual is not postponed (supra, §485). If the plaintiff's land is obtained by fraud, does the plaintiff have 5 years to sue or 3 years from the discovery of the facts? It would seem that little is accomplished in these situations by referring to the "gravamen" of the action, or in attempting to determine whether fraud is the "basis" of the action or is merely "incidentally" involved. Quite clearly both fraud and recovery of property are substantially involved, and one is as much the foundation or basis of the action as the other. The difficulty is not in the analysis of the complaint but in the application of two distinct kinds of overlapping limitation statutes: one depending on the nature of the defendant's wrongful act (fraud), the other on the remedy sought by the plaintiff (recovery of property).

(2) *Former Law.* The California cases originally took the position that the longer statute applied, by classifying the action as one to recover property. Thus, in *Murphy v. Crowley* (1903) 140 C. 141, 73 P. 820, an heir sued to set aside a conveyance allegedly procured by fraud and undue influence, to quiet title and to be let into possession. "It seems to be established ... that, although the main ground of the action is fraud or mistake, whereby the defendant has obtained the legal title to the land in controversy, and the chief contention between the parties is with respect to the fraud or mistake alleged, yet, if the plaintiff alleges facts which show, as matter of law, that he is entitled to possession of the property, and a part of the relief asked is, that he be let into possession, or that his title to the land be quieted, the action is in reality for the recovery of real property, and is not barred except by the five-year limitation" in *C.C.P. 318*. (140 C. 146.) (See *Union Ice Co. v. Doyle* (1907) 6 C.A. 284, 292, 92 P. 112 [action to reform deed for mistake and quiet title]; *Earl v. Lofquist* (1933) 135 C.A. 373, 379, 27 P.2d 416 [dictum]; *Wilkerson v. Thomas* (1953) 121 C.A.2d 479, 485, 263 P.2d 678; 63 Harv. L. Rev. 1198; but see *People v. Kings County Dev. Co.* (1918) 177 C. 529, 534, 171 P. 102 [fraud statute was inapplicable, on theory that separate chapter of Code deals with actions for recovery of real property, and that specific sections in this chapter are controlling].)

(3) *Present Rule: Fraud Statute Applies.* The problem was presented in *Leeper v. Beltrami* (1959) 53 C.2d 195, 1 C.R. 12, 347 P.2d 12, supra, §657, in connection with the claim against one defendant. To avoid the bar of the 3-year fraud statute and the requirement of prompt rescission, plaintiffs contended that this was a cause of action for the recovery of real property (quiet title) governed by the 5-year period of *C.C.P. 318*, under *Thompson v. Moore* (1937) 8 C.2d 367, 65 P.2d 800. The court, disapproving *Thompson*, held that the quiet title statute does not apply, for this would

place the emphasis on the relief sought rather than the cause of action, and would permit the plaintiff to avoid the 3-year statute by simply framing his complaint in the general terms permitted for quiet title (see 5 *Cal. Proc.* (5th), *Pleading*, §663).

"Quieting title is the relief granted once a court determines that title belongs in plaintiff. In determining that question, where a contract exists between the parties, the court must first find something wrong with that contract. In other words, in such a case, the plaintiff must show he has a substantive right to relief before he can be granted any relief at all. Plaintiff must show a right to rescind before he can be granted the right to quiet his title. The *Thompson* case permits a plaintiff who has executed a contract to secure relief by simply couching his cause of action in terms of quiet title, and thus permits him to avoid and evade the normal requirements of a cause of action to avoid that contract. This is pure formalism and should not be countenanced. The case is disapproved." (53 *C.2d* 216.) (See *Ankoanda v. Walker-Smith* (1996) 44 *C.A.4th* 610, 615, 52 *C.R.2d* 39 [following *Leeper*]; 77 *A.L.R.2d* 821 [what statute of limitations applies to action, based on duress, to recover money or property].)

SUPPLEMENT: [This section is current through the latest supplement]



111 of 145 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XV. STATUTE OF LIMITATIONS: ACTIONS FOR FRAUD OR MISTAKE

B. Accrual: Showing To Excuse Late Discovery of Facts.

1. Burden on Plaintiff To Show Diligence.

a. General Rule.

3 Witkin Cal. Proc. Actions § 659

[§ 659] General Rule.

(1) *Statement of Rule.* "The cause of action in that case is not deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake." (C.C.P. 338(d).) Literally interpreted, this language would give the plaintiff an unlimited period to sue if he or she could establish ignorance of the facts. But the courts have read into the statute a duty to exercise diligence to discover the facts. Thus, the rule is that the plaintiff must plead and prove the facts showing: (a) lack of knowledge; (b) lack of means of obtaining knowledge (in the exercise of reasonable diligence the facts could not have been discovered at an earlier date); (c) how and when the plaintiff did actually discover the fraud or mistake. Under this rule, constructive and presumed notice or knowledge are equivalent to knowledge. So, when the plaintiff has notice or information of circumstances to put a reasonable person on inquiry, or has the opportunity to obtain knowledge from sources open to his or her investigation (such as public records or corporation books), the statute commences to run.

(2) *Illustrations.* Many cases, both old and new, strictly apply these requirements to bar actions brought after lapse of the 3-year period. (See *Lady Washington Consol. Co. v. Wood* (1896) 113 C. 482, 486, 45 P. 809; *Consolidated Reservoir & Power Co. v. Scarborough* (1932) 216 C. 698, 701, 16 P.2d 268; *Bainbridge v. Stoner* (1940) 16 C.2d 423, 430, 106 P.2d 423; *Jackson v. Master Holding Corp.* (1940) 16 C.2d 824, 827, 108 P.2d 673; *Lazzarevich v. Lazzarevich* (1952) 39 C.2d 48, 49, 244 P.2d 1 [mistake]; *Sun 'N Sand v. United Calif. Bank* (1978) 21 C.3d 671, 702, 148 C.R. 329, 582 P.2d 920 [negligent delay in discovering mistake]; *Miller v. Bechtel Corp.* (1983) 33 C.3d 868, 874, 191 C.R. 619, 663 P.2d 177 [summary judgment was affirmed where declarations showed failure to inquire; dissent quotes text on fiduciary relationship and no duty to inquire]; *Myers v. Metropolitan Trust Co. of Calif.* (1937) 22 C.A.2d 284, 289, 70 P.2d 992; *Nighbert v. First Nat. Bank* (1938) 26 C.A.2d 624, 633, 79 P.2d 1105; *Greenberg v. Du Bain Realty Corp.* (1938) 27 C.A.2d 111, 115, 80 P.2d 537; *Turman v. Holmes* (1938) 29 C.A.2d 198, 206, 84 P.2d 225; *Vertex Inv. Co. v. Schwabacher* (1943) 57 C.A.2d 406, 417, 134 P.2d 891; *Scafidi v. Western Loan & Bldg. Co.* (1946) 72 C.A.2d 550, 566, 165 P.2d 260; *Bliss v. Martin* (1946) 74 C.A.2d 500, 506, 169 P.2d 61; *Shapiro v. Equitable Life Assur. Soc. of the United States* (1946) 76 C.A.2d 75, 88, 172 P.2d 725; *Merchants' Ice & Cold Storage Co. v. Globe Brewing Co.* (1947) 78 C.A.2d 618, 623, 177 P.2d 963; *Bank of America v. Vannini* (1956) 140 C.A.2d 120, 129, 295 P.2d 102 [purchaser's cross-complaint for fraud was barred; duty arose from contractual provision calling for

investigation within 17 months before exercising option to buy]; *Woodring v. Basso* (1961) 195 C.A.2d 459, 467, 15 C.R. 805, citing the text [action to set aside decree of distribution and impose trust]; *Wilson v. Wilson* (1962) 199 C.A.2d 542, 545, 18 C.R. 768 [same]; *Helper v. Hubert* (1962) 208 C.A.2d 22, 28, 24 C.R. 900, citing the text [summary judgment for defendants affirmed]; *Weir v. Snow* (1962) 210 C.A.2d 283, 292, 26 C.R. 868, citing the text [same]; *Hayward Union High School Dist. of Alameda v. Madrid* (1965) 234 C.A.2d 100, 125, 44 C.R. 268; *Orange County Rock Products Co. v. Cook Bros. Equipment Co.* (1966) 246 C.A.2d 698, 702, 55 C.R. 265 [pleading was insufficient]; *National Auto. & Cas. Ins. Co. v. Payne* (1968) 261 C.A.2d 403, 409, 67 C.R. 784 [same]; *Casualty Ins. Co. v. Rees Inv. Co.* (1971) 14 C.A.3d 716, 719, 92 C.R. 857, quoting the text [judgment on demurrer affirmed]; *Bedolla v. Logan & Frazer* (1975) 52 C.A.3d 118, 129, 125 C.R. 59 [knowledge of limited partner was imputed to partnership plaintiff, and statute ran from time of that knowledge, barring action]; *Baker v. Beech Aircraft Corp.* (1979) 96 C.A.3d 321, 327, 333, 157 C.R. 779, quoting the text; *Lee v. Escrow Consultants* (1989) 210 C.A.3d 915, 920, 259 C.R. 117, quoting the text; *North Star Reinsurance Corp. v. Superior Court* (1992) 10 C.A.4th 1815, 1823, 13 C.R.2d 775 [action for reformation of excess insurance contract based on mistake accrued when insurer notified plaintiff insured of exclusions from coverage that plaintiff alleged were included by mistake]; *Kirby v. Albert D. Seeno Const. Co.* (1992) 11 C.A.4th 1059, 1066, 14 C.R.2d 604 [complaint alleging discovery of soil subsidence damage on a certain date "and continuing" failed to allege delayed discovery but, when coupled with evidence of fraud, was sufficient to allow for amendment]; *Parsons v. Tickner* (1995) 31 C.A.4th 1513, 1525, 37 C.R.2d 810, quoting the text; *Creditors Collection Service v. Castaldi* (1995) 38 C.A.4th 1039, 1044, 45 C.R.2d 511, *supra*, §656 [action for repayment of check that bank honored, but mistakenly neglected to debit from customers' account, accrued when bank discovered mistake, not when mistake occurred]; *Kline v. Turner* (2001) 87 C.A.4th 1369, 1374, 105 C.R.2d 699 [plaintiff's discovery that defendants had made check owed to him payable to his courier put plaintiff on inquiry notice concerning both courier's and defendants' wrongdoing; quoting the text]; 30 Cal. L. Rev. 589; 5 Cal. Proc. (5th), *Pleading*, §929 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]



112 of 145 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XV. STATUTE OF LIMITATIONS: ACTIONS FOR FRAUD OR MISTAKE

B. Accrual: Showing To Excuse Late Discovery of Facts.

1. Burden on Plaintiff To Show Diligence.

b. Illustrations: Accrual Postponed.

3 Witkin Cal. Proc. Actions § 660

[§ 660] Illustrations: Accrual Postponed.

In *Aaroe v. First Amer. Title Ins. Co.* (1990) 222 C.A.3d 124, 271 C.R. 434, plaintiffs, investors in a trust deed investment program that was in effect a pyramid scheme, brought an action for conspiracy to defraud against defendant title insurance company alleging that it participated in the scheme. The trial judge recognized that this action was filed within 3 years of the alleged discovery of the fraud, as required by *C.C.P. 338(d)*, but ruled that plaintiffs could not have the benefit of that statute of limitations because the last overt act, pursuant to the alleged conspiracy to defraud, occurred when a coconspirator went into bankruptcy, more than 3 years prior to the action. The trial judge then granted a nonsuit for the title insurance company. *Held*, judgment reversed.

(a) The last overt act doctrine, as enunciated in *Wyatt v. Union Mortg. Co.* (1979) 24 C.3d 773, 157 C.R. 392, 598 P.2d 45, *supra*, §557, acts to toll the beginning of the applicable 3-year limitations period, in the same way that *C.C.P. 338(d)* tolls the beginning of the 3-year period based upon delayed discovery. However, "[i]n cases in which it is alleged that the fraud was *not* discovered until less than three years prior to the filing of suit, section 338(d) directs that the action may be timely despite the fact that the last overt act is more than three years old. Any other rule would simply repeal the three-year discovery rule of section 338(d), which is applicable in fraud and conspiracy to defraud cases, and replace it with a straight three-year statute measured from the last fraudulent act." (222 C.A.3d 128.)

(b) Plaintiffs relied on delayed discovery under *C.C.P. 338(d)*, not the last overt act doctrine. Their allegations established the timeliness of their action under *C.C.P. 338(d)*. "The fact they did not additionally allege tolling under the last overt act doctrine is irrelevant; that omission cannot defeat the delayed discovery tolling which section 338(d) allows. Consequently, respondent's argument here, that the last overt act doctrine would not save appellants' complaint, is a non sequitur; respondent was not entitled to nonsuit on that basis. Since the last overt act doctrine was the sole basis upon which nonsuit was granted, and since the evidence at trial did not negate appellants' claims to tolling under the delayed discovery rule, we must reverse the judgment and remand for further proceedings." (222 C.A.3d 128, 129.)

(c) Alternatively, defendant contended that even if the discovery rule applied here, the coconspirator's bankruptcy required plaintiffs as a matter of law to discover defendant's alleged fraud. However, "[a]t the time of the bankruptcy, and thereafter, appellants were reassured by direct communications and by court filings that [the coconspirator] had

assets which exceeded its liabilities and merely faced a short-term problem of cash flow. Not every bankruptcy necessarily results from or implies fraud; and neither we nor the trial court could rule as a matter of law that a bankruptcy proceeding, in which appellants were reassured they would receive their money, would ineluctably trigger a duty on the part of unsophisticated investors to somehow discover a fraud not apparent to the rest of the world." (222 C.A.3d 129.)

Later cases are to the same effect. (See *Brandon G. v. Gray* (2003) 111 C.A.4th 29, 34, 3 C.R.3d 330 [parents' cause of action against county for misrepresenting that no complaints had been filed against day care facility accrued when parents discovered misrepresentation, and not earlier when they learned that one of their children had been molested at facility]; *E-Fab v. Accountants, Inc. Services* (2007) 153 C.A.4th 1308, 1323, 64 C.R.3d 9 [citing *Brandon G.*; action by client against employment agency for misrepresenting that agency had conducted criminal background check and verified academic credentials of applicant; accrual occurred when client was informed by police that applicant had prior criminal record and had falsified her credentials, and not earlier when client learned that applicant had embezzled client's funds].)

SUPPLEMENT: [This section is current through the latest supplement]

See *Federal Deposit Ins. Corp. v. Dintino* (2008) 167 C.A.4th 333, 350, 84 C.R.3d 38 [action by bank against borrower for unjust enrichment based on bank's mistaken request for recordation of reconveyance of unpaid trust deed on borrower's home, resulting in loss of its security interest in borrower's property and its ability to foreclose on trust deed on borrower's default; action accrued when borrower's installment payment was late, and not earlier on date of bank's mistake or when grant deed was recorded]; *Broberg v. Guardian Life Ins. Co. of America* (2009) 171 C.A.4th 912, 921, 923, 90 C.R.3d 225 [in action by insured alleging that insurer misrepresented that earnings from whole life insurance policy would be sufficient to pay premiums after 11th year, trial judge erred in ruling as matter of law that accrual occurred on purchase of policy, rather than when insured was billed for additional premiums after 11th year; policy's disclaimers and other terms were not sufficient to change that result].



113 of 145 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XV. STATUTE OF LIMITATIONS: ACTIONS FOR FRAUD OR MISTAKE

B. Accrual: Showing To Excuse Late Discovery of Facts.

1. Burden on Plaintiff To Show Diligence.

c. Illustrations: Accrual Not Postponed.

3 *Witkin Cal. Proc. Actions* § 661

[§ 661] Illustrations: Accrual Not Postponed.

In *Spellis v. Lawn* (1988) 200 C.A.3d 1075, 246 C.R. 385, plaintiffs, an ex-wife and her adult children, brought an action for fraud, conspiracy to defraud, intentional infliction of emotional distress, and violation of a statutory duty of support against the children's father, arising out of his failure to provide court-ordered support for 16 years following his disappearance and change of identity. The trial judge sustained a demurrer to all causes of action without leave to amend and dismissed the complaint. One of the grounds for demurrer was that the actions were barred by the statute of limitations. *Held*, judgment of dismissal affirmed.

(a) *Discovery rule*. Plaintiffs seek protection under the "discovery rule." "For the discovery rule to come into play, the cause of action itself must lie unsuspected; hidden facts relating to proof are of no consequence. The late-discovered information concerning defendant's alias and residence was not essential to any asserted cause of action. Thus, plaintiffs' ignorance of these facts did not stop the statute's running." (200 C.A.3d 1080.)

(b) *Continuing course of conduct*. Plaintiffs contend that defendant's "fraudulent concealment of his changed identity and whereabouts constituted a continuing course of conduct that ended only when plaintiffs finally located him." They argue that the statute of limitations did not begin to run until that date and that the complaint, filed 1 year later, was timely. However, this proposition is contrary to the fundamental rule that the statute begins to run from the time conduct becomes actionable. "[W]here an injury, although slight, is sustained in consequence of the wrongful act of another, and the law affords a remedy therefor, the statute of limitations attaches at once. It is not material that all the damages resulting from the act shall have been sustained at that time, and the running of the statute is not postponed by the fact that the actual or substantial damages do not occur until a later date." (200 C.A.3d 1080, citing *Martinez-Ferrer v. Richardson-Merrell* (1980) 105 C.A.3d 316, 164 C.R. 591, *supra*, §591.) The extended duration of defendant's disappearance added to plaintiffs' difficulties and to their damages, but did not postpone accrual of any cause of action or toll the statute of limitations. (200 C.A.3d 1081.)

(c) *Estoppel*. Plaintiffs contend that defendant's wrongful concealment of his whereabouts and masking his identity caused their delay in filing suit. This argument mischaracterizes their position during defendant's absence. "Their inability to locate him did not preclude this litigation. ... [P]laintiffs had possession of all facts essential to their causes

of action in the early days of his disappearance; they could have served him by publication then. Because defendant's conduct did not hinder plaintiffs in bringing their action, no grounds for estoppel exist." (200 C.A.3d 1081.)

In *Love v. Fire Ins. Exchange* (1990) 221 C.A.3d 1136, 271 C.R. 246, insureds in late 1980 discovered cracks in the foundation and filling of their home and related problems, and were advised by an engineering report in February 1981 that the damage was related to earth movement and the negligence of the home builders. Insureds submitted damage claims to their insurer in February 1981 and again in December 1985, which the insurer denied on grounds of no coverage under the policy. In January 1988, the insureds filed an action against the insurer, alleging, among others, causes of action for breach of the covenant of good faith and fair dealing, breach of statutory duties, breach of contract, fraud, and intentional infliction of emotional distress. The trial judge concluded that the action was time-barred by the governing statutes of limitation, and granted insurer's motion for summary judgment. *Held*, judgment affirmed.

(a) *Accrual of cause of action*. "Where an insured observes abnormal damage, hires an engineering firm to investigate, and obtains a report stating earth movement and third party negligence are causes of the damage, his causes of action against the insurer accrue on receipt of such report ... because the statute of limitations commences when a party knows or should know the *facts* essential to his claim. ... An insured who is aware of the essential facts cannot toll the statute of limitations by contending he only belatedly discovered his policy might provide coverage ... because knowledge of the *facts*, rather than knowledge of the available legal theories or remedies, starts the statute of limitations." Accordingly, insureds' causes of action accrued not later than February 1981, when insureds "were aware of the factual predicate to their suit and were aware their claim had been unconditionally denied." (221 C.A.3d 1143.)

(b) *Estoppel*. Insurer's conduct did not estop it from relying on the statute of limitations defenses. (221 C.A.3d 1144, citing *Neff v. New York Life Ins. Co.* (1947) 30 C.2d 165, 180 P.2d 900, *infra*, §776.) Insurer neither "misrepresented" nor "concealed" any facts (as opposed to pertinent law or legal theories) on which insureds' claim was based, nor did it conceal the terms of the policy or the fact that it denied the claim for lack of coverage. (221 C.A.3d 1145.) Although an insurer has a "special relationship" to its insured, it is not a *true* fiduciary. (221 C.A.3d 1147.) Hence, when it denied their claims, insurer was not obligated to inform insureds of pertinent laws or legal theories upon which insureds could rely in a later lawsuit challenging the denial of their claims. (221 C.A.3d 1144, 1149, 1150.) Neither insureds' ignorance of, nor insurer's failure to explain, the different legal theories on which suit might be filed extends the time within which insureds is required to file their action. (221 C.A.3d 1150.)

In *McKelvey v. Boeing North Amer.* (1999) 74 C.A.4th 151, 160, 86 C.R.2d 645, the trial judge dismissed four actions alleging that plaintiffs were injured by pollution that defendant manufacturers caused over several decades. The judge ruled that plaintiffs failed to allege sufficiently the application of the delayed discovery rule, and thus each action was time-barred. *Held*, affirmed. Plaintiffs offered only conclusory allegations of defendants' cover-up and allegations that plaintiffs discovered that they may have sustained injuries as a result of defendants' wrongdoing less than 1 year before filing these actions. Before that time, they claimed, without elaboration, that they did not suspect any wrongdoing. They did not allege that they were not aware of facts sufficient to make a reasonably prudent person sufficiently suspicious to investigate further. In light of the facts that they did allege, these omissions were fatal. Indeed, plaintiffs admitted that newspapers had reported defendants' conduct, but plaintiffs did not allege that they had not read or heard of these reports. Thus, their allegations that they were unaware of defendants' conduct were inadequate. (74 C.A.4th 160.)

McKelvey was disapproved by the adoption of C.C.P. 340.8 (statute of limitations for action for personal injury or death resulting from exposure to hazardous material or toxic substance) in 2003. (See *supra*, §573.)

SUPPLEMENT: [This section is current through the latest supplement]



114 of 145 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XV. STATUTE OF LIMITATIONS: ACTIONS FOR FRAUD OR MISTAKE

B. Accrual: Showing To Excuse Late Discovery of Facts.

2. Where Circumstances Do Not Impose Duty To Inquire.

3 *Witkin Cal. Proc. Actions* § 662

[§ 662] Where Circumstances Do Not Impose Duty To Inquire.

The rule that calls for diligence in discovery of the facts (*supra*, §659) applies only where there is a duty to inquire and the circumstances are such that the plaintiff is negligent in failing to inquire. If there are no circumstances to arouse the suspicion of a reasonably prudent person, the statute will not commence to run, even though the means of obtaining the information are available. Some of the earlier cases, particularly those involving actions by shareholders based on fraud of directors, gave this qualification little more than lip service. Typical examples of such decisions are *Lady Washington Consol. Co. v. Wood* (1896) 113 C. 482, 483, 45 P. 809, and *Consolidated Reservoir & Power Co. v. Scarborough* (1932) 216 C. 698, 700, 16 P.2d 268. (See 30 Cal. L. Rev. 589.)

The trend was reversed, however, and a new liberal policy in favor of the ignorant defrauded shareholder was instituted, in *Hobart v. Hobart Estate Co.* (1945) 26 C.2d 412, 438, 159 P.2d 958. (See *Denson v. Pressey* (1936) 13 C.A.2d 472, 474, 57 P.2d 522; *Mortimer v. Loynes* (1946) 74 C.A.2d 160, 171, 168 P.2d 481; *Sime v. Malouf* (1949) 95 C.A.2d 82, 101, 213 P.2d 788.)

In *Snow v. A. H. Robins Co.* (1985) 165 C.A.3d 120, 211 C.R. 271, plaintiff had an intrauterine contraceptive device (Dalkon Shield) inserted, but nevertheless became pregnant and, for fear of blood poisoning, had a therapeutic abortion. Plaintiff had been told that the pregnancy rates for this device were 1% or 2%. However, nearly 7 years later, plaintiff learned from a television show that the rates were actually much higher and, less than a year thereafter, filed a complaint against the manufacturer of the device alleging that the true pregnancy rates had been fraudulently concealed from her. *Held*, the action was timely filed within the 3-year period. The period began on the date of the television show; prior to that date, plaintiff had no grounds for suspecting fraudulent concealment of the pregnancy rates. On the basis of the low pregnancy rates of which she had been informed, she was entitled to believe that her pregnancy was simply a matter of bad luck. (165 C.A.3d 134.)

SUPPLEMENT: [This section is current through the latest supplement]



115 of 145 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XV. STATUTE OF LIMITATIONS: ACTIONS FOR FRAUD OR MISTAKE

B. Accrual: Showing To Excuse Late Discovery of Facts.

3. Duty Relaxed Where Confidential Relationship Exists.

3 *Witkin Cal. Proc. Actions* § 663

[§ 663] Duty Relaxed Where Confidential Relationship Exists.

(1) *Statement of Rule.* If the plaintiff and the defendant are in a confidential relationship, there is no duty of inquiry until the relationship is repudiated. The nature of the relationship is such as to cause the plaintiff to rely on the fiduciary, and awareness of facts that would ordinarily call for investigation does not excite suspicion under these special circumstances. This qualification has been applied in cases involving strict trusts and various other confidential relationships. (See *Rutherford v. Rideout Bank* (1938) 11 C.2d 479, 486, 80 P.2d 978 [banker who acted as adviser in business affairs]; *Knapp v. Knapp* (1940) 15 C.2d 237, 241, 100 P.2d 759 [trustee]; *Laraway v. First Nat. Bank of La Verne* (1940) 39 C.A.2d 718, 728, 104 P.2d 95 [agent]; *Lee v. Hensley* (1951) 103 C.A.2d 697, 704, 230 P.2d 159 [guardian]; *Schaefer v. Berinstein* (1956) 140 C.A.2d 278, 296, 295 P.2d 113; *Lee v. Escrow Consultants* (1989) 210 C.A.3d 915, 921, 259 C.R. 117, quoting the text [escrow agency]; *Parsons v. Tickner* (1995) 31 C.A.4th 1513, 1529, 37 C.R.2d 810, quoting the text [music managers of composer].)

The earlier cases gave scant consideration to the confidential relations qualification where the action was by a corporation or shareholders against a fraudulent director or managing officer. (See *Lady Washington Consol. Co. v. Wood* (1896) 113 C. 482, 483, 45 P. 809; *Vertex Inv. Co. v. Schwabacher* (1943) 57 C.A.2d 406, 418, 134 P.2d 891.) But subsequent decisions recognize that concealment by a fraudulent corporate fiduciary is a good excuse for late discovery of the facts. (See *Hobart v. Hobart Estate Co.* (1945) 26 C.2d 412, 440, 159 P.2d 958 [president, general manager, and director of family corporation]; *Mortimer v. Loynes* (1946) 74 C.A.2d 160, 175, 168 P.2d 481 [president, director, and manager of building and loan association]; 30 *Cal. L. Rev.* 589.)

(2) *Duty Arises on Discovery of Suspicious Facts.* Once the plaintiff becomes aware of facts that would make a reasonably prudent person suspicious, the duty to investigate arises, and the plaintiff may then be charged with knowledge of facts that would have been discovered by an investigation. (*Bedolla v. Logan & Frazer* (1975) 52 C.A.3d 118, 131, 125 C.R. 59.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Statement of Rule.* But see *Alfaro v. Community Housing Imp. System & Planning Assn.* (2009) 171 C.A.4th 1356, 1393, 89 C.R.3d 659 [grant deeds contained restriction on resale prices for homes; purchasers' receipt of deeds constituted discovery of vendors' alleged fraud in failing to disclose restriction, and thus caused limitations period to

run, even if vendors were in fiduciary relationship with purchasers, and even if deeds were in English, purchasers did not understand English, and vendors generally communicated with purchasers only in Spanish; grant deeds gave purchasers actual knowledge of existence of deed restriction and inquiry notice of nature of restriction].



116 of 145 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XVI. STATUTE OF LIMITATIONS: ACTIONS ON STATUTORY LIABILITIES

A. Three-Year Limitation: Scope of Statute.

1. In General.

3 Witkin Cal. Proc. Actions § 664

[§ 664] In General.

(1) *Nature of Statute.* *C.C.P. 338(a)* establishes a 3-year period for an "action upon a liability created by statute, other than a penalty or forfeiture." This section applies only where the liability is embodied in a statutory provision and was of a type that did not exist at common law. It is inapplicable, therefore, to a liability that, although imposed by statute, is contractual in nature. (See *People v. Wilson* (1966) 240 C.A.2d 574, 576, 49 C.R. 792, quoting the text; 63 Harv. L. Rev. 1196.)

In *People v. Wilson*, the action was to recover the expense of fire suppression against a person who negligently allowed the fire to start. The statute provided that the expense should be a charge against such a person, and should constitute "a debt" collectible "in the same manner as in the case of an obligation under a contract, expressed or implied." The court, relying on a case holding that this statute supported contract venue, concluded that the legislative intent was to impose a contractual liability governed by the 2-year period of *C.C.P. 339(1)*. (240 C.A.2d 576; see *supra*, §512.)

(2) *Statute Held Applicable.* *C.C.P. 338(a)* was held applicable in the following cases:

Lerner v. Los Angeles City Bd. of Education (1963) 59 C.2d 382, 389, 29 C.R. 657, 380 P.2d 97, *infra*, §730 [schoolteacher's action, based on tenure laws, for reinstatement after wrongful discharge].

Monroe v. Trustees of the Calif. State Colleges (1971) 6 C.3d 399, 405, 99 C.R. 129, 491 P.2d 1105, *supra*, §435 [teacher's action].

Green v. Obledo (1981) 29 C.3d 126, 140, footnote 10, 172 C.R. 206, 624 P.2d 256 [mandamus proceeding by AFDC recipients to prevent state from enforcing regulation limiting recognition of work-related transportation expenses].

Travis v. Santa Cruz (2004) 33 C.4th 757, 772, 16 C.R.3d 404, 94 P.3d 538 [action challenging city ordinance imposing residential land use restrictions on ground that ordinance was preempted by later-enacted state statutes].

Murphy v. Kenneth Cole Productions (2007) 40 C.4th 1094, 1114, 56 C.R.3d 880, 155 P.3d 284 [action against

employer for meal and rest period violations under *Lab.C.* 226.7].

Raymond v. Christian (1937) 24 C.A.2d 92, 113, 74 P.2d 536 [mandamus proceeding by public officer or employee to recover statutory compensation].

Bourdieu v. Seaboard Oil Corp. of Delaware (1940) 38 C.A.2d 11, 17, 100 P.2d 528 [action for damages to servient estate caused by exploitation of oil and gas leases].

Marin v. Messner (1941) 44 C.A.2d 577, 591, 112 P.2d 731 [action to recover fees unlawfully paid to surveyor by county supervisors].

Holland v. Nelson (1970) 5 C.A.3d 308, 312, 85 C.R. 117, *infra*, §668 [action to recover treble damages under C.C. 1812.62, regulating contracts for dance lessons].

Board of Retirement of Kern County Employees' Retirement Assn. v. Terry (1974) 40 C.A.3d 1091, 1093, 115 C.R. 718 [county retirement board's subrogation suit under *Govt.C.* 31820 against third-party tortfeasor to recover retirement benefits paid to injured county employee].

Pasquinelli v. California (1975) 45 C.A.3d 457, 461, 119 C.R. 438 [highway patrol members' mandamus proceeding seeking reinstatement to leave of absence for disability, with salary, pursuant to judicial interpretation of statute].

Peles v. La Bounty (1979) 90 C.A.3d 431, 435, 153 C.R. 571 [graduate student's petition to compel university to reinstate him after expulsion, based on rights under governing statute].

People v. Barger (1979) 97 C.A.3d 661, 158 C.R. 825 [action to recover costs of court-appointed counsel].

Blue Cross of Northern Calif. v. Cory (1981) 120 C.A.3d 723, 742, 174 C.R. 901, quoting the text [action by State Controller under Unclaimed Property Law (*C.C.P.* 1500 *et seq.*) to recover escheated money].

MacManus v. A.E. Realty Partners (1983) 146 C.A.3d 275, 283, 284, 194 C.R. 567 [action to recover treble damages under C.C. 2995, prohibiting requirement that real property purchaser use escrow entity in which developer has financial interest].

Winick Corp. v. General Ins. Co. (1986) 187 C.A.3d 142, 145, 231 C.R. 606 [action against surety on stop notice release bond under C.C. 3196].

Giffin v. United Trans. Union (1987) 190 C.A.3d 1359, 1362, 236 C.R. 6 [action for breach of union's duty of fair representation where employer is public entity exempt from federal labor law].

Aubry v. Goldhor (1988) 201 C.A.3d 399, 404, 247 C.R. 205 [Labor Commissioner's action pursuant to Labor Code to recover overtime compensation and penalties on behalf of employee].

Craig v. Poway (1994) 28 C.A.4th 319, 342, 33 C.R.2d 528, *infra*, §673 [action alleging violation of Community Redevelopment Law (*Health & Saf.C.* 33000 *et seq.*; see 12 *Summary* (10th), *Real Property*, §827 *et seq.*) by city's underfunding and improper use of low- and moderate-income housing fund].

Mitchell v. Leslie (1995) 39 C.A.4th Supp. 7, 10, 46 C.R.2d 419 [tenant's action against landlord to recover excess rent charged for furniture rental in violation of city ordinance allowing treble damages].

People v. Triplett (1996) 48 C.A.4th 233, 240, 55 C.R.2d 610 [challenge to county assessor's valuation of fee to cancel contract under Williamson Act; Act's limitations period only applies to challenge to cancellation decision by board of supervisors].

California v. Superior Court (Woosley) (1998) 66 C.A.4th 421, 435, 78 C.R.2d 88 [taxpayer's action for refund of excessive state vehicle license fees].

Low v. Lan (2002) 96 C.A.4th 1371, 1380, 118 C.R.2d 60 [preference action under *Ins.C. 1034* brought by Insurance Commissioner against creditor of insolvent insurance company to recover funds paid to creditor in satisfaction of judgment].

Shamsian v. Atlantic Richfield Co. (2003) 107 C.A.4th 967, 976, 132 C.R.2d 635 [action for civil penalties under *Health & Saf.C. 25249.7* (civil enforcement provision of Safe Drinking Water and Toxic Enforcement Act of 1986)].

Shewry v. Begil (2005) 128 C.A.4th 639, 772, 27 C.R.3d 209 [action by Department of Health Services against son of decedent under *Welf.C. 14009.5* to recover Medi-Cal benefits provided to decedent].

Valdez v. Himmelfarb (2006) 144 C.A.4th 1261, 1269, 51 C.R.3d 195 [personal injury action by employee against employer without workers' compensation insurance].

(3) *Statute Held Not Applicable. C.C.P. 338(a)* was held not applicable in the following cases:

Ventura County Employees' Retirement Assn. v. Pope (1978) 87 C.A.3d 938, 955, 151 C.R. 695 [rejecting reasoning of *Board of Retirement v. Terry*].

Bank of America v. Cory (1985) 164 C.A.3d 66, 75, 210 C.R. 351 [disapproving *Blue Cross*; application of statute to action by controller to enforce Unclaimed Property Law (*C.C.P. 1500* et seq.) would be in direct conflict with *C.C.P. 1570*, providing that there is no limitations period in that action (see *supra*, §489)].

Jackson v. Cedars-Sinai Med. Center (1990) 220 C.A.3d 1315, 1319, 269 C.R. 877 [causes of action for violations of Lanterman-Petris-Short Act (see *supra*, §80 et seq.) sounded in tort and did not involve newly created rights wholly statutory in nature; thus, they were subject to 1-year period for personal injuries in former *C.C.P. 340(3)* (now 2-year period in *C.C.P. 335.1*)].

Marin Assn. of Firefighters v. Marin County Employees' Retirement Assn. (1994) 30 C.A.4th 1638, 1651, 36 C.R.2d 736 [county's mistaken failure to include firefighters' holiday pay as final compensation in computing retirement benefits; action was governed by delayed discovery rule of *C.C.P. 338(d)* (limitations period for action based on fraud or mistake; see *supra*, §653)].

Prudential Home Mortg. Co. v. Superior Court (1998) 66 C.A.4th 1236, 1241, 78 C.R.2d 566 [disagreeing with analysis in *MacManus*; action to recover monetary forfeiture under *C.C. 2941* for failing to observe requirements for recording reconveyance of trust deed after borrower pays secured loan was governed by former *C.C.P. 340(1)* (now *C.C.P. 340(a)*), because forfeiture was penal, not remedial].

West Shield Investigations & Sec. Consultants v. Superior Court (2000) 82 C.A.4th 935, 951, 98 C.R.2d 612, supra, §558 [action alleging violations of *C.C. 51.9* and *52.1* of Unruh Civil Rights Act is governed by 1-year period for personal injury in former *C.C.P. 340(3)* (now 2-year period in *C.C.P. 335.1*)]; see *Gatto v. Sonoma (2002) 98 C.A.4th 744, 760, 120 C.R.2d 550, supra, §558* [same, as to action alleging violation of *C.C. 51(b)* and *52.1*].

David M. v. Beverly Hosp. (2005) 131 C.A.4th 1272, 1277, 32 C.R.3d 649 [action against physician and hospital for negligently failing to report suspected child abuse that should have been discovered during medical examination was governed by *C.C.P. 340.5* (medical malpractice statute of limitations governing minor plaintiffs; see *supra*, §586 et seq.)].

SUPPLEMENT: [This section is current through the latest supplement]



117 of 145 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XVI. STATUTE OF LIMITATIONS: ACTIONS ON STATUTORY LIABILITIES

A. Three-Year Limitation: Scope of Statute.

2. Federal Civil Rights Action.

3 *Witkin Cal. Proc. Actions* § 665

[§ 665] Federal Civil Rights Action.

(1) *Limitations Period Governed by State Law.* An action may be brought in a state court under the federal Civil Rights Act (42 U.S.C., §1983) for depriving a person of federal constitutional or statutory rights under color of state law. (See 8 *Summary* (10th), *Constitutional Law*, §814 et seq.) The Act does not contain a statute of limitations, and the appropriate state limitation applies (see *supra*, §58). In *Rossiter v. Benoit* (1979) 88 C.A.3d 706, 152 C.R. 65, plaintiff sued peace officers, alleging unlawful arrest and false imprisonment. Defendants contended that the 1-year period for false imprisonment actions (*supra*, §549) was a bar. *Held*, the action, brought within 3 years of the incident, was timely. Former C.C.P. 338(1) (now C.C.P. 338(a)) applies where the liability is of a type that did not exist at common law (88 C.A.3d 717, citing the text); and liability under 42 U.S.C., §1983 for deprivation of civil rights is wholly statutory, despite the circumstance that the same facts may give rise to a common law action for false imprisonment. (88 C.A.3d 717.)

Notwithstanding *Rossiter* and without mentioning that case, *Wilson v. Garcia* (1985) 471 U.S. 261, 105 S.Ct. 1938, 85 L.Ed.2d 254, *Jackson v. Cedars-Sinai Med. Center* (1990) 220 C.A.3d 1315, 269 C.R. 877, *Huntington Park v. Superior Court* (1995) 34 C.A.4th 1293, 1297, 41 C.R.2d 68, and many other later cases make clear that a state court action under 42 U.S.C., §1983 is governed by the state's personal injury statute of limitations. In California, that is the 2-year limitations period of C.C.P. 335.1. (See *supra*, §558.)

(2) *Accrual Governed by Federal Law.* Although state law determines which limitations period applies to a civil rights action under 42 U.S.C., §1983, federal law determines when the limitations period accrues. Aspects of the action that are not governed by reference to state law are governed by federal rules conforming generally to common law tort principles. Under those principles, it is the standard rule that accrual of a cause of action occurs when the plaintiff has a complete and present cause of action, i.e., when the plaintiff may file an action and obtain relief. (*Wallace v. Kato* (2007) 549 U.S. ___, 127 S.Ct. 1091, 1094, 166 L.Ed2d 973, 980 [limitations period for plaintiff's unlawful arrest claim accrued when he appeared before examining magistrate and was bound over for trial, not later on his release from custody after state dropped charges against him].)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Accrual Governed by Federal Law.*

Citation: Wallace v. Kato (2007) 549 U.S. 384, 127 S.Ct. 1091, 1094, 166 L.Ed.2d 973, 980.



118 of 145 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XVI. STATUTE OF LIMITATIONS: ACTIONS ON STATUTORY LIABILITIES

A. Three-Year Limitation: Scope of Statute.

3. Governmental Claim for Taxes.

a. Action To Collect Taxes.

3 *Witkin Cal. Proc. Actions* § 666

[§ 666] Action To Collect Taxes.

(1) *In General.* The payment of delinquent property taxes is usually enforced by imposing a lien on the property and selling it at a delinquency sale. (See 9 *Summary* (10th), *Taxation*, §260 et seq.) Taxes are, however, a liability of the taxpayer, and may be collected by a personal action. That action is on a liability created by statute; hence, unless some other specific provision is made in the taxing statute, the action is within the 3-year limitations period of *C.C.P.* 338(a). (See *Los Angeles v. Ballerino* (1893) 99 C. 593, 595, 34 P. 329 [county real property taxes and penalties]; *California Emp. Stabilization Com. v. Payne* (1947) 31 C.2d 210, 215, 187 P.2d 702 [employers' unemployment contributions]; *Los Angeles v. Belridge Oil Co.* (1954) 42 C.2d 823, 833, 271 P.2d 5 [although section expressly refers only to liability created by "statute," it is applicable to action for delinquent taxes under city licensing ordinance]; *Los Angeles v. Los Angeles Junk Co.* (1935) 8 C.A.2d 136, 47 P.2d 309 [county personal property taxes]; but see *McGrath v. Butte* (1939) 30 C.A.2d 734, 87 P.2d 381 [statute was not applicable to proceeding to compel county to levy tax to pay assessments on improvement bonds; contract statute governs]; *Los Angeles v. Continental Corp.* (1952) 113 C.A.2d 207, 213, 248 P.2d 157; *Montgomery Ward & Co. v. Santa Clara* (1996) 47 C.A.4th 1122, 1138, 55 C.R.2d 261, 9 *Summary* (10th), *Taxation*, §232 [escape assessments are enforceable by lien-sale procedure, not by civil action; thus, *C.C.P.* 338(a) does not apply].)

(2) *Special Limitations Periods.* Among the special provisions containing limitations periods are the following:

(a) *Sales and use taxes:* 3 years, except where the return is fraudulent or no return is made. (Rev.C. 6487, 6711; see *People v. Universal Film Exchanges* (1950) 34 C.2d 649, 659, 213 P.2d 697; *People v. West Publishing Co.* (1950) 35 C.2d 80, 216 P.2d 441; *People v. Nymer* (1945) 71 C.A.2d 550, 552, 163 P.2d 92; *People v. Clauson* (1964) 231 C.A.2d 374, 380, 41 C.R. 691 [applicable to individual shareholders using corporation as alter ego]; *State Bd. of Equalization v. Balboa Ins. Co.* (1978) 89 C.A.3d 499, 502, 155 C.R. 205 [extension of period of Rev.C. 6711 by recording abstract or certificate].)

(b) *Personal income tax and bank and corporation tax:* 10 years. (Rev.C. 19371; see *People v. Santa Fe Fed. Savings & Loan Assn.* (1946) 28 C.2d 675, 680, 171 P.2d 713 [decided under predecessor statute governing bank and corporation tax].)

(c) *Statutory penalty for false personal income tax or bank and corporation tax return*: 4 years. (Rev.C. 19704.)

(d) Estate tax: 10 years after delinquency determination. (Rev.C. 13680.)

(e) *Income tax received by decedent or estate during administration*: 18 months after written request for an assessment notice and collection proceedings is made. (Rev.C. 19517.)

SUPPLEMENT: [This section is current through the latest supplement]



119 of 145 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XVI. STATUTE OF LIMITATIONS: ACTIONS ON STATUTORY LIABILITIES

A. Three-Year Limitation: Scope of Statute.

3. Governmental Claim for Taxes.

b. Duration of Tax Lien.

3 Witkin Cal. Proc. Actions § 667

[§ 667] Duration of Tax Lien.

The statutes of limitations set forth in the preceding section bar a personal action by the governmental agency. However, the principal method of collecting property taxes is by sale, which can be made as long as the taxes are a lien. Despite some earlier uncertainty, it appears to be the law that the statutes limiting actions do not extinguish a tax lien. (See Rev.C. 2194.) But special provisions deal with tax liens as follows:

(1) Pursuant to Cal. Const., Art. XIII, §30, Rev.C. 2195 provides that the lien of a property tax is extinguished in 30 years. (See *Ducey v. Dambacher* (1938) 27 C.A.2d 658, 663, 81 P.2d 597; *Paul v. Los Angeles County Flood Control Dist.* (1974) 37 C.A.3d 265, 271, 112 C.R. 274 [tax sale and deed to state after 30 years was invalid].) However, property for which a power to sell has been recorded for nonpayment of taxes is not subject to this provision. (Rev.C. 2195.)

(2) An estate tax lien expires 10 years from the time a deficiency determination is issued unless the lien is recorded or filed in accordance with *Govt.C. 7171*. (Rev.C. 13610.)

(3) The lien securing an ordinary street assessment bond ceases to exist after the time within which a foreclosure proceeding must be commenced: 2 years. (C.C.P. 329.)

(4) The lien securing an assessment under the Improvement Act of 1911 or the Improvement Bond Act of 1915 lasts 4 years from the due date of the bond, during which time enforcement by foreclosure or sale is possible. (C.C. 2911; C.C.P. 330; see *Scheas v. Robertson* (1951) 38 C.2d 119, 124, 238 P.2d 982; *Harless v. Carter* (1954) 42 C.2d 352, 354, 267 P.2d 4; *Kipp v. Kipp* (1954) 42 C.2d 724, 726, 269 P.2d 1; *Rombotis v. Fink* (1948) 89 C.A.2d 378, 383, 201 P.2d 588; *Harless v. Winter* (1953) 116 C.A.2d 641, 645, 254 P.2d 168; *Kipp v. Lubercos, Ltd.* (1953) 116 C.A.2d 656, 659, 254 P.2d 150; *Margraf v. Hart* (1954) 128 C.A.2d 308, 313, 275 P.2d 771.)

SUPPLEMENT: [This section is current through the latest supplement]



120 of 145 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XVI. STATUTE OF LIMITATIONS: ACTIONS ON STATUTORY LIABILITIES

A. Three-Year Limitation: Scope of Statute.

4. Exceptions.

3 *Witkin Cal. Proc. Actions* § 668

[§ 668] Exceptions.

A number of express exceptions to *C.C.P.* 338(a) have been enacted:

(1) *Statutory Penalty or Forfeiture*. An action by an individual or the state for a statutory penalty or forfeiture is subject to a 1-year limitations period. (*C.C.P.* 340(a), (b); see *Hansen v. Vallejo Elec. Light & Power Co.* (1920) 182 C. 492, 496, 188 P. 999; *San Diego v. Milotz* (1956) 46 C.2d 761, 766, 300 P.2d 1 [P.C. 869, providing that court reporter's compensation shall be reduced one-half for failure to file transcript of preliminary examination in 10 days]; *Myers v. Eastwood Care Center* (1982) 31 C.3d 628, 633, 636, 183 C.R. 386, 645 P.2d 1218 [action by state to recover penalties under *Health & Saf.C.* 1428; cause of action accrues when facility notifies Director of Health Services that it intends to contest conference decision to impose penalty]; *People v. Grant* (1942) 52 C.A.2d 794, 798, 127 P.2d 19 [action by state to forfeit money taken in illegal slot machines seized by authorities]; *Department of Social Welfare v. Stauffer* (1943) 56 C.A.2d 699, 702, 133 P.2d 692 [action by state for statutory penalty against estate of decedent who obtained aid while ineligible]; *Prudential Home Mortg. Co. v. Superior Court* (1998) 66 C.A.4th 1236, 1241, 78 C.R.2d 566 [action to recover monetary forfeiture under C.C. 2941 for failing to observe requirements for recording reconveyance of trust deed after borrower pays secured loan was governed by former *C.C.P.* 340(1) (now *C.C.P.* 340(a)), because forfeiture was penal, not remedial]; *Goehring v. Chapman University* (2004) 121 C.A.4th 353, 386, 17 C.R.3d 39, citing the text [*C.C.P.* 340(a) applied to law students' action seeking tuition refund from law school for violating *B. & P.C.* 6061 (duty to disclose accreditation status)]; *Brandenburg v. Eureka Redevelopment Agency* (2007) 152 C.A.4th 1350, 1365, 62 C.R.3d 339 [*C.C.P.* 340(a) applied to action under *Govt.C.* 1090 alleging that public official had improper financial interest in redevelopment agreement; but see *Govt.C.* 1092(b), abrogating *Bradenburg*, by subsequently imposing 4-year limitations period for this action].)

In *Holland v. Nelson* (1970) 5 C.A.3d 308, 85 C.R. 117, plaintiff sued defendant dance studio to recover treble damages under the Dance Act, C.C. 1812.62 (see 4 *Summary* (10th), *Sales*, §362). Defendant set up the 1-year penalty statute as a defense. *Held*, the action was timely. The allowance of treble damages was in the discretion of the court; hence, it was a statutory liability (*C.C.P.* 338(a)), not a penalty. (See *Jensen v. BMW of North America* (1995) 35 C.A.4th 112, 132, 41 C.R.2d 295 [action to impose civil penalty under C.C. 1794(c) for wilful violation of Song-Beverly Consumer Warranty Act (see 4 *Summary* (10th), *Sales*, §314 et seq.) is governed by 4-year limitations period of U.C.C. 2725 (breach of express warranty; see *supra*, §519), and not by 1-year limitations period of former *C.C.P.* 340(1) (now

C.C.P. 340(a)), because imposition of penalty is discretionary and not mandatory]; *Mitchell v. Leslie* (1995) 39 C.A.4th Supp. 7, 10, 46 C.R.2d 419 [former C.C.P. 340(1) (now *C.C.P. 340(a)*) did not govern tenant's action against landlord to recover excess rent charged for furniture rental in violation of city ordinance allowing treble damages, because imposition of treble damages was discretionary; thus, action was statutory liability (*C.C.P. 338(a)*), not penalty].)

(2) *Action Against Sheriff or Coroner*. An action against a sheriff or coroner for an act or omission in his or her official duty is subject to a 2-year limitations period. (*C.C.P. 339(2)*; see *Medley v. Hill* (1930) 104 C.A. 309, 285 P. 891.)

(3) *Action Under Fair Employment and Housing Act*. An action under the Fair Employment and Housing Act (*Govt.C. 12900 et seq.*) must be brought within 1 year of receipt of a "right to sue" letter from the Department of Fair Employment and Housing notifying the plaintiff that it will not be issuing a timely administrative accusation. (*Govt.C. 12965(b)* [employment discrimination]; *Govt.C. 12980(h)* [housing discrimination]; see 8 *Summary* (10th), *Constitutional Law*, §948 et seq.)

(4) *Actions To Collect Taxes*. These actions are governed by special limitations periods. (See *supra*, §666.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Statutory Penalty or Forfeiture*. See *TJX Cos. v. Superior Court* (2008) 163 C.A.4th 80, 84, 77 C.R.3d 114 [*C.C.P. 340(a)* applied to class action against department store alleging violation of C.C. 1747.08 (improper request for personal information from card holder in credit card transaction; see 4 *Summary* (10th), *Negotiable Instruments*, §150), because C.C. 1747.08(e) imposes penalty].



121 of 145 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XVI. STATUTE OF LIMITATIONS: ACTIONS ON STATUTORY LIABILITIES

B. Accrual.

1. Obligation Payable in Installments.

3 *Witkin Cal. Proc. Actions* § 669

[§ 669] Obligation Payable in Installments.

(1) *Action Where Continuing Right Is Established.* In several types of cases it has been held that, where a right or obligation is continuing, successive causes of action to enforce it continuously accrue, and the bar of the statute can only be set up against those causes on which the period has run. (See *Dryden v. Board of Pension Commrs. of Los Angeles* (1936) 6 C.2d 575, 580, 59 P.2d 104 [installments falling due under pension, right to which had already been established]; *Howard Jarvis Taxpayers Assn. v. La Habra* (2001) 25 C.4th 809, 821, 107 C.R.2d 369, 23 P.3d 601, supra, §437 [action to declare void, enjoin enforcement, and cease collection of city utility tax as violative of Proposition 62 (Govt.C. 53720 et seq.; see 9 *Summary* (10th), *Taxation*, §131), began to run anew on each collection of tax]; *Santa Cruz v. Pacific Gas & Elec. Co.* (2000) 82 C.A.4th 1167, 1178, 99 C.R.2d 198 [in action by cities against utility alleging underpayment of franchise fees, action accrued at time each year that utility underpaid fees]; 63 *Harv. L. Rev.* 1205; supra, §§522 et seq., 601 et seq.)

(2) *Action To Establish or Determine Right.* An action to establish or determine the right to a pension is entirely different; the cause of action accrues at the time the plaintiff is entitled to the pension and the statute bars the action in 3 years. This is true, e.g., where the death of a public employee automatically entitles the surviving spouse to a pension; the cause of action accrues at the time of death. (*Dillon v. Board of Pension Commrs. of Los Angeles* (1941) 18 C.2d 427, 430, 116 P.2d 37.) On the other hand, if the claim is made by a living employee on the ground of permanent disability, the statute will not begin to run until the commission or board makes the determination for or against the petitioner. (*Tyra v. Board of Police & Fire Pension Commrs. of Long Beach* (1948) 32 C.2d 666, 671, 197 P.2d 710.) And, despite an earlier right to sue for declaratory relief, the statute does not begin to run on an installment until it falls due. (*Abbott v. Los Angeles* (1958) 50 C.2d 438, 462, 326 P.2d 484.)

The rule of the pension cases was applied in *San Diego v. Myers* (1983) 147 C.A.3d 417, 195 C.R. 124. Plaintiff county incurred costs in administering services to "medically indigent" Medi-Cal recipients as required by statute, and sought reimbursement from the state. On August 28 1975, the state Department of Health, after a review of state and federal law, informed all county welfare officials that no reimbursement could be claimed. Plaintiff filed this action on December 29, 1978, for mandamus and declaratory relief. *Held*, the action was barred. The dispute between the state and county involved the establishment of statutory entitlement; the statute began to run from the date the state gave notice that entitlement was rejected--not from the date of failure to make a future periodic reimbursement where no

obligation to do so existed. (147 C.A.3d 422.) (See *Mezey v. California* (1984) 161 C.A.3d 1060, 1064, 208 C.R. 40 [action for reinstatement of college instructor dismissed for refusing to take loyalty oath; because action was to determine right to reinstatement rather than to recover benefits already granted, concept of continuing duty was inapplicable].)

The rule of the pension cases was also applied in *Phillips v. Fresno* (1990) 225 C.A.3d 1240, 277 C.R. 531. Plaintiff deputy sheriff's application for disability retirement was denied by defendant's retirement board on December 7, 1983, and his petition for rehearing was denied on February 1, 1984. On February 3, 1984, plaintiff requested the sheriff to reinstate him to active duty, but the request was denied. Plaintiff sought reinstatement by a petition for mandamus filed on March 2, 1987. *Held*, the petition was timely filed. Plaintiff's cause of action for reinstatement is governed by the 3-year statute of limitations of C.C.P. 338(a). (225 C.A.3d 1240.) This cause of action did not accrue until March 2, 1984, when the 30 days that the sheriff had to challenge the retirement board's decision expired. Until that time, the sheriff's obligation to reinstate plaintiff did not arise. (225 C.A.3d 1252.) By analogy to the pension cases, including *Dillon*, had plaintiff's cause of action accrued immediately on denial of his petition for rehearing, the running of the statute of limitations would still be suspended during the 30-day period the sheriff had to act. (225 C.A.3d 1251.)

SUPPLEMENT: [This section is current through the latest supplement]



122 of 145 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XVI. STATUTE OF LIMITATIONS: ACTIONS ON STATUTORY LIABILITIES

B. Accrual.

2. Action Against Surety of Public Officer.

3 Witkin Cal. Proc. Actions § 670

[§ 670] Action Against Surety of Public Officer.

(1) *Action Against Surety of Fraudulent Fiduciary.* The favorable fraud statute, with its rule of no accrual until discovery, applies to an action against the surety of a fraudulent private fiduciary. (*Haswell v. Costellenos* (1932) 126 C.A. 427, 433, 14 P.2d 846.) But the surety of a fraudulent public officer was formerly given the protection of a 3-year period with no delayed accrual. (See *Norton v. Title Guaranty & Surety Co.* (1917) 176 C. 212, 214, 168 P. 16 [notary public]; *United Bank & Trust Co. v. Fidelity & Deposit Co. of Maryland* (1928) 204 C. 460, 464, 268 P. 907 [receiver]; *Haswell v. Costellenos*, *supra*, 126 C.A. 431 ["if official misconduct is an essential part of the facts causing the injury complained of, the case against the surety is not to be regarded as a fraud action, because of any misrepresentation or concealment involved"]; 18 A.L.R.2d 1176.)

The 3-year statute is applicable to "[a]n action upon a bond of a public official except any cause of action based on fraud or embezzlement is not deemed to have accrued until the discovery, by the aggrieved party or his or her agent, of the facts constituting the cause of action upon the bond." (C.C.P. 338(e).)

(2) *Action Against Notary Public.* The 3-year statute is applicable to an action against a notary public on his or her bond or in his or her official capacity, but a cause of action based on malfeasance or misfeasance does not accrue until discovery of the facts; that action must be commenced either within 1 year from discovery or within 3 years from the wrongful act, whichever is later; and any action must be commenced within 6 years. (C.C.P. 338(f).)

(3) *Action Against Surety of Sheriff or Constable.* C.C.P. 339(2), prescribing a 2-year limitations period for actions against a sheriff or coroner (see *supra*, §668), is also construed as applicable to actions against their sureties. But this section contains no provision for delayed accrual pending discovery of the facts. (See *Medley v. Hill* (1930) 104 C.A. 309, 310, 285 P. 891 [action for damages for negligent failure to give proper notice of sale under execution].)

SUPPLEMENT: [This section is current through the latest supplement]



123 of 145 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XVI. STATUTE OF LIMITATIONS: ACTIONS ON STATUTORY LIABILITIES

B. Accrual.

3. Action Against Shareholders and Directors.

3 Witkin Cal. Proc. Actions § 671

[§ 671] Action Against Shareholders and Directors.

(1) *Former Law.* C.C.P. 359 originally provided that actions against directors or shareholders to enforce "a liability created by law" must be brought within 3 years after the liability was created. In numerous cases arising out of former unlimited proportional liability of shareholders for the debts of the corporation, this section was interpreted as barring the action 3 years after the debt was incurred. The absurd result was that a corporation might become liable on a 4-year note, but the shareholders' liability would be barred 1 year before the note matured, i.e., the statute of limitations would have run before the cause of action had accrued. (See *Coombes v. Getz* (1933) 217 C. 320, 327, 18 P.2d 939 [former directors' liability]; *Ohio v. Porter* (1942) 21 C.2d 45, 53, 129 P.2d 691 [dissenting opinion]; *Barker v. Ackers* (1938) 29 C.A.2d 162, 169, 84 P.2d 264.)

(2) *Current Law.* Although the unlimited liability was abolished in the revision of California corporation law, C.C.P. 359 was left substantially unchanged. It is therefore still applicable to the liabilities of directors and to the double liability of shareholders of banking and building and loan corporations. However, the liability of bank shareholders is not based on the original debt of the corporation but arises from an assessment levied by the Superintendent of Banks (now the Commissioner of the Department of Financial Institutions). The liability is thus "created" at the time of the assessment, not at the time the bank incurred the debts; hence, the statute does not begin to run prior to the assessment. (*Richardson v. Craig* (1938) 11 C.2d 131, 134, 77 P.2d 1077; see *Ohio v. Porter, supra*, 21 C.2d 51 [effect of Ohio law].)

The shareholder's liability to creditors on an unpaid subscription may also be barred before the cause of action accrues. The liability to the corporation is created by the subscription contract, and the statute starts to run in favor of the shareholder, whereas the creditor's right of action against the shareholder does not accrue until he has first obtained judgment against the corporation and has had execution returned unsatisfied. (See *Spencer v. Anderson* (1924) 193 C. 1, 7, 222 P. 355.)

In *Hoover v. Galbraith* (1972) 7 C.3d 519, 102 C.R. 733, 498 P.2d 981; directors, in violation of former Corp.C. 826 (now Corp.C. 316(c); see 9 *Summary* (10th), *Corporations*, §101), distributed assets without providing for the payment of plaintiff's claim or disclosing its existence. The 3-year period began, and would have barred the action had the statute not been tolled. (7 C.3d 525.) (For holding on tolling, see *infra*, §734.)

California courts are split on the question whether an action alleging a violation of *Corp.C. 309* (standard of care for corporate directors; see 9 *Summary* (10th), *Corporations*, §102 et seq.) is governed by the limitations period of *C.C.P. 359*. In *Smith v. Superior Court* (1990) 217 *C.A.3d* 950, 266 *C.R. 253*, a condominium association sued the former president of its board of directors for breach of his duty under *Corp.C. 309* by failing to properly investigate problems in the common area and to timely sue the condominium developer. The limitations period began when the underlying action against the developer was time-barred, and expired when the association failed to sue within 3 years of that date. (217 *C.A.3d* 953.) However, *Briano v. Rubio* (1996) 46 *C.A.4th* 1167, 54 *C.R.2d* 408, 9 *Summary* (10th), *Corporations*, §102, and *Lehman v. Superior Court* (2006) 145 *C.A.4th* 109, 120, 51 *C.R.3d* 411, citing the text, disagreed with *Smith* and held that an action alleging a violation of *Corp.C. 309* is not subject to the limitations period of *C.C.P. 359*.

SUPPLEMENT: [This section is current through the latest supplement]



124 of 145 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XVI. STATUTE OF LIMITATIONS: ACTIONS ON STATUTORY LIABILITIES

B. Accrual.

4. Action for Reimbursement for Costs of State-Mandated Programs.

3 Witkin Cal. Proc. Actions § 672

[§ 672] Action for Reimbursement for Costs of State-Mandated Programs.

In *Fresno v. Lehman* (1991) 229 C.A.3d 340, 280 C.R. 310, plaintiff county was ordered to pay attorneys' fees under C.C.P. 1021.5 (7 Cal. Proc. (5th), *Judgment*, §259). On November 25, 1987, plaintiff filed an action against defendant state seeking reimbursement under Cal. Const., Art. XIII B, §6 (9 *Summary* (10th), *Taxation*, §119), requiring the state to reimburse counties for costs of state-mandated programs. Defendant argued that the 3-year period of C.C.P. 338(a) expired on April 16, 1983, 3 years after a decision in a test case, filed by a different county, that counties were not entitled to reimbursement for fees paid under C.C.P. 1021.5. *Held*, the period had not expired. Plaintiff's cause of action for reimbursement did not accrue until it paid the attorneys' fees. And plaintiff was not bound by the prior determination of no right to reimbursement, because no privity existed between it and the entity that filed the claim in that case. (229 C.A.3d 346.)

SUPPLEMENT: [This section is current through the latest supplement]



125 of 145 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XVI. STATUTE OF LIMITATIONS: ACTIONS ON STATUTORY LIABILITIES

B. Accrual.

5. Action for Violation of Community Redevelopment Law.

3 *Witkin Cal. Proc. Actions* § 673

[§ 673] Action for Violation of Community Redevelopment Law.

Craig v. Poway (1994) 28 C.A.4th 319, 342, 33 C.R.2d 528, held that the delayed discovery rule extended the limitations period of C.C.P. 338(a) in an action alleging violation of the Community Redevelopment Law (*Health & Saf.C. 33000* et seq.; see 12 *Summary* (10th), *Real Property*, §827 et seq.) by a city's underfunding and improper use of a low- and moderate-income housing fund. (28 C.A.4th 342.) However, in *Hogar Dulce Hogar v. Community Dev. Com. of Escondido* (2003) 110 C.A.4th 1288, 2 C.R.3d 497, the court held that the delayed discovery rule did not apply to extend the limitations period of C.C.P. 338(a) in an action by an unincorporated association claiming that the manner in which a city community development commission calculated the payment to its housing fund violated the Community Redevelopment Law. The city's violation of the statute was a matter of public record and plaintiff had no direct beneficial interest in the outcome of the litigation. (110 C.A.4th 1296; distinguishing and expressing doubt about the continuing validity of *Craig*.)

SUPPLEMENT: [This section is current through the latest supplement]



126 of 145 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XVI. STATUTE OF LIMITATIONS: ACTIONS ON STATUTORY LIABILITIES

B. Accrual.

6. Action Alleging Multiple Claims.

3 Witkin Cal. Proc. Actions § 674

[§ 674] Action Alleging Multiple Claims.

In *Engstrom v. Kallins* (1996) 49 C.A.4th 773, 56 C.R.2d 842, plaintiff, the owner of multifamily residential real property, sued defendant, a profit-sharing retirement trust, alleging a violation of C.C. 1799.91 (notice to cosigners of consumer credit contracts concerning consequences of cosigning), wrongful foreclosure, slander of title, negligence, and declaratory and injunctive relief. Plaintiff alleged that her former husband had requested her to sign a trust deed and note encumbering her property so that he could obtain a loan from defendant, that the trust deed would not be recorded, and that when the loan was closed a replacement trust deed on property owned by the former husband and his then wife would replace the trust deed plaintiff had signed. In fact, plaintiff's signature was required as a condition of the loan, and when the note went into default, defendant exercised its power of sale. The trial judge ruled that all five claims were barred by the 3-year limitations period in C.C. 338(a), because they were filed more than 3 years after defendant failed to provide the required statutory notice. *Held*, reversed.

(a) Plaintiff's claims did not accrue on the date she was not given cosigner notice. Instead, the harm to plaintiff occurred when defendant acted to enforce its security interest by instituting foreclosure proceedings, and that event occurred within the 3-year limitations period. (49 C.A.4th 783, citing the text; see *supra*, §494.)

(b) Furthermore, even plaintiff's request for declaratory relief was timely filed; although plaintiff's right to declaratory relief may have existed prior to the institution of foreclosure proceedings, the same point of accrual governed all of plaintiff's causes of action. (49 C.A.4th 784, quoting the text; see *infra*, §685.)

SUPPLEMENT: [This section is current through the latest supplement]



127 of 145 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XVII. STATUTE OF LIMITATIONS: OTHER ACTIONS

A. Action on Judgment: Ten Years.

3 *Witkin Cal. Proc. Actions* § 675

[§ 675] Action on Judgment: Ten Years.

(1) *Scope of Statute.* An action on a judgment is not governed by the contract statute of limitations, but by the 10-year (formerly 5-year) limitations period of *C.C.P.* 337.5 for an "action upon a judgment or decree of any court of the United States or of any state within the United States." (*C.C.P.* 337.5(3); see *Angeli v. Lischetti* (1962) 58 *C.2d* 474, 476, 24 *C.R.* 845, 374 *P.2d* 813 [amendment extending 5-year period to 10-year period was validly applied retroactively to causes of action not already barred].)

The statute applies to judgments both of this state and sister states. (*St. Paul Title & Trust Co. v. Stensgaard* (1912) 162 *C.* 178, 180, 121 *P.* 731 [Minnesota judgment]; *Tucker v. Nicholson* (1938) 12 *C.2d* 427, 431, 84 *P.2d* 1045 [California judgment; action for contribution by judgment debtor who paid judgment and took assignment to himself]; *Biewend v. Biewend* (1941) 17 *C.2d* 108, 115, 109 *P.2d* 701 [Missouri judgment for support of wife and child]; *Gay v. Straube* (1966) 245 *C.A.2d* 683, 684, 54 *C.R.* 293 [California decree of distribution; action by legatees against executor for failure to pay].)

(2) *Accrual.* The cause of action does not accrue at the time of entry, but only when the judgment becomes final. In *Turner v. Donovan* (1942) 52 *C.A.2d* 236, 126 *P.2d* 187, a judgment was entered in 1931 and an appeal was taken, but execution was not stayed and partial satisfaction was obtained. The judgment was affirmed on appeal in 1935. This action on the judgment, filed in 1939, was held timely on the theory that the judgment should not be the basis for a new action until it has merged the original claim. (52 *C.A.* 238.) (See *Govt.C.* 965.5(a) [money judgment against state or its agencies; 10 years from finality or when last installment becomes due]; *Govt.C.* 970.1(a) [local entities; same]; *Scott v. Superior Court* (1932) 125 *C.A.* 513, 518, 14 *P.2d* 99 [same reasoning applied in determining time to petition to revoke probate]; *United States Capital Corp. v. Nickelberry* (1981) 120 *C.A.3d* 864, 867, 174 *C.R.* 814 [if action is begun within statutory period, creditor's right to recover remains alive even though 10-year period may subsequently expire].)

A stipulated judgment is an exception to the general rule of accrual when a judgment becomes final, because a stipulated judgment normally may not be appealed. Thus, a stipulated judgment becomes final when it is entered by the trial court, unless the parties agree to the judgment for purposes of facilitating an appeal. (See *Cadle Co. II v. Sundance Financial* (2007) 154 *C.A.4th* 622, 624, 64 *C.R.3d* 824 [no such agreement found, and action filed more than 10 years after entry of stipulated judgment was therefore untimely].)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Scope of Statute.* See *Manco Contracting Co. (W.L.L.) v. Bezdikian* (2008) 45 C.4th 192, 204, 85 C.R.3d 233, 195 P.3d 604, 8 Cal. Proc. (5th), *Enforcement of Judgment*, Supp., §462 [10-year limitations period in C.C.P. 337.5 (action on sister state judgment), rather than 4-year limitations period in C.C.P. 343 (action not otherwise provided for; see text, §677 et seq.), applies to action on foreign judgment under former Uniform Foreign Money Judgments Recognition Act (see 8 Cal. Proc. (5th), *Enforcement of Judgment*, §462)].



128 of 145 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XVII. STATUTE OF LIMITATIONS: OTHER ACTIONS

B. Action by Beneficiary Against Trustee: Three Years.

3 *Witkin Cal. Proc. Actions* § 676

[§ 676] Action by Beneficiary Against Trustee: Three Years.

(1) *Former Law.* Under former law, the 4-year catchall statute (*C.C.P.* 343; see *infra*, §677) applied to actions to enforce trusts, including actions by beneficiaries of express trusts and actions to establish resulting trusts. (See *Scott v. Symons* (1923) 191 C. 441, 456, 216 P. 604; *Wrightson v. Dougherty* (1936) 5 C.2d 257, 264, 54 P.2d 13; *Estate of McCabe* (1947) 80 C.A.2d 823, 826, 183 P.2d 72; *Oeth v. Mason* (1967) 247 C.A.2d 805, 811, 56 C.R. 69, citing the text [express trust].)

(2) *Current Law.* *Prob.C.* 16460 now provides a 3-year limitations period for proceedings by beneficiaries against trustees. (See 13 *Summary* (10th), *Trusts*, §137; on limitations period for action to establish resulting trust, see *infra*, §678; on limitations period for action involving constructive trust, see *infra*, §680 et seq.)

As originally enacted, *Prob.C.* 16460 applied only where "a beneficiary has received an interim or final account in writing, or other written report, that adequately discloses the existence of a claim against the trustee for breach of trust." (*Prob.C.* 16460(a).) Thus, *Di Grazia v. Anderlini* (1994) 22 C.A.4th 1337, 28 C.R.2d 37, held that, in an action to enforce a trust where the beneficiary had not received a written account or report, *C.C.P.* 343 applied, rather than *Prob.C.* 16460. (22 C.A.4th 1346.)

The 1996 Legislature abrogated the holding in *Di Grazia*. *Prob.C.* 16460 now expressly provides that its limitations period is triggered where the beneficiary has received an insufficient written account or report (*Prob.C.* 16460(a)(1)), as well as where the beneficiary has received an inadequate account or report or no written account or report (*Prob.C.* 16460(a)(2)). "This revision is consistent with the original intent of this section, and rejects the contrary conclusion reached by the court in *Di Grazia*." The limitations period of *Prob.C.* 16460 "is applicable to all claims for breach of trust" and the limitations period of *C.C.P.* 343 (the catchall statute) "is inapplicable." (Law Rev. Com. Comment to *Prob.C.* 16460.)

SUPPLEMENT: [This section is current through the latest supplement]



129 of 145 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XVII. STATUTE OF LIMITATIONS: OTHER ACTIONS

C. Actions Not Otherwise Provided for: Four Years.

1. Scope of Provision: Actions in Equity.

a. In General.

3 Witkin Cal. Proc. Actions § 677

[§ 677] In General.

The general catchall statute is *C.C.P. 343*: "An action for relief not hereinbefore provided for must be commenced within four years after the cause of action shall have accrued." The effect of this section is to eliminate the contention that an action without a specific limitation provision may be brought at any time; unlimited time to sue depends on affirmative statutory permission. (See *Moss v. Moss (1942) 20 C.2d 640, 645, 128 P.2d 526*; *supra*, §489.)

However, the expectation of broad coverage of the catchall section is quickly disappointed. The specific statutes of limitations with their classifications based on tort, contract, property, statutory liability, etc., cover virtually all actions at law and a great many equitable actions. (See *supra*, §431.)

A few equitable actions remain that, were it not for the catchall statute, would be subject to no fixed time provision but only to the defense of laches. These miscellaneous equitable actions are within the 4-year limitations period of *C.C.P. 343*. (See *Moss v. Moss, supra*, 20 *C.2d* 644; *Freeman v. Donohoe (1923) 65 C.A. 65, 83, 223 P. 431*; *infra*, §683.)

SUPPLEMENT: [This section is current through the latest supplement]



130 of 145 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XVII. STATUTE OF LIMITATIONS: OTHER ACTIONS

C. Actions Not Otherwise Provided for: Four Years.

1. Scope of Provision: Actions in Equity.

b. Illustrations.

3 *Witkin Cal. Proc. Actions* § 678

[§ 678] Illustrations.

The following miscellaneous actions fall within the 4-year catchall statute (*supra*, §677):

(1) An action to establish a resulting trust. (*McCosker v. McCosker* (1954) 122 C.A.2d 498, 501, 265 P.2d 21; *Estate of Yool* (2007) 151 C.A.4th 867, 875, 60 C.R.3d 526 [probate petition, filed by administrator to determine title to decedent's property after coowner sought resulting trust, was governed by 4-year statute, rather than 1-year statute of C.C.P. 366.2(a) for actions on liability of person who survives decedent's death (see *infra*, §719)]; see Cal. Civil Practice, 3 Probate and Trust Proceedings, §24:8; 45 A.L.R.2d 382 [limitations period for action on resulting trust].) (On limitations period for action by beneficiary against trustee, see *supra*, §676; on limitations period for action involving constructive trust, see *infra*, §680 et seq.)

(2) An action to cancel an instrument on grounds other than fraud or mistake; e.g., undue influence (*Wade v. Busby* (1944) 66 C.A.2d 700, 702, 152 P.2d 754); illegality (*Moss v. Moss* (1942) 20 C.2d 640, 645, 128 P.2d 526 [property settlement attacked as promoting divorce]); nondelivery of deed (*Estate of Pieper* (1964) 224 C.A.2d 670, 688, 37 C.R. 46).

(3) A creditor's bill in equity. (*Sherman v. S.K.D. Oil Co.* (1921) 185 C. 534, 545, 197 P. 799.)

(4) An equitable proceeding under C.C.P. 701.680 to revive a judgment. (*Thompson v. Cook* (1943) 61 C.A.2d 485, 488, 143 P.2d 107 [action under former C.C.P. 708].)

(5) A mandamus proceeding to compel the reinstatement of petitioners to membership in a labor union, after their expulsion under a policy of racial discrimination. (*Griffin v. International Longshoremen's & Warehousemen's Union, Local 1-13* (1952) 109 C.A.2d 823, 826, 241 P.2d 552.)

(6) An action by a putative spouse for property division. In *Pack v. Vartanian* (1965) 232 C.A.2d 466, 42 C.R. 729, plaintiff wife was married to defendant from 1944 to 1960, when the marriage was annulled. In this action in 1963, plaintiff sought a division of property. Defendant set up the 2-year limitations period for oral contracts. *Held*, plaintiff

was not asserting a contract right, but rather claiming an interest in property, under the equitable doctrine developed by the courts to protect the putative spouse (see 11 *Summary* (10th), *Community Property*, §260 et seq.; for codification of doctrine, see Family. C. 2251 and 2252, 11 *Summary* (10th), *Community Property*, §265; 11 *Summary* (10th), *Husband and Wife*, §148 et seq.). Hence, the action was in equity, and the 4-year statute for miscellaneous equity suits applied. (232 C.A.2d 475.) (The court did not decide whether the time ran from discovery of invalidity of the marriage or from the decree of annulment, for both events were within the period.)

(7) An action by a nonmarital cohabitant seeking a share in real property acquired while the parties were living together. (*Nelson v. Nevel* (1984) 154 C.A.3d 132, 138, 140, 201 C.R. 93.)

(8) An action by a former spouse to set aside a dissolution decree on the ground of mental incompetence at the time of the execution of a property settlement agreement. In *Zastrow v. Zastrow* (1976) 61 C.A.3d 710, 132 C.R. 536, the trial judge ruled that the action was barred by the 3-year statute for actions based on fraud or mistake (see supra, §§653, 655). In reversing, the appellate court pointed out that the ground of mental incompetence is distinct from that of fraud and mistake and is outside the ambit of former C.C.P. 338(4) (now C.C.P. 338(d)). (61 C.A.3d 717.)

(9) A proceeding to enforce the right of local entities under Cal. Const., Art. XIII B, §6, to reimbursement for the costs of state-mandated programs. (*Berkeley Unified School Dist. v. California* (1995) 33 C.A.4th 350, 362, 363, 39 C.R.2d 326.) (On proceeding itself, see 7 *Summary* (10th), *Constitutional Law*, §141; on Cal. Const., Art. XIII B, §6, see 9 *Summary* (10th), *Taxation*, §119 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]

The following action also falls within the 4-year catch-all statute (see text, §677):(10) (New) Action by a coalition of planned unit development homeowners for declaratory and injunctive relief premised on claims that amendments to the declarations of restrictions governing the development were void because they failed to conform to the requirements of the provisions that outlined how the declarations could be amended. (*Costa Serena Owners Coalition v. Costa Serena Architectural Committee* (2009) 175 C.A.4th 1175, 1195, 97 C.R.3d 170.)



131 of 145 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XVII. STATUTE OF LIMITATIONS: OTHER ACTIONS

C. Actions Not Otherwise Provided for: Four Years.

2. Delayed Accrual in Action Against Fiduciary.

3 *Witkin Cal. Proc. Actions* § 679

[§ 679] Delayed Accrual in Action Against Fiduciary.

(1) *In General.* C.C.P. 343 (supra, §677) is silent on when the cause of action accrues, and there is no single rule applicable to all the miscellaneous actions that it covers. The important inquiry is whether a fiduciary obligation is involved, for the same considerations of policy calling for delayed accrual in fraud actions are present where the cause of action is based on breach of fiduciary duty. (See CACI, No. 4106; 63 *Harv. L. Rev.* 1214, 1219.)

(2) *Action To Establish Express Trust.* Under cases decided before the enactment of the 3-year statute governing a beneficiary's action against a trustee (*Prob.C.* 16460; see supra, §676), the beneficiary of an express trust is entitled to rely on the trustee's fidelity, and the statute does not begin to run until the beneficiary has knowledge or notice of repudiation of the trust or of the act constituting the breach. (*Cortelyou v. Imperial Land Co.* (1913) 166 C. 14, 20, 134 P. 981; *England v. Winslow* (1925) 196 C. 260, 271, 237 P. 542; *Kornbau v. Evans* (1944) 66 C.A.2d 677, 683, 152 P.2d 651; *Martin v. Bank of America* (1935) 4 C.A.2d 431, 436, 41 P.2d 200; *Alton v. Rogers* (1954) 127 C.A.2d 667, 679, 274 P.2d 487; *Oeth v. Mason* (1967) 247 C.A.2d 805, 812, 56 C.R. 69.)

(3) *Action To Establish Resulting Trust.* An action to establish a resulting trust is governed by the same rule as in an action to establish an express trust. (*Lezinsky v. Mason Malt Whiskey Distilling Co.* (1921) 185 C. 240, 244, 196 P. 884; *Leviston v. Tonningsen* (1931) 212 C. 656, 663, 299 P. 724; *Berniker v. Berniker* (1947) 30 C.2d 439, 447, 182 P.2d 557; *Steiner v. Amsel* (1941) 18 C.2d 48, 53, 112 P.2d 635; *Davenport v. Davenport Foundation* (1950) 36 C.2d 67, 75, 222 P.2d 11.)

(4) *Action Against Real Estate Broker for Failure To Disclose Material Defects.* An action for breach of a fiduciary duty under C.C. 2079 (duty to visually inspect and disclose material facts; see 12 *Summary* (10th), *Real Property*, §472 et seq.) against a real estate broker by a purchaser of residential real property whom the agent exclusively represented is not subject to the 2-year limitations period of C.C. 2079.4, but to the delayed discovery rule governing actions against fiduciaries generally. (*Field v. Century 21 Klowden-Forness Realty* (1998) 63 C.A.4th 18, 25, 73 C.R.2d 784.)

(5) *Action Against Sheriff for Wrongful Payment of Garnishment.* A sheriff who wrongfully pays out money taken under a garnishment commits a breach of fiduciary duty owed as trustee to the attaching creditor. But this "anticipatory breach" does not require an immediate action, and the statute does not begin to run until the attaching creditor recovers

judgment and is entitled to the money. (*National Auto. & Cas. Ins. Co. v. Pitchess* (1973) 35 C.A.3d 62, 65, 110 C.R. 649.)

(6) *Actions Against Other Fiduciaries*. The other confidential relationships in which the defendant has the fiduciary obligations of a trustee should be, and usually are, within the rule that accrual is delayed until knowledge or notice. In *Allsopp v. Joshua Hendy Machine Works* (1907) 5 C.A. 228, 90 P. 39, an action by a principal against his agent, the court quoted the following with approval: "As long as the relation of principal and agent continues, there is a privity between the parties, and there is nothing to set the statute in operation as to claims and accounts between them. The position of the agent is that of a trustee, and claims against him are governed by a rule similar to that controlling trustees. The assertion by the agent of an adverse right or his failure to discharge a duty to his principal arising out of his agency does not set the statute in motion until called to the attention of the principal or until he knows, or with reasonable diligence might have known thereof." (5 C.A. 234.) (For disapproval of *Allsopp* on another point, see *infra*, §683.)

In *Rafferty v. Mitchell* (1935) 4 C.A.2d 491, 41 P.2d 563, plaintiff devisee sued defendant surety on an executor's bond, for failure to deliver a devise. *Held*, the cause of action accrued at the time of the decree of distribution, and this action (13 years after partial distribution, 9 years after final distribution) was barred. The court cited early cases from other jurisdictions holding that the trustee rule applies only to trusts that are "a creature of a court of equity" and not within the cognizance of a court of law, and that where an action at law will lie (here under the Probate Code), the statute runs from the time the cause arises, without any repudiation. (4 C.A.2d 493, 495.) The relevancy of the equity law distinction in this situation is not apparent, and the holding is inconsistent with decisions applying the trustee rule to other fiduciary relationships.

Other actions against fiduciaries are *San Leandro Canning Co. v. Perillo* (1931) 211 C. 482, 487, 295 P. 1026 [action by corporation against directors for wrongful withdrawals]; *Mergenthaler v. Mergenthaler* (1945) 69 C.A.2d 525, 529, 160 P.2d 121 [action by wife against husband for divorce and for repayment of money advanced under oral agreement; different statute of limitations but same rule of delayed accrual]; *Schneider v. Union Oil Co.* (1970) 6 C.A.3d 987, 993, 86 C.R. 315 [action by stockholder against corporation for wrongful transfer of stock]; *Sherman v. Lloyd* (1986) 181 C.A.3d 693, 697, 700, 226 C.R. 495 [action by limited partner against general partner under *Corp.C.* 25503 for failure to properly qualify security; accrual delayed until limited partner was informed by attorney of probable violation]; *Stalberg v. Western Title Ins. Co.* (1991) 230 C.A.3d 1223, 1230, 282 C.R. 43 [landowners' action against insurer for breach of fiduciary duty; accrual delayed until landowners discovered that insurer had recorded deeds containing fictitious easement]. (See 63 *Harv. L. Rev.* 1215.)

SUPPLEMENT: [This section is current through the latest supplement]



132 of 145 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XVII. STATUTE OF LIMITATIONS: OTHER ACTIONS

D. Proceedings Subject to Various Limitations Statutes.

1. Constructive Trust.

a. Analysis of Problem.

3 *Witkin Cal. Proc. Actions* § 680

[§ 680] Analysis of Problem.

A constructive trust is not a substantive device but merely a remedy to compel a person not justly entitled to property to transfer it to another who is entitled to it. (See 13 *Summary* (10th), *Trusts*, §319.) On principle it would seem improper to assign any particular period of limitation to an action to establish a constructive trust. None of the statutes refers expressly to the action; and the usual classification of the limitation statutes in terms of substantive right and injury (tort, contract, property, person, etc.) is independent of the remedy sought. Looking at the common constructive trust situations, the following limitations periods would appear to be appropriate:

(1) *Fraud or Mistake*. Where the defendant obtains property by fraud or mistake: the fraud statute. (*C.C.P.* 338(d); *supra*, §653.) The plaintiff is injured by reason of the fraud or mistake, the relief the plaintiff seeks is on the ground of fraud or mistake, and the plaintiff has several alternative remedies (damages for fraud, restitution, constructive trust).

(2) *Breach of Fiduciary Duty Without Fraud*. Where property is obtained by breach of fiduciary duty without actual fraud: the catchall statute. (*C.C.P.* 343; *supra*, §677.) This section covers miscellaneous equitable actions based on breach of fiduciary duty, and it should be immaterial whether the plaintiff seeks the remedies of damages, restitution, or constructive trust. (See CACI, No. 4106.)

(3) *Breach of Unenforceable Contract*. Where property is unjustly retained by the defendant in violation of an unenforceable contract (an oral contract within the statute of frauds, or an extrinsic agreement contradicting the terms of a will), the choice is less easy. If, as is true in many of the situations, the defendant transferee was in a confidential relationship with the transferor, *C.C.P.* 343 might be applied on the theory that the basis of the action is a breach of fiduciary duty. And if there is fraud, *C.C.P.* 338(d) seems appropriate. If neither is involved, and the ground of the action is prevention of unjust enrichment, *C.C.P.* 339(1), the 2-year statute on an obligation or liability not founded upon an instrument in writing, might be applied, so that the same statutory period would govern whether the plaintiff seeks quasi-contractual recovery in money or the remedy of a constructive trust. But the legal "obligation or liability" envisaged by *C.C.P.* 339(1) is, in this situation, unenforceable. The equitable remedy of constructive trust is all that is left, and this would seem to bring the case within the miscellaneous equitable action group, to which the catchall statute (*C.C.P.* 343) applies. (See *infra*, §681.) (On limitations period for action by beneficiary against trustee, see *supra*, §676;

on limitations period for action to establish resulting trust, see *supra*, §678.)

SUPPLEMENT: [This section is current through the latest supplement]



133 of 145 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XVII. STATUTE OF LIMITATIONS: OTHER ACTIONS

D. Proceedings Subject to Various Limitations Statutes.

1. Constructive Trust.

b. What Statutes Apply.

3 *Witkin Cal. Proc. Actions* § 681

[§ 681] What Statutes Apply.

The analysis made in the preceding section finds some support and some dissent in the decisions. Unfortunately, few of the cases face the problem squarely; the tendency has been to assume without discussion that one or the other limitation applies.

(1) *Catchall Statute*. A dictum in the early case of *Piller v. Southern Pac. R. Co.* (1877) 52 C. 42, reads as follows: "While by our Code all distinctions in pleading between suits at law and in equity are abolished, the different forms of declaration at the common law existed so long, and became so ingrained in the legal habit of thought, that the very codifiers themselves have been contented to copy the provisions of the English statutes in respect to personal actions, sometimes substituting for the technical names employed in those statutes what was supposed to be their equivalent in ordinary English. Thus reading the statute, the four years' limitation of sec. 343 applies to all suits in equity not strictly of concurrent cognizance in law and equity." (52 C. 44.) This decision has been frequently cited, and the mysterious language quoted, in support of the rule that *C.C.P.* 343 applies indiscriminately to all actions to enforce constructive trusts. (See *Hecht v. Slaney* (1887) 72 C. 363, 366, 14 P. 88 [fraud]; *Nouques v. Newlands* (1897) 118 C. 102, 106, 50 P. 386 [conveyance in breach of trust]; *Burns v. Ross* (1923) 190 C. 269, 277, 212 P. 17 [forgery; dictum]; *Petaluma v. Hickey* (1928) 90 C.A. 616, 621, 266 P. 613 [mistake].)

(2) *Fraud Statute*. Other cases either expressly reject the view that *C.C.P.* 343 applies or simply assume that former *C.C.P.* 338(4) (now *C.C.P.* 338(d)) applies. In *Unkel v. Robinson* (1912) 163 C. 648, 126 P. 485, the court said: "True, the appellant is seeking to establish a constructive trust, but such a trust may arise under various circumstances which may embrace no element of fraud in fact, or even technical fraud within the law. Here the constructive trust which appellant endeavors to have established is based on fraud as the substantive cause of action, and how section 343 can apply, and why subdivision 4 of section 338 does not, appellant has not undertaken to point out." (163 C. 650.) (See *Earhart v. Churchill Co.* (1915) 169 C. 728, 731, 147 P. 942 [confusingly citing *Hecht* line of cases and *Unkel*]; *Benoist v. Benoist* (1918) 178 C. 234, 236, 172 P. 1109; *Bainbridge v. Stoner* (1940) 16 C.2d 423, 429, 430, 106 P.2d 423; *Day v. Greene* (1963) 59 C.2d 404, 411, 29 C.R. 785, 380 P.2d 385; *Calkins v. Calkins* (1923) 63 C.A. 292, 302, 303, 218 P. 611; *Pacific Nat. Bank of San Francisco v. Corona Nat. Bank* (1931) 113 C.A. 366, 374, 298 P. 144; *Douglas v. Douglas* (1951) 103 C.A.2d 29, 32, 228 P.2d 603; *Security-First Nat. Bank v. Ross* (1963) 214 C.A.2d 424, 429, 29 C.R.

538.)

(3) *Property Statute*. The limitations governing recovery of real or personal property (*C.C.P. 318, 338(b), 338(c)*) should not be applicable in any of these situations, for the plaintiff, on the commencement of the action, has neither title nor right to possession. If plaintiff did have a legal right plaintiff would not need, and would not seek, the equitable remedy of a constructive trust. (See *Unkel v. Robinson*, supra, 163 C. 651; but see *Cohn v. Goodday* (1923) 191 C. 615, 626, 217 P. 756 ["voluntary" constructive trust where trustee recognized plaintiff's right; dictum that *C.C.P. 318* would apply]; *Hillyer v. Hynes* (1917) 33 C.A. 506, 510, 165 P. 718 [ordinary constructive trust; *C.C.P. 318* was applicable, as one ground of decision]; *Marshall v. Marshall* (1965) 232 C.A.2d 232, 250, 42 C.R. 686 [following *Cohn* and *Hillyer*].)

(4) *Contract Statute*. The 4-year period of *C.C.P. 337(1)* (obligation founded on writing; see supra, §508) governs an action for quasi-specific performance by imposition of a constructive trust on real property under an oral agreement to devise property by will. (See *Estate of Brenzikofer* (1996) 49 C.A.4th 1461, 1468, 57 C.R.2d 401, supra, §513.)

SUPPLEMENT: [This section is current through the latest supplement]



134 of 145 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XVII. STATUTE OF LIMITATIONS: OTHER ACTIONS

D. Proceedings Subject to Various Limitations Statutes.

1. Constructive Trust.

c. Accrual on Knowledge of Facts.

3 Witkin Cal. Proc. Actions § 682

[§ 682] Accrual on Knowledge of Facts.

It is a familiar rule that no repudiation is necessary to start the statute running on an action to establish a constructive trust. (See *Broder v. Conklin* (1898) 121 C. 282, 288, 53 P. 699; *Norton v. Bassett* (1908) 154 C. 411, 416, 97 P. 894; *Benoist v. Benoist* (1918) 178 C. 234, 236, 172 P. 1109; *Varrois v. Gomet* (1919) 43 C.A. 756, 759, 185 P. 1001.) An exception has been declared where the person charged as constructive trustee at first recognizes the rights of the plaintiff and voluntarily holds the property for him or her; the statute will not run until the trustee or his or her successors repudiate. (*Cohn v. Goodday* (1923) 191 C. 615, 627, 217 P. 756 [theory of "voluntary constructive trust"]; see 12 Cal. L. Rev. 244.)

Frequently the statement that no repudiation is necessary to start the statute running is coupled with the observation that the time begins to run immediately on the commission of the wrongful act. And sometimes, in the same case, it is said that the statute runs from the time the beneficiary knows or should know the facts. An explanation of this apparent contradiction will serve to minimize the importance of the choice between C.C.P. 343 and C.C.P. 338(d).

(1) An express trustee, with legal title and trust powers, cannot be compelled to convey to the beneficiary while the express trustee recognizes the trust; the cause of action arises only on his or her conveyance in breach of trust or his or her repudiation of the beneficiary's right. (See *supra*, §679.) But the constructive trustee has no valid claim and no trustee functions; his or her title and possession are adverse from the beginning, and the constructive trustee's only duty is to convey to the person rightfully entitled to the property. Hence, no repudiation is necessary to give the plaintiff a cause of action.

(2) It is quite a different thing to say that the statute starts running in every case regardless of the plaintiff's ignorance of the facts. Accrual is usually postponed in favor of the plaintiff excusably ignorant of the facts, where the cause of action is based on fraud, mistake, or breach of fiduciary duty. This should be true regardless of what remedy the plaintiff seeks, e.g., damages, restitution, accounting, or constructive trust. Hence, if C.C.P. 338(d) is applied, the plaintiff has 3 years from the discovery or presumed knowledge of the facts of fraud or mistake; or, if C.C.P. 343 is applied, the plaintiff has 4 years from the discovery or presumed knowledge of the facts of fraud, mistake or breach of fiduciary duty. It seems reasonably safe to call this the California rule. (See *Bainbridge v. Stoner* (1940) 16 C.2d 423,

429, 106 P.2d 423 [rule stated, though statute held a bar]; *Bennett v. Hibernia Bank* (1956) 47 C.2d 540, 562, 563, 305 P.2d 20; *Truesdail v. Lewis* (1941) 45 C.A.2d 718, 723, 115 P.2d 218; *Airola v. Gorham* (1942) 56 C.A.2d 42, 46, 133 P.2d 78; *Marshall v. Marshall* (1965) 232 C.A.2d 232, 251, 42 C.R. 686; 55 A.L.R.2d 220 [when statute of limitations begins to run on action to enforce constructive trust].)

Some of the apparently contrary cases that appear to state a flat rule of accrual on commission of the wrongful act involve an open taking of which the plaintiff had actual or presumed knowledge. In *Calkins v. Calkins* (1923) 63 C.A. 292, 218 P. 611, the court declared that the "sweeping generalization" in these decisions must be interpreted in the light of their facts, and that in most of them "it appears that the defrauded party had knowledge of the fraud at the time it was committed or of facts sufficient to put him upon inquiry." (63 C.A. 302.) Similarly, in *Bell v. Bayly Bros. of Calif.* (1942) 53 C.A.2d 149, 127 P.2d 662, the court said: "In case of such a trust where there is no concealment and the facts are known or should have been known to the claimant, the statute of limitations begins to run when the so-called trustee acquires the property in question in violation of his duty, no repudiation of the trust by the trustee being necessary for that purpose." (53 C.A.2d 159.)

SUPPLEMENT: [This section is current through the latest supplement]



135 of 145 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XVII. STATUTE OF LIMITATIONS: OTHER ACTIONS

D. Proceedings Subject to Various Limitations Statutes.

2. Accounting.

3 *Witkin Cal. Proc. Actions* § 683

[§ 683] Accounting.

(1) *In General.* An action for an accounting, against a fiduciary such as an executor or administrator, guardian, partner, or agent, has been held to be within the group of miscellaneous equitable actions governed by *C.C.P.* 343, the 4-year catchall statute. (See *West v. Russell* (1888) 74 C. 544, 546, 16 P. 392; *McArthur v. Blaisdell* (1911) 159 C. 604, 608, 115 P. 52; *Allsopp v. Joshua Hendy Machine Works* (1907) 5 C.A. 228, 234, 90 P. 39; *Freeman v. Donohoe* (1923) 65 C.A. 65, 80, 223 P. 431; *Taylor v. Odell* (1942) 50 C.A.2d 115, 123, 122 P.2d 919.)

West, *McArthur*, *Allsopp*, and *Freeman* were disapproved in *Jefferson v. J.E. French Co.* (1960) 54 C.2d 717, 7 C.R. 899, 355 P.2d 643. The court followed *Leeper v. Beltrami* (1959) 53 C.2d 195, 1 C.R. 12, 347 P.2d 12, *supra*, §§657, 658, holding that the basic right or obligation rather than the relief sought determines the applicable statute. (54 C.2d 719.) Under the *Jefferson* rule, it is immaterial that an accounting is necessary to determine the amount of recovery:

(a) If the cause of action is based on the breach of a written contract, the 4-year period of *C.C.P.* 337(1) applies. (See *supra*, §508.)

(b) If, as in *Jefferson*, the cause of action arises out of the breach of an oral agreement, the 2-year period of *C.C.P.* 339(1) governs. (See *supra*, §512.)

(c) If the cause of action is for conversion of personal property, the 3-year period of *C.C.P.* 338(c) governs. (See *supra*, §619.)

(2) *Partnership Accounting Cases.* *Freeman* still has vitality in its holding as to a partnership accounting, according to *Manok v. Fishman* (1973) 31 C.A.3d 208, 107 C.R. 266. Plaintiffs alleged that they formed a partnership with defendants by oral agreement, and that defendants excluded them from the business and refused to account. *Held*, the 4-year period of *C.C.P.* 343 governed, and the action, brought within 4 years after the alleged repudiation of the fiduciary relationship, was timely. The primary right involved was not based on the oral partnership agreement, but on the partnership relationship with its duty to account under former *Corp.C.* 15022 (now *Corp.C.* 16404). (31 C.A.3d 210.)

Where a partnership is dissolved by the death of a partner, accrual of the cause of action against surviving partners for an accounting is not postponed until winding up; the statute begins to run against the deceased partner's administrator from the time of death. (*Estate of Peebles* (1972) 27 C.A.3d 163, 166, 103 C.R. 560.) (See 44 A.L.R.4th 678 [partnership accounting].)

SUPPLEMENT: [This section is current through the latest supplement]



136 of 145 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XVII. STATUTE OF LIMITATIONS: OTHER ACTIONS

D. Proceedings Subject to Various Limitations Statutes.

3. Mandamus.

3 Witkin Cal. Proc. Actions § 684

[§ 684] Mandamus.

(1) *In General.* Mandamus is an extraordinary remedy, and, like constructive trust (*supra*, §680), is available to enforce a number of rights and obligations (see *C.C.P. 1085*, 8 *Cal. Proc.* (5th), *Extraordinary Writs*, §74 et seq.) subject to different statutes of limitations. The applicable statute therefore depends on the right or obligation involved. (*Allen v. Humboldt County Bd. of Supervisors* (1963) 220 C.A.2d 877, 884, 34 C.R. 232, citing the text.)

(2) *Statutory Liability.* Mandamus to enforce a statutory liability is governed by the 3-year limitation of *C.C.P. 338(a)*. (See *Dillon v. Board of Pension Commrs. of Los Angeles* (1941) 18 C.2d 427, 429, 116 P.2d 37 [mandamus to compel payment of pension]; *Leahey v. Department of Water & Power of Los Angeles* (1946) 76 C.A.2d 281, 286, 173 P.2d 69 [same]; *Monroe v. Trustees of the Calif. State Colleges* (1971) 6 C.3d 399, 405, 99 C.R. 129, 491 P.2d 1105, *supra*, §435; *Howard Jarvis Taxpayers Assn. v. La Habra* (2001) 25 C.4th 809, 815, 107 C.R.2d 369, 23 P.3d 601, *supra*, §437 [mandamus to enforce city's obligation to submit utility tax to public vote]; *McBrearty v. Brawley* (1997) 59 C.A.4th 1441, 1446, 69 C.R.2d 862, *supra*, §437 [same]; *Harby v. Board of Education of San Francisco* (1905) 2 C.A. 418, 419, 83 P. 1081 [mandamus to compel restoration of statutory position]; *Raymond v. Christian* (1937) 24 C.A.2d 92, 113, 74 P.2d 536; *Peles v. La Bounty* (1979) 90 C.A.3d 431, 435, 153 C.R. 571.)

(3) *Contractual Liability.* Mandamus to enforce rights under a written contract or other instrument is governed by the 4-year limitation of *C.C.P. 337(1)*. (See *Miller & Lux v. Batz* (1901) 131 C. 402, 404, 63 P. 680 [mandamus to compel county treasurer to pay money due petitioner under contract with state, which money state had deposited with county]; *Barlow v. City Council of Inglewood* (1948) 32 C.2d 688, 693, 197 P.2d 721 [mandamus to compel city to transfer money to bond redemption fund was subject to limitation governing actions on bonds]; *McGrath v. Butte* (1939) 30 C.A.2d 734, 736, 87 P.2d 381 [mandamus to compel county to levy tax to pay for lands purchased at delinquent sale for failure to pay bond assessments, held a proceeding to enforce bond agreement].)

(4) *Other Liabilities.* If the right involved does not come within any of the specific limitations statutes, the catchall section (*C.C.P. 343*) may apply. (See *W.R. Grace & Co. v. California Emp. Com.* (1944) 24 C.2d 720, 728, 151 P.2d 215; *Taketa v. State Bd. of Equalization* (1951) 104 C.A.2d 455, 458, 231 P.2d 873; *Griffin v. International Longshoremen's & Warehousemen's Union, Local 1-13* (1952) 109 C.A.2d 823, 826, 241 P.2d 552; *Valvo v. University of Southern Calif.* (1977) 67 C.A.3d 887, 894, 136 C.R. 865 [action seeking reinstatement to medical school]; *Balch*

Enterprises v. New Haven Unified School Dist. (1990) 219 C.A.3d 783, 787, 790, 268 C.R. 543, citing the text.)

(5) *Administrative Mandamus*. Review of decisions of agencies subject to the Administrative Procedure Act must be sought within 30 days after the last day for reconsideration by the agency. (C.C.P. 1094.5; Govt.C. 11523; see *Sinetos v. Department of Motor Vehicles* (1984) 160 C.A.3d 1172, 1176, 207 C.R. 207 [unlike Govt.C. 11523, Veh.C. 14401 (90-day period to seek review of DMV order) contains no extension provision; hence, DMV's delay in furnishing copy of record did not extend period].) The Act does not govern proceedings of local agencies unless they elect to adopt it, and the 30-day limitation does not apply. As to these agencies, the applicable limitation is determined in the same manner as in other mandamus proceedings.

In *Allen v. Humboldt County Bd. of Supervisors*, *supra*, a petition was filed to set aside the granting of a zoning variance, on the ground of illegality, 4 months after the board of supervisors denied an appeal. *Held*, the petition was timely; the right involved did not bring any specific statute of limitations into operation, and hence, C.C.P. 343 applied, and gave 4 years to file. The court took note of the objection that this unnecessarily long period would defeat the objective of prompt review, but thought that corrective measures should come from the *Legislature*. (220 C.A.2d 885.) (See *Lasko v. Valley Presbyterian Hosp.* (1986) 180 C.A.3d 519, 526, 225 C.R. 603 [4-year period of C.C.P. 343 applied to physician's administrative mandamus proceeding seeking admission or readmission to hospital staffs where proceeding was not based on liability created by statute]; *Cockshott v. Department of Forestry & Fire Protection* (2004) 125 C.A.4th 235, 240, 22 C.R.3d 675 [challenge to decision of Board of Forestry and Fire Protection was governed by more specific statute (Pub.Res.C. 4601.3), rather than by general administrative mandamus statute (Govt.C. 11523)]; 8 Cal. Proc. (5th), *Extraordinary Writs*, §307.)

SUPPLEMENT: [This section is current through the latest supplement]

(5) *Administrative Mandamus*. See *Capitol Racing, LLC v. California Horse Racing Bd.* (2008) 161 C.A.4th 892, 902, 75 C.R.3d 384 [following *Cockshott v. Department of Forestry & Fire Protection* (2004) 125 C.A.4th 235, 22 C.R.3d 675, text, p. 904; challenge to decision of Horse Racing Board was governed by more specific statute (B. & P.C. 19463), rather than by general administrative mandamus statute (Govt.C. 11523)].



137 of 145 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XVII. STATUTE OF LIMITATIONS: OTHER ACTIONS

D. Proceedings Subject to Various Limitations Statutes.

4. Declaratory Relief.

3 *Witkin Cal. Proc. Actions* § 685

[§ 685] Declaratory Relief.

(1) *In General.* Like mandamus (*supra*, §684), declaratory relief is available as a remedy in cases involving various rights and obligations, and the governing statute will be the one applicable to an ordinary legal or equitable action based on the same claim. (See *Maguire v. Hibernia Savings & Loan Soc. (1944)* 23 C.2d 719, 733, 146 P.2d 673; *Leahey v. Department of Water & Power of Los Angeles (1946)* 76 C.A.2d 281, 285, 173 P.2d 69; 62 *Harv. L. Rev.* 830.) The real question is, when does the statute run? Because the right to declaratory relief may exist prior to a breach of obligation, the typical point of accrual of the cause of action is often lacking. And the rule calls for a distinction between declaratory relief after and before an actual breach.

(2) *Action After Breach.* If a breach has occurred, and the appropriate statute has begun to run on an ordinary action for "coercive relief" either in contract or tort, or legal or equitable, the same statute begins to run at the same time on the declaratory remedy, and both causes of action are extinguished at the same time. In other words, the statute of limitations cannot be circumvented by using the form of a declaratory action. (*Maguire v. Hibernia Savings & Loan Soc., supra*, 23 C.2d 734 [dictum]; *Leahey v. Department of Water & Power, supra*, 76 C.A.2d 287; *Tostevin v. Douglas (1958)* 160 C.A.2d 321, 330, 325 P.2d 130; *Phillis v. Santa Barbara (1964)* 229 C.A.2d 45, 53, 40 C.R. 27; *Pena v. Los Angeles (1970)* 8 C.A.3d 257, 262, 87 C.R. 326; *Engstrom v. Kallins (1996)* 49 C.A.4th 773, 784, 56 C.R.2d 842, *supra*, §674, quoting the text; 62 *Harv. L. Rev.* 830; 18 *So. Cal. L. Rev.* 58; but see *Salada Beach Public Util. Dist. v. Anderson (1942)* 50 C.A.2d 306, 308, 123 P.2d 86 [contra in result, and not satisfactorily distinguished in *Leahey*].)

(3) *Action Before Breach.* The cause of action for declaratory relief may accrue, in the sense that an action may be maintained, before a breach occurs. This is the very purpose of the remedy. But it would be most undesirable to start the statute running at the moment a controversy arises; the less drastic remedy of a declaratory judgment should certainly not be barred before the remedy of damages or equitable relief for the actual breach. Again, the rule seeks to make the same limitation govern the action for declaratory relief and the action for coercive relief; i.e., just as the statute will bar the declaratory remedy when the coercive remedy is barred, so, too, the statute will not bar the declaratory remedy while the coercive remedy remains. Under this rule the "controversy" may be an ancient one, and the cause of action for declaratory relief may have accrued long before the action, but the action may nevertheless be maintained. (See 62 *Harv. L. Rev.* 830.)

The opportunity that this latter rule gives a careful pleader is well illustrated by the extraordinary case of *Maguire*. The complaint alleged that defendant society was organized in 1859 to conduct a banking business; that plaintiffs were successors of original members; that in 1864 the society was incorporated and adopted bylaws purporting to deprive existing members of their rights. This action for declaratory relief was brought in 1934, to determine plaintiffs' right to participate in the contemplated distribution of a reserve fund in connection with a reorganization. *Held*, the trial judge erred in sustaining a demurrer. Defendants contended that the cause accrued when plaintiffs' predecessors were excluded from membership in 1864, because a remedy was then available. But the opinion states that the complaint did not show that plaintiffs or their predecessors were deprived of the right to attend meetings, vote, or otherwise participate in the society's affairs, and it did not show that they had knowledge of the passage of the exclusionary bylaws. The court relied on cases holding that the statute does not run against a stockholder until knowledge that his or her rights are denied or that his or her status is controverted by the corporation. (23 C.2d 735.) (See 18 So. Cal. L. Rev. 59.)

In *United Pac./Reliance Ins. Co. v. DiDomenico* (1985) 173 C.A.3d 673, 219 C.R. 119, plaintiff insurer assumed defense of a tort action against defendant arising out of an incident in 1977. The insurer's defense was pursuant to a reservation of rights, and in February 1979, it filed a complaint for declaratory relief seeking an adjudication of no coverage under the policy. In 1983, the declaratory relief action was dismissed without prejudice; a second complaint in the same form was then filed, and a demurrer based on the statute of limitations was sustained. *Held*, judgment on demurrer reversed. (173 C.A.3d 675.) "In the instant case, the underlying cause of action for coercive relief would have accrued upon the breach of the contract of insurance. Such a breach would have occurred, for instance, had appellant refused to defend the tort action. In such a situation, the statute of limitations for a cause of action based on a written contract would be four years. ... However, because appellant assumed defense of the civil action and has continued to discharge its obligations under the policy, no breach of contract exists. In the absence of any breach, no cause of action for coercive remedy has accrued and no statute of limitations has been set in motion." (173 C.A.3d 677, quoting *Maguire* and the text.)

SUPPLEMENT: [This section is current through the latest supplement]



138 of 145 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XVII. STATUTE OF LIMITATIONS: OTHER ACTIONS

D. Proceedings Subject to Various Limitations Statutes.

5. Restitution After Rescission.

3 Witkin Cal. Proc. Actions § 686

[§ 686] Restitution After Rescission.

(1) *Limitation Statutes.* Prior to 1961, the law on this subject was complicated by the statutory recognition of an equitable action for rescission in addition to the remedy of restitution after unilateral rescission. In the case of written contracts, the equitable action could be viewed as on the contract (4-year statute) or, where fraud was the ground, as based on fraud (3-year statute with delayed accrual provision). (See *Redpath v. Aagaard* (1932) 217 C. 63, 66, 16 P.2d 998 [3-year statute]; *Toomey v. Toomey* (1939) 13 C.2d 317, 320, 89 P.2d 634.) This confusion was eliminated by the abolition of the equitable action in 1961. The Civil Code sections now recognize only the action for restitution after unilateral rescission. (See *supra*, §130.) And the Code of Civil Procedure creates different statutes of limitation for written and oral or implied contracts as follows:

(a) *Written contract: 4 years.* "An action based upon the rescission of a contract in writing" is governed by the 4-year statute. (C.C.P. 337(3).)

(b) *Oral or implied contract: 2 years.* "An action based upon the rescission of a contract not in writing" is governed by the 2-year statute. (C.C.P. 339(3).)

(2) *Accrual of Cause of Action.* For all grounds of rescission other than fraud and mistake, the time begins to run from the date when the facts occurred. Where the ground is fraud or mistake, it does not begin to run until discovery of the facts. (C.C.P. 337(3), 339(3).)

C.C.P. 337(3) contains a special accrual provision for misrepresentations in negotiations for insurance policies. The right to rescind arises when the representation becomes false (*Ins.C.* 359), and the time does not begin to run until then.

SUPPLEMENT: [This section is current through the latest supplement]



139 of 145 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XVII. STATUTE OF LIMITATIONS: OTHER ACTIONS

D. Proceedings Subject to Various Limitations Statutes.

6. Petition To Vacate or Correct Arbitration Award.

3 Witkin Cal. Proc. Actions § 687

[§ 687] Petition To Vacate or Correct Arbitration Award.

In *Knass v. Blue Cross of Calif.* (1991) 228 C.A.3d 390, 279 C.R. 124, plaintiff insured sued defendant insurer for refusal to pay medical benefits, and the parties stipulated to binding arbitration. The arbitrator found in favor of defendant, and approximately 2 months later the trial judge entered judgment for defendant. *Held*, affirmed; because plaintiff had not challenged the award within the 100-day period set forth in C.C.P. 1288 (see *supra*, §478), he could not challenge it on appeal.

(a) To comply with the purpose of expeditious resolution of disputes through arbitration, time limits for challenging arbitration awards must be strictly enforced. Allowing a party to wait until after judgment to challenge an award would undermine this goal. (228 C.A.3d 395.)

(b) Although C.C.P. 1287.4 allows an appeal from a judgment confirming an arbitrator's award (see 6 Cal. Proc. (5th), *Proceedings Without Trial*, §566), there is no indication that this statute contemplates allowing a party to bypass the procedures providing for a limited review by the superior court. Because plaintiff did not petition to vacate the award during the statutory period, there is nothing to review, and the appeal must fail. (228 C.A.3d 395.)

Later cases are to the same effect. (See *Elden v. Superior Court* (1997) 53 C.A.4th 1497, 1511, 62 C.R.2d 322 [trial judge was without jurisdiction to grant relief from 100-day period of C.C.P. 1288 under C.C.P. 473 (relief for mistake, inadvertence, surprise, or neglect); challenge to award was late by more than 8 months]; *Louise Gardens of Encino Homeowners' Assn. v. Truck Ins. Exchange* (2000) 82 C.A.4th 648, 658, 98 C.R.2d 378 [following *Knass*]; *Eternity Inv. v. Brown* (2007) 151 C.A.4th 739, 746, 60 C.R.3d 134 [award was properly confirmed where petition to vacate was filed only in response to petition to confirm, which was filed 3 weeks after 100-day period had expired]; 85 A.L.R.2d 779 [time for impeaching arbitration award].)

SUPPLEMENT: [This section is current through the latest supplement]



140 of 145 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XVII. STATUTE OF LIMITATIONS: OTHER ACTIONS

D. Proceedings Subject to Various Limitations Statutes.

7. Actions Against Public Entity or Employee.

a. Public Entity: Where Claim Is Required.

1. In General.

3 Witkin Cal. Proc. Actions § 688

[§ 688] In General.

(1) *Former Law.* Where a notice of claim is required as a condition precedent to the action (see *supra*, §235 et seq.), *Govt.C. 945.6* originally established a short limitations period: 6 months after board action or deemed rejection. (See *Hunter v. Los Angeles* (1968) 262 C.A.2d 820, 822, 69 C.R. 288; *Isaacson v. Oakland* (1968) 263 C.A.2d 414, 420, 69 C.R. 379.) A 1969 amendment allowed alternatives: 6 months after board action or deemed rejection, or 1 year from accrual of the cause of action, whichever period expired later.

(2) *Statutory Periods.* The 1970 Legislature again amended *Govt.C. 945.6* in conformity with the new requirement of notice by the public entity to the claimant of action or inaction on the claim (see *supra*, §263 et seq.). The action must be commenced within 6 months or 2 years, depending on whether notice of action or inaction on the claim was given or not given. (See *infra*, §689 et seq.)

(3) *Extension of Time.* Any extension of time within which the entity is required to act (see *Govt.C. 912.4(b)*, *supra*, §264) is excluded from the 2-year period (*infra*, §691). (*Govt.C. 945.6(a)(2)*; see *Ocean Services Corp. v. Ventura Port Dist.* (1993) 15 C.A.4th 1762, 1780, 19 C.R.2d 750 [2-year period was extended by written agreement].) The periods are also extended for a person who is imprisoned. (*Govt.C. 945.6(b)*; see *infra*, §§702, 703.) But *C.C.P. 1013*, extending time to act for 5 calendar days when a notice is served by mail to a California address and the place of mailing is within California (see 6 *Cal. Proc.* (5th), *Proceedings Without Trial*, §30 et seq.), does not apply to notices under *Govt.C. 945.6(a)(1)*, which requires filing of an action within 6 months after the notice is "personally delivered or deposited in the mail." (For decisions construing prior version of *C.C.P. 1013*, see *Smith v. San Francisco* (1977) 68 C.A.3d 227, 231, 137 C.R. 146; *Cole v. Los Angeles Unified School Dist.* (1986) 177 C.A.3d 1, 3, 4, 222 C.R. 426 [following *Smith* and *Edgington v. San Diego* (1981) 118 C.A.3d 39, 47, 173 C.R. 225].)

However, *C.C.P. 12a*, providing for a 1-day extension where the last day to do a required act falls on a holiday, does apply. In *DeLeon v. Bay Area Rapid Transit Dist.* (1983) 33 C.3d 456, 189 C.R. 181, 658 P.2d 108, plaintiff's claim against a transit district was denied on June 25, 1979. His complaint was filed on December 26, 1979, 1 day after the expiration of the applicable 6-month period (see *infra*, §689). In ruling that the 1-day extension of *C.C.P. 12a* was

not applicable to *Govt.C. 945.6*, the trial judge relied on decisions holding that statutes providing that an act "shall" be performed "not later than" a certain date are mandatory and not subject to exception. *Held*, this was error.

(a) Decisions holding *C.C.P. 12a* inapplicable to statutory provisions requiring nominating papers to be filed not later than the 31st day before an election were based on the need to uphold the statutory goals of insuring accurate election ballots and the emergence of no new candidates within a given time period. However, the purposes of the limitations periods of *Govt.C. 945.6*, i.e., to insure that claims are not stale and that evidence is available, would not be frustrated by the 1-day extension provided by *C.C.P. 12a*. (33 C.3d 459.)

(b) Decisions rejecting the contention that the plaintiff's minority tolls the time limits of *Govt.C. 945.6* were based on the specific language to the contrary in *C.C.P. 352(b)* (see *infra*, §697). (33 C.3d 460.) And the specific language of *Govt.C. 945.6* itself was the basis of the holding in *Smith* that *C.C.P. 1013* is inapplicable. (33 C.3d 456.) On the other hand, the specific language of *C.C.P. 12a* supports the conclusion that it applies to *Govt.C. 945.6*; i.e., the statute applies "to all other provisions of law, however stated or wherever expressed, providing or requiring an act to be performed on a particular day or within a specific period of time." (33 C.3d 460.)

SUPPLEMENT: [This section is current through the latest supplement]



141 of 145 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XVII. STATUTE OF LIMITATIONS: OTHER ACTIONS

D. Proceedings Subject to Various Limitations Statutes.

7. Actions Against Public Entity or Employee.

a. Public Entity: Where Claim Is Required.

2. Six-Month Period.

aa. Scope and Accrual.

3 *Witkin Cal. Proc. Actions* § 689

[§ 689] Scope and Accrual.

(1) *In General.* If notice was given by the public entity of action or inaction on a claim, as required by *Govt.C. 913*, the claimant must commence the action within 6 months after notice is personally delivered or deposited in the mail. (*Govt.C. 945.6(a)(1)*); see *Stanley v. San Francisco* (1975) 48 C.A.3d 575, 578, 121 C.R. 842 [rejecting constitutional challenges invoking due process and equal protection]; *Edgington v. San Diego* (1981) 118 C.A.3d 39, 45, 46, 173 C.R. 225 [6-month period began to run when notice, sent by certified mail with return receipt requested, was deposited in mail, rather than when postal employee delivered notice and secured signature on receipt]; *Glorietta Foods v. San Jose* (1983) 147 C.A.3d 835, 836, 195 C.R. 355 [rejecting argument that 2-year period (see *infra*, §691), rather than 6-month period, applies where entity fails to act on claim within 45 days as required by *Govt.C. 911.6(a)* and *912.4(a)*]; *Norwood v. Southern Calif. Rapid Transit Dist.* (1985) 164 C.A.3d 741, 743, 211 C.R. 6 [in wrongful death action, 6-month period was started by rejection of amended claim naming all heirs, rather than by earlier rejection of defective claim naming only one heir]; *Gonzales v. Los Angeles* (1988) 199 C.A.3d 601, 604, 245 C.R. 112 [6-month period of *Govt.C. 945.6* means 6 calendar months or 182 days, whichever is longer]; *Anson v. Merced* (1988) 202 C.A.3d 1195, 1198, 249 C.R. 457 [in medical malpractice action against public entity, 6-month period of *Govt.C. 945.6* applies over longer periods specified in *C.C.P. 340.5* (*supra*, §578)]; *Martell v. Antelope Valley Hosp. Med. Center* (1998) 67 C.A.4th 978, 981, 79 C.R.2d 329 [tolling provisions of *C.C.P. 340.5* (medical malpractice action by minors; see *supra*, §586) did not extend 6-month filing requirement of *Govt.C. 945.6* in medical malpractice action by minor and his parents against public hospital]; *Moore v. Twomey* (2004) 120 C.A.4th 910, 918, 16 C.R.3d 163 [civil complaint against public entity filed by pro se prisoner is deemed filed when it is delivered to prison officials for forwarding to court]; *Los Angeles v. Superior Court (N.L.)* (2005) 127 C.A.4th 1263, 1270, 26 C.R.3d 445 [in action against county for sexual abuse of minor, 6-month period of *Govt.C. 945.6* applied over longer period specified in *C.C.P. 340.1* (*supra*, §593 et seq.)]; *V.C. v. Los Angeles Unified School Dist.* (2006) 139 C.A.4th 499, 514, 43 C.R.3d 103 [relying on *Los Angeles v. Superior Court (N.L.)*; in action against school district for sexual abuse of minor, longer limitations period in *C.C.P. 340.1* did not expand accrual limits of claims presentation requirements in *Govt.C. 911.2* or *911.4*]; *Sofranek v. Merced* (2007) 146 C.A.4th 1238, 1250, 53 C.R.3d 426 [amended claim related back to original claim for purposes of

commencement of 6-month limitations period]; C.E.B., 1 Government Tort Liability Practice 4th, §8.6 et seq.; 19 Southwestern U. L. Rev. 205 [applicability of *Gonzales* rule to all 6-month and 3-month limitations periods].)

The period may not be avoided by amending a complaint to substitute the public entity for a Doe defendant. (*Chase v. California* (1977) 67 C.A.3d 808, 813, 136 C.R. 833, 4 Cal. Proc. (5th), *Pleading*, §486 [no charging allegation against public entity in original complaint].)

A plaintiff who files a petition to perpetuate testimony or preserve evidence under *C.C.P. 2035.010* et seq. (see 2 Cal. Evidence (4th), *Discovery, Supp.*, §210 et seq.) does not commence an action for purposes of satisfying the 6-month limitations period, because the petition is not an adversarial proceeding in which one party initiates a proceeding against a public entity to enforce a right or redress an injury. (*Orr v. Stockton* (2007) 150 C.A.4th 622, 630, 58 C.R.3d 662.)

(2) *Claim Required by City Charter*. Where a claim is required by a city charter (see supra, §269), the 6-month limitations period of *Govt.C. 945.6* is applicable. This is so even though the action is for a refund of local business license taxes. The exception of *Govt.C. 905* (see supra, §240) applies only to claims for tax refunds under the Revenue and Taxation Code or other statute, and does not cover claims for refund under a city charter. But even if all tax refund claims were excepted by *Govt.C. 905*, the claim against the city would fall under *Govt.C. 935* (see supra, §269), and the action would still be subject to the limitation of *Govt.C. 945.6*. (*Volkswagen Pac. v. Los Angeles* (1972) 7 C.3d 48, 62, 63, 101 C.R. 869, 496 P.2d 1237.) (See C.E.B., 1 Government Tort Liability Practice 4th, §6.116 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]



142 of 145 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XVII. STATUTE OF LIMITATIONS: OTHER ACTIONS

D. Proceedings Subject to Various Limitations Statutes.

7. Actions Against Public Entity or Employee.

a. Public Entity: Where Claim Is Required.

2. Six-Month Period.

bb. Personal Injury Claim Not Involving Medical Malpractice.

3 *Witkin Cal. Proc. Actions* § 690

[§ 690] Personal Injury Claim Not Involving Medical Malpractice.

In *Schmidt v. Southern Calif. Rapid Transit Dist.* (1993) 14 C.A.4th 23, 17 C.R.2d 340, plaintiff was injured on December 28, 1988, while riding on defendant public entity's bus. On June 27, 1989, 1 day short of the 6-month filing requirement of *Govt.C. 911.2* (see *supra*, §255), plaintiff filed a claim with defendant, which was denied 9 days later. On January 2, 1990, 4 days before the expiration of the 6-month period allowed by *Govt.C. 945.6* for bringing an action, plaintiff filed the present personal injury action. However, because the action was not filed within the 1-year period allowed for those actions by former C.C.P. 340(3) (now 2-year period of C.C.P. 335.1; see *supra*, §552), the trial judge granted defendant's motion for judgment on the pleadings. *Held*, reversed; in a personal injury action not involving the negligence of a health care provider, compliance with the Government Claims Act exempts a claimant from former C.C.P. 340(3).

(a) Had defendant *not* given a timely written denial of plaintiff's claim, plaintiff, under *Govt.C. 945.6(a)(2)* (*supra*, §688), would have had 2 years from December 28, 1988, to file the action. *Jenkins v. Contra Costa* (1985) 167 C.A.3d 152, 213 C.R. 126, *supra*, §265, held that former C.C.P. 340(3) was inapplicable in that situation. And there is no logical reason for holding that the statute should apply where, as here, the defendant *has* given a timely denial. (14 C.A.4th 29.)

(b) C.C.P. 342 provides that actions under the Government Claims Act must be commenced within the time provided in *Govt.C. 945.6*. Although C.C.P. 342 does not say that the time limitations of *Govt.C. 945.6* are exclusive, the statutory history of the Government Claims Act reveals that C.C.P. 342 was placed with the general statutes of limitations so that the applicable limitations period for actions against public entities could be discovered by looking "at either that section or the appropriate section of the Government Code." This language "strongly suggests that it was indeed the intent of the Legislature that the time limitation provisions of section 945.6 would exclusively control over its existing general counterparts." (14 C.A.4th 30.)

(c) Defendant's denial of plaintiff's claim stated that, subject to certain exceptions, plaintiff had only 6 months to commence a court action. If one of those "exceptions" entailed compliance with an additional statute of limitations,

defendant should have expressly said so. It would be manifestly inequitable to allow a public entity to inform a claimant that he had 6 months to file an action, and then, after he had relied on that statement, to broadside him with former C.C.P. 340(3). (*14 C.A.4th 30.*)

SUPPLEMENT: [This section is current through the latest supplement]



143 of 145 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XVII. STATUTE OF LIMITATIONS: OTHER ACTIONS

D. Proceedings Subject to Various Limitations Statutes.

7. Actions Against Public Entity or Employee.

a. Public Entity: Where Claim Is Required.

3. Two-Year Period.

3 *Witkin Cal. Proc. Actions* § 691

[§ 691] Two-Year Period.

(1) *Limitations Period.* If notice was not given as required by *Govt.C. 913*, the action must be commenced within 2 years from the time the cause of action accrued. (See *Scott v. Los Angeles* (1977) 73 C.A.3d 476, 484, 140 C.R. 785 [claim was rejected as untimely, rather than on merits]; *Wheeler v. San Bernardino* (1978) 76 C.A.3d 841, 847, 848, 143 C.R. 295 [same]; *Rason v. Santa Barbara City Housing Authority* (1988) 201 C.A.3d 817, 830, 247 C.R. 492, supra, §305 [same]; *Paniagua v. Orange County Fire Authority* (2007) 149 C.A.4th 83, 88, 56 C.R.3d 746 [same]; *Carlino v. Los Angeles County Flood Control Dist.* (1992) 10 C.A.4th 1526, 1536, 13 C.R.2d 437 [claim was filed with county board, which also governed flood control district, and timely complaint was filed against county; later complaint against district "related back," and was timely].)

(2) *Accrual.* The time of accrual is determined in accordance with general rules. (*Govt.C. 901.*) (See *Dujardin v. Ventura County General Hosp.* (1977) 69 C.A.3d 350, 358, 138 C.R. 20 [rule that accrual is delayed until discovery of cause of injuries applied in malpractice action governed by *C.C.P. 340.5* (supra, §578 et seq.)]; *Lundeen Coatings Corp. v. Department of Water & Power* (1991) 232 C.A.3d 816, 827, 283 C.R. 551 [subcontractor's contract cause of action accrued on date subcontractor filed claim for damages, not on later date when public entity settled accounts between owner and prime contractor]; *C.E.B.*, 1 Government Tort Liability Practice 4th, §8.11.)

SUPPLEMENT: [This section is current through the latest supplement]



144 of 145 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XVII. STATUTE OF LIMITATIONS: OTHER ACTIONS

D. Proceedings Subject to Various Limitations Statutes.

7. Actions Against Public Entity or Employee.

b. Public Entity: Where Claim Is Not Required.

3 Witkin Cal. Proc. Actions § 692

[§ 692] Public Entity: Where Claim Is Not Required.

A number of types of claims are exempt from the requirement of notice of claim as a condition precedent to the action. (See *supra*, §240 et seq.) These are, with two exceptions, governed by the general statutes of limitations applicable to the particular causes of action. (*Govt.C.* 945.8; see *C.E.B.*, 1 Government Tort Liability Practice 4th, §8.13.) The exceptions are:

(1) Where "a different statute of limitations is specifically applicable to the public entity." (*Govt.C.* 945.8.)

(2) Where the special claims provisions of *Govt.C.* 930.6 or 935 apply. (See *supra*, §269 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]



145 of 145 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XVII. STATUTE OF LIMITATIONS: OTHER ACTIONS

D. Proceedings Subject to Various Limitations Statutes.

7. Actions Against Public Entity or Employee.

c. Public Employee.

3 *Witkin Cal. Proc. Actions* § 693

[§ 693] Public Employee.

(1) *Limitations periods.* The limitations periods for an action against a public employee or former public employee are the same as those governing the action against the entity (*supra*, §688 et seq.): (a) if the entity gave notice of rejection, within 6 months after such notice; (b) if that notice was not given, within 2 years from accrual of the cause of action. (*Govt.C. 950.6(b)*.) (See C.E.B., 1 Government Tort Liability Practice 4th, §5.61 et seq.)

The periods are extended for certain persons under disability. (See *infra*, §§696, 698, 702.)

If a claim is filed against the public entity, a separate claim need not be filed against a public employee to permit an action against him or her. Hence, the 6-month period for filing an action against a public employee begins to run on rejection of the claim against the public entity, even if no claim was filed against the public employee. (See *Julian v. San Diego* (1986) 183 C.A.3d 169, 173, 176, 229 C.R. 664.)

Schmidt v. Southern Calif. Rapid Transit Dist. (1993) 14 C.A.4th 23, 29, 30, 17 C.R.2d 340, *supra*, §690, held that, in a personal injury action against a public *entity* not involving medical malpractice, compliance with the 6-month claims filing requirement of the Government Claims Act exempts a claimant from the 1-year statute of limitations allowed for those actions by former C.C.P. 340(3) (now 2-year limitations period in C.C.P. 335.1; see *supra*, §552). That rule applies with equal force to a personal injury action against a public *employee*. (*Massa v. Southern Calif. Rapid Transit Dist.* (1996) 43 C.A.4th 1217, 1220, 51 C.R.2d 164.)

(2) *Accrual.* The cause of action accrues when the claim against the entity itself is rejected or deemed rejected. (See *Govt.C. 950.6(a)*, *supra*, §252.)

SUPPLEMENT: [This section is current through the latest supplement]



1 of 188 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XVIII. SUSPENSION OR EQUITABLE TOLLING OF STATUTE OF LIMITATIONS

A. In General.

3 Witkin Cal. Proc. Actions § 694

[§ 694] In General.

The statute of limitations may be suspended or equitably tolled under the following circumstances:

- (1) The disability of the plaintiff. (See *infra*, §695 et seq.)
- (2) The disability of the attorney for a party. (See *infra*, §709.)
- (3) The absence or nonresidence of the defendant. (See *infra*, §710 et seq.)
- (4) The death of a party. (See *infra*, §717 et seq.)
- (5) A stay or other prevention of the action. (See *infra*, §720 et seq.)
- (6) The commencement of the action. (See *infra*, §735 et seq.)
- (7) A prior action tolling the statute on a subsequent action. (See *infra*, §738 et seq.)
- (8) The trial of an insured's murder. (See *infra*, §749.)
- (9) Revival by the acknowledgement of a debt. (See *infra*, §750 et seq.)
- (10) Probation with an order of restitution. (See *infra*, §756.)
- (11) In actions against insurers on policies of insurance, while an insurer is investigating a claim (see *infra*, §§757, 758), or until final judgment in an underlying action against the insured (see *infra*, §759).
- (12) In cases involving construction defects, defective products, and other breaches of warranty, during each period that the defendant attempts to repair the defect. (See *infra*, §§760, 761.)

Other circumstances may have the same effect, including the following:

- (a) Legislative changes in the limitations period, including the revival of an action previously barred. (See *supra*,

§458 et seq.)

(b) Contractual changes in the limitations period, including extending the period by a waiver. (See *supra*, §468 et seq.)

(c) Estoppel to plead the statute of limitations. (See *infra*, §762 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]



2 of 188 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XVIII. SUSPENSION OR EQUITABLE TOLLING OF STATUTE OF LIMITATIONS

B. Disability of Plaintiff.

1. In General.

3 *Witkin Cal. Proc. Actions* § 695

[§ 695] In General.

(1) *Principal Disability Statutes.* If a person entitled to sue is under a "disability" at the time the cause of action accrues, so that it is impossible or impracticable for him or her to bring an action, the time of the disability is not part of the time limit for the commencement of the action. Disability is said to "toll" or suspend the running of the statute. (See 63 *Harv. L. Rev.* 1229; 51 *Am.Jur.2d* (2000 ed.), *Limitation of Actions* §216 et seq.; 30 *A.L.R.4th* 1092 [tolling in favor of one commencing action despite existing disability].) The principal disability statutes include the following:

- (a) *C.C.P.* 352 (minority and insanity). (See *infra*, §696 et seq.)
- (b) *C.C.P.* 352.1 (imprisonment). (See *infra*, §§702, 703.)
- (c) *C.C.P.* 354 (war). (See *infra*, §§704, 705.)
- (d) *C.C.P.* 328 and 328.5 (minority, insanity, and imprisonment; action for recovery of real property from adverse claimant). (See 12 *Summary* (10th), *Real Property*, §235.)
- (e) *C.C.P.* 358 (two or more disabilities coexisting, limitation does not attach until they are removed).
- (f) *C.C.P.* 1355 (minority and insanity; proceeding for recovery of escheated property).
- (g) *Prob.C.* 2548, 8270, 10382 (probate proceedings). (See 14 *Summary* (10th), *Wills and Probate*, §§581, 709, 1017; *infra*, §§707, 708.)

(2) *Form of Suspension.* Despite the general language of the tolling provisions for disabilities, the suspension may take several different forms:

- (a) Elimination of the years of disability from computation of the statutory period. (See *C.C.P.* 352(a), 352.1(a), 354.)
- (b) A special period given to sue after the disability is removed. (See *C.C.P.* 328 and 328.5 [recovery of real

property from adverse claimant: 5 years]; *C.C.P.* 1355 [recovery of escheated property: 1 year]; *Prob.C.* 8270 [contest of will; "at any time before entry of an order for final distribution"]; *Prob.C.* 2548 [recovery of property after void sale by guardian: 3 years].)

(c) Suspension only until a guardian, conservator of the estate, or trustee is appointed to bring the action on behalf of a minor. (*Lab.C.* 5408 [workers' compensation claim; see 2 *Summary* (10th), *Workers' Compensation*, §374].)

(d) The peculiar rule of *C.C.P.* 340.4: An action for damages for injuries to an unborn child must be brought within 6 years from the date of birth. (See *supra*, §589.)

SUPPLEMENT: [This section is current through the latest supplement]



3 of 188 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XVIII. SUSPENSION OR EQUITABLE TOLLING OF STATUTE OF LIMITATIONS

B. Disability of Plaintiff.

2. Minority.

a. Scope of Suspension.

3 *Witkin Cal. Proc. Actions* § 696

[§ 696] Scope of Suspension.

(1) *In General.* The statute is suspended by the minority of a child. (*C.C.P.* 352(a) ["under the age of majority"].) (See *Aronson v. Bank of America* (1941) 42 C.A.2d 710, 720, 109 P.2d 1001; *Swart v. Swart* (1942) 49 C.A.2d 48, 120 P.2d 942; 49 A.L.R.4th 216 [tolling of statute on account of minority of injured child as applicable to parent's or guardian's action arising out of same injury]; 54 A.L.R.4th 362 [surviving parent's minority as tolling action for child's wrongful death]; 1 A.L.R.6th 407 [effect of appointment of legal representative for minor on running of state statute of limitations against minor]; 51 Am.Jur.2d (2000 ed.), *Limitation of Actions* §224 et seq.) (On applicability to action alleging sexual abuse of minor, see *supra*, §595.)

The age of majority is 18. (*Family C.* 6500; see 1 *Summary* (10th), *Contracts*, §26.)

(2) *Effect of Parent or Guardian on Minor's Action.* The fact that the plaintiff minor is a ward with a general guardian is immaterial where the cause of action is in the minor. (*Aronson v. Bank of America*, *supra*; see *infra*, §707.) The same is true of an action by a mother to determine paternity and obtain support for an illegitimate child: The child is the real party in interest, and the statute is tolled. (*Van Buskirk v. Todd* (1969) 269 C.A.2d 680, 688, 75 C.R. 280; *Perez v. Singh* (1971) 21 C.A.3d 870, 872, 97 C.R. 920.) (See *Epstein v. Frank* (1981) 125 C.A.3d 111, 122, 177 C.R. 831 [action on promissory notes payable to custodians for minors under former Uniform Gifts to Minors Act; legal title remained with minors and statute was tolled].)

(3) *Effect of Time Limits in Other Statutes.* The tolling provisions of *C.C.P.* 352 prevail over special time limitations contained in specific statutes, in the absence of a contrary expression of legislative intent. In *Jessica H. v. Allstate Ins. Co.* (1984) 155 C.A.3d 590, 202 C.R. 239, plaintiff's father died in an automobile accident in Hawaii in January 1978. Plaintiff minor brought this action in March 1982 on the father's insurance policy issued in accordance with Hawaii's no-fault insurance law. Judgment on demurrer was rendered in favor of defendant insurer, on the ground that the contract action was barred by Hawaii's 2-year limitation in its no-fault statute. *Held*, reversed. Hawaii law is similar to that of California in its treatment of tolling statutes, and "the strong public policy for preserving causes of actions throughout periods of a plaintiff's minority prevents circumventing tolling statutes through contracts containing special time limitations." (155 C.A.3d 592.)

SUPPLEMENT: [This section is current through the latest supplement]



4 of 188 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XVIII. SUSPENSION OR EQUITABLE TOLLING OF STATUTE OF LIMITATIONS

B. Disability of Plaintiff.

2. Minority.

b. Exceptions and Distinctions.

3 *Witkin Cal. Proc. Actions* § 697

[§ 697] Exceptions and Distinctions.

(1) *Claims Against Government*. *C.C.P.* 352 expressly provides that it does not toll an action against a public entity or public employee on a cause of action for which a claim is required to be presented under the Government Claims Act (*supra*, §231 et seq.). (*C.C.P.* 352(b).)

Government claims presentation requirements of other statutes do not trigger the exception. (See *Huntington Park v. Superior Court* (1995) 34 C.A.4th 1293, 1300, 41 C.R.2d 68 [federal civil rights action under 42 U.S.C., §1983]; *Balloon v. Superior Court* (1995) 39 C.A.4th 1116, 1120, 46 C.R.2d 161 [FEHA action alleging sexual harassment and discrimination in employment under *Govt.C.* 12960]; *Rodriguez v. Superior Court* (2003) 108 C.A.4th 301, 307, 133 C.R.2d 294 [action against foster parent by children alleging abuse while in defendant's care, where plaintiffs were required under *Health & Saf.C.* 1527.6 to present claim to Foster Family Home and Small Family Home Insurance Fund as precondition to filing suit].)

(2) *Effect of Emancipation*. A minor who is emancipated by court order under *Family C.* 7000 et seq. (see 10 *Summary* (10th), *Parent and Child*, §298 et seq.) is, by operation of law, subject to all legal consequences of emancipation that are set forth in *Family C.* 7050, including the right to sue or be sued in the minor's own name. Once emancipated, a minor is under no legal disability with respect to bringing his or her own claims. Therefore, the minor's tolling provision of *C.C.P.* 352(a) no longer applies and the emancipated minor's causes of action accrue on the date of emancipation. Nothing in the statutory language or the legislative history authorizes a trial court to modify the list of legal consequences of emancipation when issuing a court declaration of emancipation pursuant to *Family C.* 7122. (*West Shield Investigations & Sec. Consultants v. Superior Court* (2000) 82 C.A.4th 935, 947, 98 C.R.2d 612, *supra*, §558 [issue of first impression].)

(3) *Action Under Uninsured Motorist Insurance Policy*. The minority tolling provision in *C.C.P.* 352(a) does not suspend the statute of limitations (*Ins.C.* 11580.2(i), *supra*, §566) governing an action by an insured against an insurer under an uninsured motorist clause in an insurance policy. (See *State Farm Mut. Auto. Ins. Co. v. Superior Court* (1965) 232 C.A.2d 808, 809, 43 C.R. 209; *Pacific Indem. Co. v. Superior Court* (1966) 246 C.A.2d 63, 70, 54 C.R. 470; *Republic Indem. Co. of America v. Barn Furniture Mart* (1967) 248 C.A.2d 517, 518, 56 C.R. 609; *Allstate Ins. Co. v.*

Orlando (1968) 262 C.A.2d 858, 865, 69 C.R. 702.)

SUPPLEMENT: [This section is current through the latest supplement]



5 of 188 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XVIII. SUSPENSION OR EQUITABLE TOLLING OF STATUTE OF LIMITATIONS

B. Disability of Plaintiff.

3. Insanity.

a. Scope of Suspension.

3 *Witkin Cal. Proc. Actions* § 698

[§ 698] Scope of Suspension.

(1) *In General.* The statute is suspended for a person who is "insane." (*C.C.P.* 352(a).) The test is being incapable of caring for property or understanding the nature and effect of one's acts. (See *Pearl v. Pearl* (1918) 177 C. 303, 306, 177 P. 845; *Wade v. Busby* (1944) 66 C.A.2d 700, 702, 152 P.2d 754; *Hsu v. Mt. Zion Hosp.* (1968) 259 C.A.2d 562, 574, 66 C.R. 659; 63 *Harv. L. Rev.* 1231; 51 *Am.Jur.2d* (2000 ed.), *Limitation of Actions* §229 et seq.)

A disability does not suspend the statute unless it existed when the right of action accrued. (*C.C.P.* 357, *infra*, §706.) This rule presents a special problem where it is alleged that the insanity was caused by, and occurred simultaneously with, the wrongful act that gave rise to the cause of action. In *Weinstock v. Eissler* (1964) 224 C.A.2d 212, 36 C.R. 537, the court followed the view of those jurisdictions that toll the statute: "Where the condition of insanity results directly from, and occurs on the same day, as the wrongful act or neglect which is the basis of the action, the two events are *legally* simultaneous since the law disregards fractions of days and the statute of limitations will not be deemed to have commenced running prior to the occurrence of the condition of insanity." (224 C.A.2d 232.) (See 41 *A.L.R.2d* 726 [time of existence of mental incompetency].)

(2) *Exceptions and Distinctions.* *C.C.P.* 352 expressly provides that it does not toll an action against a public entity or public employee on a cause of action for which a claim is required to be presented under the Government Claims Act (*supra*, §231 et seq.). (*C.C.P.* 352(b), *supra*, §697.)

A sexual molestation victim suffering from posttraumatic stress syndrome is not "insane" for purposes of *C.C.P.* 352(a). (*Snyder v. Boy Scouts of America* (1988) 205 C.A.3d 1318, 1324, 253 C.R. 156; see 11 *A.L.R.5th* 588 [emotional or psychological "blocking" or repression as tolling statute of limitations]; 12 *A.L.R.5th* 546 [posttraumatic stress syndrome as tolling statute of limitations]; 23 *A.L.R.6th* 697 [mental disability, other than posttraumatic stress or memory repression, as tolling statute of limitations].)

In a medical malpractice action, the 3-year limitations period in *C.C.P.* 340.5 (*supra*, §581) is not suspended by the insanity tolling provision in *C.C.P.* 352(a). (*Fogarty v. Superior Court* (1981) 117 C.A.3d 316, 320, 321, 172 C.R. 594.) However, the Courts of Appeal are in conflict about whether the insanity tolling provision in *C.C.P.* 352(a) suspends

the 1-year limitations period in *C.C.P. 340.5* (see *supra*, §579). (See *Fogarty* [statute tolled]; *Bennett v. Shahhal* (1999) 75 *C.A.4th* 384, 389, 89 *C.R.2d* 272 [same]; *Alcott Rehabilitation Hosp. v. Superior Court* (2001) 93 *C.A.4th* 94, 103, 112 *C.R.2d* 807 [statute not tolled]; *supra*, §585.)

SUPPLEMENT: [This section is current through the latest supplement]



6 of 188 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XVIII. SUSPENSION OR EQUITABLE TOLLING OF STATUTE OF LIMITATIONS

B. Disability of Plaintiff.

3. Insanity.

b. Where Guardian Ad Litem Is Appointed.

3 Witkin Cal. Proc. Actions § 699

[§ 699] Where Guardian Ad Litem Is Appointed.

In *Tzolov v. International Jet Leasing* (1991) 232 C.A.3d 117, 283 C.R. 314, plaintiff received injuries in an accident on January 27, 1983, which rendered him permanently incompetent. A guardian ad litem was appointed for him on January 23, 1984. In the present action the trial judge rendered judgment for defendant on demurrer, on the ground that the 1-year limitations period began to run from the date of the guardian's appointment and had expired. *Held*, reversed.

(a) The statute will not run against an incompetent plaintiff simply because he has a general guardian; the cause of action belongs to the plaintiff. (232 C.A.3d 120, citing the text.)

(b) Where a guardian ad litem has been appointed, the statute should not begin to run against either a minor or an incompetent. "It appears to be the general rule nationally that a guardian ad litem's failure to bring a *minor's* action within the applicable limitations period will not prejudice the minor's right to do so after he or she becomes of age. ... We are satisfied that this should be the California rule, applicable to minors and mentally incompetent persons alike." (232 C.A.3d 120.)

(c) Defendant argued that because plaintiff and his guardian ad litem had the assistance of counsel, and with counsel's help were able to file one timely action (which they failed to prosecute), the purpose of the tolling statute had been served and they needed no further exemption. "Such an argument appears to have been accepted in some other jurisdictions ... , but we are satisfied that the majority would agree with the few California cases that have considered the situation of a minor plaintiff." (232 C.A.3d 121.)

(d) "We appreciate the burden our conclusion will place upon defendants and their insurance carriers in cases of this kind. We conclude, however, that these burdens are justified by the legislative judgment that an incompetent plaintiff's ability to bring a claim for his or her injuries must be protected. We assume that upon an appropriate showing of good cause trial courts will make discovery orders and other provisions to mitigate any prejudice unavoidably caused to a defendant by long delay." (232 C.A.3d 122.) (See 111 A.L.R.5th 159 [effect, on commencement of state statute of limitations, of appointing legal representative for mentally disabled person].)

SUPPLEMENT: [This section is current through the latest supplement]



7 of 188 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XVIII. SUSPENSION OR EQUITABLE TOLLING OF STATUTE OF LIMITATIONS

B. Disability of Plaintiff.

3. Insanity.

c. Unconsciousness as Insanity.

3 Witkin Cal. Proc. Actions § 700

[§ 700] Unconsciousness as Insanity.

In *Feeley v. Southern Pac. Trans. Co.* (1991) 234 C.A.3d 949, 285 C.R. 666, plaintiff, an independent contractor employed by defendant, was at his post on defendant's premises when he was struck on the head from behind by an unknown assailant. He was knocked unconscious, and remained so for 12 days, during which period he was hospitalized and underwent cranial surgery. He filed this action 1 day after the 1-year statute of limitations had run, and the trial judge granted summary judgment for defendant. *Held*, reversed; the statute was tolled for the 12 days of unconsciousness.

(a) "[A] coma caused by physical trauma is a mental condition which renders the plaintiff 'incapable of caring for his [or her] property or transacting business or understanding the nature or effects of his [or her] acts' so long as the comatose condition exists ... , and logically should be included within the judicially developed definition of insanity" in *C.C.P.* 352. (234 C.A.3d 952.)

(b) Defendant's contention that some equivalent of actual psychiatric illness must be present is untenable. "First, the standard expressed in the cases, though often cast in terms of 'mental derangement,' ... actually requires only some mental condition which renders the plaintiff incapable. ... Second, we can perceive no rational distinction between a person rendered completely unconscious by trauma, and a person who remains conscious but incapable. If the latter litigant is entitled to tolling during the period of incapacity, it would be arbitrary and harsh to deprive the former of the same benefit." (234 C.A.3d 952.)

SUPPLEMENT: [This section is current through the latest supplement]



8 of 188 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XVIII. SUSPENSION OR EQUITABLE TOLLING OF STATUTE OF LIMITATIONS

B. Disability of Plaintiff.

3. Insanity.

d. Effect of Judicial Determination.

3 Witkin Cal. Proc. Actions § 701

[§ 701] Effect of Judicial Determination.

(1) *In General.* In *Gottesman v. Simon* (1959) 169 C.A.2d 494, 337 P.2d 906, plaintiff husband, suffering brain injuries in an automobile accident in September 1954, was adjudged incompetent. He was ordered restored to competency in October 1955, and filed the action in April 1956. The action was timely if his incompetency continued until October 1955; but defendant offered medical evidence, found sufficient by the trial judge, that he was sane before April 1955, and the judge concluded that the action was barred. *Held*, reversed; the evidence was inadmissible. The court followed the rule established by the contract cases under C.C. 38 et seq. that a judicial determination of incompetency fixes that status until the order of restoration or substantial abandonment of the guardianship. The opinion comments on the possible abuse of this rule by an injured person refusing to seek an order of restoration and thus indefinitely suspending the statute of limitations, but, finding no evidence of abuse in the record, does not consider remedies for it. (See *Hsu v. Mt. Zion Hosp.* (1968) 259 C.A.2d 562, 573, 66 C.R. 659 [presumption applies only to contracts and conveyances, not to wills, marriage, or other legal acts; modern tendency is to accord less weight to hospitalization as evidence of contractual incompetence]; 33 So. Cal. L. Rev. 321.)

(2) *Commitment Proceedings.* Commitment of a person under the Lanterman-Petris-Short Act (*supra*, §80 et seq.) is not a conclusive judicial determination of insanity. The purpose of this proceeding is not to determine whether a person is incapable of handling property or business, but only whether the person needs care and remedial aid. (*Hsu v. Mt. Zion Hosp.*, *supra*, 259 C.A.2d 572.)

In *Hsu*, plaintiffs, husband and wife, sued defendant hospital, two doctors, and the county for damages for malpractice, false imprisonment, and assault and battery, based on an incident of removal from defendant hospital to the county hospital on July 13, 1957. The action was filed in September 1960, and, to avoid the bar as to plaintiff wife, the complaint alleged her insanity (triggered by the incident) from July 13, 1957, to her official discharge from Napa State Hospital on October 16, 1959. In a jury trial on the severed issue of limitations, the jury brought in a special verdict finding that she was capable of transacting business and understanding the nature of her acts during March, April, and May of 1959 and learned of the alleged tort before September 1959. *Held*, judgment for defendant on the verdict affirmed. The verdict was supported by evidence that she had been released from the hospital for the 3-month period to manage an apartment building and take care of her two children. (259 C.A.2d 574.)

SUPPLEMENT: [This section is current through the latest supplement]



9 of 188 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XVIII. SUSPENSION OR EQUITABLE TOLLING OF STATUTE OF LIMITATIONS

B. Disability of Plaintiff.

4. Imprisonment.

a. Scope of Suspension.

3 *Witkin Cal. Proc. Actions* § 702

[§ 702] Scope of Suspension.

(1) *In General.* Originally, *C.C.P.* 352 governed suspension of the statute for the disability of imprisonment. However, in 1994 the provisions for statutory tolling during imprisonment were restated, with some changes, in *C.C.P.* 352.1. *C.C.P.* 352.1 applies retroactively to tort actions accruing before its effective date (January 1, 1995), so long as that does not result in manifest injustice. Thus, claims that accrued before January 1, 1995, were tolled for 2 years from accrual or until that date, whichever occurs later. (*Carlson v. Blatt* (2001) 87 *C.A.4th* 646, 650, 105 *C.R.2d* 42 [professional malpractice action filed in 1997 by prisoner who was convicted in 1989, but was released in 1995, was time-barred; statutory tolling terminated on January 1, 1995].) (See 51 *Am.Jur.2d* (2000 ed.), *Limitation of Actions* §235 et seq.)

(2) *Term Less Than Life.* The statute is suspended for a period, not to exceed 2 years, as to a person (a) "imprisoned on a criminal charge, or in execution under the sentence of a criminal court for a term less than for life" (b) "at the time the cause of action accrued." (*C.C.P.* 352.1(a); see *Meraviglia v. Bovee* (1931) 113 *C.A.* 752, 753, 298 *P.* 1040; *Hightower v. Roman Catholic Bishop of Sacramento* (2006) 142 *C.A.4th* 759, 768, 48 *C.R.3d* 420 [*C.C.P.* 352.1(a) did not toll action that accrued before plaintiff was imprisoned]; 63 *Harv. L. Rev.* 1232; 77 *A.L.R.3d* 735 [imprisonment of party to civil action as tolling statute of limitations].) Under the original statute, the duration of the tolling period was unrestricted.

In *Leeper v. Beltrami* (1959) 53 *C.2d* 195, 1 *C.R.* 12, 347 *P.2d* 12, supra, §657, plaintiffs, husband and wife, sued to recover money paid under duress. *Held*, the action was barred as to the wife by the lapse of the 3-year period of the fraud statute (supra, §483), but not as to the husband, because all wrongful acts took place after he had been imprisoned for a felony. However, because there was no joint right of action, the tolling of the statute as to the husband did not benefit the wife. (53 *C.2d* 208.)

(3) *Life Imprisonment With Possibility of Parole.* When the original statute was enacted in 1872, parole for life termers was unknown. The statute therefore referred only to persons imprisoned for "a term less than for life," for the person who could never be released could not enjoy the fruits of litigation. Today a person sentenced to life may be paroled and may actually serve less time than one whose maximum sentence is a term of years. Under a literal

interpretation of *C.C.P. 352.1(a)*, the statute would not be tolled as to such a person. But in *Grasso v. McDonough Power Equipment* (1968) 264 C.A.2d 597, 70 C.R. 458, construing nearly identical language in the prior statute, the court held that only those imprisoned for life without possibility of parole should be excluded from the tolling provision. Here, plaintiff, sentenced to life imprisonment (no indication of the offense), was injured in 1956 while operating a power lawn mower in the prison. In April 1965, her civil rights were restored to the extent necessary to retain an attorney and file an action against the manufacturer of the machine. The action, filed in June 1965, was held timely. (264 C.A.2d 601.)

SUPPLEMENT: [This section is current through the latest supplement]



10 of 188 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XVIII. SUSPENSION OR EQUITABLE TOLLING OF STATUTE OF LIMITATIONS

B. Disability of Plaintiff.

4. Imprisonment.

b. Exceptions and Distinctions.

3 *Witkin Cal. Proc. Actions* § 703

[§ 703] Exceptions and Distinctions.

(1) *No Tolling During Parole.* In *Deutch v. Hoffman* (1985) 165 C.A.3d 152, 211 C.R. 319, plaintiff's cause of action accrued in August 1975, and his complaint, filed more than 3 years thereafter, was barred by former C.C.P. 338(3) (now C.C.P. 338(c)). However, plaintiff was on parole at the time of accrual, and he contended that the tolling provision for imprisonment applied. *Held*, the action was barred. Prior to 1976, former P.C. 2600 suspended the civil rights of prisoners, but no decision has held that a parolee's right to institute a civil action was among the pre-1976 restrictions. (165 C.A.3d 155.) Moreover, under *Payne v. Superior Court* (1976) 17 C.3d 908, 132 C.R. 405, 553 P.2d 565, 1 Cal. Proc. (5th), Attorneys, §49, even a prison inmate cannot be denied access to the courts. (165 C.A.3d 155.) Hence, plaintiff's status as a parolee neither precluded nor significantly impaired his ability to enforce his claim during the period, and no tolling occurred. (165 C.A.3d 156.)

(2) *Claims Against Government.* C.C.P. 352.1 does not apply to an action against a public entity or public employee on a cause of action for which a claim is required to be presented under the Government Claims Act. (C.C.P. 352.1(b).) However, Govt.C. 945.6 of the Act expressly provides for tolling. If the claimant is in state prison and unable to commence an action, the time is extended to 6 months after the date of restoration of his or her civil right to sue, provided the claim has been presented. (Govt.C. 945.6(b), (c).) The extension is lost if the public entity "establishes" that the claimant failed to make a reasonable effort to commence suit or obtain restoration of his or her civil rights before the expiration of the normal time. (Govt.C. 945.6(b).)

(3) *Federal Civil Rights Action.* A federal court applying a state statute of limitations to a state prisoner's federal civil rights action under 42 U.S.C., §1983 must also apply the state statute's tolling period for prisoners. (*Hardin v. Straub* (1989) 490 U.S. 536, 109 S.Ct. 1998, 2003, 104 L.Ed.2d 582, 591.)

However, C.C.P. 352.1 does not apply to an action, including a federal civil rights action under 42 U.S.C., §1983, relating to the conditions of confinement of a person imprisoned on a criminal charge. But the statute does apply to an action for damages or that portion of an action that is for the recovery of damages. (C.C.P. 352.1(c).)

The tolling provision of Govt.C. 945.6 does not apply to an action under 42 U.S.C., §1983, because that action is

not subject to a state's government claims presentation statutes. (See *supra*, §245.)

(4) *Medical Malpractice Action*. In a medical malpractice action, *C.C.P.* 352.1 tolls the 1-year limitations period of *C.C.P.* 340.5 (*supra*, §579), but does not toll the 3-year maximum limitations period of *C.C.P.* 340.5 (*supra*, §581). (*Belton v. Bowers Ambulance Service* (1999) 20 *C.4th* 928, 931, 932, 86 *C.R.2d* 107, 931, 978 *P.2d* 591, *supra*, §585.)

SUPPLEMENT: [This section is current through the latest supplement]



11 of 188 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XVIII. SUSPENSION OR EQUITABLE TOLLING OF STATUTE OF LIMITATIONS

B. Disability of Plaintiff.

5. War.

a. General Suspension Statute.

3 Witkin Cal. Proc. Actions § 704

[§ 704] General Suspension Statute.

"When a person is, by reason of the existence of a state of war, under a disability to commence an action, the time of the continuance of such disability is not part of the period limited for the commencement of the action whether such cause of action shall have accrued prior to or during the period of such disability." (*C.C.P.* 354; see *Taketa v. State Bd. of Equalization* (1951) 104 C.A.2d 455, 459, 231 P.2d 873 [statute began to run on return of evacuated Japanese-Americans]; *Estate of Spinosa* (1953) 117 C.A.2d 364, 370, 255 P.2d 843; 63 Harv. L. Rev. 1234; 51 Am.Jur.2d (2000 ed.), *Limitation of Actions* §213.) (On similar effect of Servicemembers Civil Relief Act, see *infra*, §721; on similar effect of *Mil. & Vet.C.* 400 et seq., protecting National Guard members or military reservists called to active duty, see *infra*, §721.)

In *Estate of Caravas* (1952) 40 C.2d 33, 250 P.2d 593, the court said: "[I]t is an established principle of international and municipal law that a statute of limitation is tolled during the period when the existence of a state of war prevents access to the courts, whether or not the particular statute of limitation expressly provides for such suspension thereof." (40 C.2d 40.)

SUPPLEMENT: [This section is current through the latest supplement]



12 of 188 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XVIII. SUSPENSION OR EQUITABLE TOLLING OF STATUTE OF LIMITATIONS

B. Disability of Plaintiff.

5. War.

b. Special Suspension Statutes.

3 *Witkin Cal. Proc. Actions* § 705

[§ 705] Special Suspension Statutes.

(1) *Holocaust Victims*. An action by a Holocaust victim, or the heir or beneficiary of a victim, filed on or before December 31, 2010, to recover on an insurance policy issued or in effect in Europe before 1945 may not be dismissed for failure to comply with the applicable statute of limitations. (*C.C.P.* 354.5.)

The continuing validity of *C.C.P.* 354.5 was called into question by *American Ins. Assn. v. Garamendi* (2003) 539 U.S. 396, 123 S.Ct. 2374, 156 L.Ed.2d 376. California's Holocaust Victim Insurance Relief Act (*Ins.C.* 13800 et seq.) requires insurers that do business in California and that sold insurance policies in Europe that were in effect during the Holocaust to disclose certain information about those policies to the California Insurance Commissioner or risk losing their license. *American Ins. Assn. v. Garamendi* held that the Act impermissibly interfered with the federal Government's right to conduct foreign affairs (see 8 *Summary* (10th), *Constitutional Law*, §1337 et seq.) and therefore was preempted. (123 S.Ct. 2379, 156 L.Ed.2d 387.)

Steinberg v. International Com. on Holocaust Era Ins. Claims (2005) 133 C.A.4th 689, 34 C.R.3d 944, adopting the reasoning of *Garamendi*, also held that *C.C.P.* 354.5 was preempted by federal law. (133 C.A.4th 699.) (See 6 *A.L.R. Fed* 2d 279 [recovery of reparations from corporations for Nazi-related conduct].)

(2) *World War II Forced Labor Victims*. An action by a World War II slave or forced labor victim, or the heir or beneficiary of a victim, filed on or before December 31, 2010, to recover compensation for labor performed as a victim may not be dismissed for failure to comply with the applicable statute of limitations. (*C.C.P.* 354.6; see 31 *McGeorge L. Rev.* 221.)

In *Deutsch v. Turner Corp.* (9th Cir. 2003) 317 F.3d 1005, the Ninth Circuit Court of Appeals held that *C.C.P.* 354.6 was unconstitutional, because the U.S. Constitution allocates power over foreign affairs exclusively to the federal Government, and because *C.C.P.* 354.6 intrudes on the federal Government's exclusive power to make and resolve war, including the procedure for resolving war claims. (317 F.3d 1020.)

Relying on the reasoning of *American Ins. Assn. v. Garamendi* and *Deutsch v. Turner Corp.*, two decisions,

Mitsubishi Materials Corp. v. Superior Court (2003) 113 C.A.4th 55, 78, 6 C.R.3d 159, and *Taiheiyo Cement Corp. v. Superior Court* (2004) 117 C.A.4th 380, 398, 12 C.R.3d 32, each independently held that C.C.P. 354.6 was invalid. The statute impermissibly interferes with the 1951 Treaty of Peace with Japan, in which World War II claims between United States citizens and Japanese nationals were compromised by the federal Government.

(3) *Misappropriated Holocaust-Era Artwork*. An action by an owner of Holocaust-era artwork, or the heir or beneficiary of the owner, filed on or before December 31, 2010, to recover the artwork from a museum or gallery displaying, exhibiting, or selling it may not be dismissed for failure to comply with the applicable statute of limitations. (C.C.P. 354.3.)

(4) *Armenian Genocide Victims*. An action by an Armenian Genocide victim, or the heir or beneficiary of a victim, filed on or before December 31, 2010, to recover on an insurance policy issued or in effect between 1875 and 1923 may not be dismissed for failure to comply with the applicable statute of limitations. An "Armenian Genocide victim" means a person of Armenian or other ancestry living in the Ottoman Empire from 1915 to 1923 who died, was deported, or escaped to avoid persecution. (C.C.P. 354.4.)

An action by an Armenian Genocide victim, or the heir or beneficiary of a victim, residing in California that is filed on or before December 31, 2016, to recover on a claim arising out of the failure of a bank to turn over deposits or assets looted between 1890 and 1923 by a person acting on behalf of the Turkish Government, may not be dismissed for failure to comply with the applicable statute of limitations. An "Armenian Genocide victim" means a person of Armenian or other ancestry living in the Ottoman Empire from 1890 to 1923 who died, was injured in person or property, was deported, or escaped to avoid persecution. (C.C.P. 354.45.)

(5) *Bracero Performing Wartime Labor*. An action by a bracero, or the heir or beneficiary of a bracero, filed on or before December 31, 2005, to recover unpaid wages or to turn over savings fund amounts may not be dismissed for failure to comply with the applicable statute of limitations. A "bracero" is a participant in a work program between January 1, 1942, and January 1, 1950, under agreements between the United States and Mexico intended to relieve a wartime labor shortage in the United States. (C.C.P. 354.7.)

SUPPLEMENT: [This section is current through the latest supplement]



13 of 188 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XVIII. SUSPENSION OR EQUITABLE TOLLING OF STATUTE OF LIMITATIONS

B. Disability of Plaintiff.

6. When Disability Does Not Suspend.

a. Statute Already Running.

3 Witkin Cal. Proc. Actions § 706

[§ 706] Statute Already Running.

(1) *General Rule.* "No person can avail himself of a disability, unless it existed when his right of action accrued." (C.C.P. 357.) Once the cause of action has accrued and the statute commences to run, no subsequent disability will suspend it. (*Rose v. Petaluma & Santa Rosa Ry. Co.* (1923) 64 C.A. 213, 217, 221 P. 406; *Larsson v. Cedars of Lebanon Hosp.* (1950) 97 C.A.2d 704, 707, 218 P.2d 604; see 63 Harv. L. Rev. 1229.)

(2) *War Exception.* An express exception to this general rule is made by C.C.P. 354, dealing with disability caused by war (*supra*, §704).

SUPPLEMENT: [This section is current through the latest supplement]



14 of 188 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XVIII. SUSPENSION OR EQUITABLE TOLLING OF STATUTE OF LIMITATIONS

B. Disability of Plaintiff.

6. When Disability Does Not Suspend.

b. Representative With Right To Sue.

3 *Witkin Cal. Proc. Actions* § 707

[§ 707] Representative With Right To Sue.

(1) *General Rule.* Under the "real party in interest" statutes, the right to bring an action may be in a trustee or other representative. (See 4 *Cal. Proc.* (5th), *Pleading*, §§134, 137.) In those situations, the statute will run despite the disability of the beneficial owner of the right. (See *Patchett v. Pacific Coast Ry. Co.* (1893) 100 C. 505, 509, 35 P. 73 [trustee]; *Lane v. Starkey* (1922) 59 C.A. 140, 143, 210 P. 277 [administrator]; *De Tarr v. Texaco* (1968) 267 C.A.2d 872, 875, 73 C.R. 511 [trustee]; *Triplett v. Williams* (1969) 269 C.A.2d 135, 137, 74 C.R. 594 [trustee].)

(2) *Distinction: General Guardian.* Although the foregoing cases by dictum included a general guardian in the statement of the rule, it has been squarely held that the statute does not run against the ward during guardianship, because the cause of action is held by the minor and not the guardian. (See *Aronson v. Bank of America* (1941) 42 C.A.2d 710, 720, 109 P.2d 1001; *Gottesman v. Simon* (1959) 169 C.A.2d 494, 501, 337 P.2d 906; 63 *Harv. L. Rev.* 1231; 1 *A.L.R.6th* 407 [effect of appointment of legal representative for minor on running of statute of limitations against minor]; *supra*, §696.)

(3) *Distinction: Wrongful Death and Adult Heir.* It was formerly the California rule that if there was an adult heir capable of suing for wrongful death, the statute ran on the "indivisible" cause of action, barring minor heirs. (*Sears v. Majors* (1930) 104 C.A. 60, 61, 285 P. 321; *Haro v. Southern Pac. R. Co.* (1936) 17 C.A.2d 594, 595, 62 P.2d 441; *Caraway v. Burns* (1956) 143 C.A.2d 327, 328, 299 P.2d 689; see criticism, 25 *Cal. L. Rev.* 373; 63 *Harv. L. Rev.* 1230.) Doubt was cast on the rule by a dictum in *Leeper v. Beltrami* (1959) 53 C.2d 195, 208, 1 C.R. 12, 347 P.2d 12, and this dictum induced the United States Supreme Court to remand a New York federal suit involving the California statute of limitations. (*Nolan v. Transocean Air Lines* (1961) 365 U.S. 293, 81 S.Ct. 555, 557, 5 L.Ed.2d 571, 573; see 74 *Harv. L. Rev.* 606 [*Nolan* in Court of Appeals].)

The issue arose again in *Cross v. Pacific Gas & Elec. Co.* (1964) 60 C.2d 690, 36 C.R. 321, 388 P.2d 353. Decedent was killed in 1956, leaving a widow and three minor children. The children sued for wrongful death in 1961. *Held*, the statute ran against the widow but not the children. The court disposed of the objection of "joint, single and indivisible cause of action" by pointing out that former C.C.P. 377 (now C.C.P. 377.60 et seq.) did not create a joint cause, but merely required joinder of the causes. "In stating that an action for wrongful death is joint, it is meant that all

heirs should join or be joined in the action and that a single verdict should be rendered for all recoverable damages; when it is said that the action is single, it is meant that only one action for wrongful death may be brought whether, in fact, it is instituted by all or only one of the heirs, or by the personal representative of the decedent as statutory trustee for the heirs; and when it is said that the action is indivisible, it is meant that there cannot be a series of suits by heirs against the tortfeasor for their individual damages." (60 C.2d 694.) *Haro* and *Sears* were disapproved. (60 C.2d 694.) (See 4 Santa Clara Lawyer 239.)

SUPPLEMENT: [This section is current through the latest supplement]



15 of 188 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XVIII. SUSPENSION OR EQUITABLE TOLLING OF STATUTE OF LIMITATIONS

B. Disability of Plaintiff.

6. When Disability Does Not Suspend.

c. Action To Recover Property Sold by Personal Representative.

3 Witkin Cal. Proc. Actions § 708

[§ 708] Action To Recover Property Sold by Personal Representative.

An action by an heir or one claiming under a decedent to recover personal property sold by a personal representative on the ground that the sale is void must be commenced within 3 years after the representative's final account is settled or 3 years after the discovery of the fraud on which the action is based, whichever period is later. The limitation "is not tolled for any reason." (*Prob.C. 10382.*)

SUPPLEMENT: [This section is current through the latest supplement]



16 of 188 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XVIII. SUSPENSION OR EQUITABLE TOLLING OF STATUTE OF LIMITATIONS

C. Disability of Attorney.

3 *Witkin Cal. Proc. Actions* § 709

[§ 709] Disability of Attorney.

A strong affirmation of the judicial power to create tolling exceptions to the running of the statute of limitations was made in *Lewis v. Superior Court* (1985) 175 C.A.3d 366, 220 C.R. 594. On March 17, 1983, plaintiff was injured in an automobile accident and retained attorney B, a sole practitioner, to represent her. B obtained payment of property damages from defendant's insurer, engaged in settlement negotiations on the personal injury claim, and calendared March 16, 1984, for filing a complaint if a settlement was not reached. But on March 12, 1984, B was struck by an automobile and suffered injuries that totally disabled him mentally and physically beyond the March 17, 1984, deadline. Plaintiff was not notified of B's accident until his return to part-time work on April 16, 1984, and B had no associate to cover his filing requirements during his illness. On April 27, 1984, B discovered the omission to file a complaint and filed it on that day. The trial judge granted a motion to strike all allegations relating to personal injuries, and plaintiff sought mandamus. *Held*, writ granted; the statute of limitations was tolled.

(a) *Statutory and implied exceptions.* The common legislative purpose in enacting the statutory exceptions was to avoid injustice where circumstances render timely the commencement of an action impossible or virtually impossible. The 1872 statutes formulated exceptions by specification of circumstances rather than by statement of a general principle; but the Legislature could not then predict all of the circumstances that could prevent timely filing, and it is therefore appropriate for courts to imply exceptions to effect the legislative purpose. (175 C.A.3d 372.)

(b) *Precedents for implied tolling exceptions.* Although early cases regarded tolling exceptions as statutory only, later California decisions have recognized several not expressly mentioned in the code: (1) the estoppel doctrine (175 C.A.3d 372; see *infra*, §762); (2) the nonresident defendant who was never in the state (a construction of C.C.P. 351) (175 C.A.3d 373, quoting the text; see *infra*, §711); (3) the first action tolling the statute on a second action; (175 C.A.3d 373; see *infra*, §§738, 739); and (4) an administrative proceeding tolling the statute on a civil action (175 C.A.3d 374; see *infra*, §744).

(c) *Analogous cases on bringing case to trial within 5 years.* Former C.C.P. 583 (now C.C.P. 583.310) was subjected to the judicially created exception of "impossibility, impracticability or futility," and the Legislature later codified the exception. (175 C.A.3d 374; see 6 *Cal. Proc.* (5th), *Proceedings Without Trial*, §395 et seq.) "[T]he common purposes served by these parallel statutes permit a parallel, but narrower, implied exception to statutes of limitations." (175 C.A.3d 375.)

(d) *Reasons for implied exception here.*

(1) *C.C.P. 353.1* provides for an extension of time to commence an action where an attorney's practice has been taken over by the court under *B. & P.C. 6190* because of the attorney's incapacity to perform. (*175 C.A.3d 377*; see 1 *Cal. Proc.* (5th), *Attorneys*, §89.) These statutes justify relief where, as here, an attorney was disabled in an accident after prior diligent performance, and the disability began only 5 days before the running of the limitations period. "It would be absurd to attribute to the Legislature an intent to construe the language and underlying purpose of section 353.1 so narrowly as to benefit a plaintiff whose attorney became incompetent to practice near the commencement of the statutory period yet deny similar relief to a plaintiff whose attorney suffers the same onset of professional incompetence or license suspension only days before the period expired." (*175 C.A.3d 377*.)

(2) The nature of the impossibility here is that plaintiff would probably be precluded from maintaining a successful action against her attorney for it is unlikely that he would be found negligent under these circumstances. "Thus, enforcement of the statute could result in a plaintiff permanently and grievously disabled, who has a 'clear liability' claim, being wholly barred from legal recovery." (*175 C.A.3d 378*.)

(3) Defendant contends that, because the personal disabilities set forth in the statutes apply to the party and not to counsel, no tolling exception for counsel can be recognized; and even if it were recognized, under *C.C.P. 357* (see *supra*, §706), the disability would have to be in existence when the right of action accrued. Neither contention is sound. "Defendant's first argument does not undermine the reasoning that unusual catastrophes rendering timely filings impossible are circumstances apparently not contemplated by the Legislature and thus call for construction of an implicit exception. Defendant's second argument presumes that this circumstance of impossibility must be equated with the personal disabilities of plaintiffs enumerated by statute and thus must be subject to the same requirement." These are unwarranted assumptions. First, such impossibilities will by their nature occur at or very near the end of the applicable statutory period. They are in reality more analogous to the recognized tolling circumstance of a state of war (*supra*, §704) or death (*infra*, §717) that prevents the plaintiff from timely commencing action. *C.C.P. 353.1* "must be construed to encompass tolling circumstances that did not exist when plaintiff's cause of action accrued." (*175 C.A.3d 379*.)

SUPPLEMENT: [This section is current through the latest supplement]



17 of 188 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XVIII. SUSPENSION OR EQUITABLE TOLLING OF STATUTE OF LIMITATIONS

D. Absence or Nonresidence of Defendant.

1. General Rule of Suspension.

a. Absence.

3 *Witkin Cal. Proc. Actions* § 710

[§ 710] Absence.

(1) *In General.* "If, when the cause of action accrues against a person, he is out of the State, the action may be commenced within the term herein limited, after his return to the State, and if, after the cause of action accrues, he departs from the State, the time of his absence is not part of the time limited for the commencement of the action." (C.C.P. 351.) This section protects the right of a creditor to obtain a personal judgment against a debtor who, with or without wrongful intent, prevents the plaintiff from obtaining personal jurisdiction. "The reasons for the absence of the debtor from the state are immaterial. The important thing is that the debtor is absent from the state and cannot be served with a complaint and summons for the purpose of conferring upon the court jurisdiction to enter a personal judgment against him." (*Schneider v. Schneider* (1947) 82 C.A.2d 860, 862, 187 P.2d 459; see *Cvecich v. Giardino* (1940) 37 C.A.2d 394, 400, 99 P.2d 573 [statute is applicable even though plaintiff is not resident of California]; *Ridgway v. Salrin* (1940) 41 C.A.2d 50, 54, 105 P.2d 1024; 46 Harv. L. Rev. 706; 63 Harv. L. Rev. 1224; 23 Pacific L. J. 1639 [problems in current interpretation]; 27 Santa Clara L. Rev. 767 [C.C.P. 351 as applied to defendant in country not permitting service by mail]; 1 U.C.L.A. L. Rev. 619; 51 Am.Jur.2d (2000 ed.), *Limitation of Actions* §190 et seq.; 27 A.L.R.2d 839 [absence of judgment debtor].)

(2) *Effect of Successive Absences.* Successive absences, even of slight duration, will be aggregated and added to the total statutory period in which an action may be brought. (*Schneider v. Schneider*, *supra* [40 days of business trips and honeymoon added to 4-year period for action on note]; see 63 Harv. L. Rev. 1225.)

(3) *Effect of Multiple Defendants.* Where several defendants are involved, the absence of one suspends the running of the statute as to the absent defendant alone. (*Arocena v. Sawyer* (1923) 60 C.A. 581, 591, 213 P. 523; *Loope v. Greyhound Lines* (1952) 114 C.A.2d 611, 614, 250 P.2d 651.) Hence, if a mortgagor is absent the first mortgagee may sue the mortgagor after the normal running of the period, but junior encumbrancers may set up the bar of the statute and foreclose free of the first mortgage. (*Foster v. Butler* (1913) 164 C. 623, 626, 130 P. 6.)

A limited partnership is regarded as an entity permanently within the state regardless of the whereabouts of its principals; hence, the limitations period on claims against it is not tolled by the general partner's absence from the state. (*Epstein v. Frank* (1981) 125 C.A.3d 111, 120, 177 C.R. 831.)

(4) *Effect of Minority.* Absence during the period of the plaintiff's minority cannot be added to absence after majority to give an extra suspension. In *Rafael v. Superior Court* (1969) 1 C.A.3d 457, 81 C.R. 748, the 20-year-old plaintiff, a minor under the law then in effect, was married and thus attained majority. He brought a personal injury action more than 1 year later. To avoid the bar of the statute he showed that defendant was absent from the state while plaintiff was still a minor. The court rejected the idea of a double suspension under the circumstances, for the absence occurred when the statute was not running at all, and plaintiff had a full year after his marriage before the action was barred. (1 C.A.3d 458.)

(5) *Continuing Validity of Suspension Statute.* Despite the long acceptance of the rule of suspension by absence (including nonresidence), its necessity has decreased to a point where its abolition has been proposed. (See 63 *Harv. L. Rev.* 1226, 1228.) In 1994, the Legislature directed the California Law Revision Commission to consider whether C.C.P. 351 should be revised, and to make an appropriate recommendation. (See 24 Cal. Law Rev. Com. Reports, p. 580.) In 1995, the Commission circulated a tentative recommendation calling for repeal of the statute on grounds that it is based on outdated notions of personal jurisdiction and service of process and is unconstitutional as applied to cases involving interstate commerce. And in 1999, a Court of Appeal decision partially invalidated the statute to the extent it impairs interstate commerce. (See *Filet Menu v. Cheng* (1999) 71 C.A.4th 1276, 1282, 84 C.R.2d 384, *infra*, §712.) (For rules where substituted service is possible, see *infra*, §713 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General.* See *Kaplan v. Mamelak* (2008) 162 C.A.4th 637, 642, 75 C.R.3d 861 [C.C.P. 351 tolls 1-year limitations period for medical malpractice action (C.C.P. 340.5; see text, §§579, 585) during time that defendant physician is outside California; relying on *Belton v. Bowers Ambulance Service* (1999) 20 C.4th 928, 86 C.R.2d 107, 978 P.2d 591, text, §585]; *Resurgence Financial, LLC v. Chambers* (2009) 173 C.A.4th Supp. 1, 3, 92 C.R.3d 844 [construing similar Delaware statute tolling limitations period while defendant is not subject to service of process in Delaware].



18 of 188 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XVIII. SUSPENSION OR EQUITABLE TOLLING OF STATUTE OF LIMITATIONS

D. Absence or Nonresidence of Defendant.

1. General Rule of Suspension.

b. Nonresidence.

3 Witkin Cal. Proc. Actions § 711

[§ 711] Nonresidence.

The language of *C.C.P. 351* (supra, §710), particularly in the use of the words "departs" and "return," seems most inappropriate as applied to a defendant who never was a resident of the state. (See 63 *Harv. L. Rev.* 1225 [suggesting that it should not be so applied].) However, the weight of authority, said to be based on reasons of fairness, tolls the statute "where the defendant has never been in, or resided in, the state until the filing of the complaint." (*Cvecich v. Giardino* (1940) 37 *C.A.2d* 394, 399, 99 *P.2d* 573; see *Kohan v. Cohan* (1988) 204 *C.A.3d* 915, 920, 921, 251 *C.R.* 570 [following *Cvecich* and other cases; statute was tolled against defendant who was nonresident until action accrued; limitations period commenced on his entry into state]; *Green v. Zissis* (1992) 5 *C.A.4th* 1219, 1223, 7 *C.R.2d* 406 [same].)

SUPPLEMENT: [This section is current through the latest supplement]



19 of 188 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XVIII. SUSPENSION OR EQUITABLE TOLLING OF STATUTE OF LIMITATIONS

D. Absence or Nonresidence of Defendant.

1. General Rule of Suspension.

c. Constitutionality.

3 *Witkin Cal. Proc. Actions* § 712

[§ 712] Constitutionality.

California law is unsettled as to the constitutionality of *C.C.P. 351* (*supra*, §710). In *Dew v. Appleberry* (1979) 23 *C.3d* 630, 153 *C.R.* 219, 591 *P.2d* 509, *infra*, §715, the Supreme Court rejected the claim that *C.C.P. 351* unconstitutionally infringes on the defendant's right to travel. (23 *C.3d* 636.) In *Pratali v. Gates* (1992) 4 *C.A.4th* 632, 5 *C.R.2d* 733, the court rejected constitutional challenges to *C.C.P. 351* based on the *Equal Protection Clause* (4 *C.A.4th* 639) and the *Commerce Clause* (4 *C.A.4th* 642).

A result contrary to *Pratali* was reached in *Filet Menu v. Cheng* (1999) 71 *C.A.4th* 1276, 84 *C.R.2d* 384. Plaintiff, a California corporation, brought an action for commercial breach of contract after defendant, a California resident, refused to pay for goods that plaintiff shipped to defendant's business in Canada and to accept further deliveries from plaintiff. The trial judge found that the applicable statute of limitations had expired and that the action was not tolled under *C.C.P. 351* while defendant was outside of California, because that statute was unconstitutional as violative of the Commerce Clause. Based on these findings, the judge sustained defendant's demurrer without leave to amend on the ground that the action was untimely. *Held*, reversed.

(a) *Tolling is unconstitutional where related to interstate commerce.* *C.C.P. 351* violates the Commerce Clause as applied to a resident engaged in interstate commerce by imposing a special burden that is not shared by residents involved solely in local business and trade. (71 *C.A.4th* 1282.) Residents occupied in interstate commerce must curtail their travel outside the state in the course of interstate commerce to avoid the tolling provisions of *C.C.P. 351* or endure extended exposure to litigation because of their travel. And no state interest outweighs this burden. (71 *C.A.4th* 1283.)

(b) *Tolling is constitutional where not related to interstate commerce.* Tolling statutory limitations periods for the duration of out-of-state travel unrelated to interstate commerce does not violate the Commerce Clause, because the implications of *C.C.P. 351* for that travel apply equally to residents engaged in interstate commerce and to residents not so occupied. (71 *C.A.4th* 1283.)

(c) *Demurrer was improperly sustained in present case.* Plaintiff's complaint alleged that defendant was absent from California for periods sufficient to toll the running of the applicable statutory period, but did not allege the specific

reasons for defendant's out-of-state travel. Because the allegations did not describe the extent to which defendant's absences from the state were in the course of interstate commerce, they did not establish that applying *C.C.P. 351* under the circumstances violated the *Commerce Clause*. (71 *C.A.4th* 1284.)

SUPPLEMENT: [This section is current through the latest supplement]

Heritage Marketing & Ins. Services v. Chrustawka (2008) 160 *C.A.4th* 754, 73 *C.R.3d* 126, extended the rule of *Filet Menu v. Cheng* (1999) 71 *C.A.4th* 1276, 84 *C.R.2d* 384, text, p. 932, to defendants residing in California who permanently move out of state. Plaintiffs, who operated a general partnership in California that provided living trust services, sued defendants, who were former employees, 4 years after defendants moved to Texas and opened competing businesses. Plaintiffs alleged breach of contract, conspiracy to defraud, defamation, tortious interference with economic advantage, slander, and violation of California's Uniform Trade Secrets Act. *Held*, the action was timed-barred under the applicable statutes of limitations because the tolling provisions of *C.C.P. 351* could not be constitutionally applied without violating the *Commerce Clause*. A contrary result would penalize persons who move out of state by imposing a longer statute of limitations on them than on those who remain in the state. (160 *C.A.4th* 763, adopting reasoning of Missouri Supreme Court decision.) By creating disincentives to travel across state lines and imposing costs on those who wish to do so, *C.C.P. 351* prevents or limits the exercise of the right to freedom of movement. Applying *C.C.P. 351* in this case would have imposed an impermissible burden on interstate commerce because it would have forced defendants to choose between remaining California residents until the limitations periods expired or moving out of state and forfeiting the limitations defense, thus remaining subject to suit in California in perpetuity. (160 *C.A.4th* 764.)



20 of 188 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XVIII. SUSPENSION OR EQUITABLE TOLLING OF STATUTE OF LIMITATIONS

D. Absence or Nonresidence of Defendant.

2. Where Substituted Service Is Possible.

a. Action In Rem.

3 *Witkin Cal. Proc. Actions* § 713

[§ 713] Action In Rem.

If the action is in rem so that jurisdiction of the res may be acquired and judgment rendered in the absence of its owner, the statute should not be tolled. Thus, in *Ridgway v. Salrin* (1940) 41 C.A.2d 50, 105 P.2d 1024, plaintiff mortgagee, after the statute had normally run, sued defendant mortgagor of California land, who had been present all the time, and defendant grantee of the mortgagor, a nonresident who had not personally assumed the mortgage debt. *Held*, the action was barred. Because no personal judgment for the deficiency could have been given against the nonassuming grantee, his absence was immaterial; and at all times foreclosure, a proceeding in rem, could have been maintained against the property. (41 C.A.2d 54.) (See 46 *Harv. L. Rev.* 706; 63 *Harv. L. Rev.* 1226 [arguing that exception should apply and statute should not be suspended where personal claim may be satisfied out of property in action quasi in rem]; 17 *A.L.R.*2d 502 [applicability of suspension provision to local action against individual who was nonresident when action arose].)

SUPPLEMENT: [This section is current through the latest supplement]



21 of 188 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XVIII. SUSPENSION OR EQUITABLE TOLLING OF STATUTE OF LIMITATIONS

D. Absence or Nonresidence of Defendant.

2. Where Substituted Service Is Possible.

b. Action In Personam.

3 *Witkin Cal. Proc. Actions* § 714

[§ 714] Action In Personam.

(1) *In General.* Modern law has cut down the scope of the doctrine of *Pennoyer v. Neff* (1877) 95 U.S. 714, 24 L.Ed. 565 (see 2 *Cal. Proc.* (5th), *Jurisdiction*, §116), with the result that a personal judgment can be obtained by substituted service against an absent resident or a nonresident in various situations. (See *Loope v. Greyhound Lines* (1952) 114 C.A.2d 611, 614, 250 P.2d 651 [C.C.P. 351 was not applicable to foreign corporation because statutes allow constructive service]; *Cardoso v. American Med. Systems* (1986) 183 C.A.3d 994, 997, 999, 228 C.R. 627 [following *Loope*]; 52 *Harv. L. Rev.* 168 [nonresident motorist]; 13 *So. Cal. L. Rev.* 166 [foreign corporation, after withdrawal, was still subject to suit by service on agent]; 51 *Am.Jur.2d* (2000 ed.), *Limitation of Actions* §205; 55 *A.L.R.3d* 1158 [tolling during absence as affected by amenability to service]; 2 *Cal. Proc.* (5th), *Jurisdiction*, §117 et seq.; *infra*, §1001.)

(2) *Action Against Nonresident Motorist.* Notwithstanding C.C.P. 351, an action arising out of a motor vehicle accident in California against a nonresident (*infra*, §1026 et seq.) who "may be personally served" under *Veh.C.* 17459 and 17460 (*infra*, §1029) is not tolled during the time that the defendant is out of California "except when he is out of this State and cannot be located through the exercise of reasonable diligence." (*Veh.C.* 17463.) (See *Dovie v. Hibler* (1967) 254 C.A.2d 673, 674, 62 C.R. 228 [statute runs in favor of absent resident or nonresident motorist who can be personally served out of state]; *Bigelow v. Smik* (1970) 6 C.A.3d 10, 85 C.R. 613 [same]; 51 *Am.Jur.2d* (2000 ed.), *Limitation of Actions* §206.)

In *Hirsch v. Blish* (1977) 76 C.A.3d 163, 142 C.R. 646, plaintiff was injured in an automobile collision with a car driven by defendant. Defendant was a California resident and a California licensed driver, and his car was registered in California, so service could be made in or out of the state under *Veh.C.* 17459 and 17460. Plaintiff filed this action 3 days after the expiration of the 1-year statute of limitations, and contended that the statute was tolled by defendant's absence from the state during a 2-week vacation period. On motion for summary judgment, defendant showed that he had notified his neighbor, coworkers, mother-in-law, and stepdaughter of his intended destination (St. Louis) with no suggestion of confidentiality; and that no attempt was made to contact any of them. *Held*, summary judgment was properly granted.

(a) *Wurnitsch v. Nordvik* (1971) 14 C.A.3d 679, 92 C.R. 518, contains a dictum that, for purposes of tolling under

Veh.C. 17463, active effort to locate the defendant is not required if that effort would have been unsuccessful; *Dovie*, *supra*, gives the failure to make the effort as one of two reasons why the statute was not tolled. (76 C.A.3d 166, 167.)

(b) The *Dovie* view is supported by decisions construing similar language ("reasonable diligence") in other statutes. (76 C.A.3d 167.) These authorities support the proposition that "statutory language triggering a right where an adversary 'cannot be located with reasonable diligence' conditions the right upon activity to locate." (76 C.A.3d 167.) While the record establishes that defendant could not be located during the time he was driving to and from St. Louis, it also establishes that plaintiff made no effort to locate him. Because *Veh.C. 17463* "requires an active exercise of due diligence as a prerequisite to the tolling of the statute of limitations, the trial judge properly determined that the statute was not tolled." (76 C.A.3d 167.)

(3) *Exception: Accident Outside State.* *Garcia v. Flores* (1976) 64 C.A.3d 705, 134 C.R. 712, construing *Veh.C. 17463* with *Veh.C. 17459* and *17460* on substituted service (see *infra*, §1026 et seq.), held that the nontolling provision of *Veh.C. 17463* does not apply where the accident occurs outside *California*. (64 C.A.3d 708.) The accident occurred in Mexico and the defendant was hospitalized there for 8 days. The action, filed 2 days after the 1-year period, was timely; under *C.C.P. 351* the time of defendant's absence from California was excluded. "Section 351 does not make its tolling provision depend on the availability of service on a defendant, but on his physical presence in California." (64 C.A.3d 709.)

(4) *Exception: Action Not Arising Out of Operation of Vehicle.* In *Mounts v. Uyeda* (1991) 227 C.A.3d 111, 277 C.R. 730, plaintiff was driving behind defendant when defendant negligently or intentionally waved or pointed a gun at her. One day after the expiration of the 1-year limitations period prescribed by former *C.C.P. 340(3)* (now 2-year limitations period of *C.C.P. 335.1*; see *supra*, §552), plaintiff brought an action for infliction of emotional distress, arguing that, under *C.C.P. 351*, the limitations period was tolled during the 4 days that defendant was out of the state. Relying on the exception to *C.C.P. 351* provided by *Veh.C. 17463*, defendant argued that the period was not tolled during his absence. *Held*, summary judgment for defendant reversed.

(a) *Veh.C. 17463* creates an exception to *C.C.P. 351* when summons may be personally served on a person as provided by *Veh.C. 17459* and *17460*. And the latter two statutes provide that a California resident who accepts a certificate of ownership or registration or a driver's license consents to personal service in an action arising out of the operation of a motor vehicle in California. Hence, the issue is whether plaintiff's cause of action arose out of defendant's operation of his automobile. (227 C.A.3d 115.)

(b) Because all of the decisions construing *Veh.C. 17459* and *17460* have involved injuries that were indisputably the direct result of the vehicle's operation, the issue of the nexus that is required between injury and operation has never been raised. However, *Glens Falls Ins. Co. v. Consolidated Freightways* (1966) 242 C.A.2d 774, 51 C.R. 789, involving insurance coverage required by *Veh.C. 16451* for damages arising out of the use of a vehicle (see 2 *Summary* (10th), *Insurance*, §159 et seq.), established that "use" and "operation" are not synonymous; i.e., "use" is not limited to a vehicle's operational activity. (227 C.A.3d 116.) And because most of the Vehicle Code financial responsibility and liability statutes have been amended since the *Glens Falls* decision, it may be presumed that the Legislature was aware of the distinction made in that case and intended that it continue. (227 C.A.3d 118.)

(c) A plaintiff who claims that an injury arose out of the operation of a vehicle must establish a causal connection between the operation and the injury. (227 C.A.3d 119, citing *Chilcote v. San Bernardino* (1933) 218 C. 444, 23 P.2d 748, and other decisions; see 5 *Summary* (10th), *Torts*, §333.) The mere fact that a tort occurred within an automobile does not necessarily establish that connection. Hence, a driver who utters a slanderous remark concerning a passenger or uses a car phone to make a harassing call has not committed an act that can be characterized as one arising out of the operation of the vehicle. (227 C.A.3d 120.)

(d) Here, the conduct attributed to defendant was independent of and unrelated to the operation of his vehicle; i.e., there was no contact between defendant's vehicle and plaintiff's, no contention that defendant's vehicle was moving in

an erratic or unlawful manner, no suggestion that defendant was driving under the influence of alcohol or drugs, and no contention that defendant violated the Vehicle Code in any other fashion. Hence, plaintiff's injury did not arise out of the operation of a motor vehicle, and her complaint was timely filed. (227 C.A.3d 120.)

SUPPLEMENT: [This section is current through the latest supplement]



22 of 188 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XVIII. SUSPENSION OR EQUITABLE TOLLING OF STATUTE OF LIMITATIONS

D. Absence or Nonresidence of Defendant.

2. Where Substituted Service Is Possible.

c. Distinction: No Express Statute.

3 *Witkin Cal. Proc. Actions* § 715

[§ 715] Distinction: No Express Statute.

It has been suggested that the statute of limitations should run normally in all cases in which substituted service is possible under modern expanded authorization such as that given by the California Jurisdiction and Service of Process Act (*infra*, §1001 *et seq.*). (See 63 *Harv. L. Rev.* 1227.) This suggestion was rejected in *Dew v. Appleberry* (1979) 23 *C.3d* 630, 153 *C.R.* 219, 591 *P.2d* 509. Plaintiff suffered a personal injury on September 23, 1973, but did not file her complaint until September 24, 1974. To overcome the 1-year statute of limitations she showed that defendant had been absent from the state for 5 weeks during the year. *Held*, the statute was tolled.

(a) Defendant contended that the statutory rule was laid down before the development of modern methods of substituted service of process, and that a plaintiff entitled to serve by mail or other suitable means does not need the protection of the tolling provision of *C.C.P.* 351. (23 *C.3d* 634.) This argument does not justify a judicial exception to the clear statutory language. The Legislature has made an express exception to *C.C.P.* 351 in the case of a defendant nonresident motorist; it could extend the exceptions to cover all situations in which the defendant is subject to substituted service, but has not done so. (23 *C.3d* 635.)

(b) "The Legislature may justifiably have concluded that a defendant's physical absence impedes his availability for suit, and that it would be inequitable to force a claimant to pursue the defendant out of state in order effectively to commence an action within the limitations period. At the same time, by providing alternate forms of service the Legislature simply encourages a plaintiff to adjudicate his claim expeditiously if possible: by using substituted service a plaintiff may now obtain a binding judgment even in the defendant's absence. While the alternate service provisions may lessen the need for section 351, we do not believe that they repeal section 351 *pro tanto*." (23 *C.3d* 636.) (But see joint resolution of 1994 Legislature directing California Law Revision Commission to study and issue recommendation whether *C.C.P.* 351 should be revised, *supra*, §710; *Filet Menu v. Cheng* (1999) 71 *C.A.4th* 1276, 1282, 84 *C.R.2d* 384, *supra*, §712 [partially invalidating *C.C.P.* 351 to extent it impairs interstate commerce].)

SUPPLEMENT: [This section is current through the latest supplement]



23 of 188 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XVIII. SUSPENSION OR EQUITABLE TOLLING OF STATUTE OF LIMITATIONS

D. Absence or Nonresidence of Defendant.

3. Effect of Defendant's Return.

3 Witkin Cal. Proc. Actions § 716

[§ 716] Effect of Defendant's Return.

If the defendant is absent or departs, and later comes back to the state, is the physical act of returning sufficient by itself to end the suspension of the statute? This is certainly true if the return is open and with actual knowledge of the plaintiff. On the other hand, a secret return, fraudulently designed to set the statute of limitations in motion and accomplished without knowledge or opportunity to discover it on the part of the plaintiff, does not fulfill the requirement. (See *Stewart v. Stewart* (1907) 152 C. 162, 166, 92 P. 87.)

But what is the effect of an open, unconcealed return of which the plaintiff has no knowledge? In *Stewart*, defendant, liable on a promissory note, left California for Oregon shortly before the statute had run. He came back to the state on numerous visits over a period of years, remaining for months at a time in a place near plaintiff's residence. The trial judge found that plaintiff did not know of the visits and could not have discovered them by reasonable diligence. *Held*, nevertheless, the statute ran during the time of the visits and the action was barred. "[A] person departing from the state after a cause of action has accrued against him cannot have reckoned in his favor the time of any secret, clandestine or fraudulently contrived visit to his former residence for the purpose of ascertaining the time of his absence from the state. But if he returns openly, long after the action would be barred but for his absence, and especially if, as in this case, his return is not only open and unconcealed, but his visits repeated and prolonged, the fact that the plaintiff has not learned of his presence here before his departure is immaterial." (152 C. 166.) (See *St. Paul Title & Trust Co. v. Stensgaard* (1912) 162 C. 178, 181, 121 P. 731 [nonresident debtor came to this state, changed his name; statute ran, where trial judge concluded that no fraud was intended]; 63 *Harv. L. Rev.* 1225; 51 *Am.Jur.2d* (2005 ed.), *Limitation of Actions* §§202, 203.)

SUPPLEMENT: [This section is current through the latest supplement]



24 of 188 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XVIII. SUSPENSION OR EQUITABLE TOLLING OF STATUTE OF LIMITATIONS

E. Death of Party.

1. Death of Prospective Plaintiff.

3 Witkin Cal. Proc. Actions § 717

[§ 717] Death of Prospective Plaintiff.

(1) *Survival of Action.* "[A] cause of action for ... a person is not lost by reason of the person's death, but survives subject to the applicable limitations period." (*C.C.P. 377.20(a)*; see 14 *Summary* (10th), *Wills and Probate*, §518.)

Subject to *Prob.C. 7000* and *7001* (passage of decedents' property; see 14 *Summary* (10th), *Wills and Probate*, §§404, 405), the right to bring a survivable cause of action passes to the decedent's successor in interest, and may be brought by the decedent's personal representative (or if none, by the decedent's successor in interest). (*C.C.P. 377.30*.) (For comprehensive coverage, see 14 *Summary* (10th), *Wills and Probate*, §519.)

(2) *Limitations Period.* The action may be brought within: (a) 6 months of the decedent's death, or (b) the limitations period that would have been applicable had the decedent not died, whichever is later. (*C.C.P. 366.1*; see 63 *Harv. L. Rev.* 1232; 28 *A.L.R.3d* 1141 [effect of delay in appointing representative]; 51 *Am.Jur.2d* (2005 ed.), *Limitation of Actions* §241.) (For comprehensive coverage, see 14 *Summary* (10th), *Wills and Probate*, §§516, 517.)

SUPPLEMENT: [This section is current through the latest supplement]



25 of 188 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XVIII. SUSPENSION OR EQUITABLE TOLLING OF STATUTE OF LIMITATIONS

E. Death of Party.

2. Death of Prospective Defendant.

a. Survival of Action.

3 *Witkin Cal. Proc. Actions* § 718

[§ 718] Survival of Action.

(1) *In General.* "[A] cause of action ... against a person is not lost by reason of the person's death, but survives subject to the applicable limitations period." (*C.C.P. 377.20(a)*; see 14 *Summary* (10th), *Wills and Probate*, §518.)

(2) *Assertion of Action.* Subject to *Prob.C. 9000* et seq. (creditor claims; see 14 *Summary* (10th), *Wills and Probate*, §612 et seq.), a surviving cause of action against a decedent may be asserted against his or her personal representative or, to the extent provided by statute, against the decedent's successor in interest. (*C.C.P. 377.40*.) (For comprehensive coverage, see 14 *Summary* (10th), *Wills and Probate*, §520.)

(3) *Insured Actions.* An action to establish a decedent's liability for which the decedent was protected by insurance may be commenced or continued against the decedent's estate as provided in *Prob.C. 550* et seq. (see 14 *Summary* (10th), *Wills and Probate*, §515). (*C.C.P. 377.50*; see 14 *Summary* (10th), *Wills and Probate*, §520.)

SUPPLEMENT: [This section is current through the latest supplement]



26 of 188 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XVIII. SUSPENSION OR EQUITABLE TOLLING OF STATUTE OF LIMITATIONS

E. Death of Party.

2. Death of Prospective Defendant.

b. Limitations Periods.

3 *Witkin Cal. Proc. Actions* § 719

[§ 719] Limitations Periods.

The applicable limitations periods for surviving actions (see *supra*, §718) are as follows (for comprehensive coverage, see 14 *Summary* (10th), *Wills and Probate*, §§517, 646):

(1) *General Limitations Period*. An action (whether arising in tort, contract, or otherwise, and whether accrued or not accrued) against a person who dies before the applicable limitations period expires must be commenced within 1 year after the date of death. The limitations period that otherwise would have applied is not applicable. (*C.C.P.* 366.2(a); see *Bradley v. Breen* (1999) 73 *C.A.4th* 798, 803, 86 *C.R.2d* 726 [*C.C.P.* 366.2 barred cross-complaint for equitable indemnity against estate, even though action for equitable indemnity had not yet accrued]; 63 *Harv. L. Rev.* 1228; 47 *A.L.R.3d* 179 [tolling pending appointment of executor or administrator or for tortfeasor in personal injury or death action]; 51 *Am.Jur.2d* (2005 ed.), *Limitation of Actions* §242.)

The limitations period provided by *C.C.P.* 366.2 is not tolled or extended for any reason, except as provided in the following "where applicable":

(a) *C.C.P.* 12, 12a, and 12b (extensions when last day for computing time falls on holiday; see 2 *Cal. Proc.* (5th), *Courts*, §§50, 51). (*C.C.P.* 366.2(b)(1).)

(b) *Prob.C.* 9000 et seq. (creditors' claims; see 14 *Summary* (10th), *Wills and Probate*, §612 et seq.). (*C.C.P.* 366.2(b)(2).)

(c) *Prob.C.* 19000 et seq. (payment of claims from revocable trust of decedent; see 13 *Summary* (10th), *Trusts*, §260 et seq.). (*C.C.P.* 366.2(b)(3).)

(d) *Prob.C.* 21300 et seq. (no contest clauses; see 14 *Summary* (10th), *Wills and Probate*, §561 et seq.). (*C.C.P.* 366.2(b)(4).)

The doctrine of equitable estoppel (see *infra*, §762 et seq.) may be applied to a case that would otherwise be barred by *C.C.P.* 366.2. While the statute indicates that the Legislature intended that the limitations period not be tolled or

extended, the statute says nothing about equitable estoppel. In the absence of that language or of legislative history suggesting that the doctrine was intended *not* to apply, it does apply. (*Battuello v. Battuello* (1998) 64 C.A.4th 842, 847, 75 C.R.2d 548.)

(2) *Action for Necessaries of Life*. In an action to recover from one spouse on a debt of the other spouse for necessities of life under *Family C. 914* (see 11 *Summary* (10th), *Community Property*, §180), *C.C.P. 366.2* ordinarily applies if the indebted spouse dies. However, if the surviving spouse has actual knowledge of the debt before the period of *C.C.P. 366.2* expires, and the personal representative of the decedent's estate fails to provide the creditor with a timely written notice of probate administration, the claim is governed by the applicable statute of limitations under *Family C. 337* or *339*. (*Family C. 914(c)*; codifying rule of *Collection Bureau of San Jose v. Rumsey* (2000) 24 C.4th 301, 308, 99 C.R.2d 792, 6 P.3d 713.)

(3) *Promise Concerning Distribution*. If a claim arises from a promise or agreement with a decedent, whether oral or written, for a distribution from an estate or trust or under another instrument, an action to enforce the claim must be commenced within 1 year of the date of death. The limitations period that would otherwise apply is not applicable. (*C.C.P. 366.3(a)*.)

The limitations period provided by *C.C.P. 366.3* is not tolled or extended for any reason, except as provided in *C.C.P. 12, 12a*, and *12b* (extension when last day for computing time falls on holiday; see 2 *Cal. Proc.* (5th), *Courts*, §§50, 51) and *Prob.C. 21300* et seq. (no contest clauses; see 14 *Summary* (10th), *Wills and Probate*, §561 et seq.). (*C.C.P. 366.3(b)*.)

(4) *Action Against Decedent's Insurer*. Notwithstanding *C.C.P. 366.2*, an action against a decedent's insurer under *Prob.C. 550* et seq. (see 14 *Summary* (10th), *Wills and Probate*, §515) may be brought within 1 year after expiration of the limitations period otherwise applicable. (*Prob.C. 551*.)

(5) *Action on Rejected Claim*. The 90 day period of *Prob.C. 9353(a)* for an action after notice of rejection of a claim against the estate prevails over the 1-year period stated in *C.C.P. 366.2*. (See *Zapata v. Meyers* (1974) 41 C.A.3d 268, 271, 115 C.R. 854 [decided under predecessor statutes]; *Anderson v. Anderson* (1995) 41 C.A.4th 135, 138, 48 C.R.2d 642 [distinguishing *Zapata* on facts, but holding that action filed within 3 months (now 90 days) of rejection was timely under *Prob.C. 9353(a)*, even though 1-year statute otherwise applicable to claim had expired]; 14 *Summary* (10th), *Wills and Probate*, §646.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *General Limitations Period*.

Applicability of period: See *Farb v. Superior Court* (2009) 174 C.A.4th 678, 683, 94 C.R.3d 586 [1-year limitations period in *C.C.P. 366.2* for claims against decedent's estate applies even if probate is pending in another state].

Tolling or extension of period: See *Farb v. Superior Court*, *supra* [1-year limitations period in *C.C.P. 366.2* for claims against decedent's estate is not subject to minority tolling (see text, §696)].

(d) *No contest clauses in wills:* In 2008, the existing no contest clause statutes (*Prob.C. 21300* et seq.) were repealed and new statutes (*Prob.C. 21310* et seq.) were adopted, effective January 1, 2010. (See 14 *Summary* (10th), *Wills and Probate*, Supp., §560A.) *C.C.P. 366.2(b)(4)* was amended in 2009 to reflect the repeal, but still refers to the former law, which "continues to apply to the enforcement of a no contest clause in an instrument that became irrevocable prior to January 1, 2001, notwithstanding the repeal of the former law." (Law Rev. Com. Comment.)(3) *Promise Concerning Distribution*. See *Ferraro v. Camarlinghi* (2008) 161 C.A.4th 509, 554, 555, 75 C.R.3d 19 [*C.C.P. 366.3(a)* governed stepdaughter's cause of action for testator's breach of agreement with testator's predeceased husband to leave her estate in equal shares to testator's children and testator's stepchildren, even though action alleged fraud rather than breach of contract; further, *C.C.P. 366.2(a)* did not apply because stepdaughter's claim could not come into

existence until decedent died without making devise provision in accordance with alleged agreement].

Tolling or extension of period: In 2008, the existing no contest clause statutes (*Prob.C. 21300* et seq.) were repealed and new statutes (*Prob.C. 21310* et seq.) were adopted, effective January 1, 2010. (See 14 *Summary* (10th), *Wills and Probate*, Supp., §560A.) *C.C.P. 366.3(b)* was amended in 2009 to reflect the repeal, but still refers to the former law, which "continues to apply to the enforcement of a no contest clause in an instrument that became irrevocable prior to January 1, 2001, notwithstanding the repeal of the former law." (Law Rev. Com. Comment.)



27 of 188 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XVIII. SUSPENSION OR EQUITABLE TOLLING OF STATUTE OF LIMITATIONS

F. Stay or Other Prevention of Action.

1. Injunction.

3 *Witkin Cal. Proc. Actions* § 720

[§ 720] Injunction.

C.C.P. 356 excludes from the statutory period the time during which the commencement of an action is stayed by an injunction. (See *Eistrat v. Cekada* (1958) 50 *C.2d* 289, 324 *P.2d* 881 [bankruptcy court's order restraining action against bankrupt]; *Elliott & Horne v. Chambers Land Co.* (1923) 61 *C.A.* 310, 312, 215 *P.* 99; 63 *Harv. L. Rev.* 1233; 51 *Am.Jur.2d* (2000 ed.), *Limitation of Actions* §208.)

SUPPLEMENT: [This section is current through the latest supplement]



28 of 188 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XVIII. SUSPENSION OR EQUITABLE TOLLING OF STATUTE OF LIMITATIONS

F. Stay or Other Prevention of Action.

2. Statutory Prohibition.

a. In General.

3 *Witkin Cal. Proc. Actions* § 721

[§ 721] In General.

C.C.P. 356 suspends the statute where a stay is by a statutory prohibition. The following are illustrative:

(1) *Federal Bankruptcy Code*. The chief illustration is the federal Bankruptcy Code provision that a state statute of limitations is suspended during the time between the filing of the petition and 30 days after the entry of an order denying a discharge (or loss of right to discharge or dismissal). (See *11 U.S.C.*, §108(c).) The effect of the statute is to add this excluded time to the period of the applicable statute of limitations. (See *Graybar Elec. Co. v. Lovinger* (1947) 81 C.A.2d 936, 937, 185 P.2d 370; *Schumacher v. Worcester* (1997) 55 C.A.4th 376, 379, 64 C.R.2d 1 [following *Graybar Elec. Co.*]; 59 Harv. L. Rev. 1157 [statute was suspended for provable debt though nondischargeable].) Even though the bankruptcy court may authorize an action against the trustee, the statute will not begin to run against the creditor until, after due diligence, the authorization is obtained. (See *Wells v. California Tomato Juice* (1941) 47 C.A.2d 634, 638, 118 P.2d 916; *Schumacher v. Worcester*, *supra* [following *Wells*].) But as soon as it is obtained, the statutory period begins running again, even though the bankruptcy proceedings are not concluded. (*Martin v. Goggin* (1951) 107 C.A.2d 688, 691, 238 P.2d 84.)

(2) *Servicemembers Civil Relief Act*. Another prohibition is found in the Servicemembers Civil Relief Act, which prevents the running of the statute on causes of action by or against persons on active duty with the armed forces. (See 50 U.S.C. Appx., §526; *Conroy v. Aniskoff* (1993) 507 U.S. 511, 113 S.Ct. 1562, 1564, 123 L.Ed.2d 229, 235 [tolling of limitations period to redeem real property sold for taxes does not require showing of prejudice due to military service]; 35 Proof of Facts 3d 323 [proof of entitlement to stay or default judgment relief under Act].)

(3) *Wartime Suspension of Limitations Act*. The Wartime Suspension of Limitations Act (18 U.S.C., §3287) suspends the statute for fraud or other offenses against the United States when the country is at war. (See *Bridges v. United States* (1953) 346 U.S. 209, 73 S.Ct. 1055, 1059, 97 L.Ed. 1557, 1565 [stating rule, but holding that fraud statute was not suspended under facts of case]; *United States v. Grainger* (1953) 346 U.S. 235, 73 S.Ct. 1069, 1072, 97 L.Ed. 1575, 1581 [fraud statute was suspended]; 67 Harv. L. Rev. 152; 3 Stanf. L. Rev. 440.)

(4) *Action Involving National Guard Member or Military Reservist Called to Active Duty*. Mil. & Vet.C. 400 et seq.

temporarily suspend legal proceedings by or against National Guard members or military reservists called to active duty and toll the statute of limitations during that time. (See *Mil. & Vet.C. 404* [tolling provision].)

(5) *False Arrest Action by Person Charged With Crime.* Govt.C. 945.3 prohibits a person charged with a criminal offense from initiating a civil action for false arrest against a peace officer or public entity employing the officer while criminal charges are pending, and tolls the statute of limitations for prosecuting the civil action during that period.

(6) *Defamation Action by Person Charged With Child Abuse.* C.C. 48.7(a) prohibits a person charged with child abuse from suing the child, the child's parent, or any witness for defamation arising from statements made while criminal charges are pending. (See 5 *Summary* (10th), *Torts*, §140 et seq.; 5 *Cal. Proc.* (5th), *Pleading*, §736.) The statute provides that an applicable statute of limitations is tolled "during the period that such charges are pending before a trial court." (C.C. 48.7(a).) However, in *Satz v. Superior Court* (1990) 225 C.A.3d 1525, 275 C.R. 710, the court held that a newscaster who made allegedly defamatory broadcasts was not a "witness" and the limitations period was not tolled. (225 C.A.3d 1529.)

(7) *Distinction: Action for Latent Construction Defects.* C.C.P. 337.15 (10-year limitations period for actions based on latent defects in realty; see supra, §608 et seq.) is a statute of repose, and as such, is not subject to equitable tolling under C.C.P. 356. (*Inco Dev. Corp. v. Superior Court* (2005) 131 C.A.4th 1014, 1025, 31 C.R.3d 872 [relying on *Lantzy v. Centex Homes* (2003) 31 C.4th 363, 363, 2 C.R.3d 655, 73 P.3d 517, infra, §761].)

SUPPLEMENT: [This section is current through the latest supplement]

(5) *False Arrest Action by Person Charged With Crime.* Govt.C. 945.3 tolls the limitations period in a false arrest action from the time that a P.C. 853.6 criminal notice to appear is served on the plaintiff until the final disposition of the criminal charges. (See *Schmidlin v. Palo Alto* (2007) 157 C.A.4th 728, 761, 69 C.R.3d 365.)



29 of 188 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XVIII. SUSPENSION OR EQUITABLE TOLLING OF STATUTE OF LIMITATIONS

F. Stay or Other Prevention of Action.

2. Statutory Prohibition.

b. Notice of Intent To File Medical Malpractice Action.

1. In General.

3 *Witkin Cal. Proc. Actions* § 722

[§ 722] In General.

(1) *Statutory Tolling Rule.* *C.C.P. 364(a)* prohibits the commencement of an action for medical malpractice for a period of 90 days following service of a notice that an action will be filed. (See *supra*, §224.) If the notice is served within 90 days of the expiration of the applicable statute of limitations, the time for the commencement of the action is extended for 90 days from the service of the notice. (*C.C.P. 364(d)*.) (On scope of tolling provision, see *infra*, §723 et seq.; on sufficiency of notice, see *infra*, §726; on service of notice, see *infra*, §727; on duration of tolling, see *infra*, §728.)

The tolling provision of *C.C.P. 364(d)* applies only to a plaintiff who has served an original notice of intent to sue within 90 days of the expiration of the applicable limitations period. Thus, if an original notice is served prematurely, service of a timely second notice will not toll the limitations period. (*Bennett v. Shahhal* (1999) 75 *C.A.4th* 384, 389, 89 *C.R.2d* 272.)

(2) *Notice Where Defendant Is Unknown.* *C.C.P. 364* does not apply to a defendant whose name is unknown to the plaintiff at the time the complaint is filed and who is identified by a fictitious name pursuant to *C.C.P. 474* (see 4 *Cal. Proc.* (5th), *Pleading*, §478). (*C.C.P. 364(e)*.) *C.C.P. 364(e)* "states the obvious. If a defendant is *not* known at the time the complaint is filed, no section 364 notice to that defendant is required. It also ... means that the 90-day notice need not be given to Doe defendants before amending the complaint to name them." (*Davis v. Marin* (2000) 80 *C.A.4th* 380, 386, 94 *C.R.2d* 896 [promulgating rule but holding that *C.C.P. 364(e)* did not prevent tolling in this case because notice was given to known defendant].)

Camarillo v. Vaage (2003) 105 *C.A.4th* 552, 130 *C.R.2d* 26, involved a legal malpractice action against defendant attorneys based on their representation of plaintiff in her underlying medical malpractice action. About 51 weeks after the delivery of her child, plaintiff consulted defendants about injuries she had suffered during the delivery. Plaintiff did not know the name of the delivering physician, and defendants sent letters of intent to sue under *C.C.P. 364(a)* to a hospital and health center. During the next month, defendants notified plaintiff that they would not represent her further, and plaintiff did not file a medical malpractice action within 90 days of the letters. She eventually sued defendants,

claiming that the letters of intent had failed to give the statutorily required notice to any individual doctor, and thus by the time defendants informed plaintiff that they declined to take the case, all of her claims against any doctor for professional negligence in handling the birth had become time-barred. *Held*, summary judgment for defendants affirmed.

Plaintiff's loss of her action against the delivery physician was not attributable to defendants. By sending the *C.C.P.* 364 notices, consistent with the facts as known to them at the time, defendants adequately preserved plaintiff's right of action against unknown defendants. Sending the notices in the last 90 days before the statute of limitations ran tolled the statute for 90 days against not only known defendants, but also unknown defendants. Under *C.C.P.* 474, notice to an unknown defendant is not required before amending a complaint to add a fictitiously named defendant when that party is identified. Because the limitations period was tolled, defendants were not required to prepare a complaint naming fictitious Doe defendants. The letter gave plaintiff 90 days to proceed with her claim. (105 *C.A.4th* 569, relying on rule of *Grimm v. Thayer* (1987) 188 *C.A.3d* 866, 233 *C.R.* 687, and holding that rule survived partial disapproval of *Grimm* by Supreme Court in *Woods v. Young* (1991) 53 *C.3d* 315, 279 *C.R.* 613, 807 *P.2d* 455, *infra*, §728.)

SUPPLEMENT: [This section is current through the latest supplement]



30 of 188 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XVIII. SUSPENSION OR EQUITABLE TOLLING OF STATUTE OF LIMITATIONS

F. Stay or Other Prevention of Action.

2. Statutory Prohibition.

b. Notice of Intent To File Medical Malpractice Action.

2. Scope of Tolling Provision.

aa. Medical Malpractice.

3 *Witkin Cal. Proc. Actions* § 723

[§ 723] Medical Malpractice.

(1) *In General.* The tolling provisions of *C.C.P. 364(d)* apply to causes of action for professional negligence by "health care providers," as defined in *C.C.P. 364(f)*. In determining whether *C.C.P. 364(d)* applies to a medical malpractice action, the focus is on whether the negligence occurs in rendering professional services, not on whether a high or low level of skill is required. Professional negligence is not restricted to a breach of the duty to provide professional skill, procedure, and diligence. A particular patient's condition is a relevant circumstance bearing on whether there was negligence, but it does not alter the character of the negligence. (*Bellamy v. Appellate Dept.* (1996) 50 *C.A.4th* 797, 805, 57 *C.R.2d* 894, 6 *Summary* (10th), *Torts*, §934 [*C.C.P. 364(d)* applied to toll patient's action against hospital for injuries sustained in falling off X-ray table, despite hospital's claim that conduct was ordinary negligence outside scope of statute]; see *Wurts v. Fresno* (1996) 44 *C.A.4th* 380, 383, 51 *C.R.2d* 689, 6 *Summary* (10th), *Torts*, §955 [*C.C.P. 364(d)* extends 6-month period of *Govt.C. 946.6* (supra, §304) for initiating action after denial of government tort claim].)

(2) *Adult Plaintiffs.* Courts have uniformly held that a *C.C.P. 364(d)* notice applies to the 1-year medical malpractice statute in *C.C.P. 340.5*. (See *Woods v. Young* (1991) 53 *C.3d* 315, 325, 279 *C.R. 613*, 807 *P.2d* 455; *Gomez v. Valley View Sanitorium* (1978) 87 *C.A.3d* 507, 510, 151 *C.R. 97*; *Braham v. Sorenson* (1981) 119 *C.A.3d* 367, 372, 373, 174 *C.R. 39*; *Banfield v. Sierra View Local Dist. Hosp.* (1981) 124 *C.A.3d* 444, 457, 177 *C.R. 290*; *Hilburger v. Madsen* (1986) 177 *C.A.3d* 45, 52, 222 *C.R. 713*; *Gilbertson v. Osman* (1986) 185 *C.A.3d* 308, 316, 317, 229 *C.R. 627*; *Paxton v. Chapman General Hosp.* (1986) 186 *C.A.3d* 110, 115, 230 *C.R. 355*; *Hazel v. Hewlett* (1988) 201 *C.A.3d* 1458, 1463, 247 *C.R. 723*.)

In *Rewald v. San Pedro Peninsula Hosp.* (1994) 27 *C.A.4th* 480, 32 *C.R.2d* 411, the Court of Appeal held that the tolling provision in *C.C.P. 364* does not apply to the 3-year limitations period in *C.C.P. 340.5* (see supra, §581). *C.C.P. 340.5* provides only three reasons for extending its 3-year limitations period, i.e., fraud, intentional concealment, and presence of foreign body inside plaintiff (see supra, §582 et seq.). Enumeration of certain exceptions by necessary implication excludes all other exceptions. Further, the Legislature prefaced the exceptions with the proviso that "in no

event" shall the statute be tolled in other instances. This limiting language in *C.C.P. 340.5*, along with the history of the Medical Injury Compensation Reform Act (MICRA), compel the conclusion that the tolling provision in *C.C.P. 364* is not applicable to the 3-year limitations period. (27 *C.A.4th* 485.)

In *Russell v. Stanford University Hosp.* (1997) 15 *C.4th* 783, 64 *C.R.2d* 97, 937 *P.2d* 640, the Supreme Court repudiated *Rewald*. (15 *C.4th* 791, footnote 2.) *Held*, the tolling provision in *C.C.P. 364(d)* applies to both the 3-year and the 1-year limitations periods in *C.C.P. 340.5*.

(a) On its face, *C.C.P. 364* applies equally to both limitations periods, and the legislative intent in enacting *C.C.P. 364*, i.e., to encourage settlement, also applies to both periods. (15 *C.4th* 788.)

(b) The *C.C.P. 364* notice and the limitations provisions of MICRA are in apparent conflict. *C.C.P. 364* tolls the time for commencing a medical malpractice action for 90 days, while *C.C.P. 340.5* purports to limit plaintiffs in these actions only to tolling in the three circumstances set forth in that statute, which do not include the 90-day notice. MICRA was enacted as an interrelated legislative scheme to deal specifically with all medical malpractice claims. It is fundamental that legislation be construed so as to harmonize its various elements without doing violence to its language or spirit. In addition, if conflicting provisions of a statute cannot be harmonized, the provision that is positioned later in the statute normally controls the earlier provision. Guided by those principles, it must be concluded that *C.C.P. 364* applies equally to both periods in *C.C.P. 340.5*. (15 *C.4th* 789.)

(3) *Minor Plaintiffs.* *Newman v. Burnett* (1997) 54 *C.A.4th* 722, 62 *C.R.2d* 175, involved the question whether a *C.C.P. 364(d)* notice applies to the 3-year statute of limitations for minors suing for medical malpractice in *C.C.P. 340.5* (see *supra*, §586 et seq.). *Held*, the notice does toll the 3-year limitations period for minor plaintiffs. The Legislature stated when it enacted MICRA that *C.C.P. 364(d)* shall toll the "expiration of the applicable statute of limitations," which is found in *C.C.P. 340.5*. Also, MICRA drastically curtailed the time within which a minor was permitted to bring an action. Nothing in the statutory language or legislative history suggests an intent to limit the right of a minor further to a judicial remedy by imposing additional restrictions intended for adults. (54 *C.A.4th* 727, 728.)

SUPPLEMENT: [This section is current through the latest supplement]



31 of 188 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XVIII. SUSPENSION OR EQUITABLE TOLLING OF STATUTE OF LIMITATIONS

F. Stay or Other Prevention of Action.

2. Statutory Prohibition.

b. Notice of Intent To File Medical Malpractice Action.

2. Scope of Tolling Provision.

bb. Equitable Indemnity.

3 *Witkin Cal. Proc. Actions* § 724

[§ 724] Equitable Indemnity.

Preferred Risk Mut. Ins. Co. v. Reiswig (1999) 21 C.4th 208, 87 C.R.2d 187, 980 P.2d 895, involved the question whether C.C.P. 364(d) applies to an equitable indemnity action that is based on medical malpractice, but is governed by a non-MICRA statute of limitations. P was injured when her hand was slammed in the door of a van. She brought a negligence action against the church that owned the van and a malpractice action against defendant doctors who treated her. On January 24, 1996, plaintiff--the church's insurer--settled with P for the \$ 1 million policy limit. On January 16, 1997, plaintiff served defendants with a C.C.P. 364 notice. On April 10, 1997, plaintiff brought the present action for equitable indemnity against defendants. The trial judge ruled that the action was barred by the 1-year limitations period in former C.C.P. 340(3) (now 2-year period in C.C.P. 335.1; see supra, §552). *Held*, reversed; the 90-day tolling provision of C.C.P. 364(d) applies to equitable indemnity actions that are based on professional negligence and governed by non-MICRA statutes of limitation, including former C.C.P. 340(3). Thus, plaintiff's action was timely.

(a) Had the Legislature intended the tolling provision to apply only to C.C.P. 340.5, the MICRA statute of limitations (see supra, §579 et seq.), and not to the more general "applicable statute of limitations," it would have so stated. (21 C.4th 218.)

(b) Application of C.C.P. 364(d) to equitable indemnity actions based on a health care provider's professional negligence furthers the purpose of MICRA, which is to give doctors and their insurers an opportunity to negotiate with prospective plaintiffs and settle derivative claims without unnecessary litigation. (21 C.4th 218, 219.)

SUPPLEMENT: [This section is current through the latest supplement]



32 of 188 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XVIII. SUSPENSION OR EQUITABLE TOLLING OF STATUTE OF LIMITATIONS

F. Stay or Other Prevention of Action.

2. Statutory Prohibition.

b. Notice of Intent To File Medical Malpractice Action.

2. Scope of Tolling Provision.

cc. Distinction: Intentional Torts.

3 *Witkin Cal. Proc. Actions* § 725

[§ 725] Distinction: Intentional Torts.

C.C.P. 364(d) does not apply to claims against health care providers based on intentional torts. (See *Noble v. Superior Court* (1987) 191 C.A.3d 1189, 1190, 237 C.R. 38 [no tolling for count for battery].)

Smith v. Ben Bennett (2005) 133 C.A.4th 1507, 35 C.R.3d 612, addressed whether the 90-day tolling provision of *C.C.P. 364(d)* applies to a claim against a health care provider for the enhanced remedies available under the Elder Abuse and Dependent Adult Civil Protection Act (Welf.C. 15600 et seq.; see 5 *Summary* (10th), *Torts*, §147 et seq.). *Held*, *C.C.P. 364(d)* does not apply to claims under the Act. Like every other MICRA provision, *C.C.P. 364(d)* governs claims against health care professionals based on simple "professional negligence." (133 C.A.4th 1516.) Conversely, an elder abuse claim under the Act involves egregious abuse, i.e., reckless neglect or intentional abuse by the elder's custodian. Thus, a claim under the Act "is simply not encompassed within 'professional negligence' " under *MICRA*. (133 C.A.4th 1522, relying on *Delaney v. Baker* (1999) 20 C.4th 23, 82 C.R.2d 610, 971 P.2d 986, 6 *Summary* (10th), *Torts*, §1687.)

SUPPLEMENT: [This section is current through the latest supplement]



33 of 188 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XVIII. SUSPENSION OR EQUITABLE TOLLING OF STATUTE OF LIMITATIONS

F. Stay or Other Prevention of Action.

2. Statutory Prohibition.

b. Notice of Intent To File Medical Malpractice Action.

3. Form of Notice.

3 *Witkin Cal. Proc. Actions* § 726

[§ 726] Form of Notice.

"No particular form of notice is required, but it shall notify the defendant of the legal basis of the claim and the type of loss sustained, including with specificity the nature of the injuries suffered." (*C.C.P.* 364(b); see *Anson v. Merced* (1988) 202 *C.A.3d* 1195, 1203, 249 *C.R.* 457 [notice was insufficient, where it failed to mention type of injury suffered, and merely stated that public employees causing injuries were medical personnel whose names were unknown, rather than naming physicians who were charged with malpractice]; *Godwin v. Bellflower* (1992) 5 *C.A.4th* 1625, 1632, 7 *C.R.2d* 524 [where plaintiff has actual knowledge of identities of treating physicians, notice that fails to name physicians is insufficient as to them]; *Wurts v. Fresno* (1996) 44 *C.A.4th* 380, 388, 51 *C.R.2d* 689, 6 *Summary* (10th), *Torts*, §955 [government tort claim based on negligence of health care provider does not constitute notice under *C.C.P.* 364 without evidence that claimant intended otherwise].)

Edwards v. Superior Court (2001) 93 *C.A.4th* 172, 112 *C.R.2d* 838, involved a question of first impression: Must a *C.C.P.* 364 notice allege the specific factual basis for each cause of action in the action to be filed? Plaintiff filed a *C.C.P.* 364 notice regarding her intention to sue defendant doctor for malpractice arising from his performance of plastic surgery on her breasts and nose. The notice mentioned problems with the breast surgery, but did not specifically refer to problems with the nose surgery. She then filed her complaint, in which she mentioned "surgeries" but did not refer specifically to problems with the nose surgery. Several months later, she moved to amend the complaint to allege the doctrine of *res ipsa loquitur*, and in the proposed amended complaint alleged injuries arising from the nose surgery. *Held*, denial of the motion to amend was reversible error.

(a) Plaintiff's notice was sufficient, even though it did not specifically mention problems relating to the reconstruction of her nose. The notice furthered the public policy underlying the statute of giving the parties a meaningful opportunity to settle the claim and thus reduce the number of medical negligence actions. (93 *C.A.4th* 179.)

(b) Even assuming that the notice was insufficient to identify the nose injury, the omission was not fatal to plaintiff's ability to amend her complaint. Failure to comply with the notice provision does not invalidate court proceedings and is not jurisdictional, although it may subject plaintiff's attorney to State Bar discipline. (93 *C.A.4th*

179.) A logical application of this rule is that failure to specify in the notice all injuries suffered cannot bar a plaintiff from including an injury unintentionally omitted from the notice if it is not otherwise barred by the statute of limitations. (93 C.A.4th 180.)

(c) Leave to amend the complaint should have been granted, because the specifics of plaintiff's injuries as alleged in her proposed amended complaint were based on the same general set of facts and the same surgeries as alleged in the original complaint. (93 C.A.4th 181.)

SUPPLEMENT: [This section is current through the latest supplement]



34 of 188 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XVIII. SUSPENSION OR EQUITABLE TOLLING OF STATUTE OF LIMITATIONS

F. Stay or Other Prevention of Action.

2. Statutory Prohibition.

b. Notice of Intent To File Medical Malpractice Action.

4. Service of Notice.

3 Witkin Cal. Proc. Actions § 727

[§ 727] Service of Notice.

(1) *In General.* The notice may be served in the manner prescribed in *C.C.P. 1010* et seq. (service of notice of motion; see 6 *Cal. Proc.* (5th), *Proceedings Without Trial*, §12 et seq.). (*C.C.P. 364(c)*.) However, the plain language of *C.C.P. 364(c)* is permissive and does not require compliance with *C.C.P. 1010* et seq. (See *Jones v. Catholic Healthcare West* (2007) 147 *C.A.4th* 300, 306, 54 *C.R.3d* 148 [faxed notice was effective to toll statute, even though defendant had not agreed in writing to faxed service as required by *C.C.P. 1010(e)*; parties had past practice of faxing documents, and defendant actually had received faxed notice].)

(2) *Failure To Serve Defendant.* In *Hanooka v. Pivko* (1994) 22 *C.A.4th* 1553, 28 *C.R.2d* 70, plaintiffs filed a medical malpractice action against defendant doctors 20 days after the 1-year limitations period for medical malpractice (*C.C.P. 340.5*, supra, §579) had expired. Before the statute had run, however, plaintiffs prepared a *C.C.P. 364(a)* notice, but served it on the hospital where defendants had staff privileges, rather than on defendants themselves. *Held*, the action was untimely.

(a) *Notice was insufficient.* Plaintiffs were aware of defendants' identities and could easily have effected service of the notice as required by *C.C.P. 364(d)*. Defendants did not receive actual notice pursuant to the statute, and plaintiffs could not rely on the hospital to forward the notice to defendants when they had knowledge of their identity and location. (22 *C.A.4th* 1558, citing *Godwin v. Bellflower* (1992) 5 *C.A.4th* 1625, 1632, 7 *C.R.2d* 524, supra, §726.)

(b) *No relief under C.C.P. 473.* Plaintiffs could not extend the limitations period of *C.C.P. 340.5* by applying *C.C.P. 473* (motion for relief due to mistake, inadvertence, surprise, or excusable neglect; see 8 *Cal. Proc.* (5th), *Attack on Judgment in Trial Court*, §144 et seq.) to the notice provision of *C.C.P. 364*. *C.C.P. 340.5* does not provide for an extension of a limitations period on a showing of good cause, or under *C.C.P. 473*. (22 *C.A.4th* 1562, 1563, citing *Gutierrez v. Mofid* (1985) 39 *C.3d* 892, 218 *C.R.* 313, 705 *P.2d* 886, supra, §580.) "Section 364 ... should likewise not be susceptible to extension." To do so "would create a 'loophole' not envisioned by the Legislature." (22 *C.A.4th* 1563.) Even if *C.C.P. 473* were applicable, plaintiffs' counsel's excuses, i.e., (1) that he merely mailed the notice to the incorrect address, and (2) that *C.C.P. 364* gives no guidance about the proper method of service, were unreasonable, and

thus inexcusable. The first excuse was not credible and the second excuse was not true. (22 C.A.4th 1563, 1564.) (See *Derderian v. Dietrick* (1997) 56 C.A.4th 892, 898, 65 C.R.2d 800 [following *Hanooka*; notice mailed to, but not received by, billing service for whom defendant had worked as independent contractor at time of alleged malpractice was insufficient].)

In *Silver v. McNamee* (1999) 69 C.A.4th 269, 81 C.R.2d 445, plaintiff sent two properly addressed, postage paid, C.C.P. 364 notices to defendant physician's residence in Ohio 3 days before expiration of the 1-year statute of limitations. Plaintiff sent the first notice by regular, first class mail, and the post office never returned the notice to him. Plaintiff sent the second notice by certified mail, and the post office returned the notice to him 2 days later as unclaimed. About 2 months after the limitations period had expired, defendant received actual notice of plaintiff's intention to sue, and at nearly the same time, plaintiff filed the present medical malpractice action. The trial judge ruled that C.C.P. 364(d), which plaintiff claimed tolled the limitations period by 90 days so as to render his action timely, did not apply for two reasons: (a) Under *Woods v. Young* (1991) 53 C.3d 315, 279 C.R. 613, 807 P.2d 455, *infra*, §728, a C.C.P. 364(d) notice must be given within the last 90 days of the limitations period. But here, C.C.P. 1013(a) (time for service by mail extended by 10 days where sent to address outside California; see 6 Cal. Proc. (5th), *Proceedings Without Trial*, §30) delayed the effective date of service of plaintiff's notice until after the limitations period had expired. (b) Defendant did not receive actual notice of plaintiff's intention to sue until after the limitations period had expired. *Held*, summary judgment for defendant reversed; the tolling provisions of C.C.P. 364(d) applied, and plaintiff's action was timely.

(a) *Notice was effective when mailed.* C.C.P. 364(c) provides that a notice "may be served in the manner prescribed" in C.C.P. 1010 et seq., and plaintiff strictly complied with these statutory requirements. Thus, by the express terms of C.C.P. 1013(a), service of the C.C.P. 364 notices were "complete" on the date that they were mailed, which occurred during the last 90 days of the limitations period. (69 C.A.4th 279, 280.) Contrary to the trial judge's interpretation of C.C.P. 1013(a), case law suggests that the statute at most may have entitled defendant to 10 additional days of prior notice of plaintiff's intention to sue. However, the 10 additional days would not have made plaintiff's action untimely, but only may have presented possible grounds for professional discipline against his attorney. (69 C.A.4th 280, 281, citing *Woods*.)

(b) *No "actual notice" requirement.* For purposes of C.C.P. 1013(a), service is complete at the time of mailing. The sender does not have the burden of showing that the notice was actually received by the addressee, and the addressee incurs the risk of the failure of the mail. Moreover, neither the language of C.C.P. 364 nor case law requires that the defendant receive actual notice before the limitations period may be tolled. *Godwin*, *Derderian*, and *Hanooka*, *supra*, are factually distinguishable; unlike the present case, they involved plaintiffs who did not strictly comply with statutes governing the method of service. (69 C.A.4th 283.)

SUPPLEMENT: [This section is current through the latest supplement]



35 of 188 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XVIII. SUSPENSION OR EQUITABLE TOLLING OF STATUTE OF LIMITATIONS

F. Stay or Other Prevention of Action.

2. Statutory Prohibition.

b. Notice of Intent To File Medical Malpractice Action.

5. Duration of Tolling.

3 *Witkin Cal. Proc. Actions* § 728

[§ 728] Duration of Tolling.

(1) *One-Year Statute for Adult Plaintiffs.* As discussed in *Woods v. Young* (1991) 53 C.3d 315, 320, 279 C.R. 613, 807 P.2d 455, the Courts of Appeal have disagreed on the length of time the 1-year medical malpractice statute (*C.C.P.* 340.5; see *supra*, §579) is tolled when a notice of intent to sue is served within 90 days of expiration of the limitations period (see *supra*, §727).

(a) *C.C.P.* 364(a) requires a 90-day notice of intent to sue, and *C.C.P.* 365 states that an attorney's failure to provide the notice does not invalidate the proceedings, but makes the attorney subject to disciplinary action by the State Bar. Unless giving the 90-day notice tolls or extends the statute of limitations, these two sections pose a dilemma for the attorney who serves the notice within the last 90 days of the 1-year limitations period in *C.C.P.* 340.5. The attorney must either comply with the *C.C.P.* 364(a) proscription against commencing the action, thereby forfeiting the client's cause of action, or file during the 90-day waiting period, thereby triggering possible disciplinary action. In the absence of tolling or extension, the attorney would have to serve the notice within 9 months of the plaintiff's discovery of the injury, which would in effect shorten the statute of limitations to 9 months.

(b) The Legislature attempted to solve the problem by enacting *C.C.P.* 364(d), stating that if the notice is served during the last 90 days of the statute of limitations, the limitations period is extended 90 days from service of the notice. But a literal application of this section leads to incongruous results: If a plaintiff served the notice 50 days before expiration of the 1-year statute, the section would extend the period by 90 days, giving the plaintiff 1 year and 40 days to file the action. But if the plaintiff filed the action on the last day of the extension, he or she would violate the 90-day requirement; if the plaintiff filed 1 day after the extended period, the action would be barred by the 1-year statute.

(c) The Courts of Appeal have attempted to resolve these difficulties by applying the non-Medical Injury Compensation Reform Act (MICRA) tolling provision of *C.C.P.* 356 (suspension of limitations period by stay pursuant to statutory prohibition; *supra*, §721). But they have disagreed on whether the 90-day extension of *C.C.P.* 364(d) is in addition to, or is included within, the 90-day tolling under *C.C.P.* 356. (See *Gomez v. Valley View Sanitorium* (1978) 87 C.A.3d 507, 510, 151 C.R. 97 ["Where section 364 also operates to extend the period of limitations because notice is

served within 90 days of the expiration of the statute, the plaintiff is entitled to that extension as well as the tolling of the statute during the 90 days plaintiff is prohibited from filing his action"]; *Braham v. Sorenson* (1981) 119 C.A.3d 367, 372, 373, 174 C.R. 39 [tolling for only 90 days]; *Paxton v. Chapman General Hosp.* (1986) 186 C.A.3d 110, 115, 230 C.R. 355 [plaintiff has at least 90 days from expiration of time excluded by C.C.P. 356 to file complaint; thus, plaintiff had 1 year from accrual of action, plus 180 days from date of service of notice of intent to sue, to file complaint].)

The conflict among the Courts of Appeal was resolved by *Woods. Held*, service of the C.C.P. 364(d) notice tolls the 1-year statute of limitations only when the plaintiff gives the notice in the last 90 days of the limitations period, but the running of the statutory period is not otherwise affected by the service of the notice.

(a) Under general principles of statutory construction, and also under the rule that a later more specific statute controls an earlier general statute, C.C.P. 356 (a general statute) does not apply to C.C.P. 364 (the MICRA statute). (53 C.3d 324.)

(b) C.C.P. 364(d) should be construed as tolling the 1-year limitations period when the 90-day notice of intent to sue is served during, but not before, the last 90 days of the 1-year limitations period. "Because the statute of limitations is tolled for 90 days and not merely extended by 90 days from the date of service of the notice, this construction results in a period of 1 year and 90 days in which to file the lawsuit. In providing for a waiting period of at least 90 days before suit can be brought, this construction achieves the legislative objective of encouraging negotiated resolutions of disputes." (53 C.3d 325.) This construction also resolves the dilemma of the plaintiff's attorney who serves the 90-day notice in the last 90 days of the 1-year limitations period. "Our construction of section 364 as tolling, rather than merely extending, the statute of limitations, permits the plaintiff to commence the action after the 90-day 'waiting' period has elapsed and before the limitations period has expired. The plaintiff who gives the 90-day notice before the last 90 days of the 1-year limitations period can still bring the lawsuit after the 90-day period has elapsed because in that situation the 1-year limitations will not have expired at the end of the 90-day waiting period." (53 C.3d 326.)

(c) To grant additional time to the plaintiff who serves the notice in the last 90 days of the limitations period, but not to a plaintiff who more promptly gives notice, appears to reward the dilatory plaintiff. But the Legislature drew this distinction when it enacted MICRA, and it serves the legislative object of allowing time for negotiations without the formal initiation of legal proceedings. (53 C.3d 326, 327.) And it does not violate the constitutional guarantee of equal protection because the classification is rationally related to the legislative objective. (53 C.3d 327.)

(d) For all of these reasons, when a plaintiff gives the 90-day notice of intent to sue required by C.C.P. 364(a) in the last 90 days of the 1-year limitations period, the statute is tolled for 90 days. (53 C.3d 328.)

(e) Considerations of fairness and public policy require that application of this rule be prospective only, and thus did not apply to plaintiff in this case or to plaintiffs filing complaints no later than 90 days after the finality of the decision. (53 C.3d 331.) (See *Barber v. Superior Court* (1991) 234 C.A.3d 1076, 1081, 1082, 285 C.R. 668 [following *Woods*]; *Davis v. Marin* (2000) 80 C.A.4th 380, 384, 94 C.R.2d 896 [same]; 19 *Pepperdine L. Rev.* 223.)

(2) *Three-Year Statute for Adult Plaintiffs.* Subsequent to *Woods*, the Court of Appeal in *Rewald v. San Pedro Peninsula Hosp.* (1994) 27 C.A.4th 480, 485, 32 C.R.2d 411, supra, §723, held that the 3-year medical malpractice limitations period in C.C.P. 340.5 (see supra, §581) was not tolled by service of the notice of intent to sue. However, in *Russell v. Stanford University Hosp.* (1997) 15 C.4th 783, 64 C.R.2d 97, 937 P.2d 640, the Supreme Court repudiated *Rewald*. (15 C.4th 791, footnote 2.) The *Russell* court, in holding that a C.C.P. 364(d) notice does apply to the 3-year limitations period in C.C.P. 340.5 (see supra, §586 et seq.), further held that the tolling rule announced in *Woods* also applied to the 3-year period.

Defendants assert that tolling for any period when a plaintiff gives notice of intention to sue within 90 days of the expiration of the statute of limitations would defeat the legislative intent to curtail open-ended statutes of limitations. It

is true that conceivably the time for commencing a claim might be extended by 90 days beyond the 3-year limitations period prescribed by *C.C.P. 340.5*. On balance, however, the legislative interest in promoting negotiated resolution of medical malpractice disputes--including permitting plaintiff's attorneys to commence timely actions without subjecting themselves to potential disciplinary action--must be deemed overriding. Any conceivably prejudicial effect on defendants of the relatively brief tolling period will be offset by the fact that, as a practical matter, the notice of intent to sue will itself make defendants aware of the intended claim. Thus, a prospective defendant is still guaranteed notice of the malpractice claim within the limitations period by means of the notice of intent to sue, even though the complaint itself may be filed up to 90 days beyond the period. (15 *C.4th* 790.)

(3) *Three-Year Statute for Minor Plaintiffs*. The *Woods* tolling rule applies to the 3-year statute of limitations for minors suing for medical malpractice in *C.C.P. 340.5* (see *supra*, §586 et seq.). (*Newman v. Burnett* (1997) 54 *C.A.4th* 722, 727, 728, 62 *C.R.2d* 175, *supra*, §723.)

SUPPLEMENT: [This section is current through the latest supplement]



36 of 188 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XVIII. SUSPENSION OR EQUITABLE TOLLING OF STATUTE OF LIMITATIONS

F. Stay or Other Prevention of Action.

3. Other Proceedings Preventing Effective Suit.

a. In General.

3 Witkin Cal. Proc. Actions § 729

[§ 729] In General.

By its terms, *C.C.P.* 356 applies only where an injunction or statutory prohibition stays the commencement of the action. (See *supra*, §§720, 721.) But the action may be legally prohibited by other means than injunction or statutory prohibition, and an action not stayed may nevertheless be futile. On not very clear grounds, the authorities invoke *C.C.P.* 356 or an analogous doctrine to suspend the running of the statute when pending proceedings prevent an effective suit. (See *Hoover v. Galbraith* (1972) 7 C.3d 519, 526, 102 C.R. 733, 498 P.2d 981, *infra*, §734, citing the text; 13 *Pacific L. J.* 764; 15 *Pacific L. J.* 685; *infra*, §730 et seq.) The result can sometimes be viewed as postponed accrual of the cause of action rather than as suspension of the period in which to commence suit on an accrued cause of action. But the underlying principle is the same.

Similarly, a criminal action against a licensee will toll the period for disciplinary proceedings. (See *Karrell v. Watson* (1953) 116 C.A.2d 769, 777, 255 P.2d 464.)

SUPPLEMENT: [This section is current through the latest supplement]



37 of 188 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XVIII. SUSPENSION OR EQUITABLE TOLLING OF STATUTE OF LIMITATIONS

F. Stay or Other Prevention of Action.

3. Other Proceedings Preventing Effective Suit.

b. Pending Administrative Proceeding.

1. In General.

3 *Witkin Cal. Proc. Actions* § 730

[§ 730] In General.

Dillon v. Board of Pension Commrs. of Los Angeles (1941) 18 C.2d 427, 116 P.2d 37, is a good example of the broad application of C.C.P. 356. Petitioner filed a pension claim with defendant board and, after denial, brought suit. In holding that the statute did not run during the board's deliberations, the court pointed out that no action could be filed until the decision was rendered. "It is well recognized that the running of the statute of limitations is suspended during any period in which the plaintiff is legally prevented from taking action to protect his rights." (18 C.2d 431.)

Many other cases have followed the *Dillon* rule. (See *Skaggs v. Los Angeles* (1954) 43 C.2d 497, 500, 275 P.2d 9; *Santa Clara v. Hayes Co.* (1954) 43 C.2d 615, 618, 275 P.2d 456; *Elkins v. Derby* (1974) 12 C.3d 410, 414, 115 C.R. 641, 525 P.2d 81, *infra*, §744 ["It has long been settled in this and other jurisdictions that whenever the exhaustion of administrative remedies is a prerequisite to the initiation of a civil action, the running of the limitations period is tolled during the time consumed by the administrative proceeding"]; *Valvo v. University of Southern Calif.* (1977) 67 C.A.3d 887, 894, 136 C.R. 865 ["It is ... more precise to view petitioner's claim of improper dismissal as having accrued on the date of actual dismissal, and to consider the statute of limitations as tolled while petitioner pursued available administrative remedies"]; but see *Berkeley Unified School Dist. v. California* (1995) 33 C.A.4th 350, 363, 39 C.R.2d 326, citing the text [statute of limitations for school district's action against state for reimbursement of state-mandated desegregation program was not suspended until expiration of state's right to judicially challenge adverse administrative decision on same mandate initiated by another school district].)

In *Lerner v. Los Angeles City Bd. of Education* (1963) 59 C.2d 382, 391, 29 C.R. 657, 380 P.2d 97, citing the text, the state Board of Education, acting pursuant to a statute retroactively applied, revoked plaintiff's teaching credential in December 1954, and the city board immediately terminated his employment. Subsequently the retroactive application of the statute was held invalid in another case, and in July 1958 the state board restored his credential. The city board nevertheless refused to reinstate him, and he brought an action for declaratory relief in December 1958. *Held*, the 3-year statute (see *supra*, §664) was not a bar, for no effective action was possible until the state board restored the credential, thereby removing the basis of his discharge and obligating the city board to reinstate him. (59 C.2d 390.) (For estoppel theory in this case, see *infra*, §767.)

In *Olson v. Sacramento* (1974) 38 C.A.3d 958, 113 C.R. 664, the court said: "The judicial policy underlying the decisions which toll statutes of limitations during the pendency of interrelated administrative proceedings in cases where the latter may be dispositive of an essential element of a legal cause of action is founded on the need for harmony and the avoidance of chaos in the administration of justice. It avoids a multiplicity of actions in cases having common elements of law or fact *or both*. It does not pressure litigants concurrently to seek redress in two separate forums with the attendant danger of conflicting decisions on the same issue. It relieves litigants of the pressure to outrace each other in seeking an adjudication of one or the other of the legal proceedings in a forum where he may believe he has a greater chance of prevailing. The orderly administration of justice is best served by tolling the statute of limitations on independent actions at law until the final determination of the interrelated administrative proceeding." (38 C.A.3d 965.)

SUPPLEMENT: [This section is current through the latest supplement]



38 of 188 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XVIII. SUSPENSION OR EQUITABLE TOLLING OF STATUTE OF LIMITATIONS

F. Stay or Other Prevention of Action.

3. Other Proceedings Preventing Effective Suit.

b. Pending Administrative Proceeding.

2. Effect of Pending Federal Administrative Proceeding on State Limitations Period.

3 *Witkin Cal. Proc. Actions* § 731

[§ 731] Effect of Pending Federal Administrative Proceeding on State Limitations Period.

Downs v. Department of Water & Power of Los Angeles (1997) 58 C.A.4th 1093, 68 C.R.2d 590, involved an issue of first impression: Is *Govt.C. 12965(b)*, which requires an action under the California Fair Employment and Housing Act (FEHA) to be filed within 1 year of receipt of a right-to-sue letter from the Department of Fair Employment and Housing (DFEH) (see *supra*, §225), equitably tolled during the pendency of administrative proceedings before the federal Equal Employment Opportunity Commission (EEOC)? Plaintiff employee filed a claim under FEHA with the DFEH and a federal civil rights claim with the EEOC against defendant employer alleging racial discrimination. The DFEH issued a right-to-sue letter, but it deferred investigation to the EEOC under the work-sharing agreement between the state and federal agencies. The EEOC dismissed plaintiff's federal claim, and he filed his FEHA action more than 1 year after the DFEH had issued the right-to-sue letter. The trial judge found that plaintiff's action was time-barred by *Govt.C. 12965(b)*. *Held*, reversed; the statute was equitably tolled while plaintiff pursued his federal administrative remedies with the EEOC and awaited the outcome of that investigation.

(a) Plaintiff had filed a timely charge with the EEOC, which immediately filed a copy with the DFEH and provided timely notice of the charge to defendant. Because the FEHA action was based on identical facts and charges as those investigated by the EEOC, defendant was not prejudiced in its ability to gather evidence to defend against the FEHA action. (58 C.A.4th 1102.)

(b) Further, tolling the 1-year statute satisfied the policy considerations of the equitable tolling doctrine by relieving plaintiff from pursuing duplicative actions simultaneously on the same set of facts, and by preventing unnecessary state court action. (58 C.A.4th 1102.)

The holding in *Downs* has been codified. The 1-year limitations period in *Govt.C. 12965(b)* is tolled in cases where the DFEH has deferred its investigation of plaintiff's complaint to the EEOC or where, after an investigation by the DFEH, the EEOC agrees to perform a substantial weight review of the determination of the DFEH or conducts its own investigation. The time for commencing an action for which the limitations period is tolled expires when the federal right-to-sue period expires, or 1 year from the date of the right-to-sue notice by the DFEH, whichever period is later. (

Govt.C. 12965(d), (e).)

SUPPLEMENT: [This section is current through the latest supplement]

See *Guevara v. Ventura County Community College Dist.* (2008) 169 C.A.4th 167, 174, 87 C.R.3d 50 [following *Downs v. Department of Water & Power of Los Angeles* (1997) 58 C.A.4th 1093, 68 C.R.2d 590, text, p. 955; police officer's federal district court action against employer for administrative mandamus, violation of federal constitutional rights, and wrongful termination equitably tolled statute of limitations on his later state court action alleging same claims under state law].



39 of 188 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XVIII. SUSPENSION OR EQUITABLE TOLLING OF STATUTE OF LIMITATIONS

F. Stay or Other Prevention of Action.

3. Other Proceedings Preventing Effective Suit.

b. Pending Administrative Proceeding.

3. Distinction: Availability of Alternative Remedies.

3 *Witkin Cal. Proc. Actions* § 732

[§ 732] Distinction: Availability of Alternative Remedies.

Mock v. Santa Monica Hosp. (1960) 187 C.A.2d 57, 9 C.R. 555, recognizes a distinction to the general rule of equitable tolling during the pendency of an administrative proceeding where alternative remedies are involved. An employee suffered an industrial injury and commenced protracted workers' compensation proceedings. While those proceedings were pending, he was further injured during related medical treatment. The employee then filed the malpractice action here against the treating physician, but it was dismissed as untimely. *Held*, affirmed. The employee had independent remedies before the Workers' Compensation Appeals Board and in the courts. Hence, the pendency of the workers' compensation proceedings did not prevent the running of the statute on the cause of action against the physician. (187 C.A.2d 64.) (See *Mathieu v. Norrell Corp.* (2004) 115 C.A.4th 1174, 1189, 10 C.R.3d 52 [common law action for wrongful termination of employment in violation of public policy was not tolled during pendency of Department of Fair Employment and Housing proceedings; common law action was independent alternative to Fair Employment and Housing Act (FEHA) administrative claim and subsequent FEHA action].)

SUPPLEMENT: [This section is current through the latest supplement]



40 of 188 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XVIII. SUSPENSION OR EQUITABLE TOLLING OF STATUTE OF LIMITATIONS

F. Stay or Other Prevention of Action.

3. Other Proceedings Preventing Effective Suit.

c. Pending Contract or Arbitration Proceeding.

3 Witkin Cal. Proc. Actions § 733

[§ 733] Pending Contract or Arbitration Proceeding.

The equitable tolling rule governing pending administrative proceedings (*supra*, §730 et seq.) has been applied in the following situations:

(1) Where a union officer pursued his "private administrative remedy" before the local and international union. (*Van Hook v. Southern Calif. Waiters Alliance, Local 17* (1958) 158 C.A.2d 556, 565, 323 P.2d 212; *Rodriguez v. Southern Calif. Dist. Council of Laborers* (1984) 160 C.A.3d 956, 960, 207 C.R. 75.)

(2) Where a public contractor pursued a contractual settlement procedure. (*A. Teichert & Son v. California* (1965) 238 C.A.2d 736, 747, 48 C.R. 225.) (See 40 Harv. L. Rev. 1139.)

SUPPLEMENT: [This section is current through the latest supplement]



41 of 188 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XVIII. SUSPENSION OR EQUITABLE TOLLING OF STATUTE OF LIMITATIONS

F. Stay or Other Prevention of Action.

3. Other Proceedings Preventing Effective Suit.

d. Pending Review Proceedings in Related Action.

3 *Witkin Cal. Proc. Actions* § 734

[§ 734] Pending Review Proceedings in Related Action.

In *Burns v. Massachusetts Bonding & Ins. Co. (1944)* 62 C.A.2d 962, 146 P.2d 24, a guardian's appeal from an order settling his accounts prevented an action against his sureties until the statute of limitations (former Prob.C. 1487) had apparently run. *Held*, an appeal, by either the guardian or the ward, would toll the limitation on an action against the guardian's surety. This judicial exception to the particular section was justified on the presumed legislative intent to protect the rights of the ward. "[T]he Legislature must have known of the general principle applicable to statutes of limitation that an appeal tolls the statute." (62 C.A.2d 972.) (Current Prob.C. 2333 provides that statute does not begin to run until guardian or conservator is removed or order surcharging guardian or conservator has become final; see *supra*, §543.)

The statute of limitations for an action against corporate directors (*supra*, §671) is tolled by the directors' appeal from a judgment against the corporation, for an action on the judgment may not be commenced until final judgment on that appeal. "To hold that the limitations period is not tolled in such a case would allow defaulting corporate directors to avoid personal liability by filing an appeal and delaying its outcome, thus defeating the statutory purpose to make them accountable to creditors not paid or provided for in the dissolution proceedings." (*Hoover v. Galbraith (1972)* 7 C.3d 519, 527, 102 C.R. 733, 498 P.2d 981, *supra*, §671, citing the text.)

Elkins v. Bryson (1936) 16 C.A.2d 173, 60 P.2d 301, seems inconsistent with the cases discussed above. Plaintiffs, by a valid order settling accounts and decreeing distribution, became entitled to a share in an estate. Then the court made void orders granting a new trial to the administrator and allowing him certain credits, which reduced plaintiffs' share. Plaintiffs had the void orders annulled on certiorari, and, over 5 years after the valid order, sued the administrator and his surety to recover the balance of their distributive share. *Held*, the statute ran from the time of the valid order and was not tolled by the later orders which, being void, would not have prevented suit. (16 C.A.2d 174.)

This harsh and unrealistic decision implies that the appropriate course for a party aggrieved by an invalid order is to flout it rather than to seek judicial review. But why should plaintiffs have sued? The sole effect would have been to stop the statute of limitations from running. A plea in abatement would have been sustained, for the trial judge could not allow a collateral attack on the later orders while the very issue of their validity was pending in the appellate court in the

certiorari proceeding. *C.C.P.* 356 ought to apply where there is a prevention of trial on the merits, regardless of whether an action may be filed.

SUPPLEMENT: [This section is current through the latest supplement]



42 of 188 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XVIII. SUSPENSION OR EQUITABLE TOLLING OF STATUTE OF LIMITATIONS

G. Commencement of Action.

1. In General.

3 *Witkin Cal. Proc. Actions* § 735

[§ 735] In General.

(1) *Filing Complaint.* C.C.P. 350, in the chapter on limitations, states that an action is commenced for that purpose when the complaint is filed. (See *Los Angeles v. Superior Court (Peters)* (1968) 264 C.A.2d 766, 773, 70 C.R. 826; 51 Am.Jur.2d (2000 ed.), *Limitation of Actions* §252 et seq.; for federal practice, see F.R. Civ. P., Rule 3; 4 Federal Practice & Procedure (Wright & Miller) §1052 et seq.; 28 Federal Procedure, L.Ed. §65:51 et seq.) (On distinction where mass tort class action is involved, see *infra*, §736; on effect of filing motion for leave to amend, see *infra*, §737.)

Thus, it is possible to interrupt the running of the period without actually bringing the action to trial or even notifying the defendant of the claim. To achieve the purpose of the statute of limitations (protection of the defendant against stale claims), some jurisdictions make the additional requirement of diligence in the service of the summons. (See 63 Harv. L. Rev. 1237; 20 Stanf. L. Rev. 1281 [F.R. Civ. P., Rule 3].) Others, like California, make lack of diligence in the service of the summons a ground for dismissal. (See 6 Cal. Proc. (5th), *Proceedings Without Trial*, §§319 et seq., 355 et seq.)

Because the impending bar of the statute is removed by the mere filing of a complaint, an action is sometimes brought just for that purpose, i.e., to keep the claim alive rather than to satisfy it. Thus, an action may be filed and a claim converted into a judgment although there is no likelihood of recovery at the time. (See *People v. Honey Lake Valley Irr. Dist.* (1926) 77 C.A. 367, 372, 246 P. 819.) An action may be filed within 10 years after rendition of an unsatisfied judgment to keep the judgment from outlawing. (See *supra*, §675.) And a pledgee of collateral securities may sue to collect them, not because he or she is the beneficial owner, but because otherwise the statute might run before the pledgor-owner could sue to collect. (*Mitchell v. Automobile Owners Indem. Underwriters* (1941) 19 C.2d 1, 6, 118 P.2d 815, 4 Summary (10th), *Secured Transactions in Personal Property*, §§6, 7; for procedures under Uniform Commercial Code, see 4 Summary (10th), *Secured Transactions in Personal Property*, §153; on suing unknown defendant by fictitious name for this purpose, see 4 Cal. Proc. (5th), *Pleading*, §478 et seq.)

(2) *Statute Is Topped in Favor of Party With Right of Intervention.* As already pointed out, the commencement of the action stops the running of the statute not only on the plaintiff's cause of action but also on any claim by the defendant for affirmative relief that existed at the time of filing the complaint. (See *supra*, §448.) The statute also is suspended in favor of a party with a statutory right of intervention. In *Harrison v. Englebrick* (1967) 254 C.A.2d 871, 62 C.R. 831,

plaintiff was injured in the course of his employment by the alleged negligence of third-party tortfeasors. Plaintiff filed the action against them within 1 year. Plaintiff's employer and its insurer were entitled to recover compensation payments from the third-party tortfeasors by an independent action, by joining or intervening in plaintiff's action, or by letting plaintiff get judgment and applying for a lien. (See 2 *Summary* (10th), *Workers' Compensation*, §69 et seq.) The independent action would be subject to the same 1-year statute of limitations as that governing the personal injury action (see *supra*, §559). The insurer, however, elected to file a complaint in intervention, 3 years after the accident, relying on the language of *Lab.C. 3853* and former language of *C.C.P. 387* permitting intervention "before trial" (now "upon timely application"). *Held*, it was not barred.

(a) The purpose of the statute of limitations, to give the adverse party timely warning, was served by the employee's action brought within the 1-year period. (254 *C.A.2d* 874.)

(b) If the insurer files a timely independent action, an employee's complaint in intervention is timely even though the statutory period for an action has run; the same rule should apply where the employee sues and the insurer intervenes. (254 *C.A.2d* 875.)

SUPPLEMENT: [This section is current through the latest supplement]



43 of 188 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XVIII. SUSPENSION OR EQUITABLE TOLLING OF STATUTE OF LIMITATIONS

G. Commencement of Action.

2. Distinction: Mass Tort Class Action.

3 *Witkin Cal. Proc. Actions* § 736

[§ 736] Distinction: Mass Tort Class Action.

In *American Pipe & Const. Co. v. Utah* (1974) 414 U.S. 538, 94 S.Ct. 756, 38 L.Ed.2d 713, the court held that the commencement of a class action tolled the statute for all purported members of the class who made timely motions to intervene after the trial judge denied class certification for lack of a showing of numerosity. (94 S.Ct. 765, 38 L.Ed.2d 726.) In *Bangert v. Narmco Materials* (1984) 163 C.A.3d 207, 209 C.R. 438, the court extended the *American Pipe* rule to a class action where certification was denied on the ground of insufficient community of interest. (163 C.A.3d 212.)

In *Jolly v. Eli Lilly & Co.* (1988) 44 C.3d 1103, 245 C.R. 658, 751 P.2d 923, *supra*, §500, an action against drug manufacturers by a DES daughter, plaintiff argued that, under the *Bangert* extension, filing of the class action in *Sindell v. Abbott Laboratories* (1980) 26 C.3d 588, 163 C.R. 132, 607 P.2d 924, 6 *Summary* (10th), *Torts*, §1486, tolled the statute on her individual suit. *Held*, *American Pipe* was not applicable and *Bangert* was disapproved. (44 C.3d 1126, footnote 20.)

(a) The policy considerations of *American Pipe*--protecting the defendant from unfair claims--do not call for application of the holding to the present case. Many courts have rejected the class action device in mass tort actions, and California DES litigation has followed this trend. (44 C.3d 1122.) As Justice Blackmun said in his concurrence in *American Pipe*: "Our decision ... must not be regarded as encouragement to lawyers in a case of this kind to frame their pleadings as a class action, intentionally, to attract and save members of the purported class who have slept on their rights." (44 C.3d 1124.)

(b) "Our position in the present case ensures that the abuse warned of by Justice Blackmun will not occur. ... Because the *Sindell* complaint never put defendants on notice that personal injury damages were being sought on a class basis, it would be unfair to defendants to toll the statute of limitations on such personal injury actions. ... And because the *Sindell* complaint did not seek personal injury damages on behalf of the class, even those absent class members who were aware of that action could not reasonably have relied on the complaint as a basis for postponing their own personal injury actions." (44 C.3d 1124, 1125.)

(c) "In light of our disposition, we need not address the broader question whether in any personal injury mass-tort case the filing of a class action complaint can serve to toll the statute of limitations for putative class members when the

class ultimately is denied certification for lack of commonality. We observe, however, that because personal-injury mass-tort class-action claims can rarely meet the community of interest requirement in that each member's right to recover depends on facts peculiar to each particular case, such claims may be presumptively incapable of apprising defendants of 'the substantive claims being brought against them' ... , a prerequisite, in our view, to the application of *American Pipe* This being so, putative class members would be ill advised to rely on the mere filing of a class action complaint to toll their individual statute of limitations. The presumption, rather, should be to the contrary--i.e., that lack of commonality will defeat certification and preclude application of the *American Pipe* tolling doctrine." (44 C.3d 1125.) (But see *Becker v. McMillin Const. Co.* (1991) 226 C.A.3d 1493, 1498, 277 C.R. 491 [discussing *Jolly*, and holding that tolling was proper in mass construction defect case]; *San Francisco Unified School Dist. v. W.R. Grace & Co.* (1995) 37 C.A.4th 1318, 1336, 44 C.R.2d 305, supra, §598 [same].)

SUPPLEMENT: [This section is current through the latest supplement]



44 of 188 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XVIII. SUSPENSION OR EQUITABLE TOLLING OF STATUTE OF LIMITATIONS

G. Commencement of Action.

3. Motion for Leave To Amend.

3 *Witkin Cal. Proc. Actions* § 737

[§ 737] Motion for Leave To Amend.

Wiener v. Superior Court (1976) 58 C.A.3d 525, 130 C.R. 61, holds that a notice of motion for leave to amend to add a new cause of action is a commencement of an action that stops the running of the statute. Plaintiffs filed a complaint on February 6, 1975, alleging that defendants published a libel on April 23, 1974. On April 24, 1975, plaintiffs filed a notice of motion for leave to amend to add a count alleging that defendants published another libel on April 25, 1974. The motion was granted on May 19, 1975, but defendants' demurrer to that count, based on the 1-year statute of limitations, was subsequently sustained. *Held*, mandamus was granted to compel overruling the demurrer.

(a) The new count of the amended complaint stated a new cause of action arising out of different facts; hence, it did not relate back to the time the original complaint was filed so as to overcome the defense of the statute of limitations. (58 C.A.3d 529; see 5 Cal. Proc. (5th), *Pleading*, §1217.)

(b) However, the notice of motion, filed within the 1-year period, was equivalent to the filing of a new complaint. If plaintiffs had filed a new complaint, no statute of limitations problem would have arisen, but efficient judicial administration would have called for a consolidation of the new case with the pending action. An amendment to the original complaint is a more efficient method of accomplishing this result, and parties should be encouraged to proceed in that manner, without the risk of having the statute run while a busy court delays decision on the motion to amend. (58 C.A.3d 530.)

(c) The court added an explanation for its novel treatment of the notice of motion: "We recognize that an amendment or an amended pleading is commonly ordered 'filed' when the court grants the motion for leave to amend, and that in some cases a new document is filed following the order granting the motion. These activities, which are important for the sake of a complete and convenient trial court record, do not militate against our decision that, under the facts of the case at bench, the action on the April 25, 1974, publication commenced when plaintiffs filed their proposed first amended complaint with their notice of motion for leave to amend." (58 C.A.3d 531.)

SUPPLEMENT: [This section is current through the latest supplement]



45 of 188 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XVIII. SUSPENSION OR EQUITABLE TOLLING OF STATUTE OF LIMITATIONS

H. First Action Tolling Statute on Second Action.

1. In General.

3 Witkin Cal. Proc. Actions § 738

[§ 738] In General.

(1) *Nature of Problem.* The commencement of an action interrupts the statute (see *supra*, §735); but what happens if the complaint fails to set forth a basis for recovery? A badly conceived complaint, filed just before the expiration of the period, may end in disaster: the plaintiff cannot amend, after the statute has run, to state a cause of action totally unrelated to the one first alleged (see 5 *Cal. Proc.* (5th), *Pleading*, §1217), and the first abortive action normally does not toll the statute on a second action.

(2) *Statutory Rules.* If the defect in the first action is procedural and technical, many state statutes allow a second action to be brought within a short period after termination of the first, notwithstanding the expiration of the limitations period. (See 33 *Cal. L. Rev.* 453; 63 *Harv. L. Rev.* 1243; 51 *Am.Jur.2d* (2000 ed.), *Limitation of Actions* §273 et seq.; 79 *A.L.R.2d* 1270, 1309 [beginning of period allowed by statute for commencement of new action after failure, otherwise than on merits, of action timely begun]; 92 *A.L.R.2d* 168 [action to enforce insurance policy as tolling statute on later action to reform policy]; 6 *A.L.R.3d* 1043 [statute permitting new action after failure of original action commenced within period of limitation, as applicable in cases where original action failed for lack of jurisdiction]; 13 *A.L.R.3d* 848, 979 [applicability, as affected by change in parties, of statute permitting commencement of new action within specified time after failure of prior action not on merits]; 16 *A.L.R.3d* 452 [application to period of limitations fixed by contract, of statute permitting new action to be brought within specified time after failure of prior action for cause other than on merits].)

California has a similar statute, but it is of narrower scope. If an action is commenced within the applicable statute of limitations and a subsequent judgment for the plaintiff is "reversed on appeal other than on the merits, a new action may be commenced within one year after the reversal." (*C.C.P.* 355.) The statute applies, of course, only when the reversal is for such a defect as to require the filing of a new action; it has no reference where the judgment was reversed on the merits. (See 22 *Cal. Law Rev. Com. Reports*, p. 919 [*C.C.P.* 355 codifies earlier judicial rule enunciated in *Watterson v. Owens River Canal Co.* (1922) 190 C. 88, 210 P. 625, and in *Schneider v. Schimmels* (1967) 256 C.A.2d 366, 64 C.R. 273, *infra*, §740].)

(3) *Judicial Rules.* A judicial solution to the problem was devised in *Burnett v. New York Cen. R. Co.* (1965) 380 U.S. 424, 85 S.Ct. 1050, 13 L.Ed.2d 941. Plaintiff railroad employee was injured in Indiana on March 17, 1960. On

March 15, 1963, within the 3-year statute of the Federal Employers' Liability Act, he filed a proper action in Ohio and served process. But the Ohio venue was wrong, the Ohio law had no transfer statute, and the action was dismissed. Eight days later he filed a new action in the federal district court. *Held*, the statute of limitations was tolled by the filing and service in the first action. (85 S.Ct. 1053, 13 L.Ed.2d 944.)

Notwithstanding C.C.P. 355, California has also adopted a judicial solution of broad scope. As the court in *Hull v. Central Pathology Service Med. Clinic* (1994) 28 C.A.4th 1328, 34 C.R.2d 175, *infra*, §748, noted:

(a) C.C.P. 355 provides an extremely narrow exception to the sometimes harsh dictates of the statute of limitations. The provision is designed to ensure to the diligent suitor the right to a hearing in court until he reaches a judgment on the merits. C.C.P. 355 by its terms applies only when a judgment favorable to the plaintiff is reversed on appeal other than on the merits. (28 C.A.4th 1334, citing the text.)

(b) However, in the usual case, when a judgment is reversed on appeal without qualification, the cause is remanded for a new trial on all of the issues presented by the pleadings. Thus, in the usual situation, a plaintiff will have no need to file a new action, and thus no need for recourse to C.C.P. 355. Rather, the statute is implicated only in the uncommon situation where a judgment in favor of the plaintiff is reversed on appeal for procedural reasons that require the filing of a new action. Faced with an equitable statute that can seldom be invoked to do equity, the courts have also crafted a rule of equitable tolling that satisfies the rationale of C.C.P. 355. (28 C.A.4th 1334.) (See *infra*, §739 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]



46 of 188 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XVIII. SUSPENSION OR EQUITABLE TOLLING OF STATUTE OF LIMITATIONS

H. First Action Tolling Statute on Second Action.

2. Equitable Tolling Doctrine.

3 *Witkin Cal. Proc. Actions* § 739

[§ 739] Equitable Tolling Doctrine.

(1) *Bollinger Rule*. *Bollinger v. National Fire Ins. Co. of Hartford, Connecticut* (1944) 25 C.2d 399, 154 P.2d 399, declares a general equitable principle of disregarding the statute of limitations to avoid a harsh and technical forfeiture. Defendant insurer agreed on the amount of a fire loss but unconditionally denied liability. The policy provided that 30 days must elapse, from the time of the agreement on the amount of loss, before suit. Plaintiff, the trustee in bankruptcy of the insured, filed an action before that time. Defendant, by various dilatory proceedings (change of venue, extensions of time, and continuances), delayed the trial for about a year, and then moved for a nonsuit on the ground that the action was premature. The nonsuit was granted, and plaintiff did not appeal. Instead he filed a new action 5 days later, and the trial judge sustained a demurrer on the ground that the contractually shortened limitations period (15 months) had run. *Held*, this was error; the statute was not a bar. The court held that the nonsuit was improperly granted because the action was not premature and also because defendant had waived the objection. But plaintiff's failure to appeal left this issue finally determined against him. How, then, did the court justify the maintenance of the new action after the statute had run? On two theories:

(a) The English statute and those of other states, though broader in terms than *C.C.P.* 355 (*supra*, §738) are rooted in the same policy, and all require a liberal construction to carry out their purpose. This purpose, as declared in a leading New York decision, is "to insure to the diligent suitor the right to a hearing in court till he reaches a judgment on the merits. ... The important consideration is that by invoking judicial aid, a litigant gives timely notice to his adversary of a present purpose to maintain his rights before the courts." (25 C.2d 409.)

(b) It would be "a perversion of the policy of the statute of limitation to deny a trial on the merits." (25 C.2d 406.) Apart from the statute "this court is not powerless to formulate rules of procedure where justice demands it." (25 C.2d 410.) Plaintiff brought a timely action and diligently pursued it; the limitations period would not have expired except for the unreasonable delay in bringing the first action to trial. "Since this action is in reality a continuance of the earlier action involving the same parties, facts, and cause of action, and was promptly filed after entry of judgment on the nonsuit, plaintiff should not be deprived of a trial on the merits." (25 C.2d 410, 411.) Defendant insurer had a duty of good faith to the insured, and "the equitable considerations that justify relief in this case are applicable whether defendant violated a legal duty in failing to disclose its intention to set up this technical defense, or whether it is now merely seeking the aid of a court in sustaining a plea that would enable it to obtain an unconscionable advantage and

enforce a forfeiture." (25 C.2d 411.)

The *Bollinger* decision, by a divided court, has been criticized. (See dissents, and 33 Cal. L. Rev. 453.) The most difficult aspect of the case is the fact that the defendant's technical defense became possible only because of the plaintiff's negligence in acquiescing in the continuances and in failing to appeal from the order of nonsuit. (See 25 C.2d 420.)

(2) *Illustrations: Equitable Tolling Allowed.* Subsequent decisions have approved the theories in *Bollinger* and have expanded the scope of the *Bollinger* rule. (See *Elkins v. Derby* (1974) 12 C.3d 410, 419, 420, 115 C.R. 641, 525 P.2d 81, *infra*, §744, citing the text; *Addison v. California* (1978) 21 C.3d 313, 318, 146 C.R. 224, 578 P.2d 941, *infra*, §741; *Stalberg v. Western Title Ins. Co.* (1994) 27 C.A.4th 925, 932, 32 C.R.2d 750 [plaintiffs' action against neighbors to quiet title to fictitious easement over plaintiffs' land tolled statute for plaintiffs' subsequent slander of title action against their title insurer; first action was reasonable remedy, because plaintiffs only discovered insurer's role in creating easement in that action, and insurer was not prejudiced by delay]; *Structural Steel Fabricators v. Orange* (1995) 40 C.A.4th 459, 463, 46 C.R.2d 867 [subcontractor's action against general contractor for nonpayment of work completed on city project tolled statute for subcontractor's subsequent action against city to enforce stop notice; city had sufficient notice and was not prejudiced, and first action was pursued in good faith but was ineffective because general contractor was bankrupt]; *Marcario v. Orange* (2007) 155 C.A.4th 397, 407, 65 C.R.3d 903 [employee's union grievance proceeding tolled statute for her subsequent claims against employer for violation of civil rights and intentional infliction of emotional distress].)

(3) *Illustrations: Equitable Tolling Denied.* Other cases, although recognizing the validity of the *Bollinger* rule, have refused to extend it to other contexts. (See *Gordon v. Law Offices of Aguirre & Meyer* (1999) 70 C.A.4th 972, 979, 83 C.R.2d 119, *supra*, §647 [equitable tolling doctrine does not apply to C.C.P. 340.6 (statute of limitations for legal malpractice actions)]; *Javor v. Taggart* (2002) 98 C.A.4th 795, 804, 120 C.R.2d 174 [prior state law tort claim does not toll statute of limitations on federal civil rights action under 42 U.S.C., §1983]; *Apple Valley Unified School Dist. v. Vavrinek, Trine, Day & Co.* (2002) 98 C.A.4th 934, 953, 120 C.R.2d 629 [no equitable tolling where first proceeding did not involve defendant sued in second proceeding]; *McMahon v. Albany Unified School Dist.* (2002) 104 C.A.4th 1275, 1292, 129 C.R.2d 184 [following *Javor*]; *Mills v. Forestex Co.* (2003) 108 C.A.4th 625, 651, 134 C.R.2d 273 [doctrine was not available in action against contractor and siding manufacturer for latent construction defects and related claims].)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Illustrations: Equitable Tolling Allowed.* See *McDonald v. Antelope Valley Community College Dist.* (2008) 45 C.4th 88, 104, 84 C.R.3d 734, 194 P.3d 1026 [administrative grievance procedures for discrimination complaints support equitable tolling of statute of limitations on Fair Employment and Housing Act (FEHA) claim, even though exhaustion of procedures is not required to support FEHA claim; procedures afford both parties full opportunity to formally or informally resolve dispute in way that minimizes or eliminates need for further judicial proceedings]; *Tarkington v. California Unemp. Ins. App. Bd.* (2009) 172 C.A.4th 1494, 1502, 92 C.R.3d 131 [petition for administrative mandamus relief from decision that employees of two grocery companies were ineligible for unemployment insurance benefits during union lockout, which was dismissed for misjoinder, equitably tolled limitations period for later petition challenging same decision as to employees of only one grocery company; first petition was timely, claims were nearly identical, and employees acted reasonably and in good faith].



47 of 188 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XVIII. SUSPENSION OR EQUITABLE TOLLING OF STATUTE OF LIMITATIONS

H. First Action Tolling Statute on Second Action.

3. First Action Outside California.

3 Witkin Cal. Proc. Actions § 740

[§ 740] First Action Outside California.

Because the literal language of *C.C.P.* 355 (see *supra*, §738) is not followed, the theory in *Bollinger v. National Fire Ins. Co. of Hartford, Connecticut* (1944) 25 *C.2d* 399, 154 *P.2d* 399, *supra*, §739, can be applied to prevent a forfeiture in any situation in which the first action has failed to accomplish its purpose. In *Schneider v. Schimmels* (1967) 256 *C.A.2d* 366, 64 *C.R.* 273, the theory was applied to a pending action outside California in which jurisdiction of the defendant could not be obtained.

Defendant allegedly assaulted plaintiff in Colorado in July 1962. Pursuant to Colorado procedure, plaintiff served a summons on defendant in Colorado, but failed to comply with the statutory requirement of filing a complaint within 10 days after service. Defendant left the state and came to California, and his attorney had the Colorado action dismissed. Plaintiff filed a new action, but could not serve summons, and the Colorado Supreme Court issued prohibition, holding that the summons in the first action could not serve as a summons in the second. Plaintiff then filed a new action in California in April 1965, serving defendant here. The 1-year statute of limitations of both Colorado and California had clearly run. *Held*, however, judgment on demurrer reversed; the statute was tolled because plaintiff's California action was filed within 1 year after the Colorado court prohibited the second action. The court pointed out that there was no injustice to defendant, who had timely warnings of the Colorado action and was informed of later proceedings. (256 *C.A.2d* 371.) (For disapproval of *Schneider* on unstated grounds, see *Wood v. Elling Corp.* (1977) 20 *C.3d* 353, 362, footnote 7, 142 *C.R.* 696, 572 *P.2d* 755, *infra*, §748.) (See *Gordon v. Law Offices of Aguirre & Meyer* (1999) 70 *C.A.4th* 972, 979, 83 *C.R.2d* 119, *supra*, §647 [equitable tolling doctrine does not apply to attorney malpractice actions subject to *C.C.P.* 340.6, including where plaintiff in California action alleged that *C.C.P.* 340.6 was equitably tolled during pendency of prior Arizona action].)

SUPPLEMENT: [This section is current through the latest supplement]



48 of 188 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XVIII. SUSPENSION OR EQUITABLE TOLLING OF STATUTE OF LIMITATIONS

H. First Action Tolling Statute on Second Action.

4. Federal Proceeding Tolling State Action.

a. General Rule.

3 Witkin Cal. Proc. Actions § 741

[§ 741] General Rule.

In *Addison v. California* (1978) 21 C.3d 313, 146 C.R. 224, 578 P.2d 941, plaintiffs, in the business of selling automobiles at auction, were investigated by state and county officials for allegedly fraudulent practices. Officers of the State Department of Motor Vehicles and a deputy district attorney of Santa Clara County conducted a search under a search warrant, seized records, and publicized the raid in the news media. Plaintiffs filed claims against the state and county within the statutory periods, and commenced an action in the federal district court within the 6-month period after rejection of the claims. The federal action alleged violation of federal civil rights, and, under pendent jurisdiction, state law causes of action for defamation, conversion, and abuse of process. Defendants moved to dismiss for lack of jurisdiction. The federal court granted the motion as to the federal causes after determining that a federal civil rights action would not lie against public entities. The court then decided not to retain the state causes and dismissed them without prejudice to refiling in the state court. Plaintiffs filed their state court action 8 days prior to the order of dismissal, in anticipation of this ruling, but after the 6-month period of *Govt.C. 945.6* had expired. *Held*, reversing judgment on demurrer, the period was tolled during the period in which plaintiff's action was pending in the federal court.

(a) *Bollinger v. National Fire Ins. Co. of Hartford, Connecticut* (1944) 25 C.2d 399, 154 P.2d 399, *supra*, §739, and *Elkins v. Derby* (1974) 12 C.3d 410, 115 C.R. 641, 525 P.2d 81, *infra*, §744, announce a general equitable rule operating independently of the literal wording of the Code of Civil Procedure: The running of the limitations period is tolled when an injured person has several legal remedies and reasonably and in good faith pursues one. (21 C.3d 318.)

(b) The conditions of the rule are met here: (1) The federal court without prejudice declined to assert jurisdiction over a timely filed state law cause of action, and plaintiffs thereafter promptly asserted that cause in the proper state court; as in *Elkins*, there was no policy reason requiring plaintiffs to file simultaneous separate actions in both courts; (2) defendants received timely notice by the federal court action and had the opportunity to prepare their defense; hence, no prejudice to them appears. (21 C.3d 319.)

(c) Defendants contend that the equitable tolling doctrine should not apply to actions against public entities, because there is a need for prompt resolution of disputes to aid orderly fiscal planning. And they point to the legislative

repudiation of *Williams v. Los Angeles Metropolitan Transit Authority* (1968) 68 C.2d 599, 68 C.R. 297, 440 P.2d 497, by the amendment of C.C.P. 352 on tolling during minority (see supra, §§696, 697). But neither the cases on strict construction of the Government Claims Act nor the legislative amendment of C.C.P. 352 controls the present case. Here, plaintiffs duly filed their claims and timely filed their federal action; also, the printed warning ("you have only six (6) months ... to file a court action"--Govt.C. 913) "gave no indication that filing suit in federal court would not comply equally with the statutory mandate." (21 C.3d 320.)

(d) Application of the equitable tolling doctrine requires a balancing of the injustice to the plaintiff of barring the claim against the effects on the important public interest expressed by the Government Claims Act limitations statute. This balance must be struck in plaintiffs' favor. If the tolling doctrine were not applied, plaintiffs would be denied a hearing on the merits; and its application should not substantially undermine the policy of prompt resolution of claims, for the delay resulting from plaintiffs' erroneous choice of forum was minimal--in contrast to the prospect of a 21-year tolling period in *Williams*. (21 C.3d 321.)

Nichols v. Canoga Industries (1978) 83 C.A.3d 956, 148 C.R. 459, follows *Addison*. In 1968 plaintiff, the sole stockholder of R Corp., made a written agreement with defendant C Corp., under which plaintiff and R agreed to transfer its assets and business to C in return for shares of C stock. The transfer was made in February 1969, but plaintiff claimed breach of warranty of financial condition by C. In November 1972, plaintiff sued C in the federal district court, on one cause of action for violation of §10(b) of the federal Securities Exchange Act, and on another for breach of contract (under the district court's pendent jurisdiction; see 2 Cal. Proc. (5th), *Jurisdiction*, §72). The district court granted summary judgment for defendant on the ground that the §10(b) cause of action was barred by a 3-year statute of limitations, and then dismissed the breach of contract cause for lack of pendent jurisdiction. Plaintiff appealed from the federal court judgment; and in January 1975, while the appeal was pending, he filed the present action in the California court on the breach of contract cause, alleging the same facts as in the federal court complaint. The trial judge sustained a demurrer and dismissed on the ground that the 4-year period of C.C.P. 337(1) had run (February 1969 closing date of transaction, over 5 years before complaint filed). *Held*, reversed; the statute was tolled by the federal action.

(a) *Bollinger rule and applications*. The limitations period is tolled when the injured person has several legal remedies and reasonably and in good faith pursues one, provided that the defendant is not prejudiced. This "equity based decisional rule" has been applied where a prior action resulted in a nonsuit because it was premature (*Bollinger*); where a party pursued a third-party claim for property on which execution was levied and later sued for damages for unlawful detention of the property (*Tu-Vu Drive-In Corp. v. Davies* (1967) 66 C.2d 435, 58 C.R. 105, 426 P.2d 505); where a petition for mandamus was filed in the Court of Appeal rather than the superior court and a petition for the same relief was later filed in the superior court (*Friends of Mammoth v. Board of Supervisors* (1972) 8 C.3d 247, 269, 104 C.R. 761, 502 P.2d 1049); and where a proceeding was filed with the Workers' Compensation Board and an action was later filed in the superior court (*Elkins*). (83 C.A.3d 963.)

(b) *Bollinger rule applies here*. Plaintiff had two legal remedies for the alleged breach of warranty: one in the federal court as a pendent claim to a cause of action for violation of the federal statute, and the other in the California court. His institution of the federal court action was reasonable and in good faith, and no prejudice to defendant or undue delay in filing appears on the face of the state court complaint. (83 C.A.3d 963.)

(c) *Remedies need not be inconsistent*. The contention that tolling occurs only where the two remedies are inconsistent is not supported by the cases; although this restriction is possibly inherent in the facts of *Elkins*, it is not compatible with the facts of *Tu-Vu Drive-In* or *Friends of Mammoth*. And *Freeman v. State Farm Mut. Auto. Ins. Co.* (1975) 14 C.3d 473, 121 C.R. 477, 535 P.2d 341, is distinguishable: It did not involve successive actions against the same defendant (the second action was against a defendant not named in the first proceeding). (83 C.A.3d 964.)

(d) *Dismissal for delay in prosecution distinguished*. *Manor Drug Stores v. Blue Chip Stamps* (1977) 71 C.A.3d 423, 139 C.R. 483, held that the pendency of a federal court action does not render the prosecution of a parallel

California action impossible or impractical so as to avoid the bar of former C.C.P. 583 (now *C.C.P. 583.110* et seq.). But there are dual policies underlying that section: the first is similar to that on which the statute of limitations rests--to promote the trial of cases before evidence is lost or memory of witnesses is dimmed; the second is designed to protect defendants from being subjected to the annoyance of an action remaining undecided for an indefinite period of time. The second policy is not involved in statute of limitations cases, where no action is pending; hence, the *Manor Drug* case is not controlling. (83 *C.A.3d* 964, 965.)

Other cases have applied the *Addison* rule. (See *Jones v. Tracy School Dist.* (1980) 27 *C.3d* 99, 108, 165 *C.R.* 100, 611 *P.2d* 441 [employee subjected to illegal wage discrimination pursued federal administrative remedy; limitations period was tolled in subsequent action under *Lab.C. 1197.5*]; *Barnett v. Lewis* (1985) 170 *C.A.3d* 1079, 1085, 1089, 217 *C.R.* 80 [11 *U.S.C.*, §362, staying proceedings against judgment debtor during bankruptcy, did not toll 10-year statutes governing enforcement and renewal of judgment where bankruptcy involved minority shareholder and judgment sought to be enforced was against corporation]; *Appalachian Ins. Co. v. McDonnell Douglas Corp.* (1989) 214 *C.A.3d* 1, 41, 42, 262 *C.R.* 716 [*Bollinger* criteria were met and action was timely filed]; *Kertesz v. Ostrovsky* (2004) 115 *C.A.4th* 369, 376, 8 *C.R.3d* 907 [*C.C.P.* 337.5 (10-year limitations period for action on judgment; see supra, §675) was tolled by judgment debtor's federal bankruptcy petition and resulting automatic stay; distinguishing and disagreeing with *Barnett*]; *Mojica v. 4311 Wilshire, LLC* (2005) 131 *C.A.4th* 1069, 1072, 31 *C.R.3d* 887 [1-year limitations period for personal injury action was tolled by federal proceeding, and thus plaintiff was entitled to take advantage of extension of 1-year period to 2 years by enactment of *C.C.P.* 335.1 (see supra, §552) during pendency of federal proceeding]; 6 *Cal. Proc.* (5th), *Proceedings Without Trial*, §411.) (On whether limitations period for state action is tolled while federal class action is pending, see supra, §736; on tolling of state limitations period during pendency of federal administrative proceedings, see supra, §731; on effect of federal tolling statute on California's equitable tolling doctrine, see infra, §743.)

SUPPLEMENT: [This section is current through the latest supplement]



49 of 188 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XVIII. SUSPENSION OR EQUITABLE TOLLING OF STATUTE OF LIMITATIONS

H. First Action Tolling Statute on Second Action.

4. Federal Proceeding Tolling State Action.

b. Distinction: Where Federal Court Is Without Jurisdiction.

3 *Witkin Cal. Proc. Actions* § 742

[§ 742] Distinction: Where Federal Court Is Without Jurisdiction.

In *Garabedian v. Skochko* (1991) 232 C.A.3d 836, 283 C.R. 802, plaintiff real estate agent was permitted by the United States Department of Housing and Urban Development (HUD) to show homes to potential purchasers. On June 3, 1987, in the course of an inspection of a HUD home, he fell into an empty swimming pool because of accumulated debris. HUD rejected his tort claim on the ground that, although HUD owned the home, it was managed by S, an independent contractor. In August 1988 plaintiff filed an action in the federal court against defendant S and the United States, and the court dismissed defendant from that action for lack of jurisdiction over him. On September 7, 1989, plaintiff filed this action in the California court, after the 1-year statute had run (from the date of injury, June 3, 1987). *Held*, the federal tort action did not toll the statute.

(a) Plaintiff alleged that he did not know and could not have known that anyone other than a HUD employee could have been responsible for the negligence that led to his injuries, until HUD's letter of July 27, 1988, advising him of the independent contractor status of defendant. But a plaintiff's ignorance of his cause of action or the identity of the wrongdoer does not prevent the running of the statute unless there is some wrongdoing on the part of the defendant. (232 C.A.3d 840, citing the text.) And HUD had no legal obligation to advise plaintiff in sufficient time for him to initiate the appropriate proceedings. (232 C.A.3d 840.)

(b) Under the "several remedies" rule, the statute may be tolled when an injured person has several legal remedies and reasonably and in good faith pursues one of them. (232 C.A.3d 841, citing and discussing *Santa Clara v. Hayes Co.* (1954) 43 C.2d 615, 275 P.2d 456, *Tu-Vu Drive-In Corp. v. Davies* (1967) 66 C.2d 435, 58 C.R. 105, 426 P.2d 505, *Myers v. Orange* (1970) 6 C.A.3d 626, 86 C.R. 198, and *Elkins v. Derby* (1974) 12 C.3d 410, 115 C.R. 641, 525 P.2d 81, *infra*, §744.) In these cases, the plaintiffs sought preliminary relief from the parties before filing suit against them in the state court actions. Here, however, defendant was not named in the federal tort claim; and by the time plaintiff filed his federal action naming defendant, more than 1 year had elapsed. (232 C.A.3d 843.)

(c) "[T]he underlying assumption of the 'several remedies' rule is that the plaintiff is aware of alternative remedies and makes a conscious, rational and reasonable decision to pursue one remedy in order to eliminate the need to pursue the other. Those cases applying the rule do not address a situation in which the plaintiff has failed to ascertain the need

to pursue an alternative remedy until after the statute of limitations has run on the alternative remedy." (232 C.A.3d 844.)

(d) The equitable tolling rule of *Addison v. California* (1978) 21 C.3d 313, 146 C.R. 224, 578 P.2d 941, supra, §741, requires timely notice to the defendant. (232 C.A.3d 845, 846.) But the question here is "whether formal notice to one defendant is sufficient notice to another defendant." (232 C.A.3d 846.) "We assume, as the complaint alleges, that respondent had notice of the claim filed with HUD. We conclude, however, that the doctrine of equitable tolling does not apply merely because defendant B has obtained timely knowledge of a claim against defendant A for which defendant B knows or believes he may share liability." (232 C.A.3d 847, discussing *Dowell v. Contra Costa* (1985) 173 C.A.3d 896, 219 C.R. 341, supra, §265.)

SUPPLEMENT: [This section is current through the latest supplement]



50 of 188 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XVIII. SUSPENSION OR EQUITABLE TOLLING OF STATUTE OF LIMITATIONS

H. First Action Tolling Statute on Second Action.

4. Federal Proceeding Tolling State Action.

c. Effect of Federal Tolling Statute.

3 Witkin Cal. Proc. Actions § 743

[§ 743] Effect of Federal Tolling Statute.

(1) *Nature of Statute.* In 1990, more than 12 years after California's common law equitable tolling doctrine governing state claims pending in federal court was set forth in *Addison v. California* (1978) 21 C.3d 313, 146 C.R. 224, 578 P.2d 941, supra, §741, Congress enacted 28 U.S.C., §1367(d), a federal saving statute. It provides that the statute of limitations for a state claim over which a federal court has supplemental jurisdiction is tolled while the claim is pending in the federal court and for 30 days after it is dismissed, unless state law provides for a longer tolling period.

The statute's tolling provision applies to the period during which the state claim is pending in a federal district court, and to the period during which an appeal is pending in the Circuit Court of Appeals. However, tolling is not extended by the later filing of a petition for a writ of certiorari with the United States Supreme Court. That interpretation is supported (a) by federal courts analyzing the word "pending" in 28 U.S.C., §1367(d), and state courts analyzing the term in analogous statutes; and (b) by the fact that denial of a petition for a writ of certiorari has no significance with respect to the judgment, nor does it constitute an adjudication of anything. (*Kendrick v. Eureka* (2000) 82 C.A.4th 364, 368, 98 C.R.2d 153; see *Okoro v. Oakland* (2006) 142 C.A.4th 306, 312, 48 C.R.3d 260 [following *Kendrick*].)

(2) *Constitutionality.* Application of the federal statute to claims brought against a state's political subdivisions is constitutional. (*Jinks v. Richland County, South Carolina* (2003) 538 U.S. 456, 123 S.Ct. 1667, 1670, 1672, 155 L.Ed.2d 631, 638, 641.) However, the federal statute does not toll the statute of limitations for claims against nonconsenting states filed in federal court but subsequently dismissed on Eleventh Amendment grounds. (*Raygor v. Regents of University of Minnesota* (2002) 534 U.S. 533, 122 S.Ct. 999, 1005, 152 L.Ed.2d 27, 37.)

(3) *Conflict in Courts of Appeal on Application of Statute.* *Kolani v. Gluska* (1998) 64 C.A.4th 402, 75 C.R.2d 257, was the first California decision to apply 28 U.S.C., §1367(d). Plaintiff, the former employer of defendant salesperson, brought an action against defendant for intentional and negligent interference with prospective advantage based on a covenant not to compete. The action was filed 78 days after a federal district court had dismissed plaintiff's pendent state claims containing identical allegations, and more than 2 years after accrual of those claims. The trial judge sustained defendants' demurrer without leave to amend on the ground that the action was barred by the 2-year

limitations period of *C.C.P.* 339. *Held*, affirmed.

(a) The equitable tolling doctrine relieves a plaintiff from the bar of a limitations statute when the plaintiff, possessing several legal remedies, reasonably and in good faith pursues one designed to lessen the extent of injuries or damage. One of the requirements for equitable tolling is reasonable conduct by the plaintiff, which is addressed by the requirement of 28 U.S.C., §1367(d) that the plaintiff file the second action within 30 days after dismissal of the pendent claims. "This part of subdivision (d) substitutes a bright-line rule in place of the case-by-case analysis of 'reasonableness' found in the equitable tolling cases. It affords plaintiff a reasonable time within which to get the case refiled. At the same time, it upholds the policy of the statute of limitations, by *limiting* the time to refile, and thus assuring that claims will be *promptly* pursued in any subsequent action." (64 C.A.4th 409.)

(b) Because plaintiff did not refile in state court until 78 days after the federal suit was dismissed, 28 U.S.C., §1367(d) did not save the claims. (64 C.A.4th 410.) That provision does not exclude from the limitations computation the entire interval that a plaintiff's federal claims were pending. That construction is not needed to avoid forfeitures, because 30 days is ample time for a diligent plaintiff to refile the state claims. Further, that construction would do significant harm to the statute of limitations policy. (64 C.A.4th 410.)

(c) Plaintiff's claims were not saved by the common law equitable tolling doctrine announced in *Addison*. "It was not 'reasonable' for appellants to refile much later than 30 days after the prior dismissal, in the face of section 1367(d)'s express 30-day requirement, absent a state statute extending that period, and absent some extraordinary circumstance justifying the delay." (64 C.A.4th 411.)

However, the court in *Bonifield v. Nevada* (2001) 94 C.A.4th 298, 114 C.R.2d 207, stated that *Kolani* was "wrongly decided." (94 C.A.4th 301.) Plaintiffs--a decedent's estate and family members--brought a wrongful death action against defendant county and county officials in state court after the parties dismissed a related federal action. Plaintiffs filed the federal action 77 days before expiration of the 6-month limitations period of Govt.C. 945.6, and refiled their claims in state court 146 days thereafter. The trial court sustained defendants' demurrer without leave to amend on the basis that the state action was untimely. *Held*, affirmed.

(a) In the federal action, the parties executed and filed a stipulation to dismiss the action, which contained an order of dismissal for the District Court judge's signature. However, the court clerk entered the dismissal without the judge's signature. Plaintiffs claimed that, because the judge had not signed and returned the order of dismissal, the federal statute's tolling period "never actually ran." (94 C.A.4th 302.) But that claim is without merit. Under the Federal Rules of Civil Procedure, a party's action may be dismissed without order of court by the filing of a stipulated dismissal signed by all parties appearing in the action; the dismissal is effective, as here, on the filing of the stipulation without further judicial action. (94 C.A.4th 303.)

(b) 28 U.S.C., §1367(d) operated to toll the statute of limitations on plaintiffs' state claims from the date on which they filed their federal lawsuit, through the 30th day after the federal action was dismissed. Only then did the remaining 77 days left on the statute of limitations start to run. The contrary holding in *Kolani* ignores and is inconsistent with the plain meaning of the statutory language. Further, the additional 30 days of tolling are intended to provide a grace period after dismissal of the federal action that is filed on or near the final day of the limitations period. That the additional 30 days may be unnecessary in some cases does not, as asserted by the *Kolani* court, do significant harm to the statute of limitations policy. "By no stretch of the imagination can it be said that an additional 30 days unduly compromises the policy in favor of the prompt prosecution of legal claims." (94 C.A.4th 304.)

(c) Even with the extra 77 days, however, plaintiffs filed their action 1 week too late; thus, it was properly dismissed as untimely. (94 C.A.4th 304.)

(d) The *Kolani* court's analysis of the effect of 28 U.S.C., §1367(d) on California's equitable tolling doctrine, i.e., a state claim refiled more than 30 days after dismissal of the related federal action is untimely and must be dismissed

without extraordinary circumstances justifying delay, is incorrect. "Nothing in section 1367(d) can be construed to supplant our state's common law doctrine of equitable tolling with a 'bright-line' 30-day rule. Quite to the contrary, section 1367(d) explicitly states that it provides an extra 30 days 'unless State law provides for a longer tolling period.' Therefore, the plain language of section 1367(d) contemplates that California's equitable tolling doctrine may, 'occasionally and in special situations' ... , provide a longer tolling period than that specified in section 1367(d)." (94 C.A.4th 305, 306, quoting *Addison*.) However, the present case does not present a special circumstance, because plaintiffs could not meet the third requirement of the doctrine, i.e., that they acted reasonably in not filing their state action within 77 days after the federal statute's saving period ceased. The delay was attributable to their attorney's neglect, i.e., the failure to appreciate that the filing of the stipulation for dismissal constituted a dismissal of the federal action, which does not satisfy the standard of reasonableness and special circumstances required by the equitable tolling doctrine. (94 C.A.4th 306.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Nature of Statute.* See *Guevara v. Ventura County Community College Dist.* (2008) 169 C.A.4th 167, 171, 172, 87 C.R.3d 50 [tolling period in 28 U.S.C., §1367(d) prevails over conflicting tolling period in state statute; 28 U.S.C., §1367(d) applies to dismissed claims by federal courts exercising their supplemental jurisdiction to review claims that require deferential review of state administrative decisions].



51 of 188 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XVIII. SUSPENSION OR EQUITABLE TOLLING OF STATUTE OF LIMITATIONS

H. First Action Tolling Statute on Second Action.

5. Compensation Proceeding Tolling Tort Action.

a. General Rule.

3 Witkin Cal. Proc. Actions § 744

[§ 744] General Rule.

The California Supreme Court made a strong statement on the power and duty of courts to apply the tolling principle to new situations in *Elkins v. Derby* (1974) 12 C.3d 410, 115 C.R. 641, 525 P.2d 81. Plaintiff suffered an injury on September 8, 1969, when attacked by a performing timber wolf at defendants' "Animal Kingdom." On July 13, 1970, he filed an application for workers' compensation. On October 15, 1970, the referee determined that he had not been an employee at the time of the injury because he had not received compensation for his services. The referee's decision became final in December 1970, and plaintiff filed the present tort action on January 19, 1971. The lower court sustained a demurrer on the ground that the 1-year statute of limitations expired in September 1970. *Held*, reversed; the statute was tolled by the filing of the compensation claim, for the period between the filing of the claim and the final decision of the referee.

(a) The statute is tolled when exhaustion of an administrative remedy is a prerequisite to a civil action (see *supra*, §730 et seq.); and, even where exhaustion of one remedy is not a prerequisite to the pursuit of another, it is tolled when an injured person has several legal remedies and reasonably and in good faith pursues one (see *supra*, §506). (12 C.3d 414.)

(b) The present case is distinguishable, for no exhaustion or election is required: an injured person may simultaneously file a compensation claim and a tort action. Accordingly, early cases held that the statute was not tolled. But later cases, particularly *Bollinger v. National Fire Ins. Co. of Hartford, Connecticut* (1944) 25 C.2d 399, 154 P.2d 399, *supra*, §739, cast doubt on the strict view. (12 C.3d 416, footnote 3.)

(c) The modern tendency is to suspend the running of the statute where this will not frustrate its primary purpose--to prevent surprise through the revival of stale claims (see *supra*, §433). (12 C.3d 417.) And the defendant's interest in being promptly informed of a claim in order to gather and preserve evidence is fully satisfied when a prospective tort plaintiff files a compensation claim within the 1-year period. The employer can then identify and locate witnesses; although the employer may choose not to gather evidence on fault (not an issue in compensation proceedings), the employer will in most instances be able to reach the witnesses again, particularly if they are continuing employees; also, if an employer suspects that the facts are near the boundary line of compensation and tort,

the employer may well choose to obtain evidence of fault immediately; and, finally, the employer may find it necessary to assemble evidence on fault because of the possibility of an increased award for serious and wilful misconduct. (12 C.3d 418.)

(d) The accepted practice of duplicative filing has an undesirable effect on the injured party. The compensation system was intended to afford a simple and nontechnical path to relief; it affords means by which an employee may learn about his or her rights informally and without an attorney. "Unaware, under such circumstances, that he may be entitled to a remedy only in superior court or overwhelmed by seemingly inscrutable distinctions between 'employees' and 'independent contractors' or injuries arising within and without 'the course of employment,' an injured party can easily lose his tort remedy while devoting his attention to pursuing a compensation claim. ... The tolling of the statute during the pendency of the compensation claim does much to eliminate this trap--and without unfairly prejudicing the employer." (12 C.3d 419.)

(e) The duplicative proceedings are also a burden on "the already overtaxed judicial system," and this is an independent reason for tolling. "Procedural rules should engender smooth and functional adjudication. A procedural practice is neither sacred nor immutable. It must be able to withstand the charge that it is inequitable, burdensome or dysfunctional. We think duplicative filing succumbs to all three charges. We also believe that respect for our legal system--a respect which is absolutely essential to its effective functioning--is hardly enhanced by an incongruent procedural structure which causes an injured party simultaneously to allege before different tribunals propositions which are mutually inconsistent. Absent a tolling rule, this is precisely the strategy to which a party unsure of his remedy must resort in order to protect his right to recovery." (12 C.3d 420.) (See *Baillargeon v. Department of Water & Power* (1977) 69 C.A.3d 670, 683, 138 C.R. 338 [following *Elkins*]; *Valdez v. Himmelfarb* (2006) 144 C.A.4th 1261, 1270, 51 C.R.3d 195 [same]; 71 A.L.R.3d 849 [effect of injured employee's proceeding for workers' compensation benefits on running of statute of limitations governing action for personal injury arising from same incident].)

SUPPLEMENT: [This section is current through the latest supplement]

Cf. *Aguilera v. Heiman* (2009) 174 C.A.4th 590, 597, 95 C.R.3d 18 [tort statute of limitations period for filing negligence action against property manager and homeowners association was not equitably tolled by filing of workers' compensation claims against them, where defendants had not been named in workers' compensation action within limitations period].



52 of 188 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XVIII. SUSPENSION OR EQUITABLE TOLLING OF STATUTE OF LIMITATIONS

H. First Action Tolling Statute on Second Action.

5. Compensation Proceeding Tolling Tort Action.

b. Distinction: Where Different Wrong Is Involved.

3 *Witkin Cal. Proc. Actions* § 745

[§ 745] Distinction: Where Different Wrong Is Involved.

In *Aerojet General Corp. v. Superior Court* (1986) 177 C.A.3d 950, 223 C.R. 249, plaintiff commenced a workers' compensation proceeding against his employer in 1978, and in 1982, filed a personal injury action based on fraudulent concealment of the cause of his injury. *Held*, prosecution of the workers' compensation claim did not toll the statute on the personal injury claim.

(a) In *Elkins v. Derby* (1974) 12 C.3d 410, 115 C.R. 641, 525 P.2d 81, *supra*, §744, the same injury formed the basis for both the civil proceeding and the workers' compensation claim; here, the complaint relates to a different wrong. Thus, the two proceedings are not alternative remedies for the same harm but different remedies for different harms. (177 C.A.3d 954, 956.)

(b) Because filing the workers' compensation claim did not provide defendants with notice of the fraudulent concealment action, the statute was not tolled. (177 C.A.3d 957.) And because the facts show plaintiff's knowledge of the cause of action for fraudulent concealment in 1978, his action is barred. (177 C.A.3d 956.)

SUPPLEMENT: [This section is current through the latest supplement]



53 of 188 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XVIII. SUSPENSION OR EQUITABLE TOLLING OF STATUTE OF LIMITATIONS

H. First Action Tolling Statute on Second Action.

6. Compensation Proceeding Tolling Other Proceeding.

3 Witkin Cal. Proc. Actions § 746

[§ 746] Compensation Proceeding Tolling Other Proceeding.

In *Collier v. Pasadena* (1983) 142 C.A.3d 917, 191 C.R. 681, the court, elaborately reviewing the California case law on pendency of a first proceeding as a basis for tolling the statute on a second proceeding, applied the reasoning of *Elkins v. Derby* (1974) 12 C.3d 410, 115 C.R. 641, 525 P.2d 81, supra, §744, to hold that a workers' compensation proceeding tolled a city's 6-month limitation on initiating a disability pension claim. "Workers' compensation claims are 'different and separate' from tort claims against an employer. Yet the California Supreme Court had no difficulty using one to equitably toll the other. ... Nor did the court have any trouble tolling a state tort claim action while the plaintiffs pursued a federal civil rights lawsuit in federal court. ... Even more to the point the court of appeal managed to toll an equitable claim for supplemental disability benefits while a workers' compensation proceeding ran its course." (142 C.A.3d 931.) (See *Barth v. Board of Pension Commrs.* (1983) 145 C.A.3d 826, 832, 193 C.R. 755, [same result].)

SUPPLEMENT: [This section is current through the latest supplement]



54 of 188 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XVIII. SUSPENSION OR EQUITABLE TOLLING OF STATUTE OF LIMITATIONS

H. First Action Tolling Statute on Second Action.

7. First Action Not Diligently Pursued.

a. Statute in Second Action Tollen.

3 *Witkin Cal. Proc. Actions* § 747

[§ 747] Statute in Second Action Tollen.

In *Miranda v. Great Southwest Fire Ins. Co.* (1975) 50 C.A.3d 492, 123 C.R. 357, R filed timely claims against defendant insurers and, on rejection, commenced the R action for damages. The complaint was filed in May 1970. R died in June 1970, and in November 1970, an ex parte order was obtained substituting the estate of R as plaintiff. Defendants moved to dismiss on the ground that the estate was not an entity capable of suing (see 4 *Cal. Proc.* (5th), *Pleading*, §69), and the motion was granted in April 1971. Two years later, M, the administrator of the R estate, filed an identical action. Defendants demurred, setting up the bar of former C.C.P. 353 (6 months after death), and the lower court entered judgment of dismissal on demurrer. *Held*, reversed. In practical effect the M action was a continuance of the R action. Whether it was unduly delayed was a question of fact to be determined on a consideration of the peculiar circumstances of the case: R had been murdered, the date of his death was uncertain, his estate was probated in Massachusetts, and there were great difficulties in obtaining the facts necessary to bring the action. (50 C.A.3d 496.)

The dissent pointed to the distinguishable facts of *Bollinger v. National Fire Ins. Co. of Hartford, Connecticut* (1944) 25 C.2d 399, 154 P.2d 399, *supra*, §739. There defendant was guilty of dilatory tactics, here there were none; there the second action was filed almost immediately after the first was dismissed, here not until 2 years had passed. (50 C.A.3d 498.)

SUPPLEMENT: [This section is current through the latest supplement]



55 of 188 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XVIII. SUSPENSION OR EQUITABLE TOLLING OF STATUTE OF LIMITATIONS

H. First Action Tolling Statute on Second Action.

7. First Action Not Diligently Pursued.

b. Statute in Second Action Not Tolloed.

3 *Witkin Cal. Proc. Actions* § 748

[§ 748] Statute in Second Action Not Tolloed.

The reasoning of *Miranda v. Great Southwest Fire Ins. Co.* (1975) 50 C.A.3d 492, 123 C.R. 357, supra, §747, was disapproved in *Wood v. Elling Corp.* (1977) 20 C.3d 353, 142 C.R. 696, 572 P.2d 755. Plaintiff sued defendants Mr. and Mrs. W and two Nevada corporations, alleging default on a promissory note and fraudulent conveyances of property. Summons was promptly served on defendants Mr. and Mrs. W, but not on the two corporations, and they successfully sought dismissal for delay in service (see 6 *Cal. Proc.* (5th), *Proceedings Without Trial*, §319 et seq.). The action was then tried and judgment was rendered against the individual defendants. Prior to entry of judgment, plaintiff brought a second action against the same parties seeking the same relief, but also alleging that the two corporations were the alter egos of defendants Mr. and Mrs. W, and seeking to hold them liable for the personal obligations of these individual defendants. In response to defendants' demurrer on the ground that the fraud statute of limitations had run, plaintiff contended that the period from filing to dismissal should be deducted. *Held*, no deduction was permissible.

(a) After a dismissal, a new action is subject to any applicable statute of limitations. (20 C.3d 359.)

(b) The rule of *Bollinger v. National Fire Ins. Co. of Hartford, Connecticut* (1944) 25 C.2d 399, 154 P.2d 399, supra, §739, depends on the existence of the three factors present in that case, including diligence in pursuing the first action. Diligence was absent here; the first action was dismissed for failure to serve summons. (20 C.3d 362.)

(c) Plaintiff's contention that *Bollinger* applies because the first action was diligently pursued as to the individual defendants is unacceptable. It would permit a plaintiff to impair the credit of a corporate defendant for an indefinite period of time while maintaining an action against other defendants alleged to be its controlling principals, by the expedient of failing to serve the corporation and renewing the action after each dismissal. (20 C.3d 362.)

(d) *Miranda* and *Schneider v. Schimmels* (1967) 256 C.A.2d 366, 64 C.R. 273, supra, §740, are disapproved to the extent they are inconsistent. (20 C.3d 362, footnote 7.)

Hull v. Central Pathology Service Med. Clinic (1994) 28 C.A.4th 1328, 34 C.R.2d 175, also refused to apply the *Bollinger* theory. *Hull* involved the second action by plaintiff against defendant medical providers for failure to care for

and treat plaintiff arising out of events occurring in December 1989. In plaintiff's first action, she alleged malpractice and loss of consortium. Plaintiff subsequently filed a motion for leave to amend her complaint to add causes of action for fraud and intentional infliction of emotional distress, with accompanying claims for punitive damages. The trial judge granted the motion, ruling that the amendment was not subject to *C.C.P.* 425.13 (leave to file amended pleading for punitive damages against health care provider; see 6 *Summary* (10th), *Torts*, §1600 et seq.), because it alleged intentional torts rather than professional negligence. After defendants' writ of mandamus was denied, the California Supreme Court granted review (*Central Pathology Service Med. Clinic v. Superior Court* (1992) 3 C.4th 181, 10 C.R.2d 208, 832 P.2d 924; see 6 *Summary* (10th), *Torts*, §1604). The Supreme Court held that, because the intentional torts alleged by plaintiff were directly related to the professional services provided by defendants as health care providers, the amended complaint was subject to the requirements of *C.C.P.* 425.13. On remand, the trial judge vacated the earlier order and denied the motion to amend.

In February 1993, plaintiff filed the present action against defendants, alleging emotional distress and breach of oral contract, and seeking punitive damages. Defendants demurred on several grounds, including failure to comply with *C.C.P.* 425.13, and the bar of the statute of limitations. The trial judge sustained the demurrer without leave to amend, ruling that, pursuant to the Supreme Court's decision, plaintiff could have brought a further motion to amend the complaint in the first action, rather than raising her claims in a second action that arose from the same facts. *Held*, affirmed; the second action was not equitably tolled by the first action.

(a) Under *Bollinger* and its progeny (supra, §739 et seq.), three elements must be present before equitable tolling will apply: (1) The plaintiff must have diligently pursued the claim; (2) the fact that the plaintiff is left without a judicial forum to resolve the claim must be attributable to forces outside the plaintiff's control; and (3) the defendant must not be prejudiced. (28 C.A.4th 1334, 1335, 1336.)

(b) Here, plaintiff did not satisfy either of the first two elements: She did not diligently pursue the claims set forth in her second complaint. Rather, with full knowledge of the facts underlying these claims, she filed her first action without raising them. Moreover, while she was unable to amend her complaint in her first action to include punitive damages due to her failure to comply with the time limits of *C.C.P.* 425.13, she was free to seek leave to amend the initial complaint to allege the claims pleaded in her second action, but without punitive damages. (28 C.A.4th 1336.)

Other cases are to the same effect. (See *Central Bank v. Transamerica Title Ins. Co.* (1978) 85 C.A.3d 859, 867, 149 C.R. 822 [following *Miranda*]; *Hu v. Silgan Containers Corp.* (1999) 70 C.A.4th 1261, 1270, 83 C.R.2d 333 [plaintiff's good faith effort in rectifying nonpayment of filing fees, which resulted in voiding of first complaint by court clerk, did not toll statute; no error by court and no delay or dilatory tactics by defendant]; *Thomas v. Gilliland* (2002) 95 C.A.4th 427, 430, 433, 115 C.R.2d 520 [following *Wood*; filing first complaint, which plaintiff's attorney voluntarily dismissed because he was simultaneously facing two trials, did not toll statute to permit filing second complaint after statute had expired].)

SUPPLEMENT: [This section is current through the latest supplement]



56 of 188 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XVIII. SUSPENSION OR EQUITABLE TOLLING OF STATUTE OF LIMITATIONS

I. Trial of Insured's Murderer.

3 *Witkin Cal. Proc. Actions* § 749

[§ 749] Trial of Insured's Murderer.

In *Mize v. Reserve Life Ins. Co.* (1975) 48 C.A.3d 487, 121 C.R. 848, an insured was murdered. The administrator advised the insurer that the named beneficiary was a suspect and had been arrested. The insurer sent notice of cancellation of the policies for fraud, which the administrator disputed. Thereafter the beneficiary was charged with murder and convicted, and the conviction was affirmed on appeal. The administrator then filed the present action against defendant insurer to recover the amounts due on behalf of the estate. Under the settled rule of law, the beneficiary forfeited his right to the insurance (see 14 *Summary* (10th), *Wills and Probate*, §297 et seq.), and the estate of the insured was entitled to it. But the action was brought 6 years after the insured's death, and the insurer set up the defense of the 4-year statute of limitations for equitable actions (*C.C.P.* 343, *supra*, §677). *Held*, the statute was tolled during the period of the criminal proceedings.

(a) The administrator could have brought the action on his appointment; but the evidence of the beneficiary's guilt was being assembled by the authorities, and an action prior to the finality of the judgment of conviction would have been impracticable. (48 C.A.3d 494.)

(b) The insurer, having denied all liability under the policies, could have proceeded at once to have the issue of its liability determined and, if it had been held liable, could have interpleaded the claimants--the insured and the administrator. (48 C.A.3d 494.)

(c) The principles declared in the *Bollinger v. National Fire Ins. Co. of Hartford, Connecticut* (1944) 25 C.2d 399, 154 P.2d 399, *supra*, §739, and *Elkins v. Derby* (1974) 12 C.3d 410, 115 C.R. 641, 525 P.2d 81, *supra*, §744, called for tolling of the statute; i.e., the purpose of the statute was served by the timely notice to the insured of the facts, and tolling would not frustrate that purpose. (48 C.A.3d 492, 493.)

(d) The same facts were effective to toll the 3-year time limitation in the insurance policy. (48 C.A.3d 495.)

SUPPLEMENT: [This section is current through the latest supplement]



57 of 188 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XVIII. SUSPENSION OR EQUITABLE TOLLING OF STATUTE OF LIMITATIONS

J. Revival by Acknowledgment of Debt.

1. In General.

3 Witkin Cal. Proc. Actions § 750

[§ 750] In General.

(1) *Revival of Debt.* A debtor's act of acknowledgment of a debt (contractual obligation) starts a new full statutory period running on the cause of action. The jurisdictions vary in their statutory and case law applications of this doctrine, particularly in the formal requisites of the acknowledgment. (See 63 *Harv. L. Rev.* 1254; 51 *A.L.R.2d* 331, 362 [account stated]; 1 *Summary* (10th), *Contracts*, §239 et seq.)

(2) *Revival of Judgment.* There is a conflict of authority whether a judgment may be revived, but an early California case applied the doctrine to a money judgment. (*McCormick v. Brown* (1868) 36 C. 180, 184; see *Wilson v. Walters* (1944) 66 *C.A.2d* 1, 4, 151 *P.2d* 685; 63 *Harv. L. Rev.* 1255; 51 *Am.Jur.2d* (2000 ed.), *Limitation of Actions* §301 et seq.; 45 *A.L.R.2d* 967 [part payment or promise to pay judgment as affecting running of statute of limitations].)

SUPPLEMENT: [This section is current through the latest supplement]



58 of 188 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XVIII. SUSPENSION OR EQUITABLE TOLLING OF STATUTE OF LIMITATIONS

J. Revival by Acknowledgment of Debt.

2. Formal Requisites.

3 *Witkin Cal. Proc. Actions* § 751

[§ 751] Formal Requisites.

Ordinarily there must be a writing, in the form of an express promise to pay or an unconditional acknowledgment of the indebtedness, signed by the debtor, and communicated to the creditor or the creditor's agent or representative. If these requirements are satisfied, informal writings, such as letters, notices, and checks, will be sufficient. (See *C.C.P.* 360; *Searles v. Gonzalez* (1923) 191 C. 426, 429, 216 P. 1003 [general discussion of requisites]; *Easton v. Ash* (1941) 18 C.2d 530, 536, 116 P.2d 433 [new promise made to executor of creditor's estate]; *Western Coal & Mining Co. v. Jones* (1946) 27 C.2d 819, 822, 167 P.2d 719 [if subsisting obligation is admitted, no need for express statement of willingness to pay is required]; *Weatherwax v. Hills* (1931) 113 C.A. 557, 558, 298 P. 853 [several letters]; *Van Cauteren v. Forger* (1941) 45 C.A.2d 388, 114 P.2d 6 [checks sent by debtor, receipts sent by creditor]; *Estate of Cole* (1942) 52 C.A.2d 520, 523, 529, 126 P.2d 660 [letter]; *Sterling v. Title Ins. & Trust Co.* (1942) 53 C.A.2d 736, 128 P.2d 31 [several letters]; *Herman v. Brown* (1949) 91 C.A.2d 758, 205 P.2d 1086 [acknowledgment addressed to debtor's future administrator but sent to creditor]; *Buescher v. Lastar* (1976) 61 C.A.3d 73, 75, 132 C.R. 124 [letters recognizing obligation of note were sufficient, despite debtor's observation that he had no money and that little would be gained by lawsuit]; 30 *Cal. L. Rev.* 85; 63 *Harv. L. Rev.* 1256, 1259; 51 *Am.Jur.2d* (2000 ed.), *Limitation of Actions* §310 et seq.; 21 *A.L.R.4th* 1121 [necessity and sufficiency, in order to toll statute of limitations as to debt, of statement of amount of debt in acknowledgment or new promise to pay]; 1 *Summary* (10th), *Contracts*, §240.)

SUPPLEMENT: [This section is current through the latest supplement]



59 of 188 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XVIII. SUSPENSION OR EQUITABLE TOLLING OF STATUTE OF LIMITATIONS

J. Revival by Acknowledgment of Debt.

3. Effect of Sufficient Acknowledgment.

a. Acknowledgment Before and After Bar.

3 *Witkin Cal. Proc. Actions* § 752

[§ 752] Acknowledgment Before and After Bar.

(1) *In General.* Acknowledgment by any of the permissible means (express promise, admission of indebtedness, part payment of note) before the statute has run tolls or suspends the statute for a new period on the old debt. On the other hand, if the new promise or written acknowledgment is made after the statute has run, a new obligation is created, for which the original barred debt is said to be "consideration." The cause of action is on the new obligation, and a new statutory period starts running as on any other written promise. (See *Kaichen's Metal Mart v. Ferro Cast Co.* (1995) 33 C.A.4th 8, 15, 16, 39 C.R.2d 233 [stating general rule and holding that debtor's acknowledgment of debt to senior lienholder before expiration of limitations period, but after creation of junior lien, was nevertheless effective to preclude junior lienholder's assertion of statute in its subsequent action to declare senior lien invalid]; on substantive effect of distinction on mortgage securing note, see *Sanford v. Bergin* (1909) 156 C. 43, 52, 103 P. 333; *Curtis v. Holee* (1921) 184 C. 726, 730, 195 P. 395; 4 *Summary* (10th), *Security Transactions in Real Property*, §121 et seq.)

(2) *Duration of New Limitations Period.* This distinction has an important bearing on the applicable statute of limitations, i.e., on the duration of the new period. If the old as well as the new promise is embodied in a writing, the 4-year statute applies. But if the old obligation is not founded on a written instrument, and is extended by a writing, two different statutes may apply, and the rules are as follows: (a) if the acknowledgment is made before the statute has run, the action is on the old obligation, and the new period is only 2 years; (b) if the acknowledgment is made after the statute has run, the action is on the new promise, a written instrument, and the new period is 4 years. (*Vassere v. Joerger* (1938) 10 C.2d 689, 692, 76 P.2d 656; see 63 *Harv. L. Rev.* 1257; 4 *Stanf. L. Rev.* 419, 421.)

(3) *Renewal of Note.* Another distinction was made in *Steiner v. Davis* (1938) 24 C.A.2d 692, 76 P.2d 157. A promissory note, due 3 years from the date of execution, started a 7-year period (3 years to due date, 4 years for statute to run). Just before the statute ran, the maker wrote on the instrument "Renewed Apr. 21, 1926" and signed. *Held*, suit over 4 years later was timely. This was not a mere acknowledgment (which would give only a new 4-year period) but a renewal of the note itself. Hence, the payee had 3 more years to the due date and 4 additional years for the statute to run. (24 C.A.2d 694.)

SUPPLEMENT: [This section is current through the latest supplement]



60 of 188 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XVIII. SUSPENSION OR EQUITABLE TOLLING OF STATUTE OF LIMITATIONS

J. Revival by Acknowledgment of Debt.

3. Effect of Sufficient Acknowledgment.

b. No Effect on Third Parties.

3 *Witkin Cal. Proc. Actions* § 753

[§ 753] No Effect on Third Parties.

(1) *General Rule.* Generally speaking, revival is like an express waiver of the statute, i.e., it is personal with the particular debtor who makes the acknowledgment, and suspends the statute only as to that debtor and those in privity with him or her. Thus, the acknowledgment by one joint debtor will not suspend the statute or revive the barred claim as against another joint debtor. (See *Steiner v. Croonquist* (1951) 108 C.A.2d Supp. 895, 898, 238 P.2d 690; *Bemer v. Bemer* (1957) 152 C.A.2d 766, 773, 314 P.2d 114; 63 Harv. L. Rev. 1258; 74 A.L.R.2d 1287 [payment by one of two or more joint or joint and several debtors as suspending or tolling limitation].)

(2) *Junior Lienholders.* A junior lienholder is in the same position as the debtor, and its rights regarding any available defense are the same. Thus, where the debtor loses the right to raise the defense of the statute of limitations, it is not available to the junior creditor. (*Kaichen's Metal Mart v. Ferro Cast Co.* (1995) 33 C.A.4th 8, 16, 39 C.R.2d 233 [debtor's acknowledgment of debt to senior lienholder was effective to preclude junior lienholder's assertion of statute in its subsequent action to declare senior lien invalid].)

SUPPLEMENT: [This section is current through the latest supplement]



61 of 188 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XVIII. SUSPENSION OR EQUITABLE TOLLING OF STATUTE OF LIMITATIONS

J. Revival by Acknowledgment of Debt.

4. Insufficient Acknowledgment.

3 *Witkin Cal. Proc. Actions* § 754

[§ 754] Insufficient Acknowledgment.

Insufficiency of a writing to revive the obligation is usually a result of the following defects:

(1) A conditional or equivocal promise or acknowledgment. The rule requires a distinct and unqualified promise or admission of the indebtedness. (See *Vassere v. Joerger* (1938) 10 C.2d 689, 692, 76 P.2d 656 [promise to pay at future date]; *Foristiere v. Alonge* (1929) 98 C.A. 563, 567, 277 P. 367 [conditional promise, to pay only balance due if credited with certain sum]; *Maurer v. Bernardo* (1931) 118 C.A. 290, 294, 5 P.2d 36 [promise to pay when able]; *Heiser v. McAlpine* (1937) 20 C.A.2d 467, 469, 67 P.2d 141 [conditional promise, to liquidate debt in particular manner]; *Steiner v. Croonquist* (1951) 108 C.A.2d Supp. 895, 899, 238 P.2d 690 [letter of inquiry on what creditor was claiming]; 30 Cal. L. Rev. 85.)

(2) The failure to communicate the acknowledgment to the creditor or the creditor's agent or representative. (See *Clunin v. First Fed. Trust Co.* (1922) 189 C. 248, 250, 207 P. 1009, 1 Summary (10th), *Contracts*, §242; *Estate of Azevedo* (1936) 17 C.A.2d 710, 711, 62 P.2d 1058 [acknowledgment in petition filed with probate court was not communication to decedent creditor]; 4 So. Cal. L. Rev. 314.) (On effect of insufficient acknowledgment in creating estoppel to plead statute, see *infra*, §763.)

SUPPLEMENT: [This section is current through the latest supplement]



62 of 188 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XVIII. SUSPENSION OR EQUITABLE TOLLING OF STATUTE OF LIMITATIONS

J. Revival by Acknowledgment of Debt.

5. Part Payment of Promissory Note.

3 *Witkin Cal. Proc. Actions* § 755

[§ 755] Part Payment of Promissory Note.

(1) *In General.* In some states the part payment of principal or interest has the same effect as a writing. (See 63 *Harv. L. Rev.* 1256; 51 *Am.Jur.2d* (2000 ed.), *Limitation of Actions* §339 et seq.) This method of suspension was formerly not permissible at all in California under the strict terms of *C.C.P.* 360. (*Clunin v. First Fed. Trust Co.* (1922) 189 C. 248, 252, 207 P. 1009; see 11 *Cal. L. Rev.* 130.) But in 1947, a narrowly drawn amendment to *C.C.P.* 360 allowed suspension for a new period before the statute has run (not revival of an already barred note), by payment of interest or principal on a promissory note. (See 21 *So. Cal. L. Rev.* 2; 45 *A.L.R.2d* 967 [part payment or promise to pay judgment as affecting running of statute of limitations]; 1 *Summary* (10th), *Contracts*, §240.) (On debtor's restrictive language accompanying part payment as preventing interruption of statute, see 10 *A.L.R.4th* 932.)

It should be noted that part payment on an open account gives an extended period to sue, not because it tolls the statute, but because it determines the time of accrual of the cause of action (from the date of the last item). (See *Furlow Pressed Brick Co. v. Balboa Land & Water Co.* (1921) 186 C. 754, 763, 200 P. 625.)

(2) *Successive Payments.* The 1947 amendment stated that part payment should be deemed a sufficient acknowledgment or promise of a continuing contract to take the case out of the statute of limitations. But the extremely involved language raised a serious problem of construction where payments were made both before and after the normal time when the statute would have run. In *Eilke v. Rice* (1955) 45 *C.2d* 66, 286 *P.2d* 349, the court took the broad view that the statute will be tolled as long as payments are made that are not more than 4 years apart. (45 *C.2d* 74.) The 1955 Legislature reached the same result. The amendment, after the statement that part payment shall be deemed a sufficient acknowledgment or promise of a continuing contract, substitutes the following for the former ambiguous language: "to stop, from time to time as any such payment is made, the running of the time within which an action may be commenced upon the principal sum or upon any installment of principal or interest due on such note, and to start the running of a new period of time, but no such payment of itself shall revive a cause of action once barred." (See 29 *So. Cal. L. Rev.* 370; 3 *U.C.L.A. L. Rev.* 110.)

(3) *Payment by Debtor or Agent.* The payment must be made "by the party to be charged." (*C.C.P.* 360.) Thus, it must be made by the debtor or the debtor's authorized agent, because it is regarded as the equivalent of an acknowledgment of the debt and an implied promise to pay it. Thus, a creditor-payee may owe the maker money on an

independent obligation and credit this on the note; or the creditor may sell collateral securities and apply the proceeds to the obligation of the note; but neither of these acts by the creditor constitutes payment by the debtor so as to toll the statute of limitations.

The authorities to this effect were discussed in *Bullock v. Simon* (1955) 132 C.A.2d Supp. 881, 281 P.2d 916, where plaintiff employer (creditor) credited defendant employee (debtor on a note) with sums allowed by him as vacation pay. In holding that the statute ran, nevertheless, the court indicated approval of the majority view "that the mere entry of a credit by the creditor without the consent of the debtor is without effect upon the statute of limitations and likewise the fact that the debtor knows of the unauthorized entry of credit on his debt and makes no objection thereto is not alone sufficient to constitute a ratification of the credit so as to toll the statute." (132 C.A.2d Supp. 882.) (See *Martindell v. Bodrero* (1967) 256 C.A.2d 56, 60, 63 C.R. 774 [stating rule but holding that evidence was sufficient to show that corporation made payment as actual agent of directors who were makers of note].)

SUPPLEMENT: [This section is current through the latest supplement]



63 of 188 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XVIII. SUSPENSION OR EQUITABLE TOLLING OF STATUTE OF LIMITATIONS

K. Probation With Order of Restitution.

3 Witkin Cal. Proc. Actions § 756

[§ 756] Probation With Order of Restitution.

C.C.P. 352.5 tolls the period where, after a cause of action accrues against a person, he or she "comes under an order for restitution as a condition of probation with respect to the specific act or omission giving rise to such person's liability." The time during which the order is in effect is excluded from the period.

SUPPLEMENT: [This section is current through the latest supplement]



64 of 188 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XVIII. SUSPENSION OR EQUITABLE TOLLING OF STATUTE OF LIMITATIONS

L. Insurance Cases.

1. Tolling While Insurer Investigates Claim.

a. Liability Insurance.

3 *Witkin Cal. Proc. Actions* § 757

[§ 757] Liability Insurance.

(1) *In General.* The doctrine of equitable tolling has been applied in cases involving liability insurance. *Ins.C.* 2071, authorizing a shortened 1-year limitations period for disputes involving standard fire insurance policies, has been held to be equitably tolled from the time the insured notifies the insurer of the loss until coverage is denied. (See *Prudential-LMI Commercial Ins. v. Superior Court* (1990) 51 C.3d 674, 693, 274 C.R. 387, 798 P.2d 1230, *supra*, §471; *Aliberti v. Allstate Ins. Co.* (1999) 74 C.A.4th 138, 146, 87 C.R.2d 645 [tolling continues until insurer formally notifies insured *in writing* that claim was denied]; *Migliore v. Mid-Century Ins. Co.* (2002) 97 C.A.4th 592, 605, 118 C.R.2d 548 [insurer's letter to insured stating that no further benefits would be paid on claim was sufficiently unequivocal denial to end tolling, even though letter did not say "deny" or "denied" and insurer invited insured to submit further information for consideration, obtained supplemental report, and did not inform insured of limitations period]; *Ashou v. Liberty Mut. Fire Ins. Co.* (2006) 138 C.A.4th 748, 763, 41 C.R.3d 819 [C.C.P. 340.9 (revival of barred action arising from Northridge earthquake; see *supra*, §466) was tolled while insurer reopened and reconsidered claim; statute's legislative intent supported tolling, and tolling would promote, not frustrate, statute's purposes].) (On tolling of period for submitting proof of loss as prerequisite for insured's filing action on claim, see *supra*, §229.)

(2) *Distinctions.* Courts have found reasons to refuse to apply or extend the doctrine permitting tolling until the insurer denies the claim. (See *Hydro-Mill Co. v. Hayward, Tilton & Rolapp Ins. Associates* (2004) 115 C.A.4th 1145, 1163, 10 C.R.3d 582, citing the text [doctrine did not apply to insured's action against insurance broker for failure to procure adequate coverage]; *Marselis v. Allstate Ins. Co.* (2004) 121 C.A.4th 122, 127, 16 C.R.3d 668 [refusing to extend doctrine to toll settled claim until insurer provided insured with unequivocal written statement that claim was closed]; *Doheny Park Terrace Homeowners Assn. v. Truck Ins. Exchange* (2005) 132 C.A.4th 1076, 1088, 34 C.R.3d 157 [no tolling based on insurer's failure to send insured *formal* written denial of claim, where insurer had unequivocally advised insured in writing that loss was less than policy's deductible].)

Singh v. Allstate Ins. Co. (1998) 63 C.A.4th 135, 73 C.R.2d 546, involved a question of first impression: Although the 1-year statute generally is equitably tolled from the time the insured notifies the insurer of the loss until coverage is denied, is the statute also tolled during the period the insurer voluntarily agrees to reconsider its initial denial? Plaintiffs filed an action against defendant insurer for wrongful denial of their fire loss claim nearly 20 months after the loss and

about 13 months after defendant had unequivocally denied their claim, but within 1 year of defendant's agreement, as a courtesy to plaintiffs, to reconsider its original denial. *Held*, the action was untimely; the limitations period was not tolled while defendant reconsidered its initial denial.

(a) Once a claim has been made, the insurer has pursued its investigation, and the claim has been denied, the policies justifying equitable tolling have been fulfilled. The insurer's right to notice, and its ability to investigate and marshal any evidence it may need to defend, have been preserved. The insured has been provided at least some grounds for the denial before being required to sue the carrier. Thereafter, the enforcement of the 1-year limit works no injustice to either party. (63 C.A.4th 142, 145.)

(b) If an insurer's conduct after denying coverage expressly waives the 1-year limit or induces the insured to forbear filing the action, the doctrines of waiver and estoppel are available to avoid injustice. (63 C.A.4th 145.)

(c) "[B]eginning a new period of equitable tolling based merely on a *request* for reconsideration would be anomalous. By the simple expedient of making many requests for reconsideration, claimants could extend the one-year statute at will with successive periods of tolling." (63 C.A.4th 145.)

SUPPLEMENT: [This section is current through the latest supplement]



65 of 188 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XVIII. SUSPENSION OR EQUITABLE TOLLING OF STATUTE OF LIMITATIONS

L. Insurance Cases.

1. Tolling While Insurer Investigates Claim.

b. Title Insurance.

3 *Witkin Cal. Proc. Actions* § 758

[§ 758] Title Insurance.

Forman v. Chicago Title Ins. Co. (1995) 32 C.A.4th 998, 38 C.R.2d 790, applied the equitable tolling doctrine in the title insurance context. Plaintiff timely filed a claim under his title insurance policy based on defendant title insurer's failure to list an easement affecting property that plaintiff had purchased. Defendant denied liability after taking 16 months to investigate the claim. Plaintiff subsequently filed this action against defendant, alleging breach of the title insurance contract and breach of the covenant of good faith and fair dealing. The insurer raised the statute of limitations (C.C.P. 339(1)) as a defense, and the trial judge found that the 2-year limitations period had expired before plaintiff filed suit. *Held*, reversed; the limitations period on an action on a title insurance policy is equitably tolled while the insurer investigates a timely filed claim.

(a) Sixteen months of the 2-year limitations period were used by defendant to investigate plaintiff's timely claim. The period during which plaintiff's right to bring suit was postponed was for the insurer's benefit, relating to its procedures for investigating the claim, and that period could not be charged against plaintiff. (32 C.A.4th 1003, citing *Prudential-LMI Commercial Ins. v. Superior Court* (1990) 51 C.3d 674, 274 C.R. 387, 798 P.2d 1230, *supra*, §471.)

(b) "Equitable tolling will only implement, and not frustrate, the purpose of allowing insureds a two-year period to decide whether to file suit for breaches of a title insurance policy. It will not work any hardship on the insurer who will have been on notice and fully investigated the claim before deciding not to honor that claim." (32 C.A.4th 1003.)

(c) Equitable tolling allows the insured to wait until after the investigation before filing suit, thereby minimizing unnecessary lawsuits. It also protects the reasonable expectations of the insured, encourages settlements, and discourages unnecessary bad faith suits. (32 C.A.4th 1004.)

(d) Equitable tolling is also consistent with the insurer's entitlement to receive prompt notice of a claim and the insured's being penalized for waiting too long to make a claim. Whatever time the insured delays in notifying the insurer about a claim may be deducted from the period during which the insured will be allowed to file suit after the claim is denied. (32 C.A.4th 1004.)

(e) *Tabachnick v. Ticor Title Ins. Co.* (1994) 24 C.A.4th 70, 29 C.R.2d 59, supra, §525, which held that the statute of limitations had run on an action on a title insurance policy that was filed 3 years after the insured had discovered his loss, "is readily distinguishable." (32 C.A.4th 1004.) "Nothing in *Tabachnick* suggests equitable tolling does not apply to title insurance cases. *Tabachnick* did not even involve an issue of equitable tolling under *Prudential-LMI*. The insured in that case did not file a claim with the insurance company until well after the two-year period expired. Thus, it was too late to toll the running of the statute while the insurance company processed the claim. Tolling can only suspend the running of a statute that still has time to run; it cannot revive a statute which has already run out. In *Tabachnick*, the statutory period had expired before the insured filed his claim with the insurance company. In this case it had not." (32 C.A.4th 1006.) (But see 65 *Butterfield v. Chicago Title Ins. Co.* (1999) 70 C.A.4th 1047, 1062, 83 C.R.2d 40 [following *Tabachnick*, but refusing to permit equitable tolling where limitations period had expired before plaintiff tendered claim].) (On tolling of period for submitting proof of loss as prerequisite for insured's filing action on claim, see supra, §229.)

SUPPLEMENT: [This section is current through the latest supplement]



66 of 188 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XVIII. SUSPENSION OR EQUITABLE TOLLING OF STATUTE OF LIMITATIONS

L. Insurance Cases.

2. Tolling Until Final Judgment in Underlying Action Against Insured.

3 *Witkin Cal. Proc. Actions* § 759

[§ 759] Tolling Until Final Judgment in Underlying Action Against Insured.

The limitations period governing an insured's action against its insurer for breach of the duty to defend is equitably tolled from the time the insured tenders the defense of the underlying action until that action is terminated by final judgment. (*Lambert v. Commonwealth Land Title Ins. Co.* (1991) 53 C.3d 1072, 1077, 282 C.R. 445, 811 P.2d 737, supra, §524.) Similarly, the limitations period applicable to an insured's action against its liability insurer for bad faith in refusing to accept a reasonable settlement offer in excess of the policy limits is equitably tolled from the time of the entry of an excess judgment in the underlying action until that judgment becomes final. (*Archdale v. American Int. Specialty Lines Ins. Co.* (2007) 154 C.A.4th 449, 476, 64 C.R.3d 632 [relying on *Lambert*].)

SUPPLEMENT: [This section is current through the latest supplement]



67 of 188 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XVIII. SUSPENSION OR EQUITABLE TOLLING OF STATUTE OF LIMITATIONS

M. Repairing Defects.

1. General Rule of Tolling.

3 *Witkin Cal. Proc. Actions* § 760

[§ 760] General Rule of Tolling.

(1) *Equitable Tolling Doctrine*. In cases involving construction defects, defective products, and other breaches of warranty, courts have applied the equitable tolling doctrine to toll the statute of limitations during each period that the defendant promises or attempts to repair the defect. (See *Aced v. Hobbs-Sesack Plumbing Co.* (1961) 55 C.2d 573, 585, 12 C.R. 257, 360 P.2d 897, 4 *Summary* (10th), Sales, §53 [defective materials furnished by subcontractor to general contractor; limitations period of C.C.P. 337(1) was tolled on breach of warranty claim]; *Southern Calif. Enterprises v. D. N. & E. Walter & Co.* (1947) 78 C.A.2d 750, 755, 178 P.2d 785, supra, §538 [sale of defective personal property; limitations period of C.C.P. 339(1) was tolled on breach of warranty claim]; *Mack v. Hugh W. Comstock Associates* (1964) 225 C.A.2d 583, 589, 37 C.R. 466 [defective heating system installed in plaintiffs' home; limitations period was tolled for claims of breach of express warranties (C.C.P. 337(1)) and implied warranties (C.C.P. 339(1)) and consequential damages to property (C.C.P. 338(a)) and person (former C.C.P. 340(3), now C.C.P. 335.1)]; 68 A.L.R.3d 1277 [promises or attempts by seller to repair goods as tolling statute of limitations for breach of warranty].) (On exception for latent construction defects, see *infra*, §761.)

(2) *Statutory Rule for Defects in Original Construction of Residence*. C.C. 895 et seq. set forth standards for the original construction of residences and specify procedures for homeowners seeking to sue builders and other persons for defects. The statute establishes a prelitigation, nonadversarial claims resolution process during which the builder may offer to make repairs. (C.C. 910 et seq.) During this process, specified repairs toll the applicable statute of limitations for the action, but all others do not. (C.C. 927, 941(e); see *supra*, §617.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Equitable Tolling Doctrine*. See *Cardinal Health 301 v. Tyco Electronics Corp.* (2008) 169 C.A.4th 116, 133, 87 C.R.3d 5 [statute is not tolled unless defendant itself actually engages in repair efforts; neither repairs by third parties nor defendant's efforts to assist plaintiff in investigating cause of problems with product are sufficient].



68 of 188 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XVIII. SUSPENSION OR EQUITABLE TOLLING OF STATUTE OF LIMITATIONS

M. Repairing Defects.

2. Distinction: Latent Defects in Real Property.

3 *Witkin Cal. Proc. Actions* § 761

[§ 761] Distinction: Latent Defects in Real Property.

(1) *Conflict in Courts of Appeal.* The Courts of Appeal were in conflict whether the 10-year limitations period in *C.C.P. 337.15* governing actions for latent defects in real property (see *supra*, §608 et seq.) is equitably tolled while the defendant promises or attempts to repair the defect. In *Cascade Gardens Homeowners Assn. v. McKellar & Associates* (1987) 194 C.A.3d 1252, 240 C.R. 113, plaintiff condominium association sued defendant developer for damages for defective construction. The notice of completion had been filed on July 13, 1973, and the action, filed on August 12, 1983, was 1 month late and apparently barred by *C.C.P. 337.15*. However, during a period of 4 months in 1974, defendant, in response to complaints by plaintiff, had undertaken substantial repairs. *Held*, the repairs tolled the statute of limitations, and the extension of 4 months rendered the action timely. (194 C.A.3d 1256, 1257, citing and discussing *Mack v. Hugh W. Comstock Associates* (1964) 225 C.A.2d 583, 37 C.R. 466, *supra*, §760.) (See *Grange Debris Box & Wrecking Co. v. Superior Court* (1993) 16 C.A.4th 1349, 1360, 20 C.R.2d 515, *supra*, §614 [following *Cascade Gardens*].)

The statute was held not to have been tolled during repairs, and *Cascade Gardens* was distinguished, in *A & B Painting & Drywall v. Superior Court* (1994) 25 C.A.4th 349, 30 C.R.2d 418. Plaintiff, the owner and developer of a shopping mall, brought an action against defendant contractors for damages due to defective drywall installation 10 years and 4 months after defendants had filed a notice of completion of the project. Plaintiff contended that the action was not barred by the 10-year limitations period of *C.C.P. 337.15* because substantial repairs on the project performed for 11 months, after the notice of completion had been filed, tolled the statute, as did other substantial repairs begun 7 months before the running of the statute. *Held*, neither repair work tolled the statute, and the action was thus untimely.

(a) The repair work performed immediately before the running of the statute was performed by a third party, and not by defendants. Repairs by third parties do not involve reliance on the defendant in any way and do not furnish a basis for tolling. (25 C.A.4th 354, distinguishing *Cascade Gardens*.)

(b) The repair work performed immediately after the filing of the notice of completion did not toll the statute. If plaintiff had discovered defects in the allegedly defective drywall construction after the filing of the notice, rather than tolling the statute, that would have triggered a shorter period of time in which to bring suit. This was because the defects would then have been patent, rather than latent, and the 4-year statute to bring an action on a patent defect (*C.C.P. 337.1*

, *supra*, §§606, 607) would have applied. (25 C.A.4th 356.)

C.C.P. 337.15 was held not tolled during repairs in *FNB Mortg. Corp. v. Pacific General Group* (1999) 76 C.A.4th 1116, 90 C.R.2d 841. Cross-complainants, a mortgage company and a bank, brought a cross-action for express contractual indemnity against cross-defendant, the developer of an apartment complex, after the parties settled the underlying construction defects action. Both the cross-complaint and the underlying defects action were filed more than 10 years after the project was substantially complete. The trial judge found that the cross-action was barred by the 10-year statute of limitations under *C.C.P. 337.15*, rejecting cross-complainants' assertion that the statute was equitably tolled by cross-defendant's implicit promises to the plaintiff in the underlying action to make repairs to the complex. *Held*, affirmed.

(a) *C.C.P. 337.15* is not subject to equitable tolling for repair work. Engrafting a judicially created exception onto the existing legislatively enacted express exceptions--in conflict with the statute's specific objective of establishing an outer limit on liability--would usurp the Legislature's role of determining policy. (76 C.A.4th 1134, disagreeing with *Cascade Gardens*.)

(b) Even if *C.C.P. 337.15* were subject to tolling, cross-defendant's promises to plaintiff that it would repair the defects could not toll the statute of limitations for cross-complainants, because the latter did not rely on those promises. Cross-defendant did not do anything that induced cross-complainants to delay the filing of their cross-complaint. (76 C.A.4th 1134, 1135.)

(2) *Resolution by Supreme Court: No Equitable Tolling.* In *Lantzy v. Centex Homes* (2003) 31 C.4th 363, 2 C.R.3d 655, 73 P.3d 517, the California Supreme Court ultimately resolved the dispute in the Courts of Appeal about whether *C.C.P. 337.15* is subject to equitable tolling while a defendant's promises or attempts to repair defects are pending. Plaintiffs bought homes in a housing development. Leaks in the windows developed. Plaintiffs filed suit, alleging latent design defects, against the developer and other defendants about 9 months after the 10-year limitations period of *C.C.P. 337.15* had expired. Plaintiffs claimed that the statute of limitations was both equitably tolled during defendants' promises or attempts to repair the defects and that defendants were equitably estopped to assert the statute because, by that conduct, defendants had forestalled a timely action. *Held*, (a) *C.C.P. 337.15* is not subject to the equitable tolling doctrine; (b) *C.C.P. 337.15* is subject to the equitable estoppel doctrine, but an estoppel was not established under the facts of this case.

(a) *Equitable tolling.*

(1) Equitable tolling should not apply if it is inconsistent with the text of the relevant statute of limitations. (31 C.4th 363.) The plain language of *C.C.P. 337.15* suggests that the 10-year limitations period is not subject to extension for reasons not stated in the statute itself. Although *C.C.P. 337.15*, unlike some statutes of limitations, does not expressly ban nonstatutory tolling, its structure and tone differ markedly from "garden-variety" limitations statutes that simply provide for various limitations periods for the commencement of specified actions. *C.C.P. 337.15* "declares, in stentorian terms," that no action for latent construction defects may be brought "more than 10 years after the *substantial completion* of the development or improvement." Further, *C.C.P. 337.15* expressly exempts specified types of actions (see *supra*, §612 et seq.). "An argument thus arises ... that the Legislature intended to omit other exceptions." (31 C.4th 373.)

(2) Even more important, a broad tolling-for-repairs rule would contravene the statute's purpose of ensuring a generous but firm cutoff date for latent defect actions. Further, the extraordinary length of the limitations period weighs strongly against the need for an equitable tolling rule as a matter of fair procedure. The holding in *FNB Mortg. Corp.* is approved and the contrary holdings in *Cascade Gardens* and *Grange Debris Box & Wrecking Co* are disapproved. (31 C.4th 367, 374.)

(b) *Equitable estoppel.*

(1) Equitable tolling and equitable estoppel are distinct doctrines. Equitable tolling is concerned with when the limitations period commences and under what circumstances the commencement may be suspended. Equitable estoppel only comes into play after the limitations period has expired and addresses the circumstances in which a defendant may be prevented from asserting the limitations period as a defense to an admittedly untimely action because the defendant's conduct induced the plaintiff to forgo bringing a timely action. Thus, equitable estoppel is available even where, as here, the applicable statute of limitations precludes equitable tolling. (31 C.4th 383.)

(2) No estoppel occurred here. Plaintiffs alleged that at various times defendants attempted to make repairs or advised plaintiffs that the defective windows were not defective and not to file suit, but that defendants did not properly repair these defects. These allegations were insufficient, because defendants' conduct did not actually and reasonably induce plaintiffs to forbear from filing suit. Even if the repair attempts had been successful, the need for filing suit would not have been obviated. All of defendants' conduct occurred either well before the limitations period had expired or after its expiration. Further, there was no proof that the alleged inadequacy of these repairs or the falsity of defendants' representations remained hidden until after the limitations period had expired. (31 C.4th 385.)

In a single dissenting opinion, two justices argued that the equitable tolling doctrine does apply to C.C.P. 337.15 and that plaintiffs sufficiently stated a claim of equitable estoppel to assert the statute. (31 C.4th 388.)

SUPPLEMENT: [This section is current through the latest supplement]



69 of 188 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XIX. ESTOPPEL TO PLEAD STATUTE OF LIMITATIONS

A. In General.

3 *Witkin Cal. Proc. Actions* § 762

[§ 762] In General.

(1) *Nature of Doctrine.* An estoppel to set up the defense of the statute of limitations arises as a result of some conduct by the defendant, relied on by the plaintiff, that induces the belated filing of the action. "One cannot justly or equitably lull his adversary into a false sense of security, and thereby cause his adversary to subject his claim to the bar of the statute of limitations, and then be permitted to plead the very delay caused by his course of conduct as a defense to the action when brought." (*Carruth v. Fritch* (1950) 36 C.2d 426, 433, 224 P.2d 702 [quoting New Jersey case]; see *Lerner v. Los Angeles City Bd. of Education* (1963) 59 C.2d 382, 396, 29 C.R. 657, 380 P.2d 97, supra, §730; *Iusi v. City Title Ins. Co.* (1963) 213 C.A.2d 582, 589, 28 C.R. 893 [citing the text but finding no estoppel]; *Kunstman v. Mirizzi* (1965) 234 C.A.2d 753, 755, 44 C.R. 707 [same]; 30 *Loyola L.A. L. Rev.* 323 [judicial estoppel doctrine as precluding inconsistent positions]; 2 *Stanf. L. Rev.* 793 [F.E.L.A. cases]; 24 *A.L.R.2d* 1413 [estoppel to rely on statute of limitations]; 48 *A.L.R.2d* 1069 [promissory estoppel]; 81 *A.L.R.2d* 1039 [waiver of or estoppel to rely on contractual limitation for action against governmental subdivision]; 16 *A.L.R.3d* 637 [F.E.L.A. cases]; 41 *A.L.R.3d* 1111 [insurer's failure to pay amount of admitted liability as precluding reliance on statute of limitations]; 43 *A.L.R.3d* 429 [fraud, misrepresentation, or deception as raising estoppel]; 44 *A.L.R.3d* 760 [plaintiff's diligence as affecting right to have defendant estopped from pleading statute of limitations]; 51 *Am.Jur.2d* (2000 ed.), *Limitation of Actions* §380 et seq.; 21 *Proof of Facts* 2d 463 [estoppel to assert statute of limitations in contract actions].) (On application of doctrine to bar insurer from asserting defense of statute of limitations in claim arising out of Northridge earthquake, see supra, §466.)

(2) *Waiver, Acknowledgement, and Equitable Tolling Distinguished.* Estoppel, which deprives the defendant of the defense because of his own objectionable conduct, should be distinguished from contractual waiver of the defense and from suspension of the running of the period or revival of a barred claim by acknowledgment (supra, §750 et seq.).

Estoppel must also be distinguished from the doctrine of equitable tolling of the statute of limitations. For example, estoppel may be applied to a case that would otherwise be barred by C.C.P. 366.2 (1-year limitations period for action existing at time of death; see supra, §719). While the statute indicates that the Legislature intended that the limitations period not be tolled or extended, the statute says nothing about estoppel. In the absence of that language or of legislative history suggesting that the doctrine was intended *not* to apply, it does apply. (*Battuello v. Battuello* (1998) 64 C.A.4th 842, 847, 75 C.R.2d 548; see *Leasequip v. Dapeer* (2002) 103 C.A.4th 394, 406, 407, 126 C.R.2d 782 [following and applying *Battuello* on same rationale to equitably estop defendant from asserting 1-year limitations period for legal malpractice in C.C.P. 340.6 (supra, §626 et seq.), even though statute sets forth exclusive circumstances for tolling of

statute].)

(3) *Classification of Cases.* The estoppel cases appear to fall roughly into three classes:

(a) Where the plaintiff is aware of the cause of action and the identity of the wrongdoer, but the latter by affirmative acts induces the plaintiff to refrain from filing an action. (See *infra*, §763 et seq.)

(b) Where the plaintiff is unaware of the cause of action, and his or her ignorance is due to false representations by the defendant. (See *infra*, §770 et seq.)

(c) Where the plaintiff is unaware of the identity of the wrongdoer and this is due to fraudulent concealment by the defendant. (See *infra*, §§769, 770.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Nature of Doctrine.* See CACI, No. 456 [defendant estopped from asserting statute of limitations defense].



70 of 188 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XIX. ESTOPPEL TO PLEAD STATUTE OF LIMITATIONS

B. Inducement Not To Sue.

1. Promise of Performance.

3 Witkin Cal. Proc. Actions § 763

[§ 763] Promise of Performance.

(1) *Inducing Plaintiff To Forbear From Bringing Action.* Tolling may arise where the defendant makes representations to the effect that the defendant will perform his or her contractual obligation and the plaintiff, in reliance on it, forbears to sue in time. (See *Rapp v. Rapp* (1933) 218 C. 505, 509, 24 P.2d 161; *Roper v. Smith* (1919) 45 C.A. 302, 305, 187 P. 454; *Calistoga Nat. Bank v. Calistoga Vineyard Co.* (1935) 7 C.A.2d 65, 72, 46 P.2d 246; *Langdon v. Langdon* (1941) 47 C.A.2d 28, 31, 117 P.2d 371 [defendant, liable under oral agreement to pay bonus for services, repeatedly requested plaintiff to be patient and not press him until his business was well established]; *Berkey v. Halm* (1950) 101 C.A.2d 62, 68, 224 P.2d 885; *Lagomarsino v. San Jose Abstract & Title Ins. Co.* (1960) 178 C.A.2d 455, 462, 3 C.R. 80, 12 Summary (10th), *Real Property*, §367 [in action involving disputed claim, title insurer's representative stated that his function was to help insured with his problems]; *Mercer v. Elliott* (1962) 208 C.A.2d 275, 281, 25 C.R. 217 [fraud in sale of aircraft; defendant represented that he would provide necessary records for F.A.A. certification of plane]; *Santa Clara v. Vargas* (1977) 71 C.A.3d 510, 524, 139 C.R. 537 [noting general rule, but holding that summary judgment on issue was properly denied]; *Gilbert Financial Corp. v. Steelform Contracting Co.* (1978) 82 C.A.3d 65, 68, 145 C.R. 448, quoting the text; 44 A.L.R.3d 482 [promises to settle or perform as estopping reliance on statute of limitations]; 45 A.L.R.3d 630 [fiduciary or confidential relationship as affecting estoppel to plead statute of limitations]; 51 Am.Jur.2d (2000 ed.), *Limitation of Actions* §391; but see *Mills v. Forestex Co.* (2003) 108 C.A.4th 625, 655, 134 C.R.2d 273 [doctrine was not available in action against housing contractor for defective installation of siding and related claims]; *Hydro-Mill Co. v. Hayward, Tilton & Rolapp Ins. Associates* (2004) 115 C.A.4th 1145, 1166, 10 C.R.3d 582, citing the text [in insured's action against insurance broker for failure to procure adequate coverage, doctrine was not available where it was based on conduct by insurer's adjuster].)

(2) *Inducing Plaintiff To Drop Action.* An analogous situation is presented where the plaintiff, having brought an action in time, is induced to drop it. In *California Savings & Loan Soc. v. Culver* (1899) 127 C. 107, 59 P. 292, plaintiff mortgagee obtained a default foreclosure decree for failure to pay interest (which accelerated the principal debt). Defendant mortgagor then paid the interest and, on stipulation of both parties, the decree was vacated and the action dismissed. Later defendant defaulted again, and, in the new action, contended that the statute commenced to run on the debt when plaintiff declared the whole due and elected to foreclose. *Held*, defendant was estopped to plead the statute because it was at his instance that the original foreclosure suit was abandoned. (127 C. 113.)

(3) *Inducing Plaintiff To Extend Time To Pay*. This application of the estoppel doctrine may protect a creditor who has relied on a defective acknowledgment (see *supra*, §754). In *Quanchi v. Ben Lomond Wine Co.* (1911) 17 C.A. 565, 120 P. 427, defendant maker induced plaintiff holder to extend the time of payment on a note, and plaintiff wrote an extension agreement on the back. In the action defendant contended that the agreement, which it had not signed, did not suspend the running of the statute. *Held*, where an obligor asks for and gets an extension of time to pay, the obligor will be estopped to plead the statute. (17 C.A. 567.) (See *Herman v. Brown* (1949) 91 C.A.2d 758, 761, 205 P.2d 1086 [same view expressed as alternative ground of decision].)

(4) *Inducing Plaintiff To Delay Claim While Defendant Makes Repairs*. In *Shaffer v. Debbas* (1993) 17 C.A.4th 33, 21 C.R.2d 110, defendant contractors agreed to build a custom house for plaintiff homeowners and warranted that it would be free from defects in materials and workmanship for 1 year. However, shortly after taking possession in 1983, plaintiffs began experiencing a variety of problems related to defects in construction. After defendants' repeated promises to correct the situation were not kept, plaintiffs instituted the present action in 1986, seeking to recover damages for both property damage and emotional distress. Defendants conceded that their promises to repair the defects tolled the statute of limitations with respect to the property damage claims (see *supra*, §§760, 761), but argued that plaintiffs' claims for emotional damage, of which they became aware in 1984, were barred by the expiration of the 1-year limitations period provided by former C.C.P. 340(3) (now 2-year period of C.C.P. 335.1; see *supra*, §552). *Held*, defendants were estopped to assert the statute.

(a) The issue in this case is whether a jury may find that a plaintiff who has delayed filing a lawsuit for property damage, in reasonable reliance upon the defendant's promise to repair the damage, may also delay the filing of a suit for personal injuries arising from the defendant's failure to keep its promise. Under the facts of this case, the answer is in the affirmative. "Where a potential defendant has promised to remedy a portion of the damages suffered by the plaintiff, it would be unreasonable to expect the plaintiff to jeopardize the possibility of repair by filing a lawsuit as to items of damage not covered by the defendant's promise. This is particularly true where, as here, the defendant's promise relates to a substantial aspect of the dispute. Certainly the effect of a contrary rule would be to foster the precipitous filing of actions and reduce the possibility of settlement without litigation, outcomes hardly in the best interests of the judicial system or the public at large." (17 C.A.4th 43.)

(b) Additionally, it is possible that, at the time the 1-year personal injury statute of limitations expired, plaintiffs were willing to waive any claim of entitlement to personal injury damages in exchange for defendants' promise to repair the property damage. When defendants then failed to fulfill that promise, it would be unfair to enforce an implied waiver of the personal injury claim. (17 C.A.4th 44, citing *Carruth v. Fritch* (1950) 36 C.2d 426, 224 P.2d 702, *infra*, §764.) (See *Lantzy v. Centex Homes* (2003) 31 C.4th 363, 385, 388, 2 C.R.3d 655, 73 P.3d 517 *supra*, §761 [in action alleging latent construction defects, statute of limitations was subject to estoppel based on defendant's promise to make repairs, but estoppel was not established under facts of case].)

SUPPLEMENT: [This section is current through the latest supplement]

(4) *Inducing Plaintiff To Delay Claim While Defendant Makes Repairs*. See *Holdgrafer v. Unocal Corp.* (2008) 160 C.A.4th 907, 927, 73 C.R.3d 216, citing the text [in action by property owners against company that owned subterranean oil pipelines for damages arising from lead contamination, defendant was estopped to assert limitations period by its promise to remediate contamination]; *Gundogdu v. King Mai* (2009) 171 C.A.4th 310, 317, 89 C.R.3d 489 [in action alleging latent construction defects, home builder was not estopped to assert limitations period; limitations period had not expired when builder's representation that it would perform repairs proved false, and homeowners did not proceed diligently once truth was discovered].



71 of 188 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XIX. ESTOPPEL TO PLEAD STATUTE OF LIMITATIONS

B. Inducement Not To Sue.

2. Promise of Settlement.

3 *Witkin Cal. Proc. Actions* § 764

[§ 764] Promise of Settlement.

Tolling may arise where the defendant represents that the matter will be settled without filing an action. (See *Benner v. Industrial Acc. Com.* (1945) 26 C.2d 346, 350, 159 P.2d 24 [employer and insurance carrier, indicating desire to settle, requested time for investigation, inducing delayed filing of claim for compensation]; *Miles v. Bank of America* (1936) 17 C.A.2d 389, 395, 62 P.2d 177 [defendant, which had orally agreed to repurchase bonds from plaintiff on demand, repeatedly urged him to "lay low," "don't start anything," and "don't go to any attorneys," and defendant would work out some solution]; *Schaefer v. Kerber* (1951) 105 C.A.2d 645, 234 P.2d 109; *Industrial Indem. Co. v. Industrial Acc. Com.* (1953) 115 C.A.2d 684, 690, 252 P.2d 649; *Van Hook v. Southern Calif. Waiters Alliance, Local 17* (1958) 158 C.A.2d 556, 568, 323 P.2d 212 [representations of defendant union that plaintiff officer's claim might be recognized or settled by internal union proceedings]; *Morgan v. International Aviation Underwriters* (1967) 250 C.A.2d 176, 180, 58 C.R. 164; *Sumrall v. Cypress* (1968) 258 C.A.2d 565, 569, 65 C.R. 755 [representatives of defendant city requested plaintiff's attorney to permit settlement negotiations to proceed and not to file complaint]; *Holland v. Nelson* (1970) 5 C.A.3d 308, 313, 85 C.R. 117, supra, §668 [defendant made refunds of payments received under illegal agreement, over 2-year and 4-month period; plaintiff reasonably expected further refunds]; *Nicholson-Brown v. San Jose* (1976) 62 C.A.3d 526, 532, 133 C.R. 159; *Valvo v. University of Southern Calif.* (1977) 67 C.A.3d 887, 896, 136 C.R. 865; *Battuello v. Battuello* (1998) 64 C.A.4th 842, 847, 75 C.R.2d 548 [action by decedent's son who was falsely promised by trustee of estate during settlement negotiations that son would be given certain estate property if he delayed filing timely action]; 2 *Stanf. L. Rev.* 793 [tolling substantive time limit]; 39 *A.L.R.3d* 127 [settlement negotiations as estopping reliance on statute of limitations]; 44 *A.L.R.3d* 482 [promises to settle or perform as estopping reliance on statute of limitations]; 51 *Am.Jur.2d* (2000 ed.), *Limitation of Actions* §394 et seq.; but see *Lobrovich v. Georgison* (1956) 144 C.A.2d 567, 573, 301 P.2d 460 [mere advice to explore possibility of settlement did not amount to representation that would raise an estoppel]; *Kunstman v. Mirizzi* (1965) 234 C.A.2d 753, 44 C.R. 707 [pleading was insufficient to raise estoppel; allegations showed adjuster's willingness to consider settlement on furnishing of medical report, and no report was furnished].)

The doctrine was given an extremely liberal application in *Carruth v. Fritch* (1950) 36 C.2d 426, 224 P.2d 702. Plaintiff, a guest in defendant's automobile, was injured by his alleged wilful misconduct, and released the claim for \$ 2,000. After the statute had run she sued to set aside the release and recover general damages, alleging that defendant

host had represented that she had no legal claim; that she had been induced to sign the release by false promises of defendant and his insurance carrier that they would pay for all future medical care and loss of wages; and that when she requested that aid defendant disclaimed any obligation. *Held*, a cause of action was stated. "Having thus fraudulently induced [plaintiff] to delay filing suit, the respondents may not plead in defense of her claim for damages the very delay caused by their own conduct. The purpose of the statute of limitations is to protect a defendant from the prosecution of a stale claim; it may never be used to assure the success of his fraud." (36 C.2d 434.)

SUPPLEMENT: [This section is current through the latest supplement]

See *Union Oil Co. of Calif. v. Greka Energy Corp.* (2008) 165 C.A.4th 129, 138, 80 C.R.3d 738, citing the text [in action by vendor to specifically enforce land sales contract requiring purchasers to plug and abandon idle oil wells, purchasers were estopped from asserting limitations period by inducing vendor not to sue pending settlement].



72 of 188 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XIX. ESTOPPEL TO PLEAD STATUTE OF LIMITATIONS

B. Inducement Not To Sue.

3. Promise Concerning Other Pending Litigation.

3 *Witkin Cal. Proc. Actions* § 765

[§ 765] Promise Concerning Other Pending Litigation.

(1) *Estoppel Raised*. An estoppel may arise where the defendant represents that he or she will be governed by the determination of pending litigation involving similar issues (*Adams v. California Mut. Bldg. & Loan Assn. (1941) 18 C.2d 487, 488, 116 P.2d 75*), or where the parties agree that an action need not be brought while that litigation is pending (*Atlas Finance Corp. v. Kenny (1945) 68 C.A.2d 504, 513, 157 P.2d 401*). (See 45 A.L.R.3d 703 [delay caused by other litigation as estopping reliance on statute of limitations].)

(2) *Estoppel Not Raised*. The mere fact that the parties anticipate a controlling decision from pending litigation will not raise an estoppel. In *California Cigarette Concessions v. Los Angeles (1960) 53 C.2d 865, 3 C.R. 675, 350 P.2d 715*, plaintiff filed a claim for a refund of municipal business license taxes. Defendant city did not give notice of rejection until 1957, and when the action was brought, the statute had run, for a claim pending 90 days was deemed rejected. But estoppel was asserted on the following facts: the city clerk's office, in correspondence with plaintiff's attorney, had stated that the city would take no further action in this matter pending the anticipated decision in the other case; and plaintiff's attorney wrote that "I am further assuming that no claim of defense will be made by you for lack of filing suit until that time." *Held*, the essential elements of an estoppel were lacking: (a) the party to be estopped must be apprised of the material facts and the other party must be ignorant of them; here, plaintiff was aware of the dates and knew that the city council and not the clerk had authority to approve or reject the claim; (b) the party to be estopped must have acted in such a manner as to lead the other party to rely on his or her conduct. Here, the clerk's letter, under the law, meant only what he might recommend; it could not be deemed a statement that the city had waived either the claims-rejection provision of the charter or the statute of limitations. (53 C.2d 870.)

Other cases are to the same effect. (See *Berkeley Unified School Dist. v. California (1995) 33 C.A.4th 350, 366, 39 C.R.2d 326*, citing the text [defendant's allegedly inconsistent positions concerning administrative collateral estoppel in related case and in present one; no estoppel was raised where there was no inconsistency by defendant and no detrimental reliance by plaintiff]; *Barr v. ACandS (1997) 57 C.A.4th 1038, 1056, 67 C.R.2d 494*, citing the text [where defendants made no specific representations, allegation that "custom" in asbestos litigation was to dismiss marginal case with recognition that later action may be filed if more significant symptoms develop was insufficient].)

SUPPLEMENT: [This section is current through the latest supplement]



73 of 188 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XIX. ESTOPPEL TO PLEAD STATUTE OF LIMITATIONS

B. Inducement Not To Sue.

4. False Representation of No Insurance.

3 Witkin Cal. Proc. Actions § 766

[§ 766] False Representation of No Insurance.

In *Casey v. Anschutz* (1967) 252 C.A.2d 9, 60 C.R. 105, plaintiff was injured while a passenger in a vehicle owned by defendant M and driven by defendant L. L represented on several occasions that she had no insurance. Plaintiff, relying on the representations, did not sue, but presented an uninsured motorist claim to her own insurance carrier. After the 1-year statute of limitations had run on the action against L, plaintiff's insurance carrier advised her that L's own vehicle was insured, with additional coverage of liability while driving other cars. The trial judge found that L was unaware of her coverage, hence that an essential element of estoppel (must be apprised of the facts) was absent. *Held*, judgment for defendants reversed. It was error to fail to find on whether L was guilty of culpable negligence in failing to apprise herself of the coverage of her policy before representing to plaintiff that she was uninsured. (252 C.A.2d 16.)

The trial judge also thought that estoppel could never be raised where the defendant misrepresented or concealed financial ability rather than existence of a cause of action. This absolute rule, said the appellate court, would be "unwise and unrealistic." "[W]here a plaintiff has secondary insurance coverage of his own and has been misled into believing that the prospective defendant is, in effect, 'judgment-proof' and possesses neither insurance coverage nor other assets sufficient to compensate the plaintiff for his loss, such plaintiff should not be required to bring suit nevertheless and to incur court costs and attorney's fees in return for a worthless judgment. Although it is true ... that it has never been held that the statute of limitations begins to run only at such time as the plaintiff ascertains that the debt or other liability is collectible, principles of basic fairness compel the conclusion that the defendant ought not be allowed to mislead the plaintiff, either intentionally or negligently, and then reap the benefits of his own culpable misconduct and the plaintiff's justifiable reliance thereon." (252 C.A.2d 15.)

SUPPLEMENT: [This section is current through the latest supplement]



74 of 188 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XIX. ESTOPPEL TO PLEAD STATUTE OF LIMITATIONS

B. Inducement Not To Sue.

5. Other Representations.

3 Witkin Cal. Proc. Actions § 767

[§ 767] Other Representations.

(1) *Promise That Plaintiff Will Not Suffer Loss.* An estoppel may arise where the defendant represents that by relying on defendant and following his or her advice the plaintiff will suffer no loss. (*Laraway v. First Nat. Bank of La Verne* (1940) 39 C.A.2d 718, 729, 104 P.2d 95 [defendants, after fraudulently selling low grade securities to plaintiff, continued to advise her and assure her that her losses would be recouped].)

(2) *Insurer's Failure To Disclose Shorter Policy Limitations.* An insurer may be estopped to rely on its shorter policy limitation where the memorandum of insurance furnished by it does not contain the provision. (See *Elliano v. Assurance Co. of America* (1970) 3 C.A.3d 446, 452, 83 C.R. 509; *Spray, Gould & Bowers v. Associated Int. Ins. Co.* (1999) 71 C.A.4th 1260, 1267, 84 C.R.2d 552, 2 Summary (10th), *Insurance*, §256, citing the text [administrative regulations impose affirmative duty on insurers to disclose all policy time limits to insureds, and violations, including silence, may raise estoppel defense]; *Neufeld v. Balboa Ins. Co.* (2000) 84 C.A.4th 759, 760, 101 C.R.2d 151 [following *Spray, Gould & Bowers*].)

(3) *Insurer's Misrepresentation That Damage Was Less Than Amount of Deductible.* An insurer may be estopped from asserting the statute of limitations as a defense to a claim by the insured if the insured can show that he or she refrained from bringing a timely action because the insured reasonably relied on the insurer's factual misrepresentation that the insured's damages were less than the policy's deductible amount (and therefore not compensable). (*Vu v. Prudential Property & Cas. Ins. Co.* (2001) 26 C.4th 1142, 1152, 1153, 113 C.R.2d 70, 33 P.3d 487, *infra*, §776; *Doheny Park Terrace Homeowners Assn. v. Truck Ins. Exchange* (2005) 132 C.A.4th 1076, 1091, 1096, 34 C.R.3d 157 [condominium association's complaint stated sufficient facts to establish estoppel, based on allegations that property insurer intentionally misrepresented that cost to repair earthquake damage was less than policy's deductible].)

(4) *Erroneous Legal Advice by Government Agency.* Erroneous advice by an administrative agency or public entity on matters of law may give rise to an estoppel. In *Lerner v. Los Angeles City Bd. of Education* (1963) 59 C.2d 382, 29 C.R. 657, 380 P.2d 97, *supra*, §730, a decision involving a teaching credential, the court approved two theories on which the statute of limitations would be avoided: (a) prior to a controlling decision in another case involving the same issue, the state board had advised plaintiff that it had no authority to restore his credential and that no school district could employ him; this advice, inducing plaintiff's inaction, estopped the state board from setting up the statute; (b) later

the state board restored the credential without invoking the statute. This was a waiver. (59 C.2d 396.) The estoppel also bound the city board, because both were state agencies, representing the same governmental right, and were consequently in privity. (59 C.2d 397, 398.) (See *Driscoll v. Los Angeles* (1967) 67 C.2d 297, 307, 61 C.R. 661, 431 P.2d 245 [if inaccurate advice or information is negligently ascertained or given, public entity's conduct may be deemed unreasonable, and estoppel will arise]; but see *Jordan v. Sacramento* (2007) 148 C.A.4th 1487, 1499, 56 C.R.3d 641 [distinguishing *Driscoll*; city's erroneous advice to plaintiff did not estop city from asserting filing deadline, where plaintiff was represented by counsel when she filed claim].)

In *Denham v. Los Angeles* (1968) 259 C.A.2d 860, 66 C.R. 922, plaintiff contractor claimed sums from defendant county as extras and damages for breach of contract. He filed a claim on November 16, 1964. The 45-day period passed without board action or an extension of time, hence the claim was deemed rejected on December 31, 1964, under Govt.C. 912.4 (supra, §263 et seq.). The then 6-month statute of limitations on suit after deemed rejection ran on June 30, 1965. The action, filed July 9, 1965, was 9 days too late, and the trial judge rendered judgment for defendant on demurrer. *Held*, reversed; defendant was estopped to set up the statutory bar.

(a) The peculiar facts giving rise to the estoppel were as follows: Although the claim was deemed rejected on December 31, 1964, and the statute would normally have begun to run at that time, defendant on January 12, 1965, took the wholly unnecessary step denying the already rejected claim by a formal order, and advised plaintiff of this action by letter the next day. The court observed that if defendant had done nothing, no estoppel would have resulted; but "defendant embarked upon a course of conduct entirely inconsistent with treating the claim as rejected by inaction and operation of law and thereby brought into play elements necessary to create an equitable estoppel." (259 C.A.2d 866.)

(b) This conclusion rests on the ground that, by statute, defendant could have made a written agreement to extend the period and reconsider the claim, and that its letter informing plaintiff of the order of rejection was an equivalent expression of intention to reconsider: the mailing "was conduct which plaintiff could reasonably interpret to be a manifestation of an intent to waive defendant's right to stand upon a rejection by operation of law and to rely upon its affirmative order of rejection of January 12, 1965, in its future dealings with plaintiff." (259 C.A.2d 867.)

SUPPLEMENT: [This section is current through the latest supplement]



75 of 188 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XIX. ESTOPPEL TO PLEAD STATUTE OF LIMITATIONS

C. Fraudulent Concealment of Identity of Defendant.

1. Prior Rule: Statute Not Tolloed in Absence of Confidential Relationship.

3 Witkin Cal. Proc. Actions § 768

[§ 768] Prior Rule: Statute Not Tolloed in Absence of Confidential Relationship.

(1) *Statement of Rule.* In *Staples v. Zoph* (1935) 9 C.A.2d 369, 49 P.2d 1131, plaintiff sued for libel in June 1934, alleging that anonymous libelous letters had been published by defendant in September 1932, but that she had fraudulently concealed her identity until June 1933. *Held*, the action was barred. The court briefly declared that fraudulent concealment of the defendant's identity does not toll the statute and that this rule works no injustice because the plaintiff may sue an unknown defendant by a fictitious name. (9 C.A.2d 370.)

In *Wright v. Redwood Theatres* (1942) 49 C.A.2d 403, 121 P.2d 756, plaintiff sued Redwood Theatres, a corporation, for personal injuries sustained on theatre premises. At the trial, he discovered that defendant merely owned the real property, while the lessee and operator of the business was National Theatres Syndicate. A supplemental complaint was filed and, to avoid the bar of the statute, it was alleged that the two corporations had common officers, a joint office, and substantially the same stock ownership; that the parties negotiated for a settlement and defendant's officers allowed plaintiff to believe that defendant was the operator of the theatre; and that at the request of defendant's counsel, the matter was not set for trial until too late to bring in the other party by a new pleading. *Held*, the statute was not tolled. Defendants made no misrepresentations, and their silence was not a basis for estoppel, for they were in no relationship giving rise to a duty to speak. Moreover, the means of knowledge were open to plaintiff, who could have ascertained the facts by a mere inquiry. (49 C.A.2d 408.)

Cases of this sort were said to state the then majority view that, in the absence of a confidential relationship, the plaintiff who was aware of the cause of action took the risk of discovering the identity of the wrongdoer. (See 25 Cal. L. Rev. 366; 1 U.C.L.A. L. Rev. 233; 63 Harv. L. Rev. 1221.) But this rule began to break down: first, by a broadening of the confidential relations exception (see *Kimball v. Pacific Gas & Elec. Co.* (1934) 220 C. 203, 210, 30 P.2d 39); and second, by the impressive number of decisions holding the statute tolled by fraudulent concealment of the cause of action (*infra*, §770 et seq.). Finally, the rule was rejected outright by *Bernson v. Browning-Ferris Industries* (1994) 7 C.4th 926, 933, 30 C.R.2d 440, 873 P.2d 613, *infra*, §769.

The foundation for the rule that the fraudulent concealment of the cause of action tolled the statute was laid in *Kimball*. Defendant PG & E, repairing machinery for defendant P. Co., borrowed W, P. Co.'s employee, who thereby became PG & E's employee. Plaintiff, a P. Co. employee, was seriously injured through the negligence of W. Thinking

that W was simply a fellow employee of P. Co., plaintiff accepted medical treatment and a workers' compensation settlement of \$ 3,500 from his employer, without knowledge of his right of action against PG & E, the third-party tortfeasor. The facts would normally have been discovered in the proceedings or on P. Co.'s prosecution of its claim against the third-party tortfeasor. However, P. Co. secretly agreed with PG & E to keep the fact of the latter's liability secret, and PG & E agreed to meet half the cost of compensation and medical expenses. Though plaintiff sought to learn the facts, and representatives of plaintiff's employer fully discussed the injury with plaintiff on a number of occasions, at no time did they disclose PG & E's liability, and plaintiff eventually discovered it by accident. Thus, the employer enabled the tortfeasor to settle for a small sum a cause of action that eventually resulted in a verdict for \$ 25,000 against the tortfeasor. The action, filed 2 years and 4 months after the injury, was held timely. (220 C. 215.)

This case, in a peculiarly aggravated form, involved several aspects of the broad principle under consideration: (a) concealment of the identity of the defendant against which the cause of action for negligence actually existed (see *infra*, §769); (b) concealment of that cause of action itself by impliedly representing that the only cause of action was for workers' compensation (see *infra*, §771); (c) nondisclosure in breach of duty, and active misrepresentation (see *infra*, §§774, 775). But the opinion of the court was devoted to establishing the proposition that fraudulent concealment of the cause of action tolls the statute and it has been cited as holding that alone. (See *Staples v. Zoph*, *supra*, 9 C.A.2d 370; 23 Cal. L. Rev. 105; 25 Cal. L. Rev. 366.)

(2) *Criticism of Rule.* There seems little justification in principle for limiting the estoppel rule to concealment of the cause of action. Giving the fraudulent defendant the benefit of California's short limitations as a reward for his or her fraud was hardly consistent with the purpose of the statute--protection of the defendant from stale claims of a dilatory plaintiff. From this point of view, the situations are substantially similar: In each the plaintiff, by reason of the defendant's conduct, is late in filing the action, and in each the statute is invoked by the defendant not for the legitimate purpose of preventing the surprise assertion of a stale claim but to defeat a trial on the merits of a claim well known. It is beside the point to contend, as in the *Staples* case, that the plaintiff could file an action against a fictitious defendant. An injured person does not go to the expense of legal representation and litigation merely because the injured person knows that he or she has been wronged. If the injured person knows something of the identity of the wrongdoer, the injured person will sue though ignorant of the wrongdoer's true name, and this is of course the use for which the pleading rule was designed. (See 4 Cal. Proc. (5th), *Pleading*, §478.) But if the injured person has no knowledge of the wrongdoer's identity or does not even know that there is a wrongdoer liable for his injury, it is scarcely expectable that the injured person will file an action and hope that something turns up to make it worthwhile. Moreover, in most of the concealed identity cases, the plaintiff is given a false steer; the plaintiff is led to believe that there is a particular wrongdoer liable and the plaintiff proceeds solely against that wrongdoer, rather than against the proper defendant. (See *Wright and Kimball*, *supra*.) In short, if the necessary showing of fraud is made, it would seem that the wrongdoer's concealment of his or her identity should toll the statute. And this was the reasoning ultimately adopted in *Bernson*.

SUPPLEMENT: [This section is current through the latest supplement]



76 of 188 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XIX. ESTOPPEL TO PLEAD STATUTE OF LIMITATIONS

C. Fraudulent Concealment of Identity of Defendant.

2. Current Rule: Statute Tolloed.

3 *Witkin Cal. Proc. Actions* § 769

[§ 769] Current Rule: Statute Tolloed.

In *Bernson v. Browning-Ferris Industries* (1994) 7 C.4th 926, 30 C.R.2d 440, 873 P.2d 613, plaintiff city council member filed a libel action against defendants--a corporation, two political consultants, and a corporation employee who had hired the consultants. Plaintiff had become aware in late 1988 that he was the subject of a highly critical dossier. The dossier did not identify its author, sponsor, or distributor, and plaintiff had no information about its source until February 1990, when two newspaper reporters informed him that it had been prepared on behalf of the corporation. Plaintiff immediately contacted the corporation's attorney, who denied knowledge of the dossier or its source. Finally, in May 1991, plaintiff discovered from another newspaper reporter that the consultants had prepared the dossier for the corporation, and plaintiff filed the present action less than a year later. The trial judge granted summary judgment for defendants on the ground that the action was not filed within 1 year after plaintiff learned of the libelous document under former C.C.P. 340(3) (now C.C.P. 340(c); see *supra*, §550), and the Court of Appeal affirmed. *Held*, reversed and remanded; defendants could be equitably estopped from asserting the statute of limitations if they intentionally concealed their authorship of the dossier and if this prevented plaintiff from discovering their identities.

(a) "[A] cause of action for libel generally accrues when the defamatory matter is published." (7 C.4th 931, citing *Strick v. Superior Court* (1983) 143 C.A.3d 916, 192 C.R. 314, *supra*, §551.) "[U]nder the discovery rule, however, the date of accrual may be delayed where the defendant's actions hinder plaintiff's discovery of the defamatory matter." (7 C.4th 931, 932, citing, *Cain v. State Farm Mut. Auto. Ins. Co.* (1976) 62 C.A.3d 310, 132 C.R. 860, *supra*, §556, and *Manguso v. Oceanside Unified School Dist.* (1979) 88 C.A.3d 725, 152 C.R. 27, *supra*, §550.)

(b) Nevertheless, "the general rule in California has been that ignorance of the identity of the defendant is not essential to a claim and therefore will not toll the statute." (7 C.4th 932, citing *Jolly v. Eli Lilly & Co.* (1988) 44 C.3d 1103, 245 C.R. 658, 751 P.2d 923, *supra*, §500; see *supra*, §768.) "Although never fully articulated, the rationale for distinguishing between ignorance of the wrongdoer and ignorance of the injury itself appears to be premised on the commonsense assumption that once the plaintiff is aware of the injury, the applicable limitations period (often effectively extended by the filing of a Doe complaint) normally affords sufficient opportunity to discover the identity of all the wrongdoers." (7 C.4th 932.)

(c) "The question here, however, is whether the general rule should apply when, as a result of the defendant's

intentional concealment, the plaintiff is not only unaware of the defendant's identity, but is effectively precluded as a practical matter from ascertaining it through normal discovery procedures." (7 C.4th 933.)

(d) After reviewing federal and foreign state decisions holding that a defendant who intentionally conceals his or her identity may be equitably estopped from asserting the statute of limitations to defeat an untimely claim (7 C.4th 933, 934), and disagreeing with the contrary holding in *Staples v. Zoph* (1935) 9 C.A.2d 369, 49 P.2d 1131, supra, §768 (7 C.4th 935, 936, footnote 6), the court concluded: "We agree in the main with Witkin. One should not profit from one's own wrongdoing. Accordingly, we hold that a defendant may be equitably estopped from asserting the statute of limitations when, as the result of intentional concealment, the plaintiff is unable to discover the defendant's actual identity. Although several of the out-of-state decisions ... conclude that a tort claim 'accrues' only when the identity of the defendant is discovered ... , we need not go so far here. It is sufficient to hold simply that, under the circumstances described, the statute may be equitably tolled." (7 C.4th 936, quoting the text.)

(e) "The rule of equitable estoppel includes, of course, the requirement that the plaintiff exercise reasonable diligence. ... Thus, under our holding the statute will toll *only* until such time that the plaintiff knows, or through the exercise of reasonable diligence should have discovered, the defendant's identity. Lack of knowledge alone is not sufficient to stay the statute; a plaintiff may not disregard reasonably available avenues of inquiry which, if vigorously pursued, might yield the desired information." (7 C.4th 936.)

(f) "One factor which must be considered pertinent to the diligence inquiry is whether the filing of a timely Doe complaint would, as a practical matter, have facilitated the discovery of the defendant's identity within the requisite three-year period for service of process. ... Where the identity of at least one defendant is known, for example, the plaintiff must avail himself of the opportunity to file a timely complaint naming Doe defendants and take discovery. However, where the facts are such that even discovery cannot pierce a defendant's intentional efforts to conceal his identity, the plaintiff should not be penalized." (7 C.4th 937.) (See 22 *Pepperdine L. Rev.* 1772 [Bernson]; 32 *Proof of Facts* 3d 129 [proving fraudulent concealment to toll statutory limitations periods].)

SUPPLEMENT: [This section is current through the latest supplement]



77 of 188 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XIX. ESTOPPEL TO PLEAD STATUTE OF LIMITATIONS

D. Fraudulent Concealment of Cause of Action.

1. Nature of Doctrine.

3 *Witkin Cal. Proc. Actions* § 770

[§ 770] Nature of Doctrine.

In *Kimball v. Pacific Gas & Elec. Co.* (1934) 220 C. 203, 30 P.2d 39, supra, §768, the court, relying mainly on *Kane v. Cook* (1857) 8 C. 449, and decisions outside of California, squarely held that "the fraudulent concealment by the defendant of the facts upon the existence of which the cause of action depends tolls the statute," and that the statute does not begin to run until discovery. (220 C. 215.)

In *Pashley v. Pacific Elec. Ry. Co.* (1944) 25 C.2d 226, 153 P.2d 325, the principle of the *Kane* and *Kimball* cases was reaffirmed and restated as follows: "In reality the ground of relief is that the defendant, having by fraud or deceit concealed material facts and by misrepresentations hindered the plaintiff from bringing an action within the statutory period, is estopped from taking advantage of his own wrong. The statute of limitations was intended as a shield for his protection against stale claims, but he may not use it to perpetrate a fraud upon otherwise diligent suitors." (25 C.2d 231.)

Other cases are to the same effect. (See *Bowman v. McPheeters* (1947) 77 C.A.2d 795, 799, 176 P.2d 745; *Mills v. Mills* (1956) 147 C.A.2d 107, 119, 305 P.2d 61; *Ramey v. General Petroleum Corp.* (1959) 173 C.A.2d 386, 394, 403, 343 P.2d 787, 2 Summary (10th), *Workers' Compensation*, §64; *Baker v. Beech Aircraft Corp.* (1974) 39 C.A.3d 315, 321, 114 C.R. 171, citing the text; 43 *Harv. L. Rev.* 471; 32 Proof of Facts 3d 129 [proving fraudulent concealment to toll statutory limitations periods]; 88 *A.L.R.4th* 851 [fraudulent concealment of cause of action for wrongful death].)

SUPPLEMENT: [This section is current through the latest supplement]



78 of 188 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XIX. ESTOPPEL TO PLEAD STATUTE OF LIMITATIONS

D. Fraudulent Concealment of Cause of Action.

2. Scope of Doctrine.

3 *Witkin Cal. Proc. Actions* § 771

[§ 771] Scope of Doctrine.

(1) *In General.* The doctrine applies to any type of case, including a quasi-contract action pleaded in the form of a common count for money had and received. "[I]n actions based on negligence, malpractice, breach of written contract, and in various types of restitutionary actions brought upon the common count to recover benefits tortiously acquired, defendant's undiscovered fraud or fraudulent concealment will toll the statute of repose. Though fraud is not the gravamen of such actions, the plaintiff is not precluded in a proper case from relying upon the fraud or concealment which permeated the transaction, to toll the particular limitation provision germane to his action." (*Sears, Roebuck & Co. v. Blade* (1956) 139 C.A.2d 580, 589, 294 P.2d 140.)

(2) *Distinctions.* The doctrine "does not come into play, whatever the lengths to which a defendant has gone to conceal the wrongs, if a plaintiff is on notice of a potential claim." (*Rita M. v. Roman Catholic Archbishop* (1986) 187 C.A.3d 1453, 1460, 232 C.R. 685 [action alleging conspiracy among priests to have secret sexual relations with plaintiff parishioner; plaintiff was at all times aware of relevant facts]; see *Barber v. Superior Court* (1991) 234 C.A.3d 1076, 1082, 285 C.R. 668 [quoting *Rita M.*]; *Snapp & Associates Ins. Services v. Robertson* (2002) 96 C.A.4th 884, 890, 117 C.R.2d 331 [same]; *Sagehorn v. Engle* (2006) 141 C.A.4th 452, 461, 46 C.R.3d 131 [doctrine does not apply to action for sale of unregistered security under 15 U.S.C., §771(a)(1), based on language of statute and because registration of security is matter of public record].)

In a professional malpractice context, accrual of the cause of action does not await the plaintiff's discovery that the facts constituting the wrongful act or omission constitute professional negligence, i.e., the plaintiff's discovery that a particular legal theory is applicable based on the known facts. If one has suffered appreciable harm and knows or suspects that professional blundering is its cause, the fact that the professional has not yet advised the plaintiff does not postpone the commencement of the limitations period. Thus, concealment of this type of information cannot toll the statute of limitations. (*Curtis v. Kellogg & Andelson* (1999) 73 C.A.4th 492, 500, 86 C.R.2d 536 [in accountant malpractice action, defendant's assurances that tax deficiency was aberration was not fraudulent concealment sufficient to toll statute].)

In *Regents of Univ. of Calif. v. Superior Court* (1999) 20 C.4th 509, 85 C.R.2d 257, 976 P.2d 808, the California Supreme Court addressed whether the doctrine applied to the then 30-day limitations period of Govt.C. 11130.3(a) for

bringing actions to enforce violations of the Bagley-Keene Open Meeting Act (see 9 *Cal. Proc.* (5th), *Administrative Proceedings*, §10 et seq.). *Held*, the doctrine may not be used to extend the 30-day limitations period.

(a) The purposes of the doctrine and the statute are inconsistent. "That of the doctrine, as stated, is to disarm a defendant who, by his own deception, has caused a claim to become stale and a plaintiff dilatory. In contrast, that of section 11130.3(a) is to authorize the nullification and avoidance of an action taken by a state body in violation of the act's notice or open-and-public-meeting requirement, but only under strict conditions--which in their absence, entails the protection of even the most deceptive defendant from the freshest claim of the most diligent plaintiff." (20 *C.4th* 534.)

(b) *Govt.C. 11130.3(a)* does not refer to the doctrine either expressly or by implication. The doctrine cannot be judicially read into the statute because that would frustrate the Legislature's purpose in enacting the statute. (20 *C.4th* 534.)

The result in *Molloy* was called into question when the Legislature amended *Govt.C. 11130.3* later that year. *Govt.C. 11130.3* now requires that the action be commenced within "90 days from the date the action was taken." (*Govt.C. 11130.3(a)*.) "It is the intent of the Legislature, in amending *Sections 11130 and 11130.3 of the Government Code*, to supersede the decision of the California Supreme Court in ... *Molloy* ... , in which the Court held that the only remedy under the Bagley-Keene Act for an action taken in violation of that act is to bring a lawsuit to nullify the action within 30 days." (Stats. 1999, Chap. 393, §6.)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Distinctions.* See *Apollo Capital Fund, LLC v. Roth Capital Partners, LLC* (2007) 158 *C.A.4th* 226, 249, 70 *C.R.3d* 199 [following *Sagehorn v. Engle* (2006) 141 *C.A.4th* 452, 46 *C.R.3d* 131, text, p. 1007].



79 of 188 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XIX. ESTOPPEL TO PLEAD STATUTE OF LIMITATIONS

D. Fraudulent Concealment of Cause of Action.

3. What Constitutes Concealment.

3 *Witkin Cal. Proc. Actions* § 772

[§ 772] What Constitutes Concealment.

Although the doctrine has been repeatedly stated in California in terms of the concealment of the cause of action, the actual holdings are not so limited. Thus, in *Pashley v. Pacific Elec. Ry. Co.* (1944) 25 C.2d 226, 153 P.2d 325, and *Bowman v. McPheeters* (1947) 77 C.A.2d 795, 176 P.2d 745, *infra*, §774, the plaintiff was injured and knew who caused the injury; hence, the cause of action was not actually concealed. But there was a fraudulent concealment of the nature and extent of the injury that had the effect of inducing him not to sue.

This broader doctrine, discussed in *Pashley* (25 C.2d 231), is restated in *Bowman* as follows: "[I]t would seem to be clear that the conduct of the defendants need not be shown to be directed specifically against the bringing of an action, but that if it was aimed against the acquisition of the requisite knowledge which would naturally lead to such a result, it comes within the condemnation of the rule." (77 C.A.2d 804.). (See *Baker v. Beech Aircraft Corp.* (1974) 39 C.A.3d 315, 323, 114 C.R. 171, citing the text; 33 Cal. L. Rev. 152.)

SUPPLEMENT: [This section is current through the latest supplement]



80 of 188 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XIX. ESTOPPEL TO PLEAD STATUTE OF LIMITATIONS

D. Fraudulent Concealment of Cause of Action.

4. Fraud Cases Compared.

3 *Witkin Cal. Proc. Actions* § 773

[§ 773] Fraud Cases Compared.

(1) *Fraudulent Concealment Cases*. The doctrine of fraudulent concealment of the cause of action, which applies to any type of case (*supra*, §770), has an effect similar to the statutory rule of delayed accrual in fraud cases under *C.C.P.* 338(d). Because fraud is the basis of the estoppel, the same pleading and proof is required as in the fraud cases, i.e., the plaintiff must show (a) the substantive elements of fraud, and (b) an excuse for late discovery of the facts. (See *Kimball v. Pacific Gas & Elec. Co.* (1934) 220 C. 203, 215, 30 P.2d 39; *Sears v. Rule* (1945) 27 C.2d 131, 147, 163 P.2d 443; *Bowman v. McPheeters* (1947) 77 C.A.2d 795, 798, 176 P.2d 745, *infra*, §774; *Baker v. Beech Aircraft Corp.* (1974) 39 C.A.3d 315, 321, 114 C.R. 171, citing the text; *Community Cause v. Boatwright* (1981) 124 C.A.3d 888, 900, 177 C.R. 657, citing the text; *supra*, §659 et seq.)

(2) *Fraud Cases*. The fraudulent concealment cases are distinguishable from the fraud cases in that different periods may be involved. In *Boyer v. Barrows* (1914) 166 C. 757, 138 P. 354, plaintiff alleged that he and defendant, both attorneys at law, orally agreed to divide certain fees; that in August 1903, defendant collected but falsely represented that the fees were uncollectible; that plaintiff discovered the facts on April 17, 1907, and brought suit on April 16, 1910 (within 3 years after discovery). *Held*, the action was barred. Though the 3-year statute on fraud actions had not run, this action was not for relief on the ground of fraud but for money had and received (obligation not founded on instrument in writing). The cause of action accrued as soon as the fees were collected, and the fraud merely operated to prevent the running of the statute of limitations. Immediately upon discovery of the facts, the appropriate statute of limitations (2 years) commenced to run. (166 C. 758.)

SUPPLEMENT: [This section is current through the latest supplement]



81 of 188 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XIX. ESTOPPEL TO PLEAD STATUTE OF LIMITATIONS

D. Fraudulent Concealment of Cause of Action.

5. Nondisclosure in Breach of Duty.

3 *Witkin Cal. Proc. Actions* § 774

[§ 774] Nondisclosure in Breach of Duty.

(1) *Employer-Employee Relationship*. In *Kimball v. Pacific Gas & Elec. Co.* (1934) 220 C. 203, 30 P.2d 39, supra, §768, plaintiff's employer concealed the facts of plaintiff's cause of action against a third-party tortfeasor. The court did not hold that the fiduciary obligations of employee to employer are paralleled by corresponding obligations on the part of the employer to the employee; it conceded that mere silence would not raise the estoppel. But the Workers' Compensation Act prohibits settlement by the employer and third-party tortfeasor without the written consent of the employee. Hence, when P. Co. (employer) and PG & E (tortfeasor) negotiated for settlement, the employer was under a statutory duty to inform plaintiff employee. This breach of duty by the employer tolled the statute as to the tortfeasor because the latter "ratified and approved" the act and "agreed ... to keep the facts from plaintiff." (220 C. 217, 218, 220.)

(2) *Physician-Patient Relationship*. In *Pashley v. Pacific Elec. Ry. Co.* (1944) 25 C.2d 226, 153 P.2d 325, plaintiff, whose eye was injured by the negligence of defendant's streetcar operator, was sent by defendant to its doctors, eye specialists. The complaint alleged that the doctors removed glass splinters from his eye, instructed him not to go to any other physician or they would not be responsible, represented that the eye would heal quickly and permanently and told him to return in 2 years for a final checkup; that when he returned he was told that the cure was perfect; that 12 years later he learned that the injury had caused a cataract, which shortly thereafter caused permanent blindness; and that defendant's doctors knew that this would happen and made the false representations to prevent him from suing within the statutory period. The action was brought within 1 year after discovery of the alleged fraud. *Held*, a cause of action was stated. On the issue of breach of duty, the court relied on malpractice cases recognizing that the relationship of physician and patient is one of trust and confidence. "As determined in those cases, the confidence growing out of the relationship of doctor and patient imposed upon the physician the duty of refraining from fraudulent concealment, that is, the duty of disclosure when he had knowledge of the facts. If that is the result in malpractice cases, then all the more was the defendant herein under a duty of disclosure when it voluntarily undertook to treat the plaintiff's injuries caused by its own breach of duty." (25 C.2d 235.)

Thus, in *Pashley* the relationship between defendant and plaintiff, which imposed the duty of disclosure, arose from defendant's voluntary undertaking to care for a person injured through its negligence. And the deceit (concealment) of its agents (the doctors), intended for its benefit as principal, was treated as its own fraud for the purpose of raising the estoppel. (25 C.2d 235.)

The relationship of patient and physician in a malpractice case was the basis of estoppel in *Bowman v. McPheeters* (1947) 77 C.A.2d 795, 176 P.2d 745. The complaint alleged that defendant physician, in treating plaintiff's arm wound, negligently burned the arm with X-rays, eventually causing a cancerous growth in the tissues; and that defendant, in plaintiff's subsequent visits for treatment, falsely represented that the inflamed condition was due to steel poisoning and that there was nothing wrong with the arm. "As fiduciaries it was the duty of defendants to make a full and fair disclosure to plaintiff of all facts which materially affected his rights and interests." (77 C.A.2d 800.) (See *Stafford v. Shultz* (1954) 42 C.2d 767, 777, 270 P.2d 1 [physician, malpractice suit].)

(3) *Other Fiduciary Relationships*. Other cases to the same effect but involving conventional types of fiduciaries include the following: *Sears v. Rule* (1945) 27 C.2d 131, 148, 163 P.2d 443 [personal representative and trustee]; *Hansen v. Bear Film Co.* (1946) 28 C.2d 154, 178, 168 P.2d 946 [administrator]; *Sibert v. Shaver* (1952) 111 C.A.2d 833, 841, 245 P.2d 514 [partner]; *Cross v. Bonded Adjustment Bureau* (1996) 48 C.A.4th 266, 281, 55 C.R.2d 801 [collection agency enforcing judgment for creditors]; but see *Peregrine Funding v. Sheppard Mullin Richter & Hampton LLP* (2005) 133 C.A.4th 658, 685, 35 C.R.3d 31 [attorney for investment company and investors; pleading was insufficient].

SUPPLEMENT: [This section is current through the latest supplement]



82 of 188 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XIX. ESTOPPEL TO PLEAD STATUTE OF LIMITATIONS

D. Fraudulent Concealment of Cause of Action.

6. Active Misrepresentation or Concealment.

3 Witkin Cal. Proc. Actions § 775

[§ 775] Active Misrepresentation or Concealment.

The California decisions discussed in the preceding sections, by expanding the scope of the fiduciary theory to embrace any situation in which the defendant can fairly be deemed bound to speak (e.g., the statutory duty in *Kimball v. Pacific Gas & Elec. Co.* (1934) 220 C. 203, 217, 30 P.2d 39, and the duty arising from a voluntary undertaking in *Pashley v. Pacific Elec. Ry. Co.* (1944) 25 C.2d 226, 235, 153 P.2d 325, *supra*, §774), leave relatively few nonfiduciary cases. However, in practically all of these fiduciary cases there were also active misrepresentations. And the opinions or alternative grounds of decision make it clear that, regardless of a relationship imposing a duty to speak, actual fraud will raise the estoppel. This may consist of active misrepresentation or of purported disclosure that actually suppresses material facts. (See *Baker v. Beech Aircraft Corp.* (1974) 39 C.A.3d 315, 323, 114 C.R. 171, citing the text.)

SUPPLEMENT: [This section is current through the latest supplement]



83 of 188 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XIX. ESTOPPEL TO PLEAD STATUTE OF LIMITATIONS

D. Fraudulent Concealment of Cause of Action.

7. Distinction: Nondisclosure Without Fraud.

3 *Witkin Cal. Proc. Actions* § 776

[§ 776] Distinction: Nondisclosure Without Fraud.

(1) *In General.* The two contrasting doctrines that determine the result in these cases are first, that the plaintiff's ignorance of the cause of action will not necessarily prevent the statute from running (*supra*, §494), and second, that the defendant's fraudulent concealment of the cause of action will prevent it from running. Accordingly, if the cause of action is simply not disclosed by a nonfiduciary with no duty of disclosure, and there is no actual fraud, the first doctrine applies and the courts find no basis for an estoppel. (See *Scafidi v. Western Loan & Bldg. Co. (1946)* 72 C.A.2d 550, 562, 165 P.2d 260; *Simons v. Edouarde (1950)* 98 C.A.2d 826, 829, 221 P.2d 203; *Hesse v. Vinatieri (1956)* 145 C.A.2d 448, 452, 302 P.2d 699 [pleading was insufficient]; *Johnson v. Harcourt, Brace, Jovanovich (1974)* 43 C.A.3d 880, 896, 118 C.R. 370; *Love v. Fire Ins. Exchange (1990)* 221 C.A.3d 1136, 1144, 271 C.R. 246, *supra*, §661 [insurer is under no obligation to explain to insured all possible legal theories of recovery]; *Frankel v. Kizer (1993)* 21 C.A.4th 743, 751, 26 C.R.2d 268, citing the text [public agency has no duty to reveal adverse administrative ruling that is matter of public record]; *Stalberg v. Western Title Ins. Co. (1994)* 27 C.A.4th 925, 931, 32 C.R.2d 750 [no basis for estoppel in slander of title action against title insurer, where action was not related to insurer's breach of duty as plaintiffs' insurer, but based on insurer's fictitious creation of easement to benefit other landowners]; *Mills v. Forestex Co. (2003)* 108 C.A.4th 625, 656, 134 C.R.2d 273 [doctrine was not available in action against housing contractor for defective installation of siding and related claims].)

In *Neff v. New York Life Ins. Co. (1947)* 30 C.2d 165, 180 P.2d 900, the complaint alleged that an insured became totally disabled and made proof of the disability to defendant insurer with a request for disability payments; that defendant fraudulently represented that he was not entitled to benefits because it did not appear that he was disabled for life; that the insured, and later his widow, relied on the insurer's representations and made no further claim. This action was brought by plaintiff, a son, 16 years after the alleged representation, and 9 months after his discovery of defendant's original letter rejecting the insured's claim. *Held*, the statute was not tolled. Defendant, not a fiduciary, simply denied liability under the policy, making no deceptive representations and concealing no facts. And the insured was at all times in possession of the facts allegedly discovered at the later date. (30 C.2d 169.)

(2) *Exception: Insurer's Misrepresentation That Damage Was Less Than Deductible.* In *Vu v. Prudential Property & Cas. Ins. Co. (2001)* 26 C.4th 1142, 113 C.R.2d 70, 33 P.3d 487, plaintiff homeowner filed an action in federal district court against defendant, his earthquake insurer, more than 2 years after defendant had resolved his original claim

by telling him that his damage did not exceed his deductible. Defendant moved for summary judgment on the ground that the action was barred by the 1-year limitations period of *Ins.C. 2071*. Plaintiff opposed the motion, alleging that he had subsequently discovered additional damage, confirmed by his inspector, and that he had filed his action within 1 year of that discovery. The federal district court granted defendant's motion. On plaintiff's appeal, the federal Circuit Court of Appeals certified the following question to the California Supreme Court: Where an insured presents a timely claim to the insurer for property damage under a policy, and the insurer's agent inspects the property but does not discover the full extent of the covered damages, does *Ins.C. 2071* bar a claim brought by the insured more than 1 year after the damage was sustained but within 1 year of the insured's discovery of the additional damage? Or, to put the matter differently, does *Neff* remain good law? The California Supreme Court accepted the certification. *Held*, by unanimous opinion, *Neff* remains good law to the extent that it holds that an insurer's denial of a claim on the ground that the policy does not cover the loss in question offers no basis for estopping the insurer from asserting the 1-year limitations period as a defense; but *Neff* does not necessarily control the result in this case.

(a) The insurer-insured relationship is not a true fiduciary relationship in the same sense as the relationship between trustee and beneficiary, or attorney and client. It is, rather, a relationship often characterized by unequal bargaining power in which the insured must depend on the good faith and performance of the insurer. This characteristic has led courts to impose special and heightened duties; but while these special duties often resemble duties owed by fiduciaries, the fiduciary-like duties arise because of the unique nature of the insurance contract, not because the insurer is a fiduciary. (26 C.4th 1150, 1151.)

(b) A denial of insurance coverage, even if phrased as a "representation" that the policy does not cover the insured's claim, or words to that effect, offers no grounds for estopping the insurer from raising a statute of limitations defense. But that representation is different from a misrepresentation of fact, which may lead to an estoppel. Thus, defendant could be estopped from asserting *Ins.C. 2071* as a defense if plaintiff could show that he or she refrained from bringing a timely action because he or she reasonably relied on defendant's factual misrepresentation that the damages were less than the policy's deductible amount. Whether plaintiff's reliance was reasonable would depend on a myriad of factual questions: whether plaintiff's inspector was qualified and, if not, whether plaintiff knew of the inspector's lack of qualification; whether the inspector examined the entire property and, if not, whether plaintiff knew that the inspection was more limited; and what led plaintiff to suspect that the damage was greater than the policy's deductible amount, and whether plaintiff then acted diligently after he or she so suspected. (26 C.4th 1152, 1153.)

SUPPLEMENT: [This section is current through the latest supplement]



84 of 188 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XIX. ESTOPPEL TO PLEAD STATUTE OF LIMITATIONS

E. Estoppel by Duress.

3 *Witkin Cal. Proc. Actions* § 777

[§ 777] Estoppel by Duress.

In *Ateeq v. Najor* (1993) 15 C.A.4th 1351, 19 C.R.2d 320, A, a citizen of Iraq, obtained judgment against N, his business partner, in an action for fraud and undue influence. N then moved for judgment based on the expiration of the 3-year limitations period for actions for fraud (C.C.P. 338(d); see *supra*, §653). In denying this motion, the trial judge found that N's wrongful threats to have A deported if he contested certain accountings, coupled with A's reasonable belief in N's ability to carry out his threats, constituted estoppel by duress, and precluded N from relying on the statute of limitations as a defense. *Held*, judgment affirmed.

(a) There is no case specifically holding that a defendant may be estopped from pleading the defense of the statute of limitations due to threats made by the defendant causing duress upon the plaintiff. However, it is well settled that a defendant may not rely upon the statute as a defense where the delay in filing was induced by his actions. (15 C.A.4th 1356, citing *Kleinecke v. Montecito Water Dist.* (1983) 147 C.A.3d 240, 195 C.R. 58.) Here, N's wrongful threats of deportation continued at least until June 2, 1985, thereby causing A to delay filing an action that otherwise should have been filed by February 2, 1985. "Such circumstances clearly fall within established principles of equitable estoppel." (15 C.A.4th 1357.)

(b) N's argument that C.C.P. 338(d), the statute of limitations for fraud, also applies to duress is irrelevant. Although that statute sets forth the applicable period of limitations for actions based on fraud, it does not apply to situations, such as this, where the duress imposed is not a part of the underlying cause of action. Here, the trial judge's finding of equitable estoppel on grounds of duress was not based either on fraud or concealment of the underlying cause of action or on any confidential relationship between the parties. Rather, it was based on a separate wrong, i.e., the threats to have A deported if he caused problems regarding N's accounting of their dealings. (15 C.A.4th 1358.)

(c) Claiming that A's delay in initiating the action resulted in the loss of certain bank records needed for his defense, N argued that he cannot be estopped from pleading the defense of the statute of limitations because A should be prevented by laches from pursuing his action. This argument is without merit. "The delay was caused by [N]'s own wrongdoing in the form of threats to deport [A]. He cannot now claim that he is unfairly prejudiced due to the delay which he caused. If he did not retain all of the records necessary to adequately defend himself at trial, this is a result of his own wrongful actions and equity will not condone his wrongdoing by allowing him to plead laches." (15 C.A.4th 1359.)

SUPPLEMENT: [This section is current through the latest supplement]



85 of 188 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XIX. ESTOPPEL TO PLEAD STATUTE OF LIMITATIONS

F. Expiration of Period of Estoppel.

3 *Witkin Cal. Proc. Actions* § 778

[§ 778] Expiration of Period of Estoppel.

In *Regus v. Schartkoff* (1957) 156 C.A.2d 382, 319 P.2d 721, plaintiff filed her action April 2, 1956, alleging that she had a claim for injuries from a dog bite suffered on July 2, 1953; that defendant W, the agent of defendant insurance company and the dog owners, assured her of payment until July 20, 1954, when he informed her that the statute had run; that she then consulted an attorney who mistakenly advised her that the claim was barred; and that in December 1955, present counsel advised her of the estoppel rule. *Held*, the action against the dog owners was barred. The estoppel ended on July 20, 1954, when she discovered the fraud; she then had a reasonable time to sue, but this could not exceed the full limitations period imposed by the statute (1 year). (The complaint did, however, state a cause of action against W and the insurance company for fraud consisting of a false promise.) (156 C.A.2d 387.)

Later cases are to the same effect. (See *Kiernan v. Union Bank* (1976) 55 C.A.3d 111, 117, 127 C.R. 441 ["Where inquiry would have led to the discovery of the fraud, the party seeking estoppel of the statute of limitations will be charged with that knowledge as of the time he should have discovered it"]; *DeRose v. Carswell* (1987) 196 C.A.3d 1011, 1026, 242 C.R. 368 [if there is still ample time to institute action within statutory period after circumstances inducing delay have ceased to operate, plaintiff who failed to do so cannot claim an estoppel].)

SUPPLEMENT: [This section is current through the latest supplement]



86 of 188 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XX. VENUE: IN GENERAL

A. Venue Distinguished From Jurisdiction.

1. Nonjurisdictional Venue.

a. In General.

3 *Witkin Cal. Proc. Actions* § 779

[§ 779] In General.

(1) *Definition of Venue.* Venue is the place of trial--a particular county of the state. (See *C.C.P.* 392 et seq.; *Milliken v. Gray* (1969) 276 C.A.2d 595, 601, 81 C.R. 525; C.E.B., 1 Civil Proc. Before Trial 4th, Chap. 8; 44 *Cal. L. Rev.* 685 [exhaustive and critical discussion of California law on venue in "mixed actions," i.e., those involving joinder of causes or parties governed by different venue provisions]; *Cal. Civil Practice*, 1 Procedure, §4:65 et seq.; Rutter Group, *Civil Proc. Before Trial* §3:450 et seq.; 24A *Am.Jur. P.P. Forms* (2008 ed.), Venue, Form 1 et seq.; 77 *Am.Jur.2d* (2006 ed.), *Venue* §1 et seq.; on venue in federal courts, see 14D *Federal Practice & Procedure* (Wright, Miller & Cooper) §3801 et seq.; 1A *Federal Procedure*, L.Ed. §1:688 et seq.)

(2) *Jurisdiction Distinguished.* In its strict sense, venue is not jurisdictional. Jurisdiction relates to the power of the court to act, and a court with that power may render a valid judgment even though it is not the court of the proper county for trial. (See *Dougherty v. California Kettleman Oil Royalties* (1937) 9 C.2d 58, 76, 69 P.2d 155; *Brock v. Superior Court* (1947) 29 C.2d 629, 632, 177 P.2d 273; *Newman v. Sonoma* (1961) 56 C.2d 625, 627, 15 C.R. 914, 364 P.2d 850, citing the text; *Barquis v. Merchants Collection Assn.* (1972) 7 C.3d 94, 120, 101 C.R. 745, 496 P.2d 817, *infra*, §780; *Cohen v. Hellman Commercial Trust & Savings Bank* (1933) 133 C.A. 758, 767, 24 P.2d 960; *Arganbright v. Good* (1941) 46 C.A.2d Supp. 877, 116 P.2d 186; *In re Teeter* (1977) 73 C.A.3d 932, 937, 141 C.R. 103 [proper court for commitment petition under Welf.C. 6502 is question of venue, not jurisdiction]; *Rest.2d, Judgments* §11; *infra*, §§780, 781.)

(3) *Intra-County Proceedings Distinguished.* Venue is a county matter; hence, three situations should be distinguished:

(a) The proper location for trial within the superior court of the proper county is not a matter of venue. (See *infra*, §783.)

(b) The transfer of a pending cause from one department of the superior court to another is not a change of venue. (See 2 *Cal. Proc.* (5th), *Courts*, §226.)

(c) A pending case may be transferred from one location in the superior court to another location. (See *infra*, §783.)

West's Key Number Digest, Venue 1 et seq.

SUPPLEMENT: [This section is current through the latest supplement]



87 of 188 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XX. VENUE: IN GENERAL

A. Venue Distinguished From Jurisdiction.

1. Nonjurisdictional Venue.

b. Illustrations.

3 *Witkin Cal. Proc. Actions* § 780

[§ 780] Illustrations.

The distinction between jurisdiction and venue (*supra*, §779) has important practical implications, among them the following:

(1) *Waiver of Jurisdiction*. A court's lack of jurisdiction of the subject matter cannot be waived, but the wrong venue may be waived by failure to move for a change. (See *Brock v. Superior Court* (1947) 29 C.2d 629, 634, 177 P.2d 273; *Cohen v. Hellman Commercial Trust & Savings Bank* (1933) 133 C.A. 758, 767, 24 P.2d 960; *infra*, §925.)

(2) *Limited Civil Cases*. In a limited civil case (see C.C.P. 85 et seq., *infra*, §783), orders changing venue and orders transferring a case for lack of jurisdiction (see 2 *Cal. Proc.* (5th), *Jurisdiction*, §399) are reviewed in different ways. An order changing or refusing to change venue is appealable (C.C.P. 904.2(c)); an order transferring a cause for lack of jurisdiction under C.C.P. 396 is not. (*Milliken v. Gray* (1969) 276 C.A.2d 595, 601, 81 C.R. 525 [construing precursor to limited civil cases, i.e., former municipal court actions]; see *infra*, §919.)

(3) *Writ of Prohibition*. A writ of prohibition may issue to restrain a lower court from proceeding when it has no jurisdiction, but the writ is not available to correct an erroneous determination of venue. (*Brock v. Superior Court*, *supra*, 29 C.2d 633, 637; on review by mandamus of superior court order refusing to change venue, see *infra*, §919.)

(4) *Default Judgments*. A default judgment rendered by a court of the wrong venue is not subject to collateral attack. In *Barquis v. Merchants Collection Assn.* (1972) 7 C.3d 94, 101 C.R. 745, 496 P.2d 817, the court held that defendant's practice of filing numerous collection actions against retail buyers in the wrong counties and without stating the venue facts was an abuse of process and therefore an enjoined tort. (See 5 *Cal. Proc.* (5th), *Pleading*, §762.) Plaintiffs also sought to set aside as void all default judgments obtained pursuant to this practice during the 2-year period prior to the action. The theory of this count of the complaint was that the requirement of C.C.P. 396a is jurisdictional, and consequently that the judgments were void and subject to collateral attack. *Held*, the judgments so obtained were not void.

(a) The default judgments were subject to timely direct attack. The statute was designed "to protect defendants in

actions involving relatively small monetary claims from the inequitable harassment that may ensue when the action is filed in a distant venue." (7 C.3d 116.) Under C.C.P. 396b, the failure to move for change of venue is a waiver of the right. (7 C.3d 117; see *infra*, §925.) But under C.C.P. 396a, the trial courts must scrutinize the complaints and dismiss actions that are improperly filed. Hence, the failure to move for a change of venue was not a waiver of the right to attack the judgment on timely appeal or on timely motion under C.C.P. 473. (7 C.3d 119.)

(b) The default judgments were not subject to collateral attack. The mandatory language of C.C.P. 396a and its penalty of dismissal for noncompliance (see *infra*, §907) imply that prohibition might lie to prevent the court from proceeding in excess of jurisdiction. (7 C.3d 120, citing *California v. Superior Court (San Francisco)* (1936) 14 C.A.2d 718, 58 P.2d 1322, *infra*, §864.) But a mandatory venue provision is not jurisdictional in the fundamental sense; i.e., the court acting contrary to the statute nevertheless has subject matter jurisdiction, and its judgment, unless directly challenged by appeal, motion, or writ, is valid. (7 C.3d 121, citing *Newman v. Sonoma* (1961) 56 C.2d 625, 15 C.R. 914, 364 P.2d 850, *infra*, §874.) Noncompliance with C.C.P. 396a does not deprive the court of jurisdiction of the subject matter, and its judgment, though erroneous, is not void. (7 C.3d 122; see footnote 27, citing the text, and disapproving contrary decision in *Carlton v. Gray* (1935) 10 C.A.2d 658, 661, 52 P.2d 966.) (See 61 Cal. L. Rev. 334.)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Limited Civil Cases.* Order transferring cause for lack of jurisdiction is not appealable: C.C.P. 396 was amended in 2008 to delete provisions that have become obsolete as a result of the unification of the trial courts.



88 of 188 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XX. VENUE: IN GENERAL

A. Venue Distinguished From Jurisdiction.

2. Jurisdictional Venue.

3 *Witkin Cal. Proc. Actions* § 781

[§ 781] Jurisdictional Venue.

(1) *Statutes Setting Location for Trial of Specific Actions.* The proposition that venue is not jurisdictional (*supra*, §779) is not invariably true. The classifications of actions for venue purposes are mainly designed to secure the convenience of litigants. Hence, it is both theoretically and practically desirable to allow departures by express consent or waiver, and still more appropriate to uphold a judgment, rendered by a court of the wrong county, against collateral attack. But in a few situations the county of trial is specified by mandatory statutes expressing a governmental policy superior to the desires of the litigants. These provisions relate to "venue" only in the sense that they specify the county of trial; they are also "jurisdictional."

(a) The residence of the decedent or the location of the decedent's property in a particular county, determines jurisdiction of the subject matter of a probate proceeding. (See 14 *Summary* (10th), *Wills and Probate*, §353.)

(b) The venue in a proceeding to commit a person as a narcotics addict (Welf.C. 3100, *supra*, §91) is jurisdictional. (See *Van Zanten v. Superior Court* (1963) 214 C.A.2d 510, 513, 29 C.R. 625 [construing predecessor statute].)

(2) *Other Jurisdictional Aspects of Venue.* Two other jurisdictional aspects of venue should be distinguished here:

(a) The territorial limitation on the jurisdiction of the state in proceedings in rem, sometimes discussed in terms of "interstate venue," is not within the normal scope of the subject of venue. (See 2 *Cal. Proc.* (5th), *Jurisdiction*, §255 et seq.)

(b) The filing of a motion for a change of venue suspends the jurisdiction of the court to act on the merits, and an order changing venue vests jurisdiction in the new court and deprives the original transferring court of jurisdiction. (See *infra*, §§914, 916.)

SUPPLEMENT: [This section is current through the latest supplement]



89 of 188 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XX. VENUE: IN GENERAL

B. Proper Court for Trial in Superior Court.

1. Former Justice and Municipal Courts.

3 Witkin Cal. Proc. Actions § 782

[§ 782] Former Justice and Municipal Courts.

(1) *Statewide Jurisdiction of Municipal Courts.* Inferior courts were formerly subject to territorial limits on jurisdiction, and if an action was brought in a justice court of the wrong township or in a municipal court of the wrong county, the court lacked jurisdiction of the subject matter. In 1933 the statutes were extensively revised and territorial limitations on jurisdiction of municipal and justice courts were entirely removed. (See former C.C.P. 83 [jurisdiction concurrent]; former C.C.P. 84 [process "shall extend throughout the State"]; 2 *Cal. Proc.* (5th), *Courts*, §163 et seq.) The chief purposes of the revision were (a) to allow transfer of a cause to the right court even after the statute of limitations had run on the right to file a new action; and (b) to prevent collateral attack on a judgment rendered in the wrong court. Hence, if an action was within the subject matter jurisdiction of the municipal court (amount in controversy type of action), it could be filed in any municipal court in the state, and, in the absence of objection, that court could render a valid judgment. (*Roos v. Jansen* (1938) 30 *C.A.2d Supp.* 773, 776, 78 *P.2d* 476; see *Barquis v. Merchants Collection Assn.* (1972) 7 *C.3d* 94, 116, 101 *C.R.* 745, 496 *P.2d* 817, *supra*, §780, footnote 19, quoting the text.)

(2) *Proper Court for Trial Within County.* The revisers of the Code of Civil Procedure in 1933, in specifying the statewide "jurisdiction" of former municipal and former justice courts, did not intend to change the normal distribution of cases among local courts. The danger of jurisdictional defects resulting from choice of the wrong court was eliminated, and a different method of confining these courts to actions having a local aspect was devised, as follows: Added to each of the main venue sections of the Code was a provision declaring the "proper court for trial" within that county. The addition was in substantially the same language in all the sections (except for the nature of the action covered). (Former C.C.P. 392(2), 393(2), 395(c).)

(3) *Trial Court Unification.* Between 1994 and 2002, existing municipal and justice court districts were first merged, and municipal and superior courts subsequently were unified within counties. The concept of municipal court jurisdiction was replaced by the limited civil case. In addition, numerous amendments were added to the venue statutes to reflect the unification. (See *infra*, §783.)

SUPPLEMENT: [This section is current through the latest supplement]



90 of 188 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XX. VENUE: IN GENERAL

B. Proper Court for Trial in Superior Court.

2. Consolidation of Trial Courts.

3 *Witkin Cal. Proc. Actions* § 783

[§ 783] Consolidation of Trial Courts.

(1) *In General.* Cal. Const., Art. VI, §5(b), authorized the merger of existing municipal and justice districts in 1994. (See 2 *Cal. Proc.* (5th), *Courts*, §165.) The further unification of trial courts was proposed by Senate Constitutional Amendment No. 4 of the 1995-1996 Legislature, which authorized the unification of the municipal and superior court within a county by a vote of the municipal and superior court judges. The measure appeared on the ballot as Proposition 220 and was approved by the voters on June 2, 1998. Cal. Const., Art. VI, §5(e), provided in part: "[T]he municipal and superior courts shall be unified upon a majority vote of superior court judges and a majority vote of municipal court judges within the county. In those counties, there shall be only a superior court." Following unification in all counties, this provision was repealed at the November 2002 general election. (See 2 *Cal. Proc.* (5th), *Courts*, §166.)

(2) *Limited Civil Case.* As previously discussed (see *supra*, §782), the jurisdiction of former municipal courts was specified by statute. With various exceptions, cases below the jurisdictional dollar amount were within the jurisdiction of the municipal court and cases above that amount were within the jurisdiction of the superior court, although some actions were within the jurisdiction of the superior court regardless of the amount in controversy.

As part of the unification of trial courts, the concept of municipal court jurisdiction was replaced by the "limited civil case" in 1998. The California Law Revision Commission explains the change: "On unification of the trial courts in a county, all causes will be within the original jurisdiction of the superior court. Differentiating among superior court causes will be necessary, however, to preserve filing fees, economic litigation procedures, local appeal, and other significant procedural distinctions for matters that traditionally have been within the municipal court's jurisdiction." Causes traditionally within municipal court jurisdiction are now identified in *C.C.P.* 85 as limited civil cases. *C.C.P.* 86 and 86.1 identify particular proceedings as limited civil cases. The Law Revision Commission Comment to *C.C.P.* 86 provides: "A limited civil case is equivalent to a matter within the original jurisdiction of the municipal court under former law." (28 Cal. Law Rev. Com. Reports, p. 144.) (See 2 *Cal. Proc.* (5th), *Courts*, §241 et seq.)

(3) *Proper Court Location for Trial.* Without changing the rules for designating which county has venue of a case, the 2002 Legislature amended numerous venue sections to reflect the merger of all municipal courts into superior courts and to establish a new rule for determining the "proper court location for trial" within a superior court. The new rule, in substantially the same language (except for the nature of the subject action), provides that within the designated superior

court, the proper court location for trial is (a) the one that is the nearest or most accessible court that tries the type of action at issue, as designated by local court rule; otherwise, (b) any location in that superior court is proper. (See, e.g., *C.C.P.* 392(b), 394(b), (c).)

Venue in small claims court actions continues to be the same as in other civil actions. (*C.C.P.* 116.370(a).)

(4) *Transfer of Cases.* A superior court now may specify by local rule the locations where certain types of actions or proceedings may be filed, heard, or tried. The superior court may not dismiss a case, and the court clerk may not reject a case, because it is filed, or a person seeks to file it, in a court location other than the location specified by local rule. However, the court may transfer the case on its own motion to the proper location. (*C.C.P.* 402(a).) A superior court also may transfer an action or proceeding filed in one location to another location of the superior court. (*C.C.P.* 402(b).) (See *C.C.P.* 396a(f), *infra*, §795 [motion to transfer ejectment or unlawful detainer action to a different court within same superior court is governed by local court rules].)

SUPPLEMENT: [This section is current through the latest supplement]



91 of 188 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XX. VENUE: IN GENERAL

C. Legislative Control Over Venue.

3 *Witkin Cal. Proc. Actions* § 784

[§ 784] Legislative Control Over Venue.

(1) *In General.* The broad legislative power to prescribe the venue of actions is illustrated by cases upholding various classifications of types of actions for this purpose. (See *Cook v. W. S. Ray Mfg. Co.* (1911) 159 C. 694, 698, 115 P. 318; *Gridley v. Fellows* (1914) 166 C. 765, 768, 138 P. 355; *Sacramento & San Joaquin Drainage Dist. v. Superior Court* (1925) 196 C. 414, 432, 437, 238 P. 687; *Caminetti v. Superior Court* (1941) 16 C.2d 838, 843, 108 P.2d 911; *People v. Zegras* (1946) 29 C.2d 67, 68, 172 P.2d 883; *Yuba v. North America Consol. Gold Mining Co.* (1909) 12 C.A. 223, 227, 107 P. 139; *San Jose Ice & Cold Storage Co. v. San Jose* (1937) 19 C.A.2d 62, 64, 64 P.2d 1099; 77 Am.Jur.2d (2006 ed.), *Venue* §4 et seq.) (For legislative power over procedure generally, see 2 *Cal. Proc.* (5th), *Courts*, §§171, 172.)

(2) *Constitutional Limitations.* There are two chief constitutional limitations on the legislative power:

(a) *Equal protection.* Venue statutes, like any other legislative acts, are subject to the Equal Protection Clause of the Fourteenth Amendment (*Grocers' Fruit Growing Union v. Kern County Land Co.* (1907) 150 C. 466, 474, 89 P. 120, *infra*, §849) and the prohibition in the California Constitution against local or special laws (Cal. Const., Art. IV, §16(b)). (See 2 *Cal. Proc.* (5th), *Courts*, §172.)

(b) *Federal supremacy.* Where a federal statute gives a defendant a particular local venue as a matter of right, the state cannot deny it. Under 12 U.S.C., §94, venue of an action against a national bank for which the Federal Deposit Insurance Corporation has been appointed receiver is the county in which the bank is located. (See *Citizens & Southern Nat. Bank v. Bougas* (1977) 434 U.S. 35, 98 S.Ct. 88, 92, 54 L.Ed.2d 218, 222 [each national bank is "located" in county in which branch is located]; *Central Bank v. Superior Court* (1973) 30 C.A.3d 962, 966, 971, 106 C.R. 912 [same]; *Monarch Wine Co. v. Butte* (1952) 113 C.A.2d 833, 839, 249 P.2d 291; *Michigan Nat. Bank v. Superior Court* (1972) 23 C.A.3d 1, 9, 11, 99 C.R. 823; *Central Bank v. Superior Court* (1973) 30 C.A.3d 913, 918, 106 C.R. 696 [no waiver of county venue by reason of single transaction; construction loan on building in another county].)

SUPPLEMENT: [This section is current through the latest supplement]



92 of 188 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XX. VENUE: IN GENERAL

D. Effect of Contract or Consent.

1. General Rule: Agreement Fixing Venue Is Void.

3 *Witkin Cal. Proc. Actions* § 785

[§ 785] General Rule: Agreement Fixing Venue Is Void.

(1) *Statement of Rule.* A provision in a contract purporting to fix the venue of a future action on the contract in a particular county is illegal and void. "The rules to determine in what courts and counties actions may be brought are fixed upon consideration of general convenience and expediency by general law; to allow them to be changed by the agreement of the parties would disturb the symmetry of the law, and interfere with such convenience. Such contracts might be induced by considerations tending to bring the administration of justice into disrepute." (*General Acceptance Corp. of Calif. v. Robinson* (1929) 207 C. 285, 289, 277 P. 1039 [quoting Massachusetts case]; see *C.C.P.* 395(c) [waivers of venue provisions governing contract actions in *C.C.P.* 395(b) are void]; *General Motors Acceptance Corp. v. Codiga* (1923) 62 C.A. 117, 119, 216 P. 383; *Alexander v. Superior Court* (2003) 114 C.A.4th 723, 731, 8 C.R.3d 111 [upholding continuing validity of rule]; *Arntz Builders v. Superior Court* (2004) 122 C.A.4th 1195, 1207, 19 C.R.3d 346 [C.C.P. 394 (removal of action involving county to neutral county; see *infra*, §871 et seq.) may not be contractually waived]; 29 *Harv. L. Rev.* 881; 65 *Harv. L. Rev.* 184; 23 *So. Cal. L. Rev.* 595; 69 *A.L.R.2d* 1324 [provision authorizing venue in particular place]; 31 *A.L.R.4th* 404 [provision limiting venue]; 77 *Am.Jur.2d* (2006 ed.), *Venue* §10 et seq.)

(2) *Action Under Franchise Relations Act.* A provision in a franchise agreement restricting a claim to a venue outside California is void as to any claim arising under or relating to a franchise agreement involving a franchise operating within California that is subject to the Franchise Relations Act. (*B. & P.C.* 20040.5; see 3 *Summary* (10th), *Agency and Employment*, §7.)

(3) *Action Under Federal Employers' Liability Act.* A similar result is reached on a different theory where the attempt is made to limit venue to a particular state in actions under the Federal Employers' Liability Act. This provision has been held to constitute an illegal limitation of liability, in violation of express provisions of the federal statute. (*Boyd v. Grand Trunk Western R. Co.* (1949) 338 U.S. 263, 70 S.Ct. 26, 27, 94 L.Ed. 55, 57; *Pryor v. Union Pac. R. Co.* (1950) 34 C.2d 724, 725, 214 P.2d 377; see 38 *Cal. L. Rev.* 524; 23 *So. Cal. L. Rev.* 388.)

SUPPLEMENT: [This section is current through the latest supplement]



93 of 188 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XX. VENUE: IN GENERAL

D. Effect of Contract or Consent.

2. Distinctions and Exceptions.

3 *Witkin Cal. Proc. Actions* § 786

[§ 786] Distinctions and Exceptions.

(1) *Provision Indirectly Affecting Venue.* Parties may determine the venue in future contract actions by specifying the actual place of making or performing the contract. (See *infra*, §§837 et seq., 842 et seq.; but see C.C. 1804.1(i), 2983.7(f), *infra*, §845 [prohibiting these clauses in conditional sales contracts].) Also, a provision in an arbitration agreement, specifying the place where the hearings are to be held, has the effect of fixing the venue for an action to confirm the award, because the petition must be filed in the superior court of the county of the hearing. (C.C.P. 1292.2.)

(2) *Consent After Action Is Filed.* Venue may be determined by subsequent agreement where the plaintiff files in the wrong county and the defendant does not take steps to change the venue. (See *infra*, §925.) And where the action is brought in a court that lacks subject matter jurisdiction, it may be transferred to a court with jurisdiction in a county agreed upon by the parties. (C.C.P. 396; see 2 *Cal. Proc.* (5th), *Jurisdiction*, §399 et seq.)

(3) *Forum Selection Clause.* A contractual provision specifying the state in which an action must be initiated is valid, and is enforceable in the trial judge's discretion, in the absence of a showing that enforcement would be unreasonable. (*Smith, Valentino & Smith v. Superior Court* (1976) 17 C.3d 491, 496, 131 C.R. 374, 551 P.2d 1206, 2 *Cal. Proc.* (5th), *Jurisdiction*, §355 [distinguishing and disapproving to extent inconsistent *General Acceptance Corp. of Calif. v. Robinson* (1929) 207 C. 285, 277 P. 1039, *supra*, §785]; *Bos Material Handling v. Crown Controls Corp.* (1982) 137 C.A.3d 99, 108, 186 C.R. 740 [contract provision choosing forum state and law governing arbitration is enforceable if consistent with reasonable expectations of parties and not oppressive]; see *Stewart Organization v. Ricoh Corp.* (1988) 487 U.S. 22, 108 S.Ct. 2239, 2243, 101 L.Ed.2d 22, 30 [in diversity action (see 2 *Cal. Proc.* (5th), *Jurisdiction*, §66 et seq.), determination whether to give effect to forum selection clause is governed by federal law, specifically 28 U.S.C., §1404 (see 2 *Cal. Proc.* (5th), *Jurisdiction*, §382)]; but see restrictions on forum selection clauses in agreements governed by Federal Employers' Liability Act and the Franchise Relations Act, *supra*, §785.)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Consent After Action Is Filed.* C.C.P. 396 was amended in 2008 to delete provisions that have become obsolete as a result of the unification of the trial courts.



94 of 188 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XX. VENUE: IN GENERAL

E. Determining Form of Action for Venue Purposes.

1. In General: Bases of Classification.

3 Witkin Cal. Proc. Actions § 787

[§ 787] In General: Bases of Classification.

The rules of venue, like those governing a number of other subjects (e.g., the statute of limitations and attachment), are based in part upon a classification of the types or forms of action. But the determination of venue differs in several respects:

(1) There is no classification of legal and equitable actions.

(2) The major classification is of local and transitory actions, a division peculiar to the law of venue. (See *44 Cal. L. Rev. 686*; *43 Harv. L. Rev. 1217*; *70 Harv. L. Rev. 708*; *infra*, §§792 et seq., 817 et seq.)

(3) Where different kinds of relief are sought, an additional classification of "mixed actions" is recognized. (See *infra*, §§788, 789.) The joinder of causes of action also results in mixed actions. (See *infra*, §882 et seq.)

(4) Another basis of classification is the party involved: fiduciary, corporation, association, governmental body or officer. (See *infra*, §§805, 849, 850, 862 et seq.)

The class in which the action falls is determined as of the time that the motion for a change of venue is made. (See *infra*, §789.) And the relief sought, rather than the cause of action or "gravamen" of the action, determines the venue (the "main relief rule"). (See *infra*, §788.)

SUPPLEMENT: [This section is current through the latest supplement]



95 of 188 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XX. VENUE: IN GENERAL

E. Determining Form of Action for Venue Purposes.

2. The Main Relief Rule.

3 *Witkin Cal. Proc. Actions* § 788

[§ 788] The Main Relief Rule.

(1) *Statement of Rule.* To determine whether an action is local or transitory the court will look to the "main relief" sought or the "principal object" of the action. If the complaint demands only one kind of relief, the rule does not come into operation. But if the complaint, although stating a single cause of action, prays for two distinct types of relief, one local and one transitory, the proceeding is a "mixed action," and the rule selects one as determinative of venue. (See C.E.B., 1 Civil Proc. Before Trial 4th, §8.49 et seq.; Rutter Group, Civil Proc. Before Trial §3:457 et seq.)

(2) *Applications of Rule.* Applications of the rule fall into two broad groups:

(a) Where the main relief relates to rights in real property (local), the incidental demand for personal relief (transitory) does not change its fundamental character as a local action. (See *California v. Royal Consol. Mining Co.* (1921) 187 C. 343, 350, 202 P. 133, *infra*, §796 [main relief was possession of land; demand for rents, etc., was incidental]; *Standard Brands of Calif. v. Bryce* (1934) 1 C.2d 718, 721, 37 P.2d 446; *Dial v. Homestead Land & Bldg. Co.* (1919) 39 C.A. 479, 481, 179 P. 444 [main relief was reconveyance of title to realty; accounting was incidental]; *Case v. Kirkwood* (1931) 119 C.A. 207, 211, 6 P.2d 110, *infra*, §799; *Brown Materials Co. v. Angus* (1937) 20 C.A.2d 32, 613, 66 P.2d 470, *infra*, §883; *Strosnider v. Pomin* (1939) 32 C.A.2d 103, 110, 89 P.2d 179, *infra*, §802; *Massae v. Superior Court* (1981) 118 C.A.3d 527, 536, 539, 173 C.R. 527, citing the text [main relief was reformation of deed of trust; injunction and damages were incidental].)

(b) Where the main relief sought is personal, the fact that title or possession of real property is incidentally involved does not change its character as a transitory action. (See *Brown v. Happy Valley Fruit Growers* (1929) 206 C. 515, 274 P. 977, *infra*, §829; *Neet v. Holmes* (1942) 19 C.2d 605, 610, 122 P.2d 557; *Kaluzok v. Brisson* (1946) 27 C.2d 760, 764, 167 P.2d 481, *infra*, §817; *Work v. Associated Almond Growers of Paso Robles* (1926) 76 C.A. 708, 711, 245 P. 790; *Stesel v. Santa Ana River Water Co.* (1939) 35 C.A.2d 117, 125, 94 P.2d 1052, *infra*, §828; *Coe v. Kessler* (1956) 139 C.A.2d 536, 542, 294 P.2d 83; *Fletcher v. Nordeste Homes* (1961) 192 C.A.2d 33, 36, 13 C.R. 226; *Hammon v. American Exploration & Mining Co.* (1962) 203 C.A.2d 306, 308, 21 C.R. 409, citing the text; *Los Angeles City School Dist. v. Redwood Empire Title Co. of Mendocino* (1962) 206 C.A.2d 398, 402, 23 C.R. 662, citing the text; *Central Bank v. Superior Court* (1973) 30 C.A.3d 913, 917, 106 C.R. 696, citing the text.)

In *Carlton v. Superior Court* (1966) 240 C.A.2d 586, 49 C.R. 759, the court suggested that, as in then recent statute of limitations cases, the problem could be resolved by looking to "the kind of inquiry the lawsuit poses for the trial court," i.e., "classifying the action as local if title to real estate is the focus of trial and transitory if the inquiry deals primarily with financial obligations or personal relationships." (240 C.A.2d 589.)

(3) *Effect of Joinder*. A distinct problem is presented when there is a joinder of separate causes of action, in one of which the sole or main relief is local, and in the other, transitory. (See *infra*, §882 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]



96 of 188 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XX. VENUE: IN GENERAL

E. Determining Form of Action for Venue Purposes.

3. Plaintiff's Complaint.

a. Complaint Is Ordinarily Determinative.

3 *Witkin Cal. Proc. Actions* § 789

[§ 789] Complaint Is Ordinarily Determinative.

(1) *General Rule.* It is frequently declared that the form of the action and the main relief are to be determined from the allegations and demand of the original complaint. This means three things:

(a) The plaintiff's theory of the action as set forth in the complaint determines the venue. (See *Eckstrand v. Wilshusen* (1933) 217 C. 380, 381, 18 P.2d 931; *Quick v. Corsaro* (1960) 180 C.A.2d 831, 836, 4 C.R. 674, *infra*, §932; *Pacific Air Lines v. Superior Court* (1965) 231 C.A.2d 587, 590, 42 C.R. 68, citing the text; *Gutierrez v. Superior Court* (1966) 243 C.A.2d 710, 716, 52 C.R. 592; *Lebastchi v. Superior Court* (1995) 33 C.A.4th 1465, 1469, 39 C.R.2d 787, *infra*, §903, citing the text.)

(b) Venue is determined by the conditions that exist at the time the motion for change is made, i.e., by the complaint as it stands at that time and not as subsequently amended. (See *Buell v. Dodge* (1881) 57 C. 645; *Kallen v. Serretto* (1932) 126 C.A. 548, 549, 14 P.2d 917; *Armstrong Petroleum Corp. v. Superior Court* (1981) 114 C.A.3d 732, 738, 170 C.R. 767, citing the text [subsequent severance of "transitory" count of complaint did not permit return of "local" count to original county of action where real property was located]; *infra*, §891.)

(c) The plaintiff cannot change the theory of the original complaint, for venue purposes, by a subsequent affidavit. In *Sloan v. Court Hotel* (1945) 72 C.A.2d 308, 164 P.2d 516, plaintiffs sued as hotel guests (licensees, not tenants of real property) to enjoin termination of their occupancy, in the county where the hotel was situated. Defendant moved for change of venue to his residence. Plaintiffs filed an affidavit averring that the purpose of the action was to establish the estate or interest of each in real property. *Held*, plaintiffs could not by this means deprive defendant of the right to trial at his residence, arising from the allegations of the complaint. (72 C.A.2d 313.) (See *Sims v. Mains* (1933) 131 C.A. 307, 310, 21 P.2d 447; *Johnson v. Superior Court* (1965) 232 C.A.2d 212, 215, 42 C.R. 645.)

(2) *Distinctions.* It is not true, however, that the nature of the action must be determined solely from the language of the complaint. The defendant may challenge the venue by affidavits dealing with the nature of the action (see *infra*, §929), and the plaintiff may support the theory of his complaint by counteraffidavits consistent with its form but amplifying the allegations relied on for the choice of venue (see *infra*, §930).

SUPPLEMENT: [This section is current through the latest supplement]



97 of 188 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XX. VENUE: IN GENERAL

E. Determining Form of Action for Venue Purposes.

3. Plaintiff's Complaint.

b. Construction Against Plaintiff.

3 Witkin Cal. Proc. Actions § 790

[§ 790] Construction Against Plaintiff.

The policy of the law favors the right of a trial at the defendant's residence. Accordingly it is said that the complaint will be strictly construed against the plaintiff who seeks to lay the venue in a place other than the defendant's residence, i.e., the plaintiff must clearly show that the action is local or is one of the transitory actions triable outside the county of the defendant's residence. (See *Ah Fong v. Sternes* (1889) 79 C. 30, 33, 21 P. 381; *Sheeley v. Jones* (1923) 192 C. 256, 257, 219 P. 744; *Neet v. Holmes* (1942) 19 C.2d 605, 612, 122 P.2d 557 [dictum]; *Meadows v. Ematt & Chandler* (1950) 99 C.A.2d 496, 498, 222 P.2d 145; *Hayutin v. Rudnick* (1952) 115 C.A.2d 138, 141, 251 P.2d 707; *Haurat v. Superior Court* (1966) 241 C.A.2d 330, 334, 50 C.R. 520; *Gallin v. Superior Court* (1991) 230 C.A.3d 541, 544, 281 C.R. 304, citing the text.)

SUPPLEMENT: [This section is current through the latest supplement]



98 of 188 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XX. VENUE: IN GENERAL

E. Determining Form of Action for Venue Purposes.

3. Plaintiff's Complaint.

c. Failure To State Cause of Action.

3 *Witkin Cal. Proc. Actions* § 791

[§ 791] Failure To State Cause of Action.

(1) *General Rule.* A motion for a change of venue cannot serve the purpose of a demurrer by testing the sufficiency of the complaint. Hence, the only question on the motion is whether the complaint sets forth a theory of action that supports the chosen venue; if it does, the case remains there, and the insufficiency of the pleading will be tested on demurrer by the court of that county. This point is well illustrated by *Clary v. Basalt Rock Co.* (1950) 99 C.A.2d 458, 222 P.2d 24, where the court said: "We are aware that the effect of what we have said is that respondent has stated no cause of action against the appellant, and for all that now appears upon the face of the complaint which he filed, he cannot state a cause of action against it. Nevertheless, the sole question before this court is whether or not the motion for change of place of trial should have been granted. ... It is not for this court to sustain a demurrer or order a dismissal. That function, including permission to amend if amendment can be made, is to be performed by the court in which the further proceedings in the cause occur." (99 C.A.2d 463.)

Other cases are to the same effect. (See *Lakeside Ditch Co. v. Packwood Canal Co.* (1920) 50 C.A. 296, 307, 195 P. 284 ["the complaint, on a motion for change of venue, cannot be challenged either for insufficiency of facts or insufficiency of the statement of the facts by an affidavit of merits or any affidavit filed in such a proceeding. That pleading can be considered only in so far as it may throw or tend to throw any light upon the question whether the action should or should not be removed"]; *Miratti v. Banca Popolare Fugazi* (1929) 99 C.A. 1, 7, 277 P. 905; *Harbinson v. Affeldt* (1946) 75 C.A.2d 499, 501, 504, 171 P.2d 474.)

(2) *Effect of Joinder.* A qualification of this rule is recognized, however, where there is a joinder of a resident defendant against whom no cause of action has been or can be stated. (See *infra*, §§896, 897.)

SUPPLEMENT: [This section is current through the latest supplement]



99 of 188 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXI. VENUE: LOCAL ACTIONS

A. Actions Involving Real Property.

1. General Principles.

a. Former Constitutional Provision.

3 Witkin Cal. Proc. Actions § 792

[§ 792] Former Constitutional Provision.

Former Cal. Const., Art. VI, §5, established a unique type of jurisdictional venue by the following provision: "[A]ll actions for the recovery of the possession of, quieting the title to, or for the enforcement of liens upon real estate, shall be commenced in the county in which the real estate, or any part thereof, affected by such action or actions, is situated." These three types of "constitutional local actions" had to be instituted in the proper county; filing in another county did not give the court jurisdiction, and its judgment was void. (See *Fritts v. Camp* (1892) 94 C. 393, 397, 29 P. 867, *infra*, §796; *Rogers v. Cady* (1894) 104 C. 288, 292, 38 P. 81; *Duffy v. Duffy* (1894) 104 C. 602, 604, 38 P. 443 [change of venue on stipulation, for convenience of witnesses]; *California v. Royal Consol. Mining Co.* (1921) 187 C. 343, 350, 202 P. 133, *infra*, §796 [requirement applied to actions by state; statute purporting to allow different venue was unconstitutional]; *Maguire v. Cunningham* (1923) 64 C.A. 536, 540, 541, 222 P. 838; *Wood v. Emig* (1943) 58 C.A.2d 851, 856, 137 P.2d 875, *infra*, §799; *Rice v. Schubert* (1951) 101 C.A.2d 638, 642, 226 P.2d 50; *Apartments v. Trott* (1959) 172 C.A.2d 7, 11, 342 P.2d 32, citing the text; *Robinson v. Superior Court* (1962) 203 C.A.2d 263, 267, 21 C.R. 475, citing the text; *All-Cool Aluminum Awning Co. v. Superior Court* (1964) 224 C.A.2d 660, 665, 36 C.R. 769, quoting the text.) The constitutional language was eliminated in 1966.

SUPPLEMENT: [This section is current through the latest supplement]



100 of 188 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXI. VENUE: LOCAL ACTIONS

A. Actions Involving Real Property.

1. General Principles.

b. Nature and Classes.

3 *Witkin Cal. Proc. Actions* § 793

[§ 793] Nature and Classes.

(1) *Statutory Rule.* Subject to the power of the court to transfer actions and proceedings, the superior court in the county in which the real property (or part of the real property) that is the subject of the action is situated is the proper court for the trial of the following actions:

(a) For the recovery of real property, or of an estate or interest in the property, or for the determination in any form, of that right or interest, and for injuries to real property. (*C.C.P.* 392(a)(1).)

(b) For the foreclosure of all liens and mortgages on real property. (*C.C.P.* 392(a)(2).) (See *Cal. Civil Practice*, 1 Procedure, §§4:69, 4:70; Rutter Group, *Civil Proc. Before Trial* §3:467 et seq.; on venue where land is in more than one county, see *infra*, §794; on condemnation, see *infra*, §800; on partition, see *infra*, §798.)

One of the reasons for local venue in these real property actions is that "[a]ll the records relating to the title are immediately available at the county seat, and the expense and inconvenience of taking local officers from the place of their employment and subpoenaing them to appear in some other county, and procuring of certified copies of the records, is obviated." (*Strosnider v. Pomin* (1939) 32 *C.A.2d* 103, 110, 89 *P.2d* 179, *infra*, §802.)

(2) *Former Law Distinguished.* Many decisions in this area construe and apply former *Cal. Const.*, Art. VI, §5 (*supra*, §792), and it is important to note the differences in content and scope of the statute and the former constitutional provision:

(a) The statute includes the three formerly specified constitutional local actions and adds two additional types: determination of right or interest (*infra*, §795 et seq.), and injuries (*infra*, §801).

(b) The statute has been applied to actions seeking recovery of less than the fee. (See *Brown Materials Co. v. Angus* (1937) 20 *C.A.2d* 32, 33, 66 *P.2d* 470, *infra*, §883 [action by principals to compel defendant agents to transfer a lease procured by defendants while in plaintiffs' employ].)

(c) The statute also differs in its effect. It does not establish a jurisdictional requirement of commencement in the

proper county, but, like other venue provisions, merely gives a right to insist on trial in that county when no ground for change of venue exists. And the superior court of any county has jurisdiction of a statutory local action commenced there, and can render a valid judgment where no objection to the improper venue is made. (*Miller & Lux v. Madera Canal & Irr. Co.* (1909) 155 C. 59, 73, 99 P. 502; *Brock v. Superior Court* (1947) 29 C.2d 629, 633, 634, 177 P.2d 273 [dictum].)

(d) The statute refers to "real property." The constitutional provision used the term "real estate," and the relatively few cases construed the latter term, holding it applicable only to freehold interests and not to an estate for years. (See *Dougherty v. California Kettleman Oil Royalties* (1937) 9 C.2d 58, 76, 80, 69 P.2d 155 [oil lease of definite duration was not within scope of term, and suit for accumulated oil royalties was not action for recovery of or to quiet title to real property]; *Sutter-Butte Canal Co. v. Great Western Power Co. of Calif.* (1924) 65 C.A. 597, 600, 224 P. 768 [action to determine rights in water was one involving real estate].)

SUPPLEMENT: [This section is current through the latest supplement]



101 of 188 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXI. VENUE: LOCAL ACTIONS

A. Actions Involving Real Property.

1. General Principles.

c. Land in More Than One County.

3 Witkin Cal. Proc. Actions § 794

[§ 794] Land in More Than One County.

C.C.P. 392(a) refers to the county in which the real property "or some part thereof" is situated. Hence, when the subject matter of the action involves either one parcel located in more than one county or two parcels located in more than one county, either county is a proper venue. (See *Murphy v. Superior Court* (1902) 138 C. 69, 70, 70 P. 1070; *Sutter-Butte Canal Co. v. Great Western Power Co. of Calif.* (1924) 65 C.A. 597, 599, 224 P. 768; *Stoneman v. Fritz* (1939) 34 C.A.2d 26, 27, 92 P.2d 1035; *Appel v. Hubbard* (1957) 155 C.A.2d 639, 643, 318 P.2d 164; C.E.B., 1 Civil Proc. Before Trial 4th, §8.40; 77 Am.Jur.2d (2006 ed.), Venue §23.)

SUPPLEMENT: [This section is current through the latest supplement]



102 of 188 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXI. VENUE: LOCAL ACTIONS

A. Actions Involving Real Property.

2. Recovery or Determination of Interest.

a. Ejectment and Unlawful Detainer.

3 Witkin Cal. Proc. Actions § 795

[§ 795] Ejectment and Unlawful Detainer.

The language of *C.C.P. 392(a)(1)* ("[f]or the recovery of real property") doubtless includes ejectment and the summary remedy of unlawful detainer. (On nature of these actions, see 5 *Cal. Proc.* (5th), *Pleading*, §§634 et seq., 638 et seq.)

In an action for unlawful detainer, the plaintiff, by affidavit or verified complaint, must state facts showing that the action was commenced in the proper superior court and the proper court for trial of the action, and that the action was for unlawful detainer. If the affidavit or complaint is not filed, the court must dismiss the action without prejudice, but may permit late filing of the affidavit "on terms that are just." (*C.C.P. 396a(a)*.)

SUPPLEMENT: [This section is current through the latest supplement]



103 of 188 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXI. VENUE: LOCAL ACTIONS

A. Actions Involving Real Property.

2. Recovery or Determination of Interest.

b. Quiet Title.

3 *Witkin Cal. Proc. Actions* § 796

[§ 796] Quiet Title.

(1) *Statutory Rule.* The former constitutional provision referred specifically to "quieting title." The statute covers actions for "determination in any form" of an estate or interest in real property. (*C.C.P.* 392(a)(1).) (See *C.C.P.* 760.050(a) [venue provision in statute on quiet title actions; "county in which the real property, or some part thereof, is located"]; 5 *Cal. Proc.* (5th), *Pleading*, §658.)

(2) *Illustrations.* Cases applying the "main relief rule" (supra, §788) gave the constitutional provision a broad application to quite unconventional quiet title actions. In *Fritts v. Camp* (1892) 94 C. 393, 29 P. 867, plaintiff sued to restrain the defendants from dumping debris on plaintiff's land. It was alleged that defendants claimed an easement to do the acts and plaintiff sought a judgment that no easement existed. The court thought that "one avowed purpose of the action is to quiet an adverse claim to real estate." (94 C. 398.)

In *Pacific Yacht Club v. Sausalito Bay Water Co.* (1893) 98 C. 487, 33 P. 322, plaintiff claimed an easement in defendant's land, alleged that defendant claimed adversely to it, and asked for an injunction against defendant's interference. The court held that on a "fair construction" the complaint was to quiet title to the easement; the restraining order would be merely incidental and follow the adjudication of title as a matter of course. The severe penalty of dismissal of the action was meted out by construing the pleading in a manner obviously not intended by the pleader. And the artificiality of both the rule and its application are indicated in the following quotation: "There can be no question but that a complaint might be framed, alleging title to an easement, a threatened interference therewith, and asking for an injunction, which could not be considered an action to quiet title." (98 C. 489.)

The same approach, but reaching a more reasonable result, appears in *California v. Royal Consol. Mining Co.* (1921) 187 C. 343, 202 P. 133. The state controller sued to recover possession of land and its rents, issues, and profits on allegations that the state had acquired the title by a tax deed. Although an action for rents, etc., might be a transitory action for money (see *infra*, §831), in this case the right to the money was entirely dependent on the disputed issue of title; hence, the action was essentially to quiet title. (187 C. 350.)

SUPPLEMENT: [This section is current through the latest supplement]



104 of 188 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXI. VENUE: LOCAL ACTIONS

A. Actions Involving Real Property.

2. Recovery or Determination of Interest.

c. Actions Involving Deeds, Contracts, or Trusts.

3 *Witkin Cal. Proc. Actions* § 797

[§ 797] Actions Involving Deeds, Contracts, or Trusts.

C.C.P. 392(a)(1) covers a number of other actions involving the determination of rights or interests in real property:

(1) *Deeds*. An action to cancel or set aside a deed or other instrument affecting the title to land for fraud, mistake, or another invalidating cause. (See *Baker v. Fireman's Fund Ins. Co.* (1887) 73 C. 182, 185, 14 P. 686 [action to have absolute deed declared mortgage and to have property reconveyed]; *Sloss v. De Toro* (1888) 77 C. 129, 132, 19 P. 233 [heir's action to set aside fraudulent probate sale by administrator]; *Eckstrand v. Wilshusen* (1933) 217 C. 380, 382, 18 P.2d 931; *Stanley v. Barney* (1932) 123 C.A. 139, 140, 10 P.2d 1022 [action to annul deed on ground of grantor's incompetency]; *Kejr v. Construction Engineers* (1952) 111 C.A.2d 817, 819, 245 P.2d 21.)

In *Rice v. Schubert* (1951) 101 C.A.2d 638, 226 P.2d 50, an action to set aside a fraudulent conveyance, defendant argued that the action was not within *C.C.P.* 392 because plaintiff, the creditor, had no estate or interest in the property. The court held, however, that this was immaterial; the action was brought to determine an interest in land (that of plaintiff's debtor), and the statute covers an action for the "determination in any form" of that right or interest. (101 C.A.2d 642.) (See 37 A.L.R.2d 568 [action to set aside fraudulent conveyance].)

(2) *Contracts*. An action for the reformation of a contract of sale of real property. (See *Franklin v. Dutton* (1889) 79 C. 605, 606, 21 P. 964 [vendor's action].) An action for the specific performance of a contract to sell land. (See *Grocers' Fruit Growing Union v. Kern County Land Co.* (1907) 150 C. 466, 473, 89 P. 120, *infra*, §849 [principal relief sought is conveyance of land]; *Kopke v. Carlson* (1929) 98 C.A. 155, 157, 276 P. 606; *Santa Barbara Lodge No. 605, Loyal Order of Moose v. Penzner* (1951) 104 C.A.2d 494, 231 P.2d 595; 77 A.L.R.2d 1014 [venue of action to cancel contract relating to interest in land]; 8 A.L.R.3d 489 [venue of damage action for breach of real estate sales contract].)

(3) *Trusts*. An action to establish or declare a trust in land. (*McFarland v. Martin* (1904) 144 C. 771, 774, 78 P. 239; *Donohoe v. Rogers* (1914) 168 C. 700, 703, 144 P. 958; *Franco Western Oil Co. v. Cameron* (1962) 200 C.A.2d 37, 40, 19 C.R. 304.)

(4) *Deeds of Trust*. An action to reform a deed of trust on real property. (*Massae v. Superior Court* (1981) 118

C.A.3d 527, 529, 173 C.R. 527, citing the text [action to rescind power of sale granted to trustee].)

SUPPLEMENT: [This section is current through the latest supplement]



105 of 188 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXI. VENUE: LOCAL ACTIONS

A. Actions Involving Real Property.

3. Partition.

3 Witkin Cal. Proc. Actions § 798

[§ 798] Partition.

Venue in partition actions is governed by *C.C.P. 872.110(b)*, which prescribes the proper counties as follows:

(1) Where the subject matter of the action is real property or real and personal property, the county in which the real property, or some part of it, is situated. (*C.C.P. 872.110(b)(1).*)

(2) Where the subject matter of the action is personal property, the county in which, at the time the action is commenced, (a) the personal property is principally located, or (b) any defendant or all defendants reside. (*C.C.P. 872.110(b)(2).*)

SUPPLEMENT: [This section is current through the latest supplement]



106 of 188 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXI. VENUE: LOCAL ACTIONS

A. Actions Involving Real Property.

4. Enforcement of Lien.

3 *Witkin Cal. Proc. Actions* § 799

[§ 799] Enforcement of Lien.

(1) *Statutory Rule.* The former constitutional provision covered "enforcement of liens upon real estate." (See *supra*, §792.) The statutory language is "foreclosure of all liens and mortgages on real property." (*C.C.P.* 392(a)(2), *supra*, §793.)

(2) *Illustrations.* The usual application has been to the foreclosure of mortgages and mechanics' liens. (See *Rogers v. Cady* (1894) 104 C. 288, 292, 38 P. 81 [mortgage]; *Robinson v. Superior Court* (1962) 203 C.A.2d 263, 267, 21 C.R. 475 [mechanic's lien]; 2 A.L.R.2d 1261 [liens].) The main relief rule was applied in *Case v. Kirkwood* (1931) 119 C.A. 207, 6 P.2d 110, where plaintiff also sought to recover the amount of the debt secured by a mortgage lien. "When it is alleged that the party against whom a personal judgment is sought is also interested in the real property, and a foreclosure of this interest is sought, the action, as to such a party, is one to foreclose a lien." (119 C.A. 211.)

An academic distinction achieved significance in *Woodley v. Woodley* (1941) 47 C.A.2d 188, 117 P.2d 722. A testator devised real property to defendant on condition that \$ 50 per month should be paid to his son (plaintiff) for his lifetime, which sum "shall constitute a lien upon said land." If this language created a testamentary trust, venue of an enforcement proceeding was in the county of probate (Sonoma). If it created a lien, venue of an action to enforce it was in the county of location of the land (Marin). *Held*, the will did not create a trust but an equitable charge or lien, and the action was properly brought in *Marin*. (47 C.A.2d 191.)

In *Wood v. Emig* (1943) 58 C.A.2d 851, 137 P.2d 875, plaintiffs, husband and wife, owned land in Santa Clara County, which they conveyed to their daughter. Plaintiffs were sued in a personal action in Siskiyou County, a money judgment was given and recorded in Santa Clara County, and the judgment creditors had execution issue from the Siskiyou court. Plaintiffs claimed a homestead exemption, which, after a hearing, was denied. This present action was then brought by plaintiffs to determine their rights in the land; the daughter claimed title and the judgment creditors set up their judgment lien. *Held*, the daughter was the owner and entitled to quiet title.

(a) Though the original issue in the Siskiyou case was a money claim, the ultimate issue was whether the judgment could be satisfied out of the land; "the proceeding was in enforcement of a judgment by execution, in effect the satisfaction of a lien against homestead real estate in another county." (58 C.A.2d 856.)

(b) "The order of the Superior Court of Siskiyou County was without legal effect. ... It may be assumed that such court had jurisdiction to render the money judgment and, by following the usual procedure, make it effective in another county, but it did not have jurisdiction to determine homestead rights to real estate located in another county." (58 C.A.2d 857.)

(c) Sound policy requires that rights of homesteaders and claims of exemption should be heard where the land is situated. (58 C.A.2d 858.)

Although this decision in favor of the daughter could be sustained on the res judicata point (not being represented at the exemption hearing, not bound by the determination; 58 C.A.2d 858), the views expressed seem erroneous. The Siskiyou action was not brought to enforce a lien or to determine homestead rights. The action was personal and transitory, and was properly commenced, tried, and decided by a court with jurisdiction. The execution proceedings and the hearing on the question of exemption of the homestead were not new actions that had to be tried in the county in which the land was located.

SUPPLEMENT: [This section is current through the latest supplement]



107 of 188 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXI. VENUE: LOCAL ACTIONS

A. Actions Involving Real Property.

5. Condemnation.

3 Witkin Cal. Proc. Actions § 800

[§ 800] Condemnation.

A condemnation action must be brought in the county where the property sought to be taken is located (*C.C.P. 1250.020(a)*), unless the property is "situated in more than one county," in which case it may be commenced "in any one of such counties." (*C.C.P. 1250.020(b)*). (See 8 *Summary* (10th), *Constitutional Law*, §1204.)

SUPPLEMENT: [This section is current through the latest supplement]



108 of 188 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXI. VENUE: LOCAL ACTIONS

A. Actions Involving Real Property.

6. Damages for Injuries to Real Property.

a. Physical Injuries.

3 *Witkin Cal. Proc. Actions* § 801

[§ 801] Physical Injuries.

(1) *In General.* The action "for injuries to real property" is covered by *C.C.P. 392(a)(1)*. Typical examples are cases involving physical injury. (See *Miller & Lux v. Madera Canal & Irr. Co.* (1909) 155 C. 59, 73, 99 P. 502 [injuries suffered through diversion of waters]; *Standard Brands of Calif. v. Bryce* (1934) 1 C.2d 718, 721, 37 P.2d 446 [encroachments and excavations damaging adjoining lot]; *Williams v. Merced Irr. Dist.* (1935) 4 C.2d 238, 241, 48 P.2d 664 [dam causing water to overflow land]; *San Jose Ice & Cold Storage Co. v. San Jose* (1937) 19 C.A.2d 62, 63, 64 P.2d 1099 [impairment of access to real property by construction of grade crossings]; *Wolfe v. Wallace* (1957) 154 C.A.2d 523, 525, 316 P.2d 697 [damages for cutting down trees]; *Stauffer Chemical Co. v. Superior Court* (1968) 265 C.A.2d 1, 3, 71 C.R. 202, citing the text [rule usually promotes convenience of court, litigants, and witnesses, pointing "to the most convenient forum as an original matter, relieving the defendant of the burden of demonstrating convenience"]; *Rutter Group, Civil Proc. Before Trial* §3:472 et seq.; 77 *Am.Jur.2d* (2006 ed.), *Venue* §26; 65 *A.L.R.2d* 1268 [Wolfe].)

(2) *Negligent Design and Construction of Building.* *Foundation Engineers v. Superior Court* (1993) 19 C.A.4th 104, 23 C.R.2d 469, involved an issue of first impression: "What is the proper venue for an action based on the negligent design and construction of a building." (19 C.A.4th 106.) Plaintiff property owner sued defendant firms for negligent design and construction of buildings, alleging, among other things, defective soil preparation and foundation construction, which undermined the buildings' structural integrity and longevity. Plaintiff's complaint contained causes of action for negligence, strict liability, breach of implied warranty, and declaratory relief, but not for breach of contract. Defendants moved for a change of venue to the county in which the buildings were located under former C.C.P. 392(1)(a) (now *C.C.P. 392(a)(1)*), and the trial judge conditionally denied the motion, provided that plaintiff delete from its complaint all allegations of damage to the real property upon which the buildings were located. Following plaintiff's amendment of the complaint to conform with the judge's direction, defendants made a second motion for a change of venue, which the judge denied. *Held*, this was error; venue was proper at the location of the negligently designed buildings.

(a) The essence of the action was for injuries to real property, because the alleged damages were to buildings affixed to real property, and this was not altered even though plaintiff had amended its complaint to eliminate any claim

as to the diminution in value of real property. (19 C.A.4th 112.)

(b) The counts for declaratory relief and breach of implied warranty did not alter that conclusion, because neither was based on a breach of contract, but arose instead from tort theories predicated on an injury to real property. (19 C.A.4th 112.)

(3) *Growing Crops*. Growing crops are personal property for some purposes and real property for others. (See 13 Summary (10th), *Personal Property*, §92.) When unsevered, however, they are generally regarded as real property. Hence, the venue rule governing injuries to land or buildings or trees applies to injuries to growing crops. (See *Stauffer Chemical Co. v. Superior Court*, *supra*, 265 C.A.2d 3.)

(4) *Main Relief Rule*. The operation of the main relief rule in this field is well illustrated by *Standard Brands of Calif.*, *supra*. Property owners (Bs) claimed that contractors constructing a building for plaintiff had caused injuries to their Los Angeles land. Plaintiff sued in San Francisco for "declaratory relief," joining the contractors and the Bs and seeking a determination that if liability existed it was solely that of the contractors. *Held*, the cause of action was, in substance, for injuries to real property, not for declaratory relief. Such an action comes within C.C.P. 392, regardless of whether the plaintiff is the owner of the damaged property, or, as here, a person whose liability is in question. "[T]he plaintiff, by bringing the action itself in anticipation of the defendant Bs' claim against it, and by joining other defendants upon whom it attempts to fasten the claimed liability and who reside in a county outside the county where the real property is situated, may not deprive the owners of the property of their right to a trial in the county where the real property is located." (1 C.2d 721.)

Similarly, in *Stauffer Chemical Co.*, *supra*, defendant S Co. sold an agricultural weed killer through defendant local dealer. Plaintiffs were landowners and lessees whose soil and crops were allegedly damaged by the chemical. They sued in various counts on theories of negligent injury, negligent breach of contract, and breach of warranty. The land was in Modoc County, but they filed in Siskiyou County, where defendant dealer resided. S Co.'s motion for change of venue was denied. *Held*, mandamus granted; venue was in Modoc County. The injury to real property was the subject matter; and, although the damage may have been caused by breach of warranty, the warranty counts did not state a transitory cause of action. (265 C.A.2d 4.)

SUPPLEMENT: [This section is current through the latest supplement]



109 of 188 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXI. VENUE: LOCAL ACTIONS

A. Actions Involving Real Property.

6. Damages for Injuries to Real Property.

b. Indirect or Consequential Injuries.

3 *Witkin Cal. Proc. Actions* § 802

[§ 802] Indirect or Consequential Injuries.

(1) *General Rule: Local Action.* The language of *C.C.P.* 392(a)(1) has been broadly interpreted. In *Coley v. Hecker* (1928) 206 C. 22, 272 P. 1045, plaintiff alleged that defendants wrongfully filed a void abstract of judgment, clouding his title to real property. He prayed for a decree quieting title, and damages for slander of title. *Held*, both causes were local. The essence of the wrong of slander of title is an injury to a right in real property by the disparagement of the title, and the general tendency in venue cases is to construe the term "injury to real property" to embrace not only direct and forcible injuries, but consequential and indirect injuries. (206 C. 25.)

Coley was followed in *Strosnider v. Pomin* (1939) 32 C.A.2d 103, 89 P.2d 179. Plaintiff alleged in two counts that he had previously sued to quiet title to an easement of right of way, that he was fraudulently induced to dismiss that action by defendants' representations that they would allow him to use it, and that they thereafter erected a fence obstructing it. The prayer was for damages, injunctive relief, and quieting of title. Defendants argued that the second count, seeking damages for fraud, was transitory. *Held*, the action was local; the damage from the fraud was the consequential injury to the real property (the obstruction), and this came within the broad interpretation of *C.C.P.* 392: "[W]e find that issues of title and injury to real property are so inextricably intermingled with the issue of fraud in the second cause of action, as to lead to the inevitable conclusion that the action is local in character." (32 C.A.2d 110.) (See *Bybee v. Fairchild* (1946) 75 C.A.2d 35, 40, 170 P.2d 54; *Wick v. Mattison* (1962) 207 C.A.2d 608, 610, 24 C.R. 677 [following *Coley*]; 18 Cal. L. Rev. 91 [criticizing inconsistent interpretations of *C.C.P.* 392 and 395]; *infra*, §§832, 833.)

(2) *Distinction.* In *Perkins v. Winder* (1932) 123 C.A. 467, 11 P.2d 394, *Coley* was distinguished on its facts: "We do not construe *Coley v. Hecker*, *supra*, as holding that an action for slander of title must be tried in the county where the real property is situated when the action does not seek to remove the cloud cast by the slander, or to recover damages for injury to the real property occasioned thereby." (123 C.A. 472.)

SUPPLEMENT: [This section is current through the latest supplement]



110 of 188 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXI. VENUE: LOCAL ACTIONS

A. Actions Involving Real Property.

6. Damages for Injuries to Real Property.

c. Inverse Condemnation.

3 *Witkin Cal. Proc. Actions* § 803

[§ 803] Inverse Condemnation.

(1) *Nature of Problem.* A special problem arises where a landowner's property is taken or damaged for public use by a defendant having the power of eminent domain. The plaintiff cannot maintain ejectment or any other possessory action, for the defendant may, in such an action, set up the defense of its power of eminent domain, thus making the case an "inverse condemnation suit." (See 5 *Cal. Proc.* (5th), *Pleading*, §689.) The plaintiff is, however, entitled to compensation for the taking or damage. Is plaintiff's action a simple transitory one for money, or is it a local action "for injuries to real property"? Several cases have given conflicting answers based on narrow factual distinctions.

(a) If the plaintiff landowner and the defendant expressly agree to the latter's entry and taking or damage, with compensation to be paid afterward, the landowner's action is simply one on a contract for money, and is transitory. (*Gallup v. Sacramento & San Joaquin Drainage Dist.* (1915) 171 C. 71, 78, 151 P. 1142.)

(b) If there is no agreement or consent to entry, the landowner's claim is for damages by reason of the trespass and, regardless of whether the landowner sues to eject and is met by the defense of eminent domain, or the utility sues to condemn, the action is local and triable where the land is situated. (*Williams v. Merced Irr. Dist.* (1935) 4 C.2d 238, 241, 48 P.2d 664). (On venue in condemnation actions, see *supra*, §800.)

(c) A further question arises when the owner, with knowledge of the construction of public improvements that take or damage the owner's land, remains inactive until after substantial expense has been incurred in the public use. In that case, the owner is estopped to challenge the public necessity of the taking and is treated as having acquiesced in the dedication to public use. The owner's only remedy is compensation. From a practical point of view there would seem to be no substantial distinction between the nature of this action and that which follows a prior express agreement allowing the taking for public use. But in *Williams*, where express permission for entry was given by the life tenant in possession, and the remaindermen later sued, the court held the action to be local, without considering the effect of the failure of the remaindermen to sue until after the utility, with consent of the life tenant, had completed its structures.

(2) *Where State Is Defendant.* Where the state is the defendant, a uniform rule is established by statute. The proper court for trial of actions against the state for the taking or damaging of private property for public use is in the county in

which the property is situated. (*Govt.C. 955; see 37 Cal. L. Rev. 104.*)

SUPPLEMENT: [This section is current through the latest supplement]



111 of 188 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXI. VENUE: LOCAL ACTIONS

B. Recovery of Penalty or Forfeiture.

3 Witkin Cal. Proc. Actions § 804

[§ 804] Recovery of Penalty or Forfeiture.

The proper location for trial of an action for the recovery of a penalty or forfeiture imposed by statute is the county in which the cause of action, or some part of it, arose. There is one exception: When the penalty or forfeiture "is imposed for an offense committed on a lake, river, or other stream of water, situated in two or more counties, the action may be tried in any county bordering on the lake, river, or stream, and opposite to the place where the offense was committed." (*C.C.P.* 393(a).)

SUPPLEMENT: [This section is current through the latest supplement]



112 of 188 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXI. VENUE: LOCAL ACTIONS

C. Probate Code Proceedings.

1. Proceeding Against Executor or Other Representative.

3 *Witkin Cal. Proc. Actions* § 805

[§ 805] Proceeding Against Executor or Other Representative.

(1) *Statutory Rule.* Except as otherwise provided by *Prob.C. 17005*, pertaining to trustees, where a defendant is sued in an official or representative capacity as an executor, administrator, guardian, conservator, or trustee "on a claim for the payment of money or for the recovery of personal property," the county that has jurisdiction over the estate that the defendant represents is the proper location for the trial of the action. (*C.C.P. 395.1.*) (See *Abbey v. Schaefer* (1952) 108 C.A.2d 554, 239 P.2d 44; *Jones v. McGinnis* (1953) 121 C.A.2d 720, 721, 263 P.2d 907 [action for damages for personal injuries in automobile collision occurring in San Bernardino County was filed in that county against administrator of decedents; change of venue to Los Angeles County, where estates were being administered, was properly granted]; *Haines v. Lamb* (1962) 206 C.A.2d 322, 325, 24 C.R. 146.)

(2) *Scope of Statute.* *C.C.P. 395.1* does not apply to actions against trustees under the Trust Law; venue in those actions is governed by *Prob.C. 17005*. (See *infra*, §806.)

C.C.P. 395.1 applies only to actions on a claim for money or personal property. Hence, an action for declaratory relief with respect to obligations arising out of transactions with the decedent and the administrator was held not removable to the county where the estate was probated. (*Ramos v. Cypher* (1955) 137 C.A.2d 648, 650, 290 P.2d 585.)

Metzger v. Silverman (1976) 62 C.A.3d Supp. 30, 133 C.R. 355, gives a broad interpretation of the word "claim." Plaintiff, an attorney, rendered tax services to defendant administrator of an estate being probated in Los Angeles County. The work was performed in plaintiff's home county, Santa Barbara, and when his bill was unpaid he brought suit against the administrator in Santa Barbara. His theory was that *C.C.P. 395.1* applied only to actions on rejected creditors' claims against the estate. *Held*, venue was in Los Angeles.

(a) The word "claim" was used in its common meaning of "a demand" for something due, and the statute applies to all actions to recover money or property against any of the listed fiduciaries. (62 C.A.3d Supp. 36.)

(b) "This result is both logical and practical. When an executor, guardian, or trustee is appointed to serve in a fiduciary capacity in a given county, he should not be required to travel to distant parts of the state to defend lawsuits brought to recover money allegedly owed by the estate. This rule also gives protection to creditors of the estate since

they can rest assured that their lawsuit will proceed in a predictable forum, and an executor will not be able to remove the case to a different county where the executor happens to reside. Finally, since the action must be brought in the county which has jurisdiction over the fiduciary, both parties will have immediate access to records on file in the superior court relating to the estate, guardianship, or trust." (62 *C.A.3d Supp.* 37.)

SUPPLEMENT: [This section is current through the latest supplement]



113 of 188 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXI. VENUE: LOCAL ACTIONS

C. Probate Code Proceedings.

2. Proceeding Under Trust Law.

3 *Witkin Cal. Proc. Actions* § 806

[§ 806] Proceeding Under Trust Law.

Proceedings involving trusts under the Trust Law are governed by *Prob.C. 17005* (see 13 *Summary* (10th), *Trusts*, §225). *Prob.C. 17005* prescribes the following venue rules:

(1) *Living Trust*. Venue is in the county where the principal place of administration of the trust is located. (*Prob.C. 17005(a)(1)*.) (For definition of "principal place of administration," see *Prob.C. 17002*, 13 *Summary* (10th), *Trusts*, §223.)

(2) *Living Trust Without Trustee*. Venue is in the county where the trust property, or some portion of the trust property, is located. (*Prob.C. 17005(b)*.)

(3) *Testamentary Trust*. Venue is in either the county where the decedent's estate is administered or the county where the principal place of administration of the trust is located. (*Prob.C. 17005(a)(2)*.)

(4) *Other Cases*. The general rules governing venue apply. (*Prob.C. 17005(c)*; see, e.g., *C.C.P. 392* [real property]; *C.C.P. 395* [county of defendant's residence].)

SUPPLEMENT: [This section is current through the latest supplement]



114 of 188 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXI. VENUE: LOCAL ACTIONS

C. Probate Code Proceedings.

3. Guardianship or Conservatorship Proceeding.

3 Witkin Cal. Proc. Actions § 807

[§ 807] Guardianship or Conservatorship Proceeding.

(1) Guardianship Proceeding.

(a) For resident wards, venue is (1) in the county of residence (*Prob.C. 2201(a)*), or (2) "in the best interests" of the ward, some other county (*Prob.C. 2201(b)*).

(b) For nonresident wards, venue is (1) in the county in which the ward is temporarily living (*Prob.C. 2202(a)(1)*, (b)(1)), or (2) "in the best interests" of the ward, some other county (*Prob.C. 2202(a)(2)*, (b)(2)), or (3) where the proceeding is for guardianship of the estate, any county in which the ward has property (*Prob.C. 2202(b)(3)*). (See 14 *Summary* (10th), *Wills and Probate*, §980.)

(2) Conservatorship Proceeding.

(a) For resident conservatees, venue is (1) in the county of residence (*Prob.C. 2201(a)*), or (2) "in the best interest" of the conservatee, some other county (*Prob.C. 2201(b)*).

(b) For nonresident conservatees, venue is (1) in the county in which the conservatee is temporarily living (*Prob.C. 2202(a)(1)*, (b)(1)), or (2) "in the best interest" of the conservatee, some other county (*Prob.C. 2202(a)(2)*, (b)(2)), or (3) where the proceeding is for conservatorship of the estate, any county in which the conservatee has property (*Prob.C. 2202(b)(3)*). (See 14 *Summary* (10th), *Wills and Probate*, §980.)

SUPPLEMENT: [This section is current through the latest supplement]



115 of 188 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXI. VENUE: LOCAL ACTIONS

C. Probate Code Proceedings.

4. Proceeding Under Power of Attorney Law or Health Care Decisions Law.

3 Witkin Cal. Proc. Actions § 808

[§ 808] Proceeding Under Power of Attorney Law or Health Care Decisions Law.

(1) *Proceeding Under Power of Attorney Law.* Venue in proceedings under the Power of Attorney Law (*Prob.C. 4000* et seq.; see 14 *Summary* (10th), *Wills and Probate*, §873 et seq.) is to be determined in the following order of priority:

(a) The county in which the principal resides. (*Prob.C. 4523(a).*)

(b) The county in which the attorney in fact resides. (*Prob.C. 4523(b).*)

(c) The county in which the property subject to the power is located. (*Prob.C. 4523(c).*)

(d) Any other county that is in the "best interest" of the "principal." (*Prob.C. 4523(d).*) (See 14 *Summary* (10th), *Wills and Probate*, §874.)

(2) *Proceeding Under Health Care Decisions Law.* Venue in proceedings under the Health Care Decisions Law (*Prob.C. 4600* et seq.; see 14 *Summary* (10th), *Wills and Probate*, §897 et seq.) is to be determined in the following order of priority:

(a) The county in which the patient resides. (*Prob.C. 4763(a).*)

(b) The county in which the agent or surrogate resides. (*Prob.C. 4763(b).*)

(c) Any other county that is in the "best interest" of the "patient." (*Prob.C. 4763(c).*) (See 14 *Summary* (10th), *Wills and Probate*, §898.)

SUPPLEMENT: [This section is current through the latest supplement]



116 of 188 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXI. VENUE: LOCAL ACTIONS

C. Probate Code Proceedings.

5. Proceeding Under Transfers to Minors Act.

3 Witkin Cal. Proc. Actions § 809

[§ 809] Proceeding Under Transfers to Minors Act.

Venue for a proceeding under the Uniform Transfers to Minors Act (*Prob.C. 3900* et seq.) is as follows:

(1) *Resident Minor*. For a proceeding involving a resident minor, venue is in the county where either the minor or the custodian resides. (*Prob.C. 3921(a)*.)

(2) *Nonresident Minor*. For a proceeding involving a nonresident minor, venue is either the county where the transferor, minor, custodian, or parent resides, the county where the estate of a deceased or legally incapacitated custodian is being administered, or, if none of these conditions apply, any county. (*Prob.C. 3921(b), (c)*.)

SUPPLEMENT: [This section is current through the latest supplement]



117 of 188 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXI. VENUE: LOCAL ACTIONS

D. Family Law Proceedings.

1. Dissolution of Marriage.

a. Former Law: Petitioner's Residence.

3 Witkin Cal. Proc. Actions § 810

[§ 810] Former Law: Petitioner's Residence.

(1) *Early Venue Law.* Former C.C. 128 fixed venue in the county of the petitioner's residence. This is normally the matrimonial domicile and therefore the desirable county for trial, from the standpoint of convenience of the petitioner and witnesses, and the availability of evidence. It was accordingly held reversible error to grant a divorce without a finding of that residence. (*Bragg v. Bragg* (1939) 32 C.A.2d 611, 613, 90 P.2d 329; *Hamburger v. Hamburger* (1943) 60 C.A.2d 530, 534, 141 P.2d 453.)

But the requirement, though mandatory, was not jurisdictional. (*Kelsey v. Miller* (1928) 203 C. 61, 88, 263 P. 200.) And the Civil Code provision only nominally governed venue, for it was satisfied by the mere commencement of the action in the proper county. Thereafter, the general provisions of the Code of Civil Procedure on change of venue became applicable, and the respondent, if a resident of a different county, could move for a change of venue to that county. (*Warner v. Warner* (1893) 100 C. 11, 13, 34 P. 523 [reconciling apparent inconsistency between Civil Code and Code of Civil Procedure provisions]; but see *Modine v. Modine* (1932) 123 C.A. 67, 69, 10 P.2d 776 [showing was insufficient for change].) The only means of retention in the county of commencement was to file a counteraffidavit based on the convenience of witnesses. (See *infra*, §945.)

(2) *Changes in 1955.* In 1955, the rules were brought into the Code of Civil Procedure by amendments to C.C.P. 395 and 397. These amendments were designed to curtail the right of the respondent to a change of venue and to place the matter within the broad discretion of the court. (See *Lummis v. Lummis* (1956) 144 C.A.2d 255, 256, 300 P.2d 869; *Henson v. Superior Court* (1963) 218 C.A.2d 327, 329, 32 C.R. 404; 29 So. Cal. L. Rev. 104.)

In *Lummis*, plaintiff husband, a naval medical officer, filed the action in San Diego, where he was stationed with a heavy schedule, and where several witnesses, also naval officers, were stationed and unable to get away for extensive periods. The trial judge's denial of the wife's motion to change venue to her residence in Los Angeles was affirmed, because she made no showing of the length of her Los Angeles residence or any other persuasive facts. (144 C.A.2d 257.) (But see *Henson, supra* [mandamus to compel granting defendant wife's motion for change, where all witnesses were in her county, and plaintiff husband failed to name any witness or show any connection with his county].)

SUPPLEMENT: [This section is current through the latest supplement]



118 of 188 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXI. VENUE: LOCAL ACTIONS

D. Family Law Proceedings.

1. Dissolution of Marriage.

b. Current Law: Either Party's Residence.

3 Witkin Cal. Proc. Actions § 811

[§ 811] Current Law: Either Party's Residence.

(1) *Proper Venue*. The residence of the respondent is equal to that of the petitioner for venue purposes in a marital dissolution proceeding. *C.C.P. 395(a)* provides that "the superior court in the county where either the petitioner or respondent has been a resident for three months next preceding the commencement of the proceeding is the proper court for the trial of the proceeding." And *Family C. 2320* provides that "one of the parties to the marriage" must have been a resident of the county in which the proceeding is filed for the required 3-month period. (See Rutter Group, Family Law §3:190 et seq.)

(2) *Change of Venue to Respondent's Residence*. "When a proceeding for dissolution of marriage has been filed in the county in which the petitioner has been a resident for three months next preceding the commencement of the proceeding, and the respondent at the time of the commencement of the proceeding is a resident of another county in this state," the court may grant a motion for change of venue to the county of the respondent's residence "when the ends of justice would be promoted by the change." (*C.C.P. 397(e)*.) (On *C.C.P. 397.5*, authorizing transfer of marital dissolution proceeding to county in which either petitioner or respondent resides when both parties have moved from county rendering order, see *infra*, §905; on other grounds for change of venue, see *infra*, §905 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]



119 of 188 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXI. VENUE: LOCAL ACTIONS

D. Family Law Proceedings.

2. Legal Separation and Nullity of Marriage.

a. Former Law: Respondent's Residence.

3 Witkin Cal. Proc. Actions § 812

[§ 812] Former Law: Respondent's Residence.

Unlike proceedings for marital dissolution (see *supra*, §§810, 811), there was no statutory provision expressly governing venue in proceedings for legal separation or nullity of marriage prior to 1994. The lack of a specific venue provision for legal separation proceedings was addressed in *Forster v. Superior Court* (1992) 11 C.A.4th 782, 14 C.R.2d 258. Plaintiff wife and defendant husband lived in Amador County during their entire 3-year marriage. Plaintiff moved to San Luis Obispo County on May 7, 1992, and filed a petition for legal separation in that county on May 11, 1992, with the intention of amending the petition to request dissolution once she had satisfied the 3-month residency requirement (see *supra*, §811). Defendant moved to transfer the action to Amador County, the county of his residence, but the trial judge denied the motion on the belief that a spouse may bring a legal separation proceeding in the county of residence of either party. Defendant then sought mandamus. *Held*, writ granted; in an action for legal separation, the proper venue is the county of defendant's residence.

(a) *Applicable law.*

(1) Under *C.C.P. 395(a)*, the proper county for the trial of a dissolution proceeding is the county in which the plaintiff has resided for 3 months, although under *C.C.P. 397(e)*, the court may, on motion, change venue to the county of the defendant's residence when the ends of justice would be promoted. However, because there is no specific statute governing venue in legal separation proceedings, the general rule for transitory actions, *C.C.P. 395(a)*, making the defendant's county of residence the proper venue, applies. (11 C.A.4th 786.) And under *C.C.P. 396b(a)*, the court must grant defendant's motion for change of venue where, as here, no answer was filed. (11 C.A.4th 788.) In other words, in order to prevail on a change of venue motion, a defendant in a legal separation proceeding who has not filed an answer need not establish that the change will promote the ends of justice. (11 C.A.4th 787.)

(2) The earlier state of the law presented a potential venue dilemma in a situation such as that involved in this case. In 3 months plaintiff could amend her petition to make it one for dissolution, thereby making San Luis Obispo County the proper venue, while in the meantime, Amador County was the only proper venue. Recognizing the problem caused by requiring dissolution actions to be tried in the defendant's county of residence, i.e., the action would generally be removed from the locality where the parties maintained their matrimonial domicile, the Legislature amended *C.C.P. 395*

and 397 in 1955 (see *supra*, §810) by removing the absolute right of the defendant in a dissolution proceeding to have the matter tried in the county of his or her residence. The same considerations apply with respect to legal separation proceedings. However, creating an exception to the general rule is not a task for the courts. "A plaintiff's right to trial in some county other than that of a defendant's residence is an exception to the general rule and requires express statutory justification." (11 C.A.4th 789, citing *Brown v. Superior Court* (1984) 37 C.3d 477, 208 C.R. 724, 691 P.2d 272, *infra*, §886.)

(b) *Effect of premarital agreement.* Because the parties entered into a premarital agreement in San Luis Obispo County, plaintiff argues that that county is the venue under the provision in C.C.P. 395(a) making the county in which a contract was entered into a proper county for trial (see *infra*, §834). This argument is without merit. Even assuming that this provision applies where the party claiming venue at the place of contracting is the plaintiff, and even if interpretation of the premarital agreement would be the main relief sought in a dissolution proceeding involving these parties, it would be ingenuous to hold that the "main relief" sought in this legal separation proceeding is interpretation of the premarital agreement. A legal separation proceeding is essentially one for support. (11 C.A.4th 789.)

(c) *Effect of defendant's threats of violence.* In opposing defendant's motion to transfer the proceeding to Amador County, plaintiff argues that her safety would then be jeopardized because defendant had threatened violence should she ever return home. Plaintiff now argues that there is a conflict, which can be avoided by denying the writ, between the procedural rules of C.C.P. 396b and the Family Law Act provisions allowing necessary restraining orders, such as former C.C. 4359 (now *Family C.* 6320 et seq.). There are two weaknesses in this argument:

(1) Under C.C.P. 396b(c), the court may make "all necessary and proper" orders in connection with motions for support. Hence, it would appear that if restraining orders are "necessary and proper," C.C.P. 396b(c) gives the court the power to issue them. And plaintiff can seek the same restraining orders in *Amador County*. (11 C.A.4th 790.)

(2) Under the Domestic Violence Prevention Act (former C.C.P. 545, now *Family C.* 6300 et seq.; see 11 *Summary* (10th), *Husband and Wife*, §379 et seq.), a wife who shows reasonable grounds can obtain restraining orders without the necessity of filing a petition for legal separation, nullity, or dissolution of marriage. Nothing in C.C.P. 545 or C.C. 4359 "indicates that properly issued restraining orders are invalid pending determination of a motion to transfer or if the action is transferred to another county." (11 C.A.4th 791.)

SUPPLEMENT: [This section is current through the latest supplement]



120 of 188 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXI. VENUE: LOCAL ACTIONS

D. Family Law Proceedings.

2. Legal Separation and Nullity of Marriage.

b. Current Law: Either Party's Residence.

3 Witkin Cal. Proc. Actions § 813

[§ 813] Current Law: Either Party's Residence.

The 1994 Legislature abrogated the holding in *Forster v. Superior Court* (1992) 11 C.A.4th 782, 14 C.R.2d 258, supra, §812, by providing that proper venue in a proceeding for nullity of marriage or legal separation is the county of residence of either party at the time that the proceeding is commenced. (*C.C.P.* 395(a); see Rutter Group, Family Law §3:193; compare 3-month residency requirement for marital dissolution proceedings, supra, §811.) (On *C.C.P.* 397.5, authorizing transfer of proceeding for nullity of marriage or legal separation to county in which either petitioner or respondent resides when both parties have moved from county rendering order, see infra, §905.)

Thus, under the 1994 amendment, a spouse who has not yet met the minimum residence requirement for a dissolution proceeding may now file a legal separation proceeding in the county of his or her residence and, after satisfying the dissolution residency requirement, amend the petition to seek dissolution without being subject to a venue challenge by the opposing spouse. (See Rutter Group, Family Law §3:171.)

SUPPLEMENT: [This section is current through the latest supplement]



121 of 188 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXI. VENUE: LOCAL ACTIONS

D. Family Law Proceedings.

3. Adoption.

3 Witkin Cal. Proc. Actions § 814

[§ 814] Adoption.

(1) *Adoption of Children.* Venue for proceedings to adopt children is as follows:

(a) *Agency Adoptions.* For agency adoptions, venue is in the county of the adopting person's residence, or if the petitioner is not a California resident, the county in which the birth parent or birth parents resided when the relinquishment of parental rights was signed. (*Family C. 8714(a)*; see 10 *Summary* (10th), *Parent and Child*, §118.)

(b) *Independent Adoptions.* For independent adoptions, venue is in the county of the adopting person's residence, or if the petitioner is not a California resident, the county in which the placing birth parent or birth parents resided when either the placement agreement was signed or the petition was filed. (*Family C. 8802(a)(1)*; see 10 *Summary* (10th), *Parent and Child*, §132.)

(c) *Intercounty or Stepparent Adoptions.* For intercounty or stepparent adoptions, venue is in the county of the adopting person's residence. (*Family C. 8912(a)* [intercounty adoptions; see 10 *Summary* (10th), *Parent and Child*, §140]; *Family C. 9000(a)* [stepparent adoptions; see 10 *Summary* (10th), *Parent and Child*, §144].)

(2) *Adoption of Adults.* Venue is in the county of residence of either the adopting person or the person to be adopted. (*Family C. 9321(a)*; see 10 *Summary* (10th), *Parent and Child*, §155.)

SUPPLEMENT: [This section is current through the latest supplement]



122 of 188 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXI. VENUE: LOCAL ACTIONS

D. Family Law Proceedings.

4. Other Proceedings.

3 *Witkin Cal. Proc. Actions* § 815

[§ 815] Other Proceedings.

(1) *Proceeding Under Uniform Parentage Act.* Venue is in (a) the county in which the minor resides or is found (*Family C. 7620(b)(1)*), (b) if a licensed California adoption agency brings the action, the county in which the agency maintains an office (*Family C. 7620(b)(2)*), or (c) if the father is deceased, the county in which his estate has been or could be probated (*Family C. 7620(b)(3)*). (See *C.C.P. 396b(c)*, *infra*, §915 [court may consider motions to determine custody of and visitation with children prior to determining motion for change of venue]; 10 *Summary* (10th), *Parent and Child*, §17 et seq.)

(2) *Proceeding To Establish Support Obligation.* Venue is in the county of the minor's residence. (*C.C.P. 395(a)*.)

(3) *Proceeding by Local Child Support Agency To Enforce Support Obligation and To Determine Paternity.* "Notwithstanding any other provision of law," the proper venue for an action under *Welf.C. 17000* et seq. by a local child support agency to enforce support obligations and to determine paternity (see 11 *Summary* (10th), *Husband and Wife*, §308 et seq.) is as follows:

(a) In the county that is currently expending the public aid. (*Family C. 17400(n)(1)(A)*.)

(b) If public aid is not currently being expended, in the county where the minor who is entitled to current support resides or is domiciled. (*Family C. 17400(n)(1)(B)*.)

(c) If current support is no longer payable through, or enforceable by, the local child support agency, in the county that last provided public aid, for actions to enforce arrearages under *Welf.C. 11477*. (*Family C. 17400(n)(1)(C)*.)

(d) If the conditions above do not apply, in the county where the support obligee resides. (*Family C. 17400(n)(1)(D)*.)

(e) If the support obligee does not reside in California and the conditions above do not apply, in the county where the obligor resides. (*Family C. 17400(n)(1)(E)*.)

(f) Notwithstanding the venue provisions above, if the minor becomes a resident of another county after an action

has been filed, in the county where the action was filed until the action is completed. (*Family C. 17400(n)(2)*.) (See 11 *Summary* (10th), *Husband and Wife*, §319.)

C.C.P. 394 (change of venue to neutral county for actions by and against city, county, and local agency; see *infra*, §871 et seq.) is expressly inapplicable to a proceeding by a local child support agency under *Family C. 17400*.

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Proceeding Under Uniform Parentage Act*. If the child is the subject of a pending or proposed adoption, venue is in any county in which a licensed California adoption agency to which the child has been relinquished or is proposed to be relinquished maintains an office. (*Family C. 7620(b)(2)*, as amended in 2009.) If the child is the subject of a pending or proposed adoption, venue is also in the county in which an office of the Department of Child Services or a public adoption agency investigating the petition is located. (*Family C. 7620(b)(3)*, added in 2009.) *Family C. 7620(b)(3)*, cited in the text, was redesignated as *Family C. 7620(b)(4)* in 2009.



123 of 188 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXI. VENUE: LOCAL ACTIONS

E. Miscellaneous Local Proceedings.

3 *Witkin Cal. Proc. Actions* § 816

[§ 816] Miscellaneous Local Proceedings.

(1) *Petition for Name Change*. Venue for a petition for a name change must be filed in the county of residence of the person whose name is proposed to be changed. (*C.C.P. 1276(a)*.) There is one exception: a petition for a name change of a minor submitted by a guardian appointed by the juvenile court or by the probate court must be filed in the appointing court. (*C.C.P. 1276(e)*.) (On right to change name generally, see 13 *Summary* (10th), *Personal Property*, §24.) The procedure in *C.C.P. 1276* also applies to a petition for a change of name and gender. (*Health & Saf.C. 103435*; see 13 *Summary* (10th), *Personal Property*, §23.)

(2) *Dissolution of Corporations*. Venue is in the county where the principal executive office of the corporation is located, or if there is no principal office in California, in Sacramento County. (*Corp.C. 177, 1800, 1904* [voluntary dissolution]; *Capp Care v. Superior Court* (1987) 195 C.A.3d 504, 508, 241 C.R. 741, citing the text [involuntary dissolution].)

(3) *Declaratory Action To Establish Nonresident Tax Status*. Venue is in Sacramento, Los Angeles, or San Francisco County. (*C.C.P. 1060.5*; see *Whittell v. Franchise Tax Bd.* (1964) 231 C.A.2d 278, 41 C.R. 673.)

(4) *Action Against State Agency or Officer*. For inverse condemnation suits, venue is in the county where the property is situated (*Govt.C. 955*); for actions for death or injury to person or personal property, venue is in the county where the injury occurred (*Govt.C. 955.2*); for other actions, venue is in Sacramento, Los Angeles, or San Francisco County (*C.C.P. 401*; *Govt.C. 955*). (See *infra*, §862.)

(5) *Action Against National Bank in Which Federal Deposit Insurance Corporation Has Been Appointed Receiver*. Venue is in the county in which the bank's principal place of business is located. (12 U.S.C., §94; see *supra*, §784.)

SUPPLEMENT: [This section is current through the latest supplement]



124 of 188 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXII. VENUE: TRANSITORY ACTIONS

A. Actions Triable at Defendant's Residence.

1. Nature of Right.

3 *Witkin Cal. Proc. Actions* § 817

[§ 817] Nature of Right.

(1) *In General.* "Except as otherwise provided by law and subject to the power of the court to transfer actions or proceedings as provided in this title, the superior court in the county where the defendants or some of them reside at the commencement of the action is the proper court for the trial of the action." (*C.C.P.* 395(a).) This section states the general rule governing transitory actions: The defendant has a right to have the action tried at the county of his or her residence in every case except those in which a statute expressly allows or requires a different venue. (See *C.E.B.*, 1 *Civil Proc. Before Trial* 4th, §8.10 et seq.; *Cal. Civil Practice*, 1 *Procedure*, §4:71 et seq.; *Rutter Group, Civil Proc. Before Trial* §3:480 et seq.; 77 *Am.Jur.2d* (2006 ed.), *Venue* §28 et seq.)

The plaintiff, as well as the defendant, is entitled to select venue at the defendant's residence. Thus, suppose the plaintiff, on the theory that the action is transitory, sues at the defendant's residence, and the defendant, claiming that it is local, wants it moved to the county where the land is located. The plaintiff may insist on trial at the defendant's residence if the main relief is transitory. (See *Vaughan v. Roberts* (1941) 45 *C.A.2d* 246, 251, 113 *P.2d* 884.)

The same is true when resident and nonresident defendants are joined. Consent of the resident defendant to change cannot defeat the plaintiff's right to trial at that defendant's residence. (See *infra*, §889.) (On right of private corporation to trial at residence, see *infra*, §§852, 853.)

(2) *Purpose of Right.* As the court observed in *Smith v. Smith* (1891) 88 *C.* 572, 26 *P.* 356: "The general spirit and policy of the statute is to give to the defendant the right of having all personal actions against him tried in the county of his residence. Provision is made for the trial of actions affecting real estate in the county where the land is situated, and for the trial of certain other designated actions in the county where the cause of action arose; but the general rule for the place of trial is prescribed in section 395, by the declaration that 'in all other cases' the action must be tried in the county in which the defendant resides at the commencement of the action. ... It is intended to protect the defendant in the expense and inconvenience of being compelled to go to a distant county to defend himself against an action that might be commenced against him there, and is in accordance with the principles that obtain wherever the common law prevails, that the plaintiff who would seek redress from a defendant must seek it in the county where he resides." (88 *C.* 575.) (A 1970 amendment changed the phrase "in all other cases" to "Except as otherwise provided by law.")

Similarly, the court in *Kaluzok v. Brisson* (1946) 27 C.2d 760, 167 P.2d 481, stated: "The right of a defendant to have an action brought against him tried in the county of his residence is an ancient and valuable right, safeguarded by statute and supported by a long line of decisions. The right of a plaintiff to have an action tried in a county other than that of the defendant's residence is exceptional. If the plaintiff would claim such right he must bring himself within the exception." (27 C.2d 763.)

To the same effect are *Hennessy v. Nicol* (1894) 105 C. 138, 141, 38 P. 649; *Lyons v. Brunswick-Balke-Collender Co.* (1942) 20 C.2d 579, 584, 127 P.2d 924; *Goossen v. Clifton* (1946) 75 C.A.2d 44, 47, 170 P.2d 104; *Claycomb v. Caronna* (1952) 113 C.A.2d 561, 564, 248 P.2d 779.

(3) *Practical Limitations on Right.* If the statutory rule were strictly applied in the manner indicated by the preceding quotations, the defendant could be reasonably sure of a trial in the county where the defendant resided when the action was commenced. But the practical situation is quite different, for two reasons:

(a) The class of transitory actions triable solely at the defendant's residence has been steadily decreasing by the enactment of statutes providing for additional venue in most of the common types of actions. (See *infra*, §831.)

(b) If the transaction or events from which the action arises took place in a different county in which the witnesses are to be found, the plaintiff can usually make a plausible showing of convenience of witnesses in support of a motion or countermotion, and the trial judge's discretion to order trial in a convenient county is rarely disturbed. (See *National Auto. Ins. Co. v. Havlik* (1931) 113 C.A. 264, 265, 298 P. 75; *infra*, §948.)

SUPPLEMENT: [This section is current through the latest supplement]



125 of 188 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXII. VENUE: TRANSITORY ACTIONS

A. Actions Triable at Defendant's Residence.

2. Meaning and Proof of Residence.

a. Residence and Domicile.

3 *Witkin Cal. Proc. Actions* § 818

[§ 818] Residence and Domicile.

In *Briggs v. Superior Court* (1947) 81 C.A.2d 240, 183 P.2d 758, a case dealing with substituted service against a nonresident motorist, the court warned against indiscriminate use of abstract definitions: "Residence, as used in the law, is a most elusive and indefinite term. It has been variously defined, and means one thing under the attachment laws, another under the voting laws, and still another under the venue laws." (81 C.A.2d 245.)

Residence, in the sense in which the term is used in the venue statutes, has about the same meaning as domicile, i.e., the single place of permanent residence, "the place where one remains when not called elsewhere for labor or other special or temporary purpose, and to which he or she returns in seasons of repose." (*Govt.C.* 244(a); see *Marston v. Watson* (1912) 20 C.A. 465, 468, 129 P. 611; *Enter v. Crutcher* (1958) 159 C.A.2d Supp. 841, 845, 323 P.2d 586; 12 A.L.R.2d 757 [relationship between "residence" and "domicil" under venue statutes]; on nature of domicile, see 2 *Cal. Proc.* (5th), *Jurisdiction*, §127.)

The issue involves both act and intent; i.e., whether a particular place where a person lives is the person's temporary abode or permanent home (residence) depends on whether he or she intends to remain there. (See *Younger v. Spreckels* (1909) 12 C.A. 175, 177, 106 P. 895; *Johnston v. Benton* (1925) 73 C.A. 565, 569, 239 P. 60; *Catsiftes v. Catsiftes* (1938) 29 C.A.2d 207, 208, 84 P.2d 258; *Bragg v. Bragg* (1939) 32 C.A.2d 611, 614, 90 P.2d 329; *Joe Lowe Corp. v. Rasmusson* (1942) 53 C.A.2d 490, 495, 127 P.2d 1002.)

SUPPLEMENT: [This section is current through the latest supplement]



126 of 188 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXII. VENUE: TRANSITORY ACTIONS

A. Actions Triable at Defendant's Residence.

2. Meaning and Proof of Residence.

b. Subjective Factors.

3 *Witkin Cal. Proc. Actions* § 819

[§ 819] Subjective Factors.

"Intention" may be determined subjectively, from the defendant's own declarations, affidavits, or testimony, and if the subjective approach is used, the defendant is given considerable power to control venue. In *Johnston v. Benton* (1925) 73 C.A. 565, 239 P. 60, defendant lived in Shasta County as a child. He joined the army, served in various places, and, after discharge, and later, after reentering the army, lived at times in San Francisco, where this action was brought. He also joined a fraternal society in San Francisco, calling it his residence in his application for admission. However, he testified at the hearing of the motion for change of venue that he never intended to establish residence anywhere but in Shasta County. *Held*, the order granting change of venue to Shasta County should be affirmed. Defendant's domicile was not affected by his enlistment in the civil, military, or naval services, and he did not thereby abandon or lose the domicile he had before or acquire one where he served, unless he wanted to. And, whether or not one has changed his or her residence to another place can be proved by direct testimony of the person. Defendant "knew better than any other person whether he had established a residence at any other place ... for he knew or it must be assumed that he knew what his intentions were with respect to becoming or not becoming a resident in a legal sense of the place to which he moved. The fact that he 'lived' in San Francisco did not by any means prove that he was a resident thereof. A person may 'live' at a place and still not be a resident thereof in the legal sense of that term." (73 C.A. 569.)

In *Burt v. Scarborough* (1961) 56 C.2d 817, 17 C.R. 146, 366 P.2d 498, a change of venue from Los Angeles County to Orange County was upheld on the following evidence: Defendant B spent half his working time at his Los Angeles office, and had bank accounts, club memberships, and an apartment there; but he had an office in Orange County at which he spent half his working time, his home was there, he voted there, and he testified that it was his permanent residence. (56 C.2d 819.)

Other cases are to the same effect. (See *O'Brien v. O'Brien* (1911) 16 C.A. 103, 111, 116 P. 692, *infra*, §928; *McKune v. McKune* (1920) 48 C.A. 204, 207, 191 P. 958 [defendant's affidavit alleging that she was "*bona fide* resident" of Los Angeles was sufficient; "establishment of her residence depended entirely upon her intention, and she knew her intention better than any other person"]; *Enter v. Crutcher* (1958) 159 C.A.2d Supp. 841, 845, 323 P.2d 586 [defendant's affidavit was sufficient].)

SUPPLEMENT: [This section is current through the latest supplement]



127 of 188 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXII. VENUE: TRANSITORY ACTIONS

A. Actions Triable at Defendant's Residence.

2. Meaning and Proof of Residence.

c. Objective Factors.

3 *Witkin Cal. Proc. Actions* § 820

[§ 820] Objective Factors.

Johnston v. Benton (1925) 73 C.A. 565, 239 P. 60, supra, §819, was criticized in *Briggs v. Superior Court* (1947) 81 C.A.2d 240, 183 P.2d 758, as follows: "Apparently, the opinion was concerned with whether or not the statement of intention as to residence is a conclusion or an ultimate fact, and not with the question of whether the court must necessarily believe the party's statement as to that fact. The opinion, likewise, states that there was no evidence to the contrary of defendant's statement as to his intention. No consideration was given to the fact that a court does not have to accept a defendant's own statement as to his intention." (81 C.A.2d 250.) And the court in *Briggs* emphasized the sound proposition that intention "may be more satisfactorily shown by what is done than by what is said." (81 C.A.2d 244.)

Thus, apart from a person's own testimony, and sometimes contrary to it, there are various activities that have influenced the court's determination of his or her residence. In *Taff v. Goodman* (1940) 41 C.A.2d 771, 107 P.2d 431, a defendant, joined in an action in Merced County, alleged in her affidavit that she was a San Francisco resident and testified that she never intended to change her residence. But other affidavits and testimony showed that she registered to vote in Merced before the commencement of the action and voted there after it, and actually lived there for several years and taught school there. *Held*, although registration to vote and voting are not conclusive, they constitute formal acts of a convincing nature, ample to overcome her testimony of intention and to sustain the court's determination. (41 C.A.2d 775.)

Other cases are to the same effect. (See *Marston v. Watson* (1912) 20 C.A. 465, 468, 129 P. 611 [defendant's claim that she was resident of Marin County was overcome by affidavits showing that for past 4 months she had kept house on Napa County ranch and had declared that she intended to live on it and run it as business]; *Bragg v. Bragg* (1939) 32 C.A.2d 611, 614, 90 P.2d 329 [fact of physical residence cannot be overcome by mere testimony of intention to live elsewhere].)

SUPPLEMENT: [This section is current through the latest supplement]



128 of 188 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXII. VENUE: TRANSITORY ACTIONS

A. Actions Triable at Defendant's Residence.

3. Personal Torts Other Than Physical Injury or Death.

3 Witkin Cal. Proc. Actions § 821

[§ 821] Personal Torts Other Than Physical Injury or Death.

Actions for physical injury to the person and injury to personal property are transitory but have enlarged venue. (See *infra*, §§832, 833.) Other personal torts are transitory and triable where the defendant resides, but are few in number:

(1) *Tort to Person Not Resulting in Physical Injury*. (See *Monk v. Ehret* (1923) 192 C. 186, 190, 219 P. 452 [false imprisonment].)

(2) *Libel and Slander*. (See *Graham v. Mixon* (1917) 177 C. 88, 169 P. 1003 [libel]; 62 *Harv. L. Rev.* 1046 [effect of multiple publication on venue in libel action]; 70 *A.L.R.2d* 1340 [slander]; 15 *A.L.R.3d* 1249 [newspaper libel].)

(3) *Malicious Prosecution*. (See *Plum v. Forgay Lumber Co.* (1931) 118 C.A. 76, 79, 4 P.2d 804; *Carruth v. Superior Court* (1978) 80 C.A.3d 215, 219, 145 C.R. 344 [physician's malicious prosecution action against lawyer and his firm; allegations of grievous mental and emotional suffering and distress do not make action one for injury to person within meaning of C.C.P. 395]; 12 *A.L.R.4th* 1278 [venue in action for malicious prosecution].)

(4) *Abuse of Process*. (See *Cacciaquidi v. Superior Court* (1990) 226 C.A.3d 181, 184, 276 C.R. 465 [following *Carruth*].)

(5) *Intentional Infliction of Emotional Distress*. (See *Cubic Corp. v. Superior Court* (1986) 186 C.A.3d 622, 625, 231 C.R. 18.)

The foregoing cases uniformly declare that "injury to person," as the term is used in C.C.P. 395 (the enlarged venue provision), is limited to physical injury. (See *infra*, §832.) By implication it would seem that every action for physical injury would come within C.C.P. 395. But an exception was declared in *Lucas v. Lucas Ranching Co.* (1937) 18 C.A.2d 453, 64 P.2d 160. Plaintiff alleged that her estranged husband and other defendants conspired to place community property beyond her reach, causing her financial difficulties and mental and physical suffering. *Held*, defendants were entitled to trial at their place of residence. The court reasoned that this was unlike the physical injury caused by motor vehicle accidents and similar torts, where the injury occurs at the place of the accident. "In an action such as plaintiff's, however, the place where the injury occurs is not the locale of the events which, ultimately, cause the injury. She is

injured not at the site of the events, but, brooding over the wrongs done her, at the place or places where worry and loss of sleep finally take their toll. No reason appears why an injury which has no definite situs should be given potency in determining the place of trial." (18 C.A.2d 456.)

SUPPLEMENT: [This section is current through the latest supplement]



129 of 188 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXII. VENUE: TRANSITORY ACTIONS

A. Actions Triable at Defendant's Residence.

4. Torts to Personal Property Other Than Physical Injury.

3 *Witkin Cal. Proc. Actions* § 822

[§ 822] Torts to Personal Property Other Than Physical Injury.

(1) *In General.* Actions for injuries to personal property come within the enlarged venue provisions of *C.C.P.* 395, but the statute has been interpreted to apply only to physical injury. The tort of wrongful taking without physical injury is outside its scope. (See *infra*, §833.)

Accordingly, damages for conversion or for specific recovery are ordinarily transitory actions triable at the defendant's residence. (See *Mason v. Buck* (1929) 99 C.A. 219, 221, 278 P. 461 [conversion]; *Sims v. Mains* (1933) 131 C.A. 307, 311, 21 P.2d 447 [specific recovery]; *Liberal Catholic Church v. Rogers* (1944) 65 C.A.2d 196, 198, 150 P.2d 486 [mandamus proceeding to recover church records and property wrongfully withheld by defendant officer]; *Haurat v. Superior Court* (1966) 241 C.A.2d 330, 333, 50 C.R. 520 [conversion]; 60 A.L.R.2d 487 [replevin or similar possessory action]; on quiet title action, see *infra*, §828.)

The same is true of acts of interference with contract and business relations. (See *Johnson v. Superior Court* (1965) 232 C.A.2d 212, 218, 42 C.R. 645, citing the text.)

(2) *Exception.* The statutory exception to this rule is *C.C.P.* 395.1, i.e., actions for the recovery of personal property against an executor, administrator, guardian, conservator, or trustee. (See *supra*, §805.)

SUPPLEMENT: [This section is current through the latest supplement]



130 of 188 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXII. VENUE: TRANSITORY ACTIONS

A. Actions Triable at Defendant's Residence.

5. Actions in Equity Other Than Contract Actions.

a. In General.

3 Witkin Cal. Proc. Actions § 823

[§ 823] In General.

(1) *In General.* Because equity jurisdiction is mainly, though not exclusively, in personam (see supra, §119), equity actions are usually transitory and triable at the defendant's residence. (See *Myers v. Superior Court* (1946) 75 C.A.2d 925, 930, 172 P.2d 84 [quieting title to personal property]; infra, §824 et seq.)

(2) *Exceptions.* The chief exceptions are specific performance, cancellation or reformation of a land contract or deed (local real actions; see supra, §797), and contract actions not relating to land (enlarged transitory venue; see infra, §834).

SUPPLEMENT: [This section is current through the latest supplement]



131 of 188 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXII. VENUE: TRANSITORY ACTIONS

A. Actions Triable at Defendant's Residence.

5. Actions in Equity Other Than Contract Actions.

b. Accounting.

3 *Witkin Cal. Proc. Actions* § 824

[§ 824] Accounting.

(1) *In General.* The main relief rule is particularly important in accounting actions, because the plaintiff usually asks for other relief as well. Thus, in the early leading case of *Smith v. Smith* (1891) 88 C. 572, 26 P. 356, plaintiff alleged that certain absolute conveyances of real and personal property to defendant were intended as mortgages, and that income from the property had been greatly in excess of the indebtedness. He prayed for a decree that the conveyances were mortgages, that the debt was paid, that the property be transferred to plaintiff, and that defendant account to plaintiff for the excess. *Held*, the primary object of the action was an accounting of the large sums due plaintiff, and its personal nature was not changed by the additional demand for a reconveyance. (88 C. 577.)

Other cases are to the same effect. (See *Neet v. Holmes* (1942) 19 C.2d 605, 611, 122 P.2d 557; *Stesel v. Santa Ana River Water Co.* (1939) 35 C.A.2d 117, 124, 94 P.2d 1052, *infra*, §828; *Hays v. Cowles* (1943) 60 C.A.2d 514, 518, 141 P.2d 26 [action for dissolution and liquidation of hotel partnership, with prayer for accounting and other relief]; *Rudnick v. Delfino* (1956) 140 C.A.2d 260, 264, 294 P.2d 983 [action to dissolve partnership and for accounting].)

(2) *Exception.* An action for accounting against an executor, administrator, guardian, conservator, or trustee may be subject to the local venue provisions of C.C.P. 395.1. (See *supra*, §805.)

SUPPLEMENT: [This section is current through the latest supplement]



132 of 188 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXII. VENUE: TRANSITORY ACTIONS

A. Actions Triable at Defendant's Residence.

5. Actions in Equity Other Than Contract Actions.

c. Injunction.

3 *Witkin Cal. Proc. Actions* § 825

[§ 825] Injunction.

Injunction is a typical equitable remedy, triable at the defendant's residence. (See *Golden Cross Mining & Milling Co. v. Spiers* (1896) 115 C. 247, 250, 47 P. 108; *Nason v. Feldhusen* (1917) 34 C.A. 789, 795, 168 P. 1162 [accounting and injunction]; *Tyler v. Park Ridge Country Club* (1930) 108 C.A. 741, 744, 292 P. 273; *Sloan v. Court Hotel* (1945) 72 C.A.2d 308, 316, 164 P.2d 516, *supra*, §789 [action to restrain hotel keeper from terminating occupancy and thus interfering with possession by guests].)

SUPPLEMENT: [This section is current through the latest supplement]



133 of 188 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXII. VENUE: TRANSITORY ACTIONS

A. Actions Triable at Defendant's Residence.

5. Actions in Equity Other Than Contract Actions.

d. Creditor's Action.

3 Witkin Cal. Proc. Actions § 826

[§ 826] Creditor's Action.

Actions by creditors to reach the property of debtors (see 8 *Cal. Proc.* (5th), *Enforcement of Judgment*, §291 et seq.) are equitable and triable at the defendant's residence. (See *Woodbury v. Nevada Southern Ry. Co.* (1898) 120 C. 463, 465, 52 P. 730 [action to set aside fraudulent conveyance]; *Heffernan v. Bennett & Armour* (1944) 63 C.A.2d 178, 146 P.2d 482 [same]; *Los Angeles City School Dist. v. Redwood Empire Title Co. of Mendocino* (1962) 206 C.A.2d 398, 402, 23 C.R. 662, citing the text [same]; *Thomas v. Thomas* (1939) 14 C.2d 355, 359, 94 P.2d 810 [action on Butte County divorce decree to establish it as continuing judgment enforceable by contempt in Los Angeles County, defendant's residence]; *Holstein v. Superior Court* (1969) 275 C.A.2d 708, 710, 80 C.R. 301 [action against debtor of judgment debtor]; but see *Cate v. Stapleton* (1941) 43 C.A.2d 492, 494, 111 P.2d 437 [statutory action by trustee in bankruptcy to set aside preference and recover money and property transferred; change of venue from trustee's residence to bankrupt's residence was denied].)

SUPPLEMENT: [This section is current through the latest supplement]



134 of 188 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXII. VENUE: TRANSITORY ACTIONS

A. Actions Triable at Defendant's Residence.

5. Actions in Equity Other Than Contract Actions.

e. Declaratory Relief.

3 Witkin Cal. Proc. Actions § 827

[§ 827] Declaratory Relief.

It has been said that, where the complaint seeks declaratory relief with respect to a plaintiff's obligations, venue must be determined as if the defendant were a plaintiff attempting to enforce the obligation. Thus, in *Shores v. Chip Steak Co.* (1955) 130 C.A.2d 620, 279 P.2d 591, the complaint, filed in Los Angeles County, sought a declaration of plaintiff's right to sell "chip steaks" there against defendant corporations' claim of trademark infringement. *Held*, defendants' motion to change venue to Alameda County, their corporate residence, was properly denied; the obligation of noninfringement was violated (if at all) and the liability (if any) arose in *Los Angeles*. (130 C.A.2d 623.)

However, in *Massae v. Superior Court* (1981) 118 C.A.3d 527, 173 C.R. 527, the court criticized the theory ("inversion-of-the-parties" approach) of the *Shores* decision (118 C.A.3d 534), and refused to apply it to an action in which the complaint prayed for reformation of a deed of trust and declaratory relief: "[I]t seems clear that the 'main relief' contemplated by the complaint is reformation of the deed of trust to excise its power of sale. Whether because it would reflect an orthodox application of the 'main relief rule' in this action or because it would be a more sensible rule for declaratory relief actions generally, this action should be assessed for venue purposes in terms of its *substance* rather than in terms of its declaratory relief *form*." (118 C.A.3d 535.) On this analysis, the court concluded that the action did not seek to reform the agreement or promissory note, and thus did not affect the existence or the amount of the underlying obligation; that it sought only to reform the deed of trust by eliminating the power of sale; and that, because a power of sale is a right to transfer title without a judicial sale, the action to eliminate the power had a direct impact on a right or interest in the real property, and was a local action to be tried in the county where the property was situated. (118 C.A.3d 539.)

SUPPLEMENT: [This section is current through the latest supplement]



135 of 188 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXII. VENUE: TRANSITORY ACTIONS

A. Actions Triable at Defendant's Residence.

5. Actions in Equity Other Than Contract Actions.

f. Cancellation of Instrument.

3 Witkin Cal. Proc. Actions § 828

[§ 828] Cancellation of Instrument.

An action to cancel a deed or other conveyance is local if its main object is to determine or restore title to real property. (See *supra*, §797.) But if title to land is not the main object, cancellation is a personal action in equity, triable at the defendant's residence. Two cases disclose the lack of any useful test and show how the preference for transitory actions (with trial at residence) influences the determination of the "main object" or relief.

In *Howe v. Tucker* (1933) 219 C. 193, 25 P.2d 832, plaintiff maker sued defendants, the payee of a note and the trustee of the deed of trust executed as security, to cancel the instruments for fraud, to have defendants declared constructive trustees, and to compel reconveyance. *Held*, the action was either transitory or a joinder of transitory and local causes, and thus triable at defendants' residence. (219 C. 194.) The dissent argued, however, that (a) because no independent action on the note in disregard of the security was possible, there was no joinder of separate actions, but only one action; and (b) cancellation of the note was only an incident of the main relief sought, removal of the lien created by the deed of trust. (219 C. 196.)

Howe was followed in *Stesel v. Santa Ana River Water Co.* (1939) 35 C.A.2d 117, 94 P.2d 1052. Plaintiffs, landowners with stock in a mutual water company, lost their shares after a sale for delinquent assessments. They sued the directors and others, seeking (a) an accounting for benefits of alleged illegal operation, and (b) cancellation of the assessments, for nonpayment of which their stock had been sold. Defendants argued that because the stock was appurtenant to land, and the cancellation of the assessments would avoid the sale and restore the stock, this latter part of the suit was a real action for the recovery of an interest in real property. *Held*, the action was transitory, for judgment would be personal (cancellation of the assessments), and it would not directly restore the stock but only indirectly affect their interest by furnishing the foundation for an action to recover the stock. (35 C.A.2d 125.)

Other cases are to the same effect. (See *Vaughan v. Roberts* (1941) 45 C.A.2d 246, 253, 113 P.2d 884, *supra*, §817; *Cade v. Superior Court* (1961) 191 C.A.2d 554, 557, 12 C.R. 847 [action to declare notes secured by trust deeds usurious and to strike interest provisions]; 77 A.L.R.2d 1014 [venue of action for rescission or cancellation of realty contract].)

SUPPLEMENT: [This section is current through the latest supplement]



136 of 188 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXII. VENUE: TRANSITORY ACTIONS

A. Actions Triable at Defendant's Residence.

5. Actions in Equity Other Than Contract Actions.

g. Equitable Relief Against Judgment.

3 *Witkin Cal. Proc. Actions* § 829

[§ 829] Equitable Relief Against Judgment.

An action to obtain equitable relief against a judgment (see 5 *Cal. Proc.* (5th), *Pleading*, §880) would appear to be either local or transitory, depending upon the nature and effect of the judgment sought to be annulled.

In *Brown v. Happy Valley Fruit Growers* (1929) 206 C. 515, 274 P. 977, the demand apparently made the action local. However, the court, invoking the main relief rule, concluded that the demand for relief involving real property was *surplusage*, for that relief would follow by itself from the personal judgment. Plaintiff sued and attached certain land, alleging that one of the defendants had by fraud and collusion obtained a judgment, levied on the land, and bought it at execution sale. The prayer sought annulment of the fraudulent judgment and the execution, and a declaration that plaintiff's attachment lien was superior. *Held*, the action was transitory, to annul the judgment. The other results--avoidance of the execution sale and superiority of plaintiff's attachment lien, would necessarily follow from the invalidity of the defendant's judgment. "There would be absolutely nothing left so far as the condemned judgment is concerned to hinder or impede the plaintiff in the full enjoyment of the fruits" of his own judgment. The court then added that *if* it could be said that this was a joinder case, the transitory cause governed. (206 C. 522; see *infra*, §884.)

The vague notion that one court will not interfere with the judgment of another court of coordinate jurisdiction, and that therefore an action to set aside a judgment must be brought in the court that rendered it, was rejected in *Deas v. Lido Lumber Co.* (1955) 132 C.A.2d 402, 282 P.2d 90. Where the action does not involve title to real property, but merely seeks to annul a prior judgment and recover money, it is transitory. Hence, plaintiff was not entitled to sue in Mendocino County where the judgment was rendered, and defendant corporation was entitled to a change of venue to Los Angeles County, its principal place of business. (132 C.A.2d 404.)

SUPPLEMENT: [This section is current through the latest supplement]



137 of 188 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXII. VENUE: TRANSITORY ACTIONS

A. Actions Triable at Defendant's Residence.

6. Action for Damages for Fraud.

3 *Witkin Cal. Proc. Actions* § 830

[§ 830] Action for Damages for Fraud.

(1) *Statement of Rule.* If the plaintiff's main object is to quiet title to or recover possession of land obtained by the defendant's fraud, the action is local. (See *supra*, §795 et seq.) If the plaintiff rescinds a contract induced by fraud and seeks restitution of the value of what the plaintiff gave, his or her action is in contract and a choice of counties is available. (See *infra*, §835.) But if the plaintiff brings an action for equitable relief not involving title to land or contract, the venue is defendant's residence. (See *supra*, §823.) And the same is true if the plaintiff brings a legal action in tort for damages for fraud and deceit. (See *Krogh v. Pacific Gateway & Dev. Co. (1909) 11 C.A. 237, 104 P. 698*; *Stokes v. Newsom (1948) 89 C.A.2d 147, 149, 200 P.2d 17*; *Claycomb v. Caronna (1952) 113 C.A.2d 561, 565, 248 P.2d 779*.)

(2) *Illustration.* *Kaluzok v. Brisson (1946) 27 C.2d 760, 167 P.2d 481*, is a simple illustration. Plaintiffs alleged that they had purchased real property in reliance on defendants' fraudulent representations, and had given a note and deed of trust as security. They prayed for judgment of \$ 20,000, the amount of their damages, asking that it be credited on the unpaid balance on the note. *Held*, their election to affirm the contract and seek damages made this a simple transitory action for money, not affecting title to or interests in the real property. (*27 C.2d 763*.)

SUPPLEMENT: [This section is current through the latest supplement]



138 of 188 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXII. VENUE: TRANSITORY ACTIONS

B. Actions Triable at Residence and Elsewhere.

1. Actions To Recover Money: In General.

3 Witkin Cal. Proc. Actions § 831

[§ 831] Actions To Recover Money: In General.

(1) *Contract Actions.* Prior to 1939, contract actions were governed by the general rule that actions to recover money are personal and transitory and therefore triable at the defendant's residence. This was true whether the action was in law or equity, in contract or quasi-contract. The decisions on contract actions were mainly concerned with determining whether the action was local or transitory; once it was determined to be transitory, the right to trial in the county of the defendant's residence necessarily followed. (See *infra*, §836.) In 1939, *C.C.P.* 395 was amended to enlarge the venue in actions on contract. As a result, though contract actions are transitory, they are no longer limited to trial solely at the defendant's residence. (See *infra*, §834.)

(2) *Tort Actions.* A similar enlargement took place long ago in connection with transitory tort actions; actions for damages for personal injury or death, or for injuries to personal property, although personal and transitory, are not restricted to the county of the defendant's residence. (See *infra*, §§832, 833.) And the enactment of *C.C.P.* 395.1 gave local venue to actions for money against an executor, administrator, guardian, conservator, or trustee. (See *supra*, §805.)

(3) *Statutory Actions.* A special statute may specify its own enlarged venue. Thus, *B. & P.C.* 16754 provides that an action by the Attorney General or county district attorney for violation of the Cartwright Act (see 1 *Summary* (10th), *Contracts*, §600) may be brought in any county where the offense, or part of it, is committed, as well as where the offenders reside or where a corporate defendant does business.

As a result of these changes, very few actions to recover money are triable solely at the defendant's residence.

SUPPLEMENT: [This section is current through the latest supplement]



139 of 188 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXII. VENUE: TRANSITORY ACTIONS

B. Actions Triable at Residence and Elsewhere.

2. Actions for Personal Injury or Death.

3 Witkin Cal. Proc. Actions § 832

[§ 832] Actions for Personal Injury or Death.

"If the action is for injury to person ... or for death from wrongful act or negligence, the superior court in either county where the injury occurs or the injury causing death occurs or the county where the defendants, or some of them reside at the commencement of the action, is a proper court for the trial of the action." (*C.C.P.* 395(a).) (See 58 *A.L.R.5th* 535 [venue of wrongful death action].) (On actions against the state and other governmental agencies, see *infra*, §§862 et seq., 871 et seq., 880, 881.)

The loose interpretation of the "injury to property" statute to include actions for slander of title (see *supra*, §802) stands in sharp contrast to the narrow construction of "injury to person" to include only cases of physical injury. Other invasions of personal rights, such as libel, malicious prosecution, abuse of process, false imprisonment, and intentional infliction of emotional distress are triable solely at the defendant's residence. (See *supra*, §821.)

SUPPLEMENT: [This section is current through the latest supplement]



140 of 188 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXII. VENUE: TRANSITORY ACTIONS

B. Actions Triable at Residence and Elsewhere.

3. Actions for Injury to Personal Property.

3 Witkin Cal. Proc. Actions § 833

[§ 833] Actions for Injury to Personal Property.

(1) *Statutory Rule.* C.C.P. 395 prescribes the same venue for actions for injuries to personal property as for injuries to the person, i.e., the residence of the defendant or the place where the injury occurred. (See *supra*, §832.) And the same narrow construction is given the phrase "injury ... to personal property." It applies only to physical injury, and not to conversion. (See *Mason v. Buck* (1929) 99 C.A. 219, 221, 278 P. 461; 29 A.L.R.2d 1270 [what is action for damages to personal property within venue statute]; *supra*, §822.) (On actions against state and other governmental agencies, see *infra*, §§862 et seq., 871 et seq., 880, 881.)

(2) *Illustration.* Application of this section sometimes requires a knowledge of the historical distinctions between real and personal property. (See *Gosliner v. Briones* (1921) 187 C. 557, 562, 204 P. 19 [action for damages for destruction of personal property consisting of dwelling house and windmill resting on mudsills and intended to be removed]; 13 *Summary* (10th), *Personal Property*, §90 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]



141 of 188 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXII. VENUE: TRANSITORY ACTIONS

B. Actions Triable at Residence and Elsewhere.

4. Actions on Contract.

a. In General.

1. Nature of Statute.

3 Witkin Cal. Proc. Actions § 834

[§ 834] Nature of Statute.

When a defendant has contracted to perform an obligation in a particular county, trial of an action founded on the obligation is proper in (1) the county in which the obligation is to be performed, (2) the county in which the contract in fact was entered into, or (3) the county in which the defendant or any defendant resides at the commencement of the action. Unless there is a special written contract to the contrary, the county in which an obligation is incurred is deemed to be the county in which it is to be performed. (*C.C.P. 395(a)*.)

This provision is subject to the requirements of *C.C.P. 395(b)*, governing venue in actions based upon consumer obligations (see *infra*, §846). (See *Armstrong v. Smith* (1942) 49 *C.A.2d* 528, 532, 122 *P.2d* 115, *infra*, §§841, 842; *Carnation Co. v. El Rey Cheese Co.* (1948) 88 *C.A.2d* 857, 858, 200 *P.2d* 19; for special statutes dealing with installment sales, see *infra*, §845; for similar provisions on contract actions against corporations and associations, see *infra*, §849.)

SUPPLEMENT: [This section is current through the latest supplement]



142 of 188 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXII. VENUE: TRANSITORY ACTIONS

B. Actions Triable at Residence and Elsewhere.

4. Actions on Contract.

a. In General.

2. What Are Contract Actions.

3 *Witkin Cal. Proc. Actions* § 835

[§ 835] What Are Contract Actions.

Before applying the rules on contract venue, it is necessary to determine the extent to which the term "contract" applies to actions involving express contracts, implied in fact contracts, and quasi-contractual obligations.

(1) *Express and Implied in Fact Contracts.* The statute clearly applies to true contracts. (See *Peterson v. Sherman* (1945) 68 C.A.2d 706, 710, 157 P.2d 863 [plaintiff, owner-renter of machinery, sued for recovery of possession and damages for wrongful detention; suit was contract action on rental agreement]; *Roff v. Crenshaw* (1945) 69 C.A.2d 536, 539, 159 P.2d 661 [check imports promise to pay, hence, suit against drawer was contract action]; *Gilman v. Nordin* (1952) 112 C.A.2d 788, 791, 247 P.2d 394 [action for dissolution of partnership agreement for breach].)

A statutory liability is sometimes regarded as contractual, and sometimes not. (See *Cate v. Stapleton* (1941) 43 C.A.2d 492, 495, 111 P.2d 437, *supra*, §143.) But if the Legislature expressly provides that the liability shall constitute a "charge" or "debt" collectible in the same manner as "an obligation under a contract," the rules of contract venue apply irrespective of the technical classification of the obligation. (See *People v. Zegras* (1946) 29 C.2d 67, 68, 172 P.2d 883, *supra*, §143.)

The argument that a contract that is not binding cannot determine contract venue was rejected in *Harbinson v. Affeldt* (1946) 75 C.A.2d 499, 504, 171 P.2d 474, as an attempt to challenge failure to state a cause of action on a motion for change of venue. (See *supra*, §791.)

(2) *Restitution After Rescission.* An action for restitution after rescission of a contract is an action on a contract (or quasi-contract) within the meaning of a procedural statute. (See *Fitzhugh v. University Realty Co.* (1920) 46 C.A. 198, 201, 188 P. 1023, *infra*, §860; *supra*, §130.) *Postin v. Griggs* (1944) 66 C.A.2d 147, 148, 151 P.2d 887, holding that such an action after rescission for fraud is in tort and triable only at the county of defendant's residence, is clearly erroneous, although it was followed in *Sausen v. Anderton* (1954) 129 C.A.2d 324, 325, 276 P.2d 814. (See *supra*, §156.)

(3) *Distinctions*. It is generally held that an action for damages for personal injuries "sounds in tort" even though it is pleaded as a breach of the defendant's contractual obligation to exercise due care. Hence, contract venue is denied. (See *Williamson v. Pacific Greyhound Lines* (1944) 67 C.A.2d 250, 256, 153 P.2d 990 [carrier]; but see *supra*, §§165, 166.) And an action for damages for fraud in the sale of property, based on the affirmance of the contract, is not a contract action. (See *Claycomb v. Caronna* (1952) 113 C.A.2d 561, 564, 248 P.2d 779.)

SUPPLEMENT: [This section is current through the latest supplement]



143 of 188 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXII. VENUE: TRANSITORY ACTIONS

B. Actions Triable at Residence and Elsewhere.

4. Actions on Contract.

a. In General.

3. Where Main Relief Is Contractual.

3 *Witkin Cal. Proc. Actions* § 836

[§ 836] Where Main Relief Is Contractual.

Often the plaintiff, in an action on a contractual liability, seeks additional relief, and the main relief rule is invoked to determine the venue. Most of the important cases were decided prior to the 1939 amendment enlarging venue in contract actions, but they are still in point to the extent that they determine whether the action is local or transitory.

The whimsical operation of the main relief rule in this field is well illustrated by contrasting the case of *California v. Royal Consol. Mining Co.* (1921) 187 C. 343, 202 P. 133, *supra*, §796, with *Turlock Theatre Co. v. Laws* (1939) 12 C.2d 573, 86 P.2d 345. In the latter case a lessor sued a lessee to (a) cancel the lease, (b) obtain possession of the premises with damages for withholding, (c) quiet title, and (d) recover the amount of unpaid rentals. *Held*, the cause of action for rentals was transitory. The court considered the situation the converse of that in the earlier case. "Here the right to possession of the real property largely depends upon the outcome of the controversy concerning the amounts of rentals paid or claimed to have been unpaid." (12 C.2d 578.) If it were found that all had been paid, plaintiff might not be entitled to any relief (lease still binding); hence, the demand for rentals was the primary object of the complaint, and restoration of the premises would follow as an incident to a judgment for rentals. (See 27 Cal. L. Rev. 468.)

Rench v. Harris (1946) 76 C.A.2d 113, 172 P.2d 576, is another illustration of how the preference for the transitory form helps determine the main relief. Plaintiff pleaded that he gave defendants a successful plan to increase rentals on their property, in consideration of their promise to give him "an interest in any leasehold rights thereafter obtained." *Held*, the action was personal, for it did not appear that plaintiff was to have anything more than a contract right to share in increased rentals against the lessors personally. (76 C.A.2d 117.)

Other cases are to the same effect. (See *Terry v. Rivergarden Farms Co.* (1915) 29 C.A. 59, 60, 154 P. 476 [action to rescind and recover payments made under contract for sale of land]; *Work v. Associated Almond Growers of Paso Robles* (1926) 76 C.A. 708, 711, 245 P. 790 [vendor's action to recover balance of purchase price; transitory despite incidental prayer seeking specific performance]; *Scott v. Lippman* (1940) 40 C.A.2d 317, 321, 104 P.2d 715 [action to recover money due under party wall agreement; transitory despite allegations seeking injunction]; *Blackman v. Sherman* (1940) 41 C.A.2d 20, 22, 105 P.2d 1000 [action for damages for breach of contract; transitory despite count seeking

quieting of title]; *Martinez v. Martinez* (1950) 99 C.A.2d 425, 427, 221 P.2d 986 [action to reform contract for mistake; transitory despite incidental prayer for injunction to enforce provisions as reformed].)

SUPPLEMENT: [This section is current through the latest supplement]



144 of 188 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXII. VENUE: TRANSITORY ACTIONS

B. Actions Triable at Residence and Elsewhere.

4. Actions on Contract.

b. County Where Contract Is Entered Into.

1. In General.

3 Witkin Cal. Proc. Actions § 837

[§ 837] In General.

(1) *Proper County.* The place of contracting, i.e., the place where the contract was "entered into" or made, is a proper county in which to sue. (*C.C.P.* 395, *supra*, §834; see *Roff v. Crenshaw* (1945) 69 C.A.2d 536, 159 P.2d 661 [check drawn and delivered in San Luis Obispo County was contract of drawer entered into in that county]; *Hagan v. Gilbert* (1948) 83 C.A.2d 570, 575, 189 P.2d 548; *Carnation Co. v. El Rey Cheese Co.* (1948) 88 C.A.2d 857, 858, 200 P.2d 19; *Turner v. Simpson* (1949) 91 C.A.2d 590, 591, 205 P.2d 423; *Credit Bureau of San Diego v. Clark* (1950) 98 C.A.2d 479, 481, 220 P.2d 596.) (On corporation venue, see *infra*, §854.)

However, a preliminary line of credit granted by the prospective seller to the prospective buyer is not a part of the contract of sale, and the place of granting the credit is not a proper basis for venue. (*Garrett v. Superior Court* (1967) 248 C.A.2d 263, 267, 56 C.R. 418.)

(2) *Place of Acceptance.* The place of making is the place where the last act necessary for its validity was done, usually the act constituting the acceptance. (See *Bank of Yolo v. Sperry Flour Co.* (1903) 141 C. 314, 316, 74 P. 855; *Taylor v. Lundblade* (1941) 43 C.A.2d 638, 639, 111 P.2d 344, *infra*, §838; *Johnson v. Banta* (1948) 87 C.A.2d 907, 909, 198 P.2d 100; *Schreiber v. Hooker* (1952) 114 C.A.2d 634, 635, 251 P.2d 55; *Marchese Bros. v. A. Lyon & Sons* (1954) 123 C.A.2d 193, 198, 266 P.2d 556; *Ward Mfg. Co. v. Miley* (1955) 131 C.A.2d 603, 611, 281 P.2d 343, citing the text; *Pacific Nat. Bank of San Francisco v. Covington Inv. Co.* (1959) 169 C.A.2d 868, 871, 338 P.2d 56, citing the text; *Skaggs-Stone v. La Batt* (1960) 182 C.A.2d 142, 144, 5 C.R. 882; *Hollopeter v. Rogers* (1962) 199 C.A.2d 814, 817, 19 C.R. 25; *Braunstein v. Superior Court* (1964) 225 C.A.2d 691, 696, 37 C.R. 666, citing the text; *infra*, §854.)

In *Elsinore Union Elementary School Dist. of Riverside v. Kastorff* (1954) 129 C.A.2d 60, 276 P.2d 112, plaintiff, a Riverside school district, sued a defaulting contractor and his surety on the contractor's bond. The bond was executed by the surety in Los Angeles County and by the contractor in Orange County, but was delivered to and accepted by plaintiff in Riverside County. *Held*, venue in Riverside County was proper. (129 C.A.2d 65.)

A contract made by telephone is entered into at the place where the acceptor speaks his or her acceptance. (*Wilson*

v. Scannavino (1958) 159 C.A.2d 369, 371, 324 P.2d 350.) And a unilateral contract is both made and performed at the place of performance, which constitutes the acceptance. (*Richardson v. Rose* (1961) 197 C.A.2d 318, 322, 17 C.R. 84.)

In a contract for the sale of goods, where delivery to a particular place is required, title ordinarily does not pass until the goods are delivered or tendered there. (U.C.C. 2401(2)(b).) The "last act" therefore occurs at the place of delivery, and this is the place where the contract was made for purposes of venue. (See *Cal-Ore Lumber Sales v. Russell* (1955) 133 C.A.2d 296, 303, 284 P.2d 179; *Mathews Conveyer Co. West Coast v. Powell* (1958) 159 C.A.2d 489, 491, 324 P.2d 6.)

SUPPLEMENT: [This section is current through the latest supplement]



145 of 188 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXII. VENUE: TRANSITORY ACTIONS

B. Actions Triable at Residence and Elsewhere.

4. Actions on Contract.

b. County Where Contract Is Entered Into.

2. Recital Is Not Conclusive.

3 *Witkin Cal. Proc. Actions* § 838

[§ 838] Recital Is Not Conclusive.

In *Taylor v. Lundblade* (1941) 43 C.A.2d 638, 111 P.2d 344, plaintiff sued for breach of contract, alleging in the complaint and in a supporting affidavit that the formal written agreement was executed in Del Norte County. Defendant contended that Humboldt County was the proper venue because the attestation clause of the contract recited that the execution took place in that county. *Held*, the clause, a nonessential part of the contract, was not protected by the parol evidence rule and, while prima facie evidence of the place of making, could be rebutted. The Legislature "did not provide the proper county was where the contract may have been made, or where the contract declared it to have been made, or where the parties may have stipulated it was made, but declared that the county where the contract was *in fact* made is the proper county for the commencement of the action." (43 C.A.2d 639.) (See *Wilson v. Hoffman* (1947) 81 C.A.2d 664, 666, 184 P.2d 951.)

SUPPLEMENT: [This section is current through the latest supplement]



146 of 188 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXII. VENUE: TRANSITORY ACTIONS

B. Actions Triable at Residence and Elsewhere.

4. Actions on Contract.

b. County Where Contract Is Entered Into.

3. Effect of Modification or Option.

3 *Witkin Cal. Proc. Actions* § 839

[§ 839] Effect of Modification or Option.

(1) *Modification or Correction.* If a contract is "entered into" in one county, and then is modified in another, what effect has the modification on venue? In *Joe Lowe Corp. v. Rasmusson* (1942) 53 C.A.2d 490, 127 P.2d 1002, a formal contract covering the sale of a business to plaintiff buyer and performance of services by defendant seller, was executed in San Francisco. A week later a supplemental agreement was made in Los Angeles changing the terms and method of payment of the price. The action was brought against defendant for breach. *Held*, venue was in San Francisco. The original agreement was complete in itself; the supplemental modifying agreement did not relate to the issue involved, and consequently the action was not founded on an "obligation incurred" by that supplemental agreement. (53 C.A.2d 492.) (On meaning of "entered into" and "obligation incurred," see *infra*, §841.)

In *Standard Machinery Co. v. Coleman* (1956) 140 C.A.2d 748, 296 P.2d 89, the court, following *Joe Lowe*, held that plaintiff could sue where the sale agreement was negotiated and signed, though subsequently errors were discovered and it was retyped and signed again by defendant in his residence county as a convenience to him. (140 C.A.2d 749.)

(2) *Exercise of Option.* Where a contract creates an option, there may in practical effect be two contracts, the original one creating the option, and the later contract created by the optionee's exercise of the option. Nevertheless, the optionor is bound by the original contract; i.e., the obligation was incurred by that contract when it was made. Hence, venue is in the county in which the original instrument was executed. (*Dawson v. Goff* (1954) 43 C.2d 310, 317, 273 P.2d 1.)

SUPPLEMENT: [This section is current through the latest supplement]



147 of 188 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXII. VENUE: TRANSITORY ACTIONS

B. Actions Triable at Residence and Elsewhere.

4. Actions on Contract.

b. County Where Contract Is Entered Into.

4. Effect of External Condition Precedent.

3 Witkin Cal. Proc. Actions § 840

[§ 840] Effect of External Condition Precedent.

(1) *Condition of Approval*. Occasionally the terms of a contract are agreed upon by an agent and a third party, but acceptance by the principal is made an external condition precedent to its binding effect. In *Di Giorgio Fruit Corp. v. Zachary* (1943) 60 C.A.2d 560, 141 P.2d 8, a printed form of contract, designated an "order," was signed by the buyer and the seller's agent in Los Angeles, but the form stated that it was "subject to approval and acceptance" by the principal. A letter of acceptance was mailed by the principal in San Francisco to Los Angeles. *Held*, San Francisco, the place of mailing the acceptance, was the county in which the contract was entered into. (60 C.A.2d 562.) (See *De Campos v. State Comp. Ins. Fund* (1946) 75 C.A.2d 13, 22, 170 P.2d 60.)

A mere letter of confirmation of an agreement previously made is distinguishable. Thus, in *Campbell v. Clifford* (1942) 52 C.A.2d 615, 126 P.2d 887, there was an oral conversation in Los Angeles, and a letter subsequently mailed from San Francisco by defendant, referring to "confirmation of the agreement between us." The letter failed to set forth either the type of business or the nature of the agreement. *Held*, the contract was made in Los Angeles, as pleaded by plaintiff. (52 C.A.2d 619.)

(2) *Condition of Payment of Insurance Premium*. In *Limited Mut. Comp. Ins. Co. v. Curtis* (1941) 45 C.A.2d 507, 114 P.2d 404, defendant insured took workers' compensation policies from plaintiff insurer in Los Angeles, his residence, and paid his premiums at the company's Los Angeles office. Plaintiff company brought this action in San Francisco for certain premiums due. *Held*, the venue was proper, because the policies provided that, as a condition precedent to their effectiveness, the premium must be paid to the insurer at its office in San Francisco. "[B]y the terms of the contracts the parties themselves fixed the time when and the place where the condition precedent should be performed to make the contracts binding and operative; and it follows, therefore, that the place where they became binding and operative is the place where the obligations thereunder were 'incurred.' " (45 C.A.2d 509.) (See *De Campos v. State Comp. Ins. Fund*, *supra*, 75 C.A.2d 21 [same holding in action against insurer for loss caused by its failure to perform]; *Yedor v. Ocean Acc. & Guarantee Corp.* (1948) 85 C.A.2d 698, 704, 194 P.2d 95 [same].)

(3) *Distinction: Memorandum To Satisfy Statute of Frauds*. In *Taylor v. J.B. Hill Co.* (1945) 67 C.A.2d 581, 154

P.2d 926, dealing with corporation venue, plaintiff and defendant corporation's agent made an oral contract of sale in Los Angeles. Later, to comply with the statute of frauds, defendant mailed a written confirmation from Fresno, and plaintiff mailed a written confirmation from Los Angeles. *Held*, the action in Los Angeles was proper. Though unenforceable until a memorandum was signed, the oral contract was not void, and its place of making was in *Los Angeles*. (67 C.A.2d 582.)

SUPPLEMENT: [This section is current through the latest supplement]



148 of 188 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXII. VENUE: TRANSITORY ACTIONS

B. Actions Triable at Residence and Elsewhere.

4. Actions on Contract.

c. County Where Obligation Is To Be Performed.

1. Effect of Limiting Proviso: "Obligation Incurred."

3 *Witkin Cal. Proc. Actions* § 841

[§ 841] Effect of Limiting Proviso: "Obligation Incurred."

(1) *Statutory Rule.* "[I]f a defendant has contracted to perform an obligation in a particular county, the superior court in the county where the obligation is to be performed, where the contract in fact was entered into, or where the defendant or any defendant resides at the commencement of the action is a proper court for the trial of an action founded on that obligation, and the county where the obligation is incurred is the county where it is to be performed, unless there is a special contract in writing to the contrary." (*C.C.P. 395(a)*.)

(2) *Illustrations.* *Armstrong v. Smith* (1942) 49 *C.A.2d* 528, 122 *P.2d* 115, held that the proviso practically destroys the main provision, and that the statute does not, except in rare cases, allow suit at the place of performance. Plaintiff, a contractor, made a written agreement in San Francisco to build a house for defendant in Alameda County. In this action for breach, plaintiff alleged acts of prevention by defendant. *Held*, Alameda County was not a proper county for trial. Plaintiff's own obligation (building the house) was of course expressly performable in Alameda County; but defendant's obligation, for breach of which the action was brought, was merely that implied by law, to permit plaintiff to build without interference. This obligation was incurred at the time the contract was made, in San Francisco; and, in the absence of a special contrary provision, it was to be deemed performable there and not in Alameda County, regardless of what might in fact be the case.

(a) The phrase "obligation is incurred" in *C.C.P. 395(a)* adds nothing, and merely restates the rule of venue where the contract is "entered into." The ordinary effect of the limiting proviso "is to cut down the number of counties in which an action may properly be tried to two, namely, the county in which the defendant resides, and the county in which the contract was made." (49 *C.A.2d* 531.) "What the legislature has in substance said is that all actions arising on contract shall be tried in the county in which the defendant resides, or in which the contract was made, unless the defendant has contracted specially and in writing as to the county in which his obligation is to be performed." (49 *C.A.2d* 532.)

(b) In rejecting plaintiff's contention that the "obligation" on which the action was brought was "incurred" at the place of breach, the court said: "The obligation of a contract is incident to its making. It is incurred at the time the

contract is made and follows it until the contract is extinguished. The obligation arises as soon as the contract takes breath and may be breached at any time while it has life. While it is the law, in conjunction with the contract, which cast the obligation, the law does not wait until it is breached to cast it. This is done when the contract is made. So with the contract before us, all obligations arising under it were incurred at the time and in the county in which it was made." (49 C.A.2d 533.) (See *Dawson v. Goff* (1954) 43 C.2d 310, 315, 273 P.2d 1 [following *Armstrong*]; *Braunstein v. Superior Court* (1964) 225 C.A.2d 691, 695, 37 C.R. 666 [same].)

SUPPLEMENT: [This section is current through the latest supplement]



149 of 188 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXII. VENUE: TRANSITORY ACTIONS

B. Actions Triable at Residence and Elsewhere.

4. Actions on Contract.

c. County Where Obligation Is To Be Performed.

2. Meaning of "Special Contract."

aa. Promise Must Be Express.

3 Witkin Cal. Proc. Actions § 842

[§ 842] Promise Must Be Express.

The court in *Armstrong v. Smith* (1942) 49 C.A.2d 528, 122 P.2d 115, supra, §841, also gave consideration to the kind of "special contract in writing" that will allow an action at the place of performance. This language was taken almost verbatim from a section dealing with former justice court actions, and was construed, in *Gulick v. Justice's Court* (1929) 101 C.A. 619, 281 P. 1031, not to apply to a check payable at a particular bank. The "special contract" is an unusual type "in which there is expressed particular stipulations with respect to the obligations of the parties, and which, if omitted, the law will not supply." (49 C.A.2d 535.) It need not be separate and distinct, but it "must specifically state the place of performance of such obligation. If the contract so states, then the provision as to place of performance is both express and special." (49 C.A.2d 536.)

In *Caffrey v. Tilton* (1952) 38 C.2d 371, 240 P.2d 273, plaintiff, a salesman for defendant, sued for a declaration of his right to commissions. He contended that, because his territory was northern California and his residence was San Francisco, performance by defendant (payment of commissions) was to take place in San Francisco where plaintiff obligee was to be found (C.C. 1489). The contention was rejected, the court reaffirming the holding of *Armstrong* that the special contract must be express and cannot be implied. (38 C.2d 374.)

Other cases are to the same effect. (See *Yedor v. Ocean Acc. & Guarantee Corp.* (1948) 85 C.A.2d 698, 705, 194 P.2d 95 [recital of address of insured was not equivalent to special contract of insurance carrier to pay at that place]; *Johnson v. Banta* (1948) 87 C.A.2d 907, 910, 198 P.2d 100 ["f.o.b. Oakland" referred to price, not to place of performance]; *Stute v. Burinda* (1981) 123 C.A.3d Supp. 11, 16, 177 C.R. 102 [special contract need not set forth address; geographic designation of city or county is sufficient]; but see *Gilman v. Nordin* (1952) 112 C.A.2d 788, 792, 247 P.2d 394 [plaintiff's general allegation of place of performance, which did not plead special contract, was sufficient for venue purposes because defendant's answer failed to deny, and therefore admitted, allegation].) (For simpler test of place of performance for corporation venue, see *infra*, §855.)

SUPPLEMENT: [This section is current through the latest supplement]



150 of 188 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXII. VENUE: TRANSITORY ACTIONS

B. Actions Triable at Residence and Elsewhere.

4. Actions on Contract.

c. County Where Obligation Is To Be Performed.

2. Meaning of "Special Contract."

bb. Illustrations.

3 Witkin Cal. Proc. Actions § 843

[§ 843] Illustrations.

(1) *Promise To Deliver Goods at Place.* In *La Lumia v. Northern Calif. Packing Co.* (1946) 75 C.A.2d 917, 172 P.2d 94, plaintiff buyers agreed to buy grapes from defendant sellers, produced in Stanislaus County, at Stanislaus County roadside prices. The written contract provided: "Said crop to be delivered at the winery" in San Joaquin County. *Held*, this provision allowed suit in San Joaquin County, the place of performance. (75 C.A.2d 924.)

In *East-West Dairymen's Assn. v. Dias* (1943) 59 C.A.2d 437, 138 P.2d 772, defendant, a member of a cooperative marketing corporation, signed a contract agreeing to be bound by the articles and bylaws. The bylaws provided that each member agreed to sell and deliver his or her milk to the corporation plant in Stanislaus County. *Held*, an action there was proper; "the place of performance was as effectively fixed by the by-laws as though such place had been expressly fixed in the contract itself or by a provision in the contract expressly permitting the other party to fix any reasonable place for performance." (59 C.A.2d 441.)

(2) *Promise To Deliver Documents at Plaintiff's Office.* In *Wathen v. Superior Court* (1963) 212 C.A.2d 125, 27 C.R. 840, plaintiff mortgage company contracted to provide financing for defendants, residents of Fresno, in their business of building tract homes in Fresno. The written agreement required defendants to deliver loan applications to plaintiff's office. Although plaintiff had other offices, this agreement was on plaintiff's letterhead, showing its office address as Palo Alto, Santa Clara County. *Held*, Santa Clara County was the proper venue. (212 C.A.2d 129.)

(3) *Promise To Pay at Specified Place.* In *Causley v. Superior Court* (1968) 267 C.A.2d 757, 73 C.R. 585, a note recited that it was to be paid "at Santa Rosa, California" (Sonoma County). *Held*, Sonoma County venue was proper, although the note was made in San Francisco and the individual defendants resided there. (267 C.A.2d 758.) (See *Stute v. Burinda* (1981) 123 C.A.3d Supp. 11, 16, 177 C.R. 102 [following *Causley*; contract need not set forth address, geographic designation of city or county is sufficient].)

In *Mitchell v. Superior Court* (1986) 186 C.A.3d 1040, 231 C.R. 176, plaintiff, a professional liability insurer, sued

defendant, its insured, under a policy provision for reimbursement of payments made on deductible items. The policy required the insured to "pay such amounts to the Company," and did not specify where the payment was to be made or contain any reference to an address of any California office of the company. Defendant's renewal application for the policy had been mailed to the New York office of the company and accepted there. Plaintiff, however, filed this action in the municipal court of Los Angeles County. The Los Angeles venue was based on the facts that it had only one claims office in California, in Los Angeles; that it had mailed its demand for payment of the deductible from that office; and that therefore defendant's contractual obligation to reimburse was to be performed in Los Angeles. The municipal court denied defendant's motion for a change of venue, and the appellate department of the superior court affirmed on the authority of *Inglewood Thrift & Loan v. Colby* (1961) 188 C.A.2d Supp. 857, 10 C.R. 814, *infra*, §844, and *Morthrift Plan v. Fischer* (1961) 196 C.A.2d Supp. 865, 17 C.R. 607, *infra*, §844. *Held*, mandamus issued to compel granting the motion for change of venue to defendant's residence.

(a) *Armstrong v. Smith* (1942) 49 C.A.2d 528, 122 P.2d 115, *supra*, §§841, 842, and *Caffrey v. Tilton* (1952) 38 C.2d 371, 240 P.2d 273, *supra*, §842, are controlling on the issue of "special contract in writing," and both hold that parol evidence may not be admitted to identify the place of performance. (186 C.A.3d 1046, 1049, citing the text.) The attempted distinction of *Armstrong* in *Morthrift Plan* was rejected in *Caffrey*. (186 C.A.3d 1047, 1048.)

(b) Thus, "there is no 'special contract in writing' specifying Los Angeles County as the agreed location of defendant's contractual obligation to pay the disputed deductible." (186 C.A.3d 1050.)

SUPPLEMENT: [This section is current through the latest supplement]



151 of 188 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXII. VENUE: TRANSITORY ACTIONS

B. Actions Triable at Residence and Elsewhere.

4. Actions on Contract.

c. County Where Obligation Is To Be Performed.

2. Meaning of "Special Contract."

cc. Promise To Pay Seller's Assignee.

3 Witkin Cal. Proc. Actions § 844

[§ 844] Promise To Pay Seller's Assignee.

(1) *Conflicting Appellate Decisions.* Prior to the adoption of statutes regulating venue in retail installment sales (see *infra*, §845), conflicting decisions were made by the appellate department of the superior court on a question arising out of a common practice. Goods are sold on conditional sale, and the buyer contracts to pay the installments at the office of the seller's assignee; may the assignee sue in the county of its principal office?

In *Fidelity Thrift & Loan Assn. v. Hall* (1960) 186 C.A.2d Supp. 895, 9 C.R. 596, the contract was made in Kern County, where defendants resided, and was assigned by the seller to plaintiff. Plaintiff alleged that its principal place of business was in Fresno County, and sued there. *Held*, defendant buyers were entitled to a change of venue to their residence in Kern County. The court took the phrase in *Armstrong v. Smith* (1942) 49 C.A.2d 528, 122 P.2d 115, *supra*, §§841, 842 ("the contract must specifically state the place of performance"), to mean a designated geographic place; i.e., that the place must be found in express language of the contract. (186 C.A.2d Supp. 898, 899.) If such a designation is found, as in *Mills Sales Co. v. Gonzales* (1956) 146 C.A.2d Supp. 899, 901, 304 P.2d 274 ("at the Oakland Main Office of Bank of America ... in the City of Oakland, County of Alameda"), C.C.P. 395 applies. But extrinsic evidence to identify the geographic location of "Fidelity Thrift & Loan Association" was ruled out, on the theory that it would establish the place of performance by implication rather than express words. (186 C.A.2d Supp. 900, 901.)

Inglewood Thrift & Loan v. Colby (1961) 188 C.A.2d Supp. 857, 10 C.R. 814, took precisely the opposite position. The contract provided for payments "at the office of the Seller or Seller's assignee." Following earlier unpublished decisions of its own appellate department, the court held that the place was expressly designated, and that extrinsic evidence was admissible to identify the geographical location of that place. *Fidelity* was criticized as confusing the proper use of extrinsic evidence to give meaning to the express terms with the improper use of that evidence to establish an undesignated place of performance by implication. The court further held that the place is expressly designated even though there may be more than one place, i.e., the office of the seller or that of the seller's assignee: "The change is authorized by the contract and agreed to by the purchaser." (188 C.A.2d Supp. 861.) Perhaps this last observation was intended to suggest an answer to the objection in *Fidelity* that "[i]f the plaintiff had offices situated in more than one

county, then it could unilaterally fix the place of performance and thus fix the venue of the action without acquiescence on the part of the defendants." (186 C.A.2d Supp. 900.)

Inglewood was followed in another appellate department opinion, *Morthrift Plan v. Fischer* (1961) 196 C.A.2d Supp. 865, 17 C.R. 607. The contract provided for buyers' payments "at the office of Morthrift Plan." Held, parol evidence--the affidavit of Morthrift's manager--was admissible to identify the place of performance as Sacramento, where its office was located. (196 C.A.2d Supp. 865, 869, 870, 871.)

(2) *Legislative Resolution*. Insofar as installment sales are concerned, these decisions are rendered obsolete by the Unruh and Rees-Levering Acts (see *infra*, §845). (See *Mitchell v. Superior Court* (1986) 186 C.A.3d 1040, 1047, 1048, 231 C.R. 176, *supra*, §843 [disapproving theory relied on in *Inglewood Thrift & Loan* and *Morthrift Plan*].) The same is true of actions on consumer obligations, which are governed by similar venue provisions (see *infra*, §846).

SUPPLEMENT: [This section is current through the latest supplement]



152 of 188 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXII. VENUE: TRANSITORY ACTIONS

B. Actions Triable at Residence and Elsewhere.

4. Actions on Contract.

d. Actions on Installment Contracts.

3 Witkin Cal. Proc. Actions § 845

[§ 845] Actions on Installment Contracts.

(1) *Unruh Act*. The Unruh Act regulating credit and installment sales (see 4 *Summary* (10th), *Sales*, §263 et seq.) contains the following venue provision: An action on a contract or installment account under the statute "shall be tried in the superior court in the county" (a) "where the contract was in fact signed by the buyer," (b) "where the buyer resided at the time the contract was entered into," (c) "where the buyer resides at the commencement of the action," or (d) "where the goods purchased pursuant to the contract have been so affixed to real property as to become a part of that real property." (C.C. 1812.10(a).)

The proper location for trial within that superior court is specified in language similar to that in *C.C.P.* 392(b), 393(b), and 395(c) (see *supra*, §782). (C.C. 1812.10(b).)

Concurrently with filing the complaint, the plaintiff must file a statement of facts to show that the action was commenced in the proper superior court and in the proper court location within the superior court, either by (a) an affidavit, a copy of which must be served with the summons; or (b) a verified complaint (not on information and belief). If the affidavit is not filed, the court, on motion or on its own motion, must dismiss the action without prejudice. However, the court may permit late filing of the affidavit "on terms that are just." (C.C. 1812.10(c); see *C.C.P.* 396a(a) [same requirements for limited civil case subject to C.C. 1812.10].) (On mass misfiling of complaints without complying with requirement as abuse of process, see *Barquis v. Merchants Collection Assn.* (1972) 7 *C.3d* 94, 103, 101 *C.R.* 745, 496 *P.2d* 817, *supra*, §780.)

(2) *Rees-Levering Act*. This Act, regulating credit and installment sales of motor vehicles (see 4 *Summary* (10th), *Sales*, §239 et seq.), contains provisions on venue similar to those in the Unruh Act. The first three are the same but also apply to an action on a purchase order; the fourth is the superior court in the county "where the motor vehicle ... is permanently garaged." The Rees-Levering Act additionally states that its venue provisions apply to an action involving multiple claims, if there is at least one claim arising from a contract subject to the Act. (C.C. 2984.4(a).)

The specification of the proper court for trial within the appropriate superior court, and the requirement of a factual showing, are in the language of C.C. 1812.10(b) and (c). (C.C. 2984.4(b) and (c); see *C.C.P.* 396a(a) [same factual

showing requirements for limited civil case that is subject to C.C. 2984.4].)

(3) *Special Venue Provisions Are Prohibited.* Both statutes prohibit a contract term giving the right to sue in any county other than those specified. (C.C. 1804.1(i), 2983.7(f).) (On illegality of venue provisions in general, see *supra*, §§785, 786.)

SUPPLEMENT: [This section is current through the latest supplement]



153 of 188 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXII. VENUE: TRANSITORY ACTIONS

B. Actions Triable at Residence and Elsewhere.

4. Actions on Contract.

e. Actions on Consumer Obligations.

3 Witkin Cal. Proc. Actions § 846

[§ 846] Actions on Consumer Obligations.

(1) *In General.* The proper court for the trial of an action "arising from an offer or provision of goods, services, loans or extensions of credit intended primarily for personal, family or household use" (other than an action subject to the Unruh Act or the Rees-Levering Act, *supra*, §845), or "an action arising from a transaction consummated as a proximate result of either an unsolicited telephone call made by a seller engaged in the business of consummating transactions of that kind or a telephone call or electronic transmission made by the buyer or lessee in response to a solicitation by the seller," is the superior court in the county (a) where "the buyer or lessee in fact signed the contract," (b) where "the buyer or lessee resided at the time the contract was entered into," or (c) where "the buyer or lessee resides at the commencement of the action." (*C.C.P. 395(b).*)

For purposes of *C.C.P. 395(b)*, medical services are services intended primarily for personal use. (*Leonard v. Slade* (1975) 55 C.A.3d Supp. 1, 4, 127 C.R. 309, citing the text.)

C.C.P. 395 does not govern venue in an action on a consumer obligation involving conduct that occurs outside of California. (*Yu v. Signet Bank/Virginia* (1999) 69 C.A.4th 1377, 1395, 82 C.R.2d 304.)

(2) *Limited Civil Cases.* In actions subject to *C.C.P. 395(b)* that are limited civil cases, the plaintiff, by an affidavit or a verified complaint, must state facts showing that the action was commenced in the proper superior court and in the proper court location within the superior court, and that the action is subject to the provisions of *C.C.P. 395(b)*. If the affidavit or complaint is not filed, the court must dismiss the action without prejudice, but may permit late filing of an affidavit "on terms that are just." (*C.C.P. 396(a).*)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General.* See *Fontaine v. Superior Court* (2009) 175 C.A.4th 830, 838, 96 C.R.3d 607 [*C.C.P. 395(b)* applied to borrower's action against debt collection agency and its employees, alleging that debt collection techniques violated Fair Debt Collection Practices Act, even though borrower was plaintiff in action, and even though employee defendants lived outside borrower's county of residence; debt was incurred primarily for personal use, and action arose from loan, because loan led to allegedly unlawful collection efforts].



154 of 188 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXII. VENUE: TRANSITORY ACTIONS

B. Actions Triable at Residence and Elsewhere.

5. Nonresidence or Imminent Departure.

a. Defendant Nonresident or Residence Unknown.

3 Witkin Cal. Proc. Actions § 847

[§ 847] Defendant Nonresident or Residence Unknown.

(1) *Statutory Rules.* *C.C.P.* 395 permits the broadest possible choices of venue in certain situations where the normal residence venue is impossible or impracticable. "If none of the defendants reside in the state or if they reside in the state and the county where they reside is unknown to the plaintiff, the action may be tried in the superior court in any county that the plaintiff may designate in his or her complaint." (*C.C.P.* 395(a).)

As to nonresidence, the statute applies only when none is a resident. (*Banta v. Wink* (1897) 119 C. 78, 80, 51 P. 17 [resident defendants were entitled to change to county of their residence].)

As to unknown residence, the statutory language does not mean quite what it says. To avoid virtual nullification of the right to trial at residence, the section has been interpreted to require a showing by the plaintiff of proper diligence to ascertain the defendant's residence. (*Thurber v. Thurber* (1896) 113 C. 607, 610, 45 P. 852.)

(2) *Illustration.* In *Hamilton v. Superior Court* (1974) 37 C.A.3d 418, 112 C.R. 450, plaintiff, a resident of Santa Clara County, brought an action in San Mateo County to establish her foreign judgment of divorce as a California judgment. Defendant, her former husband, a resident of Colorado, was served there, and defaulted. Then he moved to set aside the default, and the San Mateo court, on its own motion, ordered the action transferred to Santa Clara, assertedly because this was plaintiff's residence and the Probation Department there had prepared a report on the child of the parties. Plaintiff sought mandamus to compel retransfer to San Mateo. *Held*, writ granted.

(a) Under *C.C.P.* 395, plaintiff, suing a nonresident of the state on a transitory cause of action, was entitled to file her complaint in any county of the state, regardless of motivation. (37 C.A.3d 422.)

(b) Venue could be changed for the convenience of witnesses, but no motion for change of venue was made, and the lower court has no authority to change venue on its own motion. (37 C.A.3d 423.)

(c) *C.C.P.* 397.5, authorizing the court to transfer certain family law proceedings to the county of residence of either party, is inapplicable until the foreign judgment is established as a California judgment. (37 C.A.3d 425; see *infra*,

§905.)

A dissenting opinion by one justice argued that technicalities should be disregarded, and the writ denied, because the result is mere circuitry of action; plaintiff gave no reason for the choice of forum, and, on return of the case to San Mateo, defendant will be entitled to a change of venue to Santa Clara, the county in which the mother has physical custody of the child. (*37 C.A.3d 425.*)

SUPPLEMENT: [This section is current through the latest supplement]



155 of 188 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXII. VENUE: TRANSITORY ACTIONS

B. Actions Triable at Residence and Elsewhere.

5. Nonresidence or Imminent Departure.

b. Defendant About To Depart.

3 Witkin Cal. Proc. Actions § 848

[§ 848] Defendant About To Depart.

"[I]f the defendant is about to depart from the state, the action may be tried in the superior court in any county where either of the parties reside or service is made." (*C.C.P.* 395(a).) This literal language has been judicially modified by a reasonable interpretation. The section applies only when the defendant is about to depart "without intending to return" or when "there is no reasonable likelihood of his early return." (*Polk v. Bradbury* (1932) 127 C.A. 383, 385, 15 P.2d 865; see 6 So. Cal. L. Rev. 261.)

SUPPLEMENT: [This section is current through the latest supplement]



156 of 188 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXIII. VENUE: ACTIONS AGAINST CORPORATIONS AND ASSOCIATIONS

A. Nature and Scope of Statute.

1. In General.

3 *Witkin Cal. Proc. Actions* § 849

[§ 849] In General.

(1) *Former Constitutional Provision.* Venue in an action against a corporation or an association was originally governed by former Cal. Const., Art. XII, §16, which authorized an action (a) where the contract was made, (b) where the contract was to be performed, (c) where the obligation or liability arose, (d) where the breach occurred, or (e) where the principal place of business of the corporation was situated, subject to the power of the court to change venue as in other cases. This self-executing provision applied to domestic and foreign corporations, and corporation venue in transitory actions was governed by its terms and not by the Code of Civil Procedure. (See *Cook v. W. S. Ray Mfg. Co.* (1911) 159 C. 694, 698, 115 P. 318 [discussing reasons for adoption of provision and holding it constitutional]; *Hale v. Bohannon* (1952) 38 C.2d 458, 470, 475, 479, 241 P.2d 4 [self-executing provision, prevails over conflicting statutes; reasons for adoption]; *Lakeside Ditch Co. v. Packwood Canal Co.* (1920) 50 C.A. 296, 302, 195 P. 284; *Ellis v. National Cas. Co.* (1950) 99 C.A.2d 77, 79, 221 P.2d 127.)

By its terms, the fifth clause (principal place of business) was applicable to any kind of action. But the Code of Civil Procedure provides for trial of real actions in the county where the land is located, and in *Grocers' Fruit Growing Union v. Kern County Land Co.* (1907) 150 C. 466, 89 P. 120, the court declared that it would be an unconstitutional discrimination against a corporation to deny it the same right of trial in the county of location as an individual defendant would have. (150 C. 474.) To avoid this result, the court held that C.C.P. 392 should be read into the constitutional statement of the power to change venue.

Despite its presence in the Constitution, the section created rules of venue and not jurisdiction. Hence, although the action was commenced in the wrong county, it could be tried there in the absence of objection by the corporation defendant (*Bond v. Karma-Ajax Consol. Mining Co.* (1911) 15 C.A. 469, 473, 115 P. 254); and the special grounds for change of venue, e.g., for convenience of witnesses, could be invoked even though the action was brought in one of the permitted counties.

The constitutional provision was repealed in 1972.

(2) *Statutory Provisions.* C.C.P. 395.5 reads as follows: "A corporation or association may be sued in the county where the contract is made or is to be performed, or where the obligation or liability arises, or the breach occurs; or in

the county where the principal place of business of such corporation is situated, subject to the power of the court to change the place of trial as in other cases." (See *Corp.C. 105* ["[a] corporation or association may be sued as provided in the Code of Civil Procedure"]; *Mission Imports v. Superior Court* (1982) 31 C.3d 921, 927, 931, 184 C.R. 296, 647 P.2d 1075; C.E.B., 1 Civil Proc. Before Trial 4th, §8.55 et seq.; Cal. Civil Practice, 1 Procedure, §4:76; Rutter Group, Civil Proc. Before Trial §3:519 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]



157 of 188 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXIII. VENUE: ACTIONS AGAINST CORPORATIONS AND ASSOCIATIONS

A. Nature and Scope of Statute.

2. Unincorporated Associations.

3 *Witkin Cal. Proc. Actions* § 850

[§ 850] Unincorporated Associations.

(1) *Former Constitutional Provision.* The inclusion of "association" in former Cal. Const., Art. XII, §16 (see *supra*, §849) made it clear that actions against unincorporated associations were subject to the first four clauses. (See *Kendrick v. Diamond Creek Consol. Gold Mining Co.* (1892) 94 C. 137, 138, 29 P. 324; *Juneau Spruce Corp. v. International Longshoremen's & Warehousemen's Union* (1951) 37 C.2d 760, 763, 235 P.2d 607 [dictum].) The difficult question was whether, in the event that the plaintiff could not make a showing of contract or tort venue under these four clauses, the association, like a corporation, was entitled to a trial at its business residence. Some jurisdictions so provide, either by statute or judicial decision, and it was persuasively urged that large associations with business headquarters in a county ought to have the same privilege of trial there as corporations similarly situated. (See *Juneau Spruce Corp. v. International Longshoremen's & Warehousemen's Union*, *supra*, 37 C.2d 764; 4 *Stanf. L. Rev.* 160.)

But in the *Juneau* case, the court concluded that the Constitution did not establish such a rule. The fifth clause spoke of "such corporation." Because a corporation is by law required to maintain a principal place of business and an unincorporated association is not, "it seems clear that the word association was deliberately omitted." (37 C.2d 763.) (See *La Mirada Community Hosp. v. Superior Court* (1967) 249 C.A.2d 39, 42, 57 C.R. 42.)

(2) *Enactment of Statutory Provisions.* As part of a modernization of the law of unincorporated associations, the 1967 Legislature adopted former Corp.C. 24003, authorizing an association to file a statement with the Secretary of State listing its "principal office in this state." The proper county for trial of an action against it will then be "the same as it would be if the unincorporated association were a corporation." (C.C.P. 395.2.) And C.C.P. 395.5 (see *supra*, §849) covers associations. (See *Mosby v. Superior Court* (1974) 43 C.A.3d 219, 225, 229, 117 C.R. 588, *infra*, §855; *Carruth v. Superior Court* (1978) 80 C.A.3d 215, 221, 222, 145 C.R. 344, *infra*, §903 [law partnership that has not proved compliance with special statute must establish nonresidence of all its members; following *Juneau*].)

(3) *2004 Statutory Revision.* Acting on a recommendation of the California Law Revision Commission (see 33 Cal. Law Rev. Com. Reports, p. 729 et seq.), the 2004 Legislature revised and recast the statutes governing unincorporated associations. (See Stats. 2004, Chap. 178; 9 *Summary* (10th), *Corporations*, §37 et seq.) Corp.C. 24003 was repealed and replaced without substantive change by Corp.C. 18200. A conforming change was made to C.C.P. 395.2 to reflect that an unincorporated association may also file a statement designating its principal office under statutes other than

Corp.C. 18200. The Law Revision Commission Comment observes that these other statutes include, e.g., *Corp.C. 15621(a)(4)* (limited partnership), *Corp.C. 16309* (general partnership), *Corp.C. 16953(a)(3)* (limited liability partnership), *Corp.C. 17051(a)(4)* (limited liability company; agent for service of process in articles of incorporation), and *Corp.C. 17060(a)(2)* (limited liability company; agent for service of process in statement of information).

SUPPLEMENT: [This section is current through the latest supplement]



158 of 188 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXIII. VENUE: ACTIONS AGAINST CORPORATIONS AND ASSOCIATIONS

B. Principal Place of Business or Office.

1. Corporate or Association Residence.

3 Witkin Cal. Proc. Actions § 851

[§ 851] Corporate or Association Residence.

(1) *Corporation.* The "principal place of business" of a corporation (see *supra*, §849) is the equivalent to "residence" in the venue statutes. (See *McClung v. Watt* (1922) 190 C. 155, 158, 211 P. 17; *Walker v. Wells Fargo Bank* (1937) 8 C.2d 447, 450, 65 P.2d 1299; *Hale v. Bohannon* (1952) 38 C.2d 458, 473, 241 P.2d 4; *Winterburn v. Sheriff* (1923) 61 C.A. 531, 534, 215 P. 406; *Bohn v. Better Biscuits* (1938) 26 C.A.2d 61, 64, 78 P.2d 1177; *Hardin v. San Jose City Lines* (1951) 103 C.A.2d 688, 689, 230 P.2d 31 [county designated in articles as principal place of business was corporate residence for purpose of suit, even though no office or place of business was actually located there]; *Rosas v. Superior Court* (1994) 25 C.A.4th 671, 677, 30 C.R.2d 609 [domestic corporation's designation of location of "principal business office" in annual statement filed with Secretary of State conclusively fixed "principal place of business" for purposes of venue]; 42 A.L.R.5th 221 [place where corporation is doing business for purposes of state venue statute].)

Under *Corp.C. 2105(a)(3)*, a foreign corporation must designate the "address of its principal office within the state, if any." (See 9 *Summary* (10th), *Corporations*, §228.)

(2) *Association.* The term "principal office," used in *C.C.P. 395.2* for associations (see *supra*, §850), ordinarily means the same thing so far as venue is concerned. (*M.H. Golden Const. Co. v. Superior Court* (1950) 98 C.A.2d 811, 814, 221 P.2d 218 [interpreting phrase in former statute applicable to corporations]; see 28 *Cal. L. Rev.* 109.)

SUPPLEMENT: [This section is current through the latest supplement]



159 of 188 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXIII. VENUE: ACTIONS AGAINST CORPORATIONS AND ASSOCIATIONS

B. Principal Place of Business or Office.

2. Right to Trial at Residence.

a. Domestic Corporation or Association.

3 Witkin Cal. Proc. Actions § 852

[§ 852] Domestic Corporation or Association.

(1) *Corporation.* The provision for trial at the principal place of business not only gives the plaintiff an election to sue there but, under some circumstances, gives the defendant corporation a right to trial there. If the plaintiff does not allege facts to justify suit in one of the first four places specified in *C.C.P.* 395.5 (*supra*, §849), the corporation is entitled to a change of venue to its corporate residence. (*Ellis v. National Cas. Co.* (1950) 99 C.A.2d 77, 78, 221 P.2d 127; *Clary v. Basalt Rock Co.* (1950) 99 C.A.2d 458, 460, 222 P.2d 24.)

However, if a corporation designates a specified county as its principal place of business with the Secretary of State (see *supra*, §851) and fails to change that designation, the corporation may not defeat venue in that county by showing that its principal place of business is actually located elsewhere. The current designation filed with the Secretary of State conclusively fixes the corporation's principal place of business for purposes of venue. (*Rosas v. Superior Court* (1994) 25 C.A.4th 671, 677, 30 C.R.2d 609.)

Similarly, a corporation sued in a county that is not the proper venue may obtain a change of venue only to the county of its residence. It does not have the election to change venue to any of the other counties in which it may be sued. (*Beutke v. American Sec. Co.* (1955) 132 C.A.2d 354, 361, 282 P.2d 201.) But if no other basis of venue is established it is entitled to a change of venue to its residence. (*Lake v. Wyatt Earp Enterprises* (1962) 210 C.A.2d 366, 370, 26 C.R. 683; *Pacific Air Lines v. Superior Court* (1965) 231 C.A.2d 587, 589, 42 C.R. 68, citing the text.)

Of course the corporation, unlike an individual defendant, cannot have a change of venue on the ground of residence alone, because this would defeat the purpose of the broad venue provision (*supra*, §849). The language means "not merely that an action against a corporation may, at the option of the plaintiff, be commenced in one of the designated counties other than the one in which the defendant has its principal place of business, but that it may be prosecuted to final judgment where commenced unless the defendant can allege and show some sufficient ground for a change of the place of trial distinct from the fact that the residence of the corporation is in another county." (*Cook v. W. S. Ray Mfg. Co.* (1911) 159 C. 694, 696, 115 P. 318; see *Lakeside Ditch Co. v. Packwood Canal Co.* (1920) 50 C.A. 296, 305, 195 P. 284; *Buck v. James McClatchy Publishing Co.* (1930) 105 C.A. 248, 252, 287 P. 364.)

(2) *Association*. An association that has filed a statement under *Corp.C. 18200* or an equivalent statute has the same right to trial at its principal place of business, i.e., its principal office listed in the statement, as if it were a corporation. (*C.C.P.* 395.2, *supra*, §850.)

SUPPLEMENT: [This section is current through the latest supplement]



160 of 188 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXIII. VENUE: ACTIONS AGAINST CORPORATIONS AND ASSOCIATIONS

B. Principal Place of Business or Office.

2. Right to Trial at Residence.

b. Foreign Corporation.

3 *Witkin Cal. Proc. Actions* § 853

[§ 853] Foreign Corporation.

(1) *Where Principal Office Is Designated.* The earlier cases held that a foreign corporation did not acquire a residence in any particular county, and therefore could be sued as a nonresident (see *supra*, §847) in any county of the state. (See *Long v. General Petroleum Corp. of Calif.* (1936) 11 C.A.2d 708, 710, 54 P.2d 1147.) This view was repudiated in *Bohn v. Better Biscuits* (1938) 26 C.A.2d 61, 78 P.2d 1177. The court pointed out that, under former Corp.C. 6403 (now Corp.C. 2105(a)(3), *supra*, §851), a foreign corporation must designate its principal office in the state in the same manner as a domestic corporation, and this becomes its residence. (26 C.A.2d 63.) (See *Independent Iron Works v. American President Lines* (1950) 35 C.2d 858, 859, 860, 221 P.2d 939; *Hale v. Bohannon* (1952) 38 C.2d 458, 474, 241 P.2d 4 ["by the Bohn case the earlier rule was terminated, ... and foreign and domestic corporations were placed upon an equal footing under the Constitution"]; *Eckles v. Justice's Court* (1948) 84 C.A.2d 269, 190 P.2d 224 [following *Bohn*]; *Gutierrez v. Superior Court* (1966) 243 C.A.2d 710, 728, 52 C.R. 592; 28 Cal. L. Rev. 109; 12 So. Cal. L. Rev. 503.)

(2) *Where Principal Office Is Not Designated.* A foreign corporation that has not designated a principal office within the state under Corp.C. 2105(a)(3) may be sued in any county in the state. (*Easton v. Superior Court* (1970) 12 C.A.3d 243, 246, 90 C.R. 642 [construing predecessor statute].)

SUPPLEMENT: [This section is current through the latest supplement]



161 of 188 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXIII. VENUE: ACTIONS AGAINST CORPORATIONS AND ASSOCIATIONS

C. Where Contract Is Made.

3 *Witkin Cal. Proc. Actions* § 854

[§ 854] Where Contract Is Made.

(1) *Statement of Rule.* Corporation venue "where a contract is made" (see *supra*, §849) is governed by the same principles as contract venue under *C.C.P.* 395 (where the contract "was entered into"), and the cases may be cited interchangeably. The basic rule is that the contract is deemed made at the place where the last act necessary for its effectiveness is done. (See *Bank of Yolo v. Sperry Flour Co.* (1903) 141 C. 314, 315, 74 P. 855 [action was properly brought at place of performance, but court observed that, where oral contract is formed by telephone, place where offeree telephones acceptance is place of making]; *Rawson v. J.C. Forkner Fig Gardens* (1928) 206 C. 4, 5, 272 P. 1057; *Lakeside Ditch Co. v. Packwood Canal Co.* (1920) 50 C.A. 296, 306, 195 P. 284; *California Bean Growers' Assn. v. C.H. & O.B. Fuller Co.* (1926) 78 C.A. 522, 524, 248 P. 967; *Brix v. Peoples Mut. Life Ins. Co.* (1932) 124 C.A. 65, 66, 12 P.2d 108; *Saito v. Policy Holders Life Ins. Assn.* (1933) 132 C.A. 412, 415, 22 P.2d 724; *C.H. Parker Co. v. Exeter Refining Co.* (1938) 26 C.A.2d 610, 612, 79 P.2d 1114; *Killam v. Riley* (1954) 125 C.A.2d 394, 396, 270 P.2d 544; *Estep v. Budger Mfg. Co.* (1958) 164 C.A.2d 119, 123, 330 P.2d 298; *Pacific Air Lines v. Superior Court* (1965) 231 C.A.2d 587, 588, 42 C.R. 68; *Jhirmack Enterprises v. Superior Court* (1979) 96 C.A.3d 715, 723, 158 C.R. 192; *supra*, §§834, 837.)

(2) *Oral Agreement.* An oral agreement within the statute of frauds is nevertheless a contract, and the place of making is where the oral agreement takes place, not where the written memorandum is prepared or delivered. (*Taylor v. J.B. Hill Co.* (1945) 67 C.A.2d 581, 582, 154 P.2d 926, *supra*, §840.) The situation is quite different, however, where an oral agreement (either within or outside the statute of frauds) is superseded by a written integration. By virtue of the parol evidence rule the writing is the contract, and the place of making is the place where the writing is executed. (*Hale v. Bohannon* (1952) 38 C.2d 458, 465, 241 P.2d 4.)

SUPPLEMENT: [This section is current through the latest supplement]



162 of 188 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXIII. VENUE: ACTIONS AGAINST CORPORATIONS AND ASSOCIATIONS

D. Where Contract Is To Be Performed.

1. In General.

3 Witkin Cal. Proc. Actions § 855

[§ 855] In General.

(1) *Nature of Rule.* An action may be brought where the contract "is to be performed" (see *supra*, §849). This is a much broader provision than that contained in *C.C.P.* 395, which authorizes venue at the place of performance only if a "special contract" specifies the place. (*Hale v. Bohannon* (1952) 38 *C.2d* 458, 471, 478, 241 *P.2d* 4; see *supra*, §842.)

In *Hale*, it was urged by defendant corporation that this provision of *C.C.P.* 395 applied as a legislative interpretation of the Constitution. After an exhaustive review of the cases holding the constitutional provision independent of the code limitations, the court observed that contracts of a large corporation are generally drawn by the corporation, at its principal place of business, and added: "If the argument here advanced by the lumber company is accepted, by the simple device of neglecting to mention the place of performance in its contracts, any corporation effectively could limit the venue of actions upon those contracts to its principal place of business. ... Such a result would render the constitutional provision a virtual nullity." (38 *C.2d* 479.) (See *Pacific Bal Industries v. Northern Timber* (1953) 118 *C.A.2d* 815, 826, 259 *P.2d* 465.)

(2) *Illustrations.* The simplicity of the performance clause is illustrated by *Gallo v. Boyle Mfg. Co.* (1939) 35 *C.A.2d* 168, 94 *P.2d* 1010. Defendant corporation, in Los Angeles, sold and delivered metal drums to plaintiff under a purchase order reading: "Please deliver to us via Santa Fe, f.o.b. Modesto." *Held*, because the contract called for delivery in Stanislaus County, it was to be performed in that county and the action could be brought there. (35 *C.A.2d* 170.) (See *Jhirmack Enterprises v. Superior Court* (1979) 96 *C.A.3d* 715, 723, 158 *C.R.* 192.)

In *Mosby v. Superior Court* (1974) 43 *C.A.3d* 219, 117 *C.R.* 588, an action against an unincorporated association, the appellate court assumed, without deciding, the correctness of the following analysis by the trial judge: Under *C.C.P.* 395, on contract venue generally, the basis must be the defendant's performance (see *supra*, §841); under *C.C.P.* 395.5, on venue in actions against corporations or associations, the basis may be either the defendant's or the plaintiff's performance (see *supra*, §849); hence, venue was properly laid in a county in which substantial performance by the plaintiff was required. (43 *C.A.3d* 225.)

In *Anaheim Extrusion Co. v. Superior Court* (1985) 170 *C.A.3d* 1201, 216 *C.R.* 815, involving a contract calling for delivery of goods in one county and payment for them in another, the alleged breach dealt with payment, not delivery.

Held, a contract's place of performance is determined by the obligation breached; hence, in this case, the county of payment was the county of performance. (170 C.A.3d 1203.)

SUPPLEMENT: [This section is current through the latest supplement]



163 of 188 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXIII. VENUE: ACTIONS AGAINST CORPORATIONS AND ASSOCIATIONS

D. Where Contract Is To Be Performed.

2. Payment of Money.

a. No Place Specified.

3 *Witkin Cal. Proc. Actions* § 856

[§ 856] No Place Specified.

(1) *In General.* The place of performance of the promisor's obligation to make payment under an ordinary contract is seldom expressly stated in the agreement. The court must therefore seek the intention of the parties in the circumstances, aided by two theories: (a) the place where the plaintiff promisee is to perform (by delivering goods or rendering services, etc.) is a likely place for the intended counterperformance (payment); and (b) under C.C. 1489, an offer of performance may be made (in the absence of provision to the contrary) at the place where the plaintiff creditor (promisee) resides, or has his or her place of business, or where the plaintiff may be found. (See *Rawson v. J.C. Forkner Fig Gardens* (1928) 206 C. 4, 5, 272 P. 1057 [action for commissions due from sale of real property was properly brought in county where land was located]; *Hale v. Bohannon* (1952) 38 C.2d 458, 466, 241 P.2d 4 [action for compensation for services was properly brought in county where plaintiff resided and rendered services]; *Blumer v. Kirkman Corp.* (1952) 38 C.2d 480, 484, 241 P.2d 17 [action for price of goods was properly brought in county of plaintiff's office]; *Konig v. Associated Almond Growers of Paso Robles* (1940) 37 C.A.2d 360, 365, 99 P.2d 678 [action for accounting for profits due from operation of orchard was properly brought in county where plaintiff resided and land was situated]; *McNear v. Geophysical Service* (1949) 90 C.A.2d 662, 665, 203 P.2d 550 [action to compel appointment of arbitrator to determine injury by defendant to plaintiff's land from work done on land was properly brought in county where land was located and work was performed]; *Anaheim Extrusion Co. v. Superior Court* (1985) 170 C.A.3d 1201, 1203, 216 C.R. 815 [action to recover price of goods delivered in one county was properly brought in another county where payment customarily occurred].)

(2) *Insurance Coverage Cases.* C.C. 1489 has been applied in actions by the beneficiary of an insurance policy against the insurance company. If the policy does not specify the place of payment, the plaintiff may sue in the county of his or her own residence, regardless of where the policy was written, where the insured resided, or where the insurance company does business. (See *Nakanishi v. Policy Holders Life Ins. Assn. of Los Angeles* (1933) 129 C.A. 747, 749, 19 P.2d 287.)

SUPPLEMENT: [This section is current through the latest supplement]



164 of 188 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXIII. VENUE: ACTIONS AGAINST CORPORATIONS AND ASSOCIATIONS

D. Where Contract Is To Be Performed.

2. Payment of Money.

b. Place Specified.

3 Witkin Cal. Proc. Actions § 857

[§ 857] Place Specified.

An insurance policy often expressly provides for payment at a particular place, such as the office of the insurance company, and, if it does, that is the place of performance. (*Burr v. Western States Life Ins. Co.* (1931) 211 C. 568, 576, 296 P. 273; see *Causley v. Superior Court* (1968) 267 C.A.2d 757, 758, 75, 73 C.R. 585, supra, §843 [promissory note].) But preoccupation with these express provisions on performance may cause the court to overlook the right to sue where the obligation arises (infra, §858).

Thus, in *Union Oil Co. of Calif. v. Basalt Rock Co.* (1939) 30 C.A.2d 317, 86 P.2d 139, the contract between plaintiff seller and defendant buyer called for delivery at the seller's plant in Contra Costa County, and payment on the 10th day of the following month at the seller's office in Napa County (where defendant's business was located). *Held*, a change of venue from Contra Costa County to Napa County was properly granted. The court reasoned that defendant's "obligation" did not arise while it was merely "potential"; it arose when it became "absolute," which was at the time the price was payable, and that was in *Napa*. (30 C.A.2d 319.) But this finely spun distinction seems insubstantial (see 27 Cal. L. Rev. 756) and the result questionable. The place of performance (payment) would have been Contra Costa County (where the goods were delivered) except for the express stipulation as to payment in Napa County. But the stipulation as to time and place of payment in no way affected the creation of the obligation to pay, which arose, under the bilateral contract of sale, on performance by the seller.

SUPPLEMENT: [This section is current through the latest supplement]



165 of 188 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXIII. VENUE: ACTIONS AGAINST CORPORATIONS AND ASSOCIATIONS

E. Where Liability Arises or Breach Occurs.

1. Contract Actions.

3 Witkin Cal. Proc. Actions § 858

[§ 858] Contract Actions.

(1) *Nature of Rule.* The third and fourth venue clauses in the former constitutional provision and its statutory successor ("where the obligation or liability arises, or the breach occurs," supra, §849) are extremely broad. To some extent they duplicate the first two clauses, for an obligation will arise where a contract is made, and a breach will often occur and a liability arise where a contract is to be performed. (But see *Union Oil Co. of Calif. v. Basalt Rock Co.* (1939) 30 C.A.2d 317, 319, 86 P.2d 139, supra, §857.) This duplication does no harm; the result is simply that in a great many cases corporation venue in actions on a contract may be sustained on more than one of the grounds. (See *Killam v. Riley* (1954) 125 C.A.2d 394, 396, 270 P.2d 544.)

(2) *Illustrations.* In *Golden State Bottling Co. v. Fidelity & Deposit Co. of Maryland* (1957) 150 C.A.2d 424, 310 P.2d 35, defendant executed and filed an undertaking on attachment in San Francisco. But a garnishment was wrongfully levied on plaintiff's funds in Sacramento. *Held*, in this action on the undertaking, venue in Sacramento was proper, for that was where the loss to plaintiff occurred and the liability arose. (150 C.A.2d 426.)

In *Smith v. Stanford Research Institute* (1963) 212 C.A.2d 750, 28 C.R. 481, the complaint, filed in San Francisco, alleged negligence and breach of warranties causing the death of decedents when a plane in which they were being carried disappeared. Defendant S sought change of venue to San Mateo, its principal place of business, and filed affidavits stating that the accident did not occur in San Francisco. However, it failed to assume its burden of negating the making of the warranties in San Francisco, hence venue there was proper. Nor did it make any difference that the action for wrongful death is usually considered solely in tort; on the motion to change venue, the sufficiency of the pleading of a contract count (breach of warranty) could not be challenged. (212 C.A.2d 753.)

Karson Industries v. Superior Court (1969) 273 C.A.2d 7, 77 C.R. 714, decided a point of first impression on venue in an action based on anticipatory breach. The repudiation consisted of a letter posted in San Bernardino County by defendant's officer, and received in Contra Costa County by plaintiff. Plaintiff, suing in Contra Costa County, contended that anticipatory repudiation was not effective as a breach until it elected, in Contra Costa County, to treat the act as such. *Held*, the venue was improper. The Restatement of Contracts and other authorities make it clear that repudiation is a breach, and it occurred in San Bernardino County where the letter was dispatched. (273 C.A.2d 10.)

SUPPLEMENT: [This section is current through the latest supplement]



166 of 188 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXIII. VENUE: ACTIONS AGAINST CORPORATIONS AND ASSOCIATIONS

E. Where Liability Arises or Breach Occurs.

2. Tort Actions.

3 *Witkin Cal. Proc. Actions* § 859

[§ 859] Tort Actions.

(1) *Nature of Rule.* The chief significance of the third and fourth venue clauses in the former constitutional provision and its statutory successor (*supra*, §849) is that they go beyond contract obligations and apply also to tort obligations and liabilities. In tort cases, the plaintiff may sue the corporation where the wrong takes place, because the liability arises there. (*Mission Imports v. Superior Court* (1982) 31 C.3d 921, 930, 184 C.R. 296, 647 P.2d 1075 [action for interference with contract]; *Buck v. James McClatchy Publishing Co.* (1930) 105 C.A. 248, 250, 287 P. 364 [libel; liability arises in county where plaintiff resides and where libel is circulated]; *Liera v. Los Angeles Finance Co.* (1950) 99 C.A.2d 254, 257, 221 P.2d 737 [wrongful attachment]; *E. M. Cotton Appliance v. Felton Aluminum Co.* (1954) 124 C.A.2d 546, 549, 269 P.2d 64 [place where plaintiff's personal property is unlawfully detained]; *Shores v. Chip Steak Co.* (1955) 130 C.A.2d 627, 629, 279 P.2d 595 [action for damages for trade libel and fraud against plaintiff in Los Angeles County]; *Sea World v. Superior Court* (1970) 13 C.A.3d 100, 104, 91 C.R. 336 [actions for false arrest and imprisonment].)

This gives the plaintiff a broader venue than in tort actions against individuals, for under C.C.P. 395, only actions for physical injury to person or property, or death, can be brought where the wrongful act occurs. (See *supra*, §§832, 833.)

(2) *Illustration.* The extreme difficulty of negating corporate venue is illustrated by *Shida v. Japan Food Corp.* (1960) 185 C.A.2d 443, 8 C.R. 271. Plaintiff, a packaged food distributor, made a contract with a partnership and individuals for the exclusive distribution of its products in California. In this action he sought damages against defendant corporation for the tort of inducing breach of the contract. The action was brought in Los Angeles. Defendant corporation sought change of venue to its principal place of business in San Francisco on the ground that the contract was made and to be performed in Hawaii, and that any agreements between the partnership and the corporation were made there. *Held*, order changing venue reversed.

(a) Plaintiff's choice of venue ("laid by the complaint") is presumptively correct and defendant has the burden of negating it on all possible alternative grounds. (185 C.A.2d 447.)

(b) The fact that agreements between the tortfeasors may have been made in Hawaii does not mean that the tort did

not occur in Los Angeles. "An agreement between one inducing breach of contract and one who breaches a contract is not an element of the tort alleged against the corporate defendant, and no allegation of an agreement or conspiracy is found in the complaint." (185 C.A.2d 448, citing the text.) Thus the injury may have resulted from plaintiff's inability to sell his products in *Los Angeles*. (185 C.A.2d 449.)

SUPPLEMENT: [This section is current through the latest supplement]



167 of 188 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXIII. VENUE: ACTIONS AGAINST CORPORATIONS AND ASSOCIATIONS

E. Where Liability Arises or Breach Occurs.

3. Restitution and Quasi-Contract.

3 *Witkin Cal. Proc. Actions* § 860

[§ 860] Restitution and Quasi-Contract.

(1) *Nature of Rule.* A plaintiff induced to contract by the defendant's fraud may sue for damages for fraud and deceit (a tort action), or the plaintiff may elect to rescind and recover the consideration paid (restitution, a contract or quasi-contract action). (See *supra*, §§152, 156.) In either case the third and fourth constitutional and statutory venue clauses (*supra*, §849) apply, but the election is nevertheless significant for purposes of venue. The tort liability arises when and where the false representations are made, while the obligation or liability to make restitution (whether viewed as contractual or quasi-contractual) arises when the contract is rescinded and where the notice of rescission is given. The mistaken and now repudiated notion that all actions based on fraud "sound in tort" (see *supra*, §156) has had its repercussions in venue cases; but the correct rule is that any action for restitution, whatever may have been the ground of rescission, may be brought where the rescission (by delivery of notice) took place. (*Fitzhugh v. University Realty Co.* (1920) 46 C.A. 198, 201, 188 P. 1023 ["That *quasi* contract went into effect instantaneously upon the service of the notice of rescission, and at the place where such notice was served"].)

(2) *Illustration.* In *Pacific Freight Lines v. Pioneer Express Co.* (1940) 39 C.A.2d 609, 103 P.2d 1056, a firm of San Francisco attorneys was employed by eight truck carriers to represent them in litigation over rates. The contract was made in San Francisco, the services were performed there, and the attorneys sued the carriers there and recovered judgment for their fees. Thereafter plaintiff, one of the carriers, paid the judgment in full, and brought this present action in Los Angeles, its own corporate residence, against the other carriers, having corporate residences elsewhere, for contribution. *Held*, the venue was proper.

The court's theory seems to be that the right of contribution, though an outgrowth of and necessarily related to a former contract or other transaction, is not a part of it, but is a new obligation implied by law. This being so, the venue of the action is unaffected by the place of making or performance of the original contract or the venue of the original action. The plaintiff is suing as a creditor, on a contract or obligation implied by law, to compel payment of a debt owed to it by defendants, and under the general rule the debtor must seek the creditor. "Defendants' debt is due plaintiff at its principal place of business, and it is there that the implied contract is to be performed. By reason of plaintiff's conduct at its principal place of business, and as a result thereof, the original claim was discharged and hence the liability of defendants to pay their share then and there arose." (39 C.A.2d 615.)

SUPPLEMENT: [This section is current through the latest supplement]



168 of 188 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXIII. VENUE: ACTIONS AGAINST CORPORATIONS AND ASSOCIATIONS

E. Where Liability Arises or Breach Occurs.

4. Action Based on Statutory Liability.

3 Witkin Cal. Proc. Actions § 861

[§ 861] Action Based on Statutory Liability.

Black Diamond Asphalt v. Superior Court (2003) 109 C.A.4th 166, 134 C.R.2d 510, involved a question of first impression: What is the proper venue in an action against an unincorporated association based on defendant's statutory liability? Plaintiff, the insured of an insolvent insurer, brought an action for declaratory relief against the California Insurance Guarantee Association seeking a declaration that defendant had a statutory duty under *Ins.C. 1063.1 et seq.* (see 2 *Summary* (10th), *Insurance*, §§12, 13) to defend and indemnify plaintiff in a wrongful death action in San Joaquin County. The trial judge granted defendant's motion for a change of venue from San Joaquin County to Los Angeles County, where defendant's home office was located. *Held*, reversed.

(a) *C.C.P. 395.5* authorizes an action against defendant, as an unincorporated association, in the county where an obligation or liability arises, and that provision applied even though defendant's alleged liability was strictly statutory, rather than contractual or tortious in nature. Defendant's alleged liability in this case arose in San Joaquin County, because that was where plaintiff was sued for wrongful death, was exposed to liability, and would suffer harm if defendant failed to honor its obligations. Because declaratory relief may be sought against an insurer in the county where a third-party action arises, the same rule applies where the obligation was created by statute rather than contract. (109 C.A.4th 172.)

(b) Because defendant is obligated to defend covered claims, venue was not affected by the fact that the insurer became insolvent after, rather than before, the wrongful death action was filed. (109 C.A.4th 172, 173.)

(c) Defendant claimed that venue in Los Angeles County was proper, because (1) that was where it decided not to defend or to indemnify plaintiff; and (2) even if defendant were obligated to defend a lawsuit in San Joaquin County, defendant need not send its employees there to perform legal services, but could simply receive invoices for legal fees and costs and send out checks from its home office in Los Angeles County. However, defendant's claims were baseless. "None of these metaphysical observations can change the fact that the *liability*--the duty to defend and indemnify--arose in San Joaquin County. The 'obligation or liability' provision of section 395.5 does not require that the defendant perform any act inside the county for venue to be proper; it merely requires that the obligation arise there." (109 C.A.4th 173.)

(d) Requiring all actions filed against defendant to be filed in Los Angeles County does not further public policy. Permitting actions elsewhere does not expose defendant to undue hardship. Further, the Legislature could have expressly fixed venue for these actions in *Los Angeles County, but did not*. (109 C.A.4th 173, 174.)

SUPPLEMENT: [This section is current through the latest supplement]



169 of 188 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXIV. VENUE: ACTIONS BY OR AGAINST STATE AND LOCAL GOVERNMENTS

A. Actions By or Against State, State Agency, or Public Officer.

1. In General.

a. Nature of Problem.

3 *Witkin Cal. Proc. Actions* § 862

[§ 862] Nature of Problem.

(1) *Express Venue Statutes*. The place of trial of actions against the state, state administrative agencies, and public officers is confused by the lack of a governing principle and by inadequate or overlapping statutory provisions. (See 37 *Cal. L. Rev.* 102.) A few statutes of relatively slight importance make specific provision for venue in actions against particular administrative agencies:

(a) *C.C.P.* 393(b) (local venue--where cause arose--in action against public officer; see *infra*, §869).

(b) *C.C.P.* 1060.5 (declaratory action by alleged nonresident against Franchise Tax Board to determine issue of residence for purposes of Personal Income Tax Law; plaintiff "may commence an action" in superior court of Sacramento, Los Angeles, or San Francisco).

(c) *Govt.C.* 955 (local venue--where property is situated--in action against state for taking or damaging property; see *supra*, §803).

(d) *Govt.C.* 17700 (for purposes of validating proceedings under *C.C.P.* 860, Sacramento County is proper venue for action by state or any of its boards, departments, agencies, or authorities, including Public Works Board, to determine validity of bonds, warrants, contracts, obligations, or evidences of indebtedness).

(2) *Ordinary Venue Statutes*. The major part of litigation involving the state and its agencies is left without express statutes fixing venue. The normal result would be that the venue statute governing the type of action would apply to an action against the state or its agency, and by the state or its agency, in the same manner as it would apply to actions between private litigants. Thus, a real action would be subject to the local venue provisions (*supra*, §793 et seq.), and a transitory action, in contract or tort, would be triable at the residence of the defendant or other places, pursuant to the appropriate venue provisions (*supra*, §817 et seq.). (See *Regents of Univ. of Calif. v. Superior Court* (1970) 3 C.3d 529, 534, 91 C.R. 57, 476 P.2d 457, *infra*, §870 [stating rule, listing major statutory exceptions, and applying exception of former *C.C.P.* 393(1)(b), now *C.C.P.* 393(b)].) If this were true, actions against the state and its agencies would be triable in every county in the state, and an impossible burden would be placed upon the defendant agency or officer and

the usual defending counsel (the Attorney General). (For legislative solution, see *infra*, §863.)

SUPPLEMENT: [This section is current through the latest supplement]



170 of 188 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXIV. VENUE: ACTIONS BY OR AGAINST STATE AND LOCAL GOVERNMENTS

A. Actions By or Against State, State Agency, or Public Officer.

1. In General.

b. Where Attorney General Has Office.

3 *Witkin Cal. Proc. Actions* § 863

[§ 863] Where Attorney General Has Office.

(1) *Sacramento Venue*. The legislative solution to the problem discussed in the preceding section is as follows: Inverse condemnation suits are tried in the county where the property is situated (*Govt.C. 955*; see *supra*, §803); actions for death or injury to persons or personal property are tried where the injury occurred (*Govt.C. 955, 955.2*; see *infra*, §866). In all other cases, "upon written demand of the Attorney General made on or before answering, the place of trial ... shall be changed to Sacramento County." (*Govt.C. 955*.)

Govt.C. 955 was designed to avoid inconvenience to the state by concentrating actions against the state in the courts of the state capital. In other words, although superficially phrased in terms of change of venue, it is clear that in almost all cases the Attorney General would demand the change and there is no discretion to refuse it. The statute gives a mandatory right to Sacramento venue. *Govt.C. 955* is therefore equivalent to a venue statute, prescribing the normal place of trial of actions against the state.

(2) *Any City or County Where Attorney General Has Office*. Exclusive venue in Sacramento under *Govt.C. 955* proved to be a hardship on many litigants and not always a convenience to the state. To alleviate the situation, *C.C.P. 401* provides as follows:

(a) *Action against State*. "Whenever it is provided by any law of this State that an action or proceeding against the State or a department, institution, board, commission, bureau, officer or other agency thereof shall or may be commenced in, tried in, or removed to the County of Sacramento, the same may be commenced and tried in any city or city and county of this State in which the Attorney General has an office." (*C.C.P. 401(1)*.)

The result is that when an action is brought against the state or its agencies or officers, the crucial question in nearly all cases is whether it is provided by law that the action is triable in Sacramento. If it is, *C.C.P. 401* applies and the proper venue is Sacramento, San Francisco, Oakland, Los Angeles, San Diego, or Fresno (cities and counties in which the Attorney General currently has an office). If it is not, then it is either subject to the very few express venue provisions on actions against the state (see *infra*, §865 et seq.), or it is subject to the general venue provisions governing other litigants.

In *Harris v. Alcoholic Bev. Control App. Bd.* (1961) 197 C.A.2d 759, 18 C.R. 151, an application for a liquor license was denied by the Department and the applicant appealed to the Appeals Board. The Department moved to dismiss the appeal and its motion was denied. The Department then sought prohibition or mandamus against the Appeals Board in San Francisco, and the Appeals Board moved for change of venue to Sacramento. *Held*, denial affirmed. After stating the purpose of *C.C.P. 401* (197 C.A.2d 762, 763, citing the text), the court held that the writ proceeding was triable in Sacramento, where the principal office of the Appeals Board was located (197 C.A.2d 769), and therefore under *C.C.P. 401*, could be brought in San Francisco where the Attorney General has an office (197 C.A.2d 770). The following contentions of the Appeals Board were examined and rejected:

(a) *C.C.P. 401(1)* only applies where the specific statute expressly names Sacramento as the county where the agency may be sued. The better view is that it also includes agencies which, by operation of the general rules of venue, may be sued in *Sacramento*. (197 C.A.2d 766.)

(b) The Appeals Board has its own counsel, and *C.C.P. 401(1)* should only apply to actions defended by the Attorney General. The Legislature, with knowledge of the fact that some state agencies have their own counsel, made no such exception. (197 C.A.2d 767.)

(c) *C.C.P. 401(1)* should not apply where the state itself sues a state agency. Again, the Legislature made no such exception, and there is no reason to complicate the law of venue by doing so. (197 C.A.2d 767.)

(b) *Action by State*. Actions by the state or its agencies or officers are governed by normal rules of venue except where the law allows the state or agency to sue in Sacramento. In these situations, *C.C.P. 401(2)* applies to give the private defendants the right to remove to one of the six cities in which the Attorney General currently has an office. (See *Rutter Group*, Civil Proc. Before Trial §3:535 et seq.; 37 Cal. L. Rev. 105.)

SUPPLEMENT: [This section is current through the latest supplement]



171 of 188 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXIV. VENUE: ACTIONS BY OR AGAINST STATE AND LOCAL GOVERNMENTS

A. Actions By or Against State, State Agency, or Public Officer.

1. In General.

c. Effect of Venue Statutes.

3 *Witkin Cal. Proc. Actions* § 864

[§ 864] Effect of Venue Statutes.

It has been seen that, except in a few situations in which the statute makes a local place of trial part of the grant of subject matter jurisdiction, venue is not jurisdictional. (See *supra*, §779 et seq.) This is well established as to private litigants, even though the venue statute may be expressed in mandatory terms. But if the defendant is the state or a governmental agency or officer, the doctrine of sovereign immunity protects it from suit except under such terms as it may permit. (See 2 *Cal. Proc.* (5th), *Jurisdiction*, §90; 4 *Cal. Proc.* (5th), *Pleading*, §106.) From this premise it is possible to argue that the wrong court would be acting in excess of its jurisdiction if it proceeded to trial against the objection of the governmental defendant. In other words, subject matter jurisdiction would exist and the judgment would be safe from collateral attack, but prohibition could be had to prevent the wrong court from trying the action in defiance of express terms of a mandatory statute relaxing in a specified manner the governmental immunity from suit. (See 2 *Cal. Proc.* (5th), *Jurisdiction*, §285.)

Several cases have so held. In *California v. Superior Court (San Francisco)* (1936) 14 C.A.2d 718, 722, 58 P.2d 1322, the statute provided that venue "must" be changed to Sacramento on demand of the Attorney General. The court granted a writ of prohibition to restrain the San Francisco superior court from taking any steps except to transfer the action to Sacramento, saying, "An order contrary to the provisions of such statutes is in excess of jurisdiction." The opinion relied in part on the similar result reached in cases dealing with the condition of plaintiff furnishing security for costs. (14 C.A.2d 722.) (See 2 *Cal. Proc.* (5th), *Jurisdiction*, §301.)

In *McPheeters v. Board of Med. Examiners of Calif.* (1946) 74 C.A.2d 46, 168 P.2d 65, although the decision was rendered on an appeal from an order refusing to change venue, the court said: "As the offer of the permission to sue the state or its governmental agencies must be accepted in the form in which it is given it follows that this action should have been started either in Sacramento, San Francisco or Los Angeles Counties and that the Superior Court of Fresno County had no jurisdiction of the case." (74 C.A.2d 49.)

In *Caminetti v. Superior Court* (1941) 16 C.2d 838, 108 P.2d 911, a statute provided that, in conservatorship or liquidation proceedings involving an insurance company, its principal office and the proceedings "shall" be moved to San Francisco or Los Angeles, on application of the Insurance Commissioner. The commissioner moved the office to

Los Angeles and objected to proceedings in San Francisco on the ground of "lack of jurisdiction." (16 C.2d 847.) Accordingly, prohibition was granted to restrain trial in San Francisco, and mandamus was also issued to compel transfer to Los Angeles.

This view was nevertheless disapproved, on grounds difficult to state, in *Brock v. Superior Court* (1947) 29 C.2d 629, 177 P.2d 273. An action was brought in Stanislaus County against defendant, State Director of Agriculture, to enjoin the enforcement of a proration regulation. The trial judge refused to change venue to Sacramento County and defendant sought prohibition, which was denied by a court divided as to its reasons.

(a) Three justices without discussion concluded that the venue was proper. (29 C.2d 639; see 37 Cal. L. Rev. 109.)

(b) One without discussion said that the order was not in excess of jurisdiction. (29 C.2d 639.)

(c) The main opinion, by only three justices, appears to assume for purposes of the argument that the venue was improper, but concludes that only where venue is strictly jurisdictional (as in the former constitutional real actions, *supra*, §792) is the denial of a change an act in excess of jurisdiction. (29 C.2d 637.) *California v. Superior Court (San Francisco)*, *supra*, was distinguished on the thin ground that the statute involved there contained the word "must." (29 C.2d 633.) And the basis of the decision is rendered still more doubtful by the statement of an independent reason for denial of the writ: that the defendant had an adequate remedy by appeal and stay of proceedings pending the appeal. (29 C.2d 637.) (But see *Newman v. Sonoma* (1961) 56 C.2d 625, 627, 15 C.R. 914, 364 P.2d 850, citing the text [distinguishing *McPheeters* and *California*]; *Barquis v. Merchants Collection Assn.* (1972) 7 C.3d 94, 120, 121, 101 C.R. 745, 496 P.2d 817, *supra*, §780 [discussing *California* and *Newman* and following *Newman* view].)

SUPPLEMENT: [This section is current through the latest supplement]



172 of 188 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXIV. VENUE: ACTIONS BY OR AGAINST STATE AND LOCAL GOVERNMENTS

A. Actions By or Against State, State Agency, or Public Officer.

2. Actions Against State.

a. Local Actions.

3 *Witkin Cal. Proc. Actions* § 865

[§ 865] Local Actions.

Because real actions are triable where the land is located, these actions against the state should be triable there. Nevertheless, *Govt.C. 955* provides expressly for local venue at the situs only in actions for taking or damaging property for public use, and goes on to state that "in other actions" venue can be changed to Sacramento. It is therefore conceivable that, although local actions must be commenced in the county of location of the land, these and other statutory real actions may be removed to any of the six cities under *C.C.P. 401(1)* (*supra*, §863).

SUPPLEMENT: [This section is current through the latest supplement]



173 of 188 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXIV. VENUE: ACTIONS BY OR AGAINST STATE AND LOCAL GOVERNMENTS

A. Actions By or Against State, State Agency, or Public Officer.

2. Actions Against State.

b. Transitory Actions.

3 *Witkin Cal. Proc. Actions* § 866

[§ 866] Transitory Actions.

The proper place of trial of actions for death or injury to person or personal property is the county where the injury or death occurred. (*Govt.C. 955.2*; see *California v. Superior Court (Fuller)* (1967) 252 C.A.2d 637, 640, 60 C.R. 653; but see *Hatcher v. California State University, Fresno* (1983) 146 C.A.3d Supp. 1, 3, 194 C.R. 756 [in action against state university under Information Practices Act, C.C. 1798.49, establishing venue in county where complainant resides or has his or her principal place of business or where defendant's records are situated, prevails over *Govt.C. 955.2*].)

Venue in these actions may be changed under the same circumstances as if the action were between private parties, but the mandatory change to Sacramento on demand of the Attorney General is not available. (*Govt.C. 955, 955.2*; see supra, §863.) And although *Govt.C. 955.2* does permit changes of venue, "[d]iscretion to choose a different venue is conferred by the statute only on the superior court of the county where the injury occurred." (*California v. Superior Court (Clark)* (1987) 193 C.A.3d 328, 330, 238 C.R. 315 [superior court in Los Angeles County lacked discretion to deny state's motion to change venue to Inyo County where subject accident occurred].)

Other transitory actions against the state, whether based on contract or tort, are clearly within the "other actions" language of *Govt.C. 955*, removable to Sacramento and therefore triable in any of the six cities under *C.C.P. 401(1)* (supra, §863).

SUPPLEMENT: [This section is current through the latest supplement]



174 of 188 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXIV. VENUE: ACTIONS BY OR AGAINST STATE AND LOCAL GOVERNMENTS

A. Actions By or Against State, State Agency, or Public Officer.

2. Actions Against State.

c. Actions by Cities, Counties, and Local Agencies.

3 Witkin Cal. Proc. Actions § 867

[§ 867] Actions by Cities, Counties, and Local Agencies.

Actions by cities, counties, and local agencies against the state may be brought in the city or county where the governmental plaintiff is situated. (*Govt.C. 955.3.*) For this purpose, "local agency" is defined as "any governmental district, board, or agency, or any other local governmental body or corporation, or elected local public official, but shall not include the State ... or any of its agencies, departments, commissions, or boards, or elected public officials in the executive branch of the state government." (*Govt.C. 955.3.*)

Venue in these actions is not subject to the mandatory change to Sacramento on the demand of the Attorney General (see *supra*, §863), but may be changed to Sacramento County pursuant to *C.C.P. 397* (see *infra*, §905 et seq.). (*Govt.C. 955, 955.3.*)

SUPPLEMENT: [This section is current through the latest supplement]



175 of 188 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXIV. VENUE: ACTIONS BY OR AGAINST STATE AND LOCAL GOVERNMENTS

A. Actions By or Against State, State Agency, or Public Officer.

3. Actions Against State Agency.

3 Witkin Cal. Proc. Actions § 868

[§ 868] Actions Against State Agency.

(1) *Local Actions.* Local actions against a state agency, like local actions against the state itself, are triable where the land is located. (See *supra*, §865.)

(2) *Transitory Actions.* Transitory actions against statewide boards or commissions that are not actions against the state itself are outside the scope of *Govt.C. 955* (*supra*, §866). Those agencies that are incorporated are public corporations and outside the scope of the corporate venue provisions (*supra*, §849). (See *De Campos v. State Comp. Ins. Fund* (1946) 75 C.A.2d 13, 16, 170 P.2d 60; *Yedor v. Ocean Acc. & Guarantee Corp.* (1948) 85 C.A.2d 698, 702, 194 P.2d 95.) Transitory actions against state agencies are therefore governed by the ordinary venue rules (*supra*, §817 et seq.) except in the few situations in which an express statutory venue is provided. However, if the normal statutory venue is in Sacramento, e.g., because the defendant agency is located there (residence venue), or a contract is made or to be performed there, it is possible that *C.C.P. 401(1)* may authorize trial in any of the six cities. (See *37 Cal. L. Rev. 106* et seq.; *supra*, §863.)

SUPPLEMENT: [This section is current through the latest supplement]



176 of 188 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXIV. VENUE: ACTIONS BY OR AGAINST STATE AND LOCAL GOVERNMENTS

A. Actions By or Against State, State Agency, or Public Officer.

4. Actions Against Public Officer for Official Act.

a. Statutory Rule.

3 Witkin Cal. Proc. Actions § 869

[§ 869] Statutory Rule.

An action "[a]gainst a public officer or person especially appointed to execute the duties of a public officer, for an act done by the officer or person in virtue of the office, or against a person who, by the officer's command or in the officer's aid, does anything touching the duties of the officer" is triable where the cause of action, or a part of it, arose. (*C.C.P. 393(b)*.) (See *Sutter Union High School Dist. v. Superior Court* (1983) 140 C.A.3d 795, 797, 190 C.R. 182 [administrative mandamus proceeding against governing board of school district under *C.C.P. 1094.5*; venue is governed by former *C.C.P. 393(1)(b)* (now *C.C.P. 393(b)*) and board is "public officer"]; *Colusa Air Pollution Control Dist. v. Superior Court* (1991) 226 C.A.3d 880, 887, 277 C.R. 110 [same result; local districts sued on claims "arising from the conduct of their official action"].)

This section has been narrowly construed to apply only to affirmative acts, not omissions or neglect, and to acts done, not contemplated future acts. (*Bonestell, Richardson & Co. v. Curry* (1908) 153 C. 418, 420, 95 P. 887, *infra*, §870 ["only such affirmative acts of an officer as directly interfere with the personal rights or property of the person complaining, such as wrongful arrest, trespass, conversion, etc."].) Nevertheless, *C.C.P. 393(b)* is not limited to actions seeking to vindicate private rights. The plain language of the statute demonstrates that it also applies to actions seeking to enforce public rights, and the terms of the statute are to be liberally construed in favor of affording a forum to citizens. (*California State Parks Foundation v. Superior Court* (2007) 150 C.A.4th 826, 834, 58 C.R.3d 715 [*C.C.P. 393(b)* applied to action challenging agency's certification of environmental impact report for, and decision approving construction of, toll road that would traverse portions of two counties].)

SUPPLEMENT: [This section is current through the latest supplement]



177 of 188 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXIV. VENUE: ACTIONS BY OR AGAINST STATE AND LOCAL GOVERNMENTS

A. Actions By or Against State, State Agency, or Public Officer.

4. Actions Against Public Officer for Official Act.

b. Illustrations.

3 *Witkin Cal. Proc. Actions* § 870

[§ 870] Illustrations.

(1) *Ordinary Venue Rules Apply.* In *Bonestell, Richardson & Co. v. Curry* (1908) 153 C. 418, 95 P. 887, the complaint sought to enjoin the Secretary of State, the state printer, and others from taking further action under an allegedly illegal contract for furnishing paper to the state. The action was brought in San Francisco, where individual defendants resided. Defendant officers moved to change venue to Sacramento, where their official business was transacted. *Held*, former C.C.P. 393(1)(b) (now C.C.P. 393(b); see *supra*, §869) was not applicable; the action was not based on acts done, but merely sought to prevent the doing of future acts. (153 C. 420.) (See *State Com. in Lunacy v. Welch* (1908) 154 C. 775, 99 P. 181 [mandamus to compel county treasurer to pay money; same holding].)

(2) *Public Officer Venue Rule Applies.* A supposedly contrasting situation to the *Bonestell* case was considered in *Cecil v. Superior Court* (1943) 59 C.A.2d 793, 140 P.2d 125. The Director of Agriculture issued an order of conditional revocation of a Los Angeles milk distributor's license for alleged violations of law. The distributor brought a mandamus proceeding in Los Angeles against the director to compel revocation of the order and to enjoin interference with its business under the order. *Held*, Los Angeles was the proper county for trial.

(a) This was not a mere general order applicable to all milk distributors, but an adjudication relating to a particular distributor, and constituted an affirmative act interfering with its property rights and business. The act of revocation was complete and self-executing; an act done and not merely threatened. Hence, the proceeding was triable where the cause arose (C.C.P. 393), and the director was not entitled to trial at the county of his residence (C.C.P. 395).

(b) The more difficult question was, where did the cause arise? Rejecting the argument that it arose where the order under attack was *made* (in Sacramento), and holding that it arose where the order was to be enforced by interfering with the distributor's business (in Los Angeles), the court said: "[W]here a citizen is singled out by a state agency and proceedings are instituted against him and result in an order, the effect of which is to deprive him absolutely or conditionally of the right to do business, the proper county for redress under section 393 ... is the county in which he carries on the business and in which he will be hurt by enforcement of the order. It is where the shaft strikes him, not where it is drawn, that counts. Process for the seizure of property operates when and where it is executed. Surely a cause of action does not arise in the county in which a state officer happens to affix his name to an order which is to become

operative in another county." (59 C.A.2d 799; see 37 Cal. L. Rev. 108.) (See *Brock v. Superior Court* (1947) 29 C.2d 629, 639, 177 P.2d 273, supra, §864 [endorsing contrary view under dubious reasoning].)

Cecil was followed in *Duval v. Contractors State License Bd.* (1954) 125 C.A.2d 532, 271 P.2d 194, a mandamus proceeding under C.C.P. 1094.5 to review an order revoking licenses for acts done in San Bernardino (principal place of business) and Riverside (branch office). The trial judge granted defendant board's motion for change of venue to Los Angeles. *Held*, reversed; the proper venue was San Bernardino (or perhaps Riverside). "The rule announced in the *Cecil* case is sound, is in accord with common experience and practice, is of great benefit to the persons most vitally affected, and works no great hardship on the departments and officers of the state." (125 C.A.2d 535.) (See *Harris v. Alcoholic Bev. Control App. Bd.* (1961) 197 C.A.2d 759, 768, 18 C.R. 151, supra, §863, citing the text [following *Cecil*]; 48 A.L.R.2d 423 [venue of actions or proceedings against public officers].)

Lynch v. Superior Court (1970) 7 C.A.3d 929, 86 C.R. 925, applies the reasoning of *Cecil* and *Duval* to review of a decision of the State Personnel Board. V, a state narcotics agent, was dismissed by his public employer, the Department of Justice, and the dismissal was affirmed by the State Personnel Board. He sought mandamus in Santa Cruz County, on the ground that he had performed some services there. The Attorney General moved for a change of venue to San Francisco. The motion was denied and he petitioned for mandamus to compel the change. *Held*, writ granted. The cause of action was based on V's dismissal, and that occurred in San Francisco, the office out of which he worked and where the state's action interfered with his activities. (7 C.A.3d 931.)

Cecil and *Duval* were again followed in *Regents of Univ. of Calif. v. Superior Court* (1970) 3 C.3d 529, 91 C.R. 57, 476 P.2d 457. Plaintiffs filed a taxpayers' action in Los Angeles County, against defendant Regents of the University of California, for declaratory relief and an injunction. The complaint alleged that the defendant was expending public money illegally, in an unconstitutional attempt to prohibit the hiring by the university of members of the Communist Party, and to terminate the employment of Angela Davis, an assistant professor at the university's Los Angeles campus, by reason of party membership. Defendant moved for change of venue to Alameda County, its official residence (place of its principal administrative office). *Held*, Los Angeles venue was proper.

(a) The county where the resolutions were adopted (Alameda) does not control the venue; the action should be brought, under the reasoning of *Cecil*, in the county where the alleged injury (illegal expenditure of public money) occurred. (3 C.3d 542.)

(b) The only difficulty in applying the *Cecil* rule arose from the peculiar nature of the state agency involved here. Most agencies function through an administrative officer, e.g., the Director of Agriculture (*Cecil*) and the Registrar of Contractors (*Duval*). The Board of Regents acts directly, not through a designated implementing officer. But this is not a significant distinction: In common understanding the Board of Regents is an entity, and some statutes refer to it as such. Hence, in the absence of a designated administrator, the board is an "officer." (3 C.3d 539.)

In *Tharp v. Superior Court* (1982) 32 C.3d 496, 186 C.R. 335, 651 P.2d 1141, plaintiff, doing business as a motor vehicle dealer in Tulare County, had a temporary permit from the Motor Vehicles Board. The board instituted a proceeding to rescind it, and plaintiff sought prohibition or mandamus in Tulare County to compel dismissal of the proceeding and prevent further action to revoke or suspend his permit. *Held*, Tulare County, where plaintiff carried on the business and would be hurt by the official action, was the proper venue. (32 C.3d 502, citing *Duval* and *Regents of Univ. of Calif.*)

SUPPLEMENT: [This section is current through the latest supplement]



178 of 188 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXIV. VENUE: ACTIONS BY OR AGAINST STATE AND LOCAL GOVERNMENTS

B. Actions by or Against City or County.

1. In General.

3 Witkin Cal. Proc. Actions § 871

[§ 871] In General.

(1) *Nature of Statute.* *C.C.P. 394* is a complicated statute under which the kind of party, rather than the subject of the action, determines venue. It deals mainly with a city or county, either as plaintiff or defendant, and its chief purpose is to avoid local prejudice by authorizing transfer to a neutral county (i.e., not the county of either plaintiff or defendant) for trial. It allows the parties to stipulate to a county for trial, and states that if there is no right to a jury or the jury is waived, the court, in lieu of transferring, may request an assignment of a disinterested judge. *C.C.P. 394* is a removal or change of venue statute, which comes into operation only where the action is filed in a county that is proper under the ordinary venue rules. The individual plaintiff does not have the right initially to select a neutral county merely because the plaintiff is suing a county. (See *Westinghouse Elec. Corp. v. Superior Court* (1976) 17 C.3d 259, 266, 131 C.R. 231, 551 P.2d 847, *infra*, §881; *San Francisco Foundation v. Superior Court* (1984) 37 C.3d 285, 208 C.R. 31, 690 P.2d 1, *infra*, §877; *Fitzpatrick v. Sonoma* (1929) 97 C.A. 588, 590, 276 P. 113 [attempting to state meaning "extricated from its mass of cumbersome phraseology"]; *San Jose Ice & Cold Storage Co. v. San Jose* (1937) 19 C.A.2d 62, 66, 64 P.2d 1099, 65 P.2d 1324 [plaintiff suing for damages to real property has no right to select neutral county]; *Oakland v. Darbee* (1951) 102 C.A.2d 493, 497, 227 P.2d 909; *Alameda v. Superior Court* (1974) 42 C.A.3d 312, 315, 116 C.R. 806, *infra*, §878; *Dorame v. Superior Court* (1978) 81 C.A.3d 70, 72, 146 C.R. 162, citing the text; *Sutter Union High School Dist. v. Superior Court* (1983) 140 C.A.3d 795, 797, 190 C.R. 182, citing the text; *Ventura Unified School Dist. v. Superior Court* (2001) 92 C.A.4th 811, 815, 112 C.R.2d 260 [transfer was mandatory despite claim of unreasonable delay, where school district filed change of venue motion within 30 days of plaintiff's settlement of claim against joint tortfeasor]; C.E.B., 1 Civil Proc. Before Trial 4th, §8.72 et seq.; Cal. Civil Practice, 1 Procedure, §4:77; Cal. Civil Practice, 2 Procedure, §10:68; for forms, see Cal. Civil Practice, 2 Procedure, §§10:95, 10:96; Rutter Group, Civil Proc. Before Trial §3:542 et seq.; on joinder of private and county defendants, see *infra*, §904; on applicability to local agencies, see *infra*, §§880, 881.)

(2) *Illustrations.* In *Skidmore v. Solano* (1954) 128 C.A.2d 391, 275 P.2d 613, plaintiff, a resident of Alameda County, filed an action in San Francisco against the County of Solano on a contract made in Solano. *Held*, venue was properly changed to Solano, which was (a) the county of "residence" of defendant county, and (b) the county where the obligation was incurred. For purposes of the venue statute (*C.C.P. 395*), the residence of a municipal corporation is determined in the same manner as that of a private corporation, i.e., where its principal place of business is. "The

conclusion seems irresistible that ... each county is the county of its own legal residence." (128 C.A.2d 393, footnote 2.)

In *Riverside v. Superior Court* (1968) 69 C.2d 828, 73 C.R. 386, 447 P.2d 626, plaintiff Desert Outdoor Advertising sued to restrain the enforcement of a Riverside County ordinance regulating display advertising signs. The action was brought in San Diego County against Riverside County and some of its officers. All defendants joined in a motion for change of venue to Riverside County. Then plaintiff dismissed without prejudice as to all defendants except the County of Riverside. The lower court ordered the action transferred to San Mateo County. *Held*, mandamus granted to compel transfer to Riverside County. As sole defendant it was entitled to have the action brought in the county of its residence (its own county). When the action is transferred to that proper county, plaintiff may seek a change of venue. (69 C.2d 831.)

In *San Bernardino v. Superior Court* (1994) 30 C.A.4th 378, 35 C.R.2d 760, plaintiff San Bernardino County brought an action against defendant city agency, also located in San Bernardino County, in Riverside County. Defendant then moved to change venue to Los Angeles County. The trial judge denied defendant's motion, but ordered the case transferred back to San Bernardino County, from where it could be transferred to a neutral county. *Held*, this was proper.

(a) The operative statutory provision is former C.C.P. 394(1) (now C.C.P. 394(a)), which provides that an action between two public entities "may be tried" in a neutral county. However, that provision does not affect the plaintiff's duty to bring the action in the proper court under the general venue provisions, which is usually the county in which the defendant resides. The provision for trial in a neutral county is a removal provision, but the alternative neutral site can only be realized through a change of venue on proper motion. (30 C.A.4th 388, approving supportive language in *Riverside*, and rejecting dicta to the contrary in *Westinghouse Elec. Corp. v. Superior Court* (1976) 17 C.3d 259, 131 C.R. 231, 551 P.2d 847, *infra*, §881.)

(b) Under this construction, the action must be commenced in a venue chosen according to the usual rules--one likely to be convenient to at least one party--and, if one party is dissatisfied, the inconveniences of transfer may be avoided by the expedient of appointing a judge from a neutral county to hear the case. However, if either party is concerned about the impartiality of the venue, transfer on application (or the appointment of a neutral judge) is mandatory. (30 C.A.4th 388, 389.)

(c) This construction also prevents a plaintiff from unilaterally choosing venue by selecting a neutral county most satisfactory to it, but instead permits the trial judge to exercise its discretion not only in choosing a neutral county, but also with respect to the option of requesting the appointment of a neutral judge. (30 C.A.4th 389.)

(d) Thus, the trial judge correctly determined that it lacked the power to transfer the case to a neutral county itself, but was required to transfer it to the "proper county," that being *San Bernardino County*. (30 C.A.4th 389.)

(3) *No Contractual Waiver*. C.C.P. 394 may not be contractually waived in advance by the parties. (*Arntz Builders v. Superior Court* (2004) 122 C.A.4th 1195, 1207, 19 C.R.3d 346.)

SUPPLEMENT: [This section is current through the latest supplement]



179 of 188 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXIV. VENUE: ACTIONS BY OR AGAINST STATE AND LOCAL GOVERNMENTS

B. Actions by or Against City or County.

2. Parties Covered.

3 *Witkin Cal. Proc. Actions* § 872

[§ 872] Parties Covered.

(1) *Plaintiff, Defendant, Cross-Complainant, and Cross-Defendant.* As originally construed, *C.C.P. 394* was clearly limited to defendants named in a complaint. In *Chico v. Superior Court* (1979) 89 C.A.3d 187, 152 C.R. 380, W filed a complaint for damages for personal injuries in San Francisco County against S Corp., based on a vehicular collision in the city of Chico, Butte County. S Corp. cross-complained for indemnity against the city and the county, and these cross-defendants moved for change of venue to Butte County. *Held*, cross-defendants named in a cross-complaint cannot claim the right to transfer. (89 C.A.3d 191.)

The holding in *Chico* was disapproved in *Ohio Cas. Ins. Group v. Superior Court* (1994) 30 C.A.4th 444, 35 C.R.2d 771. Plaintiff construction company sued a school district in superior court in the county in which the district was situated, claiming balances due on a construction project completed for the district. The district cross-complained against plaintiff in the same court for breach of contract and fraud, and also cross-complained against plaintiff's insurer, seeking damages based on the insurer's performance bonds. The insurer moved for a change of venue to a neutral county under *C.C.P. 394*. The trial judge, relying on *Chico*, denied the motion, concluding that *C.C.P. 394* was inapplicable because the district was a cross-complainant, not a "plaintiff," and the insurer was a cross-defendant, not a "defendant." *Held*, *Chico* was wrongfully decided (30 C.A.4th 451); the terms "plaintiff" and "defendant," as used in *C.C.P. 394*, also include "cross-complainant" and "cross-defendant."

(a) The common understanding of "plaintiff"--"the complaining party in any litigation"--necessarily includes "cross-complainant," a proposition that logically implies that "defendant" also includes "cross-defendant." (30 C.A.4th 449.)

(b) The terms "plaintiff" and "defendant" have been so construed in a related venue statute, *C.C.P. 396* (transfer of case filed in court lacking jurisdiction; see 2 *Cal. Proc.* (5th), *Jurisdiction*, §399 et seq.). "This judicial construction of these terms in section 396, to which the Legislature has acquiesced, is a powerful argument for construing them the same way in section 394." (30 C.A.4th 449.)

(c) The purpose of *C.C.P. 394* is to guard against local prejudices that sometimes exist in favor of litigants within a county as against those from without and to secure to both parties a trial on neutral grounds. As the statute is remedial, it

should receive a liberal construction that will promote rather than frustrate its policy. (30 C.A.4th 449, quoting *Westinghouse Elec. Corp. v. Superior Court* (1976) 17 C.3d 259, 131 C.R. 231, 551 P.2d 847, *infra*, §881.) (See *Kennedy/Jenks Consultants v. Superior Court* (2000) 80 C.A.4th 948, 954, 95 C.R.2d 817 [following *Ohio Cas. Ins. Group*]; *Metropolitan Transit System v. Superior Court* (2007) 153 C.A.4th 293, 302, 62 C.R.3d 517 [following *Ohio Cas. Ins. Group* and *Kennedy/Jenks Consultants*].)

(2) *Plaintiff Residing or Doing Business in County of Filing.* C.C.P. 394 applies where a private plaintiff sues a defendant city or county in the county where the plaintiff resides or does business. The defendant is entitled to transfer to a neutral county. (*Finance & Const. Co. of Calif. v. Sacramento* (1928) 204 C. 491, 493, 269 P. 167 ["doing business" broadly construed to require transfer from county where plaintiff corporation raised barley and pasturage].) But no right exists where the plaintiff is not a resident of or doing business in the county of filing. (*Fitzpatrick v. Sonoma* (1929) 97 C.A. 588, 591, 596, 276 P. 113.)

(3) *Right to Jury Trial.* The portion of C.C.P. 394 providing for mandatory transfer in case of a jury trial prevails over the exception authorizing assignment of a disinterested judge in a court trial (see *supra*, §871) in only one instance: when a government entity plaintiff specified in the statute has a right to a jury trial. The right of nongovernmental plaintiffs to a jury trial is irrelevant for purposes of the exception, because those plaintiffs are subject to the general rule setting venue in the defendant's county of residence (see *supra*, §817 *et seq.*). For purposes of applying C.C.P. 394, it is of no significance that the nongovernmental plaintiffs are joined in the action, because under C.C.P. 378 (permissive joinder of parties; see 4 Cal. Proc. (5th), *Pleading*, §173 *et seq.*), the action of each plaintiff is an independent action. (*Brennan v. Superior Court* (1994) 30 C.A.4th 454, 461, 35 C.R.2d 693 [assignment to disinterested judge was permitted in action by local agency and nongovernmental plaintiffs against county defendant, even though nongovernmental plaintiff had right to jury trial].)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Plaintiff, Defendant, Cross-Complainant, and Cross-Defendant.* Venue statute transferring cause for lack of jurisdiction: C.C.P. 396 was amended in 2008 to delete provisions that have become obsolete as a result of the unification of the trial courts. The statute no longer refers to a "plaintiff" or a "defendant."



180 of 188 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXIV. VENUE: ACTIONS BY OR AGAINST STATE AND LOCAL GOVERNMENTS

B. Actions by or Against City or County.

3. Parties Excluded.

3 *Witkin Cal. Proc. Actions* § 873

[§ 873] Parties Excluded.

(1) *County District Attorney*. *C.C.P. 394* does not apply to an action brought by a county district attorney, because the district attorney represents the People of the state, rather than his or her county. (*Nguyen v. Superior Court* (1996) 49 C.A.4th 1781, 1785, 57 C.R.2d 611, *infra*, §956 [defendant was not entitled to change venue to neutral county in nuisance abatement action brought by a county district attorney under the Red Light Abatement Law].)

(2) *Public Guardian*. The change of venue provisions of *C.C.P. 394* are not available to a public guardian bringing an action in its role as conservator on behalf of a conservatee, because the public guardian is acting in the interests of the conservatee, and not in the interests of the county. (*Transamerica Homefirst v. Superior Court* (1999) 69 C.A.4th 577, 580, 81 C.R.2d 705.)

SUPPLEMENT: [This section is current through the latest supplement]



181 of 188 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXIV. VENUE: ACTIONS BY OR AGAINST STATE AND LOCAL GOVERNMENTS

B. Actions by or Against City or County.

4. Actions Excluded.

a. Negligence Action Against City or County.

3 *Witkin Cal. Proc. Actions* § 874

[§ 874] Negligence Action Against City or County.

An express proviso to *C.C.P.* 394(a) makes the statute inapplicable to an action against a city or county for negligent injury to person or property; this type of action "shall be tried" in the city or county. (See *Delgado v. Superior Court* (1977) 74 C.A.3d 560, 564, 141 C.R. 528, *infra*, §904; *Tutor-Saliba-Perini Joint Venture v. Superior Court* (1991) 233 C.A.3d 736, 743, 285 C.R. 1 [express proviso was inapplicable to action for breach of contract, indemnity, and contribution, and not negligence].) The proviso, although stated in mandatory language, is not jurisdictional; hence, the defendant county may lose its right to transfer by failure to file a timely motion. (*Newman v. Sonoma* (1961) 56 C.2d 625, 627, 15 C.R. 914, 364 P.2d 850, citing the text; *Barquis v. Merchants Collection Assn.* (1972) 7 C.3d 94, 121, 101 C.R. 745, 496 P.2d 817, *supra*, §780 [approving *Newman*]; see *infra*, §958.) But it is mandatory; hence, on a proper and timely demand the defendant is entitled to a transfer. (*Alameda v. Superior Court* (1974) 42 C.A.3d 312, 316, 116 C.R. 806, *infra*, §878.)

In *Orange v. Superior Court* (1999) 73 C.A.4th 1189, 86 C.R.2d 923, plaintiff was mistakenly arrested in San Francisco on a recalled bench warrant and strip-searched. Thereafter, she was transferred to Orange County, which had issued the bench warrant, and detained there for a total of 8 days. Plaintiff then filed a negligence and false imprisonment action in San Francisco against a single defendant--Orange County. Defendant then moved to change venue to Orange County under the negligence exception proviso of *C.C.P.* 394(a). The trial judge denied the motion, reasoning that because plaintiff had sustained injuries in both San Francisco and Orange counties, venue in either county was proper under *C.C.P.* 395, the general venue statute for personal injury actions (see *supra*, §832). *Held*, reversed.

(a) The negligence proviso of *C.C.P.* 394(a) is unambiguous. The statute unequivocally requires that an action against a county for personal injuries occurring in that county be brought in the defendant county. Because plaintiff alleged that at least some of her damages occurred in Orange County, defendant was entitled to request venue to be transferred there. (73 C.A.4th 1192, citing *Newman*.)

(b) "Plaintiff's reliance upon another portion of section 394 which requires trial in a neutral county, does not involve the precise circumstance presented here--i.e., where the plaintiff sues the county for personal injuries occurring

in the county. We therefore reject that reliance as inapposite." (73 C.A.4th 1193.)

SUPPLEMENT: [This section is current through the latest supplement]



182 of 188 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXIV. VENUE: ACTIONS BY OR AGAINST STATE AND LOCAL GOVERNMENTS

B. Actions by or Against City or County.

4. Actions Excluded.

b. County Child Support or Paternity Proceeding.

3 *Witkin Cal. Proc. Actions* § 875

[§ 875] County Child Support or Paternity Proceeding.

(1) *Former Law Permitting Change to Neutral County.* In *Los Angeles v. Craig* (1942) 52 C.A.2d 450, 126 P.2d 448, plaintiff county sued a relative of a recipient of old age assistance to recover the money paid. The action was brought in plaintiff county, under former Welf.C. 2224, providing that the county's legal officer shall, on demand of the proper authorities, "maintain an action, in the superior court of the county granting said aid." *Held*, defendant was entitled to a change of venue to a neutral county. Despite the apparent intention to allow the action in the interested county, the court resolved the conflict by giving the word "maintain" the limited meaning of "commence," thus allowing subsequent change of venue under C.C.P. 394.

Dorame v. Superior Court (1978) 81 C.A.3d 70, 146 C.R. 162, applied the *Craig* rule to a proceeding against a noncustodial parent for recovery of public assistance paid to a minor child under a prior version of Welf.C. 11350, which provided that the superior court of the county providing aid was the proper court for trial. *Held*, C.C.P. 394 nevertheless applied, authorizing transfer to a neutral county. (81 C.A.3d 72.) (See *Morrison v. Superior Court* (1980) 100 C.A.3d 852, 854, 161 C.R. 169 [following *Dorame*].)

(2) *Legislative Abrogation.* An express proviso to C.C.P. 394 now makes its mandatory change of venue provisions for nonresident private defendants inapplicable to an action to enforce child support or to determine paternity initiated by a local child support agency under *Family C. 17400*. (See *supra*, §815.)

SUPPLEMENT: [This section is current through the latest supplement]



183 of 188 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXIV. VENUE: ACTIONS BY OR AGAINST STATE AND LOCAL GOVERNMENTS

B. Actions by or Against City or County.

5. City or County Plaintiff.

a. Individual Defendant.

3 Witkin Cal. Proc. Actions § 876

[§ 876] Individual Defendant.

A city or county may sue its own residents in the city or county. (*Nevada v. Phillips* (1952) 111 C.A.2d 428, 244 P.2d 495.) But if a city or county plaintiff brings an action in its own city or county against a nonresident private litigant, the action "shall" on motion of either party be transferred to a neutral city or county. (C.C.P. 394; see *Yuba v. North America Consol. Gold Mining Co.* (1909) 12 C.A. 223, 226, 107 P. 139; *Oakland v. Darbee* (1951) 102 C.A.2d 493, 497, 227 P.2d 909 [where there are several defendants, each nonresident has a right to transfer to a neutral county, even though this requires severance of action]; *Adams v. Superior Court* (1964) 226 C.A.2d 365, 367, 38 C.R. 164, *infra*, §958.) (For special venue rules in juvenile court proceedings, see Welf.C. 327; Welf.C. 651; and C.R.C., Rule 5.510(a), 10 *Summary* (10th), *Parent and Child*, §456 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]



184 of 188 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXIV. VENUE: ACTIONS BY OR AGAINST STATE AND LOCAL GOVERNMENTS

B. Actions by or Against City or County.

5. City or County Plaintiff.

b. Corporation Defendant.

3 *Witkin Cal. Proc. Actions* § 877

[§ 877] Corporation Defendant.

C.C.P. 394 (*supra*, §871) statute has a clear application to an individual defendant, who has only one residence, but it is ambiguous when applied to a corporation, which may do business in more than one county.

(1) *Transfer to Neutral County. San Francisco Foundation v. Superior Court* (1984) 37 *C.3d* 285, 208 *C.R.* 31, 690 *P.2d* 1, involved a testamentary trust for the benefit of the needy in Marin County tried before venue was governed by *Prob.C.* 17005 (see *supra*, §806). The foundation charged with distributing the proceeds (an unincorporated association treated as a corporation for venue purposes; see *supra*, §850) petitioned the Marin County Superior Court to modify the trust so that the proceeds could be distributed throughout the San Francisco Bay Area. Marin County filed a response in opposition, seeking to remove the foundation as trustee and to prevent the proposed modification. Based on evidence of widespread opposition in Marin County to the proposed modification, the foundation moved, under *C.C.P.* 394, for transfer of the case to a neutral county or assignment of a neutral judge. *Held*, the foundation was entitled to relief under *C.C.P.* 394.

(a) *Requirement that proceeding be "brought by" county "against" foundation.*

(1) The county's response, seeking removal of the foundation as trustee, satisfied this requirement. This is so regardless of the right of any other entity to have instituted a similar proceeding or to continue with the proceeding should the county withdraw. (37 *C.3d* 294.)

(2) The proceeding to modify the trust was also one "brought by" the county, within the meaning of *C.C.P.* 394. Although the petition for modification was filed by the foundation, it was not filed against the county. Nor did it assert any claim against the county nor mention any dispute between the foundation and the county. (37 *C.3d* 295.) Rather, it was the county's response in opposition that initiated the controversy concerning the modification; hence, it is the county that must be deemed to have "brought" the proceeding for resolution of that controversy. (37 *C.3d* 296.)

(b) *Requirement that foundation do business in another county.* The foundation has a branch office in Marin County, and a substantial percentage of its business is done there. Under the rule enunciated in *Westinghouse Elec.*

Corp. v. Superior Court (1976) 17 C.3d 259, 131 C.R. 231, 551 P.2d 847, *infra*, §881, i.e., a corporation with its main, or a branch, office in the county in which it is sued cannot invoke C.C.P. 394, the foundation would not be entitled to C.C.P. 394 relief. (37 C.3d 299.) However, the *Westinghouse* rule cannot be applied mechanically to this case:

(1) The *Westinghouse* court reasoned that if a corporation was doing business in the county in which it was sued, competing considerations would insure a fair trial, i.e., taxpayer jurors might be predisposed in favor of the county because of the potential effect on their taxes, but this bias would be countered by the realization that unjustly favoring the county would reduce a local business' contribution to the community economy. (37 C.3d 299.) However, *Westinghouse* involved an action for damages. Different considerations apply here, where the action involves a county's attempt to prevent a trust modification that would divert funds from that county. A hypothetical Marin County trier of fact would obviously favor the county's position, but this bias would not be offset by the perception that a county victory would harm a local business. (37 C.3d 300.)

(2) "[T]he relevant inquiry is whether, in light not only of the status of the foundation but also of the nature of the litigation, the foundation is reasonably likely to be viewed as an outsider." (37 C.3d 300.) Here, the answer is in the affirmative. The foundation's principal office, and the place where it decided to seek to modify the trust, is in another county, and the pleadings contain allegations showing the extreme hostility between the foundation and the residents of *Marin County*. (37 C.3d 298, 300.)

(3) "Under these circumstances, we conclude that the foundation's activities (including its branch office) in Marin County do not bar it from relief under section 394, because the judgment sought by the county (1) is based on conduct of the foundation reasonably perceived to have been directed from its principal office outside the county, (2) would secure benefits for most or all Marin County residents and prevent their being required to share those benefits with residents of other counties, and (3) would have no adverse effect, or appearance of adverse effect, on the foundation's contribution to the county's economy." (37 C.3d 300.)

(c) *Appropriate relief*. Because there is nothing in the pleadings indicating any right to a jury trial, the appropriate form of relief is the assignment of a disinterested judge from a neutral county. (37 C.3d 294, 301.) (See *Kennedy/Jenks Consultants v. Superior Court* (2000) 80 C.A.4th 948, 957, 95 C.R.2d 817 [corporation's activities were not closely associated with forum county under standard in *Westinghouse*, and trying case there posed substantial risk of prejudice to corporation].)

(2) *No Transfer to Neutral County*. In *Los Angeles v. Pacific Tel. & Tel. Co.* (1958) 164 C.A.2d 253, 330 P.2d 888, defendant corporation was sued in Los Angeles County where it did business, but nevertheless contended that it was entitled to change of venue. *Held*, change was properly denied. The purpose of the statute is to allow a change where local bias might arise because the defendant came from outside the county, and that was not the case here. The statute cannot be invoked "by a corporation defendant doing business in a county in which an action is brought against it by a city situated therein." (164 C.A.2d 259.)

SUPPLEMENT: [This section is current through the latest supplement]



185 of 188 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXIV. VENUE: ACTIONS BY OR AGAINST STATE AND LOCAL GOVERNMENTS

B. Actions by or Against City or County.

5. City or County Plaintiff.

c. City Defendant.

3 Witkin Cal. Proc. Actions § 878

[§ 878] City Defendant.

Where the plaintiff and the defendant are both cities in the same county, the defendant city is entitled to transfer to a neutral county, or, in the alternative, to assignment of a disinterested judge to try the case. "Either a transfer of the case out of the county, or bringing in a neutral judge would avoid the appearance of prejudice to either city. In a contest between two cities within the same county no judge should be put in the position of appearing to choose between possibly conflicting loyalties or interests, especially where his election to the bench depends upon the attitude of all the voters in the entire county." (*Alameda v. Superior Court* (1974) 42 C.A.3d 312, 316, 116 C.R. 806.)

SUPPLEMENT: [This section is current through the latest supplement]



186 of 188 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXIV. VENUE: ACTIONS BY OR AGAINST STATE AND LOCAL GOVERNMENTS

B. Actions by or Against City or County.

5. City or County Plaintiff.

d. Condemnation.

3 *Witkin Cal. Proc. Actions* § 879

[§ 879] Condemnation.

(1) *Transfer to Neutral County.* The general change of venue provisions, including *C.C.P.* 394, are applicable to condemnation proceedings. (*C.C.P.* 1250.040; see Law Rev. Com. Comment.) *C.C.P.* 394 modifies the venue rules in real actions. Thus, in a condemnation action (see *supra*, §800), if the land is located in the county of the private defendant's residence, the plaintiff city or county may have a change of venue to a neutral county. (*Stockton v. Ellingwood* (1926) 78 C.A. 117, 121, 248 P. 272 [pointing out that this situation may arise where city acquires land in an outside county for water and power development].) And if the city sues in its own county to condemn land located there, the private defendant may obtain a transfer to a neutral county. (*Oakland v. Darbee* (1951) 102 C.A.2d 493, 497, 227 P.2d 909; *Long Beach v. Lakewood Park* (1953) 118 C.A.2d 596, 597, 258 P.2d 538; *Clayton v. Superior Court* (1998) 67 C.A.4th 28, 31, 78 C.R.2d 750 [defendant's withdrawal of deposited probable compensation (*C.C.P.* 1255.260; see 8 *Summary* (10th), *Constitutional Law*, §1215) did not waive her right to transfer].)

In *Georgetown Divide Public Util. Dist. v. Bacchi* (1962) 204 C.A.2d 194, 22 C.R. 27, plaintiff, a public utility district situated in El Dorado County, sued to condemn land in the county but outside the district's boundaries. Some defendants were residents of the county, others of Sacramento County. *Held*, venue should be changed to a neutral county.

(a) *Pub.Util.C. 16404*, authorizing condemnation by the district, places it in the same position as a city under *C.C.P.* 394. Hence, the nonresident defendants were entitled to transfer. (204 C.A.2d 198, 199.)

(b) To avoid multiple trials involving substantially the same expert testimony relative to a unitary tract of land, the transfer should be granted also as to the resident defendants. (204 C.A.2d 201.) (But see *Moreland Inv. Co. v. Superior Court* (1980) 106 C.A.3d 1017, 1022, 165 C.R. 427 [private utility company is not "local agency" within meaning of *C.C.P.* 394]; *supra*, §800.)

(2) *No Transfer to Neutral County.* If the land is situated in a neutral county, the action stays there. (*Stockton v. Wilson* (1926) 79 C.A. 422, 424, 249 P. 835 [although literal language of statute called for transfer, that interpretation would be unreasonable and contrary to its purpose].)

In *Arcularius v. Los Angeles* (1938) 24 C.A.2d 365, 75 P.2d 76, plaintiffs, residents and landowners of Mono County, sued defendant city in Mono County for alleged interference with water rights. Defendant, in addition to denying the allegations, pleaded its right to take the water for public use on payment of compensation. Plaintiffs then moved for change of venue to a county other than Mono or Los Angeles. *Held*, they were not entitled; C.C.P. 394 only applies when the city brings the action. Plaintiffs' theory that the city's claim in eminent domain made it an "inverse condemnation suit" brought by the city was untenable in view of the denials in the answer. (24 C.A.2d 367.)

SUPPLEMENT: [This section is current through the latest supplement]



187 of 188 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXIV. VENUE: ACTIONS BY OR AGAINST STATE AND LOCAL GOVERNMENTS

C. Actions by or Against Local Agency.

1. In General.

3 Witkin Cal. Proc. Actions § 880

[§ 880] In General.

C.C.P. 394 (supra, §871) applies to local agencies in the same manner as to counties and cities, by using the phrase "local agency" at all places where counties and cities are mentioned. For purposes of the section, the term includes "any governmental district, board, or agency, or any other local governmental body or corporation." (*C.C.P. 394(b)*.) The statute does not cover the state or any of its agencies, departments, commissions, or boards. (*C.C.P. 394(b)*.)

Thus, in a condemnation action by a county flood control and water conservation district, the defendant property owner is entitled to a transfer to a neutral county. (*Garrett v. Superior Court* (1974) 11 C.3d 245, 247, 113 C.R. 152, 520 P.2d 968; *Anderson v. Superior Court* (1983) 142 C.A.3d 112, 117, 190 C.R. 646 [beneficiaries of real estate trust holding property had sufficient ownership interest to compel transfer].)

The mandatory transfer rule has also been applied in cases involving other local agencies. (See *Marin Community College Dist. v. Superior Court* (1977) 72 C.A.3d 719, 722, 140 C.R. 310 [community college]; *Central Contra Costa Sanitary Dist. v. Superior Court* (1978) 84 C.A.3d 702, 705, 148 C.R. 801 [sanitary district]; *H. K. H. Co. v. Superior Court* (1979) 95 C.A.3d 39, 41, 156 C.R. 827 [city housing authority]; *Golden Gate Bridge, Highway & Trans. Dist. v. Superior Court* (2004) 125 C.A.4th 177, 183, 22 C.R.3d 558 [bridge district].)

SUPPLEMENT: [This section is current through the latest supplement]



188 of 188 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXIV. VENUE: ACTIONS BY OR AGAINST STATE AND LOCAL GOVERNMENTS

C. Actions by or Against Local Agency.

2. Distinctions and Clarifications.

3 *Witkin Cal. Proc. Actions* § 881

[§ 881] Distinctions and Clarifications.

A definitive treatment of several aspects of the unclear statutory language in *C.C.P. 394* (supra, §871) appears in *Westinghouse Elec. Corp. v. Superior Court* (1976) 17 C.3d 259, 131 C.R. 231, 551 P.2d 847. BART (San Francisco Bay Area Rapid Transit District) sued its principal contractors (Westinghouse, Rohr) for damages of \$ 100 million for furnishing allegedly defective equipment and services. The action was filed in Alameda County, and defendants sought transfer to a neutral county under *C.C.P. 394*. The lower court denied the motion. *Held*, mandamus granted to compel transfer.

(a) *Action by local agency against private defendant.* The 1970 amendment to *C.C.P. 394* allows a private defendant sued by a local agency (including a district) to obtain a transfer. (See supra, §880.) The statute refers to a local agency "within a certain county," and BART contends that the right does not exist against it because it is a multi-county agency, i.e., its operations are in Alameda County, Contra Costa County, and the City and County of San Francisco. This contention is unsound:

(1) The statutory language is unclear, but it should be liberally interpreted to carry out the remedial purpose of guarding against local prejudice in favor of resident litigants and against nonresidents. (17 C.3d 266, discussing *Garrett v. Superior Court* (1974) 11 C.3d 245, 113 C.R. 152, 520 P.2d 968, supra, §880.) "[I]t is virtually *certain* that an Alameda County juror in this case will be a BART taxpayer with more than an academic interest in a damage suit totaling more than \$ 100 million. We are confronted with the paradigm case of potential prejudice that the Legislature sought to avoid by enacting section 394." (17 C.3d 267.)

(2) The contention that the Legislature felt that taxpayer prejudice would be sufficiently "diluted" in the case of a regional agency is answered by former *C.C.P. 394(3)* (now *C.C.P. 394(b)*), defining the term "local agency" and excluding the state and its agencies (supra, §880). "The distinction made by the Legislature is between state agencies and other governmental agencies, not between regional agencies and single-county agencies. ... To the extent that the Legislature took into account the argument that potential prejudice could be diluted in suits involving governmental entities, it found that such dilution might take place in actions by or against the state government, not in litigation concerning multi-county agencies." (17 C.3d 267.)

(b) *Private defendant doing business in county.*

(1) Under *Los Angeles v. Pacific Tel. & Tel. Co.* (1958) 164 C.A.2d 253, 330 P.2d 888, supra, §877, a corporation defendant doing business in the county cannot demand a transfer, and the question then arises as to the meaning of "doing business." The test established for jurisdiction over a foreign corporation (see 2 Cal. Proc. (5th), *Jurisdiction*, §166 et seq.) is based on policy considerations different from those governing change of venue. The issue is not whether it is proper to subject a corporation to trial, but where the trial should be held; the consequence of finding that a corporation is not doing business in a county is not dismissal of the action but merely transfer of the cause to another county, and a C.C.P. 394 motion to transfer presupposes that the original court has jurisdiction. Hence, the "minimum contacts" jurisdictional test is not applicable. (17 C.3d 270.)

(2) The test is concerned with defendant's "image in the community," i.e., whether it is regarded as an outside corporation or as closely associated with it. A corporation is doing business in a county for purposes of C.C.P. 394 "only if its activities in the county are substantial enough that the corporation can reasonably be viewed as being intimately identified with the affairs or closely associated with the people of the community. Under this standard, a corporation with its main place of business in the county in which it is sued cannot invoke section 394. Likewise, a corporation with a major branch office in the county would be denied the benefits of the statute. But a corporation with its principal place of business elsewhere and with only limited contacts in a county may obtain a change of venue in an action brought by a local governmental entity." (17 C.3d 271.)

(c) *Activities related to subject matter of litigation.* Defendant Rohr has its principal place of business in San Diego County, and its activity in Alameda County consists mainly in delivering trains built at its headquarters. These acts of performance of its contract cannot be viewed as "doing business" under the test set forth above. (1) The presumed prejudice against an outsider would not be diminished, but possibly increased "against the corporate interloper brought in only to work on the BART contract." (17 C.3d 272.) (2) To include activities relating to the subject matter would prevent the use of C.C.P. 394 by a nonresident corporate defendant in almost any contract action brought by a governmental entity, for the action can be brought under general venue statutes where the contract is to be performed, and performance would constitute doing business. (17 C.3d 272.) (3) In exceptional circumstances activities relating to the subject matter might be considered, e.g., if a corporation were formed in Alameda County solely to work on the BART project, failure to consider BART-related activities would lead to the conclusion that the corporation does business in no county. Also, if Rohr established a major manufacturing division in Alameda County to build the transit vehicles, and retained its plant there for several years, it might arguably be viewed as closely associated with the community. (17 C.3d 273.)

(d) *Activities of subsidiary.* A Rohr subsidiary, located in Ohio, sells buses to a transit company in Alameda County, but this has not been considered doing business even under the broader test for jurisdiction. The corporate entity of a wholly owned subsidiary will be disregarded only where recognition of the separate entity would produce fraud or injustice (see 9 Summary (10th), *Corporations*, §15). (17 C.3d 274.)

(e) *All defendants are entitled to transfer.* Because Rohr, under this analysis, is a nonresident defendant entitled to a change of venue, all defendants, including residents, are likewise entitled to a transfer, in order to avoid a multiplicity of actions. (17 C.3d 275, citing *Georgetown Divide Public Util. Dist. v. Bacchi* (1962) 204 C.A.2d 194, 22 C.R. 27, supra, §879.)

(f) *Distinction: severance for separate trials.* The trial judge granted a motion for severance as to certain causes of action involving defendants other than Rohr. One of these defendants, an unincorporated association treated as an entity and doing business in the county, sought the transfer, but the nonresident defendant did not. The transfer was therefore properly denied, for there is no provision in the statute for an independent motion by a resident defendant; the resident party is entitled to a change only when C.C.P. 394 is invoked by a nonresident defendant. (17 C.3d 277.)

In *Colusa Air Pollution Control Dist. v. Superior Court* (1991) 226 C.A.3d 880, 277 C.R. 110, the court relied on

Westinghouse to deny a request for transfer to a neutral county under *C.C.P.* 394 made by plaintiff manufacturers, retailers, and contractors in their action against two local districts. In explaining one of several reasons for denying the transfer, the court noted: "[I]t would seem that in view of plaintiffs' allegations of statewide business activity, there is no county in California to which section 394 would permit a transfer as there is no county in which plaintiffs, or any of them, are not doing business. ... [T]he Supreme Court has expressed the view that there may be no 'neutral' counties to which a suit may be transferred." (226 *C.A.3d* 889, quoting *Westinghouse*.)

SUPPLEMENT: [This section is current through the latest supplement]



1 of 194 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXV. VENUE: JOINDER RULES

A. Joinder of Causes of Action.

1. One Cause of Action.

3 *Witkin Cal. Proc. Actions* § 882

[§ 882] One Cause of Action.

(1) *One Cause Seeking Different Forms of Relief.* If the plaintiff takes advantage of the rules of permissive joinder of causes of action (*C.C.P.* 427.10; see 4 *Cal. Proc.* (5th), *Pleading*, §337 et seq.), it sometimes happens that the causes joined are classified differently for purposes of venue and hence are not triable in the same county. How is venue to be determined? The answer (*infra*, §884 et seq.) calls for a preliminary distinction. No problem of joinder arises unless the complaint states more than one cause of action. If there is only one cause, but different forms of relief are sought, the "form" of the action for venue purposes is determined by the main relief rule. (See *Peiser v. Mettler* (1958) 50 *C.2d* 594, 604, 328 *P.2d* 953; *Hammon v. American Exploration & Mining Co.* (1962) 203 *C.A.2d* 306, 308, 21 *C.R.* 409, citing the text.)

Occasionally a court, confusing remedy or relief with cause of action, speaks of joinder in these cases. (See, e.g., *Howe v. Tucker* (1933) 219 *C.* 193, 194, 25 *P.2d* 832; *Stesel v. Santa Ana River Water Co.* (1939) 35 *C.A.2d* 117, 125, 94 *P.2d* 1052; *supra*, §828.) The leading case of *Smith v. Smith* (1891) 88 *C.* 572, 26 *P.* 356, often quoted on the joinder rule, seems to recognize the distinction. "It is only when real estate alone is the subject-matter of the action that the provisions of section 392 can be invoked against a defendant who resides in a county different from that in which the land is situated. If, in his complaint, the plaintiff join with such a cause of action another which is not embraced in its provisions [joinder rule], or if he also seeks a remedy against the defendant upon matters which are not embraced within the provisions of this section [main relief rule], his action becomes one of those 'other cases' provided for in section 395." (88 *C.* 576.)

(2) *One Cause Based on Different Legal Theories.* The same rule applies where a single cause of action is pleaded in different counts according to different legal theories. There is no joinder of causes (see 4 *Cal. Proc.* (5th), *Pleading*, §36), and the main relief rule determines venue. Here again a court sometimes misconceives the nature of the problem by treating it as if joinder were involved. (See *Goossen v. Clifton* (1946) 75 *C.A.2d* 44, 49, 170 *P.2d* 104, *infra*, §885.)

SUPPLEMENT: [This section is current through the latest supplement]



2 of 194 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXV. VENUE: JOINDER RULES

A. Joinder of Causes of Action.

2. Mixed Action.

3 *Witkin Cal. Proc. Actions* § 883

[§ 883] Mixed Action.

Where causes are joined, the action may not have a single form or "gravamen." The complaint combines two or more actions, each of which might have been separately filed, and one separate cause and demand for relief may, under the main relief rule, be local, and the other transitory. The solution to the problem in these situations has not been clearly indicated in the cases.

(1) *Early View: Defendant's Right To Choose Venue.* One possibility is that the defendant may choose venue either at his or her residence or an equally proper local venue, e.g., where the land is situated. This theory was advanced in *Brown Materials Co. v. Angus* (1937) 20 C.A.2d 32, 66 P.2d 470. Plaintiff brought an action in Fresno County, seeking a judgment relating to land in San Luis Obispo County (local) and an injunction (transitory) against defendants residing in Kern County. Plaintiff conceded that the action was brought in the wrong county on any theory, but contended that defendants' only right was to a transfer to Kern County. *Held*, defendants' motion for change to San Luis Obispo County was properly granted. The actual decision was an application of the main relief rule, for the court held that the purported separate cause of action for an injunction was spurious and merely an incident of the main cause of action. (20 C.A.2d 36, 37.)

But election was approved in a strong dictum. "The principles involved in the cases cited herein are as follows: 1st. The defendant is entitled to have a local action tried in the county where the real property is located (sec. 392, *Code Civ. Proc.*); 2d. The defendant is entitled to have a personal action tried in the county of his residence (sec. 395, *supra*); 3d. The plaintiff may not deprive a defendant of either of these rights by joining a second cause of action in his complaint. If both types of action are so joined, the defendants may insist on trial in either court (sec. 398, *supra*)." (20 C.A.2d 37.)

(2) *Modern View: Residence Venue Controls.* The election theory did not attract any appreciable support, and the *Brown Materials* case was distinguished in *Neet v. Holmes* (1942) 19 C.2d 605, 122 P.2d 557, on the point mentioned above--that the action was concededly brought in an improper county. "The decision in that case cannot be construed as a holding that a defendant would have a right to have an action transferred to the county where the property was situated where the action was otherwise commenced in a proper county." (19 C.2d 613.) (See 44 Cal. L. Rev. 707 [reviewing case law and concluding that election is undesirable and without substantial support in authorities].)

The modern approach, therefore, stresses the basic right to residence venue as the solution to most mixed-action problems. (See C.E.B., 1 Civil Proc. Before Trial 4th, §8.52 et seq.; Cal. Civil Practice, 1 Procedure, §4:75; *44 Cal. L. Rev.* 713; *infra*, §§884, 885.)

SUPPLEMENT: [This section is current through the latest supplement]



3 of 194 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXV. VENUE: JOINDER RULES

A. Joinder of Causes of Action.

3. Joinder of Local and Transitory Causes.

3 *Witkin Cal. Proc. Actions* § 884

[§ 884] Joinder of Local and Transitory Causes.

(1) *General Rule: Residence Venue Controls.* The plaintiff cannot, by joining a local with a transitory cause, deprive the defendant of his or her normal right to a trial of the transitory cause at the county of his or her residence. The policy in favor of residence venue in transitory actions is stronger than that in favor of local venue in real actions. Hence, if the two causes are to be tried together, and the action is filed where the land is located, the defendant may insist on a change of venue to his or her residence. This choice is so habitual that it has given rise to the conventional rule that the transitory cause controls the venue.

(2) *Illustrations.* In *Hays v. Cowles* (1943) 60 C.A.2d 514, 141 P.2d 26, plaintiff sued in San Mateo County for an accounting and dissolution of a partnership. To avoid venue at defendant's residence (San Francisco), he alleged that defendant had invested some partnership funds in San Mateo land. Under the main relief rule, the action was essentially one for an accounting; but, assuming that a cause of action for recovery or partition of land was stated, an unbroken chain of decisions has established that C.C.P. 392 "is effective only when real property or the title thereto is the exclusive subject matter of the action, and that when a cause of action for relief *in personam* also is joined, the defendant is entitled to have the cause transferred to the county of his residence." (60 C.A.2d 516, 518.)

In *Bybee v. Fairchild* (1946) 75 C.A.2d 35, 170 P.2d 54, the complaint alleged that, in a prior wrongful death action, the present defendants obtained a \$ 15,000 judgment against the present plaintiff; that he refrained from appealing in reliance on their agreement, made fraudulently without intention to perform, to accept a compromise of \$ 2,500; that he paid the money, but they refused to go through with the agreement and recorded an abstract of their judgment in San Mateo County where plaintiff owned real property. His action, for damages, was filed in San Mateo County. *Held*, defendants were entitled to a change of venue to Lassen County, their residence. Although the complaint purported to state only one cause of action, plaintiff also alleged, without a separate statement, that the wrongful conduct of defendants had interfered with his business as a real estate broker, to his general damage in the sum of \$ 12,500. "This is a separate cause of action, although not separately and somewhat incompletely stated. This is a cause of action for money damages not growing out of injury to real property. It is transitory in nature. It is not merely incidental to the local actions above discussed because it is not dependent upon the success of the plaintiff as to those causes of action." (75 C.A.2d 43.) If plaintiff were unable to prove his ownership of the land, but did prove the fraud, he could still recover for general damage to his business under this cause. Thus the case was one of joinder of real and transitory

causes, and the latter controlled the venue.

Many other cases are to the same effect. (See *Howe v. Tucker* (1933) 219 C. 193, 194, 25 P.2d 832, supra, §828; *Turlock Theatre Co. v. Laws* (1939) 12 C.2d 573, 578, 86 P.2d 345, supra, §836 [transitory cause against lessee to recover unpaid rentals and cancel lease; local causes for restoration of possession, quiet title]; *Perkins v. Winder* (1932) 123 C.A. 467, 471, 11 P.2d 394 [malicious attachment; transitory causes for money expended in quiet title action and damages for loss of loan; local cause for depreciation of value of land]; *Vaughan v. Roberts* (1941) 45 C.A.2d 246, 253, 256, 113 P.2d 884 [transitory causes for cancellation of note and deed of trust, declaratory relief, damages and accounting; local cause to quiet title]; *Keithly v. Lacey* (1946) 77 C.A.2d 339, 341, 175 P.2d 235 [action to impress trust on real and personal property: transitory cause relating to personal property; local cause relating to realty]; *Rosen v. Kessler* (1956) 145 C.A.2d 676, 683, 303 P.2d 110; *All-Cool Aluminum Awning Co. v. Superior Court* (1964) 224 C.A.2d 660, 666, 36 C.R. 769; *Carlton v. Superior Court* (1966) 240 C.A.2d 586, 590, 49 C.R. 759; *Central Bank v. Superior Court* (1973) 30 C.A.3d 913, 918, 106 C.R. 696, citing the text; 27 Cal. L. Rev. 468.)

SUPPLEMENT: [This section is current through the latest supplement]



4 of 194 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXV. VENUE: JOINDER RULES

A. Joinder of Causes of Action.

4. Joinder of Two Transitory Causes.

a. General Rule: Residence Venue Controls.

3 *Witkin Cal. Proc. Actions* § 885

[§ 885] General Rule: Residence Venue Controls.

Modern statutes provide for the trial of various kinds of transitory actions in counties other than the defendant's residence. (See *supra*, §831 et seq.) Does the joinder of transitory causes with different venues give the defendant a right to trial at his or her residence? In *Goossen v. Clifton* (1946) 75 C.A.2d 44, 170 P.2d 104, plaintiff sued in Santa Clara County, alleging (a) an open book account with a \$ 17,500 balance due for services rendered in various places other than Santa Clara County, and (b) an account stated in the same amount, as the final sum due, arrived at in Santa Clara County. *Held*, defendants were entitled to a change of venue to Los Angeles County, their residence. Santa Clara County was a proper venue only under the second count, and the long-established rule on joinder of local and transitory causes should be equally applicable to the joinder of two transitory causes on contract. "The important right to protect is that of the defendant to have the cause tried in the county of his residence. ... If, by joining several causes of action, the defendant could be deprived of his right, the right would be lost in many cases. It is for that reason that the courts hold that the test is whether on any one of the causes of action the defendant is entitled to a change to the county of his residence. If there is one such cause, then defendant is entitled to the change no matter how many other causes may be set forth in which he is not entitled to the change. That is the situation here presented." (75 C.A.2d 49.)

It is unfortunate that the facts of the case do not squarely present the issue raised by counsel and decided by the court. There was no joinder; plaintiff was simply pleading one cause of action in separate counts on different legal theories, and the issue was whether the cause of action was based on a Santa Clara contract or a contract made somewhere else. (See, however, following *Goossen*, *Crofts & Anderson v. Johnson* (1950) 101 C.A.2d 418, 420, 225 P.2d 594; *Tringali v. Vest* (1951) 106 C.A.2d 720, 721, 236 P.2d 171; *Erwin v. Cee-Tee Const. Co.* (1952) 114 C.A.2d 364, 370, 250 P.2d 287.)

A similar case is *Sanborn v. Pomona Pump Co.* (1933) 131 C.A. 241, 21 P.2d 124. Plaintiff, the buyer of a pump, sued defendant corporation in Kern County for damages for (a) breach of warranty, (b) recovery of the price after rescission, and (c) money expended, pursuant to the request of defendant (i.e., under a separate contract), in attempting to make the machine work. The court concluded that both contracts were made and to be performed in Los Angeles County, defendant's residence. The only cause triable in Kern County was the one for breach of warranty (the pump was used there on plaintiff's land). *Held*, change of venue to Los Angeles was properly granted: "[W]hen a complaint has a

double aspect, under one of which the defendant has the right to change the place of trial, and under the other he has no such right, it will be construed against the pleader and the case transferred. The same result is reached where there are two causes of action, under one of which there exists the right of transfer, and, where, under the other no such right exists." (131 C.A. 244.) (See *Jhirmack Enterprises v. Superior Court* (1979) 96 C.A.3d 715, 720, 158 C.R. 192 [quoting *Sanborn*].)

In *Johnson v. Superior Court* (1965) 232 C.A.2d 212, 42 C.R. 645, plaintiffs filed a complaint entitled "Action for Breach of Contract," and if it had only contained that cause of action, the venue, in Fresno County where the contract was made and to be performed, would have been good. But the complaint also contained allegations of malicious interference with plaintiffs' business and injury to their business reputation, with a substantial prayer for damages for those injuries. These allegations, though not separately stated, were sufficient to constitute a cause of action in tort, not incidental to or dependent on the contract cause. Thus, the rule applied that, if there is one transitory cause that the defendant is entitled to have tried at his or her residence, the defendant may have a change of venue, regardless of how many other causes may be stated which are not subject to change. (232 C.A.2d 218.)

SUPPLEMENT: [This section is current through the latest supplement]



5 of 194 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXV. VENUE: JOINDER RULES

A. Joinder of Causes of Action.

4. Joinder of Two Transitory Causes.

b. Exceptions: Special Venue Statutes.

1. Action Under Fair Employment and Housing Act.

3 *Witkin Cal. Proc. Actions* § 886

[§ 886] Action Under Fair Employment and Housing Act.

(1) *Statutory Rule.* An action under the Fair Employment and Housing Act (FEHA) may be brought in any county in which the unlawful practice is alleged to have been committed, in the county in which relevant records are maintained or administered, or in the county in which the aggrieved person would have worked but for the alleged unlawful practice; however, if the defendant is not found within any of these counties, the action may be brought within the county of defendant's residence or principal office. (*Govt.C. 12965(b).*)

(2) *Illustrations.* In *Brown v. Superior Court* (1984) 37 C.3d 477, 208 C.R. 724, 691 P.2d 272, plaintiffs B, J, and G, employees of defendants (individuals and corporations) on a highway construction project in Alameda County, were discharged. They brought an action in Alameda County alleging (a) intentional infliction of emotional distress, (b) wrongful discharge, and (c) discriminatory practices in violation of the Fair Employment and Housing Act (FEHA). Each of the three causes of action was based on the same factual allegations. Defendants moved for a change of venue to Sacramento County on the grounds that the three individual defendants resided there, the corporate defendants' principal places of business were located there, and none of the defendants resided in Alameda County. The lower court granted the motion. *Held*, mandamus issued to compel vacating of the order.

(a) *Broad venue under FEHA.* *Govt.C. 12965(b)* permits bringing FEHA actions in several counties, including any county in the state in which the unlawful practice is alleged to have been committed. Hence, if the complaint had set forth only one cause of action for violation of the FEHA, the Alameda County venue would have been proper. (37 C.3d 482.)

(b) *Residence venue in transitory actions.* The two non-FEHA causes of action came within *C.C.P. 395(a)*, providing that the county of residence of the defendants is the proper venue. (See *supra*, §817.) Hence, the defendants were entitled to have the venue changed unless the action fell within an exception to the general statutory rule. (37 C.3d 483.)

(c) *Exceptions to residence venue in transitory actions.* The residence venue provision of *C.C.P. 395(a)* applies

"[e]xcept as otherwise provided by law." *Delgado v. Superior Court* (1977) 74 C.A.3d 560, 141 C.R. 528, *infra*, §904, *Central Contra Costa Sanitary Dist. v. Superior Court* (1978) 84 C.A.3d 702, 148 C.R. 801, *supra*, §880, and *Tharp v. Superior Court* (1982) 32 C.3d 496, 186 C.R. 335, 651 P.2d 1141, *supra*, §870, construed this exception. In each of these cases the specific venue statute prevailed over the general, but the cases involved single causes of action. (37 C.3d 484.)

(d) *Application of FEHA exception to several causes of action.* The special FEHA venue statute governs all of the causes of action, and prevails over C.C.P. 395, when the non-FEHA causes arise from the same facts as the FEHA cause.

(1) The FEHA establishes a comprehensive scheme for combating employment discrimination, pursuant to a strong public policy protecting a fundamental right. The wide choice of venue given by the statute maximizes the ability of persons aggrieved by employment discrimination to seek relief in the courts, and facilitates the enforcement of the FEHA. (37 C.3d 485, 486.)

(2) Venue is an important consideration for a plaintiff in an employment discrimination action. "Victims of employment discrimination are frequently unemployed--many times as the result of the alleged discrimination. They often lack financial resources. For such individuals, the costs of litigation pose a formidable barrier to the filing and prosecution of an FEHA action. The Legislature recognized this barrier and sought to alleviate it by providing these persons with a wide choice of venue. They should not be deprived of that choice simply because they choose to plead alternative theories of recovery. Nor should they be subject to the added burden of trying an action in a county which may be hundreds of miles away from their own choice of venue." (37 C.3d 486.)

(3) Venue considerations also have a substantial impact on the attorney's decision to undertake representation: The attorney is more likely to take the case if venue is available in a location that minimizes travel and other costs. Moreover, employment discrimination cases by their very nature involve several causes of action arising from the same set of facts, and a responsible attorney must plead a variety of statutory, tort, and contract causes to fully protect the client. (37 C.3d 486.)

(4) If the statute were narrowly construed to apply only to single FEHA causes, aggrieved persons would be faced with "a Hobson's choice": If they wished to avail themselves of FEHA venue rules, they would be forced to abandon their non-FEHA claims or to try them in a separate action in a different county; if they wished to have the entire action tried in one county, they would have to accede to the defendant's choice of venue. This would render the FEHA's special venue rules mere surplusage, and defeat the legislative purpose. "This court therefore holds that the special provisions of the FEHA venue statute control in cases involving FEHA claims joined with non-FEHA claims arising from the same facts. ... In so construing section 12965, this court adds that statute to the list of exceptions found in *Delgado*, *Central Contra Costa* and *Tharp*." (37 C.3d 487.)

(e) *Mixed action rules are not controlling.* In a "mixed action" the complaint alleges two or more causes of action, each governed by a different venue statute, and the defendant may have the venue changed if he or she is entitled to a change on any of the causes of action. (37 C.3d 488; see *supra*, §885.) However, the important public policies supporting the FEHA call for a different result: "Although the mixed action rule recognizes a preference for trial in the county of a defendant's residence, that preference is outweighed by the strong countervailing policy of the FEHA which favors a plaintiff's choice of venue." (37 C.3d 488.)

(f) *Claims must be based on similar facts.* The plaintiff cannot defeat a defendant's right to trial at his or her residence by simply adding an FEHA count: "In order for the FEHA venue provision to control, the non-FEHA claims must rest on similar factual allegations as the FEHA count." (37 C.3d 487, footnote 9.) "If a plaintiff alleges a common law tort cause of action, a motion for change of venue is promptly made by the defendant, and thereafter a redundant statutory cause of action is added by the plaintiff apparently to defeat the venue change, I would permit the trial court to exercise discretion and, if otherwise justified, to nevertheless grant the motion to transfer the action." (37 C.3d 489,

concurring opinion.)

In *Ford Motor Credit Co. v. Superior Court* (1996) 50 C.A.4th 306, 57 C.R.2d 682, plaintiff employees of defendant automobile credit company and two of their supervisors filed suit, alleging Fair Employment and Housing Act violations. The particular acts set forth in plaintiffs' complaint all occurred in Sacramento County. However, plaintiffs interpreted public policy considerations discussed in *Brown* to mean that they should be given wide latitude to select the forum, and thus could file suit in the county that they deemed "most appropriate and convenient"--i.e., in Los Angeles County where they resided. Defendants moved for a change of venue to Sacramento County, but the trial judge denied the motion. *Held*, reversed; *Brown* was distinguishable.

(a) *Govt.C. 12965(b)* specifies three counties in which an FEHA action may be brought based on three enumerated criteria, but provides that if none of those criteria are satisfied, venue rests in the county of the defendant's principal office or residence. In *Brown*, the choice of venue was a county in which one of the enumerated criteria was satisfied, even though none of the defendants resided in that forum, and thus that choice was expressly sanctioned by *Govt.C. 12965(b)*. (50 C.A.4th 309, 310.)

(b) But in the present case, venue was mandatory in Sacramento County under at least two of the criteria: (1) the unlawful practices were alleged to have been committed in Sacramento County; and (2) the records relevant to the practice were maintained there. Thus, this action was not properly brought in Los Angeles County, where none of the criteria was satisfied. (50 C.A.4th 310.)

In *Richfield Hotel Management v. Superior Court* (1994) 22 C.A.4th 222, 27 C.R.2d 161, the issue was whether *Govt.C. 12965(b)* must yield to former C.C.P. 397(3) (now C.C.P. 397(c), *infra*, §940), providing for a change of venue for the convenience of the witnesses. Plaintiffs brought an action against defendant hotel alleging sexual harassment by an employee in violation of the FEHA, and defendant moved for a change of venue from San Mateo County to Tulare County. *Held*, defendant was entitled to a change of venue.

(a) The plaintiff is given a wide choice of venue in FEHA actions because the Legislature wished to make it easier for a financially stressed litigant to bring an action in a location where travel and other costs, including the cost of securing important witnesses for trial, would be minimized. Its purpose was not to allow the plaintiff to forum shop or to impose an unreasonable burden on witnesses and the defendant. (22 C.A.4th 225, 226, adopting reasoning of *Paesano v. Superior Court* (1988) 204 C.A.3d 17, 250 C.R. 842, *infra*, §955.)

(b) Plaintiffs sufficiently met their burden of showing that the convenience of witnesses required a change of venue. All the relevant events allegedly took place in Tulare County, all the designated witnesses lived or worked in that area, all the relevant documents would be there, and plaintiffs made no showing that their witnesses would be inconvenienced by the change. (22 C.A.4th 226, 227, citing the text.)

SUPPLEMENT: [This section is current through the latest supplement]



6 of 194 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXV. VENUE: JOINDER RULES

A. Joinder of Causes of Action.

4. Joinder of Two Transitory Causes.

b. Exceptions: Special Venue Statutes.

2. Action To Dissolve Corporation.

3 *Witkin Cal. Proc. Actions* § 887

[§ 887] Action To Dissolve Corporation.

In *Capp Care v. Superior Court* (1987) 195 C.A.3d 504, 241 C.R. 741, plaintiff sued defendants--an individual and a corporation--joining contract and tort actions with an action for involuntary dissolution of the corporation. Plaintiff filed the action in the county of residence of defendant individual under C.C.P. 395.5 (see supra, §849 et seq., and infra, §902). Defendants moved to change venue to the principal office of defendant corporation under the special venue provisions for involuntary dissolutions (*Corp.C. 177, 1800*; see supra, §816), but the trial judge denied their motion. *Held*, this was improper. Although plaintiff's action technically did not involve the joinder of only transitory actions, but consisted of the joinder of transitory actions (the contract and tort causes) and a local action (the involuntary dissolution cause), the court nevertheless applied the rule of *Brown v. Superior Court* (1984) 37 C.3d 477, 208 C.R. 724, 691 P.2d 272, supra, §886. The special venue provisions for involuntary dissolutions prevailed over the general residence provision governing the contract and tort causes. (195 C.A.3d 508, citing the text.)

SUPPLEMENT: [This section is current through the latest supplement]



7 of 194 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXV. VENUE: JOINDER RULES

A. Joinder of Causes of Action.

4. Joinder of Two Transitory Causes.

b. Exceptions: Special Venue Statutes.

3. Distinction: Action Under Consumers Legal Remedies Act.

3 Witkin Cal. Proc. Actions § 888

[§ 888] Distinction: Action Under Consumers Legal Remedies Act.

In *Gallin v. Superior Court* (1991) 230 C.A.3d 541, 281 C.R. 304, plaintiff contended that C.C. 1750(c), the special venue provision of the Consumers Legal Remedies Act, prevailed over the general residence provision of C.C.P. 395(a) (supra, §817). *Held*, the general provision was controlling. The special venue provision in the Fair Employment and Housing Act was designed to protect the fundamental right to nondiscriminatory employment (*Brown v. Superior Court* (1984) 37 C.3d 477, 208 C.R. 724, 691 P.2d 272, supra, §886). In contrast, the rights protected by the Consumers Legal Remedies Act do not rise to the level of civil rights, and the plaintiffs are not disadvantaged or thwarted in pursuing litigation. (230 C.A.3d 545, 546.)

SUPPLEMENT: [This section is current through the latest supplement]



8 of 194 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXV. VENUE: JOINDER RULES

B. Joinder of Defendants.

1. In General.

a. Effect of Proper Joinder.

3 Witkin Cal. Proc. Actions § 889

[§ 889] Effect of Proper Joinder.

(1) *General Rule: Trial in Residence of Any Defendant.* C.C.P. 395(a) establishes, either as exclusive or alternative venue in transitory actions, the county in which "the defendants or some of them reside at the commencement of the action." A defendant is normally entitled to a trial at the county of the defendant's residence if he or she is the sole defendant or if all of the defendants reside in the same place. But if there are several defendants who reside in different places, a strict residence venue is impracticable. In these cases either the plaintiff must be denied the privilege of joinder or the residence requirement must be modified, and the latter alternative is chosen by the statute. Hence, the rule is that the plaintiff may bring a good transitory action against two or more defendants in the county of residence of one defendant who is a proper party. The nonresident defendant or defendants may not obtain a change of venue even if the resident defendant joins in the motion. (*McClung v. Watt* (1922) 190 C. 155, 158, 211 P. 17; *Independent Iron Works v. American President Lines* (1950) 35 C.2d 858, 860, 221 P.2d 939; *Kraft v. Innis* (1943) 57 C.A.2d 637, 640, 135 P.2d 29; see 44 Cal. L. Rev. 685; 25 So. Cal. L. Rev. 491.)

(2) *Rule Applies Even If Joined Claims Do Not Affect All Parties.* This rule is applied even though causes of action are joined that do not affect all parties; residence is determined by the entire action, and not by the separate causes. In *Monogram Co. of Calif. v. Kingsley* (1951) 38 C.2d 28, 32, 237 P.2d 265, plaintiff brought his action in Alameda County on 20 causes of action for libel, slander, and unfair competition, against many Los Angeles residents and L, an Alameda resident. All the Los Angeles defendants moved for change of venue (with L consenting) on the ground that 10 causes did not involve L at all. *Held*, Alameda venue was proper. Under the modern rule it is not essential that each cause affect every party joined (see 4 Cal. Proc. (5th), *Pleading*, §339); hence, joinder was proper. Venue statutes relate not to causes of action but to actions, and prescribe the place where an action in its entirety may be tried. (38 C.2d 31.)

Later cases are to the same effect. (See *Dreher v. Fidelity & Cas. Co. of New York* (1957) 148 C.A.2d 695, 700, 307 P.2d 407, citing the text; *Tutor-Saliba-Perini Joint Venture v. Superior Court* (1991) 233 C.A.3d 736, 742, 285 C.R. 1 [citing *Monogram Co. of Calif.*].)

SUPPLEMENT: [This section is current through the latest supplement]



9 of 194 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXV. VENUE: JOINDER RULES

B. Joinder of Defendants.

1. In General.

b. Effect of Improper Joinder.

3 Witkin Cal. Proc. Actions § 890

[§ 890] Effect of Improper Joinder.

The converse of the rule stated in the preceding section is that where the action or the joinder is not in good faith and is designed to defeat the normal right of one or more defendants to a trial at residence, venue may be changed, i.e., the residence of a defendant improperly joined will not be sufficient to establish venue. This limitation is stated in *C.C.P. 395(a)* as follows: "If any person is improperly joined as a defendant or has been made a defendant solely for the purpose of having the action tried in the superior court in the county where he or she resides, his or her residence shall not be considered in determining the proper place for the trial of the action." (See *Hoag v. Superior Court (1962) 207 C.A.2d 611, 617, 24 C.R. 659*, quoting the text; *infra*, §894 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]



10 of 194 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXV. VENUE: JOINDER RULES

B. Joinder of Defendants.

1. In General.

c. Amendment or Dismissal After Motion.

3 *Witkin Cal. Proc. Actions* § 891

[§ 891] Amendment or Dismissal After Motion.

(1) *General Rule: Original Complaint Controls.* Venue is determined by the circumstances existing at the time of the motion (see *supra*, §789). So if a cause of action is stated against a resident of the county where the action is brought, venue is established. It is immaterial that, subsequent to the denial of the motion for change, the plaintiff dismisses the action as to the only defendant whose residence originally justified the venue. (*Remington Sewing Machine Co. v. Cole* (1882) 62 C. 311, 318.)

Ferguson v. Koerber (1924) 69 C.A. 47, 230 P. 476, followed the *Remington* rule where, after denial of the motion for change, plaintiff amended his complaint to eliminate the cause of action against the resident defendants. (69 C.A. 49.) The *Ferguson* case notes the conflict of authority on this point, but neither decision explains the policy, if any, supporting the California rule. There are sound policy reasons supporting and opposing this rule: (a) To permit the plaintiff to join a party for venue purposes, without intending to prosecute the action against that party, and subsequently to drop him or her by dismissal or amendment, is to defeat the purpose of C.C.P. 395, prohibiting fraudulent joinder; (b) but to allow venue rules indirectly to curtail plaintiff's statutory rights of dismissal and amendment would be equally objectionable. Perhaps the solution is to amend the statute governing the time of the motion for change (*infra*, §924) to allow a belated (or second) motion whenever, by dismissal or amendment, the complaint fails to justify the original venue. (See *infra*, §§917, 918.)

(2) *Application of Rule Where Complaint Against Resident Defendant Is Defective.* If the original complaint is defective against the resident defendant, and the nonresident defendant moves for change, the rule that the original complaint is controlling works against the plaintiff. The nonresident defendant, the only one against whom a cause of action is stated, may have a change of venue; and the plaintiff cannot salvage the original venue by a subsequent amendment to state a cause of action against the resident defendant. (*Buell v. Dodge* (1881) 57 C. 645.)

SUPPLEMENT: [This section is current through the latest supplement]



11 of 194 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXV. VENUE: JOINDER RULES

B. Joinder of Defendants.

2. Joinder Proper for Venue Purposes.

a. Defendant as Proper Party.

3 *Witkin Cal. Proc. Actions* § 892

[§ 892] Defendant as Proper Party.

(1) *Statement of Rule.* In determining the good faith or bona fide character of the joinder, the test is not, as might appear from some unguarded language in the cases, whether the defendant is a necessary party. It is sufficient that the defendant is a proper party, i.e., one who may be named under the rules governing permissive joinder of defendants despite the fact that an action might be prosecuted and some of the relief obtained in an action against the other defendants alone. The cases are in agreement on this principle, although the discriminating use of the modern terminology (see 4 *Cal. Proc.* (5th), *Pleading*, §173) is a late development. "The fact that the plaintiffs might have maintained an action for a part of the relief to which they were entitled, and that in an action for such limited relief no person except Logan could properly be made a defendant, would not justify a change of venue of the action which they have stated in the complaint. The test is to be made by ascertaining who are necessary parties to the action as it is set forth in the complaint, and what parties are necessary in order to enable the plaintiffs to obtain all the relief which is properly included in the prayer for relief made therein." (*Hellman v. Logan* (1905) 148 C. 58, 60, 82 P. 848; see *Delno v. Market Street Ry. Co.* (1944) 63 C.A.2d 489, 499, 147 P.2d 67; *White v. Kaiser-Frazer Corp.* (1950) 100 C.A.2d 754, 760, 224 P.2d 833; *Freedman v. Imperial Cattle Co.* (1952) 112 C.A.2d 593, 597, 246 P.2d 986; *Russello v. Mori* (1957) 153 C.A.2d 828, 833, 315 P.2d 343.)

(2) *Illustrations.* In *Hellman*, plaintiff sued in San Francisco, seeking (a) recovery on a note executed by defendant L, the maker, and sale of stock pledged as security; (b) a judgment that defendant G Corp., which claimed an interest in the pledged stock by reason of a contract with L, be declared to have a lien inferior to plaintiff's lien. Clearly plaintiff could have sued L alone; just as clearly, it was to his interest to join the corporation so as to determine the adverse claim and attract buyers to the pledge sale. (148 C. 60.)

In *Freeman v. Dowling* (1933) 219 C. 213, 25 P.2d 980, plaintiff contractor and defendant D, his partner, were entitled to money from the city of Palo Alto. Plaintiff sued D for an accounting, and joined the city and its administrative officers seeking an injunction against any payments to D. *Held*, venue in Santa Clara County, where Palo Alto is located, was proper. (219 C. 216.)

In *Taff v. Goodman* (1940) 41 C.A.2d 771, 107 P.2d 431, plaintiff sued in Alameda County for personal injuries

inflicted there, naming two defendants. After trial resulting in a disagreement, plaintiff voluntarily dismissed the action and filed a new one in Merced County, this time joining a third defendant, a Merced resident, against whom, it was apparently conceded, a cause of action was stated. All defendants sought a change to Alameda County, contending that, because the action could have been retried in Alameda County, the joinder was obviously made for the sole purpose of trying it in Merced. *Held*, plaintiff had a legal right to dismiss the old action, and then had the usual right to bring a new action in the county of residence of any proper defendant. (41 C.A.2d 775.)

In *Independent Iron Works v. American President Lines* (1950) 35 C.2d 858, 221 P.2d 939, plaintiff sued in San Francisco to quiet title to personal property. He named as defendants two Los Angeles residents who claimed the property, and defendant carrier, a foreign corporation with San Francisco residence. The carrier disclaimed any interest except a possessory lien for freight and storage charges, costs and attorneys' fees. *Held*, the venue was proper. The carrier's claims (the amount or validity of which might be disputed) made it more than a mere stakeholder (see *infra*, §899), and it was a necessary party to a determination of adverse claims to the property. (35 C.2d 861.)

SUPPLEMENT: [This section is current through the latest supplement]



12 of 194 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXV. VENUE: JOINDER RULES

B. Joinder of Defendants.

2. Joinder Proper for Venue Purposes.

b. Reasonable Belief in Cause of Action.

3 *Witkin Cal. Proc. Actions* § 893

[§ 893] Reasonable Belief in Cause of Action.

(1) *Nature of Rule.* A further test of the bona fide character of the joinder is whether the complaint states a cause of action against the joined resident defendant. If it does not, then perhaps it may be concluded that the defendant was not a proper party and that the defendant's joinder was fraudulent and ineffective to determine venue. (See *supra*, §890, and *infra*, §§894, 895.) But an attack on the sufficiency of the complaint to state a cause of action may raise a wide variety of issues of substantive and procedural law that cannot appropriately be considered on a motion for change of venue. The rule is therefore well settled that a motion for change of venue cannot be made to serve the purposes of a general demurrer by searching the complaint for any defect in the statement of a cause of action against the joined resident defendant. (See *supra*, §791.)

Nevertheless the test must remain and must be met if fraudulent joinder is to be prevented. Faced with this perplexing problem the courts have concluded, in effect, that while the objections raised by general demurrer and motion for change of venue may be similar, different considerations govern their determination. A general demurrer will be sustained if the complaint is defective, even though it may be readily corrected by amendment. A motion to change venue, however, will be denied if it appears that the plaintiff has in good faith attempted to state a cause of action against a resident defendant, and if it seems possible to amend to do so. The reason for this distinction is obvious. A general demurrer tests the sufficiency of the complaint, while a motion for change of venue that challenges joinder as improper tests the good faith of the pleader. It is contemplated that the motion for a change of venue will weed out complaints where the defect is so obvious as to indicate fraudulent joinder, but will leave other defective complaints to be dealt with in the normal course on demurrer. (See *Freeman v. Dowling* (1933) 219 C. 213, 216, 25 P.2d 980; *Peiser v. Mettler* (1958) 50 C.2d 594, 603, 328 P.2d 953; *Buerkle v. Superior Court* (1963) 59 C.2d 370, 371, 29 C.R. 509, 379 P.2d 941; *Richmond Terminal Corp. v. Parr Terminal Co.* (1929) 96 C.A. 152, 155, 273 P. 845; *Pacific Coast Auto Assn. v. Ahlf* (1931) 115 C.A. 21, 24, 300 P. 841; *Stokes v. Newsom* (1948) 89 C.A.2d 147, 150, 200 P.2d 17; *Daugherty v. Kaplan* (1955) 131 C.A.2d 567, 570, 281 P.2d 43; *Russello v. Mori* (1957) 153 C.A.2d 828, 830, 315 P.2d 343; *Haines v. Lamb* (1962) 206 C.A.2d 322, 325, 24 C.R. 146, citing the text; *Gutierrez v. Superior Court* (1966) 243 C.A.2d 710, 726, 728, 52 C.R. 592.)

(2) *Illustrations.* The view stated above was taken in the leading case of *McClung v. Watt* (1922) 190 C. 155, 211

P. 17, where the court said: "If the allegations in question did no more than shadow forth the semblance of a cause of action they would be proof against assault upon the ground that they were sham and frivolous." (190 C. 160.) And further: "It is enough, however, upon the hearing and determination of the demand for a change of venue, that the cause of action purported to be stated ... was apparently pleaded in good faith and is not, *prima facie*, so glaringly and vitally defective as to be beyond correction by amendment." (190 C. 161.)

The *McClung* rule was reaffirmed after an exhaustive review of the California cases in *California Collection Agency v. Fontana* (1943) 61 C.A.2d 648, 143 P.2d 507. Plaintiff sued eight corporate directors, to recover corporate funds wrongfully appropriated, in San Francisco, where only one defendant resided. Other defendants, moving for change, filed *affidavits* seeking to show that there was no cause of action against the resident defendant and, on *conflicting affidavits*, the court granted the motion. After noting the difficulty of reconciling the language of the decisions on this question, the court emphatically declared that the trial judge in ruling on a motion for change of venue should not try issues of fact going to the merits of the cause. (61 C.A.2d 653.) "In our opinion the rule, supported by reason and by authority, is that upon the hearing of the motion for change of venue under the circumstances presented here, the real issue for determination by the trial court was whether plaintiff, in joining the resident defendant as a party, had reasonable grounds for the belief in good faith that plaintiff had a cause of action against the resident defendant. If he did, then we do not believe that it may be said that the resident defendant was *improperly* joined as a defendant or was made a defendant *solely* for the purpose of having the action tried in the county of the residence of the resident defendant within the meaning of section 395." (61 C.A.2d 653.)

SUPPLEMENT: [This section is current through the latest supplement]



13 of 194 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXV. VENUE: JOINDER RULES

B. Joinder of Defendants.

3. Joinder Improper for Venue Purposes.

a. In General.

1. Two Tests.

3 Witkin Cal. Proc. Actions § 894

[§ 894] Two Tests.

(1) *Nature of Tests.* Case law has repeatedly stated two distinct grounds for holding the joinder of the resident defendant improper (in the sense that the defendant's residence cannot determine venue): (a) no cause of action is or can be stated against the resident defendant; (b) the resident defendant is not a necessary or interested party (see *supra*, §§892, 893). Both of these extremely uncertain tests are designed to carry out the even more uncertain language of *C.C.P.* 395(a): "If any person is improperly joined as a defendant or has been made a defendant solely for the purpose of having the action tried in the superior court in the county," his or her residence is not to be considered.

(2) *Application.* It is not possible to segregate the cases in accordance with the two tests set forth above, for the second ground is often included in the first, i.e., a typical reason why the resident defendant is not a proper party is that no cause of action is stated against him or her. (See *infra*, §896.) There are only a few situations in which the second ground alone appears to be involved, i.e., a cause of action is stated against the resident defendant, but he or she is not in fact an interested party. Here the inquiry goes beyond the statutory rules of joinder of parties; under *C.C.P.* 395, "improper joinder" is only one reason for disregarding the residence of the joined defendant. The resident defendant may be technically a proper party, but if it can be shown that he or she is not in fact interested in the outcome of the action, or was joined with an actual fraudulent intention of depriving the other defendants of the right to trial at their residence, *C.C.P.* 395 may be invoked. (See *infra*, §898 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]



14 of 194 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXV. VENUE: JOINDER RULES

B. Joinder of Defendants.

3. Joinder Improper for Venue Purposes.

a. In General.

2. Affidavits and Evidence.

3 *Witkin Cal. Proc. Actions* § 895

[§ 895] Affidavits and Evidence.

The application of the two tests (*supra*, §894) would be greatly hampered and the policy easily defeated if the moving defendant were confined, like a demurring defendant, to the face of the complaint; sham, evasive, or general allegations could easily establish the venue. Necessarily, the defendant seeking a change of venue must be permitted to show, by affidavit or evidence at the hearing, the unrevealed circumstances that justify the defendant's motion. The familiar rule that the motion for change is determined by the circumstances at the time of the complaint must not be distorted into the proposition that the motion is decided on the complaint alone. (See *supra*, §789 et seq.) And the equally familiar theory that a motion for a change of venue presents somewhat less of a challenge to the complaint than does a general demurrer (*supra*, §893) is not quite accurate. In going outside the complaint, it presents something more of a challenge.

The point is well stated in *Sourbis v. Rhoads* (1920) 50 C.A. 98, 194 P. 521. After observing that the trial judge cannot determine the merits on a motion (see *supra*, §893), the court said: "The rule, however, does not extend to the point of precluding the real defendants from showing, by affidavits or otherwise, that the plaintiff has actually no cause of action against one of the parties, who was made nominally a defendant but was joined simply for the fraudulent purpose of depriving the real defendants of their right to have the action tried in the place of their residence. ... The same result should follow, if, notwithstanding the sufficiency of the complaint, it can be shown that the claim against the resident defendant is a mere pretense and made only for the purpose of having the action tried in the county where the complaint is filed. If the contention of appellant should prevail, it would enable a plaintiff by fictitiously joining a resident of the county as a defendant with the residents of another county, who are the real defendants in interest, to prevent the latter from having the action tried in the county of their residence. We think it is proper in such proceeding for the court to permit a defendant who is moving for a change of venue to make sufficient showing to convince the court that he, in connection with the plaintiff, is the only real party in interest in the controversy. Of course, the court should exercise a wise discretion in passing upon the question whether the plaintiff has acted fraudulently in joining another party defendant." (50 C.A. 101.)

Other cases are to the same effect. (See *Johnson v. Benton* (1925) 73 C.A. 571, 576, 239 P. 63; *Heringer v. Schumacher* (1928) 88 C.A. 349, 351, 263 P. 550; *South v. Wishard* (1954) 123 C.A.2d 642, 650, 267 P.2d 827 [facts

judicially noticed to determine whether resident defendant was necessary party].) (On binding effect of trial judge's determination where complaint and affidavits are conflicting, see *infra*, §921.)

SUPPLEMENT: [This section is current through the latest supplement]



15 of 194 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXV. VENUE: JOINDER RULES

B. Joinder of Defendants.

3. Joinder Improper for Venue Purposes.

b. No Cause of Action Against Joined Defendant.

1. Insufficiency Appearing From Facts Shown.

3 *Witkin Cal. Proc. Actions* § 896

[§ 896] Insufficiency Appearing From Facts Shown.

Although the trial judge will not undertake a premature consideration of the merits of the action (*supra*, §893), the insufficiency of the case against the resident defendant may appear, incontrovertibly, from undisputed facts. In *Karst v. Seller* (1920) 45 C.A. 623, 188 P. 298, plaintiff alleged that he bought a truck from defendant S, relying on false representations by defendant S and defendant A. Although concededly he could have sued both in tort for damages, his complaint was construed as one for restitution after rescission. *Held*, defendant A, neither a party to the contract nor in privity with the seller, was not liable in this action, and his residence could not justify the venue. (45 C.A. 625.)

In *Heringer v. Schumacher* (1928) 88 C.A. 349, 263 P. 550, plaintiff seller sued defendants M and S in Sacramento, the residence of S, the complaint simply alleging that defendants agreed to buy beans. Defendant M, a resident of San Francisco, moved for change, and by affidavit set out the written contract of sale. This showed, as a matter of law, that S signed solely as agent for M (a disclosed principal), and that M was alone liable as the buyer. Hence, no cause of action could be stated against S, and his residence did not support the venue. (88 C.A. 351.) (See *Johnson v. Benton* (1925) 73 C.A. 571, 575, 239 P. 63 [joinder of agent not liable].)

In *Minyard v. Superior Court* (1967) 248 C.A.2d 633, 56 C.R. 801, plaintiff, a passenger in a taxi in Napa, was injured in a collision. She filed her action in San Francisco against the Napa residents and Yellow Cab Co., a corporation with its principal place of business in San Francisco. The Napa defendants, in uncontradicted affidavits, showed that the cab was owned by defendant M in Napa, and that Yellow Cab Co. did not own or operate it. Mandamus was granted to compel change of venue. Although a cause of action against Yellow Cab was alleged, it was incontrovertibly shown that plaintiff could not prove that Yellow Cab had anything to do with the accident. (248 C.A.2d 637, citing the text.)

SUPPLEMENT: [This section is current through the latest supplement]



16 of 194 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXV. VENUE: JOINDER RULES

B. Joinder of Defendants.

3. Joinder Improper for Venue Purposes.

b. No Cause of Action Against Joined Defendant.

2. Insufficiency Appearing From Pleading.

3 *Witkin Cal. Proc. Actions* § 897

[§ 897] Insufficiency Appearing From Pleading.

The joinder of a party on surmise, with nothing but general allegations in the complaint and no showing by affidavit that the named defendant was connected with the subject of the litigation, will not stand up against a challenge under *C.C.P. 395. Denna v. Red River Lumber Co. (1941) 47 C.A.2d 235, 117 P.2d 689*, is a good illustration. Plaintiffs sued 504 defendants for damages resulting from violence in a Lassen County labor dispute. The action was filed in San Francisco where one defendant allegedly had corporate residence. But evidence at the hearing showed that the corporation had been joined on speculation without any reliable information tending to show its participation in the acts alleged, and that it had ceased doing business several years before the action. (*47 C.A.2d 238*.)

In *Norins Realty Co. v. Consolidated Abstract & Title Guaranty Co. (1947) 80 C.A.2d 879, 182 P.2d 593*, plaintiff sued a nonresident corporation, but, to fix venue in Los Angeles, joined five individual residents, alleging in general terms that they, as stockholders, dominated the corporation, which was their alter ego. *Held*, the complaint was completely lacking in allegations sufficient to justify disregard of the corporate entity, and the joinder, obviously designed to obtain Los Angeles venue, was ineffective for that purpose. (*80 C.A.2d 883*.)

The same view is taken in a rather strict case, *Konnoff v. Fraser (1944) 62 C.A.2d 788, 145 P.2d 368*. Plaintiffs sued a Contra Costa County doctor and hospital for malpractice, but fixed venue in San Francisco by joining two corporations alleged to be the owners of the hospital and employers of the doctor. The trial judge refused to change venue, but the appellate court reversed the order, distinguishing *McClung v. Watt (1922) 190 C. 155, 211 P. 17*, supra, §893, as follows: (a) The complaint did not sufficiently allege liability under the doctrine of respondeat superior; (b) the right to change is determined by conditions revealed by the pleadings at the time of the motion; and (c) it did not appear from either the complaint or plaintiffs' affidavit that a cause of action could be stated against the two corporations. (*62 C.A.2d 792*.)

SUPPLEMENT: [This section is current through the latest supplement]



17 of 194 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXV. VENUE: JOINDER RULES

B. Joinder of Defendants.

3. Joinder Improper for Venue Purposes.

c. Defendant Not Interested Party.

1. Nominal Defendant.

3 Witkin Cal. Proc. Actions § 898

[§ 898] Nominal Defendant.

The simplest application of the interested party test is where one is joined, not because recovery is sought against him or her, but for the reason that he or she might be entitled to relief against the other defendants. The joinder is proper, i.e., one who will not become a plaintiff may be joined as a defendant. (*C.C.P.* 382; see 4 *Cal. Proc.* (5th), *Pleading*, §209.) But he or she is not an interested party defendant entitled to have his or her residence considered in fixing venue, for the other plaintiffs seek no relief against him or her. And it makes no difference whether he or she does or does not wish to share in any recovery. "In either view his attitude will be substantially that of a plaintiff; in the one case that of a plaintiff asserting his right to recover, in the other, that of a plaintiff who waives such right." (*Donohoe v. Wooster* (1912) 163 C. 114, 117, 124 P. 730; see *Stesel v. Santa Ana River Water Co.* (1939) 35 C.A.2d 117, 127, 94 P.2d 1052, *supra*, §828; *Modlin v. Walter's Fur Shop* (1948) 83 C.A.2d 384, 389, 188 P.2d 805.)

SUPPLEMENT: [This section is current through the latest supplement]



18 of 194 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXV. VENUE: JOINDER RULES

B. Joinder of Defendants.

3. Joinder Improper for Venue Purposes.

c. Defendant Not Interested Party.

2. Stakeholder or Other Disinterested Person.

3 *Witkin Cal. Proc. Actions* § 899

[§ 899] Stakeholder or Other Disinterested Person.

Often the plaintiff, seeking the recovery of money or property from a defendant, joins a third party who does not challenge the claim of either. The stakeholder or other disinterested party may be properly joined to protect the plaintiff's rights and to insure realization on the plaintiff's judgment, but this defendant is not interested in the relief sought, and the same protection could be obtained by a restraining order without making the defendant a party. Hence, his or her residence is disregarded for venue purposes. (See *Sayward v. Houghton* (1890) 82 C. 628, 23 P. 120 [action to compel transfer of stock; corporation was joined with prayer that it be restrained from transferring it pending the action]; *Bartley v. Fraser* (1911) 16 C.A. 560, 565, 117 P. 683 [action to rescind contract; escrow holder was joined to keep transaction in status quo pending litigation]; *Smith v. Smith* (1938) 30 C.A.2d 70, 71, 85 P.2d 473 [action to recover debt from defendant individual; stakeholder of stock pledged as security was joined; stakeholder filed disclaimer]; *Hays v. Cowles* (1943) 60 C.A.2d 514, 518, 141 P.2d 26 [action for partnership dissolution and accounting; bank holding deposits of partnership funds and personal property was joined]; *Tomasello v. Tomasello* (1952) 113 C.A.2d 23, 25, 247 P.2d 612 [no prayer for relief against joined defendant, and latter admitted truth of allegations of complaint; hence, there was no controversy between plaintiff and that defendant]; *Gottesfeld v. Richmaid Ice Cream Co.* (1953) 115 C.A.2d 854, 860, 252 P.2d 973 [no relief sought, and complaint and counteraffidavits were evasive; thus, joinder was in bad faith]; but see distinguishable situation in *Independent Iron Works v. American President Lines* (1950) 35 C.2d 858, 862, 221 P.2d 939, *supra*, §892.)

SUPPLEMENT: [This section is current through the latest supplement]



19 of 194 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXV. VENUE: JOINDER RULES

B. Joinder of Defendants.

3. Joinder Improper for Venue Purposes.

c. Defendant Not Interested Party.

3. Fictitious Defendant.

3 Witkin Cal. Proc. Actions § 900

[§ 900] Fictitious Defendant.

Persons may be joined as defendants under fictitious names (e.g., John Doe, First Doe; 4 *Cal. Proc.* (5th), *Pleading*, §478), but are not treated as parties, for the purpose of determining venue, until the complaint is amended to state their true names. If, at the time of the motion for change, the amendment has not yet been made, the residence of a fictitiously named defendant will be disregarded. (*Bachman v. Cathry* (1896) 113 C. 498, 500, 45 P. 814; *Kallen v. Serretto* (1932) 126 C.A. 548, 549, 14 P.2d 917 [where plaintiff first gave name and residence of First Doe in affidavit in opposition to motion, this was too late].)

SUPPLEMENT: [This section is current through the latest supplement]



20 of 194 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXV. VENUE: JOINDER RULES

B. Joinder of Defendants.

3. Joinder Improper for Venue Purposes.

c. Defendant Not Interested Party.

4. Separate Unrelated Causes Against Defendants.

3 Witkin Cal. Proc. Actions § 901

[§ 901] Separate Unrelated Causes Against Defendants.

A plaintiff who has separate causes of action against several defendants may join causes and defendants if they are involved in some transaction alleged; or, if in doubt as to which of several persons is liable, may join them in the alternative on sufficient allegations of doubt. In either situation, all of the defendants are proper parties for venue purposes. (*Dallman Supply Co. v. Sweet* (1948) 86 C.A.2d 780, 783, 195 P.2d 864.) But if the plaintiff pleads distinct, unrelated causes of action against separate defendants, not connected by any transaction and not involving doubt as to which is liable, the joinder is improper. The trial judge may therefore conclude that the resident defendant was joined solely for venue purposes and grant the motion for change. (*San Francisco Milling Co. Ltd. v. Mordecai* (1933) 134 C.A. 755, 760, 761, 26 P.2d 669; see 4 Cal. Proc. (5th), Pleading, §205.)

SUPPLEMENT: [This section is current through the latest supplement]



21 of 194 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXV. VENUE: JOINDER RULES

B. Joinder of Defendants.

4. Joinder of Individual and Corporation.

a. Residence of Either Is Proper.

3 Witkin Cal. Proc. Actions § 902

[§ 902] Residence of Either Is Proper.

The general rules governing the joinder of defendants and the effect of the joinder on venue apply whether the defendants are individuals or corporations. Hence, if a cause of action is stated against both, and the joinder is in conformity with the statutes, the plaintiff may fix the venue at the residence of either the individual or the corporation. (See *Hale v. Bohannon* (1952) 38 C.2d 458, 472, 241 P.2d 4 [dictum]; *Aisbett v. Paradise Mountain Mining & Milling Co.* (1913) 21 C.A. 267, 270, 131 P. 330; *Winterburn v. Sheriff* (1923) 61 C.A. 531, 535, 215 P. 406; *Dreher v. Fidelity & Cas. Co. of New York* (1957) 148 C.A.2d 695, 700, 307 P.2d 407, citing the text; *Dillman v. Superior Court* (1962) 205 C.A.2d 769, 772, 23 C.R. 498, quoting the text; 44 Cal. L. Rev. 704.)

SUPPLEMENT: [This section is current through the latest supplement]



22 of 194 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXV. VENUE: JOINDER RULES

B. Joinder of Defendants.

4. Joinder of Individual and Corporation.

b. County Where Neither Resides Is Improper.

3 *Witkin Cal. Proc. Actions* § 903

[§ 903] County Where Neither Resides Is Improper.

(1) *General Rule.* A special problem arises in the joinder of individual and corporate defendants when the plaintiff sues in a county in which neither defendant resides, but which is one of the four other places in which a corporation may be sued (*supra*, §849). The individual defendant may obtain a change. The theory is that although the plaintiff may sue a corporation on a transitory cause where the contract is breached or the liability arises, the plaintiff loses or "waives" this privilege when the plaintiff joins an individual defendant. Joinder of the individual restricts the plaintiff to residence venue, i.e., the residence of either defendant.

In *Walker v. Wells Fargo Bank & Union Trust Co.* (1937) 24 C.A.2d 220, 74 P.2d 849, plaintiff brought an action in Contra Costa County on a transitory cause against a corporation, located in San Francisco, and R, residing in Alameda County. Concededly, R could have demanded a change to Alameda; instead R and the corporation moved for change to San Francisco. *Held*, this was proper; where an individual defendant has the right to elect a change of venue to his or her residence, the defendant may alternatively elect to change venue to the residence of a corporate codefendant, for C.C.P. 395 allows venue in the county in which the defendants "or some of them" reside. (24 C.A.2d 222.) (See *Pacific Bal Industries v. Northern Timber* (1953) 118 C.A.2d 815, 828, 259 P.2d 465; *J.C. Millett Co. v. Latchford-Marble Glass Co.* (1956) 144 C.A.2d 838, 840, 301 P.2d 914, quoting the text; 44 Cal. L. Rev. 704.)

The same rule applies where the business entity joined is an unincorporated association. (See *Mosby v. Superior Court* (1974) 43 C.A.3d 219, 226, 117 C.R. 588.) In *Carruth v. Superior Court* (1978) 80 C.A.3d 215, 145 C.R. 344, a physician sued an attorney and his law partnership in San Diego County for alleged malicious prosecution of a medical malpractice action there. Defendants moved to change venue to Fresno County, where all the partners resided. The trial judge denied the motion. *Held*, mandamus granted to compel change of venue. The partnership could be sued alone in San Diego County under C.C.P. 395.5 (*supra*, §849), but an individual, joined with the partnership as a defendant, is entitled to a change of venue. (80 C.A.3d 220, citing the text.)

This rule was reaffirmed, although found inapplicable on the facts, in *United Pac. Ins. Co. v. Superior Court* (1967) 254 C.A.2d 897, 62 C.R. 737. Plaintiff brought an action for wrongful attachment against J, H (J's assignee for collection), and United Corp. (surety on the attachment bond). The action was filed in Sutter County where the

attachment had occurred. J and H were residents of Alameda County, and would normally have moved to change venue. To avoid this, plaintiff served United alone; United moved for change of venue but its motion was denied for a technical defect. Plaintiff then served J and H, who also moved for change of venue and lost. On this aspect of the facts, the court observed: "The tactic of delayed service may not be utilized to obfuscate the position of the defendants. We take the position that both motions for change of venue were properly supported and both are now before us." (254 C.A.2d 898.) On the merits, however, defendant's petitions for mandamus were denied, on the following analysis:

(a) The liability arose in Sutter County where the allegedly wrongful levy took place, and United could be sued there. (254 C.A.2d 900.)

(b) The individual defendants would have been entitled to a transfer to Alameda County, their residence, but their motion sought a transfer to San Francisco, assertedly the corporation's principal place of business, and that also would have been proper under *Walker*. (254 C.A.2d 900.)

(c) However, the affidavit did not establish San Francisco residence of United. It merely stated that the directors of this Washington corporation had by resolution designated San Francisco as its principal office in northern California, and made no reference to a "principal office" certificate. "California's partition into northern and southern sectors is recognized in vernacular usage but not in the state's venue laws." (254 C.A.2d 900.)

(2) *Exception: Where Individual Is Alter Ego of Corporation.* In *Lebastchi v. Superior Court* (1995) 33 C.A.4th 1465, 39 C.R.2d 787, plaintiff, the lessor under a commercial real property lease, sued defendant lessees, a corporation and an individual alleged to be the corporation's alter ego, for breach of the lease. The action was filed in San Diego County, where the lease was allegedly executed, to be performed, and breached (see C.C.P. 395.5, *supra*, §849). However, defendant corporation's principal place of business was in Sacramento County, and defendant individual resided in Placer County. Defendant individual, claiming that the action named both a corporation and an individual as defendants and was thus a mixed venue action with conflicting venue provisions, moved to change venue to his residence in Placer County pursuant to C.C.P. 395(a) (see *supra*, §834). The trial judge denied the motion, and defendant individual petitioned for a writ of mandamus. *Held*, the petition was denied.

(a) The action was transitory and thus was subject to the specific venue provisions for breach of contract (C.C.P. 395(a), 395.5). (33 C.A.4th 1470.)

(b) The action was not a "mixed action," that is, one in which the complaint contains two or more causes of action, each of which might have been separately filed, and one of which is local and another transitory. Rather, plaintiff joined two defendants, one natural and one corporate, with different residences in a single transitory action, and sought to hold both liable for the same breach and damages. (33 C.A.4th 1470, citing the text.)

(c) The effect of plaintiff's alter ego allegations placed defendant individual in the same position as defendant corporation, i.e., responsible under the contract. Defendant individual did not declare otherwise or claim improper joinder. (33 C.A.4th 1470, citing the text; see 9 *Summary* (10th), *Corporations*, §9.) Thus, the expanded venue provisions for breach of contract under C.C.P. 395(a) and 395.5 were properly applied to him. (33 C.A.4th 1471.)

SUPPLEMENT: [This section is current through the latest supplement]



23 of 194 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXV. VENUE: JOINDER RULES

B. Joinder of Defendants.

5. Joinder of Private and Governmental Defendants.

3 *Witkin Cal. Proc. Actions* § 904

[§ 904] Joinder of Private and Governmental Defendants.

(1) *Joinder of State and Corporation.* The joinder of the state with a corporation as defendants may be a waiver by the plaintiff of the right to select corporation venue (*supra*, §849). *Govt.C.* 955.2, establishing venue in a personal injury or death action in the county of injury, "[n]otwithstanding any other provision of law," takes precedence. (*California v. Superior Court (Fuller)* (1967) 252 *C.A.2d* 637, 643, 60 *C.R.* 653; see *Govt.C.* 955.3 [containing similar language].)

(2) *Joinder of Individual and County.* In *Channell v. Superior Court* (1964) 226 *C.A.2d* 246, 38 *C.R.* 13, plaintiffs were injured in an automobile accident by the concurring negligence of defendant M (driving) and defendant Placer County (maintaining stop sign). The defendants were joined in an action in Sacramento County, M's residence. Placer County obtained a change of venue to its county under *C.C.P.* 394, providing that a negligence action against a county "shall be tried in such county." (See *supra*, §871.) *Held*, mandamus was granted to compel a trial in Sacramento. Where local and transitory causes are joined, residence venue prevails, and the policy underlying *C.C.P.* 394 does not require a different rule. (226 *C.A.2d* 251, 252.) A strong dissent argued that *C.C.P.* 394 expresses a controlling legislative policy protecting cities and counties from forced subjection to negligence trials in other parts of the state by reason of the tactical choice of a private litigant.

The *Channell* reasoning and holding are no longer the law. In *Delgado v. Superior Court* (1977) 74 *C.A.3d* 560, 141 *C.R.* 528, plaintiffs sued in Sacramento County for personal injuries and wrongful death arising out of a collision of their car with a Yolo County sheriff's car in Yolo County. Defendants named were the Sacramento seller of the car, the manufacturer of the car, and the County of Yolo. Yolo County moved for change of venue to Yolo and the Sacramento court granted the motion. *Held*, the order was proper.

(a) At the time of the *Channell* decision, *C.C.P.* 395 began with the words: "In all other cases, except as in this section otherwise provided." The *Channell* majority held that this gave the section's *residence* venue provisions predominance or at least equality with the local venue provisions of *C.C.P.* 394. (74 *C.A.3d* 564.)

(b) Whether this was the correct interpretation is no longer important, for a 1970 amendment changed the opening statement to read: "Except as otherwise provided by law." This amendment is a subordinating declaration, requiring an interpretation in accord with the dissent in *Channell*; i.e., it means that *C.C.P.* 395 is to be applied only when there is no

other applicable venue provision. Here, there is such a provision--*C.C.P. 394*--and it requires transfer of the action to *Yolo County*. (74 C.A.3d 564.) (See *Central Contra Costa Sanitary Dist. v. Superior Court* (1978) 84 C.A.3d 702, 705, 148 C.R. 801 [following *Delgado*].)

SUPPLEMENT: [This section is current through the latest supplement]



24 of 194 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXVI. CHANGE OF VENUE

A. In General.

1. Right To Change.

a. Statutory Grounds.

3 Witkin Cal. Proc. Actions § 905

[§ 905] Statutory Grounds.

(1) *General Statute.* The basic statute is *C.C.P.* 397, which provides that the court may, on motion, change the place of trial in the following cases:

- (a) When the court designated in the complaint is not the proper court. (*C.C.P.* 397(a); see *infra*, §922 et seq.)
- (b) When there is reason to believe that an impartial trial cannot be had. (*C.C.P.* 397(b); see *infra*, §§955, 956.)
- (c) When the convenience of witnesses and the ends of justice would be promoted by the change. (*C.C.P.* 397(c); see *infra*, §940.)
- (d) When from any cause there is no judge of the court qualified to act. (*C.C.P.* 397(d); see *infra*, §957.)
- (e) In proceedings for dissolution of marriage, to the respondent's residence "when the ends of justice would be promoted by the change." (*C.C.P.* 397(e); see *supra*, §811.) (See *C.E.B.*, 2 Civil Proc. Before Trial 4th, Chap. 20; *Cal. Civil Practice*, 2 Procedure, §10:64 et seq.; *Rutter Group*, Civil Proc. Before Trial §3:549 et seq.; 77 *Am.Jur.2d* (2006 ed.), *Venue* §47 et seq.; on change of venue under federal law, see 64 *Harv. L. Rev.* 1347.)

(2) *Special Statutes.* There are, however, several special sections that provide for change of venue on motion on additional grounds:

- (a) *Action by or against city, county, or local agency.* Venue may be changed to a neutral county. (See *supra*, §871 et seq., and *infra*, §958.)
- (b) *Action by or against state, state agency, or officer.* Venue may be changed to a city in which the Attorney General has an office. (See *supra*, §862 et seq.)
- (c) *Proceedings under Family Code where parties have moved.* The court may transfer a proceeding for "dissolution or nullity of marriage or legal separation of the parties under the Family Code" to the county of residence

of either party (1) where both the petitioner and the respondent have moved from the county rendering the decree and (2) "when the ends of justice and the convenience of the parties would be promoted by the change." (*C.C.P.* 397.5.) (See 23 Cal. Law Rev. Com. Reports, p. 13; 3 *Pacific L. J.* 337; 11 *Summary* (10th), *Husband and Wife*, §§73, 146, 170.)

SUPPLEMENT: [This section is current through the latest supplement]



25 of 194 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXVI. CHANGE OF VENUE

A. In General.

1. Right To Change.

b. Defendant's Right and Court's Discretion.

3 Witkin Cal. Proc. Actions § 906

[§ 906] Defendant's Right and Court's Discretion.

(1) *Change on Ground of Wrong Court.* Change on the ground of wrong court is often said to be mandatory, but the theoretical right to a trial in the proper county is severely limited in practice by a number of factors:

(a) The right may be lost by the failure to follow the statutory procedure of a timely motion supported by affidavits and points and authorities, or by the failure to exercise diligence in bringing the motion to a hearing. (See *infra*, §§925, 926, 933, 934.)

(b) A sufficient and timely motion may be defeated by a good countermotion to retain the case for the convenience of witnesses. (See *infra*, §946.)

(c) The plaintiff may defeat the right of the real defendant by a tactical joinder of a temporary defendant who is later eliminated by a dismissal or an amendment. (See *supra*, §891.)

(d) The burden of proof is on the moving party (see *infra*, §912), and the trial judge may defeat the right by an adverse decision on issues that control the venue; e.g., the nature and principal object of the action, the sufficiency of the statement of the cause of action against the joined defendant, the residence of party (see *infra*, §921).

(2) *Change on Other Grounds.* Change of venue on the grounds of convenience of witnesses and impartial trial is discretionary with the trial judge. (See *infra*, §§948, 956.) The same is true of change to the respondent's residence in a proceeding for dissolution of marriage. (See *supra*, §§810, 811.)

SUPPLEMENT: [This section is current through the latest supplement]



26 of 194 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXVI. CHANGE OF VENUE

A. In General.

2. Motion.

a. Necessity of Motion.

3 *Witkin Cal. Proc. Actions* § 907

[§ 907] Necessity of Motion.

(1) *In General.* The four major grounds specified in *C.C.P.* 397 (*supra*, §905) are invoked by a written notice of motion, but other procedural steps are not identical; the differences are noted in subsequent sections. (See *infra*, §§922 et seq., 940 et seq., 955.)

(2) *Limited Civil Cases.* *C.C.P.* 396a is a special statute that creates an exception to the requirement of a motion by a party in the following limited civil cases:

(a) Unlawful detainer. (See *supra*, §795.)

(b) Actions on installment contracts under the Unruh Act and the Rees-Levering Act. (See *supra*, §845.)

(c) Actions on consumer obligations. (See *supra*, §846.)

In these actions, the plaintiff must file a verified complaint or affidavit showing that the action was commenced in the proper superior court and in the proper court location within the superior court for the trial of the action. The failure to file requires dismissal without prejudice. (*C.C.P.* 396a(a).) If the complaint or affidavit is filed, but shows that the action was not commenced in the proper court or court location for the trial, the court, on its own motion or on the motion of the defendant, must transfer the action to the proper court unless the defendant consents to venue in the original court. (*C.C.P.* 396a(b).) (On limited civil cases, see *supra*, §783.)

SUPPLEMENT: [This section is current through the latest supplement]



27 of 194 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXVI. CHANGE OF VENUE

A. In General.

2. Motion.

b. No Waiver by Subsequent Procedural Steps.

3 *Witkin Cal. Proc. Actions* § 908

[§ 908] No Waiver by Subsequent Procedural Steps.

A defendant who makes a timely motion in proper form does not waive the right to change venue by filing additional pleadings, by amending pleadings, or by making motions relating to pleadings, so long as the defendant does not actually consent to a trial in the wrong court. In *Gallo v. Boyle Mfg. Co.* (1939) 30 C.A.2d 653, 86 P.2d 1067, a motion for change was denied, defendant appealed, and, while the appeal was pending, filed an amended answer and cross-complaint. "It would be a harsh rule to imply a waiver of the asserted right to a change of venue, merely because a defendant followed the statutory requirement of protecting his right to a defense on the merits by filing an answer and a cross-complaint, pending the determination of his appeal from an order denying the transfer of the case. Such a construction of the law would amount to a virtual denial of the right of appeal from an order wrongfully refusing to change the place of trial." (30 C.A.2d 655.)

Other cases are to the same effect. (See *Wood, Curtis & Co. v. The Herman Mining Co.* (1903) 139 C. 713, 717, 73 P. 588 [motion to strike parts of complaint filed with demurrer and motion for change of venue]; *Pittman v. Carstenbrook* (1909) 11 C.A. 224, 229, 104 P. 699 [filing of amended demurrer prior to hearing on motion]; *Goss v. Brown* (1923) 64 C.A. 381, 383, 221 P. 683 [cross-complaint filed at time of answer and notice of motion for change]; *Bloom v. Oroville-Wyandotte Irr. Dist.* (1939) 34 C.A.2d 102, 104, 93 P.2d 164 [motion to dissolve temporary restraining order and motion to quash writ of mandamus].)

SUPPLEMENT: [This section is current through the latest supplement]



28 of 194 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXVI. CHANGE OF VENUE

A. In General.

3. Who May Move for Change.

a. Where Ground Is Wrong Court.

3 Witkin Cal. Proc. Actions § 909

[§ 909] Where Ground Is Wrong Court.

(1) *General Rule: Any Defendant May Make Motion.* The basis of the motion for change because of nonresidence is that none of the defendants resides in the county where the action is brought, for the residence of one would make the venue proper. But, despite some confusion in earlier cases, it is settled that any one of the defendants may make the motion on that ground without the others joining or consenting. (*Brown v. Happy Valley Fruit Growers* (1929) 206 C. 515, 521, 274 P. 977, supra, §829; *Sims v. Mains* (1933) 131 C.A. 307, 310, 21 P.2d 447; *Hubbard v. Mt. Raymond Mining Co.* (1939) 33 C.A.2d 474, 477, 93 P.2d 95 [Supreme Court withholds approval from statement that motion could be denied for failure of all defendants to join]; *Goossen v. Clifton* (1946) 75 C.A.2d 44, 50, 170 P.2d 104 ["Where a change is sought on the ground that none of the defendants reside in the county of the *forum*, some of the defendants may apply for a change without joining all of the defendants if they show that none of defendants reside in the county of the *forum*"].)

The rule is the same where some of the defendants go further and, not only do not join, but actually oppose the motion and seek to have the venue unchanged. "The consent of certain defendants not residing in the county where the action is brought could not take away from the defendants who did not reside there the right to have the cause transferred to the county of their residence." (*Wood, Curtis & Co. v. The Herman Mining Co.* (1903) 139 C. 713, 716, 73 P. 588.)

A proper party defendant may move, despite his or her insolvency or pending bankruptcy proceedings, if there has been no stay by the bankruptcy court or substitution of the trustee. (*Woods v. Berry* (1931) 111 C.A. 675, 680, 296 P. 332.)

(2) *Distinctions.* Of course, the motion may be made only by an actual party defendant, and not by a stranger purporting to identify himself or herself as a fictitiously named defendant. (*Liera v. Los Angeles Finance Co.* (1950) 99 C.A.2d 254, 257, 221 P.2d 737.) A cross-defendant named in a compulsory cross-complaint also may not seek a change of venue. (*K.R.L. Partnership v. Superior Court* (2004) 120 C.A.4th 490, 503, 15 C.R.3d 517 [question of first impression].) And, although a good motion is made by a party entitled to make it, the court may refuse to rule on it where the moving party is in contempt for violating a prior order. (*Ross v. Ross* (1941) 48 C.A.2d 72, 77, 119 P.2d 444.)

SUPPLEMENT: [This section is current through the latest supplement]



29 of 194 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXVI. CHANGE OF VENUE

A. In General.

3. Who May Move for Change.

b. Where Ground Is Impartial Trial.

3 Witkin Cal. Proc. Actions § 910

[§ 910] Where Ground Is Impartial Trial.

In *People v. Ocean Shore R.* (1938) 24 C.A.2d 420, 75 P.2d 560, the State Department of Public Works sued over 30 defendants in San Mateo County to condemn land for a highway. Defendant corporation was granted a change of venue on the ground of local prejudice against it. In affirming the order, the court rejected the view of a few other states that requires all codefendants to join in the motion. It also rejected the contention that, because C.C.P. 398 requires unanimous agreement where the parties choose the new court, similar unanimous consent is required for the motion itself. The case applies the rule governing a single defendant's right to move on the ground of wrong county. "The right of a defendant to have the action tried in the county where the land is situated or where some of the defendants reside is no higher nor entitled to more protection than is his right to have it tried where an impartial trial may be had. An impartial trial means a trial impartial as to all litigants therein. If one litigant cannot secure an impartial trial in that county, his right to a transfer to a neutral county cannot be defeated by the failure or refusal of his codefendants to join with him in his demand therefor. Nor is there any reason why his codefendants, against whom, or as to whose cause, there may exist no prejudice, should be required to join in demanding a right which does not affect them. To hold otherwise would, in many instances, operate as a denial of justice." (24 C.A.2d 424; see 26 Cal. L. Rev. 716.)

SUPPLEMENT: [This section is current through the latest supplement]



30 of 194 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXVI. CHANGE OF VENUE

A. In General.

3. Who May Move for Change.

c. Motion by Plaintiff.

3 Witkin Cal. Proc. Actions § 911

[§ 911] Motion by Plaintiff.

It has been indicated that the plaintiff, who fixes ("lays") the venue by his or her own complaint, is ordinarily bound by that choice. (See dictum in *Cook v. Pendergast* (1882) 61 C. 72, 79 ["The *plaintiff* can not move to change the place of trial on the ground that he has brought the action in the wrong county"].)

However, the plaintiff as well as the defendant has a right to an impartial trial, and, having commenced an action in the county of proper venue, ought to be entitled to move for a change on that ground. (See *infra*, §955.) The plaintiff's right is also clear where the ground is the convenience of the witnesses, for the plaintiff may either file in the right county and move for a change, or file in the wrong county and countermove to retain. (See *Grewell v. Walden* (1863) 23 C. 165, 168 [plaintiff's motion]; *Carruthers v. Crown Products Co.* (1948) 89 C.A.2d 326, 327, 200 P.2d 819 [same]; *infra*, §946.)

SUPPLEMENT: [This section is current through the latest supplement]



31 of 194 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXVI. CHANGE OF VENUE

A. In General.

4. Burden of Proof on Moving Party.

a. In General.

3 *Witkin Cal. Proc. Actions* § 912

[§ 912] In General.

(1) *Wrong Court*. Because the statute prescribes the venue and gives the defendant a right to a change for wrong court, it could be argued that the plaintiff, if challenged, should justify the venue, particularly where a transitory action is filed outside the "normal" venue (the county of defendant's residence). But the theory is that the plaintiff "lays" the venue by the form and content of the complaint, which gives the name of the county, and it is for the defendant to overcome this prima facie showing. In all motions based on the ground of wrong court, therefore, the defendant has the burden of proof to sustain the motion, e.g., by showing that the defendant is not a resident of the county, or, where parties are joined, that the resident defendant is not an interested party. (See *Hearne v. De Young* (1896) 111 C. 373, 376, 43 P. 1108; *Lakeside Ditch Co. v. Packwood Canal Co.* (1920) 50 C.A. 296, 306, 195 P. 284 ["The presumption is, in the absence of an affirmative showing in that particular, that the county in which the title of the action shows that it is brought is, *prima facie*, the proper county"]; *Yellow Mfg. Acceptance Corp. v. Stoddard* (1949) 93 C.A.2d 301, 303, 208 P.2d 1040; *Sequoia Pine Mills v. Superior Court* (1968) 258 C.A.2d 65, 67, 65 C.R. 353, *infra*, §927.)

The rule is the same where the defendant is a corporation; it has the burden of negating all of the five bases of possible venue, and not merely that of corporate residence. (See *Rowe v. Policy Holders Life Ins. Assn.* (1933) 131 C.A. 339, 344, 21 P.2d 443; *Swartz v. California Olive Growers' Packing Corp.* (1942) 56 C.A.2d 168, 172, 133 P.2d 20; *Shores v. Chip Steak Co.* (1955) 130 C.A.2d 620, 623, 279 P.2d 591; *Quick v. Corsaro* (1960) 180 C.A.2d 831, 835, 4 C.R. 674, *infra*, §932; *Kupersmith v. San Francisco Shippers* (1960) 181 C.A.2d 144, 146, 5 C.R. 123; *Shida v. Japan Food Corp.* (1960) 185 C.A.2d 443, 447, 8 C.R. 271, *supra*, §859; *Los Angeles City School Dist. v. Redwood Empire Title Co. of Mendocino* (1962) 206 C.A.2d 398, 404, 23 C.R. 662, citing the text; *Smith v. Stanford Research Institute* (1963) 212 C.A.2d 750, 754, 28 C.R. 481, *supra*, §858.)

In *Konig v. Associated Almond Growers of Paso Robles* (1940) 37 C.A.2d 360, 99 P.2d 678, plaintiff sued defendant corporation in San Luis Obispo County for breach of contract and for an accounting. Defendant moved for change of venue to Santa Barbara County, making the necessary showing of its corporate residence there. Plaintiff made no showing, i.e., his complaint contained no allegations to establish venue, nor did he file affidavits. *Held*, the motion was correctly denied, for the venue, "laid" by the title of the action, was good unless the corporation negated all the constitutional bases of venue. (37 C.A.2d 365.)

(2) *Other Grounds*. The burden is also on the moving party to establish the other grounds, e.g., convenience of witnesses, impossibility of impartial trial. (*J.I. Case Threshing Machine Co. v. Copren Bros. (1917) 35 C.A. 70, 75, 169 P. 443* [impartial trial]; *Stockton v. Ellingwood (1926) 78 C.A. 117, 121, 248 P. 272* [countermotion for convenience of witnesses]; for burden on review, see *infra*, §921.)

SUPPLEMENT: [This section is current through the latest supplement]



32 of 194 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXVI. CHANGE OF VENUE

A. In General.

4. Burden of Proof on Moving Party.

b. Stipulation To Grant Motion.

3 *Witkin Cal. Proc. Actions* § 913

[§ 913] Stipulation To Grant Motion.

(1) *General Rule.* Attorneys may make binding stipulations on a great many matters of procedure, and, where no public policy is opposed, may waive procedural rights. (See *Brock v. Superior Court* (1947) 29 C.2d 629, 634, 177 P.2d 273 [dictum: "the parties may stipulate as to venue"]; 1 *Cal. Proc.* (5th), *Attorneys*, §271 et seq.) But in *La Mirada Community Hosp. v. Superior Court* (1967) 249 C.A.2d 39, 57 C.R. 42, the court reached the surprising conclusion that a stipulation could not relieve the moving party of the burden of proof in moving to change venue. S filed an action for breach of contract in Orange County against L Corp. and L partnership. Defendants moved for change of venue to Los Angeles County, asserting that both the corporation and partnership had their principal place of business there and the contract was made and performable there. The parties stipulated that the motion be granted, and the Orange County superior court made an order reciting that the transfer was made on the stipulation. Plaintiff failed to pay the costs of transfer and, after 1 year, defendants moved to dismiss under former C.C.P. 581b. The lower court denied the motion because new affidavits showed that some individual defendants were Orange County residents at the time the action was commenced. Defendants sought mandamus to compel dismissal. *Held*, writ denied.

(a) Neither the notice of motion for change of venue nor the declaration negated the individual partners' Orange County residence; hence, the burden of proof was not met. (249 C.A.2d 42.)

(b) The order granting the motion was therefore not based on an appropriate statutory ground, but only on the stipulation. (249 C.A.2d 43.)

(c) Former C.C.P. 581b required dismissal where the action was not commenced in the proper court and, after transfer, the plaintiff failed to pay transfer costs. (249 C.A.2d 43; for current law, see C.C.P. 399, *infra*, §§936, 938.) Here, the order was not made on an appropriate statutory ground, and the action was commenced in the proper court. In denying the motion to dismiss, the lower court for the first time considered and determined the issue of venue, and its determination was correct. (249 C.A.2d, 43, 44.)

A vigorous dissent challenged the reasoning and conclusion of the majority. (a) The order based on the stipulation was binding under the theory of cases holding orders valid despite insufficiency of the affidavits. (249 C.A.2d 45; see

infra, §926.) (b) The stipulation, not illegal or contrary to public policy, eliminated the necessity of passing on the merits of the motion. (249 C.A.2d 48.)

(2) *Effect on Award of Costs and Attorneys' Fees.* An offer to stipulate, reasonably made and rejected, may be considered in determining whether to award costs and attorneys' fees incurred in making or resisting the motion. (C.C.P. 396b(b), infra, §937.)

SUPPLEMENT: [This section is current through the latest supplement]



33 of 194 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXVI. CHANGE OF VENUE

A. In General.

5. Effect of Motion: Suspension of Trial Court's Powers.

a. General Rule.

3 Witkin Cal. Proc. Actions § 914

[§ 914] General Rule.

The timely filing of a motion for change in proper form on the ground of wrong court suspends the court's jurisdiction to act. While the motion is pending, the court's power is limited to hearing and determining the motion, and it cannot take other judicial action in the case. (See *Riverside v. Superior Court* (1968) 69 C.2d 828, 831, 73 C.R. 386, 447 P.2d 626 [mandamus issued to compel setting aside of temporary restraining order and order to show cause]; *Pickwick Stages System v. Superior Court* (1934) 138 C.A. 448, 449, 32 P.2d 433 [mandamus issued to compel lower court to set aside order overruling demurrer made after motion was filed; motion "operates as a *supersedeas* or stay of proceedings, and must be disposed of before any other steps can be taken"]; *Beard v. Superior Court* (1940) 39 C.A.2d 284, 286, 102 P.2d 1087 [prohibition issued to restrain court from enforcing order for attorneys' fees and costs in filiation proceeding while motion was pending]; *Oakland v. Darbee* (1951) 102 C.A.2d 493, 503, 227 P.2d 909 [dictum: "The reason for the suspension of such powers of the court is that if a defendant is entitled to have his motion for change of venue granted, he is entitled to have such matters heard before the court of the county of his residence; also, in respect to the pleadings, the motion for transfer must be decided upon the basis of their status as of the date of the filing of notice of the motion"]; *Moore v. Powell* (1977) 70 C.A.3d 583, 587, 138 C.R. 914, citing the text.)

SUPPLEMENT: [This section is current through the latest supplement]



34 of 194 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXVI. CHANGE OF VENUE

A. In General.

5. Effect of Motion: Suspension of Trial Court's Powers.

b. Exceptions.

3 *Witkin Cal. Proc. Actions* § 915

[§ 915] Exceptions.

Although the rule stated in the preceding section is strictly followed where the challenged act deals with the merits of the case, certain ancillary steps authorized by statute may be taken despite the pendency of the motion:

(1) *Severance*. A motion to transfer to a neutral county under *C.C.P.* 394 does not prevent the court from concurrently ordering the transfer and a severance of the action under *C.C.P.* 1048. (*Oakland v. Darbee* (1951) 102 C.A.2d 493, 502, 227 P.2d 909; *Pfefferle v. Lastreto* (1962) 206 C.A.2d 575, 580, 23 C.R. 834 [following *Oakland*]; *Adams v. Superior Court* (1964) 226 C.A.2d 365, 368, 38 C.R. 164, *infra*, §958.)

(2) *Ancillary Orders in Dissolution of Marriage or Legal Separation Proceedings*. Ancillary orders may be made in a proceeding for dissolution of marriage or legal separation. The court, prior to determining the motion, may "consider and determine motions for allowance of temporary spousal support, support of children, and counsel fees and costs, and motions to determine custody of and visitation with children, and make all necessary and proper orders in connection therewith." (*C.C.P.* 396b(c); see *C.C.P.* 397(e) [similar coverage except that *C.C.P.* 397 adds restraining orders to the list, but fails to mention legal separation]; *Ross v. Ross* (1941) 48 C.A.2d 72, 77, 119 P.2d 444 [court may refuse to decide motion for change while defendant is in contempt of order to pay fees and costs]; *Stutsman v. Stutsman* (1947) 79 C.A.2d 81, 83, 178 P.2d 769 [*C.C.P.* 396b(c) interpreted to authorize placing minor children in temporary custody under order for their support].)

It was formerly held that, despite the pendency of the motion, the plaintiff could have a voluntary dismissal entered by the clerk under *C.C.P.* 581. (See *Prendergast v. Mitchell-Silliman Co.* (1924) 65 C.A. 456, 459, 224 P. 243.) But *C.C.P.* 581 now prohibits voluntary dismissal when there is a motion pending for transfer under *C.C.P.* 396b. (*C.C.P.* 581(i); see 6 *Pacific L. J.* 226; 6 *Cal. Proc.* (5th), *Proceedings Without Trial*, §291.)

It also was formerly held that *C.C.P.* 396b(c) was restricted to dissolution of marriage and legal separation; the court had no power to make an award of support money, attorneys' fees, and costs pending the motion in a proceeding to enforce a parent's duty to support a child. (*Beard v. Superior Court* (1940) 39 C.A.2d 284, 286, 102 P.2d 1087.) However, *Thompson v. Thames* (1997) 57 C.A.4th 1296, 67 C.R.2d 695, upheld the trial judge's reservation of

jurisdiction to order child support in a paternity proceeding under the Uniform Parentage Act in which a motion to change venue was pending, and criticized *Beard* as "wrongly decided." (57 C.A.4th 1304.) The Legislature subsequently abrogated the *Beard* holding. C.C.P. 396b(c) now additionally applies to proceedings under the Uniform Parentage Act and further authorizes the court to consider motions to determine custody and visitation prior to determining the motion for a change of venue.

SUPPLEMENT: [This section is current through the latest supplement]



35 of 194 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXVI. CHANGE OF VENUE

A. In General.

6. Effect of Order Granting Change.

3 *Witkin Cal. Proc. Actions* § 916

[§ 916] Effect of Order Granting Change.

"The court to which an action or proceeding is transferred ... shall have and exercise over the same the like jurisdiction as if it had been originally commenced therein, all prior proceedings being saved, and the court may require amendment of the pleadings, the filing and service of amended, additional, or supplemental pleadings, and the giving of notice, as may be necessary for the proper presentation and determination of the action or proceeding in the court." (*C.C.P.* 399(c).) The effect of this section is as follows:

(1) *New Court Takes Jurisdiction.* The new court takes jurisdiction over the action and all matters and proceedings incidental to it. Thus, where a change of venue in the main action is granted, an incidental proceeding on a third-party claim under former *C.C.P.* 689 (now *C.C.P.* 720.110 et seq.; see 8 *Cal. Proc.* (5th), *Enforcement of Judgment*, §364 et seq.) is also transferable. (*Retailers' Credit Assn. of Sacramento v. Superior Court* (1937) 19 *C.A.2d* 457, 460, 65 *P.2d* 937.)

(2) *Old Court Loses Jurisdiction.* The old court loses jurisdiction, and prohibition will lie to prevent trial there. (*Chase v. Superior Court* (1908) 154 *C.* 789, 792, 99 *P.* 355; *Refrigeration Discount Corp. v. Superior Court* (1949) 91 *C.A.2d* 295, 296, 204 *P.2d* 932.) But the court may consider and grant a motion to vacate the order under *C.C.P.* 473. (See *Badella v. Miller* (1955) 44 *C.2d* 81, 86, 279 *P.2d* 729 [disapproving contrary implications in *Refrigeration* case].)

(3) *No Voluntary Dismissal.* The plaintiff cannot evade the decision by voluntary dismissal and filing of a new action. In *Karst v. Seller* (1920) 45 *C.A.* 623, 188 *P.* 298, plaintiff sued defendant in Los Angeles; defendant obtained a change of venue to San Francisco, his residence. Then plaintiff dismissed, and filed a new action in Los Angeles on the same cause of action, this time joining A and W, defendants residing in the county. S again obtained a change of venue to San Francisco, presumably on the ground that the joinder was improper. Plaintiff then filed a third action against S and A, based on the same facts. *Held*, plaintiff was "estopped" by the last order granting the change of venue. "[A] defendant, having been determined to be an improper party on one application for change of place of trial, cannot again, and, perhaps, again and again, be made a defendant to give jurisdiction under the same state of facts, by merely camouflaging them in a different form of action which such facts will not support." (45 *C.A.* 637.) (See *Plum v. Forgay Lumber Co.* (1931) 118 *C.A.* 76, 79, 4 *P.2d* 804 [after change for convenience of witnesses, plaintiff's act of dismissing and suing again was "trifling with the court"]; *Gaskill v. Richmaid Ice Cream Co.* (1952) 111 *C.A.2d* 745, 746, 245 *P.2d*

53 [order determines proper place of trial in any subsequent action "unless there are changed facts or new conditions"].)

In *Tarman v. Sherwin* (1961) 189 C.A.2d 49, 52, 10 C.R. 787, plaintiff brought an action in Alameda County, defendant obtained a change of venue to Butte County, and plaintiff filed a dismissal without prejudice. Plaintiff then filed a new action in Alameda County with immaterial changes in allegations and an identical prayer, defendant again moved for change of venue to Butte County, and this time his motion was denied, by a different Alameda County judge. *Held*, order reversed with directions to grant the motion. In the absence of a change in circumstances, a prior order granting a motion for change of venue is binding on the court in a second action of the same kind, "whether the basis of the rule be termed estoppel, as in *Karst*, or res judicata, as in *Gaskill*." (189 C.A.2d 52.)

The court, citing the text, made this additional comment: "It is true that the same rule does not appear to apply where the first order *denied* transfer. ... It is difficult to reconcile the two rules. However, we are satisfied that the rule properly applies to an order granting transfer. To permit a different result when that action is dismissed and refiled is to encourage 'trifling with the court.' " (189 C.A.2d 52.)

SUPPLEMENT: [This section is current through the latest supplement]



36 of 194 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXVI. CHANGE OF VENUE

A. In General.

7. Renewal of Motion After Denial.

a. Former Law.

3 *Witkin Cal. Proc. Actions* § 917

[§ 917] Former Law.

(1) *Original Statute.* The original version of *C.C.P. 1008*, adopted in 1933, did not authorize or prescribe the requirements for a motion for renewal; it simply required that a subsequent application for the same order be accompanied by an affidavit disclosing the circumstances and result of the previous application, and the claimed new facts. Nevertheless, the courts recognized the power of a judge to reconsider a prior decision denying a similar motion, considering the subsequent application as a *renewal* of the previous motion. In this context, it was reasoned that the decision on an ordinary motion, unlike a final determination by judgment, is not *res judicata*. (See 6 *Cal. Proc.* (5th), *Proceedings Without Trial*, §46.)

Recognition of the burden on the court and the possible abuse of the judicial process led to the settled practice of refusing to consider a renewed motion supported by substantially the same showing as the one denied. In *Connell v. Bowes* (1942) 49 *C.A.2d* 542, 122 *P.2d* 71, the court said: "A second motion for a change of venue should be discouraged if the complaint and the conditions remain unchanged. ... It was never contemplated that determination of the merits of an action should be delayed by repetition of a motion for change of venue when it appears that the second motion is based upon a ground that could have been presented upon the first motion." (49 *C.A.2d* 544.)

Later cases were to the same effect. (See *Yellow Mfg. Acceptance Corp. v. Stoddard* (1949) 93 *C.A.2d* 301, 304, 208 *P.2d* 1040; *San Francisco v. Muller* (1960) 177 *C.A.2d* 600, 603, 2 *C.R.* 383, quoting the text; *Thompson v. Superior Court* (1972) 26 *C.A.3d* 300, 306, 103 *C.R.* 94, quoting the text.)

(2) *Revision of 1978.* *C.C.P. 1008* was repealed and reenacted in 1978 to authorize two distinct remedies: motions to reconsider, and subsequent applications for the same order. (See 6 *Cal. Proc.* (5th), *Proceedings Without Trial*, §46.)

(3) *Statutory Limits Were Not Jurisdictional.* Under both the former and the revised section, it was recognized that an order granted without compliance was at most erroneous and not void; i.e., the statute gave the court power to prevent vexatious renewals, but did not deprive it of jurisdiction to entertain a second motion. (See 6 *Cal. Proc.* (5th), *Proceedings Without Trial*, §46.)

(4) *When Renewal Was Proper*. Eliminating the situations where a dilatory or inexcusably negligent party sought to repeat substantially the same motion, under the following circumstances a defendant was held entitled to make a second motion on different grounds or on a showing of changed circumstances, and to have it determined on the merits:

(a) Where the denial of the first motion was expressly made "without prejudice." Clearly in that case, the court did not intend a final, conclusive ruling. (*Lundy v. Lettunich* (1920) 50 C.A. 451, 454, 195 P. 451 [first motion, on defective notice, was denied without prejudice so that new motion on sufficient notice could be heard].)

(b) Where a defective first motion was made through inadvertence or excusable mistake, and, on an application under C.C.P. 473, the moving party was relieved from his or her default, the order of denial was set aside, and the moving party was allowed to make a new and sufficient motion. (See *Yellow Mfg. Acceptance Corp. v. Stoddard*, *supra* [recognizing practice but holding that application under C.C.P. 473 was properly denied for failure to show good excuse].) Substantially similar to the application to set aside the order of denial was a request for permission to amend the moving papers before the order was made. In other words, relief under C.C.P. 473 allowed correction of the motion after its denial; permission to amend allowed its correction before denial. (See *Yellow Mfg. Acceptance Corp. v. Stoddard*, *supra*, 93 C.A.2d 303; *infra*, §922.)

(c) Where circumstances had changed. This was the important right, recognized by many dicta but not adequately exploited. Under existing law, the plaintiff could assert a good cause of action or join an ostensibly interested party, and, under the complaint as it stood at the time of the motion, the attack on venue was doomed to failure. Thereafter, the plaintiff amended his complaint to eliminate the cause of action that gave him the venue, or dismissed the joined resident defendant. He was entitled to do this, and some cases held that a second motion for change would be denied because it was not timely and because the test of venue was the condition of the complaint at the time of the original motion. (See *supra*, §§789, 891.)

(d) Where the motion was made on a different ground by the same or a different defendant. In *Marshall v. Dunlap* (1955) 138 C.A.2d 59, 291 P.2d 538, defendant S moved for change on the ground of residence, and his motion was denied. *Held*, the court had power to grant defendant D's later motion for change on the ground of convenience of witnesses. (138 C.A.2d 60.) (See *Seybert v. Imperial* (1956) 139 C.A.2d 221, 228, 293 P.2d 135 [same, except that second motion was by same defendants].)

SUPPLEMENT: [This section is current through the latest supplement]



37 of 194 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXVI. CHANGE OF VENUE

A. In General.

7. Renewal of Motion After Denial.

b. Current Law.

3 *Witkin Cal. Proc. Actions* § 918

[§ 918] Current Law.

The 1992 Legislature substantially revised *C.C.P. 1008*. (See 6 *Cal. Proc.* (5th), *Proceedings Without Trial*, §46 et seq.)

(1) *Motion by Party for Reconsideration*. A party affected by an order may move for reconsideration "based upon new or different facts, circumstances, or law." The moving party must "state by affidavit what application was made before, when and to what judge, what order or decisions were made, and what new or different facts, circumstances, or law are claimed to be shown." (*C.C.P. 1008(a)*.)

(2) *Subsequent Application for Same Order*. *C.C.P. 1008(b)* provides for renewal motions on the same grounds and showing by affidavit as are provided for reconsideration motions under *C.C.P. 1008(a)*.

(3) *Reconsideration on Court's Own Motion*. "If a court at any time determines that there has been a change of law that warrants it to reconsider a prior order it entered, it may do so on its own motion and enter a different order." (*C.C.P. 1008(c)*.)

(4) *Nonretroactive Statute Is Not Ground for Relief*. For purposes of *C.C.P. 1008*, an alleged new or different law does not include a later enacted statute without retroactive application. (*C.C.P. 1008(f)*.) (See 6 *Cal. Proc.* (5th), *Proceedings Without Trial*, §48.)

(5) *Interim Orders*. *C.C.P. 1008* applies to applications for interim orders. (*C.C.P. 1008(g)*.)

(6) *Statutory Requirements Are Jurisdictional*. "This section specifies the court's jurisdiction with regard to applications for reconsideration of its orders and renewals of previous motions, and applies to all applications to reconsider any order of a judge or court, or for the renewal of a previous motion, whether the order deciding the previous matter or motion is interim or final. No application to reconsider any order or for the renewal of a previous motion may be considered by any judge or court unless made according to this section." (*C.C.P. 1008(e)*.)

C.C.P. 1008(e) thus nullifies former case law holding that courts have inherent jurisdiction to entertain motions for

reconsideration and renewal regardless of compliance with *C.C.P. 1008*. (See *supra*, §917.) And the statutory requirements may be applied when a judge makes an order that is inconsistent with a previous order, even if the prior order is purportedly not being reconsidered. (See 6 *Cal. Proc.* (5th), *Proceedings Without Trial*, §§49, 50.)

SUPPLEMENT: [This section is current through the latest supplement]



38 of 194 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXVI. CHANGE OF VENUE

A. In General.

8. Review of Order.

a. Mandamus and Appeal.

3 *Witkin Cal. Proc. Actions* § 919

[§ 919] Mandamus and Appeal.

(1) *Former Law: Appeal.* An order granting or denying a motion for change of venue was formerly appealable, and, if no appeal was taken, could not be reviewed on appeal from the judgment. The appeal from the order, however, did not operate as a stay, and the case could be tried in spite of the fact that, if the order were reversed, the proceedings in the wrong court would be nullified. To avoid this useless effort and expense, the aggrieved plaintiff in *Christin v. Superior Court* (1937) 9 C.2d 526, 71 P.2d 205, merely refrained from bringing the cause to trial, pending determination of the appeal from the venue order, and it was held that the action was not subject to mandatory dismissal under former C.C.P. 583. (9 C.2d 530; see 6 Cal. Proc. (5th), *Proceedings Without Trial*, §395.) Another remedy was an application for a writ of supersedeas to stay the enforcement of the order pending decision on the appeal. (See *Bardwell v. Turner* (1933) 219 C. 228, 229, 25 P.2d 978; *Alhambra Shumway Mines v. Alhambra Gold Mine Corp.* (1952) 109 C.A.2d 119, 120, 240 P.2d 340.)

(2) *Superior Court: Review by Mandamus.* The delays incident to appeals on venue orders influenced the 1961 Legislature to abolish this method of review, and to substitute the speedier procedure of review by mandamus. (C.C.P. 400, *infra*, §920; see *Hennigan v. Boren* (1966) 243 C.A.2d 810, 814, 52 C.R. 748, citing the text [because mandamus is proper remedy, no appeal lies, either from order of denial or from order denying motion to vacate order of denial]; *Calhoun v. Vallejo City Unified School Dist.* (1993) 20 C.A.4th 39, 41, 24 C.R.2d 337, 9 Cal. Proc. (5th), *Appeal*, §105 [mandamus is proper method to review order denying change of venue].)

(3) *Limited Civil Cases: Review by Appeal.* Review of venue orders in limited civil cases (see *supra*, §783) is by appeal. The order "changing or refusing to change the place of trial" is appealable to the appellate division of the superior court. (C.C.P. 904.2(c).)

SUPPLEMENT: [This section is current through the latest supplement]



39 of 194 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXVI. CHANGE OF VENUE

A. In General.

8. Review of Order.

b. Procedure on Mandamus.

3 Witkin Cal. Proc. Actions § 920

[§ 920] Procedure on Mandamus.

The procedure under *C.C.P. 400* is as follows:

(1) The aggrieved party may petition the appropriate Court of Appeal for a writ of mandamus to compel trial in the proper court.

(2) The petition may be filed within 20 days after service of written notice of the order. An extension may be granted, for good cause and prior to the expiration of the initial 20-day period, for one additional period not to exceed 10 days. A copy of the petition must be immediately filed in the trial court.

(3) The Court of Appeal may stay all proceedings in the case, pending final judgment on the petition.

(4) The appellate court clerk must file a copy of the final order or judgment with the trial court clerk when it becomes final.

After the mandamus proceeding becomes final, the trial court, on application or on its own motion, must allow the defendant a reasonable time to respond to the complaint. Notice of the order allowing the defendant further time must be promptly served by the party who obtained it, or by the clerk if it was made on the court's own motion. (*C.C.P. 586(a)(6)(C).*)

Transfer of the records, which takes place after granting of the motion (see *infra*, §936), is postponed until expiration of the period for filing the mandamus petition or until after judgment denying the writ becomes final. (*C.C.P. 399(a).*)

SUPPLEMENT: [This section is current through the latest supplement]



40 of 194 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXVI. CHANGE OF VENUE

A. In General.

8. Review of Order.

c. Determination Is Usually Upheld.

3 *Witkin Cal. Proc. Actions* § 921

[§ 921] Determination Is Usually Upheld.

The rule as to burden of proof on the moving party (*supra*, §912) applies only in the trial court. After the judge has ruled, the familiar principles of appellate review apply, notwithstanding the change from review by appeal to review by mandamus.

(1) *Matter of Right*. Where change is a matter of right (wrong court), the judge's determination on the basis of conflicting affidavits or testimony will usually be upheld. (See *Gordon v. Perkins* (1928) 203 C. 183, 186, 263 P. 231; *Mitchell v. Kim* (1919) 42 C.A. 111, 114, 183 P. 368; *Thommes v. Thommes* (1933) 128 C.A. 632, 634, 17 P.2d 1030 [residence; "where there is any conflict in the affidavits, those in favor of the prevailing party must be taken as true and the facts stated therein must be considered as established"]; *Taff v. Goodman* (1940) 41 C.A.2d 771, 774, 107 P.2d 431; *Swartz v. California Olive Growers' Packing Corp.* (1942) 56 C.A.2d 168, 170, 133 P.2d 20 [where contract to be performed; "Such a wide degree of latitude is allowed the trial court in deciding this ever-recurring controversy that the appellate courts will not disturb the order made upon conflicting evidence unless it is clear that the order was the result of arbitrary action"]; *Hagan v. Gilbert* (1948) 83 C.A.2d 570, 578, 189 P.2d 548; *Carnation Co. v. El Rey Cheese Co.* (1948) 88 C.A.2d 857, 858, 200 P.2d 19 [where obligation arose; "where such conflict exists between the allegations of a verified complaint and the affidavit of the defendant on a motion for change of venue, an appellate court will not disturb the action of the trial court thereon"]; *Hayutin v. Rudnick* (1952) 115 C.A.2d 138, 140, 251 P.2d 707; *Gottesfeld v. Richmaid Ice Cream Co.* (1953) 115 C.A.2d 854, 860, 252 P.2d 973 [joinder in bad faith]; *Hall v. Superior Court* (1963) 211 C.A.2d 634, 640, 27 C.R. 497, *infra*, §931, citing the text [mandamus].)

(2) *Matter of Discretion*. Where change is a matter of discretion (convenience of witnesses, impartial trial), the order will not be reversed unless discretion has clearly been abused. (See *infra*, §§948, 956.)

SUPPLEMENT: [This section is current through the latest supplement]



41 of 194 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXVI. CHANGE OF VENUE

B. Wrong Court.

1. Notice of Motion.

a. Form of Notice.

3 *Witkin Cal. Proc. Actions* § 922

[§ 922] Form of Notice.

(1) *Abolition of Demand.* Under former practice, the defendant was required to prepare both a written demand and a notice of motion. (See *Bohn v. Bohn* (1913) 164 C. 532, 536, 129 P. 981; *Hanovia Chemical & Mfg. Co. v. Keller* (1927) 82 C.A. 499, 502, 255 P. 884.) This duplication was eliminated in 1933 by the abolition of the useless formality of a demand, and the statute now calls only for the service and filing of a notice of motion. (*C.C.P.* 396b(a); see *Otsuka v. Balangue* (1949) 92 C.A.2d 788, 791, 208 P.2d 65 [sufficiency of proof of service by mail].)

(2) *Requisites.* The notice of motion follows the usual form for notices, prescribed by *C.C.P.* 1010. It must state (a) the time when the motion itself will be made in court, (b) the grounds upon which it will be made, and (c) the papers, if any, on which it will be based. (See *Bohn* [document entitled "motion," which failed to specify time of hearing, was fatally defective]; *Cal. Civil Practice*, 2 Procedure, §§10:66, 10:87, 10:88; Rutter Group, *Civil Proc. Before Trial* §3:549 et seq.; 24A Am.Jur. P.P. Forms (2008 ed.), Venue, Form 35; 6 *Cal. Proc.* (5th), *Proceedings Without Trial*, §9.)

(3) *Amendment.* The court, however, may allow the notice of motion to be amended to correct or add to it, e.g., by stating an additional ground. (See *Joe Lowe Corp. v. Rasmusson* (1942) 53 C.A.2d 490, 497, 127 P.2d 1002 [unusual situation warranted reversal of court's order denying application for leave to amend].)

SUPPLEMENT: [This section is current through the latest supplement]



42 of 194 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXVI. CHANGE OF VENUE

B. Wrong Court.

1. Notice of Motion.

b. Statement of Grounds.

3 *Witkin Cal. Proc. Actions* § 923

[§ 923] Statement of Grounds.

In *McDonald v. California Timber Co.* (1907) 151 C. 159, 90 P. 548, a corporation and an individual were joined as defendants. The corporation defendant moved for a change of venue, the notice stating only that the venue was not in one of the five permissible places for actions against corporations. This objection was, of course, untenable, because there was an individual defendant. To overcome this obstacle the corporation filed an affidavit alleging the fraudulent joinder of the individual for venue purposes. *Held*, this ground could not be considered, for it only appeared in the affidavit and not in the notice of motion. "[W]e think that where a fraud of that character is the ground of the motion it should be distinctly specified in the notice of motion, and unless so specified that the plaintiff cannot at the hearing of the motion be held bound to support by specific proofs the allegations of his complaint showing a cause of action against the resident defendant. In this case the notice of motion distinctly specifies other and independent grounds and entirely fails to specify the particular ground of motion here relied on in support of the appeal." (151 C. 161.)

On the other hand, in *Westover v. Bridgford* (1914) 25 C.A. 548, 144 P. 313, a notice that set forth a ground, but defectively, was held sufficient because the notice concluded with a statement that the motion would be based on the demand and affidavit of merits, which were complete enough to cure the defect. The notice was no more defective than if it had simply stated that it was based on the papers served and filed with it. (25 C.A. 549.)

Westover was followed in *Modlin v. Walter's Fur Shop* (1948) 83 C.A.2d 384, 188 P.2d 805, and *McDonald* was explained as narrowly holding that, if the ground is fraudulent joinder, the fraud must be specified. (83 C.A.2d 387.) Because actual fraud need not be shown to make the joinder ineffective for venue purposes (see *supra*, §894), it is seldom the ground. Thus, in most situations, the defective notice will be cured by a sufficient affidavit if the notice contains the routine statement that the motion will be based on the affidavit. (83 C.A.2d 388.) (See *Tarman v. Sherwin* (1961) 189 C.A.2d 49, 51, 10 C.R. 787, citing the text.)

SUPPLEMENT: [This section is current through the latest supplement]



43 of 194 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXVI. CHANGE OF VENUE

B. Wrong Court.

1. Notice of Motion.

c. Time of Notice.

3 *Witkin Cal. Proc. Actions* § 924

[§ 924] Time of Notice.

(1) *At Time of Answer, Demurrer, or Motion To Strike.* The action may be tried in the court where it was commenced unless the defendant, "at the time he or she answers, demurs, or moves to strike," files a notice of motion. (*C.C.P. 396b(a).*)

(2) *Within Time To Plead.* If the defendant chooses not to answer, demur, or move to strike, he or she may file the motion within the time otherwise allowed to respond to the complaint. (*C.C.P. 396b(a).*) A defendant's notice of motion to transfer constitutes an appearance. (*C.C.P. 1014*; see 2 *Cal. Proc. (5th), Jurisdiction*, §210.)

SUPPLEMENT: [This section is current through the latest supplement]



44 of 194 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXVI. CHANGE OF VENUE

B. Wrong Court.

1. Notice of Motion.

d. Waiver by Failure To Comply.

3 *Witkin Cal. Proc. Actions* § 925

[§ 925] Waiver by Failure To Comply.

(1) *General Rule.* The failure to comply with the statutory requirements (*supra*, §922) is equivalent to the consent to the venue and the waiver of the right to change venue. (See *Wadleigh v. Phelps* (1905) 147 C. 541, 542, 82 P. 200 ["application must be made at the time of his first appearance"]; *Newman v. Sonoma* (1961) 56 C.2d 625, 628, 15 C.R. 914, 364 P.2d 850 [right to change venue was waived where motion was not made until after pretrial conference and setting of trial date].)

(2) *Distinction: No Intent To Waive and Good Faith Compliance.* If the language of C.C.P. 396b were taken literally and applied strictly, the "waiver" by the failure to comply would always be conclusive, because the defendant could not avail himself or herself of the provisions of the section after the time had elapsed. But in *Lyons v. Brunswick-Balke-Collender Co.* (1942) 20 C.2d 579, 127 P.2d 924, plaintiffs filed the action in Los Angeles against D, a San Francisco defendant, B, a San Mateo defendant, and a foreign corporation. D and B filed a joint demurrer, and D filed a motion for change to San Francisco, with the consent of B and the corporation. Prior to the hearing of the motion, plaintiffs dismissed as to D. B then filed an amended demurrer and motion to change to San Mateo. *Held*, the motion was properly granted.

(a) Waiver is ordinarily a question of fact, depending on intent, and there was no such intent here. B originally consented to trial in San Francisco because it was only a few miles from San Mateo; he never consented to trial in Los Angeles. Until plaintiffs dismissed D in order to keep the action in Los Angeles, B had no reason to ask for a change, but he acted promptly thereafter. (20 C.2d 583.)

(b) "While it may be true that the failure to institute proceedings for change of venue on the ground of residence at the time of filing a demurrer or answer, *standing alone*, requires as a matter of law that relief be denied when an attempt to obtain it is made by later proceedings, there is nothing in section 396b or the cases heretofore cited, which compels a holding that such waiver occurs as a matter of law where, as in this case, there is a sufficient showing that there was no intent to waive the right or to invoke the jurisdiction of the court in which the action is commenced, and the defendant has acted in good faith and with diligence." (20 C.2d 583.) (See *Van Gaalen v. Superior Court* (1978) 80 C.A.3d 371, 376, 145 C.R. 509 [following *Lyons*]; 4 *Stanf. L. Rev.* 85.)

(3) *Distinction: Filing Cross-Complaint With Answer.* A defendant does not waive the right to change venue by reason of filing a cross-complaint along with his or her answer. (*Fielder v. Superior Court* (1963) 213 C.A.2d 60, 62, 28 C.R. 597.)

SUPPLEMENT: [This section is current through the latest supplement]



45 of 194 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXVI. CHANGE OF VENUE

B. Wrong Court.

2. Affidavits and Counteraffidavits.

a. Former Affidavit of Merits.

3 *Witkin Cal. Proc. Actions* § 926

[§ 926] Former Affidavit of Merits.

(1) *Nature of Requirement.* *C.C.P.* 396*b* formerly provided that the moving party must serve and file with the notice of motion an affidavit of merits, the purpose of which was to show that the moving party had a meritorious defense. No form was prescribed, but the cases held that this affidavit had to allege two things: (a) that the moving party fully and fairly stated the facts of the case to his or her attorney, and (b) that after that statement, the moving party was advised by the attorney and actually believed that he or she had a good defense on the merits. (See *Carter v. Broder* (1920) 50 C.A. 63, 69, 194 P. 527; *Spangenberg v. Spangenberg* (1932) 123 C.A. 387, 389, 11 P.2d 408 [affidavit was sufficient].)

Although the affidavit of merits was a requirement of long standing, in practice it became a relatively unimportant recital of stereotyped language copied from form books, and did little to assist the court in determining proper venue. In 1981, the requirement was deleted from *C.C.P.* 396*b*. (See 13 *Pacific L. J.* 606.)

(2) *Affidavit by Party, Attorney, or Other Person.* The affidavit was ordinarily made by the party, but it could be made by his or her attorney on a sufficient reason given for the defendant's failure to make it personally. (See *Nicholl v. Nicholl* (1884) 66 C. 36, 37, 4 P. 882; but see *Noland v. Noland* (1942) 52 C.A.2d 58, 60, 125 P.2d 847 [reason was insufficient].) And another might make the affidavit in a proper case, e.g., where the defendant was personally unavailable. (See *Gardner v. Steadman* (1916) 31 C.A. 447, 449, 160 P. 834 [defendant's wife].)

(3) *Defects of Content or Form.* An affidavit lacking in an essential averment was insufficient to support the motion. (See *Fernandez v. Fernandez* (1938) 11 C.2d 568, 569, 81 P.2d 913.) And some strict decisions held affidavits insufficient for mere defects in the form of the statement. (See *Walling v. Williams* (1920) 183 C. 600, 601, 192 P. 34; *Roberts v. Roberts* (1927) 81 C.A. 499, 500, 253 P. 1112; *Anderson v. No-Doz* (1955) 134 C.A.2d 11, 14, 284 P.2d 883.) Other cases took a less arbitrary view of these defects, and upheld the affidavits. (See *Carter v. Broder* (1920) 50 C.A. 63, 69, 194 P. 527; *Averill v. Lincoln* (1942) 52 C.A.2d 398, 401, 126 P.2d 398; *Nanny v. Ruby Lighting Corp.* (1952) 108 C.A.2d 856, 860, 239 P.2d 885.)

(4) *Timely Filing and Amendment To Cure Defect.* *Peterson Tractor Co. v. Muller* (1960) 178 C.A.2d 280, 2 C.R. 910, held that, although an affidavit defective in form could be amended, the court had no power to permit an affidavit

to be filed after objection was made. (178 C.A.2d 284.) This jurisdictional time theory was repudiated in *Van Gaalen v. Superior Court* (1978) 80 C.A.3d 371, 145 C.R. 509, holding that the court could allow the filing of an affidavit of merits after the prescribed time, on a finding that the petitioner did not intend to waive venue rights. (80 C.A.3d 379.)

SUPPLEMENT: [This section is current through the latest supplement]



46 of 194 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXVI. CHANGE OF VENUE

B. Wrong Court.

2. Affidavits and Counteraffidavits.

b. Affidavit of Residence.

1. Nature of Affidavit.

3 *Witkin Cal. Proc. Actions* § 927

[§ 927] Nature of Affidavit.

(1) *Filing Affidavit as Better Practice.* There is no statutory requirement of an affidavit of residence. *C.C.P.* 396b(a) provides that the court may order a change of venue if, "[u]pon the hearing," it "appears" that the action was brought in the wrong county. Perhaps the defendant may make the entire showing by oral testimony or exhibits. But the practice is to file an affidavit or affidavits showing that the moving defendant is a resident of the county to which transfer is sought, or is not a resident of the county in which the action is brought. (See *Stone v. Everts* (1928) 203 C. 197, 198, 263 P. 236; *O'Brien v. O'Brien* (1911) 16 C.A. 103, 105, 116 P. 692, *infra*, §928; *McKune v. McKune* (1920) 48 C.A. 204, 205, 191 P. 958; *Carruth v. Superior Court* (1978) 80 C.A.3d 215, 223, 145 C.R. 344; for forms, see *Cal. Civil Practice*, 2 Procedure, §§10:72, 10:88; 24A Am.Jur. P.P. Forms (2008 ed.), Venue, Forms 48, 49.)

(2) *Illustration. Sequoia Pine Mills v. Superior Court* (1968) 258 C.A.2d 65, 65 C.R. 353, shows how dangerous it is to overlook this conventional step in establishing residence venue. Plaintiff filed an action in Tuolumne County, for dissolution of partnership and accounting, against S Corp., H, W, and S. Defendants moved for change of venue, showing that the corporation's principal place of business was in Los Angeles, that H and W resided in counties other than Tuolumne, and that the contract of partnership was made in Los Angeles and had no special provision for performance in Tuolumne. The trial judge in a memorandum opinion denied the change of venue on the ground that the lumbermill of the business was located in Tuolumne County. This was admittedly unsound, for the action was purely transitory, and the denial seemed to be error. Nevertheless, mandamus was refused. When the record was examined, it was discovered that defendants had filed no affidavit on defendant S. Defendants' request for leave to file additional affidavits in the appellate court was denied, and the trial judge's order denying the motion for change of venue was therefore unassailable. (258 C.A.2d 66.)

SUPPLEMENT: [This section is current through the latest supplement]



47 of 194 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXVI. CHANGE OF VENUE

B. Wrong Court.

2. Affidavits and Counteraffidavits.

b. Affidavit of Residence.

2. Defects of Content or Form.

3 *Witkin Cal. Proc. Actions* § 928

[§ 928] Defects of Content or Form.

(1) *General Rule: Residence May Be Established by Defendant, but Not by Third Party.* Questions of form have arisen in connection with averments regarding residence, as they did in connection with the former affidavit of merits (*supra*, §926). Thus, the allegation that the defendant "resides in" or is a "bona fide resident" of a particular county is treated as one of fact when made by the defendant himself, but is a conclusion of law, and insufficient, when made by a third person about the defendant. (*McKune v. McKune* (1920) 48 C.A. 204, 205, 191 P. 958.)

In *O'Brien v. O'Brien* (1911) 16 C.A. 103, 116 P. 692, the court explained the rule as follows: "The defendant himself knows better than any other person whether he has established a legal residence in a particular city or a county. ... It must be assumed that he thus deposed with full knowledge of the legal import of those terms or of all the requisites of a legal residence, and that he intended that his affidavit should be so construed and understood." But, "[t]he affidavit of a party other than the defendant himself should, to be of any value as proof addressed to the question of residence, ... state some fact or facts by which the court may be aided in forming some conclusion of its own upon the question of defendant's residence. In other words, the mere declaration by an affiant, other than the defendant himself, that the latter 'resides' in or is a 'resident' of a county other than that in which the action has been instituted would constitute a conclusion of the witness as well as of law, pure and simple, for he could know nothing of the defendant's intention with respect to the establishment of his place of residence, except from extrinsic circumstances." (16 C.A. 111, 112.) (See *Modine v. Modine* (1932) 123 C.A. 67, 69, 10 P.2d 776 [plaintiff and defendant both made affidavits solely in form of legal conclusions; trial judge's order denying change was sustained]; *Enter v. Crutcher* (1958) 159 C.A.2d Supp. 841, 845, 323 P.2d 586 [defective affidavit on information and belief]; but see *Fielder v. Superior Court* (1963) 213 C.A.2d 60, 61, 28 C.R. 597 [criticizing "unrealistic" approach of *O'Brien* and holding that affidavit of J. W. Fielder concerning residence of Jerry Fielder was sufficient].)

An extremely technical holding was made in *Heidel v. California Transit Co.* (1928) 204 C. 21, 266 P. 290, where a corporation, seeking change of venue, averred that it was a corporation, etc., "having for its principal place of business the city of Oakland, county of Alameda." This was defective, the court thought, for failure to state that this was so at the time of the commencement of the action. (204 C. 22.)

(2) *Distinction: Residency Not Susceptible to Personal Knowledge.* Where the matter is not susceptible of personal knowledge, as is occasionally the case where the affidavit relates to another's residence, averments on information and belief will be accepted. (*Brown v. Happy Valley Fruit Growers* (1929) 206 C. 515, 520, 274 P. 977, *supra*, §829; *Sims v. Mains* (1933) 131 C.A. 307, 310, 21 P.2d 447.)

SUPPLEMENT: [This section is current through the latest supplement]



48 of 194 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXVI. CHANGE OF VENUE

B. Wrong Court.

2. Affidavits and Counteraffidavits.

c. Affidavit Relating to Nature of Action.

3 *Witkin Cal. Proc. Actions* § 929

[§ 929] Affidavit Relating to Nature of Action.

Just as affidavits of residence may make it "appear" that the action is brought in the wrong county (*supra*, §927), affidavits relating to the nature or form of the action, or, in joinder cases, to the sufficiency of the statement of a cause of action or necessity of a party defendant may show that the venue is improper. The practice grew up without statutory recognition, and, in view of the complex factors that determine venue under California present rules, these affidavits are often a necessity. (For illustrations, see *McDuffie v. California Tehama Land Corp.* (1934) 138 C.A. 245, 250, 32 P.2d 385 [averments in form of ultimate facts of pleading are relatively useless; affidavit should give evidentiary facts]; *Hagan v. Gilbert* (1948) 83 C.A.2d 570, 576, 189 P.2d 548 [where contract was entered into]; *Tringali v. Vest* (1951) 106 C.A.2d 720, 724, 236 P.2d 171 [same]; *Erwin v. Cee-Tee Const. Co.* (1952) 114 C.A.2d 364, 368, 250 P.2d 287 [same]; *White v. Kaiser-Frazer Corp.* (1950) 100 C.A.2d 754, 757, 224 P.2d 833 [resident defendant as proper party]; *supra*, §§789, 894, 895.)

SUPPLEMENT: [This section is current through the latest supplement]



49 of 194 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXVI. CHANGE OF VENUE

B. Wrong Court.

2. Affidavits and Counteraffidavits.

d. Plaintiff's Counteraffidavit.

1. Right To File.

3 *Witkin Cal. Proc. Actions* § 930

[§ 930] Right To File.

(1) *Verified Complaint as Counteraffidavit.* There is no statutory authorization for counteraffidavits by the plaintiff, and in many cases they would be superfluous. Venue is determined chiefly from an examination of the complaint, and a verified complaint is treated as a plaintiff's counteraffidavit insofar as it contradicts the affidavit of the moving defendant. (*East-West Dairymen's Assn. v. Dias* (1943) 59 C.A.2d 437, 442, 138 P.2d 772; *Bloom v. Carpenter* (1946) 74 C.A.2d 790, 792, 169 P.2d 388; *Goossen v. Clifton* (1946) 75 C.A.2d 44, 48, 170 P.2d 104; *Carnation Co. v. El Rey Cheese Co.* (1948) 88 C.A.2d 857, 858, 200 P.2d 19; *White v. Kaiser-Frazer Corp.* (1950) 100 C.A.2d 754, 758, 224 P.2d 833; *Hall v. Superior Court* (1963) 211 C.A.2d 634, 638, 27 C.R. 497, *infra*, §931, citing the text.)

(2) *Filing Counteraffidavit To Present Facts.* But a verified complaint is not always the equivalent of an affidavit, for a complaint alleges ultimate facts and an affidavit avers evidentiary facts. If the complaint alone does not meet the factual challenge of the defendant's affidavits, it may be necessary for the plaintiff to make an additional showing to sustain the venue. The plaintiff's right to do it by counteraffidavits has long been recognized. As the court observed in *Mills v. Dickson* (1933) 129 C.A. 728, 19 P.2d 278: "Good pleading in a complaint requires a statement of the facts constituting a cause of action in ordinary and concise language. In the case before us the name of the county in which the injury is alleged to have occurred is not essential to an allegation of the cause of action, and the pleader should not be penalized for omitting something that is only material when and if a motion for a change of place of trial is raised. Being a collateral matter the proper means of disposing of the motion is by affidavit and counter-affidavit and the pleader should not be compelled to anticipate a possible motion and embody allegations in his complaint that fulfill no other purpose than to meet a possible move to change the place of trial." (129 C.A. 732.)

Other cases are to the same effect. (See *Schilling v. Buhne* (1903) 139 C. 611, 613, 73 P. 431 ["It is the general practice to file such affidavits on the day, and at the time, of the actual hearing of the motion, and we have never known the practice to be seriously questioned. ... It is proper, if any new matter is presented by such counter-affidavits, to grant time to the moving party to file affidavits in opposition"]; *O'Brien v. O'Brien* (1911) 16 C.A. 103, 107, 116 P. 692, *supra*, §928 [residence; counteraffidavit was insufficient to overcome defendant's showing]; *Taff v. Goodman* (1940) 41 C.A.2d 771, 774, 107 P.2d 431 [same]; *Nakanishi v. Policy Holders Life Ins. Assn. of Los Angeles* (1933) 129 C.A. 747,

749, 19 P.2d 287 [place of performance of contract]; *Saito v. Policy Holders Life Ins. Assn.* (1933) 132 C.A. 412, 414, 22 P.2d 724 [same]; *California Collection Agency v. Fontana* (1943) 61 C.A.2d 648, 651, 657, 143 P.2d 507 [resident defendant as interested party]; *Liberal Catholic Church v. Rogers* (1944) 65 C.A.2d 196, 198, 150 P.2d 486 [affidavit cannot overcome theory of complaint itself]; *Hall v. Superior Court*, *supra*, quoting the text; for forms, see Cal. Civil Practice, 2 Procedure, §§10:73, 10:93.)

(3) *Counteraffidavit Must Be Consistent With Complaint.* Of course the counteraffidavit must be consistent with the complaint. Venue is controlled by conditions at the time of the defendant's appearance, and, just as the plaintiff may not sustain venue by amendment of the complaint, the plaintiff may not do so by an affidavit that goes beyond the allegations of the complaint. (*Di Giorgio Fruit Corp. v. Zachary* (1943) 60 C.A.2d 560, 562, 141 P.2d 8 [affidavit may not contradict terms of contract to show place of making]; *Sloan v. Court Hotel* (1945) 72 C.A.2d 308, 313, 164 P.2d 516, *supra*, §789; *Archer v. Superior Court* (1962) 202 C.A.2d 417, 420, 21 C.R. 48, citing the text; *Johnson v. Superior Court* (1965) 232 C.A.2d 212, 215, 42 C.R. 645; see *supra*, §885.)

SUPPLEMENT: [This section is current through the latest supplement]



50 of 194 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXVI. CHANGE OF VENUE

B. Wrong Court.

2. Affidavits and Counteraffidavits.

d. Plaintiff's Counteraffidavit.

2. Procedure.

3 *Witkin Cal. Proc. Actions* § 931

[§ 931] Procedure.

In *Hall v. Superior Court* (1963) 211 C.A.2d 634, 27 C.R. 497, plaintiff sued defendant in Alameda County on an oral contract of sale. Defendant moved for change to Mendocino County, his residence, on an affidavit that the contract was made there. Plaintiff filed counteraffidavits averring that it was made in Alameda County, and the motion was denied. On mandamus to review the order, defendant raised a novel point: His counsel had written plaintiff's counsel stating his understanding that the matter would be "submitted by papers on file without personal appearance," he did not learn of the filing of counteraffidavits because copies were never sent to him, and he did not appear at the hearing, believing that his own affidavit was uncontradicted. *Held*, writ denied.

(a) There is no requirement that prior notice of the filing of counteraffidavits be given; indeed, they may be received on the day of the hearing, just as oral evidence may be then received. (211 C.A.2d 639.)

(b) The better practice under such circumstances as these, "consistent with the amenities and courtesies which should exist among practitioners in the law," would be to give notice. However, defendant's counsel had no reason to assume that his letter would foreclose a showing in opposition to the motion, and it was presumptuous to believe it would be binding on the judge. (211 C.A.2d 639.) (On procedure generally, see Cal. Civil Practice, 2 Procedure, §§10:73, 10:74.)

SUPPLEMENT: [This section is current through the latest supplement]



51 of 194 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXVI. CHANGE OF VENUE

B. Wrong Court.

2. Affidavits and Counteraffidavits.

d. Plaintiff's Counteraffidavit.

3. Where Complaint Is Unverified.

3 Witkin Cal. Proc. Actions § 932

[§ 932] Where Complaint Is Unverified.

An unverified complaint is not the equivalent of a counteraffidavit; nevertheless, it may have some effect in supporting the chosen venue. This appears to be the substance of the holding and dicta in *Quick v. Corsaro* (1960) 180 C.A.2d 831, 4 C.R. 674, a case of first impression. Plaintiff's unverified complaint sought recovery of money on a contract by defendant to purchase stock, and alleged that payment (performance) was due in San Francisco. Defendant moved for a change of venue to his residence in Kern County, on an affidavit stating in general terms that all of the obligations were incurred in Kern County and that there was no special contract in writing to perform elsewhere. *Held*, order denying change affirmed.

(a) A verified complaint is treated as the plaintiff's counteraffidavit. (180 C.A.2d 835, citing the text.)

(b) Any complaint, regardless of verification, "lays the venue" and places the burden of proof on the defendant who seeks a change (see *supra*, §912). Hence, unless the defendant's affidavit sufficiently controverts the complaint's allegations relating to venue, or makes an affirmative showing to establish the defendant's claim of venue, no change will be granted. Here, defendant's affidavit, setting forth general conclusions, was insufficient. (180 C.A.2d 836.)

(c) If both parties had alleged mere conclusions, but defendant's affidavit had met the issue, he would have prevailed. His sworn affidavit, though defective in form, would then have been the only competent evidence on which the court could have ruled. (180 C.A.2d 838.)

SUPPLEMENT: [This section is current through the latest supplement]



52 of 194 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXVI. CHANGE OF VENUE

B. Wrong Court.

3. Points and Authorities.

3 *Witkin Cal. Proc. Actions* § 933

[§ 933] Points and Authorities.

(1) *Nature of Requirement.* C.R.C., Rule 3.1113(a) requires the service and filing of a memorandum of points and authorities with most notices of motion, and adds this discretionary but drastic penalty: "The court may construe the absence of a memorandum as an admission that the motion ... is not meritorious and cause for its denial." (See 6 *Cal. Proc.* (5th), *Proceedings Without Trial*, §11; for cases applying predecessor rule to motions to change venue, see *Butterfield v. Butterfield* (1934) 1 C.2d 227, 228, 34 P.2d 145; *Weber v. Purdy* (1948) 84 C.A.2d 482, 483, 191 P.2d 66.)

(2) *Form and Content.* "Points and authorities" may mean an outline of an argument or skeleton brief with legal propositions and citation of supporting cases, but often these would be elementary and useless. A realistic awareness of this fact appears in *Kostal v. Pullen* (1950) 36 C.2d 528, 225 P.2d 217. Defendant sought a change to Los Angeles on affidavits showing that this was both his residence and the place where the alleged obligation was incurred. He filed no points and authorities, relying on the citation of the statutes (C.C.P. 395, 396) in his notice of motion. *Held*, this was a sufficient compliance with the rule. (36 C. 529.) A better explanation would be that the rule may be disregarded where it serves no purpose, for the defendant had wholly omitted to file a memorandum.

The contents of the memorandum are now specified in C.R.C., Rule 3.1113(b): "[A] statement of facts, a concise statement of the law, evidence and arguments relied on, and a discussion of the statutes, cases, and textbooks cited in support of the position advanced."

SUPPLEMENT: [This section is current through the latest supplement]



53 of 194 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXVI. CHANGE OF VENUE

B. Wrong Court.

4. Diligence in Bringing Motion to Hearing.

3 *Witkin Cal. Proc. Actions* § 934

[§ 934] Diligence in Bringing Motion to Hearing.

It is the duty of the moving party to bring the motion promptly to a hearing. If there is an inexcusable delay, the trial judge may deny the motion for lack of diligence. (*Votaw v. Miller* (1941) 42 C.A.2d 676, 677, 109 P.2d 719.)

In *Hart v. Forgeus* (1920) 184 C. 327, 193 P. 764, defendant's attorneys sent notice of motion by mail, with a \$ 3 filing fee, but not the calendar fee of \$ 2. Despite the clerk's notification, they did not pay the fee until about 2 months later, whereupon the papers were filed. *Held*, a general order denying the motion would be affirmed for lack of diligence, even though a contrary determination by the trial judge might also have been upheld. (184 C. 329.)

Davison v. Gentry (1934) 136 C.A. 423, 29 P.2d 266, goes much further, and imposes a far stricter standard than is customary practice among lawyers. An action was brought July 12. A notice of motion to change venue, in good form, was given August 15, with August 26 specified as the date of hearing. Later, defendant's counsel learned that the court would be on vacation. A second notice was filed September 13, with September 19 for the hearing date. On that day, plaintiffs' counsel successfully objected to insufficient time of statutory notice by mail (counsel mistakenly estimated distance), and a new notice was mailed October 4, with October 31 as the hearing date. The trial judge denied the motion by general order. Defendant's counsel argued that his delay of something over 2 months was excusable; that plaintiffs' counsel opposed his efforts to shorten time and hear the motion on September 19, and failed to object to the new date of October 31 when it was selected in plaintiff counsel's presence; and that defendant's counsel had no law and motion day free between September 19 and October 31. Upholding the denial, the court referred to the "dilatory" character of the motion and declared that there was a lack of due diligence without satisfactory excuse, and neither waiver nor estoppel by plaintiffs. (136 C.A. 428.) It would seem, however, that the issue was not technically waiver or estoppel, but merely what constituted normal procedure. The chief cause of delay was not lack of diligence at all, but the obstructive and evasive tactics of counsel for plaintiffs, who opposed all efforts directed toward a prompt hearing.

SUPPLEMENT: [This section is current through the latest supplement]



54 of 194 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXVI. CHANGE OF VENUE

B. Wrong Court.

5. Order Granting Change and Transfer of Case.

a. Selection of Proper Court.

3 Witkin Cal. Proc. Actions § 935

[§ 935] Selection of Proper Court.

If the showing in support of the motion is sufficient, an order of transfer is made. (*C.C.P.* 396b(a); see *Chase v. Superior Court* (1908) 154 C. 789, 796, 99 P. 355; Cal. Civil Practice, 2 Procedure, §§10:75 et seq., 10:99 et seq.; 24A Am.Jur. P.P. Forms (2008 ed.), Venue, Form 55.)

C.C.P. 398 specifies the following methods by which the proper court may be selected:

- (1) Stipulation of the parties, either in writing or made in open court and entered in the minutes or docket.
- (2) If the parties do not stipulate, designation by the defendant in the notice of motion, or in open court, entered in the minutes or docket, of a proper court in a proper county.
- (3) If no stipulation or designation is made, or where the transfer is ordered on the court's own motion, determination by the court.

SUPPLEMENT: [This section is current through the latest supplement]



55 of 194 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXVI. CHANGE OF VENUE

B. Wrong Court.

5. Order Granting Change and Transfer of Case.

b. Transmission of Papers.

3 Witkin Cal. Proc. Actions § 936

[§ 936] Transmission of Papers.

(1) *Duty of Clerk To Transmit Papers.* When the order of transfer is made (and time for review by mandamus has expired or judgment denying the writ has become final; see *supra*, §920), the clerk must, "upon payment of the costs and fees, transmit the pleadings and papers therein (or if the pleadings be oral a transcript of the same)" to the clerk of the new court. (*C.C.P.* 399(a); see *Searcy v. Kay* (1920) 46 C.A. 792, 793, 190 P. 49 [mandamus issued to compel clerk to transmit papers].) (On payment of costs, see *infra*, §938.)

(2) *Notices by Both Clerks.* *C.C.P.* 399(b) requires two mailed notices to parties concerning the transfer: (a) the clerk of the transmitting court must, at the time of transmittal, mail notice to all parties who have appeared, stating the date on which it occurred; (b) the clerk of the new court must, promptly on receipt of the papers and pleadings, mail notice to all parties, stating the date of the filing and the number assigned to the case.

Mailing of the second notice gives the defendant 30 calendar days to respond to the complaint (if the motion for change of venue was made without responding; see *supra*, §924). (*C.R.C.*, Rule 3.1326.) Failing this, default may be entered against the defendant. (*C.C.P.* 586(a)(6)(B); see 6 *Cal. Proc.* (5th), *Proceedings Without Trial*, §§146, 147.)

SUPPLEMENT: [This section is current through the latest supplement]



56 of 194 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXVI. CHANGE OF VENUE

B. Wrong Court.

5. Order Granting Change and Transfer of Case.

c. Award of Expenses and Fees to Prevailing Party.

3 Witkin Cal. Proc. Actions § 937

[§ 937] Award of Expenses and Fees to Prevailing Party.

(1) *In General.* The court, in its discretion, may award the prevailing party "reasonable expenses and attorney's fees incurred in making or resisting the motion to transfer whether or not that party is otherwise entitled to recover his or her costs of action. In determining whether that order for expenses and fees shall be made, the court shall take into consideration (1) whether an offer to stipulate to change of venue was reasonably made and rejected, and (2) whether the motion or selection of venue was made in good faith given the facts and law the party making the motion or selecting the venue knew or should have known." Sanctions may not be imposed "except on notice contained in a party's papers, or on the court's own noticed motion, and after opportunity to be heard." (*C.C.P. 396b(b)*; see *6 Pacific L. J.* 226.)

(2) *Sanction Against Attorney for Acting in Bad Faith.* *C.C.P. 396b(b)* prescribes an unusual sanction against an attorney who acts unreasonably or in bad faith: "As between the party and his or her attorney, those expenses and fees shall be the personal liability of the attorney not chargeable to the party." (See *6 Pacific L. J.* 226.)

In *Metzger v. Silverman* (1976) 62 C.A.3d Supp. 30, 133 C.R. 355, supra, §805, the court explored the issue of the attorney's good faith.

(a) The attorney must carefully investigate the facts and the law, and, if the attorney's client insists on a venue that is improper, the attorney may withdraw. "If the lawyer yields to his client's demands, and files the action in what obviously is the wrong forum, when the court imposes attorney fees upon the lawyer, he will have no one to blame but himself." (62 C.A.3d Supp. 39.)

(b) If the law is doubtful or debatable, the attorney will not be held responsible for failing to anticipate the manner in which the uncertainty will be resolved. (62 C.A.3d Supp. 39.) But the attorney must review the statutes and case law before filing an action or making a motion to change venue. "While the statute does not require a lawyer to be omniscient, it does require him to demonstrate professional competence. We eschew a more patronizing standard." (62 C.A.3d Supp. 40.)

(c) The court's inquiry into the attorney's factual investigation may be precluded by the invocation of the attorney-client privilege, and, under *Ev.C. 913*, no adverse inference can be drawn from its claim. Hence, the determination of good faith may depend on the nature of the facts adduced at the hearing on the motion and counsel's supporting legal argument. (62 *C.A.3d Supp. 40*.)

(d) Here, venue depended on the meaning of the word "claim" in *C.C.P. 395.1* (see *supra*, §805); no reported case considered the point, and commentators did not discuss it; and a variety of rules obtain in other jurisdictions. Thus, plaintiff's counsel was not at fault in making his choice of venue, and no award of fees and expenses could properly be made against him. (62 *C.A.3d Supp. 41*.)

SUPPLEMENT: [This section is current through the latest supplement]



57 of 194 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXVI. CHANGE OF VENUE

B. Wrong Court.

5. Order Granting Change and Transfer of Case.

d. Payment of Costs of Transfer or Award.

3 Witkin Cal. Proc. Actions § 938

[§ 938] Payment of Costs of Transfer or Award.

(1) *Former Statute.* Former C.C.P. 581b provided that if the plaintiff brought an action in the wrong court, and failed to pay the costs and fees of transfer within 1 year after entry of the order of transfer, the action was subject to mandatory dismissal. (See *Marshall v. Benedict* (1958) 161 C.A.2d 284, 286, 326 P.2d 516; *South v. Wishard* (1958) 165 C.A.2d 8, 11, 331 P.2d 227; *Moore v. Superior Court* (1970) 13 C.A.3d 869, 872, 92 C.R. 23 [waiver of right to dismissal by failure to invoke power in transferor court prior to transfer]; *Bechtel Corp. v. Superior Court* (1973) 33 C.A.3d 405, 408, 109 C.R. 138 [dismissal was mandatory even though transfer was by stipulation]; *Grime v. Superior Court* (1974) 39 C.A.3d 46, 49, 113 C.R. 850 [defendant's failure to mention payment of fees in notice did not prevent dismissal].)

(2) *Current Statute.* Former C.C.P. 581b was repealed in 1974, and the subject is now covered in C.C.P. 399, which provides as follows:

(a) When the transfer is sought solely, or is ordered, because the action was commenced in the wrong court, costs and fees of transfer (including an award to the defendant under C.C.P. 396b(b), supra, §937) must be paid by the plaintiff before the transfer is made. (C.C.P. 399(a).)

(b) If the defendant has paid costs and fees at the time of filing the notice of motion, they must be repaid to the defendant on the making of the order. (C.C.P. 399(a).)

(c) If costs and fees have not been paid by the plaintiff within 5 days after service of notice of the transfer order, "any other party interested therein, whether named in the complaint as a party or not," may pay them, and the clerk must thereupon transmit the papers and pleadings. The payment by a party is a proper item of the party's costs if he or she prevails in the action; otherwise, the payment is an offset deducted from the amount awarded the plaintiff if he or she prevails against that party. (C.C.P. 399(a).)

(d) If payment is not made within 30 days after service of notice of the order (or, if an appeal is taken or mandamus is sought, within 30 days after notice of finality of the order), the court on noticed motion by any party may dismiss the action. The dismissal is made without prejudice to the cause, on the condition that no other action on the cause may be

commenced in another court prior to payment. (*C.C.P.* 399(a).)

(e) If an appeal or a petition for mandamus does not result in a stay of proceedings, the time for payment is 60 days after service of notice of the order. (*C.C.P.* 399(a).) (See C.E.B., 2 Civil Proc. Before Trial 4th, §20.28.)

SUPPLEMENT: [This section is current through the latest supplement]



58 of 194 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXVI. CHANGE OF VENUE

B. Wrong Court.

6. Pleading After Denial of Motion.

3 Witkin Cal. Proc. Actions § 939

[§ 939] Pleading After Denial of Motion.

If the court denies the change of venue motion, it must allow a defendant time to move to strike, demur, or plead if the defendant has not previously filed a response. (*C.C.P. 396b(e)*.) Unless otherwise ordered, the defendant has 30 calendar days to file a response. (*C.R.C., Rule 3.1326*.)

SUPPLEMENT: [This section is current through the latest supplement]



59 of 194 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXVI. CHANGE OF VENUE

C. Convenience of Witnesses.

1. Procedure.

a. In General.

3 Witkin Cal. Proc. Actions § 940

[§ 940] In General.

The court may, on motion, change the place of trial "[w]hen the convenience of witnesses and the ends of justice would be promoted by the change." (*C.C.P.* 397(c).) There is no statutory procedure governing the motion, and the practice differs from that prescribed by *C.C.P.* 396b(a) for the motion to change to the proper court (*supra*, §922). (See *Cal. Civil Practice*, 2 Procedure, §§10:67, 10:89 et seq.; *Rutter Group, Civil Proc. Before Trial* §3:553 et seq.; 74 *A.L.R.2d* 16 [construction and effect of statutory provision for change of venue to promote convenience of witnesses and ends of justice]; 77 *Am.Jur.2d* (2006 ed.), *Venue* §58 et seq.; 24A *Am.Jur. P.P. Forms* (2008 ed.), *Venue*, Form 173 et seq.)

(1) The motion need not be made within the time to plead. (See *infra*, §942, and *supra*, §924.)

(2) The method of selecting the proper court for transfer is different. Stipulation of the parties, or "to the nearest or most accessible court, where the like objection or cause for making the order does not exist." (*C.C.P.* 398; see *supra*, §935.)

(3) The moving party (the defendant) pays the costs and fees at the time the notice of motion is filed. (*C.C.P.* 399(a).)

SUPPLEMENT: [This section is current through the latest supplement]



60 of 194 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXVI. CHANGE OF VENUE

C. Convenience of Witnesses.

1. Procedure.

b. Form of Notice of Motion.

3 Witkin Cal. Proc. Actions § 941

[§ 941] Form of Notice of Motion.

The notice should follow the statutory language setting forth the combined ground that "the convenience of witnesses and the ends of justice would be promoted by the change." (*C.C.P.* 397(c); see *Cal. Civil Practice*, 2 Procedure, §§10:71, 10:89, 10:90; 24A *Am.Jur. P.P. Forms* (2008 ed.), Venue, Form 175 et seq.)

In *Willingham v. Pecora* (1941) 44 *C.A.2d* 289, 112 *P.2d* 328, the motion, made on the stated ground of "convenience of witnesses," was denied. The court, upholding the denial, declared that the statute contains conjunctive conditions, both of which must occur; that the moving party has the burden of proving not only that the convenience of witnesses will be promoted but that the "ends of justice" will likewise be promoted; and that, in the case before it, the judge could properly have denied the motion on the grounds that the resulting delay in going to trial would not further the ends of justice. (44 *C.A.2d* 295.) In this discussion (which is perhaps dictum), the court confused the form of the motion with its substance, and the suggestion that a motion may be denied for failure to add the three words to the statement of grounds seems most unfortunate.

However, the "ends of justice" phrase is not only an essential part of the notice but goes to the substance of the motion. "There can also be no doubt that before such a motion can be granted there must be some showing of both convenience of witnesses and that the ends of justice will be served by the change." (*Harden v. Skinner & Hammond* (1955) 130 *C.A.2d* 750, 754, 279 *P.2d* 978, *infra*, §949.)

SUPPLEMENT: [This section is current through the latest supplement]



61 of 194 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXVI. CHANGE OF VENUE

C. Convenience of Witnesses.

1. Procedure.

c. Time for Notice of Motion.

3 *Witkin Cal. Proc. Actions* § 942

[§ 942] Time for Notice of Motion.

Because *C.C.P.* 396*b* does not apply to the motion on this ground, the notice need not be given at the time prescribed there (*supra*, §924). When should it be given?

(1) The motion may not properly be made until the answer is filed, for the reason that, until issues of fact are joined, the court cannot determine whether the witnesses whose convenience is involved have material testimony to offer. (See *Cook v. Pendergast* (1882) 61 C. 72, 75; *Nanny v. Ruby Lighting Corp.* (1952) 108 C.A.2d 856, 858, 239 P.2d 885 [dictum]; but see *Pearson v. Superior Court* (1962) 199 C.A.2d 69, 75, 18 C.R. 578 [citing the text, but holding that motion was sufficient, even though notice was given before answer, where answer was on file at time of hearing on motion].)

(2) It need not be made at the time the answer is filed; a reasonable time after filing of the answer is soon enough. What is a reasonable time depends upon the circumstances, and the court's discretion in determining the matter will usually be upheld. In *Willingham v. Pecora* (1941) 44 C.A.2d 289, 112 P.2d 328, the action was brought in October 1939. In December 1939, a trial date was set for May 1940, but shortly before trial defendants filed amendments to the answer and motions to change venue. Plaintiff showed that transfer would cause 5 months' delay in the trial. *Held*, denial was proper. (44 C.A.2d 295.) (But see *Cooney v. Cooney* (1944) 25 C.2d 202, 208, 153 P.2d 334 [upholding transfer of proceeding to modify custody provisions of divorce decree made after defendant's petition was filed and before hearing was held]; *Barclay v. Supreme Lodge of Fraternal Brotherhood* (1917) 34 C.A. 426, 428, 167 P. 701 [plaintiff's demurrer was overruled, then plaintiff's motion to set for trial and motion for change of venue was made over 1 year later; order granting motion was proper].)

SUPPLEMENT: [This section is current through the latest supplement]



62 of 194 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXVI. CHANGE OF VENUE

C. Convenience of Witnesses.

1. Procedure.

d. Affidavits.

3 *Witkin Cal. Proc. Actions* § 943

[§ 943] Affidavits.

(1) *Form and Content.* The showing in support of the motion is made by an affidavit, which should contain factual averments of (a) the names of the witnesses, (b) the nature of the testimony expected from each, and (c) the reasons why attendance would be inconvenient. Omission of one of these renders the affidavit insufficient. (See *San Jose Hosp. v. Etherton* (1927) 84 C.A. 516, 518, 258 P. 611; *First-Trust Joint Stock Land Bank of Chicago v. Meredith* (1936) 16 C.A.2d 504, 508, 62 P.2d 369; *Corfee v. Southern Calif. Edison Co.* (1962) 202 C.A.2d 473, 477, 20 C.R. 870; *Dillman v. Superior Court* (1962) 205 C.A.2d 769, 773, 23 C.R. 498; Cal. Civil Practice, 2 Procedure, §§10:72, 10:90; 24A Am.Jur. P.P. Forms (2008 ed.), Venue, Form 180 et seq.; for illustration of liberal construction of affidavit, see *J.C. Millett Co. v. Latchford-Marble Glass Co.* (1959) 167 C.A.2d 218, 225, 334 P.2d 72.)

The affidavit should also aver the facts from which it may be concluded that the "ends of justice" will be served by the change. (*Harden v. Skinner & Hammond* (1955) 130 C.A.2d 750, 755, 279 P.2d 978, *infra*, §949; *Flanagan v. Flanagan* (1959) 175 C.A.2d 641, 646, 346 P.2d 418; *Pearson v. Superior Court* (1962) 199 C.A.2d 69, 80, 18 C.R. 578 [averments were sufficient].)

On the other hand, the affidavit need not aver that witnesses reside in the county where the venue is sought. Their convenience and not their residence is the issue, and convenience may be affected by where they are working, regardless of their legal residence. (*Willingham v. Pecora* (1941) 44 C.A.2d 289, 294, 112 P.2d 328.)

(2) *Illustration: Showing Sufficient.* In *Wood v. Silvers* (1939) 35 C.A.2d 604, 96 P.2d 366, the affidavits merely stated generally that the witnesses were employed in one place and that it would be inconvenient to appear in the other. *Held*, in the absence of a motion to strike for lack of a specific statement of reasons, they were sufficient to support the trial court's order, the reasonable inference being that the inconvenience was the distance and expense. In the same case, the declarants recited what they would testify to if called, and did not aver that they would actually be called. *Held*, this was sufficient; only the party, not the witnesses, can know whether they will be called, and the party's affidavit here did aver that they were necessary. (35 C.A.2d 610.) (See *Pascoe v. Baker* (1910) 158 C. 232, 234, 110 P. 815 [liberal view as to sufficiency of affidavits].)

(3) *Illustration: Showing Insufficient.* In *Juneau v. Juneau* (1941) 45 C.A.2d 14, 113 P.2d 463, the affidavit failed to name the witnesses or indicate the nature of the testimony. The moving party argued that, because an interlocutory decree of divorce had previously been granted and later set aside, the court already knew, from the files and records in the case, the name of the corroborating witness and the nature of the testimony. The opinion did not disapprove of this reasoning, but held it inapplicable on the ground that the divorce decree had been granted by a different judge from the one who heard the motion for change of venue, and that the witnesses and testimony were not known to the latter. (45 C.A.2d 17.)

SUPPLEMENT: [This section is current through the latest supplement]



63 of 194 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXVI. CHANGE OF VENUE

C. Convenience of Witnesses.

1. Procedure.

e. Plaintiff's Showing in Opposition.

1. In General.

3 Witkin Cal. Proc. Actions § 944

[§ 944] In General.

(1) *Nature of Showing.* The ordinary motion for a change of venue on the ground of convenience of witnesses is made by the defendant, in an action in which the plaintiff sues in the proper county. And, if the motion is granted, the action is tried in the county best suited to the convenience of witnesses, even though it is not the statutory venue of the action. The situation is substantially the same where the plaintiff sues in the wrong county, and the defendant moves for a change of venue to the proper county, but the plaintiff seeks to retain the action in the county where it was brought, on the ground that the convenience of witnesses will be served. If the plaintiff's showing is sufficient, the court will retain the action in the county where it is commenced, to avoid the circuitry of granting the defendant's motion, and then granting a new motion made by the plaintiff. (See *C.C.P.* 396b; *Sheffield v. Pickwick Stages, Northern Div.* (1923) 191 C. 9, 10, 214 P. 852; *Wood v. Silvers* (1939) 35 C.A.2d 604, 607, 96 P.2d 366; *Harris v. Cannon* (1941) 42 C.A.2d 748, 749, 109 P.2d 961.)

(2) *Form of Showing.* The attempt by the plaintiff to keep venue in the county where the action is brought may take one of three forms:

(a) A counteraffidavit filed by the plaintiff, in opposition to the defendant's showing in support of the motion made on the ground of convenience of witnesses. (See *infra*, §945.)

(b) A countermotion by the plaintiff to retain the action on the ground of convenience of witnesses, where the defendant's motion is made on the ground of wrong county. (See *infra*, §946.)

(c) A motion to retransfer to the county where the action was commenced, where the defendant obtains a change of venue on the ground of wrong court prior to filing an answer. (See *infra*, §947.)

SUPPLEMENT: [This section is current through the latest supplement]



64 of 194 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXVI. CHANGE OF VENUE

C. Convenience of Witnesses.

1. Procedure.

e. Plaintiff's Showing in Opposition.

2. Counteraffidavits.

3 Witkin Cal. Proc. Actions § 945

[§ 945] Counteraffidavits.

Where the plaintiff sues in the proper county, and the defendant moves for a change of venue on the ground of convenience of witnesses, no impartial trial, or disqualification of judge, the plaintiff does not make a countermotion to retain, but merely files counteraffidavits to controvert the defendant's showing. (*C.C.P. 396b(d)*) ["In any case, if an answer is filed, the court may consider opposition to the motion to transfer, if any, and may retain the action in the county where commenced if it appears that the convenience of the witnesses or the ends of justice will thereby be promoted"]; see *Cook v. Pendergast* (1882) 61 C. 72, 76; for forms, see Cal. Civil Practice, 2 Procedure, §§10:73, 10:91; 24A Am.Jur. P.P. Forms (2008 ed.), Venue, Forms 185, 186.)

SUPPLEMENT: [This section is current through the latest supplement]



65 of 194 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXVI. CHANGE OF VENUE

C. Convenience of Witnesses.

1. Procedure.

e. Plaintiff's Showing in Opposition.

3. Countermotion.

3 *Witkin Cal. Proc. Actions* § 946

[§ 946] Countermotion.

(1) *General Rule.* Where the plaintiff sues in the wrong county, and the defendant moves for a change to the proper county, the plaintiff may file a countermotion to retain the action in the county where it was commenced, for the convenience of witnesses. But here the general rule applies that a motion or countermotion on this ground is premature until the answer is filed and the issues of fact appear. (*Cook v. Pendergast* (1882) 61 C. 72, 76; *Sheffield v. Pickwick Stages, Northern Div.* (1923) 191 C. 9, 10, 214 P. 852; *Gordon v. Perkins* (1928) 203 C. 183, 185, 263 P. 231; *Sowers v. Sowers* (1932) 127 C.A. 579, 581, 16 P.2d 176 [countermotion was proper after answer was filed, even though demurrer also was filed subsequently]; *Johnson v. Superior Court* (1965) 232 C.A.2d 212, 214, 42 C.R. 645; see Cal. Civil Practice, 2 Procedure, §§10:77, 10:97, 10:98, 10:101; 24A Am.Jur. P.P. Forms (2008 ed.), Venue, Form 177; 74 A.L.R.2d 16, 50 [construction and effect of statutory provision for change of venue to promote convenience of witnesses and ends of justice].)

The affidavit in support of the countermotion must meet the same requirements as an affidavit in support of a motion for change on this ground. (See *Art Frost of Glendale v. Hooper* (1955) 130 C.A.2d Supp. 903, 905, 280 P.2d 229 [failure to give names or nature of testimony]; *Mettler v. Hedley* (1959) 170 C.A.2d 277, 282, 338 P.2d 489 [showing was sufficient]; *Maxwell v. Murray* (1961) 190 C.A.2d 440, 443, 11 C.R. 916, *infra*, §951 [showing was insufficient].)

(2) *Illustration.* In *Scribner v. Superior Court* (1971) 19 C.A.3d 764, 97 C.R. 217, the district attorney of Sonoma County filed a paternity suit in that county on behalf of plaintiff mother, resident there, to require defendant father to support the child. Defendant moved for a change of venue to Fresno County, his residence. The district attorney, without answering, filed a countermotion seeking retention in Sonoma County for convenience of witnesses and in the interests of justice. The lower court then denied defendant's motion. *Held*, mandamus granted to compel change of venue to Fresno County.

(a) The district attorney's countermotion was premature because of his failure to answer. (19 C.A.3d 766, citing the text.)

(b) The statutes authorizing the district attorney to bring the action when he believes that the interests of justice will be served (Welf.C. 11479, former C.C. 231) do not permit an exception to the venue law. (19 C.A.3d 767.)

(c) The grounds of inconvenience set up by the district attorney's affidavit (mother on welfare, cannot travel to Fresno; Sonoma district attorney cannot represent her in Fresno and Fresno district attorney is not required to represent her there) may be raised in the Fresno court. The case there will "no doubt" be presented by the Fresno district attorney, and "it may be" that the Fresno court will retransfer the case (see *infra*, §947). (19 C.A.3d 768.)

SUPPLEMENT: [This section is current through the latest supplement]



66 of 194 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXVI. CHANGE OF VENUE

C. Convenience of Witnesses.

1. Procedure.

e. Plaintiff's Showing in Opposition.

4. Motion To Retransfer.

3 *Witkin Cal. Proc. Actions* § 947

[§ 947] Motion To Retransfer.

In the situation described in the preceding section, the defendant will be successful in having the venue changed to the proper county if the defendant moves before filing an answer. But thereafter, on the filing of the answer in the court to which the action is transferred, the plaintiff may make a motion for change, i.e., retransfer, on the ground of convenience of witnesses. (See *Baird v. Smith* (1937) 21 C.A.2d 221, 223, 68 P.2d 979, *infra*, §949; *Kroesen v. Gordon* (1943) 61 C.A.2d 385, 386, 142 P.2d 935.)

SUPPLEMENT: [This section is current through the latest supplement]



67 of 194 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXVI. CHANGE OF VENUE

C. Convenience of Witnesses.

2. Review of Order.

a. Discretion of Trial Court.

3 *Witkin Cal. Proc. Actions* § 948

[§ 948] Discretion of Trial Court.

(1) *Statement of Rule.* The rule that the burden is on the moving party to make a sufficient showing is chiefly important in the lower court. Change for convenience of witnesses is discretionary with the trial judge, and the judge's ruling will not be disturbed by a reviewing court except for an abuse of discretion. In practical effect, this means that the reviewing court will be less concerned with whether the moving party has met his or her burden than with whether the trial judge could reasonably conclude that the moving party had or had not. The change in the method of reviewing superior court orders, by mandamus instead of appeal (see *supra*, §919), does not alter the approach; the same test of abuse of discretion is applied. (See *Union Trust Life Ins. Co. v. Superior Court* (1968) 259 C.A.2d 23, 28, 66 C.R. 270, citing the text.)

(2) *Illustrations.* The following cases, classified according to the result reached, are illustrative:

(a) *Granting of motion affirmed.* (See *Gordon v. Perkins* (1928) 203 C. 183, 186, 263 P. 231; *Barclay v. Supreme Lodge of Fraternal Brotherhood* (1917) 34 C.A. 426, 429, 167 P. 701; *National Auto. Ins. Co. v. Havlik* (1931) 113 C.A. 264, 265, 298 P. 75; *Wood v. Silvers* (1939) 35 C.A.2d 604, 607, 608, 96 P.2d 366; *Carruthers v. Crown Products Co.* (1948) 89 C.A.2d 326, 327, 200 P.2d 819; *State Comp. Ins. Fund v. Maloney* (1954) 122 C.A.2d 920, 925, 266 P.2d 81; *Harden v. Skinner & Hammond* (1955) 130 C.A.2d 750, 754, 279 P.2d 978, *infra*, §949; *J.C. Millett Co. v. Latchford-Marble Glass Co.* (1959) 167 C.A.2d 218, 224, 334 P.2d 72.)

(b) *Denial of motion affirmed.* (See *Scott v. Stuart* (1923) 190 C. 526, 529, 213 P. 947; *Di Giorgio Fruit Corp. v. Zachary* (1943) 60 C.A.2d 560, 563, 141 P.2d 8; *Pacific Coast Title Ins. Co. v. Land Title Ins. Co.* (1950) 97 C.A.2d 829, 832, 218 P.2d 573; *People v. Spring Valley Co.* (1952) 109 C.A.2d 656, 667, 241 P.2d 1069; *Churchill v. White* (1953) 119 C.A.2d 503, 506, 259 P.2d 974 [opposing party's material witnesses would be inconvenienced]; *Rios v. Lacey Trucking Co.* (1954) 123 C.A.2d 865, 868, 268 P.2d 160; *Chaffin Const. Co. v. Maleville Bros.* (1957) 155 C.A.2d 660, 663, 318 P.2d 196; *Edwards v. Pierson* (1957) 156 C.A.2d 72, 75, 318 P.2d 789, citing the text; *Minatta v. Crook* (1959) 166 C.A.2d 750, 754, 333 P.2d 782; *Hecker v. Ross* (1960) 183 C.A.2d 30, 33, 6 C.R. 438; *Union Trust Life Ins. Co., supra.*)

(c) *Granting of motion reversed.* (See *Peiser v. Mettler* (1958) 50 C.2d 594, 607, 328 P.2d 953; *Flanagan v. Flanagan* (1959) 175 C.A.2d 641, 643, 346 P.2d 418.)

(d) *Denial of motion reversed.* (See *Bartholomae Oil Corp. v. Associated Oil Co.* (1928) 203 C. 176, 179, 263 P. 516; *Carr v. Stern* (1911) 17 C.A. 397, 408, 120 P. 35; *First-Trust Joint Stock Land Bank of Chicago v. Meredith* (1936) 16 C.A.2d 504, 508, 60 P.2d 1023 ["where there is a showing that the convenience of witnesses and the ends of justice will be promoted by the change and there is absolutely no showing whatever to the contrary and a change has been denied, then there has been an abuse of discretion"]; *Baird v. Smith* (1937) 21 C.A.2d 221, 223, 68 P.2d 979, *infra*, §949; *E.C. Livingston Co. v. Blythe Alfalfa Growers Assn.* (1956) 139 C.A.2d 161, 164, 293 P.2d 96; *Seybert v. Imperial* (1956) 139 C.A.2d 221, 230, 293 P.2d 135; *Maxwell v. Murray* (1961) 190 C.A.2d 440, 443, 11 C.R. 916, *infra*, §951; *Pearson v. Superior Court* (1962) 199 C.A.2d 69, 78, 81, 18 C.R. 578; *Rothschild v. Superior Court* (1963) 216 C.A.2d 778, 779, 31 C.R. 248; *Garrett v. Superior Court* (1967) 248 C.A.2d 263, 268, 56 C.R. 418; *Silva v. Superior Court* (1981) 119 C.A.3d 301, 304, 173 C.R. 832.)

SUPPLEMENT: [This section is current through the latest supplement]



68 of 194 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXVI. CHANGE OF VENUE

C. Convenience of Witnesses.

2. Review of Order.

b. Showing Held Sufficient.

3 *Witkin Cal. Proc. Actions* § 949

[§ 949] Showing Held Sufficient.

(1) *Factors for Consideration.* Some of the factors to be considered in determining the sufficiency of the showing were set forth in *Wood v. Silvers* (1939) 35 C.A.2d 604, 96 P.2d 366. "The mere numerical majority of the witnesses on one side or the other does not necessarily determine the merits of the motion. ... [T]he evidence of one or more of them may be more important in deciding the issues involved than a greater number of other witnesses. Certain witnesses may live in localities inaccessible and remote from the place to which the cause is sought to be transferred; the means of conveyance for lack of railroad facilities or the absence of highways may be difficult; the time required of some witnesses in attending court at a remote place may be more valuable than that of others on account of the nature of their employment or the emergency of enterprises in which they are engaged." (35 C.A.2d 607.) (See *Richfield Hotel Management v. Superior Court* (1994) 22 C.A.4th 222, 226, 227, 27 C.R.2d 161, *supra*, §886, citing the text; 74 A.L.R.2d 16, 85 [construction and effect of statutory provision for change of venue to promote convenience of witnesses and ends of justice].)

(2) *Illustrations.* There seems little justification for the liberality displayed in *Wood*. Plaintiff sued in Sonoma County, for the value of labor and materials. Defendants moved for change to their residence, Lake County, and plaintiff made a countermotion to retain for convenience of witnesses, supported by affidavits of eight witnesses, and opposed by affidavits of three defendants. Of plaintiff's witnesses, three were currently employees, five were employees until a few months before the action, and defendants offered to stipulate to the testimony of two of these five. *Held*, the trial court did not abuse its discretion in retaining the venue at Sonoma County. Disregarding present employees and those to whose testimony defendants would stipulate, there remained three witnesses, no longer employed by plaintiff, each averring that he was employed in Sonoma County, and that it would be inconvenient to travel to Lake County, presumably on account of the distance and expense. This was held sufficient to sustain the order. (35 C.A.2d 607.)

In *Baird v. Smith* (1937) 21 C.A.2d 221, 68 P.2d 979, the action was against a widow for medical services performed for her deceased husband. After transfer to defendant's residence, plaintiff's motion sought retransfer to San Francisco for the convenience of doctors and employees of a San Francisco hospital where the deceased was treated. Defendant made a weak countershowning and, on appeal, the lower court's refusal to change was held an abuse of discretion. "If the convenience of eight or ten physicians and half a dozen employees of a prominent institution like the

University of California Hospital does not establish just cause for a change of the place of trial of a suit without proper rebuttal, under the circumstances of this case, we are of the opinion it would be difficult to make an adequate showing which would require a change of venue for the convenience of witnesses. Ten physicians who are averred to have personal knowledge of the case and who will testify to the value of the services will be accommodated far more than nonexpert witnesses who are not connected with a great institution like the University of California Hospital." (21 C.A.2d 223.)

In *Harden v. Skinner & Hammond* (1955) 130 C.A.2d 750, 279 P.2d 978, the great majority of the witnesses (more than 90) lived in the county to which transfer was sought, and the adverse party made no countershowing of inconvenience to his witnesses if the motion were granted. As to the "ends of justice," the court said that a bare averment in the affidavit would not be sufficient, but that there need not be direct evidence on the issue; inferences from the averments in the affidavits were held to justify the trial judge's order. These inferences were that (a) the numerous witnesses would be accessible for immediate recall if further testimony was desired; (b) the office of the business was close to the new place of trial, presumably making production of records more expeditious; (c) time and expense of witnesses traveling to and from the place of trial would be cut down. (130 C.A.2d 755.) The opinion thus appears to stand for the proposition that the ends of justice are served both by avoiding unnecessary delay and expense in the court proceedings, and by avoiding unnecessary delay and expense to the parties and their witnesses.

SUPPLEMENT: [This section is current through the latest supplement]



69 of 194 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXVI. CHANGE OF VENUE

C. Convenience of Witnesses.

2. Review of Order.

c. Showing Held Insufficient.

1. Testimony Sought Is Not Material.

3 *Witkin Cal. Proc. Actions* § 950

[§ 950] Testimony Sought Is Not Material.

(1) *Testimony Is Immaterial, Cumulative, or of Slight Importance.* The most obvious situations calling for denial of the motion are those in which the testimony sought is not material, or is merely cumulative, or is of slight importance in the case. In *Mize v. Old Taylor Fruit Co. (1931) 114 C.A. 588, 300 P. 128*, the affidavit of plaintiff named four witnesses who would testify to statements of Burns, "agent of Old Taylor Fruit Co." (defendant). Apart from this legal conclusion, there were no allegations of the agency of Burns. *Held*, the proposed testimony was not shown to be material, and the order granting change was reversed. "The showing in regard to their convenience is ample. But not only must it appear that the greater convenience of certain witnesses would be served, but that it would serve some useful purpose to have them as witnesses; that is, that they are expected to bring evidence which is material." (114 C.A. 589.)

Other cases are to the same effect. (See *Peiser v. Mettler (1958) 50 C.2d 594, 610, 328 P.2d 953* [witness' testimony of custom and usage would be inadmissible contradiction of lease terms]; *Ott v. Gotfried (1940) 41 C.A.2d 817, 818, 107 P.2d 658* [defendant, asserting fraud in sale of land, sought change for convenience of his witnesses on issue of falsity of representations, but mentioned no witness on the primary issue whether alleged representations were in fact made]; *Di Giorgio Fruit Corp. v. Zachary (1943) 60 C.A.2d 560, 564, 141 P.2d 8* [cumulative testimony]; but see *Sowers v. Sowers (1932) 127 C.A. 579, 583, 16 P.2d 176* [action by divorced wife for support of daughters; convenience of daughters, as witnesses, could be considered even though their testimony was cumulative of that of plaintiff wife].)

(2) *Testimony Is Material but Stipulated to.* A similar but much stronger reason for denying the motion exists where the testimony would have been material but the adverse party, in opposition to the motion, offers to stipulate to the facts involved, thereby eliminating the issue and with it the necessity for the witness. In *Blossom v. Waller (1916) 30 C.A. 439, 158 P. 509*, plaintiff sued for breach of contract, defendant cross-complained, and plaintiff sought a change for convenience of witnesses who would testify on the issues raised by the cross-complaint. Defendant, at the hearing, offered a written stipulation, on condition that the action be tried in the proper county, admitting as true the controverted facts relating to those issues. *Held*, the motion for change was properly denied. "Stipulations of the character proposed

in the present case may properly be received in opposition to a motion for a change of venue made upon the ground of the convenience of witnesses. The stipulations of the defendant, if accepted, would in effect have eliminated the defendant's cause of action for damages as pleaded in his cross-complaint, and consequently the plaintiff would not have been put to the necessity of producing witnesses to testify in his behalf upon that phase of the case." (30 C.A. 441.)

Other cases are to the same effect. (See *Stockton Combined Harvester & Agricultural Works v. Houser* (1894) 103 C. 377, 380, 37 P. 179; *Schilling v. Buhne* (1903) 139 C. 611, 613, 73 P. 431; *Wood v. Silvers* (1939) 35 C.A.2d 604, 609, 96 P.2d 366.)

The stipulation, however, must be to the facts, i.e., to the truth of the testimony to be offered. A stipulation that the witnesses would testify as the affidavit states is of slight value, because the credibility of their testimony is a matter for the jury or the court, and the party is entitled to have them appear. (*Nelson v. Enos* (1941) 47 C.A.2d 79, 81, 117 P.2d 429 [proposed stipulation by only one of two defendants, not binding on other, was not sufficient].)

SUPPLEMENT: [This section is current through the latest supplement]



70 of 194 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXVI. CHANGE OF VENUE

C. Convenience of Witnesses.

2. Review of Order.

c. Showing Held Insufficient.

2. Convenience of Experts.

3 *Witkin Cal. Proc. Actions* § 951

[§ 951] Convenience of Experts.

(1) *General Rule.* The convenience of expert witnesses having no personal knowledge of any facts in the case should not be considered on a motion of this kind. (See *Wrin v. Ohlandt* (1931) 213 C. 158, 160, 1 P.2d 991 [action for value of medical services rendered, witness merely to testify to reasonable value]; *Figley v. California Arrow Airlines* (1952) 111 C.A.2d 285, 287, 244 P.2d 472 [Civil Aviation Administration officials in death case following crash of airplane]; 74 A.L.R.2d 16, 99 [construction and effect of statutory provision for change of venue to promote convenience of witnesses and ends of justice]; but see *Goodpastor v. Cary* (1934) 2 C.A.2d 635, 637, 38 P.2d 794 [court's discretion in ordering retention of malpractice action for convenience of experts on general standard of care was upheld, without discussion].)

On the other hand, where the expert will testify from personal knowledge of the facts of the case, the expert's convenience may be considered. (See *Pacific States Corp. v. Shepardson* (1930) 105 C.A. 747, 751, 288 P. 714; *Di Giorgio Fruit Corp. v. Zachary* (1943) 60 C.A.2d 560, 563, 141 P.2d 8.)

(2) *Illustrations of Insufficient Showing.* In *Barnett v. United Oil Co.* (1935) 5 C.A.2d 175, 42 P.2d 656, an action for an accounting under an oil and gas lease, it was argued that the expert, who was to testify to practices in the industry and value of natural gas, had "personal knowledge of the facts upon which his testimony will be based" because his knowledge of the industry was derived from personal observation and training. (5 C.A.2d 181.) But the court rejected this theory, pointing out that the test was whether he had personal knowledge of the facts involved in the particular action. (5 C.A.2d 181.)

In *Maxwell v. Murray* (1961) 190 C.A.2d 440, 11 C.R. 916, a personal injury action, on plaintiff's counter-motion for retention in the county where she resided, the trial judge denied defendant's motion for change of venue to the proper county. The basis of the order was plaintiff's affidavit stating that three named doctors in the county of her residence "will testify to the nature and extent of the injuries sustained by the plaintiff." The appellate court's original opinion upheld the trial judge's order on the "inference" that the doctors had examined and treated her and could therefore testify as to facts. But on rehearing, the court reversed the order, holding the affidavit entirely insufficient. No

such inference of treatment could be drawn from the plaintiff's affidavit, and there were no affidavits of the doctors themselves. More important, the statement was a mere conclusion that did not indicate the nature of their testimony and hence failed to satisfy the rule of *Juneau v. Juneau* (1941) 45 C.A.2d 14, 113 P.2d 463, supra, §943. (190 C.A.2d 445.)

SUPPLEMENT: [This section is current through the latest supplement]



71 of 194 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXVI. CHANGE OF VENUE

C. Convenience of Witnesses.

2. Review of Order.

c. Showing Held Insufficient.

3. Convenience of Party or Employee.

aa. General Rule: Convenience Is Not Considered.

3 Witkin Cal. Proc. Actions § 952

[§ 952] General Rule: Convenience Is Not Considered.

It is said to be the general rule that the convenience of a party or his or her employee is not to be considered. (See *Wrin v. Ohlandt* (1931) 213 C. 158, 159, 1 P.2d 991; *Peiser v. Mettler* (1958) 50 C.2d 594, 612, 328 P.2d 953; *Barnett v. United Oil Co.* (1935) 5 C.A.2d 175, 180, 42 P.2d 656 [rule applies to "employees of one who is specifically asserted to be a necessary party and for whose nonjoinder the complaint is directly attacked"]; *First-Trust Joint Stock Land Bank of Chicago v. Meredith* (1936) 16 C.A.2d 504, 510, 62 P.2d 369 [Supreme Court denying hearing: "[W]e withhold approval of the statement in the opinion that the convenience of witnesses who are parties is a factor in determining a motion for change of venue on the ground of convenience of witnesses"]; *Carnation Co. v. El Rey Cheese Co.* (1949) 92 C.A.2d 726, 728, 208 P.2d 63; *Rios v. Lacey Trucking Co.* (1954) 123 C.A.2d 865, 868, 268 P.2d 160 [convenience of a party "cannot be considered in the absence of unusual circumstances"]; *Chaffin Const. Co. v. Maleville Bros.* (1957) 155 C.A.2d 660, 663, 318 P.2d 196; *Edwards v. Pierson* (1957) 156 C.A.2d 72, 76, 318 P.2d 789, citing the text; *Maxwell v. Murray* (1961) 190 C.A.2d 440, 443, 11 C.R. 916, supra, §951; *Dillman v. Superior Court* (1962) 205 C.A.2d 769, 773, 23 C.R. 498; 74 A.L.R.2d 16, 89 [construction and effect of statutory provision for change of venue to promote convenience of witnesses and ends of justice]; but see *Wood v. Silvers* (1939) 35 C.A.2d 604, 610, 96 P.2d 366, supra, §949 [convenience of former employees could be considered].)

SUPPLEMENT: [This section is current through the latest supplement]



72 of 194 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXVI. CHANGE OF VENUE

C. Convenience of Witnesses.

2. Review of Order.

c. Showing Held Insufficient.

3. Convenience of Party or Employee.

bb. Exception: Infirmary.

3 *Witkin Cal. Proc. Actions* § 953

[§ 953] Exception: Infirmary.

Some cases have sustained departures from the general rule enunciated in the preceding section as permissible exercises of the broad discretion of the court. The facts of *Borba v. Toste* (1942) 52 C.A.2d 591, 126 P.2d 655, illustrate the pressures which the supposed rule cannot withstand. Plaintiff, blind, infirm, and impecunious, sued in Tulare County, where he resided in the Old People's Home, alleging that defendants, by fraud in the inception, procured a conveyance of his property. Defendants obtained a transfer to Los Angeles, their residence, on an unopposed motion. Later plaintiff moved for retransfer to Tulare, and the order granting retransfer was upheld, despite affidavits by defendants that they were financially unable to attend or bring the only witnesses to the transaction (other than the parties) to Tulare. The court declared that "where a party is in such a state as to render it impracticable for him to be transported to a distant forum for the purpose of giving his testimony and where his testimony is an important part of his proof, it appears to be in furtherance of justice to consider his convenience also." It was further observed: "Where fraud is made the basis of an action to recover his total wealth by a party who is physically incompetent to aid himself, it would not be promotive of justice to deprive him or his witnesses of attendance at the forum. ... Especially is this true where the venue he seeks for his convenience is the county of his residence, the place where his witnesses reside and wherein the first and last acts in his narrative occurred." (52 C.A.2d 594.) Notwithstanding this persuasive language, it would seem that both sides here had equally good arguments as to convenience of their witnesses, so that the venue should have been kept in Los Angeles, the proper county. The decision apparently turned on the fact that plaintiff could not travel at all, while defendants could, though they were financially unable to do so.

A decision even more difficult to explain is *Kroesen v. Gordon* (1943) 61 C.A.2d 385, 142 P.2d 935. The order of change was granted, in an action for fraud, on the ground that plaintiff husband, in poor health, could not safely leave the county of his residence, and that his testimony was essential. In upholding the order, the court declared that the real question was simply whether there was an abuse of discretion in granting a motion where the affidavits were conflicting, and characterized the appeal as "frivolous and absolutely without merit." (61 C.A.2d 387.)

These two cases led the court in *Simonian v. Simonian* (1950) 97 C.A.2d 68, 217 P.2d 157, to conclude that the

"ends of justice" phrase in the statute justifies a departure from the ordinary rule "where one party's physical condition will make it impossible or dangerous to his health to travel to a distant county to give material evidence." Hence, plaintiff (and cross-defendant), in an action for dissolution of partnership, obtained a transfer from San Francisco to Los Angeles on an affidavit showing that he was confined in a Los Angeles sanitarium with a heart ailment. (97 C.A.2d 69.) (See *Lieberman v. Superior Court* (1987) 194 C.A.3d 396, 401, 403, 239 C.R. 450, *infra*, §954 [court properly considered convenience of plaintiff whose disability might prevent his attendance at trial].)

SUPPLEMENT: [This section is current through the latest supplement]



73 of 194 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXVI. CHANGE OF VENUE

C. Convenience of Witnesses.

2. Review of Order.

c. Showing Held Insufficient.

3. Convenience of Party or Employee.

cc. Exception: Employees of Adverse Party.

3 *Witkin Cal. Proc. Actions* § 954

[§ 954] Exception: Employees of Adverse Party.

Where the prospective witnesses are employees of the adverse party, they are ordinary witnesses as to the moving party and their convenience may be considered. (*Harden v. Skinner & Hammond* (1955) 130 C.A.2d 750, 757, 279 P.2d 978, *supra*, §949.)

In *Lieberman v. Superior Court* (1987) 194 C.A.3d 396, 239 C.R. 450, a personal injury action arising out of an automobile accident in Inyo County was filed in Los Angeles County. Defendant automobile companies filed a cross-complaint against the state, which in turn filed a motion for change of venue based primarily on the convenience of state employee witnesses. Defendants, whose earlier motions for change of venue had been denied, joined the state's motion. The trial judge granted the motions, concluding that, although the convenience of the state's employees could not be considered on the state's motion, their inconvenience could be considered with respect to the motion of defendants, as they could call the state's employees as part of their defense. *Held*, the court erroneously considered the convenience of the state's employees.

(a) A limited exception permits a court to consider the convenience of witnesses who are employees of a party, when the employees are called as witnesses by the adverse party rather than on behalf of their employer. (194 C.A.3d 401, citing *J.C. Millett Co. v. Latchford-Marble Glass Co.* (1959) 167 C.A.2d 218, 227, 334 P.2d 72, and *Harden*.)

(b) In *Millett* and *Harden*, there were but two parties involved, plaintiff and defendant, and the employees of the defendant were being called by the plaintiff, alone, to establish an element of the plaintiff's case. In the present case, the state's employees were presumably being called primarily by their employer, the cross-defendant, for the purpose of establishing a defense against the cross-complaint. Hence, the state's motion comes under the general rule and should have been denied. (194 C.A.3d 402.)

SUPPLEMENT: [This section is current through the latest supplement]



74 of 194 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXVI. CHANGE OF VENUE

D. Impartial Trial Impossible.

1. Procedure.

3 *Witkin Cal. Proc. Actions* § 955

[§ 955] Procedure.

(1) *In General.* The court may change the venue "[w]hen there is reason to believe that an impartial trial can not be had therein." (*C.C.P.* 397(b).) The motion is made in the usual manner, supported by affidavits or other showing. (See *Cal. Civil Practice*, 2 Procedure, §§10:65, 10:89, 10:92; *Rutter Group, Civil Proc. Before Trial* §3:560 et seq.; 24A *Am.Jur. P.P. Forms* (2008 ed.), Venue, Form 157 et seq.) A countershowing may be made by the adverse party. (See *infra*, §956.) The procedure of transfer, including the payment of costs, is the same as that provided for transfer on the ground of convenience of witnesses. (*C.C.P.* 398; see *supra*, §940.) (See 50 *A.L.R.3d* 760 [choice of venue to which transfer is to be made].)

(2) *Time of Motion.* The motion may not be made until an answer is on file, and perhaps until there has been an attempt to pick a jury. In *Cook v. Pendergast* (1882) 61 C. 72, a case dealing with convenience of witnesses (see *supra*, §942), the court, emphasizing the requirement of an answer on file before the motion could be made, treated the situation as analogous to that presented by a motion based on impossibility of an impartial trial. "But neither plaintiff nor defendant can move for a change of the place of trial because of the convenience of witnesses, or because a fair trial can not be had, until the event has occurred which, in the one case, can alone enable the Court to decide what facts are material to be proved by the respective parties, or which in the other case, will assist the Court in ascertaining whether such local prejudice exists as may influence the conduct of the jury. ... So plainly does it appear that a motion on this ground should be made after answer, that the practice of attempting to secure a jury before passing on the motion has been approved. It has even been held that nothing less than an actual experiment, by way of trial or attempt, to empanel a jury, and a consequential failure, will be sufficient to show that a fair and impartial trial can not be had." (61 C. 79.)

A less positive dictum appears in *J.I. Case Threshing Machine Co. v. Copren Bros.* (1917) 35 C.A. 70, 169 P. 443: "While we do not hold that a change of venue on the grounds here stated would under no condition of circumstances be granted until an unsuccessful attempt had been made to impanel a jury, no case has come under our observation in which a change of venue was sought or granted where there had not been one trial, or where some effort had not been made to obtain a jury. It is conceivable that a showing might be made of a prejudice against a plaintiff so widespread, intense, and outspoken, through the public press and otherwise, as to warrant a conclusion that the plaintiff would not have a fair trial where the action was pending. But it must be conceded that without making an attempt to secure an impartial jury, it would require something more than a showing that the defendants 'are well and favorably known

throughout the entire length of the county,' and that one of them 'is of wide and consequential influence therein.' " (35 C.A. 79.)

A later case, *People v. Ocean Shore R.* (1938) 24 C.A.2d 420, 75 P.2d 560, is even more hesitant. The court upheld an order granting a change, declaring that the attempt to impanel a jury was not the exclusive test. "It is contemplated that a motion for change of venue be heard prior to the commencement of the trial. While under the authorities above referred to, it might not be an abuse of discretion for the court if still doubtful after a consideration of the evidence adduced at such hearing to hold decision upon the motion in abeyance until an attempt to secure a fair and impartial jury had been made, there is no necessity for doing so if, at such hearing there appears sufficient reason to believe that an impartial trial cannot be had." (24 C.A.2d 426.) (See *People v. Spring Valley Co.* (1952) 109 C.A.2d 656, 665, 241 P.2d 1069; 26 Cal. L. Rev. 716.)

(3) *Effect of C.C.P. 394.* In *Paesano v. Superior Court* (1988) 204 C.A.3d 17, 250 C.R. 842, a wrongful death action against defendant county, the issue was whether the mandatory language of C.C.P. 394 that such actions "shall be tried" in the county allegedly causing the accident (see supra, §874) prohibits discretionary removal under former C.C.P. 397(2) (now C.C.P. 397(b)). *Held*, it does not. C.C.P. 397 contains no words of subordination, and hence, unambiguously applies without limitation to all cases within its terms. "If it were true that cases within the mandatory language of section 394 were absolutely excluded from the operation of section 397 (subd. 2), then it would follow that some cases in that category would necessarily be tried in counties where 'there is reason to believe that an impartial trial cannot be had.' We are satisfied the Legislature did not intend such a mischievous result." (204 C.A.3d 20.)

SUPPLEMENT: [This section is current through the latest supplement]



75 of 194 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXVI. CHANGE OF VENUE

D. Impartial Trial Impossible.

2. Sufficiency of Showing.

3 *Witkin Cal. Proc. Actions* § 956

[§ 956] Sufficiency of Showing.

The relatively few cases that have considered this ground disclose neither a test nor any consistency in result, and this is scarcely surprising, because the challenge is so vague and difficult to sustain.

(1) *Showing Insufficient.* In *J.I. Case Threshing Machine Co. v. Copren Bros.* (1917) 35 C.A. 70, 169 P. 443, plaintiff, a foreign corporation, sued defendants at their residence, for the price of a machine. The jury, after objection, returned a directed verdict for plaintiff, which was reversed on appeal. In the new action, the trial judge granted a motion for change, noting plaintiff's status, the jury's reluctance, defendants' wide acquaintance in the locality, and the fact that one defendant was the county assessor. But the order was reversed for abuse of discretion. After expressing its faith in the "moral and intellectual fibre" of the inhabitants of Sierra County, the court declared: "It is an unwarranted inference that an impartial jury cannot be called from the citizens of that county capable of impartially trying a case between a foreign corporation and residents therein simply because these persons are widely and favorably known in the county. To disqualify the entire inhabitants of a county to sit as jurors on such grounds would, in our opinion, be an unreasonable exercise of judicial power. This impeachment of its citizens would include logically the judge of the superior court and for like reasons his disqualification to sit in the case might be invoked." (35 C.A. 78.)

In *Ross v. Kalin* (1921) 53 C.A. 616, 200 P. 745, plaintiff sued some 30 defendants in the town of Brawley, Imperial County, where he and defendants resided, for assault and false imprisonment. His affidavits averred that as a result of active crusading against vice, he had incurred the enmity of many prominent people in Brawley who had him beaten, circulated false and scandalous reports about him, and also dealt harshly with his attorney and sureties on an appeal bond. Defendants' affidavits admitted that prejudice existed against plaintiff in Brawley, but not that it existed elsewhere in the county. An order denying the motion was upheld. The court recognized that for a long period prior to the hearing "there had been a strong and bitter feeling of prejudice" against plaintiff in the minds of many persons; that the 30 defendants "have been endeavoring to prejudice the minds of the people against him to prevent his having an impartial trial"; and that "the very existence of such a widespread prejudice as the appellant claims would tend to make it difficult, if not impossible, to procure proof thereof." (53 C.A. 619.) But the court then observed that the affidavits did not show more than 300 persons prejudiced, that there might be as many as 12,000 qualified jurors, and that consequently the trial judge's discretion was not abused. (53 C.A. 619.)

In *Nguyen v. Superior Court* (1996) 49 C.A.4th 1781, 57 C.R.2d 611, a county district attorney filed a complaint under the Red Light Abatement Law to abate acts of lewdness and prostitution at businesses owned by defendants, who did not reside in the county. Defendants moved to transfer the action to another county because they claimed they could not receive an impartial trial. *Held*, the trial judge did not abuse his discretion in denying the motion, because defendants failed to prove actual prejudice.

(a) Defendants showed that only two newspaper articles reported the raid on the businesses, the city and county spent only about \$ 5,000 investigating the businesses, and a declaration by an employee for defendants' counsel stated only that people told him the police department asked them if they supported shutting down the businesses. This did not demonstrate a widespread feeling of prejudice extending over a long time. (49 C.A.4th 1791.)

(b) Moreover, the prospect of a jury trial is extremely important, if not crucial, in determining whether there is reason to believe that an impartial trial cannot be had in the court where the matter is pending, and no jury trial is permitted in an abatement action. And, defendants offered no evidence to establish that they could not receive a fair court trial. (49 C.A.4th 1791.)

(2) *Showing Sufficient*. The three preceding cases, which imposed an impossible burden of proof on the moving party, should be contrasted with *People v. Ocean Shore R. (1938)* 24 C.A.2d 420, 75 P.2d 560, a condemnation proceeding. The defendant corporation, one of 32 defendants, filed nearly 200 affidavits, described as follows: "By reference to newspaper editorials and articles, by reports of civic meetings and statements by numerous citizen[s] of the county, the affidavits tend to show a widespread feeling of prejudice extending over a long period of years, both against the officials of respondent corporation and against its cause, such as would at least make it extremely doubtful whether an impartial trial could be had before a jury in that county." *Held*, the trial judge did not abuse his discretion in granting the motion. (24 C.A.2d 427.) (See *San Joaquin & Kings River Canal & Irr. Co. v. James J. Stevinson* (1919) 179 C. 533, 538, 178 P. 229 [change of venue was justified where prospective jurors in county to which action was transferred were not likely to be prejudiced]; 10 A.L.R.4th 1046 [change of venue justified by large number of local inhabitants having interest adverse to party to state civil action]; but see *People v. Spring Valley Co. (1952)* 109 C.A.2d 656, 661, 241 P.2d 1069 [conditions 10 years after *Ocean Shore* were sufficiently changed to make impartial trial possible].)

SUPPLEMENT: [This section is current through the latest supplement]



76 of 194 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXVI. CHANGE OF VENUE

E. Disqualified Judge.

3 *Witkin Cal. Proc. Actions* § 957

[§ 957] Disqualified Judge.

The court may change venue "[w]hen from any cause there is no judge of the court qualified to act." (*C.C.P.* 397(d).) (See *Hancock v. Burton* (1882) 61 C. 70, 71; *Meyer v. San Diego* (1898) 121 C. 102, 104, 53 P. 434; *Wessel v. Superior Court* (1918) 177 C. 308, 310, 170 P. 606; *Cal. Civil Practice*, 2 Procedure, §§10:65, 10:89; 64 *A.L.R.2d* 600, 611 [contempt proceeding involving judge or court]; 24A *Am.Jur.* P.P. Forms (2008 ed.), Venue, Forms 168, 192.) No grounds for disqualification are stated in the venue statutes, and reference must be made to *C.C.P.* 170.1. (See 2 *Cal. Proc.* (5th), *Courts*, §101 et seq.) The procedure of transfer, including the payment of costs, is the same as that prescribed for change on the ground of convenience of witnesses or impossibility of impartial trial. (*C.C.P.* 398; see *supra*, §940.)

C.C.P. 397(d) is virtually obsolete. Under the present system of assignment of outside judges by the Chief Justice (see 2 *Cal. Proc.* (5th), *Courts*, §11 et seq.), no useful purpose is served by transferring the entire case to another county. Assignment of a qualified judge in place of the disqualified judge is all that is necessary. (See *People v. Spring Valley Co.* (1952) 109 *C.A.2d* 656, 672, 241 *P.2d* 1069 [dictum that disqualification of all judges in county does not ordinarily require change of venue, for qualified judge may be assigned]; *San Bernardino Valley Mun. Water Dist. v. West Riverside 350 Inch Water Co.* (1962) 205 *C.A.2d* 145, 147, 22 *C.R.* 827; 2 *Cal. Proc.* (5th), *Courts*, §125.)

SUPPLEMENT: [This section is current through the latest supplement]



77 of 194 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXVI. CHANGE OF VENUE

F. Removal to Neutral County.

3 *Witkin Cal. Proc. Actions* § 958

[§ 958] Removal to Neutral County.

C.C.P. 394, authorizing removal to a neutral county where a city or county is a party, only indirectly determines venue; procedurally, it is a removal or change of venue statute, which comes into operation only after the action is filed in a county of proper venue. (See *supra*, §871.)

The procedure under *C.C.P. 394* was considered in *Adams v. Superior Court* (1964) 226 C.A.2d 365, 38 C.R. 164. Riverside County sued defendants, whose demurrers were submitted for decision under an order granting time to file points and authorities. Defendants filed them, and also filed a motion under *C.C.P. 394*. The lower court heard and denied the motion for change of venue, without ruling on the demurrers. On defendants' petition, mandamus was granted to compel transfer to San Bernardino County, but subject to conditions.

(a) *C.C.P. 394* does not prescribe any time for this motion; hence, it must be made within a reasonable time. This depends on the circumstances; it need not, like an ordinary motion, be made at the time to plead (*supra*, §924). Here, it was made before trial of any issue of law or fact, and the time was reasonable. (226 C.A.2d 367.)

(b) The primary issue, however, was whether the transfer should await determination of the demurrer. A motion under *C.C.P. 395* suspends the power of the trial court to act until it is determined (*supra*, §914), but it is doubtful whether this rule applies to a motion under *C.C.P. 394*. Even if it does apply, a ruling may be made on a demurrer already argued and submitted before making of the motion. This is recognized by *C.C.P. 400*, providing that the appellate court may stay proceedings pending a decision on the petition for mandamus. (226 C.A.2d 368.)

(c) Defendants could have moved for change of venue before submission of their demurrers, and thereby have obtained a transfer to a neutral county to try the issues of law of their demurrers. But failure to assert their right before submission of the demurrers was a waiver "as it applied to the trial of the issues of law raised by those demurrers." (226 C.A.2d 369.)

(d) Hence, mandamus was granted, but conditionally: The writ was to issue when the decision became final; in the interim between filing of the opinion and time of finality, the Riverside court could rule on the demurrers, and if that court should sustain them without leave to amend and enter judgment for defendants, no transfer should be made. (226 C.A.2d 369.)

SUPPLEMENT: [This section is current through the latest supplement]



78 of 194 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXVII. PROCESS: IN GENERAL

A. Nature of Process.

3 *Witkin Cal. Proc. Actions* § 959

[§ 959] Nature of Process.

"Process" is defined as "a writ or summons issued in the course of judicial proceedings" (*C.C.P. 17(a)(6)*), which may be civil or criminal (*Govt.C. 22*). The term "includes all writs, warrants, summons, and orders of courts of justice, or judicial officers." (*Govt.C. 26660*; see *In re Baker (1916)* 32 C.A. 320, 324, 162 P. 922; for process in criminal proceedings, see 4 *Cal. Crim. Law (3d)*, *Pretrial Proceedings*, §18 et seq.; for process in juvenile court proceedings, see 10 *Summary* (10th), *Parent and Child*, §§566, 776 et seq.; for process in insanity, narcotic, sex offender, and similar proceedings, see *supra*, §80 et seq.)

Thus the concept of "process" embraces a number of quite different matters, having distinct purposes; e.g., to commence a legal proceeding and acquire jurisdiction over a person or thing, to enforce a provisional or extraordinary remedy, to carry out or make effective some judgment or direction of a court. (See C.E.B., 1 *Civil Proc. Before Trial* 4th, Chap. 17; *Cal. Civil Practice*, 1 *Procedure*, Chap. 6; Rutter Group, *Civil Proc. Before Trial*, Chap. 4; 62 *Am.Jur.2d* (2005 ed.), *Process* §1 et seq.) (On fees, see 6 *Cal. Proc. (5th)*, *Provisional Remedies*, §4; 8 *Cal. Proc. (5th)*, *Enforcement of Judgment*, §§254, 256.)

West's Key Number Digest, Process 1 et seq.

SUPPLEMENT: [This section is current through the latest supplement]



79 of 194 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXVII. PROCESS: IN GENERAL

B. Kinds of Process.

1. Summons in Civil Action.

3 *Witkin Cal. Proc. Actions* § 960

[§ 960] Summons in Civil Action.

(1) *In General.* A summons in an action or proceeding is issued by the clerk of the court, to be served on the defendant in a manner authorized by law. It is the usual means by which the court gives jurisdictional notice to the defendant, directs the defendant's appearance, and thus acquires jurisdiction of the defendant's person. (See *C.C.P.* 410.50 et seq., 412.10 et seq.; *Lyman v. Milton* (1872) 44 C. 630, 634; *Harrington v. Superior Court* (1924) 194 C. 185, 189, 194, 228 P. 15; *Nellis v. Justices' Court* (1912) 20 C.A. 394, 397, 129 P. 472; 2 *Cal. Proc.* (5th), *Jurisdiction*, §§120, 121; *infra*, §981 et seq.) A summons may be had at the simple request of the plaintiff and may be served either by a court officer or a private individual. (See *infra*, §§997, 998.)

(2) *Substituted Service.* A summons may also be used in substituted service, e.g., by publication, to obtain jurisdiction, in rem or quasi in rem, over property or status. (See 2 *Cal. Proc.* (5th), *Jurisdiction*, §262 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]



80 of 194 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXVII. PROCESS: IN GENERAL

B. Kinds of Process.

2. Probate Notice or Citation.

3 *Witkin Cal. Proc. Actions* § 961

[§ 961] Probate Notice or Citation.

(1) *Notice*. Probate proceedings are in rem, and jurisdiction is usually obtained by a notice (see *Prob.C. 1200* et seq.; 14 *Summary* (10th), *Wills and Probate*, §385 et seq.; 2 *Cal. Proc.* (5th), *Jurisdiction*, §245), published, posted, or mailed (see *Prob.C. 1215* et seq.; 14 *Summary* (10th), *Wills and Probate*, §391 et seq.).

(2) *Citation*. In certain situations in which personal service is thought necessary, e.g., in will contests, a citation is issued. The citation is similar to a summons in that the clerk issues it, it is served in the same manner, and the same result follows from failure to appear (entry of default). But there are some differences. (See *Prob.C. 1240* et seq.; *Estate of Dam* (1932) 126 C.A. 70, 77, 14 P.2d 162 [oral proof of service of citation may be made; not restricted to affidavit required for summons]; *Horney v. Superior Court* (1948) 83 C.A.2d 262, 266, 188 P.2d 552; *Sacks v. Superior Court* (1948) 88 C.A.2d 808, 811, 199 P.2d 396; *Pousson v. Superior Court* (1958) 165 C.A.2d 750, 754, 332 P.2d 766; 14 *Summary* (10th), *Wills and Probate*, §398.)

SUPPLEMENT: [This section is current through the latest supplement]



81 of 194 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXVII. PROCESS: IN GENERAL

B. Kinds of Process.

3. Notice or Order To Show Cause.

3 *Witkin Cal. Proc. Actions* § 962

[§ 962] Notice or Order To Show Cause.

(1) *In General.* In some special proceedings the process (i.e., the jurisdictional notice) is called a notice. (See, e.g., *C.C.P. 116.330, 116.340* [notice to appear in small claims court action; see 2 *Cal. Proc.* (5th), *Courts*, §294]; *Frey & Horgan Corp. v. Superior Court* (1936) 5 *C.2d* 401, 404, 55 *P.2d* 203 [notice of petition for order directing arbitration].) In contempt proceedings and some others, this jurisdictional notice is called an order to show cause. (See *Brophy v. Industrial Acc. Com.* (1941) 46 *C.A.2d* 278, 280, 115 *P.2d* 835; *C.E.B.*, 1 *Civil Proc. Before Trial* 4th, Chap. 18; 11 *Summary* (10th), *Husband and Wife*, §198 [contempt for failure to pay spousal support]; 6 *Cal. Proc.* (5th), *Proceedings Without Trial*, §60 et seq.)

(2) *Process Distinguished.* Most notices, however, are not process; i.e., after jurisdiction of a person has been obtained (by summons, citation, or other jurisdictional means), notices of further steps in a proceeding are not necessary to continuing jurisdiction of the person. Hence, they may be given by mail, may be served on the attorney for the party, and may, under certain circumstances, be served by fax. (See *C.C.P. 1010* et seq.; *Reynolds v. Reynolds* (1943) 21 *C.2d* 580, 583, 134 *P.2d* 251 [notice of motion to modify divorce decree to increase amount of support]; *Miller v. Miller* (1943) 57 *C.A.2d* 354, 359, 134 *P.2d* 292; 6 *Cal. Proc.* (5th), *Proceedings Without Trial*, §19 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]



82 of 194 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXVII. PROCESS: IN GENERAL

B. Kinds of Process.

4. Writ.

3 *Witkin Cal. Proc. Actions* § 963

[§ 963] Writ.

The distinguishing characteristic of a writ is that it is directed by the court to an officer who has the duty of carrying out the court's direction. The forms of process bearing this label are quite numerous, but may be roughly classified as follows:

(1) Writs enforcing the provisional remedies of attachment or injunction. (*C.C.P. 484.090(b)* [attachment]; *C.C.P. 525* [injunction]; see 6 *Cal. Proc.* (5th), *Provisional Remedies*, §§112, 389.)

(2) Writs enforcing a judgment; e.g., writs of execution or of possession. (See 8 *Cal. Proc.* (5th), *Enforcement of Judgment*, §§107 et seq., 325 et seq.)

(3) Extraordinary writs, issued by a higher court to a lower judicial tribunal: certiorari, prohibition, mandamus, supersedeas. (See 2 *Cal. Proc.* (5th), *Courts*, §§214, 330, 337; 8 *Cal. Proc.* (5th), *Extraordinary Writs*, §1.)

(4) Special purpose writs such as habeas corpus and coram nobis. (See *supra*, §§73, 75.)

SUPPLEMENT: [This section is current through the latest supplement]



83 of 194 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXVII. PROCESS: IN GENERAL

B. Kinds of Process.

5. Process Used To Produce Evidence.

3 Witkin Cal. Proc. Actions § 964

[§ 964] Process Used To Produce Evidence.

The process ordinarily used to compel the testimony of a witness at a trial or by deposition, or to compel production of documents or real evidence, is the subpoena or subpoena duces tecum. These are nonjurisdictional in the sense that they are available only after jurisdiction of the cause and person has attached. (On subpoena, see 2 *Cal. Evidence* (4th), *Witnesses*, §24 et seq.; 2 *Cal. Evidence* (4th), *Discovery*, §42 et seq.; On subpoena duces tecum, see 2 *Cal. Evidence* (4th), *Discovery*, §218 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]



84 of 194 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law
XXVII. PROCESS: IN GENERAL
C. Necessity and Scope of Service.

3 *Witkin Cal. Proc. Actions* § 965

[§ 965] Necessity and Scope of Service.

(1) *In General.* All jurisdictional process must be served; i.e., jurisdiction does not result from mere knowledge of the proceeding but from proper notice. (See *Sternbeck v. Buck* (1957) 148 C.A.2d 829, 832, 307 P.2d 970; *Pousson v. Superior Court* (1958) 165 C.A.2d 750, 752, 332 P.2d 766; *Sullivan v. Sullivan* (1967) 256 C.A.2d 301, 304, 64 C.R. 82, *infra*, §997; *Independent Bankers Trust Co. v. Superior Court* (1982) 138 C.A.3d 238, 241, 188 C.R. 14.) (On manner of service of notice of motion, see 6 *Cal. Proc.* (5th), *Proceedings Without Trial*, §19 *et seq.*; on manner of service of order to show cause, see 6 *Cal. Proc.* (5th), *Proceedings Without Trial*, §62.)

(2) *Methods of Service.* In actions in personam, personal service (by physical delivery of a copy of the summons or other process within the state) has been the traditional requirement. (See *infra*, §§966, 1000.) Under the modern law other kinds of service are permitted. (See *infra*, §§967, 1001 *et seq.*)

In actions in rem and quasi in rem, substituted service (by publication, mailing, or personal delivery outside the state) has long been recognized as sufficient, and is authorized by California's statutes. (See *infra*, §966.)

The situations and circumstances in which personal or substituted service will give jurisdiction over a person or property are treated elsewhere. (See 2 *Cal. Proc.* (5th), *Jurisdiction*, §§106, 253.) (On general appearance as equivalent to personal service, see 2 *Cal. Proc.* (5th), *Jurisdiction*, §198.) The present topic is concerned with procedure, i.e., the methods of service. (See *infra*, §1000 *et seq.*)

(3) *Manner of Service.* "The process of superior courts shall extend throughout the state." (*C.C.P.* 71.) "All writs, notices, or other process issued by superior courts in civil actions or proceedings may be served by any duly qualified and acting marshal or sheriff of any county in the state, subject to the Code of Civil Procedure." (*Govt.C.* 26665.) But ordinarily process cannot be served outside the state, i.e., apart from the exceptional situations in which substituted service may be employed to obtain jurisdiction of a defendant (see *infra*, §1001), process is effective only if served within the state.

(4) *Federal Procedure.* Federal procedure is governed by *F.R. Civ. P.*, Rule 4(k); see 30 *McGeorge L. Rev.* 167; 4B *Federal Practice & Procedure* (Wright & Miller §1124 *et seq.*; 28 *Federal Procedure*, L.Ed. §65:66 *et seq.*) It provides that process may be served on anyone in either of the following ways:

(a) Under a state's long-arm statute, on a person who is joined under *F.R. Civ. P., Rule 14* or *19* and served within 100 miles of where the summons issues, or under a federal statute. (*F.R. Civ. P., Rule 4(k)(1).*)

(b) On a person against whom a federal claim is made if that person is not subject to state process and exercising jurisdiction is consistent with federal law. (*F.R. Civ. P., Rule 4(k)(2).*)

SUPPLEMENT: [This section is current through the latest supplement]



85 of 194 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXVII. PROCESS: IN GENERAL

D. Service of Process.

1. Former Law.

3 *Witkin Cal. Proc. Actions* § 966

[§ 966] Former Law.

The traditional approach of California's statutes and case law emphasized the distinction between actions in personam and actions in rem or quasi in rem. (See 21 *Hastings L. J.* 1113; 5 *U.C.L.A. L. Rev.* 232; 2 *Cal. Proc.* (5th), *Jurisdiction*, §§106, 253.)

(1) *Actions In Personam.* Actions in personam were originally thought to require personal service within the state. But it is now settled that substituted service may be validly authorized by statute against certain defendants and under certain conditions. (See 2 *Cal. Proc.* (5th), *Jurisdiction*, §117.) Accordingly, special statutes have provided for service on actual or statutory agents or by mail in certain narrow classes of actions and against corporations and other associations. (See *infra*, §1021 et seq.)

Former C.C.P. 412, a part of the 1872 code, purported to authorize service by publication when the defendant was a nonresident, had departed, could not be found within the state, or concealed himself or herself to avoid service. There was grave doubt, however, that publication could meet the constitutional standards, and the statute was virtually a dead letter. (See 37 *Cal. L. Rev.* 85; 21 *Hastings L. J.* 1117; 2 *Cal. Proc.* (5th), *Jurisdiction*, §119.)

Former C.C.P. 417, enacted in 1951, established a valid method of substituted service where the defendant was a resident of the state: publication of summons followed by personal service outside the state. (See 2 *Cal. Proc.* (5th), *Jurisdiction*, §128.)

(2) *Actions In Rem or Quasi In Rem.* Substituted service (i.e., any type other than personal service within the state) has been considered sufficient in actions in rem and quasi in rem if it meets the test of due process, i.e., that it is reasonably calculated to give notice of the proceeding. The better types of substituted service--by mail or personal delivery outside the state--are clearly sufficient; and publication, where no better method is available, has also been upheld. (See 37 *Cal. L. Rev.* 87; 45 *A.L.R.2d* 1090 [application of idem sonans doctrine to substituted service]; 2 *Cal. Proc.* (5th), *Jurisdiction*, §263 et seq.) Accordingly, California's statutes on service by publication (former C.C.P. 412, 413) were generally regarded as effective only in actions in rem and quasi in rem. (See 37 *Cal. L. Rev.* 87; 21 *Hastings L. J.* 1123.)

SUPPLEMENT: [This section is current through the latest supplement]



86 of 194 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXVII. PROCESS: IN GENERAL

D. Service of Process.

2. Statutory Revision of 1969.

3 *Witkin Cal. Proc. Actions* § 967

[§ 967] Statutory Revision of 1969.

(1) *In General.* The California statutes on jurisdiction and service of process were enacted in 1872 and remained in substantially their original form until the 1969 revision. Prior reform efforts consisted of piecemeal measures to provide some form of substituted service for particular kinds of actions. Meanwhile, several states (e.g., New York, Illinois, and Michigan) adopted new systems reflecting modern developments in communication and technology. The 1969 Legislature followed this approach by enacting the "Jurisdiction and Service of Process Act," effective July 1, 1970. (*C.C.P.* 410.10 et seq.; see Judicial Council 1969 Report, p. 27 et seq.; 21 *Hastings L. J.* 1257, 1281, 1303; 10 *Santa Clara Lawyer* 192; 2 *Cal. Proc.* (5th), *Jurisdiction*, §8.)

The provisions of the Act dealing with jurisdiction and inconvenient forum have been covered elsewhere. (See 2 *Cal. Proc.* (5th), *Jurisdiction*, §§8, 9, 107, 374.) The sections on process are in the Code of Civil Procedure, Part 2, Title 5, Chapter 3, "Summons" (*C.C.P.* 412.10 et seq.), and Chapter 4, "Service of Summons" (*C.C.P.* 413.10 et seq.). The law governing service was completely reorganized and greatly expanded. The major changes were authorization of abode service (*infra*, §1012) and service by mail (*infra*, §1015 et seq.). Service by publication is also permitted, but only where a better method of service is not available (*infra*, §1033). (On service of notice of motion, see 6 *Cal. Proc.* (5th), *Proceedings Without Trial*, §19 et seq.; on service of order to show cause, see 6 *Cal. Proc.* (5th), *Proceedings Without Trial*, §62.)

(2) *Traditional View of Strict Construction.* Under the traditional approach it was not enough that the action was one in which a particular form of substituted service met the test of due process (*supra*, §965); the statutory procedure for substituted service had to be strictly followed, and a departure from it was a fatal jurisdictional defect. (See *Ricketson v. Richardson* (1864) 26 C. 149, 152, 154; *Forbes v. Hyde* (1866) 31 C. 342, 356, *infra*, §1041; *Columbia Screw Co. v. Warner Lock Co.* (1903) 138 C. 445, 446, 71 P. 498 ["The service of a summons by publication is in derogation of the common law, and in order to obtain such constructive service, the statute must be substantially complied with and its mandates observed"]; *People v. Mulcahy* (1910) 159 C. 34, 37, 112 P. 853 [where there was no verified complaint or sufficient affidavit, service by publication was ineffective; "Actions of this sort are *in invitum* and strict compliance with the statute is necessary"]; *Pinon v. Pollard* (1945) 69 C.A.2d 129, 133, 158 P.2d 254; *Community Redevelopment Agency of Los Angeles v. Superior Court* (1967) 248 C.A.2d 164, 178, 56 C.R. 201, citing the text; 2 *Cal. Proc.* (5th), *Jurisdiction*, §§10, 268.)

(3) *Modern View of Liberal Construction.* The traditional rule was abrogated by the Jurisdiction and Service of Process Act. The following comment, from the Judicial Council's Report, was approved by the Supreme Court in *Pasadena Medi-Center Associates v. Superior Court* (1973) 9 C.3d 773, 108 C.R. 828, 511 P.2d 1180, *infra*, §1047: "The provisions of this chapter should be liberally construed to effectuate service and uphold the jurisdiction of the court if actual notice has been received by the defendant, and in the last analysis the question of service should be resolved by considering each situation from a practical standpoint." (9 C.3d 778.) (See *Hammer Collections Co. v. Ironsides Computer Corp.* (1985) 172 C.A.3d 899, 902, 218 C.R. 627, *infra*, §983 [applying rule of liberal construction].)

SUPPLEMENT: [This section is current through the latest supplement]



87 of 194 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXVII. PROCESS: IN GENERAL

E. Remedies for Defective Service.

1. Motion To Quash.

3 *Witkin Cal. Proc. Actions* § 968

[§ 968] Motion To Quash.

(1) *Judicially Developed Procedure*. The practice of special appearance and motion to quash summons has long been recognized by decisions here and elsewhere. (See *Fuller v. Lindenbaum* (1938) 29 C.A.2d 227, 230, 84 P.2d 155; *Kline v. Beauchamp* (1938) 29 C.A.2d 340, 342, 84 P.2d 194 [person served was not named in complaint as party]; *Maier Brewing Co. v. Flora Crane Service* (1969) 270 C.A.2d 873, 875, 76 C.R. 219.)

(2) *Codification*. The procedure was codified in 1955, the statute specifying the time and form of the motion, an extension of time to plead on denial, and a right to review the order of denial by mandamus. (For current statute, *C.C.P.* 418.10, see 2 *Cal. Proc.* (5th), *Jurisdiction*, §218; on renewal of motion, see *Josephson v. Superior Court* (1963) 219 C.A.2d 354, 360, 33 C.R. 196; 6 *Cal. Proc.* (5th), *Proceedings Without Trial*, §46 et seq.; on review of denial, see *infra*, §969; on review of default judgment, see *infra*, §970; for forms, see *Cal. Civil Practice*, 2 *Procedure*, §10:20 et seq.; 2 *Am.Jur. P.P. Forms* (2000 ed.), *Appearance*, Form 5 et seq. [special appearance on motion to vacate or set aside service]; on federal procedure, see *F.R. Civ. P.*, *Rule 12(b)*; 5B *Federal Practice & Procedure* (Wright & Miller) §1354; 27A *Federal Procedure*, L.Ed. §62:499.)

SUPPLEMENT: [This section is current through the latest supplement]



88 of 194 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXVII. PROCESS: IN GENERAL

E. Remedies for Defective Service.

2. Review of Denial.

3 *Witkin Cal. Proc. Actions* § 969

[§ 969] Review of Denial.

(1) *Former Law.* An order granting a motion to quash summons was, and still is, appealable. (See *C.C.P. 904.1(a)(3)* [order in unlimited civil case (*supra*, §783)]; *C.C.P. 904.2(d)* [order in limited civil case].) However, an order denying it was not. (See *Kneeland v. Ethicon Suture Laboratories* (1952) 113 C.A.2d 335, 338, 248 P.2d 447 [distinguishing two types of orders].) The defendant could elect to go to trial and take a chance on winning on the merits, but if the defendant did, the defendant submitted himself or herself to the court's jurisdiction and waived any right to review the order of denial on appeal from an adverse final judgment. (See 2 *Cal. Proc.* (5th), *Jurisdiction*, §217.)

The solution to this problem under California's former law was to make the writ of prohibition available to prevent the trial. (See *Jardine v. Superior Court* (1931) 213 C. 301, 304, 2 P.2d 756; *Frey & Horgan Corp. v. Superior Court* (1936) 5 C.2d 401, 402, 55 P.2d 203; *Hammons v. Superior Court* (1923) 63 C.A. 700, 707, 219 P. 1037; *Berger v. Superior Court* (1947) 79 C.A.2d 425, 426, 179 P.2d 600.)

The judicially approved use of prohibition, rather than mandamus, seems correct: When the trial court denies the motion to quash summons, it thereby determines that it has jurisdiction of the person and asserts its intention to exercise that jurisdiction by trial of the case. The object sought by the aggrieved party is prevention of the unauthorized exercise of jurisdiction, and prohibition achieves this object directly. (See 2 *Cal. Proc.* (5th), *Jurisdiction*, §398; 8 *Cal. Proc.* (5th), *Extraordinary Writs*, §18.)

The same result, however, can be achieved indirectly by mandamus to compel the lower court to quash the summons and thus divest itself of personal jurisdiction. And some of the cases indicated that mandamus, as well as prohibition, could be used to review the denial of the motion. (See *Proctor & Schwartz v. Superior Court* (1950) 99 C.A.2d 376, 383, 221 P.2d 972; 2 *Cal. Proc.* (5th), *Jurisdiction*, §398; 8 *Cal. Proc.* (5th), *Extraordinary Writs*, §223.)

(2) *Statutory Review by Mandamus.* In 1955 the Legislature adopted former C.C.P. 416.3 (now *C.C.P. 418.10(c)*) authorizing a petition for mandamus to review the order of denial and giving an extension of time to plead pending its determination. (See 2 *Cal. Proc.* (5th), *Jurisdiction*, §225.) The theory of the legislation appears to be that only one writ should be used for that purpose, and that mandamus is the more appropriate writ. (See *Owens v. Superior Court* (1959) 52 C.2d 822, 827, 345 P.2d 921, citing the text; *Varra v. Superior Court* (1960) 181 C.A.2d 12, 14, 4 C.R. 920.)

However, the extremely liberal rule that gives the desired relief to a petitioner notwithstanding the petitioner's mistaken choice of writs (see 8 *Cal. Proc.* (5th), *Extraordinary Writs*, §§232, 233) ought to apply in this situation. This should be particularly true because prohibition is the broader and clearer remedy, which will reach other defects of jurisdiction as well as defective service of process. Thus, the careful petitioner will ask for mandamus or prohibition; but if the petition makes a showing of defective service of summons resulting in lack of personal jurisdiction, the petitioner should be entitled to the extension of time even though the title and prayer refer only to prohibition.

SUPPLEMENT: [This section is current through the latest supplement]



89 of 194 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXVII. PROCESS: IN GENERAL

E. Remedies for Defective Service.

3. Review of Default Judgment.

3 Witkin Cal. Proc. Actions § 970

[§ 970] Review of Default Judgment.

If the defendant does not challenge jurisdiction by a motion to quash and mandamus or prohibition after denial, and does not appear and plead, a default judgment will be rendered against the defendant. The defendant may attack this in the following ways:

(1) A motion to vacate the judgment. (See 8 *Cal. Proc.* (5th), *Attack on Judgment in Trial Court*, §144 et seq.)

(2) An appeal. (See 9 *Cal. Proc.* (5th), *Appeal*, §93.)

(3) An independent action in equity to set aside the judgment. (See 8 *Cal. Proc.* (5th), *Attack on Judgment in Trial Court*, §215 et seq.)

Although jurisdiction of the person is a fundamental requisite of a valid judgment (see 2 *Cal. Proc.* (5th), *Jurisdiction*, §106), a defendant not properly served may not always safely ignore the proceedings; the defendant should make an objection promptly by one of these methods. If the defendant allows the judgment to become final, and later attacks it collaterally, the defendant faces two formidable obstacles: the presumption of validity on collateral attack, and the res judicata effect of a determination of jurisdiction. (See 2 *Cal. Proc.* (5th), *Jurisdiction*, §344; 8 *Cal. Proc.* (5th), *Attack on Judgment in Trial Court*, §11.)

SUPPLEMENT: [This section is current through the latest supplement]



90 of 194 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXVII. PROCESS: IN GENERAL

F. Immunity From Process.

1. Nonresident Witness.

a. Common Law Rule.

3 *Witkin Cal. Proc. Actions* § 971

[§ 971] Common Law Rule.

(1) *Nature and Purpose.* At common law a person who voluntarily came into the state for the primary purpose of testifying as a witness in a civil or criminal proceeding was immune from service of process in any other civil proceeding in the state while in attendance for the trial and during a reasonable time necessary to come to and return from the place of trial.

The original purpose of the rule was not to protect any right of the witness; indeed, the immunity from suit was, at first glance, an unfortunate denial of the right of a creditor to sue in the courts of the state in which the creditor could find and serve the debtor. But the rule was deemed essential to the proper conduct of the main or primary litigation. Compulsory process did not operate outside the state, and a necessary witness, if subject to suit, might refuse to enter a state where his or her creditors were present. The innocent litigants in the main proceeding (including a criminal prosecution) would thus be deprived of testimony essential to a fair hearing. The balance of conveniences justified the temporary and partial frustration of the possible creditors of the witness, and the privilege of exemption from process was an inducement to voluntary attendance by the witness as well as a reward for that attendance.

As the court said in *Russell v. Landau* (1954) 127 C.A.2d 682, 274 P.2d 681, "[I]t is now the universal rule that a nonresident witness while in attendance upon a trial in an alien state to give evidence enjoys immunity against service of civil process." (127 C.A.2d 689.) (See *Velkov v. Superior Court* (1953) 40 C.2d 289, 292, 253 P.2d 25 ["The courts increasingly have emphasized the interest advanced by the voluntary appearance of a nonresident who could not otherwise be made to testify. In such cases, immunity is an inducement to the witness to appear and is said to be his substantive right"]; 12 Cal. L. Rev. 63; 43 Cal. L. Rev. 905; 48 Cal. L. Rev. 867; 33 Harv. L. Rev. 721; 37 Harv. L. Rev. 631; 74 Harv. L. Rev. 627; 35 A.L.R.2d 1353 [immunity of nonresident witness appearing in other than strictly judicial proceedings]; on federal procedure, see 4A Federal Practice & Procedure (Wright & Miller) §1076; 28 Federal Procedure, L.Ed. §65:33 et seq.)

(2) *Exception: Personally Interested Witness.* An exception to the immunity rule was declared in *St. John v. Superior Court* (1960) 178 C.A.2d 794, 797, 3 C.R. 535, where the witness had a personal interest in the proceeding. (See 48 Cal. L. Rev. 867; 74 Harv. L. Rev. 627; 84 A.L.R.2d 421 [immunity from service of process as affected by

relationship between subject matter of litigation in which process was issued, and litigation that nonresident served was attending].)

SUPPLEMENT: [This section is current through the latest supplement]



91 of 194 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXVII. PROCESS: IN GENERAL

F. Immunity From Process.

1. Nonresident Witness.

b. Abrogation of Common Law Rule.

3 *Witkin Cal. Proc. Actions* § 972

[§ 972] Abrogation of Common Law Rule.

(1) *In General.* In *Severn v. Adidas Sportschuhfabriken* (1973) 33 C.A.3d 754, 109 C.R. 328, plaintiff commenced an action in California against three European corporations and D, a resident of France, authorized (under C.C.P. 416.10) to receive summons on behalf of the defendant corporations. One of the corporations filed an action in the federal district court in Florida. D came to that state to give a deposition in the action, and, while there, was served with summons in plaintiff's California action, on behalf of himself and defendant corporations. Defendants moved in the California action to quash summons, relying on the immunity rule. *Held*, order granting motion reversed.

(a) The rule originated in the early common law when process was given effect by body attachment or arrest. The purpose of immunity was to prevent disruption of the judicial proceeding and to encourage voluntary appearance by allaying the witness' fear of arrest. (33 C.A.3d 757.)

(b) The rule has been much criticized, and some authorities have recommended that it be abolished and its purposes accomplished by application of the doctrine of inconvenient forum (see 2 *Cal. Proc.* (5th), *Jurisdiction*, §374). (33 C.A.3d 758.)

(c) The strong public policy supporting the right of a creditor to sue (33 C.A.3d 760, quoting the text) is implemented by the Jurisdiction and Service of Process Act, allowing service outside the state and outside the United States (see *infra*, §§1003, 1004). "By section 413.10 the Legislature has made it clear that, notwithstanding the law of the foreign jurisdiction where California's judicial process is served, such service is valid if made in a manner permitted by California's laws." (33 C.A.3d 760.)

(d) Originally judicial process did not extend beyond the borders of a county, and the immunity rule applied; when jurisdiction became statewide, immunity dependent on county asylum disappeared. (33 C.A.3d 761.) The same result should follow here, because D and defendant corporations could have been served at their places of residence or business in Europe. "By virtue of these statutes, the reason for the immunity rule no longer exists in California, for nonresident witnesses and others may no longer remain in the state or country of their residence secure from the reach of this state's process. The rule no longer offers encouragement to nonresidents, who otherwise would be immune from

service of its process, to enter this state in aid of its 'judicial administration.' " (33 C.A.3d 762.) "We therefore hold that it is no longer the law of California." (33 C.A.3d 762.) (See 10 Cal. Western L. Rev. 646; 26 *Hastings L. J.* 512.)

(2) *Distinction: Witness in Criminal Proceeding.* Ordinarily a witness cannot be brought into a state by compulsory process. But the Uniform Act To Secure the Attendance of Witnesses From Without a State in Criminal Proceedings provides for attendance of nonresidents under subpoena as witnesses in a criminal prosecution or grand jury proceeding. This statute expressly grants immunity from process in connection with any matter that arose before entrance into the state. (P.C. 1334.4; see 11 U.L.A. (Master Ed.), p. 1; *Mattison v. Lichlyter* (1958) 162 C.A.2d 60, 63, 327 P.2d 599; 2 *Cal. Evidence* (4th), *Witnesses*, §9 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]



92 of 194 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXVII. PROCESS: IN GENERAL

F. Immunity From Process.

2. Nonresident Party.

a. Common Law Rule.

3 *Witkin Cal. Proc. Actions* § 973

[§ 973] Common Law Rule.

(1) *Nature and Purpose of Rule.* The usual explanation for the common law rule of immunity of a party litigant was that the rule protected the court in the primary litigation from the interruption and delay of interfering new litigation. Another reason was that, without the immunity, a party might be unwilling to take the risk of appearing, and in consequence might suffer the loss of an opportunity to assert a just claim or defend against an unjust claim. Most courts held a defendant immune; some, however, refused to extend the exemption to a plaintiff. But the principle and policy appear to be identical: the unfairness to a party is the same whether an unjust judgment is rendered against the party by default or the party is unable to take the risk of entering the state to bring a timely and effective action.

(2) *California Rule.* The California common law rule applied to "parties litigant," including defendants and plaintiffs. (*Hammons v. Superior Court* (1923) 63 C.A. 700, 708, 219 P. 1037 [plaintiff]; *Gerard v. Superior Court* (1949) 91 C.A.2d 549, 552, 205 P.2d 109 [defendant]; *Franklin v. Superior Court* (1950) 98 C.A.2d 292, 294, 220 P.2d 8 [dictum; plaintiff]; *Slosberg v. Municipal Court of Los Angeles* (1950) 101 C.A.2d 238, 240, 225 P.2d 312 [dictum]; *Russell v. Landau* (1954) 127 C.A.2d 682, 689, 274 P.2d 681 [dictum]; *Minthorne v. Superior Court* (1963) 213 C.A.2d 748, 750, 29 C.R. 265; see 77 Harv. L. Rev. 1346; 10 Stanf. L. Rev. 584 [discussing unusual case in which defendant came to state to discuss settlement with plaintiff and, after negotiations failed, was held immune from service]; 4 U.C.L.A. L. Rev. 271.)

A foreign corporation was protected by the same immunity when one of its officers voluntarily entered the state to participate in litigation. Thus, in *Hammons, supra*, petitioner, a New York resident and vice-president of E Corp., a New York corporation, came to California to testify in an action by E Corp. against H. While attending the trial he was served with summons in an action by R against him and E Corp. *Held*, neither service was valid. (63 C.A. 708.) (See 37 Harv. L. Rev. 631.)

The immunity did not apply within a county. In *Muller v. Muller* (1956) 141 C.A.2d 722, 297 P.2d 789, plaintiff filed a quiet title action in San Mateo (county of real property and residence of defendant), and served defendant in San Francisco while the latter was attending court there as a party to an action. *Held*, the service was valid. The court took note of authorities applying the immunity rule between counties, and expressed doubt whether California would follow

them. But, assuming its applicability, the reason for it ceased. Immunity is granted to prevent the unfairness of compelling a nonresident to attend trial away from his residence; here, however, the action in which he was served was pending in his own county. (*141 C.A.2d 729.*)

SUPPLEMENT: [This section is current through the latest supplement]



93 of 194 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXVII. PROCESS: IN GENERAL

F. Immunity From Process.

2. Nonresident Party.

b. Limitations on Common Law Rule.

3 *Witkin Cal. Proc. Actions* § 974

[§ 974] Limitations on Common Law Rule.

The exemption rule was narrowly confined to situations in which the underlying policy was furthered (see *supra*, §971), and was therefore subject to several limitations:

(1) *Party to Trial Outside State*. Immunity was refused where the nonresident party served here was not involved in litigation here. (See *Hand v. Superior Court* (1919) 42 C.A. 168, 169, 183 P. 456 [nonresident plaintiff came to California to attend deposition for use in Illinois action; no California policy was served by granting him immunity: "[H]e was not a witness, nor was he in attendance upon any court whose proceedings could be hampered by the service of process upon him"].)

(2) *Purpose of Entry Not Related to Litigation*. The objective of cooperation with the court in the conduct of litigation operated to limit the immunity to situations where the nonresident came in as a party to litigation, i.e., an existing or imminent civil or criminal proceeding. Coming in for the purpose of investigation or consultation with attorneys in connection with possible litigation gave no immunity. (*Franklin v. Superior Court* (1950) 98 C.A.2d 292, 295, 220 P.2d 8 [nonresident came to California with primary purpose of obtaining custody of his child by negotiation, and his subsequent filing of petition for habeas corpus was last resort]; *Gerard v. Superior Court* (1949) 91 C.A.2d 549, 554, 205 P.2d 109 [nonresident, who came here to assist and testify in action against him, attended two lectures; controlling purpose of his presence here was to attend trial, thus, other subordinate activities did not destroy immunity].)

(3) *Action Connected With Existing Proceeding*. Immunity would not be granted to deny a resident plaintiff the right to litigate with a nonresident, in a cross-action, issues created by the nonresident in the same forum. (See *Velkov v. Superior Court* (1953) 40 C.2d 289, 293, 253 P.2d 25 [resident attorneys sued nonresident for declaratory relief, and nonresident instigated professional disciplinary proceedings against them in California; immunity was denied where nonresident was served when she came to testify in those proceedings]; *Von Kesler v. Superior Court* (1930) 109 C.A. 89, 91, 292 P. 544 [nonresident sued resident and attached in California; immunity was denied where resident promptly retaliated by suing for malicious attachment and serving nonresident pending trial of first action]; *Slosberg v. Municipal Court of Los Angeles* (1950) 101 C.A.2d 238, 241, 225 P.2d 312 [exception was not confined to incidental proceedings, but applied to any cross-action substantially affecting same subject matter]; *Adler v. Superior Court* (1960) 187 C.A.2d

207, 212, 9 C.R. 373 [following *Velkov*]; *Gaines v. Superior Court* (1961) 196 C.A.2d 749, 753, 16 C.R. 909; 4 U.C.L.A. L. Rev. 271; 84 A.L.R.2d 421 [immunity from service of process as affected by relationship between subject matter of litigation in which process was issued, and litigation that nonresident served was attending]; but see *Franklin v. Superior Court* (1950) 98 C.A.2d 292, 295, 220 P.2d 8 [facts on point but decision rendered on another ground]; *Minthorne v. Superior Court* (1963) 213 C.A.2d 748, 750, 29 C.R. 265 [discussing this exception but holding it inapplicable].)

(4) *Litigation Ended*. The privilege existed only during the litigation and for a reasonable time before and after. This means that two periods could be added to the actual duration of the trial:

(a) The period prior to the trial day reasonably necessary for conference with counsel and other preparation for trial. (*Gerard v. Superior Court* (1949) 91 C.A.2d 549, 552, 205 P.2d 109 [2 days prior to 3-day trial was reasonable].)

(b) The period after conclusion of the trial necessary to arrange for departure. (*Gerard v. Superior Court, supra*, 91 C.A.2d 553 [additional day's delay to utilize round-trip ticket was reasonable; rule did not require "hot pursuit of the first train out of the state"].)

In *People v. Wilson* (1963) 213 C.A.2d 290, 28 C.R. 675, defendant, an Oregon resident, was convicted of tax evasion in a criminal trial in the federal district court in California. After conviction but before sentence he was served with summons in an action to recover money. *Held*, in this case of first impression, he was not immune. The court did not consider the broader question whether the immunity extended to a criminal defendant before or during trial, but held merely that if immunity did exist it terminated on conviction. (213 C.A.2d 294.)

In *Russell v. Landau* (1954) 127 C.A.2d 682, 274 P.2d 681, a nonresident ancillary executor and devisee of an estate in probate in Los Angeles came to California solely to appear and testify in a probate proceeding. Upholding an order quashing summons, the court held that whether he arrives too soon or remains too long depends upon all the circumstances. "In considering the facts with reference to the duration of the sojourn, the court must regard the condition of the nonresident's health as a factor in causing his detention. A litigant is entitled to a reasonable time for conferences with his counsel prior to trial, the time for the hearing, and a reasonable time for departure." (127 C.A.2d 688.)

SUPPLEMENT: [This section is current through the latest supplement]



94 of 194 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXVII. PROCESS: IN GENERAL

F. Immunity From Process.

2. Nonresident Party.

c. Abrogation of Common Law Rule.

3 *Witkin Cal. Proc. Actions* § 975

[§ 975] Abrogation of Common Law Rule.

In *Silverman v. Superior Court* (1988) 203 C.A.3d 145, 249 C.R. 724, the court, observing that *Severn v. Adidas Sportschuhfabriken* (1973) 33 C.A.3d 754, 109 C.R. 328, supra, §972, had abrogated the immunity rule for witnesses, said: "We find that reasoning to be persuasive. Inasmuch as the immunity from service rule no longer applies to nonresident witnesses, we hold that the immunity rule is likewise no longer the law in California with respect to nonresident parties." (203 C.A.3d 149.)

SUPPLEMENT: [This section is current through the latest supplement]



95 of 194 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXVII. PROCESS: IN GENERAL

F. Immunity From Process.

3. Extradited Criminal Defendant.

3 *Witkin Cal. Proc. Actions* § 976

[§ 976] Extradited Criminal Defendant.

A defendant who is extradited or waives extradition is immune from service of process "in civil actions arising out of the same facts as the criminal proceeding for which he is returned, until he has been convicted ... or, if acquitted, until he has had reasonable opportunity to return to the State from which he was extradited." (P.C. 1555, 4 *Cal. Crim. Law* (3d), *Jurisdiction and Venue*, §29; see 43 *Harv. L. Rev.* 802; 50 *Harv. L. Rev.* 1126; 22 *So. Cal. L. Rev.* 474; 20 *A.L.R.2d* 163 [immunity of nonresident defendant in criminal case from service of process]; on federal practice, see 4A *Federal Practice & Procedure* (Wright & Miller) §1081; 28 *Federal Procedure*, L.Ed. §65:34.)

SUPPLEMENT: [This section is current through the latest supplement]



96 of 194 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXVII. PROCESS: IN GENERAL

F. Immunity From Process.

4. Nonresident Attorney.

3 *Witkin Cal. Proc. Actions* § 977

[§ 977] Nonresident Attorney.

A nonresident attorney who comes in to represent a litigant in a trial within the state may be exempt. But the question was left open in *Tadge v. Byrnes* (1918) 179 C. 275, 176 P. 439, where the court held that in no event would a lawyer who was not the attorney of record be immune on the mere showing that the attorney came into the state to assist in the trial of a case. (179 C. 276.) (See *Gaines v. Superior Court* (1961) 196 C.A.2d 749, 753, 16 C.R. 909 [discussing exemption rule of some jurisdictions, but holding that exception for connected litigation was applicable].)

SUPPLEMENT: [This section is current through the latest supplement]



97 of 194 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXVII. PROCESS: IN GENERAL

F. Immunity From Process.

5. Nonresident Performing Public Duty.

3 *Witkin Cal. Proc. Actions* § 978

[§ 978] Nonresident Performing Public Duty.

(1) *Nature of Immunity.* Another loose type of immunity established by some decisions protects a nonresident coming into the state for the purpose of performing a public duty during some emergency such as war. The theory is that a person might be reluctant to engage in public service taking the person away from his or her home state if subject to the harassment of litigation in a distant place. (See 45 *A.L.R.2d* 1100 [immunity of public officer appearing in court in official capacity]; on criticism of rule, see 33 *Harv. L. Rev.* 723.)

(2) *Illustrations.* In *Murrey v. Murrey* (1932) 216 C. 707, 16 *P.2d* 741, the court indicated, by dictum, a willingness to sustain this claim of immunity in a proper case. But it held that in applying the rule, consideration must be given in each case to the public convenience, the convenience of the parties, the nature of the action in which the process was served, and the conditions under which the nonresident entered the state. Accordingly, the exemption was denied where it appeared that the claimant was a reserve officer from Utah who had voluntarily requested active duty in peacetime (no emergency), and the action was brought by his destitute minor child for support. (216 C. 711, 712.)

In *Tulley v. Superior Court* (1941) 45 *C.A.2d* 24, 113 *P.2d* 477, petitioner, relying on the dictum in *Murrey*, sought exemption from service in an action for support of his child, on a showing that he was in active military service during a state of national emergency proclaimed by the President. The exemption was denied on the ground that the Soldiers' and Sailors' Civil Relief Act (now Servicemembers Civil Relief Act) provides ample protection for civil defendants in military service (continuance, court-appointed counsel, stay of execution, right to set aside judgment). In view of the action taken by Congress, no compelling reasons of public policy called for a complete immunity from process. (45 *C.A.2d* 31.)

SUPPLEMENT: [This section is current through the latest supplement]



98 of 194 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXVII. PROCESS: IN GENERAL

F. Immunity From Process.

6. Legislator.

3 *Witkin Cal. Proc. Actions* § 979

[§ 979] Legislator.

(1) *Nature of Qualified Immunity.* The reasons for the former common law rule of immunity of nonresident parties litigant (*supra*, §973) do not justify a similar exemption of resident members of legislatures. The early common law gave an exemption from process where the action involved physical arrest of the person; today the general rule makes legislators fully liable to suit (see 33 *Harv. L. Rev.* 721), although in some tort actions they have the defense of privilege (see 5 *Summary* (10th), *Torts*, §165).

There are, however, two kinds of constitutional immunities:

(a) The federal Constitution makes members of Congress exempt from arrest (except for treason, a felony, or a breach of the peace), but they are subject to civil process. (See *Long v. Ansell* (1934) 293 U.S. 76, 55 S.Ct. 21, 22, 79 L.Ed. 208, 210; 22 So. Cal. L. Rev. 491.)

(b) The California Constitution makes members of the Legislature immune from civil process "during a session of the Legislature or for 5 days before and after a session." (Cal. Const., Art. IV, §14; but see *In re Emmett* (1932) 120 C.A. 349, 353, 7 P.2d 1096 [immunity is limited to civil process; there is no exemption from arrest on criminal charge].)

(2) *Illustration.* In *Harmer v. Superior Court* (1969) 275 C.A.2d 345, 79 C.R. 855, the California State Advisory Commission on Indian Affairs, consisting of some executive and some legislative officers, met during a legislative session. A class action was filed on behalf of California Indians to compel compliance with the open meetings law (*Govt.C. 11120 et seq.*), and the legislators were served. They moved to quash summons, the motion was denied, and they sought prohibition to restrain the superior court from proceeding against them in the action. *Held*, writ granted.

(a) The commission was exercising legislative functions, and its legislative members were entitled to the constitutional immunity. (275 C.A.2d 349.)

(b) Cal. Const., Art. IV, §14, "creates an exemption from civil process without qualification as to the kind or subject matter of the lawsuit. Similar exemptions have been construed to cover civil actions of all kinds, including those involving the legislator's personal affairs. ... While conveying incidental personal advantage, such immunities are

designed to benefit the public by protecting legislators against compelled distraction and interference during the session. ... The California immunity applies to civil process generally and cannot be squeezed by interpretation to a restricted class of lawsuits." (275 C.A.2d 348.)

(c) The opinion adds a cautionary observation: Immunities, "however temporary, inevitably trench upon the judicial function, hence may encounter constitutional objections." And there may be situations in which an immunity "might amount to a denial of due process." (275 C.A.2d 350.) But this is not one of them, for the commission is the only indispensable party to the lawsuit; the individual members, though proper parties, are not necessary parties. (275 C.A.2d 350.)

SUPPLEMENT: [This section is current through the latest supplement]



99 of 194 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXVII. PROCESS: IN GENERAL

F. Immunity From Process.

7. Diplomatic Officer.

3 *Witkin Cal. Proc. Actions* § 980

[§ 980] Diplomatic Officer.

(1) *Nature and Purpose of Immunity.* A properly accredited diplomatic agent of a foreign country is exempt from civil process. This exemption is based on the broader doctrine of sovereign immunity from suit. (See 22 U.S.C., §254d; *Rest.3d, Foreign Relations Law of the United States* §464; 22 *So. Cal. L. Rev.* 491.)

A "diplomatic agent" is the head of a foreign diplomatic mission and any member of his or her staff having diplomatic rank. The broad immunity is also enjoyed by the agent's spouse, minor children, and other dependent family members who are part of the agent's household, provided that they are not nationals of the receiving state. (See *Rest.3d, Foreign Relations Law of the United States* §464, Comment a.)

The Third Restatement explains the rule as follows: "Special consideration for emissaries of foreign princes was common in ancient times, and privileges and immunities for ambassadors and other diplomatic personnel have been firmly established in modern international law since its beginnings. In the past, the special status and treatment of foreign diplomatic personnel in international law were deemed implicit in the sovereignty of the foreign prince or state which the diplomatic agent represented. Now, diplomatic privileges and immunities are seen as functional--necessary for the orderly and effective conduct of friendly relations between states. Diplomatic immunities are often accorded even in circumstances in which the state itself no longer enjoys immunity." (*Rest.3d, Foreign Relations Law of the United States*, Introductory Note to §464 et seq.)

(2) *Exceptions.* The broad immunity does not extend to the administrative, service, or technical staff of diplomatic missions (see *Rest.3d, Foreign Relations Law of the United States* §464, Comment a), or to consular officers, i.e., persons who are mainly concerned with the commercial interests of their nationals (see *Rest.3d, Foreign Relations Law of the United States* §465, Comment a). (See 4 *Am.Jur.2d* (2007 ed.), *Ambassadors, Diplomats and Consular Officers* §§15, 16.)

SUPPLEMENT: [This section is current through the latest supplement]



100 of 194 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXVIII. PROCESS: SUMMONS IN CIVIL ACTION

A. Formal Requisites: Ordinary Summons.

1. In General.

3 Witkin Cal. Proc. Actions § 981

[§ 981] In General.

(1) *Form and Content.* The form and content of the summons are prescribed by statute and Judicial Council rules, and the statutory requirements are mandatory. (See *C.C.P. 412.20(a)* ["a summons ... shall contain" specified matters]; *Lyman v. Milton* (1872) 44 C. 630, 634 ["Its form is prescribed by law; and whatever the form may be it must be observed, at least substantially"]; *infra*, §982 et seq.)

(2) *Statutory Requisites.* The formal requisites of the ordinary summons are provided by statute:

(a) It must be "directed to the defendant, signed by the clerk and issued under the seal of the court in which the action is pending." (*C.C.P. 412.20(a)*; see *C.C.P. 153(2)* [seal is required for summons]; *Ligare v. California Southern R. Co.* (1888) 76 C. 610, 611, 18 P. 777 [summons was sufficiently "signed" by clerk where signature was printed and seal of court was affixed]; C.E.B., 1 Civil Proc. Before Trial 4th, §17.6 et seq.; Cal. Civil Practice, 1 Procedure, §6:3 et seq.; Rutter Group, Civil Proc. Before Trial, Chap. 4; 33 *Hastings L. J.* 313 [proposing more comprehensible form of general summons]; 37 *A.L.R.2d* 928 [effect of omission of signature]; 20A Am.Jur. P.P. Forms (2008 ed.), Process, Form 10 et seq.; on federal procedure, see *F.R. Civ. P., Rule 4(a)(1)*; 4A Federal Practice & Procedure (Wright & Miller) §§1087, 1088; 28 Federal Procedure, L.Ed. §65:58 et seq.)

(b) "The style of all process shall be 'The People of the State of California.' " (*Govt.C. 100(b)*.) Accordingly, the body of the summons starts with "The People of the State of California send Greeting" to the defendant. However, the simplified form approved by the Judicial Council merely begins: "Notice to Defendant." The printed summons usually contains a form for the affidavit or certificate of service printed on its back. (See *infra*, §1067.)

Although the date of issuance is stated as a matter of course, and is important in view of the dismissal statutes (6 *Cal. Proc.* (5th), *Proceedings Without Trial*, §280 et seq.), it is not a statutory requirement, and a mistake is immaterial. Hence, where the summons was in fact issued at the time the complaint was filed, a date erroneously placing its issuance prior to the action was disregarded. (*Hibernia Savings & Loan Soc. v. Churchill* (1900) 128 C. 633, 635, 61 P. 278.)

(3) *Rule of Liberal Construction.* Despite the mandatory language of *C.C.P. 412.20(a)*, a summons is liberally

construed, and minor variations of form are not fatal. (*Clark v. Palmer* (1891) 90 C. 504, 506, 27 P. 375.) And errors or omissions in conforming a copy to the original do not affect the service unless the party has been misled. (*Hershenson v. Hershenson* (1962) 205 C.A.2d 382, 385, 23 C.R. 185 [copy did not contain number of case, department of court, date of issuance, or name of clerk's deputy who issued it].) However, a substantial and misleading deviation in the copy will invalidate the service and defeat the court's jurisdiction over the person. (*In re Marriage of Van Sickle* (1977) 68 C.A.3d 728, 740, 137 C.R. 568, 2 Cal. Proc. (5th), *Jurisdiction*, §113.)

SUPPLEMENT: [This section is current through the latest supplement]



101 of 194 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXVIII. PROCESS: SUMMONS IN CIVIL ACTION

A. Formal Requisites: Ordinary Summons.

2. Form and Content.

a. In General.

3 *Witkin Cal. Proc. Actions* § 982

[§ 982] In General.

(1) *Use of Forms.* A summons in a form approved by the Judicial Council satisfies the formal requisites of *C.C.P.* 412.20 (supra, §981). (*C.C.P.* 412.20(c).) The Judicial Council has adopted a form of ordinary summons for mandatory use. (See Judicial Council Form No. SUM-100 [Summons]; C.E.B., 1 Civil Proc. Before Trial 4th, §§17.6 et seq., 17.63 et seq.; Cal. Civil Practice, 1 Procedure, §6:63; Rutter Group, Civil Proc. Before Trial, Forms 4:2 et seq.)

(2) *Content.* *C.C.P.* 412.20(a) prescribes the content of the ordinary summons as follows:

(a) The title of court in which action is pending. (See *infra*, §986.)

(b) The names of the parties. (See *infra*, §983.)

(c) A direction to defendant to plead within 30 days. (See *infra*, §984.)

(d) A notice that default may be taken on failure to answer. (See *infra*, §986.)

(e) A reminder to seek legal advice promptly. (See *infra*, §986.)

(f) A notice, in Spanish and English, that the defendant has been sued and must respond within 30 days. (See *infra*, §986.)

The introductory phrase of *C.C.P.* 412.20(a) ("Except as otherwise required by statute") calls attention to a number of special sections prescribing the form of summons in particular proceedings. (See *infra*, §987 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]



102 of 194 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXVIII. PROCESS: SUMMONS IN CIVIL ACTION

A. Formal Requisites: Ordinary Summons.

2. Form and Content.

b. Names of Parties.

3 *Witkin Cal. Proc. Actions* § 983

[§ 983] Names of Parties.

(1) *In General.* The summons must be "directed to the defendant" and must contain "[t]he names of the parties to the action." (*C.C.P. 412.20(a)*.)

Every defendant must be named; the summons is effective as service only against a person named in it. (*Lyman v. Milton* (1872) 44 C. 630, 634.) It is customary to have the heading follow that of the complaint. But where there are a number of defendants it is permissible to name only the first in the heading (e.g., A, et al.), covering the others in the body. (*Sax v. Clark* (1919) 180 C. 287, 291, 180 P. 821.)

A defendant sued by a fictitious name (see *C.C.P. 474*, 4 *Cal. Proc.* (5th), *Pleading*, §478) may be designated in the summons in the same manner as in the complaint. (*Irving v. Carpentier* (1886) 70 C. 23, 25, 11 P. 391; see *infra*, §991.)

(2) *Effect of Erroneous Names.* The complaint sometimes designates a defendant by a name misspelled or otherwise erroneous (see 4 *Cal. Proc.* (5th), *Pleading*, §477), and this mistake may be carried into the summons. However, if the service is otherwise properly made, and the person served is aware that he or she is the person named as a defendant in the erroneous manner, jurisdiction is obtained, and a default judgment is good. (*Thompson v. Southern Pac. Co.* (1919) 180 C. 730, 734, 183 P. 153; *Billings v. Edwards* (1979) 91 C.A.3d 826, 831, 154 C.R. 453, quoting the text.)

In *Hammer Collections Co. v. Ironsides Computer Corp.* (1985) 172 C.A.3d 899, 218 C.R. 627, defendant Ironsides Computers was designated in the complaint and summons as "Ironsides Computer Corporation, also known as Parthenon Computers, Inc., a corporation doing business as Ironsides Computers." Service was made on *Parthenon Computer, Inc.* Parthenon notified plaintiff that it did not intend to respond because it had been served "On behalf of Ironsides Computer Corporation," and it was not that corporation. Plaintiff obtained a default judgment, then agreed to have it set aside, and defendant not only answered the complaint, but cross-complained for abuse of process. *Held*, judgment for plaintiff on demurrer to the cross-complaint affirmed.

(a) "There is no question that Parthenon was in all respects save one properly served in the action and was fully

apprised of the fact and the nature of the pending litigation herein. What is maintained is that, even so, it was not lawfully made a party to the proceedings, such that [defendant], knowing that it had not been, abusively took its default and levied upon its assets, because Parthenon is not, and is not known as, Ironsides Computer Corporation. It is conceded at the same time that Parthenon *does business as 'Ironsides Computers.'* " (172 C.A.3d 902.)

(b) Under the rule of liberal construction of the statutory requirements of service to uphold jurisdiction if actual notice has been received by the defendant (see *supra*, §967), the service here was sufficient. (172 C.A.3d 902.)

The rule for misspelled or otherwise erroneous names is also applicable where two persons use the same name. (*Lester v. Beer* (1946) 74 C.A.2d Supp. 984, 987, 168 P.2d 998 [father and son; father was served and knew he was intended defendant].) C.C.P. 474, requiring a notice of identity in service on a fictitiously named defendant (*infra*, §991), expressly provides that it does not apply to service on an erroneously named defendant.

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Effect of Erroneous Names.* See *Sakaguchi v. Sakaguchi* (2009) 173 C.A.4th 852, 857, 92 C.R.3d 717 [misspelling of defendant's first name on summons did not render service improper, absent evidence that misspelling made him unaware that he was named as defendant; thus, defendant's motion to set aside default judgment was properly denied].



103 of 194 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXVIII. PROCESS: SUMMONS IN CIVIL ACTION

A. Formal Requisites: Ordinary Summons.

2. Form and Content.

c. Direction To Plead.

1. In General.

3 Witkin Cal. Proc. Actions § 984

[§ 984] In General.

(1) *Nature of Requirement.* The body of the summons begins with a direction to plead. The statute formerly directed the defendant to "appear and answer," and gave the defendant 10 days if the summons was served within the county and 30 days if it was served elsewhere. The direction is now to file a pleading, and one period of 30 days has been substituted for the separate time provisions. Accordingly, the summons must contain "[a] direction that the defendant file with the court a written pleading in response to the complaint within 30 days after summons is served on him or her." (*C.C.P. 412.20(a)(3)*.) The "pleading" may be an answer, demurrer, or motion to strike. (See 5 *Cal. Proc.* (5th), *Pleading*, §§946, 1008, 1017.)

(2) *Commencement of Time To Plead.* The time to plead begins to run from the time of service, and where ordinary physical delivery is employed no problem arises. But where one of the various forms of substituted service is used, the date on which the particular service is deemed complete starts the time running. (See *infra*, §1010 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]



104 of 194 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXVIII. PROCESS: SUMMONS IN CIVIL ACTION

A. Formal Requisites: Ordinary Summons.

2. Form and Content.

c. Direction To Plead.

2. Special Statutes.

3 *Witkin Cal. Proc. Actions* § 985

[§ 985] Special Statutes.

(1) *Longer Pleading Period.* A statute may give the defendant a longer period in which to plead. The following are illustrative:

(a) *Negligent motorist or boat owner.* A negligent motorist personally served out of state under *Veh.C. 17455* has 60 days. (*Veh.C. 17462*; see *infra*, §1027.) The same is true of a negligent nonresident boat owner. (*Harb. & Nav.C. 608*; see *infra*, §1031.)

(b) *Destroyed land records.* In an action to reestablish destroyed land records (*C.C.P. 751.01* et seq.), the defendant has 3 months after the first publication of summons and any further time granted by the court not to exceed 30 days. (*C.C.P. 751.12*; see *infra*, §987.)

(c) *Quiet title.* In an action to quiet title to property disturbed by earth movements (*C.C.P. 751.50* et seq.), the defendant has 90 days after the first publication of summons and any further time granted by the court not to exceed 30 days. (*C.C.P. 751.56*; see *infra*, §987.)

(2) *Shorter Pleading Period.* The time may also be shorter. The following are illustrative:

(a) *Unlawful detainer.* In an unlawful detainer action, the defendant's time to respond to the complaint is 5 days, including Saturdays and Sundays, but excluding all other judicial holidays. (*C.C.P. 1167, 1167.3*; see *infra*, §987.)

(b) *Validation proceeding.* In a validation proceeding by a public agency, the time is 10 or more days after completion of publication. (*C.C.P. 861.1*; see *infra*, §988.)

(c) *Housing law violation.* In an action under the State Housing Law to prevent or abate a violation, the time for a response is 10 days. (*Health & Saf.C. 17990*.)

(d) *Defamation.* In a defamation action based on continuous publication, the court, on a showing of good cause,

may order the defendant to answer in 20 days. (1) The plaintiff must file a written application (ex parte), supported by an affidavit showing that the alleged defamatory matter has been continuously published (three or more times within 15 days) and that there is a reasonable likelihood that publication will continue. (2) The order must direct the clerk to endorse the summons to show that time has been shortened, and a copy of the application, affidavit, and order must be served with the summons. (3) The time to answer an amended complaint, to answer after a demurrer is overruled, or to amend an answer when a demurrer to it is sustained, must not exceed 10 days unless otherwise ordered by the court on good cause shown. (*C.C.P.* 460.5.)

SUPPLEMENT: [This section is current through the latest supplement]



105 of 194 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXVIII. PROCESS: SUMMONS IN CIVIL ACTION

A. Formal Requisites: Ordinary Summons.

2. Form and Content.

d. Other Requirements.

3 *Witkin Cal. Proc. Actions* § 986

[§ 986] Other Requirements.

(1) *Title of Court.* A summons must contain the title of the court in which the action is pending, i.e., the superior court in which the complaint is filed. (*C.C.P. 412.20(a)(1)*.) (See 2 *Cal. Proc. (5th), Courts*, §208 et seq.)

(2) *Notice That Default May Be Taken.* The summons must contain "[a] notice that, unless the defendant so responds, his or her default will be entered upon application by the plaintiff, and the plaintiff may apply to the court for the relief demanded in the complaint, which could result in garnishment of wages, taking of money or property, or other relief." (*C.C.P. 412.20(a)(4)*.) This notice tells the defendant nothing of the nature of the action, and makes it clear that he must look to the complaint, a copy of which is served with the summons. (See *Stanquist v. Hebbard* (1898) 122 C. 268, 271, 54 P. 841 [discussing purpose of statute].)

(3) *Reminder To Seek Legal Advice.* A warning to uninformed or careless defendants is included. The summons must contain the following statement in boldface type: "You may seek the advice of an attorney in any matter connected with the complaint or this summons. Such attorney should be consulted promptly so that your pleading may be filed or entered within the time required by this summons." (*C.C.P. 412.20(a)(5)*.)

(4) *Warning in Spanish and Other Languages.* Concern for the Spanish-speaking defendant who is not literate in English led to a State Bar sponsored amendment in 1974, adding *C.C.P. 412.20(a)(6)*. The following introductory legend must be placed at the top of the summons above all other matter, in boldface type, in English and Spanish:

"Notice! You have been sued. The court may decide against you without your being heard unless you respond within 30 days. Read information below."

A county may, by ordinance, require that the legend be set forth in the same manner in any additional foreign language. (*C.C.P. 412.20(b)*.)

SUPPLEMENT: [This section is current through the latest supplement]



106 of 194 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXVIII. PROCESS: SUMMONS IN CIVIL ACTION

B. Formal Requisites: Special Statutory Forms.

1. Actions Involving Real Property.

3 Witkin Cal. Proc. Actions § 987

[§ 987] Actions Involving Real Property.

In actions involving real property, the form and content of the summons is generally the same as in other civil actions. (See, e.g., *C.C.P. 763.010(a)* [quiet title]; *C.C.P. 872.310(a)* [partition]; *C.C.P. 1250.120(a)* [condemnation].) However, a number of other special statutes require additional information. (See 1 C.E.B., Civil Proc. Before Trial 4th, §§17.6 et seq., 17.66 et seq.; Cal. Civil Practice, 1 Procedure, §§6:6, 6:7, 6:65 et seq.; Rutter Group, Civil Proc. Before Trial §4:80 et seq.) The following are illustrative:

(1) *Service by Publication*. Where service is by publication, *C.C.P. 763.010(c)* (quiet title), *C.C.P. 872.320(c)* (partition), and *C.C.P. 1250.120(b)* (condemnation) require that the publication contain a description of the property.

(2) *Action To Establish Destroyed Land Records*. The summons must describe the property and name the persons known to have interests or liens adverse to plaintiff. (*C.C.P. 751.05, 751.07*.) The defendant has 3 months after the first publication of the summons to respond, and any further time granted by the court not to exceed 30 days. (*C.C.P. 751.12*.)

(3) *Action To Quiet Title to Property Disturbed by Earth Movements*. The form of the summons is the same as in an action to reestablish lost land records. (*C.C.P. 751.54*.) The defendant has 90 days after the first publication of the summons to respond, and any further time granted by the court not to exceed 30 days. (*C.C.P. 751.56*.)

(4) *Action Concerning Title to Real Property Affected by Public Improvement Assessment*. The summons must describe the property and state the object of the action. (*C.C.P. 801.6*.)

(5) *Unlawful Detainer*. The form is the same as in other civil actions. The defendant's time to respond to the complaint is 5 days, including Saturdays and Sundays, but excluding all other judicial holidays. (*C.C.P. 1167, 1167.3*; see Judicial Council Form No. SUM-130 [Summons--Unlawful Detainer--Eviction].)

A prejudgment claim of right to possession may be served on any claimant or occupant with a copy of the summons and the complaint. A statutory form for the claim states that the person served may file the claim within 10 days of service and be added as a defendant, and warns that failure to do so will result in eviction without a hearing. (*C.C.P.*

415.46; see *infra*, §1045.)

(6) *Action To Determine Rights in Tax-Deeded Property*. The summons must describe the property, state the object of the action, and designate unknown defendants, as in the complaint. (Rev.C. 3957.)

(7) *Action To Determine Rights in Jointly Used Water Facilities*. The summons must include an order to defendants to show cause why the relief prayed for in the complaint should not be granted. (*Water C. 7008*.)

SUPPLEMENT: [This section is current through the latest supplement]



107 of 194 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXVIII. PROCESS: SUMMONS IN CIVIL ACTION

B. Formal Requisites: Special Statutory Forms.

2. Validating Proceedings.

3 *Witkin Cal. Proc. Actions* § 988

[§ 988] Validating Proceedings.

(1) *By Public Agency.* In a validating proceeding by a public agency under *C.C.P. 860* et seq. (see 4 *Cal. Proc.* (5th), *Pleading*, §158), the summons must be directed to "all persons interested in the matter of [specifying the matter]," and must inform interested persons that they may contest the legality or validity of the matter by appearing and filing a written answer to the complaint by "not later than the date specified in the summons, which date shall be 10 or more days after the completion of publication." The summons must contain a detailed summary about the matter, and must state that persons who contest its validity or legality will not be subject to punitive action. (*C.C.P. 861.1*; see *C.C.P. 862* [jurisdiction is complete after date specified in summons]; *Arnold v. Newhall County Water Dist.* (1970) 11 *C.A.3d* 794, 799, 96 *C.R. 894* [summons was defective in failing to set forth correct period of time for response by interested persons]; *Moorpark Unified School Dist. v. Superior Court* (1990) 223 *C.A.3d* 954, 956, 958, 959, 273 *C.R. 18* [interested party may file cross-complaint to action that challenges validity of redevelopment plan; cross-complaint filed within time specified in summons was timely]; *Coachella Valley Mosquito & Vector Control Dist. v. Indio* (2002) 101 *C.A.4th* 12, 15, 123 *C.R.2d* 551 [jurisdiction does not attach where published summons is defectively worded].)

(2) *By Interested Persons.* If the public agency fails to act, proceedings may be instituted by "any interested person." In that case a summons in the same form must be directed to the agency as well as to others interested in the matter. (*C.C.P. 863*; see *Ontario v. Superior Court* (1970) 2 *C.3d* 335, 345, 85 *C.R. 149*, 466 *P.2d* 693; *Community Redevelopment Agency of Los Angeles v. Superior Court* (1967) 248 *C.A.2d* 164, 169, 176, 56 *C.R. 201*; *Millbrae School Dist. v. Superior Court* (1989) 209 *C.A.3d* 1494, 1497, 261 *C.R. 409*; *Riverside v. Superior Court* (1997) 54 *C.A.4th* 443, 448, 62 *C.R.2d* 747 [published summons was defective in informing readers that they had 30 days to respond, instead of specifying precise response date]; *Katz v. Campbell Union High School Dist.* (2006) 144 *C.A.4th* 1024, 1029, 50 *C.R.3d* 839 [following *Arnold* and *Riverside*; published summons was defective in failing to specify precise response date, and in failing to provide full amount of time to respond].)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *By Interested Persons.* See *Bonander v. Tiburon* (2009) 46 *C.4th* 646, 658, 94 *C.R.3d* 403, 208 *P.3d* 146 [action to contest assessment under Municipal Improvement Act of 1913 is governed solely by *Sts. & H.C. 10400* (see text, §475) authorizing those contests, and not by general validation procedure for public agency action in *Govt.C. 860* et seq.; thus,

plaintiff was not required to comply with newspaper publication requirement in Govt.C. 863]; *Community Youth Athletic Center v. National City* (2009) 170 C.A.4th 416, 432, 87 C.R.3d 903 [published summons was defective in incorrectly stating deadline for responses from interested parties, in effect reducing allowable response period by 3 days; however, plaintiff had good cause for noncompliance and was thus entitled to opportunity to republish].



108 of 194 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXVIII. PROCESS: SUMMONS IN CIVIL ACTION

B. Formal Requisites: Special Statutory Forms.

3. Actions Against Corporation or Association.

3 Witkin Cal. Proc. Actions § 989

[§ 989] Actions Against Corporation or Association.

(1) *Notice of Capacity of Individual Served.* In an action against a corporation or an unincorporated association (including a partnership), service must be made on an individual as its agent or representative. (See *infra*, §§1046, 1054.) That individual is entitled to notice of the capacity in which he or she is served; i.e., as an agent of the corporation (or the unincorporated association) or as an agent and as an individual. If that notice does not appear on the copy of the summons, no default may be taken against the organization or the individual. (*C.C.P. 412.30.*)

Accordingly, *C.C.P. 412.30* requires that the copy contain "a notice stating in substance" the following: "To the person served: You are hereby served in the within action (or special proceeding) on behalf of (here state the name of the corporation or the unincorporated association) as a person upon whom a copy of the summons and of the complaint may be delivered to effect service on said party under the provisions of (here state appropriate provisions of Chapter 4 (commencing with *Section 413.10*) of the Code of Civil Procedure)."

If service also is made on the person as an individual, the notice must additionally indicate that service is being made on him or her as an individual as well as on behalf of the corporation or the unincorporated association. (*C.C.P. 412.30.*)

(2) *Notice Is Mandatory.* The statute is mandatory and the summons will be quashed for failure to comply. (See *Tresway Aero v. Superior Court* (1971) 5 C.3d 431, 435, 96 C.R. 571, 487 P.2d 1211; *Bank of America v. Carr* (1956) 138 C.A.2d 727, 736, 292 P.2d 587; *National Union Fire Ins. Co. of Pittsburgh v. Superior Court* (1966) 247 C.A.2d 326, 329, 55 C.R. 574 [construing predecessor statute]; *Schering Corp. v. Superior Court* (1975) 52 C.A.3d 737, 741, 125 C.R. 337.)

In *MJS Enterprises v. Superior Court* (1984) 153 C.A.3d 555, 200 C.R. 286, plaintiff sued MJS Enterprises, a corporation, and individual Does. Summons was served on S, and the proof of service indicated that he was served on behalf of defendant corporation. But the notice in the summons served stated that S was served as an individual; nothing in it indicated that the process was directed to defendant corporation. *Held*, the summons was fatally defective, and a default judgment entered against defendant corporation was void for lack of personal jurisdiction. "The notice given by the summons must prevail over any conflicting statements which may have been made by the person who attempted to

serve the summons upon defendant. ... [I]t is the summons, not the process server, which asserts judicial power." (153 C.A.3d 558.)

(3) *Substantial Compliance Is Sufficient.* Substantial compliance with C.C.P. 412.30 is sufficient. In *Cory v. Crocker Nat. Bank* (1981) 123 C.A.3d 665, 177 C.R. 150, the complaint and summons were served on defendant through B, its officer. By inadvertence, the notice in the summons failed to show the name of defendant, and there was no "X" in the box that would have shown that B received the service on behalf of defendant. However, the notice did show that service was made under C.C.P. 416.10, which specifies the manner in which a corporation may be served. Also, defendant was the only corporation named in the complaint and summons; there were no individual defendants named; and a stamp on both the return and the copy of the summons left with defendant revealed that it was received by B in his representative capacity. *Held*, there was substantial compliance with C.C.P. 412.30; B could not have been misled as to the capacity in which he was served. (123 C.A.3d 670.)

A contrary result occurred in *Mannesmann DeMag, Ltd. v. Superior Court* (1985) 172 C.A.3d 1118, 218 C.R. 632. In a personal injury action against a corporation, a copy of the summons, complaint, and amendment to the complaint were served on defendant's vice president. Defendant's name did not appear anywhere on the summons, and the return failed to describe the person who was served or in what capacity he was served. *Held*, although defendant was named in the amendment and had actual knowledge of the action from correspondence with plaintiff's attorney, there was no substantial compliance with C.C.P. 412.30. (172 C.A.3d 1124.)

SUPPLEMENT: [This section is current through the latest supplement]



109 of 194 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXVIII. PROCESS: SUMMONS IN CIVIL ACTION

B. Formal Requisites: Special Statutory Forms.

4. Proceedings Against Unserved Joint Debtors.

3 Witkin Cal. Proc. Actions § 990

[§ 990] Proceedings Against Unserved Joint Debtors.

(1) *Summons*. A proceeding may be brought after judgment, by an order to show cause without a new complaint, against a joint debtor defendant not originally served, to bind him or her by the judgment. (*C.C.P.* 989 et seq.; see 8 *Cal. Proc.* (5th), *Enforcement of Judgment*, §398 et seq.) The following requisites of the summons are specified:

(a) The plaintiff must present an affidavit of himself or herself, his or her agent, representative, or attorney attesting that the judgment is in whole or part unsatisfied, and specifying the amount due. (*C.C.P.* 991.)

(b) The summons must describe the judgment and require the debtor to show cause why the debtor should not be bound by it. (*C.C.P.* 990.)

The Judicial Council has adopted a form of summons for mandatory use. (See Judicial Council Form No. SUM-120 [Summons (Joint Debtor)]; *Cal. Civil Practice*, 1 Procedure, §6:65.)

(2) *Service of Summons*. The summons is served in the usual manner, and is returnable "no later than ninety (90) days after the time specified for the return of the original summons." (*C.C.P.* 990.) Because proof of service must be returned within 60 days after the summons must be served (*C.C.P.* 583.210(b); see *infra*, §§1065, 1065), and because the summons must be served within 3 years after the action is commenced (*C.C.P.* 583.210(a); see 6 *Cal. Proc.* (5th), *Proceedings Without Trial*, §322 et seq.), the total time allowed by *C.C.P.* 990 is 3 years and 150 days.

SUPPLEMENT: [This section is current through the latest supplement]



110 of 194 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXVIII. PROCESS: SUMMONS IN CIVIL ACTION

B. Formal Requisites: Special Statutory Forms.

5. Persons Sued by Fictitious Name.

3 *Witkin Cal. Proc. Actions* § 991

[§ 991] Persons Sued by Fictitious Name.

A defendant whose true name is unknown may be designated by a fictitious name, e.g., John Doe or Jane Doe. (*C.C.P.* 474; see 4 *Cal. Proc.* (5th), *Pleading*, §478 et seq.) The process server must deliver the summons to the person intended as a defendant.

(1) *Former Practice.* Formerly, there were various ways of informing the person served that he or she was designated by a fictitious name. (See *Curtis v. Herrick* (1859) 14 C. 117, 120 [return of service showed that fictitiously named defendant was served by his proper name "John Doe *alias* Westfall"; thus, Westfall, by being so served and defaulting, admitted that he was person intended to be sued]; *McGinn v. Rees* (1917) 33 C.A. 291, 294, 165 P. 52 [amendment to return was permitted to show that service was made on Mark Rees, person sued as John Doe Rees]; *Petersen v. Vane* (1943) 57 C.A.2d 58, 59, 134 P.2d 6 [plaintiff's attorney discussed case with defendant who had been served].)

(2) *Current Notice Requirement Limiting Default or Default Judgment.* In 1953 a uniform procedure was prescribed by *C.C.P.* 474, providing that no default or default judgment may be entered against a fictitiously named defendant unless the process bears on its face a notice stating in substance: "To the person served: You are hereby served in the within action (or proceedings) as (or on behalf of) the person sued under the fictitious name of (designating it)." The proof of service must state the fictitious name and the fact that notice of identity was given by endorsement on the process. (See C.E.B., 1 Civil Proc. Before Trial 4th, §17.61.)

(3) *Notice Is Mandatory.* It has been held that the limitation on entry of a default judgment makes compliance with *C.C.P.* 474 a condition of jurisdiction, and prior cases treating an omission to amend before a default judgment as error only are no longer controlling. "This statute is not directory but mandatory, and its effect is to deprive the court of the right to proceed against a defendant served with such a defective summons; that is to say, its effect is to make the service of such a defective summons insufficient to give the court jurisdiction over the person of the defendant." (*Armstrong v. Superior Court* (1956) 144 C.A.2d 420, 424, 301 P.2d 51.)

"[I]f a plaintiff sues a corporation by the fictitious business name it uses, and the corporation appears, responds to the complaint in its corporate name, and obtains a dismissal, the plaintiffs cannot then obtain a default judgment against

the fictitious business name as a legally distinct entity." (*Pinkerton's v. Superior Court* (1996) 49 C.A.4th 1342, 1344, 57 C.R.2d 356, 6 Cal. Proc. (5th), *Proceedings Without Trial*, §136.)

However, although a default judgment taken without amending the complaint to state the defendant's true name is invalid, the default itself is not affected. (*Jonson v. Weinstein* (1967) 249 C.A.2d 954, 957, 959, 58 C.R. 32.)

SUPPLEMENT: [This section is current through the latest supplement]

(3) *Notice Is Mandatory.* See *Pelayo v. J.J. Lee Management Co.* (2009) 174 C.A.4th 484, 496, 498, 94 C.R.3d 502 [summons complied with C.C.P. 474, but proof of service failed to state fictitious name under which defendant was served; thus, clerk's entry of default and subsequent judgment violated statute and were vacated].



111 of 194 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXVIII. PROCESS: SUMMONS IN CIVIL ACTION

B. Formal Requisites: Special Statutory Forms.

6. Family Law Proceedings.

3 *Witkin Cal. Proc. Actions* § 992

[§ 992] Family Law Proceedings.

(1) *In General.* The Family Law Act eliminated the adversary actions for divorce, annulment, and separate maintenance, and substituted a "proceeding" for dissolution of marriage, legal separation, or nullity of marriage. (See 11 *Summary* (10th), *Husband and Wife*, §1.) The procedure is governed by *Family C.* 2330 et seq. and C.R.C., Rule 5.100 et seq. (See 11 *Summary* (10th), *Husband and Wife*, §§67 et seq., 146, 165 et seq.; 5 *Cal. Proc.* (5th), *Pleading*, §883 et seq.)

The summons generally must be issued and filed in the same manner as the summons in a civil action. (See *Family C.* 2331; C.R.C., Rule 5.110(a) [except that clerk does not return original summons but rather retains it in file].) Responsive pleadings must be served and filed within 30 days after service of the initial pleading. (*Family C.* 2020, 11 *Summary* (10th), *Husband and Wife*, §84.) (See Judicial Council Form No. FL-110 [Summons (Family Law)]; Judicial Council Form No. FL-120 [Response--Marriage (Family Law)].)

(2) *Notice About Dispositions in Joint Tenancy Form.* The summons must contain the following notice:

"WARNING: California law provides that, for purposes of division of property upon dissolution of marriage or legal separation, property acquired by the parties during marriage in joint form is presumed to be community property. If either party to this action should die before the jointly held community property is divided, the language of how title is held in the deed (i.e., joint tenancy, tenants in common, or community property) will be controlling and not the community property presumption. You should consult your attorney if you want the community property presumption to be written into the recorded title to the property." (*Family C.* 2040(c).)

(3) *Restraining Orders.* The summons must state that any temporary restraining order included in the summons (see *Family C.* 230 et seq.) is enforceable anywhere in California by (a) any law enforcement agency that has received a copy of the order or (b) any officer who has been shown a copy of the order. (*Family C.* 232.) *Family C.* 7700 contains a similar provision for actions under the Uniform Parentage Act. (For form of summons, see Judicial Council Form No. FL-110 [Summons (Family Law)], Judicial Council Form No. FL-210 [Summons (Uniform Parentage--Petition for Custody and Support)].)

(4) *Joinder of Third Persons*. If the court orders that a third person be joined under C.R.C., Rule 5.154(a) (claimant with custody or visitation rights or interest in marital property), the court must direct that the summons be issued on Judicial Council Form No. FL-375 [Summons (Joinder)], and that the claimant be served with a copy of Judicial Council Form No. FL-371 [Notice of Motion and Declaration for Joinder], the pleading attached to that form, the order of joinder, and the summons. The claimant must file an appropriate response within 30 days after service. (C.R.C., Rule 5.158(c); see 5 *Cal. Proc.* (5th), *Pleading*, §887 et seq.; 11 *Summary* (10th), *Husband and Wife*, §78.)

SUPPLEMENT: [This section is current through the latest supplement]



112 of 194 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXVIII. PROCESS: SUMMONS IN CIVIL ACTION

B. Formal Requisites: Special Statutory Forms.

7. Probate Proceedings.

3 *Witkin Cal. Proc. Actions* § 993

[§ 993] Probate Proceedings.

Except to the extent that the Probate Code provides otherwise, the rules of practice applicable in civil actions are applicable to Probate Code proceedings. (*Prob.C. 1000*; see 14 *Summary* (10th), *Wills and Probate*, §371.) The following Probate Code provisions set forth special rules governing summonses:

(1) *Will Contests*. The summons is issued and served, with a copy of the objection, on those persons required by *Prob.C. 8110* (see 14 *Summary* (10th), *Wills and Probate*, §588) to be served with notice of a hearing on a petition for administration. The summons is issued and served as provided in *C.C.P. 413.10* et seq. (see *infra*, §1001 et seq.). The summons must direct the person summoned to file a written pleading responding to the contest within 30 days of service of the summons. (*Prob.C. 8250(a)*.) (See Judicial Council Form No. DE-125 [Summons (Probate)]; 14 *Summary* (10th), *Wills and Probate*, §577.)

(2) *Revocation of Will*. When a petition for revocation is filed, a summons is directed to the personal representative and to the heirs and devisees of the decedent, "so far as known to the petitioner." The summons directs the persons summoned to file a written pleading in response to the petition within 30 days after service. (*Prob.C. 8271(a)*.) The summons is issued and served, with a copy of the petition, as in the case of a contest of the will. (*Prob.C. 8271(b)*.) It may be directed to minors or incompetent persons or to the personal representative of a deceased person. (Law Rev. Com. Comment.) (See Judicial Council Form No. DE-125 [Summons (Probate)]; 14 *Summary* (10th), *Wills and Probate*, §581.)

SUPPLEMENT: [This section is current through the latest supplement]



113 of 194 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXVIII. PROCESS: SUMMONS IN CIVIL ACTION

C. Issuance.

3 *Witkin Cal. Proc. Actions* § 994

[§ 994] Issuance.

(1) *Elimination of Former Restrictive Rules.* Several restrictive rules of California's former law were eliminated by statutory amendment:

(a) The rule that only one original summons could be issued for each county in which a defendant resided, and that only one could be outstanding at one time. (See *Salsbery v. Ritter* (1957) 48 C.2d 1, 8, 306 P.2d 897.)

(b) The 1-year statutory limitation on issuance of summons. (See 6 *Cal. Proc.* (5th), *Proceedings Without Trial*, §319.)

(c) The requirement of an alias summons if the original was returned without service or was lost. (See *infra*, §996.)

(2) *Current Procedure.* Issuance of a summons is not a judicial act and requires no permission of a court. One or more summons for any defendant are issued by the clerk, as a matter of course, on request of the plaintiff. The clerk keeps the original summons in the court records and provides a copy to the requesting plaintiff. (*C.C.P.* 412.10.) (On federal procedure, see *F.R. Civ. P.*, Rule 4(b); 4A Federal Practice & Procedure (Wright & Miller) §1084 et seq.; 28 Federal Procedure, L.Ed. §65:56 et seq.) However, the plaintiff must first commence the action by filing the complaint (*C.C.P.* 411.10), and must pay the filing fee (*C.C.P.* 411.20). (See 4 *Cal. Proc.* (5th), *Pleading*, §19 et seq.)

The Judicial Council Comment to *C.C.P.* 412.10 observes that *C.C.P.* 412.10 "permits the plaintiff, or in appropriate cases a cross-complainant, to secure, as a matter of course, the issuance of (1) a single summons for service upon all the defendants, in which event there is only one original summons, or (2) separate summons, each for service upon one or more defendants, in which event there are as many original summons as there are separate summons, and (3) any subsequent, amended, or additional summons against any defendant." (See *Cal. Civil Practice*, 1 Procedure, §6:8.)

SUPPLEMENT: [This section is current through the latest supplement]



114 of 194 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXVIII. PROCESS: SUMMONS IN CIVIL ACTION

D. Amended or Supplemental Complaint.

3 *Witkin Cal. Proc. Actions* § 995

[§ 995] Amended or Supplemental Complaint.

(1) *General Rule.* Amendment of the complaint after service of summons does not require either a new summons or a new service on an existing party defendant. Once jurisdiction over a party is obtained by service of the summons and the original complaint, the amended pleading alone is served, usually on the party's attorney. (See *Gillette v. Burbank Community Hosp.* (1976) 56 C.A.3d 430, 433, 128 C.R. 636; *Cyrus v. Haveson* (1976) 65 C.A.3d 306, 315, 135 C.R. 246, quoting the text; Cal. Civil Practice, 1 Procedure, §6:9; 4 *Cal. Proc.* (5th), *Pleading*, §29; 5 *Cal. Proc.* (5th), *Pleading*, §1242 et seq.)

(2) *Exceptions.* A new summons is required, however, in the following situations:

(a) Where the complaint is amended before any service. An amended summons should be obtained to conform to the amended complaint. (See *Dowling v. Comerford* (1893) 99 C. 204, 206, 33 P. 853.)

(b) Where an amendment to the complaint adds a new party defendant. No jurisdiction would be obtained by serving the new defendant with the original summons, which does not name the defendant. Accordingly, an amended summons must be obtained for this purpose. (See *Baldwin v. Foster* (1910) 157 C. 643, 647, 108 P. 714; *W.H. Marston Co. v. Kochritz* (1926) 80 C.A. 352, 361, 251 P. 959.)

(c) Where a supplemental complaint is filed. (See *Koeper v. Koeper* (1954) 125 C.A.2d 118, 119, 269 P.2d 905.)

An amended or additional summons is issued as a matter of course. (*C.C.P.* 412.10, *supra*, §994.)

SUPPLEMENT: [This section is current through the latest supplement]



115 of 194 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXVIII. PROCESS: SUMMONS IN CIVIL ACTION

E. Loss or Failure To Serve.

3 *Witkin Cal. Proc. Actions* § 996

[§ 996] Loss or Failure To Serve.

(1) *Former Alias Summons.* California's former law provided that if the summons was returned without being served on any or all defendants, or was lost, the plaintiff, on demand made within a 3-year period, could have a substitute issued. This was known as an alias summons. (See *Doyle v. Hampton* (1911) 159 C. 729, 732, 116 P. 39; *W.H. Marston Co. v. Kochritz* (1926) 80 C.A. 352, 361, 251 P. 959; *Kelly v. Ferbrache* (1932) 119 C.A. 529, 533, 6 P.2d 987; but see *Brock v. Fouchy* (1946) 76 C.A.2d 363, 368, 172 P.2d 945 [no alias summons unless original was issued].)

(2) *Legislative Abrogation.* C.C.P. 412.10 (supra, §994) eliminated the concept of alias summons; i.e., it makes no distinction between the original summons and any additional ones, the latter being issued on request. (See Judicial Council Comment to C.C.P. 412.10.)

The Judicial Council has adopted for mandatory use a form declaration requesting the issuance of a summons where the original has been lost. (See Judicial Council Form No. SUM-300 [Declaration of Lost Summons After Service].)

SUPPLEMENT: [This section is current through the latest supplement]



116 of 194 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXIX. SERVICE OF PROCESS

A. Persons Who May Serve.

1. Officer or Private Person.

3 *Witkin Cal. Proc. Actions* § 997

[§ 997] Officer or Private Person.

(1) *In General.* "A summons may be served by any person who is at least 18 years of age and not a party to the action." (*C.C.P.* 414.10; see *C.E.B.*, 1 Civil Proc. Before Trial 4th, §17.14; *Cal. Civil Practice*, 1 Procedure, §6:10; *Rutter Group*, Civil Proc. Before Trial §4:110 et seq.; 37 *Cal. L. Rev.* 83; 21 *Hastings L. J.* 1307.)

There are two kinds of process servers:

(a) An officer authorized by statute, i.e., a sheriff or marshal. (*Govt.C.* 26665, 26608.) If the sheriff or other officer is a party, special statutes authorize service by the coroner, an elisor, or any qualified citizen. (See *Govt.C.* 27469 [coroner]; *C.C.P.* 262.8 [elisor may serve if sheriff and coroner are both parties]; *C.C.P.* 262.7 [any citizen over 18 may serve in action against sheriff].) (On federal procedure, see *F.R. Civ. P.*, *Rule 4(c)(3)* [U.S. marshal, deputy, or person appointed by court]; 4A *Federal Practice & Procedure* (Wright & Miller) §1089 et seq.; 28 *Federal Procedure*, L.Ed. §65:123 et seq.)

(b) Any private person who is not a party to the action. The person may or may not be engaged in the business of serving process. (See *Hibernia Savings & Loan Soc. v. Clarke* (1895) 110 *C.* 27, 31, 42 *P.* 425; *Sheehan v. All Persons* (1926) 80 *C.A.* 393, 398, 252 *P.* 337 [plaintiff's attorney may serve]; 3 *So. Cal. L. Rev.* 129.) (On similar federal procedure, see *F.R. Civ. P.*, *Rule 4(c)(2)*; on registered process servers, see *infra*, §998.)

(2) *Effect of Improper Service by Party.* Failure to observe the strict prohibition against service by a party has a lethal effect on the action. In *Sullivan v. Sullivan* (1967) 256 *C.A.2d* 301, 64 *C.R.* 82, plaintiff husband and defendant wife were agreed on a divorce. He called on her, and, with her married daughter present, delivered the summons and complaint. "I would just have to pay somebody to bring them up, and this is the same thing." He could have made a valid service by simply handing the papers to the daughter for her to hand to his wife, and he tried to cure his omission by having the daughter, on the following day, sign an affidavit of service by her. The interlocutory decree was entered by default, and, over a year later, defendant wife moved to vacate the judgment and quash summons. *Held*, order granting motion affirmed. The false showing of service was extrinsic fraud, rendering the judgment subject to attack at any time. (See 8 *Cal. Proc.* (5th), *Attack on Judgment in Trial Court*, §208.) And no personal jurisdiction was obtained: (a) knowledge of the action, and actual receipt of the complaint and summons, were not the equivalent of service (see

supra, §965); (b) the fact that the invalid physical delivery was observed by a disinterested third person who was capable of making the service (the daughter) did not cure the fatal defect. (256 C.A.2d 306.) (See *Caldwell v. Coppola* (1990) 219 C.A.3d 859, 865, 268 C.R. 453 [person named as protected "family and household member" in domestic violence injunctive order was "party" within meaning of C.C.P. 414.10 and could not personally serve order and related legal process on defendant; order so served was void for lack of personal jurisdiction].)

(3) *Criminal Penalties for Crimes Against Process Servers*. Assault or battery against a process server is punishable by a fine not over \$ 2,000, 1 year in the county jail, or both. (P.C. 241(c) [assault]; P.C. 243(b) [battery]; see *People v. Prescott* (1951) 106 C.A.2d 597, 598, 235 P.2d 406 [conviction for assaulting process server to prevent service]; 1 Cal. Crim. Law (3d), *Crimes Against the Person*, §§16, 66.)

SUPPLEMENT: [This section is current through the latest supplement]



117 of 194 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXIX. SERVICE OF PROCESS

A. Persons Who May Serve.

2. Registered Process Server.

3 *Witkin Cal. Proc. Actions* § 998

[§ 998] Registered Process Server.

(1) *In General.* *B. & P.C. 22350* et seq. provide for the registration, bonding, and regulation of private process servers. (See *Cal. Civil Practice*, 1 Procedure, §6:10.)

The statute applies to (a) persons making more than 10 services of process within California during any calendar year, (b) corporations, and (c) partnerships that derive, or expect to derive, compensation for serving process within California. (*B. & P.C. 22350(a)*.) However, the statute does not apply to sheriffs, marshals, or government employees acting within the scope of their employment; attorneys or their employees, when serving process related to cases for which the attorney is providing legal services; court-appointed process servers; licensed private investigators or their employees; or registered professional photocopyers or their employees copying records pursuant to a subpoena for their production, if so specified by the subpoena. (*B. & P.C. 22350(b)*.)

Individuals subject to the statute must file and maintain a verified certificate of registration with the county clerk in the county where they reside or have their principal place of business. Corporations or partnerships must file and maintain a verified certificate of registration with the county clerk in the county where they have their principal place of business. (*B. & P.C. 22350(a)*.)

However, a service of process that complies with the requirements of the Code of Civil Procedure is not rendered invalid or ineffective because it was made in violation of *B. & P.C. 22350* et seq. (*C.C.P. 413.40*.)

(2) *Independent Contractors for Registered Process Servers.* Several provisions deal with a registrant permitting an independent contractor to sign proof of service:

(a) A registrant is responsible for the good conduct of any person acting as an independent contractor "within the course or scope of the agency relationship with the registrant." (*B. & P.C. 22356*.)

(b) The proof of service must indicate (1) that it was signed by an independent contractor of a registered process server, (2) the county of registration, and (3) the registration number assigned to both the independent contractor and the entity registered under the registered process servers statute. (*B. & P.C. 22356.5(a)*.)

(c) No registrant may permit an individual to sign proof of service of process as an independent contractor unless specified conditions are met. (*B. & P.C. 22356.5(b)*), listing written agreement, proof of bonding, minimum supervision or control over means of service, no restrictions on independent contractor's performance of services for others, and proof that required business licenses have been obtained.) Persons not meeting those criteria must be treated as employees. (*B. & P.C. 22356.5(c)*.) And the statute "shall not preclude an independent determination of employment under any other provision of law." (*B. & P.C. 22356.5(d)*.)

SUPPLEMENT: [This section is current through the latest supplement]



118 of 194 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXIX. SERVICE OF PROCESS

B. Recoverable Costs for Service.

3 *Witkin Cal. Proc. Actions* § 999

[§ 999] Recoverable Costs for Service.

C.C.P. 1033.5 provides for an award of costs incurred in effecting service. (See *C.E.B.*, 1 *Civil Proc. Before Trial* 4th, §17.15; *Cal. Civil Practice*, 1 *Procedure*, §6:11; *Rutter Group*, *Civil Proc. Before Trial* §4:118 et seq.; 7 *Cal. Proc.* (5th), *Judgment*, §§117, 127.)

(1) *Service by Public Officer*. If service is by a public officer, "the recoverable cost is the fee authorized by law at the time of service." (*C.C.P. 1033.5(a)(4)(A)*.)

(2) *Service by Registered Process Server*. If service is by a registered process server, "the recoverable cost is the amount actually incurred in effecting service," including but not limited to the cost of a stakeout or other means used to locate the person served, "unless such charges are successfully challenged by a party to the action." (*C.C.P. 1033.5(a)(4)(B)*.)

(3) *Service by Publication*. If service is by publication, "the recoverable cost is the sum actually incurred in effecting service." (*C.C.P. 1033.5(a)(4)(C)*.)

(4) *Service by Other Means*. If service is by other means, the recoverable cost is the lesser of the actual amount incurred or the sum allowed to a public officer for that service, "except that the court may allow the sum actually incurred in effecting service" on application under *C.C.P. 1033.5(c)(4)*. (*C.C.P. 1033.5(a)(4)(D)*.)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Service by Registered Process Server*. The portion of *C.C.P. 1033.5(a)(4)(B)* quoted in the text was amended in 2009 to refer to "those charges" rather than to "such charges."



119 of 194 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXIX. SERVICE OF PROCESS

C. Manner of Service in General.

1. Former Law.

3 *Witkin Cal. Proc. Actions* § 1000

[§ 1000] Former Law.

(1) *General Rule: Physical Delivery to Defendant.* The significance of the changes made by the Jurisdiction and Service of Process Act (*supra*, §967 and *infra*, §1001) will become clear on a brief review of the prior California law dealing with service in personal actions. With a few statutory exceptions for special kinds of actions (see *infra*, §1021 et seq.), the rule requiring physical delivery of the summons to the defendant was strictly followed. (See 21 *Hastings L. J.* 1257, 1281.)

In *Sternbeck v. Buck* (1957) 148 C.A.2d 829, 307 P.2d 970, plaintiff's process server went to the home of defendant, met his wife who told him her husband was in the back of the house, and asked her to deliver the papers to her husband. She agreed and did as requested; her husband examined them and took them to his attorney. *Held*, in this equitable action to set aside a default judgment, there was no valid service. Personal service calls for actual manual tradition except where the defendant attempts to flee; service on a member of the defendant's family at defendant's residence will not suffice. (148 C.A.2d 833.)

A dissenting opinion argued persuasively that the process server delegated to the wife the task of delivering the papers personally to her husband; and that in view of her performance any lack of authority to delegate was legally inconsequential and of no concern to the defendant who fully understood that he was being served with legal papers. (148 C.A.2d 838.) However, in an opinion denying rehearing, the majority pointed to the statute on return and the typical form of process server's affidavit, indicating (in the court's view) an inflexible requirement of personal delivery by the person making the service. "For this court to hold that a process server can delegate his authority, as was done in the case at bar, and then legally execute and file the above affidavit, would be for us to encourage perjury in the filing of false affidavits. It matters not that the plaintiff in the instant case actually received the documents. To countenance the illegal practice in this case would be to invite every process server to delegate his authority and then file an affidavit based upon the hearsay and uncorroborated statement of the delegatee that he had properly made the service. An affidavit thus prepared might lead to an invalid default judgment." (148 C.A.2d 839.) (See 45 *Cal. L. Rev.* 553.)

In *Lettenmaier v. Lettenmaier* (1962) 203 C.A.2d 837, 22 C.R. 156, defendant, a Texas resident, was in his employer's office in California. His wife's attorney came there with divorce papers. Defendant's personal secretary took the papers, stating that defendant was expecting them, that she was authorized to accept them, and that she would see

that he got them. Later she gave them to defendant, who turned them over to his superior and left the state, whereupon his superior sent them back to the wife's attorney. *Held*, this was not personal service. (203 C.A.2d 843.)

(2) *Distinction*. In *Vail v. Jones* (1930) 209 C. 251, 287 P. 99, the court circumvented the strict rule by an ingenious and questionable application of principles of appellate review. Decedent V owned land. J acquired it by a tax sale, sued to quiet title, and obtained a default judgment against V. Plaintiff, V's administrator, brought this action to set aside the judgment. The trial judge, denying relief, found that (a) though the officer's return showed service on V, he did not serve her; (b) "it is not true" that she was never served "by any other person, or in any other manner," and she "was in fact served," and had knowledge of the suit. The evidence clearly showed that the officer had served V's daughter, and that the mother and daughter had subsequently discussed the suit. *Held*, the court's finding of personal service on V was correct in view of "these facts and circumstances, inferences and presumptions, and the clear equities of the case."

The carefully chosen language of the opinion gives no hint of any rule of law that supports this obviously just result. The trial judge's inconsistent findings were reconciled by conjuring up a mysterious stranger as process server: "it becomes unimportant whether the service was made by Crosbie [officer], as he alleged in his return, or whether it was made by someone else, as would follow from the trial court's finding as to service." (209 C. 255.) Because there was no stranger, there was no service; hence, the court in effect holds either that (a) in peculiar circumstances (such as this small family group in a small house), leaving the summons plus knowledge of the suit is equivalent to personal service; or (b) on collateral attack, the presumption in favor of a default judgment (in the quiet title suit) will support its recital of jurisdictional facts (such a judgment does recite the fact of service) against uncontradicted evidence to the contrary. No authority is cited for either proposition, nor is either explicitly stated. (See *Sternbeck v. Buck*, *supra*, 148 C.A.2d 834 [explaining *Vail* as resting on inferences of actual service: "perhaps, that the daughter was the defendant's agent or that the server was in the presence of the defendant"].)

SUPPLEMENT: [This section is current through the latest supplement]



120 of 194 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXIX. SERVICE OF PROCESS

C. Manner of Service in General.

2. Statutory Revision of 1969.

3 Witkin Cal. Proc. Actions § 1001

[§ 1001] Statutory Revision of 1969.

The Jurisdiction and Service of Process Act modernized California's law by expanding the methods of permissible service. (See C.E.B., 1 Civil Proc. Before Trial 4th, §17.26 et seq.; Cal. Civil Practice, 1 Procedure, §6:12 et seq.; Rutter Group, Civil Proc. Before Trial §4:180 et seq.; 21 *Hastings L. J.* 1163; 1 *Pacific L. J.* 687; 10 Santa Clara Lawyer 196; supra, §967.) Under proper circumstances, the following methods of service are authorized:

- (1) Personal delivery. (See infra, §§1008, 1009.)
- (2) Leaving the summons at the defendant's office or home. (See infra, §1010 et seq.)
- (3) Service by mail. (See infra, §1015 et seq.)
- (4) Service by publication. (See infra, §1032 et seq.)

The Act also makes special provision for service outside of California and outside of the United States. (*C.C.P.* 413.10; see infra, §1003 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]



121 of 194 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXIX. SERVICE OF PROCESS

C. Manner of Service in General.

3. Service Within California.

3 Witkin Cal. Proc. Actions § 1002

[§ 1002] Service Within California.

C.C.P. 413.10(a) states that service on a person within California shall be "as provided in this chapter" (*C.C.P. 413.10* to *C.C.P. 417.40*). (See *C.E.B.*, 1 Civil Proc. Before Trial 4th, §17.26 et seq.; *Cal. Civil Practice*, 1 Procedure, §6:12 et seq.) Five methods are authorized:

- (1) Physical delivery to the defendant personally, the traditional method. (*C.C.P. 415.10*; see *infra*, §§1008, 1009.)
- (2) Delivery to another person at the defendant's usual abode or place of business. (*C.C.P. 415.20, 415.95*; see *infra*, §1010 et seq.)
- (3) Mailing. (*C.C.P. 415.30*; see *infra*, §1015 et seq.)
- (4) Publication. (*C.C.P. 415.50*; see *infra*, §1033 et seq.)
- (5) Methods prescribed by special statutes. (*C.C.P. 413.10* ["[e]xcept as otherwise provided by statute"]; see *infra*, §1021 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]



122 of 194 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXIX. SERVICE OF PROCESS

C. Manner of Service in General.

4. Service Outside California but Within United States.

3 Witkin Cal. Proc. Actions § 1003

[§ 1003] Service Outside California but Within United States.

Service on a person outside California but within the United States shall be "as provided in this chapter" (*C.C.P. 413.10* to *C.C.P. 417.40*) or "as prescribed by the law of the place where the person is served." (*C.C.P. 413.10(b)*.) This means the following:

(1) Any method authorized for service within California (*supra*, §1002).

(2) Any method prescribed by the law of the state in which service is made. The theory is that this accommodation to the procedure of the sister state will make service easier and less open to challenge. (See Judicial Council Comment to *C.C.P. 413.10*; *C.E.B.*, 1 Civil Proc. Before Trial 4th, §17.37 et seq.; *Cal. Civil Practice*, 1 Procedure, §6:20 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]



123 of 194 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXIX. SERVICE OF PROCESS

C. Manner of Service in General.

5. Service Outside United States.

a. Statutory Requirements.

3 *Witkin Cal. Proc. Actions* § 1004

[§ 1004] Statutory Requirements.

(1) *In General.* Service on a person outside the United States shall be "as provided in this chapter" (*C.C.P. 413.10* to *C.C.P. 417.40*) or "as directed by the court in which the action is pending, or, if the court before or after service finds that the service is reasonably calculated to give actual notice, as prescribed by the law of the place where the person is served or as directed by the foreign authority, in response to a letter rogatory." (*C.C.P. 413.10(c)*.) This provision contains several innovations and authorizes the following methods:

(a) Any method authorized for service within California (*supra*, §1002).

(b) Any method prescribed by the law of the foreign country in which service is made, if the due process requirements (see 2 *Cal. Proc.* (5th), *Jurisdiction*, §112) are met. The Judicial Council Comment to *C.C.P. 413.10* justifies this innovation as follows: "Careful study of foreign law may show that service would less likely be objected to, or could be more easily made, if effected in a manner prescribed by foreign law or by a foreign authority in response to a letter rogatory. ... Since a number of foreign countries recognize foreign judgments only if they are based upon service made in accordance with their laws, the flexible provisions of Section 413.10 would permit service to be effected in accordance with such laws."

(c) Any method "directed by the court in which the action is pending." Thus, the court will approve service in accordance with foreign law only if it is reasonably calculated to give notice. If it finds that the methods prescribed by foreign law are constitutionally defective, "it may impose such additional requirements as would make such service acceptable." (Judicial Council Comment to *C.C.P. 413.10*; see *C.E.B.*, 1 Civil Proc. Before Trial 4th, §17.40; *Cal. Civil Practice*, 1 Procedure, §6:23.)

(2) *Hague Service Convention Requirements.* All of these methods are subject to the Hague Service Convention governing service abroad in civil and commercial matters. (*C.C.P. 413.10(c)*; see *infra*, §1005.) (On federal Foreign Sovereign Immunities Act, see *infra*, §1006.)

SUPPLEMENT: [This section is current through the latest supplement]



124 of 194 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXIX. SERVICE OF PROCESS

C. Manner of Service in General.

5. Service Outside United States.

b. Hague Service Convention Requirements.

3 *Witkin Cal. Proc. Actions* § 1005

[§ 1005] Hague Service Convention Requirements.

(1) *Nature of Act.* The Hague Service Convention governing "Service Abroad of Judicial and Extrajudicial Documents" in civil or commercial matters (20 U.S.T. 361 et seq., T.I.A.S. 6638) provides a mechanism for signatory nations to serve process abroad. It applies when the forum state's internal law, such as *C.C.P. 413.10(c)* (supra, §1004), requires transmittal of documents abroad as a necessary part of service of process. (*Volkswagenwerk Aktiengesellschaft v. Schlunk* (1988) 486 U.S. 694, 108 S.Ct. 2104, 2107, 100 L.Ed.2d 722, 730; *Denlinger v. Chinadotcom Corp.* (2003) 110 C.A.4th 1396, 1398, 2 C.R.3d 530.) (See *F.R. Civ. P.*, Rule 4(f)(1) [authorizing service under Convention; text of Convention and list of signatory countries are set forth after rule]; *Suzuki Motor Co. v. Superior Court* (1988) 200 C.A.3d 1476, 1486, 249 C.R. 376 [same, in appendix to opinion]; Cal. Civil Practice, 1 Procedure, §6:24; 18 A.L.R. Fed 2d 185 [when is compliance with Convention required in civil and commercial matters].) (On federal Foreign Sovereign Immunities Act, see *infra*, §1006.)

(2) *Methods of Service.* If the person to be served resides in a country that is a signatory to the Convention, the party attempting service must follow one of the several acceptable methods provided by the Convention, regardless of whether the party to be served has actual notice of the action. (*Dr. Ing H.C. F. Porsche A.G. v. Superior Court* (1981) 123 C.A.3d 755, 760, 762, 177 C.R. 155; 2 *Cal. Proc.* (5th), *Jurisdiction*, §120.) These methods are:

- (a) Service through the receiving state's designated "Central Authority" for service of foreign process. (Article 5.)
- (b) Delivery by the Central Authority to an addressee who accepts service voluntarily so long as the method used is not incompatible with the law of the receiving state. (Article 5.)
- (c) Service through diplomatic or consular agents of the sending state. (Article 8.)
- (d) Service through the judicial officers, officials, or other competent persons of the receiving state. (Article 10(b) and (c).)
- (e) Service as permitted by the internal law of the receiving state for documents coming from abroad. (Article 19.)

(3) *Mailed Documents*. Article 10(a) of the Convention provides that, absent an objection by the state of destination, the Convention will not interfere with the freedom to send judicial documents, by postal channels, directly to persons abroad. There is a split of authority in California whether this provision allows service of process by mail. (See *Shoei Kako Co. v. Superior Court* (1973) 33 C.A.3d 808, 817, 818, 109 C.R. 402, *infra*, §1072 [service of summons by mail is authorized by Article 10(a)]; *Denlinger v. Chinadotcom Corp.*, *supra*, 110 C.A.4th 1404 [same]; but see *Suzuki Motor Co. v. Superior Court*, *supra* [Article 10(a) authorizes sending documents by mail after summons, but not service of summons by mail]; *Honda Motor Co., Ltd. v. Superior Court* (1992) 10 C.A.4th 1043, 1047, 12 C.R.2d 861 [same].)

(4) *Illustrations*. In *Kott v. Superior Court* (1996) 45 C.A.4th 1126, 53 C.R.2d 215, plaintiffs in a civil action obtained court authorization to accomplish service on defendant, a Canadian citizen, by publication (see *infra*, §1032 et seq.) in a Los Angeles newspaper. *Held*, service of summons quashed.

(a) Service through the Convention provides the exclusive means of service on a Canadian national if there is occasion to transmit judicial or extrajudicial documents abroad. (45 C.A.4th 1135.)

(b) The only method of service on a foreign national, under California law, that would not require the transmission of documents abroad, and consequently not implicate the Convention, is service of summons by publication where a party's address remains unknown during the publication period despite the exercise of reasonable diligence. (45 C.A.4th 1136.)

(c) However, the affidavit in support of plaintiffs' application for service of summons by publication was deficient and misleading, and in light of facts known at the time, failed to demonstrate reasonable diligence (see *infra*, §§1038, 1039) in attempting to learn defendant's address. Plaintiffs' reliance on an investigator's efforts to locate defendant in California was inadequate, because the investigation occurred before plaintiffs learned that defendant was a Canadian citizen. Plaintiffs made no effort to use a Canadian vital statistics registry to locate an address for defendant in Canada, and failed to consult individuals, including defendant's attorney and business associates, who were obvious sources to contact about defendant's current business or residence address. (45 C.A.4th 1138, 1139.)

Kott was distinguished in *People v. Parcel No. 056-500-09* (1997) 58 C.A.4th 120, 68 C.R.2d 51, an action to forfeit real property purchased with criminal proceeds. The prosecution sought to serve defendant with a notice of the action at his last known address in California. When the service was returned unclaimed, the prosecution requested to serve defendant by publication in the county in which the real property was located because it had run out of leads about his whereabouts. The trial judge granted the request, and during the publication period, defendant's whereabouts continued to remain unknown. The prosecution subsequently discovered that defendant was in Spain and served him there with a copy of the amended complaint by registered mail. *Held*, service by publication was not void for failure to comply with the Convention. The Convention applies in civil or commercial matters where there is occasion to transmit a judicial or extrajudicial document for service abroad. It does not apply in situations where, as here, the whereabouts of a defendant cannot be ascertained despite reasonable diligence. (58 C.A.4th 125.)

Many other cases have construed the service of process requirements of the Convention. (See, e.g., *Volkswagenwerk Aktiengesellschaft v. Schlunk*, *supra*, 108 S.Ct. 2108, 100 L.Ed.2d 731, 735 [Convention's requirement of "service abroad" was not applicable where German corporation was served by substituted service on its domestic subsidiary, as allowed by Illinois law]; *Balcom v. Hiller* (1996) 46 C.A.4th 1758, 1763, 54 C.R.2d 536 [personal service on defendant in England by process server complied with Convention]; *Floveyor Int., Ltd. v. Superior Court* (1997) 59 C.A.4th 789, 794, 69 C.R.2d 457 [service on defendant in England by Senior Master of Supreme Court of England and Wales in manner provided by laws of Great Britain complied with Convention]; *In re Alyssa F.* (2003) 112 C.A.4th 846, 853, 6 C.R.3d 1, 10 Summary (10th), *Parent and Child*, §610 [in proceeding to terminate father's parental rights, neither service by first-class mail nor telephone message sent to father in Mexico complied with Convention].)

SUPPLEMENT: [This section is current through the latest supplement]

(4) *Illustrations.* See *Yamaha Motor Co., Ltd. v. Superior Court* (2009) 174 C.A.4th 264, 268, 94 C.R.3d 494 [foreign manufacturer could be served through American subsidiary under California law without following Hague Service Convention].



125 of 194 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXIX. SERVICE OF PROCESS

C. Manner of Service in General.

5. Service Outside United States.

c. Foreign Sovereign Immunities Act.

3 *Witkin Cal. Proc. Actions* § 1006

[§ 1006] Foreign Sovereign Immunities Act.

(1) *Nature of Act.* The Foreign Sovereign Immunities Act of 1976 (FSIA) (28 U.S.C., §1602 et seq.) is the sole basis for obtaining jurisdiction over a foreign state, its political subdivisions, and agencies or instrumentalities. (See 28 U.S.C., §§1602, 1604.) Subject matter jurisdiction over a foreign state depends on the existence of one of the exceptions to immunity specified in the FSIA. (See 28 U.S.C., §1604 et seq.) Service of process on the sovereign state itself or its political subdivisions must strictly comply with the requirements of the FSIA, which requires that service of process be through diplomatic channels in the absence of a separate prior arrangement between the parties for service. (See 28 U.S.C., §1608.) (See 16 A.L.R. Fed 2d 563 [United States Supreme Court cases construing and applying Act]; on jurisdictional aspects of FSIA, see 4 *Cal. Proc.* (5th), *Pleading*, §110.)

(2) *Illustration.* The FSIA was construed in *Bolkiah v. Superior Court* (1999) 74 C.A.4th 984, 88 C.R.2d 540. Plaintiff, a California company, brought a breach of contract action against defendants, who were family members of the Sultan of Brunei. Defendants, claiming that they were foreign states, moved to quash service for failure to comply with the service of process requirements of the FSIA. *Held*, denial of motion upheld; the FSIA was not applicable to the action.

(a) When a plaintiff's complaint alleges claims based on strictly commercial activity (or another of the exceptions to immunity under the FSIA), the defendant must establish a prima facie case that it is a foreign state. Defendants presented no evidence from which that inference could be drawn. Under the Brunei Constitution, they held no government position or power by birthright, and no official of the Brunei government presented an affidavit attesting to their recognition as officials of the government, or as potential heads of state, by virtue of their familial relationship to the Sultan. Nor was there evidence that the United States government recognized the Sultan of Brunei's siblings and their offspring as enjoying head of state status by virtue of their family relationship. And, there was no evidence of a line of succession that included siblings and children of siblings as heirs to the sultanate in the Brunei monarchy. (74 C.A.4th 996.)

(b) The FSIA does not apply to individuals who are not government officials and who are not sued in their official capacities. (74 C.A.4th 995.) No defendant held an official position at any level of government at any of the relevant

times. Moreover, the complaint did not allege any official acts committed by defendants, and did not purport to sue any defendant in an official capacity. Instead, the allegations of the complaint concerned acts committed by individuals in their personal dealings with plaintiff. Additionally, defendants neither showed nor argued that the government of Brunei authorized them to enter the contracts at issue. (74 C.A.4th 997.) (On whether service was defective under California law, see *infra*, §§1071, 1072.)

SUPPLEMENT: [This section is current through the latest supplement]



126 of 194 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXIX. SERVICE OF PROCESS

C. Manner of Service in General.

6. Method Devised by Court.

3 *Witkin Cal. Proc. Actions* § 1007

[§ 1007] Method Devised by Court.

Where no provision is made in *C.C.P. 413.10* et seq. or other law for the service of summons, the court in which the action is pending may direct that the summons be served in a manner that is "reasonably calculated to give actual notice to the party to be served and that proof of such service be made as prescribed by the court." (*C.C.P. 413.30.*) (See *C.C.P. 187*, supra, §§6, 7 [court has "all the means necessary" to carry jurisdiction into effect, including adoption of "suitable process"].)

The Judicial Council Comment points out that this power may be exercised not only where a statutory procedure is lacking (surely a rare occurrence), but also "where the specified procedure cannot wholly or in part be followed." (See *C.E.B.*, 1 Civil Proc. Before Trial 4th, §17.43; *Cal. Civil Practice*, 1 Procedure, §6:19.)

SUPPLEMENT: [This section is current through the latest supplement]



127 of 194 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXIX. SERVICE OF PROCESS

D. Personal Delivery.

1. Delivery to Defendant.

3 *Witkin Cal. Proc. Actions* § 1008

[§ 1008] Delivery to Defendant.

(1) *In General.* "A summons may be served by personal delivery of a copy of the summons and of the complaint to the person to be served." (*C.C.P.* 415.10; see *C.C.P.* 396a [in limited civil case (see *supra*, §783), if affidavit showing proper court is filed, copy is served with summons].) (On federal procedure, see *F.R. Civ. P.*, *Rule 4(c)(1)* ["summons must be served with a copy of the complaint"]; 4A Federal Practice & Procedure (Wright & Miller) §1095; 28 Federal Procedure, L.Ed. §65:69.)

"Service of a summons in this manner is deemed complete at the time of such delivery." (*C.C.P.* 415.10.)

Even though the original summons cannot be served and is returned for filing, later service by a copy of the complaint and summons is sufficient. (*Torgersen v. Smith* (1979) 98 C.A.3d 948, 952, 159 C.R. 781, 6 Cal. Proc. (5th), *Proceedings Without Trial*, §322 [rejecting contention that return and filing of original summons rendered it ineffective to support personal service].)

(2) *Entering Date of Delivery.* The problem faced by defendants in fixing the time for responsive pleadings, where no written evidence of the time of delivery is readily available, was partially solved by a 1976 amendment to *C.C.P.* 415.10, adding the following: "The date upon which personal delivery is made shall be entered on or affixed to the face of the copy of the summons at the time of its delivery." However, the requirement is only directory: "service of a summons without such date shall be valid and effective."

(3) *Inquiry as to Military Service.* Something more than delivery of the process and an ordinary return (see *infra*, §1064 et seq.) may be required when the plaintiff desires assurance that the defendant is not in military service. The federal Servicemembers Civil Relief Act (50 U.S.C. Appx., §501 et seq.) protects military personnel by prohibiting entry of a default judgment without a certificate or affidavit that the defendant is not in military service. Formerly there was no mandatory duty on the part of a sheriff or marshal to make the necessary inquiry and execute the certificate. To remedy this omission and enable plaintiffs to comply with the federal statute, *Govt.C.* 26608.1 provides that the sheriff, when serving any process or notice, must, if instructed to obtain a certificate, make inquiry of the person served. The sheriff must then execute and deliver to the party requesting service either the certificate required by the Act or a certificate setting forth the facts ascertained.

SUPPLEMENT: [This section is current through the latest supplement]
(3) *Inquiry as to Military Service.*

Federal Servicemembers Civil Relief Act: See 37 A.L.R. Fed 2d 1 [construction and application of Act].



128 of 194 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXIX. SERVICE OF PROCESS

D. Personal Delivery.

2. Sufficient Attempted Delivery.

3 *Witkin Cal. Proc. Actions* § 1009

[§ 1009] Sufficient Attempted Delivery.

(1) *Defendant's Refusal of Service.* Actual physical delivery of process can be prevented by a recalcitrant defendant, and the cases recognize the sufficiency of attempted delivery in the presence of a defendant who refuses to accept the paper. "We take it that when men are within easy speaking distance of each other and facts occur that would convince a reasonable man that personal service of a legal document is being attempted, service cannot be avoided by denying service and moving away without consenting to take the document in hand." (*In re Ball* (1934) 2 C.A.2d 578, 579, 38 P.2d 411 [process server came within 12 feet of petitioner, said "I have here another one of those things for you," tossed paper toward petitioner, and added "Now you are served"]; *Trujillo v. Trujillo* (1945) 71 C.A.2d 257, 260, 162 P.2d 640 [process server loudly explained nature of document through locked door of defendant's car and placed it under windshield wiper]; see *People v. Prescott* (1951) 106 C.A.2d 597, 598, 235 P.2d 406 [conviction for assaulting process server to prevent service].)

(2) *Defendant's Concealment To Avoid Service.* More often the frustration of physical delivery is accomplished by the defendant's concealment. Because mere knowledge of an action does not confer jurisdiction of the person (see *supra*, §965), the defendant, upon becoming aware of the filing of the complaint, may successfully avoid personal service by secreting himself or herself. In that situation the plaintiff may either attempt a tedious and expensive pursuit (see, e.g., *Central Mfrs. Mut. Ins. Co. v. Torreyson* (1952) 113 C.A.2d 634, 637, 248 P.2d 940), or may elect to use a form of substituted service (see *infra*, §1010 et seq.).

(3) *No Forced Entry To Serve Defendant.* Of course, no process server, whether an officer or a private person, has any authority to break into a dwelling for purposes of service. (*Foley v. Martin* (1904) 142 C. 256, 258, 75 P. 842.)

SUPPLEMENT: [This section is current through the latest supplement]



129 of 194 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXIX. SERVICE OF PROCESS

E. Leaving Copy at Office or Home.

1. Corporation, Association, or Public Entity Defendant.

3 *Witkin Cal. Proc. Actions* § 1010

[§ 1010] Corporation, Association, or Public Entity Defendant.

(1) *Scope of Provision.* In lieu of personally delivering a copy of the summons and of the complaint to the person to be served as specified in *C.C.P. 416.10* (service on corporation), *C.C.P. 416.20* (service on defunct corporation), *C.C.P. 416.30* (service on joint stock company or association), *C.C.P. 416.40* (service on unincorporated association, including partnership), or *C.C.P. 416.50* (service on public entity), a type of substituted service may be used. (*C.C.P. 415.20(a)*.) In actions against these defendants, physical delivery is no longer required and the substituted service may be freely elected. (See Judicial Council Comment to *C.C.P. 415.20(a)*.) (On service on business organization of unknown form, see *infra*, §1013; on service at gated communities, see *infra*, §1014.)

(2) *Physical Delivery and Mailing.* Two steps are involved in this kind of substituted service:

(a) Leaving a copy of the summons and complaint during usual office hours in the office of the defendant, or if no physical address is known, at the defendant's usual mailing address (other than a United States Postal Service post office box) with the person apparently in charge. (*C.C.P. 415.20(a)*.)

(b) Thereafter mailing another copy "to the person to be served" (i.e., the person specified in the enumerated sections) "at the place where a copy of the summons and complaint were left." (*C.C.P. 415.20(a)*.) Ordinary first-class mail, postage prepaid, is sufficient. (*C.C.P. 415.20(a)*.)

Service in this manner is deemed complete on the 10th day after mailing. (*C.C.P. 415.20(a)*.)

(3) *Illustrations: Service Sufficient.* In *Ludka v. Memory Magnetics Int.* (1972) 25 C.A.3d 316, 101 C.R. 615, defendant corporation used several names and, although allegedly Room 1210 was its office, the only access was through Room 1200. Plaintiff, unsuccessful in attempts to find a corporate officer, left the process in Room 1200, where it was allegedly thrown into the wastebasket by an intermeddling stranger. Later, a copy was mailed to Room 1200. *Held*, this was sufficient service. (25 C.A.3d 321.)

In *Khourie, Crew & Jaeger v. Sabek* (1990) 220 C.A.3d 1009, 269 C.R. 687, a process server attempted to leave a copy of the summons and complaint during usual office hours with the person apparently in charge of defendant

corporation's office--i.e., the only person who responded to his attempt to enter. When the person refused to unlock the door, the process server left the papers outside the door, and subsequently mailed copies to defendant's principal officer. *Held*, this was sufficient service. *C.C.P. 415.20(a)* permits "service to be completed upon a good faith attempt at physical service on a responsible person, plus actual notification of the action by mailing the summons and complaint to the appropriate party." A corporate defendant cannot thwart service by refusing to unlock its door during normal business hours. (220 *C.A.3d* 1013, citing *In re Ball* (1934) 2 *C.A.2d* 578, 38 *P.2d* 411, *supra*, §1009, and *Ludka*.)

(4) *Illustration: Service Insufficient.* In *Earl W. Schott v. Kalar* (1993) 20 *C.A.4th* 943, 24 *C.R.2d* 580, service was held to be ineffective. Plaintiff served defendant, named individually and as doing business as a construction company, by leaving a copy of the summons and complaint with the company's office manager, but the proof of service did not indicate that plaintiff had used due diligence to attempt personal service or had mailed a copy of the complaint, as required by *C.C.P. 415.20(b)* (service on natural person defendant, *infra*, §1011). *Held*, *C.C.P. 415.20(a)*, which contains an exception from the due diligence requirement for service of corporate defendants, was inapplicable, and service was thus ineffectual. The construction company was not identified in the pleadings as a corporation, but as an association or partnership. (20 *C.A.4th* 945.)

SUPPLEMENT: [This section is current through the latest supplement]



130 of 194 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXIX. SERVICE OF PROCESS

E. Leaving Copy at Office or Home.

2. Natural Person Defendant.

a. Attempted Physical Delivery Is Required.

3 *Witkin Cal. Proc. Actions* § 1011

[§ 1011] Attempted Physical Delivery Is Required.

(1) *Scope of Provision.* If a copy of the summons and of the complaint "cannot with reasonable diligence be personally delivered to the person to be served" as specified in *C.C.P. 416.60* (service on minor), *C.C.P. 416.70* (service on ward or conservatee), *C.C.P. 416.80* (service on candidate for public office), or *C.C.P. 416.90* (service on persons not otherwise specified), another type of substituted service may be used. (*C.C.P. 415.20(b)*.) Thus, as to natural persons, including those covered by the enumerated sections, substituted service may not be freely elected; a diligent effort to make physical delivery must be shown. (See Judicial Council Comment to *C.C.P. 415.20(b)*; *Evartt v. Superior Court* (1979) 89 *C.A.3d* 795, 798, 152 *C.R. 836* [reasonable diligence was not exercised]; 21 *Hastings L. J.* 1273.) (On exception from due diligence requirement for corporations, associations, partnerships, etc., see *C.C.P. 415.20(a)*, *supra*, §1010; on service at gated communities, see *infra*, §1014.)

(2) *Illustration: Service Sufficient.* In *Espindola v. Nunez* (1988) 199 *C.A.3d* 1389, 245 *C.R. 596*, plaintiff filed a complaint for damages against a husband and wife. After three unsuccessful attempts to serve them at their current address, the process server finally found the wife at home, served her individually, and left another summons for the husband. The husband's motion to quash service for failure to serve him personally was granted. *Held*, reversed.

(a) Because substituted service on an individual defendant was not recognized until the 1969 legislation, there is little case law on what constitutes "reasonable diligence." But the provisions of the revised law are to be reasonably construed to effectuate service and uphold the jurisdiction of the court if actual notice has been received. (199 *C.A.3d* 1391, 1393; see *supra*, §967 and *infra*, §1047.)

(b) *Evartt, supra*, finding insufficient diligence, relied on cases dealing with service by publication, which rarely results in actual notice. Substituted "abode service," as attempted here, is an effective way to give actual notice. (199 *C.A.3d* 1392, 1393.) Reasonable diligence was shown by the several attempts to serve personally; the abode service method was reasonably calculated to provide the husband with actual notice, and he did not deny receiving the copy left for him. (199 *C.A.3d* 1392.)

(3) *Illustration: Service Insufficient.* *Espindola* was distinguished in *Burchett v. Newport Beach* (1995) 33 *C.A.4th*

1472, 40 C.R.2d 1. Plaintiffs served specially appearing defendant city officials and department heads by leaving the summons with an assistant to the city clerk and mailing copies to defendants. *Held*, summons was properly quashed; plaintiffs did not exercise reasonable diligence in attempting to make physical delivery. Unlike *Espindola*, the plaintiff here never attempted to physically serve defendants, even though opposing counsel informed plaintiffs that service was ineffective; the trial judge ordered them to make physical delivery, and defendants were easily reachable and available at scheduled city council meetings. (33 C.A.4th 1477, 1478.)

SUPPLEMENT: [This section is current through the latest supplement]



131 of 194 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXIX. SERVICE OF PROCESS

E. Leaving Copy at Office or Home.

2. Natural Person Defendant.

b. Effectuating Substituted Service.

3 *Witkin Cal. Proc. Actions* § 1012

[§ 1012] Effectuating Substituted Service.

If the condition of attempted physical delivery is satisfied (see *supra*, §1011), two steps are involved for substituted service (see *supra*, §1010): physical delivery and mailing.

(1) *Physical Delivery*. Leaving a copy of the summons and complaint at the person's "dwelling house, usual place of abode, usual place of business, or usual mailing address other than a United States Postal Service post office box in the presence of a competent member of the household or a person apparently in charge of his or her office or place of business, or usual mailing address other than a United States Postal Service post office box, at least 18 years of age, who shall be informed of the contents thereof." (*C.C.P. 415.20(b)*.) (See 91 *A.L.R.3d* 827 [statutes providing for service on "person of suitable age and discretion"].)

The "usual place of business" includes a defendant's place of employment as well as a place where the defendant conducts a business. (Judicial Council Comment to *C.C.P. 415.20(b)*; see *Zirbes v. Stratton* (1986) 187 *C.A.3d* 1407, 1415, 232 *C.R.* 653 [service at defendant's estranged husband's restaurant was ineffective, where defendant had not worked at restaurant for years]; *Corcoran v. Arouh* (1994) 24 *C.A.4th* 310, 315, 29 *C.R.2d* 326 [following *Zirbes*; service at nonbusiness address of codefendant, who was alleged business colleague of defendant, was ineffective, because defendant had no connection with address where service occurred].)

The phrase "usual place of abode" was taken from former *F.R. Civ. P., Rule 4(d)(1)* (now *F.R. Civ. P., Rule 4(e)(2)(B)*), and abode service has been authorized by statute in many states. (See Judicial Council Comment to *C.C.P. 415.20(b)*; *Zirbes v. Stratton*, *supra*, 187 *C.A.3d* 1415 [service at defendant's parents' home was ineffective, where defendant had separate legal residence]; 37 *Cal. L. Rev.* 83; 21 *Hastings L. J.* 1261; 10 *Santa Clara Lawyer* 198; 87 *A.L.R.2d* 1163 [place or manner of delivering or depositing papers, under statutes permitting service of process by leaving copy at usual place of abode or residence]; 32 *A.L.R.3d* 112 [construction of phrase "usual place of abode," or similar terms referring to abode, residence, or domicile, as used in statutes relating to service of process].) (On federal procedure, see *F.R. Civ. P., Rule 4(e)(2)*; 4A *Federal Practice & Procedure* (Wright & Miller) §1096; 28 *Federal Procedure*, L.Ed. §65:132 et seq.)

C.C.P. 415.20(b) does not permit substituted service at a mailing address that is a United States Postal Service (USPS) post office box. But *Ellard v. Conway* (2001) 94 C.A.4th 540, 114 C.R.2d 399, appears to be the first California case to decide whether substituted service is proper at a private or commercial post office box. Plaintiffs' process server had attempted to serve defendants at their last known address, and a guard at that address advised the server that defendants had moved. Plaintiffs obtained from the USPS a forwarding address at a private, commercial post office box facility. The server left the summons and complaint with the manager of the facility, advised the manager of the nature of the documents, and mailed copies of the documents to defendants at the facility. After the trial judge granted plaintiffs a default judgment, defendants moved to vacate it on the ground that they were not properly served. *Held*, denial of defendants' motion affirmed; plaintiffs' substituted service on defendants was proper.

(a) Repeated attempts to serve defendants at the original address would have been futile, and contacting the USPS constituted sufficient diligence. (94 C.A.4th 545.)

(b) *C.C.P. 415.20(b)* allows service at a private or commercial post office box. If the Legislature had intended otherwise, it would have precluded substituted service at *any* post office box, rather than merely a USPS post office box. (94 C.A.4th 546, citing a federal District Court case authorizing that service.) By leasing the box and claiming it as their forwarding address, defendants made the box their usual mailing address. (94 C.A.4th 546.) Finally, the manager of the facility knew defendants and stated that they received mail at the facility, and it was more likely than not that the manager would deliver the summons and complaint to defendants. (94 C.A.4th 547.)

(c) Defendants had received actual notice of the lawsuit in time to defend it. (94 C.A.4th 547.)

(2) *Mailing*. Thereafter mailing another copy by first-class mail, postage prepaid, to the person to be served at the place where the copies were left. (*C.C.P. 415.20(b)* [identical with mailing provision in *C.C.P. 415.20(a)*, *supra*, §1010].) Service is deemed complete on the 10th day after mailing. (*C.C.P. 415.20(b)* [identical to provision in *C.C.P. 415.20(a)*, *supra*, §1010].)

The purpose of the 10-day grace period is merely to allow actual notice of the service before the period for filing an answer begins to run. (See *Ginns v. Shumate* (1977) 65 C.A.3d 802, 806, 135 C.R. 604; *Billings v. Edwards* (1979) 91 C.A.3d 826, 830, 154 C.R. 453.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Physical Delivery*. Substituted service at private or commercial post office box: See *Hearn v. Howard* (2009) 177 C.A.4th 1193, 1202, 99 C.R.3d 642 [following *Ellard v. Conway* (2001) 94 C.A.4th 540, 114 C.R.2d 399, text, p. 1232; substituted service was sufficient, where server attempted to serve attorney personally at business address three times on three different days, business address was private post office box rental store, server left documents with mail store clerk after third attempt, and thereafter mailed documents to same address by first-class, postage prepaid mail, and no better method of service was available].



132 of 194 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXIX. SERVICE OF PROCESS

E. Leaving Copy at Office or Home.

3. Business Organization of Unknown Form.

3 Witkin Cal. Proc. Actions § 1013

[§ 1013] Business Organization of Unknown Form.

C.C.P. 415.95 provides for substituted service on a business organization of unknown form as follows:

(1) *Physical Delivery*. Leaving a copy of the summons and complaint during usual office hours with the person who is apparently in charge of the office of that business organization. (*C.C.P. 415.95(a)*.)

(2) *Mailing*. Thereafter mailing another copy to the person to be served at the place where the copy of the summons and complaint was left. Ordinary first-class mail, postage prepaid, is sufficient. (*C.C.P. 415.95(a)*) [identical with mailing provisions of *C.C.P. 415.20*, supra, §§1010, 1012].)

Service in this manner is deemed complete on the 10th day after mailing. (*C.C.P. 415.95(a)*) [identical with provisions of *C.C.P. 415.20*, supra, §§1010, 1012].) This manner of service is not valid for a corporation with a registered agent for service of process listed with the Secretary of State. (*C.C.P. 415.95(b)*.)

SUPPLEMENT: [This section is current through the latest supplement]



133 of 194 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXIX. SERVICE OF PROCESS

E. Leaving Copy at Office or Home.

4. Service at Gated Communities.

3 *Witkin Cal. Proc. Actions* § 1014

[§ 1014] Service at Gated Communities.

(1) *Judicial Rule.* In *Bein v. Brechtel-Jochim Group* (1992) 6 C.A.4th 1387, 8 C.R.2d 351, plaintiffs sued defendant corporation and two couples who were the only shareholders and were alleged to be alter egos of the corporation. Service was attempted at the residence of one of the shareholders, but the process server was denied access to the area by the gate guard stationed at the community's entrance. The process server then served the guard. *Held*, the service was good.

(a) "Despite the great number of gated communities in the state, no California court has addressed this issue." (6 C.A.4th 1392.) However, the pre-1969 rule of strict compliance with service of process statutes no longer applies; the provisions are now to be liberally construed. (6 C.A.4th 1392, citing *Pasadena Medi-Center Associates v. Superior Court* (1973) 9 C.3d 773, 108 C.R. 828, 511 P.2d 1180, *supra*, §967, and *infra*, §1047.) The Supreme Court's admonition in *Pasadena Medi-Center* extends to substituted service as well as personal service. (6 C.A.4th 1392, citing *Espindola v. Nunez* (1988) 199 C.A.3d 1389, 245 C.R. 596, *supra*, §1011.)

(b) "The gate guard in this case must be considered a competent member of the household and the person apparently in charge. Appellants authorized the guard to control access to them and their residence. We therefore assume the relationship between appellants and the guard ensures delivery of process." (6 C.A.4th 1393, citing and discussing New York case, in which service on an apartment building doorman was found sufficient.)

(c) "Litigants have the right to choose their abodes; they do not have the right to control who may sue or serve them by denying them physical access." (6 C.A.4th 1393, citing *Khourie, Crew & Jaeger v. Sabek* (1990) 220 C.A.3d 1009, 269 C.R. 687, *supra*, §1010.)

(d) An additional reason to find the service adequate appears in *C.C.P. 415.20(b)*. The guard gate constitutes part of the dwelling. If the process server is not permitted to proceed to the actual residence, "the outer bounds of the actual dwelling place must be deemed to extend to the location at which the process server's progress is arrested." (6 C.A.4th 1394, footnote 7.)

(2) *Legislative Response.* The Legislature responded to the problem of effectuating service of process in gated

communities by enacting *C.C.P. 415.21* in 1994. The statute is applicable only to a gated community that is staffed by a guard or other security personnel assigned to control access to the community at the time that lawful service is attempted. (*C.C.P. 415.21(b)*.)

For communities covered by the statute, any person, "[n]otwithstanding any other provision of law," must be given access for a reasonable period of time to perform lawful service of process. However, the process server must first (a) identify to the guard the person or persons to be served, and (b) display a current driver's license or other identification and either (1) a badge or other confirmation that he is acting in his capacity as a representative of a county sheriff or marshal, or (2) evidence of current registration as a process server under *B. & P.C. 22350* et seq. (supra, §998). (*C.C.P. 415.21(a)(1)*, (a)(2).)

In enacting the statute, "it is not the intent of the Legislature to abrogate or modify the holding of the court in *Bein*." (Stats. 1994, Chap. 691, §2.)

SUPPLEMENT: [This section is current through the latest supplement]



134 of 194 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXIX. SERVICE OF PROCESS

F. Service by Mail.

1. Defendant in California: Mailing and Acknowledgment.

a. In General.

3 Witkin Cal. Proc. Actions § 1015

[§ 1015] In General.

(1) *Necessity of Acknowledgment of Receipt.* Service may be made on a natural person or a corporation or other entity by mail, but service is effective only if receipt of the mailed summons is acknowledged by or on behalf of the defendant. If no acknowledgment is made and returned within 20 days from the date of mailing, the plaintiff must employ another authorized method of service. However, on the motion of the plaintiff, with or without notice, the expense of the new method will (except for good cause shown) be recoverable as costs, even though the plaintiff does not prevail in the action. (*C.C.P. 415.30(a)*, (d); see *21 Hastings L. J. 1281*; 10 Santa Clara Lawyer 199.)

(2) *Mailing of Summons and Notice.* The plaintiff must mail (a) a copy of the summons and complaint, (b) two copies of a notice designed to elicit an acknowledgment of receipt of the summons, and (c) a return envelope, postage prepaid, addressed to the plaintiff. (*C.C.P. 415.30(a)*; see *infra*, §§1016, 1017.) Ordinary first-class mail or airmail, postage prepaid, is sufficient. (*C.C.P. 415.30(a)*.) Mailing the materials to the post office box of the person to be served complies with the statute. (*Transamerica Title Ins. Co. v. Hendrix* (1995) 34 C.A.4th 740, 745, 40 C.R.2d 614.)

(3) *Deliberate Attempt To Avoid Service.* "Where a statute provides for service by registered or certified mail, the addressee cannot assert failure of service when he wilfully disregards a notice of certified mail delivered to his address under circumstances where it can be reasonably inferred that the addressee was aware of the nature of the correspondence." (*Hankla v. Governing Bd. of Roseland School Dist.* (1975) 46 C.A.3d 644, 655, 120 C.R. 827.) (For similar rule on personal service, see *supra*, §1009.)

SUPPLEMENT: [This section is current through the latest supplement]



135 of 194 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXIX. SERVICE OF PROCESS

F. Service by Mail.

1. Defendant in California: Mailing and Acknowledgment.
 - b. Notice.

3 Witkin Cal. Proc. Actions § 1016

[§ 1016] Notice.

C.C.P. 415.30(b) sets forth a statutory form for notice that must be substantially followed. It provides in part: "This summons is served pursuant to *Section 415.30 of the California Code of Civil Procedure*. Failure to complete this form and return it to the sender within 20 days may subject you (or the party on whose behalf you are being served) to liability for the payment of any expenses incurred in serving a summons upon you in any other manner permitted by law. If you are served on behalf of a corporation, unincorporated association (including a partnership), or other entity, this form must be signed in the name of such entity by you or by a person authorized to receive service of process on behalf of such entity. In all other cases, this form must be signed by you personally or by a person authorized by you to acknowledge receipt of summons."

A form of notice approved by the Judicial Council is deemed sufficient. (*C.C.P. 415.30(e)*.) (See Judicial Council Form No. POS-015 [Notice and Acknowledgement of Receipt--Civil]; C.E.B., 1 Civil Proc. Before Trial 4th, §§17.33, 17.65; Cal. Civil Practice, 1 Procedure, §6:71.)

SUPPLEMENT: [This section is current through the latest supplement]



136 of 194 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXIX. SERVICE OF PROCESS

F. Service by Mail.

1. Defendant in California: Mailing and Acknowledgment.

c. Acknowledgment of Receipt.

3 Witkin Cal. Proc. Actions § 1017

[§ 1017] Acknowledgment of Receipt.

(1) *In General.* Service by mail under *C.C.P. 415.30* (supra, §1015) is effective if (a) the person served executes a "written acknowledgment of receipt of summons," and (b) the acknowledgment is returned to the sender. Service is deemed complete on the date the acknowledgment is executed. (*C.C.P. 415.30(c)*; see *Wagner v. South Pasadena* (2000) 78 C.A.4th 943, 947, 93 C.R.2d 91 [service of Govt.C. 65009(c) petition challenging local zoning decision (see supra, §477) is governed by procedure for summonses, not procedure for notices; thus, *C.C.P. 415.30* applied, and service was complete when acknowledgment was executed, not when it was mailed].)

(2) *Form of Acknowledgment.* A suggested statutory form is set forth in *C.C.P. 415.30*. A form approved by the Judicial Council is deemed sufficient. (*C.C.P. 415.30(e)*.) (See, adopted for mandatory use, Judicial Council Form No. POS-015 [Notice and Acknowledgement of Receipt--Civil]; C.E.B., 1 Civil Proc. Before Trial 4th, §§17.33, 17.65; Cal. Civil Practice, 1 Procedure, §6:71.)

SUPPLEMENT: [This section is current through the latest supplement]



137 of 194 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXIX. SERVICE OF PROCESS

F. Service by Mail.

2. Defendant Outside California: Mailing and Return Receipt.

a. In General.

3 Witkin Cal. Proc. Actions § 1018

[§ 1018] In General.

(1) *Statutory Procedure.* When the defendant is outside California the plaintiff may serve the defendant by mail in the manner prescribed by *C.C.P. 415.40*. No executed acknowledgment of receipt is required as in the case of a defendant within the state (see *supra*, §1017), but the practical equivalent is required: The copy of the summons and complaint is sent "by first-class mail, postage prepaid, requiring a return receipt." If the plaintiff requests the necessary receipt, either registered or certified mail is sufficient. (See *Neadeau v. Foster* (1982) 129 C.A.3d 234, 237, 180 C.R. 806 [return receipt signed by defendant's office manager established proof of service on defendant]; *Cruz v. Fagor America* (2007) 146 C.A.4th 488, 496, 52 C.R.3d 862 [following *Neadeau*; return receipt signed by defendant's employee, who regularly received mail on defendant's behalf, established proof of service on defendant]; Cal. Civil Practice, 1 Procedure, §6:20 et seq.)

A return receipt signed by a person authorized by the nonresident defendant is sufficient, but the plaintiff must provide separate evidence of the authority or of actual receipt of the summons. In the absence of that evidence, the service is void, notwithstanding the defendant's actual knowledge of the action. (*Taylor-Rush v. Multitech Corp.* (1990) 217 C.A.3d 103, 110, 111, 265 C.R. 672, citing *Neadeau v. Foster* and *Kappel v. Bartlett* (1988) 200 C.A.3d 1457, 1466, 246 C.R. 815.)

Service outside California is also authorized under *C.C.P. 415.30*, the general mail provision (see *supra*, §1015). (See Judicial Council Comment to *C.C.P. 415.30*.)

(2) *Constitutionality of Procedure.* The court in *M. Lowenstein & Sons v. Superior Court* (1978) 80 C.A.3d 762, 145 C.R. 814, *infra*, §§1019, 1072, held that mailed service met the constitutional requirements of due process. It was reasonably calculated to afford notice and an opportunity to defend, and "there is no constitutional requirement that personal service is indispensable when practical." (80 C.A.3d 768, citing the text, and *International Shoe Co. v. Washington, Office of Unemp. Compensation & Placement* (1945) 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95; see 2 Cal. Proc. (5th), *Jurisdiction*, §166.) The difference in procedures authorized for nonresidents does not deny equal protection, because nonresidence "makes for a distinctive procedure." (80 C.A.3d 769.)

SUPPLEMENT: [This section is current through the latest supplement]



138 of 194 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXIX. SERVICE OF PROCESS

F. Service by Mail.

2. Defendant Outside California: Mailing and Return Receipt.

b. Service on Corporation.

3 Witkin Cal. Proc. Actions § 1019

[§ 1019] Service on Corporation.

(1) *Service on Either Agent or Officer Is Sufficient.* Service by mail under *C.C.P. 415.40* (see *supra*, §1018) may be used on a foreign corporation, even though it has designated a resident agent for personal service. *C.C.P. 415.40* permits service on nonresidents "in any manner provided by this article" (*C.C.P. 415.10* to *C.C.P. 415.95*) or by mailing requiring a return receipt; and, although the resident agent could have been served, service on an officer is also authorized by *C.C.P. 416.10* (see *infra*, §1049). (*M. Lowenstein & Sons v. Superior Court* (1978) 80 C.A.3d 762, 767, 145 C.R. 814, *infra*, §1072, citing the text.)

(2) *Service on Corporation Alone Is Insufficient.* In *Dill v. Berquist Const. Co.* (1994) 24 C.A.4th 1426, 29 C.R.2d 746, plaintiff filed a complaint for personal injuries under theories of negligence and strict liability. Plaintiff mailed a copy of the summons, complaint, and statement of damages, return receipt requested, to defendant foreign corporations at their respective addresses, pursuant to *C.C.P. 415.40*, and obtained a default judgment against them when neither filed responsive pleadings. *Held*, default judgments vacated; no valid service had been accomplished.

(a) *Compliance with C.C.P. 416.10 is required.* When serving a foreign corporation under *C.C.P. 415.40*, a plaintiff is required to comply with *C.C.P. 416.10* (see *infra*, §1046 et seq.). To serve a foreign corporation by mail under *C.C.P. 415.40*, the summons must be mailed to a person to be served on behalf of the corporation, i.e., an individual specified in *C.C.P. 416.10*. (24 C.A.4th 1434.) Plaintiff's claim that *C.C.P. 416.20* applies only to in-state service of corporations was without merit:

(1) *C.C.P. 415.40* allows service of a person out of state in any manner provided by "this article," or by mailing the summons "to the person to be served," as specified (see *supra*, §1018). However, *C.C.P. 416.10* is part of another article, and *C.C.P. 415.40* does not permit a plaintiff to ignore the requirements of that article. This is clear from the language of the statutes, and the legislative history of the act by which the sections were created. (24 C.A.4th 1434.) The Judicial Council's Comments were before the Legislature when it adopted the act, making them highly persuasive evidence of legislative intent, and they establish that a plaintiff must comply with *C.C.P. 416.10*. (24 C.A.4th 1435.)

(2) The words "person to be served" are words of precision, used throughout the act, referring to the "individual" to

be served, and not to the "party" to be served. Because a corporation can only be served through a person, the person to be served is always different from the corporation. (24 C.A.4th 1435, 1436.)

(b) *Compliance with C.C.P. 415.40 is required.* Plaintiff did not comply with C.C.P. 415.40, and thus did not effect valid service of process:

(1) *C.C.P. 415.40* expressly requires that the summons be mailed to a "person to be served." "Here, it is undisputed that [plaintiff] did not mail the summons to any individual at all, but rather to the corporate defendants themselves. Therefore, he did not strictly comply with that section. Since section 416.10 lists the individuals to which he should have addressed the envelopes containing the summons, it is equally obvious that he did not strictly comply with that section either." (24 C.A.4th 1436.)

(2) Plaintiff did not substantially comply, because there was no evidence that either person who signed postal receipts was among the individuals specified in C.C.P. 416.10. Although one of the receipts of service stated that the signer was an "agent," the signer's implied statement that he or she was an agent of defendant was not competent evidence of that fact. Even if the signer was an agent of defendant, there was no evidence that the signer was authorized to accept service of process, as required by C.C.P. 416.10: the evidence did not contain an express acknowledgment of receipt. The mere fact that an employee of defendant received the summons did not establish substantial compliance, because C.C.P. 417.20(a) (proof of out-of-state service; see *infra*, §1071 et seq.) requires evidence "establishing actual delivery to the person to be served." (24 C.A.4th 1437.)

(3) Plaintiff had the burden of establishing that he complied with statutory requirements to effect valid service, and he failed to meet that burden. (24 C.A.4th 1439.) Although defendants moved to dismiss for failure to obtain personal jurisdiction rather than to quash service, these motions have similar objectives, raise similar issues, and can serve the same purpose. Thus, the same burden was on plaintiff to show that those who signed the postal receipts were among the individuals enumerated in C.C.P. 416.10. (24 C.A.4th 1440; see 2 Cal. Proc. (5th), *Jurisdiction*, §229.) Further, the proofs of service showed that the summonses were addressed solely to the corporate defendants, rather than to any of the requisite individuals. Thus, defendants were not required to present evidence to show invalid service and the resulting lack of jurisdiction. (24 C.A.4th 1441.)

SUPPLEMENT: [This section is current through the latest supplement]



139 of 194 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXIX. SERVICE OF PROCESS

F. Service by Mail.

3. No Extension of Time.

3 *Witkin Cal. Proc. Actions* § 1020

[§ 1020] No Extension of Time.

(1) *General Rule.* *C.C.P. 1013* provides for an extension of time to act where papers are sent by mail. (See 6 *Cal. Proc.* (5th), *Proceedings Without Trial*, §30.) But it deals only with motions and similar proceedings, not with jurisdictional process. *C.C.P. 413.20* makes this clear: "If a summons is served by mail pursuant to this chapter, the provisions of Section 1013 that extend the time for exercising a right or doing an act shall not extend any time specified in this title."

(2) *Exception: Service of Cross-Complaint.* Service of a cross-complaint on a party who has appeared is not jurisdictional and is subject to *C.C.P. 1013*. (*C.C.P. 428.60(2)*.)

SUPPLEMENT: [This section is current through the latest supplement]



140 of 194 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXIX. SERVICE OF PROCESS

F. Service by Mail.

4. Special Statutes for Particular Actions.

a. In General.

3 Witkin Cal. Proc. Actions § 1021

[§ 1021] In General.

It has been noted that, prior to the adoption of the Jurisdiction and Service of Process Act, "long-arm" statutes were enacted to permit substituted service on corporations and on nonresident individuals engaged in certain activities. (See *31 So. Cal. L. Rev.* 339, 347, 356; *supra*, §966.) Insofar as they deal with jurisdiction, these statutes add nothing to the broad scope of the jurisdiction section of the Act. (See 2 *Cal. Proc.* (5th), *Jurisdiction*, §9.)

The substituted service provisions, usually calling for service on a statutory officer followed by mailed notice, deal with situations covered by the Act, and could probably be eliminated without any harmful effects. But the alternative methods may have some advantages, and their continued effectiveness is expressly confirmed in the introductory clause of *C.C.P. 413.10*: "Except as otherwise provided by statute." As the Judicial Council Comment puts it: "Section 413.10 governs service of process within and outside this state, with one exception: special methods for effectuating service that are authorized by other statutes of this state may be used in appropriate instances."

The more important special statutes are covered in detail in subsequent sections. (See *infra*, §1022 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]



141 of 194 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXIX. SERVICE OF PROCESS

F. Service by Mail.

4. Special Statutes for Particular Actions.

b. Unlawful Detainer.

3 Witkin Cal. Proc. Actions § 1022

[§ 1022] Unlawful Detainer.

Leased real property is deemed abandoned where the lessor gives written notice of the lessor's belief of abandonment and the lessee fails to give timely written notice stating that the lessee does not intend to abandon. (C.C. 1951.3; see 12 *Summary* (10th), *Real Property*, §695.) Where the lessee gives that notice, the summons in an unlawful detainer action may be served by postage paid certified mail within 60 days from the date the lessee's notice is received. Service is deemed completed on the 10th day after mailing. (C.C.P. 415.47(a), (b).) This method of service does not preclude service in any other authorized manner. (C.C.P. 415.47(c).) (See Cal. Civil Practice, 1 Procedure, §§6:17, 6:67; Cal. Civil Practice, 3 Real Property Litigation, §§27:22, 27:23; 6 *Pacific L. J.* 373.) (On service of unlawful detainer summons by posting, see *infra*, §1045.)

SUPPLEMENT: [This section is current through the latest supplement]



142 of 194 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXIX. SERVICE OF PROCESS

F. Service by Mail.

4. Special Statutes for Particular Actions.

c. Nonresident Real Estate Licensee or Subdivider.

3 Witkin Cal. Proc. Actions § 1023

[§ 1023] Nonresident Real Estate Licensee or Subdivider.

A nonresident applicant for a real estate license must file an irrevocable consent to service on the Department of Real Estate in the event personal service cannot be had. (*B. & P.C. 10151.5(c).*)

The same filing requirement applies to a nonresident subdivider, who must designate the Secretary of State as agent for the service of process. (*B. & P.C. 11007.*)

SUPPLEMENT: [This section is current through the latest supplement]



143 of 194 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXIX. SERVICE OF PROCESS

F. Service by Mail.

4. Special Statutes for Particular Actions.

d. Nonresident Insurer.

3 *Witkin Cal. Proc. Actions* § 1024

[§ 1024] Nonresident Insurer.

(1) *Unauthorized Insurers Process Act*. The Unauthorized Insurers Process Act (*Ins.C. 1610 et seq.*) provides for service on the Insurance Commissioner in an action against a nonresident insurer not licensed to do business in California. (See *McGee v. International Life Ins. Co. (1957) 355 U.S. 220, 78 S.Ct. 199, 201, 2 L.Ed.2d 223, 226* [statute does not violate due process]; *23 So. Cal. L. Rev. 232.*)

Both the commissioner and the plaintiff must send copies of the process by certified or registered mail to the defendant's last known place of business. (*Ins.C. 1612, 12931.*)

The Act is a service of process statute, and does not create an independent basis of jurisdiction over the nonresident insurer. Hence, before the provisions of *Ins.C. 1610* and *1611* may be utilized to obtain jurisdiction, a constitutional basis for jurisdiction must be found pursuant to *C.C.P. 410.10* (see *2 Cal. Proc. (5th), Jurisdiction, §9*). (*In re Marriage of Martin (1989) 207 C.A.3d 1426, 1433, 255 C.R. 720.*)

(2) *Unauthorized Insurers False Advertising Process Act*. Substituted service by mail is also provided under a supplementary statute entitled "The Unauthorized Insurers False Advertising Process Act." This is directed at insurers "which place in or send into this State any false advertising designed to induce residents ... to purchase insurance from insurers not authorized to transact business in this State." (*Ins.C. 1620.1 et seq.*) The service is authorized in actions by the commissioner under the Unfair Trade Practices Act against insurers failing to heed notices to halt deceptive or improper advertising within the state. (*Ins.C. 1620.4.*)

SUPPLEMENT: [This section is current through the latest supplement]



144 of 194 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXIX. SERVICE OF PROCESS

F. Service by Mail.

4. Special Statutes for Particular Actions.

e. Nonresident Personal Representative of Probate Estate.

3 Witkin Cal. Proc. Actions § 1025

[§ 1025] Nonresident Personal Representative of Probate Estate.

(1) *Automatic Appointment of Secretary of State.* The appointment of a nonresident as personal representative of a probate estate, or the removal from the state of a resident personal representative, constitutes an appointment of the Secretary of State as agent for service of process in any proceeding "with respect to the estate or founded on or arising out of the acts or omissions of the nonresident personal representative in that capacity." (*Prob.C. 8570, 8572(b)*.) This appointment is irrevocable and binding on both the nonresident personal representative and his or her personal representative in the event of death. (*Prob.C. 8572(a)*.)

A nonresident personal representative must file in the estate proceedings a statement of his or her permanent address, and in the event of a change, a statement of the change. (*Prob.C. 8573*; see *Prob.C. 8577* [failure to comply is cause for removal].)

(2) *Service and Proof.* Process is served by delivering to and leaving with the Secretary of State (a) two copies of the summons and complaint (*Prob.C. 8574(a)*), and (b) either (1) a copy of the residence statement (*Prob.C. 8574(a)(1)*), or (2) if no statement has been filed, a copy of the personal representative's letters of administration together with a written statement signed by the party (or his or her attorney) seeking service that sets forth an address for use by the Secretary of State (*Prob.C. 8574(a)(2)*).

The Secretary of State sends a copy of the summons and complaint to the personal representative by registered mail. (*Prob.C. 8574(b)*.) Personal service on the personal representative "wherever found" (i.e., whether within or outside the state) is equivalent to mailed service. (*Prob.C. 8574(c)*.)

Proof of service is made by the secretary's certificate (*Prob.C. 8575(a)*), or, if personal service is made outside the state, by the return of any qualified public officer (*Prob.C. 8575(b)*; see *infra*, §1071 et seq.).

Service under this statute is the equivalent of personal service within California (*Prob.C. 8576(a)*), but the personal representative may appear and answer the complaint within 30 days from date of service (*Prob.C. 8576(b)*).

SUPPLEMENT: [This section is current through the latest supplement]



145 of 194 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXIX. SERVICE OF PROCESS

F. Service by Mail.

4. Special Statutes for Particular Actions.

f. Nonresident Motorist.

1. In General.

3 *Witkin Cal. Proc. Actions* § 1026

[§ 1026] In General.

(1) *Automatic Appointment of Director of Department of Motor Vehicles.* The earliest and most widely used of the special statutes are in *Veh.C. 17450* et seq., authorizing substituted service in an action against a nonresident arising out of a motor vehicle accident in California. Operation of the vehicle in California is "equivalent to" appointment of the Director of the Department of Motor Vehicles as agent for service against the negligent driver, his or her principal, or the owner (if the vehicle is driven with permission). (*Veh.C. 17451*; see *Fuller v. Lindenbaum* (1938) 29 C.A.2d 227, 231, 84 P.2d 155 [summons was quashed where defendant corporation showed that it did not own car and driver was independent contractor]; 37 Cal. L. Rev. 90 [suggesting revision to provide that if defendant is foreign corporation, procedure under Corporations Code should be followed]; 70 Harv. L. Rev. 729 [service in federal court action under state statute]; 21 Hastings L. J. 1125, 1139; 5 U.C.L.A. L. Rev. 204 [what constitutes "motor vehicle" within meaning of statutes]; 18 A.L.R.2d 544 [constitutionality and construction]; 48 A.L.R.2d 1283 [what constitutes "motor vehicle"]; 95 A.L.R.2d 1033 [statutes requiring return receipts]; 36 A.L.R.3d 1387 [whether airplane or other aircraft is "motor vehicle"]; on service and effect, see *infra*, §1027; on operation of vehicle, see *infra*, §1028; on nonresidents, see *infra*, §1029; on action against personal representative of probate estate, see *infra*, §1030.)

(2) *Alternative Service Under General Statute.* The special method of service authorized by *Veh.C. 17454* and 17455 (*infra*, §1027) is only a permitted, not a mandatory, method. The nonresident motorist may also be served by mail under the general statute--*C.C.P. 415.40* (*supra*, §1018). (*Anderson v. Sherman* (1981) 125 C.A.3d 228, 236, 237, 178 C.R. 38.)

SUPPLEMENT: [This section is current through the latest supplement]



146 of 194 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXIX. SERVICE OF PROCESS

F. Service by Mail.

4. Special Statutes for Particular Actions.

f. Nonresident Motorist.

2. Service and Effect.

3 *Witkin Cal. Proc. Actions* § 1027

[§ 1027] Service and Effect.

(1) *Service on Director.* The first step is service of a copy of the summons and complaint on the Director of the Department of Motor Vehicles. This may be by personal delivery or by certified mail. (*Veh.C. 17454.*)

(2) *Mailing or Personal Service Outside State.* The second step is notice to the defendant, given by the plaintiff or the plaintiff's attorney. This may be either (a) sending the notice and copy of the summons and complaint by registered mail, or (b) personal service on the defendant outside the state. (*Veh.C. 17455.*) The person so served has 60 days to appear. (*Veh.C. 17462.*) (See *Silver Swan Liquor Corp. v. Adams* (1941) 43 C.A.2d Supp. 851, 852, 110 P.2d 1097 [personal service outside territorial boundaries of United States is valid].)

(3) *Service on Former Resident.* Where the nonresident motorist was a resident of this state at the time of the accident but not at the time the action is filed (see *infra*, §1029), *Veh.C. 17461* provides two alternate methods for serving summons outside the state: (a) it may be served and proof of service made in the manner provided by *Veh.C. 17454* et seq.; or (b) it may be served pursuant to *C.C.P. 413.10* et seq. (see *supra*, §1001 et seq.).

(4) *Proof of Service.* Proof is made by either the affidavit of mailing and return receipt signed by the defendant, or the return of a qualified officer who made service out of the state. (*Veh.C. 17456*; see 37 Cal. L. Rev. 89 [suggesting that, if defendant refuses to accept letter and sign receipt, proof of this fact should be sufficient compliance]; on proof of service, see *infra*, §1071 et seq.)

(5) *Effect of Proper Service.* The prescribed service on the nonresident "shall be of the same legal force and validity as if served on him personally in this state." (*Veh.C. 17453.*) As the court said in *Solot v. Lynch* (1956) 46 C.2d 99, 292 P.2d 887: "Although the statute relates primarily to jurisdiction, it manifestly has the purpose of placing a nonresident motorist summoned thereunder on a parity with the resident in other respects. While it requires the nonresident to consent to the service of process upon the agent designated in the statute, it further requires that the nonresident shall actually receive the notice of the service and copy of the process and shall acknowledge receipt thereof. Moreover, the statute also contemplates such continuances as may be found necessary to give reasonable time and opportunity for

defense." (46 C.2d 104.)

(6) *Effect of Defective Service.* The statutory procedure must be strictly followed, and a deviation renders the service void. (See *Weisfeld v. Superior Court* (1952) 110 C.A.2d 148, 152, 242 P.2d 29 [service was fatally defective where (a) mailing was by third person, not plaintiff or his attorney, and (b) letter was received and receipted for by defendant's mother, not by defendant]; *Varra v. Superior Court* (1960) 181 C.A.2d 12, 14, 4 C.R. 920 [so-called notice of service was mailed to defendant October 28, director was served November 2; summons was quashed]; *Kaplan v. Superior Court* (1961) 191 C.A.2d 492, 494, 12 C.R. 781 [no summons was served on director or sent by mail to foreign representative, although letter was personally served in California]; *Coulston v. Cooper* (1966) 245 C.A.2d 866, 869, 54 C.R. 302 [no showing that defendant was nonresident, no service on director].)

SUPPLEMENT: [This section is current through the latest supplement]



147 of 194 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXIX. SERVICE OF PROCESS

F. Service by Mail.

4. Special Statutes for Particular Actions.

f. Nonresident Motorist.

3. What Constitutes Operation of Vehicle.

3 *Witkin Cal. Proc. Actions* § 1028

[§ 1028] What Constitutes Operation of Vehicle.

(1) *Anywhere In State.* The original statute covered only the operation of a vehicle "upon the highways." It now refers to operation "anywhere within this state." (*Veh.C. 17451, 17453.*)

(2) *Renting as Sufficient.* Pursuant to the statutory purpose, the term "operation" has been given a broad interpretation far beyond its ordinary meaning of physical driving of the vehicle. Thus, a nonresident who rented a defective truck to plaintiff was held subject to service under the statute, because renting for immediate use "constitutes the initiation of its operation," and it is enough that the accident "results from such operation." (*McDonald v. Superior Court (1954) 43 C.2d 621, 624, 275 P.2d 464*; see 5 *U.C.L.A. L. Rev.* 205; 73 *A.L.R.2d* 1351, 1365 [place or type of accident as affecting applicability of statute].)

(3) *Unloading as Sufficient.* It is not necessary that the vehicle be moving at the time of the accident. Thus, unloading the rented truck was regarded in *McDonald* as either a part of the "operation" or as an accident traceable to the negligent renting of it in defective condition. (43 *C.2d* 624.) And in *Schefke v. Superior Court (1955) 136 C.A.2d 715, 289 P.2d 542*, petitioner, a nonresident, backed his automobile into plaintiff while at a service station. *Held*, the principle of *McDonald* governed; stopping to load and unload, to receive and deliver goods, to make business calls, and to obtain gasoline and service are all incidental to the operation of the vehicle. (136 *C.A.* 717.) (See 73 *A.L.R.2d* 1351, 1365.)

(4) *Permission To Operate Is Required.* The operation, however, must be with "permission." Hence, where defendant rental company rented a car for Arizona use only, and no endorsement for out-of-state use was requested, the statute did not apply to an accident in California. (*Coulston v. Cooper (1966) 245 C.A.2d 866, 869, 54 C.R. 302.*)

SUPPLEMENT: [This section is current through the latest supplement]



148 of 194 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXIX. SERVICE OF PROCESS

F. Service by Mail.

4. Special Statutes for Particular Actions.

f. Nonresident Motorist.

4. Who Are Nonresidents.

3 *Witkin Cal. Proc. Actions* § 1029

[§ 1029] Who Are Nonresidents.

(1) *Test Is Not Identical With Domicile.* Residence under *Veh.C. 17451*, as under other procedural statutes, is largely a question of fact. To escape from its application (by showing that the defendant is a resident), the defendant need not go so far as to prove a domicile in California, but must show more than a temporary, casual sojourn. This test was developed after an exhaustive review of authorities in *Briggs v. Superior Court* (1947) 81 C.A.2d 240, 183 P.2d 758, where the court held defendant to be a nonresident. "While the Vehicle Code does not require that a person from out of state must acquire a domiciliary residence in order not to be classified as a nonresident, it does require a stay here of such length coupled with an intention to remain long enough, that the presence in the state cannot be classified as merely temporary." (81 C.A.2d 246.) (See *Berger v. Superior Court* (1947) 79 C.A.2d 425, 179 P.2d 600 [defendant was resident]; *De Pier v. Maddox* (1948) 87 C.A.2d 460, 197 P.2d 87 [same].)

(2) *Former Residents.* The original statute defined a nonresident as a person not residing in California at the time of the accident; thus, it did not cover a person who resided in California at the time of the accident but left before the action was filed. (See 37 Cal. L. Rev. 90; 41 Cal. L. Rev. 389.) This defect was corrected by amendments in 1955, broadening the concept of nonresident to include former residents. (See *Chesin v. Superior Court* (1956) 142 C.A.2d 360, 363, 298 P.2d 593; *House v. Tucker* (1957) 150 C.A.2d 580, 582, 310 P.2d 53; *Radner v. Eide* (1957) 151 C.A.2d 800, 803, 312 P.2d 74; 5 U.C.L.A. L. Rev. 213; 53 A.L.R.2d 1164 [who is subject to constructive or substituted service of process under statutes providing for that service on nonresident motorists].) (For methods of serving summons on former resident, see *supra*, §1027.)

Thus, *Veh.C. 17459* provides that the acceptance of an ownership or registration certificate by a resident "shall constitute the consent by the person that service of summons may be made upon him within or without this state, whether or not he is then a resident of this state, in any action brought in the courts of this state upon a cause of action arising in this state out of the ownership or operation of the vehicle."

Veh.C. 17460 makes the same provision as to the acceptance or retention of a driver's license, where the cause of action arises out of "operation of a motor vehicle anywhere within this state."

SUPPLEMENT: [This section is current through the latest supplement]



149 of 194 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXIX. SERVICE OF PROCESS

F. Service by Mail.

4. Special Statutes for Particular Actions.

f. Nonresident Motorist.

5. Action Against Executor or Administrator.

3 *Witkin Cal. Proc. Actions* § 1030

[§ 1030] Action Against Executor or Administrator.

(1) *Former Law Prohibiting Action.* The original statute was based on the fiction of consent to appointment of the statutory agent, and some courts held that, if the negligent motorist died, substituted service could not be used in an action against his or her executor or administrator (who did not consent). (See 37 *Cal. L. Rev.* 91; 50 *Harv. L. Rev.* 1185; 61 *Harv. L. Rev.* 355.)

(2) *Legislative Abrogation.* This gap was closed in 1955. *Veh.C. 17451* provides that the appointment "shall also be irrevocable and binding upon his executor or administrator." (See *Veh.C. 17453* [use of highways signifies nonresident's agreement to type of service prescribed; agreement is "irrevocable" and "binding as well upon his executor or administrator"].)

"Where the nonresident has died prior to the commencement of an action brought pursuant to this article, service of process shall be made on the executor or administrator of the nonresident in the same manner and on the same notice as is provided in the case of the nonresident. Where an action has been duly commenced under the provisions of this article by service upon a defendant who dies thereafter, the court shall allow the action to be continued against his executor or administrator upon motion with such notice as the court deems proper." (*Veh.C. 17452.*)

SUPPLEMENT: [This section is current through the latest supplement]



150 of 194 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXIX. SERVICE OF PROCESS

F. Service by Mail.

4. Special Statutes for Particular Actions.

g. Nonresident Watercraft Owner.

3 Witkin Cal. Proc. Actions § 1031

[§ 1031] Nonresident Watercraft Owner.

Harb. & Nav.C. 600 et seq. provide for service on nonresidents who operate watercraft in California waters and are involved in accidents or collisions causing damage or loss to person or property. The procedure is substantially similar to that governing service in actions against nonresident motorists (*supra*, §1026 et seq.), and the scope of the statute is likewise similar. (See *99 A.L.R.2d 287* [validity of service of process on nonresident owner of watercraft under state long-arm statute].) The following outline covers the principal sections:

- (1) Definitions of watercraft and nonresident. (*Harb. & Nav.C. 600.*)
- (2) Service on executor or administrator. (*Harb. & Nav.C. 605.*)
- (3) Proof of mailed notice or service out of state, by affidavit or officer's return. (*Harb. & Nav.C. 606.*)
- (4) Person served outside state has 60 days to appear. (*Harb. & Nav.C. 608.*)

SUPPLEMENT: [This section is current through the latest supplement]



151 of 194 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXIX. SERVICE OF PROCESS

G. Service by Publication.

1. When Publication Is Permissible.

a. Former Law.

3 Witkin Cal. Proc. Actions § 1032

[§ 1032] Former Law.

The original California statute (former C.C.P. 412) authorized publication in certain types of cases where the defendant was a nonresident, had departed from the state, could not after due diligence be found within the state, concealed himself or herself to avoid service, or was a corporation with no officer or agent to be served. It was accordingly necessary to show, by an affidavit in proper form, that the defendant came within one of these classes. The following cases are illustrative:

(1) *Defendant Is Nonresident.* (See *Bender v. Hutton* (1911) 160 C. 372, 374, 117 P. 322 [averment of actual residence if known, or averment that it is unknown]; *Bell v. McDermoth* (1926) 198 C. 594, 600, 246 P. 805; *Davis-Heller-Pearce Co. v. Ramont* (1924) 66 C.A. 778, 780, 226 P. 972 [information and belief].)

(2) *Defendant Has Departed.* (See *Ligare v. California Southern R. Co.* (1888) 76 C. 610, 614, 18 P. 777 [averment of residence if known]; *McKendrick v. Western Zinc Mining Co.* (1913) 165 C. 24, 26, 130 P. 865; *Bell v. McDermoth*, *supra*, 198 C. 599.)

(3) *Defendant Cannot, After Due Diligence, Be Found.* (See *infra*, §1038.)

(4) *Defendant Conceals Himself or Herself.* (See *Bradford v. McAvoy* (1893) 99 C. 324, 326, 33 P. 1091; *Langley v. Zurich General Acc. & Liab. Ins. Co.* (1933) 219 C. 101, 105, 25 P.2d 418; *Wyoming Pac. Oil Co. v. Preston* (1958) 50 C.2d 736, 739, 329 P.2d 489; *Miller v. Superior Court* (1961) 195 C.A.2d 779, 783, 16 C.R. 36; *Craddock v. Financial Indem. Co.* (1966) 242 C.A.2d 850, 857, 52 C.R. 90.)

(5) *Corporation With No Agent To Be Served.* The modern law permitting service on the Secretary of State (see *infra*, §1048) made this provision obsolete.

SUPPLEMENT: [This section is current through the latest supplement]



152 of 194 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXIX. SERVICE OF PROCESS

G. Service by Publication.

1. When Publication Is Permissible.

b. Statutory Revision of 1969.

3 Witkin Cal. Proc. Actions § 1033

[§ 1033] Statutory Revision of 1969.

The Jurisdiction and Service of Process Act contains the same specification of classes (*infra*, §1040) but substitutes for the conditions of nonresidence, etc. (*supra*, §1032), the basic condition that the defendant "cannot with reasonable diligence be served in another manner specified in this article." (*C.C.P. 415.50(a)*; see *21 Hastings L. J. 1309* [discussing effect of differences in terminology between old and new provisions].)

Thus, the plaintiff must show by affidavit that he or she has made a sufficient effort to serve by one or more of the better methods (e.g., personal service, abode service, or service by mail, *supra*, §1008 et seq.) before resorting to publication. (See Judicial Council Comment to *C.C.P. 415.50*; *infra*, §§1038, 1039.)

SUPPLEMENT: [This section is current through the latest supplement]



153 of 194 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXIX. SERVICE OF PROCESS

G. Service by Publication.

1. When Publication Is Permissible.

c. Special Statutes.

3 Witkin Cal. Proc. Actions § 1034

[§ 1034] Special Statutes.

A number of special statutes govern service by publication in particular actions. They generally require that the summons contain additional information (e.g., a description of real property involved in the action). (See C.E.B., 1 Civil Proc. Before Trial 4th, §17.36.) The following are illustrative:

- (1) *C.C.P. 751.06* (action to reestablish destroyed land record).
- (2) *C.C.P. 751.54* (action to quiet title to property disturbed by earth movement).
- (3) *C.C.P. 763.010 et seq.* (quiet title action).
- (4) *C.C.P. 801.8, 801.9* (action concerning title to real property affected by a public improvement assessment).
- (5) *C.C.P. 872.310 et seq.* (partition action).
- (6) *C.C.P. 1250.120 et seq.* (condemnation proceeding).
- (7) *Rev.C. 3960* (action to determine rights in tax-deeded property).

SUPPLEMENT: [This section is current through the latest supplement]



154 of 194 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXIX. SERVICE OF PROCESS

G. Service by Publication.

2. Affidavit.

a. Necessity.

3 Witkin Cal. Proc. Actions § 1035

[§ 1035] Necessity.

(1) *Affidavit Is Jurisdictional.* Service may be made by publication "if upon affidavit it appears to the satisfaction of the court" that the statutory conditions (supra, §1033, and infra, §1040) are satisfied. (*C.C.P.* 415.50(a); see infra, §1038 et seq.)

An affidavit in proper form (infra, §1037) is a jurisdictional basis of the order for publication: "[T]here must be an affidavit containing a statement of some fact which would be legal evidence, having some appreciable tendency to make the jurisdictional fact appear, for the Judge to act upon before he has any jurisdiction to make the order. Unless the affidavit contains some such evidence tending to establish every material jurisdictional fact, the Judge has no legal authority to be satisfied, and, if he makes the order, he acts without jurisdiction, and all proceedings based upon it are void." (*Forbes v. Hyde* (1866) 31 C. 342, 350, infra, §1041; see *Columbia Screw Co. v. Warner Lock Co.* (1903) 138 C. 445, 448, 71 P. 498, infra, §1041; *In re Behymer* (1933) 130 C.A. 200, 202, 19 P.2d 829; *Harris v. Cavasso* (1977) 68 C.A.3d 723, 727, 137 C.R. 410, quoting the text.)

(2) *Sufficiency.* The affidavit need not include anything except the matters specified in the statute. (*Anderson v. Goff* (1887) 72 C. 65, 68, 13 P. 73.) However, an affidavit sufficient in content and form but fraudulent in fact will not sustain jurisdiction. (*Stern v. Judson* (1912) 163 C. 726, 735, 127 P. 38.)

It was said in an early case that the affidavit and order for publication should follow in "reasonably quick succession" so that the affidavit would relate to conditions at the time of the order; and by dictum the court condemned an affidavit executed 4 months prior to the order. (*Forbes v. Hyde*, supra, 31 C. 351; but see *Brown v. Sandell* (1926) 79 C.A. 313, 317, 249 P. 209 [showing was sufficient where earlier affidavit was brought up to date by supplemental affidavit made 1 day before order].)

SUPPLEMENT: [This section is current through the latest supplement]



155 of 194 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXIX. SERVICE OF PROCESS

G. Service by Publication.

2. Affidavit.

b. Who May Make.

3 *Witkin Cal. Proc. Actions* § 1036

[§ 1036] Who May Make.

The statute does not specify the persons who may make the showing, and an affidavit by the plaintiff is not essential. (*Rue v. Quinn* (1902) 137 C. 651, 655, 70 P. 732; *Davis-Heller-Pearce Co. v. Ramont* (1924) 66 C.A. 778, 780, 226 P. 972.)

Bearing in mind, however, the necessity for averring facts of the affiant's own knowledge, the affidavits would normally be made as follows:

(1) The sheriff or other process server should make the affidavit that the defendant cannot be found for personal service. (See *Wheeler v. Craig* (1929) 206 C. 221, 223, 273 P. 558.)

(2) The plaintiff or his or her attorney or other agent may make the affidavit as to search for the defendant. (See *Rue v. Quinn* (1902) 137 C. 651, 654, 66 P. 216; *Clarkin v. Morris* (1918) 178 C. 102, 104, 172 P. 981; *infra*, §§1038, 1039.)

(3) The plaintiff normally makes the affidavit of a cause of action, but the plaintiff's attorney may do so if the attorney knows the facts of his or her own knowledge. (See *Columbia Screw Co. v. Warner Lock Co.* (1903) 138 C. 445, 447, 71 P. 498, *infra*, §1041; 47 A.L.R.2d 423 [sufficiency of affidavit made by attorney or other person on behalf of plaintiff]; *infra*, §§1040, 1041; but see *Harris v. Cavasso* (1977) 68 C.A.3d 723, 726, 137 C.R. 410 [attorney's verification of complaint on information and belief was inadequate].)

SUPPLEMENT: [This section is current through the latest supplement]



156 of 194 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXIX. SERVICE OF PROCESS

G. Service by Publication.

2. Affidavit.

c. Form.

3 Witkin Cal. Proc. Actions § 1037

[§ 1037] Form.

The affidavit is the proof of the necessity and authority for this extreme form of substituted service, and must state probative facts. (For form of affidavit, see Cal. Civil Practice, 1 Procedure, §§6:80, 6:81; 20A Am.Jur. P.P. Forms (2008 ed.), Process, Form 98 et seq.) Two typical kinds of defects in the affidavit may defeat the order:

(1) *Averment of Legal Conclusions.* "An affidavit which merely repeats the language or substance of the statute is not sufficient. Unavoidably the statute cannot go into details, but is compelled to content itself with a statement of the ultimate facts which must be made to appear, leaving the detail to be supplied by the affidavit from the facts and circumstances of the particular case. Between the statute and the affidavit there is a relation which is analogous to that existing between a pleading and the evidence which supports it. The ultimate facts of the statute must be proved, so to speak, by the affidavit, by showing the probative facts upon which each ultimate fact depends. ... To illustrate: It is not sufficient to state generally, that after due diligence the defendant cannot be found within the State, or that the plaintiff has a good cause of action against him, or that he is a necessary party; but the acts constituting due diligence or the facts showing that he is a necessary party should be stated." (*Ricketson v. Richardson* (1864) 26 C. 149, 153; see *Forbes v. Hyde* (1866) 31 C. 342, 353, 355, *infra*, §1041 [pointing out that defendant is not heard on this ex parte application, hence, it is important that jurisdictional facts be established by legal evidence]; *Ligare v. California Southern R. Co.* (1888) 76 C. 610, 612, 18 P. 777 [dictum]; *Bender v. Hutton* (1911) 160 C. 372, 117 P. 322 [bare statement of residence without reasons for belief]; *Batte v. Bandy* (1958) 165 C.A.2d 527, 533, 332 P.2d 439 [stating that "despite diligent efforts" service could not be made]; *Sanford v. Smith* (1970) 11 C.A.3d 991, 998, 90 C.R. 256.)

(2) *Facts Alleged Are Not Legal Evidence.* The affiant must state facts based on knowledge and not on mere hearsay. (*Columbia Screw Co. v. Warner Lock Co.* (1903) 138 C. 445, 446, 71 P. 498, *infra*, §1041; *In re Behymer* (1933) 130 C.A. 200, 204, 19 P.2d 829; *Sanford v. Smith*, *supra*; but see *Rue v. Quinn* (1902) 137 C. 651, 657, 66 P. 216, *infra*, §1038 [pointing out that, in affidavit of diligent search, facts alleged must often to some extent be based on hearsay].)

A number of decisions carrying out this idea say that the test of the sufficiency of the affidavit is whether it could be the foundation of an indictment for perjury if false. (See *In re Behymer*, *supra*, 130 C.A. 203; *Columbia Screw Co. v.*

Warner Lock Co., supra, 138 C. 447.) In a proper case, however, averments may be made on information and belief. (*Davis-Heller-Pearce Co. v. Ramont* (1924) 66 C.A. 778, 780, 226 P. 972.)

In *Kahn v. Matthai* (1897) 115 C. 689, 47 P. 698, plaintiff averred that she and her attorney spoke to defendant's two adult daughters at his residence, requested them to allow service, and that the daughters refused and used "every endeavor in their power to prevent said service." The opinion declares that "[f]rom this rather singular statement it cannot be determined that any duty devolves upon the daughters of defendant to permit or to aid in the service of process upon defendant, or in what manner they have thwarted such service, or that they are colluding with the defendant to evade the service of summons." (115 C. 693.) The court's stiff attitude seems unwarranted; the affidavit sufficiently showed that defendant had his two daughters acting as lookouts to keep process servers away.

SUPPLEMENT: [This section is current through the latest supplement]



157 of 194 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXIX. SERVICE OF PROCESS

G. Service by Publication.

2. Affidavit.

d. Diligent Attempt To Serve.

1. Inquiry of Persons.

3 *Witkin Cal. Proc. Actions* § 1038

[§ 1038] Inquiry of Persons.

(1) *Affidavits as Sufficient*. Formerly the showing required was that the defendant "can not, after due diligence, be found within the State." The requirement of *C.C.P. 415.50(a)*, a showing that the defendant "cannot with reasonable diligence be served in another manner," calls for substantially the same averments, i.e., of a search, thorough and in good faith, described in detail. (See *Sanford v. Smith* (1970) 11 C.A.3d 991, 1001, 90 C.R. 256 [approving Los Angeles County rule on required scope and content of affidavit]; Cal. Civil Practice, 1 Procedure, §§6:16, 6:80, 6:81; 20A Am.Jur. P.P. Forms (2008 ed.), Process, Forms 99, 100, 116.)

Inquiry may, e.g., be made of persons living in the vicinity of the defendant's last known address or property, of relatives, friends, and acquaintances, or of the defendant's employer. The affidavit should state the names and relationships of those persons and why they could be expected to know of the defendant's whereabouts, and what they said, and the time and place. (For decisions upholding affidavits, see *Chapman v. Moore* (1907) 151 C. 509, 513, 91 P. 324; *Clarkin v. Morris* (1918) 178 C. 102, 104, 172 P. 981; *Vorburg v. Vorburg* (1941) 18 C.2d 794, 797, 117 P.2d 875; 21 A.L.R.2d 929 [sufficiency of affidavit about due diligence in attempting to learn whereabouts of party to litigation, for the purpose of obtaining service by publication].)

In *Rue v. Quinn* (1902) 137 C. 651, 66 P. 216, the affidavit was upheld, even though the search was confined to San Diego County. There is no invariable rule that inquiries must be extended beyond the county, and "the number and character of the persons inquired of must in each case be determined by the judge." (137 C. 657.)

(2) *Affidavit as Inadequate*. A perfunctory inquiry that neglects likely sources of information may render the default judgment vulnerable to later attack for fraud, even though the affidavit is superficially in good form. (*Stern v. Judson* (1912) 163 C. 726, 735, 127 P. 38 [affidavit averred inquiries of various named persons, including county officers, but evidence showed that these were not as important as others available and ignored]; *Kott v. Superior Court* (1996) 45 C.A.4th 1126, 1138, 1139, 53 C.R.2d 215, supra, §1005 [failure to consult likely sources of information].) And the affidavit should be by the person who actually made the inquiries. (*In re Behymer* (1933) 130 C.A. 200, 203, 19 P.2d 829 [affidavit, reciting that affiant employed M to ascertain whereabouts of defendants and was informed by M that he

could not find them, was insufficient].)

SUPPLEMENT: [This section is current through the latest supplement]



158 of 194 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXIX. SERVICE OF PROCESS

G. Service by Publication.

2. Affidavit.

d. Diligent Attempt To Serve.

2. Search of Directories and Records.

3 *Witkin Cal. Proc. Actions* § 1039

[§ 1039] Search of Directories and Records.

(1) *General Rule.* The plaintiff or his or her attorney ordinarily should see that a search is made, and the person making the inquiries should aver the results of the search, of directories, and other records (e.g., those of the county recorder) that might disclose the defendant's address. The affidavit should state the time, place, and other details of these inquiries and their result. (See *Vorburg v. Vorburg* (1941) 18 C.2d 794, 796, 117 P.2d 875; *Kott v. Superior Court* (1996) 45 C.A.4th 1126, 1138, 53 C.R.2d 215, supra, §1005 [plaintiffs did not act diligently where they failed to consult Canadian vital statistics registry to locate address for defendant Canadian citizen].)

(2) *Exception: Restricted Public Databases.* As a condition of establishing diligence, a court may not require a party to search public databases where access by a registered process server to residential addresses is prohibited by law or administrative policy. The prohibition extends, but is not limited to, voter registration rolls and records of the Department of Motor Vehicles. (*C.C.P.* 415.50(e).)

SUPPLEMENT: [This section is current through the latest supplement]



159 of 194 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXIX. SERVICE OF PROCESS

G. Service by Publication.

2. Affidavit.

e. Nature of Action.

1. Statutory Conditions.

3 *Witkin Cal. Proc. Actions* § 1040

[§ 1040] Statutory Conditions.

In addition to the requirement of a diligent attempt to serve, *C.C.P. 415.50(a)* requires a showing of one of the following conditions relating to the action:

(1) That a "cause of action exists against the party upon whom service is to be made." (*C.C.P. 415.50(a)(1).*)

(2) That "he or she is a necessary or proper party to the action." (*C.C.P. 415.50(a)(1).*)

(3) That he or she "has or claims an interest in real or personal property in this state that is subject to the jurisdiction of the court or the relief demanded in the action consists wholly or in part in excluding the party from any interest in the property." (*C.C.P. 415.50(a)(2).*)

This part of the showing is as much a jurisdictional basis for the order as the showing of inability to serve. (See *Forbes v. Hyde* (1866) 31 C. 342, 353, *infra*, §1041; *Harris v. Cavasso* (1977) 68 C.A.3d 723, 726, 137 C.R. 410 [existence of cause of action is jurisdictional fact].)

SUPPLEMENT: [This section is current through the latest supplement]



160 of 194 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXIX. SERVICE OF PROCESS

G. Service by Publication.

2. Affidavit.

e. Nature of Action.

2. Sufficiency of Averments.

3 *Witkin Cal. Proc. Actions* § 1041

[§ 1041] Sufficiency of Averments.

In *Forbes v. Hyde* (1866) 31 C. 342, the attorney's affidavit merely stated that "he verily believes" that the client has a good cause of action. Holding a default judgment void on collateral attack the court said: "But such an averment is neither the statement of an ultimate fact, such as is required to be stated in a pleading, nor of a probative fact from which such ultimate fact may be deduced, nor a fact of any sort which in any way legally tends to prove such ultimate or probative fact, or from which it may be inferred. It is not the statement of a fact at all. It is merely the statement of the opinion of the witness in relation to a point upon which the Judge is required to form his own opinion from facts which appear by affidavit." (31 C. 353.)

In *Columbia Screw Co. v. Warner Lock Co.* (1903) 138 C. 445, 71 P. 498, the attorney made an affidavit in the form of a common count for goods sold and delivered, and added that he stated these matters "upon information received by me from said plaintiff." *Held*, this was insufficient, for it simply meant that the client gave information; the attorney did not aver his own knowledge or belief. (138 C. 447.) (See *Ricketson v. Richardson* (1864) 26 C. 149 [bare recital of statutory language]; *Yolo v. Knight* (1886) 70 C. 431, 11 P. 662 [same]; *People v. Mulcahy* (1910) 159 C. 34, 35, 112 P. 853 [bare statement of attorney's belief without averment of probative facts].)

California's former statute provided that the showing as to the cause of action or a necessary or proper party could be made by affidavit "or by the verified complaint on file." This was eliminated in the revised statute, which authorizes a showing only by affidavit. (C.C.P. 415.50(a).) However, cases decided under the prior law held that an unverified complaint could be used by a recital in the affidavit incorporating the complaint by reference. (See *Ligare v. California Southern R. Co.* (1888) 76 C. 610, 611, 18 P. 777 [affidavit referred to complaint on file and made it a part of it]; *Davis-Heller-Pearce Co. v. Ramont* (1924) 66 C.A. 778, 780, 226 P. 972; *Brown v. Sandell* (1926) 79 C.A. 313, 316, 249 P. 209.)

In *Lima v. Lima* (1914) 26 C.A. 1, 7, 147 P. 233, plaintiff's affidavit recited that he had fully and fairly stated the facts to his attorney and "I am by him informed and verily believe that I have a good cause of action in this suit against the said defendant, as will fully appear by my complaint now on file herein, to which reference is hereby made." The

affidavit was held insufficient, either on the theory that incorporation by reference of an unverified complaint did not satisfy the statute or that the particular incorporation was defective. (26 C.A. 7.) The decision seems unnecessarily technical and contrary to the other cases cited above. (See 3 *Cal. L. Rev.* 344.)

SUPPLEMENT: [This section is current through the latest supplement]



161 of 194 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXIX. SERVICE OF PROCESS

G. Service by Publication.

3. Order.

3 Witkin Cal. Proc. Actions § 1042

[§ 1042] Order.

On a sufficient showing by affidavit (*supra*, §1035 et seq.), the court will order (1) that summons be published (*infra*, §1043), and (2) that, if the defendant's address is ascertained before expiration of the publication time, copies be mailed (*infra*, §1044). (*C.C.P. 415.50(b)*); see 20A Am.Jur. P.P. Forms (2008 ed.), Process, Form 102 et seq.)

The statute does not require a notice of motion or hearing, and consequently the affidavit may be presented and the order obtained *ex parte*. But the order is jurisdictional. (*McKeon v. Superior Court* (1927) 81 C.A. 720, 254 P. 944 [written order was apparently filed but not signed by judge; judgment was set aside].)

SUPPLEMENT: [This section is current through the latest supplement]



162 of 194 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXIX. SERVICE OF PROCESS

G. Service by Publication.

4. Service.

a. Publication.

3 Witkin Cal. Proc. Actions § 1043

[§ 1043] Publication.

(1) *Newspaper.* The order must direct publication of the summons "in a named newspaper, published in this state, that is most likely to give actual notice to the party to be served." If the party to be served resides or is located outside California, the order also may direct publication of the summons in "a named newspaper outside this state that is most likely to give actual notice to that party." (*C.C.P. 415.50(b)*); on what constitutes newspaper of general circulation for city, see *Medeiros v. South Coast Newspapers* (1992) 7 C.A.4th 982, 986, 9 C.R.2d 291.)

(2) *Period of Publication.* Ordinarily, publication is made for the period prescribed by *Govt.C. 6064* (once a week for 4 successive weeks). (*C.C.P. 415.50(b)*.) Two exceptions are stated:

(a) *Govt.C. 6064* governs "[e]xcept as otherwise provided by statute" (*C.C.P. 415.50(b)*), and a number of special statutes make different publication requirements. (See, e.g., *Welf.C. 778* [abandonment proceedings].)

(b) The court has discretion to order a longer period. (*C.C.P. 415.50(b)*.)

(3) *Completion of Service.* Service "is deemed complete" as provided by *Govt.C. 6064*. (*C.C.P. 415.50(c)*); see 4 *Pacific L. J.* 306.)

SUPPLEMENT: [This section is current through the latest supplement]



163 of 194 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXIX. SERVICE OF PROCESS

G. Service by Publication.

4. Service.

b. Where Defendant's Address Is Ascertained.

3 Witkin Cal. Proc. Actions § 1044

[§ 1044] Where Defendant's Address Is Ascertained.

(1) *Defendant's Address Known Before Order.* If the defendant's address is known before the order, a better method of service must be employed, for publication is authorized only as a last resort. (*C.C.P. 415.50(a)*, supra, §1033; see *Transamerica Title Ins. Co. v. Hendrix* (1995) 34 C.A.4th 740, 744, 40 C.R.2d 614 [where plaintiff knew defendant's post office address and that defendant was receiving mail there before application for order, service by publication was defective, even though defendant's residence and business address were unknown].)

(2) *Defendant's Address Ascertained After Order.* If the defendant's address is ascertained after the order but before expiration of the time prescribed for publication, a copy of the summons, complaint, and order for publication must be "forthwith mailed" to the defendant. The order must make this direction. (*C.C.P. 415.50(b)*.) Ordinary mail is sufficient. (See *Hubert v. Hubert* (1947) 78 C.A.2d 498, 502, 178 P.2d 15 [local rule requiring registered mail was not jurisdictional].)

A plaintiff proceeding in this manner gives the defendant actual notice by mail, but is nevertheless compelled to await expiration of the period of publication and incur the expense of publication before service is complete and the defendant's time to plead starts to run. The statute, however, gives the plaintiff an alternative procedure, speedier and less expensive. The plaintiff may disregard the order for publication, and serve the defendant in another authorized manner, "in which event the service shall supersede any published summons." (*C.C.P. 415.50(d)*; see 21 So. Cal. L. Rev. 5 [former statute allowing alternative of personal service outside state].)

SUPPLEMENT: [This section is current through the latest supplement]



164 of 194 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXIX. SERVICE OF PROCESS

H. Posting in Unlawful Detainer.

3 *Witkin Cal. Proc. Actions* § 1045

[§ 1045] Posting in Unlawful Detainer.

(1) *When Posting Is Authorized.* Posting is a common method of giving notice in probate proceedings. (See 14 *Summary* (10th), *Wills and Probate*, §394; *supra*, §961.) This method is also authorized as an alternative to publication in unlawful detainer actions concerning real property. (*C.C.P. 415.45*; see 4 *Pacific L. J.* 308; 10 *Pacific L. J.* 354.) However, a posting statute must comply with minimum standards of adequate notice. (See *Greene v. Lindsey* (1982) 456 U.S. 444, 102 S.Ct. 1874, 1879, 72 L.Ed.2d 249, 257, 2 *Cal. Proc.* (5th), *Jurisdiction*, §267.)

(2) *Affidavit.* Posting of summons may be ordered on a showing by affidavit that (a) the party to be served cannot with reasonable diligence be served except by publication; (b) a cause of action exists against the party or he or she is a necessary party to the action; and (c) the party claims an interest in or the action seeks to exclude his or her interest in the property. (*C.C.P. 415.45(a)*.)

(3) *Manner of Posting.* The court must order that (a) the posting of the summons be "in a manner most likely to give actual notice"; and (b) the summons and complaint be "forthwith" mailed by certified mail to the party's "last known address." (*C.C.P. 415.45(b)*.)

(4) *Completion of Service.* "Service of summons in this manner is complete on the 10th day after posting and mailing." (*C.C.P. 415.45(c)*.)

(5) *Substituted Service.* "Notwithstanding an order for posting of the summons, a summons may be served in any other manner ... , except publication, in which event such service shall supersede any posted summons." (*C.C.P. 415.45(d)*.) (On service of unlawful detainer summons by mailing, see *supra*, §1022.)

(6) *Prejudgment Claim of Right to Possession.* In addition to service of the summons and complaint on tenants and occupants, a prejudgment claim of right to possession may be served on other occupants of the property. *C.C.P. 415.46* sets forth a statutory form for notice of the claim, and provides for service on known occupants and posting at the property. The Judicial Council has issued a form that satisfies the statutory requirements. (See Judicial Council Form No. CP-10.5 [Prejudgment Claim of Right to Possession (Miscellaneous)]; *Cal. Civil Practice*, 3 *Real Property Litigation*, §§18:37, 18:38, 18:92; 12 *Summary* (10th), *Real Property*, §729 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]



165 of 194 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXIX. SERVICE OF PROCESS

I. Persons on Whom Summons May Be Served.

1. Domestic Corporation.

a. Officer or Designated Agent.

3 Witkin Cal. Proc. Actions § 1046

[§ 1046] Officer or Designated Agent.

Service on a corporation may only be accomplished by serving some individual as its representative. A corporation has certain executive or managerial officers, and it may also have an agent expressly designated for the purpose of receiving service. (See Cal. Civil Practice, 1 Procedure, §6:29; Cal. Civil Practice, 1 Business Litigation, §§1:5, 1:6; Rutter Group, Civil Proc. Before Trial §4:135 et seq.; 9 *Summary* (10th), *Corporations*, §76.)

A corporation may be sued "as provided in the Code of Civil Procedure" (*Corp.C. 105*), or as provided in *Corp.C. 1701* and *1702* (*Corp.C. 1700*). (See C.E.B., 1 Civil Proc. Before Trial 4th, §17.19.)

C.C.P. 416.10 specifies the officers or agents to whom delivery of the summons and complaint may be made:

(1) *Designated Agent for Service of Process*. A person "designated as agent for service of process." (*C.C.P. 416.10(a)*; see *Corp.C. 1701* [service on natural person designated as agent or, if corporate agent is designated, on person appointed by that agent to receive service].) Statements naming an individual or corporate agent must be filed with the Secretary of State. (*Corp.C. 202(c), 1502(b), 2105(a)(4), 2107(b).*)

(2) *Officers*. "[T]he president, chief executive officer, or other head of the corporation, a vice president, a secretary or assistant secretary, a treasurer or assistant treasurer, a controller or chief financial officer, a general manager, or a person authorized by the corporation to receive service of process." (*C.C.P. 416.10(b)*; see *Alexander v. State Capital Co. (1937) 9 C.2d 304, 312, 70 P.2d 619* [service on deputy of state commissioner liquidating building and loan association was equivalent to service on general manager]; *Bakersfield Hacienda v. Superior Court (1962) 199 C.A.2d 798, 803, 18 C.R. 812* [service on managing agent of motel operated by corporation was not equivalent to service on general manager of corporation]; *37 Cal. L. Rev. 94; 26 A.L.R.2d 1086* [who is agent].) (On federal procedure, see *F.R. Civ. P., Rule 4(h)(1)(B)*; 4A Federal Practice & Procedure (Wright & Miller) §1101; 28 Federal Procedure, L.Ed. §65:24 et seq.)

To make it possible to locate officers, *Corp.C. 1502(a)* requires that every domestic corporation file with the Secretary of State a statement of the names of its principal officers together with the location and address of its principal

office. (See 23 So. Cal. L. Rev. 22.)

(3) *Bank Officers or Agents.* If the corporation is a bank, any of the above-mentioned officers or agents and also "a cashier or assistant cashier." (C.C.P. 416.10(c).)

SUPPLEMENT: [This section is current through the latest supplement]



166 of 194 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXIX. SERVICE OF PROCESS

I. Persons on Whom Summons May Be Served.

1. Domestic Corporation.

b. Ostensible Agent.

3 Witkin Cal. Proc. Actions § 1047

[§ 1047] Ostensible Agent.

Invoking the directive of liberal construction of the statute (see *supra*, §967), the court in *Pasadena Medi-Center Associates v. Superior Court* (1973) 9 C.3d 773, 108 C.R. 828, 511 P.2d 1180, approved the service of process on a director who was neither an officer nor a designated agent. Plaintiff sued on promissory notes. Defendants were P Corp. and M Associates, a limited partnership with P Corp. as general partner and J as limited partner. Plaintiff attached real property of the corporation, and his counsel then attempted to serve process. The corporation had no general office and had not filed the list of agents authorized to accept service, so plaintiff's counsel examined the corporation's file with the Commissioner of Corporations, saw the name of Albert A. Binney, Sr., listed as secretary-treasurer in the application for a permit to issue stock, and served him. Actually Albert A. Binney, Sr., was only a director, not an officer; his son, Albert A. Binney, Jr., was the secretary-treasurer and acting president. On receiving the summons Sr. notified Jr., and the directors conceived the following plan to defeat plaintiff's claim, which was admittedly good. They allowed a default judgment to be taken; then defendant corporation sold the attached property, the corporation's only remaining asset, to a third party; and, to meet his demand for title insurance, J, the limited partner, gave the title company a personal indemnity. When plaintiff levied on the property, J moved to quash the service of summons and to vacate the default judgment and levy of execution. Granting this motion would clear the title, free J of his indemnity, and leave plaintiff with a cause of action against a judgment-proof corporation. The trial judge denied the motion on the ground that the corporation was estopped to deny Sr.'s authority to accept service. *Held*, affirmed.

(a) The present case "demonstrates the desirability of liberal construction of the new statutes." Defendants had no defense; recognizing their liability, they deliberately decided to permit plaintiff to obtain a default judgment, and then set up a technical defect in service, not to present a defense but to nullify plaintiff's lien and leave plaintiff powerless to collect the debt. (9 C.3d 778.)

(b) The trial judge decided the motion on "estoppel," without an express finding of ostensible authority; but this form of estoppel is better characterized as ostensible authority. (See 3 *Summary* (10th), *Agency and Employment*, §144 et seq.) And the requisite reliance (C.C. 2317), without want of ordinary care (C.C. 2334), was established: Plaintiff's counsel could reasonably rely on a list of officers prepared by defendant corporation, which in the overwhelming majority of cases accurately identifies the officers. (9 C.3d 780.)

(c) Jurisdiction over a corporation defendant can be established by serving an agent possessing only ostensible authority. C.C. 2315 and 2330, dealing with authority, actual or ostensible, are of general application. "The rules codified in these sections sweep across the civil law; the issue before the court may concern the agent's purchase or sale of property, his endorsement of a check, his touting of a product's virtues or concealment of its defects, but, whatever the context, the rule remains that an agent acting within his ostensible authority binds his principal. We perceive no reason to depart from these principles merely because the ostensible authority here at issue involves authority to receive service of process." (9 C.3d 781.)

(d)"Defendant corporation, having misled plaintiff, bears the responsibility for plaintiff's failure to serve an authorized corporate officer, and should not be permitted to strip itself of assets in order to avoid the payment of an uncontested judgment. If the rule were otherwise we would make of process 'a special preserve in which deception pays, and technical precision prevails over substantial justice.' " (9 C.3d 782.)

SUPPLEMENT: [This section is current through the latest supplement]



167 of 194 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXIX. SERVICE OF PROCESS

I. Persons on Whom Summons May Be Served.

1. Domestic Corporation.

c. Secretary of State.

3 Witkin Cal. Proc. Actions § 1048

[§ 1048] Secretary of State.

(1) *In General*. If no agent has been designated, or a designated agent has resigned and has not been replaced, or a designated agent cannot be found with reasonable diligence, service may be made on the Secretary of State. (*Corp.C. 1702; C.C.P. 416.10(d)*.) (See Cal. Civil Practice, 1 Business Litigation, §1:7; Rutter Group, Civil Proc. Before Trial §4:147 et seq.)

(2) *Affidavit by Plaintiff*. The plaintiff shows by affidavit that process "cannot be served with reasonable diligence" (a) on an agent, by personal delivery (see supra, §1008), by leaving the process at the agent's office (see supra, §1010), or by mail (see supra, §1015), or (b) on the corporation, by service on an authorized officer or agent (see supra, §1046, and infra, §1051). (*Corp.C. 1702(a)*.)

In *Batte v. Bandy* (1958) 165 C.A.2d 527, 332 P.2d 439, an order to serve a California corporation was made under former Corp.C. 3302 (now Corp.C. 1702), the Secretary of State was served, and the default of the corporation entered. But the affidavit, consisting mainly of conclusions, failed to state what efforts were made to locate the officers. *Held*, the service was void and the default judgment was properly vacated. Plaintiffs' contention, that the statute allowed substituted service merely on a showing that the corporation has not filed a designation of agent, was summarily rejected; the statutes required a showing that the corporation could not be served with the exercise of due diligence in any manner provided by law. (165 C.A.2d 536.)

(3) *Order by Court*. The court then makes an order, and service is made by "delivering by hand" to the Secretary of State, "or to any person employed in the Secretary of State's office in the capacity of assistant or deputy," a copy of the process and the order. (*Corp.C. 1702(a)*), codifying rule of *Hunstock v. Estate Dev. Corp.* (1943) 22 C.2d 205, 213, 138 P.2d 1 [predecessor statute required personal delivery, and mailing summons to Secretary of State gave no jurisdiction]; see 31 Cal. L. Rev. 449 [noting that Secretary of State gives mailed summons to employee who then makes personal delivery].)

The order for service on the Secretary of State may also be made by a federal court or another state court in which the action or proceeding has been filed. (*Corp.C. 1702(d)*.)

(4) *Mailing by Secretary of State.* The Secretary of State forwards the process by registered mail (a) to the corporation's principal executive office, if the address is known, or (b) to the last designated agent who has not resigned, if the address of the principal executive office is not known. If there is no agent, no further action is required. (*Corp.C. 1702(b).*)

(5) *Certificate of Secretary of State.* The Secretary of State keeps a record of all process served upon the Secretary of State and the official action taken on it. The Secretary of State's certificate of "the receipt of process, the giving of notice thereof to the corporation and the forwarding of such process" is prima facie evidence of those matters. (*Corp.C. 1702(c).*)

SUPPLEMENT: [This section is current through the latest supplement]



168 of 194 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXIX. SERVICE OF PROCESS

I. Persons on Whom Summons May Be Served.

2. Foreign Corporation.

a. Officer or Designated Agent.

3 Witkin Cal. Proc. Actions § 1049

[§ 1049] Officer or Designated Agent.

(1) *In General.* A foreign corporation may be served as provided by the Code of Civil Procedure. (*Corp.C. 2110.1*; see *M. Lowenstein & Sons v. Superior Court* (1978) 80 C.A.3d 762, 767, 145 C.R. 814.) C.C.P. 416.10 (supra, §1046 et seq.) therefore covers both domestic and foreign corporations (see Judicial Council Comment), and contains both general provisions and appropriate cross-references to the Corporations Code. (On requirement that plaintiff serving foreign corporation by mail under C.C.P. 415.40 must also comply with C.C.P. 416.20, see *Dill v. Berquist Const. Co.* (1994) 24 C.A.4th 1426, 1434, 29 C.R.2d 746, supra, §1019.)

(2) *Designated Agent for Service of Process.* A foreign corporation, to qualify for doing intrastate business, must designate an agent for service of process and give its consent to service on the Secretary of State if the agent cannot be found, and serving either individual is sufficient to effectuate service on the foreign corporation. (*Corp.C. 2105(a)(4)*, *2105(a)(5)*, *2107*; C.C.P. 416.10(a); see 9 *Summary* (10th), *Corporations*, §231; on service on Secretary of State, see *infra*, §1050.)

(3) *Officers.* Under C.C.P. 416.10(b) (supra, §1046), service on a foreign corporation may be accomplished by serving an officer designated in the statute, even if the officer is served outside of California. (See *Ault v. Dinner for Two* (1972) 27 C.A.3d 145, 150, 103 C.R. 572.)

Under *Corp.C. 2110* and C.C.P. 416.10(d), a foreign corporation may also be served personally by delivery of process to any of the following:

(a) An officer or the "general manager in this state." (See *Socony-Vacuum Oil Co. v. Superior Court* (1939) 35 C.A.2d 92, 94, 94 P.2d 1019 ["general manager"]; *Thew Shovel Co. v. Superior Court* (1939) 35 C.A.2d 183, 191, 95 P.2d 149 [vice-president]; *Buckner v. Industrial Acc. Com.* (1964) 226 C.A.2d 619, 624, 38 C.R. 332, 2 *Summary* (10th), *Workers' Compensation*, §388 [stating rule]; *Ault v. Dinner for Two*, supra [general manager].)

The "general manager in this state" does not mean only a single person functioning throughout the state. An agent of sufficient rank, who is the general manager in a particular area, is within the statute. (*Carl F. W. Borgward, G.M.B.H.*

v. Superior Court (1958) 51 C.2d 72, 78, 330 P.2d 789; *Eclipse Fuel Engineering Co. v. Superior Court* (1957) 148 C.A.2d 736, 745, 307 P.2d 739; see 71 A.L.R.2d 178 [who is "managing" agent of domestic corporation under statute providing for service of process on that agent]; 17 A.L.R.3d 625 [who is "general" or "managing" agent of foreign corporation under statute authorizing service of process on that agent].) The general manager may even be an independent contractor, if it appears with reasonable certainty that the defendant will be apprised of the service. (*Cosper v. Smith & Wesson Arms Co.* (1959) 53 C.2d 77, 83, 346 P.2d 409; but see *Nagel v. P & M Distributors* (1969) 273 C.A.2d 176, 183, 78 C.R. 65 [*Cosper* test applied and case distinguished on facts; independent contractor was not proper person to be served].)

(b) If the corporation is a bank, a cashier or assistant cashier.

(c) A designated individual or corporate agent. (See 37 Cal. L. Rev. 99.) (On federal procedure, see *F.R. Civ. P., Rule 4(h)(1)(B)*; 4A Federal Practice & Procedure (Wright & Miller) §1101; 28 Federal Procedure, L.Ed. §65:24 et seq.; on service on ostensible agent, see *supra*, §1047.)

(4) *Foreign Corporation No Longer Doing Business Within State*. A foreign corporation that has withdrawn from the state or has had its right to transact intrastate business forfeited may be served pursuant to *Corp.C. 2110*. (*Corp.C. 2114(a)*, *2114(c)*, *infra*, §1052.)

SUPPLEMENT: [This section is current through the latest supplement]



169 of 194 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXIX. SERVICE OF PROCESS

I. Persons on Whom Summons May Be Served.

2. Foreign Corporation.

b. Secretary of State.

3 Witkin Cal. Proc. Actions § 1050

[§ 1050] Secretary of State.

(1) *In General.* A foreign corporation transacting intrastate business may be served by service on the Secretary of State in a manner similar to that provided for domestic corporations (see *supra*, §1048). (*Corp.C. 2100, 2111; C.C.P. 416.10(d).*)

(2) *Affidavit by Plaintiff.* The conditions (no designated agent authorized to act, or agent cannot be found with due diligence, and no officer or agent listed in *Corp.C. 2110* can be found after diligent search) must be shown by affidavit "to the satisfaction of the court." (*Corp.C. 2111(a).*)

(3) *Order by Court.* The court then makes an order for service by personal delivery to the Secretary of State, or an assistant or deputy, of two copies of the process and the order (except where the corporation has not filed the statement required by *Corp.C. 2105*, in which case one copy is enough but the order must include an address to which the Secretary of State must send the process). (*Corp.C. 2111(a).*)

(4) *Mailing by Secretary of State.* The Secretary of State must forward the copies of the process and order by registered or certified mail (a) to the two stated addresses of the corporation (outside and inside the state) set forth in the latest statement filed pursuant to *Corp.C. 2105* or *2117*, (b) to the address specified in the order if the corporation has not filed the statement required by *Corp.C. 2105*, or (c) if only one address is set forth in the latest statement, to the sole stated address of the corporation. (*Corp.C. 2111(b).*)

(5) *Certificate of Secretary of State.* The Secretary of State keeps a record of the time and method of service, and his or her certificate of "the receipt of process, the giving of notice thereof to the corporation, and the forwarding of the process" is prima facie evidence of these matters. (*Corp.C. 2111(c).*)

SUPPLEMENT: [This section is current through the latest supplement]



170 of 194 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXIX. SERVICE OF PROCESS

I. Persons on Whom Summons May Be Served.

3. Defunct Corporation.

a. Domestic Corporation.

3 Witkin Cal. Proc. Actions § 1051

[§ 1051] Domestic Corporation.

(1) *In General.* C.C.P. 416.20 deals with service on a corporation that has either forfeited its charter or right to do business, or has dissolved. (See C.E.B., 1 Civil Proc. Before Trial 4th, §17.18; Cal. Civil Practice, 1 Business Litigation, §1:8; Rutter Group, Civil Proc. Before Trial §4:154 et seq.; 9 *Summary* (10th), *Corporations*, §211 et seq.) It continues prior law, and covers foreign as well as domestic corporations. (See Judicial Council Comment to C.C.P. 416.20; *Lewis v. Le Baron* (1967) 254 C.A.2d 270, 275, 61 C.R. 903 [construing former statute as applicable to foreign corporation].)

(2) *Persons Who May Be Served.* C.C.P. 416.20 specifies two classes of persons to whom the summons and complaint may be delivered:

(a) A person "who is a trustee of the corporation and of its stockholders or members." (C.C.P. 416.20(a); see *North Amer. Asbestos Corp. v. Superior Court* (1982) 128 C.A.3d 138, 142, 179 C.R. 889.)

(b) Persons authorized by Corp.C. 2011 or 2114 (infra, §1052). (C.C.P. 416.20(b).)

Process against a dissolved corporation is served on an officer, director, agent, or person having charge of the corporate assets. If no such person can be found with due diligence, the court may order service on the Secretary of State. (Corp.C. 2011(b).) In a quiet title action, process may be served in like manner or as provided by C.C.P. 413.10 et seq. (Corp.C. 2011(c).) On receipt of process, the Secretary of State must give notice as provided by Corp.C. 1702 (supra, §1048). (Corp.C. 2011(d).)

(3) *Alternative Methods of Service.* Both the permissive language of C.C.P. 416.20 and the Judicial Council Comment to the statute suggest that it is not the exclusive method for serving defunct domestic corporations. Thus, a domestic corporation that has its charter suspended for failure to file tax returns and that has no designated agent for service of process, but that continues to operate as an ongoing business during its suspension, may be validly served under C.C.P. 416.10 (service on domestic corporation; see supra, §1046 et seq.). (*Gibble v. Car-Lene Research* (1998) 67 C.A.4th 295, 301, 78 C.R.2d 892 [personal service on corporation's regional office manager was valid].)

SUPPLEMENT: [This section is current through the latest supplement]



171 of 194 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXIX. SERVICE OF PROCESS

I. Persons on Whom Summons May Be Served.

3. Defunct Corporation.

b. Foreign Corporation.

3 Witkin Cal. Proc. Actions § 1052

[§ 1052] Foreign Corporation.

(1) *Withdrawal From Doing Business.* A foreign corporation that has withdrawn from business in California may be served with process as provided in *Corp.C. 2100* et seq., i.e., on an officer or designated agent under *Corp.C. 2110* (supra, §1049) or on the Secretary of State under *Corp.C. 2111* (supra, §1050). (*Corp.C. 2114(a)*; see *Oro Navigation Co. v. Superior Court* (1947) 82 C.A.2d 884, 887, 187 P.2d 444; *Moran Towing & Trans. Co. v. Superior Court* (1948) 86 C.A.2d 240, 241, 194 P.2d 595; *Sanders v. CEG Corp.* (1979) 95 C.A.3d 779, 789, 157 C.R. 252 [C.C.P. 416.10 does not distinguish between domestic and foreign corporations on mode of service, and *Corp.C. 2114* augments, but does not restrict, scope of C.C.P. 416.10].)

(2) *Surrender of Right To Do Business.* A foreign corporation that has surrendered its right to transact intrastate business may be served by delivery on the Secretary of State in the usual manner (see supra, §1050), except that no court order is required and process is mailed to the address of a surviving domestic corporation or the address indicated in the certificate of surrender. (*Corp.C. 2114(b)*.)

(3) *Forfeiture of Right To Do Business by Action of Franchise Tax Board.* A foreign corporation that has forfeited its right to do business by action of the Franchise Tax Board pursuant to the Bank and Corporation Tax Law (Rev.C. 23001 et seq.; see 9 *Summary* (10th), *Corporations*, §222 et seq.) may be served pursuant to *Corp.C. 2110* (supra, §1049) or *Corp.C. 2111* (supra, §1050) "as if the right to transact intrastate business had not been forfeited." (*Corp.C. 2114(c)*.) (See Cal. Civil Practice, 1 Business Litigation, §1:9; Rutter Group, Civil Proc. Before Trial §4:154 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]



172 of 194 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXIX. SERVICE OF PROCESS

I. Persons on Whom Summons May Be Served.

4. Joint Stock Company.

3 Witkin Cal. Proc. Actions § 1053

[§ 1053] Joint Stock Company.

A summons may be served on a joint stock company or association by delivering a copy of the summons and of the complaint as provided by *C.C.P. 416.10* or *416.20*. (*C.C.P. 416.30*.) In other words, service may be made on the same persons, and in the same manner, as in the case of a corporation. (See *supra*, §1046 et seq.)

The Judicial Council Comment to *C.C.P. 416.30* points out that the prior law is enlarged to cover any constitutionally recognized bases of jurisdiction (see 2 *Cal. Proc.* (5th), *Jurisdiction*, §9); hence, the company need not be a nonresident doing business here.

SUPPLEMENT: [This section is current through the latest supplement]



173 of 194 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXIX. SERVICE OF PROCESS

I. Persons on Whom Summons May Be Served.

5. Unincorporated Association.

a. Domestic Association.

3 Witkin Cal. Proc. Actions § 1054

[§ 1054] Domestic Association.

(1) *In General.* An unincorporated association may sue and be sued in its association name, and accordingly it may be so served. (*C.C.P.* 369.5; see *C.E.B.*, 1 Civil Proc. Before Trial 4th, §17.22; *Cal. Civil Practice*, 1 Procedure, §6:32; *Rutter Group*, Civil Proc. Before Trial §4:162 et seq.; 4 *Cal. Proc.* (5th), *Pleading*, §94 et seq.) (On federal procedure, see *F.R. Civ. P.*, *Rule 4(h)(1)*; 4A *Federal Practice & Procedure* (Wright & Miller) §1105; 28 *Federal Procedure*, L.Ed. §65:24 et seq.) And *Corp.C. 18200* (see *supra*, §850) provides for voluntary designation of an agent for service of process by filing a statement with the Secretary of State.

(2) *Persons Who May Be Served.* *C.C.P. 416.40* specifies the persons to whom copies of the summons and complaint may be delivered in language similar to that used in *C.C.P. 416.10* for service on corporations (*supra*, §1046). The provision allows alternative methods of service, as follows:

(a) For a general or limited partnership, the agent designated under *Corp.C. 18200*, a general partner, or the general manager. (*C.C.P. 416.40(a)*.)

(b) For other associations, the agent designated, "the president or other head of the association, a vice president, a secretary or assistant secretary, a treasurer or assistant treasurer, a general manager, or a person authorized by the association to receive service of process." (*C.C.P. 416.40(b)*.) A condominium is a kind of unincorporated association and may be served in the same manner. (*White v. Cox* (1971) 17 *C.A.3d* 824, 830, 95 *C.R.* 259.)

If no agent has been designated, or a designated agent cannot "with reasonable diligence" be served, service is made pursuant to court order "by delivery of a copy of the process to one or more of the association's members designated in the order and by mailing a copy of the process to the association at its last known address." (*Corp.C. 18220*; see *supra*, §850.) (See *People v. Broderick Boys* (2007) 149 *C.A.4th* 1506, 1524, 59 *C.R.3d* 64 [in civil proceeding by district attorney for injunction against street gang (deemed unincorporated association), service on single gang member was insufficient, absent proof that he was of sufficient rank and character within gang to reasonably infer that service on him would effectively apprise gang of pendency of proceeding].)

SUPPLEMENT: [This section is current through the latest supplement]



174 of 194 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXIX. SERVICE OF PROCESS

I. Persons on Whom Summons May Be Served.

5. Unincorporated Association.

b. Foreign Partnership.

3 Witkin Cal. Proc. Actions § 1055

[§ 1055] Foreign Partnership.

(1) *In General.* Service on a foreign partnership (other than a foreign limited partnership) doing business in California is governed by *Corp.C. 15800*. The partnership must designate an agent for service of process. If service cannot be made with due diligence, or if no agent is designated or authorized, service is made on the Secretary of State, by personal delivery of process, accompanied by a statement of the last known address. The Secretary of State must forward the process to the defendant by registered mail, return receipt requested, at the address furnished by the party. (See *Lewis Mfg. Co. v. Superior Court* (1956) 140 C.A.2d 245, 260, 295 P.2d 145; 37 Cal. L. Rev. 93.)

(2) *Foreign Limited Partnership.* A foreign limited partnership must continuously maintain an agent for service of process on the limited partnership in California. (*Corp.C. 15614(b)*.) Process may be served on a foreign limited partnership in accordance with *C.C.P. 413.10* et seq. (see supra, §1001 et seq.) and *Corp.C. 15627*. (*Corp.C. 15627(a)*.) *Corp.C. 15627* provides for personal service of a copy of a process by delivery to the designated agent, general partner, or officer of the general partner. (*Corp.C. 15627(b)*.) If the agent has resigned or cannot be found, and it is shown that service cannot be made on the agent or a general partner, service may be made by delivering a copy of the process to the Secretary of State, who must then give notice of service to the partnership. (*Corp.C. 15627(c)*.)

SUPPLEMENT: [This section is current through the latest supplement]



175 of 194 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXIX. SERVICE OF PROCESS

I. Persons on Whom Summons May Be Served.

6. Public Entity.

a. In General.

3 Witkin Cal. Proc. Actions § 1056

[§ 1056] In General.

A comprehensive procedure for serving public entities is set forth in *C.C.P. 416.50*. The statute covers service in actions against every "public entity," defined to include "the state and any office, department, division, bureau, board, commission, or agency of the state, the Regents of the University of California, a county, city, district, public authority, public agency, and any other political subdivision or public corporation in this state." (*C.C.P. 416.50(b)*); see *C.E.B.*, 1 Civil Proc. Before Trial 4th, §17.23; *Cal. Civil Practice*, 1 Procedure, §6:33; *Rutter Group*, Civil Proc. Before Trial §4:174 et seq.) (On federal procedure, see *F.R. Civ. P.*, *Rule 4(i)*; 4A Federal Practice & Procedure (Wright & Miller) §1106 et seq.; 40 Federal Procedure, L.Ed. §40:723 et seq.; 73 *A.L.R.2d* 1008 [service on agency of United States].)

A Roster of Public Agencies solves the problem of locating the public agency to be served. (See *infra*, §1058.)

SUPPLEMENT: [This section is current through the latest supplement]



176 of 194 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXIX. SERVICE OF PROCESS

I. Persons on Whom Summons May Be Served.

6. Public Entity.

b. Officers.

3 Witkin Cal. Proc. Actions § 1057

[§ 1057] Officers.

(1) *General Service Statute.* In an action against a public entity (see supra, §1056), process "may be served" by delivering the summons and complaint to "the clerk, secretary, president, presiding officer, or other head of its governing body." (*C.C.P. 416.50(a)*.) (See *C.E.B.*, 1 Civil Proc. Before Trial 4th, §24.23; *Cal. Civil Practice*, 1 Procedure, §6:33.)

(2) *Service Under Other Statutes.* The phrase "may be served" in *C.C.P. 416.50(a)* indicates that service is also permitted in accordance with procedures established by other statutes. (See Judicial Council Comment.)

(a) In actions on claims against the state, service of summons generally is made on the Attorney General. (*Govt.C. 955.4*.)

(b) In actions on claims arising out of work done by the Department of Transportation, service is made on the Attorney General or the Director of Transportation. (*Govt.C. 955.6*.)

(c) In actions on claims arising out of work done by the Department of Water Resources, service is made on the Attorney General or on the Director of Water Resources. (*Govt.C. 955.8*.)

(d) In actions on claims against a judicial branch entity (see supra, §233), service of summons is made on (1) the court executive officer or trial court employee (see *Govt.C. 811.9*), if the claim is against a superior court or one of its judges; (2) the clerk or administrator of the Court of Appeal, if the claim is against that court or a judge of that court; (3) the Clerk of the Supreme Court, if the claim is against that court or a judge of that court; or (4) the Secretariat of the Judicial Council, if the claim is against the Judicial Council or the Administrative Office of the Courts. (*Govt.C. 955.9*.)

SUPPLEMENT: [This section is current through the latest supplement]



177 of 194 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXIX. SERVICE OF PROCESS

I. Persons on Whom Summons May Be Served.

6. Public Entity.

c. Roster of Public Agencies.

1. Nature and Purpose.

3 Witkin Cal. Proc. Actions § 1058

[§ 1058] Nature and Purpose.

(1) *In General.* A "Roster of Public Agencies" is maintained by the Secretary of State and various county clerks with information necessary for service of process on public entities. (*Govt.C. 53051(c).*)

(2) *Public Entities Covered.* The statute applies to every "public agency," defined as "a district, public authority, public agency, and any other political subdivision or public corporation in the state." It does not include the state, cities, or counties. (*Govt.C. 53050.*)

(3) *Information Statement To Be Filed.* The governing body of every agency must, within 70 days after the commencement of its legal existence, file with the Secretary of State on a prescribed form, and with the county clerk of each county in which it maintains an office, a statement of the following facts: The name of the agency; its official mailing address; the name and address of each member of the governing body; the name, title, and address of the chairman, president, or other presiding officer, and the clerk or secretary of the governing body. (*Govt.C. 53051(a)*; see *Elmore v. Oak Valley Hosp. Dist. (1988) 204 C.A.3d 716, 722, 251 C.R. 405, supra, §312* [statement was sufficient].) If the facts change, an amended statement must be filed on a form prescribed by the Secretary of State within 10 days. (*Govt.C. 53051(b).*) The form is available on the Secretary of State's website: <http://www.sos.ca.gov>.

(4) *Roster.* The Secretary of State and the county clerks must maintain an indexed roster containing the information, as a public record. (*Govt.C. 53051(c).*) The roster is available on the Secretary of State's website: http://www.ss.ca.gov/executive/ca_roster.

(5) *Effect of Service.* Service in conformity with the information contained in the roster, or service on a noncomplying agency pursuant to *Govt.C. 960.3* (*infra, §1059*), "constitutes personal service upon the public agency." (*Govt.C. 960.3(c), 960.8.*)

SUPPLEMENT: [This section is current through the latest supplement]



178 of 194 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXIX. SERVICE OF PROCESS

I. Persons on Whom Summons May Be Served.

6. Public Entity.

c. Roster of Public Agencies.

2. Effect of Agency's Failure To Comply.

3 *Witkin Cal. Proc. Actions* § 1059

[§ 1059] Effect of Agency's Failure To Comply.

(1) *When Constructive Service Is Permitted.* Constructive service is permissible if, within 10 days after the commencement of an action, (a) the agency has failed to comply with the information requirements (*supra*, §1058), (b) its statement is so inaccurate or incomplete that it does not substantially conform to the requirements, or (c) it does comply, but neither the governing body nor a proper officer or agent can be found with due diligence. (*Govt.C. 960.2.*)

(2) *Procedure.* The procedure is set forth in *Govt.C. 960.3* and *960.4* as follows:

(a) The showing under *Govt.C. 960.2* is made by affidavit to the court or judge, who then makes an order for service. (*Govt.C. 960.3(a).*)

(b) Service is made by (1) leaving two copies of the process and order with the Sacramento office of the Secretary of State; or (2) mailing two copies to the Sacramento office by certified or registered mail. (*Govt.C. 960.3(b).*) A \$ 50 fee must be paid to the Secretary of State for each agency so served. (*Govt.C. 960.3(d).*) The mailed service is effective as of the date the return receipt is received from the Secretary of State. (*Govt.C. 960.3(b)(2).*)

(c) The Secretary of State gives notice to the agency by registered mail containing a copy of the process. If the only known address is the county, the process is mailed to the county clerk, who sends it to the agency, or if its address is unknown, posts it for 30 days. If no address at all is known, the copy is sent to the county clerk of the county where the transaction took place or where real property of the agency is situated, and the county clerk sends it to the agency or posts it. (*Govt.C. 960.4.*)

(d) The Secretary of State also forwards a copy of all papers to the Attorney General, who may locate the responsible officers of the agency, but, until then, has the duty of conducting the defense, unless the Attorney General delegates it to a county counsel or district attorney willing to accept. (*Govt.C. 960.4, 960.5.*)

SUPPLEMENT: [This section is current through the latest supplement]



179 of 194 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXIX. SERVICE OF PROCESS

I. Persons on Whom Summons May Be Served.

7. Minor.

3 *Witkin Cal. Proc. Actions* § 1060

[§ 1060] Minor.

(1) *Minor Under Age 12: Parent or Similar Fiduciary.* If the minor is under age 12, service is made by the delivery of the copy of the summons and complaint to "his parent, guardian, conservator, or similar fiduciary, or, if no such person can be found with reasonable diligence, to any person having the care or control of such minor or with whom he resides or by whom he is employed." (*C.C.P.* 416.60.) (See *C.E.B.*, 1 Civil Proc. Before Trial 4th, §17.24; *Cal. Civil Practice*, 1 Procedure, §6:26; 86 *A.L.R.2d* 1183 [propriety of service of process in action on resident minor defendant whose only guardian is nonresident who cannot be served validly either within or without state]; 92 *A.L.R.2d* 1336 [construction and effect of provision for service of process against minor on parent, guardian, or other designated person].)

(2) *Minor Over Age 12: Parent or Similar Fiduciary and Minor.* If the minor is at least age 12 but under age 18, double delivery is required, i.e., to the persons listed above as well as to the minor. (*C.C.P.* 416.60.)

This double delivery is jurisdictional; the judgment is void if the minor is not served. (*Fanning v. Foley* (1893) 99 C. 336, 338, 33 P. 1098.) And the same is true if service is not also made on the parent, etc.; the invalidity of service (and consequently the lack of personal jurisdiction) is not cured by the appointment of a guardian ad litem. (*Akley v. Bassett* (1922) 189 C. 625, 639, 209 P. 576; *Bank of America v. Carr* (1956) 138 C.A.2d 727, 737, 292 P.2d 587 [citing the text and *Akley*; service on mother as individual (rather than guardian) was insufficient].)

The strict rule of *Akley* and *Bank of America* was criticized, however, and an exception was recognized in *Miller v. Superior Court* (1961) 56 C.2d 49, 13 C.R. 673, 362 P.2d 497. The father and mother of the minor were first served as defendants and they answered. Next the same process server served them, with their knowledge, for the children; the only defect was that the second service was on them "as defendants" instead of as "parents of the minors." *Held*, because they were not misled, the summons was proper. (56 C.2d 52.) (See 92 *A.L.R.2d* 1336 [construction and effect of provision for service of process against minor on parent, guardian, or other designated person].)

(3) *Federal Practice.* The Federal Rules of Civil Procedure provide for service on minors "by following state law for serving a summons or like process on such a defendant." (*F.R. Civ. P.*, Rule 4(g); see 4A *Federal Practice & Procedure* (Wright & Miller) §1099; 28 *Federal Procedure*, L.Ed. §65:134.)

SUPPLEMENT: [This section is current through the latest supplement]



180 of 194 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXIX. SERVICE OF PROCESS

I. Persons on Whom Summons May Be Served.

8. Ward or Conservatee.

3 Witkin Cal. Proc. Actions § 1061

[§ 1061] Ward or Conservatee.

(1) *Double Delivery Requirement.* Double delivery of a copy of the summons and the complaint is ordinarily required for service on "a person (other than a minor) for whom a guardian, conservator, or similar fiduciary has been appointed." (*C.C.P.* 416.70; see *C.E.B.*, 1 Civil Proc. Before Trial 4th, §17.24; *Cal. Civil Practice*, 1 Procedure, §6:27.)

(a) In all cases delivery must be made to the guardian or similar fiduciary. (*C.C.P.* 416.70.)

(b) Delivery must also be made to the ward or conservatee, unless the court, "for good cause shown," dispenses with it. (*C.C.P.* 416.70; see Judicial Council Comment ["This exception permits the court to dispense with service on the incompetent when he is unable to comprehend the nature of the documents or would suffer severe mental harm as a result of such service"]; *Family C.* 2332 [in proceeding for dissolution of marriage for incurable insanity, if defendant has a guardian or conservator, service must be on defendant and on guardian or conservator].)

The double service is required regardless of whether the incompetent resides within or outside California. (Judicial Council Comment to *C.C.P.* 416.70.)

(2) *Exception.* Any "process, notice, or court order concerning a decedent's estate" in which the ward or conservatee is interested, may be served on the guardian or conservator alone. (*Prob.C.* 1210.)

SUPPLEMENT: [This section is current through the latest supplement]



181 of 194 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXIX. SERVICE OF PROCESS

I. Persons on Whom Summons May Be Served.

9. Candidate for Public Office.

3 *Witkin Cal. Proc. Actions* § 1062

[§ 1062] Candidate for Public Office.

A summons may be served as authorized by *Elec.C. 12*. (See *C.C.P. 416.80* [incorrectly referring to *Elec.C. 11*].) Under *Elec.C. 12*, a candidate's filing of a declaration of candidacy, nomination paper, etc., constitutes an appointment of the Secretary of State or the county clerk as agent for service of process in any proceeding arising out of or in connection with any matter concerning his or her candidacy or the election laws. If the candidate cannot be found within the state after a diligent search, the judge may authorize that service, and the officer must forward a copy to the address shown on the candidate's papers, by special delivery registered mail. (See *C.E.B., 1 Civil Proc. Before Trial 4th*, §17.25; *Cal. Civil Practice, 1 Procedure*, §6:28.)

SUPPLEMENT: [This section is current through the latest supplement]
As amended in 2009, *C.C.P. 416.80* now correctly refers to *Elec.C. 12*.



182 of 194 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXIX. SERVICE OF PROCESS

I. Persons on Whom Summons May Be Served.

10. Other Persons.

3 *Witkin Cal. Proc. Actions* § 1063

[§ 1063] Other Persons.

C.C.P. 416.90 governs service on persons not covered by the special statutes considered above (*C.C.P. 416.10* et seq.; supra, §1046 et seq.). Delivery of the copy of the summons and complaint may be made to:

(1) The person himself.

(2) "[A] person authorized by him to receive service of process." The Judicial Council Comment observes that "such agent must be one who is authorized by law or by appointment to receive service of process, and the agent of an individual for other purposes is not necessarily authorized to receive such process." (See *Warner Bros. Records v. Golden West Music Sales* (1974) 36 C.A.3d 1012, 1018, 112 C.R. 71 [attorney retained by defendants, either actually or ostensibly authorized to receive service of process on their behalf]; *Summers v. McClanahan* (2006) 140 C.A.4th 403, 411, 44 C.R.3d 338 [distinguishing *Warner Bros. Records*; service on defendant's personal manager was ineffective, without defendant's authorization that manager receive service, frequent communication, or close business relationship that would make it likely that manager would inform defendant about action]; C.E.B., 1 Civil Proc. Before Trial 4th, §§17.7, 17.18 [nature of relationship required in absence of specific appointment].)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Person authorized by defendant to receive service:* See *Sakaguchi v. Sakaguchi* (2009) 173 C.A.4th 852, 859, 92 C.R.3d 717 [in tort action against state prison inmate, service by mail on prison litigation unit coordinator, who was authorized to receive service, was adequate as to inmate, absent evidence that prison personnel failed to carry out their statutory duty to promptly deliver papers to inmate].



183 of 194 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXIX. SERVICE OF PROCESS

J. Proof of Service.

1. In General.

3 Witkin Cal. Proc. Actions § 1064

[§ 1064] In General.

(1) *Nature and Purpose.* Proof of service of the summons is required to inform the court that the defendant has received the necessary jurisdictional notice. (See *Frohman v. Bonelli* (1949) 91 C.A.2d 285, 287, 204 P.2d 890.) Proof of service is normally made by a sworn affidavit or "return" of the person who served the process. (See *Los Angeles v. Morgan* (1951) 105 C.A.2d 726, 731, 234 P.2d 319; C.E.B., 1 Civil Proc. Before Trial 4th, §17.47 et seq.; Cal. Civil Practice, 1 Procedure, §§6:37 et seq., 6:69, 6:70; Rutter Group, Civil Proc. Before Trial §4:360 et seq.; 82 A.L.R.2d 668 [effect of failure to make return]; 31 A.L.R.3d 1393 [liability for false or fraudulent return]; on affidavit or certificate, see infra, §1067.)

Proof of service may also be made by "the written admission of the party." (C.C.P. 417.10(d), 417.20(d); see *Shirran v. Dallas* (1913) 21 C.A. 405, 411, 132 P. 454; *Smith v. Moore Mill & Lumber Co.* (1929) 101 C.A. 492, 494, 281 P. 1049; 2 Cal. Proc. (5th), *Jurisdiction*, §186.)

(2) *Filing With Court After Service of Summons.* Unless the defendant has made a general appearance, after a summons has been served the proof of service of the summons, as provided in C.C.P. 417.10 (see infra, §1068 et seq.) or C.C.P. 417.20 (see infra, §1071 et seq.), must be filed with the court. (C.C.P. 417.30.)

SUPPLEMENT: [This section is current through the latest supplement]



184 of 194 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXIX. SERVICE OF PROCESS

J. Proof of Service.

2. Nature of Return.

3 *Witkin Cal. Proc. Actions* § 1065

[§ 1065] Nature of Return.

The word "return" has a number of meanings in procedural law, and two of them apply to service of process.

(1) Most commonly, it means a paper, i.e., the "indorsement in writing" or statement of the process server (officer or private person) certifying what he or she has done, which constitutes the proof of service.

(2) It also means an act, i.e., the act of delivering back the process to the court with the certificate or affidavit, so that the court may be informed of the fact that the requisite notice has been given. (*Frohman v. Bonelli* (1949) 91 C.A.2d 285, 287, 289, 204 P.2d 890.)

C.C.P. 583.210(b) requires the return of only the proof of service, not the summons itself: "Proof of service of the summons shall be filed within 60 days after the time the summons and complaint must be served upon a defendant." (See *Govt.C.* 26663 [requiring return by sheriff or other officer "without delay"]; 6 *Cal. Proc.* (5th), *Proceedings Without Trial*, §322 et seq.) (On federal procedure, see *F.R. Civ. P.*, *Rule 4(l)*; 4B *Federal Practice & Procedure* (Wright & Miller) §1130; 28 *Federal Procedure*, L.Ed. §65:127.)

SUPPLEMENT: [This section is current through the latest supplement]



185 of 194 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXIX. SERVICE OF PROCESS

J. Proof of Service.

3. Sufficiency of Return.

3 *Witkin Cal. Proc. Actions* § 1066

[§ 1066] Sufficiency of Return.

(1) *Return as Prima Facie Evidence of Proper Service.* The return of process is prima facie evidence of proper service. (*Los Angeles v. Morgan* (1951) 105 C.A.2d 726, 731, 234 P.2d 319.) Return by a registered process server (see supra, §998) "establishes a presumption, affecting the burden of producing evidence, of the facts stated in the return." (*Ev.C.* 647; see 10 *Pacific L. J.* 350.) Nevertheless, the return may be impeached by contradictory evidence. (*Los Angeles v. Morgan.*)

(2) *Defective Return.* Where proper service is made, a defect in the certificate is not fatal to jurisdiction. (*Willen v. Boggs* (1971) 21 C.A.3d 520, 524, 97 C.R. 917 [defendant served as individual and as corporate officer; process server's slip attached to process recited this fact but certificate did not].) And a defective return may be cured by amendment. (See infra, §1075.)

SUPPLEMENT: [This section is current through the latest supplement]



186 of 194 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXIX. SERVICE OF PROCESS

J. Proof of Service.

4. Affidavit or Certificate.

3 *Witkin Cal. Proc. Actions* § 1067

[§ 1067] Affidavit or Certificate.

(1) *Contents.* *C.C.P. 417.10* governs the proof of service within the state. Although some of the recitals vary depending on the specific method employed (see *infra*, §§1068 et seq., 1071 et seq.), the affidavit or certificate must include all of the following:

(a) The name of the person served.

(b) The time, place, and manner of service.

(c) Facts showing that service has been made in accordance with the statute.

(d) The title of the person served in certain cases.

(e) A statement of the required age (at least 18 years) and nonparty status of the server. (See *21 Hastings L. J. 1312* [discussing effect of changes in statutory language]; on proof of service outside state, see *infra*, §1071 et seq.)

A registered process server (see *supra*, §998) must indicate, in the proof of service, the county in which he or she is registered and the number assigned to him or her under *B. & P.C. 22355. (C.C.P. 417.40.)*

An affidavit of proof of personal service under *C.C.P. 417.10(a)* must be made on a separate, special form adopted by the Judicial Council. (See *infra*, §1068.)

(2) *Defective Affidavits.* In view of the requirement that a process server must be over the age of 18 (*C.C.P. 414.10, supra*, §997), several cases have held affidavits fatally defective for failure to recite that fact as of the time of service. (*Lyons v. Cunningham* (1884) 66 C. 42, 43, 4 P. 938 [affidavit stated that affiant "is a white male citizen of the United States, over the age of eighteen years," failing to state that he was of that age at time of service]; *Horton v. Gallardo* (1891) 88 C. 581, 582, 26 P. 375 [no reference to age].) An affidavit is likewise defective as to an appealing defendant if it merely recites delivery of the summons to "said defendants, and to each of them" without specifically stating that a summons was delivered to the particular appealing defendant. (*Linott v. Rowland* (1897) 119 C. 452, 453, 51 P. 687.)

SUPPLEMENT: [This section is current through the latest supplement]



187 of 194 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXIX. SERVICE OF PROCESS

J. Proof of Service.

5. Service Within State.

a. Personal Delivery or Leaving Copy.

3 Witkin Cal. Proc. Actions § 1068

[§ 1068] Personal Delivery or Leaving Copy.

(1) *In General.* If service is made under *C.C.P. 415.10* (personal delivery, *supra*, §1008), or *C.C.P. 415.20* (leaving copy at office or home, *supra*, §1010 et seq.), proof must be made "by the affidavit of the person making the service showing the time, place, and manner of service and facts showing that the service was made in accordance with this chapter." (*C.C.P. 417.10(a)*.) The affidavit must also show "the name of the person to whom a copy of the summons and of the complaint were delivered." (*C.C.P. 417.10(a)*.)

If the person was served as an individual and also in a representative capacity, the affidavit must show that the special notice required by *C.C.P. 412.30* (*supra*, §989) appeared on the copy of the summons. (*C.C.P. 417.10(a)*.)

(2) *Forms.* An affidavit of proof of personal service under *C.C.P. 417.10(a)* must be made on a form adopted by the Judicial Council. (*C.C.P. 417.10(f)*; see Cal. Civil Practice, 1 Procedure, §§6:38, 6:78.)

The Judicial Council has approved for optional use the following forms of service of process:

Judicial Council Form No. POS-010 [Proof of Service of Summons].

Judicial Council Form No. POS-020 [Proof of Personal Service--Civil (Proof of Service) / Information Sheet for Proof of Personal Service--Civil].

Judicial Council Form No. POS-020(D) [Attachment to Proof of Personal Service--Civil (Documents Service) (Proof of Service)].

Judicial Council Form No. POS-020(P) [Attachment to Proof of Personal Service--Civil (Persons Served) (Proof of Service)].

Judicial Council Form No. POS-040 [Proof of Service--Civil (Proof of Service) / Information Sheet for Proof of Service--Civil].

Judicial Council Form No. POS-040(D) [Attachment to Proof of Service--Civil (Documents Served) (Proof of Service)].

Judicial Council Form No. POS-040(P) [Attachment to Proof of Service--Civil (Persons Served) (Proof of Service)].

SUPPLEMENT: [This section is current through the latest supplement]



188 of 194 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXIX. SERVICE OF PROCESS

J. Proof of Service.

5. Service Within State.

b. Service By Mail.

3 *Witkin Cal. Proc. Actions* § 1069

[§ 1069] Service By Mail.

(1) *In General.* Proof of service by mail under *C.C.P.* 415.30 (*supra*, §1015 et seq.) is made by an affidavit showing compliance with the statute, and it must include the required acknowledgment of the receipt of summons. (*C.C.P.* 417.10(a).)

(2) *Forms.* The Judicial Council has approved for optional use the following forms of service of process by mail:

Judicial Council Form No. POS-030 [Proof of Service by First-Class Mail--Civil (Proof of Service) / Information Sheet for Proof of Service by First-Class Mail--Civil].

Judicial Council Form No. POS-030(D) [Attachment to Proof of Service by First-Class Mail--Civil (Documents Served) (Proof of Service)].

Judicial Council Form No. POS-030(P) [Attachment to Proof of Service by First-Class Mail--Civil (Persons Served) (Proof of Service)].

SUPPLEMENT: [This section is current through the latest supplement]



189 of 194 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXIX. SERVICE OF PROCESS

J. Proof of Service.

5. Service Within State.

c. Other Methods of Service.

3 Witkin Cal. Proc. Actions § 1070

[§ 1070] Other Methods of Service.

(1) *Service by Publication.* If service is made by publication under *C.C.P. 415.50* (supra, §1033), proof is made by (a) an affidavit of the publisher or printer (or his or her foreman or chief clerk) indicating the place and times of publication, and (b) an affidavit stating when and where copies of the summons and complaint were mailed to the defendant. (*C.C.P. 417.10(b)*.)

(2) *Service Pursuant to Special Statute.* If the service is made under one of the special statutes (supra, §1021 et seq.), proof must be made (a) in the manner prescribed by the statute, or (b) if no manner is prescribed, in the manner prescribed by *C.C.P. 417.10* "for proof of a similar manner of service." (*C.C.P. 417.10(c)*); see Cal. Civil Practice, 1 Procedure, §6:45.)

(3) *Service by Posting.* If the summons is served by posting pursuant to *C.C.P. 415.45* (supra, §1045), service is proved "by the affidavit of the person who posted the premises, showing the time and place of posting, and an affidavit showing the time and place copies of the summons and of the complaint were mailed to the party to be served, if in fact mailed." (*C.C.P. 417.10(e)*.)

SUPPLEMENT: [This section is current through the latest supplement]



190 of 194 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXIX. SERVICE OF PROCESS

J. Proof of Service.

6. Service Outside State.

a. Under California Statute.

1. Statutory Requirements.

3 Witkin Cal. Proc. Actions § 1071

[§ 1071] Statutory Requirements.

(1) *In General.* Where process was served pursuant to a California statute, proof must be made as prescribed by *C.C.P. 417.10* (supra, §1069) for proof of service within the state. (*C.C.P. 417.20(a)*.) (See Cal. Civil Practice, 1 Procedure, §6:46 et seq.)

(2) *Service by Mail.* If service was made by mail under *C.C.P. 415.40* (supra, §§1018, 1019), the proof must include "evidence satisfactory to the court establishing actual delivery to the person to be served." This may be a signed return receipt or other evidence. (*C.C.P. 417.20(a)*.)

(3) *Service by Posting.* If the summons is served by posting pursuant to *C.C.P. 415.45* (supra, §1045), service is proved in the same manner as under *C.C.P. 417.10(e)* (supra, §1069). (*C.C.P. 417.20(e)*.)

SUPPLEMENT: [This section is current through the latest supplement]



191 of 194 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXIX. SERVICE OF PROCESS

J. Proof of Service.

6. Service Outside State.

a. Under California Statute.

2. Illustrations.

3 *Witkin Cal. Proc. Actions* § 1072

[§ 1072] Illustrations.

(1) *Service Sufficient*. The following cases have held that the plaintiff sufficiently complied with the proof of service requirements for service by mail under *C.C.P. 417.20(a)*:

Neadeau v. Foster (1982) 129 C.A.3d 234, 237, 180 C.R. 806 [receipt signed by defendant's office manager and affidavit averring that office manager was authorized to sign for and accept defendant's mail were sufficient proof of service].

In re Marriage of Tusinger (1985) 170 C.A.3d 80, 82, 215 C.R. 838 [letter from defendant's attorney to plaintiff's attorney, referring to the action, was sufficient "other evidence" to establish that defendant had received mailed summons].

Cruz v. Fagor America (2007) 146 C.A.4th 488, 496, 52 C.R.3d 862 [following *Neadeau*; receipt signed by defendant's employee, who regularly received mail on defendant's behalf, was sufficient proof of service].

Shoei Kako Co. v. Superior Court (1973) 33 C.A.3d 808, 109 C.R. 402, was a tort action brought for damages suffered by plaintiff motorcyclist in a collision. One defendant was the Japanese manufacturer of an allegedly defective safety helmet plaintiff wore. Plaintiff sent a document ("Notice of Acknowledgment of Receipt") with the complaint; the acknowledgment was not executed, but defendant did execute a form of international mail receipt in English and French. *Held*, the proof of service was sufficient. (33 C.A.3d 817, 818.) The court rejected two technical arguments, one based on the treaty with Japan (33 C.A.3d 820), and the other objecting to the fact that the document sent was written in English and not Japanese (33 C.A.3d 823).

In *M. Lowenstein & Sons v. Superior Court* (1978) 80 C.A.3d 762, 145 C.R. 814, *supra*, §1019, a foreign corporation was served by certified mail. The original return consisted only of the summons, a letter of plaintiff's counsel informing defendant it was being sued as Doe 1 in the enclosed complaint, and a return receipt showing the date it was received by plaintiff's counsel. This was defective, but later a copy of the acknowledgment of receipt by the

defendant, and a declaration of the secretary who mailed the service, were filed. *Held*, the return was sufficient. The initial proof could be accepted by the trial judge as satisfactory evidence of actual delivery, and he could permit amendment of the return. (80 C.A.3d 770, 771.)

In *Bolkiah v. Superior Court* (1999) 74 C.A.4th 984, 88 C.R.2d 540, plaintiff mailed copies of the summons and complaint to 13 different offices and residences of defendants, who were family members of the Sultan of Brunei, in Brunei, England, and California. Plaintiff did not receive a single signed return receipt from these mailings, and defendants moved to quash service for failure to comply with C.C.P. 417.20(a). *Held*, denial of motion upheld; there was sufficient other evidence within the meaning of C.C.P. 417.20(a) to assure that defendants had received actual delivery. Plaintiff served defendants at the addresses on the correspondence sent by defendants themselves or their agents a minimum of two times each. During their dealings, defendants sent correspondence to plaintiff on two corporation letterheads, and plaintiff regularly exchanged correspondence with one defendant at his Brunei address. Moreover, plaintiff had been specifically directed to use one of the corporation's addresses to ensure that correspondence and merchandise would reach defendants. The evidence established that defendants could in fact be reached at, or in fact received correspondence or parcels directed through, these various addresses. (74 C.A.4th 1001, citing the text.) (On whether service was defective under the Foreign Sovereign Immunities Act, see *supra*, §1066.)

(2) *Service Insufficient*. Strict compliance with the requirements for proof of service by mail under C.C.P. 417.20(a) is required; i.e., there must be either a signed receipt or other evidence. In *Stamps v. Superior Court* (1971) 14 C.A.3d 108, 92 C.R. 151, the service was airmailed, and the return receipt was labeled "unclaimed." Nevertheless, with no other evidence introduced, the lower court held the service sufficient. *Held*, mandamus issued to quash service. (14 C.A.3d 110.)

SUPPLEMENT: [This section is current through the latest supplement]



192 of 194 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXIX. SERVICE OF PROCESS

J. Proof of Service.

6. Service Outside State.

b. Under Foreign Law.

3 Witkin Cal. Proc. Actions § 1073

[§ 1073] Under Foreign Law.

If service is made under *C.C.P. 413.10(b)* or *413.10(c)* in accordance with the law of another state or foreign country (*supra*, §§1003, 1004), proof is made in the manner prescribed by the law of the place where the person is served, subject to "any additional requirements that may be imposed by the court in which the action is pending." (*C.C.P. 417.20(c)*; see *Cal. Civil Practice, 1 Procedure*, §6:48.)

SUPPLEMENT: [This section is current through the latest supplement]



193 of 194 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXIX. SERVICE OF PROCESS

J. Proof of Service.

6. Service Outside State.

c. Under Court Order.

3 Witkin Cal. Proc. Actions § 1074

[§ 1074] Under Court Order.

If process is served outside the state pursuant to a court order (see *C.C.P. 413.10(c)*, supra, §1004), the proof must be in the manner prescribed by the order. (*C.C.P. 417.20(b)*); see Cal. Civil Practice, 1 Procedure, §6:47.)

SUPPLEMENT: [This section is current through the latest supplement]



194 of 194 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XXIX. SERVICE OF PROCESS

J. Proof of Service.

7. Amended Proof Where Return Is Defective.

3 *Witkin Cal. Proc. Actions* § 1075

[§ 1075] Amended Proof Where Return Is Defective.

(1) *Amendment Permitted*. Jurisdiction over the person depends on the fact of service rather than the proof of service. Consequently, if the process is in correct form, validly issued, and properly served, a defective return (the certificate or affidavit) will not destroy jurisdiction; the court may permit an amendment of the return to conform to the facts.

In *Herman v. Santee* (1894) 103 C. 519, 37 P. 509, the opinion quotes from Freeman on Judgments as follows: "If the return upon the summons or other writ designed to give the court jurisdiction over the person of the defendant is omitted or incorrectly made, but the facts really existed which were required to give the court jurisdiction, the weight of authority at the present time permits the officer to correct or supply his return until it states the truth, though by such correction a judgment apparently void is made valid. Though the proof of the service of process does not consist of the return of an officer, the like rule prevails." (103 C. 523.) And in *Morrissey v. Gray* (1911) 160 C. 390, 117 P. 438, the court pointed out that this practice is not an attack on a final judgment but the opposite; i.e., an amendment is allowed not to avoid a judgment or subject it to reversal, but only to support a judgment given. (160 C. 396.)

Other cases are to the same effect. (See *Drake v. Duvenick* (1873) 45 C. 455, 463 ["The return of service might be formal or informal, perfect or imperfect, still if service were in fact made, the Court acquired jurisdiction of the person of the defendant"]; *Alpha Stores, Ltd. v. You Bet Mining Co.* (1936) 18 C.A.2d 249, 251, 63 P.2d 1137; *Crenshaw v. Smith* (1946) 74 C.A.2d 255, 263, 168 P.2d 752; *Ginns v. Shumate* (1977) 65 C.A.3d 802, 806, 135 C.R. 604; *M. Lowenstein & Sons v. Superior Court* (1978) 80 C.A.3d 762, 770, 145 C.R. 814, supra, §1072.)

(2) *No Time Limit*. Because the amendment merely corrects the record to show the true fact of jurisdiction, it is not subject to any time limit. Either on a motion to quash summons before judgment, or in a proceeding to set aside the judgment, the court may allow a showing of the fact of valid service and amend the return accordingly, filing it nunc pro tunc as of the time of the original return. (*Allison v. Thomas* (1887) 72 C. 562, 564, 14 P. 309 [amendment was permitted after default judgment and execution sale, when successor of judgment debtor sued to quiet title]; *Herman v. Santee*, supra [amendment was permitted after notice of motion to set aside default judgment]; *McGinn v. Rees* (1917) 33 C.A. 291, 294, 165 P. 52 [same; amendment should have been allowed]; *Morrissey v. Gray*, supra, 160 C. 396 ["Mere lapse of time or the fact that the officer making the return is, at the time of the proposed amendment, out of office, does not affect the right of the court to order the return to speak the truth"].)

(3) *Federal Practice*. Federal procedure is governed by *F.R. Civ. P., Rule 4(l)(3)*. (See 4B Federal Practice & Procedure (Wright & Miller) §1130 et seq.; 28 Federal Procedure, L.Ed. §65:130.)

SUPPLEMENT: [This section is current through the latest supplement]



1 of 14 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XI. IN FORMA PAUPERIS

E. (New) Revised In Forma Pauperis Statutes and Rules of Court.

1. (New) In General.

3 *Witkin Cal. Proc. Actions* § 429A

[§ 429A] (New) In General.

(1) *Enactment and Effective Date.* In 2008, the existing *in forma pauperis* statute (*Govt.C. 68511.3*) was repealed and new statutes (*Govt.C. 68630 et seq.*) were adopted. The new provisions were effective on July 1, 2009. (Stats. 2008, Chap. 462, §3.) The new statutes direct the Judicial Council to adopt uniform rules and forms for *in forma pauperis* litigants. (*Govt.C. 68641.*) The Judicial Council responded to that directive by substantially revising C.R.C., Rule 3.50 et seq. (fee waivers in proceedings in trial court), by adopting C.R.C., Rule 8.26 (fee waivers in proceedings in Supreme Court or Courts of Appeal) and C.R.C., Rule 8.818 (fee waivers in proceedings in appellate department of superior court), and adopting or revising unified forms, effective July 1, 2009. (See Supp., *infra*, §429E.)

(2) *Purposes of Revision.* The new statutes were enacted for the following reasons:

(a) Because the legal system cannot provide "equal justice under law" unless all persons have access to the courts without regard to their economic means, California law and court procedures should ensure that court fees are not a barrier to court access for those with insufficient economic means to pay those fees. (*Govt.C. 68630(a).*)

(b) Fiscal responsibility should be tempered with concern for litigants' right to access the justice system. The procedure for allowing the poor to use court services without paying ordinary fees must be one that applies rules fairly to similarly situated persons, is accessible to those with limited knowledge of court processes, and does not delay access to court services. The procedure for determining if a litigant may file a lawsuit without paying a fee must not interfere with court access for those without the financial means to do so. (*Govt.C. 68630(b).*)

(c) Those who are able to pay court fees should do so, and courts should be allowed to recover previously waived fees if a litigant has obtained a judgment or substantial settlement. (*Govt.C. 68630(c).*)

(3) *Major Changes.* The revised statutes make the following major changes (see Legislative Counsel's Digest, Stats. 2008, Chap. 462):

(a) An initial fee waiver must be granted by the court at any stage of the proceedings at both the appellate and trial court levels if an applicant meets specified criteria for eligibility and satisfies the application requirements.

(b) Applicants for an initial fee waiver must complete application forms under penalty of perjury.

(c) Courts are authorized to reconsider the initial fee waiver and to recover fees and costs that were waived under specified circumstances.

(d) A lien in favor of the court is imposed against any settlement, compromise, award, or other recovery in excess of \$ 10,000 by a party in a civil case whose court fees and costs were initially waived in the amount of those waived fees and costs.

(e) A party who petitions the court to enter a satisfaction of judgment must declare under penalty of perjury that any order requiring payment of waived fees and costs has been satisfied. Similarly, a party who petitions the court for dismissal in a case must declare under penalty of perjury that a lien in favor of the court against any settlement, compromise, award, or other recovery has been paid.

SUPPLEMENT: [This section is current through the latest supplement]



2 of 14 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XI. IN FORMA PAUPERIS

E. (New) Revised In Forma Pauperis Statutes and Rules of Court.

2. (New) Scope of Right.

a. (New) In General.

3 *Witkin Cal. Proc. Actions* § 429B

[§ 429B] (New) In General.

(1) *Initial Fee Waiver.* An initial fee waiver must be granted by the court at any stage of the proceedings at both the appellate and trial court levels if an applicant meets the criteria for eligibility under *Govt.C. 68632* (see Supp., infra, §429D) and the application requirements under *Govt.C. 68633* (see Supp., infra, §429F). An initial fee waiver excuses the applicant from paying fees for the first pleading or other paper, and other court fees and costs as specified in rules adopted by the Judicial Council, unless the court orders the applicant to make partial payments under *Govt.C. 68632(c)* (see Supp., infra, §429D), *Govt.C. 68636(d)* (see Supp., infra, §429-K), or *Govt.C. 68637(e)* (see Supp., infra, §429M). (*Govt.C. 68631.*)

An initial fee waiver expires 60 days after the judgment, the dismissal, or other final disposition of the case. (*Govt.C. 68639.*)

(2) *Reconsideration on Change of Circumstances.* Under circumstances set forth in *Govt.C. 68636* (see Supp., infra, §429K), the court may reconsider the initial fee waiver and order the fee waiver withdrawn for future fees and costs or deny the fee waiver retroactively. At the end of the case, the court may, under *Govt.C. 68637* (see Supp., infra, §429L), recover fees and costs that were initially waived. (*Govt.C. 68631*; see C.R.C., Rule 3.50(a) [fee waiver in trial court]; Advisory Committee Comments to C.R.C., Rule 8.26(a) [fee waivers in Supreme Court and Courts of Appeal] and C.R.C., Rule 8.818(a)(1)(B) [fee waivers in appellate department of superior court].)

(3) *Installment Payments of Fees by Ineligible Litigants.* The Judicial Council may adopt a rule of court to allow litigants who are not eligible for a fee waiver to pay court fees in installments. (*Govt.C. 68640.*)

SUPPLEMENT: [This section is current through the latest supplement]



3 of 14 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XI. IN FORMA PAUPERIS

E. (New) Revised In Forma Pauperis Statutes and Rules of Court.

2. (New) Scope of Right.

b. (New) Costs Excused.

3 *Witkin Cal. Proc. Actions* § 429C

[§ 429C] (New) Costs Excused.

(1) *Costs in Trial Court.* C.R.C., Rule 3.55 lists the following fees and costs that *must* be waived on granting an application for an initial fee waiver in the trial court:

(a) The clerk's fees for filing papers, for reasonably necessary certification and copying, for issuance of process and certificates, for transmitting papers, and for preparing, copying, certifying, and transmitting the clerk's transcript on appeal to the reviewing court and the party.

(b) Court-appointed interpreter's fees for parties in small claims actions.

(c) Sheriff's and marshal's fees pursuant to *Govt.C. 26720* et seq.

(d) Reporter's daily fees for attendance at hearings and trials held within 60 days of the date of the order granting the application.

(e) Fees for telephone appearances under *C.C.P. 367.5*.

C.R.C., Rule 3.56 lists the following fees and costs that *may* be waived on granting an application for an initial fee waiver, either at the outset or on a later application:

(a) Jury fees and expenses.

(b) Court-appointed interpreter's fees for witnesses.

(c) Witness fees of peace officers whose attendance is reasonably necessary for prosecution or defense of the case.

(d) Reporter's fees for attendance at hearings and trials held more than 60 days after the date of the order granting the application; witness fees of court-appointed experts.

(e) Other fees or expenses as itemized in the application.

(2) *Costs in Appellate Division of Superior Court.* C.R.C., Rule 8.818(d) lists the following fees and costs that *must* be waived on granting an application for an initial fee waiver in the appellate division of the superior court:

(a) The fee for filing a notice of appeal.

(b) The clerk's fees for preparing and certifying the clerk's transcript on appeal and for copying and transmitting a copy of the transcript to the applicant.

(c) The fee for preparing a transcript of an official electronic recording under C.R.C., Rule 8.835 or a copy of that recording.

(d) Any court fee for telephonic oral argument.

(3) *Costs in Supreme Court and Courts of Appeal.* C.R.C., Rule 8.26(e) lists the following fees and costs that *must* be waived on granting an application for an initial fee waiver in the Supreme Court or the Courts of Appeal:

(a) The fee for filing a notice of appeal in the Courts of Appeal under *Govt.C. 68926*.

(b) The fee for filing a petition for a writ within the original jurisdiction of the Supreme Court or Courts of Appeal under *Govt.C. 68926*.

(c) The fee for filing a petition for review in the Supreme Court under *Govt.C. 68927*.

(d) Any court fee for telephonic oral argument.

The Advisory Committee Comment to C.R.C., Rule 8.26(e) observes that the parties to an appeal may also ask the superior court to waive the transcription deposit required under *Govt.C. 68926.1* (see 9 *Cal. Proc.* (5th), *Appeal*, §556) and the fees for preparing, certifying, copying, and transmitting the clerk's transcript under C.R.C., Rule 8.122 (see 9 *Cal. Proc.* (5th), *Appeal*, §649).

SUPPLEMENT: [This section is current through the latest supplement]



4 of 14 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XI. IN FORMA PAUPERIS

E. (New) Revised In Forma Pauperis Statutes and Rules of Court.

3. (New) Eligibility Criteria.

3 *Witkin Cal. Proc. Actions* § 429D

[§ 429D] (New) Eligibility Criteria.

Under *Govt.C. 68632*, permission to proceed without paying court fees and costs because of an applicant's financial condition must be granted initially to all of the following persons:

(1) *Recipient of Public Assistance*. A person who is receiving public benefits under one or more of the following programs: (a) Supplemental Security Income (SSI) and State Supplementary Payment (SSP); (b) California Work Opportunity and Responsibility to Kids Act (CalWORKs) or a federal Tribal Temporary Assistance for Needy Families (Tribal TANF) grant program; (c) Food Stamps or the California Food Assistance Program; (d) County Relief, General Relief (GR), or General Assistance (GA); (e) Cash Assistance Program for Aged, Blind, and Disabled Legal Immigrants (CAPI); (f) In-Home Supportive Services (IHSS); (g) Medi-Cal. (*Govt.C. 68632(a)*.)

(2) *Person With Income Near Federal Poverty Level*. A person whose monthly income is 125% or less of the current federal Government poverty guidelines. (*Govt.C. 68632(b)*.)

(3) *Person Who Cannot Pay for Common Necessaries of Life*. A person who, as individually determined by the court, cannot pay court fees without using money that normally would pay for the common necessities of life for the applicant and the applicant's family. If a trial court finds that an applicant can pay a portion of court fees, or can pay court fees over a period of time, or under some other equitable arrangement, without using money that normally would pay for the common necessities of life for the applicant and the applicant's family, the court may grant a partial initial fee waiver using the notice and hearing procedures set forth in *Govt.C. 68634(e)(5)* (see Supp., infra, §429H). "Common necessities of life" must be interpreted consistently with the use of that term in *C.C.P. 706.051(c)(1)* (exemption to garnishment of judgment debtor's wages; see 8 *Cal. Proc.* (5th), *Enforcement of Judgment*, §251). (*Govt.C. 68632(c)*.)

SUPPLEMENT: [This section is current through the latest supplement]



5 of 14 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XI. IN FORMA PAUPERIS

E. (New) Revised In Forma Pauperis Statutes and Rules of Court.

4. (New) Procedure.

a. (New) Judicial Council Rules and Forms.

3 *Witkin Cal. Proc. Actions* § 429E

[§ 429E] (New) Judicial Council Rules and Forms.

(1) *Legislative Directive. Govt.C. 68641* directs the Judicial Council to adopt uniform rules and forms for *in forma pauperis* litigants including, but not limited to, the following:

(a) Considering and determining applications to proceed without paying court fees and costs at every stage of the proceedings, including at the trial and appellate levels of the court.

(b) Prescribing the court fees and costs that may be waived at every stage of the proceedings.

(c) Giving notice of liens and hearings for reconsideration and recovery of initially waived fees and costs.

(d) Collecting waived fees and costs.

(e) Requesting a hearing when an application is denied.

(f) Any other procedures necessary to implement the provisions of *Govt.C. 68630* et seq.

(2) *Rules of Court.* The Judicial Council responded to the legislative directive by revising or adopting the following rules, effective July 1, 2009:

(a) *Proceedings in trial court.* C.R.C., Rule 3.50 et seq. (see text, §426) were substantially revised. The revised rules govern applications in the trial court for an initial waiver of court fees and costs because of the applicant's financial condition. (C.R.C., Rules 3.50(a).)

Under the revised rules, an "initial fee waiver" means the initial waiver of court fees and costs that may be granted at any stage of the proceedings and includes the fees and costs specified in C.R.C., Rules 3.55 and 3.56 (see Supp., supra, §429B). (C.R.C., Rule 3.50(b).)

(b) *Proceedings in appellate division of superior court.* C.R.C., Rule 8.818 governs initial fee waiver applications

in the appellate division of the superior court.

(c) *Proceedings in Supreme Court and Courts of Appeal.* C.R.C., Rule 8.26 governs initial fee waiver applications in the Supreme Court or the Courts of Appeal.

(3) *Judicial Council Forms.* The Judicial Council responded to the legislative directive by revising and adopting uniform forms for litigants proceeding *in forma pauperis*. The following forms have been adopted:

Form No.

Title

FW-001	Request to Waive Court Fees
FW-001-INFO	Information Sheet on Waiver of Court Fees and Costs
FW-002	Request to Waive Additional Court Fees (Superior Court)
FW-003	Order on Court Fee Waiver (Superior Court)
FW-005	Notice: Waiver of Court Fees (Superior Court)
FW-006	Request for Hearing About Court Fee Waiver Order (Superior Court)
FW-007	Notice on Hearing About Court Fees
FW-008	Order on Court Fee Waiver After Hearing (Superior Court)
FW-010	Notice to Court of Improved Financial Situation or Settlement
FW-011	Notice to Appear for Reconsideration of Fee Waiver
FW-012	Order on Court Fee Waiver After Reconsideration Hearing (Superior Court)
FW-015	Information Sheet on Waiver of Appellate Court Fees (Supreme Court, Court of Appeal, Appellate Division)
FW-016	Order on Court Fee Waiver (Court of Appeal or Supreme Court)

SUPPLEMENT: [This section is current through the latest supplement]



6 of 14 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XI. IN FORMA PAUPERIS

E. (New) Revised In Forma Pauperis Statutes and Rules of Court.

4. (New) Procedure.

b. (New) Applications.

1. (New) General Requirements.

3 *Witkin Cal. Proc. Actions* § 429F

[§ 429F] (New) General Requirements.

(1) *Application by Recipient of Public Assistance.* An applicant for an initial fee waiver under *Govt.C. 68632(a)* (see Supp., supra, §429D) must complete, under penalty of perjury, a Judicial Council application form requiring the applicant to list his or her current street address (or another address where the court can contact the applicant), occupation, employer, and the type of public benefits that the applicant is receiving. At the time the application is submitted, the applicant may not be required to provide documents supporting the receipt of public benefits, to provide evidence of identity, to submit to interviews about the applicant's financial circumstances, to be physically present to file the application, or to fill out additional parts of the application form. (*Govt.C. 68633(a).*)

(2) *Application by Person With Income Near Poverty Level.* An applicant for an initial fee waiver under *Govt.C. 68632(b)* (see Supp., supra, §429D) must complete, under penalty of perjury, (a) a Judicial Council application form requiring the applicant to provide his or her current street address (or another address where the court can contact the applicant), occupation, and employer; and (b) a financial statement showing monthly or yearly income as determined under rules, and on forms, adopted by the Judicial Council. At the time the application is submitted, the applicant may not be required to provide documents to prove income, dependents, or expenses, to provide evidence of identity, to submit to interviews about the applicant's financial circumstances, to be physically present to file the application, or to fill out additional parts of the application form. (*Govt.C. 68633(b).*)

(3) *Application by Person Who Cannot Pay for Common Necessaries of Life.* An applicant for an initial fee waiver under *Govt.C. 68632(c)* (see Supp., supra, §429D) must complete, under penalty of perjury, (a) a Judicial Council application form requiring the applicant to provide his or her current street address (or another address where the court can contact the applicant), occupation, and employer; and (b) a financial statement showing monthly or yearly income and expenses and a summary of assets and liabilities as determined under rules, and on forms, adopted by the Judicial Council. At the time the application is submitted, the applicant may not be required to provide documents to prove income, dependents, or expenses, to provide evidence of identity, to submit to interviews regarding the applicant's financial circumstances, or to be physically present to file the application. (*Govt.C. 68633(c).*)

(4) *Application by Prisoner.* Special procedures apply to an application filed by a person sentenced to state prison or confined in county jail. (Govt.C. 68635; see Supp., infra, §429J.)

(5) *Judicial Council Forms.* The clerk of the court must provide forms adopted by the Judicial Council under Govt.C. 68630 et seq. without charge to any person who requests those forms or indicates that he or she is unable to pay any court fees or costs. An applicant may not be required to complete any form as part of his or her application other than those forms adopted by the Judicial Council. (Govt.C. 68633(d).)

(6) *Notice of Rights to Applicant.* An applicant for an initial fee waiver must be informed that, at a later date, the court may require proof of the receipt of benefits or financial information to verify eligibility under Govt.C. 68636 (see Supp., supra, §429D), and that a trial court may seek reimbursement of initially waived fees under Govt.C. 68637 (see Supp., infra, §§429L, 429M). This notice requirement is satisfied if the information is provided on the Judicial Council fee waiver application form. (Govt.C. 68633(e).)

(7) *Confidentiality.* Financial information provided by an applicant must be kept confidential by the court. No person may have access to the application except the court, authorized court personnel, and a person authorized by the applicant. No person may reveal information contained in the application except as authorized by law. A hearing about whether to grant or deny a fee waiver request must be held in camera, and the court must exclude all persons except court staff, the applicant, those present with the applicant's consent, and any witness being examined. The fact that an applicant's fees and costs have been initially waived and the amount of the waived fees and costs are not confidential. The Judicial Council is directed to adopt procedures to keep the financial information confidential and to consider a request seeking that confidential information. (Govt.C. 68633(f).)

Access to the application is limited to the court and authorized personnel, persons authorized by the applicant, and persons authorized by order of the court. No person may reveal information contained in the application except as authorized by law or an order of the court. (C.R.C., Rule 3.54(a) [trial courts]; C.R.C., Rule 8.26(g)(1) [Supreme Court or Courts of Appeal]; C.R.C., Rule 8.818(f)(1) [appellate division of superior court].)

A person seeking access to an application or to financial information provided to the court by an applicant must make the request by motion. The motion must be supported by a declaration showing good cause for releasing the confidential information. If the motion is made in the trial court, it must be noticed. (C.R.C., Rule 3.54(b) [trial courts]; C.R.C., Rule 8.26(g)(2) [Supreme Court or Courts of Appeal]; C.R.C., Rule 8.818(f)(2) [appellate division of superior court].)

An order granting access to an application or financial information may include limitations on who may access the information and on the use of the information after it has been released. (C.R.C., Rule 3.54(c) [trial courts]; C.R.C., Rule 8.26(g)(1) [Supreme Court or Courts of Appeal]; C.R.C., Rule 8.818(f)(1) [appellate division of superior court].)

(8) *Agreement by Counsel To Advance Costs.* Counsel representing an applicant who is filing in a general jurisdiction civil case under an agreement that counsel will advance litigation costs must indicate that agreement on the application form. The court must set a hearing to determine whether the applicant is able to pay court fees without using money that normally would pay for the common necessities of life. This requirement does not apply if the applicant is represented by counsel for, or affiliated with, a qualified legal services project under B. & P.C. 6213 (see 1 Cal. Proc. (5th), Attorneys, §15). (Govt.C. 68633(g).)

SUPPLEMENT: [This section is current through the latest supplement]



7 of 14 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XI. IN FORMA PAUPERIS

E. (New) Revised In Forma Pauperis Statutes and Rules of Court.

4. (New) Procedure.

b. (New) Applications.

2. (New) Requirements for Specific Proceedings.

3 *Witkin Cal. Proc. Actions* § 429G

[§ 429G] (New) Requirements for Specific Proceedings.

(1) *Proceedings in Trial Court.* An application for an initial fee waiver in the trial court under C.R.C., Rule 3.55 (see Supp., supra, §429C) must be prepared on Judicial Council Form No. FW-001 [Request to Waive Court Fees]. An application for an initial fee waiver in the trial court under C.R.C., Rule 3.56 (see Supp., supra, §429C) must be prepared on Judicial Council Form No. FW-002 [Request to Waive Additional Court Fees (Superior Court)]. The clerk must provide these forms and Judicial Council Form No. FW-001-INFO [Information Sheet on Waiver of Court Fees and Costs] without charge to any person who requests any fee waiver application or indicates that he or she is unable to pay any court fee or cost. (C.R.C., Rule 3.51.)

Each trial court must conspicuously post a notice near the filing window advising litigants in English and Spanish that they may ask the court to waive fees and costs. The notice must be substantially as follows: "NOTICE: If you are unable to pay fees and costs, you may ask the court to permit you to proceed without paying them. Ask the clerk for the *Information Sheet on Waiver of Superior Court Fees and Costs* or *Information Sheet on Waiver of Court Fees and Costs for Appeal or Writ Proceedings* and the *Request to Waive Court Fees*." (C.R.C., Rule 3.58.)

(2) *Proceedings in Appellate Division of Superior Court.* In appeals, where the trial court previously issued an order waiving court fees and costs and where that waiver is still in effect, all of the court fees listed in C.R.C., Rule 8.818(d) (see Supp. infra, §429C) are waived by that order. The party who received the waiver is not required to file a new application for waiver of fees and costs for the appeal in that case. (C.R.C., Rule 8.818(a)(1)(A).)

In appeals, where the trial court did not previously issue an order waiving court fees or where an order that was previously issued is no longer in effect, an application for initial waiver of fees and costs for an appeal must be prepared on Judicial Council Form No. FW-001 [Request to Waive Court Fees]. The appellant should file the application with the notice of appeal in the trial court that issued the judgment or order being appealed. The respondents should file an application at the time the fees are to be paid to the court. (C.R.C., Rule 8.818(a)(1)(B).) The Advisory Committee Comment explains that the waiver of fees and costs is called an "initial waiver" because, under Govt.C. 6830 et seq., it may later be modified, ended, or retroactively withdrawn if the court determines that the applicant was not or is not

longer eligible for a waiver. The court may, at a later time, order that the previously waived fees be paid. (See Supp., supra, §429B.)

In writ proceedings, a petitioner requesting a waiver of fees and costs must complete Judicial Council Form No. FW-001 [Request to Waive Court Fees] and file the application with the writ petition. (C.R.C., Rule 8.818(a)(2).)

The clerk must provide Judicial Council Form Nos. FW-001-INFO [Information Sheet on Waiver of Court Fees and Costs] and FW-015-INFO [Information Sheet on Waiver of Appellate Court Fees (Supreme Court, Court of Appeal, Appellate Division)] without charge to any person who requests any fee waiver application or indicates that he or she is unable to pay any court fee or cost. (C.R.C., Rule 8.818(a)(3).)

(3) *Proceedings in Supreme Court or Courts of Appeal.* An application for an initial fee waiver in the Supreme Court or Courts of Appeal must be prepared on Judicial Council Form No. FW-001 [Request to Waive Court Fees]. The clerk must provide that form and Judicial Council Form No. FW-015/APP-015-INFO [Information Sheet on Waiver of Appellate Court Fees (Supreme Court, Court of Appeal, Appellate Division)] without charge to any person who requests any fee waiver application or indicates that he or she is unable to pay any court fee or cost. (C.R.C., Rule 8.26(a).) The Advisory Committee Comment explains that a waiver of fees and costs is called an "initial waiver" because, under Govt.C. 6830 et seq., it may later be modified, ended, or retroactively withdrawn if the court determines that the applicant was not or is no longer eligible for a waiver. The court may, at a later time, order that the previously waived fees be paid. (See Supp., supra, §429B.)

In appeals, the appellant should submit the application with the notice of appeal in the superior court that issued the judgment or order being appealed; the respondent should submit the application at the time the fees are to be paid to the court. (C.R.C., Rule 8.26(b)(1).) The Advisory Committee Comment notes that if an applicant is requesting a waiver of both Court of Appeal fees, such as the fee for filing the notice of appeal, and superior court fees, such as the fee for preparing, certifying, copying, and transmitting the clerk's transcript, the clerk of the superior court may ask the applicant to provide two signed copies of Judicial Council Form No. FW-001 [Request to Waive Court Fees].

In writ proceedings, the petitioner should submit the application with the writ petition. (C.R.C., Rule 8.26(b)(2).) In petitions for review in the Supreme Court, the petitioner should submit the application with the petition. (C.R.C., Rule 8.26(b)(3).)

SUPPLEMENT: [This section is current through the latest supplement]



8 of 14 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XI. IN FORMA PAUPERIS

E. (New) Revised In Forma Pauperis Statutes and Rules of Court.

4. (New) Procedure.

c. (New) Determination of Trial Court Applications.

3 Witkin Cal. Proc. Actions § 429H

[§ 429H] (New) Determination of Trial Court Applications.

The determination of fee waiver applications in the trial courts is governed by *Govt.C. 68634*. (*Govt.C. 68634(a)*; C.R.C., Rule 3.52(1).) The requirements are as follows:

(1) *Mandatory Acceptance of Applications for Filing*. All applications must be accepted for filing. If an applicant submits an application without providing all required information, the clerk may request that the applicant supply the omitted information, but may not refuse to file the application, or refuse to file any pleadings accompanying the application, on the ground that the fee has not been paid. The clerk may not request that the applicant furnish information that is not required on the Judicial Council fee waiver application form. At the time the application is submitted, the clerk may not request that the applicant provide documents to support the information other than those required under *Govt.C. 68633* (see Supp., supra, §429F). (*Govt.C. 68634(b)*.)

(2) *Mandatory Filing of Pleadings and Papers*. If a person has filed an application, the person must be permitted to file pleadings or other papers immediately, without paying fees. (*Govt.C. 68634(c)*.)

(3) *Delegation of Duties to Clerk*. The court may delegate to the clerk the authority to grant applications that meet the criteria for eligibility under *Govt.C. 68632* (see Supp., supra, §429D) and the application requirements under *Govt.C. 68633* (see Supp., supra, §429F). The court may not delegate to a clerk the authority to deny or to partially grant an application. (*Govt.C. 68634(d)*.)

(4) *Determination and Action on Application*. The application must be determined without regard to the substance of the applicant's pleading or any other paper filed. (*Govt.C. 68634(e)*.) On review of an application for an initial fee waiver the court must take the following actions, as applicable:

(a) Grant the application if the information provided on the application establishes that the applicant meets the criteria for eligibility and the application requirements. (*Govt.C. 68634(e)(1)*.)

(b) Deny the application if the application is incomplete. If the application is denied on this basis, the applicant

must be given notice of the specific reason for the denial and a reasonable opportunity to submit a revised application. (*Govt.C. 68634(e)(2).*)

(c) Deny the application if the information provided on the application conclusively establishes that the applicant is not eligible for an initial fee waiver under *Govt.C. 68632* on the grounds requested. If the application is denied on this basis, the applicant must be given notice of the specific reason for the denial and a reasonable opportunity to request a hearing. The applicant may submit additional information at the hearing. (*Govt.C. 68634(e)(3).*)

(d) Set an eligibility hearing if the court has good reason to doubt the veracity of the factual statements in the application. The applicant must be given 10 days' notice of the hearing and the specific reason the court doubts the veracity of the factual statements. The court may require that specified, reasonably available, additional information be provided about the truthfulness of the factual statements in the application, but may not require the submission of information that is not related to the criteria for eligibility and the application requirements. (*Govt.C. 68634(e)(4).*)

(e) Set an eligibility hearing if the information provided on the application does not establish that the applicant meets the criteria for eligibility and the application requirements, but that information does not conclusively establish that the applicant is not eligible for an initial fee waiver on the grounds requested. The applicant must be given 10 days' notice of the hearing and the specific reason why the court has not granted the application. The court may require that specified, reasonably available, additional information be provided, but may not require the submission of information that is not related to the criteria for eligibility and the application requirements. (*Govt.C. 68634(e)(5).*)

After notice and an opportunity to be heard, the court may require an applicant under *Govt.C. 68632(c)* (common necessities of life; see Supp., supra, §429D) to pay a portion of court fees, or to pay court fees over a period of time or under some other equitable arrangement that meets the criteria of that provision. The court must give a written statement of reasons if an application is denied in whole or in part. (*Govt.C. 68634(e).*)

Generally, an order determining an application for an initial fee waiver must be prepared on Judicial Council Form No. FW-003 [Order on Court Fee Waiver (Superior Court)]. (C.R.C., Rule 3.52(2).) (On electronically generated fee waiver orders, see C.R.C., Rule 3.52(6).)

An order determining an application for an initial fee waiver after a hearing in the trial court must be prepared on Judicial Council Form No. FW-008 [Order on Court Fee Waiver After Hearing (Superior Court)]. (C.R.C., Rule 3.52(3).)

An order granting a fee waiver must be accompanied by a blank Judicial Council Form No. FW-010 [Notice of Improved Financial Situation or Settlement]. (C.R.C., Rule 3.52(4).)

An order denying an application without a hearing on the ground that the information on the application conclusively establishes that the applicant is not eligible for a waiver must be accompanied by a blank Judicial Council Form No. FW-006 [Request for Hearing About Court Fee Waiver Order (Superior Court)]. (C.R.C., Rule 3.52(5).)

(5) *Application Deemed Granted Five Days After Filing If No Court Action.* An application is deemed granted 5 court days after it is filed, unless before that time, the court gives notice of action on the application as provided in *Govt.C. 68634(e)*. (*Govt.C. 68634(f)*; C.R.C., Rule 3.53.) In those situations, the clerk must prepare and serve Judicial Council Form No. FW-005 [Notice: Waiver of Court Fees (Superior Court)]. (C.R.C., Rule 3.53.) Any delay by the court in processing an application for an initial fee waiver does not count against the time limits affecting the pleadings or other papers that the applicant timely filed. (*Govt.C. 68634(f).*)

(6) *Payment of Fees on Denial of Application.* If an application is denied in whole or in part, the applicant must pay the court fees and costs that ordinarily would be charged, or make the partial payment as ordered by the court, within 10 days after the clerk gives notice of the denial, unless within that time the applicant submits a new application or requests a hearing under *Govt.C. 68634(e)*. If the applicant does not pay on time, the clerk must void the papers that were filed

without payment of the court fees and costs. (*Govt.C. 68634(g).*)

(7) *Disclosure of Prior Applications.* A person who applies for an initial fee waiver must indicate whether he or she has filed a prior application for an initial fee waiver in the same case within the previous 6 months and must attach a copy, if one is reasonably available. (*Govt.C. 68634(h).*)

SUPPLEMENT: [This section is current through the latest supplement]



9 of 14 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XI. IN FORMA PAUPERIS

E. (New) Revised In Forma Pauperis Statutes and Rules of Court.

4. (New) Procedure.

d. (New) Determination of Appellate Court Applications.

3 Witkin Cal. Proc. Actions § 429-I

[§ 429-I] (New) Determination of Appellate Court Applications.

The determination of fee waiver applications in the appellate courts is governed by *Govt.C. 68634.5*. (*Govt.C. 68634.5(a)*; C.R.C., Rule 8.26(c) [proceedings in Supreme Court or Courts of Appeal]; C.R.C., Rule 8.818(b) [proceedings in appellate division of superior court].) The requirements are as follows:

(1) *Mandatory Acceptance of Applications*. All completed applications must be accepted for filing. If an application is submitted without all required information filled out on the form, the clerk may return the application to the applicant and request that the applicant supply the omitted information, but may not refuse to file any paper accompanying the application on the ground that the application is incomplete or the fee has not been paid. The clerk may not request that the applicant furnish information that is not required on the Judicial Council fee waiver application form. At the time the application is submitted, the clerk may not request that the applicant provide documents to support the information other than those required under *Govt.C. 68633* (see Supp., supra, §429F). (*Govt.C. 68634.5(b)*.)

(2) *Mandatory Filing of Papers*. A person must be permitted to file his or her papers immediately, even if the person does not present the filing fee, or an application for, or order granting, a fee waiver. (*Govt.C. 68634.5(c)*.)

(3) *Delegation of Duties to Clerk*. The court may delegate to the clerk the authority to grant applications that meet the criteria for eligibility under *Govt.C. 68632* (see Supp., supra, §429D) and the application requirements under *Govt.C. 68633* (see Supp., supra, §429F). The court may not delegate to a clerk the authority to deny an application. (*Govt.C. 68634.5(d)*.)

(4) *Determination and Action on Application*. The application must be determined without regard to the substance of any other paper filed by the applicant. (*Govt.C. 68634.5(e)*.) On review of an application, the court must take the following actions, as applicable:

(a) Grant the application if the information provided on the application establishes that the applicant meets the criteria for eligibility and the application requirements. (*Govt.C. 68634.5(e)(1)*.)

(b) Deny the application if the application is incomplete. If the application is denied on this basis, the applicant must be given notice of the specific reason for the denial and a reasonable opportunity to submit a revised application. (*Govt.C. 68634.5(e)(2).*)

(c) Deny the application if the information provided on the application conclusively establishes that the applicant is not eligible for a fee waiver under *Govt.C. 68632* on the grounds requested. If the application is denied on this basis, the applicant must be given notice of the specific reason for the denial and a reasonable opportunity to submit additional information related to the criteria for eligibility and the application requirements. (*Govt.C. 68634.5(e)(3).*)

(d) If the court concludes that there is a substantial evidentiary question about the applicant's eligibility, the court (1) may require the applicant to provide specified, reasonably available, additional information about the factual statements in the application, but may not require the submission of information that is not related to the criteria for eligibility and the application requirements; (2) may set a hearing to consider evidence concerning the applicant's eligibility; and (3) must give a written statement of reasons if an application is denied. (*Govt.C. 68634.5(e)(4).*)

An order determining an application or setting a hearing on the application in the appellate division of the superior court *may* be prepared on Judicial Council Form No. FW-003 [Order on Court Fee Waiver (Superior Court)]. (C.R.C., Rule 8.818(b).) An order determining an application or setting a hearing on the application in the Supreme Court or Courts of Appeal *may* be prepared on Judicial Council Form No. FW-016 [Order on Court Fee Waiver (Court of Appeal or Supreme Court)]. (C.R.C., Rule 8.26(c).)

(5) *Application Deemed Granted If No Court Action.* An application is deemed granted 5 court days after it is filed, unless before that time, the court gives notice of action on the application as provided in *Govt.C. 68634.5(e)*. (*Govt.C. 68634.5(f)*; C.R.C., Rule 8.26(d) [proceedings in Supreme Court or Courts of Appeal]; C.R.C., Rule 8.818(c) [proceedings in appellate division of superior court].)

(6) *Payment of Fees on Denial of Application.* If an application is denied, the applicant must pay the court fees and costs that ordinarily would be charged within 10 days after the clerk gives notice of the denial, unless within that time, the court grants a fee waiver based on a new application or additional information provided by the applicant under *Govt.C. 68634.5(e)*. The clerk must notify the applicant of the consequences for failure to pay the court fees. (*Govt.C. 68634.5(f)*; C.R.C., Rule 8.26(f) [proceedings in Supreme Court or Courts of Appeal]; C.R.C., Rule 8.818(e) [proceedings in appellate division of superior court].)

(7) *Disclosure of Prior Applications.* A person who applies for an initial fee waiver must indicate whether he or she has filed a prior application for a fee waiver in the same case and must attach a copy, if one is reasonably available. (*Govt.C. 68634.5(h).*)

SUPPLEMENT: [This section is current through the latest supplement]



10 of 14 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XI. IN FORMA PAUPERIS

E. (New) Revised In Forma Pauperis Statutes and Rules of Court.

4. (New) Procedure.

e. (New) Fee Waiver Requests by Prisoners.

3 *Witkin Cal. Proc. Actions* § 429J

[§ 429J] (New) Fee Waiver Requests by Prisoners.

An application by a person sentenced to state prison or confined in county jail for waiver of civil trial court fees is governed by *Govt.C. 68635*. (*Govt.C. 68635(a)* and (b); C.R.C., Rule 3.52(1).) The requirements are as follows:

(1) *Mandatory Payment of Fees*. Notwithstanding any other provision of *Govt.C. 68630* et seq., the inmate must pay the full amount of the trial court filing fees and costs to the extent provided in *Govt.C. 68635*. (*Govt.C. 68635(b)*.)

(2) *Application*. To apply for an initial fee waiver, the inmate must complete, under penalty of perjury, a Judicial Council application form giving the current address of the inmate and a statement that he or she is incarcerated, together with a statement of account for any money due to the inmate for the 6-month period immediately preceding the application. The form must be certified by the appropriate official of the Department of Corrections and Rehabilitation or the county jail. (*Govt.C. 68635(c)*.)

(3) *Partial Payment of Fees on Filing*. When pleadings or other papers are filed, the court must assess and, if funds exist, collect as partial payment a partial filing fee of 20% of the greater of either (a) the average monthly deposits to the inmate's account, or (b) the average monthly balance in the inmate's account for the 6-month period immediately preceding the application. (*Govt.C. 68635(d)*.)

(4) *Subsequent Monthly Payments of Fees*. After the initial filing fee is partially paid, the inmate must make monthly payments of 20% of the preceding month's income credited to the inmate's account. The Department of Corrections and Rehabilitation, or a county jail, must forward payments from this account to the clerk of the court each time the amount in the account exceeds \$ 10 until the filing fees are paid in full. (*Govt.C. 68635(e)*.)

(5) *Amount of Fees May Not Exceed Amount Charged to Nonprisoners*. The fees collected from an inmate applicant by the court may not exceed the amount of the fees that would be charged to a person who is not incarcerated. (*Govt.C. 68635(f)*.)

(6) *Delegation of Duties to Clerk*. The court may delegate to a clerk the authority to process requests for fee

waivers from inmates under *Govt.C. 68635*. (*Govt.C. 68635(g)*.)

(7) *Right To File Papers*. An inmate may not be prohibited from filing pleadings or other papers solely because the inmate has no assets and no means to partially pay the initial filing fee. (*Govt.C. 68635(h)*.)

SUPPLEMENT: [This section is current through the latest supplement]



11 of 14 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XI. IN FORMA PAUPERIS

E. (New) Revised In Forma Pauperis Statutes and Rules of Court.

4. (New) Procedure.

f. (New) Changed Circumstances.

3 Witkin Cal. Proc. Actions § 429K

[§ 429K] (New) Changed Circumstances.

(1) *Applicant's Notification Requirement.* After the court has granted an initial fee waiver in whole or in part, and before final disposition of the case, an applicant who has received an initial fee waiver must notify the court within 5 days of any change in financial circumstances that affects his or her ability to pay all or a portion of the court fees and costs that were initially waived. (*Govt.C. 68636(a)*; see Judicial Council Form No. FW-010 [Notice to Court of Improved Financial Situation or Settlement].)

(2) *Hearing on Court's Discovery of Changed Circumstances.* If, before or at the time of final disposition of the case, the court obtains information, including information derived from the court file, suggesting that an applicant who has received an initial fee waiver is not entitled to a fee waiver, or that the applicant's financial condition has changed so that he or she is no longer eligible for a fee waiver, the court may require the applicant to appear at a court hearing. The court must give the applicant no less than 10 days' written notice of the hearing and the specific reasons why the initial fee waiver might be reconsidered. The court may require the person to provide reasonably available evidence, including financial information, to support his or her eligibility for the fee waiver, but may not require the submission of information that is not related to the criteria for eligibility under *Govt.C. 68632* (see Supp., supra, §429D) and the application requirements under *Govt.C. 68633* (see Supp., supra, §429F). The court may not conduct a changed circumstances hearing more often than once every 6 months. (*Govt.C. 68636(b)*.)

(3) *Hearing Without Court's Discovery of Changed Circumstances.* At the time of final disposition of the case, the court may give notice that an applicant whose fees and costs were initially waived is required to appear at a court hearing by giving the applicant no less than 10 days' written notice of the hearing. The court may require the applicant to provide reasonably available evidence, including financial information, to support his or her eligibility for the fee waiver, but may not require the submission of information that is not related to the criteria for eligibility and the application requirements. (*Govt.C. 68636(c)*.)

(4) *Decision and Order.* In conducting a hearing under *Govt.C. 68636(b)* or (c), if the court determines that the applicant was not entitled to the initial fee waiver at the time it was granted, the court may order the waiver withdrawn retroactively. The court may order the applicant to pay to the court immediately, or over a period of time, all or part of

the fees that were initially waived. The court must give the applicant a minimum of 10 court days to begin paying the full or partial fees. (*Govt.C. 68636(d).*)

In conducting a hearing under *Govt.C. 68636(a)*, (b), or (c), if the court determines that the applicant's financial circumstances have changed since the grant of the initial fee waiver or partial initial fee waiver, the court may order the fee waiver withdrawn prospectively from the time that the applicant no longer was eligible for a fee waiver. The court may order the applicant to pay to the court immediately, or over a period of time, all or part of the fees that were waived since the time that the applicant no longer was eligible for a fee waiver. The court may order the applicant to begin paying all or part of the court fees assessed for future activities in the case. The court must give the applicant a minimum of 10 court days to begin paying the full or partial fees. (*Govt.C. 68636(e).*)

(5) *Sanctions for Bad Faith Conduct.* If the court obtains information suggesting that an applicant whose fees and costs were waived is obtaining court services in bad faith, or for an improper purpose such as to harass or cause unnecessary delay, or to needlessly increase the costs of litigation, the court may give notice that the applicant is required to appear at a court hearing to consider whether limitations should be placed on the court services for which fees were initially waived. (*Govt.C. 68636(f).*)

SUPPLEMENT: [This section is current through the latest supplement]



12 of 14 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XI. IN FORMA PAUPERIS

E. (New) Revised In Forma Pauperis Statutes and Rules of Court.

5. (New) Recovery of Fee Waivers.

a. (New) In General.

3 *Witkin Cal. Proc. Actions* § 429L

[§ 429L] (New) In General.

Govt.C. 68637 establishes procedures for the recovery of trial court fees waivers. (*Govt.C. 68637(a)*.)

(1) *Payment of Waived Fees by Losing Party*. If a party whose trial court fees and costs were initially waived is a prevailing party within the meaning of *C.C.P. 1032* (see 7 *Cal. Proc. (5th), Judgment*, §88 et seq.), the judgment or the dismissal entered in favor of that party must include an order requiring that the party against whom the judgment or dismissal has been entered pay to the court the waived fees and costs. The court may refuse to enter a partial or full satisfaction of the judgment until an accompanying order requiring payment of waived fees and costs has been satisfied. (*Govt.C. 68637(b)(1)*.)

A party petitioning the court to enter the satisfaction of judgment must declare, under penalty of perjury, that an order requiring the payment of waived fees and costs has been satisfied. (*Govt.C. 68637(b)(2)*.)

Govt.C. 68637(b) does not apply to any of the following: (a) unlawful detainer cases; (b) family law matters, for which recovery of fees is subject to *Govt.C. 68637(d)* and (e) (see Supp., infra, §429M); (c) cases in which the judgment or dismissal is entered against a party whose fees and costs were initially waived. (*Govt.C. 68637(b)(3)*.)

(2) *Repayment From Recovery and Lien*. If a party in a civil case whose trial court fees and costs were initially waived recovers \$ 10,000 or more in value by way of settlement, compromise, arbitration award, mediation settlement, or other recovery, the waived fees and costs must be paid to the court out of that recovery. (*Govt.C. 68637(c)*.)

The court has a lien on the recovery in the amount of all the court fees and costs initially waived. (*Govt.C. 68637(c)(1)*.) The waived fees and costs must be paid to the court before the party whose fees and costs were waived receives anything of value under the recovery. (*Govt.C. 68637(c)(2)*.) Notice of the lien must be given to the parties under rules and on forms adopted by the Judicial Council, and the Judicial Council must provide by rule the procedures by which a party subject to a lien may determine the amount of the lien. (*Govt.C. 68637(c)(3)*.)

The court may refuse to dismiss the case until the lien is satisfied. A party filing a petition for dismissal must

declare, under penalty of perjury, that the lien has been paid, or that any recovery has a value of less than \$ 10,000. (*Govt.C. 68637(c)(4).*) In a case in which an initial waiver of fees and costs was granted, or if a petition to dismiss the case is filed without the declaration, the court may issue an order to show cause why the lien should not be enforced and why the court should not enter a judgment making the parties jointly and severally liable to the court for waived fees and costs. (*Govt.C. 68637(c)(5).*)

To determine the amount of a court lien for fees and costs waived by a trial court, any party to a civil action in which an initial fee waiver has been granted may ask the clerk to calculate the total amount of waived fees and costs as of the date of the request. (C.R.C., Rule 3.57.)

SUPPLEMENT: [This section is current through the latest supplement]



13 of 14 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XI. IN FORMA PAUPERIS

E. (New) Revised In Forma Pauperis Statutes and Rules of Court.

5. (New) Recovery of Fee Waivers.

b. (New) Family Law Cases.

3 *Witkin Cal. Proc. Actions* § 429M

[§ 429M] (New) Family Law Cases.

(1) *Recovery From Other Party.* If a judgment or an order to pay support is entered in a family law case, the trial court must consider, based on the information in the court file, whether a party who did not receive a fee waiver has the ability to pay all or part of the other party's waived fees. Any order for the payment of the other party's waived fees must be made payable only after all current support and all accrued arrears owed by the party who did not receive the fee waiver have been paid. If the court orders payment of the other party's waived fees, and the party required to pay is not present in court at the time judgment is entered, the party required to pay fees must be given notice and an opportunity for a hearing to request that the court set aside the order to pay fees. A request for a hearing must be made in writing within 30 days after service of the notice of the court order. If a request for hearing is made, the order for payment of initially waived fees may not be enforced until after the hearing. (*Govt.C. 68637(d).*)

(2) *Recovery of Initial Fee Waiver on Changed Circumstances.* If a judgment is entered in a family law case, the trial court must consider, based on the information in the court file, whether a party's circumstances have changed so that it is reasonable to require a party who received an initial fee waiver to pay all or part of the fees that were initially waived. In making this determination, the court must use the criteria for eligibility under *Govt.C. 68632* (see Supp., infra, §429D). In considering whether a child or spousal support order constitutes a change of circumstances allowing the party to pay fees, the court also must consider the likelihood that the support obligor will remit the payments ordered by the court. If a support order is the primary basis for the court's finding of changed circumstances, the court must order the support obligor to pay the previously waived fees subject to the provisions of *Govt.C. 68637(d)*. When the court orders the party to pay all or part of the fees that were initially waived, the party required to pay must be given notice and an opportunity for a hearing to request that the court set aside the order to pay fees. A request for a hearing must be made in writing within 30 days after service of the notice of the court order. If a request for a hearing is made, the order for payment of initially waived fees may not be enforced until after the hearing. (*Govt.C. 68637(e).*)

SUPPLEMENT: [This section is current through the latest supplement]



14 of 14 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IV - Actions

Witkin Summary of California Law

XI. IN FORMA PAUPERIS

E. (New) Revised In Forma Pauperis Statutes and Rules of Court.

5. (New) Recovery of Fee Waivers.

c. (New) Enforcement.

3 *Witkin Cal. Proc. Actions* § 429N

[§ 429N] (New) Enforcement.

(1) *In General.* The trial court may execute on any order for payment of waived fees and costs in the same manner as on a judgment in a civil action. (*Govt.C. 68638(a).*) The court may issue an abstract of judgment, a writ of execution, or both, for all of the following:

(a) Recovery of the waived fees and costs as ordered. (*Govt.C. 68638(a)(1).*)

(b) Fees for issuing the abstract of judgment, writ of execution, or both. (*Govt.C. 68638(a)(2).*)

(c) A \$ 25 administrative fee. (*Govt.C. 68638(a)(3).*)

(d) An amount due to levying officers for serving and collecting on the judgment that will all be added to the writ of execution. (*Govt.C. 68638(a)(4).*)

(2) *Remittance to Court.* On collection, the waived fees and costs, the fees for issuing the abstract of judgment and writ of execution, and the \$ 25 administrative fee may be remitted to the court. Thereafter, the amount due to the levying officers for serving and collecting on the judgment may be paid. (*Govt.C. 68638(b).*)

SUPPLEMENT: [This section is current through the latest supplement]