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CHAPTER XIX - Equity

Witkin Summary of California Law
I. NATURE AND SCOPE OF EQUITY
A. In General.
1. Classification of Topics.

13 Witkin Sum. Cal. Law Equity § 1

[§ 1] Classification of Topics.

The subject matter of "Equity" overlaps various areas of the law of contracts, torts, property, and other fields. (See 50 *Harv. L. Rev.* 171 [Fifty Years of American Equity].) There are, of course, unifying principles that, in addition to history, may still justify separate treatment. But the classification is somewhat arbitrary, and some topics that are covered in traditional equity texts are treated in other chapters of this work and in *California Procedure*. The following are the principal ones:

- (1) *Reformation*. (See 1 *Summary* (10th), *Contracts*, §276 et seq.)
- (2) *Rescission*. (See 1 *Summary* (10th), *Contracts*, §930 et seq.)
- (3) *Equitable Servitudes*. (See 12 *Summary* (10th), *Real Property*, §440 et seq.)
- (4) *Fraudulent Conveyances*. (See 8 *Cal. Proc.* (4th), *Enforcement of Judgment*, §445 et seq.)
- (5) *Injunction*. (See 6 *Cal. Proc.* (4th), *Provisional Remedies*, §276 et seq.)
- (6) *Receivers*. (See 6 *Cal. Proc.* (4th), *Provisional Remedies*, §416 et seq.)
- (7) *Extraterritorial Relief*. (See 2 *Cal. Proc.* (4th), *Jurisdiction*, §226 et seq.)
- (8) *Bill of Peace*. (See 4 *Cal. Proc.* (4th), *Pleading*, §312 et seq.)
- (9) *Equitable Relief Against Judgment*. (See 8 *Cal. Proc.* (4th), *Attack on Judgment in Trial Court*, §214 et seq.)
- (10) *Equity Jurisdiction*. (See 2 *Cal. Proc.* (4th), *Jurisdiction*, §51 et seq.)

West's Key Number Digest, Equity k.1 et seq.

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

Equity overlaps various areas of law and other fields: See 57 *Stanf. L. Rev.* 2053 [Four Theses: Preliminary to an

Appeal to Equity].

(4) *Fraudulent Conveyances.*

Cross-Reference: 8 Cal. Proc. (5th), *Enforcement of Judgment*, §479 et seq.

(5) *Injunction.*

Cross-Reference: 6 Cal. Proc. (5th), *Provisional Remedies*, §274 et seq.

(6) *Receivers.*

Cross-Reference: 6 Cal. Proc. (5th), *Provisional Remedies*, §419 et seq.

(7) *Extraterritorial Relief.*

Cross-Reference: 2 Cal. Proc. (5th), *Jurisdiction*, §235 et seq.

(8) *Bill of Peace.*

Cross-Reference: 4 Cal. Proc. (5th), *Pleading*, §348 et seq.

(9) *Equitable Relief Against Judgment.*

Cross-Reference: 8 Cal. Proc. (5th), *Attack on Judgment in Trial Court*, §215 et seq.

(10) *Equity Jurisdiction.*

Cross-Reference: 2 Cal. Proc. (5th), *Jurisdiction*, §50 et seq.



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A. In General.

2. Distinctive Features of Equity.

13 *Witkin Sum. Cal. Law Equity* § 2

[§ 2] Distinctive Features of Equity.

Some general aspects of the subject should be constantly borne in mind:

(1) *Procedure*. The procedural distinctions between actions at law and in equity have been largely abrogated. (See *C.C.P.* 307; 4 *Cal. Proc.* (4th), *Pleading*, §§20, 21.) But it is still necessary for some purposes, e.g., the jurisdiction of courts and the right to a jury trial (none in equity), to distinguish between a proceeding that is legal in origin and nature, and one that is equitable. (See *Gore v. Bingaman* (1942) 20 *C.2d* 118, 120, 124 *P.2d* 17; for full discussion and classification of proceedings, see 27A *Am.Jur.2d* (1996 ed.), *Equity* §1 et seq.; 3 *Cal. Proc.* (4th), *Actions*, §113 et seq.; 5 *Cal. Proc.* (4th), *Pleading*, §740 et seq.; on function of equity, see 70 *Cal. L. Rev.* 524 [Statutory Violations and Equitable Discretion]; 16 *Hastings L. J.* 401; 17 *Hastings L. J.* 677; 19 *Hastings L. J.* 147; on concurrent jurisdiction, see 19 *Hastings L. J.* 1017; on equitable remedies for breach of fiduciary duties, see Chodos, *Fiduciary Duties* §5:16 et seq.)

(2) *Specific Relief*. Equity acts specifically; it grants specific relief and not damages. This typical description of equity jurisdiction is subject to the well-established exception that the court in an equity case, having once obtained jurisdiction, will dispose of the whole controversy and grant specific relief and damages in the same action to avoid a multiplicity of suits. (See *Watson v. Sutro* (1890) 86 *C.* 500, 528, 24 *P.* 172, 25 *P.* 64; *Union Oil Co. of Calif. v. Reconstruction Oil Co.* (1937) 20 *C.A.2d* 170, 183, 66 *P.2d* 1215; *Foy v. Foy* (1937) 23 *C.A.2d* 543, 546, 73 *P.2d* 618; *Crouser v. Boice* (1942) 51 *C.A.2d* 198, 203, 124 *P.2d* 358; 27A *Am.Jur.2d* (1996 ed.), *Equity* §103 et seq.; on trial of legal and equitable issues, see 3 *Cal. Proc.* (4th), *Actions*, §130 et seq.; 3 *Cal. Evidence* (4th), *Presentation at Trial*, §45.)

(3) *Jurisdiction Over Persons and Property*. "Equity acts in personam." This was one of the original maxims governing equity jurisdiction, and the principal equitable remedies--specific performance and injunction--are directed against the person. However, modern statutes confer considerable in rem jurisdiction on courts of equity. (See 2 *Cal. Proc.* (4th), *Jurisdiction*, §234 et seq.)

The power to control and direct the acts of the parties has the important effect of giving equitable decrees concerning property extraterritorial force. A court cannot directly affect the title to land outside the state, but it may compel a party within its jurisdiction to make a conveyance or to do or to refrain from acts outside the state. (See 2 *Cal.*

Proc. (4th), Jurisdiction, §226 et seq.)

(4) *Equitable Maxims and Other General Doctrines.* There are a number of maxims or general doctrines that serve as guides in the granting or denial of equitable relief. (See *infra*, §4 et seq.)

West's Key Number Digest, Equity k.1 et seq.

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

(1) *Procedure.*

Abrogation of procedural distinctions:

Cross-Reference: 4 *Cal. Proc. (5th), Pleading, §§30, 31.* *Classification of proceedings:* See 27A *Am.Jur.2d (2008 ed.), Equity §1 et seq.*

Cross-References: 3 *Cal. Proc. (5th), Actions, §119 et seq.; 5 Cal. Proc. (5th), Pleading, §784 et seq.*

(2) *Specific Relief.* See 27A *Am.Jur.2d (2008 ed.), Equity §74 et seq.*

Trial of legal and equitable issues:

Cross-Reference: 3 *Cal. Proc. (5th), Actions, §135 et seq.*

(3) *Jurisdiction Over Persons and Property.*

Cross-References: 2 *Cal. Proc. (5th), Jurisdiction, §243 et seq. [property]; 2 Cal. Proc. (5th), Jurisdiction, §235 et seq. [persons].*



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A. In General.

3. Adequacy of Legal Remedy.

13 Witkin Sum. Cal. Law Equity § 3

[§ 3] Adequacy of Legal Remedy.

(1) *Adequate Remedy as Restriction*. A basic rule limiting equity jurisdiction is that there is no right to equitable relief or an equitable remedy when there is an adequate legal remedy. (*Morrison v. Land* (1915) 169 C. 580, 586, 147 P. 259; *McCutcheon v. Superior Court* (1933) 134 C.A. 5, 9, 24 P.2d 911; *Menghetti v. Dillon* (1938) 10 C.2d 470, 472, 75 P.2d 596; *Doran v. Sherman* (1937) 18 C.A.2d 479, 480, 64 P.2d 442; *Taliaferro v. Taliaferro* (1956) 144 C.A.2d 109, 111, 300 P.2d 726; see 36 Cal. L. Rev. 647; 27A Am.Jur.2d (1996 ed.), *Equity* §29 et seq.)

(2) *Inadequate Remedy as Expansion*. Conversely, the absence of an adequate remedy at law is a reason for the exercise of equity jurisdiction. (*Bond v. Bulgheroni* (1932) 215 C. 7, 10, 8 P.2d 130.) Thus, equitable relief is flexible and expanding, and the theory that "for every wrong there is a remedy" (C.C. 3523) may be invoked by equity courts to justify the invention of new methods of relief for new types of wrongs. (See *Southern Pac. Co. v. Robinson* (1901) 132 C. 408, 412, 64 P. 572; *Atkins Corp. v. Tourny* (1936) 6 C.2d 206, 216, 57 P.2d 480 [court has power to compel physical re-execution of lost document]; *Wuest v. Wuest* (1942) 53 C.A.2d 339, 346, 127 P.2d 934; *Nadell & Co. v. Grasso* (1959) 175 C.A.2d 420, 431, 346 P.2d 505, 13 Summary (10th), *Personal Property*, §29; *Bisno v. Sax* (1959) 175 C.A.2d 714, 728, 346 P.2d 814, 4 Summary (10th), *Security Transactions in Real Property*, §220; *Holibaugh v. Stokes* (1961) 192 C.A.2d 564, 568, 13 C.R. 528, quoting the text; *Farina v. Bevilacqua* (1961) 192 C.A.2d 681, 685, 13 C.R. 791, citing the text; *Hicks v. Clayton* (1977) 67 C.A.3d 251, 264, 136 C.R. 512 [rescission, restitution, and constructive trust were proper remedies, where defendant, who obtained property from plaintiff for inadequate consideration and by fraud and undue influence, was insolvent].) (On C.C. 3523, see 3 Cal. Proc. (4th), *Actions*, §5.)

But there are limits to this creative power. "Rules of equity cannot be intruded in matters that are plain and fully covered by positive statute. ... Nor will a court of equity ever lend its aid to accomplish by indirection what the law or its clearly defined policy forbids to be done directly." (*Lass v. Eliassen* (1928) 94 C.A. 175, 179, 270 P. 745; see *Timberline v. Jaisinghani* (1997) 54 C.A.4th 1361, 1368, footnote 5, 64 C.R.2d 4 [refusing to apply "clean hands" doctrine to prevent enforcement of Rev.C. 23301 (suspension of corporate powers for failure to pay franchise taxes; see 9 Summary (10th), *Corporations*, §222 et seq.)].) Courts also are usually reluctant to develop new forms of equitable relief in a field normally assigned to legislative policy. (See *Western Gulf Oil Co. v. Superior Oil Co.* (1949) 92 C.A.2d 299, 308, 206 P.2d 944 [refusal to compel independent oil well operators to join in unitization plan, in absence of statute].) (See 3 Cal. Proc. (4th), *Actions*, §13.)

West's Key Number Digest, Equity k.43 et seq.

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

(1) *Adequate Remedy as Restriction*. See *Center for Biological Diversity v. FPL Group* (2008) 166 C.A.4th 1349, 1371, 83 C.R.3d 588 [in action by environmental advocates who alleged that owners and operators of wind turbine generators were harming birds in violation of public trust doctrine, trial court properly abstained from granting equitable relief where granting relief would interfere with administrative agency charged with regulating matter]; 27A Am.Jur.2d (2008 ed.), Equity §21 et seq. (2) *Inadequate Remedy as Expansion*. See *Andal v. Stockton* (2006) 137 C.A.4th 86, 94, 40 C.R.3d 34 [action challenging constitutionality of local fee; where legal remedy was inadequate, declaratory relief was justified].

C.C. 3523:

Cross-Reference: 3 Cal. Proc. (5th), Actions, §5.

Courts are reluctant to develop new forms of equitable relief in field assigned to legislative policy:

Cross-Reference: 3 Cal. Proc. (5th), Actions, §64.



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B. Equitable Maxims and Other General Doctrines.
1. Substance Rather Than Form.

13 Witkin Sum. Cal. Law Equity § 4

[§ 4] Substance Rather Than Form.

Equity looks at substance rather than form. (C.C. 3528; see *27A Am.Jur.2d* (1996 ed.), *Equity* §117.) Where a corporation, e.g., is simply an instrumentality through which an individual does business, a court will in a proper case disregard the corporate entity. (*Wenban Estate v. Hewlett* (1924) 193 C. 675, 696, 227 P. 723; 9 *Summary* (10th), *Corporations*, §9 et seq.; see *Copp v. Millen* (1938) 11 C.2d 122, 126, 77 P.2d 1093 [revival of mortgage discharged in mistaken reliance on effectiveness of renewal mortgage]; 1 *Summary* (10th), *Contracts*, §477 [disguised usury]; 4 *Summary* (10th), *Security Transactions in Real Property*, §10 [absolute deed as mortgage].)

West's Key Number Digest, Equity k.56

SUPPLEMENT: [This section is current through the latest supplement]
See *27A Am.Jur.2d* (2008 ed.), *Equity* §90.



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2. Equity Regards That Which Ought To Be Done as Done.

13 Witkin Sum. Cal. Law Equity § 5

[§ 5] Equity Regards That Which Ought To Be Done as Done.

Equity regards that which ought to be done as done. (C.C. 3529; see *Palos Verdes Properties v. County Sanitation Dist. No. 5 of Los Angeles* (1960) 177 C.A.2d 679, 691, 2 C.R. 537, *infra*, §175; 27A Am.Jur.2d (1996 ed.), *Equity* §116.) The doctrine of equitable conversion rests on this maxim. (See *Estate of Gracey* (1927) 200 C. 482, 488, 253 P. 921.) Where there is an agreement to give a mortgage on property, and consideration is paid but the mortgage is defectively executed, equity will create and enforce a lien on the property. (*Beckwith v. Sheldon* (1914) 168 C. 742, 746, 145 P. 97; see 4 *Summary* (10th), *Security Transactions in Real Property*, §14 et seq.)

West's Key Number Digest, Equity k.57

SUPPLEMENT: [This section is current through the latest supplement]
See 27A Am.Jur.2d (2008 ed.), *Equity* §89.



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3. Party Must Do Equity.

13 Witkin Sum. Cal. Law Equity § 6

[§ 6] Party Must Do Equity.

(1) *General Principle.* A party who seeks equity must do equity. Under this maxim, a court will not grant equitable relief to a plaintiff unless he or she acknowledges or provides for the equitable claims or demands of the adverse party growing out of the particular controversy or connected with the same subject matter. (See *Dool v. First Nat. Bank* (1929) 207 C. 347, 351, 278 P. 233; *Richman v. Bank of Perris* (1929) 102 C.A. 71, 83, 282 P. 801; *O'Brien v. O'Brien* (1925) 197 C. 577, 584, 241 P. 861; *District Bond Co. v. Pollack* (1942) 19 C.2d 304, 307, 121 P.2d 7; *Colleston v. Oftedahl* (1941) 48 C.A.2d 756, 760, 120 P.2d 710; *Olivero v. Rosano* (1941) 42 C.A.2d 740, 743, 109 P.2d 976; *Viotti v. Giomi* (1964) 230 C.A.2d 730, 737, 41 C.R. 345; 27A Am.Jur.2d (1996 ed.), *Equity* §121 et seq.) The following situations are illustrative:

(a) When the statute of limitations has run on a mortgage, the mortgagor cannot maintain an equitable action to quiet title unless the mortgagor offers to pay the outlawed mortgage debt. (*Faxon v. All Persons* (1913) 166 C. 707, 720, 137 P. 919; see 4 *Summary* (10th), *Security Transactions in Real Property*, §104.)

(b) The debtor-trustor cannot set aside a voidable sale under a deed of trust without offering to pay the debt. (*Leonard v. Bank of America* (1936) 16 C.A.2d 341, 342, 60 P.2d 325; *Ephraim v. Metropolitan Trust Co. of Calif.* (1946) 28 C.2d 824, 837, 172 P.2d 501.)

(c) In a taxpayer's suit to enjoin a fraudulent assessment, the plaintiff must pay or tender whatever tax is equitably due. (*De Mille v. Los Angeles* (1938) 25 C.A.2d 506, 512, 77 P.2d 905; see 9 *Summary* (10th), *Taxation*, §295.)

(2) *Exceptions.* This maxim does not authorize the creation of substantive rights in favor of a person, nor the imposition of arbitrary conditions not warranted by settled doctrines of equity. "[T]he court cannot deprive a plaintiff of his full equitable rights, under the pretense of awarding to the defendant something to which *he* has no equitable right. ... The principle only requires the plaintiff to do 'equity.' According to its true meaning, therefore, the terms imposed upon the plaintiff, as the condition of his obtaining the relief, must consist of the awarding or securing to the defendant something to which he is justly entitled by the principles and doctrines of equity, although not perhaps by those of the common law,--something over which he has a distinctively equitable right." (*Stein v. Simpson* (1951) 37 C.2d 79, 83, 230 P.2d 816, *infra*, §186 [quoting Pomeroy]; see *Dickson, Carlson & Campillo v. Pole* (2000) 83 C.A.4th 436, 447, 99 C.R.2d 678 ["do equity" doctrine is not complete defense to action for accounting; trial court must quantify damages

caused by plaintiff's inequitable conduct so as to account for that amount].)

West's Key Number Digest, Equity k.64

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

(1) *General Principle*. See *27A Am.Jur.2d* (2008 ed.), *Equity* §94 et seq.



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4. Taking Advantage of One's Own Wrong.

13 Witkin Sum. Cal. Law Equity § 7

[§ 7] Taking Advantage of One's Own Wrong.

"No one can take advantage of his own wrong." (C.C. 3517; see *McIvor v. Mercer-Fraser Co.* (1946) 76 C.A.2d 247, 251, 172 P.2d 758.) The following illustrate the maxim:

(1) A redemptioner demanded a statement from a mortgagee of the amount due, and the mortgagee, in violation of a statutory requirement, refused to give it. The mortgagee could not collect additional interest on the debt after the expiration of the original redemption period. (*Roberts v. Henderson* (1932) 127 C.A. 16, 19, 14 P.2d 1038.)

(2) Where defendants organized a corporation and represented themselves to be directors and stockholders, they could not escape stockholders' liability by showing that they had failed to pay for their stock. (*Bliss v. California Cooperative Producers* (1937) 23 C.A.2d 245, 248, 72 P.2d 885.)

(3) Where defendant taxpayer, in violation of a statutory duty, failed to file its tax report and consequently escaped assessment at the proper time, it could not object to the correction of this error in a subsequent year. (*Carpenter v. Pacific Coast Ins. Assn.* (1937) 10 C.2d 304, 306, 74 P.2d 511.)

(4) A medical service company could not escape liability on its contracts by contending that it was unlawfully practicing medicine. (*Hedlund v. Sutter Med. Service Co.* (1942) 51 C.A.2d 327, 332, 124 P.2d 878.)

(5) A husband who feloniously killed his wife could not acquire sole ownership of stock jointly held by them. (*Abbey v. Lord* (1959) 168 C.A.2d 499, 505, 336 P.2d 226.)

West's Key Number Digest, Estoppel k.59

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



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5. Equal Equities and Bona Fide Purchase.

13 Witkin Sum. Cal. Law Equity § 8

[§ 8] Equal Equities and Bona Fide Purchase.

Two maxims deal with the respective rights of parties whose equities are equal:

(1) *Between equal equities the first in time prevails.* (C.C. 3525; see 27A *Am.Jur.2d* (1996 ed.), *Equity* §139.) This is invoked where both parties have equitable interests and neither has the legal title. But it must be applied with caution, for in some situations a requirement of notice is made. Thus, in California, priority of notice and not priority of time determines rights as between successive assignees of a chose in action. (See *Smitton v. McCullough* (1920) 182 C. 530, 534, 535, 189 P. 686.)

(2) *Between equal equities the legal title prevails.* (*Enos v. Stewart* (1902) 138 C. 112, 114, 70 P. 1005; see 27A *Am.Jur.2d* (1996 ed.), *Equity* §139.) This is applied in the bona fide purchaser rule, e.g., where a trustee, in violation of his or her duty to the beneficiary, sells trust property to an innocent purchaser for value without notice. (See 13 *Summary* (10th), *Trusts*, §251.) (On nature of doctrine of bona fide purchase, and test of value, see *First Nat. Bank of Stockton v. Pomona Tile Mfg. Co.* (1947) 82 C.A.2d 592, 607, 186 P.2d 693; *Basch v. Tidewater Associated Oil Co.* (1942) 49 C.A.2d Supp. 743, 747, 121 P.2d 545; 12 *Summary* (10th), *Real Property*, §328 et seq.; on power of bona fide purchaser to clothe transferee with good title, see *Schuch v. Northrup-Jones* (1958) 162 C.A.2d 279, 290, 328 P.2d 279; 12 *Summary* (10th), *Real Property*, §330; 4 *Summary* (10th), *Negotiable Instruments*, §21 [transferee from holder in due course].)

West's Key Number Digest, Equity k.59 et seq.

SUPPLEMENT: [This section is current through the latest supplement]
27A *Am.Jur.2d*, *Equity* was revised in 2008, and the sections cited in the text were not continued.



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B. Equitable Maxims and Other General Doctrines.

6. Clean Hands.

a. Nature of Defense.

13 Witkin Sum. Cal. Law Equity § 9

[§ 9] Nature of Defense.

(1) *In General.* One who comes into equity must come with clean hands. A court will neither aid in the commission of a fraud by enforcing a contract, nor relieve one of two parties to a fraud from its consequences, where both are *in pari delicto*. Unconscientious conduct in the transaction may give rise to the defense. (See *Allstead v. Laumeister* (1911) 16 C.A. 59, 64, 116 P. 296; *Richman v. Bank of Perris* (1929) 102 C.A. 71, 86, 282 P. 801; *De Garmo v. Goldman* (1942) 19 C.2d 755, 764, 123 P.2d 1; *Gavina v. Smith* (1944) 25 C.2d 501, 505, 154 P.2d 681; *Rosenfeld v. Zimmer* (1953) 116 C.A.2d 719, 722, 254 P.2d 137; *Potter v. Boisvert* (1953) 117 C.A.2d 688, 690, 256 P.2d 625; *Stein v. Simpson* (1951) 37 C.2d 79, 83, 230 P.2d 816, *infra*, §186 [unclean hands precludes assertion of "do equity" doctrine and rights of subrogation and restitution]; *Allen v. Los Angeles Dist. Council of Carpenters* (1959) 51 C.2d 805, 812, 337 P.2d 457; *Womack v. Womack* (1966) 242 C.A.2d 572, 576, 51 C.R. 668, *infra*, §14, quoting the text; *Pond v. Insurance Co. of North America* (1984) 151 C.A.3d 280, 291, 294, 198 C.R. 517; *Garamendi v. Mission Ins. Co.* (1993) 15 C.A.4th 1277, 1289, 19 C.R.2d 190, quoting the text; *Keith G. v. Suzanne H.* (1998) 62 C.A.4th 853, 861, 72 C.R.2d 525 [quoting *Garamendi* and the text]; 33 Cal. L. Rev. 143; 60 Harv. L. Rev. 980; 27A Am.Jur.2d (1996 ed.), *Equity* §126 et seq.; 5 Cal. Proc. (4th), *Pleading*, §1052; 8 Cal. Proc. (4th), *Extraordinary Writs*, §153.)

As the court observed in *Precision Instrument Mfg. Co. v. Automotive Maintenance Machinery Co.* (1945) 324 U.S. 806, 65 S.Ct. 993, 89 L.Ed. 1381: "This maxim is far more than a mere banality. It is a self-imposed ordinance that closes the doors of a court of equity to one tainted with inequity or bad faith relative to the matter in which he seeks relief, however improper may have been the behavior of the defendant. The doctrine is rooted in the historical concept of court of equity as a vehicle for affirmatively enforcing the requirements of conscience and good faith. This presupposes a refusal to be 'the abetter of iniquity.'" (65 S.Ct. 997, 89 L.Ed. 1386.)

In *Blain v. Doctor's Co.* (1990) 222 C.A.3d 1048, 272 C.R. 250, *infra*, §10, the court quoted Professor Chafee (see 47 Mich. L. Rev. 877) as follows: "The most amusing maxim of equity is 'He who comes into Equity must come with clean hands.' It has given rise to many interesting cases and poor jokes." (222 C.A.3d 1059.) Chafee points out that the doctrine is not one but a number of disparate doctrines dependent for their substance on the context of application: "First, the clean hands maxim is not peculiar to equity, but is simply a picturesque phrase applied by equity judges to a general principle running through damage actions as well as suits for specific relief. This principle is that the plaintiff's fault is often an important element in the judicial settlement of disputes, as well as the defendant's fault. ... Second, this

principle of plaintiff's fault has rather weak unifying qualities. It can better be described as a string around a loose bundle of separate defenses which somewhat resemble each other. This resemblance may occasionally render analogies helpful, but more significant is the way the effect given to the plaintiff's misconduct depends on the nature of his wrong and on the nature of the defendant's wrong. In other words, this vague single principle gets most of its qualities in a given group of cases from the substantive law of the particular subject. It is largely shaped by the human practices and public policies involved in the situation." (222 C.A.3d 1059.)

(2) *Availability of Defense in Legal Action*. Emphasis on the maxim and on the traditional role of the defense suggests that it applies only in actions seeking equitable relief. But the merger of law and equity, with the resulting right to set up equitable defenses in legal actions, supports the opposite conclusion. There is little authority on the point, but California has taken the position that the defense is available in a legal action. (*Fibreboard Paper Products Corp. v. East Bay Union of Machinists, Local 1304, United Steelworkers of America, AFL-CIO* (1964) 227 C.A.2d 675, 728, 39 C.R. 64.)

(3) *Pleading and Proof*. The defense may be considered in the reviewing court even though not pleaded (see *Katz v. Karlsson* (1948) 84 C.A.2d 469, 473, 191 P.2d 541; 5 Cal. Proc. (4th), *Pleading*, §1052), but the better and safer practice is to raise it below in order that the factual issues--e.g., bad faith, relation to the transaction involved in the suit, etc., can be resolved. (See *Moriarty v. Carlson* (1960) 184 C.A.2d 51, 57, 7 C.R. 282 [raised on appeal, too late]; *Marshall v. Marshall* (1965) 232 C.A.2d 232, 253, 42 C.R. 686 [raised on motion for new trial; too late]; 5 Cal. Proc. (4th), *Pleading*, §1052.)

West's Key Number Digest, Equity k.65 et seq.

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

(1) *In General*. See 25 California Lawyer 39 (August 2005) [overview of defense]; 27A Am.Jur.2d (2008 ed.), *Equity* §98 et seq.

Cross-References: 5 Cal. Proc. (5th), *Pleading*, §1126; 8 Cal. Proc. (5th), *Extraordinary Writs*, §156.(3) *Pleading and Proof*.

Defense may be considered in reviewing court even though not pleaded:

Cross-Reference: 5 Cal. Proc. (5th), *Pleading*, §1126.

Better practice is to raise issue in lower court:

Cross-Reference: 5 Cal. Proc. (5th), *Pleading*, §1126.



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CHAPTER XIX - Equity

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B. Equitable Maxims and Other General Doctrines.

6. Clean Hands.

b. Factors Considered.

13 Witkin Sum. Cal. Law Equity § 10

[§ 10] Factors Considered.

In *Blain v. Doctor's Co.* (1990) 222 C.A.3d 1048, 272 C.R. 250, the issue was whether the doctrine of unclean hands precluded an action for legal malpractice by a physician who, in an underling medical malpractice action, "followed the advice of his lawyer to lie at a deposition." (222 C.A.3d 1052; see 1 Cal. Proc. (4th), Attorneys, §348.) Plaintiff, insured by defendant, alleged the following: The attorney for defendant advised him to lie at his deposition; plaintiff followed the advice; a complaint was filed against him, seeking punitive damages; the action was settled, defendant insurer paid the policy limits, and plaintiff paid nothing. Plaintiff contended that defense counsel's improper strategy exposed him to greater liability, causing emotional distress, and precluding further work as a physician. *Held*, judgment for defendant on demurrer affirmed.

(a) *Factors Considered.* After exhaustively examining the case law, the court set forth the three factors that recent California courts have considered in determining whether the defense should be sustained (222 C.A.3d 1060):

(1) Is the doctrine generally a defense to the relevant claim, or if not, does analogous case law support sustaining the defense?

(2) Does the nature of the misconduct justify sustaining the defense?

(3) Does the relationship of the misconduct to the claimed injuries warrant sustaining the defense?

(b) *Claims based on perjury in course of litigation.*

(1) Two out-of-state cases are persuasive. An Oregon case (*Kirkland v. Mannis*) in which a convict sought damages, claiming that his criminal defense counsel had led him to testify falsely, causing him to be convicted; and a Pennsylvania case (*Feld & Sons v. Pechner, Dorfman, Wolf, etc.*) in which plaintiffs sought damages on the claim that their counsel advised them to commit perjury in proceedings before the *National Labor Relations Board*. (222 C.A.3d 1060.) However, neither case is on point, for in both, recovery might have softened the effect of a criminal conviction, which is not the situation here. (222 C.A.3d 1062.)

(2) Plaintiff contended that, when a client engages in misconduct at the behest of an attorney, the doctrine is

inapplicable because they are not equally culpable. Plaintiff relied on *Sontag v. Denio* (1937) 23 C.A.2d 319, 73 P.2d 248, *infra*, §14, and *Clark v. Millsap* (1926) 197 C. 765, 242 P. 918, but he read the cases too broadly. "Laypersons may be confused about the legality of sham transactions employed to frustrate creditors. But there is little plausibility in the claim that one was confused about the legality of lying in the teeth of the oath just sworn. The key consideration in *Sontag* was that the lawyer would personally profit from his wrongdoing at the expense of the client if the client were left without a remedy. We see no contradiction between the holdings in *Sontag* and *Clark* on the one hand and *Kirkland* and *Feld & Sons* on the other." (222 C.A.3d 1062.)

(c) *Injury caused by plaintiff's own misconduct.*

(1) "Blain's emotional distress, if any, is attributable to his own knowing misbehavior. Even the most naive must know that lying under oath is illegal. A doctor who lies under oath about the incident for which he is being sued must know that if the lie is discovered it will adversely affect his defense." (222 C.A.3d 1063.)

(2) "Although recognition of a cause of action would tend to deter attorneys from advising their clients to lie under oath, the societal interest in deterring such behavior is already subject to vindication through criminal sanctions or professional disciplinary proceedings." (222 C.A.3d 1063.)

(3) The loss of plaintiff's ability to practice medicine because he had become uninsurable is subject to the same considerations as those concerning his claim for emotional distress, plus an additional consideration: "The alleged perjury concerned the malpractice of another physician observed by Blain in the course of his duties as a physician. The misconduct was designed to disadvantage an injured patient in pursuing a claim for medical malpractice, resulting in severe and permanent injuries. ... Such an act is grounds for the professional discipline of a physician. For these reasons Blain's misconduct inherently involved a risk of impairment of his ability to practice medicine." (222 C.A.3d 1064.)

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

See *Jay Bharat Developers v. Minidis* (2008) 167 C.A.4th 437, 446, 84 C.R.3d 267 [applying *Blain* factors to uphold trial judge's ruling that doctrine did not preclude restaurant franchisors, who allegedly failed to disclose pending litigation in franchise offering circular, from obtaining preliminary injunction against terminated franchisees' continued use of franchisors' trademark; analogous case law allowed injunctive relief where terminated franchisee continued to use franchisor's trademark, and injunction would not interfere with franchisees' right to obtain money judgment for alleged fraudulent inducement to enter into franchise agreement].

Unclean hands as defense to legal malpractice claim:

Cross-Reference: 1 Cal. Proc. (5th), Attorneys, §332.



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13 Witkin Sum. Cal. Law Equity § 11

[§ 11] Illustrations: Defense Sustained.

In *Joseph v. Macowsky* (1892) 96 C. 518, 31 P. 914, the court refused to enjoin the unauthorized use of a trade name by the defendant, where the party seeking the injunction was himself not entitled to its use. (96 C. 520.)

In *Merry v. Garibaldi* (1941) 48 C.A.2d 397, 119 P.2d 768, the owner of property, with knowledge that her name had been forged as grantor on a deed, concealed the crime until after the forger had obtained the money. *Held*, she could not cancel the deed. (48 C.A.2d 401.)

In *Woodcock v. Petrol Corp.* (1941) 48 C.A.2d 652, 120 P.2d 889, plaintiff, a stockholder in a corporation delinquent in its franchise tax, sued the corporation and obtained a default judgment for \$ 20,000, because the corporation was unable, under the law, to defend the action. He then brought this creditor's suit against debtors of the corporation. *Held*, recovery denied. The judgment was inequitably obtained, and to enforce it would deprive other creditors of the corporation of assets to satisfy their claims. (48 C.A.2d 657.)

In *Katz v. Karlsson* (1948) 84 C.A.2d 469, 191 P.2d 541, a dissolution proceeding, the husband obtained an interlocutory decree by fraud. Then the wife procured entry of the final decree by fraud. *Held*, the husband was precluded from setting aside the final decree. (84 C.A.2d 474.)

In *London v. Marco* (1951) 103 C.A.2d 450, 229 P.2d 401, a preliminary injunction against foreclosure of a trust deed was held properly denied on the following showing: (a) Plaintiff made false statements in a prior action that taxes had been paid; (b) plaintiff dismissed the first action and filed a second action in a branch court without disclosing that the court in the first action had dissolved the preliminary injunction because of the fraud. (103 C.A.2d 453.)

In *McDougall v. O'Hara* (1954) 129 C.A.2d 12, 276 P.2d 6, plaintiff borrowed money from defendant on the false representation that the note plaintiff gave her was secured by a deed of trust on his real property. Defendant sued on the note and attached the property, but before judgment was entered, plaintiff recorded a declaration of homestead. In this action to quiet title, based on the normal rule of priority of the homestead over an attachment lien, judgment was for defendant. *Held*, affirmed; plaintiff's unconscionable conduct justified refusal of equitable protection even of the homestead right. (129 C.A.2d 14.)

In *Wilson v. S.L. Rey* (1993) 17 C.A.4th 234, 21 C.R.2d 552, 12 Summary (10th), *Real Property*, §47, cotenants' misuse of the bankruptcy court and their continued refusal to make note payments, pay taxes, or account for royalties, rents and profits constituted unclean hands. (17 C.A.4th 245.)

In *Murillo v. Rite Stuff Foods* (1998) 65 C.A.4th 833, 77 C.R.2d 12, the unclean hands doctrine barred the wrongful discharge claims of an employee who presented false documentation to prove United States residency, even though the employer learned that fact after firing the employee. (65 C.A.4th 844.)

In *Thomas v. Gordon* (2000) 85 C.A.4th 113, 102 C.R.2d 28, 7 Cal. Proc. (4th), *Judgment*, Supp., §284A, plaintiff transferred funds to defendant corporations to defraud her creditors. *Held*, the unclean hands doctrine barred plaintiff's claim against defendants and their officers for failure to apprise her of defendants' financial affairs. (85 C.A.4th 123.)

In *Unilogic v. Burroughs Corp.* (1992) 10 C.A.4th 612, 12 C.R.2d 741, plaintiff's predecessor and defendant Burroughs entered into a joint project to develop computer prototypes. The project failed, and Burroughs subsequently entered into a similar venture with defendant Wyse. Plaintiff sued, alleging breach of contract, fraud, conversion, and other torts, claiming that Burroughs did not pay for plaintiff's development efforts and was wrongfully profiting from them. Burroughs cross-complained, and set up unclean hands as an affirmative defense to the cause of action for conversion. At trial, Burroughs offered evidence that plaintiff paid a bribe to a Burroughs employee in order to obtain the contract, failed to disclose its tenuous financial situation, failed to return Burroughs' software after the project terminated, and later used the software without authorization. The jury found in plaintiff's favor on its conversion claim, but awarded no damages, based on a finding in Burroughs' favor on the unclean hands defense. On appeal, plaintiff argued that unclean hands may not be asserted as an affirmative defense to a legal action for conversion. *Held*, affirmed; the defense was available and was properly submitted to the jury.

(a) The court applied the factors in *Blain v. Doctor's Co.* (1990) 222 C.A.3d 1048, 1063, 272 C.R. 250, *supra*, §10, As to the nature of the misconduct, the conduct alleged to constitute unclean hands (the bribe, the failure to disclose financial information, and the unauthorized retention and use of software) was sufficient to support the affirmative defense. Furthermore, the conversion and plaintiff's misconduct occurred in the same transaction that formed the subject of the litigation, the joint development project. (10 C.A.4th 620.)

(b) Equitable claims are generally tried to a court; however, the critical factor in determining the right to jury trial is the essential nature of the action. Here, the gist of plaintiff's action for conversion was legal. Burroughs simply asserted the affirmative defense of unclean hands. The trial judge had discretion to submit an equitable defense to the jury. (10 C.A.4th 621.)

In *Kendall-Jackson Winery, Ltd. v. Superior Court* (1999) 76 C.A.4th 970, 90 C.R.2d 743, plaintiff winemaker brought a malicious prosecution action against a competitor based on an underlying action against plaintiff for trademark infringement, trade dress violations, and unfair business practices. Defendant asserted unclean hands as an affirmative defense based on plaintiff's undue influence over shelf schematics and other retailer merchandising activity, and plaintiff's movement of a competitor's wines to create product adjacencies. The case presented this novel issue: When unclean hands is raised as an affirmative defense to a malicious prosecution claim, is the relevant misconduct limited to that which affected the defendant's decision to file and pursue the prior lawsuit? *Held*, application of the *Blain* factors requires a negative answer; the defense may be triggered by misconduct in the particular transaction or connected to the subject matter of the litigation that affects the equitable relations between the litigants.

(a) *Analogous case law.* *Pond v. Insurance Co. of North America* (1984) 151 C.A.3d 280, 198 C.R. 517, and *DeRosa v. Transamerica Title Ins. Co.* (1989) 213 C.A.3d 1390, 262 C.R. 370, establish that a plaintiff's unclean hands conduct in the underlying action (or in the transaction that was the subject of that action) may preclude relief in a subsequent malicious prosecution suit. (76 C.A.4th 981.)

(b) *Nature of misconduct.* The comprehensive statutory scheme restricting tied-house arrangements in the

distribution of alcoholic beverages (*B. & P.C. 25500 et seq.*; see 2 *Cal. Crim. Law (3d)*, *Crimes Against Public Peace and Welfare*, §290) seeks to avoid the evils and excesses of disorderly marketing conditions that plagued the alcoholic beverage industry prior to prohibition. The tied-house prohibitions target two particular dangers: the ability of large firms to dominate local markets through vertical and horizontal integration, and the excessive sales of alcoholic beverages produced by the overly aggressive marketing techniques of larger alcoholic beverage concerns. The statutes seek to remove the manufacturer's influence over the retailer, which can result in preference for the manufacturer's product. Under the statutory scheme, all levels of the alcoholic beverage industry must remain separate; producers are not to be involved with, or exercise influence over, retailers. Thus, no supplier may directly or indirectly give anything of value to a retailer except as authorized by the Alcoholic Beverage Control Act. Providing services in the form of rearranging a retailer's displays is prohibited, as is interfering with the product display of competing sellers inside retail outlets. (76 *C.A.4th* 982.)

(c) *Plaintiff's misconduct*. Plaintiff's alleged misconduct violated the letter and the spirit of the Act, and thus supported a defense of unclean hands. The gist of the underlying lawsuit was that plaintiff attempted to capitalize on defendant's success as the market leader in premium wine sales by using a variety of unfair marketing strategies, and a jury could find that plaintiff's inequitable conduct occurred in the transaction related directly to the matter before the trial court--the marketing of plaintiff's wine to compete with defendant's wine--and affected the equitable relationship between the litigants. (76 *C.A.4th* 982.)

(d) *Relationship of misconduct to injuries*. It was not necessary that plaintiff's unclean hands conduct have directly affected defendant's decision to file and pursue the underlying lawsuit. The unclean hands doctrine is not a legal or technical defense to be used as a shield against a particular element of a cause of action, but is an equitable rationale for refusing a plaintiff relief where principles of fairness dictate that the plaintiff should not recover, regardless of the merits of the claim. (76 *C.A.4th* 984.)

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

See *Peregrine Funding v. Sheppard Mullin Richter & Hampton LLP* (2005) 133 *C.A.4th* 658, 679, 35 *C.R.3d* 31 [doctrine barred trustee of bankrupt investment corporation from joining with investors in maintaining action against attorney for aiding owner of corporation in defrauding its investors; owner's misconduct was imputed to corporation without regard to trustee's succession, and attorney's alleged misconduct was directly related to transactions underlying investors' claims alleging that attorney's professional advice and tactics enabled owner and corporation to perpetuate their fraud on investors]; *Fladeboe v. American Isuzu Motors* (2007) 150 *C.A.4th* 42, 56, 58 *C.R.3d* 225 [doctrine barred plaintiff automobile dealers' claims against defendant manufacturer for improperly withholding consent to transfer dealership; plaintiffs violated *Veh.C. 11713* and acted inequitably, where one plaintiff transferred dealership license to second plaintiff, which carried on that dealership, without obtaining defendant's consent]. *Thomas case*:

Cross-Reference: 7 *Cal. Proc.* (5th), *Judgment*, §339.



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1. Misconduct Not Related to Transaction.

13 Witkin Sum. Cal. Law Equity § 12

[§ 12] Misconduct Not Related to Transaction.

(1) *Nature of Exception.* The clean hands doctrine does not call for denial of relief to a plaintiff guilty of any past improper conduct; it is only misconduct in the particular transaction or connected with the subject matter of the litigation that is a defense. (See *Western Union Tel. Co. v. Commercial Pac. Cable Co.* (1918) 177 C. 577, 585, 171 P. 317; *Nealis v. Carlson* (1950) 98 C.A.2d 65, 69, 219 P.2d 56 ["A person is not placed forever entirely outside the protection of the law in a particular transaction, because, forsooth, some time in the distant past he was guilty of an improper act"]; *Shaw v. Shaw* (1964) 227 C.A.2d 159, 166, 38 C.R. 520, 13 Summary (10th), *Personal Property*, §154, quoting the text; *Fibreboard Paper Products Corp. v. East Bay Union of Machinists, Local 1304, United Steelworkers of America, AFL-CIO* (1964) 227 C.A.2d 675, 728, 39 C.R. 64; *Pepper v. Superior Court* (1977) 76 C.A.3d 252, 259, 142 C.R. 759, citing the text; *California Satellite Systems v. Nichols* (1985) 170 C.A.3d 56, 70, 216 C.R. 180, citing the text; 21 A.L.R.2d 589 [applicability of doctrine to deny recovery of property conveyed in defraud of creditors where claim motivating conveyance was paid]; 6 A.L.R.4th 862 [applicability of doctrine to deny recovery of property conveyed in defraud of creditors where claim motivating conveyance was never established]; 27A *Am.Jur.2d* (1996 ed.), *Equity* §§133, 134.)

(2) *Illustrations: Exception Applied.* In *Wiley v. Wiley* (1943) 59 C.A.2d 840, 842, 139 P.2d 950, plaintiff husband, at his wife's insistence, consented to sterilization before marriage. In the suit for annulment on a then good ground (secret intention not to cohabit), the trial judge denied relief. *Held*, judgment reversed; the unclean hands rule applies only where the plaintiff's conduct is prejudicially and intimately connected with injury to the defendant. (59 C.A.2d 842.) (See *Germo Mfg. Co. of Missouri v. McClellan* (1930) 107 C.A. 532, 541, 290 P. 534 [suit to enjoin former employees from using trade secrets; defense that plaintiff was guilty of unfair practices in dealings with others was immaterial]; *Vacco Industries v. Van Den Berg* (1992) 5 C.A.4th 34, 50, 52, 6 C.R.2d 602 [citing *Germo Mfg. Co.*, and holding that plaintiff's wrongful discharge of defendant was immaterial in suit seeking compensatory and injunctive relief for misappropriation of trade secrets].)

(3) *Illustrations: Exception Rejected.* In *Belling v. Croter* (1943) 57 C.A.2d 296, 134 P.2d 532, plaintiff and defendant concealed their partnership assets from their creditors. *Held*, plaintiff could not obtain a declaration of existence of the partnership or an accounting from defendant, although no creditors were in fact injured. (57 C.A.2d

306.) This result seems questionable. It is difficult to see why the theoretical injury to third parties should wholly defeat plaintiff's claim against defendant, and allow the latter to appropriate the entire business. (See *Carman v. Athearn* (1947) 77 C.A.2d 585, 598, 175 P.2d 926 [defense was not available where plaintiff made fraudulent conveyance, but later "purged" himself by paying all creditors].)

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

(1) *Nature of Exception.* See 27A Am.Jur.2d (2008 ed.), *Equity* §104.

(2) *Illustrations: Exception Applied.* See *Magic Kitchen LLC v. Good Things Int., Ltd.* (2007) 153 C.A.4th 1144, 1167, 63 C.R.3d 713 [in trade dress infringement action, unclean hands doctrine did not bar defendants' laches defense; plaintiffs' allegations that defendants marked "patent pending" on their product and omitted plaintiffs' prior use of trade name in trademark application were not connected to plaintiffs' infringement action].



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2. Misconduct Not Prejudicial.

13 Witkin Sum. Cal. Law Equity § 13

[§ 13] Misconduct Not Prejudicial.

In *Soon v. Beckman* (1965) 234 C.A.2d 33, 44 C.R. 190, plaintiffs leased a trailer park to defendants for 78 months, for a rental of 45% of the gross receipts with a minimum of \$ 550 per month. The instrument gave defendants an option to purchase at a fixed price on condition that all rentals were paid. Defendants for more than 4 years kept false records and paid less than the percentage rent due. Then, becoming "either conscience stricken or option-conscious" (234 C.A.2d 34), they admitted the fraud, tendered the amount withheld with interest, and on plaintiffs' refusal of the tender, deposited the money in plaintiffs' names in a bank. Plaintiffs did not take the money, but continued for 6 months to accept rents. Then plaintiffs gave notice of rescission of the option provision, but still continued to accept rent until the lease expired. *Held*, plaintiffs' right to rescind the lease was waived by acceptance of rent for 6 months after it accrued, and it was unnecessary to consider whether the option clause was so independent as to be subject to separate rescission. (234 C.A.2d 36.)

The opinion up to this point covered familiar ground (see 1 *Summary* (10th), *Contracts*, §939; 12 *Summary* (10th), *Real Property*, §669 et seq.), but it also disposed of a more difficult question. Defendants by cross-complaint sought specific performance of the option, and plaintiffs raised the defense of unclean hands. Clearly defendants' conduct was inequitable and in the same transaction. But the court was disturbed by the conduct of plaintiffs, who attempted to hold the lessee's rights in suspense while weighing the option price against the market value. Accordingly, the court invoked another general limitation on the clean hands defense: "The unconscionable conduct must be of such a nature that it would, if permitted to go unnoticed, result in prejudice to the other party." Here, plaintiffs failed to prove any prejudice that would result from enforcement of the option. (234 C.A.2d 36.)

This statement must be taken with some reservations. The clean hands defense does not disappear merely because a thief makes belated restitution when it becomes advantageous to do so; and one is prejudiced when he or she is defrauded, even though restitution later occurs by voluntary act of the wrongdoer or as a result of legal action. The real explanation for the holding is that the waiver of the right to rescind eliminated the doctrine of unclean hands. It restored defendants to the position of lessees fully performing their obligations and entitled to counter-performance from the lessors.

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



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3. Plaintiff's Conduct Less Culpable.

13 Witkin Sum. Cal. Law Equity § 14

[§ 14] Plaintiff's Conduct Less Culpable.

(1) *Nature of Exception.* If the defendant, taking advantage of his or her superior position or of the plaintiff's weakness, was the principal moving force in an illegal or immoral transaction, the court may be lenient toward the plaintiff and grant relief despite his or her participation. (See *27A Am.Jur.2d* (1996 ed.), *Equity* §132.) This exception applies, e.g., where the plaintiff client relies on advice of the defendant attorney. (See *Sontag v. Denio* (1937) 23 C.A.2d 319, 323, 73 P.2d 248; *Karallis v. Shenan* (1940) 41 C.A.2d 694, 697, 107 P.2d 395 [plaintiff acted under advice of plaintiff's lawyer, and fraud and coercion were present]; but see *Blain v. Doctor's Co.* (1990) 222 C.A.3d 1048, 272 C.R. 250, supra, §10 [exception rejected in legal malpractice action predicated on injuries client sustained when he followed attorney's advice to lie at deposition].)

(2) *Illustrations: Fraudulent Conveyance of Property.* The exception has been applied where the defendant grantee induces the plaintiff grantor to convey property to the defendant in fraud of the defendant's creditors. (See *Young v. The Young Holdings Corp.* (1938) 27 C.A.2d 129, 151, 80 P.2d 723; but see *Belling v. Croter* (1943) 57 C.A.2d 296, 305, 134 P.2d 532, supra, §12 [plaintiff was denied benefit of this exception where, though he reposed confidence in defendant, he acted in a number of instances on independent advice of his attorney].)

In *Hall v. Hall* (1950) 98 C.A.2d 209, 219 P.2d 808, plaintiff, on parole from state prison, made payments on a contract to purchase land. Title was taken in the name of defendant, a woman with whom he was living in a meretricious relationship. When she claimed the property as her own, plaintiff, with the consent of the Adult Authority, brought this action to hold her as a resulting or constructive trustee. Judgment for plaintiff was affirmed, against her defense that the agreement was part of a scheme to circumvent the parole law. (98 C.A.2d 214.)

In *Womack v. Womack* (1966) 242 C.A.2d 572, 51 C.R. 668, William was divorced by his first wife Wilma. She was awarded \$ 8,000 as her share of community property and \$ 75 per month alimony. Title to a parcel of real property was vested in William, in trust until the sum awarded to Wilma should be paid (it was paid). Then William married Ann, but the day before, deeded the property to her to prevent Wilma reaching it for any future delinquency in support payments. Thereafter, William was frequently delinquent in support payments and had various misfortunes including a heart attack and loss of his job. Then Ann sued for divorce. The judge granted decrees to both parties (Ann was guilty of

adultery), but he refused to make any disposition of the real property because of the fraudulent conveyance. *Held*, reversed. The clean hands doctrine should not be applied to "vindicate the honor of the court" where the result would be inequitable and unjust. (242 C.A.2d 578.) Here, William had purged himself of guilt by making all payments due Wilma; support of Wilma and a daughter by his first marriage would have been endangered by the loss of this property; and if Ann, the guiltier of the two, had been allowed to remain in possession of this parcel of William's property (because it was the family home), she would have gained an undeserved windfall. (242 C.A.2d 578.)

This exception has been invoked where a plaintiff makes a fraudulent conveyance, but later "purges" himself or herself by paying all creditors. (See *Carman v. Athearn* (1947) 77 C.A.2d 585, 598, 175 P.2d 926; 21 A.L.R.2d 589 [applicability of doctrine to deny recovery of property conveyed in defraud of creditors where claim motivating conveyance was paid]; 6 A.L.R.4th 862 [applicability of exception to conveyance in defraud of creditors where claim motivating conveyance was never established].)

In *Estate of Blanco* (1978) 86 C.A.3d 826, 150 C.R. 645, the court, reviewing a number of cases illustrative of the principle set forth in *Carman* applied it to a distinct situation: "[W]e do not have a case of a grantor purging himself of his fraud by either *payment* or *settlement* of the creditor's claim. The question presented is whether the *trial* of a creditor's claim against the grantor and the rendition of a *judgment on the merits* in favor of the grantor constitutes a purging of the fraud, or, a situation analogous thereto, to preclude the application of the 'clean hands' doctrine." (86 C.A.3d 836.) The court held that the judgment was as effective a purging of the grantor's fraud as a payment or settlement. "[T]he alleged creditor sought to be defrauded by the conveyance is established, on the merits, by court action, to have possessed no cause of action against the grantor, and hence, to have been no creditor at all." (86 C.A.3d 838.)

(3) *Illustrations: Participation in Illegal Business Scheme.* In *CrossTalk Productions v. Jacobson* (1998) 65 C.A.4th 631, 76 C.R.2d 615, the court applied the factors of *Blain* to preclude the defense of unclean hands. Plaintiffs, two individuals and their corporation, sued defendant, a television company executive. Plaintiffs filed the action when their contract to supply the television company with promotional video spots was terminated after they reported to the company that defendant, who had approved the contract, had coerced plaintiffs into paying him a monthly sum, presumably to protect their contract. The trial judge sustained defendant's demurrer without leave to amend, on the ground that plaintiffs had committed commercial bribery (P.C. 641.3) in paying defendant, and that the offense would necessarily establish a defense of unclean hands. *Held*, reversed.

(a) *Unclean hands was not established as matter of law.* Plaintiffs' allegation that they believed "that they had no reasonable alternative under these circumstances but to accede to [defendant's] demand in order to secure [their] contract with" the company did not establish as a matter of law that plaintiffs were guilty of commercial bribery. (65 C.A.4th 639.) The trial judge apparently interpreted the word "secure" as meaning to "obtain, procure, get, acquire or gain." However, it may also mean to "protect, guard or safeguard." If used in that sense, it did not establish that a bribe was paid to obtain the contract. (65 C.A.4th 640.) "Courts should not sustain demurrers without leave to amend based on such ambiguities. Instead, leave to amend should be granted to clarify the ambiguity." (65 C.A.4th 641.)

(b) *Case does not satisfy Blain factors.*

(1) *Analogous case law.* Defendant cited no authority holding that unclean hands generally is a defense to claims based on economic extortion. (65 C.A.4th 642.) Analogous case law is favorable to plaintiffs. *Jacobs v. Universal Dev. Corp.* (1997) 53 C.A.4th 692, 62 C.R.2d 446, 3 Summary (10th), *Agency and Employment*, §252, held that unclean hands did not bar an action against an employer alleging violation of public policy for terminating an employee who refused to participate further in the employer's illegal scheme, despite the employee's initial participation. (65 C.A.4th 646.)

(2) *Nature of misconduct.* Plaintiffs' use of the word "secure" was not a binding admission of bribery. Moreover, the complaint showed that defendant instigated the misconduct and that the moral blame attributable to him far

outweighed any attributable to plaintiffs. (65 C.A.4th 642.)

(3) *Relationship between misconduct and claimed injuries.* Plaintiffs' actions in paying defendant were motivated by the realistic fear of losing their contract. "A fair inference could be drawn that the underlying cause of the damage to plaintiffs was defendant's extortionate demands." (65 C.A.4th 643.)

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

(1) *Nature of Exception.* See 27A Am.Jur.2d (2008 ed.), *Equity* §103.

(2) *Illustrations: Fraudulent Conveyance of Property.* See *Warren v. Merrill* (2006) 143 C.A.4th 96, 114, 49 C.R.3d 122 [plaintiff condominium purchaser was entitled to exception against defendant agent who fraudulently acquired title to condominium, even though parties had conspired to defraud lender; illegal plan was proposed by defendant and was never carried out].



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CHAPTER XIX - Equity

Witkin Summary of California Law
I. NATURE AND SCOPE OF EQUITY
B. Equitable Maxims and Other General Doctrines.

6. Clean Hands.

d. Exceptions.

4. Public Policy Favoring Relief.

13 *Witkin Sum. Cal. Law Equity* § 15

[§ 15] Public Policy Favoring Relief.

(1) *Nature of Exception.* The clean hands defense will not be recognized when to do so would be harmful to the public interest. (*Pepper v. Superior Court* (1977) 76 C.A.3d 252, 259, 142 C.R. 759, citing the text; *Radich v. Kruly* (1964) 226 C.A.2d 683, 686, 38 C.R. 340, 10 *Summary* (10th), *Parent and Child*, §377; *Health Maintenance Network v. Blue Cross of Southern Calif.* (1988) 202 C.A.3d 1043, 1061, 249 C.R. 220, citing the text.)

(2) *Illustrations.* In *Kofsky v. Smart & Final Iris Co.* (1955) 131 C.A.2d 530, 532, 281 P.2d 5, plaintiff sought an injunction, alleging defendant's violation of the Unfair Practices Act by selling cigarettes below cost with intent to injure competitors and destroy competition. The defense, that plaintiff was guilty of the same conduct, was rejected. *B. & P.C. 17001* declares the public policy objectives of the Act, and *B. & P.C. 17078* states that the court "shall enjoin." (See 7 *Hastings L. J.* 92.)

In *Sullivan v. Sullivan* (1934) 219 C. 734, 736, 28 P.2d 914, this theory was applied to require rendition of a decree of nullity of a bigamous marriage, even though the plaintiff knew it was invalid when she entered into it. (See 8 *So. Cal. L. Rev.* 176.) But application of the doctrine of estoppel may sometimes change the result. (See *Spellens v. Spellens* (1957) 49 C.2d 210, 221, 235, 317 P.2d 613 [disapproving contrary implications in *Sullivan*]; 11 *Summary* (10th), *Husband and Wife*, §140.)

In *Yu v. Signet Bank/Virginia* (2002) 103 C.A.4th 298, 126 C.R.2d 516, credit card customers sued a bank that had issued them credit cards, and its successor, alleging that defendants' "long-arm program" of pursuing collection actions in another state constituted improper distant forum abuse. *Held*, plaintiffs' alleged cavalier attitude toward repaying their credit card debt to defendants did not justify application of the unclean hands doctrine.

(a) The circumstances under which a debt is incurred are irrelevant to a claim based on collection of the debt through distant forum abuse. The misconduct that brings the unclean hands doctrine into play must relate directly to the cause at issue. (103 C.A.4th 323.)

(b) The doctrine protects the court, rather than the opposing party. The courts' strong interest in deterring distant

forum abuse requires that the unclean hands defense be narrowly applied in a suit to redress that abuse. (103 C.A.4th 323, citing the text.)

Other cases are to the same effect. (See *De Burgh v. De Burgh* (1952) 39 C.2d 858, 868, 250 P.2d 598, 11 Summary (10th), *Husband and Wife*, §58 [rejecting recriminatory defense in divorce action]; *Smith v. Smith* (1955) 135 C.A.2d 100, 103, 286 P.2d 1009, 10 Summary (10th), *Parent and Child*, §197 [custody of children was changed to father for their best interest, although he was in contempt for prior violation of court order]; *Jacobs v. Universal Dev. Corp.* (1997) 53 C.A.4th 692, 702, 62 C.R.2d 446, 3 Summary (10th), *Agency and Employment*, §252 [despite employee's participation in employer's illegal scheme, exception applied to action alleging violation of public policy for terminating employee for refusing to participate further in scheme].)

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



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B. Equitable Maxims and Other General Doctrines.
7. Laches.
a. Nature of Defense.

13 Witkin Sum. Cal. Law Equity § 16

[§ 16] Nature of Defense.

(1) *General Principle.* The maxim "Equity aids the vigilant" (see C.C. 3527 ["[t]he law helps the vigilant"]) is given application in the doctrine of laches. Under the doctrine, those who neglect their rights may be precluded from obtaining relief in equity. Laches may bar relief in equity whether or not the statute of limitations has run on the action at law. (See *Kleinclauss v. Dutard* (1905) 147 C. 245, 250, 81 P. 516; *Vesper v. Forest Lawn Cemetery Assn.* (1937) 20 C.A.2d 157, 165, 67 P.2d 368; *Gutknecht v. Paul* (1948) 83 C.A.2d 356, 357, 188 P.2d 764; *Smith v. Sheffey* (1952) 113 C.A.2d 741, 744, 248 P.2d 959; *Rouse v. Underwood* (1966) 242 C.A.2d 316, 330, 51 C.R. 437; *Marriage v. Keener* (1994) 26 C.A.4th 186, 191, 31 C.R.2d 511 [title is obtained on perfection of adverse possession, and claimant is not required to take further steps; thus, laches did not bar claim]; *In re Marriage of Plescia* (1997) 59 C.A.4th 252, 256, 69 C.R.2d 120, 11 Summary (10th), *Husband and Wife*, §220, citing the text [laches is valid defense to action for spousal support arrearages]; *In re Marriage of Fogarty & Rasbeary* (2000) 78 C.A.4th 1353, 1360, 93 C.R.2d 653 [extending *Plescia* rule to permit laches as defense in action for child support arrearages]; 45 Cal. L. Rev. 169 [patent law]; 71 A.L.R.2d 529 [taxpayers' action]; 19 A.L.R.3d 1034 [labor dispute]; 148 A.L.R. Fed 413 [copyright law]; 27A Am.Jur.2d (1996 ed.), *Equity* §140 et seq.; on distinction between statutes of limitation and laches, see *Holmberg v. Armbrecht* (1946) 327 U.S. 392, 66 S.Ct. 582, 90 L.Ed. 743; 3 Cal. Proc. (4th), *Actions*, §419; *Maquire v. Hibernia Savings & Loan Soc.* (1944) 23 C.2d 719, 736, 146 P.2d 673 ["The defense of stale claims is nothing more than a particular application of the doctrine of laches and is based on estoppel"].)

The maxim is not applied strictly between near relatives (*Lubin v. Lubin* (1956) 144 C.A.2d 781, 794, 302 P.2d 49), and cannot be invoked to aid a faithless trustee in consummating his or her wrong (*Berniker v. Berniker* (1947) 30 C.2d 439, 448, 182 P.2d 557).

In *Tustin Community Hosp. v. Santa Ana Community Hosp. Assn.* (1979) 89 C.A.3d 889, 153 C.R. 76, the court extensively reviewed the authorities on the defense in actions for injunctive relief against unfair competition and trademark infringement. (89 C.A.3d 896.) No clear California rule was found (89 C.A.3d 902), but the "better view" was accepted. "[T]he court should weigh the competing equities which bear on the issue of delay and should then grant or deny injunctive relief depending on the overall balance of those equities." (89 C.A.3d 903, citing the text.) The court may take into account delay during litigation, as well as delay prior to filing of the complaint. (89 C.A.3d 904.) (See 89 C.A.3d 905, listing factors that should be weighed, and stressing important consideration of effect of judgment on the

public interest.)

(2) *Defense Only in Equitable Action.* Laches can be asserted only in a suit in equity; an action at law may be brought at any time within the period of the statute of limitations, and a separate legal cause of action is not subject to the defense. (*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*, *supra*, 144 C.A.2d 793; *Abbott v. Los Angeles* (1958) 50 C.2d 438, 461, 326 P.2d 484; *Pratali v. Gates* (1992) 4 C.A.4th 632, 645, 5 C.R.2d 733 [defense is not available in action at law]; *Wells Fargo Bank v. Bank of America* (1995) 32 C.A.4th 424, 439, 38 C.R.2d 521 [same]; *Barkley v. Blue Lake* (1996) 47 C.A.4th 309, 315, 54 C.R.2d 679 [same, citing *Pratali*].)

(3) *Raising Defense in Trial Court.* Laches should ordinarily be pleaded, but in extreme cases in which the complaint discloses the defense, the court may deny relief on its own motion. (See 5 *Cal. Proc.* (4th), *Pleading*, §1051.)

West's Key Number Digest, Equity k.67 et seq.

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

(1) *General Principle.* See *In re Marriage of Burkle* (2006) 139 C.A.4th 712, 752, 43 C.R.3d 181 [under *Family C. 1101(d)(3)* (see 11 *Summary* (10th), *Community Property*, §134), defense of laches is available in action in which spouse asserts breach of fiduciary duty that impairs community property entitlement]; 27A *Am.Jur.2d* (2008 ed.), *Equity* §107 et seq.

Cross-Reference: 3 *Cal. Proc.* (5th), *Actions*, §446.(3) *Raising Defense in Trial Court.*

Cross-Reference: 5 *Cal. Proc.* (5th), *Pleading*, §1125.



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7. Laches.
b. Use Against Public Entity.

13 Witkin Sum. Cal. Law Equity § 17

[§ 17] Use Against Public Entity.

In a proper case, laches may be set up against a municipality or other public entity. (See *Los Angeles v. Los Angeles* (1937) 9 C.2d 624, 630, 72 P.2d 138; *People v. Department of Housing & Community Dev.* (1975) 45 C.A.3d 185, 197, 119 C.R. 266, 8 Cal. Proc. (4th), *Extraordinary Writs*, §152; *San Francisco v. Pacello* (1978) 85 C.A.3d 637, 645, 149 C.R. 705; *Brown v. State Personnel Bd.* (1985) 166 C.A.3d 1151, 1158, 213 C.R. 53, citing the text.)

In *Piscioneri v. Ontario* (2002) 95 C.A.4th 1037, 116 C.R.2d 38, the trial judge granted a petition for a writ of mandamus compelling defendant city to immediately schedule a hearing on plaintiff firefighter's applications for a disability retirement, ruling that defendant's allegation that plaintiff was guilty of laches should be determined at the hearing. *Held*, affirmed. The factual extent of defendant's responsibility for the delay had to be determined at the administrative hearing before the defense of laches could properly be sustained. (95 C.A.4th 1046.) Plaintiff had a fundamental vested right to disability retirement benefits if, in fact, he was disabled. Defendant's decision on the threshold question of laches substantially affected that right and a hearing was therefore required. (95 C.A.4th 1050.) (On application of doctrine in extraordinary writ proceedings, see 8 Cal. Proc. (4th), *Extraordinary Writs*, §148 et seq.)

Under appropriate circumstances, laches may operate to bar a claim by a public administrative agency if the requirements of unreasonable delay and resulting prejudice are met in either of two ways. First, they may be demonstrated by the evidence in the case, and the person arguing in favor of a finding of laches has the burden of proof on the laches issue. Second, 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. In the second situation, 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 show that the delay involved in the case was excusable, and 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 in administrative proceedings, but 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 on the strength of the analogy. (*Fountain Valley Regional Hosp. & Med. Center v. Bonta'a* (1999) 75 C.A.4th 316, 324, 89 C.R.2d 139 [in administrative proceeding to prevent public agency from assessing Medi-Cal liabilities for overpayment furnished to health care provider, trial judge erred in refusing to borrow several clearly

applicable statutes of limitations to determine whether burden of proof on laches should have shifted to agency].)

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

People v. Department of Housing & Community Dev. case:

Cross-Reference: 8 Cal. Proc. (5th), *Extraordinary Writs*, §155. *Application of doctrine in extraordinary writ proceedings:*

Cross-Reference: 8 Cal. Proc. (5th), *Extraordinary Writs*, §151 et seq.

(New) Distinction: doctrine may not prevent enforcement of important policy adopted for benefit of public: The doctrine of laches may not be asserted to prevent a public entity from enforcing an important policy adopted for the benefit of the public. (See *San Francisco v. Ballard* (2006) 136 C.A.4th 381, 392, 39 C.R.3d 1 [laches did not bar city's claim that sprinkling system in defendant's building violated fire prevention regulation for high-rise structures, and thus constituted public nuisance; relying on *Kajima/ Ray Wilson v. Los Angeles County Metropolitan Trans. Authority* (2000) 23 C.4th 305, 96 C.R.2d 747, 1 P.3d 63, 1 Summary (10th), *Contracts*, §987, which applied same rule in equitable estoppel context (see text, §196)]; *Golden Gate Water Ski Club v. Contra Costa* (2008) 165 C.A.4th 249, 263, 80 C.R.3d 876 [laches did not bar county from issuing nuisance abatement order against water skiing club that built structures in violation of open space restrictions, even though county delayed 35 years in issuing order; relying on *Feduniak v. California Coastal Com.* (2007) 148 C.A.4th 1346, 56 C.R.3d 591, Supp., infra, §197, which applied same rule in equitable estoppel context].)



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13 Witkin Sum. Cal. Law Equity § 18

[§ 18] Prejudice Not Shown.

Delay is not a bar unless it works to the disadvantage or prejudice of other parties. (*Newport v. Hatton* (1924) 195 C. 132, 148, 231 P. 987; *Alexander v. State Capital Co.* (1937) 9 C.2d 304, 313, 70 P.2d 619; *Abbott v. Los Angeles* (1958) 50 C.2d 438, 459, 326 P.2d 484; *Miller v. Eisenhower Med. Center* (1980) 27 C.3d 614, 624, 166 C.R. 826, 614 P.2d 258; *Security-First Nat. Bank of Los Angeles v. Superior Court* (1933) 132 C.A. 683, 687, 23 P.2d 1055; *Gallaher v. Iowa Oil Co.* (1934) 139 C.A. 100, 105, 33 P.2d 439; *McClelland v. Shaw* (1937) 23 C.A.2d 107, 115, 72 P.2d 225; see 27A *Am.Jur.2d* (1996 ed.), *Equity* §176 et seq.) Because even a long delay may not constitute laches as a matter of law, it is difficult to establish the defense by demurrer. (See 5 *Cal. Proc.* (4th), *Pleading*, §916.) (For illustrations finding that prejudice had not been sufficiently shown to justify application of doctrine of laches in mandamus proceedings, see 8 *Cal. Proc.* (4th), *Extraordinary Writs*, §150.)

Delay in reliance on legal advice, awaiting determination of a legal issue in another pending case, may be excusable. (See *Hopson v. National Union of Marine Cooks & Stewards* (1953) 116 C.A.2d 320, 325, 253 P.2d 733, 8 *Cal. Proc.* (4th), *Extraordinary Writs*, §150; *Weber v. Marine Cooks' & Stewards' Assn. of the Pac. Coast* (1954) 123 C.A.2d 328, 331, 266 P.2d 801.) The same is true of delay while negotiating in good faith, followed by the prompt institution of suit on the breakdown of the negotiations. (See *Frabotta v. Alencastre* (1960) 182 C.A.2d 679, 684, 6 C.R. 536; *Transwestern Pipeline Co. v. Monsanto Co.* (1996) 46 C.A.4th 502, 519, 53 C.R.2d 887, 4 *Summary* (10th), *Sales*, §34.)

In *Zakaessian v. Zakaessian* (1945) 70 C.A.2d 721, 161 P.2d 677, an action to cancel a deed allegedly executed by mistake was brought against successors of the grantee, 16 years after the transaction and 3 years after the death of the grantee. "If the defendants in their answer and proof show a great increase in value and improvements to the property, plus possession for the elapsed 16 years, the plaintiff's cause may be barred by laches." (70 C.A.2d 727.) It was held, however, that the face of the complaint did not justify the inference of prejudice. (70 C.A.2d 727.) The court perhaps did not give adequate consideration to the fact that the death of the grantee eliminated the most important witness for the defendants, and was necessarily prejudicial to them.

In *Field v. Bank of America* (1950) 100 C.A.2d 311, 223 P.2d 514, plaintiff wife, without knowledge of the facts, signed a waiver of community property rights in property that her husband then placed in trust. After her husband's

death many years later, she brought this action to have the trust annulled and her community property interest restored to her. The beneficiaries of the trust--the children--did not object, and assigned their interests to her. Defendant trustee, however, raised the defense of laches, which was sustained by the trial court. *Held*, reversed. The trustee was not prejudiced but actually benefited by plaintiff's inactivity; for many years its fees accrued by reason of her delay. (100 C.A.2d 314.)

In *Martin v. Santa Clara Unified School Dist.* (2002) 102 C.A.4th 241, 125 C.R.2d 337, plaintiff teacher was placed on an unpaid leave of absence for the duration of criminal proceedings involving drug-related charges against her. Plaintiff sued the school district that employed her for reinstatement and reimbursement after the charges were dismissed under the drug diversion statute, more than 1 year before she filed suit. *Held*, plaintiff was not barred from seeking relief on the ground of laches.

(a) Plaintiff had no legal obligation to keep defendant informed of the progress of the criminal proceedings. (102 C.A.4th 258.)

(b) Plaintiff's delay in filing suit until almost 1 year after completing diversion was not unreasonable. The drug charges were dismissed in August 1999, and plaintiff's attorney was not able to get a certified copy of the dismissal until November 1999. The attorney also sent several pieces of correspondence to defendant between December 1999 and April 2000. After informal attempts to resolve the matter over the next few months were unsuccessful, plaintiff filed the action in August 2000. (102 C.A.4th 258.)

A number of other decisions are illustrative:

Lam v. Bureau of Sec. & Investigative Services (1995) 34 C.A.4th 29, 39, 40 C.R.2d 137 [locksmith was not prejudiced by 3-year delay between filing of criminal action and revocation of his license, despite his claims that he "probably" would not have expanded his businesses had he known of pending revocation, and that delay impaired memory of psychologist testifying on his behalf].

Fahmy v. Medical Bd. of Calif. (1995) 38 C.A.4th 810, 818, 45 C.R.2d 486 [physician was not prejudiced by 3-year delay between medical board's discovery of his malpractice and revocation of his medical license, where all witnesses were able to testify effectively at disciplinary hearing, and physician's recollection of incident had been memorialized in deposition]; *Green v. Board of Dental Examiners* (1996) 47 C.A.4th 786, 795, 55 C.R.2d 140 [following *Fahmy*].

Robert F. Kennedy Med. Center v. Department of Health Services (1998) 61 C.A.4th 1357, 1362, 72 C.R.2d 180 [hospital was not prejudiced by department's 3-year delay in demanding repayment of Medi-Cal overpayment; demand was made within applicable statute of limitations, and hospital failed to carry overpayment as contingent liability on its books].

Committee to Save the Beverly Highlands Homes Assn. v. Beverly Highlands Homes Assn. (2001) 92 C.A.4th 1247, 1266, 112 C.R.2d 732 [in action to enjoin dissolution of nonprofit mutual benefit corporation, defendants failed to show how they or members who voted for dissolution had been prejudiced by delay in filing action, nor did record show how much time or expense defendants incurred in actions taken after dissolution vote].

Bono v. Clark (2002) 103 C.A.4th 1409, 1419, 128 C.R.2d 31, citing the text [declaratory relief action against husband's estate by wife, whose community property rights had not been resolved in pending dissolution proceeding when husband died; 3-year delay between husband's dissolution action and his death did not prejudice estate where estate was not harmed by his unavailability as witness].

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

Delay must be prejudicial: See 27A Am.Jur.2d (2008 ed.), *Equity* §143 et seq. *Cross-References:* 5 Cal. Proc. (5th), *Pleading*, §963 [establishing defense by demurrer]; 8 Cal. Proc. (5th), *Extraordinary Writs*, §153 [mandamus proceedings].

Hopson case:

Cross-Reference: 8 *Cal. Proc.* (5th), *Extraordinary Writs*, §153. The following cases are also illustrative:

Cedars-Sinai Med. Center v. Shewry (2006) 137 C.A.4th 964, 986, 41 C.R.3d 48, citing the text [Medi-Cal provider was properly required to reimburse state for overpayments; state's completion of audit within 2 years after fiscal year being audited was not unreasonable delay].

Bakersfield Elementary Teachers Assn. v. Bakersfield City School Dist. (2006) 145 C.A.4th 1260, 1274, 52 C.R.3d 486 [probationary teachers, misclassified as temporary employees not entitled to termination notice, challenged their classification after statutory deadline for school district to notify probationary employees of layoffs for economic reasons (see 3 *Summary* (10th), *Agency and Employment*, §311); delay in making challenge did not prejudice school district, because district led teachers to believe that they had no choice but to acquiesce to misclassification].

Pacific Hills Homeowners Assn. v. Prun (2008) 160 C.A.4th 1557, 1565, 73 C.R.3d 653 [homeowners challenged homeowners association ruling requiring them to move or reduce fence they erected in violation of height and setback restrictions; association's delay in enforcing restrictions was not prejudicial, because homeowners began building before they submitted application for approval of project, and association never acquiesced to project].

Estate of Molino (2008) 165 C.A.4th 913, 925, 81 C.R.3d 512 [heir hunter was not prejudiced by 9-year delay by heirs in suing to invalidate heir hunting contract as against public policy, where evidence showed that heir hunter had concealed existence of contract, and heirs had promptly produced it on discovering its existence].



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[§ 19] Prejudice Shown.

In *Hamud v. Hawthorne* (1959) 52 C.2d 78, 338 P.2d 387, plaintiff mortgagors gave an invalid contemporaneous quitclaim deed to allow strict foreclosure on default. But they waited over 5 years after recordation of the deed and transfers to various parties, and until a change in circumstances (interest of an oil company in the property), to bring their present action to have the deed declared a mortgage and for an accounting. *Held*, relief denied. "On the undisputed evidence, plaintiffs appear to be opportunists who are trying to pervert equity to recover a title and possession voluntarily surrendered in 1951, for which they then received fair value, and which they now seek to reclaim, not to right a wrong suffered by them in 1951 but to procure from defendants a value which was apparently unknown to either party until 1955." (52 C.2d 86.)

In *Vesper v. Forest Lawn Cemetery Assn.* (1937) 20 C.A.2d 157, 165, 67 P.2d 368, where plaintiffs sought to enjoin the maintenance of a mortuary, the fact that they had stood by without complaint during the construction of the building by defendants was held a bar to the action. (See *Gutknecht v. Paul* (1948) 83 C.A.2d 356, 357, 188 P.2d 764 [plaintiff, with full knowledge of activity, waited until defendant expended substantial sums in construction before seeking to enjoin].)

In *King v. Los Angeles County Fair Assn.* (1945) 70 C.A.2d 592, 161 P.2d 468, an action was brought by shareholders of a nonprofit corporation to set aside a transfer of assets. The court held that a delay of about 2 years was sufficient to justify raising the defense of laches on the face of the complaint, under the special circumstances, particularly the public interest in the corporation. (70 C.A.2d 596.)

In *Nealis v. Carlson* (1950) 98 C.A.2d 65, 219 P.2d 56, the wife obtained an interlocutory divorce decree in 1927. In 1935, the husband obtained a final decree on a false affidavit of compliance with alimony and support provisions of the interlocutory decree. Thereafter he made up all arrearages, continued regular payments, and gave the children substantial extra sums. Later he adopted the intervener and died in 1946, leaving her the major part of his estate. The wife, 8 years after actual knowledge of the final decree, moved to vacate it for fraud. *Held*, motion properly denied. Had the wife acted promptly on obtaining knowledge, the husband could have had a new final decree entered because he was then no longer in default; her delay was designed to defeat his testamentary disposition to the innocent intervener. (98 C.A.2d 68.)

In *Kimberlin v. Los Angeles City High School Dist.* (1953) 115 C.A.2d 459, 464, 252 P.2d 344, a dismissed probationary schoolteacher did not seek mandamus until a lapse of about a year, and after another teacher had been appointed to the vacant position. *Held*, laches barred the relief.

In *Brown v. State Personnel Bd.* (1985) 166 C.A.3d 1151, 213 C.R. 53, the court held that extreme delay in instituting a disciplinary proceeding against a university professor precluded his dismissal. "The loss of four years at the outset of an academic career is a considerable change of position in reliance upon the status quo. That works a sufficient prejudice to transform the unreasonable delay in this case into the bar of laches." (166 C.A.3d 1163.)

In *Getty v. Getty* (1986) 187 C.A.3d 1159, 232 C.R. 603, plaintiff trust beneficiary brought an action for reformation of the trust based on an alleged promise by the beneficiary's father, one of the trustees, to equalize the beneficiaries' shares. Plaintiff was receiving \$ 3,000 a year from the trust at the time of trial, while his three brothers were each receiving approximately \$ 27 million a year. *Held*, laches barred the relief. Plaintiff had delayed bringing his claim for 39 years after he could be charged with knowledge of the facts on which his claim was based, and for 29 years after he had reached the age of majority. During that time, important witnesses, including the original trustees, had died. (187 C.A.3d 1170.) (For illustrations finding that prejudice had been sufficiently shown to justify application of doctrine of laches in mandamus proceedings, see 8 Cal. Proc. (4th), *Extraordinary Writs*, §151.)

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

See *Magic Kitchen LLC v. Good Things Int., Ltd.* (2007) 153 C.A.4th 1144, 1162, 63 C.R.3d 713 [plaintiffs' 10-year delay in bringing trade dress infringement action prejudiced defendants, because defendants had invested significant resources in developing and marketing their product]. *Illustrations in mandamus proceedings:*

Cross-Reference: 8 Cal. Proc. (5th), *Extraordinary Writs*, §154.



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13 Witkin Sum. Cal. Law Equity § 20

[§ 20] Equitable Doctrine Codified.

(1) *In General.* Specific or preventive relief may not be granted to enforce a penalty or forfeiture "in any case." (C.C. 3369.) C.C. 3275 is more explicit. "Whenever, by the terms of an obligation, a party thereto incurs a forfeiture, or a loss in the nature of a forfeiture, by reason of his failure to comply with its provisions, he may be relieved therefrom, upon making full compensation to the other party, except in case of a grossly negligent, willful, or fraudulent breach of duty." These statutes codify the maxim that "equity abhors a forfeiture," and may give defensive or affirmative relief to prevent a serious loss to a defaulting party unwarranted by the nature of the default. (See *Hopkins v. Woodward* (1932) 216 C. 619, 622, 15 P.2d 499; *Leslie v. Federal Finance Co.* (1939) 14 C.2d 73, 78, 92 P.2d 906; *Ebbert v. Mercantile Trust Co. of Calif.* (1931) 213 C. 496, 499, 2 P.2d 776; *O'Morrow v. Borad* (1946) 27 C.2d 794, 800, 167 P.2d 483; *El Rio Oils (Canada) Ltd. v. Chase* (1949) 95 C.A.2d 402, 412, 212 P.2d 927; *Hill v. Hearron* (1952) 113 C.A.2d 763, 766, 249 P.2d 54; *Harriman v. Tetik* (1961) 56 C.2d 805, 811, 17 C.R. 134, 366 P.2d 486; *Carruth v. Madera* (1965) 233 C.A.2d 688, 701, 43 C.R. 855; *Holiday Inns of America v. Knight* (1969) 70 C.2d 327, 330, 74 C.R. 722, 450 P.2d 42, *infra*, §69; *Valley View Home of Beaumont v. Department of Health Services* (1983) 146 C.A.3d 161, 168, 194 C.R. 56; *Lauderdale Associates v. Department of Health Services* (1998) 67 C.A.4th 117, 122, 78 C.R.2d 802; 18 Cal. L. Rev. 681; 20 Cal. L. Rev. 194; 21 Cal. L. Rev. 516; 27 Cal. L. Rev. 583, 591; 40 Cal. L. Rev. 593; 25 So. Cal. L. Rev. 387; 10 Stanf. L. Rev. 355; 27A Am.Jur.2d (1996 ed.), *Equity* §72 et seq.; on rule of construction to avoid forfeiture, see 1 *Summary* (10th), *Contracts*, §§812, 826; 12 *Summary* (10th), *Real Property*, §19; *infra*, §62 et seq.)

"That relief from forfeiture will be granted only upon condition that the one relieved make full compensation to the other party for such damage as his failure to perform his covenants may have caused" is expressly stated in C.C. 3275, and "is universally required as a condition for denying enforcement of a forfeiture at the suit of the creditor." (*Ascherman v. McKee* (1956) 143 C.A.2d 277, 286, 299 P.2d 367.)

(2) *Exceptions.* An exception has been recognized where a statute contains a provision that has the effect of a forfeiture; unless constitutional defects are found, it will be enforced. (See *Palo & Dodini v. Oakland* (1947) 79 C.A.2d 739, 750, 180 P.2d 764 [charter provision for forfeiture of deposit accompanying bid for city contract, enforceable as matter of public policy]; *Castello v. Central Eureka Mining Co.* (1948) 85 C.A.2d 772, 774, 193 P.2d 968, 9 *Summary* (10th), *Corporations*, §100 [enforcing statutory provisions for forfeiture of stock for nonpayment of assessments]; but see *M.F. Kemper Const. Co. v. Los Angeles* (1951) 37 C.2d 696, 705, 235 P.2d 7, 1 *Summary* (10th), *Contracts*, §267

[limiting *Palo* case, and giving relief from mistaken bid].)

A contract that otherwise may be specifically enforced is not invalid merely because it imposes a penalty or provides for liquidated damages for its breach, if the party in default is willing to pay the penalty or liquidated damages. (C.C. 3389.)

West's Key Number Digest, Equity k.24

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

(1) *In General.* See 27A *Am.Jur.2d* (2008 ed.), *Equity* §52 et seq. (2) *Exceptions.* See *Life Care Centers of America v. CalOptima* (2005) 133 C.A.4th 1169, 1182, 35 C.R.3d 387 [under Welf.C. 14018.5, providing that C.C. 3275 does not apply to Medi-Cal reimbursement or prior authorization, county health system could enforce policy denying reimbursement to health care provider who fails to submit treatment authorization request within 21 days of patient's admission].



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CHAPTER XIX - Equity

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B. Equitable Maxims and Other General Doctrines.
8. Relief Against Forfeiture.
b. Illustrations.

13 Witkin Sum. Cal. Law Equity § 21

[§ 21] Illustrations.

(1) *Installment Contract for Sale of Land.* One of the most common situations in which the principle is applied is where a purchaser of land defaults in payment of an installment and the vendor attempts to terminate the purchaser's rights. (See *infra*, §60 et seq.)

(2) *Contract Between Debtor and Creditor.* In *Leslie v. Federal Finance Co.* (1939) 14 C.2d 73, 92 P.2d 906, plaintiffs, former owners of property, attempted to refinance their trust deed indebtedness to defendant, and in a consent interlocutory decree, were given a fixed period to do so. Performance was tendered 8 days late. Defendant contended that the decree was a mere option, with time of the essence, and that late performance need not be accepted. *Held*, the decree was more in the nature of an agreement of redemption, and the trial court should, pursuant to its equitable powers, relieve against the forfeiture. (14 C.2d 80.) (See *Steffen v. Refrigeration Discount Corp.* (1949) 91 C.A.2d 494, 498, 205 P.2d 727, 1 Summary (10th), *Contracts*, §1032 [acceleration clause in mortgage, calling for payment of unearned interest, will not be enforced]; *Bisno v. Sax* (1959) 175 C.A.2d 714, 724, 346 P.2d 814, 4 Summary (10th), *Security Transactions in Real Property*, §220.)

(3) *Construction Contract.* In *Selby v. Battley* (1957) 149 C.A.2d 659, 309 P.2d 120, plaintiff contractor agreed to improve a street and excavate a building site within 90 days, in consideration of a conveyance of one of defendants' two lots. Time was expressly made of the essence, and defendants later gave warning of forfeiture if timely performance was not made, but completion of the work was over 2 months late. *Held*, nevertheless, plaintiff was entitled to specific performance. Unexpected delays had been caused by governmental requirements and slow cooperation of public utility corporations and subcontractors. While these did not amount to impossibility or other legal excuse for performance (see 1 Summary (10th), *Contracts*, §828 et seq.), they were excusable in equity in the sense that plaintiff's default was not grossly negligent, wilful, or fraudulent. Moreover, defendants suffered no financial damage from the delay. (149 C.A.2d 664.) (On relief of contractor from mistaken bid, see *M.F. Kemper Const. Co. v. Los Angeles* (1951) 37 C.2d 696, 705, 235 P.2d 7, 1 Summary (10th), *Contracts*, §267; on relief of oil lessees, see *El Rio Oils (Canada) Ltd. v. Chase* (1949) 95 C.A.2d 402, 412, 212 P.2d 927, 12 Summary (10th), *Real Property*, §805.)

(4) *Personal Service Contract.* In *Hopkins v. Woodward* (1932) 216 C. 619, 15 P.2d 499, plaintiff licensed defendant to produce a play, and then sought to terminate the contract after defendant failed to stage the play on the

specified date. Defendant proved that the leading actor had been injured, that defendant was ready to produce the play a week later, and that he had offered to reimburse plaintiff for any loss suffered by the delay. *Held*, damages would adequately compensate plaintiff and forfeiture of the contract would not be permitted. (216 C. 621.) (See 21 *Cal. L. Rev.* 516.)

(5) *Lease*. A special statute deals with a defaulting tenant whose lease has been forfeited. On a showing of hardship and belated performance, the court may order restoration of the tenancy. (*C.C.P. 1179*; see *Hignell v. Gebala* (1949) 90 *C.A.2d* 61, 69, 202 *P.2d* 378 [limitations of C.C. 3275 are not applicable to proceeding under *C.C.P. 1179*]; *Pehau v. Stewart* (1952) 112 *C.A.2d* 90, 99, 245 *P.2d* 692 [*C.C.P. 1179* applies only in unlawful detainer proceeding; in other types of proceedings, C.C. 3275 governs]; 12 *Summary* (10th), *Real Property*, §670.)

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



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c. Wilful Breach or Default.

13 Witkin Sum. Cal. Law Equity § 22

[§ 22] Wilful Breach or Default.

(1) *Former Law Denying Relief.* A court acts on the theory that, although there is no legal excuse for performance, the circumstances and the conduct of the party warrant equitable relief. If the party seeking relief was guilty of a wilful breach or other intentional fault, the formerly established rule called for denial of relief. (See *Baffa v. Johnson* (1950) 35 C.2d 36, 39, 216 P.2d 13; *Crowell v. Riverside* (1938) 26 C.A.2d 566, 581, 80 P.2d 120 [covenant in lease against subletting]; *Biescar v. Czechoslovak-Patronat* (1956) 145 C.A.2d 133, 147, 302 P.2d 104; *Baldwin v. Kubetz* (1957) 148 C.A.2d 937, 947, 307 P.2d 1005, 12 Summary (10th), *Real Property*, §801 [no relief from effect of breach of condition subsequent to one whose own conduct rendered impossible further use of property on conditions imposed]; *Bellwood Discount Corp. v. Empire Steel Bldgs. Co.* (1959) 175 C.A.2d 432, 437, 346 P.2d 467.)

(2) *Current Law Granting Relief.* Later cases involving actions by vendors of real property have granted relief to a purchaser wilfully in default where otherwise the vendor would receive the equivalent of punitive damages instead of fair compensation. (See *Freedman v. The Rector, Wardens & Vestrymen of St. Matthias Parish of Los Angeles* (1951) 37 C.2d 16, 230 P.2d 629, and subsequent decisions, *infra*, §62 et seq.; 27A Am.Jur.2d (1996 ed.), *Equity* §79.)

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

(2) *Current Law Granting Relief.* See 27A Am.Jur.2d (2008 ed.), *Equity* §58.



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C. Marshaling Assets.

13 Witkin Sum. Cal. Law Equity § 23

[§ 23] Marshaling Assets.

(1) *Nature of Doctrine.* Where a creditor is entitled to resort to several funds for the satisfaction of a claim, and another person has an interest in, or is entitled as a creditor to resort to some but not all of the funds, the second creditor may require the first creditor to seek satisfaction from those funds to which the second creditor has no claim. (C.C. 3433.) (See *Citizens' Savings Bank of San Diego v. Mack* (1919) 180 C. 246, 251, 180 P. 618; *Shedoudy v. Beverly Surgical Supply Co.* (1980) 100 C.A.3d 730, 733, 161 C.R. 164; *Rest., Security* §53, Comment c; 53 *Am.Jur.2d* (1996 ed.), *Marshaling Assets* §1 et seq.; citing the text.) (On rule of sale in the inverse order of alienation, see C.C. 2899(4); *Commonwealth Land Title Co. v. Kornbluth* (1985) 175 C.A.3d 518, 526, 527, 220 C.R. 774; on marshaling where two funds covered by paramount lien are subject to subordinate liens in favor of different creditors, see 76 *A.L.R.3d* 326.)

(2) *Limitations on Doctrine.* The doctrine is applied only to the extent that it does not impair the first creditor's right to complete satisfaction of his or her claim and does not work an injustice on third persons. (C.C. 3433.) (See *Harrington v. Taylor* (1917) 176 C. 802, 807, 169 P. 690; *In re Bank of Oakley* (1933) 131 C.A. 203, 209, 21 P.2d 164; *Barton v. Clough* (1937) 20 C.A.2d 473, 476, 67 P.2d 358 [first creditor can resort to all debtor's property if necessary to avoid risk of loss to first creditor or impairment of his or her right to full satisfaction]; [doctrine does not compel lienholder to exhaust security before receiving dividends in liquidation, for result would be to prejudice lienholder's rights to full satisfaction].)

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

(1) *Nature of Doctrine.* See 53 *Am.Jur.2d* (2006 ed.), *Marshaling Assets* §1 et seq.



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A. In General.

1. Adequacy of Legal Remedy.

13 Witkin Sum. Cal. Law Equity § 24

[§ 24] Adequacy of Legal Remedy.

(1) *In General.* California courts will decree specific performance in the typical situations, subject to restrictions in C.C. 3384 et seq. The basic rule is that governing equitable relief generally, i.e., specific performance will be granted only when the legal remedy, such as an action for damages, is inadequate. (See *Morrison v. Land* (1915) 169 C. 580, 586, 147 P. 259; *Wehen v. Lundgaard* (1940) 41 C.A.2d 610, 612, 107 P.2d 491; *Sheppard v. Banner Food Products* (1947) 78 C.A.2d 808, 813, 178 P.2d 455; *Palo Alto-Menlo Park Yellow Cab Co. v. Santa Clara County Transit Dist.* (1976) 65 C.A.3d 121, 132, 133, 135 C.R. 192, citing the text; *Tamarind Lithography Workshop v. Sanders* (1983) 143 C.A.3d 571, 575, 193 C.R. 409 [breach of agreement to give writer-director of film screen credits; damages properly awarded for past damages, and specific performance granted to prevent future harm from exhibition of film without credits]; *Wilkison v. Wiederkehr* (2002) 101 C.A.4th 822, 833, 124 C.R.2d 631, citing the text [imposition of constructive trust on proceeds from sale of home was not proper, where plaintiff had adequate legal remedy in pursuing breach of contract to make will leaving home to plaintiff's father]; *Rest.2d, Contracts*, §359; 5A Corbin §1136, 1157; Cal. Civil Practice, 3 Business Litigation, §33:1 et seq.; 56 So. Cal. L. Rev. 795 [use of conditional specific performance decree to alleviate hardship arising from inflation and court congestion]; 71 Am.Jur.2d (2001 ed.), *Specific Performance* §10 et seq.; 5 Cal. Proc. (4th), *Pleading*, §§740 et seq., 759 et seq.)

(2) *Pleading and Proof.* Ordinarily inadequacy is determined by the pleadings and proof in each case. (*Flood v. Templeton* (1905) 148 C. 374, 377, 83 P. 148; see *Rest.2d, Contracts* §360; 5A Corbin §1142 et seq.; 71 Am.Jur.2d (2001 ed.), *Specific Performance* §221.) But in cases involving certain types of contracts, specific performance will almost invariably be granted. (See *infra*, §28 et seq.)

(3) *Statutory Restrictions.* Under C.C. 3384, specific performance of an obligation may be compelled subject to the following statutory restrictions:

- (a) There must be sufficient security for counterperformance. (C.C. 3386; see *infra*, §§53, 54.)
- (b) It is presumed that the breach of an agreement to transfer real property cannot be adequately compensated by monetary damages. (C.C. 3387; see *infra*, §§28, 29.)
- (c) A contract signed by one party only may be specifically enforced by the other party. (C.C. 3388; see *infra*, §55.)

(d) A contract otherwise specifically enforceable is not invalid merely because it imposes a penalty or provides for liquidated damages on breach, if the defaulting party is willing to pay the penalty or liquidated damages. (C.C. 3389; see *supra*, §20.)

(e) Personal service contracts and other enumerated contracts may not be specifically enforced. (C.C. 3390; see *infra*, §42 et seq.)

(f) A contract that does not provide adequate consideration or is otherwise unfair may not be specifically enforced. (C.C. 3391; see *infra*, §38 et seq.)

(g) A party who has not fulfilled the conditions precedent to a contract generally may not specifically enforce it. (C.C. 3392; see *infra*, §§56, 57, 64.)

(h) A seller of property who cannot provide good title to the purchaser may not specifically enforce the sales contract. (C.C. 3394; see *infra*, §56.)

(i) If an obligation relating to real property may be specifically enforced against a particular person, the obligation may also be enforced in the same manner against another person who subsequently acquires title to the property, except a good faith purchaser or encumbrancer for value. (C.C. 3395; see 7 *Cal. Proc.* (4th), *Judgment*, §188.)

West's Key Number Digest, Equity k.23; Specific Performance k.1 et seq.

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

(1) *In General*. See 93 *Cal. L. Rev.* 975 [actual and virtual specific performance, theory of efficient breach, and indifference principle]. *Cross-Reference*: 5 *Cal. Proc.* (5th), *Pleading*, §§784 et seq., 803 et seq.

(3) *Statutory Restrictions*. (i) *Enforcement of obligation against person who acquires title to realty*:

Cross-Reference: 7 *Cal. Proc.* (5th), *Judgment*, §208.



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2. Negative Covenants.

13 Witkin Sum. Cal. Law Equity § 25

[§ 25] Negative Covenants.

(1) *Express Negative Covenant.* Usually, the relief is in the form of an affirmative decree directing the defendant to perform. But when the contract or provision sought to be enforced is negative (a promise not to do a particular thing), equity grants relief by an injunction restraining the defendant from acting in violation of the agreement. (See *Rest.2d, Contracts* §§357, 359; *Smith v. Mendonsa* (1952) 108 C.A.2d 540, 543, 238 P.2d 1039, *infra*, §39 [adjoining landowner's promise not to permit trees to grow more than 15 feet high]; 5A Corbin §§1138, 1205 et seq.; 11 Williston 3d §1445.)

(2) *Affirmative Contract With Implied Negative Covenant.* Under C.C. 3423, an injunction will not be granted to prevent the breach of an affirmative contract except in certain special cases. (See *Anderson v. Neal Institutes Co.* (1918) 37 C.A. 174, 176, 173 P. 779; *Hunter v. Superior Court* (1939) 36 C.A.2d 100, 110, 97 P.2d 492; 6 Cal. L. Rev. 378.) The Restatement is *contra*. (*Rest.2d, Contracts* §§357, 367; see 5A Corbin §1205 et seq.; 11 Williston 3d §1448 et seq.)

In *Long Beach Drug Co. v. United Drug Co.* (1939) 13 C.2d 158, 168, 88 P.2d 698, 89 P.2d 386, plaintiff had an exclusive sales agency for defendant's products at certain prices. The contract was found to involve an implied affirmative covenant by defendant to sell to plaintiff and a negative covenant to refrain from selling to others. Plaintiff sought an injunction against sales to others. *Held*, injunction denied. The affirmative covenant involved continuous acts, and thus was not specifically enforceable (see *infra*, §45); further, to enjoin breach of the negative covenant would violate C.C. 3423. (13 C.2d 171.) Later cases have followed and applied the *Long Beach Drug* rule. (See *Whipple Road Quarry Co. v. L.C. Smith Co.* (1952) 114 C.A.2d 214, 216, 249 P.2d 854 [lessee's affirmative covenants to operate quarry, sell rock at prevailing rates, and pay royalties to lessor during term of lease]; *Nadell & Co. v. Grasso* (1959) 175 C.A.2d 420, 425, 346 P.2d 505, 13 Summary (10th), *Personal Property*, §29 [defense rejected]; *Thayer Plymouth Center v. Chrysler Motors Corp.* (1967) 255 C.A.2d 300, 304, 63 C.R. 148 [same].)

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



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A. In General.

3. Damages in Lieu of Specific Performance.

13 Witkin Sum. Cal. Law Equity § 26

[§ 26] Damages in Lieu of Specific Performance.

If the plaintiff sues for specific performance and this is denied, but facts supporting a cause of action for damages are pleaded, the plaintiff may be awarded a judgment for damages. (See *Long Beach Drug Co. v. United Drug Co. (1939) 13 C.2d 158, 173, 88 P.2d 698, 89 P.2d 386*, supra, §25 [where injunction is denied, damages may be given]; *Pascoe v. Morrison (1933) 219 C. 54, 57, 25 P.2d 9*; *Crouser v. Boice (1942) 51 C.A.2d 198, 203, 124 P.2d 358*; *Baran v. Goldberg (1948) 86 C.A.2d 506, 510, 194 P.2d 765*; *Brandolino v. Lindsay (1969) 269 C.A.2d 319, 325, 75 C.R. 56*; *Rest.2d, Contracts §358*; 5A Corbin §1161; 11 Williston 3d §1430; Cal. Civil Practice, 3 Business Litigation, §33:1 et seq.; 22 Cal. L. Rev. 208; 71 Am.Jur.2d (2001 ed.), *Specific Performance* §§233, 234; 5 Cal. Proc. (4th), *Pleading*, §740.)

SUPPLEMENT: [This section is current through the latest supplement]
Cross-Reference: 5 Cal. Proc. (5th), *Pleading*, §784.



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4. Damages Incidental to Specific Performance.

13 Witkin Sum. Cal. Law Equity § 27

[§ 27] Damages Incidental to Specific Performance.

In *Ellis v. Mihelis* (1963) 60 C.2d 206, 32 C.R. 415, 384 P.2d 7, *infra*, §55, an action by a purchaser to enforce a land sale contract, the judgment granted specific performance and rents and profits from the time the plaintiff was entitled to a conveyance.

(a) "The compensation awarded as incident to a decree for specific performance is not for breach of contract and is therefore not legal damages. The complainant affirms the contract as being still in force and asks that it be performed. If the court orders it to be performed, the decree should as nearly as possible require performance in accordance with its terms. One of the terms is the date fixed by it for completion, and since that date is past, the court, in order to relate the performance back to it, gives the complainant credit for any losses occasioned by the delay and permits the defendant to offset such amounts as may be appropriate. The result is more like an accounting between the parties than like an assessment of damages." (60 C.2d 219.)

(b) However, in this type of a case, the defendant is normally entitled to offset interest on the entire purchase price. The reason is that the judgment seeks to relate the performance back to the contract date of performance; the purchaser therefore gets the rents and profits, and the vendor should get the benefit of the money (interest) the vendor would have received on the purchase price. An exception is recognized where the purchaser has, with notice to the vendor, set aside the money so that the purchaser realizes no benefit from it. (60 C.2d 220.) (See 5A Corbin §1160; 11 Williston 3d §1430; 71 Am.Jur.2d (2001 ed.), *Specific Performance* §225 et seq.; 11 A.L.R.4th 891 [special or consequential damages arising from delay in delivering possession].)

In *Hutton v. Gliksberg* (1982) 128 C.A.3d 240, 180 C.R. 141, plaintiff purchasers sued defendant vendors for specific performance of a contract to sell an apartment building. The contract provided that plaintiff purchasers would procure a new first deed of trust loan at current rates and charges, and would execute a second deed of trust loan with interest at 1/4% more than the interest on the first deed of trust. The trial court granted specific performance, and also awarded the purchasers \$ 122,219 as compensation. The basis of the monetary award was that, at the time specified for performance, the purchasers had a loan commitment at 9 1/4% interest, but at the time of the judgment, the prevailing rate was 14%. *Held*, affirmed. The only compensation previously awarded in California involved adjustments relating to loss of use of the property or purchase money during the period required to pursue the specific performance remedy. (128 C.A.3d 248.) However, equitable remedies are flexible and capable of expansion to meet new demands of justice

(128 C.A.3d 249, citing *Wuest v. Wuest* (1942) 53 C.A.2d 339, 346, 127 P.2d 934), and decisions in other states have approved this kind of award. (128 C.A.3d 249.)

The financial adjustment theory of *Ellis* was restated and applied in *Stratton v. Tejani* (1982) 139 C.A.3d 204, 187 C.R. 231, affirming a judgment for specific performance in favor of purchasers.

(a) When the purchaser is deprived of possession pending resolution of the dispute and the vendor receives rents and profits, the purchaser is entitled to a credit against the price for those rents and profits from the time the property should have been conveyed. (139 C.A.3d 212.)

(b) The vendor must also be treated as if he had performed in a timely fashion, and is entitled to the value of his lost use of the purchase money during the period that performance was delayed. (139 C.A.3d 212.)

(c) There are some limitations on these general rules. "First, the buyer may not receive both the profits and reasonable rental value of the property and the value derived from his use of purchase funds which were not irrevocably allocated toward the purchase price. The buyer must reduce his credit for rents and profits by a sum equivalent to the value of his use of the retained purchase funds. ... Second, if any part of the purchase price has been set aside by the buyer with notice to the seller, the seller may not receive credit for his lost use of those funds. ... Third, any award to the seller representing the value of his lost use of the purchase money cannot exceed the rents and profits awarded to the buyer, for otherwise the breaching seller would profit from his wrong." (139 C.A.3d 213.)

(d) The best method of computing the value to the purchasers of their retained purchase funds and to the vendors of their lost purchase money is to hold an evidentiary hearing on (1) the rate of interest paid by the vendors to maintain the trust deeds during the delay period, (2) the purchasers' use of the retained purchase funds during that period, and (3) the types of investments open to both for that period. (139 C.A.3d 213.)

(e) The purchasers may also be entitled to "interest differential damages" if they have to pay interest on their loan at a higher rate than at the time escrow would have been timely closed. "[W]e believe a court must acknowledge the economic reality that if a seller's breach causes a buyer to pay interest on a real estate loan higher than the rate initially bargained for, then that buyer sustains damages for each dollar unnecessarily expended." (139 C.A.3d 214.)

On this point, the court disagreed with the factual assumptions made in *Hutton*. Residential real property is usually held for only 3 to 10 years; and if the purchaser sells shortly after the escrow closes, the interest differential under the *Hutton* formula would be a windfall. The preferable solution is for the trial judge to determine factually how long the purchaser will remain in possession (i.e., did he buy for investment or as a residence). If the judge is unable to make this determination, other solutions are available; e.g., the judge may be able to isolate the difference in market value caused by a residence bearing a real estate loan at a higher rate of interest, and then credit that sum to the purchasers against the purchase price. (139 C.A.3d 214.)

In *Bravo v. Buelow* (1985) 168 C.A.3d 208, 214 C.R. 65, the court, applying the reasoning of *Ellis* and *Hutton*, held that a purchaser of real property was entitled to compensation for increased costs of intended construction of a home occasioned by the seller's delay in conveying title. (168 C.A.3d 209, 213, 215.)

In *Rogers v. Davis* (1994) 28 C.A.4th 1215, 34 C.R.2d 716, plaintiff purchaser sued defendants for specific performance of an oral contract to sell real property and, alternatively, for damages. While the action was pending the property was sold to third parties at a trustee's foreclosure sale. The trial judge apportioned remaining sale proceeds between plaintiffs and defendants, plaintiffs receiving their portion as equitable owners of the property. *Held*, affirmed.

(a) *Specific performance and additional compensation.* Plaintiffs may recover property through specific performance and additional compensation when that compensation is necessary to fully vindicate their contractual rights. (28 C.A.4th 1221.)

(b) *Specific performance when contract performance is "impossible."* The foreclosure sale did not render specific performance impossible. Specific performance need not be absolute in form, nor identical with that promised in the contract. "The exact performance that is promised in a contract may be, in part or in whole, very difficult of enforcement, it may have become impossible or unlawful, and it may be such that exact enforcement would work unreasonable hardship. The court may nevertheless be able to achieve substantially the same result without undue difficulty, without hardship to the defendant, and without violation of the law or of the rights of third persons. In such cases the decree may be so drawn as best to achieve this result. It may command a performance by the defendant that is not identical with that which he promised to perform." (28 C.A.4th 1222, quoting Rest. Contracts §359.)

(c) *Right to specific performance establishes entitlement to compensation.* Although it was impossible to specifically enforce the sale of the property, plaintiffs proved both the existence of the contract and all of the elements required for specific performance. Thus, they established their entitlement, as equitable owners of the property, to the remaining proceeds from the foreclosure sale after recompense to the beneficiaries of the deeds of trust. (28 C.A.4th 1222, 1223.) Although the facts of the case were not directly on point with any other cases involving equitable conversion, "[e]quity does not wait upon precedent which exactly squares with the facts in controversy, but will assert itself in those situations where right and justice would be defeated but for its intervention." (28 C.A.4th 1223.) Thus, the trial judge correctly found plaintiffs to be equitable owners at the time of the foreclosure sale, and the equitable relief granted here had substantially the same legal effect as the promised performance. (28 C.A.4th 1224.)

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

Kassir v. Zahabi (2008) 164 C.A.4th 1352, 80 C.R.3d 1, applied one of the rent-offset limitations discussed in *Stratton v. Tejani* (1982) 139 C.A.3d 204, 187 C.R. 231, text, p. 316, to deny an offset, against rents awarded to a purchaser incidental to specific performance, to the vendor as compensation for the loss of use of the purchase price that he would have received under the purchase contract. Because the property was over encumbered, the vendor would not have received anything under that agreement. Had escrow closed as scheduled, the escrow holder would have used all of the funds paid into escrow to pay off existing liens. (164 C.A.4th 1359.)



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CHAPTER XIX - Equity

Witkin Summary of California Law
II. SPECIFIC PERFORMANCE OF CONTRACTS
A. In General.

5. (New) Attorneys' Fees Are Not Incidental to Specific Performance.

13 Witkin Sum. Cal. Law Equity § 27A

[§ 27A] (New) Attorneys' Fees Are Not Incidental to Specific Performance.

In *Behniwal v. Mix* (2007) 147 C.A.4th 621, 54 C.R.3d 427, citing the text, an action by purchasers to enforce a contract to sell a family residence, the judgment granted specific performance to the purchasers and awarded them attorneys' fees as an offset against the purchase price. *Held*, the award of attorneys' fees as an offset was reversed.

(a) An award of attorneys' fees sought by a successful purchaser in a specific performance action is not a true incident to the judgment for specific performance. Unlike an adjustment for an interest rate differential to compensate for the lost time of performance on the contract to convey, for example, the award is itself a matter of simple contract. The prevailing party's right to fees is pursuant to C.C. 1717, which governs attorneys' fees awarded under contract. (147 C.A.4th 630.) Nor can such an award be characterized as incidental to the specific performance judgment on the theory that attorneys' fees are mere costs authorized by statute. Contractual attorneys' fees are not routine costs, but rather, they are a separately litigated issue. (147 C.A.4th 631.)

(b) To permit the deduction of a contractual attorneys' fees award from off the top of the purchase price also would "play absolute havoc" with the law of liens and lien priorities. Under the judgment, the purchasers' attorneys' fees would be given effective precedence over even government liens for unpaid property taxes and purchase money deeds of trust entered into prior to the litigation. That result is not allowed. (147 C.A.4th 631.)

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



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13 Witkin Sum. Cal. Law Equity § 28

[§ 28] Action by Purchaser.

(1) *Presumption That Damages Are Inadequate.* In the case of a contract for the transfer of land, or an interest in land, whether by sale or lease, it is presumed that damages would not adequately compensate. The plaintiff need not establish inadequacy of the legal remedy in the particular case; historically, land is treated as unique, and specific performance will therefore be granted as a matter of course unless some other equitable reason for denial is shown. In the case of a single-family dwelling that the party seeking performance intends to occupy, this presumption is conclusive. In all other cases, this presumption is one affecting the burden of proof. (C.C. 3387; see *Remmers v. Ciciliot* (1943) 59 C.A.2d 113, 119, 138 P.2d 306; *Fleishman v. Woods* (1901) 135 C. 256, 261, 67 P. 276; *Pike v. Hayden* (1950) 97 C.A.2d 606, 612, 218 P.2d 578 [agreement to lease service station and cafe]; *Ellison v. Ventura Port Dist.* (1978) 80 C.A.3d 574, 579, 145 C.R. 665, citing the text; *Abadjian v. Superior Court* (1985) 168 C.A.3d 363, 374, 214 C.R. 234 [in granting specific performance, court may require setoff against purchase price for rent paid by purchaser during period in which vendor wrongfully refused to perform]; *Blackburn v. Charnley* (2004) 117 C.A.4th 758, 766, 11 C.R.3d 885 [legal descriptions in real estate purchase agreements were sufficiently certain and definite to enforce]; *Rest.2d, Contracts* §360, Comment e; 5A Corbin §1143; 11 Williston 3d §1418A; C.E.B., 2 Real Property Remedies and Damages 2d, §5.1 et seq.; Cal. Civil Practice, 3 Business Litigation, §33:11; 71 Am.Jur.2d (2001 ed.), *Specific Performance* §133 et seq.; 22B Am.Jur. P.P. Forms (2001 ed.), *Specific Performance* §48 et seq.; C.E.B., 1 Real Property Sales Transactions 3d, §4.136.) (On inherent power of court to make decree effective by additional orders affecting details of performance, see *Barnes v. Chamberlain* (1983) 147 C.A.3d 762, 767, 195 C.R. 417, 7 Cal. Proc. (4th), *Judgment*, §83; on presumptions affecting burden of proof, see 1 Cal. Evidence (4th), *Burden of Proof and Presumptions*, §86 et seq.)

(2) *Ability To Perform.* Specific performance will be denied, however, where the purchaser is not ready, willing, and able to perform both at the time the contract is entered into and during the specific performance action. (See *Am-Cal Inv. Co. v. Sharlyn Estates* (1967) 255 C.A.2d 526, 539, 63 C.R. 518; *C. Robert Nattress & Associates v. CIDCO* (1986) 184 C.A.3d 55, 64, 229 C.R. 33; *Consolidated World Inv. v. Lido Preferred Ltd.* (1992) 9 C.A.4th 373, 381, 11 C.R.2d 524 [purchaser who failed to open escrow before time expired for close of escrow was not entitled to specific performance].)

Notwithstanding the general rule, evidence of adequate assets to purchase the property may be sufficient. (See *Henry v. Sharma* (1984) 154 C.A.3d 665, 669, 201 C.R. 478.) Specific performance also will not be denied as a matter

law merely due to the absence of evidence about a purchaser's financial ability, even where the purchaser refuses to testify about that ability on privacy grounds. (See *Gaggero v. Yura* (2003) 108 C.A.4th 884, 890, 134 C.R.2d 313, 6 Cal. Proc. (4th), *Proceedings Without Trial*, Supp., §216.) And a purchaser who fulfills all of its obligations, except for timely depositing the purchase price in escrow, will not be denied specific performance if that failure is attributable to the vendor's substantial noncompliance with the vendor's escrow obligations. (See *Ninety Nine Investments Ltd. v. Overseas Courier Service (Singapore) Private, Ltd.* (2003) 113 C.A.4th 1118, 1134, 6 C.R.3d 891 [commercial vendor failed to submit city report of pending special assessment liens, rent statement, documents to obtain tax deferred exchange, articles of incorporation, and loan information, resulting in purchaser's loans failing to fund]; *Galdjie v. Darwish* (2003) 113 C.A.4th 1331, 1343, 7 C.R.3d 178 [vendor failed to timely submit termite inspection report, resulting in purchaser's loan failing to fund].)

(3) *Equitable Conversion Doctrine*. If a vendor agrees to sell land to a purchaser, and the purchaser agrees to sell all or part to a subpurchaser, the subpurchaser is usually held entitled to specific performance. Under the doctrine of equitable conversion (infra, §174), the purchaser's equitable title may be deemed to pass to the subpurchaser. (See *Miller v. Dyer* (1942) 20 C.2d 526, 529, 127 P.2d 901 [vendor and purchaser joined as defendants]; 4 *Stanf. L. Rev.* 443; 71 *Am.Jur.2d* (2001 ed.), *Specific Performance* §189.) There may be circumstances, however, where specific performance will be denied for hardship or unfairness to the vendor, e.g., where the subpurchaser has bought only a small portion of the land sold by the vendor. (See 4 *Stanf. L. Rev.* 445.)

In *Walgren v. Dolan* (1990) 226 C.A.3d 572, 276 C.R. 554, the settlor and beneficiary of a revocable living trust retained absolute control of the trust property, including the power to direct the trustee to buy or sell real property. He individually entered into a contract to sell a parcel of trust property to plaintiff. After the settlor's death, plaintiff sought specific performance (with an alternative prayer for damages) against defendant trustee. *Held*, plaintiff was entitled to specific performance.

(a) In the absence of death, the contract would have been specifically enforceable against the settlor. Unlike the beneficiary of an ordinary trust who is empowered only to convey his or her beneficial interest, the settlor here had complete power to direct the trustee to buy or sell property. "It would seem inequitable, indeed, to permit one with absolute power over title to realty to decline to perform an agreement for sale of the realty because bare legal title was held in the name of a trustee." (226 C.A.3d 576.) Thus, under the doctrine of equitable conversion, specific performance should be available. (226 C.A.3d 577, relying on an Illinois decision.) Statutes preserving the rights of creditors of a settlor who retains the power to revoke support this conclusion. (226 C.A.3d 578.)

(b) The settlor's death in no way impairs plaintiff's right to specific performance. The enforceability of the contract survived decedent's death. Although plaintiff's action for damages presumably should have been brought against the settlor's estate, "the action for specific performance necessarily had to be brought against the successors-in-interest to the title to the realty, which would be either the trustees or the successor beneficiaries of the trust." (226 C.A.3d 579.)

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

(1) *Presumption That Damages Are Inadequate*. See *Real Estate Analytics, LLC v. Vallas* (2008) 160 C.A.4th 463, 480, 72 C.R.3d 835 [overturning trial judge's refusal to award specific performance for breach of contract to sell real property on ground that monetary damages were adequate remedy for purchaser whose primary motivation was to quickly sell property for profit]; C.E.B., 1 Real Property Sales Transactions 4th, §4.149. *Barnes case*:

Cross-Reference: 7 Cal. Proc. (5th), *Judgment*, §81.

(2) *Ability To Perform*.

Evidence of adequate assets to purchase property is sufficient: See *Behniwal v. Mix* (2005) 133 C.A.4th 1027, 1044, 35 C.R.3d 320. *Gaggero case*:

Cross-Reference: 6 Cal. Proc. (5th), *Proceedings Without Trial*, §240.



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13 Witkin Sum. Cal. Law Equity § 29

[§ 29] Action by Vendor.

(1) *Rule and Theory.* Although the usual case involves an action by the purchaser (*supra*, §28), the vendor may also obtain specific performance, i.e., a judgment for the full purchase price. This is not because of the unique character of the subject of the action. (The vendor asks for money and not land.) The reasons are as follows:

(a) *Inadequacy of remedy.* Other kinds of inadequacy of remedy, such as the difficulty of proving the precise amount of damages suffered.

(b) *Affirmative mutuality.* The doctrine of affirmative mutuality; i.e., where the plaintiff's promise could have been specifically enforced (here by the purchaser), specific performance should be granted against the defendant (the purchaser) even though the defendant's promise is not of a type that could have been specifically enforced (ordinary promise to pay money). Under the Restatement, however, the fact that the plaintiff's promise was specifically enforceable is not itself a sufficient reason for granting the remedy to the plaintiff, though it is a factor to be considered. (*Rest.2d, Contracts* §363, Comment c; 5A Corbin §1145; C.E.B., 1 Real Property Sales Transactions 3d, §4.130; C.E.B., 2 Real Property Remedies and Damages 2d, §5.1 et seq.; Cal. Civil Practice, 3 Business Litigation, §33:12; see 28 Cal. L. Rev. 492; 71 Am.Jur.2d (2001 ed.), *Specific Performance* §133 et seq.; 22B Am.Jur. P.P. Forms (2001 ed.), *Specific Performance* §33 et seq.)

In *Laske v. Lampasona* (1948) 89 C.A.2d 284, 200 P.2d 871, defendant purchaser contended that the vendor was only entitled to an alternative decree, under which defendant could pay the price and accept a deed, or on defendant's failure, the property would be sold to satisfy the judgment for the price. The court rejected this contention, holding that the vendor was entitled to specific performance, i.e., a decree for the entire purchase price. Some stress was laid on the special circumstance that the full price had already been paid into escrow. (89 C.A.2d 288.) (See *Goldsworthy v. Dobbins* (1952) 110 C.A.2d 802, 808, 243 P.2d 883, 4 Summary (10th), *Security Transactions in Real Property*, §188 [C.C.P. 580b, limiting deficiency judgment, did not abolish vendor's right to specific performance]; *BD Inns v. Pooley* (1990) 218 C.A.3d 289, 293, 296, 266 C.R. 815.)

(2) *Vendor's Recovery of Interest.* A vendor who gets a decree is entitled to interest on the price (damages for loss of use of the purchase money during the period preceding judgment). And the rule is equally applicable where the

purchaser gets a decree; i.e., the court should safeguard the rights of the defendant vendor who is ordered to perform. (*Greenstone v. Claretian Theological Seminary, Claretville* (1959) 173 C.A.2d 21, 36, 343 P.2d 161, 5 Cal. Proc. (4th), Pleading, §742 [purchaser given specific performance with credit for rents paid during litigation; vendor was properly allowed credit for interest on price].)

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

(1) *Rule and Theory*.

(b) *Affirmative mutuality*. See C.E.B., 1 Real Property Sales Transactions 4th, §4.143.(2) *Vendor's Recovery of Interest*.

Greenstone case:

Cross-Reference: 5 Cal. Proc. (5th), Pleading, §786.



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2. Contract Concerning Personal Property.

13 Witkin Sum. Cal. Law Equity § 30

[§ 30] Contract Concerning Personal Property.

(1) *In General: Unique Property.* The general rule, formerly expressed in C.C. 3387, is that the breach of an agreement to transfer personal property will not justify specific performance, except in the case of unique chattels such as heirlooms or shares of stock not obtainable on the open market. (See *Gilfallan v. Gilfallan* (1914) 168 C. 23, 25, 141 P. 623; *LeMoyne Ranch v. Agajanian* (1932) 121 C.A. 423, 425, 8 P.2d 1055; *Henderson v. Fisher* (1965) 236 C.A.2d 468, 473, 46 C.R. 173; *Rest.2d, Contracts* §360, Comment b; 5A Corbin §1146, 1149; 11 Williston 3d §1419 et seq.; Cal. Civil Practice, 3 Business Litigation, §33:13; 28 A.L.R.3d 1401 [damages and specific performance for delay in performing contract for sale of corporate stock]; 82 A.L.R.3d 1102 [agreement for sale of private franchise]; 71 *Am.Jur.2d* (2001 ed.), *Specific Performance* §171 et seq.)

(2) *Effect of Former Sales Act.* On the adoption of the Uniform Sales Act in 1931, C.C. 3387 was amended to omit the presumption that damages would adequately compensate for the breach of an agreement; and under the Act, specific performance could be given by a court of equity when appropriate. (See *Price v. McConnell* (1960) 184 C.A.2d 660, 666, 7 C.R. 695, citing the text [purchase of breeding heifers; specific performance granted as to contract term calling for delivery of their registration papers]; 9 Cal. L. Rev. 33; 64 *Harv. L. Rev.* 512.) There was a difference of opinion whether this loose provision was intended to liberalize the requirements for specific performance or merely to codify the former equity practice. (See *Bomberger v. McKelvey* (1950) 35 C.2d 607, 616, 220 P.2d 729 [dictum that Act "exemplifies a tendency" to liberalize specific performance]; 64 *Harv. L. Rev.* 512 [draftsman's intention was to broaden availability of remedy, but most courts are contra].)

The Act, however, applied only to sales of goods. As to other types of transfer, and other kinds of personal property, the rule was uncertain in view of the complete omission of the former statutory presumption. Several decisions inadvertently treated the former provision of C.C. 3387 as still in effect. (See *Wehen v. Lundgaard* (1940) 41 C.A.2d 610, 613, 107 P.2d 491; *Dunner v. Hoover* (1941) 43 C.A.2d 753, 757, 111 P.2d 737 [denying specific performance of agreement to deliver list of dairy customers]; *Korabek v. Weaver Aircraft Corp.* (1944) 65 C.A.2d 32, 40, 149 P.2d 876 [granting specific performance of agreement to transfer stock to promoter of corporation, where shares were not yet marketable and of indeterminable value]; on factors involved, see *Rest.2d, Contracts* §360.)

(3) *Uniform Commercial Code.* The availability of the remedy in sales of goods was greatly increased by U.C.C. 2716. Specific performance may now be decreed "where the goods are unique or in other proper circumstances." This

provision is intended "to give the buyer rights to the goods comparable to the seller's rights to the price." (U.C.C. 2716, Official Comment 4.) In addition, the Code introduced a new concept of what are "unique" goods. The test of uniqueness now is made "in terms of the total situation which characterizes the contract." (U.C.C. 2716, Official Comment 2; see 4A Anderson 3d, §2-716; Cal. Civil Practice, 3 Business Litigation, §33:14; 67A *Am.Jur.2d* (2003 ed.), *Sales* §1046 et seq.; 4 *Summary* (10th), *Sales*, §209; 5 *Cal. Proc.* (4th), *Pleading*, §760; on what constitutes "goods" under Code, see 4 *Summary* (10th), *Sales*, §22 et seq.)

(4) *Ordinary Chattels in Scarce Supply*. Cases arising during World War II and the post-war period raised a special problem. Does an ordinary chattel, such as an automobile, become "unique" and the subject of specific performance because at the particular time it is not generally available on the market? The legal remedy is in fact inadequate, and if this basic test is used (instead of the conventional classification of ordinary and unique chattels), specific performance could be justified. This approach was taken in *Bomberger*. Plaintiffs sold land to defendants, contracting to wreck and salvage an old building thereon for \$ 3,500. Plaintiffs had informed defendants that they needed the salvaged material for another construction job. Defendants later repudiated, but plaintiffs nevertheless performed and sued for the contract price. *Held*, plaintiffs were entitled to judgment. "The fact that the agreement involved property which was scarce and under priority is of particular importance in the present case." (35 *C.2d* 616.) The court followed cases from other jurisdictions holding that a buyer of ordinary materials may have specific performance if the buyer needs them in his or her business and cannot obtain them or their equivalent within the local marketing area. (35 *C.2d* 616.)

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

(3) *Uniform Commercial Code*.

Unique goods:

Cross-Reference: 5 *Cal. Proc.* (5th), *Pleading*, §804.



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3. Contract To Make Will or Deed.
a. Quasi-Specific Performance by Constructive Trust.

13 Witkin Sum. Cal. Law Equity § 31

[§ 31] Quasi-Specific Performance by Constructive Trust.

(1) *Contract To Make Will*. A contract in writing, binding a person to make a particular disposition of property by will, is valid. A contract to make a will may be established by "clear and convincing evidence" of an agreement or a promise between the decedent and the claimant, or between the decedent and another person for the benefit of the claimant. The agreement is enforceable in equity. (*Prob.C. 21700*; see 1 *Summary* (10th), *Contracts*, §371; 14 *Summary* (10th), *Wills and Probate*, §326.) The court cannot compel the execution of a will, but it may declare a constructive trust on the property in the hands of those who have succeeded to the estate. This is, in effect, the equivalent of specific performance, and it is sometimes termed "quasi-specific performance." (See *Wolf v. Donahue* (1929) 206 C. 213, 220, 273 P. 547; *Staples v. Hawthorne* (1929) 208 C. 578, 582, 283 P. 67; *Bank of California Nat. Assn. v. Superior Court* (1940) 16 C.2d 516, 524, 106 P.2d 879; *Crail v. Blakely* (1973) 8 C.3d 744, 751, 106 C.R. 187, 505 P.2d 1027; *Sonnicksen v. Sonnickson* (1941) 45 C.A.2d 46, 53, 113 P.2d 495 [separation agreement with promise to make mutual wills]; *Fowler v. Hansen* (1941) 48 C.A.2d 518, 522, 120 P.2d 161; *Thompson v. Beskeen* (1963) 223 C.A.2d 292, 35 C.R. 676; *Riganti v. McElhinney* (1967) 248 C.A.2d 116, 122, 56 C.R. 195; *Porporato v. Devincenzi* (1968) 261 C.A.2d 670, 68 C.R. 210; *Walton v. Walton* (1995) 31 C.A.4th 277, 282, footnote 2, 36 C.R.2d 901, 7 *Cal. Proc.* (4th), *Trial*, §97, citing the text; *Estate of Brenzikofer* (1996) 49 C.A.4th 1461, 1466, 57 C.R.2d 401 [decedent's neighbors were entitled to quasi-specific performance of oral agreement to will them house they were renting from decedent in return for 26 years of care they had given to decedent and her cats]; 11 *Williston* 3d §1420; 22 *Proof of Facts*, *Contract To Make Will* §1 et seq.; 5 *Cal. Proc.* (4th), *Pleading*, §761; on constructive trusts, see 13 *Summary* (10th), *Trusts*, §319 et seq.)

Where a constructive trust is imposed, the trust res is part of the probate estate and subject to administration. (See *Estate of Torino* (1970) 8 C.A.3d 642, 646, 87 C.R. 581.)

(2) *Contract To Deed Property*. The same theory of quasi-specific performance is invoked, and the same principles are applied, where the promise is to convey property by deed. (See *Henderson v. Fisher* (1965) 236 C.A.2d 468, 472, 473, 478, 46 C.R. 173, citing the text.)

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

(1) *Contract To Make Will*.

Walton case:

Cross-Reference: 7 Cal. Proc. (5th), Trial, §87.

Pleading:

Cross-Reference: 5 Cal. Proc. (5th), Pleading, §805.



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B. When Specific Performance May Be Granted.

3. Contract To Make Will or Deed.

b. Imposition of Trust During Promisor's Lifetime.

13 Witkin Sum. Cal. Law Equity § 32

[§ 32] Imposition of Trust During Promisor's Lifetime.

In *Westbrook v. Superior Court* (1986) 176 C.A.3d 703, 222 C.R. 317, plaintiff alleged that in 1968 he entered into an agreement with defendant Fairchild, in which plaintiff agreed to make substantial payments to defendant and to give up any claims against the estate of defendant's wife, and defendant agreed to make a will leaving all of his property to plaintiff. The agreement also provided that defendant "shall not in any way alter, change, modify, or do any act which in any way would change, the distribution of property as set forth in the will." (176 C.A.3d 707.) Plaintiff alleged that he performed all of his obligations, but that defendant refused to confirm that he had made the will and told plaintiff that he would leave him nothing. In 1978, defendant acquired a valuable ground lease to a parcel of real property in Palm Springs, which he intended to develop for his own use. Plaintiff filed a lis pendens against the property on the theory that he was entitled to a constructive trust to prevent defendant from placing the property--allegedly his only asset--beyond plaintiff's reach. The trial judge granted defendant's motion to expunge the lis pendens, and plaintiff sought review by mandamus. *Held*, writ denied; the expungement was proper.

(a) *Factors justifying application of rule.* A number of cases have held that the promisee of a contract to leave property by will need not wait until the promisor's death to enforce the contract, but may seek equitable relief against inter vivos conveyances made in fraud of the promisee's rights. (176 C.A.3d 711.) However, whether this rule applies depends on the circumstances of each case, and the significant variables appear to be the following: "(1) the nature and subject of the contract to leave property, that is, whether the contract relates to specific property or property which has become specific by death of a party and whether the contract restricts the right of the promisor to dispose of or otherwise deal with the property during his or her lifetime; (2) whether or not there has been an act by the promisor in contravention of the agreement; and (3) the nature and purpose of the act alleged to be in contravention of the agreement." (176 C.A.3d 711.)

(b) *Proper applications of rule.* The following are appropriate applications of the rule:

(1) "[W]here the agreement is to leave specific property owned by the promisor at the time the agreement is made, the promisor may be found to have given up the right to dispose of that property during his or her lifetime and even an inter vivos transfer may be held to be in contravention of the agreement and a constructive trust imposed thereon." (176 C.A.3d 712, citing *Osborn v. Hoyt* (1919) 181 C. 336, 340, 184 P. 854.)

(2) "[W]here the agreement relates to property that is to become specifically identifiable only upon the death of the promisor (a promise to leave by will 'all the property I own at my death,' or a child's share of 'the property I own at my death' or the like) and the promisor has died so that the property has become specifically identified, if the promisor failed to leave a will or has willed the property to someone other than the promisee or has made an inter vivos transfer intended to take effect upon death, a constructive trust may be imposed on the property in the hands of the personal representative of the promisor's estate or the promisor's transferee." (176 C.A.3d 712, citing *Brewer v. Simpson* (1960) 53 C.2d 567, 593, 2 C.R. 609, 349 P.2d 289.)

(c) *Improper application of rule.* Where the promise is to leave whatever property the promisor owned at the time of his or her death and the promisor has not yet died, it will generally be inappropriate to impose a constructive trust on specific property in the promisor's hands, for two reasons:

(1) During the promisor's lifetime, the promisor has the right to consume the property for reasonably necessary living expenses (176 C.A.3d 712, citing *Estate of Mulholland* (1971) 20 C.A.3d 392, 397, 97 C.R. 617), and also to dispose of the property "at least so long as that is not done for the purpose of defeating the contract." (176 C.A.3d 712, citing *Rogers v. Schlotterback* (1914) 167 C. 35, 47, 138 P. 728.)

(2) The specific property in which the promisee claims an interest cannot be identified until the death of the promisor. (176 C.A.3d 712.)

(d) *Application of rule in present case.* The present case is one in which no trust should be imposed. "No specific property was referred to. ... There can be no question but that the contract contemplated Fairchild's liberty to sell, deal with and dispose of his property in any way except in fraud of the agreement. There is no allegation Fairchild has attempted to give the property away or dispose of it in fraud of the alleged contract with Westbrook, and if Westbrook can allege and prove that Fairchild is about to do so in contravention of the agreement, Westbrook may be entitled to injunctive relief to prevent such action on the part of Fairchild 'in fraud of the contract.' " (176 C.A.3d 713.) *Brewer* is distinguishable. In that case, the property had become specifically identified, it had been conveyed in part to a third person as joint tenant, and there was evidence of commingling and inadequate record keeping for the purpose of frustrating the agreement. (176 C.A.3d 714.) (See *In re Marriage of Edwards* (1995) 38 C.A.4th 456, 460, 45 C.R.2d 138 [following *Westbrook*]; 7 A.L.R.2d 1166 [remedies during promisor's lifetime on contract to convey or will property at death in consideration of support or services].)

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



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c. Defenses.

13 Witkin Sum. Cal. Law Equity § 33

[§ 33] Defenses.

(1) *Statute of Limitations*. In *Ludwicki v. Guerin* (1961) 57 C.2d 127, 17 C.R. 823, 367 P.2d 415, a written agreement between a husband and wife to make mutual wills was executed and recorded. The husband died in 1952, and his will, in violation of the agreement, made no provision for plaintiff wife. Plaintiff's action was commenced more than 7 years after the husband's death, but prior to a petition for distribution. *Held*, the action was barred by the 4-year period of either C.C.P. 337(1) or 343 (see 3 Cal. Proc. (4th), Actions, §§474, 617). Plaintiff's novel theory is that the cause of action to impress a constructive trust on the interest of the beneficiaries under a will does not accrue until the estate is distributed to them. Prior cases, however, regard the cause of action as accruing when the promisor (decedent) breached the contract by failing to make the required provision by will, i.e., at the time of death. This view is sound both in principle and policy. Where a will creates an express trust, the title and beneficial interest vest at the time of death, even though the trust estate is residuary; the same rule should be applied to a constructive trust. Postponement of the action until after distribution might delay the action for years, with the danger of loss of important evidence and consumption or removal of the property by the distributees; and it would make it necessary to determine what the plaintiff is entitled to receive from each distributee instead of giving the plaintiff his or her share from the assets in hands of the executor or administrator. (57 C.2d 132.)

(2) *Statute of Frauds and Estoppel*. Most of the cases involve oral agreements. Because the Statute of Frauds formerly required a writing, enforcement depended on a showing sufficient to raise an estoppel. (See 1 Summary (10th), Contracts, §§371, 409.) If, however, there was no sufficient change of position, or the defendant would not be unjustly enriched (see 1 Summary (10th), Contracts, §409), recovery could be denied. (See *Kennedy v. Bank of America* (1965) 237 C.A.2d 637, 647, 47 C.R. 154 [no sufficient change of position or unique services; merely labor, as domestic and gas station assistant, was readily compensable in money]; *Estate of Baglione* (1966) 65 C.2d 192, 197, 53 C.R. 139, 417 P.2d 683 [no change of position, merely contribution of wife to community earnings; and no unjust enrichment of husband's devisees].)

(3) *Uncertainty*. In *Harris v. Larter* (1940) 36 C.A.2d 587, 593, 97 P.2d 1035, the husband gave property to his wife and she agreed to "take a good living out of it" and on her death to divide it "fifty-fifty between his relatives and her relatives." *Held*, the agreement was too uncertain to enforce; there was nothing to show which members of the respective families should share, nor the proportionate share of anyone. (See *Berdan v. Berdan* (1940) 39 C.A.2d 478,

485, 103 P.2d 622 [letter stating that writer had executed will disposing of property in certain way, without expressing agreement to do so, was insufficient to create contract].)

(4) *Inadequacy of Consideration*. In *Notten v. Mensing* (1937) 20 C.A.2d 694, 67 P.2d 734, it was alleged that a husband and wife made mutual wills under an agreement not to revoke. The husband died first, leaving \$ 800. The estate increased in value and when the wife died, she left over \$ 750,000. Assuming the existence of the agreement (actually held to be unproved), the court expressed some doubt as to the right to enforce it, suggesting that the consideration received by the wife (\$ 800 from the husband's will) was inadequate to support her agreement to will \$ 750,000. (20 C.A.2d 698.) This reasoning is questionable, for adequacy of consideration should be determined as of the time the agreement is made, rather than at the time of performance. (See *Crail v. Blakely* (1973) 8 C.3d 744, 753, 106 C.R. 187, 505 P.2d 1027; *infra*, §38.)

(5) *Defendant as Bona Fide Purchaser*. In *Horton v. Kyburz* (1959) 53 C.2d 59, 346 P.2d 399, a husband and wife agreed to leave their property to plaintiff. The husband died, the wife conveyed the property in joint tenancy to herself and defendant, and on her death, defendant took as the surviving joint tenant. Ordinarily, plaintiff would have been entitled to quasi-specific performance, but in this case it was denied because defendant was found to be a bona fide purchaser who gave good consideration for the conveyance (services in improving and maintaining the property). (53 C.2d 67.)

(6) *Lack of Contractual Intent*. In *Kalmanovitz v. Bitting* (1996) 43 C.A.4th 311, 50 C.R.2d 332, a husband and wife executed a mutual will agreement leaving their \$ 480 million estate to a charitable trust and executed identical wills. They later executed identical first codicils, adding specific bequests of \$ 100,000 each to plaintiffs. The husband predeceased the wife, and plaintiffs each received their bequests under his will. However, the wife subsequently deleted those individual bequests from her will. After her death, plaintiffs sued to enforce the will agreement, seeking \$ 100,000 each as third-party beneficiaries. *Held*, plaintiffs could not sue to enforce their interpretation of the will agreement, because it was not made for their benefit. The will agreement made no mention of bequests to specific individuals, but rather revealed the couple's intent to leave their \$ 480 million estate to charity. (43 C.A.4th 314.)

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

(1) *Statute of Limitations*.

Four-year period:

Cross-Reference: 3 Cal. Proc. (5th), Actions, §§508, 677.



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13 Witkin Sum. Cal. Law Equity § 34

[§ 34] Employee's Agreement Not To Compete.

A contract of an employee not to compete with a former employer on termination of employment, if not violative of statutory restrictions (see 1 *Summary* (10th), *Contracts*, §581), may be specifically enforced by an injunction against breach. (See *Gordon v. Wasserman* (1957) 153 C.A.2d 328, 329, 314 P.2d 759; 36 U.C.L.A. L. Rev. 119 [author-publisher agreements]; 41 A.L.R.2d 15 [enforceability of covenant as affected by duration of restriction]; 43 A.L.R.2d 94 [enforceability of covenant as affected by territorial extent of restriction]; 18 A.L.R.3d 1246 [forfeiture of pension plan on entering competitive employment]; 51 A.L.R.3d 825 [sufficiency of consideration for agreement].) Most of the cases, however, involve the unauthorized use of customer lists or other confidential information, and injunctive relief is given irrespective of an express covenant. (See *infra*, §§93, 94.)

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



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5. Collective Bargaining Agreement.

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[§ 35] Collective Bargaining Agreement.

A collective bargaining agreement between an employer and a labor organization is "enforceable at law or in equity," and a breach of the agreement by any party is "subject to the same remedies, including injunctive relief, as are available on other contracts." (*Lab.C. 1126.*) (See *Montaldo v. Hires Bottling Co. (1943) 59 C.A.2d 642, 647, 139 P.2d 666*; *Sheets v. Los Angeles Metropolitan Transit Authority (1961) 56 C.2d 481, 487, 15 C.R. 156, 364 P.2d 332*; 5A Corbin §1204; 11 Williston 3d §1420B; 61 *Cal. L. Rev.* 663 [general theory]; 69 *Harv. L. Rev.* 601; 42 *So. Cal. L. Rev.* 477; 48A *Am.Jur.2d (1994 ed.)*, *Labor and Labor Relations* §3346.) The agreement is binding on the employer's successors. (*Lab.C. 1127*; see *Holayter v. Smith (1972) 29 C.A.3d 326, 335, 104 C.R. 745* [binding on lessee of business].)

SUPPLEMENT: [This section is current through the latest supplement]
See 48B *Am.Jur.2d (2005 ed.)*, *Labor and Labor Relations* §2471.



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6. Arbitration Agreement.

13 Witkin Sum. Cal. Law Equity § 36

[§ 36] Arbitration Agreement.

Contractual arbitration, including equitable enforcement of arbitration agreements, is comprehensively covered elsewhere. (See 6 *Cal. Proc.* (4th), *Proceedings Without Trial*, §484 et seq.) The law governing the specific enforcement of those agreements may be summarized as follows:

(1) *Early Rule Against Specific Performance.* The early rule was opposed to arbitration as a substitute for court proceedings. Parties might voluntarily arbitrate controversies and reach binding conclusions if the proceedings were fairly conducted and they had notice and an opportunity for hearing, but an executory agreement to submit a controversy to arbitration was unenforceable as an improper attempt to deprive parties of their right to resort to the courts. This rule against specific performance of arbitration agreements was originally stated in former C.C. 3390(3). (See *Rives-Strong Bldg. v. Bank of America* (1942) 50 C.A.2d 810, 814, 123 P.2d 942; 6 *Cal. Proc.* (4th), *Proceedings Without Trial*, §490.)

(2) *Former Statute Authorizing Specific Performance.* In 1927, by the enactment of former C.C.P. 1280, written arbitration agreements were made enforceable. (See *Clogston v. Schiff-Lang Co.* (1935) 2 C.2d 414, 416, 41 P.2d 555; *Palmer v. Fix* (1930) 104 C.A. 562, 570, 286 P. 498; *Fischer v. Superior Court* (1930) 105 C.A. 466, 470, 287 P. 556; *Snyder v. Superior Court* (1937) 24 C.A.2d 263, 266, 74 P.2d 782; *Kaliterna v. Wright* (1949) 94 C.A.2d 926, 938, 212 P.2d 32; 6 *Cal. Proc.* (4th), *Proceedings Without Trial*, §490.)

(3) *Revised Arbitration Law.* Pursuant to a study and recommendation of the California Law Revision Commission, the 1961 Legislature adopted a revised arbitration law (C.C.P. 1280 et seq.). The original statutory provision against specific performance was repealed. The revised statute restated the existing rule of enforceability of a written agreement as follows: "A written agreement to submit to arbitration an existing controversy or a controversy thereafter arising is valid, enforceable and irrevocable, save upon such grounds as exist for the revocation of any contract." (C.C.P. 1281.) (See 6 *Cal. Proc.* (4th), *Proceedings Without Trial*, §491.)

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

Cross-Reference: 6 *Cal. Proc.* (5th), *Proceedings Without Trial*, §499 et seq.

(1) *Early Rule Against Specific Performance.* *Cross-Reference:* 6 Cal. Proc. (5th), *Proceedings Without Trial*, §512.

(2) *Former Statute Authorizing Specific Performance.*

Cross-Reference: 6 Cal. Proc. (5th), *Proceedings Without Trial*, §512.

(3) *Revised Arbitration Law.*

Cross-Reference: 6 Cal. Proc. (5th), *Proceedings Without Trial*, §512.



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7. Other Contracts.

13 Witkin Sum. Cal. Law Equity § 37

[§ 37] Other Contracts.

(1) *Cooperative Marketing Contract*. The rule established by early cases that a cooperative marketing contract was not enforceable because it lacked mutuality (see *Poultry Producers of Southern Calif. v. Barlow* (1922) 189 C. 278, 292, 208 P. 93) was changed by statute in 1925. Those contracts may be specifically enforced, and an injunction may be granted to restrain their breach. (C.C. 3423(e); C.C.P. 526(b)(5); *Food & Ag.C. 54263, 54265; Colma Vegetable Assn. v. Bonetti* (1928) 91 C.A. 103, 114, 267 P. 172; see 5A Corbin §1193; 11 Williston 3d §1423B; 17 Cal. L. Rev. 19; 18 Am.Jur.2d (2004 ed.), *Cooperative Associations* §43.)

(2) *Option Contract*. An option contract is specifically enforceable by the holder of the option; lack of mutuality is removed when the holder exercises the option. (*Sayward v. Houghton* (1898) 119 C. 545, 549, 51 P. 853, 52 P. 44; *Chrisman v. Southern Calif. Edison Co.* (1927) 83 C.A. 249, 255, 256 P. 618, *infra*, §53; see 5A Corbin §1197; 11 Williston 3d §1441 et seq.; 11 A.L.R.2d 390 [change of conditions after execution of contract or option for sale of real property as affecting right to specific performance]; 71 Am.Jur.2d (2001 ed.), *Specific Performance* §161 et seq.)

(3) *Contract for Security or Loan*. Generally, a contract to give security is specifically enforceable. (See 51 Harv. L. Rev. 136; 5A Corbin §1153.) There is some conflict, however, on specific enforcement of a contract to lend money. (See 5A Corbin §1152; 82 A.L.R.3d 1116 [contract to lend or borrow money].)

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



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13 Witkin Sum. Cal. Law Equity § 38

[§ 38] Consideration Is Inadequate.

(1) *In General.* Specific performance will be denied where the defendant has not received "an adequate consideration." (C.C. 3391(1); see *Rest.2d, Contracts* §364.) The Code makes this a separate ground from unfairness, and presumably inadequate consideration alone is enough to prevent specific performance. (See *O'Hara v. Wattson* (1916) 172 C. 525, 535, 157 P. 608; *Walker v. Clark* (1926) 80 C.A. 520, 523, 252 P. 334; *Brown v. Freese* (1938) 28 C.A.2d 608, 618, 83 P.2d 82; 5A Corbin §1165; 11 Williston 3d §1428; 71 *Am.Jur.2d* (2001 ed.), *Specific Performance* §97; 42 *Cal. L. Rev.* 345.)

(2) *Necessity of Pleading and Proof.* Although substantively phrased in terms of a defense, the requirement is regarded as an element of the cause of action for specific performance, and it must be pleaded and proved by the plaintiff. (See *Cooper v. Cereghino* (1929) 101 C.A. 290, 281 P. 630; *Foley v. Cowan* (1947) 80 C.A.2d 70, 74, 181 P.2d 410; *Mayer v. Beondo* (1948) 83 C.A.2d 665, 668, 189 P.2d 327, 190 P.2d 23; *Lucientes v. Bliss* (1958) 157 C.A.2d 565, 568, 321 P.2d 526; 71 *Am.Jur.2d* (2001 ed.), *Specific Performance* §217; 5 *Cal. Proc.* (4th), *Pleading*, §747 et seq.)

Adequacy is a question for the trier of fact. (See *Baran v. Goldberg* (1948) 86 C.A.2d 506, 509, 194 P.2d 765; *Westwood Temple v. Emanuel Center* (1950) 98 C.A.2d 755, 758, 221 P.2d 146; *Gomes v. Borba* (1950) 99 C.A.2d 38, 42, 221 P.2d 124.) The consideration does not necessarily have to measure up to the value of the property; e.g., eagerness to sell may explain a discrepancy. (*Williams v. Rush* (1933) 134 C.A. 554, 559, 25 P.2d 888.)

(3) *Time of Determination.* Adequacy is determined as of the time the contract was made; if consideration is adequate at that time, it is immaterial that subsequent events, such as a change in the value of property, make the consideration inadequate later. (See *O'Connell v. Lampe* (1929) 206 C. 282, 285, 274 P. 336 [option; consideration was adequate when granted]; *Hercules Glue Co. v. Littooy* (1938) 25 C.A.2d 182, 187, 76 P.2d 700; *Drullinger v. Erskine* (1945) 71 C.A.2d 492, 495, 163 P.2d 48 [lease with option to purchase was executed in 1941 when land was valued at \$ 7,000, but option was exercised in 1944 when value had increased to \$ 12,000; specific performance was granted]; *Johnson v. Servaes* (1962) 210 C.A.2d 392, 401, 26 C.R. 733; *Schwartz v. Shapiro* (1964) 229 C.A.2d 238, 255, 40 C.R. 189; *Henderson v. Fisher* (1965) 236 C.A.2d 468, 474, 46 C.R. 173; *Meyer v. Benko* (1976) 55 C.A.3d 937, 945, 127 C.R. 846; 5A Corbin §1165; 71 *Am.Jur.2d* (2001 ed.), *Specific Performance* §99.)

SUPPLEMENT: [This section is current through the latest supplement]
(2) *Necessity of Pleading and Proof.*

Cross-Reference: 5 *Cal. Proc.* (5th), *Pleading*, §791 et seq.



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13 Witkin Sum. Cal. Law Equity § 39

[§ 39] In General.

(1) *Nature of Defense.* Specific performance will be denied where the contract is not "just and reasonable." (C.C. 3391(2).) In other words, equity should not lend its aid to the enforcement of a "hard bargain," and therefore hardship may sometimes be a defense. (See *Rest.2d, Contracts* §364; *White v. Sage* (1906) 149 C. 613, 615, 87 P. 193; *Jacklich v. Baer* (1943) 57 C.A.2d 684, 693, 135 P.2d 179; *Handy v. Gordon* (1967) 65 C.2d 578, 582, 55 C.R. 769, 422 P.2d 329, 4 Summary (10th), *Security Transactions in Real Property*, §55 [unfair subordination agreement]; *Brandolino v. Lindsay* (1969) 269 C.A.2d 319, 326, 75 C.R. 56 [purchaser's action; value of land greatly exceeded purchase price]; 5A Corbin §1162; Cal. Civil Practice, 3 Business Litigation, §33:21; 71 *Am.Jur.2d* (2001 ed.), *Specific Performance* §91 et seq.; on necessity of pleading reasonableness, see 5 *Cal. Proc.* (4th), *Pleading*, §747 et seq.)

(2) *Balancing Test.* The defense of "hard bargain" in actions for specific performance, like that of relative hardship in tort actions (*infra*, §169), is entirely dependent on the particular circumstances, and calls for a balancing of the equities. In *Smith v. Mendonsa* (1952) 108 C.A.2d 540, 238 P.2d 1039, plaintiff conveyed part of his land to defendant, and both parties covenanted not to permit trees to grow more than 15 feet high. Defendant deliberately breached the covenant, allowing ornamental trees to reach 60 feet in height, shading and causing injury to plaintiff's orchard. In this action for damages and injunction, defendant's theory was that the trees were of great value to his gas station, restaurant, and bar and that removal might ruin the business. *Held*, though relative hardships will be considered, in view of the definiteness of the promise, injunctive relief was properly granted. "It is not the business of courts, either of law or of equity, to remake contracts fairly entered into by persons who are capable of contracting. On the contrary, it is the duty of courts to encourage the keeping of agreements so made and to give adequate remedy for the breach thereof when it occurs. This is particularly true where the breach is deliberate and the wrong is wilful." (108 C.A.2d 544.)

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

(1) *Nature of Defense.*

Necessity of pleading reasonableness:

Cross-Reference: 5 *Cal. Proc.* (5th), *Pleading*, §791 et seq.



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b. Unconscionable Contract.

13 Witkin Sum. Cal. Law Equity § 40

[§ 40] Unconscionable Contract.

(1) *Unconscionable Contract Under Uniform Commercial Code.* Unif.Com.C. 2-302, dealing with contracts of sale, explicitly sets forth the power of a court to deny recovery on an oppressive one-sided contract or clause as follows:

(a) "If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result."

(b) "When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose, and effect to aid the court in making the determination."

This provision was enacted in all states except California, and has been frequently invoked and applied by the courts. (See 78 *Harv. L. Rev.* 895; 18 *A.L.R.3d* 1305 [unconscionability as ground for refusing enforcement of contract for sale of goods or collateral agreement]; 2A *Anderson* 3d, §2-302; 5A *Corbin* §1164; 67 *Am.Jur.2d* (2003 ed.), *Sales* §210 et seq.)

(2) *Unconscionable Contract Under California Law.* The Uniform Code provision was vigorously opposed in the Legislature and was omitted from the Code as adopted in California for the following chief reasons: (a) it could lead to renegotiation of contracts in every case of disagreement about the fairness of the provisions; (b) there was no definition of "unconscionability" and there were no specific criteria for evaluating it; (c) existing statutory and case law was adequate to deal with the problem. (See 9 *Cal. Western L. Rev.* 100; 25 *Hastings L. J.* 1, 53; 7 *San Diego L. Rev.* 298.) However, C.C. 1670.5, enacted in 1979 in the exact language of Unif.Com.C. 2-302, established the defense in California. (See 1 *Summary* (10th), *Contracts*, §330 et seq.) California's belated enactment of the statute in the Civil Code, rather than in the Commercial Code, is apparently a recognition that the doctrine of unconscionability is fundamental to the operation of contract law in general and has a wider application than merely that of commercial transactions between merchants. (*A & M Produce Co. v. FMC Corp.* (1982) 135 *C.A.3d* 473, 487, footnote 12, 186 *C.R.114*, 1 *Summary* (10th), *Contracts*, §332.)

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3. Fraud, Unfair Practices, or Mistake.

13 Witkin Sum. Cal. Law Equity § 41

[§ 41] Fraud, Unfair Practices, or Mistake.

(1) *Fraud or Unfair Practices.* Specific performance will be denied if the assent of the defendant was obtained by "misrepresentation, concealment, circumvention, or unfair practices," or by a promise that has not been substantially fulfilled. (C.C. 3391(3); see *Rest.2d, Contracts* §364.) The fraud need not give rise to an action at law; e.g., there may be no damage to the party deceived, but if the deceived party relied on the fraud and would not have entered into the contract had it not been for the fraud, no specific performance may be had. (See *Kelly v. Central Pac. R. Co.* (1888) 74 C. 557, 561, 16 P. 386; 5A Corbin §1167, 1168; 11 Williston 3d §1426; Cal. Civil Practice, 3 Business Litigation, §§33:22, 33:23; supra, §9 et seq, [clean hands rule]; 71 *Am.Jur.2d* (2001 ed.), *Specific Performance* §62 et seq.; but see *Fisher v. Losey* (1947) 78 C.A.2d 121, 125, 177 P.2d 334, 3 *Summary* (10th), *Agency and Employment*, §110 [overlooking defense].)

(2) *Mistake.* Mistake and surprise are also grounds for denial, but where the contract provides for compensation for the mistake, this may be given and specific performance granted. (C.C. 3391(4).) (See 5A Corbin §1166; 11 Williston 3d §1427; 71 *Am.Jur.2d* (2001 ed.), *Specific Performance* §70 et seq.; on what constitutes mistake, see 1 *Summary* (10th), *Contracts*, §256 et seq.)

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13 Witkin Sum. Cal. Law Equity § 42

[§ 42] In General.

Specific performance cannot be granted unless the terms of the contract are sufficiently definite for the court to know what to enforce. (C.C. 3390(5); see *Buckmaster v. Bertram* (1921) 186 C. 673, 676, 200 P. 610; *Martin v. Bank of San Jose* (1929) 98 C.A. 390, 398, 277 P. 197; *Harris v. Larter* (1940) 36 C.A.2d 587, 591, 97 P.2d 1035; *Ferrara v. Silver* (1956) 138 C.A.2d 616, 618, 292 P.2d 251; *Rest.2d, Contracts* §362; 5A Corbin §1174; 11 Williston 3d §1424; 56 A.L.R.2d 1272 [effect of failure of contract for sale or exchange of real estate to specify time for giving possession]; Cal. Civil Practice, 3 Business Litigation, §33:24; 36 Cal. L. Rev. 120; 24 So. Cal. L. Rev. 91; 60 A.L.R.2d 251 [uncertainty of terms of mortgage or accompanying documents as affecting right to specific performance]; 26 A.L.R.3d 855 [requisite definiteness of contract for sale or lease of land, that vendor or landlord will subordinate interest to permit other party to obtain financing]; 73 A.L.R.4th 135 [specificity of description of premises as affecting enforceability of contract to convey real property]; 71 Am.Jur.2d (2001 ed.), *Specific Performance* §34 et seq.; 5 Cal. Proc. (4th), *Pleading*, §746; on forms of decree, see 7 Cal. Proc. (4th), *Judgment*, §§16, 25; 1 Summary (10th), *Contracts*, §§137 et seq., 355 et seq.)

Courts sometimes say that more certainty is required in a suit for specific performance than in an action for damages. (See *Klein v. Markarian* (1917) 175 C. 37, 40, 165 P. 3; *Pascoe v. Morrison* (1933) 219 C. 54, 58, 25 P.2d 9; *Long Beach Drug Co. v. United Drug Co.* (1939) 13 C.2d 158, 164, 88 P.2d 698; *Durst v. Jolly* (1917) 35 C.A. 184, 190, 169 P. 449; *Chandler v. Hollingsworth* (1929) 96 C.A. 472, 475, 274 P. 581; *Store Properties v. Neal* (1945) 72 C.A.2d 112, 116, 164 P.2d 38; *Cappelmann v. Young* (1946) 73 C.A.2d 49, 54, 165 P.2d 950.) It has been suggested, however, that this rule is of doubtful practical significance, for in the large majority of California cases in which the rule is invoked, the contract was also too uncertain to support an action for damages. (See *Hennefer v. Butcher* (1986) 182 C.A.3d 492, 500, footnote 4, 227 C.R. 318, citing the text; 36 Cal. L. Rev. 120.)

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

Cross-Reference: 5 Cal. Proc. (5th), *Pleading*, §787. *Forms of decree:*

Cross-Reference: 7 Cal. Proc. (5th), *Judgment*, §§16, 25.



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13 Witkin Sum. Cal. Law Equity § 43

[§ 43] Illustrations: Uncertainty Fatal.

There are numerous examples of contracts so indefinite that they cannot be specifically enforced:

Anderson v. Permitter (1947) 78 C.A.2d 378, 383; 177 P.2d 818 [oral contract for sale of stock of groceries of certain inventory value, without any indication whether inventory should be based on wholesale or retail prices; contract was uncertain as to price]; see 1 Summary (10th), Contracts, §153.

Berven v. Miller (1948) 86 C.A.2d 39, 40, 194 P.2d 80 [landlord's written memorandum recited that in consideration of repairs and decoration by tenant, "the landlord agrees that in event of a sale of property, the tenant shall have the first chance to buy property at the offer made for same"; this "mere option" was uncertain as to terms of payment, times of payment, and property to be sold].

Roberts v. Lebrain (1952) 113 C.A.2d 712, 716, 248 P.2d 810 [deposit receipt for purchase of "1 Small House and Lot on 115 st. Los Angeles" was uncertain].

Colorado Corp. v. Smith (1953) 121 C.A.2d 374, 376, 263 P.2d 79 [purchaser's agreement to construct residences; uncertain because of silence on number, size, type, location, cost, appearance, etc.].

Gould v. Callan (1954) 127 C.A.2d 1, 5, 273 P.2d 93 [contract for sale of real property; uncertain as to terms of deferred payments and agreement subordinating second deed of trust].

Bonk v. Boyajian (1954) 128 C.A.2d 153, 156, 274 P.2d 948 [lessee's option to buy on monthly payments; indefinite as to amount of interest, etc.].

Corona Unified School Dist. of Riverside v. Vejar (1958) 165 C.A.2d 561, 566, 332 P.2d 294 [sale of 12 acres of "Southwest part of Lot 2" of tract; uncertain, where no particular area was designated].

Mueller v. Chandler (1963) 217 C.A.2d 521, 523, 31 C.R. 646 [contract to give mortgage; informal language without hint of nature or term].

Conley v. Fate (1964) 227 C.A.2d 418, 421, 38 C.R. 680 [deposit receipt for sale of real property, buyer to obtain \$ 65,000 building loan; nothing on type of structure or terms of loan].

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[§ 44] Illustrations: Contract Enforced.

If the basic elements of the contract are clear, subordinate details of performance may be determined by the decree of the court and specific performance may be granted:

Stamm v. Colvin (1928) 94 C.A. 180, 184, 270 P. 744 [contract to deed lot in exchange for second lot was not uncertain merely because it was unclear whether extension of mortgage on first lot could be obtained from third person].

Pike v. Hayden (1950) 97 C.A.2d 606, 612, 218 P.2d 578 [agreement to lease property on same "financial arrangements" as in another lease].

United Truckmen v. Lorentz (1952) 114 C.A.2d 26, 29, 249 P.2d 352 [although certainty in description of property is essential in contract of sale, parol evidence is admissible to identify property].

Henry v. Sharma (1984) 154 C.A.3d 665, 669, 201 C.R. 478 [reasonable time implied for performance of real property sale contract where date for performance was not specified].

Goodwest Rubber Corp. v. Munoz (1985) 170 C.A.3d 919, 921, 216 C.R. 604 [lease provision with option to buy property at "fair market value"].

Hennefer v. Butcher (1986) 182 C.A.3d 492, 500, 227 C.R. 318 [properly admitted extrinsic evidence rendered material contract provisions sufficiently definite for enforcement].

Okun v. Morton (1988) 203 C.A.3d 805, 818, 250 C.R. 220 [conduct of parties after execution of contract and before controversy arose provided persuasive evidence of meaning of disputed provision].

Fatal uncertainty in a severable clause does not render the contract subject to rescission. (*Lawrence v. Shutt (1969) 269 C.A.2d 749, 766, 75 C.R. 533*) [contract to sell land; uncertainty in release clause of trust deed].

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5. Continuous Acts Requiring Supervision.

13 Witkin Sum. Cal. Law Equity § 45

[§ 45] Continuous Acts Requiring Supervision.

(1) *Early View*. An archaic doctrine denies specific performance of contracts that call for a series of acts requiring continuous supervision, such as agreements for construction and repair. The earlier California cases followed this rule. (See *Pacific Elec. Ry. Co. v. Campbell-Johnston* (1908) 153 C. 106, 113, 94 P. 623; *Long Beach Drug Co. v. United Drug Co.* (1939) 13 C.2d 158, 171, 88 P.2d 698 [contract for exclusive sales agency at specified prices]; *Sheehan v. Vedder* (1930) 108 C.A. 419, 292 P. 175; *Moore v. Heron* (1930) 108 C.A. 705, 711, 292 P. 136; *Hunter v. Superior Court* (1939) 36 C.A.2d 100, 110, 97 P.2d 492; *Lind v. Baker* (1941) 48 C.A.2d 234, 247, 119 P.2d 806; *Whipple Road Quarry Co. v. L.C. Smith Co.* (1952) 114 C.A.2d 214, 216, 249 P.2d 854; *Thayer Plymouth Center v. Chrysler Motors Corp.* (1967) 255 C.A.2d 300, 303, 63 C.R. 148.)

But application of the doctrine was not always consistent. In *Moklofsky v. Moklofsky* (1947) 79 C.A.2d 259, 179 P.2d 628, an agreement for construction of an outside stairway giving access to an apartment was held subject to the objection of continuous acts. (79 C.A.2d 262.) On the other hand, in *Gale v. Seymour* (1949) 91 C.A.2d 727, 205 P.2d 752, an agreement to pave a parking lot was held to call for but a single act, requiring no constant personal supervision. The court briefly attempted, without much success, to distinguish the contrary *Moklofsky* case. (91 C.A.2d 728.)

(2) *Modern View*. The better modern cases and other authorities reject this doctrine and give specific performance whenever it is practically feasible. (See *Okun v. Morton* (1988) 203 C.A.3d 805, 821, 250 C.R. 220, citing the text [refusing to extend rule to contract governing payment of capital and expenses in joint business venture]; *Rest.2d, Contracts* §366, Comment a; 5A Corbin §§1171, 1172; 11 Williston 3d §1422A; 38 A.L.R.3d 1052 [building construction agreement in lease or option to lease]; 47 Cal. L. Rev. 126; 33 Harv. L. Rev. 433; 71 Am.Jur.2d (2001 ed.), *Specific Performance* §111 et seq.)

Ellison v. Ventura Port Dist. (1978) 80 C.A.3d 574, 145 C.R. 665, after stating the "old rule" and listing cases supporting it (80 C.A.3d 580), nevertheless concluded that a contract provision for periodic dredging of a channel was specifically enforceable. "Compared to the complexity of the acts required in contracts for development or operation of railroads, mines, oil fields, or even citrus groves, the dredging of a channel pales to insignificance and should place no great burden on the court to supervise. Additionally, unlike exclusive distribution or sales agency contracts, no cooperation between the parties is required to fulfill District's obligation to maintain the channel. Thus, we see no reason to invoke this doctrine in the case at bar. Especially since the doctrine is an archaic one and should not be unduly

extended." (80 C.A.3d 581.)

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

(2) *Modern View*. See *Union Oil Co. of Calif. v. Greka Energy Corp.* (2008) 165 C.A.4th 129, 134, 80 C.R.3d 738, citing the text [specific performance was proper remedy in action for purchaser's breach of agreement, in land sales contract, to plug and abandon idle oil wells].



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6. Statute of Frauds.

13 Witkin Sum. Cal. Law Equity § 46

[§ 46] Statute of Frauds.

(1) *General Rule Barring Remedy.* The statute of frauds will bar the legal remedy on the contract and, in most cases, the equitable remedy as well. (See *De Mattos v. McGovern* (1938) 25 C.A.2d 429, 432, 77 P.2d 522 [contract to make a will].)

(2) *Exceptions.* There are important situations in which a contract will be enforced in spite of the bar of the statute:

(a) *Release and estoppel.* Where the defendant by words or conduct induces reliance and a change of position by the plaintiff such that the defendant will be estopped to set up the bar of the statute. (*Seymour v. Oelrichs* (1909) 156 C. 782, 794, 106 P. 88; *Zellner v. Wassman* (1920) 184 C. 80, 88, 193 P. 84; *Kraft v. Rooke* (1930) 103 C.A. 552, 555, 284 P. 935; see 5A Corbin §1192; 11 Williston 3d §1437; 19 Cal. L. Rev. 70; 20 Cal. L. Rev. 663; 71 Am.Jur.2d (2001 ed.), *Specific Performance* §22; 1 Summary (10th), *Contracts*, §406 et seq.)

(b) *Part performance of real property transfer.* Where the agreement is to transfer an interest in real property, and the plaintiff has rendered part performance. (*Trout v. Ogilvie* (1919) 41 C.A. 167, 170, 182 P. 333; *Forbes v. Los Angeles* (1929) 101 C.A. 781, 788, 282 P. 528; *Baker v. Bouchard* (1932) 122 C.A. 708, 710, 10 P.2d 468; see 5A Corbin §1192; 11 Williston 3d §1437; 71 Am.Jur.2d (2001 ed.), *Specific Performance* §23; 1 Summary (10th), *Contracts*, §402 et seq.)

(c) *Oral settlement agreement.* An oral settlement agreement to rescind a written contract for the sale of real property is not within the statute of frauds and need not be in writing. (*Hastings v. Matlock* (1985) 171 C.A.3d 826, 837, 217 C.R. 856, 1 Summary (10th), *Contracts*, §387.)

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7. Contract Is Illegal or Impossible.

13 Witkin Sum. Cal. Law Equity § 47

[§ 47] Contract Is Illegal or Impossible.

The following agreements are not specifically enforceable:

(1) *No Lawful Power To Perform*. An agreement to perform an act that the party has no lawful power to perform is not specifically enforceable. (C.C. 3390(3); see *Stevens Group Fund IV v. Sobrato Dev. Co.* (1991) 1 C.A.4th 886, 894, 2 C.R.2d 460, *infra*, §59 [C.C. 3390(3) bars specific performance where party cannot perform at time of hearing, instead of at time of performance under contract]; *Stanchfield v. Hamer Toyota* (1995) 37 C.A.4th 1495, 1505, 44 C.R.2d 565, 1 Summary (10th), *Contracts*, §917 [prospective purchaser's request for specific performance of stock purchase agreement was properly denied where he had neither personal assets nor ability to obtain commercial financing necessary to conclude transaction by time specified by his own expert]; *Rest.2d, Contracts* §365; 5A Corbin §1170; 11 Williston 3d §1422, 1429; 58 A.L.R.5th 387 [illegality as basis for denying specific performance for breach of contract]; 71 Am.Jur.2d (2001 ed.), *Specific Performance* §§19, 20, 88 et seq.)

(2) *Enforcement of Penalty or Forfeiture*. An agreement to enforce a penalty or forfeiture is not specifically enforceable. (C.C. 3369; see *Ebbert v. Mercantile Trust Co. of Calif.* (1931) 213 C. 496, 499, 2 P.2d 776; *supra*, §20.) (On valid liquidated damages provision, see 1 Summary (10th), *Contracts*, §533 et seq.)

(3) *Consent of Third Person Required*. An express agreement to procure the consent of another is not specifically enforceable, and the same is true where enforcement necessarily requires the assent of a third person who is not a party to the agreement. (C.C. 3390(4); see *Armstrong v. Sacramento Valley Realty Co.* (1921) 52 C.A. 110, 115, 198 P. 217.)

In *Casady v. Modern Metal Spinning & Mfg. Co.* (1961) 188 C.A.2d 728, 731, 10 C.R. 790, defendant husband, C, and B each held 4331/3 shares of stock of defendant corporation. Plaintiff wife received an interlocutory decree of divorce. The husband's shares were found to be community property, and under a property settlement, plaintiff was awarded half. She brought this suit for specific performance to compel the corporation to issue a new certificate. The defense was a bylaw restriction on transfer without first offering the shares to the corporation and shareholders. *Held*, specific performance was properly denied, for neither defendant corporation nor C were signatories to the property settlement agreement. Plaintiff's theory that defendants could be compelled to make a change in the bylaws or waive the restriction was untenable; to compel this action, with retroactive effect on the contract rights of other shareholders, would be invalid. (188 C.A.2d 731.)

The *Casady* court noted that an exception is recognized where one party agrees to keep a life insurance policy in force; willingness on the part of insurers to write insurance is presumed if the contracting party is physically qualified and financially able to pay premiums. (188 C.A.2d 731, footnote 2.)

Another exception was recognized in *Milkes v. Smith* (1949) 91 C.A.2d 79, 204 P.2d 419. The vendor did not have full title but was only a tenant in common. He contended that specific performance would require procurement of the consent of his cotenant. *Held*, this was not an objection to partial specific performance with compensation (see *infra*, §58), and thus specific performance was not precluded. (91 C.A.2d 82.)

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a. General Rule Against Specific Performance.

13 Witkin Sum. Cal. Law Equity § 48

[§ 48] General Rule Against Specific Performance.

Neither an agreement to render personal service, nor an agreement to employ another in personal service, is specifically enforceable; i.e., the employee cannot be forced to serve, and the employer cannot be forced to hire. (C.C. 3390(1), (2); see *O'Brien v. Perry* (1900) 130 C. 526, 530, 62 P. 927; *Associated Oil Co. v. Myers* (1933) 217 C. 297, 302, 18 P.2d 668, *Lyon v. Goss* (1942) 19 C.2d 659, 674, 123 P.2d 11; *Adams v. Williams Resorts* (1962) 210 C.A.2d 456, 463, 26 C.R. 656; *Beverly Glen Music v. Warner Communications* (1986) 178 C.A.3d 1142, 1144, 224 C.R. 260, *infra*, §50; *Woolley v. Embassy Suites* (1991) 227 C.A.3d 1520, 1533, 278 C.R. 719, 3 *Summary* (10th), *Agency and Employment*, §221, citing the text; *Rest.2d, Contracts* §367; 5A Corbin §1204; 11 Williston 3d §1423; 19 *Cal. L. Rev.* 183; 71 *Am.Jur.2d* (2001 ed.), *Specific Performance* §182.)

There are several reasons for the rule: difficulty of enforcement, unsatisfactory character of services rendered under compulsion, and, where physical labor is contracted for, the constitutional prohibition against involuntary servitude (Thirteenth Amendment). (See *Rest.2d, Contracts* §367; *Poultry Producers of Southern Calif. v. Barlow* (1922) 189 C. 278, 288, 208 P. 93; *Barndt v. Los Angeles* (1989) 211 C.A.3d 397, 403, 259 C.R. 372, quoting the text.)

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b. When Specific Enforcement Is Proper.

1. Personal Performance Is Not Required.

13 Witkin Sum. Cal. Law Equity § 49

[§ 49] Personal Performance Is Not Required.

The controlling consideration is the personal character of the performance and not the character of the duty; e.g., one may personally agree to build a house, but although the duty is personal, the construction contract does not contemplate personal performance. But the distinction between the personal character of the performance and the duty is not always recognized. In *Moklofsky v. Moklofsky* (1947) 79 C.A.2d 259, 179 P.2d 628, a son had agreed to rebuild part of his mother's house and pay a fixed price, and she agreed to convey. In an action by the son before he had completed the work, specific performance was denied--one ground being that this part of the obligation called for personal services. (79 C.A.2d 262.) It would seem obvious, however, that the contract, reasonably interpreted, called for construction by any skilled person and not for the personal services of plaintiff.

A collective bargaining agreement does not call for personal services from a particular person, and is made specifically enforceable by statute (*Lab.C. 1126*, supra, §35). In *Herman v. Los Angeles* (2002) 98 C.A.4th 484, 119 C.R.2d 691, a county and a transportation authority agreed to meet and mutually agree on the placement of former transportation authority police officers who did not pass the sheriff's review process after the authority abolished its police force and contracted with the county for police services. *Held*, the agreement could be specifically enforced. The contract at issue did not call for the personal services of a particular person. It was analogous to a collective bargaining agreement, which *Lab.C. 1126* makes enforceable against a successor employer. (98 C.A.4th 488.)

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b. When Specific Enforcement Is Proper.
2. Indirect Enforcement by Negative Decree.

13 Witkin Sum. Cal. Law Equity § 50

[§ 50] Indirect Enforcement by Negative Decree.

(1) *Rule of Lumley v. Wagner.* In the famous case of *Lumley v. Wagner* (1852) 42 Eng. Rep. R. 687, defendant opera singer agreed to sing at plaintiff's theatre and nowhere else for a certain time; then she contracted to sing for another. The court could not directly enforce the affirmative promise (to sing for plaintiff), but it did enforce the negative promise (not to sing elsewhere) by an injunction against doing so. (See 5A Corbin §1208.)

By this means, pressure is brought to bear on the defendant. An injunction against breach will be granted as an indirect mode of specifically enforcing an affirmative promise, which would itself have been enforced except for the practical difficulty. (See *Motown Record Corp. v. Brockert* (1984) 160 C.A.3d 123, 129, 136, 207 C.R. 574, *infra*, §52; 5A Corbin §1206; 11 Williston 3d §1450; 42 Cal. L. Rev. 9, 18; 10 So. Cal. L. Rev. 347.) (On whether injunction may issue as indirect compulsion where defendant does not intend to compete, i.e., where there is no breach of negative promise, see 42 Cal. L. Rev. 20.)

Although there was an express negative promise in *Lumley*, the modern rule does not require it. An affirmative promise implies a promise not to do anything that defeats the required performance. (See 5A Corbin §1205.)

(2) *Limitations on Rule.* There are generally recognized limitations on the right to an injunction in these cases. The most important is that the services must be "unique" or "extraordinary." If they are not unique, others can be found to perform, and the remedy at law--damages--is adequate. (See *Rest.2d, Contracts* §367, Comment c.) Some services, such as those of an opera singer, ball player, or actor, have traditionally been regarded as unique; but other kinds of employment call for a determination on the particular facts. (See 5A Corbin §1209; 11 Williston 3d §1450; 42 Cal. L. Rev. 21; 71 Am.Jur.2d (2001 ed.), *Specific Performance* §184.)

Another limitation is that the injunction should not be given where the defendant will be left without a reasonable means of livelihood. (See *Rest.2d, Contracts* §367; 5A Corbin §1207; 11 Williston 3d §1450A; 10 So. Cal. L. Rev. 347.) And the plaintiff employer must be ready and willing to perform. (See *Rest.2d, Contracts* §363, Comment b; 42 Cal. L. Rev. 25.)

(3) *Distinction: Action Against New Employer.* In *Beverly Glen Music v. Warner Communications* (1986) 178 C.A.3d 1142, 224 C.R. 260, Anita Baker, an unknown singer, contracted in 1982 to record an album for plaintiff, which eventually grossed over a million dollars. In 1984, she was offered a better deal by defendant and accepted. Plaintiff's action against Baker was unsuccessful because the statutory condition of services with an annual compensation of \$ 6,000 (see *infra*, §51) could not be met. Plaintiff then sued defendant on the novel theory that the new employer could be enjoined from accepting the services of the breaching employee. *Held*, an injunction was properly denied. "Plaintiff contends that this is not an action against Ms. Baker but merely an equitable claim against Warner to deprive it of the wrongful benefits it gained when it 'stole' Ms. Baker away. Thus, plaintiff contends, the equities lie not between the plaintiff and Ms. Baker, but between plaintiff and the predatory Warner Communications company. Yet if Warner's behavior has actually been predatory, plaintiff has an adequate remedy by way of damages. An injunction adds nothing to plaintiff's recovery from Warner except to coerce Ms. Baker to honor her contract. Denying someone his livelihood is a harsh remedy. The Legislature has forbidden it but for one exception. To expand this remedy so that it could be used in virtually all breaches of a personal service contract is to ignore over 100 years of common law on this issue." (178 C.A.3d 1145.)

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13 Witkin Sum. Cal. Law Equity § 51

[§ 51] Nature and Purpose of Statute.

An injunction cannot be granted to prevent the breach of a contract that would not be specifically enforced. (C.C. 3423(e); *C.C.P.* 526(b)(5); see *supra*, §25.) There is an exception where the promised service is of a "special, unique, unusual, extraordinary or intellectual character" and the contract specifies a minimum salary (ranging from \$ 6,000 to \$ 30,000, depending on when the contract was executed and on its duration). (C.C. 3423(e); *C.C.P.* 526(b)(5); see 6 *Cal. Proc.* (4th), *Provisional Remedies*, §309.)

The statutory language has been interpreted as authorizing an injunction against breach of the negative promise only. (See *Warner Bros. Pictures v. Brodel* (1948) 31 *C.2d* 766, 773, 192 *P.2d* 949 [employer may enjoin employee from rendering services to others during period extended by exercise of employer's option]; *Foxx v. Williams* (1966) 244 *C.A.2d* 223, 236, 52 *C.R.* 896 [royalty payments contingent on sales of albums did not guarantee statutory minimum salary]; *Lemat Corp. v. Barry* (1969) 275 *C.A.2d* 671, 679, 80 *C.R.* 240 [professional basketball player's contract with 1-year renewal option; injunction against rendering services to others during renewal period was proper]; *MCA Records v. Newton-John* (1979) 90 *C.A.3d* 18, 22, 153 *C.R.* 153 [condition was met and injunction was upheld]; *Motown Record Corp. v. Brockert* (1984) 160 *C.A.3d* 123, 136, 207 *C.R.* 574, *infra*, §52 [condition was not met]; 42 *Cal. L. Rev.* 27; 10 *So. Cal. L. Rev.* 349; 52 *So. Cal. L. Rev.* 489 [Statutory Minimum Compensation and the Granting of Injunctive Relief to Enforce Personal Service Contracts in the Entertainment Industries].)

SUPPLEMENT: [This section is current through the latest supplement]
Statutory exception for unique personal services:

Cross-Reference: 6 *Cal. Proc.* (5th), *Provisional Remedies*, §306.



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c. Unique Personal Services.

2. Option To Pay Is Insufficient.

13 Witkin Sum. Cal. Law Equity § 52

[§ 52] Option To Pay Is Insufficient.

In *Motown Record Corp. v. Brockert* (1984) 160 C.A.3d 123, 207 C.R. 574, the court held that a clause giving the employer the option to pay the employee the statutory minimum salary does not satisfy C.C. 3423(e) and C.C.P. 526(b)(5). In 1976, plaintiff record corporations contracted with defendant Tina Marie, then an unknown in the music business, for singing and songwriting services. Each contract was for an initial period of 1 year, but granted the companies six options to renew for 1-year periods on the same terms. The contracts further gave each company the option, exercisable at any time, to pay defendant "compensation at the rate of not less than \$6,000 per annum," which was then the statutory minimum salary. Defendant recorded a number of successful albums, but in May 1982, after a dispute arose, she gave notice of rescission. In August 1982, plaintiffs sued for breach of contract, and in September 1982, they exercised their options to pay defendant at the rate of \$ 6,000 per year. In November 1982, defendant notified them that she had contracted with another company, and they then sought a preliminary injunction to prevent her from performing until her contracts with them expired in April 1983. *Held*, order granting injunction reversed.

(a) In response to *Foxx v. Williams* (1966) 244 C.A.2d 223, 52 C.R. 896, and *MCA Records v. Newton-John* (1979) 90 C.A.3d 18, 153 C.R. 153, many record companies made a practice of including a clause in their contracts giving the company the option at any time during the contract to pay the artist \$ 6,000 per year. "In this manner the company hedges its bets on the success of its artists. If the artist is not selling, the company does not exercise its option. If the artist catches on with the public and begins to make a substantial sum of money for the company, the company plays its 'option' card to keep the artist from jumping to another label." (160 C.A.3d 131.) In the present case, the option was exercised at the last possible moment. "Thus, the companies purchased an insurance policy worth a considerable sum for a minimal premium just prior to the time they could be fairly certain a loss would occur. If the option clause meets the statutory requirement of minimum compensation, the company can buy its insurance policy on the courthouse steps on its way to seek an injunction." (160 C.A.3d 132.)

(b) *Foxx* and *MCA* clearly hold that, unless the contract itself provides for \$ 6,000 per year, the statutory requirement is not met even though the artist actually receives that amount. (160 C.A.3d 132.) The companies seek to overcome these authorities by contending that when they exercised their option, a new contract came into existence that guaranteed the statutory minimum. This reasoning is unsound. The exclusivity clause of the contract was one of the

terms to which the artist agreed at the outset, not at the later time when the option was exercised. (160 C.A.3d 133.) And if the exercise of the option is viewed as a modification of the original contract, it was lacking in consideration and unenforceable. (160 C.A.3d 133.)

(c) The question left open in *Foxx* and *MCA* is whether an option to guarantee \$6,000 per year at some time in the future satisfies the requirement. The answer is clear from a reasonable reading of the statutory language. "To be subject to specific enforcement, the contract must have as one of its terms a compensation provision providing for payment at the minimum rate of \$6,000 per year. In other words, agreeing to payment of the minimum compensation is not a condition precedent to the granting of injunctive relief; it is a threshold requirement for admission of the contract into the class of contracts subject to injunctive relief under the statute." (160 C.A.3d 135.)

(d) The option clause would defeat the legislative intent to limit injunctive relief to contracts where the performer is a person of distinction. The sum of \$ 6,000 a year in 1919 is equivalent to \$100,000 today. "By selecting such a large sum, the Legislature indicated an intent injunctive relief not be available against a performer, however capable, who had not yet achieved distinction. The fact the bill was further amended to provide the services be special is a further indication the Legislature intended the statute to apply only to persons who had attained 'star quality' no matter how special their services might be." (160 C.A.3d 138.)

(e) The option clause also violates the concept of fundamental fairness embodied in C.C. 3423, i.e., that the \$6,000 compensation requirement balances the equities between employer and performer. (160 C.A.3d 139.)

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



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9. Counterperformance Is Not Secured.
a. Former Defense of Lack of Mutuality.

13 Witkin Sum. Cal. Law Equity § 53

[§ 53] Former Defense of Lack of Mutuality.

(1) *Nature of Doctrine.* Courts have developed the doctrine that for one party to obtain specific performance, the circumstances must be such that the remedy would also have been available to the other party. If the plaintiff lacks capacity to contract, or the plaintiff's promise is of a type that is not specifically enforced, the defendant could not have obtained specific performance against the plaintiff, and for this reason alone, the plaintiff is denied the remedy against the defendant. Although greatly criticized and subject to several exceptions, this requirement of mutuality of remedy is still applied to some extent in many jurisdictions. (See 5A Corbin §1178 et seq.; 11 Williston 3d §1433; 19 *Hastings L. J.* 1430; 1 *Pacific L. J.* 654; 5 *A.L.R.2d* 287 [specific performance of contract for sale of real property as affected by provision making it conditional upon purchaser's obtaining loan]; 22 *A.L.R.2d* 508 [mutuality of remedy as essential to granting of specific performance]; 71 *Am.Jur.2d* (2001 ed.), *Specific Performance* §24 et seq.)

In California, the doctrine was established by C.C. 3386 (later amended to eliminate the defense; see *infra*, §54). (See *Roy v. Pos* (1920) 183 C. 359, 364, 191 P. 542; *Moore v. Heron* (1930) 108 C.A. 705, 709, 292 P. 136; *Pimentel v. Hall-Baker Co.* (1939) 32 C.A.2d 697, 702, 90 P.2d 588; *Lind v. Baker* (1941) 48 C.A.2d 234, 245, 119 P.2d 806; *Moklofsky v. Moklofsky* (1947) 79 C.A.2d 259, 262, 179 P.2d 628; 19 *Cal. L. Rev.* 183; 28 *Cal. L. Rev.* 492; 1 *Pacific L. J.* 654.)

(2) *Exception: Exercise of Option.* At the time an option to purchase is made, the holder of the option is not bound to purchase and there is of course no mutuality either of obligation or remedy. But when the option is exercised, the option holder binds himself or herself to purchase, and the necessary mutuality exists at the time the option holder brings the action. On the theory that mutuality at the time of suit is the really significant requirement, the option holder is entitled to specific performance. (*Chrisman v. Southern Calif. Edison Co.* (1927) 83 C.A. 249, 255, 256 P. 618; see *Jonas v. Leland* (1947) 77 C.A.2d 770, 777, 176 P.2d 764; 5A Corbin §1197; 11 Williston 3d §1441; 71 *Am.Jur.2d* (2001 ed.), *Specific Performance* §163.)

(3) *Exception: Substantial Performance.* If, despite a lack of mutuality at the time of contracting, the plaintiff has fully or substantially performed, mutuality exists at the time of suit and specific performance is proper. (See *Brown v. Sebastopol* (1908) 153 C. 704, 707, 96 P. 363; *Jones v. Clark* (1941) 19 C.2d 156, 161, 119 P.2d 731; *Wolleson v. Coburn* (1923) 63 C.A. 315, 324, 218 P. 479 [plaintiff vendor's title, originally defective, was cleared at time of suit];

Van Fossen v. Yager (1944) 65 C.A.2d 591, 596, 151 P.2d 14; *Stone v. Burke* (1952) 110 C.A.2d 748, 756, 244 P.2d 51 [plaintiff's obligation for personal services was substantially performed]; *Henderson v. Fisher* (1965) 236 C.A.2d 468, 476, 46 C.R. 173; 5A Corbin §1189; 11 Williston 3d §1439; 71 Am.Jur.2d (2001 ed.), *Specific Performance* §28.)

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b. Requirement of Security.

13 Witkin Sum. Cal. Law Equity § 54

[§ 54] Requirement of Security.

The Restatement of Contracts repudiated the strict doctrine of lack of mutuality of remedy, and substituted the rule that specific performance may be refused only if there is no sufficient security that the defendant will get the performance promised to him or her. Thus, if the plaintiff's performance is due, the plaintiff can get specific performance by a conditional decree, i.e., a decree conditioned on plaintiff giving performance. And even if the plaintiff's performance is not due, the court may compel the defendant to perform if there is sufficient security that the plaintiff will perform. This requirement of security accomplishes the only reasonable object of the mutuality rule; it assures the defendant that he or she will not be forced to perform without receiving the agreed equivalent from the plaintiff. (See *Rest.2d, Contracts* §363; 5A Corbin §1183, 1190; 11 Williston 3d §1440; 70 *Harv. L. Rev.* 390.)

In 1969, on the recommendation of the Law Revision Commission, C.C. 3386 was amended to eliminate the requirement of mutuality of remedy and substitute the Restatement requirement of security. The statute now provides that notwithstanding that the agreed counterperformance "is not or would not have been specifically enforceable," specific performance may be compelled if both of the following conditions are satisfied:

(1) Specific performance would otherwise be an appropriate remedy. (C.C. 3386(a).)

(2) The agreed counterperformance has been substantially performed or its concurrent or future performance is assured; or, if the court deems necessary, the agreed counterperformance can be secured "to the satisfaction of the court." (C.C. 3386(b).) (See *Bleacher v. Conte* (1981) 29 C.3d 345, 352, 353, 213 C.R. 852, 698 P.2d 1154, citing the text [contract of sale of land; liquidated damages clause waiving seller's right to specific performance did not preclude action by buyers for specific performance]; *Converse v. Fong* (1984) 159 C.A.3d 86, 91, 92, 205 C.R. 242; 1 *Pacific L. J.* 654.)

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9. Counterperformance Is Not Secured.
c. Offer of Performance by Nonsigner.

13 Witkin Sum. Cal. Law Equity § 55

[§ 55] Offer of Performance by Nonsigner.

(1) *Statement of Rule.* Where the plaintiff is not obligated under a written contract for failure to sign the contract, the plaintiff removes this lack of mutuality of obligation by performance or an offer to perform, or by bringing the action. (C.C. 3388; *Harper v. Goldschmidt* (1909) 156 C. 245, 251, 104 P. 451; see 5A Corbin §1192; 11 Williston 3d §1437.) This rule also applies where the party's agent signed but was not authorized in writing to do so. (See *San Francisco Hotel Co. v. Baier* (1961) 189 C.A.2d 206, 210, 11 C.R. 32.) An undisclosed principal also may obtain specific performance, but for a different reason. The principal is liable on the contract even though he or she did not sign it; thus, there is mutuality of obligation. (*Buckley v. Shell Chemical Co.* (1939) 32 C.A.2d 209, 215, 89 P.2d 453.)

In *Ellis v. Mihelis* (1963) 60 C.2d 206, 32 C.R. 415, 384 P.2d 7, defendant brothers, P and E, owned a ranch as partners. E authorized P to negotiate for its sale, and P listed it with a broker, telling him that he was the owner. Plaintiff, through his broker R, agreed to buy it, and the agreement was signed by defendant P and by R on behalf of plaintiff. On defendants' repudiation, plaintiff sued for specific performance. *Held*, decree affirmed; the contention that the contract lacked mutuality of remedy, because, prior to ratification of R's orally authorized signature (see *supra*, §27) defendants could not have enforced the contract against plaintiff, was rejected. The court approved authorities supporting the view that "the only important consideration is whether a court of equity which is asked to specifically enforce a contract against the defendant is able to assure that he will receive the agreed performance from the plaintiff." (60 C.2d 215.) Cases suggesting that, where the purchaser has not signed, the nonsigning vendor may withdraw before the offer of full performance, regardless of the equities, were disapproved. (60 C.2d 216.)

(2) *Limitation.* In order for an offer to perform to justify specific enforcement, the contract must be otherwise proper for specific performance. (See C.C. 3388.) In other words, the grounds for specific performance must be clear when the single objection of lack of mutuality is removed. In *Pacific Elec. Ry. Co. v. Campbell-Johnston* (1908) 153 C. 106, 94 P. 623, the contract was one requiring construction of a railroad, i.e., the performance by the plaintiff of successive acts. Because equity would not decree specific performance of that type of contract, the fact of the plaintiff's willingness to perform was of no consequence. (153 C. 116.) (See *Moore v. Heron* (1930) 108 C.A. 705, 711, 292 P. 136.)

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1. Vendor's Default: Defect in Title.
a. Where Vendor Is Plaintiff.
1. In General.

13 Witkin Sum. Cal. Law Equity § 56

[§ 56] In General.

(1) *Marketable Title*. A plaintiff who seeks specific performance must ordinarily perform all conditions precedent to the defendant's obligation. (C.C. 3391(3), 3392; see *Realmuto v. Gagnard* (2003) 110 C.A.4th 193, 204, 1 C.R.3d 569, citing the text [vendor's failure to provide residential home purchasers with mandatory transfer disclosure statement (see 12 Summary (10th), Real Property, §§494, 495) precluded specific performance of sales contract]; 1 Summary (10th), Contracts, §776 et seq.; 4 Cal. Proc. (4th), Pleading, §491; 5 Cal. Proc. (4th), Pleading, §756 et seq.) If the contract is one for the sale of property, the vendor must be able to give the purchaser a title free from reasonable doubt (C.C. 3394), i.e., a marketable title. (See 71 Am.Jur.2d (2001 ed.), Specific Performance §141 et seq.; 77 Am.Jur.2d (1997 ed.), Vendor and Purchaser §137 et seq.) A title gained by adverse possession is not sufficient, for it cannot be deduced from the record. (*Gwin v. Calegaris* (1903) 139 C. 384, 387, 73 P. 851; but see 71 Am.Jur.2d (2001 ed.), Specific Performance §145 [majority rule is contra].) (See 81 A.L.R.2d 1020 [effect of party walls and party-wall agreements]; 39 A.L.R.3d 362 [effect of zoning or other public restrictions]; 65 A.L.R.3d 450 [effect of doubtful construction of will devising property on marketability of title]; 13 A.L.R.4th 927 [provision in contract that it is null unless marketable title is delivered, where defect is created or permitted by vendor after execution of agreement].) (For marketable record title statutes, see 12 Summary (10th), Real Property, §336 et seq.)

An encumbrance, such as an easement, prevents giving clear title. (*Krotzer v. Clark* (1918) 178 C. 736, 739, 174 P. 657; see 71 Am.Jur.2d (2001 ed.), Specific Performance §§156, 157.) But the encroachment of a building on an adjoining parcel or a public street constitutes a defect in title only where it is substantial. A slight encroachment does not give rise to a right of action for substantial damages or for injunctive relief, and consequently does not render the title unmarketable. (*Mertens v. Berendsen* (1931) 213 C. 111, 115, 1 P.2d 440; see 19 Cal. L. Rev. 647; 71 Am.Jur.2d (2001 ed.), Specific Performance §§156, 157; 12 Summary (10th), Real Property, §376; *infra*, §172.)

(2) *No Title at Time of Contract*. The vendor need not have title at the time of making the contract of sale, if, at the time of performance, the vendor is able to furnish the title that he or she agreed to convey. (*Wheat v. Thomas* (1930) 209 C. 306, 314, 287 P. 102; *Wolleson v. Coburn* (1923) 63 C.A. 315, 324, 218 P. 479; *Jedlicka v. Atwell Land Co.* (1928) 93 C.A. 455, 464, 269 P. 665, 270 P. 232; see 5A Corbin §1195; 53 A.L.R.3d 678 [lien dischargeable out of funds to be received from purchaser on closing]; 71 Am.Jur.2d (2001 ed.), Specific Performance §148.)

(3) *No Title at Time of Performance.* In *Pike v. Von Fleckenstein* (1962) 203 C.A.2d 134, 21 C.R. 390, plaintiff vendor merely had an unrecorded contract to buy the land from a third person, intending to pay the balance due on it with the money plaintiff expected to receive from defendant purchaser; hence, plaintiff did not come within the exception, for he still lacked title at the time of performance. Sometimes equitable considerations may justify an interlocutory decree giving a reasonable time to perfect a title, but a decree of specific performance is improper and reversible error. (203 C.A.2d 139.) (See 71 Am.Jur.2d (2001 ed.), *Specific Performance* §149.)

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

(1) *Marketable Title.* See 77 Am.Jur.2d (2006 ed.), *Vendor and Purchaser* §103 et seq.

Cross-References: 4 Cal. Proc. (5th), *Pleading*, §530; 5 Cal. Proc. (5th), *Pleading*, §800 et seq.



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1. Vendor's Default: Defect in Title.

a. Where Vendor Is Plaintiff.

2. Specific Performance With Compensation.

13 Witkin Sum. Cal. Law Equity § 57

[§ 57] Specific Performance With Compensation.

If the plaintiff vendor cannot fully perform because his or her title is partially defective, can the plaintiff get specific performance, subject to compensation to the defendant by way of abatement in price or other performance? Some courts hold that the plaintiff can, and the Restatement follows this view. (See *Rest.2d, Contracts* §369 [remedy may be granted despite breach "unless the breach is serious enough" to discharge other party's duty to perform]; 5A Corbin §1176; 71 *Am.Jur.2d* (2001 ed.), *Specific Performance* §153 et seq.)

C.C. 3392 would likewise permit that result. The statute allows specific performance with compensation for the default where the failure to perform "is only partial, and either entirely immaterial, or capable of being fully compensated." (See *Lifton v. Harshman* (1947) 80 C.A.2d 422, 433, 182 P.2d 222.)

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1. Vendor's Default: Defect in Title.
b. Where Vendor Is Defendant.
1. In General.

13 Witkin Sum. Cal. Law Equity § 58

[§ 58] In General.

(1) *Former Doctrine of Lack of Mutuality.* If a purchaser seeks specific performance against a vendor whose title is defective, the purchaser being willing to take title in that condition with compensation for the defect, has the vendor any defense? The chief objection was the (now abandoned) doctrine of lack of mutuality. The defendant vendor, being in default, could not have compelled specific performance against the plaintiff purchaser, and cannot therefore be subject to the remedy against the defendant. The effect of this view was that the defendant gained an advantage from his or her own failure of performance, although the same result was sometimes reached under the reasoning that the court cannot make a new contract for the parties. (See *Linehan v. Devincense* (1915) 170 C. 307, 311, 149 P. 584, and criticism, 16 Cal. L. Rev. 541; 11 Williston 3d §1436; 71 Am.Jur.2d (2001 ed.), *Specific Performance* §150 et seq.; on vendor's defenses, see C.E.B., 1 Real Property Remedies and Damages 2d, §5.35 et seq.; C.E.B., 1 Real Property Sales Transactions 3d, §4.131 et seq.)

(2) *Abandonment of Doctrine.* Rest.2d, Contracts §358 permits specific performance with compensation for the defect or partial breach. In *Miller v. Dyer* (1942) 20 C.2d 526, 530, 127 P.2d 901, the court disapproved of the observations made in *Linehan*, declaring that the rule of mutuality of remedy "was never considered applicable where the unavailability of the remedy to the party against whom relief was sought resulted from his own default."

Miller was followed in *Milkes v. Smith* (1949) 91 C.A.2d 79, 204 P.2d 419. Defendant vendor owned only an undivided half interest as a tenant in common, and had failed in an attempt to purchase his cotenant's interest. Held, specific performance should be granted with respect to defendant's interest, and the trial judge was directed to determine the amount of abatement in the purchase price to which plaintiff purchaser was entitled. After reviewing cases allowing specific performance where the defendant vendor was only the equitable owner, held only an undivided interest, or had a defective title, or where the land was subject to a lien or homestead or was deficient in quantity, the court stated the rule as follows: "[I]f a vendor has *any* interest in the property he has contracted to convey, the vendee at his option may enforce the contract with respect to whatever interest the vendor possesses, and may also receive compensation for the deficiency in performance." (91 C.A.2d 82.)

Other cases are to the same effect. (See *O'Connell v. Zimmerman* (1958) 157 C.A.2d 330, 334, 321 P.2d 161 [seller

of land with liquor store was not entitled to rescind on ground that authorities refused to approve transfer of liquor license to buyer]; *D-K Inv. Corp. v. Sutter* (1971) 19 C.A.3d 537, 547, 96 C.R. 830; 36 Cal. L. Rev. 480 [rule under Uniform Vendor and Purchaser Risk Act, *infra*, §175]; 13 A.L.R.2d 1462 [nature of deed that may be required of vendor who is unable to convey title for which vendor has contracted].)

(3) *Distinction: Conveyance for Vendor's Benefit.* A distinguishable situation was presented in *Britschgi v. McCall* (1953) 41 C.2d 138, 257 P.2d 977. Defendant vendors had made a lease to S with an option to buy, and then contracted to sell to plaintiff B. The contract with B was conditioned on defendants being able to eliminate the option right of S. B sought specific performance on the theory that he could waive the condition. *Held*, specific performance denied.

(a) In the ordinary defect of title case, the vendor may convey without incurring personal liability to a mortgage or easement holder; thus, elimination of the defect is for the sole benefit of the purchaser and he or she may waive it. (41 C.2d 143.)

(b) But here, the S lease contained a personal obligation of defendant vendors to convey to S. A conveyance to plaintiff B would be a breach of that obligation that might subject them to damages, and B's assumption of the obligation would not by itself release them from their liability to S. Thus, the condition was in part for the benefit of defendant vendors, to protect them from liability to S, and plaintiff purchaser could not waive it by himself alone. (41 C.2d 143.)

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

(1) *Former Doctrine of Lack of Mutuality.*

Vendor's defenses: See C.E.B., 1 Real Property Sales Transactions 4th, §4.141 et seq.



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1. Vendor's Default: Defect in Title.

b. Where Vendor Is Defendant.

2. Time for Removing Defect.

13 Witkin Sum. Cal. Law Equity § 59

[§ 59] Time for Removing Defect.

In *Stevens Group Fund IV v. Sobrato Dev. Co.* (1991) 1 C.A.4th 886, 2 C.R.2d 460, plaintiff sued for breach of a contract for the sale of commercial real property. Defendant vendors were unable to convey title "free and clear" as required by the contract, due to the existence of a trust deed securing a note that was not prepayable. The trial court denied plaintiff's request for specific performance because the holder of the note had refused to allow prepayment at the time of the sale. However, the note had become due and payable by the time of trial, so that defendants could then have conveyed title to the property free and clear. *Held*, judgment reversed and matter remanded for redetermination of plaintiff's request for specific performance.

(a) C.C. 3390(3) (*supra*, §47) bars specific performance where the party cannot lawfully perform "when required to do so." The statute has not been applied to facts like these before, but the general doctrine is that, to prevent specific enforcement, a defendant's incapacity must exist not just at the time of making the contract, but also at the time of the hearing. (1 C.A.4th 894.)

(b) Plaintiff had not requested conveyance of the property subject to the outstanding loan, but, if plaintiff had, it would have been entitled to the property and the difference between the payments under that loan and plaintiff's alternative loan commitment, under the rule stated in *Milkes v. Smith* (1949) 91 C.A.2d 79, 204 P.2d 419, *supra*, §58. A contrary rule would permit a defaulting party to preclude intervention by a court of equity merely by refusing to perform as agreed. (1 C.A.4th 895.)

(c) Permitting the trial court to consider the vendor's ability to perform at the time of the decree gives the court greater latitude in exercising its equitable power to order specific performance when appropriate, and provides greater assurance that a contract will be performed. However, specific performance was not necessarily required in this case; that decision was still for the trial court, which might well decide, after considering all applicable criteria, that equity warranted denial. (1 C.A.4th 897.)

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2. Purchaser's Default: Failure To Pay.
a. Former Right of Forfeiture.
1. In General.

13 Witkin Sum. Cal. Law Equity § 60

[§ 60] In General.

(1) *Vendor's Remedies.* An unpaid vendor of real property must make an election between inconsistent remedies, chiefly, recovery of the balance of the purchase price or retention of the land with or without forfeiture of the prior paid installments. A binding election of one precludes the pursuit of the other. (See *Security-First Nat. Bank of Los Angeles v. Hauer* (1941) 47 C.A.2d 302, 306, 117 P.2d 952 [purchaser assigned crop proceeds as security for price; vendor who declared forfeiture was precluded from taking proceeds]; 3 U.C.L.A. L. Rev. 264; on election of remedies, see 3 Cal. Proc. (4th), Actions, §174 et seq.; on action for damages against purchaser, see 1 Summary (10th), Contracts, §936 et seq.)

(2) *Glock Case.* In *Glock v. Howard & Wilson Colony Co.* (1898) 123 C. 1, 55 P. 713, there was a contract for the sale of land, with payment to be made in installments, and time of the essence. After some payments, the purchaser defaulted. Later, he tendered the installments due and demanded the property. *Held*, the purchaser was not entitled to a conveyance. This decision laid down the rule that the rights of a purchaser who defaults may be forfeited, and the purchaser is not thereafter entitled either to specific performance or to recovery of the installments already paid. The right to declare a forfeiture in this situation was independent of an express forfeiture clause in the contract. (123 C. 16.) (See *Winter v. Kitto* (1929) 100 C.A. 302, 309, 279 P. 1024; *Martinelli v. Hogrefe* (1932) 123 C.A. 438, 441, 11 P.2d 412; *Kelso v. Ulrich* (1945) 67 C.A.2d 698, 701, 155 P.2d 407; *Krobitzsch v. Middleton* (1946) 72 C.A.2d 804, 812, 165 P.2d 729; *Keelan v. Belmont Co.* (1946) 73 C.A.2d 6, 10, 165 P.2d 930; *Wilson v. Security-First Nat. Bank of Los Angeles* (1948) 84 C.A.2d 427, 430, 190 P.2d 975; *Pitt v. Mallalieu* (1948) 85 C.A.2d 77, 86, 192 P.2d 24; 18 Cal. L. Rev. 681; 27 Cal. L. Rev. 583; 37 Cal. L. Rev. 704; 40 Cal. L. Rev. 593.)

(3) *Where Time Is Not of Essence.* The *Glock* rule was restricted to situations in which time was of the essence of the contract. (See *Henck v. Lake Hemet Water Co.* (1937) 9 C.2d 136, 143, 69 P.2d 849; *Benedict v. Calkins* (1937) 19 C.A.2d 416, 419, 65 P.2d 831; 1 Summary (10th), Contracts, §815.)

In *Hastings v. Bank of America* (1947) 79 C.A.2d 627, 180 P.2d 358, the parties signed escrow instructions, under which plaintiff vendors agreed to deposit a sufficient deed, and defendant purchasers deposited \$ 500 and agreed to deposit the balance of the price (\$ 3,000) by July 22. It was further provided that the escrow holder should complete the

transaction by July 22, or as soon thereafter as possible, "unless a written demand for return of money or instruments" was made by one of the parties. Defendants failed to pay the balance on July 22, or within the time of an extension given them until August 21, and shortly thereafter plaintiffs sold the land to a stranger and sought to forfeit the deposit. *Held*, defendants were entitled to the return of the \$ 500 deposit. The quoted provision required a written demand by plaintiffs to terminate the rights of defendants under the escrow, and there was no language making time of the essence, or providing for forfeiture (retention as liquidated damages) of the deposit. (79 C.A.2d 629.)

(4) *Early Attacks on Glock Case*. The *Glock* rule was repeatedly criticized by writers for the court's failure to consider C.C. 3275 (supra, §20), permitting relief against forfeiture where the party seeking relief was not guilty of grossly negligent, wilful, or fraudulent breach of duty. (See 18 Cal. L. Rev. 681; 20 Cal. L. Rev. 194; 27 Cal. L. Rev. 583; 40 Cal. L. Rev. 594; 52 Harv. L. Rev. 129.) It was nevertheless followed until the decision in *Barkis v. Scott* (1949) 34 C.2d 116, 208 P.2d 367, *infra*, §62. Prior judicial attacks on the doctrine were generally dicta in opinions where the result could be supported on theories of immaterial delay or waiver (*infra*, §61). (See, e.g., *Gonzalez v. Hirose* (1948) 33 C.2d 213, 216, 200 P.2d 793; *Bedell v. Barber* (1947) 80 C.A.2d 806, 807, 182 P.2d 591; *Breitman v. Gattman* (1948) 88 C.A.2d 124, 126, 198 P.2d 311; 18 Cal. L. Rev. 681; 27 Cal. L. Rev. 583; 40 Cal. L. Rev. 594.)

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

(1) *Vendor's Remedies.Election of remedies:*

Cross-Reference: 3 Cal. Proc. (5th), Actions, §179 et seq.



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a. Former Right of Forfeiture.
2. Waiver of Right.

13 Witkin Sum. Cal. Law Equity § 61

[§ 61] Waiver of Right.

(1) *Waiver Established.* To escape from some of the harsh consequences of the rule of *Glock v. Howard & Wilson Colony Co.* (1898) 123 C. 1, 55 P. 713, supra, §60, California courts followed a liberal policy of waiver.

In *Boone v. Templeman* (1910) 158 C. 290, 110 P. 947, the vendor acquiesced in the default by accepting installments, without objection, long after they were due. *Held*, this was a waiver of the delay up to that time. (158 C. 295.)

In *Gonzalez v. Hirose* (1948) 33 C.2d 213, 200 P.2d 793, the purchaser defaulted and the vendor waived the time provision, but the vendor's successor, immediately after acquiring his interest, gave a notice of forfeiture. *Held*, the right to forfeit, once waived, could not be restored without first reestablishing the time provisions by definite seasonable notice. (33 C.2d 217.) (See, to same effect, *Lifton v. Harshman* (1947) 80 C.A.2d 422, 433, 182 P.2d 222; *Bedell v. Barber* (1947) 80 C.A.2d 806, 807, 182 P.2d 591; *Lamont v. Ball* (1949) 93 C.A.2d 291, 293, 209 P.2d 9 [vendor and purchaser represented by same attorney, who advised purchaser that vendor wanted payments and would not forfeit]; *Bodem v. Friedman* (1949) 90 C.A.2d 225, 228, 202 P.2d 632 [vendor led purchasers to believe that deed would be delivered on payment of purchase price in full]; 40 Cal. L. Rev. 594.)

In *Gaume v. Sheets* (1919) 181 C. 119, 183 P. 535, the contract provided for 60 days' notice to the purchaser before the vendor could declare a forfeiture. On default, the vendor gave notice that he elected to treat the agreement as ended, and ordered the purchaser to leave. *Held*, the purchaser could rescind and recover installments. (181 C. 124.) (See *Laffoon v. Collins* (1931) 212 C. 750, 755, 300 P. 808; *d'Artenay v. Hansen* (1934) 138 C.A. 39, 43, 31 P.2d 460; 8 Cal. L. Rev. 60.)

(2) *Waiver Not Shown.* A waiver will not extend to a delay in future installments unless the conduct of the vendor warrants the inference of this intention. (*Hoppin v. Munsey* (1921) 185 C. 678, 684, 198 P. 398; *Christin v. Story* (1931) 119 C.A. 326, 332, 6 P.2d 301.) In *Clifford v. Fleshman* (1924) 65 C.A. 762, 225 P. 45, the contract provided that the vendor could cancel for default, and on three installments becoming overdue, he sued to cancel. A settlement was then made, the purchasers paying all the amounts then due. Later, they defaulted again. *Held*, the settlement was not a waiver

for the future. (65 C.A. 769.)

In *Brown v. Chowchilla Land Co.* (1922) 59 C.A. 164, 210 P. 424, the contract expressly provided that acceptance of overdue installments would not be deemed a waiver of the right of forfeiture. The purchaser defaulted, and the vendor accepted late payment without intimating that he would insist on strict performance in the future. Later, the purchaser defaulted again. *Held*, although the vendor's conduct would normally have resulted in a waiver, there was none here because of the special contract provision. (59 C.A. 170.) (See 11 Cal. L. Rev. 286.)

The effect of waiver is at most to give the purchaser a reasonable time to perform. Thus, in an action in ejectment brought against a defaulting purchaser, an allegation of waiver is insufficient unless coupled with an allegation of willingness and ability to perform. (*Watkins v. Warren* (1932) 122 C.A. 617, 625, 10 P.2d 500.)

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2. Purchaser's Default: Failure To Pay.

b. Relief Against Forfeiture.

1. Purchaser Free From Serious Fault.

13 Witkin Sum. Cal. Law Equity § 62

[§ 62] Purchaser Free From Serious Fault.

In *Barkis v. Scott* (1949) 34 C.2d 116, 208 P.2d 367, the rule of *Glock v. Howard & Wilson Colony Co.* (1898) 123 C. 1, 55 P. 713, supra, §60, was repudiated by reinterpreting its holding, without expressly overruling the decision. Defendant purchasers contracted in 1941 to buy real property. They paid \$ 700 down, and during the next 5 years, made 57 monthly payments on the \$ 5,450 balance, and also added improvements worth over \$ 3,000. In 1946, due to some confusion in their bank deposits occasioned by illness, defendants' June check was dishonored, a July check was cashed, and a check due August 15 was dishonored. On August 26, plaintiff vendor gave notice of election to declare a forfeiture, relying on time of the essence and forfeiture provisions in the contract. Defendants, who were until then unaware that the checks had been dishonored, immediately tendered payment, but plaintiff refused and brought this action to quiet title. The trial court gave judgment for plaintiff, finding that defendants' failure to pay was "grossly negligent and a wilful breach of duty." *Held*, the finding was not supported by the evidence and defendants were entitled to relief under C.C. 3275.

(a) In *Glock* and similar cases, the contract was terminated because the purchaser was substantially in default without a satisfactory excuse, and the purchaser was seeking, on a theory of rescission and restitution, to recover some portion of the payments the purchaser had previously made. In these cases, it often appears that the damages sustained by the vendor are at least equal to the payments made, or that it is impossible to compute the actual damages; thus the purchaser is unable to establish a claim of unjust enrichment and the right of restitution. Also, in cases where the contract is still executory but no substantial expenditures have been made in reliance on it, and the only forfeiture involved is a loss of the benefit of the bargain, relief will not be granted. (34 C.2d 121.)

(b) However, if the purchaser has substantially performed and is not asking for rescission, but seeks to keep the contract alive, the purchaser is in a better position. "[W]hen the default has not been serious and the vendee is willing and able to continue with his performance of the contract, the vendor suffers no damage by allowing the vendee to do so. In this situation, if there has been substantial part performance or if the vendee has made substantial improvements in reliance on his contract, permitting the vendor to terminate the vendee's rights under the contract and keep the installments that have been paid can result only in the harshest sort of forfeitures. Accordingly, relief will be granted whether or not time has been made of the essence." (34 C.2d 122.) (See 37 Cal. L. Rev. 704; 40 Cal. L. Rev. 593; 2

Stanf. L. Rev. 235; 23 *So. Cal. L. Rev.* 111.)

The *Barkis* case was followed by a number of decisions that firmly established the principle of relief in these situations. (See *Kammerer v. Woodson* (1949) 93 C.A.2d 220, 223, 208 P.2d 372; *Bolln v. Petrocchi* (1950) 95 C.A.2d 589, 592, 213 P.2d 513; *Crofoot v. Weger* (1952) 109 C.A.2d 839, 842, 241 P.2d 1017; *Scarbery v. Bill Patch Land & Water Co.* (1960) 184 C.A.2d 87, 103, 7 C.R. 408 ["the proper procedure in such circumstances is for the court to find the amount that is owing under the agreement" and "make its decree that such amount be paid within a reasonable time and that if it is not paid within that time the vendee's equity be foreclosed"]; 48 *Cal. L. Rev.* 729.)

In *Major-Blakeney Corp. v. Jenkins* (1953) 121 C.A.2d 325, 263 P.2d 655, plaintiff purchaser contracted to buy 10 lots for \$ 6,700. A \$ 1,500 deposit was paid into escrow, the balance being due January 1, with time of the essence. January 1 and 2 were holidays, and plaintiff failed to pay on January 3. Thus, defendants were entitled to terminate the contract on January 6; i.e., there was a violation of the condition precedent and no evidence of waiver. But restitution may be given to a purchaser who is able to show that his or her default was not wilful, fraudulent, or grossly negligent, and that the purchaser's prior payments exceed the damages suffered by the vendor. Here, plaintiff was 2 weeks late as a result of the unexpected failure of his money source, and the downpayment was 30% of the purchase price, too large an amount for retention as liquidating damages. (121 C.A.2d 331.) (See *Williams Plumbing Co. v. Sinsley* (1975) 53 C.A.3d 1027, 1032, 126 C.R. 345, *infra*, §67 [distinguishing and criticizing *Major-Blakeney*]; 4 A.L.R.4th 993 [Modern Status of Defaulting Vendee's Right To Recover Contractual Payments Withheld by Vendor as Forfeited].)

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2. Wilful Default: Restitution.
aa. In General.

13 Witkin Sum. Cal. Law Equity § 63

[§ 63] In General.

(1) *Former Forfeiture Rule.* *Barkis v. Scott* (1949) 34 C.2d 116, 208 P.2d 367, supra, §62, did not purport to change the rule, derived from the express terms of C.C. 3275, that relief will be denied to a person who wilfully defaults or is grossly negligent in failing to perform. Thus, in *Amoruso v. Carley* (1949) 93 C.A.2d 422, 209 P.2d 139, plaintiff purchaser failed to pay installments for 11 months, permitted taxes to become delinquent, evaded service of notices, and made no offer of performance until the day the vendor's action was filed. *Held*, a forfeiture was justified. (93 C.A.2d 427.) (See *Baffa v. Johnson* (1950) 35 C.2d 36, 39, 216 P.2d 13; 40 Cal. L. Rev. 595.)

(2) *Current Restitution Rule.* The forfeiture rule applied in *Amoruso* and similar cases is no longer the law. In *Freedman v. The Rector, Wardens & Vestrymen of St. Matthias Parish of Los Angeles* (1951) 37 C.2d 16, 230 P.2d 629, plaintiff bought lots, paying \$ 2,000 down and agreeing to pay the \$ 16,000 balance in 30 days. Title was cleared but on November 28 plaintiff repudiated and demanded return of his deposit. Defendant resold to another for \$ 20,000, thus suffering no damage from the breach and realizing a profit of \$ 2,000. Plaintiff then sought to withdraw his repudiation, and later brought this action for specific performance. *Held*, specific performance was properly denied, but the judgment was reversed for retrial on the issue of restitution of part of the downpayment; i.e., plaintiff should recover that payment after deducting expenses incurred by defendant, such as the broker's commission.

(a) The statutes must be construed together to authorize affirmative relief to the purchaser. Liquidated damage clauses are prohibited where actual damages can be determined (see 1 *Summary* (10th), *Contracts*, §503), and C.C. 3294 excepts breach of contract from the situations in which punitive damages may be imposed. C.C. 3275 and 3369 should not therefore be limited to situations in which the vendor sues to quiet title. "Unless the same rule is adopted when the vendee seeks restitution, the rights of the parties under identical fact situations will turn on the chance of which one first seeks the aid of the court." (37 C.2d 22.)

(b) Considerations of policy justify recovery by the defaulting purchaser after wilful breach, where otherwise the vendor would receive the equivalent of punitive damages instead of fair compensation. Denial of a remedy to this purchaser would mean that if the purchaser paid every installment but the last, he or she would lose all. But even a

penalty should bear some relationship to its purpose. "A penalty equal to the net benefits conferred by part performance bears no such relationship. It not only fails to take into consideration the degree of culpability, but its severity increases as the seriousness of the breach decreases. Thus a vendee who breaches his contract before he has benefited the vendor by part performance suffers no penalty, whereas one who has almost completely performed his contract suffers the maximum penalty." (37 C.2d 22.)

Other cases are to the same effect. (See *Behrendt v. Abraham* (1966) 64 C.2d 182, 187, 49 C.R. 292, 410 P.2d 828; *MacFadden v. Walker* (1971) 5 C.3d 809, 814, 97 C.R. 537, 488 P.2d 1353, *infra*, §67; *Lucientes v. Bliss* (1958) 157 C.A.2d 565, 573, 321 P.2d 526; *Branche v. Hetzel* (1966) 241 C.A.2d 801, 807, 51 C.R. 188; *Kudokas v. Balkus* (1972) 26 C.A.3d 744, 752, 103 C.R. 318, 1 Summary (10th), *Contracts*, §904; *Rest.2d, Contracts* §374; 40 Cal. L. Rev. 593; 48 Cal. L. Rev. 733; 60 Cal. L. Rev. 84; 19 *Hastings L. J.* 1212; 10 *Stanf. L. Rev.* 355; 13 *Stanf. L. Rev.* 850; 25 *So. Cal. L. Rev.* 387; 2 *U.S.F. L. Rev.* 329.)

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bb. Extent of Relief.

13 Witkin Sum. Cal. Law Equity § 64

[§ 64] Extent of Relief.

Freedman v. The Rector, Wardens & Vestrymen of St. Matthias Parish of Los Angeles (1951) 37 C.2d 16, 230 P.2d 629, supra, §63, enormously expands the situations and conditions where relief from forfeiture may be given.

(1) *Escrow*. In the escrow situation, the default may take place at the outset before payments are made. Termination then involves no forfeiture, but merely a denial of specific performance under C.C. 3392 for failure to perform conditions precedent. (See *Evarts v. Johnston* (1949) 34 C.2d 6, 206 P.2d 633; *Davy v. Ogier* (1948) 87 C.A.2d 835, 842, 198 P.2d 92 [failure to make timely tender of purchase price].) However, if a downpayment or deposit is made, the *Freedman* rule authorizes restitution. (See *Major-Blakeney Corp. v. Jenkins* (1953) 121 C.A.2d 325, 332, 263 P.2d 655, supra, §62; *Nash v. Superior Court* (1978) 86 C.A.3d 690, 695, 150 C.R. 394, citing the text; 40 Cal. L. Rev. 597.)

(2) *Fraud or Gross Negligence*. The *Freedman* opinion suggests the possibility that its rule applies to all of C.C. 3275; i.e., that restitution may be given not only where the purchaser's default was wilful, but also where the purchaser's conduct was fraudulent or grossly negligent. (See 40 Cal. L. Rev. 597.) But the clean hands rule should be considered in this connection. (See supra, §9 et seq.)

(3) *Other Kinds of Contracts*. The court's discussion of statutes, principles, and policy was broad enough to justify application beyond the vendor-purchaser situations to other kinds of contracts. Thus, in *Hill v. Hearron* (1952) 113 C.A.2d 763, 249 P.2d 54, plaintiffs and defendants had a partnership or joint venture agreement to grow potatoes for the 1949 season. The contract called for advancement of equal sums by each, and provided that if either should default, he should forfeit all his interest in the lease and crop, and the remaining partners should immediately become the owners of them. Plaintiffs failed to provide their share of the money, and in this action for an accounting, the trial judge, on sufficient evidence that this was a material and wilful breach, gave judgment for defendants. *Held*, reversed; the strict forfeiture provision was an unenforceable penalty. (113 C.A.2d 766.) (See 40 Cal. L. Rev. 598; 25 So. Cal. L. Rev. 387.)

(4) *Provision for Separate Consideration*. A provision for separate consideration will not protect the vendor from the operation of the *Freedman* rule. In *Caplan v. Schroeder* (1961) 56 C.2d 515, 15 C.R. 145, 364 P.2d 321, plaintiffs,

in July 1955, agreed to buy land from defendants at a price of \$ 323,000. Under the contract, they delivered, outside of escrow and "as consideration for Sellers entering into this Agreement," a \$ 15,000 promissory note, payable in 3- and 6-month installments. (56 C.2d 518.) They paid the note and thereafter wilfully breached, following which defendants resold at a higher price. In January 1958, plaintiffs brought this action to recover the amount paid on the note. Defendants relied on the contract provision that if the sale was consummated, the purchasers were to have credit on the price for the \$ 15,000 paid; but if they defaulted, the amount paid would be retained by the vendors. *Held*, plaintiffs were entitled to recover the sum paid less the vendors' expenses (i.e., the broker's fee).

(a) The attempt by bare recital to make the \$ 15,000 payment a separate consideration for entering into the agreement was ineffectual. The transaction was not an option but a binding bilateral contract; and defendant vendors executed the contract not in exchange for the \$ 15,000 but in consideration of plaintiffs' promise to purchase the property "on all of the terms stated." (56 C.2d 519.)

(b) The contract expressly provided for payment by the vendors of \$ 5,000 "as liquidated damages" in the event of their breach. But the right of the vendors to retain the \$ 15,000 on breach by the purchaser was not so described, nor was it made the exclusive remedy in damages against the purchasers; and there was evidence that the value of the land was rising, from which it might be inferred that the parties did not contemplate that the vendors would suffer any damages by resale. Hence, this was not a valid liquidated damage provision as a matter of law, and defendants failed to prove that it was one in fact. (56 C.2d 520.)

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cc. No Recovery Where No Unjust Enrichment.

13 Witkin Sum. Cal. Law Equity § 65

[§ 65] No Recovery Where No Unjust Enrichment.

The chief ground for denial of relief under the rule of *Barkis v. Scott* (1949) 34 C.2d 116, 208 P.2d 367, supra, §62, was removed by the later rule of *Freedman v. The Rector, Wardens & Vestrymen of St. Matthias Parish of Los Angeles* (1951) 37 C.2d 16, 230 P.2d 629, supra, §63. But the purchaser still has the burden of showing unjust enrichment, i.e., that the payments he or she made exceed the vendor's damages. (See *Zellner v. Reeve* (1949) 94 C.A.2d Supp. 978, 982, 211 P.2d 395; *Barkis v. Scott*, supra, 34 C.2d 122; *Petersen v. Ridenour* (1955) 135 C.A.2d 720, 726, 287 P.2d 848, infra, §66; *Tibbets v. Robb* (1958) 158 C.A.2d 330, 341, 322 P.2d 585.)

In *Major-Blakeney Corp. v. Jenkins* (1953) 121 C.A.2d 325, 263 P.2d 655, supra, §62, an escrow was opened for the purchase of 104 1/2 lots for \$ 56,275, with a \$ 1,000 deposit paid, a further deposit of \$ 4,850 due by February 1, and a balance to be represented by notes and trust deeds. Plaintiff purchaser unreasonably delayed performance, justifying termination by defendant. And in view of the findings that the property was not worth over \$ 52,275, it had been kept off the market for almost a year, no interest had been paid and additional taxes had fallen due, defendant vendor was held entitled to keep the \$ 1,000. (121 C.A.2d 337.)

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 3. Wilful Default: Specific Performance.
 - aa. Conditional Judgment.

13 Witkin Sum. Cal. Law Equity § 66

[§ 66] Conditional Judgment.

Suppose the defaulting purchaser does not seek the affirmative remedy of specific performance (*supra*, §64), and is denied restitution because of failure to show unjust enrichment of the vendor (*supra*, §65). In theory, the purchaser should be denied any relief. But in practice, it appears that the court, to avoid a forfeiture, may give the purchaser a last moment opportunity to cure the default and receive the neglected remedy of specific performance. (See 11 Williston 3d §1425B; 71 *Am.Jur.2d* (2001 ed.), *Specific Performance* §80.)

In *Petersen v. Ridenour* (1955) 135 C.A.2d 720, 287 P.2d 848, defendant purchasers defaulted after long possession and payment of some installments, and plaintiff vendor sued to quiet title. Defendants made no showing of the rental or fair value of the property, thereby failing to sustain the burden of proof of unjust enrichment; but their answer sought declaratory relief and an opportunity to cure the default by payment of any adjudged deficiencies. *Held*, a quiet title action by the vendor in this situation is essentially an attempt to enforce a strict foreclosure; an immediate unqualified judgment of forfeiture should not be given; instead, a "qualified judgment" should be rendered, finding the amount unpaid, stating a time for payment, and providing that, on failure to make the payment, the purchaser's equity will be foreclosed. (135 C.A.2d 730.) (See *Kay v. Kay* (1961) 188 C.A.2d 214, 219, 10 C.R. 196; 14 *Hastings L. J.* 44; 47 *So. Cal. L. Rev.* 198; 3 *U.C.L.A. L. Rev.* 264; on conditional judgments generally, see 7 *Cal. Proc.* (4th), *Judgment*, §23 et seq.)

Although the *Petersen* court cited a number of waiver cases, its holding in effect supports the bold proposition that the vendor's remedy is subject to the same basic limitation as that of a mortgagee, and that the purchaser has an equitable right roughly equivalent to a mortgagor's equity of redemption. (See 48 *Cal. L. Rev.* 462; *infra*, §68.)

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Conditional judgments generally:

Cross-Reference: 7 *Cal. Proc.* (5th), *Judgment*, §23 et seq.



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3. Wilful Default: Specific Performance.

bb. Restitution Analogy.

13 Witkin Sum. Cal. Law Equity § 67

[§ 67] Restitution Analogy.

In *MacFadden v. Walker* (1971) 5 C.3d 809, 97 C.R. 537, 488 P.2d 1353, defendant purchaser entered into an oral agreement with plaintiff vendor in 1950 to buy 80 acres of unimproved land for \$ 2,500. Defendant made a small downpayment, moved a caretaker on the property, and paid taxes. The parties made a formal contract in 1953, with time of the essence and a provision for forfeiture on default. In 1963, having paid all installments to date, defendant discovered that some timber had been removed from the property and stopped payments. Plaintiff sent her a notice of forfeiture, then brought this action to quiet title. Defendant tendered the entire balance due and cross-complained for specific performance. *Held*, judgment for defendant affirmed.

(a) Defendant's default was wilful; she did not assert that plaintiff was responsible for cutting the timber. Hence, defendant could not claim relief under C.C. 3275. (5 C.3d 813.)

(b) However, *Freedman v. The Rector, Wardens & Vestrymen of St. Matthias Parish of Los Angeles* (1951) 37 C.2d 16, 230 P.2d 629, *supra*, §63, held that a wilfully defaulting purchaser could have restitution; and the same antiforfeiture policy justifies specific performance. As pointed out in *Barkis v. Scott* (1949) 34 C.2d 116, 122, 208 P.2d 367, *supra*, §62, a purchaser in default seeking to keep the contract alive is in a better position than one who does not. (5 C.3d 814.) (See 5 *Loyola L.A. L. Rev.* 435; 55 *A.L.R.3d* 10 [specific performance of land contract notwithstanding vendee's failure to timely make required payments].)

In *Williams Plumbing Co. v. Sinsley* (1975) 53 C.A.3d 1027, 126 C.R. 345, the contract contained a time of the essence provision and a forfeiture clause. Plaintiff purchaser made a \$ 12,000 deposit, but was late in making a payment into escrow. Defendant vendor terminated the contract and refunded the deposit. In the purchaser's action for specific performance, the trial judge found that the delay was not intentional or grossly negligent and that defendant suffered no injury from it, but nevertheless denied specific performance. *Held*, plaintiff was entitled to specific performance. The trial judge relied on *Major-Blakeney Corp. v. Jenkins* (1953) 121 C.A.2d 325, 263 P.2d 655, *supra*, §62, for the proposition that the vendor may terminate and that the purchaser's sole remedy is restitution. But the case has never been cited for that proposition, and the purported rule was rejected in *MacFadden*. (53 C.A.3d 1032, 1033.) Because

MacFadden upheld specific performance even though the breach was intentional, it would be illogical to deny that relief to plaintiff, whose delay was in part due to reliance on a suggestion from defendant vendor. (53 C.A.3d 1034.)

Williams was distinguished in *Nash v. Superior Court* (1978) 86 C.A.3d 690, 150 C.R. 394. The court declared that *MacFadden* did not change the established law that "if the parties so agree, the buyer's timely tender of the purchase money is a condition precedent to the seller's duty to convey under a wholly executory agreement." (86 C.A.3d 698.)

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4. Wilful Default: Redemption.

13 Witkin Sum. Cal. Law Equity § 68

[§ 68] Wilful Default: Redemption.

MacFadden v. Walker (1971) 5 C.3d 809, 97 C.R. 537, 488 P.2d 1353, supra, §67, suggested that a defaulting purchaser should be given the same right as a defaulting mortgagor to cure default; and the suggestion became a rule in *Petersen v. Hartell* (1985) 40 C.3d 102, 219 C.R. 170, 707 P.2d 232, 4 Summary (10th), *Security Transactions in Real Property*, §25: "[I]f defendant seller had sued to quiet title, plaintiffs would have been entitled as a matter of right to a conveyance of title in exchange for payment of the balance of the purchase price with interest and damages. Such redemption by plaintiff would give defendant the entire benefit bargained for, free of any dependence on further performance by plaintiff vendees. The outcome will be no less fair to both parties if, as we hold, the vendees under a real property sales contract ... are entitled to judicial enforcement of the same absolute right of redemption in response to the seller's notice of election to terminate the contract for default in payments. The complaint initiating the vendee's action for that purpose, rather than being designated as one for specific performance, is more appropriately referred to as one to redeem the vendee's interest in real property." (40 C.3d 116.)

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5. Relief to Optionee.

13 Witkin Sum. Cal. Law Equity § 69

[§ 69] Relief to Optionee.

The rule has long been established that time is of the essence in a purchase option, and that no relief can be given to a late optionee, who has received all that he or she bargained for--a limited period in which to purchase on specified terms. (See 1 *Summary* (10th), *Contracts*, §174.) But in *Holiday Inns of America v. Knight* (1969) 70 C.2d 327, 74 C.R. 722, 450 P.2d 42, a peculiar hybrid option contract was taken out of the general rule. Defendant owner of land gave plaintiffs' predecessors a 5-year option to purchase for \$ 198,633. The option contract called for an initial payment of \$ 10,000 and four additional payments of \$ 10,000, on July 1 of each year, commencing in 1964; and on failure to make payment on or before the prescribed date, the option was to "automatically cancel." (70 C.2d 328.) Initial payment of the \$ 10,000 and the annual 1964 and 1965 installments were made. For the next installment, the check was dated June 30, 1966, and received by defendant on July 2, 1966 (1 day late). Plaintiffs brought an action for declaratory relief. *Held*, summary judgment for defendant reversed.

(a) Although most of the cases applying C.C. 3275 involved land sale contracts, the statute applies in any case in which a party brings himself or herself within its terms. (70 C.2d 330.)

(b) Defendant's contention that the option was automatically cancelled might be sound if there were a series of independent contracts, each for a 1-year option. But here, each payment was partially for an option to buy during that year and partially for a renewal for another year up to a total of 5 years. With the passage of time, plaintiffs had paid more and more for the right to renew, and this right would be forfeited by enforcement of the strict time provision; i.e., they would suffer forfeiture "of that part of the \$ 30,000 attributable to the right to exercise the option during the last two years." (70 C.2d 331.)

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CHAPTER XIX - Equity

Witkin Summary of California Law

II. SPECIFIC PERFORMANCE OF CONTRACTS

D. Failure of Performance by Vendor or Purchaser.

2. Purchaser's Default: Failure To Pay.

b. Relief Against Forfeiture.

6. No Relief Where Contract Is Executed.

13 Witkin Sum. Cal. Law Equity § 70

[§ 70] No Relief Where Contract Is Executed.

The rules of *Barkis v. Scott* (1949) 34 C.2d 116, 208 P.2d 367, supra, §62, and *Freedman v. The Rector, Wardens & Vestrymen of St. Matthias Parish of Los Angeles* (1951) 37 C.2d 16, 230 P.2d 629, supra, §63, apply to executory contracts. When the contract is executed, there is no basis for equitable relief under C.C. 3275. Thus, in *Smith v. Allen* (1968) 68 C.2d 93, 65 C.R. 153, 436 P.2d 65, defendant vendors sold residential property to plaintiff purchasers for \$ 145,000. The agreement provided for a downpayment and periodic payments on the note secured by a deed of trust. Plaintiffs fulfilled the conditions, defendants conveyed to them, and plaintiffs took possession. They made substantial repairs and improvements, paid taxes, made the first note payment, and then defaulted. Defendants held a trustee's sale and purchased under it. In this action, plaintiffs alleged that the value of the property at the time of defendants' reacquisition was not less than the contract price plus the costs of repairs and improvements (a total of \$ 164,679.16), and that defendants were unjustly enriched to the extent of \$ 46,821.14. *Held*, judgment for defendants on demurrer affirmed.

(a) The contract was executed by plaintiffs' performance of the conditions and defendants' conveyance of title. (68 C.2d 96.)

(b) Plaintiffs' rights on default under a deed of trust are comprehensively covered by legislation designed to protect against forfeitures; e.g., the requirement of notice of default and 3 months' wait, the right to cure a default and reinstate the trust deed, a sale at public sale on 20 days' notice to the highest bidder, and a deficiency judgment barred after that sale under a power of sale. (See 4 *Summary* (10th), *Security Transactions in Real Property*, §§145 et seq., 182 et seq.) The Legislature intended that a properly conducted foreclosure sale should constitute a final adjudication of the rights of the borrower and lender. (68 C.2d 96.)

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CHAPTER XIX - Equity

Witkin Summary of California Law
III. EQUITABLE RELIEF AGAINST TORTS: IN GENERAL
A. Nature of Relief.

13 Witkin Sum. Cal. Law Equity § 71

[§ 71] Nature of Relief.

(1) *Injunctive Relief*. Most torts are redressed by an action for damages. (See 6 *Summary* (10th), *Torts*, §1545 et seq.) Some give rise to alternative or concurrent remedies at law and in equity. (See 3 *Cal. Proc.* (4th), *Actions*, §§121, 126.) Equitable relief against torts is given almost exclusively by injunction. (See *Rest.2d*, *Torts*, §933 et seq.) Some uses of injunctions against torts have been discussed elsewhere:

- (a) Waste. (See 12 *Summary* (10th), *Real Property*, §370 et seq.)
- (b) Trespass. (See 5 *Summary* (10th), *Torts*, §693 et seq.; 5 *Cal. Proc.* (4th), *Pleading*, §§781, 784.)
- (c) Interference with business relations. (See 5 *Summary* (10th), *Torts*, §730 et seq.)
- (d) Unprivileged concerted action in labor disputes. (See 3 *Summary* (10th), *Agency and Employment*, §531 et seq.).

The procedural aspects of injunctive relief are considered in *California Procedure*. (See 6 *Cal. Proc.* (4th), *Provisional Remedies*, §276 et seq.; 3 *Cal. Proc.* (4th), *Actions*, §121; 5 *Cal. Proc.* (4th), *Pleading*, §778 et seq.; 8 *Cal. Proc.* (4th), *Enforcement of Judgment*, §332 et seq.; 9 *Cal. Proc.* (4th), *Appeal*, §§130 et seq., 303 et seq.; 8 *Cal. Proc.* (4th), *Extraordinary Writs*, §§25, 26.)

(2) *Classification of Topics*. This chapter deals with the equitable remedy of injunctive relief against the following torts:

- (a) Criminal acts. (See *infra*, §72 et seq.)
- (b) Wrongful invasion of personal rights. (See *infra*, §§76, 77.)
- (c) Trademark and trade name infringement. (See *infra*, §78 et seq.)
- (d) Misappropriation of trade secrets. (See *infra*, §81 et seq.)
- (e) Unfair competition. (See *infra*, §97 et seq.)

(f) Nuisances. (See *infra*, §133 et seq.)

West's Key Number Digest, Equity k.26

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

(1) *Injunctive Relief*.

Alternative or concurrent remedies at law and in equity:

Cross-Reference: 3 *Cal. Proc.* (5th), *Actions*, §§127, 132.

(b) *Trespass*.

Cross-Reference: 5 *Cal. Proc.* (5th), *Pleading*, §§825, 829, 830.

Procedural aspects:

Cross-References: 3 *Cal. Proc.* (5th), *Actions*, §127; 5 *Cal. Proc.* (5th), *Pleading*, §822 et seq.; 6 *Cal. Proc.* (5th), *Provisional Remedies*, §274 et seq.; 8 *Cal. Proc.* (5th), *Enforcement of Judgment*, §340 et seq.; 8 *Cal. Proc.* (5th), *Extraordinary Writs*, §§22, 24; 9 *Cal. Proc.* (5th), *Appeal*, §§174 et seq., 296 et seq.



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CHAPTER XIX - Equity

Witkin Summary of California Law III. EQUITABLE RELIEF AGAINST TORTS: IN GENERAL

B. Equity Jurisdiction Over Criminal Acts.

1. No Injunction Against Offender.

a. In General.

13 Witkin Sum. Cal. Law Equity § 72

[§ 72] In General.

It is generally declared that equity has no criminal jurisdiction, and that therefore a court cannot enjoin the commission of a crime so as to deprive the offender of a jury trial by punishing him or her for contempt. (See *Sullivan v. San Francisco Gas & Elec. Co.* (1905) 148 C. 368, 371, 83 P. 156; *People v. Lim* (1941) 18 C.2d 872, 880, 118 P.2d 472; *Smith v. Collison* (1931) 119 C.A. 180, 184, 6 P.2d 277; *People v. Steele* (1935) 4 C.A.2d 206, 208, 40 P.2d 959, 41 P.2d 946; 78 Harv. L. Rev. 1013; 42 Am.Jur.2d (2000 ed.), *Injunctions* §143 et seq.)

In *Perrin v. Mountain View Mausoleum Assn.* (1929) 206 C. 669, 275 P. 787, a municipal ordinance made it unlawful for a cemetery to be maintained in a certain district. Defendant was prosecuted and punished but continued to operate. Held, plaintiff, a property owner, was not entitled to an injunction merely to prevent violation of the ordinance, where there was nothing otherwise objectionable in the acts sought to be enjoined. (206 C. 674.) In *People v. Seccombe* (1930) 103 C.A. 306, 284 P. 725, the court refused to enjoin continued violations of the *Usury Law*. (103 C.A. 314; see 18 Cal. L. Rev. 328.)

The rule, however, is subject to an important exception where the act is not only a crime but also a tort of the type that may be enjoined, e.g., unfair competition (*infra*, §97 et seq.) or nuisance (*infra*, §§73, 133 et seq.).

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Witkin Summary of California Law III. EQUITABLE RELIEF AGAINST TORTS: IN GENERAL

B. Equity Jurisdiction Over Criminal Acts.

1. No Injunction Against Offender.

b. Exception: Public Nuisance.

13 Witkin Sum. Cal. Law Equity § 73

[§ 73] Exception: Public Nuisance.

(1) *Early Expansive View Protecting Property Rights.* The nuisance concept has been employed with varying degrees of success to develop a "criminal equity," i.e., a power to enjoin the commission of criminal acts. (See *58 Am.Jur.2d* (2002 ed.), *Nuisances* §109 et seq.)

In some instances, the development has been by judicial decision. In an unusual case that greatly extended the theory, *In re Wood* (1924) 194 C. 49, 227 P. 908, California's Attorney General secured an injunction directed against the I.W.W. (a workers organization), prohibiting the teaching of criminal syndicalism, and prohibiting the association with any organization advocating its doctrines. Wood, a member of the I.W.W., solicited members, and was punished for contempt despite his objection that the proceeding denied him his constitutional right to a jury trial. *Held*, although equity will not enjoin the commission of an act merely criminal, where property rights are endangered, it will grant relief even though the acts are criminal. The court considered that the activities of the I.W.W. constituted a threat of irreparable injury to property, and that the case was therefore one "analogous to a public nuisance." (194 C. 57.) (See *13 Cal. L. Rev.* 63.)

(2) *Later View Restricting Injunctions to Statutory Nuisances.* The general tendency in California, however, has been to restrict equity jurisdiction to injunctions against statutory nuisances. Thus, *People v. Lim* (1941) 18 C.2d 872, 118 P.2d 472, held that a gambling house could not be enjoined as a public nuisance. Only the Legislature can declare unlawful activity to constitute a public nuisance, and no injunction will lie unless the particular activity is within the general statutory definition of a public nuisance in C.C. 3479, or is declared to be a public nuisance by a particular statute, as in the cases of houses of prostitution and places where narcotics are illegally sold. The term "nuisance" has no fixed content and that public policy changes with respect to the propriety of such matters as sale of liquor or prize fights. The determination of that policy should be left to the Legislature and not made by the courts. (18 C.2d 879, 880.) (See ; *Nathan H. Schur v. Santa Monica* (1956) 47 C.2d 11, 18, 300 P.2d 831; *Monterey Club v. Superior Court* (1941) 48 C.A.2d 131, 144, 119 P.2d 349; *People v. Brophy* (1942) 49 C.A.2d 15, 32, 120 P.2d 946; 15 So. Cal. L. Rev. 372.)

The opinions in the *Monterey* and *Brophy* cases made it clear, however, that on a showing that gambling causes disorderly persons to congregate and disturb the peace, or creates traffic or fire hazards, etc., an injunction may properly be granted.

(3) *Recent Expansive View Governing Gang Activity.* More recently, the California Supreme Court again embraced a more expansive view of criminal equity jurisdiction, at least as to the authority of a trial judge to issue a civil injunction prohibiting gang activity as a public nuisance. In *People v. Acuna* (1997) 14 C.4th 1090, 60 C.R.2d 277, 929 P.2d 596, declarations in support of the preliminary injunction depicted Rocksprings, the four-block community affected, as under siege by members of a gang. Gang members displayed "a casual contempt for notions of law, order, and decency--openly drinking, smoking dope, sniffing toluene, and even snorting cocaine laid out in neat lines on the hoods of residents' cars." Residents were subjected to loud talk, loud music, vulgarity, profanity, brutality, fistfights and the sound of gunfire. Gang members took over sidewalks, carports, and parking areas, impeding traffic, in order to "conduct their drive-up bazaar." Violent crimes were commonplace. Residents were prisoners in their own homes, afraid to go outside, especially at night; friends and relatives refused to visit. Finding that these and similar conditions constituted a public nuisance, the trial judge issued a preliminary injunction against defendants, who had been identified as gang members. Among the restrictions in the injunction were paragraph (a), which prohibited defendants from being in public view in the area with other known gang members; and paragraph (k), which prohibited defendants from intimidating, harassing, threatening, or assaulting persons in the area. *Held*, paragraphs (a) and (k) were valid restrictions.

(a) *Equitable jurisdiction to enjoin public nuisances.*

(1) C.C. 3480 (infra, §135) defines a public nuisance as one that affects an entire community or neighborhood, or a considerable number of persons. C.C. 3491 and P.C. 370 (infra, §157) authorize criminal prosecutions for persons who interfere with the comfortable enjoyment of life or property by an entire community or neighborhood or by a considerable number of persons. (14 C.4th 1102.) Thus, it is the community aspect of public nuisance that distinguishes it from private nuisance and makes it possible to use an equitable injunction to protect the quality of organized social life. (14 C.4th 1105.)

(2) *Lim* limited the use of the injunctive power to restrain nuisances to objectionable activity that meets the statutory definition of public nuisance. (14 C.4th 1107.) However, the authority of a trial judge to enjoin a public nuisance is not limited to activity that is independently proscribed by the Penal Code. "Acts or conduct which qualify as public nuisances are enjoinable as civil wrongs or prosecutable as criminal misdemeanors, a characteristic that derives not from their status as independent crimes, but from their inherent tendency to injure or interfere with the community's exercise and enjoyment of rights common to the public." (14 C.4th 1108.)

(b) *Constitutional challenges.*

(1) Paragraph (a) of the injunction did not violate defendants' right of free association, because the Rocksprings gang was not formed for the purpose of engaging in protected speech or religious activities. (14 C.4th 1110.) Nor was the provision overbroad; the injunction only issued after defendants had had their day in court, and there was no possibility of chilling protected conduct by others. (14 C.4th 1112.) The provision was not void for vagueness on the ground that its prohibition against associating with other "known" gang members might apply where a defendant associated with someone known by police, but not by the defendant, to be a gang member. In that hypothetical case, the prosecution would have to establish a defendant's own knowledge of the associate's gang membership to meet its burden of proving conduct in violation of the injunction. (14 C.4th 1117.)

(2) Paragraph (k) of the injunction was not void for vagueness, because its terms were sufficiently definite to provide a standard of conduct for those whose activities were proscribed, where the objectives of the injunction were considered and its terms were read in context. (14 C.4th 1118.)

(c) *Statutory challenge.* By its express terms, the Street Terrorism Enforcement and Protection Act (P.C. 186.20 et seq.; see infra, §150) is not the exclusive means of enjoining criminal street gangs, and thus did not preempt use of the general public nuisance statutes in this case. (14 C.4th 1119.) (See *In re Englebrecht* (1998) 67 C.A.4th 486, 493, 496, 79 C.R.2d 89 [enjoining gang members from associating with each other was constitutional, but enjoining them from

possessing or using pagers or beepers within target area was unconstitutionally overbroad; following *Acuna*]; 24 California Lawyer 43 [injunctions against gangs]; 28 *Golden Gate L. Rev.* 629 [use of injunctions to fight gang-related problems in light of *Acuna*]; 19 J. Juvenile Law 272 [same]; 27 *Hastings Const. L. Q.* 717 [same]; 35 *San Diego L. Rev.* 343 [same]; 51 *Stanf. L. Rev.* 409 [same]; 25 Western State L. Rev. 257 [same]; 31 Western State L. Rev. 79 [constitutionality of banning pagers in gang injunctions]; 2 *Cal. Crim. Law (3d)*, *Crimes Against Public Peace and Welfare*, §23 et seq.)

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B. Equity Jurisdiction Over Criminal Acts.

1. No Injunction Against Offender.

c. Exception: Statutory Authorization.

13 Witkin Sum. Cal. Law Equity § 74

[§ 74] Exception: Statutory Authorization.

Statutory authorization of injunctions against unlawful activities in certain areas is becoming more common. (See, e.g., *B. & P.C. 651(j)* [Right To Compete Act], *infra*, §130 et seq.; *B. & P.C. 3131* [optometry]; *B. & P.C. 4339* [pharmacy]; *2 Cal. Crim. Law (3d), Crimes Against Public Peace and Welfare*, §323; *B. & P.C. 6872* [unlicensed collection agency]; *B. & P.C. 17200* et seq. [unfair competition], *infra*, §105 et seq.; *C.C.P. 527.7* [criminal syndicalism; civil action by aggrieved individual to enjoin advocacy of unlawful violent acts; see *83 A.L.R.2d 848* [usury]; *42 Am.Jur.2d (2000 ed.), Injunctions* §145; *58 Am.Jur.2d (2002 ed.), Nuisances* §§35, 60, 390, 391.) (On Red Light Abatement Law and other statutes declaring nuisances per se, see *infra*, §145 et seq.; on constitutionality of injunction against possession or sale of obscene matter, see *7 Summary (10th), Constitutional Law*, §§681, 682.)

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B. & P.C. 3131 was redesignated as *B. & P.C. 3094* in 2005.



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B. Equity Jurisdiction Over Criminal Acts.
2. No Injunction Against Prosecution.

13 Witkin Sum. Cal. Law Equity § 75

[§ 75] No Injunction Against Prosecution.

(1) *Statement of Rule.* A person cannot enjoin public officials from initiating a criminal prosecution against him or her in a court with jurisdiction over the offense. (*Fairchild v. Brock* (1948) 88 C.A.2d 425, 429, 199 P.2d 9; see 37 Cal. L. Rev. 685; 78 Harv. L. Rev. 1024.)

(2) *Exceptions.* An established exception to this rule is that an injunction may be granted to restrain enforcement of an unconstitutional statute or ordinance. (See *Abbott v. Los Angeles* (1960) 53 C.2d 674, 678, 3 C.R. 158, 349 P.2d 974; 7 Summary (10th), *Constitutional Law*, §98; 6 Cal. Proc. (4th), *Provisional Remedies*, §332; 68 Harv. L. Rev. 1145.) Similar relief against prosecution in a court without jurisdiction or acting in excess of jurisdiction is available by a writ of prohibition. (See 2 Cal. Proc. (4th), *Jurisdiction*, §89; 8 Cal. Proc. (4th), *Extraordinary Writs*, §69.)

West's Key Number Digest, Equity k.28

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

(2) *Exceptions.*

Injunction to restrain unconstitutional provision: Cross-Reference: 6 Cal. Proc. (5th), *Provisional Remedies*, §331.

Writ of prohibition against prosecution in court without jurisdiction or acting in excess of jurisdiction:

Cross-References: 2 Cal. Proc. (5th), *Jurisdiction*, §88; 8 Cal. Proc. (5th), *Extraordinary Writs*, §71.



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III. EQUITABLE RELIEF AGAINST TORTS: IN GENERAL
C. Wrongful Invasion of Personal Rights.
1. In General.

13 Witkin Sum. Cal. Law Equity § 76

[§ 76] In General.

(1) *Traditional View: No Equitable Relief.* Early decisions usually refused to give equitable relief against the invasion of personal rights unless some property right was also involved. (See *Dailey v. Superior Court* (1896) 112 C. 94, 99, 44 P. 458; 17 Cal. L. Rev. 681; 69 Harv. L. Rev. 943 [defamation]; 69 Harv. L. Rev. 1327 [no injunction to prevent spouse from securing invalid Mexican divorce; legal remedy was adequate].)

(2) *Modern View: Equitable Relief Available.* The modern view, set forth in the Torts Restatement, is that interests in privacy, reputation, and similar matters may be protected by injunction in a proper case. (See *Rest.2d, Torts* §937, Comment a; Prosser & Keeton 5th, §117; 2 Harper, James & Gray 2d, §9.5 et seq.; 35 Cal. L. Rev. 571; 43 Cal. L. Rev. 326; 21 So. Cal. L. Rev. 409; 27A Am.Jur.2d (1996 ed.), *Equity* §72 et seq.; 42 Am.Jur.2d (2000 ed.), *Injunctions* §73 et seq.) (On privacy, see 14 A.L.R.2d 750 [right to privacy in general]; 23 A.L.R.3d 865 [invasion of privacy by use of plaintiff's name or likeness in advertising]; 30 A.L.R.3d 203 [invasion of privacy by use of plaintiff's name or likeness for nonadvertising purposes]; 33 A.L.R.3d 154 [public disclosure of person's indebtedness as invasion of privacy]; 57 A.L.R.3d 16 [waiver or loss of right of privacy]; 62A Am.Jur.2d (2005 ed.), *Privacy* §§264, 265; 5 Summary (10th), *Torts*, §651 et seq.; on privacy rights under California Constitution, see 7 Summary (10th), *Constitutional Law*, §575 et seq.)

Orloff v. Los Angeles Turf Club (1947) 30 C.2d 110, 180 P.2d 321, involving exclusion of plaintiff from a public horseracing course, repudiates the old approach. "[I]t is difficult to find any sound reason for the enunciation of a broad principle that equity will not protect personal rights. There may be situations involving personal rights in which equity will not act. Such situations may arise where the legal remedy is adequate or they may involve a prior restraint on freedom of speech or press ... or where there is no established legal right to be protected or some other recognized ground for refusing an equitable remedy is present." (30 C.2d 117.) "The positive declaration of the personal right and the importance of its preservation together with the inadequacy of the remedy by way of damages and the \$ 100 penalty furnish sufficient reason for injunctive relief." (30 C.2d 118.) (See 64 A.L.R.5th 769 [exclusion of persons from horseracing tracks for reasons other than color or race].)

An extraordinary use of injunctive power was made in *Dandini v. Dandini* (1948) 86 C.A.2d 478, 195 P.2d 871. Plaintiff wife, in 1946, obtained a decree of separate maintenance from defendant husband, with an award of \$ 150 per month for support. Defendant paid nothing, but instead procured a Nevada divorce after a temporary residence. He was

about to remarry when plaintiff, in an action in which he was personally served and defaulted, received a decree adjudging the Nevada divorce invalid and enjoining him from remarrying. In this proceeding, defendant unsuccessfully sought to vacate the default. *Held*, the decree was proper. (a) Though the courts of one state have no power directly to annul a foreign judgment, the object of the injunction was to protect plaintiff's interest in her support award, which would be threatened by defendant's assumption of new obligations by remarriage. (b) The fact that plaintiff also seeks the protection of a personal right--her status as a wife--is no longer an objection under *Orloff*, but instead is an additional ground for the injunction. (c) The objection that equity will not enjoin the commission of a crime (here, bigamy) is untenable where the act enjoined is also a violation of a property right. "If the prior support award is such an important property right that it is entitled to that protection in the face of a valid decree of divorce, it would seem obvious that it is of sufficient importance to protect it by injunction against the adverse effects of an invalid remarriage." (86 C.A.2d 488.)

Although *Dandini* furnishes further evidence of the progressive attitude of the California courts toward new types of equitable relief and their willingness to protect personal rights, the decision itself has been criticized for these reasons: (a) failing to consider the adequacy of other remedies, e.g., contempt, receiver, or other security, to protect the wife's future right to support; (b) failing to appreciate that the injunction against remarriage alone is not a direct or practical method of obtaining support money; and (c) entering into the undesirable field of injunctive control over family relations. (See 22 So. Cal. L. Rev. 314; 1 Stanf. L. Rev. 358; 54 A.L.R.2d 1240 [injunction against out-of-state divorce action].)

West's Key Number Digest, Equity k.16

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(2) *Modern View: Equitable Relief Available*. See 2 Harper, James & Gray 3d, §9.5 et seq.



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13 Witkin Sum. Cal. Law Equity § 77

[§ 77] Illustrations.

(1) *Defamation*. Although a trade libel will sometimes be enjoined (see 5 *Summary* (10th), *Torts*, §645), the authorities still tend to deny equitable relief against a libel or slander unconnected with some other enjoined tort. The principal objections are the constitutional guarantee of free speech and the right to a jury trial. (See 42 *Am. Jur.2d* (2000 ed.), *Injunctions* §96 et seq.)

In *Rosicrucian Fellowship v. Rosicrucian Fellowship Nonsectarian Church* (1952) 39 C.2d 121, 245 P.2d 481, the court took note of decisions upholding restraints against defamatory statements in breach of trust or contract or injurious to business relations. (See, e.g., *Magill Bros. v. Building Service Employees' Int. Union* (1942) 20 C.2d 506, 509, 127 P.2d 542, 3 *Summary* (10th), *Agency and Employment*, §646 [false statements by pickets].) But here, the portion of an injunction against making statements reflecting on the honesty and good motives of plaintiff church corporation and its organizer was improper as an interference with the constitutional right of free speech. (39 C.2d 145.) (See 69 *Harv. L. Rev.* 943; 47 *A.L.R.2d* 715 [injunction as remedy against defamation of person].)

(2) *Membership in Associations*. The rights of membership in a labor union have received substantial equitable protection in California. (See 3 *Summary* (10th), *Agency and Employment*, §616.) In *Nyman v. Desert Club* (1952) 109 C.A.2d 63, 240 P.2d 37, a preliminary injunction issued in an action to prevent expulsion from a social club. (109 C.A.2d 64.) (On membership in a religious association, see 43 *Cal. L. Rev.* 326.)

A labor union or a professional association (e.g., medical society or hospital staff) may not arbitrarily exclude members (see 3 *Summary* (10th), *Agency and Employment*, §616; 9 *Summary* (10th), *Corporations*, §§44, 45), but courts cannot compel admission to membership in a fraternal or honorary society (see 9 *Summary* (10th), *Corporations*, §46). (On judicial remedies of members of unincorporated associations, see 9 *Summary* (10th), *Corporations*, §§43, 47.)

(3) *Civil Rights*. Several California cases support the broad proposition that equitable relief may be given to prevent discrimination against a plaintiff in violation of a statute protecting civil rights. (See *Orloff v. Los Angeles Turf Club* (1947) 30 C.2d 110, 115, 180 P.2d 321, *supra*, §76; *Stone v. Board of Directors of Pasadena* (1941) 47 C.A.2d 749, 754, 118 P.2d 866 [mandamus to compel city officials to admit Blacks to public swimming pool]; 30 *Cal. L. Rev.* 563; 8 *Hastings L. J.* 220.) Current Civil Rights Acts sometimes expressly authorize injunctions by public enforcement officers, including the following:

(a) The Unruh Civil Rights Act. (See 8 *Summary* (10th), *Constitutional Law*, §914.)

(b) The Fair Employment and Housing Act. (See 8 *Summary* (10th), *Constitutional Law*, §§951, 959.)

(c) The Tom Bane Civil Rights Act (protecting the rights of disabled persons). (See 8 *Summary* (10th), *Constitutional Law*, §895.)

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D. Trademark and Trade Name Infringement.
1. Theory of Infringement.

13 Witkin Sum. Cal. Law Equity § 78

[§ 78] Theory of Infringement.

The nature and acquisition of a trademark or trade name are discussed in another chapter. (See 13 *Summary* (10th), *Personal Property*, §81 et seq.) The theory of infringement is that underlying the law of unfair competition generally. The seller is diverting business from a competitor by passing off or fraudulently representing the seller's goods to be those of the competitor. The defrauded purchaser may sue in deceit; but the competitor cannot show reliance on the fraud--a necessary element of the cause of action--and is accordingly given the equitable remedy of injunction. (See *Rest.3d, Unfair Competition* §9 et seq.; C.E.B., 1 *Business Litigation*, §6.1 et seq.; 68 *Harv. L. Rev.* 843 et seq. [exhaustive discussion of developments in the law]; 76 *Harv. L. Rev.* 1685 [imitation of actor's voice and comic delivery]; 35 *So. Cal. L. Rev.* 255 [same]; 77 *Harv. L. Rev.* 520 [trademark]; 27 *Pacific L. J.* 221 [Learned Hand's Trademark Jurisprudence: Legal Positivism and the Myth of the Prophet]; 21 *Pepperdine L. Rev.* 165 [commercial parodies and copyright or trademark infringement]; 26 *San Diego L. Rev.* 101 [suggesting "like/love" slogans in advertising should be enjoined under likelihood of confusion doctrine to protect trademark owner]; 39 *Santa Clara L. Rev.* 245 [Trademark and Unfair Competition in Cyberspace: Can These Laws Deter "Baiting" Practices on Web Sites?]; 29 *So. Cal. L. Rev.* 490 [trade name]; 35 *So. Cal. L. Rev.* 149 [stage name]; 20 *Stanf. L. Rev.* 448 [trademark]; 1 *A.L.R.3d* 760 [commercial competitor's truthful denomination of goods as copies of designs of another, using designer's name, as trademark infringement]; 8 *Am.Jur. Trials, Trademark Infringement and Unfair Competition Litigation* §1 et seq.)

West's Key Number Digest, Trade Regulation k.331 et seq., 461 et seq.

SUPPLEMENT: [This section is current through the latest supplement]
See C.E.B., 1 *Intellectual Property in Business Transactions*, §1.1 et seq.



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CHAPTER XIX - Equity

Witkin Summary of California Law
III. EQUITABLE RELIEF AGAINST TORTS: IN GENERAL
D. Trademark and Trade Name Infringement.
2. Statutory Protection.

13 Witkin Sum. Cal. Law Equity § 79

[§ 79] Statutory Protection.

The 1967 Legislature repealed the original California trademark law and enacted a new and modernized statute based on the Model State Trademark Bill. (See *B. & P.C. 14200* et seq.) Similar protections are afforded to trade names under an earlier statute. (See *B. & P.C. 14400* et seq.) A 2004 statute prohibits the unauthorized use of a trade name, logo, or tagline of a lender in a written solicitation for financial services directed to a consumer who has obtained a loan from the lender. (See *B. & P.C. 14700* et seq.)

In California, the protection of trademarks and trade names does not rest on the fraud theory alone, for state statutes treat them as property rights of the originator or appropriator. (See *B. & P.C. 14242* [registration of mark is constructive notice of "claim of ownership"]; *B. & P.C. 14260* [trademarks]; *B. & P.C. 14401* [trade names]; C.C. 655 [describing things subject to ownership, including "inanimate things which are capable of appropriation" and "trade-marks and signs"]; *Italian Swiss Colony v. Italian Vineyard Co.* (1910) 158 C. 252, 256, 110 P. 913; *Hall v. Holstrom* (1930) 106 C.A. 563, 568, 289 P. 668; 13 *Summary* (10th), *Personal Property*, §81 et seq.)

Other statutes extend equitable protection to names and labels used outside the field of business competition, including the name and insignia of fraternal or other nonprofit associations, labor unions, etc. (See *B. & P.C. 14493*; *Corp.C. 21308*; *Athens Lodge No. 70 v. Wilson* (1953) 117 C.A.2d 322, 325, 255 P.2d 482 [before statute]; 37 A.L.R.3d 277 [right of charitable or religious association to protection against use of same or similar name by another]; 13 *Summary* (10th), *Personal Property*, §89.)

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

(*New*) *Model State Trademark Law*: The 2007 Legislature repealed the Trademark Law (*B. & P.C. 14200* et seq.) and replaced it with a modernized statute also numbered *B. & P.C. 14200* et seq. The new law may be cited as the Model State Trademark Law. (See *B. & P.C. 14200*.) The registration of a trademark or service mark is effective for 5 years, and may be renewed for successive 5-year periods. (See *B. & P.C. 14217*.) Under the prior statute, a mark was effective for 10 years, with renewals for successive 10-year periods. The new statute continues prior law by treating registered marks as the property rights of the originator or appropriator. (See *B. & P.C. 14220* [mark and its registration are assignable with good will of business in which mark is used].)



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III. EQUITABLE RELIEF AGAINST TORTS: IN GENERAL
D. Trademark and Trade Name Infringement.
3. Remedies and Defenses.

13 Witkin Sum. Cal. Law Equity § 80

[§ 80] Remedies and Defenses.

(1) *Remedies.* A person injured by another's use of his or her trademark or trade name may bring an action for damages. (See *B. & P.C. 14320*; 5 *Summary* (10th), *Torts*, §721.) A criminal prosecution may also be instituted for forgery or improper use. (*B. & P.C. 14341*.) But the more important remedy, usually sought in addition to damages, is an injunction. (See *B. & P.C. 14340*; *Hall v. Holstrom* (1930) 106 C.A. 563, 571, 289 P. 668 [trade name]; *American Distilling Co. v. Bellows & Co.* (1951) 102 C.A.2d 8, 15, 226 P.2d 751; 68 *Harv. L. Rev.* 863; 23A Am.Jur. P.P. Forms (2002 ed.), Trademarks and Tradenames §77 et seq.; 8 Am.Jur. Trials, Trademark Infringement and Unfair Competition Litigation §1 et seq.; 5 *Cal. Proc.* (4th), *Pleading*, §785.) *B. & P.C. 14340* provides for the ex parte seizure of "counterfeit goods" (copies of goods protected by trademark) and for their destruction or other disposition. (See 15 *Pacific L. J.* 491.)

(2) *Defenses.* The principal defenses encountered in the action are these:

(a) Plaintiff's unclean hands, as where the plaintiff has been guilty of material misrepresentations concerning the goods. (See *Joseph v. Macowsky* (1892) 96 C. 518, 31 P. 914; 34 *Cal. L. Rev.* 610; 68 *Harv. L. Rev.* 885; on clean hands doctrine, see *supra*, §9 et seq.)

(b) Laches or abandonment. (See *H. Moffat Co. v. Kofinow* (1951) 104 C.A.2d 560, 566, 232 P.2d 15 [no laches found]; 68 *Harv. L. Rev.* 886; on laches doctrine, see *supra*, §16 et seq.)

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

(1) *Remedies.*

Injunction:

Cross-Reference: 5 *Cal. Proc.* (5th), *Pleading*, §829.

(*New*) *Model State Trademark Law:* The 2007 Legislature repealed the Trademark Law (*B. & P.C. 14200* et seq.) and replaced it with the Model State Trademark Law. (*B. & P.C. 14200*; see *Supp.*, *supra*, §79.) Under the new statute, the remedies for a person injured by another's wrongful use of his or her registered mark or trade name are as follows:

- (a) A civil action for damages. (See *B. & P.C. 14245.*)
- (b) Injunctive relief. (See *B. & P.C. 14240.*)
- (c) The ex parte seizure and destruction of goods bearing counterfeit marks. (See *B. & P.C. 14250.*)
- (d) A criminal prosecution for forgery or improper use. (See *B. & P.C. 14252.*)



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Witkin Summary of California Law IV. EQUITABLE RELIEF AGAINST TORTS: MISAPPROPRIATION OF TRADE SECRETS A. In General. 1. Theory of Protection.

13 Witkin Sum. Cal. Law Equity § 81

[§ 81] Theory of Protection.

(1) *In General.* Equitable protection against trade secret misappropriation is given even though there is, ordinarily, no protectible property right. In the absence of copyright or patent, disclosed ideas may be copied by proper means. But where they are kept secret by the user, and are obtained improperly by the defendant, the tort is committed; the unauthorized disclosure or use is not a violation of a property right, but a breach of confidence. (See *Rest.3d, Unfair Competition* §38 et seq.; *Riess v. Sanford* (1941) 47 C.A.2d 244, 246, 117 P.2d 694; *Vacco Industries v. Van Den Berg* (1992) 5 C.A.4th 34, 50, 6 C.R.2d 602, citing the text.)

Equitable protection is available only against disclosure by "improper means." "A trade secret law, however, does not offer protection against discovery by fair and honest means, such as by independent invention, accidental disclosure, or by so-called reverse engineering, that is by starting with the known product and working backward to divine the process which aided in its development or manufacture." (*Kewanee Oil Co. v. Bicron Corp.* (1974) 416 U.S. 470, 94 S.Ct. 1879, 1883, 40 L.Ed.2d 315, 322.) (On public disclosure as abandonment, see 92 A.L.R.3d 138; 41 Proof of Facts 2d 517; on discovery in court proceedings, see 75 A.L.R.4th 1009; on disclosure in court proceedings as abandonment of secrecy, see 58 A.L.R.3d 1318; on exemption of disclosures from communications privilege otherwise applicable to official proceedings, see C.C. 3426.11, 5 *Summary* (10th), *Torts*, §563.)

(2) *Common and Statutory Law.* The common law protecting trade secrets is augmented by the Uniform Trade Secrets Act. (See C.C. 3426 et seq., *infra*, §86 et seq.) (On protection of trade secrets furnished in compliance with waste management requirements, see *Pub.Res.C. 44102*; on protection of trade secrets furnished in compliance with the Air Toxics "Hot Spots" Information and Assessments Act of 1987, see *Health & Saf.C. 44346*, 12 *Summary* (10th), *Real Property*, §900.)

(3) *Balancing of Interests.* The necessity of balancing the interests of the employer and the employee was the subject of extended consideration in *Futurecraft Corp. v. Clary Corp.* (1962) 205 C.A.2d 279, 23 C.R. 198. K was employed by plaintiff in designing valves for use in rockets and guided missiles. K was already an expert in the science and mechanics when employed, and after some years, left and went to work for defendant, a competitor. Plaintiff sought an injunction and damages, alleging wrongful use and disclosure of valve designs; no claim was made that any secret process, machine, or tool, i.e., any "know-how," was wrongfully taken. *Held*, injunction properly denied. In the usual

situation, the employer discloses a previously developed or formulated secret to the employee, and the breach of confidence in its later use by the employee is clear. Where, however, the employee develops the formula or other secret, some other reason must be found for relief, and the court must give careful consideration to the danger of unduly restricting future employment, or practice of the profession, by the employee. (205 C.A.2d 286, 288.) Thus, the court concluded, relying heavily on a Pennsylvania case, that an employee may be privileged to use some trade secrets in other employment because they were developed by the employee and were part of the employee's technical knowledge and skill. (205 C.A.2d 287.)

(4) *Commentary and Practice Works*. Commentary on the subject has been extensive. (See 86 Cal. L. Rev. 241 [proposal for reform of trade secret laws]; 106 Harv. L. Rev. 461 [Trade Secret Misappropriation: A Cost-Benefit Response to the Fourth Amendment Analogy]; 27 Santa Clara L. Rev. 537; 40 Stanf. L. Rev. 519; 16 U.C. Davis L. Rev. 463 [application of trade secret protection to safety and effectiveness data of patented drugs]; 9 A.L.R.3d 665 [implied obligation not to disclose trade secrets learned during unsuccessful negotiations for sale, license, etc.]; 30 A.L.R.3d 631 [special skills or techniques]; 30 A.L.R.4th 1250 [use or disclosure of computer application software]; 53 A.L.R.4th 1046 [computer trade secrets]; 54A Am.Jur.2d (1996 ed.), *Monopolies, Restraints of Trade, and Unfair Trade Practices* §1114 et seq.; Uniform Trade Secrets Act, 14 U.L.A. (Master Ed.), p. 437; 19 Proof of Facts 2d 163 et seq.; C.E.B., 1 Business Litigation, §4.1 et seq.; C.E.B., Trade Secrets 2d, §1 et seq.; Cal. Civil Practice, 6 Business Litigation, §66:1 et seq.; Rutter Group, Employment Litigation §14:80 et seq.)

West's Key Number Digest, Trade Regulation k.28

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

(1) *In General*.

Public disclosure as abandonment of trade secret: See 100 Proof of Facts 3d 195 [superseding 41 Proof of Facts 2d 517, cited in the text, p. 375]. (4) *Commentary and Practice Works*. See C.E.B., 2 Advising California Employers and Employees, §11.1 et seq.; C.E.B., 1 Intellectual Property in Business Transactions, §1.1 et seq.; 42 Cal. Western L. Rev. 209 [The Law and Ethics of Trade Secrets: A Case Study]; 36 Golden Gate L. Rev. 219 [arguing for "newsworthy" exception to grant of preliminary injunction in trade secrets cases]; 58 Hastings L. J. 777 [resolving conflicts between trade secrets and First Amendment]; 91 Proof of Facts 3d 95 [establishing liability for misappropriation of trade secrets].

The Uniform Trade Secrets Act is now at 14 U.L.A. (Master Ed.), p. 529.



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Witkin Summary of California Law IV. EQUITABLE RELIEF AGAINST TORTS: MISAPPROPRIATION OF TRADE SECRETS

A. In General.

2. What Constitutes Trade Secret.

13 *Witkin Sum. Cal. Law Equity* § 82

[§ 82] What Constitutes Trade Secret.

(1) *In General.* There are some business formulae, compiled information, devices, or processes that, although not copyrighted, patented, or even novel, are kept as trade secrets of the user. They cannot be classified with any particularity, but secret information used in the conduct of the plaintiff's business that is of some competitive advantage, and that is not disclosed to the public, might be included. (See *Kewanee Oil Co. v. Bicron Corp.* (1974) 416 U.S. 470, 94 S.Ct. 1879, 1883, 40 L.Ed.2d 315, 322, *infra*, §84; *Riess v. Sanford* (1941) 47 C.A.2d 244, 246, 117 P.2d 694; *Sketchley v. Lipkin* (1950) 99 C.A.2d 849, 854, 222 P.2d 927 [unpatented invention]; *By-Buk Co. v. Printed Cellophane Tape Co.* (1958) 163 C.A.2d 157, 166, 329 P.2d 147 [secrets of construction of machines]; *Ungar Elec. Tools v. Sid Ungar Co.* (1961) 192 C.A.2d 398, 403, 13 C.R. 268; *Components for Research v. Isolation Products* (1966) 241 C.A.2d 726, 728, 50 C.R. 829 [efficient manufacturing techniques of products for electronics industry]; *Ernst & Ernst v. Carlson* (1966) 247 C.A.2d 125, 128, 55 C.R. 626 [details of firm's accounting methods]; *Diodes v. Franzen* (1968) 260 C.A.2d 244, 251, 67 C.R. 19, 5 *Cal. Proc.* (4th), *Pleading*, §734 [insufficient pleading]; *Sinclair v. Aquarius Electronics* (1974) 42 C.A.3d 216, 221, 116 C.R. 654, *infra*, §84; *Ralph Andrews Productions v. Paramount Pictures Corp.* (1990) 222 C.A.3d 676, 683, 271 C.R. 797 [game show idea of company that produced television game shows]; *In re Providian Credit Card Cases* (2002) 96 C.A.4th 292, 305, 116 C.R.2d 833, 2 *Cal. Proc.* (4th), *Courts, Supp.*, §42B [telemarketing scripts that had already been disclosed to customers were not trade secrets, either because they had already been disclosed, or because no reasonable efforts had been taken to protect them]; 64 *Harv. L. Rev.* 976; 80 *Harv. L. Rev.* 1432 [limits imposed by federal patent and antitrust laws]; 93 *Harv. L. Rev.* 837; 31 *Hastings L.J.* 671; 27 *Santa Clara L. Rev.* 537; 14 *U.S.F. L. Rev.* 495; 1 *Western State L. Rev.* 113; 2 *Western State L. Rev.* 1; 59 *A.L.R.4th* 641 [what is trade secret actionable under state law protecting its use or disclosure by former employee].) (For definition under Uniform Act, see C.C. 3426.1(d), *infra*, §87.)

(2) *Distinction: Other Secret Business Information.* A trade secret differs from other secret information in a business "in that it is not simply information as to single or ephemeral events in the conduct of the business, as, for example, the amount or other terms of a secret bid for a contract or the salary of certain employees, or the security investments made or contemplated, or the date fixed for the announcement of a new policy or for bringing out a new model or the like." (*Cal Francisco Inv. Corp. v. Vrionis* (1971) 14 C.A.3d 318, 322, 92 C.R. 201, citing the text.)

(3) *Distinction: Unnecessary Deprivation of Employment Opportunities.* An employee's skill and knowledge of a

particular business constitute the means by which the employee earns a living, and the courts should not hastily brand them as confidential where this will deprive the employee of employment opportunities. (See *Aetna Bldg. Maintenance Co. v. West* (1952) 39 C.2d 198, 206, 246 P.2d 11 [no trade secret in standard methods of janitorial service taught to defendant]; *Mathews Paint Co. v. Seaside Paint & Lacquer Co.* (1957) 148 C.A.2d 168, 172, 306 P.2d 113 [no secret formulae for making lacquer involved]; *Futurecraft Corp. v. Clary Corp.* (1962) 205 C.A.2d 279, 288, 23 C.R. 198, supra, §81; *Rigging Int. Maintenance Co. v. Gwin* (1982) 128 C.A.3d 594, 606, 612, 180 C.R. 451, citing the text [no unfair use of confidential information; employee's methods were based on his own extensive experience]; 74 Harv. L. Rev. 1473.)

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

(1) *In General.*

Diodes case:

Cross-Reference: 5 Cal. Proc. (5th), *Pleading*, §778.

In re Providian Credit Card Cases case:

Cross-Reference: 2 Cal. Proc. (5th), *Courts*, §43.



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13 Witkin Sum. Cal. Law Equity § 83

[§ 83] Remedies.

The typical remedies for wrongful use of a trade secret are damages (consisting usually of an accounting for profits from the unauthorized use) and an injunction against future disclosure or unauthorized use. (See *Gordon v. Landau* (1958) 49 C.2d 690, 694, 321 P.2d 456 [damages only where expiration of agreement precluded injunction]; *Components for Research v. Isolation Products* (1966) 241 C.A.2d 726, 730, 50 C.R. 829 [injunction too broad, modified]; 67 Harv. L. Rev. 982; 26 U.C.L.A. L. Rev. 203 [How Long Should an Injunction Last?]; 38 A.L.R.3d 572 [propriety of permanent injunction]; 11 A.L.R.4th 12 [measure and elements of damages]; 42 Am.Jur.2d (2000 ed.), *Injunctions* §61 et seq.; 14 Am.Jur. Trials, Actions for Unfair Competition--Trade Secrets §1 et seq.) (On privilege of witness not to disclose trade secret, see 2 Cal. Evidence (4th), *Witnesses*, §350 et seq.; on pleading, see 5 Cal. Proc. (4th), *Pleading*, §734; on remedies under Uniform Act, see *infra*, §88 et seq.)

An injunction may be directed not only against a former agent, but also against the former agent's new employer who seeks to use the information. (See *Santa Monica Ice & Cold Storage Co. v. Rossier* (1941) 42 C.A.2d 467, 471, 109 P.2d 382; *Alex Foods v. Metcalfe* (1955) 137 C.A.2d 415, 429, 290 P.2d 646.)

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

Cross-Reference: 5 Cal. Proc. (5th), *Pleading*, §778.



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A. In General.

4. Protection of Patentable Process.

13 Witkin Sum. Cal. Law Equity § 84

[§ 84] Protection of Patentable Process.

In *Kewanee Oil Co. v. Bicron Corp.* (1974) 416 U.S. 470, 94 S.Ct. 1879, 40 L.Ed.2d 315, plaintiff developed a process of growing a synthetic crystal with a valuable commercial use by processes considered trade secrets. Defendant individuals, former employees of plaintiff, used these secrets in developing a similar crystal for defendant corporation, competing with plaintiff. The district court, applying Ohio's trade secret law, gave injunctive relief to plaintiff, against defendant's claim that the federal patent law had preempted trade secret protection for processes that were appropriate for a federal patent. *Held*, reversed.

(a) *State power.* *Goldstein v. California* (1973) 412 U.S. 546, 93 S.Ct. 2303, 37 L.Ed.2d 163, holding that a state could protect against record piracy (see *infra*, §117), is determinative. "Just as the States may exercise regulatory power over writings so may the States regulate with respect to discoveries. States may hold diverse viewpoints in protecting intellectual property relating to invention as they do in protecting the intellectual property relating to the subject matter of copyright. The only limitation on the States is that in regulating the area of patents and copyrights they do not conflict with the operation of the laws in this area passed by Congress." (94 S.Ct. 1885, 40 L.Ed.2d 324.)

(b) *No federal preemption.* Even if the state law is enacted in the exercise of an otherwise undoubted state power, it must not clash with the objectives of the federal law. (94 S.Ct. 1885, 40 L.Ed.2d 325; see 7 *Summary* (10th), *Constitutional Law*, §8 et seq.) But state trade secret protection of inventions that are not patentable, are of doubtful patentability, or are clearly patentable, does not conflict with the patent policy of disclosure. (94 S.Ct. 1888, 40 L.Ed.2d 327.)

(c) *Nature of trade secret protection.* "Trade secret law encourages the development and exploitation of those items of lesser or different invention than might be accorded protection under the patent laws, but which items still have an important part to play in the technological and scientific advancement of the Nation. Trade secret law promotes the sharing of knowledge, and the efficient operation of industry; it permits the individual inventor to reap the rewards of his labor by contracting with a company large enough to develop and exploit it. Congress, by its silence over these many years, has seen the wisdom of allowing the States to enforce trade secret protection. Until Congress takes affirmative action to the contrary, States should be free to grant protection to trade secrets." (94 S.Ct. 1892, 40 L.Ed.2d 332.) (See 2 *Western State L. Rev.* 1 [on Court of Appeals decision]; 87 *Harv. L. Rev.* 807 [same].)

The *Kewanee* reasoning was followed in *Sinclair v. Aquarius Electronics* (1974) 42 C.A.3d 216, 116 C.R. 654. Plaintiff conceived the idea of a device to convert brain waves into audible form. Defendant's majority shareholder, desiring to put the device into commercial production, represented to plaintiff that whether or not a patent could be obtained, this route was expensive and unnecessary, and that confidential disclosure under a production agreement would be better. An agreement, with a provision for royalty payments, was made. Defendant then manufactured the device, and it was sold in large quantities, but defendant failed to pay royalties. Plaintiff sued and obtained judgment for an accounting of past and future royalties. *Held*, affirmed.

(a) The device was a trade secret under the accepted tests (see *supra*, §82). (42 C.A.3d 222.)

(b) The leading cases of *Sears, Roebuck & Co. v. Stiffel Co.* (1964) 376 U.S. 225, 84 S.Ct. 784, 787, 11 L.Ed.2d 661, 665, 13 Summary (10th), *Personal Property*, §79, *Compco Corp. v. Day-Brite Lighting* (1964) 376 U.S. 234, 84 S.Ct. 779, 11 L.Ed.2d 669, 13 Summary (10th), *Personal Property*, §79, and *Lear v. Adkins* (1969) 395 U.S. 653, 89 S.Ct. 1902, 1911, 23 L.Ed.2d 610, 623, 13 Summary (10th), *Personal Property*, §77, attribute the policy of the patent laws to encourage invention and disclosure. That policy does not preclude enforcement of the agreement. "[I]f the inventor whose discovery is not patentable is prevented from licensing for royalties, he will hardly have any reason or incentive to uncover his idea. It follows that in the case of a trade secret the policy goal described above can be achieved the opposite way, namely, by honoring the licensing agreement and *enforcing its royalty provisions as between the parties*. It bears repeating that the trade secret agreement is effective only between the contracting parties and by no means constitutes a bar to free copying by others who independently discover the idea." (42 C.A.3d 224.)

(c) The holding and theory of *Kewanee* support this result. Although the case dealt with enforceability of state trade secret law, the principle is applicable with equal, if not greater, force to a private contract where the licensee gains possession of the secret under an agreement to pay. (42 C.A.3d 225.) A secret idea does not lose its secret character by marketing of the device embodying it. (42 C.A.3d 226.)

(d) *Sears*, *Compco*, and *Lear* are all distinguishable on their facts. They did not involve the enforceability of a licensing agreement entered into by private parties negotiating at arm's length. (42 C.A.3d 227.)

(e) Plaintiff relied on defendant's representations in failing to file a patent application within the statutory time, and thereby lost any possible protection that a patent might have given; hence, defendant was estopped to claim that the agreement was unenforceable for lack of a valid patent. (42 C.A.3d 228.)

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



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A. In General.

5. Inevitable Disclosure Doctrine Rejected.

13 Witkin Sum. Cal. Law Equity § 85

[§ 85] Inevitable Disclosure Doctrine Rejected.

Under the doctrine of inevitable disclosure, a plaintiff may prove a claim of trade secret misappropriation by demonstrating that a former employee's new employment will inevitably lead the former employee to rely on the plaintiff's trade secrets. The justification for the doctrine, which results in an injunction prohibiting employment, not just use of trade secrets, is that unless the former employee has an uncanny ability to compartmentalize information, he or she will necessarily rely--consciously or subconsciously--on knowledge of the plaintiff's trade secrets in performing new job duties. A majority of courts addressing the issue have adopted the doctrine. In deciding whether to apply the doctrine, these courts consider the degree of similarity between the employee's former and current positions, the degree of competition between the former and current employers, the current employer's efforts to safeguard the former employer's trade secrets, and the former employee's lack of forthrightness both in activities before accepting the job and in testimony. (*Whyte v. Schlage Lock Co. (2002) 101 C.A.4th 1443, 1458, 125 C.R.2d 277*; see *26 Golden Gate L. Rev. 717* [criticizing doctrine]; *75 So. Cal. L. Rev. 1257* [worker mobility and doctrine of inevitable disclosure].)

Whyte was the first published California decision to rule on the validity of the doctrine. A vice-president for sales for a lock manufacturer brought an action against his former employer, his new employer's primary competitor, seeking a declaration that plaintiff was free to work for his new employer. Plaintiff had entered into a confidentiality agreement with defendant, but had not entered into a covenant not to compete. Defendant cross-complained for misappropriation of trade secrets. The trial judge initially issued a temporary restraining order in response to the cross-complaint, then dissolved the order and denied defendant's application for a preliminary injunction. The judge also rejected defendant's suggestion that the judge apply the inevitable disclosure doctrine. *Held*, affirmed; the doctrine is contrary to California's law disapproving covenants not to compete, and is rejected.

(a) Decisions rejecting the inevitable disclosure doctrine correctly balance competing public policies of employee mobility and protection of trade secrets. Application of the doctrine results not merely in an injunction against the use of trade secrets, but in an injunction restricting employment. *B. & P.C. 16600* generally prohibits covenants not to compete, and California public policy strongly favors employee mobility. (*101 C.A.4th 1461*.)

(b) The policy favoring employee mobility does not in itself, however, require rejection of the inevitable disclosure doctrine, because C.C. 3426 et seq. (*infra*, §86 et seq.) also protect trade secrets. Covenants not to compete are

enforceable notwithstanding *B. & P.C. 16600* if they are necessary to protect the employer's trade secrets. Further, *B. & P.C. 16600* generally does not invalidate a noncompetition agreement that merely prohibits solicitation of the former employer's customers. (*101 C.A.4th 1462*; see *infra*, §93 et seq.)

(c) The chief ill in the covenant not to compete imposed by the inevitable disclosure doctrine is its after-the-fact nature. Where, as here, a confidentiality agreement is in place, the doctrine in effect converts the confidentiality agreement into a covenant not to compete. A plaintiff should not be allowed to use the doctrine as an after-the-fact noncompetition agreement to enjoin an employee from working for the employer of his or her choice. (*101 C.A.4th 1463*.)

(d) "Lest there be any doubt about our holding, our rejection of the inevitable disclosure doctrine is complete. If a covenant not to compete (which would include, for example, a nonsolicitation clause), is part of the employment agreement, the inevitable disclosure doctrine cannot be invoked to supplement the covenant, alter its meaning, or make an otherwise unenforceable covenant enforceable. California law concerning enforcement of noncompetition agreements, not the inevitable disclosure doctrine, would measure the covenant's scope, meaning, and validity. Our opinion does not change that law. Under the circumstances presented in this case, an employer might prevent disclosure of trade secrets through, for example, an agreed-upon and reasonable nonsolicitation clause that is narrowly drafted for the purpose of protecting trade secrets. Thus, regardless whether a covenant not to compete is part of the employment agreement, the inevitable disclosure doctrine cannot be used as a substitute for proving actual or threatened misappropriation of trade secrets." (*101 C.A.4th 1463*.)

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

See *Central Valley General Hosp. v. Smith* (2008) 162 C.A.4th 501, 525, 75 C.R.3d 771 [rejection of doctrine does not preclude enjoining threatened misappropriation of trade secrets where employment is not prohibited].



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CHAPTER XIX - Equity

Witkin Summary of California Law IV. EQUITABLE RELIEF AGAINST TORTS: MISAPPROPRIATION OF TRADE SECRETS

B. Uniform Trade Secrets Act.

1. In General.

13 Witkin Sum. Cal. Law Equity § 86

[§ 86] In General.

(1) *Nature and Purpose.* In 1979, the Commissioners on Uniform State Laws approved the Uniform Trade Secrets Act. (See 14 U.L.A. (Master Ed.), p. 433.) Clarifying amendments and revised notes and comments were adopted in 1985. The Act "codifies the basic principles of common law trade secret protection," and is intended to meet the following needs: (a) Many businesses elect to rely on state trade secret laws to protect commercially valuable information, and this reliance may well have increased in view of *Kewanee Oil Co. v. Bicron Corp.* (1974) 416 U.S. 470, 94 S.Ct. 1879, 40 L.Ed.2d 315, *supra*, §84; (b) state trade secret law has not developed satisfactorily; and (c) the "most widely accepted rules of trade secret law," stated in the First Restatement of Torts, were omitted in the Second Restatement. (See Prefatory Note to Uniform Trade Secrets Act, 14 U.L.A. (Master Ed.), p. 434.)

The Act is now in force in 43 states, including California, and in the District of Columbia. (See 14 U.L.A. (Master Ed.), Supp.) The Act authorizes injunctions against misappropriation (*infra*, §89), damages (*infra*, §90), attorneys' fees (*infra*, §91), and protective orders (*infra*, §92).

(2) *Adoption in California.* The 1984 Legislature enacted the Uniform Trade Secrets Act as C.C. 3426 et seq. (See 20 Loyola L.A. L. Rev. 1167; 16 Pacific L. J. 731; *infra*, §87 et seq.) However, the amendments approved by the Commissioners in 1985 (see 14 U.L.A. (Master Ed.), p. 433) have not been adopted in California.

(3) *Construction and Severability.* The Act contains the usual provisions on uniform construction and severability. (C.C. 3426.8, 3426.9.)

(4) *Effect on Other Law.* C.C. 3426.7 provides as follows:

(a) "Except as otherwise expressly provided," the Act "does not supersede any statute relating to misappropriation of a trade secret, or any statute otherwise regulating trade secrets." (C.C. 3426.7(a).)

(b) The Act "does not affect (1) contractual remedies, whether or not based upon misappropriation of a trade secret, (2) other civil remedies that are not based upon misappropriation of a trade secret, or (3) criminal remedies, whether or not based upon misappropriation of a trade secret." (C.C. 3426.7(b).)

(c) The Act does not affect the disclosure of a record by a state or local agency under the California Public Records Act (*Govt.C. 6250 et seq.*; see 2 *Cal. Evidence (4th)*, *Witnesses*, §278 et seq.). "Any determination as to whether the disclosure of a record under the California Public Records Act constitutes a misappropriation of a trade secret and the rights and remedies with respect thereto shall be made pursuant to the law in effect before the operative date of this title." (C.C. 3426.7(c).)

(5) *Burden of Proof and Burden of Producing Evidence*. The burden of proving that the defendant used the plaintiff's trade secret through improper means under C.C. 3426.1 (*infra*, §87) remains on the plaintiff throughout trial. The burden of producing evidence that the use resulted from independent derivation or reverse engineering under C.C. 3426.1(a) (*infra*, §87), which may rebut a claim of improper means, shifts to the defendant after the plaintiff establishes a *prima facie* case of improper means. (See *Sargent Fletcher v. Able Corp. (2003) 110 C.A.4th 1658, 1668, 3 C.R.3d 279.*)

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

(1) *Nature and Purpose*. See C.E.B., 2 *Advising California Employers and Employees*, §11.2 et seq.

The Uniform Act now appears at 14 U.L.A. (Master Ed.), p. 529. The Prefatory Note quoted in the text is at p. 530 et seq. (5) *Burden of Proof and Burden of Producing Evidence*. See CACI, No. 4400 et seq. [trade secrets].

(6) *(New) Recovery of Costs*. A prevailing party now may be awarded reasonable costs under the same circumstances as an award of attorneys' fees (see text, §91). (C.C. 3426.4, as amended in 2006; see Supp., *infra*, §91.)



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B. Uniform Trade Secrets Act.

2. Definitions.

13 Witkin Sum. Cal. Law Equity § 87

[§ 87] Definitions.

C.C. 3426.1 defines the important terms ("unless the context requires otherwise"):

(1) *Improper Means*. This term includes "theft, bribery, misrepresentation, breach or inducement of a breach of a duty to maintain secrecy, or espionage through electronic or other means." However, "[r]everse engineering or independent derivation alone shall not be considered improper means." (C.C. 3426.1(a).)

(2) *Misappropriation*. This term means any of the following:

(a) Acquisition of a trade secret of another by a person who knows or has reason to know that it was acquired by improper means. (C.C. 3426.1(b)(1).)

(b) Unauthorized disclosure or use of a trade secret of another by a person who used improper means to acquire knowledge of the trade secret. (C.C. 3426.1(b)(2)(A).)

(c) Unauthorized disclosure or use of a trade secret of another by a person who, at the time of disclosure or use, knew or had reason to know that his or her knowledge of the trade secret was derived from or through a person who had utilized improper means to acquire it; was acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use; or was derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use. (C.C. 3426.1(b)(2)(B).)

(d) Unauthorized disclosure or use of a trade secret of another by a person who, before a material change of his or her position, knew or had reason to know that it was a trade secret, and that knowledge of it had been acquired by accident or mistake. (C.C. 3426.1(b)(2)(C).) (See *Morlife v. Perry* (1997) 56 C.A.4th 1514, 1523, 66 C.R.2d 731), *infra*, §93 [defendants' general pattern of soliciting former employer's customers met statutory definition]; *PMC v. Kadisha* (2000) 78 C.A.4th 1368, 1385, 93 C.R.2d 663, 9 Summary (10th), *Corporations*, §105 ["misappropriation is not limited to the initial act of improperly acquiring trade secrets; the use and continuing use of the trade secrets is also misappropriation"].

(3) *Person*. This means "a natural person, corporation, business trust, estate, trust, partnership, limited liability

company, association, joint venture, government, governmental subdivision or agency, or any other legal or commercial entity." (C.C. 3426.1(c).)

(4) *Trade Secret*. This term is defined as "information, including a formula, pattern, compilation, program, device, method, technique, or process, that ... [d]erives independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use" (C.C. 3426.1(d)(1)); and is the subject of efforts that are reasonable under the circumstances to maintain its secrecy (C.C. 3426.1(d)(2)). (See *Metro Traffic Control v. Shadow Traffic Network* (1994) 22 C.A.4th 853, 862, 27 C.R.2d 573 [no statutory trade secret under C.C. 3426.1(d)(1) where information imparted to contractor by radio station was equally available to anyone contracting with station]; *GAB Business Services v. Lindsey & Newsom Claim Services* (2000) 83 C.A.4th 409, 427, 99 C.R.2d 665 [mere fact that employee salary information is confidential does not mean that it has economic value sufficient to make it a trade secret under C.C. 3426.1(d)].)

For this purpose, a customer list is a compilation. (*American Paper & Packaging Products v. Kirgan* (1986) 183 C.A.3d 1318, 1324, 228 C.R. 713; see *Morlife v. Perry*, *supra*, 56 C.A.4th 1521 [customer list of "unusual" roofing service met statutory definition].)

In *American Credit Indem. Co. v. Sacks* (1989) 213 C.A.3d 622, 262 C.R. 92, defendant wrote companies she had personally serviced while employed as an agent for plaintiff, a national underwriter of credit insurance. Defendant's letter announced her departure from plaintiff's employment and her affiliation with a competitor, informed the customers of her new employer's "very interesting alternative" policies, invited inquiries about these products at renewal time, and petitioned the customers to call her at any time for information. The trial judge denied plaintiff's motion for a preliminary injunction, ruling that defendant had the right to solicit business from clients with whom she had become personally acquainted during her employment, and that evidence did not support plaintiff's allegation of misappropriation of trade secrets. *Held*, reversed.

(a) Because of the unique nature of credit insurance and the product resistance that must be overcome before this type of insurance can be sold or renewed, plaintiff's customer list and related information constitute "trade secrets" under C.C. 3426.1(d)(1) and under common law cases including *State Farm Mut. Auto. Ins. Co. v. Dempster* (1959) 174 C.A.2d 418, 344 P.2d 821, *infra*, §94. By seeking a protective order in other litigation with defendant and by having its employees sign confidentiality agreements, plaintiff took reasonable steps to insure the secrecy of the information as required by C.C. 3426.1(d)(2). (213 C.A.3d 630, 631, 638.)

(b) Defendant's letter to these customers constituted a "misappropriation" as defined in C.C. 3426.1(b). Although the common law right to compete, including the right to announce a new business affiliation (see *infra*, §96), survives the Act, defendant's letter went beyond an announcement and amounted to a solicitation. (213 C.A.3d 632.)

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

(2) *Misappropriation*. See *San Jose Const. v. S.B.C.C.* (2007) 155 C.A.4th 1528, 1544, 67 C.R.3d 54 [plaintiff's project binders could have been "misappropriated" by former employee within meaning of statute, even if they were returned without being used by employee's new employer to solicit project owners; misappropriation may occur by improper acquisition of trade secret, not just by use].

(4) *Trade Secret*. See *Yield Dynamics v. TEA Systems Corp.* (2007) 154 C.A.4th 547, 572, 66 C.R.3d 1 [electronic software source code lacked significant independent economic value and thus was not trade secret; code was not distinctly advantageous to competitors and did not play pervasive role in their programs]; *San Jose Const. v. S.B.C.C.*, *supra*, 155 C.A.4th 1543 [question of fact whether information contained in project binders allegedly misappropriated by former employee had significant independent economic value].



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B. Uniform Trade Secrets Act.

3. When Claim Arises.

13 Witkin Sum. Cal. Law Equity § 88

[§ 88] When Claim Arises.

An action for misappropriation must be brought within 3 years "after the misappropriation is discovered or by the exercise of reasonable diligence should have been discovered," and for these purposes, "a continuing misappropriation constitutes a single claim." (C.C. 3426.6.)

In *Glue-Fold v. Slautterback Corp.* (2000) 82 C.A.4th 1018, 98 C.R.2d 661, plaintiff corporation brought an action alleging misappropriation of a trade secret in violation of the Act and other theories, arising from defendant corporation's marketing of a product alleged to be based on a process developed by plaintiff. Although plaintiff filed its complaint more than 3 years after it first discovered the misappropriation, plaintiff contended that its action was not barred by the 3-year limitations period of C.C. 3426.6. Plaintiff argued that it was the victim of a subsequent discrete act of misappropriation, separated by a period during which plaintiff mistakenly believed that defendant would desist from that misconduct; that this second misappropriation was a continuation of the first; that plaintiff had commenced suit within 3 years of discovering the second misappropriation; and that therefore, its action was timely. The trial judge rejected plaintiff's argument and granted summary judgment for defendant. *Held*, affirmed; plaintiff's action was time-barred. The first discovered, or discoverable, misappropriation of a trade secret commences the limitations period. (82 C.A.4th 1026.) If plaintiff could escape the bar of C.C. 3426.6 by focusing only on the subsequent continuing activity as a separate claim that gives rise to a new statute of limitations period, the statute would not only contravene the principle against splitting a cause of action, but would also condone the continuing wrong approach that was rejected by the drafters of the Act, from which C.C. 3426.6 was taken. (82 C.A.4th 1027, 1028.)

In *Cadence Design Systems v. Avant! Corp.* (2002) 29 C.4th 215, 127 C.R.2d 169, 57 P.3d 647, plaintiff, a corporation in the field of integrated circuit design automation, sued a competitor for misappropriation of trade secrets after plaintiff's vice-president joined defendant. The parties negotiated a settlement of the claims and signed a release. Thereafter, plaintiff sued defendant in federal district court for misuse of the secrets occurring after the date of the release. The federal trial judge ruled on summary judgment motions that all of the claims for postrelease misuse were barred by the release. On plaintiff's appeal, the Ninth Circuit Court of Appeals requested that the California Supreme Court decide the following question: Under the California Uniform Trade Secrets Act (UTSA), when does a claim for trade secret infringement arise; only once, when the initial misappropriation occurs, or with each subsequent misuse of the trade secret? The Supreme Court accepted the request under former C.R.C., Rule 29.5 (now C.R.C., Rule 29.8).

Held, by unanimous court, a claim under the Act for misappropriation arises only once, when the trade secret is initially misappropriated; each subsequent use or disclosure of the secret does not give rise to a separate claim, but rather augments the initial claim.

(a) This interpretation is supported by C.C. 3426.6, which provides that "a continuing misappropriation constitutes a single claim." The drafters of that provision explicitly affirmed prior case law supporting this interpretation, and rejected the contrary view that each misappropriation gives rise to a separate claim. (29 C.4th 222, citing *Glue-Fold*.)

(b) C.C. 3426.6, as well as C.C.P. 3426.1(b) (see *supra*, §87), defining "misappropriation," reveals a distinction between a "misappropriation" and a "claim." A "misappropriation" occurs not only at the time of the initial acquisition of the trade secret, but also with each misuse or wrongful disclosure of the secret. A "claim" for misappropriation arises against a given defendant only once, at the time of the initial misappropriation, with each new misuse or wrongful disclosure augmenting that single claim. (29 C.4th 223.)

(c) In the context of the settlement and release of a claim, this interpretation does not effectively reward the defendant with a license to use the misappropriated technology after execution of the release or discourage parties from entering into these releases. The parties remain free to fashion the release as broadly or narrowly as they choose, and a successful plaintiff is entitled to the full panoply of remedies, including injunctive relief, damages for actual loss, and relief from unjust enrichment. (29 C.4th 226.)

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

Cypress Semiconductor Corp. v. Superior Court (2008) 163 C.A.4th 575, 77 C.R.3d 685, decided this question: If someone steals a trade secret and sells it to a third party, when does the 3-year limitations period in C.C. 3426.6 begin to run on a misappropriation claim by the trade secret owner against the third party? In 1998, a former employee of plaintiff software developer, who was then working for a competitor, incorporated a trade secret, i.e., a source code, that he had misappropriated from plaintiff into the competitor's software product. Sometime thereafter, defendant purchased the product. In 2000, plaintiff suspected the misappropriation and sued both the former employee and the competitor for trade secret misappropriation. In August 2003, as part of a settlement and stipulated judgment in plaintiff's favor, the competitor agreed to stop licensing the product and to notify customers that it contained plaintiff's trade secrets and to urge them to cease using the product. Defendant received the notice in September 2003, but continued using the product, and plaintiff filed the present misappropriation action in May 2004. Because it was undisputed that defendant learned of the misappropriation in September 2003, less than 1 year before plaintiff filed this action, plaintiff brought a motion in limine to exclude defendant's statute of limitations defense. The trial judge granted the motion, ruling as a matter of law that the action was timely because C.C. 3426.6 did not begin to run until defendant actually knew of the wrongfulness of its conduct, well within the statute's 3-year limitations period. Defendant then sought a writ of mandamus to vacate the order granting the motion in limine. *Held*, writ granted.

(a) *Single claim rule does not apply.* Under C.C. 3426.6, a continuing misappropriation constitutes a single claim. Relying on this provision, plaintiff asserted that the statute begins to run on all third party claims when the plaintiff learns of the original misappropriation, because that misappropriation sets up one continuing wrong. Under this theory, the limitations period began in 2000 when plaintiff discovered the original misappropriation and sued the competitor. (163 C.A.4th 582.) However, the single-claim rule did not apply in this case. Plaintiff's misappropriation claim against defendant was separate from its misappropriation claim against the competitor, with its own limitations period, because plaintiff did not allege that defendant was involved in the original misappropriation. (163 C.A.4th 585.)

(b) *Proper focus is on when plaintiff suspects wrongdoing.* The trial judge erred in ruling that the limitations period began to run when defendant actually learned that the competitor's product contained the stolen source code. Defendant's actual state of mind did not affect the running of the statute. Rather, the proper question was when plaintiff had reason to suspect that defendant had obtained or used the software knowing, or having reason to know, that the software contained plaintiff's stolen source code. (163 C.A.4th 587.) Based on the record, that was a question that could not be answered as a matter of law, and thus, defendant was entitled to a jury determination of its statute of limitations

defense. (163 C.A.4th 588.)*Decision on request of court of another jurisdiction:* C.R.C., Rule 29.8 was renumbered C.R.C., Rule 8.548 in 2006.*Correction:* Page 387, line 16, "C.C.P. 3426.1(b)" should be "C.C. 3426.1(b)".



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B. Uniform Trade Secrets Act.

4. Injunction.

13 Witkin Sum. Cal. Law Equity § 89

[§ 89] Injunction.

(1) *Remedy*. Actual or threatened misappropriation may be enjoined. (C.C. 3426(a); see *Morlife v. Perry* (1997) 56 C.A.4th 1514, 1527, 66 C.R.2d 731, *infra*, §93 [injunction upheld]; *DVD Copy Control Assn. v. Bunner* (2004) 116 C.A.4th 241, 255, 10 C.R.3d 185, 6 Cal. Proc. (4th), *Provisional Remedies*, Supp., §298 [injunction denied where there was insufficient proof that information allegedly misappropriated was trade secret]; 14 U.L.A. (Master Ed.), p. 449.)

(2) *Termination*. On application to the court, an injunction terminates when the trade secret has ceased to exist, but the injunction may continue for an additional period of time to eliminate commercial advantage that otherwise would be derived from the misappropriation. (C.C. 3426(a); see *Morlife v. Perry*, *supra* [continuation of injunction was upheld]; 14 U.L.A. (Master Ed.), p. 449.)

(3) *Future Use Conditioned on Payment of Royalty*. If the court determines that it would be unreasonable to prohibit future use, an injunction may condition future use on payment of a reasonable royalty for no longer than the period of time the use could have been prohibited. (C.C. 3426.2(b).) The Uniform Act differs from C.C. 3426.2(b) by authorizing that conditional injunction only in "exceptional circumstances." "Exceptional circumstances include, but are not limited to, a material and prejudicial change of position prior to acquiring knowledge or reason to know of misappropriation that renders a prohibitive injunction inequitable." (See 14 U.L.A. (Master Ed.), p. 449.)

(4) *Mandatory Injunction*. "In appropriate circumstances, affirmative acts to protect a trade secret may be compelled by court order." (C.C. 3426.2(c); see 14 U.L.A. (Master Ed.), p. 449.)

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

(1) *Remedy*. See *ReadyLink Healthcare v. Cotton* (2005) 126 C.A.4th 1006, 1018, 24 C.R.3d 720 [trial judge properly enjoined former employee from soliciting employer's employees and customers and from disclosing trade secrets]; *Syngenta Crop Protection v. Helliker* (2006) 138 C.A.4th 1135, 1173, 42 C.R.3d 191 [injunction was properly denied where there was no evidence that data allegedly misappropriated was trade secret]; 36 *Golden Gate L. Rev.* 219 [arguing for "newsworthy" exception to grant of preliminary injunction in trade secrets cases].

The Uniform Act now discusses injunctive relief at 14 U.L.A. (Master Ed.), p. 619 et seq.(2) *Termination*. The

Uniform Act now discusses termination of injunctions at 14 U.L.A. (Master Ed.), p. 619.

(3) *Future Use Conditioned on Payment of Royalty*. The Uniform Act now discusses future use at 14 U.L.A. (Master Ed.), p. 619.

(4) *Mandatory Injunction*. The Uniform Act now discusses mandatory injunctions at 14 U.L.A. (Master Ed.), p. 619.



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B. Uniform Trade Secrets Act.

5. Damages.

13 Witkin Sum. Cal. Law Equity § 90

[§ 90] Damages.

(1) *California Statute*. C.C. 3426.3 provides for the following damages:

(a) *Actual loss and unjust enrichment*. The plaintiff may recover damages for the actual loss caused by the misappropriation and "also may recover for the unjust enrichment caused by misappropriation that is not taken into account in computing damages for actual loss." (C.C. 3426.3(a).)

(b) *Royalty alternative*. "If neither damages nor unjust enrichment caused by misappropriation are provable, the court may order payment of a reasonable royalty for no longer than the period of time the use could have been prohibited." (C.C. 3426.3(b); see *Robert L. Cloud & Associates v. Mikesell* (1999) 69 C.A.4th 1141, 1149, 82 C.R.2d 143, citing the text [award of royalties in addition to lost profits was error, because it amounted to double recovery].)

(c) *Exemplary damages*. If the misappropriation is wilful and malicious, the court may award exemplary damages in an amount not exceeding twice an award made under C.C. 3426.3(a) or C.C. 3426.3(b). (C.C. 3426.3(c).)

(2) *Uniform Act*. The language of the official version differs from C.C. 3426.3. Damages are not recoverable "to the extent that a material and prejudicial change of position prior to acquiring knowledge or reason to know of misappropriation renders a monetary recovery inequitable." (See 14 U.L.A. (Master Ed.), p. 455.)

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

(1) *California Statute*.

(a) *Actual loss and unjust enrichment*. See *Ajaxo v. E*Trade Group* (2005) 135 C.A.4th 21, 57, 63, 37 C.R.3d 221 [substantial evidence supported award of damages for breach of contract and unjust enrichment to developer of wireless stock trading technology in action against Internet stock trading company for breach of mutual nondisclosure agreement].

(c) *Exemplary damages*. See *Ajaxo v. E*Trade Group*, *supra*, 135 C.A.4th 68 [substantial evidence supported award of exemplary damages for wilful and malicious misappropriation of trade secret by defendant Internet stock

trading company in favor of plaintiff developer of wireless stock trading technology].

(2) *Uniform Act*. The portion of the Uniform Act quoted in the text is now at 14 U.L.A. (Master Ed.), p. 633.



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B. Uniform Trade Secrets Act.

6. Attorneys' Fees.

13 Witkin Sum. Cal. Law Equity § 91

[§ 91] Attorneys' Fees.

Reasonable attorneys' fees may be awarded to the prevailing party in the following circumstances: (1) a claim of misappropriation is made in bad faith; (2) a motion to terminate an injunction is made or resisted in bad faith; or (3) wilful and malicious misappropriation exists. (C.C. 3426.4.)

Gemini Aluminum Corp. v. California Custom Shapes (2002) 95 C.A.4th 1249, 116 C.R.2d 358, is apparently the first California case to construe the term, "bad faith," in that portion of C.C. 3426.4 dealing with a claim of misappropriation made in bad faith. Plaintiff manufacturer sued another manufacturer for interference with prospective economic advantage based on defendant's alleged solicitation of the business of a common customer and the misappropriation. The jury found that defendant did not interfere and determined that plaintiff acted in bad faith in its claim for misappropriation of trade secrets. The trial judge entered judgment for defendant and awarded it attorneys' fees under C.C. 3426.4. *Held*, affirmed.

(a) Although "bad faith" is not defined, the term is intended to allow a court to award reasonable attorneys' fees to a prevailing party in specified circumstances as a deterrent to specious claims of misappropriation. "Bad faith" for purposes of C.C. 3426.4 requires objective speciousness of the plaintiff's claim, as opposed to frivolousness, and subjective bad faith in bringing or maintaining the claim; plaintiff's conduct met that standard. (95 C.A.4th 1261, citing federal district court case construing "bad faith" as used in C.C. 3426.4.)

(b) Applying that rule to the present case, plaintiff demonstrated bad faith by filing its complaint for misappropriation and related counts long after the identity of the common customer and the drawings for the manufactured parts held any actual or potential economic value to anyone. (95 C.A.4th 1263.)

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

See *CytoDyn of New Mexico v. Amerimmune Pharmaceuticals (2008) 160 C.A.4th 288, 300, 72 C.R.3d 600* [award of attorneys' fees was not authorized where action alleged misappropriation of trademarks and patents, not misappropriation of trade secrets].

(New) *Recovery of costs:* A prevailing party now may be awarded reasonable costs under the same circumstances

as for an award of attorneys' fees. Reasonable costs include a reasonable sum, actually incurred and reasonably necessary, for the services of expert witnesses (who are not regular employees of a party) for preparation for trial or arbitration, during trial or arbitration, or both. (C.C. 3426.4, as amended in 2006.)



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B. Uniform Trade Secrets Act.
7. Orders To Preserve Secrecy.

13 Witkin Sum. Cal. Law Equity § 92

[§ 92] Orders To Preserve Secrecy.

In actions under the Act, the court must "preserve the secrecy of an alleged trade secret by reasonable means," including protective discovery orders, in camera hearings, sealed records, and orders that persons involved in the litigation not disclose an alleged trade secret without prior court approval. (C.C. 3426.5.) Before commencing discovery relating to the trade secret, the party alleging a misappropriation must identify the trade secret with reasonable particularity subject to any protective order under C.C. 3426.5. (C.C.P. 2019.210.) (On protective orders, see 2 *Cal. Evidence (4th)*, *Discovery*, §§59 et seq., 241.)

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



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C. Customers' Lists and Requirements.

1. Trade Secret: Solicitation Enjoined.

a. Confidential List of Customers.

13 *Witkin Sum. Cal. Law Equity* § 93

[§ 93] Confidential List of Customers.

(1) *In General.* Most trade secret litigation deals with an agent or employee who, after leaving employment, uses the information in a competing business. Sometimes this is in violation of an express agreement against soliciting the former employer's customers. But this kind of an agreement is not a necessary basis for equitable relief. (See *Empire Steam Laundry v. Lozier* (1913) 165 C. 95, 100, 130 P. 1180; *New Method Laundry Co. v. MacCann* (1916) 174 C. 26, 30, 161 P. 990; *Pasadena Ice Co. v. Reeder* (1929) 206 C. 697, 702, 275 P. 944, 276 P. 995; *Dairy Dale Co. v. Azevedo* (1931) 211 C. 344, 295 P. 10; *Gordon v. Landau* (1958) 49 C.2d 690, 694, 321 P.2d 456; *Santa Monica Ice & Cold Storage Co. v. Rossier* (1941) 42 C.A.2d 467, 471, 109 P.2d 382; *Alex Foods v. Metcalfe* (1955) 137 C.A.2d 415, 427, 290 P.2d 646; *Southern Calif. Disinfecting Co. v. Lomkin* (1960) 183 C.A.2d 431, 444, 7 C.R. 43; *American Loan Corp. v. California Commercial Corp.* (1963) 211 C.A.2d 515, 522, 27 C.R. 243; *Rutter Group, Employment Litigation* §§14:125 et seq., 14:435 et seq.; 1 *Cal. L. Rev.* 385; 11 *Cal. L. Rev.* 438; 18 *Cal. L. Rev.* 88; 20 *Cal. L. Rev.* 614, note 29; 23 *Cal. L. Rev.* 399; 41 *Cal. L. Rev.* 38; 64 *Harv. L. Rev.* 977; 31 *Hastings L. J.* 671; 37 *So. Cal. L. Rev.* 112; 28 *A.L.R.*3d 7 [former employee's duty, in absence of express contract, not to solicit former employer's customers or otherwise use knowledge of customer lists acquired in earlier employment]; 54A *Am.Jur.*2d (1996 ed.), *Monopolies, Restraints of Trade, and Unfair Trade Practices* §1122 et seq.)

In *Morlife v. Perry* (1997) 56 C.A.4th 1514, 66 C.R.2d 731, plaintiff, a commercial roof repair company, sued former employees for misappropriating confidential customer information. Plaintiff alleged that, after leaving its employ, defendants actively solicited plaintiff's customers, whose identities defendants had learned by working for plaintiff. The trial judge found that defendants had violated the Uniform Trade Secrets Act, awarded plaintiff damages, and permanently enjoined defendants from doing business with 32 of plaintiff's customers who subsequently did business with defendants after being unlawfully solicited, and also enjoined defendants from soliciting other customers that defendants had become aware of while working for plaintiff. *Held*, the customer list was a trade secret. Plaintiff provided a relatively unusual roofing service; the customer list was a compilation, developed over the years, of names, addresses, and contact persons; the identities of those buildings using services like plaintiff's were not generally known in the industry; and plaintiff had made reasonable efforts to maintain the secrecy of its customers' identities. This was sufficient to satisfy the requirements of C.C. 3426.1(d) ("trade secret" defined; see *supra*, §87) that the confidential

information have independent economic value, and that the plaintiff take reasonable steps to protect the information from disclosure. (56 C.A.4th 1521.)

(2) *Solicitation Requirement.* The employer must show that the ex-employee used the list to solicit; no injunction can be granted where customers go to the ex-employee without a solicitation. (*Golden State Linen Service v. Vidalin* (1977) 69 C.A.3d 1, 8, 137 C.R. 807 ["the proscriptions inhibiting the ex-employee reach only his use of such information, not to his mere possession or knowledge of it"]; see *ABBA Rubber Co. v. Seaquist* (1991) 235 C.A.3d 1, 18, 286 C.R. 518, 6 Cal. Proc. (4th), *Provisional Remedies*, §386 [confidential customer list was protectible where competitors did not know whether customers were users of plaintiff's product].)

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

(2) *Solicitation Requirement.*

ABBA Rubber Co. case:

Cross-Reference: 6 Cal. Proc. (5th), *Provisional Remedies*, §386.



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CHAPTER XIX - Equity

Witkin Summary of California Law IV. EQUITABLE RELIEF AGAINST TORTS: MISAPPROPRIATION OF TRADE SECRETS

- C. Customers' Lists and Requirements.
 - 1. Trade Secret: Solicitation Enjoined.
 - b. Special Requirements of Customers.

13 Witkin Sum. Cal. Law Equity § 94

[§ 94] Special Requirements of Customers.

(1) *Statement of Rule.* A list of customers whose identity can be readily ascertained by anyone is not entitled to protection as a trade secret. (See *infra*, §95.) But there may be other confidential information concerning the requirements of particular customers, or the methods of doing business with them, sufficient to justify an injunction against solicitation by a former employee or agent. (See *Scavengers Protective Assn. v. Serv-U-Garbage Co.* (1933) 218 C. 568, 571, 24 P.2d 489; *George v. Burdusis* (1942) 21 C.2d 153, 160, 130 P.2d 399; *Peerless Oakland Laundry Co. v. Hickman* (1962) 205 C.A.2d 556, 559, 23 C.R. 105; *American Loan Corp. v. California Commercial Corp.* (1963) 211 C.A.2d 515, 522, 27 C.R. 243; *Klamath-Orleans Lumber v. Miller* (1978) 87 C.A.3d 458, 464, 151 C.R. 118, citing the text; 23 Cal. L. Rev. 399; 41 Cal. L. Rev. 44; 88 A.L.R.3d 1142 [rights to expirations as between insurer and insurance agent or broker].)

(2) *Illustrations.* In *Ingrassia v. Bailey* (1959) 172 C.A.2d 117, 341 P.2d 370, plaintiff, owner of a catering route, leased it to defendant. After termination of the lease, defendant started soliciting the customers. Because the route was to industrial catering customers--employees of industrial plants as they go to work, and at coffee breaks and lunch--defendant argued that all the concerns were in the phone book and directories, and that the case was therefore within the rule of *Avocado Sales Co. v. Wyse* (1932) 122 C.A. 627, 10 P.2d 485, *infra*, §95. *Held*, there was confidential information, including the scheduling of trucks to make efficient stops at the right times, the number of employees interested in the service, their particular likes in the matter of food and beverages, etc. (172 C.A.2d 123.)

In *State Farm Mut. Auto. Ins. Co. v. Dempster* (1959) 174 C.A.2d 418, 344 P.2d 821, plaintiff, a large automobile liability insurance company, had agents under contracts that did not allow them to represent other companies. The contracts of defendant agents were cancelled for violation. Defendants then proceeded to solicit and place insurance of plaintiff's clients with other companies. *Held*, the data furnished by the company to the agent, and developed by the agent while under contract with the company, e.g., special knowledge of customers' insurance habits and expiration dates, vital statistics of policyholders, etc., were trade secrets. (174 C.A.2d 427.)

In *Western Electro-Plating Co. v. Henness* (1960) 180 C.A.2d 442, 4 C.R. 434, plaintiff was in the business of chrome-plating automobile accessories. The identity of its customers was no secret, but salesmen and solicitors had

friendly contacts, and there were preferred customers with a higher volume of business. *Held*, defendant route drivers were properly enjoined from soliciting customers of plaintiff. But the injunction was too broad in restraining them from accepting business from former customers when offered without soliciting. (180 C.A.2d 450.)

Other cases are to the same effect. (See *Wallich v. Koren* (1947) 80 C.A.2d 223, 181 P.2d 682 [special preferences of customers for medical supplies]; *California Intelligence Bureau v. Cunningham* (1948) 83 C.A.2d 197, 204, 188 P.2d 303 [list of subscribers to information service of specialized character, together with information on methods of investigation, analysis, and compilation of material]; *Reid v. Mass Co.* (1957) 155 C.A.2d 293, 302, 318 P.2d 54 [advertising medium for merchants]; *Greenly v. Cooper* (1978) 77 C.A.3d 382, 391, 392, 143 C.R. 514 [mortgage loan broker's confidential list of names and addresses of home loan investors, with information as to areas, amount of investment, loan expiration dates, etc.]; *Courtesy Temporary Service v. Camacho* (1990) 222 C.A.3d 1278, 1288, 272 C.R. 352 [confidential list of customers, along with related information concerning billing rates, key contacts, specialized requirements, and mark-up rates, was product of substantial time, expense, and effort]; *Reeves v. Hanlon* (2004) 33 C.4th 1140, 1156, 17 C.R.3d 289, 95 P.3d 513, 5 Summary (10th), *Torts*, §755, and *infra*, §96 [departing attorneys from law firm used confidential client list to directly solicit clients and sent professional announcement that caused many clients to believe that law firm had gone out of business].)

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

(2) *Illustrations.* See *ReadyLink Healthcare v. Cotton* (2005) 126 C.A.4th 1006, 1019, 24 C.R.3d 720 [following *Courtesy Temporary Service v. Camacho* (1990) 222 C.A.3d 1278, 272 C.R. 352, text, p. 392].



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C. Customers' Lists and Requirements. 2. No Trade Secret: Solicitation Allowed.

13 Witkin Sum. Cal. Law Equity § 95

[§ 95] No Trade Secret: Solicitation Allowed.

If no confidential information is used, a former employee is free to compete with the old employer, to advise customers of the old employer of the former employee's new activities, and to solicit their business. In *Avocado Sales Co. v. Wyse* (1932) 122 C.A. 627, 10 P.2d 485, the customers were wholesale buyers--grocery stores, vegetable and fruit stands--and their identities and addresses were discoverable by simple observation or reference to directories. Hence, there was nothing secret or confidential in the list. (122 C.A. 634.) (See 37 So. Cal. L. Rev. 115.)

In *Aetna Bldg. Maintenance Co. v. West* (1952) 39 C.2d 198, 246 P.2d 11, defendant employee of plaintiff building maintenance company informed plaintiff's customers of the termination of his employment and the commencement of his own business. *Held*, defendant could legally accept business from these customers. They were commonly known to the trade or easily discoverable, and patronage was dependent on efficiency of service rather than personal relationship or knowledge of requirements. (39 C.2d 204, 205.) (See criticism, 41 Cal. L. Rev. 38, 54.)

In *De Luxe Box Lunch & Catering Co. v. Black* (1948) 86 C.A.2d 434, 194 P.2d 715, B was employed by a box lunch company serving industrial concerns. He quit and commenced serving P.C. Co. Service depended entirely on permission granted by P.C. Co. to enter the premises to sell to employees, and P.C. Co., dissatisfied with the former service, terminated the permission that had been granted to the employer and granted permission to B. *Held*, no trade secret was involved, there being no confidential list or other special knowledge of customers, but only a revocable license to enter and sell. (86 C.A.2d 438.)

In *Lloyd Pest Control Co. v. Lopez* (1959) 173 C.A.2d 606, 343 P.2d 757, defendant was employed by plaintiff pest control company as a route man on the "La Jolla route." He left, took the state examination for a pest control license, and 7 months after termination of his employment, went into the business for himself in that area. He operated under an entirely different fictitious name, made no attempt to solicit former customers, and used no special knowledge or information. Furthermore, the court found that the business was one where services rather than production processes or techniques were involved. *Held*, following *Aetna Bldg.*, there was no unfair competition. (173 C.A.2d 612.)

The theory of *Avocado Sales* is followed in a number of other cases. (See *Continental Car-Na-Var Corp. v. Moseley* (1944) 24 C.2d 104, 109, 148 P.2d 9; *Levine v. E.A. Johnson & Co.* (1951) 107 C.A.2d 322, 327, 237 P.2d

309; *Mathews Paint Co. v. Seaside Paint & Lacquer Co.* (1957) 148 C.A.2d 168, 173, 306 P.2d 113; *American Alloy Steel Corp. v. Ross* (1957) 149 C.A.2d 215, 218, 308 P.2d 494; *Fortna v. Martin* (1958) 158 C.A.2d 634, 638, 323 P.2d 146; *King v. Pacific Vitamin Corp.* (1967) 256 C.A.2d 841, 847, 848, 64 C.R. 486 [salesman for wholesale drug firm]; *Cal Francisco Inv. Corp. v. Vrionis* (1971) 14 C.A.3d 318, 323, 92 C.R. 201 [real estate salesman used information concerning listings and prospective purchaser to sell to that purchaser after leaving plaintiff broker's employment; judgment for defendant affirmed; no certainty that sale will follow listing or that vendor or purchaser will need broker's services]; *Rigging Int. Maintenance Co. v. Gwin* (1982) 128 C.A.3d 594, 606, 611, 180 C.R. 451; *American Paper & Packaging Products v. Kirgan* (1986) 183 C.A.3d 1318, 1321, 1326, 228 C.R. 713 [defendants developed lists from visits to communities in their sales area zoned for industry and from calls on companies located there].)

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C. Customers' Lists and Requirements. 3. Announcement of Change in Employment.

13 Witkin Sum. Cal. Law Equity § 96

[§ 96] Announcement of Change in Employment.

In *Moss, Adams & Co. v. Shilling* (1986) 179 C.A.3d 124, 224 C.R. 456, defendants were professional employees of plaintiff accounting firm. Their employment contracts stated that the names and addresses of clients were trade secrets and could not be used to solicit those clients within 1 year after termination of employment. Defendants formed their own accounting firm, and 2 weeks before resigning their employment, removed a rolodex from the office. They used that as well as a personal collection of business cards to address an announcement to the firm's clients for whom they had performed services. The announcement merely stated that they had formed a new partnership, and contained no solicitation. Plaintiffs sued, contending that defendants had misappropriated trade secrets. *Held*, summary adjudication for defendants affirmed.

(a) Defendants used the rolodex only to obtain some of the addresses of clients whose names they already knew. The names of these clients were not trade secrets; an employee who changes employers does not have to "wipe clean the slate of his memory." (179 C.A.3d 129.) The addresses of these clients were likewise not trade secrets, for they were easily obtainable through sources such as telephone directories. (179 C.A.3d 129.)

(b) "In short, we conclude that (1) former employees cannot use trade secrets to announce a change of employment to the former employer's customers, (2) the names of clients to whom Shilling and Kenyon mailed announcements were known to them from personally providing accounting services and therefore were not trade secrets, and (3) these clients' addresses could have been easily determined without the use of the rolodex and thus were also not trade secrets. As a matter of law the use of the rolodex did not violate the common law of unfair competition." (179 C.A.3d 130.)

(c) Because there was no misappropriation of a trade secret, the use of the rolodex was not actionable under the employment agreements. "Antisolicitation covenants are void as unlawful business restraints except where their enforcement is necessary to protect trade secrets." (179 C.A.3d 130.) Or as stated in a Ninth Circuit case quoting 41 Cal. L. Rev. 69: "[T]he applicable California law is that the employer will be able to restrain by contract only that conduct of the former employee that would have been subject to judicial restraint under the law of unfair competition, absent the contract." (179 C.A.3d 130.)

American Credit Indem. Co. v. Sacks (1989) 213 C.A.3d 622, 262 C.R. 92, held that the result in *Moss, Adams*, "as

opposed to the statement of its conclusion," is correct and survives the enactment of the Uniform Trade Secrets Act (UTSA) (supra, §86). (213 C.A.3d 636.) Contrary to the conclusion that the names of clients known to ex-employees from having personally provided them services were *not* trade secrets, that fact is not determinative. "Providing personal service to a customer whose identity is a trade secret does not thereafter render that customer fair game for solicitation. In fact, it is against those very employees who personally service customers that employers are most in need of protection." (213 C.A.3d 636; see supra, §87.) Nevertheless, "the right to announce a new affiliation, even to trade secret clients of a former employer, is basic to an individual's right to engage in fair competition." (213 C.A.3d 636.) (See *Hilb, Rogal & Hamilton Ins. Services v. Robb* (1995) 33 C.A.4th 1812, 1821, 39 C.R.2d 887 [citing *American Credit Indem. Co.*; insurer's former employee did not misuse customer lists and information about amount and types of their insurance by merely informing some customers that he had started new insurance business, and later by complying with their instructions to move their accounts or to furnish insurance quote]; *Thompson v. Impaxx* (2003) 113 C.A.4th 1425, 1432, 7 C.R.3d 427 [distinguishing *Moss, Adams* and following *American Credit Indem. Co.*; absent protectable trade secret, right to compete fairly outweighed employer's right to protect clients against competition from former employee by imposing 1-year, nonsolicitation clause].)

Like the court in *American Credit Indem. Co.*, *Morlife v. Perry* (1997) 56 C.A.4th 1514, 66 C.R.2d 731, supra, §93, rejected the conclusion in *Moss, Adams* that the names of clients known to ex-employees from having personally provided them services in the past are not trade secrets. (56 C.A.4th 1525, 1526.)

Morlife expressly declined to decide whether the "professional announcement" exception recognized by both *Moss, Adams* and *American Credit Indem. Co.* survived the enactment of the UTSA. (56 C.A.4th 1527, footnote 8.) This question was addressed in *Reeves v. Hanlon* (2004) 33 C.4th 1140, 17 C.R.3d 289, 95 P.3d 513, 5 Summary (10th), *Torts*, §755. Plaintiff law firm sued defendant attorneys after they left plaintiff's firm and started their own firm. Plaintiff alleged that defendants misappropriated plaintiff's confidential client list in violation of the UTSA. Citing *American Credit Indem. Co.* and other authorities, defendants countered that they had merely used the list to send the clients a professional announcement of the creation of their new firm, which was not prohibited by the UTSA. The Supreme Court acknowledged that it had "no quarrel with defendants' authorities," but nevertheless held that defendants had violated the UTSA by using the confidential client list to directly solicit plaintiff's clients and because their professional announcement had caused many of plaintiff's clients to believe that plaintiff had gone out of business. (33 C.4th 1156.)

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



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Witkin Summary of California Law
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A. Restatement 3d.

13 Witkin Sum. Cal. Law Equity § 97

[§ 97] Restatement 3d.

The American Law Institute adopted the Restatement of the Law Third, Unfair Competition in 1993. The Foreword (p. xi) explains its purpose, nature, and scope.

(1) "This Restatement treats the common law principles and analogous statutory rules that collectively comprise the law of unfair competition. Although the common law action for unfair competition evolved originally to afford relief against a competitor's misrepresentation of the source of goods or services, the term 'unfair competition' now describes an array of legal actions addressing methods of competition that improperly interfere with the legitimate commercial interests of other sellers in the marketplace. Included within this Restatement are causes of action for passing off, deceptive advertising, and the infringement of trademarks, trade secrets, and publicity rights."

(2) "Federal and state statutes play a significant, sometimes dominant role in many of the substantive areas encompassed within this Restatement. For the most part the federal legislation does not preempt state law, and both federal and state unfair competition statutes generally rely without significant elaboration on concepts derived from the common law. The interstate character of modern business accentuates the interest in uniformity--an interest advanced by a consistent interpretation of both the common law rules and derivative statutory provisions that define the boundaries of fair competition. Except as otherwise noted, the principles discussed in this Restatement are applicable to actions at common law and to the interpretation of analogous federal and state statutory codifications."

(3) "This Restatement is the Institute's first independent work on the subject. The subject of unfair competition was to have been addressed in the Restatement, Second, of Torts, as it had been in the original Restatement of Torts. However, it was eventually decided that the law of unfair competition had evolved to the point that it was no longer appropriate to treat it as a subcategory of the law of Torts. See 4 Restatement, Second, Torts, Introduction and Introductory Note to Division Nine. Subsequently--over the last 30 years or so--there has been enormous development of the law, as well as of the technology and techniques of business competition. There has been a parallel increase in the commercial and financial significance of intellectual property generally, including that defined through the law of unfair competition. Over approximately the same period theoretical explorations, often under the rubric of law and economics, have yielded a much more sophisticated understanding of the law and of the relationship between the values inherent in business competition and other social and political values, including the protection of free speech in a commercial context. It is thus timely that this work now be presented."

The Restatement covers the following subjects:

- (1) Chapter 1. The Freedom To Compete (§1).
- (2) Chapter 2. Deceptive Marketing (§§2-8).
- (3) Chapter 3. The Law of Trademarks (§§9-37).
- (4) Chapter 4. Appropriation of Trade Values (§§38-49).

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



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B. Imitation of Appearance or Name.
1. Nature of Protection.
a. In General.

13 Witkin Sum. Cal. Law Equity § 98

[§ 98] In General.

(1) *Statement of Rule.* Where no valid trademark, copyright, or patent exists in a particular name or design, one producer may freely copy the goods of another or use the same business name if no deception is involved. But if the goods or services are known to the public by that name, design, or physical appearance, an imitation that has the effect of deceiving purchasers as to the origin of the goods or services may be enjoined as unfair competition. (See *Weinstock, Lubin & Co. v. Marks* (1895) 109 C. 529, 535, 42 P. 142; *Banzhaf v. Chase* (1907) 150 C. 180, 181, 88 P. 704; *American Auto. Assn. v. American Auto. Owners Assn.* (1932) 216 C. 125, 130, 13 P.2d 707; *American Philatelic Soc. v. Claibourne* (1935) 3 C.2d 689, 697, 46 P.2d 135; *Chaplin v. Amador* (1928) 93 C.A. 358, 363, 269 P. 544; *Carolina Pines v. Catalina Pines* (1932) 128 C.A. 84, 86, 16 P.2d 781; *Hoover Co. v. Groger* (1936) 12 C.A.2d 417, 419, 55 P.2d 529; *Rosenthal v. Brasley-Krieger Shoe Co.* (1937) 19 C.A.2d 257, 259, 64 P.2d 1109; *Hoyt Heater Co. v. Hoyt* (1945) 68 C.A.2d 523, 527, 157 P.2d 657; *California Prune & Apricot Growers' Assn. v. H.R. Nicholson Co.* (1945) 69 C.A.2d 207, 219, 158 P.2d 764; *Family Record Plan v. Mitchell* (1959) 172 C.A.2d 235, 243, 342 P.2d 10; *Hair v. McGuire* (1961) 188 C.A.2d 348, 352, 10 C.R. 414; *Tustin Community Hosp. v. Santa Ana Community Hosp. Assn.* (1979) 89 C.A.3d 889, 902, 153 C.R. 76, supra, §16 [defense of laches]; *Rest.3d, Unfair Competition* §2 et seq.)

One qualification should be noted. A state cannot apply its unfair competition law to prevent copying of an article that could not get a valid mechanical or design patent. (See *Sears, Roebuck & Co. v. Stiffel Co.* (1964) 376 U.S. 225, 84 S.Ct. 784, 11 L.Ed.2d 661, 13 Summary (10th), *Personal Property*, §79; *Capitol Records v. Erickson* (1969) 2 C.A.3d 526, 530, 82 C.R. 798, infra, §117.)

(2) *Cyber Piracy.* It is unlawful for a person, with a bad faith intent, to register, traffic in, or use an internet domain name that is identical or confusingly similar to the personal name of another living person or to a deceased personality. (B. & P.C. 17525 et seq.; see 50 *Hastings L. J.* 1333 [unfair competition on World Wide Web]; 32 *McGeorge L. Rev.* 495; 39 *Santa Clara L. Rev.* 245 [Trademark and Unfair Competition in Cyberspace: Can These Laws Deter "Baiting" Practices on Web Sites?].)

(3) *Commentary and Practice Works.* Commentary on the subject has been extensive. (See C.E.B., 2 *Business Litigation*, §9.1 et seq.; Cal. Civil Practice, 6 *Business Litigation*, §67:1 et seq. [trademarks and trade names]; 24 *Cal. L. Rev.* 340; 40 *Cal. L. Rev.* 571; 68 *Harv. L. Rev.* 352; 68 *Harv. L. Rev.* 851 [developments in the law]; 69 *Harv. L. Rev.*

392; 70 *Harv. L. Rev.* 1117; 46 *Hastings L. J.* 797 [class actions and representative actions to redress unfair business practices affecting California consumers]; 2 *So. Cal. L. Rev.* 194; 9 *So. Cal. L. Rev.* 407; 16 *So. Cal. L. Rev.* 234; 28 *So. Cal. L. Rev.* 240; 2 *U.S.F. L. Rev.* 320 [architectural structures]; 5 *U.S.F. L. Rev.* 451 [product configuration]; 6 *U.S.F. L. Rev.* 172 [imitation of package]; 44 *A.L.R.2d* 1156 [use of one's own name for business purposes to detriment of another using same or similar name]; 72 *A.L.R.3d* 8 [use of family name by corporation as unfair competition]; 86 *A.L.R.3d* 505 [trade dress simulation of cosmetic product]; 86 *A.L.R.3d* 884 [imitation in sign or design of business place]; 8 *Am.Jur. Trials, Trademark Infringement and Unfair Competition Litigation* §1 et seq.; 18 *Proof of Facts* 2d 265 [appropriation of competitor's advertising matter, methods, or slogan]; 36 *Proof of Facts* 3d 221 [Proof of Statutory Unfair Business Practices]; 55 *Proof of Facts* 3d 383 [Proof of Trade Dress Infringement].)

West's Key Number Digest, Trade Regulation k.461 et seq.

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

(3) *Commentary and Practice Works*. See C.E.B., 2 *Advising California Employers and Employees*, §§11.1, 11.61 et seq.



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B. Imitation of Appearance or Name.

1. Nature of Protection.

b. Likelihood of Deception.

13 Witkin Sum. Cal. Law Equity § 99

[§ 99] Likelihood of Deception.

(1) *No Need To Prove Intent To Defraud.* The ground for the injunction is the effect of confusion of source. Deception of the public is an unfair business practice, and it is not essential to show that the defendant had an actual fraudulent intent. (See *Schwartz v. Slenderella Systems of Calif.* (1954) 43 C.2d 107, 111, 271 P.2d 857 [relief denied; see *infra*, §102]; *MacSweeney Enterprises v. Tarantino* (1951) 106 C.A.2d 504, 513, 235 P.2d 266; *Karsh v. Haiden* (1953) 120 C.A.2d 75, 83, 260 P.2d 633; *Ball v. American Trial Lawyers Assn.* (1971) 14 C.A.3d 289, 303, 304, 92 C.R. 228, *infra*, §101 ["commercial hitch-hiking" or "clinging to a benefit which is the product of misrepresentation, however innocently made"].)

(2) *No Need To Prove Actual Deception.* It is necessary to show that ordinary members of the public are likely to be deceived. But actual deception of particular persons need not be shown. (See *Winfield v. Charles* (1946) 77 C.A.2d 64, 70, 175 P.2d 69; *Weatherford v. Eytchison* (1949) 90 C.A.2d 379, 384, 202 P.2d 1040; *Sun-Maid Raisin Growers of Calif. v. Mosesian* (1927) 84 C.A. 485, 497, 258 P. 630; *California Prune & Apricot Growers' Assn. v. H.R. Nicholson Co.* (1945) 69 C.A.2d 207, 220, 158 P.2d 764; *American Distilling Co. v. Bellows & Co.* (1951) 102 C.A.2d 8, 25, 226 P.2d 751; *MacSweeney Enterprises v. Tarantino*, *supra*, 106 C.A.2d 512; *Hair v. McGuire* (1961) 188 C.A.2d 348, 353, 10 C.R. 414; *Ball v. American Trial Lawyers Assn.*, *supra*, 14 C.A.3d 310.)

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B. Imitation of Appearance or Name.
1. Nature of Protection.
c. Secondary Meaning Test.

13 Witkin Sum. Cal. Law Equity § 100

[§ 100] Secondary Meaning Test.

The protection is given where the generic or descriptive words (not subject to exclusive appropriation) acquire a secondary meaning or significance. The following test has been approved in California: "[W]hich title or name, regardless of its adoption in point of time, first made a sufficient impact on a substantial segment of the purchasing public that there thus arose the required association between the title or name and its single source." (*Family Record Plan v. Mitchell* (1959) 172 C.A.2d 235, 243, 342 P.2d 10; *Ball v. American Trial Lawyers Assn.* (1971) 14 C.A.3d 289, 302, 92 C.R. 228, *infra*, §101.)

In *Metro-Goldwyn-Mayer v. Lee* (1963) 212 C.A.2d 23, 30, 27 C.R. 833, the court observed that "secondary meaning is a shorthand phrase which describes the existence of conditions from which public confusion will flow if the defendant is permitted to pursue his deceptive scheme. ... If words have been *used* or *employed* by an author or manufacturer in such a manner that the public has learned to associate them with the thing described, they acquire a secondary meaning." (See *Gordon v. Warner Bros. Pictures* (1969) 269 C.A.2d 31, 35, 74 C.R. 499; *Allied Artists Pictures Corp. v. Friedman* (1977) 68 C.A.3d 127, 134, 135, 137 C.R. 94 [secondary meaning resulting from activities of persons other than plaintiff was nevertheless entitled to protection]; *Tustin Community Hosp. v. Santa Ana Community Hosp. Assn.* (1979) 89 C.A.3d 889, 906, 153 C.R. 76 [evidence was sufficient]; *North Carolina Dairy Foundation v. Foremost-McKesson* (1979) 92 C.A.3d 98, 107, 154 C.R. 794 [same]; *California Western School of Law v. California Western University* (1981) 125 C.A.3d 1002, 1006, 1009, 178 C.R. 685 [applying *Tustin* factors and finding evidence was sufficient].)

A secondary meaning may attach in a relatively short time. (See *Dino v. Boreta Enterprises* (1964) 226 C.A.2d 336, 340, 38 C.R. 167 [plaintiff used name less than 4 months before defendant opened his business; issue of fact presented, length of time is only one factor].) (On geographic extent of protection, see 41 A.L.R.3d 434.)

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B. Imitation of Appearance or Name.
2. Illustrations.
a. Likelihood of Deception Shown.

13 Witkin Sum. Cal. Law Equity § 101

[§ 101] Likelihood of Deception Shown.

In *Rosenthal v. Brasley-Krieger Shoe Co.* (1937) 19 C.A.2d 257, 64 P.2d 1109, plaintiff for many years conducted a shoe store under the name of "Rosenthal's Family Shoe Store," which was the only business of its kind and with its name in the locality. Defendant commenced a similar business nearby under the name of "Family Shoe Store," adding his own name, "Kirby's." *Held*, defendant could be enjoined. The word "family," used in a generic sense, could not be exclusively appropriated; but here it was used to signify that the store carried shoes suitable for men, women and children, and tended to deceive customers. (19 C.A.2d 259.)

In *Hoyt Heater Co. v. Hoyt* (1945) 68 C.A.2d 523, 157 P.2d 657, plaintiff, which had done business as a manufacturer, seller, and repairer of water heaters in Los Angeles since 1911 under the names of "Hoyt Heater Co." and "Hoyt Automatic Water Heater Co.," was given an injunction against defendant Charles Hoyt, a plumber and water heater repairman, who used phone directory listings such as "Hoyt C. H. Automatic Water Heater Repair Service and Supply Co." The court found that defendant was guilty of wilful deception, and enjoined him from using his own name in connection with the business, holding that "where he cannot use his own name without inevitably representing his goods as those of another he may be enjoined from using his name in connection with his business." (68 C.A.2d 527.) (See 44 A.L.R.2d 1156 [use of one's own name for business purposes to detriment of another using same or similar name].)

In *Winfield v. Charles* (1946) 77 C.A.2d 64, 175 P.2d 69, plaintiff Edward Winfield built up a national reputation in the manufacture of automobile engine parts bearing the name "Winfield." *Held*, defendant, Emerson Winfield Charles, could be enjoined from operating the business of manufacturing automobile parts, near plaintiff's plant, under the name of "Winfield Manufacturing Co." (77 C.A.2d 70.)

In *Jackman v. Mau* (1947) 78 C.A.2d 234, 177 P.2d 599, plaintiff conducted a wholesale clothing business under the names of "Jackman from California" and "Jackman of Hollywood." *Held*, he was entitled to enjoin defendant, Jack Mau, from using the name "Jackmau of Hollywood" in a retail clothing business. (78 C.A.2d 238.)

In *Weatherford v. Eytchison* (1949) 90 C.A.2d 379, 202 P.2d 1040, plaintiff since 1926 had conducted a transfer and storage business in Los Angeles under the name of "Ford Van Lines." Defendants, who had previously used this

name in a similar business in other states, did not attempt its use in California until 1945. *Held*, an injunction was properly granted. (90 C.A.2d 382.)

In *Karsh v. Haiden* (1953) 120 C.A.2d 75, 260 P.2d 633, defendant, operating the "Haiden Auto Wrecking" business in San Francisco, sold it to defendants with an agreement not to compete in San Francisco. Then he went into business in Oakland (across San Francisco Bay), with signs and phone book notice that this was "The original George P. Haiden" of Haiden Auto Parts. *Held*, an injunction should be granted. Although defendant expressly gave up the use of his name for San Francisco alone, the evidence showed that many persons thought the Oakland business was connected with the old firm. (120 C.A.2d 84.)

In *Family Record Plan v. Mitchell* (1959) 172 C.A.2d 235, 342 P.2d 10, plaintiff had an established business selling photograph albums with certificates entitling the buyer to a specified number of pictures, called by the corporate name, "Family Record Plan." Defendants, including the former president of plaintiff corporation, offered a similar service under the name of "Family Album Plan." *Held*, injunctive relief sustained, on a showing of large sales, large advertising, and instances of actual confusion. (172 C.A.2d 243.)

In *Metro-Goldwyn-Mayer v. Lee* (1963) 212 C.A.2d 23, 27 C.R. 833, plaintiffs were producers of an uncompleted motion picture based on the lives and works of the Grimm brothers. They created the title "The Wonderful World of The Brothers Grimm," and publicized this widely, not only to advertise the picture but to distinguish it from other plays or works derived from the same literary source (in the public domain). Defendants, having produced a film entitled "Grimms Fairy Tales" in Germany 6 years before, placed this advertisement in a Hollywood trade journal: "A Wonderful World of the Grimm Brothers is depicted in Grimm Brothers 'Grimms Fairy Tales' widescreen and color soon to be released by Monte Lee Enterprises." *Held*, injunction affirmed as to use of the phrase, which was clearly misleading in seeking to convey the impression that defendants' film was the same or similar to that of plaintiffs. (212 C.A.2d 28.)

In *Visser v. Macres* (1963) 214 C.A.2d 249, 29 C.R. 367, plaintiffs bought from a mother and daughter a florist business in Anaheim operating under the name of "Macres Florist." Defendant son, who operated the same kind of business under the same name in Santa Ana, later attempted to open under that name in Anaheim. *Held*, injunction affirmed; the name had acquired a secondary meaning in Anaheim as the business operated by plaintiffs. (214 C.A.2d 253.)

In *re Weingand* (1964) 231 C.A.2d 289, 41 C.R. 778, applied these principles to a denial of a petition for a change of name. Petitioner, a Los Angeles real estate salesman and amateur actor, falsely represented himself to be moving picture actor Peter Lorre's son. He petitioned for a change of his name to "Peter Lorie." Peter Lorre appeared in opposition. *Held*, the petition was properly denied. The change would confuse the public and directly affect the value of Peter Lorre's performances. (231 C.A.2d 294.)

In *Allied Artists Pictures Corp. v. Friedman* (1977) 68 C.A.3d 127, 137 C.R. 94, plaintiff distributed a widely publicized French film based on the French erotic book "Histoire d'O." Defendant produced a low-budget film entitled "The Journey of O," dealing with the same erotic theme and the same principal character. *Held*, injunction affirmed. (68 C.A.3d 134.)

In *Ball v. American Trial Lawyers Assn.* (1971) 14 C.A.3d 289, 92 C.R. 228, three plaintiffs, individually and on behalf of American College of Trial Lawyers (ACTL), sued American Trial Lawyers Association (ATLA) to enjoin the use of its name or any other name deceptively similar to ACTL. The record showed that officers of ACTL had protested defendant's plan to change its former name to ATLA, and some lawyers and judges thought ATLA was ACTL. The trial judge found that defendant had acted in good faith and that plaintiffs had suffered no damage. *Held*, reversed.

(a) Plaintiff's name had acquired a secondary meaning, and neither fraud nor actual deception is a condition of relief. (14 C.A.3d 303, 310; see *supra*, §99.)

(b) The injury results from confusion of source and consequent dilution of goodwill; reputation is placed in the hands of one who owes no allegiance and has no concern in maintaining the reputation. "This is an injury, even though the borrower does not tarnish it, or divert any sales by its uses; for a reputation, like a face, is the symbol of its possessor and creator, and another can use it only as a mask." (14 C.A.3d 304, quoting Learned Hand.)

(c) In the instant case, the trade name or symbol that had acquired the secondary meaning was the entire phrase, "American College of Trial Lawyers," and not, as the trial judge erroneously concluded, the one word, "College." (14 C.A.3d 307.) The relevant public was not just the bench, bar, law teachers, law students, and public officials, but "that cross-section of the populace who may come into contact with the names or the respective reputations of either organization, the activities of either organization or of its respective members, or the official positions or views of either organization upon contemporary controversial legal problems." (14 C.A.3d 308.) The likelihood of confusion, ordinarily a question of fact, was clear as a matter of law, from a comparison of the names. (14 C.A.3d 309.)

(d) The reversal was with directions to the trial judge to vacate his findings, conclusions, and judgment, and with additional evidence if necessary, to make new findings, considering such matters as whether defendant was aware of plaintiff's trade name, plaintiff's objections, whether it was feasible for defendant to choose some other name, and whether defendant's name truthfully described the nature of its organization. (14 C.A.3d 310, 311, 312.)

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B. Imitation of Appearance or Name.

2. Illustrations.

b. Evidence of Confusion Insufficient.

13 Witkin Sum. Cal. Law Equity § 102

[§ 102] Evidence of Confusion Insufficient.

In *Pohl v. Anderson* (1936) 13 C.A.2d 241, 56 P.2d 992, plaintiff established a "drive-in" soft drink booth in the form and color of an orange, referred to in roadway signs as the "Giant Orange." Defendants later opened a booth close by in the form and color of a lemon, called the "Jumbo Lemon." The trial court, after viewing the premises, found that the public was not misled, and an order denying an injunction was affirmed. (13 C.A.2d 242.)

In *Sunlite Bakery v. Homekraft Baking Co.* (1953) 119 C.A.2d 148, 259 P.2d 711, plaintiff sought to enjoin defendant from using wrappers on its bread somewhat similar to those long used by plaintiff in the territory served. *Held*, injunction denied, despite evidence of a few isolated instances of confusion. Although the law protects the ignorant, inexperienced, and gullible (see *American Distilling Co. v. Bellows & Co.* (1951) 102 C.A.2d 8, 23, 226 P.2d 751), this does not include the ultra careless and indifferent purchaser. And under the correct test--whether the similarity was likely to deceive an ordinary unsuspecting customer--there was insufficient proof. (119 C.A.2d 151.)

In *Schwartz v. Slenderella Systems of Calif.* (1954) 43 C.2d 107, 271 P.2d 857, plaintiff for many years operated two retail women's clothing stores in Los Angeles under the state-registered trade names of Slenderella and Slenderella of Hollywood. Defendant, a California corporation affiliated with other corporations in a number of other states, maintained salons for weight reduction, diet control, and posture correction. *Held*, injunction properly denied. Defendant's use of the name was in good faith, after a nationwide trademark and name search; and the small size of plaintiff's business as compared with defendant's negated any possibility that defendant sought to capitalize on plaintiff's business reputation. Although there was evidence of actual confusion (misdirected mail, telephone calls, and some customer declarations), the instances were not of sufficient weight to compel the conclusion of likelihood of confusion as a matter of law; the trial judge was justified in concluding that much of it was due to the newness of defendant's business. (43 C.2d 113.) (See 6 *Hastings L. J.* 115.)

In *West v. Lind* (1960) 186 C.A.2d 563, 9 C.R. 288, plaintiff Mae West sought to enjoin defendant Marie Lind from using the stage name "Diamond Lil" in a nightclub act. Plaintiff showed that she had long been billed in the phrase "Mae West as Diamond Lil," and had copyrighted a book and stage play called "Diamond Lil." It appeared, however, that plaintiff had never registered the name with the American Guild of Variety Artists (AGVA), and had never been publicized solely by that name. Defendant further showed that she had registered the name with the AGVA, which had

cleared it for her use, and that defendant did not resemble plaintiff or imitate her in any way. *Held*, an injunction was properly denied. (186 C.A.2d 567, distinguishing *Chaplin v. Amador* (1928) 93 C.A. 358, 363, 269 P. 544, and similar cases.)

Cases rejecting similar claims are numerous. (See *Kellogg Co. v. National Biscuit Co.* (1938) 305 U.S. 111, 59 S.Ct. 109, 83 L.Ed. 73 [shredded wheat in same pillow shape, but different size, different number of biscuits in package, dissimilar carton, and somewhat dissimilar name]; *Don Alvarado Co. v. Porganan* (1962) 203 C.A.2d 377, 385, 21 C.R. 495 [polyethylene bags for marketing carrots, with simulated mesh and green simulated carrot tops, no novelty]; *Cowles Magazine & Broadcasting v. Elysium* (1967) 255 C.A.2d 731, 737, 63 C.R. 507 [defendant's new magazine, "Nude Look," different in form and name from plaintiff's long established "Look" magazine; preliminary injunction was reversed]; *Tomlin v. Walt Disney Productions* (1971) 18 C.A.3d 226, 236, 96 C.R. 118 [plaintiff writer of copyrighted song "The Love Bug Will Bite You (If You Don't Watch Out)" sued defendant for releasing motion picture entitled "The Love Bug," dealing with a Volkswagen automobile with human attributes; summary judgment for defendant was affirmed]; *Tippett v. Terich* (1995) 37 C.A.4th 1517, 1526, 44 C.R.2d 862, 3 Summary (10th), *Agency and Employment*, §*389 [claim alleging that employer had gained unfair competitive advantage in violation of *B. & P.C. 17200* et seq. (see *infra*, §105 et seq.) by paying its employees less than prevailing wages required on public works projects was properly dismissed, where there was no showing that members of public were likely to be deceived].)

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3. Noncompetitive Businesses.

13 Witkin Sum. Cal. Law Equity § 103

[§ 103] Noncompetitive Businesses.

(1) *Traditional View*. It was formerly thought that relief was dependent on a showing that the imitation was injurious to a competitor. (See *Scutt v. Bassett* (1948) 86 C.A.2d 373, 376, 194 P.2d 781.) In *Alhambra Transfer & Storage Co. v. Muse* (1940) 41 C.A.2d 92, 106 P.2d 63, plaintiff, a corporation engaged in the real estate business under the name of "Alhambra Transfer & Storage Company," sued defendant partnership to enjoin use of the same name for a *transfer and storage business* in the same town. *Held*, no injunction should be granted, for despite the possible confusion from use of the same name, the parties were not engaged in a competitive business. (41 C.A.2d 96.)

(2) *Modern View*. The modern view is that equity will grant relief, although the businesses are not competitive, where customers would be deceived as to the source of the goods or services. (See *Jackman v. Mau* (1947) 78 C.A.2d 234, 242, 177 P.2d 599; *Winfield v. Charles* (1946) 77 C.A.2d 64, 70, 175 P.2d 69; *Schwartz v. Slenderella Systems of Calif.* (1954) 43 C.2d 107, 112, 271 P.2d 857 [but relief denied; see *supra*, §102]; 51 Cal. L. Rev. 250 [theories of passing off, confusion of source, and proposed new "dilution" theory]; 6 *Hastings L. J.* 115; 19 *So. Cal. L. Rev.* 273.)

In *Academy of Motion Picture Art & Sciences v. Benson* (1940) 15 C.2d 685, 692, 104 P.2d 650, plaintiff, Academy of Motion Picture Arts and Sciences, a nonprofit corporation organized to advance motion pictures and to confer awards of merit, sued defendant, a dramatics teacher, to enjoin use of the name "The Hollywood Motion Picture Academy" for her school. *Held*, a cause of action for unfair competition was stated; the ordinary person might be deceived into thinking that defendant's school was connected with plaintiff's institution. (15 C.2d 692.)

In *MacSweeney Enterprises v. Tarantino* (1951) 106 C.A.2d 504, 235 P.2d 266, the Tarantino family sold its interest in "Tarantino's," a proposed restaurant on San Francisco's famed Fisherman's Wharf, and plaintiff buyer built up a large business and international reputation. The family corporation, which marketed fish products under the trade name of "Tara Bell," then produced "Tarantino's Cocktail Sauce," with a label in form identical with that of the restaurant, and with the corporation's Fisherman's Wharf address. *Held*, injunction properly granted. Although there was no direct competition, the name was deliberately used to mislead the public into believing that the product was sponsored or manufactured by plaintiff. (106 C.A.2d 512.) (See 40 Cal. L. Rev. 582.)

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4. Employee Agreements.

13 Witkin Sum. Cal. Law Equity § 104

[§ 104] Employee Agreements.

(1) *In General.* In *KGB v. Giannoulas* (1980) 104 C.A.3d 844, 164 C.R. 571, defendant G was employed by plaintiff radio station in San Diego to appear as the "KGB Chicken," a costume chicken performing comic routines. Defendant's employment terminated, and he continued to make public appearances elsewhere, doing his comedy act in a chicken suit. Plaintiff sued on various theories and obtained a preliminary injunction prohibiting G from appearing in "any chicken ensemble or suit" in the county or any adjacent county. G appealed, and sought supersedeas to stay the preliminary injunction. *Held*, writ granted; the injunction was invalid.

(a) Public policy is opposed to injunctions restraining a former employee's right to pursue a calling, and this policy is recognized in *B. & P.C. 16600* (see 1 *Summary* (10th), *Contracts*, §§579, 581, 582). (104 C.A.3d 847, 848.) "The average, individual employee has little but his labor to sell or to use to make a living. He is often in urgent need of selling it and in no position to object to boiler plate restrictive covenants placed before him to sign. To him, the right to work and support his family is the most important right he possesses. His individual bargaining power is seldom equal to that of his employer. Moreover, an employee ordinarily is not on the same plane with the seller of an established business. He is more apt than the seller to be coerced into an oppressive agreement. Under pressure of need and with little opportunity for choice, he is more likely than the seller to make a rash, improvident promise that, for the sake of present gain, may tend to impair his power to earn a living, impoverish him, render him a public charge or deprive the community of his skill and training." (104 C.A.3d 849, quoting Ohio case.)

(b) Some employee practices may be enjoined as unfair competition, e.g., the improper use of trade secrets or misleading copying of products or services, giving rise to the likelihood of confusion. Here, however, G's performances in a chicken costume were neither competitive nor unfair. He did not use the KGB logos or otherwise imply that he represented the station. (104 C.A.3d 850.) Nor does he misappropriate the fruits of another's labor. KGB does not own G's comic routines. (104 C.A.3d 851.) This was not a case of a stereotyped character such as The Lone Ranger or Yogi Bear; G's performances followed no set script. Only the costume itself had a fixed design, and no case has held it unfair competition for a clown to change his or her employer. (104 C.A.3d 852.) (See 48 *Hastings L. J.* 981 [legal implications of hiring competitors' employees in Silicon Valley]; 21 *Santa Clara L. Rev.* 845.)

(2) *Other Remedies.* In addition to contractual provisions prohibiting unfair competition, an employer may use various tort theories to seek to enjoin unfair competition by a former employee, including breach of confidential

relationship, breach of fiduciary duty, interference with advantageous business relationships (see 5 *Summary* (10th), *Torts*, §730 et seq.), interference with contractual relations (see 5 *Summary* (10th), *Torts*, §730 et seq.), and interference with prospective economic advantage (see 5 *Summary* (10th), *Torts*, §741 et seq.). Moreover, trade secret protection (see *supra*, §81 et seq.) is merely a branch of unfair competition law, and common law misappropriation also comes under the broad unfair competition umbrella. (*Balboa Ins. Co. v. Trans Global Equities* (1990) 218 C.A.3d 1327, 1341, 1342, 267 C.R. 787 [determining which of several unfair competition claims were preempted by federal copyright law; see 13 *Summary* (10th), *Personal Property*, §§59, 60].)

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C. Unfair Competition Law.
1. In General.

13 Witkin Sum. Cal. Law Equity § 105

[§ 105] In General.

(1) *Former Coverage in Civil Code.* In 1931 and subsequent years, legislation was enacted establishing several new rules of unfair competition and trade practices. (Former C.C. 3369 et seq.) In 1974, 1976, and 1977, these provisions were transferred to the Business and Professions Code.

(2) *Current Coverage in Business and Professions Code.* B. & P.C. 17200 et seq. deal with remedies and penalties for acts of "unfair competition." (See *infra*, §107 et seq.) Those provisions do not bear a legislative name or title. In *Stop Youth Addiction v. Lucky Stores* (1998) 17 C.4th 553, 71 C.R.2d 731, 950 P.2d 1086, the court observed that it has variously referred to the statute as the Unfair Competition Act, the Unfair Business Practices Act, and the Unfair Practices Act. More recently, the court has referred to the statute as the Unfair Competition Law (UCL), "and we adhere now to that locution." (17 C.4th 558, footnote 2.)

(3) *Unfair Practices Act Distinguished.* The UCL must be distinguished from the Unfair Practices Act (B. & P.C. 17000 et seq.), which is treated elsewhere. The Unfair Practices Act chiefly prohibits (a) selling articles below cost, or giving them away, for the purpose of injuring competitors and destroying competition, and (b) offering rebates or special privileges that have that purpose and tendency. (See 1 *Summary* (10th), *Contracts*, §609 et seq.)

(4) *Commentary and Practice Works.* Commentary on this subject has been extensive. (See *Rest.3d, Unfair Competition* §9 et seq. [rules governing deceptive marketing, trademarks, and appropriation of trade values]; Rutter Group, *Bus. & Prof. C. §17200 Practice* §1.1 et seq.; Rutter Group, *Employment Litigation* §14:485 et seq; 25 *Hastings L. J.* 1105 [Enforcing California's False Advertising Law]; 30 *Hastings L. J.* 705 [development of law]; 32 *Hastings L. J.* 229 [Prevention of Unfair Business Practices in California: A Proposal for Effective Regulation]; 14 *Santa Clara Lawyer* 555 [Law Enforcement's Role in Consumer Protection]; 39 *Santa Clara L. Rev.* 245 [Trademark and Unfair Competition in Cyberspace: Can These Laws Deter "Baiting" Practices on Web Sites?]; 30 *Southwestern U. L. Rev.* 435 [Gun Manufacturers and Unfair Business Practices]; 41 *Stanf. L. Rev.* 1153 [competition-based approach to unfair trade injury]; 31 *U.C.L.A. L. Rev.* 671 [federal law of unfair competition]; 90 *A.L.R.2d* 7 [right to enjoin business competitor from unlicensed or otherwise illegal acts or practices]; 2 *A.L.R.3d* 748 [deceptively similar advertising slogan]; 89 *A.L.R.3d* 399 [scope and exemptions of state deceptive trade practice and consumer protection acts]; 89 *A.L.R.3d* 449 [practices forbidden by state deceptive trade practice and consumer protection acts]; 90 *A.L.R.3d* 1350 [reasonableness of offer of settlement under state deceptive trade practice and consumer protection acts]; 63 *A.L.R.5th* 1

[who is "consumer" entitled to protection]; 79 Proof of Facts 3d 199 [proof of violation of state consumer protection statute by physician or attorney].)

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(4) *Commentary and Practice Works*. See 41 *San Diego L. Rev.* 1833 [California's Unfair Competition Law--Making Sure the Avenger Is Not Guilty of the Greater Crime]; 90 Proof of Facts 3d 95 [establishing liability for unfair competition].



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C. Unfair Competition Law.

2. Broadened Scope of Unfair Competition Law.

a. In General.

13 Witkin Sum. Cal. Law Equity § 106

[§ 106] In General.

(1) *Statutory Definition.* The UCL defines "unfair competition" as including "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising" and any act prohibited by *B. & P.C.* 17500 et seq. (false advertising). (*B. & P.C.* 17200; see *Pines v. Tomson* (1984) 160 C.A.3d 370, 383, 206 C.R. 866 [activities of publisher of "Christian Yellow Pages" are "business" practices under UCL].) (On unfair practices, see *infra*, §107; on unlawful practices, see *infra*, §108.)

(2) *Intent and Purpose of Statute.* "Historically, the law of unfair competition and of trademark infringement evolved in the general field of torts. It was concerned primarily with wrongful conduct in commercial enterprises which resulted in business loss to another, ordinarily by the use of unfair means in drawing away customers from a competitor. With passage of time and accompanying epochal changes in industrial and economic conditions, the legal concept of unfair competition broadened appreciably. This was occasioned, according to the Restatement, partly by the flexibility and breadth of relief accorded by equity, and partly by changing methods of business and changing standards of commercial morality." (*People v. National Research Co. of Calif.* (1962) 201 C.A.2d 765, 770, 20 C.R. 516, *infra*, §110.)

The same theme is more fully expounded in *Barquis v. Merchants Collection Assn.* (1972) 7 C.3d 94, 101 C.R. 745, 496 P.2d 817, *infra*, §110, construing the definition in former C.C. 3369 and now in *B. & P.C.* 17200. "As used in this section, unfair competition shall mean and include unlawful, unfair or fraudulent business practice." This language "extended to the entire consuming public the protection once afforded only to business competitors." (7 C.3d 109.) The purpose of the enactment and the late decisions preclude any limitations of its effect to anticompetitive business practices. "[I]n a society which enlists a variety of psychological and advertising stimulants to induce the consumption of goods, consumers, rather than competitors, need the greatest protection from sharp business practices." (7 C.3d 111.)

(3) *Liability for Single Act or Practice.* As originally enacted, the statutory definition referred only to an "unlawful, unfair or fraudulent business practice." Courts construed the term "practice" as contemplating a pattern of conduct, instead of a single transaction, and required multiple acts or practices to support liability. (See e.g., See *Barquis v. Merchants Collection Assn.*, *supra*, 7 C.3d 113; *California v. Texaco* (1988) 46 C.3d 1147, 1169, 252 C.R. 221, 762 P.2d 385, 1 Summary (10th), *Contracts*, §595 [statutory definition did not encompass corporate merger].) *B. & P.C.*

17200 was amended in 1992 to redefine unfair competition as including "any unlawful, unfair or fraudulent business *act or practice*." The 1992 amendment abrogated the former rule. Under the current statute, even a single act of unfair competition may create liability. (*Stop Youth Addiction v. Lucky Stores* (1998) 17 C.4th 553, 570, 71 C.R.2d 731, 950 P.2d 1086; *United Farm Workers of America, AFL-CIO v. Dutra Farms* (2000) 83 C.A.4th 1146, 1163, 100 C.R.2d 251.)

(4) *Out-Of-State Businesses and Practices*. Out-of-state businesses may be held liable under the UCL for wrongful business conduct affecting California employers and employees. Thus, in an action by a nonresident former employee seeking employment with a California employer, a Maryland business could be held liable under the UCL for using an improper noncompetition covenant in plaintiff's employment agreement to prevent him from being hired in California. (*Application Group v. Hunter Group* (1998) 61 C.A.4th 881, 906, 72 C.R.2d 73, 1 Summary (10th), *Contracts*, §73.)

However, the UCL is not intended to regulate business practices that are not connected to California. Thus, in an action on behalf of all borrowers throughout the United States against a California mortgage company alleging that defendant's practice of charging borrowers for required insurance in an amount sufficient to cover the insurer's kickbacks to defendant violated the UCL, the trial judge erred in granting nationwide class certification. Although California residents and nonresidents for whom defendant purchased insurance in California could assert claims under the UCL, nonresidents for whom defendant purchased insurance outside of California could not. (*Norwest Mortg. v. Superior Court* (1999) 72 C.A.4th 214, 222, 85 C.R.2d 18, 4 Cal. Proc. (4th), *Pleading*, Supp., §260.)

(5) *UCL Does Not Apply To Investment Securities Transactions*. In a case of first impression, *Bowen v. Ziasun Technologies* (2004) 116 C.A.4th 777, 11 C.R.3d 522, held that the UCL does not apply to investment securities transactions. (116 C.A.4th 790.) The UCL is known as California's "little FTC Act" and mirrors its federal counterpart. Historically, the Federal Trade Commission Act has never been applied to securities violations. Federal cases have ruled that the UCL does not apply to securities transactions and at least 15 other states have reached the same conclusion as to their "little FTC Acts." (116 C.A.4th 787.)

West's Key Number Digest, Trade Regulation k.401 et seq., 861 et seq.

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

(4) *Out-of-State Businesses and Practices*. *Norwest Mortg. case*:

Cross-Reference: 4 Cal. Proc. (5th), *Pleading*, §293.

(5) *UCL Does Not Apply to Investment Securities Transactions*. *Bowen v. Ziasun Technologies* (2004) 116 C.A.4th 777, 11 C.R.3d 522, text, p. 411, was distinguished in *Overstock.com v. Gradient Analytics* (2007) 151 C.A.4th 688, 61 C.R.3d 29. Plaintiff corporation sued defendant investors and investment analysts on multiple theories, including that defendants published false and misleading statements about plaintiff in subscriber-based analytical reports in an effort to manipulate the price of plaintiff's stock shares in violation of the UCL. The trial judge denied defendants' motion to strike the UCL count for failure to state a valid claim. *Held*, affirmed. "Whether one agrees with *Bowen* or not, its holding that securities transactions are not covered under the UCL bars lawsuits based on deceptive conduct in the sale and purchase of securities, nothing more. [Plaintiff's] *claims do not arise from any stock transactions between the parties*. Rather, they arise from the allegedly defamatory reports" published by defendant analysts, their business practices in producing these reports and defendant investors' role in this wrongdoing. (151 C.A.4th 715.)



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b. Unfair Practices.

13 Witkin Sum. Cal. Law Equity § 107

[§ 107] Unfair Practices.

(1) *Balancing Test. Motors v. Times Mirror Co. (1980) 102 C.A.3d 735, 162 C.R. 543*, observed: "[T]he determination of whether a particular business practice is unfair necessarily involves an examination of its impact on its alleged victim, balanced against the reasons, justifications and motives of the alleged wrongdoer. In brief, the court must weigh the utility of the defendant's conduct against the gravity of the harm to the alleged victim--a weighing process quite similar to the one enjoined on us by the law of nuisance." (*102 C.A.3d 740.*)

(2) *Unfair Practice Need Not Be Unlawful. In Cel-Tech Communications v. Los Angeles Cellular Tel. Co. (1999) 20 C.4th 163, 83 C.R.2d 548, 973 P.2d 527*, the California Supreme Court expanded the scope of conduct actionable under the UCL to include business practices that are unfair, even if they are not unlawful.

(a) The scope of the UCL is broad. Unlike the Unfair Practices Act (*B. & P.C. 17000 et seq.*; see 1 *Summary* (10th), *Contracts*, §609 et seq.), the UCL does not proscribe specific practices. Rather, it defines "unfair competition" to include "any unlawful, unfair or fraudulent business act or practice" (*B. & P.C. 17200*). The coverage of the UCL is sweeping, embracing anything that can properly be called a business practice and that at the same time is forbidden by law. It governs anticompetitive business practices as well as injuries to consumers, and it has as a major purpose the preservation of fair business competition. By proscribing "any unlawful" business practice, *B. & P.C. 17200* borrows violations of other laws and treats them as unlawful practices that the unfair competition law makes independently actionable. However, the law does more than just borrow. The statutory language referring to "any unlawful, unfair or fraudulent" practice makes clear that a practice may be deemed unfair even if not specifically proscribed by some other law. Because *B. & P.C. 17200* is written in the disjunctive, it establishes three varieties of unfair competition: (1) acts or practices that are unlawful, (2) those that are unfair, or (3) those that are fraudulent. (*20 C.4th 180.*) The Legislature intended by this sweeping language to permit tribunals to enjoin ongoing wrongful business conduct in whatever context this activity might occur. (*20 C.4th 181.*)

(b) Although the scope of the UCL is sweeping, it is not unlimited. A plaintiff may not bring an action if other specific legislation bars it. However, the other provision must actually bar the action and not merely fail to allow it. In other words, courts may not use the UCL to condemn actions the Legislature permits. Conversely, the Legislature's mere failure to prohibit an activity does not prevent a court from finding it unfair. (*20 C.4th 182, 184.*) "Plaintiffs may

not 'plead around' a 'safe harbor,' but the safety must be more than the absence of danger." (20 C.4th 184.)

(c) If no statute bars an action under the UCL, the court must determine whether the challenged conduct is unfair within the meaning of that law. In doing so, it may not apply purely subjective notions of fairness. (20 C.4th 184.) Rather, the court may turn for guidance to the jurisprudence arising under the parallel section of the Federal Trade Commission Act (15 U.S.C., §45(a)). (20 C.4th 185.) Ultimately, any finding of unfairness to competitors under the UCL must be tethered to some legislatively declared policy or proof of some actual or threatened effect on competition. Thus, when a plaintiff who claims to have suffered injury from a direct competitor's "unfair" act or practice invokes *B. & P.C. 17200*, the word "unfair" in that section means conduct that threatens an incipient violation of an antitrust law or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law or otherwise significantly threatens or harms competition. (20 C.4th 186, 187.) (On application of test to business practice at issue in this case, see *infra*, §114.)

Other cases are to the same effect. (See *Allied Grape Growers v. Bronco Wine Co.* (1988) 203 C.A.3d 432, 448, 452, 249 C.R. 872, *infra*, §117 [test under *B. & P.C. 17200* is that "practice merely be unfair"; actual fraud need not be shown]; *Chavez v. Whirlpool Corp.* (2001) 93 C.A.4th 363, 375, 113 C.R.2d 175, *infra*, §123 [*Cel-Tech*; practice that courts have determined to be permissible under federal antitrust law may not be deemed "unfair" under UCL]; *Smith v. State Farm Mut. Auto. Ins. Co.* (2001) 93 C.A.4th 700, 717, 113 C.R.2d 399, *infra*, §119 [discussing *Cel-Tech* limitation that practice authorized by statute is not "unfair"]; *Gregory v. Albertson's* (2002) 104 C.A.4th 845, 854, 128 C.R.2d 389, *infra*, §123 [where claim of unfair act or practice is predicated on public policy, *Cel-Tech* requires that policy must be tethered to specific constitutional, statutory, or regulatory provision]; 52 *Hastings L. J.* 1131 [*Cel-Tech*].)

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

(2) *Unfair Practice Need Not Be Unlawful.* See *Blakemore v. Superior Court* (2005) 129 C.A.4th 36, 48, 27 C.R.3d 877, Supp., *infra*, §117 [mailing unordered merchandise to independent sales representatives, although not unlawful, could be unfair]; *In re Vaccine Cases* (2005) 134 C.A.4th 438, 457, 36 C.R.3d 80, Supp., *infra*, §123 [plaintiff's failure to satisfy presuit notice requirements of Proposition 65 (business must warn consumers of exposure to toxic substances; see 12 *Summary* (10th), *Real Property*, §911) precluded action alleging that defendants' failure to warn consumers of exposure was unfair practice under UCL].(3) *(New) Consumer Cases: Uncertainty About Proper Test.* *Progressive West Ins. Co. v. Superior Court* (2005) 135 C.A.4th 263, 285, 37 C.R.3d 434, Supp., *infra*, §§112, 119, *Bardin v. DaimlerChrysler Corp.* (2006) 136 C.A.4th 1255, 1260, 39 C.R.3d 634, Supp., *infra*, §123, and *Camacho v. Automobile Club of Southern Calif.* (2006) 142 C.A.4th 1394, 1399, 48 C.R.3d 770, Supp., *infra*, §119, discuss the unsettled state of California law as to the appropriate test for determining whether a business practice is unfair under the UCL in consumer cases. As the *Bardin* court states: "We respectfully suggest that our Legislature and Supreme Court clarify the definition of 'unfair' in consumer actions under the UCL." (136 C.A.4th 1261.)

In the landmark decision of *Cel-Tech Communications v. Los Angeles Cellular Tel. Co.* (1999) 20 C.4th 163, 83 C.R.2d 548, 973 P.2d 527, text, p. 411, the California Supreme Court departed from precedent by refusing to engage in a balancing test in determining whether a business practice was sufficiently unfair, so as to violate the UCL, in the context of a dispute between business competitors. The *Cel-Tech* court deemed the balancing test "too amorphous" in business competitor cases, and instead announced a test requiring a determination of whether the disputed practice was unfair because it threatened an incipient violation of antitrust laws, or violated the policy or spirit of those laws. (20 C.4th 187.) However, the *Cel-Tech* court expressed no opinion about which test should be applied in UCL actions involving consumers or UCL actions based on unlawful or fraudulent practices or deceptive advertising. (20 C.4th 187, footnote 12.)

The Courts of Appeal have applied two different tests in UCL consumer cases alleging unfair practices in the wake of *Cel-Tech*. One line of cases has continued to apply the original balancing test. (See, e.g., *Smith v. State Farm Mut. Auto. Ins. Co.* (2001) 93 C.A.4th 700, 113 C.R.2d 399, text, §119; *Gregory v. Albertson's* (2002) 104 C.A.4th 845, 854, 128 C.R.2d 389, text, §123; *Progressive West Ins. Co. v. Superior Court*, *supra*, 135 C.A.4th 286; *Camacho v. Automobile Club of Southern Calif.*, *supra*, 142 C.A.4th 1402.) A second line of cases has adopted the *Cel-Tech* test by

requiring that an "unfair" practice violate a specific constitutional, statutory, or regulatory provision or a policy embodied in the provision. (See, e.g., *Schnall v. Hertz Corp.* (2000) 78 C.A.4th 1144, 93 C.R.2d 439, text, §116; *Scripps Clinic v. Superior Court* (2003) 108 C.A.4th 917, 134 C.R.2d 101, 1 Summary (10th), *Contracts*, §591.) A third line of cases has failed to take a position by concluding that the allegedly unfair practice offended neither test. (See, e.g., *Pastoria v. Nationwide Ins.* (2003) 112 C.A.4th 1490, 6 C.R.3d 148, text, §112; *Bardin v. DaimlerChrysler Corp.*, *supra*, 136 C.A.4th 1261.)

(4) (New) *Causation Requirement*. *In re Firearm Cases* (2005) 126 C.A.4th 959, 24 C.R.3d 659, was an action by numerous California cities and counties on behalf of the public against manufacturers, distributors, and retailers of handguns and their trade associations claiming that defendants' conduct in distributing firearms in a manner that enabled criminals to acquire the firearms violated the UCL. Plaintiffs alleged that defendants' unfair practices included the following: failing to place controls on the actions of retail dealers; engaging in distribution policies that made sales to "straw men" likely; selling numerous large handguns in a single transaction; allowing sales to "kitchen table" dealers who did not maintain retail places of business; failing to prevent sales by private citizens at gun shows; distributing guns to dealers without ensuring that the dealers adequately checked purchasers' identification for accuracy; distributing more guns than defendants reasonably expected to sell to legal purchasers; and failing to monitor gun sales in jurisdictions outside California with weak gun control laws. *Held*, summary judgment for defendants affirmed; unfairness sufficient to establish a violation of the UCL could not be shown absent some connection between a business practice of defendants and the harm caused by illegal guns.

(a) *Unfairness requires causation*. Plaintiffs claimed that the definition of an unfair practice in effect prior to *Cel-Tech Communications v. Los Angeles Cellular Tel. Co.*, *supra*, (i.e., balancing and public policy test), applied and did not require a showing of causation. (126 C.A.4th 977.) This claim was without merit. "Although we do not interpret the prior cases as totally dispensing with the element of causation, if as plaintiffs urge, the pre-*Cel-Tech* cases would allow a finding of unfairness without such a connection, we believe the reasoning of *Cel-Tech* compels rejection of those standards." (126 C.A.4th 979.) *Cel-Tech* requires that the definition of unfairness to competitors must be "tethered to some legislatively declared policy or proof of some actual or threatened impact on competition." (126 C.A.4th 979.) The *Cel-Tech* court consulted parallel federal authority to assist in making this determination. (126 C.A.4th 980.) Federal authorities, including the Federal Trade Commission Act, include a causation element in the definition of an unfair business practice. "Moreover, none of the post-*Cel-Tech* cases that have continued to use the balancing test for the unfairness prong in consumer cases have dispensed with the need for some causal connection." (126 C.A.4th 981.)

(b) *Causation requirement is not satisfied in present case*. Defendants produced no misleading, counterfeit, or otherwise defective product for purposes of defrauding consumers. "Without some hint of participation or encouragement of wrongful conduct, there is no connection between defendants and the alleged wrongdoing. The only business practice the defendants in this case have engaged in is marketing their product in a lawful manner to federally licensed dealers." (126 C.A.4th 982.) (Cf. *Hall v. Time* (2008) 158 C.A.4th 847, 855, 70 C.R.3d 466 [consumer who alleged that he received invoice for book during free trial period *lacked standing* (see text, §124) to bring UCL action alleging unfair and misleading business practices against booksellers, because consumer did not show causal connection or reliance on misrepresentation; consumer paid after trial period had expired, and thus invoice did not induce him to pay immediately on receiving book].)



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[§ 108] Unlawful Practices.

Barquis v. Merchants Collection Assn. (1972) 7 C.3d 94, 101 C.R. 745, 496 P.2d 817, infra, §110, construing the statutory definition of unfair competition, noted:

(a) An unlawful business practice need not be deceptive or fraudulent; "the Legislature ... intended by this sweeping language to permit tribunals to enjoin on-going wrongful business conduct in whatever context such activity might occur." (7 C.3d 111.)

(b) The UCL "undeniably establishes only a wide standard to guide courts of equity." (7 C.3d 112.) But it is unnecessary in the instant case to determine "fairness" of defendant's alleged conduct, because it involved repeated violation of statutes (see *infra*, §109 et seq.), and therefore was enjoined as an "unlawful" business practice. (7 C.3d 112.) (See *People v. Cappuccio (1988) 204 C.A.3d 750, 758, 251 C.R. 657* [unlawful practice may violate UCL even without proof that defendant intended to injure competitors or destroy competition]; *Alch v. Superior Court (2004) 122 C.A.4th 339, 400, 19 C.R.3d 29* [unlawful practice may violate UCL even if practice poses no potential competitive harm or is not likely to deceive consumers].)

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



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a. False Advertising.

13 Witkin Sum. Cal. Law Equity § 109

[§ 109] False Advertising.

(1) *In General.* The UCL prohibits "unfair, deceptive, untrue or misleading advertising." (*B. & P.C. 17200*, supra, §106.) *B. & P.C. 17500* et seq. proscribe false advertising and the use of an untrue or misleading statement in selling real or personal property or personal services. Violations of *B. & P.C. 17500* et seq. are also unfair competition under the UCL. (*B. & P.C. 17200.*) *B. & P.C. 125.5* authorizes an action to enjoin these activities by the Department of Consumer Affairs and *B. & P.C. 17535* confers similar authority on the Attorney General. (See *People v. Superior Court (Olson)* (1979) 96 C.A.3d 181, 157 C.R. 628 [*B. & P.C. 17200* et seq. and 17500 et seq. do not violate First Amendment protection accorded to commercial speech]; *People v. Dollar Rent-A-Car Systems* (1989) 211 C.A.3d 119, 129, 259 C.R. 191 [injunction and civil penalty]; *Consumers Union of United States v. Alta-Dena Certified Dairy* (1992) 4 C.A.4th 963, 975, 6 C.R.2d 193 [*B. & P.C. 17203* and 17535 authorize court to correct false impressions created by prior advertising, and to deter future violations, by ordering placement of warning on products sold in future]; *Day v. AT & T Corp.* (1998) 63 C.A.4th 325, 332, 74 C.R.2d 55 ["perfectly true" statement may be actionable if it is likely to mislead or deceive consumer, such as failing to disclose other relevant information]; *Consumer Advocates v. Echostar Satellite Corp.* (2003) 113 C.A.4th 1351, 1362, 8 C.R.3d 22 [same]; 25 *Hastings L. J.* 1105; 24 *Southwestern U. L. Rev.* 213 [argument for congressional action regarding consumer standing for false advertising under Lanham Act]; 34 *U.C.L.A. L. Rev.* 953 [monetary relief for false advertising for claims arising under the Lanham Act]; 37 *Proof of Facts* 3d 259 [Liability for Airing False or Misleading Television Infomercials]; 44 *Proof of Facts* 3d 1 [proving false advertising under Lanham Act]; 55 *A.L.R.3d* 198 [restitution.]) (On professional advertising and Right to Compete Act, see *infra*, §130 et seq.; on Lanham Act (15 U.S.C., §1051 et seq.), see 13 *Summary* (10th), *Personal Property*, §86.)

A private plaintiff bears the burden of producing evidence and the burden of proof as to a false advertising claim under the UCL and the False Advertising Act. (*National Council Against Health Fraud v. King Bio Pharmaceuticals* (2003) 107 C.A.4th 1336, 1346, 133 C.R.2d 207.)

A business has no duty under the UCL to investigate the truth of advertisements made by others. (*Emery v. Visa Int. Service Assn.* (2002) 95 C.A.4th 952, 964, 116 C.R.2d 25.) Political campaign practices are not within the scope of *B. & P.C. 17200* et seq. and 17500 et seq. (See *O'Connor v. Superior Court* (1986) 177 C.A.3d 1013, 1017, 223 C.R. 357.)

(2) *Illustrations.* The false advertising statutes have been applied in a number of cases. (See *People v. Superior Court (Jayhill Corp.)* (1973) 9 C.3d 283, 286, 107 C.R. 192, 507 P.2d 1400 [false advertising in encyclopedia sales; restitution available as ancillary relief]; *Chern v. Bank of America* (1976) 15 C.3d 866, 876, 127 C.R. 110, 544 P.2d 1310 [bank's practice of quoting "per annum" rate of interest computed on basis of 360-day year enjoined as false and misleading advertising under B. & P.C. 17535]; *People v. Superior Court (Good)* (1976) 17 C.3d 732, 736, 131 C.R. 800, 552 P.2d 760, 4 Cal. Proc. (4th), Pleading, §211 [false representations in marketing oil drilling contracts]; *Fletcher v. Security Pac. Nat. Bank* (1979) 23 C.3d 442, 449, 454, 153 C.R. 28, 591 P.2d 51 [same deceptive practice as in *Chern*; restitution order was proper under B. & P.C. 17535 without individualized proof of lack of knowledge of true interest rate]; *People v. Hill* (1977) 66 C.A.3d 320, 330, 136 C.R. 30 [use of words "accountant" and "accounting" by person not licensed as public accountant or certified public accountant was properly enjoined under B. & P.C. 17535]; *People v. Western Airlines* (1984) 155 C.A.3d 597, 202 C.R. 237 [federal law does not preempt suit alleging false advertising of airline fares]; *Fenning v. Glenfed* (1995) 40 C.A.4th 1285, 1290, 47 C.R.2d 715 [action against federal savings and loan under B. & P.C. 17200 and 17500 for deceptive advertising in inducing customers to purchase investments was not preempted by federal law]; *Keimer v. Buena Vista Books* (1999) 75 C.A.4th 1220, 1226, 89 C.R.2d 781 [commercial free speech concerns did not preclude action under B. & P.C. 17200 et seq. and 17500 et seq. against publisher for disseminating false and misleading investment advertisements]; *People v. First Fed. Credit Corp.* (2002) 104 C.A.4th 721, 734, 128 C.R.2d 542, infra, §126 [defendant violated UCL and False Advertising Act where credit corporation mailed out at least 400 misleading mailings and defendant, one of two principals of corporation, actively participated in corporate business]; *Brockey v. Moore* (2003) 107 C.A.4th 86, 100, 131 C.R.2d 746 [nonlawyer violated UCL by advertising business in telephone book under listings such as "Legal Aid," "Legal Aid Services," and "Legal Services"].)

In *Lavie v. Proctor & Gamble Co.* (2003) 105 C.A.4th 496, 129 C.R.2d 486, a UCL action challenging allegedly deceptive television advertising, the trial judge used a "reasonable consumer" standard, rather than a "least sophisticated consumer" standard, to determine whether the advertisements were likely to mislead or deceive the public. After a bench trial, the judge entered judgment for defendant. *Held*, affirmed. California and federal courts applying the UCL have never applied a "least sophisticated consumer" standard without evidence that the advertisement targeted particularly vulnerable customers. Rather, these courts have consistently applied a standard closer to an ordinary or "reasonable consumer" standard to evaluate unfair advertising claims. (105 C.A.4th 504.) A representation does not become false and deceptive merely because it will be unreasonably misunderstood by an insignificant and unrepresentative segment of the class of persons to whom the representation is addressed. (105 C.A.4th 507.) A reasonable consumer need not be exceptionally acute and sophisticated. (105 C.A.4th 509.) Nor need a reasonable consumer necessarily be wary or suspicious of advertising claims. (105 C.A.4th 510.)

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

(2) *Illustrations.* See *Colgan v. Leatherman Tool Group* (2006) 135 C.A.4th 663, 679, 38 C.R.3d 36 [tool seller violated UCL and B. & P.C. 17500 et seq. by labeling and advertising tools as "Made in U.S.A.," where many tool components were manufactured abroad]; *People v. Cars 4 Causes* (2006) 139 C.A.4th 1006, 1016, 43 C.R.3d 513, Supp., infra, §117 [charity that solicited donation of motor vehicles, and shared proceeds with other charities, violated UCL by deceptively advertising that vehicles would be towed for free; although there was free towing for donors, towing fee was deducted from proceeds paid to other charities]; *Benson v. Kwikset Corp.* (2007) 152 C.A.4th 1254, 1276, 62 C.R.3d 284 [plaintiff stated a valid claim by alleging that manufacturer violated UCL, B. & P.C. 17533.7, and C.C. 1770(a)(4) by labeling and advertising merchandise as "Made in U.S.A.," where merchandise either contained foreign-made parts or involved foreign manufacture]. *People v. Superior Court (Good)* case:

Cross-Reference: 4 Cal. Proc. (5th), Pleading, §233. *Correction:* Page 415, line 28, "*Lavie v. Proctor & Gamble Co.*" should be "*Lavie v. Procter & Gamble Co.*"



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b. Unfair Credit and Debt Collection Practices.

13 Witkin Sum. Cal. Law Equity § 110

[§ 110] Unfair Credit and Debt Collection Practices.

(1) *Violation of Supermarket Club Card Disclosure Act.* Violations of the Supermarket Club Card Disclosure Act (C.C. 1749.60 et seq.; see 4 *Summary* (10th), *Sales*, §387) is "unfair competition," punishable under *B. & P.C. 17200* et seq. (C.C. 1749.63.)

(2) *Violation of Fair Credit Reporting Statutes.* Credit reporting and investigation practices in violation of federal or California fair credit reporting statutes (see 4 *Summary* (10th), *Sales*, §297 et seq.) are also unfair business practices, and *B. & P.C. 17200* et seq. provide cumulative remedies. (*Cisneros v. U.D. Registry* (1995) 39 *C.A.4th* 548, 563, 46 *C.R.2d* 233.)

(3) *Simulation of Official Forms.* In *People v. National Research Co. of Calif.* (1962) 201 *C.A.2d* 765, 20 *C.R.* 516, defendant sold "skip-tracer" forms to businesses seeking to locate delinquent debtors. The forms, purporting to come from the "Bureau of Verification" or "Bureau of Reclassification" in Sacramento, were similar to official forms of the Departments of Motor Vehicles and Employment and cited penal provisions of the respective Codes. They were mailed to the debtors' last known addresses, and called for information including residence, vehicle ownership, employment, etc. The Attorney General sued to enjoin the activity as a violation of the UCL. *Held*, injunction affirmed. Defendants, stressing the effect on the economy of widespread delinquencies in credit accounts, argued that it was justifiable to use decoy communications to locate and trick "dead beats" into revealing credit information. The court, however, following federal decisions upholding orders of the Federal Trade Commission, declared, "Standards of fairness and honesty in trade should not be downgraded for any such reasons of economical expediency." (201 *C.A.2d* 778.) Moreover, the court added, much harm had been done by public hostility to the two governmental departments supposed to have mailed the forms. (201 *C.A.2d* 779.) (See 36 *So. Cal. L. Rev.* 304.)

(4) *Abuse of Process.* In *Barquis v. Merchants Collection Assn.* (1972) 7 *C.3d* 94, 113, 101 *C.R.* 745, 496 *P.2d* 817, plaintiffs alleged that defendant collection agency repeatedly filed suits in counties which were not the proper venue. *Held*, the complaint stated a cause of action for abuse of process (see 5 *Summary* (10th), *Torts*, §517 et seq.; 5 *Cal. Proc.* (4th), *Pleading*, §715 et seq.) and unfair competition. This pattern of behavior clearly constitutes "unlawful" conduct, and if an enterprise pursues this course of conduct as a "business practice," that activity may be enjoined. (7 *C.3d* 113.) (See 24 *Hastings L. J.* 537.) (See *Yu v. Signet Bank/Virginia* (1999) 69 *C.A.4th* 1377, 1389, 82 *C.R.2d* 304

[following *Barquis*; credit card customers' allegations that bank engaged in "long arm program" of pursuing collection actions in another state stated valid claim of distant forum abuse]; *Yu v. Signet Bank/Virginia* (2002) 103 C.A.4th 298, 309, 126 C.R.2d 516, supra, §15 [on appeal of same case on remand, law of case doctrine required same holding].)

(5) *Misrepresentation of Revolving Credit Plan*. Advertisements stating that a revolving credit plan requiring monthly payments was the same as cash could support a deceptive practice claim under the UCL. (*Prata v. Superior Court* (2001) 91 C.A.4th 1128, 1139, 111 C.R.2d 296.)

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

(4) *Abuse of Process*.

Cross-Reference: 5 Cal. Proc. (5th), *Pleading*, §759 et seq.(6) *(New) Improper Bank Debit Card Disclosures*. A bank debit card customer states a valid claim under the UCL against the bank for unfair competition and false advertising predicated on violations of federal banking disclosure regulations; those claims are not preempted by federal law. (*Smith v. Wells Fargo Bank* (2005) 135 C.A.4th 1463, 1475, 1488, 38 C.R.3d 653.)



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V. EQUITABLE RELIEF AGAINST TORTS: UNFAIR COMPETITION
C. Unfair Competition Law.
3. Illustrations: Prohibited Practices.
c. Employment Practices.

13 Witkin Sum. Cal. Law Equity § 111

[§ 111] Employment Practices.

(1) *Crediting Tips Against Minimum Wage*. This practice, also prohibited by *Lab.C. 351*, inaccurately reflects income for federal and state income tax purposes, avoids payment of additional wages for overtime and split shifts, and constitutes an unfair business practice. (*People v. Los Angeles Palm (1981) 121 C.A.3d 25, 35, 175 C.R. 257.*)

(2) *Deductions From Employee's Commissions for Customers' Unidentified Returns*. A department store's policy of deducting from paid employee commissions an amount for unidentified customer returns of merchandise (i.e., merchandise for which salespersons could not be identified) violates *B. & P.C. 17200*. (*Hudgins v. Neiman Marcus Group (1995) 34 C.A.4th 1109, 1126, 41 C.R.2d 46, 3 Summary (10th), Agency and Employment, §401.*)

(3) *Unauthorized Use of Union's Trade Name and Trademark*. Misrepresenting that union labor was used to produce goods or services is a misdemeanor under *Lab.C. 1011* and *1012*, and is also actionable under the UCL. (*United Farm Workers of America v. Superior Court (1975) 47 C.A.3d 334, 120 C.R. 904.*)

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

(4) *(New) Violation of Federal Fair Labor Standards Act*. A violation of the federal Fair Labor Standards Act may be the basis for a state action under the UCL (*Harris v. Investor's Business Daily (2006) 138 C.A.4th 28, 36, 41 C.R.3d 108, 3 Summary (10th), Agency and Employment, Supp., §361.*)



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[§ 112] Insurance Practices.

(1) *Unilateral Reduction of Coverage.* In *State Farm Fire & Cas. Co. v. Superior Court* (1996) 45 C.A.4th 1093, 53 C.R.2d 229, plaintiffs, insured property owners whose homes were damaged in an earthquake, brought an action for violation of the UCL and other claims against defendants, their insurers. Plaintiffs claimed that defendants had deceived and defrauded them by changing and reducing their earthquake coverage without adequate notice while maintaining the same premium so that plaintiffs mistakenly continued to believe that their coverage had not changed. Defendants countered that plaintiffs' allegations charged violations of several of the statutory proscriptions in *Ins.C. 790.03*, and that under *Moradi-Shalal v. Fireman's Fund Ins. Cos.* (1988) 46 C.3d 287, 250 C.R. 116, 758 P.2d 58, 2 Summary (10th), *Insurance*, §254, *Ins.C. 790.03* cannot serve as a basis for a claim under the UCL. *Held*, plaintiffs stated a valid claim.

(a) Defendants correctly observed that *Ins.C. 790.03* may not serve as a basis for a UCL claim. However, plaintiffs also alleged acts amounting to common law fraud and multiple breaches of the implied covenant of good faith. (45 C.A.4th 1107.)

(b) Furthermore, because plaintiffs sought injunctive or restitutive relief under the UCL rather than compensatory or punitive damages, their claim did not conflict with the public policy reasons for barring UCL claims based on *Ins.C. 790.03*, or interfere with the Insurance Commissioner's ability to uniformly regulate the insurance industry. (45 C.A.4th 1108.) (To same effect, see *Manufacturers Life Ins. Co. v. Superior Court* (1995) 10 C.4th 257, 283, 41 C.R.2d 220, 895 P.2d 56, 1 Summary (10th), *Contracts*, §592; but see *Textron Financial Corp. v. National Union Fire Ins. Co. of Pittsburgh* (2004) 118 C.A.4th 1061, 1070, 13 C.R.3d 586, *infra*, §119 [criticizing *State Farm Fire & Cas. Co.* to extent it holds that *Moradi-Shalal* does not preclude UCL action based on independent common law claims].)

(2) *Conspiracy To Deny Title Insurance.* A title insurance company that unlawfully conspires to deny title insurance on titles derived from tax deeds in violation of the Cartwright Act may also be held liable under the UCL. Neither *Ins.C. 12414.26* (criminal and civil immunity of title insurers) nor *Ins.C. 12414.29* (title insurance statutes as exclusive remedy for violations) precludes a UCL action. The scope of those statutes is expressly limited to title insurance company activities related to rate setting. (*Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 C.4th 26, 42, 77 C.R.2d 709, 960 P.2d 513; see *Smith v. State Farm Mut. Auto. Ins. Co.* (2001) 93 C.A.4th 700, 717, 113 C.R.2d 399, *infra*, §119.)

(3) *Violation of Insurance Licensing Requirements.* Transacting insurance without a valid license in violation of *Ins.C. 1631* and administrative regulations (see 2 *Summary* (10th), *Insurance*, §§5 et seq., 17 et seq.) is unfair competition, and *B. & P.C. 17200* et seq. provide cumulative remedies. (*Stevens v. Superior Court* (1999) 75 C.A.4th 594, 602, 89 C.R.2d 370.)

(4) *Fraudulent Sales of Universal Life Insurance Policies.* In *Wilner v. Sunset Life Ins. Co.* (2000) 78 C.A.4th 952, 93 C.R.2d 413, plaintiff filed a UCL action against defendant life insurer alleging fraud in the sale of universal life insurance policies. Plaintiff alleged that defendant actively pursued the sale of universal life insurance policies as a replacement of whole or term life insurance policies that consumers had purchased from other companies, knowing that the replacement seldom, if ever, was appropriate. The trial judge refused defendant's request to dismiss the action. *Held*, affirmed.

(a) Defendant failed to disclose to consumers that replacement of an existing life insurance policy with a universal life policy would cause the consumer to lose substantial cash values and accumulation account values and would require the payment of significant new commission charges and other costs. (78 C.A.4th 966.)

(b) Defendant also failed to disclose that replacement would subject consumers to new contestability clauses and cash surrender charges and would require consumers to pay more for insurance at an older insurable age. These allegations clearly described immoral, unethical, and unscrupulous conduct, i.e., unfair business practices. (78 C.A.4th 967.)

(5) *Transfer of Insurance Policies Without Consent of Policy Holders.* In *AICCO v. Insurance Co. of North America* (2001) 90 C.A.4th 579, 588, 589, 109 C.R.2d 359, an unfair business practice claim under the UCL could be stated against an insurer that transferred policies to another insurance company without obtaining the consent of California policyholders in violation of C.C. 1457 (see 1 *Summary* (10th), *Contracts*, §730). Alternatively, a fraud claim under the UCL could be stated against the insurer on the theory that the notice sent to the policyholders about the transfer was deceptive and misleading.

(6) *Failure To Notify Insureds of Imminent Premium Increases and Benefit Reductions.* A valid UCL claim may be stated against an insurer for its practice of failing to notify insureds, when they purchase policies, about imminent premium increases and benefit reductions. This practice may be unlawful, as a violation of *Ins.C. 330* et seq. The practice also may be unfair, because it may influence insureds to purchase insurance inferior to their preexisting coverage. Further, the practice may be deceptive, because it is likely to mislead the public. (*Pastoria v. Nationwide Ins.* (2003) 112 C.A.4th 1490, 1496, 6 C.R.3d 148.)

(7) *Violations of Proposition 103.* Violations of Proposition 103 (*Ins.C. 1861.01* et seq.), requiring automobile insurers to determine rates, premiums, and insurability based on designated rating factors, are also unfair business practices, and *B. & P.C. 17200* et seq. provide cumulative remedies. (*Donabedian v. Mercury Ins. Co.* (2004) 116 C.A.4th 968, 976, 11 C.R.3d 45.)

(8) *Improper Broker-Agent Practices.* *Krumme v. Mercury Ins. Co.* (2004) 123 C.A.4th 924, 20 C.R.3d 485 holds that (a) selling automobile insurance through broker agents who were not "appointed agents" and (b) permitting the broker-agents to charge consumers broker fees added to the advertised price of the insurance violate the UCL. These practices by insurers are violative of *Ins.C. 17401(a)*, which requires that the policies be sold only by appointed agents, i.e., persons for whom the insurer has filed with the Insurance Commissioner a notice of appointment formally designating the person to act on the insurer's behalf. (123 C.A.4th 941.) Although *Ins.C. 1732* was enacted to codify acceptance of the concept of dual agency in the insurance industry, the statute does so in a precise way by only authorizing a broker to act as an insurer's agent to the extent of collecting and transmitting premiums or returning premiums and delivering policies and other documents evidencing insurance. Thus, *Ins.C. 1732* does not provide a "safe harbor" from liability under the UCL for the first practice involved here. Similarly, insurance regulations governing broker fees do not provide a safe harbor for the second practice, because only statutes, and not administrative

regulations, are sufficient to satisfy the requirements of the safe harbor doctrine. (123 C.A.4th 946.)

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

(9) *(New) Insurer's Demand for Reimbursement of Money Paid to Insured by Third Party.* An insured who alleges that its health insurer engages in a deceptive practice by demanding 100% reimbursement of medical expenses recovered by insureds from third parties, while ignoring insureds' equitable defenses under the "made-whole" rule and the "common fund" doctrine, states claims for fraudulent and unfair business practices under the UCL. (*Progressive West Ins. Co. v. Superior Court* (2005) 135 C.A.4th 263, 283, 37 C.R.3d 434, Supp., infra, §119.)

(10) *(New) Retailer's Provision of Shipping Insurance Without License.* A customer of a retail shipping outlet for a parcel delivery service, which offered declared value shipping insurance to customers, states a claim for unfair business practices under the UCL based on the retailer's violation of the insurance licensing requirement of *Ins.C. 1635(h)* (see 2 Summary (10th), *Insurance*, §18). (*Wayne v. Staples* (2006) 135 C.A.4th 466, 475, 37 C.R.3d 544, Supp., infra, §119.)*Correction:* Page 420, line 8 of section, "Ins.C. 17401(a)" should be "Ins.C. 1704(a)".



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e. Health Care Practices.

13 Witkin Sum. Cal. Law Equity § 113

[§ 113] Health Care Practices.

(1) *Resale of Drugs Acquired at Preferentially Low Prices. B. & P.C. 4380* (with specified exceptions) prohibits the resale of drugs acquired at preferentially low prices. A prohibited sale is an act of unfair competition for purposes of *B. & P.C. 17200* et seq., and may be enjoined without proof of actual damage, malice, or intent to harm competition. (*B. & P.C. 4381*.)

(2) *Fraudulent Solicitation of Nursing Home Residents. In Podolsky v. First Healthcare Corp. (1996) 50 C.A.4th 632, 649, 58 C.R.2d 89*, a nursing home operator violated the UCL by soliciting residents on admission with a third-party guaranty agreement that was deceptive to the extent that it lacked information about protections enjoyed by prospective guarantors under federal or state law.

(3) *Unlawful Marketing Practice of Clinical Laboratory Performing Services for Medi-Cal Patients. A clinical laboratory that performs services for Medi-Cal patients engages in unfair competition by paying commissions to an independent marketing contractor, because that practice violates Welf.C. 14107.2, making it a crime to refer Medi-Cal patients (see 2 Cal. Crim. Law (3d), Crimes Against Governmental Authority, §150). Although a contractor may not directly refer patients, the contractor violates the statute by arranging, through marketing activities, for Medi-Cal services to be furnished to patients, and recommending those services. (People v. Duz-Mor Diagnostic Laboratory (1998) 68 C.A.4th 654, 668, 80 C.R.2d 419; on contrary holdings as to laboratory's billing practices, see infra, §120.)*

(4) *Health Care Service Plan Practices. In Coast Plaza Doctors Hosp. v. UHP Healthcare (2002) 105 C.A.4th 693, 129 C.R.2d 650*, plaintiff hospital brought a UCL action seeking reimbursement directly from defendant health care insurer for services rendered to health care plan members who had assigned their rights to plaintiff. Plaintiff's UCL claim was based on allegations that defendant failed to pay, underpaid, or delayed paying plaintiff in violation of *Health & Saf.C. 1371*, part of the Knox-Keene Health Care Service Plan Act of 1975, and by attempting to transfer patients to plaintiff and other hospitals in violation of 42 U.S.C., §1395dd, part of the Emergency Medical Treatment and Labor Act. The trial judge dismissed the action, ruling that plaintiff's action sought to enforce the Knox-Keene Act, the enforcement of which was vested exclusively in a state department. *Held*, reversed.

(a) Plaintiff stated a proper UCL claim based on allegations of violations of both *Health & Saf.C. 1371* and 42

U.S.C., §1395dd. (105 C.A.4th 705.)

(b) The Knox-Keene Act did not bar the action. Although plaintiff alleged that defendant's conduct was in part a violation of the Act, the Department of Managed Health Care, which enforces the Act, does not have exclusive jurisdiction. (105 C.A.4th 706.) Under *Health & Saf.C. 1371.25*, the Act contemplates that a health care plan may be found liable under other statutory or common law bases for liability. (105 C.A.4th 707.)

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

(4) *Health Care Service Plan Practices*. In *Bell v. Blue Cross of Calif. (2005) 131 C.A.4th 211, 31 C.R.3d 688*, plaintiffs, emergency room physicians, brought a class action under the UCL alleging that defendant health care service plan paid plaintiffs fees below the reasonable and customary amount for their services, even though plaintiffs were legally required to treat all patients without regard to their insurance status or ability to pay, and even though plaintiffs had not contracted with defendant or otherwise agreed to accept the amount of the fees defendant paid them. The gist of plaintiffs' complaint was that defendant's practice violated *Health & Saf.C. 1371.4* of the Knox-Keene Health Care Service Plan Act of 1975, which requires health care plans to reimburse nonparticipating providers for services rendered to their enrollees. The trial judge dismissed plaintiffs' complaint for failure to state a proper claim under the UCL. *Held*, reversed.

(a) Although the Department of Managed Health Care has jurisdiction over the subject matter of *Health & Saf.C. 1371.4* (as well as the rest of the Knox-Keene Act), its jurisdiction is not exclusive and there is nothing in the statute or in the Act generally to preclude a private action under the UCL. (131 C.A.4th 216, 217, relying on *Coast Plaza Doctors Hosp. v. UHP Healthcare (2002) 105 C.A.4th 693, 129 C.R.2d 650*, text, p. 421, and distinguishing *Samura v. Kaiser Foundation Health Plan (1993) 17 C.A.4th 1284, 22 C.R.2d 20*, text, §120.) This result is further supported by the department's use of private enforcement. (131 C.A.4th 218.)

(b) The legislative history of *Health & Saf.C. 1371.4* indicates an intention to require defendant to reimburse plaintiffs at a reasonable and customary amount, not at a rate defendant chooses. Further, defendant's duty to reimburse plaintiffs arises from their legal obligation to render services without regard to a patient's insurance status or ability to pay. A contrary interpretation would render the statute's protection illusory, and would reimburse plaintiffs at a confiscatory rate that would be unconscionable and unconstitutional. (131 C.A.4th 220.)

(c) Plaintiffs stated a proper UCL claim by alleging that defendant engaged in a business practice likely to deceive a reasonable person, not whether there was actual deception, and by alleging that defendant's practice violated *Health & Saf.C. 1371.4*. (131 C.A.4th 221.)



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f. Telecommunication Practices.

13 Witkin Sum. Cal. Law Equity § 114

[§ 114] Telecommunication Practices.

(1) *Sales Notices and Disclosures.* *B. & P.C. 17360* et seq., dealing with sales of telephones and other communications equipment, require various notices and disclosures. Every failure to comply is an unfair trade practice under *B. & P.C. 17200* et seq. (*B. & P.C. 17364.*)

(2) *Anticompetitive Sales Practices.* *Cel-Tech Communications v. Los Angeles Cellular Tel. Co.* (1999) *20 C.4th 163*, *83 C.R.2d 548*, *973 P.2d 527*, involved an action by plaintiffs, telecommunications companies that sold cellular telephones, against a competitor that sold cellular telephones below cost to gain subscribers for its cellular service. The trial court ruled that plaintiffs' UCL claim necessarily failed when their claims under the Unfair Practices Act (*B. & P.C. 17000* et seq.; see *1 Summary* (10th), *Contracts*, §609 et seq.) failed. *Held*, reversed and remanded.

(a) *Unfair practice may be actionable under UCL, even if not unlawful.* The court initially made three observations: (1) the scope of the UCL is broad, and an "unfair" practice may be actionable, even if not illegal under another statute (*20 C.4th 180*); (2) an action may not be brought under the UCL if other specific legislation expressly bars it, i.e., provides a "safe harbor" (*20 C.4th 182*); (3) but if no specific law does so, a practice is actionable under the UCL as "unfair" if it threatens an incipient violation of an antitrust law or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law or otherwise significantly threatens or harms competition (*20 C.4th 186*). (For extensive discussion, see, *supra*, §107.)

(b) *Application to this case.* Defendant's below-cost sales did not come within the safe harbor of *B. & P.C. 17026.1* (cellular service providers may sell cellular phones below cost as good faith endeavor to meet legal market prices of competitors; see *1 Summary* (10th), *Contracts*, §616), or the prohibitions of *B. & P.C. 17043* and *17044* (below-cost sales and loss leaders; see *1 Summary* (10th), *Contracts*, §§609, 614, 615). (*20 C.4th 187, 188.*) Thus, remand was necessary to determine whether plaintiffs' claim could be considered "unfair" under the UCL. Given defendant's governmentally protected position in the existing duopoly service market, the fairness of its below-cost sales of cellular equipment required careful scrutiny. (*20 C.4th 189, 190.*) (See *52 Hastings L. J. 1131 [Cel-Tech].*)

Two justices each wrote a concurring and dissenting opinion. (*20 C.4th 191, 206.*)

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g. Vehicle Towing Practices.

13 Witkin Sum. Cal. Law Equity § 115

[§ 115] Vehicle Towing Practices.

In *People v. James* (1981) 122 C.A.3d 25, 177 C.R. 110, a county successfully sought to enjoin defendant liquor store owner and tow service operator from impounding and towing cars from the liquor store's parking lot without proper warning signs. "Vehicles were hoisted or towed away without sufficient warning; drivers were subjected to payment of fees to have their cars 'let-down' in the parking lot; they were coerced into paying either by physical intimidation or misrepresentation concerning the existence of liens or other rights of the tower; they were charged unconscionable fees to retrieve their vehicles from hoisting and impoundment; and they were forced to waive claims for damage to their property in order to get it back. ... The fact that defendants' scheme had never been dealt with by the appellate court does not render it any less fundamentally dishonest, unfair, or unlawful." (122 C.A.3d 36.)

In *People v. Servantes* (2001) 86 C.A.4th 1081, 103 C.R.2d 870, a city brought a UCL action against defendant, the owner and operator of a tow truck company, based on hundreds of violations of *Veh.C.* 22658 (unlawful removal of vehicles from private property by towing service), and municipal ordinances regulating towing. Defendant claimed that the UCL action was preempted by the Federal Aviation Administration Authorization Act of 1994. The trial judge rejected defendant's claim and entered judgment for the city. *Held*, affirmed.

(a) Although the federal Act expressly preempts state and local regulation of towing services generally (49 U.S.C., §14501(c)(1)), safety regulation laws are explicitly excepted from the general rule of preemption (49 U.S.C., §14501(c)(2)(A)). (86 C.A.4th 1088, 1089.) *Veh.C.* 22658 serves a public safety purpose in the protections it offers to the owner of a vehicle being towed from private property, and so falls within this safety regulation exception and is not preempted by the federal Act. (86 C.A.4th 1090, 1091.)

(b) Further, because Congress did not clearly express an intent to curtail the ability of municipalities to respond to local safety concerns, and the municipal ordinances also fall within the exception, they also are not preempted. (86 C.A.4th 1092, 1093.)

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

In *CPF Agency Corp. v. R&S Towing* (2005) 132 C.A.4th 1014, 34 C.R.3d 106, a vehicle owner brought a UCL action on behalf of itself and the general public alleging that defendant towing company had overcharged vehicle owners for

vehicle storage fees in violation of *Veh.C. 22658(i)(2)*. The trial judge dismissed the action on the ground that it was preempted by the Federal Aviation Administration Authorization Act of 1994 (FAAAA). *Held*, reversed and remanded.

(a) *People v. Servantes* (2001) 86 C.A.4th 1081, 103 C.R.2d 870, text, p. 423, held that provisions of *Veh.C. 22658*, including *Veh.C. 22658(i)*, were safety regulations explicitly excepted from preemption under 49 U.S.C., §14501(c)(2)(A). (132 C.A.4th 1024.) However, when the Legislature subsequently amended *Veh.C. 22658* in 2003, it made an implicit determination that the storage fee limitation in *Veh.C. 22658(i)* was not enacted in response to public safety concerns, and therefore was not subject to the preemption exception in 49 U.S.C., §14501(c)(2)(A). (132 C.A.4th 1028, 1030; disagreeing with *Servantes* to extent it suggests contrary view.)

(b) Although *Veh.C. 22658(i)(2)* does not fall within the FAAAA's safety exception, *Veh.C. 22658(i)(2)* does fall within the FAAAA's nonconsensual towing preemption exception in 49 U.S.C., §14501(c)(2)(C). Under that exception, a state may regulate the price of for-hire motor vehicle transportation by a tow truck if that transportation is performed without the prior written consent or authorization of the owner or operator of the motor vehicle. (132 C.A.4th 1030.) (See 29 A.L.R. Fed 2d 563 [preemptive effect of FAAAA].)

In *CPF Agency Corp. v. Sevel's 24 Hour Towing Service* (2005) 132 C.A.4th 1034, 34 C.R.3d 120, a companion case to *CPF Agency Corp. v. R & S Towing*, *supra*, the court, using the same analysis and nearly identical language, held that a UCL claim based on a violation of *Veh.C. 22658(i)(2)* was not preempted by the FAAAA. (132 C.A.4th 1045.) However, the court further held that a UCL claim based on a violation of *Veh.C. 22851.12* (limitations on towing operator's right to charge lien sale preparation fees on towed vehicles) was preempted by the FAAAA. (132 C.A.4th 1056.)



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h. Rental Car Company Practices.

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[§ 116] Rental Car Company Practices.

(1) *Misrepresentation of Collision Damage Waiver.* Car rental agencies violate the UCL by misrepresenting the "collision damage waiver" for rental cars as insurance in their rental contract and in the manner of representation by their agents. (See *People v. Dollar Rent-A-Car Systems* (1989) 211 C.A.3d 119, 128, 259 C.R. 191.)

(2) *Concealment of Fuel Service Charge.* In *Schnall v. Hertz Corp.* (2000) 78 C.A.4th 1144, 93 C.R.2d 439, the trial judge dismissed a claim by plaintiff, a car renter, alleging that defendant rental car company had violated the UCL by unfairly and fraudulently concealing a fuel service charge. A provision of defendant's standard rental agreement required renters to choose either to purchase fuel from defendant at the commencement of the rental or to pay a fuel service charge if they failed to return the car with a full tank. *Held*, reversed.

(a) To state a valid claim under the fraud prong of the UCL, a plaintiff need not show that he or she was actually deceived or confused by the conduct or business practice in question. Unlike common law fraud or deception, a violation can be shown even if no one was actually deceived, relied on the fraudulent practice, or sustained damage; all that is necessary is to show that members of the public are likely to be deceived. (78 C.A.4th 1167.)

(b) Here, the fact that the per gallon rate was not disclosed in the rental agreement but only in the rental record, a small and hard-to-read document consisting mainly of indecipherable abbreviations, may have indicated an intent to conceal this important information. (78 C.A.4th 1164.) Thus, a question of fact existed whether a reasonable customer would know from the rental agreement and rental record the amount of the fuel service charge to which the customer might be exposed if the fuel purchase option was rejected. (78 C.A.4th 1169.) Dismissing the complaint improperly relieved defendant of the need to explain and justify its conduct, or show that customers were not misled by that conduct to their detriment. (78 C.A.4th 1170.) (On holding that imposition of charge in and of itself does not violate UCL, see *infra*, §121.)

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

(2) *Concealment of Fuel Service Charge.* Plaintiff, who rented a truck, stated a valid UCL claim against defendant truck rental company by alleging that defendant impermissibly charged a refueling fee for fuel used but not replaced, refused to reimburse for excess fuel purchased, and used a fuel gauge that did not comply with statutory requirements. Because

defendant rented trucks and not cars, defendant was not entitled to the "safe harbor" afforded by C.C. 1936(n)(2) (see text, §121), which permits rental car companies to impose additional charges for optional services if the renter knows that charge is avoidable. Further, defendant's alleged practices, if true, were unlawful, unfair, and fraudulent in violation of the UCL. (*Aron v. U-Haul Co. of Calif.* (2006) 143 C.A.4th 796, 803, 804, 49 C.R.3d 555.)



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i. Other Practices.

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[§ 117] Other Practices.

(1) *Unauthorized Distribution of Commercial Handbills at Nonresidential Hotel*. A person who distributes, or causes another to distribute, a handbill soliciting a guest of a nonresidential (i.e., "transient") hotel to patronize a commercial enterprise engages in unfair competition, if the innkeeper objects either orally to the distributor or posts a notice stating an objection. However, the prohibition does not apply if the innkeeper or a guest requests or approves the distribution. (*B. & P.C. 17210*.)

(2) *Record Piracy*. In *Capitol Records v. Erickson* (1969) 2 C.A.3d 526, 82 C.R. 798, plaintiff manufactured records (discs and tapes) of performances of noted recording artists. Defendant pirated these works by copying the purchased recordings and issuing them in discs or tapes of inferior quality at a lower price, merely adding a disclaimer of any relationship with the original recording company or artist. *Held*, this conduct could be enjoined, for defendant misappropriated plaintiff's product (see 5 Summary (10th), Torts, §711), and record piracy is a criminal offense (P.C. 653h). (2 C.A.3d 537.) (See *A & M Records v. Heilman* (1977) 75 C.A.3d 554, 564, 142 C.R. 390 [unauthorized duplication of record company's product for resale]; 40 A.L.R.3d 566 [unfair competition by direct reproduction of literary, artistic, or musical property]; 56 Cal. L. Rev. 526 [unauthorized reception of nonbroadcast radio communications].)

For sound recordings "fixed" on or after February 15, 1972, federal copyright law preempts equivalent state law. (See 17 U.S.C., §301(a), 13 Summary (10th), *Personal Property*, §58 et seq.; P.C. 653h(i) [piracy statute applicable only to articles "mastered" prior to February 15, 1972]; 1 Nimmer on Copyright 1.01[B][2][d][i].) With respect to recordings fixed before February 15, 1972, state record piracy laws are not preempted. (See 17 U.S.C., §301(c) [preemption for causes of action arising on or after February 15, 2047]; *Goldstein v. California* (1973) 412 U.S. 546, 93 S.Ct. 2303, 37 L.Ed.2d 163; 1 Nimmer on Copyright 1.01[B][2][d][ii].)

(3) *Chain Referral Marketing Program*. A marketing plan under which prospective distributors are led to believe that they will make large amounts of money by recruiting additional distributors is illegal under P.C. 327, and is subject to penalties and injunction under *B. & P.C. 17200* et seq. and 17500. (See *People v. Bestline Products* (1976) 61 C.A.3d 879, 910, 132 C.R. 767; *Bounds v. Figurettes* (1982) 135 C.A.3d 1, 18, 19, 20, 185 C.R. 480 [following *Bestline*].)

(4) *Commercial Distribution of Obscene Matter*. When the distribution of obscene matter unlawful under P.C. 311.2 is a "business practice," it may be enjoined under *B. & P.C. 17200*. It is not necessary to show that the unlawful conduct is also anticompetitive or harmful to the consumer. (*People v. E.W.A.P. (1980) 106 C.A.3d 315, 319, 165 C.R. 73.*)

(5) *Retaliatory Eviction*. (See *Hernandez v. Stabach (1983) 145 C.A.3d 309, 314, 193 C.R. 350, 12 Summary (10th), Real Property, §716* [institution of eviction proceedings was integral part of defendant's unlawful business practice of maintaining substandard apartments].)

(6) *Improper Downgrading of Purchased Commodity*. In *Allied Grape Growers v. Bronco Wine Co. (1988) 203 C.A.3d 432, 448, 451, 249 C.R. 872*, plaintiff, a grape growers cooperative, was granted an injunction under *B. & P.C. 17200* against defendant wine company, based on findings that defendant had fraudulently and in violation of *Food & Ag.C. 55872, 55878, 55879*, downgraded and paid lower prices for grapes that it had contracted to purchase. Defendant contended that its conduct did not violate *B. & P.C. 17200* because (a) it was a mere buyer, (b) its downgrading activity was not fraudulent, and (c) the activity involved only one contract and was therefore not a "business practice." *Held*, injunction affirmed. A claim under *B. & P.C. 17200* may lie against a buyer, and it is sufficient that the practice complained of is unfair; it need not be fraudulent. (*203 C.A.3d 451, 452.*)

(7) *Direct Contracting*. In *Saunders v. Superior Court (1994) 27 C.A.4th 832, 33 C.R.2d 438*, plaintiffs, certified shorthand reporters, sued defendants--a shorthand reporter group (CRA) and two insurers--for several economic torts, including unfair business practices, alleging unfair competition under *B. & P.C. 17200* by direct contracting. CRA contracted with the insurance companies for the exclusive right to report depositions taken by attorneys representing the insurers' policyholders. The contract required exclusive use of CRA reporters, that CRA would train the insurers and their employees, and that CRA would review and comment on sworn testimony recorded by its reporters and assist the insurers in evaluating any need for replacement counsel. In order to provide reduced rates to contract clients, CRA members allegedly charged other parties higher than normal market rates for deposition copies and this practice was not disclosed to other litigants or to the public. The trial judge sustained defendants' demurrers to all causes of action without leave to amend. *Held*, demurrers overruled; the legality and fairness of defendants' practices cannot be decided at the demurrer stage.

The provisions of the contract between defendants required CRA to act in multiple capacities at depositions. Thus, the provisions appeared "unlawful and unfair because they compromise the impartiality of the CRA reporters, provide the CRA reporters with a financial interest in the outcome of the litigation, and constitute an unreasonable restraint of trade." (*27 C.A.4th 839.*) Whether these multiple capacities violated professional standards under *B. & P.C. 8025* must be determined by expert testimony at trial. (*27 C.A.4th 840.*) Further, there was manifest unfairness in the practice of providing a discount to parties noticing a deposition while increasing costs to parties requesting copies of the transcript. "The nondeposing parties ... are bound by their adversary's choice of reporter and cannot obtain a copy of the deposition from any other source." (*27 C.A.4th 841.*)

(8) *Improper Forestry Practices*. In *Hewlett v. Squaw Valley Ski Corp. (1997) 54 C.A.4th 499, 520, 63 C.R.2d 118, 7 Cal. Proc. (4th), Judgment, Supp., §248*, a ski resort that cut down more than 1,800 trees to carry out its planned project to develop additional ski runs, in violation of the Forest Practices Act (*Pub.Res.C. 4511 et seq.*; see *12 Summary (10th), Real Property, §884*), a conditional use permit, and a temporary restraining order, also committed unfair business practices, and *B. & P.C. 17200 et seq.* provided cumulative remedies.

(9) *Unlawful Sale of Tobacco to Minors*. Selling tobacco to minors in violation of P.C. 308 or *B. & P.C. 22950 et seq.* is an unfair business practice, and *B. & P.C. 17200 et seq.* provide cumulative remedies. (*Stop Youth Addiction v. Lucky Stores (1998) 17 C.4th 553, 573, 71 C.R.2d 731, 950 P.2d 1086.*)

(10) *Stockbroker's "Trading Ahead" Policy*. In *Roskind v. Morgan Stanley Dean Witter & Co. (2000) 80 C.A.4th 345, 352, 95 C.R.2d 258*, a stock owner's action against his brokerage firm for not executing orders for stock sales in a

fair and timely manner, but instead "trading ahead" for its own benefit before processing those sales for its customers, was not preempted by federal law, and thus was actionable under the UCL. There is no provision of federal law that preempts a state law cause of action under the UCL in these circumstances. Congress plainly contemplated the possibility of dual litigation in state and federal courts relating to securities transactions in 15 U.S.C., §78bb. Violation of a federal law may serve as a predicate for a UCL action. Because trading ahead constitutes the crime of mail fraud under federal law, it is actionable under the UCL, which borrows federal law to define unlawful practices.

(11) *Violation of False Claims Act.* In *Rothschild v. Tyco Int. (US) (2000) 83 C.A.4th 488, 99 C.R.2d 721*, the trial judge dismissed a UCL action on the ground that it was barred by an action under the False Claims Act (*Govt.C. 12650 et seq.*; see 5 *Summary* (10th), *Torts*, §767) based on the same underlying factual allegations. The judge relied on *Govt.C. 12652(c)(10)*, a provision of the False Claims Act stating that, when a person brings an action under the Act, "no other person may bring a related action based on the facts underlying the pending action." *Held*, reversed. In light of the nonexclusivity provision of the False Claims Act, *Govt.C. 12655*, the bar on related actions imposed by *Govt.C. 12652(c)(10)* applies only to *subsequent* actions filed under that Act. This reading furthers the Act's legislative purpose of encouraging private persons to disclose and prosecute fraudulent claims made to governmental agencies, while balancing the need to limit the availability of these actions to protect against opportunistic or parasitic actions that would otherwise be encouraged as a result of the statutory financial incentives for bringing the action. (*83 C.A.4th 499.*)

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

(8) *Improper Forestry Practices.*

Hewlett case:

Cross-Reference: 7 *Cal. Proc.* (5th), *Judgment*, §286.(12) (*New*) *Mailing Unordered Merchandise to Sales Representatives.* In *Blakemore v. Superior Court (2005) 129 C.A.4th 36, 27 C.R.3d 877*, independent sales representatives for a cosmetics company stated a valid claim under the UCL against the company by alleging that the company shipped the representatives products that they did not order and that, when they returned the unordered products, the company refused to credit their accounts and engaged in various other practices to dissuade them from returning unordered products. If established, the practices, although not unlawful, are unfair and fraudulent. (*129 C.A.4th 48.*)

(13) (*New*) *Improper Solicitation of Vehicle Donations.* A charity that solicited the donation of motor vehicles, and shared half the proceeds with other charities when it sold the vehicles, violated the UCL by deceptively advertising that the vehicles would be towed for free. Although there was free towing for donors, a towing fee was deducted from the proceeds paid to the other charities. The charity further violated the UCL by unlawfully selling the donated cars to retail customers and for export without complying with the smog certification requirements of the Vehicle Code. (*People v. Cars 4 Causes (2006) 139 C.A.4th 1006, 1013, 1015, 1016, 43 C.R.3d 513.*)

(14) (*New*) *Home Loan Overcharges.* Consumers who alleged that lenders violated the UCL by overcharging the consumers for underwriting, tax services, and wire transfer fees in connection with home loans stated valid claims under the UCL. Those claims, if true, would be unfair, fraudulent, and unlawful (as violative of the Real Estate Settlement Procedures Act). (*McKell v. Washington Mut. (2006) 142 C.A.4th 1457, 1470, 49 C.R.3d 227.*)



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C. Unfair Competition Law.

4. Illustrations: Permissible Practices.

a. Employment Practices.

13 Witkin Sum. Cal. Law Equity § 118

[§ 118] Employment Practices.

(1) *Liquidated Damages Clauses.* Inclusion of a provision in an employment contract for the recovery of liquidated damages from an employee who breaches the agreement is not an unfair business practice. A liquidated damages provision in an employee's contract is not invalid merely because it encourages a party to perform, so long as it represents a reasonable attempt to anticipate the losses to be suffered, and otherwise complies with the requirements of C.C. 1671 (presumption that liquidated damages clauses in nonconsumer contracts are valid; see 1 *Summary* (10th), *Contracts*, §533 et seq.). (*Californians for Population Stabilization v. Hewlett-Packard Co.* (1997) 58 C.A.4th 273, 287, 67 C.R.2d 621.)

(2) *Employment Contract Unenforceable in California but Enforceable Elsewhere.* A company based abroad that hires employees there to work for companies in California does not commit a deceptive business practice by including terms in their employment contracts that are unenforceable under California law, where those terms are valid under foreign law. (*Californians for Population Stabilization v. Hewlett-Packard Co.*, *supra*, 58 C.A.4th 292.)

(3) *Room Service Tipping.* A hotel's practice of imposing a surcharge on room service deliveries, which is passed along to the server, in addition to providing patrons with the opportunity to tip the server, is not an unfair business practice under the UCL. The practice does not violate *Lab.C. 351* (employer may not take or deduct tips; see 3 *Summary* (10th), *Agency and Employment*, §414). The practice is not unfair, because how and what a hotel pays its room service servers is a matter between the hotel and the servers. And the hotel's failure to advise patrons how it compensates its employees does not constitute deceit, even under the broad provisions of the UCL. (*Searle v. Wyndham Int.* (2002) 102 C.A.4th 1327, 1333, 126 C.R.2d 231.)

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b. Insurance Practices.

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[§ 119] Insurance Practices.

(1) *Refusal To Offer Homeowners' Coverage To Avoid Providing Earthquake Coverage.* Insurers' refusal to sell new homeowners' coverage to avoid writing new earthquake policies does not violate the UCL, because the availability of earthquake coverage is a legislative matter. (*Wolfe v. State Farm Fire & Cas. Ins. Co.* (1996) 46 C.A.4th 554, 561, 53 C.R.2d 878.)

(2) *Improper Cancellation of Coverage.* Violations of Ins.C. 769, which requires an insurer to give 120 days' advance written notice before terminating a written insurance agency contract in effect for at least 1 year, do not create a private right to sue for damages, either directly or by indirect operation of the UCL. (*Vikco Ins. Services v. Ohio Indem. Co.* (1999) 70 C.A.4th 55, 66, 82 C.R.2d 442.)

In *Textron Financial Corp. v. National Union Fire Ins. Co. of Pittsburgh* (2004) 118 C.A.4th 1061, 13 C.R.3d 586, plaintiff sued defendant insurer for common law claims of breach of contract, breach of the implied covenant of good faith and fair dealing, and fraud and for a statutory claim of violating the UCL. Defendant refused to provide coverage for property damage to a commercial bus in which plaintiff owned a security interest. Before the bus was damaged, the insured-legal owner stopped paying premiums and the insurer cancelled the policy, but failed to notify plaintiff as required by the Insurance Code. *Held*, plaintiff did not state a valid claim under the UCL.

(a) Plaintiff's complaint charged a violation of a statutory proscription in Ins.C. 790.03; under *Moradi-Shalal v. Fireman's Fund Ins. Cos.* (1988) 46 C.3d 287, 250 C.R. 116, 758 P.2d 58, 2 Summary (10th), Insurance, §254, Ins.C. 790.03 cannot serve as a basis for a claim under the UCL. (118 C.A.4th 1070.)

(b) Despite the contrary holding in *State Farm Fire & Cas. Co. v. Superior Court* (1996) 45 C.A.4th 1093, 53 C.R.2d 229, *supra*, §112, plaintiff's common law claims could not provide an independent basis for a UCL action. *State Farm Fire & Cas. Co.* defines an unfair practice under the UCL as one that offends an established public policy or is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers. However, in *Cel-Tech Communications v. Los Angeles Cellular Tel. Co.* (1999) 20 C.4th 163, 83 C.R.2d 548, 973 P.2d 527, *supra* §§107, 114, the Supreme Court criticized that definition as "too amorphous" to provide sufficient guidance to businesses and courts. "[G]iven the Supreme Court's disapproval of *State Farm's* ... definition ... and its focus on legislatively declared public

policy, reliance on general common law principles to support a cause of action for unfair competition is unavailing." (118 C.A.4th 1072.)

(3) *Insurer's Use of Replacement Cost Less Depreciation To Value Property Loss.* An insurer's use of replacement cost less depreciation, rather than fair market value, to determine the value of damaged property, is not an unfair business practice under the UCL. (*Community Assisting Recovery v. Aegis Sec. Ins. Co.* (2001) 92 C.A.4th 886, 891, 112 C.R.2d 304 [Ins.C. 2071 requires appraisal for resolution of contested fire or property insurance claims; insureds did not allege that insurers interfered with appraisal process, deceived or coerced insureds to settle for replacement cost less depreciation, or engaged in any acts that might have breached standard form policy].)

(4) *Waiver of Uninsured Motorist Coverage by Insured With Multiple Vehicles.* In *Smith v. State Farm Mut. Auto. Ins. Co.* (2001) 93 C.A.4th 700, 113 C.R.2d 399, plaintiff insureds sued several insurers alleging that defendants conspired to require their customers to either purchase uninsured motorist coverage for each of their vehicles or to waive it as to all vehicles in violation of the UCL and the Cartwright Act. One group of defendants marketed a single liability policy covering two or more vehicles; the second group marketed individual policies for each vehicle. The trial judge sustained a demurrer without leave to amend as to all defendants. *Held*, affirmed in part, and reversed and remanded in part.

(a) Ins.C. 11580.2 requires insurers to offer uninsured motorist coverage on an "all or nothing" basis when a single policy covers multiple vehicles. Thus, because the statute required the first group of defendants to take the very action objected to by plaintiffs, those defendants could not be held liable under either the *UCL* or the *Cartwright Act*. (93 C.A.4th 711.)

(b) Because each defendant in the second group was free under Ins.C. 11580.2 to agree to a waiver of uninsured motorist coverage as to each vehicle covered by a separate policy, the actions of the second group could have violated the UCL either as an unfair business practice or as an unlawful restraint of trade in violation of the *Cartwright Act*. (93 C.A.4th 716, 718.)

(5) *Insurer's Use of Employee Attorneys To Represent Insureds.* A liability insurer's use of employee attorneys to represent its insureds does not violate the UCL. In *Gafcon v. Ponsor & Associates* (2002) 98 C.A.4th 1388, 120 C.R.2d 392, 1 Cal. Proc. (4th), Attorneys, Supp., §401, the claim was based on allegations that insurance companies profit directly and indirectly by using employee attorneys to represent their insureds. Assuming these allegations sufficiently stated an unfair or illegal practice under the statute, the insurer could meet its threshold summary judgment burden by presenting admissible evidence that it did not obtain any profit from that use. The insurer did so by way of a declaration by the insurer's deputy general counsel, and there was no evidence presented raising a contrary inference. (98 C.A.4th 1424.)

(6) *Insurer's Refusal To Refund Premium After Insured Surrenders Policy.* A life insurer who responds to an insured's surrender of the policy at the beginning of the annual premium period by continuing coverage and retaining the full premium for the remainder of the period, rather than terminating coverage and refunding a portion of the premium, does not violate the UCL. The practice is not a breach of contract, is not unfair or fraudulent, and is not violative of Ins.C. 481 (premiums must be refunded when insurance policies are surrendered), because the policy may provide a different rule. (*Lambros v. Metropolitan Life Ins. Co.* (2003) 111 C.A.4th 43, 49, 3 C.R.3d 320.)

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

(5) *Insurer's Use of Employee Attorneys To Represent Insureds.*

Gafcon case:

Cross-Reference: 1 Cal. Proc. (5th), Attorneys, §386.

(7) (New) *Insurer's Demand for Reimbursement of Money Paid to Insured by Third Party.* An insured who alleges

that its health insurer's practice of demanding 100% reimbursement of medical expenses recovered by insureds from third parties, while ignoring insureds' equitable defenses under the "made-whole" rule and the "common fund" doctrine, does not state a claim for an unlawful practice under the UCL as violative of P.C. 550(b)(3) (concealment of person's right to, or amount of, insurance benefit), where the insurer pays the insured all of the benefits to which the insured is entitled. (*Progressive West Ins. Co. v. Superior Court* (2005) 135 C.A.4th 263, 283, 37 C.R.3d 434, Supp., supra, §112.)

(8) (*New*) *Shipper's Mark-Up on Shipping Insurance*. A customer of a retail shipping outlet for a parcel delivery service, which does not inform customers that its standard charge for shipping insurance included a 100% mark-up, did not state a valid claim under the UCL. The mark-up was not unconscionable; the price of the insurance was fully disclosed, customers had meaningful choices in the marketplace, and the price was not sufficiently excessive. Further, because the price was clearly disclosed, failure to inform customers about the mark-up was not deceptive. (*Wayne v. Staples* (2006) 135 C.A.4th 466, 480, 483, 37 C.R.3d 544, Supp., supra, §112.)

(9) (*New*) *Collection of Money Owed by Uninsured Motorist*. Defendants, an insurer and a collection agency, did not violate the UCL by attempting to collect money owed by plaintiff, an uninsured driver, who had rear-ended a driver insured by defendant insurer. Because plaintiff was liable for the damages arising from the accident, defendants' attempt to collect those damages was not an unfair business practice. (*Camacho v. Automobile Club of Southern Calif.* (2006) 142 C.A.4th 1394, 1405, 48 C.R.3d 770.)



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c. Health Care Practices.

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[§ 120] Health Care Practices.

(1) *Restricted Hospital Staff Privileges.* The institution by a hospital of a "closed" program, which excludes some staff surgeons from performing heart bypass surgery, is designed to reduce the mortality rate from that surgery, and thus is not an unfair business practice under *B. & P.C. 17200*. (*Redding v. St. Francis Med. Center* (1989) 208 C.A.3d 98, 107, 255 C.R. 806.)

(2) *Health Maintenance Organization's Third-Party Liability Provision.* A health maintenance organization's third-party liability provision did not violate the UCL, because regulatory powers over HMOs are entrusted to the Department of Corporations. (*Samura v. Kaiser Foundation Health Plan* (1993) 17 C.A.4th 1284, 1301, 22 C.R.2d 20.)

(3) *Billing Practices of Clinical Laboratory Performing Services for Medi-Cal Patients.* In *People v. Duz-Mor Diagnostic Laboratory* (1998) 68 C.A.4th 654, 80 C.R.2d 419, the Attorney General sued defendant, a clinical laboratory that performed services for Medi-Cal patients, alleging unfair business practices. *Held*, defendant's practices of charging discounted fees to physicians' private-pay patients and "unbundling" Medi-Cal billing (i.e., billing tests separately that should have been billed together) were not unfair competition. (On contrary holding as to defendant's practice of paying commissions to independent marketing contractor, see *supra*, §113.)

(a) Charging discounted fees to physicians' private-pay patients was not unfair competition, because the practice did not offend public policy and was not illegal. (68 C.A.4th 661.)

(b) The unbundled billing system was adopted on the instructions of a Medi-Cal representative, and thus the practice did not violate the False Claims Act (*Govt.C. 12650 et seq.*; see 5 *Summary* (10th), *Torts*, §767), which prohibits the knowing submission of false claims. (68 C.A.4th 671.)

(4) *Health Care Service Plan Practices.* In *California Med. Assn. v. Aetna U.S. Healthcare of Calif.* (2001) 94 C.A.4th 151, 114 C.R.2d 109, plaintiff physicians association sued defendant health care service plans to recover payments that insolvent intermediaries failed to make to plaintiff for services its physicians provided to members of the health plans. After ruling that plaintiff's first complaint did not allege facts sufficient to establish a violation of the Knox-Keene Act, the trial judge sustained without leave to amend defendants' demurrer to plaintiff's derivative UCL

claim. *Held*, affirmed; defendants' business practices did not violate the Knox-Keene statutory enforcement scheme. Nothing in Knox-Keene imposed an obligation on defendants to pay plaintiff directly if the intermediaries failed to do so after defendants had already paid the intermediaries for plaintiffs' services. Further, defendants shifted to the intermediaries any payment obligations owed to plaintiff. Where the Legislature has permitted certain conduct, courts may not override that determination by declaring that conduct to be actionable under the UCL. The UCL does not give the courts a general license to review the fairness of contracts. (94 C.A.4th 169.)

In *Desert Healthcare Dist. v. PacifiCare FHP* (2001) 94 C.A.4th 781, 114 C.R.2d 623, plaintiff hospital sued a health service plan to recover for medical services provided to defendant's subscribers through an intermediary under contract with defendant pursuant to a capitation agreement (provision for a flat fee per person), following the intermediary's bankruptcy. The trial judge sustained without leave to amend defendant's demurrer to plaintiff's cause of action alleging that defendant's practices of requiring providers to waive rights against defendant and its subscribers, and transferring its risk to intermediaries, violated the UCL. *Held*, affirmed. Those practices are approved by the Knox-Keene Act. (94 C.A.4th 793.) Further, judicial intervention under the guise of the UCL would be improper, as California courts have long applied an abstention doctrine in cases involving matters of complex economic policy. (94 C.A.4th 794.)

A health care service plan's practice of delegating to contracting medical providers the responsibility to pay emergency service providers is expressly permitted by *Health & Saf.C. 1371.4(e)*, part of the Knox-Keene Act, and thus does not violate the UCL. (*California Emergency Physicians Med. Group v. PacifiCare of Calif.* (2003) 111 C.A.4th 1127, 1133, 4 C.R.3d 583.)

(5) *Liens*. In *Swanson v. St. John's Regional Med. Center* (2002) 97 C.A.4th 245, 118 C.R.2d 325, plaintiff brought an action on behalf of California residents against three hospitals, alleging that liens filed by defendants against patients' recoveries from third-party tortfeasors for the reasonable value of services provided pursuant to the Hospital Lien Act (C.C. 3045.1; see 13 *Summary* (10th), *Personal Property*, §244) violated the UCL. The trial judge dismissed that action. *Held*, affirmed.

(a) The provisions of the Hospital Lien Act authorizing the liens in question provided a safe harbor against plaintiff's UCL claim. A business practice does not violate the UCL if it is permitted by law; when specific legislation provides a safe harbor, plaintiffs may not use the UCL to assault that harbor. (97 C.A.4th 248.)

(b) Plaintiff's action also was barred by the litigation privilege of C.C. 47(b)(2) (see 5 *Summary* (10th), *Torts*, §567 et seq.), because liens authorized by law are protected by this privilege. (97 C.A.4th 249.)

(c) The practice of balance billing, whereby a hospital asserts a lien for the difference between the reasonable value of services and the discounted amount paid by the patient's medical insurer, was not subject to a UCL claim, because the Legislature has exempted hospital liens from balance billing limits under C.C. 3040(g)(3). (97 C.A.4th 251.)

A Medi-Cal beneficiary's UCL claim against a medical provider for asserting a lien against the beneficiary's recovery from a third party was properly dismissed, where *Welf.C. 14124.791* and *14124.794* authorized the lien, and thus gave the provider a safe harbor. (*Olszewski v. Scripps Health* (2003) 30 C.4th 798, 827, 135 C.R.2d 1, 69 P.3d 927.)

(6) *Health Information on Internet Website*. Statements by a national reproductive health care services organization on its Internet website that abortion is safe or safer than child birth, and that credible research has failed to establish a link between induced abortion and breast cancer, are neither unlawful, unfair, or fraudulent in violation of the UCL, nor misleading in violation of the False Advertising Act. (*Bernardo v. Planned Parenthood Federation of America* (2004) 115 C.A.4th 322, 351, 9 C.R.3d 197.)

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

(4) *Health Care Service Plan Practices*. A preferred provider that imposes territorial restrictions on its members and an insurer that makes those members the exclusive preferred providers for physical therapy do not violate the UCL, because those practices are specifically authorized or exempted from antitrust enforcement under *B. & P.C. 16770(g)*, *Health & Saf.C. 1342.6*, and *Ins.C. 10133.6*. (See *Lori Rubinstein Physical Therapy v. PTPN* (2007) 148 C.A.4th 1130, 1142, 56 C.R.3d 351.) (5) *Liens*. The California Supreme Court has disapproved *Swanson v. St. John's Regional Med. Center* (2002) 97 C.A.4th 245, 118 C.R.2d 325, text, p. 432, to the extent that it conflicts with the view that a lien under the Hospital Lien Act requires the existence of an underlying debt owed by the patient to the hospital and that, without such a debt, no lien may attach. (See *Parnell v. Adventist Health System/West* (2005) 35 C.4th 595, 609, 26 C.R.3d 569, 109 P.3d 69, 13 Summary (10th), *Personal Property*, Supp., §244.) (7) *(New) Nurse Staffing Levels*. The owners and operators of skilled nursing and intermediate care facilities did not violate the UCL by failing to comply with the minimum nurse per patient requirements of *Health & Saf.C. 1276.5*, because regulatory powers over these facilities are entrusted to the Department of Health Care Services. (See *Alvarado v. Selma Convalescent Hosp.* (2007) 153 C.A.4th 1292, 1303, 64 C.R.3d 250 [following *Samura v. Kaiser Foundation Health Plan* (1993) 17 C.A.4th 1284, 22 C.R.2d 20, text, p. 431, and *Desert Healthcare Dist. v. PacifiCare FHP* (2001) 94 C.A.4th 781, 114 C.R.2d 623, text, p. 432].)

(8) *(New) Prompt-Payment Discounts*. A hospital's practice of failing to disclose its policy of offering discounts to privately insured patients if they promptly paid their balances did not violate the UCL. The practice was not fraudulent, because the hospital did not have a duty to disclose the practice, and thus privately insured patients would not expect that they were entitled to a discount. The practice was not unfair, because it was not directly connected to a legislatively declared policy and did not threaten competition; rather, the policy was beneficial because the hospital was not required to offer privately insured patients any discounts whatsoever. (See *Buller v. Sutter Health* (2008) 160 C.A.4th 981, 986, 990, 74 C.R.3d 47.)



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[§ 121] Rental Car Company Practices.

(1) *Refusal To Rent to Persons Under Age 25.* Rental car companies that refuse to rent cars to, and impose surcharges on, persons under age 25 do not violate the Unruh Civil Rights Act (C.C. 51; see 8 *Summary* (10th), *Constitutional Law*, §898 et seq.), and thus do not engage in unfair competition under the UCL. C.C. 1936 expressly permits rental car companies to set minimum age requirements, and the surcharges are neither unreasonably high nor unreasonably imposed. (*Lazar v. Hertz Corp.* (1999) 69 C.A.4th 1494, 1505, 1507, 82 C.R.2d 368.)

(2) *Fuel Service Charge.* Rental car companies may require renters to choose either to purchase fuel from the company at the commencement of the rental or to pay a fuel service charge if they fail to return the car with a full tank. The fuel service charge is avoidable if the renter initially purchases the fuel, and therefore lawful within the meaning of former C.C. 1936(m)(2) (now C.C. 1936(n)(2)), which permits a rental car company to impose additional charges for optional services if the renter knows that charge is avoidable. The practice therefore could not violate the UCL; by authorizing avoidable fuel service charges, the statute provides a "safe harbor" that insulates the reasonableness of those charges from judicial scrutiny. The logic of the statute is that consumers fully informed of the avoidability of an optional service charge would not pay charges they knew they could avoid unless they considered the service worth the amount charged. Consumers, and the rental car companies that respond to their needs, are for this reason better positioned than the courts to determine the reasonableness of an avoidable charge for an optional service. (*Schnall v. Hertz Corp.* (2000) 78 C.A.4th 1144, 1154, 1157, 93 C.R.2d 439 [also holding that concealing amount of charge may be actionable under the UCL's fraud prohibition; see *supra*, §116]; *Shvarts v. Budget Group* (2000) 81 C.A.4th 1153, 1158, 97 C.R.2d 722 [following *Schnall*].)

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



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e. Lending Practices.

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[§ 122] Lending Practices.

(1) *Bank Overdraft Fees.* The amount of a service fee charged by a bank for returned deposit items does not violate the UCL, because regulation of bank service fees is economic policy properly determined by the Legislature. (*California Grocers Assn. v. Bank of America* (1994) 22 C.A.4th 205, 218, 27 C.R.2d 396, 1 Summary (10th), Contracts, §339.)

(2) *Improper Reconveyance of Trust Deed.* The failure of real estate lenders to follow the requirements of C.C. 2941 for recording the reconveyance of a trust deed after the borrowers pay the secured loans does not violate the UCL, because the remedies under C.C. 2941 are presumed adequate. (*Prudential Home Mortg. Co. v. Superior Court* (1998) 66 C.A.4th 1236, 1249, 78 C.R.2d 566.)

(3) *Calculation of Interest on Wholesale Floor Plan Loans to Car Dealership.* A wholesale floor plan lender that uses the 365/360 method (interest calculated based on 360-day year) to calculate interest owing from a car dealership without specific contractual authorization and disclosure does not violate B. & P.C. 17200, because the practice is neither unlawful, unfair, nor fraudulent within the meaning of the statute. (*South Bay Chevrolet v. General Motors Acceptance Corp.* (1999) 72 C.A.4th 861, 878, 85 C.R.2d 301.)

(4) *Property Inspection Fees Charged to Delinquent Borrowers.* A mortgage loan servicer's practice of charging delinquent borrowers with the actual cost of performing property inspections does not violate the UCL. The practice does not violate C.C. 2954.4 (restrictions concerning late fees), C.C. 2924c (cure of default), C.C. 2924d (costs of enforcement), or Fin.C. 50130 et seq. (prohibition against mortgage loan servicers charging amounts in excess of those permitted by law). Further, the practice is not unfair or deceptive. (*Walker v. Countrywide Home Loans* (2002) 98 C.A.4th 1158, 1171, 121 C.R.2d 79.)

(5) *Lender's Payment of Yield Spread Premium to Mortgage Brokers.* A lender's practice of paying a yield spread premium (YSP) to mortgage brokers as a rebate on FHA loans does not violate the UCL. A YSP is a lump sum paid by a lender to a broker at closing where a loan originated by the broker bears an above-par interest rate. The practice does not violate a federal regulation imposing a 1% cap on loan origination fees charged directly to buyers. Further, the practice is not deceptive or illegal. A YSP is not secretly charged, and payment of a YSP without requiring a

specification of the services provided by the brokers is not illegal. (*Byars v. SCME Mortg. Bankers* (2003) 109 C.A.4th 1134, 1145, 135 C.R.2d 796.)

(6) *Finance Company's Payment of Automobile Dealer Reserve Fee*. A practice under which an automobile is purchased through a conditional sales contract between the purchaser and the dealer, with the dealer then assigning the contract to a finance company and the company paying the dealer a portion of the finance charges, does not violate the UCL. The practice is not a vertical price-fixing agreement in violation of antitrust laws. Nor is the practice fraudulent, even though it is not disclosed to consumers, because no law requires disclosure. Further, the practice is not unfair, because it is not contrary to the consumer protection policies embodied in the Rees-Levering Act (see 4 *Summary* (10th), *Sales*, §239 et seq.). (*Kunert v. Mission Financial Services Corp.* (2003) 110 C.A.4th 242, 261, 1 C.R.3d 589.)

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

(7) *(New) Mortgage Lender's Calculation of Interest on Prepayment*. Borrowers who allege that their mortgage lender calculates interest due under their home mortgage on prepayment during a partial year based on a 30.4-day month, rather than the actual days in each month, do not state a valid claim under the UCL. The practice is neither fraudulent nor unfair. (*Puentes v. Wells Fargo Home Mortg.* (2008) 160 C.A.4th 638, 651, 72 C.R.3d 903.)



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e-1. (New) Telecommunications Practices.

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[§ 122A] (New) Telecommunications Practices.

(1) *Sales Practices Between Cellular Telephone Company and Independent Dealers.* A cellular telephone company does not violate the UCL by refusing to sell popular, new cellular telephone models to independent dealers of cellular telephones during an extended holdback period and by selling cellular telephones to customers below cost when the independent dealers could not afford to compete. The practices are not anticompetitive, and thus do not violate antitrust laws. (*People's Choice Wireless v. Verizon Wireless* (2005) 131 C.A.4th 656, 668, 672, 31 C.R.3d 819.)

(2) *High-Voltage Protection Devices.* A telephone company's policy requiring customers to obtain high-voltage protection (HVP) from it or from approved HVP device makers is not unfair competition in violation of the UCL. The HVP policy does not threaten an incipient violation of the Cartwright Act, does not violate the Act's policy or spirit, or otherwise threaten competition. The HVP policy is not an illegal tying arrangement and does not risk harming competition, because it allows customers to choose between leasing the telephone company's HVP services or buying HVP devices from two independent suppliers. Thus, the determination that the conduct is not an unreasonable restraint of trade necessarily implies that the conduct is not unfair toward consumers for purposes of the UCL. (*RLH Industries v. SBC Communications* (2005) 133 C.A.4th 1277, 1286, 35 C.R.3d 469, 8 Summary (10th), *Constitutional Law*, Supp., §1306A.)

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4. Illustrations: Permissible Practices.

f. Other Practices.

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[§ 123] Other Practices.

(1) *Accidental Distribution of Contaminated Pet Food.* The accidental commercial distribution of defective pet food does not violate *B. & P.C. 17200*, because the practice is neither unlawful, unfair, nor fraudulent within the meaning of the statute. (*Klein v. Earth Elements (1997) 59 C.A.4th 965, 969, 69 C.R.2d 623.*)

(2) *Implementation of Manufacturer's Minimum Resale Prices.* In *Chavez v. Whirlpool Corp. (2001) 93 C.A.4th 363, 113 C.R.2d 175*, an appliance manufacturer and a retail dealer who agreed to maintain minimum resale prices for the manufacturer's dishwashers did not engage in either an unlawful or an unfair business practice in violation of the UCL. The manufacturer had announced a unilateral minimum price policy for its products and informed retailers that it would monitor compliance and refuse to do business with retailers who failed to comply. The dealer had implemented that policy. Under federal antitrust law, provided there is no coercion, a manufacturer may announce its resale prices in advance and refuse to deal with those who fail to comply, and a distributor is free to acquiesce in the manufacturer's demand in order to avoid termination. In the present case, the manufacturer's price maintenance policy, and the dealer's acquiescence in that policy, were independent actions that did not create an unlawful combination, and there was insufficient evidence of a coerced agreement. The practice therefore was not unlawful as violative of the Cartwright Act. Further, a practice that is permissible under federal antitrust law as being reasonable may not, as a matter of law, be deemed unfair under the UCL. (*93 C.A.4th 373, 375.*)

(3) *Supermarket Closings.* In *Gregory v. Albertson's (2002) 104 C.A.4th 845, 128 C.R.2d 389*, the trial judge ruled as a matter of law that the practice of defendant supermarket chain of closing one supermarket in a mall when it opened another one nearby, with the intention of keeping the closed one unoccupied to preclude competition from that location, did not violate the UCL. *Held*, affirmed. There was only one coherent theory of an unfair practice: by keeping the chief retail store in the shopping center off the market, defendant put in motion a process of deterioration affecting the entire shopping center that would inevitably produce the kind of blight that *Health & Saf.C. 33035* condemns. (*104 C.A.4th 854.*) However, the statutory scheme of the Community Redevelopment Law provides only one remedy for the phenomenon of blight condemned by *Health & Saf.C. 33035*, i.e., public participation in a redevelopment project. It does not authorize the courts to fashion a private remedy through the use of the UCL to affect a single leasehold in a shopping center. (*104 C.A.4th 855.*) Also, the practice does not conflict with antitrust laws or policies. (*104 C.A.4th 856.*)

(4) *Hotel's Valet Parking Fee*. A hotel's failure to post a sign notifying hotel guests that valet parking is not free does not violate the UCL, where guests are given a valet parking ticket stating the charge for valet parking services conspicuously. A ticket provides reasonable and advance notice of the charges, and it is unreasonable for someone who uses valet parking in a large metropolitan area not to expect to pay for these services. Although a rate sign may provide better notice, there is no requirement to use the best possible type of notice. (*Plotkin v. Sajahtera* (2003) 106 C.A.4th 953, 131 C.R.2d 303 [relying on *Schnall v. Hertz Corp.* (2000) 78 C.A.4th 1144, 93 C.R.2d 439], and *Shvarts v. Budget Group* (2000) 81 C.A.4th 1153, 97 C.R.2d 722, supra, §121.)

(5) *Contractual Releases*. In *Olsen v. Breeze* (1996) 48 C.A.4th 608, 55 C.R.2d 818, plaintiff took his skis to defendant ski shop to have his ski bindings adjusted. As a condition of the return of his equipment, and consistent with industry custom, he was required to sign a form releasing the shop from liability for injury resulting from use of the equipment, including injury caused by negligence, breach of warranty, or product defect. After he refused to sign the release and was denied the return of his equipment, he filed an action, on behalf of himself and all others in the state who own or seek to rent or purchase ski bindings, against defendants--the ski shop, a ski area operator, and six ski binding distributors. Plaintiff alleged that it was unlawful and unconscionable under *B. & P.C. 17200* et seq. for defendants to require customers to sign releases of liability as a condition for obtaining goods or services. During the pendency of the litigation, some of the defendants modified their releases to exclude product defect or strict liability claims, as required by *Westlye v. Look Sports* (1993) 17 C.A.4th 1715, 22 C.R.2d 781, 6 Summary (10th), Torts, §1434. *Held*, the releases were lawful and enforceable, and their use did not constitute unfair competition.

(a) *Illegality*. The releases were not unlawful under C.C. 1668 (contract immunizing party for wrongful act is unlawful; see 1 Summary (10th), *Contracts*, §660), and thus their use did not constitute unfair competition. They were not overly broad, and the public interest did not preclude enforcement of an agreement to bar claims for negligent adjustment of ski bindings. (48 C.A.4th 618, distinguishing *Baker Pac. Corp. v. Suttles* (1990) 220 C.A.3d 1148, 269 C.R. 709, 1 Summary (10th), *Contracts*, §664.) The modified releases were lawful, even though they did not expressly exclude strict liability or product defect claims, because the releases neither expressly included those claims nor excluded claims prohibited by law. Further, even assuming that the use of the unmodified releases was actionable, the trial court did not abuse its discretion by choosing not to exercise its power under *B. & P.C. 17203* to enjoin defendants from repeating past misconduct. (48 C.A.4th 620.)

(b) *Unconscionability*. The widespread use of general releases by the ski industry was not unconscionable, and thus did not constitute unfair competition.

(1) There is nothing inherently unreasonable in skiers agreeing with distributors or service providers to allocate to skiers the risk of injury from the failure of a ski binding to release properly. The releases at issue deal with risks associated with negligent acts that increase the risks inherent in skiing. Further, consumers are not denied a meaningful choice by virtue of the common use of releases. Their choice to ski already exposes them to a number of risks inherent in that activity. Skiing, like other athletic or recreational sports, however beneficial, is not an essential activity. (48 C.A.4th 621.)

(2) In addition, even assuming an inequality of bargaining power, there was no credible evidence that the release agreements surprise skiers. The agreements themselves are short and the pertinent release language is as prominent as other language in the form. There was also no evidence that distributors or service providers conceal or misrepresent the language of the releases in order to obscure its effect. (48 C.A.4th 622.)

(c) *Misleading public or customers*. The releases did not constitute unfair competition on the grounds that they were likely to mislead the public regarding their legal rights or to cause customers to sign releases they do not understand, despite evidence that skiers rarely read or understand releases before signing them. "The mere fact a release is not sufficiently clear to be enforceable under *all* conceivable circumstances does not render its use unfair competition." (48 C.A.4th 622.) Moreover, one contracting party does not owe a general duty to another contracting party to explain the other's legal rights in connection with the agreement. "We will not presume a contracting party who

is uncertain regarding the breadth of a release will interpret the document broadly and thereby forego relief which would otherwise be available. We assume contracting parties are aware of their legal rights or will seek competent legal assistance where necessary. It is pure speculation a party faced with a release which may or may not cover a given injury will forego the possibility of redress." (48 C.A.4th 623.)

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

(6) *(New) Foreign Currency Exchange Practices.* A foreign currency exchanger does not violate the UCL by failing to disclose to customers that it received a more advantageous rate of exchange on the wholesale market than it gives customers and in failing to give customers the benefit of the better exchange rate. Although the currency exchanger is required under *Fin.C. 1815(a)* to disclose to customers the rate of exchange at which it sells foreign currency, the exchanger is not obligated under the Financial Code or the False Advertising Law (*B. & P.C. 17500* et seq.; see text, §109) to disclose the rate at which it purchases foreign currency or to disclose its profit on the foreign exchange spread. Also, the currency exchanger may not be held liable for breach of a fiduciary duty, because the currency exchanger's relationship to its customers in a purely commercial transaction does not give rise to a fiduciary duty. (*McCann v. Lucky Money* (2005) 129 C.A.4th 1382, 1392, 1398, 1399, 29 C.R.3d 437.)

(7) *(New) Failure To Warn Consumers About Exposure to Toxic Substances.* Vaccine manufacturers do not violate the UCL by failing to warn consumers of exposure to toxic substances as required by Proposition 65 (see 12 Summary (10th), *Real Property*, §911). The physicians who administer the vaccines provide the standard warning approved under federal law, a California administrative regulation states that federally approved warnings are deemed clear and reasonable warnings for prescription drugs, and thus the federal warning complies with the warning requirements of Proposition 65. (*In re Vaccine Cases* (2005) 134 C.A.4th 438, 459, 36 C.R.3d 80.)

(8) *(New) Manufacturer's Use of Tubular Steel, Rather Than Cast Iron, in Vehicle Exhaust Manifolds.* A motor vehicle manufacturer that used tubular steel in the exhaust manifolds of certain of its vehicles, instead of more durable and more expensive cast iron, did not violate the UCL. The practice was not unfair, because it did not violate public policy or a specific constitutional, statutory, or regulatory provision. The practice also was not fraudulent without evidence of representations or public expectations. Lastly, the practice was not false advertising, because there was no evidence of misrepresentation prohibited by *C.C.P. 1770(a)*. (*Bardin v. DaimlerChrysler Corp.* (2006) 136 C.A.4th 1255, 1264, 1274, 1275, 39 C.R.3d 634, Supp., supra, §107.)

(9) *(New) Failure To Disclose Defects That Cause Malfunction After Expiration of Warranty.* An automobile manufacturer did not violate the UCL by failing to disclose an engine defect that did not cause malfunctions in the automobiles until long after the warranty had expired. Because the manufacturer had no duty to disclose the defect, the practice did not violate the federal Magnuson-Moss Warranty Act or the Consumers Legal Remedies Act, and therefore was not unlawful. The manufacturer's failure to disclose a fact that it had no duty to disclose was not likely to deceive consumers, and thus, was not fraudulent. And, the failure to disclose a defect that might or might not shorten the effective life span of an automobile part that functions precisely as warranted throughout the warranty period is not likely to cause substantial injury to consumers, and therefore is not unfair. (*Daugherty v. American Honda Motor Co.* (2006) 144 C.A.4th 824, 837, 51 C.R.3d 118.)

(10) *(New) Cable Service Provider's Tying Practice.* A cable service provider's practice of requiring subscribers to purchase the basic cable tier, which includes television programming they may not want, in order to obtain radio or music service that is also included, is not an unlawful tying or negative option billing arrangement, is not unfair, and is not fraudulent in violation of the UCL. (*Belton v. Comcast Cable Holdings, LLC* (2007) 151 C.A.4th 1224, 1234, 60 C.R.3d 631.)

(11) *(New) Transfer Fees Charged by Managing Agent for Homeowners Associations.* The managing agent of homeowners associations did not violate the UCL by charging excessive fees, not authorized by statute or contract, to transfer title for home purchases. Charging \$ 100 in document fees and \$ 225 in transfer fees for each association in which a sold home resides is not unlawful, unfair, or fraudulent. (*Berryman v. Merit Property Management* (2007) 152

C.A.4th 1544, 1554, 62 C.R.3d 177.)

(12) *(New) Mobilehome Park's Tying Practice.* A mobilehome park did not engage in an unlawful tying practice under the Cartwright Act by requiring tenants to buy their mobilehomes from specific dealers; thus, the mobilehome park could not be held liable for violating the UCL in an action by a competing mobilehome dealer. (*SC Manufactured Homes v. Liebert* (2008) 162 C.A.4th 68, 93, 76 C.R.3d 73 [citing *Chavez v. Whirlpool Corp.* (2001) 93 C.A.4th 363, 113 C.R.2d 175, text, p. 435].)



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5. Procedure.
a. Parties.

13 Witkin Sum. Cal. Law Equity § 124

[§ 124] Parties.

(1) *Proper Plaintiffs.* As originally enacted, *B. & P.C. 17204* provided that all of the following had standing to bring a UCL action:

(a) *Prosecutors.* The Attorney General, district attorneys, city prosecutors, and county counsel.

(b) *Aggrieved persons.* A person acting for the interests of itself or its members. (But see *Shaolian v. Safeco Ins. Co.* (1999) 71 C.A.4th 268, 275, 83 C.R.2d 702, 2 Summary (10th), *Insurance*, §304 [plaintiffs, allegedly injured at shopping mall by insureds' son, lacked standing to sue homeowner's liability insurer under UCL for concealing medical coverage; policy limited liability to third parties injured away from home to activities of insureds].)

(c) *Private attorney general.* A person acting for the interests of the general public. (See *Committee on Children's Television v. General Foods Corp.* (1983) 35 C.3d 197, 215, 197 C.R. 783, 673 P.2d 660; *Stop Youth Addiction v. Lucky Stores* (1998) 17 C.4th 553, 71 C.R.2d 731, 950 P.2d 1086 [private for-profit corporation could, on behalf of general public, sue supermarket for selling cigarettes to minors in violation of P.C. 308]; *Pines v. Tomson* (1984) 160 C.A.3d 370, 380, 206 C.R. 866; *Consumers Union of United States v. Fisher Dev.* (1989) 208 C.A.3d 1433, 257 C.R. 151 [nonprofit consumer information organization had standing to sue planned residential community for adults for limiting occupancy to adults of 55 years and over]; *Dean Witter Reynolds v. Superior Court* (1989) 211 C.A.3d 758, 774, 259 C.R. 789 [plaintiff may sue without certifying as class action]; *Midpeninsula Citizens for Fair Housing v. Westwood Investors* (1990) 221 C.A.3d 1377, 1393, 271 C.R. 99, 8 Summary (10th), *Constitutional Law*, §914 [following *Consumers Union*]; *AICCO v. Insurance Co. of North America* (2001) 90 C.A.4th 579, 591, 109 C.R.2d 359, supra, §112 [following *Stop Youth Addiction*].)

Proposition 64, adopted by the voters at the November 2004 general election, amended the UCL in an effort to prevent the filing of frivolous lawsuits by some private attorneys. As amended, *B. & P.C. 17203* and *17204* continue to authorize prosecutors and aggrieved persons to bring UCL actions. However, an aggrieved person now is expressly defined as one "who has suffered injury in fact and has lost money or property" as a result of the unfair competition. The private attorney general doctrine was abrogated. Private parties now are authorized to bring representative actions on behalf of others only if they satisfy the definition of aggrieved person and comply with the requirements of *C.C.P.*

382 governing representative actions (see 4 *Cal. Proc.* (4th), *Pleading*, §247). This rule does not apply to prosecutors bringing UCL representative actions. Proposition 64 added identical amendments to *B. & P.C.* 17535 of the False Advertising Act. (See 115 *A.L.R.5th* 709 [right to private action seeking equitable relief under state consumer protection act]; 117 *A.L.R.5th* 155 [preconditions to right to private action under state consumer protection act]; 25 *California Lawyer* 36 [Prop. 64].) (On aggrieved person's right to intervene in action brought by district attorney, see *People v. Superior Court (Good)* (1976) 17 *C.3d* 732, 736, 131 *C.R.* 800, 552 *P.2d* 760, 4 *Cal. Proc.* (4th), *Pleading*, §211.)

(2) *Proper Defendants*. A "person" who engages in unfair competition in violation of the UCL is a proper defendant. (*B. & P.C.* 17203, 17206 et seq.) For purposes of the UCL, "person" means "natural persons, corporations, firms, partnerships, joint stock companies, associations, and other organizations of persons." (*B. & P.C.* 17201.)

(3) *Government Officers and Entities*. With the exception of the prosecutors listed in *B. & P.C.* 17204, a government officer or entity generally is not considered a "person" for purposes of the UCL, and thus can not sue or be sued. (See *Community Memorial Hosp. of San Buena Ventura v. Ventura* (1996) 50 *C.A.4th* 199, 209, 56 *C.R.2d* 732 [county could not be sued for business practices of county-operated hospital]; *Janis v. California State Lottery Com.* (1998) 68 *C.A.4th* 824, 831, 80 *C.R.2d* 549 [State Lottery Commission could not be sued for operating and promoting game subsequently found to be illegal]; *Trinkle v. California State Lottery* (1999) 71 *C.A.4th* 1198, 1202, 84 *C.R.2d* 496 [same]; *California Med. Assn. v. Regents of Univ. of Calif.* (2000) 79 *C.A.4th* 542, 550, 94 *C.R.2d* 194 [University of California could not be sued for deciding to restrict anesthesia services at medical center to university faculty members].)

Santa Monica Rent Control Bd. v. Bluvshstein (1991) 230 *C.A.3d* 308, 318, 281 *C.R.* 298, held that a city rent control board could not sue the owners of a residential building for violating laws relating to tract maps and permits to withdraw rental units from the market. However, *Santa Monica Rent Control Bd.* was distinguished and criticized, and a different result was reached, in *Notrica v. State Comp. Ins. Fund* (1999) 70 *C.A.4th* 911, 83 *C.R.2d* 89. Plaintiff employer sued the State Compensation Insurance Fund to recover damages for unfair competition, alleging that the Fund's failure to estimate reasonable claim reserve levels resulted in plaintiff paying higher premiums and receiving lower dividends. *Held*, the Fund was a "person" under the UCL.

(a) *Santa Monica Rent Control Bd.* "is difficult to apply." (70 *C.A.4th* 941.) Although the decision construes the UCL, the action at issue in that case actually was brought under the Unfair Business Practices Act (*B. & P.C.* 17000 et seq.; see 1 *Summary* (10th), *Contracts*, §609 et seq.). Moreover, in *Santa Monica Rent Control Bd.*, the public entity sought to prosecute the action, while the action here was prosecuted by a private party, whose standing the Fund did not challenge. (70 *C.A.4th* 942, 943.)

(b) Deeming the Fund a "person" under the UCL was justified, given that it could transact workers' compensation insurance required or authorized by law to the same extent as any other insurer, that it could sue and be sued in all actions arising out of any act or omission in connection with its business or affairs, the expansive scope of the UCL, and the breadth of the definition of "person" under the UCL. (70 *C.A.4th* 943, 944.)

(4) *Enforceability of Forum Selection Clause Against Parties*. A UCL action brought by a public prosecutor is not subject to a forum selection clause in a contract. However, a private plaintiff who has suffered no injury and who files a representative UCL action is bound by a forum selection clause, just as the defendant's consumers would be bound had they filed the action themselves. Although the label "private attorney general" is often used to describe a private plaintiff in a UCL action, filing a UCL action by a private plaintiff does not confer on that plaintiff the stature of a prosecuting officer, and the fact that the plaintiff may be acting as a so-called private attorney general is irrelevant for purposes of the forum selection issue. The relevant inquiry is (a) whether a private plaintiff, as a third party, is nevertheless closely related to the contractual relationship, and (b) whether the contractual forum state provides a suitable alternative forum for the lawsuit. (*Net2Phone v. Superior Court* (2003) 109 *C.A.4th* 583, 585, 587, 135 *C.R.2d* 149 [private plaintiff was bound by forum selection clause].)

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

(1) *Proper Plaintiffs.*

(a) *Prosecutors.* See *People v. Bhakta* (2006) 135 C.A.4th 631, 641, 37 C.R.3d 652 [city attorney had standing to bring action on behalf of People of State of California; it was unnecessary to allege violation of ordinance, and in any event, that allegation had been made].

(b) *Aggrieved persons.* Many cases, decided after the enactment of Proposition 64, construe and apply this term:

Aron v. U-Haul Co. of Calif. (2006) 143 C.A.4th 796, 802, 49 C.R.3d 555, Supp., supra, §116 [person who rented truck had standing to bring action alleging that rental company's refueling charges and business practices violated UCL].

Daro v. Superior Court (2007) 151 C.A.4th 1079, 1097, 61 C.R.3d 716 [tenants lack standing to bring UCL action against landlords for violation of Subdivided Lands Act; loss of tenants' leasehold interests did not result from that violation, but rather, from landlords' lawful exercise of right to withdraw property from rental market under Ellis Act].

Linear Technology Corp. v. Applied Materials (2007) 152 C.A.4th 115, 135, 61 C.R.3d 221 [where UCL action is based on contracts not involving either public in general or individual consumers who are parties to contract, corporate plaintiff may not rely on UCL for relief].

Buckland v. Threshold Enterprises, Ltd. (2007) 155 C.A.4th 798, 813, 66 C.R.3d 543 [executive director of organization seeking to advance civil rights of women lacked standing to bring action alleging that defendant's packaging and marketing of skin cream violated UCL; only loss of money or property was her expenditure of funds to buy defendant's products and she conceded that she had brought action as individual, rather than as class representative].

Trujillo v. First Amer. Registry (2007) 157 C.A.4th 628, 639, 68 C.R.3d 732 [consumers who did not lose money or property lacked standing to bring action alleging that consumer credit reporting agencies violated UCL by providing incomplete reports].

Hall v. Time (2008) 158 C.A.4th 847, 852, 855, 70 C.R.3d 466 [consumer who alleged that he received invoice for book during free trial period lacked standing to bring UCL action alleging unfair and misleading business practices against booksellers; consumer did not sustain actual injury, because he received book that he requested and did not allege that book was worth less than price he paid; consumer did not show causal connection or reliance on misrepresentation, because consumer paid after trial period had expired, and thus invoice did not induce him to pay immediately on receiving book].

Animal Legal Defense Fund v. Mendes (2008) 160 C.A.4th 136, 147, 72 C.R.3d 553 [nonprofit animal legal protection corporation and California consumers of retail dairy products lacked standing to bring UCL action alleging that calf ranchers violated animal cruelty statute; plaintiffs did not suffer economic injury].

Medina v. Safe-Guard Products, Int. (2008) 164 C.A.4th 105, 114, 78 C.R.3d 672, 2 Summary (10th), Insurance, Supp., §6 [customer who purchased vehicle service insurance contract lacked standing to bring UCL action alleging that defendant violated UCL by selling insurance without license; defendant did not deny customer's claim and did not give customer inferior service or products, and customer did not pay more for contract than what it was worth; relying on *Hall*].

Peterson v. Cellco Partnership (2008) 164 C.A.4th 1583, 1590, 80 C.R.3d 316 [plaintiffs who purchased cell phones and insurance from defendant communication equipment vendor, lacked standing to bring action alleging that defendant violated UCL by selling insurance without license; plaintiffs did not pay more for insurance because defendant received commission and could not have purchased same insurance for lower price directly from insurer or

from licensed agent; relying on *Hall* and distinguishing *Aron*]. *Proposition 64: Huntingdon Life Sciences v. Stop Huntingdon Animal Cruelty USA* (2005) 129 C.A.4th 1228 29 C.R.3d 521, 6 Cal. Proc. (5th), *Provisional Remedies*, §318 was the first reported case to hold that the standing provisions of Prop. 64 (text, p. 439) applied retroactively to cases pending when it was adopted. (129 C.A.4th 1261.) The Supreme Court subsequently adopted that position in *Californians for Disability Rights v. Mervyn's, LLC* (2006) 39 C.4th 223, 46 C.R.3d 57, 138 P.3d 207. Plaintiff, a nonprofit corporation, sued defendant, a corporation that owns and operates department stores, for violating the UCL by allegedly failing to maintain pathways between fixtures and shelves in defendant's stores sufficiently wide to permit access by persons using mobility aids such as wheelchairs and walkers. At the time the action was filed, plaintiff had standing under *B. & P.C. 17204*, which allowed "any person acting for the general public" to sue for relief from unfair competition. Trial resulted in judgment for defendant, and plaintiff appealed. While the appeal was pending, *B. & P.C. 17204* was amended by Proposition 64, under which a private person has standing to sue only if he or she "has suffered injury in fact and has lost money or property as a result" of the unfair competition, a condition not satisfied by plaintiff. Arguing that Proposition 64 eliminated plaintiff's standing, defendant moved to dismiss the appeal, but the Court of Appeal denied the motion on the ground that the standing provisions did not apply to cases pending when the measure took effect. *Held*, reversed.

(a) Proposition 64 does not state whether its standing provisions apply to pending cases. Relying on the presumption that statutes apply prospectively in the absence of a clearly expressed contrary intent (see *Evangelatos v. Superior Court* (1988) 44 C.3d 1188, 246 C.R. 629, 753 P.2d 585, 7 Summary (10th), *Constitutional Law*, §634), plaintiff contends that applying the standing provisions of Proposition 64 to pending cases is impermissibly retroactive, while defendant responds that applying the standing provisions is prospective. Defendant is correct. (39 C.4th 229.)

(b) Whether the application of a law is prospective or retroactive is a matter of function, not form. Courts must inquire whether a law changes the legal consequences of past conduct by imposing new or different liabilities based on that conduct, or whether it substantially affects existing rights and obligations. If so, then application to a trial of preenactment conduct is forbidden, absent an express legislative intent to permit retroactive application. If not, then application to a trial of preenactment conduct is permitted, because the application is prospective. A statute that establishes rules for the conduct of pending litigation without changing the legal consequences of past conduct is not made retroactive merely because it draws upon facts existing prior to its enactment. Rather, the statute is prospective in nature, because it relates to the procedure to be followed in the future. (39 C.4th 230, 231.)

(c) Applying the standing provisions of Proposition 64 to the present case is not to apply them retroactively. "The measure left entirely unchanged the substantive rules governing business and competitive conduct. Nothing a business might lawfully do before Proposition 64 is unlawful now, and nothing earlier forbidden is now permitted. Nor does the measure eliminate any right to recover." (39 C.4th 232.) Although Proposition 64 withdraws the standing of persons who have not been harmed to represent those who have, it need not for that reason be described as operating retroactively; for a lawsuit properly to be allowed to continue, standing must exist at all times until judgment is entered, and not just on the date that the complaint is filed. (39 C.4th 232.)

In *Branick v. Downey Savings & Loan Assn.* (2006) 39 C.4th 235, 46 C.R.3d 66, 138 P.3d 214, a companion case to *Californians for Disability Rights*, plaintiffs sued defendant savings and loan association for violation of the unfair competition and false advertising laws, alleging that defendant had misrepresented and overcharged customers for fees charged by governmental entities to record various official documents used in real estate transactions. Defendant moved for judgment on the pleadings on the ground that federal law preempted plaintiffs' claims. The superior court granted the motion, and plaintiffs appealed. While the appeal was pending, Proposition 64 amended *B. & P.C. 17204*, eliminating plaintiffs' standing to sue. The Court of Appeal reversed on the preemption issue, and, with respect to the standing issue, remanded the matter to the trial court to determine whether, if there should be a request to amend the complaint, the circumstances warranted granting leave to amend. *Held*, judgment of the Court of Appeal affirmed.

(a) The parties were directed to brief and argue the following issue: If the standing limitations of Proposition 64 apply to actions that were pending on the date that the proposition took effect, may a plaintiff amend the complaint to

substitute in or add a party who satisfies the standing requirements of *B. & P.C. 17204*, as amended by the proposition, and does the amended complaint relate back to the date of the initial complaint for statute of limitations purposes? (39 *C.4th* 240.) "We hold as follows: Proposition 64 does not affect the ordinary rules governing the amendment of complaints and their relation back. We thus reject defendant's contention that courts may never permit a plaintiff to amend a complaint to satisfy Proposition 64's standing requirements. Whether plaintiffs *in this case* may amend, however, cannot be determined at this stage of the proceedings because plaintiffs have not yet filed a motion for leave to amend, identified any person who might be named as a plaintiff, or described the claims such a person might assert." (39 *C.4th* 239.)

(b) In passing Proposition 64, the voters intended to prevent private attorneys from filing (1) frivolous lawsuits as a means of generating attorneys' fees without creating a corresponding public benefit; (2) lawsuits where no client has been injured in fact; (3) lawsuits for clients who have had no dealings with the defendant; and (4) lawsuits on behalf of the general public without accountability to the public or court supervision. Defendant contended that plaintiffs' counsel should not benefit from their impermissible actions by substituting new plaintiffs and having the new allegations relate back to the date of the initial complaint. The argument is not convincing. The policy objectives underlying Proposition 64 are fully achieved by applying the measure to pending cases. An additional rule barring amendments made in order to comply with Proposition 64 does not permit uninjured private persons to file actions under the unfair competition law. Also, barring an unfair competition action by a substituted plaintiff who complies with standing requirements serves none of the aforementioned objectives. Finally, the substitution of plaintiffs with standing under the Proposition cannot be described as permitting plaintiffs' attorneys to benefit from "impermissible" actions, because filing suit on behalf of an uninjured client before Proposition 64 was not impermissible. (39 *C.4th* 241.)

(c) Just because Proposition 64 does not preclude all complying pleading amendments does not mean that an amendment will be allowed in this case, because, under *C.C.P. 473*, leave to amend is entrusted to the superior court (see 5 *Cal. Proc.* (5th), *Pleading*, §1186), and that court has not yet had the opportunity to address this issue. However, without rendering an improper advisory opinion, the following categorical remarks may be made at the appellate level: (1) Contrary to defendant's contention, California courts have permitted plaintiffs who have been determined to lack standing, or who have lost standing after the complaint was filed, to substitute as plaintiffs the true real parties in interest (see, e.g., *Klopstock v. Superior Court* (1941) 17 *C.2d* 13, 108 *P.2d* 906, 5 *Cal. Proc.* (5th), *Pleading*, §970). (2) The "relation back" doctrine requires that the amended complaint must rest on the same general set of facts, involve the same injury, and refer to the same instrumentality as the original complaint. Accordingly, defendant argued that leave to amend must be denied, because persons with standing under Proposition 64 would necessarily seek to enforce a different legal obligation than would the current, uninjured plaintiffs. However, this is the type of question that belongs in the first instance to the superior court. (3) As support for the proposition that plaintiffs who *never* had standing may not substitute plaintiffs with standing, defendant relied on a federal case. However, that case is not in point, because plaintiffs here did have standing to sue at the time they filed their original complaint. In any event, California's courts have not followed this rule. (39 *C.4th* 242.)

Other cases discuss the effect of Proposition 64. (See *California Consumer Health Care Council v. Kaiser Foundation Health Plan* (2006) 142 *C.A.4th* 21, 33, 47 *C.R.3d* 593 [following *Californians for Disability Rights*; Proposition 64 applied retroactively to bar UCL action by nonprofit public benefit corporation suing on behalf of general public]; *Foundation for Taxpayer & Consumer Rights v. Nextel Communications* (2006) 143 *C.A.4th* 131, 135, 48 *C.R.3d* 836 [following *Branick*; plaintiffs were entitled to amend their complaint to comply with Proposition 64's modification of standing requirements]; *Schulz v. Neovi Data Corp.* (2007) 152 *C.A.4th* 86, 93, 60 *C.R.3d* 810 [same]; *Benson v. Kwikset Corp.* (2007) 152 *C.A.4th* 1254, 1266, 62 *C.R.3d* 284 [same]; *Cryoport Systems v. CNA Ins. Cos.* (2007) 149 *C.A.4th* 627, 632, 57 *C.R.3d* 358 [distinguishing *Branick*; plaintiff was not entitled to amend its complaint to comply with Proposition 64's modification of standing requirements, where complaint was filed 1 day before Proposition 64 passed, plaintiff was specifically given opportunity to amend its complaint to allege standing but plaintiff failed to do so]; 58 *Hastings L. J.* 623 [application of Proposition 64 to pending actions]; 46 *Santa Clara L. Rev.* 451 [analyzing Proposition 64]; 35 *Southwestern U. L. Rev.* 229 [criticizing Proposition 64 and recommending

reforms]; 32 Western State L. Rev. 155 [analyzing Proposition 64].)

Requirement of complying with class action procedures:

Cross-Reference: 4 Cal. Proc. (5th), *Pleading*, §268.

People v. Superior Court (Good) case:

Cross-Reference: 4 Cal. Proc. (5th), *Pleading*, §233.

(2) *Proper Defendants.* See *Wells v. One2One Learning Foundation* (2006) 39 C.4th 1164, 1203, 48 C.R.3d 108, 141 P.3d 225 [charter schools are persons, not public entities, and thus were proper defendants under UCL]; *Frazier Nuts v. American AG Credit* (2006) 141 C.A.4th 1263, 1282, 46 C.R.3d 869 [agricultural production credit association is person, not public entity, and thus was proper defendant under UCL].

(3) *Government Officers and Entities.* See *People for the Ethical Treatment of Animals v. California Milk Producers Advisory Bd.* (2005) 125 C.A.4th 871, 878, 22 C.R.3d 900 [agreeing with result, but not reasoning, of *California Med. Assn. v. Regents of Univ. of Calif.* (2000) 79 C.A.4th 542, 94 C.R.2d 194, text, p. 439; California Milk Producers Advisory Board was government entity that could not be sued for deceptive practices in advertising campaign].



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CHAPTER XIX - Equity

Witkin Summary of California Law
V. EQUITABLE RELIEF AGAINST TORTS: UNFAIR COMPETITION
C. Unfair Competition Law.
5. Procedure.
b. Remedies.
1. In General.

13 Witkin Sum. Cal. Law Equity § 125

[§ 125] In General.

(1) *Judicial Remedies Only*. Enforcement of UCL claims is solely in the courts. (*Greenlining Institute v. Public Util. Com.* (2002) 103 C.A.4th 1324, 1328, 127 C.R.2d 736 [Public Utilities Commission lacked jurisdiction to adjudicate false advertising claims under either UCL or False Advertising Act].)

(2) *Arbitration of UCL Claims*. A deceptive advertising claim seeking injunctive relief under the UCL that is brought to benefit health care consumers and the general public is not subject to arbitration. However, the same claim seeking restitution under the UCL may be arbitrated. (*Cruz v. PacifiCare Health Systems* (2003) 30 C.4th 303, 315, 317, 133 C.R.2d 58, 66 P.3d 1157, 6 Cal. Proc. (4th), *Proceedings Without Trial*, Supp., §484A.)

(3) *Equitable Relief*. The UCL authorizes the following equitable remedies against unfair competition:

(a) *Preventive relief*. Notwithstanding C.C. 3369 (specific and preventive relief may not be granted to enforce penalty, forfeiture, or penal law; see supra, §20), specific or preventive relief is available. (*B. & P.C. 17202*.)

(b) *Injunction*. An action for an injunction may be brought by prosecutors and by a person "who has suffered injury in fact and has lost money or property" as a result of the alleged unfair competition. (*B. & P.C. 17204*, supra, §124.) Injunctive relief may be granted against a person who engages, has engaged, or is proposing to engage in unfair competition. (*B. & P.C. 17203*.) (See *People v. First Fed. Credit Corp.* (2002) 104 C.A.4th 721, 735, 128 C.R.2d 542, infra, §126 [upholding permanent injunction prohibiting defendant, who engaged in false advertising in violation of UCL, from performing services for borrowers or lenders in connection with loans secured by lien on real property without obtaining real estate broker's license; defendant held herself out for years as real estate broker, even though she was unlicensed, and forged documents].)

(c) *Other necessary orders*. The court may make other necessary orders or judgments, including the appointment of a receiver, to prevent a prohibited act or to restore an interest in property that may have been acquired by that act. (*B. & P.C. 17203*.)

Disgorgement of illegal profits into a fluid recovery fund generally is not available in a UCL action unless the action is also properly prosecuted as a class action. (See *infra*, §127.)

(4) *Civil Penalties*. Civil penalties may be imposed for violations. (*B. & P.C. 17206 et seq.*; C.C. 3345; see *infra*, §126.)

(5) *Damages Limited to Restitution*. Damages, other than restitution under *B. & P.C. 17203*, are not available to a private litigant in a UCL action. (See *Industrial Indem. Co. v. Superior Court* (1989) 209 C.A.3d 1093, 1095, 257 C.R. 655; *Bronco Wine Co. v. Frank A. Logoluso Farms* (1989) 214 C.A.3d 699, 715, 262 C.R. 899 [abuse of discretion by awarding restitution to nonparties]; *ABC Int. Traders v. Matsushita Elec. Corp. of America* (1997) 14 C.4th 1247, 1268, 61 C.R.2d 112, 931 P.2d 290, 1 Summary (10th), *Contracts*, §613 [availability of restitution is not contingent on issuance of injunction]; *Day v. AT & T Corp.* (1998) 63 C.A.4th 325, 337, 74 C.R.2d 55 [denying plaintiffs' recovery of defendants' allegedly illegal profits from misleading and deceptive advertising practices]; *Payne v. National Collection Systems* (2001) 91 C.A.4th 1037, 1044, 111 C.R.2d 260, 7 Cal. Proc. (4th), *Judgment*, Supp., §401 [res judicata doctrine did not bar restitution for UCL violations, even though injunctive relief had been granted in prior UCL action against same defendants for same misconduct, where plaintiffs received no restitution in prior action]; *People v. Fremont Life Ins. Co.* (2002) 104 C.A.4th 508, 531, 128 C.R.2d 463, *infra*, §126 [imposition of restitution order, in addition to \$ 2 million in civil penalties, was proper]; *Alch v. Superior Court* (2004) 122 C.A.4th 339, 406, 19 C.R.3d 29 [back pay is not available as remedy in UCL class action].)

As the court noted in *Dean Witter Reynolds v. Superior Court* (1989) 211 C.A.3d 758, 259 C.R. 789: "The exclusion of claims for compensatory damages is ... consistent with the overarching legislative concern to provide a streamlined procedure for the prevention of ongoing or threatened acts of unfair competition. To permit individual claims for compensatory damages to be pursued as part of such a procedure would tend to thwart this objective by requiring the court to deal with a variety of damage issues of a higher order of complexity." (211 C.A.3d 774.)

In a UCL action, an order for restitution is one compelling the defendant to return money obtained through an unfair business practice to someone who had an ownership interest in the property taken or someone claiming through that person. The concept of restitution, as used in the UCL, is not limited only to the return of money or property that was once in the possession of that person. Instead, restitution is broad enough to allow a plaintiff to recover money or property in which he or she had a vested interest. (*Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 C.4th 1134, 1149, 131 C.R.2d 29, 63 P.3d 937, *infra*, §127 [but holding that relief plaintiff sought was not restitutionary, because plaintiff had neither ownership interest nor vested interest in subject property].)

(6) *Attorneys' Fees*. It has been held that a plaintiff who prevails on a UCL claim may seek attorneys' fees as a private attorney general under C.C.P. 1021.5 (see 7 Cal. Proc. (4th), *Judgment*, §225 et seq.), but that there is no equivalent right for a successful defendant. (*Walker v. Countrywide Home Loans* (2002) 98 C.A.4th 1158, 1179, 121 C.R.2d 79). However, the significance of this remedy is called into question by the passage of Proposition 64 in 2004, which abrogated the private attorney general doctrine in UCL actions. (See *supra*, §124.)

(7) *Remedies Are Cumulative*. Unless otherwise expressly provided, the remedies and penalties under the UCL are cumulative to each other and to those available under other laws. (*B. & P.C. 17205*; see *People v. McKale* (1979) 25 C.3d 626, 634, 159 C.R. 811, 602 P.2d 731 [violations of UCL and Mobilehome Parks Act]; *Hobby Industry Assn. of America v. Younger* (1980) 101 C.A.3d 358, 371, 161 C.R. 601 [violations of UCL and Fair Packaging and Labeling Act (*B. & P.C. 12601 et seq.*)]); *People v. National Assn. of Realtors* (1981) 120 C.A.3d 459, 473, 174 C.R. 728 [violations of UCL and Cartwright Act (see 1 Summary (10th), *Contracts*, §591 et seq.)]; *People v. Los Angeles Palm* (1981) 121 C.A.3d 25, 33, 175 C.R. 257 [violations of UCL and Lab.C. 351, prohibiting crediting tips against minimum wages]; *Herr v. Nestle U.S.A.* (2003) 109 C.A.4th 779, 789, 135 C.R.2d 477 [violations of UCL and Fair Employment and Housing Act].)

(8) *No Vicarious Liability*. A UCL action may not be predicated on vicarious liability; liability must be based on

the defendant's personal participation in the prohibited practice and on the defendant's unbridled control over that practice. (*Emery v. Visa Int. Service Assn.* (2002) 95 C.A.4th 952, 960, 116 C.R.2d 25.)

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

(1) *Judicial Remedies Only.* See *Juarez v. Arcadia Financial, Ltd.* (2007) 152 C.A.4th 889, 912, 61 C.R.3d 382 [discussing judicial remedies available in UCL class actions for purposes of permitting discovery of information about defendant's profits].

(2) *Arbitration of UCL Claims.*

Cruz case:

Cross-Reference: 6 Cal. Proc. (5th), *Proceedings Without Trial*, §500.

(3) *Equitable Relief.*

(b) *Injunction.* See *Madrid v. Perot Systems Corp.* (2005) 130 C.A.4th 440, 462, 30 C.R.3d 210 [injunctive relief was not available absent threat of future unlawful act]; *Feitelberg v. Credit Suisse First Boston, LLC* (2005) 134 C.A.4th 997, 1021, 36 C.R.3d 592 [injunctive relief was not available where disputed conduct had already ended]. (5) *Damages Limited to Restitution.* See *Inline v. Apace Moving Systems* (2005) 125 C.A.4th 895, 902, 23 C.R.3d 216 [restitution did not include reimbursement of money expended by plaintiff to recover property from third party or value of property wrongfully disposed of by defendant]; *Madrid v. Perot Systems Corp.*, *supra*, 130 C.A.4th 453 [electricity customer who alleged that defendants had violated UCL by restructuring California's electricity market was not entitled to restitution for overcharges or for profits defendants realized from third parties, where plaintiff did not have vested interest in either]; *Colgan v. Leatherman Tool Group* (2006) 135 C.A.4th 663, 694, 38 C.R.3d 36 [award of restitution against toolmaker that misrepresented that its tools were "Made in U.S.A." was improper; there was no evidence quantifying dollar value of consumer impact or advantage realized by toolmaker, and no evidence concerning amount of restitution necessary to restore purchasers to status quo ante]; *Shersher v. Superior Court* (2007) 154 C.A.4th 1491, 1498, 65 C.R.3d 634 [restitution was available remedy to plaintiff who paid money to retailer but was suing manufacturer]; *Bradstreet v. Wong* (2008) 161 C.A.4th 1440, 1460, 75 C.R.3d 253 [defendant corporate agents could not be required to pay restitution for corporation's violation of UCL by failing to pay minimum wages and vacation pay; defendants did not require employees to work for them personally and did not misappropriate for themselves corporate funds that otherwise would have been used to pay unpaid wages].

Payne case:

Cross-Reference: 7 Cal. Proc. (5th), *Judgment*, §464.(6) *Attorneys' Fees*.

C.C.P. 1021.5:

Cross-Reference: 7 Cal. Proc. (5th), *Judgment*, §259 et seq.

(7) *Remedies Are Cumulative.* In *California v. Altus Finance, S.A.* (2005) 36 C.4th 1284, 32 C.R.3d 498, 116 P.3d 1175, the California Attorney General filed suit in state court seeking damages, civil penalties, restitution, and injunctive relief alleging, among other theories, that the assets of defendant, an insolvent insurer, were fraudulently acquired in violation of the UCL after the Commissioner of the California Department of Insurance had seized defendant's assets and placed defendant into conservatorship. The case was removed to federal district court, where the judge found that *Ins.C. 1037(f)*, which grants the commissioner the exclusive authority to litigate matters in connection with the conservatorship, precluded the Attorney General's action. On appeal, the Ninth Circuit Court of Appeals certified to the California Supreme Court several questions, including the following: Can the Attorney General pursue civil remedies under the UCL? *Held*, under the UCL, restitution was not available, civil penalties were available, and injunctive relief was available to the extent that it implicated core law enforcement functions.

(a) *Restitution*. The commissioner, acting primarily not as a regulator, but as a conservator and trustee, has exclusive authority under *Ins.C. 1037(f)* to act on behalf of an insolvent insurer's policyholders and creditors in civil actions. This exclusive authority precludes the Attorney General from exercising concurrent jurisdiction in a manner that would essentially duplicate the commissioner's legal action. The Attorney General's claim for restitution under the UCL in this case did precisely that, and was therefore barred by *Ins.C. 1037(f)*. (36 C.4th 1307.)

(b) *Civil penalties*. Civil penalties, which are paid to the government, are designed to penalize a defendant for past illegal conduct and are not primarily concerned with restoring the property of policyholders or creditors. The public, penal objective of civil penalties under the UCL differs fundamentally from the commissioner's purpose under the Insurance Code. The Attorney General, therefore, was entitled to pursue a claim for civil penalties under the UCL. (36 C.4th 1308.)

(c) *Injunctive relief*. When seeking an injunction to protect the public and to prevent defendants from committing future unlawful acts, the Attorney General is fulfilling primarily a law enforcement function that is not prohibited by *Ins.C. 1037(f)*. However, if the Attorney General seeks an injunction designed to resolve a conflict or in some way change the relationship between defendants and policyholders, creditors, or others represented by the commissioner as conservator and trustee of an insolvent insurer, that injunction would be precluded by *Ins.C. 1037(f)*. Here, the record was unclear about which category of injunctive relief the Attorney General requested. (36 C.4th 1308.)

(9) *(New) Aiding and Abetting Is Sufficient To Impose Liability*. Liability may be imposed on a defendant who aids and abets an act constituting a violation of the UCL. (*Schulz v. Neovi Data Corp.* (2007) 152 C.A.4th 86, 93, 60 C.R.3d 810 [holding that aiding and abetting claim was properly pleaded as to some defendants but not as to other defendants].)

(10) *(New) No Right to Jury Trial*. Because the UCL provides only equitable remedies, there is no right to a jury trial in a UCL action. (*People v. Bestline Products* (1976) 61 C.A.3d 879, 916, 132 C.R. 767, text, §117 [action by Attorney General]; *People v. Toomey* (1984) 157 C.A.3d 1, 17, 203 C.R.642 [same]; *People v. First Fed. Credit Corp.* (2002) 104 C.A.4th 721, 733, 128 C.R.2d 542, text, §126 [same]; *Hodge v. Superior Court* (2006) 145 C.A.4th 278, 284, 51 C.R.3d 519 [action by private citizen].)



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13 Witkin Sum. Cal. Law Equity § 126

[§ 126] Civil Penalties.

(1) *In General.* Civil penalties may be assessed against a person who engages in unfair competition (*B. & P.C. 17206*), or against a person who violates an injunction issued under *B. & P.C. 17203* (*B. & P.C. 17207*). Additional civil penalties may be imposed for acts perpetrated against senior citizens and disabled persons. (*B. & P.C. 17206.1*; *C.C. 3345*; see *20 Pacific L. J. 514.*)

(2) *Illustrations.* In *People v. Fremont Life Ins. Co. (2002) 104 C.A.4th 508, 128 C.R.2d 463*, the Attorney General brought a UCL action against defendant insurer arising from defendant's practice of marketing living trusts as a means of inducing the purchase of annuities. The trial judge found that defendant and its agents violated the UCL by engaging in the unauthorized practice of law, by employing untrue and misleading statements in marketing trust products, and by engaging in unfair and fraudulent practices in marketing annuities, specifically, in failing to disclose adequate information concerning a premium charge included in the annuity policy. The judge imposed over \$ 2 million in civil penalties, granted injunctive relief, and required the insurer to offer restitution to its victims. *Held*, affirmed.

(a) The imposition of civil penalties did not deprive defendant of due process, because the Department of Insurance had expressly disapproved the language describing the premium charge in defendant's policy as misleading and deceptive, which provided defendant with fair notice that the premium charge would result in liability under the unfair competition law. (*104 C.A.4th 514.*)

(b) The amount of the civil penalties was not excessive. *B. & P.C. 17206* confers discretion on trial judges in setting the penalty, with consideration of the equities of the individual case. (*104 C.A.4th 523.*) In this case, defendant's misconduct was not inadvertent. (*104 C.A.4th 524.*) A finding that defendant had engaged in "reprehensible" conduct was not required. (*104 C.A.4th 526.*) Even if there was some value to the annuity policies sold and the penalties exceeded the financial gain realized by defendant, the penalty determination is based on the defendant's opportunity for gain and the defendant's financial condition as a whole. (*104 C.A.4th 528.*) Further, the misconduct was aimed at the elderly, there were 9,143 violations, the misconduct occurred over more than 2 years, and the misconduct was wilful. (*104 C.A.4th 530.*)

(c) The restitution order was proper. The trial judge could order restitution without proof that all consumers were deprived of money or property as a result of the unfair business practice. (104 C.A.4th 531.) The restitution order did not constitute excessive double punishment. (104 C.A.4th 533.) Defendant was required to send a prescribed notice to each person who purchased an annuity policy; this notification requirement was not inflammatory, because it was accurate and readily understandable. (104 C.A.4th 534.)

In *People v. First Fed. Credit Corp.* (2002) 104 C.A.4th 721, 128 C.R.2d 542, a district attorney sued defendants, a credit corporation and its two principals, alleging that defendants made untrue and misleading statements to induce the public to obtain and pay for loan services in violation of the UCL and B. & P.C. 17500 et seq. (False Advertising Act). The trial judge imposed \$ 200,000 in civil penalties under B. & P.C. 17206 and 17536, ordered that defendants be jointly and severally liable for these penalties, ordered restitution, and permanently enjoined defendants from engaging in various acts or practices. *Held*, affirmed.

(a) Evidence of a defendant's financial condition, although relevant, is not essential for determining the amount of civil penalties to be imposed under B. & P.C. 17206 or 17536. (104 C.A.4th 728.)

(b) The amount of the civil penalties here was not excessive. There were 300 separate violations of the UCL and 400 violations of the false advertising law. Had the maximum penalty of \$ 2,500 been imposed for each violation, defendants would have been liable for \$ 1.75 million. (104 C.A.4th 733.) After considering defendants' financial status, the trial judge reduced the total penalty to \$ 200,000, a reduction of more than 88%. Defendant corporation's financial statements showed fee income over a 12-month period of \$ 1,916,468 on loan volume of \$ 58 million. Defendant principals lived in a house worth at least \$ 600,000 to \$ 700,000, with title to the property held in the name of the mother of one of them. Further, it was defendants' practice to shield their assets by not holding title in their own names, while continuing to fully enjoy the assets. (104 C.A.4th 734.)

(c) The trial judge properly imposed joint and several liability for the civil penalties. As a general matter, parties may be held jointly and severally liable for unfair competition and for making false and misleading statements. (104 C.A.4th 734.) (See *People v. Beaumont Inv., Ltd.* (2003) 111 C.A.4th 102, 129, 131, 3 C.R.3d 429 [civil penalty of \$ 525,000 was properly imposed against landlord who unlawfully forced tenants to accept long-term leases to avoid rent control; court could calculate number of violations on "per act" rather than "per person" basis, and amount was not excessive, given 14,124 violations, continuous nature of defendant's conduct, and injury to tenants].)

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

(2) *Illustrations.* See *California v. Altus Finance, S.A.* (2005) 36 C.4th 1284, 1307, 32 C.R.3d 498, 116 P.3d 1175, Supp., supra, §125 [*Ins.C. 1037(f)*], which grants Insurance Commissioner exclusive authority to litigate matters in connection with conservatorship of insolvent insurer, did not preclude Attorney General from seeking civil penalties under UCL for fraudulent acquisition of insolvent insurer's assets].



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C. Unfair Competition Law.

5. Procedure.

b. Remedies.

3. Disgorgement of Unlawful Profits into Fluid Recovery Fund.

13 Witkin Sum. Cal. Law Equity § 127

[§ 127] Disgorgement of Unlawful Profits into Fluid Recovery Fund.

(1) *General Rule: Disgorgement Is Unavailable in UCL Actions.* Although some earlier cases had held that disgorgement is an available remedy under the UCL (see, e.g., *People v. Thomas Shelton Powers, M.D. (1992) 2 C.A.4th 330, 341, 3 C.R.2d 34*), the Supreme Court repudiated that view in *Kraus v. Trinity Management Services (2000) 23 C.4th 116, 96 C.R.2d 485, 999 P.2d 718*. Plaintiffs, six former tenants of residential rental properties, brought an action against the owners and property managers on behalf of themselves and present and former tenants. Plaintiffs sought declaratory relief, restitution, and civil penalties for allegedly unlawful assessments of a nonrefundable tenant charge for pre-lease administrative services (TIER fee), liquidated damages, and security for unpaid rent. The matter was not certified as a class action. The trial judge found that the TIER fee collected from every new tenant was an illegal security fee within the meaning of C.C. 1950.5 (see 1 *Summary* (10th), *Contracts*, §522 et seq.) and also was an unfair business practice under the UCL. In addition to injunctive relief, the judge ordered defendants to make a restitution/disgorgement to a fluid recovery fund for the amount of the TIER fees and security deposits collected from the individual plaintiffs. *Held*, reversed; *B. & P.C. 17203* does not authorize orders for disgorgement into a fluid recovery fund in representative UCL actions.

(a) The term "fluid recovery" refers to the application of the equitable doctrine of *cy pres* (see 13 *Summary* (10th), *Trusts*, §302 et seq.) in the context of a modern class action. The implementation of fluid recovery involves three steps. First, the defendant's total damage liability is paid over to a class fund. Second, individual class members are afforded an opportunity to collect their individual shares by proving their particular damages, usually according to a lowered standard of proof. Third, any residue remaining after individual claims have been paid is distributed by one of several practical procedures that have been developed by the courts. (23 *C.4th* 127; see 4 *Cal. Proc.* (4th), *Pleading*, §296.)

(b) The Legislature has not expressly authorized monetary relief other than restitution in representative UCL actions, but has authorized disgorgement into a fluid recovery fund in class actions. Although the Legislature is well aware of the distinction between class actions and representative actions, it has not done so for UCL actions. Thus, to the extent that the trial judge ordered defendants to make refunds other than to refund moneys to tenants and former tenants, the award was not authorized by the UCL and was not a permissible exercise of the court's equitable powers. Further, a contrary result might implicate due process concerns. Lastly, because a representative UCL action is not

subject to the same level of judicial supervision as a class action, a UCL action seeking disgorgement into a fluid recovery fund on behalf of absent persons may not, in fact, serve the public. (23 C.4th 137.) (See 90 Cal. L. Rev. 959 [Kraus].)

Cortez v. Purolator Air Filtration Products Co. (2000) 23 C.4th 163, 96 C.R.2d 518, 999 P.2d 706, a companion case to *Kraus*, held that employees may recover unlawfully withheld overtime wages as restitution, but that, under the *Kraus* rule, profits that the employer received from withholding those wages could not be ordered disgorged to a fluid recovery fund. (23 C.4th 168, 172.) In allowing recovery of unpaid back wages as restitution, the *Cortez* court reasoned as follows: The unlawfully withheld wages were property of the employee within the meaning of the UCL. An order that a business pay an employee unlawfully withheld wages is consistent with the legislative intent underlying B. & P.C. 17203 of authorizing orders necessary to restore to a person money or property acquired by means of an unfair business practice. The order was not one for payment of damages, which are not available under B. & P.C. 17203; rather, once earned, the unpaid wages became property to which the employees were entitled. Failure to promptly pay those wages was unlawful and thus an unfair business practice. (23 C.4th 174.)

Korea Supply Co. v. Lockheed Martin Corp. (2003) 29 C.4th 1134, 131 C.R.2d 29, 63 P.3d 937, extended the *Krause* rule to a UCL action brought by an individual. Plaintiff, a business that represented manufacturers of military equipment, alleged that defendants illegally induced a foreign government to award a contract to a manufacturer other than the one represented by plaintiff. *Held*, disgorgement of profits that is not restitutionary in nature is not an available remedy.

(a) Restitution is the only monetary remedy expressly authorized by B. & P.C. 17203. Nothing in the legislative history indicates that the Legislature intended to authorize a court to order a defendant to disgorge profits to a plaintiff who does not have an ownership interest in those profits. (29 C.4th 1148.)

(b) Plaintiff described its requested remedy as restitution. However, that term did not accurately describe the relief sought, because plaintiff had neither an ownership interest nor a vested interest in the money it sought to recover. At most, plaintiff had an expectancy in the receipt of a commission. (29 C.4th 1149.) Because the recovery requested could not be traced to particular funds in possession of one of the defendants, it was not the proper subject of a constructive trust. The nonrestitutionary disgorgement remedy sought by plaintiff closely resembled a claim for damages, which is not permitted under the UCL. (29 C.4th 1150.) Allowing that remedy would have enabled plaintiff to obtain tort damages without proving the elements of liability under its traditional tort claim for intentional interference with prospective economic advantage, and would have exposed defendants to multiple suits and the risk of duplicative liability without the traditional limitations on standing, thereby raising due process concerns. (29 C.4th 1151.)

(c) This result did not foreclose all relief to plaintiff. While plaintiff could not recover monetary relief under the limited remedies provided by the UCL, plaintiff could pursue a claim under traditional tort law for intentional interference with prospective economic advantage. (29 C.4th 1152.)

(2) *Distinction: UCL Actions Brought as Class Actions.* *Corbett v. Superior Court* (2002) 101 C.A.4th 649, 125 C.R.2d 46, involved a question of first impression: Are UCL claims and class actions mutually exclusive as a matter of law? Plaintiff filed a class action against a bank and a car dealership, alleging violation of the UCL and other claims, arising from defendants' practice of approving car loans at an interest rate lower than that disclosed to the customer, and then splitting the difference between the disclosed rate and the rate actually charged. Relying on the holding in *Kraus*, *supra*, the trial judge struck that portion of plaintiff's pleading that sought disgorgement of defendants' unlawful profits into a fluid recovery fund under the UCL and refused to certify a class to pursue the UCL claim, finding, as a matter of law, that plaintiff could not pursue a class action for violations of the UCL. *Held*, this was error; UCL claims and class actions are not mutually exclusive.

(a) While fluid recovery is not authorized in a UCL action that is not certified as a class action, when a class has been properly certified pursuant to the requirements of C.C.P. 382, a plaintiff in a UCL action may seek disgorgement

of unlawful profits into a fluid recovery fund. (101 C.A.4th 663.) Refusing to ever permit a liquid recovery in a UCL action would thwart the purpose of the UCL, because defendants would thereby be permitted to keep a portion of their illegal profits. (101 C.A.4th 667.)

(b) Nothing in the UCL suggests that C.C.P. 382 and 384, which govern class actions, should not apply to the UCL. The statutes complement each other and the Legislature had no reason to specify that a fluid recovery or class certification is permitted with a UCL action. (101 C.A.4th 670.)

(c) Providing a plaintiff with this alternative would not obstruct the purpose of the UCL, nor would it place any greater burden on defendants. (101 C.A.4th 670.)

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

(1) *General Rule: Disgorgement Is Unavailable in UCL Actions.* *Fluid recovery:*

Cross-Reference: 4 Cal. Proc. (5th), *Pleading*, §331.(2) *Distinction: UCL Actions Brought as Class Actions.* See *Madrid v. Perot Systems Corp.* (2005) 130 C.A.4th 440, 460, 30 C.R.3d 210 [nonrestitutionary disgorgement is not available remedy in UCL class action; distinguishing *Corbett v. Superior Court* (2002) 101 C.A.4th 649, 125 C.R.2d 46, text, p. 447]; *Feitelberg v. Credit Suisse First Boston, LLC* (2005) 134 C.A.4th 997, 1016, 36 C.R.3d 592 [following *Madrid*].

A plaintiff is entitled to discover information about the defendant's profits in a UCL class action where a fluid recovery fund is possible under a class action statute or where the plaintiff class is alleged to have suffered a measurable loss permitting "restitutionary disgorgement," as authorized by *Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 C.4th 1134, 131 C.R.2d 29, 63 P.3d 937, text, p. 447. (See *Juarez v. Arcadia Financial, Ltd.* (2007) 152 C.A.4th 889, 914, 61 C.R.3d 382.)



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C. Unfair Competition Law.
5. Procedure.
c. Statute of Limitations and Defenses.

13 Witkin Sum. Cal. Law Equity § 128

[§ 128] Statute of Limitations and Defenses.

(1) *Statute of Limitations.* The statute of limitations for UCL actions is 4 years after accrual of the cause of action. (*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, supra, §127 [action under UCL is subject to 4-year limitations period of *B. & P.C. 17208*, even if action could have been pursued under another statute]; Cal. Civil Practice, 6 Business Litigation, §§60:5 et seq., 60:50 et seq.; Rutter Group, Employment Litigation §14:485 et seq.)

(2) *Equitable Defenses.* The *Cortez* court also made the following observations about the availability of equitable defenses in UCL actions: Equitable defenses may not be asserted to wholly defeat a UCL action, because a UCL action arises out of unlawful conduct. UCL remedies are cumulative to remedies available under other laws and, as *B. & P.C. 17203* indicates, have an independent purpose, i.e., deterrence of and restitution for unfair business practices. Therefore, what would otherwise be equitable defenses may be considered by the court when it exercises its discretion over which, if any, remedies authorized by *B. & P.C. 17203* should be awarded. The statute does not mandate restitution or injunctive relief when an unfair business practice has been shown. Rather, it provides that the court may make those orders or judgments as may be necessary to prevent the use or employment of any practice that constitutes unfair competition or to restore money or property. That is a grant of broad equitable power. In addition to those defenses that might be asserted to an alleged violation of the statute that underlies a UCL action, a UCL defendant may assert equitable considerations. In deciding whether to grant the remedy or remedies sought by a UCL plaintiff, the court must permit the defendant to offer those considerations. In short, consideration of the equities between the parties is necessary to ensure an equitable result. (23 C.4th 179.)

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

(2) *Equitable Defenses.* See *Ticconi v. Blue Shield of Calif. Life & Health Ins. Co. (2008)* 160 C.A.4th 528, 543, 72 C.R.3d 888, 2 Summary (10th), Insurance, Supp., §50 [in UCL action alleging that insurer violated Insurance Code by failing to attach insured's application to, or endorse it on, policy when issued and later rescinding policy based on insured's misrepresentations, unclean hands and fraud were not available defenses].

Where a UCL action would drag the court into an area of complex economic or similar policy, the court has discretion to abstain from applying equitable remedies. (See *Shamsian v. Department of Conservation (2006)* 136

C.A.4th 621, 641, 39 *C.R.3d* 62 [abstention from ordering restitution and disgorgement was proper in UCL action alleging that Department of Conservation had failed to provide convenient, efficient, and economical beverage container redemption opportunities, based on complex statutory arrangement of requirements and incentives involving participants in beverage container recycling regulatory scheme]; *Alvarado v. Selma Convalescent Hosp.* (2007) 153 *C.A.4th* 1292, 1303, 64 *C.R.3d* 250 [following *Shamsian*; in UCL action, trial judge's refusal to order restitution and injunctive relief to require skilled nursing and intermediate care facilities to comply with minimum nurse per patient requirements of *Health & Saf.C.* 1276.5 was proper; adjudicating controversy would have required judge to become involved in complex health care matters concerning nursing staffing and to assume regulatory function entrusted to Department of Health Care Services].)(3) (*New*) *Litigation Privilege*. Under C.C. 47(b), communications made as part of judicial or quasi-judicial proceedings are absolutely privileged. (See 5 *Summary* (10th), *Torts*, §567 et seq.) In *People v. The Pac. Lumber Co.* (2008) 158 *C.A.4th* 950, 70 *C.R.3d* 501, the court held that the privilege barred a UCL action by the state against a lumber company for fraud in intentionally misrepresenting and concealing crucial facts during administrative proceedings under the California Environmental Quality Act in connection with the company's agreement to sell land to the state and federal governments. (158 *C.A.4th* 963.)

(4) (*New*) *Noerr-Pennington Doctrine*. Under the *Noerr-Pennington Doctrine*, those who petition the government generally are immune from antitrust liability, even if the motive behind their efforts is anticompetitive. The doctrine precludes all civil liability for petitioning activities before justice courts and administrative and other governmental agencies. However, there is an exception to the doctrine where the efforts to influence government are merely a sham. (See 5 *Summary* (10th), *Torts*, §764.) In *People v. The Pacific Lumber Co.*, the court held that the doctrine barred a UCL action. The state claimed that the company submitted a report containing false data in order to obtain approval for an increased rate of timber harvesting and to ensure decreased environmental mitigation requirements. The company's challenged practices "were genuinely intended to influence government action, not mere sham activities intended to use governmental processes to interfere with a competitor's business relationships." (158 *C.A.4th* 966.)



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5. Procedure.
d. Appellate Procedure.

13 Witkin Sum. Cal. Law Equity § 129

[§ 129] Appellate Procedure.

(1) *Criticism of Statutory Procedure.* As originally enacted, *B. & P.C. 17209* required an appellant challenging an issue relating to the violation, application, or construction of the UCL in an appellate court to serve a notice of appeal, within 3 days of commencing the appeal, on the Attorney General and the district attorney of the county in which the action was initially filed. An extension could be granted for good cause. The notice was required to include the appellant's opening brief or petition and brief. Until proof of service of the notice was filed with the court, no judgment or relief, either temporary or permanent, could be granted.

Californians for Population Stabilization v. Hewlett-Packard Co. (1997) 58 C.A.4th 273, 67 C.R.2d 621, criticized *B. & P.C. 17209* as "deficient" (58 C.A.4th 283), and held that it was not jurisdictional. The court observed that compliance with the statute, if read literally, was impossible, because it required an appellant to serve its opening brief prior to the time that the appellate record could be prepared. (58 C.A.4th 284.) A more reasonable interpretation of the statute was that service had to be completed within 3 days after filing the brief. It is not until then that the issues on appeal are specifically set forth and a determination may be made whether to file an amicus curiae brief. If service is not completed by that time, and if the time for serving it has not been extended for good cause, then no judgment or relief may be granted by the court. (58 C.A.4th 285.)

(2) *Legislative Response.* The 2004 Legislature responded to criticism of *B. & P.C. 17209* by amending the statute. Each person who has filed a petition or brief with the appellate court is required to serve a copy of it on the Attorney General and on the district attorney within 3 days of its filing. Upon the request of the Attorney General or the district attorney, each person who has filed any other document, including all or part of the appellate record, with the court in addition to a brief or petition must provide a copy of that document without charge to the Attorney General or the district attorney within 5 days of the request. The time for service may be extended for good cause. Until proof of service of the brief or petition is filed with the court, no judgment or relief, either temporary or permanent, may be granted or opinion issued.

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

(3) *(New) Proposition 64 Does Not Limit Right To Appeal.* The passage of Proposition 64 in November 2004, which abrogated the private attorney general doctrine in UCL actions (see text, §124), does not affect a plaintiff's right to

appeal the dismissal of a UCL action. Even if a plaintiff has no authority to maintain the lawsuit in superior court by virtue of Proposition 64's restrictions on superior court standing, the plaintiff is sufficiently aggrieved by the dismissal of its complaint to have standing to appeal. (See *United Investors Life Ins. Co. v. Waddell & Reed* (2005) 125 C.A.4th 1300, 1304, 23 C.R.3d 387.)



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D. Right To Compete Act.
1. Nature and Purpose of Act.

13 Witkin Sum. Cal. Law Equity § 130

[§ 130] Nature and Purpose of Act.

The 1979 Legislature extensively revised the law regulating advertising of professional services by doctors, optometrists, pharmacists, and others by eliminating many restrictions. (See Stats. 1979, Chap. 653.) The revised law was adopted in apparent response to United States Supreme Court decisions protecting commercial speech and nullifying prohibitions against advertising the price of professional services. (See *11 Pacific L. J. 318, 323*; *7 Summary (10th), Constitutional Law, §§324 et seq., 329.*)

B. & P.C. 651, the principal section, covers proper and improper advertising. (See *infra, §§131, 132.*) *B. & P.C. 17500.1* provides that "no trade or professional association, or state agency, state board, or state commission within the Department of Consumer Affairs shall enact any rule, regulation, or code of professional ethics which shall restrict or prohibit advertising" that does not violate *B. & P.C. 17500* or is not prohibited by other laws.

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



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D. Right To Compete Act.
2. Unlawful Advertising Practices.

13 Witkin Sum. Cal. Law Equity § 131

[§ 131] Unlawful Advertising Practices.

(1) *False Statements, Claims, or Images.* It is unlawful for a person licensed under the Business and Profession Code to disseminate a public communication containing a false, fraudulent, misleading, or deceptive statement, claim, or image to induce, or likely to induce, the rendering of professional services or the furnishing of products in connection with the profession for which he or she is licensed. A "public communication" includes, but is not limited to, communication by means of mail, television, radio, motion picture, newspaper, book, list or directory of healing arts practitioners, Internet, or other electronic communication. (*B. & P.C. 651(a).*)

Under *B. & P.C. 651(a)*, a prohibited statement, claim, or image includes one that does any of the following:

- (a) Contains a misrepresentation of fact.
- (b) Is likely to mislead or deceive because of a failure to disclose material facts.
- (c) Is intended or is likely to create false or unjustified expectations of favorable results. Specific requirements apply to photographs, models, and other images.
- (d) Relates to fees, other than a standard consultation fee or a range of fees for specific types of services, without fully and specifically disclosing all variables and other material factors.
- (e) Contains other representations or implications that in reasonable probability will cause an ordinarily prudent person to misunderstand or be deceived.
- (f) Makes a claim either of professional superiority or of performing services in a superior manner, unless that claim is relevant to the service being performed and can be substantiated with objective scientific evidence.
- (g) Makes a scientific claim that cannot be substantiated by reliable, peer reviewed, published, scientific studies.
- (h) Includes a statement, endorsement, or testimonial that is likely to mislead or deceive because of a failure to disclose material facts.

(2) *Deceptive Statements.* *B. & P.C. 651(c)* requires accuracy and prohibits deceptive statements as follows:

(a) A price advertisement must be exact and may not use such phrases as "as low as," "and up," "lowest prices," or similar claims. Price advertising may not be fraudulent, deceitful, or misleading, including claims of bait, discount, premiums, gifts, or similar statements. The price for each product or service must be clearly identifiable. The price advertised must include charges for related professional services, including dispensing and fitting services, unless the advertisement specifically and clearly indicates otherwise.

(b) An advertisement that refers to services or their costs and that uses words of comparison must be based on verifiable data substantiating the comparison. A person disseminating the advertising must be prepared to provide information sufficient to establish the accuracy of the comparison.

(3) *Other Improper Practices.* A licensed person may not compensate or give anything of value to a representative of the press, radio, television, or other communication medium in anticipation of, or in return for, professional publicity unless this fact is made known in the publicity. (*B. & P.C. 651(d).*) A licensed person may not use a professional card, sign, listing, etc., that includes a false or deceptive statement. (*B. & P.C. 651(e).*)

(4) *Regulations To Enforce Restrictions.* Each of the healing arts boards and examining committees must adopt appropriate regulations to enforce the law. (*B. & P.C. 651(i).*)

(5) *Sanctions and Enforcement.* *B. & P.C. 651* may be enforced as follows:

(a) Violations are punishable as misdemeanors. (*B. & P.C. 651(f).*)

(b) Violations constitute good cause for revocation or suspension of a license or other disciplinary action. (*B. & P.C. 651(g).*)

(c) The Attorney General must seek injunctive or other appropriate relief to enforce *B. & P.C. 651*. (*B. & P.C. 651(j).*)

(d) District attorneys, county counsels, or city attorneys may also seek appropriate relief pursuant to existing law. (*B. & P.C. 651(j).*)

(e) A physician and surgeon or a podiatrist who knowingly and intentionally violates *B. & P.C. 651* may be cited and assessed an administrative fine. (*B. & P.C. 651(k).*)

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



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D. Right To Compete Act.
3. Permissible Practices.

13 Witkin Sum. Cal. Law Equity § 132

[§ 132] Permissible Practices.

Under *B. & P.C. 651(h)*, advertising containing the following is permissible:

- (1) The name of the practitioner.
- (2) Addresses and telephone numbers of offices maintained by the practitioner.
- (3) Office hours regularly maintained by the practitioner.
- (4) Languages, other than English, fluently spoken by the practitioner or a person in the practitioner's office.
- (5) A statement that a specified health care practitioner is board certified or that his or her practice is limited to specific fields, providing that certain other requirements are satisfied.
- (6) A statement that the practitioner provides services under a specified private or public insurance plan or health care plan.
- (7) Names of schools and postgraduate clinical training programs from which the practitioner has graduated, together with the degrees received.
- (8) Publications authored by the practitioner.
- (9) Teaching positions currently or formerly held by the practitioner, together with pertinent dates.
- (10) The practitioner's affiliations with hospitals or clinics.
- (11) Charges or fees for services or commodities offered by the practitioner.
- (12) A statement that the practitioner regularly accepts installment payments of fees.
- (13) Otherwise lawful images of a practitioner, his or her physical facilities, or a commodity to be advertised.

(14) The manufacturer, designer, style, make, trade name, brand name, color, size, or type of commodities advertised.

(15) An advertisement of a registered dispensing optician may include additional statements if they do not violate the Business and Professions Code.

(16) A statement providing public health information encouraging preventive or corrective care.

(17) Other factual information that is not false, fraudulent, misleading, or likely to deceive.

Prescription drugs or devices may be advertised if the advertisement conforms with the requirements of *B. & P.C. 651. (B. & P.C. 4341; see 2 Cal. Crim. Law (3d), Crimes Against Public Peace and Welfare, §316.)*

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



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A. In General.
1. Statutory Framework.

13 Witkin Sum. Cal. Law Equity § 133

[§ 133] Statutory Framework.

(1) *What Constitutes Nuisance.* A nuisance is anything that "is injurious to health, including, but not limited to, the illegal sale of controlled substances, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway." (C.C. 3479; see *People v. Projection Room Theater* (1976) 17 C.3d 42, 49, 130 C.R. 328, 550 P.2d 600, *infra*, §144; *Neuber v. Royal Realty Co.* (1948) 86 C.A.2d 596, 623, 195 P.2d 501; *Leslie Salt Co. v. San Francisco Bay Conservation & Dev. Com.* (1984) 153 C.A.3d 605, 619, footnote 16, 200 C.R. 575, *infra*, §141; *Lussier v. San Lorenzo Valley Water Dist.* (1988) 206 C.A.3d 92, 99, 253 C.R. 470, *infra*, §141; *Rest.2d, Torts* §821A *et seq.*, *infra*, §134; *Prosser & Keeton* 5th, §86 *et seq.*; 1 Harper, James & Gray 3d, §1.23; 59 So. Cal. L. Rev. 1101; 21 Stanf. L. Rev. 293 [economic factors]; 58 Am.Jur.2d (2002 ed.), *Nuisances* §1 *et seq.*; 8 Proof of Facts, *Nuisances*, Proof 1; on distinction between nuisance and liability without fault, see 65 Harv. L. Rev. 985; 6 Summary (10th), *Torts*, §1415; on distinction between nuisance and trespass, see *infra*, §136.)

Nuisances that affect the entire community or a considerable number of persons are public nuisances (C.C. 3480; P.C. 370, 371); all others nuisances are private nuisances (C.C. 3481). (See *infra*, §135.) Certain kinds of conduct or activity are classed as nuisances by statute. Some of these, and others, have long been regarded as nuisances "per se" under settled case law. (See *infra*, §145.) A principal example is the Red Light Abatement Law (P.C. 11225 *et seq.*; *infra*, §146 *et seq.*), which declares as a nuisance a place used for gambling, prostitution, unhealthy sexual practices, or similar conduct. (See 58 Am.Jur.2d (2002 ed.), *Nuisances* §16.) Where the conduct or activity does not fall within these established classes, the determination is made by the court by weighing the utility of the defendant's conduct against the gravity of the harm. (See *Rest.2d, Torts* §828 *et seq.*; *Anderson v. Souza* (1952) 38 C.2d 825, 843, 243 P.2d 497, *infra*, §159; *McIntosh v. Brimmer* (1924) 68 C.A. 770, 777, 230 P. 203.)

Although the cases usually involve a continuing course of conduct, a single act may constitute a nuisance. (*Ambrosini v. Alisal Sanitary Dist.* (1957) 154 C.A.2d 720, 727, 317 P.2d 33 [quoting Prosser: "the duration or recurrence of the interference is merely one--and not necessarily a conclusive--factor in determining whether the damage is so substantial as to amount to a nuisance"]; see *Prosser & Keeton* 5th, §88; 58 Am.Jur.2d (2002 ed.), *Nuisances* §24 *et seq.*)

(2) *Remedies.* A private nuisance may be abated by self-help, or may be the subject of a private civil action. (C.C. 3501 et seq.; *C.C.P.* 731; see *infra*, §153.) A public nuisance may be abated by civil or criminal actions brought by public officers or by civil actions brought by private persons who are specially injured. (C.C. 3491 et seq.; *C.C.P.* 731; *P.C.* 372, 373a; see *infra*, §154 et seq.)

(3) *Defenses.* Conduct or activity expressly authorized by statute cannot be deemed a nuisance. (C.C. 3482 et seq.; see *infra*, §160 et seq.) The doctrine of comparative negligence also is a valid defense to a civil nuisance action. (See *infra*, §§167, 168.) (On statute of limitations applicable to nuisances, see 3 *Cal. Proc.* (4th), *Actions*, §552 et seq.)

West's Key Number Digest, Nuisance k.1 et seq.

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

(3) *Defenses.*

Statute of limitations: See *Gehr v. Baker Hughes Oil Field Operations* (2008) 165 *C.A.4th* 660, 668, 81 *C.R.3d* 219 [in nuisance action for 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 loss of use of property; thus, continuing nuisance theory did not apply and action was time barred].

Cross-Reference: 3 *Cal. Proc.* (5th), *Actions*, §601 et seq.

(*New*) *Lack of causation:* To establish a public nuisance, it is not sufficient to merely show that the defendant created a risk of harm. Although it is not necessary to show that harm actually occurred, the plaintiff must show that the defendant's acts are likely to cause a significant invasion of a public right. Merely engaging in what the plaintiff deems to be a risky practice, without a connecting causative link to a threatened harm, is not a public nuisance. (*In re Firearm Cases* (2005) 126 *C.A.4th* 959, 988, 24 *C.R.3d* 659, Supp., supra, §107 [handgun manufacturers that distributed firearms to dealers in manner allegedly enabling criminals to acquire firearms could not be held liable for public nuisance, absent connection between manufacturers' practice and harm caused by illegal guns].)

(*New*) *Where alleged facts support negligence claim:* Where negligence and nuisance causes of action rely on the same facts about lack of due care, the nuisance claim is a negligence claim, and the nuisance claim cannot be maintained. The torts of negligence and nuisance frequently coexist and are practically inseparable. A nuisance in many, if not in most, instances, especially with respect to buildings or premises, presupposes negligence. (*El Escorial Owners' Assn. v. DLC Plastering* (2007) 154 *C.A.4th* 1337, 1349, 65 *C.R.3d* 524 [upholding dismissal of nuisance claim in building construction defects action alleging both negligence and nuisance].)



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CHAPTER XIX - Equity

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A. In General.
2. Restatement 2d.

13 Witkin Sum. Cal. Law Equity § 134

[§ 134] Restatement 2d.

(1) *Topics*. Volume 4, Chapter 40, of the Second Restatement of Torts, entitled "Nuisance," contains an elaborate treatment of the subject (*Rest.2d, Torts §821A et seq.*). The material is covered in five topics:

- (a) Topic 1. Types of Nuisance (§§821A-821F).
- (b) Topic 2. Private Nuisance: Elements of Liability (§§822-831).
- (c) Topic 3. Invasions Resulting From Pollution or Interference With Flow of Waters (§§832, 833).
- (d) Topic 4. Persons Liable (§§834-840A).
- (e) Topic 5. Defenses (§§840B-840E).

(2) *Introductory Note*. The Introductory Note (Vol. 4, p. 84) describes the coverage as follows:

(a) "This Chapter deals with two fields of tort liability that, through the accident of historical development, are called by a single name, that of 'nuisance.' This word, which in its origin is merely the French word for harm, has come, by reason of nothing more than the mere use of the same term to describe two quite different things, to cover two types of invasion of the interests of others. They have little or nothing else in common, and are quite unrelated, except as each involves the element of harm, inconvenience or annoyance to some one, which may be equally true of all tort liabilities. The use of the word 'nuisance' to apply to both has, however, resulted in the development of rules that, with minor differences, are the same for the two. Since the name of nuisance cannot be cast aside without departing entirely from the legal terminology that is universally accepted and ignoring the fact that the same conduct may under the same principles lead to liability in both fields, it is convenient to deal with the two together, while recognizing that they are not at all closely related."

(b) "One of these two fields of liability bears the name of public or common nuisance. It covers the invasion of public rights, which is to say, rights common to all members of the public, such as for example the right to free and safe use of the public highway. In its origin it was criminal, and it remained exclusively criminal until the sixteenth century, when as an incidental remedy tort damages were first awarded to private individuals who could show that they had

suffered particular harm, distinct from that suffered by other members of the public in general. The limitations thus imposed still have significance today. A public nuisance is still normally a criminal offense (see § 821B), and recovery of damages is still limited to those who can show particular harm, of a kind different from that suffered by other members of the public exercising the public right (see § 821C)."

(c) "The other field of liability is called a private nuisance. It covers the invasion of the private interest in the use and enjoyment of land. In its origin it was purely tortious in character, and it has remained so. It is always a tort against land, and the plaintiff's action must always be founded upon his interest in the land (see §§ 821D, 821E). ... "

(d) "Notwithstanding the absence of any real relation or connection between public and private nuisance that is readily apparent, the use of the same name for both has resulted in the application of the same rules to the two, with only minor differences due to the distinct character of the two types of interests invaded."

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



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A. In General.
3. Public and Private Nuisances.

13 Witkin Sum. Cal. Law Equity § 135

[§ 135] Public and Private Nuisances.

(1) *Distinction.* A public nuisance is one that affects a considerable number of persons. (C.C. 3480.) Any other nuisance is a private nuisance. (C.C. 3481.) One significant effect of the distinction is that the statute of limitations runs against a private nuisance, but "[n]o lapse of time can legalize a public nuisance, amounting to an actual obstruction of public right." (C.C. 3490; see *Strong v. Sullivan* (1919) 180 C. 331, 334, 181 P. 59; *Turlock v. Bristow* (1930) 103 C.A. 750, 756, 284 P. 962; *People v. Mason* (1981) 124 C.A.3d 348, 353, 177 C.R. 284, *infra*, §159 [People had standing to bring action to enjoin noisy music-playing affecting persons residing in the neighborhood]; *Leslie Salt Co. v. San Francisco Bay Conservation & Dev. Com.* (1984) 153 C.A.3d 605, 619, 200 C.R. 575, *infra*, §141; *Koll-Irvine Center Property Owners Assn. v. Orange* (1994) 24 C.A.4th 1036, 1040, 29 C.R.2d 664 [discussing distinction and necessary pleading]; *Rest.2d, Torts*, §821A *et seq.*; Prosser & Keeton 5th, §§87 [private nuisance], 90 [public nuisance]; 1 Harper, James & Gray 3d, §1.23; 2 *Ecology L. Q.* 241 [Public Nuisance, the Restatement (Second) of Torts, and Environmental Law]; 16 *Ecology L. Q.* 883 [evolution of public nuisance law and viability of public nuisance actions in light of existing environmental statutes]; 36 *Santa Clara L. Rev.* 39 [same]; 33 *McGeorge L. Rev.* 99 [The Nature of Nuisance: Judicial Environmental Ethics and Landowner Stewardship in the Age of Ecology]; 58 *Am.Jur.2d* (2002 *ed.*), *Nuisances* §§12, 30 *et seq.*)

(2) *Remedies.* There is also a distinction between the available remedies. A private nuisance may be abated by self-help, or may be the subject of a private civil action. (See *infra*, §153.) A public nuisance may be abated by civil or criminal actions brought by public officers (see *infra*, §154), but a private person has no direct remedy unless the public nuisance is specially injurious to him or her (see *infra*, §158).

(3) *Public Encroachment.* An encroachment on public land is a purpresture, which is not a private nuisance to a property owner who shows no special injury. (*Woods v. Johnson* (1966) 241 C.A.2d 278, 281, 50 C.R. 515.)

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

(1) *Distinction.* See *Zack's v. Sausalito* (2008) 165 C.A.4th 1163, 1191, 81 C.R.3d 797 [city's lease of public street to private party without complying with street closure laws created public nuisance; thus, property owner's action to enjoin it could not be time-barred under C.C. 3490].



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A. In General.
4. Trespass Distinguished.

13 Witkin Sum. Cal. Law Equity § 136

[§ 136] Trespass Distinguished.

(1) *Nature of Distinction.* Nuisance is distinguishable from trespass in that the mere intentional entry on land may violate the right of exclusive possession and create a right of action for trespass, while conduct or activity cannot amount to a nuisance unless it substantially and unreasonably interferes with the use and enjoyment of the land. (See *San Diego Gas & Elec. Co. v. Superior Court* (1996) 13 C.4th 893, 937, 938, 55 C.R.2d 724, 920 P.2d 669, *infra*, §142; *Lussier v. San Lorenzo Valley Water Dist.* (1988) 206 C.A.3d 92, 253 C.R. 470, *infra*, §141, citing the text; *Mangini v. Aerojet-General Corp.* (1991) 230 C.A.3d 1125, 1133, 281 C.R. 827; *Posey v. Leavitt* (1991) 229 C.A.3d 1236, 1243, 280 C.R. 568, quoting the text; *Capogeannis v. Superior Court* (1993) 12 C.A.4th 668, 674, 15 C.R.2d 796, 3 Cal. Proc. (4th), Actions, §554; *Newhall Land & Farming Co. v. Superior Court* (1993) 19 C.A.4th 334, 345, 23 C.R.2d 377 [contaminants left on property by prior owner constituted continuing trespass]; *KFC Western v. Meghrig* (1994) 23 C.A.4th 1167, 1182, 28 C.R.2d 676 [same; following *Newhall*]; *Rest.2d, Torts* §822; 1 Harper, James & Gray 3d, §1.23; 58 Am.Jur.2d (2002 ed.), Nuisances §5 et seq.; 5 Summary (10th), Torts, §693 et seq.) Although the case law "has developed a certain blurring and overlap of remedies, depending upon the precise nature of the invasion, we preserve that historical conceptual distinction." (*Wilson v. Interlake Steel Co.* (1982) 32 C.3d 229, 234, 185 C.R. 280, 649 P.2d 922.)

(2) *Illustration.* In *Wilson*, 22 retirees owned or resided in 14 homes adjacent to defendants' steel fabricating plant. The homes were in an area zoned for residential use, and the plant was in an industrial zone. The plant, operating on a 24-hour basis, generated a high level of noise that was particularly noticeable during the late night and early morning. But the noise vibrations were emitted through the air, not transmitted through the ground; there was no physical damage to plaintiffs' property, and no physical or particulate matter passed over or on the property. Plaintiffs first sued on a nuisance theory, seeking only injunctive relief; the trial judge gave judgment for defendants under C.C.P. 731a (*infra*, §165). Plaintiffs did not appeal, but subsequently brought the present action for damages on a trespass theory. The trial gave judgment for defendants, on the ground that noise alone would not support a trespass recovery. *Held*, reversed; the conclusion was correct but plaintiffs could still recover on the theory of nuisance.

(a) Trespass may be committed by consequential and indirect injury from noise-caused vibrations, and the cases upholding recovery in trespass have involved either the deposit of particulate matter on the property or actual physical damage to it. (32 C.3d 232; see 5 Summary (10th), Torts, §693.) But actionable trespass may not be predicated on nondamaging noise, odor, or light intrusion; hence, noise waves that are merely bothersome and not damaging must be

dealt with as a nuisance. (32 C.3d 232, 233, citing Prosser, *Rest.2d*, *Torts* §821D, and the text.)

(b) The facts pleaded are sufficient to sustain recovery on a nuisance theory, and the prior judgment may not constitute a bar. *C.C.P.* 731a eliminates injunctive relief, but does not bar recovery of damages. The record does not clearly show whether the trial judge in the first action found as a fact that defendants' operations did not constitute a nuisance, or whether that finding was necessary to the decision. This issue should be reexamined and determined in the trial court. (32 C.3d 234, citing *Rest.2d*, *Judgments* §27 and the text; see 7 *Cal. Proc.* (4th), *Judgment*, §370.) (See 17 *U.C. Davis L. Rev.* 389.)

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

(1) *Nature of Distinction.*

Capogeannis case:

Cross-Reference: 3 *Cal. Proc.* (5th), *Actions*, §603.

(2) *Illustration. Prior decision may not constitute bar:*

Cross-Reference: 7 *Cal. Proc.* (5th), *Judgment*, §432.



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A. In General.

5. Subsurface Encroachment Distinguished.

13 Witkin Sum. Cal. Law Equity § 137

[§ 137] Subsurface Encroachment Distinguished.

A subsurface encroachment is not a nuisance but is enjoined. In *Berkeley v. Gordon* (1968) 264 C.A.2d 461, 70 C.R. 716, defendants were owners and lessees of a building on an important Berkeley street (University Avenue). Their basement, constructed 65 years ago, extended under the surface for the width of the sidewalk (16 feet). Plaintiff city was enlarging and beautifying the street by narrowing the sidewalk to 14 feet and installing trees and a street light in the reduced sidewalk area. This project called for removal of a wall of the basement, building of a new wall, and some other necessary structural work. Plaintiff asked for a mandatory injunction to compel defendants to do the work. *Held*, judgment denying injunction affirmed.

(a) A subsurface structure that does not interfere with the public's use of the streets is not a nuisance; and the abutting owner has a right to construct areaways, cellars, and vaults under the street if the abutting owner does not interfere with the public easement. (264 C.A.2d 466.)

(b) It was, however, an encroachment, interfering with the city's paramount right to use the streets. Hence it should be removed. But the judge had discretion to deny a mandatory injunction because a better remedy was available--self-help. The city could do the work, determine the actual cost, and thereafter seek recovery of the costs from defendants, who were admittedly solvent. (264 C.A.2d 467.)

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



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B. Types of Conduct or Activity.
1. Physical Interference With Land.

13 Witkin Sum. Cal. Law Equity § 138

[§ 138] Physical Interference With Land.

Actual physical interference with land use constitutes the most obvious and common type of nuisance.

(1) *Encroachment*. (See *Kafka v. Bozio* (1923) 191 C. 746, 748, 218 P. 753 [substantial encroachment of building on adjoining land]; *Case v. Sisich* (1929) 97 C.A. 106, 110, 275 P. 492 [same]; *Pacific Gas & Elec. Co. v. Minnette* (1953) 115 C.A.2d 698, 706, 252 P.2d 642 [encroachment of building on plaintiff's easement]; *Lussier v. San Lorenzo Valley Water Dist.* (1988) 206 C.A.3d 92, 102, footnote 7, 253 C.R. 470, *infra*, §141 [encroachment by overhanging branches or tree roots]; 19 A.L.R.2d 1025 [encroachment by oil, water, or the like flowing from well]; 26 A.L.R.3d 1372 [encroachment by trees, shrubbery, or similar plants]; 12 *Summary* (10th), *Real Property*, §374 et seq.)

(2) *Obstruction*. (See *Lane v. San Diego Elec. Ry. Co.* (1929) 208 C. 29, 33, 280 P. 109 [obstruction of abutting owner's access to street was private as well as public nuisance]; *Marshall v. Standard Oil Co. of Calif.* (1936) 17 C.A.2d 19, 29, 61 P.2d 520 [sinking of oil wells in public street was public nuisance, and private nuisance to abutting property owners]; *People v. Henderson* (1948) 85 C.A.2d 653, 656, 194 P.2d 91 [structure placed by owner on highway, in which public had easement, was nuisance both at common law and under Sts. & H.C. 660].)

(3) *Deposit of Material or Pollution*. Cases holding that the deposit of material or pollution on land is a nuisance are legion. (See *Turlock v. Bristow* (1930) 103 C.A. 750, 755, 284 P. 962 [pollution of water in stream or irrigation ditch]; *Fredericks v. Fredericks* (1951) 108 C.A.2d 242, 244, 238 P.2d 643, 6 *Summary* (10th), *Torts*, §1415 [defendant rice grower brought too much water on his land, seepage injured plaintiff's almond trees and grape vines]; *Spaulding v. Cameron* (1952) 38 C.2d 265, 266, 239 P.2d 625 [loose earth fill on defendant's property washed down in rains and inundated lower land of plaintiff]; *Ambrosini v. Alisal Sanitary Dist.* (1957) 154 C.A.2d 720, 726, 317 P.2d 33 [overflow of sewage from defendant's outfall line damaged plaintiff's celery crop]; *Mangini v. Aerojet-General Corp.* (1991) 230 C.A.3d 1125, 1133, 281 C.R. 827 [defendants allegedly contaminated plaintiff landlord's property with hazardous waste during leasehold; plaintiff could amend complaint to state cause of action for private continuing nuisance]; *Newhall Land & Farming Co. v. Superior Court* (1993) 19 C.A.4th 334, 343, 23 C.R.2d 377 [landowner stated cause of action for private continuing nuisance against former owners who used property for natural gas processing plant, allegedly contaminating ground water; citing *Mangini*]; *Wilshire Westwood Associates v. Atlantic Richfield Co.* (1993) 20 C.A.4th 732, 745, 24 C.R.2d 562 [same; following *Mangini*]; *KFC Western v. Meghrig* (1994) 23 C.A.4th 1167, 1181, 28 C.R.2d 676 [soil contamination from former owners' operation of gas station; following

Newhall and Mangini]; *Paterno v. California* (1999) 74 C.A.4th 68, 102, 87 C.R.2d 754 [nuisance was proper theory for jury to consider in action arising after state levee overflowed onto plaintiff's property]; *Gdowski v. Louie* (2000) 84 C.A.4th 1395, 1408, 101 C.R.2d 609 [nuisance action for damage caused by discharge of surface water was not limited to defendant's intentionally unreasonable conduct; it could also be based on negligent or reckless conduct, or on abnormally dangerous activity subject to strict liability]; *Rancho Viejo, LLC v. Tres Amigos Viejos, LLC* (2002) 100 C.A.4th 550, 559, 123 C.R.2d 479, citing the text [action styled as trespass involving physical invasion and damage to property based on failure to contain irrigation was one for nuisance]; *Modesto Redevelopment Agency v. Superior Court* (2004) 119 C.A.4th 28, 41, 13 C.R.3d 865 [defendants who created, or assisted in creating, system that resulted in unauthorized disposal of hazardous solvents into drains and sewers, or who provided instructions on that disposal, could be held liable for nuisance; but defendants who merely manufactured or sold solvents without warning of dangers of improper disposal could not be held liable for nuisance]; 21 *Ecology L. Q.* 643 [California nuisance law and petroleum underground storage tank contamination]; 9 Proof of Facts, Pollution, Proof 1.)

However, other cases have held that under the facts involved, those deposits did not necessarily constitute a nuisance. (See *Mangini v. Aerojet-General Corp.* (1996) 12 C.4th 1087, 1096, 51 C.R.2d 272, 912 P.2d 1220, 3 Cal. Proc. (4th), Actions, Supp., §551A [on trial of *Mangini*, supra, defendants were entitled to judgment n.o.v. because action was time-barred; no continuing nuisance (which would have delayed accrual) without substantial evidence that contamination was abatable at reasonable cost]; *Beck Dev. Co. v. Southern Pac. Trans. Co.* (1996) 44 C.A.4th 1160, 1206, 1209, 52 C.R.2d 518 [oil contamination beneath developer's property was neither nuisance per se, because no law expressly declared it one, nor public nuisance, because it did not pose health hazard or invade other property or water]; 74 So. Cal. L. Rev. 1191 [*Beck Dev. Co.*].)

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

(3) *Deposit of Material or Pollution.* See *Santa Clara v. Atlantic Richfield Co.* (2006) 137 C.A.4th 292, 304, 40 C.R.3d 313, 3 Cal. Proc. (5th), Actions, §598 [defendant paint manufacturers could be held liable for public nuisance, where they promoted use of hazardous substance, i.e., lead paint, for interior use in buildings, and where plaintiff city sought to abate nuisance rather than to recover damages; distinguishing *Modesto Redevelopment Agency v. Superior Court* (2004) 119 C.A.4th 28, 13 C.R.3d 865, text, p. 460]; 59 *Hastings L. J.* 1553 [Lead Paint: Who will Bear the Cost of Abating the Latest Public Nuisance?]. *Mangini* case:

Cross-Reference: 3 Cal. Proc. (5th), Actions, §600.



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B. Types of Conduct or Activity.

2. Interference With Present Enjoyment of Land.

a. Air Pollution and Noise.

13 Witkin Sum. Cal. Law Equity § 139

[§ 139] Air Pollution and Noise.

An activity, without directly damaging or preventing use of the land, may nevertheless disturb or prevent its comfortable enjoyment. Typical are smoke, noxious odors, and noise. (See 22 *Hastings L. J.* 1401 [availability of private injunction]; 19 *A.L.R.4th* 456 [when statute of limitations begins to run on cause of action for nuisance based on pollution]; 8 Proof of Facts, Nuisances, Proof 1; 18B Am.Jur. P.P. Forms (1997 ed.), Nuisances §§55 et seq. [pollution], 96 et seq. [noise].) (On air quality legislation, see 12 *Summary* (10th), *Real Property*, §897 et seq.)

(1) *Smoke*. (See *Eaton v. Klimm* (1933) 217 C. 362, 368, 18 *P.2d* 678 [smoke from asphalt mixing plant]; 27 *So. Cal. L. Rev.* 379; 41 *A.L.R.3d* 1009 [incinerator].)

(2) *Odors*. (See *Willson v. Edwards* (1927) 82 *C.A.* 564, 569, 256 *P.* 239 [operation of refreshment stand]; *Wade v. Campbell* (1962) 200 *C.A.2d* 54, 58, 19 *C.R.* 173 [dairy with cattle stable, manure piles, stagnant water, etc.]; *Varjabedian v. Madera* (1977) 20 *C.3d* 285, 293, 142 *C.R.* 429, 572 *P.2d* 43, *infra*, §161 [sewage treatment plant]; 17 *A.L.R.2d* 1269 [animal rendering or bone-boiling plant]; 18 *A.L.R.2d* 1033 [stockyard]; 52 *A.L.R.2d* 1134 [public dump]; 54 *A.L.R.2d* 764 [harmful gases or fumes]; 92 *A.L.R.2d* 974 [dairy, creamery, or milk distributing plant]; 2 *A.L.R.3d* 1372 [motor bus or truck terminal]; 41 *A.L.R.3d* 1009 [incinerator]; 58 *A.L.R.3d* 1126 [zoo]; 92 *A.L.R.5th* 517 [sewage treatment plant]; 101 *A.L.R.5th* 287 [same; remedies]; 93 *A.L.R.5th* 621 [hog breeding, confining, or processing facility].)

(3) *Dust*. Spreading dust may constitute a nuisance. (See *Snow v. Marian Realty Co.* (1931) 212 C. 622, 624, 299 *P.* 720 [smoke from donkey-engine, sand, and cement blown from uncovered piles, discoloring plaintiff's building]; *McIntosh v. Brimmer* (1924) 68 *C.A.* 770, 776, 230 *P.* 203 [chickens, scratching in dry soil, sent up clouds of dust that polluted plaintiff's vineyard]; *Miles v. A. Arena & Co.* (1937) 23 *C.A.2d* 680, 683, 73 *P.2d* 1260 [poisonous dust, sprayed to kill plant pests, carried by wind to plaintiff's land, killing his bees]; *Morton v. Superior Court* (1954) 124 *C.A.2d* 577, 582, 269 *P.2d* 81, *infra*, §§152, 159 [rock quarry]; 24 *A.L.R.2d* 194 [dust]; 82 *A.L.R.3d* 1004 [cement plant]; 25 *A.L.R.4th* 1192 [dust, gases, odors, vibration, or the like, from defendant's continuous vehicular use of adjoining or nearby public highway].)

(4) *Noise*. (See *Willson v. Edwards*, *supra* [operation of refreshment stand]; *Fendley v. Anaheim* (1930) 110 *C.A.*

731, 733, 294 P. 769 [noise and vibration from machinery]; *Wilms v. Hand* (1951) 101 C.A.2d 811, 816, 226 P.2d 728 [barking dogs in dog hospital]; *Morton v. Superior Court*, *supra*, 124 C.A.2d 582 [rock quarry]; *Farmy v. College Housing* (1975) 48 C.A.3d 166, 121 C.R. 658 [exhaust fans and tenant noise at apartment building]; *Wilson v. Interlake Steel Co.* (1982) 32 C.3d 229, 232, 234, 185 C.R. 280, 649 P.2d 922, *supra*, §136 [steel plant]; *People v. Mason* (1981) 124 C.A.3d 348, 353, 177 C.R. 284, *infra*, §159 [loud music]; 1 Harper, James & Gray 3d, §1.25; 18 A.L.R.2d 1033 [stockyard]; 23 A.L.R.2d 1289 [loudspeaker]; 47 A.L.R.2d 490 [quarries and gravel pits]; 2 A.L.R.3d 1372 [motor bus or truck terminal]; 79 A.L.R.3d 320 [air conditioning equipment]; 95 A.L.R.3d 1268 [bells, carillons, and the like]; 103 A.L.R.5th 157 [vibrations not accompanied by blasting or explosion]; 41 Proof of Facts 3d 391 [Common-Law Action for Noise Nuisance on Neighboring Land]; 58 Am.Jur.2d (2002 ed.), *Nuisances* §138 et seq.)

(5) *Airports*. A private airport, though licensed, is subject to the general law, and its operations may constitute a nuisance. (See *Anderson v. Souza* (1952) 38 C.2d 825, 838, 243 P.2d 497, *infra*, §159.) A public airport, although constructed pursuant to statutory authority by a city with the power of eminent domain, may also subject the city to liability for maintaining a nuisance. (*Nestle v. Santa Monica* (1972) 6 C.3d 920, 931, 101 C.R. 568, 496 P.2d 480, 5 Summary (10th), *Torts*, §339.) (See 79 A.L.R.3d 253 [airport operation or overflights as nuisance].)

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

See 18C Am.Jur. P.P. Forms (2006 ed.), *Nuisances*, §63 et seq. [pollution], §104 et seq. [noise].(5) *Airports*. See 85 Proof of Facts 3d 307 [proof of injury or damage caused by sonic boom].



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2. Interference With Present Enjoyment of Land.

b. Other Conditions or Activities.

13 Witkin Sum. Cal. Law Equity § 140

[§ 140] Other Conditions or Activities.

(1) *Fences*. In *Hutcherson v. Alexander* (1968) 264 C.A.2d 126, 70 C.R. 366, plaintiffs and defendant operated drive-in businesses adjacent to each other on a highway. From the beginning of operations, defendant extended a 6-foot divider fence to a height of 14 feet, with a "menu board," blocking the view of plaintiffs' premises. *Held*, judgment for plaintiffs affirmed. Although the menu board did not constitute a spite fence prohibited under C.C. 841.4 (see 12 *Summary* (10th), *Real Property*, §373), the trial judge found on sufficient evidence that it was not necessary for defendant's business, was maliciously placed there to annoy, and did interfere with plaintiffs' use and enjoyment of their property. (264 C.A.2d 131.) (See 80 A.L.R.3d 962 [barbed wire and other type fences].)

(2) *Transmission Towers and Power Plants*. A landowner's allegation that an otherwise legal cellular telephone transmission tower, erected on adjacent property, had a displeasing appearance could not, by itself, be the basis of a valid nuisance claim. (*Oliver v. AT & T Wireless Services* (1999) 76 C.A.4th 521, 532, 90 C.R.2d 491; see 4 A.L.R.3d 902 [electric generating plant]; 36 A.L.R.4th 1159 [windmill]; 88 A.L.R.5th 641 [transmission tower or antenna].)

(3) *Animals and Insects*. (See 27 A.L.R.3d 627 [keeping horses]; 88 A.L.R.3d 992 [keeping bees]; 90 A.L.R.5th 619 [keeping domestic animal].)

(4) *Amusements*. (See *Hellman v. La Cumbre Golf & Country Club* (1992) 6 C.A.4th 1224, 1231, 8 C.R.2d 293 [golf balls from neighboring course landing on plaintiffs' residential property did not constitute nuisance]; 68 A.L.R.2d 1331 [golf course or driving range]; 80 A.L.R.2d 1124 [water sports, amusements, or exhibitions]; 26 A.L.R.3d 661 [gun club or shooting range]; 32 A.L.R.3d 1127 [children's playground]; 41 A.L.R.3d 1273 [automobile racetrack or dragstrip]; 49 A.L.R.3d 652 [public swimming pool]; 58 A.L.R.3d 1134 [porno shops or similar places disseminating obscene materials]; 2 Proof of Facts, Baseball, Proof 1 [night game].)

(5) *Other Businesses*. (See 82 A.L.R.2d 413 [parking lot]; 84 A.L.R.2d 653 [automobile wrecking yard or place of business]; 86 A.L.R.2d 1322 [oil refinery]; 91 A.L.R.2d 572 [drive-in restaurant]; 5 A.L.R.3d 989 [saloon or tavern]; 41 A.L.R.3d 1236 [laundry or dry cleaning establishment]; 4 A.L.R.4th 1308 [car wash].)

(6) *Miscellaneous Conditions or Activities*. (See 83 A.L.R.2d 936 [nonencroaching vegetation]; 21 A.L.R.3d 1058

[institutions for criminals]; 38 *A.L.R.3d* 647 [billboards and outdoor advertising]; 50 *A.L.R.3d* 209 [fuel storage tank]; 58 *A.L.R.3d* 1142 [interference with radio or television reception]; 45 *A.L.R.4th* 1212 [computer]; 92 *A.L.R.5th* 593 [nudity]; 37 Proof of Facts 3d 439 [recovery of damages for injury to landowner's property from environmental condition on neighboring land]; 58 *Am.Jur.2d* (2002 ed.), *Nuisances* §§71, 96 et seq.)

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

(3) *Animals and Insects*. See *Chee v. Amanda Goldt Property Management* (2006) 143 *C.A.4th* 1360, 1373, 50 *C.R.3d* 40 [nuisance action could not be stated against lessor based on lessee allowing her dog to run off leash and to urinate and defecate in common areas, where lessor was unaware of alleged nuisance and did not renew lease after it occurred].

(6) *Miscellaneous Conditions or Activities*. See *Golden Gate Water Ski Club v. Contra Costa* (2008) 165 *C.A.4th* 249, 255, 80 *C.R.3d* 876 [zoning violations constitute public nuisance].



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2. Interference With Present Enjoyment of Land.

c. Failure To Act.

13 Witkin Sum. Cal. Law Equity § 141

[§ 141] Failure To Act.

(1) *Failure To Abate Private Nuisance.* Liability for nuisance may result from the failure to act. Thus, a possessor of land is liable for a private nuisance caused by an abatable artificial condition that is otherwise actionable, if the possessor (a) knows or should know of the condition and the nuisance or unreasonable risk of nuisance involved; (b) knows or should know that the condition exists without the consent of those affected by it; and (c) has failed after a reasonable opportunity to take reasonable steps to abate the condition or to protect affected persons. (See *Rest.2d, Torts, §839 Cutujian v. Benedict Hills Estates Assn. (1996) 41 C.A.4th 1379, 1389, 49 C.R.2d 166, 12 Summary (10th), Real Property, §123* [owner of damaged lot in common interest residential development stated valid nuisance claim against governing association that failed to maintain proper slopes, as required by applicable CC&Rs].)

In *Lussier v. San Lorenzo Valley Water Dist. (1988) 206 C.A.3d 92, 253 C.R. 470*, plaintiff suffered damages when timber, debris, and water washed from the defendant's land onto plaintiffs' property during a heavy rainstorm. The trial judge entered a nonsuit on plaintiff's cause of action for nuisance and the jury returned judgment for defendant on plaintiff's cause of action for negligence. On appeal, plaintiffs contended that the nonsuit on the nuisance claim was improper. *Held*, affirmed.

(a) At common law, a possessor of land was immune from liability to those outside the premises for harm caused by natural conditions of his land. This rule was abrogated in *Sprecher v. Adamson Cos. (1981) 30 C.3d 358, 178 C.R. 783, 636 P.2d 1121, 6 Summary (10th), Torts, §1089*, holding that liability can arise from a negligent failure to correct a dangerous natural condition. (206 C.A.3d 99.)

(b) The central idea of nuisance is the unreasonable invasion of plaintiff's interest in the free use and enjoyment of his property and not the particular type of conduct subjecting the actor to liability. "In California, it is settled that where negligent conduct, i.e., conduct that violates a duty of care toward another, also interferes with another's free use and enjoyment of his property, nuisance liability arises. ... [I]t follows, a fortiori, that where one's negligence concerning a natural condition of his land injuriously invades another's right to the use and enjoyment of his property, nuisance liability may arise. Thus, despite the *Sprecher* court's expressly limited focus on negligence actions, its holding extends further and leads ineluctably to the conclusion that a possessor of land is no longer absolutely immune from nuisance liability for injuries caused by natural conditions." (206 C.A.3d 101.)

(c) This does not mean that one is strictly liable for damages that arise when a natural condition of one's land interferes with another's free use and enjoyment of his or her property. To the contrary, "where injury is allegedly caused by a natural condition, the imposition of liability on a nuisance theory, as a practical matter, requires a finding that there was negligence in dealing with it." In determining what conduct could have caused a nuisance, "we consider the distinction between natural and artificial conditions on land to be a valid and useful analytical tool, even though it no longer provides an absolute limitation on liability." (206 C.A.3d 102.)

(d) Because defendant did not create the accumulation of debris, its liability must be based on a negligent failure to remove the accumulation and thereby prevent the harm it caused. (206 C.A.3d 103.) Because the common law rule of absolute immunity does not support the trial court's nonsuit and the natural accumulation of natural debris on one's property is not a nuisance per se, the issue of nuisance should have been submitted to the jury. However, because defendant's liability for nuisance could only have arisen from its alleged negligence and the jury found that defendant was not negligent, the error in granting nonsuit was harmless. (206 C.A.3d 106.)

On the other hand, in *Boarts v. Imperial Irr. Dist.* (1947) 80 C.A.2d 574, 182 P.2d 246, plaintiff, a farmer, sought to recover damages from defendant irrigation district on the ground that defendant had allowed weeds to grow on the banks of its ditches, the seeds of which were then blown onto plaintiff's land. *Held*, this was not a nuisance, and there is no duty on the part of a landowner to destroy natural weed growth to prevent the scattering of seed on adjoining land. (But see 56 Harv. L. Rev. 772 [criticizing view that land in its natural condition cannot give rise to liability for nuisance].)

(2) *Failure To Abate Public Nuisance.* Failure to abate a public nuisance resulted in liability in *Leslie Salt Co. v. San Francisco Bay Conservation & Dev. Com.* (1984) 153 C.A.3d 605, 200 C.R. 575. Defendant San Francisco Bay Conservation and Development Commission made an order under Govt.C. 66600 et seq. (see 12 Summary (10th), *Real Property*, §873) requiring plaintiff to remove unauthorized bay fill from its property within the district's jurisdiction, notwithstanding lack of evidence that plaintiff placed the fill, authorized anyone to do so, or knew of its existence prior to the defendant's investigation. The trial judge concluded that the order was beyond the defendant's statutory authority. *Held*, reversed.

(a) Govt.C. 66600 et seq. represent the exercise by government of the traditional power to regulate public nuisances; and because the legislation does not expressly purport to depart from or alter the common law, it will be construed in light of common law principles. (153 C.A.3d 618.)

(b) All that is required to establish that particular conduct constitutes the tort or common law crime of public nuisance is that the conduct interferes with a right common to the general public. If the specific conduct is proscribed by statute, one may be held in violation of the statute even though the interference with the public right was purely accidental and unintentional. "Liability, in other words, may be strict." (153 C.A.3d 619.)

(c) Liability, whether civil or criminal, and the duty to take affirmative action "flow not from the landowner's active responsibility for a condition of his land that causes widespread harm to others or his knowledge of or intent to cause such harm but rather, and quite simply, from his very possession and control of the land in question." (153 C.A.3d 622.)

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



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3. Danger of Future Injury.

13 Witkin Sum. Cal. Law Equity § 142

[§ 142] Danger of Future Injury.

(1) *Actual Danger Is Actionable.* In *People v. Oliver* (1948) 86 C.A.2d 885, 195 P.2d 926, an uncompleted "skeleton" wooden building, surrounded by inflammable debris, in a built-up residential area, was held to be a fire hazard and a public nuisance. The court observed that even though a dilapidated wooden building, which increases the insurance rate on and depreciates the value of adjoining property, is not necessarily a nuisance, the circumstances here endangered the neighborhood. (86 C.A.2d 888.) (See *San Diego v. Carlstrom* (1961) 196 C.A.2d 485, 491, 16 C.R. 667 [dilapidated housing unit structures temporarily stored and surrounded with combustible debris].)

The principal problem in this connection is that of election to treat a nuisance as permanent, and to seek both past and future damages. (See *Spaulding v. Cameron* (1952) 38 C.2d 265, 267, 239 P.2d 625; *Kornoff v. Kingsburg Cotton Oil Co.* (1955) 45 C.2d 265, 269, 288 P.2d 507; *Baker v. Burbank-Glendale-Pasadena Airport Authority* (1985) 39 C.3d 862, 869, 218 C.R. 293, 705 P.2d 866, 3 Cal. Proc. (4th), Actions, §553; *Renz v. 33rd Dist. Agricultural Assn.* (1995) 39 C.A.4th 61, 68, 46 C.R.2d 67, *infra*, §153 ["damages incurred between the commencement and the conclusion of a continuing nuisance action should be recoverable in that action"]; *Rest.2d, Torts* §930; 58 Am.Jur.2d (2002 ed.), *Nuisances* §276 et seq.)

(2) *Fear Alone Is Insufficient.* A private nuisance action cannot be maintained for interference in the use and enjoyment of land caused solely by fear of future injury. (*Koll-Irvine Center Property Owners Assn. v. Orange* (1994) 24 C.A.4th 1036, 1041, 29 C.R.2d 664.)

In *San Diego Gas & Elec. Co. v. Superior Court* (1996) 13 C.4th 893, 55 C.R.2d 724, 920 P.2d 669, 8 Summary (10th), *Constitutional Law*, §1089, plaintiff homeowners brought an action on various theories, including private nuisance, against defendant public utility. Plaintiffs alleged that defendant ran electric currents through power lines on property adjoining plaintiffs' property and that those currents emitted high and unreasonably dangerous levels of electromagnetic radiation onto plaintiffs' property. Plaintiffs originally asserted that the currents caused them actual personal, physical harm, but then abandoned that assertion and contended that the currents posed a future risk of physical harm. *Held*, plaintiffs failed to state a valid claim of nuisance.

(a) Even assuming that plaintiffs' fear of future harm to their persons would support a nuisance cause of action, to award damages on this theory would require the trier of fact to find that reasonable persons would experience a

substantial fear that the fields cause physical harm and would deem the invasion so serious that it outweighed the social utility of defendant's conduct. (13 C.4th 939.)

(b) Those findings would conflict with prior, contrary conclusions reached by the Public Utilities Commission (PUC). Under *Pub.Util.C. 1759*, as construed in *Waters v. Pacific Tel. Co.* (1974) 12 C.3d 1, 114 C.R. 753, 523 P.2d 1161, 8 Summary (10th), *Constitutional Law*, §1089, a court may not interfere with a general supervisory or regulatory policy of the PUC. (13 C.4th 939.)

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

(1) *Actual Danger Is Actionable.*

Baker case:

Cross-Reference: 3 Cal. Proc. (5th), *Actions*, §602.

(2) *Fear Alone Is Insufficient.* See *Monks v. Rancho Palos Verdes* (2008) 167 C.A.4th 263, 305, 84 C.R.3d 75, 8 Summary (10th), *Constitutional Law*, Supp., §1158 [construction of residences in landslide area did not pose reasonable probability of significant harm to constitute nuisance, where geological stability of area was uncertain].



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B. Types of Conduct or Activity.
4. Mental and Emotional Disturbance.

13 Witkin Sum. Cal. Law Equity § 143

[§ 143] Mental and Emotional Disturbance.

(1) *Early Rule Denying Relief.* The older view was that conduct or activity that merely offends the aesthetic sense or has a depressing mental effect cannot be enjoined. (See *Haehlen v. Wilson* (1936) 11 C.A.2d 437, 441, 54 P.2d 62 ["ugly" fence at boundary line]; *Dean v. Powell Undertaking Co.* (1921) 55 C.A. 545, 547, 203 P. 1015 [undertaking company established in residential district]; 1 Harper, James & Gray 3d, §1.25.) It has been held that the Legislature itself cannot declare nuisances per se solely because the aesthetic sense is assaulted. (See *Jones v. Los Angeles* (1930) 211 C. 304, 315, 295 P. 14 [hospital for treatment of nervous or contagious diseases is not nuisance]; *Hassell v. San Francisco* (1938) 11 C.2d 168, 78 P.2d 1021, *infra*, §161.)

(2) *Repudiation of Rule.* *Dean v. Powell Undertaking Co.* was substantially repudiated by *Brown v. Arbuckle* (1948) 88 C.A.2d 258, 198 P.2d 550. The lower court found that the establishment of a mortuary and funeral parlor in a residential district should be enjoined as a nuisance, on evidence that it would be a constant mental irritant to plaintiff and his family and would thereby cause them to suffer physical disturbances. Judgment was affirmed. The opinion reviewed authorities from other states, which disclosed a trend in this direction, and distinguished the *Dean* case as "based solely upon the pleadings and general findings" (88 C.A.2d 263), whereas here "the question was one of fact for the trial court" (88 C.A.2d 264). It seems clear, however, that the "facts," whether derived from the pleadings or the evidence, were not dissimilar, and that the rule laid down in the later decision gives new weight to mental and emotional factors in determining what constitutes a nuisance, thus accomplishing, by actions to abate, some of the purposes of a modern zoning ordinance. (See 5 A.L.R.2d 705 [casting light]; 50 A.L.R.2d 1324 [cemetery]; 8 A.L.R.4th 324 [funeral home]; 53 A.L.R.4th 1153 [telephone calls].)

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5. Exhibition of Obscene Matter.

13 Witkin Sum. Cal. Law Equity § 144

[§ 144] Exhibition of Obscene Matter.

People v. Projection Room Theater (1976) 17 C.3d 42, 130 C.R. 328, 550 P.2d 600, held that the exhibition of obscene magazines or films could be enjoined. (See 7 Summary (10th), *Constitutional Law*, §455.) The opinion points out the following:

(a) The definitions of public nuisance in P.C. 370 and 371 (see 2 Cal. Crim. Law (3d), *Crimes Against Public Peace and Welfare*, §396; *infra*, §157) and C.C. 3479 and 3480 (see *supra*, §§133, 135), taken in conjunction, are substantially identical. Under P.C. 370, "the *proscribed act* may be anything which alternatively is injurious to health or is indecent, or offensive to the senses; the *results* of the act must interfere with the comfortable enjoyment of life or property; and *those affected* by the act may be an entire neighborhood or a considerable number of persons." As amplified by *Penal Code* 371, "the extent of the annoyance or damage on the affected individuals may be unequal." (17 C.3d 49.)

(b) Exhibition of obscene magazines and films is an activity "indecent" or "offensive to the senses" that interferes with the comfortable enjoyment of life of a considerable number of persons. (17 C.3d 49.) Contrary language in *Harmer v. Tonylyn Productions* (1972) 23 C.A.3d 941, 100 C.R. 576, was disapproved. (17 C.3d 51, 55.)

Other cases are to the same effect. (See *People v. E.W.A.P.* (1980) 106 C.A.3d 315, 165 C.R. 73, *supra*, §117; *People v. Adult World Bookstore* (1980) 108 C.A.3d 404, 409, 166 C.R. 519 [bookstore used for projecting obscene films in private booths]; *People v. Mitchell Bros.' Santa Ana Theater* (1981) 114 C.A.3d 923, 929, 171 C.R. 85; 50 A.L.R.3d 969 [obscene motion picture as nuisance]; 10 U.S.F. L. Rev. 115 [adult bookstore or theatre as public nuisance]; 25 A.L.R.4th 395 [statutes authorizing forfeiture or closure of property where obscene materials are disseminated or exhibited]; 92 A.L.R.5th 593 [nudity as nuisance]; 2 Cal. Crim. Law (3d), *Sex Offenses and Crimes Against Decency*, §113 et seq.) (On constitutionality of injunction against possession or sale of obscene matter, see 7 Summary (10th), *Constitutional Law*, §§681, 682; on Red Light Abatement Law, see *infra*, §146 et seq.)

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6. Nuisances Per Se.

a. In General.

13 Witkin Sum. Cal. Law Equity § 145

[§ 145] In General.

Activities or conduct declared by law to be nuisances are nuisances per se, and may be enjoined without proof of their injurious nature. (See *Pon v. Wittman* (1905) 147 C. 280, 292, 81 P. 984 [house of prostitution]; *In re Brambini* (1923) 192 C. 19, 24, 218 P. 569 [maintaining place for illegal sale of liquor]; *People v. Adco Advertisers* (1973) 35 C.A.3d 507, 513, 110 C.R. 849 [nonconforming display of outdoor advertising is public nuisance]; 1 Harper, James & Gray 3d, §1.24; 58 Am.Jur.2d (2002 ed.), Nuisances §16 et seq.; infra, §146 et seq.) (On obstructing free passage and use of public street, see P.C. 370; *Pain v. Municipal Court* (1968) 268 C.A.2d 151, 153, 73 C.R. 862 [statute constitutional, and violation is misdemeanor (P.C. 372)].)

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

Activities declared to be nuisance per se: See *Kempton v. Los Angeles* (2008) 165 C.A.4th 1344, 1349, 81 C.R.3d 852 [private fence erected on city property that prevented access to public sidewalk and blocked neighbors' sightlines on entering and exiting their garage].



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6. Nuisances Per Se.

b. Red Light Abatement Law.

1. In General.

13 Witkin Sum. Cal. Law Equity § 146

[§ 146] In General.

(1) *Covered Activities.* Under the Red Light Abatement Law (P.C. 11225 et seq.), a building or other place used for the following activities may be deemed a nuisance:

(a) Gambling, as defined by state law or local ordinance, but not including intermittent not-for-profit gambling in a private residence. (P.C. 11225(a); see 2 *Cal. Crim. Law (3d)*, *Crimes Against Public Peace and Welfare*, §274.)

(b) Lewdness, assignation, or prostitution. (P.C. 11225(a); see 2 *Cal. Crim. Law (3d)*, *Sex Offenses and Crimes Against Decency*, §64.)

(c) A bathhouse that "as a primary activity encourages or permits conduct that according to the guidelines of the federal Centers for Disease Control can transmit AIDS, including, but not limited to, anal intercourse, oral copulation, or vaginal intercourse." (P.C. 11225(a).)

(2) *Exempt Activities.* The statute does not cover the exhibition of motion pictures or magazines. (See *Harmer v. Tonylyn Productions* (1972) 23 C.A.3d 941, 100 C.R. 576 [motion pictures]; *People v. Projection Room Theater* (1976) 17 C.3d 42, 62, 130 C.R. 328, 550 P.2d 600, supra, §144 [following *Harmer*; obscene magazines or films].) (On applicability of statute to live commercial adult entertainment, see infra, §147.)

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6. Nuisances Per Se.

b. Red Light Abatement Law.

2. Live Commercial Adult Entertainment.

13 Witkin Sum. Cal. Law Equity § 147

[§ 147] Live Commercial Adult Entertainment.

In *People v. Sarong Gals* (1972) 27 C.A.3d 46, 50, 52, 103 C.R. 414, the court held that the Red Light Abatement Law may be invoked to abate continuing acts of lewdness during live commercial adult entertainment. Plaintiff district attorney obtained a preliminary injunction restraining defendant bar operators from using their premises for the purpose of lewdness, from permitting performances graphically depicting sexual intercourse, masturbation, fellatio, cunnilingus, bestiality, buggery, or masochism, and from conducting a performance in which the person's genitalia or anus was visible to another person. *Held*, the injunction was partially valid and partially violative of defendants' constitutional rights.

(a) Defendants claimed that when the Red Light Abatement Law was enacted in 1913, the Legislature did not have in mind the type of activity being conducted at the Sarong Gals bar. "This is apparently true. History does not record the existence of any topless-bottomless bars offering the type of entertainment described herein in 1913. Western folklore has it that prostitutes were good-hearted wenches who bedded their customers with no shilly-shallying around, nursed the sick in times of emergency, eventually married homesteaders and became pillars of the community. However, even prior to 1913, the exploitation of sexual desires for profit was apparently recognized as a social problem. Thus the Legislature specifically included lewdness as one of the grounds of the court's power to curb a public nuisance." (27 C.A.3d 49.)

(b) The statute applies to lewd entertainment. Even though nude dancing is protected by the First Amendment, lewd nude entertainment may be stopped. "Lewdness is lewdness and covering it with a patina of 'free expression' is a fiction which the law will not tolerate. Masturbating on the stage, causing customers to openly masturbate, allowing patrons to peer into females' innards, simulating sexual intercourse and in other ways titillating the customers sexually amounts to lewdness--even though it may be entertaining." (27 C.A.3d 50.)

(c) Entertainment value per se does not give an activity redeeming social importance. "Presumably, the Romans of the first century derived entertainment from witnessing Christians being devoured by lions." (27 C.A.3d 51.) The displays in question represent only commercialized lewdness. "The acts of the 'entertainers' or 'dancers' in the instant case were purely and simply obscene acts performed for the purpose of inciting the sexual desires and imaginations of a

group of randy, beer-drinking patrons. As such, these acts amount to conduct not protected by the First Amendment." (27 C.A.3d 51.)

(d) However, the statute may not be used to prohibit free expression that is not obscene. "Graphic depiction of sexual activity--standing by itself--does not possess the indicia of a theatrical performance. The injunction here is valid insofar as it prohibits this. But that portion of it purporting to enjoin 'conducting or permitting to be conducted upon or within said grounds, building or premises any performance wherein or whereby any person's genitalia or anus is visible to any other person,' is, under current law, an invalid restraint on free expression. Prior restraints on expression are presumptively invalid. ... A prior restraint on live expression, as opposed to films or books, would bear an even heavier burden of justification because the content of the future expression is unknown and cannot be presumed to be obscene. ... In fact, since the only conduct which is obscene, under present authorities, is prohibited by the first part of the injunction, the prohibition of nude dancing of any sort is directed to protected expression." (27 C.A.3d 52.)

Later cases are to the same effect. (See *People v. Sarong Gals* (1974) 42 C.A.3d 556, 117 C.R. 24 [affirming subsequent judgment granting permanent injunction]; *People v. American Art Enterprises* (1977) 75 C.A.3d 523, 529, 531, 142 C.R. 338 [where models engaged in sexual activity photographed for defendant's publications, building was used for purpose of prostitution and injunctive relief would have been appropriate]; 1 *Pepperdine L. Rev.* 116.)

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



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B. Types of Conduct or Activity.

6. Nuisances Per Se.

b. Red Light Abatement Law.

3. Action and Temporary Relief.

13 Witkin Sum. Cal. Law Equity § 148

[§ 148] Action and Temporary Relief.

(1) *Action*. A district attorney, city attorney, or a California citizen residing within the affected county may maintain an action in equity "to abate and prevent the nuisance and to perpetually enjoin the person conducting or maintaining it, and the owner, lessee, or agent of the building or place, in or upon which the nuisance exists, from directly or indirectly maintaining or permitting it." (P.C. 11226.) The action has precedence over most civil actions, and, if brought by a private citizen, dismissal on the plaintiff's request or for want of prosecution requires a court order. (P.C. 11228.)

A defendant in a nuisance abatement action brought by a county district attorney has no right under *C.C.P.* 394 to change venue to a neutral county (see 3 *Cal. Proc.* (4th), *Actions*, §788 et seq.), 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, 3 *Cal. Proc.* (4th), *Actions*, Supp., §871.)

(2) *Temporary Injunction or Restraining Order*. *People v. Kothari* (2000) 83 *C.A.4th* 759, 765, 100 *C.R.2d* 29, 6 *Cal. Proc.* (4th), *Provisional Remedies*, Supp., §394, held that a stipulated judgment restraining the owners of a hotel from permitting prostitution and drug use on the premises did not run with the land, and thus was not binding on future bona fide purchasers. This result has been abrogated by statute. If existence of a nuisance is shown to the satisfaction of the court either by verified complaint or affidavit, the court must issue "a temporary restraining order or injunction to abate and prevent the continuance or recurrence of the nuisance." (P.C. 11227(a).) The temporary injunction or restraining order is effective to enjoin subsequent owners, commercial lessees, or agents who acquire the premises with notice of the injunction or order. Owners are required to furnish them with that information prior to entering into an agreement to sell or lease the premises. (P.C. 11227(b).) (On requirement of notice and hearing before temporary relief may be granted, see *Skinner v. Superior Court* (1977) 69 *C.A.3d* 183, 188, 137 *C.R.* 851, 7 *Summary* (10th), *Constitutional Law*, §656.)

In *People v. Mitchell* (1976) 64 *C.A.3d* 336, 134 *C.R.* 358, the trial judge granted a preliminary injunction against operation of a theatre showing X-rated films, on evidence of numerous acts of public masturbation by patrons, condoned and encouraged by the management. *Held*, the preliminary injunction was too broad. P.C. 11230 (*infra*, §149) authorizes a judgment closing a property for a period of up to 1 year; but P.C. 11227 authorizes provisional relief only

"to abate and prevent" the continuance or recurrence of the nuisance. Here, the record did not show that closing of the theatre was necessary to prevent the lewd acts of the patrons; it would have been sufficient to restrain its improper use. (64 C.A.3d 340.)

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

(1) *Action*. See *People v. Bhakta* (2006) 135 C.A.4th 631, 637, 37 C.R.3d 652 [city attorney had standing to bring action on behalf of People of State of California].

Change of venue to neutral county:

Cross-Reference: 3 Cal. Proc. (5th), *Actions*, §871 et seq.

Nguyen case:

Cross-Reference: 3 Cal. Proc. (5th), *Actions*, §956.

(2) *Temporary Injunction or Restraining Order*. See *People v. Pacific Landmark* (2005) 129 C.A.4th 1203, 1211, 29 C.R.3d 193, 9 Summary (10th), *Partnership*, Supp., §168 [manager of limited liability company could be personally subject to injunction, notwithstanding *Corp.C. 17158(a)* (manager of limited liability company is not personally liable for debt, obligation, or liability of company; see 9 Summary (10th), *Partnership*, §168)].

People v. Kothari case:

Cross-Reference: 6 Cal. Proc. (5th), *Provisional Remedies*, §394.



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b. Red Light Abatement Law.

4. Decision and Order.

13 Witkin Sum. Cal. Law Equity § 149

[§ 149] Decision and Order.

(1) *Order of Abatement and Judgment.* If the existence of a nuisance is established in the action, an order of abatement must be entered as a part of the judgment directing the removal and sale under execution of all "fixtures, musical instruments and movable property used in conducting, maintaining, aiding, or abetting the nuisance." The building is to be closed and kept closed and in the custody of the court for 1 year, unless sooner released; alternatively, if the court finds that a vacancy resulting from the building's closure may create a nuisance or is otherwise harmful to the community, the court may order the person responsible for the nuisance to pay damages not to exceed the fair market rental value of the building or place for 1 year. (P.C. 11230(a).) A civil penalty, not to exceed \$ 25,000, may also be assessed against a person responsible for the nuisance. (P.C. 11230(b).)

P.C. 11231 states the order in which the proceeds from the sale of property removed from the building or place must be applied; if the proceeds do not fully discharge the costs, fees, and allowances, the building and place must also be sold under execution and the proceeds applied in like manner. (On sales under execution, see 8 *Cal. Proc.* (4th), *Enforcement of Judgment*, §93 et seq.)

(2) *Damages.* *People v. American Art Enterprises* (1983) 33 C.3d 328, 330, 188 C.R. 740, 656 P.2d 1170, held that the Red Light Abatement Law did not support an award of damages against the owner of property that has been used for the prohibited purposes. Because money damages "are not included among the sanctions specifically enumerated in the act, and because past authorities establish that the primary purpose of the act is to 'reform' the property in question rather than to punish the property owner, we conclude that the act does not authorize such a damage award." (33 C.3d 330.) P.C. 11225 was amended in 1983 to authorize damages. (See P.C. 11230, supra.) C.C. 3496 authorizes an award of costs and reasonable attorneys' fees to the prevailing party in a case in which a governmental agency seeks to enjoin the use of a building or place for illegal gambling, lewdness, assignation, or prostitution, or seeks to enjoin those acts, as authorized by P.C. 11225 et seq.

(3) *Contempt.* Violating or disobeying an injunction or order expressly provided for under the statute is punishable as a contempt by a fine of not less than \$ 200 nor more than \$ 1,000, a county jail sentence of not less than 1 month nor more than 6 months, or both. (P.C. 11229; see P.C. 11233 [fine is lien on building].)

In *Mitchell v. Superior Court* (1989) 49 C.3d 1230, 265 C.R. 144, 783 P.2d 731, the trial judge, after an evidentiary hearing, found petitioners in contempt of an injunction under the statute and imposed fines and jail sentences for each of 62 contemptuous acts committed over a 4-day period under P.C. 11229. The judge also pronounced an alternative order and jail sentence under C.C.P. 1209 et seq. "if the Court of Appeal should find that the defendants should have been sentenced under" C.C.P. 1218. The court annulled the judgments of contempt, holding as follows:

(a) Because a defendant in a contempt proceeding under P.C. 11229 faces a sentence equivalent to that of many misdemeanors, Cal. Const., Art. I, §16 guarantees the defendant the right to trial by jury in a contempt proceeding. (49 C.3d 1241, 1244.)

(b) Insofar as an injunction authorized under the Red Light Abatement Law is an injunction to abate a nuisance, namely, maintaining premises where prostitution and lewdness occur, persons who violate it may properly be charged under P.C. 11229 with only one count of contempt for each separate day they permit the prohibited nuisance to continue. (49 C.3d 1245, 1248.)

(c) The prosecution may exercise discretion to proceed against a person who has violated a Red Light Abatement Law injunction under the less serious general contempt provisions of C.C.P. 1209 et seq., which triggers neither a state constitutional nor statutory right to a jury trial. (49 C.3d 1249, 1252; see 8 Cal. Proc. (4th), *Enforcement of Judgment*, §332 et seq.) However, because Red Light Abatement Law contempts are "substantially greater" than C.C.P. 1209 contempts, "due process requires the prosecution to afford the defendant fair notice of the nature of the penalties and proceedings he faces, by indicating, in the declarations filed initiating the contempt proceeding, the jurisdictional basis for the action." (49 C.3d 1252.)

(4) *Release of Property*. If the owner (a) is not guilty of contempt in the proceedings, (b) appears and pays all costs, fees, and allowances that are a lien on property, and (c) files a bond in the full value of the property providing that the owner will immediately abate any nuisance and prevent it for 1 year thereafter, the court may, if satisfied of the owner's good faith, order the closed premises delivered to the owner and cancel the abatement order. (P.C. 11232.)

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

(1) *Order of Abatement and Judgment*.

Sales under execution:

Cross-Reference: 8 Cal. Proc. (5th), *Enforcement of Judgment*, §99 et seq.(3) *Contempt*.

General contempt provisions:

Cross-Reference: 8 Cal. Proc. (5th), *Enforcement of Judgment*, §340 et seq.



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c. Other Statutes.

13 Witkin Sum. Cal. Law Equity § 150

[§ 150] Other Statutes.

A number of other statutes characterize as nuisances places where various activities occur or conditions exist. The following are illustrative:

(1) *Controlled Substances Offenses*. A building or place used to unlawfully sell, store, keep, manufacture, or give away controlled substances "is a nuisance which shall be enjoined, abated, and prevented, and for which damages may be recovered, whether it is a public or private nuisance." (*Health & Saf.C. 11570*; see *Lew v. Superior Court* (1993) 20 C.A.4th 866, 871, 25 C.R.2d 42 [*Health & Saf.C. 11570* does not require that unlawful activity constituting nuisance be conducted by owner or tenant of building, or by person entering with permission]; 28 *Pacific L. J.* 663 [Using Civil Remedies to Evict Tenants Engaged in Illegal Drug Activity Rapidly].) (On abatement procedure, see *Health & Saf.C. 11571* et seq.; on controlled substance offenses, see 2 *Cal. Crim. Law* (3d), *Crimes Against Public Peace and Welfare*, §63 et seq.)

(2) *Street Gang Terrorism*. P.C. 186.22a, part of the Street Terrorism Enforcement and Prevention Act (P.C. 186.20 et seq.), makes a place or building a nuisance if used by a criminal street gang in connection with specified criminal activity. (For comprehensive coverage, see 2 *Cal. Crim. Law* (3d), *Crimes Against Public Peace and Welfare*, §23 et seq.)

(3) *Unlawful Liquor Sales*. A building or place used to unlawfully sell, serve, or give away alcoholic beverages, or in which that activity has occurred, "is a nuisance which shall be enjoined, abated, and prevented, whether it is a public or private nuisance." (P.C. 11200.) (On abatement procedure, see P.C. 11201 et seq.; on alcohol offenses, see 2 *Cal. Crim. Law* (3d), *Crimes Against Public Peace and Welfare*, §288 et seq.)

(4) *Weapons*. Unlawfully used or possessed weapons are nuisances. (See P.C. 12028(a), 12029 [unlawfully carrying concealed weapon]; P.C. 12028(b) [use in crime]; P.C. 12028.5(e) [firearm or other deadly weapon taken during domestic dispute and not recovered]; P.C. 12251 [public nuisance to unlawfully carry machine gun]; P.C. 12307 [unlawful possession of "destructive device"].) (On weapons offenses, see 2 *Cal. Crim. Law* (3d), *Crimes Against Public Peace and Welfare*, §161 et seq.)

(5) *Motion Picture Depicting Cruelty to Human or Animal*. Exhibition of a motion picture depicting the intentional killing of, or cruelty to, a human being or an animal that actually occurred in the production of the motion picture, or for the purpose of the production, "is a nuisance, which shall be enjoined, abated, and prevented." (C.C. 3505(a).)

(6) *Interference With Solar Collector*. The Solar Shade Control Act (*Pub.Res.C. 25980 et seq.*) protects solar collectors, i.e., devices "used primarily to transform solar energy into thermal, chemical, or electrical energy." (*Pub.Res.C. 25981.*) With specified exceptions (*Pub.Res.C. 25982, 25984*), no person owning or controlling property may allow an interfering tree or shrub to be placed or to grow, after installation of a solar collector on another's property. The prohibited interference consists of casting a shadow greater than 10% of the collector absorption area on the solar collector surface at any one time between 10 a.m. and 2 p.m. (*Pub.Res.C. 25982.*) A person violating the statute is guilty of a public nuisance, and the district attorney, city attorney, or prosecuting attorney may prosecute. (*Pub.Res.C. 25983.*) However, a city or county (for unincorporated areas) may adopt an ordinance exempting that jurisdiction from the provisions of the Act. (*Pub.Res.C. 25985.*) A person whose passive or natural solar heating or cooling system would impact on an adjacent active solar system may obtain equitable relief in a court on a showing that his or her system would provide a greater net energy saving than the other. (*Pub.Res.C. 25986.*) (See *Sher v. Leiderman* (1986) 181 C.A.3d 867, 880, 226 C.R. 698 [exclusively "passive solar" home was not protected by Act]; 10 *Pacific L. J.* 484; 15 *U.S.F. L. Rev.* 537.)

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

(4) *Weapons*. See C.C. 3485, added in 2007 [pilot project authorizing city prosecutors in Los Angeles, San Diego, Sacramento, and Alameda Counties to bring unlawful detainer action to abate nuisance caused by illegal conduct involving unlawful weapons or ammunitions on real property; unless extended, statute is repealed effective January 1, 2010]. (6) *Interference With Solar Collector*. A person who owns or controls a building where a solar collector is proposed to be installed may provide a prescribed written notice by certified mail to owners of affected property. (*Pub.Res.C. 25982*, added in 2008.) A person violating the statute is guilty of a private nuisance, rather than a public nuisance. (*Pub.Res.C. 25983*, as amended in 2008.)

See *Zipperer v. Santa Clara* (2005) 133 C.A.4th 1013, 1023, 35 C.R.3d 487 [county's adoption of qualifying ordinance under exemption provision of Solar Shade Control Act abolished property owners' action under Act for malfunction to their solar home allegedly caused by shade from trees growing on county's adjoining property].



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6. Nuisances Per Se.

d. Municipal Ordinances.

13 Witkin Sum. Cal. Law Equity § 151

[§ 151] Municipal Ordinances.

In addition to state regulations (*supra*, §§146, 150), municipal ordinances may declare certain conduct and activities to be nuisances. (See *People v. Johnson* (1954) 129 C.A.2d 1, 8, 277 P.2d 45 [county zoning ordinance prohibiting keeping of more than five hogs in limited manufacturing zone]; *People v. Los Angeles* (1958) 160 C.A.2d 494, 501, 325 P.2d 639 [city's right to prevent discharge of sewage in bay, despite *Water C. 13000 et seq.*]; *San Francisco v. Padilla* (1972) 23 C.A.3d 388, 401, 100 C.R. 223, 2 Cal. Proc. (4th), *Jurisdiction*, §339 [building maintained in violation of city planning code may be enjoined as public nuisance]; 1 Harper, James & Gray 3d, §1.29; on local zoning regulations, see 8 *Summary* (10th), *Constitutional Law*, §§1019 et seq., 1026. On ordinances prohibiting public display of offensive materials, and remedies, see 10 *U.S.F. L. Rev.* 232.)

In *Costa Mesa v. Soffer* (1992) 11 C.A.4th 378, 13 C.R.2d 735, plaintiff city brought an action to abate defendant's eight motor vehicles as a public nuisance under a municipal ordinance. The trial judge declared five of the vehicles a public nuisance and ordered them removed within 10 days. On appeal, defendant challenged plaintiff's authority to declare the storage of wrecked, inoperable, or dismantled automobiles a public nuisance per se. *Held*, affirmed.

(a) Cities are constitutionally authorized to make and enforce within their limits all local, police, and sanitary ordinances and other regulations not in conflict with the general laws. Under *Govt.C. 38771*, the city legislative body may declare what constitutes a nuisance. (11 C.A.4th 382, 383.)

(b) Defendant's claim that the Vehicle Code is preemptive is without merit. *Veh.C. 22660* provides that a city "may adopt an ordinance establishing procedures for the abatement and removal, as public nuisances, of abandoned, wrecked, dismantled, or inoperative vehicles or parts thereof from private or public property." (11 C.A.4th 383.)

(c) Nor does the Penal Code preempt the field of public nuisance law. Although P.C. 372 provides that it is a misdemeanor to maintain or commit a public nuisance if the punishment is not otherwise prescribed, one statute is hardly a case for preemption. In this case, the punishment was prescribed by ordinance, which made storing inoperative vehicles an infraction. (11 C.A.4th 384, 385.)

(d) The ordinance was not unconstitutionally vague or overbroad for failure to define the terms "abandoned,"

"wrecked," "dismantled," or "mechanically incapable of being driven." These terms are all of common usage and are applied in common context; hence, their meaning is reasonably certain. (11 C.A.4th 385, 387.)

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

See *Corona v. Naulls* (2008) 166 C.A.4th 418, 433, 83 C.R.3d 1 [medical marijuana dispensary that obtained business license to operate "miscellaneous retail" establishment was properly enjoined as nuisance per se for violating municipal ordinances requiring it to disclose nature of business or to obtain variance].

San Francisco v. Padilla case:

Cross-Reference: 2 Cal. Proc. (5th), *Jurisdiction*, §348.



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e. Distinction: Lawful Business.

13 Witkin Sum. Cal. Law Equity § 152

[§ 152] Distinction: Lawful Business.

A lawful business cannot be a nuisance per se, although it may become a nuisance by reason of its location or the manner in which it is conducted. (*Dauberman v. Grant* (1926) 198 C. 586, 590, 246 P. 319; see *McPheeters v. McMahon* (1933) 131 C.A. 418, 425, 21 P.2d 606; 44 A.L.R.2d 1381 [public dances or dance halls as nuisance]; 58 Am.Jur.2d (2002 ed.), Nuisances §20.)

A business may also be declared by statute or ordinance to constitute a nuisance if operating without a permit. But a distinction was drawn in *Morton v. Superior Court* (1954) 124 C.A.2d 577, 269 P.2d 81. A county ordinance required a permit to operate a quarry. Defendants applied, the planning commission denied the application, and defendants petitioned for mandamus to review the order. The county then sought to enjoin the operation. *Held*, (a) if defendants had not applied for a permit, or the denial had become final, continued operation of the quarry would be an enjoined nuisance; (b) but while the review proceeding was pending, the planning commission's inchoate determination could not be the basis of an injunction, particularly where the activity itself could not, as a matter of law, be absolutely prohibited. "The planning commission is as much bound by the rule restricting the right to prohibit lawful businesses, where regulation is possible, as is a court. If, as already held, the trial court on the facts before it was without power to enjoin absolutely, it would be anomalous, indeed, to hold that an administrative determination which is under direct attack in the courts, should have greater legal effect. To so hold would be to give greater legal efficacy to administrative rulings than is afforded to judicial determinations. That is not the law. The vested right of defendants to engage in a lawful business, subject only to a lawful exercise of the police power, cannot be taken away in such a cavalier manner. To do so would be to deprive defendants of a vested right without due process." (124 C.A.2d 588.)

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



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C. Remedies.
1. Against Private Nuisance.

13 Witkin Sum. Cal. Law Equity § 153

[§ 153] Against Private Nuisance.

(1) *In General.* A private nuisance may be abated by the party injured at his or her own risk; or the injured party may bring a civil action for an injunction, damages, or both. (C.C. 3501; C.C.P. 731; see *McCarthy v. Gaston Ridge Mill & Mining Co.* (1904) 144 C. 542, 78 P. 7; *Farmy v. College Housing* (1975) 48 C.A.3d 166, 121 C.R. 658 [no punitive damages where defendants made good faith attempts to control objectionable noise]; *Santa Fe Partnership v. ARCO Products Co.* (1996) 46 C.A.4th 967, 973, 54 C.R.2d 214 [landowners could not recover for diminution in market value caused by "stigma" of contaminated land, where landowners claimed that nuisance was abatable and temporary, rather than permanent or indefinite]; *Rest.2d, Torts* §822, Comment d; Prosser & Keeton 5th, §89; 1 Harper, James & Gray 3d, §1.30; BAJI, No. 8.60, CACI, Nos. 2020, 2021 [essential elements and damages in action for private nuisance]; 25 A.L.R.5th 568 [nuisance entitling owner or occupant to damages for personal inconvenience, discomfort, annoyance, anguish, or sickness as distinct from or in addition to damages for property depreciation]; 58 Am.Jur.2d (2002 ed.), Nuisances §218 et seq.; 18B Am.Jur. P.P. Forms (1997 ed.), Nuisances §1 et seq. On injunction, see 5 Cal. Proc. (4th), Pleading, §784; 6 Cal. Proc. (4th), Provisional Remedies, §307.)

(2) *Recovery of Postcomplaint Damages.* *Renz v. 33rd Dist. Agricultural Assn.* (1995) 39 C.A.4th 61, 46 C.R.2d 67, involved an issue of first impression: Could plaintiff property owners recover damages that accrued between the commencement and conclusion of their successful continuing nuisance action against a governmental entity that operated motorcycle races on fairgrounds near plaintiffs' property? *Held*, yes.

(a) In *Baker v. Burbank-Glendale-Pasadena Airport Authority* (1985) 39 C.3d 862, 218 C.R. 293, 705 P.2d 866, 3 Cal. Proc. (4th), Actions, §553, the Supreme Court stated that recovery of damages in continuing nuisance actions is limited to actual injury suffered "prior to commencement of each action." (39 C.A.4th 65.) However, *Baker* involved the issue whether a plaintiff was barred by the statute of limitations from seeking accrued continuing nuisance damages. The Supreme Court's "statement about the damages period was not necessary to its decision and therefore does not bind this court." (39 C.A.4th 68.)

(b) "In the absence of this language in *Baker*, it is clear that damages incurred between the commencement and the conclusion of a continuing nuisance action should be recoverable in that action." (39 C.A.4th 68.) Under C.C. 3283 (see 6 Summary (10th), Torts, §1552), damages may be awarded in a judicial proceeding for detriment resulting after the commencement of the proceeding. In an action to abate a continuing nuisance, the plaintiff will ordinarily file an action

for both injunctive relief and damages. The plaintiff may still suffer additional injuries from the continuing nuisance between the commencement of the action and its conclusion. If damages incurred during this period were not recoverable, plaintiffs in many continuing nuisance actions would be forced to bring an additional action even if they ultimately obtained an injunction preventing further damage. Requiring repetitive litigation is not in the interests of justice and judicial economy. (39 C.A.4th 68.)

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

(1) *In General.* See CACI, No. VF-2006 [private nuisance]; 18C Am.Jur. P.P. Forms (2006 ed.), Nuisances, §1 et seq. *Injunction:*

Cross-References: 5 Cal. Proc. (5th), *Pleading*, §828; 6 Cal. Proc. (5th), *Provisional Remedies*, §304.

(2) *Recovery of Postcomplaint Damages.*

Baker case:

Cross-Reference: 3 Cal. Proc. (5th), *Actions*, §602.



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C. Remedies.

2. Against Public Nuisance.

a. Abatement and Injunction.

13 Witkin Sum. Cal. Law Equity § 154

[§ 154] Abatement and Injunction.

(1) *In General.* The remedies against a public nuisance include abatement by public officers and a suit on behalf of the state for an injunction. (See *C.C.P.* 731; *People v. Gold Run Ditch & Mining Co.* (1884) 66 C. 138, 4 P. 1152; *People v. New Penn Mines* (1963) 212 C.A.2d 667, 671, 675, 28 C.R. 337 [no authority to sue to enjoin pollution of stream by industrial waste; Water Code procedure governs]; *People v. Wheeler* (1973) 30 C.A.3d 282, 294, 106 C.R. 260; *People v. Mitchell Bros.' Santa Ana Theater* (1981) 114 C.A.3d 923, 930, 171 C.R. 85 [abatement is sole remedy under *C.C.P.* 731; award of damages to public agency was improper]; *San Luis Obispo v. Abalone Alliance* (1986) 178 C.A.3d 848, 859, 223 C.R. 846 [same]; *Lamont Storm Water Dist. v. Pavich* (2000) 78 C.A.4th 1081, 1083, 93 C.R.2d 288 [storm water district lacked statutory authority to bring action to abate public nuisance]; *People v. Englebrecht* (2001) 88 C.A.4th 1236, 1244, 106 C.R.2d 738 [no right to jury trial in proceeding to abate street gang activity as public nuisance]; 16 *Ecology L. Q.* 883 [evolution of public nuisance law and viability of public nuisance actions in light of existing environmental statutes]; 113 *Harv. L. Rev.* 1521 [recovering costs of abating gun violence nuisance from gun industry]; 113 *Harv. L. Rev.* 1759 [same]; 31 *Western State L. Rev.* 79 [constitutionality of banning pagers in gang injunctions]; 60 *A.L.R.3d* 665 [right to enjoin as affected by existence of pollution control agency]; 101 *A.L.R.5th* 287 [remedies for sewage treatment plant alleged to be nuisance].)

In *Knapp v. Newport Beach* (1960) 186 C.A.2d 669, 9 C.R. 90, defendant city, on a cross-complaint, obtained judgment that plaintiff's dilapidated apartment house was a public nuisance and should be repaired or demolished. Plaintiff set up the defense that the building was constructed prior to the 1923 State Housing Act. *Held*, this defense was untenable. "A public nuisance, if found to exist, is a present danger to the public. It can be abated under the police power whenever discovered. The date of construction of the building or enactment of the law under which public authorities are proceeding is not the criterion. Retroactive effect is not sought. The present condition of danger to the public is the real criterion." (186 C.A.2d 681.)

(2) *Local Procedure.* County boards of supervisors may by ordinance establish a procedure for the abatement of nuisances and, where a nuisance is on a parcel of land, make the cost a special assessment against that parcel. Counties may recover abatement and related administrative costs and attorneys' fees. (*Govt.C.* 25845.) A similar procedure is available to municipal legislative bodies, with a special procedure to summarily abate a nuisance resulting from the defacement of property by graffiti or other inscribed material at the expense of the person responsible for the nuisance

or, if a minor, at the expense of the parent or guardian. Alternatively, municipal legislative bodies may establish by ordinance a procedure to collect abatement and related administrative costs by a nuisance abatement lien. (*Govt.C. 38772 et seq.*) (On notice and hearing requirements, see *Mohilef v. Janovici* (1996) 51 C.A.4th 267, 276, 58 C.R.2d 721.)

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

(1) *In General.* See CACI, No. VF-2005 [public nuisance]; 59 *Hastings L. J.* 1553 [Lead Paint: Who will Bear the Cost of Abating the Latest Public Nuisance?]. (2) *Local Procedure.* See *Monte Sereno v. Padgett* (2007) 149 C.A.4th 1530, 1540, 58 C.R.3d 218 [ordinance authorizing city to recover attorneys' fees if it prevailed in nuisance action was invalid where ordinance conflicted with *Govt.C. 38773.5(b)*, which permits recovery by prevailing party in nuisance action, rather than limiting recovery only to city].



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C. Remedies.

2. Against Public Nuisance.

b. Action by State for Damages.

13 Witkin Sum. Cal. Law Equity § 155

[§ 155] Action by State for Damages.

In *Selma Pressure Treating Co. v. Osmose Wood Preserving Co. of America* (1990) 221 C.A.3d 1601, 271 C.R. 596, the State of California and the Regional Water Quality Control Board filed an action against owners and operators of a wood treatment facility, alleging causes of action for improper disposal of hazardous waste and maintenance of a public nuisance. The complaint sought injunctive relief and damages. Defendant owners cross-complained against the supplier of the equipment used at the facility, and defendant operators cross-complained against the supplier of chemicals used at the facility, seeking indemnification for damages for which they might be held liable. The trial judge sustained demurrers to the cross-complaints on the theory that the state, in prosecuting a cause of action for a public nuisance, is confined to the remedy of abatement and cannot recover damages; hence, cross-defendants cannot be liable under the doctrine of equitable indemnity. *Held*, judgment of dismissal reversed.

(a) *State as property owner may recover damages.*

(1) *C.C.P. 731*, and the cases interpreting it, limit the state's recovery only when it acts in its representative capacity to protect the public interest. When the state has a property interest that has been injuriously affected by a nuisance, the state, like any other property owner, can seek damages. (221 C.A.3d 1614, citing *Prosser & Keeton*.) "[I]f a governmental property owner cannot pursue the tortfeasor for damages to its property interests, the governmental entity suffers under a disadvantage felt by no other property owner--it cannot recover for any injury to its property interest when another maintains a public nuisance. No public interest would be served by such a limitation; it merely would relieve a tortfeasor of some of the consequences of his tortious behavior where the property injuriously affected happened to be owned by a public entity." (221 C.A.3d 1616.)

(2) *Water C. 102* declares that water in the state is the property of the state, and the cases suggest that the state "has a legally cognizable property interest in the waters of the state." (221 C.A.3d 1616, citing *Ivanhoe Irr. Dist. v. McCracken* (1958) 357 U.S. 275, 78 S.Ct. 1174, 2 L.Ed.2d 1313, 12 Summary (10th), *Real Property*, §924, and *California Trout v. State Water Resources Control Bd.* (1979) 90 C.A.3d 816, 153 C.R. 672, 12 Summary (10th), *Real Property*, §943.)

(3) Other cases "recognize and protect the state's *parens patriae* interest in the air, land and waters of its territory."

"Where confronted with the issue, the courts have accorded the State the right to seek money damages based upon such interest." (221 C.A.3d 1617.) "This right of recovery is not diminished by the coexistence of express statutory remedies where the legislation does not presume to preempt common law rights." (221 C.A.3d 1618.)

(4) "Whether we term the State's interest here a direct usufructuary interest, a mere legal interest held for the benefit of the People or an interest supported by its *parens patriae* role, the State does have a legally cognizable interest in the groundwaters affected here which would suffice to support a claim for damages." (221 C.A.3d 1618.)

(b) *Cross-defendants may be liable under doctrine of equitable indemnity.* The pleadings adequately allege acts of the suppliers in designing and installing equipment, and providing technical advice concerning disposal of the chemical waste products that they knew or should have known might threaten the safety of the underlying water supply. (221 C.A.3d 1620; see 5 Summary (10th), Torts, §112.) The chemical suppliers owed a duty to warn of the danger to human health and safety and the environment that would result from the foreseeable and intended use of the wood-treating chemicals. (221 C.A.3d 1621, citing Rest.2d, Torts §388, and *Stevens v. Parke, Davis & Co.* (1973) 9 C.3d 51, 107 C.R. 45, 507 P.2d 653, 6 Summary (10th), Torts, §1177.) Thus, defendants could state claims for equitable indemnity against cross-defendants. (221 C.A.3d 1624.)

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



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c. Demolition or Destruction.

13 Witkin Sum. Cal. Law Equity § 156

[§ 156] Demolition or Destruction.

(1) *Constitutional Protections.* In an emergency, the police may justify destruction of dangerous property without a prior hearing. (See 7 *Summary* (10th), *Constitutional Law*, §678.) But where no emergency exists, summary abatement is a denial of due process. In *Leppo v. Petaluma* (1971) 20 C.A.3d 711, 97 C.R. 840, plaintiff owned a 100-year-old hotel building. Defendant city determined that it was a public nuisance, and without a hearing or any judicial action, ordered its demolition. *Held*, the city was liable in damages. The burden of proof of necessity for immediate abatement was on the city, and it failed to make the showing. (20 C.A.3d 178.)

(2) *Statutory Protections.* Prior to ordering demolition, a municipality must afford the owner the choice of repairing or demolishing the building, a reasonable time in which to make that choice, and a reasonable opportunity to do so. (See *Health & Saf.C. 17980(b)*.) In *Hawthorne Savings & Loan Assn. v. Signal Hill* (1993) 19 C.A.4th 148, 23 C.R.2d 272, plaintiff owned an apartment complex acquired through foreclosure. The prior owner had allowed the complex to deteriorate, and soon after plaintiff's acquisition defendant city ordered the buildings demolished. Plaintiff appealed to the city council, presenting evidence of the estimated cost of repairs and its desire to proceed with them. The city council denied the appeal and ordered demolition. The trial judge denied plaintiff's petition for a writ of mandamus. *Held*, writ granted, with directions that defendant conduct further proceedings.

Under *Health & Saf.C. 17980(b)*, defendant had no discretion whether to afford plaintiff a choice between repair and demolition. "California's legislative scheme requires the property owner be given the right to choose repair or demolition but places reasonable conditions on that choice in order to protect the public interest in the abatement of substandard buildings. These conditions include the requirements the owner exercise the choice to repair or demolish in a timely manner and develop a 'reasonable and feasible schedule for expeditious repair.' In addition, the repair work must be done on schedule. If the owner fails to comply with these conditions, the municipality may itself demolish or repair the buildings. ... Furthermore, the owner's right to choose repair over demolition does not apply in the case of a public health or safety emergency." (19 C.A.4th 160, citing *Leppo*.)

Health & Saf.C. 17980(b) now provides that if the owner does not complete the repair within the time required in the notice of abatement, rather than in the repair schedule, the municipality itself may demolish or repair the affected building.

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

(1) *Constitutional Protections*. See *D & M Financial Corp. v. Long Beach* (2006) 136 C.A.4th 165, 174, 38 C.R.3d 562 [city violated due process by demolishing substandard property without notifying beneficiary of trust deed on property and giving beneficiary opportunity to make repairs].

(2) *Statutory Protections*. See *D & M Financial Corp. v. Long Beach*, *supra*, 136 C.A.4th 184 [city violated *Health & Saf.C. 17980(b)* by demolishing substandard property without notifying beneficiary of trust deed on property and giving beneficiary opportunity to make repairs; following *Hawthorne Savings & Loan Assn. v. Signal Hill* (1993) 19 C.A.4th 148, 23 C.R.2d 272, text, p. 482].



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d. Criminal Proceedings.

13 Witkin Sum. Cal. Law Equity § 157

[§ 157] Criminal Proceedings.

A nuisance is a misdemeanor, and a criminal prosecution may be brought. (C.C. 3491; P.C. 370 et seq.; see *People v. Montoya* (1933) 137 C.A. Supp. 784, 785, 28 P.2d 101; *Pain v. Municipal Court* (1968) 268 C.A.2d 151, 154, 73 C.R. 862 [P.C. 370 is constitutional]; 2 *Cal. Crim. Law* (3d), *Crimes Against Public Peace and Welfare*, §396.)

Under P.C. 373a, an owner or lessee who maintains a public nuisance is criminally liable after notice from a health officer or district attorney, so that the omission to abate is actually the punishable offense. (*People v. Cooper* (1944) 64 C.A.2d Supp. 946, 948, 149 P.2d 86.)

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



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C. Remedies.

2. Against Public Nuisance.

e. No Private Remedy.

13 Witkin Sum. Cal. Law Equity § 158

[§ 158] No Private Remedy.

(1) *Statement of Rule.* A private person has no direct remedy against a public nuisance unless he or she is injuriously affected; in other words, unless it is also a private nuisance. (C.C. 3493, 3495, 3502; see *Johnson v. V.D. Reduction Co.* (1917) 175 C. 63, 64, 164 P. 1119; *Buchanan v. Los Angeles County Flood Control Dist.* (1976) 56 C.A.3d 757, 768, 128 C.R. 770, citing the text [special injury found]; *Mangini v. Aerojet-General Corp.* (1991) 230 C.A.3d 1125, 1138, 281 C.R. 827 [cost of testing property allegedly polluted with hazardous waste by former tenants constituted special injury to owners]; Rest.2d, Torts §821G; 1 Harper, James & Gray 3d, §1.23; 28 *Ecology L. Q.* 755 [special injury rule]; 71 *A.L.R.4th* 13 [special injury entitling private party to maintain action based on public nuisance]; 5 Proof of Facts 3d 657 [proof of special injury]; 58 *Am.Jur.2d* (2002 ed.), *Nuisances* §246 et seq.) (On governmental activity, see 5 *Summary* (10th), Torts, §339; on right of private person to enjoin closure of public trail, see C.C.P. 731.5.)

(2) *Illustrations.* *Frost v. Los Angeles* (1919) 181 C. 22, 183 P. 342, is an unusual case on this point. A statute provided that when any agency supplied water for human consumption without a permit from the State Board of Health, a private person might secure an injunction against the continuance of the service. Frost sued for an injunction against the city. *Held*, the injunction could be denied. The meaning of the decision appears to be that although the Legislature gives a private citizen the power to enjoin a public nuisance, equity may nevertheless refuse the injunction where the citizen himself or herself has not been injured by it, in accordance with the usual equitable rule. (181 C. 24.)

In *Venuto v. Owens-Corning Fiberglas Corp.* (1971) 22 C.A.3d 116, 99 C.R. 350, plaintiffs, four individuals, filed a complaint alleging that defendant's manufacturing plant in the city of Santa Clara was operated in a manner constituting a public nuisance in that emissions polluted the air. Three plaintiffs also alleged allergies and respiratory disorders as a result. *Held*, judgment for defendant on demurrer affirmed. The facts pleaded were sufficient to show a public nuisance; but in order for a private person to obtain relief, he or she must show special injury, different in kind from that suffered by the general public. Here, the allegations of allergies and respiratory disorders amounted to nothing more than a claim that the health of the public was affected, with plaintiffs' own injury different only in degree. (22 C.A.3d 125.)

Other cases are to the same effect. (See *Thompson v. Kraft Cheese Co. of Calif.* (1930) 210 C. 171, 178, 291 P. 204 [following *Frost*]; *Brown v. Petrolane* (1980) 102 C.A.3d 720, 724, 726, 162 C.R. 551 [following *Venuto*]; *Wolford v. Thomas* (1987) 190 C.A.3d 347, 356, 235 C.R. 422 [applying *Venuto*; no cause of action for blockage of light, etc., by

lawfully constructed penthouse]; *Institoris v. Los Angeles* (1989) 210 C.A.3d 10, 20, 258 C.R. 418 [plaintiff's concession that nuisance caused by airport operations was public and of same kind suffered by other nearby residents bars recovery]; *Baker v. Burbank-Glendale-Pasadena Airport Authority* (1990) 220 C.A.3d 1602, 1610, 270 C.R. 337 [following *Venuto* and *Institoris*; no recovery of emotional distress damages by plaintiffs whose properties experienced airport-generated noise level higher than general public, because their injury differed not in kind, but only in degree]; 8 Cal. L. Rev. 127 [Frost].)

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

(2) *Illustrations.* See *Kempton v. Los Angeles* (2008) 165 C.A.4th 1344, 1349, 81 C.R.3d 852 [complaint alleging that neighbors' fence was erected on city property, prevented access to public sidewalk, and blocked plaintiffs' sightlines on entering and exiting their garage was sufficient to establish both public nuisance and specific injury to plaintiffs].



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3. Scope of Injunction.

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[§ 159] Scope of Injunction.

(1) *In General.* Injunction is a drastic remedy, and its scope should be limited so as to afford reasonable protection of the plaintiff's rights without excessive restraint on the defendant's activities. Absolute prohibition of a particular business is therefore unjustified where satisfactory results can be obtained by changing the methods of operation to eliminate the nuisance. (See *Thompson v. Kraft Cheese Co. of Calif.* (1930) 210 C. 171, 176, 291 P. 204; *Cook v. Hatcher* (1932) 121 C.A. 398, 407, 9 P.2d 231; *Guttinger v. Calaveras Cement Co.* (1951) 105 C.A.2d 382, 390, 233 P.2d 914; *Little v. Schwartz* (1960) 182 C.A.2d 594, 597, 6 C.R. 40, 7 Cal. Proc. (4th), Judgment, §84; *Rest.2d, Torts* §943.)

"Injunctive process ought never to go beyond the necessities of the case and where a legitimate business is being conducted and in the conduct thereof a nuisance has been created and is being maintained, the relief granted should be directed and confined to the elimination of the nuisance, unless under the peculiar circumstances of the case the business, lawful in itself, cannot be conducted without creating a nuisance and violating the rights of contiguous property owners." (*Anderson v. Souza* (1952) 38 C.2d 825, 840, 243 P.2d 497.)

(2) *Illustrations.* In *Anderson v. Souza*, plaintiffs sought to enjoin defendants' operation of a private airport, flying school, and repair service, on evidence of disturbance of their peace by low flying planes. The trial judge granted the injunction abating the airport on the theory that it was too small and that the runway was too close to homes. *Held*, reversed. After stating the general principle quoted above, the court observed that buzzing and stunting could be prohibited, limits could be placed on low flying in close proximity to homes, and use of planes for which the field was inadequate could be prohibited. And "the burden was on plaintiffs who sought to close the airport to prove that no planes could fly to and from the field at proper elevations." (38 C.2d 843.) "Contiguous property owners must to a reasonable degree yield their desired privacy to the general welfare which is contributed to by the operation of legitimate businesses. Were it not so, railroads could not operate near residences, and factories could not be established without the necessity of purchasing prohibitively large areas of property. That reasonable inconvenience must be suffered by owners whose holdings are contiguous to commercial enterprises is too well decided to require citation of authorities." (38 C.2d 843.)

In *Morton v. Superior Court* (1954) 124 C.A.2d 577, 269 P.2d 81, defendant operated a rock quarry with excessive dust, noise, and some traffic hazard, and also in violation of the terms of a regulatory ordinance. The state and county

brought this action to enjoin it as a public nuisance, and the trial judge so ordered. *Held*, absolute prohibition was not warranted. Dust could be controlled by housing and sprinkling, the traffic hazard by a flagman and a different access road, and the company should be given an opportunity to correct its methods of operation before an injunction is issued in such extreme form. The police power limitation is analogous. Absolute prohibition of a legitimate business is not justified where the condition can be remedied by less drastic means (see 8 *Summary* (10th), *Constitutional Law*, §981). "Whether the attempt to regulate be by ordinance or by injunction the approach must be reasonable." (124 C.A.2d 582.)

In *People v. Mason* (1981) 124 C.A.3d 348, 177 C.R. 284, defendant conducted a restaurant and bar business, using live and juke box music with sound amplifying equipment during weekend evening and early morning hours. Neighborhood residents complained of the loud music, hand clapping, and foot stomping, and the trial judge granted an injunction against such activity when the noise is "audible anywhere in the neighborhood." *Held*, the injunction was overbroad and should be modified "so as to permit some noise to be audible, save and except that which unreasonably interferes with the residents' use and enjoyment of their property." (124 C.A.3d 354.)

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

(1) *In General*.

Little case:

Cross-Reference: 7 Cal. Proc. (5th), *Judgment*, §82.

(2) *Illustrations*. See *Golden Gate Water Ski Club v. Contra Costa* (2008) 165 C.A.4th 249, 265, 80 C.R.3d 876 [nuisance abatement order requiring water skiing club to remove structures it built in violation of open space restrictions was not overbroad; club made no attempt to obtain requisite permits, permits were not likely to have been granted if sought, and limiting injunction would encourage similar violations].



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D. Defenses.

1. Statutory Authority or Permission.

a. In General.

13 Witkin Sum. Cal. Law Equity § 160

[§ 160] In General.

(1) *Nature of Defense.* A thing that "is done or maintained under the express authority of a statute" cannot be deemed a nuisance. (C.C. 3482.) This statute would seem to apply only to a specific act authorized, and to legalize only a public and not a private nuisance. (*Tuebner v. California Street R. Co.* (1884) 66 C. 171, 173, 4 P. 1162; see *Liebman v. Richmond* (1930) 103 C.A. 354, 357, 284 P. 731; *Ambrosini v. Alisal Sanitary Dist.* (1957) 154 C.A.2d 720, 727, 317 P.2d 33 [sanitary district authorized to establish sewer but not defective outfall line]; *Bright v. East Side Mosquito Abatement Dist.* (1959) 168 C.A.2d 7, 11, 335 P.2d 527 [mosquito abatement district authorized to abate but not to cover highway with blanket of chemical fog]; *Lombardy v. Peter Kiewit Sons' Co.* (1968) 266 C.A.2d 599, 605, 72 C.R. 240 [construction of freeway]; *Prosser & Keeton* 5th, §88A; 1 Harper, James & Gray 3d, §1.30; 76 A.L.R.2d 896 [power of municipality to permit owner to build structure overhanging street or sidewalk]; 58 Am.Jur.2d (2002 ed.), *Nuisances* §446 et seq.)

(2) *Illustrations.* In *Farmers Ins. Exchange v. California* (1985) 175 C.A.3d 494, 221 C.R. 225, plaintiff insurance companies paid numerous claims of policyholders for paint damage to automobiles caused by the state's aerial spraying of fruit fly-infested areas pursuant to the Governor's declaration of a state emergency. In one cause of action (see 5 *Summary* (10th), *Torts*, §338), they sought recovery on the theory of nuisance, relying on the holding in *Varjabedian v. Madera* (1977) 20 C.3d 285, 142 C.R. 429, 572 P.2d 43, *infra*, §161, that the statutes permitting a city to construct a sewage treatment plant did not authorize the emission of septic smells onto plaintiffs' land. *Held*, no cause of action was stated. Here, the release of the chemically destructive spray was precisely what was authorized by the statute dealing with public nuisances (*Food & Ag.C.* 5321 et seq.), and C.C. 3482 was a complete defense. (175 C.A.3d 503.)

In *Friends of H Street v. Sacramento* (1993) 20 C.A.4th 152, 24 C.R.2d 607, plaintiff, an unincorporated association comprised primarily of residents of an urban street, sued defendant city to enjoin defendant to reduce the street's traffic speed and volume. Plaintiffs alleged that the ongoing traffic condition constituted a nuisance. The trial judge sustained defendant's demurrer without leave to amend, finding that the nuisance claim was barred under C.C. 3482, and that the separation of powers doctrine prevented the court from compelling defendant to perform a legislative act. *Held*, affirmed.

(a) *C.C. 3482 defense.* The action was clearly barred by C.C. 3482. Defendant's authority to maintain and manage

the street was well defined in several statutes, including *Veh.C. 21100*, *Sts. & H.C. 27*, and *Sts. & H.C. 5000* et seq. (20 C.A.4th 160, 161.) Further, prior cases have consistently held that alleged nuisances arising from the construction, operation, and maintenance of streets and highways come within the protection of C.C. 3482. (20 C.A.4th 162.)

(b) *Separation of powers defense*. The Legislature has delegated to local governments the power to regulate traffic on local streets. (20 C.A.4th 165.) Courts have no means, and no power, to avoid the effects of nonaction. In the present case, plaintiffs asked the court to remedy, through injunctive relief, defendant's alleged inaction in solving traffic problems. This remedy would directly interfere with defendant's legislative function, and thus, the court lacks the power to order it. (20 C.A.4th 165, 166.)

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

(1) *Nature of Defense*. See *Dina v. People* (2007) 151 C.A.4th 1029, 1052, 60 C.R.3d 559 [following *Lombardy v. Peter Kiewit Sons' Co.* (1968) 266 C.A.2d 599, 72 C.R. 240, text, p. 486; C.C. 3482 barred nuisance action against state for construction of freeway].



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1. Statutory Authority or Permission.
- b. Illustrations: No Express Authority.

13 Witkin Sum. Cal. Law Equity § 161

[§ 161] Illustrations: No Express Authority.

In *Hassell v. San Francisco* (1938) 11 C.2d 168, 78 P.2d 1021, defendant city proposed to build a public convenience station on the surface of a strip of public park in a residential district. *Held*, it could be enjoined as a nuisance, for it would be unsightly and disagreeable, and the city could build it underground without prohibitive expense. C.C. 3482 was not a defense, because there was no express statutory authority for the construction of that particular building. (11 C.2d 171.)

In *Behr v. Santa Cruz* (1959) 172 C.A.2d 697, 342 P.2d 987, plaintiff sued for damages to property from a fire originating in a dump of defendant county. Causes of action under the former Public Liability Act and for nuisance were alleged. *Held*: (a) The county's defense of governmental authority did not preclude an action based on a nuisance if the governmental agency acted negligently. Hence, the nuisance count was good. (b) But a nonsuit on that count was nevertheless proper because the jury brought in a verdict against plaintiff on the Public Liability Act count. This was an implied finding that there was no dangerous or defective condition of the dump resulting from defendant's negligence, which was the basis of the nuisance charge. (172 C.A.2d 711.)

In *Varjabedian v. Madera* (1977) 20 C.3d 285, 142 C.R. 429, 572 P.2d 43, plaintiffs sought damages on theories of inverse condemnation (see 8 *Summary* (10th), *Constitutional Law*, §1152) and nuisance. The complaint alleged that defendant city operated a sewage treatment plant near plaintiffs' home, and that noxious odors blown by prevailing winds rendered the premises uninhabitable. *Held*, verdict and judgment for plaintiffs, for permanent diminution in the value of the property and for personal discomfort, affirmed. (20 C.3d 293.) As to the city's defense of statutory authority, the court said: "[W]e reject defendant's theory that the general authorization of municipal construction of sewage plants 'expressly' sanctions the production of any particular level of odors within the meaning of section 3482. None of the Government Code statutes under which the city claims to act mentions the possibility of noxious emanations from such facilities. Nor can we find that such odors were authorized by the 'plainest and most necessary implication' from the general powers there conferred, or that it can be fairly said that the Legislature contemplated, to any extent, the creation of a malodorous nuisance when it authorized sewage plant construction. Indeed, one object of such plants is to remove harmful and obnoxious effluents from the environment." (20 C.3d 292.)

Greater Westchester Homeowners Assn. v. Los Angeles (1979) 26 C.3d 86, 160 C.R. 733, 603 P.2d 1329, citing

Hassell and Varjabedian, stresses the narrow construction consistently given to C.C. 3482. The action was brought by homeowners in the area of runways of defendant city's airport, for personal injuries caused by noise from aircraft using the facility. The planning, location, construction, and operation of airports and the flight procedures of aircraft are regulated by both federal and state law; but the statutes do not create a legislative sanction for their maintenance as a nuisance. (26 C.3d 101.) The argument that aviation and noise are necessarily inseparable, and that governmental approval of aviation implies legislative approval of noise, is unconvincing; both federal and state authorities have sought to abate that noise. (26 C.3d 101.) The analysis in *Lombardy v. Peter Kiewit Sons' Co.* (1968) 266 C.A.2d 599, 72 C.R. 240, applicably to freeway construction, is not persuasive here. (26 C.3d 102.)

Other cases are to the same effect. (See *People v. Glenn-Colusa Irr. Dist.* (1932) 127 C.A. 30, 36, 15 P.2d 549 [following *Hassell*]; *Venuto v. Owens-Corning Fiberglas Corp.* (1971) 22 C.A.3d 116, 129, 99 C.R. 350, supra, §158 [same]; *Jones v. Union Pac. R. Co.* (2000) 79 C.A.4th 1053, 1067, 94 C.R.2d 661 [C.C. 3482 was not defense to nuisance action by residents adjacent to rail yard seeking damages for excessive and needless noise, because no federal regulation authorized rail yard's activities].)

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



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D. Defenses.

1. Statutory Authority or Permission.
c. Properly Conducted Shooting Range.

13 Witkin Sum. Cal. Law Equity § 162

[§ 162] Properly Conducted Shooting Range.

(1) *Express Authority To Operate Range.* Operation or use of a shooting range, as defined in C.C. 3482.1(a)(2), is not subject to a nuisance action based on noise or noise pollution in any of the following situations:

(a) A person who operates or uses a sport shooting range or law enforcement training range complied with noise control laws or ordinances that applied to the range when it was constructed or when its operation was approved by a local public entity, or no noise pollution control laws applied to the range at those times. (C.C. 3482.1(b)(2).)

(b) A person who acquires title to, or who owns real property adversely affected by, the use of property with a permanent and improved sport shooting range may not bring a nuisance action based on noise or noise pollution against the owner of the range if there has been no substantial change in the nature or use of the range. However, an action may be maintained for negligent or reckless operation or use of the range. (C.C. 3482.1(c).)

(c) A sport shooting range that is in operation and not in violation of existing law when an ordinance regulating noise or noise pollution is enacted may continue to operate, even if later operation does not conform to a new ordinance or to an amendment of an existing ordinance, if there has been no substantial change in the nature or use of the range. However, this does not limit the right of a local agency to enforce any term of a conditional use permit. (C.C. 3482.1(d).)

(2) *Exceptions.* Four exceptions are stated:

(a) Unless otherwise provided in C.C. 3482.1, a local public entity may regulate the location and construction of sport shooting ranges. (C.C. 3482.1(e).)

(b) A local public entity may impose specified noise level restrictions for nighttime shooting at ranges. (C.C. 3482.1(f).)

(c) Indoor shooting ranges are not covered by the statute. (C.C. 3482.1(g).)

(d) The statute does not apply to a range in existence prior to January 1, 1998, that is operated for law enforcement

training purposes by a county of the sixth class, if the range is located in another county. (C.C. 3482.1(h).)

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D. Defenses.

1. Statutory Authority or Permission.
- d. Properly Conducted Agricultural Enterprise.

13 Witkin Sum. Cal. Law Equity § 163

[§ 163] Properly Conducted Agricultural Enterprise.

(1) *Commercial Agricultural Activity.* An "agricultural activity, operation, or facility, or appurtenances thereof, conducted or maintained for commercial purposes, and in a manner consistent with proper and accepted customs and standards, as established and followed by similar agricultural operations in the same locality," is not and may not become a public or private nuisance due to a changed condition "in or about the locality" after the activity has been in operation for more than 3 years if it was not a nuisance when it began. (C.C. 3482.5(a)(1).) Two types of agricultural activities are excepted: (a) those that obstruct "the free passage or use, in the customary manner, of any navigable lake, river, bay, stream, canal, or basin, or any public park, square, street, or highway" (C.C. 3482.5(b)); (b) those that constitute a public or private nuisance specifically defined or described in the Health and Safety Code, Fish and Game Code, Food and Agricultural Code, or Division 7 of the Water Code (C.C. 3482.5(c)). (See C.C. 3482.5(e), broadly defining "agricultural activity," etc.; *Souza v. Lauppe* (1997) 59 C.A.4th 865, 871, 69 C.R.2d 494 [C.C. 3482.5(a)(1) does not merely bar nuisance actions by nonagricultural plaintiffs; statute precluded nuisance action in which both parties were commercial agricultural entities]; *Rancho Viejo, LLC v. Tres Amigos Viejos, LLC* (2002) 100 C.A.4th 550, 559, 123 C.R.2d 479 [C.C. 3482.5 barred action against commercial farmer for trespass involving physical invasion and damage to property based on failure to contain irrigation; although statute refers to immunity from nuisance, nuisance is not limited to intangible intrusions on land].)

An activity of a district agricultural association operated in compliance with *Food & Ag.C. 3001* et seq. is not and may not become a private or public nuisance due to a changed condition in or about the locality, after it has been in operation for more than 3 years if it was not a nuisance at the time it began. This protection does not apply to any activities of the 52nd District Agricultural Association that are conducted on the grounds of the California Exposition and State Fair or to a public nuisance action brought by a city or county, or city and county alleging that the activities, operations, or conditions of a district agricultural association have substantially changed after more than 3 years from the time that the activities, operations, or conditions began. (C.C. 3482.5(a)(2).)

C.C.P. 3482.5 prevails over contrary provisions of an ordinance or regulation of a political subdivision, but does not preclude a political subdivision from adopting an ordinance allowing notification to prospective homeowners that a dwelling is in close proximity to an agricultural activity and is subject to this statute. (C.C. 3482.5(d).)

(2) *Commercial Agricultural Processing Activity*. C.C. 3482.6 contains provisions similar to those in C.C. 3482.5, but is applicable to an "agricultural processing activity, operation, facility, or appurtenances thereof" that is conducted or maintained for commercial purposes in a manner consistent with proper and accepted customs and standards. (For definition of "agricultural processing activity," etc., see C.C. 3482.6(e)(1).) After this type of activity has been in continuous operation for more than 3 years, it may not become a public or private nuisance due to changed conditions in or about the locality, if it was not a nuisance at the time it began. (C.C. 3482.6(a).) If an agricultural processing activity, etc., substantially increases its operations after January 1, 1993, a nuisance action may be brought with respect to those increases that have a significant effect on the environment. But if an increase has been in effect for more than 3 years, there is a rebuttable presumption affecting the burden of producing evidence that the increase was not substantial. (C.C. 3482.6(b).)

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

(1) *Commercial Agricultural Activity*. See 8 *A.L.R.6th* 465 [validity, construction, and application of right-to-farm acts]. *Correction:* Page 490, line 27, "C.C.P. 3482.5" should be "C.C. 3482.5".



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2. Permit.

13 Witkin Sum. Cal. Law Equity § 164

[§ 164] Permit.

A valid permit is a defense against a suit to enjoin the very acts authorized. (See *Jordan v. Santa Barbara* (1996) 46 C.A.4th 1245, 1257, 54 C.R.2d 340 [water district was not liable for discharging treated wastewater, because operation of its treatment facility was authorized by National Pollutant Discharge Elimination System permit]; 58 Am.Jur.2d (2002 ed.), Nuisances §§438, 451, 453 et seq.)

In *Strong v. Sullivan* (1919) 180 C. 331, 333, 181 P. 59, although defendant had a permit to operate a lunch wagon at a particular place, he was properly enjoined from blocking the entrance to plaintiff's restaurant. The defense also is not available if the permit has been revoked. (See *El Dorado v. Al Tahoe Inv. Co.* (1959) 175 C.A.2d 407, 410, 346 P.2d 205.)

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D. Defenses.
3. Zoning Regulations.

13 Witkin Sum. Cal. Law Equity § 165

[§ 165] Zoning Regulations.

(1) *In General.* The mere fact that a district is zoned for certain industrial activities does not justify the maintenance of a nuisance. (See *Williams v. Blue Bird Laundry* (1927) 85 C.A. 388, 392, 259 P. 484; *Fendley v. Anaheim* (1930) 110 C.A. 731, 735, 294 P. 769 [vibration and noise from operation of factory]; *Eaton v. Klimm* (1933) 217 C. 362, 370, 18 P.2d 678 [dirt and smoke from asphalt mixing plant]; 1 So. Cal. L. Rev. 97.)

However, where the zoning law expressly authorizes a particular manufacturing, commercial, or airport use, it may not be deemed a nuisance or enjoined except (a) in an action by the state to abate a public nuisance; (b) where there is evidence of "unnecessary and injurious methods of operation"; or (c) where the business is a cannery, fertilizing plant, refinery, or similar establishment that produces offensive odors. (*C.C.P. 731a.*)

The statute has been successfully invoked as a defense to an injunction in a number of cases. (See *North Side Property Owners' Assn. v. Hillside Memorial Park* (1945) 70 C.A.2d 609, 617, 161 P.2d 618 [maintenance of cemetery in ordinary manner within area authorized by county zoning ordinance cannot be enjoined]; *Wheeler v. Gregg* (1949) 90 C.A.2d 348, 369, 203 P.2d 37 [manufacturer operating in prohibited zone, but under variance or conditional use permit].)

C.C.P. 731a eliminates injunctive relief, but does not preclude recovery of damages. (*McNeill v. Redington* (1944) 67 C.A.2d 315, 319, 154 P.2d 428 [vibrations from drop forging plant caused substantial damage to a number of homes; although *C.C.P. 731a* was complete bar to injunctive relief, damages should be given]; *Wilson v. Interlake Steel Co.* (1982) 32 C.3d 229, 234, 185 C.R. 280, 649 P.2d 922, supra, §136; 9 *Hastings L. J.* 193.)

(2) *Unnecessary and Injurious Methods of Operation.* The exception in *C.C.P. 731a*, where the proof shows "unnecessary and injurious methods of operation," was interpreted in *Gelfand v. O'Haver* (1948) 33 C.2d 218, 200 P.2d 790. Defendants operated a music studio in a proper zone, but their place of business was a private residence, without soundproofing and with windows open, from which loud sounds of band instruments and singing were heard during the day and until late at night. *Held*, an injunction was properly granted. Answering the contention that plaintiffs had failed to show operation in a manner different from that of other studios in the city, the court said: "But that does not mean that the only evidence that will establish an unnecessary and injurious method of operation is a failure to pursue the methods customarily and usually employed in other similar businesses in the vicinity. While such evidence may be

relevant to that issue, we see no reason why it should be indispensable." (33 C.2d 220.)

Other cases have applied the exception. (See *Christopher v. Jones* (1964) 231 C.A.2d 408, 411, 41 C.R. 828 [chemical plant that allowed chlorine fumes to escape]; *Venuto v. Owens-Corning Fiberglas Corp.* (1971) 22 C.A.3d 116, 131, 99 C.R. 350, supra, §158 [air pollution]; *Sierra Screw Products v. Azusa Greens* (1979) 88 C.A.3d 358, 366, 151 C.R. 799 [golf course adjacent to plaintiff's industrial property; intrusion of golf balls because of design of fairways and inadequate fencing].)

(3) *Prior Nonconforming Use by Liquor Licensee. B. & P.C. 23790* prohibits the issuance of a retail license for premises located in a territory where use of the license would be contrary to a valid city or county zoning ordinance. The statute does allow an alcoholic beverage licensee in existence at the time a restrictive zoning ordinance is enacted to remain in business, but this "grandfathering" applies only to continuously operated businesses. (See 8 *Summary* (10th), *Constitutional Law*, §988 et seq.)

In *Suzuki v. Los Angeles* (1996) 44 C.A.4th 263, 269, 51 C.R.2d 880, defendant city, acting under its nuisance abatement ordinance, imposed restrictions and conditions on the continued operation of plaintiffs' liquor store after the store became a police problem during a civil disturbance. Plaintiffs petitioned for mandamus relief, claiming that defendant's nuisance abatement procedures conflicted with *B. & P.C. 23790*, because plaintiffs' liquor license was issued before the ordinance was enacted. The trial judge agreed, and granted relief. *Held*, reversed.

(a) Defendant's ordinance was a nuisance abatement ordinance, rather than a zoning ordinance, and therefore *B. & P.C. 23790* did not prevent its application. (44 C.A.4th 270.)

(b) Further, *B. & P.C. 23790* only exempts existing nonconforming uses from compliance with later enacted zoning ordinances, and then only when the business has continuously operated without substantial change in either mode or character of operation. The statute does not exempt licensees like plaintiffs, who have allowed their businesses to be maintained as a nuisance, from a city's administrative procedures to abate what has been found to constitute a nuisance. (44 C.A.4th 277.) (To same effect, see *Oakland v. Superior Court* (1996) 45 C.A.4th 740, 752, 53 C.R.2d 120.)

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D. Defenses.

4. Due Care and Consent Are Not Defenses.

13 Witkin Sum. Cal. Law Equity § 166

[§ 166] Due Care and Consent Are Not Defenses.

(1) *Due Care*. A nuisance is determined by the consequences, rather than by the nature, of the defendant's conduct. (See *supra*, §133.) Hence, it is no defense that the activity was conducted with due care or even great care. (*Judson v. Los Angeles Suburban Gas Co.* (1910) 157 C. 168, 173, 106 P. 581; 65 *Harv. L. Rev.* 986.) Nor does the fact that the nuisance is created by the acts of an independent contractor constitute a defense for the owner of property on which the nuisance is maintained. (*Snow v. Marian Realty Co.* (1931) 212 C. 622, 624, 299 P. 720.)

(2) *Consent*. The so-called doctrine of coming to a nuisance has generally been repudiated; i.e., the plaintiff may obtain injunctive relief even though the nuisance was already in operation, with the plaintiff's knowledge, when the plaintiff acquired his or her own property. (See *Friedman v. Pacific Outdoor Advertising Co.* (1946) 74 C.A.2d 946, 952, 170 P.2d 67 [fire hazard in violation of ordinance; neither knowledge nor consent was defense]; *Mangini v. Aerojet-General Corp.* (1991) 230 C.A.3d 1125, 1139, 281 C.R. 827, quoting the text; *Hellman v. La Cumbre Golf & Country Club* (1992) 6 C.A.4th 1224, 1231, 8 C.R.2d 293, citing the text [fact that nuisance predates plaintiff's acquisition or improvement of land does not bar action, but is factor for consideration in determining actionability]; *Rest.2d, Torts §840D*; *Prosser & Keeton* 5th, §88B; 1 *Harper, James & Gray* 3d, §1.50; 41 *Cal. L. Rev.* 148; 27 *So. Cal. L. Rev.* 389; 74 *So. Cal. L. Rev.* 1191 [California's "consent" defense in environmental nuisance cases]; 42 *A.L.R.3d* 344 [doctrine as defense or estoppel]; 58 *Am.Jur.2d* (2002 ed.), *Nuisances* §§426, 427.)

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D. Defenses.

5. Comparative Negligence.

a. In General.

13 Witkin Sum. Cal. Law Equity § 167

[§ 167] In General.

(1) *Restatement View. Restatement 2d, Torts, §840B*, states a comprehensive rule on the defense of contributory negligence in actions for damages based on nuisance:

(a) "When a nuisance results from negligent conduct of the defendant, the contributory negligence of the plaintiff is a defense to the same extent as in other actions founded on negligence."

(b) "When the harm is intentional or the result of recklessness, contributory negligence is not a defense."

(c) "When the nuisance results from an abnormally dangerous condition or activity, contributory negligence is a defense only if the plaintiff has voluntarily and unreasonably subjected himself to the risk of harm."

(2) *California Law*. In California, the defense of contributory negligence has been replaced by the doctrine of comparative negligence, which results in reduction of damages in proportion to the amount of negligence attributable to the plaintiff. (See 6 *Summary* (10th), *Torts*, §1327 et seq.) But the case law on what conduct constitutes negligence is still relevant in actions in which the defendant asserts comparative negligence as a defense. (See 6 *Summary* (10th), *Torts*, §831 et seq.)

Tint v. Sanborn (1989) 211 C.A.3d 1225, 259 C.R. 902, *infra*, §168, approved the rule of *Rest.2d, Torts §840B* that the defense may be asserted in nuisance actions based on negligence. (211 C.A.3d 1238.) "We need not and do not decide here whether comparative fault principles could properly be applied to a nuisance which all parties concede arose from intentional or reckless conduct, or an ultrahazardous activity as to which strict liability in tort might be applied." (211 C.A.3d 1234, footnote 3.) (See *Curtis v. Kastner* (1934) 220 C. 185, 189, 30 P.2d 26 [action for damages for personal injuries suffered when plaintiff ran into obstruction in street]; 4 Harper, James & Gray 2d, §1.50; 23 Cal. L. Rev. 427; 65 Harv. L. Rev. 988; 73 A.L.R.2d 1378 [contributory negligence or assumption of risk as defense]; 57B Am.Jur.2d (2004 ed.), *Negligence* §838 et seq.; 58 Am.Jur.2d (2002 ed.), *Nuisances* §434 et seq.)

The plaintiff's contributory fault is not a defense where an injunction alone is sought. (*Kafka v. Bozio* (1923) 191 C. 746, 749, 218 P. 753.)

SUPPLEMENT: [This section is current through the latest supplement]
(2) *California Law*. See 4 Harper, James & Gray 3d, §22.8.



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D. Defenses.

5. Comparative Negligence.

b. Negligence Causing Injury to Property.

13 Witkin Sum. Cal. Law Equity § 168

[§ 168] Negligence Causing Injury to Property.

In *Tint v. Sanborn* (1989) 211 C.A.3d 1225, 259 C.R. 902, the court held that comparative negligence may be asserted as a defense in an action for damages to real property resulting from the negligent maintenance of a nuisance. Plaintiff alleged that defendant maintained a row of trees on his residential lot that interfered with plaintiff's view from his adjoining lot and reduced the saleable value of that lot. He sought damages for loss suffered by delay in the sale and the reduced price he received for the property. His theory was that defendant's trees constituted an actionable private nuisance because they violated a recorded declaration of restrictions prohibiting tree planting that unreasonably interfered with view. The trial judge, at defendant's request, instructed the jury on the comparative negligence defense. Plaintiff appealed from the resulting verdict and judgment, contending that the instruction resulted in an inadequate award of damages. *Held*, judgment affirmed; the instruction was proper.

(a) The Restatement view that the plaintiff's contributory negligence can be asserted in a nuisance action founded on negligence has the support of two *California* cases. (211 C.A.3d 1228, 1232, citing *Curtis v. Kastner* (1934) 220 C. 185, 189, 30 P.2d 26, and *Calder v. San Francisco* (1942) 50 C.A.2d 837, 840, 123 P.2d. 897.) And the same rule should apply to comparative negligence; "we believe that comparative negligence logically would become a defense in nuisance actions arising from negligence." (211 C.A.3d 1229.)

(b) Public policy favors the rule. "[T]here is no reason to allow negligent plaintiffs to sue on a simple allegation of nuisance in order to avoid the consequences of their comparative fault, if the issue of that nuisance arising from negligence is inserted in the case by the defense. Our system of compensation for injuries has become so dependent on the assessment of negligent fault, and its comparison, that we believe we should not create an exception in such nuisance cases absent a rational reason to do so." (211 C.A.3d 1234.)

(c) Plaintiff relied on *Kleinclaus v. Marin Realty Co.* (1949) 94 C.A.2d 733, 211 P.2d 582, and *Atlas Assur. Co. v. California* (1951) 102 C.A.2d 789, 229 P.2d 13, for the proposition that "[t]he doctrine of contributory negligence apparently has no place in actions for damages for injuries to property." However, these cases were decided on the alternative grounds that the actions of the plaintiffs did not constitute negligence and did not specifically involve nuisance claims arising from negligent conduct. (211 C.A.3d 1231, 1232, citing the text.)

(d) "Finally, to the extent that the system of comparative fault ... was intended to be a comprehensive one for injuries to person and property, we do not believe that any contrary doctrines of property law imbedded in the law of nuisance should be controlling over the system of comparative liability for negligence there established by the Supreme Court." (211 C.A.3d 1234.)

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D. Defenses.

6. Balancing Conveniences (Relative Hardship).

a. Nature of Doctrine.

13 Witkin Sum. Cal. Law Equity § 169

[§ 169] Nature of Doctrine.

In the initial determination of what constitutes a nuisance, there is a consideration of conflicting interests leading to a conclusion about whether the harm suffered outweighs the utility of the conduct. (See *Rest.2d, Torts* §826 et seq.) After it is determined that the conduct does constitute a nuisance, there is a further question about whether the equitable remedy of injunction should be granted, wholly prohibiting the conduct, or whether damages alone should be given. The courts will often "balance the conveniences" or consider the relative hardship to the respective parties of the prohibition; e.g., where the injunction would interfere with a public service being rendered by a large industrial plant, or where, as in cases of a slight encroachment of buildings on adjoining property, the loss to the defendant resulting from the injunction would be entirely out of proportion to the damage suffered by the plaintiff. (See *Rest.2d, Torts* §941; 28 *So. Cal. L. Rev.* 139; 42 *Am.Jur.2d* (2000 ed.), *Injunctions* §35 et seq.; 40 *A.L.R.3d* 601 [modern status of doctrine].)

Earlier California cases were somewhat hostile to the doctrine. (See, e.g., *Hulbert v. California Portland Cement Co.* (1911) 161 C. 239, 246, 118 P. 928; *Felsenthal v. Warring* (1919) 40 C.A. 119, 129, 180 P. 67; *Vowinckel v. N. Clark & Sons* (1932) 216 C. 156, 162, 13 P.2d 733; *Bemmerly v. Lake* (1942) 55 C.A.2d 829, 833, 132 P.2d 249.) But the later view is extremely liberal. (See *Christensen v. Tucker* (1952) 114 C.A.2d 554, 564, 250 P.2d 660, *infra*, §172; *Baglione v. Leue* (1958) 160 C.A.2d 731, 734, 325 P.2d 471; *Miller v. Johnston* (1969) 270 C.A.2d 289, 305, 75 C.R. 699; *Posey v. Leavitt* (1991) 229 C.A.3d 1236, 1247, 280 C.R. 568, citing the text; *Hellman v. La Cumbre Golf & Country Club* (1992) 6 C.A.4th 1224, 1231, 8 C.R.2d 293, citing the text; 6 *Cal. Proc.* (4th), *Provisional Remedies*, §346 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]
Earlier California cases hostile to doctrine:

Cross-Reference: 6 *Cal. Proc.* (5th), *Provisional Remedies*, §345 et seq.



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- 6. Balancing Conveniences (Relative Hardship).
- b. Doctrine Is Not Applicable To Wilful Conduct.

13 Witkin Sum. Cal. Law Equity § 170

[§ 170] Doctrine Is Not Applicable To Wilful Conduct.

One limitation on the doctrine of relative hardship is that it will not be applied where a serious nuisance or substantial encroachment is wilfully created. (See *Morgan v. Veach* (1943) 59 C.A.2d 682, 690, 139 P.2d 976 [wilful and substantial violation of restrictive covenant for setback lines; mandatory injunction granted]; *Christensen v. Tucker* (1952) 114 C.A.2d 554, 563, 564, 250 P.2d 660, *infra*, §172; *Pacific Gas & Elec. Co. v. Minnette* (1953) 115 C.A.2d 698, 708, 252 P.2d 642; 6 Cal. Proc. (4th), *Provisional Remedies*, §348.)

The problem was presented in an unusual setting in *Frabotta v. Alencastre* (1960) 182 C.A.2d 679, 6 C.R. 536. Plaintiffs owned land with a recorded easement giving them access to a public thoroughfare. A subdivider built on an adjoining tract, obstructed the easement, and sold lots. Defendant title company, with full knowledge of the easement, insured policies to the lot purchasers showing title in fee free and clear of the easement, under an agreement with the now bankrupt subdivider to hold it harmless. Plaintiffs sought relief from the purchasers, who refused, relying on their title policies. Plaintiffs then sued to enjoin obstruction of the easement and to quiet title. The trial judge gave judgment for defendants. *Held*, reversed.

(a) The purchasers, with constructive and actual notice of plaintiffs' rights at the time of purchase, chose to rely on their title policies. Plaintiffs sought to show that an injunction would cause no hardship to the purchasers because they could recover in full from the title company. The trial judge sustained objections, invoking the rules that insurance coverage against loss is not admissible and that sums recoverable from a collateral source cannot be shown to diminish the amount of an award of damages. (See 6 *Summary* (10th), *Torts*, §1631 et seq.) But these rules were inapplicable. "The purchasers are relying on the equitable doctrine of balancing conveniences and should not be permitted to subvert the principles of equity by invoking the rules announced in the cited cases to deprive plaintiffs of their property rights. Any purchaser of property knows that titles may be defective. These purchasers paid rent until they received title insurance. They relied on that insurance when they completed the obstruction of the easement. Presumably they are fully protected against financial hardship and can recover on their policies or in actions for damages against the insurer who misled them. In all probability they will suffer little or no hardship. They had constructive notice of plaintiffs' right before they purchased and actual notice of plaintiffs' claims thereafter and while they were improving their lots. To hold that evidence of insurance is inadmissible under these circumstances is to permit the guilty party, the title company, which acted with full knowledge of all the facts, to escape all liability. Such a rule would open the door to a new type of

fraud against which property owners would have no protection and in which offenders could operate with little fear of loss." (182 C.A.2d 684.)

(b) The judge found, on the testimony of the city planning engineer, that use by the plaintiffs of their easement would be contrary to the public interest because the city planned new developments in the area with which the easement would interfere. This was not a defense. "[T]he future plans of the state and the city can not be considered in applying the doctrine of balance of conveniences for the purpose of depriving a property owner of his title. Appellants have a vested right to direct access to Cowell Road. If in time the public interest requires it, the right can be acquired by purchase or condemnation. The theory of respondents, if carried into effect, would give private individuals a right of eminent domain without even requiring the payment of just compensation." (182 C.A.2d 686.)

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

Cross-Reference: 6 Cal. Proc. (5th), *Provisional Remedies*, §347.



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D. Defenses.

6. Balancing Conveniences (Relative Hardship).

c. Hardship Must Be Shown.

13 Witkin Sum. Cal. Law Equity § 171

[§ 171] Hardship Must Be Shown.

A second limitation on the doctrine of relative hardship is that an injunction will not be refused merely because the activity is highly beneficial to the defendant; the defendant must show that the prohibition will work a substantial hardship before the court can balance conveniences. "When a court of equity balances conveniences to determine that an injunction, otherwise warranted, should be withheld, its action approaches an exercise of the right of eminent domain in favor of a private person. ... Thus, proof of irreparable injury is a necessary element of a defense based upon a balancing of conveniences." (*Fairrington v. Dyke Water Co. (1958) 50 C.2d 198, 200, 323 P.2d 1001, 6 Cal. Proc. (4th), Provisional Remedies, §348; see Pahl v. Ribero (1961) 193 C.A.2d 154, 164, 14 C.R. 174, infra, §172.*)

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

Cross-Reference: 6 Cal. Proc. (5th), Provisional Remedies, §347.



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d. Encroachments.

13 Witkin Sum. Cal. Law Equity § 172

[§ 172] Encroachments.

(1) *Slight Encroachment*. California cases have long recognized the defense of balancing conveniences where the nuisance consisted of a slight encroachment of buildings on adjoining property not caused by a wilful act. (See *Rothaermel v. Amerige* (1921) 55 C.A. 273, 275, 203 P. 833; *McKean v. Alliance Land Co.* (1927) 200 C. 396, 399, 253 P. 134; *Agmar v. Solomon* (1927) 87 C.A. 127, 138, 261 P. 1029; *Baldocchi v. Four Fifty Sutter Corp.* (1933) 129 C.A. 383, 393, 18 P.2d 682; *Dolske v. Gormley* (1962) 58 C.2d 513, 520, 25 C.R. 270, 375 P.2d 174 [minor encroachments on driveway, delay of 8 years in seeking relief, cost of removal was disproportionate, and damages were adequate remedy]; *Posey v. Leavitt* (1991) 229 C.A.3d 1236, 280 C.R. 568, citing the text; *Rest.2d, Torts §941*, Comment c; 1 *So. Cal. L. Rev.* 298; 10 *Cal. L. Rev.* 169.)

(2) *Substantial Encroachment*. In *Christensen v. Tucker* (1952) 114 C.A.2d 554, 250 P.2d 660, the court, in a definitive opinion reviewing the prior law, stressed some of the limitations of the defense. Defendants' cement curb and driveway encroached on plaintiff's lot (from inches to several feet). The trial judge gave defendants the option of title to the encroached area or payment of \$ 200. *Held*, reversed; while negligence of the defendant does not wholly preclude application of the doctrine where the plaintiff is also negligent, it is an important factor to be considered. There was no need to grant title to defendants where an easement would have been sufficient protection. The court should have taken evidence on the amount of hardship involved in removal of the encroachment. The court also should have determined whether the parties were negligent. (114 C.A.2d 564.) (See *Hirshfield v. Schwartz* (2001) 91 C.A.4th 749, 758, 110 C.R.2d 861, citing the text [*Christensen* states proper formulation of relative hardship doctrine; thus, denial of injunction does not require irreparable injury to defendants]; 6 *Cal. Proc.* (4th), *Provisional Remedies*, §346.)

In *Ukhtomski v. Tioga Mut. Water Co.* (1936) 12 C.A.2d 726, 55 P.2d 1251, plaintiff owned three acres of land worth \$ 150 per acre. Defendant constructed a \$ 7,000 water system, the sole source of water for 500 residents. By mistake, the works encroached on 15/100th acre of plaintiff's land. The lower court gave him damages of \$ 762, but denied an injunction and gave defendant a permanent easement to maintain the system on the land. *Held*, the judgment was proper. Even though the encroachment was substantial, "an injunction should not issue where its issuance would cause serious harm to the defendant and the injury caused by his inadvertence and mistake can be fully compensated by damages." (12 C.A.2d 728.) An additional reason for refusing injunctive relief is the injury that would result to the public, the residents of the area. Having refused to enjoin the use, the court had inherent power to end the litigation by

decreeing an easement insuring the use for which defendant had been compelled to pay. (12 C.A.2d 729.)

In *Pahl v. Ribero* (1961) 193 C.A.2d 154, 14 C.R. 174, a mandatory injunction against a building encroachment was affirmed. *Held*, applying the criteria of *Christensen*, (a) defendants were innocent--the cause of the lateral movement of their property was unknown; (b) however, plaintiff would suffer irreparable injury unless the encroachment was removed; and (c) the evidence indicated that the hardships were equal. (193 C.A.2d 163.)

In *Field-Escandon v. DeMann* (1988) 204 C.A.3d 228, 251 C.R. 49, defendants purchased a lot improved with a single-family residence and a sewer pipe in 1973. Previously, in 1959, the city engineer had issued a sewer permit for construction of a sewer line for the property across an adjacent empty lot. In 1982, plaintiff bought the empty lot at a tax sale, planning to build a home. When he discovered the sewer line and a title search did not reveal an easement in favor of defendants, he brought this action seeking removal of the line. The trial judge decided that the sewer line was a permanent trespass or nuisance, and that the 3-year statute of limitations barred plaintiff's action. On defendants' cross-complaint to establish a prescriptive easement, the court found in their favor. *Held*, affirmed.

(a) The unrecorded sewer permit did not constitute constructive notice of open and notorious use. The courts usually require a showing of visibility of the easement throughout the prescriptive period. (204 C.A.3d 235, citing *Jones v. Harmon* (1959) 175 C.A.2d 869, 1 C.R. 192, 12 Summary (10th), *Real Property*, §403, and 55 A.L.R.2d 1144 [easement by prescription in artificial drains, pipes, or sewers].) The existence of the permit in the public records does not have the same presumptive effect as recorded documents of title, and there was no evidence that visible signs of the sewer line were apparent to the property owner (as in *Jones*). (204 C.A.3d 236.)

(b) Nevertheless, an easement may be recognized by applying the doctrine of balancing relative hardships under the reasoning in *Christensen* and *Warsaw v. Chicago Metallic Ceilings* (1984) 35 C.3d 564, 199 C.R. 773, 676 P.2d 584, 12 Summary (10th), *Real Property*, §405. "Appellant purchased the property at a tax sale without investigating the possibility that it was burdened with easements or other conditions which might render it unbuildable except for a brief visual inspection a few hours before the sale. He now wishes to build a 20- by 40-foot house on his property. He plans to excavate the ground surface to a depth of about eight feet, where the sewer line runs, for a driveway and a retaining wall. Evidence established that it is possible to construct the retaining wall around the existing sewer pipe. On the other hand, the sewer line is the only means of sewage disposal from the DeManns' residence. There is no evidence that there is another sewer facility available to the DeManns. The potential hardship to the DeManns is 'greatly disproportionate' to the hardship to appellant by the continued existence and use of the sewer line." (204 C.A.3d 238.)

Other cases are to the same effect. (See *Baglione v. Leue* (1958) 160 C.A.2d 731, 734, 325 P.2d 471; *Brown Derby Hollywood Corp. v. Hatton* (1964) 61 C.2d 855, 858, 40 C.R. 848, 395 P.2d 896, 6 Cal. Proc. (4th), *Provisional Remedies*, §347; *D'Andrea v. Pringle* (1966) 243 C.A.2d 689, 695, 52 C.R. 606; 25 Cal. L. Rev. 245; 28 A.L.R.2d 679 [mandatory injunction to compel removal of encroachment by adjoining landowner].)

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

(2) *Substantial Encroachment*.

Cross-Reference: 6 Cal. Proc. (5th), *Provisional Remedies*, §345. *Brown Derby Hollywood Corp. case:*

Cross-Reference: 6 Cal. Proc. (5th), *Provisional Remedies*, §348.



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6. Balancing Conveniences (Relative Hardship).

e. Other Situations.

13 Witkin Sum. Cal. Law Equity § 173

[§ 173] Other Situations.

(1) *Injunction Only Affects Business and Nuisance Can Be Ameliorated.* Where the injunction would only affect the defendant's business, and the defendant could either move or eliminate the nuisance, the courts tend to protect plaintiff. Thus, in *Ohaver v. Fenech* (1928) 206 C. 118, 273 P. 555, an action was brought to restrain defendants from receiving putrid garbage at their ranch as food for hogs. The court found these acts to be dangerous to the health and comfort of persons living in the vicinity, including the plaintiff. Defendants urged that they had a contract with the City of Sacramento, and that the injunction would cause them great losses. *Held*, this was immaterial in view of the actual invasion of the right of plaintiff to the free use and enjoyment of his property. (206 C. 124.) (See *Wilms v. Hand* (1951) 101 C.A.2d 811, 815, 226 P.2d 728 [injunction granted against excessive noise from barking dogs in dog hospital].)

(2) *Strong Public Interest Involved.* If the public interest is involved, as where the nuisance is created by a plant producing necessary economic goods or services, or employing a great many people, it may be proper to withhold injunctive relief, particularly if the defendant makes diligent efforts to eliminate or mitigate the injurious activity. (See *Rest.2d, Torts* §§941, 942; 28 *So. Cal. L. Rev.* 143; 58 *Am.Jur.2d* (2002 ed.), *Nuisances* §440 et seq.; but see *Hulbert v. California Portland Cement Co.* (1911) 161 C. 239, 246, 118 P. 928.)

This defense was sustained in *Loma Portal Civic Club v. American Airlines* (1964) 61 C.2d 582, 39 C.R. 708, 394 P.2d 548. Lindbergh Field in San Diego is a major terminal used by commercial airlines flying passenger jets. Plaintiffs, property owners near the airport, filed a complaint to enjoin low altitude flights in close proximity to their homes. *Held*, summary judgment for defendants affirmed. No issue was raised concerning any right to damages from operators of the aircraft, or compensation from the operator of the airport. The complaint sought only injunctive relief. (61 C.2d 590.) "We hold here that under the facts of this case, i.e., the operation of aircraft with federal airworthiness certificates in federally-certificated, scheduled passenger service, in conformity with federal safety regulations, in a manner not creating imminent danger, and in furtherance of the public interest in safe, regular air transportation of goods and passengers, an injunction is not available." (61 C.2d 591.)

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



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VII. EQUITABLE CONVERSION
A. Equitable Conversion by Contract.
1. In General.

13 Witkin Sum. Cal. Law Equity § 174

[§ 174] In General.

(1) *Nature of Doctrine.* The question whether there has been an equitable conversion by contract usually arises in connection with a contract for the sale of real property. The doctrine is based on a fiction employed to do equity. If the contract may be specifically enforced, the purchaser at once becomes the equitable owner, the vendor retaining merely the legal title, although both parties have an insurable interest. (*White v. Gilman* (1903) 138 C. 375, 377, 71 P. 436.) In equity, the vendor's interest is the unpaid purchase price, while the purchaser's interest is the land. (See *Estate of Dwyer* (1911) 159 C. 664, 675, 115 P. 235; *Estate of Reid* (1938) 26 C.A.2d 362, 367, 79 P.2d 451; *Elliott v. McCombs* (1941) 17 C.2d 23, 31, 109 P.2d 329; *Los Angeles v. Butcher* (1957) 155 C.A.2d 744, 746, 318 P.2d 838; *Alhambra Redevelopment Agency v. Transamerica Financial Services* (1989) 212 C.A.3d 1370, 1375, 261 C.R. 248; 1 So. Cal. L. Rev. 309; 66 A.L.R.2d 1266 [time of equitable conversion of real estate sold under and by court order]; 27A Am.Jur.2d (1996 ed.), *Equitable Conversion* §§10, 13.)

(2) *Limitations on Doctrine.* The doctrine does not apply in any of the following situations:

(a) Where it would compel an inequitable result or would conflict with statutory provisions or public policy. (See *Vigli v. Davis* (1947) 79 C.A.2d 237, 255, 179 P.2d 586; *Reiner v. Hermann* (1947) 79 C.A.2d 543, 546, 180 P.2d 385; *Laurel Hill Cemetery Assn. v. San Francisco* (1947) 81 C.A.2d 371, 376, 184 P.2d 160; *Fresno v. Kahn* (1962) 207 C.A.2d 213, 217, 24 C.R. 394 [doctrine not applied to destroy joint tenancy by reason of contract by joint tenants to convey].)

(b) Where the contract is not specifically enforceable. In *Parr-Richmond Industrial Corp. v. Boyd* (1954) 43 C.2d 157, 166, 272 P.2d 16, plaintiff bid on government surplus real property, conditional on clearing of unmerchantable title, and the government accepted the bid without title being cleared. *Held*, although plaintiff took possession, it was not liable for taxes as equitable owner because the government had no right to specific performance at the time and plaintiff's interest was therefore contingent. (43 C.2d 168.)

(c) Where a person's claim or right to the property is purely incidental, i.e., not connected with the property's devolution or transfer. (See *Lang v. Klinger* (1973) 34 C.A.3d 987, 992, 110 C.R. 532.)

West's Key Number Digest, Conversion k.1 et seq.

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

(1) *Nature of Doctrine.* See 27A Am.Jur.2d (2008 ed.), *Equitable Conversion* §§10, 13.



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A. Equitable Conversion by Contract.
2. Risk of Loss.

13 Witkin Sum. Cal. Law Equity § 175

[§ 175] Risk of Loss.

(1) *Early California Law.* If the doctrine of equitable conversion is applied in cases where the property is destroyed, the loss falls on the purchaser, the equitable owner. The earlier cases indicated the rule to be that the risk was on the holder of the legal title, even though the purchaser was in possession. (See *Cooper v. Huntington* (1918) 178 C. 160, 165, 172 P. 591; *La Chance v. Brown* (1919) 41 C.A. 500, 504, 183 P. 216; *Ogren v. Inner Harbor Land Co.* (1927) 83 C.A. 197, 199, 256 P. 607; *Lubarsky v. Chavis* (1929) 99 C.A. 610, 615, 279 P. 205; 8 Cal. L. Rev. 194; 9 Cal. L. Rev. 258; 1 So. Cal. L. Rev. 309; but see *McCarty v. Wilson* (1920) 184 C. 194, 200, 193 P. 578, expressing contrary view.)

(2) *Law Under Uniform Act.* In 1947, California adopted the Uniform Vendor and Purchaser Risk Act (C.C. 1662), which rejects the equitable conversion theory in favor of the Williston possession rule. The Act covers the risk of loss in cases of either destruction or taking by eminent domain, of all or a material part of the property, without fault of the parties, where they fail to make express provision for risk of loss. (a) Where neither the legal title nor possession has been transferred, the vendor cannot enforce the contract, and the purchaser may recover prior payments on the price; i.e., the risk of loss is on the vendor, even though the contract may be specifically enforceable, and under the equitable conversion doctrine, the purchaser is the equitable owner. (b) If legal title or possession has been transferred, the purchaser is bound by the contract; i.e., the risk of loss is on the purchaser in possession. (See C.E.B., 1 Real Property Sales Transactions 3d, §§4.124 et seq., 4.160, 4.161; C.E.B., 2 Real Property Sales Transactions 3d, §12.32 et seq.; 14 U.L.A. (Master Ed.), p. 471; 36 Cal. L. Rev. 476; 51 Harv. L. Rev. 1276; 21 So. Cal. L. Rev. 177; 25 So. Cal. L. Rev. 229 [effect of eminent domain rule on marketable title]; 27 A.L.R.3d 572 [rights of parties to executory contract for sale of land taken by eminent domain]; 28 A.L.R.3d 788 [building repair contract]; 85 A.L.R.4th 233 [risk of loss by casualty pending contract for conveyance of real property].) (On risk of loss on condemnee-owner where property is destroyed after summons issues in condemnation suit, see *Redevelopment Agency of San Francisco v. Maxwell* (1961) 193 C.A.2d 414, 417, 14 C.R. 170, 8 Summary (10th), Constitutional Law, §1224; 89 A.L.R.2d 1076; on conflict of laws, see Rest.2d, Conflict of Laws §225.)

In *Palos Verdes Properties v. County Sanitation Dist. No. 5 of Los Angeles* (1960) 177 C.A.2d 679, 2 C.R. 537, plaintiff agreed to construct a trunk sewer line (here held a fixture) for defendant. The work was completed, and defendant certified it as without defects and authorized its acceptance. Then a landslide occurred causing some damage. *Held*, the risk of loss was on defendant. Under the contract, defendant had primary dominion and control over the entire project, i.e., possession. After the certification, plaintiff submitted a proposed form of transfer of title. Whatever title

then remained in plaintiff was tendered, and nothing remained to be done except for plaintiff to execute and deliver the necessary document of title and defendant to accept and pay. And equity regards that as done which ought to be done in favor of him to whom performance is due (see *supra*, §5). (177 C.A.2d 691.)

(3) *No Specific Performance With Abatement.* In *Dixon v. Salvation Army* (1983) 142 C.A.3d 463, 191 C.R. 111, plaintiff purchaser agreed to purchase from defendant vendor two parcels of realty improved with three commercial structures. Before the escrow closed, and before either title or possession passed, one of the three buildings was destroyed by fire. The risk of loss was therefore on defendant vendor; but plaintiff, instead of rescinding, sought specific performance with an abatement of the purchase price to reflect the loss in value (see *supra*, §57). *Held*, he was not entitled to this remedy. "We believe the more equitable approach and one more compatible with the Uniform Act is to place the parties in their original position, free to make a new bargain. A rule that denies a vendor the ability to specifically enforce the sales agreement where the material part of the consideration is lost or destroyed calls out for the converse also to be applied. It would be grossly unfair to require either party to accept consideration less than the whole of what was bargained for under these circumstances. If it is unfair to force the purchaser to receive materially damaged property, it is equally unfair to compel the vendor to accept a price substantially below what was bargained for. Although a court in equity has broad powers, it should not use its jurisdiction to remake the contract for the parties, particularly on the critical term of the purchase price. This task is better left to the further negotiations of the parties, with neither compelled to strike an agreement. Specific performance with abatement of the purchase price is not an appropriate remedy for the purchaser." (142 C.A.3d 467.)

(4) *Distinction: Sale Involving Trust Deed or Mortgage.* C.C. 1662 provides for fixing loss as between vendor and purchaser; it does not give additional remedial rights to a vendor when the sale involves a trust deed or mortgage. The rights of the vendor-mortgagee are limited by C.C.P. 580b and 726 (see 4 *Summary* (10th), *Security Transactions in Real Property*, §§124 et seq., 185 et seq.). (*Krone v. Goff* (1975) 53 C.A.3d 191, 196, 127 C.R. 390.)

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

(2) *Law Under Uniform Act.* See C.E.B., 1 Real Property Sales Transactions 4th, §4.137 et seq.; C.E.B., 2 Real Property Sales Transactions 4th, §13.3 et seq.

The Uniform Act now appears at 14 U.L.A. (Master Ed.), p. 689.



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3. Effect of Insurance.

13 Witkin Sum. Cal. Law Equity § 176

[§ 176] Effect of Insurance.

In *Kelly v. Smith* (1933) 218 C. 543, 24 P.2d 471, the purchaser entered into possession under a contract of sale providing that she should procure fire insurance. After destruction of part of the premises, she sought to rescind for partial failure of consideration. *Held*, the risk of loss was on her and she could not rescind. The court reviewed and distinguished prior decisions, and concluded that "where the vendee is in possession, enjoying the entire beneficial use of the property, having acquired an estate which he may convey or encumber, and which to all intents and purposes is his," the loss should fall on him, "such being the manifest intent of the parties where title is retained solely as security." (218 C. 553.) The court added that "in view of the insurance provision ... it should be particularly true." (218 C. 554.) (See *Ware v. Security-First Nat. Bank of Los Angeles* (1936) 7 C.2d 604, 610, 61 P.2d 936; *Ross v. McDougal* (1936) 12 C.A.2d 172, 182, 55 P.2d 574; C.E.B., 1 Real Property Sales Transactions 3d, §4.124 et seq.; C.E.B., 2 Real Property Sales Transactions 3d, §12.32 et seq.; 22 Cal. L. Rev. 427; 7 So. Cal. L. Rev. 475; 77 Am.Jur.2d (1997 ed.), *Vendor and Purchaser* §§360, 361.) (On right to proceeds of vendor's insurance, see 12 *Hastings L. J.* 420; 65 A.L.R.2d 989.)

It has been pointed out that a special problem remains in California as a result of the emphasis in the *Kelly*, *Ross*, and *Ware* cases on the provision that the purchaser insure the property. It may be held that although neither title nor possession has been transferred, and normally the risk of loss would be on the vendor, the insurance clause constitutes an express provision excluding the statutory rule, and amounts to an assumption of the risk of loss by the purchaser. (See 36 Cal. L. Rev. 478.)

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

See C.E.B., 2 Real Property Sales Transactions 4th, §13.1 et seq.; 77 Am.Jur.2d (2006 ed.), *Vendor and Purchaser* §318 et seq.



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B. Equitable Conversion by Will.

13 Witkin Sum. Cal. Law Equity § 177

[§ 177] Equitable Conversion by Will.

(1) *General Principle.* Where a will directs that real property be sold and turned into money, "equity regards that as done which ought to be done" (see *supra*, §5) and considers the real property as money; it is transformed or converted, in the view of equity, from realty to personalty, at the time of the testator's death (when the will becomes effective). (*Prob.C. 21107*; see *Estate of Pforr* (1904) 144 C. 121, 127, 77 P. 825; *Estate of Bothwell* (1944) 65 C.A.2d 598, 602, 151 P.2d 298.) The will must order the sale; if the executors have a mere discretionary power, there is no conversion. (*Estate of Gracey* (1927) 200 C. 482, 488, 253 P. 921.) (See 27A Am.Jur.2d (1996 ed.), *Equitable Conversion* §§6, 7, 12, 16. On rights of surviving spouse taking under or against will, see 33 A.L.R.3d 1280.)

The same principle applies where the instrument directs that money be used to purchase real property; the money will be regarded as realty. (See 1 So. Cal. L. Rev. 309.)

(2) *Exception: Testator's Intent.* The doctrine may not be invoked where for any reason it would defeat the clear intention of the testator. (See *McCaughna v. Bilhorn* (1935) 10 C.A.2d 674, 681, 52 P.2d 1025; 27A Am.Jur.2d (1996 ed.), *Equitable Conversion* §§7, 8.)

(3) *Reconversion.* If a will directs executors to sell lands for the benefit of certain parties named in the will, but all the parties beneficially interested desire to receive the lands and not the money, they may elect to do so, and this works a reconversion of the property so that it becomes realty again. (See *Estate of Loyd* (1917) 175 C. 699, 708, 167 P. 157; 27A Am.Jur.2d (1996 ed.), *Equitable Conversion* §19 et seq.)

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

(1) *General Principle.* See 27A Am.Jur.2d (2008 ed.), *Equitable Conversion* §§6, 7, 12, 16. (2) *Exception: Testator's Intent.* See 27A Am.Jur.2d (2008 ed.), *Equitable Conversion* §§7, 8.

(3) *Reconversion.* See 27A Am.Jur.2d (2008 ed.), *Equitable Conversion* §19 et seq.



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VIII. EQUITABLE INDEMNITY, CONTRIBUTION, AND SUBROGATION
A. Equitable Indemnity: Reimbursement From Principal.

13 Witkin Sum. Cal. Law Equity § 178

[§ 178] Equitable Indemnity: Reimbursement From Principal.

(1) *Nature of Doctrine.* Equity gives various rights to one who has satisfied an obligation of another so that he or she may be reimburse himself or herself. Indemnity is the right to recover from the principal. (See *41 Am.Jur.2d* (1995 ed.), *Indemnity* §1 et seq.; *14 Am.Jur. P.P. Forms* (1996 ed.), *Indemnity*, §1 et seq.) When a surety, e.g., has paid the principal's debt, the surety may sue the principal directly and recover what the surety has disbursed, including costs and expenses. (C.C. 2847; see *Rest., Restitution* §76 et seq.; *Rest.3d, Suretyship and Guaranty* §22 et seq.; *Berrington v. Williams* (1966) 244 C.A.2d 130, 134, 52 C.R. 772; *United Pac. Ins. Co. v. Hanover Ins. Co.* (1990) 217 C.A.3d 925, 936, 266 C.R. 231, quoting the text; *Herrick Corp. v. Canadian Ins. Co.* (1994) 29 C.A.4th 753, 763, 766, 34 C.R.2d 844, *infra*, §182; 2 *Summary* (10th), *Insurance*, §4.) (On contracts of indemnity, see C.C. 2772 et seq.; 24 *Cal. L. Rev.* 193; on procedure for enforcing indemnity in certain cases, see C.C.P. 881 et seq., 8 *Cal. Proc.* (4th), *Enforcement of Judgment*, §479 et seq.; on indemnity between tortfeasors, see 5 *Summary* (10th), *Torts*, §112 et seq.)

The surety may also sue the principal debtor after the obligation has become due, even though the surety has not paid the obligation; i.e., the surety may compel the principal to perform. (C.C. 2846; see *Karn v. Wills* (1942) 50 C.A.2d 604, 606, 123 P.2d 640.)

(2) *Limitations on Doctrine.* Where the surety is sued alone by a third party and successfully defends the action so that the surety is not required to pay any of the debt, the surety cannot recover for the expense of the litigation in the absence of an agreement to indemnify. (*Pacific Indem. Co. v. Harper* (1939) 14 C.2d 379, 385, 94 P.2d 586. See *United Services Auto. Assn. v. Alaska Ins. Co.* (2001) 94 C.A.4th 638, 644, 114 C.R.2d 449, 2 *Summary* (10th), *Insurance*, §262 [excess automobile insurer that paid bad faith damages to passenger injured in car driven by insured was not entitled to equitable indemnity against primary insurer; primary insurer had settled with passenger, and thus owed no debt to insured or passenger that excess insurer was obligated to pay].)

Unless a contrary intention appears in an indemnity agreement, a surety is required under C.C. 2778(4) to defend matters embraced by the agreement if the surety is requested to do so by the principal. The surety does not avoid its duty under the statute to defend or pay the principal's defense costs in connection with a covered third-party claim by settling with the third party and obtaining a dismissal of the action with prejudice, without liability or contribution by the principal. (*United States Elevator Corp. v. Pacific Inv. Co.* (1994) 30 C.A.4th 122, 126, 128, 35 C.R.2d 382.)

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

(1) *Nature of Doctrine.* See 41 *Am.Jur.2d* (2005 ed.), *Indemnity* §1 et seq.

Enforcement procedure under C.C.P. 881 et seq.:

Cross-Reference: 8 *Cal. Proc.* (5th), *Enforcement of Judgment*, §508 et seq.(3) *(New) Guaranty Distinguished.* "California law recognizes a distinction between an agreement to indemnify and a guaranty. ... A guarantor makes a direct promise to perform the principal's obligation in the event the principal fails to perform. An indemnitor does not make a direct promise to perform the principal's obligation, but promises to reimburse the indemnitee for losses suffered or to hold the indemnitee harmless." (*Trust One Mortg. Corp. v. Invest America Mortg. Corp.* (2005) 134 C.A.4th 1302, 1309, 37 C.R.3d 83, 4 Summary (10th), *Security Transactions in Real Property*, Supp., §199 [citing C.C. 2772 and 2787, and holding that agreement in dispute was one to indemnify].)



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CHAPTER XIX - Equity

Witkin Summary of California Law
VIII. EQUITABLE INDEMNITY, CONTRIBUTION, AND SUBROGATION
B. Equitable Contribution From Co-Obligor.
1. Nature of Doctrine.

13 Witkin Sum. Cal. Law Equity § 179

[§ 179] Nature of Doctrine.

(1) *In General.* Contribution is the right to recover from a co-obligor. When several parties such as sureties, guarantors, coinsurers, or partners are jointly liable, and one has paid more than his or her share, that party may enforce contribution from the others. (C.C. 1432; see *Hurlbut v. Quigley* (1919) 180 C. 265, 270, 180 P. 613; *Rest., Restitution* §81 et seq.; *Rest.3d, Suretyship and Guaranty* §55 et seq.; 11 *Stanf. L. Rev.* 778; 38 *A.L.R.3d* 680 [right of guarantor or surety to compel coguarantors or cosureties to pay proportionate share to creditor]; 18 *Am.Jur.2d* (2004 ed.), *Contribution* §1 et seq.; 7A *Am.Jur. P.P. Forms* (2002 ed.), *Contribution* §1 et seq.; 1 *Summary* (10th), *Contracts*, §113; 2 *Summary* (10th), *Insurance*, §4.) (On contribution among tortfeasors, see 5 *Summary* (10th), *Torts*, §103 et seq.; on effect of release, dismissal, or covenant not to sue or enforce judgment, see *C.C.P.* 877, 5 *Summary* (10th), *Torts*, §71 et seq.; on procedure for enforcing contribution, see *C.C.P.* 881 et seq., 8 *Cal. Proc.* (4th), *Enforcement of Judgment*, §479.)

(2) *Insolvency Requirement.* One co-obligor cannot be held for more than his or her just proportion of the debt in the absence of a showing of insolvency of the others; but in the latter case, the loss arising from the insolvency is borne proportionately by the solvent co-obligors. (See *Tucker v. Nicholson* (1938) 12 *C.2d* 427, 433, 84 *P.2d* 1045; *Rest., Restitution* §85, Comment h.)

(3) *When Right to Contribution Arises.* It seems clear that the right to contribution arises as soon as a party pays more than his or her share of the obligation. (See C.C. 1432; *Rest., Restitution* §82.) However, it has been held in California that a surety has no claim against co-sureties for contribution before the surety has paid the entire obligation. (*Jackson v. Lacy* (1940) 37 *C.A.2d* 551, 559, 100 *P.2d* 313; see criticism, 29 *Cal. L. Rev.* 65.)

West's Key Number Digest, Contribution k.1 et seq.

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

(1) *In General.* See *Morgan Creek Residential v. Kemp* (2007) 153 *C.A.4th* 675, 689, 63 *C.R.3d* 232 [letter of credit applicant could not seek equitable contribution from guarantors of loan after loan default resulted in draw on letter, where applicant had different level of liability than guarantors].

Enforcement procedure under C.C.P. 881 et seq.:

13 Witkin Sum. Cal. Law Equity § 179

Cross-Reference: 8 Cal. Proc. (5th), *Enforcement of Judgment*, §508 et seq.



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2. Equitable Subrogation Distinguished.

13 Witkin Sum. Cal. Law Equity § 180

[§ 180] Equitable Subrogation Distinguished.

In *Fireman's Fund Ins. Co. v. Maryland Cas. Co.* (1998) 65 C.A.4th 1279, 77 C.R.2d 296, plaintiff and defendants were four general liability insurers that provided overlapping and consecutive coverage to a common insured. When a lawsuit was filed against the insured, it tendered the defense both to plaintiff and defendants, but only plaintiff undertook the defense and ultimately settled the action on the insured's behalf. Thereafter, the insured sued defendants for refusing to undertake the defense, and the insured settled that suit and released defendants from further liability. Plaintiff elected not to intervene or join in the insured's suit against defendants, and instead brought the present action for equitable contribution and indemnification seeking to recover its costs of defending and settling the underlying lawsuit against the insured. The trial judge granted summary judgment for plaintiff, despite defendants' contention that plaintiff's claims were actually based on its equitable subrogation (see *infra*, §183 et seq.) to the rights of the insured against defendants, and that because those rights were settled in the previous litigation between the insured and defendants, no rights remained against defendants to which plaintiff could be subrogated. *Held*, affirmed: (a) there is a direct right of action for equitable contribution between coinsurers on the same risk, entirely independent of the requirements for suing based on equitable subrogation to the rights of the insured; and (b) one insurer's settlement with the insured is not a bar to a separate action against that insurer by another insurer for equitable contribution or indemnity.

(a) The right of equitable contribution belongs to each insurer individually. It is not based on the right of subrogation to the rights of the insured, and is not equivalent to "standing in the shoes" of the insured. Instead, the reciprocal contribution rights of coinsurers who insure the same risk are based on the equitable principle that the burden of indemnifying or defending the insured with whom each has independently contracted should be borne by all of the insurance carriers together, with the loss equitably distributed among those who share liability for it in direct ratio to the proportion each insurer's coverage bears to the total coverage provided by all of the insurance policies. As a matter of equity, insurers of the same risk may sue each other for contribution. This right is not a matter of contract, but flows from equitable principles designed to accomplish ultimate justice in the bearing of a specific burden. The idea is that because the insurers are equally bound, they all should contribute to the payment. (65 C.A.4th 1294, citing the text.)

(b) Unlike subrogation, the right to equitable contribution exists independently of the rights of the insured. It is predicated on the common sense principle that where multiple insurers or indemnitors share equal contractual liability for the primary indemnification of a loss or the discharge of an obligation, the selection of which indemnitor is to bear

the loss should not be left to the often arbitrary choice of the loss claimant, and no indemnitor should have an incentive to avoid paying a just claim in the hope that the claimant will obtain full payment from another coindemnitor. Equitable contribution thus assumes the existence of two or more valid contracts of insurance covering the particular risk of loss and the particular casualty in question. The fact that several insurance policies may cover the same risk does not increase the insured's right to recover for the loss, or give the insured the right to recover more than once. Instead, the insured's right of recovery is restricted to the actual amount of the loss. Thus, where there are several policies of insurance on the same risk and the insured has recovered the full amount of its loss from one or more, but not all, of the insurance carriers, the insured has no further rights against the insurers who have not contributed to its recovery. Similarly, the liability of the remaining insurers to the insured ceases, even if they have done nothing to indemnify or defend the insured. They remain liable, however, for contribution to those insurers who have already paid on the loss or for the insured's defense. (65 C.A.4th 1295.)

(c) "The right to equitable contribution between coinsurers is not based on, and indeed has nothing to do with, the coinsurers' subrogation to the rights of their insured against the party legally and primarily responsible for the loss." (65 C.A.4th 1295.) While subrogation requires that the party to be charged be in an equitable position inferior to that of the insurer such that justice requires the entire loss to be shifted from the insurer to the party to be charged, contribution permits liability for the loss to be allocated among the various insurers without regard to questions of comparative fault or the relative equities between the insurers. "[T]he 'true nature of subrogation' is that it is applied in all cases in which one party pays a debt for which another is primarily answerable, and which, in equity and good conscience, should have been discharged by the latter." (65 C.A.4th 1296.)

(d) Contribution and subrogation are based on different equitable principles that are reflective of different underlying public policies. The aim of equitable subrogation is to place the burden for a loss on the party ultimately liable or responsible for it and by whom it should have been discharged, and to relieve entirely the insurer or surety who indemnified the loss and who in equity was not primarily liable for it. On the other hand, the aim of equitable contribution is to apportion a loss between two or more insurers who cover the same risk, so that each pays its fair share and one does not profit at the expense of the others. Although these underlying policy aims may be similar, they are nonetheless distinct. (65 C.A.4th 1296, citing the text.)

Later cases have followed the approach of the *Fireman's Fund* decision. (See *American Continental Ins. Co. v. American Cas. Co. of Reading, Pennsylvania* (1999) 73 C.A.4th 508, 512, 86 C.R.2d 560 [case resolved by application of principles of equitable contribution, not equitable subrogation]; *Maryland Cas. Co. v. Nationwide Mut. Ins. Co.* (2000) 81 C.A.4th 1082, 1088, 97 C.R.2d 374 [same].)

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



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3. Illustrations: Partnership Cases.

13 Witkin Sum. Cal. Law Equity § 181

[§ 181] Illustrations: Partnership Cases.

A partner who pays more than his or her share of partnership debts is entitled to contribution from a co-partner (*Corp.C. 16401*), and the basis of computation is the sum actually paid by the partner and not the total amount of the partnership debt. (*Goldring v. Chudacoff* (1936) 15 C.A.2d 741, 742, 60 P.2d 135 [partner who paid less than one-half of debt, but more than other partner, was entitled to contribution]; *Great Western Bank v. Kong* (2001) 90 C.A.4th 28, 33, 108 C.R.2d 266 [partners who settled partnership deficiency judgment were entitled to equitable contribution from nonsettling partner].) However, *Corp.C. 16401* expressly provides that it is subject to *Corp.C. 16306(c)*. *Corp.C. 16306(c)*, in turn, provides that, with certain exceptions, a partner in a registered limited liability partnership does not have a duty to contribute toward the debts of the partnership or another partner. (See 9 *Summary* (10th), *Partnership*, §§33, 39.)

In *Jans v. Nelson* (2000) 83 C.A.4th 848, 100 C.R.2d 106, a partner brought an action against other partners for contribution following plaintiff's payment of part of a partnership debt for which plaintiff and defendants were co-guarantors. The trial judge ruled that each solvent partner was responsible in equity for an equal share of the total sum paid on the debt, in the absence of an express agreement for unequal contribution, and entered judgment accordingly. *Held*, reversed. An action to enforce the right of contribution is governed by equitable principles. Although an express or implied agreement allocating contribution among the parties usually will be honored, in the absence of that agreement, the allocation of contribution rests on principles of equity and natural justice. Because the guarantors constituted all owners of the partnership and included both partners active in the daily management of the business and partners whose participation was solely financial, the inference was that the guarantors signed the guaranties solely because of their partnership interest, which interests varied greatly. In these circumstances, in which all limited partners executed guaranties of a partnership debt and there was no other express agreement concerning rights of contribution, equity required the proportionate obligation for contribution to be based on the ownership interest of the various guarantors. (83 C.A.4th 858.)

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



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4. Illustrations: Insurance Cases.

13 Witkin Sum. Cal. Law Equity § 182

[§ 182] Illustrations: Insurance Cases.

The right to equitable contribution arises most frequently between coinsurers. An insurer seeking equitable contribution from a second insurer need only demonstrate that the second insurer covered the same risk and failed to pay its share of the loss. (*Maryland Cas. Co. v. Nationwide Ins. Co. (1998) 65 C.A.4th 21, 27, 76 C.R.2d 113*; see 2 *Summary* (10th), *Insurance*, §4.) The following cases are illustrative:

Truck Ins. Exchange v. Amoco Corp. (1995) 35 C.A.4th 814, 827, 41 C.R.2d 551 [subsidiary insurer was not entitled to equitable contribution from its parent company for defense of underlying suits, where parent did not have contractual or other obligation to reimburse subsidiary, and where parent was not insurer, but self-insured entity].

Commerce & Industry Ins. Co. v. Chubb Custom Ins. Co. (1999) 75 C.A.4th 739, 748, 89 C.R.2d 415 [primary insurer that paid loss was entitled to pro rata contribution from co-primary insurer; both policies contained "other insurance" provisions and plaintiff's provision was "excessonly" clause, while defendant's provisions were hybrid pro rata/escape clause].

Truck Ins. Exchange v. Unigard Ins. Co. (2000) 79 C.A.4th 966, 973, 94 C.R.2d 516 [insurer was not entitled to contribution from coinsurer for defense costs and indemnity for its insured in underlying litigation, where coinsurer had neither been asked to participate in that defense nor notified of potential contribution claim until after litigation was resolved].

Centennial Ins. Co. v. United States Fire Ins. Co. (2001) 88 C.A.4th 105, 110, 105 C.R.2d 559 [approving "time on the risk" rather than "equal shares" method of apportioning defense costs among multiple insurers, where first insurer's coverage period was small fraction of total coverage period].

*Atlantic Mut. Ins. Co. v. J. Lamb (2002) 100 C.A.4th 1017, 1041, 123 C.R.2d 256, 2 *Summary* (10th), *Insurance*, §145* [two insurers provided liability coverage to same insured for same risk for different policy periods; where it could not be determined which policy applied when insured tendered defense of claim to both insurers, insurer that provided defense was entitled to equitable contribution from other insurer].

Hartford Cas. Ins. Co. v. Travelers Indem. Co. (2003) 110 C.A.4th 710, 724, 2 C.R.3d 18 [tenant's liability insurer

was not entitled to equitable contribution from landlord's liability insurer for defense of underlying premise liability action; by their terms, tenant's policy was primary, while landlord's policy was excess].

In *Herrick Corp. v. Canadian Ins. Co.* (1994) 29 C.A.4th 753, 34 C.R.2d 844, plaintiffs--a subcontractor and its insurer--sued defendants--another subcontractor and its insurer--for contribution and reimbursement after plaintiff insurer had indemnified the general contractor for its settlement with an injured employee of plaintiff subcontractor, and also for defense costs in the employee's underlying suit. The trial judge ordered dismissal. *Held*, affirmed in part, and reversed in part.

(a) The trial judge erred to the extent that he precluded plaintiff insurer's contribution claim for defense costs, but did not err in recognizing that plaintiff insurer had no claim based on the money it paid on behalf of its own insured (i.e., plaintiff subcontractor) to the general contractor. Because there was no basis to establish that plaintiff insurer was either a joint tortfeasor or co-obligor on a contract debt with defendant insurer, the good faith settlement law (C.C.P. 877, 877.6; see 5 *Summary* (10th), *Torts*, §71 et seq.) did not prevent a suit for contribution. Nevertheless, because it was the liability of plaintiff subcontractor, and not that of the general contractor, that required plaintiff insurer to pay money, plaintiff insurer had no basis to seek contribution from defendant insurer as to that money. The defense costs were different because plaintiff insurer was independently obligated to provide a defense to the general contractor, which was an additional insured, and the risk of providing the defense was a risk identical to that assumed by defendant insurer. (29 C.A.4th 759.)

(b) The trial judge erred by precluding plaintiff insurer's contribution claim against defendant insurer for defense costs, and its subrogation claim (see *infra*, §183 et seq.) against defendant subcontractor, but did not err in recognizing that plaintiff insurer had no claim against either defendant for the indemnity money paid (see *supra*, §178), and that plaintiff subcontractor had no claims of any sort against either defendant. The indemnification, paid on behalf of plaintiff subcontractor rather than the general contractor, could not subrogate plaintiff insurer to any of the general contractor's rights against defendant subcontractor. However, plaintiff insurer was subrogated to an express contractual right of the general contractor to be defended by defendant subcontractor. Also, plaintiff subcontractor could not state a claim for equitable contribution against defendant insurer based on their being coinsurers of the same risk, because plaintiff subcontractor was not an insurer, and it had made no payments on the general contractor's behalf that would allow it to be subrogated to the general contractor's rights against defendant subcontractor. (29 C.A.4th 763, 766.) (See 24 *Southwestern U. L. Rev.* 1157 [discussing *Herrick* and contribution and indemnity under C.C.P. 877.6 in settlement of complex environmental insurance cases].)

American Continental Ins. Co. v. American Cas. Co. of Reading, PA (2001) 86 C.A.4th 929, 103 C.R.2d 632, involved unusual facts that presented a question of first impression. A patient sued a hospital and several of its employees for medical malpractice. Plaintiff insurer, which had issued two liability policies to the hospital and its employees, defended the suit and negotiated a settlement that released the hospital and its employees from liability. Plaintiff then sued defendant insurer, which had issued a liability policy to a nurse who was involved in the incident giving rise to the malpractice claim but who had not been sued, for equitable contribution. Defendant demurred, arguing that because no claim had ever been made against the nurse and because she had never been named or served in the malpractice action, no obligation to provide coverage under its policy had ever arisen and thus there was no basis on which it could be held liable to plaintiff for any part of the sum paid to defend and settle the malpractice action. The trial court agreed and sustained the demurrer. *Held*, judgment on demurrer affirmed; there must be a legal obligation to provide a defense or indemnity coverage before a valid claim for equitable contribution may be asserted. In the present case, no coverage obligation ever arose, because the nurse was not named or served as a party in the underlying action, and defendant never had a duty to defend her in that action. (86 C.A.4th 938.) Further, defendant never had a duty to indemnify her because she never became legally obligated to pay as a result of the underlying malpractice claim. (86 C.A.4th 939.) (On collateral estoppel issue, see 7 *Cal. Proc.* (4th), *Judgment*, Supp., §378A.)

SUPPLEMENT: [This section is current through the latest supplement]
The following cases discuss equitable contribution between coinsurers:

Carmel Dev. Co. v. RLI Ins. Co. (2005) 126 C.A.4th 502, 516, 24 C.R.3d 588 [where commercial general liability (CGL) policy provided coverage specifically excess to insured's underlying primary policy, while second CGL insurer was liable for claims in excess of any other insurance, two policies did not operate at same level of coverage; thus, second insurer had no duty to contribute to first insurer's settlement with injured party, because settlement did not exceed first insurer's policy limit].

Safeco Ins. Co. of America v. Superior Court (2006) 140 C.A.4th 874, 879, 44 C.R.3d 841 [in action for equitable contribution by settling insurer against nonparticipating insurer, settling insurer met its burden of proof by making prima facie showing of coverage under nonparticipating insurer's policy, i.e., same showing necessary to trigger recalcitrant insurer's duty to defend; burden of proof then shifted to nonparticipating insurer to prove absence of actual coverage].

Employers Ins. Co. of Wausau v. Travelers Indem. Co. (2006) 141 C.A.4th 398, 403, 46 C.R.3d 1 [where two or more insurers' policies potentially cover insured's liability and one insurer bears defense burden alone, that insurer is entitled to equitable contribution from nondefending insurers; insurer cannot avoid contribution to other insurers by settling with insured].

American Int. Specialty Lines Ins. Co. v. Continental Cas. Ins. Co. (2006) 142 C.A.4th 1342, 1366, 49 C.R.3d 1 [following *Truck Ins. Exchange v. Unigard Ins. Co. (2000) 79 C.A.4th 966, 94 C.R.2d 516, text, p. 511*].

Edmondson Property Management v. Kwock (2007) 156 C.A.4th 197, 209, 67 C.R.3d 243, 2 Summary (10th), Insurance, Supp., §4 [indemnity agreement between property manager and property owner did not preclude application of equitable contribution doctrine between insurers in settlement of claim by child injured in accident on property; agreement did not clearly state that it applied to active negligence, which was liability involved in this case]. *Collateral estoppel issue*:

Cross-Reference: 7 Cal. Proc. (5th), Judgment, §441.



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Witkin Summary of California Law VIII. EQUITABLE INDEMNITY, CONTRIBUTION, AND SUBROGATION C. Equitable Subrogation: Surety's Recovery From Obligor. 1. Nature of Doctrine.

13 Witkin Sum. Cal. Law Equity § 183

[§ 183] Nature of Doctrine.

(1) *In General.* Equitable subrogation is the right to recover from the debtor-obligor. A surety, e.g., pays the principal debtor's obligation to the creditor, and in equity is substituted for the creditor or subrogated to the creditor's rights against the debtor. (C.C. 2848, 2849; see *Katsivalis v. Serrano Reconveyance Co.* (1977) 70 C.A.3d 200, 210, 138 C.R. 620; *In re Marriage of Shore* (1977) 71 C.A.3d 290, 297, 139 C.R. 349, citing the text; *Liberty Mut. Ins. Co. v. Altfillisch Const. Co.* (1977) 70 C.A.3d 789, 796, 139 C.R. 91, 2 Summary (10th), *Insurance*, §243; *Smith v. State Savings & Loan Assn.* (1985) 175 C.A.3d 1092, 1098, 223 C.R. 298; *Rest., Restitution* §§162, 171; *Rest.3d, Suretyship and Guaranty* §27 et seq.; 29 Cal. L. Rev. 65; 34 Loyola L.A. L. Rev. 231 [California commentary on Rest.3d]; 77 So. Cal. L. Rev. 1039 [suggesting correction to subrogation doctrine in California health care]; 73 Am.Jur.2d (2001 ed.), *Subrogation* §1 et seq.; 2 Summary (10th), *Insurance*, §4.) (On distinction between equitable contribution and subrogation, see *supra*, §180; on distinction between legal (equitable) and conventional (contractual) subrogation, see *Fifield Manor v. Finston* (1960) 54 C.2d 632, 638, 7 C.R. 377, 354 P.2d 1073, *infra*, §188, and *Patent Scaffolding Co. v. William Simpson Const. Co.* (1967) 256 C.A.2d 506, 510, 64 C.R. 187, *infra*, §189.)

The doctrine is not limited to sureties and quasi-sureties. "As now applied, it is broad enough to include every instance in which one person, not acting as a mere volunteer or intruder, pays a debt for which another is primarily liable, and which in equity and good conscience should have been discharged by the latter. Its use to enforce restitution in order to prevent unjust enrichment has elsewhere been pointed out." (*Estate of Kemmerrer* (1952) 114 C.A.2d 810, 814, 251 P.2d 345; 28 Proof of Facts 3d 507 [proof of excess insurer's cause of action against primary insurer]; *infra*, §§184, 185.) (On surety's recovery where insured settles with third-party tortfeasor for less than amount that will compensate entire loss, see *Conservatorship of Edwards* (1988) 198 C.A.3d 1176, 1183, 244 C.R. 330; on circumstances under which amount of subrogation claim paid to plaintiff's insurer is deductible from final settlement, see *Griffin v. Calistro* (1991) 229 C.A.3d 193, 196, 280 C.R. 30; on priority between primary and excess insurers' claims on indemnification fund where both have subrogation clauses, see *Century Indem. Co. v. London Underwriters* (1993) 12 C.A.4th 1701, 1710, 16 C.R.2d 393.)

(2) *Elements of Claim.* A party entitled to subrogation has the same rights as an assignee of the claim. (*Snider v. Basinger* (1976) 61 C.A.3d 819, 824, 132 C.R. 637.) The party need not first establish a right in equity; the party may bring a legal action against the debtor directly, as an assignee of the creditor's claim. (*Offer v. Superior Court* (1924) 194 C. 114, 120, 228 P. 11; see *Simon Newman Co. v. Fink* (1928) 206 C. 143, 146, 273 P. 565; *Johnson v. Mortgage*

Guarantee Co. (1931) 117 C.A. 416, 420, 4 P.2d 208; *A.F.C. v. Brockett* (1967) 257 C.A.2d 40, 42, 64 C.R. 771, citing the text; 23 Am.Jur. P.P. Forms (1993 ed.), Subrogation §1 et seq.; Cal. Civil Practice, 3 Business Litigation, §38:21 et seq.; 4 Cal. Proc. (4th), Pleading, §113.)

Grant v. de Otte (1954) 122 C.A.2d 724, 728, 265 P.2d 952, sets forth the fundamental elements of a valid claim for equitable subrogation:

(a) Payment must have been made by the subrogee to protect his or her own interest. (See *California Ins. Guarantee Assn. v. Superior Court* (1998) 64 C.A.4th 219, 221, 224, 75 C.R.2d 461 [in proceeding to liquidate insolvent insurer, plaintiff was entitled to retain amounts it recovered in subrogation actions after paying insurer's covered claims, but only to extent that it did so with its own assets].)

(b) The subrogee must not have acted as a volunteer. (See *infra*, §186.)

(c) The debt paid must be one for which the subrogee was not primarily liable. (See *Caito v. United Calif. Bank* (1978) 20 C.3d 694, 704, 144 C.R. 751, 576 P.2d 466 [person paying debt for which he or she is primarily liable was not entitled].)

(d) The entire debt must have been paid. (See *Iusi v. City Title Ins. Co.* (1963) 213 C.A.2d 582, 587, 28 C.R. 893 [necessity of actual payment]; *Sapiano v. Williamsburg Nat. Ins. Co.* (1994) 28 C.A.4th 533, 536, 33 C.R.2d 659 [unless contract explicitly establishes insurer's priority, insurer paying portion of debt owed to insured is not entitled to subrogation of that portion from third-party tortfeasor until insured is made whole]; *Plut v. Fireman's Fund Ins. Co.* (2000) 85 C.A.4th 98, 104, 102 C.R.2d 36 [in insured's breach of contract action against insurer, insurer was entitled to setoff for settlement, where damages were assessment of funds necessary to make insured whole for loss, and judgment against insurer supported setoff, even though judgment had not yet been paid]; *American Contractors Indem. Co. v. Saladino* (2004) 115 C.A.4th 1262, 1269, 9 C.R.3d 835, citing the text [where trial court's surcharge order was not fully satisfied, sureties' right to subrogation was premature because debt was not fully paid].)

(e) Subrogation must not work an injustice to the rights of others. (See *St. Paul Fire & Marine Ins. Co. v. Murray Plumbing & Heating Corp.* (1976) 65 C.A.3d 66, 75, 135 C.R. 120 [equity does not permit insurer to be subrogated against insured's coinsured]; *Longoria v. Hengehold Motor Co.* (1983) 142 C.A.3d 1059, 1061, 191 C.R. 439 [insurer not subrogated against tortfeasor who has statutory right of reimbursement from insured]; *Low v. Golden Eagle Ins. Co.* (2002) 101 C.A.4th 1354, 1363, 125 C.R.2d 155 [general rule that subrogated insurer stands in shoes of insured did not apply where insureds' recovery was limited by clerical error in their complaint and insurer had put them on notice of much greater amount]; *infra*, §187 et seq.)

(3) *Subrogee's Exercise of Subrogor's Right To Impose Constructive Trust.* A subrogee has the right to exercise the equitable remedy of constructive trust possessed by the subrogor. (See *Haskel Engineering & Supply Co. v. Hartford Acc. & Indem. Co.* (1978) 78 C.A.3d 371, 376, 144 C.R. 189.)

(4) *Waiver.* The right to equitable contribution may be expressly waived. (See *Sacramento-Yolo Port Dist. v. Cargill of Calif.* (1970) 4 C.A.3d 1004, 1010, 84 C.R. 822, 2 Summary (10th), Insurance, §4; *Davlar Corp. v. Superior Court* (1997) 53 C.A.4th 1121, 1124, 62 C.R.2d 199.)

West's Key Number Digest, Subrogation k.1 et seq.

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

(2) *Elements of Claim.*

Cross-Reference: 4 Cal. Proc. (5th), Pleading, §132.

(c) *Debt paid must be one for which subrogee was not primarily liable:* See *McKinley v. XL Specialty Ins. Co.*

(2005) 131 C.A.4th 1572, 1575, 33 C.R.3d 98 [insurer had no subrogation rights against its own insured for loss or liability covered by policy; quoting *Truck Ins. Exchange v. Los Angeles* (2002) 95 C.A.4th 13, 115 C.R.2d 179, text, §184]; *Morgan Creek Residential v. Kemp* (2007) 153 C.A.4th 675, 690, 63 C.R.3d 232 [letter of credit applicant was not entitled to equitable subrogation under U.C.C. 5117 from guarantors of loan after loan default resulted in draw on letter, where guarantors were not primarily liable for loan].(4) *Waiver*. See 125 A.L.R.5th 1 [conduct or inaction by insurer constituting waiver of, or creating estoppel to assert, right of subrogation].*Correction*: Page 516, line 17 of section, "equitable contribution" should be "equitable subrogation".



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CHAPTER XIX - Equity

Witkin Summary of California Law
VIII. EQUITABLE INDEMNITY, CONTRIBUTION, AND SUBROGATION
C. Equitable Subrogation: Surety's Recovery From Obligor.
2. Illustrations: Insurance Cases.

13 Witkin Sum. Cal. Law Equity § 184

[§ 184] Illustrations: Insurance Cases.

Equitable subrogation arises most frequently in the insurance context. (See 2 *Summary* (10th), *Insurance*, §4.) The following cases are illustrative:

(1) An insurer on a fidelity bond of an employee is entitled to subrogation against a third party with inferior equities. (*Hartford Acc. & Indem. Co. v. Bank of America* (1963) 220 C.A.2d 545, 550, 34 C.R. 23.)

(2) One insurer is entitled to subrogation against another insurer where the first insurer has defended and settled a third-party claim against their common insured. (See *State Farm Fire & Cas. Co. v. Cooperative of Amer. Physicians* (1984) 163 C.A.3d 199, 204, 205, 209 C.R. 251; *Herrick Corp. v. Canadian Ins. Co.* (1994) 29 C.A.4th 753, 763, 766, 34 C.R.2d 844, *supra*, §182.)

(3) An insurer is subrogated to its insured's right to enforce another insurer's duty to defend the insured. (*Maryland Cas. Co. v. National Amer. Ins. Co. of Calif.* (1996) 48 C.A.4th 1822, 1829, 56 C.R.2d 498; *Maryland Cas. Co. v. Nationwide Ins. Co.* (1998) 65 C.A.4th 21, 26, 76 C.R.2d 113.)

(4) An insurer that fully reimburses its insured, the lessor of equipment stolen through no fault of the lessee, is subrogated to the insured-lessor's right to enforce an obligation in the lease requiring the lessee to pay the full value of the stolen equipment. (*Fireman's Fund Ins. Co. v. Wilshire Film Ventures* (1997) 52 C.A.4th 553, 555, 60 C.R.2d 591 [agreeing with result, but not reasoning, of *Patent Scaffolding Co. v. William Simpson Const. Co.* (1967) 256 C.A.2d 506, 64 C.R. 187, *infra*, §189].)

(5) An insurer who pays a claim to settle an action against defendant insured is subrogated to the insured's right to seek equitable indemnity from a third party. (*Smith v. Parks Manor* (1987) 197 C.A.3d 872, 878, 879, 243 C.R. 256; *Herrick*, *supra*; see *Allstate Ins. Co. v. Loo* (1996) 46 C.A.4th 1794, 1799, 54 C.R.2d 541 [insurer-subrogee assumed insured-subrogor's contractual liability for attorneys' fees in unsuccessful subrogation action, because insurer would have been subrogated to insured's right to fees had insurer prevailed].)

In *Truck Ins. Exchange v. Los Angeles* (2002) 95 C.A.4th 13, 115 C.R.2d 179, plaintiff insurer brought an equitable subrogation action against defendant county, seeking, pursuant to an indemnity agreement, to recover the costs incurred

to defend the named insured, under a hospital liability policy, against a medical malpractice action. The named insured was a hospital that had contracted with defendant to treat low-risk obstetric patients. Defendant was an additional insured under the policy, which provided coverage to defendant for legal liability arising out of the negligence of the named insured, but not for defendant's own liability. Defendant had referred a high-risk patient to the named insured and injuries sustained by that patient and her baby during birth precipitated the underlying medical malpractice action. The trial judge granted summary judgment for defendant, finding that plaintiff was not entitled to subrogation. *Held*, reversed and remanded; plaintiff was entitled to equitable subrogation from defendant, notwithstanding that defendant was an additional insured.

(a) An insurer may not be subrogated to a claim against its own insured when the claim arises from an incident for which the insurer's policy covers that insured. However, if a policy does not cover an insured for the particular loss or liability that the insurer seeks to impose on the insured, there is no obstacle to equitable subrogation. (95 C.A.4th 21.)

(b) Under the additional insured endorsement, the county's coverage was limited to its vicarious liability for negligence on the part of the named insured. Thus, the insurer's policy did not cover the county's liability for the named insured's defense costs. (95 C.A.4th 24.)

(c) Because the named insured was not at fault for the loss, and because defendant's negligence had caused the named insured to incur the defense costs under the policy, it was proper to hold defendant primarily liable and equitably to bear the entire obligation. (95 C.A.4th 27.)

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

(2) *Right of insurer to subrogation against another insurer where first insurer has defended and settled third-party claim against common insured:* See *Transcontinental Ins. Co. v. Insurance Co. of the State of Pennsylvania* (2007) 148 C.A.4th 1296, 1302, 56 C.R.3d 491 [excess insurer was obligated to reimburse primary insurer that paid substantial part of defense costs; payment of defense costs by primary insurer was under reservation of rights, and underlying action contained some claims for which primary insurer's policies provided no potential coverage].



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3. Illustrations: Other Cases.

13 Witkin Sum. Cal. Law Equity § 185

[§ 185] Illustrations: Other Cases.

Illustrations of the doctrine of equitable subrogation that do not involve insurance are numerous:

(1) Where a mortgagor grants mortgaged property, and then is compelled to pay the mortgage debt, the mortgagor is subrogated to the mortgagee's rights against the grantee or the property. (*Sanders v. Magill* (1937) 9 C.2d 145, 150, 70 P.2d 159; *Vincent v. Garland* (1936) 14 C.A.2d 725, 727, 58 P.2d 1320; see 48 U.C.L.A. L. Rev. 1633 [subrogation of mortgages in California]; 73 Am.Jur.2d (2001 ed.), *Subrogation* §52; 4 *Summary* (10th), *Security Transactions in Real Property*, §111.)

(2) A junior lienholder who, to protect his or her interest, pays a debt secured by a senior lien on property, is subrogated to the rights of the senior lienholder against the owner. (*Diehl v. Hanrahan* (1945) 68 C.A.2d 32, 37, 155 P.2d 853; *Stein v. Simpson* (1951) 37 C.2d 79, 84, 230 P.2d 816, *infra*, §186 [dictum]; see 73 Am.Jur.2d (2001 ed.), *Subrogation* §57.)

(3) A tenant in common who redeems property from a mortgage is subrogated to the lien of the mortgagee on interests of the other cotenants for their just proportion of the redemption money. (*Kenney v. Kenney* (1950) 97 C.A.2d 60, 62, 217 P.2d 151; *Snider v. Basinger* (1976) 61 C.A.3d 819, 823, 132 C.R. 637.)

(4) An employer who has suffered a judgment for damages based on the tort of an employee is subrogated to the rights of the party injured and may recoup the loss from the employee. (*Continental Cas. Co. v. Phoenix Const. Co.* (1956) 46 C.2d 423, 428, 296 P.2d 801 [insurer of employer may recover against either employee or employee's insurer]; see 73 Am.Jur.2d (2001 ed.), *Subrogation* §31; 3 *Summary* (10th), *Agency and Employment*, §116; 53 A.L.R.3d 631 [subrogation of employer's liability insurer to employer's right of indemnity against negligent employee].)

(5) An employer who has paid workers' compensation to an employee injured by a third-party tortfeasor is subrogated to the employee's right of action against the tortfeasor. (*Lab.C.* 3852; see 2 *Summary* (10th), *Workers' Compensation*, §69.)

(6) A surety who has paid after defalcation of a receiver in bankruptcy is subrogated to the rights of the new trustee in bankruptcy against the old trustee who had participated in the receiver's wrongful acts. (*Indemnity Ins. Co. of North*

America v. Sampson (1940) 40 C.A.2d 119, 122, 104 P.2d 374.)

(7) An attorney claiming fees from a decedent payable out of real property, who advances money to prevent foreclosure of a trust deed, is subrogated to the rights of the trustees. (*Grant v. de Otte* (1954) 122 C.A.2d 724, 729, 265 P.2d 952.)

(8) Where a testator's hospital and funeral expenses were paid by the testator's mother and sole legatee, they both were entitled to recover their expenditures as against the widow who was seeking to set aside the small estate. (*Estate of Kemmerrer* (1952) 114 C.A.2d 810, 813, 251 P.2d 345; see *Estate of Johnson* (1966) 240 C.A.2d 742, 744, 50 C.R. 147; 35 A.L.R.2d 1399 [subrogation or reimbursement from decedent's estate of persons other than personal representative or surviving spouse paying funeral expenses].)

(9) A contractor's surety is subrogated to the rights of unpaid laborers and materialpersons against an owner who makes progress payments after stop notices. (*United States Fidelity & Guaranty Co. v. Oak Groves Union School Dist. of Sonoma* (1962) 205 C.A.2d 226, 231, 22 C.R. 907; *Leatherby Ins. Co. v. Tustin* (1977) 76 C.A.3d 678, 685, 143 C.R. 153; *Golden Eagle Ins. Co. v. First Nationwide Financial Corp.* (1994) 26 C.A.4th 160, 169, 31 C.R.2d 815, citing the text.)

(10) The state may recover the reasonable value of Medi-Cal payments made to a beneficiary as a result of injuries for which a third person or an uninsured motorist insurer is liable. (Welf.C. 14124.70 et seq.; see *Kizer v. Hirata* (1993) 20 C.A.4th 841, 844, 25 C.R.2d 19 [state acquires lien on injured person's recovery of damages from third party when Medi-Cal program pays for injured person's medical services]; *Riddell v. California* (1996) 50 C.A.4th 1607, 1610, 58 C.R.2d 555 [same]; *Bonta'a v. Friedman* (2001) 91 C.A.4th 819, 822, 111 C.R.2d 194 [same, as applied to medical malpractice recovery for spina bifida, because that condition is "injury"]; *Kain v. State Dept. of Health Services* (2001) 91 C.A.4th 325, 328, 109 C.R.2d 891 [state may recover Medi-Cal payments made to parents whose child was injured by vaccination and who were compensated under federal program]; *Boehm & Associates v. Work. Comp. App. Bd.* (2003) 108 C.A.4th 137, 142, 133 C.R.2d 396 [Medi-Cal recoupment provisions of Welf.C. 14124.70 et seq. apply in workers' compensation proceedings]; 8 *Pacific L. J.* 393.)

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

(10) *Recovery of Medi-Cal payments to beneficiary injured by third party:* See *Fitch v. Select Products Co.* (2005) 36 C.A.4th 812, 822, 31 C.R.3d 591, 115 P.3d 1233 [state could not assert lien against wrongful death recovery by Medi-Cal beneficiary's survivors from third party, where recovery did not include compensation for beneficiary's medical expenses]; *Espericueta v. Shewry* (2008) 164 C.A.4th 615, 625, 79 C.R.3d 517 [state's lien against personal injury recovery by Medi-Cal beneficiary did not have to be reduced to same percentage that recovery bore to overall value of beneficiary's case, because there had already been judicial allocation of medical expenses portion of recovery].



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3. Limitations on Doctrine.
a. No Recovery by Volunteer.

13 Witkin Sum. Cal. Law Equity § 186

[§ 186] No Recovery by Volunteer.

Under the accepted definition (*supra*, §183), a mere volunteer or intermeddler who discharges another's debt is not entitled to subrogation; one who claims the right must have been bound by a lawful obligation, or must have acted in protection of his or her own interests. (See *Fresno Inv. Co. v. Brandon* (1926) 79 C.A. 387, 389, 249 P. 548; *McMillan v. O'Brien* (1934) 219 C. 775, 779, 29 P.2d 183; *Fuller v. Harwell* (1932) 126 C.A. 654, 661, 15 P.2d 562; *Holmes v. Hughes* (1932) 125 C.A. 290, 294, 14 P.2d 149; *United Pac. Ins. Co. v. Hanover Ins. Co.* (1990) 217 C.A.3d 925, 934, 935, 266 C.R. 231; *Fireman's Fund Ins. Co. v. Maryland Cas. Co.* (1994) 21 C.A.4th 1586, 1598, 26 C.R.2d 762, citing the text [excess liability insurer's payment represented amount for which neither it nor any other party was liable; thus, payment was as volunteer]; *Rest., Restitution* §162, Comment b; 21 *Cal. L. Rev.* 176; 22 *Cal. L. Rev.* 118; 11 *Hastings L. J.* 474; 73 *Am.Jur.2d* (2001 ed.), *Subrogation* §§20, 21.)

Although this limitation is well established, the courts have experienced great difficulty in determining when a person has an "interest" to protect and when the person is a "mere volunteer." (See *Employers Mut. Liab. Ins. Co. of Wisconsin v. Pacific Indem. Co.* (1959) 167 C.A.2d 369, 379, 381, 334 P.2d 658 ["harsh" rule relaxed by modern cases--good faith and reasonable belief that payment is necessary for protection is sufficient]; *Estate of Kemmerrer* (1952) 114 C.A.2d 810, 813, 251 P.2d 345 [similar approach]; *State Farm Fire & Cas. Co. v. East Bay Mun. Util. Dist.* (1997) 53 C.A.4th 769, 776, 62 C.R.2d 72 [even though insurance policy's exclusions appeared to preclude coverage, loss was covered under policy's basic grant of coverage; thus, insurer's payment was not as volunteer]; *Gulf Ins. Co. v. TIG Ins. Co.* (2001) 86 C.A.4th 422, 432, 103 C.R.2d 305, 2 *Summary* (10th), *Insurance*, §239 [surety that did not suffer injury was not equitably subrogated to rights of insured].)

Where the claimant did not act in good faith, the volunteer rule may be strictly applied. In *Stein v. Simpson* (1951) 37 C.2d 79, 230 P.2d 816, plaintiffs owned property worth over \$ 50,000. H Bank had a first trust deed for \$ 18,000, and defendant Simpson had a second trust deed for \$ 22,000, securing a usurious loan. After the principal of the second loan had been reduced to \$ 12,000, plaintiffs made several proper tenders of the balance due, all refused by Simpson for the admitted reason that he wanted to acquire the property at a sacrifice. Thereafter, Simpson held a sale under his second trust deed, at which he suddenly paid off the \$ 18,000 first loan, so that the sale would give the purchaser title; he prevented a requested 24-hour postponement sought by plaintiffs to obtain funds, and then he bought the property. *Held*, Simpson's conduct was unconscionable and constructively fraudulent, and plaintiffs were entitled to quiet title on

condition of payment of the balance they owed to Simpson (\$ 12,000) less costs. Thus, plaintiffs received their property free of the \$ 18,000 first loan, and the main issue was whether Simpson, who paid that sum to the creditor bank, was entitled to subrogation or reimbursement from plaintiff. Simpson's claim was rejected on two theories:

(a) As to subrogation: When plaintiffs tendered the balance of Simpson's second loan, the unaccepted tender discharged his security (see 1 *Summary* (10th), *Contracts*, §770); hence he had no actual interest to protect when he paid off the first loan, and was a mere volunteer. (37 *C.2d* 84.)

(b) As to restitution or quasi-contractual recovery for payment under mistake: Simpson contended that at least he thought he had an interest, and his payment was made under a mistaken belief that he had (see 1 *Summary* (10th), *Contracts*, §§1022, 1023). But his admitted object was to obtain the property at a sacrifice, and this, rather than the alleged mistaken belief, was the motive for the payment. The benefit, therefore, was conferred not by mistake but by wrongful conduct, and plaintiffs were not unjustly enriched. (37 *C.2d* 86.)

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



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b. No Recovery Against Innocent Third Party.

13 Witkin Sum. Cal. Law Equity § 187

[§ 187] No Recovery Against Innocent Third Party.

The right of subrogation is ordinarily asserted against the obligor or principal. It may be invoked against a third party only if he or she is guilty of some wrongful conduct that makes his or her equity inferior to that of the plaintiff. (See *Continental Ins. Co. v. Morgan, Olmstead, Kennedy & Gardner* (1978) 83 C.A.3d 593, 602, 148 C.R. 57 [doctrine of superior equities]; 73 Am.Jur.2d (2001), *Subrogation* §17.)

In *Meyers v. Bank of America* (1938) 11 C.2d 92, 77 P.2d 1084, an employee forged his employer's endorsement on checks and negotiated them for value to a third party, who deposited them in defendant bank, which collected them from the drawee. The bonding company paid the employer, took an assignment of any cause of action he might have, and sued defendant bank. *Held*, (a) the written assignment added nothing to the rights already accrued by subrogation and the same defenses were available as if the assignment had not been made; and (b) because the bank was an innocent party and the bonding company was paid to indemnify the loss, the latter had no superior equities and could not recover. (11 C.2d 102.) (See 27 Cal. L. Rev. 88; 12 So. Cal. L. Rev. 490.)

Meyers was followed on substantially similar facts in *American Alliance Ins. Co. v. Capital Nat. Bank of Sacramento* (1946) 75 C.A.2d 787, 171 P.2d 449. The court looked through immaterial procedural differences and restated the rule that where an employer suffers loss on instruments forged by an employee, and the surety pays the employer, the surety's cause of action, based on its right of subrogation, is only against the tortfeasor (the employee) and not against the bank, an innocent third party; and the employer cannot recover on the drawee bank's liability because the employer has been compensated in full and is not entitled to double recovery. (75 C.A.2d 791.)

In *Lawyers Title Ins. Corp. v. Feldsher* (1996) 42 C.A.4th 41, 49 C.R.2d 542, defendants sold their business to R and secured his purchase obligations by recording a fourth deed of trust on his commercial property. G, a commercial lender, subsequently made a loan to R and secured it against the property. G was aware of defendants' senior trust deed on the property, but mistakenly believed, based on conversations with R, that his loan would retire and supersede the second trust deed, and thus be senior to defendants' trust deed. After R defaulted on his purchase obligations, defendants foreclosed on their trust deed and purchased the property at a trustee's sale, resulting in the loss of G's junior trust deed. Defendants learned of that trust deed after the sale. Plaintiff, a title company that had indemnified G on his loan to R and ultimately had become his assignee, then filed the present action seeking equitable subrogation. *Held*, recovery

denied.

(a) After an extensive review of equitable subrogation case law, the court, citing *Copp v. Millen* (1938) 11 C.2d 122, 77 P.2d 1093, supra, §4, observed that some knowledge of an intervening lien will not automatically preclude a party from invoking the remedy of equitable subrogation, provided that the interests of the intervening lienholder are not prejudiced. The question in the present case was whether the extent of G's knowledge of defendants' trust deed precluded plaintiff from taking advantage of the equitable doctrine. (42 C.A.4th 51.)

(b) It was undisputed that G had constructive as well as actual knowledge of the critical facts concerning defendants' senior trust deed. G knew his trust deed would be junior to defendants' trust deed unless defendants agreed--as well as executed and recorded an agreement--to subordinate their trust deed to G's trust deed. But G took no affirmative steps to personally secure that agreement from defendants, there was no evidence that R had even agreed to secure the agreement, and G, an experienced lender, should have realized when he inspected the relevant documents at the close of escrow that they did not include the agreement. (42 C.A.4th 52.)

(c) Unlike defendants, who were unaware of G's contemplated loan, he was in a position to avoid any harm. "Nevertheless, despite this knowledge Greenberg failed to take any affirmative steps to protect those interests. Greenberg's actual knowledge of the crucial facts, combined with his negligence in allowing the transaction to close despite the absence of a subordination agreement, is the type of 'culpable and inexcusable neglect' which justifies the denial of equitable subrogation under the overall circumstances of this case." (42 C.A.4th 54.)

Other cases are to the same effect:

King v. Hartford Acc. & Indem. Co. (1933) 133 C.A. 711, 718, 24 P.2d 906 ["the surety on a *supersedeas* bond is not entitled, upon paying the judgment recovered against his principal, to be subrogated to the creditor's remedies against sureties on a prior bond of the same debtor in the absence of special circumstances which operate to render the equities of the later surety superior to those of the earlier"].

Jones v. Bank of America (1942) 49 C.A.2d 115, 123, 121 P.2d 94 ["the doctrine of subrogation does not apply in favor of a surety company on a fidelity bond against persons who did not participate in the wrongful act of the wrongdoer"].

Reliance Nat. Indem. Co. v. General Star Indem. Co. (1999) 72 C.A.4th 1063, 1079, 85 C.R.2d 627 [primary insurer was not entitled to subrogation against excess insurer, despite indemnification contract between two insureds; insureds were not present, and risks and premiums in providing primary coverage differ from those in providing excess coverage].

Travelers Cas. & Surety Co. v. American Equity Ins. Co. (2001) 93 C.A.4th 1142, 1152, 113 C.R.2d 613 [insurer was entitled to equitable contribution of 50% of defense costs from co-insurer where both policies were primary with "other insurance" clauses; although there was indemnification agreement, action was between insurers, and parties to that agreement were not involved].

United Services Auto. Assn. v. Alaska Ins. Co. (2001) 94 C.A.4th 638, 645, 114 C.R.2d 449, 2 Summary (10th), Insurance, §262 [excess automobile insurer that paid bad faith damages to passenger injured in car driven by insured was not entitled to equitable subrogation against primary insurer; insured had no bad faith claim against primary insurer, because it had settled with passenger, and thus payments made were in settlement of excess insurer's alleged wrongful conduct, not for settlement of passenger's claim against insured].

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

Doctrine of superior equities: See *State Farm General Ins. Co. v. Wells Fargo Bank* (2006) 143 C.A.4th 1098, 1108, 1119, 49 C.R.3d 785 [doctrine is not limited to contract actions, but is available in all subrogation actions, including tort actions; however, trial judge improperly interpreted and applied doctrine to bar recovery in present tort action]; *JPI*

Westcoast Const., L.P. v. RJS & Associates (2007) 156 C.A.4th 1448, 1463, 68 C.R.3d 91 [following *Reliance Nat. Indem. Co. v. General Star Indem. Co.* (1999) 72 C.A.4th 1063, 85 C.R.2d 627, text, p. 523; primary insurer was not entitled to subrogation against excess insurer, despite indemnification contract between two insureds, where equities did not favor primary insurer].



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c. Nonassignable Claim.

13 Witkin Sum. Cal. Law Equity § 188

[§ 188] Nonassignable Claim.

In *Fifield Manor v. Finston* (1960) 54 C.2d 632, 7 C.R. 377, 354 P.2d 1073, plaintiff was under contract to provide R with medical care for his life, defendant negligently injured R, and plaintiff spent \$ 6,250 in medical costs. R died soon after, and plaintiff sued for reimbursement on two theories. The first, that a direct right of action lies for negligent interference with contractual relations, was rejected on the ground that only intentional interference is a tort. (See 5 *Summary* (10th), *Torts*, §751.) The second was that a right of subrogation arose from the contract, which contained an express assignment from R to plaintiff of the right to recover for expenses incurred by reason of injuries inflicted by a third party. *Held*, there was no such right.

(a) Although R's personal tort claim is, under our modern rule, survivable (see 5 *Summary* (10th), *Torts*, §23), it is still nonassignable (see 1 *Summary* (10th), *Contracts*, §727). And despite the "cryptic" statement in *Rest., Restitution* §162, Comment h, on principle, subrogation should be governed by the same rule as assignability. "While subrogation and assignment have certain technical differences, each operates to transfer from one person to another a cause of action against a third, and the reasons of policy which make certain causes of action nonassignable would seem to operate as forcefully against the transfer of such causes of action by subrogation." (54 C.2d 640.) Support for this view is found in the California statutory history of subrogation in tort cases pointing out that whenever the Legislature intended to give a right to subrogation, it did so expressly. (54 C.2d 639.)

(b) Two cases are distinguishable. *United States v. Aetna Cas. & Surety Co.* (1949) 338 U.S. 366, 70 S.Ct. 207, 94 L.Ed. 171, construing a federal statute to allow subrogation despite a prohibition of assignment, and *Continental Cas. Co. v. Phoenix Const. Co.* (1956) 46 C.2d 423, 428, 296 P.2d 801, holding that an employer's insurer is subrogated to the employer's right of recoupment against a negligent employee. "The employer's cause of action against the employee in such circumstances is based upon the breach of the servant's duty to his master and is one for indemnification." (54 C.2d 642.)

In *Fireman's Fund Ins. Co. v. McDonald, Hecht & Solberg* (1994) 30 C.A.4th 1373, 36 C.R.2d 424, the trial judge dismissed certain liability insurers as plaintiffs in a malpractice action by them (in subrogation) and their insureds against defendant law firm for causing misrepresentations to be made by plaintiff insureds in selling homes. *Held*, affirmed.

(a) Defendant owed its clients (i.e., plaintiff insureds) a duty of undivided loyalty and diligence, and that duty was owed solely to them as the intended beneficiaries; plaintiff insurers were not clients of defendant and were not intended beneficiaries of its legal services. Because of the inherent character of the attorney-client relationship, it has been jealously guarded and restricted to the parties involved. Assignment of claims, whether voluntary or involuntary, perils the sanctity of that relationship and violates public policy. Differences between lawyer and client respecting malpractice should be limited to those individuals. (30 C.A.4th 1383, citing *Kracht v. Perrin, Gartland & Doyle* (1990) 219 C.A.3d 1019, 268 C.R. 637, 1 Summary (10th), *Contracts*, §§95, 729, and *Goodley v. Wank & Wank* (1976) 62 C.A.3d 389, 133 C.R. 83, 1 Summary (10th), *Contracts*, §729.)

(b) Further, nonassignable claims are not subject to subrogation absent express statutory authorization, and no statute expressly authorizes subrogation of legal malpractice claims. (30 C.A.4th 1384, citing *Fifield Manor and Patent Scaffolding Co. v. William Simpson Const. Co.* (1967) 256 C.A.2d 506, 64 C.R. 187, *infra*, §189.) (See *Musser v. Provencher* (2002) 28 C.4th 274, 285, 121 C.R.2d 373, 48 P.3d 408, 1 Cal. Proc. (4th), *Attorneys*, Supp., §351A [*Fireman's Fund* rule against assignability and subrogation of legal malpractice actions did not apply to attorney's insurer, who was not seeking to succeed to rights of client against attorney, but to its insured attorney's right to seek indemnity from client's predecessor counsel for proportional fault in client's action against insured's attorney; *Fireman's Fund* rule is confined to third party (including client's insurer) attempting to succeed to *client's* legal malpractice action against client's former attorney]; 34 So. Cal. L. Rev. 475; 8 U.C.L.A. L. Rev. 668; 78 A.L.R.2d 822 [right of one who pays medical expenses of injured person under life care contract to recover cost from tortfeasor]; 73 Am.Jur.2d (2001 ed.), *Subrogation* §18.)

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

Musser case:

Cross-Reference: 1 Cal. Proc. (5th), *Attorneys*, §336.



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d. Party Fully Compensated.

13 Witkin Sum. Cal. Law Equity § 189

[§ 189] Party Fully Compensated.

The policy against double recovery, coupled with the requirement of causation, operated to preclude subrogation in *Patent Scaffolding Co. v. William Simpson Const. Co.* (1967) 256 C.A.2d 506, 64 C.R. 187. S was the general contractor on a building. P was the subcontractor for scaffolding and other equipment. The contract between S and P provided that the subcontractor's materials were to be protected from fire loss by insurance procured by the contractor or the owner without cost to the subcontractor. However, before making its subcontract, P had obtained coverage from three separate insurance companies on its materials and equipment. A fire of unknown origin damaged P's equipment in the amount of \$ 16,481.09. S had not procured insurance, did not request the owner to do so, and did not pay the loss. P collected in full from its insurers, and the insurers brought this action for subrogation in the name of P against S and the owner. Judgment was rendered for plaintiff P against S. *Held*, reversed.

(a) If P had not procured its own insurance, it could have collected in full from S for breach of the contractual duty to indemnify or to procure insurance. (256 C.A.2d 510.)

(b) Although it was fully compensated by its own insurers, the collateral source rule would have allowed recovery from a third-party wrongdoer whose tort caused the loss. (256 C.A.2d 510; see 6 *Summary* (10th), *Torts*, §1631 et seq.) But the collateral source rule is not applied to a mere breach of contract without some "tortious or wilful flavor." Application here would violate the rule that one cannot profit more from breach of an obligation than from full performance, and would be particularly indefensible where an injured party might get treble recovery--one from his insurer, one from a defendant who had undertaken contractual liability for the loss, and one from the wrongdoer. (256 C.A.2d 511.)

(c) Because the cost of the premiums was not incurred as a result of S's breach, that breach resulted in no detriment to P. (256 C.A.2d 511.)

(d) For the same reason, the insurers have no subrogation rights. Their loss was not caused by S's failure to get insurance or to indemnify P, but by the fire (the risk assumed). "Where two parties are contractually bound by independent contracts to indemnify the same person for the same loss, the payment by one of them to his indemnitee does not create in him equities superior to the nonpaying indemnitor, justifying subrogation, if the latter did not cause or

participate in causing the loss." (256 C.A.2d 514.) *Meyer Koulish Co. v. Cannon* (1963) 213 C.A.2d 419, 28 C.R. 757, did not explain why one liability was held primary, did not discuss causal connection, and is out of line with *Meyers v. Bank of America* (1938) 11 C.2d 92, 77 P.2d 1084, supra, §187. (256 C.A.2d 515.)

(e) No public policy would be served by shifting the loss from the insurers to S. There would be no deterrent to wrongdoing, as where subrogation is permitted against a tortfeasor; the insurers who accepted premiums to cover the very loss would receive a windfall. Insurers are in a position to spread risks and to gauge premiums on loss experience; S could not. (256 C.A.2d 516.)

(f) The facts that S is relieved of a solemn undertaking and that the result appears to reward delay (because if S had paid, it would have had no subrogation against the insurers) are not controlling. There are other situations in which a person who has suffered a loss may select among persons liable; e.g., if neither the insurers nor S had paid, P could have sued either without a right of contribution by the other. (256 C.A.2d 516.)

(g) All parties approached the problem on an all-or-nothing basis. Had the insurers claimed equitable contribution rather than equitable subrogation, and established the kind and amount of insurance coverage that would have satisfied S's contractual obligation, they might have been successful. (256 C.A.2d 517.) (See *California Food Service Corp. v. Great Amer. Ins. Co.* (1982) 130 C.A.3d 892, 898, 900, 182 C.R. 67 [following *Patent Scaffolding*]; *Bramalea Calif. v. Reliable Interiors* (2004) 119 C.A.4th 468, 475, 14 C.R.3d 302 [same]; *Fireman's Fund Ins. Co. v. Wilshire Film Ventures* (1997) 52 C.A.4th 553, 556, 60 C.R.2d 591, supra, §184 [approving result, but not reasoning, of *Patent Scaffolding*].)

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



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CHAPTER XIX - Equity

Witkin Summary of California Law

IX. EQUITABLE ESTOPPEL

A. In General.

1. Nature of Doctrine.

13 Witkin Sum. Cal. Law Equity § 190

[§ 190] Nature of Doctrine.

(1) *In General*. Equitable estoppel, also called estoppel in pais, estoppel by conduct, and estoppel by misrepresentation, arises from declarations or conduct of the party estopped. "Whenever a party has, by his own statement or conduct, intentionally and deliberately led another to believe a particular thing true and to act upon such belief, he is not, in any litigation arising out of such statement or conduct, permitted to contradict it." (Ev.C. 623; see *Calistoga Nat. Bank v. Calistoga Vineyard Co.* (1935) 7 C.A.2d 65, 72, 46 P.2d 246; *Wilk v. Vencill* (1947) 30 C.2d 104, 107, 180 P.2d 351; *Klein v. Farmer* (1948) 85 C.A.2d 545, 552, 194 P.2d 106; 28 Am.Jur.2d (2000 ed.), *Estoppel and Waiver* §27 et seq.; Cal. Civil Practice, 3 Business Litigation, §32:6 et seq.)

(2) *Doctrine Acts Defensively*. "The doctrine acts defensively only. It operates to prevent one from taking an unfair advantage of another but not to give an unfair advantage to one seeking to invoke the doctrine." (*Peskin v. Phinney* (1960) 182 C.A.2d 632, 636, 6 C.R. 389 [doctrine cannot be used to overcome the out of pocket loss rule of damages for fraud (see 6 Summary (10th), Torts, §1710)]; *Green v. Travelers Indem. Co.* (1986) 185 C.A.3d 544, 555, 230 C.R. 13; *In re Marriage of Umphrey* (1990) 218 C.A.3d 647, 659, 267 C.R. 218 [husband was not estopped to dispute separation date stated in agreement; application of doctrine might inequitably convert husband's separate property into community asset].)

West's Key Number Digest, Estoppel k.52 et seq.

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



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IX. EQUITABLE ESTOPPEL
A. In General.
2. Elements of Claim.

13 Witkin Sum. Cal. Law Equity § 191

[§ 191] Elements of Claim.

(1) *In General.* A valid claim of equitable estoppel consists of the following elements: (a) a representation or concealment of material facts (b) made with knowledge, actual or virtual, of the facts (c) to a party ignorant, actually and permissibly, of the truth (d) with the intention, actual or virtual, that the ignorant party act on it, and (e) that party was induced to act on it. (See *Wood v. Blaney* (1895) 107 C. 291, 295, 40 P. 428; *Seymour v. Oelrichs* (1909) 156 C. 782, 795, 106 P. 88; *Los Angeles v. Babcock* (1929) 102 C.A. 571, 577, 283 P. 314; *Banco Mercantil, S.A. v. Sauls* (1956) 140 C.A.2d 316, 323, 295 P.2d 55; *California Milling Corp. v. White* (1964) 229 C.A.2d 469, 479, 40 C.R. 301, quoting the text; *Domarad v. Fisher & Burke* (1969) 270 C.A.2d 543, 555, 76 C.R. 529 [elements established]; *Long Beach v. Mansell* (1970) 3 C.3d 462, 489, 91 C.R. 23, 476 P.2d 423, *infra*, §§192, 199; *Baillargeon v. Department of Water & Power* (1977) 69 C.A.3d 670, 679, 138 C.R. 338 [elements were established]; *Lemat Corp. v. American Basketball Assn.* (1975) 51 C.A.3d 267, 276, 124 C.R. 388 [corporate contract was invalid for lack of authorization by directors; corporation was estopped to challenge validity where benefits of contract were retained]; *Division of Labor Law Enforcement v. Transpacific Trans. Co.* (1979) 88 C.A.3d 823, 828, 829, 152 C.R. 98 [employer's representation that annual bonus would be paid to employee was material inducement to accepting employment and remaining in employment]; *Guild Wineries & Distilleries v. Land Dynamics* (1980) 103 C.A.3d 966, 978, 163 C.R. 348, citing the text; *Hill v. Kaiser Aetna* (1982) 130 C.A.3d 188, 195, 181 C.R. 564, citing the text [employer's representation that bonus would be paid; following *Transpacific Trans. Co.*]; *San Diego Mun. Credit Union v. Smith* (1986) 176 C.A.3d 919, 922, 222 C.R. 467, citing the text.)

There can be no estoppel where one of these elements is missing. (See *El Dorado v. Al Tahoe Inv. Co.* (1959) 175 C.A.2d 407, 411, 346 P.2d 205 [no conduct of defendant inducing reliance; plaintiff acted mistakenly without seeking legal advice]; *California Cigarette Concessions v. Los Angeles* (1960) 53 C.2d 865, 869, 3 C.R. 675, 350 P.2d 715, 3 Cal. Proc. (4th), Actions, §688 [no showing of facts known to defendant but unknown to plaintiff; no showing that defendant's conduct induced plaintiff to act in reliance]; *Johnson v. Johnson* (1960) 179 C.A.2d 326, 330, 3 C.R. 575 [no showing that estoppel-asserter was misled by other party]; *Henry v. Los Angeles* (1962) 201 C.A.2d 299, 308, 20 C.R. 440 [no misrepresentation or concealment, only mutual mistake of law]; *Transport Clearings-Bay Area v. Simmonds* (1964) 226 C.A.2d 405, 429, 38 C.R. 116 [same]; *Hendren v. Yonash* (1966) 243 C.A.2d 672, 680, 52 C.R. 738 [no knowledge by plaintiffs, no reliance by defendants]; *In re Lisa R.* (1975) 13 C.3d 636, 645, 119 C.R. 475, 532 P.2d 123, citing the text [no reliance and detriment; no estoppel]; *California School Employees Assn. v. Jefferson Elementary*

School Dist. (1975) 45 C.A.3d 683, 692, 119 C.R. 668, citing the text [no estoppel found]; *San Francisco v. Grant Co.* (1986) 181 C.A.3d 1085, 1091, 227 C.R. 154; *Green v. Travelers Indem. Co.* (1986) 185 C.A.3d 544, 556, 230 C.R. 13, citing the text; *Hair v. California* (1991) 2 C.A.4th 321, 328, 329, 2 C.R.2d 871 [state not estopped from paying lotto winner over 18-year period, where purchaser did not rely on sign stating payout period of 10 years when he bought ticket]; *Golden West Baseball Co. v. Anaheim* (1994) 25 C.A.4th 11, 42, 47, 31 C.R.2d 378, 12 Summary (10th), *Real Property*, §517 [defendants did not rely on plaintiff's statements or conduct, and statements and conduct did not show intention to mislead anyone]; *Friedman v. Friedman* (1993) 20 C.A.4th 876, 885, 24 C.R.2d 892, citing the text [no showing that party was ignorant of truth]; *Laird v. Capital Cities/ABC* (1998) 68 C.A.4th 727, 742, 80 C.R.2d 454 [same]; *Amarawansa v. Superior Court* (1996) 49 C.A.4th 1251, 1260, 57 C.R.2d 249 [no detrimental reliance]; *Michaelian v. State Comp. Ins. Fund* (1996) 50 C.A.4th 1093, 1110, 58 C.R.2d 133, citing the text [same]; *Rodney F. v. Karen M.* (1998) 61 C.A.4th 233, 241, 71 C.R.2d 399 [same]; *Downey Venture v. LMI Ins. Co.* (1998) 66 C.A.4th 478, 510, 78 C.R.2d 142, 2 Summary (10th), *Insurance*, §272 [same]; *Golden Day Schools v. Department of Education* (1999) 69 C.A.4th 681, 692, 81 C.R.2d 758 [same]; *Martinez v. Scott Specialty Gases* (2000) 83 C.A.4th 1236, 1248, 100 C.R.2d 403 [same]; *Southern Calif. Edison Co. v. Public Util. Com.* (2000) 85 C.A.4th 1086, 1110, 102 C.R.2d 684 [same].)

(2) *Pleading and Proof*. Whether there is an estoppel is chiefly a nonjury question of fact to be determined by the trial judge, and normally it must be pleaded, either as a part of the cause of action or as a defense. (*Fair Oaks Bank v. Johnson* (1926) 198 C. 196, 201, 244 P. 335; *General Motors Acceptance Corp. v. Gandy* (1927) 200 C. 284, 295, 253 P. 137; *Kenny v. Christianson* (1927) 200 C. 419, 424, 253 P. 715; *Green v. Travelers Indem. Co.*, *supra*, 185 C.A.3d 555; *Aetna Cas. & Surety Co. v. Humboldt Loaders* (1988) 202 C.A.3d 921, 930, 249 C.R. 175, citing the text. See 5 Cal. Proc. (4th), *Pleading*, §1048 et seq.)

While it may be the better procedure for the trial judge to rule on the estoppel issue before submitting the matter for jury determination, the order of the determination is within the sound discretion of the judge, so long as the judge ultimately rules on the issue. (*DRG/Beverly Hills, Ltd. v. Chopstix Dim Sum Cafe & Takeout III, Ltd.* (1994) 30 C.A.4th 54, 61, 35 C.R.2d 515 [trial judge's failure to rule on estoppel issue at all was improper].)

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

(1) *In General*. No estoppel where element is missing: See *Simmons v. Ghaderi* (2008) 44 C.4th 570, 584, 80 C.R.3d 83, 187 P.3d 934, 1 Cal. Evidence (4th), *Circumstantial Evidence*, Supp., §155, citing the text [no knowledge of facts and no detrimental reliance by plaintiffs]; *People v. American Contractors Indem. Co.* (2006) 136 C.A.4th 245, 251, 38 C.R.3d 603, citing the text [no misrepresentation, no knowledge of facts by defendant]; *State Water Resources Control Bd. Cases* (2006) 136 C.A.4th 674, 818, 39 C.R.3d 189 [no detrimental reliance]; *Aerojet-General Corp. v. Commercial Union Ins. Co.* (2007) 155 C.A.4th 132, 147, 65 C.R.3d 803, 2 Summary (10th), *Insurance*, Supp., §93 [defendants had no intention that plaintiff act on alleged misrepresentation, and plaintiff was aware of facts]; *Bailey v. Outdoor Media Group* (2007) 155 C.A.4th 778, 790, 66 C.R.3d 322, citing the text [no misrepresentation by defendant]; *Stillwell v. Salvation Army* (2008) 167 C.A.4th 360, 378, 84 C.R.3d 111 [no knowledge of facts by defendant and no detrimental reliance by plaintiff].

California Cigarette Concessions case:

Cross-Reference: 3 Cal. Proc. (5th), *Actions*, §765.(2) *Pleading and Proof*.

Cross-Reference: 5 Cal. Proc. (5th), *Pleading*, §1122 et seq.



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IX. EQUITABLE ESTOPPEL

A. In General.

3. Fraudulent Intent Is Unnecessary.

13 Witkin Sum. Cal. Law Equity § 192

[§ 192] Fraudulent Intent Is Unnecessary.

(1) *In General.* Actual fraudulent intent is ordinarily unnecessary to raise an estoppel if the circumstances are such that a fraud would be perpetrated by permitting a denial of the representations. (*Seymour v. Oelrichs* (1909) 156 C. 782, 796, 106 P. 88; *Crestline Mobile Homes Mfg. Co. v. Pacific Finance Corp.* (1960) 54 C.2d 773, 778, 8 C.R. 448, 356 P.2d 192 ["Negligence that is careless and culpable conduct is, as a matter of law, equivalent to an intent to deceive and will satisfy the element of fraud necessary to an estoppel"]; *Comer v. Associated Almond Growers of Paso Robles* (1929) 101 C.A. 687, 689, 282 P. 532; *Wilson v. Grey* (1942) 49 C.A.2d 228, 231, 121 P.2d 514; see 19 Cal. L. Rev. 547; 28 Am.Jur.2d (2000 ed.), *Estoppel and Waiver* §§46, 47.)

An estoppel may also arise from silence where there is a duty to speak. (See *Dettamanti v. Lompoc Union School Dist. of Santa Barbara* (1956) 143 C.A.2d 715, 721, 300 P.2d 78; *Lix v. Edwards* (1978) 82 C.A.3d 573, 580, 147 C.R. 294, citing the text; *Skulnick v. Roberts Express* (1992) 2 C.A.4th 884, 891, 3 C.R.2d 597, citing the text; *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; 28 Am.Jur.2d (2000 ed.), *Estoppel and Waiver* §60 et seq.)

(2) *Title to Real Property.* A special rule has been followed in California in the application of the doctrine of estoppel to title to real property. This rule requires culpability consisting of actual fraudulent intent or culpable negligence amounting to constructive fraud. In the early case of *Boggs v. Merced Mining Co.* (1859) 14 C. 279, it was said that, where one has made representations concerning the state of his or her title, no estoppel can be set up against that person unless (a) the person was apprised of the true state of his or her own title; (b) the person made the admission with the express intention to deceive, or with culpable negligence sufficient to amount to constructive fraud; (c) the other party had no knowledge or means of obtaining knowledge of the true state of the title; and (d) the other party relied directly on that admission and would be injured by allowing its truth to be disproved. In that case, the person did not know the true state of his or her title, and it was therefore held that the person was not estopped.

However, the rule was relaxed in *Eaton v. Wilkins* (1912) 163 C. 742, 127 P. 71. Plaintiffs contracted to purchase certain land from defendants W and C, and defendant C, who did not appear of record, refused to sign, claiming that he had no interest in the property. After plaintiffs and defendant W signed the contract, defendant C recorded a deed to defendant W of an interest in the land, dated before the contract. In their complaint, plaintiffs contended that defendant C was estopped from setting up this interest, but failed to allege that he was apprised of the true state of his title when

he made the declarations. *Held*, there was no estoppel. (163 C. 746.) (See *Alpha Stores, Ltd. v. Croft* (1943) 60 C.A.2d 349, 352, 140 P.2d 688; *Mott v. Nardo* (1946) 73 C.A.2d 159, 163, 166 P.2d 37; *Marks v. Bunker* (1958) 165 C.A.2d 695, 700, 332 P.2d 340; 1 Cal. L. Rev. 189; 19 Cal. L. Rev. 547; 11 Stanf. L. Rev. 476, 490, 729 [criticizing *Biddle Boggs*].)

In *Long Beach v. Mansell* (1970) 3 C.3d 462, 91 C.R. 23, 476 P.2d 423, *infra*, §199, the court explained the *Biddle Boggs* rule as requiring caution in invoking an estoppel where the effect would be to take title from a person in contravention of the statute of frauds. (3 C.3d 489.) However, although the requirement of actual or constructive fraud has been consistently recognized, later cases are not so strict in its application; in particular, the requirement of knowledge of the true facts is now held to be satisfied by knowledge imputed to the party estopped, especially where he or she has made affirmative representations. "It thus appears that the doctrine of equitable estoppel applied to questions of land title in this jurisdiction differs from that applied to questions involving other matters only in that the culpability of the party to be estopped must be of sufficient dimension that actual or constructive fraud would result if the estoppel were not raised." (3 C.3d 491.)

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



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CHAPTER XIX - Equity

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IX. EQUITABLE ESTOPPEL
A. In General.
4. Distinctions.

13 Witkin Sum. Cal. Law Equity § 193

[§ 193] Distinctions.

(1) *Other Types of Estoppel.* A party may be forbidden to show the existence of a fact when, by his or her past conduct, declaration, or agreement or by a judgment, it would work an injustice and injury to an adversary to permit the party to do so. (See *Allen v. Hance* (1911) 161 C. 189, 196, 118 P. 527; 28 *Am.Jur.2d* (2000 ed.), *Estoppel and Waiver* §1 et seq.) Several kinds of estoppel, other than equitable estoppel, are recognized by statutes and decisions and are covered elsewhere.

(a) *Estoppel by judgment.* Parties to a proceeding and their successors in interest cannot question the conclusiveness of the judgment as to any matters litigated or litigable. (*C.C.P.* 1908; see 46 *Am.Jur.2d* (1994 ed.), *Judgments* §§494, 514 et seq.; 7 *Cal. Proc.* (4th), *Judgment*, §280 et seq.)

(b) *Estoppel by deed.* One who grants property that he or she does not own, and afterwards acquires title, is estopped to deny that he or she had title and granted it. (*C.C.* 1106; see 28 *Am.Jur.2d* (2000 ed.), *Estoppel and Waiver* §4 et seq.; 12 *Summary* (10th), *Real Property*, §§334, 335.)

(c) *Estoppel by contract.* The parties to a contract and their successors are estopped to deny the truth of recitals in it except, however, that a recital of consideration may always be questioned (*Ev.C.* 622), and there can be no estoppel if the contract is void. (See *American Nat. Bank of San Francisco v. A.G. Sommerville* (1923) 191 C. 364, 369, 216 P. 376; *First Fed. Trust Co. v. Stockfleth* (1929) 98 C.A. 21, 27, 276 P. 371; 1 *Cal. Evidence* (4th), *Burden of Proof and Presumptions*, §161; 2 *Cal. Evidence* (4th), *Documentary Evidence*, §99.)

(d) *Promissory estoppel.* One who makes a promise on which another justifiably relies may be estopped to assert a lack of consideration. (See *Division of Labor Law Enforcement v. Transpacific Trans. Co.* (1979) 88 C.A.3d 823, 829, 152 C.R. 98, citing the text [equitable estoppel distinguished]; *Hill v. Kaiser Aetna* (1982) 130 C.A.3d 188, 194, 195, 181 C.R. 564 [same]; 17A *Am.Jur.2d* (1991 ed.), *Contracts* §120; 28 *Am.Jur.2d* (2000 ed.), *Estoppel and Waiver* §55 et seq.; *Cal. Civil Practice*, 3 *Business Litigation*, §32:3 et seq.; 1 *Summary* (10th), *Contracts*, §244 et seq.)

(e) *Judicial estoppel.* Judicial estoppel, sometimes referred to as the doctrine of preclusion of inconsistent positions, prevents a party from "asserting a position in a legal proceeding that is contrary to a position previously taken in the same or some earlier proceeding. The doctrine serves a clear purpose: to protect the integrity of the judicial process." (

Jackson v. Los Angeles (1997) 60 C.A.4th 171, 181, 70 C.R.2d 96; see 7 Cal. Proc. (4th), Judgment, Supp., §284A.)

(2) *Ratification*. The legal effect of ratification and equitable estoppel is frequently the same, where the question is whether one party can deny that another had certain authority; and in many cases, it is not necessary to make the distinction. (See *Curtin v. Salmon River Hydraulic Gold Mining & Ditch Co.* (1903) 141 C. 308, 312, 74 P. 851.) But the differences are substantial:

(a) Ratification is a legal doctrine, governed by express provisions of the Civil Code; equitable estoppel, as its name implies, is an equitable doctrine.

(b) Ratification must be in the same form as the original authority (C.C. 2310); equitable estoppel may result from any declarations or conduct.

(c) Ratification adopts an act of another; equitable estoppel is based on one's own acts.

(d) Ratification need not be specially pleaded; equitable estoppel must be pleaded. (See *Blood v. La Serena Land & Water Co.* (1896) 113 C. 221, 226, 45 P. 252; *Laack v. Dimmick* (1928) 95 C.A. 456, 466, 273 P. 50; 28 Am.Jur.2d (2000 ed.), *Estoppel and Waiver* §38; 3 Summary (10th), *Agency and Employment*, §§95, 139 et seq.)

(3) *Waiver*. Waiver is the intentional relinquishment of a known right. (See *Wienke v. Smith* (1918) 179 C. 220, 226, 176 P. 42; *Bickel v. Piedmont* (1997) 16 C.4th 1040, 1051, 68 C.R.2d 758, 946 P.2d 427, 12 Summary (10th), *Real Property*, §872, citing the text; *Bettelheim v. Hagstrom Food Stores* (1952) 113 C.A.2d 873, 878, 249 P.2d 301; *Guild Wineries & Distilleries v. Land Dynamics* (1980) 103 C.A.3d 966, 977, 163 C.R. 348, citing the text; *DRG/Beverly Hills, Ltd. v. Chopstix Dim Sum Cafe & Takeout III, Ltd.* (1994) 30 C.A.4th 54, 59, 35 C.R.2d 515, citing the text; 28 Am.Jur.2d (2000 ed.), *Estoppel and Waiver* §§36, 37, 197 et seq.; 1 Summary (10th), *Contracts*, §§823 et seq., 856, 857.) Technically, therefore, waiver is the affirmative act of one party and does not require an act or conduct by the other party. (*Jones v. Maria* (1920) 48 C.A. 171, 173, 191 P. 943.) The doctrine is, however, frequently confused with that of estoppel. (See *McDanel v. General Ins. Co. of America* (1934) 1 C.A.2d 454, 459, 36 P.2d 829; *Bastanchury v. Times-Mirror Co.* (1945) 68 C.A.2d 217, 240, 156 P.2d 488; 20 Cal. L. Rev. 1; 21 Cal. L. Rev. 91; 23 Cal. L. Rev. 443.) Also, in many cases, what is referred to as a "waiver" is really a contractual release of a right, supported by consideration. (See *Flanagan v. Capital Nat. Bank of Sacramento* (1931) 213 C. 664, 666, 3 P.2d 307; 1 Summary (10th), *Contracts*, §946 et seq.)

(4) *Election*. The substantive law sometimes compels an injured party to elect between inconsistent rights. (See 1 Summary (10th), *Contracts*, §854; 3 Summary (10th), *Agency and Employment*, §160; 4 Summary (10th), *Sales*, §§181, 193; 5 Summary (10th), *Torts*, §827 et seq.; 3 Cal. Proc. (4th), *Actions*, §174 et seq.) Where one of two or more inconsistent remedies is sought, however, the modern view is to treat election as a question of estoppel; i.e., an inconsistent remedy is not barred unless the plaintiff is estopped because of reliance and change of position by the defendant. (See 3 Cal. Proc. (4th), *Actions*, §181 et seq.)

West's Key Number Digest, Estoppel k.1 et seq.

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

(1) *Other Types of Estoppel*.

(a) *Estoppel by judgment*. See 46 Am.Jur.2d (2006 ed.), *Judgments* §444; 47 Am.Jur.2d (2006 ed.), *Judgments* §463 et seq.

Cross-Reference: 7 Cal. Proc. (5th), Judgment, §334 et seq.(e) *Judicial estoppel*.

Cross-Reference: 7 Cal. Proc. (5th), Judgment, §339 et seq.

(f) *(New) Estoppel to contest jurisdiction.* A party may not be estopped from contesting a judgment *lacking* jurisdiction of the subject matter. (See *Summers v. Superior Court* (1959) 53 C.2d 295, 298, 1 C.R. 324, 347 P.2d 668; 2 Cal. Proc. (5th), *Jurisdiction*, §§16, 332.) However, a party may be estopped from contesting a judgment *made in* excess of jurisdiction. (See *In re Griffin* (1967) 67 C.2d 343, 347, 62 C.R. 1, 431 C.R.2d 625, 4 Cal. Crim. Law (3d), *Jurisdiction and Venue*, §8; 2 Cal. Proc. (5th), *Jurisdiction*, §332 et seq.) Unlike the doctrine of equitable estoppel (see text, §191), the doctrine of estoppel to contest jurisdiction does not require detrimental reliance or ignorance by the party seeking to assert estoppel. (See *Mt. Holyoke Homes, LP v. California Coastal Com.* (2008) 167 C.A.4th 830, 843, 84 C.R.3d 452.) (4) *Election.*

Election between inconsistent rights:

Cross-Reference: 3 Cal. Proc. (5th), *Actions*, §179 et seq.

Inconsistent remedy is not barred in absence of estoppel:

Cross-Reference: 3 Cal. Proc. (5th), *Actions*, §186 et seq.



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A. In General.
5. Illustrations.

13 Witkin Sum. Cal. Law Equity § 194

[§ 194] Illustrations.

The situations where equitable estoppel is invoked are numerous and varied, but the following are important illustrations:

(1) Estoppel to set up the defense of the statute of frauds. (See *Seymour v. Oelrichs* (1909) 156 C. 782, 794, 106 P. 88; 73 Am.Jur.2d (2001 ed.), *Statute of Frauds* §471 et seq.; for full discussion, see 1 Summary (10th), *Contracts*, §406 et seq.)

(2) Estoppel to set up the defense of the statute of limitations. (See *Pashley v. Pacific Elec. Ry. Co.* (1944) 25 C.2d 226, 231, 153 P.2d 325; 51 Am.Jur.2d (2000 ed.), *Limitation of Actions* §380 et seq.; 3 Cal. Proc. (4th), *Actions*, §685 et seq.)

(3) Estoppel to deny the title of a pledgor, bailor, or lessor. (See 8A Am.Jur.2d (1997 ed.), *Bailments* §56 et seq.; 49 Am.Jur.2d (1995 ed.), *Landlord and Tenant* §915 et seq.; 4 Summary (10th), *Secured Transactions in Personal Property*, §2; 12 Summary (10th), *Real Property*, §607; 13 Summary (10th), *Personal Property*, §157.)

(4) Estoppel of an insurer to deny liability on a policy. (See *Truck Ins. Exchange v. Industrial Acc. Com.* (1951) 36 C.2d 646, 651, 226 P.2d 583; *Boggio v. California-Western States Life Ins. Co.* (1952) 108 C.A.2d 597, 599, 239 P.2d 144 [insured's misrepresentation occurred through fraud or negligence of insurer's agent]; *Scott v. Federal Life Ins. Co.* (1962) 200 C.A.2d 384, 391, 19 C.R. 258 [estoppel to assert lapse of policy where payment of premiums was requested]; *Tomerlin v. Canadian Indem. Co.* (1964) 61 C.2d 638, 647, 39 C.R. 731, 394 P.2d 571, 2 Summary (10th), *Insurance*, §324 [representations of insurer's attorney that company would provide full coverage]; 85 A.L.R.2d 1410 [renewal of policy]; 1 A.L.R.3d 1139 [risks not covered or expressly excluded]; 63 A.L.R.5th 427 [estoppel based on statements or omissions in promotional, illustrative, or explanatory materials given to insured]; 44A Am.Jur.2d (2003 ed.), *Insurance* §1542 et seq.)

(5) Estoppel to assert a mechanic's lien. (See *Ware Supply Co. v. Sacramento Savings & Loan Assn.* (1966) 246 C.A.2d 398, 410, 54 C.R. 674 [materialpersons estopped to enforce claim under its stop notice, where it authorized payment of loan funds to general contractor]; *R.D. Reeder Lathing Co. v. Allen* (1967) 66 C.2d 373, 378, 57 C.R. 841, 425 P.2d 785; 53 Am.Jur.2d (1996 ed.), *Mechanics' Liens* §308 et seq.)

(6) Estoppel to assert the *invalidity* of a mechanic's lien. (See *Fontana Paving v. Hedley Bros.* (1995) 38 C.A.4th 146, 156, 45 C.R.2d 295, 4 Summary (10th), *Security Transactions in Real Property*, §29 [property owner was not estopped from asserting invalidity of mechanic's lien claim, even though owner had not filed timely notice of completion, where claimant did not rely on late notice when recording lien].)

(7) Estoppel of business entities to deny they that were successors to a previous enterprise. (*Citizens Suburban Co. v. Rosemont Dev. Co.* (1966) 244 C.A.2d 666, 679, 53 C.R. 551.)

(8) Estoppel to assert the invalidity of a deed. (See *Merry v. Garibaldi* (1941) 48 C.A.2d 397, 402, 119 P.2d 768 [owner of property, knowing that forged deed had been delivered to innocent purchaser, nevertheless remained silent]; 12 Summary (10th), *Real Property*, §270.)

(9) Estoppel to deny the title of a vendor where the purchaser enters into possession under an executory contract. (See *Butler v. Woodburn* (1942) 19 C.2d 420, 423, 122 P.2d 17 [no estoppel where possession was not obtained under terms of contract].)

(10) Estoppel to enforce an illegal "gold clause" (price-indexing method to adjust for inflation) in a commercial lease subsequently rendered enforceable by new legislation. (See *Wells Fargo Bank v. Bank of America* (1995) 32 C.A.4th 424, 438, 38 C.R.2d 521 [lessors were not estopped, based primarily on lessee's lack of detrimental reliance].)

(11) Estoppel of foster parents to set up the defense, in a negligent supervision action, of the natural parent's failure to file required claim with the Foster Family Home and Small Family Home Insurance Fund. (See *Becerra v. Gonzales* (1995) 32 C.A.4th 584, 595, 38 C.R.2d 248, citing the text [defendant foster parents and Fund were not estopped where, among other reasons, they had no duty to advise plaintiff natural parent and siblings of requirement, and plaintiffs had no right to rely on defendants for that advice].) (On Fund, see 3 *Cal. Proc.* (4th), *Actions*, §219.)

(12) Estoppel of a decedent's children to deny the status of decedent's wife after the settlement of a wrongful death action. (*Changaris v. Marvel* (1964) 231 C.A.2d 308, 314, 41 C.R. 774, 6 Summary (10th), *Torts*, §1398.)

(13) Estoppel of a husband to claim his first wife's estate where he entered into a bigamous second marriage. (See *Estate of Anderson* (1997) 60 C.A.4th 436, 441, 70 C.R.2d 266, 11 Summary (10th), *Husband and Wife*, §142 [husband's conduct during 38-year separation from first wife constituted complete repudiation of his marital status].)

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

(2) *Estoppel to set up defense of statute of limitations:*

Cross-Reference: 3 *Cal. Proc.* (5th), *Actions*, §762 et seq.(3) *Estoppel to deny title of pledgor, bailor, or lessor:* See 8A *Am.Jur.2d* (2009 ed.), *Bailments* §53 et seq.; 49 *Am.Jur.2d* (2006 ed.), *Landlord and Tenant* §764 et seq.

(4) *Estoppel of insurer to deny liability on policy:* See *Hollister v. Monterey Ins. Co.* (2008) 165 C.A.4th 455, 491, 81 C.R.3d 72 [insurer was estopped from asserting insured's noncompliance with policy condition, where insurer failed to assist or to cooperate with insured in satisfying condition].

(5) *Estoppel to assert mechanic's lien:* See 53 *Am.Jur.2d* (2006 ed.), *Mechanics' Liens* §302 et seq.(11) *Estoppel of foster parents to set up defense, in negligent supervision action, of natural parent's failure to file required insurance claim:*

Cross-Reference: 3 *Cal. Proc.* (5th), *Actions*, §227.

(14) (New) Estoppel of a wife to claim that a postmarital agreement was void and unenforceable, where the wife had accepted the benefits under the agreement for more than 5 years before challenging it. (*In re Marriage of Burkle* (2006) 139 C.A.4th 712, 751, 43 C.R.3d 181.)

(15) (*New*) Estoppel of a wife to obtain her share of her deceased spouse's estate without probate administration, where she had agreed to permit the probate court to distribute the property according to a settlement agreement, and where the decedent's daughter, with the help of her attorney, had acted as the administrator of the estate for years and both were expecting to be compensated for their services. (*Estate of Bonanno* (2008) 165 C.A.4th 7, 23, 80 C.R.3d 560.)



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CHAPTER XIX - Equity

Witkin Summary of California Law
IX. EQUITABLE ESTOPPEL
B. Estoppel Against Governmental Agency.
1. Estoppel Denied.
a. Early Strict Approach.

13 Witkin Sum. Cal. Law Equity § 195

[§ 195] Early Strict Approach.

(1) *In General.* The earlier cases frequently declared that estoppels against the government are rare and to be invoked only in extraordinary circumstances. (See *United States v. California* (1947) 332 U.S. 19, 67 S.Ct. 1658, 1668, 91 L.Ed. 1889, 1899, 12 Summary (10th), *Real Property*, §209 [rejecting state's claim of estoppel or laches against federal government]; *Office of Personnel Management v. Richmond* (1990) 496 U.S. 414, 110 S.Ct. 2465, 2469, 2471, 110 L.Ed.2d 387, 396 ["We leave for another day whether an estoppel claim could ever succeed" against federal government]; *San Diego v. California Water & Tel. Co.* (1947) 30 C.2d 817, 825, 186 P.2d 124; *Wheeler v. Santa Ana* (1947) 81 C.A.2d 811, 817, 185 P.2d 373; *Boren v. State Personnel Bd.* (1951) 37 C.2d 634, 643, 234 P.2d 981; 44 Cal. L. Rev. 340; 104 Harv. L. Rev. 288; 25 Loyola L.A. L. Rev. 229; 1 A.L.R.2d 338 [estoppel against government and governmental agencies]; 23 A.L.R.2d 1419 [estoppel of United States, state, or political subdivision by deed or other instrument]; 28 Am.Jur.2d (2000 ed.), *Estoppel and Waiver* §138 et seq.)

(2) *Tax Cases.* Tax cases are illustrative of this approach. It has been said that the power of taxation is so important that failure to collect taxes due or to challenge a taxpayer's report will seldom be grounds for an estoppel. (See *United States Fidelity & Guaranty Co. v. State Bd. of Equalization* (1956) 47 C.2d 384, 390, 303 P.2d 1034; *Market Street Railway Co. v. California State Bd. of Equalization* (1955) 137 C.A.2d 87, 103, 290 P.2d 20; 170 A.L.R. Fed 447 [taxpayer's assertion of equitable estoppel against IRS was rejected]; *Burhans v. Kern* (1959) 170 C.A.2d 218, 226, 338 P.2d 546 [if administrative official makes erroneous ruling, taxpayer will be assessed for amount he or she would have paid if ruling had been correct].)

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



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b. Public Protection.

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[§ 196] Public Protection.

There can be no estoppel where it would defeat operation of a policy protecting the public. The following cases are illustrative:

Merco Const. Engineers v. Los Angeles Unified School Dist. of Los Angeles (1969) 274 C.A.2d 154, 162, 79 C.R. 23 [no estoppel where statute is measure of governmental agency's power to act].

California v. Haslett Co. (1975) 45 C.A.3d 252, 257, 119 C.R. 78 [no estoppel where basic purpose of statute of frauds and Government Code sections on approval of contracts would be thwarted]; see *Seymour v. California* (1984) 156 C.A.3d 200, 204, 201 C.R. 15 [following *Haslett Co.*]; *First Street Plaza Partners v. Los Angeles* (1998) 65 C.A.4th 650, 667, 76 C.R.2d 626 [city was not estopped from denying existence of contract that did not comply with contract formation requirements of city charter; following *Haslett Co.* and *Seymour*].

Pittsburg Unified School Dist. v. Commission on Professional Competence (1983) 146 C.A.3d 964, 981, 194 C.R. 672 [no estoppel of dismissal of high school teacher; strong policy of protecting students from exposure to teacher's illegal conduct].

In re Marriage of Lugo (1985) 170 C.A.3d 427, 435, 217 C.R. 74 [strong public policy favoring collection of county child support payments from delinquent parent justified rejecting estoppel].

Hughes v. Board of Architectural Examiners (1998) 17 C.4th 763, 793, 72 C.R.2d 624, 952 P.2d 641 [board was not estopped from revoking architect's license based on wrongful conduct he committed in other states before being licensed in California; otherwise, policy in favor of regulating architectural profession would be defeated].

Adams v. Sacramento (1991) 235 C.A.3d 872, 883, 1 C.R.2d 138 [sheriff's department was not estopped from dismissing deputy sheriff based on expunged out-of-state felony conviction; detriment to sheriff was outweighed by policy of assuring peace officers' good character and avoiding appearance of untrustworthiness].

Garamendi v. Mission Ins. Co. (1993) 15 C.A.4th 1277, 1289, 19 C.R.2d 190 [insurance commissioner was not estopped to deny late claim against insolvent insurer; acceptance would have unjustly enriched claimant at expense of

others who filed timely claims].

Stewart v. Pismo Beach (1995) 35 C.A.4th 1600, 1607, 42 C.R.2d 382 [city was not estopped to withdraw defense of former police officer in federal civil rights action against city and officer; otherwise, policy that public entity should not pay to defend former employee whose personal interests are in conflict with entity's (see 1 Cal. Proc. (4th), Attorneys, §167) would be nullified, because officer had agreed to testify for plaintiffs].

In re Marriage of Thompson (1996) 41 C.A.4th 1049, 1061, 48 C.R.2d 882, citing the text [county that accepted partial child support arrears allegedly as payment in full was not estopped from collecting balance; parent was aware of true facts but county was not, and parent had not relied on misrepresentations].

Morrison v. California Horse Racing Bd. (1988) 205 C.A.3d 211, 218, 252 C.R. 293 [horse racing board was not estopped by previous issuance of racehorse owner's license to deny owner access to racetrack; public policy to deny access to felons convicted of moral turpitude offenses].

Western Aggregates v. Yuba (2002) 101 C.A.4th 278, 301, 130 C.R.2d 436 [county was not estopped from claiming that property was public road, even though county took contrary position in prior, unrelated case as litigation tactic].

Westly v. California Public Employees' Retirement System Bd. of Administration (2003) 105 C.A.4th 1095, 1118, 130 C.R.2d 149 [state Controller was not estopped from challenging state agency's exemption of certain employees from civil service law and related conduct, even though Controller failed to object to agency's past violations; Controller was acting in official capacity and seeking to protect state taxpayers].

Medina v. Board of Retirement, Los Angeles Employees Retirement Assn. (2003) 112 C.A.4th 864, 869, 5 C.R.3d 634 [county public employees' retirement system was not estopped from changing erroneous classification of district attorney members; applying doctrine would have contravened statute governing classification].

Smith v. Governing Bd. of the Elk Grove Unified School Dist. (2004) 120 C.A.4th 563, 569, 16 C.R.3d 1 [school district was not estopped from refusing to reclassify teacher as permanent employee based on parties' mistaken belief of effect of working under emergency credential; upholding estoppel would have rewritten Educ.C. 44911, governing emergency credentials].

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

The following cases illustrate the rule that there can be no estoppel where it would defeat the operation of a policy protecting the public:

In re Joshua G. (2005) 129 C.A.4th 189, 197, 28 C.R.3d 213 [county was not estopped from recommending termination of mother's parental rights and adoption of child by grandparents, even though county had earlier recommended only guardianship by grandparents; upholding estoppel would have contravened strong public policy in protecting best interests of dependent children].

North Kern Water Storage Dist. v. Kern Delta Water Dist. (2007) 147 C.A.4th 555, 601, 54 C.R.3d 578, citing the text [water district was not estopped by its prior assurances from asserting that second water district had forfeited its right to appropriate water from river through nonuse, based on important constitutional and statutory requirements that water be used reasonably and for beneficial purposes, and because assertion of detrimental reliance was precluded by law of the case].

Phelps v. State Water Resources Control Bd. (2007) 157 C.A.4th 89, 116, 68 C.R.3d 350 [State Water Resources Control Board was not estopped to enforce conditions in water users' licenses prohibiting diversion of water, based on board assurances that users had riparian rights, because of public importance of protecting water quality].

Cotta v. San Francisco (2007) 157 C.A.4th 1550, 1567, 69 C.R.3d 612 [taxi drivers, who purchased compressed

natural gas vehicles under city incentive program, sued city after it subsequently adopted measure reducing incentives; city was not estopped from enacting later resolution, because permitting estoppel would chill city's exercise of police powers].

Niles Freeman Equipment v. Joseph (2008) 161 C.A.4th 765, 793, 74 C.R.3d 690 [state contractor was decertified from disabled veteran business program and subsequently suspended from participating in state contracts; notice of intent to decertify, stating that decertification does not prevent participating in state contracts, did not estop state from imposing subsequent suspension, because suspension reduces fraud and permitting estoppel would allow wrongdoers to escape consequences of their actions with no corresponding benefit].

In re Social Services Payment Cases (2008) 166 C.A.4th 1249, 1272, 83 C.R.3d 434 [distinguishing *Lentz v. McMahon* (1989) 49 C.3d 393, 261 C.R. 310, 777 P.2d 83, text, §201; Department of Social Services was not estopped from refusing to pay Alternative Residential Model (ARM) benefit rates to developmentally disabled foster children living in nonvendorized individual foster homes; elements of estoppel were not established and, in any event, permitting estoppel would thwart important public policy considerations served by requiring vendorization]. *Public entity should not pay to defend former employee whose personal interests are in conflict with entity's:*

Cross-Reference: 1 Cal. Proc. (5th), Attorneys, §143.



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c. Zoning Cases.

13 Witkin Sum. Cal. Law Equity § 197

[§ 197] Zoning Cases.

Public protection (see *supra*, §196) is paramount in the area of land use zoning. In *Pettitt v. Fresno* (1973) 34 C.A.3d 813, 110 C.R. 262, the trial judge found that plaintiffs purchased property in reliance on representations of the planning department of defendant city that they had a nonconforming right of use for commercial purposes, and they spent considerable sums in improvements. But their building permit was in fact issued in violation of the zoning ordinance. *Held*, there was no estoppel. Distinguishing cases involving valid permits where retroactive zoning was attempted (34 C.A.3d 823; see 8 *Summary* (10th), *Constitutional Law*, §1040), the court applied the balancing test in *Long Beach v. Mansell* (1970) 3 C.3d 462, 91 C.R. 23, 476 P.2d 423, *infra*, §199, to reach the conclusion that the public interest outweighed the individual injustice. "In the field of zoning laws, we are dealing with a vital public interest--not one that is strictly between the municipality and the individual litigant. All the residents of the community have a protectable property and personal interest in maintaining the character of the area as established by comprehensive and carefully considered zoning plans in order to promote the orderly physical development of the district and the city and to prevent the property of one person from being damaged by the use of neighboring property in a manner not compatible with the general location of two parcels. ... These protectable interests further manifest themselves in the preservation of land values, in esthetic considerations and in the desire to increase safety by lowering traffic volume. To hold that the City can be estopped would not punish the City but it would assuredly injure the area residents, who in no way can be held responsible for the City's mistake. Thus, permitting the violation to continue gives no consideration to the interest of the public in the area nor to the strong public policy in favor of eliminating nonconforming uses and against expansion of such uses." (34 C.A.3d 822.)

Other cases are to the same effect. (See *Fontana v. Atkinson* (1963) 212 C.A.2d 499, 507, 28 C.R. 25 [zoning ordinance, expansion of nonconforming use involving health problem]; *Carty v. Ojai* (1978) 77 C.A.3d 329, 341, 143 C.R. 506 [zoning change]; *Chaplis v. Monterey* (1979) 97 C.A.3d 249, 259, 158 C.R. 395 [county was not estopped to deny invalid septic tank permit; there was vital public interest in adequate sewage disposal]; *California v. Superior Court (Fogerty)* (1981) 29 C.3d 240, 244, 172 C.R. 713, 625 P.2d 256 [policy to protect public trust in shorelands of navigable lake]; *Penn-Co. v. Board of Supervisors* (1984) 158 C.A.3d 1072, 1081, 1082, 205 C.R. 298 [county was not estopped to deny grant of use permit by preliminary finding that proposed use was consistent with general plan; there was unreasonable reliance by applicant and no showing of grave injustice]; *Smith v. Santa Barbara* (1992) 7 C.A.4th

770, 775, 9 C.R.2d 120 [county was not estopped from revoking land use permit for failure to file environmental impact report; public policy would be adversely affected if estoppel could replace procedural requirements for obtaining permits]; *Toigo v. Ross* (1998) 70 C.A.4th 309, 319, 82 C.R.2d 649 [town was not estopped from denying application for five-lot subdivision by its prior general endorsement of cluster housing; prior endorsement addressed open space concerns, not equally important public health, safety, and welfare concerns; following *Penn-Co.*.]

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

In *Feduniak v. California Coastal Com.* (2007) 148 C.A.4th 1346, 56 C.R.3d 591, citing the text, defendant California Coastal Commission issued a cease-and-desist order (a) directing plaintiff property owners to remove a three-hole, pitch and putt golf course surrounding their home, built earlier on coastal property by the previous owners in violation of an open-space easement and restrictions imposed by defendant, and (b) requiring the restoration of the area to its natural state. Plaintiffs then filed this mandamus proceeding seeking relief. The trial judge estopped defendant from enforcing its orders for as long as plaintiffs retained ownership of the property, because the golf course was easily visible, it had been there for 18 years, and defendant did not inspect the site for compliance for nearly 10 years. *Held*, reversed; there was no basis for estoppel.

(a) Defendant neither knew nor should have known that the golf course violated the easement and permit restrictions before plaintiffs purchased the property. (148 C.A.4th 1361.) Defendant's regulatory inaction for years in the face of a prominently located golf course did not, by itself, support the trial judge's finding that defendant had constructive notice of the violation. (148 C.A.4th 1367.)

(b) Defendant did not intend that plaintiffs rely on its failure to enforce the restrictions over the years and plaintiffs reasonably could not have believed that defendant so intended its regulatory inaction. (148 C.A.4th 1367.)

(c) Plaintiffs' individual loss of enjoyment if defendant was not estopped did not outweigh the public's strong interest in (1) eliminating an ongoing unpermitted development, which violates applicable restrictions and had done so for over 20 years; (2) finally restoring the area to its natural state and native vegetation; and (3) protecting defendant's ability to enforce existing and future easement and permit conditions. (148 C.A.4th 1380.)

See *Goleta v. Superior Court* (2006) 40 C.4th 270, 279, 52 C.R.3d 114, 147 P.3d 1037 [city, which approved developer's tentative map before city was incorporated, was not estopped from disapproving map after incorporation; city officials repeatedly objected to map both before and after incorporation, and estoppel could not be based on developer's expenditures before building permit or its equivalent was issued]; *Golden Gate Water Ski Club v. Contra Costa* (2008) 165 C.A.4th 249, 258, 80 C.R.3d 876 [county was not estopped from issuing nuisance abatement order against water skiing club that built structures in violation of open space restrictions, even though county delayed 35 years in issuing order; club could not reasonably have assumed that structures complied with local law or that county would never enforce restrictions; citing *Feduniak*]; *Humboldt v. McKee* (2008) 165 C.A.4th 1476, 1493, 82 C.R.3d 38 [county was not estopped from applying its 1978 parcel size guidelines to agricultural preserve established in 1977 by Williamson Act contract (see 12 Summary (10th), *Real Property*, §880); preserve owner neither satisfied any of requisite elements of estoppel against private party nor met heightened standard for application of government estoppel].



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 1. Estoppel Denied.
 d. Other Grounds for Denial.

13 Witkin Sum. Cal. Law Equity § 198

[§ 198] Other Grounds for Denial.

(1) *Activity Beyond Scope of Agency's Powers*. Estoppel may not be invoked to contravene constitutional and statutory provisions that define an agency's powers. (See *Longshore v. Ventura* (1979) 25 C.3d 14, 28, 157 C.R. 706, 598 P.2d 866 [county was not estopped to deny compensation for overtime credits promised in excess of statutory authority; estoppel would directly thwart constitutional policy against retroactive compensation]; *Page v. Montebello* (1980) 112 C.A.3d 658, 669, 169 C.R. 447 [city was not estopped to deny unauthorized promise to provide benefits to uncompensated narcotics agent in event of injury during undercover activities]; *Fresno v. California Highway Com.* (1981) 118 C.A.3d 687, 697, 173 C.R. 671 [quoting *Longshore v. Ventura*]; *El Camino Community College Dist. v. Superior Court* (1985) 173 C.A.3d 606, 617, 219 C.R. 236 [school district was not estopped from repudiating contract that had not been ratified by district as required by statute]; *Fleice v. Chualar Union Elementary School Dist.* (1988) 206 C.A.3d 886, 893, 254 C.R. 54 [school district was not estopped from denying tenure mistakenly granted before termination of mandatory 2-year probationary period]; *Garamendi v. Mission Ins. Co.* (1993) 15 C.A.4th 1277, 1288, 19 C.R.2d 190 [insurance commissioner was not estopped to deny late claim against insolvent insurer; initial mistaken acceptance of claim was beyond commissioner's statutory authority]; *Pipe Trades Dist. Council No. 51 v. Aubry* (1996) 41 C.A.4th 1457, 1474, 49 C.R.2d 208 [Department of Industrial Relations was not estopped from refusing to publish jurisdictional agreement between two unions involved in prevailing wage determination; department's purported promise to one union to publish agreement exceeded its statutory authority].)

(2) *No Privity Between Government Entities*. Estoppel is also unavailable where there is not a sufficient privity between separate government entities. (*California Tahoe Regional Planning Agency v. Day & Night Elec.* (1985) 163 C.A.3d 898, 903, 210 C.R. 48 [regional planning agency was not estopped to seek removal of building constructed in violation of land use ordinance by city's issuance of permit in disregard of agency's jurisdiction]; *San Francisco v. Grant Co.* (1986) 181 C.A.3d 1085, 1092, 227 C.R. 154 [state was not estopped to enforce handicapped access requirements against restaurant by city's issuance of construction permit not requiring handicapped access]; *Lusardi Const. Co. v. Aubry* (1992) 1 C.4th 976, 995, 4 C.R.2d 837, 824 P.2d 643, 3 Summary (10th), Agency and Employment, §388 [no privity between hospital district, which contracted with defendant for construction work, and Director of Department of Industrial Relations, who sought to enforce prevailing wage law]; *Hudson v. Board of Administration of Public Employees' Retirement System* (1997) 59 C.A.4th 1310, 1330, 69 C.R.2d 737 [no privity between Public

Employees' Retirement System, which excluded from pension calculation conversion of city employees' benefits to salary, and city, which authorized conversion]; *Independent Roofing Contractors of Calif. Unilateral Apprenticeship Committee v. California Apprenticeship Council* (2003) 114 C.A.4th 1330, 1338, 9 C.R.3d 477 [citing *California Tahoe Regional Planning Agency*; conduct of subordinate governmental body does not estop superior government body empowered to review subordinate's conduct].)

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



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2. Estoppel Upheld.
a. Balancing Approach.

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[§ 199] Balancing Approach.

Subject to recognized exceptions (*supra*, §196 et seq.), the estoppel doctrine is now applied freely against the state, its subdivisions, and other governmental agencies. (See *United States Fidelity & Guaranty Co. v. State Bd. of Equalization* (1956) 47 C.2d 384, 388, 303 P.2d 1034; *Shoban v. Board of Trustees of Desert Center Unified School Dist.* (1969) 276 C.A.2d 534, 542, 81 C.R. 112; *Crumpler v. Board of Administration Public Employees' Retirement System* (1973) 32 C.A.3d 567, 579, 108 C.R. 293; *Housing Authority of Los Angeles v. Los Angeles* (1953) 40 C.2d 682, 691, 256 P.2d 4 [concurring opinion]; *Strong v. Santa Cruz* (1975) 15 C.3d 720, 725, 125 C.R. 896, 543 P.2d 264 [rule recognized, but evidence was insufficient to support finding of estoppel]; *Advance Med. Diagnostic Laboratories v. Los Angeles* (1976) 58 C.A.3d 263, 273, 129 C.R. 723; *Canfield v. Prod* (1977) 67 C.A.3d 722, 731, 137 C.R. 27 [failure of Director of Department of Benefit Payments to inform plaintiff of her status and obligation to pay employer's tax; elements were established]; *Baillargeon v. Department of Water & Power* (1977) 69 C.A.3d 670, 679, 138 C.R. 338; *Killian v. San Francisco* (1978) 77 C.A.3d 1, 13, 16, 18, 143 C.R. 430, citing the text; *Fullerton Union High School Dist. v. Riles* (1983) 139 C.A.3d 369, 378, 188 C.R. 897 [reviewing cases and holding that doctrine was applicable]; *In re Marriage of Smith* (1989) 209 C.A.3d 196, 203, 204, 257 C.R. 47 [county, as assignee of mother's claim against father for unpaid child support, was subject to estoppel defense that father could raise against mother concerning preassignment arrearages]; *Emma Corp. v. Inglewood Unified School Dist.* (2004) 114 C.A.4th 1018, 1031, 8 C.R.3d 213 [following *Fullerton Union High School Dist.*; school district deliberately misled bidder on school construction contract into failing to correct mistaken bid]; 50 Cal. L. Rev. 542; 29 Hastings L. J. 648 [zoning]; 42 So. Cal. L. Rev. 391; 28 Am.Jur.2d (2000 ed.), *Estoppel and Waiver* §138 et seq.)

In *Long Beach v. Mansell* (1970) 3 C.3d 462, 496, 91 C.R. 23, 476 P.2d 423, the court observed that the doctrine may be applied against the government "where justice and right require it"; but it will not be applied where this would nullify a strong rule of policy adopted for the benefit of the public; and "[t]he tension between these twin principles makes up the doctrinal context in which concrete cases are decided." (3 C.3d 493.) "The government may be bound by an equitable estoppel in the same manner as a private party when the elements requisite to such an estoppel against a private party are present and, in the considered view of a court of equity, the injustice which would result from a failure to uphold an estoppel is of sufficient dimension to justify any effect upon public interest or policy which would result from the raising of an estoppel." (3 C.3d 496.) (See *Kieffer v. Spencer* (1984) 153 C.A.3d 954, 963, 200 C.R. 755

[quoting *Mansell*]; *Lentz v. McMahon* (1989) 49 C.3d 393, 400, 261 C.R. 310, 777 P.2d 83, *infra*, §201 [same].)

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



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CHAPTER XIX - Equity

Witkin Summary of California Law
IX. EQUITABLE ESTOPPEL
B. Estoppel Against Governmental Agency.
2. Estoppel Upheld.
b. Illustrations.

13 Witkin Sum. Cal. Law Equity § 200

[§ 200] Illustrations.

Illustrative cases, both old and new, are numerous:

(1) Estoppel to assert delay in filing a tort claim against a public entity. (See *Farrell v. Placer* (1944) 23 C.2d 624, 627, 145 P.2d 570; *Fredrichsen v. Lakewood* (1971) 6 C.3d 353, 357, 359, 99 C.R. 13, 491 P.2d 805; 3 Cal. Proc. (4th), Actions, §295.)

(2) Estoppel of a city after 20 years to claim land as a public street, after defendant built on it in reliance on the city's investigation and report that it had no title. (*Los Angeles v. Cohn* (1894) 101 C. 373, 35 P. 1002; see 44 A.L.R.3d 257 [encroachments on public streets].)

(3) Estoppel of a city to abandon street condemnation proceedings, after plaintiff had destroyed a building and erected another one to conform to new street lines. (*McGee v. Los Angeles* (1936) 6 C.2d 390, 393, 57 P.2d 925.)

(4) Estoppel of the state to hold a corporation liable for employee contributions that were not withheld from wages, where tax officials classified the corporation as a charity exempt from Social Security taxes, and where the ruling was later retroactively reversed. (*La Societe Francaise v. California Emp. Com.* (1943) 56 C.A.2d 534, 551, 133 P.2d 47.)

(5) Estoppel of a city, by advising plaintiff that he was not yet eligible for a pension, to invoke the statute of limitations against plaintiff's late claim. (*Phillis v. Santa Barbara* (1964) 229 C.A.2d 45, 60, 40 C.R. 27.)

(6) Estoppel of a city in a quiet title action, where a street on a subdivision map was never used for street purposes and was formally closed to traffic, taxes were levied on it as private property, and it was sold to defendant for delinquent assessments. (*Imperial Beach v. Algert* (1962) 200 C.A.2d 48, 53, 19 C.R. 144.)

(7) Estoppel of a school district to reclassify and reduce salaries of plaintiff teachers, where services were rendered in reliance on representations of the school district superintendent. (*Shoban v. Board of Trustees of Desert Center Unified School Dist.* (1969) 276 C.A.2d 534, 544, 81 C.R. 112.)

(8) Estoppel of a city to discontinue water service, where it had supplied a subdivision with water for many years

and knew that homes had been built in reliance on that supply. (*Sawyer v. San Diego* (1956) 138 C.A.2d 652, 662, 292 P.2d 233.)

(9) Estoppel of the state where plaintiff, in reliance on a promise of authorized agents to purchase land for widening a highway, left the parcels undeveloped, rendering them useless for any other purpose. (*Hilltop Properties v. California* (1965) 233 C.A.2d 349, 363, 43 C.R. 605.)

(10) Estoppel of the Board of Prison Terms to recalculate an inmate's worktime credits to delay initial parole hearing date where the inmate, though ineligible, had been allowed to participate in a worktime program for over 4 years. (*In re Monigold* (1988) 205 C.A.3d 1224, 1230, 1231, 253 C.R. 120.)

(11) Estoppel of a city to invoke the statute of limitations in an action by a subcontractor to enforce a stop notice, where the city refused to withhold payment to the general contractor when the subcontractor first served the stop notice on the city. (*Structural Steel Fabricators v. Orange* (1991) 234 C.A.3d 1206, 1212, 286 C.R. 24.)

(12) Estoppel of a county employees retirement association from denying the validity of an oral agreement with a city in which the association orally offered to settle a restitution claim with the city in exchange for the city's suspending litigation until the offer was considered and decided. The association received the benefits of the litigation standstill, and thus the association could not assert the invalidity of the option contract. (*Orange v. San Diego County Employees Retirement Assn.* (2002) 103 C.A.4th 45, 52, 126 C.R.2d 405.)

(13) Estoppel of the Franchise Tax Board to assert a taxpayer's failure to exhaust administrative remedies before suing for a refund of a disputed tax payment, where the board introduced the possibility of an early termination of the claim as a way to expedite resolution in court, and where denial of the claim would allow the board to retain \$ 97,000 that the taxpayer never owed. (*J.H. McKnight Ranch v. Franchise Tax Bd.* (2003) 110 C.A.4th 978, 990, 2 C.R.3d 339.)

(14) Estoppel of a county, as the defendant in a wrongful termination of employment action, to assert the dismissed employee's failure to exhaust administrative remedies, where the county had negligently led the employee to conclude that she had no administrative recourse. (*Shuer v. San Diego* (2004) 117 C.A.4th 476, 487, 11 C.R.3d 776.)

(15) Estoppel of a city, in a condemnation action, to assert the property owner's failure to bring an administrative mandamus proceeding as a bar to receiving just compensation for the demolition of his driveway. The absence of the mandamus proceeding was a direct result of the city's violation of a preliminary injunction prohibiting the demolition. Further, the city's own filing of a condemnation action was inconsistent with the theory that an administrative mandamus proceeding should have been filed. (*Hurwitz v. Orange* (2004) 122 C.A.4th 835, 843, 19 C.R.3d 213.)

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

(1) *Estoppel to assert delay in filing tort claim against public entity*: Cross-Reference: 3 Cal. Proc. (5th), Actions, §312.



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CHAPTER XIX - Equity

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IX. EQUITABLE ESTOPPEL
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2. Estoppel Upheld.
c. Estoppel Applied in Administrative Hearing.

13 Witkin Sum. Cal. Law Equity § 201

[§ 201] Estoppel Applied in Administrative Hearing.

In *Lentz v. McMahon* (1989) 49 C.3d 393, 261 C.R. 310, 777 P.2d 83, the State Department of Social Services (DSS), pursuant to Welf.C. 11004, sought recoupment of overpayments to county welfare recipients. Despite prior acceptance of recipients' assertions of equitable estoppel when overpayment was caused by agency error, DSS adopted a new policy declaration that equitable remedies are not appropriate in administrative hearing decisions, and that the doctrine of equitable estoppel would no longer be applied. *Held*, this was error; under appropriate circumstances, the defense is available.

(a) *Canfield v. Prod* (1977) 67 C.A.3d 722, 137 C.R. 27, held that a county was estopped from invoking the applicable claims limitations statute against a plaintiff's claim for benefits. The county, in violation of its confidential relationship with plaintiff, had failed to inform her of her obligation to pay a federal employer's tax; a federal tax lien had been placed on her home, and she was threatened with its loss. (49 C.3d 400.) This result was sound; welfare benefits, like the pensions involved in *Driscoll v. Los Angeles* (1967) 67 C.2d 297, 61 C.R. 661, 431 P.2d 245, are intended to provide the basic means of subsistence to recipients. "Welfare department workers, who purport to advise and direct recipients, clearly stand in a confidential relation to them. ... And, as demonstrated by the facts in *Canfield*, a recipient's justified reliance on a county welfare department can produce compelling hardship." (49 C.3d 401.)

(b) On the public policy side of the balancing test, "the interests represented by the statute of limitations--to encourage the timely presentation of claims and prevent windfall benefits--were not seriously undermined by the application of estoppel in the circumstances of *Canfield*." (49 C.3d 401.) Similarly, estoppel against a welfare agency may be appropriate when "a government agent has negligently or intentionally caused a claimant to fail to comply with a *procedural* precondition to eligibility, and the failure to invoke estoppel would cause great hardship to the claimant." (49 C.3d 401.)

(c) The statutory scheme permits DSS to consider claims of estoppel in the administrative hearing. The statutes contain a "fair hearing mechanism" providing an aggrieved welfare recipient with the means to challenge an administrative action reducing or terminating benefits, and either the applicant or the county may seek judicial review by administrative mandamus. (49 C.3d 402.) In *Woods v. Superior Court* (1981) 28 C.3d 668, 170 C.R. 484, 620 P.2d 1032, this court held that an applicant could challenge the validity of DSS regulations at the hearing even if no factual

question was presented; and the opinion points out that permitting administrators an opportunity to construe challenged regulations in a manner to avoid their invalidation is preferable to requiring a court challenge. This reasoning applies with even greater force here. "The existence of estoppel is largely a question of fact, although the weighing of policy concerns that must be conducted in a case of estoppel against the government is in part a question of law. In light of the Legislature's purpose in providing a speedy and informal mode of resolving welfare disputes (subject to administrative mandamus review), it is appropriate to construe the scheme as requiring that these largely factual claims be heard in the administrative hearing, despite the absence of specific statutory authorization for such a defense." (49 C.3d 403.)

(d) DSS contends that the California Constitution's provisions on judicial power in the courts prevent application of the doctrine because that application would be an exercise of judicial power. This contention ignores the constitutional development of administrative law over the last half century and has no support in the case law. Decisions of the Courts of Appeal disclose that equitable estoppel has been routinely applied in administrative hearings without constitutional challenge. (49 C.3d 405, 406.) Moreover, the position urged by DSS would render nonconstitutional administrative agencies impotent. "They would be precluded not only from adjudicating claims of equitable estoppel, but also, under all circumstances, from imposing equitable remedies, and even from applying general principles of law and 'equity' in reaching administrative determinations." (49 C.3d 405.)

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